

No. 21268 - Homer A. Eggleston, Jr., v. West Virginia Department of Highways and Greiner Engineering Sciences, Inc.

Workman, Chief Justice, dissenting:

I must dissent. The State's insurance policy clearly and unambiguously provides for "bodily injury or property damage which arises out of and occurs during the performance or [sic] construction." Thus had this accident occurred during the performance of the act of erection or placing the sign, or otherwise arose out of the performance of construction, then it would be covered under the policy.

This accident occurred during the use of this highway and the policy clearly provided this was not covered. Specifically, the policy provides that "the insurance afforded under this policy does not apply to the:

ownership, maintenance, supervision, operation, use of [sic] control of streets, including . . . highways or other public thoroughfares. . . ."

(Emphasis added). The majority, however, goes to great lengths to find coverage by interpreting the policy language "arises out of and occurs during the performance . . . [of] construction" to mean that there is coverage for a bodily injury which occurs up until the completion of the highway construction project even though no actual construction is being performed. This interpretation of the policy language was made even though this Court recently interpreted this identical language in an inconsistent manner, while indicating that it was unambiguous. Shrader v. Holland, 186 W. Va. 687, 689, 414 S.E.2d 448, 450 (1992).

As much as one's sympathies are drawn to the Plaintiff-Appellant in his quest to be recompensed for his injuries, the insurance policy simply did not cover accidents occurring in connection with the use of the highway.

This injury did not arise out of and occur during the performance of construction. While an insurer should be required to pay for a covered loss, it should not be required to pay under circumstances clearly and unambiguously not covered by the policy.