STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Scott Blatt and Brooke Blatt
Plaintiffs Below, Petitioners

vs) No. 101545 (Cabell County No. 08-C-0721)

Steel of West Virginia, Inc. and
John Doe, a corporation
Defendants Below, Respondents

FILED
April 29, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioners, Scott and Brooke Blatt, file this timely appeal from the circuit court's order granting summary judgment in favor of respondent, Steel of West Virginia, Inc. (hereinafter "SWVA"), in this deliberate intent action. Petitioners seek a reversal of the summary judgment order and a remand with directions that the action be reinstated on the circuit court's docket. SWVA filed a timely response.

This Court has considered the parties' briefs and the record on appeal. Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this case is appropriate for consideration under the Revised Rules. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

SWVA is a steel mill. One of the machines in the mill is called the "Aetna Straightener." SWVA states that a discharge conveyor system was installed on the discharge side of the Aetna Straightener in 1966. The Aetna Straightener and its component parts are monitored and controlled by the "straightener operator" from the operator's station utilizing a "Panel Box" with three separate "on/off" buttons, one of which controls the "cyclodyne,"[1]

[1] Sometimes spelled "cyclodine."

which is part of the power transmission clutching system. The straightener operator turns off the power to the conveyor system by turning off all three buttons.

Petitioner Scott Blatt was hired by SWVA in November of 2002. He became a straightener operator on the Aetna Straightener in January of 2004, and received on-the-job training. Petitioners assert that SWVA's safety manager and management knew that straightener operators are required to work in, around, and on top of the moving parts of the Aetna Straightener in performing various tests without the ability to "lock out/tag out" the machine.

On September 19, 2006, petitioner states that, as part of his job, he walked across the "rolling tables" and stepped down into the hole where the cyclodyne is located to retrieve a small piece of metal that had fallen into the area. Petitioner states that while he had no reason to believe that any component part of the machinery was operational, the "rotating coupling" near the cyclodyne grabbed his pants and pulled his leg into the drive shaft of the power transmission causing him to sustain serious and permanent injury to his right leg.

SWVA states that there is no reason for a production worker, such as petitioner, to ever go into the hole where the cyclodyne is housed. SWVA adds that if a small piece of metal had caused a problem with production on the day of the accident, which it had not, petitioner should have reported the problem to either maintenance or his foreman. SWVA states that petitioner testified that no one from SWVA instructed him to either walk across the machine while it was operating or to go into the hole with the cyclodyne, and that he had been trained to stay away from moving parts.

SWVA states that there were no prior complaints or injuries in relation to the cyclodyne, and that neither the Occupational Safety and Health Administration ("OSHA"), petitioner, nor the safety committee of petitioner's labor union ever identified the cyclodyne area as a safety issue. SWVA adds that the labor union's collective bargaining agreement with SWVA provides that workers may refuse to work in an area they believe is dangerous.

Petitioners instituted this deliberate intent action pursuant to West Virginia Code §23-4-2(c)(2)(ii)(A-E). SWVA filed a motion for summary judgment and the matter was briefed below. Following a hearing on the motion, the circuit court entered an order that reflects its finding that petitioners had met their burden of a *prima facie* showing on four of the five elements of the deliberate intent statute, but had failed to meet their burden of proof in relation to the element contained in subparagraph (D) of the statute: the intentional exposure to a known unsafe working condition. Accordingly, the circuit court awarded summary judgment in favor of SWVA.

The circuit court found in its twenty-three page summary judgment order that "[t]here is no evidence in this case which shows that the employer intentionally exposed the employee to an unsafe working condition. The Plaintiff's acknowledgment that he was injured while performing a task outside his job duties without being ordered to do so and without turning off the power or checking to make sure that the power was off before stepping onto a strong motor in a hole is simply not the type of intentional exposure that an employee must demonstrate." The circuit court further noted that SWVA had never been cited by OSHA for a violation with reference to the cyclodyne area and that neither petitioner nor any other production worker had been directed to enter the cyclodyne area by SWVA.

Petitioners assert that the circuit court failed to draw any inferences in their favor with respect to subparagraph (D) of the deliberate intent statute and that their evidence met the "offer evidence" requirement in Syllabus Point 2 of *Helmick v. Potomac Edison Co.*, 185 W.Va. 269, 406 S.E.2d 700 (1991). SWVA asserts that a plaintiff is entitled to favorable inferences that may be reasonably drawn from the forecasted evidence—not to unreasonable inferences—and that workers' compensation immunity is lost only where a rational jury could find from the evidence that the employer deliberately intended to injure the plaintiff either purposely or knowingly.

Petitioners assert that SWVA knew the cyclodyne area was dangerous, yet there was never any training about this specific location and that the lack of safeguarding in "lock-out/tag-out" violated numerous safety codes, standards, and customs. SWVA states that only its maintenance personnel are authorized to work on the machine, therefore, only maintenance personnel are trained on how to perform the "lock-out/tag-out" for the machine.

SWVA argues that petitioner created the unsafe working condition when he chose to perform a non-production function and climb into a hole with a powerful running motor. SWVA states that no citations were issued and that there was no evidence that SWVA made a conscious decision to require petitioner to go into an isolated area without first turning off the machine. SWVA asserts that when asked during his deposition whether he saw the coupling spinning, petitioner responded, "I probably just didn't pay attention."Petitioner asserts that in his co-straightener operator's sworn statement, he recalled that everything was turned off when he left the operator's station shortly before petitioner was injured.

"A circuit court's entry of summary judgment is reviewed *de novo*." Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). In conducting a *de novo* review, this Court applies the same standard for granting summary judgment that a circuit court must apply. *United Bank, Inc. v. Blosser,* 218 W.Va. 378, 383, 624 S.E.2d 815, 820 (2005). Further, "[s]ummary judgment is appropriate if, from the totality of the evidence presented, the record 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. 2, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995).

"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) [then (c)] 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)." *Ramey v. Contractor Enterprises, Inc.*, 225 W.Va. 424, 429, 693 S.E.2d 789, 794 (2010)(per curiam).

After considering the record and the arguments of counsel, this Court concludes that there was no error in the circuit court's entry of summary judgment in favor of SWVA. Accordingly, we affirm.

Affirmed.

ISSUED: April 29, 2011

CONCURRED IN BY:

Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Thomas E. McHugh

DISQUALIFIED:

Chief Justice Margaret L. Workman