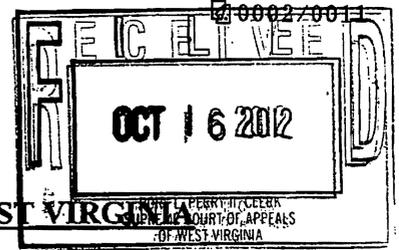


12-1206



**Over IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA**

**RICHARD SIMMONS**

2012 SEP 18 P 3 46

**Plaintiff,**

ADELL CHANDLER  
CIRCUIT CLERK  
CABELL CO., WV

v.

**CIVIL ACTION NO.: 06-C-0133**  
**F. Jane Husted, Judge**

**MASTER MECHANICAL  
INSULATION, INC.,**

**Defendant.**

**ORDER CERTIFYING QUESTIONS PURSUANT TO W.VA. CODE §58-5-2**

**Statement of Facts**

1. Richard Simmons was injured on Friday, April 9, 2004 in Portsmouth, Ohio.
2. The site where Simmons was injured was an apartment complex for senior citizens, which was being demolished.
3. Master Mechanical had a contract to perform asbestos abatement activities at the site. Simmons was a member of the Asbestos Worker's Union Local 207 who was employed from time to time by Master Mechanical.
4. Prior to April 9, 2004 Simmons had worked at the site performing asbestos abatement activities for Master Mechanical with his last day working there prior to his injury being April 6, 2004.
5. Simmons worked at a different site for Master Mechanical on April 7 and 8, 2004.
6. Both Simmons and Mike Plants had completed 40 hours of work for Master Mechanical by the end of the work day on April 8, 2004.
7. While Mike Plants is a member of the Asbestos Worker's Union, he is a Supervisor for Master Mechanical. He is paid by the hour and is owed overtime when appropriate.

SEP 18 2012

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 Deputy Circuit Clerk

8. On April 8, 2004, Mike Plants phoned the main Supervisor Richard Meckstroth to discuss additional work that week.

9. During the conversation, Mike Plants told Rick Meckstroth that since Meckstroth was sending Joe Plants and another worker to Portsmouth the following day to get

ready for the next week's work, Mike Plants was going to go to the site also to make sure that everything was in order for the following week. After Mike Plants got off the phone with Meckstroth, Simmons asked if he could ride with Mike Plants to the job site.

10. Consistent with his conversation with Meckstroth the day before, Mike Plants went to the site the next day to confirm that the site would be prepared for the following week's work.
11. Master Mechanical hourly employees Joe Plants and Mike Plants on occasion perform work-related activities without charge to Master Mechanical.
12. Simmons traveled to the Portsmouth, Ohio site on April 9, 2004 with Mike Plants. When Mike Plants worked for Master Mechanical, he was a supervisor, including on April 9, 2004.
13. Neither Simmons nor Mike Plants were paid for any work on April 9, 2004.
14. Joe Plants and Eddie Borden were working at the site for Master Mechanical on April 9, 2004. Joe Plants and Eddie Borden also act as Supervisors on occasion.
15. Simmons has testified that when he arrived at the work site he helped to unload supplies.
16. Later in the day Mike Plants had a discussion with Joe Plants, Eddie Borden and Richard Simmons.
17. In the presence of Simmons, Mike Plants told Joe Plants to remove a decontamination unit from Building B of the site, and place it in Building C for work that was to begin Monday.
18. A decontamination unit is a temporary structure which is used in asbestos abatement to remove asbestos dust from work clothes. A complete decontamination unit consists of three chambers which are made of PVC pipe and plastic sheeting. A single decontamination unit measures approximately 3 feet square and 6 feet tall.
19. Master Mechanical had completed its asbestos abatement work in Building B prior to April 9, 2004 except for removing the decontamination unit.
20. On April 9, 2004, the railings had been removed from the balcony of Building B.
21. The decontamination unit was located on the second floor balcony of Building B.
22. The second floor of Building B had a balcony that was in excess of 10 feet off the ground.

23. After Mike Plants told Joe Plants to retrieve the decontamination unit from Building B, Simmons accompanied Joe Plants to Building B.
24. When they arrived at Building B, Simmons went to the second floor of the building, while Joe Plants stayed on the ground.
25. Simmons and Joe Plants understood that the decontamination unit would be removed from the building by coming over the edge of the second floor of the building.
26. The decontamination unit was at least 10 feet from the edge of the balcony.
27. Simmons went to the second floor of Building B to remove the decontamination unit.
28. At the time of the accident, Master Mechanical did not provide Mr. Simmons with any fall protection.
29. Plaintiff Simmons fell off the edge of the balcony while removing the decontamination unit.
30. Simmons suffered injuries in the fall.
31. Simmons filed a claim for worker's compensation benefits, which was denied. The denial of benefits was upheld by the Office of Judges and the Board of Review.
32. On September 19, 2008, The West Virginia Supreme Court of Appeals ultimately found that the injuries sustained by Simmons were compensable injuries under the West Virginia Worker's Compensation Act.
33. Once Simmons' injuries were found to be compensable, the plaintiff amended his negligence complaint on January 26, 2010 to assert a deliberate intent claim against Master Mechanical pursuant to W. Va. Code §23-4-2, and dismissed his negligence count.

#### Questions To Be Certified

1. Is Simmons' claim against Master Mechanical governed by the 2005 amendment to the deliberate intent statute, W.Va. Code §23-4-2(d)(2)(ii), pursuant to *Roney v. Gencorp*, 431 F.Supp. 2d 622 (S.D.W.Va. 2006) and *Corley v. Eastern Assoc. Coal Corp.*, 2009 U.S. Dist. LEXIS 22080 (N.D. W.Va. 2009)?

Yes

No

- 2. In light of the Supreme Court of Appeals' decision in *Roberts v. Consolidation Coal Co.*, 539 S.E. 2d 478 (W. Va. 2000) and the facts as set forth above, is an employer prohibited from introducing evidence or testimony, or arguing that an employee's conduct in the performance of the work for the employer was the proximate cause of the plaintiff's injury?

Yes

No

- 3. In light of the Supreme Court's ruling of September 19, 2008 that Simmons' injury was compensable under the West Virginia Worker's Compensation Act, is Master Mechanical precluded from arguing that Simmons was at the site of his own volition, and voluntarily agreed to remove the decontamination unit from the second floor of Building B?

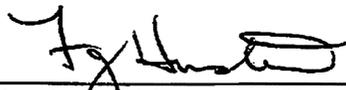
Yes

No

This matter shall remain stayed pending resolution of the certified questions.

The parties are hereby directed to prepare a joint appendix of the record sufficient to permit review of the certified questions.

ENTERED this 17th day of September 2012.



The Honorable F. Jane Hustead, Judge  
Circuit Court of Cabell County, West Virginia

**PREPARED AND SUBMITTED BY:**

ENTERED Circuit Court Civil Order Book  
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