
NO. 33210

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

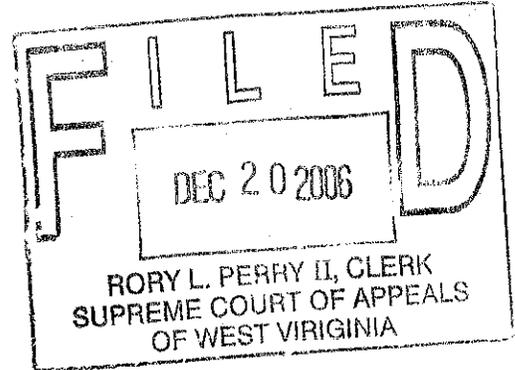
STATE OF WEST VIRGINIA ex rel.
DONALD DARLING,

Petitioner,

v.

DARRELL V. McGRAW,
ATTORNEY GENERAL OF THE
STATE OF WEST VIRGINIA, and
WEST VIRGINIA BOARD OF RISK
AND INSURANCE MANAGEMENT,

Respondents.



RESPONSE TO PETITION FOR WRIT OF MANDAMUS
ON BEHALF OF ATTORNEY GENERAL

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

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304-558-2021

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**RESPONSE TO PETITION FOR WRIT OF MANDAMUS
ON BEHALF OF ATTORNEY GENERAL**

By Order dated October 31, 2006, this Court issued a Rule to Show Cause why a writ of prohibition should not be awarded with respect to the Petition for Writ of Mandamus filed by Petitioner in connection with compensation he seeks for the mental-mental injury allegedly resulting from his employment with the Attorney General's Office, which ceased on April 9, 2002. According to the Petition, Petitioner seeks compensation not from the Attorney General or from the State, but from "the insurance protection seemingly tailored for this very circumstance." Petitioner's Memorandum of Law, pg. 13, fn. omitted. For that reason, this Court ordered the West Virginia Board of Risk and Insurance Management (BRIM) be added as a party respondent in this matter.

Because it is BRIM and not the Attorney General's Office which ostensibly would be mandated to take certain action, this office defers to BRIM's able counsel to address the applicability

of the State's policy of insurance to the issues presented here. However, to the extent this office has some understanding of the nature of the alleged injury and the several proceedings Petitioner has brought and not appealed – or chose not to bring -- in connection with that injury, the Office of the Attorney General appreciates the Court's willingness to extend the response time and grant leave for the belated filing of this response to consider the following in connection with the writ of mandamus sought by Petitioner.

FACTS

As presented in the Petition and discussed in the Memorandum of Law in Opposition to the Petition for Writ of Mandamus, Mr. Darling was an employee of the Attorney General from 1992 through 2002, but alleges he suffered extreme and prolonged stress as a result of the employment, forcing him to stop working on April 9, 2002. (The Petition's reference to 2003 is clearly in error, since it then states: "Subsequently, he formally resigned his employment on July 1, 2002.") Petition, ¶¶ 7,8. His Petition then states "that during 2002 he was declared totally and permanently disabled by both the Social Security Administration and the West Virginia Consolidated Public Retirement Board" on the basis of his initial applications. Petition, ¶ 9. His Petition goes on to set forth the following dates in connection with his Workers' Compensation claim:

- May 15, 2002 Petitioner filed his claim for workers' compensation benefits against the Workers' Compensation Commission and the West Virginia Office of the Attorney General, alleging "physical manifestations of prolonged stress due to extraordinary requirements of job duties." Petitioner's Exhibit A.
- June 26, 2002 The Workers' Compensation Division denied the claim for benefits. In the Rejection Notice, the Division stated it was "clear ... that the claimant has suffered neither a physical impact nor a physical result from any impact." Respondent BRIM's Exhibit A; Petitioner's Exhibit B.

June 24, 2003 The Office of Judges affirmed the decision of the Division, concluding that "Claimant has not established a causal [corrected] relationship between his employment and his infirmities" and, despite Mr. Darling's argument that the alleged physical symptoms removed his claim from the mental-mental exclusion of W. Va. Code §23-4-1f, that the injuries constituted such a mental-mental claim and were therefore not compensable. Respondent BRIM's Exhibit B, Conclusions of Law, ¶¶1, 2.

June 7, 2004 The Workers' Compensation Appeal Board adopted the findings and conclusions set forth in the Division's Order and rejected the claim as a matter of law. Respondent Attorney General's Exhibit A.

The next paragraph in the above chronology should be the application for review which may be filed within thirty days of the Appeal Board's order, as referenced therein. For reasons unknown, Petitioner chose not to appeal the denial of his claim for workers' compensation benefits to this Court as provided in W. Va. Code § 23-5-15. "No judicial review was pursued [corrected]." Petition, ¶ 13.

However, Mr. Darling filed two other lawsuits in an attempt to get payments from Workers' Compensation in addition to the state disability and social security payments he was already receiving. In his Petition, Mr. Darling discussed the declaratory judgment action which was dismissed by the United States District Court for the Southern District of West Virginia on November 23, 2005. However, he did not advise this Court of the prior decision of the federal court in *Darling v. Burton*, No. 2:04-0647, 2005 WL 2337817 (S.D. W. Va. Feb. 28, 2005), attached hereto as Exhibit B, and BRIM did not discuss this action in its Response, but this Court should be made aware of the federal action Petitioner brought against the Commission. *Darling v. Burton* was instituted on June 25, 2004, against the Executive Director and a named Claims Representative of the Workers' Compensation Commission pursuant to 42 U.S.C. § 1983 seeking both damages and injunctive relief. In that action, Petitioner contended that the mental-mental exclusion in the West

Virginia Workers' Compensation statute violated the equal protection clauses of the federal and state constitutions. Finding there was no "clear guidance" and that state "officials must enforce the rule of law," the federal court dismissed the individual capacity claims. The federal court then addressed the constitutionality of W. Va. Code § 23-4-1f and found the exclusion "a reasonable one" which treated all mentally or emotionally injured workers in the same manner." *See Darling v. Burton*, No. 2:04-0647, 2005 WL 2337817 (S.D. W. Va. Feb. 28, 2005).¹

BRIM in its response discusses at length Petitioner's attempt to seek damages from through a declaratory judgment action against the state's insurer, National Union Fire Insurance Company of Pittsburgh, PA (NUFIC), and the opinion denying relief is further referenced *infra*. Petitioner's Exhibit E; Respondent BRIM's Exhibit C. As with that declaratory judgment, Petitioner still seeks through this Petition for Writ of Mandamus money from the State's insurer. He does not ask this Court to mandate that the money be taken from the appropriation or other budgeted monies of the Attorney General's Office. He does not seek money directly from the State of West Virginia. Rather, Petitioner seeks the proceeds from the State's policy of liability insurance, specifically the stop-gap coverage, through this mandamus proceeding. Respondent Attorney General concurs with the several points made by Respondent BRIM regarding the comprehensive liability policy administered by it for the agencies of the State, the nature of the Workers' Compensation System at the time of Petitioner's injury, and Respondent Attorney General's reasonable expectations

¹While perhaps not relevant to the issue now before this Court, Petitioner did not allege any physical manifestation of a physical injury in the *Burton* complaint, but alleged only injuries which were "psychiatric in nature, *inter alia*, i.e. severe chronic depression which is exacerbated by stress." Exhibit C, ¶8.

regarding claims brought in accordance with the Workers' Compensation Act. Therefore, facts related to these matters and corresponding arguments are not repeated in this Response.

It is now four and one half years from the date Petitioner left his employment, four and one half years from the date Petitioner could have sought and did seek relief in the civil courts in addition to his Workers' Compensation claim. The federal court in *Darling v. NUFIC* set forth things Petitioner Darling could have done ("pursue the state in an appropriate civil action") and should have done ("availed himself of review in the supreme court of appeals"). Petitioner's Exhibit E; Respondent BRIM's Exhibit C.² He chose not to seek judicial review from this Court; he did not, and at this late date cannot, file a personal injury inasmuch as such an action is now time-barred; and the legal strategy he chose – to challenge the constitutionality of W. Va. Code § 23-4-1f – was unsuccessful.

Again, the date of occurrence of Mr. Darling's injury, i.e., his last day of work, was April 9, 2002. As is discussed more fully in the argument below, he could have brought a civil action against the Attorney General for damages – whether it be an action for personal injury (including negligent infliction of emotional distress) under a legally creative theory similar to that now before this Court or a deliberate intent action against his employer as authorized by West Virginia law.³ He could have also pursued this theory in an appeal of the denial of benefits. The time has now run out, but apparently so has Petitioner's money. Through this proceeding – which is essentially the same issue against the same parties, Petitioner is seeking a different result.

²It is unclear from the Order whether the *Darling v. NUFIC* court was aware of the *Darling v. Burton* lawsuit.

³The fact that no deliberate intent action pursuant to W. Va. Code § 23-4-2 was brought is well taken since Petitioner had no good faith basis for allegations of intentional injury.

ARGUMENT

The federal court's reasoning in *Darling v. NUFIC* (Petitioner's Exhibit E; Respondent BRIM's Exhibit C) is unassailable. However, it is unclear why the federal court dismissed the action without prejudice since the statute of limitations for any action against the Attorney General had run as of November 23, 2005. Similarly, Respondent's point that the Attorney General's liability insurance policy is only triggered if Petitioner can show a colorable claim outside the workers' compensation system ignores the fact that the statute of limitations has run on any such claim. Any civil action which might be pleaded for Petitioner's alleged injuries would commence, at the latest, on April 9, 2002. A one-year statute applies to personal injury actions for negligent or intentional infliction of emotional distress. W. Va. Code § 55-2-12 (1959); *Funeral Services by Gregory, Inc., v. Bluefield Community Hospital*, 186 W. Va. 424, 413 S.E.2d 79 (1991). Arguably a two-year statute of limitations may apply, depending on the allegations and the nature of personal injury. *In re Hearing Losses*, 208 W. Va. 169, 539 S.E.2d 112 (2000). Regardless, the statute has run, and any claim by Mr. Darling for damages against the Attorney General is now time barred.

As argued by Respondent BRIM, Petitioner's failure to appeal also constitutes a failure to exhaust his administrative remedy. There have been circumstances where a workers' comp claimant has not been required to exhaust the administrative remedy set forth in statute (*Stull v. Firemen's Pension and Relief Fund of City of Charleston*, 202 W. Va. 440, 504 S.E.2d 903 (1998)), but this Court has noted that "the usual rule" is to defer actions such as one for declaratory judgment "where administrative remedies, *such as an appeal from a protestable order*, have not been exhausted . . ." *Hardy v. Richardson*, 198 W. Va. 11, 14, 479 S.E.2d 310, 313 (1996) (emphasis added). Exhaustion is required when the administrative remedy serves the interests of justice, and one

consideration where exhaustion may not be required is whether it would be futile. *Collins v. Elkay Min. Co.*, 179 W. Va. 549, 554, 371 S.E.2d 46, 51 (1988). Here, Petitioner cannot reasonably argue that an appeal to this tribunal would have been futile, and he should be precluded from now seeking relief from this Court in this dilatory and circuitous manner.

The failure to appeal also renders the March 18, 2004, Order of the Workers' Compensation Board of Review a final decision on the merits, thus barring this proceeding in accordance with the doctrine of *res judicata*.⁴ "*Res judicata* generally applies when there is a final judgment on the merits which precludes the parties or their privies from relitigating the issues that were decided or the issues that could have been decided in the earlier action. *See Allen v. McCurry*, 449 U.S. 90, 94, 101 S. Ct. 411, 414, 66 L. Ed. 2d 308, 313 (1980). A claim is barred by *res judicata* when the prior action involves identical claims and the same parties or their privies." *State v. Miller*, 194 W. Va. 3, 9, 459 S.E.2d 114, 120 (1995).

BRIM, in its response, argues the applicability of the doctrine of *res judicata* because the bar extends not only to those matters which were actually litigated in the former proceeding, but also to those matters which could or should have been litigated. Syl. pt. 2, *Conley v. Spillers*, 171 W. Va. 584, 301 S.E.2d 216 (1983). "An adjudication by a court having jurisdiction of the subject-matter and the parties is final and conclusive, not only as to the matters actually determined, but as to every other matter which the parties might have litigated as incident thereto and coming within the legitimate purview of the subject-matter of the action. It is not essential that the matter should have been formally put in issue in a former suit, but it is sufficient that the status of the suit

⁴The Office of the Attorney General adopts and incorporates by reference the *res judicata* argument of Respondent BRIM.

was such that the parties might have had the matter disposed of on its merits. An erroneous ruling of the court will not prevent the matter from being res judicata.” Syl. pt. 1, *Estate of McIntosh*, 144 W. Va. 583, 584, 109 S.E.2d 153, 155 (1959) quoting Syl. pt. 1, *Sayre's Adm'r v. Harpold*, 33 W. Va. 553, 11 S.E. 16 (1890). As argued by Respondent BRIM, the doctrine of *res judicata* applies to Workers' Compensation and other quasi-judicial proceedings.

However, because this mandamus proceeding can be viewed as a challenge to the constitutionality of W. Va. Code § 23-4-1f, Petitioner may also be collaterally estopped from adjudicating these same issues. *State v. Miller* makes clear that collateral estoppel does not always require that the parties be the same if identical issues are raised in successive proceedings for which there has been a valid judgment and the party against whom it is invoked was a party or in privity with a party to the prior proceeding. *State v. Miller*, 194 W. Va. at 9, 459 S.E.2d 1at 120, citing *Conley v. Spillers*, 171 W. Va. 584, 301 S.E.2d 216 (1983); *Lane v. Williams*, 150 W. Va. 96, 100, 144 S.E.2d 234, 236 (1965). While the issue presented here is stated differently, it is essentially the same issue raised in *Darling v. Burton* where there was a final adjudication on the merits, and Petitioner, as the party bringing the action, had a full and fair opportunity to litigate the legality of the mental-mental exclusion. Thus, all the elements of collateral estoppel are met. *Id.*

One important purpose of the doctrines of *res judicata* and collateral estoppel is to disallow the same parties to litigate the same or related causes of action in several proceedings. This is Petitioner's fourth action, three of which may have been unnecessary had he simply appealed the denial of his workers' compensation claim.

What is the relief sought by Petitioner? Is Petitioner actually requesting that, through a mandamus action, this Court institute or reinstate his workers' compensation claim even though it

would not be paid from the Workers' Compensation Fund? Apparently, since there is no suit for damages, the relief which Petitioner seeks. This Court is also requested to order that this claim, these "damages," be paid from the state's insurer although the insurer is not a party to this proceeding, is not subject to mandamus, and does not insure against no-fault liabilities. While the State's policy of insurance has characteristics that are significantly different from other insurance coverage, Respondent BRIM's point that the state's insurance policy is a liability policy for **tortious** conduct – not a disability policy – is an important distinction. Even if the amount of the award could be determined, neither of the Respondents – certainly not the Attorney General – can demand NUFIC to pay "damages" under these circumstances.

In summary, it is too late to appeal the decision of the Workers Compensation Commission or to bring a civil action, and there is nothing in Petitioner's predicament that should persuade this Court to allow him to again litigate this issue. Petitioner is asking this Court to mandate a non-specified payment from non-existent insurance coverage based on a non-existent theory of no-fault liability. There is no clear legal right to the relief sought, and the Attorney General has performed all legal duties which may be compelled of him as a public employer.

CONCLUSION

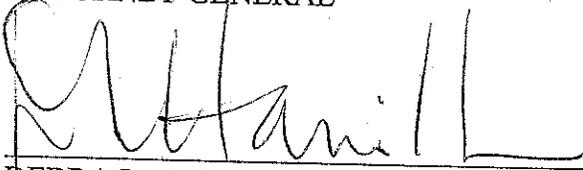
For the reasons set forth above and in Respondent BRIM's Response incorporated by reference, Respondent Darrell V. McGraw, Jr., Attorney General of the State of West Virginia, prays this Petition be denied.

Respectfully submitted,

DARRELL V. McGRAW, JR.,
ATTORNEY GENERAL OF THE
STATE OF WEST VIRGINIA,
Respondent,

By Counsel.

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

A handwritten signature in cursive script, appearing to read "D Hamilton", written over a horizontal line.

DEBRA L. HAMILTON, State Bar No. 1553

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