

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

APPEAL NO. 33001

JOSEPH E. RYAN,

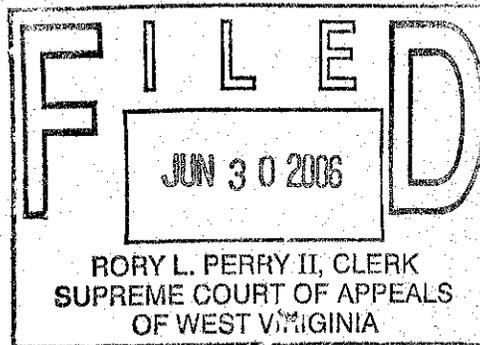
Plaintiff/Appellant,

v.

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

Defendants/Appellees.

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



REPLY BRIEF OF APPELLANT, JOSEPH E. RYAN

Respectfully submitted,

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I. INTRODUCTION

In their brief, appellees Clonch Industries, Inc. and H&D Lumber Distributors, Inc. (hereinafter "Clonch,") argue and assert that appellant Joseph Ryan did not proffer evidence on two of the five elements of W. Va. Code § 23-4-2(c)(2)(ii) sufficient to withstand a motion for summary judgment.

Clonch argued, and the trial court concluded, incorrectly, that Clonch lacked 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 was wrong because, *inter alia*, (1) Clonch's designated and *defacto* supervisors knew that performing the banding operation without eye protection was unsafe and presented a significant risk of eye injury; (2) Clonch had an affirmative duty to be aware of and enforce applicable safety rules; (3) both parties' experts testified that the banding operation posed a serious risk of eye injury; (4) deliberate ignorance of safety rules is not a defense for Clonch; and (5) the warning labels on the tin snips provided by Clonch direct a user to use safety glasses.

Clonch also argued, and the trial court found, incorrectly, that the specific unsafe working condition (cutting metal bands with inappropriate and/or dull tin snips, then placing these metal bands around stacks of lumber, tightening and crimping these bands in preparation for transport, all of which was done without approved safety glasses.) was not a violation of a state or federal safety statute, rule or regulation or a commonly accepted and well-known safety standard within Clonch's industry or business.

The evidence proffered by Mr. Ryan, which is contained in the record before this Court, clearly demonstrates that the trial court committed reversible error.

II. STATEMENT OF FACTS

The Statement of Facts contained in Mr. Ryan's April 17, 2006, appellant's brief are hereby incorporated by reference as if fully stated verbatim herein.

In addition to the Statement of Facts incorporated herein above, where necessary, additional facts have been cited to rebut certain misleading and/or out-of-context factual assertions made by Clonch in its brief.

III. POINTS AND AUTHORITIES RELIED UPON

1. Knowledge of employees and agents of a corporation is attributable to the corporation and their acts and/or omissions may amount to willfulness, an intentional disregard or deliberate indifference by the corporation. Steere Tank Lines, Inc. v. United States of America, 330 F.2d 719 (1964).
2. All individuals and corporations are charged with knowledge of the United States statutes, rules and regulations found in the federal register, specifically including the rules and regulations of OSHA. Fed. Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947).
3. Deliberate ignorance of the rules and regulations of OSHA and/or industry standards and customs may not be utilized as a defense by the employer to an employee's claim under W. Va. Code, § 23-4-2(c)(2)(ii).
4. A corporation is considered to have acquired the collective knowledge of its employees and is held responsible for their failure to act. United States of America v. T.I.M.E. - D.C., Inc., 381 F. Supp. 730 (1974).
5. Knowledge acquired by employees of a corporation within the scope of their employment is imputed to the corporation. United States of America v. T.I.M.E. - D.C., Inc., 381 F. Supp. 730 (1974).

IV. DISCUSSION OF LAW

A. SUBJECTIVE REALIZATION AND APPRECIATION OF THE EXISTENCE OF A SPECIFIC UNSAFE WORKING CONDITION THAT PRESENTED A STRONG PROBABILITY OF SERIOUS INJURY OR DEATH.

At pages 1 and 2 of Clonch's brief, Clonch asserts that Mr. Ryan was instructed in the banding operation by Roger Brown, his trainer and *defacto* supervisor, which included, *inter alia*, measuring the steel bands to a predetermined length, cutting the bands with snips provided by Clonch, putting the cut bands around stacks of lumber, placing the two band ends in a crimper, putting them under tension and securing the bands with metal crimps. Clonch further asserts that Mr. Brown noted that Mr. Ryan was not performing these tasks as instructed and that he advised Mr. Ryan of that.

Clonch's factual assertions are misleading, incomplete and taken out of context. Clonch alleges that Mr. Ryan was provided detailed and craft-specific instruction in the banding operation, was closely monitored to evaluate his progress and provided periodic guidance and instruction. This is simply untrue.

In its answers to plaintiff's first interrogatories numbers 6 and 9 and plaintiff's second interrogatories numbers 1 and 2, Clonch states that Joseph Ryan was trained in the banding operation and in the use of personal protective equipment ("PPE"), safety glasses, by Cecil Hicks. Cecil Hicks denies providing any training to Mr. Ryan. (Deposition transcript of C.J. Hicks, pp 26-37.) At some time between the filing of Clonch's motion for summary judgment and its brief before this Court, Clonch decided that Roger Brown trained Mr. Ryan. Mr. Ryan testified that Roger Brown's so-called training consisted of placing pre-cut bands around 2 or 3 stacks of lumber and crimping

the bands together. (Deposition transcript of Joseph Ryan, p. 48.) Mr. Brown did not use safety glasses while performing this task. (Deposition transcript of Roger Brown, pp. 14-20.) Mr. Brown's mentorship of Mr. Ryan consisted of jokes about Mr. Ryan being slow at banding lumber. (Deposition transcript of Joseph Ryan, pp. 43-60.)

As noted earlier, the banding operation at Clonch consists of both cutting the steel bands and securing the cut bands around stacks of lumber. As described by Mr. Ryan and the personnel assigned to train him, this operation was not divided or separated by Clonch. Further, Clonch's liability expert testified that OSHA required safety glasses while securing the steel bands around stacks of lumber. (Deposition transcript of James Vaughan, p. 74.) In essence, Clonch argues that "cutting the bands" does not require PPE, while "securing the bands" around stacks of lumber does require PPE. Clonch's assertion herein that the banding operation is divisible into two separate tasks is disingenuous, misleading and contrary to the actual daily operation at the Clonch facility. At a minimum, it creates a genuine issue of fact proper for a jury to decide.

It should be noted that if Clonch is attempting to assert that Mr. Ryan was contributorily negligent, this Court held in Roberts v. Consolidated Coal Co., at syllabus points 8 and 9 that:

8. "When an employee asserts a deliberate intention cause of action against his/her employer, pursuant to W. Va. Code §§ 23-4-2(b) - (c) (1991) (Cum.Supp.1991), the employer may not assert the employee's contributory negligence as a defense to such action."

9. "An employer defending against its employee's deliberate intention action, which suit has been brought pursuant to W. Va. Code §§ 23-4-2(b) - (c) (1991) (Cum.Supp.1991), may not assert as a defense thereto the employee's deliberate intention, as that term is construed by W. Va. Code § 23-4-2(c)(2), in causing or contributing to his/her occupational injury or disease."

208 W. Va. 218, 539 S.E. 2d 478 (W. Va. 2000).

Next, Clonch argues that Mr. Ryan failed to produce any evidence that any supervisor believed the banding operation was unsafe. (Appellees brief pp. 5-7) (emphasis added). As noted in the Statement of Facts and as evidenced in the various deposition transcripts made a part of this record, this assertion is factually incorrect and inconsistent with accepted principles of corporate and/or agency law.

Mr. Ryan's first immediate supervisor was Harvey Maynor. Mr. Maynor acknowledged in his deposition that OSHA regulations and accepted industry safety customs required the use of eye protection while performing the banding operation. (Deposition transcript of Harvey Maynor, pp. 18-45.)

C.J. Hicks was Clonch's kiln (dry side) yard foreman, Mr. Ryan's supervisor and was directly below Scott Clonch (dry side superintendent and 30(b)(7) safety designee) in the chain of command at Clonch. (See generally deposition transcripts of Scott Clonch and Lloyd Clonch.) C.J. Hicks not only acknowledged that OSHA and other lumber mills at which he worked required eye protection (deposition transcript of C.J. Hicks, pp. 31-46), but he further acknowledged that the banding operation exposed Mr. Ryan to a known serious risk of eye injury. (Deposition transcript of C.J. Hicks, pp. 47-48.)

Mr. Hicks also specifically directed either, or both, Roger Brown and Gary Deel to train and observe Mr. Ryan in the banding operation, including the use of proper PPE. Brown and Deel were unquestionably in a position of authority over Mr. Ryan and were his *defacto* supervisors. Brown and Deel testified that they had experience in the sawmill lumber industry, knew PPE/safety glasses were required by OSHA and the lumber mill industry and had themselves been injured while performing the banding operation at Clonch. Mr. Deel actually testified that his prescription glasses had been scratched by a piece of steel banding. (Deposition transcript of Roger Deel, pp., 10-29; deposition transcript of Roger Brown, pp. 14, 16-20, 23.)

Clonch argues that its senior management's deliberate ignorance of OSHA regulations and/or industry customs equates to a lack of actual knowledge. This "head in the sand" defense is, as a matter of law, unavailable to Clonch. OSHA is a codified federal statute with corresponding regulations. The United States Supreme Court has held that all persons and corporations are charged with knowledge of the United States statutes, as well as the rules and regulations found in the Federal Register. Fed. Crop Ins. Corp. v. Merrill, 332 U.S. 380, at 384-85, (1947). A corporation is considered to have acquired the collective knowledge of its employees, said knowledge being imputed to the corporation. United States of America v. T.I.M.E. - D.C., Inc., 381 F. Supp. 730 (1974).

Further, Clonch's employees and Mr. Ryan's supervisors knew that the lumber industry required the use of safety glasses when performing the banding operation that injured Mr. Ryan. Consequently, Clonch had actual knowledge that OSHA and

accepted industry standards required employees be provided and required to use safety glasses while banding lumber.

For the reasons stated above, the trial court's granting of summary judgment on this issue was reversible error.

B. SPECIFIC STATE OR FEDERAL SAFETY STATUTE, RULE OR REGULATION

Clonch next argues that Mr. Ryan failed to present any evidence that Clonch violated a specific state or federal safety statute, rule or regulation.

In its brief, Clonch appears to claim that:

1. the OSHA regulations applicable to flying debris, cutting metal and eye protection are not applicable to the banding operation; and
2. that violations of accepted sawmill industry safety standards which require the use of eye protection while performing the banding operation are not sufficient to meet the requirements of W. Va. Code § 23-4-2(c)(2)(ii).

Neither of Clonch's assertions are well grounded in fact or law.

Factually, as explained in great detail by Jim Shephard, plaintiff's expert, and agreed to by James Vaughan, defendants' expert, the rules and regulations of OSHA are applicable to the sawmill lumber industry and to all industries wherein worker safety issues are a concern. (See generally deposition transcript of Jim Shephard, Affidavit of Jim Shephard and deposition transcript of James Vaughan.)

The OSHA rules cited by Mr. Ryan are not esoteric or general rules which require employers to provide a reasonable safe place to work. These rules are specifically tailored to assess the potential for eye related injuries, determine what

methods and/or equipment are necessary to prevent eye injuries and to ensure that these methods are adopted and equipment utilized.

In its attempts to artificially divide the banding operation into two distinct and separate tasks, Clonch asserts that the cutting of the steel bands does not require safety glasses and is not subject to OSHA. However, they argue that the "crimping" and/or placing the bands under tension around stacks of lumber does. (Deposition transcript of James Vaughan, generally and at p. 74.) Assuming no other factual controversy exists, this determination, at a minimum, is a question for the jury and not properly decided on summary judgment.

Clonch cites as authority for this argument a case decided on issues of causation rather than whether a specific state or federal statute was involved. In Tolley v. ACF Industries, 212 W. Va. 548, 575 S.E.2d 158 (2002), Mr. Tolley alleged, *inter alia*, that he had been exposed to excessive levels of isocyanates and that this exposure caused him to develop asthma. Tolley's deliberate intention claim was dismissed not because of his failure to identify a specific federal or state statute; rather, it was dismissed because Tolley could not produce evidence of actual exposure. Id. at 554, 164. As the Tolley court stated, "absent some evidence of exposure, an unsafe working condition cannot be even argued to exist." Id. at 555, 165. Furthermore, the plaintiff in Tolley admitted that there is no regulation which requires an employer to monitor for isocyanates. Id. At 557, 168.

Conversely, Mr. Ryan presented specific OSHA regulations which require an employer to assess the workplace for potential eye injuries and provide PPE to prevent

these injuries. As noted, even Clonch's expert admitted that glasses and face shields were required by OSHA for the banding process. (Deposition transcript of James Vaughan, pp. 73-75).

Additionally, in its brief, Clonch asserts for the first time ever that the packaging on the tin snips provided to Mr. Ryan lacked any warnings about the use of safety glasses. This evidence was never before the trial court, and as a result, is not part of the record in this case and is not properly before this Court. However, if the Court considers the same, the presence or absence of this warning label is a jury question and not proper for summary judgment.

C. INDUSTRY SAFETY STANDARD

W. Va. Code, § 23-4-2(c)(2)(ii)(c) is satisfied upon a showing of violation of a state or federal statute, rule or regulation or a commonly accepted or well-known industry safety standard. It does not require a claimant to show both. Costillow v. Elkay Mining Company, 200 W. Va. 131, 488 S.E.2d 406 (1997.) Clonch apparently agrees with this by citing Mayles v. Shoneys, Inc. in its brief stating that the Mayles Court based its finding on a violation of industry standard as the basis of fulfilling subsection (c) of W. Va. Code § 23-4-2(c)(2)(ii). It should be noted that Clonch does not argue that Mr. Ryan failed to offer evidence of a violation of industry standard.

Clonch cites Blevins v. Beckley Magentite, 185 W. Va. 633, 408 S.E.2d 385 (1991), Beard v. Beckley Coal Mining Co., 183 W. Va. 485, 396 S.E.2d 447 (1990) and Sias v. W-P Coal Co., 185 W. Va. 569, 408 S.E.2d 321 (1991), as somehow requiring that a claimant

present evidence that a regulatory body issue a citation before the courts may find a "specific safety statute" to have been violated.

Mr. Ryan is not required under W. Va. Code, 23-4-2(c)(2)(ii) to offer evidence of an employer's citation either before or after his injury. This fact could be used as evidence, just as prior injuries or complaints, of subjective realization but it is not mandated by W. Va. Code, 23-4-2(c)(2)(ii). Nutter v. Owens-Illinois, 209 W. Va. 608, 550 S.E.2d 398 (2001); Bell v. Vecellio & Grogen, Inc., 191 W. Va. 577, 447 S.E.2d 269 (1994).

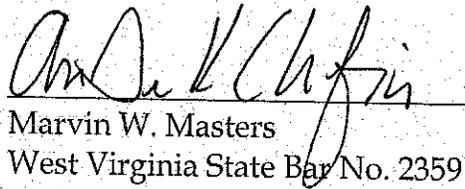
In conclusion, as evident from the record in this case, and even in the facts argued by both parties, the trial court's granting of summary judgment was improper. Multiple issues of material fact and the interpretation of even the agreed facts are present in this case. Consequently, summary judgment was improper and the trial court's granting of the same should be reversed. Affirming the trial court's decision would allow employers to intentionally be unaware of state and federal regulations concerning worker safety, or at least to claim ignorance of the same and escape responsibility.

V. PRAYER FOR RELIEF

For all of the foregoing reasons and as demonstrated in the record of this case, appellant respectfully requests that this Honorable Court reverse the trial court's order granting summary judgment on plaintiff's claim.

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Defendants/Appellees.

CERTIFICATE OF SERVICE

I, Andrew K. Chafin, counsel for plaintiff, do hereby certify that a true and exact copy of the foregoing "Reply 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 30th day of June, 2006.



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