

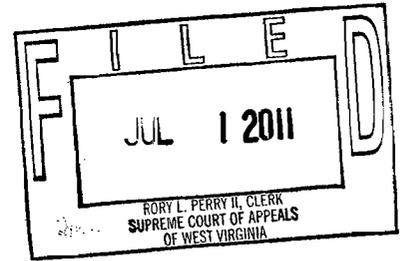
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BYRON BOWENS,

Petitioner,

VS.

NO. 11—0210



ALLIED WAREHOUSING SERVICES,
INC.,

Wayne County Circuit Court
Civil Action No. 08-C-291

Respondent.

BRIEF ON BEHALF OF RESPONDENT
ALLIED WAREHOUSING SERVICES, INC.

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II. Statement of the Case

A. Procedural History

On October 23, 2008, Petitioner Byron Bowens (“Petitioner”) filed suit against Allied Warehousing Services, Inc.(hereinafter “Allied”), Allied Realty Co.(“Allied Realty”), and Commercial Help, Ltd. d/b/a (“Manpower”), asserting various claims against the defendant parties, including negligence, negligent hiring, unsafe work place, Workers’ Compensation fraud, and statutory and/or common law fraud. *Appx. 7-18*. Allied and the other defendants timely responded and asserted certain affirmative defenses, including its Tenth Defense “any and all defenses, immunities and protection afforded by the provisions of the West Virginia Workers’ Compensation Act.” *Appx. 19-37*. Thereafter, Allied (on January 23, 2009) and Manpower (on January 8, 2009) filed Motions to Dismiss various claims in Petitioner’s Complaint, including his fraud claims. *Appx. 1, 38-51*.

Following a February 11, 2009 hearing on the Motions to Dismiss, the Court entered an Order which, among other things, denied the Motions to Dismiss the fraud claims, finding that they presented issues outside of the pleadings so the motions had to be considered as motions for summary judgment. *Appx. 159-164*. The Court also held that it should review the Administrative Law Judge’s decision regarding Petitioner’s Temporary Total Disability (“TTD”) benefits, which decision formed the basis of his fraud claims. Accordingly, Allied and Manpower filed Motions for Summary Judgment with supporting documentation, again seeking judgment on and dismissal of Petitioner’s fraud claims. By Orders dated April 15, 2009, the Court granted Summary Judgment to Allied on the Petitioner’s fraud claims. *Appx. 165-170*. The Court, by separate Order, also granted Manpower’s Motion for Summary Judgment.

Thereafter, on May 11, 2009, Allied filed a Motion for Summary Judgment on the Petitioner’s negligence claim based on Workers’ Compensation immunity. *Appx. 175-224*. The

Court determined, however, without objection, that the Motion was premature and that certain additional discovery was needed. Thereafter, the parties conducted additional discovery related to various issues raised by Allied's Motion.

By Order dated August 28, 2009, Manpower was dismissed as a party defendant following a compromise and settlement, and on September 4, 2009, Allied Realty was voluntarily dismissed by Petitioner by stipulation, leaving Allied as the only remaining defendant. *Appx. 4.*

On March 29, 2010, Allied renewed its Motion for Summary Judgment based upon Workers' Compensation immunity. *Appx. 276-359.* After full briefing and a hearing on April 28, 2010, (*Appx. 376-403*). The Court entered an Order on June 8, 2010 (*Appx. 404-408*) concluding that Allied was a "special employer" for Workers' Compensation purposes, thereby entitling it to employer immunity and granting Allied's Motion for Summary Judgment. In light of its ruling, however, the Court also granted the Petitioner leave to file an Amended Complaint to assert a deliberate intent claim against Allied pursuant to West Virginia Code Section 23-2-4. *Appx. 407.*

On July 7, 2010, Petitioner filed an Amended Complaint asserting a deliberate intent claim against Allied. *Appx. 409-414.* After some additional discovery related to the deliberate intent issues, Allied filed a Motion for Summary Judgment on November 15, 2010, (*Appx. 481-485 and 424-480*) on the basis that Petitioner failed to fully respond to discovery, failed to produce and identify any expert witness to support his claim, and failed to provide or identify any evidence concerning any genuine issue of material fact as to the elements of a deliberate intent claim. The undisputed evidence indicated that the only specific unsafe working condition that existed arose from Petitioner's own failure to follow established company policies and safety instructions of which he was well aware and that there was no evidence that Allied had

actual knowledge of any specific unsafe working condition. In addition, Petitioner was unable to show that Allied violated any safety statute, rule or regulation or that it intentionally exposed him to the alleged specific unsafe working condition.

The Petitioner failed to file any response or opposition to Allied's Motion for Summary Judgment, and failed to attend the December 20, 2010 hearing on the Motion. Accordingly, on January 4, 2011, the Circuit Court entered an Order granting Allied's Motion for Summary Judgment on Petitioner's deliberate intent claim. *Appx. 486-491.*

B. Statement of the Facts

1. Allied and Manpower

Allied is in the business of providing a wide range of warehousing services from various warehouse facilities located in West Virginia and Virginia. Although Allied directly employs certain supervisors and workers at its various facilities, due to the variability of its needs and for other business reasons, it has historically staffed its warehouse in Kenova, West Virginia, by obtaining temporary workers from a temporary employment agency, like Manpower.

As part of its ongoing relationship with Manpower, on August 12, 2006, Allied prepared a "pre-interview" form designed to assist Manpower in selecting workers for Allied's Kenova facility. *Appx. 447-450.* In responding to Manpower's questions, Allied indicated that Manpower employees would likely perform work with forklifts and therefore it needed workers with forklift operation experience. As a result, Manpower agreed to send Allied only experienced forklift operators and Allied in turn paid premium rates to Manpower for these employees. *Appx. 352.*

Although Allied expected Manpower to provide it with experienced forklift operators, it implemented additional testing and training before permitting Manpower temporary employees to operate machinery. *Appx. 352.* Allied provided them with manuals containing extensive

instructions regarding the proper way to drive and park a forklift, as well as warning signals and when to yield the right-of-way to pedestrians and other vehicles. *Appx. 342, 347-8, 451-455*. Allied also conducted a two part test to evaluate each temporary employees' knowledge and proficiency. Each employee was orally given a multiple choice (*Appx. 197-199*) and true/false test (*Appx. 200-203*) based on a Clark Equipment Operator Training form.¹ Allied also observed each new forklift operator for several days, after which a supervisor would complete an evaluation form entitled *Allied Warehouse Forklift Operator Field Test. Appx. 195-196; Appx. 337*.

Under the arrangement between Allied and Manpower, Manpower was responsible for payment of employee wages, payroll deductions and payment of unemployment and workers' compensation premiums. Each week Manpower would submit an invoice to Allied for time and work of all Manpower employees who were assigned to work and who worked for Allied. *Appx. 185-186; 188-190*. The amount charged by and paid to Manpower by Allied included a premium over Petitioner's actual wages to cover the costs of employing the Petitioner, including the payroll deductions, Federal and State unemployment compensation, and required payment of Workers' Compensation premiums.

2. Petitioner's Employment and Work for Manpower and Allied

Sometime during 2006, Petitioner began looking for a new job. (*Bowens Depo. at 74*)*. Prior to that time, Petitioner had held several jobs requiring heavy equipment operation. (*Bowens Depo. at 37-39*). Notably, he worked for two years at American National Rubber ("ANR") in Ceredo, where he listed truck and forklift operation among his daily duties. (*Bowens*

¹ This testing was done orally because through prior experience, Allied had learned that many of the employees it evaluated had difficulty reading and writing but were very capable forklift operators.

* Bowens' Deposition which was before the Circuit Court and which should have been part of Appendix does not appear to be fully included.

Depo. at 39). Petitioner testified that he received “hands-on” training and was not involved in any forklift accidents during his employment at ANR. (*Bowens Depo.* at 41-42). Additionally, Petitioner stated that he drove a truck for a number of years, and also operated a bulldozer and a “skidder,” a machine used to haul logs, while working in a sawmill. (*Bowens Depo.* at 62-65). *Appx.* 425.

Petitioner testified that he needed work within walking distance of his home. (*Bowens Depo.* at 87). He lived with an Allied employee, Doug Deboard (“Deboard”), near the Allied’s Kenova warehouse. Deboard told petitioner to contact J.R. Jeffrey (“Jeffrey”), a supervisor at Allied, regarding employment. (*Bowens Depo.* at 79). Petitioner subsequently visited Allied’s Kenova warehouse and told Jeffrey and other Allied employees that he had experience operating a forklift. (*Bowens Depo.* at 91). According to Petitioner, Jeffrey explained to him that Allied did most of its hiring through Manpower and suggested that he contact Manpower to obtain work at Allied. (*Bowens Depo.* at 87). *Appx.* 426.

Thereafter, on May 30, 2006, Petitioner applied for work through Manpower, and again claimed to have forklift operation experience. (*Bowens Depo.* at 91). He also completed and signed several forms, including one in which he indicates that he “understands that Manpower is strictly a temporary employment service, which does not offer or guarantee permanent employment to its employees”. *Appx.* 426.

Despite Petitioner’s preference, his initial assignment was not with Allied. Rather, Petitioner’s first assignment was at/for Wilbert Home Products. He worked for Wilbert Home Products as a general laborer for only two (2) days, from June 14 through June 16, 2006. Due to his sensitivity and aversion to certain chemical smells present, he exercised his right to decline further work at/or Wilbert Home Products. Petitioner did no additional work through Manpower

until August 21, 2006 when a position at Allied became open. Based on his direct representations to Manpower and to Allied that he had forklift operation experience, Petitioner was assigned to work for Allied. Petitioner completed the Allied temporary employee orientation and signed a form on September 18, 2006, indicating that he had received instruction regarding safety rules in the work area and on the work to be performed. (*Bowens Depo.* at 123-24)*. *Appx.* 342, 348. Petitioner never reported any concerns to Manpower regarding his qualifications or the type of tasks Allied asked him to perform. (*Bowens Depo.* at 105-06) *Appx.* 342.

3. Allied's Evaluation of Petitioner

As with other similar Manpower employees assigned and leased by Manpower to Allied, Petitioner was to have been a trained and fully qualified forklift operator when assigned to work for Allied. *Appx.* 352. Nevertheless, Allied tested and evaluated Petitioner's knowledge and proficiency regarding proper, safe operation of forklifts. See Allied Warehouse Forklift Operator Field Test dated October 1, 2006. *Appx.* 195-196. See also Jeffrey Nov. 6, 2008.Memo. *Appx.* 204; 313, 334, 352-3. Jeffrey, an Allied employee and warehouse supervisor and an experienced forklift operator and Petitioner's supervisor at the Kenova warehouse, conducted the two part evaluation process. *Appx.* 313.

First, on October 1, 2006, almost seven (7) month before Petitioner's accident, Jeffrey performed the two-part field test using a form, entitled "Allied Warehouse Forklift Operator Field Test," a two-page pre-printed form with spaces provided at the top for the date, the name of the individual being evaluated, and the name of the individual performing the evaluation. Jeffrey personally signed the form in the top right corner and printed Petitioner's name in the top left corner. *Appx.* 195-196. Petitioner has made no allegation of forgery or fraud regarding this form.

Jeffrey also used a form entitled "Clark Equipment Company Operator Training" to evaluate the Petitioner. *Appx. 197-199*. The form consists of various multiple choice and true/false questions regarding equipment operating procedures. As suggested by the title, the form was not created by Allied. It is a pre-printed form prepared by Clark Equipment Company, which Allied used, without modification, as a matter of convenience. The form contains a space in the top right corner for the date and a space in the top left corner for the "student's signature." Like the "Field Test," the Clark Equipment Company form is used by Allied in the regular course of its business to ensure that all workers who use equipment in its facility are properly trained and qualified. In this case, Jeffrey orally administered the test contained on the Clark Equipment Company form to the Petitioner on October 1, 2006, the same day he completed the "Field Test." Finally, as he did with the "Field Test," Jeffrey personally signed the Clark Equipment Company form in the top right corner and then printed Petitioner's name in the top left corner to indicate that the test, not the form, had been completed by the Petitioner. *Appx. 355*. Thereafter, as required by OSHA, Jeffrey certified and verified that Petitioner was capable of operating a forklift in Allied's warehouse. *Appx. 336-338, 352*.

4. Petitioner's Allied Work

Following his certification, Petitioner began working on a regular basis for Allied at its Kenova warehouse. He would report directly to Allied's Kenova Warehouse per the schedule determined by Allied. As determined and assigned to him by Allied, Petitioner's primary job was to move from one warehouse building to another, Ethaform, a product similar to heavy Styrofoam, which was being stored for a customer prior to resale. The warehouse building in which Petitioner was working was controlled by Allied. The forklifts and other equipment being used were owned by Allied. At all times, the manner, details and all aspects of the work

performed by Petitioner and his co-workers was determined, directed and controlled by Allied, through supervisor Jeffrey, or in his absence, other Allied representatives, including Jim Shelton and/or Randy Stephens. *Appx. 335-357.*

At the time of the April 23, 2007 accident, both Petitioner and John Church (“Church”), the other temporary employee involved in the subject accident, had significant experience performing the particular Ethafoam transfer operation. Church had been doing it for nearly two (2) years, and since his October 1, 2006 certification, petitioner had operated a forklift for Allied, performing the Ethafoam transfer operation without incident, for approximately seven (7) months. A typical day on the job for Petitioner and Church would include 50 to 75 trips virtually identical to the one on which the accident occurred.

5. April 23, 2007 Accident

On April 23, 2007, Petitioner and Church, both Manpower employees assigned to work for Allied at its Kenova warehouse, were working together, using forklifts to move loads of Ethafoam from one warehouse to another. Moving the foam to its destination required them to each load their respective forklifts with Ethafoam, travel up a small ramp through a large, garage-type door, and drive down another ramp before backing up and driving a short distance on to another loading area. (*Bowens Depo. at 140*) *Appx. 208.* After backing his load through the connecting warehouse door, Petitioner started down the second ramp. He alleges that his load then shifted on the forks, (*Id.*), and he stopped and exited his forklift leaving it parked on the edge of the ramp, directly in the lane of travel. (*Appx. 208 and Id.*) Despite his knowledge that Church, the other forklift operator, would follow right behind him, he stepped out of the vehicle and walked to the front of the forklift as he attempted to straighten the stack of Ethafoam. (*Id. at 140*). *Appx. 208.*

Petitioner remained in the forklift lane in the direct path of the oncoming forklift (*Id.* at 148), as Church picked up another load of Ethafoam and began following him through the connecting warehouse door. Petitioner testified that he was aware that Church would follow him up the ramp, through the door and down the other side, as it was the only way to enter and exit the warehouse. (*Bowens Depo.* at 148). According to Petitioner, he continued to struggle with his pile of foam as he heard the motor of Church's approaching forklift. (*Bowens Depo.* at 149) When he heard Church coming toward him, instead of sounding his horn, moving his forklift, or simply stepping to the side and out of the lane of traffic, Petitioner merely stood in the lane as Church's forklift moved closer and closer before eventually sliding into him. *Appx. 208 and* (*Bowens Depo.* at 148) According to Petitioner, he had time to shout four (4) or five (5) warnings to Church before the collision, which pushed Petitioner into his load of Ethafoam. (*Bowens Depo.* at 149).

6. Post Accident

Following the accident, Allied took various steps to record and/or report the incident. Allied completed an internal "Situation Report" (*Appx. 208*) on or about April 24, 2007. Allied also included Petitioner's injury on its OSHA 300 log. *Appx. 211, 354.*

Petitioner apparently filed a Workers' Compensation claim against Manpower, his general employer on April 23, 2007, the day of the accident. He initially sought treatment at Occupational Health & Urgent Care and Cabell Huntington Hospital in Huntington, West Virginia. Initial x-rays showed only a pelvic contusion. *Appx. 210.* Petitioner actually attempted to return to work two days after the accident, but Allied declined to permit him to resume his duties without a physician's clearance. Petitioner subsequently received further medical treatment, and a CT scan eventually revealed two non-displaced pelvic fractures, which had

since fully healed and resulted in no permanent disability or impairment. (*Bowens Depo.* at 154) and Medical Records of Dr. Allen Young. The ongoing pain of which the Petitioner continued to complain was principally in the lumbar region of his spine, where his medical records reflect a history of prior injury dating back to 1971.²

On May 7, 2008, over a year after the accident, Manpower requested that Allied provide it with certain documentation. Although Manpower records reveal that training documents and certifications had been provided to or made available for review by Manpower when they were originally prepared in October, 2006, it complied with Manpower's request and sent Manpower another copy of the documents. *Appx. 15, 338*. Thereafter, Manpower's Workers' Compensation counsel apparently submitted certain training documents to the West Virginia Workers' Compensation Office of Judges ("Office of Judges") in Petitioner's protest to two Claims Administrator's Orders closing his claim for TTD benefits. *Appx. -15*.

7. ALJ Decision

On August 29, 2008, the Office of Judges entered a *Decision of an Administrative Law Judge (Appx. 119-130) regarding* Petitioner's claim for TTD benefits. The decision followed Claims Administrator's Orders, dated December 3 and December 5, 2007, each of which had closed Petitioner/claimant's claim for payment of TTD benefits.

The twelve (12) page decision of Chief Administrative Law Judge ("ALJ") Timothy Leach contained thirty (30) "Findings of Fact." One finding which merely states that "[t]he employer submitted the Forklift Operator Field Test dated October 1, 2006." *Appx. 129*. The

² A worksite accident in the early 1970's resulted in a partial disc herniation throughout area of L1 to L5. In 1978, while working in a coal mine, petitioner was struck in the back when a portion of the mine collapsed. He was subsequently to pass the physical exam required to return to work in the mine. He was also involved in two (2) September 1999 motor vehicle accidents. Tri-State MRI records from Jan. 3, 2000, report "mild worsening of the L5-S1 disc consistent with degenerative change . . . minor degenerative changes noted in the lower lumbar spine.

“Forklift Operator Field Test” was also identified in the “Record Considered” section of the decision. The decision described the document as “Not Medical.” *Appx. 127-130*. Significantly, the ALJ’s decision does not even make reference to the Clark Equipment Company Operator’s Training form, the document that Petitioner claims was fraudulent.

Petitioner did not appeal the ALJ’s decision, but on October 23, 2008, filed his complaint in this case asserting multiple claims based on various alternative theories against various defendants. In Counts V and VI of the Complaint, Petitioner alleges that Allied committed Workers’ Compensation fraud and statutory and/or common law fraud by allegedly forging the “Clark Equipment Company Operator Training” document and sending it to Manpower which submitted it to the Office of Judges. *Appx. 16-17*.

III. Summary Arguments

A. April 15, 2009 Order Granting Allied Summary Judgment on Petitioner’s Fraud Claims.

The Circuit Court’s April 15, 2009 Order (*Appx. 165-170*) granting summary judgment and dismissing Petitioner’s fraud claims is clearly supported by applicable law and the undisputed evidence. As is outlined and explained in the Court’s April 15th Order, Petitioner failed to satisfy the requirements and prove the essential elements of a Workers’ Compensation fraud claim, as established by this Court in *Persinger v. Peabody Coal Company*, 196 W. Va. 707, 719, 474 S.E.2d 887,889 (1996), and also failed to prove the essential elements of a common law fraud claim. The conduct Petitioner claims was fraudulent was the alleged submission to the Office of Judges of a training document, which Petitioner claims to be false. First, there is no evidence in the record that the specific training document at issue was even submitted to the Office of Judges. To the extent the document was submitted to the Office of Judges, it was done so by Manpower, not Allied, and therefore the alleged fraudulent act was not

even the act of Allied. Moreover, there is no evidence that Allied knew what Manpower was going to do with the document, and no evidence that Allied induced or played any role in Manpower's decision to submit any training documents to Workers' Compensation. Additionally, there is absolutely no evidence the ALJ, relied upon any documents for any purpose. Similarly, Petitioner was unable to provide any evidence indicating that he was damaged or injured by Manpower's submission of any training documents to the ALJ since issues related to the award, denial or suspension of Temporary Total Disability ("TTD") benefits are based solely upon medical evidence related to a claimant's physical condition or maximum degree of improvement as determined by a physician pursuant to the criteria set forth by the West Virginia Legislature.

Training documents are non-medical documents which, as a matter of law, were irrelevant to and had absolutely no impact on the ALJ's decision on Petitioner's TTD benefits. Petitioner's argument that the ALJ's decision was not based solely on medical issues, but was influenced by Manpower's submission of a training document, is without factual, legal or logical support of any kind.

B. June 8, 2010 Order Granting Allied Summary Judgment based on Workers' Compensation Exclusivity and Immunity

The Circuit Court's June 8, 2010 Order granting Summary Judgment and dismissing Petitioner's negligence claims based on Workers' Compensation exclusivity and immunity (*Appx. 404-408*) is clearly supported by applicable law and the undisputed evidence. As outlined in the June 8, 2010 Order, relying on longstanding, universally accepted principles, and based on the undisputed evidence, the Circuit Court concluded that the Petitioner was a lent or borrowed employee, and pursuant to the "loaned servant doctrine," Allied was Petitioner's "special employer" entitled to Workers' Compensation immunity. As a result, Petitioner's exclusive and

sole remedy for a work related injury, was a claim for Worker's Compensation benefits, and/or a civil action for injury resulting from alleged "deliberate intent." The Circuit Court's analysis and ruling are in accord with the decision of Fourth Circuit Court of Appeals, interpreting West Virginia law (*See Maynard v. Kenova Chemical Co.*, 626 F.2d 359 (4th Cir. 1980)); various authoritative treaties, including Larson's on Workers' Compensation Law, and virtually unanimous decisions on the same issue from state and Federal jurisdictions throughout the country.

Petitioner was a leased employee of Manpower, a temporary employment agency that is in the business of supplying workers to others. Petitioner knowingly and willingly accepted his assignment to work at and for Allied. As Courts have held, as a matter of experience and based on present business practices, an employee may be employed by more than one employer. When a dual employment situation and relationship exists, the employee has both a "general employer" and a "special employer". Both are subject to the laws and regulations that provide safety and other employment protections to employees, and both are also entitled to the benefits of their employer status, including the exclusivity and immunity provided by West Virginia's Workers' Compensation laws.

The existence of the special employment relationship is a question of law for the Court to decide, particularly where the relevant evidence is undisputed. Applying the generally accepted three step analysis set forth in both *Larson* and *Maynard*, and generally relied upon by jurisdictions throughout the country, the Circuit Court properly determined that a special employee/employer relationship existed between Petitioner and Allied. It is undisputed and in fact admitted that the work performed by the Petitioner was the work of and for the benefit of Allied. In addition, the undisputed evidence indicates that Allied had the right to control, and did

in fact, direct and control the details of the work being performed by the Petitioner. Finally, the undisputed evidence indicates that, as a leased employee assigned to work for Allied, Petitioner had an implied contract for hire with Allied. Petitioner had the right to reject any assignment, but accepted his assignment and consented to his employment at Allied.

Contrary to Petitioner's argument, Allied did not at any time, make a judicial admission, representation or argument that it was not a special employer of the Petitioner. In fact, in its original answer, Allied asserted that it was entitled to the Workers' Compensation Act employer immunity. *Appx. 31*. Throughout the litigation, Allied merely stated that while it was not the technical or direct employer of the Petitioner with respect to the processing and litigation of Workers' Compensation claims, it was Petitioner's special employer pursuant to the "loaned servant doctrine", and accordingly was subject and entitled to both the obligations and the rights of that special employment relationship. Petitioner sought and received Workers' Compensation benefits, his exclusive remedy, and based on longstanding generally accepted principles both Manpower, his general employer, and Allied, his special employer, are entitled to Workers' Compensation Act immunity.

IV. Statement Regarding Oral Argument and Decision

Based on the criteria established by the Court in Rule 18 of Rules of Appellate Procedure, Allied believes that oral argument is unnecessary. The facts and legal arguments are adequately presented in the Briefs and Record on Appeal, and the decision process would not be significantly aided by oral argument. Allied also believes that oral argument is unnecessary because the disposition issues have been authoritatively decided and the appeal is frivolous.

V. Argument

- A. April 15, 2009 Judgment Order Dismissing Petitioner's Fraud Claims (*Appx. 165-170*).

Petitioner's claim of fraud against Allied relates solely to Petitioner's Workers' Compensation claim. As discussed below, the applicable law, the undisputed facts of record, and basic logic required the Circuit Court to grant summary judgment on Petitioner's fraud claims.

Petitioner can set forth no set of facts that indicate or even suggest that Allied committed Workers' Compensation fraud and/or statutory or common law fraud as alleged in Counts V and VI of his Complaint. Petitioner's allegations stem from the alleged submission of a training document by Manpower to the Office of Judges as part of Petitioner's claim for TTD benefits. Pursuant to West Virginia Code Section 23-4-7a(e), the issue of continuation or termination of TTD benefits is solely a medical issue related to whether the petitioner/claimant has reached "maximum degree of improvement," has been medically released to return to work and/or whether the petitioner/claimant is engaging in abuse, such as "physical activity inconsistent with his or her Workers' Compensation injury." Because the training documents allegedly provided to the Office of Judges by Manpower do not concern any medical issues, there could be no reliance, and there was no reliance, upon those documents for purposes of the issue before the ALJ and, therefore, Petitioner cannot make out a fraud claim against Allied.

Petitioner's accident occurred on April 23, 2007. *Appx. 207-209*. On or about May 7, 2008, over a year after the accident and over a year and a half after Jeffrey tested and certified Petitioner, Manpower requested that Allied provide it with a copy of documentation of Petitioner's evaluation and certification. Although the evidence indicates that at least some of these documents were provided to, or made available for review by Manpower at the time they were originally prepared in October 2006, (*Appx. 338*), Allied nevertheless again provided them to Manpower as requested. For some unknown reason, Manpower's counsel apparently submitted at least some of these documents to the Office of Judges.

On August 29, 2008, the Office of Judges affirmed the two prior Claims Administrative Orders and closed Petitioner's TTD benefits. (*Appx. 81-92*). Based on unsupported speculation, Petitioner argues that summary judgment was inappropriate because he claims "there is a genuine issue as to whether the [training] documents were relied upon by the ALJ." *Appx. 141-142*. There is no such issue.

1. The claim for Workers' Compensation fraud in Count V of Petitioner's Complaint against Allied was properly dismissed because the Petitioner did not plead fraud with particularity and/or could not prove any set of facts that would support a finding of Workers' Compensation fraud.

It has long been held 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) ("He who alleges fraud must clearly and distinctly prove it, either by circumstantial or direct evidence. It will not be presumed from doubtful evidence, or circumstances of suspicion. The presumption is always in favor of innocence and honesty.") This requirement is reinforced by Rule 9(b) of the West Virginia Rules of Civil Procedure: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."

Petitioner did not plead sufficient facts to state a claim for Workers' Compensation fraud. On the requirements for pleading Workers' Compensation fraud, the West Virginia Supreme Court of Appeals has held that:

In order for a Petitioner employee to prevail on the narrowly construed cause of action by the employee against an employer for fraudulent misrepresentation concerning the employee's Workers' Compensation claim, the employee must (1) plead his or her claim with particularity, specifically identifying the facts and circumstances that constitute the fraudulent misrepresentation, and (2) prove by clear and convincing evidence all essential elements of the claim, including the injury resulting from the fraudulent conduct. A Petitioner employee is not entitled to recover unless the evidence at trial is persuasive enough for both the judge and jury to find substantial, outrageous and reprehensible conduct which falls outside of the

permissible boundary of protected behavior under the statute. If the pleadings or evidence adduced is insufficient to establish either of the two factors stated above, the trial court may dismiss the action pursuant to Rule 12(b), Rule 56 or Rule 50 of the West Virginia Rules of Civil Procedure.

Syl. Pt. 3, *Cobb v. E.I. duPont deNemours & Co.*, 209 W.Va. 463, 549 S.E.2d 657 (1999) (citing Syl. Pt. 4, *Persinger v. Peabody Coal Co.*, 196 W.Va. 707, 474 S.E.2d 887 (1996)).

The court also requires application of the basic test for fraud. *Cobb*, 209 W.Va. at 467, 549 S.E.2d at 661. “[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*, 104 W.Va. 238, 139 S.E. 737 (1927)).

Under *Persinger*, *Cobb*, and the basic test for fraud, a plaintiff must plead, with particularity, an injury suffered as a result of justifiable reliance on “material and false” fraudulent conduct. In a “*Persinger*” action for Workers’ Compensation fraud, the element of “detrimental reliance” refers not to the plaintiff, but to the party to whom the allegedly material and false information was conveyed. *Cobb*, 209 W.Va. at 467, 549 S.E.2d at 661. Thus, it is a question of whether the ALJ relied on some false representation to Petitioner’s detriment.

First, there is no allegation that Allied submitted or induced the submission of any training document to the Office of Judges. Petitioner even acknowledges in his complaint that Manpower, not Allied, submitted the training documents to the Office of Judges. *Appx. 15*. There is no allegation that Allied played any role in Manpower’s decision to submit the documents to the Office of Judges.

It is undisputed that Petitioner was an employee of Manpower (*Appx. 7*) for Workers’ Compensation premiums and claims processing purposes, not Allied. Contrary to

Petitioner's argument, 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. Furthermore, The Clark Equipment Company Operator Training document (*Appx. 197-203*), created by Allied almost seven (7) months before Petitioner's accident, was not "material" to any Workers' Compensation issue or decision. Workers' Compensation benefits are granted on a no-fault basis when an injury occurs in the course of and resulting from the employment, and as an absolute matter of law, Petitioner's level of training would have no bearing on any Workers' Compensation decision.

Under West Virginia Code § 23-4-7a(e) a private carrier shall suspend the payment of TTD benefits when the physician or physicians selected by the Commission conclude, or when the authorized treating physician advises, that the claimant reached his maximum degree of improvement or that he is ready for disability evaluation.

The section further states that:

in all cases, a finding . . . that the claimant has reached his or her maximum degree of improvement terminates the claimant's entitlement to temporary total disability benefits regardless of whether the claimant has been released to return to work. Under no circumstances shall a claimant be entitled to receive temporary total disability benefits either beyond the date the claimant is released to return to work or beyond the date he or she actually returns work. (emphasis added)

Petitioner argues that the ALJ's TTD benefit decision (*Appx. 81-92*) "was not based solely upon medical issues." He makes this statement without any factual basis or support. There is not one scintilla of evidence that the ALJ affirmed the closure of Petitioner's TTD claim based upon anything other than the medical evidence that the Petitioner was not totally disabled; that the

Petitioner had been released to return to work by his doctors; and that the doctors had found that Petitioner had reached maximum degree of medical improvement. *Appx. 87.*

The written decision discusses only the medical evidence submitted as the sole reason for affirming the closure of the TTD claim. The decision clearly articulates that the affirmation of the closure of the TTD claim was based on the facts that the Petitioner was released to work and that he had reached maximum medical improvement. In accordance with West Virginia Code § 23-4-7a, the TTD claim had to be closed.

Nevertheless, the Petitioner claims that Manpower's submission of a nonmedical training document caused the Office of Judges to affirm an order closing his TTD benefits. This allegation appears to be based solely on Petitioner's averment that the document is "listed as employer evidence in the Record Considered." *Appx. 15.* First, the mere fact that a document is listed in the record does not mean that the Office of Judges relied on it or that it had any impact on the ALJ's decision. Second, as indicated, the issue of the payment of TTD benefits is a purely medical issue. Testing and training documents would have no bearing on the decision to grant or deny TTD benefits. Thus, even assuming that Allied sent Manpower a false training document (which it did not), which Manpower subsequently submitted to Workers' Compensation, Petitioner's chances of receiving Workers' Compensation benefits were neither effected nor damaged by it as a matter of law.

Petitioner's argument that the document at issue affected the Office of Judges' decision to deny Petitioner's TTD benefits is not only pure speculation, it is contrary to the ALJ's decision itself. The ALJ's decision contains a very detailed and thorough discussion of the factors and evidence that prompted and supported its conclusions and decision. As noted by the ALJ, a suspension of TTD benefits is required when a claimant has reached his maximum degree

of medical improvement ("MMI"), or, when a claimant has been released to return to work. *Appx. 85 and W.Va. Code §23-4-7(a)*. These factors call only for the consideration of objective medical evidence, not the Petitioner's credibility on any issue, and, in fact, the decision contains no explicit or implicit discussion whatsoever of Petitioner's credibility.

Instead, the ALJ noted that Petitioner failed to submit sufficient medical evidence demonstrating a continued disability. *Appx. 87*. As noted by the ALJ in his findings of fact, Petitioner was released to return to work by Allen Young, M.D., on October 5, 2007, and determined to have reached MMI by Dr. Young on September 14, 2007 and also by Paul Bachwitt, M.D. *Appx. 82-86*. These objective medical considerations justified the ALJ's decision to affirm the Petitioner's suspension of TTD benefits. *Appx. 87*.

In the twelve (12) page decision of the ALJ, there are thirty (30) paragraphs detailing the Findings of Fact. The twenty-eighth (28th) paragraph states in totality: "The employer submitted the Fork Lift Operator field Test dated October 1, 2006." *Appx. 85*. In the "Record Considered", there is a reference to the Allied Warehouse Forklift Operator Field Test found under "Employer Evidence," and it categorized the document as "Not Medical." Of greatest significance is the fact that the only document Petitioner has claimed fraudulent, the Clark Equipment Company Operator Training document, because Jeffrey printed Petitioner's name on the signature line, is not mentioned or referred in the ALJ's decision as being submitted to or considered by him.

Moreover, in the seven (7) paragraphs comprising the "Discussion" in the decision of the ALJ, (*Appx. 85-87*) there is absolutely no reference to the training documents, nor is there any evidence of reliance upon the training documents. There is also no reference to the Petitioner's testimony that he was not trained on a forklift. Some of the language in the last paragraph of the "Discussion" and the "Conclusions of Law" in the Decision states:

After again reviewing the claim, there was insufficient information to pay additional temporary total as the evidence has not established the claimant was totally disabled. The evidence revealed the claimant was released to return to work but chose to pursue Social Security disability. The claimant was found to have reached maximum medical improvement regarding the April 23, 2007, injury,

Conclusions of Law:

The preponderance of the evidence has established the Claims Administrator's Orders dated December 3, 2007, and December 5, 2007, should each be affirmed as the claimant was released to return to work and chose not to do so. Further, the claimant was found to have reached maximum medical improvement regarding the April 23, 2007, injury. Therefore, the Claims Administrator's Order should be affirmed.

The ALJ also noted that Petitioner decided to file for Social Security disability rather than to return to work, and it is from this comment that Petitioner attempts to construct a triable issue of fact. Petitioner asserts that the evaluation document attacks his credibility inasmuch as he claims it is inconsistent with his Workers' Compensation hearing testimony. However, various relevant portions of Petitioner's hearing testimony (*Appx. 237-244*) are conveniently ignored by Petitioner. When his testimony is taken as a whole, it is clear that it is not inconsistent with the document discussed above. Petitioner testified that when asked if he could drive a forklift, he informed Manpower that "yes he could", and that he had driven them before, at least suggesting that he was knowledgeable and experienced in the operation of forklifts. *Appx. 238*.

OSHA regulations do not require that an employer or a lessor of workers like Allied re-train previously trained and experienced forklift operators. Rather, OSHA merely requires that an employer certify or verify that the worker is trained and qualified to operate a forklift. *See* 29 CFR 29 CFR 191.178(1)(i)(ii) and 178(1)(5). As discussed above, the document at issue was a test completed by Jeffrey based on questions orally asked of Petitioner. Allied's testing of

Petitioner supplemented its observation of Petitioner's forklift operation over an extended period of time and were both part of Allied's process of verifying Petitioner's knowledge, experience and training and overall qualification to operate a forklift. As testified by Petitioner during the Workers' Compensation hearing, Allied observed him operate a forklift and move loads. That along with the oral testing, were used by Allied to confirm that Petitioner was indeed capable and qualified to operate forklifts and move the required loads. *Appx. 238*.

Furthermore, other than the bold conclusory allegation that the training document was a forgery, Petitioner did not even plead sufficient facts to establish that the "Clark Equipment Company Operator Training" document (*Appx. 197-203*) which Allied sent to Manpower, constituted a false representation. This component of Petitioner's allegations relies on the assumption that Petitioner's printed name on the form is a signature. In actuality, it was simply the printed name of the Petitioner, printed to indicate that the test (not necessarily the form) was completed by Petitioner. *Appx. 335*. Even a cursory review of the document in question reveals that while Petitioner's printed name on the document appears in a space provided for a signature, the Petitioner's name is clearly not purported or represented to be Petitioner's signature. Petitioner's name was simply printed by Allied supervisor Jeffrey in the same manner in which he printed Petitioner's name on the "Allied Warehouse Forklift Operator Field Test," (*Appx. 195-196*) completed on the same day.

2. The claim for statutory and/or common law fraud in Count VI of Petitioner's Complaint against Allied was properly dismissed because Petitioner has not pled fraud with particularity and/or could not prove any set of facts that would support a finding of fraud.

Rule 9(b) of the West Virginia Rules of Civil Procedure provides: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." In West Virginia, "[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*, 104 W.Va. 238, 139 S.E. 737 (1927)). The allegations of fraud contained in Count VI of Petitioner's Complaint (*Appx. 16, 17*) are not pled with particularity and they fail to state a claim upon which relief could be granted. All of the substantive allegations in Count VI are contained in one short paragraph in which Petitioner asserts that Allied's alleged forgery of one of Petitioner's training and testing document was intended to (1) harm Petitioner's chances of recovery in his Workers' Compensation proceedings and (2) deter Petitioner from filing suit regarding the alleged negligence of Allied.

As argued more fully above, Allied did not submit any documents in Petitioner's Workers' Compensation claim, Manpower did. Even if Allied did seek to harm Petitioner's chances by sending the documents to Manpower, which, of course, it did not, the document at issue could not have had any bearing on any Workers' Compensation decision as a matter of law, because, pursuant to West Virginia Code § 23-4-1, Workers' Compensation benefits are granted on a no-fault basis when an injury occurs in the course of employment, and the payment of TTD benefits is based solely on the submission of medical evidence. W.Va. Code § 23-4-1c(c).

B. As Petitioner's "special employer," Allied is entitled to employer immunity from Petitioner's negligence claims are barred.

The public policy goal of Workers' Compensation immunity laws is to protect the employer-employee relationship by setting forth clear duties and responsibilities, to provide an employee with prompt compensation for work related injuries and to prevent a litigious and adversarial work environment. In this case, Petitioner worked in the Allied workplace. He worked

with Allied employees and supervisors on a daily basis, and when he was injured he received Workers' Compensation benefits based on premiums ultimately paid by Allied through Manpower. Accordingly, the policy purpose behind employer immunity is most applicable to the day-to-day employer-employee relationship, which was the relationship that existed between Petitioner and Allied.

Petitioner has no reasonable basis to argue against Allied's immunity in this case. Under the "borrowed servant" or "loaned Servant" doctrine³, as expressly adopted by the West Virginia Supreme Court of Appeals, a temporary employee engaged in negligent conduct while working for an employer would subject the employer to liability for that temporary employee's negligence if the control element was satisfied. *See American Telephone & Telegraph Co. v. Ohio Valley Sand Co.*, 50 S.E. 2d 884, syl. Pt. 1 (W.Va. 1948). A later decision, *Burdette v. Maust Coal and Coke Corp.*, 222 S.E. 2d 293, 299 (W.Va. 1976), reaffirmed the acceptance of the "borrowed servant" rule. It would seem illogical indeed to saddle an employer with this obligation with respect to temporary employees, but deny that employer the corresponding benefit of immunity from a tort action.

Any argument that Petitioner cannot have two employers entitled to Workers' Compensation immunity, and any argument that Allied is not entitled to immunity because it did not directly pay for Petitioner's Workers' Compensation coverage are misplaced. *See* the Fourth Circuit's decision in *Maynard v. Kenova Chemical Co.*, 626 F.2d 359 (4th Cir. 1980) applying West Virginia law, wherein the court awarded immunity to a special employer following the plaintiff's receipt of a Workers' Compensation award against his temporary employment service employer. As in *Maynard*, a dual employment situation, the plaintiff's employer (a temporary

³ As indicated earlier, the terms "loaned servant" and "borrowed servant" are interchangeable. There is no distinction between the two in contexts addressed herein.

employment service) billed the special employer “to compensate for expenses and profits, including Manpower’s cost of subscribing to the Workmen’s Compensation Fund.” 626 F.2d at 360. In this case, Petitioner’s temporary employment service employer, Manpower, likewise billed Allied, and therefore, Allied, by proxy, was in fact paying for Petitioner’s Workers’ Compensation coverage and shares in the immunity it affords.

The Fourth Circuit’s decision in *Maynard* recognizes the realities of the temporary agency and temporary employee’s role in the work force. When individuals seek employment through an employment agency, like Manpower, they are aware that it is not the agency for whom they will be working; rather they will perform work for the customers of the agency. The temporary employee has opted to engage in this species of employment relationship, and treating temporary employees the same as permanent employees in this context makes perfect sense.

Perhaps the most compelling basis for limiting temporary employees to the relief provided by Workers’ Compensation is that the employer is liable to the injured employee for Workers’ Compensation benefits. Liability for Workers’ Compensation benefits must not be confused with actual payment of those benefits. When an employee has dual employers pursuant to the “loaned servant” doctrine, “both employees are liable for Workers’ Compensation”. *Maynard*, 626 F.2d at 362. Even though an employer and temporary agency may agree between themselves that the temporary agency is responsible for payment of benefits, the employer would be liable if the temporary agency defaulted in that obligation. *Cf. Bilotta v. Labor Pool of St. Paul, Inc.*, 321 N.W.2d 888 (Minn. 1982). Precisely as West Virginia’s statutory framework intended, the employer has both the benefit of tort immunity and the obligation of Workers’ Compensation liability imposed by the Workers’ Compensation statute.

1. Allied has not taken any position in this litigation which is inconsistent with its status as Petitioner’s “special employer”, entitled to employer immunity.

Petitioner attempts to argue that Allied has taken prior positions in this litigation which are inconsistent with its argument that it is Petitioner's "special employer". Petitioner's argument misrepresents the procedural history of the case and Allied's prior legal and factual arguments. Petitioner takes certain previously made arguments out of context and argues that Allied previously contended that it was not Petitioner's employer, and therefore, it is not entitled to Workers Compensation immunity. Petitioner's argument in this regard was fully discussed during the April 28, 2010 Circuit Court hearing on Allied's motion for summary judgment and is addressed in the Court's June 8, 2010 Order.

There is no dispute that Manpower was Petitioner's employer. Petitioner was hired by Manpower, a temporary employment service with the knowledge and understanding that he would be assigned to work at, for and under the direction of certain Manpower customer(s). Following his accident, Petitioner sought and received Workers' Compensation benefits, his exclusive remedy, and based on longstanding, generally accepted principles, both Manpower, his general employer, and Allied, his special employer, are entitled to Workers' Compensation employer immunity.

The fact that Petitioner was a Manpower employee is not inconsistent with him also being an employee of Allied for certain purposes. Under the laws of West Virginia, a worker may have more than one employer at the same time. In that situation, both employers are ultimately obligated to ensure the employee is provided with Workers' Compensation. The question is and always has been whether this case involves a dual employment situation where Petitioner is an employee of both Manpower, its general and administration employer, and Allied, its special and operational employer. From inception of the case, in its original answer, Allied asserted that it is entitled to Workers' Compensation employer immunity. Throughout the

litigation, Allied merely stated that while it was not the technical or general employer of Petitioner, it was Petitioner's special employer pursuant to the "loaned" servant doctrine, and accordingly was subject and entitled to both the obligations and the rights of that special employment relationship.

In support of its prior dispositive motion with respect to Petitioner's fraud claims, Allied readily acknowledged that Petitioner was an employee of Manpower for Workers' Compensation premiums and claims processing purposes. Contrary to Petitioner's argument, however, this point was not made to avoid any type of liability but simply to point out why Allied was not directly involved in Petitioner's Workers' Compensation claim, and why Allied had no right or reason to submit any documents to Workers' Compensation in Petitioner's claims, including any training documents.

2. Simple statutory construction of West Virginia Code § 23-2-6 alone does not resolve whether Allied is an Employer entitled to immunity.

Petitioner argues that Petitioner "was never an Allied employee" and therefore, Allied is not entitled to immunity under the Workers' Compensation Act. Petitioner's argument begs the question: was Petitioner an employee of Allied? The issue before the Circuit Court and now this Court, is whether Allied is an "employer" entitled to immunity under the Act. There is no dispute that Allied is a subscriber in good standing to the West Virginia Fund, just not specifically for Petitioner, whose Workers' Compensation premiums are paid by Manpower.

The Act provides only broad definitions of "employer" and "employee", which do not define them in a way that resolves the issue before the Court. West Virginia Code §23-2-1 simply provides that "all persons, firms . . .regularly employing another person . . . for the purpose of carrying on any form of industry, service or business . . . are employers within the meaning of this chapter." West Virginia Code §23-2-1a provides that "all persons in the service

of an employer and employed by them for the purpose of carrying out the industry, business, service or work in which they are engaged in is an employee.”

Nevertheless, regardless of how the Workers’ Compensation Act defines “employer” and “employee”, it is the legal relationship between the parties that determines applicability of the Workers’ Compensation Act. According to the Court in *Lester v. Workers Compensation Com’r.*, 161 W.Va. 299, 313, 242 S.E.2d 443, 451 (W.Va 1978), if there exists an employer/employee relationship, the statute imposes certain duties and responsibilities, and certain rights and benefits, on the parties to that relationship. This Court has also made it clear when considering whether one is an employee or an independent contractor within the meaning of the Act, that the Act must be given a liberal construction and any doubt must be resolved in favor of his status as an employee. *Myers v. Workers Comp. Com’r.*, 150 W.Va. 563, 148 S.E.2d 664 (W.Va. 1966). The *Myers*’ court also held that ordinarily when one person is retained to render services for another, there is a presumption that the relationship of employer and employee exists.

Even is one was to argue that the Act is somehow ambiguous because it fails to more precisely define “employer” so as to determine if a special employer is an employer recognized under the Act entitled to share immunity, and therefore must be construed, under the principles of statutory construction, the Court must consider the entire statute as a whole, and also must consider the reason for and spirit of the law, and the purposes that induced the legislature to enact it, in order to discover and apply a statutory meaning most consistent with the statute’s policies and purposes. See *Sorenson v. Colibri Corp.*, 6509 A.2d 125 (1994 R.I.). In *Bias v. Eastern Assoc. Coal Corp.*, 640 S.E.2d 540 (W.Va. 2006), the Supreme Court of West Virginia held that the Legislature intended West Virginia Code Section 23-2-6 “to provide qualifying

employers with a sweeping immunity from common-law tort liability for negligently caused work-related injuries.” In West Virginia Code § 23-2-6a, employer immunity from liability was extended to the employer’s officer, manager, agent, representative or employee when he is acting in furtherance of the employer’s business and does not inflict an injury with deliberate intention. *Henderson v. Meredith Lumber Co.*, 190 W.Va. 292, 438 S.E.2d 324 (W.Va. 1993); *Redder v. McClung*, 192 W.Va. 102, 450 S.E.2d 799 (W.Va. 1994).

West Virginia Code Section 33-46A-7(e) made clear that the Act’s exclusive remedy extends and also applies to Professional Employer Organizations, persons or entities engaged in the business of providing professional employer services, or conducting business as a staff or employee leasing company or an administrative employer. Even if this provision does not apply to the situation at bar, it further demonstrates the legislative intent to further the purpose and public policy goals of the Act and ensure that it fits practical employment realities.

The Act seeks to protect the employee-employer relationship by a legislative compromise between the interests of employees and the concerns of employers. On both sides, there is a *quid pro quo*. In return for the guarantee of no fault compensation, employees surrender common law claims against their employers for work related injuries. In exchange, employers obtain immunity from suit, and both parties avoid litigation which can have a significant adverse effect on the ongoing relationship between employee and his employer.

3. West Virginia law generally, and West Virginia law as interpreted by various counts of competent jurisdiction, as well as law from courts throughout the country, support the conclusion that Allied was Petitioner’s special employer entitled to immunity.

Petitioner also argues that there is no competent precedent that allows summary judgment based upon “special employer” or “borrowed servant” principles. Of all of Petitioner’s arguments, this is the most fallacious. While the West Virginia Supreme Court has not

addressed this precise issue, it has in numerous other related instances fully adopted and applied the “loaned servant” doctrine and related principles. Furthermore, the Fourth Circuit Court of Appeals, several West Virginia federal district courts and an Ohio appellate court have all interpreted West Virginia law and have concluded that West Virginia law is consistent with that of at least forty-three states and the District of Columbia, all of which clearly and unequivocally apply the “loaned servant” doctrine and hold as a matter of law that a “special employment” relationship exists in temporary employment, labor service situations, and that an injured employee is barred from asserting negligence claims against his special employer.⁴

In *Maynard v. Kenova Chemical Co.*, 626 F.2d 359 (4th Cir. 1980), the Fourth Circuit interpreted West Virginia law regarding the existence of a special employer relationship and/or the “loaned or borrowed servant doctrine.” In *Maynard*, ironically a case involving a Manpower employee loaned to a Kenova, West Virginia business, the Court held that the special employer relationship and loaned servant doctrine applied when “an employee directed or permitted to perform services for another ‘special’ employer may become the employer’s employee while performing those services” for purposes of Worker’s Compensation and, therefore, is precluded from suing a company in tort for injuries sustained while on the job. *Id.* at 361 *citing Restatement (Second) of Agency*, §227 (1958). The loaned or borrowed servant doctrine is based upon the premise that an employee may have more than one employer while doing a specific act. *See Maynard*, 626 F.2d at 362. The *Maynard* Court easily distinguished its prior holding in

⁴ The length of a footnote required to cite representative cases from all 43 states and the District of Columbia, is prohibitive given the Court’s page limitations. Consequently, it is necessary to rely on several cases which make the point that the overwhelming majority of courts have decided this issue in a similar fashion. *Crespo v. Bagl, LLC*, 2009 Conn Super LEXIS 3325 (Conn. Super. Ct. pp 18-20 Dec. 15, 2009); *USA Waste of Md., Inc. v. Love*, 954 A.2d 1027 (D.C. 2008); *Frank v. Hawaii Planning Mill Foundation*, 963 P.2d 349, 1354 (Haw. 1998); *Sorenson v. Colibri Corp.*, 650 A.2d 125, 130-131 (1994 R.I. Lexis); *Evans v. Webster*, 832 P.2d 951, 956 (1991 Colo.App.); *Riley v. Southwest Marine, Inc.*, 203 Cal.App. 3d 1242, 1251-52 (Cal.App. 4th Dist. 1988); *Rumsey v. Eastern Distribution, Inc.*, 445 So.2d 1085, 1086-87 (Fla.App. 1984).

Kirby v. Union Carbide Corp., 373 F2d 590 (4th Cir. 1967), which Petitioner attempts to rely on. The Court also noted that the West Virginia Supreme Court “at least partially negated the effect of *Kirby* by its holding” in *Lester*, 626 F2d at 361.

The *Maynard* Court set forth three criteria for determining whether a special employer is liable for Workers’ Compensation. *Id.* at 362 citing 1A Larson, Workers’ Compensation Law, §48.00. The Court stated that a special employer only becomes liable for Worker’s Compensation when a “general employer lends an employee to a special employer” and when each of the three following factors are present: (1) the employee made a contract of hire, express or implied, with a special employer; (2) the work being done is essentially that of the special employer; and (3) the special employer has the right to control the details of the work. When all three factors are present, then both the special employer and the general employer are liable for Worker’s Compensation. 626 F.2d at 362.

The Court in *Maynard* offered additional insight into the rationale for its ruling in the following footnote:

We note that the court in *St. Claire v. Minnesota Harper Service, Inc.*, on facts very similar to this case, considered the ‘most damning fact’ against the petitioner-employee to be that part of the difference between what the defendant-employer paid Manpower and what Manpower paid the petitioner went towards paying the petitioner’s workers’ compensation premium. ‘In other words, the petition [was] suing in tort the man who paid for his Workers’ Compensation.’ 211 F.Supp. at 528. In the *St. Claire* court’s opinion, such a case ‘strikes at the heart of the Workers’ Compensation law’ and ‘is in unequivocal opposition to the well-known principles on which Workers’ Compensation is founded.’ *Id.* The same argument may be made in this case.

Id., fn. 3 (emphasis in original).

Since its holding in 1980, *Maynard* has been relied upon by various West Virginia Federal District Courts which have applied the *Maynard* Court’s analysis and holding, as well as by various West Virginia Circuit Courts. See *Soldani v. Mayflower Vehicle Sys., Inc.*, 2005 WL

2405938 (S.D.W.Va. Sept. 29, 2005); *Watson v. Consol Energy, Inc.*, 2006 U.S. Dist. LEXIS 69948 (N.D.W.Va. Sept. 26, 2006) (both involving fraudulent joinder/remand issues in diversity situations; the Courts applied *Maynard* in both 23-2-6 and 23-2-6 contexts); and *Jackson v. WV University Hospitals, Inc.*, 2011 U.S. Dist. LEXIS 42428 (N.D.W.Va. April 19, 2011) (relying on *Maynard* in a Title VII case to the employees benefit). *See also February 12, 2009 Order Granting Partial Summary Judgment* (Honorable David M. Pancake, Cabell County, West Virginia Circuit Court Civil Action No. 04-C-746), *Appx.* 320-330, where the Circuit Court held that Huntington Steel was a “special employer” entitled to the Workers’ Compensation employer immunity in another matter involving Manpower.

Although Petitioner claims the *Maynard* Court’s reasoning is flawed, he fails to explain how it is flawed, instead simply relies on the unfair and oversimplified argument that the Fourth Circuit is “one of the most conservative Court’s in the country” and the West Virginia Supreme Court is “a fairly liberal court.” In reality, the *Maynard* Court did not create new law, but merely applied longstanding, generally accepted principals, and based its analysis and holding on West Virginia law, a process which it is often required to perform. *Maynard* is also consistent with law in 43 states and the District of Columbia, *Larson on Workers’ Compensation Law* and *Restatement Second of Agency*. In this context, it is difficult to understand how the Fourth Circuit’s analysis and holding could be considered “conservative”. It is based on a consistent application of prior West Virginia law, and places as many burdens and obligations on special employers as benefits it may provide.

Maynard was recently applied in several cases with facts nearly identical to those in the case at bar wherein the court granted summary judgment to the special employer, holding that it was immune from liability. In *Crespo v. Bagl, LLC*, 2009 Conn. Super. LEXIS 3325 (Conn.

Super. Ct. Dec. 15, 2009) the Superior Court of Connecticut found that where a plaintiff, employed by a temporary employment agency, was injured while working at a company that leased him to work on its loading dock, the company was a special employer and was immune from liability under the exclusive remedy provision of the Workers' Compensation statute. *Id.* at 18-19 (*citing Maynard supra*).

In *Sorenson v. Colibri Corp.*, 650 A2d 125 (RI. 1994), a case with very similar facts and circumstances to the case at bar, the Court granted summary judgment to Colibri Corp. finding that Colibri was plaintiff's "special employer" and that as such, it was entitled to Workers' Compensation employer immunity. The plaintiff was employed by Temp Pro Resources, a temporary employment agency, and was assigned by Temp Pro to work for Colibri. While working for Colibri, the plaintiff and another employee were using a forklift to load goods onto a trailer/truck. The plaintiff stopped and exited the forklift. The forklift rolled forward and struck the plaintiff.

The plaintiff obtained Workers' Compensation benefits from Temp Pro, his general employer, and filed a personal injury action against Colibri. The trial court granted Colibri summary judgment, and the Rhode Island Supreme Court affirmed, holding that the case presented a classic example of a dual employer situation wherein Colibri was the operational and special employer and Temp Pro was the administrative and general employer. The Court found that an overly technical, literal application of the Rhode Island Act would have resulted in immunity for the general employer but liability for the special employer, and such a result would be contrary to the Act's policy and purpose of compromise and discouraging litigation.

Similar to the facts in our case, the Court, in *Sorenson*, found that Colibri (1) exercised all supervision and control over plaintiff while he worked at the company; (2) was solely

responsible for instructing plaintiff regarding how and where work was to be performed; (3) supplied any necessary tools and equipment; (4) determined the length of time that plaintiff would be required to work; and, (5) had the right to refuse to accept plaintiff as an employee if his work was unsatisfactory. The Court further noted that while plaintiff was paid by Temp Pro, which paid Workers' Compensation coverage for plaintiff, Colibri paid Temp Pro for plaintiff's services. The Court noted that the amount Colibri paid Temp Pro was sufficient to cover all of Temp Pro's expenses incident to plaintiff's employment, including the cost of Workers' Compensation, and its profit. *See also USA Waste of Maryland v. Love*, 954 A.2d 1027 (D.C. 2008) (discussing both Maryland and District of Columbia law); *Evans v. Webster*, 832 P.2d 951 (Col. 1991); and *Frank v. Hawaii Planing Mill Foundation*, 963 P.2d 349 (Haw. 1998).

Of special note is a decision of the Ohio Court of Appeals in *Carman v. Link*, 695 N.E.2d 28 (Ohio App. 3d 1997) in which the Court considered and analyzed West Virginia law. In *Carman*, the plaintiff was injured when a tractor trailer driven by a co-worker ran into a similar tractor trailer driven by plaintiff. Both plaintiff and his co-worker worked at and for Chambers, an Ohio corporation, through TSL, Ltd., a West Virginia corporation and a labor contracting business. Plaintiff received Workers' Compensation benefits from West Virginia for his injuries. Applying West Virginia law, and citing *Larson* and *Maynard*, the Ohio Court found that Chambers was Carman's "special employer" "...Carman accepted employment with TSL, he agreed to perform necessary services for TSL's customers. The services performed by Carman were always services for the special employer, and Chambers, as the special employer, had the right to control the details of the services performed." The Court held that these were circumstances sufficient to establish an implied contract for services between Carman and Chambers. Although Chambers was not a subscriber to the West Virginia Workers'

Compensation Fund, and did not directly pay any Workers Compensation premiums for plaintiff, it was an employer in good standing in Ohio, and therefore, pursuant to West Virginia law, Chambers, like TSL, was immune from liability. In reaching its decision, the Ohio Court noted, citing *Pasquale v. Ohio Power Co.*, 187 W.Va. 292, 418 SE 2d 738 (1992), that this West Virginia Court had been willing to extend immunity to employers who subscribe to the Ohio Workers Compensation Fund, rather than the West Virginia Fund.

4. Applying *Larson* three part test, adopted by *Maynard* and courts throughout the country, Allied is clearly Petitioner's special employer.

The existence of the special employment relationship, and whether an employer is entitled to immunity from an action in tort, is purely a question of law for the Court to decide, particularly where the material evidence is undisputed. See *USA Waste of Md., Inc. v. Love*, 954 A.2d 1027 (D.C. 2008); *Fletcher v. Apache Hose & Belting Co.*, 519 N.W. 2d 839 (Iowa Ct. App. 1994); *Hamilton v. Shell Oil Co.*, 233 So. 2d 179 (Fla. 1970).

Applying the generally accepted three step analysis set forth in both *Larson* and *Maynard*, and generally relied upon by jurisdictions throughout the country, the Circuit Court properly determined that a special employee/employer relationship existed between Petitioner and Allied. It is undisputed and in fact admitted that the work performed by the Petitioner was the work of and for the benefit of Allied. The undisputed evidence indicates that Allied had the right to control, and did in fact, direct and control the details of the work being performed by the Petitioner. The undisputed evidence further indicates that, as a leased employee assigned to work at and for Allied, Petitioner had an implied contract for hire with Allied.

- a. Petitioner had a contract for hire with Allied.

Petitioner was a leased employee of Manpower that was assigned to work at and for Allied. Petitioner accepted employment from Manpower and agreed to perform work for

Manpower's customers, including Allied. Petitioner had a right to refuse to accept an assignment and refuse to work at and for a particular work site, including at Allied, but Petitioner chose not to exercise that right. He willingly accepted the assignment at Allied and went to work at its Kenova Warehouse, and therefore, he had an implied employment contract with Allied. In fact, in this case, the evidence indicates that the only reason Petitioner approached and entered into an arrangement with Manpower was as a means to obtain employment with Allied. All of these facts admit a consensual relationship and point to the existence of, at a minimum, an implied contract for hire. See *Evans v. Webster*, 832 P.2d 951 (Colo. 1991). *Carman v. Link*, 695 N.E. 2d 28 (Ohio App 3d 1997); *Bliss v. Ernst Home Center, Inc.*, 866 F.Supp. 1362 (N.D. Utah 1995).

All of Petitioner's day-to-day tasks were indisputably performed at Allied's facility and under the direction and supervision of Allied employees.

Question: And would I be correct that Allied was the entity that had the right to control the details of their work?

Answer: That's correct.

Question: Did Manpower, any of Manpower's representatives have, play any role in directing the day-to-day work of any of the Manpower temporary workers working at the Allied Warehousing Kenova Warehouse?

Answer: No.

Appx. 336-7.

Any argument based on the perception of Petitioner or Allied concerning the identity of Petitioner's employer is simply is not relevant to this analysis and this at issue. Even if Allied considered Petitioner to be Manpower's employee and not its own, or if Petitioner considered himself to be a Manpower employee and not one of Allied, the fact is that, based their relationship and on applicable legal principles, Allied was Petitioner's special employer entitled to Workers' Compensation immunity. Pursuant to Lester, a company cannot farm out its

liability. If the employee-special employer relationship exists, the court will treat it as such despite a party's perception or belief.

- b. Petitioner's work, at the time of his injury, was essentially that of special employer, Allied.

At the time Petitioner's accident occurred, he was an employee leased from Manpower that was assigned to Allied and who worked for Allied at its Kenova, West Virginia facility. No dispute exists regarding these facts and Petitioner admits this in his Petition.

- c. Allied had the right to control the manner and details of Petitioner's work.

Despite Petitioner's argument to the contrary, there is no factual dispute that Allied had the right to control, and did in fact control, the details of Petitioner's day to day work while working at Allied. *Appx. 337* (confirming that Allied controlled the details of Petitioner's work). No Manpower supervisory employees were present in Allied's facility for the purpose of monitoring or controlling Petitioner's work performance. *Appx. 335* (*Question*: "And did Manpower also have control over what activities they performed?" *Answer*: "No. I would either directly or indirectly instruct Manpower employees what to do.") *See Esquivel v. Mapelli Meat Packing Co.*, 932 SW 2d 612 (Tex. Ct. App. 1996); *Metro Mach. Corp. v. Mizenko*, 419 S.E. 2d 632 (Va. 1992).

Petitioner was supposed to have been an experienced, qualified forklift operator prior to being assigned to work for Allied. Nevertheless, Allied tested and evaluated Petitioner's knowledge and proficiency and certified him to be a qualified fork lift operator. *Appx. 339; 341-343, 346-355, 334; and 336* (confirming that Petitioner was certified by Jeffrey at Allied in Kenova). Additionally, Jeffrey, Petitioner's supervisor, was an Allied employee. *Appx. 339; and 333* ("The Manpower employees that worked there would have been under my direct or indirect supervision while they were working on the premises.") *and Appx. 336* (confirming that

temporary workers at the Allied Kenova Warehouse were under Jeffrey's supervision). Jeffrey directed the manner in which Petitioner conducted his day-to-day work tasks. *Appx. 339-40* ("Mr. Bowens' day-to-day work was performed under my direct or indirect supervision..."). *Appx. 336* (confirming that Manpower had no role in directing the "day-to-day work" of the temporary workers at the Kenova Warehouse).

Moreover, there is no dispute that Petitioner was injured during the course of his work with certain Allied equipment. *Appx. 339-40* ("the work being done by Mr. Bowens at the Allied warehouse was done using Allied tools and equipment..."). *Appx. 337* (*Question*: "And when they were performing their work as temporary employees working at the Allied Kenova Warehouse, whose equipment and tools did they use?" *Answer*: "They used Allied's equipment and tools.") *Appx. 349-50*.

Petitioner admits that Allied exercised a degree of control over Petitioner, but claims that Manpower did not relinquish all control since Allied agreed to discuss with it certain matters regarding employment, job assignment, and pay procedures, and Manpower visited Allied periodically. First of all, the relinquishment of total control over all employment issues is not required under the *Maynard/Larson* analysis, and more importantly, the control issue has to do with the work being performed, not with other ancillary matters, like those described by Petitioner. *See Maynard* 626 F.2d 362 ("the district court also correctly noted that, under West Virginia law, Kenova's authority to exercise complete supervision and control over Maynard while he was on Kenova's premises, established Kenova as Maynard's employer within the meaning of the Workers' Compensation statutes"). In this case, there is absolutely no question or dispute that the work being performed by Petitioner at Allied, at the time of the accident, and at all times, was under the complete direction and control of Allied. The fact that Allied agreed

to discuss various matters with Manpower and that Manpower handled the administrative issues regarding Petitioner's employment, does not alter the fact that Allied had complete control over Petitioner's work and work environment. The fact that Manpower periodically made visits to Allied is also irrelevant. Although Manpower would note any safety issues that it observed, its principal purpose and activities were more of a marketing effort to determine how its employees were doing, whether Allied was satisfied, and whether there might be additional work for which it could supply employees to Allied.

Based upon the three-step analysis set forth in *Larson* and *Maynard*, an employee-special employer relationship existed between Petitioner and Allied and, therefore, Allied is entitled to the immunity provided by West Virginia Code Section 22-3-6.

VI. Conclusion

Based on briefs and the record on appeal, it should be apparent that the Circuit Court carefully considered all issues before it, and properly ruled and entered the two Orders that are the subject of the Petition for Appeal. By Order dated April 15, 2009, the Court granted Allied Summary Judgment on Petitioner's fraud claims because, as a matter of law, Petitioner is unable to support his claims. The conduct at issue, i.e., the submission of an alleged fraudulent training document, was not the conduct of Allied, which did not submit any documents to Workers' Compensation. Moreover, there is no evidence or basis to conclude that the alleged fraudulent conduct played any role or had any effect on the decision of the Administrative Law Judge regarding the suspension of Petitioner's TTD.

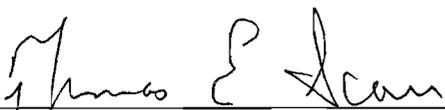
By June 8, 2010 Order, the Circuit Court granted Allied Summary Judgment on Petitioner's negligence claim on the basis that Allied was Petitioner's "special employer" and as such, it is entitled to immunity. The Petitioner's sole and exclusive remedy is a Workers' Compensation claim for benefits, and/or a civil action to the extent that he can establish that his

injury was the result of the deliberate intent of his special employer. Petitioner filed and received Workers' Compensation benefits and subsequently unsuccessfully pursued a deliberate intent claim. The Court's ruling on this issue is in accord with the law in almost every jurisdiction in the country, including decisions by the Fourth Circuit Court of Appeals, various West Virginia District Court rulings, and an Ohio Appellate Court decision, all interpreting West Virginia law. It is consistent and supportive of the practical goals and purposes of the Workers' Compensation Act, and is reasonable and appropriate given the undisputed evidence before the Court.

Accordingly, Allied Warehousing Services respectfully requests that this Court affirm the decisions of the Circuit Court and deny and dismiss Petitioner's appeal.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BYRON BOWENS,

Petitioner,

VS.

ALLIED WAREHOUSING SERVICES,
INC.,

Respondent.

NO. 11—0210
Wayne County Circuit Court
Civil Action No. 08-C-291

CERTIFICATE OF SERVICE

I, Thomas E. Scarr, do hereby certify that I have served a true and correct copy of the foregoing "*Brief on Behalf of Respondent Allied Warehousing Services, Inc.*" upon the following individual by United States Mail this 1st day of July, 2011:

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