

33210

~~NO-062467~~

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

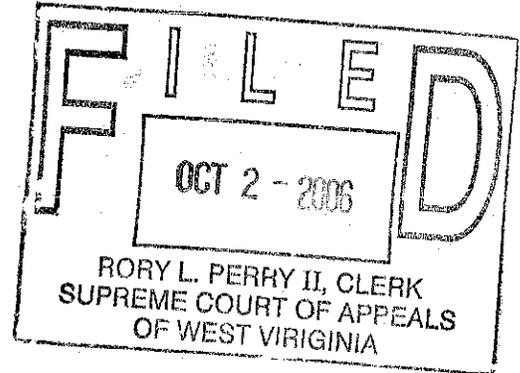
STATE OF WEST VIRGINIA ex rel.  
DONALD DARLING,

Petitioner,

v.

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

Respondent.



MEMORANDUM OF LAW  
IN OPPOSITION TO  
PETITION FOR WRIT OF MANDAMUS

Although legally creative, Petitioner Darling's attempt to acquire moneys in addition to the disability payments he currently receives through the Social Security Administration and the West Virginia Consolidated Public Retirement board falls so far short of the legal standard for the issuance of a writ of mandamus that one need merely quote from the opinion of the federal court in the related declaratory judgment action brought by Respondent:

First, plaintiff's argument that the state is "legally obligated" to him occupies twelve (12) pages of his nineteen (19) page brief. Ironically, implicit in this breadth of discussion is that the state is under no clear legal obligation to pay him damages.

Petition, Exhibit E, p.11. Similarly, Petitioner's attempt to convince this Court that he has a clear legal right to the relief sought takes up almost one-third of his Memorandum of Law, and another several pages attempt to convince this Court that the relief sought (the payment of damages)

would present no financial burden because the “State of West Virginia has insurance protection seemingly tailored for this very circumstance.” These assertions simply are untrue.

Before addressing the first element that must be shown before a writ of mandamus shall be issued – the petitioner’s clear legal right to the relief sought – Respondent feels compelled to point out the obvious: the Attorney General not only does not have a legal duty to pay damages, he does not have the legal ability to pay the insurance proceeds Petitioner seeks. Petitioner states he is merely seeking the State’s stop gap liability insurance, but the Attorney General has no authority over the acquisition nor administration of the State’s policy of insurance and has no involvement in the interpretation of the scope and extent of the coverage. That is the role of the Board of Risk and Insurance Management (BRIM) under W. Va. Code §29-12-1 *et seq.* Similarly, the Attorney General cannot compel the State’s insurer, National Union Fire Insurance Company of Pittsburgh (NUFIC), or its authorized agent, AIG Claims Services, Inc. (AIG), to do anything in connection with the State’s policy of insurance, especially order it to pay some undetermined amount of damages. Even BRIM has no such authority.

In short, assuming *arguendo* that Petitioner can prove the elements required for the issuance of a writ of mandamus, which he cannot, Respondent is not quite sure what this Petitioner seeks to mandate the Attorney General to do that would be within the Attorney General’s power. The element of mandamus that requires the finding of a clear legal duty implies there is a legal ability to perform or carry out that duty. If Petitioner is asking this Court mandate that the Attorney General pay him some unspecified amount of damages from the coffers of the State’s insurer, that is something the Attorney General simply cannot do. The federal court noted the absence of the insured as a party to the declaratory judgment action

against the insurer and its agent. Petition, Exhibit E, p. 12. Of note here is the absence of BRIM as a party. And, of course, mandamus does not lie against NUFIC or AIG since they are not governmental entities. However, as discussed *infra*, there is no such coverage since the State has a *liability* insurance policy which requires *proof* of liability, rather than the imaginative no-fault standard proposed by Petitioner.

In addition to the impossibility of meeting the legal standard for issuance of a writ of mandamus or including a party that could arguably be mandated to provide the relief sought, a significant procedural shortcoming makes it questionable whether Petitioner even has the right to seek mandamus at this time in this way. Petitioner failed to appeal the denial of his claim for workers' compensation benefits to this Court as provided in W. Va. Code § 23-5-15. As set forth in his Petition, for whatever reason Mr. Darling chose not to pursue a judicial review. Petition, ¶13. Appeals to this Court are analogous to mandamus proceedings (*McDaniel v. State Compensation Comm'r*, 121 W. Va. 60, 200 S.E. 47 (1939)) and that is clearly the type of mandamus proceeding he should have brought. Instead he made a claim for direct payment to BRIM which transmitted the claim to its insurance carrier which denied coverage. Petition, ¶¶15-16. Mr. Darling then filed an action for declaratory judgment in the Circuit Court of Kanawha County which was removed to the United States District Court for the Southern District of West Virginia. Petition, ¶¶17-18. The Attorney General's Office was not involved in those proceedings, and, as far as this author could ascertain, this Office was not even aware of the federal court's Memorandum Opinion and Order until it was attached as Exhibit E to the Petition for Writ of Mandamus although the Attorney General's office would be the insured that the federal court refers to when it 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." Petition, Exhibit E, p. 12.

While the suit was thrown out of federal court, the Memorandum Opinion and Order acknowledges that Mr. Darling offered "arguments that might, under the right circumstances, eventually mature into a legal obligation for which the insurer would have to pay." Petition, Exhibit E, p. 12. However, this petition for writ of mandamus is not a legal avenue which can turn Petitioner's desire for additional funds into a legal obligation of this Office, much less a legal obligation that this Court can mandate the Attorney General's insurer to pay. The federal court had already informed Petitioner that some of his issues "might very well have been resolved in [his] favor had he chosen to pursue the state *in an appropriate civil action*." Petition, Exhibit E, p. 11 (emphasis added). Again, this petition for writ of mandamus is *not* the appropriate civil action.

Mr. Darling's declaratory judgment action was decided before the West Virginia Supreme Court of Appeals issued the highly relevant opinion of *Bias v. Eastern Associated Coal Corp.* — S.E.2d —, 2005 WL 4076760 (W. Va.). That opinion sets forth the three ways an employee may pursue a private remedy, i.e., it discusses what actions are appropriate. *Bias, supra*, Syl. Pt. 2. However, rather than going any further down the civil action road, let us back up to Petitioner's choice not to pursue judicial review of the administrative affirmance of the denial of his claim for workers' compensation benefits. His failure to appeal the decision of the Workers' Compensation Appeal Board should be fatal to his subsequent attempts to present his convoluted argument that, because of the administrative denial based on the mental-mental

exclusion, he has a clear legal right to the payment of damages. As the federal court noted, “had he 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.” Petition, Exhibit E, pp. 11-12.

Mr. Darling did not exhaust his administrative remedy – the statutory scheme in place for workplace injuries. 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).

However, “the usual rule is that the courts ought to defer granting a declaratory judgment action 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). Clearly, as the federal court noted, Mr. Darling’s claim may have been deemed compensable upon judicial review. Petitioner’s failure to follow that road to the end should preclude him from starting down this path of mandamus, especially inasmuch as the path cannot take Petitioner where he wants to go or where this State should go.

Petitioner’s supposed legal right to the payment of damages appears to be based on the following innovative though illogical argument:

- 1) The workers’ compensation system is a no-fault dispute resolution process which guarantees an injured worker prompt payment in return for an employer’s immunity from common law tort actions.

2) West Virginia Code § 23-4-1(f) excluded “mental-mental claims” from the fund, but it did not exclude such claims from the no-fault process and did not remove the employer’s immunity from common law tort actions.

3) Since the statute protects the fund not the employer, the employer is required to directly pay the damages within this no-fault process.

Petitioner either is not aware of or chose not to cite *Bias v. Eastern Associated Coal Corp.*, — S.E.2d —, 2005 WL 4076760 (W. Va.). However, he correctly sets forth the majority’s holding that an employee is precluded under W. Va. Code § 23-4-1f from maintaining a common law negligence action against his employer for a mental-mental injury. No problem, asserts Petitioner. This simply means the employer is responsible for the injured employee’s damages. What are those damages? No one knows – but Petitioner points out the Supreme Court’s adoption of the above argument will present “no additional financial burden” since “(t)he stop gap coverage of the general liability coverage provides a mechanism to fund this statutorily imposed cost.”

There are many reasons why the above statement is preposterous. First, clearly there is nothing in the workers’ compensation statute which imposes such a cost. The concurring opinion in *Bias* by Justice Davis addresses the economic problems facing the workers’ compensation system, a system established to immunize employers from common law liability in part as a protection to employers. To judicially impose no-fault liability on employers would certainly be to “sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations[.]” *Bias, supra*, Davis concurring opinion, citing *Lewis v. Canaan Valley Resorts, Inc.*, 185 W. Va. 684, 692, 408 S.E.2d 634, 642 (1991). Every employer in the State

would be required to pay out of pocket (or from some kind of no-fault insurance that would be exorbitantly expensive) whatever damages would somehow be determined to emanate from mental-mental workplace injuries – and there would be a *lot* of them should such a theory be adopted. Second, the State’s insurer has already denied coverage and surely would continue to do so if Mr. Darling insisted on proceeding with a no-fault theory of liability rather than pleading a cause of action for which he must prove legal liability against his employer as contemplated by the State’s policy of insurance. However, it seems unnecessary to address Petitioner’s attempt to persuade this forum of the applicability of the State’s stop gap liability insurance. Again, no claim has been made that might trigger such insurance, and the insurer would be a necessary party to any action seeking to determine the scope and nature of such coverage.

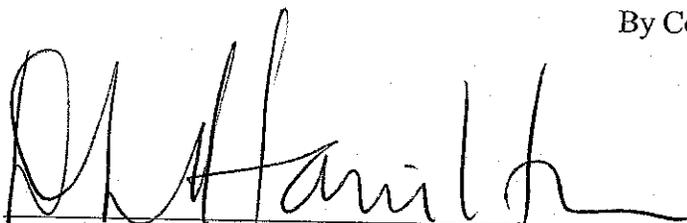
This Court so recently addressed the legislative intent and public policy issues connected with the exclusion of mental-mental claims from the Workers’ Compensation system that it seems a trespass on the Court’s time to revisit the issue. Both the concurring and dissenting opinions make it clear the Court understands the roadblock Petitioner is up against, but Petitioner’s suggested shortcut will land this State in muck and mire so deep that a legislative tow truck would be called immediately. The *Bias* majority makes emphatically clear that the West Virginia Supreme Court of Appeals is not going to “improperly exercise a legislative function.” Why, then, would this Court create a new no-fault theory of employer liability for mental-mental injury on a petition for a writ of mandamus, which requires a clear legal right to the relief sought?

For the reasons set forth above, Respondent Darrell V. McGraw, Attorney General of the State of West Virginia, prays this Petition be refused.

Respectfully submitted,

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

By Counsel.

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

DEBRA L. HAMILTON, State Bar No. 1553

DEPUTY ATTORNEY GENERAL

Office of the Attorney General

State Capitol, Room 26-E

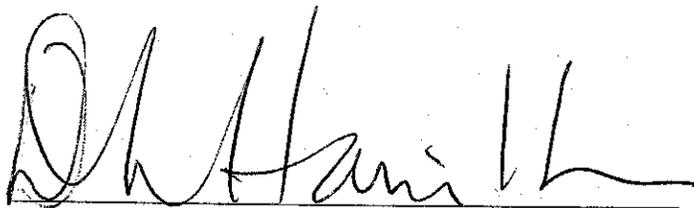
Charleston, WV 25305

304-558-2021

**CERTIFICATE OF SERVICE**

The undersigned, Debra L. Hamilton, Deputy Attorney General and counsel for Respondent, does hereby certify that a true and accurate copy of the foregoing Memorandum of Law in Opposition to Petition for Writ of Mandamus was served upon Petitioner by depositing the same in the United States mail, first-class postage prepaid, this 2nd day of October, 2006, addressed as follows:

Donald Darling  
6790 Chaffee Court  
Brecksville, OH 44141

A handwritten signature in black ink, appearing to read 'D. Hamilton', written over a horizontal line.

DEBRA L. HAMILTON