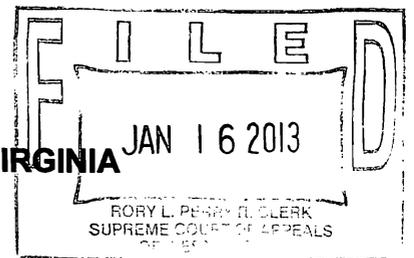


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 12-1206



**MASTER MECHANICAL INSULATION, INC.,
Defendant Below, Petitioner**

v.)

**RICHARD SIMMONS,
Plaintiff Below, Respondent**

BRIEF OF RESPONDENT, RICHARD SIMMONS

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ASSIGNMENTS OF ERROR

The Circuit Court of Cabell County entered an *Order Certifying Questions Pursuant to W.Va. Code § 58-5-2*, on the 18th day of September, 2012. (“Certifying Order”). The circuit court answered all three questions in the affirmative. Each question is set forth below, along with a corresponding assignment of error by Richard Simmons, Plaintiff Below, Respondent (“Mr. Simmons”):

1. Is Simmons’ claim against Master Mechanical governed by the 2005 amendment to the deliberate intent statute, W.Va. Code § 23-4-2(d)(2)(ii), pursuant to Roney v. Gencorp, 431 F.Supp2d 622 (S.D.W.Va. 2006) and Corley v. Eastern Assoc. Coal Corp., 2009 U.S. Dist. LEXIS 22080 (N.D.W.Va. 2009)?

Yes X No _____

The Circuit Court erred in its answer to the first certified question, because the West Virginia Legislature’s use of the conjunctive term “and”—as opposed to the disjunctive term “or”—demonstrates legislative intent that the 2005 amendment be prospectively applied to those cases where both the injury occurs after July 1, 2005 and the action is filed after July 1, 2005. The 2005 amendment does not apply to Mr. Simmons’ case, because his injury occurred on April 9, 2004. Both federal district courts failed to recognize long-standing West Virginia precedent that the use of the conjunctive term “and” in a statute reflects legislative intent that both elements joined by the conjunctive term are necessary to trigger the statutory provision.

2. In light of the Supreme Court of Appeals' decision in Roberts v. Consolidation Coal Co., 539 S.E.2d 478 (W.Va. 2000) and the facts as set forth above, is an employer prohibited from introducing evidence or testimony, or arguing that an employee's conduct in the performance of the work for the employer was the proximate cause of the plaintiff's injury?

Yes X No _____

Mr. Simmons submits that the Circuit Court's answer to the second certified question is correct.

3. In light of the Supreme Court's ruling of September 19, 2008 that Simmons' injury was compensable under the West Virginia Worker's Compensation Act, is Master Mechanical precluded from arguing that Simmons was at the site of his own volition, and voluntarily agreed to remove the decontamination unit from the second floor of Building B?

Yes X No _____

Mr. Simmons submits that the Circuit Court's answer to the third certified question is correct.

STATEMENT OF THE CASE

Mr. Simmons submits that the statement of the case provided by Master Mechanical Insulation, Inc. ("MMI") is sufficient, proper and accurately stated, with the exception of Footnote 2. In its *Certifying Order*, the Circuit Court set out a very specific *Statement of Facts*--numbered 1 through 33--which reflected the undisputed material facts upon which the Court relied in answering the three certified questions. These undisputed materials facts were agreed upon by the parties and presented to the circuit court. Moreover, the parties agreed that these undisputed material facts were the material facts necessary for the Court to rule upon the three certified questions. MMI

actually prepared the *Certifying Order* and presented the same to the circuit court, and Footnote 2 was not included in the *Certifying Order*.

Footnote 2 includes additional “facts,” as well as statements that a dispute of fact exists. Footnote 2 also includes argument relating to the Court’s answer to the second certified question. Mr. Simmons submits that this Honorable Court should disregard the contents of Footnote 2, as they were not included in the *Statement of Facts* set out by the circuit court in the *Certifying Order*. More importantly, Footnote 2 should be disregarded because its content is immaterial to the Court’s answer to the second certified question.

SUMMARY OF ARGUMENTS

First Certified Question

The 2005 amendments to West Virginia Code § 23-4-2 do not apply to Mr. Simmons case, because the plain and unambiguous language of subsection (f) requires *prospective* application of the 2005 amendment to those cases where both the injury occurs and the action is filed after July 1, 2005. Because Mr. Simmons’ injury occurred on April 9, 2004, both elements of the statutory provision have *not* been satisfied and the 2005 amendments do not apply to his case. In drafting the statutory provision, the West Virginia Legislature specifically chose to use the conjunctive term “and” to connect the two triggering elements – “all injuries” and “all actions”. The use of the conjunctive term “and” requires the presence of both stated elements. The Legislature was free to use the disjunctive term “or” when writing the provision, which would have reflected a contrary intent to treat the elements separately, or alternatively.

Second Certified Question

The Circuit Court correctly answered the second certified question, because it is undisputed that MMI had actual knowledge that Mr. Simmons was standing on an unguarded second floor balcony without adequate fall protection for the purpose of removing decontamination at the direction of MMI. Once MMI had actual knowledge that Mr. Simmons was in an unsafe working condition for the purpose of performing a work-related task, MMI is not permitted to present additional evidence and/or argument that Mr. Simmons was at fault or that he “still wasn’t safe enough.”

Third Certified Question

The Circuit Court correctly answered the third certified question, because Mr. Simmons’ original motive for being at the work site is immaterial. It is undisputed that this Honorable Court rendered a definitive conclusion that Mr. Simmons’ personal injury was compensable. In order for a claim to be held compensable under the Workmen's Compensation Act, three elements must coexist: (1) a personal injury (2) received in the course of employment and (3) resulting from that employment. Wilkinson v. West Virginia Office Ins. Com'n, 222 W.Va. 394, 664 S.E.2d 735 (2008). Mr. Simmons bears the burden of proof on the five part test under the deliberate intent statute. However, Mr. Simmons’ original motive for being on the work site is not an element of the five part test and it has no bearing on any element in the five part test.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent submits that oral argument under either Rule 19 or Rule 20 of the *West Virginia Rules of Appellate Procedure* is appropriate in this case. Because the issues presented in this case involve narrow issues of law, oral argument could be made under Rule 19. However, because at least one of the three issues presents a matter of first impression,¹ this case could also be argued under Rule 20. Respondent submits that oral argument under either Rule 19 or Rule 20 is acceptable.

ARGUMENT

Standard of Review

" 'The appellate standard of review of questions of law answered and certified by a circuit court is de novo.' Syllabus point 1, Gallapoo v. Wal-Mart Stores, Inc., 197 W.Va. 172, 475 S.E.2d 172 (1996)." Syl. Pt. 1, Wilson v. Bernet, 218 W.Va. 628, 625 S.E.2d 706 (2005)." Syl. Pt. 1, State v. Bostic, 229 W.Va. 513, 729 S.E.2d 835 (2012).

First Certified Question

Is Simmons' claim against Master Mechanical governed by the 2005 amendment to the deliberate intent statute, W.Va. Code § 23-4-2(d)(2)(ii), pursuant to Roney v. Gencorp, 431 F.Supp2d 622 (S.D.W.Va. 2006) and Corley v. Eastern Assoc. Coal Corp., 2009 U.S. Dist. LEXIS 22080 (N.D.W.Va. 2009)?

Mr. Simmons submits that the first certified question should be answered in the negative, because the West Virginia Legislature expressed its clear intention that the 2005 amendment be prospectively applied to those cases where both the injury occurs

¹ First certified question regarding applicability of 2005 amendment to W.Va. Code § 23-4-2.

after July 1, 2005 and the civil action is filed after July 1, 2005. The 2005 amendment does not apply to Mr. Simmons' case, because his injury occurred on April 9, 2004. The federal district court decisions should be not followed, because they did not properly recognize the Legislature's use of the conjunctive term "and" in the statutory provision.

The West Virginia Legislature's intent regarding the application of the 2005 amendments to West Virginia Code § 23-4-2 was expressed in subsection (f), as follows: "The amendments to this section enacted during the two thousand five session of the Legislature shall apply to all injuries occurring *and* all actions filed on or after the first day of July, two thousand five." (emphasis added). In drafting the statutory provision, the West Virginia Legislature specifically chose the conjunctive term "and" to connect the two triggering elements ("injuries occurring" and "actions filed"). "Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." Huffman v. Goals Coal Co., 223 W.Va. 724, 729, 679 S.E.2d 323, 328 (2009) (quoting Syl. pt. 2, State v. Elder, 152 W.Va. 571, 165 S.E.2d 108 (1968)).

MMI acknowledges that subsection (f) identifies two elements which trigger application of the 2005 amendments: (1) injuries occurring after July 1, 2005 ("injuries occurring"); and (2) civil actions filed after July 1, 2005 ("actions filed"). However, MMI argues that the presence of either of the elements can trigger the application of the 2005 amendments. Mr. Simmons disagrees and submits that the Legislature chose to use the conjunctive term "and" in the statute, which require the presence of both elements. Simply stated, Mr. Simmons simply requests the statutory provision be applied, as written.

This Court generally operates “under the presumption that the Legislature attaches specific meaning to every word and clause set forth in a statute. See, State ex rel. City of Huntington v. Lombardo, 149 W.Va. 671, 698, 143 S.E.2d 535, 551 (1965) (“A cardinal rule of statutory construction is that significance and effect must, if possible, be given to every section, clause, word or part of a statute.”). In subsection (f), the Legislature chose to use of the conjunctive term “and,” which requires that both elements be present in order to trigger the statute.

This Court previously recognized the significance of the use of the term “and” in Emmel v. State Compensation Director, 150 W.Va. 277, 145 S.E.2d 29 (1965). In Emmel, this Court reiterated its prior holdings that a workers compensation claimant has the burden of establishing that he sustained an injury both in the course of and resulting from his employment. (citations omitted). This Court explained that “[t]he two phrases, ‘in the course of’ and ‘resulting from’ are not synonymous and both elements must concur in order to make a claim compensable.” 150 W.Va. at 281, 145 S.E.2d at 32. This Court further explained that “[t]he statute is in the conjunctive and not the disjunctive. [citation omitted]. Therefore, in the instant case it must be shown that the injury complained of occurred not only in the course of employment but also as a result of such employment.” Id.

In the case *sub judice*, Mr. Simmons submits that the circuit court erred by ignoring the West Virginia Legislature’s use of the conjunctive term “and” in subsection (f), *supra*, and thus concluding that either of the two stated elements (“injuries occurring” and “actions filed”) could independently trigger the application of the 2005 amendments. As recognized in Emmel, *supra*, and its progeny, the use of the conjunctive term “and”

demonstrates clear legislative intent that the 2005 amendments apply to those cases where both the injury occurs after July 1, 2005 and the action is filed after July 1, 2005.

The approach taken by MMI and adopted by the circuit court--that the two stated elements should be treated separately or independently--is simply contrary to the use of the term "and" in the statute. Certainly, the Legislature was free to use the disjunctive "or" in the statute, as "[this Court has] customarily stated that where the disjunctive 'or' is used, it ordinarily connotes an alternative between the two clauses it connects." State v. Rummer, 189 W.Va. 369, 377, 432 S.E.2d 39, 47 (1993). Certainly, the use of the term "or" in subsection (f) would indicate legislative intent to treat the elements separately or alternatively for the purpose of triggering application of the statutory provision. However, the term "or" was not used in subsection (f).

Because the Legislature chose to use the word "and" when writing subsection (f), it is clear that the legislative intent was to join the two stated elements triggering application of the 2005 amendments. This approach require the presence of both elements to trigger application of the 2005 amendments. Both MMI and the circuit court have ignored the Legislature's use of the conjunctive term "and," and they have treated the provision as if it contains the disjunctive term "or" instead. This was error.²

² It is noted that jurisprudence does exist which allows this Court to change "and" to "or" and vice versa. However, that practice has only been employed where the legislative intent is obviously contrary to the wording of the statute. In this case, the West Virginia Legislature could have chosen to use either "and" or "or" when choosing a term to join the elements, and the use of either term would have resulted in a sound statutory provision. Thus, there is no compelling reason to re-write the terms of this provision. (See, Ex Parte Watson, 82 W.Va. 201, 205, 95 S.E. 648, 649 (1918) (stating that "[a]n interpretation of a statute or clause thereof which gives it no function to perform ... must be rejected as unsound; for it is presumed that the legislature had a purpose in the use of every word and clause found in a statute, and intended the terms used to be effective"). See also, Carper v. Kanawha Banking & Trust Co., 157 W.Va. 477, 517, 207 S.E.2d 897, 921 (1974); Cogan v. City of Wheeling, 166 W.Va. 393, 396, 274 S.E.2d 516, 519 (1981).

MMI cites two federal district court decisions to persuade this Court to conclude that the presence of only one of the two elements set forth in subsection (f) of the 2005 amendment can be trigger application thereof. While neither decision is binding upon this Court, it is noteworthy that neither district court followed the ordinary and customary rule the conjunctive term “and” is used in statutory provisions to require the presence of both elements joined by the term to be present. The older district court decision cited by MMI is Roney v. Gencorp, 431 F.Supp.2d 622 (S.D.W.Va., 2006). The more recent district court decision and Corley v. Eastern Associate Coal Corp., 2009 U.S. Dist. LEXIS 22080 (N.D.W.Va. 2009). It appears that the district court in Corley simply followed the Roney decision. Both Roney and Corley appear to be analogous to the case *sub judice*, in that both involve injuries occurring before July 1, 2005 and actions filed after July 1, 2005.

Interestingly, both federal district courts initially recognized that West Virginia courts have historically applied the statute *in effect at the time of the injury*. Roney, *supra*, at p. 629; Corley, *supra*, at pp. 7-8. However, both courts proceeded to find that the Legislature’s use of the term “and” demonstrated legislative intent to treat the elements separately or independently. In Roney, *supra*, the district even concluded that “[t]he language chosen in the effective date clause expresses the Legislature’s intent that this statute should be an **exception to that general rule.**” (emphasis added). Finally, both district court’s held that “[t]he plain meaning of the language indicates the Legislature’s intention to make the new provisions apply to both injuries occurring after July 1, 2005, and also to actions filed after July 1, 2005.” Id.

Neither district court cites any legal authority to support its conclusion that the term “and” should be applied to allow each of the elements to separately or independently trigger application of the 2005 amendments. Surprisingly, identical conclusions were reached by each district court without either court engaging in any discussion regarding the Legislature’s obvious choice not to use the disjunctive term “or,” when joining the two elements which trigger the application of the 2005 amendment. In reaching this conclusion, both district courts have ignored long-standing jurisprudence in West Virginia and neither decision should be followed by this Court.

Second Certified Question

In light of the Supreme Court of Appeals’ decision in Roberts v. Consolidation Coal Co., 539 S.E.2d 478 (W.Va. 2000) and the facts as set forth above, is an employer prohibited from introducing evidence or testimony, or arguing that an employee’s conduct in the performance of the work for the employer was the proximate cause of the plaintiff’s injury?

The circuit court correctly answered the second certified question in the affirmative. In Syllabus Point 8, Roberts v. Consolidation Coal Co., 208 W.Va. 218, 539 S.E.2d 478 (2000), this Court held: “When an employee asserts a deliberate intention cause of action against his/her employer, pursuant to W. Va. Code §§ 23-4-2(b)-(c) (1991) (Cum.Supp.1991), the employer may not assert the employee’s contributory negligence as a defense to such action.” In keeping with the Roberts decision, the circuit court concluded that MMI is precluded from introducing evidence or testimony, or arguing that Mr. Simmons’ conduct in the performance of the work for MMI was the proximate cause of his injuries. In other words, this Court’s decision in Roberts precludes MMI from attempting to blame Mr. Simmons for causing his own injuries.

In Roberts, *supra*, this Court examined the Legislative intent surrounding the entire workers compensation system, and explained that, “in enacting this provision, the Legislature intended “to establish a system which compensates ***even though the injury or death of an employee may be caused by his own fault.***” (emphasis added). Roberts, 208 W.Va. at 233, 539 S.E.2d at 493. The workers compensation system replaced common law actions with statutory actions. Accordingly, “[t]he Workmen's Compensation Act . . . insures employees . . . against the negligence of their employers and *against the operation of the doctrines of contributory negligence and assumption of the risk, and the fellow servant rule.*” Syl. pt. 7, Thompson v. State Compensation Comm'r, 133 W.Va. 95, 54 S.E.2d 13 (1949).” (emphasis added). Id. This Court also made clear that deliberate intent actions and an employers’ defenses thereto are governed by the statutory scheme. Roberts, 208 W.Va. at 234, 539 S.E.2d at 494. (“[a]s an employee's cause of action for deliberate intention comes squarely within the parameters of the workers' compensation statutes, it seems only fitting, then, that an employer's defenses to such an action should likewise be governed by the pertinent statutory law.”)

The circuit court answered the second certified question correctly, as MMI is clearly precluded from introducing evidence or testimony or arguing that Mr. Simmons’ conduct was the proximate cause of his own injuries. In an apparent effort to side-step *the actual issue* before the Court, MMI submits that it should be able to present the very same evidence, in order to “permit[] the jury to consider the employee’s conduct in determining if the employer can meet the five part test.” (MMI Brief, p. 16). This is simply an effort by MMI to bring through the back door what it could not bring through

the front door. Even so, MMI's argument is wholly misplaced in this case, because Mr. Simmons' conduct has no probative value with respect to the five part test in this case.

The "five part test" is set out in W.Va. Code 23-4-2(c)(2)(ii)(A)-(E), as follows:

(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 had a subjective** realization and an appreciation of the existence of such specific unsafe working condition and of the high degree of risk and the strong probability of serious injury or death presented by such specific unsafe working condition;

(C) That such **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 such employer, 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) hereof, such **employer nevertheless thereafter exposed an employee** to such specific unsafe working condition intentionally; and

(E) That such **employee so exposed suffered serious injury** or death as a direct and proximate result of such specific unsafe working condition.

(emphasis added).

As reflected by the *Certifying Order*, the undisputed evidence in this case is that, while in the course and scope of his employment, Mr. Simmons was injured when he fell to the ground from an unprotected second floor balcony while removing a decontamination unit, without fall protection, at the direction of MMI. (Statement of

Facts, ## 20, 21, 22, 25, 27, 28, 29 and 30). Parts (A) and (C) pertain specifically to the “unsafe working condition,” requiring proof that it existed and that it was in violation of a legally established standard. In Mr. Simmons’ case, proof that Mr. Simmons was working on an unprotected second floor balcony without fall protection is sufficient to establish part (A) and evidence of the legal standard violated by the condition will establish part (B). Mr. Simmons’ conduct is irrelevant with respect to the unsafe working condition in this case.

Parts (B) and (D) pertain to the conduct of the employer, MMI, not Mr. Simmons. Part (B) requires proof of “subjective realization” on the part of MMI that the unsafe working condition existed. Part (D) also pertains to MMI’s conduct, and requires proof that MMI exposed Mr. Simmons to the unsafe working condition. Thus, both part (B) and part (D) are established by proof of MMI’s conduct. Mr. Simmons’ conduct has absolutely no bearing on whether MMI had subjective realization of the unsafe working condition, and Mr. Simmons’ exposure to the unsafe working condition is undisputed. The undisputed facts relating to parts (B) and (D) reveal that the balcony railings were removed prior to the date of injury (SOF, #20), and that Mr. Simmons was injured when he fell to the ground from the unprotected second floor balcony while removing a decontamination unit, without fall protection, at the direction of MMI. Again, Mr. Simmons’ conduct has is neither relevant nor material as to MMI’s conduct.

Finally, part (E) relates to whether Mr. Simmons’ exposure to the unsafe working condition was the proximate cause of his injuries. This is the only element of the five part test dealing with the proximate cause of Mr. Simmons’ injuries. The burden of proving part (E) rests with Mr. Simmons, not MMI. In order to prove part (E), Mr.

Simmons must demonstrate that his exposure to the unsafe working condition was the proximate cause of his injuries.

The issue of proximate cause in a deliberate intent action is statutory and the burden of proof lies with the employee. Common law defenses to proximate cause are not available to the employer, as “additional defenses sounding in contributory negligence would be inconsistent with the definite legislative intent ” ’to establish a system which compensates even though the injury or death of an employee may be caused by his own fault.’ W.Va. Code § 23-4-2(c)(1)” Roberts, supra 208 W.Va. at 236, 539 S.E.2d at 496. In fact, [a]part from intoxication and a self-inflicted injury, . . . the governing statutes do not provide employers with any other defenses to a claim for workers' compensation benefits. Id. Thus, the only statutory defenses an employer has to counter the employee's proof of proximate cause under part (E), is a claim by the employer that the injury was self-inflicted by the employee. See, W.Va. Code § 23-4-2(a). Neither claim has been made by MMI in this case, and MMI is precluded from presenting any other evidence of “contributory negligence” or “fault” on the part of Mr. Simmons in an effort to avoid liability.

MMI mistakenly contends that Justice Workman's opinion in Blevins v. Beckley Magnetite, Inc., 185 W.Va. 633, 408 S.E.2d 385 (W.Va. 1991) permits it to argue that an employee proximately caused his/her own injuries. MMI reliance on Blevins--which predates Roberts, supra, by nearly a decade--is simply misplaced. In writing for the majority, Justice Workman did uphold the trial court's finding that the injured employee failed to meet his burden of proof that an unsafe working condition existed; however, she did not create a contributory negligence defense for employers. More importantly,

the issue in Blevins was focused upon part (A) and part (C), regarding the unsafe working condition, not the proximate cause issue of part (E) presented in the instant case.

In Blevins, 185 W.Va. at 635, 408 S.E.2d at 387, a dryer-hopper operator was severely injured when his left hand and arm were pulled into and crushed in the pinch-point of a self-cleaning conveyor tail pulley. The injured employee testified that the injury occurred as he was cleaning up ore spillage around the tail pulley. Id. The appellant indicated that clean-up of the spilled ore occurred three to four times a shift. The trial court concluded “that the plaintiff failed to prove the existence of a specific unsafe working condition which presented a high degree of risk and the strong probability of injury or death to employees.” Id., 185 W.Va. at 639-640, 408 S.E.2d at 391-392. This Court upheld the trial court and explained that “[t]he evidence demonstrates that the tail pulley portion of the conveyor belt system was guarded in a way which was accepted and approved by the MHSA inspector. Further, the evidence indicated that it only became unsafe when the guard was removed and a worker entered the unguarded area while the machinery was in operation.” Id.

MMI reliance on this Court’s decision in Blevins is misplaced, as the injured employee was *unable to prove the existence of an unsafe working condition*. This Court noted the evidence that the tail pulley which caused the injury was guarded in an accepted fashion. In other words, the employer in Blevins did not create an unsafe working condition, nor did it have any knowledge of one. Therefore, Mr. Blevins was unable to prove both part (A) and part (C) of the five part test. More importantly, the decision in Blevins was not focused on part (E), or proximate cause.

Unlike the employee in Blevins, *supra*, Mr. Simmons *has presented* sufficient evidence that MMI both created and had actual knowledge of the unsafe working condition—i.e., Mr. Simmons' working on the unguarded second floor balcony without fall protection with MMI's knowledge. Thus, Mr. Simmons has sufficiently established part (A) and part (C). Notwithstanding the foregoing, MMI now seeks permission from this Court to present evidence, testimony or argument to show that Mr. Simmons *proximately caused his own injuries*. It appears that MMI contends that Mr. Simmons, while placed in an unsafe working condition, should have acted "more safely." This Court's decision in Blevins does not provide support for MMI's position. Also, as stated hereinabove, the only two methods by which an employer may assert fault against the employee in a deliberate intent action is by asserting intoxication or self-infliction. MMI has done neither.

For similar reasons, MMI's reliance on this Court's decision in Deskins v. S.W. Jack Drilling Co., 215 W.Va. 525, 600 S.E.2d 237 (2004)(per curiam) is misplaced. The central issue in Deskins involved part (B), or subjective realization by the employer. The focus in Deskins was not on the employee's conduct, but on the employer's. In Deskins, 215 W.Va. at 528, 600 S.E.2d at 240, an employee was injured when his foot was caught and crushed between a tub and rack as the rack was being moved adjacent to the tub by pushing it with a dozer. The evidence before the trial court was that the employer had no knowledge that the employee went into the dangerous area as he had been seen moving away from the equipment after his supervisor instructed him to do so. As the circuit court noted, "the specific unsafe working condition ... occurred within seconds after he was instructed to, and did, move to a safe area." 215 W.Va. at 531,

600 S.E.2d at 243. Accordingly, this Court concluded that “the circuit court properly found that the evidence was simply inadequate to create an issue of fact regarding the appellees' subjective realization of the specific unsafe working condition.” Id.

The employers prevailed in both Blevins and Deskins, but not for the reasons suggested by MMI. In Blevins, the employer prevailed because the employee failed to present sufficient evidence of part (A) and (C), relating the unsafe working condition. In Deskins, the employee failed to present evidence of part (B), or subjective realization. Neither Blevins nor Deskins holds or implies that an employer should be permitted to present evidence or argument that the employee proximately caused his own injuries. Because proximate cause in deliberate intent cases is a statutory element, the only “defenses” to proximate cause are also statutory. The two “statutory defenses” which may be utilized by an employer to refuse proximate cause are intoxication and self-infliction. Neither is present in the instant case against MMI.

Third Certified Question

In light of the Supreme Court’s ruling of September 19, 2008 that Simmons’ injury was compensable under the West Virginia Worker’s Compensation Act, is Master Mechanical precluded from arguing that Simmons was at the site of his own volition, and voluntarily agreed to remove the decontamination unit from the second floor of Building B?

The circuit court correctly answered the third certified question in the affirmative. Any dispute regarding Mr. Simmons’ original motive or purpose for appearing at the worksite on April 9, 2004 is immaterial, in light of the undisputed fact that his injuries were ruled compensable under the West Virginia Workers’ Compensation Act. (SOF, #32). The elements of a compensable work-related injury are set out in Syllabus Point

1 of Barnett v. State Workmen's Compensation Commissioner, 153 W.Va. 796, 172 S.E.2d 698 (1970), as follows: "In order for a claim to be held compensable under the Workmen's Compensation Act, three elements must coexist: (1) a personal injury (2) received in the course of employment and (3) resulting from that employment." Thus, in the instant case, this Court has definitively concluded that Mr. Simmons received personal injury in the course of and resulting from his employment with MMI.

MMI contends that the circuit court erred by refusing to allow MMI to offer testimony and argument *as to the reasons Mr. Simmons was at the work site and what work he was to perform*. MMI argues that the circuit court's ruling allows Mr. Simmons to "improperly and unfairly present his case." More specifically, MMI believes such information will "bear upon whether an unsafe condition existed, what risks were associated with any alleged unsafe condition, what [MMI] actually knew about such unsafe conditions and risks, and whether [MMI] intentionally exposed [Mr. Simmons] to an unsafe condition . . . considering that [Mr. Simmons] . . . was not directed, instructed, or ordered to approach the edge of the balcony." (MMI's Brief, p. 24).

Given the fact this Court has already concluded that Mr. Simmons was injured in the course and scope of his employment, any argument that Mr. Simmons was originally on the worksite of his own violation or to perform voluntary services is irrelevant and immaterial. Likewise, Mr. Simmons' purpose or motivation for being on the worksite has no bearing on whether an unsafe working condition existed and no bearing on what MMI knew about. MMI does little to explain its position and cites no legal authority in support thereof. However, MMI does state that "the reason [Mr. Simmons] was at the site, and [his] concession that he voluntarily agreed to remove the

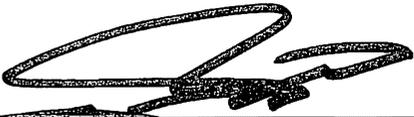
decon unit without direction from [MMI] are the facts of the case and they bear directly upon the elements of [Mr. Simmons's] claims against [MMI]." MMI's Brief, p. 24. The aforesaid "facts" cited by MMI are not the facts of the case.

Mr. Simmons has not conceded to removing the decontamination unit without direction from MMI. Instead, the undisputed facts of the case are that Mr. Simmons went to the second floor balcony to remove a decontamination unit; MMI knew Mr. Simmons went to second floor balcony to perform the work-related task; MMI knew the second floor balcony was unguarded; MMI knew Mr. Simmons did not have fall protection; and MMI did direct Mr. Simmons regarding the removal of the decontamination to the ground below. In fact, the initial attempt to remove the decontamination unit failed when the unit got stuck. Thus, MMI then instructed Mr. Simmons to "give it a push," which resulted in him falling over the balcony along with the decontamination unit. See, J.A., p. 376.

Mr. Simmons' motive for being at the work site has no bearing on the elements of the five part test. It is undisputed that MMI exposed Mr. Simmons to the unguarded second floor balcony without fall protection. It is undisputed that MMI knew why Mr. Simmons was on the second floor balcony and what he was doing. Quite frankly, MMI is attempting to re-write the five part test, in such a fashion to open the door for MMI's continuing efforts to cast blame or fault upon Mr. Simmons. This approach has never been permitted by this Court, and there is no reason to start with Mr. Simmons' case. The circuit court's response to the third certified question is correct.

CONCLUSION

For the foregoing reasons, Mr. Simmons, by counsel, respectfully requests this Honorable Court to **REVERSE** the circuit court's order as to the **first certified question**, insofar as the circuit court erred by concluding that the 2005 amendment applies to Mr. Simmons case. Mr. Simmons further requests this Honorable Court to **AFFIRM** the circuit court's decisions as to the **second and third certified questions**, for all the reasons outlined hereinabove. Mr. Simmons further requests this Honorable Court to **REMAND** this case to the Circuit Court of Cabell County for further proceedings consistent with this decision, and for such other relief as the Court deems just and proper.

Signed: 

J. Michael Ranson, Esquire (WVSB #3017)
Counsel of Record for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of January, 2013, a true and accurate copy of the foregoing *Petitioner's Brief of Respondent, Richard Simmons* was deposited in the U.S. Mail contained in postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

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