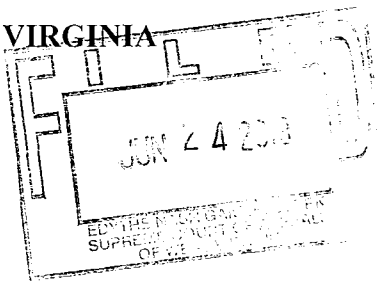
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON



SOUTHERN ENVIRONMENTAL, INC.,

Petitioner

Appeal No.: 18-1124

v.

TUCKER-STEPHEN G. BELL et. al.,

Respondents.

PETITIONER SOUTHERN ENVIRONMENTAL INC.'S REPLY BRIEF

Bradley K. Shafer (WV 7794)
MINTZER SAROWITZ ZERIS
LEDVA & MEYERS
48 Fourteenth Street, Suite 200
Wheeling, WV 26003
P: 304-241-2976 | F: 423-218-0284
bshafer@defensecounsel.com
Counsel for Petitioner
Southern Environmental, Inc.

Carl A. Frankovitch (WV 12150)
FRANKOVITCH, ANETAKIS, SIMON,
DECAPIO & PEARL, LLP
337 Penn Road
Weirton, WV 26062
P: 304-723-4400
cfrankovitch@faslaw.com
Counsel for Respondent **Bell**

Matthew R. Zwick, Esquire (WV 12169)
ZWICK & ZWICK LLP
171 Beaver Drive
PO Box 1127
DuBois, PA 15801
P: 814-371-6400
mrz@zwick-law.com
Counsel for Respondent **Bell**

J. David Bolen (WV 8783)
DINSMORE AND SHOHL, LLP
611 Third Avenue
Huntington, WV 25701
P: 304-691-8464
David.Bolen@Dinsmore.com
Counsel for Respondent
Best Flow Line Equipment, LP

Brandy D. Bell (WV 9633)
KAY CASTO & CHANEY PLLC
1085 Van Voorhis Road – Suite 100
Morgantown, WV 26505
P: 304-225-0970
bbell@kaycasto.com
Counsel for Respondent
Longview Power, LLC

Nathaniel D. Griffith (WV 11362)
PULLIN, FOWLER, FLANAGAN,
BROWN & POE, PLLC
2414 Cranberry Square
Morgantown, WV 26508
P: 304-225-2200
NGriffith@pffwv.com
Counsel for Respondent
Casagrande USA, LP

Rita Massie Biser (WV 7195)
MOORE & BISER PLLC
317 Fifth Avenue
Charleston, WV 25303
P: 304-414-2300
tshuler@moorebiserlaw.com
Counsel for Respondent
Nicholson Construction Company

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

REGULATIONS

CASES

I. Statement of Oral Argument

Petitioner requests Oral Argument in accord with Rule 20.

II. Legal Argument

The Respondents Bell, Best Flow, and Longview have filed briefs or at least summary responses in regards to the Petitioner Brief filed by Southern Environmental. All raise the same arguments.

A. This Court Does Have Jurisdiction to Hear this Appeal.

First, Respondents argue that despite the certification by the Circuit Court, the Order is not final and appealable. Southern Environmental's motion for entry of final judgment (JA 1121) was unopposed. Generally speaking, given the nature of the rulings issued by the Circuit Court, the parties agreed all matters ought to be reviewed by the Supreme Court now to avoid piecemeal appeals. As the Court has surely gleaned from the briefings, SEI's issue in regards to immunity under the Pennsylvania Workers' Compensation Act is intertwined with the other issues pending in this consolidated appeal. Furthermore, rulings involving claims of immunity are immediately appealable. *See e.g.* Hutchison v. City of Huntington, 198 W.Va. 139, 479 S.E.2d 649 (1996). SEI has claimed that it is immune from this action by virtue of Pennsylvania law. Accordingly, this Court has jurisdiction to proceed with this appeal.

B. Exclusivity of Remedies Is the Real Issue.

Second, the Respondents draw attention to the fact that it is undisputed that Bell worked more than thirty days in West Virginia and therefore he is not a "temporary" employee from outside the state. However, in its brief, Southern Environmental agreed Bell qualified for coverage under both Pennsylvania's and West Virginia's workers'

compensation statutes. The issue is that because Bell has pursued his Pennsylvania workers' compensation claim, that is now his exclusive remedy. "Where an employee's injury is compensable under the Act, the compensation provided by the statute is the employee's exclusive remedy against his or her employer." 77 P.S. § 481(a).

C. Bell's Affidavit is a Red Herring.

The Respondents try to make hay by referencing an affidavit completed by Heather Bell. (JA 841-847) The affidavit does not carry the day for the Respondents. First, the affidavit confirms that Bell has a Pennsylvania workers' compensation claim open for the injuries that are the subject of this litigation. The affidavit does not say that the Plaintiffs object or in any way disagree with the opening of the claim. The affidavit does not say Plaintiffs did anything to close the Pennsylvania claim and open one in West Virginia. The affidavit does not say that Plaintiffs even have a West Virginia workers compensation claim. Thus, while Nicholson may have started the ball rolling for the Plaintiffs in regards to the Pennsylvania Workers' Compensation claim, Plaintiffs have done nothing but choose to continue with it, accepting and receiving benefits. "[Bell] enjoyed (and continues to enjoy) the benefits of the Pennsylvania workers compensation [claim] for years before filing his amended claim against Respondent [Nicholson] for deliberate intent under West Virginia law. *Tucker-Stephen G. Bell, et al., v. Nicholson Construction Company, No. 18-1139, Respondent's Brief p.8.*

Respondents have also referenced a West Virginia workers' compensation form attached to Bell's affidavit as "Exhibit B." Heather Bell testified in the affidavit she was presented with a West Virginia workers' comp form which she signed and is attached as Exhibit B to her affidavit. However, Bell does not say who presented her with the form

or why. Best Flow and Longview both refer to the form in their briefing and note it was "timely filed." Under Pennsylvania and West Virginia law, the employee, employer, or treating physician can file the paperwork to open a workers compensation claim. Closer examination of Exhibit B suggests that it is a document prepared by the treating physician for the purposes of being compensated for his treatment of a workers' compensation injury. Bell signed the form May 20, 2015, but the treating physician did not sign until August 15, 2015. The form is stamped as "Received" on August 19, 2015. Given these dates, it appears this form originated with the staff of the treating physician who are completing paperwork for billing purposes. They are obviously aware that the treatment is for a work related injury and likely simply pulled a blank West Virginia workers' compensation form from the stack. Whether or not the doctor was ultimately paid by West Virginia or Pennsylvania is unknown. It is also unknown if the form was rejected and the doctor told to resubmit with Pennsylvania. Respondents do nothing more than simply point out the existence of this billing form and Heather Bell's affidavit. They do not suggest that Bell ever actually opened a West Virginia compensation claim or that any benefits were issued. They do not even allege that Bell has two workers compensation claims – one in Pennsylvania and one in West Virginia.

Plaintiffs allege ignorance on the entire workers' compensation matter in their brief. They complain they have tried to obtain the records, but only Nicholson has them and it refuses to produce them. This is preposterous. As the claimant in a workers' compensation claim, Plaintiffs would receive an introductory letter from the claims representative providing the claim number and address to file paperwork. Plaintiffs would receive rulings identifying which conditions are allowed under the claim and

which are disallowed along with instructions on filing an appeal and the deadlines for the same. Plaintiffs would receive letters either approving or disapproving of various medical treatments with the same explanation as to how to contest the decision.

D. Gallapoo is not Strictly Limited to Temporary Employees.

The Respondents also try to undo West Virginia precedent on the matter. They argue that Gallapoo v. Walmart, 197 W.Va. 172, 475 S.E.2d 172 (1996) is not dispositive on the issue because he was a "temporary employee." First, the Gallapoo case is silent as to how many days Gallapoo worked in West Virginia. Thus, it is not clear from the record whether or not Gallapoo was a "temporary employee" in that he worked less than 31 days (WV CSR 85-8-7.2) or that he was "temporary" in that he was not permanently stationed in West Virginia. Second, the Supreme Court's third syllabus point makes the temporary employee factor irrelevant. The syllabus point states "A non-resident employee who is injured in this State and is protected under the terms and provisions of the workers' compensation laws of a foreign state shall not be entitled to the benefits and privileges provided under the West Virginia Workers Compensation Act, including the right to file and maintain a deliberate intention cause of action under W.Va. Code 23–4–2(c)(2) (1994)." Gallapoo v. Walmart, 197 W.Va. 172, 475 S.E.2d 172 (1996). As can be seen, Gallapoo's temporary status is not mentioned at all in the syllabus point. To the contrary, the determinative factors are non-residency and protection of a foreign state's workers' compensation laws. Bell meets both those criteria. Accordingly, Pennsylvania's Workers' Compensation Act must apply and thus, SEI has immunity as a statutory employer.

E. As the Statutory Employer, SEI is Immune from Negligence Claims.

The Respondents also argue that the claims against SEI are not for deliberate intent but for negligence. However, this argument is of no consequence as, if applied, Pennsylvania law would provide immunity to SEI for the claim.

Plaintiffs argue SEI has failed to show that it is a statutory employer under Pennsylvania law. However, Plaintiffs' own admissions prove to the contrary. Plaintiffs' brief opposing SEI's motion to dismiss filed in response to the original version of the Complaint states that Bell was operating a drill rig to drill foundation pilings at the power plant in the scope of his employment with Nicholson. (JA 217, p. 17-18). Accordingly, Plaintiff was engaged in work that consisted of "removal, excavation, or drilling of soil, rock, or minerals..." *See* Six L's Packing Co., 615 Pa. 615, 629-630 (2012).

F. The Russell Case is Inapplicable.

The Respondents all cite Russell v. Bush & Burchett, 210 W.Va. 699 (2001) for the proposition that a deliberate intent claim can be pursued in spite of the statutory immunity provided by the state in which the compensation claim is filed. In Russell, the plaintiff was a resident of Kentucky working on a project for the West Virginia Department of Transportation, Division of Highways. In the course of that work Russel sustained an injury. He filed a compensation claim with Kentucky and a West Virginia deliberate intent claim. Justice Starcher wrote for the Court and lamented that any employee working on a project for a West Virginia agency ought to be allowed to pursue whatever West Virginia claim he wanted as a matter of public policy. "We hold, based on the foregoing, that there is a public policy that the full range of rights provided to workers under West Virginia law should protect and be available to workers on a West Virginia

state-funded construction project." Russell at 704. This was the genesis of Syllabus Point 3: "There is a public policy that the full range of rights provided to workers under West Virginia law should protect and be available to workers on a West Virginia state-funded construction project." Here Bell was not working on a project for the DOH or any other state agency. Thus, Justice Starcher's public policy arguments do not apply.

G. The Coburn Case is Inapplicable.

The Respondents cite Coburn v. C&K Industrial Services 2007 WL 2789468 for the proposition that someone with a Pennsylvania workers' compensation claim can still proceed with a deliberate intent claim in West Virginia. However, Coburn was a resident of West Virginia who was injured in West Virginia. Bell is a non-resident. As this Court has deciphered from the briefings, "temporary employment" and residency are key factors when reading the various statutes and membership, or the lack thereof, in the statutory class is determinative of the issue. In the case of Coburn, he was allowed to participate because he was a West Virginia resident.

H. The Contract Language is not Dispositve.

Respondents raise the issue that the contracts between SEI, Nicholson, and Longview required the acquisition of workers' compensation coverage for the State of West Virginia. This is true. And, as we know, West Virginia statutory law also required the parties to procure coverage under the state's workers' compensation system. However, nothing in the contracts indicate that the exclusive remedy was with the West Virginia Workers' Compensation Act. All of the parties were fully aware that both Nicholson and SEI were companies from outside the state of West Virginia and therefore had knowledge that both had workers' compensation coverage in states other than West

Virginia. If the Respondents wanted to guarantee exclusive coverage of the West Virginia Act, they could have said so in the contracts.

I. Pennsylvania's Workers Compensation Statute Controls.

Finally, all of the Respondents have tried to convert SEI's argument on election of remedies into one of comity for the purpose of arguing that immunity for SEI and Nicholson is against public policy. However, the parties have referenced cases wherein the West Virginia Supreme Court has agreed to enforce the foreign state's workers' compensation laws, enforcing the foreign state's immunity, and refusing to permit deliberate intent claims. *See e.g.* Gallapoo v. Wal-Mart, 197 W. Va. 172, 475 S.Ed.2d 172 (1996), Pasquale v. Ohio Power Company, 187 W. Va. 292, 418 S.E.2d 738 (1992). Accordingly, there is nothing inherent in West Virginia's public policy that the filing of a deliberate intent claim is a universal right to be enjoyed by all or that non-residents can disregard their home workers' compensation statutes by filing suit in West Virginia.

Further, by converting the argument about exclusive remedies to one of comity, Respondents conveniently duck the expectation that they will cite a case where someone simultaneously pursued workers compensation claims in both West Virginia and Pennsylvania and a Pennsylvania court or West Virginia court approved that maneuver. The absence of such citation is further proof of the soundness of the election of remedies argument.

III. Conclusion.

Regardless of who started it, Bell has chosen to proceed with his Pennsylvania workers' compensation claim. As a result, he is bound by the statute and cannot maintain

any action against SEI as it is a statutory employer. Accordingly, this Court should reverse the Circuit Court's Order and dismiss SEI from this action.

MINTZER, SAROWITZ, ZERIS, LEDVA & MEYERS, LLP

BY: _____
BRADLEY K. SHAFER, ESQUIRE (WVSB #7794)
48 Fourteenth Street, Suite 200
Wheeling, WV 26003
P: (304) 241-2976 F: (423) 500-3800
bshafer@defensecounsel.com
Counsel for Petitioner SEI