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Barrett v. Hecla Min. Co. Clerk's Record v. 4 Dckt. 43639

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LAW CLERK

IN THE

SUPREME COURT

OF THE

STATE OF IDAHO

RONNEL E. BARRETT, etal

Petitioners-Appellants,

v.

HELCA MINING COMPANY, etal

Defendant-Respondent,

Appealed from the District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai.

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

RONNEL E. BARRETT, an individual; GREGG HAMMERBERG, an individual; ERIC J. TESTER, an individual; and MATTHEW WILLIAMS, an individual, Plaintiffs, -vs- HECLA MINING COMPANY, a Delaware Corporation; JOHN JORDAN, an individual; DOUG BAYER, an individual; SCOTT HOGAMIER, an individual; and DOES I-X, unknown parties, Defendants.	**CASE NO. CV 13-8793** **PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT**

COME NOW, Plaintiffs, by and through their counsel of record, Eric S. Rossman of Rossman Law Group, PLLC and hereby submits this Memorandum in Support of Motion for Partial Summary Judgment.

I. INTRODUCTION

This case arises from a rockburst which occurred on December 14, 2011 at the Lucky Friday mine in Mullan, Idaho. This rockburst resulted in the injury of seven miners, including the Plaintiffs who were working in the area of the 5900 level pillar at the Lucky Friday mine. On December 11, 2013, Plaintiffs filed the complaint in this manner alleging knowing, intentional, willful and wanton injury to the Plaintiffs, respondeat superior liability against Hecla, and intentional infliction of emotional distress.

On May 12, 2014, Defendants filed an Answer in which Defendants asserted as their Fourth and Seventh Affirmative Defense that Plaintiffs' claims were barred by the exclusive remedies set forth within Idaho's Worker's Compensation Law, Idaho Code § 72-101, *et. seq.* Defendants further asserted within the Fifth, Seventh, and Eighth Affirmative Defenses that such claims were barred by the Employers' Liability Act, Idaho Code § 44-1401, *et. seq.* By this motion, Plaintiffs seek partial summary judgment on Defendants' Fourth, Fifth, Seventh, and Eighth Affirmative Defenses in this matter.

II. STATEMENT OF UNDISPUTED MATERIAL FACTS

Plaintiffs have prepared and filed concurrently with this Memorandum, a separate Statement of Facts and hereby incorporate that Statement herein by this reference.

III. STANDARD OF REVIEW

Rule 56 of the Idaho Rules of Civil Procedure provides that summary judgment is proper

"if the pleadings, deposition, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." I.R.C.P. 56(c); *see also Northwest Bec-Corp. v. Home Living Serv.,* 136 Idaho 835, 838, 41 P.3d 263, 166 (2002). The burden is upon the moving party to prove the absence of a genuine issue of material fact. *Petricevich v. Salmon River Canal Co.,* 92 Idaho 865, 868, 452 P.2d 362, 365 (1969). It is not the judge's function to weigh evidence, "but to determine whether there is a genuine issue for trial. . . [T]here is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249-50 (1986). Summary judgment is proper if the evidence before the court would warrant a directed verdict if the case were to go to trial. *Jephson v. Ambuel,* 93 Idaho 790, 793, 473 P.2d 932, 935 (1970).

IV. ARGUMENT

The Idaho Worker's Compensation Law expressly states that it provides the exclusive remedy for employees injured while working for an employer, except where the injury is proximately caused by the "wilful or unprovoked physical aggression of the employer" or its employees and that such loss of exemption shall apply to the employer if the employer provoked or authorized the willful physical aggression. *See* Idaho Code § 72-209(3).[1] As will be set forth in detail below, Idaho case law, the legislative history of the Idaho Worker's Compensation Act, and the facts of this case demonstrate that, as a matter of law, Plaintiffs have pled a valid cause of action in tort based on the exception to the exclusive liability provisions of the Idaho Worker's Compensation Act.

[1] Within Idaho Code § 72-209(3), the statue uses the term "wilful." This appears to be nothing more than a misspelling by the Legislature in enacting the provision. In the interest of consistency with court decisions and modern usage of the word, Plaintiffs will use the correct spelling of "willful" throughout this Memorandum.

A. Idaho Worker's Compensation Act Provides an Exemption from the Exclusive Remedy Provisions of the Act where Willful Physical Aggression is Shown.

The Idaho Worker's Compensation Act was passed in 1972, replacing the prior Idaho Workmen's Compensation Act. *See* Compiler's Notes to Idaho Code § 72-101. Among the numerous changes to the law was the inclusion of an exemption to the exclusive liability provisions in cases where the injury was caused by the willful physical aggression of the employer. The provisions of the former Idaho Workmen's Compensation Act, Idaho Code § 72-102 provided that all phases of industrial injuries were withdrawn from private controversy and subject exclusively to the provision of workmen's compensation, regardless of fault. *See Roe v. Albertson.s, Inc.*, 141 Idaho 524, 527-30, 112 P.3d 812, 815-18 (2005). In contrast, Idaho Code § 72-209(3), enacted in 1972, expressly exempts the employer from the exclusive liability protections of Idaho's Worker's Compensation Law in the case of "wilful [sic] physical aggression." *See* Idaho Code § 72-209(3). Thus, the legislature clearly intended that certain actions of the employer would not be subject to the exclusive remedy provisions of Idaho's Worker's Compensation Law.

B. Under Idaho Law, "Willful" does not Require a Showing of Intent to Harm.

The *mens rea* or mental state required of an employer to satisfy the exemption to the exclusive remedy provisions of the Idaho Worker's Compensation Act is identified as willful. A review of the legislative history of the adoption of the Idaho Worker's Compensation Act reveals little, if any, insight into the interpretation of this term. However, the primary author of the 1972 revision, E.B. Smith, did offer a definition of "willful" as applied to the proposed provision which would exclude an employee from coverage under the Act if the injury was caused solely by the employee's "willful" intention to injure himself. Within a document entitled *Comparative Studies of the Model Code with Idaho's Workmen's Compensation and Occupation Disease Compensation*

Laws, Mr. Smith stated that willfulness connotes "deliberation or calculated, determined, and stubborn persistence in a particular course in order to satisfy the will of the actor." *See* Smith, E.B, COMPARATIVE STUDIES OF THE MODEL CODE WITH IDAHO'S WORKMEN'S COMPENSATION AND OCCUPATIONAL DISEASE COMPENSATION., p. 24, attached as **Exhibit "29"** to the Rossman Affidavit. As explained below, this definition is very consistent with the judicial interpretation of the term by the Idaho Supreme Court and as expressed within Idaho Model Jury Instruction No. 2.25. There is absolutely no indication within the Act or within the legislative history behind the exemption that the legislature in any way intended to modify or alter the judicial meaning relating to the term "willful." Rather, there is clear evidence that the term willful as used in the statute was intended to mean something more than negligence, but less than intent to harm.

1. Statutory Language.

The Idaho Supreme Court has recognized that "when the legislature 'borrows terms of art in which are accumulated the legal tradition and meaning . . . it presumably knows and adopts the cluster of ideas that were attached to each borrowed word . . . and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.'" *State v. Oar*, 129 Idaho 337, 340, 924 P.2d 599, 602 (1996) (quoting *Morissette v. United States*, 342 U.S. 246, 263, 72 S. Ct. 240, 250 (1952)).

Based on this established rule of construction, it is clear that by using the term "willful" within Idaho Code § 209(3), the legislature intended that word to have the common legal meaning given to that word. Furthermore, the Idaho Supreme Court has recognized that the legislature is presumed to know existing judicial interpretations when it amends a statute. *See Robinson v.*

Bateman-Hall, Inc., 139 Idaho 207, 76 P.3d 951 (2003). Various provisions of the Idaho Worker's Compensation Law have been amended since 1972 and the legislature has not changed the word "willful" nor provided an additional definition of that word. As such, the legislature is presumed to know and approve of the existing definition of "willful." In fact, had the legislature intended for "willful" to have a different meaning, it most certain could have provided one as it has done in other statutes. *See, e.g.*, Idaho Code § 904C (providing a specific definition for "reckless, willful and wanton" conduct under the Idaho Tort Claims Act).

2. *Case law defining "willful."*

In *Hennefer v. Blaine County Sch. Dist. #61*, --- Idaho ---, 346 P.3d 259 (Idaho 2015), the Idaho Supreme Court addressed the current legal definition of reckless, willful and willful and wanton. The Court approved Idaho Pattern Jury Instruction 2.25 which provides a definition of "willful and wanton" and recognized that there was no distinction between "reckless" and willful and wanton." *See id.* The definition set forth in Jury Instruction 2.25 provides:

> The words "willful and wanton" ... mean more than ordinary negligence. The words mean intentional or reckless actions, taken under circumstances where the actor knew or should have known that the actions not only created an unreasonable risk of harm to another, but involved a high degree of probability that such harm would actually result.

See id. The Idaho Supreme Court then recognized that this definition requires that the actor make a conscious choice as to his or her course of action, but the actor need not subjectively be actually aware of the risk or the high probability that harm will result. *See id.* Rather, it is sufficient that the actor makes a choice as to his or her course of conduct under circumstances where the risk and high probability of harm are objectively foreseeable. *See id.* Thus, the actor must choose the course of

action under circumstances he or she either knows, or should have reasonably known, of the risk and the high probability of harm.

This same definition has been applied in other contexts. For example, this definition has been applied to "willful and wanton" conduct by a landowner which would exclude the landowner from the protections of the Idaho Recreational Use Statute. *See To v. City of Coeur d' Alene*, CV 2002 5424, *Memorandum Decision and Order Denying Summary Judgment in Part and Granting Summary Judgment in Part* (February 5, 2004), attached as **Exhibit "30"** to the Rossman Affidavit. In *To*, Judge Mitchell reviewed the history of the definition of willful and wanton conduct and recognized that the definition set forth in Jury Instruction No. 2.25 was the proper definition to apply to a claim that a landowner was exempt from the protections of the Recreational Use Statute. *See id.* at 4-6. The district court then held that, as to the acts alleged by the Plaintiff, the jury would have to decide if the city 1) knew of the deficiency and 2) could have foreseen the possibility of a drowning and 3) the possibility of drowning was highly likely to occur with that deficiency and yet 4) the city consciously proceeded to act knowing the risk caused by that deficiency created a high likelihood of drowning. *See id.* at p. 7.

Given these decisions, it is clear that the Idaho Legislature did not intend that the exemption carry a different meaning for the term "willful" than that defined repeatedly by the Idaho courts. Had it intended to do so, it would have done so expressly. As set forth herein-below, there is extensive evidence in this case demonstrating the existence of willful conduct by Hecla management. It knew and objectively should have known that the 5900 foot pillar was dangerous and unstable with objectively identifiable stress measurements showing substantial increases in stress in the pillar, during every shift of every day that the rehabilitation continued. Hecla's rock mechanics consultant

told management that the prior modeling of the pillar was rendered invalid by the substantially changed dimensions of the pillar (an approximately 2/3 reduction in width/height dimension), that further modeling was necessary, that the pillar was stressed to its capacity and that the new dimension of the pillar rendered it at serious risk of complete failure given his prior research in the Coeur D'Alene mining district. Management knew that blasting and mining above and below the pillar was a known trigger for rock burst activity, yet **before the rehabilitation** could be completed, Hecla restarted blasting during every shift at six different stopes within the mine both above and below the pillar. As discussed herein, Hecla management lied to MSHA investigators regarding the stability of the pillar, and to induce the employees to continue working in the area, management refused to show them stress and closure data or consultant reports and fraudulently told them that the pillar was "stable", that it was not increasing in stress and that further rock bursting wasn't expected by consultants for "at least five years." These representations were made by management while knowing that the pillar was unstable, that it had reached its maximum stress bearing capacity and that stress readings showed an increase in measurable stress within the pillar of **over a thousand psi** in less than two weeks of active monitoring. As if manipulating the federal government and its employees were not enough, management provided the ultimate demonstration of its willful and conscious disregard for the value of safety to its employees, by restarting blasting and mining at six different areas of the mine each shift for a week leading up to the fateful 2.2 Richter rock burst on December 14, 2011 that buried seven of its miners. Clearly, there is substantial evidence in this case that Hecla management acted willfully as intended by the statute.

C. "Physical Aggression" is an Act, not a Mental State.

Although Idaho Code § 72-209(3) has been a part of the Idaho Worker's Compensation Act since 1972, there is very little case law available interpreting that provision. However, it is patently clear that the Idaho Legislature included the term, "willful" to define the required mental state to satisfy the exemption. It is further clear that the term "willful" has been repeatedly defined by the Idaho Supreme Court to require something substantially less than a showing of an "intent to harm." To satisfy the exemption, the required act that must be demonstrated by the employer with the "willful" state of mind is identified as "physical aggression." In applying the term "willful physical aggression" it is clear that the court has identified a threshold resting somewhere between an "intent to harm" and negligent conduct.

The first case to directly address this provision as an exception to the exclusive remedy of the Worker's Compensation Act was *Cope v. State*, 108 Idaho 416, 700 P.2d 38 (1985). In *Cope*, the plaintiff had sued his employer for damages suffered when he was attacked/tackled by a patient at the State Hospital while working as a rehab technician. *See id.* The district court granted summary judgment to the employer and the Idaho Supreme Court affirmed on the basis that the plaintiff had alleged no physical aggression by the employer or the employer's agent. *See id.*

The next case addressing Idaho Code § 72-209(3) is *Kearney v. Denker*, 114 Idaho 755, 760 P.2d 1171 (1988). In Kearney, an employee was injured while operating a lawn mower and alleged that the employer had failed to install certain safety devices on the mower which caused the injuries. *See id.* at 756, 760 P.2d at 1172. The employee alleged that the employer was willfully, wantonly, and grossly negligent in such a way that it was substantially certain that someone would be injured. *See id.* The district court granted summary judgment based on the exclusive remedy provisions of the Idaho Workers Compensation Act and the employee appealed.

On appeal, the Idaho Supreme Court directly addressed Idaho Code § 72-209(3) and held that the word "aggression" connotes an "offensive action." *See id.* at 757, 760 P.2d at 1173. The Court then held that "[t]o prove aggression there must be evidence of some offensive action or hostile attack. It is not sufficient to prove the alleged aggressor committed **negligent acts** that made it substantially certain that injury would occur." *See id.* (emphasis added). The Court then concluded that because the employee did not allege any willful physical offensive attack on the employee, the district court properly granted summary judgment and affirmed. *See id.* Thus, in *Kearney*, the Idaho Supreme Court established that Idaho Code § 72-209(3) required something more than ordinary negligence with a substantial certainty of harm and, instead, required willful offensive action against the employee. This standard was then affirmed in *DeMoss v. Coeur D'Alene*, 118 Idaho 176, 795 P.2d 875 (1990).

In *DeMoss*, the plaintiffs brought suit seeking recovery for mental anguish resulting from asbestos exposure. *See id.* The district court granted summary judgment based on the exclusive remedy of the worker's compensation law and the Court affirmed reiterating its statement that it is not sufficient to prove that the alleged aggressor committed negligent acts that made it substantially certain that injury would occur. *See id.* at 179, 795 P.2d at 878. The Court based this decision on the fact that there was no evidence that the employer actually knew the substance was asbestos until after the first exposure had occurred and that, at best, the failure to provide adequate protective gear was merely negligent. *See id.*

The provision was next addressed in *Dominguez v. Evergreen Res., Inc.*, 142 Idaho 7, 121 P.3d 938 (2005). In *Dominguez*, the plaintiff had worked for the defendant and was instructed to enter and clean a steel tank which had been used as part of a cyanide-leach process and which had a

layer of cyanide laced sludge in the bottom. *See id.* at 9, 121 P.3d at 940. The evidence showed that the employer knew it was dangerous to enter the tank but concealed the knowledge from Dominguez. The employer had failed to obtain the proper permit for entry into the tank in violation of federal regulations and had failed to provide any safety training or equipment. *See id.* During the cleaning process, Dominguez was overcome by poisonous hydrogen cyanide gas and lost consciousness. He ultimately suffered severe and irreversible brain damage. *See id.* at 10, 121 P.3d at 941. Dominguez filed suit against his employer alleging willful physical aggression to avoid the exclusive remedy provisions of the Workers' Compensation Act. *See id.* Eventually, the employer's attorney withdrew and the employer failed to find new counsel leading the district court to enter default against the employer. *See id.*

On appeal, the employer asserted that Dominguez's claims were barred by the exclusive remedy provision of the Idaho Worker's Compensation Act. The Idaho Supreme Court disagreed and stated that Dominguez had alleged willful or unprovoked physical aggression by his employer and, therefore, his claim fell into the statutory exception. *See id.* at 12; 121 P.3d at 943. Thus, the Court has recognized that the statutory exception applied to a claim that the employer willfully placed an employee in a situation where there was a high probability that an injury would occur.

Because the case involved a default judgment, Hecla will likely argue that the Court never held that the circumstances alleged by Dominguez actually fell within the statutory exception. However, a review of the case demonstrates that the Court was fully aware of the factual circumstances alleged by Dominguez and nevertheless recognized that the statutory exception applied to his case. The court analyzed and restated the facts alleged within the complaint and

expressly recognized that a cause of action satisfying the statutory exemption had been properly alleged. In its decision, the court stated:

> "In this case, Dominguez has alleged a willful or unprovoked physical aggression by his employer, and therefore his claim falls into a statutory exception to the exclusive remedy rule. I.C. § 72-209(3). Consequently, Dominguez is permitted to collect those worker's compensation benefits for which he is eligible and to bring a cause of action against his employer outside the worker's compensation system.

Dominguez, 142 Idaho at 12, 121 P.3d at 943.

In *Olson v. Kirkham*, 111 Idaho 34, 37, 720 P.2d 217, 220 (Ct. App. 1986), the Idaho Court of Appeals held that a default judgment is not appropriate where a complaint fails to state a valid cause of action. *See id.* ("A court having before it a sworn complaint alleging a good cause of action has no need to take testimony to reaffirm that allegations of the complaint."). This holding is in accord with other courts. *See e.g.*, *Benny v. Pipes*, 799 F.2d 489, 495 (9th Cir. 1986) (finding that the complaint stated a valid claim for relief before affirming a default judgment). As such, while the court was obligated to take the facts alleged by Dominguez as true upon a default, those facts still had to form the basis for a valid claim for relief. It would be non-sensical and patently absurd to conclude that the court upheld the complaint as stating a valid cause of action under the exemption allowing recovery outside of the Idaho Worker's Compensation Act with an understanding or belief that the facts alleged within the complaint could not meet the definition of "willful physical aggression." It is inconceivable that both the District Court and the Idaho Supreme Court would have affirmed a multi-million dollar judgment if the factual allegations pled by Dominguez did not state a valid cause of action.

This conclusion is further supported by the findings of the bankruptcy judge in *In re Elias*, 302 B.R. 900 (Id. Bankr. 2003). In *Elias*, the bankruptcy court was asked to determine whether the

default judgment entered by the state District Court had preclusive effect in determining the dischargeability of the judgment entered against Dominguez's employer. In holding that the default judgment did have preclusive effect, the bankruptcy court stated "the default judgment actually decided the issues raised by Plaintiff's complaint in the state court action because 'upon default, the allegations of the complaint are taken as true.'" *See id.* at 912 (quoting *Olson*, 111 Idaho at 37, 720 P.2d at 220). The bankruptcy court further found that the default judgment determined that Defendant committed an act of "'wilful [sic] or unprovoked physical aggression upon [Plaintiff]' by sending him into the tank car without providing adequate safety equipment or taking appropriate safety precautions." *See id.* (emphasis added).

It is clear that the facts alleged were not simply some conclusory "willful physical aggression" but rather specific facts regarding the incident. The bankruptcy court recognized that "the default judgment can be fairly read as establishing that when Defendant sent Plaintiff into the tank car, he acted with a harmful state of mind and that, in doing so, Defendant either understood, or knowingly disregarded the likely consequences of Plaintiff's entry into a confined space containing harmful chemicals, with little or no ventilation or safety equipment." *See id.* (emphasis added).

The conclusion to be drawn from the cases cited above is that the statutory exception to the exclusive remedy of the Worker's Compensation Act embodied in Idaho Code § 72-209(3) requires something more than ordinary negligence combined with a substantial risk of harm but something less than deliberate intent to injure and that the exception can be applied where an employer engages in an offensive act and willfully exposes an employee to circumstances creating a substantial likelihood of injury without regard for the employee's safety and/or the likely consequences to the Plaintiff.

It is further clear that the term "willful physical aggression" does not require an actual physical striking of the employee by the employer. Had it intended such an act to meet the exemption, it would have done so expressly. "Aggression" does not mean "striking." It means the engagement of an offensive act toward the employee subjecting the employee to a substantial risk of harm with a substantial likelihood that such harm would result. A contrary definition cannot be rationalized with the court's decision in *Dominguez* or its repeated decisions setting forth that "willfulness" does not require a demonstration of intent to harm. Further, one can envision no policy consideration that would justify an exemption where an employee physically strikes and employee, but not where, as here, the employer lies to its employees and the Federal Government in willfully exposing its employees to a known, substantial risk of death or serious injury. Lying to an employee in order to fraudulently induce him/her to act in a way which exposed him/her to a substantial risk of physical injury must be an "offensive act" sufficient to meet the definition of "physical aggression." An overtly formalistic, contrary construction of the term would not only be in contradiction of Idaho Supreme Court precedent, but also would ignore the very policies and principles upon which the exemption was created.

D. Plaintiffs have pled a valid cause of action in tort against Hecla as matter of law.

As is thoroughly discussed above, if the Plaintiffs can establish that Hecla committed "willful physical aggression" the Plaintiffs are entitled to pursue their tort claims against Hecla outside of the Workers' Compensation proceedings. The facts supporting such willful physical aggression in this matter are fully set forth in the Statement of Undisputed Facts filed concurrently herewith and support by the Affidavits filed in support of partial summary judgment in this matter.

1. Hecla knew the pillar was unstable.

- Hecla did not employ a rock mechanics expert in 2011 and in fact relied exclusively upon a consultant, Wilson Blake, Phd., regarding any rock mechanics issues including rock bursts and pillar stability. Neither its mine superintendent, Doug Bayer, nor any of its employees had necessary training, education or certification as a rock mechanics expert. *See* SOF, ¶¶ 12-15.

- Following the November 16, 2011 rockburst, Hecla management knew that the size and dimensions of the pillar had substantially changed rendering its prior modelling of the pillar (which assumed a 10:1 width:height ratio) invalid. Management knew that the pillar had reached its maximum unconfined strength and that the walls of the pillar continued to carry stress. *See* SOF, ¶¶ 18, 25, 29-30.

- Dr. Blake's November 25, 2011 draft memo sent to Doug Bayer, the mine superintendent, stated that the stress on the 5900 level pillar leading up to the November 16, 2011 burst "was very near the pillar's maximum confined strength." Dr. Blake further advised that the pillar continued to carry stress and that Hecla "proceed with caution" during any rehabilitation of the pillar. *See* SOF, ¶¶ 18, 30 *see also* **Exhibit "6"** to the Rossman Affidavit.

- Dr. Blake's memo further included a sentence that the November 16, 2011 burst had rendered the 5900 level pillar to condition identified as "borderline stable." Such statement was based on his calculation that the November 16, 2011 burst had rendered the 5900 level pillar to an approximate width/height ratio of 3 or 3.5 to 1 which, according to his research rendered the pillar at serious risk of failure due to an inability to carry a sufficient load. Dr. Blake testified that his research indicated that any pillar (10 ft wide) in the Coeur D'Alene Mining District that was reduced below 40 feet in height (4:1 width:height ratio) carried a substantial likelihood of complete failure. *See* SOF, ¶ 28-30.

- Dr. Blake specifically testified that:

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16 **Q.** You said, "The pillar is borderline stable
17 based on mining history at Lucky Friday/Gold Hunter."
18 When you say borderline stable, that's based on your
19 Galena research, correct?

20 **A.** Well, that's based on pillar failures in most
21 mines. As I say, once that pillar becomes less than 35
22 feet, **you can expect it to burst**. And that was ...

23 **Q.** And that's what you were trying to tell Hecla
24 at that point is it's borderline --

25 **A.** Yes.

See Blake Depo, p. 119, LL 16-25 (emphasis added).

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Q. And from your research, pillars 40 feet or smaller in height are -- have a history in the Coeur d'Alene silver district of failing, correct?

A. **When the size is reduced beyond that, the history has been you can expect rockbursting.**

See Blake Depo, p. 121, LL 11-15.

- Hecla admits that it relied upon Dr. Blake's consultation in developing a rehabilitation plan for the pillar. *See* SOF, ¶ 31.

- Despite the express language regarding the borderline stability of the pillar in Dr. Blake's report, Hecla either removed or instructed Dr. Blake to remove that language from the report before such report was provided to MSHA. *See* SOF, ¶ 33.

- In regards to the change in the memo, Dr. Blake testified that:

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Q. Well, you sent him Exhibit 24 for his review, correct?

A. That's right.

Q. And then you created a final memo, which is Exhibit 13, correct?

A. That's correct.

Q. And Exhibit 13 does not have language that says this pillar is borderline stable, correct?

A. That's correct.

Q. And the removal of that sentence would have come at the suggestion of Hecla, correct?

MR. RAMSDEN: Object to the form.

THE WITNESS: I did remove it.

BY MR. ROSSMAN:

Q. At the suggestion of Hecla, correct?

A. It would have to be the case.

See Blake Depo, p. 123, LL 1-16 (emphasis added).

- Doug Bayer testified he would not have put miners at the 5900 level pillar had he thought the pillar was borderline stable. The fact that Dr. Blake clearly informed Doug Bayer that the pillar was borderline stable therefore demonstrates that Mr. Bayer absolutely knew he was placing miners at risk by ordering them to work at the pillar. *See* SOF, ¶ 32.

- Furthermore, despite Dr. Blake's express warnings to proceed with rehabilitation of the pillar with caution and warnings that the pillar was borderline stable, Bayer provided updates to MSHA on November 29, December 1, December 2, and December 6, 2011 asking for modifications to the 103k order which would allow rehabilitation of the pillar and, ultimately, on December 6, 2011, to allow the resuming of mining operations in the mine. *See* SOF, ¶ 34.

- These mining operations commenced even before the rehabilitation of the 5900 level pillar were complete. *See* SOF, ¶¶ 54-55.

- Bayer's "updates" sent to MSHA included statements that the November 16, 2011 burst de-stressed a majority of the pressures at the 5900 level, that stress monitoring readings had stabilized, and that the mine did not expect any measureable increase in stress to occur for weeks if not months. *See* SOF, ¶ 34.

- Dr. Blake expressly testified that he never told Doug Bayer or anyone at Hecla that he believed the November 16th burst had dissipated a majority of the stress at the 5900 pillar and that he never believed that as a result of the November 16th burst the pillar had lost a majority of its' stress. *See* SOF, ¶ 39.

- When making these representations, Bayer knew that the pillar had reached its maximum unconfined stress capacity, that the size of the pillar had substantially changed, that it was at serious risk of complete failure and that actual measurable increases in stress were recorded every shift of every day during the rehabilitation. Stress monitoring results actually demonstrate an increase of over one thousand psi of stress increase in just two weeks prior to the fateful, December 14, 2011 burst. Of course, it refused to show the results to MSHA, its employees and even its own rock mechanics consultant while expressly representing that it didn't expect "any measurable increase" in stresses for weeks if not months following rehabilitation of the pillar. *See* SOF, ¶¶ 18; 25-39.

- Bayer knew that the miners were reporting cracking, popping, spitting and spalling of rock during rehabilitation efforts. Yet despite a modification order requiring that he do so, he at no time communicated these concerns to MSHA. Further, when employees expressed concerns he merely told them that the rock mechanic's report as well as the stress monitoring readings were reassuring that the pillar was stable. *See* SOF, ¶¶ 22-23; 47-53.

- When asked, Bayer falsely and fraudulently informed miners working at the 5900 level pillar that Dr. Blake had assured him that the pillar would be stable for at least another five years. *See* SOF, ¶ 51.

- The mining that resumed on December 6, 2011 included blasting at six stopes during both shifts between December 6, 2011 and December 13, 2011, again, while knowing the relationship between blasting and rock burst activity in the mine as well as the fact that the pillar was carrying stress and stresses were rapidly increasing in the pillar. *See* SOF, ¶¶ 54-55.

2. Hecla lied to MSHA and the miners about the stress levels at the pillar.

- Employees informed Dr. Blake that during the rehabilitation efforts at the pillar, the walls were "popping," "cracking" and "spalling" when they tried to drive bolts and dwyidags into the walls. Despite a modification order that required that, "[a]ny significant changes will be reported to MSHA to include additional stressing, closure, cracking or squeeze and deformity" none of these reports were actually communicated to MSHA. *See* Modification Order 8605614-03, attached as **Exhibit "17"** to the Rossman Affidavit; *see also*, SOF ¶ 22-23.

- Bayer informed MSHA that Hecla had installed three stress monitors in the 5900 pillar and falsely stated that it would install three additional monitors as soon as they arrived from the manufacturer. *See* SOF, ¶¶ 43-44.

- Bayer falsely informed MSHA that the stress monitoring information would be reviewed daily by mine personnel and Hecla's rock mechanic consultant. *See* SOF, ¶ 40.

- Dr. Blake stated that he received 4-5 days worth of monitoring information in total. *See* SOF, ¶ 40.

- Bayer never informed MSHA that the East Low gauge showed invalid readings and Hecla never took steps to reinstall or check the placement of the gauge. *See* SOF, ¶¶ 41-42.

- Dr. Blake testified that negative readings from the East Low gauge were clearly inaccurate and that the surrounding rock around the gauge must have crumbled. *See* SOF, ¶ 41.

- Hecla never installed the remaining three gauges as it falsely represented it would to MSHA. *See* SOF, ¶¶ 43-44.

- Hecla never informed MSHA or employees that the stress readings on the West Low gauge during the two week period prior to the December 14, 2011 burst showed per shift, steadily increasing pressures at the 5900 level pillar ultimately resulting in a 1000 psi stress increase. *See* SOF, ¶¶ 38, 50.

- Hecla never allowed employees to see the stress monitoring information. *See* SOF, ¶ 47.

- Approximately two to three days following the November 16, 2011 burst, Doug Bayer was inspecting the pillar while mine employees were working on it. At that time he held what was represented to be a report from Wilson Blake and he said to the miners that he knew several of them were concerned about the safety of the pillar but, while waiving the report in the air, he stated the report indicated that "we don't have to worry about it for at least five years." *See* SOF, ¶ 51.

- In his deposition, Bayer admitted that his representations to employees and MSHA regarding the release of stress at the 5900 level pillar, the stability of the pillar, and the expectations of future stability of the pillar were not based on anything told to him by Dr. Blake but rather his own history and experience at the mine. Bayer is not a rock mechanics expert and its consultant who held a Ph.D in this area, Dr. Blake, expressly testified that Bayer's representations to MSHA were incorrect. *See* SOF, ¶¶ 36-37; 39.

3. Bayer's lies induced MSHA to issue modifications to allow mining that it would not have otherwise allowed.

- MSHA was never told of Dr. Blake's serious concerns of pillar failure or that miners were complaining of spalling, cracking, and popping of rock at the pillar. In fact, Bayer stated that the pillar appeared to be stable. *See* SOF, ¶¶ 22-40.

- MSHA was never told that Hecla failed to install the three remaining gauges as promised by Hecla. *See* SOF, ¶ 43-44.

- MSHA was never told that the existing gauges were showing steadily increasing pressures over the two week period they were monitored prior to December 14, 2011. *See* SOF, ¶ 34.

- MSHA was never told that the third gauge installed in the east wall was registering consistently invalid stress readings and that no action was taken to reinstall the gauge to obtain accurate readings. *See* SOF, ¶ 34; 42.

- MSHA was not informed that Hecla was initiating substantial mining operations with blasting at six different stopes above and below the 5900 level pillar before rehabilitation of the pillar was completed. Modification order 8605614-03 permitted only "very limited activity" based upon false representations to it by Bayer. *See* SOF, ¶ 54-55.

4. Hecla's lies induced miners to work at the 5900 level pillar without knowing of the substantially dangerous condition of the pillar.

- Rick Norman, Rick Vallerio, and Matt Williams are current and/or former employees of Hecla who worked on the 5900 level pillar between November and December 14, 2011. *See* Affidavits of Rick Norman, Rick Vallerio, and Matt Williams.

- Each miner testified by affidavit that Hecla management, including Doug Bayer, were informed that the walls were cracking, spalling, and popping when they tried to drive bolts and dwyidags into the walls. *See* Affidavits of Rick Norman, Rick Vallerio, and Matt Williams.

- Each miner testified by affidavit that they were expressly told by Doug Bayer that the pillar was safe, and Rick Vallerio was told that Dr. Blake's report said the pillar was safe for at least five years. *See* SOF, ¶ 51, *see also* Affidavits of Rick Norman, Rick Vallerio and Matt Williams.

- Each miner testified by affidavit that they were never told by Hecla management that the stress monitors were showing steadily increasing pressures or that Dr. Blake had expressed concerns about the safety of the pillar. *See* Affidavits of Rick Norman, Rick Vallerio, and Matt Williams.

- Each miner testified by affidavit that had they known that Dr. Blake considered the pillar to be borderline stable and that stress monitoring data was showing steadily increasing pressures, they would not have worked at the pillar and/or would have taken steps to remove any mining personnel from working at the pillar. *See* Affidavits of Rick Norman, Rick Vallerio, and Matt Williams.

5. Hecla's actions constitute willful physical aggression.

As is set forth above, Plaintiffs have evidence in this case that would demonstrate that Hecla knew that the pillar was unstable, that it had not been de-stressed by the November 16, 2011 rockburst, that the pillar was building stress every shift of every day, and that blasting was a known trigger for rockburst activity within the mine. Despite this knowledge, the evidence demonstrates that Hecla lied to MSHA and its own employee miners regarding the stress levels and stress monitoring at the pillar; excluded vital information from Dr. Blake's reports from MSHA and the miners, pushed for permission to resume mining activities before the rehabilitation of the pillar was complete (and based upon inaccurate information); and resumed such mining activities despite not having completed rehabilitation of the pillar. These false statements were calculated to induce MSHA to issue modifications to its original 103k order barring further activity within the mine, and further calculated to induce the miners to continue rehabilitation of the pillar.

The evidence demonstrates that this is not a case of "mere negligence with a substantial risk of harm" as occurred in *Kearney*. Rather, the facts of this case are substantially similar to the facts presented to the court in the *Dominguez* case. As in *Dominguez*, the employer induced its employees into what the employer knew was an exceedingly dangerous situation without regard to the risks it was placing upon its employees. Additionally, while there is no evidence the employer in *Dominguez* lied to regulatory authorities or the employee prior to the incident, in this case there is substantial evidence that Hecla committed repeated offensive acts by lying to both MSHA and its employees. If Hecla's aggressive and offensive conduct does not rise to the level of "intentional or reckless actions, taken under circumstances where the actor knew or should have known that the actions not only created an unreasonable risk of physical harm to another, but involved a high degree of probability that such harm would actually result" then no conduct by an employer could meet that standard.

As was set forth in *Kearney*, "aggression" means an offensive or hostile act. In this case, Hecla intentionally lied to both employees and MSHA regarding the stability of the pillar and the stress levels building on the pillar. It lied about how it was monitoring the stresses within the pillar and it concealed evidence that the unstable pillar was building stress. Clearly, lying to employees about life-threatening dangers associated with the work is an offensive act. It is an overt act which would offend any employee. Hecla engaged in this offensive act and ordered work done on the 5900 level pillar when Hecla knew that the actions created an unreasonable risk of harm and involved a high degree of probability that such harm would result. Hecla knew that Wilson Blake had described the pillar as borderline stable and had expressed to management serious concerns about its stability, that it had not been de-stressed as Hecla represented to MSHA, that there was objective evidence of

stress on the pillar in the form of the craking, spalling, and popping of the walls reported by the miners as well as the steadily increasing pressures on the only two operating stress monitors on the west and top walls. Hecla knew that the pillar was in serious danger of failure yet chose to disregard that danger, lie to federal authorities and its employees, and place its miners in a situation where it was highly likely that harm would result. And such harm did result, causing serious injuries to the miners.

There is a sound public policy basis for allowing employees to seek tort damages for in cases where the evidence demonstrates that an employer fraudulently placed employees in dangerous situations where serious physical injury or death was highly likely to occur. The purpose of the Idaho Worker's Compensation Act was to provide sure and certain relief to employers and employees in the case of industrial accidents without regard to fault. *See Blake v. Starr*, 146 Idaho 847, 848-849, 203 P.3d 1246, 1247-1248 (2009). It was a recognition that in the normal course of employment accidents, even those caused by the negligence of the employer or employee, can occur and that the civil justice system was ill-suited to bringing speedy and necessary relief to injured workers and certainty to employers. *See id.* Nothing in that purpose is served by limiting the liability of employers under these circumstances. Allowing employers to retain the exclusive liability of the worker's compensations system in these cases, effectively rewards employers for their actions and substantially limits the employee's ability to obtain a full recovery for his/her injuries. Pre-emption under these circumstances shields the employer from the "market cost" of willfully placing its employees at substantial risk of harm in the name of profits. Nothing in the policy behind worker's compensation law supports that kind of protection for dangerous employers.

Protection of Hecla under these circumstances would have wide-spread implications. An employer who orders its employee to drive a vehicle with no brakes or, as in *Dominguez*, knowingly places upon its employee's a substantial risk of serious injury or death would be substantially protected from serious responsibility for its actions. There is absolutely no public policy which would support such arbitrary distinctions.

Simply put, when an employer engages in willful conduct that includes an offensive act and results in physical injury to the employee, that employee is an innocent victim just as any third party would be. And public policy supports allowing tort victims to seek a full recovery of damages in the civil justice system. An employer engaged in that level of wrongful conduct does not deserve the protections of the Idaho Worker's Compensation Act and should not be allowed to use its protections as a shield from full liability. To do so would do nothing but provide incentives for employers to willfully place employees in highly dangerous situations where the monetary reward exceeds the known liability. This was never the purpose of the Idaho Worker's Compensation Act and, therefore, Plaintiffs must be allowed to proceed with their tort claims against Hecla in this matter.

6. Plaintiffs' Experts Agree that Hecla Engaged in Willful Physical Aggression.

The conclusion that Hecla's conduct amounted to willful physical aggression is further supported by the Affidavits of Jack Spadero and James W. Dally, PhD. Dr. Dally is a rock mechanics expert with a B.S. and M.S. in Mechanical Engineering and a Ph.D. in Mechanics. *See* Affidavit of James W. Dally, Ph.D. ("Dally Affidavit"), Exhibit "1" (CV). Dr. Dally has authored numerous textbooks and technical papers on engineering and stress analysis.

Within Dr. Dally's Affidavit, he reviews the history surrounding the November 16, 2011 rockburst, as well as the Memorandum authored by Dr. Blake on November 18, 2011 and November

25, 2011. Dr. Dally concludes that Doug Bayer's representations to MSHA regarding the stress levels on the 5900 level pillar as well as whether the pillar was still carrying stress were inconsistent with the information provided by Dr. Blake, including the November 25, 2011 memorandum. *See* Dally Affidavit, ¶ 25. Dr. Dally further concludes that Mr. Bayer's decision to request resumption in mining activity was a dangerous decision because it involved blasting that was known to trigger rock bursts. *See* Dally Affidavit, ¶ 27. Dr. Dally states that there is considerable evidence that blasting triggers seismic events in the Lucky Friday Mine. *See* Dally Affidavit, ¶ 55. A footnote in a letter from Hecla's counsel in the MSHA proceedings, Jackson Kelly PLLC, admits that "[t]he vast majority of seismic events at the Lucky Friday mine are triggered by blasting." *See* Geotechnical Characteristics of the Lucky Friday Mine, December 2012, Section 4.2.3; Rock burst Control Plan, Lucky Friday Unit, December 2012, Section 3.3., attached as **Exhibit "38"** to the Rossman Affidavit.

Dr. Dally further notes that Hecla was mining above and below the 5900 level pillar after December 6, 2011 and that such mining has two detrimental effects. First it allowed for more than 100 opportunities to trigger a seismic event from blasting and, second, removal of ore from above and below the 5900 level pillar increased the mined out area and thereby increased the pressure on the side wall of the pillar. *See* Dally Affidavit, ¶ 58. Dr. Dally has reviewed the actions of the mine management as has been set forth previously and concludes that the managers of the Lucky Friday Mine were taking unwarrantable risk in deciding to rehabilitate the 5900 drift and that the risk was inexcusable when the stress gauges were showing increasing stresses on the pillar. *See* Dally Affidavit, ¶ 67. Dr. Dally further declares that Hecla acted willfully with gross disregard for the safety of its employees when it resumed mining that involved blasting. *See id.* Lastly, Dr. Dally

concludes that Hecla's conduct constituted "willful physical aggression" when it engaged in a conscious choice of action under circumstances where Hecla knew or should have known that this conduct created an unreasonable risk of direct physical injury and aggression to the miners and that there was a high degree of probability that such direct physical injury would actually result from the conduct. *See* Dally Affidavit, ¶ 68.

Mr. Spadero is a Mine Safety and Health/Environmental Consultant. *See* Affidavit of Jack Spadero, ¶ 4. Mr. Spadero is a former superintendent of the National Mine Health and Safety Academy, has a degree in mining engineering, and has specialized knowledge regarding the application of Mine Safety and Health Act to working mines. He further has specialized knowledge regarding mining accidents and health and safety issues in mining based on his education and more than twenty years experience working for MSHA and other departments within the Department of Labor. *See* Affidavit of Jack Spadero, ¶¶ 5-8 and Exhibit "1" to the Affidavit (Spadero's CV).

Within Mr. Spadero's Affidavit, he identifies multiple illustrations of a deliberate intent by Hecla management, including Doug Bayer, to deceive MSHA regarding the stability of the 5900 level pillar. *See* Spadero Affidavit, ¶¶ 17 – 24. Mr. Spadero further reviews MSHA's investigation into the December 14, 2011 rockburst, including MSHA's conclusions that Hecla acted with reckless disregard to the safety of the miners. *See* Spadero Affidavit, ¶¶ 26 - 30. Mr. Spadero concludes that mine management personnel knew that the 5900 level pillar posed a risk of serious injury or death to miners and deliberately and knowingly gave false information to MSHA following the November 16, 2011 rockburst that led MSHA to believe that there were no longer stresses in the 5900 level pillar. *See* Spadero Affidavit, ¶¶ 20 – 25, 34 – 35, 42 - 43. Mr. Spadero concludes that Hecla deliberately deceived MSHA and deliberately and recklessly ignored the advice of its own rock mechanics

consultant. *See* Spadero Affidavit, ¶¶ 37-39. Lastly, Mr. Spadero concludes that Hecla's actions constituted willful physical aggression towards the miners on December 14, 2011. *See* Spadero Affidaivt, ¶ 45.

The Affidavits of Dr. Dally and Mr. Spadero demonstrate that upon a review of all of the circumstances surrounding the time period between November 16, 2011 and December 14, 2011 and in light of the conduct by Hecla, Hecla committed willful physical aggression against the Plaintiffs by lying to the miners and MSHA regarding the stress conditions on the pillar and allowing mining activity to resume by blasting on levels both below and above the pillar resulting in the rockburst which severely injured Plaintiffs.

7. This case is substantially different from Marek v. Hecla, et. al.

Plaintiffs anticipate that Defendants will seek to rely up on the case of *Marek v. Hecla,* Case No. CV 2013-2722, in which the district court granted summary judgment to Hecla and found that the exception to the exclusive liability provisions of the Worker's Compensation Act did not apply under the facts of that case. In *Marek*, the district court granted summary judgment to Hecla and found that, as a matter of law there was no genuine issue of material fact regarding whether Hecla had committed willful physical aggression against the miners. *See* Memorandum Decision and Order, attached as **Exhibit "39"** to the Rossman Affidavit. However, the district court in that case also found that there was no evidence that Hecla knew that the miners were working in a dangerous situation or that the miners were directed to work in the specific area where the accident in that case occurred. *See id.* at pp. 8-9. Rather, the district court found that the actions alleged by the plaintiffs such as the failure to have an engineer review and approve pillar removal, failing to heed warnings

regarding the removal of the pillar and failing to undergo a safety review were more analogous to negligent acts, not willful acts. *See id.* at 9-10.

In this case, as was set forth above, there is substantial evidence that Hecla did know of the dangerous condition of the pillar, lied about that condition to the miners and MSHA, lied about increasing pressures registered by the stress monitors, provided inaccurate and unsupported information to MSHA regarding the stability of the pillar – information Hecla knew was false or completely unsupported, and directed full mining activities to take place despite knowing that the rehabilitation efforts of the pillar were not complete. Thus, this is not a situation where Hecla was merely negligent in failing to undergo a safety review or where Hecla did not have actual knowledge of the dangerous conditions. Rather, this is a situation where Hecla absolutely knew of the danger and knew that there was a substantial risk to the miners. It further knew that such risk was substantially likely to occur. Just as importantly, Hecla lied to the miners and MSHA about those risks and the substantial likelihood that pillar would fail. As such, this case falls directly within the willful physical aggression standard and Plaintiffs should be allowed to proceed with their tort claims.

E. Defendants' Affirmative Defenses Based on the Employers Liability Act, Idaho Code § 44-1401, et. seq. fail as a matter of law.

Hecla has also asserted in its Fifth, Seventh, and Eighth Affirmative Defenses that Plaintiffs claims are barred by the Employers' Liability Act, Idaho Code § 44-1401, *et. seq.* This statute was passed in 1909 and preceded the enactment of Idaho's Worker's Compensation Law. It purports to provide liability by the employer to the employee is certain situations, including the negligence of the employer or any person in the employ of the employer. *See* Idaho Code § 44-1401. However, Idaho

Code § 72-201, setting forth the police power of the state in enacting the Idaho Worker's Compensation Act expressly provides:

> The state of Idaho, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for injured workmen and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as is otherwise provided in this act, and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of this state over such causes are hereby abolished, except as in this law provided.

Idaho Code § 72-201 (emphasis added). The plain language of this provision mandates that the Employer Liability Act was rendered null and void upon the passage of the Idaho Workers Compensation Act. Rather, the only remedy available to an employee is the workers compensation law unless the worker can meet the requirements of the exception to the exclusive liability as found in Idaho Code § 72-209(3). Nothing in Idaho Code § 72-201 or 72-209(3) suggests that the Employer's Liability Act is intended to apply to any situation where the Worker's Compensation Law applies. In fact, in *Lopez v. Allen*, 96 Idaho 866, 538 P.2d 1170 (1975), the Idaho Supreme Court recognized that if the employee was engaged in the type of activity that came under the purview of the Employers Liability Act, then he was also engaged in the type of activity that provided workers compensation coverage. *See Lopez*, 96 Idaho at 869 n.1, 538 P.2d at 1173 n.1. The Court then concluded that the employee was engaged in agricultural pursuits which, at that time, was exempt from coverage under the Worker's Compensation Act and was also not included in the types of industries included in the Employer's Liability Act and, therefore, neither act applied. *See id.*

It is therefore only logical that the reverse applies. If, in fact, the Workers Compensation Act applies to type of industry in which the Plaintiffs were engaged, then the Employer's Liability Act is

rendered null and void by the provisions of Idaho Code § 72-201. There is no dispute that the miners were covered by the worker's compensation law. The only question is in this case is whether they can meet the requirements of the exception to the exclusive liability rule. That is, if the provision of Idaho Code § 72-209(3) are met, the Plaintiffs are still entitled to coverage under the workers compensation law, but the employer is not entitled to the exclusive remedy protections. *See, e.g.*, *Dominguez v. Evergreen Res., Inc.*, 142 Idaho 7, 12, 121 P.3d 938, 943 (2005) (holding that an employee is not required to forgo the filing of a worker's compensation claim in order to sue his employer for willful or unprovoked physical aggression but rather may collect worker's compensation benefits and bring a cause of action against his employer outside of the worker's compensation system). As such, the provision of the Employers Liability Act are clearly and expressly preempted by the provisions of the Worker's Compensation and Act and Plaintiffs are entitled to summary judgment on Hecla's Fifth, Seventh, and Eighth Affirmative Defenses.

V. CONCLUSION

Hecla engaged in a course of offensive conduct designed to conceal the real and known dangers regarding the stability of the 5900 level pillar from both MSHA and the miners working at that pillar. This offensive conduct was undertaken with utter disregard to the substantial risk posed to the miners and with knowledge such risk was highly likely to occur. Seven miners were seriously injured as a result of Hecla's willful physical aggression against those miners and, therefore, Hecla is not entitled to the protections of the exclusive remedy provisions of the Idaho Worker's Compensation law. Further, Hecla's affirmative defenses based on the Employer's Liability Act fail as a matter of law. Therefore, Plaintiffs respectfully request that the Court grant this Motion for Partial Summary Judgment as to Hecla's Fourth, Fifth, Seventh, and Eighth Affirmative Defenses.

DATED this 12th day of June, 2015.

ROSSMAN LAW GROUP, PLLC

Erica S. Phillips
for Eric S. Rossman
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of June, 2015 I caused a true and correct copy of the foregoing to be forwarded with all the required charges prepaid, by the method(s) indicated below to the following persons:

Michael E. Ramsden RAMSDEN & LYONS, LLP 700 Northwest Boulevard P.O. Box 1336 Coeur d'Alene, ID 83816-1336	Hand Delivery _____ U.S. Mail _____ Facsimile 208-664-5884 _____ Overnight Mail ✓ Electronic Mail _____ mramsden@ramsdenlyons.com

Erica S. Phillips
for Eric S. Rossman

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COUNTY OF KOOTENAI) ss
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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

RONNEL E. BARRETT, an individual; GREGG HAMMERBERG, an individual; ERIC J. TESTER, an individual; and MATTHEW WILLIAMS, an individual, Plaintiffs, -vs- HECLA MINING COMPANY, a Delaware Corporation; JOHN JORDAN, an individual; DOUG BAYER, an individual; SCOTT	**CASE NO. CV 13-8793** **AFFIDAVIT OF JACK SPADARO IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

AFFIDAVIT OF JACK SPADARO IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT - 1

HOGAMIER, an individual; and DOES I-X, unknown parties,

Defendants.

STATE OF WEST VIRGINIA)
: ss
County of Lincoln)

JACK SPADARO, being first duly sworn, deposes and says:

1. I am over the age of eighteen (18) and competent to testify to the matters stated herein.

2. I have personal knowledge of the facts contained herein and make this affidavit based upon my own personal knowledge.

3. I currently am and at all relevant times mentioned herein was a resident of the State of West Virginia.

4. I currently am and at all relevant times mentioned herein was employed with as a Mine Health & Safety and Environmental Consultant from 2004 to the present.

5. I was the Academy Superintendent for the U.S. Department of Labor, Mine Safety and Health Administration at the National Mine Health and Safety Academy from 1998 to 2004.

6. I served as the Academy Deputy Superintendent for the U.S. Department of Labor, Mine Safety and Health Administration at the National Mine Health and Safety Academy from 1997 to 1998.

7. I have a Bachelor of Science degree in Mining Engineering from West Virginia University.

8. I have been a mining engineer and employed in the mining industry since 1971. See my *curriculum vitae*, listing of prior testimony and listing of publications, attached hereto as **Exhibit "1"**.

9. I have reviewed the following reports, documents, citations, orders, deposition transcripts, records, photographs and other materials related to the serious injury of Ronnell E. Barrett, Gregg Hammerberg, Eric J. Tester, Matthew Williams, and other miners on December 14, 2011 in the Lucky Friday Mine operated by Hecla Mining Company near Mullan, Idaho: United States Department of Labor, Mine Safety and Health Administration {MSHA} Reports of Investigations regarding fatalities and injuries of miners at the Lucky Friday Mine on April 15, November 17, and December 14, 2011; Citations and Orders issued by MSHA related to prior fatalities and injuries of miners at the Lucky Friday Mine; Orders Nos. 8559614 and 8559615 issued by MSHA on May 15, 2012 regarding the rock burst that caused injury to Ronnell E. Barrett and six (6) other miners with documentation notes, sketches, drawings, and photographs; Memorandum from Wilson Blake, Consultant, to John Jordan, Doug Bayer, John Lund, Karl Hartman, Eric Carlson, Zach Thomas regarding the rock burst in the 5900 Pillar that had occurred on November 16, 2011. Memorandum dated 11/18/2011; Deposition transcript for Wilson Blake dated April 9, 2015 and Wilson Blake Affidavit dated November 8, 2013; Correspondence from Hecla Mining Company to the Mine Safety and Health Administration regarding stress monitors; Complaint; MSHA Citations and Orders issued to Hecla regarding safety violations related to ground control and support on December 16, 18, and 19, 2011 with inspector notes and documents; Exhibits 1 through 58 of deposition exhibits for Hecla employees; MSHA Order No. 8565565 issued to Hecla on

December 21, 2011 for continuing to work while still under a previous order; Defendant' Discovery Responses and Exhibits; Depositions of Doug Bayer, John Jordan, Terry Devoe, and Ronald Krusmark in Secretary of Labor, Mine Safety and Health Administration v. Hecla Limited; Deposition transcript for John Jordan dated April 6, 2015; Deposition transcript for Doug Bayer dated April 6, 2015; MSHA Order 8605614 issued to Hecla to conduct readings of stress monitors at the 5900 I-Drift Pillar; December 27, 2011 Memorandum from Wilson Blake and Mark Board, Consultants to Hecla managers John Jordan, Doug Bayer, John Lund, Karl Hartmann, Eric Carlson, and Zach Thomas; "Recent Bursting in Gold Hunter and Its Implications"; Report by Itasca Consulting Group, regarding stability of the 5900 I-Drift Pillar in the Lucky Friday Mine; Memorandum from Blake Wilson to Mark Board, Itasca Consulting Group, dated November 17, 2011 regarding the stability of the 5900 Pillar in the Lucky Friday Mine; MSHA reports, citations, and orders related to the rock bursts at the Lucky Friday Mine on November 16, 2011 and December 14, 2011.

10. From August 2010 until March 2011 there were five rock bursts and tunnel collapses at the Lucky Friday Mine. On April 15, 2011 Larry Marek was killed in a rock fall approximately 90 feet long, 20 feet wide, and 30 feet high. The U.S. Department of Labor, Mine Safety and Health Administration {MSHA} investigated the fatal incident and concluded:

> "The accident occurred because management did not have policies and procedures that provided for the safe mining of split stopes in a multi-vein deposit. Management failed to design, install, and maintain a support system to control the ground in places where miners worked and traveled. Additionally, management failed to ensure that appropriate supervisors or other designated persons examined or

tested the ground conditions where the fall occurred"

11. A root cause analysis was conducted by MSHA and the following root causes were identified:

"Management did not conduct an evaluation, engineering analysis, or risk assessment to determine the structural integrity of the stope back. The back that struck the victim was comprised of a combination of paste fill and waste pillar. As shown on projection maps, geologic structure in the form of joints, faults, and fractures intersected the waste pillar at various angles. These intersecting discontinuities cut the pillar rock mass into angular blocks and wedges which facilitated gravity failure. The large blocks and wedges observed in the fall rubble were not sufficiently supported by the 6-foot long rock bolts installed in the undercut surface of the waste pillar."

12. On August 8, 2011 MSHA issued Citation No. 8559607 to Hecla as a result of its investigation of the death of Mr. Marek. The citation was for a violation of 30 CFR 57.3360 which stated:

"A fatal accident occurred at this mine on April 15, 2011, when a miner was struck by falling material while working in the 6150-15-3 West stope. A substantial quantity of material (measuring approximately 25 feet in width, 74 feet in length, and 25 feet in height) fell 10 feet from the stope back after portions of a supporting pillar were removed to extract ore. Ground support was necessary in the stope to mine safely but ground support utilized was not adequate. The ground control was not designed, installed and/or maintained in a manner that was capable of supporting the ground in such a wide stope when the support pillar was removed. Mine management has engaged in aggravated conduct constituting more

than ordinary negligence by directing the pillar to be mined as the stope advanced and allowing miners to work under inadequately supported ground. This is an unwarrantable failure to comply with a mandatory standard."

See Order No. 8559607, attached as **Exhibit "26"** to the Rossman Affidavit.

13. MSHA also issued Order No. 8559608 under Section 104(d)(1) of the federal Mine Safety and Health Act for a violation of 30 CFR 57.3401 which states:

"A fatal accident occurred at this mine on April 15, 2011, when a miner was struck by falling material while working in the 6150-15-3 West stope. A substantial quantity of material (measuring approximately 25 feet in width, 74 feet in length, and 25 feet in height) fell 10 feet from the stope back after portions of supporting pillar were removed to extract ore. Management failed to adequately examine and test the ground conditions to determine if additional measures needed to be taken. This was necessary due to constantly changing ground conditions; they were mining a wide stope and removing the support pillar. The operator has engaged in aggravated conduct constituting more than ordinary negligence, as they needed to make examinations and conduct tests to ensure that all feasible precautions were taken. This is an unwarrantable failure to comply with a mandatory standard."

See Order No. 8559608, attached as **Exhibit "27"** to the Rossman Affidavit.

14. Approximately three (3) months after the order and citation were issued to Hecla regarding the death of Larry Marek another fatal incident occurred in the Lucky Friday Mine on November 17, 2011 while Brandon Gray and another miner were clearing a mine waste bin in the mine. The MSHA investigators concluded that Brandon Gray was killed because:

"The accident occurred due to management's failure to provide the miners with proper personal protective equipment when required to remove blocked materials in the bin."

15. MSHA cited Hecla for violations of 30 CFR 57.16002(c) and 30 CFR 48.7(c). MSHA stated:

"Management engaged in aggravated conduct constituting more than ordinary negligence..."

See Order No. 8690067, attached as **Exhibit "28"** to the Rossman Affidavit.

16. On November 16, 2011 a rock burst occurred at 5900 Pillar where Larry Marek was killed on April 15, 2011. MSHA required Hecla to remove miners from the affected area and issued Order No. 8605614 which stated:

> "At 02:25 p.s.t. the mine safety representative contacted MSHA to inform them that a fall of ground had occurred in two separate travelways of the mine. A verbal 103(j) order was issued by MSHA Boise f/o supervisor to the mine to withdraw miners from the affected areas.
>
> The affected areas of the mine are hereby withdrawn from service to include the 5700 intersection of the #54 ramp from the spray chamber cut out to down ramp of the affected area (at the old day box cut out). This order also includes the 5900 level to 30 feet before the chevron which is currently taped off."
>
> This Order is issued to ensure the safety of any person in the mine until an examination or investigation is made to determine that the affected areas are safe. Only those persons selected from company officials, state

officials, the miners' representative and other persons who are deemed by MSHA to have information relevant to the investigation may enter or remain in the affected area. The intersection of the 5900 main haulage and lateral and the south side of the fall of ground to approximately 30 feet before the chevron."

See Order No. 8605614, attached as **Exhibit "17"** to the Rossman Affidavit.

17. MSHA continued to monitor conditions regarding the stability of the roof in the Lucky Friday Mine and modified the Order issued on November 16, 2011 to allow Hecla to install stress gauges through the 5900 main drift. The modification {Order No. 8605614-03} states:

"This modification is to allow limited travel through the affected area of the 5900 main haulage and of the 54 ramp at the 5700 level.

This modification is based upon no movement of the affected area has occurred since monitoring began (about four days) after shotcrete and bolting following the mine's level three bolting plan were followed. Stress monitors indicate the area is distressed as compared to other active areas of the mine.

This action is to allow very limited activities utilizing the 5900 main haulage based upon the temporary repairs already conducted by the mine until the engineered culvert arrives and more permanent repairs are made.

Upon arrival of the culvert from the manufacturer, the mine will stop work to install the culvert and only those miners working on the culvert will travel in the affected area.

This modification is based upon the mine will conduct two daily surveys at the start and end of the 1st shift to determine whether movement is occurring at the survey stations of the 5900 main haulage near the chevron.

This modification is based upon no feet travel will occur in the affected area and that each mobile equipment operator will conduct a visual inspection of the affected area before travel occurs.

This modification is based upon the mine has developed a written plan to address any cracking or closure of the main haulage, and that the mine will stop travel in the affected area should detectable movement, distortion, cracking or damage occur.

This modification is to allow further repair work at the 5700 level of the 54 ramp to include the installation of utilities through the affected area and to allow miners to conduct timber repairs at the 5700 level of the 54 ramp.

This modification is to allow backfilling of parts of the 5700 level intersection at the 54 ramp as to provide strain relief and to prevent miners from going into areas unnecessary to their daily work.

Any significant changes will be reported to MSHA to include additional stressing, closure, cracking or squeeze and deformity.

This modification allows approximately 3 trucks per shift to make 10 rounds each per shift. It allows mechanics/electricians to travel through the area if required to repair equipment. It allows only miners necessary to

conduct normal mining activities to travel through the area."

See Order No. 8605614-03, attached as **Exhibit "17"** to the Rossman Affidavit.

18. The November 16, 2011 rock burst was investigated by Wilson Blake, Consultant for Hecla. In Mr. Blake's summary of a report dated November 18, 2011 which was sent to John Jordan, Mine Manager; and Doug Bayer, Superintendent of the Lucky Friday Mine; Mr. Blake clearly states:

"Because the upper ribs and back appeared to be solid, we can't assume that the remaining pillar is destressed, hence the rehabilitation needs to proceed with caution. And, finally, we need to better understand the cause of this burst to be able to relate it to mining the main sill."

See Blake Report, dated November 18, 2011, attached as **Exhibit "8"** to the Rossman Affidavit.

19. In a report to MSHA by Doug Bayer, Superintendent of the Lucky Friday Mine, dated November 29, 2011, Mr. Bayer states:

"...it is believed the majority of the stress was dissipated with the large rock burst and it will take months or years for the pillar to gain more stress that could cause major rock bursts. In addition, the pillar is now smaller in size so it cannot carry the same load that caused the rock burst."

See Bayer Update, dated November 29, 2011, attached as **Exhibit "10"** to the Rossman Affidavit.

20. This report to MSHA by Mr. Bayer is in direct contradiction with the report by Wilson Blake dated November 18, 2011. It illustrates deliberate intent by Hecla

management to deceive MSHA regarding the stability of the 5900 pillar following the November 16, 2011 rock burst.

21. Another report was sent to MSHA by Doug Bayer, Superintendent of the Hecla Lucky Friday Mine, in which Mr. Bayer states on December 1, 2011:

> "It is expected the stress will build slowly over time, and may take weeks or months to show any measurable increase in stress…
>
> In addition to gathering stress data, the area will be visually inspected every shift by the underground supervisors…"

See Bayer Update, dated December 1, 2011, attached as **Exhibit "11"** to the Rossman Affidavit.

22. Again, on December 2, 2011, Mr. Bayer requested a modification to the closure order and stated:

> "The 3 stress gauges have been installed into the 5900 main drift pillar. Readings were taken and the gauges show a small increase in stress, which is expected. We will continue to take readings every shift for 1 week. If the gauges indicate no appreciable buildup of stress, then the gauges will be read once a week. {The readings will be reviewed daily by mine personnel and our rock mechanics consultant.}
>
> The rock burst area is now secure. Mine services such as chilled water, power and compressed air need to be restored through the area so the mine can be properly ventilated and cooled. Once the utilities are in place and operational, MSHA will evaluate the readings again prior to using the

5900 main drift for normal travel.

Because this rock burst was triggered during the designated blasting time, travel through the rock burst area will not be allowed until all the rounds have been shot. This is a precautionary measure, as we do not expect another rock burst. The mining crews will wait at the 5900 refuge chamber, which is on the north side of the rock burst area until 10 minutes after the rounds are blasted. There will be no travel through the rock burst area from light up time until 10 minutes following the last round going off. We are also investigating going to a centralized blasting system, which would take some time to implement.

The ConTech tunnel liner was ordered on December 2 and is expected to arrive in 12 to 14 days. The process of installing the liner will begin as soon as the materials arrive onsite. The Techfoam pumps and product are standing by, and will be ordered 1 week prior to use."

See Bayer Request for Modification, dated December 2, 2011, attached as **Exhibit "11"** to the Rossman Affidavit.

23. Also on December 2, 2011, Mr. Bayer reported to MSHA:

"Although the pillar is still intact and is still carrying some load and stress, it is believed the majority of the stress was dissipated with the large rock burst and it will take months or years for the pillar to gain more stress that could cause any major rock bursts." *See* Bayer Update, dated December 2, 2011, attached as **Exhibit "12"** to the Rossman Affidavit.

24. Again, on December 6, 2011, Mr. Bayer informed MSHA:

"The burst area on the 5900 main drift has been monitored for movement with closure points since December 2nd. Readings taken on December 6th show no movement or closure and the shotcrete shows no signs of cracks or movement. The stress gauge readings show that the small expected increase in stress over time has slowed down. {All of these factors indicate that the pillar is stable and not 'loading' up.}

The pillar will continue to be monitored. Closure measurements will be taken with the survey instrument twice a day. The stress gauge readings will also be downloaded twice a day at the same time.

Persons traveling through the area will be required to visually inspect the drift before proceeding through. If the visual inspection shows the shotcrete is cracking or taking weight, miners will be removed from the area and no travel will be allowed until the tunnel liner is installed. Likewise, any closure measurements that indicate closure above the normal error factor will result in the drift being shut down to travel. Any significant changes in closure or the visual inspection will be reported to MSHA."

See Bayer Update, dated December 6, 2011, attached as **Exhibit "13"** to the Rossman Affidavit.

25. On December 14, 2011, less than two (2) weeks after Doug Bayer, Superintendent, had informed MSHA that stress in the 5900 pillar had "slowed down" a major rock burst occurred at the same location as the 5900 pillar rock burst on November 16,

2011. Seven miners, including Ronnell E. Barrett, Gregg Hammerberg, Eric J. Tester, and Matthew Williams were injured and trapped in the Lucky Friday Mine.

26. MSHA investigators found that Hecla had violated 30 CFR 8559614 . The MSHA order stated:

"The mine operator failed to adequately examine the 5900 I-Drift Pillar while additional ground support was installed. Stress monitors were installed to evaluate the stress levels in the pillar after a violent rock burst occurred on November 16, 2011. These stress monitors were installed as monitors were installed as monitoring devises for examination of stress levels in the damaged pillar. Of the three stress gauges installed, the East Low gauge never read stress levels. The company continued to record inaccurate readings on the East Low gauge until another violent rock burst occurred on the east wall that seriously injured 7 miners. The company has engaged in aggravated conduct constituting more than ordinary negligence in that they were aware that the East Low stress gauge was defective and assigned miners to work in an area without knowing if the East wall was building stress. This order is unwarrantable failure to comply with a mandatory standard.

See Order No. 8559615, attached as **Exhibit "20"** to the Rossman Affidavit.

27. MSHA further stated that Hecla had shown:

"Reckless disregard" for the safety of miners by allowing the unsafe condition to exist while miners were exposed to the hazards posed by rock bursts at the 5900 pillar. MSHA also stated that the incident could have caused "Permanently disabling injuries" to the miners.

28. MSHA documents establish that:

"The East Low monitor never worked, readings were taken 2 times a day and negative readings were documented. Management reviewed these readings and did not withdraw miners from areas."

29. MSHA also found that Hecla had continued to mine in the area that had been closed to additional mining following the November 16, 2011 rock burst. Hecla managers had recklessly continued to place miners at risk of serious injury or death by deliberately working and delaying the 103(k) Order No. 8605614. The MSHA Order issued on December 21, 2011 states:

"The mine operator worked in the face of 103(k) order 8605614, this order was issued by MSHA on November 16, 2011. This order was issued to insure the safety of miners at the mine after a violent rock burst occurred and was subsequently modified to insure a safe means to repair the damaged area. Subsequent action number 8605614-03 states that the mine operator will conduct two daily surveys at the start and end of the first shift to determine weather movement is occurring to indicate if stress levels are increasing. The operator submitted a plan that these readings would be taken twice a day at the same time. On December 14, 2011 the operator failed to take the last reading just prior to another violent rock burst that resulted in serious injuries to seven miners. The Mine Superintendent stated that the readings could not be taken because the steel liner was installed over the gauges and the gauges could not be read. Upon inspection it was found that the stress gauges were provided with extended wire so that they could be read during the installation of the liner. If this reading was taken it may have indicated high levels, which have removed miners from

the 2nd rock burst."

See Order No. 8565565, attached as **Exhibit "22"** to the Rossman Affidavit.

30. MSHA stated in the Order that Hecla had shown, "Reckless disregard" for the safety of miners by ignoring the original order and continuing to mine.

31. On December 15, 2011 MSHA closed the entire Lucky Friday Mine until the safety of miners could be ensured. The closure Order No. 8605622 stated:

"An accident occurred at this operation on 12/14/2011 at approximately 19:40 pacific standard time. As rescue and recover work is necessary this order is being issued under 103j of the federal Mine Safety and Health Act of 1977 to assure the safety of all persons at this operation. This order is being issued to prevent the destruction of any evidence which would assist in investigating the cause or causes of the accident. It prohibits all activity in all underground areas of the mine except to the extent necessary to rescue an individual or prevent or eliminate an imminent danger until MSHA has determined it is safe to resume normal mining operations underground. This order applies to all persons engaged in the rescue and recovery operation and any other persons on site. This order was initially issued orally to the mine operator at 21:00 pacific standard time."

See Order No. 8605622, attached as **Exhibit "23"** to the Rossman Affidavit.

32. The initial Order was modified as follows:

"The initial order is modified to reflect that MSHA is now proceeding under the authority of section 103k of the federal Mine Safety and Health Act of 1977. This section 103k order is intended to protect the safety of all persons on site including those involved in rescue and recovery operations or investigation of the accident. The mine operator shall

obtain prior approval from an authorized representative of the secretary of all actions to recover and restore operations in the mine. Additionally, the mine operator is reminded of its existing obligations to prevent destruction of evidence that would aid in investigating the cause or causes of the accident. Item 12 is modified to a 103k order."

See 8605622-01, attached as **Exhibit "24"** to the Rossman Affidavit.

33. Hecla management including John Jordan, Mine Manager; Doug Bayer, Mine Superintendent; Scott Hogamier, and others knew of the unsafe conditions regarding the 5900 pillar for months prior to December 14, 2011. The November 16, 2011 rock burst was an indicator that conditions in that area of the mine posed a risk of serious injury or death to miners working in the area. An earlier rock fall that killed Larry Marek in the 5900 pillar area was also a warning to Hecla management that conditions in that part of the mine were unsafe and that miners should not be required to work there.

34. In spite of their actual knowledge of the unsafe roof conditions and the high degree of risk to miners, Hecla continued to mine and operate in the area where it knew miners could die or be seriously injured because of a rock burst. Doug Bayer deliberately and knowingly gave deceptive information to MSHA following the November 16, 2011 that led MSHA to believe that there were no longer stresses in the 5900 pillar area. They instead directed miners to mine into the 5900 I-Drift Pillar.

35. On May 15, 2011 MSHA issued an order that summarizes the deliberate and willful actions by Hecla management that caused the rock bust of December 14, 2011. The rock burst caused serious injury to seven (7) miners including Ronnell E. Barrett, Gregg Hammerberg, Eric J. Tester, and Matthew Williams.

36. Order No. 8559614 states that Hecla violated 30 CFR 57:346(1)(b)(1):

"The mining procedure in place at the time of the massive rock bust, which occurred on 12/17/2012, was not designed to reduce the occurrence of a rock burst. This Rock Burst resulted in serious injuries to seven miners that were in the I-Drift Pillar performing repair work from a previous rock burst that occurred on 11/16/2011. The mining method in place during the accident was to mine the main sill pillar above the 5900 I-Drift pillar. The company was warned that the rehabilitation should proceed with caution, and that a better understanding of the cause of the previous burst, in relation to mining into the Sill Pillar, was needed. Mine Management engaged in aggravated conduct constituting more than ordinary negligence in that they were aware that mining into the main sill pillar could cause added stress tot the 5900 I-Drift pillar but directed the mining to be done.

This order is an unwarrantable failure to comply with a mandatory standard. This violation is an unwarrantable failure to comply with a mandatory standard."

See Order No. 8559614, attached as **Exhibit "25"** to the Rossman Affidavit.

37. MSHA also established that Hecla had shown, "Reckless Disregard" to miners in the Lucky Friday Mine by directing that mining be done in main sill pillar above the 5900 I-Drift pillar. This was a deliberate and deceitful effort by Hecla to continue mining in spite of the high degree of risk and probability that another rock burst would occur that could kill or seriously injure miners. Hecla ignored the advice of its own rock mechanics experts.

38. Hecla management directed that mining proceed into the sill pillar even though Blake Wilson recommended that mining "proceed with caution." Hecla management advanced ninety-six (96) feet into the main sill pillar at 5900 during the week before the December 14, 2011 rock burst that seriously injured seven (7) miners. This action was intentional and in violation of specific orders that had been given by MSHA in November 2011. These conditions created by Hecla put the seven miners and others at risk of being crushed to death by a massive rock burst and did result in their entrapment and severe injuries on December 14, 2011.

39. The unsafe condition related to the 5900 pillar and potential for rock bursts were provided to Hecla management by Blake Wilson in memoranda and reports that established that the pillar was, "Borderline stable." Hecla recklessly chose to ignore Mr. Blake's warnings.

40. Hecla Mining Company, et. al. showed a reckless disregard for the safety of miners in the Lucky Friday Mine by continuing to mine in the 5900 pillar area after being ordered not to do so by the Mine Safety and Health Administration {MSHA} following the November 16, 2011 rock burst in the same area. This willful action by Hecla placed miners at risk of being crushed to death by a rock burst and roof fall that occurred on December 14, 2011.

41. The extremely unsafe conditions regarding the potential for rock bursts were actually known to Hecla before December 14, 2011. Hecla's roof control consultants had told Hecla management to "proceed with caution" when rehabilitating the 5900 Pillar I-Drift because of the "borderline stability" of the pillar. Hecla deliberately and recklessly ignored the advice of its consultant and continued to advance mining in the area another ninety-six (96) feet after the rock burst of November 16, 2011. The reckless actions by Hecla Mining Company, et. al. were undertaken with the full knowledge that miners could be killed or seriously injured. These actions by

Hecla led directly to the severe injuries of the seven (7) miners and could have caused their deaths.

42. Hecla Mining Company, et. al. knew that the stress gauges in the 5900 Pillar I-Drift were not giving an accurate reading but continued to mine in the area. Hecla deliberately deceived MSHA regarding its inability to take reading and assured MSHA just one week prior to the December 14, 2011 rock burst that "the pillar is stable and not loading up." These fraudulent reports were made to MSHA by Doug Bayer, Superintendent of the Lucky Friday Mine. Mr. Bayer and other Hecla managers deliberately lied to MSHA mine safety regulators. Hecla directed that mining continue. The actions of Hecla management put miners who were performing the work at risk of serious injury or death and were a direct cause of the severe injuries to Ronnell Barrett, Gregg Hammerberg, Eric Tester, and Matthew Williams.

43. The Hecla Mining Company, et. al. management concealed from MSHA that its own consultant considered the 5900 pillar "borderline stable" and continued to commit a fraud against the government by concealing their knowledge of the unsafe condition and the probability that another rock burst would occur that would kill or seriously injure miners.

44. Hecla Mining Company, et. al. did not inform its own employees of the hazards that existed at the 5900 pillar and continually put those employees at risk of serious injury or death on a daily basis for weeks and months prior to December 14, 2011. This failure to be truthful to its own miners illustrates Hecla's callous disregard for the safety of its employees and deliberately exposed them to crushing hazards caused by rock bursts. This attitude and these actions by Hecla led directly to the severe injuries of seven (7) miners on December 14, 2011.

45. Hecla Mining Company, et. al. knowingly placed its miners in dangerous and

hazardous conditions at the 5900 level drift with direct knowledge that the drift pillar was not de-stressed and was at high risk for failure. This conduct, combined with Hecla's fraudulent communications to MSHA in order to resume mining activities and Hecla's fraudulent statements to its own miners which induced them to enter the 5900 level to perform work, constituted willful physical aggression toward the miners on December 14, 2011. Hecla engaged in a conscious choice of action under circumstances where Hecla knew, or reasonably should have known, that this choice of action would create an unreasonable risk of direct physical injury to the miners and that there was a high degree of probability that such direct physical injury would actually result from this conduct.

DATED this 11th day of June, 2015.

Jack Spadaro

SUBSCRIBED AND SWORN to before me this 11th day of June, 2015.

Notary Public for ~~West Virginia~~ Kentucky
Residing at Knott, Kentucky
Commission expires: 11/24/2018
Notary ID: 522693

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of June, 2015 I caused a true and correct copy of the foregoing to be forwarded with all the required charges prepaid, by the method(s) indicated below to the following persons:

Michael E. Ramsden	Hand Delivery _____
RAMSDEN & LYONS, LLP	U.S. Mail _____
700 Northwest Boulevard	Facsimile 208-664-5884 _____
P.O. Box 1336	Overnight Mail ✓
Coeur d'Alene, ID 83816-1336	Electronic Mail _____
	mramsden@ramsdenlyons.com

Erica S. Phillips
for Eric S. Rossman

\\OFFICESERVER\Rossman Law\Documents\Work\B\Barrett, Ron\Pleadings\MSJ Partial Aff Spadaro.doc

Jack Spadaro
P.O. Box 442
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Professional Experience

1) **Mine Health & Safety and Environmental Consultant** **10/2004 to Present**
Hamlin, WV

Duties and Accomplishments

I provide consulting services and expert witness services to attorneys, labor unions, companies, and organizations involving the health and safety of miners in surface and underground coal and metal/non-metal mines and mineral processing facilities on a national basis. I also provide consulting services regarding surface and underground mine environmental problems related to water quality, ground water systems, mine waste and tailings areas, surface drainage control facilities, and stability of coal refuse dams, mine tailings areas, and valley fills.

I provide expertise in the application of the Mine Safety and Health Act to clients needing advice and knowledge of the federal regulations and industry standards related to mine worker health and safety. I also provide services regarding the Federal Surface Mining Control and Reclamation Act (SMCRA) and the Clean Water Act.

I provide expert witness services related to mining accidents and the mining environment. I have served as an expert witness in litigation related to the Mine Safety and Health Act and SMCRA from 2004 to the present time. The expertise is related to surface and underground haulage accidents, roof and rib control, exposure of workers to hazardous chemicals, mine tailings areas, mine dust exposure, stability of dumping sites, safety of road gradients, explosions, surface and underground transportation, crushers and processing plant safety, and the overall mine work environment. I have served as an expert witness in complex litigation involving multiple plaintiffs and have served as an expert witness in federal and state courts. The testimony required extensive knowledge of mining and the mine environment and a thorough knowledge of both federal and state mine health and safety regulations and environmental regulations. I have also been involved in litigation involving the stability of coal waste impoundments and surface mine waste fills. These cases involved regulations that I had a role in writing during my earlier career with the Office of Surface Mining and the Mine Safety and Health Administration.

I conducted investigations of mining accidents in coal mines and metal/non-metal mines and related mineral processing areas. I wrote reports detailing the root causes of the accidents and made recommendations for improvement of the mine operations regarding

health, safety, and the environment. I have been recognized as an expert in mining safety and health and the mining environment at academic conferences examining the mining industry.

2) MSHA Academy Superintendent, GS-1712-15 **9/30/98 to 9/30/04**

Employer

U.S. Department of Labor
Mine Safety and Health Administration
National Mine Health & Safety Academy
1301 Airport Road
Beaver, WV 25813

Supervisor

Davitt McAteer
Assistant Secretary of Labor
for Mine Safety and Health

Duties and Accomplishments

The National Mine Health and Safety Academy is the principal training facility for all federal Mine Safety and Health Administration (MSHA) inspectors and for other mining interests. As superintendent of the Academy, I provided leadership and exercised overall planning and management control, direction and coordination of resources, activities, programs, and facilities of the Academy, including the development, establishment and implementation of policies and procedures; the planning, development and implementation of national and international education and training programs in mine health and safety; and operation of the Academy's physical facilities. I determined program goals and exercised decision-making authority within the parameters of MSHA policy and program objectives. During my tenure, I developed and implemented a Strategic Plan for improving the quality of training and the production of training materials for mine inspectors and industry.

Through subordinate managers, I directed a staff of professional, technical, and clerical personnel in the conduct of a variety of comprehensive programs designed to accomplish the Academy's goals. During my tenure, the Academy had a staff of 65 full-time federal employees and 67 contract employees. I planned, developed, and implemented the educational and training programs of the Academy. I developed program goals, objectives and proposals. I was responsible for the development and administration of individualized study materials and education programs for nonresident students from federal, state, and local government agencies, from industry and labor organizations, and from educational institutions.

I planned and developed seminars and conferences on mine safety and health and related programs to be conducted at the Academy and at other locations. I was responsible for overseeing the management of the Technical Information Center and Library, and for acquiring and making available appropriate and up-to-date reference materials to meet customer needs.

I was responsible for development of studies designed to evaluate the effectiveness of the Academy's educational programs, and to determine needs for revisions in curricula based on changes in materials, industries and in educational processes. I also directed significant changes in the curricula for Entry Level and Journeyman MSHA inspector training.

I was responsible for development and implementation of support programs for services at the Academy for staff, faculty, and students. Support programs include administrative services, ancillary staff services support, student housing, recreation, internal safety, health services, and physical plant services. I managed the implementation of a capital improvement program to modernize classrooms, residence halls and computer capabilities.

I maintained liaison with key officials in MSHA, academia, industry and other organizations concerned with improved education techniques and methodologies related to safety and health issues. I developed and maintained relationships with universities, colleges, vocational schools, and secondary school to promote training and educational courses in the mineral industries, and to further the recognized stature of the Academy as a leading educational institution in mine health and safety. I participated in cooperative agreements with several colleges and universities and the Appalachian Consortium.

I delegated authority to subordinate managers for the personnel and program management of their respective areas. I evaluated the performance and review evaluations of subordinate supervisors. I conducted staff meetings, and provided advice and counsel on both program and administrative matters, and guidance in the solution of special problems. During my tenure, I helped improve the effectiveness of each program area by communicating regularly and exchanging information among departments.

I served as a team leader in the investigation of the Martin County Coal Slurry Discharge, which occurred on Oct. 11, 2000 in Martin County, Kentucky. I managed the geotechnical engineering investigation of the slurry discharge, which was the largest and most serious pollution event in the eastern United States. I oversaw the drilling operations, laboratory analysis and the writing of the engineering evaluation regarding the causes of the incident.

During my tenure, I upgraded all training programs at the Academy. As a result, course days of training the Academy increased from 497 to 2,200. Enrollment increased from 17,000 students per year to 30,000 students per year.

3) **Deputy Superintendent, GS-301-14** **1/05/97 to 8/30/1998**

Employer

U.S. Department of Labor
Mine Safety and Health Administration
National Mine Health and Safety Academy
1301 Airport Road
Beaver, WV 24813

Supervisor

Davitt McAteer
Assistant Secretary of
Labor for Mine Safety
and Health

Duties and Accomplishments

As deputy superintendent, I was the day-to-day operations manager at the National Mine Health and Safety Academy. I assisted the Superintendent to plan, develop and implement the education and training programs of the Academy. I worked with department managers to direct a staff of professional, technical, and support personnel in the conduct of comprehensive programs designed to accomplish the Academy's goals.

I oversaw the human resources program for Academy employees, including work assignments, performance [standards, appraisals, rewards, disciplinary actions], safety and health programs, counseling, complaint systems, and leave systems. I worked directly with federal and state agency administrators to conduct research and technology transfer projects to further the Academy's goals.

I supervised the implementation of a long-term Strategic Plan that outlined the mission of the Academy. The plan included faculty and staff development and a program development plan to provide training programs and instructional materials that meet the highest educational and technical standards of quality. I directed attention to essential technical areas to provide improved training in surface and underground haulage safety, roof control safety, underground machinery and electrical safety, and industrial hygiene related to the mine environment. I guided a pilot training program in Surface Mine Haulage safety that is being used as a model for future programs.

I devised a restructuring plan for the Academy and supervised its implementation. The plan created new divisions in mining technology, safety management, inspection automation, and course development. I supervised a staff of 62 full-time federal employees and 58 contract employees. I supervised the departments of Instructional Services and Instructional Materials, the Technical Information Center and Library, and the Facilities Support Services.

The reorganization of the Academy resulted in a more even distribution of work by Academy employees and more effective education and training to MSHA inspectors, miners, mine supervisors, and training specialists. I set up committees to develop new programs and improve existing programs. Altogether, 16 working committees, made up of staff members from various disciplines, took on projects to improve the Academy's curricula and other Academy functions. These committees completed comprehensive

plans in the areas of Program Development, New Technology in Training, Academic/International Relations, Facilities Utilization, Community Relations, Individual Development, Internet Usage, Library Usage, Marketing of the Academy's courses and products, and use of the Mine Simulation Laboratory. The New Technology Committee completed an outline of the best methods for delivering mine safety and health-related training to the mining community.

I initiated the development of roof control seminars to provide training to all coal mine inspectors that will ensure that the most current information in this subject area will be made available to the inspectors. I also initiated conferences and seminars in the areas of noise and dust control in the mining environment, ventilation, blasting, construction, underground haulage safety, maintenance and repair safety, surface haulage safety, electrical hazards and inspection methods, and accident investigation.

I supervised the revision of entry-level training modules for metal, nonmetal and coal mine inspectors. The revision emphasized critical areas of the inspection process so that the early training is meaningful and comprehensive.

Under my supervision, the Academy negotiated cooperative agreements with six colleges and universities and joined the Appalachian Consortium to broaden the institution's expertise in various subject areas related to mine health and safety. The agreements include faculty exchanges, summer intern programs, and distance learning programs.

I included labor representatives in all phases of planning and implementation of revised and new programs. I created an individual development program that ensures that all employees have equal opportunity for advancement and additional professional development. This program allows Academy staff and students to receive credit toward associate, bachelor and master's degrees for courses taken at the Academy.

In 1998, I traveled to Russia and Ukraine to begin the development of an International Mine Health and Safety training program. Between 1998 and 2003, delegations from Russia, Ukraine, South Africa, China, Mexico, Poland, Peru, Georgia, Canada, Mexico, Thailand, and Indonesia have trained in mine health and safety at the Academy.

4) **Mining Engineer, GS-880-13** — **4/96 to 1/97**

Employer — **Supervisor**

U.S. Department of Labor
Program Evaluation and Information Resources
4015 Wilson Boulevard
Arlington, VA 22203-1984

George Fesak

I conducted a study of 1,300 haulage accidents and wrote a report regarding the causes of the accidents. I made recommendations for haulage safety program that has been adopted by MSHA. I also served as special assistant to the Superintendent of the National Mine Health and Safety Academy to work on curriculum expansion in the areas of mine ventilation, underground haulage accident prevention, roof control, underground mine electricity and machinery, and health. I presented a technical paper at a seminar at Virginia Polytechnical Institute and State University in August 1996. The technical paper has been used as a basis for developing the new training program in surface and underground haulage and equipment safety.

I evaluated the overall training needs for the Academy and recommended a program that included a research-driven curriculum that was aimed at eliminating fatalities and injuries in mines. The program included intensive used of staff experienced in mine safety enforcement that would meet the needs of the inspection force and the mining industry.

I planned a training program for new surface haulage instructors that began in November 1996. The program was key to a nationwide inspection and enforcement effort that concentrated on the critical safety and health needs of industry regarding steep haul roads, unsafe dump and fill sites, and vehicle maintenance programs.

5) Mining Engineer, GS-880-13 — **3/82 to 4/96**

Employer
Office of Surface Mining
U.S. Department of Interior
10 Parkway Center
Pittsburgh, PA 15520

Supervisor
James Gilley

Duties and Accomplishments

I was responsible for design and construction of health and safety hazard abatement, acid mine drainage abatement, landslide stabilization, subsidence control, and mine fire projects in Kentucky, Virginia, West Virginia, Ohio, Indiana, Pennsylvania, Georgia, and Illinois.

I served as project engineer on approximately 300 mining-related landslides, drainage control projects, coal refuse fires, underground mine subsidences, and mine fire emergency projects. I also provided technical assistance to Office of Surface Mining field offices regarding valley fill construction, coal waste disposal, subsidence control, mine drainage control, and landslide stabilization. I served as an expert witness regarding surface and underground mine operations, valley fill construction, landslide stabilization, subsidence, and coal mine reclamation in federal court hearing. I taught mining and civil engineering classes about methods used to abate mining hazards.

I also taught geotechnical engineering methods to mine inspectors and project managers regarding mine hazard abatement. I managed a training program for inspectors and engineers.

6) Reclamation Supervisor, GS-13 **4/78 to 3/82**

Employer **Supervisor**

Office of Surface Mining **Richard Hall**
U.S. Department of Interior
Washington, D.C. 20240

Duties and Accomplishments

I supervised inspection and enforcement programs and regulation of surface and underground mining operations on a regional and national level. I wrote regulations for the permanent program for the construction of coal waste embankments, control of surface and underground mine drainage, valley fills, contour mining, mountaintop removal mining, and backfilling and grading on surface mines.

I served as an expert witness in administrative and federal court hearings in West Virginia, Pennsylvania, Virginia and Kentucky. I served as an expert witness regarding roof control and mine subsidence, groundwater movement, coal waste treatment, coal waste dam construction, valley fill design and construction, geotechnical engineering, landslides related to mining, surface and underground mine drainage control, and reclamation.

I authored papers on construction of earth-and rock fill coal waste embankments. I served as assistant to the director of Inspection and Enforcement in Washington, D.C. I wrote policy directives and supervised the national interim surface and underground mining inspection program. I managed tracking systems for violators and provided guidance to field managers regarding enforcement.

I served as district manager in Pennsylvania and West Virginia. I managed a nationwide training program for new inspectors and managers regarding inspection techniques at

surface and underground mining facilities. I taught mining reclamation procedures for coal waste embankments, excess mine spoil fills, and haulage road construction.

7) **Division Chief** — 3/73 to 4/78

Employer — **Supervisor**

Coal Refuse and Dam Control Division
WV Department of Natural Resources
Charleston, WV 25321

Ira Latimer

Duties and Responsibilities

I was responsible for development of safety criteria for coal waste embankment construction, dam construction, landslide stabilization, excess mine spoil fills, and surface and underground mine drainage systems for the state of West Virginia. More than 1,500 coal waste embankments and dams were evaluated for safety. I issued enforcement documents to mine owners and supervised an inspection and compliance program for surface and underground mines.

I managed a statewide inspection and enforcement program with a staff of civil and mining engineers, geologists and reclamation specialists. I was also responsible for the review, approval, and inspection of drainage facilities for surface mines, coal preparation facilities, and underground mines.

I taught seminars to train mine inspectors and engineers. I taught on the subjects of slope stabilization procedures for mine tailings areas, coal waste dams, waste piles and earthen dams, excess mine spoil fills, and mine sediment control structures. I taught all staff about the basics of geotechnical engineering as related to the mining environment. I managed a statewide training program for all dam and waste pile inspectors. I cross-trained all personnel in basic engineering and hydrology pertaining to earth and coal-related structures.

8) **Staff Engineer** — 3/72 to 10/72

Employer — **Supervisor**

Governor's Commission of Inquiry
Into the Buffalo Creek Flood
Of February 1972
Charleston, WV 25321

Ira Latimer

Duties and Accomplishments

I wrote the final report regarding the failure of a coal waste dam in February 1972 that killed 125 people in Logan County, West Virginia. I assembled and evaluated geotechnical engineering data regarding the construction and sudden failure of the dam. I interviewed witnesses and briefed commission members before hearings. I prepared recommendations for coal refuse and dam control regulations that were enacted into law in West Virginia.

9) Mining Research Engineer **1/71 to 3/72**

Employer **Supervisor**

Coal Research Bureau
West Virginia University
School of Mines
Morgantown, WV 26505

James Stump

Duties and Accomplishments

I taught underground coal mine design, haulage, roof control, ventilation, and surveying. I conducted research projects in abatement of surface and underground acid mine drainage. This research included analysis of mine water and evaluation of treatment facilities and mine plans to abate acid drainage. I wrote reports about my research regarding the development of mine plans to reduce the possibility of acid drainage formation.

10) Mining Engineer **5/70 to 1/71**

Employer **Supervisor**

Semet Solvey Division
Allied Chemical Corporation
Montgomery, WV 25136

Charles Bowling

Duties and Accomplishments

I worked as a mining engineer in the design of surface and underground mining operations. I developed roof control and ventilation plans and designed valley fills, dams, and sediment control plans. I worked in underground continuous miner sections.

11) Mining Engineer in Training **6/66 to 5/70**

Employer **Supervisor**

U.S. Bureau of Mines (now MSHA) William Park

Mount Hope and Morgantown, WV

Duties and Accomplishments

I assisted in training in the areas of roof control, mine ventilation, and coal mine health and safety. I was part of a team that inspected underground mining operations and surface-related facilities to determine compliance with federal health and safety laws. I conducted investigations of fatal roof falls and other accidents in underground coal mines. I conducted ventilation and dust surveys.

Education

Bachelor of Science – Mining Engineering
West Virginia University, 1970

Mount Hope High School, 1966
Salutatorian

Awards/Accomplishments

1991 – Instructor Training, Office of Surface Mining, U.S. Department of Interior
1991 – Meritorious Service Award, Secretary of the Interior
1991 – Impoundment Inspector Certificate, MSHA, U.S. Department of the Interior
1993 – Engineer of the Year Award, U.S. Department of Interior
2004 – Jenco Foundation Award for Service to Humanity in Appalachia
2004 – Chuck Chambers Public Service Award, W.Va. Environmental Council
2005 – Helen Lewis Community Service Award, Appalachian Studies Association
2006 – First Amendment Award
2010 – Lifetime Achievement Award, Union of Concerned Scientists
2012 – Conservation Achievement Award, National Wildlife Federation

Addendum: Jack Spadaro Resume
Summary of cases in which testimony has been given at trial or deposition

Publications

The Buffalo Creek Flood and Disaster, a Report of the Governor's Commission of Inquiry into the Buffalo Flood, August 1972

Analysis of Surface Powered Haulage Accidents, Holmes Safety Association Bulletin, September 1996

1. Kay Ward, Et. Al. v. Martin County Coal Company; Martin County Circuit Court, Martin County, Kentucky: Failure of a coal slurry impoundment that resulted in a 300 million gallon toxic coal slurry spill into the Tug Fork River. Involved MSHA and EPA regulations. Attorney: Ned Pillersdorf, Prestonsburg, Ky. 606-886-6090. Completed.

2. Perry Et. Al. v. Bandmill Coal Company; Civil Action No. 04-C-227; Logan County Circuit Court, Logan County, W. Va.: Failure of a surface mine valley fill and resultant flood that damaged ten houses. Involved W. Va. Department of Environmental Protection regulations. Attorney: Randolph McGraw, Beckley, W. Va. 304-252-1014. Completed.

3. Erby Lester v. Elk Run Coal Company; Civil Action No. 04-C-231; Boone County Circuit Court, Boone County, W.Va.: Investigation of a fire and resultant injury at a surface mine site. Involved MSHA and W.Va. mine safety regulations. Attorney: Kristofer Cormany, Charleston, W. Va. 304-720-3566. Completed.

4. Guy Vansant v. Commonwealth of Kentucky; Franklin Circuit Court, Frankfort, Ky.; Whistleblower case involving coal waste dams and landfills. Involved MSHA, OSM and KY. DEP regulations. Attorney: Phillip Shepherd, Frankfort, Ky. 502-227-1122. Completed.

5. Debbie Williams v. Commonwealth of Kentucky; Administrative hearing; Frankfort, Ky.: Concerning a mine related landslide and acid mine drainage. Involved Ky. DEP and federal OSM regulations. Attorney: Appalachian Citizens Law Center, Stephen Sanders, Director 606-886-1442. Completed.

6. Willie Juan Hatfield Et. Al. v. Hampden Coal Co. Inc.; Civil Action No. 05-C-63; Mingo County Circuit Court, Mingo County, W.Va.; Injury of a worker at a coal preparation plant. Involved MSHA and

state of W. Va. mine safety regulations. Attorney: Kristofer Cormany, Charleston, W. Va. 304-720-3566. Completed.

7. I have also testified as an expert witness while working as a federal mine health and safety engineer. I testified in approximately thirty-five to forty administrative and federal district court hearings involving OSM or MSHA regulations.

8. Larry Brown v. Rawl Sales and Processing Company; Injection of coal slurry into underground mine workings, damage to groundwater system and water wells; Involves Clean Water Act and Surface Mining Control and Reclamation Act; Mingo County Circuit Court, Williamson, W. Va.; Attorney: Kevin Thompson, Charleston, W.Va. 304-235-4006. Completed.

9. Flood Litigation; Involved mountaintop removal mining operations, mine drainage, and relationship to flooding of July 8, 2001 in southern West Virginia; Raleigh County Circuit Court, Beckley, W.Va.; Attorneys: Stuart Calwell, Charleston, W.Va. and Randolph McGraw, Beckley, W.Va. 304-252-1014. Completed.

10. Johnny Orras v. Min. Inc. and Nell-Jean Industries, Inc.; Investigation of an accident involving an end-loader on a surface mine; Mingo County Circuit Court, Williamson, W.Va.; Attorney: Kristofer Cormany, Charleston, W.Va. 304-720-3566. Completed.

11. Richard Hanshaw v. Kanawha River Terminals Inc. and J&T Contracting Inc; Investigation of an accident involving an excavator at a coal loading facility; Kanawha County Circuit Court, Charleston, W.Va.; Attorneys: Kristofer Cormany and J.R. Carter, Charleston, W.Va. 304-720-3566. Completed.

12. Ricky Dean Lester v. J.M.A.C. Leasing, Inc.; Investigation of a rock truck haulage accident on a surface mine; Wyoming County Circuit Court, Pineville, W.Va.; Attorney: Robert Warner, Charleston, W.Va. 304-344-4460. Completed.

13. Gordon Lawson v. Patriot Mining Company and Anker Energy Corporation; Involved fly ash disposal on a surface mining operation in northern W.Va.; Monongalia County Circuit Court, Morgantown, W.Va.; Attorney: Vincent Trivelli, Morgantown, W.Va. Completed.

14. Anthony Runyon v. Hampden Coal Co. and Sartin Contracting, Inc.; Coal truck haulage accident at a coal loading facility near Man, W.Va.; Involved MSHA and state of W.Va. mine safety regulations; Logan

County Circuit Court, Logan, W.Va.; Attorney: Kristofer Cormany, Charleston, W.Va. 304-720-3566. Completed.

15. Rocky Wiley v. Colony Bay Coal Co. and Eastern Associated Coal Corp.; Accident involving a fall from the platform on an excavator; Involved MSHA and state of W.Va. mine safety regulations; Boone County Circuit Court, Madison, W.Va.; Attorney: Kristofer Cormany, Charleston, W.Va. 304-720-3566. Completed.

16. Woodrow Church v. Premium Processing, Inc. and Addington Mining, Inc.; A case involving worker exposure to chemicals and silica dust on a surface mine in southern West Virginia; Involved MSHA and state of W.Va. mine health and safety regulations; McDowell County Circuit Court, Welch, W.Va.; Attorney: Kristofer Cormany, Charleston, W.Va. 304-720-3566. Completed.

17. Ila Cisco v. Mingo Logan Coal Company and Arch Coal Inc.; Underground coal mine subsidence damage to a residence; Mingo County Circuit Court, Williamson, W.Va.; Attorneys: David Barney and Kevin Thompson, Williamson, W.Va. 304-235-4006. Completed.

18. James Bailey v. Extra Energy, Inc.; Truck haulage accident at a valley fill dump site on a coal surface mine; McDowell County Circuit Court, Welch, W.Va.; Attorneys: David Barney and Kevin Thompson, Williamson, W.Va. 304-235-4006. Completed.

19. Robert W. Coffield v. Consol Energy, Inc. and Consolidation Coal Company; Underground coal mine haulage accident involving a motor operator; United States District Court for the Northern District of W.Va., Wheeling, W. Va.; Attorneys: Christopher Turak and Richard Wilson, Moundsville, W. Va. 304-845-9750. Completed.

20. Roxann and Dennis Treadway v. Simmons Fork Mining, Inc. and Danbi Inc.; Truck haulage accident involving defective brakes and a steep road grade at a surface coal mine; Wyoming County Circuit Court, Pineville, W.Va.; Attorneys: Guy Bucci and Blake Carter, Charleston, W. Va. 304-345-0346. Completed.

21. Michelle and William Martin v. Dynamic Energy, Inc. and Bluestone Industries, Inc.; Truck haulage accident at a dumping location at a valley fill on a surface coal mine; Wyoming County Circuit Court, Pineville, W.Va.; Attorneys: Lee Javins and Blake Carter, Charleston, W.Va. 304-345-0346. Completed.

22. William J. Osborne v. Rockhouse Creek Development, LLC.; Civil Action No: 07-C-363; Underground coal haulage accident involving a

scoop operator; Mingo County Circuit Court, Williamson, W.Va.; Attorney: Michael Ranson, Charleston, W. Va. 304-345-1990. Completed.

23. Ricky and Mary Christian v. Premium Energy, LLC.; Flood damage to properties caused by surface water runoff and mine drainage from mountaintop removal surface coal mining operations; Mingo County Circuit Court, Williamson, W.Va.; Civil Action No: 06-C-178; Attorneys: David Barney, Kevin Thompson, Jeffrey Simpkins, and Eugene Sisko, Williamson, W.Va. 304-235-4006. Completed.

24. Michael W. Pennington v. Hampden Coal Company, Inc. Et. Al.; Civil Action No: 07-C-283; Vehicle accident at a coal preparation plant and loading facility; Mingo County Circuit Court, Williamson, W.Va.; Attorney: Robert B. Warner, Charleston, W.Va. 304-344-4460. Completed.

25. Maria Gunnoe v. Jupiter Coal Company, Inc., Et. Al.; Flood damage caused by mine drainage from surface coal mining operations; Boone County Circuit Court, Madison, W.Va.; Civil Action No: 04-C-276; Attorney: Randolph McGraw, Beckley, W.Va. 304-252-1014. Completed.

26. Dahryl Keller v. Martin County Coal Company; Landslides, acid mine drainage, and flood damage caused by mountaintop coal mining operations; Martin County Circuit Court, Inez, Kentucky; Attorney : Kevin Thompson, Williamson, W.Va. 304-235-4006. Completed.

27. George Ballard v. Petroleum Fueling, Inc., Et. Al.; Surface coal mining truck haulage accident on a steep road gradient involving serious injury to two miners; Boone County Circuit Court, Boone County, W.Va.; Civil Action No. 08-C-235; Attorneys: Paula Wilson and Timothy Bailey, Charleston, W.Va., 304-345-0346. Completed.

28. Donald McCoy v. Eagle Creek Mining, LLC.; Surface coal mining truck haulage accident at a valley fill dumping point; Mingo County Circuit Court, Mingo County, W.Va.; Attorney: Kris Cormany, Charleston, W.Va. 304-720-3566. Completed.

29. Aric Hinrichs v. The Cincinnati Insurance Co.; Fatal truck accident in a limestone quarry; Springfield Township, Dare County, Wisconsin; Involved violation of MSHA regulations regarding safety berms at quarries; Attorney: Eric Haag of Gingras Cates and Luebke, Madison, WI 608-833-2632. Completed.

30. Randal Varney v. Akers Supply, Inc., Et. Al.; Involved the electrocution of a mine worker at a magnetite processing facility; Mingo County Circuit Court, Mingo County, W. Va.; Civil Action No. 08-C-185; Attorney: Kristofer Cormany 304-720-3566. Completed.

31. Alberta Allen, Et. Al. v. Lexington Coal Company, Et. Al.; Involves flooding of areas downstream from surface coal mining operations on Quicksand Creek in Breathitt County, Ky.; Breathitt County Circuit Court, Jackson, Ky.; Attorney : Ned Pillersdorf, Prestonsburg, Ky. 606-886-6090. Completed

32. Chad Kalousek v. The Monarch Cement Company; Involves an injury to a worker near a conveyor belt at a processing plant; Involves MSHA metal/non-metal regulations and citations of the plant operator; District Court, Allen County, Kansas; Case No. 09-CV-45; Attorney : Scott McCreight, Kansas City Mo. 816-842-1515. Completed.

33. Larry Wiggins v. Coal Transport, Inc. and Argus Energy, Inc.; Involves defective surface haulage equipment; Civil Action No: 09-C-154; Circuit Court of Lincoln County, W.Va.; Attorney: Frank Venezia and Jamie Little, Madison, WV 304-369-0511. Completed.

34. Ronald Beverly v. Dakota, LLC; Involves unsafe working conditions resulting in injury caused by rock from rib falling and pinning individual between rock and a roof bolting machine; Civil Action No: 08-C-90; Circuit Count of Boone County, W.Va.; Boone County, W.Va.; Attorney: Bradley J. Pyles, Logan, W.Va. 304-645-6400. Completed.

35. Kevin Blankenship v. Deepgreen West Virginia; Involves an accident caused from unstable road surface on haulage road; Civil Action No: 06-C-222-M; Circuit Court of McDowell County, W.Va.; McDowell County, W.Va.; Attorney: Warren R. McGraw II, Prosperity, W.Va. 304-252-1014. Completed.

36. Franklin Crabtree, Et. Al. v. West Virginia Department of Environmental Protection; Involves flooding, mine drainage, and location of an underground mine; Case No: U-4011-06 in War, W.Va. Completed.

37. Charles Evans v. Apollo Fuels, Inc.; Involves landslide damages from surface mine to property; Attorney: Mary Cromer of the Appalachian Citizens' Law Center, Whitesburg, KY 606-633-3929. Completed

38. Victoria Green v. Energy and Environmental Cabinet; Involves Abandoned Mined Lands including a landslide and acid mine drainage

issues; Case No: GAH-40543-039; Commonwealth of Kentucky; Attorney: Stephen Sanders, Appalachian Citizens' Law Center, Inc., Whitesburg, KY 606-633-3929. Completed

39. Mabel Smith v. Energy and Environmental Cabinet; Involves Abandoned Mined Lands, landslide and mine drainage issues; Case No: GAH-40479-046; Commonwealth of Kentucky; Attorney; Stephen Sanders, Appalachian Citizens' Law Center, Inc., Whitesburg, KY 606-633-3929. Completed

40. Michael Hathaway v. R.G. Johnson, Consol. Energy; Involves unsafe working conditions at a shotcrete injection borehole; Civil Action No: 09-C-105-1; Circuit Court of Harrison County, W.Va.; Harrison County, W.Va.; Attorney: Paul Cranston and James Bryan Shockley, Morgantown, W.Va. 304-296-3500. Completed.

41. Wilson Lambert v. Odell Processing; Involves unsafe working conditions resulting in a machinery accident (jack failure); Attorney: Douglas Witten of Avis, Witten and Wandling, Logan, W.Va. 304-752-2838. Completed.

42. Gary Lawson v. Black Bear Processing; Involves unsafe working conditions and injury caused by the removal of a lockout mechanism from the sump pump area in a preparation plant; Civil Action No: 09-C-103-S; Circuit Court of McDowell County, W.Va.; McDowell County, W.Va.; Attorney: Robert B. Warner and Tammy Bowles Raines, Charleston, W.Va. 304-344-4460. Completed.

43. Charles Martin v. Remington, LLC; Involves unsafe working conditions resulting in a rib roll that pinned client; Kanawha County, W.Va.; Attorney: Robert A. Campbell of Farmer, Cline and Campbell, Charleston, W.Va. 304-346-5990. Completed.

44. Priscilla Miranda v. Crisp Contractors; Involves accident due to dangerous conditions and defective equipment at a caliche pit resulting in death; Case No: 09-07-00064-CVL; Texas; Attorney: Rudy Gonzales, Ray Pena, and Hilliard Munoz Gonzales, Corpus Christi, Texas 361-882-1612. Completed

45. SAGO: Randal McCloy, Et. Al. v. International Coal Group, Et. Al.; Civil Action No: 06-C-2454; Mine Explosion resulting in the death of twelve miners: Circuit Court of Kanawha County, W.Va.; Attorneys: Allan N. Karlin, Morgantown, WV 304-296-8266; Stephen Annand, Washington DC 202-682-5800; Hunter Mullens, and Catherine McGuire, Philippi, W.Va. 304-457-9000. Completed.

46. Yukon Pocahontas v. Consolidation Coal Co.; Case No: CL04-91; Involves groundwater contamination caused by discharging mine wastewater; Circuit Court for the County of Buchanan, VA; Buchanan, VA; Attorney: J. Scott Sexton and Travis Graham, Roanoke, VA 540-983-9300. Completed.

47. Joe Justice v. Nicewonder Contracting, Et. Al; Involves unsafe working conditions resulting in an injury caused from an unsafe air receiver on a service truck; Civil Action Case No: 09-C-413; Circuit Court of Mingo County, W.Va.; Mingo County, W.Va.; Attorney: Timothy Bailey of Bucci Bailey and Javins, Charleston, W. Va. 304-345-0346. Completed.

48. Roush v. American Electric Power; Involves fly ash and coal ash dumped in Little Broad Run Creek causing damages; Civil Action Case No.: 08-C-576-N; Mason County Circuit Court; Mason County, W.Va.; Bradley H. Layne of Kayser Layne and Clark, Point Pleasant, W.Va. 304-675-5440. Completed.

49. Estate of Wilbur Farris v. U. S. Lime Co.; Fatal accident in a limestone preparation plant; Marble City, Sequoyah County, OK; Attorney: Blake Beeler 405-232-6490. Completed.

50. Julian Ooten v Bridgestone Retail; Involves injury caused by improper tire changing equipment at a surface mine; Civil Action Case No. 2:10-0246; U. S. District Court, Southern District of W. Va.; Attorney: J. Kristofer Cormany of Cormany Law, PLLC, Charleston, W.Va. 304-720-3566. Completed.

51. Wayne Turner v David Stanley Consultants; Involves accident causing injury due to unsafe conditions on mantrip in mine; Civil Action Case No. 10-C-148; Circuit Court of Boone County, W. Va.; Attorney: Tammy Bowles Raines of Warner Law Offices, Charleston, W.Va. 304-344-4460. Completed.

52. Rodney Reed v Baylor Mining, Inc.; Involves unsafe coal ribs resulting in rib roll accident in underground mine; Civil Action Case No. 07-C-250; Attorney: James R. Fox of Fox Law Office, Hurricane, W.Va. 304-562-9202. Completed.

53. Robert King v Double Bonus Coal Co./Bluestone Industries; Involves accident due to unsafe roof and rib conditions (no support) resulting in injury; Civil Action Case No.: 10-C-112; Circuit Court of Wyoming Co., W. Va.; Attorney: J. Kristofer Cormany of Cormany Law, PLLC, Charleston, W.Va. 304-720-3566. Completed.

54. John Hardesty, et. al. v International Coal Group, et. al.; Involves unsafe working conditions resulting in injury to individual when run over by a scoop; Civil Action Case No.: 10-C-513; Circuit Court of Monongalia Co., W. Va.; Attorney: J. Bryan Edwards and Paul Cranston of Cranston and Edwards, Morgantown, W.Va. 304-296-3500. Completed.

55. Upshur County School Board v. ICG. Involves mining under proposed new school. Attorney: Hunter Mullens, Mullens and Mcguire Law Firm, Phillipi, W. Va. 304-457-9000. Completed.

56. Laura Chapman v. Performance Coal Co./Upper Big Branch; Involves investigation of mine explosion that resulted in the death of 29 coal miners; Attorney: Randolph McGraw, Beckley, W.Va. 304-252-1014. Completed.

57. Nathan Earle v. Harrison Western Construction; Safety discrimination case regarding mine electrician; Civil Action Case No. 10-C-1002-H; Circuit Court of Raleigh Co., WV; Attorney: Stephen P. New, Beckley, W.Va. 304-250-6017. Completed

58. Frasure Creek Mine Appeal (Fayette County) to Surface Mine Board; Appeal of a permit in the Beards Fork watershed involving surface mining and potential contamination of surface and ground water; Case # 2011-01-SMB; Attorney: Tom Rist, Rist Law Offices, Oak Hill, W.Va. 304-253-1636. Completed.

59. William Dixon, as administrator of the Estate of Charles E. Dixon v. Newtown Energy and Kanawha Eagle Coal; Involves hoisting rope accident resulting in fatality; Civil Action No. 10-C-1090; Attorney: Robert Berthold, Berthold Law Firm, Charleston, W.Va. 304-345-5700. Completed.

60. Clarence Ray Maynard v. Logan-Mingo Contractors; Accident involving excavator that fell from high wall on a surface mining reclamation operation resulting in injury; Civil Action No. 09-C-1911; Attorney: Matthew Berthold, Berthold Law Firm, Charleston, W.Va. 304-345-5700. Completed.

61. David Smith, Et. Al. v. KWV Operations, LLC; Involves injury to miner when instructed to cross conveyor belt; Attorney: Kris Cormany, Cormany Law PLLC, Charleston, W.Va. 304-720-3566. Completed.

62. Rodney Thomas v. Massey Coal Services, Inc.; Involves injury to a contract employee; Civil Action No. 07-CI-01627; Attorney: Mike Ranson, Charleston, W.Va. 304-345-1990. Completed.

63. Paul Ledford Et. Al. v Kentucky Darby Et. Al.; Involves a mine explosion at a mine seal resulting in the death of five miners; Civil Action No. 07-CI-00418; Attorney: Tony Oppegard, Lexington KY. 859-948-9239. Completed

64. Calvin and Denise Howard; Involves continued release of methane resulting in health hazards regarding explosions and water well contamination; Attorney: Ned Pillersdorf, Prestonsburg, KY, 606-886-6090. Completed

65. Bonnie Crisp, Et. Al. v. Grizzly Processing, LLC., and Frasure Creek Mining, LLC. ; Involves damage to property and air pollution caused by a coal processing plant near Allen, Ky.; Floyd County Circuit Court, Prestonsburg, Ky.; Case No. 07-CI-1384; Attorney: Ned Pillersdorf, Prestonsburg, Ky. 606-886-6090. Completed

2nd Phase: Susan Barnette, et.al. v. Grizzly Processing and Frasure Creek Mining. Involves damage to property and air pollution caused by a coal processing plant near Allen, KY; Civil Action No. 7:10-CB-00077-ART; United States District Court, Eastern District of Kentucky, Southern Division, Pikeville, Ky.; Attorney: Ned Pillersdorf, Prestonburg, Ky. 606-886-6090. Completed

66. Charles Howard v. Blue Diamond Coal; Involves subsidence and landslide induced by subsidence in an underground coal mine; CRI No. 10-06-0014; Commonwealth of Kentucky, Energy and Environment Cabinet, Department of Natural Resources; Frankfort, KY. Attorney: Mary Cromer, Appalachian Citizens Law Center, Whitesburg, KY. 606-633-3929. Completed

67. Mary Bowles v. Massey Energy (Seth Water Case). Groundwater contamination and well water damage caused by surface and underground mine drainage; Civil Action Case No. 09-C-212; Circuit Court of Boone County, W. Va.; Attorneys: Roger Decanio, John Sutter, and John Mitchell, Sr. of Sutter Law Firm, Charleston, W. Va. 304-343-1514. Completed

68. Allen Baisden v. Alpha and Omega; Involves serious injury to roof bolting machine operator when canopy lift was modified and the miner was injured by a roof fall; Attorney: Tom Peyton, Nitro W.Va. 304-755-5556. Completed

69. Jennifer Hensley, et.al. v. Dolet Hills Lignite; Involves fatality of a dragline oiler when he was crushed between the top of the walking shoe and the bottom of the dragline house; Docket # 645,178, Division P; 24th Judicial Court, Parish of Jefferson, State of Louisiana; Attorney: Dodson, Hooks and Frederick, Michael T. Beckers, Baton Rouge, LA, 225-756-0222. Completed

70. Donald Gene Snyder v. Alpha Natural Resources Services, LLC; Wrongful termination of miner regarding safety discrimination case; Civil Action No. 11-C-142; Attorney: Atkinson and Polak, Charleston, W.Va. 304-346-5100. Completed

71. Richard Hutchens v. Alpha Natural Resources Services, LLC; Wrongful termination of miner regarding safety discrimination case; Civil Action No. 11-C-205; Attorney: Atkinson and Polak, Charleston, W.Va., 304-346-5100. Completed.

72. Thomas Gary Young v. Alpha Natural Resources Services, LLC; Wrongful termination of miner regarding safety discrimination case; Civil Action No. 11-C-204; Attorney: Atkinson and Polak, Charleston, W.Va., 304-346-5100. Completed.

73. Brian Penny v. Jim Walter Resources; Involves dam face of slurry impoundment collapse and injury to worker on a dredge; Circuit Court of Jefferson County, Alabama; Attorney: Lloyd Gathings, Birmingham, AL 205-322-1201. Completed.

74. Richard Ooten v. F. Dunlop and Mingo Logan Coal Company; Involves an injury caused when a dislodged belt roller fell on the victim; Kanawha County, W.Va.; Attorney: Robert A. Campbell, Charleston, W.Va. 304-346-5990. Completed.

75. Jason Metcalf v. Peabody Midwest Mining, LLC.; Injury and burns to a miner caused from a methane/coal dust explosion; Case No. 82D03-1008-CT-04831; State of Indiana, County of Vanderburgh, Vanderburgh Superior Court; Attorney: William Winingham, Indianapolis, IN, 317-920-6400. Completed.

76. Ronald C. Buckler v. Uehlin Farms, Inc., et. al.; Serious injury to miner caused by impact with steel rod used to clear limestone crusher; Attorney: Benjamin Creedy of Murphy, Taylor, Siemens and Elliott, St. Joseph, Missouri, 816-364-6677. Completed.

77. Jerome and Ernestina Trent v. Frasure Creek Mining, et al; Mining mudslide and debris flow causing property damage, Gilbert Creek,

Mingo County; Civil Action No. 11-C-235; Attorney: Jerry Lyall, Williamson, W.Va. 304-235-2578. Completed.

78. Ronnie Hall v. Remington, LLC; Involves harassment and the creation of unsafe working conditions and a hostile work environment in an underground coal mine ; Civil Action No. 2:11-CV-00812; U. S. District Court, Southern District Court of W.Va.; Attorney: Tom Rist, Fayetteville, W.Va. 304-574-0222. Completed.

79. Curtis and Sue Blankenship v. Alpha Natural Resources Services, Open Fork Mining and Mingo Logan Coal Company; Involves damage to property on Gilbert Creek on May 9, 2009 caused by runoff and flooding from surface mines; Civil Action No. 11-C-234; Circuit Court of Mingo County, WV; Attorney: The Calwell Practice, Alex McLaughlin, Charleston, WV 304-343-4323. Completed.

80. Ethel Adams, Et.Al. v. Bluestone Coal Corporation, Et.Al.; Involves material damage to property caused from excess runoff from surface mining operation; Civil Action Case No. 04-C-101-M; Circuit Court of McDowell County, W.Va.; Attorney: Warren McGraw II, Prosperity, W.Va. 304-252-1014. Completed.

81. Donnie Smith v. Spartan Mining Co., Alex Energy, Inc., and Jack Tharp; Wrongful termination case involving harassment of scoop operator/laborer due to illness and attack, assault and battery to scoop operator/laborer; Civil Action No. 10-C-289; Boone County, WV; Attorney: Kristofer Cormany, Charleston, W.Va. 304-720-3566. Completed.

82. Glenn Dials v. Spartan Mining Company; Investigation regarding a beam in a mine which fell on an individual causing injury; Attorney: Douglas Witten of Avis/Witten and Wandling, Logan, W.Va. 304-752-2838. Completed.

83. Brenda K. Starcher for Wilbert Ray Starcher v. White Buck Coal Co.; Underground coal mine fatality involving a shuttle car; Attorney; Gregory Sproles, Summerville, W.Va., 304-872-2271. Completed.

84. Jeff Bartram v. N.F.C. Mining, Inc.; Involves excessive fugitive dust emissions, mine drainage, and water pollution; Civil Action No: 05-CI-01297; Commonwealth of Kentucky; Floyd Circuit Court; Attorney: Earl McGuire, Prestonsburg, KY 606-886-2201. Completed.

85. Kenneth Combs v. B and W Resources, Inc.; Landslide and mud flow from surface mining operation that caused extensive and destructive

property damage; Perry County, KY; Attorneys: Patrick Conley, Hindman, KY. 606-477-5659, and Adam Collins, Hindman, KY. 606-785-5048. Completed.

86. Randy Martin v. Bluestone Coal Corporation; Wrongful termination case involving exposing of unsafe mining conditions while performing duties as the certified mine foreman. Civil Action No. R-10-4201; Beckley, WV; Attorney: Stephen New, Beckley, W.Va. 304-250-6017. Completed.

87. Raymond and Mary Holyfield v. Kingwood Mining, LLC.; Underground coal mining operations that contaminated groundwater with acid mine drainage. Also mine subsidence damage to homes; Preston County Circuit Court, Kingwood , W. Va.; Civil Action No: 07-C-239; Attorneys: Hunter Mullens, Kevin Thompson, and David Barney, Philippi, W.Va. 304-457-9000. Completed.

88. Justin Morgan et. al. v. BHP Holdings, Inc. et. al.; Serious injury to mine worker due to injection of nitrogen into gob area and the creation of an oxygen deficient environment; Civil Action No. D-0101-CV-2010-344; Attorney: Sam Fadduol and Joshua Conaway of Fadduol, Cluff and Hardy, Albuquerque, NM 505-243-6045. Completed.

89. Doyle Whitaker v. James River Coal Service Company; Involves an accident on 2/2/09 resulting in severe injury to a continuous mine operator; Civil Action No. 10-CI-025, Commonwealth of Kentucky, Knott Circuit Court; Attorney: Randy A. Campbell, Hindman, KY 606-785-9958. Completed.

90. Mason Slone and Garnett Gibson v. Adam Consol of Kentucky; Civil Action Case No. 10-C1-00105; Knott Circuit Court; Attorney: Adam Collins and Patrick Conley, Hindman KY 606-785-5048. Completed.

91. Randall Beheler v. Binkley and Oker, Inc.; Involves an accident causing an eye injury due to unsafe working conditions at a stone quarry; Case No: CI-08-05313; Court of Common Pleas of Lancaster County, Pennsylvania; Lancaster, PA; Attorney: John P. Stengel, Lancaster, PA 717-290-7971. Completed.

92. Bertha Adkins, Et. Al. v. Cambrian Coal Company, Et. Al. (Harless Creek Flooding); Involves investigation of surface mining resulting in flooding and damage to homes; Civil Action Case No. 10-CI-01290; Pike Circuit Court; Pikeville, KY; Attorney: Ned Pillersdorf, Prestonsburg, KY 606-886-6090. Completed.

93. Melvin Jones v. Process Machinery Inc.; Involves the death of a miner who was working on a conveyor belt at a limestone processing plant; Civil Action Case No. 10-CI-00147; Commonwealth of Kentucky; Gallatin County Circuit Court, KY; Attorney: Meredith Lawrence, Warsaw, KY. 859-567-8500. Completed.

94. Anita Cecil, Et. Al. v Bluestone Coal Corporation, Et. Al.; Involves material damage to property caused by runoff from surface mining operation; Civil Action Case No. 04-C-104; Circuit Court of Wyoming County, W.Va.; Attorney: Warren McGraw II, Prosperity, W.Va. 304-252-1014. Completed.

95. Timothy Bevel v. Patriot Coal Corporation; Involved injury to a miner while he was working attempting to hammer and tighten rollers in place. Movement of unblocked and unsecured hauler resulted in miner being hit in the head with a sledge hammer causing head and neck injury; Civil Action No. 11-C- ; Circuit Court of Boone Co., W.Va.; Attorney: Robert Warner, Tammy Bowles Raines, Warner Law Offices, Charleston, W. Va. 304-345-6789. Completed.

96. Champion Processing Coal Refuse Disposal Area; Involves acid mine drainage pollution generated by coal refuse disposal area; Client: Environmental and Natural Resources Law Clinic, Vermont Law School, Ken Rumelt, South Royalton, VT 802-821-1630. Completed.

97. Keith Barnhart v. Big River Mining; Involves an accident on 2/11/10 when a roof bolt machine operator was hit by draw rock falling and crushing his legs; Attorney: Rob Berthold, III. Completed.

98. Elizabeth Jane Carmack v. Arch Coal, Inc. and Lone Mountain Processing; Involves a fatal accident on 6/16/10 when a portion of rib fell, dislodging a roof jack hitting a section foreman; Civil Action No. 6:11-cv-00186-GFVT; United States District Court, Eastern District of Kentucky, Southern Division at London; Attorney: Tony Oppegard, Lexington KY. 859-948-9239. Completed.

99. Mildred Elkins et. al. v. Nicewonder, et. al.; Mingo County Flooding. Re: Danny Hylton case. Involves Pigeon Creek Watershed and King Coal Highway. Involves flooding of residence from runoff from surface mining operations; Civil Action Case; Circuit Court of Mingo County, W.Va.; Mingo County, W.Va.; Attorney: Kevin Thompson of Thompson Barney; Williamson, W.Va. 304-235-4006. Completed.

100. Edward Finney v. Affinity Coal Company, Inc.; Involves fatal accident on 2/7/13 when a service hoist operated unexpectedly causing a scoop

to fall back onto a miner; Attorney: Kris Cormany, Charleston, WV 304-720-3566. Completed.

101. Melissa Adkins as Administratrix of the Estate of Jessie Adkins v. Consolidation Coal Company; Involves a fatal injury in a rib roll accident to a Continuous Mining Machine Mounted Roof Bolter Operator; Civil Action Case No. 2:11-cv-285; United States District Court for the Southern District of West Virginia; Attorney: Law Offices of David A. Sims, Adam L. McCoy, Elkins, W. Va. 304-636-8000. Completed.

102. Kimberly Adkins, et. al. v. Appolo Fuels, et. al.; Material damage to property caused by runoff and flooding from surface mining operation; Civil Action No. 11-CI-00508; Commonwealth of Kentucky, Bell Circuit Court; Middlesboro Kentucky Flood case; Attorney: Ned Pillersdorf, Prestonsburg, KY, 606-886-6090. Completed.

103. Donna M. Fisher and Scott Fisher v. Mallard Contracting Co., Farragut Anthracite Co., and Edward Helfrick, Jr.; Surface mining operation that created unsafe highwalls and lack of berms and safety provisions that presented a hazard to the public and resulted in injuries to persons; Civil Action No. CV-10-1024; Northumberland Co., PA; Attorney: Robert Hoffa of Campana, Hoffa, Morrone and Lovecchio, Williamsport, PA 570-326-2401. Completed.

104. Kenneth Allen, Jr. v. Chafin Clear Cutting, et.al.; Involves an accident on 9/9/2008 when a heavy equipment operator was overturned while operating a bulldozer on a steep undulating slope and was severely injured; Civil Action No. 10-C-257, Circuit Court of Logan County, WV.; Attorney: Pamela Lambert, The Masters Law Firm, Charleston, WV 304-342-3106. Completed.

105. Benjamin L. Mullens v. Independence Coal Co., et. al.; Head injury to mine worker when struck by a rock while cleaning coal feeder; Civil Action No.: 11-C-114; Attorney: Ranson Law Offices, Charleston, W.Va., 304-345-1990. Completed.

106. William and Joann Mullins v. Alpha Natural Resources Services and Bandmill Coal Corporation; Flood damage from runoff from mountain top removal operation; Civil Action No. 12-C-162; Circuit Court of Logan County, WV; Attorney: Tom Rist, Fayetteville, WV 304-574-0222. Completed.

107. Frank Ferguson v. Hanson Aggregates; Injury caused from a fall from the back of a dump truck while adjusting a mandatory tarp over a load of gravel; Civil Action No. CA2007-002175; Attorney: Michael

Longstreet and Berry, Syracuse, New York, 315-422-9295. Completed.

108. Charles and Debbie Semenske v. Massey Energy Co., et. al.; Involves severe and debilitating physical and psychological injuries caused by a mine explosion killing 29 WV coal miners; Civil Action No. 12-C-38, Circuit Court of Boone County, WV; Attorney: Thomas A. Rist, Fayetteville, WV 304-574-0222. Completed.

109. Philip R. White v. Nicewonder Contracting, Et. Al.; Involves flooding damages caused by surface mining; Civil Action Case No.: 10-C-131; Circuit Court of Mingo County, W.Va.; Mingo County, W.Va.; Attorney: Jane Moran, Williamson, W.Va., 304-235-3509. Completed.

110. Larry Morgan v. Kirk Trucking, et. al.; Involves a falling accident on 5/12/2011 caused by faulty truck door not opening from the outside; Civil Action Case No. 12-C-229-P; Circuit Court of Beckley, WV; Attorney: Stephen P. New, Beckley WV 304-250-6017. Completed.

111. Anthony Lester v. Bandmill Coal Corporation, et. al.; Involves severe injuries to a bulldozer operator on when a bulldozer turned over on hillside and rolled multiple times; Civil Action Case No. 12-C-1919; Circuit Court of Kanawha County, WV; Attorney: Kristofer Cormany, Charleston, WV 304-720-3566. Completed.

112. Deborah Watts et. al. v. T&T Energy, LLC et. al., Leslie Circuit Court, Hyden, Leslie County, Kentucky; Attorney Gary C. Johnson, P.S.C. 570 East Main Street, PO Box 1717, Lexington, KY 40588-1717, Phone 859-268-4300. Fax 859-268-7318. Attorney: Michael Liska of Gary C. Johnson, PSC, Lexington, KY 859-268-4300. Fatal accident caused by injuries to the head when a mechanic was struck by a metal liner (component of the push blade) at the Begley Resources, #1 Mine. Completed.

113. Anthony Castle v. Long Branch Development Co., et. al.; Injury from fall while standing on a drill pod of a roof bolter. Attorney: Mark Atkinson of Atkinson and Polak, Charleston, W.Va., 304-346-5100. Completed.

114. Zachary Bowman v. Affinity Coal Company, Pocahontas Coal Company, and United Coal Company; Involves injury on 10/7/11 to miner due to unsafe working conditions created by suspended boom that dropped from a roof bolt plate; Civil Action No. 12-C-995-H; Circuit Court of Raleigh Co., WV; Attorney: Zach Zatezalo of Bordas and Bordas, Wheeling, WV 304-242-8410. Completed.

115. Adam Lanham, Et. Al. v. International Coal Group, Et. Al.; Involves an accident causing death when a miner was hit by a scoop in an underground mine; Civil Action No: 09-C-1; Circuit Court of Barbour County, W.Va.; Barbour County, W.Va.; Attorney: James Fox of Fox Law Office, Hurricane W.Va. 304-562-9202.

116. Tammy Seals, Kathy Pennington, Walter Johnson, Rick and Luna Adams, Everett and Kathleen Slone v. H & D Coal Co., Inc.; Flood damage to homes caused by runoff from surface mines; Attorney: Adam Collins and Patrick Conley, Hindman, KY 606-477-5659. Completed.

117. The Estates of Roberts and Wallace v. Sterling Materials; Involves the death of three individuals in an automobile accident related to haulage from a limestone quarry; Civil Action Case No.: 09-CI-00225; Gallatin County Circuit Court; Gallatin County KY; Attorney: Meredith L. Lawrence, Warsaw, KY, 859-567-8500. Completed.

118. Dorsey Green v. Eastern Assoc. Coal and Patriot Coal; Material damage to property caused by mine subsidence; Attorney: Tom Rist, Fayetteville, W.Va. 304-574-0222. Completed.

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:

2015 JUN 15 AM 10: 36

CLERK DISTRICT COURT
DEPUTY

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Attorneys for Plaintiffs

FILED

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

RONNEL E. BARRETT, an individual; GREGG HAMMERBERG, an individual; ERIC J. TESTER, an individual; and MATTHEW WILLIAMS, an individual, Plaintiffs, -VS- HECLA MINING COMPANY, a Delaware Corporation; JOHN JORDAN, an individual; DOUG BAYER, an individual; SCOTT HOGAMIER, an individual; and DOES I-X, unknown parties,	**CASE NO. CV 13-8793** **AFFIDAVIT OF RICK VALERIO**

Defendants.

STATE OF IDAHO)
: ss
County of Shoshone)

RICK VALERIO, being first duly sworn, deposes and says:

1. I am over the age of eighteen (18) and competent to testify to the matters stated herein.

2. I have personal knowledge of the facts contained herein and make this affidavit based upon my own personal knowledge.

3. I was in November and December, 2011 and am currently an employee of Hecla Mining Company, a Delaware corporation as a union mining employee.

4. In November and December, 2011, I served as the President of the United Steelworkers Local number 5114 representing union employees in their negotiations and dealings with Hecla management.

5. After the November 16, 2011 rock burst at the 5900 pillar of the Lucky Friday mine, I was involved in the rehabilitation work at the pillar during the first several days following the burst.

6. I and several other employees involved in the rehabilitation process were seriously concerned about the stability of the pillar. We frequently heard cracking and popping in the walls of the pillar and when we attempted to drill bolts and dwydags, the walls were popping and snapping. I observed several employees express concern about the pillar to Doug Bayer, the Hecla mine superintendent.

7. Approximately two to three days following the November 16, 2011 burst, Doug Bayer was conducting a pre shift crew meeting. At that time he held what was represented to be a report from Wilson Blake and he said to the miners that he knew several of them were concerned about the safety of the pillar but, while waiving the report in the air, he stated the report indicated that "we don't have to worry about it for at least five years."

8. As we were attempting to drill dwydags into the East wall of the pillar, the wall was slipping preventing them from taking hold in the wall. I told Doug Bayer that I believed that there was a fault slip in the East wall of the pillar as the dwydags weren't taking in the wall. He looked at me and, without responding, walked away from me with no response.

9. At no time did Hecla allow non-management personnel to see the Blake reports regarding the safety of the pillar.

10. At no time did Hecla management tell the miners working on the rehabilitation of the pillar the results of, or allow them to see, closure or stress monitoring data that was being conducted at that time.

11. At no time did Hecla management tell the miners working on the rehabilitation that the stress monitoring was showing increased stress during the project.

12. At no time did Hecla management tell the minors working on the rehabilitation that the East wall stress monitoring was showing invalid readings or data.

13. Had I known that that Wilson Blake considered the pillar to have been "borderline stable" and that stress monitoring data was showing increased stress at the pillar during every shift of every day during the rehabilitation project, steps would have been taken with Hecla management to remove the mining personnel from the pillar.

DATED this 9 day of April, 2015.

Rick Valerio

SUBSCRIBED AND SWORN to before me this 9 day of April, 2015.

RENEE CORWIN
NOTARY PUBLIC
STATE OF IDAHO

Notary Public for Idaho
Residing at Kellogg
Commission expires: 5-27-17

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of June, 2015 I caused a true and correct copy of the foregoing to be forwarded with all the required charges prepaid, by the method(s) indicated below to the following persons:

Michael E. Ramsden
RAMSDEN & LYONS, LLP
700 Northwest Boulevard
P.O. Box 1336
Coeur d'Alene, ID 83816-1336

Hand Delivery ____
U.S. Mail ____
Facsimile 208-664-5884 ____
Overnight Mail ✓
Electronic Mail ____
mramsden@ramsdenlyons.com

Eric S. Rossman

\\OFFICESERVER\Rossman Law\Documents\Work\B\Barrett, Ron\Pleadings\Aff Valerio.doc

STATE OF IDAHO)
COUNTY OF KOOTENAI) ss
FILED:

2015 JUN 15 AM 10: 36

CLERK DISTRICT COURT
DEPUTY

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Eric S. Rossman, ISB #4573
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Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

RONNEL E. BARRETT, an individual; GREGG HAMMERBERG, an individual; ERIC J. TESTER, an individual; and MATTHEW WILLIAMS, an individual, Plaintiffs, -vs- HECLA MINING COMPANY, a Delaware Corporation; JOHN JORDAN, an individual; DOUG BAYER, an individual; SCOTT HOGAMIER, an individual; and DOES I-X, unknown parties, Defendants.	CASE NO. CV 13-8793 **AFFIDAVIT OF MATTHEW WILLIAMS**

STATE OF IDAHO)
: ss
County of ... ...)

MATTHEW WILLIAMS, being first duly sworn, deposes and says:

1. I am a Plaintiff in the above-captioned lawsuit against Hecla Mining Company, a Delaware Corporation.

2. I have personal knowledge of the facts contained herein and make this affidavit based upon my own personal knowledge.

3. I was employed with Hecla as a union miner during November and December, 2011.

4. Following the November 16, 2011 rock burst at the 5900 drift pillar of the Lucky Friday mine, I was requested by Hecla management to participate in the rehabilitation of the pillar.

5. During the rehabilitation, the involved miners including myself, were very concerned about the stability of the pillar. The walls of the pillar were frequently popping and cracking and when we attempted install bolts and dwydags, the walls would spit or spall rock at us causing us serious concern. We brought these issues to the attention of mine superintendent, Doug Bayer and mine foreman, John Lund.

6. Once the first phase (ground support and shotcreting of the walls) of the rehabilitation was complete Hecla began running trucks through the pillar and mining and blasting stopes within the Gold Hunter vein was restarted. Another miner, Rick Norman, and I went into Doug Bayer's office and asked him if the truck drivers had anything to worry about when driving through the drift. Doug simply said "no."

7. Later, I asked Doug Bayer what Wilson Blake had to say about the pillar. Mr. Bayer said that we didn't have anything to worry about. Mr. Bayer at no time told me or, to my knowledge, any other of the miners involved in the rehabilitation project that Wilson Blake had cautioned Hecla about increasing stresses in the pillar, that stress monitoring had shown steady increases in stress at the pillar or that one of the gages was not even recording valid information.

8. Had we known that Dr. Blake believed the pillar to have been "borderline stable," at serious risk of failure and that stress monitoring was showing increasing stress readings, I would never have continued working in the pillar.

DATED this 29th day of April, 2015.

Matt Williams
Matthew Williams

SUBSCRIBED AND SWORN to before me this 29 day of April, 2015.

ERIC S. ROSSMAN
NOTARY
STATE OF IDAHO

Notary Public for Idaho
Residing at Boise, Idaho
Commission expires: 12/30/2017

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of ~~April~~ June, 2015 I caused a true and correct copy of the

foregoing to be forwarded with all the required charges prepaid, by the method(s) indicated below to the following persons:

Michael E. Ramsden	Hand Delivery _____
RAMSDEN & LYONS, LLP	U.S. Mail _____
700 Northwest Boulevard	Facsimile 208-664-5884 _____
P.O. Box 1336	Overnight Mail ✓
Coeur d'Alene, ID 83816-1336	Electronic Mail _____
	mramsden@ramsdenlyons.com

Eric S. Rossman

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Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

RONNEL E. BARRETT, an individual; GREGG HAMMERBERG, an individual; ERIC J. TESTER, an individual; and MATTHEW WILLIAMS, an individual, Plaintiffs, -vs- HECLA MINING COMPANY, a Delaware Corporation; JOHN JORDAN, an individual; DOUG BAYER, an individual; SCOTT HOGAMIER, an individual; and DOES I-X, unknown parties,	**CASE NO. CV 13-8793** **DECLARATION OF PHILIP A. HANGER, PH.D.**

Defendants.)

PHILIP A. HANGER, PH.D. states:

1. I am over the age of eighteen (18) and I have personal knowledge of all facts contained herein.

2. I am a clinical psychologist with a private practice in Coeur d'Alene, Idaho. I provide psychological and neuropsychological evaluation and treatment, including evaluations for post-traumatic stress disorder. I have a Ph.D in Clinical Psychology and am a licensed psychologist in the State of Idaho. A true and correct copy of my *curriculum vitae* is attached hereto as Exhibit "A."

3. I have interviewed and evaluated each of the Plaintiffs in this case as is set forth in my reports attached hereto as Exhibits "B," "C," "D," and "E".

4. Based on those interviews and evaluations it is my professional opinion to a reasonable degree of certainty that each Plaintiff has suffered severe emotional distress related to the traumatic event suffered by the Plaintiffs on December 14, 2011.

5. If called to testify at trial in this matter, I will testify consistent with the information contained with the reports attached to this Declaration.

6. I declare under penalty of perjury of the laws of the State of Idaho that the foregoing statements are true and correct.

DATED this 16th day of June, 2015.

Philip A. Hanger, Ph.D.

DATED this 17th day of June, 2015.

ROSSMAN LAW GROUP, PLLC

Eric S. Rossman
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of June, 2015 I caused a true and correct copy of the foregoing to be forwarded with all the required charges prepaid, by the method(s) indicated below to the following persons:

Michael E. Ramsden	Hand Delivery _____
RAMSDEN & LYONS, LLP	U.S. Mail ✓
700 Northwest Boulevard	Facsimile 208-664-5884 _____
P.O. Box 1336	Overnight Mail _____
Coeur d'Alene, ID 83816-1336	Electronic Mail _____
	mramsden@ramsdenlyons.com

Eric S. Rossman

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Exhibit "A"

Philip A. Hanger, Ph.D.
103 S. 4th Street, Suite 252
Coeur d'Alene, ID 83814
208-964-4776

Clinical Psychologist
Idaho License: PSY 202760

Professional Experience:

- **Independent Practice, Consulting Psychologist** August 2014 – Present
  Designated Examiner, State of Idaho Region One
  Privileges at Kootenai Health Services
  - Provide psychological, neuropsychological, and forensic assessments for adolescents and adults.

- **Northwest Psychiatric Associates** October 2013 – March 2015
  Coeur d'Alene, ID

  Clinical Psychologist
  - Conduct psychological assessments for adolescent and young adult of **Innercept Residential Treatment Program**, Coeur d'Alene, to assist in treatment planning and diagnostic determinations.
  - Provide individual and group psychotherapeutic intervention, as well as clinical supervision of staff.

- **Mental Health Systems, Inc.** December 2011 – June 2013
  San Diego, CA

  Executive Vice President, Clinical Services (2/2012 – 6/2013)
  - Responsible for standards of clinical practice in mental health and substance abuse treatment provided by non-profit, community behavioral health agency throughout Southern and Central/Inland California.
  - Assessment of clinical needs and development of evidenced-based services/programs.
  - Oversight and direction of clinical outcomes and training needs.
  - Clinical supervision of program management and crisis response for all levels of program staff.

  Vice President, Adult Mental Health Services (12/2011 – 2/2012)
  - Direct oversight of mental health programs in North San Diego region.
  - Monitor contract compliance, fiscal management, quality assurance, and productivity standards.
  - Development and implementation of new programs/projects as assigned.
  - Direct clinical supervision of program managers and crisis response to programs.

- **County of San Diego** May 2003 – December 2011

  Director, Office of Health Systems Innovation, HHSA (10/2010 – 12/2011)
  - Maximize County's efforts to improve health of San Diegans by enhancing collaboration and communication within public health system.
  - County's lead for collaborative development and implementation of County-wide MediCal healthcare reform (ACA) "bridge" program called Low Income Health Program (LIHP).

Assistant Deputy Director, Forensic Mental Health Services, MHSA Coordinator (6/2006 – 10/2010)

- **Juvenile Forensic Services**

  Administrative oversight of County contracted (25 contracts; $30 million) and County operated (60 staff; $5 million) mental health services for San Diego County's juvenile dependents and wards:
  - Oversight of county-funded Child/Adolescent Inpatient Psychiatric Care
  - Crisis assessment and stabilization in Probation and Child Welfare institutional settings
  - Outpatient Mentor Health services to at-risk children and adolescents
  - Intensive Case Management for youth and families
  - Quality assurance of forensic evaluations and treatment for wards and dependents

- **Adult Forensic Services**

  Administrative oversight of $8 million (35 staff) in County operated services, including:
  - Conservatorship for involuntary mental health treatment of gravely disabled individuals
  - Conditional Release Program for mentally ill parolees
  - Forensic Examining Unit, providing Count-ordered mental health evaluations to Superior Court
  - Monitoring of contracted case management services associated with Behavioral Health Court

- **Mental Health Services Act Coordinator**

  County lead for extensive Community planning process, involving:
  - Community forums for planning input
  - Information management, data analysis, report development
  - Point-of-contact for community members, stakeholder, partners, and other Count, agencies involved in planning

  Program Development and Implementation
  - County lead for development and submission of all MHSA plans between 2006-2011
    - Over 40 Community Services & Support projects, $100 million annual budget
    - Over 20 Prevention & Early Intervention projects, $30 million annual budget

  Compliance with State Guidelines
  - County liaison to State's Mental Health and Oversight & Accountability Committee
  - Responsible for Agency and community education on Act

  Budget Oversight and Audit Response
  - Lead executive for audit response
  - Responsible for compiling fiscal and outcome data for submission to State

- **State Liaison for County of San Diego Behavioral Health, HHSA**

  - Member California Mental Health Directors' Association (CMHDA), *Forensic Committee*
  - Member of CA Dept of Corrections *Inmate Transitional Protocol Working Group*

- **HHSA Disaster Operations Center**, Representative for Behavioral Health Services

- **Community Presentations and Meetings**

  - Media Spokesperson, County's Mental Health Services
  - Regular presenter to County's *Mental Health Board*
  - *MHSA/Public Safety Group Work Group*

- **Special Projects**

  - Assisted in multi-agency collaborative to develop Behavioral Health Court Calendar
  - Community Forums to explore activation of Welfare & Institutions Codes 5270 & 5345
  - Behavioral Health Representative on *HHSA/SEIU Labor Relations Committee*

Chief, Children's Mental Health Services (1/2005 – 6/2006)

- Supervised County programs providing crisis and outpatient services to children & adolescents.
- Monitored twenty county-contracted outpatient mental health programs.
- Data collection, analysis, and reporting related to Children's Mental Health services system wide.
- Developed the baseline report (Gap Analysis) on San Diego County's Children's Mental Health needs, used for the initial planning of the Mental Health Service Act.
- Part of Educational Advisory Committee which revised the Memorandum of Understanding between Mental Health Services (HHSA) and Education.
- Provided testimony to Court as consulting Forensic Psychologist at FEU.

Conservatorship Investigator, Office of Public Conservator (5/2003 – 1/2005)

- Provided Clinical and Forensic assessments for patients referred for Conservatorship
- Consulted with County and community mental health professionals.
- Provided written and oral reports to the Superior Court.

➢ **Mental Health Systems, Inc.** April 2001 - May 2003

Program Manager / Psychologist

- Oversight of two County-contracted Children's Mental Health programs, including budget development and analysis, clinical and administrative supervision.
- Interface with collaborative partners from Child Welfare Services, Juvenile Probation, Regional Center, and Juvenile Justice.
- Development of outcome data tracking system.
- Psychological & Neuropsychological Assessments and clinical intervention as needed.
- Maintained staff morale and retention during difficult transition period of contract novation.

➢ **West Florida Rehab Institute**, Pensacola, Florida June 1998 – Dec. 2000

Director of Psychological Services / Neuropsychologist

- Oversight of hospital based programs providing services to neurologically and physically impaired patients undergoing rehabilitative care.
- Developed, implemented, directed, and evaluated clinical services delivered by multi-disciplinary team of professionals, including physiatrists, psychiatrists, neurologists, speech pathologists, occupational therapists, psychologists, physical therapists, vocational therapists.
- Responsible for budget development and monitoring of services delivered.
- Provided expert witness testimony in civil/personal injury cases.

➢ **Area Mental Health Center**, Garden City, Kansas Nov. 1996 – June 1998

Director Behavioral Health Services, St. Catherine Hospital

- Administrative and clinical oversight of interagency collaborative which provided inpatient mental health services for a multi-county, rural region of Kansas.
- Responsible for budget development and monitoring of hospital-based services.
- Maintained interface between child and adult protective services, juvenile and adult justice systems, as well as educational systems throughout a four-county region.
- Provided psychological and neuropsychological assessment services in both hospital and outpatient settings.
- Under my direction this program evolved from a traditional medical treatment model to a Community Based/Integrated Mental Health model.

➢ **Independent Practice**, St. Petersburg, Florida Feb. 1992 – Nov. 1996

Clinical Psychologist / Neuropsychologist

- Psychological & Neuropsychological Assessments
- Individual, Couples & Group Psychotherapy
- Pain Management Intervention
- Expert witness testimony in civil/personal injury
- Psychological Evaluations for Pinellas County Probate

Consultant / Director of Services

- Provided clinical and administrative oversight of several hospital and outpatient-clinic based neuro-rehabilitation services.
- Responsible for clinical supervision of multi-disciplinary team of rehabilitation professionals.
- Provided budget development and monitoring.

Educational Experience

- **Ph.D. Clinical Psychology**, University of Florida, 1989
  - **M.S. Clinical Psychology**, University of Florida, 1987
  - **B.S. Psychology**, with Honors, The University of Iowa, 1984

Teaching Experience

Clinical Supervisor – Alliant University, Forensic Psychology Graduate Program
2008 – 2011 (Graduate students and Interns)
Volunteer Clinical Instructor - UCSD Deptartment of Psychiatry
2003 - 2008 (1st Year Medical Students & Forensic Rotation)
Adjunct Instructor – National University, San Diego
2003 – 2006 (Cognitive Psychology, Biological Psychology)
Adjunct Faculty – University of West Florida, Pensacola, Florida
2000 (Psychology of Learning, Abnormal Psychology)
Adjunct Instructor – Garden City Community College, Garden City, Kansas
1997-1998 (Cognitive Psychology, General Psychology)
Adjunct Lecturer – University of Sarasota, Tampa Campus
1996-1997 (Psych. Assessment, Cognitive and Affective Bases of Behavior)
Instructor – Hillsborough Community College, MacDill Campus, Tampa
1995-1997 (General Psychology)

Daniel S. Hayes, Ph.D. LLC & Associates
2190 Ironwood Center Drive, Ste 2
Coeur d'Alene, ID 83814
Office (208) 666-0357 Fax (208) 666-0468 Billing (877) 821-2217

April 21, 2015

Rossman Law Group, PLLC
Attn: Jason Carroll
737 N. 7th St.
Boise, ID 83702
Fax (208)342-2170

Dear Jason Carroll,

In regards to the information you have requested, I have attached a copy of Dr. Hanger's CV. As for the Disarming Stress Program, this is thru Kootenai Health at 208.620.4176. The program is a 6 week program, 1.5 hours per week with a total cost of $149.00.
Dr. Hanger currently has zero (0) publications, and as far as expert testimony in the past four (4) years see cases listed:

- State of CA v Dwayne Johnson, San Diego Superior Court, #CD-207414, May 2010
- State of CA v Adam Brown, San Diego Superior Court, #CD247064, July 2013

Dr. Hanger's fees for expert testimony are as follows:

- $450.00/hour for direct court/deposition
- $150.00/hour for travel/wait time

If any further information is needed please contact me at 208.666.0357.

Thank you

Pam Everitt
Office Manager

Exhibit "B"

Daniel S. Hayes, Ph.D., L.L.C. and Associates
Daniel S. Hayes, Ph.D., Licensed Psychologist PSY-244
Philip A. Hanger, Ph.D., Licensed Psychologist PSY-202760
Emily Crawford, Psy.D., Licensed Psychologist PSY-202783
Steve Allen, M.S., Service Extender SE-202785
2190 Ironwood Center Drive
Coeur d'Alene, ID 83814
208.666.0357
208.666.0468 fax

Ψ

NEUROPSYCHOLOGICAL EVALUATION

Patient Name: Ronnell "Ron" Barrett **DOB:** [redacted] **Age:** 48

Date of Evaluation: 10 April 2015

Reason for Referral:

Ron Barrett is a 48 year-old, single, right-handed, Caucasian male who was referred by his attorney through the Rossman Law Group, for a neuropsychological evaluation, to assist in determining Mr. Barrett's current level of cognitive and psychological functioning.

Records Reviewed:

Over 1300 pages of medical records were provided by Mr. Barrett's legal representation, which were reviewed as part of this evaluation. A non-exhaustive listing of these records includes:

- Complaint and Demand for Jury Trial, submitted by Rossman Law Group, 12/11/2013
- Records from medical treatment facilities
  - Shoshone Medical Center, Kellogg
  - Northwest Specialty Hospital, Post Falls
  - Mountain Health Services, Kellogg
- Medical treatment records from a number of providers
  - Frederick Haller, M.D.
  - Terry Spohr, PAC
  - Michael Ludwig, M.D.
  - Arthur Watanabe, M.D.
  - James Harris, M.D.
  - David Warden, M.D.
  - John McNulty, M.D.
  - Jeffrey McDonald, M.D.
- Independent Medical Evaluations
  - Brian Tallerico, D.O. on 1/19/2013
  - John McNulty, M.D. on 10/8/2013
- Psychological & Neuropsychological Evaluations
  - Daniel Hayes, Ph.D. on 6/12/2012
  - John Wolfe, Ph.D. on 7/16/2012
  - Allen Bostwick, Ph.D. on 4/23/2014

Background Information:

Mr. Barrett was born in Seattle, Washington. He indicated his primary residence has been Mullen, Idaho. Mr. Barrett indicated that he completed a high school education, admitting to receiving grades of "B's and C's." He stated he did poorly in biology, while his more favored classes were in business math and history. He indicated he lost interest in pursuing a career related to business, however, due to a conflict with his teacher in high school. Mr. Barrett has had prior history of working as a firefighter for the Forest Service for approximately six years. Mr. Barrett stated he has never been married, and has no children. He indicated that he recently broke off a relationship with his girlfriend of approximately five years due to differences related to their background - he characterized that she "came from a rich family."

Mr. Barrett is employed through the Hecla Mining Company and worked at the Lucky Friday mine. Mr. Barrett stated he has been employed by Hecla for approximately 18 years, and described his job duties as a "cager," operating heavy machinery. According to Mr. Barrett, on 12/14/2011, he was involved in an accident within the mine, described as a "rock burst," during which he sustained traumatic injuries.

According to the Complaint document submitted by Mr. Barrett's attorney, Mr. Barrett and several other miners were involved in a "rock burst" incident on 12/14/2011 in a section of the mine at approximately the 5900 foot level. This document defines a "rock burst" as a "spontaneous, violent fracture of rock that typically occurs in deep mines." As a consequence of these "rock bursts," additional collapse of the "roof" and walls of the mine may occur, resulting in injury, entrapment, or even death to the miners.

Medical Records:

Records dated **12/11/2014** from the Emergency Department of the Shoshone Medical Center indicate Mr. Barrett presented to their facility alert, fully oriented, talking with staff, and with no apparent loss of consciousness at the time of this triage, 10:15pm. Mr. Barrett's complaints including back and neck soreness, with "mild tenderness" noted in his dorsal neck region. Radiological studies of Mr. Barret's spine, read by Dr. James Harris, indicated degenerative disease at the c3-4 level, and to a lesser degree at the C4-5 level. Dr. Harris concluded that there was "no fracture or malalignment or soft tissue swelling identified" from this study. The concluding impressions from the Emergency Department was that Mr. Barrett experienced a cervical strain and exacerbation of a previous lower back injury. He was discharged home, according to the nurse's note, at 11:59pm on that same evening.

Follow up services with certified physician's assistant, Terry Spohr, through Mountain Health Services on **12/27/2011** provided the impression that Mr. Barrett was suffering from amnesia probably caused by a mild concussion. Supporting indications sited included Mr. Barrett's report of having been struck in the head during the accident and subsequent headaches. On **1/5/2012,** Mountain Health Services' records provided the diagnostic impression that Mr. Barrett was recovering from a concussion and cervicalgia (neck pain) as the result of the accident of 12/14/2011. On a subsequent service visit with Terry Spohr, PAC on **1/14/2012,** the additional diagnosis of Amnesic Disorder (294.0) was provided. On 2/21/2012, Mr. Barrett was provided the diagnoses of an Anxiety State (300.0) and a Depressive Disorder (311).

On **1/9/2012,** Mr. Barrett received an MRI scan of his lumbar region at Shoshone Medical Center, and the results were negative for any acute injuries. **On 1/30/2012,** Jeffrey McDonald, M.D., opined that Mr. Barrett was suffering from cervical pain radiating from what was estimated to be the C5 region. On **2/2/2012,** an MRI study of his cervical region, read by Arthur Watanabe, M.D., indicated mild to moderate disc degeneration in his c3-4 and c4-5 regions. On

3/13/2012, Mr. Barrett underwent a c3-4 discectomy and fusion, performed by Dr. McDonald at Northwest Specialty Hospital. At a follow up visit with Dr. McDonald on 12/3/2012, Mr. Barrett was considered to be doing "poorly" in regard to his recovery from the procedure – notably, he continued to have extensive pain complaints. Dr. McDonald provided the consideration that Mr. Barrett's physical condition may be confounded by a psychological condition, and he offered the rule out of posttraumatic stress disorder. Nonetheless, Dr. McDonald indicated Mr. Barrett was at his maximum medical improvement at that time. On 2/7/2013, Frederick Haller, M.D., of Mountain Health Services, provided the diagnosis of Posttraumatic Stress Disorder (309.81).

An Independent Medical Evaluation, completed by Brian Tallerico, D.O. on 1/19/2013, noted Mr. Barrett's previous history of lumbar and left knee issues. Additional impressions included cervical sprain/strain with permanent aggravation of an underlying c3-4 degenerative disc disease, related to his accident of 12/14/2011. Mr. Barrett's c3-4 discectomy and fusion were noted. Dr. Tallerico also opined that Mr. Barrett was exhibiting "significant psychological issues" following the accident, and recommended further evaluation of this condition. In an Idaho Industrial Commission document, dated 1/10/2013, Dr. Tallerico indicated his impression that Mr. Barrett could be considered to return to his time-of-injury duties on 2/4/2013.

An Independent Medical Evaluation on 10/8/2013, performed by John McNulty, M.D., indicated the impression that Mr. Barret had reached his maximum level of medical improvement regarding his cervical spine injury. Dr. McNulty indicated that Mr. Barrett demonstrated chronic residual neck pain, status-post his c3-4 discectomy and fusion. In addition, he was manifesting chronic thoracic and lumbar sprain/strain. Dr. McNulty offered his opinion that Mr. Barrett was able to return to work at "light medium" job duties, but would be unable to return to his previous, "strenuous" occupation as a miner. Dr. McNulty further qualified that Mr. Barrett may operate machinery in his job, but placed a maximum lifting limit of 25 pounds.

Previous Psychological Evaluations:

Mr. Barrett underwent a psychological Diagnostic Interview with Daniel Hayes, Ph.D. on 6/19/2012. Dr. Hayes concluded that Mr. Barrett met clinical criteria for the diagnosis of Posttraumatic Stress Disorder, and recommended a course of counseling to address his psychological distress and challenges with adaptive functioning. In addition, Dr. Hayes recommended that Mr. Barrett obtain a comprehensive neuropsychological evaluation to ascertain the presence and nature of any cognitive deficits.

On 7/16/2012, Mr. Barrett completed a neuropsychological evaluation performed by John Wolfe, Ph.D. Results indicated Mr. Barrett's attention functioning to be grossly normal, but he did display memory deficits on a number of measures administered, particularly for verbal material. His intellectual abilities were noted to be generally within the *Average* range for his age, with verbal abilities noted to be a relative weakness for him. His sensory and motor testing were noted to be within normal limits. Based on these findings, Dr. Wolfe provided the diagnostic impression of a Cognitive Disorder, NOS (294.9). Dr. Wolfe included that Mr. Barrett provided the impression that his attention and memory difficulties were improving, but noted that others have reported Mr. Barrett continues to have challenges with these abilities. Dr. Wolfe qualified Mr. Barrett's cognitive difficulties as causing a "functional day to day problems." And while Dr. Wolfe expressed uncertainty as to whether the discrepancy between verbal and nonverbal, visual abilities was "new," he did conclude that Mr. Barrett's memory deficits were "likely the result of a brain injury possibly of a concussing type of nature." Based on the results of psychological testing and his diagnostic interview, Dr. Wolfe also provided the diagnosis of Posttraumatic Stress Disorder (309.81).

On 4/23/2014, Mr. Barrett obtained a neuropsychological evaluation, completed by Allen Bostwick, Ph.D. Dr. Bostwick noted the presence of "mild inefficiencies" in Mr. Barrett's verbal functioning. However, he then, curiously, offered that these were expected findings given Mr. Barrett's premorbid level of intellectual and cognitive functioning, although no indication of previous cognitive deficient was noted in the record. In addition, Dr. Bostwick concluded that Mr. Barrett's mildly weaker verbal performances may not be a new finding. Dr. Bostwick clarified that the only significant impairment was within the areas of verbal learning and memory, which he cited as being consistent with that obtained in previous testing by Dr. Wolfe. However, Dr. Bostwick concludes that Mr. Barrett results are "unremarkable for any clinically significant neurobehavioral residuals." He further opines that Mr. Barrett's "neurobehavioral complaints are accounted for by several psychodynamic factors including a strong somatoform disorder consistent with hypochondriasis which is associated with secondary gain motivation" as well as a "preexisting passive-dependent personality trait which predisposes him to react with a 'mass hysteria' reaction to his meeting with colleagues to discuss the mining accident of 12/14/11." Curiously, Dr. Bostwick previously noted that "Mr. Barrett was pleasant and cooperative throughout the lengthy evaluation and his neuropsychological testing results are considered to be valid representations of his current states of assessment neurobehavioral functioning." It was also noted that when administered the Rey 15-Item Memorization Test, a measure sensitive to reduced motivation or feign neurobehavioral deficits, Mr. Barrett's performance was within the *Average* range, "and thus reflects adequate effort and motivation on memory testing." In addition, on the Test of Memory Malingering (TOMM), Mr. Barrett's performance was within the *Average* range, "and thus reflects adequate effort and motivation on neuropsychological testing."

Measures Administered:

- Clinical interview with patient, Ron Barrett
- Wechsler Adult Intelligence Scale – Fourth Edition (WAIS-IV)
- Verbal Fluency Test (FAS)
- Wechsler Memory Scale – Third Edition (WMS-III, selected subtests)
- California Verbal Learning Test– Second Edition (CVLT-II); Short Form
- Trail Making Test
- Stroop Interference Test
- Grooved Pegboard Test
- Personality Assessment Inventory (PAI)
- Substance Abuse Subtle Screening Inventory – Third Edition (SASSI-3)
- McGill Pain Questionnaire (MPQ)

Clinical Interview:

Mr. Barrett admitted at the start of this assessment that he was somewhat upset, having had difficulty finding parking near this psychologist's office. He described his current state as "tired" owing to what he indicated was difficulty sleeping. He also described himself as being "uptight" today, adding that he tries to "keep calm, but it wears on you."

When asked to relate his understanding of the nature and purpose of this present examination, he offered, "The accident at the mine – being buried – it's gotten better, but I still have issues when I'm down there." He then related that he had been receiving psychological counseling services from Dr. Daniel Hayes for his emotional distress, indicating that it "helped." He admitted that he feels emotionally better when he doesn't talk about the accident of December 2011 and his subsequence adjustment to the injuries he sustained. He indicated that when he does talk about it, he becomes anxious – he noted that this was one of the reasons he was

"uptight" prior to the outset of this assessment, due to his anxiety about expecting to talk about the accident and his injuries. Mr. Barrett claimed that he did not experience significant anxiety prior to the accident referenced. He also noted that he feels he must continue working at his present position due to limitations in finding other comparable employment due to his age – "If I was younger, I wouldn't be doing it." Mr. Barrett admitted that he has involuntary, intrusive thoughts about the accident at other times, but claimed he has become effective at "pushing them out of (his) head." He noted additional distress due to his perception that he has experienced a change in his physical capacity which limits his job performance. He also noted that he has observed a decrease in his interests in recreational activities that he previously enjoyed, such as fishing and hunting.

Mr. Barrett described being hypervigilant to his surroundings, characterizing himself as "always looking around that next corner for danger." He described being more easily startled to loud noises, describing the reaction as, "I jump more, my heart starts pumping." He also stated he experiences a rapid escalation of these physiological reactions when the mine elevator stops suddenly. He admitted to having nightmares involving the accident in the past, but stated these have discontinued. He did express that he will suddenly recall a distressing aspect of the accident during the day, which results in a distraction in his concentration to the task at hand. He noted that, prior to the accident of December 2011, he did not have this pattern of emotional distress and response to stressors. He stated he had been resistant to leaving work when feeling emotionally distress, as he was very invested in keeping his "outstanding" work record. Mr. Barrett denied any past or current suicidal ideation, claiming his religious beliefs buffer him from having such thoughts. He denied any problems with anger or aggressive actions in the past as well as at present.

When asked if he noted any changes to his thinking abilities, Mr. Barrett stated he forgets information more often than he did prior to the accident. He stated he writes information down as a means of compensating for this memory deficiency, but felt he continues to have challenges remembering. He also claimed he repeats statements to friends and co-workers.

Mr. Barrett indicated he sustained a neck injury during the accident of December 2011. He claimed that he declined pain medication for this condition, as he did not want to "get dependent" on them. In addition, he stated his belief that he sustained a concussion with a loss of consciousness, of uncertain duration. He stated he has no recall of the events of the accident, with the last recall prior to the event of him "working with a pry tool." He reportedly sustained lacerations to the back of his head, and related later discovery of significant damage to the left side of the hard hat he was wearing at the time of the accident. Mr. Barrett acknowledged that he sustained a concussion during a motor vehicle accident in 2006, but denied any loss of consciousness or any resulting neuropsychological sequelae.

Mr. Barrett admitted to using alcohol, but characterized it as occasional use and non-problematic at present. He acknowledged he used alcohol to a greater degree in the past, and admitted to having been involved in a motor vehicle accident in 1999 causally related to his alcohol use. He claimed that the accident in 1999 "straightened (him) out," and that he has no longer used alcohol to excess. He denied any illicit drug use at present and in the past.

Mr. Barrett characterized himself as a helpful person who tries to be good to others. He currently lives alone in his own house, but stated he has no difficulty completing the necessary activities of daily living, such as shopping, cleaning, and financial management. He stated he did not have clear plans for the future, but added that he was mindful of the need to plan for his retirement years.

Behavioral Observations:

Mr. Barrett presented 15 minutes early for his scheduled appointment. He was neatly groomed and casually dressed. His facial affect was of normal range of expression. However, his expressive language was of somewhat reduced volume and of slowed rate of output. His vocal quality was characterized as "raspy," yet he was quite verbose in relating his personal history. His speech was of normal syntax and logically organization, with no evidence of bizarre or tangential content. Receptive language abilities were grossly intact, as demonstrated by his accuracy in responding to questions and initiation to tasks. He did not exhibit any excessive restlessness or agitation, with no increased susceptibility to distraction. He remained seated throughout the testing sessions, with no excessive shifting of posture or extraneous movements. He appeared to put forth sincere effort to tasks that were clearly difficult for him, continuing to work on items until terminated by this examiner. No indication of an attempt to exaggerate his symptom pattern or compromise his performance on tasks was noted. The results of this assessment are therefore considered to provide a valid estimate of Mr. Barrett's current level of neuropsychological and psychological functioning.

Results of Testing:

1. **Intellectual Abilities.**

Mr. Barrett was administered the **Wechsler Adult Intelligence Scale-IV (WAIS-IV)**, a standardized measure of cognitive and intellectual abilities. Mr. Barrett's **Full Scale IQ** score of **102** is considered within the *Average* range for his age, and consistent with estimates of his premorbid level of abilities, based on education and occupation. This result is congruent with that found on previous testing in June 2012, reflecting a slight improvement in performance of global intellectual abilities over the past two assessments.

Mr. Barrett obtained a **Verbal Comprehension Index** score of **93** on the **WAIS-IV**, which is considered within the *Average* range for his age. This index measures verbal concept formation, verbal reasoning, and knowledge acquired from one's environment. This performance is at an expected level given his educational history and not indicative of any impairment in verbal intellectual abilities at present. However, this finding represents a significant improvement in his level of verbal intellectual abilities from previous testing in June 2012 and April 2014. His **Perceptual Reasoning Index** score was **105**, which is considered within the *Average* range for his age, and unchanged from previously assessed level in 2012 but slightly improved from 2014. This index measures perceptual and fluid reasoning, spatial processing, and visual-motor integration. Mr. Barrett obtained a **Working Memory Index** score of **100**, which is considered within the *Average* range for his age, congruent with the results of both previous testing sessions. Performance on this index involves attention, concentration, mental control and reasoning. Working memory tasks require the ability to temporarily retain information in memory, while performing some operation or manipulation with it, and then providing a response. Mr. Barrett's **Processing Speed Index** score of **114** is considered within the *High Average* range when compared with same-age peers, a relative strength in cognitive abilities for Mr. Barrett, and a consistent finding from previous testing in 2012 and 2014. Tasks on this index involve rapid eye-hand coordination, as well as visual scanning, sequencing and discrimination of simple visual information.

The table below provides his **WAIS-IV** index composite score results and percentile rankings. These scores have a comparative mean score of 100 and *Average* range reflective of one standard deviation (15 points) above and below this mean – a range which comprises performances between the 16th to 84th percentile ranks among same-age peers. The confidence interval provided indicates the range within which Mr. Barrett's actual ability level may be

considered, within a reasonable degree of statistical probability (i.e., 95% of the time). The composite scores from previous testing in June 2012 and April 2014 are provided for comparative purposes.

WAIS-IV Index	Current Composite Score	Percentile Rank	95% Confidence Interval	Qualitative Description	June 2012 Composite Score	April 2014 Composite Score
Full Scale IQ	102	55th	98-106	*Average*	97	92
Verbal Comprehension	93	32nd	88-99	*Average*	83	81
Perceptual Reasoning	105	63rd	99-111	*Average*	100	92
Working Memory	100	50th	93-107	*Average*	100	95
Processing Speed	114	82nd	104-121	*High Average*	114	111

Mr. Barrett's performance within **Verbal Comprehension Index** domain was relatively consistent across areas of ability assessed, with all levels falling within the *Average* range for his age. He displayed an expected level of ability on a subtest that allowed him to demonstrate his knowledge of cultural and historical information (Information), a measure commonly considered to be a reflection of acquired academic-based knowledge. This performance is congruent with the level of abilities seen from individuals with a high school education, and no appreciable change in performance relative to findings of June of 2012 and April 2014. His ability to synthesize verbal concepts and express abstract reasoning determinations (Similarities) was also within the *Average* range for his age. This current performance represents a significant improvement in performance on this subtest when compared with previous testing results. His performance on a task requiring him to orally express the definition of words (Vocabulary) was within the lower *Average* range for his age. This level of performance represents an improvement relative to that seen on previous testing. Overall, these results do not provide any indication of a deficit in general verbal intellectual abilities, and shows an improvement in verbal intellectual abilities over findings from two previous assessments.

The table below provides his Verbal Comprehension subtest scores. Comparisons can be made from a mean score of 10 and an *Average* range that reflects one standard deviation (2 points) above and below this mean – comprising performances between the 16th to 84th percentile ranks among same-age peers. Scaled scores from the June 2012 and April 2014 assessment are provided for comparative purposes.

WAIS-IV Verbal Comprehension Subtests	Scaled Score	Percentile Rank	Qualitative Description	June 2012 Scaled Score	April 2014 Scaled Score
Similarities	9	37th	*Average*	6	5
Vocabulary	8	25th	*Average*	7	6
Information	9	37th	*Average*	8	9

Mr. Barrett's performance on the subtests comprising the **Perceptual Reasoning Index** was also somewhat variable, with his best performance noted on a task involving his ability to visually recognize abstracted visuoperceptual elements and arrange them into the correct synthesis (Visual Puzzles). On this task, his current level of performance was considered within the *High Average* range for his age, a relative strength for Mr. Barrett within the domain of nonverbal, visual intellectual abilities and unchanged from the level of performance noted on testing in 2012, but a slight increase in performance relative to April 2014. His performance on

the Block Design subtest was within the Average range for his age, and equivalent to that seen on previous testing in 2012, but a significant improvement in performance relative to April 2014. This task requires him to complete an analysis of a visual whole and transfer this information into component parts (visual abstraction), and construct a similar model using spatial organization as well as rapid visuomotor coordination. His performances on the Matrix Reasoning subtest, an untimed task considered to measure fluid or novel visuospatial problem solving ability, was also within the Average range for his age. This finding represents a substantial improvement in performance relative to previous test results of 2012, but no appreciable change from performance in April 2014.

The table below provides his Perceptual Reasoning subtest scores. Comparisons can be made from a mean score of 10 and an *Average* range that reflects one standard deviation (2 points) above and below this mean – comprising performances between the 16th to 84th percentile ranks among same-age peers. Scaled scores from the June 2012 and April 2014 assessment are provided for comparative purposes.

WAIS-IV Perceptual Reasoning Subtests	Scaled Score	Percentile Rank	Qualitative Description	June 2012 Scaled Score	April 2014 Scaled Score
Block Design	9	37th	*Average*	10	6
Matrix Reasoning	11	63rd	*Average*	7	10
Visual Puzzles	13	84th	*High Average*	13	10

Mr. Barrett's performance on the subtests of the **Working Memory Index** reflected a level of performance considered well within the *Average* range for his age, with no indication of there being a weakness for Mr. Barrett in this domain of functioning. His subtest performance on an immediate auditory recall task (Digit Span) was within the *Average* range, reflective of an intact ability to focus his attention in a relatively stimulus-free environment (i.e., the testing room). On a task requiring Mr. Barrett to perform mental mathematical calculations (Arithmetic) his performance was also considered within the *Average* range for his age. His Digit Span performance was consistent with observed findings from both previous assessment, and while his mental calculation abilities were unchanged from June 2012, they represent an improvement over that seen from the April 2014 assessment.

The table below provides his Working Memory subtest scores. Comparisons can be made from a mean score of 10 and an *Average* range that reflects one standard deviation (2 points) above and below this mean – comprising performances between the 16th to 84th percentile ranks among same-age peers. Scaled scores from the June 2012 and April 2014 assessments are provided for comparative purposes.

WAIS-IV Working Memory Subtests	Scaled Score	Percentile Rank	Qualitative Description	June 2012 Scaled Score	April 2014 Scaled Sore
Digit Span	10	50th	*Average*	10	11
Arithmetic	10	50th	*Average*	10	7

Within the subtests comprising the **Processing Speed Index**, Mr. Barrett displayed a Superior level of performance on a task requiring him to rapidly scan visually presented geometric shapes and compare details of these figures (Symbol Search). This result is consistent with that seen on previous testing. His performance on a task requiring rapid visuomotor production (drawing) of symptoms to matched numbers (Coding) was within the upper *Average*

range for his age, also comparable to previous test results. Overall, these results indicate a relative strength in cognitive processing speed for Mr. Barrett, compared with age-peers.

The table below provides his Processing Speed subtest scores. Comparisons can be made from a mean score of 10 and an *Average* range that reflects one standard deviation (2 points) above and below this mean – comprising performances between the 16th to 84th percentile ranks among same-age peers. Scaled scores from the June 2012 assessment are provided for comparative purposes.

WAIS-IV Processing Speed Subtests	Scaled Score	Percentile Rank	Qualitative Description	June 2012 Scaled Score	April 2014 Scaled Score
Symbol Search	14	91st	*Superior*	14	14
Coding	11	63rd	*Average*	11	10

2. Attention and Concentration.

Mr. Barrett's focused and sustained attention, assessed on a digit recall task, was within the average range for his age. His immediate recall of a super-span word list (CVLT) was within the lower average range, suggestive of some confounding influence of his need to impose organization onto this information. These results do not reflect a significant impairment in attention and concentration functions, and are considered congruent with findings from previous testing.

3. Language Functions.

Mr. Barrett's gross receptive and expressive language abilities were within normal limits. His ability to express word definitions (Vocabulary) was within the Average range, and his sustained verbal expression (FAS) was also within normal limits. He did not exhibit a significant difficulty with naming, word finding or presence of paraphasic errors during this assessment. These findings of no impairment within the domain of language functions are consistent with the results obtained on previous testing.

4. Visuoperceptual Abilities.

Mr. Barrett's ability to reproduce visual material on a drawing task (Visual Reproduction Copy) was above average for his age. His ability to recognize abstracted elements of a visual stimulus were similarly above average (Visual Puzzles). His visuoconstruction, assessed on the Block Design subtest, was within the average range for his age. These results suggest no impairment in visuoperceptual abilities for Mr. Barrett, a finding consistent with previous test results.

5. Verbal Learning and Memory.

Mr. Barrett's initial recall of a super-span word list (CVLT) was at the low average range (16th percentile) for his age and gender. After four repeated exposures to this material, he demonstrated average recall performance, suggestive of an adequate learning capacity (32nd percentile). His short delayed recall performance was the average range (50th percentile), and not reflective of a significant loss of information over this interval. However, he exhibited a slight decline in level of recall after a longer, distraction-filled delay (16th percentile). When provided category (semantic) cuing to aid his retrieval process, he demonstrated a level of performance considered within the average range (50th percentile) – results suggesting he has intact retention of this verbal information, but a slightly weakened retrieval capacity. Overall, Mr. Barrett's performance on this verbal list-learning and retention task was significantly improved relative to his performance on a similar task at previous testing.

His performance on the Logical Memory subtest of the WMS-III reflected his immediate recall of logically organized verbal information (stories) was within the low average range (16th percentile) for his age. However, his recall of this same material after a distraction-filled delay showed considerable improvement to within the average range (37th percentile), with a 90% retention of information originally learned (84th percentile). These results represent a considerable improvement in verbal memory performance relative to previous testing in 2012, but no significant change in prose recall noted in April 2014.

6. **Visual Memory.**

Mr. Barrett's immediate recall by drawing of visually presented geometric shapes (Visual Reproduction subtest of the WMS-III) was within the upper average range for his age (84th percentile). After a delay, he was able to demonstrate retention in his drawing of 67% of this material, with an overall recall performance considered within the average range (63rd percentile). Immediate recall of more complex visual material (Faces) was also within the average range (25th percentile), and his delayed recognition recall of this information was within the superior range for his age (95th percentile). These results mirror those of previous testing, which reflect a relative strength for Mr. Barrett in his visuospatial memory functions.

7. **Abstract Reasoning and Executive Functions.**

Verbal abstract reasoning abilities, assessed on a task requiring Mr. Barrett to provide overlapping concept elements between two target words (Similarities) was within the average range for his age (37th percentile). Similarly, his ability to identify visual patterns on a Matrix Reasoning task was within the Average range (63rd percentile). His ability to sustain verbal output within a restricted phonemic category on a fluency task (FAS) was also unimpaired (60-64th percentile). His ability to maintain simultaneous, alternative sequences on a drawing task (Trails B) reflected mild impairment for his age and education level (36T). His performance on a complex executive processing task (Stroop) was within the lower average range as well. This task requires the individual to continuously monitor the visual quality (color of ink) of the words read, while inhibiting the dominant semantic response to read the printed words. As a whole, these results suggest adequate reasoning and executive function abilities, consistent with findings from previous testing.

8. **Personality and Psychological Functioning.**

Mr. Barrett was administered the *Personality Assessment Inventory* (**PAI**), a standardized instrument of psychological functioning and personality. His pattern of responses on this measure indicated he provided consistent responses to items of similar content. His pattern of endorsement on this measure indicated he approached the task in a reasonably forthright manner, without an attempt to present an unrealistic or inaccurate impression that was either more negative or positive than his clinical presentation would warrant.

Individuals with similar **PAI** profiles are described as maintaining ruminative concerns about their physical functioning. They view their lives as being disrupted by their physical problems, and report feeling these problems have left them feeling tense and worried, and contributed to the disruption of interpersonal relationships. This response pattern is reflective of individuals with significant somatic concerns, at a degree of endorsement greater than that seen within clinical populations. This pattern is, again, reflective of a ruminative preoccupation with their physical functioning that may spuriously elevate their subjective severity rating of these symptoms. These individuals are likely to experience chronic fatigue and weakness that may limit their perceived or actual level of performance on physical tasks.

This **PAI** profile is consistent with an individual who reports specific fears and anxiety surrounding a past traumatic life event. These individuals display a variety of maladaptive behavior patterns aimed at controlling their anxiety. This pattern is not indicative of a phobic reaction. These individuals are perceived by others as being somewhat perfectionistic. They may admit to being fairly rigid in their conduct and inflexible in their personal guidelines. Their rumination style may result in diminished efficiency at making decisions.

Individuals with this **PAI** response pattern are seen as experiencing symptoms of depression. While they do not endorse feeling hopeless and maintain generally intact self-esteem, their symptoms of depression are primarily affective and physiological in nature. These individuals openly admit to feelings of sadness, a loss of interest in normal activities, and a loss of pleasure in things they previously enjoyed. Additional symptoms associated with this profile include difficulty sleeping, decreased energy, and reduced libido. This PAI profile is not indicative of any pattern of psychotic thinking or extremes of mood and impulsivity.

The interpersonal style of individuals with this **PAI** profile is characterized as somewhat distant and withdrawn. Others view them as being reserved and aloof, and they may perceive themselves as being shy. They report feeling a great deal of tension most of the day, and experience difficulty relaxing.

9. Alcohol and Substance Use.

Mr. Barrett's pattern of responses to a standardized substance dependence screening instrument (**SASSI-3**) was considered to be reflective of an individual who is somewhat defensive regarding the self-report of his substance use. While his face valid endorsement of alcohol use on this measure was below the level seen for individuals with a severe substance abuse problems, the subtle and supplemental symptoms endorsed, along with his defensive pattern, is suggestive of an individual with a high probability of being at risk for developing a substance abuse disorder.

Mr. Barrett's pattern of item endorsement on the **PAI** was not indicative of any significant problems with alcohol or drug abuse or dependence.

Mr. Barrett denied any recent life problems associated with his alcohol consumption. However, his remote history of legal and personal safety problems related to his alcohol use support the concern that he remains at risk for development of an alcohol use disorder.

10. Pain Experience.

Mr. Barrett completed the **McGill Pain Questionnaire (MPQ)**, a self-report measure of pain experience that assesses both the quality and intensity of subjective pain. The McGill provides a rating (total PRI score), as well as three subscales of pain quality; *Sensory*, *Affective*, and *Evaluative*. The *Sensory* subscale describes pain in terms of the temporal, spatial, pressure, and thermal qualities – Mr. Barrett endorsed his present pain experience in this domain as *throbbing, shooting, stabbing, sharp, pinching, wrenching, burning, tingling, hurting,* and *tender*. The *Affective* subscale describes the pain experience in terms of tension, fear and autonomic properties – Mr. Barrett indicated his experience as *tiring, frightful, grueling,* and *wretched* within this subjective category of pain experience. Finally, the *Evaluative* subscale describes a general subjective quality of the pain experience – Mr. Barrett reported his pain experience as *intense*. Utilizing the quantification standards of the MPQ, Mr. Barrett's item endorsement pattern provided a Total Pain Response Index score of 45 out of a possible 78. This score is substantially higher than the average level of pain rating offered by patients experiencing chronic pain.

Mr. Barrett's pattern of item responses on the Somatization Scale of the PAI was similarly in excess of the normative patient population (91T). This response pattern is generally seen from individuals who experience chronic somatic distress, accompanied by fatigue and weakness to the degree that limits the ability of these individuals to perform physical tasks, at times. These individuals are seen to be resistant to psychological intervention for their somatic/pain management.

Impressions:

- Improvements were noted relative to previous testing in 2012 and 2014 within the domains of general verbal intellectual abilities as well as verbal learning and memory, which are now within the unimpaired range for his age – congruent with expected levels of performance based on education and vocational history.
- Mr. Barrett does not exhibit any significant neurocognitive deficiencies at the present time. It may be considered that any cognitive sequelae that had been documented by previous medical and psychological providers has resolved.
- Congruent with the impressions offered by previous providers, lingering deficits in neurocognitive efficiency, particularly noted in the domain of attention and concentration, may be attributed to the negative confounding effect of Mr. Barrett's distressing, and therefore, distracting, psychological condition.
- Mr. Barrett is considered to meet clinical criteria for the diagnosis of Posttraumatic Stress Disorder.
    - Mr. Barrett was directly exposed to a life threatening traumatic event on 12/14/2011.
    - He experiences recurrent, involuntary, ruminative memories of this traumatic event.
    - He admitted to avoiding discussion of the distressing memories with family and peers.
    - He experiences persistent fear and anger related to the events of the accident, and has subsequently had diminished interest in previously enjoyable activities.
    - He admits to being hypervigilant to dangers since the accident, and described feeling an increased startle reaction to loud noises.
    - This negative emotional condition has persistent for several years, as documented by previous health providers and by Mr. Barrett's own report.
    - This condition is not causally related to Mr. Barrett's alcohol use – he denied any illicit substance use.
- Mr. Barrett's clinical presentation meets clinical criteria for the diagnosis of Major Depression Disorder.
    - Mr. Barrett exhibits and report experiencing a depressed mood as a predominant, pervasive experience on more days than not.
    - He has experienced a marked decrease in participating in previously enjoyed activities.
    - He has impaired sleep on most nights.
    - He reports feeling slowed down, evidenced in his speech as well as general level of activity.
    - He admits to continued disturbance in concentration and attention efficiency, in the absent of a quantified neuropsychological impairment in this domain, attributed to the distracting and ruminative quality of his emotional distress.

- Mr. Barrett displays additional ruminative and anxious features which further confound his psychological condition.

- Mr. Barrett's pain experience is augmented by his psychological distress – which is not to say it is psychosomatic. Rather, Mr. Barrett's pattern of pain complaints is most congruent with that seen from individuals with legitimate physical causal factors initiating the pain experience, which are then amplified in psychological experience and tolerance due to his maladaptive rumination and anxiety.

Clinical Diagnoses:

- **Posttraumatic Stress Disorder (309.81)**
- **Major Depressive Disorder, Mild, Recurrent, with Anxious Distress (296.31)**
- **Psychological Factors Affecting Other Medical Condition, Pain Experience, Moderate (316)**

Recommendations:

- Mr. Barrett may be considered for continued benefit from psychotropic medication to address his anxiety and depression. While he has demonstrated some acceptance of psychological intervention in the past, it may be considered that this medication management may be monitored by his primary care physician, particularly in light of the confounding effect his psychological condition has on his physical condition.

- Mr. Barrett may benefit from psychological counseling targeting his adjustment to his pain experience – particularly as his emotional distress augments this experience. Such psychological pain management may include relaxation and mindfulness practices, as well as stress management techniques, in additional to more traditional cognitive-behavioral therapeutic intervention.

- Mr. Barrett should be encouraged to establish and maintain community support and engagement with an interest in decreasing his symptoms of depression and anxiety. Such a support network could be beneficial in providing Mr. Barrett with a return in avocational activities and the positive influence this may have on his psychological functioning.

- Mr. Barrett should be encouraged to actively monitor his alcohol consumption due to heightened risk he has of developing an alcohol abuse problem. While he may not meet criteria for substance abuse treatment at present, he may benefit from the educational and supportive aspects of such intervention.

Philip A. Hanger, Ph.D.
Licensed Psychologist

Exhibit "C"

Daniel S. Hayes, Ph.D., L.L.C. and Associates
Daniel S. Hayes, Ph.D., Licensed Psychologist PSY-244
Philip A. Hanger, Ph.D., Licensed Psychologist PSY-202760
Emily Crawford, Psy.D., Licensed Psychologist PSY-202783
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NEUROPSYCHOLOGICAL EVALUATION

Patient Name: Hammerberg, Gregg **DOB:** [redacted] **Age:** 38

Date of Evaluation: 15 April 2015

Reason for Referral:

Gregg Hammerberg is a 38 year-old, right-handed, married male who was referred by his legal representation for a neuropsychological evaluation to ascertain the presence and nature of cognitive deficits and psychological functioning, status post a traumatic head injury December 2011.

Records Reviewed:

Mr. Hammerberg's legal representatives provided this psychologist with approximately 1400 pages of records related to his medical and work history. A non-exhaustive list of the medical facilities, physicians, and mental health professionals and other items referenced in this collection of records includes:

General Records
- Complaint and Demand for Jury Trial, submitted by Rossman Law Group, 12/11/2013
- Four (4) unlabeled photographs of a mine worksite
- Fourteen handwritten pages of notes authored by Mr. Hammerberg related to the accident and his subsequent treatment process

Medical Facilities
- Shoshone Medical Center, Kellogg
- Mountain Health Care, Kellogg
- Northwest Specialty Hospital, Post Falls
- Kellogg Physical Therapy
- Kohal Pharmacy, Kellogg
- Rainbow Dental Clinic

Medical Physicians
- Terry Spohr, Certified Physician's Assistant
- James Edlin, M.D.
- Jeffrey McDonald, M.D.
- Roger Dunteman, M.D.
- Anthony Branz, M.D.
- Frederick Haller, M.D.
- Katie Klein, Certified Physician's Assistant
- Scott Gibbs, Certified Physician's Assistant

Independent Medical Evaluations
- Karl Goler, M.D, completed 10/12/2012

Psychological Treatment and Evaluations
- Daniel Hayes, Ph.D., Diagnostic Interview, completed 9/18/2012
  - Individual psychotherapy progress notes by Dr. Hayes, 9/25/2012 to 12/18/2013
- John Wolfe, Ph.D., Neurocognitive & Psychological Evaluation, completed 11/19/2012

Background Information:

Mr. Hammerberg was born in Deer Lodge, Montana. He described having lived most of his life in Wallace, Idaho. He is married to his wife of eleven years, and the couple have four children, ranging in age from seven to seventeen years of age. Mr. Hammerberg indicated that he completed a high school education, obtaining "average" grades. He estimated that his best class was "shop," while he struggled in "math" courses.

Mr. Hammerberg is employed through the Hecla Mining Company since March of 2007 and worked at the Lucky Friday mine. Following his injury/accident in December 2011, he was restricted from working. He reportedly returned to work in July 2012, but was still restricted from underground work. He has been working ever since then at what he described as a "surface, desk job," involving "tracking and data entry."

According to the Complaint document submitted by Mr. Hammerberg's attorney, Mr. Hammerberg and several other miners were involved in a "rock burst" incident on 12/14/2011 in a section of the mine at approximately the 5900 foot level. This document defines a "rock burst" as a "spontaneous, violent fracture of rock that typically occurs in deep mines." As a consequence of these "rock bursts," additional collapse of the "roof" and walls of the mine may occur, resulting in injury, entrapment, or even death to the miners.

Medical Records:

Records indicate Mr. Hammerberg was seen in **July 2006** by physician's assistant, Katie Klein, through Mountain Health Services for a complaint of lower back pain. Mr. Hammerberg denied any known trauma. He was prescribed muscle relaxants and anti-inflammatory medications, as well as stretching exercises and application of heat.

In **February 2007**, Mr. Hammerberg presented to Mountain Health Services with right elbow pain secondary to recent strenuous activity. He was diagnoses with "tennis elbow" and prescribed a standard course of rest, ice, compression, and elevation by physician's assistant, Scott Gibbs.

In **February 2008**, Mr. Hammerberg was seen by physician's assistant, Terry Spohr at Mountain Health Services, when he presented with a complaint of lower back pain. He indicated the onset following shoveling snow, and indicated his pain included muscle spasms. He was diagnosed with Lumbago and provided pain medications and muscle relaxants. A series of subsequent visits to Mountain Health Services were noted, each for the primary complaint of lower back pain, for which he was provided medication for management, often including administration of IM medication by PA Spohr. These visits were on:

- **5/20/2008**
- **12/23/2008**
- **8/18/2009**
- **1/29/2010**
- **7/11/2011**

Emergency Department Records from Shoshone Medical Center, beginning **12/14/2011**, indicated Mr. Hammerberg presented immediately after extrication from the mine accident on that date with abrasions to an extensive portion of his body, right forehead laceration requiring suture. Mr. Hammerberg was described as being "dazed," although the Glasgow Coma Score given at that time was 15 of 15. He complained of pain in his head, neck, chest, abdomen, and back. He was given the diagnostic impression of a concussion and reportedly had sustained a period of loss of consciousness. A CT brain scan indicated extensive soft tissue injury about his head, but no evidence of intracranial abnormality. A possible fracture to his right occipital mastoid suture was observed, as was a nondisplaced nasal bridge fracture. A CT scan of his cervical spine revealed no fracture or malalignment, although a congenital fusion (spina bifida) at c6-7 was noted. He was held overnight for observation, and released to his home in the morning with follow up care through outpatient clinic services on **12/15/2011**.

On **12/16/2011**, Mr. Hammerberg was seen by PA Terry Spohr at Mountain Health Services. Records of this visit include the diagnostic summary of a concussion, as well as fractures to the left maxilla and nasal bones, and multiple lacerations and abrasions to his head and body. Results of the CT scan of his spine added the impression of a narrowing of the L4-5 disc space in the lumbar region. A subsequent MRI of the cervical spine, read by James Edlin, M.D. on **12/21/2011**, indicated mild degenerative disease at multiple levels, but no herniation or stenosis. And in a follow up visit with PA Spohr on **12/27/2011**, Mr. Hammerberg was recommended to pursue physical therapy and was prescribed pain medication and muscle relaxants.

Mr. Hammerberg underwent an MRI of the spine at Mountain Health Services on **1/9/2012**, which was read by Peter Vance, M.D. These findings indicated the presence of a "large" bulging disc at the L5-S1 level with mass effect on the spinal cord. Additionally, Dr. Vance noted multi-level degenerative disc disease within the lumbar region.

A consultation visit with Jeffrey McDonald, M.D., neurosurgeon, was completed on **1/26/2012**. Dr. McDonald recommended a series of epidural steroid injections as a first course of treatment for the lumbar injury, with a secondary recommendation of surgical intervention if no appreciable improvement was gained. In subsequent visit, Mr. Hammerberg underwent these guided epidural procedures. However, it was noted in the subsequent records that Mr. Hammerberg did not experience significant improvement in his physical condition, and he agreed to undergo spinal surgery.

Mr. Hammerberg is seen at the Rainbow Dental Clinic beginning on **2/23/2012**. At that time, he is diagnosed as having multiple chipped and broken teeth, as well as some presence of decay. It was noted that it was unclear the degree to which damage and decay predated his injury/accident of December 2011. A course of restorative treatment over a period of several months is outlined in subsequent records.

On **4/24/2012**, Dr. McDonald performed an L5-S1 decompression laminectomy on Mr. Hammerberg at the Northwest Specialty Hospital. He was discharged home on **4/26/2012**.

Mr. Hammerberg was seen by Dr. McDonald on **6/4/2012**, approximately seven weeks post lumbar surgery. Dr. McDonald summarized Mr. Hammerberg's status as, "He is not doing well." The record elaborates that Mr. Hammerberg continued to have left lower extremity discomfort, but has now begun experiencing radiating pain and discomfort into his right left leg. After additional MRI studies indicated no additional injury, Dr. McDonald offered on **6/25/2012** that there was no further surgical treatment warranted, and recommended that Mr. Hammerberg continued physical therapy as a treatment modality. In a visit note dated **7/26/2012**, Dr. McDonald indicate Mr. Hammerberg was "nearing MMI" and recommended

that he be released to work on **8/6/2012** at a "light duty" restriction level. Additional restrictions included, "Above ground position only – no underground work yet." In his **9/20/2012** progress note, Dr. McDonald indicates Mr. Hammerberg has reached maximum medical improvement for his lumbar injury. It is also indicated that there appear to be "psychological factors overlying" his physical condition, including the impression of depression and possible posttraumatic stress.

An Independent Medical Evaluation was completed on Mr. Hammerberg by Karl Goler, M.D., on **10/12/2012.** This report notes that Mr. Hammerberg had previously returned to light duty work duties. Dr. Goler characterized Mr. Hammerberg as not being able to progress physically, and considered that there was "significant non-physiologic behavior on his physical examination." Dr. Goler opined that there was no further recommended treatment for Mr. Hammerberg's injuries, and considered him to be at a fixed, stable maximum level of medical improvement. Dr. Goler rated Mr. Hammerberg at a 7% disability of the whole person, and recommended that he could return to work with 50 pound lift restrictions.

Records indicate Mr. Hammerberg presented to Anthony Branz, M.D., of Osburn Family Medicine on **2/4/2013**. Mr. Hammerberg reported that he slipped and fell at work on **12/31/2012**, at which time he sustained an injury to his left shoulder and arm. An x-ray indicated no fracture or dislocation of the shoulder. Subsequent MRI findings revealed multiple mild tears of the tendons in the shoulder, and Dr. Branz made a referral for an orthopedic consultation.

Mr. Hammerberg was seen by Roger Dunteman, M.D. on **2/25/2013** who recommended Mr. Hammerberg undergo physical therapy and steroid injection for treatment of his left shoulder injury.

On **2/26/2013**, Mr. Hammerberg consulted with Dr. Branz for consideration of a vasectomy – and he underwent said procedure by Dr. Branz on **3/7/2013**.

Mr. Hammerberg returned to Dr. Dunteman on **4/8/2013**, at which time Dr. Dunteman gave the impression that Mr. Hammerberg had failed to improve in the previous course of treatment, and therefor recommended surgical intervention to correct his left shoulder injury. Dr. Dunteman conducted an arthroscopic decompression of Mr. Hammerberg's left shoulder on **4/23/2013**, and on a follow up visit to Dr. Dunteman on **4/29/2013**, Mr. Hammerberg is described as "doing well."

However, records from an **8/28/2013** visit with Jeff Lien, physician's assistant working with Dr. Dunteman, Mr. Hammerberg was complaining of persistent left shoulder pain. At that time, a permanent impairment rating of 14% of the upper extremity was given, and Mr. Hammerberg was recommended to return to work by **11/18/2013**, with 50 pound lift restriction from the ground, and 25 pound restriction over-head.

Previous Psychological Evaluations:

Mr. Hammerberg underwent a Diagnostic Interview with Daniel Hayes, Ph.D., psychologist, on **9/18/2012**. He presented to Dr. Hayes with the complaint of new onset of "fear of going down the shaft and being underground again." His symptoms included anxiety, panic, fatigue, decreased energy, agitation, irritability, and sleep disturbance. Dr. Hayes concluded the diagnostic impression of Posttraumatic Stress Disorder. Dr. Hayes began seeing Mr. Hammerberg for psychotherapeutic services targeting his symptoms of PTSD, as well as pain management. He later included services to target Mr. Hammerberg's apparent cognitive disturbances. These treatment services were conducted between **9/25/2012** and **12/18/2013**.

Dr. Hayes noted in the final progress note that Mr. Hammerberg was able to return to being underground, and therapy services were discontinued.

Mr. Hammerberg completed a Neurocognitive Evaluation with John Wolfe, Ph.D. on **11/19/2012.** Dr. Wolfe indicated that Mr. Hammerberg continued to report experiencing back pain and paresthesia, with little improvement since his spinal surgery. Symptoms characteristic of Posttraumatic Stress Disorder were present, including rumination, increased startle, flashback of the trauma, claustrophobia, as well as panic and anxiety related to situations that reminded him of the accident of December 2011. Dr. Wolfe indicated that Mr. Hammerberg denied any history of substance abuse or previous mental health diagnosis or treatment. Neurocognitive results indicated Mr. Hammerberg maintained *Average* intellectual abilities and academic achievement skills. His executive and memory functioning were similarly within the Average range. Dr. Wolfe observed a problematic area in performance related to Mr. Hammerberg's attention capacity, particularly when he had to sustain attention or when modulating his attention in response to changing task demands. Diagnostic impressions provided by Dr. Wolfe included Posttraumatic Stress Disorder, Cognitive Disorder, NOS, slightly improved, and Pain associated with medical condition. In a follow-up noted dated 11/26/2012, Dr. Wolfe indicated Mr. Hammerberg continued to complain of ongoing cognitive concerns as well as paresthesia.

Measures Administered:

- Clinical interview with patient, Gregg Hammerberg
- Wechsler Adult Intelligence Scale – Fourth Edition (WAIS-IV)
- California Verbal Learning Test – Second Edition (CVLT-II, Short Form)
- Wechsler Memory Scale – Third Edition (WMS-III, selected subtests)
- Verbal Fluency Test (FAS)
- Benton's Visual Form Discrimination Test (VFD)
- Trail Making Test (Trails)
- Grooved Pegboard Test (Pegboard)
- Personality Assessment Inventory (PAI)
- McGill Pain Questionnaire (MPQ)

Clinical Interview:

Mr. Hammerberg indicated at the outset of this evaluation that he wasn't "100% sure" why he being assessed today. When the nature and purpose of the evaluation was explained, he expressed accurate awareness and agreement with the procedures. When asked his present mood state, he offered that his back was "sore," but then qualified, "I don't feel too bad." He characterized himself as a "fairly laid back" individual, but admitted to having a "temper" at times. He explained that his friends would acknowledge he exhibits this negative mood state on occasion, but he claimed he has gotten "mellower" in recent years, which he attributed to having "grown up." He elaborated his impression that his character and behavior has changed considerably over the past three years, adding, "I just don't do stuff I used to love to do anymore. It just doesn't seem to matter – like hunting, fishing, and steelheading."

Mr. Hammerberg indicated he recalled events on the day of the accident 14 December 2011, but not at the time of the event. He indicated he was working at the "face" of the mine operating a loader. He stated his first recall after the accident was waking up while still down in the mine, but he admitted he was noting thinking clearly – "I was dazed." He was unable to estimate the total length of time he was unconscious. He recalled having received trauma to the right front part of his head, and was told that he sustained a concussion, as well as fractures to the jaw,

nasal region, and in the ocular area. Mr. Hammerberg denied any previous history of traumatic head injury or loss of consciousness.

Mr. Hammerberg indicated he experiences symptoms which were later diagnosed as Posttraumatic Stress Disorder and depression following the accident. He explained that he underwent counseling with Dr. Daniel Hayes, psychologist, and expressed feeling this helped resolve the intensity of this symptoms. He also indicated that he took psychotropic medications previously, but has since discontinued all such medication, as he feels he no longer receives substantial benefit from their uses.

Mr. Hammerberg reported experiencing significant pain in his lower back, which he attributed to having been caused by an injury during the accident, resulting in a herniated disc. He reported having undergone surgery to address this injury, but estimated that he has not experienced significant resolve in his pain experience, and, in fact, described it was "worse." He qualified his back pain as "sharp." In addition, he reported pain "between" his shoulders, which is "always there." He also stated he has episodic right-sided neck discomfort, which he described as "tightening," and occasional "migraine" headaches. He stated that he takes Oxycodone during the day, and morphine sulfate at bedtime, due to his chronic pain condition.

Mr. Hammerberg denied any history of problematic use of either alcohol or illicit drugs. He described having used alcohol more regularly as a young adult, but never considered himself a "daily drinker" – he estimated he drank primarily on weekends. He claimed that he has significantly diminished his alcohol consumption in the past three years, currently rating his intake as "very little." He denied any recent history of illicit substance use, and claimed that he did not deviate from the prescribed regimen for his narcotic use.

Mr. Hammerberg claimed that he occasionally will wake up in the night, in a sweat, from a nightmare in which he relives the events surrounding the accident. He indicated he is uncomfortable going underground at the mine, having done so on several occasions since returning to work. However, he expressed relief that he does not have to do so on a daily basis, given his reassignment of duties. He indicated that he is hypervigilant, which he described as "constantly looking harder at things." He admitted to an increased startle response, qualifying, "I'm definitely jumpy now." When asked if he noted any changes in his thinking abilities, he characterized himself as always having been not very talkative around others. He specifically stated his belief that his attention span was "short," which he indicated was a change from before his injury/accident of December 2011. When asked about his memory functions, he stated "not terrible – but not good." When asked further about his emotional status, he needed some prompting to elaborate, eventually stating he felt preoccupied by his pain experience and generally disinterested in previously pleasurable activities. He dismissed the label of feeling "depressed," and denied ever having thoughts of self-harm. When asked what his future plans and goals included, he offered, "I have no idea."

Behavioral Observations:

Mr. Hammerberg presented on time for his scheduled appointment – he indicated that he drove himself to the appointment. He was neatly groomed and appropriately dressed. He ambulated without assistive device and no apparent gait deviation – he was slightly out of breath after having gained two flights of stairs to this psychologist's office, however. His facial affect was somewhat reduced in range, but he did respond appropriately to jocularity – initiating humor, himself, at times. He was able to remain seated throughout the lengthy testing session, without exhibiting any excessive restlessness or increased susceptibility to distraction. He continued to work on tasks that he appeared to have difficulty completing, without needing significant prompts or cuing – indicative of good sustained effort and appropriate motivation. His

expressive language abilities were of normal prosody, and while of slightly reduced rate and volume of output, there was no evidence of paraphasic or dysarthric errors. He kept "dip" in his mouth throughout the assessment, affecting his articulation, at time – although his speech was intelligible at all times. His receptive language abilities appeared grossly normal, as evidenced by his ability to respond to questions presented and initiate activities to tasks presented. Mr. Hammerberg appeared to put forth sincere effort in this assessment, and the results are considered to provide a valid estimate of his current level of neuropsychological and psychological functioning.

Results of Testing:

1. **Intellectual Abilities.**

Mr. Hammerberg was administered the **Wechsler Adult Intelligence Scale-IV (WAIS-IV)**, a standardized measure of cognitive and intellectual abilities. Mr. Hammerberg's **Full Scale IQ** score of **97** is considered within the *Average* range for his age, and consistent with estimates of his premorbid level of abilities, based on education and occupation, and therefore not indicative of a significant impairment in general intellectual abilities.. This result is congruent with that found on previous testing in November 2012, reflecting no significant change in functioning within this general domain of abilities.

Mr. Hammerberg obtained a **Verbal Comprehension Index** score of **96** on the **WAIS-IV**, which is considered within the *Average* range for his age. This index measures verbal concept formation, verbal reasoning, and knowledge acquired from one's environment. This performance is at an expected level given his educational history and not indicative of any impairment in verbal intellectual abilities. This finding is at a level unchanged from that observed on previous testing in November 2012. His **Perceptual Reasoning Index** score was **94**, which is considered within the *Average* range for his age, and unchanged from previously assessed level in 2012. This index measures perceptual and fluid reasoning, spatial processing, and visual-motor integration. Mr. Hammerberg obtained a **Working Memory Index** score of **102**, which is considered within the *Average* range for his age. This result may be considered a slight improvement in functioning within this domain, compared to findings on the previous assessment. Performance on this index involves attention, concentration, mental control and reasoning. Working memory tasks also require the ability to temporarily retain information in memory, while performing some operation or manipulation with it, and then providing a response. Mr. Hammerberg's **Processing Speed Index** score of **100** is considered within the *Average* range when compared with same-age peers, and consistent with the finding from previous testing in 2012. Tasks on this index involve rapid eye-hand coordination, as well as visual scanning, sequencing and discrimination of simple visual information.

The table below provides his **WAIS-IV** index composite score results and percentile rankings. These scores have a comparative mean score of 100 and *Average* range reflective of one standard deviation (15 points) above and below this mean – a range which comprises performances between the 16th to 84th percentile ranks among same-age peers. The confidence interval provided indicates the range within which Mr. Hammerberg's actual ability level may be considered, within a reasonable degree of statistical probability (i.e., 95% of the time). The composite scores from previous testing in November 2012 are provided for comparative purposes.

WAIS-IV Index	Current Composite Score	Percentile Rank	95% Confidence Interval	Qualitative Description	November 2012 Composite Score
Full Scale IQ	97	42nd	93-101	*Average*	94
Verbal Comprehension	96	39th	91-102	*Average*	95
Perceptual Reasoning	94	34th	88-101	*Average*	90
Working Memory	102	55th	95-109	*Average*	95
Processing Speed	100	50th	92-108	*Average*	105

Mr. Hammerberg's performance within **Verbal Comprehension Index** domain was relatively consistent across areas of ability assessed, with all levels falling within the *Average* range for his age. He displayed an expected level of ability on a subtest that allowed him to demonstrate his knowledge of cultural and historical information (Information), a measure commonly considered to be a reflection of acquired academic-based knowledge. This performance is congruent with the level of abilities seen from individuals with a high school education. His ability to synthesize verbal concepts and express abstract reasoning determinations (Similarities) was also within the *Average* range for his age. His performance on a task requiring him to orally express the definition of words (Vocabulary) was within the *Average* range for his age. Overall, these results do not provide any indication of a deficit in general verbal intellectual abilities, and reflect stability within this domain of neuropsychological functioning since November 2012.

The table below provides his Verbal Comprehension subtest scores. Comparisons can be made from a mean score of 10 and an *Average* range that reflects one standard deviation (2 points) above and below this mean – comprising performances between the 16th to 84th percentile ranks among same-age peers. Scaled scores from his November 2012 evaluation are also provided, for comparative purposes.

WAIS-IV Verbal Comprehension Subtests	Scaled Score	Percentile Rank	Qualitative Description	November 2012 Scaled Score
Similarities	10	50th	*Average*	8
Vocabulary	9	37th	*Average*	9
Information	9	37th	*Average*	10

Mr. Hammerberg's performance on the subtests comprising the **Perceptual Reasoning Index** was consistent across measures utilized to assess this domain of functioning, and all falling within the Average range for his age. His performance on the Block Design subtest was within the Average range for his age. This task requires him to complete an analysis of a visual whole, transfer this information into component parts (visual abstraction), and construct a similar model using spatial organization as well as rapid visuomotor coordination. His performances on the Matrix Reasoning subtest, an untimed task considered to measure fluid or novel visuospatial problem solving ability, was also within the Average range for his age. On a task involving his ability to visually recognize abstracted visuoperceptual elements and arrange them into the correct synthesis (Visual Puzzles), his performance was within the lower Average range for his age. Overall, these results do not provide an indication of a deficit in nonverbal, visual intellectual abilities.

The table below provides his Perceptual Reasoning subtest scores. Comparisons can be made from a mean score of 10 and an *Average* range that reflects one standard deviation (2 points) above and below this mean – comprising performances between the 16th to 84th percentile ranks among same-age peers. Scaled scores from his November 2012 evaluation are also provided, for comparative purposes.

WAIS-IV Perceptual Reasoning Subtests	Scaled Score	Percentile Rank	Qualitative Description	November 2012 Scaled Score
Block Design	10	50th	*Average*	8
Matrix Reasoning	9	37th	*Average*	8
Visual Puzzles	8	25th	*Average*	9

Mr. Hammerberg's performance on the subtests of the **Working Memory Index** were within the *Average* range for his age, with no indication of there being a weakness for Mr. Hammerberg in this domain of intellectual functioning. His subtest performance on an immediate auditory recall task (Digit Span) was within the upper *Average* range, reflective of an intact ability to focus his attention in a relatively stimulus-free environment (i.e., the testing room). This performance was noted to be significantly improved relative to the lower *Average* level he displayed on previous testing in November 2012. On a task requiring Mr. Hammerberg to perform mental mathematical calculations (Arithmetic) his performance was considered within the *Average* range for his age.

The table below provides his Working Memory subtest scores. Comparisons can be made from a mean score of 10 and an *Average* range that reflects one standard deviation (2 points) above and below this mean – comprising performances between the 16th to 84th percentile ranks among same-age peers. Scaled scores from his November 2012 evaluation are also provided, for comparative purposes.

WAIS-IV Working Memory Subtests	Scaled Score	Percentile Rank	Qualitative Description	November 2012 Scaled Score
Digit Span	12	75th	*Average*	8
Arithmetic	9	37th	*Average*	10

Within the subtests comprising the **Processing Speed Index**, Mr. Hammerberg displayed a level of performance within the *Average* range for his age, with no indication of impairment within this domain of intellectual functioning. On a task requiring him to rapidly scan visually presented geometric shapes and compare details of these figures (Symbol Search), his performance was Average, as was his performance on a task requiring rapid visuomotor production (drawing) of symptoms to matched numbers (Coding).

The table below provides his Processing Speed subtest scores. Comparisons can be made from a mean score of 10 and an *Average* range that reflects one standard deviation (2 points) above and below this mean – comprising performances between the 16th to 84th percentile ranks among same-age peers. Scaled scores from his November 2012 evaluation are also provided, for comparative purposes.

WAIS-IV Processing Speed Subtests	Scaled Score	Percentile Rank	Qualitative Description	November 2012 Scaled Score
Symbol Search	9	37th	*Average*	11
Coding	11	63rd	*Average*	10

2. **Attention and Concentration.**

Mr. Hammerberg's sustained attention, assessed on a digit recall task, was within the upper Average range for his age (75th percentile), a marked improvement over his previous level of performance in November 2012. On a more complex attention task, including the repetition of a super-span word list presented auditorially (CVLT), his performance was within the *Borderline Impaired* range (7th percentile). However, with repeated exposures to learning this word list, his recall improved, reflecting an adequate resolve of this attention weakness. Performance on tasks measuring cognitive processing speed also indicated he did not exhibit any deficit in sustaining attention to visuoperceptual and visuomotor tasks, as well. It may be considered that this overall level of attention and concentration performance is an improvement relative to that seen on testing in November of 2012.

3. **Language Functions.**

Mr. Hammerberg receptive and expressive language abilities were grossly normal. His ability to express word definitions (Vocabulary) was within the Average range for his age (37th percentile), and his sustained verbal expression within a restricted phonemic category (FAS) was also within normal limits (45th percentile). He did not exhibit any significant difficulty with naming, word finding ability, and no indication of paraphasic or dysarthric errors were noted.

4. **Visuoperceptual Abilities.**

Mr. Hammerberg's visuoperceptual discrimination ability was unimpaired, as assessed by a task involving matching of geometric figures (VFD). His ability to reproduce visual material on a drawing task (Visual Reproduction Copy from WMS-III) was also unimpaired, within the *Average* range for his age. On a task requiring him to recognize abstracted elements of a visual stimulus (Visual Puzzles), his performance was within the lower *Average* range (25th percentile) for his age. On a complex visuoconstruction task, assessed on the Block Design subtest, his performance was within the Average range for his age (50th percentile). These results suggest no impairment in visuoperceptual abilities, a finding consistent with that seen on previous testing.

5. **Verbal Learning and Memory.**

Mr. Hammerberg's initial recall of a super-span word list (CVLT) was within the *Borderline Impaired* range for his age and gender (7th percentile). After four repeated exposures to this material, he demonstrated an immediate verbal recall ability within the lower average range (16th percentile), with a total learning level considered within the *Average* range (32nd percentile). His recall of this word list after a short delay was well within the *Average* range (50th percentile), and after a longer, distraction-filled delay, he did not exhibit any significant loss of information, with recall within the *Average* range (50th percentile). When presented with forced-choice recognition trials, his accuracy of identifying the original word list was 100%.

Immediate recall of semantically organized verbal information (stories from Logical Memory subtest of the WMS-III) were within the Average range for his age (50th percentile). Recall of this information, after a distraction-filled delay, were similarly unimpaired (50th percentile), with retention of 83% of the originally recalled information – considered an Average level of verbal retention capacity (63rd percentile).

These results indicate no significant impairment within the cognitive domain of verbal learning and memory, a finding unchanged from previous assessment of November 2012.

6. Visual Memory.

Mr. Hammerberg's immediate recall by drawing visually presented geometric shapes (Visual Reproduction subtest of the WMS-III) was within the *Average* range for his age (50th percentile). After a delay, he was able to demonstrate retention of 53% of the original material recalled in his drawings, a performance considered within the lower range of Average for his age (25th percentile). Immediate recognition recall of more complex visual material (Faces from WMS-III) was within the lower *Average* range of performance for his age (16th percentile). While his delayed recognition of this same material was also within the low Average range (16th percentile), he did not exhibit any significant loss of information over time, as his retention rate was at 100%.

These findings do not reflect a significant deficit pattern, although it is suggestive of a relative weakness in visual memory, relative to verbal memory – comparable to findings from previous assessment results of November 2012.

7. Lateralized Motor Functions.

Mr. Hammerberg's performance on a task of sustained manual dexterity (Grooved Pegboard) reflected a mild slowing bilaterally, with results at the lower Average range for both his dominant, right, and non-dominant, left hands (16th percentile). These results to do reflect any lateralizing weakness, as was the finding on previous testing.

8. Abstract Reasoning and Executive Functions.

Verbal abstract reasoning abilities, assessed on a task requiring Mr. Hammerberg to provide overlapping concept elements between two target words (Similarities) was within the *Average* range for his age (50th percentile). Similarly, his ability to identify visual patterns on a Matrix Reasoning task was within the *Average* range (37th percentile). His ability to sustain verbal output within a restricted phonemic category on a fluency task (FAS) was also unimpaired (45th percentile). His ability to maintain simultaneous, alternative sequences on a drawing task (Trails B) reflected intact ability within this domain of functioning compared to age and education peers (34th percentile). As a whole, these results suggest intact reasoning and executive function abilities, findings comparable to those obtained in previous testing.

9. Personality and Psychological Functioning.

Mr. Hammerberg was administered the *Personality Assessment Inventory* (**PAI**), a standardized instrument of psychological functioning and personality. His pattern of responses on this measure indicated that he attended consistently to item content throughout the task. However, his endorsements suggested he was tending to portray himself as being relatively free from common shortcomings to which most individuals will admit. This pattern of under-reporting distress and problems may be an intentional attempt to minimize his symptoms, although it is also seen from individuals who are not comfortable allowing light to be shed on their personal life situation – a tendency towards being reluctant to admit to minor faults to others. In contrast, there was no indication of any attempt to portray himself in an excessively negative light. With the caution of possible under-estimation of psychopathology, the results of this assessment may generally be considered clinically valid.

Despite the above noted tendency towards reduced expression of faults, Mr. Hammerberg's pattern of **PAI** responses was consistent with that seen from individuals who are reporting significant distress related to their physical functioning. These individuals see their lives as being severely disrupted by a variety of physical deficits, and this impairment in physical functioning is attributed to their feelings of being unhappy, with reduced energy and enthusiasm to engage in previously important and pleasurable aspects of their life. These individuals report feeling little hope of improvement in functioning and life pleasure in the future, and their social relationships, including marital and occupational, are likely to be negatively impacted by this condition of malaise.

The level of focus and concern on somatic problems demonstrated on this **PAI** profile is in excess of that usually reported by clinical populations with similar life complaints. This pattern is suggestive of an individual who excessively ruminates about their somatic condition, to the degree that they may seem preoccupied and distracted by their physical discomfort. Additional symptoms seen from this chronic distress pattern include fatigue and weakness, which further limits the individual's activity and interest levels. These individuals often report feeling that their daily functioning has been compromised by the numerous physical problems, as they described their health as being poorer than others their age. This continuous pattern of concern over their physical health and problems causally relates to the problem this population often expresses related to concentration and memory challenges – the result of excessive emotional rumination distracting from their capacity to adequately attend to information processing, rather than an endogenous neuropsychological deficit.

Individuals with similar **PAI** response patterns report a number of difficulties consistent with a significant depressive experience. These individuals describe feeling pessimistic and a general decrease in their self-esteem. At times, the experience of sadness contributes to the loss of interest in previously pleasurable activities. No indication of significant problems was noted from this profile in the areas of psychotic thinking, instability or elevation of mood, or marked anxiety.

10. Pain Experience.

Mr. Hammerberg completed the **McGill Pain Questionnaire (MPQ)**, a self-report measure of pain experience that assesses both the quality and intensity of subjective pain. The McGill provides a rating (total PRI score), as well as three subscales of pain quality; *Sensory, Affective,* and *Evaluative.* The *Sensory* subscale describes pain in terms of the temporal, spatial, pressure, and thermal qualities – Mr. Hammerberg endorsed his present pain experience in this domain as *throbbing, shooting, pricking, stabbing, sharp, pinching, burning, stinging, aching,* and *tender.* The *Affective* subscale describes the pain experience in terms of tension, fear and autonomic properties – Mr. Hammerberg indicated his experience as *tiring* and *punishing* within this subjective category of pain experience. Finally, the *Evaluative* subscale describes a general subjective quality of the pain experience – Mr. Hammerberg reported his pain experience as *intense.* Utilizing the quantification standards of the MPQ, Mr. Hammerberg's item endorsement pattern provided a Total Pain Response Index score of 37 out of a possible 78. This score is significantly higher than the average rating seen from patients with low back pain (27.9) and mixed chronic pain (25.4). This pattern is consistent with an individual whose psychological experience, including rumination and emotional distress, is confounding and exacerbating their physical pain condition, which is at a significant level of intensity.

Impressions:

- Mr. Hammerberg has demonstrated improvement in formal testing of attention and concentration, to the point that there is not presently an appreciable neuropsychological impairment based on his current level of test performance.
- It is considered that Mr. Hammerberg's continued experience of attention and memory failures are most consistent with the limitations on concentration ability that are seen secondary to the distracting effect of emotional distress. This is considered a transient impairment on his cognitive efficiency, and is not considered to be a reflection of a residual, endogenous neuropsychological impairment.
- Mr. Hammerberg is demonstrating considerable psychological distress, despite his best efforts to minimize his clinical presentation to others. His symptom pattern is congruent with the conditions, Posttraumatic Stress Disorder with depressive features. His symptom pattern includes:
  - Exposure to a near-death traumatic accident with severe injury, 12/14/2011
  - Intrusive, involuntary thoughts, images and dreams related to the accident of December 2011
  - Preferential avoidance of the accident site and discussion of the events surrounding the event
  - Persistent negative mood state, including depressed mood, irritability, agitation, and anger
  - Significantly reduced interest in previously pleasurable activities
  - Hypervigilance
  - Exaggerated startle response
  - Problems concentrating due to emotional distress
  - This symptom pattern causes significant impairment in his social, occupational, and interpersonal functioning.
- Mr. Hammerberg continues to experience significant pain experience, and exhibits a pattern of psychological distress and rumination that may be considered to be augmenting this experience. While Mr. Hammerberg is not exaggerating or feigning his expressed pain symptoms, it is considered that his psychological presentation is amplifying his experience beyond expected levels compared to other patient populations, an opinion supported by medical health providers as well.

Clinical Diagnoses:

- **Posttraumatic Stress Disorder (309.81)**
- **Psychological Factors Affecting Other Medical Condition, Pain Experience, Moderate (316)**

Recommendations:

- Mr. Hammerberg may benefit from continued psychotherapy to target his stress reaction, depressed mood, and psychological pain management.
  - Stress management may be gained through either individual or group treatment, wherein he obtains ongoing support and emotional stabilization.
  - Mr. Hammerberg may be considered for a referral to his primary care physician for medication management of his depressive and stress symptoms.
  - Pain management intervention may include relaxation and mindfulness practices. A continued integrated approach to pain management, including

physical/physiological interventions (including medication and exercise) as well as psychological attention to the ruminative and emotional distress response that may be augmenting his pain experience.

Philip A. Hanger, Ph.D.
Licensed Psychologist

Exhibit "D"

Daniel S. Hayes, Ph.D., L.L.C. and Associates
Daniel S. Hayes, Ph.D., Licensed Psychologist PSY-244
Philip A. Hanger, Ph.D., Licensed Psychologist PSY-202760
Emily Crawford, Psy.D., Licensed Psychologist PSY-202783
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NEUROPSYCHOLOGICAL EVALUATION

Patient Name: Eric Tester **DOB** [redacted] **Age:** 41

Date of Evaluation: 8 April 2015

Reason for Referral:

Eric Tester is a 41 year-old, married, Caucasian male who was referred by his attorney, Eric Rossman, for a neuropsychological evaluation, to assist in determining Mr. Tester's current level of cognitive and psychological functioning.

Records Reviewed:

- Complaint and Demand for Jury Trial, submitted by Rossman Law Group, 12/11/2013
- W-2 income documents 2010 to 2013
- Kohal Pharmacy, Kellogg, ID, 12/14/2011 to 6/29/2014
- Jeffrey Larson, M.D., Neurosurgeon, Coeur d'Alene Spine & Brain, 2/1/2012 to 2/12/2014
- John McNulty, M.D., Orthopaedic Surgeon, Kellogg, ID, 1/11/2012
- Osburn Drug, Osburn, ID, 12/15/2011 to 7/31/2014
- Scott Reed, M.D., Family Medicine, Kellogg, ID, 12/15/2011 to 7/30/2014
- Shoshone Medical Center, Kellogg, ID, 12/14/2011 to 1/18/2012
- Shopko Pharmacy, Coeur d'Alene, ID, Notice of no records available

Relevant Background Information:

Mr. Tester was born in Coeur d'Alene, Idaho. He stated that is hometown growing up was Pritchard, but has been most recently residing in Silverton, Idaho. Mr. Tester indicated that he completed a high school education, admitting to "average" grades. He stated he did poorly in mathematics, but was unable to recall a favored class. He characterized his academic career by stating he "just wanted to get through it." He denied any learning difficulties, compensations, or behavioral/truancy issues. Mr. Tester is married to his wife of 16 years, and the couple has two teenage sons. He stated he has known his wife since he was 10 years old, and added they attended high school together.

Mr. Tester is employed through the Hecla Mining Company and worked at the Lucky Friday mine. Mr. Tester stated he has been employed by Hecla since January of 1997. He described his job duties as that of a "machine operator" working under ground in the process of "excavating ore." According to Mr. Tester, on 12/14/2011, he was involved in an accident within the mine, described as a "rock burst," during which he sustained traumatic injuries.

According to the Complaint document submitted by Mr. Tester's attorney, Mr. Tester and several other miners were involved in a "rock burst" incident on 12/14/2011 in a section of the mine at approximately the 5900 foot level. This document defines a "rock burst" as a "spontaneous, violent fracture of rock that typically occurs in deep mines." As a consequence of these "rock bursts," additional collapse of the "roof" and walls of the mine may occur, resulting in injury, entrapment, or even death to the miners.

On 12/15/2011, Mr. Tester's was examination by Scott Reed, M.D., through Shoshone Medical Center. According to Dr. Reed, Mr. Tester appeared to suffered from symptoms of a "concussion," including loss of consciousness and no recall of accident/injury, and a post-traumatic amnesia that resolved by the time Mr. Tester was admitted to the hospital on the date of the accident. Additional symptoms included confusion upon discharge home, but no evidence of emesis. Dr. Reed referenced the results of a CT head scan, completed 12/14/2011, which was negative. Dr. Reed also noted that Mr. Tester sustained a "large" laceration of the forehead, requiring sutures.

On 12/16/2011, a CT scan of Mr. Tester's maxillofacial region was read by James Edlin, M.D. of Shoshone Medical Center. According to this report, Mr. Tester displayed a "subtle nondisplaced fracture through frontal calvarium passing through frontal sinus." It was noted that there was no acute intracranial damage.

Mr. Tester was seen by Dr. Reed on 12/20/2011 for complaints of headache, as well as neck and right wrist pain. Dr. Reed opined that Mr. Tester was continuing to exhibit a "post concussion effect."

Mr. Tester underwent treatment with physical therapist, Meghan Waters, on 1/4/2012. At that time, Mr. Tester was reporting continued right wrist and neck pain, as well as decreased range of motion in both.

On 1/11/2012, Mr. Tester was seen by John McNulty, M.D., orthopedist, for his continue right wrist pain and decreased range of motion. Dr. McNulty reviewed x-rays to conclude that Mr. Tester was exhibiting "a healing nondisplaced scaphoid fracture" of his right wrist.

On 1/18/2012, Mr. Tester underwent a spinal MRI of the cervical region. The results of this assessment were summarized by Dr. Reed who indicated Mr. Tester had a "small to moderate central/left paracentral disc herniation at C5-C6 contacts and mildly compresses the left ventral surface of the cord."

Mr. Tester was examined by Jeffrey Larson, M.D., neurosurgeon with Coeur d'Alene Spine, on 2/1/2012. Dr. Larson indicated his impression that there was no further treatment warranted for Mr. Tester's cervical neck injury, as he was not willing to accept surgical interventions recommended.

On 2/2/12, Dr. Reed wrote a prescription authorizing Mr. Tester to return to work. In a 2/14/12 Idaho Industrial Commission document, Dr. Reed indicated Mr. Tester had been discharged from his care, and was able to return to his pre-injury position as an underground miner.

Mr. Tester returned to Dr. Larson on 6/19/2012, with complaints of continued neck pain. At that time, Dr. Larson was able to convince Mr. Tester to undergo the recommended surgical intervention of a disc arthroplasty at the C5-C6 level, due to the "large" disc herniation and spinal cord compression. The surgery was scheduled for September, 2012.

Mr. Tester saw Dr. Reed on 7/30/2012 for the continued complaint of neck pain. Dr. Reed prescribed Narco, Relafen, and Tramadol for relief of his pain experience.

On 9/24/2012, Mr. Tester underwent spinal surgery with Dr. Larson. Records indicate Mr. Tester experienced considerable resolve of his neck pain and improved range of motion, such that he was able to return to work by November of 2012. However, on 1/29/2013, Mr. Tester was seen by Dr. Larson for continued neck pain, localized to the left trapezius area and occasionally involving the right shoulder. Dr. Larson prescribed Tramadol for the pain, and Mr. Tester declined to comply with the recommended physical therapy.

Mr. Tester was seen on 2/12/2014 by Holly Moore, NP, with Coeur d'Alene Spine. This record indicated Mr. Tester reported no significant complaints, and expressed being pleased with the results of the surgery. No further treatment services from CDA Spine was recommended at that time.

On 7/30/2014, Mr. Tester presented to Dr. Reed with the complaint of "feeling poorly." He admitted to increased life stressors, including financial and marital discord of late. Dr. Reed concluded that Mr. Tester's symptoms may have been associated with a general "malaise" and prescribed Fluoxetine and Xanax to treat the symptoms of depression. Mr. Tester was also referred to his company's EAP program for counseling.

Measures Administered:

- Clinical interview with patient, Eric Tester
- Mini International Neuropsychiatric Interview (MINI)
- Wechsler Adult Intelligence Scale – 4th Edition (WAIS-IV)
- California Verbal Learning Test – 2nd Edition (CVLT-II)
- Wechsler Memory Scale – 3rd Edition (WMS-III, selected subtests)
- Wisconsin Card Sorting Task (WCST)
- Trail Making Tests (Trails)
- Personality Assessment Inventory (PAI)
- Substance Abuse Subtle Screening Inventory – Third Edition (SASSI-3)
- McGill Pain Questionnaire (MPQ)

Clinical Interview:

When asked to describe his present emotional state, Mr. Tester began by stating "I'm alright." He then added, "Me and my wife are not getting along, though." He indicated that they had been arguing more frequently, and opined that his wife has been concerned about his pattern of "forgetting stuff" and "money issues." Later in the interview, he admitted to feeling "more depressed" since his injury/accident in December 2011. He qualified that this depressed mood state is not persistent, and does not impair his occupational or daily functioning. When pressed further, he did admit to a change in his activity patterns, noting that he no longer engages in activities that he used to find pleasurable, including snowmobiling. However, he challenged himself that this might be due to the physical pain discomfort he has experienced since the accident, rather than a depressed mood state. He also indicated he has experienced a decrease in his libido, but offered that was due to his advancing in age. He qualified that there was no "sudden change" in his sexual interest, rather, that the "drive just slowed down."Mr. Tester indicated that he has not been seen by a counselor, but had been prescribed psychotropic medications by his general physical in the past. He stated that he discontinued taking this medication, as he did not feel there was any benefit to his emotional status from its use.

Mr. Tester characterized himself as "an all-around good guy," adding his opinion that he got along well with others and considered himself to be "hard working." When asked how his wife would characterize him, he laughed and stated "she says I have 'brain farts' all the time, now."

He also admitted that she has chastised him for "blowing up" at their children "for no reason," and he also admitted that he occasionally "yells" at his wife during arguments. He denied having a history of anger problems, and qualified that he felt his verbal aggression was limited to just his marital relationship, and that the incidents of their discord has increased in the past few years.

Mr. Tester described feeling more "anxious" since the accident in December 2011, characterizing this as "always waiting for the next bad thing to happen." He admitted to being more easily startled by loud noises, but denied any avoidance or intrusive thoughts or dreams related to the accident. He stated he was quite comfortable relating his recall of the events of the accident, but noted that he believed he had a brief loss of consciousness immediately following the "rock burst," and was "dazed" for a period of time shortly after. He stated his recall of the events immediately preceding the accident, describing his duties as a machine operator and recalling the position of himself and fellow miner at the moment before the accident. He related his recall of events returning to clarity after he was transported to the hospital. He expressed distress over what he felt was a prolonged period of time before the full nature and severity of his wrist, neck, and chest injuries were diagnosed and treated. When asked to relate any changes in his thinking abilities since the accident, he admitted that he does not notice a significant change, but accepted that his wife has seen changes in his memory performance. Mr. Tester admitted to having a prior head trauma in 1998, as a result of a motor vehicle accident. He denied that he was ever diagnosed with a concussion or other neurologic condition, but claimed that he experienced a possible loss of consciousness, adding "I don't recall the accident, but work up on the side of the road." He provided additional details that his wife had been driving the vehicle, and apparently she fell asleep at the wheel.

Mr. Tester indicated he has had a long-standing medical condition, which he described as "high blood pressure," for which he takes medication. He also reported that he underwent surgery on his neck in the "summer or fall" of 2012, at which time an "artificial disc" was inserted into the cervical region.

Mr. Tester described his alcohol consumption as "occasional" usage, denying any history of social or occupational problems as the result of his use. He did admit to having received a misdemeanor DUI in May 2014. He qualified himself as "not a heavy drinker," but admitted that he had consumed to excess on that particular evening, while out with friends, and made the poor judgment of operating his vehicle. He reported having paid the necessary fine and attended education classes as a consequence, but did not engage in any ongoing treatment for his alcohol use. He denied any history or current illicit drug use.

Behavioral Observations:

Mr. Tester presented on time, unaccompanied for his scheduled appointment. He reported that he drove himself. He was casually dressed and appropriately groomed. He maintained good social eye contact throughout the assessment, and his facial affect was bright and of appropriate range of expression. He responded appropriately to jocularity. He displayed adequate comprehension of all questions and tasks presented, without need for excessive repetition or explanation of instructions. He put forth continued effort on tasks that appeared challenging for him, and did not display any increased fatigue or noncompliance with tasks presented. He was able to remain seated for the duration of the testing sessions, without evidence of increased restlessness or increased susceptibility to distraction. The results of this assessment are considered to provide a valid estimate of his current level of neuropsychological and psychological functioning.

Results of Testing:

1. **Intellectual Abilities.**

Mr. Tester was administered the **Wechsler Adult Intelligence Scale-IV (WAIS-IV)**, a standardized measure of cognitive and intellectual abilities. Mr. Tester's **Full Scale IQ** score of **96** is considered within the *Average* range for his age, and consistent with estimates of his premorbid level of abilities, based on education and occupation. No previous psychological testing records were available for comparison.

Mr. Tester obtained a **Verbal Comprehension Index** score of **100** on the **WAIS-IV**, which is considered within the *Average* range for his age. This index measures verbal concept formation, verbal reasoning, and knowledge acquired from one's environment. This performance is reflective of intact verbal abilities, with no overall indication of a decline in functioning within this domain. His **Perceptual Reasoning Index** score was also **100**, which is considered within the *Average* range for his age. This index measures perceptual and fluid reasoning, spatial processing, and visual-motor integration. Mr. Tester obtained a **Working Memory Index** score of **89**, which is considered within the lower *Average* range for his age, and may be considered a relative weakness in abilities, although not considered of statistically significant difference compared to other abilities. Performance on this index involves attention, concentration, mental control and reasoning. Working memory tasks require the ability to temporarily retain information in memory, while performing some operation or manipulation with it, and then providing a response. Mr. Tester's **Processing Speed Index** score of **94** is considered within the *Average* range when compared with same-age peers. Tasks on this index involve rapid eye-hand coordination, as well as visual scanning, sequencing and discrimination of simple visual information.

The table below provides his **WAIS-IV** index composite score results and percentile rankings. These scores have a comparative mean score of 100 and *Average* range reflective of one standard deviation (15 points) above and below this mean – a range which comprising performances between the 16th to 84th percentile ranks among same-age peers. The confidence interval provided indicates the range within which Mr. Tester's actual ability level may be considered, within a reasonable degree of statistical probability (i.e., 95% of the time).

WAIS-IV Index	Composite Score	Percentile Rank	95% Confidence Interval	Qualitative Description
Full Scale IQ	96	39th	92-100	*Average*
Verbal Comprehension	100	50th	94-106	*Average*
Perceptual Reasoning	100	50th	94-106	*Average*
Working Memory	89	23rd	83-96	*Average*
Processing Speed	94	34th	86-103	*Average*

Mr. Tester's performance within **Verbal Comprehension Index** domain was relatively consistent across areas of ability assessed, with all levels falling well within the Average range for his age. He displayed an expected level of ability on a subtest that allowed him to demonstrate his knowledge of cultural and historical information (Information), a measure commonly considered to be a reflection of acquired academic-based knowledge. This performance is not indicative of any deviation from the level of abilities seen from individuals with a high school education. His performance on a task requiring him to orally express the definition of words (Vocabulary) was also within the *Average* range for his age, as was his ability

to synthesize verbal concepts and express abstract reasoning determinations (Similarities). These results do not provide any indication of a change from expected levels of verbal intellectual abilities.

The table below provides his Verbal Comprehension subtest scores. Comparisons can be made from a mean score of 10 and an *Average* range that reflects one standard deviation (2 points) above and below this mean – comprising performances between the 16th to 84th percentile ranks among same-age peers.

WAIS-IV Verbal Comprehension Subtests	Scaled Score	Percentile Rank	Qualitative Description
Similarities	10	50th	*Average*
Vocabulary	9	37th	*Average*
Information	11	63rd	*Average*

Mr. Tester's performance on the subtests comprising the **Perceptual Reasoning Index** was also somewhat variable, although his overall level of abilities within this domain of intellectual functioning was still considered within the *Average* range for his age. His best performance, considered in the upper *Average* range for his age, was seen on the Block Design subtest. This task requires him to complete an analysis of a visual whole and transfer this information into component parts (visual abstraction), and construct a similar model using spatial organization as well as rapid visuomotor coordination. He displayed Average level performances on the Matrix Reasoning subtest, an untimed task considered to measure fluid or novel visuospatial problem solving ability, and on the Visual Puzzles subtest, a task which emphasizes the individual's ability to recognize and visually identify the segmented parts of a figure in relation to the whole (visual synthesis). These results do not provide any indication of a change from expected levels of nonverbal, perceptual intellectual abilities.

The table below provides his Perceptual Reasoning subtest scores. Comparisons can be made from a mean score of 10 and an *Average* range that reflects one standard deviation (2 points) above and below this mean – comprising performances between the 16th to 84th percentile ranks among same-age peers.

WAIS-IV Perceptual Reasoning Subtests	Scaled Score	Percentile Rank	Qualitative Description
Block Design	12	75th	*Average*
Matrix Reasoning	9	37th	*Average*
Visual Puzzles	9	37th	*Average*

Mr. Tester's performance on the subtests of the **Working Memory Index** reflected a level of performance considered within the lower *Average* range for his age, which, although not of statistically significant variance, may be considered a relative weakness for Mr. Tester, when compared with other intellectual abilities. It is considered likely that this weakness may present as a challenge in daily functioning on activities that require sustained or simultaneous attention, particularly when in situations of increased cognitive demand or emotional distress. His subtest performance on an immediate auditory recall task (Digit Span) was within the *Average* range, reflective of an intact ability to focus his attention in a relatively stimulus-free environment (i.e., the testing room). However, performance on a task requiring Mr. Tester to perform mental mathematical calculations (Arithmetic) was considered within the *Low Average* range for his age. However, absent any previous testing or academic records, it is unclear whether this

performance was influenced by his self-report of having previous poor academic history in mathematics.

The table below provides his Working Memory subtest scores. Comparisons can be made from a mean score of 10 and an *Average* range that reflects one standard deviation (2 points) above and below this mean – comprising performances between the 16th to 84th percentile ranks among same-age peers.

WAIS-IV Working Memory Subtests	Scaled Score	Percentile Rank	Qualitative Description
Digit Span	9	37th	*Average*
Arithmetic	7	16th	*Low Average*

Within the subtests comprising the **Processing Speed Index**, Mr. Tester's performance was considered well within the *Average* level of cognitive functioning for his age. On a task requiring him to rapidly scan visually presented geometric shapes and compare details of these figures (Symbol Search), his performance was unimpaired. Similarly, on a task requiring rapid visuomotor production (drawing) of symptoms to matched numbers (Coding) his performance was within the *Average* range for his age. These results do not provide any indication of a change from expected levels of visuomotor processing abilities.

The table below provides his Processing Speed subtest scores. Comparisons can be made from a mean score of 10 and an *Average* range that reflects one standard deviation (2 points) above and below this mean – comprising performances between the 16th to 84th percentile ranks among same-age peers.

WAIS-IV Processing Speed Subtests	Scaled Score	Percentile Rank	Qualitative Description
Symbol Search	8	25th	*Average*
Coding	10	50th	*Average*

2. Attention and Concentration.
Mr. Tester demonstrated grossly adequate ability to sustain focus to tasks presented, with no increased susceptibility to distraction or digression from tasks or questions once initiated. His performance on immediate recall of auditory verbal information (Digit Span) was within the unimpaired, *Average* range relative to age and education. However, his immediate recall of super-span word lists (CVLT-II) were considered below average for his age and gender. This pattern is reflective of a weakness in attention when confronted with a challenge to his cognitive functioning which overwhelms his capacity – a negative effect of excessive stimuli. This may account for his relatively poor performance on a task involving mental calculation (Arithmetic). This pattern may be best characterized as a weakness in sustained attention when faced with complex or excessive material. Such a weakness in attention capacity may demonstrate itself when the subject is fatigued or overcome by information, such as in a novel work situation. However, it is considered easily compensated for, by reducing the attention demand through repetition or limited exposure of information at one time. This attention weakness is commonly seen for individuals who experience challenges in sustained concentration due to the distracting effects of emotional distress, such as depression or anxiety.

3. Language Functions.
Mr. Tester's gross receptive language functions were unimpaired, as demonstrated by his accurate ability to initiate responses to questions and tasks presented. His expressive speech was of normal rate, prosody, and syntax. His statements were of logical organization, with no evidence of bizarre or digressive content. His word finding ability was unimpaired in

conversation. Expressed knowledge of word meaning (Vocabulary) was within the *Average* range for his age. Reading comprehension was unimpaired, as demonstrated by his valid response patterns to standardized tasks requiring him to process written language. Overall, no impairment in language related functions was noted on this assessment.

4. **Visuoperceptual Abilities.**
Mr. Tester claimed that he has a long-standing history of "nystagmus," but denied using corrective lens or experiencing any significant disturbance in his visual acuity. He stated he was able to read street signs while driving and had no difficulty with reading material at arm's length. Visuoperceptual abilities were unimpaired, as demonstrated by his Average level of performance on tasks requiring him to analyze visually presented verbal and spatial information. His gross visuocontruction abilities, assessed by his ability to draw geometric shapes was within normal limits, at the 63rd percentile compared to age peers (Visual Reproduction Copy from WMS-III). On a more complex visuocontruction task requiring rapid manipulation of objects (Block Design), his performance was considered a relative strength (75th percentile) when compared to other perceptual abilities. His ability to synthesize visual elements to match a target (Visual Puzzles) was within the *Average* range for his age. Overall, these results do not reflect an impairment in visuoperceptual, spatial, or visuocontruction abilities for Mr. Tester.

5. **Verbal Learning and Memory.**
Mr. Tester's ability to learn a superspan (16 items) novel word list (CVLT-II) was in the mildly to moderately impaired level. His initial recall of this material, 5 of 16, was considered at the *Low Average* (16th percentile) level of performance relative to his age and gender. However, after the fifth exposure to this same material, he was only able to successfully recall 7 of 16 items, considered at a severe level deficiency (1st percentile), with a total learning performance across the five trials considered to reflect a mild to moderate impairment (31T). When a second learning list was presented, his initial recall of this information was similarly deficient, at 4 of 16 (16th percentile), and his subsequent short delayed recall of the original word list remained at an impaired level (7th percentile), at 6 of 16 items. No appreciable benefit was noted when provided category (semantic) cues, suggesting his poor recall performance is due to an initial encoding memory impairment, rather than a weakened retrieval ability. Recall of this material after a longer, distraction filled delay remained impaired (2nd percentile), at 5 of 16 items. As before, no appreciable increase in recall was noted when provided category cues. When presented with a forced-choice ("yes, no") recognition trial, his endorsement of original word-list items increased substantially to 14 of 16 (16th percentile compared to age and gender peers). However, he also endorsed a significant number of extra-list, intrusive errors, reflective of an impairment in discrimination of verbal learning information, which is likely a confound of an encoding deficiency.

Mr. Tester's ability to learn and immediately recall logically organized verbal material ("stories") was within the Average range for his age (25th percentile – Logical Memory I from WMS-III), and his recall of the major themes ("gist") of this information was in the upper Average range for his age (63rd percentile). Similarly, he displayed an expected level of learning over repeated exposure to this verbal information (37th percentile). He displayed a 95% retention of this information over a longer, distraction-filled delay, with recall performance within the Average range (27th percentile – Logical Memory II from WMS-III). His relatively intact verbal learning and memory for this information is reflective of the intrinsic benefit of the organization of this material – allowing him to compensate for the weakened encoding (acquisition) capacity demonstrated when he must impose organization to verbal material, as demonstrated on the word list recall task (CVLT-II). These results lend further support for the impression that Mr. Tester's verbal memory (retention over time) is intact, but that his capacity to learn (encode)

new information may be compromised relative to age peers particularly when in situations that tax his sustained attention capacity – e.g., heightened distress or environmental distraction.

6. **Visual Memory.**
Initial recall by reproduction of visually presented geometric figures (Visual Reproduction I of WMS-III) was within the *Borderline Impaired* range for his age (5th percentile). However, after a distraction-filled delay, his reproduction improved to within the Average range (37th percentile), with an overall retention of 81% of the material produced on first recall (63rd percentile). This performance is suggestive of an individual who has grossly adequate learning and retention capacity for nonverbal, visuoperceptual information.

7. **Abstract Reasoning and Executive Functions.**
Verbal abstract reasoning, assessed on a task requiring Mr. Tester to determine semantic elements shared between verbally presented concepts (Similarities) was within the *Average* range for his age. His ability to determine visual patterns (Matrix Reasoning) was similarly within the *Average* range, reflective of an intact nonverbal, visual abstract reasoning capacity. Mr. Tester's concept formation ability, assessed on a visual matching task (WCST) was within normal limits. On this measure he did not display an excessive loss of cognitive set, once established, as might be expected in the presence of an attention weakness. In addition, his problem solving strategy on this task was not plagued by increased perseveration, reflective of an individual who appropriately benefits from feedback when performing abstract reasoning tasks.

8. **Personality and Psychological Functioning.**
In response to a structured clinical interview (**MINI**), Mr. Tester indicated he has not been experiencing a consistently depressed or down mood. During the open interview, he characterized his current mood state as "alright." Later in the interview, he indicated that he has felt "more depressed" since the accident. He qualified that he has lost interest in activities that he previously enjoyed, adding, "I used to love snowmobiling, but I couldn't care less after the accident." Additional symptoms endorsed on the MINI include reduced level of activity, decreased energy, and difficulty concentrating. He noted that his wife has expressed concern that she sees a decrease in his concentration and subsequent memory performance since the accident. Mr. Tester denied having this pattern of symptoms prior to his injury/accident. When queried further about his mood state, he indicated that he does not experience any change/disruption in his sleep pattern, wakes feeling upbeat and positive for the day, and denied any history or current suicidal ideation. Overall, Mr. Tester appears to be exhibiting a pattern of occasional malaise, which may be considered congruent with the adjustment challenges and emotional distress associated with his ongoing physical pain condition and recent life stressors, rather than an endogenous mood disorder.

Mr. Tester did not endorse symptoms on the **MINI** reflective of a manic or hypomanic condition, panic disorder, or generalized anxiety disorder. While Mr. Tester did consider his recent accident as an "extremely traumatic event," he did not report re-experiencing the event in a distressing way (i.e., dreams or flashbacks). And while he did admit to feeling hyper-vigilant and more easily startled, he did not endorse a clinically significant pattern of symptoms that would meet criteria for Post-Traumatic Stress Disorder.

Mr. Tester was administered the *Personality Assessment Inventory* (**PAI**), a standardized instrument of psychological functioning and personality. His pattern of responses on this measure indicated an appropriate level of consistent responding to items of similar content, although he did demonstrate a tendency to portray himself as being relatively free of common shortcomings, in a somewhat defensive style. However, no evidence of an attempt to intentionally distort his clinical presentation was noted – rather, his manner of responding may

result in an under-representation of clinical distress. In addition, there was no evidence to suggest that he was attempting to portray himself in an excessively negative light by spuriously amplifying his level of distress.

Mr. Tester's **PAI** response profile was not indicative of any clinical psychopathology. While it may be considered that some level of defensiveness may account for this presentations, this profile is suggestive of an individual who is reporting that they are generally psychologically trouble-free. This profile specifically describes no problems within the areas of unusual thoughts or peculiar experiences (psychosis), extreme moodiness and impulsivity (mania), excessive unhappiness or depression. In addition, there is no pattern of problematic behaviors used to manage anxiety. This profile is reflective of an individual who reports having a level of stress comparable to most other adults.

Individuals with this **PAI** profile are characterized as having a generally stable self-evaluation, and tend to approach life with a clear sense of purpose and distinct convictions. They often exhibit a pattern of minimizing their own successes, generally viewing such accomplishments as either good fortune or the result of the efforts of others. These individuals are described as being modest, unpretentious, and somewhat self-conscious in social settings. Others typically describe them as passive, humble, and unassuming.

9. **Alcohol and Substance Use.**
Mr. Tester's pattern of responses to a standardized substance dependence screening instrument (**SASSI-3**) was considered to be reflective of an individual who is somewhat defensive regarding the self-report of his substance use. While his face valid endorsement of alcohol use on this measure was below the level seen for individuals with a severe substance abuse problems, the subtle and supplemental symptoms endorsed, along with his defensive pattern, is suggestive of an individual with a high probability of experiencing a substance abuse disorder. Mr. Tester admitted to having been recently arrested for a DUI (May 2014), but denied any other social, occupational, or legal problems associated with his alcohol use. He denied any illicit substance use history, and his pattern of endorsement on the **PAI** was congruent with that seen from individuals who are not currently bothered by substance abuse issues. These results should be viewed as providing a cautionary indication that Mr. Tester may become at risk for alcohol dependence and abuse.

10. **Pain Experience.**
Mr. Tester completed the **McGill Pain Questionnaire (MPQ)**, a self-report measure of pain experience that assesses both the quality and intensity of subjective pain. The McGill provides a rating (total PRI score), as well as three subscales of pain quality; *Sensory*, *Affective*, and *Evaluative*. The *Sensory* subscale describes pain in terms of the temporal, spatial, pressure, and thermal qualities – Mr. Tester endorsed his present pain experience in this domain as "aching." The *Affective* subscale describes the pain experience in terms of tension, fear and autonomic properties – Mr. Tester did not endorse any symptoms within this subjective category of pain experience. Finally, the *Evaluative* subscale describes a general subjective quality of the pain experience – Mr. Tester reported his pain experience as being "annoying." Utilizing the quantification standards of the MPQ, Mr. Tester's item endorsement pattern provided a Total Pain Response Index score of 5 out of a possible 78. This score is well below the threshold of self-report seen across all categories of patients experiencing chronic pain. During the clinical follow up to this measure, Mr. Tester acknowledged that his pain experience was subjectively minimal, but qualified that it was "continuous." It may be considered that Mr. Tester has demonstrated an effective coping ability to compensate for his pain experience, and that neither his pain experience nor the behavior patterns invested in this compensation interfere with his daily functioning.

Mr. Tester's pattern of item responses on the Somatization Scale of the PAI was within normal limits. Analysis of the factors that constitute this Scale indicated there no elevation in symptoms reflective of excessive health concern, somatization, or conversion issues. This PAI profile is not consistent with that seen from individuals who report significant emotional or physical distress associated with chronic pain.

Impressions:

- Mild impairment in verbal attention, resulting in mild to moderate new learning deficits for verbal information. This impairment is noted when Mr. Tester is required to impose structure on the information to be recalled, reflective of the negative impact his limited attention capacity has on his encoding efficiency. While this attention and memory deficit is a circumscribed impairment, rather than global cognitive deficit, it may still be considered to limit his occupational and social functioning at times. This pattern of attention/encoding deficit is commonly associated with the distracting effects of emotional distress or excessive environmental stimuli – both resulting in reduced ability for Mr. Tester to process information in an efficient manner at these times.
    - Given Mr. Tester's reported loss of consciousness and posttraumatic confusion, it may be considered that he experienced a mild traumatic brain injury as the result of the accident of December 2011.
    - Mr. Tester's pattern of cognitive deficits – mild attention and mild to moderate verbal learning impairments – are congruent with that seen from individuals with mild traumatic brain injury.
    - Mr. Tester claimed that the onset of his cognitive deficits post-dates his injuries sustained in December 2011.
- No other neuropsychological deficits were noted in this assessment, with general intellectual abilities, language functions, visuoperceptual abilities, complex verbal and visual memory, and abstract reasoning found to be within normal limits relative to his age, education level, and gender.
- Mr. Tester presents with a heightened level of psychologically defensiveness, resulting in a minimized pattern of distress and under-reporting of symptoms. While his current clinical presentation and response patterns on standardized testing do not currently reflect clinically significant psychopathy, there are several areas of concern that were noted:
    - Mr. Tester appears to be experiencing a general, subthreshold level of malaise. While this profile is not consistent with a major depressive disorder, a number of symptoms may be of considerable concern, including his reduced level of interest in previously enjoyed activities.
    - This lingering emotional distress may have a negative impact on his attention and new learning abilities.
    - Mr. Tester reports a general level of "soreness" and "continuous" pain experience that, while below level of self-report compared to patient's diagnosed with severe chronic pain, may be resulting in a continuous taxing of his emotional coping capacity.
    - Mr. Tester's chronic emotional malaise, episodic attention difficulties, and continuous physical distress may be considered to negatively impact his social, occupational, and interpersonal interactions – of particular concern is the harmful impact his undesirable internal experiences may have on his marital relationship.

- Mr. Tester does not currently meet clinical criteria for the diagnosis of Posttraumatic Stress Disorder. While he has been exposed to a significant life threatening event, and admits to the experience of hypervigilance and increased startle response, he does not currently report the presence of additional symptoms associated with this disorder.
  - He does not report current experience of intrusive symptoms associated with the traumatic event – denying disturbing dreams, flashbacks, or other involuntary distressing memories of the event.
  - He denied any pattern of avoidance of stimuli or situations associated with the traumatic event. He admitted to such discomfort when he first returned to work in the mine, but states this has resolved and is not noted at a distressing level at present.
  - Beyond the episode of altered consciousness reportedly experienced at the time of the traumatic event considered due to the head trauma resulting in his concussion, he does not currently experience any alterations in cognitions or mood specific to the traumatic event.
- Mr. Tester may be considered at risk for alcohol abuse problems, particularly if he is not attentive to his pattern of use and if he experiences an increase in life stressors. He is not considered to currently meet criteria for a substance dependence or use disorder. In addition, his emotional malaise and attention/learning deficits are not considered to be causally related to his present alcohol use.

Clinical Diagnoses:

- **331.83 Mild Neurocognitive Disorder due to Traumatic Brain Injury**

Recommendations:

- Mr. Tester may benefit from general compensatory strategies to assist an individual with limited attention, particularly within vocational settings, which may include:
  - Provide information to be learned in low stimuli, non-distracting situations.
  - Provide repetition of information to be learned, allowing for Mr. Tester to confirm acquisition of material.
  - Minimize units of information to be learned, decreasing the cognitive "load" of sequential and simultaneous tasks.
  - Utilize list or other external cues to decrease dependence on memorization.
- Mr. Tester may benefit from psychological counseling to address his general malaise, neurocognitive deficits, and chronic physical discomfort. Intervention may focus on maximizing his ability to cope/adjustment to these life stressors, and to reduce the potential negative impact they may have on his social, interpersonal (marital), and occupational functioning.
  - Unfortunately, given his pattern of defensiveness and history of having declined counseling services in the past, Mr. Tester may not accept this recommendation unless he can overcome his resistance to this form of treatment – even then, he will likely exhibit difficulty establishing rapport with a counselor, given his defensive personality style.

- Mr. Tester should be provided caution that his pattern of alcohol use may place him at an elevated risk of developing dependence or abuse problems. He should be advised to monitor his alcohol intake to ensure a reasonably acceptable level and pattern of use is maintained. In addition, he may benefit from enlisting nonjudgmental support from his family and friends to safeguard continued moderation in his alcohol use.

Philip A. Hanger, Ph.D.
Licensed Psychologist

Exhibit "E"

Daniel S. Hayes, Ph.D., L.L.C. and Associates
Daniel S. Hayes, Ph.D., Licensed Psychologist PSY-244
Philip A. Hanger, Ph.D., Licensed Psychologist PSY-202760
Emily Crawford, Psy.D., Licensed Psychologist PSY-202783
Steve Allen, M.S., Service Extender SE-202785
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Coeur d'Alene, ID 83814
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Psychological Consultation

Client Name: Williams, Matthew
DOB [redacted] Age: 45

Reason for Referral:
Mr. Williams was referred by his personal attorney, Eric Rossman, for a psychological assessment to provide an opinion as to Mr. Williams' current level of psychological functioning, limitations, and recommendations for treatment and accommodation.

Records Reviewed:

- *Records from David Wait, M.D., psychiatrist – including psychiatric assessment, dated 6/11/2012, within which Dr. Wait provides Mr. Williams with the diagnosis of Post-Traumatic Stress Disorder*
- *Records from psychotherapist, Emily Hart, M.Ed., indicated individual therapy services were provided for Mr. Williams related to his diagnosis of PTSD, from a period between June 2012 and August 2014.*
- *Explanation of Benefits statements from Regence BlueShield outlining claims made for services provided by psychotherapist, Emily Hart.*
- *Records from John McNulty, M.D., orthopedic surgeon, St. Maries, related to services provided in January and April 2012 related to Mr. William's right elbow injury.*
- *Prescription record between December 2011 and December 2014 of Mr. Williams through Kohals Pharmacy, indicating psychotropic mediation, Fluoxetine, prescribed by Scott Gibbs, PA.*
- *Shoshone Medical Center, Kellogg, emergency admission records of 14 December 2011, indicating impression of contusion injuries from "crush" to right thigh and right ankle, as well as multiple lacerations. Discharge note from same the following day. As well as follow up services in December 2011 and January 2012.*
- *Kellogg Physical Therapy records indicating services from 30 December 2011 through 3 February 2012 referencing thigh, ankle, and elbow rehabilitation.*
- *Mountain Health, Kellogg records spanning approximately period of December 2011 through August 2014. Including reference to treatment within 48 hours post mine accident (December 2011), full duty work release (February 2012), several employee physicals (August 2013 and June 2014), and*

record of visit in August 2014 or "anger and depression" wherein Scott Gibbs, PA, prescribed the psychotropic, Prozac, and the diagnosis of PTSD.

- *Psychological Evaluation completed by Daniel Hayes Ph.D., 26 January 2015. Dr. Hayes opined that Mr. Williams had maintained appropriate effort and openness during this examination, with no evidence of feigning of psychological symptoms. Based on the clinical interview, review of records, and results of valid psychometric testing administered, Dr. Hayes provided the diagnostic impressions of Post-Traumatic Stress Disorder, chronic (309.81), Anxiety Disorder, NOS (300.00), Generalized Anxiety Disorder (300.03), and Depressive Disorder, NOS (311). In addition, Mr. Williams is considered to experience Alcohol Abuse, in early full remission (305.00).*

Summary:

After reviewing the available records, it was ascertained that Mr. Williams' most recent psychological assessment under Dr. Daniel Hayes, 26 January 2015, was considered sufficiently comprehensive and accurate to provide a valid estimate of Mr. Williams' current level of psychological functioning. It is the opinion of this psychologist that **no additional testing, augmentation or clarification of diagnostic conclusions and impressions is warranted beyond that provided in the referenced report by Dr. Hayes.**

Dated this 6th day of April, 2015.

Philip A. Hanger, Ph.D.
Licensed Psychologist

DANIEL S. HAYES, PH.D., LLC AND ASSOCIATES
psychology
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Psychological Evaluation

Patient: Matthew Williams
Age: 45
Gender: Male
Date of Birth: [redacted]
Date(s) of Service: 01/26 /2015
Education: High school plus three years of college
Marital Status: Married 10+ years, has two biological and three-step children
Occupation: Works in the mining industry, currently in Alaska as an underground equipment operator
Medical Problems reported: previously right shoulder and knee injuries and ongoing chronic pain
Previous Psychological/Emotional Symptoms, Diagnoses or Treatment: Post Traumatic Stress Disorder diagnosed by a number of professionals, currently works with Emily Hart. Also has diagnoses of Major Depressive Disorder, Recurrent, Alcohol Disorder, Panic/Agoraphobia.
Alcohol Related Problems: Reports that alcohol was problematic in the past. He stopped drinking entirely on August 2, 2014.
Non-Alcohol Substance Related Problems And Misuse Of Medication: Denied

Current Medications: Prozac

Procedures Utilized

- Review of documents, consisting of medical records from Emily Hart, evaluation by David Wait, the medical records from Dr. Gibbs and medical outline, previous diagnostic interview completed on 01/30/2014 by Daniel S. Hayes PhD.
- Diagnostic Interview
- History and Background Information
- BioPsychoSocial History
- Mental Status / Cognitive Screening Examination
- Miller Forensic Assessment of Symptoms Test (M-FAST)
- MINI International Neuropsychiatric Interview
- Millon Clinical Multiaxial Inventory III
- 16 PF

Referral: Matthew Williams is a 45-year-old male referred by Richard Whitehead, Mr. Williams' attorney, to provide an opinion regarding diagnosis and associated levels of emotional distress and functional impairment. My initial contact with Mr. Williams was on January 30 of 2014, approximately two years after he was involved in the third of a series of three mining accidents in the Lucky Friday underground mine within a roughly nine-month period of time. That third incident was extremely traumatic and threatened serious injury and death to himself and others.

This evaluation was requested to assess Mr. Williams' levels of emotional distress and functioning at the present time and to determine whether he currently meets the diagnostic criteria for any clinical syndromal patterns.

According to Mr. Williams, he still needs "...to be in control of situations, of my own destiny.... I've lost trust in others after my injuries.... I experience intense anxiety if I'm not in control of the situation." He explained that when machinery, motor vehicles, equipment in his vicinity, etc. are being operated by others, and when riding as a passenger in a car rather than being the driver, he can experience emotional distress, discomfort, anxiety, and physical reactivity. He reports that although somewhat lessened in severity and frequency when compared to a year ago, he continues to experience distressing and intrusive recollections of the events that occurred in the mining accidents, distressing dreams related to those incidents, and intense psychological distress upon exposure to external cues such as being in situations in which he is not in control and must rely on others for his own safety. He notes that he is particularly sensitive on the anniversary date of the third mining accident on December 14, 2011 "in which I got hurt."

Mr. Williams admits that in the aftermath of the third incident, he tried to manage his anxiety and distressing emotional and physical symptoms through self-medication with alcohol, but on August 2, 2014 "I had a pretty bad episode. I exploded on my wife, started to throw and break things around the house." He was "about to kill myself" on that day, he picked up his gun and was going to go outside to his garage to shoot himself, but his wife "talked me down.... I didn't take the PTSD stuff serious. I thought I could handle it myself." He had dismissed the recommendations he had received, to take medications to help manage his symptoms, feeling that he could "work through it." Looking back he admits, "I had all kinds of anxiety and anger, and it all came to a head on August 2, 2014." Since he has been on medication (Prozac), he admits that his symptoms have been better managed. "I admit I was getting hard to be around." His family has noticed a positive difference since he started taking medications and seeing a counselor. In the summer of 2014, prior to his August breakdown, "I really noticed my temper and rage and impatience... I realized this stuff was getting the best of me."

Based on Mr. Williams' description of his emotional distress and levels of functional impairment in the past, they fit into the *severe* category, meaning that the quality of his life and/or functioning on a day-to-day basis were profoundly impacted. Currently, he estimates his emotional distress to be in the *moderate* category, meaning a significant impact on the quality of his life and/or functioning on a day-to-day basis. He estimates the negative impact on his current levels of functioning to be in the *mild to moderate* category, meaning that his quality of life is significantly impacted, but the impairment in his day-to-day functioning is not significant unless he is in situations in which he is not the one in control and must rely on others for his safety – in such situations, the impairment rating is considerably worsened. "Since medication, my functioning is a lot better. Before that, it was impacting me on a day to day basis."

BioPsychoSocial History

Symptoms

Mr. Williams reports that his current symptoms of emotional distress are in the *moderate* category, meaning that they have a significant impact on the quality of his functioning on a day-to-day basis, causing sleep disturbance, fatigue, low energy, agitation, anxiety, irritability, guilt, grief, and being a victim of emotional trauma. His current symptoms in the *mild* category, meaning that they impact quality of life but do not cause significant impairment of his day-to-day

functioning, include depressed mood, poor concentration, mood swings, social isolation, and being a victim of physical trauma. The impact of these symptoms rises from mild to moderate, signifying significant negative impact on his quality of life, when he is in situations that elicit recall or physical reactivity, such as environmental triggers, being asked about what happened, or being in a potentially risky situation where someone else is in control of his safety and/or the safety of his family. He comes to this current evaluation with previous diagnoses of Post Traumatic Stress Disorder; Major Depressive Disorder, recurrent, without psychotic symptoms; Panic Disorder with Agoraphobia; and Alcohol Disorder all related to the series of three mining accidents in the Lucky Friday within a roughly nine-month period of time. He has had previous outpatient psychotherapy and found it to be beneficial. He has no psychiatric hospitalizations in his history. He admits to previous suicidal ideation, plan, and intent, on August 2, 2014, but he denies current suicide ideation, plan, or intent.

Family Medical History
Cardiovascular disease, dementia, cancer, and alcoholism run in Mr. Williams' family of origin.

Patient's Medical History
Mr. Williams describes his current physical health as fair. He currently is taking psychotropic medication.

Patient's History of Significant Relationships
Mr. Williams has been married 10 years and is satisfied in his relationship with his wife. He has two biological children, ages 25 and 7, and three step children, ages 26, 21, and 18.

Substance Related History
Mr. Williams admits to some alcohol-related problems in his history. He began drinking at age 16, and he feels drinking didn't become problematic for him until his early 20s, when he received two DUIs within a year of each other. He received outpatient Alcohol treatment at age 31. He married at age 35, after having been independent and becoming "set in my ways." He feels it took him about a year to adjust to being married and instantly having three [step]children and soon adding a fourth [biological child], but then "I became a family man... and I cut way down on my drinking." He completely stopped drinking at age 45. Consequences of his alcohol use included hangovers, tolerance changes, loss of control over amount used, and arrests.

Sleep History
Mr. Williams admits to having difficulty falling asleep, and lack of restorative sleep.

Intellectual and Academic Functioning
Mr. Williams describes himself as having normal intelligence.

Socioeconomic History
Mr. Williams has a supportive network of friends and family. His housing is adequate. He is employed and satisfied with his employment. He has never served in the military. He has large indebtedness at this point. He admits to having one DUI about 15 years ago, he reports no other legal problems. He describes himself as Christian. He is currently involved in community and recreational activities as well as hobbies, including camping and fishing. He is not engaged at this time in spiritual activities.

Stated Goals of Treatment:
Mr. Williams states that his goals for treatment are "...To get back to normal life... Dealing with

the PTSD... Not feeling like I'm going to die or like I always have to be in control of my life."

HISTORY AND BACKGROUND INFORMATION:

Mr. Williams was born in Silverton, Idaho. He has one younger brother. His biological parents divorced when he was about five years of age. His father worked as a meat cutter and died at 66 years of age. Mr. Williams is unaware of his father having any psychological or emotional problems, but is aware that his father had had alcoholic-related problems ("He was a heavy drinker.") and stopped drinking about 18 years prior to his death. Cardiovascular disease and cancer run on the paternal side of the family. Mr. Williams feels that his father "did the best he could... but he was a bit hard and not very affectionate." Mr. Williams' mother is 66 years of age currently and has no significant medical, psychiatric, or substance-related problems. Cardiovascular disease and alcoholism run on the maternal side of the family. Mother did office-type work in a variety of job settings, including offices, banks, and the local school district. He describes her as very loving, caring, "...always there for my brother and me."

Mr. Williams was a full term baby in good health at birth. He had double-hernia surgery during infancy but otherwise had only normal illnesses and injuries in infancy and early childhood. His developmental milestones were met within normal limits. He denies any traumas or upsetting events during infancy and early childhood, and he denies any abuse of a physical, mental, or sexual nature throughout his life. He reports no significant behavior problems or adjustment issues in this period of his life, having been described as a "kind of shy kid... but an everyday kind of kid."

He maintained good physical health with normal illnesses and injuries in middle and late childhood. He denies any psychological or emotional difficulties. His parents divorced when he was five years old, but both remarried when he was about seven and his stepfather "was a really good guy, and a positive influence on me." Other than his parents' divorce, he denies any upsetting events. Academically he was an average to above-average student. Socially he had lots of friends, "a large and good group," and has maintained many of those friendships to the present time. He denies behavior problems, acting out, or adjustment difficulties within the home, school, and community settings during this period of his life. He was involved in sports, "...and I loved it.... I was a pretty typical kid."

Mr. Williams maintained good health in his adolescence. He occasionally had a sports-related injury but none that was serious or resulting in residual problems. He had no psychological or emotional difficulties. He started drinking during this period of his life, "a normal amount" relative to his peers and it was not problematic for him. He had no acting out, behavior problems, or adjustment difficulties within the home, school, and community settings during his adolescence. He admits that he "slacked off a bit academically in high school.... I only did what I had-to-do.... I didn't apply myself. I graduated with a 2.8 grade-point-average." He started doing odd jobs while in school, but was "pretty dedicated to doing sports." He did some dating in high school. Home life was good and there were no significant stressors, traumas or upsetting events except, at times, having to stick up for his mother intermittently and tell his biological father, who had drinking problems and sometimes came by the house drunk, to leave her alone.

Upon graduation from high school he worked for a tree trimming service and attended the University of Idaho for about 3-1/2 years, majoring in finance. "I went to school because my best friends were going.... But the more I got into business classes, the more I became disinterested." He reports getting a girl pregnant in college, which was "an embarrassment.... I felt I let everybody down" in his home and community of origin." The mother gave birth to the child and

he paid child support for 18 years. The mother imposed limits on the level of interaction he was able to have with their son. "It was a difficult situation." He worked for a couple years in the logging industry, then switched to mining where he has remained to the present. He has a steady work history and good job performance reports and ratings, becoming known as "the go-to guy" for issues and problems that came up from time to time.

Mr. Williams married for the first time at age 35. His wife was married previously and had three children. They produced one child together. He admits that his first year of marriage was "tough.... I was independent. I was 35. I'd been alone my whole life. I had to adjust to being a family man." He feels he worked through those issues, and he speaks very positively about his relationship with his wife and family at this point. "I had to learn to pick my battles."

Mr. Williams has two DUI charges on his record, one 15 years ago, and one 16 years ago. The consequence of his first DUI was unsupervised probation. The consequence of his second DUI was added time to his probation, fines which he paid, and attending court-ordered alcohol classes.

Mining-Related Traumas And Upsetting Events

- In April of 2011, there was a cave-in at the Lucky Friday Mine where Mr. Williams worked. Larry Merrick, a coworker, was killed in that event. "He was a friend and a coworker." Mr. Williams helped in efforts to recover Mr. Merrick's body over the course of nine days. "Looking back I was dumb to do it. As a human it was the worst thing I'd ever experienced. I thought I could handle it. I was scared shitless. It was a hopeless situation. We knew he was dead and we wondered if anyone else was going to get hurt." It was Mr. Williams' opinion that the company gave Mr. Merrick's wife false hope that they might find him alive. "Everyone knew he was already dead." Mr. Williams' description of the eventual recovery of the body was that it was quite upsetting, as decomposition was well under way, the odor was very strong, and access to the body was difficult and limited and required some pulling, which resulted in retrieving "pieces" of him.
- In November of 2011, several miners, including Mr. Williams, were in "the main drift" of the mine and a rock burst occurred. No one was injured physically. It took 11 days for the rock burst to be cleared and the mine reopened. Mr. Williams' reaction to this second incident within the same year was "dismay.... We were all lucky that no one was hurt. We worked hard for 11 days so we could get back to mining."
- On December 14, 2011, a second rock burst occurred. This time, Mr. Williams was buried. "This is where my trust issues started.... It was found that the company was not doing what they were supposed to be doing. This was determined by M.S.H.A.... Also, it was the way we were treated by them." He felt that he and his coworkers gave the company 150% and believed the company was "watching our back." After his injuries healed to some degree from being buried in the rock burst, he returned to work and was presented with a $60,000 cut in pay. He had ongoing physical injuries and psychological distress, ...

  "...especially trusting others, when someone else is in control or in charge.... The worst part of my day is allowing someone to take control or when I have to depend on others for my safety. This continues today.... Up to that point, I had worked 14 or 15 years and nothing like this ever crossed my mind. I just went down in the mines and did my job and helped the other guys do their job." He recalls experiencing intense panic and feelings of dread, going up and down the hoist "because my life was in their hands.... I don't trust people any more.... This patterns continues.... My anger built over time and I became obsessed with the way things have gone.... I went from being the go-to guy, someone they would call on, one of the top miners, one of their best miners, to being nothing but a number and a strong back that was replaceable.... I had tons of pride in my work and I did

things right.... One of the hardest experiences I ever had is when I was buried and I thought, 'Will I ever see my wife and kids again.' I still feel unsure, will I lose them.... I almost lost them once, and I fear that might happen again.... This whole experience I wouldn't wish upon anyone. Now I have to work far from home [in Alaska] and far from my family...."
He explained this by stating that despite the good work he had done for so many years, he was given a poor recommendation by the HR department at the mine, which prevented him from getting local mine work as well as mine work elsewhere within the lower 48 states.

Mr. Williams admits to some alcohol-related problems in his history. He began drinking at age 16. Drinking did not become problematic for him until his early 20s, when he received two DUIs within a year of each other. He received outpatient treatment ("alcohol classes") at age 31, court-ordered after the second DUI. He married at age 35, after having been independent and becoming "set in my ways," and admits it took him about a year to adjust to being married and instantly having three [step]children and soon adding a fourth [biological child], but then "I became a family man... and I cut way down on my drinking without a problem." However, after the third mining accident in December of 2011, his drinking dramatically increased. He feels it was a way of self-medicating, to try and control his anxiety. "It would mellow me out to some point." He notes, however, that his symptoms worsened over time. He recalls in July of 2014 he went on a "crying jag," and told his wife something was wrong with him. He recalls being "irritable all the time.... It was getting worse and worse." On August 2, he came home from his current job in Alaska and "completely lost it." That was on August 2, 2014. "I broke up some stuff. I was going to go out to the garage and shoot myself. I was serious about it." His wife "talked me down." Since then he has had no alcohol, he is seeing a counselor, and he is taking antidepressant medication. He admits that all three of those factors have helped him — the sobriety, the counseling, and the medication. His family agrees. "Looking back, I realize I had not been dealing with what I should have been dealing with."

After the third mining incident – the rock burst in which he was buried and injured, he frequently had recurrent, intrusive, and distressing recollections, distressing dreams, intense psychological distress and physical reactivity. He recalls one instance when a cast was being applied for an injury; "I felt I was buried. I couldn't sleep. I freaked out. I had to cut the cast off. I panicked. He reports that the severity of his symptoms of PTSD had continued to worsen "until I got on some medication.... Before then, I felt I was slipping further and further away. I felt I could handle it on my own." Although his descriptions of his current symptoms, distress, and functioning indicate clearly that he is still not fully recovered, he feels that seeking help was the right choice for him, and as a result of having made that choice he has begun to feel a difference in his adjustment.

Mental Status / Cognitive Screening Examination
Mr. Williams arrived for the appointment on time and was casually but appropriately-dressed and groomed. His eye contact was good. His behaviors and psychomotor activity levels were appropriate to the setting of this evaluation. His speech was fluent with normal volume, rhythm and articulation. He was cooperative, respectful, attentive and pleasant throughout the evaluation. He showed a broad range of affective expression and complained primarily of symptoms that are consistent with diagnoses of Post Traumatic Stress Disorder, Anxiety Disorder, and some Depression which appears to be reactive to the changes that have occurred in his life since his mining injuries occurred. His emotional expression was appropriate to thought content and the setting of the evaluation. There was no evidence of disturbances of perception or thought which would have been suggestive of a psychotic disorder. His productivity and continuity of thought

fell within normal limits. His content of thought tended to focus primarily on the three traumatic and upsetting experiences that occurred in the mine, the impact they have had on him, and the significant changes that have occurred in his life since they happened. His thinking was linear, goal directed, and concordant with logic and experience. His intellect is estimated to be within the average to possibly high average range.

The patient was oriented in all spheres and able to provide personal information, both recent and historic. His fund of general information and knowledge of world events were quite good and were consistent with previous reported levels of educational achievement and functioning. His mental control, attention, and concentration appeared to fall within normal limits. He was able to count backward from 20 to 1, recite the alphabet, state the days of the week backward, and perform serial addition by 3s and serial subtraction by 7s all without error. He did not appear to exhibit any problems with expressive or receptive language. His memory functioning appeared to fall within normal limits. He was able to recall four of four words in the delayed recall portion of the memory examination. His abstract reasoning, logical analysis, and immediate problem solving abilities all appeared to fall within normal limits. He scored 30 out of a possible 30 on the Cognitive Screening Examination, which falls within the normal range. Relative strengths were noted in general information, vocabulary, abstract reasoning, immediate problem solving skills, the ability to perform simple mathematical calculations without the aid of paper and pencil, and judgment. There was no evidence of impulse control difficulties noted during the evaluation. He appears to have awareness of and insight into the nature of his problems. He has realistic expectations and has an active plan for addressing his issues in a structured and productive manner.

The Miller Forensic Assessment of Symptoms Test (M-FAST) is a 25-item instrument used to evaluate motivation and detect exaggeration of psychological symptoms and possible malingering. Mr. Williams' score on the M-FAST was 1 out of a possible 25. A score of 6 or greater is suggestive of Malingering Psychopathology. Mr. Williams' score on the M-FAST did not suggest malingering or exaggeration of the extent or severity of psychological symptoms.

Diagnoses

AXIS 1 Diagnoses

309.81 Post Traumatic Stress Disorder, chronic.

Mr. Williams has experienced and witnessed and/or was a responder to three extremely traumatic events, including actual death of a coworker and serious injury to himself and others. The event during which he was injured had the most profound impact on him. The event during which he witnessed and retrieved the badly decomposed body of his dead coworker was also quite traumatic for him. He responded to these events with intense fear, helplessness, and horror. The frequency and intensity of his symptoms in the immediate aftermath of the third and most upsetting event were profound, and have lessened somewhat since he has received psychopharmacologic treatment and counseling. Despite his improvement, he continues to re-experience the events, with resultant emotional distress and functional impairment at a moderate level of severity at this point, meaning that they have a significant impact on his quality of life and functional ability on a day-to-day basis, particularly when exposed to common environmental circumstances that trigger an involuntary physical reaction. He continues to re-experience the events in a distressing and intrusive way, including dreams, intense recollections, and physical reactions. He continues to avoid thinking about and talking about the events whenever possible. He avoids activities and locations that remind him of the events, particularly those that require him to yield control of his safety to others. He admits to initially having trouble recalling some of

the important events that happened. "At first I didn't remember all of it. But over time it came back." He notes that he tends to avoid people who have the potential of bringing up the topic of the mining incidents. He notices intermittent feelings of emotional numbness and a tendency to distance himself from thoughts and feelings about the first mining incident (resulting in the death of his coworker and Mr. Williams' experience when retrieving his body) as well as the third mining incident (the rock burst that buried him and injured him). Since the third incident, he has a strong feeling that his life will be shortened. "I have the experience that I will die sooner than others." He continues to have difficulty sleeping as a direct result of experiencing the three incidents. He has been irritable and has had temper outbursts, although these features have lessened since starting to take medication and undergoing regular counseling. His symptoms have continued to interfere with his ability to concentrate. He can become nervous and on guard, "especially when I feel I am not in control of a situation." He complains of continued exaggerated startle response.

300.00 Anxiety Disorder, not otherwise specified.
Although Mr. Williams has symptoms that are consistent with a diagnosis of Panic Disorder, I was unable at this point to establish that he clearly meets the full criteria for this diagnosis. The symptoms he experiences are sudden, intermittent episodes during which he feels anxious, frightened, or uncomfortable, and these episodes appear to be related to his active and ongoing PTSD rather than to a separate diagnosis of Panic Disorder. The panic-like episodes he experiences are, in most cases, identified by him as having been provoked by a particular situation, encounter, or environment which evokes recollections and physical and emotional reactions to the traumatic events in the mine. An example is if he feels he is not in control over a situation in which his safety might be at risk and he must yield to and rely on others for his safety. Another example is the dread he feels when going down into a mine. His symptoms of anxiety include racing heart, sweaty and clammy hands, shortness of breath, and a fear that he is losing control or dying.

300.02 Generalized Anxiety Disorder
Mr. Williams describes excessive worry and anxiety which are present most days, including worries about something bad that is going to happen to him and/or his family and worries about his financial situation. He finds that these worries and anxieties are difficult for him to control and at times they interfere with his ability to focus on what he is doing. During times of anxiety, he describes himself as feeling restless, keyed up, on edge, tense, and sometimes irritable. He feels the anxiety contributes to his overall tiredness, his difficulty falling asleep, his awakening in the middle of the night and finding that he cannot return to sleep, and his lack of restorative sleep. He feels his anxiety interferes with his ability to concentrate because he becomes preoccupied with "what could happen."

311 Depressive Disorder Not Otherwise Specified
Mr. Williams denies ever experiencing significant symptoms of depression prior to his mining accident. From his description, he likely did meet the criteria for a diagnosis of Major Depressive Disorder earlier in the aftermath of the third mining incident that he experienced in the year 2011, but he is taking psychotropic medication presently to address his symptoms of depression and I was unable to establish clearly that he meets the criteria for that diagnosis at this point. However, he does appear to be experiencing some residual depression which seems to be reactive to the significant lifestyle changes that he has undergone since his mining-related traumatic experiences. The negative work review he received from his former employer interfered with his ability to find work in the mining industry within not only his local area but the lower 48 states, so after months of unemployment he took a mining job in Alaska, requiring him to be apart from his family for

weeks at a time. He has had to force himself to adopt an uncomfortable mindset regarding his own safety -- yielding control to others -- in order to work and attempt to offset the negative impact of the mining incidents on his financial situation. "I felt down, the way the whole situation played out.... I gave 150%, and I don't understand why they (his former employer) didn't do the same back when we were injured.... My depression and anger made me not too enjoyable to be around for others.... I reacted to some of the smallest things that turned out not to be a big deal." He denies currently thinking that he would be better off dead or wishing he were dead. He denies wanting to harm himself or having suicidal thoughts, plan, or intent. He admits to previously (on August 2, 2014) wanting to harm himself, stating that he wanted to kill himself, had the intent and plan to take his life, and wanted to die. He admits it was "an impulsive thought," which led to the action of picking up his gun and heading to the garage to shoot himself. His wife was able to stop him, and since that time he has not felt seriously suicidal.

Null: Mr. Williams does not appear to meet the criteria for Psychotic Disorder.

305.00 Alcohol Abuse, in early full remission.
Mr. Williams reports that his alcohol consumption was excessive for about 10 years beginning in his early 20s. He had two DUIs during that period, and may have met the criteria for Alcohol Abuse. He got married at 35 years of age, and he purposefully and significantly reduced his drinking upon becoming "a family man." After the mining accident in which he was injured, however, his drinking increased to the point of being problematic, but he stated, "It helped to calm me down." This period of excessive drinking reached a nadir on August 2, 2014. Since that date he has entirely stopped consuming alcohol.

On occasion during times when he drank, he drank more than he had planned to when he started drinking. He admits to having been intoxicated, high or hung over on more than one occasion when he had responsibilities. He admits to have placed others at physical risk while under the influence of alcohol. He also is aware that his drinking caused problems for his family.

Before the mining accident, drinking was more of a social activity. After the mining accident, drinking alone became the norm and he acknowledges that it was a form of self medication, to attempt to gain relief from his symptoms of PTSD and Anxiety Disorder. Currently, having remained clean and sober for six months thus far, he is in early full remission.

AXIS 2
V71.09 No diagnosis in this axis.

Personality and Interpersonal Features
Overall, Mr. Williams reports healthy levels of functioning and adjustment within the home, school, work, community settings, and interpersonal relationships throughout his life. It appears that he is a rather disciplined individual who is respectful, conscientious, devoted to his work and to productivity. He appears to be conforming, adhering to social expectations. He readily accepts demands and expectations of him. He takes a fairly serious, restrained approach in his life and is concerned about practical, down-to-earth issues. He seems to be rather respectful of conservative and traditional ideas. He is self sufficient, and he prefers his own decisions at this point, which could be related, in part, to the development of trust issues since his experience in mining accidents which have made him uncomfortable in situations where his wellbeing and life rest in the hands of others rather than on himself. He admits to some intermittent problems with alcohol in his 20s and early 30s, and he successfully adjusted his relationship with alcohol to be within appropriate levels upon becoming a married "family man" in his mid 30s. He has been a well functioning individual throughout his life, having established himself among his coworkers and

employer as the "go-to guy" devoted to "being there" to meet work-related challenges effectively. He adjusted to a relatively late-in-life marriage to become a devoted "family man" who voluntarily and effectively reduced his alcohol consumption, of his own volition, to a level that was not problematic. He has been disciplined, respectful, conscientious, conforming, rule bound, socially precise, compulsive, reliable, competent, devoted, highly driven, and living by self-set high standards which, perhaps unbeknownst to himself at the time, set in himself an expectation that others would respond in kind. Significant changes occurred in this individual in the aftermath of the series of three reported mining accidents within a period of nine months in 2011 at his place of employment. The physically and emotionally traumatic effects of those incidents, and of the response he feels his employer gave to those incidents and to the needs of those who were most impacted, were followed by Mr. Williams developing clinical syndromal patterns as described in this report.

AXIS 3
Deferred to physician.
Mr. Williams himself reports injuries and a chronic pain condition.

AXIS 4
Problems related to physical health, psychological health, occupational due to a significant decrease in his income and the need to find work outside a reasonable commute from his home and family.

AXIS 5
Current Global Assessment of Functioning: 45 to 55

Impressions:
Based on the information I have gathered thus far, including the results of my Psychological Evaluation of Mr. Williams on January 26, 2015, my clinical observations made during the evaluation process, Mr. Williams's self reports including his history and background information, and my review of medical records and documents prior to completion of this written report, Mr. William's accounts of his life prior to the three mining incidents in April, November and December of 2011 paint a picture of an individual who was functioning at a high level, with healthy functional capacity and performance, healthy adjustment throughout his life in the home, school, work, and community settings, developing some intermittent alcohol-related problems between his 20s and early 30s which he corrected successfully on his own without difficulty when he got married and became "a family man," maintaining healthy social and interpersonal relationships including a solid marriage and good relationship with his wife and children, and receiving good job performance reports in a steady career at the Lucky Friday Mine where he became known among coworkers and supervisors as "the go-to guy" for any needs or problems that arose. He was asymptomatic regarding any psychological or emotional distress during the first 42 years of his life. Significant changes occurred in this individual at that point, in the aftermath of his experience in the series of three serious mining incidents that occurred within a nine-month period in 2011 at the Lucky Friday mine.

As a result of my evaluation of Mr. Williams, it is my professional opinion that his condition is sufficient to warrant diagnoses consistent with the DSM criteria for the following diagnoses:
309.81 Post Traumatic Stress Disorder
300.02 Generalized Anxiety Disorder
311.00 Depressive Disorder Not Otherwise Specified
305.00 Alcohol Abuse In Early Full Remission.
The evaluation finds that his current emotional distress is of the *moderate* category, meaning that

it has a significant impact on the quality of his life and his functioning on a day-to-day basis. His functional impairment is in a range from *mild*, meaning that it impacts quality of life but causes no significant impairment in day-to-day functioning, to *moderate*, if, as if often the case, he finds himself in one of a number of situations that has been shown to trigger upsetting recall, re-experience, and/or physically reactivity. The evaluation also finds that his social, occupational, psychological and adaptive functioning are *moderately* impaired as reflected by his Global Assessment of Functioning (GAF) Scale of 45 to 55 out of a range of 0 to 100.

In my opinion there is clear and convincing evidence, based on the totality of information gathered, that Mr. Williams' symptoms were initiated by, and grew out of, the direct experiences of and reactions to the three mining accidents in which he was involved within a nine-month period of time. This also includes the loss of his job, the significant $60,000 reduction in his pay grade, the damage to his ability to find employment elsewhere in his field through unfavorable entries in his employment record, and his resultant occupational and economic distress.

Mr. Williams stated that since the three mining accidents, his life has "not been the same" personally, interpersonally, occupationally, and financially. His view of life, and his comfort in and quality of life, all have changed. He experiences a chronic state of anxiety and worry about his own health and safety as well as that of his family. After eight months of unemployment despite applying to mining jobs both within his community and elsewhere in the lower 48 states, he has had to commute to Alaska to work and is away from his family for weeks at a time. This contributes to his anxiety about their health and safety, as well as the negative impact on his quality of life and emotional distress as a result of the isolation from his family during the time he is gone.

Daniel S. Hayes, PhD, L.L.C.
Psychologist
DSH/ken

STATE OF IDAHO)
COUNTY OF KOOTENAI) ss
FILED:

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

RONNEL E. BARRETT, an individual; GREGG HAMMERBERG, an individual; ERIC J. TESTER, an individual; and MATTHEW WILLIAMS, an individual, Plaintiffs, -vs- HECLA MINING COMPANY, a Delaware Corporation; JOHN JORDAN, an individual; DOUG BAYER, an individual; SCOTT HOGAMIER, an individual; and DOES I-X, unknown parties, Defendants.	**CASE NO. CV 13-8793** **AFFIDAVIT OF RICK NORMAN**

STATE OF IDAHO)
: ss
County of _____)

RICK NORMAN, being first duly sworn, deposes and says:

1. I am over the age of eighteen (18) and competent to testify to the matters stated herein.

2. I have personal knowledge of the facts contained herein and make this affidavit based upon my own personal knowledge.

3. I was employed with Hecla in November and December, 2011 and still am an employee with Hecla.

4. I was assigned to one of the crews responsible for rehabilitating the pillar at the 5900 foot level of the Lucky Friday mine following the 2.8 Richter scale rock burst on November 16, 2011.

5. I, and the other members of the crew, was seriously concerned about the safety of the pillar during the rehabilitation process.

6. Throughout the process, we observed cracking, spalling and other indications that the walls of the pillar were carrying considerable stress.

7. I, and other crew members, communicated our concerns on several occasions to John Lund, Doug Bayer and other members of Hecla management.

8. A few days following the November 16, 2011 burst, I asked Wilson Blake Ph.D., the company's rock mechanics consultant, whether the pillar was still carrying stress. This discussion occurred within a few days following the burst as Dr. Blake was observing the pillar.

Dr. Blake responded that the pillar was not a problem and that he didn't expect another significant burst for "at least five years."

9. When the company began running trucks through the pillar before the rehabilitation was complete, Matt Williams and I asked Doug Bayer in his office if the employees driving the trucks should be worried while driving through the pillar. Mr. Bayer's response was that there were no concerns about the safety of the employees while working in or travelling through the pillar.

10. We were never shown by Hecla the reports prepared by Dr. Blake, nor did we see any monitoring or closure data that had been conducted.

11. We were never told that the stress gages were showing significant increases in stress or that Dr. Blake believed that the reduced width of the pillar rendered it in serious risk of failure. Had I known these things, I would have refused to participate in the rehabilitation process.

DATED this 12 day of June, 2015.

Rick Norman

SUBSCRIBED AND SWORN to before me this 12th day of June, 2015.

PEGGI HARRIS
NOTARY PUBLIC
STATE OF IDAHO

Notary Public for Idaho
Residing at Wallace
Commission expires: 8-25-16

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of June, 2015 I caused a true and correct copy of the foregoing to be forwarded with all the required charges prepaid, by the method(s) indicated below to the following persons:

Michael E. Ramsden	Hand Delivery _____
RAMSDEN & LYONS, LLP	U.S. Mail ✓
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Eric S. Rossman

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

RONNEL E. BARRETT, an individual; GREGG HAMMERBERG, an individual; ERIC J. TESTER, an individual; and MATTHEW WILLIAMS, an individual, Plaintiffs, -vs- HECLA MINING COMPANY, a Delaware Corporation; JOHN JORDAN, an individual; DOUG BAYER, an individual; SCOTT HOGAMIER, an individual; and DOES I-X, unknown parties,	**CASE NO. CV 13-8793** **AFFIDAVIT OF JAMES W. DALLY, PH.D. IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

Defendants.)

STATE OF TENNESSEE)
: ss
County of Knox)

JAMES W. DALLY, PH.D., being first duly sworn, deposes and says:

1. I am over the age of eighteen (18) and competent to testify to the matters stated herein.

2. I have personal knowledge of the facts contained herein and make this affidavit based upon my own personal knowledge.

3. I currently am and at all relevant times mentioned herein was a resident of the State of Tennessee.

4. I currently am and at all relevant times mentioned herein employed as an Emeritus Professor of Engineering at the University of Maryland and have a Doctorate degree in Mechanics from the Illinois Institute of Technology. I have been a mechanical engineer since 1951. See my *curriculum vitae*, listing of prior testimony and listing of publications, attached hereto as **Exhibit "1"**.

5. I have reviewed the following documents and records in preparing my opinions in this matter: United States Department of Labor, Mine Safety and Health Administration {MSHA} Reports of Investigations regarding fatalities and injuries of miners at the Lucky Friday Mine on April 15, November 17, and December 14, 2011; Citations and Orders issued by MSHA related to prior fatalities and injuries of miners at the Lucky Friday Mine; Orders Nos. 8559614 and 8559615 issued by MSHA on May 15, 2012 regarding the rock burst that caused injury to Ronnell E. Barrett

and six (6) other miners with documentation notes, sketches, drawings, and photographs; Memorandum from Wilson Blake, Consultant, to John Jordan, Doug Bayer, John Lund, Karl Hartman, Eric Carlson, Zach Thomas regarding the rock burst in the 5900 Pillar that had occurred on November 16, 2011. Memorandum dated 11/18/2011; Deposition transcript for Wilson Blake dated April 9, 2015 and Wilson Blake Affidavit dated November 8, 2013; Correspondence from Hecla Mining Company to the Mine Safety and Health Administration regarding stress monitors; Complaint; MSHA Citations and Orders issued to Hecla regarding safety violations related to ground control and support on December 16, 18, and 19, 2011 with inspector notes and documents; Exhibits 1 through 58 of deposition exhibits for Hecla employees; MSHA Order No. 8565565 issued to Hecla on December 21, 2011 for continuing to work while still under a previous order; Defendant' Discovery Responses and Exhibits; MSHA Order 8605614 issued to Hecla to conduct readings of stress monitors at the 5900 I-Drift Pillar; December 27, 2011 Memorandum from Wilson Blake and Mark Board, Consultants to Hecla managers John Jordan, Doug Bayer, John Lund, Karl Hartmann, Eric Carlson, and Zach Thomas; "Recent Bursting in Gold Hunter and Its Implications"; Report by Itasca Consulting Group, regarding stability of the 5900 I-Drift Pillar in the Lucky Friday Mine; Memorandum from Blake Wilson to Mark Board, Itasca Consulting Group, dated November 17, 2011 regarding the stability of the 5900 Pillar in the Lucky Friday Mine; MSHA reports, citations, and orders related to the rock bursts at the Lucky Friday Mine on November 16, 2011 and December 14, 2011.

6. On Wednesday, December 14, 2011 at 7:40 PM a rock burst occurred at the pillar on the 5900 main drift of the Lucky Silver Mine located in Mullan, Idaho. The intensity of the rock burst was reported to have caused a seismic wave of 2.2 measured on the Richter scale.

Eight miners were installing a steel tunnel liner in this drift at the time of the rock burst. Seven of these miners were injured by the falling rock during this event and taken to area hospitals. The injured miners included: Jason Chambers, Ronnel E Barrett, Greg Hammerberg, Erick J. Tester, Matthew Williams, Geoff Parker, and Wallace Lambott.

7. The Hecla Mining Company, a Delaware Corporation, operates the Lucky Friday Mine. This is one of the deepest mines in the United States with mining operations being conducted at depths exceeding 6,000 ft. In 1998 White and Whyatt, from the Spokane Research laboratory of the National Institute for Occupational Safety and Health, wrote "The Coeur d'Alene Mining District in northern Idaho is the second largest silver-mining district in the world as well as a leading U.S. producer of lead and zinc. At recent mining depths of nearly 2,000 m, Hecla Mining Co.'s Lucky Friday Mine has been one of the most active mines in North America in tenns of seismic energy per tonne of ore mined.

8. The mining area is accessed by an 18 ft diameter concrete lined shaft constructed in 1983 and known as the Silver Shaft. Ore is removed from a relatively narrow vein (6 to 10 ft wide) that is nearly vertical. The vein is accessed by tunnels leading from the Silver Shaft to the various levels where the ore is being mined. At the time of the accident ore was being mined at the 5500 and 6100 levels while miners were working to install a steel tunnel liner in the 5900 drift. The mining method was to drill holes into the ore, fill these holes with an explosive and detonate the explosive to loosen the ore. The ore is then loaded onto trucks and taken to the elevator in the Silver Shaft, where it is conveyed to the surface for processing.

9. A drawing showing the cross section of the Gold Hunter region of the mine is

presented in Attachment "A". Of particular interest is the donut like pillar located near the center of the mined out region. The 5900 level drift (tunnel) passes through this pillar. The location of the mining activity at the time of the accident, 550-11 cut #5, 555-14 cut #4, 610-12 cut #5, 620-15 cut #4 and 615-16 cut #5 is shown in the drawing.

10. As ore is removed from the vein, the walls on the sides of the mined out area tend to close, due to the weight of the overburden and horizontal forces that develop at depth. The donut like pillar at the 5900 level resists the closure and in doing so significant compressive stresses develop within the pillar. These compressive stresses increase as the ore is removed and the mined out area increases in size. When the compressive stresses in the pillar exceed the compressive strength of the rock the pillar fails. The failure releases the strain energy stored in the pillar causing a rock burst with stress waves that propagate away from the fracture site causing severe vibrations that locally register as earthquakes with magnitudes ranging from 1 to 3 or more on the Richter scale.

11. Wilson Blake Ph.D an experienced Geologist and Mining Engineer has served as a consultant to Hecla Mining Corp. for many years. From May 10, 2010 to December 27, 2011 he submitted five memos to various managers of the Lucky Friday Mine pertaining to rock bursts in the Gold Hunter region of the mine near the 5900 level pillar. The first memo written on May 10, 2010 refers to 2.5 Ml rock burst that occurred on April 22, 2010 in the footwall of the 5700 stope. *See* Blake Memo, dated May 10, 2010, attached as **Exhibit "36"** to the Rossman Affidavit. This seismic event was the third one that occurred in this region. A listing of the seismic events recorded with the geo phones installed in the lucky Friday mine is presented in

the table below: This listing may not be complete, as it was compiled based on the memos written by Dr. Wilson Blake. I have not had the opportunity to review the complete log of the seismic events at the mine that were recorded by their system of geo transducers.

Seismic Events in the Gold Hunter Region

Date	Magnitude
4/6/2009	1
10/18/2009	1.5
2/22/2010	2.5
4/22/2010	2.5
11/16/2010	2.2
11/16/2010	2.3
12/9/2010	1.9
8/2/2011	1.9
11/16/2011	2.8 or 3.0+
12/14/2011	2.2

12. Dr. Blake's second memo, written on November 30, 2010, pertains to two rock bursts that occurred on November 16, 2010. *See* Blake Memo, dated November 30, 2010, attached as **Exhibit "37"** to the Rossman Affidavit. One was a 2.2 M1 burst that occurred at 15:01 and the second was a 2.3 M1 burst that occurred at 15:33. Both of these rock bursts were

associated with blasting of the 14W stope in the 5500 level. It is important to note that the rock bursts (seismic events) are often triggered by blasting the stopes.

13. While these reports of rock bursts refer to events occurring prior to the November/December 2011 period, these memos clearly indicate the high probability of rock bursts in the Lucky Friday/Gold Hunter mine, and the fact that blasting induces rock bursts.

14. The third memo written on November 18, 2011 pertains to the 2.8 rock burst that occurred on November 16, 2011. *See* Blake Report, dated November 18, 2011, attached as **Exhibit "8"** to the Rossman Affidavit. In the summary section of this memo, he stated "The 2.8 burst in the 5900 pillar was not expected and did not appear to be a classic pillar burst. Because the upper ribs and back appeared to be solid, we can't assume that the remaining pillar is destressed, hence the rehabilitation needs to proceed with caution." He also stated that, "we need to better understand the cause of this burst to be able to relate it to mining the main sill."

15. His fourth memo, written a week later on November 25, 2011, also pertains to the 2.8 M1 rock burst that occurred on November 16, 2011. *See* November 25, 2011 Blake Memo, attached as **Exhibit "6"** to the Rossman Affidavit. Blake made an initial visit to the 5900 pillar immediately following the rock burst on November 16 and a subsequent visit on November 23. The November 25th memo describes his observations and opinion for the cause of the 5900 pillar burst, as well as the present stability of the 5900 pillar. He makes several very important statements in this document, which include:

1. Instrumentation at the mine indicated the magnitude of the rock burst was 2.8 that occurred as the last hole of the round from the overlying

5500 level underhand stope was blasted. However, the magnitude was in the 3.0 range as measured by the seismic sensors of the USGS National Earthquake Center located at Montana Tech in Butte, MT. Butte, MT is about 250 miles from Mullin, ID; hence it appears that the seismic event on November 16, 2011 was much stronger than the 2.8 reported by Dr. Blake.

2. The model studies by Itasca indicated that small rock bursts around the edges of the pillar could be expected with magnitudes up to 2.0, and rock bursts with magnitudes as high as 1.9, in fact, did occur[1]. The model results also indicated that pillar was safe unless its height to width ratio changed and the pillar lost confinement.

3. The model assumed a 10:1 width to height ratio for the pillar and predicted that a foundation failure would occur in the outer walls, rather than in the core of the pillar. Moreover, the model results did not include any geologic structures intersecting the pillar.

4. As a result of the rock burst on November 16th it is clear that stress deterioration along the inner and outer edges of the pillar, likely in the 10 ft range, has occurred. Because of this damage, the width to height ratio of the 5900 (a doughnut shape) pillar is actually 3.5, assuming a 10 ft. vein

1 The 3.0+ magnitude earthquake generated by the seismic event on November 16, 2011 was an order of magnitude higher than the predictions made in the Itasca report. This magnitude and the widespread damage in the mine should have alerted management that the status of the 5900 pillar had changed.

thickness. **The 5900 pillar is borderline stable based on mining history at Lucky Friday/Gold Hunter.**

5. The in situ stress in the 5900 pillar area before mining was some 1.2 psi/ ft of depth for the vertical stress, and 1.5 times this value for the horizontal stress. The actual vertical distance to surface above the Gold Hunter is in the 7,000 ft range, hence the vertical stress would be 8,400 psi, and the maximum horizontal stress, N40°W direction, is 12,600 psi.

6. From the stress gages it is known that the stresses increase in the pillar from mining off of the 5900 level, taking into account the ore and waste rock modulus values, was also some 12,600 psi. **Hence, the stress in the pillar was very near the unconfined compressive strength of the pillar, and any further loss of confinement could lead to a pillar failure.**

7. The fact that the displaced rock from the back and walls of the pillar was comprised of very large slabs, with no dust, indicated that the 2.8 burst was not a classic pillar rock burst. In addition, the domed cavity formed above the burst zone was not fractured and appeared to still be stressed. Hence, this confirmed that the rock in the remaining 5900 pillar was still stressed.

16. Blake's fifth memo written on December 27, 2011 pertains to the rock burst that occurred on December 14, 2011. *See* Memorandum from Wilson Blake and Mark Board, dated

December 27, 2011, attached as **Exhibit "18"** to the Rossman Affidavit. He observed that the event appears to have occurred directly in the 5900 pillar, in the immediate east rib of the 5900 drift. Damage was finely-fragmented and crushed rock and bolts and cables appearing to be broken in tension at the drift east shoulder and rib. This appears to be a typical strain burst mechanism resulting from the solid pillar in the wall of the 5900 drift reaching its peak strength. He attributes the cause of this rock burst to the damage produced during the November 16 event, which ejected rock from the 5900 drift, expanded the drift size, reduced the width to height ratio of the pillar (to around 3:1), and increased the mining-induced stress in the pillar. He noted that the pillar failure was centered in the strong, non-failed core of the pillar of reduced w/h ratio.

17. Dr. Wilson Blake warned the management team at Helca Mining Corp. of the danger of rock bursts at the 5900 drift and pillar.

18. He cautioned Hecla management that **the stress in the pillar was very near the unconfined compressive strength of the pillar, and any further loss of confinement could lead to a pillar failure.**

19. He also informed management that the damage due to the rock burst of November 16, 2011 changed the geometry of the 5900 pillar. The new width to height ratio of the 5900 pillar (a doughnut shape) is actually 3.5, assuming a 10 ft. vein thickness. Previously the width to height ratio was considered to be 10 to 1.

20. He also warned that **the 5900 pillar is borderline stable based on mining history at Lucky Friday/Gold Hunter.** Finally he informed Helca managers that the **rehabilitation needs to proceed with caution**.

21. It is important to note that these warnings about the pillar's borderline stability and additional loss of confinement could lead to pillar failure were made on November 28th more than two weeks before the accident on December 14, 2011.

22. The managers at Helca decided to rehabilitate the 5900 Drift. On November 29, 2011 Doug Bayer issued a memo[2] describing the rehabilitation plan for the 5900 drift. *See* Bayer Update, dated November 29, 2011, attached as **Exhibit "10"** to the Rossman Affidavit. The rock burst on November 16th had caused approximately 12 feet of its back to fail and damaged both ribs.

23. The repair of the area was planned for two stages. The first stage was to bolt and shotcrete the area. The second stage was to install a steel tunnel liner through the vein area of the drift and fill the void above and around the liner with Techfoam (a compressible concrete foam). The initial stage of repair, completed by November 29, 2011 involved installation of dywidags, cable bolts, wire fencing and splits sets. The entire area was shotcreted to a depth of 2 to 3 inches.

24. The secondary, long-term repair involved a steel tunnel liner that was to be installed through about 35 ft of the 5900 drift. The rock burst of December 14, 2011 occurred while this liner was being installed.

25. Mr. Bayer recognized that the constant stress from closure was the contributing factor causing the 5900 pillar to burst. He **wrote "that although the pillar is still intact and is still carrying some load and stress, it is believed the majority of the stress was dissipated**

with the large rock burst and it will take months or years for the pillar to gain more stress that could cause any major rock bursts. In addition, the pillar is now smaller in size so it cannot carry the same load that caused this rock burst". This statement is not consistent with Dr. Blake's conclusion in his November 25 memorandum that **"the pillar was borderline stable" and that "the stress in the pillar was very near the unconfined compressive strength of the pillar and that any further loss of confinement could lead to pillar failure".**

26. After completion of the first stage or rehabilitation, Mr. Bayer considered the rock burst area to be stable and wrote that management of the mine would like to resume production prior to completing the installation of the tunnel liner. **Requesting the resumption of production was a serious error as they were authorizing blasting that was known to trigger rock bursts.** On December 6, 2011 MHSA authorized travel by trucks through the 5900 drift and mining was initiated.

27. The decision to initiate mining was willful and exceedingly dangerous because it involved blasting at three different levels not far removed from the perimeter of the 5900 pillar. It was well known that blasting triggered rock bursts.

28. Personnel at the mine employ stress meters to monitor the stresses that develop with time in the 5900 pillar. However, the stress meters originally installed in the pillar were destroyed in the rock burst. The plan was to monitor the stresses imposed on the pillar, as a function of time, by installing 6 new NX4300 stress meters (2 in the back and 2 in East and West walls). The stress meters in the back were to be installed 10 ft above the drift and the stress

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2 The rehabilitation memo was written four days after Dr. Blake had issued his warnings that the pillar was

meters in the ribs were to be placed at a depth of 20 ft. Personnel were able to install 3 of the 6 meters which were in inventory; however 3 of the other meters were on order and were required by MSHA to be installed immediately upon receipt by Hecla. In addition to the stress meters, closure points were re-established, and closure was measured east-west across the drift and north-south across the vein.

29. During the period of the repair from December 2 to the 14th two of the stress meters installed in the 5900 pillar showed that the stresses in the pillar were continuing to increase at the rate of about 1,000 psi per week. **Helca managers ignored the increasing stress level in spite of the advice from Blake that the pillar was borderline stable and that the stresses were very near the unconfined compressive strength of the pillar.**

30. Mr. Ted Williams, for several years, was responsible for measuring the stresses in the 5900 drift in the Gold Hunter pillar. He collected data from functioning stress gages at the site and installed new stress gages when replacements became necessary. An illustration of the 6 bore holes used for mounting the stress gages in the 5900 drift is presented in Fig. 1.

31. The data collected from the stress gages over the period from May 23, 2006 to April 27, 2011 is presented in Fig. 2. The data collected in earlier years (2006 to 2009) was reasonably continuous; however, data from 2010 through April 2011 showed large gaps due to failure of the stress measuring system at three locations and failure to quickly replace or repair the gage installation. However, the gages at locations West-Low and East-Hi provided measurements of the stresses.

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borderline stable. and that the stress in the pillar was very near the compressive strength of the pillar.

32. The measurements are increasing steadily with time and indicate very high stress levels. The West-Hi gage registered 22,500 psi before malfunctioning and the West-Lo gage is indicating a stress of 20,300 psi. These values are almost twice the estimate of the unconfined strength of the rock in the pillar. Wilson Blake, a consultant to Hecla, has stated[3] the maximum horizontal stress is 12,600 psi which is near the unconfined compressive strength of the pillar. **He also stated that the pillar after the 3.0 (USGS) magnitude burst on November 16, 2011 would fail with any further loss of confinement.** Note the gaps in the data are due to either gage failure or failure of the data logger.

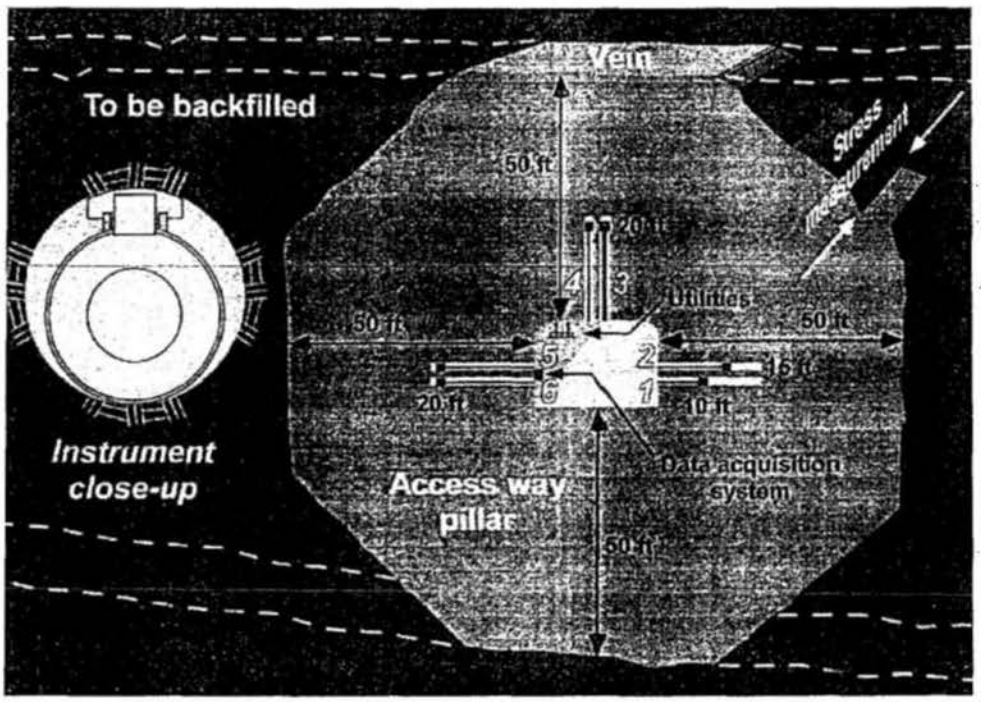


Fig. 1 Location of the stress gages in the 5900 drift (2006 to April 2011). Note the direction of the stresses is parallel to the drift.

3 Wilson Blake Memo of November 25, 2011 to John Jordan, Doug Bayer, John Lund. Karl Hartman, Eric Carlson and Zach Thomas.

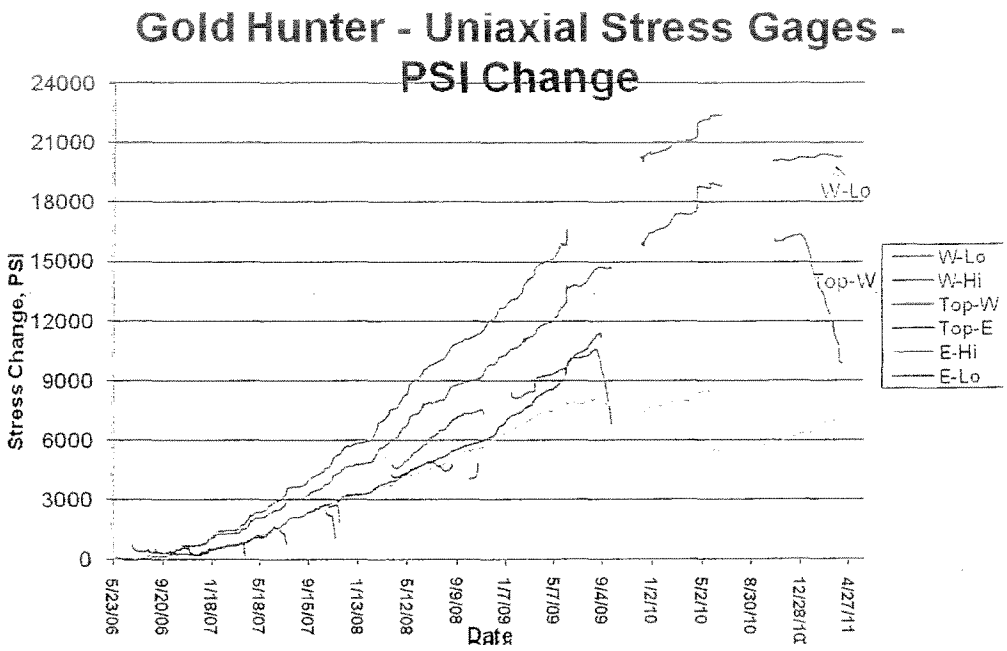


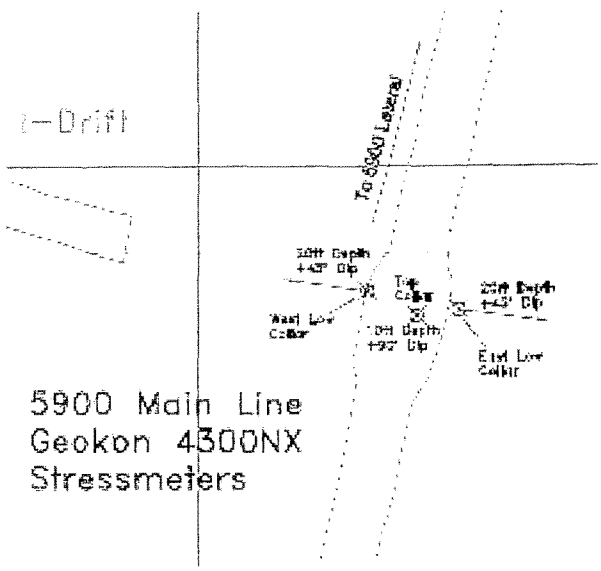
Fig. 2 Stress increasing steadily in the 5900 pillar from 2006 to 2011. Data from Ted Williams.

33. After the rock burst on November 16, 2015, Helca management decided to repair the area and to restore the 5900 drift so it could be used for haulage. Part of the repair plan involved the measurement of stresses at six sites in the 5900 pillar. Because the gages originally installed in the pillar were destroyed in the rock burst new bore holes and gages were required. Because only three gages were available at the time they were installed at the locations shown in Fig. 3. Additional gages were to be installed immediately after their delivery.

34. Three stress gages were installed on December 1, 2011. Readings from the three gages from December 2nd to the 14th are shown in Fig. 4. It is evident from these results that the

stresses recorded by the Top and the West gages are increasing with time and the stresses in the pillar continue to increase. However, the results from the East gage decreased initially and then held essentially constant for the remaining interval. This behavior was not anticipated as all three gages were expected to indicate either increasing load or constant load. I believe the East stress gage was not properly installed. The fact that the gage is providing readings indicates that the gage is functioning and has not failed. The installation was a failure.

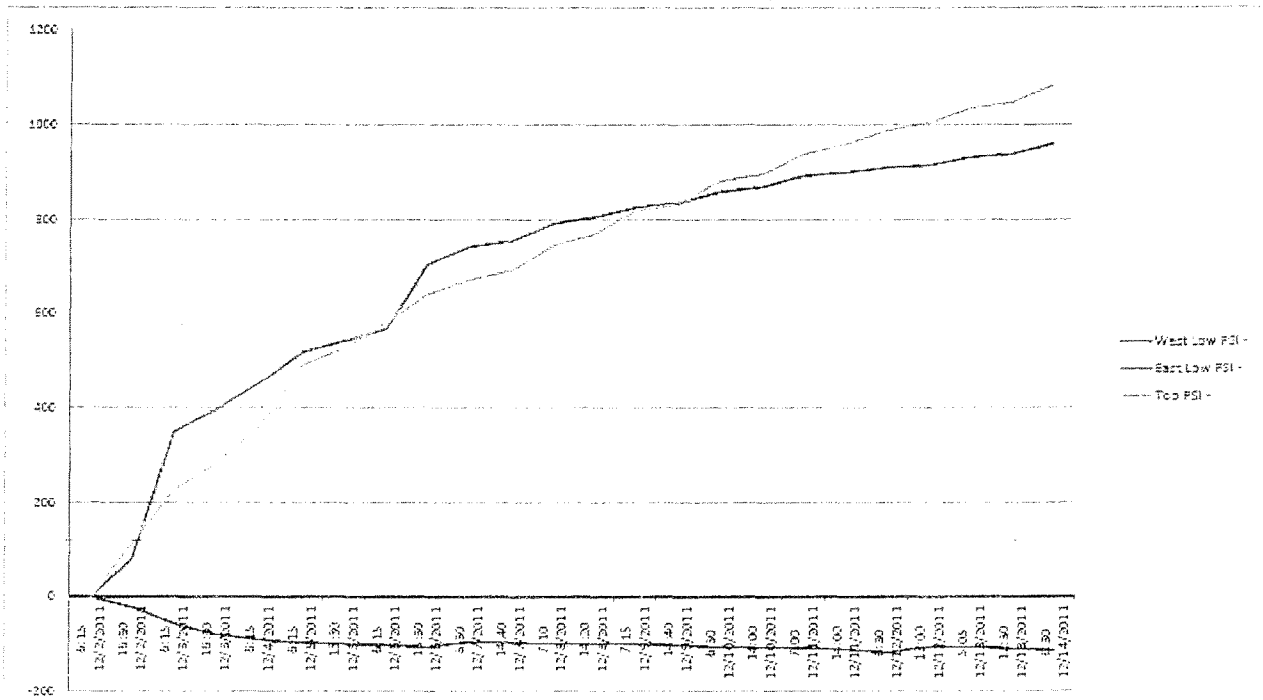
35. The stress gages respond to very small changes in the diameter of the borehole and Geokon is specific in its installation instructions that the bore hole's surface must be smooth and clean. In fact they recommend using a diamond coring tool to prepare the hole or to ream the hole if it was drilled with a percussion drill. The miners employed a jumbo drill (percussion drilling) to form the boreholes for the installation of the three stress gages. I did not find evidence that they used a borescope to confirm that the walls of the boreholes were sufficiently smooth for a successful gage installation.



4 See document titled Lucky Friday 5900 drift pillar rock burst repair, by Doug Bayer dated December, 2 2011.

Fig. 3 Location of the three stress gages installed in the 5900 pillar following the rock burst of November 16, 2011.

Fig. 4 Stress measurements from the three gages installed in the 5900 pillar following the



rock burst of November 16, 2011. The readings are for the 12 day period from December 2 to December 14, 2011.

36. The data from the two gages show that stresses in the pillar were continuing to increase. The gages indicated an increase of about 1,000 psi in additional stress imposed on the 5900 pillar in a 12 day period. Although stress gages were not in place from November 16 to December 1, 2011, it is reasonable to assume at least another 1,000 psi of stress was imposed on the 5900 pillar during this 14 day period.

37. Helca was able to monitor the stresses in the 5900 pillar at two locations. These stress meters showed that the stresses in the pillar were increasing; however, management at Helca continued with the repairs in the 5900 drift in spite of the warnings[5] from Wilson Blake that the pillar was "borderline stable based on mining history at Lucky Friday/Gold Hunter."

38. Two of the stress gages showed increasing stress levels, which should have warned managers at the Lucky Friday Mine that the loading on the 5900 pillar was increasing and that Blake had previously warned them that the pillar had little or no margin of safety.

39. Mark Board working for Itasca Denver, performed a numerical analysis of the 5900 pillar in the Hunter Gold region of the Lucky Friday Mine. The purpose of this study was to provide a numerical model to match the pillar observations and thereby develop an understanding of the current pillar behavior. The issues raised pertaining to the 5900 pillar are:

1. Is the pillar currently in a failed or unfailed state?

2. Do the monitored stresses make sense given the expected in situ stress field measured at the Lucky Friday mine, and the stress concentration factor due to the pillar creation?

3. Given the high stress values monitored, why is the drift not showing more damage?

4. Is the discing and hole breakout observed what might be expected given the monitored stresses?

5 See page 2 of Blake's memo of November 25, 2011 to John Jordon, Doug Bayer, John Lund, Karl Hartman, Eric Carlson and Zach Thomas.

5. Why is the response of the pillar apparently different on the two sides of the 5900 drift?

40. A summary of the numerical results indicated:

1. A reasonable agreement of the numerical model to predict stress changes was achieved, after considering the uncertainty of the stress meter measurements.

2. The reason for the variation in measured stress on the east and west side of the 5900 drift was not determined. However, the results were within the typical uncertainty of the output from the stress meters. The most significant uncertainty in the stress measurements is the calibration factor used in for converting the vibrational frequency of the sensor's wire to stress change. This calibration factor is dependent on the modulus of the rock in which the gage is installed. The high variability of the rock modulus (vitreous quartzite to siderite-argillite) means that a wide range of calibration factors should be used to convert the gage output to stress. Because the same gage factor is used for all gages, considerable error in the stress measurements from location to location can occur. Other uncertainties involve installation orientations and hole roundness (contact seating area). Because of these uncertainties, the correspondence of the numerical and experimental data is considered to be very good.

3. The numerical analysis predicts that the outer boundaries of the pillar (about 10' to 15' thick) will fail in brittle tensile and shearing modes. This failure relieves the stresses from the pillar boundaries and transfers them into the confined core of the pillar. These stresses are sufficient to produce discing and borehole breakouts, particularly in the weaker siderite zones. The observation holes show extensive discing whose intensity appears to vary by rock type, but discing occurs throughout most of the holes away from the 5900 drift. Breakouts occur in both holes, and are strongest in the west borehole, although both holes are open and passable to the camera. The bottom 10' of the west borehole is rubblized and core lost, which corresponds to the depth of extensive failure predicted by the numerical analysis. The bottom 10' of the east borehole, conversely, shows little non-failed core in what appears to be strong silicic material. The east hole actually is drilled in the stronger rocks between the 30 and 40 veins, and this could account for the better condition of the core.

4. The numerical results indicate that the yielded region around the 5900 drift is relatively small; about 1 drift radius in the back and sidewalls of the drift. The model indicates that the drift should be stable under the current stress conditions, largely because it is driven parallel to the major principal stress that flows vein-perpendicular.

5. The strength properties taken for the stronger silicic rocks result in approximately the correct zone of brittle fracturing in the back and floor observed in the overhand and underhand stopes (about 3 to 5' of back fracturing).

6. The results indicate a closure of the orebody (hanging wall to footwall) at the 5900 drift of about 1.5 in." is similar to that measured by the tape extensometer. This is not a very sensitive calibration measure, but the modeling appears to have used about the correct applied N-S stress and elastic modulus of the rock.

41. The numerical results were considered to be in reasonable agreement with the measurements and observations of failure zones considering the uncertainties in the rock properties and measurements. The important question pertains to the stability of the 5900 pillar, and how might it be expected to respond in the future?

42. The numerical results clearly indicate that the core of the pillar has not failed and is in an elastic state with the yielded regions limited to about 10 to 15ft about the circumference of the pillar. In addition the yielded regions about the boundaries of the 5900 drift are about 5 to 10 ft deep.

43. It is important to note that the Itasca report is dated March 2010 and does not account for the effects of continued mining of the 30 vein. *See* Calibration of 5900 Pillar Numerical Model, attached as **Exhibit "31"** to the Rossman Affidavit. Mark Board expects that the stress changes in the pillar should stabilize. It is also expected that the pillar should have an

elastic core, because it has a width to height ratio of about 8 to 10 to 1[6]. Experience and research studies have shown that pillars with width to height ratios (W/H) in brittle rocks are elastic for W/H greater than about 3. With squat pillars, the rock cannot displace under the action of compressive stress, the interior of the pillar is confined; thus, permitting large stresses to build without yielding. It is well known that the rock strength increases dramatically with confining pressure. These squat highly stressed pillars can fail and in doing so produce small seismic events in the highly-stressed regions around the periphery. However, they are unlikely to fail by crushing. Time-dependent yielding in the pillar's periphery can cause small seismic events as the pillar slowly adjusts to the stress redistribution.

44. The stability discussion in the paragraph above may have been valid in March of 2010. However, the rock burst of November 16, 2011 markedly changed the geometry of the pillar.

45. Blake in his November 25, 2011 memorandum observed that Itasca's numerical model results did indicate that small bursts around the edges of the pillar could be expected with magnitudes up to 2.0. *See id.*, **Exhibit "6"**. The 5900 pillar did have such bursting, with the largest a magnitude 1.9. The model results also indicated that the **only way the pillar could fail was if the height to width ratio changed** and the pillar lost confinement, in which case a foundation failure might occur. The model assumed a 10 to 1 width to height ratio. The foundation failure would occur at the walls, rather than in the core of the pillar. And further, the

6 The 10 to 1 W/H ratio does not account for the fact that the 5900 pillar has a drift through its center that markedly reduces the W/H ratio. Dr. Blake recognizes the effect of the drift in his memo of November 25, 2011.

model results did not include any geologic structures intersecting the pillar.

46. Blake then adds that with the observed stress deterioration along the inner and outer edges of the pillar, likely in the 10 ft range, the width to height ratio of the in place doughnut shaped pillar is actually 3.5, assuming a 10 ft. vein thickness. This pillar is borderline stable based on mining history at Lucky Friday/Gold Hunter.

47. Finally Blake indicates that the stress in the pillar is at the unconfined strength of the rock. He states that "the in situ stress in the 5900 pillar area before mining was some 1.2 psi/ ft of depth for the vertical stress, and 1.5 times this value for the horizontal stress. The actual vertical distance to surface above the Gold Hunter is in the 7,000 ft range, hence the vertical stress would be 8,400 psi, and the maximum horizontal stress, N40°W direction, is 12,600 psi. From the stress gages we know that the stress increase in the pillar from mining off of the 5900 level, taking into account the ore and waste rock modulus values, was also some 12,600 psi. Hence, **the stress in the pillar was very near the unconfined compressive strength of the pillar, and any further loss of confinement could lead to a pillar failure.**"

48. There is considerable evidence that blasting triggers seismic events in the Lucky Friday Mine. A footnote in the 2013 letter from Jackson Kelly PLLC states "The vast majority of seismic events at the Lucky Friday Mine are triggered by blasting (i.e., occurring with the blast or within some time window thereafter)". *See* Geotechnical Characteristics of the Lucky Friday Mine, December 2012, Section 4.2.3; Rock burst Control Plan, Lucky Friday Unit, December 2012, Section 3.3. *See* Jackson Kelly PLLC letter, dated November 8, 2013, attached as **Exhibit "32"** to the Rossman Affidavit.

49. The Lucky Friday Incident Report for the November 16, 2011 rock burst identifies the trigger of the seismic event as blasting together with ground movement causing a build-up of pressure in the rock. *See* Incident Report, attached as **Exhibit "33"** to the Rossman Affidavit. The report also states that rock bursts can and will happen without warning. Ensuring our employees are in a safe place during blasting will aid in our goal of sending everyone home safe and sound. Continued monitoring of the working conditions is a must.

50. Dr. Blake in his memo of November 18, 2011 identifies the trigger of the seismic event of November 16, 2011 as the firing of last hole of the round from the overlying 5500 level underhand stope. *See id.*, **Exhibit "8"**.

51. Dr. Blake in his memo of November 30, 2010 identifies the trigger for the seismic event of November 16, 2010 as the blasting on the 5500 14W cut. *See id.*, **Exhibit "37"**.

52. Blasting can induce rock bursts or rock falls in two different ways. First the detonation of an explosive, which is coupled tightly to the rock in a bore hole, produces both dilatational and shear wave that propagate radially outward from their source. These waves can interact with nearby faults that exist in the structure and initiate fault slip. The fault slip generates much more intense stress waves that cause significant rock falls in the mine, such as the seismic event of November 16, 2011. The stress waves from the fault slip on November 16, 2011 were sufficiently intense to cause a 3.0+ earthquake as registered on the seismograph 200 miles away at Montana Tech.

53. The second mechanism for blasting to cause seismic events is by local rock bursting. The ore body is confined, except at a bench face where mining is occurring. Confined

rock bodies can support much higher stresses than unconfined rock specimens.

54. When a miner blasts away the bench face to loosen the ore, he exposes a new surface, which has not be stress relieved. This new surface has suddenly lost its confinement and cannot support the stresses that exist there. A small and local rock burst occurs that ejects rock into the muck pile and relieves the stresses for a depth of a few feet into the bench face. The detrimental effect is again the stress wave generated by the small local rock burst that may interact with a near-by fault causing a fault slip that in turn generates a much more significant stress wave capable of damaging structures in the mine.

55. There is clear evidence that blasting triggers seismic events with rock bursts or rock falls. When Helca managers resumed mining on December 6, 2011, they authorized blasting in the stopes above and below the 5900 pillar. The daily shift reports show blasting occurring daily on multiple levels. Blasting was occurring at 520-10, 550-11, 555-14, 610-12, 615-15, 615-16, 620-15, and 650-55 levels above and below the 5900 pillar from December 6 to December 14, 2011 when the accident occurred. *See* Shift Reports, attached as **Exhibit "16"** to the Rossman Affidavit.

56. The amount of ore removed was listed in an email from Mike Clary (Helca) to Brad Breland (MHSA) dated February 14, 2012. *See* Email, dated February 14, 2012, attached as **Exhibit "34"** to the Rossman Affidavit. The report states that the amount of footage mined in the 10, 11, and 14 stopes between November 17, 2011 and December 13, 2011 was:

Stope 10 -12 feet of advance, and a 6 foot slab

Stope 11 - 96 feet, both east and west sides

Stope 14 - 38 feet, both east and west sides

57. Note that this listing of advances is not consistent with the daily shift reports which indicated drilling and blasting on stopes 10, 11, 12, 14, 15, 16 and 55. *See id.*, **Exhibit "16"** to the Rossman Affidavit. The stopes 12, 15 and 16 are in the levels from 6100 to 6200 located below the 5900 pillar, and the stopes 10, 11 and 14 are located above the 5900 pillar.

58. Mining above and below the pillar had two detrimental effects. First blasting at many sites (I estimate 10 to 12 sites) for 8 days with 3 shifts per day provided more than 100 opportunities to trigger a seismic event that would result in failure of the 5900 pillar. Second removal of ore from above and below the 5900 pillar increased the mined out area and thereby increased the pressure of the side wall on the pillar and elevated the compressive stresses. The stress gages confirmed the increased pressure on the 5900 pillar.

59. Helca's Management at the highest levels were aware of the occurrence of rock bursts in the Lucky Friday Mine and they developed a three page Rock Burst Plan dated February 1, 2011 establishing procedures to deal with them. *See* Rock Burst Plan, attached as **Exhibit "35"** to the Rossman Affidavit.

60. Rock bursts occurred at frequent intervals during the period of mining in the Gold Hunter system. Reports describing these rock bursts were written by Dr. Wilson Blake and directed to various managers in charge of operations at the mine. My report provides considerable detail on the content of Dr. Blake's findings. Of particular importance are his two memos describing the major rock burst that occurred on November 16, 2011. In his memo of November 25, 2011, Blake makes several statements which clearly represent warnings to the

managers.

1. The occurrence of the 2.8 (USGS) magnitude burst in the 5900 pillar during blasting on 11/16/11, and its resulting extensive and widespread damage, was very much unexpected. Such widespread damage is not characteristic of a simple pillar burst.

2. With the observed stress deterioration along the inner and outer edges of the pillar, the width to height ratio of the in-place, doughnut-shaped pillar is actually 3.5. This pillar is borderline stable based on mining history at Lucky Friday/Gold Hunter.

3. Hence, the stress in the pillar was very near the unconfined compressive strength of the pillar, and any further loss of confinement could lead to a pillar failure.

4. Hence, this confirmed that the rock in the remaining 5900 pillar was still stressed, indicating that this pillar did not completely fail.

5. While I would conclude that the occurrence of another large 2.8 magnitude burst in this pillar is unlikely, it cannot be totally eliminated.

See id., **Exhibit "6"**.

61. Managers at the Lucky Friday Mine decided to rehabilitate the 5900 drift. On November 29, 2011 Doug Bayer issued a memo describing the rehabilitation plan for the 5900 drift. *See id.*, **Exhibit "10"** to the Rossman Affidavit. The repair of the area was planned for two stages. The first stage was to bolt and shotcrete the damaged areas. The second stage was to

install a steel tunnel liner through the drift and fill the void around the liner with Techfoam (a compressible concrete foam). The initial stage of repair was completed on or before November 29, 2011.

62. The secondary long term repairs involved a steel tunnel liner that was to be installed through about 35 ft of the 5900 drift. The rock burst of December 14, 2011 occurred while this liner was being installed. Seven of the eight miners working to install the liner were injured during the rock burst.

63. After completing the first stage of the rehabilitation, Mr. Bayer considered the rock burst area to be stable and wrote that management of the mine would like to resume production prior to completing the installation of the tunnel liner. On December 6, 2011, based upon reports issued by Hecla, MSHA authorized travel by trucks through the 5900 drift and mining was initiated. *See* Bayer Update, dated December 6, 2011, attached as **Exhibit "13"** to the Rossman Affidavit.

64. The rehabilitation plan specified stress measurements to be made in the 5900 pillar. The stress measurements showed that the loading of the pillar was increasing. The gages indicated an increase of about 1,000 psi in additional stress imposed on the 5900 pillar in the 12 day period leading to the rock burst of December 14. Although stress gages were not in place from November 16 to December 1, 2011, it is reasonable to assume at least another 1,000 psi of stress was imposed on the column during this 14 day period.

65. Disregarding the fact that the stresses in the pillar were increasing, mine managers continued with repairing the 5900 drift ignoring the warnings from Wilson Blake that the pillar

was borderline stable and that the pillar had little or no margin of safety.

66. The decision to send employees into the pillar to rehabilitate the pillar while at the same time initiating mining was extremely dangerous, because it involved blasting at three different levels and at least 10 sites not far removed from the perimeter of the 5900 pillar. It was well known that blasting triggered rock bursts and the pillar was at or very near its compressive strength with increasing monitoring stresses.

67. From my review of the actions of the managers at the Lucky Friday Mine, I believe they were taking unwarrantable risk in deciding to rehabilitate the 5900 drift. I believe this risk became **inexcusable** when the stress gages in the 5900 pillar were clearly showing that the stresses, already at their limit, were continuing to increase. Finally I believe that Hecla management acted willfully with gross disregard for the safety of its employees when mining was resumed that involved blasting, which was known to trigger seismic events at the 5900 pillar. They were also aware that the removal of ore opening the void above and below the 5900 pillar would increase the load on the pillar, which was already marginally stable.

68. Hecla management's conduct constituted "willful physical aggression" when it engaged in a conscious choice of action under circumstances where Hecla knew or should have reasonably known that this conduct would create an unreasonable risk of direct physical injury and aggression to the miners and that there was a high degree of probability that such direct physical injury would actually result from the conduct.

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DATED this 16 day of June, 2015.

James W. Dally
James W. Dally, Ph.D.

SUBSCRIBED AND SWORN to before me this 16 day of June, 2015.

MEGAN LARISSA DESJARLAIS
STATE OF TENNESSEE NOTARY PUBLIC
KNOX COUNTY

Megan Desjarlais
Notary Public for Tennessee
Residing at 128 N. Northshore Dr. Knoxville 37919
Commission expires: 3/31/18

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of June, 2015 I caused a true and correct copy of the foregoing to be forwarded with all the required charges prepaid, by the method(s) indicated below to the following persons:

Michael E. Ramsden
RAMSDEN & LYONS, LLP
700 Northwest Boulevard
P.O. Box 1336
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Hand Delivery ____
U.S. Mail ✓
Facsimile 208-664-5884 ____
Overnight Mail ____
Electronic Mail ____
mramsden@ramsdenlyons.com

Eric S. Rossman

\\OFFICESERVER\Rossman Law\Documents\Work\B\Barrett, Ron\Pleadings\MSJ Partial Aff Dally.doc

Attachment No. 1. Profile of the Gold Hunter Drift showing the location of the pillar and the 5900 ft drive that passes through the pillar. Note the underhand mining occurring at the 5500 level and the 6100 and 6200 Levels.

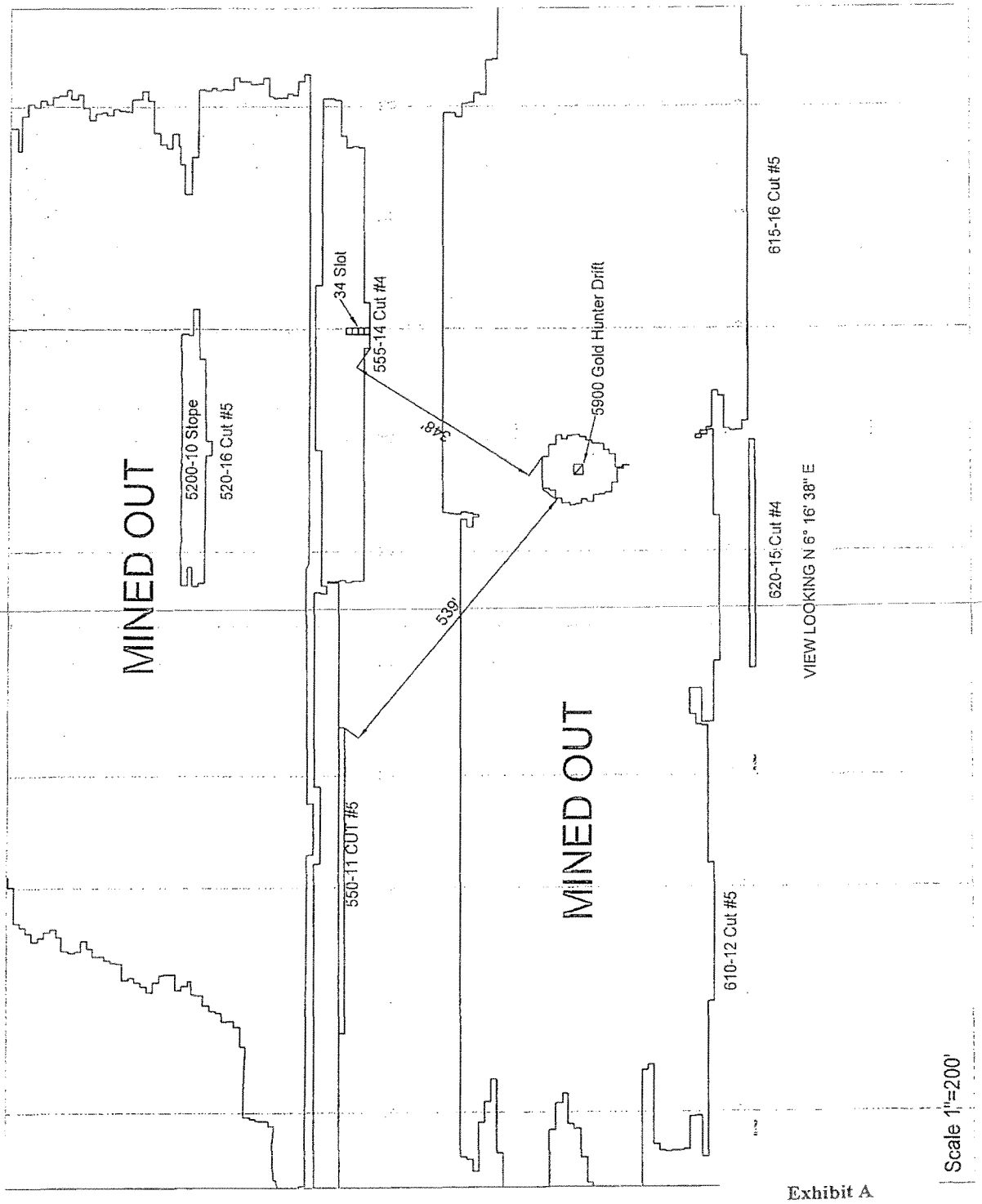

Exhibit A

APPENDIX THE GEOKON STRESS METER

The stress meters used in the Lucky Friday Mine are commercially available from Geokon. A photograph showing three models of the sensors is presented in Fig. A-1. The method for installing the sensor is illustrated in Fig. A.2

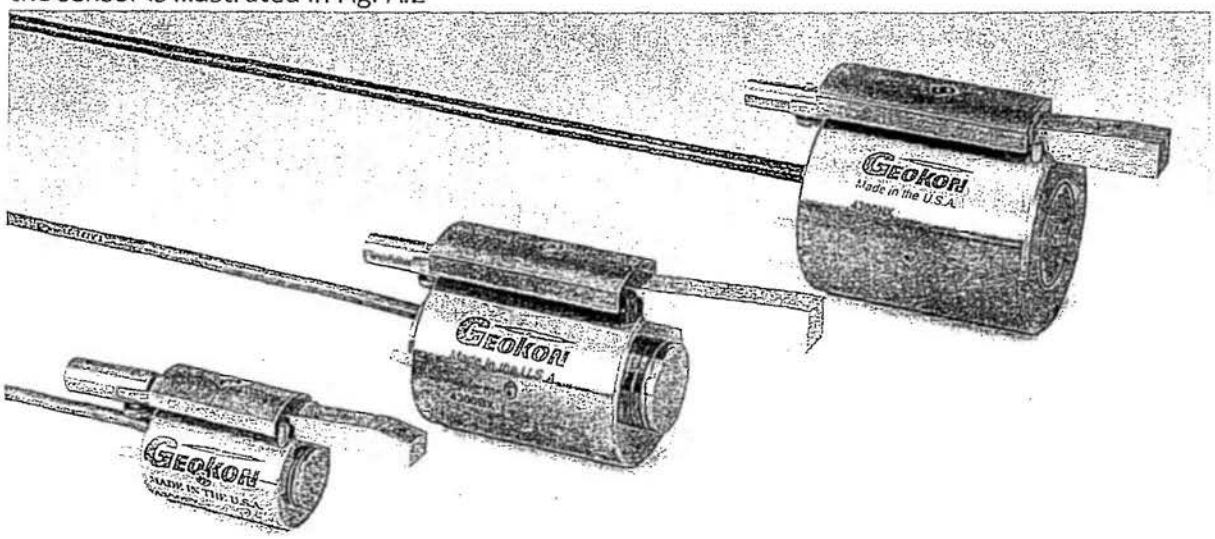

Fig. A.1 Three models (sizes) of the Geokon stress meters.

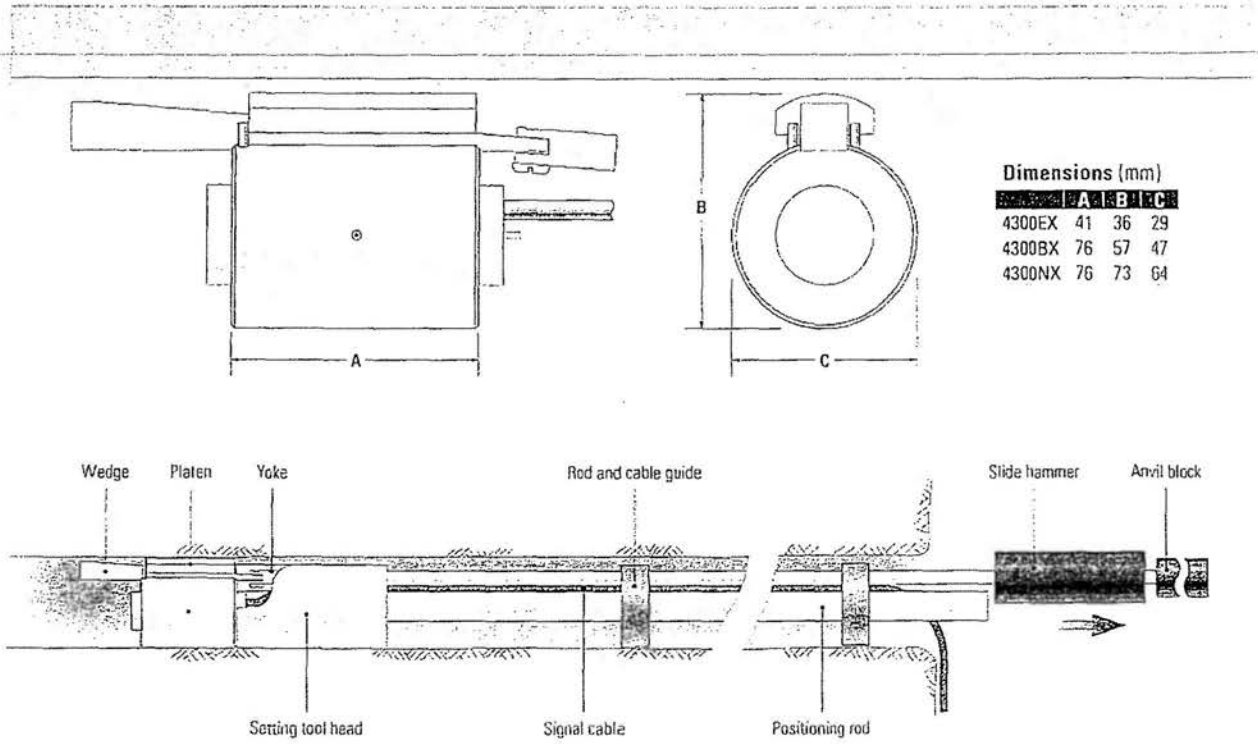

Fig. A.2 Installation of the stress meter in a bore hole using a setting head and wedge.

In operation it is essential that the stress meter be wedged tightly into the bore hole as shown in Fig. A.3. Because the deformations of the hole are very small it is essential that the surface of the bore hole be smooth and free of small rock particles. When a mass of rock undergoes stresses the bore hole deforms and squeezes the anvil downward onto the proving ring. As the proving ring deforms it becomes elliptical in shape and stretches a sensing wire. The sensor contains a coil that is used to excite vibration in this wire. This same coil senses the frequency of the vibration and relays this frequency through a signal cable to a read out device located near the mouth of the bore hole. The square of the vibratory frequency is proportional to the change in the diameter of the sensor and through calibration to the increase or decrease in the rock stresses.

A thermistor is also contained within the sensor to monitor the temperature of the installation. In the application of the sensors in the Lucky Friday mine, the temperatures are stable and the signal from the thermistor is essentially constant as soon as it records the rock temperature.

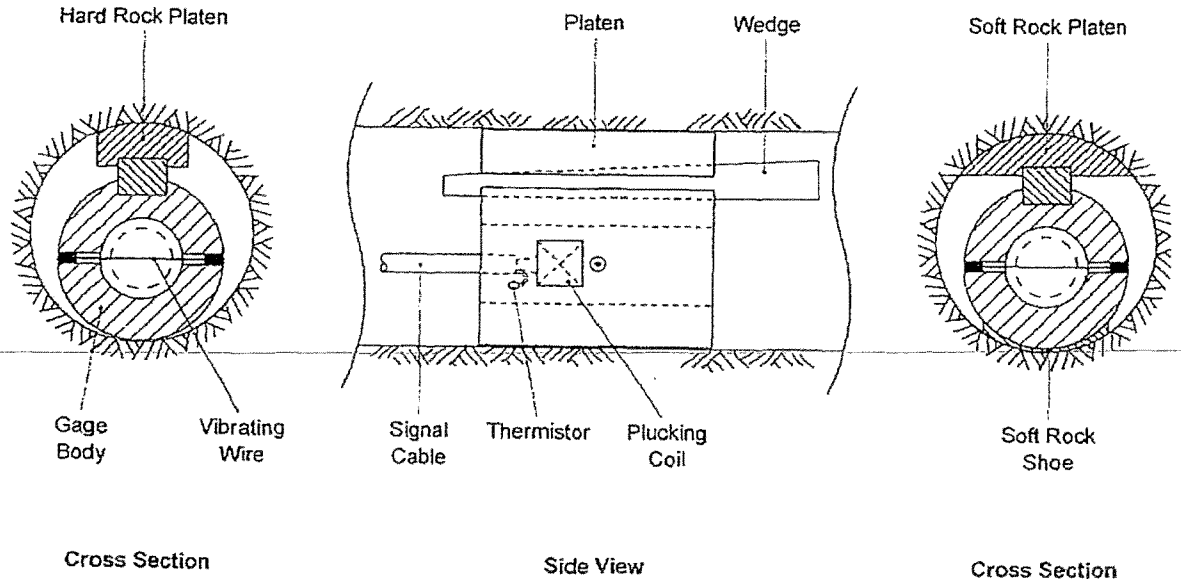

Fig. A-3 Mounting details and internal components of the Geokon stress meter.

The stress σ is determined from the gage readings by:

$$\sigma = (R_1 - R_0)G$$

where R_1 and R_0 are the current stress meter reading and its initial reading, respectively.
G is the calibration constant.

The elastic modulus of the stress meter is about 4×10^6 psi. However the relationship between the stress meter's output and the stress measurement is a function of the modulus of elasticity of the rock in which the sensor is embedded. The calibration curve for the model 4300NX stress meter is shown in Fig A.4.

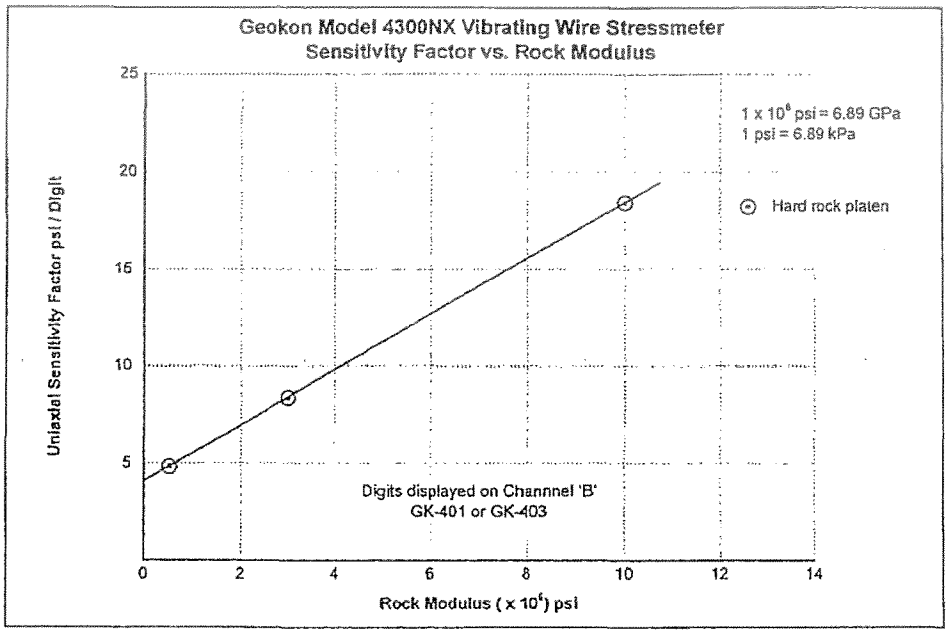

Fig. A.4 Calibration curve for the 4300 NX Geokon stress meter.

The elastic modulus of the rock in the 5900 pillar is not constant. Wilson Blake[9] has stated:

"We know from before that the modulus on the west side was very different than the modulus on the east side, and no idea of the modulus for the top. We should look at the values Agapito got from testing the cores from the Observations holes, if they did, or their test results from other cores, rather than the old values of Doug Scott. Clear that stress on both sides before burst was same, so only the modulus was different, which meant the west modulus had to be about 1.5 x 10^6 if the east modulus was 5.3 x 10^6. This number was what I gave Rimas based on the deformation of the 30 vein drift measurements of closure along the 4900 level. I had to increase the modulus in my model to 5.3 x 10^6 to get the model to agree with the measurements - so lot of guess work in original numbers which we continue to use."

Using Blake's values for the elastic modulus gives the calibration constants as G = 7 for the west stress meter and about 12 for the stress meter in the east wall. I have not determined the exact constant employed in generating the results presented by Hecla for the period from December 2 to 14, 2011.

The Geokon stress meters provide an indication of stress, but they cannot be considered accurate. In fact the manufacturer only indicates accuracy of 20% in the best case. If properly installed, they indicate if the stress is increasing, decreasing or is stable. In the case of the two gages responding in the 5900 pillar in early December 2011, the gages indicated that the stress was increasing.

[9] Blake email of December 3, 2011 to Doug Bayer.

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Assistant Director of Research, IIT Research Institute, Chicago, IL, 1961-1963
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- Frocht Award 1976
- Fellow Award 1978
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- Hetenyi Award 1995
- Tatnall Award 2001
- Taylor Award 2002

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Past President Award 1990
University of Maryland
Outstanding Teaching Award, College of Engineering 1991
Distinguished Scholar-Teacher Award 1993
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Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

RONNEL E. BARRETT, an individual; GREGG HAMMERBERG, an individual; ERIC J. TESTER, an individual; and MATTHEW WILLIAMS, an individual, Plaintiffs, -vs- HECLA MINING COMPANY, a Delaware Corporation; JOHN JORDAN, an individual; DOUG BAYER, an individual; SCOTT HOGAMIER, an individual; and DOES I-X, unknown parties, Defendants.	**CASE NO. CV 13-8793** **PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

COME NOW, Plaintiffs, by and through their counsel of record, Eric S. Rossman of Rossman Law Group, PLLC and hereby submit this Memorandum in Opposition to Defendants' Motion for Summary Judgment.

I. INTRODUCTION

This case arises from a rockburst which occurred on December 14, 2011 at the Lucky Friday mine in Mullan, Idaho. This rockburst resulted in the serious injury of seven miners, including the Plaintiffs who were working in the area of the 5900 level pillar at the Lucky Friday mine. On December 11, 2013, Plaintiffs filed the complaint in this manner alleging knowing, intentional, willful and wanton injury to the Plaintiffs, *respondeat superior* liability against Hecla, and intentional infliction of emotional distress.

On May 29, 2015, Defendants filed a Motion for Summary Judgment asserting that such claims were barred by the exclusive remedies set forth within Idaho's Worker's Compensation Law, Idaho Code §§ 72-101, *et. seq.* Defendants additionally asserted Plaintiffs' claims for intentional infliction of emotional distress should be dismissed because Plaintiffs have provided no evidence that they have suffered severe emotional distress. For the reasons set forth below, as well as the arguments set forth within the Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment filed on June 15, 2015, Plaintiffs respectfully request that the Defendants' Motion for Summary Judgment be denied.

II. STATEMENT OF UNDISPUTED MATERIAL FACTS

Plaintiffs have prepared and filed a separate Statement of Facts in Support of Plaintiffs' Motion for Partial Summary Judgment and in Opposition to Defendants' Motion for Summary Judgment and hereby incorporate that Statement herein by this reference.

III. STANDARD OF REVIEW

Rule 56 of the Idaho Rules of Civil Procedure provides that summary judgment is proper "if the pleadings, deposition, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." I.R.C.P. 56(c); *see also Northwest Bec-Corp. v. Home Living Serv.,* 136 Idaho 835, 838, 41 P.3d 263, 166 (2002). The burden is upon the moving party to prove the absence of a genuine issue of material fact. *Petricevich v. Salmon River Canal Co.,* 92 Idaho 865, 868, 452 P.2d 362, 365 (1969). It is not the judge's function to weigh evidence, "but to determine whether there is a genuine issue for trial. . . [T]here is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249-50 (1986). Summary judgment is proper if the evidence before the court would warrant a directed verdict if the case were to go to trial. *Jephson v. Ambuel,* 93 Idaho 790, 793, 473 P.2d 932, 935 (1970).

IV. ARGUMENT

The Idaho Worker's Compensation Law expressly states that it provides the exclusive remedy for employees injured while working for an employer, except where the injury is proximately caused by the "wilful[sic] or unprovoked physical aggression of the employer" or its employees and that such loss of exemption shall apply to the employer if the employer provoked or authorized the willful physical aggression. *See* Idaho Code § 72-209(3).[1] As was fully set forth within Plaintiffs' Memorandum in Support of Motion for Partial Summary Judgment, Idaho case law and the

[1] Within Idaho Code § 72-209(3), the statue uses the term "wilful." This appears to be nothing more than a misspelling by the Legislature in enacting the provision. In the interest of consistency with court decisions and modern usage of the word, Plaintiffs will use the correct spelling of "willful" throughout this Memorandum.

legislative history of the Idaho Worker's Compensation Act demonstrate that, contrary to Defendants' argument, "willful physical aggression" does not require a showing that the employer deliberately intended to harm the Plaintiffs. Because that issue was fully briefed within Plaintiffs' Memorandum in Support of Motion for Partial Summary Judgment, Plaintiffs' full arguments will not be repeated herein, but are incorporated into this brief by this reference. This Memorandum in Opposition to Defendants' Motion for Summary Judgment will focus solely on the specific issues raised by Defendants.

A. The Kearney *and* DeMoss *cases do not require a showing of an intent to harm by the employer.*

Within the Memorandum in Support of Defendants' Motion for Summary Judgment, Defendants assert that the controlling case authorities for this case are *Kearney v. Denker*, 114 Idaho 755, 760 P.2d 1171 (1988) and *DeMoss v. City of Coeur d'Alene*, 118 Idaho 176, 695 P.2d 875 (1990). Defendants assert that these two cases mandate that in order for an employee to pursue a tort action outside of the workers' compensation process, the employee must prove that the employer intended to harm the employee.

However, a review of those cases demonstrates that, at best, any language referencing the requirement of a deliberate intent to harm by the employer was merely dicta and was not central to the decision. In *Kearney*, the Idaho Supreme Court first addressed the question of whether the plaintiff's claim met the requirements of Idaho Code § 72-209(3) as an act of willful physical aggression. In denying the plaintiff's claim, the Court held only that Idaho Code § 72-209(3) did not apply to "negligent acts that made it substantially certain that injury would occur." *See Kearney*, 114 Idaho at 757, 760 P.2d at 1173. While the Court did offer the conclusory statement that "Both I.C. § 72-208 and § 72-209(3) require an intention to injure the employee," this statement was offered in

relation to the equal protection claim brought by the plaintiff. *See Kearney*, 114 Idaho at 758, 760 P.3d at 1174. The Court offered no analysis to support this conclusion and nothing in the decision indicates that by using the term "intention" that the Court meant a deliberate intent rather than willfulness. In fact, both Idaho Code § 72-208 and Idaho Code § 72-209(3) use the term "willful" in describing the mental state of mind required for the statutory provisions to apply. *See* I.C. § 72-208; §72-309(3). As such, it is clear that the Court was opining that because the two statutory provisions require the same mental state, i.e. willfulness, there was no discrimination within the statute requiring an equal protection analysis. *See Kearney*, 114 Idaho at 758, 760 P.2d at 1174. Nothing within the section of the opinion regarding the application of the "willful physical aggression" exception to the Worker's Compensation Act references or requires a showing of an intent to injure the plaintiff. Further, such a construction of the opinion would be directly inconsistent with the multitude of prior and subsequent cases defining the term "willfulness" under Idaho law. There is simply no basis in law or fact to assume that the Idaho Supreme Court intended from the Kearney opinion that the term "willfulness" should be construed to require an "intent to harm" standard when the court has expressly stated in every other context that it does not. As such, nothing in *Kearney* provides that only a deliberate intent to injure an employee will satisfy the "willful physical aggression" standard.

Defendants then cite to *DeMoss v. City of Coeur d'Alene*, 118 Idaho 176, 795 P.2d 875 (1990). Again, however, *DeMoss* merely reiterated the earlier standard announced in *Kearney* that "[i]t is not sufficient to prove that the alleged aggressor committed negligent acts that made it substantially certain that injury would occur." *See DeMoss*, 118 Idaho at 178, 795 P.2d at 877 (quoting *Kearney*, 114 Idaho at 757, 760 P.3d at 1173). Defendants assert that the Idaho Supreme

Court set forth a requirement of deliberate intent to injure, but a review of the language cited by the Defendants demonstrates that it is hardly that simple. In *DeMoss*, the Court stated "[t]he city and its supervisory employees may have been negligent, even grossly negligent in not recognizing the danger but there is simply no evidence herein that any of the supervisors or the higher city officials ever willfully **or** intentionally wanted to cause injury to the plaintiffs." *See DeMoss*, 118 Idaho at 179, 795 P.2d at 878 (emphasis added). By inserting the word "or" into the previous sentence the court expressly held that either willful or intentional injury to the plaintiffs will satisfy the mental state required under the statute. The term "or" is a conjunction that is used to link alternative actions. Thus, the Court expressly recognized the willfulness standard within the opinion. Furthermore, the Court emphasized that there was no evidence of any ill feelings or hostility by the employer and also that "[t]he record does not show that Eastwood or any of the defendants actually knew that it was asbestos until the test results from the laboratory were received. These test results were received after the appellants' first exposure to the asbestos had occurred. Moreover, while the protective clothing provided the workers prior to the second round of removal may indeed have been inadequate, that does not rise to the level of 'unprovoked physical aggression.'" *See id.* at 180, 795 P.2d at 879. A reasonable construction of the opinion is that had there been evidence that the employer did actually know that there was asbestos in the materials and instructed the employees to remove them anyways without protective measures, a viable claim may have been stated. In this case, as set forth within Plaintiff's memorandum in support of their Motion for Partial Summary Judgment, there is substantial evidence that the employer not only should have known that there was a substantial likelihood that the pillar would fail but that it in fact did know of this condition, yet it

fraudulently concealed it and lied to the employees to get them to complete the repairs despite this knowledge.

Based on the above language from the Idaho Supreme Court, it is clear that the basis for the decision in *DeMoss* was not the failure of the plaintiffs to prove a deliberate intent to injure. Rather, the Court clearly recognized that "willful physical aggression" required more than negligence combined with a substantial likelihood of injury and that the employer's conduct in that case did not rise above some form of negligence, even if such negligence created a substantial likelihood of harm. As set forth above, the Court specifically noted the lack of any evidence of the employer "wilfully[sic] **or** intentionally" causing injury to the plaintiffs. Therefore, contrary to Defendants' arguments, neither *Kearney* nor *DeMoss* establish that there must be a deliberate intent to injure plaintiff in order to meet the requirements of Idaho Code § 72-209(3). Had the Idaho legislature intended the exception to require an "intent to harm" it would have done so expressly.

B. This case is substantially different from* Marek v. Hecla, *et. al.

Defendants also rely upon the case of *Marek v. Hecla,* Case No. CV 2013-2722, in which the district court granted summary judgment to Hecla. In *Marek*, plaintiffs were miners at the Lucky Friday mine and one of the miners was killed in a rock fall that occurred in April of 2011. The District Court found that the exception to the exclusive liability provisions of the Worker's Compensation Act did not apply under the facts of that case. *See Marek v. Hecla, et. al.*, Case No. 2013-2722, Memorandum Decision and Order Granting Defendants' Motion for Summary Judgment and Denying Plaintiffs' Motion for Partial Summary Judgment, attached as Exhibit 39 to the Affidavit of Eric S. Rossman in Support of Plaintiffs' Motion for Partial Summary Judgment. However, the district court in *Marek* focused on the fact that there was no evidence that Hecla knew

that the miners were working in a dangerous situation or that the miners were directed to work in the specific area where the accident in that case occurred. *See id.* at pp. 8-9. Rather, the district court found that the actions alleged by the plaintiffs such as the failure to have an engineer review and approve pillar removal, failing to heed warnings regarding the removal of the pillar and failing to undergo a safety review were more analogous to negligent acts, not willful acts. *See id.* at 9-10.

Defendants again cite to language within the District Court's opinion regarding the lack of any evidence of any ill will or deliberate intent to injure the plaintiffs. As with *Kearney* and *DeMoss*, however, the decision clearly shows that this was not the basis of the decision. Rather, the Court pointed to the lack of any evidence that Hecla actually knew the conditions were hazardous. *See Marek*, at p. 9. To the extent the District Court then went on to talk about the lack of evidence of any intent to cause injury, that discussion is merely dicta. *See Marek*, at p. 10. Furthermore, the District Court's decision in *Marek* indicates that the District Court did not properly apply the standard set forth in *Kearney* and *DeMoss*. The District Court stated "even if the Defendants did know that the environment was potentially hazardous, *Kearney* and *DeMoss* demonstrate that knowledge of the dangerous condition alone that made it substantially certain that injury would occur does not create an exception to exclusivity." *See Marek*, at p. 9. As was set forth above, *Kearney* and *DeMoss* do not state that knowledge of a hazardous condition is insufficient to establish willful physical aggression, they state that **negligence** is insufficient to meet that exception and, in both cases, the facts did not demonstrate anything more than negligence by the employer.

In *Kearney* the court relied upon *Webster's Third New International Dictionary* for its definition of the term "aggression" under the exception to include "an offensive action." That same dictionary also defines aggression to include, "hostile, injurious, or destructive behavior or outlook

especially when caused by frustration." the present case, as is fully set forth in the Statement of Facts and the Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment, there is substantial evidence that Hecla did know of the dangerous condition of the pillar, lied about that condition to the miners and MSHA, lied about increasing pressures registered by the stress monitors, provided inaccurate and unsupported information to MSHA and miners regarding the stability of the pillar – information Hecla knew was false or completely unsupported, and directed full mining activities to take place despite knowing that the rehabilitation efforts of the pillar were not complete. Thus, this is not a situation where Hecla was merely negligent in failing to undergo a safety review or where Hecla did not have actual knowledge of the dangerous conditions. Rather, this is a situation where Hecla management absolutely knew of the danger and knew that there was a substantial risk to the miners. Knowledge that the pillar carried a substantial risk of failure during the repairs that was so compelling to cause Hecla management to fraudulently induce the miners to perform the repairs is, in fact, a quintessential expression of "ill will." The argument that there is a lack of evidence of Hecla management's subjective intent in carrying out its conduct is irrelevant. The evidence in this case demonstrates that Hecla willfully committed an offensive act that caused severe physical injury to the Plaintiffs. As such, this case falls directly within the willful physical aggression standard.

C. California Law is Irrelevant to Idaho's Worker's Compensation Law.

Defendants next attempt to rely upon California law as support for the deliberate intent to injure standard they seek to impose on the Plaintiffs in this case. However, as Defendants even admit, the provisions of California's workers compensation law are not identical to Idaho's. First, California applies a "willful physical assault" standard to employers, rather than "willful physical aggression." Furthermore, in reviewing *Torres v. Parkhouse Tire Service, Inc.*, 30 P.3d 57, 60 (Cal.

2001), the California case relied upon by Defendants, it cannot be used to support the Defendants' argument.

In *Torres*, the California Supreme Court attempted to interpret "willful and unprovoked physical aggression" but did so in reliance upon California's own case law, including case law interpreting "initial physical aggressor" as requiring a real, present and apparent threat of bodily harm." The California Supreme Court held that because there were two provisions containing the same language, they should be interpreted similarly. *See Torres*, 30 P.3d at 61. In contrast, Idaho's worker's compensation law has no exclusion of compensation for an employee who is the "initial physical aggressor." Rather, Idaho's worker's compensation act has an exclusion for an employee who willfully intends to injure himself. Thus, the underlying basis for the California court's interpretation of "physical aggression" does not apply in this case. More importantly, the California court's interpretation of "physical aggression" is also irrelevant because the Idaho Supreme Court has already interpreted this provision as requiring an offensive or hostile act. *See, e.g.*, *Kearney*, 114 Idaho at 757-758, 760 P.2d at 1173-1174. There is no reason to believe the Idaho Supreme Court would reject its own interpretation in order to adopt the California court's case law.

Additionally, California's definition of willfulness is substantially different from Idaho. In *Torres*, the California Supreme Court discussed willful as requiring an intentional act and cited to *Mercer-Fraser Co. v. Industrial Acci. Com.*, 251 P.2d 955, 964 (Cal. 1953). In *Mercer-Fraser*, the California Supreme Court defined "willful misconduct" as "an act deliberately done for the express purpose of injuring another, or intentionally performed either with knowledge that serious injury is a probable result or with a positive, active, wanton, reckless, and absolute disregard of its possibly damaging consequences." *See id.* Obviously, this is a much different standard than that articulated

in *Hennefer v. Blaine County Sch. Dist. #61*, --- Idaho ---, 346 P.3d 259 (Idaho 2015). In *Hennefer*, the Court specifically rejected a subjective, intentional standard for willful or reckless conduct. *See id.* at ---, 346 P.3d at 265. Rather, the Court held that

> *Phillips, Carrillo,* and IDJI 2.25 show that an objective, "should have known" standard is the appropriate standard of recklessness .... Though the actor must make a conscious choice as to his or her course of action, the actor need not subjectively be actually aware of the risk or high probability that harm will result. It is sufficient for a finding of recklessness that the actor makes the choice as to his or her course of conduct under circumstances where the risk and high probability of harm are objectively foreseeable.

See id. at 266.

As was set forth fully within Plaintiffs' Memorandum in Support of Motion for Partial Summary Judgment, this definition of willful and/or reckless misconduct is the definition to be applied to the facts of this case. Unlike California, Idaho's definition of willfulness does not include any requirement of any subject intent to cause injury and, therefore, California's interpretation of "willful physical aggression" is simply inapplicable and irrelevant to the interpretation of Idaho Code § 72-209(3).

D. Dominguez *Provides the Appropriate Standard for this Case.*

Plaintiffs' claims are further supported by *Dominguez v. Evergreen Res., Inc.*, 142 Idaho 7, 121 P.3d 938 (2005). In *Dominguez*, the plaintiff had worked for the defendant and was instructed to enter and clean a steel tank which had been used as part of a cyanide-leach process and which had a layer of cyanide laced sludge in the bottom. *See id.* at 9, 121 P.3d at 940. The evidence showed that the employer knew it was dangerous to enter the tank but concealed the knowledge from Dominguez. The employer had failed to obtain the proper permit for entry into the tank in violation of federal regulations and had failed to provide any safety training or equipment. *See id.* During the cleaning

process, Dominguez was overcome by poisonous hydrogen cyanide gas and lost consciousness. He ultimately suffered severe and irreversible brain damage. *See id.* at 10, 121 P.3d at 941. Dominguez filed suit against his employer alleging willful physical aggression to avoid the exclusive remedy provisions of the Workers' Compensation Act. *See id.* Eventually, the employer's attorney withdrew and the employer failed to find new counsel leading the district court to enter default against the employer. *See id.*

On appeal, the employer asserted that Dominguez's claims were barred by the exclusive remedy provision of the Idaho Worker's Compensation Act. The Idaho Supreme Court disagreed and stated that Dominguez had alleged willful or unprovoked physical aggression by his employer and, therefore, his claim fell into the statutory exception. *See id.* at 12; 121 P.3d at 943. Thus, the Court has recognized that the statutory exception applied to a claim that the employer willfully placed an employee in a situation where there was a high probability that an injury would occur.

Because the case involved a default judgment, Hecla states in a footnote that *Dominguez* is factually and procedurally distinguishable. Based on the facts set forth in *Dominguez*, it is not factually distinguishable at all and, in fact, is far more in line with the facts of this case than the facts underlying *Kearney* and *DeMoss*. Furthermore, in contrast to Defendants' assertion that the Idaho Supreme Court never held that the circumstances alleged by Dominguez actually fell within the statutory exception, a review of the case demonstrates that the Court was fully aware of the factual circumstances alleged by Dominguez and nevertheless recognized that the statutory exception applied to his case. *See Dominguez*, 142 Idaho at 12, 121 P.3d at 943. Specifically, the Court restated the facts of the case as follows:

> In the summer of 1996, Elias directed Dominguez and another employee to wash out the sludge that had accumulated in the steel

> tank. **Dominguez alleges Elias knew it was hazardous to enter the steel tank, but concealed that knowledge from Dominguez. Contrary to federal regulations, no confined space entry permit had been prepared, there had been no special employee training, appropriate safety equipment was not provided, and no attendant was standing by.** The two employees entered the steel tank through a manhole opening on the top of the tank, and using a water hose and broom the pair attempted to wash the sludge out through a small opening. While in the steel tank, Dominguez was overcome by poisonous hydrogen cyanide gas and lost consciousness. The other employee was able to escape.

See id. at 9, 121 P.3d at 940 (emphasis added).

Based on this recitation, it is clear that the Court expressly recognized the facts underlying Dominguez's claim of willful physical aggression and agreed that a cause of action satisfying the statutory exemption had been properly alleged. In its decision, the court stated:

> In this case, Dominguez has alleged a willful or unprovoked physical aggression by his employer, and therefore his claim falls into a statutory exception to the exclusive remedy rule. I.C. § 72-209(3). Consequently, Dominguez is permitted to collect those worker's compensation benefits for which he is eligible and to bring a cause of action against his employer outside the worker's compensation system.

Dominguez, 142 Idaho at 12, 121 P.3d at 943. The decision is clear that it was not based simply on Dominguez setting forth a conclusory allegation of willful or unprovoked physical aggression. Rather, the determination that Dominguez had alleged willful or unprovoked physical aggression was based upon the underlying facts within the complaint. And, as was set forth within Plaintiffs' Memorandum in Support of Motion for Partial Summary Judgment, a court cannot approve a default judgment where the underlying facts in the complaint do not support a valid cause of action. *See, e.g., Olson v. Kirkham*, 111 Idaho 34, 37, 720 P.2d 217, 220 (Ct. App. 1986); *Benny v. Pipes*, 799 F.2d 489, 495 (9th Cir. 1986).

Therefore, the Idaho Supreme Court was obligated to take the facts alleged by Dominguez as true upon a default, but it was not obligated to find that those facts necessarily created a valid claim for relief. As such, the only reasonable conclusion is that the facts alleged by Dominguez were sufficient to meet the requirements of Idaho Code § 72-209(3). There is no basis to believe that the Idaho Supreme Court would have affirmed a multi-million dollar judgment if the factual allegations pled by Dominguez did not state a valid cause of action. The evidence in this case is substantially similar to *Dominguez* and, like the plaintiff in that case, these Plaintiffs have pled a valid cause of action and summary judgment for the Defendants must be denied.

E. The Evidence in this Case Demonstrates Willful Physical Aggression by Hecla.

Hecla concludes the argument by asserting that Plaintiffs cannot demonstrate that it harbored ill will towards the Plaintiffs or wanted to cause Plaintiffs injury and no such evidence exists on the record. Plaintiffs have provided legislative history and case law to demonstrate that, in fact, they are not required to prove that Hecla deliberately intended to cause injury to them. Rather, Plaintiffs must demonstrate that Hecla engaged in a conscious choice of action when it knew or should have known that such action created a high risk of harm and knew or should have known that such harm was likely to result; that Hecla committed an offensive act towards the Plaintiffs; and that Plaintiffs were physically injured by such acts.

The full facts demonstrating each of these elements are set forth with the Statement of Facts and the Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment and will only be repeated in summary here. These facts show that Hecla lied to the miners working in the 5900 pillar regarding the stability of the pillar, including stating that the pillar was perfectly safe and would be for another five years. Hecla lied to MSHA regarding the installation of stress gauges,

about the data being received from those stress gauges, and about the overall stability of the pillar. Hecla took no action to repair the obviously inaccurate gauges on the East wall. Hecla removed critical language from its own consultant's report before providing that report to MSHA. Wilson Blake's first report to Hecla stated that the pillar was borderline stable and had nearly reached its maximum compressive strength prior to the November 16, 2011 rockburst and, therefore, Hecla had actual knowledge of both these facts. And despite knowing that the prior rockburst occurred during blasting, Hecla induced MSHA to approve "limited activities" through the 5900 level pillar and used that approval as a basis to resume normal mining activities, including blasting, before completing the planned rehabilitation of the pillar. Plaintiffs' experts have submitted affidavits which detail the willful conduct by Hecla and both conclude that Hecla committed willful physical aggression in this matter.

Based on the evidence submitted by Plaintiffs as set forth within the Statement of Facts and the supporting affidavits, there is at least a genuine issue of material fact regarding whether Hecla committed willful physical aggression against the Plaintiffs in this matter. Therefore, Hecla's motion for summary judgment must be denied and this case should proceed to the jury.

F. Summary Judgment should not be Granted on Plaintiffs' Claims for Intentional Infliction of Emotional Distress.

Defendants have also sought summary judgment on Plaintiffs' claims for Intentional Infliction of Emotional Distress.[2] Defendants first assert that such claims are barred by the exclusive remedy provision of the Idaho Workers' Compensation Act. For the reasons already discussed

[2]Defendants have also moved for summary judgment on Plaintiffs' claims of *respondeat superior* liability and intentional infliction of emotional distress on the basis that such claims are barred by the exclusive remedy provision of the Idaho Worker's Compensation Act. Should the court find that the exclusive remedy provision does not apply, Plaintiffs claims against Hecla for this claim must proceed to trial.

above, the motion for summary judgment must be denied on this basis. Defendants further assert that even if the exclusive remedy provision does not apply, no genuine issue of material fact exists regarding this claim and, therefore, summary judgment must be granted. As will be set forth in detail below, there are genuine issues of material fact remaining regarding the intentional infliction of emotional distress claim and summary judgment must be denied.

1. Intentional Infliction of Emotional Distress does not Require Physical Injury or Physical Manifestation of the Emotional Distress.

A claim for intentional infliction of emotional distress requires (1) the conduct be intentional or reckless; (2) the conduct must be extreme and outrageous; (3) there must be a casual connection between the wrongful conduct and the emotional distress; and (4) the emotional distress must be severe. *See Edmondson v. Shearer Lumber Prod.*, 139 Idaho 172, 179, 75 P.3d 733, 740 (2003). In contrast to Defendants' assertion, there is no requirement of showing physical injury or physical manifestations of injury to establish intentional infliction of emotional distress. *See Brown v. Matthews Mortuary, Inc.*, 118 Idaho 830, 835 801 P.2d 37, 42 (1990) (only requiring physical manifestations in relation to the claim for negligent infliction of emotional distress). Defendants cite to *Hopper v. Swinnerton*, 155 Idaho 801, 317 P.3d 698 (2013), as support for the proposition that intentional infliction of emotional distress requires physical injury or physical manifestations of the emotional distress. While the Idaho Supreme Court did cite to *Brown* as support for such an element in *Hopper*, the holding in *Hopper* was that the plaintiffs had failed to identify any emotional distress they had suffered, not just the failure to identify any physical manifestations of such distress. *See Hopper*, 155 Idaho at 810-811, 317 P.3d at 707-708. Further, there is well-established case law in this state that clarifies that in a claim for intentional infliction of emotional distress, a plaintiff does

not have to establish a physical injury or physical manifestation of such distress. *See, e.g., Curtis v. Firth*, 123 Idaho 598, 601, 850 P.2d 749, 752 (1993).

In *Curtis*, the Idaho Supreme Court expressly held that "[u]nlike a claim for negligent infliction of emotional distress which requires a showing of physical injury or physical manifestation, a claim for intentional infliction of emotional distress has no such requirement." *See id.* (emphasis added). The Court further stated "[a]lthough evidence of physical harm may bear on the severity of emotional harm, it is clear that evidence of physical injury or manifestation is not a required element for the claim of intentional infliction of emotional distress." *See id.* (emphasis added). There is nothing in the *Hopper* opinion which indicates that the Idaho Supreme Court intended to overrule decades of precedent regarding the required elements of intentional infliction of emotional distress. Had the Court intended such a holding, it would have undoubtedly expressed that intent. As such, this Court should follow the long-established elements for intentional infliction of emotional distress as set forth in *Curtis*.[3]

2. *There are Genuine Issues of Material Fact Precluding the Entry of Summary Judgment on the Claims for Intentional Infliction of Emotional Distress.*

Defendants assert summary judgment is appropriate on the claim for intentional infliction of emotional distress because there is no evidence of intentional, reckless, outrageous or extreme conduct by Defendants. However, as was set forth above and in detail in the Statement of Facts and Memorandum in Support of Plaintiff's Motion for Partial Summary Judgment, there is substantial evidence that Hecla acted recklessly and outrageously in this matter. Hecla lied to the miners

[3] Additionally, if the Court determines that "physical injury or physical manifestation of emotional distress" must accompany the emotional distress, summary judgment should still be denied. It is undisputed that each of the Plaintiffs suffered severe physical injuries due to being buried in the rockburst on December 14, 2011. As such, even if the physical injury requirement is applied, Plaintiffs have presented evidence to meet that requirement.

working in the 5900 pillar regarding the stability of the pillar, including stating that the pillar was perfectly safe and would be for another five years. Hecla lied to MSHA regarding the installation of stress gauges, about the data being received from those stress gauges, and about the overall stability of the pillar. Hecla took no action to repair the obviously inaccurate gauges on the East wall. Hecla removed critical language from its own consultant's report before providing that report to MSHA. Wilson Blake's first report to Hecla stated that the pillar was borderline stable and had nearly reached its maximum compressive strength prior to the November 16, 2011 rockburst and, therefore, Hecla had actual knowledge of both these facts. And despite knowing that the prior rockburst occurred during blasting, Hecla induced MSHA to approve "limited activities" through the 5900 level pillar and used that approval as a basis to resume normal mining activities, including blasting, before completing the planned rehabilitation of the pillar. This conduct clearly meets the definition of reckless or willful as is set forth in *v. Blaine County Sch. Dist. #61*, --- Idaho ---, 346 P.3d 259 (Idaho 2015).

In addition to clearly constituting reckless conduct, Hecla's conduct in this matter was also extreme and outrageous. The Idaho Supreme Court has held that conduct supporting a claim for intentional infliction of emotional distress "must not be merely unjustifiable; it must rise to the level of 'atrocious' and 'beyond all possible bounds of decency,' such that it would cause an average member of the community to believe that it was outrageous. *Johnson v. McPhee*, 147 Idaho 455, 464, 210 P.3d 563, 572 (2009). Examples of such outrageous conduct in Idaho cases include: an insurance company speciously denying a grieving widower's cancer insurance claim while simultaneously impugning his character and drawing him into a prolonged dispute; prolonged sexual, mental, and physical abuse inflicted upon a woman by her co-habiting boyfriend; recklessly shooting

and killing someone's donkey that was both pet and pack animal; and real estate developers defrauding a family out of property that was subject of a lifelong dream to build a retreat. *See id.* (internal citations omitted). In this case, the evidence demonstrates that Hecla acted willfully and recklessly, that Hecla lied to the miners and federal authorities about the safety of the mine; that Hecla removed vital information from the report of its rock mechanics expert; that Hecla ignored and lied about stress readings indicating stress was building on the pillar; and Hecla lied to MSHA and the miners about the destressing of the pillar from the November 16, 2011 rockburst. Clearly, this evidence is sufficient to allow a jury to decide whether this type of conduct by an employer is outside the bounds of decency. As such, summary judgment should be denied.

Defendants further argue that there is no evidence that the Plaintiffs suffered severe emotional distress. In response, Plaintiffs have filed the Declaration of Philip A. Hanger, Ph.D. ("Hanger Declaration"). Dr. Hanger is a licensed psychologist practicing in Coeur d'Alene, Idaho. *See* Hanger Declaration, ¶ 2. Dr. Hanger interviewed and evaluated each of the Plaintiffs in this matter. *See* Hanger Declaration, ¶ 3. Dr. Hanger then prepared diagnosis reports for each Plaintiff. *See* Hanger Declaration, ¶¶ 3-4 and Exhibits "B," "C," "D," and "E" to the Declaration. Based on these reports, Dr. Hanger has concluded that each Plaintiff suffered severe emotional distress as a result of the traumatic events of December 14, 2011. Therefore, there is evidence in the record to support Plaintiffs' claims that they suffered severe emotional distress. As such, the motion for summary judgment as to the claim for intentional infliction of emotional distress must be denied.

V. CONCLUSION

Hecla engaged in a course of offensive conduct designed to conceal the real and known dangers regarding the stability of the 5900 level pillar from both MSHA and the miners working at

that pillar. This offensive conduct was undertaken with utter disregard to the substantial risk posed to the miners and with knowledge such risk was highly likely to occur. Seven miners were seriously injured as a result of Hecla's willful physical aggression against those miners and, therefore, Hecla is not entitled to the protections of the exclusive remedy provisions of the Idaho Worker's Compensation law. Further, Plaintiffs can and have established a genuine issue of material fact regarding the elements of the claim for intentional infliction of emotional distress. As such, Defendants' motion for summary judgment must be denied.

DATED this 13th day of July, 2015.

ROSSMAN LAW GROUP, PLLC

Eric S. Rossman
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of July, 2015 I caused a true and correct copy of the foregoing to be forwarded with all the required charges prepaid, by the method(s) indicated below to the following persons:

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