



**IN THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA**

**IN RE: FLOAT-SINK LITIGATION**

**CIVIL ACTION NO.: 11-C-5000000  
(Honorable John A. Hutchison)**

**THIS DOCUMENT APPLIES TO ALL CASES**

**ORDER GRANTING EMPLOYER DEFENDANTS' MOTION TO  
DISMISS BASED ON THE PLAINTIFFS' INSUFFICIENT RESPONSES TO  
AMENDED FLOAT-SINK PLAINTIFF FACT SHEETS, QUESTION NO. 7.**

On July 20, 2012 the parties, by counsel, came before the Mass Litigation Panel ("the Panel" or "the Court") for a hearing on "Employer Defendants' Motion to Dismiss Based on Plaintiffs' Insufficient Responses in Their Amended Float-Sink Plaintiff Fact Sheets," filed March 27, 2012 (Transaction ID#43327421), a related joinder and motion by the Distributor Defendant filed April 3, 2012 (TID#43454645), Plaintiffs' Opposition to the Employer Defendants' Motion filed April 10, 2012 (TID#43584700), Plaintiffs' Opposition to the Distributor Defendants' Motion filed April 18, 2012 (TID#43739978), Employer Defendants' Reply brief filed April 18, 2012 (TID#43742217), and Distributor Defendant's Reply brief filed April 24, 2012 (TID#43862510). The subject motion addressed Question Nos. 6, 7, and 12 of the Float-Sink Plaintiff Fact Sheets. This Order addresses only Question No. 7, Questions Nos. 6 and 12 will be addressed by separate Order. After consideration of the written and oral arguments of the parties and after consultation with each other to ensure uniformity of opinion, the Panel makes the following Findings of Fact and Conclusions of Law:

**FINDINGS OF FACT**

1. The history of these cases dates back to 2002, when some Plaintiffs and their counsel gained had knowledge of the claims and issues relevant to the exposure to chemicals used in the coal float-sink process.

2. The lawsuits began in 2004 when the proposed class action of *Katy Addair et al. v. Litwar Processing et al.*, Civil Action No. 04-C-252, was filed in the Circuit Court of Wyoming County, West Virginia. *Addair* raised claims against manufacturers and distributors of the chemicals used in the coal float-sink process and the companies who employed persons who worked in the coal float-sink process.

3. As early as April 15, 2008 Plaintiffs were ordered to disclose their expert witnesses in *Addair*.

4. The circuit court in *Addair* eventually sanctioned the plaintiffs for “repeated failure to comply with the court’s scheduling orders” and ultimately barred, as a sanction, the plaintiffs from offering any expert witnesses. *Addair v. Litwar*, No. 11-0397, fn. 7 (W.Va. Supreme Court, February 9, 2012) (memorandum decision).

5. The inability to proffer expert witness testimony in a case such as *Addair* led the West Virginia Supreme Court of Appeals to affirm summary judgment granted in the Circuit Court of Wyoming County in favor of various defendant employers. *Id.* at 8.

6. *Addair* is, essentially, the parent case to the multiple individual cases that were consolidated before this Mass Litigation Panel. Some of the Plaintiffs before the Panel sought inclusion in the *Addair* case but abandoned that effort when these cases were filed.

7. The cases presently before the Court were filed in early 2010, and referred to the Mass Litigation Panel in November 2010.

8. By Orders dated June 28, 2011 (TID#38386487), and August 12, 2011 (TID#39248578) Plaintiffs were ordered by the Panel to complete Fact Sheets to provide basic information regarding their claims. Completion of the Fact Sheets was made subject to enforcement under the West Virginia Rules of Civil Procedure, but did not bar the parties from

also conducting discovery. The Panel made clear that the Fact Sheet requirements in no way relieved any party's discovery obligations.

9. The June 28, 2011 Order specifically held, "Fact Sheets constitute discovery under Rules 26, 33 and 37 of the West Virginia Rules of Civil Procedure, and shall be subject to all sanctions for failure to respond to discovery, up to and including dismissal." *Id.* at p. 2.

10. Plaintiff Fact Sheet Question No. 7 stated:

Identify each specific unsafe working condition you contend existed in your work place(s) and which you assert in your claim(s) against your employer(s) and for each such condition identify (a) by proper citation each state or federal safety statute, rule or regulation which you contend was applicable to said work and working condition and which you contend was violated by your employer; and (b) each commonly accepted and well-known safety standard within the industry or business of your employer, as demonstrated by competent evidence of written standards or guidelines which reflect a consensus safety standard in the industry or business; (c) If you contend that a particular employer or distributor had actual knowledge of the specific unsafe working condition(s) identified above, provide the facts supporting your contention and identify each person who had actual knowledge or information regarding the specific unsafe working condition(s).

11. Inquiry similar to that in Fact Sheet Question No. 7 was made by several Employer Defendants in separate discovery, and was the subject of efforts to obtain proper answers to that discovery as noted in the subject motion (TID#43327421, Appendices B and C).

12. Plaintiffs responded substantially similarly to Fact Sheet Question No. 7 on October 10, 2011, a sample of that answer is:

Defendants violated multiple federal and state regulations and standards, including, but not limited to, WV Code § 21-3-18, 29 CFR §§ 1910.94, 1910.119, 1910.132, 1910.133, 1910.134, 1910.145, 1910.1000, 1910.1200, 1910.1450 and the NIOSH standard for exposure to perchloroethylene.

Employer defendants routinely disregarded or ignored ASTM and NIOSH standards and recommendations for float-sink testing. The work was not performed in well ventilated or hooded areas. System effectiveness was not checked. My employer did not conduct any sampling of personal exposure to perchloroethylene and other chemical or conduct air sampling tests in the lab area. Despite knowledge of the chronic and acute exposure risks associated with float-sink chemicals, my employer failed to adhere to and follow all regulatory obligations and failed to provide adequate safety equipment.

The manner in which we conducted float-sink testing, from the use of the equipment to the persistent presence of chemical odors was open and obvious and was known to anyone visiting the lab. The officers of the company would have had knowledge of these conditions as a result of any attention to the operation of the company. Individuals with knowledge of the conditions during float-sink testing include Jim Lewis. (TID#40275341, p. 9-10).

13. The Panel addressed Plaintiffs' original Fact Sheet responses at the January 9, 2012 hearing in this matter. One of the orders resulting from that hearing, the Court's February 13, 2012 Order Regarding Defendants' Motions to Strike (TID#42472270)<sup>1</sup> held:

a. "Plaintiffs' responses to the Plaintiff Fact Sheet are deficient insofar as they are boilerplate and lack the specific detail required to be fully responsive." *Id.* at ¶6.

b. "Plaintiffs shall make detailed amendments to their Responses to the Plaintiff Fact Sheet and supply additional plaintiff-specific detail no later than sixty (60) days from the January 9, 2012 Hearing." *Id.* at ¶12.

c. "In Plaintiffs' Amended Responses to the Plaintiff Fact Sheet, Plaintiffs are barred from stating that any Response requires an expert opinion. Plaintiffs are further barred from referring to original or amended Answers and Responses to Defendants discovery requests. Plaintiffs shall provide individual and complete Responses to each and every Plaintiff Fact Sheet Question." *Id.* at ¶13.

14. Similarly, at the January 9, 2012, hearing the Court found the Plaintiffs' initial expert witness disclosures made on December 15, 2011, to be egregious and totally unacceptable.

15. The February 13, 2012 Order Regarding Defendants' Motions to Strike (TID#42472270) specifically found:

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<sup>1</sup> The Court issued two orders on February 13, 2012, both of which are referenced in this Order.

a. “Plaintiffs failed to respond appropriately to the October 18, 2011 Case Management and Scheduling Order (hereinafter “Case Management Order”) when they served Plaintiffs’ Expert Witness Disclosures on December 15, 2011.” *Id.* at ¶1.

b. “Plaintiffs’ conduct in regards to the service of Plaintiffs’ Expert Witness Disclosures was egregious and totally unacceptable.” *Id.* at ¶2.

c. “Due to the Plaintiffs’ failure to appropriately supply information regarding their experts, Defendants are unable to make their expert disclosures as required by the Case Management Order on January 16, 2012.” *Id.* at ¶3.

d. “Based upon the Court’s review of the history of this action and the egregiousness of Plaintiffs’ present conduct, **Plaintiffs’ actions regarding Plaintiffs’ Expert Witness Disclosures are sanctionable.**” *Id.* at ¶5 (emphasis added).

16. This Court’s February 13, 2012 Order Regarding Expert Witness Disclosures (TID#42471949) included the following requirements in paragraph 7:

7. Deliberate Intent Claims: For each expert who will provide testimony regarding the “deliberate intent” claims, provide separately for each Plaintiff the expert’s opinion, if any, as to:

a. The specific unsafe working condition(s) in the workplace, identifying the employer allegedly responsible for each condition, that the expert will opine presents or did present a high degree of risk and a strong probability of serious injury or death to that particular Plaintiff;

b. Any knowledge which, in the expert’s opinion, the Employer Defendant possessed regarding the specific unsafe working condition and of the high degree of risk and strong probability of serious injury or death presented by such condition;

c. The manner in which each identified specific unsafe working condition violated any state or federal

safety statute, rule or regulation, whether cited or not, specifically identifying every such statute, rule or regulation on which that expert relies and the reasons why each specific statute, rule or regulation applies to each employer;

- d. The manner in which each identified specific unsafe working condition violated any commonly accepted and well-known safety standard within the industry or business of which each employer was a part as defined in W.Va. Code § 23-4-2(d)(2)(ii)C, specifically identifying each such safety standard on which the expert relies and the reasons why each such safety standard applies to each employer;
- e. The manner in which the individual Plaintiff's employer, in the expert's opinion, intentionally exposed that Plaintiff to each specific unsafe working condition identified above;
- f. Each serious compensable injury or death suffered by the identified Plaintiff as a result of said condition; and
- g. A summary of the grounds for the expert's opinions with regards to items a-f, including a list of the Plaintiff's medical records reviewed by the expert. *Id.* at ¶7a-g.

17. The Plaintiffs were also cautioned: "Plaintiffs are notified that failure to provide amended Expert Witness Disclosures, according to the below requirements, on or before the date specified herein shall subject them to all sanctions, up to and including dismissal of their respective civil actions with prejudice." *Id.* at ¶2.

18. On March 9, 2012, Plaintiffs filed their Amended Float-Sink Plaintiff Fact Sheets.

19. Plaintiffs' Amended answers with regard to Question No. 7 of the Fact Sheets provided no more specificity than that which was provided in Plaintiffs' original answers as to the statute, rule, regulations, or commonly accepted standard other than noting the ASTM standard was designated "D-4371." The reference to the other 11 statutes, rules, or regulations

cited were the same as those made in the original Fact Sheet answers, which this Court found deficient (Order Regarding Defendants' Motions to Strike, TID#42472270), and warned would be subject to sanctions (Order Regarding Expert Witness Disclosures, TID#42471949, ¶2).

20. Plaintiffs' amended answers to Fact Sheet Question No. 7 did not identify a statute, rule, regulation or commonly accepted standard with the specificity the Court directed.

21. Plaintiffs' claims span decades of potential exposure, therefore dozens of versions of the statutes, rules, or regulations would apply to Plaintiffs' claims by virtue of the manner in which Plaintiffs answered this question. Plaintiffs' amended answers to Fact Sheet Question No. 7 do not identify which version applies.

22. The most recent versions of the 12 statutes, rules, or regulations identified in the amended answers to Fact Sheet Question No. 7 comprise hundreds of pages of materials (over 300 pages, as noted in Exhibits 7, 8, and 9 of TID#43327421).

23. Neither Plaintiffs' amended answers to Fact Sheet Question No. 7, nor their Amended Expert Witness Disclosures or supplements, provide the information required in paragraph 7(a)-(g) of the Order Regarding Expert Witness Disclosures (TID#42471949). Specifically, Plaintiffs' amended Fact Sheet answers and Amended Expert Witness Disclosures:

a. Failed to identify, with particularity, the specific unsafe working condition(s) that allegedly existed in each of their workplaces and that presented a high degree of risk and a strong probability of serious injury or death;

b. Failed to describe, with particularity, the knowledge that each Employer Defendant possessed regarding the specific unsafe working condition(s) and the high degree of risk and strong probability of serious injury or death presented by such condition(s);

c. Failed to explain the manner in which each specific unsafe working condition violated any statute, rule, or regulation and the reasons why each such statute, rule, or regulation applies to each Employer Defendant;

d. Failed to explain the manner in which each specific unsafe working condition violated any commonly accepted and well-known safety standard within the industry or business of each Employer Defendant and the reasons why each such safety standard applies to each Employer Defendant;

e. Failed to explain the manner in which each Employer Defendant intentionally exposed each Plaintiff to the specific unsafe working condition(s);

f. Failed to show how each serious compensable injury or death resulted from the specific unsafe working condition(s); and,

g. Failed to provide a summary of the grounds for the expert opinions in accordance with paragraph 7(a)-(f) of the Order, and fail to provide a list of the medical records reviewed by each expert.

24. In response to Employer Defendants' Motion, Plaintiffs pointed to their Amended Expert Witness Disclosures to correct these deficiencies (TID#43584700, p. 15), despite this Court's admonition to the contrary (See Finding of Fact 13.c), and argued that the substantially uniform amended responses to Fact Sheet Question No. 7 satisfied the specificity requirements set forth in this Court's Orders.

25. Plaintiffs' Amended Expert Witness Disclosures (only those of Dr. Cheremisinoff and Dr. Guth relate to this issue) did not rectify the deficiencies with Plaintiffs' answers to Fact Sheet Question No. 7, but exacerbated the problem. Dr. Cheremisinoff and Dr. Guth did not

identity how the statutes, rules, or regulations pertain to a specific Plaintiff and, ergo, a specific Employer Defendant.

26. As it pertains to the statutes, rules, or regulations allegedly violated by each Employer Defendant, Dr. Cheremisinoff and Dr. Guth each provided a “Preliminary Summary Opinion” and not an employer-specific report as the Court required (TID#43654892, TID#43667700).

27. In their Preliminary Summary Opinions (sometimes referred to hereinafter as “expert reports”), Dr. Cheremisinoff and Dr. Guth ignored many of the statutes, rules, or regulations identified in the Fact Sheets, leaving Employer Defendants to guess as to their application, if any, in these cases.

28. The statutes, rules, and regulations that were discussed by Dr. Cheremisinoff and Dr. Guth did not relate to specific employer conduct vis-à-vis a specific plaintiff, and did not identify the versions or the precise subsection to adequately put the Employer Defendants on notice of what specific violation of a statute, rule or regulation was being asserted against a specific employer defendant, in violation of paragraph 7 (a-g) of the February 13, 2012 Order Regarding Expert Witness Disclosures (TID#42471949).

29. In his expert report, Dr. Cheremisinoff also added new statutes, rules, or regulations (likewise without reference to version) which are unrelated to these cases including alleged violations of OSHA sections related to shipbuilding (TID#43654892, p. 19-20, *citing* 29 C.F.R. 1915.152 and 29 C.F.R. 1915.153).

30. Plaintiffs later filed a supplemental report by Dr. Guth pertaining to the statutes, rules, or regulations allegedly violated by each Employer Defendant. Dr. Guth’s supplemental report was filed on June 15, 2012 in opposition to defendant Litwar’s motion for summary

judgment (TID#44845329, Exhibit C). Leave was not requested to submit this supplemental expert report, but it was considered by the Court in regards to this motion.

a. Dr. Guth intended that his supplemental report apply to all employer defendants. *Id.* at p. 1-2.

b. Dr. Guth's supplemental expert report asserts that dozens of additional statutes, rules, or regulations were allegedly violated by the Employer Defendants, including more regulations pertaining to shipbuilding; standards published by the Sheet Metal and Air Conditioning Contractor's National Association and the American Society of Heating, Refrigerating and Air Conditioning Engineers; and, other entities. *Id.* at p. 31-36.

c. This supplemental expert report was too general to comport with paragraph 7 of the February 13, 2012 Order Regarding Expert Witness Disclosures (TID#42471949) and its vague assertions of new violations, many unrelated to these cases, exacerbated the problems with Plaintiffs' Amended Fact Sheet answers and expert witness disclosures.

### **CONCLUSIONS OF LAW**

31. "[A] trial court has broad authority to enforce its orders and to sanction any party who fails to comply with its discovery rulings." *Bartles v. Hinkle*, 196 W. Va. 381, 389, 472 S.E.2d 827, 835 (1996).

32. According to Rule 37(b)(2) of the West Virginia Rules of Civil Procedure,

[i]f a party or an officer, director, or managing agent of a party or a person designated under Rules 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to supplement as provided for under Rule 26(e), or if a party fails to obey an order entered under

Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others are the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party[.]

W. Va. R. Civ. P. 37(b)(2)(A)-(C).

33. Rule 37 “is designed to ensure that persons who are subject to discovery requests respond promptly and adequately” and, further, “to permit the use of sanctions against a party who refuses to comply with the discovery rules, i.e., Rules 26 through 36.” *Doulamis v. Alpine Lake Prop. Owners Ass’n, Inc.*, 184 W. Va. 107, 110, 399 S.E.2d 689, 692 (1990) (quoting Syl. Pt. 1, *Shreve v. Warren Assoc., Inc.*, 177 W. Va. 600, 355 S.E.2d 389 (1987)).

34. The “imposition of sanctions by a circuit court under [Rule] 37(b) for the failure of a party to obey the court’s order to provide or permit discovery is within the sound discretion of the court and will not be disturbed upon appeal unless there has been an abuse of that discretion.” Syl. Pt. 1, *Cattrell Companies, Inc. v. Carlton, Inc.*, 217 W. Va. 1, 614 S.E.2d 1 (2005) (quoting Syl. Pt. 1, *Bell v. Inland Mutual Ins. Co.*, 175 W. Va. 165, 332 S.E.2d 127 (1985)).

35. In determining the appropriate sanction(s) in a given case, the Court “may consider the seriousness of the conduct, the impact the conduct had in the case and in the

administration of justice, any mitigating circumstances, and whether the conduct was an isolated occurrence or was a pattern of wrongdoing throughout the case.” Syl. Pt. 2, in part, *Bartles v. Hinkle*, 196 W. Va. 381, 472 S.E.2d 827 (1996) (quoted in *Mills v. Davis*, 211 W. Va. 569, 575, 567 S.E.2d 285, 291 (2002)).

36. The Court “must have good cause to issue a sanction, and . . . when used, the sanction must bear some reasonable relationship to the conduct at issue[.]” *Mills*, 211 W. Va. at 574, 567 S.E.2d at 290.

37. A “party seeking sanctions under Rule 37(b) has the burden of establishing noncompliance with the circuit court’s order to provide or permit discovery[.]” and, “[o]nce the noncompliance is established, the burden is upon the disobedient party to avoid the sanctions sought under Rule 37(b) by showing that the inability to comply with the court’s order or special circumstances render the particular sanctions unjust.” *Bell*, 175 W. Va. at 173, 332 S.E.2d at 134.

38. Apart from the authority granted by Rule 37, the Court has the authority to issue sanctions “pursuant to the ‘inherent power [of a court] to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction.’” *State ex rel. Richmond Am. Homes of W. Va., Inc. v. Sanders*, 226 W. Va. 103, 111, 697 S.E.2d 139, 147 (2010) (quoting Syl. Pt. 3, in part, *Shields v. Romine*, 122 W. Va. 639, 13 S.E.2d 16 (1940)).

39. The “[i]mposition of sanctions of dismissal and default judgment for serious litigation misconduct pursuant to the inherent powers of the court to regulate its proceedings will be upheld upon review as a proper exercise of discretion when trial court findings adequately demonstrate and establish willfulness, bad faith or fault of the offending party.” Syl. Pt. 7, *Richmond Am. Homes*, 226 W. Va. at 106, 697 S.E.2d at 142.

40. Rule 37(b)(2) does not contain any express meet-and-confer requirement, *see* W. Va. R. Civ. P. 37(b)(2), and the meet-and-confer requirements contained in Rules 37(a)(2) and 37(d) do not apply to this situation, where the Court has ordered supplementation. *See* W. Va. R. Civ. P. 37(a)(2), (d).

41. Employer Defendants were not required, under Rule 37, to meet and confer with Plaintiffs before filing the Motion that is the subject of this Order. *See* W. Va. R. Civ. P. 37; *Cattrell*, 217 W. Va. at 6-7, 614 S.E.2d at 6-7.

42. *Cattrell* holds that a party seeking relief under Rule 37(b) need only meet and confer with opposing counsel when the latter requests clarification of discovery issues. 217 W. Va. at 6-7, 614 S.E.2d at 6-7 (“[A] party who has successfully obtained an order compelling discovery has a duty to act in good faith with the opposing party when the opposing party seeks clarification of what is sought under the order compelling discovery.”).

43. Plaintiffs’ counsel did not seek from Employer Defendants clarification of the issues that had been raised, and that had already been addressed by the Court regarding Plaintiffs’ Fact Sheet answers. Indeed, such clarification was not necessary under the instant circumstances.

44. The Court made clear when it ordered the filing of the Fact Sheets that they would be treated like discovery and subject to all the sanctions and punishments applicable to discovery responses. *See* June 28, 2011 Order (TID#38386487); August 12, 2011 Order (TID#39248578).

45. In its February 13, 2012 Order Regarding Defendants’ Motions to Strike (TID#42472270), wherein it found Plaintiffs’ initial Fact Sheet responses to be deficient, the Court expressly ordered Plaintiffs to make detailed amendments to their initial responses and

provide additional plaintiff-specific detail therein, without referring to other discovery or expert opinions.

46. In that same Order, the Court found Plaintiffs' initial Expert Witness Disclosures to be "egregious and totally unacceptable" and ordered Plaintiffs to amend their disclosures to comport with certain necessary requirements, as discussed above.

47. Despite the clear directives to Plaintiffs with respect to amending their Fact Sheets and expert witness disclosures, the Court finds that Plaintiffs' amended responses to Fact Sheet Question No. 7, Plaintiffs' Amended Expert Witness Disclosures, and Dr. Guth's supplemental expert report fail to comply with the Court's February 13, 2012 Order Regarding Expert Witness Disclosures (TID#42471949).

48. Plaintiffs' amended responses to Fact Sheet Question No. 7, which do not contain "additional plaintiff-specific detail," fail to correct the deficiencies in their initial responses, leaving Employer Defendants unable to adequately assess Plaintiffs' claims, prepare their defenses to those claims, and identify expert witnesses.

49. Specifically, Plaintiffs' amended Fact Sheet responses:

a. Failed to identify the particular statutes, rules, or regulations that were violated by each alleged unsafe working condition, making only general references to a litany of statutes, rules, or regulations that eventually numbered in the dozens and many of which were inapplicable to Plaintiffs' claims on their face;

b. Failed to explain how each cited statute, rule, and regulation was allegedly violated;

c. Failed to provide the particular version of each statute, rule, and regulation that was allegedly violated (i.e., no year of publication was cited); and,

d. Failed to cite employer-specific conduct.

50. Plaintiff's Amended Expert Disclosures provided only general citations to 12 statutes, rules, or regulations, with no explanation as to how they apply to the conduct of a specific Employer Defendant vis-à-vis a specific Plaintiff. Dr. Guth's supplemental expert report added dozens of new statutes, rules and regulations with no explanation as to how they apply to the conduct of a specific Employer Defendant vis-à-vis a specific Plaintiff. In other words, Plaintiffs failed to respond with the most fundamental information: what specific rules Employer Defendants allegedly violated and how they allegedly violated them.

51. The statutes, rules, regulations, and standards that were allegedly violated in this case constitute a critical element of the five-part test that Plaintiffs must pass. *See* W. Va. Code § 23-4-2(d)(2)(ii). To succeed on their deliberate intent claims, Plaintiffs must show, *inter alia*, that a "specific unsafe working condition" (which posed "a high degree of risk and a strong probability of serious injury or death")

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[.]

W. Va. Code § 23-4-2(d)(2)(ii)(C).

52. Now, after years of litigation, Plaintiffs are unable to identify the statutes, rules, and regulations that Employer Defendants allegedly violated and explain how such statutes, rules, and regulations were "specifically applicable" to the alleged unsafe working conditions. The Employer Defendants are entitled to this information in order to mount a defense and retain

expert witnesses. Plaintiffs' failure to provide such vital information on a required element of proof is completely unacceptable and warrants sanctions.

53. Employer Defendants have satisfied their burden of showing that Plaintiffs failed to comply with the Court's February 13, 2012 Order, which shifts the burden to Plaintiffs to prove that their non-compliance is justified.

54. Plaintiffs have not carried their burden: they have not demonstrated that they were unable to comply with the Court's Order, nor have they demonstrated that special circumstances exist which make the imposition of sanctions unjust. *See Bell*, 175 W. Va. at 173, 332 S.E.2d at 134.

55. Based upon the considerations enumerated by the West Virginia Supreme Court of Appeals in Syllabus Point 2 of *Bartles*, 196 W. Va. 381, 472 S.E.2d 827, the Court finds that the appropriate sanction is to strike Plaintiffs' expert witness disclosures as they relate to the statutes, rules, or regulations allegedly violated by the Employer Defendants:

a. Plaintiffs' conduct in failing to provide sufficient responses to Fact Sheet Question No. 7 on two separate occasions and failing to provide sufficient, specific Expert Disclosures on two occasions (plus a supplement) was serious, as it impaired the administration of the case by preventing Employer Defendants from proceeding with depositions and/or other discovery, and inhibiting Employer Defendants in evaluating Plaintiffs' claims and alleged damages.

b. Plaintiffs' repeated failure to abide by this Court's Orders and to meaningfully participate in discovery evidences a pattern of wrongdoing throughout this case and warrants dismissal of their claims against Employer Defendants. *See Bartles*,

196 W. Va. at 390, 472 S.E.2d at 836 (noting that “counsel's disregard of a prior warning from the court in the same case exacerbates the offense”).

c. The Court has found no mitigating circumstances here. Plaintiffs have had multiple opportunities to provide the appropriate disclosure of information (initial Fact Sheet answers, Amended Fact Sheet answers, initial Expert Disclosures, Amended Expert Disclosures, Supplemental Expert Disclosures) and all have been inadequate and failed to provide the information ordered by the Court.

56. As evidenced by their actions, Plaintiffs cannot make the requisite showing under Subsection C of the deliberate intent statute and, thus, dismissal of their claims is warranted.

57. Plaintiffs have failed to provide the necessary specificity in the statutes, rules, or regulations cited, or a commonly accepted and well-known safety standard within the industry or business of the employer.

58. As a sanction available to the Court under Rule 37(b)(2) of the West Virginia Rules of Civil Procedure and pursuant to its inherent power to regulate the proceedings before it, the Court is striking the plaintiffs’ expert witness disclosures as they relate to the statutes, rules, or regulations or commonly accepted standard which were allegedly applicable and were allegedly violated by each Employer Defendant.

59. This is a complex case that requires expert testimony to establish that the plaintiffs have suffered serious compensable injury or death as a direct and proximate result of a specific unsafe working condition. *Addair v. Litwar*, No. 11-0397, p. 8 (W.Va. Supreme Court, February 9, 2012) (memorandum decision).

60. In cases such as these, without expert witness testimony regarding the statutes, rules, or regulations allegedly violated by the Employer Defendants, Plaintiffs cannot prove the

necessary elements of the deliberate intent 5-part test, particularly West Virginia Code §23-4-2(d)(2)(ii)(C).

61. Therefore, dismissal of Plaintiffs' claims against the Employer Defendants with prejudice is warranted.

62. The Court has considered the positions argued by Plaintiffs and Employer Defendants and thoroughly considered whether less onerous sanctions were warranted. The Court considered its prior Orders in this case finding Plaintiffs' initial fact sheet responses and expert witness disclosures to be deficient and, indeed, has levied lesser sanctions related to the same issues brought before the Court in the instant Motion. Because those sanctions were, apparently, ineffective, the Court must impose harsher sanctions. The Court has determined that it could not fashion a remedy short of dismissal that would be appropriate.

63. Pursuant to Rule 37(b)(2) of the West Virginia Rules of Civil Procedure and its inherent power to regulate the proceedings before it, the Court finds good cause to dismiss Plaintiffs' claims against Employer Defendants and that the sanction of dismissal bears a reasonable relationship to the conduct at issue. *See Richmond Am. Homes*, 226 W. Va. at 106, 697 S.E.2d at 142; *Mills*, 211 W. Va. at 574, 567 S.E.2d at 290.

64. This is a final order under Rule 54(b) of the West Virginia Rules of Civil Procedure as it pertains to Plaintiffs' claims against the Employer Defendants.

65. This Order reflects the unanimous decision of the three member panel of judges.

66. The claims of Michael Bibbee, James Elswick, Jr., and Earl Holt are excluded from this order. Mr. Bibbee is currently serving in the United States Armed Forces and is the subject of a separate order.

67. This Order does not address the cross-claims of the remaining Distributor Defendant Preiser Scientific, Inc. against the Employer Defendants. Those are preserved and may be subject to subsequent briefing among the relevant parties.

68. As a result of the Court's rulings, some Motions docketed for hearing on July 20, 2012 were rendered moot. These included Certain Manufacturing Defendants' Joint Motion to Modify the Expert Witness Disclosure Schedule, (TID#44207162), Plaintiffs' Motion to Strike the Pleadings of Defendants Westmoreland Coal and Westmoreland Coal Sales as a Sanction, (TID#45048888), Commercial Coal Testing, LLC's Motion for Protective Order and for Costs Associated with the Filing of this Motion, (TID#45147853).

### **CONCLUSION**

Based on the foregoing Findings and Conclusions, Employer Defendants' Motion to Dismiss Based on Plaintiffs' Insufficient Responses in Their Amended Float-Sink Plaintiff Fact Sheets is hereby **Granted** as it pertains to Question No. 7 of the Fact Sheet. It is hereby **Ordered, Adjudged, and Decreed** that the claims and causes of action of all Plaintiffs against all Employer Defendants not specifically excepted herein 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.

ENTER: 08-30-2012

/S/ John A. Hutchison

John A. Hutchison  
Lead Presiding Judge  
Float-Sink Litigation

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