IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2018 Term

No. 17-0067

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

FIRSTENERGY GENERATION, LLC,
Defendant Below, Petitioner,

v.

JAMES J. MUTO AND CAROL MUTO,
Plaintiffs Below, Respondents.

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Appeal from the Circuit Court of Harrison County
Honorable John Lewis Marks, Jr., Judge
Civil Action No. 14-C-532-1

REVERSED AND REMANDED WITH DIRECTIONS

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JUSTICE LOUGHRY delivered the Opinion of the Court.
JUSTICE DAVIS dissents and reserves the right to file a dissenting opinion.

SYLLABUS BY THE COURT

1. "The appellate standard of review for an order granting or denying a renewed motion for a judgment as a matter of law after trial pursuant to Rule 50(b) of the *West Virginia Rules of Civil Procedure* [1998] is *de novo*." Syl. Pt. 1, *Fredeking v. Tyler*, 224 W.Va. 1, 680 S.E.2d 16 (2009).

2. "When this Court reviews a trial court's order granting or denying a renewed motion for judgment as a matter of law after trial under Rule 50(b) of the *West Virginia Rules of Civil Procedure* [1998], it is not the task of this Court to review the facts to determine how it would have ruled on the evidence presented. Instead, its task is to determine whether the evidence was such that a reasonable trier of fact might have reached the decision below. Thus, when considering a ruling on a renewed motion for judgment as a matter of law after trial, the evidence must be viewed in the light most favorable to the nonmoving party." Syl. Pt. 2, *Fredeking v. Tyler*, 224 W.Va. 1, 680 S.E.2d 16 (2009).

3. "'To establish "deliberate intention" in an action under [W.Va. Code § 23-4-2(d)(2)(ii)], a plaintiff or cross-claimant must offer evidence to prove each of the five specific statutory requirements.' Syllabus point 2, *Helmick v. Potomac Edison Co.*, 185

W.Va. 269, 406 S.E.2d 700 (1991)." Syl. Pt. 3, *Mumaw v. U.S. Silica Co.*, 204 W.Va. 6, 511 S.E.2d 117 (1998).

LOUGHRY, Justice:

The petitioner and defendant below, FirstEnergy Generation, LLC, appeals the December 27, 2016, order of the Circuit Court of Harrison County denying its post-trial motions following an adverse jury verdict in this "deliberate intention" action filed pursuant to West Virginia Code § 23-4-2(d)(2)(ii) (2005)[1] by the respondents and plaintiffs below, James and Carol Muto. In this appeal, FirstEnergy asserts multiple assignments of error. Having considered the parties' briefs and oral arguments, the submitted appendix record, and the applicable authorities, we find the evidence presented at trial was insufficient to establish two of the required elements of a "deliberate intention" claim. Accordingly, we reverse the circuit court's final order and remand this case for entry of an order granting FirstEnergy's post-trial motion for judgment as a matter of law.

## I. Factual and Procedural Background

On January 22, 2013, James Muto suffered permanent injuries when he fell approximately fourteen feet and landed on a concrete floor while attempting to inspect a rotary flyash feeder in a flyash silo at FirstEnergy's Harrison Power Station.[2] At the time of

[1]The injury at issue occurred in 2013. Therefore, the 2005 version of West Virginia Code § 23-4-2 applies, and the relevant provisions are set forth herein. The statute was rewritten in 2015, but the amendments were made applicable to "all injuries occurring on or after July 1, 2015." W.Va. Code § 23-4-2(g) (2015).

[2]The power plant uses coal to generate electricity. Flyash is a byproduct of the coal.

the accident, Mr. Muto had been an employee of FirstEnergy for twenty-three years. On January 26, 2014, he filed this action against FirstEnergy to recover damages for his injuries and, his wife, Carol Muto, asserted a claim for loss of consortium. The case was tried before a Harrison County jury in April 2016. The following is a brief summary of the evidence presented at trial. The evidence pertinent to the issues in this appeal will be addressed more fully in the discussion section.

On the morning of January 22, 2013, a FirstEnergy maintenance crew under the direction of John Rapp, a maintenance supervisor, went into the flyash silo in the solid waste processing building of the Harrison Power Station to replace a piece of equipment known as a rotary feeder.[3] The entrance to the flyash silo is located on the fifth floor of the six-story waste processing building. The rotary feeder is housed on the second level of an elevated platform constructed of metal grating inside the flyash silo. In order to replace the rotary feeder, the crew had to remove the old rotary feeder, attach it to a chain, and lower it to the concrete floor, which required them to open portions of the grating on both levels of the elevated platform. Upon arrival, the maintenance crew proceeded to remove the old rotary feeder from its housing. The crew then left the silo for a mid-morning break. When the crew returned, they put steel cable barricades and yellow caution tape, labeled "Caution

[3]The members the maintenance crew that entered the silo that morning were Tom Hamilton, John Burton, Bob Bartlett, and John Graziani. Mr. Graziani was only scheduled to work half a day and did not return to the silo after the crew took its mid-morning break.

Do Not Enter," across the access points to both the first and second levels of the elevated platform. The crew then opened a portion of the grating on both levels of the elevated platform in order to lower the old feeder to the floor below. The crew noticed that dust had become more prevalent inside the silo since removing the old feeder.[4] Tom Hamilton, the maintenance crew member who was in charge, called the control room[5] and requested that the flyash "train"[6] be shutdown to decrease the dust.

The maintenance crew was informed that the "train" was not going to be shutdown and that alternative measures for reducing the dust were being taken. The crew proceeded to lower the old rotary feeder to the ground floor of the flyash silo. By that time, the dust had increased to the point of causing near zero visibility inside the silo. The maintenance crew decided to evacuate the silo and did so without closing the floor grating on either the first or second levels of the elevated platform; however, the barricades and yellow caution tape remained in place. The crew did not inform anyone that they were

[4]The general consensus of the trial witnesses was that the removal of the old rotary feeder created an opening that allowed the flyash to come into the silo.

[5]According to FirstEnergy, the control room is located three floors below the flyash silo in the waste processing building. The control room employees monitor and periodically check the building and yard equipment.

[6]According to FirstEnergy, "train" is the term used for the series of equipment that transports flyash through the processing unit in the flyash silo.

leaving the silo, that they had left the floor grating open, or that the amount of dust in the air had increased.

In the meantime, Mr. Muto, a control room employee, had been dispatched from the control room to the pug mill, which is located one floor below the flyash silo, to check the water levels in the pug mill dust collectors. Jim Harley, the control room supervisor, had decided to try to alleviate the dust problem by adjusting the water levels in the pug mill dust collectors rather than shutting down the "train." According to Mr. Muto, he did not know that the maintenance crew was replacing the rotary feeder; therefore, when he found nothing unusual on the pug mill floor, he proceeded to climb the steps to the flyash silo to find the source of the dust. Through a window in the door to the silo, Mr. Muto observed that the dust had caused near zero visibility conditions and the maintenance crew was no longer inside. Although he was carrying a radio that allowed him to communicate with the control room, Mr. Muto did not notify anyone of the conditions inside the silo. Instead, he opened the door, climbed the two flights of steps to the top of the elevated platform and ducked under the barricade and yellow caution tape, which he assumed were erected due to the dusty conditions. Mr. Muto was going to inspect the rotary feeder when he fell through the open grating, landing two levels below on the concrete floor. Mr. Muto acknowledged during his testimony at trial that he had not been asked to inspect the rotary feeder and that he made the decision to do so himself. Although he sustained a head injury,

Mr. Muto was able to call for help, and he was subsequently transported to a hospital for treatment. Prior to trial, Mr. Muto was granted workers' compensation permanent partial disability benefits.

After a multi-day trial, the jury returned a verdict in favor of the Mutos, finding that FirstEnergy acted with "deliberate intent." The jury awarded Mr. Muto $350,000.00 for past pain and suffering; $150,000.00 for future pain and suffering; $275,000.00 in past lost wages; and $420,000.00 in future lost wages. The jury awarded Carol Muto $25,000.00 for loss of consortium. The total verdict amount was $1,220,000.00. Prior to trial, the parties agreed that FirstEnergy was entitled to an offset for medical payments and indemnity of lost wages paid through workers compensation in the respective amounts of $21,338.25 and $56,047.75. Accordingly, after the offsets were applied, the total verdict was $1,142,614.00, to which the trial court added pre-judgment interest in the amount of $49,497.90.

Upon entry of the verdict, FirstEnergy filed a renewed motion for judgment as a matter of law[7] and, alternatively, filed a motion for a new trial and a motion to alter or amend the judgment. After a hearing, the trial court denied the motions, and this appeal followed.

[7]During the trial, FirstEnergy moved for a directed verdict pursuant to Rule 50 of the West Virginia Rules of Civil Procedure after the Mutos presented their case and renewed the motion after all evidence was submitted.

## II. Standard of Review

FirstEnergy contends the circuit court erred by denying its post-trial motions. Our standards of review with respect to such motions are well-established. "The appellate standard of review for an order granting or denying a renewed motion for a judgment as a matter of law after trial pursuant to Rule 50(b) of the *West Virginia Rules of Civil Procedure* [1998] is *de novo*." Syl. Pt. 1, *Fredeking v. Tyler*, 224 W.Va. 1, 680 S.E.2d 16 (2009). We have explained that

> [w]hen this Court reviews a trial court's order granting or denying a renewed motion for judgment as a matter of law after trial under Rule 50(b) of the *West Virginia Rules of Civil Procedure* [1998], it is not the task of this Court to review the facts to determine how it would have ruled on the evidence presented. Instead, its task is to determine whether the evidence was such that a reasonable trier of fact might have reached the decision below. Thus, when considering a ruling on a renewed motion for judgment as a matter of law after trial, the evidence must be viewed in the light most favorable to the nonmoving party.

*Fredeking*, 224 W.Va. at 2, 680 S.E.2d at 17, syl. pt. 2.

Regarding a motion for a new trial, we have held that,

> [a]lthough the ruling of a trial court in granting or denying a motion for a new trial is entitled to great respect and weight, the trial court's ruling will be reversed on appeal when it is clear that the trial court has acted under some misapprehension of the law or the evidence.

Syl. Pt. 4, *Sanders v. Georgia-Pacific Corp.*, 159 W.Va. 621, 225 S.E.2d 218 (1976). Therefore,

> [t]his Court reviews the rulings of the circuit court concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review.

Syl. Pt. 1, *Burke-Parsons-Bowlby Corp. v. Rice*, 230 W.Va. 105, 736 S.E.2d 338 (2012). With these standards in mind, we consider the parties' arguments.

## III. Discussion

As set forth above, the Mutos filed this "deliberate intention" action pursuant to West Virginia Code § 23-4-2(d)(2)(ii). "When 'deliberate intention' is proven, an employer loses his immunity from civil liability for work-related injuries to employees provided by the Workers' Compensation Act."[8] *Deskins v. S.W. Jack Drilling Co.*, 215 W.Va. 525, 528, 600 S.E.2d 237, 240 (2004). "'To establish "deliberate intention" in an action under [W.Va. Code § 23-4-2(d)(2)(ii)], a plaintiff or cross-claimant must offer evidence to prove each of the five specific statutory requirements.' Syllabus point 2, *Helmick v. Potomac Edison Co.*, 185 W.Va. 269, 406 S.E.2d 700 (1991)." Syl. Pt. 3, *Mumaw v. U.S.*

[8]*See* W.Va. Code § 23-2-6 (2003) (immunizing employers covered by Workers' Compensation Act from "damages at common law or by statute for the injury or death of any employee, however occurring").

*Silica Co.*, 204 W.Va. 6, 511 S.E.2d 117 (1998). Simply stated, "[e]ach of the five statutory [requirements] is an essential element of a 'deliberate intention' cause of action, which a plaintiff has the ultimate burden to prove." *Smith v. Apex Pipeline Services, Inc.,* 230 W.Va. 620, 628, 741 S.E.2d 845, 853 (2013) (internal quotations and citation omitted).

The five requirements that must be established to prove that an employer acted with "deliberate intention" are set forth in West Virginia Code § 23-4-2(d)(2)(ii), as follows:

> (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 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), 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 or compensable death as defined in section one [§ 23-4-1], article four, chapter twenty-three whether a claim for benefits under this section is filed or not as a direct and proximate result of the specific unsafe working condition.

In this appeal, FirstEnergy argues that the Mutos failed to present sufficient evidence at trial to establish the requirements set forth in subsections (B) and (D) of West Virginia Code § 23-4-2(d)(2)(ii) and, therefore, it was entitled to judgment as a matter of law. We will consider the parties' arguments with respect to the evidence presented at trial on each of these requirements below.

### A. Employer's Actual Knowledge of a Specific Unsafe Working Condition

In order to establish the second requirement of a "deliberate intention" claim, the employee has the burden of proving that the employer had actual knowledge of a specific unsafe working condition. W.Va. Code § 23-4-2(d)(2)(ii)(B). At trial, Mr. Muto asserted that two unsafe working conditions existed on January 22, 2013, which resulted in his injuries: (1) open floor grating in an elevated platform inside the flyash silo, which was improperly barricaded with yellow, instead of red, caution tape and (2) excessive dust inside the flyash silo causing near zero visibility. Therefore, in this instance, Mr. Muto had to present sufficient evidence to show that FirstEnergy, through his supervisor, Mr. Harley or another management employee, actually knew that the grating in the elevated platform had

been left open without a proper barricade in place[9] or that FirstEnergy actually knew that dust inside the silo had resulted in near zero visibility conditions.

We have recognized that "a determination of whether an employer had actual knowledge 'requires an interpretation of the employer's state of mind, and must ordinarily be shown by circumstantial evidence, from which conflicting inferences may often reasonably be drawn.'" *Smith*, 230 W.Va. at 630, 741 S.E.2d at 855 (quoting Syl. Pt. 2, in part, *Nutter v. Owens-Illinois, Inc.*, 209 W.Va. 608, 609, 550 S.E.2d 398, 399 (2001)). We have also made clear, however, that the actual knowledge requirement "is a high threshold that cannot be successfully met by speculation and conjecture." *Id.* (quoting *Mumaw v. U.S. Silica Co.*, 204 W.Va. 6, 12, 511 S.E.2d 117, 123 (1998); *see also Coleman Estate ex rel. Coleman v. R. M. Logging, Inc.*, 226 W.Va 199, 207, 700 S.E.2d 168, 176 (2010). In that regard, we have held that

> the actual knowledge 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

[9]The testimony at trial indicated that it was unnecessary for the maintenance crew to have put in place barricades with yellow caution tape when they opened the grating so long as a person was guarding the holes. However, once the crew decided to leave the silo without closing the grating, the failure to have barricades around the holes with red caution tape, which would have indicated a hazardous condition capable of causing serious injury or death, was a violation of OSHA regulations.

> knowledge." Syl. Pt. 3, in part, *Blevins v. Beckley Magnetite, Inc*., 185 W.Va. 633, 634, 408 S.E.2d 385, 386 (1991).

*Smith*, 230 W.Va. at 630, 741 S.E.2d at 855.

With respect to the open floor grating, FirstEnergy asserts that there was no evidence presented at trial from which the jury could have reasonably concluded that FirstEnergy, through Mr. Harley or another management employee, knew that the grating had been left open and unattended without a proper barricade in place. Indeed, members of the maintenance crew testified at trial that they were told by their supervisor, Mr. Rapp, during the pre-job briefing that morning not to leave the floor grates open. Tom Hamilton, who was in charge of the crew inside the silo, testified that when discussing the job with Mr. Rapp, he was told "whenever we had the grating open, just to make sure that we had the barricades up, and they didn't want us to leave the area with the grating open."[10]

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[10]Mr. Rapp testified that when he talked to the maintenance crew about replacing the rotary feeder:

> I did also let them know that we needed to put the lifting beam up–beam up above the feeder, that would allow us to lower that rotor down through the grating.
>
> I said, "Once you have the feeder out, I would like to have you guys lower the rotary assembly down through the grating.
>
> Whoever is up at the chain fall, running the chain fall, when you remove the grating needs to have fall protection on to protect their [sic] self.
>
> But once you lower that rotary feeder down through the opening, and it's safely to the ground, do not walk away from

Critically, Mr. Hamilton testified that when the crew made the decision to leave the silo without closing the grating, they did not inform the control room. He testified:

> Q: And did anyone call the control room to say that you all were leaving the silo, and you were going to stay out until the dusting situation was resolved?
> A: Not–not to my knowledge.
> Q: You didn't?
> A: No.
> Q: No one, to your knowledge, from the crew did?
> A: No.
> Q: Okay. As I – tell the jury, when you and your crew left the silo, what – what was the status of the grates that had been opened up to lower the rotary feeder?
> A: They were still open, in the open position.
> Q: Okay. And why was that?
> A: We didn't feel it was – as dusty as it was, we didn't feel safe closing them.
> . . . .
> Q: What was your feeling about that when you left those grates up and left the silo? What were you thinking?
> A: I mean, I felt safe with the barricades being in place.

The Mutos argue that because Mr. Harley knew portions of the grating had to be opened in order to replace the rotary feeder, he had actual knowledge of the unsafe working condition. However, as set forth above, the maintenance crew was instructed by their supervisor, Mr. Rapp, not to leave the grates open and unattended. The fact that Mr. Harley knew that opening the floor grating at some juncture was necessary to complete the job does not establish that he knew the grates had been left open and unattended at the time

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> the grating. Put the grating right back into the hole."

Mr. Muto left the control room. The undisputed fact was that the maintenance crew failed to inform anyone that they had left the silo without closing the floor grating, contrary to the instructions they had been given by Mr. Rapp and in violation of OSHA regulations.[11] Consequently, there was no evidence from which a jury could have reasonably concluded that FirstEnergy had actual knowledge of the unsafe working condition created by the open floor grating on the elevated platform.

Regarding the dust inside the silo, FirstEnergy argues that there was no evidence from which the jury could have reasonably concluded that Mr. Harley had actual knowledge that the dust inside the silo had increased to the point of causing near zero visibility conditions. The evidence presented at trial indicated that the dust only created an unsafe working condition when it affected the workers' ability to see.[12] As Mr. Muto's own expert witness, David J. Bizzak, testified, "When you have dust to the level of people saying you can't see your hand in front of your face, that creates a hazardous condition."

It was undisputed that the maintenance crew called the control room and requested that the "train" be shutdown because of the dust inside the solo. The evidence showed that the call was made after the crew members returned from their mid-morning

[11] *See supra* note 9.

[12] As one witness explained, "We work at a power station. Dust is part of our life."

break and were preparing to lower the old rotary feeder to the floor of the silo. The call was received by Seth James, the control room operator, who conveyed the maintenance crew's request to Mr. Harley. Both Mr. James and Mr. Harley testified that they discussed whether adjusting the water levels in the pug mill dust collectors would alleviate the dust problem and Mr. Harley decided to make that adjustment first, instead of shutting down the "train." Mr. Harley further testified that he was never informed that the dust had caused near zero visibility conditions inside the silo. His testimony regarding his lack of knowledge was confirmed by members of the maintenance crew who testified that the dust did not escalate to the point of causing near zero visibility conditions until after they had made the call to request that the train be shutdown.

During his testimony, Mr. Hamilton explained the maintenance crew had two communications with the control room while inside the silo. After the initial call to the control room requesting that the train be shutdown, the crew began lowering the rotary feeder to the floor. While doing so, Mr. Hamilton heard the control room paging him. He testified:

> A: It was during, while we were lowering it. I was lowering it through the mid-level, and I heard them [the control room] paging me on the page system.
>
> Q: Okay.
>
> A: And I sent – Bobby Bartlett was on the ground, so I sent him over to answer the phone.
>
> Q: Okay. And were you able to hear the conversation he had with someone on the other end?
>
> A: No. You can't hear that.
>
> Q: Did he tell you who called?

A: He just said it was the control room.

. . . .

A: He said that – lost my train of thought. He said they were going to try to adjust something on the pug mill floor.

Q: Okay. Anything else?

A: He also asked – wanted to know how long the [train] would be down, if we needed it.

Q: Okay.

A: Didn't have an answer for that.

Q: Okay. Anything else, just to be –

A: That's all I can recall.

Q: All right. Now, after Mr. Bartlett got off the phone, what took place next?

A: We got the rotary feeder on the ground. And, at that point, we were waiting to bring the new one up into the silo.

We had been waiting on a crane. And, at that point, the dust, it got pretty bad.

Q: Okay.

A: That's when we decided to step outside.

As previously discussed, the testimony established that the maintenance crew never communicated with anyone in the control room regarding their decision to leave the silo because the dust had increased. Consequently, there was no evidence that FirstEnergy had actual knowledge of the unsafe working condition that occurred when the dust escalated to the level that visibility inside the silo was near zero.

The Mutos argue that it was not the "extent" of the dust that created a specific unsafe working condition; rather, it was the dust that existed at the time the maintenance crew contacted the control room and requested the train be shutdown that constituted a hazard. Thus, the Mutos maintain that the "actual knowledge" requirement was satisfied.

However, even if we assume that FirstEnergy had knowledge of this specific unsafe working condition, there was no evidence from which a jury could have reasonably concluded that Mr. Muto was intentionally exposed to the dust hazard.

### B. Intentional Exposure to Unsafe Working Condition

As set forth above, the fourth element of a deliberate intention claim requires evidence from which the trier of fact could reasonably find that the employer intentionally exposed the employee to the specific unsafe working condition. W.Va. Code § 23-4-2(d)(2)(ii)(D). We have explained that

> [i]n order to establish the existence of intentional exposure in a deliberate intention claim, there "must be some evidence that, with conscious awareness of the unsafe working condition . . . an employee was directed to continue working in that same harmful environment." *Ramey v. Contractor Enterprises, Inc.*, 225 W.Va. 424, 431, 693 S.E.2d 789, 796 (2010) (quoting *Tolley* [v. *ACF Industries, Inc.*], 212 W.Va. [548] at 558, 575 S.E.2d [158] at 168 [(2002)]). "In other words, this element, which is linked particularly with the [actual knowledge] element, is not satisfied if the exposure of the employee to the condition was inadvertent or merely negligent." *Sias* [v. *W-P Coal Co.*], 185 W.Va. [569] at 575, 408 S.E.2d [321] at 327[(1991)].

*Smith,* 230 W.Va. at 633, 741 S.E.2d at 858. Discussing the type of evidence necessary to establish intentional exposure in *Tolley v. ACF Industries, Inc*., 212 W.Va. 548, 557-58, 575 S.E.2d 158, 167-68 (2002), we noted:

> In *Mayles* [*v. Shoney's Inc.*, 185 W.Va. 88, 405 S.E.2d 15 (1990)], we found sufficient evidence was introduced where

> "management at the restaurant knew how the employees were disposing of the grease, knew that a previous employee had been injured by such practice, had received employee complaints about the practice, and still took no action to remedy the situation." 185 W.Va. at 96, 405 S.E.2d at 23. Similarly, in *Sias* [*v. W-P Coal Co.*, 185 W.Va. 569, 408 S.E.2d 321 (1991)], we held that the requisite intentional exposure prong had been met where the plaintiff produced evidence that his coal employer directed him to work in an unsafe mining area despite having actual knowledge of the probability and risk of a coal outburst in that particular section of the mine. 185 W.Va. at 575, 408 S.E.2d at 327-28.

First Energy argues that even if Mr. Harley actually knew of the hazardous condition created by the dust inside the flyash silo, there was no evidence that Mr. Harley directed Mr. Muto to go to that location. Rather, the evidence at trial established that the only instruction Mr. Harley gave that morning was to adjust the water levels in the pug mill dust collectors. The pug mill is located one level below the flyash silo and is accessed separately and apart from the flyash silo. FirstEnergy points out that not only did Mr. Muto admit that he was not told to go to the flyash silo during his testimony, he acknowledged that he made that decision himself.

Mr. Muto testified that he went to the control room that morning to relieve Tim Eakle, who had to go to a meeting. According to Mr. Muto, Mr. Eakle's job that day was "equipment watch" and Mr. Eakle told him that "everthing was okay." Mr. Muto further testified that at some point, the control room operator, Mr. James, told him that

"maintenance was complaining about a dusting problem where they were working, up in number one fly ash silo" and "they would like someone to go up there and take a look at it." Mr. Muto stated that he did not know the maintenance crew was actually replacing the rotary feeder and that he left the control room to go find the source of the dust. Mr. Muto recounted how he went to the pug mill floor first, and then proceeded to the flyash silo where he was injured.

On cross-examination, Mr. Muto acknowledged that he told Mr. James that "he would go up and take a look" and that he never spoke to their supervisor, Mr. Harley, before doing so. Similarly, Mr. James testified that he discussed adjusting the pug mill water level with Mr. Muto, who said he would "go check it out." Responding to defense counsel's questions, Mr. James testified:

> Q: Okay. You do recall, you and Mr. Muto talking about the pug mill water level, and he didn't think adjusting the water level would work either, right?
>
> A: Yes.
>
> Q: All right [sic]. And he said, he would go check it out?
>
> A: Yes.
>
> Q: And you can't say, if Mr. Harley was still in the control room at that point, can you?
>
> A: No.
>
> Q: And you don't recall discussing anything else with Mr. Muto at that time, either?
>
> A: No.
>
> Q: Okay. Did you assume he was going to check the water levels in the pug mill?
>
> A: I assumed he was going to that floor.

Mr. Muto also testified that he did not remember speaking to Mr. Harley that morning and, likewise, Mr. Harley did not recall having a conversation with Mr. Muto. In fact, whether Mr. Harley was present in the control room that morning was never actually established.[13] However, whether or not Mr. Harley was in the control room, the critical fact is that there was no evidence Mr. Harley directed Mr. Muto to go to the flyash silo to inspect the rotary feeder. Testifying on cross-examination, Mr. Muto acknowledged that he was never told by anyone to go to the flyash silo.

> Q: In fact, you don't recall anyone asking you to check the flyash rotary feeder, do you?
>
> A: I don't recall, no.
>
> Q: Now, you made the decision to go check the flyash rotary feeder, right?
>
> A: I made the decision because I knew–somebody told 'em it was dusting, but I don't know who.
>
> . . . .
>
> Q: Uh-huh. And you got on the elevator and you went to the fifth floor?
>
> A: That's correct.
>
> . . . .
>
> Q: Okay. And you got off the elevator and you didn't see anything unusual, right?
>
> A: Correct.

[13]At trial, Mr. Harley testified that he could not remember whether he actually went to the control room that morning. Mr. James testified that he called Mr. Harley at his office which is located in another building to relay the maintenance crew's request to shutdown the train and that a few minutes later, Mr. Harley came to the control room. Mr. Muto testified that Mr. Harley was not there. Finally, Mr. Eakle testified at trial that Mr. Harley was not in the control room but acknowledged that he gave a statement to the contrary shortly after the accident occurred.

Q: And you took the east stairwell down to the pug mill floor where we went yesterday?[14]

A: Correct.

Q: Things looked normal there to you, right?

A: Yes.

Q: Then, you made the decision to go up the flight of stairs to the silo door, where the fly ash rotary feeder was, right?

A: Yes.

(Footnote added).

Mr. Muto's expert, Mr. Bizzak, also testified that he was not aware of any evidence indicating that Mr. Muto was directed to go to the flyash silo. On cross-examination, Mr. Bizzak admitted there was no evidence that anyone knew Mr. Muto was going to enter the silo that morning. Mr. Bizzak also acknowledged that he had initially rendered his opinion that Mr. Muto had been intentionally exposed to an unsafe working condition based on his mistaken belief that in order to adjust the pug mill dust collectors, Mr. Muto had to cross over the catwalk in the silo where the grating had been opened. Mr. Bizzak testified that he did not realize until a few weeks before trial that the pug mill is located in a different area and on another floor of the building.

Even if Mr. Muto had been instructed to go to the silo, there was no evidence that he was directed to ignore the barricade and caution tape that had been put in place before

[14]At the beginning to trial, there was a jury view of the facilities where Mr. Muto was injured.

the floor grating was opened. Notwithstanding the fact that OSHA regulations required the caution tape to be red under these circumstances, the testimony at trial indicated that FirstEnergy's safety procedures provided that yellow caution tape should not be crossed unless the hazard on the other side is known. Mr. Muto testified, however, that he ignored the barricade and caution tape on the second level of the platform, ducking underneath of it without making any effort to find why it was there. Specifically, he testified:

> Q: And you ducked under that caution tape and the come-along, didn't you?
>
> A: That's correct.
>
> Q: Nobody asked you to do it, you did it on your own?
>
> A: Yes, sir.
>
> Q: Nobody in management knew you were going to do that, did they?
>
> A: No sir.
>
> Q: Okay. And, once again, before you made that decision and you actually went under this come-along with the yellow caution tape, you didn't get on your radio and say, "What's this caution tape here for? What's the come-along here for? What's the issue, besides this dusting?"
>
> A: No sir. I just assumed it was the dust.

In sum, our review of the testimony presented at trial reveals no evidence from which the jury could have reasonably concluded that FirstEnergy intentionally exposed Mr. Muto to a specific unsafe working condition. At best, the evidence indicated that a coworker, Mr. James, told Mr. Muto that there was a dust problem and Mr. Muto left the control room to go find the source without knowledge that the maintenance crew was in the process of replacing the rotary feeder. Mr. Muto testified that had he been made aware of the nature of

the maintenance crew's work, he would have immediately known the cause of the dust and would have never entered the silo. While the lack of communication or mis-communication that occurred in this case may constitute ordinary negligence, there is simply no evidence that FirstEnergy intentionally exposed Mr. Muto to an unsafe working condition. As this Court has noted, "[t]he 'deliberate intention' exception to the Workers' Compensation system is meant to deter the malicious employer, not to punish the stupid one." *Helmick v. Potomac Edison Co.*, 185 W.Va. 269, 274, 406 S.E.2d 700, 705 (1991).

## IV. Conclusion

Having found that the evidence presented at trial was insufficient to satisfy all of the statutory requirements for a "deliberate intention" claim,[15] the final order of the Circuit Court of Harrison County entered on December 27, 2016, is reversed, and this case is remanded for entry of an order granting judgment as a matter of law in favor of FirstEnergy.

Reversed and remanded with directions.

[15]FirstEnergy asserted additional assignments of error concerning specific jury instructions; the expert testimony relating to future lost earning capacity; and the court's refusal to reduce the jury award of damages to comport with the evidence presented at trial. In light of our decision that the evidence was insufficient to established the statutory predicate for a "deliberate intention" claim, we need not address these issues.