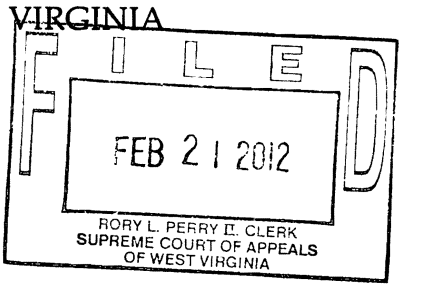
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



NO. 11-1610

JASON J. SMITH

Plaintiffs below, Petitioners,

v.

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

Defendants below, Respondent.

PETITIONERS' BRIEF

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TABLE OF CONTENTS

I. Assignments of Error 1

A. The Trial Court Committed Reversible Error By Granting Summary Judgment In Favor Of The Appellee Where The Appellant Demonstrated By Competent That His Claim Of Workers Compensation Discrimination Was Meritorious And That At The Very Least Questions Of Material Fact Existed With Regard To The Claim That A Jury Should Have Decided. 1

B. The Trial Court Committed Reversible Error By Granting Summary Judgment In Favor Of The Appellee Where The Appellant Demonstrated By Evidence A Meritorious Deliberate Intent Claim And That There Were Genuine Issues If Material Fact Demonstrating That The Appellee Was Liable For Injuries Sustained By The Appellant In His Deliberate Intent Action Against The Appellee. 1

II. Statement of the Case 1

1. Procedural History 1
2. Statement of Facts 1

III. Summary of Argument 4

IV. Statement Regarding Oral Argument and Decision 5

V. Argument 6
1. Standard of Review 6
2. Assignments of Error 6

A. The trial court committed reversible error by granting summary judgment in favor of the appellee where the appellant demonstrated by competent that his claim of workers compensation discrimination was meritorious and that at the very least questions of material fact existed with regard to the claim that a jury should have decided. 6

B. The trial court committed reversible error by granting summary judgment in favor of the appellee where the appellant demonstrated by evidence a meritorious deliberate intent claim and that there were genuine issues if material fact demonstrating that the appellee was liable for injuries sustained by the appellant in his deliberate intent action against the appellee. 9

3. Conclusion 26

TABLE OF AUTHORITIES

Cases

G.Nestor, II v. Bruce Hardwood Floors, L.P. 210 W.Va. 692, 558 S.E.2d 691 (2001)..... 7

Miller v. City Hosp., Inc., 197 W.Va. 403, 475 S.E.2d 495 (W.Va. 1996)..... 6

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

Powell v. Wyoming Cablevision, Inc., 184 W.Va. 700, 403, S.E.2d 717 (1991)..... 7,9

Ramey v. Contractor Enterprises, Inc., 693 S.E.2d 789, 794—797 (W.Va. 2010)..... 23

Ryan v. Clonch Industries, Inc., 639 S.E. 2d 756 (W.Va. 2006)..... 21, 23

Skaggs v. Eastern Associated Coal Corp. 212 W,Va. 248, 569 S.E.2d 769 (2002)..... 7

St. Peter v. Ampak Division of Gatewood Products, Inc. 199 W.Va. 365, 484 S.E.2d 481 (1997) 9

Authorities

W.Va. Code § 23-4-2(d)(2)(ii)..... 10

I. ASSIGNMENTS OF ERROR

A. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY GRANTING SUMMARY JUDGMENT IN FAVOR OF THE APPELLEE WHERE THE APPELLANT DEMONSTRATED BY COMPETENT EVIDENCE THAT HIS CLAIM OF WORKERS COMPENSATION DISCRIMINATION WAS MERITORIOUS AND THAT AT THE VERY LEAST QUESTIONS OF MATERIAL FACT EXISTED WITH REGARD TO THE CLAIM THAT A JURY SHOULD HAVE DECIDED.

B. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY GRANTING SUMMARY JUDGMENT IN FAVOR OF THE APPELLEE WHERE THE APPELLANT DEMONSTRATED BY COMPETENT EVIDENCE A MERITORIOUS DELIBERATE INTENT CLAIM AND THAT GENUINE ISSUES OF MATERIAL FACT EXISTED DEMONSTRATING THAT THE APPELLEE WAS LIABLE FOR INJURIES SUSTAINED BY THE APPELLANT IN HIS DELIBERATE INTENT ACTION AGAINST THE APPELLEE.

II. STATEMENT OF THE CASE

1. Procedural History

This civil action was filed on November 6, 2009, in the Circuit Court of Kanawha County. The case proceeded through discovery and on February 3, 2011, and August 12, 2011, Apex Pipeline Services, Inc. ("Apex") filed its motions for summary judgment. By order entered on October 19, 2011, the circuit court granted Apex's motions for summary judgment. It is from this order that Mr. Smith appeals

2. Statement of Facts

On or about September 30, 2008, Jason J. Smith, was employed by Apex as a laborer. Mr. Smith was sent into a ditch by his boss Robert Keaton to prepare a couple of joints of pipe for welding on the following day. See AR 268, Smith deposition at p. 40. Mr. Keaton was on the scene and directed that the plaintiff

adjust a pipe in a trench next to a joint of pipe that sat unsecured above Mr. Smith as he toiled in the trench. While Mr. Smith was trying to manipulate a piece of pipe already in the trench, the unsecured pipe rolled form the top of the trench down and over Mr. Smith's back.

As a result of this unsecured piece of pipe rolling over Mr. Smith he suffered serious injuries including but not limited to a broken back.

Plaintiffs liability expert, Dr. Gary S. Nelson has opined that specific OSHA requirements pertaining to excavations include:

> 29 CFR 1926 Subpart P -- Excavations
>
> 1926.651 -- Specific Excavation Requirements
>
> 1926.651(j) -- Protection of employees from loose rock or soil.
>
> 1926.651(j)(2) -- Employees 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 (.61m) 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.
>
> 1926.651(k) -- Inspections.
>
> 1926.651(k)(1) -- Daily inspection 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 of protective systems, hazardous atmospheres, or other hazardous conditions. An inspection shall be conducted by the competent person prior to the start of work and as needed throughout the shift. Inspections shall also be made after every rainstorm or other hazard increasing occurrence. These inspections are only required when employee exposure can be reasonably anticipated.

Dr. Nelson opined:

> 7. Regarding the application of the basic elements of working place safety programming to the prevention of pipe stored immediately adjacent to excavations from rolling or falling into

such excavations, among other things, Apex knew that compliance with their responsibility to *identify, evaluate,* and *control* reasonable foreseeable potential workplace safety hazards would include, but not be limited to, establishing and maintaining such safety programming necessary to comply with 29 CFR Subparts C and P as cited in the body of this report, to include:

- The conduct of frequent and regular inspections of the materials and equipment at their jobsite by a designated competent person.
- To prohibit the use of material (stored pipe) at their jobsite that is not in compliance with applicable requirements of 29 CFR 1926 construction regulations.
- To properly instruct every employee in the recognition and avoidance of unsafe conditions (such as unsecured pipe storage) and the federal regulations (to include 29 CFR 651(j)(2) requiring the proper securement of pipe that could pose a falling or rolling hazard into excavations.

12. Based on available discovery, Apex failed to utilize any pro-active formal workplace safety analysis technique, as required by 29 CFR 1926.20(b)(2), to be used in regard to the *planned* and *systematic physical safety inspection* of their workplace facilities and equipment on a timely basis to assure compliance with good practice and the provisions of relevant authoritative guidelines and required OSHA regulations, in order to discover and correct potential, latent, or developing workplace hazards to which persons are or may be exposed, in this case, the physical hazard associated with pipe rolling or falling into excavations where workers are commonly present.

The pipe in this matter could not have rolled or otherwise fallen into the excavation in this matter unless it was improperly blocked at its base. The required inspection of jobsite "materials" in storage would have, with a high degree of scientific certainty, detected such a defect (and corrected such a defect) prior to the incident in this matter that injured Mr. Smith.

13. Based on available discovery, Apex failed to develop or properly conduct overall workplace management, supervisor, and worker training activity, as required by 29 CFR 1926.21(a)(2) regarding the recognition and avoidance of unsafe conditions (to include the danger of unstable pipe stored immediately adjacent to excavations where workers would commonly be present, and the required OSHA regulations, to include 29 CFR 1926.651(j)(2) that

> require employees to be protected from materials that could pose a hazard by falling or rolling into excavation.
>
> As the potential for such pipe to roll or otherwise fall into adjacent excavations was known to Apex (as evidenced by their attempt, although paltry, to block such pipe with miscellaneous rocks and clumps of earth), Apex clearly had a subjective (and in fact an actual) realization and an appreciation of the existence of the specific unsafe working condition (unstable pipe) in this matter, and of the high degree of risk and the strong probability of serious injury or death presented by such specific and unsafe working condition.

See Nelson Report. AR 298--764

When Mr. Smith was physically able to return to work he was told that no work was available for him by Mr. Keaton. When Mr. Smith applied for unemployment benefits, his request was denied because Apex communicated that Mr. Smith had been discharged because he filed a workers compensation claim.

III. SUMMARY OF ARGUMENT

The order entered in this case was prepared and written by Apex and lacks competent consideration of the fact presented by the appellant. Indeed the order reviews the facts presented in a light most favorable to Apex, the moving party. Such a review is impermissible under West Virginia law.

When this Court reviews the facts in a light favoring the non-moving party, Mr. Smith, it is clear that questions of material fact exist which favor denial of summary judgment and a trial on the merits.

Mr. Smith presented a written document from the defendant which acknowledged terminating Mr. Smith for filing a workers compensation claim. Despite this submission, summary judgment was granted in favor of Apex on the appellant's Workers Compensation discrimination claim. This ruling was clearly wrong and outrageous.

Mr. Smith submitted evidence that his supervisor was present at the time of his injuries, oversaw and directed the work under working conditions which violated OSHA regulations and yet summary judgment was granted with regard to knowledge of the employer and by the appellee to the specific unsafe, intentional exposure working conditions. This order was clearly wrong.

Specific unsafe working conditions were presented to the trial court but ignored. This was improper as well.

Questions of material fact existed as to all of the elements of Mr. Smith's claims but were improperly ignored and summary judgment was unjustly granted. Mr. Smith requests that this Court reverse and remand the trial court's order and direct that a trial on the merits be held.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case should be set for Rule 20 argument since it is a case involving workplace safety and discrimination resulting from filing a workers compensation claim, both issues are of fundamental public importance.

V. ARGUMENT

1. Standard Of Review

"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 (W.Va. 1994). Thus, in undertaking a *de novo* review, this Court applies the same standard for granting summary judgment that is applied by the circuit court. That standard is as follows:

> "'"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 Buchannon*, 187 W.Va. 706, 421 S.E.2d 247 (1992).
>
> ***
>
> "The 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." Syllabus Point 3, *Painter, supra.*

In considering a motion for summary judgment, the Court is to view all facts and inferences in the light most favorable to the nonmovant. *Miller v. City Hosp., Inc.*, 197 W.Va. 403, 475 S.E.2d 495 (W.Va. 1996).

2. Assignments of Error

A. The trial court committed reversible error by granting summary judgment in favor of the appellee where the appellant demonstrated by competent evidence that his claim of workers compensation discrimination was meritorious and that at the very least questions of material fact existed with regard to the claim that a jury should have decided.

In this case the appellant's employer refused to put Jason Smith back to work despite the fact that he was released to work without restriction from an injury he sustained while working for Apex and after Mr. Smith filed workers compensation claim for this injury.

> "In order to make a prima facie case of discrimination under W.VA. Code, 23-5A-1, the employee must prove that: (1) an on-the-job injury was sustained; (2) proceeding 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." Syllabus Point 1 *Powell v. Wyoming Cablevision, Inc.*, 184 W.Va. 700, 403, S.E.2d 717 (1991).

Skaggs v. Eastern Associated Coal Corp. 212 W,Va. 248, 569 S.E.2d 769 (2002).

> "It is a contravention of public policy and actionable to discharge an employee because he has filed a workmen's compensation claim against his employer." Syllabus Point 2, *Shanholtz v. Monongahela Power Co.*, 165 W.Va. 305, 270 S.E.2d 178 (1980)
>
> If workers' compensation discrimination is litigated case under the burden-shifting analysis applicable in mixed-motive employment discrimination cases, the burden will ultimately be upon the employer to prove that the challenged decision to terminate the employee would have been made in the absence of an unlawful motive. Code. 23-5A-1

G.Nestor, II v. Bruce Hardwood Floors, L.P. 210 W.Va. 692, 558 S.E.2d 691 (2001)

Jason Smith was released to return to work after he filed a workers compensation claim resulting from an injury he sustained in the employ of Apex Pipeline and as a result Apex Pipeline refused to put him back to work.

In determining whether there is a nexus between the filing of the workers' compensation claim and the discharge, we take heed of this warning by the New York Court of Appeals in Axel v. Duffy-Mott Co., 47 N.Y.2d at 6, 416 N.Y.S.2d at 556, 389 N.E.2d at 1077:

> "[I]n a case premised on an alleged violation of a statute purposed to counter retaliation or other discrimination, we must keep in mind that those engaged in such conduct rarely broadcast their intentions to the world. Rather, employers who practice retaliation may be expected to seek to avoid detection, and it is hardly to be supposed that they will not try to accomplish their aims by subtle rather than obvious methods. . . . Moreover, employers are vested with considerable discretion in the hiring and firing of their employees so as to maintain an efficient and productive work force, and the visible manifestations of even a most improperly motivated discharge may be difficult to sort out from a nonretaliatory exercise of this discretion." (Citations omitted).

Because of the usual lack of direct evidence, courts have looked to a variety of factors. Proximity in time of the claim and the firing is relevant, of course. Evidence of satisfactory work performance and supervisory evaluations before the accident can rebut an employer's claim of poor job performance. Any evidence of an actual pattern of harassing conduct for submitting the claim is very persuasive. *E.g.*, Axel v. Duffy-Mott co., *supra* (immediately after claimant filed for workers' compensation benefits, adverse comments began to appear in her personnel file about her work performance and appearance); Elzey v. Forest, 739 P.2d 999 (Okla. 1987) (supervisor told employee that he was jeopardizing job by seeking treatment from doctors whose practices were associated with workers' compensation claimants). *Cf.* Milner v. Stepan Chem. Co., 599 F.Supp. 358 (D.Mass. 1984) (following a work-related accident, the employee's supervisor repeatedly harassed him about not reporting the ****722 *705** injury so as not to spoil the company's safety record). *See generally* 2A *Larson's Workers' Compensation Law* § 68.36(d) at pp. 13-187 to 13-188.

Powell v. Wyoming Cablevision, Inc. 184 W.Va. 700, 403 S.E.2d 717 (1991)

> In *Powell* we noted that "employers who practice retaliation may be expected to seek to avoid detection, and it is hardly to be supposed that they will not try to accomplish their aims by subtle rather than obvious methods. . . ." *Powell* 184 W.Va. at 704, 403 S.E.2d at 721 *quoting, Axel v. Duffy-Mott Co.*, 47 N.Y.2d 1, 6, 416 N.Y.S.2d 554, 556, 389 N.E.2d 1075, 1077 (1979). Because of the lack of direct evidence *Powell* instructs courts to look to a variety of factors including: (1) "[p]roximity in time of the claim and firing;" (2) "[e]vidence of satisfactory work performance and supervisory evaluation before the accident;" (3) "actual pattern of harassing conduct for submitting the claim;" and (4) "adverse comments" after filing of the workers' compensation claim. *Powell*, 184 W.Va. at 704, 403 S.E.2d at 721 (citations omitted).

St. Peter v. Ampak Division of Gatewood Products, Inc. 199 W.Va. 365, 484 S.E.2d 481 (1997)

In this case, Jason Smith informed the West Virginia Unemployment Office that he was discharged because he filed a workers compensation claim. Apex informed the unemployment office that he was discharged because he filed a workers compensation claim. Apex's communication was done in writing and is attached hereto at AR 26.

A question of material fact exists with regard to the discrimination against Mr. Smith for filing a workers compensation claim. The appellant requests that the Court deny the appellee's motion for summary judgment on appellant's workers compensation claim for the foregoing reasons.

B. The trial court committed reversible error by granting summary judgment in favor of the appellee where the appellant demonstrated by competent evidence a meritorious deliberate intent claim and that genuine issues of material fact existed demonstrating that the appellee was liable for injuries sustained

by the appellant in his deliberate intent action against the appellee.

The appellee in this matter claims that Mr. Smith has failed to prove any of the five elements necessary to recover under W.Va. Code § 23-4-2(d)(2)(ii)[1]. The appellant has presented sufficient evidence to prove each element by a preponderance of the evidence and at the very lease a question of material with regard to each element.

The appellant will discuss each element and evidence presented in support thereof.

(1) Specific Unsafe Working Condition

The appellant has proven through expert testimony and reports the specific unsafe working conditions presented at the time of this incident.

Dr. Nelson presented through his report and deposition specific OSHA regulations that were violated by Apex. They are as follows:

> 1926 Subpart C -- General Safety and Health Provisions
>
> 1926.20 -- General Safety and Health Provisions
>
> Special note: The Occupational Safety and Health Act of 1970 (Public Law 91-596) requires every employer to comply with a general duty under Section 5(a)(1) to provide a safe workplace, and various specific duties (regulations) as promulgated under Section 5(a)(2). This section of this report outlines specific regulations applicable to all construction workplaces under Section 5(a)(2), wherein the term *general* does not refer back to the Section 5(a)(1) general duty, but rather, within the regulations promulgated under Section 5(a)(2), the term *general* is used to indicate specific duties that apply universally to all types of

[1] Apex failed to put on any evidence that Mr. Smith received a serious injury from the actions of Apex.

construction operations, as opposed to other Section 5(a)(2) regulations that may or may not apply to all construction worksites depending upon the type of construction being performed (such as excavation, framing, structural steel erection, roofing, electrical, mechanical material handling, as so forth).

1926.20(b) -- Accident prevention responsibilities.

1926.20(b)(1) -- It shall be the responsibility of the employer to initiate and maintain such programs as may be necessary to comply with this part.

1926.20(b)(2) -- Such 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.

1926.29(b)(3) -- The use of any machinery, tool, material, or equipment which is not in compliance with any applicable requirement of this part is prohibited. Such machine, tool, material, or equipment shall either be identified as unsafe by tagging or locking the controls to render them inoperable or shall be physically removed from its place of operation.
1926.20(b)(4) -- The employer shall permit only those employees qualified by training or experience to operate equipment and machinery.

1926.21 -- Safety training and education

1926.21(b)(2) -- The 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 illness or injury.

1926.32 -- Definitions

1926.32(f) -- *Competent person* means one who is capable of identifying existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them.

1926.32(m) --*Qualified person* means one who, by possession of a recognized degree, certificate, or professional standing, or who by extensive knowledge, training, and experience, ahs successfully demonstrated the ability to solve or resolve problems relating to the subject matter, the work, or the project.

29 CFR 1926 Subpart P-- Excavations

1926.651 -- Specific Excavation Requirements

1926.651(j) -- Protection of employees from loose rock or soil.

1926.651(j)(2) -- Employees 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 (.61 m) 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.

1926.651(k) -- Inspections.

1926.651(k)(1) -- Daily 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 of protective systems, hazardous atmospheres, or other hazardous conditions. An inspection shall be conducted by the competent person prior to the start of work and as needed throughout the shift. Inspections shall also be made after every rainstorm or other hazard increasing occurrence. These inspections are only required when employee exposure can be reasonably anticipated.

29 CFR 1926 Subpart P (Excavations), Appendix F -- Selection of Protective Systems.

Dr. Nelson also describes the specific OSHA Violations in his deposition.

Q. And would you briefly describe what OSHA regulations would apply in this case?

A. The specific requirements of Subpart C as I have listed on page 4, and also the specific requirements that apply to excavations on the top of page 5.

See Nelson deposition p.31, at AR 796.

Dr. Nelson concluded in his report:

10. The primary unsafe condition and/or causative factor related to the incident made a subject of this matter was, in express violation of federal OSHA regulations, the failure, in a physically positive manner, to secure pipe stored immediately adjacent to excavations where workers were present.

11. In regard to the issues related to this matter, Apex failed to provide Mr. Smith with a worksite free of recognized (reasonably foreseeable) hazards likely to result in death or severe injury.

As such, in addition to their failure to exercise ordinary care for the safety of the workforce at their jobsite in this matter, Apex was in specific violation of the 29 CFR 1926 OSHA regulations cited in the body of this report.

In this regard, Apex failed to establish and/or failed to properly implement the basic elements of workplace safety programming as outlined in the body of this report. Such a failure would be in specific violation of 29 CFR 1926(b)(1) regulations cited in the body of this report.

As an integral part of such safety programming, there is no evidence that Apex utilized any safety analysis technique, such as Job Safety Analysis, to properly identify, evaluate, and control the known unsecured pipe hazards made the subject of this matter.

12. Based on available discovery, Apex failed to utilize any pro-active formal workplace safety analysis technique, as required by 29 CFR 1926.20(b)(2), to be used in regard to the *planned* and *systematic physical safety inspection* of their workplace facilities and equipment on a timely basis to assure compliance with good practice and the provisions of relevant authoritative guidelines and required OSHA regulations, in order to discover and correct potential, latent, or developing workplace hazards to which persons are or may be exposed, in this case, the physical hazard associated with pipe rolling or falling into excavations where workers are commonly present.

The pipe in this matter could not have rolled or otherwise fallen into the excavation in this matter unless it was improperly blocked at its base. The required inspection of jobsite "materials" in storage would have, with a high degree of scientific certainly, detected such a defect (and corrected such a defect) prior to the incident in this matter that injured Mr. Smith.

13. Based on available discovery, Apex failed to develop or properly conduct overall workplace management, supervisor, and worker training activity, as required by 29 CFR 1926.21(a)(2) regarding the recognition and avoidance of unsafe conditions (to include the danger of unstable pipe stored immediately adjacent to excavations were workers would commonly be present, and the required OSHA regulations, to include 29 CFR 1926.651(j)(2) that require employees to be protected from materials that could pose a hazard by falling or rolling into excavation.

14. In this matter, Apex failed to utilize the core principles of safety engineering and the cardinal (basic, principal) rules of hazard control discussed in this report, as they would be logically applied to the potential hazard made a subject of this matter.

That is, in regard to the first and second rules of hazard control, since ground excavations and the need for pipe to be placed into such excavations on a regular basis, and the fact that such was inherent to the work and could not be eliminated, Apex then failed to adhere to the second rule of hazard control by physically securing the pipe against potential movement (rolling or falling into excavations where workers were commonly present).

In this regard, Apex failed to physically safeguard the pipe in this matter, in a physically positive manner, from rolling otherwise falling into the adjacent excavation where Mr. Smith was present. This could have been done in an easily achievable combination of safeguards by the required use of iron stacks driven into the ground at each end of every pipe on the excavation side of such pipe, and as a secondary (backup), the routine piling of excavated earth (the construction of a small mound) at the edge of all excavations behind which pipe in storage would be place in preparation for its transfer into the excavation under controlled (stable) conditions.

Special note: The routine practice and procedure established by Apex in an attempt (the key word is *attempt*) to secure stored pipe from rolling or otherwise prevent the pipe from falling into adjacent excavations was to "find a nearby rock or clump of earth" to place at the base of the pipe to keep it from rolling. Such a haphazard method must be recognized as subject chance (high risk of failure), the potential for such material to move or roll away from such pipe or otherwise crumble under the weight of the pipe, and therefore not a reliable method to secure such pipe.

Special note: Unlike the relatively hidden nature of rocks (etc.) to secure the pipe in this matter that are relatively small and hidden from view in terms required inspection, the use of iron stacks to secure pipe, stacks that would appear above the pipe after being driven into the

ground, would provide a readily observable method to assure that such pipe was secure.

In regard to the third rule of hazard control, and as a follow-through to the rule to use iron stacks to secure pipe from unintended movement into excavations, Apex failed to properly train worked regarding the proper methods to secure such pipe from movement.

In regard to the above, by failing to positively secure the pipe (through the methods discussed or other equivalent methods), properly train supervisors and workers regarding the required adherence to such a practice, and the failure to properly inspect the pipe in this matter in regard to its continuous securement, Apex was in express violations of the following mandatory OSHA regulations as cited in the body of this report:

- 1926.20(b)(1) regarding the requirement to initiate and maintain safety programming necessary to comply with applicable OSHA regulations.
- 1926.20(b)(2) regarding the requirement to conduct frequent and regular inspections of jobsite materials (which would have included the stability of materials in storage).
- 1926.20(b)(3) regarding the prohibited use of "materials" not in compliance with OSHA regulations (to include the requirement for stable pipe storage).
- 1926.21(b)(2) requiring the instruction (training) of all employees regarding the recognition and avoidance of unsafe conditions and the applicable (OSHA) regulations that control such conditions (which would have included the potential for unstable pipe storage and the requirement to stablize such pipe through positive (physically reliable) means.
- 1926.651(j)(2) that specifically requires the positive protection of materials (pipe in this matter) to prevent it from falling or rolling into excavations.
- 1926.651(k)(1) that again, specifically require daily inspections of excavations and its protective systems (that would have included the system to prevent pipe from falling or rolling into such excavations) to assure the absence of hazardous conditions.

15. In this matter, a specific unsafe working condition existed in the workplace in the form of unstabilized pipe (unsafely stored pipe) susceptible to sudden and unexpected movement that presented a high degree of risk and a strong probability of serious injury or death to persons such as Mr. Smith who commonly work in the direct path of such

pipe should it roll or otherwise fall into an excavation (which occurred in this matter).

> **As the potential for such pipe to roll or otherwise fall into adjacent excavations was known to Apex (as evidenced by their attempt, although paltry, to block such pipe with miscellaneous rocks and clumps of earth), Apex clearly had a subjective (and in fact an actual) realization and an appreciation of the existence of the specific unsafe working condition (unstable pipe) in this matter, and of the high degree of risk and the strong probability of serious injury or death presented by such specific an unsafe working condition.**
>
> **The specific unsafe working condition (unsecured pipe) was a violation of a well-known specific mandatory federal safety statute and associated regulations accepted as a primary standard of conduct (and in fact, a mandatory standard of conduct) in the construction industry.**
>
> **Nevertheless, Apex intentionally (knowingly) exposed Mr. Smith to such specific unsafe working conditions; and Mr. Smith suffered serious injury as a direct and proximate result of those specific unsafe working conditions.**

See Nelson report, AR 298--764.

The appellant through expert testimony has shown that specific unsafe working conditions existed which could cause serious injury or death. At the very least a question of material fact exists with regard to the first element.

(2) Knowledge

The appellant has proven the knowledge of Apex by showing that despite the appellant's supervisor being present at the time of the incident, Apex failed to perform a reasonable evaluation to identify hazards in the workplace.

Dr. Nelson opined that Apex failed to perform a job safety analysis which is a violation of industry standard and OSHA standards. Dr. Nelson stated in his deposition,

> A. I think by performing a JSA they would have understood the foolishness of putting in writing that you find a rock or clump of earth and you shove it up against the pipe to keep it from falling in the excavation. I think they would have discovered the foolishness of that and required the type of securement that I suggest in my report.
>
> In terms of 1926.21 to train -- this specific requirement to train employees to recognize and avoid hazards, to teach them to find a rock or clump of earth to secure the pipe is not teaching them to avoid a hazard.

See Nelson deposition at pp. 39--40, AR 804--805

Dr. Nelson stated in his report the reason for performing a job safety assessment and why safety and OSHA standards require them.

> 1. Apex, as the employer of Mr. Smith and *top management* of the workplace, knew of their responsibility to provide overall jobsite leadership regarding workplace safety. In this regard, Apex knew of their ordinary responsibility to exercise reasonable care to establish, monitor, and maintain a workplace free of recognized (reasonably foreseeable) hazards likely to result in the death or severe injury of anyone reasonably anticipated to be exposed to such hazards.
>
> In addition to Apex's ordinary responsibility to exercise reasonable care to establish and maintain a workplace free of recognized (reasonably foreseeable) hazards, Apex also knew of their responsibility to comply with OSHA regulations, well-known industry standards, and their own published corporate safety policies and work rules.
>
> As such, Apex knew that their responsibility to establish and maintain a workplace free of recognized hazards likely to result in the death or severe injury to their employees was a specific requirement under federal workplace safety legislation as prescribed under 29 USC 651 et seq., the Occupational Safety and Health Act of 1970 (Public Law 91-

596), administered by the Occupational Safety and Health Administration (OSHA) of the U.S. Department of Labor.

1. In this regard, Apex knew that 29 USC 654(a)(2) states that each employer *shall comply with occupational safety and health standards promulgated under [the] Act.* In this regard, see the attached Appendix A that cites the Preamble and Duties of Employers under the Occupational Safety and Health Act of 1970.

2. Apex knew (a) of the basic elements of workplace safety (accident prevention) programming as outlined in the body of this report, (b) that establishing and conducting such programming is dictated by the principles and ethics of public minded business management and, [if a construction matter] specifically, as a federal workplace safety requirement under 29 CFR 1926.20(b) [if a general industry workplace] specifically, according to the well known industry practice established by the U.S. Department of Labor, Occupational Safety and Health Administration, in their "Safety and Health Management Guidelines" as published in the Federal Register, 54 (18): 3908-3916, January 26, 1989, (c) that the purpose (core principles) of such safety programming centers on the timely *identification, evaluation,* and *control* of reasonably foreseeable workplace hazards, (d) that such programming would include the appropriate selection and use of proper protective equipment for the work assigned to their employees to include the establishment of workplace policies and associated supervision to assure its use, and that (e) such programming should be vigorously and conspicuously pursued and applied by prudent workplace managers (and associated workplace designers and technical personnel) in responsible charge of such activity for the protection of those who will use or otherwise be exposed to the potential hazards associated with their workplace.

3. Apex knew of the numerous workplace safety analysis techniques that are readily available in the safety literature to *identify, evaluate,* and *control* reasonably foreseeable workplace safety hazards to which persons might potentially be exposed during the reasonably anticipated course of their work.

In this regard, Apex knew that these techniques would include, but not be limited to the use of the long established workplace hazard control technique known as Job Safety Analysis (JSA). Further, Apex knew that, among other things, to establish the requirement that every job performed on their jobsite must have its own JSA (or some other similar safety analysis treatment) would be a most effective method to exercise their responsibility for overall jobsite safety.

4. Because of the nature of their daily work of laying pipe in excavated trenches, Apex (undeniably) knew (a) of the severe injury

potential associated with the danger of heavy pipe rolling or falling into excavations from the adjacent embankment, (b) knew of that such potential contains the clear risk of producing severe injury to workers working within such excavations; that is, they had a clear and reasonable subjective awareness of the high degree of risk and probability of severe injury (or death) associated with the potential for unsecured pipe rolling or falling into excavations where their workers were present, and (c) that such injury potential would dictate the focused attention on their part toward the positive elimination or control of related hazardous conditions or factors that cause such injury through the use of the best means reasonably available, including the dictates of ordinary prudence, adherence to the core principles of safety engineering (outlined in this report), and applicable criteria and guidelines contained in authoritative references, codes, standards and applicable federal regulations that were known to them.

5. As an effective guide for conducting workplace safety activity, Apex knew of the *core principles of safety engineering and the cardinal (basic, principal) rules of hazard control* (whether by this name or another) as advocated in the safety literature for the past several decades to include (a) hazard *removal* (hazard *elimination, attenuation,* and *isolation, or substitution*), followed by (b) the addition or use of appropriate *physical safeguards,* followed by (c) the provision of *adequate warnings and instructions* (established safe work methods and procedures), that these alternatives are listed in the order of their preference and effectiveness, and that these principles and rules would logically apply to the control of the potential rolling or falling pipe hazards made the subject of this matter.

6. Based on explicit federal OSHA workplace regulations and recognized best-practice industry standards, Apex knew of the proper safeguards to be followed in the instant matter; that is, they knew of the physical and procedural safeguards related to the proper securement of pipe to prevent such pipe from movement that would have prevented the incident that occurred in this matter. In this regard, Apex knew of the associated safeguard requirements of federal OSHA workplace regulations as cited in the body of this report.

7. Regarding the application of the basic elements of workplace safety programming to the prevention of pipe stored immediately adjacent to excavations from rolling or falling into such excavations, among other things, Apex knew that compliance with their responsibility to *identify, evaluate,* and *control* reasonably foreseeable potential workplace safety hazards would include, but not be limited to, establishing and maintaining such safety programming necessary to comply with 29 CFR Subparts C and P as cited in the body of this report, to include:

- The conduct of frequent and regular inspections of the materials and equipment at their jobsite by a designated competent person.
- To prohibit the use of materials (stored pipe) at their jobsite that is not in compliance with applicable requirements of 29 CFR 1926 construction regulations.
- To properly instruct every employee in the recognition and avoidance of unsafe conditions (such as unsecured pipe storage) and the federal regulations (to include 29 CFR 651(j)(2) requiring the proper securement of pipe that could pose a falling or rolling hazard into excavations.

8. Apex knew that injury producing events depend on (a) the eventual simultaneous presence of multiple factors (to include the sudden instability of pipe stored adjacent to excavations at the same time that person would be present below such pipe in the excavation), (b) that such factors must include the presence of one or more unsafe conditions (such as unstable stored pipe), (c) that the unsafe conditions that resulted in the occurrence of the instant matter were foreseeable and under their effective control, and (d) that such hazards, if allowed to exist over time, only await the exposure of a certain number of persons to such hazards before potential injury is substantially certain to occur.

9. Proper accident cause analysis must focus on "the accident process" to include all of the causative factors that could have been foreseen and controlled long before the day or precise time of the injury event made a subject of this matter. In this regard, Apex doubtlessly and undeniably knew and appreciated this reality.

See Nelson report, AR 298--764.

Apex's failure to inspect and train does not absolve the appellee from its duty to do so and cannot be used as a defense to knowledge of unsafe working conditions.

> "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.

Syl. Pt. 3, *Ryan v. Conch Industries, Inc.*, 219 W.Va. 664, 639 S.E.2d 756.

> "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)(B).

Syl. Pt. 6, *Ryan v. Conch Industries, Inc.*, 219 W.Va. 664, 639 S.E.2d 756.

In this case it is clear that the defendant failed to follow the mandates of OSHA.

The West Virginia Supreme Court in *Ryan v. Clonch Industries, Inc.*, 639 S.E. 2d 756 (W.Va. 2006) found.

> 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 need is identified, requiring employees to use the requisite safety equipment.[FN10] 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 those subject to its protective scope to take definitive,

affirmative ***672 * *764** action. Plainly, it does far more than impose a general, nonspecific regulatory or safety standard ....").

FN10. 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)).

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.

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.

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)(B). [FN11]

Ryan v. Clonch Industries, Inc., 639 S.E. 2d 756 (W.Va. 2006). See also *Ramey v. Contractor Enterprises, Inc.*, 693 S.E.2d 789, 794—797 (W.Va. 2010).

For the foregoing reasons, a question of material fact exists at the very least with regard to the question of the employer's knowledge, however appellant requests that the Court grant summary judgment in their favor on the issue. The appellant requests that the Court deny the appellee's motion and grant all other relief the Court deems just and appropriate. A question of material fact exists as to the knowledge of Apex on this issue.

3. Violation of Standard

The appellant has presented competent evidence that safety standards were violated.

In regard to the above, by failing to positively secure the pipe (through the methods discussed or other equivalent methods), properly train supervisors and workers regarding the required adherence to such a practice, and the failure to properly inspect the pipe in this matter in regard to its continuous securement, Apex was in express violations of the following mandatory OSHA regulations as cited in the body of this report:

- 1926.20(b)(1) regarding the requirement to initiate and maintain safety programming necessary to comply with applicable OSHA regulations.
- 1926.20(b)(2) regarding the requirement to conduct frequent and regular inspections of jobsite materials (which would have included the stability of materials in storage).
- 1926.20(b)(3) regarding the prohibited use of "materials" not in compliance with OSHA regulations (to include the requirement for stable pipe storage).
- 1926.21(b)(2) requiring the instruction (training) of all employees regarding the recognition and avoidance of unsafe conditions and the applicable (OSHA) regulations that control such conditions (which would have included the potential for unstable pipe storage and the requirement to stablize such pipe through positive (physically reliable) means.
- 1926.651(j)(2) that specifically requires the positive protection of materials (pipe in this matter) to prevent it from falling or rolling into excavations.
- 1926.651(k)(1) that again, specifically require daily inspections of excavations and its protective systems (that would have included the system to prevent pipe from falling or rolling into such excavations) to assure the absence of hazardous conditions.

15. In this matter, a specific unsafe working condition existed in the workplace in the form of unstabilized pipe (unsafely stored pipe) susceptible to sudden and unexpected movement that presented a high degree of risk and a strong probability of serious injury or death to persons such as Mr. Smith who commonly work in the direct path of such pipe should it roll or otherwise fall into an excavation (which occurred in this matter).

As the potential for such pipe to roll or otherwise fall into adjacent excavations was known to Apex (as evidenced by their attempt, although paltry, to block such pipe with miscellaneous rocks and clumps of earth), Apex clearly had a subjective (and in fact an actual) realization and an appreciation

of the existence of the specific unsafe working condition (unstable pipe) in this matter, and of the high degree of risk and the strong probability of serious injury or death presented by such specific an unsafe working condition.

The specific unsafe working condition (unsecured pipe) was a violation of a well-known specific mandatory federal safety statute and associated regulations accepted as a primary standard of conduct (and in fact, a mandatory standard of conduct) in the construction industry.

Nevertheless, Apex intentionally (knowingly) exposed Mr. Smith to such specific unsafe working conditions; and Mr. Smith suffered serious injury as a direct and proximate result of those specific unsafe working conditions.

For the foregoing reasons the appellant requested that the Court deny the appellee's motion for summary judgment with regard to violation of a safety standard because a question of material fact existed on this issue.

4. Intentional Exposure

It is uncontroverted that Mr. Smith's supervisor instructed him to work in the trench below the unsecured pipe and as a result the Mr. Smith received multiple injuries including a broken back.

Despite Apex's knowledge of safety violations and hazards as described earlier in the brier Mr. Smith was ordered into the trench by Robert "Bob" Keaton his boss. Mr. Smith testified.

> Q. Okay. Why did you get down in that ditch next to a pipe that was uncribbed? Who told you to do that?
> A. Bob wanted us to get everything set up.
> Q. Okay, so you did that --
> A. And he was there.
> Q. You did that at the direction of Bob Keaton?
> A. Right.
> Q. Okay, and Bob Keaton was there at the time you went down into the ditch?
> A. Exactly.

Q. Okay.
A. Yes he was.
Q. All right.
A. I mean, if there was something unsafe, he should have said something to us right there and right then.
Q. Okay.
A. I mean, he was -- he is the boss over that job.

See Smith deposition at pp. 117--118., AR 288.

For the foregoing reasons, the appellant requested that the Court deny the appellee's motion for summary judgment on intentional exposure due to the existence of a question of material fact on the issue.

Conclusion

The appellee failed to prove that no questions of material fact remain with regard to appellant's claims for workers compensation discrimination and deliberate intent. The trial court erred by granting summary judgment, and this Honorable Court should reverse the trial court's order granting Apex's motion for summary judgment on the workers compensation discrimination and deliberate intent action and remand the case for trial on the merits. The appellant requests that the Court grant all other relief it deems just and appropriate.

JASON J. SMITH

By Counsel

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 11-1610

JASON J. SMITH

Plaintiffs below, Petitioners,

v.

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

Defendants below, Respondent.

CERTIFICATE OF SERVICE

I, Charles M. Love, IV, counsel for the Plaintiffs below, Petitioners, do hereby certify that true and exact copies of the foregoing "Petitioners Brief" and "Appendix Record " were served upon:

Mary H. Sanders
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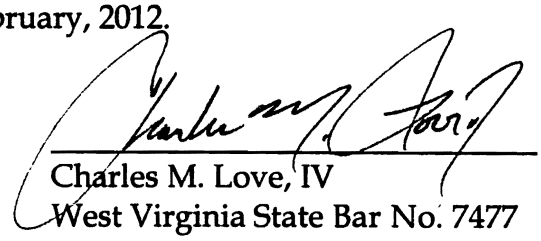
via hand delivery this 21st day of February, 2012.



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