

12-0548

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IN THE CIRCUIT COURT OF **FILED** CABELL COUNTY, WEST VIRGINIA

DAVID MCCOMAS,

2012 MAR 22 P 2:11

*Plaintiff,*

v.

Civil Action No.:09-C-534  
Honorable Jane F. Husted, Judge  
ADELI CHANDLER  
CIRCUIT CLERK  
CABELL CO., WV

ACF INDUSTRIES, LLC a  
Delaware Company,

*Defendant.*

**ORDER GRANTING DEFENDANT ACF INDUSTRIES, LLC'S  
MOTION FOR SUMMARY JUDGMENT**

On the 21<sup>st</sup> day of July, 2011, came the defendant ACF Industries, LLC by counsel, Jenna Perkins Wood and the plaintiff David McComas in person and by counsel, Shannon M. Bland pursuant to the defendant ACF Industries, LLC's Motion for Summary Judgment. Based on the memorandums, deposition transcripts, affidavits, arguments of counsel and for reasons appearing on the record, the Court does hereby GRANT the defendant ACF Industries, LLC's Motion for Summary Judgment.

The Court makes the following findings of fact and conclusions of law:

**FINDINGS OF FACT**

On June 22, 2007, David McComas was employed by the defendant ACF Industries in Huntington, West Virginia as a welder. On that day while working, Mr. McComas was directed by his supervisor to go to the ST-3 section of the ACF facility and begin building sides for rail road cars.

Mr. McComas proceeded to the ST-3 section of the plant as instructed and proceeded to turn on the electric to begin to conduct the work requested.

In order to turn on the electric in the ST-3 section of the ACF facility, it was necessary to activate a 480-volt switch box. There was deposition testimony workers had been told not to turn on the electric this way, but they did it anyway. There had been no prior reported incidents or accidents with any of the electric boxes in the facility prior to this accident and the Plaintiff and others present on said date testified that they had no prior knowledge of any defect in this box or others.

When Mr. McComas activated the switch box an arc blast occurred that caused serious burns to Mr. McComas' upper body and face.

The switch box that was involved in the arc blast that injured Mr. McComas was subject to the inspection requirements set forth in ANSI/NFPA 70-B (29 CFR 1910 subpart S- Electric at Appendix A). Said standards are for electrical safety in the workplace. This issue was contested by the Defendant, but the Court finds that the inspection requirements were mandatory.

ANSI/NFPA 70-B imposed a specific identifiable duty on ACF Industries to inspect the switch box involved in this incident pursuant to electrical safety in the workplace.

The defendant ACF Industries did not comply with the inspection requirements of section ANSI/NFPA 70-B which are subject to differing working conditions and use conditions.

According to the Plaintiff's expert, Roger Bybee, the uninspected switch box was a specific unsafe working condition at ACF that presented a high degree of risk and a strong probability of serious injury or death.

The failure to perform the ANSI/NFPA 70-B inspections was a violation of a statute, rule or regulation imposing a mandatory duty to perform a safety inspection pursuant to electrical safety in the workplace.

The ANSI/NFPA 70-B inspections, if conducted, may have identified the unsafe switch box which was involved in this incident.

### **SUMMARY JUDGMENT STANDARD**

To obtain summary judgment, the moving party must show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Fed.R.Civ.P. 56(c). In considering a motion for summary judgment, the Court will not "weigh the evidence and determine the truth of the matter[.]" *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Instead, the Court will draw any permissible inference from the underlying facts in the light most favorable to the nonmoving party.

*Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

Although the Court will view all underlying facts and inferences in the light most favorable to the nonmoving party, the nonmoving party nonetheless must offer some "concrete evidence from which a reasonable juror could return a verdict in his [or her] favor[.]" *Anderson*, 477 U.S. at 256, 106 S.Ct. 2505. Summary judgment is appropriate when the nonmoving party has the burden of proof on an essential element of his or her case and does not make, after adequate time for discovery, a showing sufficient to establish that element. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The nonmoving party must satisfy this burden of proof by offering more than a mere "scintilla of evidence" in support of his or her position. *Anderson*, 477 U.S. at 252, 106 S.Ct. 2505.

### **LAW**

"To establish 'deliberate intention' in an action under W. Va. Code § 23-4-2(c)(2)(ii) (1983), a plaintiff or cross-claimant must offer evidence to prove each of the five specific

statutory requirements." Syl. Pt. 2, *Helmick v. Potomac Edison Co.*, 185 W. Va. 269, 406 S.E.2d 700 (1991), cert. denied 502 U.S. 908, 116 L. Ed. 2d 244, 112 S.Ct. 301.

W. Va. Code 23-4-2(c)(2)(ii) (current version at 23-4-2(d)(2)(ii), 2005) provides in summary that the trier of fact must determine 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 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, 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 thereafter exposed an employee to the specific unsafe working condition intentionally; and

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

Moreover, summary judgment is statutorily required to further the legislative intent of "prompt judicial resolution of issues of [employer] immunity from litigation" under the workers' compensation system when a court finds "that one or more of the facts required to be proved by

the provisions of subparagraphs (A) through (E) [of the deliberate intent statute] ... do not exist.” W. Va.Code § 23-4-2(d)(2)(iii)(B); see also *Mumaw v. U.S. Silica Co.*, 204 W.Va. 6, 10-11, 511 S.E.2d 117, 121-22 (1998) (a summary judgment motion made by an employer in a W. Va. Code § 23-4-2(d)(2)(ii) action is appropriate where the nonmoving party has failed to make a sufficient showing on an essential element of the case it has the burden to prove).

"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).

In *Ryan v. Clonch Industries, Inc.*, 639 S.E.2d 2d 756, (2006), the Court states “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.”

In the present case, the Court has considered the five statutory factors and determined that the evidence before it established genuine issues of material fact with regard to subparagraphs (A) and (E) of the deliberate intent statute. (The Defendant does not contest that there was a serious injury as a result of the unsafe working condition as set forth in subparagraph (E) of the statute.)

The Court notes that if the evidence put forth by the Plaintiff concerned the violation of a mandatory safety statute relating to the specific work at issue, this would support an inference that ACF had a subjective realization of an unsafe condition and would thus satisfy the prima facie requirements of subparagraph (B) and (C) so that ACF could not attempt to "avoid a[]... viable deliberate intent action by conducting itself 'like the proverbial ostrich who sticks his head in the sand to avoid seeing the obvious....'" *Ryan*, 639 S.E.2d at 766 (quoting *State ex rel. League of Women Voters of W. Va. v. Tomblin*, 550 S.E.2d 355, 368 (2001) (Davis, J., dissenting)); *Gibson v. Argus Energy, LLC*, (S.D. W. Va., 2011). Circumstantial evidence is sufficient to allow Plaintiff to survive summary judgment on this element. *Ryan*, 639 S.E.2d at Syl. Pt. 5.

However, the Court finds that the performance of the ANSI/NFPA 70-B evaluations is related to general electrical safety in the workplace and does not meet the standards set forth in *Ryan v. Clonch Industries, Inc.*, 639 S.E.2d 2d 756, (2006). Thus, the Plaintiff has not met the elements of subparagraph (C) of the statute.

Furthermore, as stated in *Baisden v. Alpha & Omega Coal Co.* (S.D. W. Va., 2012), to satisfy the "intentional exposure" requirement, there "must be some evidence that, with conscious awareness of the unsafe working condition . . . , an employee was directed to continue working in that same harmful environment." *Tolley v. ACF Indus., Inc.*, 575 S.E.2d 158, 168 (W. Va. 2002) (emphasis added). See also *Ramey v. Contractor Enters. Inc.*, 225 W.Va. 424, 693

S.E.2d 789 (W.Va., 2010). "In other words, this element, which is linked particularly with the subjective realization element [now actual knowledge], is not satisfied if the exposure of the employee to the condition was inadvertent or merely negligent." *Sias v. W-P Coal Co.*, 408 S.E.2d 321, 327 (W. Va. 1991). The factor of conscious awareness has not been shown here.

Therefore, the Court finds there is no inference and there are no facts that would show that the Defendant intentionally exposed Plaintiff to a known unsafe working condition as contained in subparagraph (D) of the statute.

At best, the appellant might be able to prove gross 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).

### **CONCLUSIONS OF LAW**

On June 22, 2007, David McComas received serious injuries as a direct and proximate result of an arc blast that occurred in a switch box at the defendant ACF Industries' facility in Huntington, West Virginia.

The uninspected switch box at ACF Industries that was involved in the arc blast was a specific unsafe working condition that presented a high degree of risk and a strong probability of serious injury or death.

ACF Industries did not comply with the inspection requirements of ANSI/NFPA 70-B.

However, the performance of the ANSI/NFPA 70-B evaluations are related to general electrical safety in the workplace and is not specifically applicable to the particular work and working condition involved, and is not capable of application to the specific work at issue pursuant to *Ryan v. Clonch Industries, Inc.*, 639 S.E.2d 2d 756, (2006) and the Court finds there

is no inference and there are no facts that would show that the Defendant intentionally exposed Plaintiff to a known unsafe working condition as contained in subparagraph (D) of the statute.

WHEREFORE, it is ORDERED, ADJUDGED, and DECREED, that there is no genuine issue of material fact as to the required elements set forth in W.V. Code §23-4-2 (c) (2) (ii) (C) and (D).

WHEREFORE, the defendant ACF Industries Motion for Summary Judgment is hereby GRANTED.

The plaintiff's objections to the Courts ruling are preserved for the record.

The clerk shall send certified copies of this Order to all counsel of record.

ENTERED THIS 22nd DAY OF March, 2012.

  
HONORABLE F. JANE HUSTEAD, JUDGE

STATE OF WEST VIRGINIA  
Circuit Court of Cabell  
No. \_\_\_\_\_  
I, ADELL CHANDLER, CLERK OF THE CIRCUIT COURT FOR THE COUNTY AND STATE AFORESAID DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT ENTERED ON MAR 22 2012 GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS MAR 22 2012  
, CLERK  
CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA