

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 14-0381

**THE WEST VIRGINIA DEPARTMENT
OF TRANSPORTATION, DIVISION OF
HIGHWAYS,**

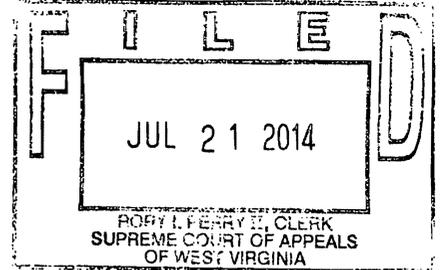
Petitioner,

v.

**WESTERN POCAHONTAS PROPERTIES, L.P.,
WWP, LLC, and
BEACON RESOURCES, INC.,**

Respondents.

**BEACON RESOURCES, INC.'S
RESPONSE TO PETITION FOR APPEAL**



Lori A. Dawkins (WV State Bar #6880)
STEPTOE & JOHNSON PLLC
600 17th Street, Suite 2300 South
Denver, Colorado 80202
(303) 389-4300
lori.dawkins@steptoe-johnson.com

Lauren K. Turner (WV State Bar #11942)
STEPTOE & JOHNSON PLLC
400 White Oaks Boulevard
Bridgeport, West Virginia 26330
(304) 933-8000
lauren.turner@steptoe-johnson.com

*Counsel for Respondent
Beacon Resources, Inc.*

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... II

STATEMENT OF THE CASE 1

STANDARD OF REVIEW 5

SUMMARY OF ARGUMENT..... 6

STATEMENT REGARDING ORAL ARGUMENT AND DECISION 7

ARGUMENT 7

I. Judge Nelson Did Not Abuse His Discretion In Excluding Mr. Gray’s
“Comparable Sales” Testimony, Which Was Based Entirely On Unverified and
Inadmissible Newspaper Articles He Found On the Internet. 7

II. Judge Nelson Did Not Abuse His Discretion In Refusing Petitioner’s Proffered
“Lost Profit” Instruction As He Properly Instructed The Jury On The Law As
Applied To The Facts Of This Case. 11

A. Judge Nelson properly refused Petitioner’s proposed instruction on the
issue of lost business profits. 12

B. The jury instructions given as a whole accurately stated the applicable law..... 17

CONCLUSION..... 21

TABLE OF AUTHORITIES

Cases

Baltimore & O. R.R. v. Bonafield's Heirs, 79
W. Va. 287, 90 S.E. 868 (1916)..... 5

Browning v. Hoffman,
90 W. Va. 568, 111 S.E. 492 (1922)..... 19

Burke-Parsons-Bowbly Corp. v. Rice,
230 W. Va. 105, 736 S.E.2d 338 (2012)..... 5

Chesapeake & O. Ry. Co. v. Johnson,
137 W. Va. 19, 69 S.E.2d 393 (1952)..... 19

Foster v. United States,
2 Cl. Ct. 426 (1983) 13, 16

Gauley & Eastern Railway Co. v. Conley,
84 W. Va. 489, 100 S.E. 290 (1919)..... 14

Harris v. CSX Transportation, Inc.,
232 W. Va. 617, 753 S.E.2d 275 (2013)..... 6

Huntington Urban Renewal Auth. v. Commercial Adjunct Co.,
161 W. Va. 360, 242 S.E.2d 562 (1978)..... 16

In re State Public Bldg. Asbestos Litig.,
193 W. Va. 119, 454 S.E.2d 413 (1994)..... 5

Lipinski v. Lynn Redevelopment Auth.,
246 N.E.2d 429 (Mass. 1969)..... 8

Michael v. Sabado,
192 W. Va. 585, 453 S.E.2d 419 (1994)..... 11

Reed v. Wimmer,
195 W. Va. 199, 465 S.E.2d 199 (1995)..... 9

Reynolds v. City Hosp.,
207 W. Va. 101, 529 S.E.2d 341 (2000)..... 5

Shanandoah Valley Railroad Co. v. Shepherd,
26 W. Va. 672 (1885) 14

<i>Snowbank Enter., Inc. v. United States</i> , 6 Cl. Ct. 476 (1984)	16
<i>State ex rel. Cooper v. Caperton</i> , 196 W. Va. 208, 470 S.E.2d 162 (1996).....	11
<i>State Road Comm'n v. Bd. of Park Comm'rs</i> , 154 W. Va. 159, 173 S.E.2d 919 (1970).....	17
<i>State v. Bishop</i> , 800 N.E.2d 918 (Ind. 2003)	15
<i>State v. Jones</i> , 363 N.E.2d 1018 (Ind. App. 1977)	15
<i>State v. Miller</i> , 175 W. Va. 616, 336 S.E.2d 910 (1985).....	7
<i>Strouds Creek & Muddlety R.R. Co. v. Herold</i> , 131 W. Va. 45, 45 S.E.2d 513 (1947).....	18
<i>Taylor v. Cabell-Huntington Hosp., Inc.</i> , 208 W. Va. 128, 538 S.E.2d 719 (2000).....	6
<i>Tennant v. Marion Health Care Found. Inc.</i> , 194 W. Va. 97, 459 S.E.2d 374 (1995).....	5, 11
<i>Torrence v. Kusminsky</i> , 185 W. Va. 734, 408 S.E.2d 684 (1991).....	19
<i>United States v. 8.34 Acres of Land</i> , No. Civ. A. 04-5-D-MJ, 2006 WL 6860387 (M.D. La. June 12, 2006).....	16
<i>United States v. Alderson</i> , 49 F. Supp. 673 (S.D.W. Va. 1943).....	3
<i>United States v. Atomic Fuel Coal Co.</i> , 383 F.2d 1 (4th Cir. 1967)	3
<i>United States v. Tampa Bay Garden Apartments, Inc.</i> , 294 F.2d 598 (5th Cir. 1961)	16
<i>W. Va. Dep't of Highways v. Bellomy</i> , 169 W. Va. 791, 289 S.E.2d 511 (1982).....	8, 10
<i>W. Va. Dep't of Highways v. Berwind Land Co.</i> , 167 W. Va. 726, 280 S.E.2d 609 (1981).....	17, 18, 19, 20

<i>W. Va. Dep't of Highways v. Brumsfield</i> , 170 W. Va. 677, 295 S.E.2d 917 (1982).....	5, 7
<i>W. Va. Dep't of Highways v. Roda</i> , 177 W. Va. 383, 352 S.E.2d 134 (1986).....	17
<i>Whitney Benefits, Inc v. United States</i> , 18 Cl. Ct. 394 (1989)	13, 16
Statutes	
W. Va. R. Evid. 703	8

STATEMENT OF THE CASE

This case involves the taking by the Petitioner, the West Virginia Division of Highways, of real property located in Tucker County owned by Western Pocahontas Properties, L.P. (“WPP”), which was under lease to Beacon Resources, Inc. (“Beacon”) on the date of take. *See* App. vol. II, 88. The Petitioner, through its power of eminent domain, routed a portion of Corridor H directly through Beacon’s active surface coal mine, effectively thwarting Beacon’s ability to continue mining operations on its leasehold property. Indeed, as a result of the condemnation, Beacon was forced to cease its mining operation and close its active surface mine on July 25, 2012.

As explained in detail below, throughout these proceedings, the Petitioner has treated the subject property as if it were “coal reserve” property instead of property that was an active surface mine. The Petitioner has taken the position that it is only required to provide just compensation to WPP in the amount of 8% of the value of the coal (which is WPP’s royalty rate pursuant to the terms of the lease between Beacon and WPP). The Petitioner ignored the remaining 92% value of the coal and Beacon’s active coal mine. After hearing the evidence and weighing the testimony presented by Petitioner, Beacon, and WPP, the jury in the trial of this matter disagreed with the Petitioner and awarded \$24 million to Beacon and WPP.

The evidence adduced at trial was that pursuant to the terms of the Aggregate Mining Lease Agreement between WPP and Beacon, Beacon had the right to extract and sell coal and WPP was entitled to an 8% royalty on the sale of the coal. Trial Tr. 119:18–120:2. The Lease covered both the surface and the minerals corresponding with those designated and described as “Parcel 1-5” in the petition filed with the Circuit Court of Tucker County on April 19, 2012. App. vol. II, 5. Of the 187 acres leased to Beacon, 179 acres were permitted and shown by scientific drilling and testing to contain extensive quantities of recoverable coal. Trial

Tr. 123:16–20, 202:20–203:7. *See also* App. vol. II, 38. It is undisputed that significant minerals underlying Parcel 1-5 were capable of being commercially mined and, in fact, Beacon began actively surface mining Parcel 1-5 in 2011. Trial Tr. 123:13–15. *See also* App. vol. II, 22, 25, 50.

After Beacon had commenced its mining operations, Beacon learned through WPP that Petitioner intended to execute a taking for public use in connection with West Virginia’s Corridor H project, and that Parcel 1-5, which was being actively mined by Beacon, was one of the parcels included in the taking. *See* App. vol. II, 5. Beacon discovered that Petitioner had engaged in negotiations with WPP regarding just compensation, but had not included Beacon, as lessee of Parcel 1-5, in these discussions. *Id.* Beacon notified Petitioner that, under West Virginia law and the terms of the Lease, it was entitled to just compensation for its leasehold interest in Parcel 1-5. *Id.*

Petitioner filed its petition for condemnation and determination of just compensation in the Tucker County Circuit Court on April 19, 2012. *Id.* In its petition, Petitioner named WPP and the Tucker County Sheriff/Treasurer as parties and respondents with interests in the designated land parcels, but failed to properly include Beacon in the action. *Id.* Beacon filed a motion to intervene as a party to the action on May 9, 2012, which motion was properly granted. *Id.* at 6.

On July 25, 2012, the Honorable Lynn A. Nelson entered an Order Separating Parcel 1-5 from Pending Actions and an Order Vesting Defensible Title. *See* App. vol. I, 39–41. On or about July 25, 2012, Petitioner deposited with the Clerk of Court the sum of \$6,613,100.00 as the purported value of Parcel 1-5. *See id.* at 42–43; App. vol. II, 6. Petitioner’s appraised value of the minerals within the take area totaled \$5,753,059.00 and was based on the eight percent

royalty rate (which is WPP's royalty rate pursuant to the terms of the lease between Beacon and WPP). *See* App. vol. II, 38, 63. Beacon took exception to Petitioner's estimate of just compensation because the amount deposited into court did not include just compensation for Beacon's leasehold interest. *See id.* at 6.

Beacon subsequently filed a motion *in limine* seeking to preclude Petitioner from arguing to the jury that Beacon's leasehold interest was subordinate to or derivative of the rights of WPP. *See* App. vol. II, 1. In granting Beacon's motion, Judge Nelson held that under West Virginia law,¹

Beacon Resources has an absolute right to compensation from the WVDOH for the fair market of its *lease* with Western Pocahontas. WVDOH is prohibited from arguing to the jury that Beacon Resources rights or interests under its lease are subordinate to or derive from those of its lessor Western Pocahontas.

Id. at 90–91.

Prior to trial, Beacon filed a motion seeking the exclusion of the valuation testimony of Petitioner's proffered expert witnesses, Thomas A. Gray and Phillip Lucas, in its entirety. *See Id.* at 97. With regard to Mr. Gray, Beacon urged the circuit court to preclude Mr. Gray from offering "comparable sales" testimony at trial. *See id.* at 102–104. As explained in Beacon's motion, Mr. Gray's "comparable sales" testimony was not based on scientific, technical or specialized knowledge because it was based entirely on unverified internet newspaper articles

¹ As noted by Judge Nelson, West Virginia Code Section 37-6-29 expressly provides that "The foregoing provisions shall not affect or impair any right which a tenant of land may have to compensation from the person exercising the right of eminent domain, for the **value of his lease**, or other property upon the leases premises belonging to him, or in which he may have an interest, if such value shall exceed the amount of rent from the payment of which he is relieved by virtue of the provisions of this section." *See* App. vol. II, 90. Judge Nelson, citing to *United States v. Atomic Fuel Coal Co.*, 383 F.2d 1 (4th Cir. 1967), held that "where a condemned property is a coal mine under lease to a mining company, the mining company is entitled to the value of the lease." *Id.* *See also United States v. Alderson*, 49 F. Supp. 673, 675 (S.D.W. Va. 1943) (noting that where land subject to a mineral lease is taken by condemnation, the lessee and lessor are entitled to just compensation for their respective interests). Petitioner does not challenge this ruling on appeal.

which could have been obtained by anyone with a computer. *See id.* Not only was Mr. Gray's valuation testimony based entirely on inadmissible and incompetent evidence, but Mr. Gray is an Engineer by profession (not a certified appraiser) and his use of a flawed methodology failed to produce a credible and reliable opinion of value. *See id.* Petitioner had an opportunity to respond to Beacon's motion *in limine* and did, in fact, submit a brief setting forth its response to Beacon's motion. *See App. vol. I, Dkt. Sheet.* In Petitioner's Response to Respondent Beacon Resources, Inc.'s Motion *in Limine* to Exclude Engineer Testimony on Appraisal Issues, Petitioner represented to the court that Mr. Gray relied "in small part on information obtained from the internet." *See id.* Based on Petitioners' representations that Mr. Gray's opinion on the issue of the value of Beacon's leasehold was formulated based on relevant and reliable sources other than unverified internet articles, Judge Nelson initially denied Beacon's motion and permitted the Petitioner to present Mr. Gray's testimony at trial.

The trial of this case went forward on July 16, 2013. The only issue for the jury to decide was the amount of just compensation due to WPP and Beacon for the taking of Parcel 1-5, including the amount of just compensation due to Beacon for its leasehold interest. *See Trial Tr. 62:10–19.* Following opening statements of counsel, the jury viewed the subject property. *See App. vol. I, 50.* Testimonial evidence was heard by the jury (*see id.*) and at the close of all evidence, the jury presented its verdict:

We the jury in the above styled action award the sum of \$24,000,000.00 to respondents Western Pocahontas Properties Limited Partnership, WPP, LLC, and Beacon Resources, Inc., as just compensation for them for the mineral interests acquired by petitioner in this matter, which sum includes damages to the residue.

Id. at 50–51. The jury's verdict was within the limits of damages testified to by the witnesses.

Petitioner filed its motion for new trial on August 13, 2013. *See App. vol. I, 48–49.*

Beacon filed its response in opposition to Petitioner’s motion on August 23, 2013. *See id.* at Dkt. Sheet. *See also* App. vol. II, 122–131. A hearing was held on Petitioner’s motion on August 27, 2013. *See* App. vol. I, Dkt. Sheet. Upon consideration of the briefs of the parties and oral argument of counsel, Judge Nelson denied Petitioner’s Motion for New Trial. *See id.* at 55–60. Petitioner now appeals. *See* Pet’r’s Br. 5.

STANDARD OF REVIEW

All of Petitioner’s assignments of error are reviewed by this Court for abuse of discretion. This Court has consistently held that it reviews a circuit court’s ruling on a motion for a new trial under an abuse of discretion standard.” *See Burke-Parsons-Bowbly Corp. v. Rice*, 230 W. Va. 105, 736 S.E.2d 338 (2012); *Tennant v. Marion Health Care Found. Inc.*, 194 W. Va. 97, 104, 459 S.E.2d 374, 381 (1995). As acknowledged by this Court, a motion for new trial “invokes the sound discretion of the trial court, and appellate review of its ruling is quite limited.” *In re State Public Bldg. Asbestos Litig.*, 193 W. Va. 119, 124, 454 S.E.2d 413, 418 (1994). This holds particularly true in condemnation proceedings. *See* Syl. Pt. 8, *Baltimore & O. R.R. v. Bonafield’s Heirs*, 79 W. Va. 287, 90 S.E. 868 (1916) (“Courts rarely disturb the verdict of juries in condemnation proceedings, if founded upon any reasonable view of conflicting evidence as to what amount is just compensation to the land owner.”).

Likewise, this Court has expressly held that “the question of the admissibility of particular comparable sales rests within the sound discretion of the trial judge.” *W. Va. Dep’t of Highways v. Brumsfield*, 170 W. Va. 677, 679 n.2, 295 S.E.2d 917, 920 n.2 (1982).

Furthermore, this Court has repeatedly held that a trial court’s refusal to give a requested jury instruction is reviewed for abuse of discretion. Syl. Pt. 1, *Reynolds v. City Hosp.*, 207 W. Va. 101, 529 S.E.2d 341 (2000); Syl. Pt. 5, *Taylor v. Cabell-Huntington Hosp., Inc.*, 208 W. Va.

128, 538 S.E.2d 719 (2000). Therefore, this Court should review each of Petitioner's assignments of error under an abuse of discretion standard of review.²

SUMMARY OF ARGUMENT

This petition for appeal follows a three-day jury trial in which the jury awarded Respondents the sum of \$24,000,000.00 as just compensation for their property interests condemned by Petitioner. Petitioner contests Judge Nelson's evidentiary ruling which limited the scope of Petitioner's expert testimony to exclude certain valuation testimony based entirely on inadmissible and unverified internet newspaper articles. Petitioner also assigns as error Judge Nelson's refusal to give one of its proffered jury instructions on the issue of lost business profits.

As detailed below, Judge Nelson did not abuse his discretion by limiting the scope of Petitioner's expert testimony to exclude incompetent "comparable sales" based entirely on unverified newspaper articles. Petitioner was fully apprised of the basis for the exclusion of a portion of Mr. Gray's testimony because the issue had been fully briefed and argued by Beacon and Petitioner prior to trial. Moreover, Judge Nelson did not abuse his discretion in properly refusing Petitioner's proffered jury instruction on the issue of lost business profits because the law relied upon by Petitioner in support of its proffered instruction is not applicable where, as here, income is derived from the intrinsic nature of the property condemned (coal) and not from the business conducted on the property. Moreover, the only certified appraiser who testified at the trial of this matter specifically excluded entrepreneurial profits from his calculations of just compensation due to Beacon for the taking of its leasehold interest. Additionally, the jury instructions given by Judge Nelson fully instructed the jury on the applicable law as applied to

² Petitioner's reliance on *Harris v. CSX Transportation, Inc.*, 232 W. Va. 617, 753 S.E.2d 275 (2013), is misplaced as the "gatekeeper" function applies to expert testimony based upon novel scientific theories.

the facts of this case. Petitioner has presented this Court with no legally sufficient basis to disturb the jury verdict. Accordingly, this Court should affirm the judgment of the circuit court in all respects.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

In accordance with West Virginia Rule of Civil Procedure 18(a), oral argument is not necessary on this appeal. The facts and arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument. In addition, this appeal is appropriate for disposition by memorandum decision under the criteria of West Virginia Rule of Appellate Procedure 21(c) because there is no prejudicial error.

ARGUMENT

I. Judge Nelson Did Not Abuse His Discretion In Excluding Mr. Gray’s “Comparable Sales” Testimony, Which Was Based Entirely On Unverified and Inadmissible Newspaper Articles He Found On the Internet.

Petitioner contends that Judge Nelson erred in excluding Mr. Gray’s testimony regarding his valuation of Beacon’s leasehold interest. As explained below, Judge Nelson did not abuse his discretion in limiting the scope of Mr. Gray’s testimony, which was based entirely on unverified newspaper articles from the internet.³

It is a well-settled rule that “[r]ulings on the admissibility of evidence are largely within a trial court’s sound discretion and should not be disturbed unless there has been an abuse of discretion.” *See, e.g.,* Syl. Pt. 7, *State v. Miller*, 175 W. Va. 616, 336 S.E.2d 910 (1985). In the context of a condemnation proceeding, this Court has expressly held that “the question of the admissibility of particular comparable sales rests within the sound discretion of the trial judge.” *W. Va. Dep’t of Highways v. Brumsfield*, 170 W. Va. 677, 679 n.2, 295 S.E.2d 917, 920 n.2

³ Notably, Mr. Gray was not precluded from testifying at the trial of this matter. Mr. Gray was permitted to, and did, offer testimony on issues other than comparable sales.

(1982) (“We recognize, as we did in *West Virginia Department of Highways v. Mountain, Inc.*, *supra*, and other cases, that the question of the admissibility of particular comparable sales rests within the sound discretion of the trial judge.”). Moreover, this Court has held that “a witness qualified to give his opinion on the value of the land involved in condemnation proceedings cannot use inadmissible facts to support his opinion.” *W. Va. Dep’t of Highways v. Bellomy*, 169 W. Va. 791, 793, 289 S.E.2d 511, 512 (1982).⁴ Where, as here, “there is no substantiating evidence to fortify the opinion or if the elements considered by the witness in reaching his opinion are irrelevant, speculative and conjectural, or otherwise incompetent, the opinion should be excluded.”⁵ *Id.* (citing *Lipinski v. Lynn Redevelopment Auth.*, 246 N.E.2d 429 (Mass. 1969) (“[T]he rule is that where it is demonstrated during the testimony of an expert witness that his opinion rests wholly upon reasons which are legally incompetent, there is no right to have his opinion considered in evidence.”)).

Here, the information upon which Mr. Gray based his valuation opinion could have been obtained by anyone with a computer and a motivation to conduct an internet based search using an online search engine. Contrary to Petitioner’s representation to the circuit court that Mr. Gray relied “in small part on information obtained from the internet,” Mr. Gray admitted in both his deposition⁶ and in trial testimony (*in response to a direct question by the court*) that his opinion

⁴ Not only has this Court explicitly held that a “a witness qualified to give his opinion on the value of the land involved in condemnation proceedings cannot use inadmissible facts to support his opinion,” but even if unverified newspaper articles were a proper basis for an expert opinion, Petitioner did not proffer any evidence whatsoever tending to establish that unverified newspaper articles are of the type “reasonably relied upon by experts in the [valuation or appraisal] field.” *W. Va. R. Evid.* 703.

⁵ This is precisely the reason for Judge Nelson’s refusal to permit Mr. Gray’s testimony on the limited issue of comparable sales. *See App. vol. I*, 58 (“Finding that the opinion itself was based on incompetent evidence, the Court refused to allow the testimony as to his valuation of the take using the comparable approach.”).

⁶ *See App. vol. II*, at Gray Dep. 34:24–35:1, Apr. 19, 2013 (“I don’t know anymore than what’s in the article.”).

was based *entirely* on unverified internet newspaper articles. At trial, Mr. Gray testified about his “approach” to valuing Beacon’s leasehold interest utilizing “comparable sales” on direct examination as follows:

So the approach I took was I 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 - - there was three other sites where there was primarily reserves that were brought. So the reserves - - these are actual projects. *I know we have heard that, you know, they were, you know, newspaper articles, et cetera, or websites, 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 reserves at this price, and I used that and I compared it to. And it was \$1.04 per ton. . . .

Trial Tr. 308:14–309:1 (emphasis supplied). At that time counsel for Beacon timely⁷ renewed its motion *in limine*:

MS. DAWKINS: Your Honor, I make *my motion*⁸ right now to preclude the testimony of Mr. Gray with respect to the comparable sales and the value toward Beacon. He has already admitted that he obtained those through newspaper articles. Your Honor - - this doesn’t pass the - -

⁷ Even if this Court were to determine that Petitioner’s reliance of West Virginia Rule of Evidence 103(a)(1) is proper, Petitioner’s argument that Beacon’s motion was not timely is baseless. An objection made contemporaneously with the evidence believed to be of a prejudicial nature provides the court with an opportunity to rule on the admissibility of the evidence and is therefore timely. *See Reed v. Wimmer*, 195 W. Va. 199, 201 n.4, 465 S.E.2d 199, 201 n.4 (1995). As Beacon renewed its motion *in limine* immediately after Mr. Gray began to offer his “comparable sales” testimony, the objection was timely. Moreover, this argument was not asserted by Petitioner in its post-trial motion and was therefore waived. Accordingly, Petitioner’s assertion that Beacon’s objection was not timely must be rejected.

⁸ Petitioner’s argument that Respondent’s objection was not sufficiently specific is flawed because a party is not required to restate the entire basis for its motion *in limine* when renewing such motion. Moreover, the circuit court judge and counsel were fully aware of the basis for the motion *in limine* as the issue was fully briefed and argued prior to trial. *See* App. vol I, Dkt. Sheet. Petitioner’s reliance on West Virginia Rule of Evidence 103(a)(1) and *State v. Day* is similarly unfounded. Petitioner contends that Rule 103(a)(1) and *State v. Day*, a criminal case discussing Rule 103, “set forth the minimum criteria to apply before excluding evidence.” Pet’r’s Br. 24. This proposition, however, is not stated or even implied by Rule 103(a)(1) or *Day*. Rule 103(a)(1) sets forth the criteria for preserving a ruling on the *admission* of evidence for appeal. Because Petitioner is not contending that evidence was improperly admitted, Rule 103(a)(1) is irrelevant.

Trial Tr. 309:10–14 (emphasis supplied). The motion to which Ms. Dawkins was referring was Beacon’s motion *in limine* seeking to exclude Mr. Gray’s unverified and incompetent “comparable sales” testimony, which was based entirely on unverified internet newspaper articles. *See* App. vol I, Dkt. Sheet; *see also* App. vol. II, 97. This motion was fully briefed by Petitioner and Beacon and argued to the circuit court on April 24, 2013. For Petitioner to now argue that it was unaware of the basis upon which Judge Nelson excluded this portion of Mr. Gray’s testimony is disingenuous.

In response to direct questioning by Judge Nelson, Mr. Gray confirmed that his opinion regarding “comparable sales” was based *entirely* on unverified press releases:

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.

Trial Tr. 309:15–18. This testimony was contrary to Petitioner’s prior written and oral representations made to Judge Nelson during the prior briefing and argument of Beacon’s motion *in limine* wherein Petitioner represented to Judge Nelson that Mr. Gray’s testimony was based “in small part on information obtained from the internet.” Moreover, Mr. Gray’s testimony confirmed that his “comparable sales” were based entirely on incompetent evidence. Accordingly, it would have been error for Judge Nelson to permit Mr. Gray to proceed with his “comparable sales” testimony. *See Bellomy*, 169 W. Va. at 793, 289 S.E.2d at 512 (“If there is no substantiating evidence to fortify the opinion or if the elements considered by the witness in reaching his opinion are irrelevant, speculative and conjectural, or otherwise incompetent, the opinion should be excluded.”). Accordingly, Judge Nelson did not abuse his discretion in precluding Mr. Gray from offering incompetent “comparable sales” testimony.

Petitioner’s assertion that “[h]ad 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” lacks any legal support whatsoever.⁹ Pet’r’s Br. 25–26. Petitioner has not cited any authority in support of this position. This Court has acknowledged that it is not the responsibility of a trial judge to exclude or limit testimony absent a party’s timely request for the judge to do so. *See Tennant*, 194 W. Va. at 114, 459 S.E.2d at 391.

For the reasons set forth above, Judge Nelson’s exclusion of Mr. Gray’s unverified and incompetent comparable sales testimony was proper and Judge Nelson’s discretion should not be disturbed.¹⁰

II. Judge Nelson Did Not Abuse His Discretion In Refusing Petitioner’s Proffered “Lost Profit” Instruction As He Properly Instructed The Jury On The Law As Applied To The Facts Of This Case.

On appeal, the question of whether a jury has been properly instructed is to be determined not upon consideration of a single paragraph, sentence, phrase, or word, but upon the charge as a whole. *See* Syl. Pt. 6, *Michael v. Sabado*, 192 W. Va. 585, 453 S.E.2d 419 (1994). As explained below, the jury instructions, as given, properly instructed the jury on the applicable law.

⁹ Equally without merit is Petitioner’s contention that it was entitled to a hearing. Pet’r’s Br. 25 (stating without any citation to legal authority that “DOH was entitled to a hearing”). Moreover, at no time did Petitioner request any such hearing.

¹⁰ Moreover, Petitioner’s failure to object to the exclusion of Mr. Gray’s “comparable sales” testimony precludes the review of Judge Nelson’s evidentiary ruling on appeal. As repeatedly acknowledged by this Court, “preserving error is the responsibility of the parties.” *See Tennant v. Marion Health Care Found.*, 194 W. Va. 97, 114, 459 S.E.2d 374, 391 (1995). To preserve an issue for appeal, a party must articulate the claimed defect to the circuit court. *State ex rel. Cooper v. Caperton*, 196 W. Va. 208, 216, 470 S.E.2d 162, 170 (1996). In the present case, Petitioner did not articulate *any* objection to the exclusion of Mr. Gray’s “comparable sales.” Because Petitioner made no attempt whatsoever to alert Judge Nelson to the nature of the alleged defect in his evidentiary ruling, Petitioner is precluded from raising the issue on appeal. *See Tennant*, 194 W. Va. at 114, 459 S.E.2d at 391 (“Simply stated, [a party] cannot ‘squirrel’ away objections, revealing them for the first time after an adverse verdict.”).

Petitioner's proposed Instruction No. 8 was properly rejected because the case law relied upon by Petitioner in support of its proffered instruction is not applicable where, as here, income is derived from the intrinsic nature of the property condemned (coal) and not from the business conducted on the property.

Moreover, Petitioner has expressly acknowledged that the income approach is a proper method of valuation,¹¹ and Petitioner's original estimate of just compensation was based entirely on income calculations. *See App. vol. II, 32–33, 63* (utilizing the contract price of \$120.00 per ton of coal and the eight percent royalty rate pursuant to the lease to estimate just compensation). *See also* Pet'r's Br. 12 (noting that its own expert, Phillip Lucas, "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").

A. Judge Nelson properly refused Petitioner's proposed instruction on the issue of lost business profits.

Petitioner's contention that Judge Nelson's refusal to give its proposed Instruction No. 8 impermissibly allowed the jury to consider profit testimony as the basis for just compensation is without merit. As explained below and in Beacon's pre-trial objection to Petitioner's proposed instruction,¹² the jury instruction was not relevant to the facts, evidence, and law in this case. The proffered jury instruction which Judge Nelson properly rejected is as follows:

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

¹¹ *See App. vol. II, 12, 14, 16* (acknowledging that the income approach is an "established appraisal and valuation technique").

¹² *See App. vol. II, 115–116.*

to businesses thereon, because such damages depend on contingencies too uncertain and speculative to be allowed.

Shenandoah Valley R. Co. v. Shepherd, 26 W. Va. 672 (1885);
Gauley & Eastern R. Co. v. Conley, 84 W. Va. 489, 100 S.E. 290
(1919)[.]

App. vol. I, 44.

As Judge Nelson properly acknowledged, Beacon did not seek nor was it awarded lost profits or damage to its business; it was properly awarded the value of the property taken (coal) “which is measured by the dollar amount for which they could sell it.” *Whitney Benefits, Inc v. United States*, 18 Cl. Ct. 394, 409 (1989). In ascertaining just compensation, courts have recognized that the whole mineral estate is comprised of two parts: (1) the royalty interest, and (2) the operator’s interest. *See, e.g., Foster v. United States*, 2 Cl. Ct. 426, 448 (1983). In discussing the two components, the *Foster* court explained:

A royalty interest is an interest of a passive landowner-lessor or of an inactive lessee; an operator’s interest is the interest of a person with the right, capital, and ability to develop, produce and sell the mineral.

Id. (citations omitted). Courts have recognized that

the operator’s interest in a mineral estate has a different function than as a measure of an operator’s profit. The operator’s interest is a separate right to produce and sell the mineral. When bought and sold on the open market it commands a price that represents a present value, measured by an estimate of what can be earned by exercise of the right. The value placed on an operator’s interest is not compensation for the consequential damages of lost future profits; it is compensation for the taking of an interest in real property.

Foster, 2 Cl. Ct. at 448–49. *See also Whitney Benefits, Inc.*, 18 Cl. Ct. at 409 (“Simply stated, an operator’s interest in a mineral estate is a compensable property interest.”).

Judge Nelson did not abuse his discretion in rejecting Petitioner’s proffered “lost profit” instruction because the cases relied upon by Petitioner in support of its instruction are

inapplicable to the facts of this case. As noted by Judge Nelson, Petitioner’s reliance on *Gauley & Eastern Railway Co. v. Conley*, 84 W. Va. 489, 100 S.E. 290 (1919), and *Shanandoah Valley Railroad Co. v. Shepherd*, 26 W. Va. 672 (1885), is misplaced. See App. vol. I, 59–60. As explained in Beacon’s objections to Petitioner’s proposed jury instructions,¹³ in discussing lost *business* profits in *Gauley*, this Court noted that “[t]he profits derived from a business conducted upon the property are uncertain and speculative in character, because the question of profit and loss, or the amount of profit, in any event, depends more upon the capital invested, general business conditions, and the trading skill and capacity of the person conducting it, than it does upon the location of the place of business.” 100 S.E. at 291. Here, however, the property itself (coal), and thus its location, is the business. See Trial Tr. 391:11–21. Similarly, in *Shanandoah*, this Court held that any injury to defendant’s milling business from increased competition by the railroad was “not an injury to the land but to the business, which is or *may* be transacted upon the land.” 26 W. Va. at 681. In the instant case, the damages are to the property itself as clearly the minerals cannot be extracted and sold elsewhere.

As noted by counsel for Beacon during the charge conference,¹⁴ an exception to the general rule that courts should not look to business profits as an indicator of the value of land has been recognized where, as here, the income is derived from the condemned property (coal) and not from the business conducted on the property. The assignment of error asserted by Petitioner

¹³ See App. Vol II, 115–116. Although Petitioner had ample time to respond to Beacon’s objection, Petitioner failed to do so. See Trial Tr. 391:11–392:2. In fact, following the charge conference in which the circuit court rejected the instruction, counsel for Petitioner simply requested that the court “preserve [its] objection to the denial.” Trial Tr. 392:1–2.

¹⁴ Trial Tr. 391:11-21 (“And, your Honor, Number 8 is a huge objection, with respect to the lost profit or damage. That law is not applicable. This would apply, like, if Corridor H was going through a gas station or a Sheetz and the lessee under that circumstance, they could pick up their business, move it down the street, and start again. And lost profits in that location would not be admissible. And that’s clear black letter law, and we agree with that in that circumstance. However, that is not applicable. And there’s case law here, and we’ve done a bench brief, actually, on this.”).

has been rejected by other jurisdictions in the context of mineral producing properties.¹⁵ In *State v. Jones*, the condemning authority alleged error in the trial court's refusal to give the following jury instructions:

PLAINTIFFS'S TENDERED INSTRUCTION NO. 1

You are further instructed that any evidence of the present volume of any business being conducted on the premises by any lessee is to be considered by you only for the purpose of allocating between the various defendants, the amount of their interests, if any, in your total award of damages to the defendants and that it is improper for you to consider such business profits or volume as evidence of the value of the land or any interest thereon.

PLAINTIFF'S TENDERED INSTRUCTION NO. 3

You are further instructed that future business profits, or the volume of business resulting from future operations on the property are too uncertain, remote, and speculative, to be used as the measure in establishing the market value of the land upon which the business is conducted. Neither the value of such business nor the future profits therefrom, are to be considered by you in arriving at the fair market value of the land upon which the business is conducted.

Id. at 1026. The court rejected the condemning authority's argument and held that both of the above instructions were rightfully excluded by the trial court because they incorrectly stated the law as applied to a quarrying business. Acknowledging that "there is a direct and proportional relationship between the value of quarrying lands and the value of the quarrying operation which is being conducted upon those lands," the court explained that "where income is produced by the sale of minerals or other soil materials which are an intrinsic part of the land, then the capitalization of business profits may be proper." *Id.*

¹⁵ See *State v. Bishop*, 800 N.E.2d 918, 925 (Ind. 2003) ("Income from property is an element to be considered in determining the market value of the condemned property when the income is derived from the intrinsic nature of the property itself and not from the business conducted on the property.") (quoting *State v. Jones*, 363 N.E.2d 1018 (Ind. App. 1977)). In *Bishop*, the court discussed the difference between business conducted on land, e.g., a restaurant, from a quarrying business which "derive[s] its income by processing material which is an intrinsic part of the land." *Id.* (citations omitted).

This Court has similarly acknowledged that “the revenue which a piece of property generates directly affects its fair market value under the ‘income approach’ to property appraisal.” See *Huntington Urban Renewal Auth. v. Commercial Adjunct Co.*, 161 W. Va. 360, 361, 242 S.E.2d 562, 563 (1978). As aptly stated by the court in *Whitney Benefits*, the only acceptable approach to valuing mineral interests taken in eminent domain proceedings is to estimate the anticipated income that might be derived from the sale of minerals over a period of time, and capitalize that income. 18 Cl. Ct. at 409. See also *United States v. 8.34 Acres of Land*, No. Civ. A. 04-5-D-MJ, 2006 WL 6860387, *8 (M.D. La. June 12, 2006) (refusing to exclude expert testimony utilizing the income approach to value dirt fill). Not only is this approach entirely proper,¹⁶ but contrary to Petitioner’s suggestion, the evidence presented by the only certified general appraiser explicitly excluded Beacon’s entrepreneurial profits from his appraisal calculations. See Trial Tr. 245:5–6 (“And then we took their profit off. We took the entrepreneurial profit off.”); *id.* at 248:8–9 (“We took off a 14 percent entrepreneurial adjustment.”); *id.* at 265:22–266:1 (“We took 14 percent off for an entrepreneurial profit, which equated to \$11 million profit someone could make if they invested the \$48 million to get their money over that period of time.”).

¹⁶ Petitioner’s argument that the income approach utilized by Beacon impermissibly values Beacon’s lost profits has been rejected by several courts. See, e.g., *Foster*, 2 Cl. Ct. at 448 (“The capitalization of income approach has become acceptable in recognition of situations where income producing potential is a key element for both buyer and seller in many negotiations in arriving at a fair price.”); *United States v. 47.14 Acres of Land*, 674 F.2d 722, 726 (8th Cir. 1982) (“One permissible method of estimating the value of land with mineral interests is the income capitalization method, in which the income stream from the sale of minerals over a number of years is capitalized in terms of present worth.”); *United States v. Tampa Bay Garden Apartments, Inc.*, 294 F.2d 598, 600 (5th Cir. 1961) (noting that the “capitalization of income” method is a “recognized method of appraisal” in takings cases); *Snowbank Enter., Inc. v. United States*, 6 Cl. Ct. 476, 485 (1984) (noting that under the income method, “the value of a particular piece of property is shown by calculating the present value of the income the property could be expected to generate over its useful economic life”).

As the income approach utilized by Beacon does not impermissibly value lost profits, Judge Nelson's refusal to give Petitioner's proposed Instruction No. 8 was entirely correct and was in no way an abuse of discretion.

B. The jury instructions given as a whole accurately stated the applicable law.

This Court has repeatedly acknowledged that "the primary purpose of an eminent domain proceeding is to determine the amount which the condemnor shall be required to pay the [condemnee] as just compensation for the property taken." *See, e.g., State Road Comm'n v. Bd. of Park Comm'rs*, 154 W. Va. 159, 166, 173 S.E.2d 919, 924 (1970). Accordingly, "[t]he guiding principle of just compensation is reimbursement to the [condemnee] for the property taken and [the condemnee] is entitled to be put in as good a position pecuniarily as if [the] property had not been taken." *Id.* at 167, 173 S.E.2d at 925. It is well established in this State that in an eminent domain proceeding, "the proper measure of the value of the property taken is the [condemnee's] loss, not the [condemnor's] gain." *Id.*

Generally, the measure of compensation to be awarded to one whose property interests are taken for public use in a condemnation proceeding is the fair market value of the property interests at the time of the taking. *See W. Va. Dep't of Highways v. Roda*, 177 W. Va. 383, 386, 352 S.E.2d 134, 137–38 (1986). For the purpose of determining the fair market value of property interests taken for public use

consideration should be given to every element of value which ordinarily arises in negotiations between private persons with respect to the voluntary sale and purchase of land, the use made of the land at the time . . . it is taken, its suitability for other uses, its adaptability for every useful purpose to which it may be reasonably expected to be immediately devoted, and the most advantageous uses to which it may so be applied.

W. Va. Dep't of Highways v. Berwind Land Co., 167 W. Va. 726, 733, 280 S.E.2d 609, 614 (1981) (quoting Syl. Pt. 7, in part, *Strouds Creek & Muddlety R.R. Co. v. Herold*, 131 W. Va. 45,

45 S.E.2d 513 (1947)). However, this Court has recognized that “[t]he determination of what constitutes just compensation ‘cannot be reduced to inexorable rules[.]’” *Id.* See also 4 Nichols on Eminent Domain § 12.1 (3d ed.) (“All elements of value inherent in the property merit consideration in the valuation process. Every element which affects value and which would influence a prudent purchaser should be considered. No single element, standing alone, is decisive. . . . No general rule can be inflexibly adhered to. Each case necessarily differs from all others insofar as its factual situation is concerned, and exceptional circumstances render imperative a fair degree of elasticity in application of the fundamental rule.”). This is particularly true where the factual circumstances are as unique¹⁷ as they are here.

This Court has specifically noted that when “the existence and quantity of minerals or other elements of value [underlying the condemned property] can be accurately determined, an expert witness may testify to his opinion of the value in place of one unit of that element and multiply it by the quantity of that resource present in or on the land to determine the value of the element in place.” *Berwind Land Co.*, 167 W. Va. at 742, 280 S.E.2d at 619. Thus, although the total market value of all mineable coal alone may not be considered by the jury in ascertaining just compensation, the jury may consider such evidence as a *factor* in arriving at a final award of just compensation. See *id.* at 739, 280 S.E.2d at 617. Contrary to Petitioner’s suggestion,¹⁸ Mr. Svonavec’s testimony was entirely consistent with this approach.

¹⁷ Petitioner has acknowledged that this case is “unique.” See App. vol. II, 95. Mr. Wise similarly testified that this case presented a very unique situation and that in his thirty eight years of appraisal practice he has never come across a situation in which the condemned property ran through an active coal mine. See Trial Tr. 267.

¹⁸ Notably, however, at no time did Petitioner object to this testimony which it now complains of. In fact, the “profit” testimony cited to in Petitioner’s Brief was elicited by Petitioner, through its counsel G. Alan Williams, during the cross-examination of Mr. Svonavec:

Mr. Svonavec testified based on his knowledge and experience, including prior productivity of the mine, that it was his opinion that “just compensation for in the take area is \$27 million and outside of the take area is \$57 million.” Trial Tr. 162:21–22. This opinion was based on multiple factors including the amount of royalty payments paid by Beacon (Trial Tr. 169:22–170:5, 170:24–171:1), the existence and quantity of mineable coal (Trial Tr. 148:17–22, 149:22–150:2), the market value per ton of coal on the date of take (Trial Tr. 145:8–13), extraction and production expenses (Trial Tr. 164:11–13), and the amount of coal lost during mining (Trial Tr. 163:7–17). Accordingly, Mr. Svonavec’s testimony was consistent with the factors expressly approved by this Court. *See Berwind Land Co.*, 167 W. Va. at 746, 280 S.E.2d at 621 (approving “the introduction of evidence of the separate value of the elements in or on the

[MR. WILLIAMS]: What would - - well, in this mine that you indicated previously that you had been working with low cover and high cover all combined, what was your profit margin on that coal? What was your profit per ton?

[MR. SVONAVEC]: I would need a calculator. I’d - - \$120 minus \$55.00 a ton, if you want me to figure that out.

[MR WILLIAMS]: Can we hand him a calculator, Your Honor?

[THE COURT]:It’s \$65.00.

...

[MR. WILLIAMS]: Basically your testimony is, then, that for every ton you were mining, on average, you were making \$65 a ton?

[MR. SVONAVEC]: Correct.

Trial Tr. 175:3–21. This Court had repeatedly held that “[a] party cannot complain of admission of an answer responsive to a question propounded to a witness, by himself, on cross-examination.” *See, e.g., Torrence v. Kusminsky*, 185 W. Va. 734, 408 S.E.2d 684 (1991) (quoting Syl. Pt. 13, *Browning v. Hoffman*, 90 W. Va. 568, 111 S.E. 492 (1922)). Accordingly, not only did Petitioner invite this alleged error, but evidently the jury gave Mr. Svonavec’s opinion little, if any, weight as the amount of just compensation awarded by the jury was sufficiently lower than the opinion of value testified to by Mr. Svonavec. The law is clear that “where evidence is permitted to go to the jury without any objection thereto, any error in the admission thereof will be deemed to have been waived.” *Chesapeake & O. Ry. Co. v. Johnson*, 137 W. Va. 19, 22, 69 S.E.2d 393, 395 (1952).

land when it can be shown that (1) the existence and quantity of the element of value can be accurately determined, (2) other factors, such as the expense of production and marketing, were taken into consideration in arriving at the value sought to be introduced, (3) the element is clearly significant in value, and (4) the use of the property for purposes of exploiting that element of value is not inconsistent or incompatible with the highest and best use to which the property may be put”).

This Court has expressed the need for such evidence in eminent domain proceedings:

[W]e know of no other evidence by which the jury could be properly guided in determining the value of the property than to be told the per ton value of the [mineral] as it lay, or, without this knowledge, how the jury could ever . . . reach a judgment based on anything more than guess or speculation.

Id. at 742, 280 S.E.2d at 618 (quoting *National Brick Co. v. United States*, 131 F.2d 30, 31 (D.C. Cir. 1942)).

Judge Nelson’s instructions to the jury sufficiently instructed the jury in accordance with the principles articulated above and it was entirely proper for the jury, as the trier of fact, to weigh the testimonies of all the witnesses in accordance with the law as given. *See* Trial Tr. 399–418. Accordingly, Judge Nelson did not abuse his discretion and the verdict of the jury should not be disturbed.

CONCLUSION

For the reasons discussed above, Petitioner has presented this Court with no legally sufficient basis to disturb the jury verdict. Accordingly, Beacon Resources, Inc. respectfully requests that this Court affirm the judgment of the circuit court in all respects.

Respectfully submitted this 21st day of July, 2014.

LORI A. DAWKINS BY PERMISSION
Lori A. Dawkins (WV State Bar #6880) #9210
STEPTOE & JOHNSON PLLC (LAW)
600 17th Street, Suite 2300 South
Denver, Colorado 80202
(303) 389-4300

Lauren K. Turner (WV State Bar #11942)
STEPTOE & JOHNSON PLLC
400 White Oaks Boulevard
Bridgeport, WV 26330
(304) 933-8000

*Counsel for Respondent
Beacon Resources, Inc.*

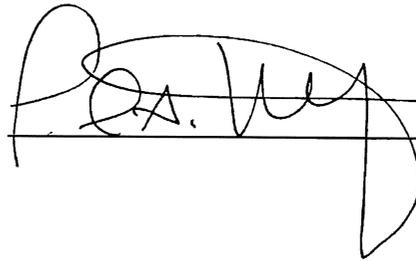
CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of July, 2014, I filed the foregoing "*Beacon Resources, Inc.'s Response to Petition for Appeal*" upon the following counsel of record, by depositing a true copy thereof, in the United States mail, postage prepaid, in envelopes addressed as follows:

Leah R. Chappell, Esquire
ADAMS, FISHER & CHAPPELL, PLLC
P.O. Box 326
Ripley, WV 25271

James Christie, Esquire
P.O. Box 1133
Bridgeport, WV 26330

David H. Wilmoth, Esquire
427 Kerens Avenue, Suite 3
P. O. Box 933
Elkins, WV 26241-0933



9210