IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
BLUEFIELD DIVISION

JAMES E. GRAHAM II; DENNIS ADKINS; ROGER WRISTON; and DAVID B. POLK; on behalf of themselves and others similarly situated; and UNITED MINE WORKERS OF AMERICA INTERNATIONAL UNION,

Plaintiffs,

v. **CIVIL ACTION NO. 1:19-cv-00597**

JUSTICE ENERGY CO. INC.; KEYSTONE SERVICE INDUSTRIES, INC.; BLUESTONE COAL CORPORATION; DOUBLE-BONUS COAL CO.; and SOUTHERN COAL CORPORATION,

Defendants.

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Defendants, Justice Energy Co., Inc., Keystone Service Industries, Inc., Bluestone Coal Corporation, Double-Bonus Coal Co., and Southern Coal Corporation (collectively "Defendants"), pursuant to Rule 65 of the Federal Rules of Civil Procedure and Rule 7.1 (a)(7) of the Local Rules of Civil Procedure, file Defendants' Response in Opposition to Plaintiffs' Motion for Preliminary Injunction.[1] The only alleged "evidence" to support Plaintiffs' request for an extraordinary remedy of a Preliminary Injunction is the original Complaint and two declarations signed on August 5 and September 20 of 2019, one of which was signed by a person not a party to the litigation and neither of which included any supporting documentation. (*See,* Page 3 of Plaintiffs' Motion for

[1] Defendants incorporate by reference their Motion to Dismiss the Complaint, together with the Memorandum in Support of the Motion to Dismiss, as well as Defendants' Reply Brief. Documents 4, 5 and 11.

Preliminary Injunction, Document 12, incorporating the Complaint; *See also,* Documents 12-4 and 12-5, Page ID #'s: 179 and 181).

I. Summary of Defendants' Response to Plaintiffs' Motion for an Injunction.

In their Motion for Preliminary Injunction, Plaintiffs claim to be moving the Court to order a preliminary injunction to require Defendants to do what the National Bituminous Coal Wage Agreement ("NBCWA") requires them to do, provide Health Coverage. Of course, this requirement is subject to Collective Bargaining Agreement/ERISA oversight and subject to Health Plan Guidelines. However, that is not what Plaintiffs seek. Rather, Plaintiffs want the Court to nullify the Collective Bargaining Agreement/ERISA oversight and Health Plan Guidelines. Moreover, Plaintiffs seek to elevate their individual Health Plan claims directly to a Federal District Court, without ever even attempting resolution at the mandatory lower levels. This effectively makes the court an administrator of the Health Plan.

In support of their Motion, Plaintiffs allege that Defendants have failed or refused "to provide contractually-mandated health care coverage and prescription drug benefits to plaintiff retirees and their dependents….under the National Bituminous Coal Wage Agreement of 2016" (Document 12, Page 2, Page ID # 163). As with the Complaint, Plaintiffs again place the cart before the horse. Plaintiffs offer no evidence that the Plan has not paid their medical bills in accordance with the terms of the Health Plan. Moreover, Plaintiffs have never attempted to rely on the internal administrative protections related to the Plans.

Notwithstanding that Plaintiffs still have never even invoked, let alone exhausted the mandatory ROD arbitration/claims review remedies of either Section 301 of the Labor and Management Relations Act of 1947 (29 U.S.C. §185) or Sections 502 and 503 of the Employee Retirement Security Act ("ERISA"), 29 U.S.C. §§ 1132 and 1133, and further notwithstanding

that Plaintiffs have never sought to amend their Complaint to allege that they have followed the mandatory pre-suit administrative procedures, Plaintiffs still want the Judge to enjoin the Defendants.

In other words, the "status quo" which Defendants seek to preserve is that described in the deficient Complaint which is characterized by an absolute failure to exhaust the CBA ROD arbitration and ERISA claims review process. As with their underlying Complaint, Plaintiffs again appear to assert that the LMRA and ERISA exhaustion requirements do not apply to them and seek to persuade the Judge that he should skip all of the normal steps for them arguing that "Defendants' ongoing failure to provide medical and prescription drug coverage is a breach of their obligations under Article XX of the [NBCWA]…and it threatens Plaintiffs and other similarly-situated beneficiaries with irreparable harm." (Plaintiffs' Motion for Preliminary Injunction, Document 12, Page 2 of 5, Page ID #: 163).

II. The Court Should Deny Plaintiffs' Motion for a Preliminary Injunction.

Defendants reply to Plaintiffs' Motion for a Preliminary Injunction as follows:

A) The Standard.

In the earlier case of *International Union, United Mine Workers of America, et al., Plaintiffs, v. CONSOL Energy, Inc., et al*., 243 F. Supp. 3d 755 (S.D. 2017), this Court granted an injunction to a proposed unilateral change to insurance coverage that the parties had not bargained for. In the process, this Court outlined the standard for issuing a preliminary injunction in the context of a labor dispute, noting that a plaintiff must demonstrate:

> "[1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Id.* at 763, *citing*, *Real Truth About Obama, Inc. v. Fed. Election Comm'n,* 575 F.3d 342, 346 (4th Cir. 2009).

In *CONSOL*, This Court noted that "[a] preliminary injunction is an extraordinary remedy, to be granted only if the moving party clearly establishes entitlement to the relief sought." *Id., citing Manning v. Hunt*, 119 F.3d 254, 263 (4th Cir. 1997). This court cautioned that "satisfying these factors will not automatically guarantee an injunction. In particular, "[i]n exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Id.* at n. 1, *citing Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008).

In the context of the facts of the *CONSOL* case, the Court held that "[t]ermination of Plaintiffs' group health insurance benefits is likely to cause harm that cannot be remedied by the arbitrator, threatening to make arbitration but a "hollow formality." *Id.* at 764, *citing, Nursing H. & Hosp. Union v. Sky Vue Terrace,* 759 F.2d 1094, 1098 (3d Cir. 1985).

The situation is not the same here and Plaintiffs fail to meet the standard for a preliminary injunction. In this case, a Health Plan exists. There have been no proposed changes to the Plan. The Defendants acknowledge that they must provide coverage to eligible employees in accordance with the bargained-for benefits. Defendants acknowledge their obligation, through the Health Plan, to pay eligible bills of eligible participants, subject to the normal ERISA claims process. Accordingly, there is no "irreparable harm." If an injunction issues here, an injunction must issue every time there is any issue with any Health Plan claim of any sort, even before the employee or his/her representative even attempts to follow the ERISA/Collective Bargaining Agreement oversight guidelines.

B) A Preliminary Injunction should not be issued here.

Apparently, the UMWA has repackaged its 2017 injunction motion from *CONSOL* and is now using it as a template for this Motion. The question here is whether the UMWA is justified in doing so or whether the Court should grant a Preliminary Injunction in this case. There are several facts in the *CONSOL* case which make it fundamentally distinguishable from this case:

1) In *CONSOL*, the UMWA had, and presented, documentary evidence in the form of a letter from CONSOL to the UMWA that: "CONSOL Energy…intended to terminate and replace its Employer Plan." *Id* at 759. This was a unilateral and unbargained-for change.
2) In *CONSOL*, there were ongoing negotiations between CONSOL Energy and UMWA and the parties had "failed to resolve disagreements over which changes, if any, would be acceptable to the union and its retirees." *Id*.
3) In *CONSOL*, the Defendant had officially informed the UMWA "pursuant to Section 8(d) of the NLRA that all of its subsidiaries signatory to the NBCWA have permanently terminated their mining operations and that the subsidiaries would terminate the 2011 NBCWA effective as of its expiration date." *Id*.
4) In *CONSOL*, the "UMWA filed a ROD [Resolution of Dispute] with the Trustees noting the parties' dispute as to whether CONSOL may implement any unilateral changes or modifications of the benefits provided by its plan…without the agreement of the UMWA." *Id*.
5) In *CONSOL*, the Defendants threatened to terminate the HRA [Health Reimbursement Account] Scheme at any time, for any reason." *Id* at 765.

6) In *CONSOL*, the Defendant had repudiated the arbitration process entirely. Because of this, the Court held that "irreparable harm that exists when arbitration is denied ab initio…*Id.* at 766, *citing, Taylor v. Nelson*, 788 F.2d 220, 224 (4th Cir. 1986).

7) In *CONSOL*, the Court concluded that "[a] decision on the merits from any forum other than the ROD process would undermine the bargained-for benefit of that process." *Id*.

None of the conditions warranting a preliminary injunction in *CONSOL* are present here. For example:

1) Here, Plaintiffs have no letter that the Defendants unilaterally plan to cancel the Health Plan or that Defendants do not intend to provide coverage to eligible employees. To the contrary, Defendants here have a Health Plan.

2) As with the earlier Complaint and Response to the Defendants' Motion to Dismiss, Plaintiffs' assertion is still based on anecdotal statements of two retirees. One of the retirees is not even a named party (*See* "Declaration of Raymond Dye;" Document 12-5). The other is a named party (*See* "Declaration of Roger Wriston" Document 12-4). However, Mr. Wriston's declaration has no documents attached and no dates of service are specified. Moreover, the putative bill for $12,367.76 described in paragraph 6 of the statement has not been provided. The explanation of benefits and subsequent medical bills described in paragraph 7 have not been provided. Plaintiffs submit no documents or any evidence that these amounts have been submitted to the third-party administrator to determine if the expenses are covered, exceed the deductible and otherwise qualify for coverage.

3) Here, there is no disagreement between the parties as to whether eligible retirees are entitled to Health Plan coverage pursuant to the terms of the NBCWA.

4) Here, neither party has invoked Section 8(d) of the NLRA.

5) Here, the UMWA never filed a ROD [Resolution of Dispute] request with the Trustees.

6) Here, Defendants never threatened to terminate coverage.

7) Here, Defendants have not repudiated the arbitration process. If anything, the UMWA appears to be attempting to repudiate the ROD process.

8) Here, Plaintiffs never attempted any sort of ERISA appeal, a prerequisite for seeking judicial relief.

In applying the tests for a preliminary injunction, the factors favor the Defendants. First, because the Complaint fails to allege exhaustion of administrative (arbitration and claims review) remedies, Plaintiffs cannot succeed in a civil action unless and until they have exhausted their administrative remedies and allege this in a Complaint. The very process of exhaustion will almost certainly obviate the need for court intervention. Accordingly, Plaintiffs are unlikely to succeed on the merits.

This case is much more analogous to this Court's decision in *Henderson v. Bluefield Hospital Company, LLC*, 208 F.Supp. 3d 763 (2016). In that case, the Acting Regional Director of the National Labor Relations Board (NLRB) petitioned for injunctive relief against two related acute-care hospitals, to require collective bargaining in good faith with nurse's union under the National Labor Relations Act (NLRA), as amended by the Labor Management Relations Act (LMRA). The NLRB claimed that it simply wanted to maintain the "status quo." *Id.* at 766.

In responding to two Motions for Preliminary Injunction, this Court first noted that "§ 10(j) relief is extraordinary and that such relief should be narrowly tailored." This Court then turned to the elements necessary for a Preliminary Injunction and noted that the NLRB "has not satisfied the requisite 'irreparable injury' prong of the preliminary-injunction inquiry" *Id.* In *Henderson*,

this Court started and finished the decision with the "irreparable injury" element. This Court found no "irreparable injury" in the case because The Acting Regional Director could not demonstrate to "th[is] court that the case presents one of those rare situations in which the delay inherent in completing the adjudicatory process will frustrate the Board's ability to remedy the alleged unfair labor practices." *Id*. at 770.

Importantly, this Court held that "[i]rreparable harm exists only when the remedy will become unavailable unless a preliminary injunction is granted and the district court's judgment, even if it is favorable, will remain unsatisfied. By contrast, when the remedy can be satisfied at the conclusion of the Board proceedings, an injury is not deemed to be 'irreparable.'" *Id*. at 772. Here, Plaintiffs have never attempted the ERISA/CBA administrative remedies. Moreover, Defendants have not repudiated or changed the Health Plan.[2] Without exhausting these administrative remedies, the Plaintiffs simply cannot allege or demonstrate that their remedy will become unavailable unless a preliminary injunction is granted.

In *Henderson*, the Court noted that "the NLRB has not demonstrated in either case that availing itself of this court's interim-injunctive-relief authority will be any more effective than utilizing its own expansive remedial powers." *Id.* at 773. Here, the Plaintiffs have access to the ERISA appeals process and to binding ROD arbitration, if only they assert this. These remedies are likely to be effective in meeting the Plaintiffs' concerns and ensuring that all covered medical expenses are met. Of course, we will not know until they are attempted.

While Plaintiffs, in their Motion for a Preliminary Injunction, attempt to make it seem as though their grievance just surfaced in December of 2019, Plaintiffs previously alleged that this

[2] Just as this case is distinguishable from *CONSOL* on this point, it is also distinguishable from *Pashby v. Delia*, 709 F.3d 307, 329 (4th Cir. 2013), which Plaintiffs' cite, where the Fourth Circuit found irreparable harm from a reduction in certain health benefits. There was no modification of the Health Plan here.

problem has been ongoing since 2017. (*Compare,* Document 12, paragraph 4, Page 3, Page ID # 164 with Complaint, paragraph 19, incorporated into the Motion for a Preliminary Injunction on Page 3, Document 12). If this issue dates to 2017, and the Defendants took no action in the interim to fulfill their administrative obligations, why is a Preliminary Injunction needed for the first time in 2020? In *Henderson*, the Court noted that "for reasons of its own, the NLRB delayed initiating the proceedings. The allegations contained in the NLRB's Complaint arise from sessions that occurred from late February 2015 through November 2015." *Id.* at 770. By analogy, Plaintiffs elected to delay pursuing their administrative remedies and now want the Court to overlook this. The Court should reject this invitation.

There is no irreparable harm here because Defendants have not repudiated arbitration and are willing to abide by the arbitration provisions of the CBA. Moreover, Defendants do not repudiate their Health Plan obligations for eligible employees and retirees. If the Court finds "irreparable harm" every time a Complaint is filed under Section 301 of the LMRA or ERISA, then the Court should simply announce that henceforth, an injunction will be an automatic right for every employee Plaintiff. The real irreparable harm here is the Plaintiffs' end run around arbitration and ERISA.

Because Plaintiffs have not even attempted arbitration or ERISA claims' review, the balance of equities tips in favor of Defendants. These arbitration and ERISA claims review procedures will almost certainly obviate the need for Court intervention. Following the Plaintiffs' logic that the balance favors the party with less resources, the balance of the equities would always weigh in favor of Plaintiffs in this type of action because individual employees always have less resources than employers. Of course, if this were the rule, then every employee disagreeing with

an ERISA claim decision would be able to go to the District Court and get an automatic injunction even if they elect not to file an ERISA appeal.

Finally, while it is tempting to broadly assert that the public interest favors employees and retirees, the public interest also favors the exhaustion of administrative remedies and the careful and justified use of preliminary injunctions based on real evidence, reserving such extraordinary remedies for cases where they are really needed, where irreparable harm is likely to occur and where the Plaintiffs themselves have followed the rules.

The facts of this case are in no way like the *CONSOL* case. Defendants inappropriately attempt to copy the template of that case where it does not apply. Defendants here are not attempting to repudiate any eligible Health Plan coverage. The Coverage is set forth in the Plan Documents.

III. CONCLUSION

Plaintiffs have failed to present or even allege facts necessary to overcome Defendants Motion to Dismiss based on exhaustion of arbitration/ERISA administrative remedies. Plaintiffs have also not availed themselves to the mandatory ERISA Health Plan Claims Review Process and the mandatory and binding grievance and arbitration procedures of the NBCWA. Accordingly, the Court should reject the Plaintiffs invitation to skip the essential "exhaustion of administrative remedies" elements of Plaintiffs' ERISA and Section 301 claims in a case where the Plaintiffs' Complaint itself is deficient. Moreover, the facts here do not meet the fundamental elements for a preliminary injunction.

If the Court does not deny an injunction here, Plaintiffs will be encouraged to skip the well-recognized "exhaustion" steps and turn to this Court as a matter of routine without going through

the exhaustion steps. For these reasons, Defendants request that this Court deny Plaintiffs' request for a preliminary Injunction.

JUSTICE ENERGY CO. INC.; KEYSTONE SERVICE INDUSTRIES, INC.; BLUESTONE COAL CORPORATION; DOUBLE-BONUS COAL CO.; and SOUTHERN COAL CORPORATION,

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Defendants.

CERTIFICATE OF SERVICE

I, James P. McHugh, hereby certify that on the 3rd day of January 2020, the foregoing "***Defendants' Response in Opposition to Plaintiffs' Motion for Preliminary Injunction***" was electronically filed with the Clerk of the Court through the CM/ECF System which will send electronic notification of such filing to counsel listed below:

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