

No. 33210

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

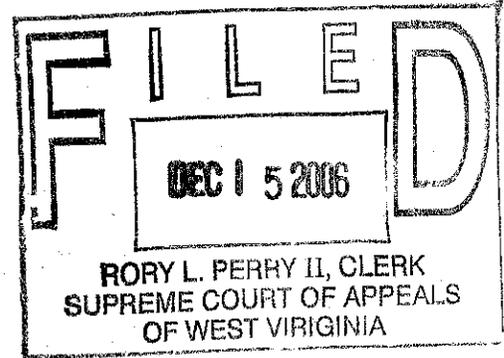
STATE OF WEST VIRGINIA EX REL.  
DONALD DARLING,

Petitioner,

v.

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

Respondents.



**RESPONSE TO PETITION FOR WRIT OF MANDAMUS  
ON BEHALF OF RESPONDENT STATE OF WEST VIRGINIA  
BOARD OF RISK AND INSURANCE MANAGEMENT**

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ON BEHALF OF RESPONDENT STATE OF WEST VIRGINIA  
BOARD OF RISK AND INSURANCE MANAGEMENT**

COMES NOW Respondent, State of West Virginia Board of Risk and Insurance Management (hereinafter "BRIM"), by counsel, Charles R. Bailey and the law firm of BAILEY & WYANT, PLLC, and responds to Petitioner's Petition for Writ of Mandamus, in accordance with Rule 14(d) of the *West Virginia Rules of Appellate Procedure*. In support of its position, BRIM states and avers as follows:

**I. PROCEDURAL AND FACTUAL HISTORY**

On or about April 9, 2002, Petitioner filed a workers' compensation claim. In his claim, Petitioner alleged that he suffered injuries as a result of his employment at the West Virginia Attorney General's Office and that these injuries were manifested with physical symptoms. More specifically, Petitioner alleged that his job responsibilities caused him severe stress resulting in

bodily injuries that included chronic depression and frequent, severe migraine pain. Petitioner argued that because of his alleged physical symptoms, his claim should be removed from the purview of W. Va. Code § 23-4-1f, *i.e.* the “mental-mental” exclusion to coverage within the Workers’ Compensation Act. By a document dated June 26, 2002, Petitioner’s claim for benefits was denied based upon the Claims Representative’s determination that the Petitioner did not suffer a “physical impact” or a “physical result from any impact.” *See* Exhibit A, Rejection Notice on Stress Claim. Accordingly, the Claims Representative found that Petitioner’s claim was barred by W. Va. Code § 23-4-1f.

This determination was reviewed and affirmed by the Office of Judges, who concluded that Petitioner did not establish a causal relationship between his employment and “his infirmities,” and that he failed to take his claim outside the scope of W.Va. Code § 23-4-1f because “[t]he medical evidence [did] not indicate that the claimant [had] a work-related physical injury or disease.” *See* Exhibit B, Decision of Administrative Law Judge, p. 8. The matter was then appealed to the Workers’ Compensation Appeals Board, who also affirmed the decision of the Claims Representative.

Petitioner did not appeal the final decision of the Appeals Board to this Court. Instead, Petitioner sought payment under the stop-gap liability insurance policy for which his former employer was an insured. After Petitioner was denied payment under the policy, he brought a declaratory judgment action against the employer’s insurance company in the Circuit Court of Kanawha County, West Virginia. The declaratory judgment action was subsequently removed to the United States District Court for the Southern District of West Virginia. On November 23, 2005, the District Court entered a Memorandum Opinion and Order granting the defendant insurance

company summary judgment. *See* Exhibit C, Memorandum Opinion and Order. The District Court found that the Petitioner had not shown that his former employer, the Attorney General's Office, was legally obligated to pay the Petitioner's alleged damages pursuant to the policy terms at issue.

In explaining his decision, Judge Copenhaver states: "Given the contingent nature of the arguments, the uncertainty of their success, and, of course, the absence of the insured as a party to this action, one is left in a factual and legal vacuum rendering it well nigh impossible to find the insurer 'legally obligated to pay . . . damages' to plaintiff." The District Court further notes that Petitioner's cause "might very well have been resolved in [his] favor had he chosen to pursue the state in an appropriate civil action" or "had he availed himself of review [of his Workers' Compensation claim] in the supreme court of appeals." The action was dismissed without prejudice to allow the Petitioner to bring suit against his former employer to determine the legally liable for his alleged injuries.

Despite the implicit urging of the District Court for the Petitioner to bring an "appropriate civil action" to have his claim resolved, the Petitioner has filed the instant proceeding in an apparent attempt to seek yet another "bite" at his Workers' Compensation claim.

## II. STANDARD FOR WRIT OF MANDAMUS

"Mandamus lies to require the discharge by a public officer of a nondiscretionary duty." Syl. pt. 3, *State ex rel. Greenbrier County Airport Authority v. Hanna*, 151 W. Va. 479, 153 S.E.2d 284 (1967). "A writ of mandamus will not issue unless three elements coexist-(1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy." Syl. pt. 2, *State ex rel. Kucera v. City of Wheeling*, 153 W. Va. 538, 170 S.E.2d 367 (1969). Moreover, this "clear legal

right” that a petitioner must show “cannot be established in the proceeding itself.” *Id.*, 153 W. Va. at 542, 170 S.E.2d at 369.

### III. SUMMARY OF ARGUMENT

The Petitioner’s Petition for Writ of Mandamus should be denied for several reasons. First, BRIM is not a proper party to this proceeding as it has no duty, statutory or otherwise, to give the Petitioner his requested relief. BRIM is not the insurer or the insured and thus does not have the capability to satisfy what the Petitioner seeks. A mandamus action is a proper remedy when a public entity is not fulfilling its legal obligations. Here, however, there is simply no duty in which BRIM could be compelled to discharge. Moreover, BRIM was never requested by any state agency to provide workers’ compensation insurance because that obligation rested, at the time of the Petitioner’s claim, with the Workers’ Compensation Commission.

Second, the Petitioner seeks to essentially convert an express *liability* policy into a *disability* policy even though it is clearly evident, by its title and its terms, that the subject policy in question is a comprehensive *liability* policy. The coverage in question is triggered *only* upon a finding of specific tortious conduct and not by a no-fault workers’ compensation mechanism as being maintained by the Petitioner. To find for the Petitioner would be to disturb the basic understanding of what liability insurance is and would essentially throw risk expectations relating to stop-gap coverage out the proverbial window. Likewise, it is obvious that the insurance coverage at issue is not, and should not be treated as, no-fault workers’ compensation insurance. Because West Virginia had a monopolistic workers’ compensation system at the time of the Petitioner’s claim allegedly arose, there was obviously no reason for the Attorney General’s office to carry workers’ compensation insurance.

Third, the doctrine of *res judicata* bars the Petitioner from re-litigating this issue. Petitioner's workers' compensation claim was denied by the Workers' Compensation Division, which decision was subsequently affirmed at the administrative appellate levels. He chose not to appeal the decision of the Worker's Compensation Appeals Board to this Court. While pursuing workers' compensation benefits, the Petitioner had a full and fair opportunity to present any legal theory of his choice to establish that the Workers' Compensation Act provided him relief. In failing to prevail in his arguments, as well as not appealing the administrative decision to this Court, Petitioner is now precluded from ever asserting in a judicial setting that his former employer, or his former employer's liability insurance carrier, is liable under the Workers' Compensation Act for his alleged injuries.

#### IV. ARGUMENT

- A. The Petitioner's Petition must be denied with respect to BRIM because BRIM is neither the insured nor the insurer in this matter and thus cannot be compelled to pay the Petitioner's alleged damages.**

The commercial general liability policy at issue was procured by BRIM by contracting with National Union Fire Insurance Company of Pittsburgh, PA (hereinafter "NUFIC"). See Exhibit D, Comprehensive Liability Policy. BRIM "has, without limitation and in its discretion as it seems necessary for the benefit of the insurance program, general supervision and control over the insurance of state property, activities and responsibilities, including: The **acquisition** or cancellation of state insurance." W. Va. Code § 29-12-5(a)(1)(A) (emphasis added). Moreover, W. Va. Code § 29-12-5(b)(2) provides that BRIM "may enter into any contract necessary to the execution of the powers granted by this article or to further the intent of this article."

BRIM is neither the insured nor the insurer as a result of the policy issued by NUFIC, but is instead a statutorily-created conduit by which the insurance is acquired. Any obligation of BRIM

in this matter is limited by statute or rule, neither of which permit it to provide the relief being requested by the Petitioner. Petitioner is aware of BRIM's role considering that he did not include BRIM as a named respondent in the instant matter, nor did he include BRIM in his earlier declaratory judgment action against NUFIC. In short, BRIM owes no obligation to the Petitioner and has performed its statutory duties by procuring insurance for the benefit of the Attorney General's Office.

"Mandamus lies to require the discharge by a public officer of a nondiscretionary duty." Syl. pt. 3, *State ex rel. Greenbrier County Airport Authority v. Hanna*, 151 W. Va. 479, 153 S.E.2d 284 (1967). Here, there is no duty, nondiscretionary or otherwise, for BRIM to discharge. Therefore, the second element required for the issuance of a writ of mandamus (a legal duty on the part of respondent to do the thing which the petitioner seeks to compel) as set forth by this Court in *Kucera*, *supra*, cannot be satisfied. On that basis alone, the Petitioner's Petition for Writ of Mandamus must be denied with respect to BRIM.

**B. The subject liability policy cannot be triggered by Petitioner's claim because stop-gap coverage is premised on a finding of tort liability rather than a no-fault standard.**

Petitioner's argument for coverage under the policy at issue is, in essence, an attempt to convert an express *liability* policy into a *disability* policy. The statement by the Petitioner that "[t]he State of West Virginia has insurance protection seemingly tailored for this very circumstance" is plainly wrong. The policy that was issued to the Petitioner's former employer is, by its title and by its terms, a comprehensive *liability* policy. Consequently, the coverages provided under the policy are intended to insure the State of West Virginia against financial or pecuniary obligations that may otherwise result from the *tortious* conduct of its agents. It is evident that the protection intended under the policy is for *tortious* conduct by simply reviewing the various types of coverages that are

explicitly provided under the policy, such as Personal Injury Liability, Professional Liability, Wrongful Act Liability, Comprehensive Auto Liability, Auto Physical Damage, etc.

Generally speaking, BRIM's primary responsibility is to procure insurance to protect state agencies against lawsuits and claims brought by alleged victims of torts or other statutory rights, including employees. With regard to stop-gap coverage in particular, those involved with the insurance industry could never have anticipated that provisions such as the one at issue are *no-fault* provisions.<sup>1</sup> To the contrary, stop-gap liability provisions are designed to provide coverage for legal obligations or liabilities that arise under tort law. Such a position is in agreement with this Court's discussion of stop-gap/liability coverage:

Between [workers' compensation coverage and commercial general liability coverage] lies a "gap" in coverage. In this gap are claims made against a business by injured employees whose claims are not generally compensable under the workers' compensation system. An "employers' liability" policy therefore exists to "fill the gaps" between workers' compensation coverage and an employers' general liability policy. "In the modern era, employers' liability insurance is designed to protect the insurer from *tort liability* for injuries to employees who do not come under the exclusive remedy provisions of workers' compensation." 16 *Couch on Insurance* § 225;157 (3d ed.2000).

*Erie Ins. Property and Cas. Co. v. Stage Show Pizza, JTS, Inc.*, 210 W. Va. 63, 68, 553 S.E.2d 257, 262 (2001)(emphasis added). Petitioner, in fact, partially sets forth the above-quote in his Memorandum of Law, but offers no explanation of how stop-gap coverage can be triggered outside a determination of tort liability.

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<sup>1</sup>The stop-gap liability provision at issue states, in pertinent part: "The company will pay on behalf of the 'insured' all sums which the 'insured' shall become legally obligated to pay as damages because of 'bodily injury' to which this insurance applies, caused by an 'occurrence', to any employee of the 'insured' whose remuneration has been reported and declared under a 'Workers' Compensation Law' of the State of West Virginia and who has been injured in the course of his employment, but is not entitled to receive (or elects not to accept) the benefits provided by the aforementioned law . . ."

Accordingly, it was never anticipated that stop-gap provisions would provide coverage for mental-mental injuries, absent proof that such injuries were the fault of the employer and fell outside of the Workers' Compensation Act, e.g. a "deliberate intent" action filed pursuant to West Virginia Code § 23-4-2 or an action alleging a violation of the Human Rights Act pursuant to West Virginia Code § 5-11-1, *et seq.* See Syl. pt. 5, *Messer v. Huntington Anesthesia Group, Inc.*, 218 W. Va. 4, 620 S.E.2d 144 (2005)("[A]n employee's claim against an employer for violation of the West Virginia Human Rights Act and resulting non-physical injuries . . . [is] not barred by the exclusivity provisions of the Workers Compensation Act.").

This Court recently held that an employer may lose the immunity provided by the Workers' Compensation Act "(1) by defaulting in payments required by the Workers' Compensation Act or otherwise failing to be in compliance with the Act; (2) by acting with 'deliberate intention' to cause an employee's injury as set forth in W. Va. Code § 23-4-2(d); or (3) in such other circumstances where the Legislature has by statute expressly provided an employee a private remedy outside the workers' compensation system." Syl. pt. 2, *Bias v. Eastern Associated Coal Corp.*, — S.E.2d —, 2005 WL 4076760 (W.Va. 2006). In *Bias*, the Court held that an employee could not maintain a common law negligence action against his employer for a mental injury due to the immunity provided by the Workers' Compensation Act. The result of *Bias* is clear: An employee may seek to hold its employer liable for a mental injury only in those situations as set forth by the majority's opinion. The basis for the Attorney General's liability in the instant matter, as argued by the Petitioner, undeniably falls outside of those enumerated circumstances.

Moreover, the unambiguous import of the United States District Court's decision concerning Petitioner's declaratory judgment action against NUFIC is that the Petitioner should bring a lawful

cause of action to determine whether the Attorney General is liable for the Petitioner's alleged damages. The District Court even hinted that Petitioner might prevail in such an action: "[Whether the Attorney General is 'legally obligated,' whether the Petitioner experienced 'bodily injury,' and whether the injury occurred 'in the course of his employment'] are some of the issues that might very well have been resolved in plaintiff's favor had he chosen to pursue the state in an appropriate civil action." See Exhibit C, Memorandum Opinion and Order, p. 11.

Petitioner chose to ignore the District Court's suggested course of filing a lawsuit against his former employer. Instead, the Petitioner filed the instant proceeding in hopes that this Court will quickly determine that his former employer is legally obligated for his alleged damages. This "end-run" attempt at a judicial determination of legal liability failed in the District Court and should likewise fail in this matter. The District Court noted that the Petitioner offered "arguments that might, under the right circumstances, eventually mature into a legal obligation for which the insurer would have to pay." See Exhibit C, Memorandum Opinion and Order, p. 12. The "right circumstances" unquestionably begins with the filing of a proper civil action, i.e. a cause of action as recognized by *Bias, supra*, and **not** by filing a petition for writ of mandamus.

Notwithstanding the evidence and authority in support of the position that stop-gap liability provisions are applicable only to specific tortious conduct, the effect of Petitioner's circuitous attempt to recover under the policy at issue is to convert a *liability* policy, in which legal liability is a pre-requisite, into a *disability* policy, where liability on behalf of the employer is *not* a pre-requisite. In other words, Petitioner improperly seeks to turn a "fault-based" liability policy into a "no-fault" workers' compensation policy. Petitioner has not brought an "appropriate" civil action against his former employer and thus has not proven liability **as contemplated and required under**

**the subject policy.** Accordingly, the claim of the Petitioner is not ripe for this Court to review.

Furthermore, the policy in question certainly could not be construed as one containing workers' compensation coverage should the Petitioner somehow convince this Court that his alleged claim falls within the ambit of the Workers' Compensation Act. There simply would have been no reason for the Attorney General's Office to have workers' compensation coverage in place at the time of the Petitioner's alleged injuries. That is because workers' compensation coverage was essentially provided through the West Virginia Workers' Compensation Commission, which was the agency that was responsible for maintaining the government-controlled workers' compensation insurance system.<sup>2</sup> "The benefits of this system accrue both to the employer, who is relieved from common-law tort liability for negligently inflicted injuries, and to the employee, who is assured prompt payment of benefits." *Meadows v. Lewis*, 172 W. Va. 457, 469, 307 S.E.2d 625, 638 (1983); *see also Persinger v. Peabody Coal Co.*, 196 W. Va. 707, 713, 474 S.E.2d 887, 893 (1996); *State ex rel. Abraham Linc. Corp. v. Bedell*, 216 W. Va. 99, 103, 602 S.E.2d 542, 546 (2004). Accordingly, the "keystone" of this monopolistic system was the employer's immunity from suit in conjunction with the employee's right to a no-fault standard when he or she experienced a work-related injury. Given this *quid pro quo* relationship, the need for BRIM to procure workers' compensation coverage through a private insurance company did not exist.

The Attorney General paid into the Worker's Compensation Fund with the reasonable expectation that a claim derived from the Workers' Compensation Act relieved him of any liability with respect to that claim. "When an employer subscribes to and pays premiums into the Fund, and

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<sup>2</sup>Of course, since this time, the Legislature has created a mutual insurance company to administer workers' compensation claims, and the market will open up to private insurers in 2008.

complies with all other requirements of the Act, the employer is entitled to immunity for any injury occurring to an employee **and shall not be liable to respond in damages at common law or by statute.** W. Va. Code, 23 -2-6.” *State ex rel. Frazier v. Hrko*, 203 W. Va. 652, 659, 510 S.E.2d 486, 493 (1998) (emphasis added). The Petitioner seeks to turn this expectation, as well as the public policy behind the workers’ compensation system as it existed in West Virginia at the time of his claim, on its head with his convoluted theory that W. Va. Code § 23-4-1f shifts the costs for mental-mental claims from the Fund to the employer. Simply put, liability for the Petitioner’s damages begins and ends with the Fund unless he can prove that he has a cognizable claim **outside** of the Workers’ Compensation Act. If, and only if, the Petitioner can show that a colorable claim outside the worker’s compensation system exists, then the Attorney General’s liability insurance may be triggered.

**C. The doctrine of *res judicata* bars the Petitioner from maintaining his claim.**

It is undisputed that Petitioner’s claim for Workers’ Compensation benefits was denied by the Workers’ Compensation Division, which decision was subsequently affirmed at the administrative appellate levels. Because Petitioner had a full and fair opportunity to present evidence during those proceedings, yet failed to establish that he suffered any physical manifestations of his alleged mental injuries or that he otherwise had a claim derived from the Workers’ Compensation Act, Petitioner’s claim is now blocked by *res judicata*.<sup>3</sup> *Res judicata* is the legal doctrine that provides “[a]n affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim . . . that could have been – but was not – raised

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<sup>3</sup>The District Court notes in its related opinion that “had [Petitioner] availed himself of review in the supreme court of appeals, his claim might have been deemed compensable and, hence, not the subject of stop-gap coverage.”

in the first suit.” BLACK’S LAW DICTIONARY 1052 (7th ed. 2000).

This Court has repeatedly held that the doctrine of *res judicata* is applicable to quasi-judicial proceedings conducted by an administrative agency. *See e.g., Rowe v. Grapevine Corp.*, 206 W. Va. 703, 527 S.E.2d 814 (1999); *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995). Further, in *Frazier, supra*, this Court had the opportunity to discuss whether issues that have been fully and finally decided by the Workers’ Compensation Commission can be collaterally-attacked in subsequent suits. The Court stated:

It is generally held that an administrative decision by a workers’ compensation tribunal cannot be collaterally attacked in another tribunal . . . We believe such a rule should be adopted in West Virginia concerning final orders relating to default and in-good-standing issues by the Workers’ Compensation Commissioner.

*Id.*, 203 W. Va. at 662, 510 S.E.2d at 496 (citations omitted).

The Court limited its ruling in *Frazier* to employers because that case was premised upon a Commissioner’s ruling that the employer had defaulted on workers’ compensation premiums, which stripped the employer of its statutory immunities. In lieu of exercising the employer’s administrative remedies, the employer challenged the Commissioner’s finding in circuit court. Consequently, this Court properly had before it *only* the issue of whether an *employer* was precluded from attacking final decisions of the Workers’ Compensation Commission. However, the Court’s decision with regard to employers clearly indicates that it would apply the same doctrine to decisions on injuries to employees.

In addition to the above, the applicability of *res judicata* to workers’ compensation proceedings is supported by decisions in other jurisdictions. *See e.g., Criner v. North American Van*

*Lines*, 613 A.2d 1272 (R.I. 1992)(“In this case there was an identity of parties, the injuries that were the basis for the claim of relief were the same, and there was a finality of judgment in the Workers’ Compensation Court. The plaintiff’s Superior Court suit is barred under the doctrine of *res judicata*.”); *Missildine v. Avondale Mills, Inc.*, 415 So.2d 1040 (Ala. 1981)(“If the facts as presented by Missildine at the trial court are accepted, that Avondale and Cowikee are one entity, then all the elements for *res judicata* to apply are present.”); *see generally*, 82 *Am.Jur.2d Workers’ Compensation* §606 (Westlaw Search - “AmJur Workers 606”); 84 *A.L.R. 2d* 1036.

It is anticipated that the Petitioner will attempt to distinguish the Workers’ Compensation decision, in which the Commission determined that the Petitioner failed to prove that he suffered physical manifestation of his mental injuries, from the instant case by arguing that a new legal theory of liability is in play. While it may be true that the Petitioner is now arguing under a different theory, and notwithstanding the fact that this theory existed at the time he initially made his workers’ compensation claim, what has not changed is the overarching issue: Is the Petitioner’s former employer liable under the Workers’ Compensation Act for the Petitioner’s alleged injuries? Thus, the issue that the Petitioner seeks to have determined here is the same issue that was, or should have been, determined when his claim was being evaluated and reviewed by the Workers’ Compensation Division.

Also, a workers’ compensation claim is styled as an adversary proceeding, pitting a claimant as an adverse party to his/her employer and the Workers’ Compensation Commission. Accordingly, the employer *is* adverse to the claimant in a workers’ compensation action. Therefore, the parties with direct interests at stake in the instant proceeding are the same parties that had a chance to be heard during the Petitioner’s workers’ compensation claim.

Again, the Petitioner had a full and fair opportunity to litigate his claims and to prove that his claim should be recognized within the Workers' Compensation administrative and statutory procedures. The Rules of Procedure utilized in the litigation of Workers' Compensation claims provide all of the discovery tools and methods of presenting evidence as is found in civil litigation, including interrogatories, depositions, the ability to introduce physical evidence, and the ability to subpoena witnesses for the taking of testimony. *See* W.Va.C.S.R. §§ 93-1-6, -7, and -8. Petitioner readily concedes in his Petition and Memorandum in Support that he had a right to appellate review, both through the administrative process and, ultimately, through this Court. Therefore, Petitioner knowingly had a right and the opportunity to prove the issues arising from his case in his workers' compensation proceedings, which utilizes procedures that are "substantially similar to those in a court," as required by Syllabus Point 2 of *Vest v. Board of Education of the County of Nicholas*, 193 W. Va. 222, 455 S.E.2d 781 (1995).<sup>4</sup>

Petitioner's position that the Workers' Compensation Act is the source of his relief *has already been adjudicated* by an administrative body that implemented practices and procedures substantially similar to general litigation. Therefore, Petitioner is now barred from asserting that his former employer, or his former employer's liability insurer, is liable under the Workers' Compensation Act for his alleged injuries.

Even if this Court determines that the issue preclusion doctrine is not applicable to the instant matter, Petitioner has still waived a known legal right by failing to appeal the decision to the Supreme Court of Appeals, as authorized by W. Va. Code § 23-5-15. Once Petitioner was denied

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<sup>4</sup>It is undeniable that the Workers' Compensation Commission's decision was "rendered pursuant to the agency's adjudicatory authority," which is also a requirement under Syllabus Point 2 of *Vest*.

Workers' Compensation benefits by the Appeals Board, he essentially had two options if he desired to continue pursuing his claim. First, because the Appeals Board determined that his injury fell outside the scope of the Workers' Compensation system, Petitioner could have accepted that decision and brought an action against his former employer as recognized by *Bias, supra*. Second, Petitioner could have appealed the Appeals Board's decision to this Court. However, even though Petitioner was aware of his legal right to appeal, Petitioner made a knowing tactical decision to waive his right to appeal.

In *Potesta v. U.S. Fidelity & Guar. Co.*, 202 W. Va. 308, 315-316, 504 S.E.2d 135, 142-143 (1998), this Court asserted:

[T]o establish waiver there must be evidence demonstrating that a party has intentionally relinquished a known right . . . The doctrine of waiver focuses on the conduct of the party against whom waiver is sought, and requires that party to have intentionally relinquished a known right.

In the instant case, Petitioner clearly relinquished, at his peril, a legal right to appeal the Workers' Compensation Appeals Board's decision to this Court. Petitioner did this knowingly and intentionally as a tactical maneuver. Therefore, the Petitioner's *only* available recourse to him at this time is to bring an "appropriate" civil action against his former employer to prove that the former employer is liable to him for the injuries that he has allegedly sustained.

**V. CONCLUSION**

For the foregoing reasons, Respondent, State of West Virginia Board of Risk and Insurance Management, respectfully requests that the Petitioner's Petition for Writ of Mandamus be DENIED.

Respectfully submitted,

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OF RISK AND INSURANCE MANAGEMENT

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