

11-0610

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FILED  
OCT 19 AM 11:57  
CATHY S. GIBSON  
KANAWHA COUNTY CLERK

JASON J. SMITH,

Plaintiff,

v.

Civil Action No.: 09-C-2087  
Honorable Tod Kaufman

APEX PIPELINE SERVICES, INC.,  
a West Virginia Corporation,

Defendant.

**ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

On a previous day came, the Defendant, Apex Pipeline Services, Inc., by counsel, Mary H. Sanders, J. Todd Bergstrom, and Huddleston Bolen LLP, and Plaintiff by counsel, Charles M. Love, IV for hearing on Defendant's Amended Motion for Summary Judgment. After argument of counsel and review of the record, the Court makes the following findings and conclusions.

**FACTUAL BACKGROUND**

The Defendant Apex temporarily hires employees out of the union hall as needed. The Plaintiff in this case was hired out of the union hall for a specific job. On September 30, 2008, the Plaintiff was in the process of stringing natural gas pipeline with several co-workers at a job site in Boone County, West Virginia. In preparation for lowering the pipe into the trench, two pipes were lying side by side across the trench. Wooden chocks were placed on the outside of the two pipes to keep them secure on one side of the ditch, and the pipe was secured on the other side of the ditch by being cradled in the loose dirt that was removed from the trench. 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. The Plaintiff failed to move the wooden chock flush to the remaining pipe when the first pipe was lifted, leaving it unsecured. After the Plaintiff entered the

trench to put the pipe in place, the second pipe rolled, and struck him in the back. Due to the pipe striking Plaintiff, the Plaintiff filed for workers' compensation benefits.

By the time Plaintiff requested a return to work in May 2009, the job Plaintiff had been hired to do had been completed. The Plaintiff contacted Apex to inquire about returning to work in May 2009, and was told there was no work. Several of Apex's permanent employees were also drawing unemployment due to a lack of work. There being no available work, Plaintiff then contacted Apex regarding filing for unemployment compensation.

On Plaintiff's unemployment compensation form, Apex's secretary, Pam Moss, inadvertently checked the incorrect box on the unemployment form. Ms. Moss marked a box stating that Plaintiff was "discharged" due to "workers comp. injury." The top of the form, however, also states that separation was due to "lack of work." Ms. Moss testified in deposition that "I checked the wrong box on the form." When the Plaintiff called her to inform her of her error, Ms. Moss took the necessary action to correct her error. Ms. Moss testified: "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." She specifically testified that "Mr. Smith wasn't let go," and that he wasn't hired back because "[t]here was no work available." 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.

### CONCLUSIONS OF LAW

For a Plaintiff-employee to overcome the workers' compensation immunity in West Virginia, 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.<sup>1</sup>

The West Virginia Supreme Court of Appeals (“WVSCA”) mandates the use of summary judgment where a Plaintiff fails with regard to even one of the five elements.<sup>2</sup> The WVSCA has held 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.”<sup>3</sup> In this case, the Plaintiff’s deliberate intent claim fails because the Plaintiff cannot present evidence supporting elements (A) through (D).

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<sup>1</sup> W. VA. CODE § 23-4-2(d)(2)(ii).

<sup>2</sup> See e.g., *Tolley v. ACF Indus. Inc.*, 212 W.Va. 548, 559 (2002).

<sup>3</sup> *Id.* at 552.

***(A) Specific Unsafe Working Condition: The Plaintiff has failed to proffer a specific unsafe working condition that was not caused by the Plaintiff's own carelessness***

The first element of the Plaintiff's deliberate intent claim requires him to prove that an unsafe working condition existed "[w]hich presented a high degree of risk and a strong probability of serious injury or death[.]"<sup>4</sup> According to the Plaintiff's expert, the specific unsafe working condition 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. The Plaintiff testified that he believed it the responsibility of the person stringing the pipe to secure them so they do not roll. He did not believe that it was his job to secure pipes. 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. The only unsafe condition that existed on this jobsite occurred after the Plaintiff failed 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 caused by Apex.

***(B) Actual Knowledge: No evidence has been presented that Apex management was aware that the Plaintiff failed to secure the pipe that caused his injuries***

The WVSCA 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

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<sup>4</sup> *Id.*

condition.<sup>5</sup> Rather, it must be shown that the employer actually possessed such knowledge.<sup>6</sup> “This is a high threshold that cannot be successfully met by speculation or conjecture.”<sup>7</sup>

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.<sup>8</sup> In *Deskings v. Jack Drilling Co.*, 215 W.Va. 525 (2004) (per curiam), the WVSCA 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).

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 to suggest that Apex had “actual knowledge” of the alleged high risk of serious injury or death associated with the purported unsafe working condition identified by the Plaintiff. Furthermore, there is no 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

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<sup>5</sup> Syl. Pt. 3, *Blevins v. Beckley Magnetite, Inc.*, 185 W.Va. 633 (1991); see also *Blake v. John Skidmore Truck Stop, Inc.*, 201 W.Va. 126 (1997); *Deskings v. S.W. Jack Drilling Co.*, 215 W. Va. 525 (2004).

<sup>6</sup> *Id.*

<sup>7</sup> *Mumaw v. U.S. Silica Co.*, 204 W. Va. 6, 12 (1998).

<sup>8</sup> *Sedgmer v. McElroy Coal Co.*, 220 W. Va. 66 (2006).

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. Plaintiff's expert's opinions are based solely upon the "singular incident" and are likewise not probative of Apex's knowledge prior to the accident. In this case, there is no evidence of actual knowledge of an unsafe working condition other than the Plaintiff's unsubstantiated allegations. Accordingly, the Plaintiff cannot prove element (B) of his claim.

**(C) *Violation of Standard:* The Plaintiff has 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 this case, the Plaintiff has failed to present evidence sufficient to prove the violation of any safety statute, rule, regulation, or standard. Plaintiff complains of several violations of general health and safety regulations; however, there is no evidence that any of these regulations were even violated. Specifically, Plaintiff is unable to present any evidence that Apex failed to instruct its employees in the avoidance of unsafe working conditions, that Apex improperly secured the pipes, or that Apex did not regularly inspect the jobsite, tools and equipment. In fact, the evidence shows that Apex hires union personnel that are specifically experienced in the pipe line field. 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. In addition, the pipe at issue was initially secure with chocks as is a common practice in the industry. Therefore, all of the evidence presented in this case demonstrates that Apex did properly inspect the worksite, instruct its employees in hazard avoidance, and properly secure the pipes.

**(D) Intentional Exposure: The Plaintiff has presented no evidence that Apex intentionally exposed him to an unsafe working condition.**

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 in this case indicates that it is the laborer’s responsibility to secure the pipe waiting to be placed into the ditch. 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.

In regards to the Plaintiff’s cause 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.”<sup>9</sup> 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

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<sup>9</sup> W. VA. CODE § 23-5A-1 (2011).

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.<sup>10</sup>

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.<sup>11</sup> The Plaintiff's workers' compensation claim had settled, and therefore his temporary total disability benefits had expired by the time he sought reinstatement with Apex. Thus, there is no genuine issue of material fact regarding Apex's alleged violation of § 23-5A-3(a).

In addition, 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. 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."<sup>12</sup> 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." Further, the Plaintiff admitted in his interrogatory responses that he had not yet been released to return to work as of January 27, 2010. 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:

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<sup>10</sup> *Id.* at § 23-5A-3.

<sup>11</sup> *See id.*; *Rollins v. Mason County Bd. of Educ.*, 200 W.Va. 386, 391 (1997).

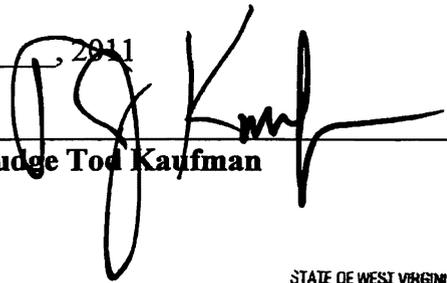
(1) an on-the-job injury was sustained; (2) proceedings were instituted under the Workers' Compensation Act, W. Va. Code, 23-1-1, et seq.; and (3) the filing of a workers' compensation claim was a significant factor in the employer's decision to discharge or otherwise discriminate against the employee.<sup>13</sup>

In this case, there is no 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. Plaintiff has produced no evidence that he was discriminated against.

Accordingly, for good cause shown, the Court hereby **GRANTS** the Defendant's Amended Motion for Summary Judgment with respect to the Plaintiff's deliberate intent claim and Plaintiff's worker's compensation discrimination claim.

The Clerk is directed to send a certified copy of this Order to all counsel of record.

Entered this 18 day October, 2011

  
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Judge Tod Kaufman

STATE OF WEST VIRGINIA  
COUNTY OF KANAWHA, SS  
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY  
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING  
IS A TRUE COPY FROM THE RECORDS OF SAID COURT  
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 20<sup>th</sup>  
DAY OF October, 2011  
Cathy S. Gatson CLERK  
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA KH

<sup>12</sup> *Bailey v. Mayflower Vehicles Sys., Inc.*, 218 W.Va. 273, 278 (2005).

<sup>13</sup> Syl. Pt. 1, *Powell v. Wyo. Cablevision*, 184 W.Va. 700 (1991).