

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

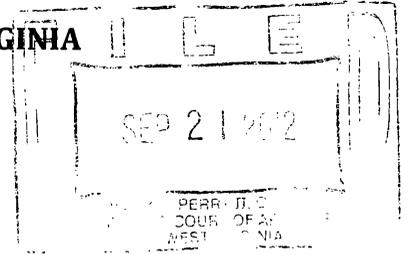
Docket No. 12-0548

DAVID MCCOMAS,
Petitioner,

v.

ACF INDUSTRIES, LLC,
Respondent

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



PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

To each of the points raised by the respondent in their brief there is testimony that creates a factual dispute and raises questions that should be determined by a jury.

The petitioner, as stated, is required to show that there are genuine issues of material fact on each of the five subsections of the statute 23-4-2 (d) (2) (ii).

Summary judgment should not be granted when there are genuine issues of material fact to be determined by a jury.

If there are disputed facts those disputes are to be resolved in the favor of the non-moving party. *Aetna Casualty and Surety Company v. Federal Insurance Company of New York* 148 W.Va. 160 (1963).

There are genuine issues of material fact present on each of the four contested subparts of the statute.¹

A reasonable jury could return a verdict for the petitioners based on the facts of this case, and if that is so then the motion for summary judgment should have been denied. *Stephens v. West Virginia College of Graduate Studies*, 1998, 506 S.E. 2d 336, 203 W.Va. 81

The petitioner has pointed to one or more material disputed facts on each of the contested elements and therefore summary judgment is not proper *Marcus v. Holley* (2005) 618 S.E. 2d 517, 217 W.Va. 508.

A.

The respondent first raises the question pursuant to subsection A, was there, “a specific unsafe working condition that existed in the work place that which presented a high

¹ No one has contested that Mr. Mccomas suffered serious compensable injuries as a result of the arc blast, therefore subsection E is not discussed herein.

degree of risk and a strong probability of serious injury or death” W.V. Code 23-4-2 (d) (ii) (a).

The respondent contends that the petitioner is unable to pinpoint the exact cause of the arc blast. First at all there is no authority cited to support the assertion that we are required to pinpoint the exact cause of the arc blast.

Secondly, there is testimony from Danny Scarberry the electrician at the ACF plant that says what caused the arc blast, “the insulator had come apart or was gone, had fallen down into the bottom and it let the bar come into contact with the knives” “it was obvious what happened”. This evidence was personally seen by the plant electrician Danny Scarberry (A.R. 0261-0262).

The respondent then asserts that the NFPA 70-B inspection would have “definitely” had to have shown the problem with the switch box. Again, that is not the proper standard to be applied.

This Court has established the standard, that had the required testing been performed it, “may have readily identified the workplace hazards”. *Ryan v. Clonch Industries, Inc.* 219 W.Va. 674, 639 S.E. 2d 756 (2006).

This argument may however be more appropriate in the analysis of subsection (B) regarding the actual knowledge component of the statute.

The respondent does however raise the issue of their destruction or throwing away of the actual switch box. Similar to the failure to perform required testing that may have readily identified workplace hazards, being unacceptable, certainly it is not the intent of the legislature to reward an employer who creates the situation where the evidence is not

available so they can avail themselves to the argument that the employee can not tell us exactly what went wrong.

Both of the experts in the case testified that the uninspected switch box was a specific unsafe working condition (A.R. 0099) (A.R. 0050).

When the testimony is considered in the light most favorable to the non-moving party the petitioner should prevail on a motion for summary judgement on sub section A.

B.

The respondent's next area of discussion pertains to the "actual knowledge" requirement of subsection B of the statute.

There is no evidence in this case that indicates that the respondent in any way complied with the inspection requirements of NFPA 70-B. In fact, every witness including the respondent's own expert testified that they did not comply with the testing requirements (A.R. 0084-0086).

The respondent next attempts to establish that the inspection requirements of NFPA 70-B are not mandatory upon ACF Industries. The evidence in the case however, from both experts is that the requirements of NFPA 70-B are mandatory (A.R. 0099) (A.R. 0084-0086). The testimony in this case clearly establishes that NFPA 70-B testing was required.

The respondent is correct in the assertion that without syllabus point 6 of Clonch, there is no evidence of actual knowledge, because no one in the 50 plus years of this switch box being used in this plant ever inspected it and they "lose" the box itself after the arc blast so that the only person to inspect the actual box was the plant electrician Danny Scarberry.

However the requirements of syllabus point 6 of the Clonch case have clearly been established in this case, and summary judgement should have been denied.

C.

The next area contested by the respondent is the second part of subsection C of the statute, that the statute rule or regulation that is violated be specifically applicable to the work or working condition involved, as contrasted with a statute, rule, regulation, or standard generally requiring safe workplaces, equipment or working conditions.

The question here is, did the regulation require the employer to do something?

The doing of which, "may" (Clonch @ 674 W.Va) has identified the hazard.

NFPA 70-B requires the employer to do inspections, two separate and distinct types of inspections, and establishes the time in which they are to be performed.

It does not generally require a safe electrical system but requires the employer to do something.

The respondents next argument is that the employer told employees not to use the 480 volt switches to turn on the electric. The testimony however is that everyone used the 480 volt boxes and the employer did nothing, the clear practice at this plant was to turn on and do whatever needed done to maintain production with a wink and a nod given to safety procedures and required inspection programs.

Next the respondent raises the issue of whether turning on the electric was directly related to the job of welding. The evidence is clear and unrefuted that the welding equipment at the ACF plant were electric welders.

The respondents own expert testified that there was no alternative way for David Mccomas to carry out the directive to build sides other than to turn on the 480 volt switch (A.R. 0043-0044).

Mr. Mccomas simply could not run an electric welder without the electricity being turned on (A.R. 0494).

There are genuine issues of fact clearly established by the testimony in this case to each of the points raised by the respondent and therefor summary judgment is not proper

D.

The respondent argues in subpart D of the statue that the employer intentionally exposed Mr. Mccomas to the dangerous switch box, even with the knowledge from A-C.

As discussed above the requirements of actual knowledge set forth in subsection B are met through the Clonch test.

The employer intentionally sent three workers to a section of the plant that had not been in operation for some time preceding the day of the arc blast. The employer knew the welders to be used were electric.

Further, when the actual knowledge element is satisfied by the employers failure to perform required inspections, to allow the employer to then say they did not intentionally expose the employee under subpart D seems to allow the employer a second opportunity to “stick their head in the sand like the proverbial ostrich”, Clonch @ 674 W.Va.

CONCLUSION

Based on the foregoing and the brief previously submitted the respondents

pray that the circuit court's order granting the respondents motion for summary judgment be reversed and this matter be remanded for trial bu jury.

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of September, 2012, true and accurate copies of the foregoing **Petitioner's Reply 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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