

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

TIMOTHY WALKER,

Plaintiff,

v.

ELK RUN COAL COMPANY, INC.  
d/b/a REPUBLIC ENERGY, and  
ERIC SCOTT REDDEN,

Defendants,

and

ELK RUN COAL COMPANY, INC.  
d/b/a REPUBLIC ENERGY,

Third-Party Plaintiff,

v.

YASAR J. AKSOY, M.D.;  
CANOPIUS US INSURANCE, INC.  
(f/k/a OMEGA US INSURANCE, INC.);  
RSUI INDEMNITY COMPANY; NATIONAL  
CASUALTY COMPANY; AND SCOTTSDALE  
INSURANCE COMPANY,

Third-Party Defendants.

ORDER GRANTING THIRD-PARTY DEFENDANT NATIONAL CASUALTY  
COMPANY'S MOTION FOR SUMMARY JUDGMENT

On April 10, 2014, this Court heard argument concerning Third Party Defendant National Casualty Company's ("NCC") Motion for Summary Judgment on Third-Party Plaintiff Elk Run Coal Company, Inc. d/b/a Republic Energy's ("Elk Run") claim for indemnity and defense under a commercial auto policy issued by NCC. All interested parties had the opportunity to submit their positions to the Court through written pleadings and arguments of counsel. Having

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CATHY J. GILL CLERK  
KANAWHA COUNTY CIRCUIT COURT

Civil Action No. 11-C-1740  
Honorable Charles E. King, Judge

considered NCC's motion for summary judgment, the response of Elk Run and complete record in this matter, the Court hereby grants NCC's Motion for Summary Judgment. In support thereof, the Court makes the following findings of fact and conclusions of law:

**Findings of Fact**

1. This action arises out of an accident which occurred on or about May 31, 2011. Plaintiff, Timothy Walker ("Walker"), an employee of Medford Trucking, LLC ("Medford") sustained injuries when a caterpillar 992D ("front end loader") operated by Eric Redden ("Redden"), an employee of Elk Run, struck and overturned the Medford Truck in which Walker was sitting.

2. Walker's Complaint does not assert a claim against his employer Medford.

3. At the time of his subject accident, Medford was a coal hauler for Elk Run under the terms of a hauling and delivery agreement. Walker was sitting in his truck waiting for Elk Run to load the truck. It is undisputed that neither Walker nor the Medford truck in which he was sitting in any way caused or contributed to the accident. The accident occurred when Mr. Redden became unconscious while operating his front end loader, causing the vehicle to circle in reverse and strike Walker's truck, flipping it onto its side.

4. Elk Run has admitted in answers to requests for admission that Walker is free of fault in this accident and also has stipulated that it would not seek a finding of comparative fault against Walker.

5. On the date of the subject accident, Medford had in effect a commercial auto liability policy issued by NCC which covered the truck in which Walker was merely sitting at the time he was struck by Redden's front end loader. The NCC commercial auto liability policy, No. OPO0035273, provides, in relevant part, as follows:

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## SECTION I - COVERED AUTOS

Item Two of the Declarations shows the "autos" that are covered "autos" for each of your coverages. The following numerical symbols describe the "autos" that may be covered "autos". The symbols entered next to a coverage on the Declarations designate the only "autos" that are covered "autos".

### A. Description Of Covered Auto Designation Symbols

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#### 46 Specifically Described "Autos"

Only those "autos" described in Item Three of the Declarations for which a premium charge is shown (and for Liability Coverage any "trailers" you don't own while attached to any power unit described in Item Three).

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## SECTION II - LIABILITY COVERAGE

### A. Coverage

We will pay all sums an "insured" legally must pay as damages because of "bodily injury" or "property damage" to which this insurance applies, caused by an "accident" and resulting from the ownership, maintenance or use of a covered "auto".

We have the right and duty to defend any "insured" against a "suit" asking for such damages or a "covered pollution cost or expense". However, we have no duty to defend any "insured" against a "suit" seeking damages for "bodily injury" or "property damage" or a "covered pollution cost or expense" to which this insurance does not apply. We may investigate and settle any claim or "suit" as we consider appropriate. Our duty to defend or settle ends when the Liability Coverage Limit of Insurance has been exhausted by payment of judgments or settlements.

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### B. Exclusions

This insurance does not apply to any of the following:

2. Contractual

Liability assumed under any contract or agreement. But this exclusion does not apply to liability for damages:

- a. Assumed in a contract or agreement that is an "insured contract" provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement; or
- b. That the "insured" would have in the absence of the contract or agreement.

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**SECTION VI – DEFINITIONS**

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B. "Auto" means:

- 1. A land motor vehicle, "trailer" or semitrailer designed for travel on public roads; or
- 2. Any other land vehicle that is subject to a compulsory or financial responsibility law or other motor vehicle insurance law where it is licensed or principally garaged.

However, "auto" does not include "mobile equipment".

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H. "Insured Contract" means:

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- 5. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another to pay for "bodily injury" or "property damage" to a third party or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement;

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K. "Mobile equipment" means any of the following types of land vehicles, including any attached machinery or equipment:

1. Bulldozers, farm machinery, forklifts and other vehicles designed for use principally off public roads;
2. Vehicles maintained for use solely on or next to premises you own or rent;
3. Vehicles that travel on crawler treads;
4. Vehicles, whether self-propelled or not, maintained primarily to provide mobility to permanently mounted:
  - a. Power cranes, shovels, loaders, diggers or drills; or
  - b. Road construction or resurfacing equipment such as graders, scrapers or rollers;
5. Vehicles not described in Paragraph 1., 2., 3. or 4. above that are not self-propelled and are maintained primarily to provide mobility to permanently attached equipment of the following types:
  - a. Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment; or
  - b. Cherry pickers and similar devices used to raise or lower workers.
6. Vehicles not described in Paragraph 1., 2., 3. or 4. above maintained primarily for purposes other than the transportation of persons or cargo. However, self-propelled vehicles with the following types of permanently attached equipment are not "mobile equipment" but will be considered "autos":
  - a. Equipment designed primarily for:
    - (1) Snow removal;
    - (2) Road maintenance, but not construction or resurfacing; or
    - (3) Street cleaning;
  - b. Cherry pickers and similar devices mounted on automobile or truck chassis and used to raise or lower workers; and
  - c. Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting or well servicing equipment.

However, "mobile equipment" does not include land vehicles that are subject to a compulsory or financial responsibility law or other motor vehicle insurance law where it is licensed or principally garaged. Land vehicles subject to a compulsory or financial responsibility law or other motor vehicle insurance law are considered "autos".

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**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

**DESIGNATED INSURED**

This endorsement modifies insurance provided under the following:

BUSINESS AUTO COVERAGE FORM  
GARAGE COVERAGE FORM  
MOTOR CARRIER COVERAGE FORM  
TRUCKERS COVERAGE FORM

With respect to coverage provided by this endorsement, the provisions of the Coverage Form apply unless modified by this endorsement.

This endorsement identifies person(s) or organization(s) who are "insureds" under the Who Is An Insured Provision of the Coverage Form. This endorsement does not alter coverage provided in the Coverage Form.

This endorsement changes the policy effective on the inception date of the policy unless another date is indicated below.

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**Name of Person(s) or Organization(s):**

ELK RUN COAL CO. INC  
DBA REPUBLIC ENERGY  
RT 1 BOX 77  
SCARBRO WV 25917

7. On the date of the subject accident, Medford was the named insured under the policy and Elk Run was an additional insured pursuant to endorsement.

8. Elk Run has requested defense and indemnification from NCC for Walker's injury claim under the commercial auto liability policy NCC issued to Medford.

9. Elk Run had a Hauling and Delivery Agreement with Medford dated October 25, 2004. The agreement states at Paragraph 9.1, in relevant part, that Medford:

“shall indemnify, defend and save harmless Elk Run, its subsidiaries, affiliates, insurers, reinsurers...employees and agents...from and against any and all demands, actions, suits, claims, rights, losses..., controversies, damages, costs, expenses (including but not limited to interest, fines, penalties, costs of preparation and investigation, and the reasonable fees and expenses of attorneys, accountants, and other professional advisors), and any other liability of whatsoever kind or nature against Elk Run, whether on account of damage or injury (including death) to persons or property, violation of law or regulation, or otherwise, relating to, resulting from, arising out of, caused by or sustained in connection with, directly or indirectly, Medford’s performance of the work or other activities performed pursuant to this agreement (including work and activities performed by subcontractors) or contractors’ nonperformance or breach of the terms of this agreement.”

10. The NCC policy, by its plain language affords coverage only for bodily injury caused by an accident and resulting from the use of a covered auto. By policy definition, an “auto” does not include “mobile equipment.” Mobile equipment, as defined by the policy, includes among other equipment bulldozers and the other vehicles designed for use principally off public roads.

11. The Medford Truck Walker was occupying at the time of this accident was a covered auto under the NCC policy. The end loader operated by Redden, which caused this accident, was mobile equipment as defined by the policy and, therefore, not a covered auto.

#### Conclusions of Law

1. The NCC policy is an automobile liability policy and the insuring agreement clearly limits coverage to liability for bodily injury that is caused by an accident resulting from the ownership, maintenance, or use of the covered auto. The Court finds that the coverage grant requires that the liability or injury must result from some conduct of the covered auto. The Court further finds that the liability or injury must be foreseeably identifiable with the normal use of the vehicle. The causal connection between the covered auto and the injury must be more than incidental fortuitous or “but for”. Further, an injury does not result from the use of a covered

auto when the covered auto serves merely as the situs of the injury. Baber v. Fortner, 412 S.E.2d 814 (W.Va. 1991).

2. The Court finds that the Medford truck served nothing more than the situs of Walker's injuries. The undisputed facts are that at the time of the accident, Walker's truck was parked with him sitting inside with his seatbelt fastened. Walker's injuries admittedly were caused solely by Redden's operation of a non-insured end loader, conduct wholly independent of the use of the insured Medford truck. Accordingly, the Court finds no causal nexus between Walker's injuries and the use of the insured truck. As such, no coverage is afforded Elk Run under the NCC policy.

3. The Court further finds that no coverage is afforded Elk Run under the policy because the accident resulted from the use of mobile equipment. By policy definition, an "auto" does not include "mobile equipment." The end loader operated by Redden, which admittedly was the sole cause of the accident, is mobile equipment. Therefore, the Court further finds that Walker's injuries did not result from the use of a covered auto.

4. Elk Run also asserts coverage under the NCC policy by virtue of its indemnity agreement with Medford. It is well established that the rights of additional insureds are limited by the terms and conditions of the insurance policy. The additional insured enjoys the full benefits of the policy despite any restrictions contained in a separate contractual agreement with the insured, as well as being subject to all policy exclusions. Nautilus Ins. Co. v. Johnny Clark Trucking Co., LLC, Civil Action No. 2:12-CV-06678, Memorandum and Opinion Order (S.D.W.V. March 20, 2014), quoting Tidewater Equip. Co., Inc. v. Reliance Ins. Co., 650 F.2d 583 (4<sup>th</sup> Cir. 1981) and 9 Couch on Ins. § 126:7 (3d Rev. Ed. 2008) (and finding that despite a valid indemnity agreement, an additional insured was entitled to no more coverage than the

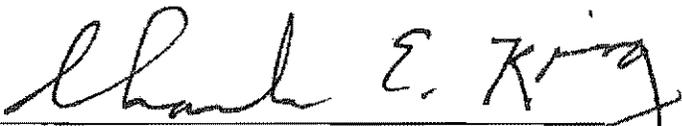
named insured under a general liability policy). While there is no dispute of the existence of a valid indemnity agreement between Elk Run and Medford or that Elk Run qualifies as an additional insured under the subject NCC policy, the Court finds that Elk Run is entitled only to the same coverage afforded Medford under the policy and nothing more.

Accordingly, based upon the foregoing findings of fact and conclusions of law, the Court hereby ORDERS that Third Party Defendant, National Casualty Company's Motion for Summary Judgment is GRANTED and that the Third-Party Complaint of Elk Run against National Casualty Company is hereby dismissed, with prejudice.

The Court notes the exceptions and objections of Elk Run Coal Company, Inc. d/b/a Republic Energy, Inc.

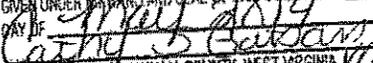
The Clerk of the Court is instructed to forward certified copies of this Order to counsel of record.

Entered: 5-28-14

  
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Honorable Charles E. King, Judge

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STATE OF WEST VIRGINIA  
COUNTY OF KANAWHA, SS  
I, CATHY S. GATSON, CLERK OF THE CIRCUIT COURT OF SAID COUNTY  
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING  
IS A TRUE COPY FROM THE RECORDS OF SAID COURT  
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 29  
DAY OF May 2014  
  
CATHY S. GATSON, CLERK  
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA 10

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