



IN THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA

**IN RE: MINGO COUNTY COAL SLURRY CIVIL ACTION NO. 10-C-5000
LITIGATION**

THIS DOCUMENT APPLIES TO ALL CASES

**ORDER TO CONFORM PROCEDURES FOR APPROVAL
OF SETTLEMENT FOR CERTAIN PLAINTIFFS IN
ACCORDANCE WITH THE WEST VIRGINIA CODE**

Defendants, Rawl Sales & Processing Co. and Massey Energy Company (collectively referred to as “defendants”), by counsel, moved the Court to conform procedures for approval of the proposed settlement, release of liability, and manner of distribution of settlement proceeds for certain plaintiffs in accordance with the West Virginia Code (TID# 40227186).¹ Plaintiffs responded to defendants’ motion (TID# 40344939), and in response to the Court’s order, the parties submitted proposed orders (TID#s 40758863 and 40760619). Having fully considered the motion, response, proposed orders and the arguments presented, and having conferred with one another to ensure uniformity of their decision, as contemplated by West Virginia Trial Court Rule 26.07(a), the Presiding Judges unanimously find and rule as follows:

FINDINGS OF FACT

1. The Mingo County Coal Slurry Litigation was settled during mediation on July 27, 2011.
2. On September 19 and 21, 2011, the Court appointed guardians *ad litem* to represent the minor, incarcerated and incompetent plaintiffs during the settlement proceedings.

¹ Third-Party Defendant Zurich American Insurance Company joined in defendants’ motion (TID# 40448011).

3. The Court ordered “any guardians ad litem appointed by the Court to represent the interest of Plaintiffs under the age of eighteen (18), incarcerated Plaintiffs, and incompetent Plaintiffs are required to attend the September 29, 2011, hearing.” Order Regarding Amendment to Procedures for Settlement Hearing of September 14, 2011. (TID# 39802216)

4. The Order from the Court did not specifically set forth the procedures to be followed, as outlined in the “Minor Settlement Proceedings Reform Act” West Virginia Code § 44-10-14, e.g., that a petition be filed by the parent, next friend or guardian of the minor plaintiffs, or an answer to the petition be filed by the guardians *ad litem*.

5. On September 28, 2011, plaintiffs’ counsel filed an “Omnibus Petition of Certain Plaintiffs, as Biological Parents and/or Next Friends of Certain Minor Plaintiffs, For Court Approval & Confirmation of Settlements on Behalf of the Minor Plaintiffs Pursuant to West Virginia Code § 44-10-14.” The Omnibus Petition was not verified.

6. On September 29, 2011, the Court held a hearing regarding the settlement. During that hearing, guardians *ad litem* filed reports/answers involving 107 minor plaintiffs. The Court ruled that the reports were answers to the Omnibus Petition, satisfying the requirement under § 44-10-14(d)(2) that the guardian *ad litem* file an answer to the petition or motion on behalf of the minor, stating the opinion of the guardian *ad litem* as to whether or not the proposed settlement and release and the proposed distribution of proceeds are in the best interest of the minor.

7. The appointed guardians *ad litem* also made a proffer/testified at the September 29 hearing about their investigations, including their discussions with their respective minor plaintiff(s), and the parent(s), next friend(s) and/or guardian(s) of their respective minor plaintiff(s). The appointed guardians *ad litem* made a proffer/testified about the facts and circumstances of their respective minor plaintiff(s), including the injuries and losses allegedly caused by the party or parties to be released; the treatment and conditions past, present and in the foreseeable future of their respective minor plaintiff(s) as the result of the injuries and losses at issue; the proposed amounts and procedures for distribution of the proposed settlement proceeds to their respective minor plaintiff(s); whether the proposed distribution of settlement proceeds is in the best interest of their respective minor plaintiff(s); and whether or not the proposed settlements should be approved as to their respective minor plaintiff(s). See § 44-10-14(d)(1)-(2), and (e).

8. No parent, next friend, or guardian of the minor plaintiffs whose claims were subject to the proposed settlement agreement testified at the September 29, 2011, hearing regarding the terms of the proposed settlements covered by the Omnibus Petition, nor did any minor plaintiff testify at the hearing.

9. A number of guardians *ad litem* appointed to represent the interests of Plaintiffs under the age of eighteen (18), incarcerated Plaintiffs, and incompetent Plaintiffs requested additional time to complete their work and submit reports during the September 29 hearing. Other guardians *ad litem* requested an opportunity to supplement the reports they submitted on September 29.

10. The Court ordered all guardians *ad litem* who had not submitted a report to submit their report to Lead Presiding Judge James P. Mazzone by no later than

November 14, 2011. Any guardian *ad litem* who wished to supplement their report was also required to submit their supplemental report to Judge Mazzone by November 14. (TID# 40542504)

11. As of November 28, 2011, sixty-five (65) guardians *ad litem* approve the settlements on behalf of one hundred and three (103) minor, incarcerated, missing or incompetent plaintiffs. Seven (7) guardians *ad litem* do not approve the settlements for eleven (11) plaintiffs.²

12. On November 23, 2011, plaintiffs' counsel filed and served an omnibus petition for Court approval of wrongful death settlements pursuant to West Virginia Code § 55-7-7 on behalf of Mary Elizabeth Dillon (C.A. No. 07-C-109), Francis Delores Fuller (C.A. No. 05-C-345), Opal Jervis (C.A. No. 05-C-509), and Chastity Dawn Prince (C.A. No. 05-C-355). A hearing has not been held regarding the settlements of these claims.

13. The settlement of July 27, 2011, also included claims of five (5) plaintiffs who plaintiffs' counsel identified as legally incompetent. Three of these plaintiffs executed a Power of Attorney prior to the date they were deemed legally incompetent. However, two (2) plaintiffs do not have a Power of Attorney dated prior to the onset of legal incompetency and no conservator has been appointed for them. A guardian *ad litem* was appointed for five (5) plaintiffs that plaintiffs' counsel advised the Court are incompetent and reports for those five (5) plaintiffs have been submitted to the Court. Four (4) guardians *ad litem* recommended approval of the proposed settlements

² These numbers do not include two (2) guardians *ad litem* who were re-appointed to represent three (3) minor plaintiffs whose claims were tentatively settled in 2009, but whose proposed settlements were not approved.

on behalf of their respective plaintiffs. One (1) guardian *ad litem* did not recommend approval of the proposed settlement.³

CONCLUSIONS OF LAW

14. Pursuant to West Virginia Code § 44-10-14(b), “if an action for damages of the minor is pending in circuit court, the petition shall be filed, verified and serve as a motion in the pending action and may be filed by a parent, guardian or next friend.” In this instance, the Omnibus Petition was filed by plaintiffs’ counsel on September 28, 2011. The Omnibus Petition was not verified when filed.

15. The duties of the guardian *ad litem* are specified in section 44-10-14(d), which include filing an answer to the petition. The reports submitted by the guardians *ad litem* on behalf of their respective minor plaintiff(s) are deemed by the Court to be answers to the Omnibus Petition.

16. Under the statute, “[a] hearing shall be conducted on the petition or motion, at which time the court shall take testimony and consider arguments regarding the alleged injuries or losses and the proposals for the settlement, release, initial payment of expenses and the distribution of settlement proceeds: Provided, That the court may order that the minor appear and testify if the court finds that his or her appearance or testimony is appropriate for consideration by the court of the proposed settlement.” W. Va. Code § 44-10-14(e).

17. Although neither the minor plaintiffs, nor the parent, next friend, or guardian of the minor plaintiffs testified at the hearing held on September 29, 2011, the proffers/testimony of the guardians *ad litem* who filed reports regarding their

³ One (1) missing plaintiff was also appointed a guardian *ad litem*. That guardian *ad litem* submitted a report recommending approval of the proposed settlement.

respective minor plaintiff(s) on September 29, 2011, satisfies the requirements of West Virginia Code § 44-10-14(e) for each of their respective minor plaintiff(s).

18. An infant settlement agreement is final when the dictates set forth by W. Va. Code § 44-10-14 are followed and the circuit court approves the legal guardian's petition for permission to settle the claim. *See* Syl. Pt. 3, *Mills v. Watkins*, 213 W. Va. 430, 582 S.E.2d 877 (2003) (holding that when infant is injured in automobile accident and infant's legal guardian enters into settlement agreement with insurer by complying with dictates set forth in W.Va. Code § 44-10-14, the settlement is final as to that insurance company at the time the circuit court approves the legal guardian's petition for permission to settle the claim)

19. The settlement of wrongful death claims also requires court approval. W. Va. Code § 55-7-7. Syl. Pt. 3, *Estate of Postlewait v. Ohio Valley Medical Center, Inc.*, 214 W. Va. 668, 591 S.E.2d 226 (2003).

20. Section 44A-1-2(c) of the "West Virginia Guardianship and Conservatorship Act" gives the circuit courts exclusive jurisdiction of all matters involving determinations of mental incompetency.

21. Pursuant to § 44A-1-3, the existence of a living will, medical power of attorney, durable power of attorney or other advance directive, duly executed by a person alleged to be a "protected person", as defined in section four [§ 44A-1-4] of this article, or the prior appointment of a surrogate decisionmaker for the protected person may eliminate, limit or supercede the need for the assistance or protection of a guardian or conservator. . . ."

The Court hereby **ORDERS** that the parent, next friend, or guardian of each minor plaintiff must verify the “Omnibus Petition of Certain Plaintiffs, as Biological Parents and/or Next Friends of Certain Minor Plaintiffs, For Court Approval & Confirmation of Settlements on Behalf of the Minor Plaintiffs Pursuant to West Virginia Code § 44-10-14” by **no later than December 12, 2011**.

Any guardian *ad litem* who did not submit a report or answer for their respective minor plaintiff(s) at the September 29, 2011, hearing, and any guardian *ad litem* who submitted a supplemental report or answer for their respective minor plaintiff(s) is **ORDERED** to appear for a **hearing at 1:00 p.m. on the 16th day of December, 2011**, in Courtroom Four, also known as the **Ceremonial Courtroom**, on the Second Floor of the Kanawha County Courthouse, at 407 Virginia Street, East, in **Charleston, West Virginia** to give the statutorily required proffer/testimony regarding the Omnibus Petition and pursuant to West Virginia Code § 44-10-14(e) for their respective minor plaintiff(s).

Attorney William Thomas Ward, re-appointed to represent minor plaintiff M.R.B., C.A. No. O6-C-352, and attorney A.J. Ryan, re-appointed to represent minor plaintiffs H.D.M.D, C.A. No. 06-C-207, and J.S., C.A. No. 05-C-369, whose cases were tentatively settled in 2009, but whose settlements were not approved, are also **ORDERED** to appear for a **hearing at 1:00 p.m. on the 16th day of December, 2011**, in Courtroom Four, also known as the **Ceremonial Courtroom**, on the Second Floor of the Kanawha County Courthouse, at 407 Virginia Street, East, in **Charleston, West Virginia** to give the statutorily required proffer/testimony regarding the previously-filed, verified petitions and pursuant to West Virginia Code § 44-10-14(e) for their respective

minor plaintiff(s). The parent, next friend, or guardian of each of these minor plaintiffs is also **ORDERED** to attend the hearing.

It is further **ORDERED** that defendants file their answer, if any, to plaintiffs' omnibus petition for Court approval of wrongful death settlements pursuant to West Virginia Code § 55-7-7 by no later than 5:00 p.m. on **December 5, 2011**. A **hearing** shall be held at **1:00 p.m. on the 16th day of December, 2011**, in Courtroom Four, also known as the **Ceremonial Courtroom**, on the Second Floor of the Kanawha County Courthouse, at 407 Virginia Street, East, in **Charleston, West Virginia** regarding the petition.

The Court **ORDERS** that plaintiffs' counsel provide the Court with documentary evidence regarding the legal incompetency of the two plaintiffs previously identified by plaintiffs' counsel as legally incompetent. If these two individuals are held to be legally incompetent, the Court will appoint a limited conservator, as defined in West Virginia Code § 44A-1-4(7) to review of the terms of the proposed settlement on behalf of those plaintiffs and determine whether the proposed settlement is in the best interests of those plaintiffs.

ENTER: November 28, 2011.

/s/ James P. Mazzone
Lead Presiding Judge
Mingo County Coal Slurry Litigation