

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

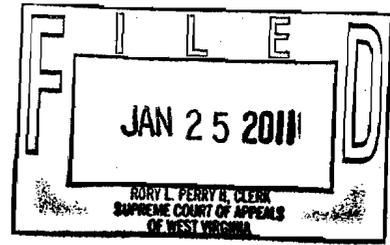
KATY ADDAIR, Administratrix of the
Estate of Gary Addair; DAVID FARLEY;
DEBORAH STOLLINGS, *et al.*,

Petitioners/Plaintiffs,

v.

LITWAR PROCESSING COMPANY, *et al.*,

Respondents/Defendants.



Appeal No.10-091
Civil Action No. 04-C-252
Circuit Court of Wyoming County

**RESPONSE TO PETITION FOR APPEAL ON BEHALF OF VIRGINIA CREWS COAL
COMPANY, WESTMORELAND COAL COMPANY, BUFFALO MINING COMPANY,
INDEPENDENCE COAL COMPANY, INC., AND RAWL SALES & PROCESSING CO.**

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I. INTRODUCTION¹

This Court has long recognized that a deliberate intent cause of action pursuant to Section 23-4-2(c) of the West Virginia Code is not common law concept, but a statutory cause of action that is part and parcel of West Virginia's workers' compensation scheme. *See* syl. pt. 2, *Bell v. Vecellio & Grogan, Inc.*, 197 W.Va. 138, 475 S.E.2d 138 (1996) ("[Section 23-4-2(c)] represents the wholesale abandonment of the common law tort concept of a deliberate intention cause of action by an employee against an employer, to be replaced by a statutory direct cause of action by an employee against an employer expressed within the workers' compensation system."). Indeed, a deliberate intent cause of action and a workers' compensation claim are inextricably intertwined in that a deliberate intent plaintiff may only recover damages over and above the amounts received or receivable in a workers' compensation claim. *See* W.Va. Code § 23-4-2(c) (2005).

With that said, the issue presented in the Petition for Appeal is a narrow, legal question. Pursuant to the Workers' Compensation Act, an employee files a claim for workers' compensation benefits alleging injuries as a result of chemical exposure in the workplace. The employee litigates the claim before the Workers' Compensation Office of Judges ("Office of Judges"), and it is determined the employee has no injuries causally connected to his workplace exposures. Can that employee then turn around and, under the same statutory scheme, pursue a deliberate intent claim against his employer(s) for the same alleged exposures? The lower court answered the question in the negative, holding that the doctrines of *res judicata* and/or collateral estoppel apply to the quasi-judicial determinations of the Office of Judges, and that Petitioners were

¹ As an initial matter, it appears the Petition for Appeal was prepared under the assumption that it was governed by the Revised Rules of Appellate Procedure. However, pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, such rules only apply to rulings, orders, or judgments entered on or after December 1, 2010. Here, the Petition for Appeal is from an order entered August 4, 2010. As a result, the former Rules of Appellate Procedure govern.

precluded from establishing the element of proximate causation required under the deliberate intent statute. *See* W.Va. Code § 23-4-2(d)(ii)(E).

The lower court's application of preclusion doctrines to the determinations of the Offices of Judges was correct and well-reasoned. The manner of litigation before the Offices of Judges and the procedures available therein are substantially similar, if not nearly identical, to those in civil litigation. Even Petitioners themselves did not dispute that they were afforded a full and fair opportunity to litigate the issue of whether they suffered injury as a result of their alleged workplace chemical exposures.

Moreover, as the lower court recognized, applying preclusion doctrines furthers the policies and goals of the Workers' Compensation Act, while failing to apply the doctrines would undercut them. When the Office of Judges makes a determination there is no causal connection between an employee's claimed injuries and his or her workplace exposures, their claim is not compensable and no benefits are received or receivable. Allowing the employee to then seek to recover the full amount of his or her alleged damages in a deliberate intent civil action renders meaningless the offset provided to employers under Section 23-4-2(c) and effectively results in an abrogation of employers' "benefit of the bargain" that is the workers' compensation system.

In arguing the lower court's granting of summary judgment was erroneous, Petitioners are advancing a novel, narrow theory of *res judicata* and collateral estoppel that would effectively remove them from West Virginia jurisprudence. Petitioners argue that despite having a full and fair opportunity to litigate an issue or claim, a party is not bound by the outcome unless that party utilizes each and every possible procedure and discovery mechanism available to it. [*See* Petition for Appeal at p.32 ("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.")]. For example, under Petitioners' argument, if a party utilizes oral depositions and requests for production, but not requests for admission, neither *res judicata* nor collateral estoppel could apply because there was not a full and fair adjudication.

Petitioners' argument is legally unsupported and absurd. As lawyers, we make "judgment calls" in every single matter. In some cases, where the issues are expert intensive, there may be little, if any, fact discovery. In some cases, written discovery may not be utilized at all because oral depositions are believed to be sufficient. This is why the application of *res judicata* and collateral estoppel, whether being applied to civil actions or to quasi-judicial administrative adjudications, has always been concerned with whether the available procedures give the party a full and fair opportunity to litigate a claim or issue. Any other framework would require a reviewing court to "read of the mind" of counsel as to why he or she made the professional judgments they did, which is an impossible task.

As set forth herein, the lower court properly granted summary judgment and the Petition for Appeal should be denied.

II. KIND OF PROCEEDING AND NATURE OF RULING BELOW

The Petition for Appeal arises from a civil action filed in the Circuit Court of Wyoming County, West Virginia. The original Class Action Complaint was filed on September 3, 2004. The Class Action Complaint was brought on behalf of "all West Virginia residents and non-residents who have ever worked in and around any float sink coal labs that have operated in West Virginia, and who have suffered exposures to hazardous chemicals as alleged herein" [Class Action Compl. at p.1]. The hazardous chemicals at issue were perchloroethylene, tetrachloroethylene, and ethylene dibromide. [See *id.* at ¶ 66]. The Class Action Complaint

asserted deliberate intent causes of action against the entities that owned and operated the laboratories, referred to as “employer defendants,” and product liability causes of action against the entities that manufactured the chemicals used in the laboratories, referred to as “manufacturing defendants.”

However, the Class Action Complaint was invalid with respect to the majority of employer defendants. Although the Class Action Complaint named forty-one employer defendants, there were only three named plaintiffs identified, who had worked for only three of the employer defendants. [See *id.* ¶¶ 1-44]. Thus, the Class Action Complaint was attempting to assert deliberate intent claims against thirty-eight alleged employers when there was no named plaintiff that was even alleged to have worked for these employers.

Given the facial invalidity of the Class Action Complaint, and in the face of numerous motions to dismiss, the plaintiffs moved to amend. On July 13, 2005, the plaintiffs filed a motion to amend with a proposed Second Amended Class Action Complaint. The proposed Second Amended Class Action Complaint added an additional twenty-three plaintiffs. [Pls' Omnibus Response to Employer Defendants' Motions to Dismiss and Plaintiffs' Renewed Motion to Amend Complaint filed 7/13/05]. However, the proposed Second Amended Class Action Complaint still did not contain a named plaintiff with respect to every employer defendant.

Despite being granted leave to file their proposed Second Amended Class Action Complaint in July 2005, the plaintiffs did not file it for nearly two years. On April 17, 2007, the plaintiffs filed a modified version of the Second Amended Class Action Complaint, which was titled Amended Class Action Complaint. The Amended Class Action Complaint added seven more plaintiffs in addition to the twenty-three previously added in the proposed Second Amended Class Action Complaint.

Subsequently, the employer defendants collectively moved to dismiss the class allegations against them in the Amended Class Action Complaint. On March 27, 2008, the lower court entered an Order dismissing the class allegations against the employer defendants.

Thereafter, Respondents filed motions for summary judgment with respect to the deliberate intent claims of Roger Muncy, Katy Addair, Clarence McCoy, William Weese, Larry Hatfield, and Steven Hylton. On August 4, 2010, the lower court entered summary judgment in favor of Respondents. The lower court held that, because Petitioners' claimed injuries were held to be not compensable before the Office of Judges, Petitioners were precluded from establishing the element of proximate causation required under Section 23-4-2(d)(ii)(E).

On December 6, 2010, Petitioners filed their Petition for Appeal.

III. STATEMENT OF FACTS²

A. PETITIONERS' WORKERS' COMPENSATION CLAIMS

1. Roger Muncy

Roger Muncy worked at Virginia Crews Coal Company ("Virginia Crews") as a coal sampler from 1986 to 2001. [Muncy Answer to Interrogatory No. 8 of Virginia Crews Coal Company's First Set of Interrogatories and Requests for Production, attached as Exhibit B of Motion for Summary Judgment on Behalf of Virginia Crews Coal Co., *et al.* filed 6/15/10].

On May 19, 2003, Mr. Muncy commenced a claim for workers' compensation benefits against Virginia Crews, Claim No. 2003054308. The Report of Occupational Injury was

² Under Rule 4(c) of the Rules of Appellate Procedure, it is Petitioners' responsibility to designate a record that will "enable the Supreme Court to decide the matters arising in the petition." W.Va. R. App. P. 4(c). Petitioners have not done so, but instead opted to provide this Court with only part of the "story." For example, although part of the record before the lower court, Petitioners failed to designate relevant reply briefs, hearing transcripts, and other pertinent filings. It is not proper for Petitioners to argue to this Court that the lower court erred, but then not supply all of the materials that were before the lower court and relevant to its decision. In order to fully brief the issues presented in the Petition for Appeal, Respondents have no choice but to cite to portions of the record below that were not included in Petitioners' designation. For those items cited to, but not designated by Petitioners, Respondents will include the date of filing as evidenced on the docket sheet.

completed by Mr. Muncy's diagnosing physician, Dr. Michael Kostenko. [Muncy Report of Occupational Injury, attached as Exhibit A to Virginia Crews Coal Company's Motion for Summary Judgment]. Dr. Kostenko diagnosed Mr. Muncy as suffering from toxic neuropathy, toxic encephalopathy, hypertension, and hematuria. [*Id.*]. The Report of Occupational Injury identified the cause of the injuries as "chemical exposure." [*Id.*]. In his workers' compensation claim, Mr. Muncy was represented by Tom Basile, who was and remains Mr. Muncy's counsel in this civil action. [Muncy Notice of Representation, attached as Exhibit B to Virginia Crews Coal Company's Motion for Summary Judgment].

On September 2, 2004, Mr. Muncy's claim was denied by the Workers' Compensation Commission. [Muncy Protestable Claims Decision, attached as Exhibit C to Virginia Crews Coal Company's Motion for Summary Judgment]. The Commission found that Mr. Muncy's alleged injuries and/or disease had no causal connection to his employment in Virginia Crews' float sink lab. [*Id.* at p.3]. Mr. Muncy protested the decision. Mr. Muncy's claim was then litigated before the Office of Judges for nearly three years. During this time, Mr. Muncy had the opportunity to submit evidence and develop a record through, *inter alia*, oral depositions, written interrogatories, documents requests, and compulsory process. In fact, a review of the administrative record reveals that Mr. Muncy alone submitted thirty-two exhibits into the record. [See Muncy Decision of Administrative Law Judge at pp.18-20, attached as Exhibit D to Virginia Crew's Coal Company's Motion for Summary Judgment]. Mr. Muncy's submissions consisted of numerous physician reports, including that of Dr. Kostenko; material data safety sheets; and government guidelines. [See *id.*]. On May 14, 2007, the Office of Judges affirmed the Commission's decision, finding "no credible evidence that the claimant's symptoms are the result of occupational exposure." [*Id.* at p.16].

Mr. Muncy appealed the Offices of Judge's decision to the Workers' Compensation Board of Review ("Board of Review"). On December 12, 2007, the Board of Review affirmed the Office of Judge's decision. [Muncy Board of Review Order, attached as Exhibit E to Virginia Crews Coal Company's Motion for Summary Judgment]. Mr. Muncy then filed a petition for appeal with this Court, which was rejected. [Muncy Order Refusing Petition for Appeal, attached as Exhibit F to Virginia Crews Coal Company's Motion for Summary Judgment].

2. Gary Addair

Gary Addair worked at Virginia Crews as a lab technician from 1985 to 1999. [Addair Answer to Interrogatory No. 8 of Virginia Crews Coal Company's First Set of Interrogatories and Requests for Production, attached as Exhibit C of Motion for Summary Judgment on Behalf of Virginia Crews Coal Co., *et al.* filed 6/15/10].

On May 19, 2003, Mr. Addair commenced a claim for workers' compensation benefits against Virginia Crews, Claim No. 2003054041. The Report of Occupational Injury dated was completed by Mr. Addair's diagnosing physician, Dr. Michael Kostenko. [Addair Report of Occupational Injury, attached as Exhibit G to Virginia Crews Coal Company's Motion for Summary Judgment].³ Dr. Kostenko diagnosed Mr. Addair as suffering from hypertension, toxic encephalopathy, peripheral neuropathy, and an unspecified endocrine disorder. [*Id.*]. The Report of Occupational Injury identified the cause of the injuries as "[float sink] of raw coal material" and "exposure to chemicals." [*Id.*]. In his workers' compensation claim, Mr. Addair was represented by Tom Basile, who was and remains counsel for Mr. Addair's personal representative⁴ in this civil

³ As the Court will see, Dr. Kostenko was the diagnosing physician in each of Petitioners' workers' compensation claims. Likewise, Mr. Basile was the counsel of record in each of the claims. Respondents apologize for the repetition in this regard. However, because each of Petitioners were asserting a separate, individual deliberate intent claim, Respondents believe it important to set forth in detail the facts pertaining to each workers' compensation claim.

⁴ Mr. Addair passed away on December 1, 2006.

action. [Addair Notice of Representation, attached as Exhibit H to Virginia Crews Coal Company's Motion for Summary Judgment].

Mr. Addair's claim was initially denied by the Workers' Compensation Commission. Mr. Addair protested the initial determination and litigated his claim before the Office of Judges. A review of the administrative record reveals that Mr. Addair submitted forty-three exhibits into the record. [See Addair Decision of Administrative Law Judge at pp.19-22, attached as Exhibit I to Virginia Crew's Coal Company's Motion for Summary Judgment]. Mr. Addair's submissions consisted of numerous physician reports, including that of Dr. Kostenko; material data safety sheets; and government guidelines. [See *id.*]. On November 15, 2007, the Office of Judges affirmed the Commission's decision, finding Mr. Addair had not suffered an injury or disease as a result of his chemical exposure. [*Id.* at p.17]. Mr. Addair appealed the Office of Judges' decision to the Board of Review. In August 2008, the Board of Review affirmed the decision of the Office of Judges. [Addair Board of Review Order, attached as Exhibit J to Virginia Crews Coal Company's Motion for Summary Judgment].

3. Clarence McCoy

Clarence McCoy worked at Rawl Sales & Processing Co. ("Rawl Sales") as a laboratory technician from 1981 to 1999. [McCoy Answer to Interrogatory No. 8 of Rawl Sales & Processing Co.'s First Set of Interrogatories and Requests for Production, attached as Exhibit A of Motion for Summary Judgment on Behalf of Virginia Crews Coal Co., *et al.*]. Mr. McCoy then worked as a laboratory manager at Independence Coal Company, Inc. ("Independence Coal") from 1999 to 2002. [*Id.*].

On August 28, 2003, Mr. McCoy commenced a claim for workers' compensation benefits against Independence Coal, Claim No. 2004011751. The Report of Occupational Injury was completed by Mr. McCoy's diagnosing physician, Dr. Michael Kostenko. [McCoy Report of

Occupational Injury, attached as Exhibit A to Rawl Sales and Independence Coal's Motion for Summary Judgment]. Dr. Kostenko diagnosed Mr. McCoy as suffering from toxic encephalopathy, restless leg syndrome, and peripheral neuropathy. [*Id.*]. The Report of Occupational Injury identified the cause of the injuries as "chemical exposure." In his workers' compensation claim, Mr. Addair was represented by Tom Basile, who was and remains counsel for Mr. McCoy in this civil action. [McCoy Notice of Representation, attached as Exhibit C to Rawl Sales and Independence Coal's Motion for Summary Judgment].

Mr. McCoy's claim was initially denied by the Workers' Compensation Commission. [McCoy Protestable Claims Decision, attached as Exhibit D to Rawl Sales and Independence Coal's Motion for Summary Judgment]. Mr. McCoy protested the initial determination and litigated his claim before the Office of Judges. A review of the administrative record reveals that Mr. McCoy submitted thirty-four exhibits into the record. [See McCoy Decision of Administrative Law Judge at pp.14-16, attached as Exhibit C to Reply to Plaintiff's Memorandum in Opposition to the Pending Motions for Summary Judgment Founded on the Doctrine of Collateral Estoppel filed 1/28/10]. Mr. McCoy's submissions consisted of multiple physician reports, including that of Dr. Kostenko; material data safety sheets; and government guidelines. [See *id.*]. On January 26, 2007, the Office of Judges affirmed the Commission's decision, finding Mr. McCoy's "symptoms and medical problems cannot fairly be traced to his employment as the proximate cause." [*Id.* at p.12].

4. Steven Hylton

Steven Hylton was employed at Westmoreland Coal Company ("Westmoreland") from May 1978 to August 1987. [Hylton Answer to Interrogatory No. 2 of Dow Chemical Company and Noone Associates, Inc.'s First Set of Interrogatories and Requests for Production, attached as Exhibit A to Westmoreland Coal Company's Joinder in Motion for Summary Judgment by Noone Associates, Inc.]. Mr. Hylton then worked at Noone Associates, Inc. from August 1987

to September 1988; at West Virginia Laboratories, Inc. from September 1988 to December 1995; and at Precision Testing Laboratory, Inc. from December 1995 to July 1996 and May 1997 to August 1999. [*Id.*].

On May 9, 2003, nearly sixteen years after his employment at Westmoreland ceased, Mr. Hylton commenced a claim for workers' compensation benefits against Precision Testing Laboratory, Inc., Claim No. 2003054030. The Report of Occupational Injury was completed by Mr. Hylton's diagnosing physician, Dr. Michael Kostenko. [Hylton Report of Occupational Injury, attached as Exhibit A to Motion for Summary Judgment of Noone Associates, Inc.]. Dr. Kostenko diagnosed Mr. Hylton as having toxic neuropathy, toxic encephalopathy, myofascial pain, and an unspecified endocrine disorder. [*Id.*]. The Report of Occupational Injury identified the cause of the injuries as "float/sink coal lab technician working with perchloroethylene, ethylene dibromide, dibromomethane, naphtha varsal [sic]." [*Id.*]. In his workers' compensation claim, Mr. Hylton was represented by Tom Basile, who was and remains counsel for Mr. Hylton in this civil action.

On September 2, 2004, Mr. Hylton's claim was denied by the Workers' Compensation Commission. [Hylton Protestable Claims Decision, attached as Exhibit B to Motion for Summary Judgment of Noone Associates, Inc.]. Mr. Hylton protested the initial determination and litigated his claim before the Office of Judges. On December 6, 2006, the Office of Judges affirmed the Commission's decision, finding the "evidence of record does not establish a causal connection between the claimant's alleged illness and his chemical exposure in the workplace." [Hylton Decision of Administrative Law Judge at p.7, attached as Exhibit C to Motion for Summary Judgment of Noone Associates, Inc.].

Mr. Hylton appealed the Office of Judge's decision to the Board of Review. On August 31, 2007, the Board of Review affirmed the Office of Judge's decision. [Hylton Board of Review Order, attached as Exhibit D to Motion for Summary Judgment of Noone Associates, Inc.].

Mr. Hylton then filed a petition for appeal with this Court. The petition for appeal was rejected. [Hylton Order Refusing Petition for Appeal, attached as Exhibit E to Motion for Summary Judgment of Noone Associates, Inc.].

5. Larry Hatfield

Larry Hatfield was employed at Buffalo Mining Company ("Buffalo") from 1981 to 1983 and Standard Laboratories, Inc. from 1989 to 1997. [Hatfield Answer to Interrogatory No. 8 of Buffalo Mining Company's First Set of Interrogatories and Requests for Production, attached as Exhibit A to Defendant Buffalo Mining Company's Motion for Summary Judgment].

On May 9, 2003, twenty years after his employment at Buffalo Mining ceased, Mr. Hatfield commenced a claim for workers' compensation benefits against Standard Laboratories, Inc., Claim No. 2003054311. The Report of Occupational Injury was completed by Mr. Hatfield's diagnosing physician, Dr. Michael Kostenko. [Hatfield Report of Occupational Injury, attached as Exhibit B to Defendant Buffalo Mining Company's Motion for Summary Judgment]. Dr. Kostenko diagnosed Mr. Hatfield with toxic neuropathy, toxic encephalopathy, protenuria, and myofascial pain. [*Id.*]. The Report of Occupational Injury identified the cause of the injuries as "[f]loat sink work" and "exposed to chemicals." [*Id.*]. In his workers' compensation claim, Mr. Hatfield was represented by Tom Basile, who was and remains counsel for Mr. Hatfield in this civil action.

Mr. Hatfield's claim was initially denied by the Workers' Compensation Commission. [Hatfield Protestable Claims Decision, attached as Exhibit C to Defendant Buffalo Mining Company's Motion for Summary Judgment]. Hatfield protested the initial determination and litigated his claim before the Office of Judges. On November 30, 2007, the Office of Judges affirmed the Commission's decision, finding the evidence insufficient to support any causal connection between any medical condition and Mr. Hatfield's chemical exposure. [Hatfield

Decision of Administrative Law Judge at p.8, attached as Exhibit D to Defendant Buffalo Mining Company's Motion for Summary Judgment].

6. William Weese

William Weese worked at Buffalo Mining from 1970 to 1984 and Elkay Mining Company from 1984 to 1998. [Weese Answer to Interrogatory No. 8 of Buffalo Mining Company's First Set of Interrogatories and Requests for Production of Documents, attached as Exhibit E to Defendant Buffalo Mining Company's Motion for Summary Judgment].

On May 28, 2003, nineteen years after his employment at Buffalo Mining ceased, Mr. Weese commenced a claim for workers' compensation benefits against Elkay Mining Company, Claim No. 2003054036. [See Weese Decision of Administrative Law Judge at p.1, attached as Exhibit F to Defendant Buffalo Mining Company's Motion for Summary Judgment]. In his workers' compensation claim, Mr. Weese was represented by Tom Basile, who was and remains counsel for Mr. Weese in this civil action.

In support of his claim, Mr. Weese relied upon and introduced the opinions and report of Dr. Michael Kostenko. [See *id.* at p.2]. Dr. Kostenko opined that Mr. Weese had symptoms consistent with exposure during the "float sink" process, including sleep disturbance, short-term memory loss, mental confusion, depression, restless leg syndrome, peripheral neuropathy, and autonomic nervous system neuropathy, tremor, myofascial pain, and low serum testosterone. [*Id.*].

On October 14, 2003, Mr. Weese's claim was denied by the Workers' Compensation Commission. [*Id.* at p.3]. On August 17, 2005, the Office of Judges affirmed the Commission's decision, finding a lack of objective medical evidence supporting Mr. Weese's claim of injury and/or disease from chemical exposure. [*Id.* at p.7].

B. PETITIONERS' DELIBERATE INTENT CLAIMS

Beginning in 2004,⁵ Petitioners commenced deliberate intent causes of action against their respective former employers. Specifically, Messrs. Addair and Muncy pursued deliberate intent claims against Virginia Crews; Mr. McCoy against Rawl Sales and Independence Coal; Mr. Hylton against Westmoreland and others; and Messrs. Weese and Hatfield against Buffalo Mining and others.

It is clear from the face of the Amended Class Action Complaint that Petitioners' deliberate intent claims were seeking damages for the same thing that Petitioners had previously sought workers' compensation benefits, *i.e.*, alleged injuries and/or disease as a result of exposure to the chemicals used in the float sink analysis. According to the Amended Class Action Complaint, Petitioners brought their claims "against the defendant float sink coal lab operators and/or employers of float sink coal lab workers in West Virginia and against the manufacturers of the primary chemicals used in the float sink coal labs . . . perchloroethylene, tetrachloroethylene, [and] ethylene dibromide." [Am. Class Action Compl. ¶ 88]. Petitioners alleged that they had suffered injuries as a result of exposure to these chemicals while performing float sink analysis. [Am. Class Action Compl. at ¶¶ 99-102].

In discovery, Petitioners were asked to "describe, with specificity, all injuries and/or conditions for which you are seeking to recover . . . in this action." Each of Petitioners essentially gave their complete medical histories, identifying everything from rashes to sinus problems to depression to decreased libido. Petitioners were then asked whether a physician or other medical provider had told them that the injuries and/or conditions for which they were seeking damages were the result of exposure to "perchloroethylene, tetrachloroethylene, ethylene dibromide, or any

⁵ The deliberate intent claim of Gary Addair against Virginia Crews was asserted in the original Complaint filed on September 3, 2004. Petitioners Roger Muncy, Clarence McCoy, Steven Hylton, William Weese, and Larry Hatfield were not parties to the original Complaint. As a result, these claims were not commenced until, at the very earliest, July 2005 upon the filing of the motion to amend and the proposed Second Amended Class Action Complaint.

other chemical during your employment," including the identity of the physician or medical provider and the date the diagnosis was made. Each of Petitioners identified one individual, Dr. Michael Kostenko.⁶ For example, petitioner Larry Hatfield identified Dr. Kostenko with a date of diagnosis of October 7, 2002. Petitioner Roger Muncy identified Dr. Kostenko with a date of diagnosis of May 5, 2003. In other words, Petitioners pursued their deliberate intent claims based upon the exact same diagnosis upon which they pursued their claims for workers' compensation benefits, the same diagnosis that had been rejected in litigation before the Office of Judges.

IV. DISCUSSION OF LAW

A. THE LOWER COURT'S GRANTING OF SUMMARY JUDGMENT AGAINST PETITIONERS JAMES JONES, BOBBY MAYNARD, AND CARL MCPeAKE WAS A MISTAKE AND/OR CLERICAL OVERSIGHT THAT IS EFFECTIVELY MOOT.⁷

Petitioners first assignment of error is that the lower court erred in granting summary judgment against petitioners James Jones, Bobby Maynard, and Carl McPeake. [See Petition for Appeal at pp.21-22]. Given that Petitioners have an unopposed Rule 60(b) motion pending before the lower court on this issue, this assignment of error can be disposed of easily.

⁶ See Muncy Answer to Interrogatory Nos. 1 and 2 of Virginia Crews Coal Company's First Set of Interrogatories and Requests for Production of Documents; Addair Answer to Interrogatory Nos. 1 and 2 of Virginia Crews Coal Company's First Set of Interrogatories and Requests for Production of Documents; McCoy Answer to Interrogatory Nos. 1 and 2 of Rawl Sales & Processing Co.'s First Set of Interrogatories and Requests for Production of Documents; Hylton Answer to Interrogatory Nos. 1 and 2 of Westmoreland Coal Company's First Set of Interrogatories and Requests for Production of Documents; Hatfield Answer to Interrogatory Nos. 1 and 2 of Buffalo Mining Company's First Set of Interrogatories and Requests for Production of Documents; Weese Answer to Interrogatory Nos. 1 and 2 of Buffalo Mining Company's First Set of Interrogatories and Requests for Production of Documents. Petitioners interrogatory answers were attached as exhibits A, B, C, E, F, and I to the Motion for Summary Judgment on Behalf of Virginia Crews Coal Co., *et al.* that was filed on June 15, 2010.

⁷ Respondents will not bother to address counsel for Petitioners attacks on the "integrity" of the lower court, the Honorable Jack Alsop. [See Petition for Appeal at p.4 ("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 . . . [I]t appears that the lower court inserted 'facts' entirely absent from the record in order to substantiate its dismissal of the plaintiffs' claims.")]. This litigation involved dozens of plaintiffs asserting many separate types of claims against dozens of defendants, which in turn gave rise to countless, overlapping motions for relief. Under such circumstances, to question the integrity of the lower court based upon a clerical oversight is inappropriate. Quite frankly, Judge Alsop's reputation as a learned jurist has existed in West Virginia long before lead counsel from New York was granted not the right, but the privilege, of admission *pro hac vice* in this litigation. See *State ex rel. H.K. Porter Co., Inc. v. White*, 182 W.Va. 97, 103, 386 S.E.2d 25, 31 (1989) ("[W]e emphasize that . . . the *pro hac vice* admission of an out-of-state attorney not licensed to practice law in this State is a privilege, not a right.").

On August 4, 2010, the lower court entered its Order Granting Defendants' Motions for Summary Judgment Dismissing the Deliberate Intent Cause of Action Claim, which inadvertently stated that it applied to petitioner Bobby Maynard's deliberate intent claim against Buffalo, as well as petitioners James Jones and Carl McPeake's deliberate intent claims against Westmoreland. On October 26, 2010, Plaintiffs' Rule 60 Motion for Relief from Portions of the Court's Collateral Estoppel Order was filed seeking to remove these individuals' inclusion in the Order Granting Defendants' Motions for Summary Judgment Dismissing the Deliberate Intent Cause of Action Claim. On November 15, 2010, counsel for Respondents forwarded to counsel for Petitioners a proposed agreed order granting the relief requested in their Rule 60 motion, as well as subsequently filed a formal response indicating Respondents had no objection to the relief requested in the Rule 60 motion. [See Response to Plaintiffs' Rule 60 Motion for Relief from Portions of the Court's Collateral Estoppel Order filed 1/6/11].

Accordingly, the relief requested with respect to petitioners Bobby Maynard, James Jones, and Carl McPeake has not been disputed and, if not already granted by the lower court, should be done so in the near future.

B. RESPONDENTS INDEPENDENCE COAL AND RAWL SALES' MOTION FOR SUMMARY JUDGMENT WAS PROPERLY SUPPORTED IN THE RECORD.

Petitioners second assignment of error is that the lower court erred in granting summary judgment in favor of certain defendants below whose motions were not properly supported with the required documentation and, thus, failed to make a preliminary showing that there was no genuine issue of material fact. [See Petition for Appeal at pp.23-26].

With respect to their second assignment of error, most of Petitioners arguments have no application to any of Respondents herein. However, Petitioners do argue that Independence Coal and Rawl Sales' motion for summary judgment was facially insufficient. Specifically, Petitioners argue that Independence Coal and Rawl Sales "ignored the most basic element of their

motion" because their motion for summary judgment "neglected to provide the Court a copy of the ALJ's determination or the final order." [*Id.* at p.25]. This argument is without merit and simply reveals that Petitioners have ignored their own submissions into the record.

In Independence Coal and Rawl Sales' motion for summary judgment, it was undisputed that the Office of Judges had issued an opinion rejecting petitioner Clarence McCoy's claim. As the motion indicated, Independence Coal and Rawl Sales were awaiting a copy of the decision and intended to supplement the record upon its receipt. [Independence Coal and Rawl Sales' Motion for Summary Judgment at p.2 n.1 ("A copy of the Office of Judges decision is being obtained from Sedgwick Claims Management Services and the record will be supplemented upon its receipt.")]. However, it became unnecessary for Independence Coal and Rawl Sales to place the Offices of Judges' decision into the record because Petitioners did so. On January 4, 2010, the Plaintiffs' Memorandum of Law in Opposition to the Pending Motions for Summary Judgment Founded on the Doctrine of Collateral Estoppel was filed. Accompanying the Plaintiffs' Memorandum of Law in Opposition was a sworn declaration of Petitioners' lead counsel, William A. Walsh, titled "Declaration of William A. Walsh Opposing Motion for Summary Judgment." The Offices of Judges decision denying Mr. McCoy's claim was attached thereto as Exhibit Q. [Decision of Administrative Law Judge, attached as Exhibit Q to Declaration of William A. Walsh Opposing Motion for Summary Judgment].⁸ Subsequently, although Petitioners themselves had already submitted the decision into the record, Independence Coal and Rawl Sales also attached the decision to their reply brief. [*See* Exhibit C to Reply to Pls' Memo in Opposition filed 1/28/10].

Moreover, even assuming, *arguendo*, the Office of Judges decision with respect to Mr. McCoy had never been submitted into the record, the lower court, or this Court for that matter,

⁸ It is unclear why Mr. Walsh, as counsel, has throughout this litigation given purported sworn declarations verifying documents and setting forth grounds for either the granting or denying of motions. As he was admonished by the lower court, such declarations of counsel are not a recognized practice in West Virginia.

could properly take judicial notice of the same pursuant to Rule 201 of the West Virginia Rules of Evidence. *See, e.g., Brooks v. Galen of West Virginia, Inc.*, 220 W.Va. 699, 649 S.E.2d 272 (2007) (judicial notice of Social Security Administration's disability findings).

Lastly, although not raised as a separate assignment of error, Petitioners state, "[N]one of the moving defendants ever authenticated their supporting evidence or provided them to the lower court within the context of a supporting affidavit." [Petition for Appeal at p.14]. First, Petitioners never raised any objection on this ground before the lower court. Second, Petitioners once again totally ignore their own submissions into the record. In opposing the motions for summary judgment, Petitioners submitted and relied upon the very same documents that were attached as exhibits to the motions for summary judgment. [See Exhibits A-Q to Declaration of William A. Walsh Opposing Motion for Summary Judgment]. Moreover, not only did Petitioners submit and rely upon these same documents, lead counsel for Petitioners, William Walsh, attached them to one of his aforementioned sworn declarations vouching as to their authenticity. [See *id.*].

Accordingly, Petitioners argument that Independence Coal and Rawl Sales' motion for summary judgment was not properly supported is wholly without merit and should be outright rejected.

C. THE LOWER COURT PROPERLY HELD THAT *RES JUDICATA* AND/OR COLLATERAL ESTOPPEL BARRED PETITIONERS' DELIBERATE INTENT CLAIMS.

1. The Lower Court Properly Held that Res Judicata and/or Collateral Estoppel Can Apply to the Quasi-Judicial Determinations of the Workers' Compensation Office of Judges.

Petitioners third assignment of error is that the lower court erred in applying the doctrines of *res judicata* and/or collateral estoppel to the quasi-judicial determinations of the Office of Judges. To the contrary, under the standards this Court has set forth with respect to application of preclusion doctrines to quasi-judicial administrative proceedings, the application of collateral estoppel and/or *res judicata* to the Office of Judges' determinations is entirely appropriate.

Although integrally related, *res judicata* and collateral estoppel have conceptual distinctions. As for *res judicata*, or claim preclusion, it "generally applies when there is a final judgment on the merits which precludes the parties or their privies from relitigating the issues that were decided or the issues that could have been decided in the earlier action." *State v. Miller*, 194 W.Va. 3, 9, 459 S.E.2d 114, 120 (1995). "A claim is barred by *res judicata* when the prior action involves identical claims and the same parties or their privies." *Id.* As for collateral estoppel, or issue preclusion, it "is designed to foreclose relitigation of issues in a second suit which have actually been litigated in [an] earlier suit." Syl. pt. 2, *Conley v. Spillers*, 171 W. Va. 584, 301 S.E.2d 216 (1983). Unlike *res judicata*, collateral estoppel "does not always require that the parties be the same. Instead, collateral estoppel requires identical issues rose in successive proceedings and requires a determination of the issues by a valid judgment to which such determination was essential to the judgment." *Miller*, 194 W.Va. at 9, 459 S.E.2d at 120.

As this Court has recognized, *res judicata* and collateral estoppel serve important policies. See *Mellon-Stuart Co. v. Hall*, 178 W.Va. 291, 298, 359 S.E.2d 124, 131 (1987) ("[R]es judicata [or claim preclusion] serves to advance several related policy goals-(1) to promote fairness by preventing vexatious litigation; (2) to conserve judicial resources; (3) to prevent inconsistent decisions; and (4) to promote finality by bringing litigation to an end."); *id.* at 299, 359 S.E.2d at 132 ("Collateral estoppel or issue preclusion is supported by the same public policy considerations as *res judicata*." (internal quotations and citation omitted).

As a general rule, for *res judicata* to apply, three elements must be satisfied:

First, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings. Second, the two actions must involve either the same parties or persons in privity with those same parties. Third, the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action.

Blake v. Charleston Area Med. Ctr., Inc., 201 W.Va. 469, 477, 498 S.E.2d 41, 49 (1997). Collateral estoppel will apply when four conditions are met: “(1) the issue previously decided is identical to the one presented in the action in question; (2) there is a final adjudication on the merits of the prior action; (3) the party against whom the doctrine is invoked was a party or in privity with a party to a prior action; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.” Syl. pt. 1, *Miller*, 194 W. Va. at 3, 459 S.E.2d at 114.

This Court has held that *res judicata* and collateral estoppel can be applied to quasi-judicial determinations of administrative agencies:

For issue or claim preclusion to attach to quasi-judicial determinations of administrative agencies . . . the prior decisions must be rendered pursuant to the agency's adjudicatory authority and the procedures employed by the agency must be substantially similar to those used in a court. In addition, the identity of the issues litigated is a key component of the application of administrative *res judicata* or collateral estoppel.

Syl. pt. 2, *Vest v. Bd. of Educ. of Nicholas County*, 193 W.Va. 222, 455 S.E.2d 781 (1995).

Similarly, with respect to the application of *res judicata* and collateral estoppel to administrative agency determinations or other hearing bodies, this Court has held:

An assessment of three factors is ordinarily made in determining whether *res judicata* and collateral estoppel may be applied to a hearing body: (1) whether the body acts in a judicial capacity; (2) whether the parties were afforded a full and fair opportunity to litigate the matters in dispute; and (3) whether applying the doctrines is consistent with the express or implied policy in the legislation which created the body.

Syl. pt. 3, *Mellon-Stuart Co.*, 178 W.Va. at 291, 359 S.E.2d at 124.

In this case, there was and is no dispute that there was a final adjudication on the merits in each of Petitioners' workers' compensation claims. There was and is no dispute that the

Offices of Judges' decisions and any related appeals thereof were made pursuant to the agency's adjudicatory authority.

However, Petitioners claim that application of preclusion was inappropriate because there was no showing that the issues litigated before the Office of Judges were identical to those presented in their deliberate intent claims. Specifically, Petitioners argue that Respondents failed to prove 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." [Petition for Appeal at p.34]. Petitioners also argue that application of preclusion was inappropriate because there had not been an actual full and fair adjudication. Both of these arguments are without merit.

(a) The issues litigated before the Office of Judges were identical.

Petitioners take an extremely narrow view of the identity required in order for preclusion to apply. Again, it is Petitioners' position that the issues litigated before the Office of Judges were not identical because Respondents failed to prove the exact same injuries were at issue before the Office of Judges as were at issue in their deliberate intent civil claims. Petitioners' arguments run afoul of the law.

In *White v. SWCC*, 164 W.Va. 284, 262 S.E.2d 752 (1980), this Court utilized the "same-evidence" approach to determine whether two claims or issues should be deemed the same for the purposes of preclusion:

For purposes of res judicata, "a cause of action" is the fact or facts which establish or give rise to a right of action, the existence of which affords a party a right to judicial relief... The test to determine if the issue or cause of action involved in the two suits is identical is to inquire whether the same evidence would support both actions or issues If the two cases require substantially different evidence to sustain them, the second cannot be said to be the same cause of action and barred by res judicata.

Id. at 290, 262 S.E.2d 756 (citations omitted).

Here, is it clear from Petitioners' pleadings and the record of their respective workers' compensation claims that both arise from the same operative facts and require the same type of evidence. Both sought benefits and/or damages from alleged chemical exposure arising out of Petitioners' employment performing float sink analysis. However, it does not stop there. Petitioners' own admissions reveal that not only did their workers' compensation and deliberate intent claims require the same type of evidence, but that Petitioners commenced their deliberate intent civil actions based upon the exact same medical diagnosis. Each and every one of Petitioners' workers' compensation claims were commenced and supported by the diagnosis of Dr. Michael Kostenko. When asked in written discovery in the deliberate intent actions what, if any, medical provider had informed them their injuries and/or conditions were the result of chemical exposure during float sink analysis, all Petitioners identified one individual, Dr. Kostenko.

Accordingly, Petitioners' argument that the issues presented in their workers' compensation claim were not identical to the issues presented in their deliberate intent actions is wholly without merit.

(b) Petitioners had a full and fair opportunity to litigate before the Office of Judges.

Importantly, Petitioners themselves do not dispute that the procedures available to them before the Office of Judges provided them a full and fair opportunity to litigate the issue of whether their claimed injuries were causally related to chemical exposure in their employment:

MR. WALSH: [H]ere what you really have is, there was not a full and fair actual adjudication. There was the opportunity.

THE COURT: Okay.

MR. WALSH: I don't think that there's any question that the opportunity existed for Mr. McCoy to go in and demonstrate his injury

THE COURT: I mean, do you not agree that the claimant had the opportunity to litigate it, had the opportunity to appeal the decision to the [Board of Review], and had the opportunity to appeal that decision to the West Virginia Supreme Court of Appeals?

MR. BASILE: Yes.

[Hrg. Tr. at 27:12-18, 38:10-16 filed 3/3/10].

Indeed, looking at the litigation process before the Office of Judges, Petitioners were left no choice but to agree they had a full and fair opportunity to litigate whether they had injuries causally related to their alleged chemical exposure. The burden of proof in litigation before the Office of Judges is a preponderance of the evidence standard, just the same as a deliberate intent civil action. *See* W.Va. Code § 23-4-1g ("[R]esolution of any issue raised in administering this chapter shall be based on a weighing of all evidence pertaining to the issue and a finding that a preponderance of the evidence supports the chosen manner of resolution."). Parties have the right to be represented by counsel. *See* 93 C.S.R. § 1-3.6(11) (2002).⁹ Parties have a right to a hearing. *Id.* § 1-3.4 ("Any party to a claim shall, upon timely request, have a right to a hearing concerning any issue of fact or law upon which the Workers' Compensation Division has made a decision . . ."). Parties have the right to cross examine witnesses. *Id.* § 1-3.6(B)(2). The discovery procedures are substantially identical to those in civil litigation. Just as under Rule 33 of the Rules of Civil Procedure, each party may serve up thirty written interrogatories. *Id.* § 1-3.8(D). Just as under Rule 30 of the Rules of Civil Procedure, parties can, and are encouraged, to take oral depositions. *Id.* § 1-3.12(A) ("In order to promptly and efficiently process cases the parties are encouraged, particularly

⁹ The Title 93 of the Code of State Rules relative to the litigation of protests before the Office of Judges underwent amendments in 2002, 2004, 2005, and 2008. However, no such amendments were substantive with respect to the issues presented here. For example, regardless of which version of Title 93 was technically in effect at the time of Petitioners' respective workers' compensation claims, all versions have provided for the right to hearings, interrogatories, depositions, *etc.* Nonetheless, since most of Petitioners claims were commenced in late 2002 and 2003, Respondents will cite to the 2002 version of Title 93.

for the purpose of cross-examining expert witnesses, to use depositions to the maximum extent possible. Accordingly, depositions may be obtained and used for evidentiary purposes without prior consent of the Office of Judges."). Just as under Rule 35 of the Rules of Civil Procedure, parties "are entitled to a reasonable number of relevant medical examinations or vocational evaluations." *Id.* § 1-3.9(E)(1). Just as in civil actions, parties' counsel may issue subpoenas to compel attendance of witnesses or the production of documents. *Id.* § 1-3.9(B)(1) ("The presence of a witness or production of evidence shall be obtained by the issuance of a subpoena or subpoena duces tecum through the party's counsel as a member of the Bar and an officer of the Court.").

Moreover, applying preclusion doctrines to the Office of Judges' determinations "is consistent with the express or implied policy in the legislation which created the body." Syl. pt. 3, *Mellon-Stuart Co.*, 178 W.Va. at 291, 359 S.E.2d at 124. In fact, not only is applying preclusion doctrines consistent with the policy and goals of the Workers' Compensation Act, not applying preclusion doctrines severely undercuts such goals. The Act requires employers to subscribe and purchase workers' compensation insurance. *See* W.Va. Code § 23-2-1 (2005).¹⁰ Workers' compensation insurance policies typically do not cover liabilities from deliberate intent civil litigation. To have such coverage, an employer must generally pay additional premium monies and/or purchase an additional policy. When the Office of Judges determines there is no compensable injury causally related to employment, there are no benefits received or receivable and, thus, no offset available to the employer in a deliberate intent civil action.¹¹ If an employee can then seek to recover the full amount of their damages in a civil action, it renders the employer's

¹⁰ If certain rigorous criteria are met, including the provision of security or bond, an employer may elect to self-insure. *See* W.Va. Code § 23-2-9 (2005).

¹¹ As a result of the 2005 amendments to Section 23-4-2, an employee does not have to file a claim for workers' compensation benefits as a condition precedent to bringing a deliberate intent action. *See* W.Va. Code § 23-4-2(c). However, under that scenario, the employer is still entitled to put on evidence concerning the amounts of workers' compensation benefits that would have been receivable had a claim for benefits been filed. *See id.* Here, if a claim for benefits is pursued first and denied on the merits, there are no benefits either received or receivable.

purchase of workers' compensation insurance mandated by the Act meaningless. This, again, results in an effective abrogation of the employers "benefits of the bargain" under the Act.

Taking all of the above into account, it comes as no surprise that courts have already recognized preclusion doctrines can apply to the Office of Judges' determinations. In *Corley v. Eastern Assoc. Coal Corp.*, 2009 WL 723120 (N.D.W.Va. March 18, 2009), the plaintiff filed a workers' compensation claim arising out of her husband's death at an underground coal mine. The claim was denied based upon the expiration of the six-month statute of limitations for workers' compensation claims. The denial was affirmed by both the Offices of Judges and the Board of Review. The defendant argued that the denial of the plaintiff's workers' compensation claim mandated a dismissal of the plaintiff's deliberate intent claim on the basis that the plaintiff was precluded from proving a compensable injury, a mandatory element of a deliberate intent cause of action. The Honorable Irene Keeley discussed the procedures employed in a workers' compensation claim and held that "findings of the Office of Judges and the Board of Review constitute 'quasi-judicial' decisions that can be given preclusive effect." *Id.* at *6. Judge Keeley ultimately determined that collateral estoppel did not apply in *Corley* because the dismissal of the plaintiff's workers' compensation claim based upon the statute of limitations was not considered an adjudication on the merits. *Id.* at *7. However, Judge Keeley went on to state, "Had the Office of Judges reviewed the claim in full and denied it on the basis that Mr. Corley's death was not compensable, this Court would readily agreed that such a decision would preclude Mrs. Corley from re-litigating the issue here." *Id.* (emphasis added).

At the end of the day, Petitioners are advancing a unsupported theory of preclusion that would effectively eviscerate them. Petitioners' position is that despite having a full and fair opportunity to litigate the issue of whether their injuries were causally related to their chemical exposure during their employment, preclusion cannot apply unless a party takes advantage of every

possible procedure and discovery mechanism available to it. Essentially, Petitioners' argument is that "we did not have an actual full and fair adjudication because we did not win."

Contrary to Petitioners' argument, the application of preclusion has always focused on the procedures available to a party and whether they provided a full and fair opportunity to litigate, not the extent on which a party chooses to utilize them. For example, in *Padilla v. Intel Corp.*, 964 P.2d 862 (N.M. App. 1998), in giving preclusive effect to a prior workers' compensation determination, the court stated, "The fact that Plaintiff did not take full advantage of these procedures by moving to compel additional discovery responses or objecting to inadmissible evidence is not a sufficient basis for reversing the district court's decision." *Id.* at 868; *see also Kremer v. Chem. Const. Corp.*, 456 U.S. 461, 485 (1982) ("The fact that Mr. Kremer failed to avail himself of the full procedures provided by state law does not constitute a sign of their inadequacy.").

Petitioners' argument itself evidences why the application of preclusion has always looked at whether the procedures available provide an opportunity for full and fair litigation, as any other standard is unworkable. For example, Petitioners supported their workers' compensation claims by, among other things, submitting medical reports and undergoing independent evaluations. Yet, they now argue there was no full and fair adjudication of their claims because Petitioners "did not utilize witnesses available to them . . . (such as co-workers and employees of adverse parties) . . ." [Petition for Appeal at p.30]. Given the medically intensive, expert nature of the causation question presented, perhaps Petitioners' counsel, Mr. Basile, felt such discovery was unwarranted or irrelevant. Perhaps it did not fit into his litigation strategy. But the point is this: no court can read Mr. Basile's mind.

Indeed, as the saying goes, "hindsight is always 20/20." As lawyers, there is always room for second guessing ourselves. Perhaps a different or additional expert could have been

utilized. Perhaps additional written discovery could have been propounded. Perhaps a witness could have been asked a key question in a different way. However, if simply wanting to use a different expert from one used in a prior proceeding is sufficient grounds to defeat the application of *res judicata* or collateral estoppel, those doctrines will no longer have meaning in West Virginia jurisprudence. This is, again, exactly why the analysis focuses on the opportunity for full and fair litigation, and not why counsel may or may not have made a certain decision as to how to best utilize the procedures available.

Accordingly, the lower court properly held that the doctrines of *res judicata* and collateral estoppel can apply to the adjudications of the Office of Judges.

2. The Lower Court Properly Held Collateral Estoppel Can Be Used By Employers Not Party to the Underlying Workers' Compensation Proceeding.

Lastly, Petitioners argue that the lower court erred in holding that collateral estoppel could be applied to preclude Petitioners' deliberate intent claims against employers who were not parties to the underlying workers' compensation claim. Specifically, the lower court granted summary judgment in favor of Rawl Sales on the deliberate intent claim of petitioner Clarence McCoy and in favor of Westmoreland on the deliberate intent claim of petitioner Steven Hylton. Petitioners' argument is without merit and ignores the purpose and relative burdens in a workers' compensation claim.

Importantly, as this Court has recognized, there is no requirement that the parties in a prior proceeding must have been identical for collateral estoppel to apply. Indeed, collateral estoppel, by its very nature, typically involves a stranger to the first proceeding. *See Rowe v. Grapevine Corp.*, 206 W.Va. 703, 710, 527 S.E.2d 814, 821 (1999) ("A claim is barred by *res judicata* when the prior action involves identical claims and the same parties or their privies. Collateral estoppel, however, does not always require that the parties be the same. Instead, collateral

estoppel requires identical issues raised in successive proceedings and requires a determination of the issues by a valid judgment to which such determination was essential to the judgment."). The only requirement is that the party against whom collateral estoppel is being asserted against, not necessarily the party asserting it, had a prior opportunity to have litigated the issue. *See* syl. pt. 8, *Conley*, 171 W.Va. at 584, 301 S.E.2d at 216 ("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.").

Along those lines, it was entirely proper for Rawl Sales and Westmoreland to assert collateral estoppel against Messrs. McCoy and Hylton, respectively, because they had already litigated the issue of whether they had any injury causally related to float sink exposure. The first and foremost issue in a workers' compensation claim seeking benefits for occupational disease is that the claimant must show he or she has suffered injury as a result of his or her exposure during their employment. *See* W.Va. Code § 23-4-1(f) (defining "occupational disease"). This determination is not confined to a single employer, but can include all of the employee's exposure across multiple employers. Again, the employee simply needs to prove the fact of an occupational disease. *See Maynard v. State Workmen's Compensation Comm'r*, 161 W.Va. 21, 28, 239 S.E.2d 504, 508 (1977) ("Under the relevant provisions of [23-4-1], there is no requirement that an employee, upon filing an initial claim for occupational pneumoconiosis where he has worked for multiple employers, must prove to what extent or degree each employer has contributed to this disease."). Once the employee proves the fact of an occupational disease causally related to his employment, the benefits awarded may be then allocated among the employee's various employers. W.Va. Code § 23-4-1(f) ("The commission may allocate to and divide any charges resulting from such claim among the employers by whom the claimant was employed.").

Indeed, a review of the underlying administrative records reveal that Petitioners' entire employment histories were at issue and considered. For example, in making the determination as to whether he was suffering any occupational disease, petitioner Clarence McCoy clearly asserted, and the Office of Judges considered, his prior employment at Rawl Sales. In discovery served in the course of Mr. McCoy's workers' compensation claim, he was asked the following interrogatory:

List specifically, by product name, trade name or chemical name each and every product which you claim has caused or could in the future cause, symptoms or disease, and for each product, provide the following information:

- a. the name and address of the employer for whom you were working at the time of the exposure;
- b. your job title,
- c. the reason for your exposure;
- d. the way in which you believe you were exposed, including the duration of the exposure.

Mr. McCoy identified both Independence and Rawl Sales as employers at which he was exposed to chemicals used in the float sink process. [Answer to Interrogatory No. 2 of Claimant Clarence McCoy's Answers to Employer's Interrogatories, attached as Exhibit B to Defendants Independence Coal Company and Rawl Sales & Processing Co.'s Motion for Summary Judgment]. In Dr. Michael Kostenko's report that was submitted to the Office of Judges in support of Mr. McCoy's claim, Dr. Kostenko identified Mr. McCoy's exposure at both Rawl Sales and Independence Coal as the cause of his injuries. [Claimants Submission and Report of Dr. Michael Kostenko, attached as Exhibit B to Reply to Pls' Memo in Opposition filed 1/28/10]. Indeed, the Offices of Judges' decision with respect to Mr. McCoy's claim makes multiple references to his employment at Rawl Sales. For example, on page 2, it states, "His exposure . . . [at Rawl] with the chemicals was 3,744 hours over

the course of 18 years." [Decision of Administrative Law Judge at p.2, attached as Exhibit C to Reply to Pls' Memo in Opposition filed 1/28/10].

Here, in Messrs. McCoy and Hylton's workers' compensation claims, the sole burden placed upon these gentlemen was to prove by a preponderance of the evidence an injury causally related to chemical exposure from their employment performing float sink analysis. This determination is not made on an employer-by-employer determination. With respect to Mr. McCoy, it would not matter whether the injury was from, in whole or in part, his exposure at Rawl Sales from 1981 to 1999 or his exposure at Independence Coal from 1999 to 2002. With respect to Mr. Hylton, it would not matter whether the injury was from, in whole or in part, his exposure at Westmoreland in the 1970s and 1980s, or his subsequent exposure at Precision Testing Laboratory, Inc. Messrs. McCoy and Hylton simply failed to carry their burden.

Accordingly, the lower court properly held that collateral estoppel could be applied to preclude Petitioners' deliberate intent claims against former employers that were not parties to the proceeding before the Office of Judges.

C. THERE WERE NO VALID EXCEPTIONS TO PREVENT THE APPLICATION OF PRECLUSION TO PETITIONERS' CLAIMS.

The last assignment of error Petitioners raise is that the lower court failed to apply exceptions to the application of preclusion. Petitioners argue the application of preclusion was inappropriate because of the availability of additional and strong evidence not presented in the litigation before the Office of Judges. According to Petitioners, this additional evidence not provided in their workers' compensation proceedings includes Petitioners' own affidavits detailing their work history and work environment, as well as expert affidavits. [See Petition for Appeal at p.39]. Petitioners' argument misinterprets the law.

In *Tolley v. Carboline Co.*, 217 W.Va. 158, 617 S.E.2d 508 (2005) (per curiam), this Court stated, "In order for the Tolleys 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 [trial] court" *Id.* at 164, 617 S.E.2d at 514 (quoting *Molinaro v. Fannon/Courier Corp.*, 745 F.2d 651, 655 (Fed.Cir.1984)). However, the analysis is not as simple as Petitioners would have it. The additional and strong evidence cannot be just any evidence. Courts, including in *Molinaro* and the cases cited therein, recognize that to overcome the application of collateral estoppel, a party must show it bears no responsibility for the absence of the additional evidence in the prior proceeding. *See, e.g., Kaiser Indus. Corp. v. Jones & Laughlin Steel Corp.*, 515 F.2d 954, 982 (3d Cir. 1975) ("In order to show that a prior judgment is not binding for want of essential evidence, a patentee must fulfill the two criteria of the Supreme Court test. It must persuade the second court that the additional evidence was crucial to a proper resolution in the first tribunal, and that the patentee bore no responsibility for the absence of the evidence in the prior trial."); 50 C.J.S. Judgments § 1061 ("Under the issue preclusion doctrine, a party may not be permitted to introduce new or different evidence to relitigate a factual issue which was presented and determined in a former action. Litigation of an issue necessarily encompasses all arguments and evidence that could be presented to resolve the issue, and the mere discovery of new evidence does not create a new issue. . . . Some degree of diligence must be shown to avoid the application of issue preclusion on a 'new evidence' theory").

Here, Petitioners are essentially advancing the same argument as to why preclusion should not have applied in the first place, *i.e.*, that there was no actual full and fair adjudication. Although it would have been of questionable relevancy given the expert nature of the medical issues involved, Petitioners were free to testify and/or submit any affidavits they saw fit before the Office of Judges. Petitioners were free to retain and rely upon the experts they saw fit. This is not a case of some new, unexpected source of evidence that Petitioners could not have been aware. Again, if a party could avoid preclusion under these circumstances, then there would never be finality.

This case is a perfect example of why courts limit the "new evidence" exception to those rare cases of truly newly discovered evidence not previously available, as any other rule encourages parties to play "fast and loose" with the system. Take, for example, Petitioner Clarence McCoy. Petitioners' argue that preclusion is inappropriate because Mr. McCoy has now provided an affidavit in his civil claim outlining his work environment, including how "safety equipment was not provided and the PCE odor was a constant presence." [Petition for Appeal at p.39]. Yet, in his workers' compensation claim, Mr. McCoy was asked in a written interrogatory whether personal protective equipment was available to him and worn. In an answer signed by Mr. Basile, Mr. McCoy stated, "Yes, personal protective equipment was worn. Chemical full face mask, nitrile gloves and rubber aprons were used." [Answer to Interrogatory No. 10 of Claimant, Clarence McCoy's Answers to Employer's Interrogatories, attached as Exhibit B to Defendants Independence Coal Company and Rawl Sales & Processing Co.'s Motion for Summary Judgment]. Which is the truth? Is it the interrogatory Mr. McCoy answered and Mr. Basile signed in the workers' compensation claim, or is it the affidavit Mr. McCoy purportedly signed stating no personal protective equipment was provided? Again, the case of Mr. McCoy highlights why claims of "new evidence" must be looked upon with skepticism. A party simply wanting to change or add to their own story, or counsel wanting to try a different expert, is not new evidence sufficient to defeat the application of *res judicata* or collateral estoppel.

Accordingly, there were no exceptions that would prevent the lower court from applying *res judicata* or collateral estoppel to the Office of Judges adjudications of Petitioners' workers' compensation claims. Summary judgment was appropriately granted and the Petition for Appeal should be denied.

V. CONCLUSION

For the above reasons, respondents Virginia Crews Coal Company, Westmoreland Coal Company, Buffalo Mining Company, Independence Coal Company, Inc., and Rawl Sales & Processing Co. respectfully request that the Petition for Appeal be denied.

Respectfully submitted,

**VIRGINIA CREWS COAL COMPANY,
WESTMORELAND COAL COMPANY,
BUFFALO MINING COMPANY,
INDEPENDENCE COAL COMPANY, INC., and
RAWL SALES & PROCESSING CO.**

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IN THE SUPREME COURT OF APPEALS 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.,

**Appeal No.10-091
Civil Action No. 04-C-252
Circuit Court of Wyoming County**

Respondents/Defendants.

CERTIFICATE OF SERVICE

I, Jonathan L. Anderson, do hereby certify that I have served a true and exact copy of the foregoing *Response to Petition for Appeal on Behalf of Virginia Crews Company, Westmoreland Coal Company, Buffalo Mining Company, Independence Coal Company, Inc., and Rawl Sales & Processing Co.* upon the following persons by depositing the same in the regular course of the United States Mail, postage prepaid, on this 25th day of January, 2011:

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