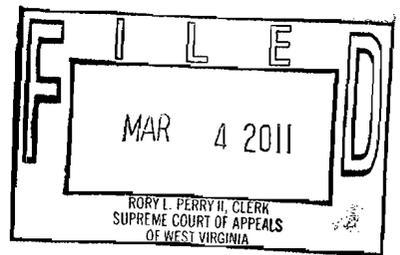


Docket Number: 11-0397



***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.*,

Petitioners/Plaintiffs,

- v. -

LITWAR PROCESSING COMPANY, *et al.*,

Respondents/Defendants.

PETITION FOR APPEAL

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

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CITATION BIBLIOGRAPHY & SHORTFORM ABBREVIATIONS

Abbreviation Source

Orders of the Circuit Court, Wyoming County

CE Order Order granting Defendants' Motions for Summary Judgment Dismissing the Deliberate Intent Cause of Action Claim, entered Aug. 4, 2010.

'08 Order Amended Order to Correct Typographical Errors, entered March 27, 2008

Other Sources, Record on Petition

CM Aff Affidavit of Clarence McCoy, sworn to Dec. 31, 2009

CM ALJ Declaration of William A. Walsh Opposing Motion for Summary Judgment, dated Jan. 4, 2010, Exhibit Q, Decision of Administrative Law Judge regarding Clarence McCoy, dated Jan. 26, 2007

CM Dahl Declaration of William A. Walsh Opposing Motion for Summary Judgment, dated Jan. 4, 2010, Exhibit V, Report of James G. Dahlgren, M.D. regarding Clarence McCoy, dated Dec. 30, 2009

GA Aff Affidavit of Katy Addair, sworn to Dec. 10, 2009

GA ALJ Declaration of William A. Walsh Opposing Motion for Summary Judgment, dated Jan. 4, 2010, Exhibit L, Decision of Administrative Law Judge regarding Gary Addair, dated Nov. 15, 2007

GA Dahl Declaration of William A. Walsh Opposing Motion for Summary Judgment, dated Jan. 4, 2010, Exhibit U, Report of James G. Dahlgren, M.D. regarding Gary Addair, dated Dec. 30, 2009

KK Aff Affidavit of Kenneth King, sworn to Feb. 3, 2010

KK ALJ Joinder of Defendant Standard Laboratories, Inc. in the Motion for Summary Judgment by Defendant Virginia Crews Coal Company, served Dec. 23, 2009, C-3, Decision of Administrative Law Judge regarding Kenneth King, dated May 3, 2007

LH Affl Affidavit of Larry Hatfield, sworn to Feb. 5, 2010

LH Aff2	Affidavit of Larry Hatfield, sworn to June 17, 2010
LH ALJ	Joinder of Defendant Standard Laboratories, Inc. in the Motion for Summary Judgment by Defendant Virginia Crews Coal Company, served Dec. 23, 2009, B-3, Decision of Administrative Law Judge regarding Larry Hatfield, dated Nov. 30, 2007
LH Rog	Defendant Buffalo Mining Company's Motion for Summary Judgment with Respect to the Claims of Plaintiffs Larry Hatfield and William Weese, served Mar. 29, 2010, Exhibit A, Plaintiff Larry Hatfield's Answers to Defendant Buffalo Mining Company's First Set of Interrogatories and Requests for Production of Documents, dated Nov. 2, 2009
MM ALJ	Joinder of Defendant Standard Laboratories, Inc. in the Motion for Summary Judgment by Defendant Virginia Crews Coal Company, served Dec. 23, 2009, Exhibit A-3, Decision of Administrative Law Judge regarding Mitchell McDerment, dated May 9, 2007
NCKK	Affidavit of Nicholas Cheremisinoff, PhD, regarding Kenneth King, sworn to Feb. 2, 2010
NCLH	Affidavit of Nicholas Cheremisinoff, PhD, regarding Larry Hatfield, dated Feb. 2, 2010
NCLH2	Affidavit of Nicholas Cheremisinoff, PhD, regarding Larry Hatfield, dated June 21, 2010
NCRM	Affidavit of Nicholas Cheremisinoff, PhD, regarding Gary Addair and Roger Muncy, sworn to Dec. 23, 2009
NCTM	Affidavit of Nicholas Cheremisinoff, PhD, regarding Terry Martin, sworn to May
NCWW	Affidavit of Nicholas Cheremisinoff, PhD, regarding William Weese, sworn to June 21, 2010
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RG Rpt Declaration of William A. Walsh Opposing Motion for Summary Judgment, dated Jan. 4, 2010, Exhibit O, Report of Ronald E. Gots, M.D., Ph.D., dated March 10, 2004

RM Aff Affidavit of Roger Muncy, sworn to Oct. 22, 2009

RM ALJ Declaration of William A. Walsh Opposing Motion for Summary Judgment, dated Jan. 4, 2010, Exhibit G, Decision of Administrative Law Judge regarding Roger Muncy, dated May 14, 2007

RM Dahl Declaration of William A. Walsh Opposing Motion for Summary Judgment, dated Jan. 4, 2010, Exhibit T, Report of James G. Dahlgren, M.D. regarding Roger Muncy, dated Dec. 30, 2009

SH Rog Defendant Westmoreland Coal Company's Joinder in Motion for Summary Judgment by Defendant Noone Associates, Inc., Exhibit A, Plaintiff Steven Hylton's Answers to Defendants Dow Chemical Company and Noone Associates Inc.'s First Set of Interrogatories and Requests for Production of Documents, undated

SH ALJ Motion for Summary Judgment [Against Steven Hylton] by Defendant Noone Associates, served March 19, 2010, Exhibit C, Decision of Administrative Law Judge regarding Steven Hylton, dated Dec. 6, 2006

TM Aff Affidavit of Terry Martin, sworn to April 16, 2010

TM ALJ Motion for Summary Judgment [Against Terry Martin] by Defendant Noone Associates, served February 12, 2010, Exhibit C, Decision of Administrative Law Judge regarding Terry Martin, dated Feb. 26, 2007

WW Aff Affidavit of William Weese, sworn to June 20, 2010

WW ALJ Defendant Buffalo Mining Company's Motion for Summary Judgment with Respect to the Claims of Plaintiffs Larry Hatfield and William Weese, served Mar. 29, 2010, Exhibit F, Decision of Administrative Law Judge regarding William Weese, dated Aug. 15, 2007

ASSIGNMENT OF ERRORS & SUMMARY OF ARGUMENT

1. **Did the Circuit Court err as a matter of law in granting summary judgment for defendants against three plaintiffs who were not the subject of a motion?**

The Circuit Court committed reversible error in granting summary judgment dismissing the deliberate intent cause of action of plaintiffs Jones, Maynard and McPeake. The Court erred as no defendant moved for summary judgment specific to these plaintiffs, no one advanced a legal argument for their dismissal, and as plaintiffs Maynard and McPeake actually prevailed on their workers' compensation claims, the application of the doctrine of collateral estoppel could not stand as a matter of fact or law.

2. **Did the Circuit Court err as a matter of law in granting summary judgment for certain defendants where those defendants failed to make the necessary showing under Rule 56 to demonstrate the absence of a genuine issue of material fact?**

The Circuit Court committed reversible error in granting summary judgment in that none of the defendants supported their motions with the required submission of evidence in admissible form or provided an affidavit to address the relevant facts. Further, certain defendants submitted minimal support, including one moving defendant, whose entire submission is a four-sentence joinder notice and 13 unidentified and unexplained documents.

3. **Did the Circuit Court err in applying the doctrine of collateral estoppel to prior determinations of the Workers' Compensation Commission?**

The Circuit Court committed reversible error in granting summary judgment in giving collateral estoppel effect to prior decisions of a quasi-judicial body. The express legislative decision to define the statutory exception to employer immunity under the workers' compensation laws, *see* §23-4-2, and this Court's prior determination that significant differences exist between full litigation and a compensation proceeding, *see Plummer v. Workers Compensation Div.*, 209 W. Va. 710, 713-14, 551 S.E.2d 46, 49-50 (2001), preclude application of the doctrine to quasi-judicial proceedings under the workers' compensation statute.

Application of the doctrine to prior compensation determination as to a deliberate intent cause of action will force an election of remedies upon workers which is not contemplated within the statute or otherwise appropriate.

The Circuit Court further erred in applying the doctrine of collateral estoppel offensively and using it to strike various plaintiffs' deliberate intent claims against other employers not involved in the compensation proceeding.

The underlying facts also confirm that the plaintiffs did not fully litigate the issues before the Workers' Compensation Commission. Further, moving defendants never addressed that the identical issue was resolved in the prior proceeding and a review of the appellate record demonstrates the specific nature of the alleged injury and the time frames were different.

4. **Did the Circuit Court err in failing to consider the exceptions to the doctrine of collateral estoppel before dismissing the plaintiffs' deliberate intent causes of action?**

The Circuit Court committed reversible error in granting summary judgment in never considering specific exceptions to the doctrine of collateral estoppel. The availability of additional and strong evidence for each of the plaintiffs, as demonstrated in a series of accompanying affidavits from the plaintiffs and expert witnesses, was sufficient to overcome the application of the doctrine. *See Tolley v. Carboline Co.*, 217 W.Va. 158, 164, 617 S.E.2d 508, 514 (2005). Likewise, application of the doctrine was inappropriate as the determinations in the prior compensation proceedings rested, in part, on fraud or misrepresentation. *See Persinger v. Peabody Coal Co.*, 196 W. Va. 707, 474 S.E.2d 887 (1996).

STATEMENT REGARDING ORAL ARGUMENT

The question as to whether a Court should give collateral estoppel effect to a prior determination of the Workers Compensation Commission or other workers' compensation claim to a deliberate intent claim is a question of first impression for the West Virginia Supreme Court of Appeals and one involving a question of fundamental public importance. Likewise, the question as to whether the doctrine of collateral estoppel may be employed offensively against other employers not involved in a compensation proceeding is a question of first impression. As such, these two issues are Rule 20 arguments.

All other arguments presented within the petition constitute Rule 19 oral argument issues.

Plaintiffs/petitioners believe oral argument is necessary and may request additional time as the underlying order granted summary judgment dismissing the deliberate intent cause of action of 12 different individuals with each individual's underlying case being fact specific to that person.

STATEMENT OF THE CASE

Plaintiffs Gary Addair, Larry Hatfield, Steven Hylton, James Jones, Kenneth King, Bobby Maynard, Terry Martin, Clarence McCoy, Mitchell McDerment, Carl McPeake, Roger Muncy and William Weese (collectively, “plaintiffs”) appeal from the decision of the Circuit Court, Wyoming County, entered on August 4, 2010 (“Estoppel Order”). The lower court granted summary judgment against each individual and held that prior workers’ compensation proceeding determinations precluded these 12 plaintiffs’ deliberate intent claims against their respective employers. This dismissal constituted a final determination against these plaintiffs for the only identified claim – of deliberate intent – that these plaintiffs have in this litigation. As detailed below, a number of grounds support reversal of the Estoppel Order.

Plaintiffs, along with others, are individuals who conducted coal float-sink work or otherwise worked near such testing. Float-sink operations involve protracted exposure to perchloroethylene and other hazardous chemicals while determining the specific gravity of coal samples. Plaintiffs were exposed to these chemicals both by dermal contact and inhalation.

Plaintiffs commenced this litigation as a class action asserting a series of claims against the manufacturers and distributors of perchloroethylene and other involved chemicals for products liability and medical monitoring and against the operators of coal float-sink labs around the State for deliberate intent. By order dated March 27, 2008, the Circuit Court denied class certification for the plaintiffs on their deliberate intent claim. Plaintiffs subsequently moved for leave to amend the complaint in order to assert individual deliberate intent claims for the identified plaintiffs. Although plaintiffs filed and served that motion nearly 20 months ago, that motion remains pending.

A series of significant errors undermine the lower court's order. The Circuit Court invoked the doctrine of collateral estoppel to grant summary judgment on behalf of 13 defendants against 12 plaintiffs. Initially, the Order contains critical errors that call into question the integrity of the entire decision as the Court failed to identify the proper parties. Six¹ of the defendants had not filed the motions for summary judgment and no defendant named three of the identified plaintiffs in any applicable motion. Indeed, in looking at the Circuit Court's recitation of facts specific to plaintiffs James Jones, Bobby Maynard and Carl McPeake, it appears that the lower court inserted "facts" entirely absent from the record in order to substantiate its dismissal of the plaintiffs' claims. The lower court provided a series of paragraphs indicating a series of adverse decisions on specific dates for plaintiffs Jones, Maynard and McPeake, even though no defendant provided this information. The Circuit Court's awarding of summary judgment to the defendants is more disturbing when the Court understands that, in fact, plaintiffs Maynard and McPeake prevailed on their compensation claims. Further, the Court considered and granted summary judgment motions fatally defective on their face (one joinder was a simple, four-sentence document that never discussed any of the applicable facts, while thrusting 13 unidentified documents at the lower court to assess and understand). *See* Joinder of Defendant Standard Laboratories, Inc. in the Motion for Summary Judgment by Defendant Virginia Crews Coal Company, served Dec. 23, 2009 ("Standard Labs Joinder").² These opening errors signal the existence of other legal errors within the Estoppel Order.

¹ The defendants who had not served motions for summary judgment on collateral estoppel grounds were Pittston Coal Management, Pittston Coal Sales Corp., Marfork Coal Co., Massey Energy Co., Massey Coal Services, Inc. and Massey Coal Capital Corp.

² Plaintiffs have utilized short-form abbreviations for those documents within the record to which plaintiffs make repeated references. Plaintiffs have provided a list of these short-form abbreviations at the end of the Table of Authorities.

Reversal of the Estoppel Order is appropriate as a matter of law. A review of the relevant facts confirms that the defendants never argued, let alone met, their burden of proof for the remaining nine plaintiffs. Application of the doctrine of collateral estoppel requires four specific elements. Defendants, however, never discussed whether the issue which the Workers' Compensation Commission (WCC) determined was identical to the issue before the Circuit Court. Certainly, no moving defendant ever attempted to demonstrate that the specific type of injury was identical between the compensation claim and the instant litigation. Additionally, the facts support plaintiffs' position that the relevant issue did not enjoy full consideration before the Commission. As the moving defendants failed to meet necessary elements for collateral estoppel, the lower court erred in awarding summary judgment. The Estoppel Order is further flawed as a matter of law in that it applied the doctrine of collateral estoppel offensively against employers not involved in the underlying proceeding for whom some of these plaintiffs worked under different circumstances with differing levels of chemical exposure during entirely different periods of time. Further, beyond these deficiencies, the availability of significant additional evidence and the role of fraud in the underlying decisions of the Commission move these claims into recognized exceptions to the application of the collateral estoppel doctrine. For the reasons fully detailed within this brief, plaintiffs Gary Addair, Larry Hatfield, Steven Hylton, James Jones, Kenneth King, Bobby Maynard, Terry Martin, Clarence McCoy, Mitchell McDerment, Carl McPeake, Roger Muncy and William Weese respectfully request that this Court reverse and vacate the Estoppel Order in its entirety.

STATEMENT OF FACTS

The instant action involves the adverse health impacts associated with perchloroethylene (“PCE” or “Perc”), which is used in coal float-sink labs to test the quality of the coal. Plaintiffs originally brought the litigation as a class claim for deliberate intent against the employer-operators of the float-sink labs, while bringing a class action against the manufacturers of PCE and other chemicals for failure to warn and medical monitoring. The Circuit Court has previously denied class certification for the deliberate intent claim and directed the various plaintiffs to move forward individually against their respective employers. *See* '08 Order. Various employers moved for summary judgment dismissing the individual deliberate intent cause of action of certain plaintiffs in the action. These defendants argued that prior determinations from the WCC precluded those plaintiffs from prevailing because they are collaterally estopped from demonstrating injury. The Circuit Court, in the Estoppel Order, accepted this argument and granted the motions.

1. Individuals Impacted, Overview

An understanding of the float-sink operation and the working conditions which the plaintiffs endured remains a critical aspect of judicial consideration of the defendants’ motions for summary judgment. None of the plaintiffs submitted any of the necessary evidence to the WCC. In opposing the motion, the plaintiffs provided the Circuit Court with 18 separate affidavits to explain the process of a coal float-sink to the court, the adverse environmental conditions and how exposure to those chemicals was responsible for the injuries that these plaintiffs have suffered. Various challenged plaintiffs submitted an affidavit that detailed their

work environment, their ailments and their exposure to PCE. Plaintiffs also produced an expert affidavit that assessed the chemical exposure of the plaintiffs and a medical affidavit for certain plaintiffs to advise the lower court of the harm from exposure to the float-sink chemicals. Notably, particularly given the standard for evaluating a motion for summary judgment, none of the defendants offered any evidence contrary to plaintiffs' submissions. In short, not a single moving defendant challenged plaintiffs' factual submissions. The absence of any contrary factual information insures the presence of genuine issues of unresolved material facts. Indeed, in the five motions for summary judgment and three joinder motions, not a single defendant submitted an affidavit from an individual with first-hand knowledge or any other supporting affidavit.

2. Work Environment Considerations

Roger Muncy and Gary Addair worked for Virginia Crews Coal (VCC) for nearly 15 years each covering the years 1985 to 2001, *see* RM Aff. ¶¶ 7, 9, and this should provide the Court with a reasonable illustration of the process, the related chemical exposure and the injuries that these men have incurred. During this period of time they worked in the float-sink lab, which was a trailer, or boxcar, with a hole cut in it and a fan for ventilation. *Id.* at ¶ 8. During each two-week test cycle, Mr. Muncy and Mr. Addair experienced extensive periods of exposure to PCE. They would work three twelve-hour shifts, during which time they conducted float-sink testing almost continually. *Id.* at ¶ 14. Over the remaining nine work days, they would conduct float-sink testing during three or four hours each day, while performing other related tasks, e.g., collecting samples. *Id.* at ¶ 15.

The work performed within the boxcar was largely consistent with float-sink operations

around the state. The tasks included crushing the coal down to a certain grade, conducting a specific gravity test on the sample through the placement of the crushed samples in vats of PCE, drying the samples in ovens and then pulverizing the samples for further testing. *Id.* at ¶ 11. Mr. Muncy and Mr. Addair conducted the float-sink test in open vats, each of which contained approximately 25 gallons of PCE. *Id.* at ¶¶ 13, 24. The placement of the sample in the PCE vat, agitation of the PCE and the removal of the samples frequently resulted in PCE coming into contact with their skin, or spilling on their clothes. *Id.* at ¶ 29.

VCC's lab "room" measured approximately 10 feet by 25 feet and the sole source of ventilation was a single exhaust fan and a door in the middle of the side of the boxcar/trailer. *Id.* at ¶ 16. The lab maintained a constant "Perc" odor. *Id.* at ¶ 18. The Perc smell increased each time that workers used the ovens in the lab. *Id.* at ¶ 19. During the oven drying process, Mr. Muncy, Mr. Addair and others would open the ovens and flip the drying samples with a spatula while breathing in the heated fumes that the oven released. *Id.* at ¶ 20. The Perc odor would also intensify during the summer with the increased heat. *Id.* at ¶ 21. The odor would become oppressive to anyone working within the trailer, and it was rare that anyone would spend more than 30 to 60 minutes in the area where Virginia Crews conducted the float-sink testing and analytical work without taking a break to breathe some fresh air and clear their heads. *Id.* at ¶ 22.

VCC disregarded health and safety procedures in the lab. VCC did not conduct any air testing in the box car and did not maintain a monitoring system of any type during the 14 years of Mr. Muncy's employment with VCC. *Id.* at ¶ 38. Likewise, during that period of time, VCC never conducted a safety training seminar specific to the handling of perchloroethylene and other hazardous chemicals involved in the float-sink process and it appears not to have ever made the

relevant Material Safety Data Sheets available to its float-sink employees. *Id.* at ¶¶ 39-40. Personal protection equipment (PPE) remained minimal for the individuals conducting the float-sink work. *See Id.* at ¶ 31. While the company made gloves available to the employees in the lab, these gloves were not designed for handling of hazardous chemicals, but rather were the type of gloves typically used for washing dishes and frequently developed holes in them. *Id.* at ¶¶ 32-33. For most of Mr. Muncy's employment with the company, VCC did not provide any form of breathing apparatus or other PPE required for frequent exposure to hazardous chemicals. *Id.* at ¶ 34. For the final five years or so, a single respiratory unit was provided for all individuals within the lab, but that equipment was not fit-tested for any particular individual who might wear it and only one individual at a time could wear that respirator. *Id.* at ¶¶ 35-37.

The lack of proper PPE and the horrific conditions within the lab resulted in frequent dermal and inhalation exposure to perchloroethylene and other hazardous chemicals. *Id.* at ¶ 41. As already noted, VCC float-sink employees came into direct contact with perchloroethylene during the float-sink testing, when the chemical would get on individual employees' hands or splash on their clothing. *Id.* at ¶ 42. Employees, including Mr. Muncy, also constantly inhaled perchloroethylene-filled air. *See Id.* at ¶ 43. Perchloroethylene fumes filled the lab by escaping from the vats used for float-sink testing, venting from the ovens used to dry float samples (employees had to open the ovens to flip over the samples resulting in the venting of heated PCE into the work area), gassing off the PCE-soaked sink samples in burlap bags left in any available corner, as well as from the crushing and pulverizing of dried float samples. *See Id.* at ¶ 45. The presence of the stairs to the union bathhouse and the scale room within eight feet of the door to the box car forced employees performing float-sink work to keep the door to the room shut, significantly decreasing any natural ventilation and causing PCE odors to grow. *Id.* at ¶¶ 48-49.

Throughout Mr. Muncy's employment with VCC, he experienced a persistent headache, which he associated with working around PCE and which would dissipate within an hour or two of the end of his shift and leaving the lab. *Id.* at ¶ 51. He also experienced dizziness and disorientation, as well as occasional nausea when he stayed in the lab too long (more than forty-five minutes to an hour) or the lab got too warm during the summer. *Id.* at ¶ 52. Mr. Muncy attributes a number of ailments to his exposure to perchloroethylene and other hazardous chemicals at VCC, including short term memory loss, anxiety, depression, frequent bouts of dizziness, tremors in arms and legs, loss of sleep, nerve twitches, frequent kidney stones, bodily jerking that is worsened by fatigue, sleeplessness, numbness in legs and arms, fibromyalgia, shortness of breath, nosebleeds and bilateral carpal tunnel syndrome. *Id.* at ¶¶ 53-54. Mr. Muncy is aware that other employees have suffered from these same or similar medical problems. *Id.* at ¶ 55. Mr. Muncy is also aware that each of his colleagues experienced similar short-term problems from PCE exposure – i.e., headaches, disorientation, partial loss of motor control, and nausea – on a regular basis while working with perchloroethylene and believes that most suffered similar long-term injury. *Id.* at ¶¶ 56-57.

Mr. Addair's widow describes the symptoms her husband endured as very similar to those of Mr. Muncy. *See GA* at ¶¶ 25-39. Mr. Addair experienced lightheadedness on the job and felt significant headaches on a near daily basis. *See Id.* at ¶¶ 25-26. Gary Addair also suffered significant memory loss going from an ability to sing almost any song from memory while playing the guitar to halting all performances around friends and family because he could no longer remember lyrics. *See Id.* at ¶¶ 28-30. He developed difficulties with sleeping and what sleep he did achieve was restless and caused him to sweat heavily. *See Id.* at ¶¶ 31-34. Mr. Addair, like Mr. Muncy, developed severe depression; though whether that was due to direct

exposure to perchloroethylene or a consequence of his ailments, such as memory loss, which PCE exposure caused remained undetermined. *See Id.* at ¶¶ 35-42

The experiences of Gary Addair and Roger Muncy were not isolated events. Subsequent professional evaluations of various work environment and lab conditions confirmed a disturbing continuity in employer disregard for health standards. These employer defendants consistently disregarded the standard of care afforded under the General Duty Clause of the 1970 OSHA Act. *See, e.g.*, NCRM at 8, ¶ 22; NCWW at 9, ¶ 35. These employers largely disregarded their obligations to provide proper PPE. *See, e.g.*, NCRM at 9, ¶ 22(e)-(f); NCWW at 10, ¶ 35(d)-(e). Calculations indicate that Mr. Weese, for example, worked in an ultra-hazardous environment where his exposure to PCE was several times higher than the permissible exposure level. NCWW at 5, ¶ 21. For Mr. Hatfield, estimates indicate that the level of PCE that he inhaled on a daily basis varied from 1.7 to 13 times the federally recommended inhalation exposure level. NCLH at 6, ¶ 25. Such levels qualify as Immediately Dangerous to Life and Health (IDLH). *Id.* at 7-8, ¶ 34. The current OSHA standard for perchloroethylene is 25 ppm for an 8-hour time-weighted average, while including a short term exposure limit of 200 ppm. At VCC, however, conservative estimates indicate that Mr. Addair and Mr. Muncy worked in an environment where the concentration of PCE in the work room on average exceeded 120 ppm. *See* NCRM at 8, ¶ 21. Defendant Noone Associates also provided inadequate ventilation, not meeting the requirements for a kitchen, let alone an area working with hazardous chemicals. *See* NCTM at 8-10, ¶ 25. Similarly, Mr. Kenneth King worked for thousands of hours at Standard Laboratories in an environment where PCE exposure far exceeded recommended levels. NCKK at 7, ¶ 19. Each of these men, in turn, experienced short-term adverse health consequences consistent with known health effects. *See* RM Dahl at 20 (stating that “[i]t is certain that Mr. Muncy’s damages

to his Central and Peripheral Nervous Systems were caused by his work exposures to PCE”); GA Dahl at 3 (stating that for Gary Addair, “his illness during his life and his death medically probably related to his exposure to PCE”); CM Dahl (finding that Clarence McCoy’s toxic encephalopathy arises from his work exposure to PCE and adding that “his already damaged neurological system will manifest in more severe disabilities as he ages” and that “his occupational exposures have increased his risk of developing cancer, as well as kidney, liver and lung damage ... associated with this type of exposure”).

3. Workers’ Compensation Proceedings & Determinations

As attorneys were establishing this litigation as a class action, plaintiffs Addair, Hatfield, Hylton, King, Martin, McCoy, McDerment, Muncy and Weese, as well as several others, filed workers’ compensation claims against their respective employers. For the nine individuals subject to the Estoppel Order, the WCC ultimately rejected their claims. A series of common factors mark the various plaintiffs’ claim histories as they worked their way through the WCC proceedings. First, each individual submitted his claim specific to his then current employer and not against all of the float-sink labs where he might have worked. Second, as is typical with workers’ compensation claims, claimants and their counsel did not utilize any of the discovery procedures which are normally employed as a matter of course and to a much greater degree in civil litigation. For example, none of these plaintiffs conducted depositions or submitted written discovery to his employer and only a few utilized a medical expert to support their claims. *See, e.g.,* GA ALJ at 19-22 (listing the submitted material in support of plaintiff’s claim); MM ALJ at 22-25 (same); TM ALJ at 16-19 (same); WW ALJ at 9-10 (same). Consistent with the focus of the workers’ compensation claim process on swift consideration, the claimants largely relied on

the initial doctor's identification of an injury and only supported those claims with other medical reports in rare instances. The specific employers did use some discovery devices in certain cases and almost all of the employers made use of the same "expert" reports. Third, the administrative law judges (ALJ) who reviewed the initial determination were almost universal in their finding that the claimant's failure arose from a lack of evidence; the reviewing ALJ did not find an absence of injury or absence of causation, as opposed to a complete lack of evidence offered to support the injury or its cause. *See, e.g.*, GA ALJ at 20; MM ALJ at 20; SH ALJ at 7. Fourth, when the information was considered, the ALJs uniformly gave deference to the expert submissions of the coal float-sink lab's expert report without any knowledge of the significant misrepresentations in those reports. *See, e.g.*, CM ALJ at 8, ¶ 30; 9 ¶ 32 (detailing the employer's experts' testimony and finding it reliable); GA ALJ at 5, ¶ 14 – 9, ¶ 5 (same).

The lack of submitted evidence impacted each compensation review. Each ALJ noted an absence of evidence to support the plaintiffs' compensation claims. In review of the denial of Roger Muncy's claim, the ALJ wrote:

but there is no documentation, other than Dr. Kostenko's conclusory statements, as to what the claimant was actually exposed, under what conditions, in what amount, and for how long. There is no job description, employment time records, nor other documentation regarding the claimant's actual amount of time spent doing float sink work and the amount of exposure and at what level of exposure.

RM ALJ at 16. This finding parallels the determination of the McCoy ALJ, who wrote:

There is a lack of information regarding the claimant's actual workplace exposure. His workplace has not been studied, nor has there been provided a clear indication of how much time he spent in the laboratory on a daily basis or what his job duties were. There is also a complete lack of documentation of the claimant's actual physical condition. This claim is not compensable because the

claimant's symptoms and medical problems cannot be fairly traced to his employment as the proximate cause.

CM ALJ at 14. Similar language exists in most of the other ALJs' determinations. *See* MM ALJ at 20; SH ALJ at 7; KK ALJ at 8; WW ALJ at 7.

4. Submissions of Defendants in this Litigation

Starting on September 14, 2009, a number of employer defendants brought motions for summary judgment. The moving defendants argued that the WCC's prior determinations that certain individuals had not demonstrated any injury from work place exposures precluded those plaintiffs from prevailing on their deliberate intent causes of action as a matter of law. In short, the moving defendants argued that having failed to show a recoverable injury previously, those same individuals could not demonstrate injury now to support this necessary element of a deliberate intent cause of action. Defendants made no effort to identify what injury was at issue before the WCC. Defendants did not detail what injuries the individual plaintiffs alleged from which they sought to recover damages. Indeed, none of the moving defendants ever authenticated their supporting evidence or provided them to the lower court within the context of a supporting affidavit. *See* W. Va. R. Civ. P. 56(a)(stating that the moving party can seek summary judgment "with or without supporting affidavits"). Eventually, defendants Virginia Crews Coal Company, Independence Coal Company, Inc., Rawl Sales & Processing Co., Buffalo Mining Co., and Noone Associates, Inc. filed motions for summary judgment and defendants SGS North America, Standard Laboratories and Westmoreland Coal Company joined those motions. Those motions, collectively, were specific to plaintiffs Gary Addair, Larry Hatfield, Steven Hylton, Kenneth King, Terry Martin, Clarence McCoy, Mitchell McDerment, Roger

Muncy and William Weese. Plaintiffs James Jones, Bobby Maynard and Carl McPeake were not subject to any of these motions.³

The Circuit Court received a variety of motion papers from the defendants in support of their motions. VCC, Independence Coal and Rawl Sales, in making the first motions for summary judgment on these grounds, provided the Circuit Court with a memorandum of law which discussed their burden or proof to apply the doctrine and a series of documents, referenced within the memoranda of law, which explained (somewhat) how summary judgment was appropriate. *See* “Virginia Crews Coal Company’s Motion for Summary Judgment,” served Sept. 14, 2009. Having found an argument that the defendants like, they abandoned any semblance of substantive, independent argument. Defendant Standard Laboratories, Inc. next filed a joinder to the summary judgment motion of VCC, but for three different plaintiffs, as opposed to the two plaintiffs who were the subject of VCC’s motion. *See* Standard Labs Joinder. Standard Labs filed no memorandum of law, affidavit or notice of motion, but rather simply relied on its four-sentence joinder, its incorporation of VCC’s argument and the 13 documents that it deposited on the judge’s desk without identification. *See Id.* Noone Associates simply submitted a brief memorandum of law arguing that the doctrine of collateral estoppel applied

³ For plaintiffs Maynard and McPeake, the doctrine of collateral estoppel could not have applied under any scenario. The ALJ reversed the original findings for both Mr. Maynard and Mr. McPeake. Mr. Maynard subsequently settled his occupational disease claim with his employer, while Mr. McPeake was awarded a 14% PPD on his occupational disease claim after the ALJ’s reversal of the original denial of coverage.

The obviously improper inclusion of plaintiffs Jones, Maynard and McPeake is the subject of a motion to amend the decision pursuant to Rule 60, which plaintiffs served and filed on October 26, 2010. Despite filing of the motion and a subsequent call to chambers, the Circuit Court Judge has neither corrected his error, nor scheduled a hearing on plaintiffs’ motion. As the Circuit Court has previously sat on and refused to consider motions pending for over nine months on several occasions, plaintiffs also appeal that element of the Court’s Order which dismissed the deliberate intent cause of action of plaintiffs Jones, Maynard and McPeake.

without ever discussing its burden of proof, let alone demonstrating that the considered issues were identical. See “Motion for Summary Judgment [Against Steven Hylton] by Defendant Noone Associates,” served March 19, 2010. SGS provided the thinnest possible support for its motion, setting a new standard for extensive, well-substantiated advocacy. SGS’s single page, three-sentence motion simply incorporated the past arguments of others without submitting a single document, affidavit or memorandum in support of its motion and sought summary judgment, based on the footnote, against “any other plaintiff who would be similarly situated.” See “Motion for Summary Judgment of Defendant, SGS North America, Inc. and Joinder in the Motion for Summary Judgment by Defendant Noone Associates, Inc.,” served June 9, 2010.

5. The Circuit Court Applied the Doctrine of Collateral Estoppel

The Circuit Court signed its decision on the motion on July 27, 2010, and the clerk entered the decision on August 4, 2010. In that decision, the Circuit Court purportedly considered the summary judgment motions of 13 defendants against 12 plaintiffs, *see* CE Order at 1, and, ultimately, ruled on behalf of all defendants against each plaintiff. The lower court’s opening forewarned of the problems to come in the decision as only seven of these defendants had filed motions for summary judgment against nine plaintiffs.⁴

⁴ Unaddressed in the Circuit Court’s decision is any explanation as to how the court is dismissing individual causes of action which have not yet been expressly pled. Plaintiffs’ complaint originally pled the deliberate intent causes of action as a class action claim against the employer defendants. In 2008, the court denied the plaintiffs class status for this claim and required the plaintiffs to move forward with individual deliberate intent causes of action against their respective employers. *See* ’08 Order. In March 2009, plaintiffs moved for leave to amend the complaint in order to reflect those individual claims. That motion remains pending before the Court as to the originally named plaintiff members of the class. While all parties have moved forward with the understanding that each plaintiff is asserting a deliberate intent claim, the Circuit Court has not yet granted the plaintiffs leave to amend so that each individual claim is pled. *In theory, the lower court has issued an advisory opinion in that it*

The Circuit Court anchored its decision on two leading arguments based on the four elements connected with the doctrine of collateral estoppel. Initially, the lower court argues that the plaintiffs had a full and fair opportunity before the WCC. In support of this, the lower court states that 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.” CE Order at 13. Connected with this thought, the Circuit Court further argued that “the procedures set forth in workers’ compensation claims are substantially similar to those used in a court.” *Id.* at 15. Curiously, the Circuit Court also maintains that 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.” *Id.* at 13.

With little analysis, the lower court also concluded that the WCC had addressed the identical issue of injury which was before the court. The lower court connected its arguments with the various administrative decisions to conclude that the workers’ compensation cases had decided “[t]he 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” *Id.* at 16. The court, in turn, viewed this as precluding the plaintiffs from re-litigating the issue of whether the plaintiffs had suffered an injury, *id.* at 13, which prevented them from meeting their burden of proof on a deliberate intent cause of action. *Id.* at 17-18. At no point does the court identify what injury was before the WCC, what injury each plaintiff now alleged and how those chemical exposure injuries are identical. *See generally Id.* (speaking only

has dismissed a cause of action for nine different individual plaintiffs which the plaintiffs have not yet expressly pled.

in terms of injury); *id.* at 2-9 (providing the finding of facts specific to each plaintiff, but never mentioning the nature of their injury). In *dicta*, the lower court further justified its application of the collateral estoppel doctrine with the suggestion that failure to apply the doctrine could make the defendants subject to great liability. *Id.* at 18. Based on this analysis, the lower court granted summary judgment against 12 different plaintiffs.

SUMMARY OF ARGUMENT

I

THIS COURT'S *DE NOVO* REVIEW NECESSITATES A REVERSAL OF THE LOWER COURT'S DECISION

This Court's independent review of the Circuit Court's decision should result in a full reversal of the decision below. West Virginia case law has firmly established that this Court conducts a *de novo* review of the underlying decision to grant summary judgment. See *Coleman Estate ex rel. Coleman v. R. M. Logging, Inc.*, 700 S.E.2d 168, 171 (2010); *Painter v. Peavy*, 192 W.Va. 189, 190, Syllabus Point 1, 451 S.E.2d 755, 756 (1994). This Court has also repeatedly confirmed that "a motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." *Id.*; *Aetna Casualty & Sur. Co. v. Federal Ins. Co.*, 148 W. Va. 160, 160, Syllabus Point 3, 133 S.E.2d 770, 771 (1963). Similarly, the Court applies a *de novo* review to questions of law. *Hartley Marine Corp. v. Mierke*, 196 W.Va. 669, 673, 474 S.E.2d 599, 603 (1996).

A full review of the Circuit Court's decision confirms the need to reverse each and every aspect of the Estoppel Order. Initially, the Estoppel Order contains a basic flaw as it grants summary judgment on behalf of six defendants who did not seek summary judgment and against three plaintiffs, against whom no party filed a motion. Next, as a preliminary matter, the Circuit Court improperly granted summary judgment for certain defendants who failed to meet their burden of proof. Once one peels away these preliminary matters, other faulty aspects of the lower court's decision become apparent.

This Court should also reverse and remand the Circuit Court's decision in its entirety as the core aspects of the decision are wrong as a matter of law. Application of the doctrine of collateral estoppel on a motion for summary judgment requires defendants to demonstrate that the plaintiffs fully litigated the issue before the quasi-judicial body, the WCC, and that the resolved issue was identical to the issue in the instant litigation and that no unresolved issue of material fact remains on these points. As detailed below, defendants failed to carry either of these elements of their burden of proof. Further, should the Court consider affirming the decision below, two exceptions to the collateral estoppel doctrine, particularly the existence of additional significant facts, justify and require a reversal of the Circuit Court's decision.

II

THE COURT IMPROPERLY GRANTED SUMMARY JUDGMENT AS TO PLAINTIFFS JONES, MAYNARD & McPEAKE

This Court must reverse the Circuit Court's decision to grant summary judgment dismissing the deliberate intent claims of plaintiffs Jones, Maynard and McPeake as these three plaintiffs were not the subject of any motion for summary judgment. An application for an order dismissing a claim requires the submission of a motion. *See* W.Va. R. Civ. P. 7(b). Equally, the granting of summary judgment requires a judicial finding that no genuine issue as to a material fact exists. *See Pingley v. Huttonville*, 225 W. Va. 205, 691 S.E.2d 531, 533 (2010). As no defendant made a motion specific to these three plaintiffs and as no party submitted any facts to the Circuit Court concerning these three plaintiffs, the entry of summary judgment against them lacks any supporting foundation and must be reversed.⁵

The absence of any served and noticed motion alone justifies relief from the Estoppel Order for plaintiffs Jones, Maynard and McPeake. No defendant sought summary judgment on those grounds for these three plaintiffs. The five separate summary judgment motions on collateral estoppel grounds make no reference to these plaintiffs. Indeed, although their respective employers, Westmoreland Coal and Buffalo Mining, sought summary judgment with respect to certain plaintiffs, their papers make no reference to plaintiffs Jones, Maynard or McPeake. *See* Westmoreland Joinder; Defendant Buffalo Mining Company's Motion for Summary Judgment with Respect to the Claims of Plaintiffs Larry Hatfield and William Weese,

⁵ The plaintiffs moved pursuant to Rule 60 to correct this erroneous inclusion of plaintiffs on October 26, 2010. To date, the Circuit Court has failed to amend its Order and expressly declined to schedule a hearing on plaintiffs' Rule 60 motion when the plaintiffs sought a prompt consideration of the motion.

served Mar. 29, 2010. As the Circuit Court had no motion before it pertaining to any of these plaintiffs and as the Court lacked factual information about the plaintiffs, the lower court lacked a factual and legal basis for granting summary judgment.

Application of the doctrine of collateral estoppel against plaintiffs Maynard and McPeake is particularly inappropriate inasmuch as both men actually prevailed on their workers' compensation claims. The factual determination within the Estoppel Order for plaintiffs Jones, Maynard and McPeake, *see* CE Order at 7, ¶ 25 through 8, ¶ 33, are illusory without any basis in fact.⁶ Indeed, contrary to the Circuit Court's improvised facts, Mr. Maynard reached a settlement with his employer after the ALJ reversed the denial of his claim, while Mr. McPeake was awarded a 14% PPD award after the ALJ reversed the initial denial of his occupational disease claim. For all of the reasons stated above, this Court should reverse the lower Court's granting of summary judgment against plaintiffs Jones, Maynard and McPeake.

⁶ The repetition within the Order of identical facts for all three gentlemen, with the same incorrect dates being provided for the filing of the claim, the initial hearing, the ALJ's determination and the Board of Review's final order, underscores the oddity of these prejudicial errors. *See Id.* at 7-8. Further, it is unclear what the basis is for the four dates asserted in the Court's Finding of Facts for each plaintiff. *See* CE Order at 7-8, ¶¶ 26-27, 29-30, 32-33. These two repeated paragraphs are not directly lifted from the discussion of any other single plaintiff. Each of the four dates, however, does arise in the discussion of some other plaintiff with the May 9, 2003 claim date attributable to Mr. Hatfield, *id.* at ¶ 2, the September 2, 2004 denial belonging to Mr. Muncy, *id.* at ¶ 20, the December 6, 2006 ALJ decision coming from Mr. Hylton, *id.* at ¶ 15, and the August 31, 2007 Board of Review denial belonging to Mr. McCoy. *Id.* at ¶ 18.

III

CERTAIN DEFENDANTS' MOTIONS FAIL TO MEET THE BASIC REQUIREMENTS OF MOTION PRACTICE AND ENTIRELY DISREGARD THEIR BURDEN OF PROOF

The Circuit Court improperly granted summary judgment for certain defendants, who wholly disregarded their legal burden and never discussed, let alone met, their burden of proof. This Court has provided specific direction to a moving party. “Under Rule 56(c) of the West Virginia Rules of Civil Procedure, summary judgment is proper only where the moving party shows by ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, ... that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.’”⁷ *Williams v. Precision Coil Co.*, 194 W. Va. 52, 59, 459 S.E.2d 329, 336 (1995)(authority omitted). “[A] party seeking summary judgment must make a preliminary showing that no genuine issue of material fact exists. This means the movant bears the initial responsibility of informing the circuit court of the basis of the motion and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact.” *Powderidge Unit Owners Assoc. v. Highland Props. Ltd.*, 196 W. Va. 692, 698-99, 474 S.E.2d 872, 878-79 (1996)(emphasis added). Rule 56 does not impose a duty on the Court to sift through documents in order to determine whether a party has

⁷ In identifying when a motion for summary judgment is appropriate, this Court has stated: “When a motion for summary judgment is mature for consideration and properly is documented with such clarity as to leave no room for controversy, the nonmoving party must take the initiative and by affirmative evidence demonstrate that a genuine issue of fact exists.” *Williams v. Precision Coil Co.*, 194 W. Va. at 58, 459 S.E.2d at 335. Logically, that moving party must present the evidence in admissible form, rather than simply stacking it on the judge’s desk without authentication or explanation.

met its burden. *See Id.* at 700, 474 S.E.2d at 880. This Court has detailed the specific consequence of a moving party failing to meet its burden when seeking summary judgment: “if the moving party fails to meet this initial burden, the motion must be denied, regardless of the nonmovant's response.” *Id.* at 699, 474 S.E.2d at 879 (emphasis added).

The Circuit Court erred in granting defendant Standard Laboratories, Inc. (“Standard Labs”) motion for summary judgment against plaintiffs McDerment, Hatfield and King, as that defendant wholly failed to support its motion and meet its burden of proof. Standard Lab’s four-sentence joinder of another defendant’s summary judgment motion specific to different plaintiffs fails as a matter of law.⁸ Standard Labs’ motion made no reference to defendant’s burden of proof let alone demonstrates the absence of any question of material fact. Standard Labs makes no attempt to identify the injury that each plaintiff raised before the Workers’ Compensation Commission, the injuries alleged in the complaint or how the injuries are identical and, accordingly, summary judgment pursuant to the doctrine of collateral estoppel is appropriate.⁹ Given the fact-intensive requirements of summary judgment on a deliberate intent claim, coupled with the factual scrutiny necessary to apply the doctrine of collateral estoppel, the factual

⁸ Defendant did attempt to subsequently address its complete neglect with the submission of reply papers. The Court should disregard Standard Lab’s subsequent papers in their entirety as the Rules do not contemplate the submission of reply papers in support of a motion, *see* Trial Court Rule 22.01, and, typically, a moving party may not raise on reply matters that it neglected to address in its initial submission. As Standard Lab’s motion papers did not discuss any element of its burden of proof or of the underlying facts, this standard precluded Standard Labs from discussing anything on reply. Further, the Circuit Court indicated that it was not willing to permit the plaintiffs the opportunity to respond to Standard Labs’s reply papers.

⁹ In making its motion, Standard Labs “incorporate[d] by reference ... the arguments, legal citations and relevant factual recitations contained within the above-referenced joint motion served by defendant Virginia Crews Coal Company ...” Standard Labs Joinder at 1. As VCC’s motion rested on facts specific to different plaintiffs working at different labs at different times, Standard Lab’s incorporation of facts served no function and could not play and should not play any role in defendant meeting its burden of proof.

vacuum underlying Standard Labs's motion papers should have precluded summary judgment. Standard Labs' complete abdication on its Rule 56 obligations, accordingly, necessitates the reversal of the Circuit Court's decision granting summary judgment in its favor.

Defendants Independence Coal Co. (Independence) and Rawl Sales & Processing Co. (Rawl Sales) also failed to provide the Circuit Court with the necessary information to support its motion for summary judgment. Although those defendants did provide a supporting memorandum of law with its five exhibits, they ignored the most basic element of their motion. Although demonstrating a prior decision on the identical issue constitute key burdens of proof to application of collateral estoppel, *see infra*, Independence neglected to provide the Court a copy of the ALJ's determination or the final order. The absence of this documentation should have precluded the defendants from prevailing on their motion as it became impossible for them to demonstrate a final decision below on an identical issue.

SGS North America, Inc.'s (SGS) joining papers established a new standard for unsubstantiated motions. SGS's single-page joinder does not seek summary judgment as to any specific plaintiff and SGS neglected to support its motion for summary judgment with any evidence, affidavit or any other document. *See generally* Standard Labs Joinder. SGS simply made absolutely no showing as to why it was entitled to summary judgment. This Court's analysis in *Powderidge Unit Owners Assoc.* must preclude any possible consideration of summary judgment for defendant SGS.

The various defendants' attempts to achieve summary judgment through minimal effort with joinder to other pending motions also face a significant hurdle within the litigation and their prior representations to the Court. In denying class status for the individual plaintiffs in their deliberate intent claim, the Circuit Court found that "deliberate intent actions are unique lawsuits

between an individual employee and his employer(s).” ’08 Order at 6. The court further concluded that “the plain language of the statute requires an individual employee to raise specific allegations against their employer in order to maintain a deliberate intent cause of action” *Id.* at 7. This determination follows the defendants’ argument to the Circuit Court that “the circumstances of any single employee’s claims are unique to the specific employee and the specific employer, and that no individual deliberate intent claim between an employee and his employer(s) can determine the validity of other deliberate intent claims.” *Id.* at 4 (emphasis added). For the defendants to maintain a consistent position, and a position that adheres to the law of the case, no defendant could simply join the motion of another defendant in seeking summary judgment on the deliberate intent claim against it, but rather it had the affirmative obligation to meet each and every aspect of the claim as each possesses a “unique” set of facts. As defendants SGS, Standard Labs, Independence and Rawl Sales made no attempt to address the unique aspects of their former employees deliberate intent claims against them, they never addressed, let alone met, their burden of proof and this Court should reverse the grant of summary judgment against those employees.

IV

THE CIRCUIT COURT ERRED IN APPLYING THE DOCTRINE OF COLLATERAL ESTOPPEL

The application of collateral estoppel in this case to the prior workers' compensation claims is inappropriate. Collateral estoppel will bar a claim if 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 in the prior action." *Holloman v. Nationwide Mut. Ins. Co.*, 217 W.Va. 269, 617 S.E.2d 816 (2005). Collateral estoppel is designed to foreclose relitigation of issues in a second suit which have actually been litigated in the earlier suit even though there may be a difference in the cause of action between the parties of the first and second suit. As the Supreme Court has emphasized, "A fundamental due process point relating to the utilization of collateral estoppel is that any person against whom collateral estoppel is asserted must have had a prior opportunity to have litigated his claim." *Horkulic v. Galloway*, 222 W. Va. 450, 460, 665 S.E.2d 284, 294 (2008)(authority omitted). In the applicable motions, however, the defendants failed to demonstrate that plaintiffs fully litigated the issue of injury before the WCC and no defendant demonstrated that the injuries involved were identical in both cases. Additionally, as explained below, exceptions to the doctrine further justify the reversal of the Estoppel Order.

A. Plaintiffs Did Not Have a Full and Fair Hearing.

The Circuit Court erred in determining that the individual plaintiff's opportunity to have a full and fair hearing was sufficient to apply the doctrine of collateral estoppel to a determination from a quasi-judicial entity. This Court previously indicated that there must be an actual full and fair litigation of an issue, rather than the simple opportunity to do so before collateral estoppel is applied to a quasi-judicial proceeding. See *Wheeling-Pittsburgh Steel Corp. v. Rowing*, 205 W. Va. 286, 296-97, 517 S.E.2d 763, 773-74 (1999). In *Wheeling-Pittsburgh Steel Corp.*, the Court discouraged the application of the doctrine of collateral estoppel to quasi-judicial proceedings unless the party actually fully litigated the issue, as opposed to merely having the opportunity to do so. See *Wheeling-Pittsburgh Steel Corp.*, 205 W. Va. at 296, 517 S.E.2d at 773; *Rowan v. McKnight*, 184 W. Va. 763, 764, 403 S.E.2d 780, 781 (1991). Likewise, this Court has repeatedly emphasized that the quasi-judicial process must be substantially similar to those procedures used by the court. See *Wheeling-Pittsburgh Steel Corp.*, 205 W. Va. at 296, 517 S.E.2d at 773 (quoting *Vest v. Board of Ed.*, 193 W. Va. 222, 455 S.E.2d 781 (1995)). See also Restatement (Second) of Judgments, § 28(c) (noting that “a new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts ...”).

The distinction between full litigation and the quasi-judicial determination of a compensation claim fully justifies limited application of the doctrine of collateral estoppel. Workers' compensation proceedings adhere to a structure predicated on speed and efficiency and, as such, directly discourage the full litigation of an issue. The WCC exists “to provide a simple and expeditious method of resolving the question of disputed claims arising in injuries

occurring in the workplace.” *Casdorph v. West Virginia Off. Ins. Comm.*, 225 W.Va. 94, 690 S.E.2d 102, 113 n. 20 (2009)(authority omitted). To facilitate this prompt determination, the system does not strictly adhere to judicial rules and parties do not maximize use of discovery and other judicial discovery devices. *See Morris v. Consolidated Coal Co.*, 191 W. Va. 426, 429, 446 S.E.2d 648, 651 (1994) (noting that the WCC does not strictly follow the Rules of Civil Procedure or Rules of Evidence). This Court has expressly observed that there are “significant differences” between a civil judicial proceeding and a workers’ compensation claim. *See Id.* The less formal approach that the workers’ compensation provisions encourage, *see Plummer v. Workers Compensation Div.*, 209 W. Va. at 713-14, 551 S.E.2d at 49-50, prompts different approaches to litigation notably different from judicial proceedings.

The Nebraska Supreme Court provides some additional guidance to this appeal. In *Cunningham v. Prime Mover, Inc.*, 252 Neb. 899, 567 N.W.2d 178 (1997), the plaintiff was injured while operating a pallet jack when the brakes seized and he was thrown off the pallet jack. *Id.* at 900, 567 N.W.2d at 180. In reviewing his workers’ compensation claim, the compensation court concluded that the resulting paralysis was the result of a pre-existing condition that the accident did not cause, hasten, accelerate or aggravate the injury. *Id.* Mr. Cunningham brought a third-party action against the manufacturer of the pallet jack, claiming that it was responsible for the accident and his injuries and the Nebraska district court granted the defendant’s motion for summary judgment on the grounds of collateral estoppel. *Id.* at 900-01, 567 N.W.2d at 180. The Nebraska Supreme Court reversed. In declining to apply collateral estoppel, that Court emphasized that “there are procedural differences between the two courts and sound policy reasons for leaving a degree of separation between factual determinations in the compensation court and the trial courts of this state,” and that the compensation court is not

bound by the rules of evidence. *Id.* at 904, 567 N.W.2d at 182. The Court further noted that “the application of collateral estoppel may also chill the purpose and effect of the compensation court” and indicted that application of collateral estoppel could encourage delay in the resolution of compensation claims, contrary to the underlying policy of those proceedings. *Id.* at 905, 567 N.W.2d at 182-83. The views of the Nebraska Supreme Court are sound and plaintiffs encourage this Court to adopt them and decline to apply the doctrine to compensation determinations.

The Court should reverse the Estoppel Order as the plaintiffs did not fully litigate the issue of injury before the WCC and, therefore, the doctrine of collateral estoppel should not apply. The various plaintiffs simply did not fully litigate their compensation cases, which were considered while the instant action remained pending. The nine plaintiffs did not initiate any discovery, did not utilize witnesses available to them in the civil discovery process (such as co-workers and employees of adverse parties), did not provide testimony, did not present expert testimony and offered no rebuttal witness. *See, e.g.,* GA ALJ at 19-22 (listing the information submitted to the ALJ); MM ALJ at 22-25 (same); TM ALJ at 16-19 (same). Focused on the swift and efficient nature of the workers’ compensation process, relying on the presumptive weight given to the diagnosing physician in a compensation claim and aware of the pendency of this class action, plaintiffs sought a swift consideration of their individual claim. No factual basis exists for defendants to successfully argue that any of the nine plaintiffs fully litigated the issue of injury before the WCC. Given the quasi-judicial status of the Commission and the judicially recognized distinctions between the WCC and a Circuit Court, the lower court committed reversible error in applying the doctrine of collateral estoppel to the Commission’s various adverse decisions.

The Circuit Court inserted unsubstantiated details into its Order to permit it to determine that the various individual plaintiffs fully litigated the issue of injury previously. The lower court asserted that the plaintiffs “conducted written discovery, took depositions and obtained expert witnesses; virtually identical to all of the procedures in a civil action.” CE Order at 13. Unfortunately, the lower court is incorrect on each point and nothing within the record supports the lower court’s representations. In reality, when before the WCC, these plaintiffs never served any written interrogatories on the employer, never served any request for the production of documents, never served any requests for admission, never conducted the deposition of any employer, co-worker or corporate agent, never utilized a toxicologist, industrial hygienist or similar expert witness and did not utilize any independent medical examiner beyond Dr. Kostenko. *See, e.g.*, GA ALJ at 19-22 (listing the submitted material in support of plaintiff’s claim); MM ALJ at 22-25 (same); TM ALJ at 16-19 (same). To the extent that the Circuit Court’s determination that the plaintiffs “had a full and fair opportunity to litigate,” CE Order at 13, is founded on these erroneous factual representations, the Circuit Court’s decision must be overturned because it is based on an incorrect representation of the facts. Seeking the simple and expedient approach inherent to the workers’ compensation process and cognizant of this pending litigation, these plaintiffs never made any attempt to extensively argue their compensation claims as if they were tort claims before the Circuit Court.

Strong arguments exist to preclude the application of collateral estoppel to workers’ compensation claim decisions. The application of collateral estoppel effect to workers’ compensation proceedings could impose a significant chilling effect on those reviews and undermine the public policy specific to the statute. Injured workers would fear filing a claim because of the potential that an adverse decision on their compensation claim would foreclose

any chance for the broader relief that a deliberate intent claim could provide. West Virginia adheres to a liberal and less formal approach to compensation claims in order to prompt a swift and efficient resolution of those requests. *See Plummer v. Workers Compensation Div.*, 209 W. Va. at 713-14, 551 S.E.2d at 49-50; *Casdorph v. West Virginia Off. Inc. Comm.*, 690 S.E.2d at 113 n.20. Should the Court affirm the decision below, the Court will place on notice employees throughout the State that any determination before the WCC will have preclusive effect to any third-party claim or deliberate intent claim. Such a decision will force or otherwise require employees to fully litigate all issues before the commission, including interrogatories, document requests, motions to compel discovery, depositions, requests for admission, discovery schedules, motions to limit evidence, stricter adherence to the Rules of Evidence, extensive testimony and a host of other requirements in order to insure a full and fair consideration of the issue. All of these steps contradict the fundamental nature of workers' compensation hearings and prevent a quick and efficient resolution. *See Cunningham v. Prime Mover, Inc.*, 252 Neb. at 904-05, 567 N.W.2d at 182-83 (declining to apply collateral estoppel for public policy reasons and finding that the individual did not have the opportunity to fully and fairly litigate his claim before the compensation board).

The Supreme Court of Utah most recently examined the question of the application of collateral estoppel to workers' compensation claims and ruled in *Gudmundson v. Del Ozone*, 232 P.3d 1059 (2010), that it would not apply the doctrine. *See Id.* at 1069. Examining the issue in terms of a claim against a third-party, the Utah Supreme Court found that applying preclusive effect did not promote the purposes of collateral estoppel (such as judicial economy and preserving the integrity of the judicial system). *Id.* That Court recognized that the workers' compensation remedies are not analogous to lump-sum judgments. *Id.* at 1067. That Court

further recognized that applying the doctrine may force a party into an election of remedies. *Id.* at 1068. Though emphasizing the “unique” facts of the case, the Supreme Court found itself “unable to discern any of the recognized justifications for the application of collateral estoppel” *Id.* at 1069 (indicating that the decision to apply or withhold the doctrine rests upon the facts of each case without any firm rule). In the immediate instances before this Court, the complete lack of any significant development of the facts before the WCC defeats any suggestion that the plaintiffs fully litigated their claims. This Court, accordingly, should decline to apply the doctrine and reverse the lower court’s decision.

B. Defendants Never Demonstrated that the Issues were Identical.

Defendants’ failure to meet the first element of their burden of proof forces a reversal of the Circuit Court’s decision. Courts may apply collateral estoppel only if, in part, “the issue previously decided is identical to the one presented in the action in question.” *See State v. Miller*, 194 W.Va. 3, 9, 459 S.E.2d 114, 120 (1995) (emphasis added). An issue “is not identical if the second action involves different facts, legal standards or procedures.” *Id.* at 10, 459 S.E.2d at 121. *See also City of Huntington v. Bacon*, 196 W.Va. 457, 463, 473 S.E.2d 743, 749 (1996). This Court reiterated the need for all aspects of the proceeding to be identical in *Holloman v. Nationwide Mut. Ins. Co.*, 217 W.Va. at 276, 617 S.E.2d at 823. As defendant sought to apply collateral estoppel on summary judgment, they faced additional Rule 56 burdens. As previously noted, “a party seeking summary judgment must make a preliminary showing that no genuine issue of material fact exists. This means the movant bears the initial responsibility of informing the circuit court of the basis of the motion and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any,

which it believes demonstrate the absence of a genuine issue of material fact.” *Powderidge Unit Owners Assoc. v. Highland Props. Ltd.*, 196 W. Va. at 698-99, 474 S.E.2d at 878-79 (emphasis added).

The defendants uniformly ignored their burden of proof and never demonstrated that the various individual injuries addressed within the prior workers’ compensation hearing were identical to the injuries from which each plaintiff seeks to recover under their deliberate intent claims. Not a single moving defendant mentioned, let alone compared, the injuries that were the subject of the workers’ compensation claims in 2003, to the injuries that the plaintiffs identify in connection with their deliberate intent claims. *See, e.g.*, Virginia Crews Coal Company’s Motion for Summary Judgment, served Sept. 14, 2009 (containing no discussion of the type or nature of injury); Motion for Summary Judgment [Against Steven Hylton] by Defendant Noone Associates (“Noone Hylton Mt”), served March 19, 2010 (same). Even a simple review of the applicable timeframes illustrates the fundamental neglect in defendants’ motions. Defendant Noone Associates neglected to offer the lower court any means for assessing, for example, whether or not plaintiff Steven Hylton’s filed claim for an injury experienced while working for Precision Testing Labs between 1995 and 1996, and 1997 and 1999 is identical to the injuries that form the basis for his deliberate intent claims against defendant Noone Associates (1987-88), defendant Westmoreland (1978-87) or defendant SGS (2004-05). Each and every defendant failed to confirm and demonstrate to the Circuit Court that the injuries were identical in fact and time. As the issue in the prior proceeding must mirror the current one in order for the doctrine of collateral estoppel to apply, defendants’ consistent failure to address this point is fatal to the lower court’s granting of summary judgment.

A specific example illustrates both the defendants' failure to meet their burden of proof and the actual absence of an identical issue in both proceedings. None of the applicable moving defendants, Noone, Westmoreland and SGS,¹⁰ addressed the injuries appropriate to plaintiff Steven Hylton. The focal point for both moving defendants is that the doctrine of collateral estoppel means that Mr. Hylton cannot demonstrate injury. Westmoreland argues that the ALJ "determined Hylton had no injury or disease as a result of chemical exposure in his float-sink laboratory employment." Westmoreland Joinder at 2, ¶ 4. Similarly, Noone Associates argues that the WCC rejected plaintiff Hylton's claim "because he did not sustain a work-related injury." Noone Hylton Mt at 4. Connecting the issues, Noone Associates continues that "the compensability issue (whether Hylton sustained a work-related injury), having already been litigated with a full and final decision from the Supreme Court, cannot be re-litigated in this civil action." *Id.* At no point does either defendant actually identify the specific injury allegedly suffered or, as their burden of proof requires, demonstrate that the identical issue was fully litigated. *See generally* Westmoreland Joinder (containing no discussion of the nature of Mr. Hylton's injuries); Noone Hylton Mt (never discussing in its 5-page memorandum the nature or type of Mr. Hylton's injuries).

A review of the Hylton ALJ decision and actual specified injury confirms that identical issues do not appear to be involved. Initially, a question of timing exists as Mr. Hylton filed his claim against Precision Testing, for whom he worked more than a decade after his work for

¹⁰ As previously noted, in a single-page submission absolutely devoid of details, SGS joined in the motion for summary judgment on the basis of collateral estoppel and mentioned Mr. Hylton, a former employer, within the footnote to its motion. *See* Motion for Summary Judgment of Defendant, SGS North America, Inc. and Joinder in the Motion for Summary Judgment by Defendant Noone Associates, Inc., served June 9, 2010.

Westmoreland and nearly a decade after he worked for Noone. Accordingly, the time frames are not identical. Further, contrary to the movants' assertions, the ALJ did not determine that Mr. Hylton did not suffer an injury, the basis for their motion, but rather determined that the "weighed evidence of record does not establish a causal connection between the claimant's alleged illness and his chemical exposure in the workplace. SH LJ at 7. This holding demonstrates that the actual issue of injury was not resolved within the prior proceeding. Finally, differences exist between the actual injuries alleged. According to the reviewing ALJ, Mr. Hylton alleged before the WCC that he "had decreased touch sensation and history of hematuria. [The reviewing doctor] further indicated that the claimant's exposure caused sleep disturbance, short-term memory loss, [and] peripheral neuropathy, along with carpal tunnel syndrome and myofascial pain." SH ALJ at 6. On his deliberate intent claim, the submitted interrogatory response indicates that Mr. Hylton has continuing trouble with "dry skin, restless legs, nervousness, depression, fibromyalgia, inability to concentrate and/or remember." SH Rog at 5. For plaintiff Hylton, it appears that a significant unresolved question of fact exists as to whether the injuries are identical.

Even when the employer before the WCC is the moving defendant here, the information within the record confirms that unresolved questions of fact remain as to whether the injuries alleged are identical. For plaintiff Larry Hatfield, the WCC's focused injuries were "kidneys, with the diagnosis codes of toxic neuropathy, ... toxic encephalopathy, ... proteinuria, ... [and] myofascial pain." LH ALJ at 2, while Mr. Hatfield's submitted affidavit discusses persistent headaches and dizziness, numbness in his hands and legs, leg cramps, memory loss, rashes, sinus problems, breathing problems, depression, nervousness, sleeplessness and stiffness in joints. LH Rog at 6. These details confirm that had the defendants made any attempt to meet their burden

of proof on this fact-specific issue, they could not have demonstrated that no material question of fact remained that the injuries were identical.

The Circuit Court's decision is flawed as a matter of law as the lower court lacks any factual basis for its conclusions. The defendants' repeated failures to demonstrate the absence of a question of material fact with respect to the identical nature of the alleged injuries forced the Circuit Court to adopt impermissible generalities. The Circuit Court, in reviewing the motion, held that

The issue of whether the Plaintiffs suffered a serious compensable injury or compensable death as a direct result and proximate result of the specific unsafe working condition or employment, as alleged, was decided in the workers' compensation cases. In those proceedings, the ruling was that the Plaintiffs did not prove, by a preponderance of the evidence that they had suffered an injury.

CE Order at 16. *See also Id.* at 2 (asserting that the prior proceedings found no injury). The sweeping generality of the lower court's decision highlights the fundamental error attached to its granting of summary judgment. A review of the compensation determination reveals the fundamental error of the Circuit Court's determination as six of the nine ALJ determinations did not rule on the issue of injury, but rather denied compensation on an apparent lack of evidence generally or lack of proof of causation between the asserted injury and the chemical exposure. *See* LH ALJ at 8, SH ALJ at 7, KK ALJ at 8, TM ALJ at 14¹¹ estoppel with respect to injury, CE Order at 12, and applying the doctrine on the basis of no injury, *id.* at 2, 16, stands at odds with the prior determination and confirms that the considered issues were not identical. Further, the lower court simply conducted a cursory and unsophisticated analysis without considering

¹¹ Mr. Martin's ALJ determined that Terry Martin had demonstrated that his exposure to chemicals caused toxic encephalopathy, SH ALJ at 14, but this decision was subsequently reversed.

whether the issues were identical. Simply put, if the injury that the WCC reviewed is different from the injuries asserted in this litigation, then collateral estoppel cannot apply and the fact that both proceedings require a demonstration of “injury,” without actually detailing the injury involved, cannot meet the applicable burden of proof. For this reason, as well as those stated previously, the Court should reverse the decision of the Circuit Court in full.

C. The Availability of Substantial Additional Factual Evidence Provides an Exception to the Application of Collateral Estoppel.

This Court has recognized an exception to the doctrine of collateral estoppel and discourages application of the doctrine in West Virginia when significant additional evidence is available. For a nonmoving party to “overcome the application of collateral estoppel, ‘[t]here must be additional and strong fact evidence, which has not been shown to have been supplied to the court.’” *Tolley v. Carboline Co.*, 217 W.Va. 158, 164, 617 S.E.2d 508, 514 (2005)(citing *Molinaro v. Fannon/Courier Corp.*, 745 F.2d 651, 655 (Fed. Cir.1984)). When looking at the findings of a quasi-judicial agency, rather than another court, West Virginia case law indicates that the individual must have had not only the opportunity to litigate the issue fully, but did indeed litigate the issue. See *Wheeling-Pittsburgh Steel Corp. v. Rowing*, 205 W. Va. 286, 296, 517 S.E.2d 763, 773 (1999); *Rowan v. McKnight*, 184 W. Va. 763, 764, 403 S.E.2d 780, 781 (1991). Confirmation that the West Virginia Supreme Court leaves the application of the doctrine to the discretion of the Court rests in the repeated observation that “[i]t is now well established that ‘the doctrine of res judicata may be applied to quasi-judicial determinations of administrative agencies.’” See *Wheeling-Pittsburgh Steel Corp. v. Rowing*, 205 W. Va. at 296, 517 S.E.2d at 773 (1999)(emphasis added); *Rowan v. McKnight*, 184 W. Va. at 764, 403 S.E.2d

at 781; *see also Liller v. West Virginia Human Rights Comm.*, 180 W.Va. 433, 440, 376 S.E.2d 639, 646 (1988). For reasons detailed below, this Court should reverse the Circuit Court's decision because the availability of critical evidence corrects the significant omissions before the Workers' Compensation Commission and present facts and opinions that directly link the various plaintiff's exposure to perchloroethylene to the injuries that they have suffered.

Plaintiffs, in opposition to the motions for summary judgment, offered additional and strong evidence in support of their causes of action. Each plaintiff had submitted to the court an affidavit that detailed the work that each did, the chemicals to which they were exposed, the work environment (where safety equipment was not provided and the PCE odor was a constant presence) and the injuries that they suffered. Plaintiffs also submitted an expert affidavit from Dr. Cheremisinoff for each plaintiff. Those affidavits provided a preliminary assessment of the plaintiffs' various work environments and found that each plaintiff worked in an unsafe or toxic environment. The current OSHA standard for perchloroethylene is 25 ppm for an 8-hour time-weighted average, while including a short-term exposure limit of 200 ppm. Conservative estimates indicate that Mr. Addair and Mr. Muncy worked in an environment where the concentration of PCE in the work room on average exceeded 120 ppm. NCRM at 8, ¶ 21. Other plaintiffs experienced comparable or worse working conditions. *See, e.g.*, NCWW at 5-6, Annex B; NCLH at 6, ¶ 25. Finally, in response to the initial motions for summary judgment, plaintiffs supplied the Circuit Court with expert affidavits from Dr. Dahlgren who detailed the health risks associated with PCE exposure and linked Mr. Addair's, Mr. McCoy's and Mr. Muncy's ailments with that exposure. *See* DM Dahl at 20; GA Dahl at 3; CM Dahl at 3. These collected and submitted affidavits provided the lower court with a wealth of information that the WCC never received.

The various ALJ determinations spotlight the significance of this information. For example, in the McCoy Decision ALJ provides the initial cataloging of the omissions from the application:

There is a lack of information regarding the claimant's actual workplace exposure. His workplace has not been studied, nor has there been provided a clear indication of how much time he spent in the laboratory on a daily basis or what his job duties were. There is also a complete lack of documentation of the claimant's actual physical condition. This claim is not compensable because the claimant's symptoms and medical problems cannot be fairly traced to his employment as the proximate cause.

CM ALJ at 12. The Muncy Decision ALJ found the same extensive emissions, observing:

but there is no documentation, other than Dr. Kostenko's conclusory statements, as to what the claimant was actually exposed, under what conditions, in what amount, and for how long. There is no job description, employment time records, nor other documentation regarding the claimant's actual amount of time spent doing float sink work and the amount of exposure and at what level of exposure.

RM ALJ at 16. *See also* SH ALJ at 7 (holding that "the claimant has not established through the introduction of credible evidence that he has suffered from chemical exposure"); MM ALJ at 20 (observing that "the claimant has never introduced any evidence regarding the degree of his exposure" and taking an adverse inference from the absence of testimony)(emphasis added). Each of these decisions confirms that the plaintiffs have now submitted the very information that the ALJs desired but did not receive in the various compensation proceedings. The affidavits serve not only to raise a question of fact which should have been sufficient to bar summary judgment, but reach the level of "significant evidence" sufficient to bar the application of the collateral estoppel. For this reason, plaintiffs request that the Court reverse the Circuit Court's decision in its entirety.

D. The Circuit Court Erred in Applying Collateral Estoppel Offensively.

The Circuit Court erred in permitting certain defendants to apply collateral estoppel offensively and gain the advantage of quasi-judicial determination which involved different facts from a different period in time. The first element under the doctrine of collateral estoppel requires that “the issue previously decided is identical to the one presented in the action in question” *See State v. Miller*, 194 W.Va. 3, 9, 459 S.E.2d 114, 120 (1995). While this element does not demand preclusion for third-parties involved in the same event at the same time, it should bar the application of the doctrine to a different set of facts during a different period of employment.

The defendants’ own prior argument precludes the offensive use of collateral estoppel here. The employer defendants previously asserted to the Circuit Court that “the circumstances of any single employee’s claims are unique to the specific employee and the specific employer, and that no individual deliberate intent claim between an employee and his employer(s) can determine the validity of other deliberate intent claims.” ’08 Order at 4 (emphasis added). If each set of facts specific to an individual employer is distinctive and different from any other employer, then it is impossible for the issue of injury that the WCC considered to be identical on the issue for other employers that were not part of the prior proceeding. Determinative factors such as chemicals involved, work environment, level of exposure, hours of exposure, availability of safety equipment and other issues will vary on a site-by-site basis. Consistent with West Virginia case law, *see Holloman v. Nationwide Mut. Ins. Co.*, 217 W.Va. at 276, 617 S.E.2d at 823, and the defendants’ own representations, the Circuit Court erred in granting summary judgment to those defendants who had not participated in the workers’ compensation

proceeding.¹² Defendants Buffalo Mining and SGS North America were not named parties in proceedings for plaintiffs Addair, Hatfield, Hylton, Martin and Weese and neither defendant Noone Associates or Westmoreland Coal participated in the hearing for plaintiff Hylton. The deliberate intent claim for each of plaintiffs against these defendants should be reinstated and the lower court's decision reversed.

E. Application of Collateral Estoppel Would Force an Improper Election of Remedies.

Upholding the Circuit Court's application of collateral estoppel to workers' compensation claims will force an improper election of remedies on West Virginia workers. The doctrine of election of remedies precludes a party from pursuing inconsistent claims for relief. Under the rule requiring an election of remedies, a party will be stopped from maintaining a second action only if the second remedy sought is substantially the same. *See Cameron v. Cameron*, 111 W.Va. 375, 162 S.E. 173, Syllabus Point 1 (1931). *See also Messick v. Star Enterprise*, 655 A.2d 1209, 1212 (1995)(declining to apply collateral estoppel because it would force an election of remedies). Conversely, the law permits a plaintiff to plead multiple causes of action from the

¹² The Commission's review of Steven Hylton's claim sharply illustrates the absence of "identical" issues, which, in turn, precludes the application of the doctrine of collateral estoppel. Mr. Hylton's made his workers' compensation claim against his employer Precision Testing ("Precision Testing") Laboratories, Inc. *See* SH ALJ at 1. In affirming the denial of the claim, the ALJ opened his substantive analysis with the statement: "The weighted evidence of record fails to establish that the claimant suffered from chemical exposure as a result of his employment with Precision Testing Laboratory, Inc.," *id.* at 6, and concluded with: "The weighted evidence of record does not establish a causal connection between the claimant's alleged illness and his chemical exposure in the workplace." *Id.* at 7. The ALJ's decision reflects consideration solely of Mr. Hylton's chemical exposure while with Precision Testing. The use of the singular workplace confirms the focus of the Court's consideration and no suggestion exists within the ALJ's decision that the Commission ever considered, let alone decided, whether or not Mr. Hylton's exposure to PCE at Noone, SGS or Westmoreland did or did not cause any injury.

same collection of facts and does not condone a restriction on the party to seek all claims it deems appropriate. *See* W.Va. R. Civ. P. 8. *See also Ilosky v. Michelin Tire Corp.*, 172 W. Va. 435, 307 S.E.2d 603 (1983).

The deliberate intent provision differs significantly from general workers' compensation claims that are coexistent with those claims. The West Virginia legislature has carved out a specific exception to the general immunity provision of the statute. *See* W.Va. Code § 23-4-2(d)(1). A deliberate intent claim requires the assertion of "specific mandatory elements rather than the common law," *id.*, and must meet very specific criteria. W.Va. Code § 23-4-2(d)(2). The statute also establishes a prohibition against punitive damages while still encouraging a swift resolution. *See* W.Va. Code § 23-4-2(d)(2)(iii). Further, the calculation of damages pursuant to a deliberate intent claim confirms that the legislature intended the deliberate intent provision to co-exist with a general workers' compensation claim as the law requires the subtraction of any awarded compensation from damages arising from a successful deliberate intent claim. *See* W.Va. Code § 23-4-2(c).

This Court should not apply collateral estoppel to workers' compensation decisions because a workers' compensation claim is processed pursuant to a statutory scheme that provides a summary, expedited procedure. *See* Restatement (Second) Judgment § 26 cmt e. A workers' compensation proceeding falls under this exception because it involves an expedited proceeding while allowing the worker to simultaneously pursue a deliberate intent claim. *See Id.* Illustration 5 (noting that the second action is not precluded if "the statutory system discloses a purpose to give the [party] a choice between" two actions rather than a "regular action combining the two demands"). The worker compensation system fits squarely here.

The application of collateral estoppel to unsuccessful workers' compensation claims will force individual workers to select between two possible remedies although the legislature intended both remedies to be available. It is entirely possible for a compensation claim to be resolved before or shortly after an employee's statute of limitations might expire to commence a deliberate intent claim. Applying collateral estoppel effect to WCC proceedings, even though the legislature drafted the deliberate intent provision as a double track process, would impermissibly force workers to select between the two options. For this reason alone, the Court should decline to give preclusive effect to WCC proceedings.

**F. The Apparent Role of Fraud in the WCC Proceeding Defeats
The Application of the Collateral Estoppel Doctrine.**

A significant question about the veracity of the employer defendants' expert, whose report contained significant false representations, should defeat giving preclusive effect to the WCC proceedings. This Court has stated that courts should not apply the collateral estoppel doctrine where the prior determination arose from fraud or misrepresentation. *See Persinger v. Peabody Coal Co*, 196 W. Va. 707, 474 S.E.2d 887 (1996). Plaintiffs have serious reservations concerning the submission of Dr. Ronald Gots, whose report each defendant submitted to the WCC. As detailed below, significant problems exist in the representations made within that report.

The emphasis placed on the defendants' expert by the reviewing ALJ highlights the underlying problem. The administrative law judges frequently quoted Dr. Gots's characterization within the report of the plaintiffs' doctor as "a rambling diatribe consisting of accusations, perceptions, anecdotal statements and unsupported conclusions, rather than a

scientific study.’” CM ALJ at 7; GA ALJ at 7; MM ALJ at 8. The ALJ emphasized Dr. Gots representations concerning a 1983 NIOSH study of “five” float-sink facilities where, according to Dr. Gots, there was no detection of chemical levels above acceptable limits. CM ALJ at 8, TM ALJ at 6. Based on the representations of Dr. Gots and the credentials apparently supporting those representations, ALJs found his report credible and rejected the submissions of the plaintiffs. CM ALJ at 8; GA ALJ at 9. In relying on the Gots report, the administrative law judges were deceived.

The Gots Report suffers from an appalling lack of research. The defendants’ expert is forthcoming on his lack of specific knowledge. He states that the only documents that he considered and reviewed were the Kostenko Report, the NIOSH Mine Survey Study, dated August 1983, the OSHA Chemical Sampling Information regarding Perchloroethylene, and DHHS (NIOSH) Publication 78-111, dated Jan. 20, 1978. *See* RG Rpt at 2. As he discredits the first, Dr. Gots has opted to express his views on perchloroethylene use in float-sink labs and the risks that the chemical posed to human health based on two reports, both over 20 years old and a single page, federal information sheet. In so doing, Dr. Gots apparently disregarded his own admission that “[a] critical element of *Daubert*, specifically stated, is that scientific literature used by experts to support their opinions must be relevant (or, fit) the situation extant in the case.” Ronald E. Gots M.D. Ph.D., “For the Defense – Legal Research, Law Blog and Magazine Archives,” dated March 9, 2009. Dr. Gots based his opinion on minimal direct evidence, which is sufficiently dated to be irrelevant to the question before the Court. Even more problematic, Dr. Gots then misrepresents the data to substantiate a series of incorrect statements.

Dr. Gots’s review of his minimal material suffers from a few errors. Dr. Gots expressly informed the previous reviewing body that “[t]he 1983 NIOSH survey of five facilities which

specifically evaluated and tested their float-sink operations found no level of chemicals in use above acceptable levels.”¹³ RG Rpt at 4. Initially, Dr. Gots is incorrect because that survey only examined two commercial float-sink labs (as well as a third lab which was connected with a preparation plant for approximately twenty minutes twice a week). *See* NIOSH Rpt at 37. At a practical level, Dr. Gots inflated the number of float-sink labs surveyed by 150 percent. Dr. Gots’s representation concerning the NIOSH findings is also incorrect. The survey reported that air monitoring consistently found that airborne concentrations of ethylene dibromide were in excess of the NIOSH-recommended exposure limit of 0.13 ppm. *See Id.* at 45. Similarly, in one of the two dedicated float-sink labs, NIOSH identified an area as a major source of airborne vapors with short-term sampling indicating, despite ventilation, “that workers were potentially exposed to hazardous concentrations of [ethylene dibromide] and perchloroethylene during routine drying operations.” *See Id.* at 46 (indicating that perchloroethylene levels reached 560 ppm). In short, Dr. Gots misrepresented to the administrative law judge both the sample size of the survey (overstated) and the findings with respect to the concentration of hazardous chemicals within the lab (understated).

Dr. Gots’s report also includes a number of statements that raise a serious question about the veracity of his representations and the merits of his knowledge. Initially, Dr. Gots appears to have a basic disagreement with the chemical’s manufacturer. Discussing the health and safety issues, Dr. Gots announced that perchloroethylene is “only slightly volatile. This means that their tendency to evaporate into ambient air and, thereby, expose workers to vapors, is minimal.” *See* RG Rpt at 4. Dow Chemical, a PCE manufacturer, conversely states under environmental

¹³ Dr. Gots also makes this representation a few sentences earlier. RG Rpt at 3.

information: “Perchloroethylene may be released to air from fugitive emissions from manufacturing facilities or use, or by evaporation from products that contain it. Because it has low solubility in water and is highly volatile, perchloroethylene will quickly volatilize (evaporate) to the atmosphere.” *See* Dow, Product Safety Assessment, Perchloroethylene, dated June 24, 2008 at 4 (emphasis added). Of course, if the manufacturer, rather than Dr. Gots, is correct, then the presence of PCE in the lab’s atmosphere could be higher as the chemical evaporates from the various testing tanks.

Dr. Gots also misrepresents facts in order to imply that no significant health risk existed.

In an interesting analogy, Dr. Gots stated:

The chemicals at issue, for the most part, do not produce permanent brain dysfunction. Rather, they may, if levels are sufficiently high, produce alcohol-like mild euphoria with no lasting effects. Whether this happens is unknown, but, just as one can drink several drinks of alcohol per day and feel its effects, but have no lasting brain dysfunction, so, too, can one have the same outcomes with tetrachloroethylene exposures.

See RG Rpt at 4. The federal government, however, disagrees with Dr. Got, with the EPA presently indicating that “[a] wide range of effects on neurologic function are well-documented for both acute and chronic exposure to tetrachloroethylene.”¹⁴ Declaration of William A. Walsh Opposing Motion for Summary Judgment, dated Jan. 4, 2010, Exhibit S, Portions, EPA, Toxicological Review of Tetrachloroethylene (Perchloroethylene) (CAS No. 127-18-4), June

¹⁴ The validity of Dr. Gots’ analogy is also subject to challenge. Examinations of individuals with a significant alcohol consumption, differing from alcoholics, has shown brain metabolite changes that are associated with lower brain function and indicating that brain damage among heavy drinkers is detectable. *See* Meyerhoff, Alcoholism: Clinical & Experimental Research, April 2004. *See also* “Alcohol Alert: Alcohol’s Damaging Effects on the Brain,” U.S. Dep’t of Health & Human Services, National Institute of Health, No. 63 (Oct. 2004)(stating “[w]e do know that heavy drinking may have extensive and far-reaching effects on the brain, ranging from simple ‘slips’ in memory to permanent and debilitating conditions that require lifetime custodial care”).

2008 at 4-52. *See also Id.* at 4-65-66 (stating that “[c]linical evidence accumulated over the years clearly demonstrates that perchloroethylene is toxic to the liver and kidneys in humans). A 1989 German study of chronic exposure for dry-cleaning workers found that the performance of low-exposure (12 (±8) ppm) and high exposure (53 (±17) ppm) individuals differed significantly in tests than the unexposed control group. *Id.* at 4-65-66 (discussing Seeber, A., “Neurobehavioral toxicity of long-term exposure to tetrachloroethylene,” *Neurotoxicol. Teratol.* (1989) at 11:579-583). The Seeber study found that both exposure groups demonstrated delayed responses and performed worse than the control group on attention and visual scanning tests. *Id.* Similarly, a test of workers with chronic exposure to perchloroethylene in low (3 ppm) and high (20 ppm) concentrations found reduced test performance in three different cognitive functions, switching, pattern memory and pattern recognition. *Id.* (4-74-75) (citing Echeverria, Hyer, Bitner, Checkoway, Toutonghi and Ronhovde, “Behavioral Effects of Low Level Exposure to Perchloroethylene (PCE) Among Dry Cleaners,” Battelle Centers for Public Health Research and Evaluation. A Behavioral Investigation of Occupational Exposure to Solvents: Perchloroethylene Among Dry Cleaners and Styrene Among Reinforced Fiberglass Laminations,” Final Report SSRC-10OM4/040 (1994)). One must wonder, accordingly, whether “[a]ll of the opinions which [Dr. Gots was] rendering are generally-accepted in the scientific community and are based on methodology which is generally-accepted in the scientific community.” *See* RG Rpt at 2.

In short, the Gots reports are littered with significant misrepresentations. The various ALJ’s reliance on Dr. Gots’s representations concerning the 1983 NIOSH study and his express statement that no unsafe levels of chemical exposure were found becomes problematic when one reviews the NIOSH report and determines that Dr. Gots has lied to the ALJs about these specific

facts. It certainly appears that the ALJs gave deference to and found reliable a report of questionable veracity¹⁵ where the most significant representation is a falsehood. As this Court has previously indicated it does not favor giving preclusive effect to prior determinations founded on fraud, the Court should reverse the Circuit Court's Estoppel Order in its entirety.

¹⁵ Although the plaintiffs made this point several times in opposing the defendants' motion for summary judgment, not one defendant addressed the point or attempted to defend the honor of Dr. Gots. Implicitly, defendants have conceded that their former expert's representations before the WCC were false.

CONCLUSION

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

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