No. 32960 – *William L. Sedgmer, Jr., personally and as next friend of his natural children, Jacob A. Sedgmer, Lucas D. Sedgmer and William L. Sedgmer, III, individually v. McElroy Coal Company, Consolidation Coal Company, Consol, Inc., and Eugene L. Saunders, individually and as agent of the aforementioned corporations*

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Starcher, J., dissenting:

I dissent because the majority opinion answered a question that was clearly a question of fact designated for trial by a jury. In so doing, the majority opinion has done nothing but make workplaces even more dangerous, and shields employers from responsibility for the employees who are crushed and killed by an employer's gross carelessness.

The undisputed facts in this case are simple. On July 28, 1994 – deep inside a mine owned by the appellee, McElroy Coal Company – appellant William Sedgmer was sitting in one of three lightweight railroad passenger cars (called a "man bus") on the 3 North passway. Mr. Sedgmer was calmly twiddling his thumbs and waiting for a locomotive pulling fully-loaded freight cars to pass by on the main line tracks.

As these freight cars packed with tons of coal crawled upward out of the mine, debris hanging from one of the freight cars snagged an "overhead toggle switch," diverting the freight cars off of the main line and onto the 3 North passway.

Now – and this is a fact the majority opinion overlooks – this was not the first time the coal company had problems with these overhead toggle switches. For example, in

1989, a plank sticking up out of a fully-loaded freight car struck an overhead toggle switch. The tracks moved, and the freight cars jumped the tracks, plowed into a portal, knocked out power to a section of the mine and shut down production. In response to the 1989 wreck, the appellees replaced that one particular overhead toggle switch with a "paw" or "palm" type switch. But none of the other overhead toggle switches – including the one involved in this case – were replaced until after the appellee was mangled in the collision on the 3 North passway.

In this case, after the known-to-be-hazardous overhead toggle switch had been snagged, seventeen rail cars broke loose from the locomotive and careened backward down the tracks into the mine. Instead of rolling backward down the "main" line, the runaway train roared down the 3 North passway. The runaway train plowed into the three sitting passenger cars before Mr. Sedgmer could jump clear, and he suffered severe injuries.

I dissent, in part, because the majority opinion ignores the obvious hazardous nature of the overhead toggle switches that were used throughout the mine. The appellees knew these switches were an accident waiting to happen, but did nothing to replace or protect them from accidental activation.

But I also dissent because of the majority opinion's mangled interpretation of a state regulation and company rules with which the company plainly did not comply, and which form the kernel of the question that the majority opinion should have left to a jury: did the company's failure to comply with the regulation and rules constitute an unsafe working condition *known* to the appellees?

The bunch of rules at issue in this case essentially said the same thing: inside of a mine, it is dangerous for coal miners to sit inside light-weight rail passenger cars when heavy-weight rail freight cars laden with tons of coal are using the same railroad tracks. These rules all gave the same guidance: miners are to get out of the light-weight cars, get away from the tracks, and wait in an area of safety like a crosscut or shelter hole. These rules were issued by the West Virginia Board of Coal Mine Health & Safety, McElroy Coal Company, and McElroy's owner, Consolidation Coal Company.

The appellant's whole argument is that sitting in an unmoving passenger car inside of a mine is an "unsafe working condition." State regulations and the company's internal rules all say just that, and order that miners get out of sitting passenger cars and move to safety in a shelter or crosscut.

If Mr. Sedgmer's employer had followed state regulations and the company's internal rules, then Mr. Sedgmer and the other employees would not have been sitting in the passenger cars at the time of the collision with the runaway train. It appears from the record that, if the employer done what it was supposed to do, then Mr. Sedgmer would not have been injured. It was therefore plainly a question of fact for the jury to decide whether or not the appellees exposed Mr. Sedgmer to an unsafe working condition with deliberate intent, when it left him sitting in a passenger-carrying rail car while fully-loaded freight cars were passing on the tracks nearby.

Nevertheless, the majority opinion places itself in the position of the jury and declares its factual conclusion that "there is no evidence that Appellees exposed Appellant

to an unsafe working condition." The majority opinion therefore declares that Mr. Sedgmer's injuries were nothing more than an unavoidable "accident," and then blithely declares that "no employer will ever be able to prevent all accidents, no matter what its efforts." This is nonsense.

Somehow, the majority opinion thinks that this was a freak accident that could never have been predicted. This is so even though this Court's own opinions are replete with horrific instances of miners being crushed and mangled while they were sitting inside passenger-carrying rail cars. A classic example is *Cecil v. D and M Inc.*, 205 W.Va. 162, 517 S.E.2d 27 (1999) where the plaintiff (who, like the appellant, was working for a Consolidated Coal Company subsidiary) was seriously injured when he tried to jump clear of the passenger carrier in which he was sitting before it was struck by a runaway train. *See also, Harris v. Martinka Coal Co.*, 201 W.Va. 578, 499 S.E.2d 307 (1997) (plaintiff seriously injured when passenger carrier rammed by another vehicle lacking brakes); *Beard v. Beckley Coal Min. Co.*, 183 W.Va. 485, 396 S.E.2d 447 (1990) (plaintiff seriously injured when runaway passenger carrier derailed).[1]

[1]While I was drafting this dissenting opinion, I noticed that three people were injured in a passenger-carrying "mantrip" accident in, of all places, the Beckley Exhibition Coal Mine. Apparently, the electric-motor-driven passenger carrier was climbing an incline out of the mine when a breaker failed, causing the carrier to roll backward until it struck a door. It therefore seems – contrary to the majority's opinion – that even a non-functioning exhibition mine is a dangerous place. *See* "Three Hurt at Exhibition Mine," *Charleston Gazette*, December 2, 2006.

Government exists, in part, to encourage employers to make workplaces safer and more efficient. All branches of government – executive, legislative and judicial – should vigorously work together to make it absolutely clear that workplace injuries and fatalities are unacceptable, intolerable and 100% preventable. The state regulation and rules at issue in this case were plainly designed to further the goal of the total elimination of workplace injuries.

The appellees and the majority's opinion, however, shrug off this goal, and cast the plaintiff's injury as some sort of unforeseeable, "Rube Goldbergian" freak accident.

I refuse to be so blind. I therefore respectfully dissent.