

No. 31858 – *IPI, Inc. v. Gregory A. Burton, in his capacity as Acting Commissioner, West Virginia Bureau of Employment Programs, Workers’ Compensation Division, and West Virginia Division of Transportation, Division of Highways*

FILED

July 14, 2005

released at 3:00 p.m.

RORY L. PERRY II, CLERK

**SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

Starcher, J., dissenting:

The facts of this case demonstrate, in a nutshell, why our workers’ compensation system is on financially tenuous ground. A historical problem in West Virginia has been the use by employers of “shell” corporations which are created, pay little or no workers’ compensation premiums, and then go out of business a year or two later. The Workers’ Compensation Commissioner and companies that do pay their compensation premiums are then left to foot the bill for injured workers. Shortly thereafter, the first shell corporation is replaced by another shell corporation with the same corporate officers using the same equipment and same employees to do the same work, and the cycle repeats itself endlessly.

The Legislature has tried to fix this problem. I dissent because the majority opinion undoes the Legislature’s work, and strips the Workers’ Compensation Commissioner of the statutory authority to put the workers’ compensation system back on the right financial track and make *all* employers pay their fair share.

North American, Inc. and North American Construction, Inc., were both owned equally by Joseph Morris and Matthew Taylor, and had common officers. Both companies used the same equipment, employees, business location and had the same clients. In June

1992, North American, Inc. filed an application for workers' compensation coverage stating the type of business as "putting up metal and aluminum storage buildings." In June 1996, North American Construction filed an application which stated that the type of business was "small building erection." These were both lies. Both North American companies were actually incorporated as industrial painting businesses, and had the company's owners been honest, their correct business classification would have resulted in the companies paying much higher workers compensation premiums.

In October 1997, the First National Bank of Ronceverte sued both North American companies, and Mr. Morris and Mr. Taylor individually, claiming a default had occurred on certain loans. At this point, Mr. Taylor allegedly became suspicious of Mr. Morris' activities, and upon investigation discovered the companies had serious delinquencies to the bank, the Workers' Compensation Division, the Internal Revenue Service, the Department of Tax and Revenue, and to others. Mr. Morris' and Mr. Taylor's activities also apparently came to the attention of federal investigators.

Shortly thereafter, Mr. Morris transferred enough stock to Mr. Taylor to give him an 80% share of the stock in the North American companies. Mr. Taylor asserts that at this point he calculated that the companies could not be financially salvaged, and made a decision to shut the companies down effective January 1, 1998.

Two months later, Julia Taylor, Mr. Taylor's wife, formed a new corporation called IPI, Inc., with Mrs. Taylor owning 100% of the stock and Mr. Taylor acting as president. IPI was incorporated as an industrial painting business, and had the same general

manager, foreman and office manager/bookkeeper as the North American companies. The new corporation continued to paint for the same customers. Mr. Taylor represented to an industry trade group that IPI “utilized the same employees and equipment” as North American, because North American had “ceased all business activities, and I reincorporated under the name IPI. IPI retains all personnel, equipment and projects of the former North American. IPI “leased” all of its equipment – trucks, power washers, fax machines, air compressors, safes, paint guns, trailers, etc. – from North American. However, not all of North American’s property was leased by IPI; that which was not leased remained in the physical possession of Mr. Taylor.

The record shows the financial relationships of these companies were substantially entangled, with each company agreeing to pay debts of one of the others, including IPI. All of these financial transactions were calculated to benefit Mr. Taylor. For instance, the bank won a default judgment against the North American companies and Mr. Taylor in the amount of \$463,773.00. To partially satisfy this judgment, Mr. Taylor used North American Development to sell certain North American real estate for \$125,000.00. Similarly, North American bought equipment from W.W. Graingers, but in March 1998 Mr. Taylor sent a letter to W.W. Graingers saying “North American, Inc. has been changed to IPI, Inc.,” and asking the vendor to “send us a new statement so we can clear the balance on this account.” Furthermore, IPI loaned Mr. Taylor \$25,000.00 for legal fees to defend his criminal charges related to the North American companies.

In sum, the facts show that IPI acquired substantially all of the goodwill, customers, clients, contracts, leases, operations, stock of goods, inventory, equipment and employees that existed at the time that the North American companies ceased doing business. Only the cash and outstanding accounts receivable were not transferred, because there was apparently no cash or accounts receivable in existence. The acquisition caused North American to be incapable of continuing its business.

The North American companies had racked up an \$865,486.57 delinquency to the Workers' Compensation Commissioner through their misconduct. The average citizen can see that Mr. Taylor created IPI as a way to keep doing business as usual, but to avoid responsibility for the workers' compensation delinquency and other debts. The majority opinion gives the Workers' Compensation Act a ridiculously narrow construction, finding that the phrase "substantially all" in *W.Va. Code*, 23-2-14(b) [2003] means "all" and nothing less. And because IPI was not a mirror image of the North American companies, the majority opinion determined that IPI was not a successor liable for the North American companies' workers' compensation debts.

I would have held Mr. Taylor's feet to the fire and permitted the Commissioner to extract payment for that delinquency from IPI's corporate hide. Instead, the majority opinion has dropped Mr. Taylor's \$865,000.00 debt into the lap of State taxpayers and honest, premium-paying businesses. I therefore respectfully dissent.