

14-0723

FILED 14

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.

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

2014 MAY 28 PM 3:07

CATHY E. PATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

**ORDER GRANTING THIRD-PARTY DEFENDANT SCOTTSDALE INSURANCE
COMPANY'S MOTION FOR SUMMARY JUDGMENT**

On April 10, 2014, this Court heard argument concerning Third Party Defendant Scottsdale Insurance Company's ("SIC") 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 an excess transportation policy. All interested parties had the opportunity to submit their positions to the Court through written pleadings and arguments of counsel. Having

considered SIC's motion for summary judgment, the responses and complete record in this matter, the Court hereby grants SIC'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 an excess liability Policy No. XLS0058690 issued by SIC which covered the truck in which Walker was merely sitting at the time he was struck by Redden's front end loader. The SIC excess liability policy provides, in relevant part, as follows:

**DECLARATIONS
EXCESS LIABILITY POLICY**

Policy Number XLS0058690

ITEM 1. NAMED INSURED AND MAILING ADDRESS

MEDFORD TRUCKING, LLC
4799 KANAWHA BLVD E.
CHARLESTON, WV 25306

ITEM 2. POLICY PERIOD

From: 04/07/2011 To: 04/07/2012

ITEM 5. SCHEDULE OF UNDERLYING INSURANCE:

See Schedule of Underlying Insurance

ITEM 7. ENDORSEMENTS ATTACHED TO THE POLICY AT INCEPTION:

See Schedule of Forms and Endorsements

**SCHEDULE OF UNDERLYING INSURANCE
EXCESS LIABILITY**

Policy No. XLS0058690

Effective Date 04/07/2011

Named Insured MEDFORD TRUCKING, LLC

INSURER, POLICY NUMBER AND POLICY PERIOD	TYPE OF COVERAGE	APPLICABLE LIMITS
Insurer's Name	Auto Liability	Bodily Injury and Property Damage Limit

NATIONAL CASUALTY		\$1,000,000 Each Accident
Policy Number OPO0035273		
Policy Period 4-7-2011 TO 4-7-2012		

EXCESS LIABILITY COVERAGE FORM

VARIOUS PROVISIONS IN THIS POLICY RESTRICT COVERAGE. READ THE ENTIRE POLICY CAREFULLY TO DETERMINE RIGHTS, DUTIES AND WHAT IS AND IS NOT COVERED.

Throughout this policy, the words "you" and "your" refer to the "Named Insured" shown in the Declarations and any person or organization qualifying as an "Insured" in the "Underlying Insurance." "We," "us," "our" and "Company" refers to the Company providing this insurance.

Other words and phrases that appear in quotation marks have special meaning. Refer to DEFINITIONS (Section III) and other provisions of this Policy for such meanings.

In consideration of the payment of premium and in reliance upon the statements in the Declarations and subject to all the terms, conditions, exclusions and endorsements of this Policy, the Company agrees with the "Named Insured" to provide coverage, as follows:

INSURING AGREEMENTS

I. COVERAGE

This Policy is excess insurance and, except as otherwise stated in this Policy, follows the terms, conditions, exclusions, definitions and endorsements of the "Underlying Insurance" described in ITEM 5. of the Declarations.

- A. We will pay on behalf of the insured those sums in excess of the "Underlying Insurance" which the insured becomes legally obligated to pay as damages arising out of an occurrence or accident during the policy period stated in ITEM 2. of the Declarations (the POLICY PERIOD).
- B. We have no other obligation or liability to pay sums or perform services, except as described in Section II. Defense and Supplementary Payments.

- C. If we are prevented by law or statute to pay on behalf of the insured, we will, in accordance with A. and B. above, indemnify the insured for those sums in excess of the "Underlying Insurance."
- D. Where any terms of this Policy conflict with any terms of the "Underlying Insurance," the terms of this Policy shall apply.
- E. Settlement of any claim or suit for an amount in excess of available "Underlying Insurance" by you or any underlying insurer shall not be binding on us unless we consent in writing.

II. DEFENSE AND SUPPLEMENTARY PAYMENTS

- A. We will not be obligated to assume the investigation, settlement or defense of any claim made, or suit brought, or proceedings instituted against you. We will, however, have the right to participate in the investigation, settlement or defense of any suit or proceeding which relates to any occurrence or accident that we feel may create liability on our part under the terms of this Policy. We will not defend any suit after we have exhausted the applicable LIMITS OF INSURANCE as stated in ITEM 4. of the Declarations.

III. DEFINITIONS

"Underlying Insurance" means any policy or policies of insurance as listed in ITEM 5. of the Declarations including any renewal or replacement of such policies.

V. CONDITIONS

I. Other Insurance.

If there is any other collectible insurance available to the insured (whether such insurance is stated to be primary, contributing, excess or contingent) that covers a loss that is also covered by this Policy, the insurance provided by this Policy will apply in excess of, and shall not contribute with, such insurance. This Condition I. does not apply to any insurance policy purchased specifically (and which is so specified in such insurance policy) to apply in excess of this Policy.

6. The SIC policy is an excess policy that affords coverage in excess of the limits shown in Item 5 of the Declarations. Item 6 of the Schedule of Underlying Insurance identifies National Casualty Company, Policy No. OPO0035273, as providing the underlying auto liability insurance with limits of "\$1,000,000 Each Accident."

7. The SIC policy insuring agreement clearly states this policy is excess insurance and, except as otherwise stated in this policy, follows the terms, conditions, exclusions, definitions, and endorsements of the underlying insurance described in Item 5 of the Declarations. Further, the SIC policy pays on behalf of the insured only those sums in excess of the underlying insurance which the insured becomes legally obligated to pay as damages arising out of an occurrence or accident during the policy period.

8. The NCC policy, which is addressed by this Court more fully in a separate Order, 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.

9. 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.

10. 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."

Conclusions of Law

1. The Court finds that the SIC excess policy follows the terms, conditions, exclusions, definitions and endorsements of the underlying National Casualty Company ("NCC") auto liability Policy No. OPO0035273.

2. 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).

3. 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. Therefore, the Court also finds no coverage under the SIC excess policy.

4. The Court further finds that no coverage is afforded Elk Run under the NCC policy because the accident resulted from the use of mobile equipment. The Court similarly finds no coverage under the SIC excess policy. 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.

5. Elk Run also asserts coverage under the SIC 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 (4th 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.

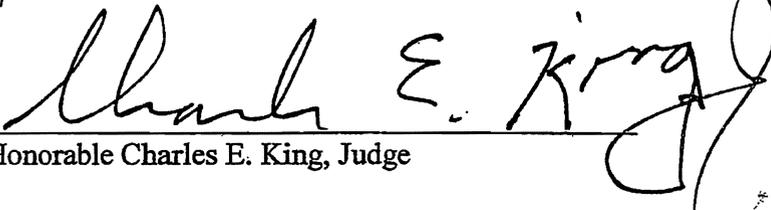
Accordingly, based upon the foregoing findings of fact and conclusions of law, the Court is of the opinion to and does hereby ORDER that Scottsdale Insurance Company's Motion for

Summary Judgment should be, and the same is hereby GRANTED. The Court finds that the SIC excess 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 Third Party Complaint against Scottsdale Insurance 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, Inc.

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

Entered: 5-28-14


Honorable Charles E. King, Judge

Prepared for entry by:

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

Charles K. Gould, Esquire (WV Bar #7539)
JENKINS FENSTERMAKER, PLLC
Post Office Box 2688
Huntington, West Virginia 25726-2688
Phone: (304) 523-2100
Fax: (304) 523-2347

Copies to:

Brett J. Preston, Esquire
Dan R. Snuffer, Esquire
PRESTON & SALANGO, P.L.L.C.
Post Office Box 3084
Charleston, West Virginia 25331
Counsel for Plaintiff, Timothy Walker

Jonathan R. Ellis, Esquire
STEPTOE & JOHNSON PLLC
Post Office Box 1588
Charleston, West Virginia 25326-1588
Counsel for Defendant Eric Scott Redden

Jeffrey K. Phillips, Esquire
STEPTOE & JOHNSON, PLLC
One Paragon Centre, Suite 300
2525 Harrodsburg Road
Lexington Kentucky 40504
Counsel for Defendant Eric Scott Redden

Brent K. Kesner, Esquire
KESNER & KESNER, PLLC
P.O. Box 2587
Charleston, WV 25329
Counsel for Third-Party Defendants, Canopus US Insurance, Inc. and RSUI Indemnity Company, Inc.

William R. Slicer, Esquire
SHUMAN, MCCUSKEY & SLICER, PLLC
Post Office Box 3953
Charleston, WV 25339-3953
Counsel for Defendant Elk Run Coal Company, Inc. d/b/a Republic Energy

Gretchen M. Callas, Esquire
Jonathan L. Anderson, Esquire
JACKSON KELLY PLLC
500 Lee Street East, Suite 1600
Charleston, WV 25301-3202
Counsel for Third-Party Plaintiff Elk Run Coal Company d/b/a Republic Energy

Koorosh Talieh, Esquire (pro hac vice)
Peter L. Tracey, Esquire (pro hac vice)
PERKINS COIE LLP
700 Thirteenth St., N.W., Suite 600
Washington, DC 20005-3960
Counsel for Third-Party Plaintiff Elk Run Coal Company d/b/a Republic Energy

Yasar K. Aksoy, M.D.
201 Shawnee Circle
Mount Hope, WV 25880
Pro Se Third-Party Defendant