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IN THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA

IN RE: FLOAT-SINK LITIGATION CIVIL ACTION NO. 11-C-5000000

THIS DOCUMENT APPLIES TO THE FOLLOWING CASE:

Podunavac v. American Coal Testing, Inc., et al. Civil Action No. 11-C-5230020

ORDER GRANTING DEFENDANTS BUFFALO MINING COMPANY, ELKAY MINING COMPANY, PITTSTON COAL COMPANY, PITTSTON COAL GROUP, AND PITTSTON COAL SALES COMPANY'S MOTION FOR SUMMARY JUDGMENT

On July 20, 2012, this matter came before the Court pursuant to the hearing on Defendants Buffalo Mining Company, Elkay Mining Company, Pittston Coal Company, Pittston Coal Group, and Pittston Coal Sales Company's Motion for Summary Judgment [TID 44808829]. Defendants Buffalo Mining Company, Elkay Mining Company, Pittston Coal Company, Pittston Coal Group, and Pittston Coal Sales Company were represented by counsel, Jonathan L. Anderson and Jackson Kelly PLLC. The plaintiff was represented by counsel, William A. Walsh and Weitz & Luxenberg.

The Court has considered the instant motion, all responses, arguments of counsel, and all relevant legal authority and hereby **GRANTS** the Motion for Summary Judgment based upon the following findings and conclusions:

FINDINGS OF FACT

1. In June 2010, plaintiff Sammy Podunavac brought this deliberate intent claim, alleging he suffered personal injuries as a result of chemical exposure while working at his former employers' "float sink" laboratories. [Am. Compl. ¶¶ 51, 291-96].

2. Plaintiff Podunavac was employed at Buffalo Mining Company ("Buffalo") and Elkay Mining Company ("Elkay") during periods between 1980 and 1993. [TID 42995187, Pl. S. Podunavac's Am. Fact Sheet Answers at 2(b)]. Specifically, plaintiff Podunavac was

employed with Buffalo as a coal sampler from January 24, 1980 to February 5, 1984. [S. Podunavac Personnel Record, attached as Exhibit B to Motion for Summary Judgment]. Plaintiff Podunavac was then employed as a coal sampler with Elkay from February 6, 1984 to September 2, 1986. [*Id.*]. Plaintiff Podunavac then returned to work with Buffalo from September 3, 1986 to March 31, 1993. [*Id.*].

3. Elkay's laboratory where plaintiff Podunavac's alleged "float sink" chemical exposure occurred was part of the Rum Creek Preparation Plant, which is located in Logan County, West Virginia. [Affidavit of David Fields ¶¶3-4, attached as Exhibit C to Motion for Summary Judgment]. The Rum Creek Preparation Plant and related facilities were governed by the Mine Safety and Health Administration ("MSHA"), operating under MSHA Mine ID. No. 4605086. [*Id.* ¶4].

4. Buffalo's laboratory where plaintiff Podunavac's alleged "float sink" chemical exposure occurred was part of the Lorado Tipple, which is located in Logan County, West Virginia. [*Id.* ¶5]. The Lorado Tipple and related facilities were governed by MSHA, operating under MSHA Mine ID. No. 4602140. [*Id*].

5. Throughout discovery, plaintiff Podunavac and his experts do not identify any safety rules or regulations allegedly violated by Elkay or Buffalo other than those promulgated by the Occupational Safety and Health Administration ("OSHA"), which are found in Title 29 of the Code of Federal Regulations. [TID 43668409, Am. Expert Witness Disclosure of S. Podunavac at pp.12-22].

6. Specifically, in his expert witness disclosure, plaintiff Podunavac and his experts contend Buffalo and Elkay violated the following:

> More specifically, Dr. Guth will testify that, based on information provided by Plaintiff and analyzed by Dr. Cheremisinoff,

> Plaintiff's Employers violated the following OSHA regulations: 29 C.F.R. § 1903.1; 29 C.F.R. § 1910.134; 29 C.F.R. § 1910.138; 29 C.F.R. § 1910.1000; 29 C.F.R. § 1910.1200; 29 C.F.R. § 1915.152; and 29 C.F.R. § 1915.153.

[*Id.* at p.29; *see also* S. Podunavac Am. Fact Sheet Answers at 7].

7. In terms of statutory provisions, plaintiff Podunavac and his experts contend Buffalo and Elkay violated Section 21-3-18 of the West Virginia Code:

> Dr. Guth will further testify that, beginning in 1981, float-sink lab employers were required by W.Va. Code § 21-3-18 to post a warning notice conspicuously in the work area regarding hazardous chemical, including perchloroethylene, and that such warning advise employees of the common symptoms of overexposure.
>
> Dr. Guth will testify that, based on information provided by the Plaintiff, Plaintiff's Employers violated W.Va. Code § 21-3-18 by failing to post the required warning or to do so conspicuously.

[Am. Expert Witness Disclosure of S. Podunavac at p.29].

CONCLUSIONS OF LAW

I. LEGAL STANDARD

1. Rule 56 of the West Virginia Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." W. Va. R. Civ. P. 56(c) (2012).

2. "Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." Syl. pt. 2, *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995).

3. "If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of a material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure." *Id.* at syl. pt. 3. "[T]he party opposing summary judgment must satisfy the burden of proof by offering more than a mere scintilla of evidence and must produce evidence sufficient for a reasonable jury to find in a nonmoving party's favor." *Id.* at 60, 459 S.E.2d at 337 (internal quotations and citations omitted).

II. PLAINTIFF PODUNAVAC CANNOT ESTABLISH ELKAY OR BUFFALO VIOLATED ANY SPECIFICALLY APPLICABLE SAFETY REGULATIONS OR INDUSTRY SAFETY STANDARDS WITH RESPECT TO HIS ALLEGED "FLOAT SINK" CHEMICAL EXPOSURE.

4. To succeed on a deliberate intent cause of action, a plaintiff must prove each of the five elements set forth in Section 23-4-2(d)(2)(ii)(A)-(E) of the West Virginia Code. *See* W.Va. Code § 23-4-2(d)(2)(ii)(A)-(E) (2005). If the plaintiff fails to establish a genuine issue of material fact on any one of the five statutory elements, summary judgment is mandatory:

> Notwithstanding any other provision of law or rule to the contrary, and consistent with the legislative findings of intent to promote prompt judicial resolution of issues of immunity from litigation under this chapter, the court shall dismiss the action upon motion for summary judgment if it finds, pursuant to rule 56 of the rules of civil procedure that one or more of the facts required to be proved by the provisions of subparagraphs (A) through (E), inclusive, paragraph (ii) of this subdivision do not exist . . . .

Id. § 23-4-2(d)(iii)(B).

5. The third mandatory element of a deliberate intent action is that the alleged specific unsafe working condition violated a specifically applicable safety rule, regulation, or

industry safety standard:

> (C) That the specific unsafe working condition was a violation of a state or federal safety statute, rule or regulation, whether cited or not, or of a commonly accepted and well-known safety standard within the industry or business of the employer, as demonstrated by competent evidence of written standards or guidelines which reflect a consensus safety standard in the industry or business, which statute, rule, regulation or standard was specifically applicable to the particular work and working condition involved, as contrasted with a statute, rule, regulation or standard generally requiring safe workplaces, equipment or working conditions.

Id. § 23-4-2(d)(2)(ii)(C).

6. In order to form the basis of a deliberate intent action against an employer, the alleged safety rule or regulation violated must first be capable of legal application to that employer. *See Ryan v. Clonch*, 219 W.Va. 664, 672, 639 S.E.2d 756, 764 (2006) ("We interpret W. Va.Code § 23-4-2(d)(2)(ii)(C) as simply requiring that the statute, rule, regulation or standard asserted by an employee be capable of application to the specific type of work at issue. For example, a regulation directed specifically to coal mining could not be used as a basis for establishing a violation by an employer operating exclusively in the lumber industry . . . .").

7. As set forth below, the statutory and regulatory provisions relied upon by plaintiff Podunavac and his experts have no application to Elkay and Buffalo's operations and the "float sink" laboratories in which plaintiff Podunavac worked and cannot form the basis for plaintiff Podunavac's deliberate intent cause of action against Elkay and Buffalo.

A. Elkay and Buffalo's Operations Are Governed by MSHA and OSHA Regulations Have No Legal Applicability.

(i) The OSH Act

8. The Occupational Safety and Health Act ("OSH Act"), under which OSHA was created and from which it obtains it authority, was passed in 1970. The OSH Act expressly states that it does not apply to, and thus OSHA has no jurisdiction over, working conditions regulated by other federal agencies:

> Nothing in this chapter shall apply to working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

29 U.S.C. § 653(b)(1).

9. Soon after the OSH Act was passed, there was a question as to the interpretation of the term "working conditions." Specifically, whether the term referred to particular, discrete hazards in the working place, or whether it referred to the working area in general.

10. The Fourth Circuit has adopted the latter interpretation, defining "working conditions" as "the environmental area in which an employee customarily goes about his daily tasks." *Southern Ry. v. Occupational Safety & Health Review Comm'n,* 539 F.2d 335, 339 (4th Cir. 1976). Thus, in terms of OSHA preemption, the relevant inquiry is not whether another federal agency has promulgated a specific regulation for the particular, discrete hazard involved, but whether the agency has exercised its statutory authority to regulate the working area at issue. *See id.* ("We are further of the opinion that when an agency has exercised its statutory authority to prescribe standards affecting occupational safety or health for such an area, the authority of [OSHA] in that area is foreclosed.").

11. For example, in *U.S. Air, Inc. v. Occupational Safety and Health Review Comm'n*, 689 F.2d 1191 (4th Cir. 1982), the issue was whether regulations of the Federal Aviation Administration ("FAA") preempted those of OSHA. OSHA argued that preemption only occurred when another federal agency promulgated a specific regulation dealing with the same discrete hazard. The Fourth Circuit expressly rejected such an interpretation:

> Under this construction, the valid regulations exercised by another agency, which will work a preemption of the Act, must relate both to the same "environment" and to the same "discrete hazard." An illustration of the manner in which this construction would operate is set forth by an advocate of the Commission's view in the Note, Interpreting OSHA's Pre-Emption Clause: Farmworkers as a Case Study, 128 U.Pa.L.Rev. 1509 at 1530 (1980): "... if (the other agency) adopted a regulation involving only fire alarm systems (a discrete hazard), OSHA could still enforce its own regulations concerning fire extinguishers (another discrete hazard within the same category of working conditions)." This is the same construction urged unsuccessfully upon us earlier in Southern Ry. We were unpersuaded then; we remain unpersuaded.
>
> What, in effect, the Commission posits in this connection is that if the regulation adopted and applied validly by another agency does not deal in the same way with the same "discrete hazard" in the "working environment" as does the OSHA regulation then there is no preemption. Such an argument, if accepted, would allow preemption only in those situations where the regulations of the other agency were substantially the same as those of OSHA. If this had been the intention of Congress, there would have been no point in including in the Act an exemption section. It is not necessary that the regulations of the other agency be the same or substantially the same as those of OSHA in order to meet the test provided for exemption under Section 4(b)(1); it is sufficient as we declared in Southern Ry. that the FAA regulations cover the working conditions in the specific "environmental area in which an employee customarily goes about his daily tasks."

Id. at 1193.

(ii) The Mine Act

12. In 1977, Congress passed the comprehensive Federal Mine Safety and Health Act ("Mine Act"), creating the exclusive statutory framework regulating coal mines and related operations. *See* 30 U.S.C. § 801 *et seq*. The Mine Act states, "Each coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this chapter." *Id.* § 803. The Mine Act defines "coal or other mine" broadly:

> "[C]oal or other mine" means (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities.

Id. § 802(h)(1).

13. The Mine Act was intended to provide a "sweeping definition" of the word "mine." *Donovan v. Carolina Stalite Co.,* 734 F.2d 1547, 1551 (D.C. Cir.1984). Mine Act coverage is to be given the "broadest possible" scope. *Pennsylvania Elec. Co. v. Federal Mine Safety & Health Review Comm'n*, 969 F.2 1501, 1503 (3d. Cir. 1992). For example, in *Norfolk & W. Ry. v. Director*, 5 F.3d 777 (4th Cir. 1993), the working of delivering of empty railroad cars to a preparation facility constituted the work of preparing coal. *Id.* at 780 ("We are of opinion that the delivery of empty cars to a preparation facility is integral to the process of loading coal at the preparation facility and therefore is part of coal preparation."); *see also*

Adelsberger v. Mathews, 543 F.2d 82, 84 (7th Cir. 1976) (per curiam) (holding that the work of a clerical employee responsible for the switching of grates at the tipple and for the weighing of coal "fell within the statute's broad definition of 'work of preparing the coal'"); *Roberts v. Weinberger*, 527 F.2d 600, 601-02 (4th Cir. 1975) (finding that a truck driver who hauled coal from the site of extraction to a preparation plant was employed in a coal mine within the meaning defined by the Mine Act).

(iii) The Mine Act and MSHA regulation preempts OSHA jurisdiction over coal operators.

14. The Fourth Circuit has specifically addressed whether MSHA regulation preempts OSHA jurisdiction over West Virginia coal operators. In *United Energy Serv., Inc. v. Federal Mine Safety and Health Administration*, 35 F.3d 971 (4th Cir. 1994), an independent contractor working on mine property was cited by MSHA for multiple violations. The contractor argued only OSHA, not MSHA, could exercise jurisdiction over its activities. Thus, the issue before the court was "whether MSHA has exercised its statutory authority under the Mine Act in such a way as to preempt OSHA's regulatory jurisdiction under the OSH Act." *Id.* at 977. The court held that MSHA had preempted OSHA's regulatory jurisdiction because MSHA had exercised its authority to regulate the working area at issue, *i.e.* the coal mine:

> We have interpreted "working conditions," as that term is used in section 4(b)(1), to mean "the environmental area in which an employee customarily goes about his daily tasks." *Southern Ry. v. Occupational Safety & Health Review Comm'n,* 539 F.2d 335, 339 (4th Cir.), *cert. denied,* 429 U.S. 999, 97 S.Ct. 525, 50 L.Ed.2d 609 (1976). Because MSHA has prescribed regulations addressing the area on mine property in which United Energy's employees work, MSHA has preempted OSHA's jurisdiction.

Id.

15. In response, plaintiff Podunavac does not dispute that MSHA has exercised jurisdiction over coal operators' coal testing laboratories. [*See* TID 45072820, Pl's Memo In Opposition at pp.11-12 ("Plaintiff does not disagree that MSHA provides the governing regulations for some or even many of the activities within a coal preparation plant. The regulations, however, do not fully capture all activities there."); *Id.* at Ex. D p.20 ("MSHA contains certain regulations that hold some relevance, but which largely do not overlap with OSHA regulatory requirements.")]. For example, 30 C.F.R. §71.700 sets forth the threshold limit values for exposure to gases, dust, fumes, mists, and vapors at surface facilities and worksites.

16. Plaintiff Podunavac is essentially arguing that while MSHA jurisdiction may apply to "float-sink" testing, unless MSHA has a specific regulation covering the same discrete subject matter as an OSHA regulation, then OSHA jurisdiction still applies. However, as previously stated, this argument has been rejected. *See U.S. Air,* 689 F.2d at 1193; *Southern Ry.*, 539 F.2d at 339.

17. Plaintiff Podunavac also argues that "float sink" testing does not constitute the work of preparing coal and, therefore, MSHA has no jurisdiction. [*See* Pl's Memo In Opposition at p.14 ("The testing performed in the float-sink labs does not pertain to the preparing of coal.")]. This argument is without merit.

18. It has been expressly recognized that laboratory technicians performing coal sampling/testing fall within the Mine Act. In *Amigo Smokeless Coal Co. v. Director, Office of Workers' Compensation*, 642 F.2d 68 (4th Cir. 1981), the claimant worked as a laboratory technician collecting samples of coal for processing and analysis. *Id.* at 69. The claimant would take the coal samples to the preparation room of the laboratory where the coal was crushed into

small particles and then pulverized. From there, multiple tests were run on the coal, such as for ash, sulfur, BTU, fusion, and coke buttons to determine its composition and hence its market price. *Id.* at 70. This laboratory work fell within the definition of the "work of preparing the coal" under the Mine Act. *See id.* at 70-71 ("[K]knowledge of the chemical composition and energy content of the coal was a necessary step in Amigo's preparation of the coal for sale.").

19. In *Amigo Smokeless*, the claimant was engaged in the work of preparing coal under the Mine Act because the testing and sampling conducted in the laboratory was a necessary step in the preparing of the coal for sale. Here, just as in *Amigo Smokeless*, plaintiff Podunavac does not dispute that "float sink" testing is a process for assessing the quality of the coal in preparation for sale. [*See* Pl's Memo In Opposition at p.15 (stating that the "float- sink test" is for "assessing the washability or quality of the coal that will be sold")].

20. Lastly, plaintiff Podunavac argues that OSHA has jurisdiction over "float sink" testing pursuant to a 1979 Interagency Agreement between MSHA and OSHA. This argument fails as well.

21. Paragraph (C) of the Interagency Agreement, titled "Enforcement Procedures," states:

> When MSHA receives information regarding a possible unsafe or unhealthful condition in an area for which MSHA has authority and determines that such a condition exists but that none of the Mine Act's provisions with respect to imminent danger authority or any enforceable standards issued thereunder provide an appropriate remedy, then MSHA will refer the matter to OSHA for appropriate action under the OSHAct.

[Pl's Memo In Opposition at Ex. E p.2]. Here, there is no evidence that MSHA has ever referred jurisdiction and/or enforcement responsibilities for "float sink" laboratory testing to OSHA.

22. Accordingly, the Court **FINDS** that the "float sink" analysis plaintiff Podunavac performed constitutes the work of preparing coal under the Mine Act; that MSHA has exercised regulatory jurisdiction; and that OSHA jurisdiction is, therefore, preempted.

(iv) Under applicable federal law, the OSHA regulations plaintiff Podunavac relies upon have no application to Elkay and Buffalo's operations.

23. As support for his deliberate intent claim, plaintiff Podunavac cites a litany of OSHA regulations that Elkay and Buffalo allegedly violated. Specifically, plaintiff Podunavac's expert disclosure and his fact sheet answers identify the following OSHA regulations as allegedly violated: 29 C.F.R. § 1903.1; 29 C.F.R. § 1910.134; 29 C.F.R. § 1910.138; 29 C.F.R. § 1910.1000; 29 C.F.R. § 1910.1200; 29 C.F.R. § 1915.152; and 29 C.F.R. § 1915.153. [Am. Expert Witness Disclosure of S. Podunavac at p.29; S. Podunavac Am. Fact Sheet Answers at 7].

24. However, in accordance with the above, OSHA jurisdiction is preempted with respect to Elkay and Buffalo's operations. As a result, OSHA regulations have no legal applicability and the alleged violations thereof are, as a matter of law, insufficient to satisfy plaintiff Podunavac's burden of proof under Section 23-4-2(d)(2)(ii)(C).

(v) Section 21-3-18 of the West Virginia Code Does Not Apply to Elkay and Buffalo.

25. Plaintiff Podunavac and his experts also contend Elkay and Buffalo violated Section 21-3-18 of the West Virginia Code requiring employers to post warnings concerning hazardous or toxic chemicals used in the workplace. [Am. Expert Witness Disclosure of S. Podunavac at p.29].

26. Chapter 21, Article 3 of the West Virginia Code, titled "Safety and Welfare of Employees," specifically states that it does not apply to coal-related operations. *See* W.Va. Code § 21-3-14 (1937) ("Those portions of all coal mining properties and operations which are under

the supervision of the department of mines are excepted from the operation of provisions of this article.").

27. In accordance with this, Section 21-3-18 of the Code upon which plaintiff Podunavac and his experts rely specifically exempts coal mines and coal processing facilities from its provisions. *See* W.Va. Code § 21-3-18(f) (1981) ("The provisions of this section shall not apply to any coal mine, coal mining or coal processing plant, and any agricultural or horticultural activity, and any such mine, plant or activity is hereby exempted from the provisions of this section.").

28. There can be no dispute that Elkay and Buffalo's operations are exempted from the provisions of Chapter 21, Article 3 of the Code, including Section 21-3-18, as their operations are governed by the West Virginia Office of Miners', Health Safety and Training ("WVOMHST").

29. Chapter 22A, Article 1 of the West Virginia Code, titled "Miners' Health, Safety and Training," is enforced by the WVOMHST, formerly known as the West Virginia Department of Mines. *See* W.Va. Code § 22A-1-1(b) (1994) ("The division of health, safety and training shall have as its purpose the supervision of the execution and enforcement of the provisions of this chapter and, in carrying out the aforesaid purposes, it shall give prime consideration to the protection of the safety and health of persons employed within or at the mines of this state.").

30. Chapter 22A of the Code defines the terms "mine," the "working of preparing coal," and miner co-extensively with the federal Mine Act:

> (6) Mine: The term "mine" includes the shafts, slopes, drifts or inclines connected with, or intended in the future to be connected with, excavations penetrating coal seams or strata, which excavations are ventilated by one general air current or divisions

> thereof, and connected by one general system of mine haulage over which coal may be delivered to one or more points outside the mine, and the surface structures or equipment connected or associated therewith which contribute directly or indirectly to the mining, preparation or handling of coal, or construction thereof.
>
> (7) Miner: The term "miner" means any individual working in a coal mine.
>
> ***
>
> (11) Work of preparing the coal: The term "work of preparing the coal" means the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing and loading of bituminous coal or lignite and such other work of preparing such coal as is usually done by the operator of the coal mine.

Id. § 22A-1-2(a)(6), (7), (11).

31. Just as under the federal Mine Act, Elkay and Buffalo clearly fall within the application of Chapter 22A and the jurisdiction of the WVOMHST. Pursuant to express exemptions of Sections 21-3-14 and 21-3-18(f), the latter has no application to Elkay and Buffalo. Accordingly, plaintiff Podunavac cannot rely upon an alleged violation of Section 21-3-18 as the basis for his deliberate intent claim against Elkay and Buffalo.

B. Plaintiff Podunavac Has Not Identified Any Industry Safety Standard that Satisfies the Requirements of Section 23-4-2(d)(2)(ii)(C).

32. In addition to a violation of specifically applicable safety rules or regulations, a plaintiff can satisfy Section 23-4-2(d)(2)(ii)(C) by establishing the employer violated a "commonly accepted and well-known safety standard within the industry or business of the employer, as demonstrated by competent evidence of written standards or guidelines which reflect a consensus safety standard in the industry or business . . ." W.Va. Code § 23-4-2(d)(2)(ii)(C). Just as with a safety rule or regulation, any industry safety standard alleged violated must also be specifically applicable to the working condition involved, as opposed to a

general safety standard. *See id.*

33. As the statute makes clear, the safety standard must be commonly-accepted and well-known within the industry or business of the employer, which in the case of Elkay and Buffalo is coal mining and processing. Moreover, the safety standard must be demonstrated by written standards or guidelines reflecting that it is, in fact, a consensus safety standard within the employer's industry or business.

34. For example, in *Spaulding v. Thunderhill Coal Co., Inc.*, Civil Action No. 05-C-231, Circuit Court of Boone County, the plaintiff was injured when he fell while climbing the boarding ladder of a rock truck at a surface mining operation. The plaintiff argued the employer violated a commonly-accepted and well-known industry safety standard by failing to use "bucket ropes" on its rock trucks. In making this argument, the plaintiff relied upon an MSHA "Best Practices" handout. The court rejected the plaintiff's argument and granted summary judgment in favor of the employer, holding that the handout was not documentation from the industry at issue, but a unilateral agency publication:

> [The Court] has examined the "Best Practices" handouts from the Mine Safety and Health Administration ("MSHA") and the Owner's Manual for the 777D rock truck. The Court finds however, that neither of these materials constitutes a state or federal safety statute, rule or regulation. The Court also finds that these documents are not documentation from the industry at issue, the Surface Coal Mining industry.

[Order Granting Def.'s Motion for Summary Judgment at p.7, attached as Exhibit E to Motion for Summary Judgment].

35. Here, plaintiff Podunavac does not identify any written, consensus safety standard within Elkay and Buffalo's industry or business that they allegedly violated.

36. Plaintiff's Podunavac's expert disclosure references the 1976 NIOSH "Criteria for a Recommended Standard . . . Occupational Exposure to Tetrachloroethylene."

37. It is not clear whether plaintiff Podunavac and his experts rely upon the 1976 NIOSH publication as an industry safety standard independent of any regulatory requirements, or whether it is incorporated into OSHA's regulations. For example, in plaintiff Podunavac's expert disclosures, his expert states, "Since 1971, NIOSH has been responsible for developing chemical-specific and prescriptive recommended standards for the safe handling of individual chemicals used by workers in industrial settings. These recommended technical standards become obligations under the OSHA rules." [Am. Expert Witness Disclosure of S. Podunavac at p.13; *see also id.* at p.14 ("When NIOSH recommends that workers should wear respirators when working with a particular chemical, then the employer is obligated to follow OSHA Standard 1910.134 Respiratory Protection.")].

38. If plaintiff Podunavac and his experts contend the 1976 NIOSH publication is incorporated into OSHA regulations and, as a result, a violation of the 1976 NIOSH publication is a violation of OSHA regulations, this argument fails because OSHA regulations have no applicability to Elkay and Buffalo

39. Nonetheless, to the extent plaintiff Podunavac and his experts rely upon the 1976 NIOSH publication as an industry safety standard separate and apart from OSHA regulations, this argument still fails.

40. The 1976 NIOSH publication is not a standard of any kind, but a regulatory recommendation to the Secretary of Labor pursuant to the OSH Act. Specifically, the OSH Act states:

> [I]n promulgating standards dealing with toxic materials or harmful physical agents under this subsection, [the Secretary of

> Labor] shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life. Development of standards under this subsection shall be based upon research, demonstrations, experiments, and such other information as may be appropriate.

29 U.S.C. § 655(b)(5).

41. As part of this process, NIOSH makes a recommendation to the Secretary of Labor, which the Secretary can then accept, reject, or otherwise use in the development of regulations under the OSH Act. *See, e.g., AFLCIO v. Secretary of Labor*, 617 F.2d 636, 668 n.194 (D.C. Cir. 1979) ("OSHA must consider all information made available by interested parties and experts, so determinations of NIOSH are only one factor in OSHA's deliberations."); *GAF Corp. v. Occupational Safety and Health Rev. Comm'n*, 561 F.2d. 913, 917 (D.C. Cir. 1977) ("NIOSH was created by the Act for the purpose of developing health and safety standards and recommending them to the Secretary . . . We have previously held that the Secretary is not bound by NIOSH recommendations . . . [a]nd in this case the Secretary's departure from the NIOSH recommendation is reasonable."). As the preface to the 1976 NIOSH publication itself states:

> Recommended standards for occupational exposure, which are the result of this work are based on the health effects of exposure. The Secretary of Labor will weigh these recommendations along with other considerations such as feasibility and means of implementation in developing regulatory standards.

[1976 NIOSH Recommendation at p.4, attached as Exhibit F to Motion for Summary Judgment].

42. A recommendation to the Secretary of Labor in setting regulatory, occupational exposure standards under the OSH Act does not represent an "industry" standard, much less a consensus standard within Elkay and Buffalo's industry or business.

43. Moreover, state and federal agencies make frequent recommendations and/or proposed changes to safety and health regulations. Some are adopted. Some are rejected. Some are adopted with modifications. Under plaintiff Podunavac's argument, any regulatory recommendation, regardless of whether adopted or not, could become a *de facto* "industry standard." This is clearly not the purpose of regulatory recommendations such as the 1976 NIOSH publication.

44. Accordingly, the 1976 NIOSH publication is not evidence of a consensus safety standard in Elkay and Buffalo's industry or business as required by Section 23-4-2(d)(2)(ii)(C).

CONCLUSION

WHEREFORE, based upon the foregoing findings and conclusions, Defendants Buffalo Mining Company, Elkay Mining Company, Pittston Coal Company, Pittston Coal Group, and Pittston Coal Sales Company's Motion for Summary Judgment is hereby **GRANTED**. It is hereby **ORDERED** that plaintiff Sammy Podunavac's claims against Buffalo Mining Company, Elkay Mining Company, Pittston Coal Company, Pittston Coal Group, and Pittston Coal Sales Company be and hereby are **DISMISSED** with prejudice. The Court notes and preserves the objections of any party aggrieved by this Order.

The Clerk is directed to send certified copies of this order to counsel of record and any unrepresented party.

Entered this 30th day of August, 2012.

/S/ John A. Hutchison

Honorable John A. Hutchison, Presiding Judge

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