No. 33001 *Joseph E. Ryan v. Clonch Industries, Inc., a West Virginia corporation; and H & D Lumber Distributor, Inc., a West Virginia corporation*

FILED
December 15, 2006
released at 10:00 a.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Benjamin, Justice, dissenting:

I must respectfully dissent from the majority decision in this matter. In my opinion, the majority contravenes clear legislative intent by deeming a general safety regulation sufficient to satisfy the statutory specificity requirement of a deliberate intent cause of action.[1] The regulation relied upon by the majority requires employers to conduct a hazard assessment in the workplace in order to identify the need for use of personal protective equipment.[2] According to the majority, the failure to conduct a hazard assessment not only satisfies the statutory requirement that a specifically applicable safety regulation be violated but also precludes the employer from denying a subjective realization of risk. In so finding, the majority creates, at Syllabus Point 3, new law at odds with the "specifically applicable" language of W. Va. Code §23-4-2(c)(2)(ii)(c) and essentially negates the statutory cause of action's subjective realization requirement. The majority's interpretation of the deliberate intent statute in this matter simply does not, in my opinion, comply with

[1] At the time of the incident at issue herein, the statutory deliberate intent provisions at issue herein were codified within W. Va. Code § 23-4-2(c). The relevant provisions have been subsequently amended and are currently codified at W. Va. Code § 23-4-2(d) (2005). I will, however, consistent with the majority opinion refer to and discuss the prior W. Va. Code § 23-4-2(c).

[2] *See*, note 6, majority opinion.

express statutory purposes and Legislative intent.

The Legislature's purpose is establishing a deliberate intent cause of action was clearly set forth in W. Va. Code § 23-4-2 (c)(1).[3] Therein, the Legislature:

> declared that enactment of this chapter and the establishment of the workers' compensation system in this chapter was and is *intended to remove from the common law tort system all disputes between or among employers and employees* regarding the compensation to be received for injury or death to an employee except as herein expressly provided, and to establish a system which compensates even though the injury or death of an employee may be caused by his or her own fault or the fault of a co-employee; that the immunity established in sections six and six-a, article two of this chapter, is an essential aspect of this workers' compensation system; *that the intent of the Legislature in providing immunity from common law suit was and is to protect those so immunized from litigation outside the workers' compensation system except as herein expressly provided*; that, *in enacting the immunity provisions of this chapter, the Legislature intended to create a legislative standard for loss of that immunity of more narrow application and containing more specific mandatory elements than the common law tort system concept and standard of willful, wanton and reckless misconduct*; and that it was and is the legislative intent to promote prompt judicial resolution of the question of whether a suit prosecuted under the asserted authority of this section is or is not prohibited by the immunity granted under this chapter.

W. Va. Code § 23-4-2 (c)(1) (emphasis added). *See also*, Syl. Pt. 2, *Bell v. Vecellio & Grogan, Inc.*, 197 W. Va. 138, 475 S.E.2d 138 (1996) ("W. Va. Code 23-4-2(c) (1991)

[3] Currently W. Va. Code § 23-4-2(d)(1) (2005). The 2005 version of this provision contains minor grammatical changes which do not affect the substance of the text.

represents the wholesale abandonment of the common law tort concept of a deliberate intention cause of action by an employee against an employer, to be replaced by a statutory direct cause of action by an employee against an employer expressed within the workers' compensation system."); *Mayles v. Shoney's Inc.*, 185 W. Va. 88, 92, 405 S.E.2d 15, 19 (1990) (recognizing that intent of deliberate intent statute was "to make it more difficult for an employer to lose the immunity provided to him by the Workers' Compensation Act.").

The statute provides two separate and distinct methods of proving "deliberate intention" so as to remove Workers' Compensation immunity. The employee may prove the employer "acted with a consciously, subjectively and deliberately formed intention to produce the specific result of injury or death to an employee." W. Va. Code § 23-4-2(c)(2)(i). Or, the employee may offer evidence proving the five specific requirements set forth in W. Va. Code § 23-4-2(c)(2)(ii). Syl. Pt. 2, *Mayles*; Syl. Pt. 3, *Blevins v. Beckley Magnetite, Inc.*, 185 W. Va. 633, 408 S.E.2d 385 (1991). Appellant has only relied upon W. Va. Code § 23-4-2(c)(2)(ii) in the instant action. Thus, to survive summary judgment, he is required to offer demonstrate that a material question exists as to whether each of the following facts may be 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 such specific unsafe working condition and of the high degree of risk and the strong probability of serious injury or death presented by such specific unsafe working condition;
>
> (C) That such 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 such 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) hereof, such employer nevertheless thereafter exposed an employee to such specific unsafe working condition intentionally; and
>
> (E) That such employee so exposed suffered serious injury or death as a direct and proximate result of such specific unsafe working condition.

W. Va. Code § 23-4-2(c)(2)(ii). I believe the circuit court properly granted summary judgment in light of Appellant's failure to offer sufficient proof that these five statutory requirements may be met in the instant action.

The majority and the parties focus upon Appellant's evidence relating to

requirements (B) and (C), the "subjective realization"[4] and "specifically applicable" requirements. The majority opinion hinges upon a determination that a federal OSHA regulation, 29 C.F.R. § 1910.132, requiring "employers" to conduct a hazard assessment and determine the need for employees to use personal protective equipment satisfies the "specifically applicable" requirement of subsection (C). To accomplish this, the majority takes the statutory requirement in W. Va. Code §23-4-2(c)(2)(ii)(c), " . . . which statute, rule, regulation or standard was *specifically applicable to the particular work or working condition involved* . . .", and replaces it with the following phrase found at Syllabus Point 3 of the majority opinion: "Where such statute, rule, regulation or standard imposes a specifically identifiable duty upon an employer . . . and where the statue, rule, regulation or standard asserted by the employee is *capable of application to the specific type of work involved*." (Emphasis added.) This judicial modification of the standard necessary for maintenance of a statutory cause of action is improper. I disagree with this judicial rewrite.

The general, rather than specific, nature of the OSHA regulation is evidenced by its very title - which is "General requirements." 29 C.F.R. § 1910.132 (2006). It is applicable to all employers, not specifically to the lumber industry. To the contrary, W. Va. Code § 23-4-2(c)(2)(ii)(C) requires the statute, rule or regulation relied upon to be

[4] 2005 amendments to this statute changed the language in subsection (B) from "employer had a subjective realization and an appreciation" to "employer, prior to the injury, *had actual knowledge*." (Emphasis added).

"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."[5] Our case law confirms the need for the standard to be specifically applicable to the particular working condition involved. *See*, *Mayles*, 185 W. Va. at 95, 405 S.E.2d at 22 (noting subsection (C) requires "proof that the specific unsafe working condition constituted a violation of a state or federal safety statute . . . specifically applicable to the particular working condition involved, as contrasted with a statute or standard generally requiring safe working conditions."); *Miller v. City Hospital, Inc.*, 197 W. Va. 403, 409-10, 475 S.E.2d 495, 501-2 (1996) (*per curiam*) (noting general knowledge does not satisfy statutory specificity requirement); *Tolley v. ACF Indusries, Inc.*, 212 W. Va. 548, 575 S.E.2d 158, 166-7 (2002) (*per curiam*) (finding generalized allegations of non-compliance with safety regulations, including generalized notion of requiring safe work place insufficient to satisfy statutory requirements). As noted by a federal district court discussing the type of statute or rule needed to satisfy W. Va. Code § 23-4-2(c)(2)(ii)(C), "the statute or standard must *specifically* address the unsafe working condition in question. It is not enough to prove that a part on a piece of machinery was defective and that a statute or

[5] The majority attempts to avoid this statutory requirement that by deeming that it requires only that the "statute, rule, regulation or standard asserted by an employee be capable of application to the specific work at issue." Slip Opinion at 13. By deeming the regulation at issue to be applicable to the "labor industry" (rather than the lumber industry as is involved in this matter) and finding that Appellant performs "labor", the majority deems the regulation to met statutory requirements. I disagree. The general "labor" regulation relied upon does not set forth a requirement that eye protection be worn when banding lumber as would be needed to meet statutory requirements in this matter.

regulation required all parts to be in good working order." *Greene v. Carolina Freight Carriers*, 663 F.Supp.112 (S.D.W. Va. 1987), *aff'd*, 840 F.2d 10 (4th Cir. 1988). In my opinion, 29 C.F.R. § 1910.132 is an OSHA regulation which attempts to satisfy the general goal of requiring a safe workplace and working conditions. As such, it does not meet statutory specificity requirements.

I am deeply concerned regarding the potential breadth of the majority decision in this matter; a result which would be completely at odds with the Legislature's expressed intent in creating this statutory cause of action. Suppose the employer herein had performed a hazard assessment as set forth in 29 C.F.R. § 1910.132, but had failed to identify the purported eye hazard at issue herein (or whatever condition forms the basis of a claim). Under the majority's reasoning, would an argument that the employer was negligent in performing the hazard assessment now be sufficient to satisfy deliberate intent requirements? I fear that is precisely the probability which will now occur by virtue of the majority's actions herein, despite the clear legislative intent to immunize employers from mere negligence.

As stated above, the majority has, in essence, negated the statutory "subjective realization" requirement in those instances where an employee can argue there was some general duty to discover a potential hazard. In my opinion, the rule outlined in Syllabus

Point 6 is also contrary to both statutory language and prior decisions of this Court. This Court previously held that the subjective realization requirement "is not satisfied merely by evidence that the employer reasonably should have known of the specific unsafe working condition and of the strong possibility of serious injury or death presented by that condition. Instead, it must be shown that the employer actually possessed such knowledge." Syl. Pt. 3, in part, *Blevins v. Beckley Magnetite, Inc.*, 185 W. Va. 633, 408 S.E.2d 385 (1991). *See also*, *Tolley*, 212 W. Va. at 556, 575 S.E.2d at 165 (quoting *Blevins*); *Deskins v. S.W. Jack Drilling Co.*, 215 W. Va. 525, 530, 600 S.E.2d 237, 242 (2004) (*per curiam*) (same). At most, an argument can be made that if a hazard assessment had been performed, the employer reasonably should have known of the risk. Until now, that has not been enough to satisfy the subjective realization requirement under our law. By negating this statutory requirement, the majority likewise negates the possibility that the hazard assessment, if performed, would not have identified the alleged unsafe working condition as a hazard. Assuming a regulation requiring a hazard assessment satisfies statutory specificity requirements, the better approach would have been to require a showing that a reasonable hazard assessment would have identified the alleged unsafe working condition in question before deeming W. Va. Code § 23-4-2(c)(2)(ii)(B) to have been be satisfied by default.

In my opinion, the circuit court properly granted summary judgment in this matter. Accordingly, I dissent.