

11-0397

IN THE CIRCUIT COURT OF WYOMING COUNTY, WEST VIRGINIA

GARY ADDAIR, et al.,

Plaintiffs,

v.

Civil Action No. 04-C-252
Honorable Judge Jack Alsop

LITWAR PROCESSING COMPANY, LLC, et al.,

Defendants.

**ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT
DISMISSING THE DELIBERATE INTENT CAUSE OF ACTION CLAIM**

Pursuant to Rule 56 of the West Virginia Rules of Civil Procedure, Defendants Virginia Crews Coal Company, Independence Coal Company, Inc., Rawl Sales & Processing Co., Buffalo Mining Company, Standard Labs, Inc., Noone Associates, Inc., Westmoreland Coal Company, Pittston Coal Management Company, Pittston Coal Sales Corporation, Marfork Coal Company, Inc., Massey Energy Company, Massey Coal Services, Inc., and Massey Coal Capital Corporation ("hereinafter Defendants") moved this Court for summary judgment on the basis that Plaintiffs Roger Muncy, Katy Addair (Administratrix for Gary Addair), Larry Hatfield, William Weese, Mitchell McDerment, Kenneth King, Steven Hylton, Clarence McCoy, Bobby Maynard, James Jones, Carl McPeake, and Terry Martin (hereinafter "Plaintiffs") are collaterally estopped from asserting a deliberate intent claim against the

Defendants because of a failure to meet all of the requirements for a deliberate intent claim under W.Va. Code 23-4-2.

The worker's compensation claims by the Plaintiffs were denied by the worker's compensation commission based on the finding that the Plaintiffs did not suffer a recoverable injury under the Worker's Compensation laws. For the reasons hereinafter set forth, Plaintiffs can not prove one of the required elements of the deliberate intent claim because of the preclusive effect of collateral estoppel. Since the Plaintiffs are precluded from retrying the issue of injury, they can not maintain their deliberate intent cause of action because they are unable to prove an injury as required under W.Va. Code § 23-4-2(d)(i) or §23-4-2(d)(ii)(E). As such, summary judgment in favor of the Defendants is appropriate.

For the purposes of the motions for summary judgment, and in accordance with the requirement that the trial court make factual findings sufficient to permit meaningful appellate review, *Fayette County Natl. Bank, v. Lilly*, 484 S.E.2d 232, 199 W. Va. 349, (1997), the Court makes the following undisputed facts, which the Court finds to be relevant, determinative of the issues and as a basis therefore, sets forth as follows:

I. FINDINGS OF FACT

1. Plaintiff Larry Hatfield (hereinafter "Hatfield") was employed at Buffalo Mining from 1981 to 1983 and Standard Laboratories, Inc. from 1989 to 1997.
2. Plaintiff Hatfield filed a Worker's Compensation claim on May 9, 2003 that was denied on October 14, 2003, in which the Worker's Compensation Commission

found that Plaintiff Hatfield's alleged injuries and/or disease had no causal connection to chemical exposure during his employment.

3. Plaintiff Hatfield appealed the Worker's Compensation Commission's decision to the Office of Judges, which affirmed the Commission's decision on November 30, 2007. Plaintiff Hatfield then filed an appeal to the Board of Review, in which the previous decision was affirmed, the appeal time having run, the decision has become a final order.

4. Plaintiff William Weese (hereinafter "Weese") worked at Buffalo Mining from 1970 to 1984 and Elkay Mining Company from 1984 to 1998.

5. Plaintiff Weese filed a Worker's Compensation Claim on May 29, 2003 that was denied on October 14, 2003, in which the Worker's Compensation Commission found a lack of objective medical evidence supporting Plaintiff Weese's claim of injury and/or disease from chemical exposure.

6. Plaintiff Weese appealed the Worker's Compensation Commission's decision to the Office of Judges, which affirmed the Commission's decision August 17, 2005. Plaintiff Weese then appealed that decision to the Board of Review; however that appeal was subsequently dismissed by Plaintiff Weese, and therefore the decision of the Office of Judges has become a final order.

7. Plaintiff Mitchell McDerment (hereinafter "McDerment") was employed at Standard Laboratories, Inc.

8. Plaintiff McDerment filed a Worker's Compensation Claim on July 11, 2003 that was denied on November 11, 2004, in which the Worker's Compensation

Commission found that Plaintiff McDerment did not suffer a compensable injury or disease during his employment.

9. Plaintiff McDerment appealed the Worker's Compensation Commission's decision to the Office of Judges, which affirmed the Commission's decision on May 9, 2007. Plaintiff McDerment appealed that decision to the Board of Review; however that appeal was subsequently withdrawn by Plaintiff McDerment, and therefore, the decision of the Office of Judges has become a final order.

10. Plaintiff Kenneth King (hereinafter "King") was employed at Standard Laboratories, Inc.

11. Plaintiff King filed a Worker's Compensation claim on September 8, 2003 that was denied on December 13, 2004, in which the Worker's Compensation Commission found that Plaintiff King did not have a compensable medical condition related to exposure to chemicals during his employment.

12. Plaintiff King appealed the Worker's Compensation Commission's decision to the Office of Judges, which affirmed the Commission's decision on May 3, 2007. Plaintiff King appealed that decision to the Board of Review; however that appeal was subsequently withdrawn by Plaintiff King, and therefore the decision of the Office of Judges has become a final order.

13. Plaintiff Steven Hylton (hereinafter "Hylton") was employed at Westmoreland from May 1978 to August 1987; at Noone Associates, Inc. from August 1987 to September 1988; at West Virginia Laboratories, Inc. from September 1988 to December 1995; and at Precision Testing Laboratory, Inc from December 1995 to July 1996 and then May 1997 to August 1999.

14. Plaintiff Hylton filed a Worker's Compensation claim on May 9, 2003 that was denied on October 1, 2003, in which the Worker's Compensation Commission found that Plaintiff Hylton's alleged injuries had no causal connection to chemical exposure in his employment.

15. Plaintiff Hylton appealed the Worker's Compensation Commission's decision to the Office of Judges, which affirmed the Commission's decision on December 6, 2006. Plaintiff Hylton appealed that decision to the Board of Review, and on August 31, 2007, the Board of Review affirmed the Office of Judges' decision. Plaintiff Hylton then filed an appeal with the West Virginia Supreme Court of Appeals which was rejected on June 22, 2009, making the decision by the Board of Review a final order.

16. Plaintiff Clarence McCoy (hereinafter "McCoy") was employed at Rawl Sales & Processing Company and Independent Coal Company, Inc. from 1981 to 1999.

17. Plaintiff McCoy filed a worker's compensation claim on August 28, 2003 that was denied on December 13, 2004, in which the Worker's Compensation Commission found that Plaintiff McCoy's alleged injuries had no direct causal connection between work and the alleged condition. Furthermore, the Plaintiff's alleged condition can't be fairly traceable to his employment as the proximate cause and the alleged condition is independent of the employment relationship.

18. Plaintiff McCoy appealed the Worker's Compensation Commission's decision to the Office of Judges, which affirmed the Commission's decision on January 26, 2007. Plaintiff McCoy appealed that decision to the Board of Review, and on August 31, 2007, the Board of Review affirmed the Office of Judges' decision, making the decision a final order.

19. Plaintiff Roger Muncy (hereinafter "Muncy") was employed at Virginia Crews Coal Company from 1986 to 2001

20. Plaintiff Muncy filed a Worker's Compensation claim on May 19, 2003 which was denied on September 2, 2004, in which the Worker's Compensation Commission found that Plaintiff Muncy's alleged injuries had "no direct causal connection" between his work and alleged condition.

21. Plaintiff Muncy appealed the Worker's Compensation Commission's decision to the Office of Judges, which affirmed the Commission's decision on May 14, 2007, and stated there is "no credible evidence that the claimant's symptoms are the result of occupational exposure." Plaintiff Muncy appealed that decision to the Board of Review, and on December 12, 2007, the Board of Review affirmed the Office of Judges' decision. Subsequently, Plaintiff Muncy filed a petition for appeal with the West Virginia Supreme Court of Appeals and said petition was rejected on July 24, 2009, making the decision of the Board of Review a final order.

22. Plaintiff Katy Addair is the Administratrix of the Estate of Gary Addair. Gary Addair was employed at Virginia Crews Coal Company from 1982 to 1999.

23. Gary Addair filed a Worker's Compensation claim on May 28, 2003 that the Worker's Compensation Division held the claim was compensable by Order of August 13, 2003. Said Order was reversed by an Order entered on August 22, 2003, until further evidence could be presented. The Worker's Compensation Commission found that Gary Addair's alleged injuries had no causal connection to chemical exposure in his employment and denied the claim on January 24, 2006.

24. Gary Addair appealed the Worker's Compensation Commission's decision to the Office of Judges, which affirmed the Commission's decision on November 15, 2007. Gary Addair appealed that decision to the Board of Review, and on August 21, 2008, the Board of Review affirmed the Office of Judges' decision. Plaintiff's counsel, in his opposition to the defendant's motion for summary judgment, stated that Plaintiff Addair had an appeal pending with the West Virginia Supreme Court of Appeals; however, at the date of that filing, by the plaintiff, there was no record of an appeal with the West Virginia Supreme Court of Appeals, the appeal time having run, the decision has become a final order.

25. Plaintiff Bobby Maynard (hereinafter "Maynard") was employed at Buffalo Mining Company from 1978 to 1985.

26. Plaintiff Maynard filed a Worker's Compensation claim on May 9, 2003 that was denied on September 2, 2004, in which the Worker's Compensation Commission found that Plaintiff Maynard's alleged injuries had no causal connection to chemical exposure in his employment.

27. Plaintiff Maynard appealed the Worker's Compensation Commission's decision to the Office of Judges, which affirmed the Commission's decision on December 6, 2006. Plaintiff Maynard appealed that decision to the Board of Review, and on August 31, 2007, the Board of Review affirmed the Office of Judges' decision, the appeal time having run, the decision by the Board of Review has become a final order.

28. Plaintiff James Jones (hereinafter "Jones") was employed at Westmoreland Coal Company from 1971 to 1985.

29. Plaintiff Jones filed a Worker's Compensation claim on May 9, 2003 that was denied on September 2, 2004, in which the Worker's Compensation Commission found that Plaintiff Jones's alleged injuries had no causal connection to chemical exposure in his employment.

30. Plaintiff Jones appealed the Worker's Compensation Commission's decision to the Office of Judges, which affirmed the Commission's decision on December 6, 2006. Plaintiff King appealed that decision to the Board of Review, and on August 31, 2007, the Board of Review affirmed the Office of Judges' decision, the appeal time having run, the order has become a final order.

31. Plaintiff Carl McPeake (hereinafter "McPeake") was employed at Westmoreland Coal Company from 1972 to 1992.

32. Plaintiff McPeake filed a Worker's Compensation claim on May 9, 2003 that was denied on September 2, 2004, in which the Worker's Compensation Commission found that Plaintiff McPeake's alleged injuries had no causal connection to chemical exposure in his employment.

33. Plaintiff McPeake appealed the Worker's Compensation Commission's decision to the Office of Judges, which affirmed the Commission's decision on December 6, 2006. Plaintiff McPeake appealed that decision to the Board of Review, and on August 31, 2007, the Board of Review affirmed the Office of Judges' decision, the appeal time having run, the decision has become a final order.

34. Plaintiff Terry Martin (hereinafter "Martin") was employed at Noone Associates from 1984 to 1993.

35. Plaintiff Martin filed a Worker's Compensation claim on May 19, 2003 that was denied on December 6, 2004, in which the Worker's Compensation Commission found that Plaintiff Martin's alleged injuries were "not due to an injury received in the course of and resulting from employment."

36. Plaintiff Martin appealed the Worker's Compensation Commission's decision to the Office of Judges, which reversed the Commission's decision on February 26, 2007 and ruling Plaintiff Martin's claim compensable for toxic encephalopathy. The West Virginia Insurance Commission appealed the Office of Judges' decision to the Board of Review who reversed the Office of Judges' decision and reinstated the Worker's Compensation Commission's decision on February 27, 2008, which stated that Plaintiff Martin did not sustain a compensable injury. Plaintiff Martin appealed that decision to the West Virginia Supreme Court of Appeals who refused to hear the Petition on August 24, 2009, making the decision by the Board of Review a final order.

37. Each of the aforementioned Plaintiffs had an opportunity to fully litigate the issue of compensable injury before the worker's compensation commission.

II. DISCUSSION

A. Summary Judgment

A motion for summary judgment should be granted only where it is clear that no genuine issue of material fact remains to be determined and the moving party is entitled to judgment as a matter of law. *Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995), and an inquiry concerning the facts is not desirable to clarify the application of the law. *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994). When a motion for

summary judgment is mature for consideration and is documented with such clarity as to leave no room for controversy, the nonmoving party must take initiative and by affirmative evidence demonstrate that a genuine issue of fact exists. *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, at 59, 459 S.E.2d 329 at 336 (1995).

The circuit court's function at the summary judgment stage is not to weigh evidence and determine truth of the matter but to determine whether there is a genuine issue for trial; consequently, the court must draw any permissible inference from underlying facts in a most favorable light to the party opposing the motion. *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, at 59, 459 S.E.2d 329 at 336 (1995).

A summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove. *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, at 59, 459 S.E.2d 329 at 336 (1995).

[A] defendant may be entitled to summary judgment if he can negate an issue as to which a plaintiff as the nonmoving party has the burden of proof or, if he can show that the plaintiff will be unable to prove a critical fact at trial. *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 62 n.17, 459 S.E.2d 329, 339 n.17 (1995).

When there is no dispute as to the salient facts and there only exists a question of law for the Court, the controversy should be disposed of promptly to avoid a lengthy trial. *Painter v. Peavey*, 192 W. Va. 189, 452 S.E.2d 755 (1994). However, where there is a genuine issue of a material fact, summary judgment should be denied. *Howard's Mobile Homes, Inc. v. Patton*, 156 W. Va. 543, 195 S.E.2d 156 (1973).

According to Rule 56(a) of the West Virginia Rules of Civil Procedure, a party seeking to obtain declaratory judgment may move for a summary judgment in the party's favor upon all or any part thereof. For the reasons hereafter set forth, the Defendants are entitled to summary judgment with regards to the deliberate intent cause of action filed by the Plaintiffs.

B. Issues

1. The Doctrine of Collateral Estoppel Prohibits the Plaintiffs from Pursuing their Deliberate Intent Claims against the Defendants.

Collateral estoppel is a legal doctrine in which a judgment in one case prevents a party to that suit from trying to litigate the same issue in another legal action. In effect, once decided, the parties are permanently bound by that ruling if collateral estoppel is applicable. Collateral estoppel is applicable to a prior proceeding when four conditions are met: 1) the issue previously decided is identical to the one presented in the action in question; 2) there is a final adjudication on the merits of the prior action; 3) the party against whom the doctrine is invoked was a party or in privity with a party to a prior action; and 4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue prior to the present action. *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

The issue previously decided in the worker's compensation cases, whether the Plaintiffs suffered an injury or death that is causally connected to their employment, is one of the same issues that the Plaintiffs must prove in their deliberate intent claim under

either W.Va. Code §23-4-2(d)(i) or §23-4-2(d)(ii)(E).¹ The final determination in all of the worker's compensation cases found that the Plaintiffs failed to prove that they suffered the requisite injury.

The worker's compensation cases have all concluded with a final adjudication on the merits of their respective claims. After the initial decision was rendered in the worker's compensation cases, the Plaintiffs filed varying levels of appeals on their claims. All of the plaintiffs' claims have been denied and the time allowed for an appeal has expired.

The Plaintiffs in the workers compensation cases, Roger Muncy, Katy Addair (Administratrix for Gary Addair), Larry Hatfield, William Weese, Mitchell McDerment, Kenneth King, Steven Hylton, Clarence McCoy, Bobby Maynard, James Jones, Carl McPeake, and Terry Martin, are the same Plaintiffs who are the parties to this action. The Defendants' motions for summary judgment are invoking the doctrine of collateral estoppel against those very same Plaintiffs to preclude the re-litigation of the issue of injury.

The Plaintiffs have argued that certain Defendants listed in this motion for summary judgment weren't named defendants in the worker's compensation claims; however, that fact does not prohibit the application of collateral estoppel. The only

¹ W.Va. Code §23-4-2(d)(i) states: "It is proved that the employer or person against whom liability is asserted acted with a consciously, subjectively and deliberately formed intention to produce the specific result of injury or death to an employee. This standard requires a showing of an actual, specific intent and may not be satisfied by allegation or proof of: (A) Conduct which produces a result that was not specifically intended; (B) conduct which constitutes negligence, no matter how gross or aggravated; or (C) willful, wanton or reckless misconduct"

W.Va. Code §23-4-2(d)(ii)(E) states: "That the employee exposed suffered serious compensable injury or compensable death as defined in section one, article four, chapter twenty-three whether a claim for benefits under this chapter is filed or not as a direct and proximate result of the specific unsafe working condition."

requirement in the worker's compensation cases is that the plaintiff must show that an injury is related to any employment to be compensable. The preclusive effect of collateral estoppel is applicable because the Plaintiffs didn't suffer the required injuries in connection with their employment. In the worker's compensation cases, the Plaintiffs weren't required to prove which employer was responsible for their injuries to be compensable; the only proof required by the Plaintiff was to prove their injuries are causally connected to employment, regardless of their employer. Therefore, collateral estoppel is applicable to bar the Plaintiffs from asserting any deliberate intent claim against any of the Defendants the employees worked for up and until the filing of the worker's compensation claim of the respective Plaintiffs.

The Plaintiffs had a full and fair opportunity to litigate the issue of injury in the worker's compensation cases. The Plaintiffs were represented by counsel, conducted written discovery, took depositions and obtained expert witnesses; virtually identical to all of the procedures in a civil action. The Plaintiffs in fact were represented by counsel, conducted discovery, took depositions and had expert witnesses testify in support of their claims.

In the underlying worker's compensation cases, the issue of whether the Plaintiffs had, by a preponderance of the evidence, suffered a compensable injury or death with a causal connection between their alleged injury and their employment had already been decided and was determined that there was no causal connection between any of the Plaintiffs' alleged injuries and their employment. In the worker's compensation cases, there has been a final adjudication on the merits of the claims, the Plaintiffs in the deliberate intent action are the same plaintiffs in the worker's compensation claims and

the Plaintiffs had a full and fair opportunity to litigate the issue prior to the present action. Therefore, collateral estoppel is applicable to the present case and acts as a bar to prohibit the re-litigation of the issue of alleged injuries connected to their employment that has been previously decided.

2. Collateral Estoppel can be Applied to Quasi-Judicial Determinations of Administrative Agencies.

The West Virginia Supreme Court of Appeals has held that collateral estoppel can be applied to quasi-judicial determinations of administrative agencies. In *Vest v. Board of Educ. of County of Nicholas*, 193 W.Va. 222, 485 S.E.2d. 781 (1995), the Court set forth the three elements for quasi-judicial preclusion: 1) the prior decision must be rendered pursuant to the agency's adjudicatory authority; 2) the procedures employed by the agency must be substantially similar to those used in a court; and 3) the identity of the issues litigated is a key component to the application of administrative res judicata or collateral estoppel.

The application of collateral estoppel to a deliberate intent cause of action, as long as all three required elements are met, is appropriate. The provision for a deliberate intent cause of action is contained in West Virginia Code §23-4-2(d)(2) for worker's compensation claims.²

² W.Va. Code §23-4-2(d)(2) states: "The immunity from suit provided under this section and under sections six and six-a, article two of this chapter may be lost only if the employer or person against whom liability is asserted acted with "deliberate intention". This requirement may be satisfied only if:

(i) It is proved that the employer or person against whom liability is asserted acted with a consciously, subjectively and deliberately formed intention to produce the specific result of injury or death to an employee. This standard requires a showing of an actual, specific intent and may not be satisfied by allegation or proof of: (A) Conduct which produces a result that was not specifically intended; (B) conduct

The prior decisions rendered by the Worker's Compensation Commission in the worker's compensation cases and any subsequent appeals were issued pursuant to the agency's adjudicatory authority. In fact, the Plaintiffs have failed to even dispute this fact in their responsive pleadings. Therefore, the first requirement of quasi-judicial preclusion is met.

Under W.Va. Code § 23-1-13, the procedures set forth in worker's compensation claims are substantially similar to those used in a court. In worker's compensation actions, claimants may be represented by counsel, conduct written discovery, take depositions and obtain expert witnesses, virtually identical procedures as in a civil action.

which constitutes negligence, no matter how gross or aggravated; or (C) willful, wanton or reckless misconduct; or

(ii) The trier of fact determines, either through specific findings of fact made by the court in a trial without a jury, or through special interrogatories to the jury in a jury trial, that all of the following facts are proven:

(A) That a specific unsafe working condition existed in the workplace which presented a high degree of risk and a strong probability of serious injury or death;

(B) That the employer, prior to the injury, had actual knowledge of the existence of the specific unsafe working condition and of the high degree of risk and the strong probability of serious injury or death presented by the specific unsafe working condition;

(C) That the specific unsafe working condition was a violation of a state or federal safety statute, rule or regulation, whether cited or not, or of a commonly accepted and well-known safety standard within the industry or business of the employer, as demonstrated by competent evidence of written standards or guidelines which reflect a consensus safety standard in the industry or business, which statute, rule, regulation or standard was specifically applicable to the particular work and working condition involved, as contrasted with a statute, rule, regulation or standard generally requiring safe workplaces, equipment or working conditions;

(D) That notwithstanding the existence of the facts set forth in subparagraphs (A) through (C), inclusive, of this paragraph, the employer nevertheless intentionally thereafter exposed an employee to the specific unsafe working condition; and

(E) That the employee exposed suffered serious compensable injury or compensable death as defined in section one, article four, chapter twenty-three whether a claim for benefits under this chapter is filed or not as a direct and proximate result of the specific unsafe working condition"

In fact, the Plaintiffs retained the same counsel, Thomas Basile, in the worker's compensation cases as counsel in the present case.

The burden of proof required in both instances is by a preponderance of the evidence standard. In fact, the burden of proof in a worker's compensation claim is even more liberally in favor of a claimant because it is a modified preponderance of the evidence standard. W.Va. Code §23-4-1(g) states that "[i]f, after weighing all of the evidence regarding an issue in which a claimant has an interest, there is a finding that an equal amount of evidentiary weight exists favoring conflicting matters for resolution, the resolution that is more consistent with the claimant's position will be adopted." The procedures set forth in worker's compensation cases are substantially similar to those in civil actions; therefore, the second element of quasi-judicial preclusion applies to this case.

The issue of whether the Plaintiffs had suffered a serious compensable injury or compensable death as a direct and proximate result of the specific unsafe working condition or employment, as alleged, was decided in the worker's compensation cases. In those proceedings, the ruling was that the Plaintiffs did not prove, by a preponderance of the evidence, that they had suffered such an injury. The very same issue, whether the Plaintiffs suffered a serious compensable injury or compensable death as a direct and proximate result of the specific unsafe working condition, had already been decided in the worker's compensation cases and the injuries alleged were a key component of those proceedings that resulted in a denial of their claims. In fact, the establishment of a compensable injury or death is a required element to maintain a deliberate cause of action under W.Va. Code §23-4-2-(c), §23-4-2(d)(i) and §23-4-2(d)(ii)(E).

The three elements for quasi-judicial preclusion: that the prior decision must be rendered pursuant to the agency's adjudicatory authority; that the procedures employed by the agency must be substantially similar to those used in a court; and that the identity of the issues litigated is a key component to the application of administrative collateral estoppel, are applicable to the Worker's Compensation rulings and as such, quasi-judicial preclusion is appropriate. Therefore, this court finds that collateral estoppel is applicable to the quasi-judicial determinations in the worker's compensation cases.

3. Plaintiffs Cannot Assert a Deliberate Intent Claim Under W.Va. Code § 23-4-2 when the Plaintiffs were Found, by a Preponderance of the Evidence to have not Suffered a Serious Compensable Injury or Death as a Direct and Proximate Result of the Alleged Specific Unsafe Working Conditions.

The findings in the Worker's Compensation cases were that the Plaintiffs did not suffer the required injuries as a result of their employment, sufficient to allow for a recovery. The ruling has a quasi-judicial preclusive effect on the issue of whether the Plaintiffs suffered the requisite injuries to maintain a deliberate intent cause of action. The Plaintiffs are estopped from re-litigating the issue of whether the plaintiffs have suffered an injury or death as the result of the actions of their respective employers.

W.Va. Code 23-4-2 (c) states:

"[i]f injury or death result to any employee from the deliberate intention of his or her employer to produce the injury or death of the employee, the widow, widower, child or dependent of the employee has the privilege to take under this chapter and has a cause of action against the employer, as if this chapter had not been enacted, for any excess of damages over the amount received or receivable in a claim for benefits under this chapter, whether filed or not." (Emphasis added).

A key element to maintain a deliberate intent cause of action is that the employee must have suffered an injury or death as a result on their employer's deliberate intent to produce such an injury or death. In the worker's compensation cases it was determined that the Plaintiffs failed to prove that they suffered an injury or death as a result of their respective employment. The Plaintiffs cannot prove their employers deliberately caused an injury or death since the court already found that the Plaintiffs did not incur any injury or death as a result to their employment.

To establish a deliberate intent cause of action, an employee must prove each of the five elements set forth in Section 23-4-2(d)(2)(ii)(A)-(E) of the West Virginia Code. However, if an employee fails to show that a genuine issue of material fact exists on each of the five elements, "the court shall dismiss the action upon motion for summary judgment." W.Va. Code §23-4-2(d)(2)(iii)(B). The fifth element of a deliberate intent cause of action requires the employee to prove that he or she has suffered an injury or death "as a proximate result of the specific unsafe working condition, W.Va. Code §23-4-2(d)(2)(ii)(E). Based on the Plaintiffs' failure to prove that they suffered such an injury as a result of their working conditions, the Plaintiffs cannot meet their burden of proof required in W.Va. Code §23-4-2(d)(2)(ii)(A)-(E).

Additionally, W.Va. Code 23-4-2 (c) provides that any employee proving deliberate intent is entitled to recovery "for any excess of damages over the amount received or receivable in a claim for benefits." (Emphasis added). If an employee is permitted to maintain a deliberate intent claim after the worker's compensation claims were denied based on a lack of compensable injury, an employer would potentially be subject to greater liability. This result would place employers in a difficult position;

either choose not to defend the worker's compensation claim or defend the worker's compensation claim and risk greater liability exposure on behalf of the employers. This Court finds that such an interpretation would be contrary to the legislative intent of the worker's compensation laws.

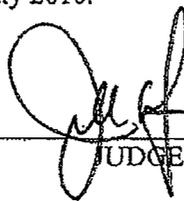
This Court finds that based on the preclusive effect of collateral estoppel, the Plaintiffs can not maintain a deliberate intent cause of action against the Defendants.

III. CONCLUSIONS OF LAW

It is accordingly **ADJUDGED** and **ORDERED** that the **DEFENDANTS'** **MOTIONS** for **SUMMARY JUDGMENT** is **GRANTED** and as such, the deliberate intent claims by the Plaintiffs Roger Muncy, Katy Addair (Administratrix for Gary Addair), Larry Hatfield, William Weese, Mitchell McDerment, Kenneth King, Steven Hylton, Clarence McCoy, Bobby Maynard, James Jones, Carl McPeake, and Terry Martin are dismissed as a part of this action.

The parties' objections and exceptions are noted by the Court. It is further **ORDERED** that the Clerk of this Court send certified copies to counsel of record in this case.

Entered this 27 day of July 2010.



JUDGE JACK ALSOP

A TRUE COPY, ATTEST.
DAVID "BUGS" STOVER, CLERK

This the 4 day of Aug, 2010

By: [Signature]
Deputy.