32960

SUPREME COURT OF APPEALS OF WEST VIRGINIA

WILLIAM L. SEDGMER, JR.,
Personally and as next friend
of his natural children, Jacob A.
Sedgmer, Lucas D. Sedgmer and
Elizabeth A. Sedgmer and
William L. Sedgmer, III, Individually,

Plaintiffs/Appellants,

vs.

McELROY COAL COMPANY,
CONSOLIDATION COAL COMPANY,
CONSOL, INC., EUGENE L.
SAUNDERS, Individually and as agent
of the aforementioned corporations, and
NATIONAL CASTINGS, INC.,

Defendants/Appellees.

FILED
MAY 1 2006
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRIGINIA

Supreme Court No.: 32960
Marshall County Civil Action
No.: 96-C-135/M

BRIEF OF APPELLEES

James R. Miller
W.Va. ID No. 8978
Rodger L. Puz
W.Va. ID No. 9174

Dickie, McCamey & Chilcote, P.C.
Two PPG Place, Suite 400
Pittsburgh, PA 15222
(412) 281-7272

Attorneys for Appellees,
Eugene L. Saunders, McElroy Coal Company,
Consolidation Coal Company and CONSOL, Inc.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. TYPE OF PROCEEDING AND NATURE OF LOWER TRIBUNAL DECISION 1

II. COUNTERSTATEMENT OF THE FACTS OF THE CASE 2

III. SUMMARY OF ARGUMENT 7

IV. DISCUSSION OF LAW 8

A. STANDARDS FOR SUMMARY JUDGMENT AND APPEAL 8

B. APPLICABILITY OF SUMMARY JUDGMENT IN DELIBERATE INTENTION CLAIMS 10

C. APPELLANTS' ASSIGNMENTS OF ERROR ARE WITHOUT MERIT 10

1. Appellants' alleged specific unsafe working condition: "parking an occupied man bus too close to a railroad track switch in an underground mine." 11

2. Appellants cannot demonstrate subjective realization and appreciation. 17

a. "Knowledge" of Eugene Saunders (and other mine personnel) 18

b. Haulage Safety Rules and Procedures from 1988 22

c. 1989 Incident, "Electric Throw Switches" and "Toggle Switches" 23

3. Appellants cannot demonstrate violation of specific safety statute/regulation/industry standard. 26

a. 36 C.S.R. 33-4.1 27

b. Alleged Industry Standard 31

c. W.Va. Code § 22A-2-37(w) 33

V. CONCLUSION 34

TABLE OF AUTHORITIES

Cases

Bronz v. St. Jude's Hospital, 184 W.Va. 594, 402 S.E. 2d 263 (1991) 29

Cecil v. D&M, Inc., 517 S.E.2d 27 (W.Va. 1999) 34

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 9

City of Benwood v. Bd. of Educ., 212 W.Va. 436, 573 S.E.2d 347 (2002) 10, 17

Deskins v. S.W. Jack Drilling Co., 600 S.E.2d 237 (W.Va. 2004) 15, 16

Frymier-Halloran v. Page, 193 W.Va. 687, 458 S.E.2d 780 (1995) 30

Gable v. The Kroger Co., 410 S.E.2d 701 (W.Va. 1991) 25

Greenfield v. Schmidt Baking Co., Inc., 199 W.Va. 447, 485 S.E.2d 391 (1997) 9

Handley v. Union Carbide Corp., 620 F. Supp. 428, (S.D. W.Va. 1985), *aff'd,* 804 F.2d 265 (4th Cir. 1986) ..... passim

Jividen v. Law, 194 W.Va. 705, 461 S.E.2d 451 (1995) 8, 9

McBee v. U.S. Silica Co., 205 W.Va. 211, 517 S.E.2d 308 (1999) 17, 24

Mumaw v. U.S. Silica Co., 511 S.E.2d 117 (W.Va. 1998) 10

Nutter v. Owens-Illinois, Inc., 209 W. Va. 608, 550 S.E. 2d 608 (2001) 24

Painter v. Peavy, 192 W.Va. 189, 451 S.E.2d 755, (1994) 8

Princeton Comm. Hosp. v. State Health Planning, 174 W.Va. 558, 328 S.E.2d 164 (1985) 30

Williams v. Precision Coil, Inc., 194 W.Va. 52, 459 S.E.2d 329 (1995) 9, 20

Yeater v. Allied Chemical Company, 755 F.Supp. 1330 n.1 (N.D. W. Va. 1991) 10

Statutes

36 C.S.R. 33-4.1 ..... passim

W.Va. Code § 22A-2-37 ..... 26, 33, 34

W.Va. Code § 22A-2-37(w) 33

W.Va. Code § 23-4-2(c)(1) 10

W.Va. Code § 23-4-2(d)(2)(iii)(B) 8

SUPREME COURT OF APPEALS OF WEST VIRGINIA

WILLIAM L. SEDGMER, JR., Personally and as next friend of his natural children, Jacob A. Sedgmer, Lucas D. Sedgmer and Elizabeth A. Sedgmer and William L. Sedgmer, III, Individually,	:	
Plaintiffs/Appellants,	:	
vs.	:	Supreme Court No.: 32960 Marshall County Civil Action No.: 96-C-135/M
McELROY COAL COMPANY, CONSOLIDATION COAL COMPANY, CONSOL, INC., EUGENE L. SAUNDERS, Individually and as agent of the aforementioned corporations, and NATIONAL CASTINGS, INC.,	:	
Defendants/Appellees.	:	

BRIEF OF APPELLEES

AND NOW come Appellees, Eugene L. Saunders, McElroy Coal Company, Consolidation Coal Company and Consol, Inc. ("Appellees" or "Defendants"), by and through their undersigned counsel, and file the following Brief in response to the Appellants' Brief:

I. TYPE OF PROCEEDING AND NATURE OF LOWER TRIBUNAL DECISION

Appellants have filed the instant Appeal following the Circuit Court's award of summary judgment in favor of Appellees. Appellant William L. Sedgmer, Jr. asserted claims against Appellees under the "deliberate intention" exception to Workers' Compensation Act immunity from civil tort actions, codified at W.Va. Code § 23-4-2(c)(2)(ii). The issue in this case is whether Appellants have adduced sufficient evidence to create a genuine issue of material fact as to whether they can meet all five of the "tightly drawn elements" of this rare exception. *See*

Handley v. Union Carbide Corp., 620 F. Supp. 428, 434 (S.D. W.Va. 1985), *aff'd,* 804 F.2d 265 (4th Cir. 1986). The Circuit Court of Marshall County correctly ruled that they do not. Accordingly, summary judgment in favor of Appellees was proper.

II. COUNTERSTATEMENT OF THE FACTS OF THE CASE

Appellant Sedgmer asserted claims against the moving defendants, McElroy Coal Company, Eugene Saunders, Consolidation Coal Company and CONSOL Energy, Inc. under the "deliberate intention" exception to Workers' Compensation Act immunity, codified at W.Va. Code § 23-4-2(c)(2)(ii). *See* Complaint.

The present action stems from an underground mine accident which occurred in McElroy Coal Company's McElroy Mine on July 28, 1994, when rail cars loaded with coal and traveling on the main haulage line, through totally unforeseen and aberrant (indeed, Rube Goldbergian) happenstances, became diverted and eventually, after traveling a considerable distance, collided with three parked man trips in a passway. Sedgmer was a passenger in one of the man trips. *See* Report of Pat Korsnick ("Korsnick Report"), attached to Defendants' Motion for Summary Judgment as Exhibit "A."[1]

At the time of the subject accident, Sedgmer was employed by MCElroy Coal Company as a shuttle car operator at its McElroy Mine in Marshall County, West Virginia. McElroy Coal Company is a subsidiary of Consolidation Coal Company, which, in turn, is a subsidiary of CONSOL Energy, Inc.

Defendant Saunders was, at the time of the accident, a section foreman for McElroy Coal Company at the McElroy Mine. Saunders was operating the lead man trip (personnel carrier) of three (3) man trips heading "inby" (into the mine) at the McElroy Mine. The other two (2) man

[1] Defendants' Motion for Summary Judgment and Exhibits thereto were included by the parties within their Joint Designation of Record on Appeal dated February 6, 2006.

trips were operated by non-parties Wilbur Riddle and Ron Tanner. *See* Saunders Depo. (excerpts attached hereto as Exhibit "1"), pp. 5-6.

The accident occurred at the "Three North Passway" in the McElroy Mine. The Three North Passway is a "spur" off of the main haulage track in the mine.[2] At the same time the three (3) man trips were heading inby, a trip of approximately thirty (30) rail cars loaded with coal was heading "outby" (out of the mine) on the main haulage track. *See* Korsnick Report.

The direction of rail mounted vehicles at track junctures is controlled by electronic switch throw boxes. If an operator wants to change directions, he pushes an overhead lever located approximately 50 feet before the switch, electronically sending the switch throw box into operation and changing the direction of the track rails at the switch. Prior to the accident, the loaded rail cars were traveling along the main haulage line. The electronic switch relative to the Three North Passway (where Sedgmer, Saunders and the other miners were located) was set in the "straight" position such that as the coal cars travelled into the switch they would continue straight on the main haulage and could not enter the Three North Passway. Devices known as "levelers," were located where the coal cars were loaded in the mine. These consist of two-by-fours which are scraped along the top edge of the loaded cars and are used to prevent the mounding of coal above the top edge of the car. The levelers were properly functioning and used on the coal cars in question in this case. *See* William K. Blackwell Depo. (attached to Defendants' Motion for Summary Judgment as Exhibit "D"), pp. 28-29.

---

[2] The main haulage is a single set of rails by which workers, equipment, and coal cars are transported both into and out of the mine. When rail traffic is traveling on the main haulage in opposite directions, a radio dispatcher directs one vehicle into a passway to wait until the opposing vehicle passes on the main haulage. The Passway is another track that juts off of the main haulage and rejoins it several hundred feet further along the haulage.

While the loaded rail cars in question were traveling outby on the main line, Saunders and the other two (2) man trip operators, Wilbur Riddle and Ron Tanner, were directed via radio dispatcher, to proceed into the Three North Passway to await the passing of the outbound trip of coal cars. The man trips stopped at least a couple of hundred feet back from the inby end of the passway where the 30-car haulage load was to pass.[3] Unfortunately and totally unexpectedly, a piece of fiberglass ventilation tubing protruding out of the coal in one of the cars in the haulage load made contact with the electric switch throw box on the main line, causing the switch at the Three North Passway juncture to operate (*i.e.*, switch from "straight" to "curve") as the coal haulage trip traveled over it. The sudden change in direction of the track caused the trip to come uncoupled, and seventeen (17) cars of the haulage load went into the Three North Passway while the front cars proceeded on the straight, as those cars had passed through the switch before it was inadvertently engaged. Investigation revealed that the tubing was struck and flattened by the levelers, but later sprung back up to protrude from the coal car, which in turn allowed it to make contact with the overhead lever controlling the throw box, thereby unforeseeably activating the switch. *See* Korsnick Report.

While he and the other miners waited in the Passway for the coal trip to pass on the main haulage, Saunders heard the operator of the coal trip say over the mine radio that he thought he had a car off in the trip (*i.e.*, he thought a car had been derailed). Saunders then noticed that the directional indicator lights ahead at the intersection had changed (indicating the direction of the switch had been changed from the straight to the curve), and saw the cars coming into the Passway. Saunders then began to call for the crew members to exit the man trips, recognizing

[3] As described more fully below, there is disagreement over the distance from the main haulage to where the man trips were located. The evidence shows the distance to be at least 200 feet and as much as 400 feet.

that coal cars were headed toward the man trips. *See* Saunders Depo. (Ex. "1"), p. 6. Sedgmer did not exit the man trip in time, and was injured when one of the haulage cars struck the man trip. Sedgmer sustained bodily injuries to his left side, including his shoulder, arm and ribs. He also claims to have sustained psychological injuries from this accident, including depression and Post Traumatic Stress Disorder. *See* Complaint.

A total of seventeen (17) haulage cars entered the Passway, and all remained on the track without derailing except the last three (3). Thus, while the first half of the coal cars proceeded on the main line (on the straight), the remaining half were diverted into the Passway. The diverted haulage cars, after leaving the main haulage track, traveled several hundred feet to contact the first man trip, and then traveled an additional distance (approximately 69 feet) after the collision. *See* Korsnick Report.

Saunders directed the man trips to be parked in the Passway at least two hundred (200) feet back from the switch because he felt that distance was safe, and did not believe that the man trips were close enough to the switch so as to require the passengers to seek shelter. *See* Saunders Depo. (Ex. "1"), p. 19. Wilbur Riddle and Ron Tanner, the operators of the other man trips, shared Saunders' belief. Gene McClellan, a passenger in one of the man trips, felt the same. *See* Mills Depo. (excerpts attached hereto as Exhibit "4"), pp. 93-94.

As a result of an investigation performed by state inspector Brian Mills, McElroy was initially cited by the West Virginia Office of Miner Health, Safety & Training for violating Title 36-33-4.1 of the West Virginia Board of Coal Mine Health and Safety Legislative Rules, which requires that "[w]hen in the vicinity of a switch, all persons shall get into an area of safety, either in a shelter hole or a crosscut, when trips are approaching." A "shelter hole" is a man-made, four-by-five hole in the mine wall where miners can stand in safety while a moving vehicle

passes by. *See* Mills Depo. (Ex. "4"), p. 56. A cross-cut is a connecting passage between two entries used, *inter alia*, for ventilation and haulage. *See* Trigg Combs Depo. (attached to Defendants' Motion for Summary Judgment as Exhibit "E"), p. 142.

McElroy appealed the citation to the West Virginia Coal Mine Safety Board of Appeals ("Board of Appeals"). Following an investigation of the accident and review by the Board of Appeals—the state agency responsible for enforcing and reviewing appealed Notices of Violation issued to mine operators—found that the regulation was not violated. *See* Order of Withdrawal and Agreement (attached hereto as Exhibit "5"). In fact, following an investigation of this accident by the West Virginia Office of Miner Health, Safety and Training and the exhaustion of appeals for any action on behalf of the agency, there was no finding of any violation of any statutory or regulatory standard.

A number of aberrant events converged to create this accident. These include:

- a piece of scrap plastic ventilation tubing making its way into the mined coal that was loaded into one of the cars in the trip, and projecting into the air out of the loaded coal; *see* Korsnick Report;
- the tubing not being removed or pressed flat by the coal car "leveler"; instead, it bent and rebounded to its original position projecting upward out of the car; *see* Blackwell Depo. (Defendants' Motion for Summary Judgment, Ex. "D"), p. 30;
- the tubing striking and activating the track switch operating mechanism as the trip of cars was proceeding over the switch; *see* Blackwell Depo. (Defendants' Motion for Summary Judgment, Ex. "D"), p. 28; and
- the back half of the trip becoming detached from the front half and being diverted into the Passway (rather than derailing at the switch) and the diverted cars remaining on track and traveling at least two (2) hundred feet; *see* Korsnick Report; Mills Depo. (Ex. "4"), pp. 44-45.

In the absence of <u>any one</u> of these extraordinary incidents, this accident would not have occurred.

III. SUMMARY OF ARGUMENT

There is no merit to any of Appellants' three (3) Assignments of Error.

West Virginia's "deliberate intention" statute demands strict proof of all five (5) of its elements. The Circuit Court correctly determined that Appellants cannot present sufficient evidence with respect to the alleged specific unsafe working condition. By this Appeal, Appellants attempt to manufacture questions of fact, regardless of their relevance or materiality, in an effort to overcome the statutorily-mandated grant of summary judgment. Despite Appellants' freewheeling practice of using the terms interchangeably, as set forth above, this case involves a train diversion, and does not involve a train derailment.

At the trial level, Appellants attempted to allege and prove several claimed unsafe working conditions in an apparent "shotgun proof scheme." However, as the Circuit Court correctly observed, Appellants could not prove all five elements of the deliberate intention statute as to any one specific unsafe working condition.

Within their Appeal, the Appellants now aver that "'parking an occupied man bus too close to a railroad track switch in an underground mine' is a specific unsafe working condition." *See* Appellants' Brief, p. 7 (emphasis added). Indeed, the Appellants' three (3) Assignments of Error focus solely on that alleged unsafe working condition. West Virginia law is clear that Appellants must prove each of the elements of the deliberate intention statute as to that specific unsafe working condition—"parking an occupied man bus too close to a railroad switch in an underground mine."

Appellants, however, attempt (as they attempted at the trial level) to cross-reference and essentially jump back and forth with other alleged unsafe working conditions. Such arguments represent a cluttered and confused attempt to deflect the Court's attention from the sole issue in this Appeal: whether Appellants can meet all the elements of a deliberate intention claim relative

to the claimed specific unsafe working condition: "parking an occupied man bus too close to a railroad track switch in an underground mine." *See* Appellants' Brief, p. 7.

The deliberate intention statute does not permit selective proof of its elements, and Appellants cannot rely on "evidence" of other alleged unsafe working conditions as support for their instant Assignments of Error. In other words, Appellants cannot, as they have attempted to do, assert subjective realization as to one alleged specific unsafe working condition, and assert a statutory/regulatory violation as to a different specific unsafe working condition for which they cannot assert subjective realization. Rather, to survive a motion for summary judgment, there must be evidence of "all five tightly drawn elements." *See Handley*, 620 F. Supp. at 434. Because Appellants could not and cannot present such evidence, summary judgment in favor of Appellees was proper.

IV. DISCUSSION OF LAW

A. STANDARDS FOR SUMMARY JUDGMENT AND APPEAL

"A circuit court's entry of summary judgment is reviewed de novo." *See Painter v. Peavy*, 192 W.Va. 189, 192, 451 S.E.2d 755, 758 (1994). Rule 56(c) "was incorporated into West Virginia civil practice for good reason, and circuit courts should not hesitate to summarily dispose of litigation where the requirements of the Rule are satisfied." *See Jividen v. Law*, 194 W.Va. 705, 713, 461 S.E.2d 451, 459 (1995). In fact, the West Virginia Legislature in enacting the deliberate intention statute, mandated the disposition of such cases on summary judgment when a plaintiff fails to provide sufficient evidence of all five (5) elements of the claim. *See* W.Va. Code § 23-4-2(d)(2)(iii)(B).

In interpreting the language of Rule 56, this Court has stated that "[s]ummary 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." *See Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 59, 459 S.E.2d 329, 336 (1995), citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

"While the underlying facts and all inferences are viewed in the light most favorable to the nonmoving party, the nonmoving party must nonetheless offer some 'concrete evidence from which a reasonable . . . [finder of fact] could return a verdict in . . . [its] favor' or other 'significant probative evidence tending to support the complaint.'" *Williams*, 194 W.Va. at 59-60 (citations omitted). However, only "reasonable inferences" need be considered by a court, and "it is the duty of the court to withdraw the case from the jury when the necessary inference is so tenuous that it rests merely upon speculation and conjecture." *Id.* (citations omitted).

A "genuine issue" for purposes of a motion for summary judgment "is simply one half of a trialworthy issue, and a genuine issue does not arise unless there is sufficient evidence favoring the non-moving party for a reasonable jury to return a verdict for that party . . . . A material fact is one that has the capacity to sway the outcome of the litigation under the applicable law." *See Greenfield v. Schmidt Baking Co., Inc.*, 199 W.Va. 447, 451-452, 485 S.E.2d 391, 395-396 (1997), citing *Jividen*, 194 W.Va. 705, Syl. Pt. 5. To be sure:

> [t]he evidence illustrating the factual controversy cannot be conjectural or problematic. It must have substance in the sense that limns differing versions of the truth which a factfinder must resolve. The evidence must contradict the showing of the moving party by pointing to specific facts demonstrating that, indeed, there is a "trialworthy" issue.

Williams, 194 W.Va. at 60.

Finally, on appeal, this Court may "affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of

the ground, reason or theory assigned by the lower court as the basis for its judgment." *See City of Benwood v. Bd. of Educ.*, 212 W.Va. 436, 442, 573 S.E.2d 347, 353 (2002) (citations omitted).

B. APPLICABILITY OF SUMMARY JUDGMENT IN DELIBERATE INTENTION CLAIMS

In codifying the deliberate intention exception, the West Virginia legislature stated that it "intended to create a legislative standard for loss of [the immunity provided to employers] of more narrow application and containing more specific mandatory elements than the common law tort system concept and standard of willful, wanton and reckless misconduct." W.Va. Code § 23-4-2(c)(1). The legislature further declared that its passage of the exception-codifying legislation represented an effort "to promote prompt judicial resolution of the question of whether a suit prosecuted under the asserted authority of this section is or is not prohibited by the immunity granted under this chapter." *Id.* More specifically "the West Virginia Legislature has expressly directed those courts faced with enforcing [§ 23-4-2] to use procedural pre-trial disposition where the employee cannot meet the requirements of proving deliberate intention under the Act." *Yeater v. Allied Chemical Company*, 755 F.Supp. 1330, 1336 n.1 (N.D. W. Va. 1991).

"Thus, in order to withstand a motion for summary judgment, a plaintiff must make a prima facie showing of dispute on each of the five factors." *See Mumaw v. U.S. Silica Co.*, 511 S.E.2d 117, 120 (W.Va. 1998) (emphasis added). With this legislative mandate in mind, Appellees turn to the arguments set forth in the Appellants' Brief.

C. APPELLANTS' ASSIGNMENTS OF ERROR ARE WITHOUT MERIT

As set forth below, the grant of summary judgment in favor of Appellees was proper because Appellants have not demonstrated the existence of a genuine issue of material fact relevant to all five of the elements necessary for a viable deliberate intention claim.

Accordingly, Appellees respectfully request that this Honorable Court affirm the Circuit Court's grant of summary judgment in favor of Defendant-Appellees.

1. Appellants' alleged specific unsafe working condition: "parking an occupied man bus too close to a railroad track switch in an underground mine."

At the outset, Appellants' contention that a genuine issue of *material* fact exists with respect to the "impact area" can be dismissed rather summarily. *See* Appellants' Brief, pp. 9-11. Stated simply, even if Appellants' location of the impact area—tenuous as it is—is taken as true, the analysis with respect to whether 36 C.S.R. 33-4.1 was violated does not change. The uncontroverted evidence of record demonstrates there was no such violation.

As part of his investigation (within days of the accident) on behalf of the state, Mills—whose testimony Appellants so prominently rely on to support their claims—visited the accident scene, interviewed several eyewitnesses, and determined that the man trips were parked at least 300 feet from the switch. *See* Ex. "4," Mills depo., p. 53. Indeed, his interview notes and deposition reveal that those eyewitnesses (including the other two man trip locomotive operators) believed that they were parked in a safe location. *See* Ex. "2." Combs depo., p. 151. McElroy also performed a timely investigation (the day of the accident), and determined that the distance was over 400 feet. *See* Ex. "3," Blackwell depo., pp. 8-9.[4] Even Plaintiffs' own liability expert, Trigg Combs, testified that the impact area was at least 300 feet from the switch. *See* Ex. "2," Combs depo., p. 133.

[4] There is no dispute that seventeen (17) coal cars were diverted into the Three North Passway. *See* Appellants' Brief, p. 3, ¶ 7. Each coal car is over twenty-seven (27) feet in length. *See* Affidavit of William Blackwell, attached hereto as Exhibit "6." This totals at least four hundred and seventy (470) feet of coal cars being diverted from the switch into the Three North Passway.

Against these facts of record, Appellants rely upon affidavits—created nine (9) years after the accident at issue—of two non-eyewitnesses to support their attempt to create a general issue of material fact, contending that "the area of impact was not in the designated safe area, but 'inby' of the Old Main East Empty Track Switch (3 North Construction)." *See* Appellants' Brief, p. 10 and Exhibit "6" thereto. In making that assertion, Appellants ignore the accounts of actual eyewitnesses who were interviewed by Mills within days of the accident, the McElroy investigation on the day of the accident, the undisputed fact that 470 feet of coal cars went down the Passway, and that the miners who were unexpectedly endangered believed that the man trips were parked in a safe location.

In any event, whether the impact area was 200-250 feet from the switch (as Appellants tenuously contend) or 300-400 + feet from the switch (as the evidence demonstrates) does not change the fact that (1) where the man trips were located was not unsafe under expected circumstances, and (2) the regulation at issue was not violated.

In opposing the Defendants' Motion for Summary Judgment, Appellants had claimed several "specific unsafe working conditions," such as the general "danger associated with the track switches" (*see* Appellants' Brief, p. 15), the alleged danger with using "toggle switches" as opposed to "paw switches" (*see* Appellants' Brief, p. 17), and the alleged danger associated with "the lack of a derail device." (*see* Appellants' Brief, p. 23). "Such a strategy might appear to increase a plaintiff's opportunities for success; it also measurably compounds his burden of production and proof. More significantly—at least for the trier of fact—this attack on several fronts, or shotgun proof scheme, can lead to confusion and unreliable results." *See Handley*, 620 F. Supp. at 436.

For each specific unsafe working condition adduced, Appellants must prove each of the five elements set forth under § 23-4-2(c)(2)(ii). *Id.* In other words, Appellants cannot cobble together a deliberate intention claim by proving element number one applicable to one unsafe working condition, element number two applicable to another, and so on. *Id.* All five elements must be proven for each allegedly unsafe condition in order for the Appellants to succeed on their claim based on that condition. If there is a failure of proof on any one of the five elements for a particular alleged unsafe condition, the plaintiffs cannot establish their deliberate intention claim based on that condition. *Id.* [5]

In this Appeal, the Appellants challenge the Circuit Court's grant of summary judgment on one (1) alleged specific unsafe working condition: "parking an occupied man bus too close to a railroad track switch in an underground mine." *See* Appellants' Brief, p. 7 (emphasis added); *see also id.*, p. 5 ("The Circuit Court erred by granting summary judgment as the evidence created a genuine issue [of] material fact that a specific unsafe working condition existed, i.e., parking an occupied man bus too close to a railroad track switch in an underground mine.") Because Appellants fail to demonstrate the existence of several elements of their deliberate intention claim, summary judgment was proper.

The Circuit Court was correct that Appellants failed to come forward with sufficient evidence to demonstrate an "unsafe working condition," and therefore, could not demonstrate "subjective realization and appreciation." The five (5) elements of a deliberate intention claim are necessarily intertwined, especially the first element (specific unsafe working condition) and

---

[5] To be sure, a simple reading of the statute confirms the finding of *Handley*. Subsection (A) of §23-4-2(c)(2)(ii) refers to "a" specific unsafe working condition. Thereafter, subsections (B) through (E) refer to "the" specific unsafe working condition. Thus, Appellants may attempt to point to as many specific unsafe working conditions as they wish, but they must also prove subjective realization, statutory/standard violation, intentional exposure and proximate cause for each such alleged specific unsafe working condition.

the second element (subjective realization and appreciation of that condition). As the Circuit Court correctly observed, subjective realization and appreciation and violation of safety statute, regulation or industry standard cannot be proven if the threshold element (specific unsafe working condition) has not been established. *See* Memorandum Order, p. 8. Specifically, a one-time freak accident such as this accident cannot establish a specific unsafe working condition, or at the very least, cannot support subjective realization and appreciation:

> Plaintiff is attempting to bring a negligence claim for a singular incident disguised as a "deliberate intention" claim. Plaintiff is trying to make the alleged violation of 36 C.S.R. 33-4.1 related to the legal use of "electric switch throw boxes" - the actual condition perceived by the Plaintiff to be the specific unsafe working condition. Unable to find legal authority or industry standards applicable to "electric switch throw boxes," the Plaintiff tries to attach the working condition to the singular event.
>
> The alleged violation of 36 C.S.R. 33-4.1 was an isolated event, not a specific unsafe working condition. This event cannot be the basis for a "deliberate intention" action.
>
> The Court disagrees that the foreman's "subjective realization" of the oncoming danger in this singular incident can be the basis for a "deliberate intent" claim. Plaintiff's theory stretches the "deliberate intent" cause of action far beyond it[s] intended purpose. Plaintiff's theory would suggest that anytime a foreman witnesses an oncoming dangerous situation, and reacts negligently to the situation, the negligence of the foreman is immediately imputed to the company as a "deliberate intention" action. Such a theory turns the "deliberate intention" statute on its head and creates a loophole for negligence actions in contravention of employer immunity.

See Memorandum Order, pp. 9-10 (emphasis added).

Where, as here, the alleged unsafe working condition consists of a sudden, unexpected event[6], there is no opportunity for the employer to subjectively realize that the condition exists.

---

[6] The Plaintiff's theory that the working condition was unsafe is premised on a *post hoc* accident analysis, i.e., the occupied man bus was parked too close to the railroad track switch simply because the freak accident occurred and the plaintiff's man trip was struck by the uncoupled cars, even though it was struck at a point several hundred feet from the switch. Of

Instructive in this regard is *Deskins v. S.W. Jack Drilling Co.*, 600 S.E.2d 237 (W.Va. 2004). There, the plaintiff, a general laborer for a drilling company, was injured while he and other members of a crew were in the process of setting up a mobile drilling rig. The plaintiff was directly involved in the placement of the "pipe tub" and "pipe rack" into their proper positions. Plaintiff was injured when his foot was caught and crushed between the tub and the rack as the rack was being moved adjacent to the tub by pushing it with a bulldozer, which was being operated by the plaintiff's immediate supervisor. *Id.* 239-240. The circuit court found that the unsafe working condition was "the plaintiff's location between the two pieces of equipment being pushed together by the dozer." *Id.* at 241. Just prior to moving the bulldozer, the supervisor instructed the crew (including plaintiff) to move away from the area. The crew (including plaintiff) complied, but the plaintiff then suddenly moved back into the area and between the two pieces of equipment, sustaining his injuries. *Id.*

The circuit court granted summary judgment in favor of the employer, finding that plaintiff did not provide sufficient evidence to satisfy the subjective realization element of the deliberate intention statute. *Id.* at 240. This Court affirmed on appeal:

> [T]here was no unsafe working condition in this case until the appellant moved in between the two pieces of equipment as they were being pushed together.
>
> * * *
>
> . . . . The circuit court merely indicated that the sudden occurrence of the unsafe condition in this case was relevant to its determination of whether there was evidence indicating that the appellees subjectively realized that an unsafe working condition existed. Obviously, an unsafe condition that develops or first springs into existence close in time to the accident presents less of an opportunity for the employer to realize and appreciate the risk.

---

course, the fallacy of that theory is demonstrated by the fact that the plaintiff's man trip could have been struck even if it were parked hundreds of feet further from the switch if the uncoupled cars remained traveling on the track.

Id. at 243.

In the instant action, the Circuit Court correctly observed that this singular extraordinary and unexpected accident cannot be the basis for a deliberate intention action because it does not support a specific unsafe working condition. *See* Memorandum Order, p. 10. Specifically, the "condition" giving rise to this accident came about after a piece of flexible tubing made it through the coal car leveler (unbeknownst to anyone), after the tubing protruded from the coal car, that it did so prior to passing under the overhead lever controlling the switch, that it actually struck the lever and activated the switch at the junction with the Three North Passway, that as a result seventeen (17) cars in the trip were uncoupled and diverted into the Passway seconds later, and that the cars stayed on the track rather than derailing and traveled for hundreds of feet before striking the man trip. Logically, as the Circuit Court concluded, there was no opportunity for Appellees to subjectively realize the alleged unsafe condition. *Id.* Furthermore, the defendant Mr. Saunders was the only supervisory person present at the time and obviously did not subjectively realize that an unsafe working condition existed because he was equally exposed to any risk; of course, none of the other miners did either. Accordingly, summary judgment in favor of Appellees was and is proper.

Even assuming *arguendo*, that parking the man trips at that location constituted a "specific unsafe working condition," Appellants would still be required to prove the remaining elements of deliberate intention with respect to that condition in order to survive a motion for summary judgment. As set forth below, even assuming such parking did constitute a "specific unsafe working condition," Appellants cannot demonstrate either (1) a subjective realization and appreciation of the existence of such specific unsafe working condition and of the high degree of risk and the strong probability of serious injury (element "2" or "B" of W.Va. Code § 23-4-

2(c)(2)(ii)) or (2) a violation of a specific safety statute/regulation/industry standard (element "3" or "C" of W.Va. Code § 23-4-2(c)(2)(ii)). Accordingly, summary judgment in favor of Appellees was proper, and there exist several bases on which to affirm the Circuit Court's decision. *See City of Benwood*, 212 W.Va. at 442; 573 S.E.2d at 353 (Supreme Court may affirm "when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the lower court as the basis for its judgment.").

2. Appellants cannot demonstrate subjective realization and appreciation.

This Court has determined that the "subjective realization" element of a deliberate intention claim requires proof of actual knowledge on the part of an employer. "*This [subjective realization] requirement is not satisfied merely by evidence that the employer reasonably should have known of the specific unsafe working condition and of the strong probability of serious injury or death presented by that condition. Instead, it must be shown that the employer actually possessed such knowledge.*" *McBee v. U.S. Silica Co.*, 205 W.Va. 211, 214-15, 517 S.E.2d 308, 311-12 (1999)(emphasis in original).

As previously noted, the alleged specific unsafe working condition of which Appellants complain in the instant Appeal is "'parking an occupied man bus too close to a railroad track switch in an underground mine' is a specific unsafe working condition." *See* Appellants' Brief, p. 7 (emphasis added).

In their "subjective realization" argument section of their Brief (pp. 12-18), the Appellants point to three (3) areas allegedly creating a genuine issue of material fact: (1) circumstantial evidence of Mr. Saunders' actions; (2) Haulage Safety Rules and Procedures from

1988; and (3) prior incidents and subsequent remedial measures relative to "electric throw switches" and "toggle switches."

Appellants' arguments relative to Mr. Saunders are without merit, as set forth more fully below and by the Circuit Court's Memorandum. *See* Memorandum Order, p. 10. The arguments relative to the Haulage Safety Rules and Procedures fail because the foreman and operators were parked and believed they were parked "in a designated safe area." Finally, the arguments relative to prior incidents and subsequent remedial measures relative to "electric throw switches" and "toggle switches" not only fail on the merits, but are wholly unrelated to and cannot support the specific unsafe working condition ("parking an occupied man bus too close to a railroad track switch in an underground mine") as alleged in the instant Appeal. Accordingly, summary judgment in favor of Appellees was proper.

a. "Knowledge" of Eugene Saunders (and other mine personnel)

The evidence of record shows that Eugene Saunders, the foreman who allegedly directed the man trips to be parked in the Three North Passway, did not possess the requisite subjective realization and appreciation of the risk for the fate that befell Sedgmer. First, and perhaps most critically, when asked why he parked in that position, Saunders responded, "I parked there because I felt it was a safe distance. That's where I felt it was safe." *See* Saunders Depo., p. 19 (relevant portions of Mr. Saunders' deposition testimony are attached hereto as Exhibit "1"). Second, Saunders was not aware of any prior similar accidents or circumstances such as the instant accident:

> Q. Have you ever heard of any other incidents of runaway trains at the McElroy Mine before July 28, 1994?
>
> A. No, sir.

Q. Did you ever know of an instance where a switch was inadvertently hit by something sticking out of a coal car?

A. No, sir.

See Ex. "1," Saunders depo., p. 34. Clearly, Saunders, the foreman in charge, felt that parking at that distance from the switch was a safe practice. Indeed, since his personal safety would be jeopardized if he was in the "vicinity of a switch" and not in a safe area, his determination that he was sufficiently beyond the switch proves that there was no subjective realization of any danger. It is beyond reason to construe the fact of an accident occurring as evidence that Saunders had a subjective realization and appreciation that the accident would or could occur.

Appellants contend that "[w]arnings are only legitimately given when actual danger is perceived." *See* Appellants' Brief, p. 14. Appellees do not necessarily disagree with this contention. The key in this case is "when" a person (here, Mr. Saunders) became aware of a danger. The record is clear that Mr. Saunders warned his men to get out of the man trips <u>after</u> he saw the lights change and the cars coming in. Trigg Combs, Appellants' liability expert witness, concedes as much. *See* Combs depo., pp. 166-167 (relevant portions of Mr. Combs' deposition testimony are attached hereto as Exhibit "2"). As the Circuit Court recognized, Mr. Saunders' <u>heroic actions</u> in yelling at his men and attempting to throw the switch do <u>nothing</u> to implicate a subjective realization and appreciation, as these actions occurred <u>after</u> Mr. Saunders recognized that a danger existed. *See* Memorandum Order, p. 10.[7]

---

[7] Mr. Saunders testified that upon recognizing that coal cars were heading into the Passway and toward the parked man trips, he immediately called for all of the individuals in the three man trips to exit the vehicles and seek safety. At the same time, rather than seeking safety himself, Mr. Saunders proceeded inby -- and <u>toward</u> the runaway cars -- for the purpose of throwing a track switch, in the hope that it would derail the cars prior to them reaching the man trips. Due to the advancing runaways, Mr. Saunders was unable to reach the switch in time, and narrowly escaped death or serious injury as he abandoned his attempt. *See* Ex. "1," Saunders depo., pp. 6-7.

Recognizing their own flawed logic, Appellants go so far as to accuse Mr. Saunders of lying. *See* Appellants' Brief, p. 13 ("Appellants assert his testimony about trying to throw the safety switch is a recent fabrication."). However, "unsupported speculation is not sufficient to defeat a summary judgment motion," and a non-movant "cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another." *See Williams v. Precision Coil, Inc.*, 459 S.E.2d 329, 338 (W.Va. 1995) (citation omitted). Appellants have had every opportunity to develop their case, and stooping to the level of relying upon the "he's lying" argument at this stage of the proceedings only further reveals the weaknesses in their deliberate intention claim.

The record is completely devoid of any evidence—direct or circumstantial—that Mr. Saunders knew that the cars would come in or that there was a strong possibility that they would come in. In fact, the evidence is quite to the contrary. To be sure, Saunders (1) felt he and his men were safe; (2) never heard of any runaway train incidents in the McElroy Mine; and (3) never knew of any instance where a switch was inadvertently hit by something sticking out of a coal car.

Further, the "circumstantial" evidence explanation proffered by Appellants—Saunders was looking ahead and began screaming when the cars started to come in—is patently unreasonable. When deciding a motion for summary judgment, a court must not draw <u>unreasonable</u> inferences in favor of a non-moving party. *See Williams*, 194 W.Va. at 59-60, *supra*. The evidence is clear that Saunders was looking straight ahead, waiting for the cars to pass, and screamed only after the danger became apparent. As the Circuit Court aptly recognized, "Plaintiff's theory would suggest that anytime a foreman witnesses an oncoming dangerous situation, and reacts negligently to the situation, the negligence of the foreman is

immediately imputed to the company as a 'deliberate intention' action. Such a theory turns the 'deliberate intention' statute on its head and creates a loophole for negligence actions in contravention of employer immunity." *See* Memorandum Order, p. 10.

Appellants misstate the precise danger of which Mr. Saunders was allegedly aware. Of course Mr. Saunders was aware of a danger once he saw the light change and the cars coming in. However, there is no evidence that Mr. Saunders knew that there was even the slightest chance the switch would be thrown in the middle of the trip and the cars would come in the Passway and stay on track for at least 200 feet. That is the danger of which Mr. Saunders must have had a subjective realization and appreciation of before liability may attach. Appellants cannot show a genuine issue of material fact relative to the same.

Further, no subjective realization and appreciation of the risk of this accident occurring may be imputable to McElroy by way of any other of its representatives. For example, William Blackwell, the Safety Supervisor at the McElroy Mine.[8] *See* Blackwell Depo., p. 4 (relevant portions of Mr. Blackwell's deposition testimony are attached hereto as Exhibit "3"). Blackwell testified that he felt the area in which Saunders parked the man trip was safe:

> I'm one of the ones that picked that [area in the Three North Passway] and nothing ever has happened like that before, in my whole mining knowledge, and nothing since, and I felt, as well as a lot of other people, that that was a very safe place and above and beyond where we needed to stop them. I mean, we had them well back out of the road, and with, you know, my mining knowledge and other people's, that was a safe area.

See Ex. "3," Blackwell depo., p. 22.

Additionally, mine inspector Brian Mills also testified that he has never seen or heard of a wreck where cars that have in effect been diverted from a track traveled upwards of 300 feet.

---

[8] Mr. Blackwell investigated the accident by interviewing witnesses that same day as part of his duties as McElroy's safety supervisor. *See* Ex. "3," Blackwell depo., pp. 6 and 12-14.

See Mills Depo., p. 57 (relevant portions of Mr. Mills' deposition testimony are attached hereto as Exhibit "4"). Furthermore, his investigation reveals that such a subjective appreciation is utterly lacking. Mills' interview notes and deposition testimony reflect that other individuals, including the operators of and passengers in the other man trips, who were actually present on the day in question, considered where the man trips were located to be a safe distance, and Combs conceded as much. *See* Ex. "2," Combs depo., p. 151.

For example, in his interview with Mills, Wilbur Riddle (who was operating one of the three (3) man trips), stated that he felt because of the distance to the switch from where they were parked there was no need to get out of the vehicle. He also stated that the practice was to dismount only "when parked close to the switch." *See* Ex. "4," Mills Depo., pp. 93-94. Obviously, none of the persons present felt that they were parked close to (or "in the vicinity of") the switch on the occasion in question The operator of the other man trip, Ron Tanner, stated the same, as did Gene McClellan, a passenger in one of the man trips. *See* Ex. "4," Mills Depo., pp. 108-109.

Appellants cannot demonstrate that Saunders, nor McElroy, possessed a subjective realization and appreciation of the risk of this accident occurring. The opinions of Appellants' own expert, Mr. Combs, reflect this. At best, Appellants argue that someone at the McElroy Mine *should have known* of the risk of danger. *See* Ex. "2," Combs Depo., p. 152. They cannot establish that someone *did* know of this specific danger and chose to take the risk.

b. Haulage Safety Rules and Procedures from 1988

Appellants first point to these rules, appearing in an inter-office communication from October 1987 and Rules and Procedures from October 1988, at page 2 of their Brief, taking care to highlight the following language: "all individuals are required to dismount all rail equipment . . . ". *See* Appellants' Brief, p. 2. Appellants failed to make any mention of another clause in

those rules, one that appears directly after the highlighted language and is critical to the instant litigation: ". . . unless such equipment is parked in a designated safe area or oncoming traffic is traveling with the switch." *See* Appellants' Exhibits "1" and "2."

First, there is no evidence that this internal rule was even violated. The man trips were parked several hundred feet from the switch on the main haulage -- a safe area. Moreover, the evidence of record has demonstrated that no one—including the foreman, Mr. Saunders, the two (2) other locomotive operators, Messrs. Riddle and Tanner, or the Safety Supervisor, Mr. Blackwell—believed that this "in-house" rule was being violated. In short, these rules do not establish that any of the Appellees possessed a subjective realization and appreciation of any specific unsafe working condition on the day in question. In no colorable manner do these rules reflect any subjective realization and appreciation of the risk of a freak accident such as the one at issue.

Even assuming *arguendo* that the Appellees violated the internally created Haulage Safety Rules and Procedures, which is denied, that fact, standing alone, would be insufficient to support a determination that the Appellees violated a commonly accepted and well-known safety standard within the coal mining industry. *See Handley*, 804 F.2d at 272 (holding that the defendant's violation of the procedures described in its internal safety data sheets was insufficient to support a jury determination that a commonly accepted and well-known safety standard was violated). In any event, it is clear that no one possessed a subjective realization and appreciation of any specific unsafe working condition related to these Rules.

c. 1989 Incident, "Electric Throw Switches" and "Toggle Switches"

Appellants also go to great lengths to contend that the use of "electric throw switches" as opposed to "toggle switches" is relevant to a subjective realization and appreciation of the

specific unsafe working condition alleged in their Appeal: "parking an occupied man bus too close to a railroad track switch in an underground mine." Appellants point to a 1989 **derailment** of a track-mounted vehicle and Respondent's replacing "electric throw switches" following the instant action. This is a classic example of Appellants' "shotgun approach," jumping back and forth between alleged unsafe conditions, statutory violations and subjective realization, hoping that something will stick. Significantly, Appellants do not characterize McElroy's use of electric throw switches as a specific unsafe working condition on which they may base their claims. Indeed, as described more fully below, such a condition cannot support—either wholly or partially—a *prima facie* deliberate intention claim.

First, and most critically, Mr. Saunders, the very individual charged by Appellants with the requisite subjective realization and appreciation element, had never heard about the 1989 incident or any other incidents involving "runaway trains." *See* Ex. "1," Saunders Depo., p. 34. Indeed, Appellees dispute the existence of such an incident as alleged by Appellants.

Second, the 1989 incident, standing alone, cannot support a finding of subjective realization and appreciation. "[A] plaintiff may choose to introduce evidence of prior *similar* incidents or complaints to circumstantially establish that an employer has acted with deliberate intention...." *Nutter v. Owens-Illinois, Inc.*, 209 W. Va. 608, 613, 550 S.E. 2d 608, 613 (2001) (emphasis added). However, for such prior incidents or complaints to be admissible as probative of an employer's subjective realization of an unsafe condition, a plaintiff must establish the requisite degree of similarity between the prior incidents and the incident that forms the basis of the case at bar. *See McBee*, 205 W. Va. at 215; 517 S.E.2d at 312 (stating that "the [prior] accident and the accident [involving the Plaintiff] were not sufficiently similar so as to give [the Defendant] a subjective realization of any danger with respect to the [unsafe condition]."); *see*

also, *Gable v. The Kroger Co.*, 410 S.E.2d 701 (W.Va. 1991) (other incidents are relevant only if they are "substantially similar" to the incident in question).

In the 1989 incident, the train allegedly **derailed**, with cars only going a few feet before stopping. Here, the train **diverted**, remained on track, and traveled several hundred feet. Moreover, in the 1989 incident, a wooden plank projecting out of the coal pile on one of the coal cars allegedly struck a switch throw. The "levelers" in use at the time of the subject accident were subsequently installed to flatten or strike and remove such projections, thus preventing a subsequent similar occurrence. The aberrant nature of the chain of events leading to this train diversion (not derailment) cannot be overstated. A piece of scrap plastic ventilation tubing made its way into the mined coal that was loaded into the seventeenth car in the trip. The tubing was not removed or pressed flat by the coal car "leveler" (as would a rigid plank), instead bending and rebounding to its original position to enable it to activate the switch. Once the switch was activated, half of the cars in trip remained on the straight (without derailing) and half headed into the Three North Passway, remaining on track and traveling several hundred feet.

Appellants do not even attempt to establish any "substantial similarity" betweens these incidents. Appellants' broad assertion that derailed trains "either wreck or, if there is another rail available, become runaways" finds no support in the record. Again, no one testifying in this case has ever seen or heard of a similar situation—not even Appellants' liability expert, Trigg Combs. In fact, even Combs conceded that derailments are not uncommon at switches, and when a derailment occurs, the cars travel no more than 100 feet. There is simply no evidence that Appellees (or anyone) anticipated that a train of coal cars could divert at a switch and remain on track for several hundred feet.

In any event, as the Circuit Court aptly recognized, there is absolutely no evidence of record that the use of "electric throw switches" violates any state or federal safety statute or regulation, or a commonly accepted and well-known safety standard. *See* Memorandum Order, p. 9. Further, neither the 1989 derailment nor the use of "electric throw switches" has any bearing whatsoever on the Appellants' burden of proof here: Appellants must present evidence that Appellees had a subjective realization and appreciation of the risk of a diversion (not a derailment) at a switch, with the diverted train traveling several hundred feet (at a minimum, 200 feet) and making contact with the miners parked in the Passway. In other words, these are two (2) completely different risks, and they cannot be used interchangeably to support the five (5) "tightly drawn elements" of the deliberate intention statute.

Because Appellants cannot establish the subjective realization and appreciation element of their deliberate intention claims (as to the distance of the man trips parked for the switch or an electric switch throw being inadvertently activated under these circumstances), summary judgment in favor of Appellees was proper.

3. Appellants cannot demonstrate violation of specific safety statute/regulation/industry standard.

Appellants also contend that genuine issues of material fact as to the existence of a violation of a specific safety standard or industry standard. In support of their claims, Appellants point to (1) 36 C.S.R. 33-4.1, (2) an alleged industry standard (essentially incorporating 36 C.S.R. 33-4.1), and even though not related to their Assignments of Error, W.Va. Code § 22A-2-37, which pertains to "stop blocks or derails." As set forth below, Appellants fail to create a genuine issue of material fact, and, in any event, assuming *arguendo*, that there is a question of fact relative to this single element of a deliberate intention claim, Appellants have failed to

demonstrate the other four (4) elements of a deliberate intention claim, and therefore, summary judgment in favor of Appellees was proper.

a. 36 C.S.R. 33-4.1

Following his investigation of the accident, Mr. Mills issued a Notice of Violation of 36 C.S.R. 33-4.1. Appellants seek to employ this alleged violation as evidence of element "3" or "C" of the deliberate intention statute: "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." The evidence of record, however, establishes that there was no such violation in this case.

It must be stated that upon McElroy's challenge to the Notice of Violation, at the outset, the citation was subsequently withdrawn upon review by the West Virginia Coal Mine Safety Board of Appeals. A copy of the Order of Withdrawal and Agreement is attached hereto as Exhibit "5." The Board determined that:

> Counsel for HST [Office of Miners' Health, Safety and Training] has reviewed the evidence regarding the Notice of Violation. The evidence indicates that the cited regulation was not violated as alleged in the Notice of Violation.

Id. at Paragraph 2 (emphasis added). Notwithstanding the fact that the state agency charged with enforcement of the state regulation concluded there was no violation of it, Sedgmer apparently bases his deliberate intention claim upon the determination of Mr. Brian Mills (which determination, as noted, was abrogated by the agency employing him) and the Appellants' liability expert, Trigg Combs, who concluded that Appellees violated 36 C.S.R. 33-4.1. Specifically, Appellants maintain that in stopping the man trips where they did, they were in the vicinity of a switch and the operators (and Mr. Saunders in particular) should have instructed all passengers to dismount the vehicle and seek refuge in a shelter hole or a crosscut.

Obviously, the critical issue here is what meaning is attributed to "vicinity of a switch." The evidence of record established that because switches are discontinuities in the rails, derailments (where wheels jump off the track) at switches are not uncommon. *See* Ex. "4," Mills depo., p. 56. Indeed, a true derailment, *i.e.*, where the wheels of a mounted piece of equipment actually leave the track, involves the derailed vehicle traveling a distance of much less than 100 feet. *See* Ex. "2," Combs depo., p. 137. Thus, the logic of 36 C.S.R. 33-4.1's requirement of getting into a shelter hole or cross-cut when "in the vicinity of a switch" becomes more clear: there is a danger of derailment in the "vicinity of a switch." Here, while a derailment (where the cars travel less than 100 feet) could reasonably have been anticipated if something went wrong, such a freak diversion, where the vehicle stays on an unintended track, could not have been anticipated.

Again, whether the impact area was 200-250 feet from the switch or 300-400 feet from the switch does not change the fact that the regulation at issue was not violated. Appellants' interpretation of "vicinity of a switch" is, to say the least, over-inclusive and contrary to law and common sense.

For example, despite the fact that the man trips were parked over 300 feet (or, as Appellants argue, 200-250 feet) from the switch, Mills issued the violation. However, it is apparent that the sole basis for Mills' issuance of the Notice of Violation was the fact that the accident occurred. To be sure, Mills testified that had he been at the mine, had seen the man trips parked there, and no accident had occurred, he would not have issued a citation. *See* Ex. "4," Mills depo., pp. 140-141. Mills did not engage in any analysis of various factors to consider in determining what, in this instance, would constitute the "vicinity of a switch." *Id.* at pp. 70-71. In other words, under Mills' interpretation, if there is an accident, the regulation is violated.

This cannot be the case. To be sure, it is well established that the mere occurrence of an accident does not mean that a legal duty has been breached. *See, e.g., Bronz v. St. Jude's Hospital,* 184 W.Va. 594, 596, 402 S.E. 2d 263, 265 (1991).

Similarly, Appellants' liability expert witness, Trigg Combs, who has, until this case, never interpreted the regulation at issue, testified that "vicinity of a switch" in this action would constitute anywhere up to 4,800 feet -- nearly one mile. *See* Ex. "2," Combs Depo., pp. 155-156. Under Combs' analysis, the area beyond the vicinity of the Three North Passway in-by switch would be so far along the out-by portion of the Three North Passway to a point actually *on the main haulage track. Id.* at pp. 140-141. By Combs' own admission it would be "insane" to interpret the regulation to require the man trips in this case to await the passing of the trip of loaded coal cars *on the main haulage track. Id.* at 141. Such an expansive interpretation of "vicinity of a switch" renders the regulation at issue a nullity. Under Combs' interpretation, there are few, if any, areas of the entire mine which are not in the "vicinity of a switch." In other words, Combs would have miners go to a place of safety almost any time a trip was approaching from the other direction, even if the approaching trip is nearly a mile away. Clearly, this also cannot be the case.

Indeed, Combs testified that he had never heard of a situation where diverted cars remained on the track and traveled for a distance of approximately 300 feet, as here. *See* Ex. "2," Combs depo., p. 135. He further acknowledged that a true derailment, *i.e.*, where the wheels of a mounted piece of equipment actually leave the track, involves the derailed vehicle traveling a distance much less than 100 feet. *Id.* at p.137. Further, there were no prior diversions into the Three North Passway which would constitute "runaway" traffic. *Id.* at pp. 173-174.

Appellants cannot dispute that the violation of this provision issued by Mr. Mills was withdrawn by the West Virginia Office of Miners' Health, Safety and Training ("OMHST") and approved by Order of the West Virginia Coal Mine Safety Board of Appeals, the very state agency charged with the ultimate interpretation and enforcement of coal mine safety regulations. Appellants attempt to create an issue of fact by arguing, *inter alia*, that the withdrawal of the citation is dubious. *See* Appellants' Brief, pp. 18-19.

Although not *res judicata*, the Court should give deference to this unchallenged decision, made by the very agency with expertise in interpreting and enforcing mine safety regulations. "[C]ourts will not override administrative agency decisions, of whatever kind, unless the decisions contradict some explicit constitutional provision or right, are the results of a flawed process, or are either fundamentally unfair or arbitrary." *See Frymier-Halloran v. Page*, 193 W.Va. 687, 694, 458 S.E.2d 780, 788 (1995); *Princeton Comm. Hosp. v. State Health Planning*, 174 W.Va. 558, 564, 328 S.E.2d 164, 171 (1985)("[T]he court must give due deference to the agency's ability to rely on its own developed expertise.")(citations omitted).

Further, the record clearly demonstrates that this is not a situation where the subject incident occurred and went without investigation by the state administrative agency having authority over McElroy's operations. To the contrary, an investigation was conducted, and reviewed at the highest level. That an "authorized miners' representative" did not "sign off" on it, as raised by Appellants, is of no moment. The fact is we do not know why, and short of Appellants' intimations of "something fishy is going on here," they've offered <u>no facts</u> as to why, nor what difference such a sign-off would have made.

Conceivably, Appellants could also allege international espionage and other tales of intrigue. But just like Appellants' cries of "cover up," they are meaningless without evidence to

substantiate them. The record is completely devoid of any evidence suggesting any improprieties in the agency review process, and does not reveal anything to even remotely support such a claim. As the proponents of the claim, it is the burden of the Appellants to proffer evidence establishing it, and showing that it is relevant to their claims. Even after over eight (8) years of discovery, they have done neither.

The record does reveal, however, that (1) there was an investigation; (2) a violation was issued; and (3) that violation was reviewed and withdrawn by the OMHST and approved by the Board of Appeals, the very agency responsible for interpreting and enforcing the regulations. The withdrawal does not indicate a cover up; rather, it is the result of a standard adjudicatory process afforded persons cited for allegedly violating certain statutory and regulatory provisions, and here, that process resulted in the agency determining that its inspector was wrong in issuing the citation. Appellants cannot produce any evidence to the contrary.

Thus, the only "evidence" the Appellants have proffered in support of a violation of this provision is the testimony of Mr. Combs and Mr. Mills, both of whom, as set forth above, provide untenable interpretations of 36 C.S.R. 33-4.1.

b. Alleged Industry Standard

Appellants also cite to testimony of Messrs. Clemons, Sedgmer and Mills in an effort to create an issue of fact relative to an alleged "standard of the industry to enter a shelter hole while waiting for coal cars to pass." *See* Appellants' Brief, pp. 26-27.

At the outset, the flaw in Appellants' theory, (a flaw that applies nearly universally to each of Appellants' theories in this case), is that it presumes the individuals involved in the accident (namely, Mssrs. Saunders, Sedgmer, Riddle and Tanner) were in a place of apparent danger or within the "vicinity of the switch." As the record has clearly demonstrated, Mr. Blackwell, the Safety Supervisor, Mr. Saunders, the foreman directing the man trips into the

Three North Passway, and Mssrs. Riddle and Tanner, the operators of the other locomotives, all believed they were in a position of safety. *See* Ex. "3," Blackwell depo., p. 22; Ex. "1,", Saunders depo., p. 19; Ex. "4," Mills depo, pp. 93-94 and 108-109.

There is simply no genuine issue of material fact with respect to the proffered testimony on an alleged "industry standard." None of these three (3) (Clemons, Sedgmer or Mills) is an expert witness on the subject of the "industry standard." Mills is employed by the W.Va. OMHST, which enforces state mining regulations, and to the extent some "industry standard" is codified in the regulations (such as 36 C.S.R. 33-4.1), as set forth above, Appellees did not violate any such regulation. Further, Mr. Clemons was not involved in the accident at issue, and there is absolutely no evidence that any one of his constituents actually present on the day in question (including Mr. Sedgmer) suggested to Mssrs. Saunders, Riddle or Tanner (the locomotive operators) that they should exit the man trips and get into a shelter hole or crosscut. Likewise, the testimony of Sedgmer is clearly self-serving, and, in any event, he said nothing to Saunders, Riddle or Tanner on the day in question, nor take any action to avoid what he now says was a dangerous condition. Clearly, to the extent Sedgmer was aware of any industry standard, he did not believe it was being violated on that day.

The testimony submitted by Appellants may in fact demonstrate an "industry standard" exists when miners are in a position of apparent danger or within the "vicinity of a switch." The miners were not in such a position at the time of this accident. There is absolutely no evidence or suggestion that the situations described by Mssrs. Clemons, Sedgmer and Mills involved man trips parked in a fashion similar to the instant case, several hundred feet (between 200 and 400 feet) in a passway, on a "fairly level" track.

Further, there is absolutely no evidence or suggestion that Mssrs. Clemons, Sedgmer or Mills were ever directed in the past by Mr. Saunders (the Appellants' alleged link to subjective realization and appreciation) to exit the man trips and seek shelter. Thus, there is absolutely no evidence of any subjective realization and appreciation that any industry standard was being violated.

c. W.Va. Code § 22A-2-37(w)

Appellants also attempt to rely upon—rather inexplicably in light of their three (3) Assignments of Error (which focus solely upon parking in the "vicinity of a switch")—W.Va. Code § 22A-2-37(w), which provides that "[p]ositive stop blocks or derails shall be installed on all tracks near the top and at landings of shafts, slopes and surface inclines. Positive-acting stop blocks or derails shall be used where necessary to protect persons from danger of runaway haulage equipment." (emphasis added). A "derail," as identified by Appellants' liability expert, is a switch-operated device that is part of a track system. When the switch is pulled, the derail causes the rail-mounted vehicle to jump off the track, rather than continue down the line. *See* Ex. "2," Combs Depo., pp. 112-113. Obviously, the alleged violation of § 22A-2-37(w)—which was not asserted as a basis for error—has nothing to do with the sole alleged specific unsafe working condition: "parking an occupied man bus too close to a railroad track switch in an underground mine." *See* Appellants' Brief, p. 7.

Quite simply, the conditions that existed at and near the scene of the accident were not such as to require the use of stop blocks under this provision. Indeed, even following an investigation by the West Virginia Office of Miner Health, Safety and Training, no citation was issued with respect to this provision—a statute that very agency is charged with enforcing.

There is absolutely no evidence in the record that demonstrates that Appellees (1) were in violation of this statutory provision; or (2) possessed notice, much less actual knowledge, that a

"strong probability of serious injury or death" was presented by non-use of stopblocks under the circumstances existent in the McElroy Mine on the date in question.[9] As described above, a number of aberrant events occurred, all of which coalesced to result in this accident.

Further, Appellants' reliance upon *Cecil v. D&M, Inc.*, 517 S.E.2d 27 (W.Va. 1999) is misplaced. That case involved a collision of man trips, one of which had "traveled down a 450-foot slope with a 10% grade." *Id.* at 30. Thus, unlike the instant case, which involved "very little" grade where locomotives traveled "fairly level" (*see* Ex. "2," Combs depo., pp. 92-93), the dangerous condition in *Cecil* existed "because the man trip station was located at the bottom of a steep slope around a curve." *See Cecil*, 517 S.E.2d at 33. Thus, in *Cecil*, the applicability of W.Va. Code § 22A-2-37 (which applies only to "tracks near the top and at landings of shafts, slopes and surface inclines") was apparent. Here, the evidence of record clearly demonstrated that the area of track at issue was <u>not</u> near the top or at the landing of a shaft, slope, or surface incline and was <u>not</u> "necessary to protect persons from danger of runaway haulage equipment," and that there were <u>no</u> <u>prior</u> <u>diversions</u> into the Three North Passway.

Appellants have come forward with no evidence to establish a violation of this provision. Moreover, there is a complete failure of proof that any of the Appellees had a subjective realization of the alleged unsafe working condition asserted by the Appellants.

V. <u>CONCLUSION</u>

For the foregoing reasons, the Appellees, Eugene L. Saunders, McElroy Coal Company, Consolidation Coal Company and Consol, Inc., respectfully request that this Honorable Court

---

[9] The only evidence of any type proffered by the plaintiffs on these points is the conclusory opinions of their expert, Trigg Combs. These opinions, as to both violation of a statute and the so-called subjective realization of McElroy are without <u>any</u> foundation and cannot be considered.

rule in their favor, and against the Appellants, and affirm the Circuit Court's grant of summary judgment in favor of Defendant-Appellees.

Respectfully submitted,

DICKIE, McCAMEY & CHILCOTE, P.C.

By_____

James R. Miller
W.Va. ID No. 8978
Rodger L. Puz
W.Va. ID No. 9174

Two PPG Place, Suite 400
Pittsburgh, PA 15222
(412) 281-7272

Attorneys for Appellees,
Eugene L. Saunders, McElroy Coal Company,
Consolidation Coal Company and Consol, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the within ***BRIEF OF APPELLEES*** has been served this 28th day of April, 2006, to all counsel of record via United States first-class mail, postage pre-paid, addressed as follows:

Ronald W. Kasserman, Esquire
Kasserman & Bowman PLLC
21 Waddles Run Road
Suite 202
Wheeling, WV 26003

DICKIE, McCAMEY & CHILCOTE, P.C.

By:_____
Rodger L. Puz

Attorneys for Appellees,
Eugene L. Saunders, McElroy Coal Company,
Consolidation Coal Company and Consol, Inc.