

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
ROANOKE DIVISION**

<b>HARRY ADAMS, et al.,</b>	)	
	)	
<b>Plaintiffs,</b>	)	<b>Civil Action No. 7:99CV00813</b>
	)	
<b>v.</b>	)	<b><u>MEMORANDUM OPINION</u></b>
	)	
<b>ALLIANT TECHSYSTEMS INC., and</b>	)	<b>By: Samuel G. Wilson</b>
<b>HERCULES INCORPORATED,</b>	)	<b>Chief United States District Judge</b>
	)	
<b>Defendants.</b>	)	

In this action three hundred forty-two Plaintiffs, employees or former employees at the Radford Army Ammunition Plant (“Arsenal”), sue Defendants Alliant Techsystems, Inc. (“Alliant”) and Hercules Incorporated (“Hercules”) for hearing loss that Plaintiffs allegedly suffered while working at the Arsenal. The court has jurisdiction under 28 U.S.C. § 1332. This action is before the court on Defendants’ motion to abstain or, alternatively, to stay the proceedings. For the reasons stated below, the court denies Defendants’ motions.

**I.**

The three hundred forty-two Plaintiffs in this action were employees at the Arsenal in Radford, Virginia. Hercules operated the Arsenal until February 1995, when operations were taken over by Alliant. Plaintiffs allege Alliant and Hercules negligently conducted manufacturing operations during their respective tenures of operating the Arsenal, causing each of the Plaintiffs to suffer partial or total hearing loss.

Defendants filed a motion to dismiss for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). Defendants claimed that Plaintiffs’ exclusive remedy was under the Virginia Workers’ Compensation Act (“Act”) and that the Act barred Plaintiffs’

common law claims. Additionally, Defendants argued that even if the common law claims were not barred, Plaintiffs had to file their claims with the Workers' Compensation Commission ("Commission") to have compensability determined before filing common law causes of action. To decide Defendants' motion to dismiss, the court had to look to state law and decisions by the Virginia Supreme Court.

On March 1, 1996, the Virginia Supreme Court decided The Stenrich Group v. Jemmott, 251 Va. 186, 467 S.E.2d 795 (1996). In Jemmott, the court held that "job-related impairments resulting from cumulative trauma caused by repetitive motion, however labeled or however defined, are, as a matter of law, not compensable under the [then existing] provisions of the [Virginia Workers' Compensation] Act." Id. at 199, 467 S.E. 2d at 802. Six months later, the Virginia Court of Appeals held that under Jemmott, "gradually incurred industrial hearing loss is a noncompensable, cumulative trauma condition or injury" under the terms of the then existing Act. Allied Fibers v. Rhodes, 23 Va. App. 101, 102, 474 S.E.2d 829, 829-30 (1996). In response to these cases the General Assembly amended the Act, effective July 1, 1997, to include carpal tunnel syndrome and hearing loss as compensable occupational diseases under the Act. See Virginia Code § 65.2-401. Although the amendment made these injuries compensable under the Act, the Act barred common law claims for these injuries.

Both the Plaintiffs and Defendants agreed that under the amended Act common law claims for hearing loss that accrued after July 1, 1997 (when the General Assembly's amendments became affective) were barred. For these claims Plaintiffs' sole remedy is under the Act. However, Plaintiffs and Defendants disagreed as to whether common law claims that accrued before July 1, 1997 were barred. Since this question involved unsettled issues of state law, this

court certified the following two questions to the Virginia Supreme Court:

(1) Does the Virginia Workers' Compensation Act bar a plaintiff from bringing a common-law cause of action to recover damages for his or her hearing loss resulting from cumulative trauma if the claim accrued during the period in which such hearing loss was not a compensable injury or disease under the Act?

(2) If an alleged impairment is not compensable under and not barred by the Virginia Workers' Compensation Act, must the plaintiff still file a claim with the Workers' Compensation Commission before filing a common-law cause of action?

On April 20, 2001, the Virginia Supreme Court answered both of these questions in the negative. Adams v. Alliant Techsystems, Inc., 2001 WL 406473 (Va.). The court held that the Plaintiffs' claims were never within the purview of the Act before July 1, 1997 and that the General Assembly's modification of the Act to include coverage for hearing loss was not to be applied retrospectively. "Having determined that prior to July 1, 1997, hearing loss was not within the purview of the Act," the court stated that "the employee's common law right of action for damages for the injury is not impaired by the Act." Id. at \*3. Furthermore, the court held that "[w]here it is clear from the face of the pleadings that a claim is not within the purview of the Act, it is not necessary for plaintiffs to submit their claims to the Commission" before pursuing their common law causes of action. Id. at \*4.

Given the Virginia Supreme Court's answers to the certified questions, on April 27, 2001, this court denied Defendants' motion to dismiss.<sup>1</sup> However, on October 16, 2001, Defendants filed a motion asking this court to abstain from exercising its jurisdiction or, alternatively, to stay these proceedings until the conclusion of proceedings currently before the Virginia Workers'

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<sup>1</sup>Defendants filed a motion to reconsider this court's denial of their motion to dismiss because the Defendants were seeking a rehearing before the Virginia Supreme Court. However, since the Virginia Supreme Court denied Defendants' request for a rehearing, this court will deny Defendants' motion to reconsider.

Compensation Commission. Apparently, after the Plaintiffs filed this action in the Western District of Virginia, the Defendants initiated administrative procedures with the Virginia Workers' Compensation Commission to determine whether some of Plaintiffs' claims actually accrued after July 1, 1997. If so, the claims would be compensable under the Act and Plaintiffs' common law claims would be barred. In a recent ruling, the Commission noted the strange procedural posture of the proceedings and pointed out that the "defendants have not only filed the claims [with the Commission], but apparently seek, in some cases, to force workers' compensation benefits on the claimants." (Defendants' Memorandum in Support of Motion to Abstain or Stay, Exhibit A). The Defendants are now asking this court to abstain or stay these proceedings to allow the Commission to make factual determinations regarding Plaintiffs' claims.

## II.

The Supreme Court has long noted that federal courts should not abstain from exercising jurisdiction that has been conferred by Congress. See e.g. New Orleans Public Service, Inc. v. Council of the City of New Orleans, 491 U.S. 350, 359 (1989) (recognizing the "undisputed constitutional principle that Congress, and not the Judiciary, defines the scope of federal jurisdiction within the constitutionally permissible bounds.") (hereinafter NOPSI); Chicot County v. Sherwood, 148 U.S. 529, 534 (1893) ("[T]he courts of the United States are bound to proceed to the judgment and to afford redress to suitors before them in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction."); Cohens v. Virginia, 6 Wheat. 264, 404, 5 L. Ed. 257 (1821) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution.").

Despite the strong language in some of these opinions, the Supreme Court has also recognized limited circumstances in which a federal court may decline to proceed though it has jurisdiction under the Constitution and the statutes. See Charles Alan Wright, Law of Federal Courts § 52 (1994). These circumstances are referred to as the “abstention” doctrines. The Supreme Court, however, has carefully defined “the areas in which such ‘abstention’ is permissible, and it remains the exception not the rule.” NOPSI, 491 U.S. at 359 (quotations omitted). The Court has recognized several types of abstention. Here, the Defendants rely on Burford abstention and Colorado River abstention.

The focus of Burford abstention is to avoid needless conflict with state administrative proceedings. In NOPSI, Justice Scalia explained the limited circumstances in which Burford abstention applies:

Where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) where there are “difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case at bar”; or (2) where the “exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.”

Id. at 361 (quoting Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 814 (1976)).

Justice Scalia explained that Burford abstention is based on the “federal court’s discretion in determining whether to grant certain types of relief.” NOPSI, 491 U.S. at 359. “Thus, there are some classes of cases in which the withholding of authorized *equitable* relief because of undue interference with state proceedings is the normal thing to do.” Id. (quotation omitted and

emphasis added). In this case, however, the Plaintiffs are not seeking *equitable* relief; they are seeking compensatory damages. Therefore, this is not the typical Burford-like situation in which the court has discretion to withhold authorized equitable relief.

Moreover, there are no difficult questions of state law that bear on policy problems of substantial public import whose importance transcends the result in the case at bar, nor will the exercise of federal jurisdiction be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern. The Virginia Supreme Court has already decided the unsettled questions of state law. The factual question of when the Plaintiffs' claims accrued is not an issue which the court should abstain from deciding under Burford abstention.

Defendants also suggest that under Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976), the court should abstain or stay the proceedings on the ground that there is a similar action pending before the Virginia Workers' Compensation Commission. However, in Colorado River the Supreme Court stated that “[g]enerally, as between state and federal courts, the rule is that the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction.” Id. at 817. Given “the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them,” a court can abstain from deciding a federal suit due to the presence of a concurrent state proceeding only under “exceptional” circumstances. Id. The Court suggested that a federal court look at the following factors: whether the court was attempting to assume jurisdiction over property which was already the subject of another court’s jurisdiction; “the inconvenience of the federal forum;” “the desirability of avoiding piecemeal litigation;” and “the order in which jurisdiction was obtained by the concurrent forums.” Id. After reviewing these factors, this court finds that there

are no “exceptional” circumstances in this case that call for the court to abstain or stay these proceedings. The court does not have *in rem* jurisdiction in this case; the federal forum is not inconvenient; there is no need to avoid piecemeal litigation since the claims that accrued before July 1, 1997 can be heard by this court and the claims that accrued after July 1, 1997 can be heard by the Commission; and Plaintiffs filed their action with this court before the Defendants filed their action with the Commission.

In short, there are no grounds for abstention or for a stay of these proceedings. In their complaint, Plaintiffs plead that their hearing loss claims accrued before July 1, 1997. The Virginia Supreme Court has already ruled that the Virginia Workers’ Compensation Act does not bar common law claims for hearing loss that accrued before July 1, 1997, and that “when it is clear from the face of the pleadings” that the claims accrued before July 1, 1997, it is not necessary to submit the claims to the Commission before pursuing common law causes of action. For the purpose of deciding this motion, the court must assume that Plaintiffs’ pleadings are true. If it turns out that Plaintiffs’ claims did not accrue until after July 1, 1997, then this court can dismiss those claims. Until such time, however, this court has jurisdiction and will not abstain from exercising its jurisdiction. Accordingly, Defendants’ motion will be denied.

### III.

For the reasons stated above, Defendants’ motion to abstain or, alternatively, to stay the proceedings will be denied. An appropriate order will be entered this day.

**ENTER:** This \_\_\_\_\_ day of January 2002.

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CHIEF UNITED STATES DISTRICT JUDGE

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<b>Defendants.</b>	)	

For the reasons stated in the court’s Memorandum Opinion entered this day, it is **ORDERED** and **ADJUDGED** that Alliant Techsystems Inc.’s and Hercules Incorporated’s motion to reconsider and motion to abstain or, alternatively, to stay the proceedings are **DENIED**.

**ENTER:** This \_\_\_\_\_ day of January 2002.

\_\_\_\_\_  
CHIEF UNITED STATES DISTRICT JUDGE