# IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

2011

No. 11-0631

**ROBERT L. MEADOWS and RHONDA K. MEADOWS,**
**Plaintiffs Below, Petitioners**

**vs.**

**MASSEY COAL SERVICES, INC. and**
**INDEPENDENCE COAL COMPANY, INC.,**
**Defendants Below, Respondents**

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Hon. William Thompson, Judge
Circuit Court of Boone County
Civil Action No. 08-C-185

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## I. CROSS-ASSIGMENTS OF ERROR[1]

A. THE CIRCUIT COURT SHOULD HAVE AWARDED SUMMARY JUDGMENT ON THE ALTERNATIVE GROUND THAT THERE WAS NO EVIDENCE THAT THE EMPLOYER, PRIOR TO THE ACCIDENT, HAD ACTUAL KNOWLEDGE OF ANY SPECIFIC UNSAFE WORKING CONDITION AND OF THE HIGH DEGREE OF RISK AND STRONG PROBABILITY OF SERIOUS INJURY OR DEATH PRESENTED BY THIS CONDITION.

B. THE CIRCUIT COURT SHOULD HAVE AWARDED SUMMARY JUDGMENT ON THE ALTERNATIVE GROUND THAT THERE WAS NO EVIDENCE THAT ANY OF THE ALLEGED UNSAFE WORKING CONDITIONS VIOLATED ANY SPECIFIC FEDERAL OR STATE SAFTETY STATUTE, RULE, OR REGULATION.

C. THE CIRCUIT COURT SHOULD HAVE AWARDED SUMMARY JUDGMENT ON THE ALTERNATIVE GROUND THAT THERE WAS NO EVIDENCE THAT THE EMPLOYER INTENTIONALLY EXPOSED ITS EMPLOYEE TO A SPECIFIC UNSAFE WORKING CONDITION.

## II. STATEMENT OF THE CASE

### A. INTRODUCTION.

This is the response by defendant, Independence Coal Company, Inc., ("Independence") to petitioners' cursory brief in support of an appeal from an order of the Circuit Court of Boone County that correctly determined that plaintiffs, Robert and Rhonda Meadows, failed to present any genuine issue of material fact where Mr. Meadows testified under oath that the accident was not caused by any

[1] In its summary judgment order, the Circuit Court did not rule against respondent on these assignments of error; rather, because it decided that there was no genuine issue of material fact, it did not reach these legal issues raised in respondent's summary judgment motion. Accordingly, respondent asserts these additional cross-assignments of error.

unsafe working condition, but was caused by the collapse of a berm upon which he operated a truck.[2]

Specifically, as noted by the Circuit Court in its summary judgment order, Mr. Meadows testified that none of the three conditions alleged by his attorneys caused the accident in which he was injured; rather, Mr. Meadows testified, "As I backed that truck up going towards the berm, it sunk in and gave way, fell in front of the berm, before the berm." App. at 366.

As the Circuit Court held, "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, as required by W. Va. Code § 23-4-2(d)(2)(ii)(E)." App. at 366-367.

As the Circuit Court further reasoned, "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." App. at 367.

Consequently, in accordance with a long line of precedent from this Court and others regarding the award of summary judgment in deliberate intent cases,[3] the

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[2] Petitioners have not assigned any error with respect to summary judgment granted to defendant Massey Coal Services, Inc. ("MCS") on all of their claims against it.

[3] See *Blatt v. Steel of West Virginia, Inc.*, Memo. Op. No. 101545 (W. Va. April 29, 2011)(no genuine issues of material fact regarding intentional exposure of employee to unsafe working condition); *Ramey v. Contractor Enterprises, Inc.*, 225 W. Va. 424, 693 S.E.2d 789 (2010)(no genuine issues of material fact regarding employer's knowledge of

unsafe working condition or intentional exposure); *Sedgmer v. McElroy Coal Co.*, 220 W. Va. 66, 640 S.E.2d 129 (2006)(no genuine issues of material fact regarding existence of a specific unsafe working condition of which employer had subjective realization and to which plaintiff was nevertheless intentionally exposed); *Marcus v. Holley*, 217 W. Va. 508, 618 S.E.2d 517 (2005)(no genuine issues of material fact regarding existence of a specific unsafe working condition); *Deskins v. S.W. Jack Drilling Co.*, 215 W. Va. 525, 600 S.E.2d 237 (2004)(no genuine issues of material fact regarding employer's subjective knowledge of a specific unsafe working condition or that it created a high risk and strong probability of serious injury or death); *Tolley v. ACF Industries, Inc.*, 212 W. Va. 548, 575 S.E.2d 158 (2002)(no genuine issues of material fact regarding any of five statutory deliberate intent factors); *Jones v. Patterson Contracting, Inc.*, 206 W. Va. 399, 524 S.E.2d 915 (1999)(no genuine issues of material fact regarding employer's knowledge of specific unsafe working condition); *McBee v. U.S. Silica Co.*, 205 W. Va. 211, 517 S.E.2d 308 (1999)(no genuine issues of material fact regarding employer's knowledge of specific unsafe working condition); *Mumaw v. U.S. Silica Co.*, 204 W. Va. 6, 511 S.E.2d 117 (1999)(no genuine issues of material fact regarding specific unsafe working condition, employer's subjective knowledge of condition, or intentional exposure to unsafe working condition); *Kerns v. Slider Augering & Welding, Inc.*, 202 W. Va. 548, 505 S.E.2d 611 (1997)(no genuine issues of material fact regarding employer's subjective realization of unsafe working condition or intentional exposure of employee to unsafe working condition); *Tolliver v. Kroger Co.*, 201 W. Va. 509, 498 S.E.2d 702 (1997)(no genuine issues of material fact regarding any of five statutory deliberate intent factors); *Miller v. City Hospital, Inc.*, 197 W. Va. 403, 475 S.E.2d 495 (1996)(no genuine issues of material fact regarding unsafe working condition); B*levins v. Beckley Magnetite, Inc.*, 185 W. Va. 633, 408 S.E.2d 385 (1991)(no genuine issues of material fact regarding employer's subjective realization of unsafe working condition); *Delawder v. American Woodmark Corp.*, 178 Fed. 197 (4th Cir. 2006)(no genuine issues of material fact regarding violation of known safety standard); *Rota v. Consolidation Coal Co.*, 175 F.3d 1016 (4th Cir. 1999)(no genuine issues of material fact regarding causation); *Bennett v. Kroger Co.*, 155 F.3d 557 (4th Cir. 1998)(no genuine issues of material fact regarding violation of known safety standard); *Brown v. Appalachian Mining, Inc.*, 141 F.3d 1157 (4th Cir. 1998)(no genuine issues of material fact regarding unsafe working condition or high degree of risk and strong probability of serious injury or death); *Arthur v. E.I. DuPont de Nemours & Co.*, 58 F.3d 121 (4th Cir. 1995)(no genuine issues of material fact regarding five statutory factors); *Bennett v. National Steel Corp.*, 881 F.2d 1069 (4th Cir. 1989)(no genuine issues of material fact regarding intentional exposure of employee to unsafe working condition); *Reynolds v. Consol of Kentucky, Inc.*, 2010 WL 3522130 (S.D. W. Va.)(no genuine issues of material fact regarding employer's knowledge of unsafe working condition); *Cox v. Babcock & Wilcox Const. Co., Inc.*, 2010 WL 3521584 (N.D. W. Va.)(no genuine issues of material fact regarding five statutory factors); *Harbolt v. Steel of West Virginia, Inc.*, 640 F. Supp. 2d 803 (S.D. W. Va.)(no genuine issues of material fact regarding employer's subjective realization of unsafe working condition that presented high degree of risk and strong probability of serious injury or death); *Hoffman v. Monsanto Co.*, 2007 WL 2984692 (S.D. W. Va.)(no genuine issues of material fact regarding causation); *Mayle v. Mashuda Corp.*, 2007 WL 951691 (N.D. W. Va.)(no genuine issues of material fact regarding subjective realization of unsafe working condition or violation of known safety standard); *Vincent v. Consolidation Coal Co.*, 2005 WL 3059421 (N.D. W. Va.)(no genuine

Circuit Court correctly concluded, "Therefore, the action for deliberate intent fails as a matter of law with respect to proximate cause." App. at 367.

In addition to plaintiffs' failure to create a genuine issue of material fact regarding the required element of causation, plaintiffs also failed to create genuine issues of material fact regarding the required elements of (1) the employer's actual knowledge of the existence of a specific unsafe working condition that presented a high degree of risk and a strong probability of serious injury or death; (2) the existence of an unsafe working condition that violated a specific federal or state safety statute, rule, or regulation; or (3) the intentional exposure of an employee by an employer to such specific unsafe working condition despite such actual knowledge.

As in the other cases in which this Court and other courts have awarded or affirmed summary judgment in deliberate intent cases, there were simply no genuine issues of material fact regarding one or more of the five statutory factors, particularly where, in this case, Mr. Meadows conceded that it was the collapse of

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issues of material fact regarding subjective realization of unsafe working condition that presented high degree of risk and strong probability of serious injury or death); *Gaus v. Consol, Inc.*, 294 F. Supp. 2d 815 (N.D. W. Va. 2002)(no genuine issues of material fact regarding employer's subjective realization of unsafe working condition); *Scaggs v. McGinnis Bros., Inc.*, 2002 WL 32144761 (S.D. W. Va.)(no genuine issues of material fact regarding employer's subjective realization of unsafe working condition that presented high degree of risk and strong probability of serious injury or death); *Livingston v. K-Mart Corp.*, 32 F. Supp. 2d 369 (S.D. W. Va. 1998)(no genuine issues of material fact regarding employer's subjective realization of unsafe working condition); *Yeater v. Allied Chemical Co.*, 755 F. Supp. 1330 (N.D. W. Va. 1991)(no genuine issues of material fact regarding causation); *Handley v. Union Carbide Corp.*, 620 F. Supp. 428 (S.D. W. Va. 1985)(no genuine issues of material fact regarding violation of known safety standard).

the berm, not its height, illumination, or the absence of a spotter, that caused the accident for which Mr. Meadows received workers' compensation benefits.

Quite simply, this was an industrial accident, nothing more, and certainly not a case where Independence intentionally exposed Mr. Meadows to an unsafe working condition.

## B. STATEMENT OF FACTS.

During the early morning of July 18, 2007, Mr. Meadows was driving a dump truck at Independence's Twilight surface mine site transporting overburden (rock and dirt) to a dump site on the property. App. at 7.

At these dump sites, some overburden material is groomed into a more or less flat space (typically by bulldozer) overlooking an area into which the overburden will be dumped, and a berm is placed to mark the edge beyond which trucks may not go without risking going over the hill.[4]

It is undisputed that such berms are meant to "prevent" over-travel only by serving as "guideposts" to drivers to mark the place beyond which they are not to drive their trucks. They are not "backstops" meant to physically stop the trucks in other normal or emergency situations. App. at 40, R. Meadows Dep. at 24 ("[T]he berm on the dump is just used as a guide post. It is not used to actually stop the truck. It's used as a guide post to tell you when to stop to dump the truck.").[5]

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[4] *See* 30 C.F.R. § 77.1605(*l*) ("Berms, bumper blocks, safety hooks, or similar means shall be provided to prevent overtravel and overturning at dumping locations.").

[5] *See also* App. at 103, J. Dillon Dep. at 21; App. at 59, R. Howell Dep. at 24; App. at 65, J. Fowler Dep. at 67 ("The berm is not there to stop you. It is there for a reference . . . .");

Mr. Meadows testified that as he began to back towards the edge but before he reached the berm, the dump site itself partially gave way, and his truck slid down the hill with him in it.[6]

Other witnesses testified that Mr. Meadows was backing into the berm too hard and that he failed to back in perpendicularly, so his passenger's side rear tire was much closer to the berm than his driver's side rear tire (the only one that he was apparently watching). Thus, as he backed up the truck, his passenger's side rear tire drove through the berm, taking him and the truck down the hill.[7]

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App. at 71, B. Hicks Dep. at 31-32 ("It is a guide. It is a guide in terms of when you are backing up so you see. Again, it is not a stop. . . ."); App. at 78, H. Osborne Dep. at 38. Mr. Dillon was Independence's safety director. App. at 100, J. Dillon Dep. at 11. Mr. Fowler was one of Plaintiff's foremen. App. at 62, J. Fowler Dep. at 5. Mr. Howell was Plaintiff's other foreman. App. at 58, R. Howell Dep. at 6. Mr. Osborne was Independence's superintendent. App. at 76, H. Osborne Dep. at 17.

[6] *See* App. at 41, R. Meadows Dep. at 35 ("I can still see the berm in my good [driver's] side mirrors as I was backing up and I was inching to it to dump to where I wouldn't dump in front of it or on the berm, itself. The truck, that's when the off [passenger's] side give way and the truck proceeded to flip over the hill.").

[7] *See, e.g.*, App. at 103, J. Dillon Dep. at 21 ("From my perspective, it looked like the truck just backed through the berm and just down over the slope."); App. at 173, J. Fowler Dep. at 66 ("He backed in and he wasn't square with his berm, and he backed his offside wheels through the berm, and then the truck sat down."); App. at 173, J. Fowler Dep. at 69 ("It was fine. I looked at it, and the dump did not give way. He backed through the berm."); App. at 72, B. Hicks Dep. at 55 ("He [Plaintiff] went at an angle and he went over the berm. I think that had there been more consciousness in that, and I had learned, too, that they were . . . going back hard on the berm. You know . . . you don't back up fast on a berm. Again, it is not a stop. It is just a guide, and I think that he went too aggressive at the berm and consequently, and he went at an angle, too, and I think he went through it . . . ."); App. at 135, H. Osborne Dep. at 30 ("I seen where the [dump truck] backed through the berm and went down over in the hole."); App. at 135, H. Osborne Dep. at 33 ("[Mr. Dillon] was showing me some tire marks through the berm where the truck had went in there at an angle. It wasn't square on the berm, and it went through the bump.").

Although it did not appear he was injured, Mr. Meadows was nevertheless transported to the hospital out of an abundance of caution.[8] He returned to work a few days later, but after working for only about a day, he drove over a bump in the road, complained of numbness, and was driven to the hospital.[9] He was away from work until December.

Later, Mr. Meadows gave "invalid" effort on two functional capacity evaluations[10] and, in January, his physician released him to return to work "full duty with no restrictions."[11] When he returned, however, Mr. Meadows worked for only a few hours, complained that he could not perform his job, and resigned. Instead, Mr. Meadows and his wife sued Independence as well as Massey Coal Services, Inc. ("MCS")[12] for negligence; deliberate intention;[13] and workers' compensation discrimination.[14]

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[8] *See, e.g.*, App. at 101-102, J. Dillon Dep. at 16-17 (noting that Meadows "was alert and talking" and that he was sent to the hospital "mostly as a precaution").

[9] App. at 42, 45, & 48, R. Meadows Dep. at 54, 61 & 69.

[10] *See, e.g.*, App. at 49-50, R. Meadows Dep. at 73-74 (acknowledging that he "failed both of those [functional capacity evaluations]").

[11] *Id.* ("So he [Dr. Ramesh] released me to go on back to work...."); *See also* App. at 108, Dr. Ramesh Order ("I recommend: Return to work on 1/4/08 to full duty with no restrictions.").

[12] Although MCS had nothing to do with his accident or injuries, Plaintiff alleged that MCS and Independence were involved in a "partnership or joint venture or joint enterprise" (Am. Compl. ¶ 4) or as agents of each other (*id.* ¶ 5), apparently in an effort to drag a deeper pocket into his case.

[13] *See* W. VA. CODE § 23-4-2(d)(2)(ii).

[14] *See* W. VA. CODE §§ 23-5A-1 and -3.

As noted in the Circuit Court's order, the workers' compensation discrimination count was ultimately dismissed without objection. App. at 365.

As to the negligence count, the Circuit Court ruled that if Independence and MCS were joint employees, as alleged by plaintiffs, then both Independence and MCS would be statutorily immune for a negligence claim, and thus, the Circuit Court dismissed that count, from which plaintiffs have not appealed. App. at 366.

As to the deliberate intent count, the Circuit Court ruled:

> The Plaintiffs cannot prove any of the conditions identified proximately caused Robert Meadows' injuries. The Plaintiff's own testimony stated, "As I backed that truck up going towards 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.

App. at 366-367 (footnote omitted).

It is from this ruling that plaintiffs appeal, but unless a deliberate intent plaintiff can create a genuine issue of material fact by impeaching his own sworn testimony as to causation, the Circuit Court's award of summary judgment, as in similar cases, should be affirmed.

## III. SUMMARY OF ARGUMENT

Whether it was due to an act of gravity when the dump site collapsed or to Mr. Meadows' violation of his training when he backed into the berm too hard and failed to back in perpendicularly, this was the type of accident for which workers compensation was designed to provide a remedy, not an injury to an employee deliberately intended by an employer for which the deliberate intention statute was designed to provide a remedy.

Mr. Meadows testified that the accident was caused, not by an inadequate berm, lighting, or assistance, but by the collapse of the site. Consequently, the Circuit Court correctly ruled that there was no genuine issue of material fact regarding the statutory requirement that the alleged unsafe working condition proximately cause the employee's injuries.

## IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case should be decided without oral argument as in the recent case of *Blatt*, supra. There was a wealth of authority[15] to support the Circuit Court's summary judgment order and there is nothing about this case presenting any new issues of law.

## V. ARGUMENT

### A. STANDARD OF REVIEW

In *Blatt*, supra at 3-4, this Court restated the standard of review of summary judgment orders in deliberate intent cases as follows:

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[15] See supra note 3.

> "A circuit court's entry of summary judgment is reviewed de novo." Syl. Pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994). In conducting a de novo review, this Court applies the same standard for granting summary judgment that a circuit court must apply. *United Bank, Inc. v. Blosser*, 218 W. Va. 378, 383, 624 S.E.2d 815, 820 (2005). Further, "[s]ummary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." Syl. Pt. 2, *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995).
>
> "Moreover, summary judgment is statutorily required to further the legislative intent of 'prompt judicial resolution of issues of [employer] immunity from litigation' under the workers' compensation system when a court finds 'that one or more of the facts required to be proved by the provisions of subparagraphs (A) through (E) [of the deliberate intent statute] . . . do not exist.' W. Va. Code § 23-4-2(d)(2)(iii)(B); see also *Mumaw v. U.S. Silica Co.*, 204 W. Va. 6, 10-11, 511 S.E.2d 117, 121-22 (1998) (a summary judgment motion made by an employer in a W. Va. Code § 23-4-2(d)(2)(ii) [then (c)] action is appropriate where the nonmoving party has failed to make a sufficient showing on an essential element of the case it has the burden to prove)." *Ramey v. Contractor Enterprises, Inc.*, 225 W. Va. 424, 429, 693 S.E.2d 789, 794 (2010)(per curiam).

Indeed, the Legislature has required that, due to their slippery nature and abrogation of an important statutory immunity, claims for deliberate intention should be carefully scrutinized:

> Notwithstanding any other provision of law or rule to the contrary, and consistent with the legislative findings of intent to promote prompt judicial resolution of issues of immunity from litigation under this chapter, the court shall dismiss the action upon motion for summary judgment if it finds, pursuant to rule 56 of the rules of

> civil procedure that one or more of the facts required to be proved by the provisions of subparagraphs (A) through (E), inclusive, paragraph (ii) of this subdivision do not exist, and the court ***shall dismiss*** the action upon a timely motion for a directed verdict against the plaintiff if after considering all the evidence and every inference legitimately and reasonably raised thereby most favorably to the plaintiff, the court determines that there is not sufficient evidence to find each and every one of the facts required to be proven by the provisions of subparagraphs (A) through (E), inclusive, paragraph (ii) of this subdivision . . . .[16]

Consequently, this Court and federal courts applying West Virginia law have frequently affirmed the award of summary judgment or entered judgment as a matter of law upon appeal when there was no genuine issue of material fact regarding a plaintiff's inability to prove one of the five statutory factors.[17]

Likewise, Independence was entitled to summary judgment herein where Mr. Meadows' own sworn testimony established that there was no causation and where plaintiffs failed to meet their burden of presenting any genuine issue of material fact that Independence intentionally exposed Mr. Meadows to a specific unsafe condition in the workplace. Thus, this Court should affirm.

## B. THE TRIAL COURT DID NOT ERR IN RULING THAT MR. MEADOWS' OWN SWORN TESTIMONY ESTABLISHED A LACK OF CAUSATION BETWEEN ANY ALLEGED UNSAFE WORKING CONDITION AND HIS INJURIES.

The deliberate intention statute requires a plaintiff who seeks to avoid his or her employer's statutory immunity to prove all five of the following elements for

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[16] W. VA. CODE § 23-4-2(d)(iii)(B) (emphasis supplied).

[17] See supra note 3.

each specific unsafe working condition alleged (*i.e.*, a plaintiff cannot use one working condition to satisfy one element and a different working condition to meet another element):

> (A) That a specific unsafe working condition existed in the workplace which presented a high degree of risk and a strong probability of serious injury or death;
>
> (B) That the employer, prior to the injury, had actual knowledge of the existence of the specific unsafe working condition and of the high degree of risk and the strong probability of serious injury or death presented by the specific unsafe working condition;
>
> (C) That the specific unsafe working condition was a violation of a state or federal safety statute, rule or regulation, whether cited or not, or of a commonly accepted and well-known safety standard within the industry or business of the employer, as demonstrated by competent evidence of written standards or guidelines which reflect a consensus safety standard in the industry or business, which statute, rule, regulation or standard was specifically applicable to the particular work and working condition involved, as contrasted with a statute, rule, regulation or standard generally requiring safe workplaces, equipment or working conditions;
>
> (D) That notwithstanding the existence of the facts set forth in subparagraphs (A) through (C), inclusive, of this paragraph, the employer nevertheless intentionally thereafter exposed an employee to the specific unsafe working condition; and
>
> (E) That the employee exposed suffered serious compensable injury or compensable death as defined in section one, article four, chapter twenty-three whether a claim for benefits under this chapter is filed or not ***as a direct and proximate result of the specific unsafe working condition.***

W. VA. CODE § 23-4-2(d)(2)(ii) (emphasis supplied).

A deliberate intention action is "a legislative standard for loss of . . . [employer] immunity of more narrow application and containing more specific mandatory elements than the common law tort system concept and standard of willful, wanton and reckless misconduct."[18]

A plaintiff has the burden of proving ***all*** elements of the deliberate intention statute for any alleged specific unsafe working condition; if the plaintiff fails to prove *any* single element for any alleged specific unsafe working condition, then the defendant-employer is entitled to summary judgment as a matter of law as to that alleged condition.[19] If—as here—when the analysis is complete, a plaintiff has failed to prove all five elements as to each alleged specific unsafe working condition, then the plaintiff's deliberate intention claim fails ***en toto***. Moreover, the Legislature expressly encourages summary judgment to resolve deliberate intention cases, which shall be dismissed where any of the elements are not met. W. VA. CODE § 23-2-4(d)(iii)(B).[20]

In his appeal, Mr. Meadows ignores the fact that his burden was to present a genuine issue of material fact for all five statutory factors for each of the three unsafe working conditions he alleged.

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[18] *Blake v. John Skidmore Truck Stop, Inc.*, 201 W. Va. 126, 130-31, 493 S.E.2d 887, 891-92 (1997) (quoting W. VA. CODE § 23-4-2(d)(1))

[19] See syl. pt. 5, *Marcus v. Holley*, supra (citing syl. pt. 2, *Helmich v. Potomac Edison Co.*, 185 W. Va. 269, 406 S.E.2d 700, *cert. denied*, 502 U.S. 908 (1991)) (emphasis supplied).

[20] See also *Miller*, supra at 410, 475 S.E.2d at 502 (subparagraph (c)(iii)(B) "imposes a more substantive burden on plaintiffs"); *Blevins*, supra at 641, 408 S.E.2d at 393 (affirming summary judgment where there was evidence to support plaintiff's claim but evidence was "weak at best").

Mr. Meadows ignores that the fact that he failed to meet his burden of presenting a genuine issue of material fact for the first four statutory factors for each of the three unsafe working conditions he alleged.

Rather, Mr. Meadows focuses solely on the fifth statutory factor and the Circuit Court's reliance on his own testimony to determine that he had presented no genuine issue of material fact that his injury was a direct and proximate result of any of the three unsafe working conditions he alleged.

Mr. Meadows' own testimony is that well before he got to the berm, the dump site partially collapsed out from underneath of him, taking his truck and him down the hill with it: "As I backed that truck up going towards the berm, it sunk in and gave way, fell in in front of the berm, before the berm."[21]

So, accepting as true Meadows's own testimony, none of the unsafe working conditions of which he complained could possibly have proximately ***caused*** his injuries. More lighting would not have prevented the dump site from caving in. A taller berm would not have prevented the dump site from caving in (in fact, more dirt on the berm would have *increased* the chances of that happening). And a spotter could not have prevented the dump site from caving in.[22] According to Mr.

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[21] App. at 47, R. Meadows Dep. at 64.

[22] Plaintiff conceded that dump sites collapse without warning. *See, e.g.*, App. at 47-48, R. Meadows Dep. at 63-64 (describing incident where "the berm looked real nice" but it "just gave way and slid[] down the hill. So basically what I'm saying for no reason without warning. And they will. If this was a berm . . . six to seven foot tall, . . . [a]t any time either the ground in front of or the berm itself can give way . . . ."); see also App. at 53, R. Meadows Dep. at 86 ("in an instant a dump can give way"); App. at 54, R. Meadows Dep. at 92 ("You don't know from one day to the next what will occur.").

Meadows, it was gravity that pulled the dump site, Independence's truck, and him over the hill, and gravity is not a law that any light plant, any berm, or any spotter could have disobeyed.

It is well-settled that one cannot create a genuine issue of material fact by impeaching one's own sworn testimony in response to a motion for summary judgment.

As one court has observed, "If a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting [her] own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact." *Doe v. Dallas Independent School District,* 220 F.3d 380, 386 (5th Cir. 2000).[23]

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[23] See also Freedman, *Propriety, under Rule 56 of the Federal Rules of Civil Procedure, of Granting Summary Judgment When Deponent Contradicts in Affidavit Earlier Admission of Fact in Deposition,* 131 A.L.R. Fed. 403 at § 2 (2011)("Recognizing that the objectives of summary judgment would be seriously impaired if the District Court were not free to disregard a conflicting affidavit, all federal circuits agree that where a party attempts to overcome a motion for summary judgment by submitting an affidavit that squarely contradicts the party's earlier deposition testimony, the court may properly grant the motion despite the conflict. This approach is consistent with the Supreme Court's opinion in *Anderson v Liberty Lobby, Inc.* (1986) 477 U.S. 242, 91 L. Ed. 2d 202, 106 S. Ct. 2505, 2509-10, 12 Media L.R. 2297, 4 F.R. Serv. 3d 1041, motion den 480 U.S. 903, 94 L. Ed. 2d 515, 107 S. Ct. 1343, which states that 'the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.'"); 73 Am. Jur. 2d *Summary Judgment* § 55 (2011)("It has been held that a person may not create a material issue of fact to defeat summary judgment under Fed. R. Civ. P. 56 by filing an affidavit disputing his or her own sworn testimony . . . .")(footnote omitted); *Campanello v. Anthony & Sylvan Pools Corp.*, 2004 WL 2049313 (N.D. Tex.)("To the extent that Campanello's affidavit contradicts her earlier deposition, the court will disregard it in determining the existence of genuine issues of material fact.").

Here, an analogous situation is presented where Mr. Meadows testified that the accident was caused by the collapse of the dump site, which he admitted can occur without warning, not by any inadequate berm, lighting, or supervision.

This Court has previously affirmed the award of summary judgment where there was no genuine issue of material fact regarding the statutory element of causation.

In *Tolley*, supra, an employee sued his employer claiming that his preexisting asthma was aggravated by chemicals in the employer's paint department. Affirming summary judgment because of the absence of a genuine issue of material fact on the issue of causation, this Court observed:

> As the circuit court correctly ruled, "the law is clear that a mere possibility of causation is not sufficient to allow a reasonable juror to find causation." . . .
>
> As the trial court correctly recognized, this case, due to the lack of sufficient evidence meeting each of the five prongs of the "deliberate intention" standard, is one that squarely falls within the legislative mandate included in the subject statute: "[T]he court shall dismiss the ["deliberate intention"] action upon motion for summary judgment if it finds, pursuant to Rule 56 of the Rules of Civil Procedure that one or more of the facts required to be proved by the provisions of subparagraphs (A) through (E) of the preceding paragraph (ii) [W. Va. Code § 23-4-2(c)(ii) ] do not exist." W. Va. Code § 23-4-2(c)(iii)(B).
>
> Based on the foregoing, the decision of the Circuit Court of Kanawha County is hereby affirmed.

212 W. Va. at 558-559, 575 S.E.2d at 169-170.

In *Rota*, supra at *2, the Fourth Circuit affirmed summary judgment in a deliberate intent case where there was no genuine issue of material fact regarding causation: "These proffers, however, are not enough to establish that exposure to MIBC caused Mr. Rota's liver condition to deteriorate, even under the 'reasonable probability' standard applied on summary judgment."

In *Hoffman*, supra at *10, the court awarded summary judgment in a deliberate intent case where there was no genuine issue of material fact regarding causation: "[T]here is nothing in the record that connects the tepid causal relationship to a specific unsafe working condition as required by the statute. The hole in their testimony is especially large when, as is the case here, one of the proffered 'specific unsafe working conditions' is a violation of the requirement to develop and maintain a respiratory program. The causal relationship, if any, is thus far too attenuated to satisfy the requirement that plaintiffs show that their injuries are a 'direct and proximate result of the specific unsafe working condition.'"

Likewise, in the instant case, where Mr. Meadows' sworn testimony was that the accident was caused by a collapse of the site, not by any inadequate berm, lighting, or supervision,[24] the Circuit Court correctly awarded summary judgment which should be affirmed.

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[24] In their brief, petitioners argue that the testimony of other witnesses that Mr. Meadows non-compliance with safety practices also contributed to the accident somehow gave rise to a genuine issue of material fact. Petitioners' Brief at 6-8. As the Circuit Court correctly observed, however, this testimony was not conflicting with respect to the issue of causation. Rather, that "conflicting" testimony also negated liability under the deliberate intent statue because it attributed Mr. Meadows' own failure to follow safety protocol as the cause of the accident.

## C. THE CIRCUIT COURT SHOULD HAVE AWARDED SUMMARY JUDGMENT ON THE ALTERNATIVE GROUND THAT THERE WAS NO EVIDENCE THAT THE EMPLOYER, PRIOR TO THE ACCIDENT, HAD ACTUAL KNOWLEDGE OF ANY SPECIFIC UNSAFE WORKING CONDITION AND OF THE HIGH DEGREE OF RISK AND STRONG PROBABILITY OF SERIOUS INJURY OR DEATH PRESENTED BY THIS CONDITION.

Even assuming the existence of the specific unsafe working conditions that Mr. Meadows alleged,[25] element (B) required Mr. Meadows to prove: (1) his

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For example, petitioners rely upon the deposition testimony of Mr. Hicks, Mr. Fowler, and Mr. Osborne, Petitioners' Brief at 7, but these witnesses testified that it was Mr. Meadows' own failure to follow safety protocol which caused the accident.

Mr. Hicks, who investigated the accident after the fact and contrary to petitioners' representation in their brief that he "had the benefit of light, cameras, and seeing the wreck immediately after the wreck," Petitioners' Brief at 7, testified, "I didn't go out on the berm site." App. at 261, 266, Hicks Dep. at 17-18, 38. Based upon his post-accident investigation, he concluded that it was Mr. Meadows' failure to comply with company safety protocol that caused the accident: "Robert, on the other hand, made his decision to do that. I hate the fact that he went through the daggone berm, but again, on the investigation, you know, one thing is you dump straight into a berm. He went at an angle over the berm. . . . and I think he went too aggressive at the berm . . . ." App. at 270, B. Hicks Dep. at 55. This testimony hardly supported Mr. Meadows' cause of action and petitioners' argument to the contrary was properly rejected by the Circuit Court.

Mr. Fowler, who also did not observe the accident, but only its aftermath, also testified, "He backed in and wasn't square with the berm, and he backed his offside wheels through the berm, and then the truck sat down." App. at 173, J. Fowler Dep. at 66. Again, as with Mr. Hicks, this testimony hardly supported Mr. Meadows' cause of action and the petitioners' argument to the contrary was properly rejected by the Circuit Court.

Finally, Mr. Osborne, who also did not observe the accident, but only its aftermath, also testified, "What he [Mr. Dillon] thought happened when he was showing me some tire marks through the berm where the truck had went in at an angle. It wasn't squared on the berm, and it went through the bump." App. at 135, H. Osborne Dep. at 33. Again, as with Mr. Hicks and Mr. Fowler, this testimony did not support Mr. Meadows' cause of action and the petitioners' argument to the contrary was properly rejected by the Circuit Court.

[25] Independence by no means concedes the existence of any specific unsafe working condition. For example, Mr. Meadows complained that the berm was not axle-height on his truck. But as discussed below, there is no legal requirement that berms be axle high. As the governing regulation makes clear, berms only need to be provided; there is no specific height requirement in the applicable rules. Mr. Meadows also complained that a light plant near the dump site was not activated at the time of the accident, but did not dispute that the dragline in operation was illuminated, and the eye witnesses uniformly described

employer had subjective knowledge, *i.e.*, ***actually knew***, immediately prior to the accident, that the berm was too short; there was inadequate lighting; or there was inadequate supervision and (2) his employer actually knew of the ***high degree of risk*** and the ***strong probability*** of serious injury or death presented by these allegedly unsafe working conditions. Mr. Meadows offered no evidence, however, of either of these elements of his claim.

Mr. Meadows stated in his deposition that he complained ***generally*** about dump sites being "not properly kept up," being "hazardous," being built of "soft material, dirt and gravel," not having a spotter, and so on. [26] But he never testified that before his accident, he complained to his employer about this dump site having a berm that was too low; there was inadequate lighting; or there was inadequate supervision.[27] Indeed, it would have been all but impossible for Independence to have known much at all about the dump site where Mr. Meadows was injured, as it is undisputed that it was created just before Mr. Meadows started using it.[28]

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the dragline's light as bright as "daylight." App. at 63-64, J. Fowler Dep. at 44; see also App. at 104, J. Dillon Dep. at 25-26 ("They did have the drag line operating, just, I am guessing maybe 300 feet from this dump, and the boom of that drag line has about 25 high intensity lights. Each one of them are probably equivalent to a light plant in output.").

[26] See App. at 37, R. Meadows Dep. at 13.

[27] Id. at 38.

[28] Id. at 39.

Mr. Meadows alleged during discovery that certain agents of Independence ***should have known*** that the berm was too low.[29] But that is precisely the kind of evidence that a plaintiff may ***not*** offer to satisfy element (B):

> Given the statutory framework of W. Va. Code §§ 23-4-2([d])(2)(i) and (ii), [ ] which equates proof of the five requirements . . . with deliberate intention, a plaintiff attempting to impose liability on the employer must present sufficient evidence, especially with regard to the requirement that the employer had a subjective realization and an appreciation of the existence of such specific unsafe working condition and the strong probability of serious injury or death presented by such specific unsafe working condition. ***This requirement is not satisfied merely by evidence that the employer reasonably should have known of the specific unsafe working condition and of the strong probability of serious injury or death presented by that condition. Instead, it must be shown that the employer actually possessed such knowledge.***

Syl. pt. 3, *Blevins,* supra (emphasis added).

In petitioners' brief, they reference evidence of past truck accidents, Petitioners' Brief at 1-2, but the Court will notice that the brief references no evidence that those accidents were attributable to low berms, inadequate lighting, or inadequate supervision, id. The Court will notice that the brief references no prior suits, claims, or MSHA citations arising from those accidents. Evidence that there was a prior similar accident is obviously not evidence of "a specific unsafe

[29] For the purposes of this motion, defendants assume *arguendo* that the knowledge of a foreman or higher manager is properly imputed to his employer. But that cannot be said about a bulldozer or loader operator or fellow truck driver, so to whatever extent plaintiffs base their actual knowledge allegations on evidence that a non-managerial employee knew that the berm was too short (*see, e.g.*, App. 37, R. Meadows Dep. at 13), that evidence is incompetent to satisfy element (B).

working condition existed in the workplace which presented a high degree of risk and a strong probability of serious injury or death." Rather, it is evidence of a prior accident.

Certainly, had Mr. Meadows developed evidence that there were prior accidents of which Independence was aware in which there had been serious injury or death ***and*** the cause of those accidents had been determined to be "a violation of a state or federal safety statute, rule or regulation, whether cited or not, or of a commonly accepted and well-known safety standard within the industry or business of the employer, as demonstrated by competent evidence of written standards or guidelines which reflect a consensus safety standard in the industry or business, which statute, rule, regulation or standard was specifically applicable to the particular work and working condition involved, as contrasted with a statute, rule, regulation or standard generally requiring safe workplaces, equipment or working conditions," then there might have been a genuine issue of material fact on this element of a deliberate intent action.

The mere fact that there were prior accidents of unknown cause, however, presented no genuine issue of material fact and, accordingly, the Circuit Court should have awarded judgment as a matter of law to Independence because there was no genuine issue of material fact regarding element (B).

## D. THE CIRCUIT COURT SHOULD HAVE AWARDED SUMMARY JUDGMENT ON THE ALTERNATIVE GROUND THAT THERE WAS NO EVIDENCE THAT ANY OF THE ALLEGED UNSAFE WORKING CONDITIONS VIOLATED ANY SPECIFIC FEDERAL OR STATE SAFTETY STATUTE, RULE, OR REGULATION.

As noted, to meet element (C) as to a putative specific unsafe working condition, a plaintiff must prove that the condition:

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

W. VA. CODE § 23-4-2(d)(2)(ii)(C) (emphasis added).

As for Mr. Meadows' allegation regarding the absence of a spotter, Mr. Meadows' own expert admitted that there is no requirement that coal mine operators use spotters: "Q: Is a spotter required by law? Is there a specific regulation that requires the use of a spotter? A: No." App. at 290, R. Allen Dep. at 19. Thus, general allegations regarding absence of a spotter cannot form the basis of a deliberate intent case in this matter.

As for Mr. Meadows' allegation that a light plant near the dump was not in use at the time of his accident, the regulation on lighting is the paradigmatic "statute, rule [or] regulation . . . generally requiring safe workplaces, equipment or working conditions" so expressly excluded from the kind of standards that satisfy

element (C) as it provides only that, "Illumination sufficient to provide safe working conditions shall be provided in and on all surface structures, paths, walkways, stairways, switch panels, loading and dumping sites, and work areas." 30 C.F.R. § 56.17001. Thus, § 56.17001 does not meet element (C).

In *Bennett v. Kroger Co.*, supra, for example, a Kroger employee was injured when she slipped and fell on a wet floor, relying upon 29 C.F.R. § 1910.22(a)(2), which merely provides, "The floor of every workroom shall be maintained in a clean and, so far as possible, a dry condition. Where wet processes are used, drainage shall be maintained, and false floors, platforms, mats, or other dry standing places should be provided where practical." Affirming an award of summary judgment, the Fourth Circuit found these provisions "the sort of general provisions that are specifically excluded" by § 23-4-2(d)(2)(ii)(C). Id. at *2. Although expert testimony about industry standards can satisfy subsection (C), reliance upon general provisions will not. Id. at *3.

In application, "Illumination sufficient to provide safe working conditions" is no different than "The floor of every workroom shall be maintained in a clean and, so far as possible, a dry condition." Consequently, general allegations regarding insufficient illumination cannot form the basis of a deliberate intent case in this matter.

Finally, with respect to berm height, the only written safety standard presented to the Circuit Court was contained in Exhibit 10 to the petitioners' response to defendant's motion for summary judgment. App. at 281. That written

safety standard, however, for the reasons discussed, cannot form the basis for a deliberate intent action.

That standard merely provides, "[T]hey need to be at least mid-axle height." Id. Here, Mr. Meadows' own expert admitted that he could not determine whether the berm was below this minimum requirement:

> Q. How tall should the berm have been for this truck?
>
> A. At least axle high, mid-wheel. It's mid-wheel. ***I cannot give you a specific inch number . . .***
>
> Q. So you reference some measurements from Mr. Dillon. I think you said that he said 33 inches high?
>
> A. I believe that's what I remember.
>
> Q. ***But you don't know in inches how high that it should have been?***
>
> A. ***No, I do not remember what the height of mid-axle, mid-wheel on a truck is, not, I do not.***
>
> Q. In writing the report, did you ever look that information up?
>
> A. I did not because I don't know how to use the internet. No, I did not.

App. at 290-291 (emphasis supplied). Obviously, when Mr. Meadows' own expert conceded that he could not say that the berm was less than the standard, there was no genuine issue of material fact on this issue.

Accordingly, the Circuit Court should have awarded judgment as a matter of law to Independence because there was no genuine issue of material fact regarding element (C).

## E. THE CIRCUIT COURT SHOULD HAVE AWARDED SUMMARY JUDGMENT ON THE ALTERNATIVE GROUND THAT THERE WAS NO EVIDENCE THAT THE EMPLOYER INTENTIONALLY EXPOSED ITS EMPLOYEE TO A SPECIFIC UNSAFE WORKING CONDITION.

Mr. Meadows's employer, Independence, did not intentionally expose him to any unsafe working conditions because it is beyond dispute that Mr. Meadows exposed himself to this risk, meaning that he cannot meet element (D).

First, just as a general safety standard without objective measure is insufficient to form the basis of a deliberate intent claim, general knowledge regarding prior accidents without reference to the specific unsafe working conditions that allegedly caused the subject accident is insufficient.

For example, in *Ramey*, supra at 430, 693 S.E.2d at 795, this Court held that prior reports regarding bulldozers being operated too close to highwall edges was insufficient to establish actual knowledge of drillers being operated too close:

> However, it is clear from the affidavit that Mr. Kennedy did not tell anyone about drilling machines being operated too close to the highwall edges. The following is the only statement in the affidavit indicating what Mr. Kennedy told the unnamed supervisor which is relevant to the statutory element of actual knowledge. As stated under oath by Mr. Kennedy,
>
> > the last day he worked at Snap Creek No. 1 Mine he was operating a bull dozer on the edge of a highwall. He advised the supervisor that this was too dangerous and refused to work the remainder of his shift. He further told the supervisor that the company was working people too close to the highwall edges without any regard to safety. He also told the supervisor someone was going to get hurt or killed.

> As stated, even if an unnamed supervisor of Contractor Enterprise became aware of work being done dangerously close to the edge of the highwall, Mr. Kennedy's statement would only establish that some unidentified person was informed that Mr. Kennedy as a bull dozer operator was exposed to the specific unsafe working condition of operating his bull dozer too close to the edge of the highwall.

Accordingly, Mr. Meadows' general evidence regarding his employer's knowledge of prior trucking accidents was simply insufficient to create a genuine issue of material fact regarding the existence of one or more specific unsafe working conditions that caused this particular accident.

Second, all of the witnesses who testified about the issue uniformly said that Independence's training of its employees could not possibly have been clearer: If the lighting or berm is inadequate, either "short dump;" go somewhere else; have the problem remedied; or do not dump:

> Q If the berm is inadequate [. . . ] why did you say [in the accident report] if the berm is inadequate?
>
> A Well, that is saying if that was a cause or whatever, that he [Meadows] should have not dumped over it. He should have told somebody and dumped short.").
>
> Q What do you mean if the berm is inadequate? In what way could it be inadequate?
>
> A Say there wasn't a berm there or something, which there was. Then anytime the dump was not safe, and every truck driver we have knows that, that if the berm is not there or it is cracking or you can't see, you tell somebody, tell your foreman.

> Don't dump; dump short; go to another dump, but no man has to dump on a berm, and he knowed that.
>
> * * * *
>
> Q Where are they instructed that?
>
> A In safety meetings, over the radio. It is not just once a year. I mean, it is constant. You can ask any man on that mountain about that.

App. at 65-66, J. Fowler Dep. at 67-69; accord App. at 43-44, R. Meadows Dep. at 55-56 ("I'll state that before I even tell you, [the safety director] told me that he felt that as a miner, ***and I do***, as [a] miner, if I see an unsafe working condition, I have the right to say I'm not going to do it.")(emphasis supplied); App. at 105-106, J. Dillon Dep. at 36-37 ("First of all, Mr. Meadows should have short dumped there, and it came out in the investigation that the dozer operator, as he was leaving, got on the radio and told him, you know, just go ahead and short dump there, and there will be somebody come back.")[30]

Even Mr. Meadows' own expert testified that a rock truck driver "should not rely specifically on the spotter." App. at 290, R. Allen Dep. at 19; see also App. at 293, R. Allen Dep. at 29 ("He could not do it if he felt it was unsafe. He could have

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[30] In his deposition, Mr. Meadows speculated that if he had done one of these things, "I would not have been fired right there on the spot, but somewhere down the line they would have found some little thing to get rid of me." App. at 44, R. Meadows Dep. at 56. Other than his own paranoid conjecture, however, Mr. Meadows offered no ***evidence*** that Independence intentionally exposed him to inadequate lighting or berm height. *See Wriston v. Raleigh County Emergency Servs. Auth.*, 205 W. Va. 409, 421, 518 S.E.2d 650, 662 (1999) ("In order for the appellant to sustain her claim against Mr. Bowden, she must have produced some concrete evidence from which a reasonable . . . [finder of fact] could return a verdict in . . . [her] favor or other significant probative evidence tending to support the complaint.") (citations and internal quotations omitted) (remaining alterations in original).

short dumped if he felt there was a danger. A man has that right under law to not do anything management requires him to do if he feels it's unsafe."); id., R. Allen Depo. at 32 ("Q: If they had said, 'If you feel like you need to dump short, dump short.' A: He should have done it and dumped short, if they gave him that option.").[31]

Again, as this Court held in *Ramey*, supra at 433, 693 S.E.2d at 798:

> Mr. Ramey alleged in his complaint that he was ordered by Contract Enterprise to work in the hazardous working condition of operating a drill less than four feet from the edge of a highwall without being properly trained or equipped. There is no suggestion in the record that Mr. Ramey was required by the employer to operate his drilling equipment less than four feet from the highwall edge. The record before us reveals that the hazardous condition in this case did not occur until Mr. Ramey deviated from the ground control plan and moved his drilling equipment to within twenty-three inches of the highwall. As to training, the record before us shows that the employer provided Mr. Ramey with all MSHA required training, and there is no indication that Mr. Ramey requested additional instruction regarding the

[31] In the Petitioners' Brief, they use colorful language like "plaintiff's supervisors . . . ordered Robert Meadows, II, to dump a 777 D rock truck at a dumpsite with an admittedly illegal berm, no spotter, and inadequate illumination," Petitioners' Brief at 2, but the Court will notice no record citation. They further state, "Despite prior complaints of the plaintiff to his supervisors of the lack of illumination and the need for a spotter, Mr. Meadows was ordered to dump the rock truck at this potentially deadly dump site," id., again with no record citation. Finally, they state, "The defendants affirmatively pulled the spotter, Brian Hutchinson, from the dump site on the subject evening and did not replace him," id., again with no record citation. The intended effect of these statements, without any citation to the evidentiary record, is to create the impression that Mr. Meadows was callously exposed to a knowingly hazardous working condition despite knowledge of his impending doom. Independence states the reason Petitioners' Brief contains no record references in support of these assertions is that there is no evidence in the record to support them. This was an unfortunate workplace accident for which Mr. Meadows received workers' compensation benefits despite the fact that the accident was his fault. The Legislature never intended that this type of accident form the basis of a deliberate intent action.

> operation of the drilling equipment or relevant safety issues. It is also evident from our review of the record we have that on the date of the incident the employer was not required to provide safety equipment such as a harness or lanyard unless there was a danger of falling. The safe distance prescribed in the MSHA approved ground control plan in effect at the time of the accident was four foot from the edge of the highwall.

Accordingly, Mr. Meadows' evidence was simply insufficient to create a genuine issue of material fact regarding his employer's intentional exposure of Mr. Meadows to a specific unsafe working condition.

Two of the five statutory elements for a deliberate intent cause of action are that "***the employer*** . . . intentionally . . . exposed an employee to the specific unsafe working condition"[32] – as opposed to someone else exposing the employee – and that the injuries were "a direct and proximate result ***of the specific unsafe working condition***"[33] – as opposed to the injuries being caused by something other than the specific unsafe working condition. Accordingly, employers are free to show that to whatever extent the employee ***was*** exposed to a specific unsafe working condition, it was not the ***employer*** who intentionally exposed the employee.

If, in doing so, the employer shows that it was the employee that exposed himself or herself to a specific unsafe working condition, despite the employer's efforts to the contrary, this is not asserting comparative fault. This is merely

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[32] W. VA. CODE § 23-4-2(d)(2)(ii)(D) (emphasis added).

[33] W. VA. CODE § 23-4-2(d)(2)(ii)(E) (emphasis added).

disproving an element of the employee's claim (or, as noted, pointing out that the employee has failed to meet his or her burden).[34]

For example, in *Blatt*, supra at 3, this Court recently affirmed summary judgment to an employer in a deliberate intent case where it was the employee, not the employer, who created the unsafe working condition: "SWVA states that no citations were issued and that there was no evidence that SWVA made a conscious decision to require petitioner to go into an isolated area without first turning off the machine. SWVA asserts that when asked during his deposition whether he saw the coupling spinning, petitioner responded, 'I probably just didn't pay attention.'"

Likewise, in this case, it was Mr. Meadows who decided unilaterally to disregard his training and to try to dump over the berm notwithstanding the problems that he says he knew about at the time.

"[I]it is important to remember that the ultimate goal of W. VA. CODE § 23-4-2([d])(2)(ii) is to offer an alternative method of proof for a plaintiff to establish that his injury was ***deliberately intended*** by the employer. Thus, when a plaintiff utilizes the five requirements . . . his evidence must be strong enough that it essentially equates to a showing that 'the employer . . . against whom liability is asserted acted with deliberate intention.' "[35]

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[34] See *Mumaw*, supra at 2, 511 S.E.2d at 123; *Deskins*, supra; *Blevins*, supra; *McBee*, supra.

[35] *Blevins*, 185 W. Va. at 641, 408 S.E.2d at 393 (emphasis in original).

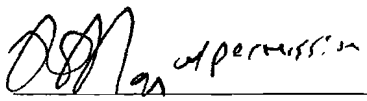
Accordingly, the Circuit Court should have awarded judgment as a matter of law to Independence because there was no genuine issue of material fact regarding element (D).

## VI. CONCLUSION

Defendant, Independence Coal Company, Inc., respectfully requests that this Court affirm the judgment of the Circuit Court of Boone County ruling that there was no genuine issue of material fact regarding the element of causation in petitioners' cause of action for deliberate intent and/or, in the alternative, the Court enter judgment for defendant as there was no genuine issue of material fact regarding whether defendant, prior to the accident, had actual knowledge of any specific unsafe working condition and of the high degree of risk and strong probability of serious injury or death presented by this condition; whether any of the alleged unsafe working conditions violated any specific federal or state safety statute, rule, or regulation; and whether defendant intentionally exposed Mr. Meadows to such specific unsafe working condition.

**MASSEY COAL SERVICES, INC., AND INDEPENDENCE COAL COMPANY, INC.**

By Counsel



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## CERTIFICATE OF SERVICE

I hereby certify that on September 6, 2011, I served the foregoing BRIEF OF RESPONDENTS by depositing a true copy thereof in the United States mail, postage prepaid, in an envelope addressed to counsel as follows:

Charles M. Love IV, Esq.
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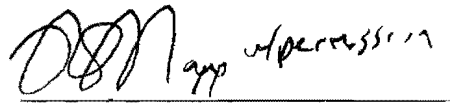

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