

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 11-0631

ROBERT L. MEADOWS, II and  
RHONDA K. MEADOWS, his wife,

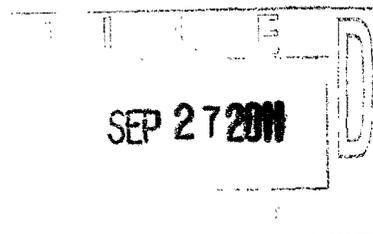
Plaintiffs below, Petitioners,

v.

MASSEY COAL SERVICES, INC., and  
INDEPENDENCE COAL COMPANY, INC.,

Defendants below, Respondents.

(Civil action No. 08-C-185)  
(Boone County Circuit Court)



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**PETITIONERS' REPLY TO RESPONDENTS RESPONSE**

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Come now the Petitioners, by counsel, in reply to Respondent's response and respectfully request that the Court reverse the ruling of the Circuit Court of Boone County and remand this case so that the Petitioners may proceed to trial.

The respondents misstate the basis of the circuit court's findings. This is because the order itself acknowledges a question of material fact which prohibits a summary judgment ruling in the respondents favor. Petitioner did not testify that the inadequate lighting, inadequate berm and lack of spotter failed to cause his injury. On the contrary Petitioner presented competent evidence creating a question of material fact as to these safety violations causing Petitioner's injuries. Faced with this, the respondents now attempt to argue no safety standard was violated ignoring the various MSHA standards and violations thereof argued to the circuit court, no knowledge by the respondents of the unsafe conditions despite respondents history of two similar wrecks occurring before this incident and respondents failure to inspect the subject dump site prior to the incident, and no intentional exposure of the petitioner to the unsafe conditions despite respondents direct order that petitioner dump on this non-compliant site in the face of petitioners complaints of active safety violations. These arguments were waived by the respondents in their argument to the trial court as well. AR at 351.

Summary judgment for the Respondents was ordered in error. Competent evidence creating legitimate questions of material fact was presented to the trial court, but was ignored by the trial court. The trial court's order should be reversed and this matter remanded for trial.

## Argument

The Petitioner will now address each of Respondents arguments and waived arguments in turn.

**B. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN RULING THE PLAINTIFF PROVIDED NO EVIDENCE OF CAUSATION FOR THE INCIDENT, WHERE INVESTIGATIONS AND WITNESS TESTIMONY PROVED THAT THE RESPONDENTS MAINTAINED AN UNSAFE WORKING CONDITION WHICH CAUSED THE COMPLAINED OF INCIDENT.**

It should be noted that the trial court obviously issued its order granting summary judgment because the trial court chose to weigh the evidence and determine the truth of the matter. This is impermissible given the conflicting evidence in this case.

The question of material fact as to causation is one for the jury where as the Court in this case acknowledged there is conflicting evidence on the issue. *Stevenson v. Independence Coal Co., Inc.*, 709 S.E.2d 723, 731 (W.Va. 2011) and *Hatten. v. Mason Realty Co.*, 148 W.Va. 380, 135 S.E.2d 236, Syl. Pt. 5 (W.Va. 1964).

The trial court in this case acknowledged conflicting testimony by other witnesses stating in the Order at issue:

"The Court acknowledges conflicting testimony by other witnesses. However, even when viewing facts in light most favorable to the Plaintiffs, the Court takes Robert Meadows' testimony as true. If not, Plaintiffs would be forced into the unenviable position of impeaching Plaintiff's own testimony. Therefore, there is no genuine issue of material fact with respect to where the truck fell into the pit." (See Order entered March 21, 2011; AR at 366-367).

The conflicting testimony from Hicks, Fowler and Osborne was:

Brian Hicks, at the time of this wreck, was the regional HR director for eight subsidiaries of Massey. (*See Hicks Dep.*, p. 5; AR at 258). Mr. Hicks investigated the wreck pursuant to Massey protocols and found the following:

"You know, obviously, Robert had backed over the berm and his truck had flipped." (*Id.* at 22; AR at 262)

Joseph Fowler, Mr. Meadows' foreman at the time of the wreck, prepared the accident report for this wreck and found that the rear wheels were through the berm and the truck went over the dump. Mr. Fowler further stated in his deposition that he could tell what happened by looking at it and, "he backed in and wasn't square with his berm, and he back his offside wheels through the berm, and then the truck sat down." (*See Fowler Dep.*, p. 66; AR at 173).

Howard Osborne, the designated agent of Independence, stated that Mr. Dillon, a safety tech for Independence, showed him pictures of the wreck scene where tire marks were shown through the berm. "It wasn't squared on the berm, and it went through the bump." (*See Osborne Dep.*, p. 33; AR at 135).

The only factual finding that the Court based its Order on was:

The Plaintiffs cannot prove that any of the conditions identified proximately caused Mr. Meadows' injuries. The Plaintiff's own testimony he stated, "As I backed that truck up going toward the berm, it sunk in and gave way, fell in front of the berm, before the berm." *R. Meadows Dep.* at 64. The Court takes Plaintiff's own words to be the truth. Therefore, the three specific unsafe working conditions, inadequacy of the dump site's berm, inadequate illumination, and the absence of a spotter, could not have been a direct and proximate cause of Plaintiff's injuries, required by W.Va. Code § 23-4-2(d)(2)(ii)(E). Plaintiff's injuries would have occurred even if all three specific unsafe working conditions had been remedied. A higher berm, more lighting, and a spotter would not have prevented the dump site from caving in, and more importantly, the

Plaintiff's injuries. Therefore, the action for deliberate intent fails as a matter of law with respect to proximate cause. (*See* Order entered March 21, 2011, AR at 366-367).

The Court thereby determined the truth of the conflicting testimony on its own. This is in contravention of the law of this state. "The circuit court's function at the summary judgment stage is not weigh the evidence and determine the truth of the matter but is to determine whether there is a genuine issue for trial." *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755, Syl. Pt. 3 (W.Va. 1994).

The conflicting testimony in this case comes from the defendant's witnesses who were in a much better position and mental state to determine what caused the wreck. Mr. Meadows backed into the dumpsite in the dark and without the assistance of a spotter or of an adequate berm to judge distance if he could see it. Mr. Meadows also suffered a head injury in the wreck. All of these facts were made known to the Court. This is not a case of a "sham affidavit" as the respondents now claim.

Mr. Hicks, Mr. Fowler, and Mr. Osborne had the benefit of light, cameras, and seeing the wreck scene immediately after the wreck. Mr. Meadows was rushed from the scene by ambulance on a backboard.

Plaintiffs' expert, Richard Allen, a former MSHA inspector opined that the berm was in violation of MSHA law, that the inadequate illumination was a cause of the accident and that failure to have a spotter on the site was a violation of industry standards. Mr. Allen also opined that failure to inspect the berm by the foreman was a cause of this wreck. (*See* Allen Dep., pp. 38-40, 77-82, and 89-94, 305-306 and 308-309 AR at 295).

The testimony of Hicks, Fowler and Osborne supports the plaintiffs' contention that the truck backed through the berm. A jury could easily determine from the testimony of the witnesses that the Plaintiff backed the truck through the berm. Factual discrepancies and conflicting testimony create genuine issues of material fact ripe for jury resolution. This is precisely the situation in which summary judgment should not be utilized. *Kelly v. City of Williamson*, 221 W.Va. 506, 655 S.E.2d 528, 535 (W.Va. 2007).<sup>1</sup>

The factual scenario in this case certainly is sufficient to submit the question to the jury.

**C. THE RESPONDENTS KNEW OF THE UNSAFE CONDITIONS BECAUSE THE RESPONDENTS FAILED TO PERFORM REQUIRED SAFETY INSPECTIONS AND BECAUSE OF PREVIOUS SIMILAR INCIDENTS ON THEIR PROPERTY**

It is disingenuous of the defendants to argue that violations of MSHA regulations and the defendants' own safety standards did not expose Mr. Meadows to a high degree of risk or a strong probability of serious injury where the defendant had had the same type incidents occur on the same mine site multiple times prior to the subject incident and where Respondents failed to perform mandatory safety inspections of the subject dump site. It is a known risk that when a truck is given no or insufficient guidance indicators for dumping off a cliff in the middle of the night that the truck could tumble into the ravine below.

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<sup>1</sup> Had the Respondents inspected the dumpsite prior to the incident, the inadequacy of the dumpsite would have been discovered.

It is undisputed that the berm was inadequate. Both Roy Howell and Brian Hutchison were written up for the berm being inadequate in both height and integrity. See AR at 190 and 207.

It was the defendants own policy to place spotters on the dump site. See Howell deposition, p. 22--23, at AR 195, 38, at AR 199; Hicks deposition p. 30 at AR 264; Fowler Deposition, pp. 57-58 at AR 171; and Osborne deposition, pp. 60-63 at AR 142 and 143.

The designated agent of Independence Coal stated that not having a spotter where a truck could fall 140 feet, as is the case here, would be a safety violation and that a dozer man would be directed to be at the dump site at all times.

Illumination is also required. Bryan Hicks notes that the light plant that was supposed to be illuminating the dump site was not on. See Hicks deposition, p. 26 at AR 263. The preventative report noted that adequate illumination must be present. See AR 256.

Defendant had two identical incidents involving rock trucks backing up and falling into dump pits below prior to this incident occurring. The defendants violated the law by failing to inspect and complete a pre-shift or on-shift inspection of the site. The defendants now wish to use their illegal conduct to shield themselves from having knowledge of the inadequate berm. Further the defendants knew that no spotter was present because the defendants' foreman removed the spotter from the dump site themselves. The foreman knew that the light plant was not working because of plaintiffs' complaints about the need for a spotter.

The defendant's failure to inspect and train does not absolve the

defendant from its duty to do so and cannot be used as a defense to knowledge of unsafe working conditions.

"The violation of a statute, rule, regulation or standard is a proper foundation for the element of deliberate intent found at W.Va. Code § 23-4-2(c)(2)(ii)(C) (1994) (Repl, Vol. 1998), where such statute, rule, regulation, or standard imposes a specifically identifiable duty upon an employer, as opposed to merely expressing a generalized goal, and where the statute, rule, regulation or standard asserted by the employee is capable of application to the specific type of work at issue.

Syl. Pt. 3, *Ryan v. Conch Industries, Inc.*, 219 W.Va. 664, 639 S.E.2d 756 (W.Va. 2006).

"Where an employee has instituted a deliberate intent action against an employer under W.Va. Code § 23-4-2(c)(2)(ii) (1994) (Repl. Vol. 1998), and where the defendant employer has failed to perform a reasonable evaluation to identify hazards in the workplace in violation of a statute, rule or regulation imposing a mandatory duty to perform the same, the performance of which may have readily identified certain workplace hazards, the defendant employer is prohibited from denying that it possessed " a subjective realization" of the hazard asserted in the deliberate intent action, and the employee, upon demonstrating such violation, is deemed to have satisfied his or her burden of proof with respect to showing "subjective realization" pursuant to W. Va. Code § 23-4-2(c)(2)(ii)(B).

Syl. Pt. 6, *Ryan v. Conch Industries, Inc.*, 219 W.Va. 664, 639 S.E.2d 756 (W.Va. 2006).

In this case it is clear that the defendant failed to follow the mandates of MSHA, thus precluding summary judgment on this issue..

**D. SPECIFIC UNSAFE WORKING CONDITIONS EXISTED AT THE TIME OF THIS WRECK WHICH VIOLATED SPECIFIC SAFETY STANDARD AND CAUSED THE PERMANENT AND SERIOUS INJURIES TO MR. MEADOWS.**

All of the factors of an inadequate berm, inadequate lighting and no spotter being present are proximate causes of this wreck. The berm was not in compliance with the MSHA safety laws and had it restrained the truck then this incident would have been avoided.

Plaintiffs' expert, Richard Allen, a retired MSHA inspector opined that the berm was in violation of MSHA law, that the inadequate illumination was a cause of the accident and that failure to have a spotter on the site was a violation of industry standards. Mr. Allen also opined that failure to inspect the berm by the foreman was a cause of this wreck. See Exhibit 12, Allen deposition, AR 295, pp. 38-40, 77--82, and 89--94, 305-306 and 308--309. Mr. Allen cited violations of MSHA regulations:

Section 77.1713 requires in part that (a) at least once during each working shift and more often if necessary for safety, each active work area be examined by a certified person for hazardous conditions, and any hazardous conditions be reported to the operator and corrected; (b) the operator withdraw persons from any area where a hazardous condition creates an imminent danger; (c) a written report be made of the conditions found and (d) a report be made of the action taken to abate any hazardous conditions.

"Before dumping begins, and throughout the shift, equipment operators and their supervisors should routinely check the dump area for unsafe conditions, such as cracks, inadequate berms, unstable material on the slope below the dump point, or a loaded-out slope below the dump point. Such conditions should be promptly reported and corrected."

Section 77.1605(1) requires that berms, bumper blocks, safety hooks, or similar means be provided to prevent overtravel and overturning at dumping locations

Section 77.2. defines "berm" as a pile of material capable of restraining a vehicle.

Section 56/57.17001 requires, in part, that illumination, sufficient to provide safe working conditions be provided on all loading and dumping sites, and work areas.

For the foregoing reasons, the Petitioners request that the Court deny the Respondents motion for summary judgment on this issue.

**E. THE RESPONDENTS INTENTIONALLY EXPOSED MR. MEADOWS TO THREE SPECIFIED UNSAFE WORKING CONDITIONS.**

Respondents never instructed the Petitioner to cease dumping at the site or to dump short of the berm. Respondents were aware that the Petitioner would continue to dump at the site without such instruction. Mr. Meadows feared that he would be fired if he did not continue to dump at the site. Moreover, the defendants were aware of two nearly identical incidents occurring on the property in the past. Despite Mr. Meadows complaints about inadequate lighting and Respondents own admission that communication was inadequate, Mr. Meadows was ordered to continue dumping under the unsafe conditions. Meadows deposition, AR 221.

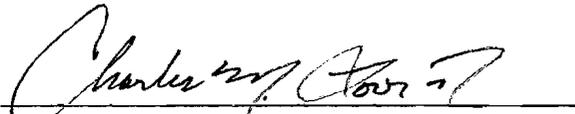
Summary judgment should not have been granted on this issue because a question of material fact exists as to whether Respondents intentionally exposed Mr. Meadows to the unsafe conditions.

Conclusion

Wherefore, Petitioner request that based upon the foregoing, questions of material fact exist as to all elements of the deliberate intent claim and Petitioner requests that the Court reverse the trial court's order and remand the case for trial.

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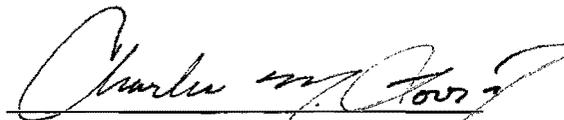
Defendants below, Respondents.

CERTIFICATE OF SERVICE

I, Charles M. Love, IV, counsel for the Plaintiffs below, Petitioners, do hereby certify that a true and exact copy of the foregoing "Petitioners' Reply To Respondents Response" was served upon:

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via hand delivery this 27th day of September, 2011.

  
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