

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE**

CIVIL ACTION NO. 3:11-CV-401-S

MICHAEL B. MEANY

PLAINTIFF

V.

AMERICAN CASUALTY COMPANY
OF READING, PENNSYLVANIA
as subrogee of the Fishel Company

INTERVENOR PLAINTIFF

V.

ALTEC INDUSTRIES, INC.

DEFENDANT

REPORT AND RECOMMENDATION

The plaintiff, Michael Meany, asks the district court to impose sanctions on Altec Industries, Inc., for its destruction of certain electronically stored information and for its dismantling and sale of the digger derrick Mr. Meany was operating when he was injured. After reviewing the parties' pleadings and evidence presented on the issue, including testimony presented during an evidentiary hearing, the magistrate judge recommends that the district court impose sanctions on Altec for its destruction of the electronically stored information, but not for its dismantling and sale of the digger derrick.

I.

This is a product liability action in which Mr. Meany asserts that Altec Industries, Inc.'s manufacture and design of a particular digger derrick were faulty. He asserts claims of negligence, negligence *per se*, and strict liability,¹ and asks this court to sanction Altec for

¹ See, Am. Compl. (docket no. 60).

spoliating two different forms of potential evidence: the digger derrick itself and emails Altec's employees sent and received during the months immediately following the accident.²

Mr. Meany was severely electrocuted by a dangling power line while he was operating a tamper attached to digger derrick manufactured and sold by Altec, and rented from one of Altec's wholly owned subsidiaries, Gulf Rental.³ It is undisputed that the accident occurred because the tip of the derrick's boom came into contact with a live power line, which created an electrical short condition that caused extremely high levels of electricity to travel through various parts of the derrick as the current ran to ground. It is also undisputed that the current traveled through a metal braided hose that connected the tamper Mr. Meany was operating to the derrick and that the current (approximately 7,200 volts) then traveled through the tamper and into Mr. Meany.⁴

Following the accident, Mr. Meany was hospitalized for approximately six weeks. The first two weeks he spent in a coma, and thereafter underwent several surgeries to treat his severely burned skin.⁵ After being discharged from the hospital, Mr. Meany spent a few weeks at a rehabilitation facility before he was able to return home.⁶

In the first two months following the accident, the following happened, most of which took place while Mr. Meany was still in the hospital or rehabilitation facility. Mr. Meany's employer, the Fishel Company immediately notified the Kentucky Public Service Commission, and Kentucky's occupational safety and health agency ("OSHA") of the accident. Fishel, the

² See Mot. For Sanctions (docket no. 56).

³ See <http://www.altec.com/about-altec/> ("Altec, Inc. is the holding company for Altec Industries, Global Rental, Altec NUECO, Altec Worldwide, Altec Capital, Altec Supply, and Altec Ventures, LLC.").

⁴ Compare Meany Dep. at 106-108 (docket no. 56-3) (in which he stated he spent eight weeks in the hospital); and Notes from OSHA's Post Accident Rep't (docket no. 64-2) (in which the CSHO reports interviewing Mr. Meany at home on September 22, 2010).

⁵ Meany Dep. at 106-108 (docket no. 56-2).

⁶ *Id.*

Public Service Commission and OSHA investigated immediately and prepared reports of their investigation.⁷ Fishel and the Public Service Commission concluded that the accident could have been avoided if the third stage of the derrick's boom had been extended, but neither made any specific findings about the design or labeling of the derrick.⁸ OSHA made no conclusions regarding the operation, design or labeling of the derrick, and cited Fishel only for failing to ensure its employees that wore appropriate protective gear.⁹

The Fishel Company also promptly notified Altec about the accident.¹⁰ Fishel's fleet manager emailed his contact at Altec, Chris Disponette, to let him know about the accident, to express surprise that there were conductive hoses connecting the tamper to the derrick, and to request that all such hoses be swapped out with non-conductive hoses.¹¹ "In anticipation of litigation,"¹² Mr. Disponette referred the matter to Joshua Chard, Altec's Director of Product and Corporate Safety, who informed Altec's General Counsel. Altec's General Counsel promptly, and specifically "in anticipation of litigation," directed Mr. Chard to inspect the derrick, investigate the accident, and prepare a report.¹³ In spite of his anticipation of litigation, however, Altec's General Counsel did not place a litigation hold on any documents, including its electronic communications, which Altec's customary policy specifies shall only retained for 180 days.¹⁴ Emails older than 180 days are automatically destroyed on a weekly basis.¹⁵

⁷ See Excerpt of Fishel Rep't (docket no. 64-1); Excerpts of OSHA Rep't (docket no. 64-2); Ky. PSC Rep't (docket no. 75-2)

⁸ See Excerpt of Fishel Rep't (docket no. 64-1). Ky. PSC Rep't (docket no. 75-2).

⁹ See docket no. 64-2.

¹⁰ See Disponette Dep. at 25-28, 53-60 (docket no. 56-9).

¹¹ See *Id.*; See also Wathen Dep. at 58-61 (docket no. 56-6); Email from C. Disponette to M. Wathen (Aug. 31, 2010) (docket no. 56-11).

¹² See Disponette Dep. at 59-60 (docket no. 56-9).

¹³ See Chard Aff. (docket no. 71-2).

¹⁴ See Altec's Email Policy (docket no. 71-2).

¹⁵ *Id.*

On September 2, 2010, not long after a still hospitalized Mr. Meany emerged from his coma, Mr. Chard inspected the derrick, took several pictures of it from various angles, and also prepared the requested report, in which he concluded that there were no defects in the design, manufacture or labeling of the derrick, and that Mr. Meany's injuries were caused by the failure of Fishel employees to extend the non-conductive third stage of the derrick's boom before they attempted to repair the power line, and also by Mr. Meany's failure to wear appropriate protective clothing.¹⁶

On September 9, 2010, Fishel hired a company to test the derrick, and the derrick's boom passed dielectric, visual and ultrasonic testing.¹⁷ Nevertheless, Fishel returned the derrick to Gulf Rental.¹⁸ While the derrick was at Gulf Rental it underwent additional dielectric testing, servicing, and repairs, including the repair and replacement several of the derrick's component parts.¹⁹ Once again, "in anticipation of litigation," Altec saved some of the parts that Mr. Chard determined might be relevant to any further analysis of the cause of Mr. Meany's injuries.²⁰ But notwithstanding the anticipated litigation, Altec sold the derrick to a company in Florida at the end of September 2010.²¹ In connection with that sale, Altec serviced the derrick again, and repaired and replaced more parts.²²

Mr. Meany filed this lawsuit in July 2011, almost one year after his accident. Altec was served on July 22, 2011, and for the first time placed a litigation hold on documents and correspondence related to Mr. Meany's accident and the derrick at issue. Because Altec's

¹⁶ See Chard Rep't (docket no. 56-4); Chard Aff. (docket no. 71-2).

¹⁷ See docket no. 75-1.

¹⁸ See Wathen Dep. at 19-20 (docket no. 56-6).

¹⁹ See docket no. 71-2.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

computer system automatically deletes all email correspondence older than 180 days, however, all email correspondence generated immediately following Mr. Meany’s accident and pertaining to subjects relevant to this lawsuit (*e.g.*, Fishel’s requests that conductive hoses on the derrick be exchanged with non-conductive hoses, the Public Service Commission and OSHA reports and investigations, and the return, transfer, repair and sale of the derrick) were deleted from Altec’s computer systems. Only email generated after January 12, 2011, remains available. Documents retained by Fishel employees who communicated with Altec about the derrick and the accident suggest that substantive correspondence may have been lost.

For ease of reference as the trial court evaluates the magistrate judge’s application of the law to the facts, all significant post-accident events are summarized in the following chart:

		DATE	EVENT
Pursuant to Altec’s destruction policy, all emails generated or received between August 10, 2011 and January 11, 2011 are destroyed. Mr. Meany is hospitalized and undergoes several skin graft surgeries.	Mr. Meany is in a coma until approximately August 24, 2014.	August 10, 2010	Mr. Meany is electrocuted.
		August 10, 2010	Fishel notifies the Kentucky Public Service Commission and OSHA of the accident.
		August 10-12, 2010	OSHA conducts an investigation and makes no conclusions about the cause of the accident, but cites Fishel for failing to ensure its employees wore appropriate protective gear.
		August 11, 2010	The Kentucky Public Service Commission conducts an investigation.
		August 17, 2010	Kentucky Public Service Commission issues its Electric Utility Personal Injury Incident Report, which concludes that the accident happened because the insulated section of the derrick’s boom was not being used, which permitted electricity to travel through the continuous metal parts of the boom.
		August 31, 2010	Chris Disponette of Altec responds to an email from Michael Wathen, Fleet Manager for Fishel, who asked whether Altec would replace the conductive hoses on the derrick with non-conductive hoses. Disponette, “in anticipation of litigation,” refers the matter to Joshua Chard
		September 2, 2010	Joshua Chard, Altec’s Director of Corporate Safety, inspects and photographs the digger derrick at the request of Altec’s General Counsel, who ordered the

	DATE	EVENT
		inspection “in anticipation of litigation.”
	September 9, 2010	Torco, a company hired by Fishel, tests the digger and determines that the boom passed dielectric, visual, and ultrasonic testing
	Late September 2010	Fishel returns the digger to Global Rental
	September 22, 2010	Mr. Meany, according to notes from an OSHA interview, has returned home.
	September 22, 2010	Altec repairs the derrick’s pole guide cylinder, but kept the cylinder tube and hose reel because they “may be needed for later.”
	September 23, 2010	Dielectric testing of the derrick performed. It passed.
	September 29, 2010	Altec sells the derrick to a company in Florida.
	October 18, 2010	Altec services the derrick and installs a new pole guide assembly, a new tool reel, and performed three dielectric tests.
	January 12, 2011	All electronic communications sent or received between the date of the accident and this date (approximately over five months’ worth) are gradually destroyed.
	July 22, 2011	Altec is served with this lawsuit and immediately places a litigation hold on all electronic communications from this day forward.

II.

In federal court, the issue of spoliation is controlled by federal law. *Adkins v. Wolever*, 554 F.3d 650, 652 (6th Cir.2009) (en banc). “Spoliation is defined as the intentional destruction of evidence that is presumed to be unfavorable to the party responsible for its destruction.” *United States v. Copeland*, 321 F.3d 582, 597 (6th Cir. 2003) (citation omitted). Although spoliation is only appropriate when a party has a duty to preserve the evidence in question, it is “beyond question” that a party to litigation has a duty to preserve evidence it knows is relevant to current litigation or should know may be relevant to future litigation. *John B. v. Goetz*, 531 F.3d 448, 459 (6th Cir. 2008). And, because “a proper spoliation sanction should serve both fairness and punitive functions,” *Adkins*, 554 F.3d at 652 (citation omitted), the court must conduct a

fact-intensive evaluation of the spoliating party's degree of fault, which generally falls "along a continuum ... ranging from innocence through the degrees of negligence to intentionality[.]" *Id.* at 652–653 (internal citation omitted). Accordingly, a party requesting a spoliation sanction generally must establish three things:

- (1) That the party having control over the evidence had an obligation to preserve it at the time it was destroyed;
- (2) That the records were destroyed "with a culpable state of mind;" and
- (3) That the destroyed evidence was "relevant" to the party's claim or defense (*i.e.*, a reasonable trier of fact could find that the evidence would support that claim or defense).

Beaven, 622 F.3d at 553. It is important to note that the culpability requirement does not require proof of specific bad intent – it is enough if the evidence was destroyed knowingly or negligently. *Id.* The degree of intent may be relevant to the evaluation of what type of sanction to impose, though. *See id.*

There exists no evidence that Altec acted with specific bad intent. However, there also exists no dispute that Altec had control of the relevant evidence and that, at a minimum, it knowingly permitted its electronic communications to be gradually destroyed and that it knowingly dismantled, repaired, and sold the derrick in the months after it determined that it anticipated litigation. Given that it immediately anticipated litigation over a very serious injury, Altec's failure to override its document retention policy and its failure to preserve the derrick as it existed on the day Mr. Chard inspected it are, frankly, inexplicable, plainly wrong, and raise very serious concerns.

A. Altec's Destruction of Its Electronically Stored Information

Altec's post-accident electronic communications were destroyed pursuant to the weekly

application of its E-mail Policy, by which all emails older than 180 days are automatically deleted from Altec's systems and the archiving of email messages is strictly forbidden.²³

Federal Rule of Civil Procedure 37(e) states:

Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

Fed. R. Civ. P. 37(e) (West 2013). The Advisory Committee Notes regarding the rule state, however, that this provision applies only to "information lost due to the routine operation of an information system only if the operation was in good faith," and further clarify that good faith in this context "means that *a party is not permitted to exploit the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve.*" Fed. R. Civ. P. 37 advisory comm. nn. to 2006 amendment (West 2013).

In other pleadings with this court, Altec has argued that the court should have prevented discovery of certain parts of Mr. Chard's report of his investigation as attorney work product because litigation was reasonably anticipated.²⁴ Yet, Altec now argues, in essence, that it would not have been reasonable to anticipate litigation until it was served with Mr. Meany's complaint and, if it were reasonable, the communications are irrelevant.²⁵ These completely inconsistent arguments strike the magistrate judge as disingenuous.

Altec's General Counsel anticipated almost immediately after the accident that Mr. Meany's injuries would result in litigation, and promptly took very specific action: he directed

²³ See docket no. 71-2.

²⁴ See, e.g., Def.'s Supp. Mem. At 10-12 (docket no. 71).

²⁵ See Def.'s Resp. to Mot. for Sanctions at 8-9 (docket no. 64).

Mr. Chard to travel to Louisville, investigate the accident, and prepare a report. Yet Altec's General Counsel took no steps to preserve post-accident electronic communications that might be relevant to the future litigation it anticipated until it was served with Mr. Meany's complaint, because it "had no reason to preserve" those emails. Such a contention lacks credibility

It is important to note that culpability for spoliation purposes does not require any intent to breach a known duty to preserve. It is sufficient that the evidence was knowingly or negligently destroyed, and Altec concedes this point. Moreover, documents retained by Fishel establish that Fishel's representatives communicated with Altec's representatives by email about why certain hoses were not dielectric, and that the initial Altec contact did not answer Fishel's questions, but referred the matter to Mr. Chard "in anticipation of litigation" and also by email. This strongly suggests that there were at least some post-accident emails that were potentially relevant. Whether the destroyed communications might have established any defect in the design or manufacture of the derrick, is admittedly uncertain, but the burden of that uncertainty should not be Mr. Meany's to bear.

B. Altec's Dismantling and Sale of the Derrick

Altec's actions with respect to the derrick are, in the magistrate judge's experience, unprecedented. Although it anticipated litigation, Altec did not preserve the derrick in the condition it existed at the time of the accident. Instead, in the two months following Mr. Meany's accident -- the time period in which Mr. Meany was comatose for two weeks, underwent surgeries during the following several weeks, and then spent weeks in rehabilitation therapy in preparation for later surgeries -- Altec accepted the return of the derrick, repaired and replaced several parts, and sold the derrick to a company in Florida. While it is true that Altec took several photographs of the derrick on the day Mr. Chard inspected it, that Mr. Chard

preserved some component parts that showed evidence of electrical charring, and that Altec saved other parts when it serviced and repaired the derrick, that does not make its actions any less troublesome. Altec and Altec alone decided which parts of the derrick were relevant and should be retained, and the derrick was repaired, partially dismantled and sold out of state, during a time that a recently and severely injured Mr. Meany was in no condition to evaluate his options or hire an attorney.

As distressing as Altec's indefensible actions are, however, the magistrate judge concludes that sanctions are not warranted. Sanctions are proper only if evidence that was destroyed is relevant to a party's claims or defenses – in other words, if a reasonable trier of fact could find that the evidence would support a party's claim or defense.

Mr. Meany's theory of the case is that:

Altec's use of the metal braided hose [that connected the tamper to the derrick] resulted in the truck's insulating properties being compromised, thus allowing electricity to travel through the truck, out the metal braided hose, into the hydraulic tamper Meany was using, and into Meany's body.

Mr. Meany therefore asserts the presence of the connecting metal hose means that the derrick was defectively designed or that the derrick was defectively manufactured.

Altec admits that it manufactured the derrick with a metal braided hose connecting the tamper to the body of the truck,²⁶ but asserts that the accident would not have occurred if the Fishel employees had extended the non-conductive third stage of the boom. There is no dispute that the Fishel crew did not try to raise the third stage of the boom before it came into contact with the live wire. Accordingly, the only issue remaining is whether the derrick was

²⁶ See Tr. at 52 (docket no. 67).

defectively designed,²⁷ either by the inclusion of a metal hose instead of a dielectric hose to connect the tamper to the derrick, or by Altec's failure to place appropriate warnings on the derrick regarding the hose.²⁸ Because Altec saved the hose that connected the tamper to the truck (in addition to some other parts through which the current traveled), and because there exists no dispute that Mr. Chard's pictures of the truck accurately document the warnings Altec placed on it, the magistrate judge concludes that there has been no loss of relevant evidence.

In concluding that there has been no loss of relevant evidence, however, the magistrate judge in no way condones Altec's actions. At the time Altec repaired, replaced parts on, and sold the derrick, it did not know: (1) what Mr. Meany's theory of the case would be or (2) that an independent company hired by Fishel had determined that the boom passed dielectric and ultrasonic testing, plus a visual inspection. Instead, Altec appointed itself sole arbiter of evidentiary relevancy with respect to derrick and proceeded accordingly. In isolation, Altec's actions with respect to the derrick cause concern, but in combination with Altec's failure to prevent the destruction of its electronic communications sent and received during the time that it was replacing parts on the derrick and then selling it to company in Florida, Altec's choices suggest specific bad intent. Moreover, Altec's General Counsel monitored the company's response to the accident, which makes the occurrence of two incidents of spoliation totally insupportable.

²⁷ See Tr. at 24, 29 (docket no. 67).

²⁸ In plaintiff's supplemental memorandum and at the evidentiary hearing (docket no.72), Mr. Meany's counsel asserted that the dismantling and sale of the derrick prevented its expert from inspecting other components of the derrick to determine whether their deteriorated condition might have permitted electricity to travel down the truck and into tamper regardless of whether the third stage of the boom was extended. While this argument is sensible on its face, it ignores the post-accident test results from Torco, the company hired by Fishel. Torco completed its inspection and tests before the derrick was returned to Altec, and its results indicate that boom, including its third stage and related parts, passed dielectric, ultrasonic, and visual testing. Thus, there is no reasonable basis for suspecting that any degraded condition of the third stage of the boom might have permitted current to travel into the derrick even if the third stage had been raised.

Nevertheless, given Mr. Meany's stated causes of action, the post-accident test results, and Altec's admission that it manufactured and sold the derrick with a conductive hose attaching the tamper to the body of the vehicle, Altec does not appear to have destroyed relevant evidence. While Altec's conduct is distressing, a spoliation sanction for its dismantling, repair, and sale of the derrick is not legally warranted.

III.

The magistrate judge recommends that the district court grant Mr. Meany's motion for sanctions, but only with respect to Altec's failure to preserve its post-accident emails. What type of sanction to impose, the magistrate judge leaves to the sound determination of the trial court, which has broad discretion in such matters, and can choose from among the following options: summary judgment, exclusion of expert testimony, or the imposition of an adverse evidentiary inference. *Adkins*, 554 F.3d at 653.

The purpose of sanctions are, as always, to deter similar conduct in the future, to shift the risk of an erroneous judgment to the party that created the risk, and to restore the parties to their relative positions before the improper conduct occurred. Accordingly, before imposing a sanction, the trial court must consider the Altec's party's degree of fault, the degree of prejudice suffered by Mr. Meany, and the effectiveness of lesser sanctions.

The magistrate judge concludes that Altec's degree of fault is high. Although there exists no proof that Altec's General Counsel intentionally permitted or ordered the destruction of harmful evidence, it is simply too questionable that the Altec's General Counsel would direct that certain evidence be preserved in anticipation, but permit other evidence to be destroyed because litigation had not officially commenced. Such behavior should be deterred, because Altec is an international company with several products in the marketplace. This is not the first

time it has been sued, and probably will not be the last.

How much prejudice Mr. Meany has suffered is unknowable. Certainly, Altec's response to Fishel's inquiry about whether metal hoses are customary suggests that there may have been some internal discussion regarding the reasons why certain types of component parts were chosen for the derrick, which might have led to evidence that would support a design defect claim. The magistrate judge recommends shifting the burden of an erroneous judgment to Altec, which created the risk, but whether the least effective sanction is an adverse instruction permitting the jury to infer that the destroyed emails contained evidence that the derrick was defectively designed, or summary judgment in favor of one or more of Mr. Meany's claims premised on a design defect, is for the trial court to determine.²⁹

DATE:

cc: counsel of record

Notice:

Within fourteen (14) days after being served a copy of these proposed findings of fact, conclusions of law, and recommendation, any party who wishes to object must file and serve written objections, or further appeal is waived. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). A party may file a response to another party's objections within fourteen (14) days after being served with a copy thereof. Fed. R. Civ. P. 72(b).

²⁹ While not specifically contemplated by the rules, the additional sanction of reporting the conduct of Altec's General Counsel to the Bar Association of all states in which he is licensed to practice would not be unwarranted under these circumstances.