

IN THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA

MARY L. FOX, individually
and on behalf of the estate of
Gary Fox,

Plaintiff,

v.

JACKSON KELLY PLLC,

Defendant.

CIVIL ACTION NO. 09-C-497-K

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COMPLAINT

INTRODUCTION

1. Plaintiff brings this case against defendant Jackson Kelly PLLC ("Jackson Kelly") for fraudulent misrepresentation in its representation of coal companies in the black lung claims of Gary Fox, the late husband of Mary L. Fox. Plaintiff requests damages for fraudulent misrepresentation and, in addition, declaratory and injunctive relief against Jackson Kelly.

2. Plaintiff states that this case involves misconduct by attorneys at Jackson Kelly who represent coal companies in black lung claims. Plaintiff does not contend, nor does she have reason to believe, that the conduct upon which this Complaint is based is indicative of the firm as a whole or of those outside its federal black lung attorneys.

3. This case is filed within two years of the date when the plaintiff knew or should have known of the claims alleged herein.

PARTIES

4. Plaintiff Mary L. Fox is the widow of Gary Fox, a miner who worked for over thirty (30) years in West Virginia coal mines. She brings this case individually and in her capacity as administrator of the estate of Gary Fox.

5. Plaintiff also brings this case on behalf of others similarly situated, seeking declaratory and injunctive relief requiring Jackson Kelly to disclose those cases in which it has engaged in the fraudulent misrepresentations described in this Complaint, to declare that Jackson Kelly's practices, as set forth in the Complaint and as proven at trial, are contrary to law, and to order Jackson Kelly to cease and desist from those practices in the future.

6. Defendant Jackson Kelly is a West Virginia Professional Limited Liability Company with its principal offices in Charleston, West Virginia. For many years, its attorneys have been representing coal companies in federal black lung claims. The attorneys who have been involved in this practice in West Virginia have primarily worked out of Jackson Kelly's Charleston office and Morgantown office.

FACTS

BLACK LUNG BENEFITS

7. The Black Lung Benefits Act ("Act") is designed "to ensure that in the future adequate benefits are provided to coal miners and their dependents in the event of their death or total disability due to pneumoconiosis." 30 U.S.C. § 901.

8. The Act recognized that coal miners were exposed to coal dust that caused an occupational disease known as Coal Workers Pneumoconiosis ("CWP") or, more commonly, black lung.

9. CWP is a disease of the lungs caused by exposure to coal dust. Those afflicted with CWP suffer from a progressive lung disease that can and does permanently disable coal miners. Although it was once thought that the disease would be prevented by the control of coal dust in the mines, there is reason to believe that the incidence of the disease has increased in recent years.

10. Under the Act, a coal miner can qualify for monthly benefits if he has pneumoconiosis arising out coal mine employment and a pulmonary disability substantially caused by pneumoconiosis that would prevent him from performing his usual coal mine work or comparable work. There is an irrebuttable presumption of disability due to pneumoconiosis if the miner can establish that he was employed for ten (10) or more years in the nation's coal mines, that he is suffering from a chronic disease of the lung and that there is evidence that he has one or more large opacities in his lungs that are classified as category A, B, or C in the International Classification of Radiographs of the Pneumoconioses by the International Labor Organization. These large opacities are known as complicated coal workers pneumoconiosis ("complicated CWP").

11. Thus, in many cases, the difference between winning and losing a case may turn on the decision of an administrative law judge ("ALJ") as to whether the coal miner has or does not have complicated CWP.

THE CONDUCT OF JACKSON KELLY

12. In developing evidence in the black lung cases, Jackson Kelly attorneys have knowingly submitted evidence that misrepresents the facts, including, in some cases, the opinions of their experts, to the ALJs who hear black lung claims.

13. The pattern and practice of Jackson Kelly's conduct in these cases demonstrates that the conduct is neither accidental nor negligent and that Jackson Kelly attorneys have knowingly misrepresented evidence to the ALJs who decide these cases as well as to the claimants.

14. Jackson Kelly attorneys have also knowingly misrepresented the evidence to their own experts who then rely on those misrepresentations when they opine in reports and/or testimony presented by Jackson Kelly to the ALJ that the claimant does not have CWP or complicated CWP.

15. Although it misled some of its experts, on information and belief, other experts supported and participated in Jackson Kelly's presentation of evidence that misrepresented the facts.

16. Jackson Kelly has been able to engage in this conduct because, in most cases, its attorneys are not required to disclose all of the evidence they have developed in the defense of the case. As a result, neither the claimant nor the public ever learn about Jackson Kelly's conduct.

17. As discussed below, this conduct breaches Jackson Kelly's legal and ethical duties to both the claimant and to the ALJ.

18. Plaintiff is aware of this misconduct because, in cases, ALJs have required Jackson Kelly attorneys to turn over documents that disclosed the Jackson Kelly misconduct described in this Complaint.

19. Examples of Jackson Kelly's misconduct include, but are not limited to:

a. Submitting x-ray and/or CT scan reports that misrepresent the opinions of its own experts. For example, Jackson Kelly has relied upon the opinions of Dr. Harold Spitz, a radiologist who offers his opinion as to the presence or absence of CWP on x-rays and CT scans. In one black lung case (*Carroll v. Westmoreland Coal Company*, (Case No. 07-BLA-5142)), Jackson Kelly:

i. Sent Dr. Spitz an x-ray dated December 30, 1999, as part of a series of five (5) x-rays taken over a period of three years. Dr. Spitz read the x-ray dated December 30, 1999, and the series of x-rays as consistent with complicated CWP. This was a particularly persuasive conclusion because, as Jackson Kelly knows, reviewing a series of x-rays permits the reader to better evaluate the presence of disease.

Jackson Kelly, however, did not disclose this conclusion by Dr. Spitz.

- ii. Sent Dr. Spitz the same x-ray dated December 30, 1999, *nearly two and a half years later*. This time the x-ray was sent alone and Dr. Spitz read it without the series that had previously been available to him. This time, his reading of the x-ray was *simple CWP with coalescence* instead of *complicated CWP*. Jackson Kelly submitted this second reading of the x-ray to the ALJ and also to another expert who reviewed the medical evidence in order to render a medical opinion in the case, but Jackson Kelly withheld Dr. Spitz's prior opinion that this x-ray and the series of x-rays were consistent with *complicated CWP*.
- iii. Thus, anyone reviewing the Jackson Kelly submissions would conclude that Dr. Spitz did not believe the claimant had complicated CWP. *Only Jackson Kelly knew, and did not disclose, the fact that Dr. Spitz also had read the same x-ray and the series of five x-rays as consistent with complicated CWP.*
- iv. Sending Dr. Spitz the single x-ray film again after he already had read the film in conjunction with four other x-rays as being consistent with complicated CWP and then submitting his second reading because it was favorable to Jackson Kelly's client without disclosing his prior readings is a significant misrepresentation of Dr. Spitz's opinion.

- v. This is particularly true because, as Jackson Kelly attorneys know and understand, a review of a series of x-rays permits the reader to better evaluate the presence of disease.
 - vi. Moreover, Jackson Kelly also failed to disclose an earlier x-ray interpretation by Dr. Spitz which also confirmed complicated CWP.
- b. This conduct not only misleads the ALJ but also influences the opinions of some of Jackson Kelly's experts who review the medical evidence in order to provide what is supposed to be a well-informed, rather than a misinformed, medical opinion. Those expert medical opinions, which Jackson Kelly knows are based on a misrepresentation of the scope of the available evidence, are presented to the ALJ as evidence in the case. For example, in *Harris v. Westmoreland Coal Company* (Case No. 98-BLA-0188), Jackson Kelly submitted x-ray readings by Dr. Jerome Wiot, whom the ALJ described as the "preeminent radiologist in the country" in regard to interpreting x-rays for pneumoconiosis. Dr. Wiot had read x-rays in the case and said they revealed *simple CWP with coalescence* but testified that it was a "close call" between *coalescence* and *complicated CWP*. When asked by Jackson Kelly's attorney if there were any other studies that could determine whether the pulmonary changes "are or are not" complicated CWP, Dr. Wiot said, "Oh yes . . . a CT scan of the upper lung fields in this individual would either prove that these are or are not large opacities." However, Jackson Kelly did not disclose Dr. Wiot's subsequent interpretation of a CT scan. Nor did it disclose the fact

that, based on the CT scan – which is more reliable than the x-ray – Dr. Wiot opined that the CT scan was compatible with “complicated coal worker’s pneumoconiosis.” As in *Carroll*, the ALJ and the pulmonology experts hired by Jackson Kelly to review the medical record and to provide an informed medical opinion considered Dr. Wiot’s x-ray readings, which did not support a finding of complicated CWP, but did not know that Dr. Wiot had changed his opinion after reading the CT scan.

- c. Jackson Kelly’s attitude toward this kind of misrepresentation of the evidence to some of its own experts is evident in the attempt of one of its attorneys to explain its behavior to an ALJ during a hearing in the case of *Daugherty v. Westmoreland Coal Co.* (Case No. 2001-BLA-594). In that case, Jackson Kelly provided its expert Dr. David Rosenberg with Dr. Wiot’s opinion regarding a September 10, 2000 x-ray, but did not provide Dr. Rosenberg with Dr. Wiot’s more recent reading of a CT scan. Although Dr. Wiot’s later opinion found emphysema rather than CWP, he also stated that there were “fibroidic [*sic*] masses within the upper lung fields, *which are symmetrical and would be consistent with larger opacities as seen in Coal Worker’s Pneumoconiosis.*” (Emphasis added.) When asked by the ALJ why Jackson Kelly had sent one of Dr. Wiot’s opinions to its expert but did not disclose Dr. Wiot’s other opinion, the Jackson Kelly attorney replied he did not want to confuse either the record or his expert.

A. [Jackson Kelly attorney] So the decision was made, rather than complicate the record or confuse the record with Dr. Wiot's report - -

Q. [ALJ] So you made the decision that you didn't want to confuse Dr. Rosenberg, and that's why you didn't turn over that CT can to him.

A. [Jackson Kelly attorney] Sure.

Transcript of December 16, 2004 hearing in *Daugherty*, pp. 36-37. This cherry-picking of the evidence provided to the ALJ and to the expert inevitably misrepresents the evidence to the ALJ and taints the opinion of the Jackson Kelly experts.

- d. Jackson Kelly, to this day, claims the right to provide the ALJ and the claimant with incomplete medical reports that mislead the reader because the missing pages reveal conclusions that are favorable to the claimant. For example, in *Caldwell v. Hobet Mining Inc.*, Jackson Kelly submitted the "report of Dr. George L. Zaldivar dated March 2, 1994," but that "report" only included his History & Physical and test results. Jackson Kelly withheld Dr. Zaldivar's narrative report concluding that Mr. Caldwell had *complicated* CWP. More recently, Jackson Kelly engaged in similar misconduct in the case of *Daugherty v. Westmoreland Coal Company* (Case No. 2001-BLA-594).
- e. Jackson Kelly has also engaged in a practice of skewing the evidence by, for example, presenting reports that it knows are not an accurate representation of the evidence that it has obtained from its experts. For example, as discussed in Mr. Fox's case below, Jackson Kelly's own experts reviewed

pathology slides and concluded that the slides contained evidence of complicated pneumoconiosis or that the mass had "at least a partial silicotic origin." Jackson Kelly, however, did not seek additional reports from other pathologists to see if the first two experts they had hired were wrong. Instead, realizing that the pathology slides demonstrated evidence of complicated CWP, it proceeded to defend the case by relying on the original hospital report and x-ray readings that its attorneys knew were not reliable but contained opinions more favorable to Jackson Kelly's client.

20. Jackson Kelly has been able to engage in this conduct because the disclosure of the medical evidence it develops is often not requested by claimants or required by ALJs, so the claimants and the ALJs usually do not realize that the evidence proffered in a case may misrepresent the facts as known to Jackson Kelly.

21. In some of those cases, where an ALJ does direct Jackson Kelly to disclose such evidence, Jackson Kelly, on behalf of its clients, has agreed to accept liability for the claim rather than to reveal the additional undisclosed evidence. In addition to plaintiff's decedent's claim, Jackson Kelly's client accepted liability without or prior to complying with an order to compel discovery in other cases including, *Caldwell v. Hobet Mining Inc.* (Case No. 94-BLA-1401), *DeShazo v. Consolidation Coal Co.* (Case No. 03-BLA-5626), *Harris v. Westmoreland Coal Co.* (Case No. 98-BLA-0188), and *Carroll v. Westmoreland Coal Co.* (Case No. 07-BLA-5142) (where the motion to compel discovery was pending).

22. In one case wherein the ALJ ordered Jackson Kelly to disclose such withheld evidence, *Eller v. Elk Run Coal Co.* (Case No. 03-BLA-5316), the plaintiff discovered that Jackson

Kelly had failed to disclose a CT scan report from Dr. Wiot that unequivocally found the CT scan incomplete and, "*Therefore, evaluation for the presence or absence of pneumoconiosis cannot be made.*" Instead, it submitted the expert reports of Dr. Paul Wheeler and Dr. William Scott, both of whom concluded that the CT scan showed no pneumoconiosis without clearly stating that the incomplete CT scan could not rule out CWP.

23. Jackson Kelly then presented the ALJ with the transcripts of the depositions of two expert pulmonologists, Dr. Zaldivar and Dr. Crisalli wherein Jackson Kelly attorneys elicited opinions based on interpretations of the December 13, 2001 CT scan by Drs. Wheeler and Scott, but not Dr. Wiot. For example, in the deposition of Dr. Zaldivar, one of the Jackson Kelly attorneys asked:

Q. [Jackson Kelly Attorney] In your discussion of the x-ray's appearance, to what are you referring . . . ?

A. [Dr. Zaldivar] I'm referring to my own x-ray interpretation, the written report from Dr. Crisalli, and the CT scan that you gave me this morning that had been interpreted by Dr. Scott. The CT scan was done in 2001. There is no mention of any nodules that could represent retention of dust.

Thus, Dr. Zaldivar relied on Dr. Scott's report and gave no indication that he realized from Dr. Scott's reference to "Limited images at lung windows" meant what Dr. Wiot plainly stated, "Therefore, evaluation for the presence or absence of pneumoconiosis cannot be made." Moreover, by providing the report to Dr. Zaldivar the morning of the deposition and by failing to explain that the images were inadequate to diagnose complicated CWP, Jackson Kelly encouraged Dr. Zaldivar to believe that the CT scan had some diagnostic value and supported a finding of no CWP when Jackson Kelly knew that it did not. Jackson Kelly conducted the deposition of Dr. Crisalli in a similar manner:

Q. [Jackson Kelly Attorney] And among the readings that we've discussed today, do you see a correlation or a pattern?

A. [Dr. Crisalli] I see a very strong correlation between the reading of Dr. Smith...Dr. Wiot...Dr. Zaldivar... and the CT scan interpretation by Dr. Wheeler...and that correlation is that there's no evidence of CWP.

Knowing that this CT scan could not be used to rule out pneumoconiosis, Jackson Kelly nonetheless stated in its closing argument to the ALJ:

- a. Both readings of a CT scan dated December 13, 2001, are negative for pneumoconiosis.
- b. Dr. Zaldivar...provided an in-depth and insightful discussion of the x-ray and CT scan evidence.
- c. Clearly, Dr. Zaldivar has obtained a complete picture of the miner's radiographic, CT scan, and clinical status.

24. The ALJ who issued a Decision and Order denying benefits to Mr. Eller understood that the CT evidence was not totally reliable, but he did not understand the full extent of Jackson Kelly's misuse of that evidence. Of greater importance, the ALJ relied upon Dr. Zaldivar's and Dr. Crisalli's assessment of the medical evidence. Their assessments of the evidence, as presented in their deposition testimony were, however, tainted by their misunderstanding of the CT scan evidence, a misunderstanding that Jackson Kelly encouraged by the manner in which it handled the CT evidence. On information and believe, Jackson Kelly was well aware of the fact that the additional CT scan evidence existed when it proffered the misleading readings of one CT scan and the tainted expert opinions to the ALJ.

25. Plaintiff is well aware of the fact that attorneys are normally not required to disclose consulting experts whose opinions are contrary to the experts they chose to rely upon in their case. However, the conduct of Jackson Kelly in its black lung representation involves knowing misrepresentation of the facts, not a choice between the subjective opinions of competing experts.

26. Plaintiff also recognizes that the negligent misrepresentation of evidence to a judicial or quasi-judicial official is not actionable by an opposing party. However, the conduct outlined above and discussed in further detail below goes beyond the acceptable scope of attorney behavior and includes the knowing and intentional manipulation of evidence and the fraudulent misrepresentation of facts and opinions to Jackson Kelly's own experts, to the claimants Jackson Kelly opposes, and to the ALJs who decide the black lung cases.

27. Jackson Kelly's misconduct in these cases goes well beyond an attorney's duty of zealous advocacy and rises to the level of intentional conduct which is unrelated to legitimate litigation tactics and which harmed the plaintiff and her decedent and other black lung claimants opposing it.

THE BLACK LUNG CLAIMS OF GARY FOX

28. Gary Fox filed his initial claim for black lung benefits with the Department of Labor ("DOL") in May 1999. At the time, he hoped that he would be awarded benefits and would be able to leave his employment as a coal miner.

29. Mr. Fox's decision to apply for black benefits was based on his concern that he was developing black lung or complicated CWP and he had competent evidence to support his claim including physicians who diagnosed him with complicated CWP by x-ray.

30. Mr. Fox was not able to retain an attorney to represent him and, as a result, appeared *pro se*. His difficulty in obtaining counsel was not unusual. On information and belief, there are not many attorneys willing to represent claimants for federal black lung benefits due to the complexity and length of the litigation, the high degree of risk and the difficulties associated with both the

applicable law and the high cost of competing with the money spent on experts by the coal companies who oppose the claims.

31. Based upon the evidence provided, DOL awarded him benefits in 2000. However, his employer, Elk Run Coal Company, contested the claim and it was forwarded to the Office of Administrative Law Judges (“OALJ”) for a hearing.

32. In opposing the award of benefits, Jackson Kelly relied, in part, on an interpretation of a lobectomy of Mr. Fox’s lung from September 1998 which noted “numerous anthracotic deposits . . . [and] anthracotic pigment-containing macrophages . . .” The “anthracotic” references suggested the possibility of some degree of black lung, but the pathologist who reviewed the tissue concluded that Mr. Fox had an “inflammatory pseudotumor” and did not comment on whether or not Mr. Fox had CWP.

33. Jackson Kelly knew and understood that this pathologist had focused on pseudotumor because he was concerned with the diagnosis of pseudotumor and/or cancer and not with looking for CWP.

34. In developing its cases, Jackson Kelly has a cadre of experts upon whom it regularly relies to review and interpret the evidence in each claim.

35. For the review of pathology slides, it turns to the pathologists whom it believes to have better credentials and to be more reliable in the area of black lung than other pathologists, such as the hospital pathologist who diagnosed a pseudotumor.

36. In Mr. Fox’s case, Jackson Kelly obtained two interpretations of the lobectomy pathology slides from two of the expert pathologists upon whom it normally relies to defend black

lung claims. However, neither of the pathologists made findings that supported a diagnosis of pseudotumor.

37. Although the Jackson Kelly pathologists did not find a pseudotumor, they both reported findings that were consistent with a diagnosis of complicated CWP.

38. Jackson Kelly could have sought additional opinions to see if any other pathology expert would rule out complicated CWP from the pathology slides. But, it chose not to make an effort to do so. Nor, on information and belief, did Jackson Kelly contact the pathologist who diagnosed a pseudotumor to determine whether he even considered CWP during his review of the pathology slides and/or whether he intended to rule in or out CWP.

39. Jackson Kelly knew and understood that the reports of its retained experts were accurate and that the report of the hospital pathologist was not accurate with regard to the presence or absence of CWP and/or complicated CWP in Mr. Fox's lungs.

40. Nonetheless, Jackson Kelly submitted the report of the hospital pathologist to the ALJ and withheld the reports of its own experts.

41. Knowing that its own expert pathology reports would support a conclusion that Mr. Fox suffered from complicated CWP, rather than from a pseudotumor, Jackson Kelly also withheld those reports from its own expert pulmonologists and radiologist.

42. In developing evidence in black lung claims, Jackson Kelly routinely submits selected evidence to pulmonologists who review medical records for it and asks those experts to opine on whether, from the records Jackson Kelly provides, the miner has black lung.

43. In Mr. Fox's case, Jackson Kelly presented the hospital pathology report diagnosing a pseudotumor to its own experts and withheld its expert pathology reports from them, thus leading

its pulmonology experts to believe that the best available pathology evidence did not support a finding of complicated CWP.

44. When Jackson Kelly attorneys decided to limit the pathology evidence they presented to their own pulmonology experts to the original hospital pathology report of pseudotumor, they knew and understood that they were misleading their pulmonology experts and/or encouraging those pulmonology experts to join with them in misrepresenting the evidence to the ALJ.

45. On information and belief, Jackson Kelly limited the pathology evidence it presented to its own pulmonology experts with the intent and for the purpose of ensuring that none of the experts would consider a diagnosis of disabling and/or complicated CWP.

46. In depositions of its experts submitted to the ALJ, Jackson Kelly attorneys directly solicited testimony to the effect that the pathology evidence ruled out CWP. For example, a deposition of Jackson Kelly's reviewing pulmonologist, who had not been given the findings of Jackson Kelly's two expert pathologists, included the following testimony:

Q. [Jackson Kelly attorney] Do you think that [the DOL examiner who diagnosed complicated CWP] would have been aided by having all of the biopsy medical evidence at his hand when he reviewed this case?

A. [Jackson Kelly expert] I think that he would have, and I would certainly hope so, because all of the evidence, as I've outlined, certainly indicates that this is not complicated disease. I believe the [DOL examiner] would have reviewed that data and come to the same conclusion that this is not complicated pneumoconiosis.

Thus, Jackson Kelly used this pulmonologist to discredit the DOL examiner for not reviewing "all" of the pathology evidence when Jackson Kelly knew that the pulmonologist, himself, had not reviewed the most probative pathology evidence, *i.e.*, the expert opinions of two reviewing pathologists, because Jackson Kelly withheld those reports.

47. The deposition testimony submitted to the ALJ also included the following evidence:

Q. [Jackson Kelly attorney] Does knowledge of the pathology results also call into doubt any classification of this as a complicated pneumoconiosis or massive lesions consistent with exposure to coal mine dust?

A. [Jackson Kelly expert] Yes. The large opacities would be a series of small nodules merged together which would be quite typical on an X-ray - - on a pathology slide, so it didn't have the whirled or the small nodular appearance of pneumoconiosis, otherwise they would have reported that. So it's neither on, in my opinion, on the X-ray due to the fact there were no background nodules, *nor on the pathology slides, the fact that they didn't have the coalescent nodules*, in no way is this pneumoconiosis.

Emphasis added. Again, Jackson Kelly encouraged its own expert to rely on a pathology report that Jackson Kelly knew was not reliable for the diagnosis of CWP.

48. Jackson Kelly also knew and understood that one or more of its pulmonology experts incorrectly believed that Jackson Kelly had provided him with all of the medical evidence that Jackson Kelly had been able to gather and/or develop concerning Mr. Fox.

49. Nonetheless, Jackson Kelly failed to tell those pulmonologists that Jackson Kelly attorneys had provided them with a skewed record that did not include evidence that was both reliable and favorable to Mr. Fox and that would have supported a finding of complicated CWP.

50. Alternatively, on information and belief, one or more of Jackson Kelly's experts realized that they could not and should not rely on the hospital pathology report because that pathologist failed to directly address the presence or absence of CWP and, nonetheless, joined with Jackson Kelly in its scheme by preparing a report for the ALJ that relied on that hospital pathologist.

51. In ruling against Mr. Fox, the ALJ discussed and relied upon the importance of the pathology evidence that failed to diagnose black lung, stating that "the pathology reports convinced

Drs. Castle, Dahhan, Fino, Hippensteel, and Wheeler that the existence of the pseudotumor effectively ruled out the existence of pneumoconiosis.”

52. Although Jackson Kelly attorneys encouraged their experts and the ALJ to rely on the hospital pathology report, those Jackson Kelly attorneys knew, at all times relevant herein, that the pathology report was not accurate for CWP purposes, that the lung tissue upon which that report was based demonstrated that Mr. Fox had complicated CWP and that, as a result, Mr. Fox was suffering from a progressive pulmonary disease that was caused by his coal mining employment and that qualified him for black lung benefits.

53. By knowingly misrepresenting the pathology results to its own experts and to the ALJ, Jackson Kelly not only violated its ethical duties, including, but not limited to, the duty of candor to the ALJ and to the administrative law system in which he worked, but also fraudulently misrepresented the evidence in violation of its duty to Mr. Fox.

54. Had Jackson Kelly acted consistent with its ethical and legal duties, Mr. Fox would have prevailed in his case and left the coal mines.

55. Having lost his case, Mr. Fox continued his coal mining employment and, over the years, his respiratory problems worsened until July 2006 when his breathing problems made it impossible for him to continue working.

56. By knowingly misrepresenting the pathology results to its own experts and to the ALJ, Jackson Kelly proximately caused Mr. Fox to continue working in the coal mines when he should have been able to receive black lung benefits and leave the coal mines.

57. In November 2006, Mr. Fox filed a new claim for federal black lung benefits. This time, he was represented by counsel.

58. During Mr. Fox's second case, Jackson Kelly was required to disclose additional evidence. Jackson Kelly resisted disclosure and, initially, did not even disclose that it had the hospital pathology slides in its possession. In fact, Jackson Kelly failed to even answer the requests of Mr. Fox's counsel for information about where the pathology slides might be.

59. Instead of complying with discovery orders from the ALJ and instead of providing the pathology slides, Jackson Kelly, on behalf of Elk Run Coal Company, withdrew its request for a hearing and conceded the case to Mr. Fox.

60. Although he had prevailed in the case, Mr. Fox asked the ALJ to compel Jackson Kelly to produce the requested discovery which was relevant, among other things, to the possible request to reopen the earlier claim based on a finding of *fraud on the court*.

61. The ALJ did compel discovery and Jackson Kelly eventually produced the reports from the two pathologists that Jackson Kelly frequently relies upon in its defense of black lung cases.

62. As explained above, those two reports demonstrated that the pathology evidence known to Jackson Kelly did not support the diagnosis of a pseudotumor and did, in fact, support a finding or diagnosis of complicated CWP.

63. Given the experience of Jackson Kelly attorneys with the black lung medicine and their knowledge of and respect for their experts, including the two pathologists who reviewed the pathology slides of Mr. Fox's lungs, it is clear that Jackson Kelly knew that the pathology evidence supported a conclusion of complicated CWP.

64. Nonetheless, Jackson Kelly encouraged its own pulmonologists and the ALJ to believe a fact that it knew to be untrue, *i.e.*, that the pathology evidence contradicted Mr. Fox's claim.

65. Moreover, this pattern of cherry-picking evidence and then providing a skewed selection of that evidence to its experts who then opine that all the evidence supports only one conclusion, *i.e.*, no black lung, is consistent with Jackson Kelly's conduct in other cases as discussed in greater detail in this Complaint.

66. This and other evidence point to the conclusion that the conduct of Jackson Kelly in Mr. Fox's case was knowing and fraudulent:

- a. When initially ordered to produce the medical reports, including the pathology reports and the pathology slides, Jackson Kelly withdrew its request for a hearing rather than comply with the order and produce the reports and the pathology slides that demonstrated its misrepresentations in the initial case. Its conduct in opposing production of the slides and reports supports an inference that it was willing to concede the case rather than to disclose its misconduct.
- b. This pattern of conceding the case to the claimant rather than complying with a discovery order and disclosing that the medical evidence in its possession may have supported the miner's claim is consistent with Jackson Kelly's conduct in other cases and supports an inference that Jackson Kelly knows and understands that it practices fraudulently misrepresent the evidence to the ALJ.
- c. Cases in which Jackson Kelly has conceded the case in an attempt to avoid an order to disclose its evidence include: *Caldwell v. Hobet Mining Inc.* (Case No. 94-BLA-1401), *Daugherty v. Westmoreland Coal Company* (Case No.

2001-BLA-594), *DeShazo v. Consolidation Coal Co.* (Case No. 03-BLA-5626), *Harris v. Westmoreland Coal Co.* (Case No. 98-BLA-0188), and *Carroll v. Westmoreland Coal Co.* (Case No. 07-BLA-5142).

- d. In Mr. Fox's case, the consequences of Jackson Kelly's misconduct led to Mr. Fox's continued employment as his progressive lung disease worsened, rather than to his rightful receipt of benefits and retirement from the mines.
- e. The pattern and practice of manipulating the evidence, creating misleading evidence, and misrepresenting the facts to the ALJ, as discussed with regard to this case and above in paragraphs 19 - 24, compel an inference that Jackson Kelly knowingly and intentionally distorts and misrepresents evidence in black lung cases. This other case evidence can and should be taken into account when considering Jackson Kelly's intent in the present case.

67. In 2008, Mr. Fox was advised that he would need a lung transplant, but he died on April 14, 2009, before he could obtain the needed transplant.

CAUSE OF ACTION
(Fraudulent Misrepresentation)

68. The conduct of Jackson Kelly as alleged in this Complaint constitutes fraudulent misrepresentation.

69. The conduct was knowing, intentional, substantial, outrageous and reprehensible, and outside the bounds of permissible conduct.

70. Further, the misconduct was undertaken with the intension of depriving the plaintiff's decedent of benefits rightly due to him.

71. As a direct and proximate result of the conduct of Jackson Kelly, the plaintiff's decedent lost his initial black lung claim.

72. Plaintiff can prove all elements of her claim by clear and convincing evidence.

73. As a direct and proximate result of the conduct of Jackson Kelly, the plaintiff is entitled to damages, on behalf of the Estate, for any economic loss that is not covered by Mr. Fox's federal and/or state black lung claims and to punitive damages in an amount to be determined by a jury.

74. Plaintiff is further entitled to recover damages for the emotional distress suffered by her husband Gary Fox prior to his death that was proximately caused by Jackson Kelly's misconduct as well as her own damages for loss of consortium.

75. Plaintiff is also entitled to attorney fees and costs as defendant acted in bad faith, vexatiously, wantonly, or for oppressive reasons.

PRAYER FOR RELIEF

WHEREFORE, plaintiff move this Court for relief as follows:

1. Damages as prayed for in this Complaint;
2. Declaratory relief declaring that the conduct of Jackson Kelly is unlawful;
3. Injunctive relief prohibiting Jackson Kelly from engaging in similar conduct in the future; and
4. Such other and further relief as this Court may find just and equitable.

DEMAND FOR TRIAL BY JURY

Plaintiff demands a jury trial on all issues triable to a jury.

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BY COUNSEL.

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