

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**September 2006 Term**

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**No. 33001**  
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**FILED**

**October 27, 2006**

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SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

**JOSEPH E. RYAN,**  
**Plaintiff Below, Appellant,**

**V.**

**CLONCH INDUSTRIES, INC.,**  
**A WEST VIRGINIA CORPORATION; AND**  
**H&D LUMBER DISTRIBUTOR, INC.,**  
**A WEST VIRGINIA CORPORATION,**  
**Defendants Below, Appellees.**

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**Appeal from the Circuit Court of Nicholas County**  
**Honorable Gary L. Johnson, Judge**  
**Civil Action No. 03-C-126**  
**REVERSED AND REMANDED**

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**Submitted: September 19, 2006**

**Filed: October 27, 2006**

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**CHIEF JUSTICE DAVIS delivered the Opinion of the Court.**  
**JUSTICE STARCHER concurs and reserves the right to file a separate opinion.**  
**JUSTICE BENJAMIN dissents and reserves the right to file a dissenting opinion.**

## SYLLABUS BY THE COURT

1. ““A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.” Syllabus Point 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W. Va. 160, 133 S.E.2d 770 (1963).’ Syllabus Point 1, *Andrick v. Town of Buckhannon*, 187 W. Va. 706, 421 S.E.2d 247 (1992).” Syllabus point 2, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994).

2. “A plaintiff may establish “deliberate intention” in a civil action against an employer for a work-related injury by offering evidence to prove the five specific requirements provided in W. Va. Code, § 23-4-2(c)(2)(ii) (1983).’ Syl. pt. 2, *Mayles v. Shoney’s, Inc.*, 185 W. Va. 88, 405 S.E.2d 15 (1990).” Syllabus point 1, *Bell v. Vecellio & Grogan, Inc.*, 191 W. Va. 577, 447 S.E.2d 269 (1994).

3. The violation of a statute, rule, regulation or standard is a proper foundation for the element of deliberate intent found at W. Va. Code § 23-4-2(c)(2)(ii)(C) (1994) (Repl. Vol. 1998), where such statute, rule, regulation or standard imposes a specifically identifiable duty upon an employer, as opposed to merely expressing a generalized goal, and where the statute, rule, regulation or standard asserted by the employee is capable of application to the specific type of work at issue.

4. “Given the statutory framework of W. Va. Code §§ 23-4-2(c)(2)(i) and (ii), (1983, 1991) which equates proof of the five requirements listed in W. Va. Code § 23-4-2(c)(2)(ii) with deliberate intention, a plaintiff attempting to impose liability on the employer must present sufficient evidence, especially with regard to the requirement that the employer had a subjective realization and an appreciation of the existence of such specific unsafe working condition and the strong probability of serious injury or death presented by such specific unsafe working condition. This requirement is not satisfied merely by evidence that the employer reasonably should have known of the specific unsafe working condition and of the strong probability of serious injury or death presented by that condition. Instead, it must be shown that the employer actually possessed such knowledge.” Syllabus point 3, *Blevins v. Beckley Magnetite, Inc.*, 185 W. Va. 633, 408 S.E.2d 385 (1991).

5. “To establish that an employer has acted with deliberate intention, no higher burden of proof exists beyond those five requirements set forth in *W. Va. Code* § 23-4-2(c)(2)(ii) [1994]. Under the statute, whether an employer has a ‘subjective realization and appreciation’ of an unsafe working condition and its attendant risks, and whether the employer intentionally exposed an employee to the hazards created by the working condition, requires an interpretation of the employer’s state of mind, and must ordinarily be shown by circumstantial evidence, from which conflicting inferences may often reasonably be drawn. Accordingly, while a plaintiff may choose to introduce evidence of prior similar incidents or complaints to circumstantially establish that an employer has acted with deliberate

intention, evidence of prior similar incidents or complaints is not mandated by *W. Va. Code*, 23-4-2(c)(2)(ii) [1994].” Syllabus point 2, *Nutter v. Owens-Illinois, Inc.*, 209 W. Va. 608, 550 S.E.2d 398 (2001).

6. Where an employee has instituted a deliberate intent action against an employer under W. Va. Code § 23-4-2(c)(2)(ii) (1994) (Repl. Vol. 1998), and where the defendant employer has failed to perform a reasonable evaluation to identify hazards in the workplace in violation of a statute, rule or regulation imposing a mandatory duty to perform the same, the performance of which may have readily identified certain workplace hazards, the defendant employer is prohibited from denying that it possessed “a subjective realization” of the hazard asserted in the deliberate intent action, and the employee, upon demonstrating such violation, is deemed to have satisfied his or her burden of proof with respect to showing “subjective realization” pursuant to W. Va. Code § 23-4-2(c)(2)(ii)(C).

**Davis, Chief Justice:**

Joseph E. Ryan, plaintiff below/appellant (hereinafter referred to as “Mr. Ryan”), appeals summary judgment granted in favor of his employer, Clonch Industries, Inc. and H&D Lumber Distributors, Inc., defendants below/appellees (hereinafter collectively referred to as “Clonch”),<sup>1</sup> in a deliberate intent action brought under W. Va. Code § 23-4-2(c)(2)(ii) (1994) (Repl. Vol. 1998).<sup>2</sup> In granting summary judgment, the circuit court of Nicholas County concluded that Mr. Ryan had failed to establish a genuine issue of material fact as to (1) whether Clonch had a subjective realization and appreciation of the existence of a specific unsafe working condition, or a high degree of risk and strong probability of serious injury or death presented by the specific unsafe working condition, and (2) whether there was a specific safety statute violated. We find that Mr. Ryan has met his burden on these two issues and therefore reverse the summary judgment order and remand this case for

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<sup>1</sup>According to Mr. Ryan, H&D Lumber Distributor, Inc. is wholly owned by Clonch Industries, Inc., and both companies are engaged in the sawmilling business. H&D explains that the two companies share officers, directors and offices, and that H&D Lumber Distributor, Inc., is essentially a payroll account pursuant to which the employees, other than those working at Clonch Industries’ sawmill, are paid.

<sup>2</sup>This statute has been amended; however, we apply the law in existence at the time of the injury. *See Kane v. Corning Glass Works*, 175 W. Va. 77, 78 n.1, 331 S.E.2d 807, 808 n.1 (1984) (“The above-cited statute was in effect at the time of the plaintiff’s injury and, therefore, it governs this [deliberate intent] case.” (citations omitted)); *Cline v. Joy Mfg. Co.*, 172 W. Va. 769, 771 n.4, 310 S.E.2d 835, 837 n.4 (1983) (“The above-cited statute was in effect at the time of the plaintiff’s injury and so it controls this [deliberate intent] case.” (citation omitted)). The elements required to prevail in a claim for deliberate intent under the theory asserted by Mr. Ryan may now be found at W. Va. Code § 23-4-2(d)(2)(ii) (2005) (Repl. Vol. 2005).

further proceedings.

## I.

### **FACTUAL AND PROCEDURAL HISTORY**

Although there are many contentions between the parties with respect to what may be gleaned from the evidence in the record, there are a few undisputed facts. Basically, Mr. Ryan was hired by Clonch on August 19, 2002. Clonch is in the lumbering business, and Mr. Ryan was originally hired to perform the job of stacker. Mr. Ryan asserts that prior to this employment, he had never before worked in or around a sawmill or lumberyard. After three weeks of employment, Mr. Ryan was offered a position as a banding man. The job duties of a banding man included cutting measured lengths of metal banding from a coil using tin snips provided by Clonch, placing the bands around pallets of lumber, tightening the bands and crimping the ends together. While Mr. Ryan was cutting metal banding on September 17, 2002, his third day of performing the job of banding man, he was struck in the left eye by a sharp piece of the metal banding material, which caused a deep laceration. Mr. Ryan has undergone five surgeries on his injured eye. It has been determined that he has been rendered permanently blind in that eye.

Thereafter, Mr. Ryan filed a deliberate intent claim against Clonch under W. Va. Code § 23-4-2(c)(2)(ii). Prior to trial, by order entered April 21, 2005, the Circuit Court of Nicholas County granted summary judgment in favor of Clonch based upon its

conclusion that Mr. Ryan had failed to establish two of the five elements of W. Va. Code § 23-4-2(c)(2)(ii). Specifically, the circuit court concluded that Mr. Ryan failed to establish a genuine issue of material fact as to (1) whether Clonch had a subjective realization and appreciation of the existence of a specific unsafe working condition, or a high degree of risk and strong probability of serious injury or death presented by the specific unsafe working condition, and (2) whether there was a specific safety statute, rule or regulation violated. It is from the circuit court's summary judgment order that Mr. Ryan now appeals.

## II.

### STANDARD OF REVIEW

The instant case is before this Court on appeal of an order of the circuit court granting summary judgment in favor of Clonch. Accordingly, our review of this case is *de novo*. Syl. pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994) (“A circuit court’s entry of summary judgment is reviewed *de novo*.”). In performing our plenary review, we are mindful that

“‘[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.’ Syllabus Point 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W. Va. 160, 133 S.E.2d 770 (1963).” Syllabus Point 1, *Andrick v. Town of Buckhannon*, 187 W. Va. 706, 421 S.E.2d 247 (1992).

Syl. pt. 2, *Painter*. Finally, we note that “[t]he circuit court’s function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to

determine whether there is a genuine issue for trial.” Syl. pt. 3, *Painter*.

### III.

#### DISCUSSION

To overcome the immunity afforded Clonch under the West Virginia workers’ compensation system and establish deliberate intent under the theory propounded by Mr. Ryan, he is required to establish each of the elements set out in W. Va. Code § 23-4-2(c)(2)(ii).<sup>3</sup> This Court acknowledged the same when it held that “[a] plaintiff may establish “deliberate intention” in a civil action against an employer for a work-related injury by

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<sup>3</sup>“The statute creating a legislative standard for loss of employer immunity from civil liability for work-related injury to employees found in W. Va. Code § 23-4-2 (1983) essentially sets forth two separate and distinct methods of proving ‘deliberate intention.’” Syl. pt. 1, *Mayles v. Shoney’s, Inc.*, 185 W. Va. 88, 405 S.E.2d 15 (1990). As noted, Mr. Ryan has asserted his claim against Clonch under W. Va. Code § 23-4-2(c)(2)(ii). A deliberate intent cause of action may also be brought under W. Va. Code § 23-4-2(c)(2)(i), where

[i]t is proved that such employer or person against whom liability is asserted acted with a consciously, subjectively and deliberately formed intention to produce the specific result of injury or death to an employee. This standard requires a showing of an actual, specific intent and may not be satisfied by allegation or proof of (A) conduct which produces a result that was not specifically intended; (B) conduct which constitutes negligence, no matter how gross or aggravated; or (C) willful, wanton or reckless misconduct[.]

The foregoing provision has been amended and can now be found at W. Va. Code § 23-4-2(d)(2)(i) (2005) (Repl. Vol. 2005)). Mr. Ryan has not asserted a claim under W. Va. Code § 23-4-2(c)(2)(i).

offering evidence to prove the five specific requirements provided in W. Va. Code, § 23-4-2(c)(2)(ii) (1983).’ Syl. pt. 2, *Mayles v. Shoney’s, Inc.*, 185 W. Va. 88, 405 S.E.2d 15 (1990).” Syl. pt. 1, *Bell v. Vecellio & Grogan, Inc.*, 191 W. Va. 577, 447 S.E.2d 269 (1994). The aforementioned statutory provision states that

(2) The immunity from suit provided under this section and under section six-a, [§ 23-2-6a] article two of this chapter, may be lost only if the employer or person against whom liability is asserted acted with “deliberate intention”. This requirement may be satisfied only if:

....

(ii) The trier of fact determines, either through specific findings of fact made by the court in a trial without a jury, or through special interrogatories to the jury in a jury trial, that all of the following facts are proven:

(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 had a subjective realization and an appreciation of the existence of such specific unsafe working condition and of the high degree of risk and the strong probability of serious injury or death presented by such specific unsafe working condition;

(C) That such 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 such employer, 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) hereof, such employer nevertheless thereafter exposed an employee to such specific unsafe working condition intentionally; and

(E) That such employee so exposed suffered serious injury or death as a direct and proximate result of such specific unsafe working condition.

W. Va. Code § 23-4-2(c)(2)(ii).

Because the circuit court based its summary judgment ruling on its determination that Mr. Ryan failed to establish elements (B) and (C) above,<sup>4</sup> our discussion

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<sup>4</sup>See W. Va. Code § 23-4-2(c)(2)(iii)(B) (“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) of the preceding paragraph (ii) do not exist . . .”). With respect to this provision, we have held that

The portion of the statute which authorizes “prompt judicial resolution” of “deliberate intention” actions against employers, specifically, *W. Va. Code*, 23-4-2(c)(2)(iii)(B) [1983, 1991], relates to plaintiffs’ more specific substantive law burden under the five-element test of *W. Va. Code*, 23-4-2(c)(2)(ii)(A)-(E) [1983, 1991], but the preexisting procedural law still applies for granting employers’ motions for summary judgment, directed verdict and judgment notwithstanding the verdict.

Syl. pt. 3, *Sias v. W-P Coal Co.*, 185 W. Va. 569, 408 S.E.2d 321 (1991).

will be limited to those two criteria.<sup>5</sup> We will first discuss subsection (C).

***A. Violation of Safety Statute, Rule, Regulation or Industry Standard***

In order to overcome Clonch’s motion for summary judgment as to W. Va. Code § 23-4-2(c)(2)(ii)(C), Mr. Ryan was required to establish a question of fact existed with respect to whether the specific unsafe working condition of which he complained

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 such employer, 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.

In granting summary judgment to Clonch in the instant case, the circuit court found that “[t]he safety regulations cited by [Mr. Ryan] regarding the use of safety glasses and a hazard assessment are general regulations that do not apply specifically to the cutting of bands.” Accordingly, the circuit court concluded that Mr. Ryan had failed to establish “the violation of a safety statute, rule, regulation, or industry standard specifically applicable to the band cutting process.” We disagree with the circuit court’s conclusion that Mr. Ryan failed to submit evidence that Clonch had violated a regulation specifically applicable to the

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<sup>5</sup>No issues involving the remaining elements of W. Va. Code § 23-4-2(c)(2)(ii), namely subsections (A), (D) and (E), are presently before this Court.

band cutting process.

Mr. Ryan has provided expert testimony that Clonch violated several regulations; however we will focus our attention only on a regulation of the Occupational Safety and Health Administration (hereinafter referred to as “OSHA”), found at 29 C.F.R. § 1910.132(d)(1) (2006),<sup>6</sup> which required Clonch to conduct a hazard assessment “to

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<sup>6</sup>29 C.F.R. §1910.132(d) was last amended in 1994 and states:

(d) *Hazard assessment and equipment selection.* (1) The employer shall assess the workplace to determine if hazards are present, or are likely to be present, which necessitate the use of personal protective equipment (PPE). If such hazards are present, the employer shall:

(i) Select, and have each affected employee use, the types of PPE that will protect the affected employee from the hazards identified in the hazard assessment;

(ii) Communicate selection decisions to each affected employee; and,

(iii) Select PPE that properly fits each affected employee.

NOTE: Non-mandatory Appendix B contains an example of procedures that would comply with the requirement for a hazard assessment.

(2) The employer shall verify that the required workplace hazard assessment has been performed through a written certification that identifies the workplace evaluated; the person certifying that the evaluation has been performed; the date(s) of the hazard assessment; and, which identifies the document as a certification of hazard assessment.

determine if hazards are present, or are likely to be present, which necessitate the use of personal protective equipment (PPE).” This regulation further directs that “[i]f such hazards are present, the employer shall: . . . (i) Select, and have each affected employee use, the types of PPE that will protect the affected employee from the hazards identified in the hazard assessment[.]” 29 C.F.R. § 1910.132(d)(1).

Clonch has conceded that it failed to perform the hazard evaluation mandated by 29 C.F.R. §1910.132(d)(1),<sup>7</sup> and that it did not require Mr. Ryan to wear safety goggles or any other personal protective equipment.<sup>8</sup> Clonch argues, however, that this regulation is merely a regulation “generally requiring safe workplaces, equipment or working conditions.” W. Va. Code § 23-4-2(c)(2)(ii)(C). Therefore, Clonch asserts that its violation of this regulation is insufficient to establish the violation of a regulation “specifically applicable to the particular work and working condition [herein] involved.” W. Va. Code § 23-4-2(c)(2)(ii)(C). Again, we disagree.

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<sup>7</sup>Lloyd D. Clonch, vice president and secretary of Clonch, and also one of its owners, testified in his deposition that no one employed by Clonch had ever conducted a hazard assessment, and he had no knowledge of anyone being hired to come to the facility to perform such an assessment.

<sup>8</sup>Scott Clonch, superintendent of the Clonch Kilns and Kiln yard, which is also known as the “dry side” of the lumber yard and included the banding operation, gave deposition testimony that employees working on the “dry side” of the lumber yard were not required to wear safety goggles or any other type of protective gear. Likewise, C.J. Hicks, who was the yard foreman at the time of Mr. Ryan’s injury, testified in his deposition that no one at Clonch was required to wear safety glasses.

W. Va. Code § 23-4-2(c)(2)(ii)(C) expressly states that the type of statute, rule, regulation or standard, the violation of which is adequate to establish this prong of the five part test for this type of deliberate intent action, is a “statute, rule, regulation or standard [that is] 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.*” (Emphasis added). We find no ambiguity in this language. Thus, we must apply its plain terms.

“‘Where the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation.’ Syl. Pt. 2, *Crockett v. Andrews*, 153 W. Va. 714, 172 S.E.2d 384 (1970).” Syllabus Point 4, *Syncor International Corp. v. Palmer*, 208 W. Va. 658, 542 S.E.2d 479 (2001).

Syl. pt. 4, *Charter Communs. VI, PLLC v. Community Antenna Serv., Inc.*, 211 W. Va. 71, 561 S.E.2d 793 (2002).

Contrary to what the circuit court order indicates, the OSHA regulation found at 29 C.F.R. § 1910.132(d)(1) is not rendered a regulation “*generally requiring safe workplaces, equipment or working conditions,*” merely because it does not expressly identify the banding process. W. Va. Code § 23-4-2(c)(2)(ii)(C). A regulation “*generally requiring safe workplaces, equipment or working conditions,*” would merely require safety in a broad sense, without imposing a specific affirmative duty upon an employer.<sup>9</sup> W. Va. Code § 23-4-

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<sup>9</sup>An example of such a regulation may be found at 29 C.F.R. § 1903.1 (2006),  
(continued...)

2(c)(2)(ii)(C). This Court has rejected deliberate intent actions based upon these types of regulations or standards. *See, e.g., Miller v. City Hosp., Inc.*, 197 W. Va. 403, 409, 475 S.E.2d 495, 501 (1996) (rejecting proof of violation “based on the *general knowledge* of the ‘cause and effect between high stress and clinical depression and other disorders,’” and commenting that a general allegation is not a “‘specific unsafe working condition [which] was a violation of a state or federal safety statute . . . .’” (footnote omitted) (emphasis added)); *Tolly v. ACF Indus., Inc.*, 212 W. Va. 548, 557, 575 S.E.2d 158, 167 (2002) (*per curiam*) (commenting, after noting the absence of any regulation requiring an employer to monitor for isocyanates, that “[a]rguably, any such duty [to separately monitor for isocyanates] would only arise under a generalized notion of providing a safe workplace and . . . a violation of such a general duty does not rise to the level of a ‘deliberate intention’ action”).

By contrast, 29 C.F.R. §1910.132(d)(1) does not merely require a safe workplace, or safe equipment or working conditions. Instead, it imposes a specific mandatory duty upon employers in the labor industry to assess their workplaces for the purpose of identifying hazards, assessing the need for protective equipment, and, where a

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<sup>9</sup>(...continued)

which is titled “Purpose and scope,” and notes that the “Williams-Steiger Occupational Safety and Health Act of 1970 (84 Stat. 1590 *et seq.*, 29 U.S.C. 651 *et seq.*) requires, in part, that every employer covered under the Act furnish to his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to [] employees.”

need is identified, requiring employees to use the requisite safety equipment.<sup>10</sup> Because 29 C.F.R. §1910.132(d)(1) prescribes specifically identified duties, as opposed to merely expressing a generalized goal of safety, we conclude that it is not the type of regulation “generally requiring safe workplaces, equipment or working conditions” that is rejected as a foundation for a deliberate intent action under W. Va. Code § 23-4-2(c)(2)(ii)(C). *Cf. Zuniga v Stam Realty*, 647 N.Y.S.2d 426, 430, 169 Misc.2d 1004, 1009 (1996) (finding, in connection with a labor law case that required violation of a specific administrative rule as opposed to broad regulatory standard, that “the Industrial Code provision . . . which mandates ‘continuing inspections . . . made by designated persons as the work progresses to detect any hazards to any person resulting from . . . loosened material,’ is . . . a specific safety regulation -- ‘a concrete specification’ -- in contrast to a general safety standard. It directs

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<sup>10</sup>29 C.F.R. §1910.132(d)(1) states, in relevant part, that

“[t]he employer *shall* assess the workplace to determine if hazards are present, or are likely to be present, which necessitate the use of personal protective equipment (PPE). If such hazards are present, or likely to be present, the employer *shall*:

(i) Select, and have each affected employee use, the types of PPE that will protect the affected employee from the hazards identified in the hazard assessment. . . .

(Emphasis added). This Court has long recognized that “[i]t is well established that the word “shall,” in the absence of language in the statute showing a contrary intent on the part of the Legislature, should be afforded a mandatory connotation.” Syl. pt. 1, *E.H. v. Matin*, 201 W. Va. 463, 498 S.E.2d 35 (1997) (internal citation omitted). *See also State v. Allen*, 208 W. Va. 144, 153, 539 S.E.2d 87, 96 (1999) (“Generally, ‘shall’ commands a mandatory connotation and denotes that the described behavior is directory, rather than discretionary.” (citations omitted)).

those subject to its protective scope to take definitive, affirmative action. Plainly, it does far more than impose a general, nonspecific regulatory or safety standard . . .”).

This conclusion does not end our analysis, however. Under W. Va. Code § 23-4-2, the specific duty imposed by the statute, rule, regulation or standard must also be “*specifically applicable* to the particular work and working condition involved.” W. Va. Code § 23-4-2(c)(2)(ii)(C) (emphasis added). The circuit court’s conclusion that 29 C.F.R. § 1910.132(d)(1) is not “specifically applicable” to the banding process because such process is not expressly mentioned therein applies an unreasonably narrow meaning to the phrase “specifically applicable.” It is well established that “[g]enerally the words of a statute are to be given their ordinary and familiar significance and meaning, and regard is to be had for their general and proper use.” Syl. pt. 4, *State v. General Daniel Morgan Post No. 548, V.F.W.*, 144 W. Va. 137, 107 S.E.2d 353 (1959). We interpret W. Va. Code § 23-4-2(c)(2)(ii)(C) as simply requiring that the statute, rule, regulation or standard asserted by an employee be capable of application to the specific type of work at issue. For example, a regulation directed specifically to coal mining could not be used as a basis for establishing a violation by an employer operating exclusively in the lumber industry, while a regulation falling under a more general classification, such as labor, might be applicable to several different industries.

Based upon the foregoing discussion, we now hold that the violation of a

statute, rule, regulation or standard is a proper foundation for the element of deliberate intent found at W. Va. Code § 23-4-2(c)(2)(ii)(C) (1994) (Repl. Vol. 1998), where such statute, rule, regulation or standard imposes a specifically identifiable duty upon an employer, as opposed to merely expressing a generalized goal, and where the statute, rule, regulation or standard asserted by the employee is capable of application to the specific type of work at issue.

Turning to the instant case, 29 C.F.R. § 1910.132(d)(1) is classified as a regulation relating to labor. There is no dispute that the work performed by Mr. Ryan falls into the category of labor. Moreover, insofar as 29 C.F.R. § 1910.132(d)(1) requires, in mandatory terms, that employers “assess the *workplace* to determine if hazards are present,” it applies with equal force to the banding operation as it would to any other process that occurred within the employer’s workplace. Thus, we conclude, that Clonch’s violation of the OSHA regulation found at 29 C.F.R. § 1910.132(d)(1), which required Clonch to conduct a hazard assessment and to require the use of personal protective equipment where hazards were identified by virtue of the assessment, satisfied Mr. Ryan’s burden of establishing the violation of a regulation in connection with his deliberate intent action pursuant to W. Va. Code § 23-4-2(c)(2)(ii)(C). Accordingly, we find that the circuit court erred in granting summary judgment in favor of Clonch with respect to its violation of a specific regulation.

### ***B. Subjective Realization***

In order to overcome summary judgment with regard to subsection (B) of W. Va. Code § 23-4-2(c)(2)(ii), Mr. Ryan was required to establish a question of fact as to whether Clonch “had a subjective realization and an appreciation 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 such specific unsafe working condition[.]” W. Va. Code § 23-4-2(c)(2)(ii)(B).

This Court has previously held that

Given the statutory framework of W. Va. Code §§ 23-4-2(c)(2)(i) and (ii), (1983, 1991) which equates proof of the five requirements listed in W. Va. Code § 23-4-2(c)(2)(ii) with deliberate intention, a plaintiff attempting to impose liability on the employer must present sufficient evidence, especially with regard to the requirement that the employer had a subjective realization and an appreciation of the existence of such specific unsafe working condition and the strong probability of serious injury or death presented by such specific unsafe working condition. *This requirement is not satisfied merely by evidence that the employer reasonably should have known of the specific unsafe working condition and of the strong probability of serious injury or death presented by that condition. Instead, it must be shown that the employer actually possessed such knowledge.*

Syl. pt. 3, *Blevins v. Beckley Magnetite, Inc.*, 185 W. Va. 633, 408 S.E.2d 385 (1991) (emphasis added). While the type of evidence presented to establish the requisite subjective knowledge on the part of the employer often has been presented as evidence of prior similar injuries or of prior complaints to the employer regarding the unsafe working condition, this

Court has clarified that

To establish that an employer has acted with deliberate intention, no higher burden of proof exists beyond those five requirements set forth in *W. Va. Code* § 23-4-2(c)(2)(ii) [1994]. Under the statute, whether an employer has a “subjective realization and appreciation” of an unsafe working condition and its attendant risks, and whether the employer intentionally exposed an employee to the hazards created by the working condition, *requires an interpretation of the employer’s state of mind, and must ordinarily be shown by circumstantial evidence, from which conflicting inferences may often reasonably be drawn. Accordingly, while a plaintiff may choose to introduce evidence of prior similar incidents or complaints to circumstantially establish that an employer has acted with deliberate intention, evidence of prior similar incidents or complaints is not mandated by W. Va. Code, 23-4-2(c)(2)(ii) [1994].*

Syl. pt. 2, *Nutter v. Owens-Illinois, Inc.*, 209 W. Va. 608, 550 S.E.2d 398 (2001) (emphasis added). *See also Sias v. W-P Coal Co.*, 185 W. Va. 569, 575, 408 S.E.2d 321, 327 (“Subjective realization, like any state of mind, must be shown usually by circumstantial evidence, from which, ordinarily, conflicting inferences reasonably can be drawn.”).

Mr. Ryan contends that all he was required to prove was that Clonch had a subjective realization of the fact that Mr. Ryan was using tin snips to cut metal banding without the use of protective eyewear. We disagree with this proposition as the relevant statute expressly requires Mr. Ryan to establish that Clonch also realized the “high degree of risk and the strong probability of serious injury or death presented by [the] specific unsafe working condition.” *W. Va. Code* § 23-4-2(c)(2)(ii)(B). Clonch maintains that no evidence

was presented to show that it had a subjective realization and appreciation of any specific unsafe working condition regarding the band cutting job or any high degree of risk and strong probability of injury presented thereby. Clonch concedes that there is no dispute that it did not require or instruct Mr. Ryan to wear safety glasses while cutting bands. However, Clonch argues that Mr. Ryan was able to produce no evidence that any Clonch supervisor believed that this was an unsafe working condition that posed a high degree of risk and a strong probability of serious injury.

While we agree with Clonch that Mr. Ryan's evidence with respect to Clonch's actual subjective knowledge of the existence of an unsafe working condition was lacking, we nevertheless find that Mr. Ryan's evidence that Clonch violated its mandatory duty to perform a hazard evaluation pursuant to the OSHA regulation found at 29 C.F.R. § 1910.132(d)(1), along with Clonch's admission of the same, requires greater scrutiny of this issue.

The aforementioned regulation, 29 C.F.R. § 1910.132(d)(1), directs, in relevant part, that

[t]he employer *shall* assess the workplace to determine if hazards are present, or are likely to be present, which necessitate the use of personal protective equipment (PPE). If such hazards are present, or likely to be present, the employer *shall*:

(i) Select, and have each affected employee use, the types of PPE that will protect the affected employee from the hazards

identified in the hazard assessment. . . .

(Emphasis added). By utilizing the term “shall,” this regulation signals that its terms are mandatory. ““It is well established that the word “shall,” in the absence of language in the statute showing a contrary intent on the part of the Legislature, should be afforded a mandatory connotation.”” Syl. pt. 1, *E.H. v. Matin*, 201 W. Va. 463, 498 S.E.2d 35 (1997) (internal citation omitted).

Had Clonch complied with this mandatory statute, as it was required to do, it would either have had documented evidence to support its claim that the banding operation was not hazardous and required no personal protective equipment, or, in the alternative, it would have discovered any hazards associated with the process and would then have been under a duty to prescribe appropriate protective equipment. Instead, Clonch simply ignored this mandatory duty, and now seeks to avoid liability in a deliberate intent action by claiming a lack of subjective knowledge. We find such conduct unconscionable.

Our role when addressing statutory provisions is to give effect to the intent of the legislature. In this regard, we have often declared that “[t]he primary object in construing a statute is to ascertain and give effect to the intent of the Legislature.” Syl. pt. 1, *Smith v. State Workmen’s Comp. Comm’r*, 159 W. Va. 108, 219 S.E.2d 361 (1975). However, “[a] statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect.” Syl. pt.

2, *State v. Epperly*, 135 W. Va. 877, 65 S.E.2d 488 (1951). Unquestionably, the Legislature intended, by operation of W. Va. Code § 23-4-2(c)(2)(ii), to pierce the immunity from tort liability granted to employers under our workers' compensation system when all of the five elements enumerated therein have been established. Certainly, however, the Legislature did not intend for an employer to circumvent liability by purposefully avoiding the subjective knowledge element by violating a mandatory regulatory duty. Likewise, we simply cannot condone any employer's attempt to avoid an otherwise viable deliberate intent action by conducting itself "like the proverbial ostrich who sticks his head in the sand to avoid seeing the obvious . . . ." *State ex rel. League of Women Voters of West Virginia v. Tomblin*, 209 W. Va. 565, 578, 550 S.E.2d 355, 368 (2001) (Davis, J., dissenting). Accordingly, we now hold that where an employee has instituted a deliberate intent action against an employer under W. Va. Code § 23-4-2(c)(2)(ii) (1994) (Repl. Vol. 1998), and where the defendant employer has failed to perform a reasonable evaluation to identify hazards in the workplace in violation of a statute, rule or regulation imposing a mandatory duty to perform the same, the performance of which may have readily identified certain workplace hazards, the defendant employer is prohibited from denying that it possessed "a subjective realization" of the hazard asserted in the deliberate intent action, and the employee, upon demonstrating such violation, is deemed to have satisfied his or her burden of proof with respect to showing "subjective realization" pursuant to W. Va. Code § 23-4-2(c)(2)(ii)(C).<sup>11</sup>

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<sup>11</sup>Of course, the employee must also fulfill his or her burden of establishing the  
(continued...)

In the instant case, Clonch has admitted that it failed to comply with the mandatory duty to perform a hazard evaluation imposed upon it by OSHA. *See* 29 C.F.R. § 1910.132(d)(1). Indeed Clonch brazenly argues in its brief that “[personal protective equipment (PPE)], including safety glasses, is required *only if* the employer determines, through a hazard assessment, that a hazard exists (or is likely to exist) which necessitates the use of PPE. [Clonch] did not identify a hazard requiring PPE regarding the band cutting job.” (Emphasis added). Clonch could not have identified such a hazard by virtue of a hazard evaluation because it violated its mandatory duty to perform such an evaluation. Accordingly, Mr. Ryan is deemed to have met his burden of establishing Clonch’s subjective realization with respect to the hazards of the band cutting job and the need for protective glasses. The circuit court’s award of summary judgment on this issue was in error, and is hereby reversed.

#### IV.

#### CONCLUSION

For the reasons explained in the body of this opinion, the April 21, 2005, order of the Circuit Court of Nicholas County granting summary judgment to Clonch is reversed, and this case is remanded for further proceedings consistent with this opinion.

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<sup>11</sup>(...continued)

remaining four elements of W. Va. Code § 23-4-2(c)(2)(ii) in order to overcome summary judgment and/or ultimately succeed in his or her deliberate intent action.

Reversed and Remanded.