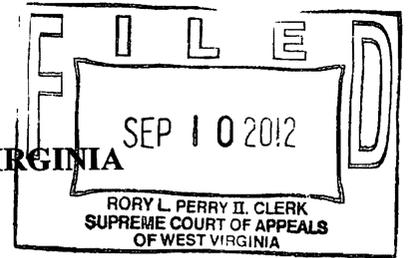


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 12-0548



DAVID MCCOMAS,
Petitioner,

v.

Appeal from a final Order of the Circuit
Court of Cabell County (09-C-534)

ACF INDUSTRIES, LLC
Respondent.

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

This civil action was filed in the Circuit Court of Cabell County, WV on or about June 19, 2009 wherein the petitioner, David McComas, asserted a deliberate intent cause of action against his employer, respondent ACF Industries, LLC. (A.R. 506-509) This case comes before the Court on appeal from a final decision of the Circuit Court of Cabell County, WV, entered March 22, 2012, granting summary judgment to the respondent. (A.R. 495-502)

The respondent, ACF Industries, LLC, builds rail road cars at a facility located in Huntington, WV. On June 22, 2007, the petitioner, David McComas, was working as a welder for the respondent. Following lunch, the petitioner and co-workers, Vollie McComas (petitioner's father) and Ronnie Lambert, were assigned to the ST-3 section of the plant to build sides of rail road cars. The workers concluded that they needed the lights to be turned on to perform their work. They first tried individual circuit breakers to turn-on the lights but noticed that the power was off. The petitioner then went to a 480-volt, fused disconnect-switch box and attempted to turn on this switch. (A.R. 273-74) There was some testimony that employees were told not to turn on the electricity in this manner. (A.R. 263-64, 334, 496)

Vollie McComas reported that the petitioner was standing in front of and to the right of the box and reached up with his left hand to push the lever upward to turn on the switch. (A.R. 299-300) The petitioner stated in his deposition that he was standing directly in front of the box and reached upward with his right hand to turn on the switch. (A.R. 340) When the switch lever was moved toward the on position, an-explosive event occurred that forced the door open, causing heat to exit and burn plaintiff on his ears, face, neck, arms, chest, stomach and back. The petitioner was taken to Cabell Huntington Hospital, where he was admitted and treated for his injuries.

The electrical switch involved in this matter was manufactured at some point in the 1940s, 1950s, or 1960s. It was one of only two switches of its kind at the facility. The switch in question was stored for over a year by the respondent, but was ultimately discarded before it could be inspected by any of the experts in this matter. (A.R. 465-66) However, the other switch of its kind was inspected as an exemplary switch. The switch operated with a normal up/down type lever. There had been no similar accidents in at least twenty-one years.

The Circuit Court granted summary judgment to the respondent following oral argument and by Order dated March 22, 2012. The Court found National Fire Protection Agency No. 70B (NFPA 70B) was a standard generally requiring safe workplaces, equipment or working conditions and did not apply specifically to the job the petitioner was performing. The Court further found that the petitioner failed to offer evidence that employer intentionally exposed an employee to the specific unsafe working condition after having actual knowledge of the same. (A.R. 495-502).

SUMMARY OF ARGUMENT

The petitioner has failed meet his burden under W.Va. Code §23-4-2(d)(2)(ii), in that they have not established competent evidence to survive a summary judgment motion on the following four factors: (1) That a specific unsafe working condition existed in the workplace which presented a high degree of risk and a strong probability or serious injury or death; (2) 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; (3) 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 a particular work and working condition involved, as contrasted with a statute, rule, regulation or standard generally requiring safe workplaces, equipment or working conditions; and (4) That notwithstanding the existence of the facts set forth in (1)-(4), the employer nevertheless intentionally thereafter exposed an employee to the specific unsafe working condition. Therefore, the granting of summary judgment by the Circuit Court should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent believes its brief and the appeal record sufficient establishes that the petitioner has failed to make all required showings under W.Va. Code §23-4-2(d)(2)(ii). As such, this case should be affirmed on the written submissions alone. However, if this Court deems additional information or oral argument appropriate, the respondent will comply.

ARGUMENT

- I. In a deliberate intent action, summary judgment is appropriate if the Plaintiff fails to show a genuine issue of fact regarding any one (1) of the five (5) required elements.**

In West Virginia it is well established that “a motion for summary judgment should be granted only when it is clear that there is no genuine issue of material fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.” Syl. Pt. 3, *Aetna Casualty and Surety Company v. Federal Insurance Company of New York*, 148 W.Va. 160 (1963). “The question to be decided on a motion for summary judgment is whether there is a genuine issue of fact and not how that issue should be determined.” Syl. Pt. 5, *Aetna, Id.* Further, “A party who moves for summary judgment has the burden of showing that there is no

genuine issue of fact and any doubt as to the existence of such issue is resolved against the movant for such judgment.” Syl. Pt. 6, *Aetna, Id.*

“Summary Judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.” Syl. Pt. 4, *Painter v. Peavy*, 192 W.Va. 189 (1994). “If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure.” Syl. Pt. 3, *Williams v. Precision Coil, Inc.*, 184 W.Va. 52 (1995).

Finally, “Roughly stated, a ‘genuine issue’ for purposed of West Virginia Rule of Civil Procedure 56(c) is simply one half of a trial worthy issue, and a genuine issue does not arise unless there is sufficient evidence favoring the non-moving party for a reasonable jury to return a verdict for that party. The opposing half of a trial worthy issue is present where the non-moving party can point to one or more disputed ‘material’ facts. A material fact is one that has the capacity to sway the outcome of the litigation under the applicable law. Syl. Pt. 5, *Jividen v. Law*, 194 W.Va. 705 (1995).

West Virginia Code § 23-4-2 (2005) reads in pertinent part as follows:

§ 23-4-2. Disbursement where injury is self-inflicted or intentionally caused by employer; legislative findings; “deliberate intention”: defined

(c) If injury or death result to any employee from the deliberate intention of his or her employer...the employee has the privilege to take under this chapter and has a cause of action

against the employer...for any excess of damages over the amount received or receivable in a claim for benefits under this chapter, whether filed or not.

(d)(2) The immunity from suit provided under this section...may be lost only if the employer...acted with "deliberate intention." This requirement may be satisfied only if:

- (i) It is proved the employer...acted with a consciously, subjectively and deliberately formed intention to produce the specific result of injury or death to an employee. This standard requires a showing of an actual, specific intent and may not be satisfied by allegation or proof of: (A) conduct which produces a result that was not specifically intended; (B) conduct which constitutes negligence, no matter how gross or aggravated; or (C) willful, wanton or reckless misconduct; or
- (ii) ...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, prior to the injury, had actual knowledge of the existence of the specific unsafe working condition and of the high degree of risk and the strong probability of serious injury or death presented by the specific unsafe working condition;
 - (C) That the specific unsafe working condition was a violation of a state or federal safety statute, rule or regulation, whether cited or not, or of a commonly accepted and well-known safety standard within the industry or business of the employer, as demonstrated by competent evidence of written standards or guidelines which reflect a consensus safety standard in the industry or business, which statute, rule, regulation or standard was specifically applicable to a particular work and working condition involved, as contrasted with a statute, rule, regulation or standard generally requiring safe workplaces, equipment or working conditions;
 - (D) That notwithstanding the existence of the facts set forth in subparagraphs (A) through (C), inclusive, of this paragraph, the employer nevertheless intentionally thereafter exposed an employee to the specific unsafe working condition; and
 - (E) That the employee exposed suffered serious compensable injury...as a direct and proximate result of the specific unsafe working condition.
- (ii) In cases alleging liability under the provisions of paragraph (ii) of this subdivision:
 - (A) No punitive or exemplary damages shall be awarded to the employee or other plaintiff;

- (B) **...the court shall dismiss the action upon motion for summary judgment if it finds, pursuant to rule 56 of the rules of civil procedure that one or more of the facts required to be proved by the provisions of subparagraphs (A) through (E), inclusive, paragraph (ii) of this subdivision do not exist, and the court shall dismiss the action upon a timely motion for a directed verdict against the plaintiff if after considering all the evidence and every inference legitimately and reasonably raised thereby most favorably to the plaintiff, the court determines that there is not sufficient evidence to find each and every one of the facts required to be proven by the provisions of subparagraphs (A) through (E), inclusive, paragraph (ii) of this subdivision;....**

W.Va. Code § 23-4-2 (2005)(emphasis added).

Under §23-4-2, there are two distinct methods of proving deliberate intent of an employer, either by showing the elements of §23-4-2(d)(2)(i) or §23-4-2(d)(2)(ii). In the vast majority of cases, the parties and the courts have analyzed deliberate intent under the elements of §23-4-2(d)(2)(ii). Upon a motion for summary judgment, a plaintiff must make a prima facie showing of dispute on each of the five factors of §23-4-2(d)(2)(ii). Without a showing on all elements, the case shall be dismissed upon summary judgment.

II. The petitioner has failed to show 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.

Under W.Va. Code §23-4-2(d)(ii), the petitioner must make a showing of a specific unsafe working condition that existed in the workplace and which presented a high degree of risk and a strong probability of serious injury or death. The petitioner has failed to make the requested showing sufficient to survive a summary judgment motion.

In the case at hand, the petitioner is unable to pinpoint the exact cause of the arc blast that occurred. Neither expert has been able to express an opinion as to the cause of the arc blast. Moreover, each expert has been unable to say that any problem with the box definitely would

have been found had the switch box been inspected under NFPA 70B. (A.R. 0001-0098, 0541-0600)

Part of this problem with showing the cause of the arc blast is that the switch box involved in the incident was not available for inspection or examination. After the incident, the switch box was no longer operable. It was removed and stored in an office for some time. After a period of time it was moved to storage. At some point later, it was removed from storage and disposed of. All told, the respondent kept the incident box in its possession for over a year. (A.R. 465-66) This is not a case where there have been allegations of intentional destruction of evidence or any other unseemly act on behalf of the respondent.

As testified to by both experts, there are many components within an electrical disconnect switch. A problem with any of these components could create an unsafe working condition. The box itself is not the unsafe working condition. Without knowing what caused the failure within the box, the petitioner is unable to show a specific unsafe working condition sufficient to survive a summary judgment motion.

III. The petitioner has failed to show that the respondent 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.

Under W.Va. Code §23-4-2(d)(ii), the petitioner must also make a showing that the respondent 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 petitioner has failed to make this showing sufficient to survive a summary judgment motion.

In fact, the petitioner has offered no evidence whatsoever that the respondent was aware of the specific unsafe working condition involving the incident box. As this court has previously stated,

[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. 663 (1991).

The petitioner focuses on the fact that a maintenance schedule was not followed as recommended by NFPA 70B. However, the petitioner has not shown that inspection provisions were mandatory upon the respondent. The petitioner's expert was unable to cite to the specific section of NFPA 70B that required these inspections. (A.R. 551-600) NFPA 70B deals with recommend practices. In fact, in several sections of NFPA 70B, the recommended frequency of maintenance depends on the operating environment and conditions, so no fixed rule can govern all applications. NFPA 70B §15.1.1.3 & §15.2.3.1 (2010 ed.) (substations and switchgears). In fact, Table K.4(f) refers to the 2-6 month energized inspections and 3-6 year de-energized inspections as "typical frequency." NFPA 70B Table K.4(f) (2010 ed.). Without the standard being mandatory, the petitioner cannot claim the petitioner had actual knowledge of the unsafe working condition under Syl. Pt. 6 of *Ryan v. Clonch Industries, Inc.*, 219 W.Va. 664 (2006).

Without relying on Syl. Pt. 6 of *Clonch*, the petitioner has failed to offer any evidence whatsoever that the respondent had actual knowledge of a specific unsafe working condition. As such, the petitioner's case cannot survive a motion for summary judgment.

IV. The petitioner has failed to show that NFPA 70B was specifically applicable to a particular work and working condition involved, as contrasted with a statute, rule, regulation or standard generally requiring safe workplaces, equipment or working conditions.

Another required showing under W.Va. Code §23-4-2(d)(ii) is that the regulation, NFPA 70B, was specifically applicable to a particular work and working condition involved, as contrasted with a statute, rule, regulation or standard generally requiring safe workplaces, equipment or working conditions. As the Circuit Court found, the petitioners have failed to make this showing.

The act of turning on this 480-volt switch box was not directly related to the job of welding or “building sides”, as the petitioner had been instructed to do. In fact, there was deposition testimony that employees were told not to turn on the electric in this way, but the petitioner did so anyway. (A.R. 263-64, 334, 496) Therefore, the respondent cannot be held responsible when it had instructed production workers to call an electrician to turn on the 480 volt boxes.

Nonetheless, as the Circuit Court found, NFPA 70B deals with general electrical safety in the workplace and is not applicable to the particular work or working condition involved in this matter. In the “Origin and Development” section of NFPA 70B it states

It was recognized that much had been done to enunciate maintenance needs for specific types of equipment by the equipment manufacturers and that guidance was available on the *general subject* from a number of sources. However, it was also felt to be desirable to bring together some of the *general guidelines* in a single document under NFPA procedure.

NFPA 70B (2010 ed.)(emphasis added). It is clear that NFPA 70B was developed to deal with the general subject of electrical safety, in that it compiles general guidelines.

The petitioner was a welder, not an electrician. NFPA 70B does address welders specifically. It does not apply specifically to any equipment needed in the welding process itself. It applies entirely to electricity and electrical components and fixtures.

The only way NFPA 70B plays a role in this matter is that electricity and lighting were generally needed to perform the work. Logically extended, NFPA 70B would then apply to any industrial job wherein lighting was needed to perform the work, whether that be a welder, machine operator, janitor, laborer, manager, or virtually any other position. This most certainly was not the intent of the drafters of NFPA 70B. The intent of NFPA 70B is clear and unambiguous from its “Origin and Development” section. The intent was to bring together “general guidelines” in electrical safety.

The evidence is clear that NFPA 70B only references general guidelines regarding electricity. Without NFPA 70B being directly applicable to the petitioner’s work as a welder or to his working conditions, the plaintiff cannot sustain his deliberate intent action and his only avenue of recovery is under the West Virginia Workers Compensation Act. Therefore, summary judgment is appropriate in this matter.

V. The petitioner has failed to show that the respondent employer nevertheless intentionally thereafter exposed the petitioner employee to the specific unsafe working condition.

In addition to showing a specific dangerous working condition that the employer had actual knowledge of, the petitioner must also show that the respondent employer nevertheless intentionally thereafter exposed the petitioner employee to the specific unsafe working condition. “In other words, this element, which is linked particularly with the subjective realization element, is not satisfied if the exposure of the employee to the condition was inadvertent or

merely negligent.” *Sias v. W-P Coal*, 185 W.Va. 569, 575 (1991). As the Circuit Court found, the petitioner has failed to make this showing.

The petitioner was instructed to go to the ST-3 section of the plant to “build sides” for a rail road car. This was an instruction to weld part of the rail road car together, in accordance with the petitioner’s job as a welder. He was never given any specific instructions regarding the turning on of electricity or lighting in this area of the plant. (A.R. 329-31) The petitioner was never instructed by anybody associated with ACF Industries to turn on the power at the incident box. (A.R. 293-94, 337-38) The workers made a decision on their own, without even knowing what boxes and switches were connected to what, to simply start flipping all the switches until the lights and power came on. (A.R. 292, 337-38) This was a decision by the three workers involved, not by any foreman or management of ACF Industries. It appears this was a spontaneous decision of the workers involved.

Furthermore, the petitioner has not attempted to make any showing that management knew the power was turned off at this incident box. Without this knowledge, management could not have known that the petitioner would attempt to turn on the power at the subject box. Therefore, the petitioner cannot show that despite the actual knowledge of the specific unsafe working condition, the respondent nevertheless intentionally exposed the petitioner to the unsafe working condition.

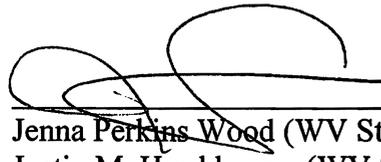
Due to the fact that nobody from ACF Industries, with a supervisory role over the petitioner, directed the petitioner to turn on the power at the incident box, the petitioner cannot show that the respondent intentionally exposed the petitioner to the unsafe working condition. This, combined with the fact the there is no evidence that management knew the power was off at the incident box, clearly shows that the respondent did not intentionally expose the petitioner

to the unsafe working condition. As such, summary judgment is appropriate and the petitioner is limited to his recovery under the West Virginia Workers' Compensation Act.

CONCLUSION

The petitioner has failed meet his burden under W.Va. Code §23-4-2(d)(2)(ii), in that they have not established competent evidence to survive a summary judgment motion on the following four factors: (1) That a specific unsafe working condition existed in the workplace which presented a high degree of risk and a strong probability or serious injury or death; (2) 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; (3) 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 a particular work and working condition involved, as contrasted with a statute, rule, regulation or standard generally requiring safe workplaces, equipment or working conditions; and (4) That notwithstanding the existence of the facts set forth in (1)-(4), the employer nevertheless intentionally thereafter exposed an employee to the specific unsafe working condition. Therefore, the granting of summary judgment by the Circuit Court should be affirmed.

Respectfully Submitted,



Jenna Perkins Wood (WV State Bar #6983)
Justin M. Hershberger (WV State Bar #10370)

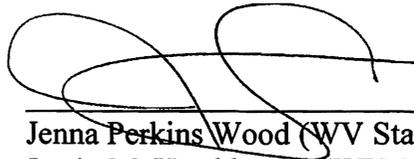
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CERTIFICATE OF SERVICE

I hereby certify that on the 6 day of September, 2012, I served the foregoing
“RESPONDENT’S MOTION FOR LEAVE TO FILE A SUPPLEMENTAL APPENDIX” upon
plaintiff’s counsel of record by United States Mail as follows:

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