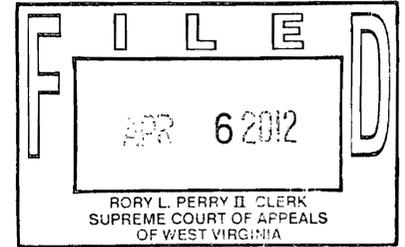


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 11-1610

JASON J. SMITH

Plaintiff Below, Petitioner



v.

APEX PIPELINE SERVICES, INC.

Defendant Below, Respondent.

RESPONDENT'S BRIEF

Counsel for Respondent

Mary H. Sanders, Esquire (WVSB #3084)
J. Todd Bergstrom, Esquire (WVSB #11385)
Huddleston Bolen, LLP
707 Virginia Street East, Suite 1300
P. O. Box 3786
Charleston, WV 25337-3786
(304) 344-9869
msanders@huddlestonbolen.com
jbergstrom@huddlestonbolen.com

Counsel for Petitioner

Charles M. Love, IV (WVSB #7477)
The Masters Law Firm lc
181 Summers Street
Charleston, WV 25301
(304) 342-3106
cml@themasterslawfirm.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE.....1

SUMMARY OF ARGUMENT.....3

STATEMENT REGARDING ORAL ARGUMENT AND DECISION.....5

ARGUMENT.....5

 A. STANDARD OF REVIEW.....5

 B. THE CIRCUIT COURT PROPERLY GRANTED SUMMARY
 JUDGMENT WITH RESPECT TO THE PLAINTIFF’S
 WORKERS’ COMPENSATION DISCRIMINATION CLAIM.....7

 C. THE CIRCUIT COURT PROPERLY GRANTED SUMMARY
 JUDGMENT WITH RESPECT TO THE PLAINTIFF’S
 DELIBERATE INTENT CLAIM.....12

 1. *Specific Unsafe Working Condition:* The Circuit Court
 correctly concluded that the Petitioner failed to proffer a
 specific unsafe working condition that was not caused by his
 own carelessness.....14

 2. *Actual Knowledge:* The Circuit Court correctly ruled that Apex
 management was not aware of any unsafe working conditions.....16

 3. *Violation of Standard:* The Circuit Court correctly concluded
 that the Plaintiff failed to offer sufficient evidence to create a
 question of fact as to whether Apex violated a specifically
 applicable state or federal safety statute, rule or regulation or a
 commonly accepted and well-known safety standard, which
 violation proximately caused the accident.....20

 i. The regulations contained in 29 C.F.R. §
 1926.20(b)(1)-(3) and 29 C.F.R. § 1926.21(b)(2) are
 not specific enough to the working condition
 involved to impose deliberate intent liability and
 there is no evidence such regulations were violated.....21

 ii. There is no evidence in the record to suggest that
 Apex violated 29 C.F.R. § 1926.651(j)(2).....24

iii. There is no evidence in the record to suggest that
Apex violated 29 C.F.R. § 1926.651(k)(1).....25

4. *Intentional Exposure*: The Circuit Court correctly held that the
Plaintiff presented insufficient evidence indicating that Apex
intentionally exposed him to an unsafe working condition26

CONCLUSION AND PRAYER FOR RELIEF27

CERTIFICATE OF SERVICE29

TABLE OF AUTHORITIES

WEST VIRGINIA CASES

Amazzi v. Quad/Graphics, Inc.
218 W.Va. 36, 621 S.E.2d 705 (2005)17

Bailey v. Mayflower Vehicles Sys., Inc.
218 W.Va. 273, 624 S.E.2d 710 (2005)8

Bell v. Vecellio & Grogan, Inc.
191 W.Va. 577, 447 S.E.2d 269 (1994)17

Blake v. John Skidmore Truck Stop, Inc.
201 W.Va. 126, 493 S.E.2d 887 (1997)17

Blevins v. Beckley Magnetite, Inc.
185 W.Va. 633, 408 S.E.2d 385 (1991)17-18, 20

Coleman v. R.M. Logging, Inc.
226 W.Va. 199, 700 S.E.2d 168 (2010).....6

Deskens v. S.W. Jack Drilling Co.
215 W.Va. 525, 600 S.E.2d 237 (2004)17-18

Gentry v. Mangum
195 W.Va. 512, 466 S.E.2d 171 (1995).....4

Hanks v. Beckley Newspapers Corp.
153 W.Va. 834, 172 S.E.2d 816 (1970).....6

Helmick v. Potomac Edison Co.
185 W.Va. 269, 406 S.E.2d 700 (1991)18

Mayles v. Shoney's Inc.
185 W.Va. 88, 405 S.E.2d 15 (1990)17

Mumaw v. U.S. Silica Co.
204 W.Va. 6, 511 S.E.2d 117 (1998)13, 17

Nutter v. Owens Illinois, Inc.
209 W.Va. 608, 550 S.E.2d 398 (2001)17

Painter v. Peavy
192 W.Va. 189, 451 S.E.2d 755 (1994).....5-6

<i>Powell v. Wyo. Cablevision</i> 184 W.Va. 700, 403 S.E.2d 717 (1991)	9
<i>Ramey v. Contractor Enters.</i> 225 W.Va. 424, 693 S.E.2d 789 (2010)	14, 20
<i>Rollins v. Mason County Bd. of Educ.</i> 200 W.Va. 386, 489 S.E.2d 768 (1997)	8
<i>Sedgmer v. McElroy Coal Co.</i> 220 W.Va. 66, 640 S.E.2d 129 (2006)	17
<i>Sias v. W-P Coal Co.</i> 185 W.Va. 569, 408 S.E.2d 321 (1991)	17
<i>Tolley v. ACF Indus. Inc.</i> 212 W.Va. 548, 575 S.E.2d 158 (2002)	13
<i>Williams v. Precision Coil, Inc.</i> 194 W.Va. 52, 459 S.E.2d 329	17-18

OTHER JURISDICTIONAL CASES

<i>Anderson v. Liberty Lobby, Inc.</i> 477 U.S. 242 (1986).....	6, 18
<i>Beale v. Hardy</i> 769 F.2d 213 (4 th Cir. 1985)	17
<i>Felty v. Graves-Humphreys Co.</i> 818 F.2d 1126 (4 th Cir. 1987)	18
<i>Greene v. Carolina Freight Carriers</i> 663 F.Supp 112 (S.D.W.Va. 1987)	21-22

WEST VIRGINIA STATUTES AND REGULATIONS

W. VA. CODE § 23-4-2(d)(1)	14
W. VA. CODE § 23-4-2(d)(2)(i)	12
W.VA. CODE § 23-4-2(d)(2)(ii).....	4

W.VA. CODE § 23-4-2(d)(2)(iii)(B)	13-14
W.VA. CODE § 23-5A-1	7, 9
W.VA. CODE § 23-5A-3	8-9
W.Va. Rules of Appellate Procedure, Rule 18(a)	5
W.Va. Rules of Civil Procedure, Rule 56	5-6
29 C.F.R. § 1926.20(b)(1)	21-22
29 C.F.R. § 1926.20(b)(2)	21-22
29 C.F.R. § 1926.20(b)(3)	21-22
29 C.F.R. § 1926.21(b)(2)	21-22
29 C.F.R. § 1926.651(j)(2)	24-25
29 C.F.R. § 1926.651(k)(1)	25

STATEMENT OF THE CASE

Procedural History

Plaintiff brought a deliberate intent claim and a workers' compensation discrimination claim against his former employer, Apex Pipeline Services, Inc. ("Apex"). *See* Complaint, AR 146-151. The parties progressed through discovery, wherein a total of eleven depositions were taken and voluminous documents exchanged. Both the Plaintiff and the Defendant procured liability experts, exchanged expert reports, and took expert depositions. At the conclusion of discovery it became clear that the Plaintiff put forth woefully inadequate evidence on several of the essential elements of his deliberate intent claim and his workers' compensation claim, and the Defendant therefore filed its Amended Motion for Summary Judgment.¹ *See* AR 121-231. On October 19, 2011, after two lengthy hearings on the subject and the submission of proposed findings of facts and conclusions of law by both parties, Judge Kaufman properly entered an Order granting the Defendant's Amended Motion for Summary Judgment, ruling in part that no material issues of fact remained in dispute. *See* AR 856-864.

Statement of the Facts

On September 30, 2008, Plaintiff was a laborer whose job was to assist in stringing natural gas pipeline with several co-workers at a job site in Boone County, West Virginia. *See* Complaint, AR 146-151. Plaintiff was hired out of the hall for this work. He was hired as experienced in this job. Apex temporarily hires employees out of the union hall as needed. The Plaintiff was only hired

¹ Apex had previously filed a Motion for Summary Judgment on the ground that Plaintiff's liability expert had not produced any opinions, and therefore the Plaintiff's claims could not withstand summary judgment.

{C0157505.1 }

for the job where the subject incident occurred, and when the job was over he was no longer guaranteed employment.

In preparation for lowering the pipe into the trench, and consistent with industry standard, two pipes were lying side by side across the trench at an angle. *See* Deposition of Bob Keaton, AR 154, 158. According to the testimony of job superintendent Bob Keaton, and side boom operator Chris Graham, wooden chocks were placed on the outside of the two pipes to keep them secure on one side of the ditch. *See id.*, AR 160-161; Deposition of Chris Graham, AR 166, 169. As is standard industry practice, the pipe was secured on the other side of the ditch by being cradled in the loose dirt that was removed from the trench. *See* Deposition of Bob Keaton, AR 155; Deposition of Chris Graham, AR 169.

The Plaintiff was guiding the end of one of the pipes as the pipe was lifted and moved by the side boom to be put into the trench. *See* Complaint, AR 146-151. Inconsistent with his job duty, training, and industry practice, the Plaintiff failed to move the wooden chock flush to the remaining pipe when the first pipe was lifted, leaving it unsecure. After the Plaintiff entered the trench to put the pipe in place, the second pipe rolled, and struck him in the back. *Id.* The Plaintiff asserted a deliberate intent cause of action against his employer, Apex, for his injuries. *Id.*

The Plaintiff also asserted a cause of action for workers' compensation discrimination under West Virginia Code § 23-5(a)-1 and § 23-5(a)-3. *Id.* The Plaintiff filed for workers' compensation benefits and alleges that because of filing for workers' compensation, Apex refused to allow him to return to employment and terminated him. *Id.* This claim arises out of a mistake by Apex's secretary

in preparing a form that was sent to the Unemployment Compensation Division. *See* Unemployment Form, AR 172. On this form, the secretary marked a box stating that Plaintiff was “discharged” due to “workers comp. injury.” *Id.* The top of the form, however, also states that separation was due to “lack of work.” *Id.* At the Plaintiff’s deposition, the Plaintiff testified that he contacted Apex to inquire about returning to work in May 2009, and was told there was no work for him. *See* Deposition of Jason Smith, AR 179. The Plaintiff does not deny that there Apex had no available work. *Id.* In fact, several of Apex’s long-time employees did not return to work at the same time due to a lack of work. *Id.* Apex’s work is largely seasonal.

There being no available work, Plaintiff then contacted Apex regarding filing for unemployment compensation. Apex’s secretary, Pam Moss, inadvertently checked the incorrect box on the unemployment form. Ms. Moss testified that “I checked the wrong box on the form.” *See* Deposition of Pam Moss, AR 183. When the Plaintiff called her to inform her of her error, Ms. Moss took the necessary action to correct her error. *Id.* Due to Ms. Moss’s error, the Plaintiff’s unemployment benefits were delayed for a period of two weeks but he was then made whole. *See* Deposition of Jason Smith, AR 180. Other than this form, which clearly represents a simple clerical error, the Plaintiff presented no evidence of discrimination.

SUMMARY OF ARGUMENT

The Petitioner’s Brief provides little substantive argument, and is nothing more than a repackaging of his expert’s report. While the Petitioner may be satisfied in relying on his expert’s opinion to create a question of fact, such reliance is misplaced pursuant to West Virginia law,

given the actual facts of this case. The Supreme Court of Appeals of West Virginia has clearly held that an expert's opinion alone is not sufficient to create a genuine issue of material fact. *See Gentry v. Mangum*, 195 W.Va. 512, 529-30, 466 S.E.2d 171, 188-89 (1995) ("Finally, in the event that the circuit court decides the expert testimony is admissible for summary judgment purposes, the circuit court must still address the separate inquiry as to whether the expert evidence is sufficient to create a genuine issue of material fact.").

The record of this case, which was adequately developed and presented to the Circuit Court through both written and oral argument, clearly demonstrates that there is no genuine issue as to any material fact and no rational trier of fact could find for the Plaintiff. The Plaintiff failed to produce any evidence that Apex discriminated against him based on his filing of a workers' compensation claim. In support of that claim, the Plaintiff points only to an internally inconsistent form filled out by an Apex secretary. That secretary has testified under oath that she filled the form out incorrectly, and that the Plaintiff was not discharged because of his workers' compensation claim. All of evidence presented to the Circuit Court clearly indicated that the Plaintiff was not hired back due to a lack of work in the industry at the time of his one request to return to work. The Circuit Court correctly dismissed this claim.

Similarly, the Plaintiff was unable to demonstrate evidence supporting elements (A) through (D) of W.VA. CODE § 23-4-2(d)(2)(ii). All of the evidence indicated that the Plaintiff was properly trained, and that Apex had proper safety procedures. Despite the existence of those procedures, the Plaintiff failed to take a necessary safety step on the day of the accident, thereby causing his own

injury. Therefore, the Circuit Court properly concluded that the Petitioner failed to meet his burden of producing sufficient evidence for a reasonable jury to find in his favor on all five elements of a deliberate intent claim, and summary judgment was proper.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Because the dispositive issues in this case have been authoritatively decided by this Court's prior precedent, oral argument under Rule 18(a) of the *West Virginia Rules of Appellate Procedure* is not necessary unless the Court determines that other issues arising upon the record should be addressed. If the Court determines that oral argument is necessary, this case is appropriate for a Rule 19 argument and disposition by memorandum decision.

ARGUMENT

A. STANDARD OF REVIEW

As is clearly established, “[a] circuit court’s entry of summary judgment is reviewed *de novo*.” Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). Rule 56(c) of the West Virginia Rules of Civil Procedure provides in pertinent part, as follows:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, 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.

The Supreme Court of Appeals of West Virginia has further held:

Summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.

Syl. Pt. 4, *Painter*, 192 W.Va. at 193. Also, “the party opposing summary judgment must satisfy the burden of proof by offering more than a mere ‘scintilla of evidence,’ and must produce evidence sufficient for a reasonable jury to find in a nonmoving party’s favor.” *Id.* at 192-93 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)).

The Supreme Court of Appeals of West Virginia has stated that summary judgment is favored in appropriate circumstances and plays an important role in litigation in this state. *Id.* at 192 n. 5. The purpose of Rule 56 is to permit courts to promptly dispose of controversies on their merits without resort to trial when there is no real dispute of salient facts or if only a question of law exists. *Hanks v. Beckley Newspapers Corp.*, 153 W.Va. 834, 836-37, 172 S.E.2d 816, 817 (1970).

In his Petition, the Plaintiff asserts that the Circuit Court inappropriately applied the summary judgment standard by failing to consider the evidence in the light most favorable to him as the nonmoving party. This assertion, however, misinterprets the summary judgment standard and incorrectly characterizes Judge Kaufman’s ruling. The lower court clearly analyzed all the evidence presented by the Plaintiff and determined that, even if viewed in the light most favorable to the nonmoving party, the evidence was nonetheless insufficient to support his claim. As this Court has held:

Although the facts and inferences must be viewed in a light most favorable to the non-moving party, that party must produce “concrete” evidence which would allow a reasonable finder of fact to return a verdict in its favor. Where, as here, there has been an opportunity for adequate discovery, our consideration should properly move from the speculative realm of possibility to the actual realm of plausibility when considering the non-moving party’s case.

Coleman v. R.M. Logging, Inc., 226 W.Va. 199, 209, 700 S.E.2d 168, 178 (2010) (Benjamin, J.,

dissenting) (citing *Painter*, 192 W.Va. at 193). In this case, as evidenced by the record presented in this appeal, the Circuit Court properly concluded that the Petitioner failed to produce plausible and “concrete” evidence supporting his claims, and that no reasonable finder of fact could return a verdict in his favor. As such, the Petitioner’s appeal should be denied.

B. THE CIRCUIT COURT PROPERLY GRANTED SUMMARY JUDGMENT WITH RESPECT TO THE PLAINTIFF’S WORKERS’ COMPENSATION DISCRIMINATION CLAIM

In his complaint, the Plaintiff asserts causes of action under West Virginia Code § 23-5A-1 and § 23-5A-3. W.VA. CODE § 23-5A-1 provides that “[n]o employer shall discriminate in any manner against any of his present or former employees because of such . . . employee’s receipt of or attempt to receive benefits under this chapter.” W.VA. CODE § 23-5A-3 provides as follows:

(a) It shall be a discriminatory practice . . . to terminate an injured employee while the injured employee is off work due to a compensable injury within the meaning of article four . . . of this chapter ***and is receiving or is eligible to receive temporary total disability benefits***, unless the injured employee has committed a separate dischargeable offense. A separate dischargeable offense shall mean misconduct by the injured employee wholly unrelated to the injury or the absence from work resulting from the injury. A separate dischargeable offense shall not include absence resulting from the injury or from the inclusion or aggregation of absence due to the injury with any other absence from work.

(b) It shall be a discriminatory practice within the meaning of section one of this article for an employer to fail to reinstate an employee who has sustained a compensable injury to the employee’s former position of employment upon demand for such reinstatement ***provided that the position is available*** and the employee is not disabled from performing the duties of such position. If the former position is not available, the employee shall be reinstated to another comparable ***position which is available*** and which the employee is capable of performing. . . . In the event that neither the former position nor a comparable position is available, the employee shall have a right to preferential recall to any job which the injured employee is capable of performing which becomes open after the injured employee notifies the employer that

he or she desired reinstatement. Said right of preferential recall shall be in effect for one year from the day the injured employee notifies the employer that he or she desires reinstatement: Provided, that the employee provides to the employer a current mailing address during this one year period.

Id. at § 23-5A-3.

First, Apex did not violate § 23-5A-3(a) because the Plaintiff was not receiving or eligible to receive temporary total disability benefits at the time that he sought reinstatement. *See id.; Rollins v. Mason County Bd. of Educ.*, 200 W.Va. 386, 391, 489 S.E.2d 768 (1997). It cannot be disputed that the Plaintiff's workers' compensation claim had settled, and therefore his temporary total disability benefits had expired by the time he first sought reinstatement with Apex. *See Workers' Compensation Letter* dated April 22, 2009, AR 186. Thus, there is no genuine issue of material fact regarding Apex's alleged violation of § 23-5A-3(a).

Second, Apex did not violate § 23-5A-3(b) because the Plaintiff was disabled from performing the duties of a general laborer at the time he sought reinstatement with Apex. Furthermore, neither the Plaintiff's position, nor any comparable position, was available for the Plaintiff at the time he sought reinstatement. In order to exercise the reinstatement rights protected by this statute, including rights to preferential recall, an employee must prove "through competent medical evidence that he has recovered from his compensable injuries and is capable of returning to work and performing his job duties." *Bailey v. Mayflower Vehicles Sys., Inc.*, 218 W.Va. 273, 278, 624 S.E.2d 710, 715 (2005). An IME performed by Dr. William Hoh on March 19, 2009 – about the time the Plaintiff sought re-employment – stated that "it is unlikely that [the Plaintiff] will return to his pre-injury job duties." *See IME Report*, AR 188-208. Further, the Plaintiff admitted in his

{C0157505.1 }

interrogatory responses that he had not yet been released to return to work as of January 27, 2010. *See* Plaintiff's Answer to Defendant's Interrogatory No. 8, AR 210-212. Therefore, there is no genuine issue of material fact regarding Apex's alleged violation of § 23-5A-3(b).

Finally, Apex did not violate W.VA. CODE § 23-5A-1 – the more general workers' compensation discrimination provision. In order to prevail on a claim of workers' compensation discrimination pursuant to § 23-5A-1, an employee must prove that:

(1) an on-the-job injury was sustained; (2) proceedings were instituted under the Workers' Compensation Act, W. Va. Code, 23-1-1, et seq.; and (3) the filing of a workers' compensation claim was a significant factor in the employer's decision to discharge or otherwise discriminate against the employee.

Syl. Pt. 1, *Powell v. Wyo. Cablevision*, 184 W.Va. 700, 403 S.E.2d 717 (1991). In this case, there is absolutely no credible evidence that demonstrates that the Plaintiff's filing of a workers' compensation claim was a significant factor in Apex's decision not to rehire the Plaintiff. Rather, all of the evidence demonstrates that the only reason the Plaintiff was not hired back to work for Apex was because there was a lack of work at the time of his one request to return to work.

The Plaintiff only worked for Apex for 26 days prior to his injury on September 30, 2008. *See* Unemployment Form, AR 172. The project on which the Plaintiff was injured had already been started prior to his hiring. *See* Deposition of Jason Smith, AR 175. Apex needed more laborers for the job, so he was hired as a general laborer. *Id.* Apex hires its laborers out of the Laborer's Union. *See* Deposition of Pam Moss, AR 184. At the time of his employment with Apex in September 2008, the Plaintiff was a member of Laborer's Union Local 453 in Beckley, West Virginia. *See* Union Records, AR 214. He was a member of that union for just 10 months until he was terminated for

non-payment of union dues. *Id.*

The Plaintiff testified in deposition that, sometime around May 2009, he called Apex vice-president and job superintendent Bob Keaton and asked him if work was available. *See* Deposition of Jason Smith, AR 179. Keaton told him that there was no work available at that time, and the Plaintiff admitted he believed him. *Id.*² There being no available work, the Plaintiff then contacted Apex regarding filing for unemployment compensation. *Id.* Apex's Secretary, Pam Perry (now Pam Moss), filled out the Plaintiff's unemployment compensation form on May 21, 2009. *See* Unemployment Form, AR 172. It is this form – and this form only – which is the basis of the Plaintiff's workers' compensation discrimination claim. *See* Deposition of Jason Smith, AR 179.³ On this form, Ms. Moss inadvertently and mistakenly marked a box stating that the Plaintiff was "discharged" due to "workers comp. injury." *See* Unemployment Form, AR 172. The top of the form, however, also states that separation was due to "lack of work." *Id.* Ms. Moss testified in deposition that "I checked

² Mr. Smith testified:

- Q. And you were going to go back – you wanted to go back and do the same kind of work you were doing before as a laborer?
- A. Yes, I wanted to see if I could. . . .
- Q. And Bob said what, there wasn't any work?
- A. Right.
- Q. And is there some reason why you don't believe there wasn't any work?
- A. There wasn't any work.
- Q. You believe he said there is no work to do, so there is no work to do?
- A. Right, I mean, --
- Q. Okay.
- A. -- if there is no work, there is no work.

³ Mr. Smith testified:

- Q. So why have you alleged in your lawsuit that they didn't hire you back because you had a Comp claim?
- A. Well, that is what it says on my – why I couldn't get unemployment.
- Q. Where is that? I don't understand what you are talking about. . . Where does it say that?
- A. I called. It says it on the unemployment, I guess, because she said it was Apex stopping me from getting my unemployment.

the wrong box on the form.” *See* Deposition of Pam Moss, AR 183. When the Plaintiff called her to inform her of her error, Ms. Moss then took the necessary action to correct her error. *Id.* Ms. Moss testified in deposition that: “I called the judge, and the judge called me back, and I explained to her that I was unaware up until Jason had called me that I had made an error on the form, and I did, and I explained to her what had happened, and she awarded him his unemployment.” *Id.* She specifically testified that “Mr. Smith wasn’t let go,” and that he wasn’t hired back because “[t]here was no work available.” *Id.*, AR 184.

Because of Ms. Moss’s inadvertent error in filling out this form, the Plaintiff’s unemployment benefits were delayed for two weeks until the error was corrected. *See* Deposition of Jason Smith, AR 180. Other than this form, the Plaintiff admits that he was never told by anyone at Apex that he was fired. *Id.* The only communication he made with Apex regarding returning to work was one conversation with Bob Keaton in May 2009, in which Mr. Keaton explained that Apex did not have any work available. *Id.*, AR 179. Furthermore, Mr. Keaton testified that the Plaintiff was not hired back to work for Apex because there was insufficient work at the time and he was not needed. *See* Deposition of Bob Keaton, AR 163. He testified that many employees were laid off after that job. *Id.* He plainly stated that the reason that the Plaintiff was not brought back to work at Apex was a lack of work, not because he filed a workers’ compensation claim. *Id.*

Every piece of evidence presented in this case demonstrates that the Plaintiff was not hired back to work at Apex because of a lack of work. Even the unemployment form – the sole evidence the Plaintiff utilizes to support this claim – states that the separation was due to “lack of work.”

Because the Plaintiff failed to produce plausible and concrete evidence that the Plaintiff was discriminated against which goes beyond mere speculation, the lower court's granting of summary judgment on this claim was appropriate.

C. THE CIRCUIT COURT PROPERLY GRANTED SUMMARY JUDGMENT WITH RESPECT TO THE PLAINTIFF'S DELIBERATE INTENT CLAIM

There are two ways that a Plaintiff-employee may prove deliberate intent against his employer in West Virginia in order to overcome the workers' compensation immunity. The Plaintiff may prove that the employer "acted with a consciously, subjectively and deliberately formed intention to produce the specific result of injury or death to an employee" W. VA. CODE § 23-4-2(d)(2)(i). Alternatively, the Plaintiff must allege and prove *all* of the following five elements:

(A) That a specific unsafe working condition existed in the workplace which presented a high degree of risk and a strong probability of serious injury or death;

(B) That the employer, prior to the injury, had actual knowledge of the existence of the specific unsafe working condition and of the high degree of risk and the strong probability of serious injury or death presented by the specific unsafe working condition;

(C) That the specific unsafe working condition was a violation of a state or federal safety statute, rule or regulation, whether cited or not, or of a commonly accepted and well-known safety standard within the industry or business of the employer, as demonstrated by competent evidence of written standards or guidelines which reflect a consensus safety standard in the industry or business, which statute, rule, regulation or standard was specifically applicable to the particular work and working condition involved, as contrasted with a statute, rule, regulation or standard generally requiring safe workplaces, equipment or working conditions;

(D) That notwithstanding the existence of the facts set forth in subparagraphs (A) through (C), inclusive, of this paragraph, the employer nevertheless intentionally thereafter exposed an employee to the specific unsafe working condition; and

(E) That the employee exposed suffered serious compensable injury or compensable death as defined in section one [§ 23-4-1], article four, chapter twenty-three whether a claim for benefits under this chapter is filed or not as a direct and proximate result of the specific unsafe working condition.

W. VA. CODE § 23-4-2(d)(2)(ii). Here, the Plaintiff has chosen the second method, pursuant to W.VA. CODE § 23-4-2(d)(2)(ii), hereinafter referred to as the “deliberate intent statute.”

The deliberate intent statute mandates that a Court must grant summary judgment when a Plaintiff fails to prove *any* of the required elements through the evidence on the record. *See id.* at § 23-4-2(d)(2)(iii)(B); *Mumaw v. U.S. Silica Co.*, 204 W.Va. 6, 9, 511 S.E.2d 117, 120 (1998) (“In order to withstand a motion for summary judgment, a plaintiff must make a prima facie showing of dispute on each of the five factors.”). The West Virginia Supreme Court of Appeals has upheld the use of summary judgment where a Plaintiff fails with regard to even one of the five elements. *See e.g., Tolley v. ACF Indus. Inc.*, 212 W.Va. 548, 559, 575 S.E.2d 158, 169 (2002). In reviewing the Circuit Court’s decision in *Tolley*, the Supreme Court of Appeals of West Virginia reiterated that a Plaintiff must raise genuine issues of material fact “as to each of the five elements,” as “[a] necessary prerequisite to jury consideration of this type of case.” *Id.* at 552.

Indeed, the text of the Workers’ Compensation Act itself mandates a more stringent review of the evidence forwarded in deliberate intention cases and explicitly expresses the legislature’s intent that summary judgment be utilized to resolve issues regarding employer immunity. The Act states:

Notwithstanding any other provision of law or rule to the contrary, and consistent with the legislative findings of intent to promote prompt judicial resolution of issues of immunity from litigation under this chapter, the court shall dismiss the action upon motion for summary judgment if it finds, pursuant to rule 56 of the rules of civil procedure that one or more of the facts required to be proved by the provisions of

subparagraphs (A) through (E), inclusive, paragraph (ii) of this subdivision do not exist. . . .

W.VA. CODE § 23-4-2(d)(2)(iii)(B). In addition, the plain language of W. VA. CODE § 23-4-2(d)(1) provides, in pertinent part, that:

[i]n enacting the immunity provisions of this chapter, the Legislature intended to create a legislative standard for loss of that immunity of more narrow application and containing more specific mandatory elements than the common law tort system concept and *standard of willful, wanton and reckless misconduct*; and that it was and is the legislative intent to promote prompt judicial resolution of the question of whether a suit prosecuted under the asserted authority of this section is or is not prohibited by the immunity granted under this chapter.

In this case, the Plaintiff's deliberate intent claim fails because the Plaintiff cannot present evidence supporting elements (A) through (D).

1. ***Specific Unsafe Working Condition: The Circuit Court correctly concluded that the Petitioner failed to proffer a specific unsafe working condition that was not caused by his own carelessness.***

The first element of the Plaintiff's deliberate intent claim requires him to prove that an unsafe working condition existed. *See* W. VA. CODE § 23-4-2(d)(2)(ii)(A). Specifically, the Plaintiff must show “[t]hat a specific unsafe working condition existed in the workplace which presented a high degree of risk and a strong probability of serious injury or death[.]” *Id.* The West Virginia Supreme Court of Appeals has held that a Plaintiff cannot meet his burden of proof under this element if he creates the unsafe working condition himself. *See e.g. Ramey v. Contractor Enters.*, 225 W.Va. 424, 433, 693 S.E.2d 789, 798 (2010) (“The record before us reveals that the hazardous condition in this case did not occur until Mr. Ramey deviated from the ground control plan and moved his drilling equipment to within twenty-three inches of the highwall.”).

The specific unsafe working condition asserted by the Plaintiff, according to the Plaintiff's expert Gary S. Nelson, is "the failure, in a physically positive manner, to secure pipe stored immediately adjacent to excavations where workers were present." However, all the testimony presented in this case demonstrates that securing the pipe was the responsibility of the laborers. Apex cannot be held liable for an unsafe working condition that was created by the Plaintiff's failure to perform the duties and obligations of his job. For these reasons, the Circuit Court correctly granted summary judgment as to the Plaintiff's deliberate intent claim.

The Plaintiff testified that he believed it is the responsibility of the person stringing the pipe to secure them so they do not roll. *See* Deposition of Jason Smith, AR 178. He did not believe that it was his job to secure pipes. *Id.*, AR 177 While the Plaintiff is correct that it is the responsibility of the unloader (stringer) of the pipe to initially chock and secure the pipes, if one pipe is removed from a pair that are lying beside each other, it is the responsibility of the laborer guiding the removed pipe to move the chock over flush to the other pipe. *See* Deposition of Bob Keaton, AR 160-161; Deposition of Chris Graham, AR 167-168, 170. The Plaintiff admitted that sometimes, if he saw a pipe that was not chocked, he would put a rock up against it to keep it from rolling into the ditch. *See* Deposition of Jason Smith, AR 177-178.

While there has been some factual dispute as to the exact location, orientation, and placement of the pipes and chocks,⁴ such factual disputes (which are inevitable in a case such as this where the participants are not trained witnesses) do not bar summary judgment on this issue. There can be no

⁴ Compare Deposition of Jason Smith, AR 176-177, with Deposition of Bob Keaton, AR 158, 160-161 and Deposition of Chris Graham, AR 166, 169.
{C0157505.1 }

dispute that when the side boom lifted the first of two pipes lying side by side, it was the Plaintiff's responsibility to move the chock flush to the next pipe, thereby securing it to prevent injury.

Both Bob Keaton and Chris Graham testified that it is the responsibility of the laborer to make sure the pipe is chocked and secured so that it doesn't roll. *See* Deposition of Bob Keaton, AR 160-161; Deposition of Chris Graham, AR 167-168, 170. Who else could possibly have this responsibility? When the side boom lifts one of the two pipes up, all the Plaintiff had to do was kick the chock up next to the remaining pipe so that it wouldn't roll. He was in the easiest and best position to protect himself from this accident. The Apex procedure of temporarily storing pipes across the trench with both ends secure against accidental displacement was an inherently safe precaution incorporated by Apex to minimize or eliminate the potential hazard of rolling pipes. The only unsafe condition that existed on this jobsite occurred after the Plaintiff failed in his duty to secure the remaining pipe after its companion pipe was lifted. For this reason, the Plaintiff is unable to point to a specific unsafe working condition that was not caused by his own carelessness, and the Circuit Court correctly granted summary judgment.

2. *Actual Knowledge:* The Circuit Court correctly ruled that Apex management was not aware of any unsafe working conditions.

There is no evidence on the record that supports Apex having actual knowledge of a specific unsafe working condition. W. VA. CODE § 23-4-2(d)(2)(ii)(B) requires a plaintiff to prove that:

the employer, prior to the injury, had actual knowledge of the existence of the specific unsafe working condition and of the high degree of risk and the strong probability of serious injury or death presented by the specific unsafe working condition.

The West Virginia Supreme Court of Appeals has consistently held that the “subjective realization” element is not satisfied by evidence that the employer reasonably *should have known* of the specific unsafe working condition and the strong probability of death or serious injury presented by that condition. Syl. Pt. 3, *Blevins v. Beckley Magnetite, Inc.*, 185 W.Va. 633, 408 S.E.2d 385 (1991); *see also Blake v. John Skidmore Truck Stop, Inc.*, 201 W.Va. 126, 493 S.E.2d 887 (1997); *Deskens v. S.W. Jack Drilling Co.*, 215 W.Va. 525, 600 S.E.2d 237 (2004). Rather, it must be shown that the employer actually possessed such knowledge. *Blevins*, 185 W.Va. at Syl. Pt. 3. “This is a high threshold that cannot be successfully met by speculation or conjecture.” *Mumaw*, 204 W.Va. at 12. This requirement is most often satisfied by evidence of prior complaints (whether formal or informal), prior injuries on the same equipment, or prior, unabated citations by federal or state agencies. Singular incidents have been held insufficient to prove actual knowledge. *Sedgmer v. McElroy Coal Co.*, 220 W.Va. 66, 640 S.E.2d 129 (2006).

While this Court has previously held that circumstantial evidence may be used to prove the actual knowledge requirement, there must be more circumstantial evidence than just the accident’s occurrence for a jury to consider. *See Nutter v. Owens Illinois, Inc.*, 209 W.Va. 608, 550 S.E.2d 398 (2001); *Mayles v. Shoney’s Inc.*, 185 W.Va. 88, 405 S.E.2d 15 (1990); *Amazzi v. Quad/Graphics, Inc.*, 218 W.Va. 36, 621 S.E.2d 705 (2005); *Bell v. Vecellio & Grogan, Inc.*, 191 W.Va. 577, 447 S.E.2d 269 (1994); *Sias v. W-P Coal Co.*, 185 W.Va. 569, 408 S.E.2d 321 (1991). “[A] non-moving party cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another.” *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985). “The evidence

illustrating the factual controversy cannot be conjectural or problematic.” *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 60, 459 S.E.2d 329, 337 (quoting *Anderson*, 477 U.S. at 252). *See also Felty v. Graves-Humphreys Co.*, 818 F.2d 1126, 1128 (4th Cir. 1987) (holding that unsupported speculation is insufficient to defeat summary judgment).

In *Deskins v. Jack Drilling Co.*, 215 W.Va. 525, 600 S.E.2d 237 (2004), the West Virginia Supreme Court of Appeals affirmed the circuit court’s grant of summary judgment to the defendant employer stating that:

In the case at bar, the appellant has not presented any evidence to show that the appellees possessed actual knowledge that their employees were improperly supervised and that there was a high degree of risk and a strong probability of serious injury. ***To be specific, the appellant has produced no evidence of prior injuries, employee complaints, or citations from any regulatory or governmental agency*** arising from the use of a dozer to set up the pipe rack and pipe tub or the lack of supervision during that operation. The appellant simply has not offered any evidence remotely suggesting that the appellees knew that their supervision of the appellant or any of their employees was inadequate. At best, the appellant might be able to prove ordinary negligence on the part of the appellees. However, “the ‘deliberate intention’ exception to the Workers’ Compensation system is meant to deter the malicious employer, not to punish the stupid one.” *Helmick v. Potomac Edison Co.*, 185 W.Va. 269, 274, 406 S.E.2d 700, 705 (1991).

Further, in *Blevins v. Beckley Magnetite*, 185 W.Va. 633, 408 S.E.2d 385 (1991), the trial court granted the employer judgment notwithstanding the verdict in a deliberate intent action. That case involved an employee who was severely injured while cleaning up ore spillage around a self-cleaning conveyor tail pulley. The employee was shoveling material onto the conveyor belt when his coveralls got caught, and he was pulled into the machine. The employee claimed that his employer told him not to shut off the conveyor belt when performing such task. No other witness testimony

corroborated that they had received such an instruction. The evidence showed that the employees who worked at the plant during the relevant time-frame were advised to shut off the power to the conveyer and that no prior injuries had occurred. The former employees presented by the plaintiff, all of whom worked prior to the gate being installed as a guard, testified that they received no instruction regarding whether the conveyor should be turned off while performing the task. Moreover, the Court found no evidence that the employer was put on notice of the particular unsafe working condition alleged – cleaning spillage while the conveyor belt was running. The Court upheld the lower court’s decision finding that an unsafe working condition existed only upon the plaintiff’s failure to comply with safety procedures and that the plaintiff failed to prove subjective realization.

In the case at bar, there is no evidence of any prior complaints, no evidence of any prior injuries, and no evidence of any similar prior citations from federal or state agencies. Simply put, there is no evidence whatsoever to suggest that Apex had “actual knowledge” of the alleged high risk of serious injury or death associated with the purported unsafe working conditions identified by the Plaintiff.

Apex knew that unsecured piping could present a hazard. Therefore, it directed its laborers to ensure that the pipes were secure and expected its laborers to perform their job duties as expected. There is not a shred of evidence that Apex or its supervisors had actual knowledge that the Plaintiff did not secure the second pipe and that it remained unsecured as he entered the trench. Apex was reasonable in relying on the laborers to perform the necessary safety checks, especially since the

laborers would be exposing themselves to the hazard if they did not perform the necessary inspection and chocking.

In addition, Bob Keaton, an owner of Apex and Vice President of Operations, testified that in all of his years in this industry he has never seen a pipe fall into the ditch in the way that occurred in this case. *See* Deposition of Bob Keaton, AR 162. The Plaintiff's expert's opinions are also based solely upon the "singular incident" and are likewise not probative of Apex's knowledge prior to the accident. As in *Blevins* and *Ramey*, the unsafe condition here is the employee's failure to comply with his safety training and jobsite procedural duties. In this case, there is no evidence of actual knowledge of an unsafe working condition other than the Plaintiff's unsubstantiated allegations.

The Petitioner relies upon his expert's opinion that Apex had actual knowledge of an unsafe procedure and/or a lack of supervision and training. However, it is evident from Mr. Nelson's deposition that he had not ascertained any facts, other than the occurrence of the accident itself, on which to base an opinion that the Petitioner had been inadequately trained or supervised or that Apex had inadequate procedures. Accordingly, the Circuit Court properly concluded that the Petitioner could not prove element (B) of his claim.

3. ***Violation of Standard:*** The Circuit Court correctly concluded that the Plaintiff failed to offer sufficient evidence to create a question of fact as to whether Apex violated a specifically applicable state or federal safety statute, rule or regulation or a commonly accepted and well-known safety standard, which violation proximately caused the accident.

In order to establish a prima facie case of deliberate intent, the Plaintiff must prove that the specific unsafe working condition complained of

was a violation of a state or federal safety statute, rule or regulation, whether cited or not, or of a commonly accepted and well-known safety standard within the industry or business of the employer, as demonstrated by competent evidence of written standards or guidelines which reflect a consensus safety standard in the industry or business, which statute, rule, regulation or standard was ***specifically applicable to the particular work and working condition involved***, as contrasted with a statute, rule, regulation or standard generally requiring safe workplaces, equipment or working conditions.

W. VA. CODE § 23-4-2(d)(2)(ii)(C) (emphasis added).

The West Virginia Legislature intended only egregious acts or omissions by the employer to be actionable in a deliberate intent action. *See Greene v. Carolina Freight Carriers*, 663 F.Supp 112, 115 (S.D.W.Va. 1987). The District Court for the Southern District of West Virginia, in *Green*, opined that in order “[t]o put the employer on notice, and to evidence its egregious conduct, the statute or standard [alleged to have been violated] must specifically address the unsafe working condition in question.” *Id.* A “regulation . . . generally requiring safe . . . equipment” is insufficient. *Id.*; W. VA. CODE § 23-4-2(d)(ii)(C). In this case, the Plaintiff has failed to present evidence sufficient to prove the violation of any safety statute, rule, regulation, or standard that is specifically applicable to installing pipe.

- i. **The regulations contained in 29 C.F.R. § 1926.20(b)(1)-(3) and 29 C.F.R. § 1926.21(b)(2) are not specific enough to the working condition involved to impose deliberate intent liability and there is no evidence such regulations were violated.**

The Plaintiff’s expert has opined that Apex violated 29 C.F.R. § 1926.20(b)(1)-(3) and 29 C.F.R. § 1926.21(b)(2). However, these regulations are not specific enough to impose deliberate intent liability. In fact, the very title of Subpart C of 29 C.F.R. § 1926, under which these regulations

fall, is entitled “General Health and Safety Provisions,” indicating that they are general regulations and not applicable to any specific working condition.

The language of the regulations themselves further demonstrates their general nature. 29 C.F.R. § 1926.20(b)(1) merely states that “[i]t shall be the responsibility of the employer to initiate and maintain such programs as may be necessary to comply with this part.” 29 C.F.R. § 1926.20(b)(1). 29 C.F.R. § 1926.20(b)(2) merely states that “[s]uch programs shall provide for frequent and regular inspections of the job sites, materials, and equipment to be made by competent persons designated by the employers.” 29 C.F.R. § 1926.20(b)(2). 29 C.F.R. § 1926.20(b)(3) simply provides that “[t]he use of any machinery, tool, material, or equipment which is not in compliance with any applicable requirement of this part is prohibited” 29 C.F.R. § 1926.20(b)(3). Finally, 29 C.F.R. § 1926.21(b)(2) provides that “[t]he employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposures to illness or injury.” 29 C.F.R. § 1926.21(b)(2).

None of the above regulations are specific to any particular working condition. Collectively, they are merely general regulations that require a safe workplace and safe equipment. In fact, 29 C.F.R. § 1926.20(b)(3) is almost identical to the regulation rejected by the *Greene* Court. *Greene*, 663 F.Supp at 114-15.

Moreover, there is no evidence that any of these regulations were violated. Specifically, there is no evidence that Apex did not regularly inspect the jobsite, tools and equipment. Further, there is

no evidence that Apex failed to instruct its employees in the avoidance of unsafe working conditions.

In fact, the only evidence suggests otherwise. For instance, Bob Keaton testified as follows:

Q. As vice president of operation, do you oversee hazard training for the men that work for Apex?

A. I give the safety meetings on Monday mornings.

Q. Okay.

A. Is that what you're asking?

Q. Well, yea, sort of.

A. And closely monitor the whole place every day.

Q. Okay. Is there a hazard training course or anything that your employees have to complete before you put them out in the field?

A. When we start a project, we call the union hall, which we hire out of the union hall. And we ask specifically for pipeline laborers.

Q. Okay.

A. They're supposed to be trained professionals when they come.

Q. Okay.

A. But when they come, we always put them with our trained people until we figure out if they are actually what they say they are.

See Deposition of Bob Keaton, AR 156.

As demonstrated above, Apex hired union personnel that are specifically experienced in the pipe line field. Mr. Keaton and Apex were reasonable in relying on the training and experience of the laborers hired from the union hall. As an extra precaution, Mr. Keaton instructs any new laborer

arriving on a jobsite to be placed with a trained professional in order to determine if they are truly trained and capable. Further, Mr. Keaton leads weekly safety meetings designed to identify and avoid unsafe working conditions. He also closely monitors the entire site every day. There has been no testimony that Mr. Keaton or anyone else observed any problems with Mr. Smith or his work abilities.

Therefore, all of the evidence presented in this case demonstrates that Apex did properly inspect the worksite, and instruct its employees in hazard avoidance. As a matter of law, the above-referenced general safety regulations cited by Plaintiff's expert are not specific enough to the working condition involved to be a basis for deliberate intent liability. Moreover, there is no evidence that such regulations were violated.

ii. There is no evidence in the record to suggest that Apex violated 29 C.F.R. § 1926.651(j)(2).

29 C.F.R. § 1926.651(j)(2) provides that “[e]mployees shall be protected from excavated or other materials or equipment that could pose a hazard by falling or rolling into excavations. Protection shall be provided by placing and keeping such materials or equipment at least 2 feet from the edge of excavations, or by the use of retaining devices that are sufficient to prevent materials or equipment from falling or rolling into excavations, or by a combination of both if necessary.”

The common practice in the industry is to either secure the pipe with chocks or blocks so it will not roll, or by cradling the pipe in excavated dirt in a way that prevents the pipe from rolling. *See* Deposition of Bob Keaton, AR 155. The testimony presented in this case demonstrates that the pipe was initially secure. *See id.*, AR 155, 160-161; Deposition of Chris Graham, AR 166, 169.

When the first pipe was lifted and the second pipe left unsecured, the Plaintiff had the opportunity to secure it, but did not. Therefore, Apex diligently complied with this regulation by utilizing retaining devices sufficient to prevent pipes from rolling into excavations. The cause of the accident was the Plaintiff's own carelessness in failing to secure the second pipe upon removal of the first.

iii. There is no evidence in the record to suggest that Apex violated 29 C.F.R. § 1926.651(k)(1).

29 C.F.R. § 1926.651(k)(1) provides that “[d]aily inspections of excavations, the adjacent areas, and protective systems shall be made by a competent person for evidence of a situation that could result in possible cave-ins, indications of failure or protective systems, hazardous atmospheres, or other hazardous conditions. An inspection shall be conducted by a competent person prior to the start of work and as needed throughout the shift.”

Bob Keaton specifically testified that he performs inspections of the trench work and closely monitors the entire job site on a daily basis. *See* Deposition of Bob Keaton, AR 156. The Plaintiff, on the other hand, has presented no evidence that such daily inspections were not done. Nor has the Plaintiff presented any evidence that Mr. Keaton is not competent to perform such inspections. There simply is no evidence that this regulation has been violated by Apex.

In conclusion, the majority of the regulations, standards, and principles contained in Mr. Nelson's report are general regulations that are not specifically applicable to any particular work or working condition, much less those involved in this case. The only specifically applicable regulations or standards alleged by the Plaintiff are 29 C.F.R. § 1926.651(j)(2) and 29 C.F.R. § 1926.651(k)(1), requiring that materials adjacent to excavations be stored in a secure manner, and daily inspections

for hazardous conditions near excavations. However, all of the witnesses in this case testified that the pipe in this case was safety blocked so as to be secured in compliance with the regulation. Further, Mr. Keaton personally performed daily safety inspections to identify workplace hazards. Therefore, there is no evidence that Apex violated a specifically applicable state or federal safety statute, rule or regulation or a commonly accepted and well-known safety standard, which violation proximately caused the subject accident. Accordingly, the Plaintiff cannot prove element (C) of his claim, and the Circuit Court properly granted summary judgment.

4. *Intentional Exposure:* The Circuit Court correctly held that the Plaintiff presented insufficient evidence indicating that Apex intentionally exposed him to an unsafe working condition.

Finally, the Petitioner presented no evidence that Apex intentionally exposed the Plaintiff to an unsafe working condition despite knowing the existence of the same. W. VA. CODE § 23-4-2(d)(2)(ii)(D) requires a plaintiff to prove that the employer “intentionally thereafter exposed an employee to the specific unsafe working condition.”

The evidence gathered in this case indicates that it is the laborer’s responsibility to secure the pipe waiting to be placed into the ditch. If the laborer failed to do this, it is the laborer who exposed himself to the unsafe condition, not the employer. Apex reasonably expected its trained and experienced workers to perform their work safely. Furthermore, there is no evidence that Apex had knowledge that the Plaintiff or anyone else did not secure the second pipe. Without actual knowledge on the part of Apex that an unsafe condition existed, the Plaintiff cannot prove that Apex intentionally exposed him to that unsafe condition.

CONCLUSION AND PRAYER FOR RELIEF

The Plaintiff has been unable to produce any evidence that Apex discriminated against him based on his filing of a workers' compensation claim. Rather, all of the evidence indicates that he was not hired back due to a lack of work in the industry at the time of his request to return to work. The Plaintiff's only "proof" with respect to this claim is an internally inconsistent form filled out by an Apex secretary. That secretary has testified under oath in this matter that she filled the form out incorrectly, and that the Plaintiff was not discharged because of his workers' compensation claim. For these reasons, the Circuit Court properly granted summary judgment with respect to the Plaintiff's workers' compensation discrimination claim.

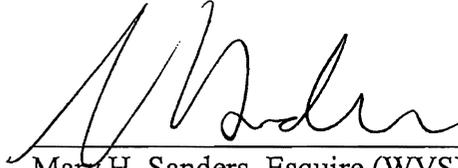
Finally, the Plaintiff's deliberate intent claim also lacks foundation and was appropriate for dismissal by the Circuit Court. The Plaintiff failed to demonstrate evidence supporting elements (A) through (D) of W. VA. CODE § 23-4-2(d)(2)(ii). Therefore, the Plaintiff failed to meet his burden of producing sufficient evidence for a reasonable jury to find in his favor on all five elements of a deliberate intent claim, and the Circuit Court properly granted summary judgment with respect to the Plaintiff's deliberate intent claim.

Therefore, because the Circuit Court's ruling in this case was consistent with the evidence and well within its realm of discretion, the Respondent respectfully prays that this Court deny the Plaintiff's Petition for appeal, affirm the lower court's granting of summary judgment as to all of the

Petitioner's claims, and remove the Petitioner's appeal from this Court's docket.

Respectfully submitted,
APEX PIPELINE SERVICES, INC.

By Counsel,

A handwritten signature in black ink, appearing to read 'M. Sanders', written over a horizontal line.

Mary H. Sanders, Esquire (WVSB #3084)
J. Todd Bergstrom, Esquire (WVSB #11385)
Huddleston Bolen, LLP
707 Virginia Street East, Suite 1300
P. O. Box 3786
Charleston, WV 25337-3786
(304) 344-9869
msanders@huddlestonbolen.com
jbergstrom@huddlestonbolen.com

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 11-1610

JASON J. SMITH

Plaintiff Below, Petitioner

v.

APEX PIPELINE SERVICES, INC.

Defendant Below, Respondent.

CERTIFICATE OF SERVICE

I, Mary H. Sanders, counsel for the Respondent, hereby certify that service of the foregoing *Respondent's Brief* was made upon counsel of record this 6th day of April, 2011, by mailing a true and exact copy thereof via first class United States Mail, postage prepaid, in an envelope addressed as follows:

Charles M. Love, IV (WVSB #7477)
The Masters Law Firm lc
181 Summers Street
Charleston, WV 25301



Mary H. Sanders, Esq.