

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BYRON BOWENS,

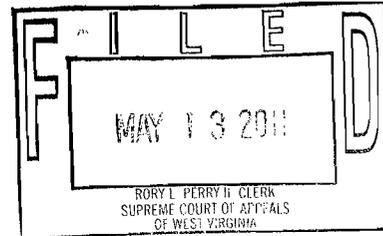
Petitioner,

vs.

ALLIED WAREHOUSING SERVICES, Inc.,

Respondent.

**No. 11-0210
(Civil Action No. 08-C-291)**



PETITIONER'S BRIEF

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Table of Contents

TABLE OF AUTHORITIES 3
ASSIGNMENT OF ERROR..... 5
STATEMENT OF THE CASE..... 6
SUMMARY OF ARGUMENT..... 8
STATEMENT REGARDING ORAL ARGUMENT AND DECISION 9
ARGUMENT..... 9
CONCLUSION 24
CERTIFICATE OF SERVICE 26

TABLE OF AUTHORITIES

Statute

W.Va. Code § 23-2-6	9, 14
W.Va. Code § 23-2A-1	15

Cases

<i>Adkins v Inco Alloys International, Inc.</i> , 187 W. Va. 219, 223, 417 S.E.2d 910 (1992)	20
<i>American Tel. & Tel. Co. v. Ohio Valley Sand Co.</i> 131 W.Va. 736, 50 S.E.2d 884 (1948)	17, 21
<i>Bannister v. Victoria Coal & Coke Co.</i> , 63 W.Va. 502, 61 S.E. 338 (1908).	20
<i>Barajas v. USA Petroleum Corp.</i> , 184 Cal. App. 3d 974, 229 Cal. Rptr. 513 (1986).	24
<i>Cobb v. E.I. DuPont DeNemours & Co</i> 549 S.E. 2d 657 (W.Va. 1999).	9, 12
<i>Craft v. Pocahontas Coal Corp.</i> , 118 W.Va. 380, 190 S.E.2d 687 (1937).	17
<i>Daily Gazette Co. Inc., v. West Virginia Dev. Office</i> 206 W.Va. 51, 521 S.E.2d 543 (1999).	16
<i>Denton v. Yazoo & M.V.R. Co.</i> 284 U.S. 305, 52 S.Ct. 141 (1932)	17
<i>Horton v. Tyree</i> 139 S.E. 737 (1927)	9, 12
<i>Kirby v. Union Carbide Corp.</i> 373 F.2d 590 (4 th Cir. 1967).	19
<i>Lengyel v. Lint</i> 167 W.Va. 272, 278 (1981)	12

<i>Lester v. State Workmen's Compensation</i> 161 W.Va. 299; 242 S.E. 2d 443 (1978)	18, 19
<i>Maynard v. Kenova Chemical Co.</i> 626 F. 2d 359 (4 th Circuit 1980)	16-22
<i>Novenson v. Spokane Culvert & Fabricating Co.,</i> 91 Wash. 2d 550;588 P.2d 1174 (Wash. 1979).	24
<i>Peerce v. Kitzmiller,</i> 19 W. Va. 564, 574 (1882)	20
<i>Persinger v. Peabody Coal Co.,</i> 196 W.Va. 707 (1996).	9
<i>Standard Oil Co. v. Anderson</i> 212 U.S. 215, 29 S.Ct. 252 (1909)	17
<i>State ex rel McGraw v. Combs Services, Inc.</i> 206 W.Va. 512; 526 S.E.2d 34 (1999).	15

Legal References

1A Larson, Workmens' Compensation Law § 48.00	17
<u>Restatement (Second) Contracts</u> , § 1 (1981)	20
1 S. Williston <u>A Treatise on the Law of Contracts</u> , § 1 at p. 1 (3d ed. 1957).	20

ASSIGNMENT OF ERROR

The Circuit Court erred in their Order of April 15, 2009, by dismissing Plaintiff's Worker's Compensation Fraud and common law Fraud claims when Allied Warehousing provided Plaintiff's employer fraudulent training documents submitted in a Worker's Compensation proceeding. See appx 165-170. The Court should review this issue, because based upon the Circuit Court's ruling, businesses can submit fraudulent training documents to discredit claimants yet suffer no consequences by relying on the argument that it is purely a medical issue and no reliance. Further, Allied Warehousing adamantly maintained it was not Plaintiff's employer for these causes of action, and the Court recognized this in a ruling, yet Allied Warehousing later argued successfully it was plaintiff's employer for Worker's Compensation immunity purposes.

The Circuit Court further erred in their June 8, 2010 order by holding Allied Warehousing was a "special employer" entitled to immunity from liability under the exclusive remedy provisions of the West Virginia Workers' Compensation Act even though Allied Warehousing never paid Workers' Compensation premiums for plaintiff. See appx 404-408. The Court should review this issue because it is one of first impression in West Virginia and the Circuit Courts of West Virginia are split. The Court should also review this issue to correct the injustice of Allied Warehousing's inconsistent assertions that it was not Plaintiff's employer for the fraud claim purposes, but was for the purpose of Worker's Compensation immunity.

STATEMENT OF THE CASE

Byron Bowens began working for Commercial Help, Ltd, d.b.a. "Manpower," in the summer of 2006. Shortly thereafter, the second work assignment he received was to operate a forklift for Allied Warehousing. On April 23, 2007, he suffered a crushed pelvis after being pinned between his forklift and another operated by Bowen's supervisor, and fellow Manpower employee John Church. That same day, Bowens submitted an Employees' and Physicians' Report of Injury to BrickStreet. See appx 90. This report lists Bowen's employer as Manpower and his supervisor as John Church. On April 26, 2007, Manpower filed an Employer's Report of Injury with BrickStreet. See appx 318. Allied did not file an Employer's Report of Injury. Manpower's Report of Injury lists Bowens as employed by Manpower and does not list Allied in any capacity as his employer.

Bowens received temporary total Workers' Compensation ("WC") benefits for approximately five months and was then awarded a permanent partial disability. Allied had no involvement in any of the WC proceedings. This lack of involvement was proper as Allied did not pay WC premiums for Bowens.

On October 23, 2008, Bowens filed a Complaint against Allied Warehousing, Inc., Allied Realty Co, and Commercial Help LTD dba Manpower. See appx 7-18. Manpower and Allied Realty Co. were later dismissed from the case. The Complaint's allegations against Allied Warehousing were: 1) Negligence; 2) Unsafe Workplace; 3) Negligent Hiring; 4) Workers' Compensation Fraud; 5) Fraud; and, 6) Punitive Damages.

Id. On January 23, 2009, Allied filed a motion to dismiss the WCF claim. See appx 38-51. In support of its motion, Allied declared that:

When the alleged injury occurred, the plaintiff was an employee of Commercial Help, Ltd. d/b/a Manpower, not Allied Warehousing or Allied Realty. Without being plaintiff's employer, neither Allied Warehousing nor Allied Realty had any reason to be concerned with plaintiff's Workers' Compensation claims... Id

The Court denied Allied's motion to dismiss for further discovery. In its Order, the Court stated that "[p]laintiff acknowledges that neither Allied Warehousing nor Allied Realty was plaintiff's employer. Plaintiff alleges that he was employed by Commercial Help." Cite order par. 4. Allied then filed its *Motion for Summary Judgment as to Plaintiff's Workers' Compensation Fraud Claim And/Or Statutory And/Or Common Law Fraud Claim on Behalf Of Defendants' Allied Realty Co. And Allied Warehousing Services, Inc.*, with the motion to dismiss attached as an exhibit.

On March 27, 2009, Allied filed a reply brief regarding the above mentioned motion for summary judgment. In this reply, Allied reiterated "it is undisputed that plaintiff was an employee of Manpower, not Allied Warehousing or Allied Realty." See appx 153 (bold added). The Court granted Allied's motion.

The Court's Order granting Allied's motion dismissed punitive damages against Allied and Manpower. Subsequently, plaintiff filed a motion for reconsideration of punitive damages in regard to Allied. See appx 171-174. Allied's response, states "the facts in the record indicate that plaintiff, acted recklessly and contrary to the safety guidelines, and outside of Allied Warehousing's direct observation and/or control..." See appx 232. The Court granted the Plaintiff's *Motion for Reconsideration* by Order on September 10, 2009. See appx 273-275.

On March 30, 2010, the Defendant filed their *Renewed Motion for Summary Judgment*. See appx 276-359. The Plaintiff's response was filed on April 26, 2010. See appx 360-375. Hearing on the Motion for Summary Judgment was held on April 28, 2010. See appx 376-403. The Court granted the Defendant's Motion for Summary Judgment and granted the Plaintiff the right to amend the Complaint, by order dated June 9, 2010. See appx 404-408.

The Plaintiff filed the *Amended Complaint* of July 8, 2010. See appx 409-414. The Defendant replied on July 22, 2010. See appx 415-423.

The Defendant filed a *Motion for Summary Judgment and Memorandum in Support of Motion*. See appx 424-485. The court granted this motion by order dated January 4, 2011. See appx 486-492.

SUMMARY OF ARGUMENT

The dismissal of the fraud claims was improper because the decision of the ALJ was not based solely upon the medical issues presented, but rather was influenced by the submission of the fraudulent training documents by Manpower, which were supplied by Allied. The fraudulent training documents, which Allied admits were not signed by Mr. Bowens, were supplied to Manpower for the sole purpose of discrediting Mr. Bowens' testimony.

At the beginning of the case at bar Allied stated that they were not the employer of Mr. Bowens to avoid liability for Worker's Compensation Fraud. See appx 41. Later Allied claims to be Mr. Bowens' employer to gain immunity under Worker's Compensation. See appx 276-359. Allied was not Mr. Bowens employer, as they

acknowledged previously. See appx 41. Thus, Allied is not entitled to immunity under W.Va. Code § 23-2-6.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral Argument is necessary. The considerations of Rule 20 are met. This is a case of first impression.

ARGUMENT

I. Dismissal of the Fraud Claims was improper because the Workers' Compensation Decision was not Based Solely upon Medical Issues.

The elements for a fraud claim are: (1) that the act claimed to be fraudulent was the act of the defendant or induced by him; (2) that it was material and false; that plaintiff relied upon it and was justified under the circumstances in relying upon it; and (3) that he was damaged because he relied upon it. *Horton v. Tyree*, 139 S.E. 737 (1927). *Persinger and Cobb* allow workers' compensation fraud claims outside of deliberate intent and incorporate the Horton elements of fraud. *Persinger v. Peabody Coal Co.*, 196 W.Va. 707 (1996).

The Court granted summary judgment against appellant because "temporary total disability benefits are awarded and suspended based upon a physical and medical determination. As such the termination of the Plaintiff's benefits would not have been effected by the receipt of the allegedly fraudulent training documents." See appx 168.

Dismissal of the fraud claims is not proper because the decision issued by the Administrative Law Judge lists two reasons for denying Mr. Bowens temporary total benefits 1) he was released to work and chose not to do so. 2) "[f]urther, the claimant was

found to have reached maximum medical improvement (“MMI”) regarding the April 23, 2007 injury.” See appx 87. The ALJ’s second reason regarding MMI is not relevant to the reliance issue because it is uncontroverted that Mr. Bowens did not reach MMI until April 7, 2008 in the IME by Dr. Bachwitt. If MMI was the only reason that Mr. Bowens was denied benefits, he would have been entitled to compensation from the date his temporary total benefits stopped, approximately October 1, 2007, until April 7, 2008. Therefore, the central inquiry regarding reliance must focus upon the first and main reason for denial of benefits. The question presented to this Court is did the ALJ rely upon the fraudulent training documents in making the decision the Mr. Bowens was release to work and chose not to do so? As will be displayed below , the ALJ had to deem Mr. Bowens’ testimony as not credible to reach the conclusion that Mr. Bowens was released to work and chose not to do so.

Curiously missing from all defendant’s briefs is an explanation of why Allied faxed the training documents to Manpower on October 1, 2006. Also missing from both defendants’ briefs is an explanation of why the documents were submitted in the Worker’s Compensation proceeding on May 9, 2008. Neither defendant has attempted to explain the reason for faxing or submitting the fraudulent training documents because clearly the documents were submitted to attack Mr. Bowens’ credibility. Mr. Bowens testified that he was not certified to operate a forklift and that he did not take a written test from Manpower or Allied on April 22, 2008. See appx 147-49. As shown by the facsimile transmission information at the top of the training documents, they were the only pages sent to Manpower on May 7, 2008. All medical information had already been submitted by both parties. The only document submission after Mr. Bowens’ testimony

was Manpower's submission of the fraudulent training documents. Clearly, Mr. Bowens' credibility was under attack.

Mr. Bowens' credibility was attacked because facts arose at the hearing which displayed that Mr. Bowens was unable to work at all relevant times. Mr. Bowens testified consistent with the documentation in the file that Dr. Young had him completely off work from the date of the accident until September or October of 2007. Dr. Young first released Mr. Bowens to work on October 5, 2007 as displayed by the Clinic Discharge and Return to Work Certificate which stated return to work with specific restrictions on. See appx 144-146. Mr. Bowens also testified that when Dr. Young released him to work with restriction that he took the form to Manpower and was told that they did not have to work for him with those restrictions. See appx 147-49. He further testified that he attempted to find work but was told that he could not work if he couldn't walk and get around. *Id.* Mr. Bowens' testimony was clear that he had sought employment from Manpower and other employers while on severely restricted work duty. Unable to prove otherwise, Manpower chose to attack Mr. Bowens' credibility by submitting fraudulent documents to prove that he was lying about receiving training.

Based upon the aforementioned testimony, the ALJ could not have deemed Mr. Bowens' testimony as credible to reach the decision that Mr. Bowens was released to work and chose not to do so. Further, it is not necessary for the ALJ decision to state directly that it discredited Mr. Bowens' testimony. In West Virginia, "[t]he complaining party must, generally, have relied upon the representations claimed to be false, but 'It is not necessary that the fraudulent representations complained of should be the sole consideration or inducement moving the plaintiff. If the representations contributed to the

formation of the conclusion in the plaintiff's mind, that is enough..." *Lengyel v. Lint*, 167 W.Va. 272, 278 (1981) citing Syl. Pt. 3, *Horton v. Tyree*, 139 S.E. 737 (1927). Every trial layer knows that if you prove a witness is lying, anything else they say is not going to be believed. As displayed above, it was impossible for the ALJ's decision to be made without discrediting Mr. Bowens' testimony that was attacked by the fraudulent training documents and there is no evidence that suggests otherwise. By discrediting Mr. Bowes with the fraudulent documents, certainly there is a triable issue as to the formation of the conclusion in the hearing examiner's mind that Mr. Bowens was release to work and chose not to do so.

Allied cites *Cobb* heavily in their motions regarding the issue of reliance in support of their positions. *Cobb v. E.I. DuPont DeNemours & Co.* 549 S.E. 2d 657 (W.Va. 1999). While plaintiff agrees that *Cobb* is a controlling authority for Worker's Compensation Fraud, our facts are completely different. In *Cobb*, the Court noted that the allegations that the documents submitted in the Worker's Compensation proceeding were fraudulent were "without any evidence whatsoever to support the contention," *Cobb* at 467. In the case at bar, Allied admits that the documents contained a signature that was not Mr. Bowens. A reasonable inference is that they are fraudulent. Further, Mr. Bowens never took any type of test. Also in *Cobb*, the claims analyst was deposed and stated that the documents in question did not factor in her decision. *Id.* There is no such testimony in this matter. Obviously, the facts in *Cobb* are much different and do not support the defendant's position.

Although not central to the Court's decision, Allied argued extensively that it was no subject to the Workers Compensation Fraud claim because it was not appellants

employer for WCF purposes. As is displayed below, it completely reversed course when arguing it was entitled to immunity from the negligence claim.

II. Allied is properly sued under a negligence theory, not deliberate intent, because it was not Appellants Employer

A. Allied Has Already Admitted In This Litigation That Bowens Was Not Its Employee For Worker's Compensation Purposes And Therefore Is Foreclosed From Immunity.

This Court need not look any further than Allied's unequivocal statements in this litigation to determine that Bowens was not its employee. To avoid liability for Worker's Compensation purposes, Allied previously asserted in this litigation that "[w]hen the alleged injury occurred, the plaintiff was an employee of...Manpower, not Allied Warehousing or Allied Realty," and "it is undisputed that plaintiff was an employee of Manpower, not Allied Warehousing or Allied Realty." See appx 41. So, to avoid liability for WC fraud purposes, Allied readily admits it was not Bowen's employer, but when this classification inures to the benefit of Bowen's, Allied abandons its previous statements.

In *The Renewed Motion for Summary Judgment Based Upon Workers' Compensation Immunity*, Allied writes that it would be "odd and illogical to saddle an employer" with the obligation of "borrowed servant" doctrine "but deny that employer the corresponding benefit of immunity from action in tort."¹ See appx 283. Bowens finds it more odd that in this exact case, Allied argued it should not be saddled with this burden, this court did not saddle it with the burden, yet Allied argues that it is entitled to the benefit of immunity. Not only has Allied admitted that it was not Bowen's employer

¹ Taken in the general context this is not odd. West Virginia courts understand the power and resources that corporations have leading to rules such as those which strictly construe insurance policies against insurance companies. Further, in the criminal context, to presume someone innocent is odd when magistrate courts have already found that probable cause existed that the defendant committed the crime, but our founding father understood the power of the government.

for WC purposes, it analyzed exactly why it was not Bowen's was not its employee for WC purposes:

Again, the plaintiff was an employee of Manpower, not Allied Warehousing or Allied Realty. Without being plaintiff's employer, neither Allied Warehousing nor Allied Realty would be required to pay plaintiff's Workers' Compensation benefits. Likewise, neither would experience an increase in Workers' Compensation insurance premiums, or any other costs, as a result of plaintiff's Workers' Compensation claims. It is difficult to imagine what incentive they would have for harming plaintiff's chances of receiving Workers' Compensation benefits.

See appx 44. It is difficult for Bowens to imagine how Allied can now argue that it was his employer for WC purposes. It is even more difficult to imagine how Allied's can state that "[p]laintiff has no basis to argue against Allied Warehousing's immunity in this case." The basis is already provided by Allied.

B. Allied Was Not The Employer Of Bowens And West Virginia Code § 23-2-6 Should Not Be Interpreted To Affect The Legislative Purpose Of The Act

Much of Allied's argument is unnecessary discussion of immunity afforded under the West Virginia Worker's Compensation Act. It is unnecessary and inapplicable to this case because Byron Bowens was never an Allied employee and attempts to usurp the legislative purpose of the Act. W.Va. Code § 23-2-6 reads, in part:

Any employer subject to this chapter who subscribes and pays into the workers' compensation fund the premiums provided by this chapter...is not liable to respond in damages at common law or by statute for the injury or death of any employee, however occurring, after so subscribing...

This provides immunity from common law or statutory liability from the relationship between an employer and employee.

As set forth in *State ex rel McGraw v. Combs Services, Inc.*, the Supreme Court laid out the proper steps for interpreting statutes. 206 W.Va. 512, 526 S.E.2d 34 (1999). The Court will "discern the objective of the enactment" so as to "ascertain and give effect to the intent of the Legislature." *Id.*, 206 W.Va. at 518, 526 S.E.2d at 40. Once the intent has been determined, the Court will consider the "precise language" of the statute. *Id.* "A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect." Syl. Pt. 4, *Daily Gazette Co. Inc., v. West Virginia Dev. Office*, 206 W.Va. 51, 521 S.E.2d 543 (1999). Hence, if a statute is clear and unambiguous, and plainly expresses the intention of the legislature, the Court will construe the statute in accord with the legislative intent. This Court should give the pure unambiguous meaning to the words "employer" and "employee" without interpreting it to reach an absurd result.

The legislative intent not to extend immunity to non-employers, such as Allied, is even clearer when one considers W.Va. Code § 23-2A-1 that reads, in pertinent part that:

(a) Where a compensable injury ... is caused, ... by the act or omission of a third party, the injured worker, ..., shall not ... be precluded from making a claim against the third party.

(b) ...if an injured worker ... makes a claim against said third party, and recovers any sum thereby, the commissioner or self insured employer shall be allowed subrogation with regard to medical benefits paid as of the date of recovery ...

Therefore, WC statutory construction certainly contemplates such suits as the case at bar and operates to protect the system by mandatory reimbursement of medical benefits paid to the injured worker. Thus, not only is it illogical to extend immunity to such third party, it is a vital part of the system to allow suits in order to effectuate reimbursement of medical expenses from the true wrongdoer. To extend immunity to

Allied in this case would in no way further the legislative purpose of the WC statutes, as set out by this Court in *Deller*. In fact, it would be contrary to the Legislative intent.

C. There Is No Competent Precedent That Allows Summary Judgment Based Upon “Special Employer” Or “Borrowed Servant” Principles

Whether a third-party can obtain deliberate intent protection from common law suits based upon the “special employer” rule is an issue of first impression in West Virginia. Notwithstanding that the lower court’s ruling is properly overturned because Allied is not the employer of Bowens, it is likewise flawed in its argument that is a “special employer” and the “borrowed servant” rule entitles it to immunity.² There is no statement from the West Virginia Supreme Court to support such a notion. The authority Allied cites, mainly *Maynard v. Kenova Chemical Co.*, does not resolve the issue in this case. See *Maynard*, 626 F.2d 359 (4th Cir. 1980).

The borrowed servant rule is being used in this case in a context it was not intended to. The purpose of the borrowed servant rule was to protect third parties from injuries inflicted by the alleged borrowed servant: allowing recovery from the “master” or employer who controls and is responsible for his or her acts. *Denton v. Yazoo & M.V.R.*

² Some confusion arises because Allied does not make clear that there is a difference between a “special employer” and when a “special employer” becomes liable or protected by WC under *Maynard*. A **special employer** is “an employer who has borrowed an employee for a limited period and has temporary responsibility and control over the employee’s work.” Blacks Law Dictionary. A **borrowed employee** is defined as “an employee whose services are, with the employee’s consent, lent to another employer who temporarily assumes control over the employee’s work. Under the doctrine of respondent superior, the borrowing employer is vicariously liable for the employee’s acts. But the employer *may* also be entitled to assert immunity under the workers’-compensation laws – Also termed borrowed servant; loaned employee; loaned servant; employee pro hac vice; special employee. Blacks Law Dictionary.

The term “special employer” and its variants, i.e. borrowed servant, loaned servant, special employee, all omit the element of the *Maynard* test that requires the employee to make a contract of hire with the special employer. Allied acknowledges that it is not Bowen’s employer, but states it is his “special employer” and thus entitled to WC immunity. But the definitions and citation from *Maynard* illustrate that being a “special employer” is different from actually becoming an employee for the purposes of WC. Therefore, Allied’s assertion that workers compensation immunity arises if it was Bowen’s special employer is erroneous. Regardless of this distinction, Allied was not a special employer nor did it become the employer of Bowen’s pursuant to the *Maynard* test requiring a deliberate intent cause of action.

Co., 284 U.S. 305, 52 S.Ct. 141 (1932); *Standard Oil Co. v. Anderson*, 212 U.S. 215, 29 S.Ct. 252 (1909); *American Tel. & Tel. Co. v. Ohio Valley Sand Co.*, 131 W.Va. 736, 50 S.E.2d 884 (1948); *Craft v. Pocahontas Coal Corp.*, 118 W.Va. 380, 190 S.E.2d 687 (1937). That is not the circumstance in this case, nor was it the circumstance in *Maynard*, the case upon which Allied relies heavily.

Not only is *Maynard* a per curiam, non-controlling opinion, with all due respect to the Fourth Circuit, its reasoning is flawed and should not be adopted by this Court. As often happens when one of the most conservative courts in the country, Fourth Circuit, attempts to interpret the law of a fairly liberal court, WV Supreme Court, inconsistencies arise. However, even if this Court ignores that Allied admits it was not Bowens' employer for WC purposes and does not apply the plain legislative intent of the WC Act, applying the *Maynard* test to our facts demands the same conclusion, Bowens was not the employee or "special employee" of Allied.

D. Assuming *arguendo* that *Maynard* applies, Bowens is not the employee or "special employee" of Allied.

The Fourth Circuit, in the *Maynard* per curiam opinion, relied upon the following criteria to determine whether a special employer is entitled to immunity for WC purposes:

1A Larson, Workmens' Compensation Law § 48.00 provides:

When a general employer lends an employee to a special employer, the special employer becomes liable for workmen's compensation only if:

- (a) the employee has made a contract of hire, express or implied with the special employer; and
- (b) the work being done is essentially that of the special employer; and
- (c) the special employer has the right to control details of the work.

When all three of the above conditions are satisfied in relations to both employees, both employees are liable for workmen's compensation.

Maynard, 626 F.2d at 362.

As Bowens never made a contract of hire with Allied and the special employer did not have the right to control the details of his work, Allied is not entitled to immunity for WC purposes.

1. *Bowens did not have a contract for hire with Allied*

Plaintiff is somewhat confused as to Allied's reasoning regarding this element of the *Maynard* test. To support its argument for the application of *Maynard*, Allied states that West Virginia has applied the "loaned servant's doctrine in a related context." See appx 283. However, Allied has a problem with West Virginia's application of the "borrowed servant" rule, because it requires the general employer, Manpower in our case, to completely relinquish control of the servant's conduct,³ which is stricter than the *Maynard* test of "right to control the details of the work." Allied next cites the West Virginia case *Lester v. State Workman's Compensation* to establish that "it is the legal relationship between the parties that determines the applicability of Workers' Compensation law," and therefore, if there is an employer-employee relationship, certain duties and responsibilities attach. See appx 284; 161 W.Va. 299; 242 S.E. 2d 443 (1978). Allied then makes a logical leap by concluding if you add the aforementioned rules and assume the *Maynard* test is satisfied, Allied is plaintiff's special employer and entitled to immunity.

³ It will be displayed below that Manpower did not relinquish control of Bowens to Allied.

What Allied attempts is to combine the favorable aspects of West Virginia law with the *Maynard* test to reach its desired conclusion of immunity. Allied understands that Manpower did not relinquish control of Bowens and therefore it cannot satisfy the West Virginia legal standard. It also understands that *Maynard's* first prong requires a contract of hire which did not exist between Allied and Bowen's. So Allied attempts to interject the West Virginia *Lester* analysis to display that the first prong of *Maynard* is satisfied because it doesn't mention a contract, only an employer-employee relationship.

Allied misinterprets *Maynard*, and thus interjects that its holding that companies cannot contractually farm out liability, relates to whether a contract existed between Bowens and Allied. *Maynard* cited *Lester* for this proposition, but in the context of whether the general employer and special employer can contract away liability, not whether a contract existed between the employer and alleged special employer. The *Maynard* court used *Lester* to distinguish it from the Fourth Circuit's prior holding which held the special employer was not entitled to WC immunity because the special and general employer had contractually agreed that the general employer would remain their employer. See *Kirby v. Union Carbide Corp.*, 373 F.2d 590 (4th Cir. 1967). *Maynard* clearly makes this distinction by noting "liability of an employer arises from the law itself and not from any contractual relationship *aside from that which is inherent in an employer-employee relationship.*" *Maynard* at 361 (emphasis added).

When *Maynard* analyzed whether or not the plaintiff made an implied contract of hire, it had to rely upon a New Jersey opinion which does not even delve into contractual principles. *Id.* at 362. When West Virginia law is applied to whether a contract existed,

as the *Maynard* Court should have done, it is clear that Bowens did not have an implied contract for hire with Allied.

In West Virginia, a contract is an agreement between two or more persons to do or not to do a particular thing. It gives rise to an obligation or legal duty, enforceable in an action at law. *Peerce v. Kitzmiller*, 19 W. Va. 564, 574 (1882). A contract is a promise or a set of promises, the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty. Restatement (Second) Contracts, § 1 (1981); 1 S. Williston A Treatise on the Law of Contracts, § 1 at p. 1 (3d ed. 1957). An implied contract "presupposes an obligation 'arising from mutual agreement and intent to promise but where the agreement and promise have not been expressed in words.'" *Case v. Shepherd*, 140 W.Va. 305, 310, 84 S.E.2d 140, 143 (1954) (quoting Williston on Contracts, Revised Ed., § 3). However, "[a]n implied promise must be as distinctly alleged in a declaration as an express one." *Syl. pt. 2, Bannister v. Victoria Coal & Coke Co.*, 63 W.Va. 502, 61 S.E. 338 (1908).

In the context of employment, West Virginia requires even more stringent proof that an implied contract exists. See *Adkins v Inco Alloys International, Inc.*, 187 W. Va. 219, 223, 417 S.E.2d 910 (1992)("an implied contract of employment must be clearly proved")(citing *Suter v. Harsco Corp.*, 184 W. Va. 734, 403 S.E.2d 751 (1991)). Quite simply, nothing suggests that Mr. Bowens had an express or implied contract of hire with Allied. Allied had a contract with Manpower, mutual consideration of provide us with labor and we will provide you with money. Accordingly, Allied had a duty to pay Manpower for Bowen's labor, but it was under no "obligation or legal duty" to pay

Bowens. Neither was Allied under a duty or legal obligation to pay Workers' Compensation premiums Bowens.

Allied writes that “[p]laintiff accepted employment from Manpower and, therefore, impliedly agreed to perform work for Manpower’s customers, including Allied Warehousing.” See appx 288. This statement is correct, but in no way establishes that Mr. Bowens had a contract for hire with Allied. Allied further states Bowens tasks were performed at the Allied facility under the direct supervision of Allied employees, Allied provided him training and he was considered an Allied employee for certain OSHA purposes, therefore, “it is clear that an employment contract existed between plaintiff and Allied Warehousing.’ *Id.* These factors are not even relevant to the existence of a contract, they relate to the third prong of Maynard regarding the right to control plaintiff’s work.

2. *Bowens admits his work was essentially that of Allied.*

3. *Manpower did not have the authority to exercise complete supervision and control over Bowen’s work.*

Allied cites *American Telephone & Telegraph Co. v. Ohio Valley Sand Co.* for the proposition that “under the so called ‘borrowed servant’ rule, a general employer remains liable for the negligent acts of his servant unless it affirmatively appears that the general employer has completely relinquished control of the servants conduct from which the alleged negligence arose to the person for whom the servant is engaged in performing a special service. See appx283. However, it does not apply this holding to the third prong of *Maynard* as that Court did.

The record clearly establishes that Manpower did not completely relinquish control of Bowen’s to Allied for several reasons. First, and foremost, Allied admits

Bowens was not under its direct control or observation. Second, numerous facts display that Manpower did not completely relinquish control to Allied.

After this Court previously ruled that Allied was not liable to Bowen's for the WC fraud and punitive damages claims, Bowens filed a motion for reconsideration regarding the punitive damages claim. See appx 165-170, 171-174. In its response as to why the punitive damages claim was properly dismissed, Allied stated "the facts in the record indicate that plaintiff, acted recklessly and contrary to the safety guidelines, and outside of Allied Warehousing's direct observation and/or control...." See appx 232. At the time of his accident, Bowen's was toiling in the Allied Warehouse doing essentially Allied's work. But somehow, when this accident happened, Bowens freed himself from the direct observation and control of Allied. Once again, when facts inure to the benefit of Allied they readily admit the truth, when the same facts are not beneficial to Allied, they change.

Undoubtedly, Allied exercised a degree of control over Bowen's work, but the facts display that Manpower did not relinquish control of its employee. During Jerry Jeffries 30(b)(7) deposition, as representative of Allied, he read the statement of its contract with Manpower:

A: "The customer recognizes Manpower's employer/employee relationship with its personnel, and accepts the obligation to discuss all matters concerning the employment, job assignments, pay procedures, et cetera, with Manpower."

Q. And in the context of this litigation, the customer would be Allied Warehousing, correct?

A. Yes.

Q. Do you disagree with that statement?

A. No.

Q. Did Allied ever pay Workers' Compensation premiums for Mr. Bowen's?

A. No.

See appx 337.

Allied will likely respond to this admission that evidence of contract between Allied and Manpower is irrelevant to the *Maynard* test. But Bowens does not introduce this evidence for that purpose. It is entirely relevant because Allied agrees with the statement which clearly evinces that Manpower retained a large degree of control over its employee Bowens. Even more important for the relevant legal standard, Allied admits it did not have the complete right to control Bowen's work. Further, Jeffrey agreed with this statement because it was true. Jeffries stated that "[i]t wasn't unusual to see them [manpower supervisory employees]. I might see Lisa or Jim a couple times a month at most." Further, Bowen's direct supervisor was a Manpower employee. During Mr. Jeffries deposition, he continuously asserted that he was Bowen's supervisor. But Mr. Jeffries admits that he was not even at the Allied Warehouse for most of the second shift when Bowens worked: "See, our shift overlaps the second shift...And before Jimmy and I would leave at four or five o'clock, whatever time we left, we would instruct John (Church) what needed to be done during the evening shift." See appx 335. While this may display a level of direction by Allied as to what work was to be performed, Manpower employee John Church controlled fellow Manpower employee Bowens work. Bowens seconded this notion by answering who his supervisor was as "[i]'d say John, because he's the one that told me what we had to do and things." See appx 343.

Clearly, when Allied admits it accepted "the obligation to discuss all matters concerning the employment, job assignments, pay procedures, et cetera, with Manpower," Manpower supervisory employees visited Allied several times a month, and

Bowens direct supervisor was a Manpower employee, Manpower did not relinquish complete control of Bowens.

Whether Bowen's is an employee of Allied for Workers' Compensation immunity is an issue of fact, disputed facts as to what degree of control it exercised over appellant. In *Barajas v. USA Petroleum Corp*, where labor contractors were provided to the defendant, the Court held that it could not say as a matter of law that the worker had an employment relationship with the special employer because it is generally an issue of fact left to a jury. *Barajas v. USA Petroleum Corp.*, 184 Cal. App. 3d 974, 229 Cal. Rptr. 513 (1986). Washington also recognizes that consent to an employment agreement should not be imputed to an employee as a matter of law if factual questions exist concerning the contract of hire. *Novenson v. Spokane Culvert & Fabricating Co.*, 91 Wash. 2d 550, 588 P.2d 1174 (Wash. 1979). The Court in this case essentially assumed that there was an implied employment contract because "[t]he issue of an implied contract...him showing up to work everyday, I think, creates an implied contract. I mean, he wasn't there volunteering his services." See appx 385. True, appellant was not volunteering his services. He was being paid by his employer, Manpower. And they also paid his workers' compensation premiums.

CONCLUSION

Mr. Bowens was an employee of Manpower. Allied cannot rest upon this truth to gain relief from liability, then attempt to change the facts to claim immunity for Worker's Compensation purposes under West Virginia law. Allied was properly sued under the negligence theory because they were not Mr. Bowens' employer. The record has demonstrated that Allied knowingly submitted fraudulent documents, *claimed* it was not

Mr. Bowens employer to avoid liability, and then claimed the exact opposite, that they were Mr. Bowens employer, for immunity from Worker's Compensation. For these reasons, and those demonstrated in the record this Court should reverse the decision of the Circuit Court granting Allied summary judgment.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BYRON BOWENS,

Plaintiff,

No. 11-0210

vs.

ALLIED WAREHOUSING SERVICES, Inc.,

Defendant.

CERTIFICATE OF SERVICE

13th I, Richard W. Weston, do hereby verify that I served the "Petitioner's Brief" this day of May, 2011, via U.S. Mail, postage prepaid, addressed to the following:

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