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ENTERED 3/22/10

IN THE CIRCUIT COURT OF BOONE COUNTY, WEST VIRGINIA

MARK CASTLE,

Plaintiff,

v.

NEWTON ENERGY, INC.,  
A West Virginia corporation,

Defendant/Third party plaintiff,

v.

ROXIE SUE BRINAGER d/b/a  
BELO MINE SERVICES,

Third-party defendant/Fourth-party plaintiff,

v.

LEXINGTON INSURANCE COMPANY,

Fourth-party defendant.

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) Civ. Action No. 06-C-97  
) Honorable William  
) Thompson

**PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW GRANTING  
MOTION BY LEXINGTON INSURANCE COMPANY TO INCORPORATE THE  
ARBITRATION AWARD AND TO CONFIRM AND REDUCE TO JUDGMENT AND  
DENYING BELO MINE SERVICES' MOTION TO VACATE THE ARBITRATION  
AWARD**

Findings of Fact

1. Lexington Insurance Company<sup>1</sup> ("Lexington") filed a demand for arbitration with the American Arbitration Association in June 2007. Several coverage issues were in dispute. In response, Belo Mine Services ("Belo") filed a Fourth-Party Complaint before this Court on July

<sup>1</sup> Given the amount of time that the arbitration portion of this proceeding has taken, this case is certainly not a good endorsement for the arbitration process.

23, 2007, seeking, among other things, a declaration that the arbitration provision contained in the Lexington insurance policy ("Policy") that was issued to Belo was unconscionable and unenforceable under the laws of West Virginia. Likewise, Belo sought to have all coverage issues decided by the circuit court.

2. The Arbitration Provision in the Lexington Policy issued to Belo states:

**16. Arbitration**

Notwithstanding Condition 15. Service of Suit, in the event of a disagreement as to the interpretation of this policy, it is mutually agreed that such dispute shall be submitted to binding arbitration before a panel of three (3) Arbitrators, consisting of two (2) party nominated (nonimpartial) Arbitrators and a third (impartial) arbitrator (hereinafter "umpire") as the sole and exclusive remedy. The party desiring arbitration of a dispute shall notify the other party, said notice including the name, address and occupation of the Arbitrator nominated by the demanding party. The other party shall within 30 days following receipt of the demand, notify the demanding party in writing of the name, address and occupation of the Arbitrator nominated by it. The two (2) Arbitrators so selected shall, within 30 days of the appointment of the second Arbitrator, select and umpire. If the Arbitrators are unable to agree upon an umpire, each Arbitrator shall submit to the Arbitrator a list of three (3) proposed individuals, from which list each Arbitrator shall chose one (1) individual. The names of two (2) individuals so chosen shall be subject to a draw, whereby the individual drawn shall serve as umpire.

The parties shall submit their cases to the panel by written and oral evidence at a hearing time and place selected by the umpire. Said hearings shall be held within thirty (30) days of the selection of the umpire. The panel shall be relieved of all judicial formality, shall not be obligated to adhere to the strict rules of law or of evidence, shall seek to enforce the intent of the parties hereto and may refer to, but are not limited to, relevant legal principles. The decision of at least two (2) of the three (3) panel members shall be binding and final and not subject to appeal except for grounds of fraud or gross misconduct by the Arbitrators. The award will be issued within 30 days of the close of the hearings. Each party shall bear the expenses of its designated Arbitrator and shall jointly and equally share with the other the expense of the umpire and of the arbitration proceeding.

3. This Court ordered a sixty (60) day discovery period regarding the enforceability of the arbitration provision, which focused on the negotiation and procurement of the Lexington

Policy. During this discovery period, it was revealed, *inter alia*, that Belo is a sophisticated commercial entity with a substantial payroll during the policy period in question.

4. After the discovery period, both parties filed supplemental briefs with the Court; Lexington moving to have the Fourth-Party Complaint dismissed and the matter compelled to arbitration, and Belo seeking to have the arbitration stayed and the coverage issues heard before this Court.

5. Upon good cause shown, the Court granted Lexington's Motion to Compel Arbitration, and Lexington was orally dismissed from this matter without prejudice on March 20, 2008. The Order was formally entered on June 27, 2008. The Court held that the arbitration provision at issue was not unconscionable, and ordered the parties to proceed with arbitration.

6. In the Order compelling arbitration of this matter, this Court specifically made the following factual findings in holding that the arbitration provision at issue was not unconscionable:

(a) Belo may not have seen a copy of the Policy before the end of the Policy period, but that fact is not dispositive to determining the issue.

(b) Belo's corporate designee could not articulate anything unfair about the arbitration provision in the Policy.

(c) Belo's corporate designee has been involved in numerous prior arbitrations, and testified that they are similar to court proceedings.

7. Belo sought a Writ of Prohibition from the West Virginia Supreme Court of Appeals, filed June 26, 2008.

8. The Writ of Prohibition was denied on September 4, 2008.

9. The initial planning conference for the arbitration proceeding was held on October 6, 2008. At that time, it was determined by the Arbitration Panel that the parties would write brief statements of their respective positions on whether the Policy exclusion for subsidence is a legal issue that could be examined by the Panel without further factual development, or whether it is intertwined with factual matters that necessitate discovery and factual development. Lexington filed its initial statement on October 21, 2008. Belo filed its initial statement on November 4, 2008, and Newtown filed its initial statement on November 11, 2008. Lexington filed its reply statement by November 18, 2008.

10. Lexington urged the Panel to consider the subsidence issue immediately as a matter of law, while Belo and Newtown urged the Panel to allow a period of discovery.

11. Another conference to discuss the issue was held on January 28, 2009, at which time the parties were instructed to submit additional statements regarding the need (or lack thereof) to conduct factual discovery. Additional written statements were submitted.

12. On February 6, 2009, the Panel issued a discovery order, in which the Panel granted Belo and Newtown a ninety (90) day discovery period.

13. At the close of the discovery period, the parties requested a briefing schedule regarding the application of the Subsidence Exclusion and Belo's defense from application of the Subsidence Exclusion in reliance upon the doctrine of reasonable expectations. The Panel ruled that Lexington's initial brief was due on July 10, 2009, Belo's response was due on August 7, 2009, and Lexington's Reply was due on August 21, 2009. A hearing was set by the Panel on September 4, 2009.

14. Oral arguments on the issue of the applicability of the Subsidence Exclusion in the Lexington Policy were held before the Panel on September 4, 2009. At the conclusion of that

hearing, the Panel instructed the parties to further brief the following issue: “whether the use of the term subsidence in endorsement number five is ambiguous in light of the common and ordinary understanding of that term as reflected in things like [the geological] dictionary that [Arbitrator Arceneaux] has pointed [the parties] towards.”

15. Additional briefs were submitted by the parties as required by the Panel, on that issue, and on all other issues raised in Lexington’s Arbitration Demand.<sup>2</sup>

16. Another hearing was held on October 27, 2009, wherein the Umpire stated at the close of oral arguments:

Okay. Here is what I want to tell the parties. I appreciate everybody’s diligence and briefing. I think Lexington did that which a good advocate does, that they have presented me with a persuasive argument that caused me to look at more carefully this whole issue of ambiguity.

When I went on this path to begin with, I think I got on this path as an offshoot to the reasonable expectations argument of Belo’s. I didn’t find that a particularly strong or persuasive argument. I started to look at subsidence and ambiguity and say, “Gee, what does this really mean?” And Lexington has said, “Hey, you don’t need to go look at external source, because it’s a defined term [in the Policy], and therefore there is no ambiguity.” And probably the argument that resonated the most with me from Lexington was to say, “Gee, how ambiguous can this be, because this isn’t even the argument raised by Belo in this matter?” which is your own argument, not theirs. So I have looked at this carefully. I have not definitely made up my mind, and I certainly didn’t mean to suggest to anybody in the last proceeding that I had made up my mind.

17. At the conclusion of the October 27, 2009, hearing, the Panel ordered the parties to submit proposed findings of fact and conclusions of law on the applicability of the Subsidence Exclusion by November 13, 2009.

18. On December 9, 2009, the Panel declared the hearings on this matter closed.

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<sup>2</sup> Some briefing has been left out of this timeline, as it has no bearing on the final findings of this Court. For example, there was an entire briefing schedule that surrounded a jurisdictional issue raised by Belo in the midst of the arbitration proceedings.

19. A Final Award was entered into by the Panel on January 7, 2010 in favor of Lexington and against Newtown Energy, Inc. ("Newtown") and Belo, 29 days after the hearings were declared closed. In the Final Award, the majority found that "the Subsidence Exclusion in the Lexington Insurance Policy is not ambiguous and should be applied as written to deny insurance coverage in this instance."

20. The arbitration award issued by the Panel divides the costs of the umpire and arbitration proceedings between Lexington, Newtown, Belo, and Kanawha Eagle, all of whom were parties to the arbitration.

21. Rule 43 of the AAA Commercial Arbitration Rules states:

R-43. Scope of Award

(a) The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract.

(b) In addition to a final award, the arbitrator may make other decisions, including interim, interlocutory, or partial rulings, orders, and awards. In any interim, interlocutory, or partial award, the arbitrator may assess and apportion the fees, expenses, and compensation related to such award as the arbitrator determines is appropriate.

(c) In the final award, the arbitrator shall assess the fees, expenses, and compensation provided in Sections R-49, R-50, and R-51. The arbitrator may apportion such fees, expenses, and compensation among the parties in such amounts as the arbitrator determines is appropriate.

(d) The award of the arbitrator(s) may include:

(i) interest at such rate and from such date as the arbitrator(s) may deem appropriate; and

(ii) an award of attorneys' fees if all parties have requested such an award or it is authorized by law or their arbitration agreement.

22. Similarly, the arbitration provision in the Lexington Policy states that "[e]ach party shall bear the expenses of its designated Arbitrator and shall jointly and equally share with the other the expense of the umpire and of the arbitration proceeding."

23. The arbitration provision does not contain a "time is of the essence" clause, or any other language which voids an arbitration decision if it is not rendered in the proper time frame.

Additionally, the parties did not agree in advance that a late filed award would nullify the entire arbitration process.

### Conclusions of Law

1. Under West Virginia law, an arbitration award shall be entered as a judgment of the court, unless good cause be shown against it. W. Va. Code §55-10-3.

2. The Final Award of the Arbitration Panel in favor of Lexington and against Belo and Newtown was not procured by fraud, corruption, mistake, or any other undue means. The panel of arbitrators, and each one individually, acted impartially and properly, such that the Final Award is mutual (by the majority), final, and definite. W. Va. Code §55-10-4.

3. Judicial review of arbitration awards is extremely limited – in fact, it is ‘among the narrowest known to the law.’” *United States Postal Serv. v. American Postal Workers Union*, 204 F.3d 523, 527 (4<sup>th</sup> Cir. 2000) (quoting *Union Pac. R.R. v. Sheehan*, 439 U.S. 89, 91 (1978) (internal quotation marks omitted)).

4. “A court sits to ‘determine only whether the arbitrator did his job – not whether he did it well, correctly, or reasonably, but simply whether he did it.’” 204 F.3d at 527 (quoting *Mountaineer Gas Co. v. Oil, Chem. & Atomic Workers Int’l Union*, 76 F.3d 606, 608 (4<sup>th</sup> Cir. 1996)).

5. “As long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.” *United States Postal Serv. v. Am. Postal Workers Union*, 204 F.3d 523, 527 (4<sup>th</sup> Cir. 2000) (citation and internal quotation marks omitted).

6. The Federal Arbitration Act (“FAA”), 9 U.S.C. § 2 *et seq.*, provides that a court may only vacate an arbitration award on one of the following grounds:

- (1) where the award was procured by corruption, fraud, or undue means;
- (2) where there was evident partiality or corruption in the arbitrators, or either of them;
- (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
- (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

*Id.* § 10(a).

7. As a matter of law, none of the three grounds raised by Belo as reasons to vacate the award - (1) that the arbitration clause and resulting final award are unconscionable as they have imposed an excessive and punitive financial burden upon Belo; (2) that the arbitrators exceeded their jurisdiction by issuing an award outside the time limits mandated by the controlling arbitration agreement; and (3) that the award on its face contains "clear and palpable" mistakes of law - are permissible reasons under the FAA, West Virginia law, and the case law to vacate an arbitration award.

8. This Court has already allowed discovery as to the enforceability of the arbitration provision in this Policy, read briefs and held oral arguments not once but twice on whether or not the arbitration provision in the Policy is unconscionable, and held that it is not.

9. The Court's Order of June 27, 2008, compelling this matter to arbitration, contained three specific findings of law:

- (a) West Virginia law is well settled that arbitration clauses are enforceable unless they are unconscionable;
- (b) the arbitration provision in the Policy is not unconscionable;
- (c) Belo's argument that it would be deprived of attorney fees and costs if arbitration is compelled is not persuasive.

10. Belo's renewed argument that the arbitration award should be vacated due to the costs it has/will incur remains unpersuasive. Additionally, this Court finds that the Panel has apportioned only the costs of the arbitration proceeding and of Mr. Arceneaux's compensation between Lexington, Belo, Newtown, and Kanawha Eagle, all of whom were parties to the arbitration, in accordance with the Policy provision and in accordance with Rule 43(c) of the American Arbitration Association's rules for commercial arbitrations.

11. Belo's argument that the expense of arbitration makes the arbitration provision in the Lexington Policy unconscionable has been expressly rejected by the Supreme Court of Appeals of West Virginia. In *State ex rel. Wells v. Matish*, 215 W. Va. 686, 600 S.E.2d 583 (2004), the plaintiff, an individual whose employment contract contained an arbitration provision, argued that he could not afford arbitration and that the costs rendered the arbitration clause in his contract unconscionable and therefore unenforceable. The Court disagreed, finding that the employment contract, although prepared by the employer, was clearly negotiated by both parties. *Id.* 215 W. Va. at 692, 600 S.E.2d at 589. Further, the Court stated that Mr. Wells was a sophisticated party to the contract, rather than an unsophisticated party forced to sign a form contract:

Rather, Mr. Wells was an experienced anchor and reporter who, along with his wife, actively and jointly negotiated his employment agreement. Mr. Wells was given the opportunity to examine the agreement at home and modifications were made after his overnight review. While the arbitration clause may not have been

subject to alteration, there is no evidence that Mr. Wells was under any duress to sign this or any other contract. He was employed at another news station while he was negotiating his employment contract.

*Id.* The Court held that, in light of these facts, it could not find that the contract in question was one of adhesion, and that Mr. Wells “has simply not shown that arbitration would be prohibitively expensive.” *Id.*

12. Belo’s argument that \$30,000 is prohibitively expensive is not legally persuasive, nor is it supported by the facts or by Belo’s own behavior in continuing to seek out new avenues of litigation against Lexington.

13. This Court cannot legally conclude that the arbitration award was actually rendered untimely, given that the neutral arbitrator sent a letter to all parties on December 9, 2009, stating that the hearings were deemed closed as of that date. AAA rules allot 30 days to render a decision once the hearings are closed, and the Award was rendered on January 7, 2010 (29 days after the hearings were determined to be closed by the Panel).

14. To the extent that the award should have been rendered 30 days after the proposed findings and conclusions were submitted by the parties on November 13, 2009, such award would only be 25 days late, which is *de minimis*.

15. In *Anderson v. Nichols*, 178 W. Va. 284, 359 S.E.2d 117 (1987), the arbitration award was issued six days later than the arbitration agreement called for, rather than the 25 days alleged herein. *Id.* at 288. The Supreme Court of Appeals stated:

Appellants would have us believe that it is of great moment that the arbitration award was rendered six days later than specified in the arbitration agreement. Had the arbitration clause provided that time was of the essence in the arbitration process we might agree with the appellants; however, there was no agreement by the parties that a late award would nullify the whole arbitration proceeding and we see no reason to set aside an otherwise exemplary decision for a *de minimis* delay.

16. The *Anderson* Court held that the threshold question is whether the party raising the delay issue has been prejudiced by the delay. *Id.* This Court finds that Belo cannot illustrate any prejudice due to the alleged 25 day delay, particularly when the relief it requests from this Court is to start the briefing process over again with respect to the coverage issues in dispute.

17. “Usually, however, the delay issue is used only to establish colorable grounds for challenging an otherwise just and reasonable award to postpone paying off the winner. We disapprove of that tactic. As is usual in these cases that use delay to buy more delay, we have in the case before us only a classic example of *damnum absque injuria* (more commonly expressed in the coal fields as no hurt, no foul).” *Id.*

18. The Court need not engage in an analysis of the decision rendered by the arbitration panel. “Clear and palpable” mistakes of law is not the standard in West Virginia for vacating an arbitration award.

19. The seminal case regarding arbitration in West Virginia is *Board of Educ. v. Harley Miller, Inc.*, 160 W. Va. 473, 236 S.E.2d 439 (1977).

20. In that case, the Supreme Court of Appeals reviewed the case *Hughes v. Nat'l Fuel Co.*, 121 W. Va. 392, 3 S.E.2d 621 (1939) and held:

To the extent that *Hughes* implied that a court should grant a hearing upon challenges to the arbitration award not amounting to actual fraud it is overruled, and to the extent that it stands for the enforceability and presumptive regularity of arbitration awards, it is approved.

*Id.* at 489, n.7.

21. The Supreme Court of Appeals went on to hold: “for emphasis we state and endorse syllabus pt. 3 of the *Hughes* case: ‘Awards by arbitration are to be favorably and

liberally construed and are not to be set aside unless they appear to be founded on grounds clearly illegal.” *Id.*

22. The Arbitration Award issued in this case, a 41 page decision grounded in West Virginia law regarding the interpretation of insurance contracts, was not founded on grounds ‘clearly illegal’ and as such, the Court will not vacate the Arbitration Award.

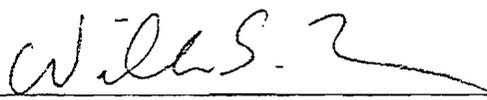
This matter having come before the Court on Special-intervenor Lexington Insurance Company’s Motion to Confirm and Reduce to Judgment the Arbitration Award, AND Belo Mine Services’ Motion to Vacate the Arbitration Award, after due deliberation this Court now finds that said Motion by Lexington should be GRANTED and said Motion by Belo should be DENIED.

It is therefore ORDERED, ADJUDGED and DECREED that Lexington Insurance Company’s Motion to Confirm and Reduce to Judgment the Arbitration Award is hereby GRANTED and the written opinion of the arbitration panel is incorporated by reference into this Order. Lexington is dismissed from this action with prejudice, and may withdraw immediately from defending Newtown in the underlying action. There is no just reason for delay and the Court hereby enters final judgment in favor of Lexington Insurance Company and against Belo Mine Services and Newtown Energy Inc.

Also for the reasons set forth above, Belo’s Motion to Vacate the Arbitration Award is denied. This is a final, appealable Order.

ENTER this the 22<sup>nd</sup> day of March, 2010.

A COPY ATTEST  
*William S. Thompson*  
CIRCUIT COURT

  
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William S. Thompson, Judge  
Circuit Court of Boone County, WV