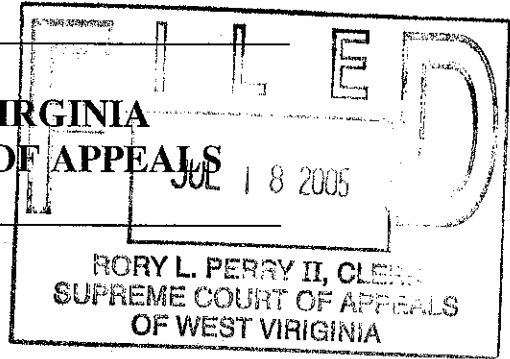


IN THE WEST VIRGINIA
SUPREME COURT OF APPEALS



REGGIE LEE PHILYAW,

Appellant

**On Appeal from the
Circuit Court of Raleigh County
Civil Action No. 04-C-238B**

DOCKET NO. 32754

v.

**EASTERN ASSOCIATED COAL CORP.,
a West Virginia Corporation**

Appellee

BRIEF OF APPELLANT

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TABLE OF AUTHORITIES

CASES

Auber v. Jellen, 196 W. Va. 168, 469 S.E. 2d 104 (1996)

Graham v. Beverage, P.C., 211 W. Va. 466, 566 S.E. 2d 203 (2002)

Handley v. Shinnston, 169 W. Va. 617, 289 S. E. 2d 201 (1982)

Tanner v. Rite Aid, 194 W. Va. 643, 461 S.E.2d 149 (1995)

Travis v. Alcon Lab. Inc., 202 W. Va. 369, 504 S.E.2d 419 (1998)

West Va. Human Rights Comm'n v. United Transp. Union, 167 W. Va. 282, 280 S.E. 2d 653 (1981)

STATUTES

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54 C.J.S. Limitations of Actions § 169 (1948)

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**TO THE WEST VIRGINIA SUPREME COURT OF APPEALS AND THE
HONORABLE JUSTICES THEREOF:**

Brief of Appellant

1. Kind of Proceeding

This case arises from a grant of summary judgment by the Circuit Court of Raleigh County, Hon. Robert Burnside presiding, in favor of Defendant Eastern Associated Coal Company and against Plaintiff, Reggie Lee Philyaw.

If a person were to kidnap a man's wife and children and threaten to kill them if the man did not rob a federal bank, and the man did rob the federal bank, would the Court

say that the kidnapper committed the intentional infliction of emotional distress? If so, then Reggie Lee Philyaw is entitled to have this summary judgment reversed.

2. The Lower Court's Ruling

Plaintiff Reggie Philyaw was employed by Defendant Eastern Associated Coal Company from November, 1974 until March, 2002 at which time he suffered a complete mental breakdown, and was furloughed on long term disability. Mr. Philyaw worked as a safety supervisor for Eastern Associated Coal beginning in 1980 until his disability began in 2002.

The facts below clearly show that Eastern Associated Coal Company required Reggie Philyaw, as a condition of his employment, to falsify reports to MSHA concerning levels of ambient dust in coal mines. The Report of Dr. Ahmed D. Faheem of Appalachian Psychiatric Services clearly shows that Mr. Philyaw's mental collapse was directly related to his stress at work, particularly the stress of being required on a daily basis to commit a federal felony. This Report is attached as Exhibit I to Plaintiff's Response to Defendant's Motion for Summary Judgment. Dr. Faheem writes on page 4 of his Report:

The patient has consistently been diagnosed with problems with Major Affective Illness (Depression) as well as Panic Anxiety Disorder. As already indicated, one thing that has been featured very prominently by every psychiatrist and counselor that he had seen including inpatient admission, as well as outpatient treatment, is the fact that the patient has mentioned significant stressors at work. Those have already been summarized in his set of interrogatories. It was felt by different professionals that it had contributed directly to his psychiatric difficulties.

Judge Burnside conceded in his findings of fact and conclusions of law that if Plaintiff's

testimony were to be believed, Eastern had ordered Plaintiff to commit numerous federal felonies. In this regard, the Court said on page 3 of his opinion:

The Court will accept for argument's sake, that the Plaintiff believed that the communication constituted an instruction to break the law. The weakness in Plaintiff's position, in the context of a claim for the intentional infliction of emotional distress, is that Plaintiff points to no overt conduct of the Defendant. Plaintiff relies entirely on his subjective interpretation of Defendant's communication. That subjective interpretation finds some support in Plaintiff's experience with the federal grand jury prior to 1993, but it remains subjective.

In essence, the judge accepted that: (1) Mr. Philyaw was a target of a federal grand jury investigation arising out of his employment with Eastern and his manipulation of mine safety data between 1990 and 1993; (2) Eastern told Mr. Philyaw that if the mine "went out of compliance" he would be fired; and, (3) there was no lawful way for the mine to remain in compliance that was in any way under Mr. Philyaw's control.

In this last regard, the Court said:

...If Plaintiff truly believed that his employer's standard constituted a command to break the law, he was faced with an admittedly difficult choice. The solution available to Plaintiff was not an easy one...

...The fact that an employee finds himself faced with a set of instructions that he interprets to require that a law be broken might support another cause of action, but it does not satisfy the Travis standard that the Defendant's conduct be "atrocious, intolerable, and so extreme and outrageous as to exceed the bounds of decency."...

Upon these considerations, it is the Court's opinion that while an employer's admonition to an employee to meet the employer's standard of performance or be fired might be unreasonable, unkind or unfair, no reasonable person would find that it exceeds the bounds of decency or offends community notions of acceptable conduct.

Memorandum Opinion, p. 6.

If the Court's ruling in this case is allowed to stand, it implies that the man whose wife and children are held hostage until he robs a federal bank cannot sue for the intentional infliction of emotional distress because he could have refused to rob the bank. In this regard the lower Court says:

The solution was to attempt to comply with his employer's command without breaking the law, and if he failed to satisfy his employer's unreasonable demand, to suffer the consequences. Breaking the law was not an option. If the Plaintiff chose to break the law, and then worried about it, his worry was the result of his own choice.

Obviously this is a difficult case, and a jury could conclude exactly what the Court concluded. Nonetheless, that is an issue for a jury, particularly because the actions of Eastern in subjecting its miners to a greatly increased risk of chronic lung disease from higher than acceptable levels of ambient dust is contrary to public policy, to say the least. Indeed, Eastern's actions were outrageous and go beyond all bounds of human decency!

3. Facts of the Case

Plaintiff Reggie Philyaw was employed by Eastern Associated Coal Company from 4 November 1974 until 13 March 2002— a period of roughly twenty-eight years. (See, Deposition of Reggie Lee Philyaw.) Mr. Philyaw is a high school graduate with a local community college associate's degree; primarily, however, Mr. Philyaw's ability to earn a good living was entirely dependent upon his on-the-job training with Eastern as a safety supervisor and his experience in the mines. If Eastern fired Mr. Philyaw, he became nothing more than a laborer, but so long as he held his job, he earned over \$71,000 per year. See, Deposition of Reggie Lee Philyaw, p. 109, .

As a condition of his employment, however, Eastern required Mr. Philyaw to violate the federal mine safety law. Specifically, Mr. Philyaw was required to manipulate the dust samples provided to MHSA during two periods of his employment, namely all during the 1980's and then again beginning about 1998.

In the late 1980's, Mr. Philyaw was required to "blow out" the dust sample "disks" that were sent back to MHSA for analysis through the federal mails. These "disks," that were carried around by miners tasked with monitoring respirable dust, were used to determine the level of respirable dust in the mines when checked at MHSA headquarters. These dust disks were easily tampered with, and at that time everyone, including Mr. Philyaw, did not take terribly seriously the mine safety dust requirements. And, this conspicuous policy of non-enforcement is reflected in MHSA's own lack of commitment to dust sampling: MHSA left everything to the mine owner and the equipment MHSA employed was an invitation to manipulation.

The proffered testimony of Mr. Richard Goodwin¹, Mr. Philyaw's direct supervisor during the 1980's, reveals that this particular part of the mine law involving dust monitoring was viewed about the way college drinking was viewed in the 1960's. Eventually, however,

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Plaintiff's counsel provided a disclosure to Defendant's counsel concerning those subjects about which Mr. Goodwin planned to testify. Because Mr. Goodwin lives in Indiana, Defendant's counsel delayed deposing Mr. Goodwin by agreement and his deposition was in the process of being scheduled at the time the Court rendered summary judgment. Mr. Goodwin's testimony was anticipated to parallel the testimony given by Mr. Philyaw in his deposition, particularly pp. 13 through 21.

for reasons that are beyond the scope of this case, MSHA and the federal prosecutors decided to get serious about enforcing respirable dust limits and there was a federal grand jury investigation that targeted Mr. Philyaw for a possible felony (or multiple felony) indictment. At that time, then, it became clear to everyone that tampering with dust samples was a serious offense under the federal law. As it turned out, after three years of uncertainty about whether he would be indicted for federal felonies along with resulting anxiety, Mr. Philyaw was informed by the federal authorities that he was no longer a target: Eastern had pled guilty to a misdemeanor pursuant to a lengthy plea agreement with the federal prosecutors and, apparently, the Government had determined not to pursue individuals. See, Rule 30(b)(7) deposition of Eastern representative David Carl Ashby, pp. 25-41.

Eastern was well chastened by its near miss with a major felony prosecution of itself, its management and its employees and did not require Mr. Philyaw to manipulate dust samples for roughly eight years, i.e., until about 1998. (Philyaw Deposition, pp. 39-40.) Then, however, Eastern again required Mr. Philyaw, as a condition of his employment, to violate the federal law. (Ibid. p. 44.) However, by now, as a result of the greater commitment to dust monitoring by MSHA, the devices for monitoring dust in the mines were much more sophisticated and less amenable to tampering (see, Rule 30(b)(7) Deposition of Eastern representative Danny Ray Spratt, pp. 15-16), so this time Mr. Philyaw was told to manipulate the dust readings by following the miner around and taking steps (absolutely prohibited by 30 Code of Federal Regulations Part 70-2(l)) that would artificially reduce the dust in the area

where the monitoring miner was working.

As a direct result of the anxiety Mr. Philyaw suffered at work, including fear of another federal felony investigation with an attendant prosecution as well as the general disparagement he suffered at the hands of working miners on the job who understood what Mr. Philyaw was doing, Mr. Philyaw suffered a mental breakdown. And, this is validated by the report of his treating psychiatrist, Dr. Ahmed D. Faheem of Appalachian Psychiatric Services quoted in the introduction to this Petition.

Although Eastern Associated Coal was permitted to plead to a misdemeanor in 1990 for having altered or tampered with the dust samples required by MSHA, Eastern's actions leading up to the settlement with the Federal Government and Eastern's plea to the misdemeanor charge emerged from a compromise of obvious felony counts under 18 U.S.C. § 1341; 18 U.S.C. § 1343; and, 18 U.S.C. § 1346 -- namely, the federal mail fraud and wire fraud statutes.

Certainly, if a person comes into my house, takes my wife and children hostage, and threatens to kill them unless I rob a federal bank, that person has done something "outrageous" and is clearly liable for the intentional infliction of severe emotional distress. In this case, Mr. Philyaw had a high-paying, reasonably secure job in the coal industry during the 1980's and 1990's-- a time when the coal industry was contracting overall employment and most employees had an intense sense of job insecurity.

Mr. Philyaw and his wife are lifelong residents of West Virginia, and for Mr. Philyaw

to have refused Eastern's orders to violate the law would have meant his utter ruin. Therefore, he was in no different position than the man whose family is held hostage to force him to commit a bank robbery: To require a person to commit federal felonies as a condition precedent to keeping his or her job in an economy fraught with unemployment and economic decline, is the intentional infliction of emotional distress.

As Plaintiff fully developed on the 30(b)(7) deposition of Defendant, in the years leading up to the 1990 guilty plea with the United States Attorney, Eastern's safety personnel, with the knowledge of Eastern's senior management, had been returning "disks" for the testing of respirable dust to MSHA through the mails. This constitutes mail fraud pure and simple. . However, by Mr. Philyaw's own testimony, it was not the tampering before 1990 and the federal grand jury probe that led to Mr. Philyaw's mental breakdown. Rather, it was Eastern's actions after 1998— after roughly eight years of lawful conduct— in again requiring Mr. Philyaw to subject himself to federal felony prosecutions that led to the breakdown.

The actions of Defendant before 1990 in blowing out the dust disks were predicate to the renewed actions in 1998. However, one thing became clear in the 1990 grand jury investigation: Not only did Eastern expect its employees to commit federal felonies; it also expected them to lie to the grand jury! Twelve persons were targets of the federal grand jury probe in 1990 (see, Deposition of David Caryl Ashby, Defendant's 30(b)(7) representative, pp. 10-12.) With this number of persons targeted, it can be reasonably inferred that management at Eastern completely understood that there was tampering with dust disks in the

1980's.

Yet, Mr. Philyaw was sent a letter indicating that if he admitted to committing any illegal acts, he would be cut off from company help and bankrupted by paying his own legal fees. (See, letter of Thomas L. Clarke to Reggie Philyaw dated 25 January 2005, Exhibit II to Plaintiff's Response to Defendant's Motion for Summary Judgment.) This, obviously, was an admonition to lie to the grand jury, and upon deposition of Mr. Ashby counsel asked whether he could produce a similar letter that had ever been sent to a senior management employee and no letter has been forthcoming. (See, Ashby Deposition, pp. 21-22)

Yet, although knowing that his employer would not support him if he followed orders, violated the law, and then got caught contributed to Mr. Philyaw's overall level of stress, the proximate cause of Mr. Philyaw's breakdown were the actions taken by the Defendant beginning in or about 1998. (See, Report of Dr. Faheem, Exhibit I.) At this time, Mr. Philyaw, according to his deposition testimony, was required to: (1) follow a miner around with a hand-held dust monitor and remove him from areas where there was excessive dust; (2) provide "extra" maintenance on the water mechanisms for dust suppression that was not provided normally; (3) cooperate in the shutting down of a shift during which monitoring was occurring when the minimum amount of coal was mined when normally more coal was produced on a shift; and (4) generally take steps (such as keeping a monitoring miner away from workers spreading "rock dust") artificially to reduce the amount of dust in the vicinity of a monitoring miner. (See, Deposition of Reggie Lee Philyaw, pp. 75-80.)

Facts for Trial

In Plaintiff's disclosure of expert witnesses, Plaintiff disclosed Mr. Sam Gross, who served as a Federal Mine Inspector and supervisor. Mr. Gross, whom Defendant had not yet deposed at the time this motion for summary judgment was granted, has been offered to testify to the nature of the mining regulations and that if Plaintiff's testimony is believed, Plaintiff was required to falsify mine safety information. (Mr. Philips, counsel for Defendant, has agreed to stipulate that if asked Mr. Gross would make an affidavit consistent with his expert disclosure.) Mr. Gross will testify that what Mr. Philyaw was required to do was entirely improper and probably constituted a felony. Mr. Gross will testify that 30 Code of Federal Regulations Part 70-2(l) which provides:

Production Shift means (1) with regard to a mechanized mining unit, a shift during which material is produced, or (2) with regard to a designated area of a mine, as shift during which material is produced and routine day-to-day activities are occurring in the designated area. [emphasis added]

is generally known to require that **NO** intervention on the part of management or anyone else be allowed to interfere with the monitoring of operations as they routinely and normally occur. Therefore, Mr. Gross will opine that if Mr. Philyaw was required to do the things about which he has testified, then he was breaking the law. And, as this Honorable Court will judicially notice, if the dust pumps were returned to MHSA through the mails or through any commercial express service, or if information concerning tests conducted were returned to Defendant through the mails, then there was a violation of the Federal Mail Fraud statute cited

above.

Requiring a person to commit a felony, as a condition of saving his wife or children, or as a condition of keeping his job so that he can support his wife and children, is obviously the intentional infliction of emotional distress. How severe the distress is probably depends on the psychological make-up of the person. Thus Dillinger would be less distressed than Jimmy Carter if his wife and children were held hostage and he were required to rob a bank. But in this case we know that the distress to Mr. Philyaw was "severe" because (1) he suffered a mental breakdown; (2) his breakdown was so severe and obvious that even the parsimonious Social Security Administration gave him a total disability award; and, (3) his mental health professionals have testified that the breakdown's proximate cause was anxiety at work. (See, Dr. Faheem's Report, Exhibit I to Plaintiff's Response to Defendant's Motion for Summary Judgment.)

3. Assignments of Error

The Court erred when he concluded that as a matter of law Eastern's action did not and could not constitute the intentional infliction of emotional distress.

4. Points and Authorities Relied upon and Discussion of the Law,

There are numerous cases over the past ten years that involve the "intentional infliction of emotional distress." Indeed, as cited by the trial court, a recent case is Travis v. Alcon Lab. Inc., 202 W.Va. 369, 504 S.E.2d 419 (1998), which roughly summarizes our law. The relevant syllabus points of Travis are:

2. "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm." Syllabus Point 6, *Harless v. First Nat. Bank in Fairmont*, 169 W. Va. 673, 289 S.E.2d 692 (1982).

3. In order for a plaintiff to prevail on a claim for intentional or reckless infliction of emotional distress, four elements must be established. It must be shown: (1) that the defendant's conduct was atrocious, intolerable, and so extreme and outrageous as to exceed the bounds of decency; (2) that the defendant acted with the intent to inflict emotional distress, or acted recklessly when it was certain or substantially certain emotional distress would result from his conduct; (3) that the actions of the defendant caused the plaintiff to suffer emotional distress; and, (4) that the emotional distress suffered by the plaintiff was so severe that no reasonable person could be expected to endure it.

4. In evaluating a defendant's conduct in an intentional or reckless infliction of emotional distress claim, the role of the trial court is to first determine whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to constitute the intentional or reckless infliction of emotional distress. Whether conduct may reasonably be considered outrageous is a legal question, and whether conduct is in fact outrageous is a question for jury determination.

But attempts to establish "verbal" standards in syllabus points are not necessarily successful because it is always possible to argue about whether certain facts do, indeed, fall within the ambit of the verbal definitions. Much more useful, then, is to look at the factual patterns where this Honorable Court has allowed suits for the intentional infliction of emotional distress.

Thus, in *Travis, supra*, the employee's supervisor was fired and then reemployed. The supervisor blamed the employee for the firing and stated that he would retaliate. The supervisor treated the employee in a demeaning manner. The employee complained to management, but the behavior continued. The Court held that the employer could be held

liable for the supervisor's outrageous actions committed within the scope of employment and for causing the outrageous conduct. Certainly those facts are substantially less egregious than the facts of Mr. Philyaw's case.

Then in Tanner v. Rite Aid, 194 W. Va. 643, 461 S.E.2d 149 (1995) Ms. Tanner, along with her ten-year-old daughter Brandi, had just retrieved Marjorie Legg from the hospital, where Ms. Legg had been undergoing treatment for depression. The three family members stopped at Rite Aid where they went to the pharmacy to have Ms. Legg's prescription filled. While Ms. Legg sat down and waited for the prescription, Ms. Tanner found some soap on sale and decided to buy it. When the prescription was filled, Ms. Tanner asked the pharmacy clerk if the soap could be purchased at the pharmacy register rather than at the check-out line at the front of the store. The clerk rang up the items, and the items were paid for and placed in a single bag. Ms. Tanner took the bag, and the three began to leave the store. The line at the front of the store was crowded, and Ms Tanner wanted to get her mother home as soon as possible, given her recent release from the hospital. Ms. Legg and Brandi exited the store just a few steps ahead of Ms. Tanner.

But before Ms. Tanner could reach the outside of the store a male Rite Aid employee stopped her by "roughly" grabbing her shoulder and ceasing her forward motion. The employee told Ms. Tanner that she would have to step back into the store, stating "one of you has taken something you haven't paid for, and you're going to have to come back in the store." Ms. Tanner immediately became nervous, and the employee again stated "get your

grandmother, get your daughter and get back in the store. Get them back in the store." The Tanners were then required to turn out their pockets and were publicly held up to ridicule. Under these facts, this Honorable Court affirmed the award in favor of Plaintiffs.

How is it possible for a West Virginia Court, sitting in a State where a substantial part of the population in the coal counties is suffering from respiratory ailments, i.e., "black lung," directly related to excessive dust in coal mines, able to say that Eastern's deliberate falsification of documents to allow mines to have much more than the allowed amount of dust is not atrocious, intolerable and in excess of the bounds of decency? The deliberate killing and maiming of coal miners is the atrocious act, and requiring Mr. Philyaw, as a condition of his employment, to aid and abet this murder and maiming is ipso facto also atrocious.

To say that Mr. Philyaw should have refused misses the point: Mr. Philyaw was utterly dependent on Eastern to support his wife and family, and Mr. Philyaw had invested virtually his entire working life in the Eastern corporate structure. The fact that Eastern was subtle about how it instructed Mr. Philyaw to aid and abet the killing and maiming of coal miners (as the Trial Judge actually held) does not detract from the fact that if Mr. Philyaw didn't commit federal felonies, he would be fired. (See, Philyaw Deposition, p109; Memorandum Opinion p. 5, par. 2.) "In evaluating a defendant's conduct in an intentional or reckless infliction of emotional distress case, the role of the trial court is to first determine whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to constitute the intentional or reckless infliction of emotional distress." Syl. Pt. 3, Travis, supra. Here the

Court was an overzealous gatekeeper: Nowhere in the Trial Court's opinion does the Court quibble with the facts as set forth in this petition; rather, the court appears to ground his ruling on the simple proposition that Mr. Philyaw should have refused to participate and then tried to get another job. This is a conclusion proper for a jury; it is not, however, a conclusion proper for the judge at this juncture.

And were this not the case, then the person who is required to rob the bank would have no grounds to sue for intentional infliction of emotional distress either. After all, he could refuse to rob the bank, let his wife and children be killed, and then sue for wrongful death! If, indeed, that's the law, then the law takes no cognizance of normal human frailties and expects every citizen to behave as an ideal Roman stoic.

5. Statute of Limitations Issue not Raised Below

In its opposition to Plaintiff's petition for appeal, Defendant raised the issue of the statute of limitations and asserted that Mr. Philyaw had not alleged a specific act within two years of bringing his suit. The reason, obviously, is that there were no "specific" acts such as caused discrete, identifiable injuries. Furthermore, the Circuit Court did not find a statute of limitations problem below or predicate any part of his summary judgment ruling on the statute of limitations.

This tort was a continuing course of conduct that culminated in Mr. Philyaw having a complete mental breakdown, leaving Eastern's employ on disability (terminated after two years) and receiving a total disability award from the Social Security administration. "[W]here

a tort involves a continuing or repeated injury, the cause of action accrues at, and limitations begin to run from the date of the last injury, or when the tortious overt acts cease." 54 C.J.S. Limitations of Actions § 169 (1948).

The facts show that every day Mr. Philyaw faced the prospect of needing to falsify mine safety data: although he did not actually do this each and every day, the outrageous conduct was that he was routinely required to falsify mine safety data and could be required to do it on any given day. This situation, then, comes within the holding of Handley v. Shinnston, 169 W. Va. 617 (1982) (a per curium opinion)², reaffirmed by a signed opinion by Justice Albright in Graham v. Beverage, P.C., 211 W. Va. 466 (2002) where the Court said:

We recognize that Town of Shinnston was a per curium opinion which may raise doubt in some minds as to the validity in this jurisdiction of the continuing tort exception to the statute of limitations. To dispel any such doubts, we hereby hold that where a tort involves a continuing or repeated injury, the cause of action accrues at and the statute of limitations begins to run from the date of the last injury or when the tortious overt acts or omissions cease.

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In Shinnston, the town had installed a water transmission line through the homeowners' property. It began to leak 1972, and despite notifications to the town by the homeowners, the line continued to leak, causing a crack to appear in the surface of the homeowners' lawn in 1976. After the line was removed 1978, a crater developed in the yard and the foundation of the homeowners' house shifted. The homeowners' brought an action seeking compensation for the damages to their property in 1979. This Honorable Court reversed the dismissal of the action by the trial court, holding that the tortious act in question continued until the line was removed in 1978. When a tort involved a continuous or repeated injury, the statute of limitations ran from the last date of the injury.

211 W.Va. at 477.³

And, in discussing the hallmarks of a continuing tort, this Court has also said:

"The Court conceives a continuing cause of action as being a situation where events, which for all practical purposes are identical, occur repeatedly, at short intervals, in a consistent, connected, rhythmic manner." DeRocchis v. Matlack, Inc., 194 W. Va. 417, 460 S.E.2d 663, n.4, 460 S.E.2d 663, 669 n.4 (1995), discussing Handley v. Town of Shinnston, 169 W. Va. 617, 289 S.E.2d 201 (1982).

Auber v. Jellen, 196 W. Va. 168, 173 (1996). Certainly that is the circumstance with Mr. Philyaw: He has alleged and supported with evidence in his deposition that the need to violate mine safety regulations was present every day he was on the job from roughly 1998 until he left work as a result of a mental breakdown. Thus, the rule governing "continuing torts" applies to him.

6. Conclusion and Relief Prayed For

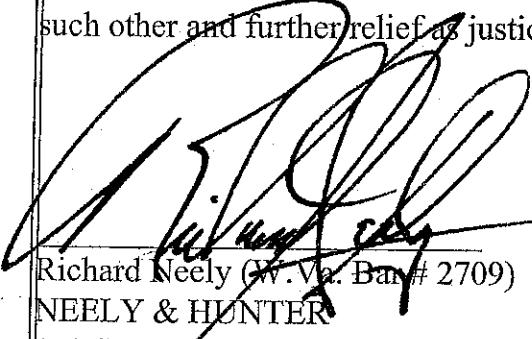
Wherefore, Petitioner prays that this Honorable Court grant reverse the judgment of the Circuit Court of Raleigh County and remand this case for trial on the merits, and grant

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See, also, West Va. Human Rights Comm'n v. United Transp. Union, 167 W. Va. 282, 280 S.E. 2d 653 (1981) In that case, the consolidated complaints of union members were heard by the Human Rights Commission, which held that the members were denied promotions on basis of their race in violation of their rights under W. Va. Code § 5-11-2. Although the seniority system was neutral on its face, it was not applied equally to blacks and whites. On appeal of the trial court's reversal, the court held that the commission's findings were supported by substantial evidence and adopted them. In reaching the conclusion that the facially neutral seniority system was discriminatorily applied, the court recognized the policies underlying federal claims brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq. The court held that the members' claims were not time-barred because the union's violations were continuous. Although the court was satisfied that the union no longer used the discriminatory system, the violations were continuous because the members had never been compensated for their inferior positions that resulted from the prior discrimination. Although the employer had already settled, the union was also responsible for collective bargaining agreements that perpetuated past discriminati

such other and further relief as justice and the nature of the cause may require.

Respectfully submitted,
Petitioner, by Counsel



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EASTERN ASSOCIATED COAL CORP.,
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Respondent

CERTIFICATE OF SERVICE

I, RICHARD NEELY, counsel for Appellant, hereby certify that I served the foregoing **Brief of Appellant** by mailing two copies of the same United States First Class Mail, postage prepaid on the 18th day of July, 2005 to all counsel of record at the following addresses:

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