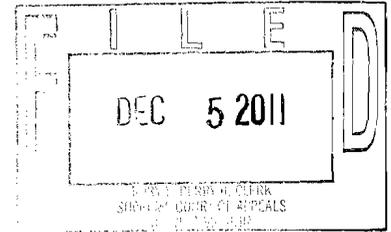


Docket Number: 11-0397



***IN THE SUPREME COURT OF APPEALS  
OF THE  
STATE OF WEST VIRGINIA***

KATY ADDAIR, Administratrix of the Estate of Gary Addair;  
DAVID FARLEY; DEBORAH STOLLINGS; *et al.*,

Appellants/Plaintiffs,

- v. -

LITWAR PROCESSING COMPANY, *et al.*,

Respondents/Defendants.

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**APPELLANTS' SUPPLEMENTAL REPLY BRIEF**

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Underlying Case No. 04-C-252  
Circuit Court of Wyoming County, WV

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The Supplemental Brief of appellants Gary Addair, Larry Hatfield, Steven Hylton, Kenneth King, Terry Martin, Clarence McCoy, Mitchell McDerment, Roger Muncy and William Weese (collectively, “appellants”) largely stands unchallenged. Respondents Buffalo Mining Independence Coal Co., Noone Associates, Inc., Virginia Crews Coal and Westmoreland Coal have declined to file supplemental briefs, while defendant SGS North America (SGS) remains entirely absent from the instant appeal. Only respondent Standard Laboratories, Inc. (“Standard Labs”), along with the Defense Trial Counsel of West Virginia (DTC) has provided a response.

The issues before the Court continue to support reversal of the Circuit Court’s decision to grant summary judgment. Appellants respectfully refer the Court to their prior submissions for a full discussion of these issues. Appellants’ reply focuses on three points. First, SGS has conceded the appeal and the Court should vacate the decision below and reinstate the deliberate intent claims of Gary Addair, Steven Hylton and Terry Martin as to SGS. Second, the DTC’s highlighting of a case where this Court noted the statutory action of the Workers’ Compensation Commissioner uncovered through a Freedom of Information Act disclosure concerning a default in payment in the system, has little relevance to this litigation. Third, although largely untouched by respondents, public policy issues strongly argue against the application of collateral estoppel to these quasi-judicial proceedings.

Policy considerations strongly argue against the application of collateral estoppel to Workers’ Compensation proceedings. As the Workers Compensation Commission (WCC)

advises, “the protesting party [frequently] fails to submit any evidence, offer any testimony, or provide any argument explaining the basis for the protest.” Utilization of collateral estoppel for WCC decisions, however, will convert these remedial hearings into protracted legal conflicts utilizing every aspect of civil litigation for every individual seeking to preserve a potential deliberate intent claim. Weighed against the potential loss of a legitimate claim from an adverse decision, workers will be required to fully litigate their injuries before the WCC. For all of these reasons and those previously specified to the Court, the appellants respectfully request that the Court vacate the decision of the Circuit Court and remand the case back to the Circuit Court.

#### STATEMENT OF FACTS

Appellants are constrained to respond to respondent Standard Labs’ suggestion that the underlying administrative protests are “substantially similar to civil litigation.” *See* Response by Standard Laboratories, Inc. to Petitioners’ Supplemental Brief,” served Nov. 14, 2011 (“SLab Br.”) at 6. For each of the individuals below, little similarity existed between his Workers’ Compensation hearing and a full civil proceeding. Consistent with the usual practice before the WCC, none of the nine protesters deposed their employer and sought information which would have provided detailed testimony about the work conditions in the laboratory in which each worked, the hours that the employees spent exposed to perchloroethylene (PCE), the lack of personal protective equipment, the observed impact of acute PCE exposure on employees, or other employees with similar conditions. *See* A150-52, A176-79, A239-42, A257-60, A276-79, A467-69, A632-35, A684-87, A763-64. None of the nine protesters deposed any other individual who worked for his employer. *See Id.* None of the nine individuals served interrogatories on his employers. None of the nine individuals made requests for the production

of documents from his employer. *See Id.* Although each of the individuals would have needed to demonstrate the general adverse conditions of PCE on the human body and connected that general causation with the specific ailments that he experienced, none of the nine individuals sought to depose the experts that his employers utilized and none of the individuals designated his own expert in the areas of industrial hygiene, epidemiology, toxicology or neurology. *See Id.* Indeed, none of the nine individuals even provided a detailed affidavit on his own behalf or introduced the testimony of a single fact witnesses with first-hand knowledge of his work environment and how it had exposed him to PCE at unhealthy levels. Each administrative law judge emphasized the absence of evidence supporting the protestor's claim of injury. *See, e.g.,* A148, A274, A761. The "substantial similarities" which Standard Labs perceives simply do not exist.

## **ARGUMENT**

### **I. THE COURT SHOULD REVERSE THE MATTERS AGAINST SGS NORTH AMERICA BECAUSE SGS HAS CONCEDED THE APPEAL**

The Court may promptly reverse and reinstate the deliberate intent cause of action of plaintiffs-appellants Gary Addair, Steven Hylton and Terry Martin against defendant SGS. Rule 10 provides that "If the respondent's brief fails to respond to an assignment of error, the Court will assume that the respondent agrees with the petitioner's view of the issue." Revised Rules of Appellate Procedure 10(d). Appellants have argued that the Court should reverse the Circuit Court's dismissal of appellants' claims against SGS and reinstate them because the quasi-judicial proceeding before the Workers Compensation Board never considered any of the gentlemen's

employment with SGS, *see* Appellants' Supplemental Brief, dated Oct. 14, 2011 ("App. Br."), at 14-15, and because SGS's original motion was deficient as a matter of law. *Id.* at 24-26.

SGS has failed to respond to appellants' arguments. Although served with the petition, SGS neither responded nor acknowledged the filing of the petition. Similarly, although aware that this Court granted appellants' petition, SGS did not respond to appellants' supplemental brief and has not filed any other document with the Court. Consistent with Appellate Rule 10(c), the Court should interpret SGS's silence as an agreement with the position of the petitioners and reinstate the deliberate intent causes of action against SGS.

## **II. THE *AMICUS CURIE* BRIEF OFFERS LITTLE ADDITIONAL INSIGHT FOR THE COURT**

The *amicus curie* brief which the DTC submitted to the Court offers little to no relevant guidance for the instant appeal. DTC seeks to place before the Court a single case, *State ex rel Frazier v. Hrko*, 203 W. Va. 652, 510 S.E.2d 486 (1998), which does not provide meaningful precedent. As the DTC acknowledges, this Court's ruling was "limited" and only addressed "employer default rulings by the Commissioner." *Id.* at 662, n.18, 510 S.E.2d at 496, n. 18. Further, the orders involved in the case did not arise during a workers' compensation proceeding, *i.e.* a quasi-judicial hearing,<sup>1</sup> but rather in the Commissioner's independent exercise of his statutory duty after the employers defendant failed to comply with their regulatory obligation/opportunity. *See Id.* at 655-56, 661, 510 S.E.2d at 489-90, 495. This Court did not

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<sup>1</sup> In *Frazier*, the parties concluded the underlying Workers' Compensation proceeding on or about March 3, 1989. *Id.* at 655, 510 S.E.2d at 489. The employee subsequently sued his employers in February 1991, and asserted a cause of action for deliberate intent. *Id.* at 656, 510 S.E.2d at 490. In May 1998, in response to a Freedom of Information Act request, the employee learned that his employers had been in default of their obligations and, during the relevant time period, were not in "good standing" with the Workers' Compensation Fund. *Id.* The employee, in his civil action, then submitted to the Circuit Court orders which the Commissioner had, apparently, previously issued declaring the employers in default to the Workers' Compensation Fund. *Id.*

apply the four-part collateral estoppel review in *Frazier*, *see id.* at 660-62, 510 S.E.2d at 494-496, but rather held that if the Commissioner, acting in accord with his statutory duties, issued an order that found that an employer was in default of its statutory obligation and no longer in good standing, then the employer could not collaterally attack that ruling in a subsequent proceeding. *See Id.* at 662, 510 S.E.2d at 496. This Court also noted that a Circuit Court could hold an employer in default as a matter of law, if the Commissioner had not made any ruling and no material facts were in dispute. *See Id.* at 660, 510 S.E.2d at 494. The specific underlying role of the Commissioner in *Frazier*, and the absence of any collateral estoppel analysis to a prior judicial or quasi-judicial proceeding, indicates that *Frazier* has minimal relevance to the instant appeal.

Otherwise, appellants suspect that all parties and their counsel support the “consistent and predictable application of the law,” which is the reason upon which the DTC relied in seeking to appear as *amicus curiae*.

### **III. STANDARD LABS' RESPONSE BRIEF PRESENTS A SERIES OF ERRORS AND DOES NOT REBUT APPELLANTS' ENTITLEMENT TO REVERSAL**

#### **A. Applying Preclusive Effect to Workers' Compensation Proceedings Would Convert Workers' Compensation to Full Litigation**

Respondents have entirely failed to comprehend the adverse impact of applying the collateral estoppel doctrine to WCC determinations. Illustratively, Standard Labs has remained silent on the express purpose and role of the WCC. As previously noted, this Court's prior decisions carefully defined the limited role of the workers' compensation statute. *See App. Br.* at 20. Workers' Compensation is “remedial” in its basic nature. *State ex rel. Beirne v. Smith*, 214 W.Va. 771, 775, 591 S.E.2d 329, 334 (2003). *See also Martin v. Workers' Compensation Div.*,

210 W. Va. 270, 557 S.E.2d 324 (2001) (also noting that long delays in processing claims is “not consistent with the declared policy of the Legislature to determine the rights of the claimants as speedily and expeditiously as possible”). “[T]he primary objectives of the workers’ compensation system ... are to provide benefits to an injured claimant promptly and to effectuate his or her return to work at the earliest possible time ....” *Fitzgerald v. Fitzgerald*, 219 W.Va. 774, 781, 630 S.E.2d 866, 873 (2006) (authority omitted). Damage calculations are subject to a statutory scheme. *Id.*

Standard Labs has also ignored the standard practice before the Workers’ Compensation system and erroneously continues to announce that “workers’ compensation claim procedures are substantially similar to civil litigation and, in fact, where the procedures differ, [they] ... generally differ in favor of the claimant ....” SLab Br. at 6. Standard Labs’ statement ignores the express acknowledgement in the Workers’ Compensation procedural rules that “[f]requently the protesting party fails to submit any evidence, offer any testimony or provide any argument explaining the basis for the protest.” 93 CSR § 1-3.2. At the other extreme, the Workers’ Compensation rules confirm that the claimant should not be required to submit new evidence on those occasions where the “Order of the Commission is incorrect on its face.” *Id.* In short, given the WCC’s representations that protestors “frequently” fail to present any evidence and that the Commission has issued orders incorrect on their face, no reasonable question should exist that proceedings before the Workers’ Compensation Commission are far from “substantially similar to civil litigation.”

A review of the underlying Workers’ Compensation proceedings confirms this standard approach to the Workers’ Compensation system and that they are not entitled to collateral estoppel effect. The underlying protests were largely devoid of any of the standard indicia of full

civil litigation. *See* A150-52, A176-79, A239-42, A257-60, A276-79, A467-69, A632-35, A684-87, A763-64. No individual provided live testimony. Indeed, inconsistent with civil litigation, the individuals entered the fuller procedural process with one determination made against them already. Further, the protesters did not serve interrogatories on their employers, did not conduct depositions and did not serve document requests. They did not offer supporting evidence from individuals with first-hand knowledge and did not incur the expense associated with deposing their employer's expert witnesses. In short, the underlying Workers' Compensation proceedings bore almost no similarity to civil litigation.

Standard Lab's response also ignores the readily apparent adverse impact of applying preclusive effect to the WCC's determinations. *See* "Appellants' Supplemental Brief," dated Oct. 14, 2011 ("Appellant Br.") at 22-23 (discussing this point). For employees possessing a companion claim for deliberate intent, the application of collateral estoppel to Workers' Compensation proceedings will have significant consequences. As the employee cannot bring the deliberate intent claim before the WCC, yet will still seek the remedial aspect of Workers' Compensation, he or she will be forced to fully litigate every aspect of the Workers' Compensation claim simply to preserve the deliberate intent claim.<sup>2</sup> The affirmation of the Circuit Court's decision would place a significant added burden on the already overburdened WCC. *See Osborne v. King*, 570 F. Supp.2d 839, 846-49 (S.D.W.Va. 2008) (warning in a similar circumstance that "the specter of issue preclusion might cause unemployment compensation proceedings to evolve into heavily contested, time consuming, and expensive

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<sup>2</sup> Logically, employers should wish to avoid this consequence as well. As administrative law judges need to strictly adhere to the rules of evidence and will give a certain degree of deference to the employee, proceedings before the WCC may result in the introduction of facts which would not be placed before the finder of fact in civil litigation.

affairs”). For this reason alone, the Court should decline to give collateral estoppel effect to the underlying Workers’ Compensation decisions and reverse and vacate the decision below.

**B. Standard Labs Has Simply Misrepresented a Series of Underlying Issues**

Standard Labs’ supplemental brief also suffers from a series of issues which undermine its credibility. These problems range from mischaracterizations of appellants’ argument to complete avoidance of other issues.

The opening of respondent’s brief illustrates the underlying credibility problems. Standard Labs opens its supplemental argument section with the allegation that appellants’ “erroneously state” and make a “misstatement of the law.” SLab Br. at 2. Respondent cites to page 13 of appellants’ supplemental brief and then provides a sentence from *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995). *Id.* A review of appellants’ supplemental brief, however, reveals that appellants quoted that precise sentence in their own brief. Appellants question Standard Labs’ charge that appellants have “ignor[ed] the holding” of the Court, *id.*, when appellants cited the identical sentence as respondent. *See* Appellant Br. at 13.

Respondent further undercuts the veracity of its brief in the next sentence. Respondent writes that “Petitioners’ reliance on *Abadir v. Dellinger*, 227 W. Va. 388, 709 S.E.2d 743 (2011), a case not previously cited in the Petition for Appeal, in support of their contention that the issues in the instant case are not identical to those in the prior workers’ compensation action is misplaced. Pet. Supp. Br. at 21.”<sup>3</sup> SLab Br. at 2. A review of page 21 of appellants’ supplemental brief, however, confirms that appellants cited *Abadir* in support of their argument that the appellants did not have a full and fair hearing before the Workers’ Compensation Board,

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<sup>3</sup> As appellants submitted their petition on December 3, 2010, appellants could not have cited to a 2011 Opinion in their petition.

not the issue that respondent identifies. *See* Appellants' Br. at 20-22. Specifically, appellants noted that "The central inquiry on collateral estoppel is whether a given issue has been actually litigated by the parties in the earlier suit.' Whether those issues could have been litigated is not important; they actually must have been litigated." *Abadir v. Dellinger*, 227 W. Va. 388, 709 S.E.2d 743, 748-49 (2011)(authority omitted)(emphasis added). *See* Appellants' Br. at 21. Respondent has either misunderstood appellants' position or intentionally misrepresented appellants' use of this Court's recent decision.

Respondent's flawed accusations continue throughout its supplemental brief. Standard Labs suggests that "Petitioners ask this Court to disregard the common[-]law test for collateral estoppel clearly established in *Vest* and instead to rely solely upon *Vest*'s holding, despite the factual differences in the case at bar." SLab Br. at 5 (citing to page 17 of Appellants' brief). Respondent is simply wrong for two very basic reasons. First, appellants made no such request of the Court. Second, appellants expressly identified and then applied the applicable three-part test used to determine whether a court should give preclusive effect to a hearing body's determination.<sup>4</sup> *See* Appellants' Br. at 17-19. Appellants do not understand respondent's basis for informing the Court that appellants' seek to disregard the applicable common-law test, when appellants directly quote the three-part test from *Page*, *id.* at 17, discuss past application of that test, *id.* at 17-19, and then, with further case law, analyze this case under that test. *Id.* at 20-23. Standard Labs' erroneous arguments have failed to rebut appellants' arguments. The Court should reverse the matters as to Standard Labs, as well as every other respondent.

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<sup>4</sup> Curiously, this three-part supplemental analysis, which the Court fashioned in *Mellon-Stuart Co. v. Hall*, 178 W. Va. 291, 359 S.E.2d 124 (1987) and repeated 11 years later in *Page v. Columbia Natural Res., Inc.*, 198 W. Va. 378, 392, 480 S.E.2d 817, 831 (1996), was not expressly identified within *Vest*. *See generally Vest v. Board of Education*, 193 W. Va. 222, 226-27, 455 S.E.2d 781, 785-86 (1995). Indeed, distinctions exist between *Vest* (1995) and *Page* (1996) as to the three factors that a court must assess in "determining whether res judicata or collateral estoppel may be applied to a hearing body ...." *Page v. Columbia Natural Res., Inc.*, 198 W. Va. at 392, 480 S.E.2d at 831.

#### **IV ADDITIONAL TIME REQUESTED FOR ORAL ARGUMENT**

Standard Labs has sought to double the time allotted to respondents for oral argument in order to accommodate the number of respondents. SLab Br. at 1. As the decision to grant summary judgment may rest on the facts specific to each of the nine underlying Workers' Compensation proceedings, appellants face a similarly daunting task of compacting their arguments into a brief period of time. If, conversely, the Court views the instant appeal as resting on a single legal argument, then the 20 minutes allotted to each side should prove sufficient to answer any and all questions that the Court possesses after reviewing the parties' submissions. As Rule 20 anticipates an equitable period of time between respondent and appellant, should the Court determine that it will expand the argument period for the respondents, then appellants Gary Addair, Larry Hatfield, Steven Hylton, Kenneth King, Terry Martin, Clarence McCoy, Mitchell McDerment, Roger Muncy and William Weese request that the Court provide them with an equal amount of additional time for oral argument.

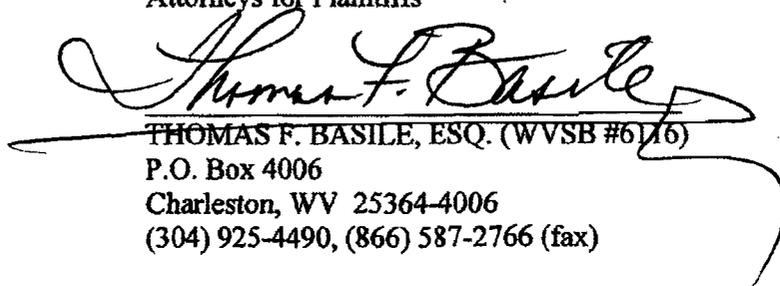
## CONCLUSION

For all of the reasons stated above, the plaintiffs-appellants respectfully request that this Court reverse the August 4, 2011 Order of the Circuit Court, Wyoming County, in full, together with such other and further relief as the Court deems just and proper.

Dated: December 5, 2011

LAW OFFICE OF THOMAS F. BASILE, ESQ.

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A handwritten signature in black ink, reading "Thomas F. Basile", is written over a horizontal line. The signature is fluid and cursive, with a long, sweeping underline that extends to the right and then loops back down.

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**WEST VIRGINIA SUPREME COURT OF APPEALS**

-----X  
KATY ADDAIR, Administratrix of the Estate of Gary Addair;  
DAVID FARLEY; DEBORAH STOLLINGS; et. al.,

Plaintiffs/Appellants,

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Civil Action No. 04-C-252  
Circuit Court, Wyoming Cty

v.

LITWAR PROCESSING COMPANY, LLC; VIRGINIA  
CREWS COAL COMPANY; et. al.,

Defendants/Respondents.  
-----X

**CERTIFICATE OF SERVICE**

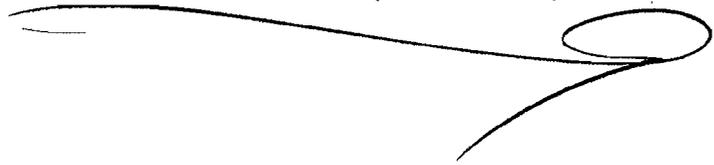
I, Thomas F. Basile, hereby declare under perjury of law that I caused to be served a true and accurate copy of the foregoing:

1. Appellants Supplemental Reply Brief, dated December 5, 2011;

upon counsel for the respondents listed on the attached service list by U.S. Mail, or by electronic transmission with consent of counsel, on this, the 5th Day of December, 2011



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