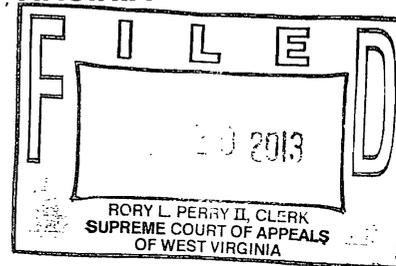


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET No. 13-0932



CHRISTOPHER D. ADKINS,

Plaintiff Below, Petitioner,

v.

**Appeal from a Final Order of the Circuit
Court of Kanawha County (11-C-307)**

AMERICAN MINE RESEARCH, INC.,

Defendant Below, Respondent.

PETITIONER'S OPENING BRIEF

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Comes now the Petitioner, Christopher D. Adkins, by and through his counsel, J. Michael Ranson and G. Patrick Jacobs pursuant to Rule 10 of the West Virginia Rules of Appellate Procedure and presents his brief in support of his Petition for Appeal from the Order of the Kanawha County Circuit Court granting respondents' Motion for Summary Judgment on August 29, 2013.

ASSIGNMENTS OF ERROR

- A. The Circuit Court's holding that Adkins earned his commission payments upon shipment of the product instead of upon sale of the product is in direct conflict with existing case law and contrary to the holdings cited by the Circuit Court.
- B. The Circuit Court erred in holding AMR's changes to commission based payments in the 2010 Commission schedule applied retroactively based on existing course of conduct between the parties absent a written agreement.
- C. The Circuit Court erred in holding the Respondent did not violate the West Virginia Wage and Payment Collection Act ("WPCA") by failing to pay Adkins all commissions earned on the sale of tracking units for AMR.

STATEMENT OF THE CASE

A. Procedural History

Petitioner Christopher Adkins (Plaintiff below) was employed as sales representative for Respondent American Mine Research, Inc. ("AMR") (Defendant below). On February 23, 2011, Adkins filed suit in Kanawha County Circuit Court to obtain back pay, commission and other appropriate relief arising out of the Respondent's failure to pay him earned commissions and wages due upon his separation from AMR. (J.A. 1). AMR filed its responsive pleading. (J.A. 9-16). Thereafter, the parties filed cross motions for summary judgment. (See J.A. 231-238

and 268-278). On August 29, 2013, Kanawha County Circuit Court Judge Tod J. Kaufman granted Respondent's Motion for Summary Judgment. (J.A. 345-352). The Petitioner filed his Notice of Appeal with this Court on September 12, 2013. (J.A. 353-359).

B. Statement of the Facts

On or about October 1, 2000 Petitioner Christopher Adkins ("Adkins") became employed as a sales representative for Respondent American Mine Research, Inc. ("AMR"). (J.A. 2). During his tenure, Adkins was the primary sales representative for AMR, a supplier of Carbon Monoxide (CO) monitoring systems and accompanying equipment. (J.A. 26, 29). Adkins served as the Eastern Territory sales representative, which covered West Virginia, Kentucky, Maryland, Ohio, Pennsylvania, Virginia, and Tennessee. Id. Initially, AMR compensated Adkins with a small base salary plus commissions on sales. Traditionally, AMR would re-evaluate Adkins' compensation plan (including commissions) near the end of the fiscal year. While the changes to the compensation plan were prospective, AMR had on occasion applied the new commission structure to pending commission payments. Other than the November 2009 decrease in Adkins' commission structure, Adkins' compensation (including commissions) always increased with each re-evaluation. (J.A. 65).

In general, Adkins' commission payments were paid in the month after the goods were shipped. Historically, AMR would ship products no more than a few weeks after orders were submitted. (J.A. 34-37). A given month's commission was calculated based upon goods shipped the month before. Id. Adkins' commission structure remained stable between 2006 and 2009. (J.A. 56). In 2006, and during Adkins' term of

employment with AMR, the United States Congress passed the ***Mine Improvement and New Emergency Response Act of 2006*** ("MINER Act"). Motivated by the Sago Mine Disaster, the MINER Act essentially mandated coal mining companies install tracking and communication systems in all mines by 2009. (J.A. 26-28). As a result of the passage of the MINER Act, AMR began to manufacture devices that would meet the mandate. In fiscal year 2008-2009, Adkins began selling and accepting orders for tracking systems. Shipment of the tracking systems was delayed due to MSHA approval of the safety mechanism. (J.A. 42-43). Despite the delay, AMR considered the sales generated by Adkins to be complete orders.

Q: When did you-all get approval?

A: September 2009.

Q: Were you selling the system mines subject to the approval prior to September of 2009?

A: Yes.

Q: So what would you tell a mine owner?

A: That once we got approval, we would be able to supply them with an approved system.

Q: So you would ship once you got approval?

A: Yes.

Q: Okay. My understanding is that in September of 2009 your IS system was approved by MSHA; is that right?

A: Yes.

Q: Okay. So you've already got it sold to customers?

A: Right. (J.A. 43-44).

Although shipment of tracking systems was conditioned upon approval by MSHA, Adkins was authorized to continue selling the tracking system. He generated approximately \$15,000,000 in sales. (J.A. 4). Although Adkins and AMR did not have a written contract or agreement, the parties relied on pay sheets that reflected the compensation schedule (including applicable commissions). (See J.A. 59).

During the period at issue, Adkins' commission rate was as follows:

1% on all sales from \$40,000 to \$80,000.00

2% on all sales between \$80,000.00 and \$100,000.00

3% on all sales over \$100,000.00

(J.A. 48-49). Upon approval of its tracking system in September 2009, AMR made preparations for shipment. AMR began shipping orders in December 2009. (J.A. 45). As the tracking systems were preparing to ship, Adkins anxiously awaited issuance of his commission compensation on the tracking units he sold. Under the 2006-2009 commission plan, Adkins was due 3% commissions on \$15,000,000 in completed sales. (J.A. 4). After AMR delivered the tracking units, its sales increased from an average of \$6,000,000 per year to \$14,000,000 per year. (J.A. 62).

Despite the fact Adkins completed \$15,000,000.00 in sales, he did not receive full compensation for his commission on those sales. In November 2009, after the sales were completed and one month prior to shipping the tracking units AMR, through its General Manager Robert Saxton, informed Adkins that his commission compensation was being restructured. Saxton, along with AMR owner Bob Graff and his son David Graff, met to devise a plan to deprive Adkins of his earned commissions.

Q: I mean, if it turns out to be October as well, I'm not trying to squabble over the month. We will use October based on your testimony. How did the commission come to change, or the rate?

A: Our company works off a fiscal year from October 1st to September 30th. Every year we try to do our evaluations either in September or October as far as pay raises, commission structure plans. All of those are reviewed during that period of time. This one was unique to us because of the volume of business our company was able to acquire, and it took a month or so for everybody's structure as far as that were on either a commission plan or a bonus plan of profit to be looked at and modified; so that's why there was a delay in that.

- Q: Okay. Who did the modifying?
A: David Graff, Bob Graff and myself.

(J.A. 53). For the first time in his tenure with AMR, Adkins commission structure was decreased and he was denied the actual commission payment on his sales of the tracking system. Furthermore, Adkins' October 2009 commission payment was delayed while management tried to figure out a way to restructure his commissions so as to reduce his overall compensation. (J.A. 65).

- Q: Okay. Why didn't you increase his commission rather than reduce them?
A: That was -- we think he made a fair amount of money for what he did. It wasn't only him that helped sell these systems just because it was his territory. I was heavily involved with the majority of the sales, so was our engineering manager, so was the owner of the company, so were several of the engineers. There were a lot of people involved in acquiring some of these sales, in particular, from Consol Energy in northern West Virginia and Pennsylvania.
Q: So if you hadn't sold these tracking systems, would you have changed his commission?
A: I can't answer that. His commission plan changed three or four times in the time period he was there.
Q: Did you ever reduce it prior to 2010?
A: No.
Q: Okay. Was there a time period where Chris did not get any commission in 2009; in other words, his commission check just wasn't given to him?
A: That would have probably been in October of 2009 when we were still coming up with a plan that would work for him and the other employees that were under the same type of structure as he was.

(J.A. 65, 70-71). Without notice and contrary to all prior commission history, Adkins was informed by Mr. Saxton that AMR decided to reduce his overall commission compensation with a maximum cap of \$85,000. (J.A. 67, 167). Adkins does not dispute that AMR had the right to change his commission rate, regarding future sales activity. However, Adkins objected to the commission rate presented to him at the November

2009 meeting being applied retroactively to commission earned on sales of the tracking units he already sold. (J.A. 49). Adkins expressed his discontent with Mr. Saxton and Mr. Graff. (J.A. 171). Adkins separated from “AMR” in August 2010, due to AMR’s complete refusal to fully compensate him for completed sales.

SUMMARY OF THE ARGUMENT

The Circuit Court misapplied existing case law and erroneously granted Respondent’s Motion for Summary Judgment. The **majority rule** in this Country regarding entitlement to commission payments is that **commissions vest at the time the sale is accepted by the employer**. Very few exceptions to this rule can be found and those exceptions only exist when a written contract or a common course of conduct between the parties exist. The facts of this case do not support any exception to the majority rule. It is clear that AMR benefited from Adkins diligence in solidifying sales on tracking systems between 2008 and 2009, yet it has denied him commissions due on those sales. Payment of commissions was historically and consistently made by AMR to Adkins the month after the product shipped. Without exception, Adkins was always entitled to commission earnings upon acceptance of the sale by AMR.

In addition, the retroactive application of the November 2009 commission adjustment was improper as Adkins did not have notice of AMR’s “right” to decrease his compensation. Admittedly, AMR had retroactively increased Adkins’ earnings on a few occasions but this did not give rise to “a course of conduct” between the parties sufficient to establish notice of AMR’s right to make retroactive changes— particularly one that decreased his compensation. Furthermore, Adkins’ commission structure was unchanged between 2006 and 2009, the same period AMR was developing and initially

selling the tracking units. It is not a coincidence that AMR limited Adkins' commission payments in the same period the tracking units were finally being shipped. AMR's retroactive change of compensation Adkins already earned is virtually stealing from him. Furthermore, and because AMR denied Adkins full payment of duly earned commissions, it expressly violated the "WPCA". When AMR failed to pay Adkins the full amount due him by the next payday after his separation from the company, AMR expressly violated the WPCA and is responsible for treble damages.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is necessary pursuant to the criteria in Rule 18(a) as all parties have not waived oral arguments. It is clear that the decisional process would be significantly aided by oral argument. In addition, as this case involves assignment of error in the application of settled law, it should be scheduled as a Rule 19 argument. Finally, this case is appropriate for a memorandum decision.

STANDARD OF REVIEW

This Court has previously held that "a circuit court's entry of summary judgment is reviewed *de novo*." Saunders v. Tri-State Block Corp., 207 W.Va. 616, 619, 535 S.E.2d 215, 218 (W.Va.,2000) per curiam (citing Syl. Pt. 1, Davis v. Foley, 193 W.Va. 595, 457 S.E.2d 532 (1995); Syl. Pt. 1, Painter v. Peavy, 192 W.Va. 189, 451 S.E.2d 755 (1994)). The Court has further indicated in Syllabus Point 3 of Aetna Cas. & Sur. Company v. Fed. Ins. Co. of N.Y., 148 W.Va. 160, 133 S.E.2d 770 (1963) that "[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to

clarify the application of the law.” Id. Further, this Court held in syllabus point two of Williams v. Precision Coil, Inc., 194 W. Va. 52,459 S.E.2d 329 (1995), 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.

194 W.Va. 52, 59-60, 459 S.E.2d 329, 336 - 337 (W.Va.1995)(citing Celotex Corp. v. Catrett, 477 U.S. 317 (1986). This Court further held that even though a reviewing court must consider “underlying facts and all inferences” 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.’” Id. (citing Anderson,477 U.S. at 256, quoting First Nat’l Bank of Arizona v. Cities Serv. Co., 391 U.S. 253, 290 (1968).

ARGUMENT

- A. **Adkins’ entitlement to commissions vested when orders for the tracking systems were accepted by AMR, not when the tracking systems were invoiced or shipped.**

While the parties do not dispute that commission based earnings constitute wages pursuant to West Virginia Code §21-5-1, there is no West Virginia case law relevant to evaluating entitlement to commission earnings. Despite the fact that no case law precedent exists on this issue, West Virginia has adopted the Uniform Commercial Code as it relates to **Sales**. Specifically, **West Virginia Code § 46-2-204** applies to the facts of this case as states as follows:

(1) A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.

(2) An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.

Furthermore, **West Virginia Code § 46-2-301** establishes “the obligation of the seller is to transfer and deliver and that of the buyer to accept and pay in accordance with the contract.” Clearly, under the law in West Virginia, a sales contract for tracking systems was consummated once Adkins completed the purchase order with the various customers.

In addition, a review of case law in other jurisdictions shows a general consensus as to the difference between “commission entitlement” and “commission payment”. For example in Vector Eng’g and Mfg. Corp v. Pequet, 431 N.E. 2d 503, 505 (Ind. App. 1982) the Court held “[a]s a general rule, a person employed on a commission basis to solicit sales orders is entitled to his commission ***when the order is accepted*** by his employer.” (***emphasis added***) See also, Oken v. Nat’l Chain Co. 424 A.2d 234, 235 (R.I. 1981). Notably, the Vector court held “[t]his general rule may be altered by written agreement by the parties or by the conduct of the parties which clearly demonstrates a different compensation scheme.” Id. at 505. In Vector, the Court of Appeals found the employee was entitled to commissions based on when orders were placed and not when payment or shipment occurred. Id. While the employer in Vector argued the employment contract did not provide for commissions until payment and shipment occurred, the Court of Appeals explained the employment contract did not clearly specify when a sale had occurred for the purpose of establishing entitlement to commission earnings. Id. Following up on its decision in Vector, the Indiana Court of

Appeals held that an employee earned commissions on “approved sales which were pending shipment and payment by the customer.” J Squared, Inc. v. Herndon, 822 N.E.2d 633, 639 (Ind. App. 2005)(See Vector, 431 N.E.2d at 505; See also Sample v. Kinser Ins. Agency, Inc., 700 N.E.2d 802, 804 (Ind.Ct.App.1998) (holding employee entitled to commissions where “[t]he sales had been consummated, and her right to the commissions had fully accrued, subject only to actual receipt of the payments.”). The Court held that employee’s commissions on orders vested “subject to a condition subsequent.” Id.

Similarly, in Davis v. All American Siding, 897 N.E.2d 936, (Ind. 2009), the court held that commissions were earned once orders were submitted to the company regardless of when final payment was received. Citing Vector, the court in Davis held that the general rule for commission entitlement could be altered either by a written agreement by the parties “or by conduct of the parties *which clearly demonstrates a different compensation scheme.*” Davis at 940. (emphasis added). In Davis, the plain language of the employment contract did not provide for a different scheme of earning commissions. The court determined commissions were earned once the orders were submitted to All American -- regardless of when they were paid. Id.

Also, evaluating an employee’s right to an earned commission the Eastern District Court of Pennsylvania held in Little v. USSC Group, Inc., 404 F.Supp.2d 849, 854 (E.D. Pa., 2005) (citing Wilson v. Homestead Valve Mfg. Co., 217 F.2d 792 (3d. Cir. 1954); Marcin v. Darling Valve & Mfg. Co., 259 F.Supp. 720, 723 (1966) that “unless there is a contract provision to the contrary, an employee selling on a commission basis is entitled to his or her commission on a sale ***when the sale is made*** and accepted by the employer.” In Marcin, the court held that “the entitlement to commissions is not

affected by the fact that payment may be delayed...” 259 Supp. at 723. Furthermore, in Oken v. Chain, 424 A.2d 234 (R.I. 1981) the Rhode Island Supreme Court held that “the entitlement to commissions is not affected by the fact that payment may be delayed, as in the present case, to the accounting period in which shipment is made.”

As in case at bar, Mr. Oken acknowledged that he was not paid commissions until the product was shipped by his employer. Id. at 236. The Oken court held that “such a concession was not clear proof that he was in agreement that his commissions were not earned until shipment was made. Id. Rather, this arrangement was but a manifestation of National’s accounting procedures in regard to when commissions would be paid.” Id. The court continued to explain that the practice of paying upon shipment was a “sound accounting practice.” Id. Noting the “substantial time lag between receipt of an order and shipment of goods”, the Oken court logically concluded that the employer National “would have had a problem paying its salesmen at the time of order since the cash did not come in until shipment. Id. Here the court explained that to deviate from the general rule concerning commissions would be to allow the employer National “to have received the value of Oken’s procurements and servicing of accounts without fully compensating him for his labor.” Id.

It is obvious that the Kanawha County Circuit Court in the instant case has muddled the concepts of payment of commission compensation with entitlement to commission compensation. In its motion for summary judgment, the Respondent AMR relied on the holding in Geary v. Telular Corp., 793 N.E.2d 128 (Ill. Ct. App. 2003) to support its contention that because the amount of commission on an order was not calculated and paid until shipment, Adkins did not have a right to commission until shipment. Adopting Respondent’s misapplication of the holding in Vector, the

Kanawha County Circuit Court determined “[t]he undisputed facts clearly demonstrate[d] Defendant's compensation package and Plaintiffs agreement therewith constitute[d] an exception to the ‘general rule’ such that Plaintiff was not entitled to any commission compensation until shipment of ordered products.” (J.A. 350). ***This is not so***. In the Geary case, a written compensation agreement clearly specified when commissions were earned. Id. Based on the plain language of the written agreement, the court in Geary found the plaintiff was not deemed to have earned his commission until product had been shipped to Motorola. Id. **There is no such written compensation agreement in the case at bar** – thus Geary could not possible apply.

As set forth in the existing **majority rule** case law, an employee's right to commission earnings vests when the order is accepted by his employer. Although there may have been a condition subsequent delaying payment of, i.e. MSHA approval of the tracking systems and shipment of systems to the mines, Adkins earned his commission at the time of sale. Prior to the sale of tracking units, Adkins always received payment for commissions earned on the prior month's sales. The Respondent asserts that since Adkins stated his commission payments were calculated based on what had shipped, he conceded there was a course of conduct between the parties that was an exception to the general rule for commission entitlement. (J.A. 233). Although Adkins did not receive payment commission until the month after items shipped, the amount of commissions was always based on the commission structure at the time of the original sale. (J.A. 34, 36). While the amount paid for commissions could possibly change from month to month, Adkins percent commissions remained constant until his annual review. (See J.A. 52). Thus, all products sold during the fiscal year were calculated based on the commission scheme in place at the time of the sale. Hence, based on the

“course of conduct” between the parties, the calculation of commissions was based on the commission structure in place at the time of the sale. The fact that payment of commissions was not tendered until the items were shipped was merely a “sound accounting practice” as outlined by the Court in Oken at 236. Adkins’ right to commission earnings on the tracking units vested when the orders for the units were submitted to AMR, as there was neither a written agreement nor a course of conduct between the parties which provided for a different scheme of entitlement.

Moreover, Adkins’ entitlement to commissions did not change merely because shipment of the tracking units was delayed due to circumstances beyond the parties’ control. MHSA required all units be inspected prior to delivery and installation in the mines. (J.A. 43-44). If AMR intended a different outcome, it could have entered into a new agreement with Adkins regarding those units prior to his sale of the new product. Previously, items sold by Adkins would ship immediately or within a few weeks. (J.A. 35-36). In general, other products sold by AMR did not pose the same issue with delayed shipment. Yet, Adkins’ commission package remained virtually unchanged during the time he sold tracking units. Significantly, Adkins’ commission structure was unchanged between 2006 and 2009. (J.A. 56). During the course of his employment with AMR, Adkins’ compensation structure was changed on several occasions and (J.A.79-80) each adjustment was an increase in base pay. Id. The “course of conduct” between Adkins and AMR does not differ from the Country wide majority rule regarding commission entitlement.

B. The Circuit Court erroneously found there was a course of conduct between the parties sufficient to permit retroactive application of the November 2009 commission structure.

Mr. Adkins does not dispute that AMR could prospectively change his commissions compensation structure. In Geary, the court held that “when an employment agreement is terminable at will, it may be modified. 341 Ill.App.3d at 698, 793 N.E.2d at 131. The Geary court held that as the “Plaintiff” continued to work after the commission plan changed, he was deemed to have accepted it. Id. Likewise, in Malone v. Am. Bus. Info., Inc., 264 Neb. 127, 135, 647 N.W.2d 569, 575 (Neb. 2002). the Nebraska Supreme Court explained “[u]nder either an at-will employment relationship or a contractual arrangement that allows employer modification at will, an employer can later the terms of compensation, provided the employer has given notice of the alteration to the employee and the employee thereafter continues his or her employment.” The court further held that an employer cannot unilaterally alter compensation for work that has already been completed in an attempt to deny accrued commissions. Id. Adjustment to a previously earned benefit is impermissible except where there is a written agreement or there was a clear course of conduct between the parties permitting such readjustment.

Conversely, in Covell v. Tymshare, Inc., 727 F.2d 1145, 1150 (D.C. Cir. 1984). the United States Court of Appeals for the D.C. Circuit held that pursuant to a written contract the employer Tymshare reserved the right “to change...individual quota and reserve payments at any time during the quota year within their sole discretion.” The United States Court of Appeals held that the contractual language was clear in its intent and unqualified. Id. As a part of its compensation plan, Tymshare had clearly reserved

the right to retroactively adjust estimated monthly quotas not “fully categorical entitlements.” Id. The court further distinguished between having “sole discretion” to determine the existence of various factors in altering a sales quota and having absolute authority to reduce or eliminate “a central compensatory element of the contract” which was a “large part of the *quid pro quo* that induced one party’s assent.” Id. at 1154. Addressing Tymshare’s blanket right to retroactively reduce or eliminate a central contract provision, the United States Court of Appeals held that it was unlikely that such authority was what the party’s had in mind. Id. The court upheld the contract provision as it pertained the clearly established commissions structure. Id. at 1155.

Once again citing the holding in Geary (albeit it erroneously), the Kanawha County Circuit Court incorrectly held that because AMR had at times made new compensation schemes retroactive, thus providing Adkins with something akin to a bonus, Adkins tacitly consented to any retroactive change. (J.A. 365). Although Adkins’ compensation package, including commission structure, was renegotiated annually around the start of the fiscal year (J.A. 52), unlike the employer in Covell, AMR did not have express contract provisions which permitted it to readjust sales quotas for legitimate business related goals. The only and only time AMR attempted to retroactively reduce Adkins’ earned commissions was prior to the shipment and invoicing of these MSHA approved tracking units because AMR felt he “earned enough for what he did”. (J.A. 65).

In fact, Adkins’ October 2009 commission payment was delayed because AMR’s management was trying to figure out a new compensation scheme. (See J.A. 71). A month prior to the shipment of most of the systems, AMR informed Adkins his commission plan was readjusted and would be retroactive to include all sales not

shipped. However, in its annual renegotiation of Adkins' compensation package, AMR never reserved an express right to retroactively alter terms including commissions. Prior to the November 2009 compensation readjustment, Adkins' commissions had never been decreased. (J.A. 65; see also J.A. 79-80). Furthermore, Adkins was the only employee to have his compensation structure altered in a manner that effectively decreased his overall earning potential. (See J.A. 74-75). In spite of the Kanawha County Circuit Court's reliance on the holding in Geary, the Geary court was evaluating changes to a commission structure that were *prospective not retrospective*. 341 Ill. App. at 698, 793 N.E.2d at 131. The employee in Geary had notice of the change and his continued employment effectuated acceptance of the conditions. Id. Clearly, these facts do not exist in the case at bar.

As previously noted, Adkins does not dispute the prospective application of the November 2009 commissions plan. However, and more importantly, Adkins had no notice of AMR's alleged ability to retroactively *reduce* compensation he rightfully earned. See generally Malone 264 Neb. at 135, 647 N.W.2d at 575. This Court must reject AMR's proposition that it is entitled to retroactively reduce Adkins' compensation, as it distorts the basic principles of fairness. An employer should not be permitted, without prior notice, to deprive an employee of a "fairly agreed benefit for his labors." Covell, 727 F.2d at 1154. To retroactively deprive Adkins of an earned benefit, by applying the November 2009 commission structure to previously earned commissions results in a gross injustice. Permitting employers, such as AMR, to randomly readjust or deny earned compensation to employees without notice encourages employers to lure people into service with promises of certain payment only to refuse payment once the work is completed and the rewards reaped by the employer.

- C. **Respondent violated the “WPCA” by failing to make payment of all compensation, including earned commissions due Adkins, by the next regular payday as required by West Virginia Code § 21-5-4(c).**

As remedial legislation designed to protect working people and assist them in the collection of wages wrongly withheld, the “WPCA” defines wages as "compensation for labor or services rendered by an employee, whether the amount is determined on a time, task, piece, commission or other basis of calculation." **West Virginia Code § 21-5-1(c).** Where an employee has quit or resigned,

the person, firm or corporation shall pay the employee's wages no later than the next regular payday, either through the regular pay channels or by mail if requested by the employee, except that if the employee gives at least one pay period's notice of intention to quit the person, firm or corporation shall pay all wages earned by the employee at the time of quitting.

W. Va. Code, § 21-5-4(c). While an employer is free to set the terms and conditions of employment and compensation, Meadows v. Wal-Mart Stores, Inc., 207 W.Va. 203, 530 S.E.2d 676, 689 (1999), it must pay earned wages to its employees, Britner v. Medical Security Card, Inc., 200 W.Va. 352, 489 S.E.2d 734, 737 (1997). The “WPCA” must be construed “liberally so as to furnish and accomplish all the purposes intended.” Meadows, 530 S.E.2d at 686. (citation and internal quotation marks omitted). Nonetheless, like other statutes, it must not be construed so as to produce an absurd result. Legg v. Johnson, Simmerman & Broughton, L.C., 213 W.Va. 53, 576 S.E.2d 532, 538 (2002). Furthermore, the “WPCA” provides that where a corporation fails to pay

an employee wages as required under this section, such person, firm or corporation shall, in addition to the amount which was unpaid when due, be liable to the employee for **three times that unpaid amount as liquidated damages.** Every employee shall have such lien and all other rights and remedies for the protection and enforcement of such salary

or wages, as he or she would have been entitled to had he or she rendered service therefor in the manner as last employed; except that, for the purpose of such liquidated damages, such failure shall not be deemed to continue after the date of the filing of a petition in bankruptcy with respect to the employer if he or she is adjudicated bankrupt upon such petition.

W.Va. 21-5-4(e). In *Conclusion of Law Number 7* of its Order and while citing Gregory v. Forest River, Inc., the Kanawha County Circuit Court found AMR did not violate the “WPCA” as the “implied agreement and custom and business practices of Defendant apply in this case and that those practices did not contravene any provision of the WPCA.” (J.A. 349). The court in Gregory held

the WPCA regulates the timing of payment of wages. However, it does not regulate the amount of wages, and it does not establish how or when wages are earned. Rather, these are matters that arise from the employment agreement. See e.g., Saunders v. Tri-State Block Corp., 207 W.Va. 616, 535 S.E.2d 215, 219 (2000) (holding in a WPCA case that the amount of the plaintiff-employee's damages for unpaid commissions was to be determined by the documents establishing the employment relationship); Meadows, 530 S.E.2d at 689 (holding in a WPCA case that fringe benefits, which are a form of “wages” under the WPCA, are set by the employment agreement).

Gregory v. Forest River, Inc., 369 Fed.Appx. 464, 2010 WL 814261, at *5 (4th Cir. 2010). Applying West Virginia case law, the Fourth Circuit Court of Appeals held the employment agreement in Gregory did not violate the “WPCA” as it merely established the amount of commissions and when they are earned. Id. In Gregory, the employer FRI established a “Commission Payment Policy” which expressly provided for when commissions would be paid, and what portion of commissions would be paid upon employment separation. Id. at 466, 2010 WL 814261at * 2

The Circuit Court incorrectly applied the holding from Gregory in finding the Respondent did not violate the “WPCA” by failing to pay Adkins outstanding compensation (including commissions) due at the time of his separation from AMR. Unlike Gregory, there was no implied course of business dealings, written policy, or other agreement to support finding the claimant had been properly compensated upon separation. As discussed above, through its attempt to deprive Adkins of commission earnings that vested upon sale of the tracking units, AMR also failed to fulfill its responsibility of paying Adkins all compensation due by the next pay day following his separation. AMR improperly assessed a retroactive commission scheme in calculating commissions owed Adkins on tracking units sold prior to the November 2009 commission plan. On behalf of AMR, Adkins sold the tracking units to regional mines subject the MSHA approval. (See J.A. 43). As the tracking units were made mandatory by MSHA, there was a reasonable certainty that the volume of orders generated would be filled. (See J.A. 44). Given the difference in the invoicing and shipping process of the tracking units versus other products sold, AMR could have adjusted Adkins’ commission plan at any time prior to his actually selling the units. Instead, on the eve of shipment, AMR’s management realized Adkins was entitled to a large sum of money in commissions and denied him compensation rightfully earned. (See J.A. 65).

Furthermore, Adkins’ right to previously earned commission based payments did not terminate upon his separation from AMR. As a general rule, “an employee is entitled to commissions collected post termination, provided those commissions were ‘earned’ during his employment.” Comerford v. Sunshine Network, 710 So.2d 197, 198 (Fla. 5th DCA 1998)(citing Cornell Computer Corp. v. Damion, 530 So.2d 297 (Fla. 3d DCA 1988)). In Comerford, the court stated there were three exceptions to the general

rule. Id. First, an employee's right to post-separation commission payments can be limited by written contract. Second, is in a "services as an entirety" employment contract where an employee is not only required to make a sale but to also perform additional service in the "business as a condition of the right to a commission". Finally, a third exception involves "recognized custom in the trade, business or industry that the right to be paid a commission terminates with the employment." Id.

None of these exceptions apply in this case. Therefore, Mr. Adkins was entitled to his full commission payments within the next pay period upon separation from AMR. Obviously, AMR failed to establish Adkins was not entitled to commissions on tracking units he sold prior to the change in his commission structure. The retroactive adjustment to Adkins earned commissions was impermissible and he was deprived full payment of earnings in violation of West Virginia Code § 21-5-4(c).

CONCLUSION

Christopher Adkins respectfully requests this Court adopt the case law analysis contained herein and find that the Kanawha County Circuit Court erroneously granted the Respondent's (Defendant below) Motion for Summary Judgment. Weighing the evidence in the light most favorable to the Petitioner, this Court must find the Kanawha County Circuit Court's order in error. Absent a written agreement or a clearly established course of conduct an employee is entitled to commissions based on the rate in effect at the time the sales were accepted by the employer. Mr. Adkins sold tracking units for AMR under a commission plan that had been in place since 2006. It is undisputed that the orders were accepted by AMR. Mr. Adkins is entitled to payment of the commission rate in effect at the time of the sales which was 3% for his sales of

\$15,000,000.00. AMR has deprived Mr. Adkins of approximately \$300,000.00 in commissions for tracking units sold during the relevant period of consideration.

Finally, Mr. Adkins requests that this Court find that the Kanawha County Circuit Court erred in finding AMR did not violate the "WPCA." Obviously, AMR denied Mr. Adkins full compensation based on commissions earned prior to his separation from the company and then did not pay him those commissions after separation from the company -- all in violation of the "WPCA."

RELIEF SOUGHT

For the foregoing reasons, the Petitioner respectfully requests this Court reverse the Kanawha County Circuit Court's granting of summary judgment and remand this case for further proceedings consistent with the legal determinations herein.

Signed:



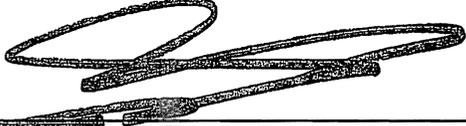
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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of December, 2013, true and accurate copies of the foregoing ***Petitioner's Brief*** were deposited in the U.S. Mail contained in postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

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