

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

2014 MAY 23 PM 3:08

CATY C. GATTON, CLERK  
KANAWHA COUNTY CIRCUIT COURT

TIMOTHY WALKER,

Plaintiff,

v.

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

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 MOTION FOR SUMMARY  
JUDGMENT OF RSUI INDEMNITY COMPANY**

Came the 13<sup>th</sup> day of March, 2014, the parties to the above-styled action, by their respective counsel. Whereupon, the Court did hear Defendant RSUI Indemnity Company's Motion for Summary Judgment, which was timely filed in connection with the present action, and which was served upon the parties to the present case on February 11, 2014.

And the Court, having considered RSUI Indemnity Company's Motion for Summary Judgment, does make the following findings of fact and conclusions of law:

1. The present action relates to the claims of the Plaintiff Walker, arising from injuries sustained by the Plaintiff on May 31, 2011, while Plaintiff was working as a coal truck driver for Medford Trucking, LLC.
2. At the time of the subject accident, Eric Scott Redden, an employee of Elk Run Coal Company, Inc., d/b/a Republic Energy, was operating a loader and reportedly lost consciousness, resulting in his failure to control the loader.
3. Elk Run/Republic has, by stipulation and responses to Requests for Admissions, admitted that Plaintiff Walker was guilty of no negligence which caused or contributed to the accident of May 31, 2011. In addition, Elk Run/Republic has failed to provide the Court with any information to suggest any act or omission on the part of Plaintiff Walker's employer, Medford Trucking, which caused or contributed to the accident. Rather, it is undisputed that Redden, an employee of Elk Run/Republic, directed Plaintiff Walker where to park his truck for loading, and Plaintiff Walker was seat belted in the truck at the time of the subject accident.
4. Defendant Redden had already loaded at least one bucket of coal onto the Plaintiff Walker's truck. Redden denied knowing what happened after that. The undisputed evidence, however, reflects that the loader operated by Redden struck the Plaintiff Walker's truck, flipping or knocking the truck over.
5. At the time of the subject accident, Medford Trucking was insured under a Commercial Excess Liability Policy issued by RSUI, identified as Policy No. NHA055540.



Type of Policy	Insurer	Applicable Limit
GENERAL LIABILITY	OMEGA US INSURANCE COMPANY	\$1,000,000 EACH OCCURRENCE  \$2,000,000 GENERAL AGGREGATE  \$2,000,000 PRODUCTS/COMPLETE D OPS AGG  \$1,000,000 PERSONAL/ADVERTISING INJURY

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### EMPLOYERS LIABILITY EXCLUSION

This endorsement modifies insurance provided under the following:

#### Commercial Excess Liability Policy

This policy does not apply to bodily injury, sickness, disease, disability, or shock, including death resulting therefrom to:

1. An employee of the Insured arising out of and in the course of employment by the insured; or
2. The spouse, child, parent, brother and sister of that employee as a consequence of 1. above.

This exclusion applies:

- a. Whether the Insured may be liable as an employer or in any other capacity; and
- b. To any obligation to share damages with or repay someone else who must pay damages because of the injury.

*This Endorsement Changes The Policy. Please Read It Carefully.*

## **EXCLUSION - SUBMITTED UNDERLYING COVERAGE**

This endorsement modifies insurance provided under the following:

### **Commercial Excess Liability Policy**

This insurance shall not apply to any occurrence for which "underlying insurance" does not provide coverage for at least the applicable limits shown on the Schedule of Underlying Insurance.

However, this exclusion shall not apply if the applicable limits of the "underlying insurance" are only reduced or only exhausted by payment for "bodily injury", "property damage" or "covered pollution cost or expense" which occurs or "personal and advertising injury" which is committed during the policy period of this policy.

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## **COMMERCIAL EXCESS LIABILITY POLICY**

Various provisions in this policy restrict coverage. Read the entire policy and any underlying insurance carefully to determine rights, duties and what is covered and not covered.

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations and any other person or organization qualifying as an Insured under the "Underlying Insurance." The words "we" and "us" refer to the COMPANY shown in the DECLARATIONS. Other words and phrases that appear in quotation marks have special meanings. Refer to Definitions (SECTION V).

## **SECTION I - EXCESS LIABILITY INSURANCE**

1. Insuring Agreement
  - a. We will pay those sums in excess of the limits shown in Item 6 of the Declarations, Schedule of Underlying Insurance, that you become legally obligated to pay as damages because of injury to which this insurance applies, provided that the "Underlying Insurance" also applies, or would apply but for the exhaustion of its applicable Limits of Insurance.

- b. This insurance is subject to the same terms, conditions, agreements, exclusions and definitions as the "Underlying Insurance," except:
- (1) We will have no obligation under this insurance with respect to any claim or suit that is settled without our consent; and
  - (2) With respect to any provisions to the contrary contained in this insurance.

\* \* \*

- d. We will have the right to participate in the defense of claims or suits against you seeking damages because of injury to which this insurance may apply. We will have a duty to defend such claims or suits when the applicable limit of insurance of the "Underlying Insurance" has been exhausted by payment of judgments, settlements and any cost or expense subject to such limit. We may, at our discretion, investigate and settle any claim or suit. Our right and duty to defend end when the applicable limit shown in the Declarations has been used up by our payment of judgments or settlements.

## **SECTION II - EXCLUSIONS**

The exclusions applicable to the "Underlying Insurance" also apply to this insurance.

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## **SECTION IV - CONDITIONS**

If any of the following conditions are contrary to conditions contained in the "Underlying Insurance" the provisions contained in this policy apply.

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### **2. Maintenance of "Underlying Insurance"**

- a. You agree to maintain the "Underlying Insurance" in full force and effect during the term of this policy, and to

inform us within 30 days of any replacement or material change of that "Underlying Insurance" by the same or another company. If you do not maintain the "Underlying Insurance" in full force and effect or fail to meet all conditions and warranties of such "Underlying Insurance", this policy shall apply as if those policies were available and collectible.

- b. Reduction or exhaustion of the aggregate limit of any "Underlying Insurance" by payments for judgments, settlements or any costs or expenses subject to that limit, will not be a failure to maintain "Underlying Insurance" in full force and effect.
- c. No statement contained in this condition limits our right to cancel or not renew this policy.

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### 3. Other Insurance

This insurance is excess over any valid and collectible insurance whether primary, excess, contingent or any other basis, except other insurance written specifically to be excess over this insurance.

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## SECTION V - DEFINITIONS

- 1. "Underlying Insurance" means the policies or self-insurance listed in the Schedule of Underlying Insurance, any replacements thereof and other policies purchased or issued for newly acquired or formed organizations. Policies purchased or issued replacements of policies or self-insurance listed in the Schedule of Underlying Insurance or for newly acquired or formed organizations shall not be more restrictive than those listed in the Schedule of Underlying Insurance. All "Underlying Insurance" shall be maintained by you in accordance with Condition 2. of this policy.

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7. The RSUI Policy is, without dispute, an excess policy that affords coverage in excess of the limits shown in Item 6 of the Declarations, Schedule of Underlying Insurance.
8. The RSUI Policy incorporates all of the exclusions and limitations of the underlying coverage, and specifically the policy of insurance issued to Medford Trucking by Canopus US Insurance, Inc. **See**, Section II-Exclusions. In addition, the Exclusion-Sublimited Underlying Coverage Endorsement clearly and unambiguously reflects that the RSUI Policy does not apply to any occurrence for which "underlying insurance" does not apply.
9. The limitations and exclusions under the Canopus Policy have been separately addressed by the Court in connection with the Motion for Summary Judgment of Canopus US Insurance, Inc. In addition to those policy limitations and exclusions, all of which are incorporated into the RSUI Policy, as noted above, the RSUI Policy also contains a clear and unambiguous Employers Liability Exclusion Endorsement, which precludes coverage for Walker's claim against Elk Run/Republic, independent of the Canopus US Policy Exclusions. Specifically, this Endorsement provides that the RSUI Policy "does not apply to bodily injury to...an employee of the Insured arising out of and in the course of employment by the Insured." This Exclusion applies "whether the insured may be liable as an employee or in any other capacity, and expressly includes any obligation to share damages with or repay someone else who must pay damages because of the injury."

10. The Employer Liability Exclusion is a valid and enforceable exclusion in West Virginia. *See, Luikart v. Valley Brook Concrete & Supply, Inc.*, 216 W.Va. 748, 613 S.E.2d 896 (2005).
11. The Employer Liability Exclusion Endorsement is "conspicuous" and "clearly visible or obvious."
12. As the Plaintiff Walker's claims against Elk Run/Republic relate to the alleged injuries and damages sustained by Plaintiff Walker during the course of his employment by Medford Trucking, the named insured under the RSUI Policy, the RSUI Policy clearly and unambiguously excludes coverage for the Plaintiff Walker's claims against Elk Run/Republic based upon the Employer Liability Exclusion Endorsement, in addition to the policy limitations and exclusions incorporated into the RSUI Policy from the Canopus US Insurance Policy.

Based upon the aforesaid Findings of Fact and Conclusions of Law, therefore, the Court is of the opinion to and does hereby **ORDER** that RSUI Indemnity Company's Motion for Summary Judgment should be, and the same is hereby **GRANTED**, as the Court finds that the RSUI Policy does not apply to provide for the defense or indemnification of Elk Run Coal Company, Inc. d/b/a Republic Energy. Elk Run's/Republic's Third-Party Complaint against RSUI Indemnity Company is hereby **DISMISSED, WITH PREJUDICE**.

To all of which the Court does note the exceptions and objections of Elk Run Coal Company, Inc. d/b/a Republic Energy.

The Clerk of the Court is instructed to forward certified or attested copies of this Order to counsel of record as follows:

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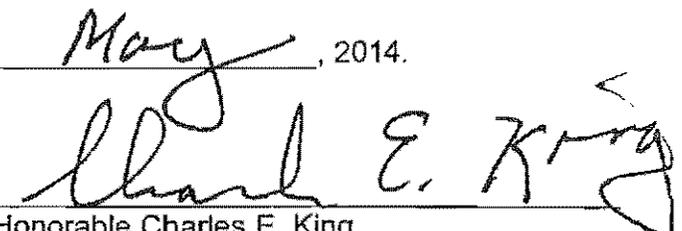
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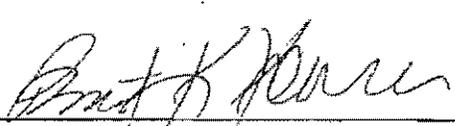
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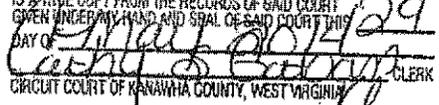
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Entered this 28<sup>TH</sup> day of May, 2014.

  
Honorable Charles E. King

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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  
DAY OF May 2014  
  
CATHY S. GATSON, CLERK  
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

**Copies Provided To:**

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