IN THE
WEST VIRGINIA SUPREME COURT
OF APPEALS

SANDRA SUE FULLEN, *et al.*,

Respondent,

v.

PHILIPS ELECTRONICS NORTH AMERICA CORPORATION, a Delaware corporation, *et al.*,

Petitioners

CIVIL ACTION NO. 1-C-319
CIVIL ACTION NO. 3-C-63

HELEN ANDRYSIAK, *et al.*,

CASE NO. __

Respondent,

v.

PHILIPS ELECTRONICS NORTH AMERICA CORPORATION, a Delaware corporation, *et al.*,

Petitioners.

AMICI, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT BRIEF IN SUPPORT OF DEFENDANTS' PETITION TO DOCKET CERTIFIED QUESTIONS

UPON CERTIFIED QUESTIONS FROM THE CIRCUIT COURT OF MARION COUNTY

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KIND OF PROCEEDING AND NATURE OF RULING BELOW

Amici, The Chamber of Commerce of the United States of America ("Chamber"), and The Society for Human Resource Management ("SHRM"), adopt by reference the defendant-petitioners' statement of the Kind of Proceeding and Nature of the Ruling below.

STATEMENT OF INTEREST

The Chamber is the world's largest business federation. The Chamber represents an underlying membership of more than three million businesses and organizations of every size, in every business sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in courts on issues of national concern to the business community; in carrying out this function, the Chamber has filed more than 1,000 *amicus* briefs in federal and state courts.

SHRM is the world's largest association devoted to human resource management. Representing more than 200,000 individual members, the Society's mission is to serve the needs of HR professionals by providing the most essential and comprehensive resources available. As an influential voice, the Society's mission is also to advance the human resource profession to ensure that HR is recognized as an essential partner in developing and executing organizational strategy. Founded in 1948, SHRM currently has more than 550 affiliated chapters and members in more than 100 countries.

It is well established that the workers' compensation system represents a balance between the interests of the employer and the employee. The employer surrenders immunity in cases where the employee's work-related injury was not due to the employer's fault. In turn, the employee relinquishes his or her right to full damages in exchange for the relatively prompt and efficient payments provided through the compensation system. *See* 1 *Larson's Workers'*

Compensation Law (MB) § 1.01 (2005); *State ex rel. Abraham Line Corp. v. Bedell*, 216 W. Va. 99, 103-04, 602 S.E.2d 542, 546-47 (2004). In recent years, however, the exclusive remedy rule has repeatedly been attacked by injured employees seeking more lucrative tort damages from employers. Unfortunately, some courts have allowed the exclusive remedy rule to be eroded. This case is an example of that process and its effect is to undo the careful balance of employee and employer interests.

In order for the exclusive remedy rule to accomplish its purpose, the rule must not be subverted and circumvented in so many ways that its protection essentially becomes illusory. West Virginia has recognized this fact in its Workers' Compensation Act, but the decision below contravenes the legislative scheme and tears a gaping hole in West Virginia's exclusive remedy rule. The judicially-created exception to exclusivity adopted by the court below will endanger West Virginia's fragile workers' compensation system by substantially broadening employer liability. But the effect of this assault on the system will be not only to harm West Virginia employers but also, ultimately, to injure West Virginia employees. *See, e.g.*, Justice Robin J. Davis & Louis J. Palmer, Jr., *Workers' Compensation Litigation in West Virginia: Assessing the Impact of the Rule of Liberality and the Need for Fiscal Reform*, 107 W. Va. L. Rev. 43, 45-46 (2004). The Chamber and SHRM have a strong interest in preventing the destruction of the exclusive remedy rule that is the premise of this Nation's and this State's workers' compensation laws.

STATEMENT OF THE CASE

These consolidated cases involve the claims of approximately 1,500 plaintiffs. Of these, 1,300 are current and former employees of a glass and light bulb manufacturing plant in

Fairmont, West Virginia ("Fairmont Plant"). Ten of these plaintiffs have been selected for an initial trial.

The employee-plaintiffs (hereafter "Employees") claim that they were exposed to hazardous substances by their employers in the course of their employment, and that this exposure harmed them in a variety of ways. Under West Virginia's Workers' Compensation Law, however:

> Any employer subject to this chapter who subscribes and pays into the workers' compensation fund the premiums provided by this chapter or who elects to make direct payments of compensation as provided in this section *is not liable to respond in damages at common law or by statute for the injury or death of any employee, however occurring* . . . . [W. Va. Code § 23-2-6 (emphasis supplied).]

This statutory provision "is known as the 'exclusivity' provision, as it makes workers' compensation benefits the exclusive remedy for personal injuries sustained by an employee injured in the course of and resulting from his or her covered employment." *State ex rel. Frazier v. Hrko*, 203 W. Va. 652, 659 n.11, 510 S.E.2d 486, 493 n.11 (1988). As this Court has explained,

> "an employer who is otherwise entitled to immunity under § 23-2-6 may lose immunity in only one of two ways: (1) by defaulting in payments required by the Act or otherwise failing to comply with the provisions of the Act, or (2) by deliberately intending to produce injury or death to the employee." [*State ex rel. Abraham Line Corp. v. Bedell*, 216 W. Va. 99, 104, 602 S.E.2d 542, 547 (2004) (quoting *Smith v. Monsanto Co.*, 822 F. Supp. 327, 330 (S.D.W. Va. 1992))].

In the instant case, the Employees seek to avoid the exclusivity provision in two ways. First, the Employees who currently have an occupational disease or other ailment resulting from the exposure bring statutory "deliberate intent" claims under W. Va. Code § 23-4-2. This statutory provision allows an employee to avoid the exclusivity rule by alleging that the employer deliberately intended to inflict injury or death on the employee. As noted, this is a

recognized exception to the exclusivity rule, and its application is not at issue in this petition for review.

Second, however, all Employees – both those who currently have a disease or other ailment and those who do not[1] – bring common-law claims for exposure to hazardous substances in the course of their employment, proximately causing emotional distress and the need for medical monitoring. The Employees allege that these injuries, admittedly incurred in the course of and resulting from covered employment, are *not* subject to the exclusivity provision.

Relying on the plain language of the exclusivity provision and this Court's established precedent, the Employers sought summary judgment on the Employees' common-law claims on two grounds. First, the Employers showed that the alleged exposure to a hazardous substance in the course of and as a result of the employment relationship is an "injury" as a matter of West Virginia law, and therefore that it is subject to the exclusivity provision of the Workers' Compensation Act that applies to job-related "injury or death," "however occurring." Common-law remedies, accordingly, are not available for the injuries that the Employees have alleged.

Second, the Employers argued that even assuming *arguendo* that Employees whose sole injury was exposure to hazardous substances can pursue common-law claims for emotional distress and medical monitoring, the Employees who allege that they are currently suffering from occupational diseases and ailments cannot do so. This latter group has concededly incurred a job-related "injury" or "disease" covered by the Act. Thus, these Employees can pursue their deliberate-intent claims, but not independent common-law claims.

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[1] The defendant-Employers correctly asserted below that the Employees with currently-manifested diseases and ailments had waived any common-law claims to damages for medical monitoring and emotional distress. The circuit court rejected this contention. *Amici* incorporate the Employers' waiver argument by reference, but will not separately brief that case-specific issue. Instead, the Chamber and SHRM argue that even if the Employees with diseases and other ailments had *not* waived claims seeking medical-monitoring and emotional distress, the Employers nonetheless are entitled to summary judgment.

On November 23, 2005, the Circuit Court denied the motions for summary judgment in both respects. However, pursuant to Rule 13 of the Rules of Appellate Procedure and West Virginia Code § 58-5-2, the court certified two questions of law to this Court:

1. Does the West Virginia Workers Compensation law, which provides that an employer "is not liable to respond in damages at common law or by statute for the injury or death of any employee, however occurring" (W.Va. Code § 23-2-6), bar an employee's common law claims against his or her employer seeking (a) medical monitoring damages for negligently exposing the employee to a toxic substance in the workplace, (b) "fear-of-future-disease" damages for negligent infliction of emotional distress in connection with such exposure, (c) compensatory damages for physical and emotional injuries for fraudulently misleading employees into believing the workplace was safe, and (d) punitive damages claimed to be available in connection with the above-described common law claims?

   Answer: No. This Court has concluded that W.Va. Code § 23-2-6 does not bar such common law claims by the employee

2. May an employee assert the common law tort claims described in question 1 against his or her employer arising from occupational exposures at his or her place of work, while asserting statutory deliberate intent claims against the same employer for existing physical injury caused by exposure at the same workplace?

   Answer: Yes. This Court has concluded that such claims may be asserted in the same lawsuit.

   [*Fullen* v. *Phillips Elec. N. Am. Corp.*, No. 01-C-319, slip op. at 2 (Marion County Cir. Ct., W. Va. Nov. 23, 2005).]

In this brief, the Chamber and SHRM demonstrate that the circuit court misinterpreted the relevant statute and this Court's precedent, and that it did so in ways that will have profound and damaging consequences for West Virginia's businesses, employees, and the workers' compensation program unless this Court intervenes.

ARGUMENT

THE EXCLUSIVITY PROVISION BARS THE EMPLOYEES' COMMON-LAW CLAIMS.

A. EXPOSURE TO HAZARDOUS SUBSTANCES RESULTING IN MEDICAL MONITORING AND EMOTIONAL DISTRESS CONSTITUTES AN INJURY UNDER THE WORKERS' COMPENSATION LAW.

1. The fundamental goal of Workers' Compensation statutes, including West Virginia's statute, is "to remove *[n]egligently* caused industrial accidents from the common law tort system." *Mandolidis v. Elkins Indus., Inc.*, 161 W. Va. 695, 700, 246 S.E.2d 907, 911 (1978) (emphasis supplied), *superseded on other grounds by statute*, W. Va. Code § 23-4-2, *as stated in Handley v. Union Carbide Corp.*, 804 F.2d 265, 269 (4th Cir. 1986). The employer immunity provision eliminates "from the common law tort system *all* disputes between or among employers and employees regarding the compensation to be received for injury or death to an employee." W. Va. Code § 23-4-2(d)(1) (emphasis supplied). "The benefits of this system accrue to both 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). "That philosophy has commonly been described as a *quid pro quo* on both sides: in return for the purchase of insurance against job-related injuries, the employer receives tort immunity; in turn for giving up the right to sue the employer, the employee receives swift and sure benefits." *State ex rel. Abraham Line Corp. v. Bedell*, 216 W. Va. 99, 103, 602 S.E.2d 542, 546 (2004) (quoting *Dominion Caisson Corp. v. Clark*, 614 A.2d 529, 532-33 (D.C. 1992)). *See also generally* Joan T.A. Gabel, *Escalating Inefficiency in Workers' Compensation Systems: Is Federal Reform the Answer?* 34 Wake Forest L. Rev. 1083, 1084, 1086, 1089 (1999).

The circuit court's decision in this case deeply undermines the historic bargain that is the basis of workers' compensation statutes in West Virginia and elsewhere. Once it is established that under state common law an employer's acts or omissions have proximately caused "injury" in the course of and resulting from covered employment, it necessarily follows that the Workers' Compensation Act provides the exclusive remedy for that injury (absent a statutory exception such as the deliberate-intent exception).

The question for this Court is the purely legal question of the meaning of the following statutory language:

> Any employer subject to this chapter who subscribes and pays into the workers' compensation fund . . is not liable to respond in damages at common law or by statute for the injury or death of any employee, however occurring[.] [W. Va. Code § 23-2-6.]

The plain language of the statute is clear that an employer may not be subjected to common-law tort actions arising out of work-related injuries unless certain narrow exceptions to this exclusivity provision apply. Specifically, an employee may bring common-law tort actions for work-related injuries only if the employer defaults in the payments required under the Act itself or acts with deliberate intent to inflict injury upon an employee. *Bedell*, 216 W. Va. at 104, 602 S.E.2d at 547. Only these express exceptions are permitted. In addition, *the statute itself* specifies that employer immunity is to be broadly construed. W. Va. Code § 23-4-2(d)(1). And, as noted above, to underline the comprehensive nature of the workers' compensation scheme, the Act states that

> this chapter and the establishment of the workers' compensation system in this chapter was and is intended to remove from the common law tort system *all* disputes between or among employers and employees regarding the compensation to be received for injury or death to an employee except as expressly provided. [*Id.* § 23-4-2(d)(1) (emphasis supplied).]

The West Virginia legislature has attempted to maintain the historic bargain that is the basis for the Workers' Compensation Act. On several occasions, it has amended the Act to protect the exclusivity rule and ensure the continued fiscal health of the system. In 1983, the Legislature amended the Act to overrule a broad construction given to the deliberate-intent exception to the exclusivity provision in *Mandolidis*, 161 W. Va. at 706, 246 S.E.2d at 914 (1978). *See* W. Va. Code § 23-4-2(d)(1) (1983) ("the Legislature intended to create a legislative standard for loss of that immunity of more narrow application and containing more specific mandatory elements than the common law tort system concept and standard of willful, wanton and reckless misconduct"); Joan T.A. Gabel et al., *The New Relationship Between Injured Worker and Employer; An Opportunity for Restructuring the System*, 35 Am. Bus. L.J. 403, 432 (1998).

In 2005, the Legislature again narrowed the scope of the deliberate-intent exception, emphasizing its intent to keep common law claims arising from the employment relationship out of the court system. *See* S.B. 744, 77th Leg. Reg. Sess. (W. Va. 2005) (amending the Act to require that the employer "prior to the injury, had actual knowledge of the existence of the specific unsafe working condition and of the high degree of risk and the strong probability of serious injury or death presented by the specific unsafe working condition").[2]

In sum, the statutory language and the legislative history of the Workers' Compensation Act make clear the intended breadth of the exclusivity provision, in furtherance of the fundamental and historic bargain that undergirds workers' compensation statutes. It is in this

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[2] Indeed, in 2005, when the West Virginia Legislature amended the deliberate-intent exception to the exclusivity provision, it also limited that statutory exception to certain "compensable injur[ies]," rather than all "injuries." *See* S.B. 744, 77th Leg. Reg. Sess. (W. Va. 2005). To give meaning to the word "compensable" in "compensable injury," that term must have a narrower meaning than the broader term "injury" utilized in § 23-2-6, and it does. Workers' compensation is the exclusive remedy for *any* injury in the course of and resulting from covered employment, while the deliberate-intent exception to the exclusivity rule applies only with regard to a "compensable injury."

context that the question presented here – whether the Employees have alleged a job-related injury – must be assessed.

2. There is certainly a conflict among jurisdictions concerning whether exposure to a hazardous substance constitutes an "injury" that can give rise to a legal right to a particular remedy (such as damages for emotional distress and medical monitoring). But, for purposes of West Virginia law, this Court has decided that question, and determined that exposure to a hazardous substance is an "injury." With that decision, this Court brought such job-related exposure to a hazardous substance within the Workers' Compensation Act's coverage, removing such injuries (and the damages flowing from such injuries) from the common-law tort system.

In 1999, in *Bower v. Westinghouse Electric Corp.*, 206 W. Va. 133, 139-43, 522 S.E.2d 424, 430-34 (1999),[3] this Court recognized an independent cause of action for emotional distress and future medical monitoring despite the absence of any present physical illness, based on its determination that significant exposure to a hazardous substance is an "injury." *See id.* at 139-43, 522 S.E.2d at 430-34. As the Court explained, "'[a]lthough the physical manifestations of an injury may not appear for years, the reality is that many of those exposed have suffered some legal detriment; *the exposure itself and the concomitant need for medical testing constitute the injury*.'" *Id.* at 139, 522 S.E.2d at 430 (emphasis supplied) (quoting *Hansen v. Mountain Fuel Supply*, 858 P.2d 970, 977 (Utah 1993)). "The 'injury' that underlies a claim for medical monitoring – just as with any other cause of action sounding in tort – is 'the invasion of any legally protected interest.'" *Id.* (quoting *Restatement (Second) of Torts* § 7(1) (1964)). In this

3 *Amici* respectfully disagree with the outcome in *Bower*. Their position is that exposure by itself does not constitute an injury and therefore that neither the workers' compensation laws nor the common law should provide a remedy for the injury of mere exposure in the form of medical monitoring and damages for emotional distress. *Cf.*, *e.g.*, *Metro-North Commuter R.R. v. Buckley*, 521 U.S. 424, 427 (1997) (employee exposed to asbestos cannot recover damages under FELA for medical monitoring or for emotional distress until symptoms of the disease manifest themselves) (citing cases). However, because *Bower* is the law in West Virginia, it necessarily follows that exposure to a hazardous substance that arises out of and is the result of the employment relationship is an injury within the meaning of the Workers' Compensation Act, and subject to its exclusivity provision.

setting, that invasion is the physical exposure to the hazardous substance, and that exposure clearly has a sufficiently direct and immediate connection with the Employee's employment to constitute an injury that is job-related.[4]

That does not mean every job-related exposure to a hazardous substance constitutes an "injury" under the Workers' Compensation Act, any more than every exposure to a hazardous substance constitutes a legal injury giving rise to a common-law tort claim. This Court has developed a multipart test to determine whether an exposure constitutes an actionable injury at common law.[5] These factors are likely to determine whether a particular exposure constitutes an "injury" under the Workers' Compensation Act, just as they determine whether a plaintiff has an injury at common law. *See also id.* at 141, 522 S.E.2d at 431 (this Court has "consistently held that the 'future effect of an injury must be proven with reasonable certainty in order to permit a jury to award an injured party future damages'") (quoting *Joran v. Bero*, 158 W. Va. 28, 210 S.E.2d 618 (1974)). It is clear, however, that if – as this Court has held – substantial exposure constitutes an injury under the common law, it also constitutes an "injury" within the meaning of the Workers' Compensation Act (so long as it is job-related) and is subject to the exclusive

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[4] Long before 1999, it was clear that emotional distress was an injury. *See Breedon v. Workmen's Comp. Comm'r*, 168 W. Va. 573, 578, 285 S.E.2d 398, 401 (1981) (claimant who suffered "mental and emotional problems" "as a result of treatment she received at work" had suffered a "compensable" injury, occurring as a result of her employment and within the contemplation of our workmen's compensation law"). *Breeden* was statutorily overruled by W. Va. Code § 23-4-1f, which said that "no alleged injury or disease shall be recognized as a compensable injury or disease which was solely caused by nonphysical means and which did not result in any physical injury or disease to the person claiming benefits." This limitation on injuries deemed compensable has no application here, because a substantial exposure to a hazardous substance is clearly a physical invasion. Moreover, it is noteworthy that the Legislature did not amend the exclusivity provision to confine Employers' immunity solely to compensable injury – instead, the workers' compensation statute is stated to be the exclusive remedy for any injury, whether or not compensable. *See supra* n.2.

5 To state a claim for medical monitoring, a plaintiff must allege that:

> (1) he or she has, relative to the general population, been significantly exposed; (2) to a proven hazardous substance, (3) through the tortious conduct of the defendant; (4) as a proximate result of the exposure, plaintiff has suffered an increased risk of contracting a serious latent disease; (5) the increased risk of disease makes it reasonably necessary for the plaintiff to undergo periodic diagnostic medical examinations different from what would be prescribed in the absence of the exposure; and (6) monitoring procedures exist that make the early detection of a disease possible. [168 W. Va. at 141-42, 522 S.E.2d at 432-33.]

remedial scheme of that Act. Any damages that result from that injury are paid out as benefits under the Act – *e.g.*, when the consequence of exposure is occupational illness. This necessarily entails the conclusion that no common-law remedies for the injury of exposure are available; they are barred by the exclusivity provision.

The logical consequence of *Bower*, accordingly, is that exposure constitutes an "injury" and that the exclusive remedy for any job-related exposure lies in the Workers' Compensation Act. In that setting, the decision about how to remedy the injury caused by job-related exposure to hazardous substances, be it disease, medical monitoring, or emotional distress, can and should be made in the context of the workers' compensation system as a whole. The Employees' common-law claims, seeking relief for emotional distress and medical monitoring caused by a covered injury, are thus barred by the exclusory rule.

B. THE EMPLOYEES' CONTRARY ARGUMENTS ARE WITHOUT MERIT.

The Circuit Court's contrary decision is wrong. It recognized that exposure is an "injury" for purposes of tort law, making common-law remedies available for this injury, yet it simultaneously failed to treat job-related exposure as an "injury" for purposes of the Workers' Compensation Act even though workers' compensation benefits are indisputably provided when exposure results in disability or death.

In urging the lower court not to apply the exclusivity rule, the Employees relied on two cases, neither of which supports this outcome. First, the Employees asserted that this Court has already decided the issue. Specifically, they relied on *Marlin v. Bill Rich Construction, Inc.*, 198 W. Va. 635, 482 S.E.2d 620 (1996), where this Court held that a plaintiff's claim of fear of disease resulting from exposure to asbestos was not a claim "covered by the workers' compensation law" within the meaning of the governmental immunity statute. *Id.* at 640, 482

S.E.2d at 625. The Court emphasized, however, that it was construing the governmental immunity statute – which was to be applied expansively to favor liability and limit immunity. The Court specifically declined to bind the Workers' Compensation Commissioner or Appeal Board, and refused to "determine the merits of a claim for benefits under [the Worker's Compensation Act]" because that is best left to the Workers' Compensation Commissioner or Office of Judges. *Id.* 642, 482 S.E.2d at 627.

Critically here, moreover, the Court decided this case without the benefit of its subsequent decision in *Bower*, which concluded that exposure (not simply emotional distress resulting from exposure) is an injury. Indeed, the *Marlin* court, *id.* at 647, 482 S.E.2d at 632, relied heavily on the analysis in *Ball v. Joy Mfg. Co.*, 755 F. Supp. 1344 (S.D.W. Va. 1990), *aff'd*, 958 F.2d 36 (4th Cir. 1991), a case expressly disapproved in *Bower*. *See* 168 W. Va. at 137 n.2, 522 S.E.2d at 427 n.2 (the *Ball* decisions "do not accurately reflect West Virginia law"). The *Bower* Court's determination that exposure to a hazardous substance constitutes an injury logically means that job-related exposure to a hazardous substance constitutes an "injury" within the meaning of the Workers' Compensation Act's exclusivity provision.

Equally to the point, *Marlin* was also decided without discussion of the decisions of the Workers' Compensation Office of Judges that medical-monitoring costs can in some circumstances be recoverable under the Workers' Compensation Act. In *In re Mount*, No. 99-52995 (Workers' Comp. Office of Judges, W. Va. Oct. 8, 1999), the administrative law judge concluded that the employer could claim the costs of medical screening without any demonstration of injury other than that which might have occurred when she was injected with a needle potentially contaminated with hepatitis B. *See also In re Claimant*, No. 910-41883 (Workers' Comp. Office of Judges, W. Va. Oct. 21, 1994) (firefighters exposed to spinal

meningitis). The scope of coverage for exposure to hazardous substances, as well as the scope of the remedy for such an injury, is not yet fully defined; but the underlying principle – that exposure may constitute an injury under the Act and thus is subject to the exclusivity provision – is clear. *Marlin* plainly does not support, let alone require the Circuit Court's holding.

Second, the Employees argued that under *Jones v. Rinehart & Dennis Co.*, 113 W. Va. 414, 168 S.E. 482 (1933), the exclusivity provision bars only common-law claims alleging "compensable injuries" under the Workers' Compensation Act. The Employees asserted that their claims for medical monitoring and emotional distress do not allege "compensable injury" under the Act, and thus cannot be precluded. This is clearly wrong. Initially, plaintiffs' have ignored the historical context of the case. In any event, exposure to hazardous substances *is* a "compensable injury" under the Act; indeed, workers' compensation benefits are paid in response to numerous claims that disability or death resulted from such job-related exposure. Finally, the Employees and the court below appear to believe that under *Jones*, common-law claims are barred only if the Workers' Compensation Act actually pays out all the compensation that common-law claims would provide, but that is most emphatically not the law.

In *Jones*, this Court was applying the Workers' Compensation Act of 1933. It held that employers were not immune from common-law tort claims arising out of occupational diseases caused by the employer's negligence because the exclusivity provision governed only claims based on "injury," as distinct from claims based on "disease." 168 S.E. at 486. The Act has since been amended to sweep job-related disease into the workers' compensation system, sharply limiting *Jones*' continued relevance. Moreover, the *Jones* Court was not asked to consider whether exposure to hazardous substances constitutes an "injury" under the Workers'

Compensation Act – not surprising in a case arising 60 years before the notion that such exposure could be an injury began to be the subject of litigation and legislation.

Even on its own terms, however, *Jones* does not support the Employees' claim that the exclusivity provision does not apply unless a plaintiff's injury results in the payment of benefits under the Workers' Compensation Act. In interpreting workers' compensation statutes, courts routinely distinguish injuries that do not fall within the basic coverage of a workers' compensation statute and injuries that are covered by the statute although, under the circumstances presented, they do not result in the payment of benefits. *See* 6 *Larson*, *supra*, at § 100.04, at 100-24 to -25 (2004). At most, *Jones* stands for the proposition that if an injury is wholly excluded from coverage under the workers' compensation law – *e.g.*, where the injury is not job-related or whether the injury is to one's dignity or reputation rather than to one's person – the injured employee may sue the employer in tort. However, where an injury is covered by the statute, but does not in a particular case result in damages that give rise to workers' compensation benefits, the exclusivity rule nonetheless applies and the employee's common-law claims are barred. *See*, *e.g.*, *Synalloy Corp. v. Newton*, 326 S.E.2d 470 (Ga. 1985) (plaintiffs' injuries fell within the purview of the workers' compensation act, and tort claims based on those injuries were barred, although the level of injury did not satisfy the act's conditions for benefits); *Shamrock Coal Co. v. Maricle*, 5 S.W.3d 130 (Ky. 1999) (same); *Silkwood v. Kerr-McGee Corp.*, 667 F.2d 908, 919-20 (10th Cir. 1981) ("[i]f a worker on the job received a hammer blow to the thumb causing pain and suffering but no time loss, surely he or she could not sue the employer in a common law tort action[] . . . . any accidental injury incurred on the job would be

covered by the [act]. . . . The fact that the Act does not compensate for every aspect and degree of the injury makes no difference."), *rev'd on other grounds*, 464 U.S. 238 (1984).[6]

The key question, accordingly, is not whether the injury entitles the employee to benefits in a particular case, but whether the injury *would* entitle the employee to benefits if death, disability or some other damage giving rise to benefits results from that injury. At the time of *Jones*, occupational disease was a type of injury that was not covered by the Act, and benefits were not awarded for the disability or other damage resulting from the exposure to hazardous substances, no matter how grave. Such an injury thus was not subject to the exclusivity rule. In marked contrast, however, exposure to hazardous materials is covered by the Act today, for example, when it results in death, disability and certain other damages. Thus, this injury is a type of injury covered by the Act and subject to the exclusivity bar, whether or not the employee's exposure to hazardous substances has resulted in disability or other damage that gives result in the award of benefits under the Act in a particular case.

C. FOR INDEPENDENT, ADDITIONAL REASONS, EMPLOYEES WHO ALLEGE EXPOSURE AND CURRENT PHYSICAL HARM ARE SUBJECT TO THE WORKERS' COMPENSATION ACT'S EXCLUSIVITY PROVISION.

The vast majority of Employees in this case (roughly 1200 out of 1300) allege not only that they were exposed to hazardous substances, but also that they are currently suffering from an occupational disease or ailment. It is undisputed that these Employees have alleged an injury within the meaning of the Workers' Compensation Act, and that they are asserting deliberate-intent claims under the Act. As noted above, the deliberate-intention claims are not the subject of the Employers' motion for summary judgment and thus are not at issue on this appeal.

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[6] *See also Kline v. Arden H. Verner Co.*, 453 A.2d 1035, 1036 (Pa. Super. Ct. 1982) (rejecting plaintiff's contention that he had a right to bring common law tort action against his employer because the "contention that he should be permitted to maintain an action at law because the permanent impairment which he has sustained is not otherwise specifically compensable is untenable"), *aff'd*, 469 A.2d 158 (Pa. 1983).

These 1200 Employees, however, claim that they may simultaneously allege that their exposure to hazardous substances resulted in occupational disease that is covered by the Workers' Compensation Act, *and* that the same exposure gave rise to other damages (emotional distress and a need for medical monitoring) that are *not* compensated by the Workers' Compensation Act and thus may be the subject of a common-law tort claim. This claim would effectively eliminate the exclusivity provision from the Workers' Compensation Act.

The Employees' claim is that the Workers' Compensation Act provides the exclusive remedy only in connection with injuries for which it provides all damages that would be provided by the common-law tort action. If the Act does not provide a full remedy, according to the Employees, one simply divides the injury into smaller components, severing the disease caused by the employer's conduct from the emotional distress and medical monitoring needed because of the employer's conduct. This is flatly wrong, as the cases cited *supra* at 14 fully demonstrate. The Workers' Compensation Act provides the exclusive remedy for job-related injury and death, even if that remedy is not as fulsome as the remedy that would be provided by the collection of common-law tort damages and remedies that the employee could otherwise obtain.

In sum, as demonstrated *supra*, under West Virginia law, the injury at issue here is exposure to hazardous substances, and common-law claims for relief based on that injury – including claims for medical monitoring and emotional distress – are barred by the exclusivity provision. But, even assuming *arguendo* that the injury at issue is the occupational disease or ailment resulting from that exposure, it is undisputed that virtually all Employees allege that they have incurred such a job-related injury. That injury clearly is subject to the exclusivity provision

and hence the Employees are restricted to remedies under the Workers' Compensation Act, even if those remedies do not include benefits for all harmful consequences of the job-related injury.

D. THE PRACTICAL POLICY CONSEQUENCES OF THE CIRCUIT COURT'S DECISION ARE STAGGERING AND WHOLLY INCONSISTENT WITH THE LEGISLATIVE PURPOSES OF THE WORKERS' COMPENSATION ACT.

The workers' compensation system is not perfect, but it has fulfilled its purposes well over the years, especially when compared to its alternative – the common-law tort system with its unpredictable imposition of damages for pain and suffering and for punitive purposes. Clearly, decisions like the one at issue here seriously undermine the bargain that led to workers' compensation laws and the financing of workers' compensation benefits by participating employers. One critical feature of that bargain is that in exchange for promptly and efficiently providing no-fault benefits, employers obtain a limitation on their tort liability to employees. Yet, on the rationale of the decision below, no such limitation exists. Instead, West Virginia employers provide workers' compensation benefits on a no-fault basis to employees who suffer job-related injuries, and are also subject to common-law tort actions by employees based on the same job-related injuries in order to receive damages not provided by the Workers' Compensation Act. In the circuit court's view, West Virginia employers have to pay employees with job-related ailments twice – first, under the workers' compensation system for the work-related injury, and second, under the tort system, for damages not provided under the Workers' Compensation Act but available through common-law tort actions.

As one commentator has explained:

> the added overall costs of subjecting an employer to *both* no-fault liability under workers' compensation *and* tort liability claims from his employees, even if overlapping damages were avoided by an appropriate set-off adjustment or other rule, would be oppressive. The number and magnitude of tort claims have dramatically increased. This has made liability insurance expensive or even

> unaffordable, and has had a stifling effect on commercial, professional, and much private activity. If the costs of defending and paying potential tort claims were added to the workers' compensation liability, such financial demands would occupy an inordinately large percentage of an enterprise's resources. Little capital would be left for the exercise of entrepreneurial skills essential to a free enterprise system. [Joseph H. King, Jr., *The Exclusiveness of an Employee's Workers' Compensation Remedy Against His Employer*, 55 Tenn. L. Rev. 405, 412-13 (1988) (emphasis supplied) (footnote omitted).]

West Virginia employers are already subject to *Bower*'s determination that exposure to a hazardous substance is an injury – even where no disease or other ailment has manifested itself – and can form the basis of a common-law action for medical monitoring and emotional distress. By deciding that exposure to hazardous substances constitutes an injury, giving rise to a common law cause of action for emotional distress and medical monitoring, West Virginia has already chosen a course that will burden not only the State's employers and businesses, but also the State's court system. As Justice Maynard noted, in dissenting from the decision to recognize exposure as an injury and create this cause of action:

> the practical effect of this decision is to make almost every West Virginian a potential plaintiff in a medical monitoring cause of action. Those who work in heavy industries such as coal, oil, gas, timber, steel, and chemicals as well as those who work in older office buildings, or handle ink in newspaper offices, or launder the linens in hotels have, no doubt, come into contact with hazardous substances. Now all of these people may be able to collect money as victorious plaintiffs without any showing of injury at all. [*Bower*, 206 W. Va. at 144, 522 S.E.2d at 435 (Maynard, J., dissenting).]

If, in addition to defining exposure as an injury and creating this common-law cause of action, West Virginia also *excludes* this injury from the historic bargain governing job-related injuries and workers compensation, then the burden on West Virginia employers and businesses will be crushing. Not simply the number of such suits, but the potential for uncertain, massive liability and punitive damages will undermine the long-term viability of numerous West Virginia employers, which the workers' compensation system was designed to prevent.

Equally to the point, the system created by the circuit court's decisions makes no sense. The workers' compensation system limits benefits in a variety of ways and does not provide punitive damages (except under the deliberate-intent exception which authorizes "excess," but not punitive damages). See King, Jr., *supra*, at 408, 442; W. Va. Code § 23-4-2(c); *id.* § 23-4-2(d)(2)(iii)(A) (no exemplary or punitive damages under workers compensation system). On the circuit court's construction, however, an employee who has been exposed to a hazardous substance and incurred an occupational disease is entitled to a limited compensatory recovery (or perhaps "excess" damages if the employer acted with deliberate intent) under the Workers' Compensation Act. In addition, however, the employee may circumvent the prohibition on punitive damages in the Workers' Compensation Act by bringing a separate common-law claim for tortious injury to recover additional damages for emotional distress, medical monitoring, and punitive damages. Indeed, even employees who have *no* manifestation of disease may obtain the punitive damages that the Workers' Compensation Act bars for employees actually suffering from disease. Such an irrational scheme should not be imputed to the Legislature.

The outcome below is incorrect and will have serious damaging consequences.

CONCLUSION

This Court should grant the petition, reverse the Circuit Court's answers to the certified questions, and remand this matter with instructions for the Circuit Court to grant defendants' motions for summary judgment.

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CERTIFICATE OF SERVICE

I, Clarence E. Martin, III, Counsel for the Petitioners, the United States Chamber of Commerce and the Society for Human Resource Management, certify that I served a true copy of the foregoing ***Amici Chamber of Commerce of the United States of America and the Society for Human Resource Management's Brief in Support of Defendants' Petition to Docket Certified Questions*** upon the following individuals, U.S. Mail, first class, on this 21st **day of February, 2006**:

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