IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

APPEAL NO. 33001

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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRIGINIA

JOSEPH E. RYAN,

Plainttiff/Appellant,

v.

Civil Action No. 03-C-126
Circuit Court of Nicholas County
Honorable Gary L. Johnson

CLONCH INDUSTRIES, INC.,
a West Virginia corporation, and
H&D LUMBER DISTRIBUTORS, INC.
a West Virginia corporation,

Defendants/Appellees.

BRIEF OF APPELLANT, JOSEPH E. RYAN

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TABLE OF CONTENTS

I. KIND OF PROCEEDING AND NATURE OF RULING IN THE LOWER TRIBUNAL 1

INTRODUCTION 1

II. STATEMENT OF FACTS 2

III. ASSIGNMENTS OF ERROR 12

A. The trial court erred in granting summary judgment on the basis that plaintiff had not proffered sufficient evidence that the defendant-employers had a subjective realization and appreciation of the existence of a specific unsafe working condition that presented a strong probability of serious injury or death presented a strong probability of serious injury or death 12

B. The trial court erred when it granted summary judgment on the basis that 29 C.F.R. § 1903.1, 29 C.F.R. § 1910, et seq. and 29 C.F.R. § 1926.102 are general safety regulations that do not apply to the process of cutting metal banding in a lumber mill using commercially-available, hand-held metal snips 12

IV. POINTS AND AUTHORITIES RELIED UPON 12

V. DISCUSSION OF LAW AND FACT 13

A. Standard of Review of Summary Judgment 13

B. Plaintiff Established Genuine Issues of Material Fact as to all Issues 15

1. Subjective Realization

The trial court erred in granting summary judgment on the basis that plaintiff had not proffered sufficient evidence that the defendant-employers had a subjective realization and appreciation of the existence of a specific unsafe working condition that presented a strong probability of serious injury or death presented a strong probability of serious injury or death 16

2. Safety Statute and/or Industry Standard

The trial court erred when it granted summary judgment on the basis that 29 C.F.R. § 1903.1, 29 C.F.R. § 1910, et seq. and 29 C.F.R. § 1926.102 are general safety regulations that do not apply to the process of cutting metal banding in a lumber mill using commercially-available, hand-held metal snips 20

VI. PRAYER FOR RELIEF 25

TABLE OF CASES AND AUTHORITIES

CASES

Arnazzi v. Quad/Graphics, Inc., 218 W. Va. 36, 621 S.E.2d 705 (2005) 14

Beard v. Beckley Coal Mining, 396 S.E.2d 447 (W.Va. 1990) 17

Bell v. Vecellio & Grogan, Inc., 191 W. Va. 577, 447 S.E.2d 269 (1994) 13, 17, 20, 21

Costilow v. Elkay Mining Company, 200 W. Va. 131, 488 S.E.2d 406 (1997) 13, 15, 21

Floyd v. Equitable Life Assurance Society, 264 S.E.2d 648, 650 (W.Va. 1980) 13

Harris v. Martinka Coal Company, 201 W. Va. 578, 499 S.E.2d 307 (1997) 13, 17

Kidd v. Mull, 595 S.E.2d 308, 2004 (W.Va., 2004) 12, 13, 14

Mayles v. Shoneys, Inc., 185 W. Va. 88, 405 S.E.2d 15 (1990) 13, 15, 20, 21

Nutter v. Owens-Illinois, Inc., 209 W. Va. 608, 550 S.E.2d 398 (2001) 16

Painter v. Peavy, 451 S.E.2d 755 (W.Va. 1994). 12, 13, 14

Sias v. W-P Coal Company, 185 W. Va. 5699, 408 S.E.2d 321 (W. Va. 1991) 13, 14, 15

Stewart v. George, 218 W. Va. 288, 607 S.E.2d 394, W.Va. Nov. 15, 2004 14

Williams v. Precision Coil, Inc., 459 S.E.2d 329, 336 (W.Va. 1995) 12, 13

AUTHORITIES

29 C.F.R. § 1903.1 ..... 8, 12, 20

29 C.F.R. § 1910.132 ..... 3, 8, 13, 20, 21

29 C.F.R. § 1910.133 9

29 C.F.R. § 1917.91 8

29 C.F.R. §1926.20(b)(2) 20

29 C.F.R. § 1926.102 ..... 8, 12, 20

W. Va. Code § 23-4-2(c)(2)(ii)(1983) 1, 13, 15, 16, 17, 20, 21

W. Va. Code, 23-4-2(c)(2)(iii)(B)[1983,1991] 14

I. KIND OF PROCEEDING AND NATURE OF RULING IN LOWER TRIBUNAL

This civil action pursuant to West Virginia Code 23-4-2(c)(ii), arises from a work related injury which occurred on September 17, 2002, and which resulted in the permanent loss of vision in the left eye of the plaintiff/petitioner. Prior to trial the Circuit Court of Nicholas County, West Virginia granted summary judgment to plaintiff's employers Clonch Industries, Inc. and H&D Lumber Distributors, Inc. hereinafter collectively the "defendants." Mr. Ryan files his Appeal seeking relief from the April 21, 2005, Order granting summary judgment to Clonch Industries, Inc. and H&D Lumber Distributors, Inc. The trial court found that the plaintiff failed to show that (1) there were genuine issues of material fact as to whether defendants had a subjective realization and appreciation of the existence of a specific unsafe working condition, or a high degree of risk and strong probability of serious injury or death presented by the specific unsafe working condition; and (2) whether there was a specific safety statute violated.

INTRODUCTION

This case arises from an on-the-job injury that occurred on September 17, 2002, at the defendant's sawmill in Nicholas County, West Virginia. In this incident, Joseph E. Ryan suffered a deep laceration to his left eye which rendered him legally blind in that eye.

Mr. Ryan was employed by the defendants as a general laborer. His task, as a "bander," on the day of injury was to feed out 1 1/4 x 1/16 inch coiled metal banding to predetermined lengths and cut it with an old and defective pair of yellow-handled

"Wiss" multi-purpose snips. He would then place these bands around pallets of stacked lumber and tighten the bands down and crimp the bands together with small metal clips. On the third day of performing the banding operation, Mr. Ryan was struck in the left eye by a sharp piece of metal banding material. Following five unsuccessful surgeries, it has been determined that he will be forever blind in his left eye. Prior to his injury, the defendants did not warn Mr. Ryan of the dangers inherent in this task, did not require the use of any approved personal protective equipment, specifically including safety glasses, and further did not advise him that safety glasses were available should he wish to use them.

II. STATEMENT OF FACTS

Defendants Clonch Industries, Inc. and H&D Lumber Distributors, Inc. are West Virginia corporations engaged in the sawmilling business, wherein raw timber is cut and processed into commercially marketable lumber of various grades and dimensions (see generally, deposition transcripts of Lloyd D. Clonch and Rodney Clonch). While each company performs different functions, it is undisputed that Clonch Industries, Inc. owns 100% of H&D Lumber Distributors, Inc. and controls 100% of all activities undertaken by H&D Lumber Distributors, Inc. Hereinafter, both H&D Lumber Distributors, Inc. and Clonch Industries, Inc. are collectively referred to as the "defendants" (see generally, Deposition Transcript of Rodney Clonch, Deposition Transcript of Lloyd Clonch, Deposition Transcript of Loretta Sue Thomas, and Order Granting Defendant's Motion for Summary Judgment).

A sawmill, such as the defendant's, is subject to the rules and regulations promulgated by the Occupational Health and Safety Act ("OSHA") (see generally, Deposition Transcript of Jim Shephard, Deposition Transcript of Roy Pauley, Deposition Transcript of James Vaughan and Occupational Health and Safety Act). At the time of Mr. Ryan's injury, OSHA imposed an affirmative duty on employers like defendants to conduct safety assessments for risks and/or conditions that could cause serious injury or death to its employees. It further required defendants to take appropriate precautions to guard and protect its employees from these risks (See 29 C.F.R. § 1910.132(d) and plaintiff's supplemental expert witness disclosures at page 4 of Jim Shephard's report). This is an affirmative duty imposed upon the defendant by OSHA and may not be ignored. (Deposition Transcript of Roy Pauley, pp. 99-100 and Deposition Transcript of Jim Shephard, pp. 91-93). Further, the defendant had an affirmative legal obligation to make its management, personnel and employees aware of the rules and regulations of OSHA and to enforce those rules in its work place (Deposition Transcript of Jim Shephard, p. 93).

Joseph Ryan is a 33 year-old married man with infant children. Prior to August 19, 2002, the date he began his employment with the defendant, he had never before worked in or around a sawmill or lumberyard, and in particular, had never worked in a sawmill "banding" lumber (Id. at p. 71).

On August 19, 2002, Joseph Ryan began working for the defendants. (See Defendants' Answers to Plaintiff's First Set of Interrogatories). At the time of plaintiff's

injury on September 17, 2002, the defendants were engaged in the sawmill lumber industry and as such were subject to the rules and regulations of OSHA.

On Mr. Ryan's first day of work for the defendant, he was simply instructed to report to the lumber stacking area of the defendant and to watch the other boys. (Deposition Transcript of Joseph Ryan, p. 29). Defendant Clonch deliberately and knowingly failed to provide any job orientation training, safety orientation or training, supervision, personal protective equipment orientation or training, was not advised and/or warned of any hazards or risk associated with this job and was not provided with nor instructed in the required use of the necessary personal protective equipment. (Deposition Transcript of Joseph Ryan, pg. 29, Deposition Transcript of C.J. Hicks, p. 26, Deposition Transcript of Scott Clonch, p. 14-16, Deposition Transcript of Harvey Maynor, p. 23-25, Deposition Transcript of Roger Brown, pp. 16-17 and Deposition Transcript of Gary Deel, pp. 15-23).

Each of these omissions were violations of OSHA. (See generally, Deposition of Roy Pauley, Deposition of Jim Shephard, Plaintiff's Supplemental Answers to Defendants' First Set of Interrogatories and plaintiff's initial and second supplemental expert witness disclosures).

Mr. Ryan's first job with the defendants was as a lumber stacker. He worked this job for approximately three weeks, when he was approached by C.J. Hicks, who was his foreman. (Deposition Transcript of Joseph Ryan, p. 45). Moreover, Mr. Hicks advised Mr. Ryan that a banding job was available, which paid more than his current position and Mr. Ryan accepted. (Id. at p. 45-46).

Mr. Hicks instructed Joseph Ryan to see Roger Brown for instruction on how to do the job. (Id. at p. 46)[1]. In general, the banding position involves measuring to length metal straps which are approximately 1 1/4 inches wide and 1/16 of an inch thick. Once the banding has been measured out, a pair of tin snips are used to cut the banding material. The cut straps are then placed around stacks of cut lumber, tightened and metal clips "crimps" are used to secure the bands. Once this is complete, a fork truck lifts the banded lumber and moves it to another part of the building where it awaits loading on a truck for delivery to a buyer. (Deposition Transcript of Scott Clonch, pp. 9-12). The tin snips provided to Mr. Ryan were yellow handled "Wiss" cutters which are readily available at stores such as Lowe's and Wal-Mart, (Deposition Transcript of Joseph Ryan, p. 61). (See photographs of the type of cutters used by Mr. Ryan and the picture of the warning label on the package which clearly states, "Warning: Wear Safety Goggles.") (See photographs attached as Exhibit C to Plaintiff's Petition for Appeal.)

Mr. Ryan was not advised or directed by the defendants, at any time during his employment, to wear safety goggles when using the "Wiss" cutters (tin snips) to cut the metal banding. (See generally, Deposition Transcript of Joseph Ryan).

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[1] In the defendants answers to plaintiff's first and second set of interrogatories nos. 6 and 9 and 1 and 2, respectively, the defendants maintain that Cecil J. Hicks, the kiln yard foreman on September 17, 2002, provided Mr. Ryan with on the job training instruction in the lumber banding operation and in the use of personal protective equipment (H&D Lumber Distributors, Inc. Answers to Plaintiff's Interrogatories No's 6, 9 Answers to 2nd Interrogatories NO. 1 and 2). However, Cecil J. Hicks states that he never trained anyone himself and did not advise Mr. Ryan to wear safety glasses despite knowing that OSHA required the use of safety glasses, ear protection and no loose clothing when working in a sawmill (Cecil Hicks deposition pp. 26-31, 33-34, 36-37)

Further, Mr. Ryan's supervisors, co-workers and the defendants' 30(b)(7) designees for safety issues testified that safety goggles were not required to be worn while performing the banding operation (cutting metal banding to length and banding the lumber,) despite knowing that (1) OSHA required eye protection; (2) that other sawmills and lumber yards required its employees to wear eye protection; and (3) consciously knowing that his task was dangerous and presented a potential for serious injury. (Deposition Transcript of C.J. Hicks, pp. 31-47, Deposition Transcript of Gary Deel, pp. 15-27, 30, Deposition Transcript of Roger Brown, pp. 14, 15-17, 20, Deposition Transcript of Harvey Maynor, pp. 18-45, Deposition Transcript of Lloyd D. Clonch, p. 15, Deposition Transcript of Scott Clonch, pp. 14-28 and Deposition Transcript of Joseph Ryan). In fact, defendants' own liability expert admitted that employees need eye protection while strapping the metal bands around the stacks of lumber. (Deposition Transcript of James Vaughan, pp. 74-77).

Not only did the defendants knowingly and deliberately fail to instruct and require Mr. Ryan to wear safety goggles, it also failed to train Mr. Ryan on how to properly and safely perform the banding operation. As noted, foreman C.J. Hicks advised Mr. Ryan that co-worker Roger Brown would show him the job. Mr. Brown's only prior experience was banding 2 or 3 stacks of lumber with bands that had already been cut. (Deposition Transcript of Joseph Ryan, p. 48). Mr. Brown then told Mr. Ryan that the next ones are yours (Id). This is described by the defendants as "on the job training." (Deposition Transcript of Scott Clonch, p. 23). Mr. Ryan struggled through his job for a couple of days without further evaluation, instruction or guidance until

September 17, 2002. (Deposition Transcript of Joseph Ryan, pp 48-60). The only comments made to Mr. Ryan during this three day period was that he was moving too slow. The person designated to instruct and supervise Mr. Ryan was aware that he was having problems in performing the job. (Deposition Transcript of Roger Brown, pp. 24-25, Deposition Transcript of Gary Deel, p. 36, Deposition Transcript of C.J. Hicks, p. 36 and Deposition Transcript of Scott Clonch, p. 23-28). It is undisputed that the defendants did not have a written or formal employee training program, workplace and/or employee safety program or hazards assessment program. (Deposition Transcript of Scott Clonch, pp. 13-16, Deposition Transcript of C.J. Hicks, pp. 26-27 and Deposition Transcript of Lloyd D. Clonch, pp. 40-41).

Further, Scott Clonch, defendants' 30(b)(7) safety designee, and also the son and nephew of the owners of defendants, was the superintendent of defendants' dry kiln and Mr. Ryan's boss. He was hired into this position despite his acknowledgement that he was unfamiliar with any federal or state law (including OSHA) concerning workplace safety. (Deposition Transcript of Scott Clonch, pp. 19-30).

It is undisputed that the defendants did not conduct a hazards/risk assessment of its workplace prior to Mr. Ryan's injury. (Deposition Transcript of Lloyd Clonch, pp. 38-41).

The defendants own and operate a sawmill/lumber mill which is an industry subject to the rules and regulations promulgated by OSHA, including but not limited to, workplace safety, employee training, personal protective equipment, emergency

medical care and the employee injury reporting requirements. This is uncontrovertibly evidenced by the following:

a. the multiple notice of violations and penalties assessed against the defendants by OSHA[2];

b. the acknowledgment of same by defendants' owners, supervisors and employees[3];

c. the testimony of both the defendants and plaintiff's experts; and

d. 29 C.F.R. 1910, et seq., 29 C.F.R. 1926.102; 29 C.F.R. 1917.91 which are the applicable OSHA regulations.

The OSHA rules which were violated state as follows:

1. 29 C.F.R. § 1903.1, in part:

> that every employer covered under the Act furnish to his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees. The Act also requires that employees comply with occupational safety and health standards promulgated under the Act, and that employees comply with standards, rules, regulations and orders issued under the Act which are applicable to their own actions and conduct.

2. 29 C.F.R. § 1910.132 (d), in part:

   a. The employer shall assess the workplace to determine if hazards are present, or are likely to be present, which necessitate the use of personal protective equipment (PPE). If such hazards are present, or likely to be present, the employer shall:

      i. Select, and have affected employee use, the types of PPE that will protect the affected

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[2] On May 11, 2001, the defendants paid Thirteen Thousand, Four Hundred, Fifty Dollars in penalties to OSHA for multiple violations specifically failing to require its employees to wear approved hearing protection. (See documents provided by the defendants in response to Plaintiff's Third Request for Production of Documents)

[3] Every supervisor and employee of the defendants who was deposed acknowledged this fact and the fact that OSHA deals with workplace safety rules (See deposition transcripts)

employee from the hazards identified in the hazard assessment;

ii. Communicate selection decisions to each affected employee; and,

iii. Select PPE that properly fits each affected employee.

3. 29 C.F.R. § 1910.133, in part:

a(1). The employer shall ensure that each affected employee uses appropriate eye or face protection when exposed to eye or face hazards from flying particles, molten metal, liquid chemicals, acids or caustic liquids, chemical gases or vapors, or potentially injurious light radiation.

(2). The employer shall ensure that each affected employee uses eye protection that provides side protection when there is a hazard from flying objects. Detachable side protectors (e.g. clip on or slide-on side shields) meeting the pertinent requirements of this section are acceptable.

The tin snips being used by the plaintiff at the time of his injury were yellow handled "Wiss" multi-purpose snips. (Joseph Ryan deposition p. 61). Jim Shephard, plaintiff's expert, testified that the manufacturer of the snips has warning labels printed on the box that direct the user of the snips to wear safety glasses when using the snips. (Jim Shephard deposition pp. 76-80;) (See also photographs attached as Exhibit C to Plaintiff's Petition for Appeal.)

The defendants, as evidenced by the Agreement of Incorporation dated September 21, 1970, had been in the sawmill/lumber industry for over thirty-two (32) years on the date of Mr. Ryan's injury. (Defendants' Response to Plaintiff's Fifth Request for Production of Documents).

On September 17, 2002, the defendants' yard foreman was Cecil J. Hicks. Mr. Hicks had worked in the lumber industry since approximately 1980 and held the

position of yard foreman since 2000. (C.J. Hicks deposition p. 21). Mr. Ryan, as a bander, was under Mr. Hicks' supervision. (C. J. Hicks deposition p. 26). Mr. Hicks understood that both OSHA and other lumber mills required its employees to use safety glasses; however, he testified that he did not advise Mr. Ryan to wear them. (C. J. Hicks deposition pp. 31-37, 46). He testified that there is a good possibility that a worker could suffer eye injuries from the metal bands that Mr. Ryan was cutting on September 17, 2002. (C. J. Hicks deposition pp. 47-48). He also testified that safety glasses could have prevented Mr. Ryan's injury. (C.J. Hicks deposition p. 48).

While the defendants state that C.J. Hicks actually trained and advised Mr. Ryan about matters concerning PPE, (see footnote 2), testimony indicates that Mr. Hicks delegated this task to either Gary Deel or Roger Brown. (C.J. Hicks deposition p. 36; Gary Deel deposition p. 12 and Roger Brown deposition p. 14). Both Gary Deel and Roger Brown testified that they "trained" Mr. Ryan for the banding operation. (Gary Deel deposition p. 12 and Roger Brown deposition p. 14). Both Gary Deel and Roger Brown have many years of experience in the sawmill/lumber industry. (Gary Deel deposition p. 12 and Roger Brown deposition p. 14).

Gary Deel testified that in his work experience for the defendants as a bander, it was a difficult job and that someone could not learn it on his own; that he had received numerous cuts; that a lot of people would get sawdust in their eyes; and that he had been hit in his prescription glasses by a piece of metal banding as he was cutting the material. (Gary Deel deposition pp. 10, 14, 23, and 29).

Roger Brown testified that other sawmills at which he had worked required its employees to wear PPE, including safety glasses; that he had received injuries doing the banding operation; that he knew that Mr. Ryan was having difficulty in the operation; and that he had seen the banding material fly up and hit Mr. Ryan numerous times. (Roger Brown deposition pp. 16, 17, 20 and 28).

Harvey Maynor, Mr. Ryan's first supervisor, who had extensive sawmill/lumber industry experience,[4] testified that OSHA required safety glasses for all sawmill employees at his prior sawmill employers. (Harvey Maynor deposition pp. 10-26).

Mr. Shephard's affidavit that was filed in this case states:

> It is common knowledge in the sawmill and lumber industry that the procedure used by defendants in cutting metal banding with metal bladed snips creates a potential for flying debris and a serious risk of injury to an individual.

Scott Clonch, the defendants Rule 30(b)(7) corporate designee for matters concerning work place safety and the PPE requirements for the sawmill industry, testified that he did not know the federal and/or state law requirements for PPE. (Scott Clonch deposition p. 25). Scott Clonch was the superintendent of the facility where Mr. Ryan worked. (Scott Clonch deposition p. 5). His uncle, Lloyd D. Clonch, the former vice president of the defendants, testified that the defendants do not require any of its employees to wear PPE, including eye protection, that a hazards assessment had never been completed by the defendants, that he was not familiar with OSHA's regulations

[4] Prior to working for the defendants, Mr. Maynor was the safety coordinator/quality control officer of three (3) other sawmills. (Harvey Maynor deposition pp10-12).

concerning PPE; that he didn't know the duties of his supervisors; and he doesn't think safety meetings or PPE are necessary. (Lloyd Clonch deposition pp. 17, 25-28, 30-31, 38).

Two other Clonch family members, Hugh Clonch (president) and Rodney Clonch (vice president) have testified that they lack knowledge concerning OSHA regulations and the PPE which OSHA required for sawmill operations. (Rodney Clonch deposition p. 14).

III. ASSIGNMENTS OF ERROR

A. The trial court erred in granting summary judgment on the basis that plaintiff had not proffered sufficient evidence that the defendant-employers had a subjective realization and appreciation of the existence of a specific unsafe working condition that presented a strong probability of serious injury or death.

B. The trial court erred when it granted summary judgment on the basis that 29 C.F.R. § 1903.1, 29 C.F.R. § 1910, et seq., and 29 C.F.R. § 1926.102 are general safety regulations that do not apply to the process of cutting metal banding in a lumber mill using commercially-available, hand-held metal snips.

IV. POINTS AND AUTHORITIES RELIED UPON

1. "A circuit court's entry of summary judgment is reviewed *de novo*." Syl. Pt. 1, Painter v. Peavy, 451 S.E.2d 755 (W.Va. 1994). Accord Syl. Pt. 1, Kidd v. Mull, 595 S.E.2d 308, (W. Va. 2004).

2. Historically, this Court has been particularly hesitant to uphold a grant of summary judgment where the issues presented involve a party's state of mind, intent, and/or motives. Williams v. Precision Coil, Inc., 459 S.E.2d 329, 338 (W. Va. 1995).

3. "The circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial." Syl. Pt. 3, Painter v. Peavy, 451 S.E.2d 755 (W.Va. 1994). Accord, Syl. Pt. 1, Kidd v. Mull, 595 S.E.2d 308, (W. Va. 2004).

4. "A plaintiff may establish 'deliberate intention' in a civil action against an employer for work-related injury by offering evidence to prove the five specific requirements provided in W. Va. Code § 23-4-2(c)(2)(ii)(1983)." Syl .pt. 2, Sias v. W-P Coal Company, 185 W. Va. 569, 408 S.E.2d 321 (1991); Syl. Pt. 2, Mayles v. Shoneys, Inc., 185 W. Va. 88, 405 S.E.2d 15 (1990); Syl. Pt. 1, Costilow v. Elkay Mining Company, 200 W. Va. 131, 488 S.E.2d 406 (1997).

5. "While a plaintiff may introduce evidence of prior similar violations or complaints to prove an employer had knowledge of the risks concerning a specific unsafe working condition, or to who an employer intentionally exposed an employee to a hazard, we do not see a requirement for this type of evidence in W. Va. Code, §23-4-2(c)(2)(ii) [1994}." Harris v. Martinka Coal Company, 201 W. Va. 578, 499 S.E.2d 307 (1997).

6. OSHA rules 29 C.F.R. §1910.132(d) and 29 C.F.R. §1926.20(b)(2) which require an employer to conduct hazard assessments and workplace inspections are specific safety statutes, the violation of which satisfies the third element of W. Va. Code § 23-4-2(c)(2)(ii). Bell v. Vecellio & Grogan, Inc., 191 W. Va. 577, 447 S.E.2d 269 (1994).

7. A violation of commonly accepted industry customs or standards in and of itself is sufficient to satisfy the third element of W. Va. Code, §23-4-2(c)(2)(ii). Costillow v. Elkay Mining Company, 200 W. Va. 131, 488 S.E.2d 406 (1997). See also Mayles, supra.

V. DISCUSSION OF LAW AND FACT

A. Standard of Review of Summary Judgment

"A circuit court's entry of summary judgment is reviewed *de novo*." Syl. Pt. 1, Painter v. Peavy, 451 S.E.2d 755 (W.Va. 1994). Accord Syl. Pt. 1, Kidd v. Mull, 595 S.E.2d 308, (W. Va. 2004).

Historically, the West Virginia Supreme Court has been particularly hesitant to uphold a grant of summary judgment where the issues presented involve a party's state of mind, intent, and/or motives. See Williams v. Precision Coal, Inc., 459 S.E.2d 329 (W. Va. 1995), Accord, Floyd v. Equitable Life Assurance Society, 264 S.E.2d 648, 650 (W.Va.

1980) (stating that "[a] motion for summary judgment must be denied if varying inferences may be drawn from evidence accepted as true.")

"The circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial." Syl. Pt. 3, Painter v. Peavy, 451 S.E.2d 755 (W.Va. 1994). Accord, Syl. Pt. 1, Kidd v. Mull, 595 S.E.2d 308, (W. Va. 2004).

"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, Arnazzi v. Quad/Graphics, Inc., 218 W. Va. 36, 621 S.E.2d 705 (2005); Syl. Pt. 4, Painter v. Peavy, 192 W. Va. 189, 451 S.E.2d 755 (1994).

"Questions of negligence, due care, proximate cause and concurrent negligence present issues of fact for jury determination when the evidence pertaining to such issues is conflicting or where the facts, even though disputed, are such that reasonable men may draw different conclusions from them." Syl. Pt. 5, Arnazzi v. Quad Graphics, Inc., 218 W. Va. 36, 621 S.E.2d 705 (2005), quoting Syl. Pt. 7, Stewart v. George, 218 W. Va. 288, 607 S.E.2d 394, W.Va. Nov. 15, 2004. The law applicable to other causes of action apply to deliberate intent actions. As the Court in Sias v. W-P Coal Company, 185 W. Va. 569, 408 S.E.2d 232 (1991) stated at Syl. 3:

> "The portion of the statute which authorizes "prompt judicial resolution" of "deliberate intention" actions against employers specifically, W. Va. Code, 23-4-2(c)(2)(iii)(B)[1983,1991] relates to plaintiff's more specific

substantive law burden under the five-element test of W. Va. Code 23-4-2 (c)(2)(ii)(A-E)[1983, 1991], but the pre-existing procedural law still applies for granting employers' motions for summary judgment, directed verdict and judgment notwithstanding the verdict." Syl. Pt. 3, Sias v. W-P Coal Company, 185 W. Va. 569, 408 S.E.2d 232 (1991).

"A plaintiff may establish 'deliberate intention' in a civil action against an employer for work-related injury by offering evidence to prove the five specific requirements provided in W. Va. Code § 23-4-2(c)(2)(ii)(1983)." Syl .pt. 2, Sias v. W-P Coal Company, 185 W. Va. 569, 408 S.E.2d 321 (1991); Syl. Pt. 2, Mayles v. Shoneys, Inc., 185 W. Va. 88, 405 S.E.2d 15 (1990); Syl. Pt. 1, Costilow v. Elkay Mining Company, 200 W. Va. 131, 488 S.E.2d 406 (1997).

B. Plaintiff Established Genuine Issues of Material Fact as to all Issues

The trial court below in granting defendant/appellee's motion for summary judgment ruled that plaintiff/appellant failed to present evidence of two of the five elements required for a deliberate intent claim under W. Va. Code §23-4-2(c)(2)(ii), namely, that the employer had a subjective realization of an unsafe working condition and that the employer violated a safety statute, rule, regulation or industry standard. Accordingly, B and C are the only two elements will be discussed hereinafter. These two are as follows:

B. That the employer had a subjective realization and 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 conditions involved, as contrasted with a statute, rule, regulation or standard generally requiring safe workplaces, equipment or working conditions;

W.Va. Code § 23-4-2(c)(2)(ii). As noted above, only B. and C. are at issue in this appeal.

1. Subjective Realization

The trial court erred in granting summary judgment on the basis that plaintiff had not proffered sufficient evidence that the defendant-employers had a subjective realization and appreciation of the existence of a specific unsafe working condition that presented a strong probability of serious injury or death.

The trial court committed reversible error in granting summary judgment to the defendants on the basis that the plaintiff failed to show that his employer had a subjective realization and an appreciation of a specific unsafe working condition and that this unsafe working condition had a high degree of risk and strong probability of harm.

In Nutter v. Owens-Illinois, Inc., 209 W. Va. 608, 550 S.E.2d 398 (2001), while specifically addressing how a claimant may demonstrate subjective realization and appreciation of an unsafe working condition, this Court stated in syllabus point 2:

> "Under the statute, whether an employer has a "subjective realization and appreciation" of an unsafe working condition and its attendant risks, and whether the employer intentionally exposed an employee to the hazards created by the working condition, requires an interpretation of the employer's state of mind, and must ordinarily be shown by circumstantial evidence, from which conflicting inferences may often reasonable be drawn. Accordingly, while a plaintiff may choose to introduce evidence of prior similar incidents or complaints to circumstantially establish that an employer has acted with deliberate intention, evidence of prior similar incidents or complaints is not mandated by W. Va. Code, 23-4-2 (c)(ii)[1994]. (emphasis added)

This Court also reviewed the subjective realization element in Bell v. Vecellio & Grogen, Inc., 191 W. Va. 577, 447 S.E.2d 269 (1994). In Bell, the plaintiff was an iron worker who was injured when steel bridge beams fell on him. Id. At 578, 270. This Court said, subjective realization like any state of mind, usually must be shown by circumstantial evidence. Id. At 582, 274.

> While a plaintiff may introduce evidence of prior similar violations or complaints to prove an employer had knowledge of the risks concerning a specific unsafe working condition, or to who an employer intentionally exposed an employee to a hazard, we do not see a requirement for this type of evidence in W. Va. Code, §23-4-2(c)(2)(ii) [1994}. Harris v. Martinka Coal Company, 201 W. Va. 578, 499 S.E.2d 307 (1997). See also Beard v. Beckley Coal Mining, 183 W. Va. 485, 396 S.E.2d 447 (1990).

For employer liability to attach, W. Va. Code § 23-4-2(c)(ii) requires that the employer have a subjective realization and appreciation of the fact that Mr. Ryan was using metal snips to cut metal banding without the use of OSHA approved eye protection. This was unquestionably proven. Mr. Ryan was not wearing OSHA approved eye protection on the day of his injury and the defendants knew that he was not wearing approved safety goggles when he was injured.[5]

Both Lloyd Clonch, defendants' former vice president and Scott Clonch, defendants' dry kiln superintendent and Rule 30(b)(7) workplace safety designee, testified that the defendants did not require Mr. Ryan to wear eye protection while

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[5] Even though the defendant's did not require Mr. Ryan to wear safety glasses, and had not advised Mr. Ryan that they were available for his use, a supply of approved safety glasses were maintained in the office buildings at defendant's premises (Rodney Clonch deposition p.37). The defendants philosophy was to leave the decision up to the untrained employee as to whether he should use safety glasses (Scott Clonch deposition p. 25). However, Mr. Ryan was never advised that the defendant had safety glasses for him to use (Joseph Ryan deposition p. 60, 173-174). Why purchase safety glasses for your employees if no risk of eye injury is present.

performing the banding operation. (Lloyd Clonch deposition pp. 30-31 and Scott Clonch deposition p. 17).

OSHA reports and logs demonstrates that the defendants were also aware, that the company had experienced several incidents involving employee eye injuries and other injuries involving the banding operation. (Plaintiff's Second Supplemental Expert Witness Disclosures and Defendants' Responses to Plaintiff's Third Request for Production of Documents).

The defendants' yard foreman and persons assigned to train Mr. Ryan, were aware that OSHA required the use of eye protection in both cutting the metal bands and crimping the bands around stacks of lumber. They testified that this was commonly known throughout the industry. The warning label on the snips provided by the defendants for Mr. Ryan's use clearly warned that safety goggles should be used.

Jim Shephard, plaintiff's expert, testified that the defendants were aware of OSHA regulations due to past visits of OSHA representatives and due to the defendants' submission of injury reports to OSHA and past fines for OSHA violations. The defendants knew of, but chose not to conduct the necessary evaluations to identify potential hazards and chose not to require Mr. Ryan to wear safety glasses. (Jim Shephard deposition p. 99).

Mr. Ryan's co-workers testified that they knew that OSHA required the use of eye protection while performing the banding operation and that it was a standard industry practice customary in other sawmills. (Harvey Maynor deposition p. 10-26, 35 and Roger Brown deposition p. 20). The plaintiff's experts have identified specific,

mandatory OSHA rules and regulations that the defendants violated. These regulations specifically deal with injuries to employees' eyes. Defendants' own employees testified concerning their knowledge of these OSHA requirements. Both plaintiff's and defendants' experts and defendants' supervisory personnel specifically acknowledge that it is commonly accepted and well known within the saw mill and lumber industry that eye protection should be, and is generally required to be provided and used in banding operations, specifically including the use of snips to cut metal banding. Defendants admitted that they controlled the plaintiff's work-related duties and assignments; provided the tools in which to perform this job; controlled the training and orientation, or lack thereof; and not only exposed the plaintiff to serious risk of injury, but also, by deliberate acts and omissions, created the risk in the first place. Therefore, the trial court's grant of summary judgment was in error and should be reversed.

The defendants' senior management offered self serving testimony that they did not feel that Mr. Ryan needed safety glasses when cutting these metal bands, and that they were ignorant of the OSHA requirements concerning the banding operations. However, even after being cited by OSHA for not providing and requiring its employees to wear hearing protection in 2001, the defendants still do not require their employees to wear hearing protection, or any type of PPE. Defendants therefore, demonstrated that their state of mind was to simply ignore known safety rules, regulations and industry practices.

These facts would lead a jury to find that the defendants actually knew Mr. Ryan was in peril and that they simply did not care. The evidence is therefore more than sufficient to overcome a motion for summary judgment.

2. Safety Statute and/or Industry Standard

The trial court erred when it granted summary judgment on the basis that 29 C.F.R. § 1903.1, 29 C.F.R. §1910, et seq. and 29 C.F.R. § 1926.102 are general safety regulations that do not apply to the process of cutting metal banding in a lumber mill using commercially-available, hand-held metal snips

OSHA rules such as 29 C.F.R. §1910.132(d) and 29 C.F.R. §1926.20(b)(2) which require an employer to conduct hazard assessments and workplace inspections are specific safety statutes, the violation of which satisfies the third element of W. Va. Code § 23-4-2(c)(2)(ii). Bell v. Vecellio & Grogan, Inc., 191 W. Va. 577, 447 S.E.2d 269 (1994).

In Bell, this Court found that the employer's failure to comply with 29 C.F.R. §1926.20(b)(2)(1993) which requires an employer to conduct frequent and regular inspections of the workplace [to assess potential hazards] by a competent person to be a violation of a specific safety statute. Bell at 580, 272. (emphasis added)

OSHA regulation 29 C.F.R. 1910.132 which requires the use of personal protective equipment in performing tasks where an employee is exposed to hazardous materials and flying debris is a specific safety statute; the violation of which satisfies the third element of W. Va. Code §23-4-2(c)(2)(ii). Mayles v. Shoneys, Inc., 185 W. Va. 88, 405 S.E.2d 15 (1990). See also Bell, supra.

A violation of commonly accepted industry customs or standards in and of itself is sufficient to satisfy the third element of W. Va. Code, §23-4-2(c)(2)(ii). Costilow v. Elkay Mining Company, 200 W. Va. 131, 488 S.E.2d 406 (1997). See also Mayles, supra.

In our present case, the employer failed to conduct a hazard and/or safety assessment of its facilities, work sites, tools and safety equipment, where its employees, including Mr. Ryan, were required to work. Second, they failed to provide proper safety equipment and reasonably safe tools and/or methods for its employees to safely perform their job duties. Finally, the defendants failed to provide proper training and supervision of its employees, including Mr. Ryan.

The facts here establish that the employer failed to conduct safety assessments for risks and/or conditions that could cause serious injury or death to its employees, and to take appropriate precautions to guard and protect its employees from these risks. This failure created, and allowed to continue, an unsafe working condition with a high degree of risk and strong probability of harm or serious injury to the defendants' employees, including Mr. Ryan.

Pursuant to 29 C.F.R. § 1910.132(d), employers shall assess the workplace to determine if hazards are present or are likely to be present which would necessitate the use of personal protective equipment. As stated in Bell, supra, this satisfies the third element of a deliberate intention cause of action. Bell, supra, at 580, 272. Roy Pauley and Jim Shephard, plaintiff's experts, both testified that defendants' failure to conduct safety assessments created, and allowed to continue, an unsafe working condition with a high degree of risk and strong probability of harm or serious injury. Mr. Pauley

testified at his deposition that the defendants' deliberate failure was a contributing factor to the unsafe working conditions at the defendants' facility. (Roy Pauley deposition p. 92). Mr. Pauley repeatedly testified that the defendants' failure to conduct a workplace hazard assessment was a contributing factor and, in fact, created the unsafe working condition which injured Mr. Ryan. (See generally, Roy Pauley deposition, Jim Shephard Affidavit, and Plaintiff's identification of expert witnesses).

The method that the defendants used to band the lumber created three unsafe working conditions that carried with them a high degree of risk and strong probability of harm or serious injury and strong probability of harm or serious injury. (Jim Shephard deposition, pp 39-52).

Plaintiff's expert, Jim Shephard, explained the banding process used by defendants in the following manner:

> [T]hey did not have a holder for the bands once they cut it loose, the company [Clonch] did not . . . There was nothing there that would secure the flying end when they cut the last holding band.

Jim Shephard deposition p. 41

> You never know what's going to happen when you are cutting metal under tension. Although you could - - cover it with your hand, with a glove on your hand; but in this application because of the environment and the type of band you were cutting and how it was placed, you're not going to have the same configuration or lay the cutting snips exactly the same every time and it may take both hands to cut it. In that case, the face and other areas of the body are going to be exposed to any flying debris. If you pinch it off and it has some pressure to it, it may fly back and hit you in the face or hit you in the arm. The ends may fly at you.

Id. at pp. 44-45

. . . .

> They don't have a secure end here off the reel and the man's only got two hands. So when he is cutting one end the other end is free to do what it wants to, and leaves a very vague area of safety there that is open for a problem. Another thing in this is that it is very hard for the - - an individual to see the ends of a projectile that may be coming straight at them or maybe a thin material coming at a side angle that may be swinging toward their face. The peripheral vision and the depth perception are probably not going to pick that up.

Id. at p. 51

. . . .

> [T]here's too many elements of surprise here, and that there is flying - - there's a potential of a lot of flying elements or debris in this application. One being that from taking and cutting the straps, securing the band on the coils of steel, a piece he may have cut - - he may have cut - - he may have cut it and he said oh, I've got it wrong, and he backs up and reopens and cuts it again. Well, now he may have a smaller sliver that he cuts off, and when he snaps the scissors shut, that may fly out from that; and with that flying out from that without safety glasses he could get a bad injury.

Id. at p. 52

> This is really an interesting way to cut this because you got an operator who's stooped over, bent over or maybe kneeling down and he's laying into the - - to get his arms in a position to cut this.
>
> Well, as he's laying over it and he's getting his face right in the area of anything that may be coming from that.

Id. at p. 52

Mr. Shephard also explained that any time a person is using tin snips to cut metal, that person needs to be wearing safety glasses. (Jim Shephard deposition p. 66). Mr. Ryan's co-workers knew this, his supervisors knew this and it is plainly stated on the warning label on the "Wiss" cutters provided by Mr. Ryan's employers.

When asked if one were performing the job Mr. Ryan was performing without safety glasses posed a high probability of injury, Mr. Shephard responded: "It's eminent danger. It's high probability" (Id. at p. 60). When asked whether performing that operation without the use of safety glasses posed a high degree of risk, Mr. Shephard replied, "Yes. I would say extreme high." (Id. at p. 61).

This high degree of risk is evidenced and further supported by the testimony of Mr. Ryan's co-workers and supervisors wherein they testified that they had received cuts, lacerations and near misses to their eyes when they were performing banding operations.

Appellees' own expert, James Vaughan, testified that the banding of lumber is a job requiring personal protective equipment, i.e., face protection and properly subject to the OSHA regulations. (James Vaughan deposition p. 74).

These OSHA regulations are specifically tailored to the prevention of the type of injury suffered by Mr. Ryan, do not require inferences to be drawn by a jury, and are specifically applicable to the type of work Mr. Ryan was performing. Mr. Ryan was never advised or directed by anyone at any time during his employment, to wear safety goggles when using the "Wiss" cutters (tin snips) to cut the metal banding. Mr. Ryan received no instruction with regard to wearing safety goggles and/or of the potential hazards inherent in the banding operation. Mr. Ryan, an inexperienced employee, had no training and no supervision, which created a high degree of risk and strong probability of harm or serious injury to Mr. Ryan.

Further, Mr. Ryan's coworkers with experience in other sawmills testified that safety glasses were required by their employers in those other sawmills. Both Mr. Pauley and Mr. Shephard presented testimony that the use of safety glasses in sawmills and when cutting steel banding materials with tin snips was a commonly accepted industry standard and custom.

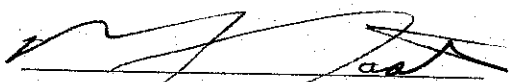
Mr. Ryan presented sufficient evidence that his employer violated specific safety statutes and the customs of the sawmill industry sufficient to withstand the scrutiny of a summary judgment motion.

VI. PRAYER FOR RELIEF

For all of the foregoing reasons and as demonstrated in the record of this case, appellant respectfully request that this Honorable Court grant his Appeal and reverse the Circuit Court's orders granting summary judgment on plaintiff's claim.

JOSEPH E. RYAN,

By Counsel



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

APPEAL NO. 33001

JOSEPH E. RYAN,

Plaintiff/Appellant,

v.

Civil Action No. 03-C-126
Circuit Court of Nicholas County
Honorable Gary L. Johnson

CLONCH INDUSTRIES, INC.,
a West Virginia corporation, and
H&D LUMBER DISTRIBUTORS, INC.
a West Virginia corporation,

Defendants/Appellees.

CERTIFICATE OF SERVICE

I, Marvin W. Masters, counsel for plaintiff, do hereby certify that a true and exact copy of the foregoing "Brief of Appellant, Joseph E. Ryan" was served upon:

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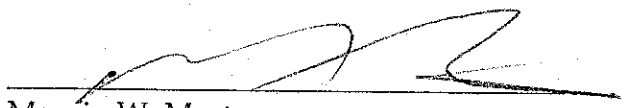
in an envelope properly addressed, stamped and deposited in the regular course of the United States Mail, this 17th day of April, 2006.



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