

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

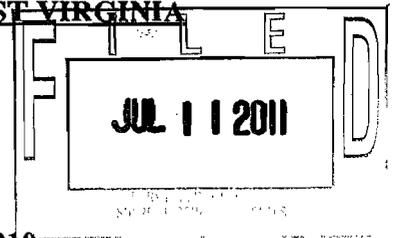
BYRON BOWENS,

Petitioner,

vs.

ALLIED WAREHOUSING SERVICES, Inc.,

Respondent.



No. 11-0210

(Civil Action No. 08-C-291)

PETITIONER'S REPLY BRIEF

Counsel for the Petitioner

Richard W. Weston (WVSB 9734)
WESTON LAW OFFICE
635 Seventh Street
Huntington, WV 25701
Phone: 304.522.4100
Fax: 304.697.5022
rww@westonlawoffice.com

Counsel for the Respondent

Thomas Scarr (WVSB 3279)
JENKINS FENSTERMAKER,
PO Box 2688
Huntington, WV 25726-2688
Phone: 304.523.2100
Fax: 304.523.2347
tes@jenkinsfenstermaker.com

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SUMMARY OF ARGUMENT

The Respondent has stated that they were not the employer of Mr. Bowens to avoid liability for Worker's Compensation Fraud. See appx 38-51. Once this liability was avoided by their stated claim that they were not the Petitioner's employer, the Respondent then claims to be Mr. Bowens' employer to gain immunity under Worker's Compensation. See appx 276-359. Allied was not the Petitioner's employer. This is an undisputed fact according to the Respondent's own repeated statements. See appx 41. Thus, Allied is not entitled to immunity under W.Va. Code § 23-2-6.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner reasserts his application for Oral Arguments. The criteria for Rule 20 is met. The Petitioner does not agree the petition is frivolous or that the matter is adequately presented in the record. This is a matter of first impression, and thus should be scheduled for Oral Arguments.

ARGUMENT

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

A. Petitioner did Meet the Requirements of Particularity

The Respondents properly point out that “[T]he essential elements in an action for fraud 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 petitioner relied upon it and was justified under the circumstances in relying upon it; and (3) that he was damaged because he relied upon it.” Syl. Pt. 1, *Lengyel v. Lint* 167 W.Va. 272, 280 S.E.2d 66 (1981) (citing *Horton v. Tyree*, 167 W.Va. 238, 139 S.E. 737 (1927)). Respondents also properly point out that to “establish fraud it must be clearly and specifically alleged.” See, e.g., Syl. Pt. 1, *Hunt v. Hunt*, 91 W.Va. 685, 114 S.E. 283 (1922). However, to state that the Petitioner did not meet these requirements is improper.

There is no question in this matter that the Petitioner has clearly and specifically showed that the act of submitting a training document purporting to be evidence of petitioner's training by manpower was induced by Allied. For Allied to claim in this matter that they had no idea why or for what reason this training form was to be used is ridiculous considering at the time they submitted the form to Manpower they were well aware of the ongoing Workers' Compensation claim and were also so entangled in the litigation in attempting to avoid Workers' Compensation liability through multiple admissions of not being the Petitioners employer.

Second, there is no question that the petition clearly and specifically set forth the reasons and evidence as to how the training form was false and fraudulent – it was submitted by the Respondent as proof of something the petitioner was certified in when in fact the petitioner never signed the document and had previously testified that he did not in fact take a written exam. Further, the petitioner has pointed out clearly and

specifically that the training document was relied upon by the ALJ in the decision making process. Because the ALJ stated that the petitioner had the opportunity to go back to work, but choose not to do so as part of it's opinion, the petitioner showed that the ALJ had to rely on this fraudulent training form in order to make take such a position. See appx 119-130.

Lastly, clearly the petitioner pointed out that he was damaged as a result of the ALJ denial.

For Allied to sit back and claim that they had nothing to do with the submission of these documents is about as incredible as them first claiming that they were not the petitioner's employer to avoid workers' compensation liability, but then claiming that they were some type of employer to avoid third party liability. Allied should be collaterally estopped from taking such an inconsistent position.

B. ALJ's Order did Rely on the Respondent's Fraudulent Submission

Very briefly, Allied goes on and on about how the training form in issue was not taken in to consideration by the ALJ because the training forms were "Non-medical." However, Allied ignores the ALJ findings. As stated in the ALJ's "Conclusions of Law" section, the ALJ stated as part of that section that "the claimant was released to return to work and chose not to do so." See appx 125. Clearly, such a decision could not have been made on strictly "medical testimony." In fact, as stated in petitioner's brief, testimony was received by the ALJ concerning the petitioners actions in seeking work with the restrictions that the doctors had placed on him. See Pet. Brief at 11. To dispute this, Manpower requested from Allied, even after all medical testimony was already

submitted, forms that would show that the petitioner was well qualified to cast doubt on his restrictions. Although Allied claims they have no idea why such forms were asked for, two things are clear: 1) Allied knew that the forms were not signed by petitioner as they were purported to be, and 2) that, surely, Allied would not turn such information over blindly at the request of another company without explanation.

II. Allied is Properly Sued under a Negligence Theory, not Deliberate Intent, because it was not the Petitioner's Employer.

Although the petitioner relies and believes that its brief and cited case law is sufficient to conclude this issue, the petitioner would argue that a common sense analysis to this issue of immunity for Allied will further expose their a la carte application of the law.

Allied previously asserted “[w]hen the alleged injury occurred, the plaintiff was an employee of...Manpower, not Allied Warehousing or Allied Realty,” See appx 41. This statement was obviously made to avoid liability purposes. It is the Respondent who clearly states who is the employer of Mr. Bowens was at the time of the accident, and states it multiple times throughout their motion and memorandum. See appx 38-51. The respondent in their “Response Brief” replies to this by stating “this point was not, and is not, made to directly avoid any type of liability, but simply to point out why Allied had no right or reason to submit any documents to Workers’ Compensation, and no real interest in or reason to be concerned about Petitioner’s Workers’ Compensation claim.” See *Response Brief* 18. This previous firm statement that the Respondent was not the

Petitioner's employee was made in a "Motion to Dismiss," and was further the basis upon which the motion was made. See appx 38-39. Obviously this motion was made to avoid liability. It is ridiculous to assert otherwise.

Further the above statement by the Respondent that Allied had "no real interest in or reason to be concerned about the Petitioner's Worker's Compensation claim," affirms the Petitioner's argument that the Respondent sought relief from liability for WC fraud by asserting that they were not Mr. Bowen's employer, and that they later tried to avoid liability for Worker's Compensation by asserting the exact opposite. *Id.* If the Respondent had, as they state, no interest in the Worker's Compensation claim of the Petitioner they obviously did not view themselves as his employer in any status.

The principals of collateral estoppel are and should be analogous to the way that Allied is picking and choose is defense. In one breath, when faced with workers compensation liability, Allied argues, over and over, that they are not the Petitioner's employer. In another breath, when faced with being liable in a third party action, they back track and claim that they are an employer, but only this time they are a "special employer." How convenient!

A ruling for Allied on this issue would allow all companies, in fact would encourage all companies, to stop hiring full time labor and instead hire "special employees" from places like Manpower because it would provide them with protection from paying Workers Compensation premiums and allow protection from being liable on third party claims to the dismay and prejudice of the everyday West Virginia worker. Surely, the legislature did not mean for such a ridiculous proposition to be imposed and this Court should not allow such an argument to have merit.

CONCLUSION

The Respondent has tried to take advantage of the protection from liability in this case by asserting that it was not the Petitioner's employer. Once gaining that protection the Respondent then sought protection from Workers' Compensation by claiming it was Mr. Bowen's employer. The Respondent has failed to give an adequate legal or logical argument for the application of their status as both Mr. Bowen's employer and not Mr. Bowen's employer. The Respondent should not be allowed to make two contradictory statements as the basis for avoiding liability in the WC fraud claim and the Workers' Compensation claim. Either the Respondent was Mr. Bowen's employer or they were not. Their status as his employer at the time of the accident cannot change based upon the type of claim made against them. Thus, this Court should reverse the decision of the Circuit Court granting Allied summary judgment.

**Byron Bowens,
Petitioner,**

By Counsel:

 11460
Richard W. Weston (WVSB 9734)
WESTON LAW OFFICE
635 Seventh Street
Huntington, WV 25701
Phone: 304.522.4100
Fax: 304.697.5022

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ALLIED WAREHOUSING SERVICES, Inc.,

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CERTIFICATE OF SERVICE

I, Richard W. Weston, do hereby verify that I served the "Petitioner's Brief" this
11th day of July, 2011, via U.S. Mail, postage prepaid, addressed to the following:

Thomas Scarr, Esq.
Jenkins Fenstermaker, PLLC
PO Box 2688
Huntington, WV 25726-2688

 WV 11460

Richard W. Weston (WVSB 9734)
WESTON LAW OFFICE
635 Seventh Street
Huntington, WV 25701
Phone: 304.522.4100
Fax: 304.697.5022