IN THE
SUPREME COURT OF ARKANSAS

NO. 12-500

POROCEL CORPORATION **PETITIONER**

v.

CIRCUIT COURT OF
SALINE COUNTY, ARKANSAS
and BOOKER T. WASHINGTON, JR. **RESPONDENTS**

ON PETITION FOR WRIT OF PROHIBITION
FROM THE CIRCUIT COURT
OF SALINE COUNTY

THE HONORABLE GARY M. ARNOLD, CIRCUIT JUDGE

BRIEF OF AMICUS CURIAE ARKANSAS AFL-CIO IN SUPPORT OF RESPONDENTS

Mark L. Martin
Arkansas Bar No. 81112
MARTIN LAW FIRM
2059 Green Acres Rd.
Fayetteville, Arkansas 72702
(479) 442-2244 (phone)
(479) 442-0134 (fax)
mark@mklawfirm.com
Counsel for Amicus Curiae
Arkansas AFL-CIO

Brent M. Rosenthal
Texas State Bar No. 17281075
LAW OFFICE OF BRENT M.
ROSENTHAL, PC
One Lincoln Center
5400 LBJ Freeway, Ste. 1260
Dallas, Texas 75240
(214) 871-6602 (phone)
(214) 871-6640 (fax)
brent@brentmrosenthallaw.com
Of Counsel to Amicus Curiae

TABLE OF CONTENTS

INFORMATIONAL AND JURISDICTIONAL STATEMENTS, POINTS ON APPEAL, STATEMENT OF THE CASE, ABSTRACT, AND ADDENDUM

Amicus Curiae Arkansas AFL-CIO incorporates by reference Respondent Booker T. Washington, Jr.'s Informational and Jurisdictional Statements, Points on Appeal, Statement of the Case, Abstract, and Addendum.

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE ARKANSAS AFL-CIO

The Arkansas American Federation of Labor and Congress of Industrial Organizations ("Arkansas AFL-CIO") serves as the umbrella organization for 178 local unions, central labor councils, building and construction trade councils, and subordinate bodies in Arkansas whose parent international unions are affiliated with the national AFL-CIO. The Arkansas AFL-CIO thus represents more than 30,000 working people in diverse occupations in Arkansas. The Arkansas AFL-CIO strives to support the interests of Arkansas workers through political action, legislative action, education, and community service. From time to time, the Arkansas AFL-CIO also participates as an amicus curiae to insure that the perspective of organized labor is presented in judicial proceedings that may affect the rights of workers.

As part of its mission to protect workers' rights, the Arkansas AFL-CIO has an interest in preserving the right of workers to a reasonable opportunity to obtain compensation for work-related injuries through proper application of Arkansas statutes, including the Arkansas Worker's Compensation Act. Although the Arkansas AFL-CIO expects Respondent Booker T. Washington to present a

comprehensive defense of the Circuit Court's exercise of jurisdiction over his work-related personal injury claims, it believes that its discussion of the controlling rules of statutory interpretation and cases from other jurisdictions addressing similar issues will be helpful to the court in resolving this proceeding. The Arkansas AFL-CIO therefore urges the Court to grant permission to file this amicus curiae brief pursuant to Arkansas Supreme Court Rule 4-6(a).

ARGUMENT

The Arkansas AFL-CIO respectfully submits that the Circuit Court correctly ruled that because the Arkansas Workers' Compensation Act failed to provide Booker T. Washington, Jr. with a remedy or even a realistic chance to obtain a remedy, the exclusive remedy provision in the Act does not bar Washington's common-law tort claim against his employer.

A. Both the Terms of the Workers' Compensation Act and the Policy Interests That the Act Promotes Allow Washington To Pursue a Common-Law Tort Claim Against His Employer.

This Court has long recognized that the purpose and effect of Arkansas' statutory system of no-fault compensation for work-related injuries "was to substitute, as to employment embraced within its terms, the liability created by it for any and all liability of the master arising from the death or injury of his servant." *Odom v. Arkansas Pipe & Scrap Material Co.*, 208 Ark. 678, 681, 187 S.W.2d 320, 321 (1945). The Act is intended to replace, not eliminate, tort remedies. Consequently, this Court has repeatedly observed that "a worker whose injury is not covered by the WCA is not precluded from filing a claim in tort against his employer." *Automated Conveyor Sys. v. Hill*,

362 Ark. 215, 218, 208 S.W.3d 136, 139 (2005); *see also Travelers Ins. Co. v. Smith*, 329 Ark. 336, 344-45, 947 S.W.2d 382, 386 (1997) ("Because Anna Smith had no remedy under the Worker's Compensation Act her claim cannot be thwarted for election-of-remedy reasons."); *Davis v. Dillmeier Enter., Inc.*, 330 Ark. 545, 554, 956 S.W.2d 155, 159 (1997) ("from the decision in *Travelers*, it is clear that in determining whether an action involving a work-related injury may be filed in circuit court, an important consideration is whether the Workers' Compensation Act provides a remedy to the plaintiff.").

In this case, the Worker's Compensation Act did not provide Washington with a remedy for his work-related silicosis. The Act requires claims for silicosis to be filed within three years of the last injurious exposure to silica. ARK. CODE ANN. § 11-9-702(a)(2)(B). The last possible date that Washington was injuriously exposed is the date his employment with Porocel ended, June 18, 2008. Porocel Add. 102. Washington was not diagnosed with silicosis until August 15, 2011, Porocel Add. 3-4, and did not file a worker's compensation claim until September 6, 2011, more than three years after his last possible injurious exposure. Thus, as the Arkansas Worker's Compensation Commission found, Washington's worker's

compensation claim was time-barred, and he had no remedy available under the Act. Porocel Add. 102. Accordingly, the Circuit Court ruled that because the Act did "not provide coverage" for Washington's work-related silicosis, Washington "is entitled to pursue his lawsuit in this Court for his damages." Porocel Add. 226.

Petitioner Porocel has filed a writ of prohibition arguing that the Circuit Court lacks jurisdiction because the Worker's Compensation Act provides the exclusive remedy for Washington's work-related injuries even though, because of the time restrictions in the Act, the Act allows Washington no recovery. Porocel and amicus curiae Reynolds Metals Company argue that Arkansas law distinguishes between situations in which a work-related injury is *covered but not compensable* under the Workers' Compensation Act and those in which the injury is *simply not covered* under the Act. In the former situation, according to Porocel and Reynolds, the Act is the exclusive remedy for the injury (even though, as a practical matter, it provides no remedy at all); in the latter situation, the worker is free to pursue tort remedies. For this reason, Porocel and Reynolds contend, cases like *Automated Conveyor Systems v. Hill* and *Travelers Insurance Company v. Smith* are distinguishable:

both of those cases, they suggest, involve work-related injuries that were not *covered* by the Act, not injuries that were *covered but not as a practical matter compensable*, as are those alleged in this case.

The problem with this argument is that this elaborate distinction is entirely a creation of Porocel and Reynolds. Nothing in the text of the statute or in Arkansas case law differentiates between work-related injuries that are "covered but not compensable" and those that are not "covered" at all. The exclusive remedy statute states that "rights and remedies that are granted to an employee subject to a provision of this chapter" bar common law tort claims, not that "covered injuries" may not be the basis of tort claims. Inarguably, the statute does not grant "rights and remedies" to Booker T. Washington for his latent silicosis; thus, under the terms of the statute, it is not "exclusive."

The reliance of Porocel and Reynolds on *Automated Conveyor Systems v. Hill* for the proposition that the exclusive remedy provision allows suits for work-related injuries that are not "covered" by the Act but not for injuries that are "covered but not compensable" reads too much into the language of the case. In *Automated Conveyor*, the plaintiff Dooley sustained a gradual onset neck injury

while employed by Automated Conveyor and sought workers' compensation benefits. The Arkansas Workers' Compensation Commission held that the injury was not compensable under the Act because the Act "*covers* only those gradual onset neck injuries that are caused by rapid and repetitive motion, and although Dooley had proven that his duties were repetitive, he failed to present evidence of the rapidity of the duties." 362 Ark. at 216, 208 S.W.3d at 137 (emphasis added). But nothing in the Court's opinion attaches any special significance to the word "covered"; the Court may just have easily said that gradual onset neck injuries in general are "covered" but those not caused by rapid and repetitive motion are not compensable. Similarly, in this case, there is no dispute that silicosis, in general, is covered, but the occurrence of the disease more than three years after the last occupational exposure renders the disease non-compensable. ANN. § 11-9-702(a)(2)(B).

On the other hand, language in *Travelers Insurance Company v. Smith* supports Washington's argument that his ineligibility for workers' compensation benefits establishes his right to bring a tort action for his work-related illness. In *Travelers*, the widow of a worker who sustained fatal injuries in a work-related trucking

accident sued the worker's compensation insurance carrier in tort for misrepresentation and outrage, alleging that the carrier falsely advised her that she needed to obtain an autopsy to qualify for workers' compensation benefits. The carrier argued that because the tort claim involved the payment or non-payment of workers' compensation benefits, the exclusive remedy provision in the Workers' Compensation Act barred the claim. This Court rejected the argument. Although the Court could have said simply that the exclusive remedy provision did not apply because the claim did not "arise out of and in the course of employment," ARK. CODE ANN. § 11-9-102(4)(A), it used broader language establishing that the exclusivity provision did not apply because the Act provided no compensation for the harm alleged. Quoting from Professor Larson's authoritative treatise, the Court recognized to hold otherwise would undermine the *quid pro quo* upon which the workers' compensation system is based:

> If . . . the exclusiveness defense is a 'part of the quid pro quo by which the sacrifices and gains of employees and employers are to some extent put in balance,' it ought logically to follow that the employer should be spared damage liability only when compensation liability has actually been provided in its place, or, to state the matter from the employee's point of view, rights of action for damages should not be deemed taken away except when something of value has been put in their place.

329 Ark. at 343, 947 S.W.2d at 385-86 (internal citations omitted). The Court concluded that the test for whether the exclusive remedy provision bars a claimant from seeking a common law remedy is whether the claimant "either received or could have received compensation for her injury under the Workers' Compensation Act." 329 Ark. at 344, 947 S.W.2d at 386. Under that test, Washington, like the plaintiff in *Travelers*, is authorized to pursue a common law tort claim.

The Arkansas Court of Appeals' decision in *Hickey v. Gardisser*, 2010 Ark. App. 464, 375 S.W.3d 733 (2010) does not suggest a contrary result. In *Hickey*, a worker fell off a roof and was injured. He tested positive for methamphetamine, and thus was ineligible for workers' compensation benefits under ARK. CODE ANN. § 11-9-102(4)(B)(iv)(a-d) (providing that a compensable injury does not include an injury where the accident was substantially occasioned by the use of illegal drugs). He then brought a tort suit against his employer, arguing that because he had no remedy under the Workers' Compensation Act, he should be allowed to pursue a common law tort claim. The Court of Appeals rejected the argument, reasoning that the worker "did have a remedy under the Act, but he failed to

overcome the presumption invoked by Gardisser's intoxication defense in order to receive the remedy." 2010 Ark. App. at * 8, 375 S.W.3d at 737.

Porocel and Reynolds argue that the result in *Hickey* dictates the outcome of this case, but are wrong for at least two reasons. First, *Hickey* is a decision of an intermediate appellate court and does not bind this Court. Second, the worker's ineligibility for compensation benefits, based on his ingestion of illegal drugs, was a matter entirely within his control. In contrast, Washington had no control over the circumstance responsible for his ineligibility for worker's compensation benefits. As Washington proved below, silicosis is a latent occupational disease that rarely occurs within three years of the cessation of exposure. By indulging in the use of illegal drugs, Hickey effectively waived his right to recover benefits for a work-related injury. The same cannot be said of Washington, who could not have maintained a workers' compensation claim within the three year period following his last injurious exposure because he did not yet have the disease, and could not do so beyond the three year period because of the statutory limitation.

Porocel and Reynolds insist that to deny application of the exclusivity provision in this case would undermine "the bargain made between employer and worker in the statutory framework: a no-fault system for determining compensation in exchange for occupational disease and workplace injury cases in exchange for the limitation of employer liability." Reynolds Br. 2-3; Porocel Pet. at Arg 8-Arg 9 (refusal to apply the exclusivity provision "would be a subversion of the very purpose of the whole workmen's compensation scheme") (quoting *Griffin v. George's, Inc.* 267 Ark. 91, 97, 589 S.W.2d 24, 27 (1979)). But this Court has described the bargain codified in the Workers' Compensation Act as an exchange by the worker of the potential for unlimited tort liability—with the accompanying risk of receiving no compensation due to the application of common-law defenses—for limited benefits awarded without regard to fault. *See, e.g., Craven v. Fulton Sanitation Serv., Inc.*, 361 Ark. 390, 396, 206 S.W.2d 842, 846 (2005) ("employers gave up the common-law defenses of contributory negligence, fellow servant, and assumption of the risk, while employees gave up the chance of recovering unlimited damages in tort actions in return for certain recovery in all

work-related cases.")[1] The bargain did not contemplate or provide that when there is no practical possibility of obtaining any compensation for a work-related injury, common-law claims would nevertheless be abolished. The Arkansas Worker's Compensation Act, and the "right to remedy" guarantee in Article II, Section 13 of the Arkansas Constitution, does not authorize employers like Porocel and Reynolds to enjoy the *quid*—freedom from common-law tort liability—without giving up the *quo*—a reasonable opportunity to obtain compensation.

B. The Court Should Interpret the Workers' Compensation Act To Comply with Article II, Section 13 of the Arkansas Constitution, Which Guarantees a Right to a Remedy.

As the United States Supreme Court has explained, as the "canon of constitutional avoidance" is "a tool for choosing between

[1] Of course, the last phrase of this quotation is generally but not literally accurate; as Washington's experience demonstrates, recovery under the Act is not "certain," and, as *Automated Conveyor* and the intentional tort exception (see *Heskett v. Fisher Laundry & Cleaners Co.*, 217 Ark. 350, 230 S.W.2d 28 (1950) indicate, the Act does not govern recovery in "all work-related cases."

competing plausible interpretations of a statutory text, resting on the reasonable presumption that [the legislature] did not intend the alternative which raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005). Under this "elementary" and "cardinal" rule of statutory interpretation, "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Council*, 485 U.S. 568, 575 (1988) (quoting *Hooper v. California*, 155 U.S. 648 (1895). Arkansas follows the canon of constitutional avoidance. *See, e.g., Clark v. Johnson Reg'l Med. Ctr.*, 2010 Ark. 115, 362 S.W.3d 311, 316-17 (2010) ("If possible, this court will construe a statute so that it is constitutional."); *Cato v. Craighead County Circuit Court*, 2009 Ark. 334, 322 S.W.3d 484, 489 (2009) (same).

In *Automated Conveyor*, this Court observed that Article II, Section 13 of the Arkansas Constitution guarantees to every person "a certain remedy in the laws for all injuries or wrongs he may receive in his person, property, or character . . . ." 362 Ark. at 218, 208 S.W.3d at 139 (quoting ARK. CONST. art. II, § 13). The Court found it "clear from our case law *and our constitution* that a worker whose injury is

not covered by the WCA is not precluded from filing a claim in tort against his employer." *Id.* (emphasis added). The Court's determination to apply the exclusive remedy provision in a way that would not violate the "right to remedy" provision of the Arkansas Constitution is consistent with the rule of "constitutional avoidance" followed by the Arkansas courts. In this case, as in *Automated Conveyor*, the Court should embrace an interpretation of the exclusive remedy provision that avoids a conflict with the constitutional guarantee of a right for every wrong, and hold that the exclusive remedy provision does not bar a common-law tort claim when no remedy is available under the Workers' Compensation Act.

C. Other Jurisdictions Recognize the Right To Bring a Common-Law Tort Claim in the Absence of a Meaningful Opportunity To Recover Benefits Under a Workers' Compensation Statute.

Highlighting two recent decisions from intermediate appellate courts in Pennsylvania, amicus curiae Reynolds asserts that other courts have held that similar exclusive remedy provisions bar common law claims even if the worker is ineligible for workers' compensation benefits. Reynolds Br. 17-19, citing *Sedlacek v. A.O. Smith Corp.*, 990 A.2d 801 (Pa. Super Ct. 2010) and *Ranalli v. Rohm*

and Haas Co., 983 A.2d 732 (Pa. Super. Ct. 2009). But the Pennsylvania Supreme Court has granted review on the decisive issue in *Sedlacek* and *Ranalli*, effectively nullifying the persuasive force of these opinions. See *Tooey v. AK Steel Corp.*, 610 Pa. 405, 20 A.3d 1184 (Pa. 2011) (granting review on the questions of whether the exclusive remedy provision in the Pennsylvania Worker's Compensation Act bars common law tort suits for work-related injuries for which benefits under the Act are unavailable, and, if so, whether such a result violates the constitutionally guaranteed right to a remedy.).

Reynolds also cites four cases from other jurisdictions in which the court held that a worker who could not comply with the timing requirements of the worker's compensation act was nonetheless barred by the exclusive remedy provision from pursuing a tort claim. Reynolds Br. 19-20, citing *Ganske v. Spahn & Rose Lumber Co.*, 580 N.W.2d 812, 816 (Iowa 1998), *Tomlinson v. Owens-Corning Fiberglas Corp.*, 244 Kan. 506, 510, 770 P.2d 833, 837 (Kan. 1989), *Bunker v. Nat'l Gypsum Co.*, 441 N.E.2d 8, 13-14 (Ind. 1982), and *Bogner v. Airco, Inc.*, No. 02-1157, 2003 WL 24121083 at *10 (C.D. Ill. Apr. 1, 2003). *Ganske* has been staunchly criticized. See Kevin R.

Sander, *The Cold Shoulder of Occupational Disease Recovery*: *Ganske v. Spahn & Rose Lumber Co.*, 25 J. CORP. L. 407, 420 (2000) ("The total denial of recovery that result's from the court's analysis in *Ganske* flies in the face of the quid pro quo rationale of workers' compensation,"). *Tomlinson* drew a sharp dissent noting that the worker's compensation scheme is constitutional "only because, in taking away the worker's common-law remedy, it substituted a remedy for the benefit of the worker by providing liability without fault," and that victims of latent disease "have lost their common-law remedy without receiving the required substitute remedy under the Act." 244 Kan. at 515-16, 770 P.2d at 841 (Herd, J., concurring and dissenting). *Bunker* held only that the limitations period applicable to silicosis claims in the worker's compensation statute was constitutional and did not explicitly address the issue of whether the absence of a remedy under the worker's compensation act allowed the worker to bring a common-law tort claim. 441 N.E.2d at 13-14. And *Bogner* is an unreported federal district court decision which merely cited *Tomlinson* and *Ganske* without analysis. 2003 WL 24121083 at *10. None of these opinions is persuasive authority for the proposition that Arkansas has effectively abolished an established

tort claim without providing any realistic prospect for a substitute remedy.

Moreover, other states with constitutional provisions similar to Article 2, Section 13 of the Arkansas Constitution have shared this Court's concern in *Automated Conveyor* that application of a worker's compensation exclusivity provision to bar a common law claim when the injured worker has no reasonable opportunity to obtain compensation under the workers' compensation statute would violate the worker's constitutional right to a remedy. In *Smothers v. Gresham Transfer, Inc.*, 23 P.3d 333 (Ore. 2001), the Oregon Supreme Court held that the application of an exclusivity provision to preclude the plaintiff's common law claim when the plaintiff was unable to satisfy the strict causation standards for obtaining workers' compensation benefits violated an open courts/right to remedy clause similar to Article II, Section 13 of the Arkansas Constitution. The plaintiff in *Smothers* alleged that his exposure to chemical fumes while working as a lube technician caused him to develop pneumonia and other serious respiratory problems. He brought a workers' compensation claim against his employer, but the claim was denied because the plaintiff could not show that his workplace exposure was

a "major contributing cause" of his condition. Under the common law, plaintiffs merely had to prove that the defendant's conduct was a "contributing cause" of injury; thus, the plaintiff's claim against the employer was potentially viable under common law. The Oregon Supreme Court had held in a prior case (*Errand v. Cascade Steel Rolling Mills, Inc.*, 888 P.2d 544 (Ore. 1995)) that the exclusive remedy provision in the Oregon workers' compensation act did not bar claims that did not allege compensable injuries under the act, so the plaintiff filed a common law negligence suit against his employer. But the Oregon Legislature had amended its workers' compensation act to state expressly that the exclusive remedy provision applied even if the work-related injury was not compensable under the act. *See* ORE. REV. STAT. 656.018 (1995). Thus, unlike this case, *Smothers* squarely presented the court with the question of whether application of the exclusivity provision to bar a common law claim even though the workers' compensation act provided no remedy for the alleged injury violated the open courts/right to remedy provision of the state's constitution, ORE. CONST. art. I, § 10.

After a lengthy analysis of the history of the open courts and right to remedy provisions in the constitutions of Oregon and other

states, the Oregon Supreme Court held that application of the exclusivity provision to bar a claim for injuries not compensable under the workers' compensation statute but viable under the common law is unconstitutional. The court emphasized that its holding "is a narrow one"; the plaintiff did not challenge the constitutionality of the workers' compensation system as a whole or of the exclusivity provision as written, but challenged only the application of the exclusivity provision to preclude the plaintiff from seeking *any* remedy. 23 P.3d at 357. The court concluded that having "alleged an injury of the kind that the remedy clause protects, and having demonstrated that there was no remedial process available under present workers' compensation law, plaintiff should have been allowed to proceed with his negligence action." *Id.* at 362.

The Louisiana Supreme Court interpreted its open courts/right to remedy constitutional provision to dictate the same result in *O'Regan v. Preferred Enterprises, Inc.*, 758 So.2d 124 (La. 2000). In that case, the plaintiff alleged that her exposure to chemicals while working at a dry cleaning company caused her to develop a form of aplastic anemia. Under the Louisiana workers' compensation law, because she was employed at the company for less than twelve

months her injuries were presumed to be non-occupational unless she could show a causal relationship between her employment and her injuries by an "overwhelming preponderance of the evidence," a higher standard than that required by Louisiana tort law. 758 So.2d at 127. She was unable to make such a showing and her workers' compensation claim was denied. She then brought a tort suit against the employer, arguing that because her injuries were not compensable under the workers' compensation statute, the exclusive remedy provision in the statute did not bar her claim.

The Louisiana Supreme Court held that the exclusive remedy provision did not apply to preclude the tort claim. The court reasoned that the "exclusive remedy provision refers only to injuries for which the employee or his dependent is entitled to be compensated, and the Act becomes the exclusive remedy for employees against their employers *only* for such diseases." 758 So.2d at 134 (emphasis in original). In construing the statute, the court considered the "basic history and policy of the compensation movement." *Id.* at 128. Significantly, however, the court also suggested that to adopt an interpretation that would bar the plaintiff's tort claim while providing her with no realistic opportunity to obtain

workers' compensation benefits would violate Louisiana's constitutional guarantee of open courts and the right to a remedy:

> LA. CONST. art. 1, § 22 inscribes in our Constitution that "[a]ll courts shall be open, and every person shall have an adequate remedy by due process of law and justice, administered without denial, partiality, or unreasonable delay, for injury to him in his person, property, reputation, or other rights." Nonetheless, it has long been the jurisprudence of this Court that the Legislature has the authority to limit codal remedies *as long as it does not leave the injured party entirely without a remedy*. *A fortiori*, the Legislature cannot completely deprive citizens of the right to seek a remedy either under the Act or under our general law.

758 So. 2d at 134 (emphasis added; footnote and citation omitted). To preclude the plaintiff's tort claim, the court added, would "place the plaintiff in the position of having a significant injury with no available avenue to address the damages that have befallen her." *Id.* at 135. The court interpreted the Louisiana exclusivity provision to avoid this constitutionally impermissible result.

In *O'Regan*, the Louisiana Supreme Court pointed out that by elevating the standard for obtaining worker's compensation benefits to the point that they are unattainable as a practical matter, the legislature "has, in effect, withdrawn the *quid pro quo* between labor and industry for this class of laborers." *O'Regan*, 758 So.2d at 134-35. As one commentator has observed, to preclude "tort recourse when

an injury is covered by, but not compensable under, workers' compensation, threatens to unravel the statutory tradeoff that provides justification for the entire system. Without the proper quid pro quo, the constitutional propriety of the system becomes extremely suspect." Eston W. Orr, Jr., Note, *The Bargain Is No Longer Equal: State Legislative Efforts to Reduce Workers' Compensation Costs Have Impermissibly Shifted the Balance of the Quid Pro Quo in Favor of Employers*, 37 GA. L. REV. 325, 354 (2002). Application of the exclusivity provision to bar plaintiffs' tort claims when plaintiffs have no realistic chance to satisfy the requirements for collecting workers' compensation benefits similarly denies them the quid pro quo promised by the workers compensation act.

Like the Louisiana Supreme Court in *O'Regan*, and unlike the Oregon Supreme Court in *Smothers*, this Court need not invalidate the exclusivity provision of the worker's compensation act to protect Washington's right to a remedy. It need merely adopt the plausible conclusion that in prohibiting tort claims by workers who are provided a reasonable opportunity for a remedy under the Arkansas Worker's Compensation Act, the exclusivity provision does *not* nullify tort claims of workers who are *not* afforded such an opportunity.

CONCLUSION

The Arkansas Workers' Compensation Act provides a remedy for work-related injuries that replaces the right to recover damages under the common law. If the Act does not provide a remedy for a particular injury, then it does not effectively replace the common-law right. To hold otherwise would be to grant employers a complete, undeserved immunity for certain types of workplace injuries, while denying workers to obtain any relief for those injuries. Such a result is neither authorized by the Act nor tolerable under the Arkansas Constitution. The Court should deny Porocel's petition.

Respectfully submitted,

Mark L. Martin
Arkansas Bar No. 81112
MARTIN LAW FIRM
2059 Green Acres Rd.
Fayetteville, Arkansas 72702
(479) 442-2244 (phone)
(479) 442-0134 (fax)
mark@mklawfirm.com
Counsel for Amicus Curiae Arkansas AFL-CIO

- and -

Brent M. Rosenthal
Texas Bar No. 17281075
brent@brentmrosenthallaw.com
LAW OFFICE OF BRENT M. ROSENTHAL, PC
One Lincoln Center
5400 LBJ Freeway, Suite 1260
Dallas, Texas 75240
(214) 871-6602 (phone)
(214) 871-6640 (fax)
Of Counsel to Amicus Curiae Arkansas AFL-CIO

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via U.S. Mail upon counsel of record on this 2nd day of November, 2012.

Hon. Gary M. Arnold, Circuit Judge
200 North Main Street
Benton, Arkansas 72015

Edward O. Moody
Edward O. Moody, PA
801 Fourth Street
Little Rock, Arkansas 72201

Robert S. Tschiemer
43001 Hwy. 89 N.
Mayflower, Arkansas 72106

Jason Lee
Ashleigh Dale Phillips
Munson, Rowlett, Moore & Boone, PA
400 West Capitol, Suite 1900
Little Rock, Arkansas 72201

Kathryn A. Pryor
Wright, Lindsey & Jennings LLP
200 West Capital Ave., Suite 2300
Little Rock, Arkansas 72201-3669

William McShane Bridgeforth
Ramsay, Bridgforth, Robinson & Raley LLP
P.O. Box 8509
Pine Bluff, Arkansas 71611

Dustin McDaniel
Attorney General
323 Center St., Suite 200
Little Rock, Arkansas 72201-2610

Edward M. Slaughter
H. Barret Marshall, Jr.
Hawkins, Parnell, Thackston & Young LLP
4514 Cole Ave., Suite 500
Dallas, Texas 75205

Michael J.R. Schalk
Gregory T. Sturges
K&L Gates Center
210 Sixth Avenue
Pittsburgh, Pennsylvania 15222

_____
Attorney for *Amicus* Curiae Arkansas AFL-CIO