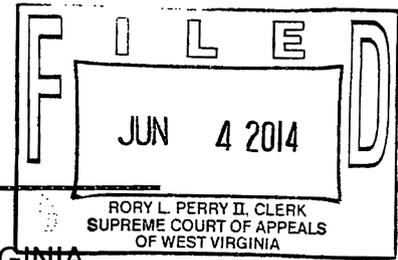


No. 14-0381



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION,
DIVISION OF HIGHWAYS, a public corporation, Petitioner below

Petitioner

vs.

WESTERN POCAHONTAS PROPERTIES, L.P., a Delaware Limited
Partnership; WPP, LLC, a Delaware Limited Liability Company; BEACON
RESOURCES, INC., Respondents below

Respondents

From the Circuit Court of
Tucker County, West Virginia
Civil Action No. 12-C-46

PETITIONER'S BRIEF

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I. ASSIGNMENTS OF ERROR

- A. The Circuit Court erred in its refusal to give Petitioner's proposed jury instruction no. 8, which necessarily allowed the jury to consider profit as a basis for just compensation.**
- B. The Circuit Court erred in its exclusion of the testimony of Petitioner's expert witness, Tom Gray, regarding his valuation of Beacon Resources, Inc.'s leasehold interest.**

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The present Petition arises from the Amended Judgment Order and the Order Denying Petitioner's Motion for New Trial and Respondent's Motion to Enforce Judgment, both entered February 4, 2014¹. The Petitioner ("DOH") appeals the Circuit Court's denial of the Petitioner's Motion for a New Trial and the Circuit Court's entry of the Amended Judgment Order requiring the DOH to pay the collective Respondents the sum of \$18,136,900 (\$24,000,000 minus DOH's original deposit of \$5,863,100) plus ten percent (10%) interest thereon until paid. Prior to trial, the parties stipulated that \$750,000 represented just compensation due Western Pocahontas Properties, L.C., ("Western Pocahontas") for surface rights taken. (Tr. Trans. pg. 11, line 18 to pg. 12, line 1) The trial concerned only the value of minerals, to-wit: coal located on the property taken and damages to the value of coal in the residue of Parcel 1-5. (Tr. Trans., pg. 12, line 2, line 4) On the date of take, Respondent WPP, LLC ("WPP") owned the mineral rights in the subject property and had leased said

¹ The Petitioner is not appealing the portion of the Order Denying Petitioner's Motion for New Trial and Respondent's Motion to Enforce Judgment which denies the Respondent's Motion to Enforce Judgment.

mineral rights underlying a portion of Parcel 1-5 to Beacon Resources, Inc. (“Beacon”) for mining of coal. (AR 55)

B. STATEMENT OF FACTS

On April 19, 2012, the DOH condemned certain real property interests owned by the Respondents collectively, subsequently depositing the sum of \$5,863,100 as just compensation therefor and obtaining defeasible title to the property in order to construct a portion of Appalachian Corridor H, alternately referred to as Route 93, in Tucker County, West Virginia.² July 25, 2012 was the date upon which DOH obtained right of entry and was treated at all times as the “date of take”. (AR 55) The trial of the case, occurring on July 16, 17 and 18, 2013, resulted in a verdict of \$24,000,000 in just compensation to the collective Respondents.³ (AR 50-51) Following the trial, counsel for Beacon submitted a proposed judgment Order, to which several objections were raised. Pending resolution of these objections, DOH filed Petitioner’s Motion for New Trial on August 13, 2013. (AR 45-47) On August 27, 2013, the Circuit Court heard the Petitioner’s Motion for New Trial and denied the same from the bench. (AR 56) On September 5, 2013, the Circuit Court entered an “Order” prepared by

² The Petitioner originally condemned multiple parcels under Civil Action No. 12-C-27 (relating to surface interests) and Civil Action No. 12-C-43 (relating to mineral interests). By “Order Separating Parcel 1-5 from Pending Action”, the surface and mineral interests relating to the property which is the subject of this action (Parcel 1-5) were removed and consolidated under a new civil action no., 12-C-46. Therefore, the Application of the West Virginia Department of Transportation, Division of Highways, a Public Corporation, to Condemn Land for Public Use, relating exclusively to Parcel 1-5, was filed in August 2012. The Order Separating Parcel 1-5 from Pending Action is attached to the Application in the Appendix (A.R. 39-41)

³ Mettiki Coal (WV), LLC was dismissed from this action prior to trial.

Beacon's counsel, which Order failed to reflect the Court's ruling on the Petitioner's Motion for New Trial. (AR 57)

On January 10, 2014, Beacon filed a Motion to Enforce Judgment, which the Circuit Court denied by Order entered February 4, 2014. (AR 56) The February 4, 2014 Order likewise denied the Petitioner's Motion for New Trial. By Amended Judgment Order entered on February 4, 2014, the Circuit Court entered a final judgment against the DOH for the sums referenced in the original trial Order. (AR 53)

The Petitioner condemned the following property for the Davis to Bismarck Section of Corridor H:

<u>Project X347-H-64.85, Parcel 1-5</u>	
Tract 1 – Controlled Access Right of Way	197.37 ac
Tract 2 – Noncontrolled Access Right of Way	6.63 ac.
Tract 3 – Noncontrolled Access Right of Way	15.53 ac.
Tract 4 – Noncontrolled Access Right of Way	45.97 ac.
Tract 5 – Noncontrolled Access Right of Way	0.85 ac.
Tract 6 – Noncontrolled Access Right of Way	0.42 ac.
Tract 7 – Permanent Drainage Easement	0.26 ac.
Tract 8 – Temporary Construction Easement	0.74 ac.
Tract 9 – Temporary Construction Easement	0.45 ac.
Residue (left side)	616.58 ac.
Residue (right side)	1,283.50 ac.
Total taken	267.03 ac.
Parcel total (before taking)	1,550.53 ac.

(AR 1-37)

Beacon leases the coal underlying 187 acres contained within Parcel 1-5, of which approximately 30 acres were taken by the condemnation (Tr. Trans. pg. 333, lines 12 to 14) Of the total 267.03 acres permanently taken from Parcel 1-5, 197.37 acres are for controlled access right of way, 69.40 acres are for noncontrolled access right of way and .26 acres are for a permanent drainage

easement. (AR 1-37) The 187 acres leased by Beacon fall within a portion of the 267.03 acres permanently taken.

The trial centered on the fair market value of Beacon's interest in the subject real property by virtue of its coal lease and active coal mining operations. On the date of take, Beacon paid WPP a 7-1/2 % royalty on the coal and retained the remaining 92-1/2% of the sale price [of coal mined and sold]. (Tr. Trans., pg. 120, lines 6-15) Mining began August 2011. Beacon's mining permit covered 179 acres of the 187 under lease. (Tr. Trans., pg. 123, lines 13-20)

Beacon presented in its case in chief the testimony of Jason Svanovec, President of Beacon Resources, Inc. In his testimony, Mr. Svanovec testified that his profit margin on the coal he was mining on the subject property was \$65 per ton; that "for every ton [he] was mining, on average, [he] was making \$65 a ton". (Tr. Trans. pg. 175, line 3 to line 20; line 18 to line 21) Mr. Svanovec claimed that over 1 million tons of coal remained in the leased area. (Tr. Trans., pg. 149, line 23 to pg. 150, line 2) Mr. Svanovec testified that his mining operations had ceased, that he was not going to mine the rest of the property, and that he had sold his equipment. (Tr. Trans. pg. 160, line 10 to pg. 161, line 1). Mr. Svanovec requested just compensation in the amount of \$27 million for the area of the take and \$57 million for damages to the residue, the residue being the area outside the take. (Tr. Trans. pg. 162, line 21 to pg. 163, line 5) These amounts reflect the total tonnage on the property at a 78-80% mining recovery rate, minus his mining costs of \$55 per ton. (Tr. Trans. pg. 163, line 6 to pg. 164, line 16) From Mr. Svanovec's testimony, it is clear that his

calculation of just compensation he claimed on behalf of Beacon Resources flows directly from his testimony of \$65 per ton of profit.

Beacon offered the testimony of Pat Gallagher, professional engineer and geologist, to explain to the jury that, after the subject taking, the mining operation would have to operate in areas with greater overburden and would operate at a loss. (Tr. Trans. pg. 213, lines 9-16) (emphasis added). This testimony reiterated Mr. Gallagher's earlier statements that the remaining coal in the residue of the leased area could not be economically mined after the taking (Tr. Trans. pg. 203, line 24 to pg. 204, line 3) (emphasis added).

Beacon presented the testimony of Aaron J. Teets, P.E., to advise the jury that the construction project reduced the amount of "low overburden" coal that could be mined, causing the profitability of the remainder of the mine to be substantially reduced. (Tr. Trans. pg. 219, line 18 to pg. 220, line 10) (emphasis added).

Beacon presented Douglas C. Wise, Certified General Real Estate Appraiser, to testify that the gross profit to Beacon on the mining operation was \$64.80 a ton. (Tr. Trans. pg. 266, line 15 to pg. 267, line 5) (emphasis added). Mr. Wise testified that just compensation for the leasehold interest, including \$23,695,000 in economic recovery outside the Corridor H footprint and the one hundred foot buffer [area sterilized by any road construction project under West Virginia law], was \$48,088,000. (Tr. Trans. pg. 250, lines 6 to 16) (emphasis added).

During DOH's case in chief, DOH offered the testimony of Thomas Gray, P.E., the Energy and Natural Resources Manager for Tetra Tech in Pittsburgh, PA. Mr. Gray, a mining engineer, has provided engineering and environmental services for the mining and natural gas industries for Tetra Tech for six (6) years. Mr. Gray has 40 years' experience in the mining industry, and has offered opinions to his employers on the acquisition of 20 to 30 surface mines in recent years. About 25% of his work involves mining feasibility. Mr. Gray was determined to be qualified to testify as an expert in mineral appraisal and mineral valuation over Beacon's objection. (Tr. Trans., pp. 288-290)

Mr. Gray's assignment under his contract with the Petitioner was to determine a valuation of the minerals owned by Beacon on subject Parcel 1-5, to-wit: coal, and the value of the leasehold held by Beacon. (Tr. Trans, pg. 292, lines 7 to 10)

Mr. Gray testified that the value of the coal in the area taken by the DOH was \$2,355,266. (Tr. Trans., pg. 37, lines 10-20) Mr. Gray testified to a separate value of the leasehold interest of \$1.04 per ton, but was not permitted to complete his testimony on the value of the leasehold interest.

The objections raised by Beacon to Mr. Gray's qualification as an expert witness were as follows:

"MS. DAWKINS: Your Honor, I object to the extent that he is going to attempt to testify concerning comparable - - a comparable sales approach with respect to Beacon Resources' leasehold. He is not qualified to do that. He is not a certified appraiser within the State of West Virginia, and he quite simply can't do it.

THE COURT: Does the law require him to be certified?

MS. DAWKINS: Your Honor, there is a certain standard that, as you know the Court is the gatekeeper with respect to the Daubert issue, and whether an expert can - -

THE COURT: Okay. I'm going to let him testify. You can explore all that on cross-examination." (Tr. Trans., pg. 290, line 17 to pg. 291, line 4)

Mr. Gray then testified that the lease held by Beacon Resources had a value which could be broken down into two components, those being the cost to cure any problems created with Beacon's mining permit, and the value reflected by an increase in the price paid by buyers of coal property under lease, versus buyers of coal properties not under lease. Mr. Gray testified that \$113,000 represented the cost of revising the permit and changes to the erosion and sediment controls. Mr. Gray further testified that, by reviewing the sales of active mines and comparing them to the sales of unpermitted coal reserves, Mr. Gray was able to determine a price of \$1.04 per ton that Beacon could have obtained from the sale of its current lease. In support for the \$1.04 per ton value of the lease, Mr. Gray testified that, in his approach to valuing the lease, he "identified mines or mining companies that were sold in the last several years and the price per ton of those active mines and compared them to . . . three other sites where there was (sic) primarily reserves that were bought . . . I know that we have heard that, you know, they were, you know, newspaper articles, et cetera, or web sites, and they were. But they were reported timely. Many of them were company reports that were - - they're the ones who put out a press release saying, we bought this many tons of reserve at this price, and I used that and I compared it to." (Tr. Trans. pg. 307, line 21, line 14 to pg. 309, line 9)

At this point in Mr. Gray's testimony, the following objection was raised:

"MS. DAWKINS: Your Honor, I make my motion right now to preclude the testimony of Mr. Gray with respect to the comparable sales and the value toward to Beacon. He has already admitted that he obtained those through newspaper articles. Your Honor, this doesn't pass the - -

THE COURT: Did you receive it through anything other than press releases, Mr. Gray?

THE WITNESS: No.

THE COURT: Then I'm going to sustain the objection."

(Tr. Trans., pg. 309, lines 10-18)

The DOH further presented the testimony of Phillip Lucas, P.E. Mr. Lucas is a mining engineer with Summit Engineering and has been in the mining industry for nearly 40 years. (Tr. Trans., pg. 326, line 22 to pg. 372, line 7) He has bachelor degrees in math and civil engineering and a masters degree in mining engineering. (Tr. Trans., pg. 328, lines 8-13) Mr. Lucas was recognized as an expert in the valuation in surface mining. (Tr. Trans., pg. 331, lines 2-8). Mr. Lucas explained that new Route 93 will cut off a portion of the front of Parcel 1-5 but that the remainder of the parcel remained intact. (Tr. Trans., pg. 332, lines 14-17) Information provided to Mr. Lucas by Beacon demonstrated that Beacon was making an average of \$95.76 per ton of coal sold, not the \$120 represented by Mr. Svonavec. Mr. Lucas used the \$95.76/ton figure to value the coal in the area of the take. (Tr. Trans., pg. 338, line 22, to pg. 339, line 9) Using this price per ton, he calculated the income stream from the sale of the coal for the four years remaining in the original five-year mining permit, using a nine percent (9%) discount rate. He applied the eight percent royalty to determine the value of the coal taken on Parcel 1-5, that being \$2,198,000. (Tr. Trans., pg. 339, line 10 to pg. 340, line 10). Mr. Lucas further calculated the

value of the leasehold interest to Beacon, that being the actual lease rate of 7-1/2% compared to the typical [market] lease rate of 8%. From the differential of 1/2% royalty, he calculated the leasehold value of the coal, that being \$137,434. This sum was in addition to the \$2,198,000 value of the coal, which belonged to Western Pocahontas until it was mined. All the values Mr. Lucas offered were as of the date of take, July 25, 2012. (Tr. Trans, pg. 340, line 15 to pg. 341, line 14).

With respect to alleged damages to the value of minerals in the residue of the parcel, Mr. Lucas explained that Beacon could continue mining the residue with an expenditure of \$191,200 for permit revision and modification, haul road construction, changes to the sediment pond and erosion control. This sum would be in addition to the other sums set forth above. (Tr. Trans., pg. 341, line 21 to pg. 343, line 6) In order to reach his conclusion that the residue could continue to be mined economically after the taking, Mr. Lucas calculated the mining ratio on the leased area prior to the take to be 16.24 to 1⁴. After the taking by the DOH, the mining ratio on the residue was 18.1 to 1, "still a very reasonable ratio to mine for coal of this quality". (Tr. Trans. pg. 343, line 7 to pg. 344, line 7). In short, he offered the expert opinion that Beacon could continue to mine the residue. (Tr. Trans. pg. 351, lines 3-5) The sum of the three line items of just compensation testified to by Mr. Lucas (\$2,198,000 in royalties due the real estate owner, \$137,434 in leasehold value and \$191,200 in cost to cure) was \$2,526,634.

⁴ Mining ratios reflect the banked cubic yards of overburden which must be moved to recover one ton of coal. (Tr. Trans. pg. 380, lines 11 to 17)

At this point in Mr. Lucas's testimony, he noted that his calculation of just compensation provided Beacon with the money to change permits and that the DOT "has provided the money". Beacon objected to the "implication that money was provided." At this point, the Court noted: "Well, I think what the jury needs to be instructed is if that had been worked out, the State would have provided the money, but there has been no money provided". (Tr. Trans., pg. 351, lines 3-16)

The Petitioner offered "*Petitioner's Instruction No. 8 - You are instructed that in determining whether the residue of the property is damaged or injured, you may consider damage to the land, but you may not consider any lost profit or damage or injury to any business thereon, because such damages depend on contingencies too uncertain and speculative to be allowed.*" Said instruction cited Shenandoah Valley R. Co. vs. Shepherd, 26 W.Va. 672 (1885) and Gauley & Eastern R. Co. vs. Conley, 84 W.Va. 489, 100 S.E. 290 (1919). The Circuit Court refused to give the offered instruction, notwithstanding Beacon's acknowledgement that lost profits are not recoverable. In argument during the instruction conference, Beacon claimed that the law regarding lost profit was not applicable to the case. (Tr. Trans., pg. 391, lines 5-23)

III. SUMMARY OF ARGUMENT

1. The Circuit Court erred in its refusal to give Petitioner's proposed jury instruction no. 8, which necessarily allowed the jury to consider profit as a basis for just compensation. Beacon Resources' witnesses blatantly refer to the dollars which they claim should flow into Beacon's pocket as just compensation for its real property interests as "profit" or in terms

which can mean nothing other than profit. Notwithstanding this testimony, the Circuit Court refused to instruct the jury that profit is noncompensable under West Virginia law.

2. The Circuit Court erred in its exclusion of the testimony of Petitioner's expert witness, Tom Gray, regarding his valuation of Beacon's leasehold interest, for the following reasons: The objection to Mr. Gray's testimony which was sustained by the Circuit Court was untimely. Beacon's counsel failed to articulate a basis for its objection to which DOH could respond. The Circuit Court failed to conduct a WVRE 103 balancing test before excluding Tom Gray's expert opinions. To the extent that a hearsay objection may be inferred from the record, the Circuit Court failed to conduct a WVRE 703 hearing prior to excluding Tom Gray's expert opinions. The applicable standard of review is impossible to determine from the record, thus demonstrating the Circuit Court's abuse of its discretion in excluding Tom Gray's expert opinions.

DOH requests that the Circuit Court's denial of a new trial be reversed and that the case be remanded to the Tucker County Circuit Court with directions consistent with the position of DOH as set forth herein.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The instant appeal involves assignments of error in the application of settled law and the unsustainable exercise of discretion where the law governing that discretion is settled. Therefore, the DOH submits that oral argument is appropriate under Rule 19 of the West Virginia Rules of Appellate Procedure.

V. ARGUMENT

Assignments of Error

1. **The Circuit Court erred in its refusal to give Petitioner's proposed jury instruction no. 8, which necessarily allowed the jury to consider profit as a basis for just compensation.**

The issue of just compensation due Beacon Resources drove the trial,⁵ and the parties' respective witness testified to dollar amounts due Beacon which spanned a low of \$2,526,634 (Phillip Lucas) to a high of \$84 million (Jason Svanovec). Beacon's one lay and three expert witnesses offered opinions on how the construction project and the "takings" on the subject property affected the profitability of the coal mine operated thereon by lessee Beacon. This testimony translated directly into the dollars the witnesses claimed should flow into Beacon's pocket as just compensation, to-wit:

Jason Svanovec, President of Beacon Resources, Inc. – his profit margin was \$65/ton; over 1 million tons of coal remained in the leased area; his mining operations had ceased; his company was entitled to just compensation in the amount of \$27 million for the area of the take and \$57 million for damages to the residue, the residue being the area outside the take; these amounts reflect the total tonnage on the property at a 78-80% mining recovery rate, minus his mining costs of \$55 per ton. Every possible angle from which this testimony could be considered leads to the same conclusion – the jury should award him \$65 per ton of profit. (See pg. 8-9, *infra.*)

⁵ Tr. Trans., pp. 21 to 35, sets forth Western Pocahontas's and WPP's repeated efforts to be dismissed from the case due to their acceptance of the deposit by DOH upon filing of the instant condemnation action.

Pat Gallagher, P.E. and geologist - after the subject taking, the mining operation would have to operate in areas with greater overburden and would operate at a loss; the remaining coal in the residue of the leased area could not be economically mined after the taking. (See pg. 9, infra.)

Aaron J. Teets, P.E. - the construction project reduced the amount of “low overburden” coal that could be mined, causing the profitability of the remainder of the mine to be substantially reduced. (See pg. 9, infra.)

Douglas C. Wise, Certified General Real Estate Appraiser - gross profit to Beacon on the mining operation was \$64.80 a ton; just compensation for the leasehold interest, including \$23,695,000 in economic recovery [code word for “profit”] outside the Corridor H footprint and the one hundred foot buffer [the area sterilized by the construction project], was \$48,088,000. (See pg. 9, infra.)

DOH offered *“Petitioner’s Instruction No. 8 - You are instructed that in determining whether the residue of the property is damaged or injured, you may consider damage to the land, but you may not consider any lost profit or damage or injury to any business thereon, because such damages depend on contingencies too uncertain and speculative to be allowed.”* Said instruction cited Shenandoah Valley R. Co. vs. Shepherd, 26 W.Va. 672 (1885) and Gauley & Eastern R. Co. vs. Conley, 84 W.Va. 489, 100 S.E. 290 (1919) and properly set forth long-standing West Virginia law regarding the non-compensability of profit in a going concern. The Circuit Court refused to give the offered instruction, notwithstanding Beacon’s acknowledgement that lost profits are not recoverable.

Absent Petitioner's Proposed Jury Instruction No. 8 on the non-compensability of profit, the jury could not possibly differentiate between the profits earned by Beacon from the sale of coal, which are non-compensable under West Virginia law, and any compensable real property interest which existed under the terms of a leasehold interest. Only a jury instruction explaining the non-compensability of profit in a going concern, whether it be a convenience store, a laundry or a coal mine, provides the condemning authority with the opportunity to fully and completely argue its case to the jury and provides the jury with a corresponding yardstick by which to assess both the testimony and the argument. The absence of the jury instruction regarding profit left a glaring hole in the instructions as a whole and allowed Beacon free reign to ask for four (4) years of profit without Beacon having to lift a finger to actually mine coal or incur the risk always present in business operations.

The West Virginia Supreme Court of Appeals has specifically refused to allow evidence of lost business income or profits to be admitted into evidence in a condemnation proceeding. In Buckhannon & N.R. Co. v. Great Scott Coal & Coke Co., 75 W.Va. 423, 83 S.E. 1031, (W.Va. 1914), the Court held that:

“While it is competent in [eminent domain] cases to show how the property is used, as an element of value, it is incompetent to show loss of profits to the business carried on upon the property. So incidental losses or inconvenience resulting from the proper and skillful doing of the work are not proper elements of damages to be considered by commissioners or jury.” Id. at 1032.

The Court further stated that:

“Loss of profits to business, due to interruption by the building of the railroad, were too remote and speculative to be the subject of jury consideration. Besides, no data were given, no facts

or figures were furnished upon which the jury could have arrived at any just result. While it is proper to show how the property is used, as an element of value, it is incompetent to go into the question of profits, derived from the business carried on upon it. Incidental loss or inconvenience in business, resulting from removal or changes made necessary upon the taking of the property, say the books, must be borne by the owner for the sake of the general good; and are not the subject of damages in condemnation.” Id. at 1040.

Several decades later, the Court considered the matter of State, by State Road Commission v. Darnall, 129 W.Va. 159, 38 S.E.2d 663 (W.Va. 1946), and concluded that “Even in [eminent domain] cases where the question of damages, as distinguished from the right to condemn, is considered, the matters of merely possible future uses or of past or future profits from business conducted upon the property taken, are held to be irrelevant.” Id. at 161, citing Gauley & Eastern Railway Company v. C. A. Conley, et al., 84 W.Va. 489, 100 S.E. 290, 7 A.L.R. 157 and Louisiana Railway & Navigation Company v. Baton Rouge Brickyard, 136 La. 833, 67 So. 922, L.R.A.1917A, 402, 412.

The Circuit Court is obligated to formulate a jury charge which fully and completely instructs the jury on all salient legal points which may arise within the case. As recently as 2012, this Court has discussed the scope of the trial Court’s responsibility in formulating a complete and accurate jury instruction, set forth in four separate syllabus points in CSX vs. Smith.

9. “The formulation of jury instructions is within the broad discretion of a circuit court, and a circuit court’s giving of an instruction is reviewed under an abuse of discretion standard. A verdict should not be disturbed based on the formulation of the language of the jury instructions so long as the instructions given as a whole are accurate and fair to both parties.” Syllabus point 6, Tennant v. Marion Health Care Foundation, Inc., 194 W.Va. 97, 459 S.E.2d 374 (1995).

10. "A trial court's instructions to the jury must be a correct statement of the law and supported by the evidence. Jury instructions are reviewed by determining whether the charge, reviewed as a whole, sufficiently instructed the jury so they understood the issues involved and were not misled by the law. A jury instruction cannot be dissected on appeal; instead, the entire instruction is looked at when determining its accuracy. A trial court, therefore, has broad discretion in formulating its charge to the jury, so long as the charge accurately reflects the law. Deference is given to a trial court's discretion concerning the specific wording of the instruction, and the precise extent and character of any specific instruction will be reviewed only for an abuse of discretion." Syllabus point 4, State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (1995).

11. " 'It will be presumed that a trial court acted correctly in giving ... instructions to the jury, unless it appears from the record in the case that the instructions were prejudicially erroneous[.]' Syllabus Point 1, [in part,] State v. Turner, 137 W.Va. 122, 70 S.E.2d 249 (1952)." Syllabus point 1, in part, Moran v. Atha Trucking, Inc., 208 W.Va. 379, 540 S.E.2d 903 (1997).

12. "[T]he question of whether a jury was properly instructed is a question of law, and the review is *de novo*." Syllabus point 1, in part, State v. Hinkle, 200 W.Va. 280, 489 S.E.2d 257 (1996).

Syl. Pts. 9 to 12, CSX Transp., Inc. v. Smith, 729 S.E.2d 151, 229 W.Va. 316 (W.Va. 2012)

In this case, it is the absence, of course, of a critical instruction which renders the jury instructions woefully incomplete and gives rise to reversible error. The Circuit Court's failure to give Petitioner's Jury Instruction 8 represents reversible error which entitles the Petitioner to a new trial and directions to the Circuit Court to properly instruct the jury that it may not consider lost profits.

2. The Circuit Court erred in excluding the testimony of Petitioner's expert witness, Tom Gray, regarding his valuation of Beacon's leasehold interest.

DOH tendered Tom Gray as an expert witness in the field of mineral appraisal and mineral valuation, at which time Beacon objected and was overruled as follows:

“MS. DAWKINS: Your Honor, I object to the extent that he is going to attempt to testify concerning comparable - - a comparable sales approach with respect to Beacon Resources’ leasehold. He is not qualified to do that. He is not a certified appraiser within the State of West Virginia, and he quite simply can’t do it.

THE COURT: Does the law require him to be certified?

MS. DAWKINS: Your Honor, there is a certain standard that, as you know the Court is the gatekeeper with respect to the Daubert issue, and whether an expert can - -

THE COURT: Okay. I’m going to let him testify. You can explore all that on cross-examination.” (Tr. Trans., pg. 290, line 17 to pg. 291, line 4)

The objection apparently challenged Mr. Gray’s qualifications to offer opinions regarding the value of the minerals taken by DOH on the grounds that he was not a “certified appraiser within the State of West Virginia”. This objection, however, was overruled and the question of Mr. Gray’s qualifications was never expressly raised again.

The value of a leasehold interest, if any, owned by Beacon at the time of the taking represented one of the most critical issues at trial. Mr. Gray testified that, by reviewing the sales of active mines and comparing them to the sales of unpermitted coal reserves, he determined that Beacon could have obtained a price of \$1.04 per ton from the sale of its current lease. In support for the \$1.04 per ton value of the leasehold, Mr. Gray testified that, in his approach to valuing the lease, he “identified mines or mining companies that were sold in the last several years and the price per ton of those active mines and compared them to .

. . . three other sites where there was (sic) primarily reserves that were bought . . . I know that we have heard that, you know, they were, you know, newspaper articles, et cetera, or web sites, and they were. But they were reported timely. Many of them were company reports that were - - they're the ones who put out a press release saying, we bought this many tons of reserve at this price, and I used that and I compared it to." (Tr. Trans. pg. 307, line 21, line 14 to pg. 309, line 9)

At this point in Mr. Gray's testimony, the following objection was raised:

"MS. DAWKINS: Your Honor, I make my motion right now to preclude the testimony of Mr. Gray with respect to the comparable sales and the value toward to Beacon. He has already admitted that he obtained those through newspaper articles. Your Honor, this doesn't pass the - -

THE COURT: Did you receive it through anything other than press releases, Mr. Gray?

THE WITNESS: No.

THE COURT: Then I'm going to sustain the objection."

(Tr. Trans., pg. 309, lines 10-18)

At no point in the trial did Beacon state any further grounds for this objection, nor was DOH given an opportunity to respond to the objection in trial. The objection effectively excluded the remainder of Mr. Gray's testimony regarding a critical question – the value of the leasehold to Beacon Resources. The DOH lost a significant portion of its expert witness's opinions on what it contends was the only real estate value held by Beacon – a leasehold interest – and subsequently suffered a tremendous verdict against DOH, with no meaningful opportunity to respond to the objection.

The DOH submits alternatively that the objection by Beacon to Mr. Gray's testimony was not timely made; if this Court deems it timely, DOH submits it was

insufficiently specific to allow the Petitioner to adequately respond to the objection. In State vs. Day, this Court analyzed and emphasized the importance of timely and meaningful objections:

“West Virginia Rule of Evidence 103(a)(1) provides, in pertinent part, that “[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and ... [i]n case the ruling is one admitting evidence, **a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context...**” Id. (emphasis added). In interpreting the significance of Rule 103(a)(1), Justice Cleckley in his Handbook on Evidence for West Virginia Lawyers states: **“the objecting party should not benefit from an insufficient objection if the grounds asserted in a valid objection could have been obviated had the objecting party alerted the offering party to the true nature of the objection.”** 1 Franklin D. Cleckley, Handbook on Evidence for West Virginia Lawyers § 1-7(C)(2) at 78 (3rd ed. 1994); see Leftwich v. Inter-Ocean Casualty Co., 123 W.Va. 577, 585-86, 17 S.E.2d 209, 213 (1941) (Kenna, J., concurring) (“It is well established that where the objection to the admission of testimony is based upon some specified ground, the objection is then limited to that precise ground and error cannot be predicated upon the overruling of the objection, and the admission of the testimony on some other ground, since **specifying a certain ground of objection is considered a waiver of other grounds not specified.**”); 1 Jack B. Weinstein et al., Weinstein's Evidence ¶ 103[02] at 103-37 (1995) (stating that “ a specific objection made on the wrong grounds and overruled precludes a party from raising a specific objection on other, tenable grounds on appeal ”). [696 S.E.2d 322] (Emphasis added) See Finley v. Norfolk and Western Ry. Co., 208 W.Va. 276, 282, 540 S.E.2d 144, 150 (1999) (“**Only those objections or grounds of objection which were urged on the trial court, without change and without addition, will be considered on appeal.**” 4 C.J.S. Appeal and Error § 216.”)

Consistent with the requirements of Rule 103(a)(1), we have steadfastly held to the rule set forth in syllabus point 3 of Voelker v. Frederick Business Properties Co., 195 W.Va. 246, 248, 465 S.E.2d 246, 248 (1995), that “ “[i]n the exercise of its appellate jurisdiction, this Court will not decide nonjurisdictional questions which were not considered and decided by the court from which the appeal has been taken.” Syllabus Point 1, Mowery v. Hitt, 155 W.Va. 103[, 181 S.E.2d 334] (1971).’ Syl. pt. 1, Shackleford v.

Catlett, 161 W.Va. 568, 244 S.E.2d 327 (1978).” See Hartwell v. Marquez, 201 W.Va. 433, 442, 498 S.E.2d 1, 10 (1997) (“It is a well established principle that this Court will not decide nonjurisdictional questions which have not been raised in the court below.” (quoting Stonebraker v. Zinn, 169 W.Va. 259, 266, 286 S.E.2d 911, 915 (1982) (additional citations omitted)); Syl. pt. 2, Trent v. Cook, 198 W.Va. 601, 602, 482 S.E.2d 218, 219 (1996) (“[T]he Supreme Court of Appeals is limited in its authority to resolve assignments of nonjurisdictional errors to a consideration of those matters passed upon by the court below and fairly arising upon the portions of the record designated for appellate review.” Syl. Pt. 6, in part, Parker v. Knowlton Const. Co., Inc., 158 W.Va. 314, 210 S.E.2d 918 (1975).”)

State v. Day, 225 W.Va. 794, 696 S.E.2d 310 at 321 (2010) (emphasis added)

Although the passage quoted above would typically be cited by the party who unsuccessfully attempted to exclude its opponent’s evidence, Day sets forth the minimum criteria the Circuit Court should have applied before excluding the evidence of DOH’s primary expert witness. The only specific objection Beacon raised to Mr. Grays’ testimony related to his lack of an appraisal license. This objection was overruled. The second objection bears no resemblance to and cannot be deemed a renewal of Beacon’s first objection.

Beacon’s second objection to Mr. Gray’s testimony occurred at a juncture which underscores the severity of the error – past the point of Mr. Grays’ testimony that \$1.04 per ton of coal represented the value of the leasehold to Beacon, yet prior to the witness completing his testimony regarding the total amount of just compensation due Beacon for the taking effected by DOH. If the Court considered granting Beacon’s second objection, it had a duty to require Beacon to offer a complete and cognizable objection to which DOH could respond. Further, the Court should have conducted the balancing test set forth in

State vs. Day before excluding Mr. Gray's opinion on an issue which clearly involved tens of millions of dollars.

If the Court, upon hearing a reference to "newspaper articles" and "press releases", presumed that Beacon objected to Mr. Gray testifying to his reliance on these materials in support of his opinion as hearsay, the result is still reversible error. West Virginia Rule of Evidence 703 expressly permits an expert to rely on otherwise inadmissible evidence as a basis of his opinion.

"The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence." W.V.R.E. 703

"An expert witness may testify about facts he/she reasonably relied upon to form his/her opinion even though such facts would otherwise be inadmissible as hearsay if the trial court determines that the probative value of allowing such testimony to aid the jury's evaluation of the expert's opinion substantially outweighs its prejudicial effect. If a trial court admits such testimony, the jury should be instructed that the otherwise inadmissible factual evidence is not being admitted to establish the truth thereof but solely for the limited purpose of informing the jury of the basis for the expert's opinion." State vs. Kennedy, 735 S.E.2d 905, 229 W.Va. 756 (W.Va., 2012), citing Syl. Pt. 3, Doe v. Wal-Mart Stores, Inc., 210 W.Va. 664, 558 S.E.2d 663 (2001).

Before the Circuit Court took the draconian step of excluding its expert's opinion, DOH was entitled to a hearing whether the probative value of Mr. Gray's reliance on comparable sales of mineral properties, obtained through press releases from the purchasing companies, substantially outweighed the prejudicial effect of said evidence. This hearing did not occur. Rather, the witness's entire opinion regarding Beacon's leasehold interest was summarily dismissed. Had

the Court conducted the hearing and determined that Mr. Gray's opinion should have been admitted, the Court still maintained the option of giving a limiting instruction to the jury regarding the weight they should give to the comparable sales upon which Mr. Gray relied.

The sparseness of the record below makes determining the proper appellate standard of review difficult. When reviewing on appeal the exclusion of an expert witness opinion, "[t]he admissibility of testimony by an expert witness is a matter within the sound discretion of the trial court, and the trial court's decision will not be reversed unless it is clearly wrong.' Syl. pt. 6, Helmick v. Potomac Edison Co., 185 W. Va. 269, 406 S.E.2d 700 (1991). However, we have indicated, and so hold, that 'when a circuit court excludes expert testimony as unreliable under the [Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993); and Wilt v. Buracker, 191 W. Va. 39, 443 S.E.2d 196 (1993),] gatekeeper analysis, we will review the circuit court's method of conducting the analysis *de novo*.' San Francisco v. Wendy's Int'l, Inc., 221 W. Va. 734, 740, 656 S.E.2d 485, 491 (2007)". Harris vs. CSX Transp., Inc., Case No. 12-1135 at pg. 5(W.Va. 2013).

Given that the Circuit Court failed to articulate on the record a legal basis for its exclusion of a significant portion of DOH's expert's opinions, DOH submits that this Court must inevitably find abuse of discretion by the Circuit Court. A *de novo* appellate analysis of the Circuit Court's gatekeeper analysis cannot occur because no gatekeeper analysis actually happened. In other words, the absence of a clear record of the basis for Beacon's objection and the grounds upon which

the Court excluded Tom Gray's opinions does not allow for any result other than reversal of this ruling and the granting of a new trial.

The Circuit Court's exclusion of Tom Gray's testimony represents reversible error which entitles the Petitioner to a new trial.

V. CONCLUSION

The Circuit Court's failure to properly instruct the jury on how it should weigh the substantial evidence presented by Beacon on profits lost by Beacon incident to the subject condemnation requires that the Amended Judgment Order be set aside and the Order Denying Petitioner's Motion for New Trial and Respondent's Motion to Enforce Judgment be reversed, and that DOH be awarded a new trial. Further, the Circuit Court's exclusion of Tom Gray's critical expert opinions offered by the Petitioner constitutes reversible error. These issues, operating jointly and separately, entitle DOH to a new trial.

Respectfully submitted,
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CERTIFICATE OF SERVICE

The undersigned counsel for the Petitioner hereby certifies that she did serve a true copy of the attached Petitioner's Brief and Appendix Record on this the 4th day of June, 2014 to all parties by UPS or U.S. Mail to the following addresses:

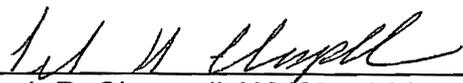
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