

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JOSEPH E. RYAN,

Appellant,

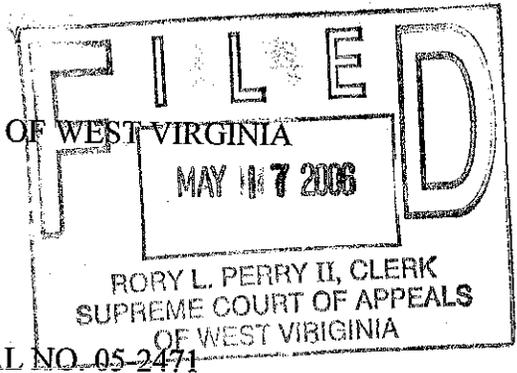
v.

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

Appellees.

BRIEF OF APPELLEES CLONCH INDUSTRIES, INC.,  
AND H & D LUMBER DISTRIBUTOR, INC.

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APPEAL NO. 05-2471

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**BRIEF OF APPELLEES CLONCH INDUSTRIES, INC., AND  
H & D LUMBER DISTRIBUTOR, INC.**

**I. STATEMENT OF CASE**

H & D Lumber Distributor, Inc. ("H & D") is a lumber processing facility located at Dixie, West Virginia.<sup>1</sup> On August 19, 2002, Appellant Joseph Ryan was hired by H & D and assigned to the position of stacker. His duties were to lay boards on a conveyor chain for grading and to unload the boards after they were graded. Approximately three weeks after he was hired, Mr. Ryan was offered a position as a "banding man." His job duties included cutting bands from a coil of metal banding, placing the bands around pallets of lumber, tightening the bands and crimping the ends together. The bands were cut with tin snips provided by H & D. H & D also provided gloves and safety glasses, although it did not require Mr. Ryan to wear them.

Roger Brown showed Mr. Ryan how to cut the bands.<sup>2</sup> While demonstrating, Mr. Brown instructed Mr. Ryan to feed the banding out to a line marked on the floor, untwisting the banding as he took it off the coil. When the band was laid out to the proper length, as indicated by the mark on the floor, Mr. Brown showed Mr. Ryan to cut the band with one hand while holding the end of the coil. The cut band was allowed to fall to the floor and the process was repeated until a sufficient supply of bands had been cut. As pallets of wood were brought in, these bands were put around the pallets, and tightened and crimped using a ratcheting band tightener. After

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<sup>1</sup>For purposes of this appeal, H & D will refer to both appellees. It is not disputed that both appellees share officers, directors and offices. H & D is essentially a payroll account pursuant to which the employees, other than those working at Clonch Industries, Inc.'s sawmill, are paid.

<sup>2</sup>Contrary to Appellant's assertion, Mr. Brown had extensive experience, at least one year, cutting bands. R. Brown dep. at pp. 13, 26. On September 17, 2002, Mr. Brown was employed as a tally man, counting the boards in the pallets being banded. Because he worked in the same area as the banding man, he often helped band lumber when the banding man got behind.

showing Mr. Ryan how to cut the bands, Mr. Brown noticed that when cutting the bands, Mr. Ryan was holding the cut band rather than the end of the coil. This was less efficient because Mr. Ryan was required to reach down and pick up the end of the coil after each cut. Mr. Brown also noted that Mr. Ryan crouched down over the band as he cut it. Mr. Brown repeatedly advised Mr. Ryan to cut the bands as he was instructed. Mr. Ryan did not comply. R. Brown dep. at pp. 24-28. On September 17, 2002, Mr. Ryan cut a band while holding the cut end of the band. The unrestrained end of the coil whipped across his face, lacerating his left eye.

Mr. Ryan subsequently filed a deliberate intention claim against Clonch and H & D. By Order dated April 21, 2005, the Circuit Court of Nicholas County granted the Defendants' Motion for Summary Judgment.

## **II. RESPONSE TO APPELLANT'S ASSIGNMENTS OF ERROR**

- A. The circuit court properly granted summary judgment on the basis that Appellant had not proffered sufficient evidence that H & D had a subjective realization of the existence of a specific unsafe working condition that presented a strong probability of serious injury or death.
- B. The circuit court properly granted summary judgment on the basis that the safety regulations cited by Appellant regarding hazard assessments and the use of safety glasses are not specific to the job of cutting metal bands.

## **III. ARGUMENT AND AUTHORITIES RELIED UPON**

As Mr. Ryan's employer, H & D is afforded immunity from liability for workplace injuries. This immunity does not extend, however, to liability for injuries deliberately intended by the employer. W. Va. Code §23-4-2(b). In order to recover on a "deliberate intention" claim, an employee must prove:

- (A) That a specific unsafe working condition existed in the workplace which presented a high degree of risk and strong probability of a serious injury or death;

(B) That the employer had a subjective realization and an appreciation of the existence of such specific unsafe working condition and of the high degree of risk and the strong probability of serious injury or death presented by such specific unsafe working condition;

(C) That such specific unsafe working condition was a violation of a state or federal safety statute, rule or regulation, whether cited or not, or of a commonly accepted and well-known safety standard within the industry or business of such employer; which statute, rule, regulation or standard was specifically applicable to the particular work and working condition involved, as contrasted with a statute, rule, regulation or standard generally requiring safe workplaces, equipment or working conditions;

(D) That notwithstanding the existence of the facts set forth in subparagraphs (A) through (C) hereof, such employer nevertheless thereafter exposed an employee to such specific unsafe working condition intentionally; and

(E) That such employee so exposed suffered serious injury or death as a direct and proximate result of such specific unsafe working condition.

W. Va. Code §23-4-2(c)(2)(ii). However, “[i]n order to prevail under the statute *all* five element *must* be present.” *Miller v. City Hospital, Inc.*, 197 W. Va. 403, 409, 475 S.E.2d 495, 500 (1996)(emphasis added). That all five elements must be proven by the employee in order to withstand a motion for summary judgment is not only well-settled law, it is statutorily mandated:

Notwithstanding any other provision of law or rule to the contrary, and consistent with the legislative findings of intent to promote prompt judicial resolution of issues of immunity from litigation under this chapter, the Court **shall** dismiss the action upon Motion for Summary Judgment if it finds, pursuant to Rule 56 of the Rules of Civil Procedure that one or more of the facts required to be proved by the provisions of sub-paragraphs (A) through (E) of the preceding paragraph (ii) do not exist . . .

W. Va. Code §23-4-2(c)(2)(iii)(B) (1994 Amendment) (emphasis added).

In this case, Appellant alleged a number of unsafe working conditions. Appellant has appealed the circuit court’s ruling as to two of those conditions:

1. H & D's failure to provide proper safety equipment and reasonably safe tools and/or methods for its employees, including the appellant, to safely perform their job duties;
2. H & D's failure to conduct a hazard and/or safety assessment of its facilities, work sites, tools and safety equipment wherein its employees, including the appellant, were required to work.

Specifically, Appellant asserts that the trial court erroneously concluded that H & D did not have a subjective awareness of any unsafe working condition arising from Appellant's failure to use safety glasses while cutting bands. Additionally, Appellant asserts that the circuit court erred in finding that H & D's failure to require Appellant to use safety glasses while cutting bands, and H & D's failure to conduct a formal hazard assessment, did not violate a safety statute or regulation specifically applicable to the band cutting job. As set forth below, the circuit court was correct in finding that Appellant was unable to prove a genuine issue of material fact as to those elements.

- A. **THERE IS NO EVIDENCE THAT H & D HAD A SUBJECTIVE REALIZATION AND APPRECIATION OF ANY SPECIFIC UNSAFE WORKING CONDITION REGARDING THE BAND CUTTING JOB OR OF THE HIGH DEGREE OF RISK AND STRONG PROBABILITY OF INJURY PRESENTED BY SUCH CONDITION.**

The second element of the five-part test which an employee must prove in order to prevail on a deliberate intention claim concerns the employer's subjective realization of the alleged specific unsafe working condition:

(B) That the employer had a subjective realization and an appreciation of the existence of such specific unsafe working condition and of the high degree of risk and the strong probability of serious injury or death presented by such specific unsafe working condition;

W. Va. Code §23-4-2(c)(2)(ii)(B). This Court has made it clear that West Virginia Code §23-4-2(c)(2)(ii)(B) mandates that:

a plaintiff attempting to impose liability on the employer must present sufficient evidence, especially with regard to the requirement that the employer had a subjective realization and an appreciation of the existence of such specific unsafe working condition and the strong probability of serious injury or death presented by such specific unsafe working condition. This requirement is not satisfied merely by evidence that the employer *should have* reasonably known of this specific unsafe working condition and that the strong possibility of serious injury or death presented by that condition. **Instead, it must be shown that the employer actually possessed such knowledge.**

*Blevins v. Beckley Magnetite, Inc.*, 185 W. Va. 633, 640, 408 S.E.2d 385, 393 (1991) (emphasis added).

This stringent standard of requiring *actual knowledge* was reaffirmed by this Court in *Tolley v. ACF Industries, Inc.*, 212 W. Va. 548, 575 S.E.2d 158 (2002). In fact, in *Tolley*, the Court expressly found that the plaintiff/employee “failed to produce the proof required to meet the subjective knowledge standard, either by direct or circumstantial evidence, of demonstrating that [the employer had subjective knowledge and appreciation of a specific unsafe working condition]” because “during the relevant time period, no foreman or other person performing [the plaintiff/employee’s] job duties ever made a respiratory claim.” *Id.* at 13. In short, the Court has made it clear that the actual knowledge standard is satisfied only by evidence of exactly that, i.e., *actual knowledge*; what an employer should have known is simply not enough.

It is undisputed that Appellant was not required or instructed to wear safety glasses while cutting bands. Appellant was able to produce no evidence, however, that any H & D supervisor believed that this was an unsafe working condition that posed a high degree of risk and a strong probability of serious injury. Appellant alleges that OSHA logs and reports indicate a subjective awareness by H & D, stating that “the company had experienced several incidents involving employee eye injuries and other injuries involving the banding operation.” Those reports and

logs reflect three prior eye injuries. On October 7, 2000, a general labor employee reported that the wind blew some sawdust in his eye. On November 9, 2001, a welder reported that a piece of metal got in his eye while he was grinding (despite the fact that he was wearing safety glasses). On June 22, 2002, a laborer reported that something flew into his eye while he was pulling lumber off the chain. See Exhibit 1. (These reports are in the record as Exhibit 3 to H & D's Supplemental Responses to Plaintiff's Third Set of Request for Production of Documents.) None of these injuries occurred during the banding operation.

Although the reports indicate six injuries involving the banding operation from 1999 through 2002, they were not eye injuries and did not occur while the employees were cutting bands. See Exhibit 2. (These reports are in the record as Exhibit 3 to H & D's Supplemental responses to Plaintiff's Third Set of Request for Production of Documents.) In fact, prior to Appellant's injury, no H & D employee had ever been injured in any manner while cutting bands. Furthermore, H & D has never received an OSHA citation or warning for not requiring safety glasses.<sup>3</sup>

Appellant asserts that H & D's yard foreman and the persons assigned to train Appellant were aware that OSHA required the use of eye protection while cutting the bands. Those individuals, however, were never asked that question. Mr. Hicks, Appellant's supervisor, was asked whether the use of safety glasses was an OSHA requirement for anyone under his supervision, to which he replied "I think it would be." Hicks dep. at pp.33-34. It should be noted that Mr. Hicks also supervised welders and chain saw operators, for which eye protection

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<sup>3</sup>Complete OSHA inspections were done in 1995 and 2001. Although H & D received several citations, none involved the use of safety glasses or the banding job. See Exhibit 9 to H & D's Memorandum in Support of Motion for Summary Judgment.

was required. Gary Deel and Roger Brown, who trained Appellant, were not supervisory employees and Appellant has not provided any evidence that their alleged knowledge of OSHA requirements regarding the use of safety glasses, or that of any of Appellant's co-workers, was ever communicated to H & D.

Finally, Appellant alleges that the packaging for the tin snips that H & D provided to Appellant warned that safety goggles should be used. The tin snips cited by Appellant in support of this assertion, however, are not the type of tin snips used by H & D. As demonstrated to the circuit court, the tin snips used by H & D do not come with any such warning. See Exhibit 3. (These documents are in the Record as Exhibit 3 attached to Reply Memorandum in Support of Defendants' Motion for Summary Judgment.)

In summary, Appellant could produce no evidence before the circuit court of H & D's actual awareness of this alleged unsafe working condition. Plaintiff's own expert, Jim Shephard, does not believe that H & D possessed such awareness. J. Shephard dep. at pp. 87-88.

B. **THERE IS NO EVIDENCE THAT H & D VIOLATED A SPECIFIC SAFETY STATUTE, RULE, OR REGULATION APPLICABLE TO H & D'S INDUSTRY OR BUSINESS AND TO THE ACTIVITY IN WHICH APPELLANT WAS ENGAGED AT THE TIME OF HIS INJURY.**

The third element of the five-prong test requires that the employee prove that a specific unsafe working condition existed which violated a state or federal safety statute, rule or regulation or some commonly accepted and well-known safety standard within the industry or business of the employer. W. Va. Code §23-4-2(c)(2)(iii)(C). This Court has held that only a **specific regulation specifically applicable** to the particular work condition which serves as the basis of the employee's accident/injury satisfies the third part of the employee's stringent five-element burden of proof and explicitly rejected an employee's proffer of generally applicable

federal regulations as evidence sufficient to satisfy the “specifically applicable” requirement. *Tolley v. ACF Industries, Inc.*, 212 W. Va. 548, 575 S.E.2d 158 (2002) (per curiam). In *Tolley*, the employee claimed that as a result of his employment within the paint department of his employer, ACF, he sustained breathing ailments, including the aggravation of pre-existing breathing afflictions. He specifically contended that ACF’s failure to monitor for a specific chemical – isocyanates – caused him detrimental exposure.

In his efforts to prove the third-part of the five-part deliberate intention test, the plaintiff alleged non-compliance with safety regulations pertaining to respiratory equipment, specifically that ACF had violated 29 C.F.R. Section 1910.134 (mandating an employer’s responsibility to have appropriate respiratory equipment), and 29 C.F.R. Section 1910.1200(h)(3)(mandating an employer’s responsibility to develop and maintain a safety data sheet for hazardous chemicals).

*Id.* Though the *Tolley* plaintiff cited specific safety regulations in the prosecution of his case, none of the alleged regulation violations were accepted by the Court as satisfying the mandates of West Virginia Code §23-4-2(ii)(C):

To meet this prong of the “deliberate intention” cause of action, Appellants rely on generalized allegations of non-compliance with safety regulations . . . , the warning provided in the safety data sheets; and employee training . . . While Appellants identify certain federal regulations, . . . they have not introduced specific evidence . . . that any of these alleged violations specifically applied to the alleged unsafe working condition at issue . . .

*Id.* at 16-17. The Court found instead that the employee’s case was comprised mainly of “inference,” necessitating that one extrapolate from generally applicable regulations a specific inference that the employer acted improperly. Finding this insufficient, the Court affirmed the lower Court’s dismissal of the claim.

In contrast, however, the Court has readily found in other cases that the “specifically applicable” requirement was met whenever a regulatory agency had issued a citation governing the injury-inducing event.

In *Blevins v. Beckley Magnetite, Inc.*, 185 W. Va. 633, 408 S.E.2d 385 (1991), a dryer-hopper operator, while cleaning up ore spillage pursuant to his supervisor’s express instructions to keep all systems operating – even during clean-up – had his left hand and arm crushed when they got caught in the pinch-point of self-cleaning conveyor tail pulley. The Court observed that the employee’s claim against the employer was based upon the employer’s citation for the specific regulatory violation of failing to turn off a conveyor before clean-up which was specifically applicable to the employer’s business. *Id.*

Likewise, in *Beard v. Beckley Coal Mining Co.*, 183 W. Va. 485, 396 S.E.2d 447 (1990), the Court found element three was satisfied when the employee’s claim was founded upon the employer’s citation for specific MSHA and West Virginia Department of Mines regulatory and statutory violations of not maintaining sand in the sanding device, both of which specifically governed the activity in which the employee was engaged when the accident giving rise to the employee’s claim arose and both of which were specifically applicable to the employer’s business of mining.

Again in *Sias v. W-P Coal Co.*, 185 W. Va. 569, 408 S.E.2d 321 (1991), the Court found that the third element of the five-part test was satisfied when the employee’s claim was founded upon the employer’s citation for a specific MSHA violation which directly governed the specific activity of which the employee was engaged at the time of the injury-inducing accident and specifically pertained to the employer’s business of mining.

1. Failure to conduct a hazard and/or safety assessment.

OSHA requires a written certification that a hazard assessment has been performed. 29 C.F.R. §1910.132(d).<sup>4</sup> That regulation, however, is a general occupational safety and health standard regarding all types of personal protective equipment ("PPE") and is applicable to all employers subject to OSHA. It is not specifically applicable to the lumber processing industry, much less the task of cutting bands. In fact, this regulation falls within 1910 Subpart I - Personal Protective Equipment, which includes a similar regulation regarding respiratory equipment, 29 C.F.R. §1910.134. As noted above, in *Tolley*, the Court held that such regulation was a general regulation that did not satisfy the third element of the deliberate intention test.

Appellant cites *Mayles v. Shoney's Inc.*, 185 W.Va. 88, 405 S.E.2d 15 (1990) for the proposition that 29 C.F.R. Section 1919.132 is a safety regulation specifically applicable to the band cutting job. *Mayles* involved a fast food restaurant employee who was burned while carrying hot grease. Although the Plaintiff's expert testified that the employee's grease disposal procedure violated a number of OSHA regulations, including Section 1910.132, the court based its holding on the employer's violation of an industry standard. *Mayles*, 185 W. Va. at 95, 405 S.E.2d at 22.

Appellant also asserts that H & D violated 29 C.F.R. Section 1926.102 and further cites 29 C.F.R. Section 1926.20(b)(2). These regulations, however, apply to the construction industry, not the lumber industry. Furthermore, contrary to Appellant's assertion, this Court did not find, in *Bell v. Vecellia & Grogan, Inc.*, 191 W.Va. 577, 447 S.E.2d 69 (1994), that the employer's

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<sup>4</sup>Copies of the OSHA regulations cited herein are attached to H & D's Memorandum in Support of Motion for Summary Judgment as Exhibit 15.

alleged violation of Section 1926.20(b)(2), which requires frequent and regular inspections of the workplace, was a sufficient showing on the third element of a deliberate intention claim. The Court merely agreed that the testimony of the Plaintiff's experts regarding the employer's violation of several OSHA regulations, was sufficient to preclude a directed verdict for the employer.

2. Failure to require safety glasses.

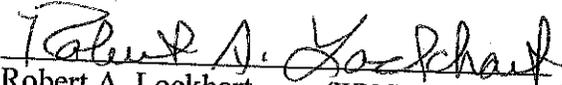
Appellant's experts have testified that H & D's failure to require Appellant to require safety glasses while cutting bands violated 29 C.F.R. §§1910.132 and 1910.133. Again, these are general safety standards regarding the use of PPE in all industries and for all jobs. They do not meet the specificity requirements of W. Va. Code §23-4-2(c)(2)(ii)(C). Their general nature is further underscored by the fact that PPE, including safety glasses, is required only if the employer determines, through a hazard assessment, that a hazard exists (or is likely to exist) which necessitates the use of PPE. H & D did not identify a hazard requiring PPE regarding the band cutting job. Accordingly, there was no violation of §1910.132 or §1910.133. Although no formal hazard assessment was performed, H & D's supervisory personnel have all attested that they did not believe that the band cutting procedure was a hazardous task. Accordingly, even if a formal hazard assessment had been done, no hazard would have been identified and no PPE would have been required.

#### IV. CONCLUSION

Appellant was unable to raise a genuine issue of fact before the circuit court as to H & D's alleged subjective awareness that its failure to require Appellant to wear safety glasses while cutting bands was an unsafe working condition that posed a high degree of risk and strong probability of serious injury or death. Appellant also failed to cite a safety statute or regulation

specifically applicable to the particular work and working condition involved, as contrasted with a statute, rule, regulation generally requiring safe workplaces, equipment or working conditions. Accordingly, the circuit court properly granted summary judgment in H & D's favor. The circuit court's ruling and rationale are supported by this Court's past rulings and the public policy underlying the workers' compensation immunity provisions and should not be overturned. Accordingly, H & D requests that the circuit court's ruling be affirmed.

CLONCH INDUSTRIES, INC. and  
H & D LUMBER DISTRIBUTOR, INC.  
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