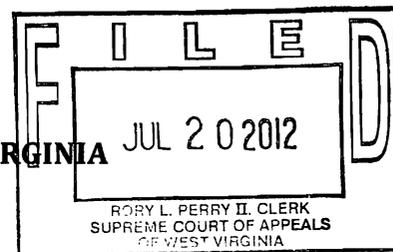


**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

Docket No. 12-0548



DAVID MCCOMAS,  
Petitioner,

v.

ACF INDUSTRIES, LLC,  
Respondent

Appeal from a final order of  
The Circuit Court of Cabell County  
(09-C-534)

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**PETITIONER'S BRIEF**

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### **PROCEDURAL HISTORY**

This Civil Action was filed in the Circuit Court of Cabell County, West Virginia on June 18, 2009 where in the Plaintiff asserted a deliberate intent cause of action pursuant to W.V. Code Section 23-4-2(c)(2)(ii)(2005)(against the Defendant).

On July 21, 2011 the Circuit Court held a hearing on the Defendants Motion and on March 22, 2012 the Circuit Court entered its Order granting the Defendant's motion for summary judgement.

### **ASSIGNMENTS OF ERROR**

The petitioner assigns error to the circuit court for its granting the respondent's motion for summary judgement.

The evidence establishes genuine issues of material fact on each of the five elements required by the West Virginia Deliberate Intent Statute 23-4-2(e)(ii).

### **STATEMENT OF THE CASE**

On June 22, 2007 David McComas was working as a welder for ACF Industries in their plant located in Huntington, WV.

ACF Industries builds rail road cars at it's Huntington facility.

On the day in question Mr. McComas had worked the first part of the day up to lunch in the second nineties section of the plant. Mr. McComas was instructed by Wayne Stillwell his supervisor to go to the "ST-3" section of the plant after lunch and begin "building sides"<sup>1</sup>.

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<sup>1</sup>Building Sides refers to the process of welding steel plates together to form the side of a rail car, these sides are then later in the manufacturing process combined with the other components of the rail car to complete the car.

The ST-3 section of the plant had not be in operation for some time prior to the afternoon of June 22, 2007 and the electric service to operate that section of the plant was shut off.

Mr. David McComas along with Ronnie Lambert and Vollie McComas, his father, proceeded as instructed to the ST-3 section of the plant. In order to perform the instructed task of building sides it was necessary to turn on the electrical system in the ST-3 section. This was necessary not only for lighting but the welding machines used to build the sides were electric welders.

First Mr. David McComas attempted to energize the electrical system by activating the breakers in the breaker box, when this attempt did not work, further investigation revealed that the electrical system had been shut off at the 480 Volt switch box that fed the breaker box.

David McComas then engaged the switch on the right side of the 480 Volt box by raising the arm into the "On" position. When Mr. David McComas switched the box to on an "Arc Blast"<sup>2</sup> occurred that blew him backwards and caused severe burns to his face, arms, and torso.

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<sup>2</sup>NFPA 70-E defines arc blast as follows:

The tremendous temperatures of the arc cause the explosive expansion of both the surrounding air and metal in the arc path. For example, copper expands by a factor of 67,000 times when it turns from solid to a vapor. The danger associated with this expansion is one of high pressures, sound, and shrapnel. The high pressures can easily exceed hundreds or even thousand of pounds per square foot, knocking workers off ladders, rupturing eardrums, and collapsing lungs. The sounds associated with these pressures can exceed 160dB. Finally material and molten metal is expelled away from the arc at speeds exceeding 700 miles per hour, fast enough for shrapnel to completely penetrate the human body.

The flames on Mr. McComas were put out by Mr. Lambert.

He was taken to Cabell Huntington Hospital by Mr. Mike McGuffin where he was immediately admitted to the burn unit of the hospital.

The testimony reveals that the 480 Volt switch box that arc blasted on Mr. McComas was installed some time in the 1950's<sup>3</sup> and had never been inspected.

#### ELECTRICAL INSPECTION STANDARD

The inspection and maintaining of electrical systems in industrial settings such as the ACF, Huntington facility is governed by rule 70-B of the American National Standards Institute (ANSI) and the National Fire Protection Association (NFPA) and applies specifically to the 480 Volt electrical box that arc blasted on Mr. McComas. Each of the electrical experts in this case, ROGER BYBEE and JAMES WARREN agree that rule 70-B is applicable to the ACF plant, there is no testimony or documentary evidence to refute rule 70-B's application to these facts. (Warren- A.R. 0073) (Bybee A.R. 0099-0100).

It is also agreed by each of the experts that the requirement of Rule 70-B are mandatory upon ACF and are not optional.

Rule 70-B requires specific inspections of the electrical box that arc blasted in this case. Rule 70-B requires energized inspections of the subject box every 3 to 6 months and non-energized inspections every 3 to 6 years. Further it is required that records of these inspections be maintained at the facility.

It is undisputed in this case and is testified to by ACF's own electrical expert that

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<sup>3</sup>The actual box involved in this arc blast was significantly damaged by the blast and was disposed of by ACF before it could be inspected by any of the experts in this case.

ACF did not comply with the requirements of Rule 70-B and that in fact there were no inspection program in place for the electrical boxes at the ACF plant in Huntington, WV.

The plant manager, Dennis Nibert, testified that neither he nor his employers were required to inspect the electrical system in the plant. (A.R. 0193). It is abundantly clear that no inspection plan was even in place.

Though the actual switch box involved in this arc blast was not inspected by either electrical expert subsequent to the blast, the Defendants expert James Warren testified that likely the insulators on the knives, in this 1950's era box, that make contact when the switch is engaged were worn to the extent that they failed to properly function and allowed the arc blast to occur.

Mr. Warren further testified that the performance of the mandatory inspection required by 70-B may have revealed this hazardous condition.

The best idea of what actually happened in this case comes from Danny Scarberry who is the electrician at ACF that worked on restoring electrical service to the plant following this arc blast event. (A.R. 0260-0269).

### **SUMMARY OF ARGUMENT**

Respondent violated all five of the requirements of the deliberate intent statute.

Respondent blatantly failed to comply with the electrical inspection requirements of ANSI-NFPA 70-B and did not inspect a 1950's era electric switch box. The insulators in this box were deteriorated and worn out and the allowed the arc blast to occur when the box was turned on. Has the inspections been performed the problem was obvious and would

have been discovered.

This failure to inspect created a specific unsafe working condition as set forth above.

That rule 70-B of the ANSI-NFPA Code and 29 CFR 1910 subpart S- electrical are national and federal safety statutes or regulations.

Rule 70-B was specifically applicable to the industrial setting in this case.

Rule 70-B requires specific affirmative duties on employers and is not a general safety standard.

Respondent should be precluded from denying they had actual knowledge of the unsafe working condition. The respondent intentionally exposed Mr. McComas to this dangerous working condition.

Mr. McComas suffered severe permanent burns and scarring as a result of the arc blast from the uninspected switch box.

#### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Petitioners believe their brief and the testimony set forth therein established that the five requirements of W.V. Code 23-4-2 (d)(2)(ii) were met at the summary judgment stage of this case, however if this court determines additional information or clarification on any of the elements are needed the petitioner will provide oral argument if necessary.

#### **ARGUMENT**

The petitioner's argument will follow the factual application to the individual elements of W.V. Code 23-4-2 (d)(2)(ii)(A-E).

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;

As found by the Circuit Court, "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". (A.R. 0501).

The Plaintiff's electrical engineer expert, Roger Bybee in his affidavit dated July 20, 2011 says, "The failure of ACF to inspect and maintain the electrical boxes in their plant created a specific unsafe working condition, which presented an unreasonably high degree of risk and a strong probability of injury or death to employees from arc flashes or arc blasts." (A.R. 0099).

The Defendants electrical engineer expert, James Warren in his deposition testified that arc blasts present a strong probability of injury when they occur.

Q. Do these arc blasts present a strong probability of injury when they occur?

A. Yes, if someone is standing close enough to it, obviously. (A.R. 0050).

The switch box involved in this arc blast was from the late 1950's to early 1960's.

The plant electrician Danny Scarberry testified regarding the age of the subject box when he started at the plant in May of 1969.

Q. Okay. Now, this particular box, do you know how old it was

A. No. I mean it's old, but I don't know how old.

Q. Did you put it in?

A. No.

Q. It had been there before you came?

A. Oh, yeah.

Q. And you came when?

A. I come in May of '69.

Q. May of '69. Is there any way that you could have told or can tell how old or what generation or era a box would have been from?

A. We looked at another one just like it, and I don't know, we never established how old it was. It had to be pretty old.

Q. Okay. Do you recall any repairs ever being done to this particular box?

A. No. (A.R. 0262).

Mr. Scarberry was the first electrician who had an opportunity to analyze the electrical box involved in the arc blast after the blast occurred. His testimony regarding what happened to allow this arc blast to occur was as follows:

Q. When you took the one that had the problem down, did you investigate it at all to look and see what was going on inside of it or what had gone on inside of it?

A. The insulator on the inside that insulate the knives from the bar had disintegrated or come apart, had broken and fell down, that let the bar go against the knives.

- Q. And, so I can understand this, the knives are kind of an open - they have a space between them inside and you -
- A. Yeah, they go into - you know, the knives are out and they go in like that, you know, make contact.
- Q. Once they make contact, then that completes the circuit?
- A. That puts power to the bottom of the box there.
- Q. Okay. Which in this case would send it over to the transformer?
- A. Transformer, yes, sir.
- Q. And the transformer on to the switch box?
- A. Right, breaker panel.
- Q. Okay. So the insulator on the knives when they were shoved up made contact with what's called where they go into?
- A. You've got a bar that goes up across there that hooks to this handle, and that bar shoves all three blades in, but the blades are insulated from the bar because it's steel, you know.
- Q. Okay.
- A. And the insulator had come apart or was gone, had fell down in the bottom, and it let the bar come in contact with the knives.
- Q. And did you personally see that when you looked at the box afterwards?
- A. Yeah, it was obvious what happened. (A.R. 0261-0262).

Further creating the specific unsafe working condition was the undisputed fact that

these 480 volt boxes were not inspected or maintained.

Practically every witness that has testified in this case has said there was no maintenance, inspection or cleaning of the electrical boxes at ACF.

Ronnie Lambert, one of the individuals that was with David McComas when the blast occurred testified:

Q. Did you ever see anybody checking the electrical boxes to just inspect them or clean them or anything like that?.

A. Not unless someone was having a problem.

Q. They had to report a problem before that would be done as far as you knew?

A. As far as I know. (A.R. 0280).

Vollie McComas, David McComas' father who was beside him when the blast occurred, who worked at this plant from 1963 to 2009 testified:

Q. From '63 to June of '07, did you ever know this box to be replaced?

A. The box has never been - - no, no, it hadn't been replaced, no.

Q. The years that you were there, did you ever know of any preventive maintenance or any regular maintenance that was done on all these boxes that was in this plant? We've been told that there's all kinds of boxes.

A. No. (A.R. 0305).

The plaintiff, David McComas testified:

A. I don't know when the last time they had maintained the box.

Q. So you don't know if there was poor maintenance. You just don't know when the last time there was any maintenance; is that correct?

A. I don't know if there was any maintenance. No, I don't know. (A.R. 0346).

Dennis Deal, who worked at the ACF plant for thirty three years testified:

Q. During your years at the plant, are you aware of any cleaning or maintenance program of the electrical boxes that was performed by ACF?

A. I have never heard of it. A lot of times if there was - - like I said, if there were problems, especially in maintenance- - the production workers didn't have a good opinion on maintenance. And they finally found through these committees that we had that occasionally we could get something done. But I have never heard of any maintenance on electrical boxes. (A.R. 0386-0387).

Dennis Nibert, the plant manager for the ACF plant, who has been there for the last 37 years testified:

Q. Okay. As far as required maintenance on these electrical boxes, specifically 480-volt boxes, what was done at this plant?

A. The only time there was any maintenance or whatever done to any of the boxes in the plant, only if there was a problem. There's no requirement that I'm aware of or ever heard of that you've got to go through and clean out a box or blow a box out or change this out or whatever.

These boxes all, whether it's the box at your house or in your garage or whatever, they install a box and it's called a - - I don't know if this is the right term or not - - long-term box. It's installed and it's there from now on. Unless there's an issue with that box, my electricians or nobody else has any business or reason to be in that box.

A. .... but in the plant, I've never that I'm aware of in my 37 years ever heard of an electrician doing a PM on a box unless there was a problem with that box. (A.R. 0193-0194).

Q. Okay. Did the electricians ever perform any hazard evaluations or anything of that sort on the electric boxes or on the electric system?

A. Like throughout the plant?

Q. Yes.

A. I'm not aware of it. The only time they would do something like that if there was a problem, but a particular box or a particular section in the plant or something like that, that's the only time I would know that they would ever do anything like that. (A.R. 0195).

Danny Scarberry an electrician at the ACF plant that took the subject box down after the arc blast and had worked at ACF since 1969 testified:

Q. Okay. What was the policy at the plant as far as non-electricians turning these 480 volts on and off?

- A. Well, we'd always - - electricians, you know, safety, we'd always stress trying to use - - not to turn them big boxes on, use the small boxes downstream if possible.
- Q. To use the panel box?
- A. Panel box, yeah, whatever.
- Q. Okay. Why was that?
- A. Less chance of a problem.
- Q. By using the bigger boxes?
- A. No, the little boxes that you use.
- Q. Oh, less chance of a problem?
- A. Right.
- Q. Okay. So that was something that the electricians and the safety people talked about?
- A. We talked about that, yes.
- Q. Not using the 480s as switches?
- A. Yeah.
- Q. Had you talked about the before this accident in June of 2007?
- A. I believe we have, yeah. (A.R. 0263-0264).
- Q. Okay. Now, this particular box, do you know how old it was?
- A. No. I mean it's old, but I don't know how old.
- Q. Did you put it in?

A. No.

Q. It had been there before you came?

A. Oh, yeah.

Q. And you came when?

A. I come in May of '69.

Q. May of '69. Is there any way that you could have told or can tell how old or what generation or era a box would have been from?

A. We looked at another one just like it, and I don't know, we never established how old it was. It has to be pretty old.

Q. Okay. Do you recall any repairs ever being done to this particular box?

A. No. (A.R. 0262).

Larry Brumfield, who began work at ACF June 5, 1964, (page 10 line 14-Exhibit 14), through 2001 testified:

Q. That box, that ST3 box, during the time that you were there, did you ever see a new box get put up there?

A. Not as I ever recall. (A.R. 0405).

Mr. Mike McGuffin the safety director at the ACF plant testified:

Q. So, as far you know, Mr. McGuffin, there was no procedure in place to inspect these boxes?

A. Yes, that's true. (A.R. 0452).

As stated in the affidavit of Roger Bybee, the plaintiff's expert witness "the failure of ACF to inspect and maintain the electrical boxes in their plant created a specific unsafe working condition, which presented a high degree of risk and a strong probability of injury or death to employees from arc flashes or arc blasts". (A.R. 0099).

Based on the above evidence, there are genuine issues of material fact on sub-part A of the subject statutory requirements.

The above evidence presents a genuine issue of material fact that there was a specific unsafe working condition at the ACF plant in Huntington WV that presented a high degree of risk and a strong probability of injury or death on June 22, 2007.

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;

The analysis of section B regarding the employers actual knowledge of the above unsafe working condition follows an analysis established by the Court in *Ryan v. Clonch Industries, Inc.* 219 W.Va. 664 (2006).

All of the evidence in this case is clear that ANSI/NFPA Rule 70-B is a statute rule on regulation that imposes a mandatory duty on ACF to conduct inspections of the electrical switches in its plant.

In his affidavit Petitioners expert Roger Bybee says;

"ANSI/NFPA 70-B is specifically incorporated by reference in ANSI/NFPA 70 - The

National Electric Code (NEC). ANSI/NFPA 70-E Standard for electric safety in the work place and thus in 29 CFR 1910 subpart S - Electrical at appendix A". (A.R. 0099).

"ANSI/NFPA 70-B was specifically applicable to the particular work being performed at ACF's Huntington, West Virginia facility. NFPA 70-B requires the electrical boxes to be inspected every 3 to 6 months energized and every 3 to 6 years de-energized. ACF did not comply with the requirements of NFPA 70-B and did not perform the required inspections of the switch boxes in their electrical system". (A.R. 0099).

The requirements to inspect in 70-B are incorporated in 70-E which becomes a backbone of the OSHA Requirements.

The Defendants expert James Warren testified as follows regarding ANSI/NFPA 70-B.

A. And most of the codes - - - the 70-E becomes the backbone of OSHA's requirements. 70-E typically would apply to the OSHA requirements the same.

Q. The NFPA would you characterize as a commonly-accepted, well-known safety standard in the electrical field?

A. NFPA offers a whole range of codes. Are you talking about all of them or just the electrical ones?

Q. Well, the electrical ones.

A. Yes.

Q. All right. And you indicated that they have been adopted or I think you said

form the backbone of the OSHA regulations, 70 - - -

A. Personal safety, yes.

Q. - - - 70-E?

A. Correct. (A.R. 0052-0053).

The Circuit Court in the Findings of Fact section of its Order of March 22, 2012 finds, "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". (A.R. 0496).

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 ANSI/NFPA section 70-B which are subject to differing working conditions and use conditions.

According to the Plaintiff's expert, Roger Bybee, the failure to ACF to inspect and maintain the electrical boxes in their plant created a specific unsafe working condition which presented an unreasonably high degree to risk and a strong probability of injury or death to employees from arc flashes or arc blasts. (A.R. 0099).

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.

ACF's own expert James Warren was unequivocal in his testimony that ACF did not comply with the requirements of 70-B.

Q. Okay. What is your understanding of the inspection program that was in place at ACF?

A. For boxes, I'm not aware that there was a program in place.

Q. Nobody's told you there was a program in place or material-wise you haven't seen - - -

A. No.

Q. - - - anything that there was an inspection program?

A. No, I haven't

Q. Have you seen any documents that set forth the schedule of the three to six-year inspections - - - non-energized inspections required by 70-B?

A. No.

Q. 70-B requires that some documentation be maintained at the facility showing that those inspections have been done; is that correct?

A. That's correct.

Q. You haven't received any of that in this case?

A. I have not.

Q. Based on what you reviewed and your site inspection and so forth, everything you've done in this case, can you tell me whether or not there was

any inspection program of the electrical boxes at ACF?

A. I am not aware of any.

Q. And based on the requirements of 70-B and based on that response can you tell me whether there's anything that would indicate that ACF was in compliance with 70-B and its requirements?

ATTORNEY WOOD:

Object to the form of the question. You can go ahead and answer.

A. Can you repeat the question?

BY ATTORNEY BLAND:

Q. Can you tell me if there is anything that indicates to you that ACF was in compliance with the requirements of 70-B?

A. No, they were not.

ATTORNEY WOOD:

Same objection. I'm sorry. Go ahead.

A. No, they were not. (A.R. 0084-0086).

There is no question that ACF did not comply with the mandatory requirements set forth in ANSI/NFPA 70-B.

As stated by this Court in *Ryan v. Clonch Industries, Inc.* 219 W.Va. 664 (2006).

Certainly, however, the Legislature did not intend for an employer to circumvent liability by purposefully avoiding the subjective 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 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).

As noted previously in the testimony of ACF electrician Danny Scarberry, when discussing the worn out and missing insulators.

"Yeah, it was obvious what happened." (A.R. 0262).

The next inquiry under *Ryan*, is "The performance of which may have readily identified workplace hazards." *Ryan v. Clonch Industries, Inc.* 219 W.Va. 664 (2006) at page 674. If ACF has performed the inspection would it have revealed the hazard?

The affidavit of Roger Bybee addresses this question.

"Had ACF performed the required inspections and maintenance of the unsafe box as required by all applicable standard of good practice it would have shown the dangerous condition of the box". (A.R. 0100).

The Circuit Courts Order of March 22, 2012 addresses this question.

"The ANSI/NFPA 70-B inspections, if conducted, may have identified the unsafe switch box which was involved in this incident." (A.R. 0497).

The deposition testimony of ACF electrical expert James Warren addresses this question.

Q. Okay. 70-B requires that there be - - - I think you talk about it here, in your report, a little bit on page three, inspection and preventative maintenance. It has been suggested that the fused disconnect switches should be subject to inspections every three to six months, parentheses, energized. And that's

what we're talking about right now; is that right?

A. That is correct.

Q. And every three to six years, parentheses, de-energized?

A. Correct.

Q. These suggestions are in accordance with NFPA Code 70-B; is that right?

A. That is right.

Q. And is that what 70-B actually requires?

A. Yes.

Q. And you further say the purpose of 70-B Code, as stated in Section 11, is to reduce hazards to life and property?

A. Correct.

Q. So you're supposed to perform those inspections for that purpose?

A. Correct.

Q. Now, you say, there is no expectation that such an inspection will identify 100 percent of all possible problems that could occur within the next three to six years; is that right?

A. That is right.

Q. But is it fair to say that an inspection may identify a problem that exists?

**ATTORNEY WOOD:**

Object to the form of the question. You can go ahead and answer.

A. It may if you get lucky.

**BY ATTORNEY BLAND:**

Q. If you don't do it, you don't know; is that right?

A. That's right.

Q. But if you do it, it may?

A. It may. (A.R. 0070-0072).

Further Mr. Warren testified regarding the strong probability of injury serious injury or death from this unsafe working condition.

Q. These arc blasts present a strong probability of injury when they occur?

A. Yes, if someone is standing close enough to it, obviously. (A.R. 0050).

Based upon the foregoing it is clear that ACF failed to perform the mandatory 70-B electrical inspections which may have identified the obviously deteriorated insulators with in the switch box. The petitioner asserts that in accordance with the holding in *Ryan v. Clonch Industries, Inc.* 219 W.Va. 664 (2006) page 674.

"... 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 Section 23-4-2(c)(ii)(B)".

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;

As set forth above both of the electrical engineer experts in this case have testified that ANSI/NFPA 70-B is "part of the national electric codes and incorporated into the OSHA regulations in 29 CFR 1910 subpart S-Electrical at appendix A". (A.R. 0099).

James Warren's testimony regarding the statutory regulations and industry standards was:

Q. NFPA.

A. NFPA 70-E is where most of that is

Q. Okay.

A. And most of the codes - - - the 70-E becomes a backbone of OSHA's requirements. So what I just said for 70-E typically would apply to the OSHA requirements the same.

Q. The NFPA would you characterize as a commonly-accepted, well-known safety standard in the electrical field?

ATTORNEY WOOD:

Object to the form of the question. Go ahead and answer.

A. NFPA offers a whole range of codes. Are you talking about all of them or just the electrical ones?

BY ATTORNEY BLAND:

Q. Well, the electrical ones.

A. Yes.

Q. All right. And you indicated that they have been adopted or I think you said form the backbone of the OSHA regulations, 70 - - -

A. Personal safety, yes.

Q. - - - 70-E?

A. Correct.

Q. Okay. So you believe that this event should be defined as an arc blast based on NFPA 70-E?

A. Correct. (A.R. 0052-0053).

The next area of inquiry to comply with subsection C is, were the mandatory 70-B requirements specifically applicable to the particular work and working conditions involved?

James Warren's testimony on this point was clear.

Q. Still NFPA?

A. Still NFPA.

Q. Okay. Still recognized as an industry standard in the electrical industry?

A. Correct.

Q. So is it your opinion that NFPA 70-B and its inspections are applicable in this industrial setting?

A. Yes. (A.R. 0072-0073).

Roger Bybee in his affidavit addresses this question.

“ANSI/NFPA 70-B was specifically applicable to the particular work being performed at ACF’s Huntington West Virginia facility. NFPA 70-B required the electrical boxes to be inspected every 3 to 6 months energized and every 3 to 6 years de-energized. ACF did not comply with the requirements of NFPA 70-B and did not perform the required inspections of the switch boxes in their electrical system”. (A.R. 0099).

As stated in Ryan, this portion of subsection C requires that the requirements of 70-B be “capable” of application to the specific work at issue. *Ryan v. Clonch Industries, Inc.* 219 W.Va. 672 (2006)

“ANSI/NFPA 70-B was specifically applicable to the particular work being performed at ACF’s Huntington, West Virginia facility.” (A.R. 0099).

The evidence is unrefuted that the welding equipment used at the ACF facility were electric welders. (A.R. 0494).

ACF was aware that in order to weld sides in the ST-3 section of the plant it would be necessary to activate the electric service to that portion of the plant.

In the meetings following this accident one of the issues discussed was “Need to

train hourly employees and supervisors not to use 480 Volt boxes to turn lights, welders, (emphasis added), and other equipment off and on.” (A.R. 0265).

There are genuine questions of material fact and it appears clear that failure to properly \_ maintain the electrical system is capable of application to the operation of electric welding equipment.

There is no evidence to indicate that 70-B does not apply to this case.

The next area of inquiry of subsection c; is whether the 70-B inspections are general safety requirements or do they require specific identifiable duties on the employer.

The Circuit Court in its Order of March 22, 2012 finds that ANSI/NFPA 70-B is related to “general electrical safety in the work place”. This formed the circuit court’s basis for granting of the defendant’s summary judgment motion. (A.R. 0501).

As stated in *Ryan v. Clonch Industries, Inc.* 219 W.Va. 671 (2006). 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 employers.

By contrast ANSI/NFPA 70-B “does not merely require a safe workplace or safe equipment or working conditions. Instead, it imposes a specific mandatory duty upon employers. NFPA 70-B requires employers to perform actual inspections of the electrical boxes within their facility, energized every 3 to 6 months and non-energized every 3 to 6 years and to address any unsafe condition discovered as a result of those inspections.

Mr. Warren's testimony regarding the mandatory nature of these inspections and the code requiring the employers to actually do them was as follows:

Q. Okay. It doesn't say a plant that has or a facility that has ten boxes should do this and a facility that has 500 boxes should do it a different way, does it?

A. No, it doesn't. They expect you to do each one. They're typically not looking at the quantity I'm sure when they're doing that, but still, the Code requires you to - - -. (A.R. 0081).

ANSI/NFPA 70-B prescribes "specific identifiable duties, as opposed to merely expressing a generalized goal of safety."

As discussed in the *Ryan v. Clonch Industries, Inc.* 219 W.Va. the case of *Zuniga v. Storm Realty* 647 NY 52d 426, 430, 169 Misc. 2d 1004, 1009 (1996) which requires continuous inspections to be performed, ... was found to be a... "specific safety regulation - and concrete specification" in contrast to a general safety standard.

The inspections required by 70-B likewise requires specific identifiable duties on the employer and does not express a generalized safety goal.

Based the foregoing the Petitioners believe there are genuine issues of material fact on the question of whether ANSI/NFPA 70-B requires specific identifiable duties as opposed to stating a general safety goal.

Based on the above testimony and evidence the Petitioner believes they have met their burden with regard to subsection C.

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

Regarding the intentional exposure to the unsafe working condition, Roger Bybee in his affidavit testified:

“AFC supervisors intentionally exposed David McComas to this unsafe working condition by requiring him to turn on the electrical power in the ST-3 area of the facility where there had been no required inspections of an electrical box that was approximately 50 years old, and had been used repeatedly as a switch over its life time, thus causing excessive wear and tear that was never inspected or maintained.” (A.R. 0100).

David McComas had no other way to carry out the directive of his supervisor Wayne Stillwell then to go to the ST-3 section of the plant and start building sides other than to turn on the switch that arc blasted on him.

James Warren testified as follows:

Q. After that, in order to turn on the lights to that area, what would be the next step that an individual would have to do?

A. The next step would be to go to the supply disconnect switch, which is to the left of the transformer, and turn on that, because that was the device that put the 440 volt - - 277/440 volt, arguably, onto the disconnect - - rather, the circuit breaker panel.

Q. Through the transformer?

A. Through the transformer.

Q. All right. And there was no - - and that was what you had to do. There was no alternative process to try another box or something else? The way this is set up, that's the way you had to do it; is that right?

A. That's the way you had to do it. (A.R. 0043-0044).

Q. And you were told, based on your notes and I think your previous testimony that - - - in paragraph twp here, that the procedure - - procedures were to have an electrician turn on power; is that right?

A. Correct. (A.R. 0046).

By directing Mr. McComas to go to ST-3 and build sides, Mr. Stillwell required him to activate the 480 Volt box that based on the evidence discussed herein had not been inspected for approximately 50 years since its installation in the late 50's to early 60's.

Based upon all of the above the Petitioners believe there are genuine issues of material fact presented on the elements required by sub section D.

E.

That the employee exposed suffered serious compensable injury or compensable death as defined in section on, 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.

Mr. McComas suffered burns to 25% of his body. Mr. McComas has been rendered 31% permanently partial disabled as a result of this explosion. These injuries are a direct result of the arc blast that occurred on June 22, 2007.

The defendant's expert witness, James Warren testified:

Q. .... will you agree with me that in this particular event Mr. McComas did receive serious burns as a result of this arc-blast?

A. Correct. (A.R. 0075-0076).

There is no question that Mr. McComas suffered serious injuries as a direct and proximate result of the arc blast from the uninspected 480 volt electrical box.

The Circuit Court Order of March 22, 2012 in the Conclusions of Law Section finds "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. (A.R. 0501).

This failure to comply with the requirements of NFPA 70-B resulted in an unsafe electrical box that arc blasted as defined by NFPA 70E as well as an electrically unsafe workplace and caused serious injuries to David McComas. (A.R. 0100).

There is little doubt that Mr. McComas' injuries are permanent and serious compensable injuries and that the requirements of section E are satisfied.

**CONCLUSION**

When the testimony and facts set forth herein are applied to the Rule 56 standard and considered in the light most favorable to the Petitioner there are genuine issues of material fact raised to each of the five sections of W.V. Code Section 23-4-2(c)(2)(ii), and therefore the Petitioners herein pray that the Order of the Circuit Court granting the Defendants Motion for Summary Judgement be reversed, and that this matter be considered for a trial by jury.

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 20<sup>th</sup> day of July, 2012, true and accurate copies of the foregoing **Petitioner's Brief** were deposited in the U.S. Mail contained in postage paid envelope address to counsel for all other parties to this appeal as follows:

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