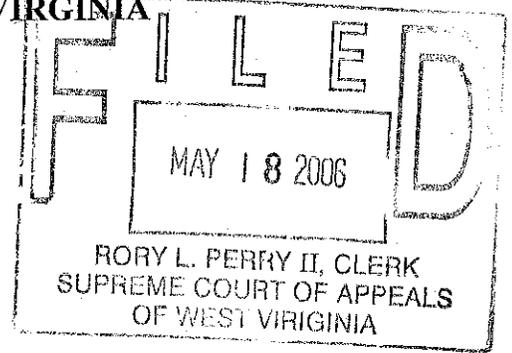


SUPREME COURT OF APPEALS OF WEST VIRGINIA



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,

Appellants,

vs.

Supreme Court No.: ³²⁹⁶⁰~~051309~~

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

Appellees.

APPELLANTS' REPLY BRIEF

During the presentation of the Petition in this case Justice Benjamin asked Appellants' counsel what was the best evidence of the employer's subjective realization and appreciation of the specific unsafe working condition. The response was similar to that which is contained in Appellants' Brief, that the foreman, Eugene Saunders, was "focused on the passing coal cars and when he saw something go wrong he immediately began screaming." He was watching for a reason. That was safety.

In Appellees' Brief in its Counter-Statement of the Facts of the Case on page 4, last paragraph, the Appellees state:

While he and 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 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.

Appellees' Brief at page 4.

These "facts" are the self-serving narrative of Consolidation Coal Company's investigative report. See Exhibit 10 of Appellants' Brief. Mr. Saunders didn't testify about hearing anything on the radio.

Actually, the words "operator," "radio" and "off" do not appear anywhere in Mr. Saunders' deposition. Mr. Saunders testified as follows:

I'm sitting in the front bus, I got my lights on, I got my cap light on and I'm watching the light, it's green, then, **all of a sudden**, I seen the light turn yellow. When I seen the light turn yellow I seen loads which appeared to be coming in the passway. I turned around and started screaming for people to get out of the bus. (Emphasis added.)

Saunders Deposition, page 6, lines 18 - 24, attached to Appellants' Brief as Exhibit 9.

The evidence is significant. Mr. Saunders was sitting there watching because he knew it was a dangerous condition, he was not watching because he heard something over the radio as Appellees suggest. These are issues of fact that are only controverted because Appellee, Consolidation Coal Company, created a self-serving report. Mr. Saunders' testimony is unequivocal.

At page 16 of Appellees' Brief it argues that Mr. Saunders "obviously did not subjectively realize that an unsafe working condition existed because he was equally exposed

to any risk.” Appellees’ Brief, page 16.

To the contrary, Appellants rely upon Mr. Saunders’ sworn testimony that he was sitting there watching the switch and suddenly he saw the light change. Taking the Appellee’s position as true, Mr. Saunders thought he was 400 feet away from the switch. That means that he was looking a distance of at least the length of a football field, through the end zone and into the stands when he suddenly saw a green light turn yellow which caused him to start screaming.

If he knew that he was far enough away from the switch to be in a safe location he may have sat there a few minutes thinking that he was safe. However, the evidence is to the contrary. The sudden changing of the light sent him **immediately screaming** to warn others that a runaway train was heading toward them. There is circumstantial evidence that Mr. Saunders had a subjective realization and appreciation that a specific unsafe working condition existed “parking an occupied manbus too close to a railroad track switch in an underground mine.”

Appellees argue that Mr. Saunders “screamed only after the danger became apparent.” Appellees’ Brief at page 20. However, Mr. Saunders’ sworn testimony is that the light changed “all of a sudden” and the same time that he saw the light turn yellow he saw the cars coming into the passway. He testified, “When I seen the light turn yellow I seen loads which appeared to be coming in the passway.” Saunders’ Deposition, page 6, lines 20 -23, attached to Appellants’ Brief as Exhibit 9.

As Appellants are the non-moving party it is a reasonable inference from Mr. Saunders' testimony that he knew he was sitting too close to the switch. Immediately when he saw the light change and the cars coming into the passway he knew that he should get the men into shelter holes or cross cuts because he had failed to do so when he initially parked. Mr. Saunders knowingly took a risk and kept a vigilant lookout, but still William Sedgmer was injured.

Appellees make significant argument that this was not a "derailment," but rather a "diversion." That completely ignores the fact that the last three fully loaded coal cars did derail in this incident. Indeed, Appellees even notes this on page 5 of its Brief stating "a total of seventeen (17) haulage cars entered the passway, and all remained on the track without derailing except the last three (3)." Appellees' Brief at page 5.

This was not a simple diversion of a train but a runaway train with a derailment.

Standing between the rails at this switch would guarantee sure death when this fully loaded coal train was passing. Standing a few feet away would be considered suicidal and insane. Parking a fully loaded bus full of men 200 feet away was considered by Brian Mills, the Mine Inspector, as a violation of a safety regulation. The withdrawal of the citation by the agency does not concede the issue of fact as to whether the citation was valid or 36 C.S.R. 33-4.1 was violated. As noted on page 21 of Appellants' Brief Mr. Mills, who is now the area Inspector at Large, still believes that the regulation was violated. He testified as follows:

Q. So one violation we know is that it is your belief that McElroy violated the regulation we have been talking about and for which you issued a Notice of Violation. That is one opinion, isn't it?

A. Yes, Sir.

Q. Do you continue to hold that opinion today?

A. Based upon what I know now, and what I knew then about how far the cars could travel, yes, I think they violated the law because they were not in a shelter hole or cross cut.

Mills Deposition, page 69, lines 2 - 10, Exhibit 14, attached to Appellants' Brief.

This creates an issue of fact of whether this regulation was violated. Mr. Mills is an unbiased, unpaid expert in this field. In addition, Trigg Combs, Appellants' mining expert, has indicated that 36 C.S.R. 33-4.1 was violated. This is a contested material fact in issue that precludes summary judgment.

Appellees argue that Appellants' case is so weak that we are accusing the Appellees' witnesses of "lying." Appellants believe that it is more than a coincidence Appellants' witnesses, the Union men, William Sedgmer, Mike Usenick and Randy Mulvey, all have the impact area being approximately 200 feet from the switch but the company representatives, Eugene Saunders, William Blackwell, Edmond Korsnick and John Bess, have it back at approximately 400 to 450 feet from the intersection. This contention was developed years ago.

Appellees forget that there were a total of three (3) man trips in the 3 North Passway. Mr. Sedgmer alleges that he was in the first man trip, the one operated by Appellee Eugene

Saunders. Federal regulations require that man trips are not to be operated within 300 feet of any other man trips.

30 C.F.R. 75.1403-7(a) states as follows:

Man trips should be operated independently of any loaded trip, empty trip, or supply trip and should not be operated within 300 feet of any trip, including another man trip.

Mr. Sedgmer testified that the busses were parked 300 feet apart. Mr. Sedgmer testified as follows:

Q. So they hit another bus before they hit the bus you were just trying to set out of?

A. No. They hit my bus first, but the busses are parked 300 feet apart. Then I really didn't hear a whole lot of everything. I more or less felt.

Q. So they hit the bus you were stepping off of, then they hit the next bus that was at least 300 feet away; right?

A. Yes.

Q. How about the next bus?

A. Yes.

Q. They hit that one too?

A. Yes

Sedgmer Deposition , 5/16/98, page 88, line 24 through page 89, line 12. See Exhibit 1, attached.

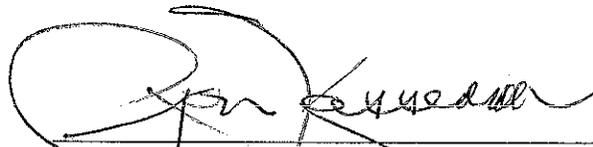
If the second coal car in the 3 North Passway was parked where the company representatives, Appellee Saunders, William Blackmore, Edmond Korsnick and John Bess indicate then the impact with the first vehicle, occupied by Mr. Sedgmer, was 300 feet closer to the switch. This is consistent

with Appellants' theory of the case. It creates a genuine material issue of fact as to how close the bus Mr. Sedgmer was occupying was to the switch which relates to the dangerous working condition. How close the bus was to the switch also relates to Eugene Saunders' subjective knowledge and appreciation of danger of being too close to the switch. The distance also relates to Brian Mills citation and the applicability of 36 C.S.R. 33-4.1 requiring the occupants of the busses to get into a shelter hole or cross cut when trips are approaching and the bus is "in the vicinity of a switch."

The distance away from the switch and the area of impact are the determining factors in this case regarding these elements of the deliberate intention statute. The distance and the impact area are disputed by eye witnesses to the wreck, by witnesses to the debris after the wreck, by an unbiased third party Mine Safety Inspector and Appellants' qualified mining expert.

Appellants request that this case be remanded for a jury trial.

Respectfully submitted,



Counsel for Appellants

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IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA

WILLIAM L. SEDGMER, JR.,)
personally and as next friend)
of his natural children,)
Jacob A. Sedgmer, Lucas D.)
Sedgmer, Elizabeth A. Sedgmer;)
and WILLIAM L. SEDGMER, III,)
individually,)

Plaintiffs,)

vs.)

Civil Action No.)
96-C-135M)

McELROY COAL COMPANY;)
CONSOLIDATION COAL COMPANY;)
CONSOL, INC.; EUGENE L.)
SAUNDERS, individually an)
as agent for the aforementioned)
corporations; THE WATT CAR &)
WHEEL COMPANY; MINE TECHNIK)
AMERICA, INC.; NATIONAL)
CASTINGS, INC.; and UNITRAC)
SYSTEMS INCORPORATED,)

Defendants.)

Deposition of WILLIAM L. SEDGMER, JR.

Saturday, May 16, 1998

LEWIS REPORTING SERVICE
300 Shangri-La Lane
Wellsburg, West Virginia 26070
(304) 737-4114

CONDENSED

COPY

1 Q By the way, did anybody else get hurt in this
 2 accident?
 3 A Not to my knowledge.
 4 Q You said that you got thrown up.
 5 Did you hit the mine roof? Is that what you're
 6 saying?
 7 A Roof and rib. I went into the corner. I bent.
 8 It bent me. It was very fast and very hard.
 9 Q Can you tell me how far you think you
 10 physically went?
 11 A I'd say six to eight feet. It was very fast.
 12 I hit the corner, and I bounced right back into the
 13 cars going by, went between two cars and down and
 14 landed semi-sideways right next to the track.
 15 And the cars were moving so fast that they kind
 16 of like were out of control, rocking, and they caught
 17 my head, and it spun me out from between the cars,
 18 and my feet were -- when I -- my feet was up in the
 19 air.
 20 The first initial contact knocked my light off,
 21 so it was by feel, and I couldn't move no more. I
 22 couldn't breathe.
 23 Every car that went by was sliding on my back,
 24 and then when there would be a gap in the cars and
 25 the pressure of me being buckled up against the

1 my back was bent against the cars. I was real close
 2 to the track.
 3 So I was more or less pinned by the pressure of
 4 my legs being straight out up on this sloughage and
 5 my back being bent forward as far as I could, and not
 6 being able to breathe, not being able to see and not
 7 wanting it to go on any more.
 8 Q So it's on your back that you feel these cars
 9 going by; right?
 10 A Oh, yeah. They were sliding right against my
 11 side and back, and every gap they would hit me again.
 12 Q And then it stopped; right?
 13 A Yeah.
 14 Q Did you hear any more sounds as this was all
 15 happening, after you had heard this loud bang and the
 16 metal crashing?
 17 A Not till it stopped. I mainly -- it's hard to
 18 tell what all I heard. I heard my heart beating, and
 19 I practically give -- I can remember thinking of all
 20 the pieces of slivers of steel sticking out on those
 21 coal cars from being banged around, and I was
 22 contemplating on how long I would last there before
 23 it was going to be over and I wouldn't have to feel
 24 any more of it.
 25 Q These coal cars that you're talking about and

1 sloughage off the rib, the next car would bang me
 2 again in the side. And this went on until the cars
 3 went off track again and they slid to a halting stop.
 4 Q How many cars do you think hit you?
 5 A I don't know.
 6 Q By the way, where did all these other fellows
 7 get to that they didn't get hurt?
 8 A They run to the first crosscut that they could
 9 get to.
 10 Q And Tim made it there?
 11 A Yes.
 12 Q While all this is happening to you, it's pitch
 13 dark?
 14 A Yes, pure black.
 15 Q I presume from what you're saying there's no
 16 light on the ceiling or nothing there?
 17 A No light.
 18 Q Nothing, okay.
 19 So you can feel all this happening to you?
 20 A Oh, yes.
 21 Q Were you pinned up against the side there?
 22 Where were you pinned up?
 23 A The roof sloughages in. After a certain amount
 24 of time, it starts breaking away. As it falls, it
 25 forms an angle, and my feet were up that angle, and

1 the slivers of steel, I get the impression that they
 2 had been around the mine for a while?
 3 A Yes.
 4 Q So they had been used quite awhile?
 5 A Yes. They bring new ones in from time to time
 6 and take old battered ones out, you know, but in my
 7 experience, I had seen a lot of them.
 8 Q Had you ever known Consol to move cars from one
 9 mine to another?
 10 A Yes.
 11 Q Did you hear the wheels of the cars going by?
 12 Could you hear the wheels on the metal, or is
 13 that padded there?
 14 A It was a pretty wild time, to be honest with
 15 you, and I probably heard a lot of different sounds.
 16 Q Did you here a screeching?
 17 A I heard the cars.
 18 Q When you say you heard the cars, describe for
 19 me the sound you heard.
 20 A Bump, bump, bump. I mean, I could hear them
 21 going by. They were out of control. There was no
 22 motor on the front. I can remember hearing them hit
 23 another bus. I was kind of just --
 24 Q So they hit another bus before they hit the bus
 25 you were just trying to step out of?

1 A No. They hit my bus first, but the buses are
 2 parked 300 feet apart.
 3 Then I didn't really hear a whole lot of
 4 everything. I more or less felt.
 5 Q So they hit the bus you were stepping off of,
 6 and then they hit the next bus that was at least 300
 7 feet away; right?
 8 A Yes.
 9 Q How about the next bus?
 10 A Yes.
 11 Q They hit that one, too?
 12 A Yes.
 13 Q Did you say then they went off the track?
 14 A Two of the cars, I'm pretty sure, that were
 15 coming went off track, and they were causing the
 16 sliding effect on the rib that I was up against.
 17 They were buckled a little bit there, and
 18 that's what ended up stopping it. It bounced up in
 19 front, and they bound and whatever.
 20 Q This trip had no operator in the front; is that
 21 what you're saying?
 22 A No, not at the time of the crash.
 23 Q Had there been an operator?
 24 A Yes. There was a motor hooked to the front of
 25 the loaded coal cars when he first started pulling

1 called them dick switches because they hung down.
 2 They had been modified so that the foremen
 3 didn't have to stand up on their Jeeps to throw them.
 4 They had rubber hoses hung on the bottom of them, and
 5 coal being piled higher than normal caught the switch
 6 and threw the electric switch going into the
 7 passway.
 8 Q I'm going to come back to that in a minute,
 9 Mr. Sedgmer, but, first of all, explain to me why
 10 there was nobody operating this trip.
 11 A When the switch was thrown, it changed
 12 directions after the motorman pulling the load.
 13 Q So the motorman was going one way down the
 14 track, and the rest of the cars --
 15 A And the load switched into the passway
 16 uncontrollable with the motor on the back end.
 17 Q I see.
 18 Did you ever find out who that motorman was?
 19 A I can't remember right offhand.
 20 Q Then you were telling me about these switches,
 21 and you said they had modified these switches.
 22 Who is "they"?
 23 A McElroy Coal Company had them modified. And in
 24 "modification" I mean there was a rubber hose stuck
 25 on the normal toggles that hung down that you flipped

1 them.
 2 Q Do you know how fast that trip was running?
 3 Did anybody ever tell you?
 4 A (Witness shakes head.)
 5 Q You are shaking your head no?
 6 A No, no one ever told me. None of the engines
 7 are equipped with speedometers.
 8 Q What happened to this motorman? Did he bail?
 9 A No, he didn't bail. The cars were loaded
 10 heavier than normal because the leveling board was
 11 broke that leveled the coal and dispersed it evenly
 12 over the car to keep them at a certain height.
 13 Q When did that break?
 14 A I don't know.
 15 Q Had it broken on the earlier shift?
 16 A I don't know.
 17 Q You don't know if it had been going on for a
 18 couple days like that?
 19 A I don't know.
 20 Q But the coal cars were loaded heavier than
 21 normal because the leveler had broken?
 22 A Yes.
 23 Q How does that tie into the fact that there
 24 wasn't a motorman there?
 25 A The coal caught -- they had switches. We

1 to throw the switch.
 2 It was an electric switch or an air switch.
 3 Electric over air, even, maybe. I'm not positive.
 4 Q So you had these toggle switches in the
 5 ceiling; right?
 6 A They were hanging down.
 7 Q They only reached so far; right? Is that what
 8 you're saying?
 9 What happened was McElroy decided to add to
 10 this toggle switch with some kind of a rubber hose;
 11 is that right?
 12 A Yes. They had rubber hose stuck up over.
 13 There was, like, two knobs hanging down.
 14 Q How far did they hang?
 15 A I don't know.
 16 Q These rubber hoses, they were hanging there
 17 from the toggle switch to make it easier for the
 18 foreman; is that right?
 19 A Foreman or probably maybe even anybody in the
 20 mine in a Jeep, so that they didn't have to stand up
 21 while their piece of equipment was moving, to throw
 22 it.
 23 Q That toggle switch configuration with this hose
 24 hanging down had been in existence for some time?
 25 A I'm not sure how long.

SUPREME COURT OF APPEALS OF WEST VIRGINIA

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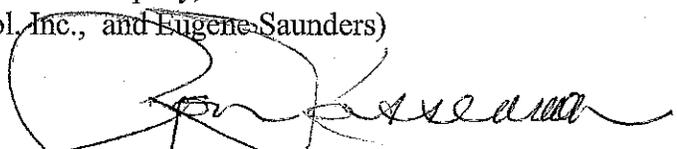
Appellees.

CERTIFICATE OF SERVICE

Service of the foregoing Appellants' Reply Brief was had upon the Appellees herein by mailing a true and correct copy thereof by regular United States mail, postage prepaid and properly addressed, to their counsel of record, this 16th day of May, 2006, as follows:

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