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SUPREME COURT OF KENTUCKY

2009-SC-000015-D

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BLACKSTONE MINING COMPANY

APPELLANT

APPEAL FROM THE PIKE CIRCUIT COURT

DIVISION I

v.

HONORABLE EDDY COLEMAN, JUDGE

CIVIL ACTION № 97 CI - 00684

THE TRAVELERS INSURANCE COMPANY

APPELLEE

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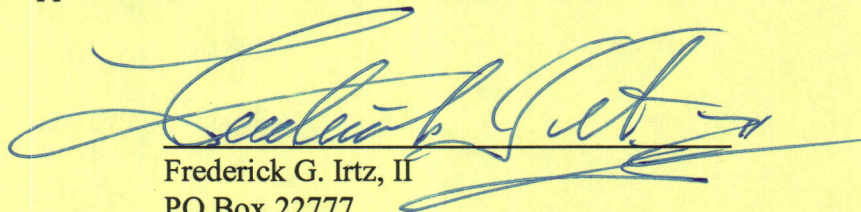
REPLY BRIEF FOR APPELLANT  
BLACKSTONE MINING COMPANY

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of this Brief for Appellant was served by mailing, postage prepaid, to Hon. Eddy Coleman, Judge, Pike Circuit Court, 172 Division Street, Pikeville, Kentucky 41501 and to Hon. Ronald G. Sheffer and Hon. William K. Burnham, Sheffer Law Firm, PLLC, 101 South Fifth Street, Suite 1600, Louisville, Kentucky 40202 on October 28, 2009. The Record on Appeal has not been removed by Appellant from the Office of the Clerk.



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## **PURPOSE**

This Reply Brief is to clarify the evidence in the record pertaining to the rejections of workers' compensation insurance and to address two questions of law raised in the Appellee's Brief.

## **ARGUMENT**

### **I. Travelers Failed to Provide Any Evidence that the Rejections of Workers' Compensation Insurance Was Involuntarily or Unknowingly Made.**

The record unequivocally reflects that many, but not all, of Blackstone Mining's employees signed notices of rejection of workers' compensation coverage. Each of these notices was filed with and accepted by the Office of Workers' Claims pursuant to KRS 342.395(1). Additionally, all of the employees of Blackstone Mining that Travelers elected to depose testified that the notices of rejections were voluntarily and knowingly signed and that the notices were executed without coercion from Blackstone Mining. As noted by the Court of Appeals, both Mr. Thacker and Mr. Strawser testified unequivocally that Blackstone Mining's employees had voluntarily signed rejections of workers' compensation insurance and that such rejections were executed with full knowledge of the consequences and without coercion from Blackstone Mining.<sup>1</sup> Blackstone Mining thus not only met its burden of proof by producing properly executed rejections of coverage that were accepted by the Office of Workers' Claims, but Blackstone Mining exceeded its burden by producing additional evidence to support the conclusion that the rejections were made voluntarily and without coercion.

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<sup>1</sup> Court of Appeals Opinion at page 5.

Travelers provided absolutely no evidence to the trial court which would even intimate that the rejections were somehow invalid or were involuntarily or unknowingly executed. All the evidence supports the uncontroverted fact that the rejections were voluntarily executed and that each employee believed he would receive better insurance coverage by rejecting workers' compensation coverage. Travelers did not even make an attempt to explain why the notices were not voluntarily and knowingly executed. In *Karst Robbins Mach. Shop, Inc. v. Caudill*, 779 S.W.2d 207, 208 (Ky. 1989), this Court suggested that, with regard to a rejection of workers' compensation insurance, the "presumption of accountability attaching to one's signature may be overcome by convincing proof of illiteracy and a lack of knowledge regarding the document being signed." Travelers, however, not only failed to produce any convincing proof to the trial court, but failed to produce any evidence whatsoever. The fact that Travelers took Mr. Strawser's deposition two times over a five year period, shows that it possessed unanswered questions from the first deposition which it wanted to clarify, but more importantly, it conclusively shows that Travelers possessed ample opportunity to depose additional employees if it deemed such depositions were necessary at the time. The length of time, the follow-up deposition of Mr. Strawser coupled with the written and verbal representations to the trial court show that there were no genuine issues of material fact before the court when it rendered its opinion.

## **II. Blackstone Mining Provided Insurance Coverage for Pneumoconiosis as Required by Law**

Under federal law, Blackstone Mining had the option of either purchasing Black Lung coverage for its employees or self insuring its employees. In this case, Blackstone Mining chose to

purchase a disability insurance policy.<sup>2</sup> The Mass Mutual policy that was purchased by Blackstone Mining was a “general” disability policy that provided benefits whenever an insured was injured or sick. The policy contains no exclusion for Black Lung disease. Accordingly, Travelers’ contention that the Mass Mutual policy fails to cover Black Lung is misplaced. But, even if there were an issue as to whether the Mass Mutual policy covered Black Lung disease, it is a fundamental rule of construction that insurance policies are to be liberally construed, with any doubts resolved in favor of the insured. KRS 446.080; *see also State Farm Mutual Auto. Ins. Co. v. Shelton*, 413 S.W.2d 344, 347 (Ky. 1967). Any limitation or exclusion of coverage would have to have been clearly stated in an insurance policy. *St. Paul Fire & Marine Ins. Co. v. Powell-Walton-Milward, Inc.*, 870 S.W.2d 223 (Ky. 1994). Blackstone Mining fully complied with the federal requirements to obtain black lung disability coverage for its employees and cannot be compelled to pay for the same insurance coverage two times.

### **III. Prejudgment Interest Was Property Awarded Because the Damages Were Liquidated**

The amount of damages was never in controversy. Both parties stated to the trial court that the case only needed to be presented to the court for a determination of the legal issue of liability for insurance premiums. The record is contrary to Travelers’ argument that the amount of damages was unknown. First, the Court’s handwritten bench notes unequivocally state: “Parties stipulated damages . . . .”<sup>3</sup> Second, the trial court’s written video log contains the following notations: (i) at 09:17:48, “Parties agree on figures”; (ii) at 09:21:09 “Blackstone would owe Federal Black Lung

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<sup>2</sup> 30 U.S.C. § 933. Please see the trial court Conclusions of Law at page 5 and finding # 10 at page 6. Appellants brief at Tab #3. [RA 295-302]

<sup>3</sup> Please see Appellant’s Brief, Appendix Tab # 6, page 1.

\$32,801.00 and \$9,478.00"; and, (iii) at 09:22:52 "Blackstone believes they are entitled to a refund of \$ 26,768.51 and \$94,091.74."<sup>4</sup> Third, in the opening paragraph of its Proposed Findings of Fact and Conclusions of Law, Travelers states:

Both the Plaintiff and Defendant stipulated that the only outstanding issue for the Court to decide at this point . . . is whether Defendant is liable to Plaintiff for payment of Federal Black Lung insurance premiums. If Defendant is found liable for said premiums, Defendant will owe Plaintiff \$42,279.00 in unpaid premiums. If Defendant is determined not to be liable for said premiums, Plaintiff will owe Defendant a refund of overpaid premiums in the amount of \$120,861.25."<sup>5</sup>

Finally, Travelers has stated and continues to state in its Brief with this Court that "both parties stipulated that if the Court's Order of August, 2004 was accepted **THE ONLY REMAINING ISSUE** was whether Appellee was still responsible for Black Lung premiums." (emphasis added).

In *Nucor Corp. v. General Electric Co.*, 812 S.W.2d 136, 141 (Ky. 1991), this court stated the controlling authority on prejudgment interest: "**When the damages are 'liquidated,' prejudgment interest follows as a matter of course.**" (emphasis added). The words "as a matter of course" means automatically. Because the parties stipulated the damages and because this was a breach of contract case, prejudgment interest automatically attaches to the party receiving the verdict.

WHEREFORE, for the reasons and pursuant to the law stated hereinbefore the opinion of the Court of Appeals should be reversed and the JUDGMENT and AMENDED JUDGMENT of the Pike Circuit Court should be REINSTATED.

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<sup>4</sup> Please see Appellant's Brief, Appendix Tab # 6, page 2.

<sup>5</sup> Please see Appendix Tab #1 for a copy of the document without tabs. Please also see the Circuit Court Case History Sheet at the bottom of page 12 of 15 pages showing that the document was tendered, but not filed.

Respectfully submitted.

October 28, 2009.

A handwritten signature in black ink, appearing to read "Frederick G. Fritz, II", written in a cursive style.

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