

IN THE CIRCUIT COURT OF LOGAN COUNTY, WEST VIRGINIA

KYLE D. RAMEY and  
TRINA RAMEY,  
Plaintiffs,

v.

Civil Action No. 07-C-65  
Honorable Roger L. Perry

CONTRACTOR ENTERPRISE, INC.,  
Defendant.

**ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

On May 14, 2008, this matter was brought on for hearing on Defendant's Motion for Summary Judgment. Appearing before the Court was Thomas Plymale, counsel for plaintiff, and Shawn C. Gillispie, counsel for Defendant, Contractor Enterprise, Inc. After hearing argument of counsel and considering the Defendant's Motion and Supporting Memorandum, Plaintiff's Response to Defendant's Motion and the Reply of the Defendants to Plaintiff's Response, and after mature consideration, the Court hereby makes the following Findings of Fact and Conclusions of Law:

**FINDINGS OF FACT**

1. This is a deliberate intent action brought pursuant to West Virginia Code 23-4-2(d)(2)(ii).
2. Because Contractors is an employer in good standing with workers' compensation fund, it is entitled to the statutory immunity provided by § 23-2-6 of the West Virginia Workers' Compensation statute. Contractors loses that immunity only if the Plaintiff can prove the very specific requirements of the "deliberate intent" exception described in West Virginia Code 23-4-2(d)(2)(ii)(A)-(E).

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3. Plaintiff has alleged three unsafe conditions that he asserts caused the subject accident; lack of training, dangerous highwall conditions, and lack of a safety harness or lanyard.

4. The facts show that Plaintiff was in fact trained on the specific drill that he was operating. Training documents have been supplied to the court to sustain that fact and further, Plaintiff admits that he was trained for at least three hours on the proper operation of said drill.

5. There is no evidence, and no allegation by plaintiff, that the condition of the highwall caused or contributed to the accident.

6. The facts show that a safety harness and lanyard are only required when there is a fear of falling.

7. The Defendant had a ground control plan in place that required all drill operators to be at least four (4) feet away from the edge of the highwall.

8. The Defendant held mandatory safety meetings in which highwall safety and the ground control plan was discussed.

9. There is no evidence to show that the Defendant instructed the Plaintiff to drill within 23 inches of the highwall edge.

10. There is no evidence to show that there were any similar accidents that would have alerted the Defendant that drill operators were within 23 inches of the highwall edge.

11. The Defendant performed all mandatory pre-shift and on-shift examinations on the day of the accident and no hazardous conditions were noted.

12. Had Plaintiff followed his training, experience, the ground control plan

and his own common sense, he would not have been within 23 inches of the highwall edge and would also had no fear of falling.

13. The Plaintiff, in his deposition, could not recall anything in regards to how the accident happened or why he was within 23 inches of the highwall edge.

14. Plaintiffs' expert, Homer Grose, has opined that the Defendant did not conduct mandatory pre-shift examinations. However, the Defendant provided documentation rebutting the same.

15. The Plaintiff performed no discovery in this case, written or through deposition, to ascertain any factual information for which their expert to rely on.

16. The Plaintiff has offered no facts to support their allegations that the Defendant had actual knowledge the Plaintiff would be or was operating his drill within 23 inches of the highwall edge, which was in direct contravention of his training, experience, the ground control plan and his own common sense.

17. There is no evidence to indicate that Plaintiff was directed or required by Contractors to work in any unsafe working condition.

18. There are no facts that would show that the Defendant had actual knowledge of any of the alleged unsafe working conditions and likewise, no evidence to support that the Defendant intentionally exposed Plaintiff to a known unsafe working condition.

After making the foregoing Findings of Fact, the Court hereby makes the following conclusions of law:

#### **CONCLUSIONS OF LAW**

1. This deliberate intent action is brought pursuant to West Virginia Code §

23-4-2(d)(2)(ii)(A)-(E).

2. Each and every element and sub-element of the five-part test must be proven, and the five elements are 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, article four, chapter twenty-three whether a claim for benefits under this chapter is filed or not as a direct and proximate result of the specific unsafe working condition.

2. If the Plaintiff fails to satisfy even one of the five elements,

the statute directs that the court shall dismiss the action upon a motion for summary judgment.

W. Va. Code § 23-4-2(d)(2)(iii)(B).

3. When a Plaintiff utilizes the five requirements of § 23-4-2(d)(2)(ii), "his evidence must be strong enough that it essentially equates to a showing that 'the employer . . . against

whom liability is asserted acted with 'deliberate intention.' *Blevins v. Beckley Magnetite*, 185 W. Va. 633, 641, 408 S.E.2d 385, 393 (1991) (citations omitted).

4. The West Virginia Supreme Court of Appeals has held and reiterated that nothing less than **actual knowledge** of an unsafe condition will suffice to support a claim for deliberate intent.

Given the statutory framework of W. Va. Code §§ 23-4-2(c)(2)(i) and (ii), (1983, 1991) which equates proof of the five requirements listed in W. Va. Code § 23-4-2(c)(2)(ii) with deliberate intention, a plaintiff attempting to impose liability on the employer must present such 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 known of the specific unsafe 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 knowledge.

*Deskins v. S.W. Jack Drilling Co.*, 215 W. Va. 525, 600 S.E.2d 237 (2004) (citing Syl. Pt. 3 *Blevins v. Beckley Magnetite, Inc.*, 185 W. Va. 633, 408 S.E.2d 385 (1991)). Thus, to prove prong (B), a plaintiff must show that the employer had actual knowledge of the specific unsafe condition.

5. That when an employee acts in contravention of his training, and the injury occurs almost immediately as a result, an employer cannot be found to have had a subjective realization of the unsafe condition caused by the employee's actions. *Deskins v. S.W. Jack Drilling Co.*, 215 W. Va. 525, 600 S.E.2d 237 (2004) and *Blevins v. Beckley Magnetite, Inc.*, 185 W. Va. 633, 408 S.E.2d 385 (1991). In the instant case, the Plaintiff shows no genuine issue of material fact with respect to the Defendant having any actual knowledge of any unsafe working condition beyond danger inherent to the job such as exposure to high places, highwalls, and machinery.

6. Plaintiffs' attempt to use the West Virginia Supreme Court of Appeals decision in *Ryan v. Clonch*, 219 W.Va. 664, 639 S.E.2d 756 (2006), is misguided.

7. The imputed knowledge theory espoused in *Ryan* is a manner by which "subjective realization" can be imputed to the employer for its *admitted* failure to perform a mandatory hazard inspection.

8. The *Ryan* decision created a rule whereby an employer cannot claim lack of knowledge of an unsafe condition after admittedly failing to perform a required hazard evaluation.

9. There is no evidence that the Defendant failed to perform a mandatory inspection in this matter, and in fact, the opposite is true. The Defendant has provided its pre-shift and on-shift examination reports to the Court which show that said inspections were performed less than two (2) hours prior to Plaintiff, Kyle Ramey's, fall.

10. Therefore, the *Ryan* decision is not applicable to this case as Defendant is not admitting that it failed to perform a mandatory hazard inspection. In fact, the Defendant has provided evidence to prove it did perform said inspections.

11. *Deskins v. S.W. Jack Drilling Co.*, 215 W.Va. 525, 600 S.E.2d 237 (2004), held that the specific unsafe working condition was created only when the employee acted in contravention of his training and instruction and it was impossible for the employer to have had a subjective realization as to that specific unsafe working condition.

12. The instant case is on point with both *Blevins* and *Deskins* in that the unsafe working condition was created in this case only when the Plaintiff, in direct contravention to his training, experience, and his own common sense, inexplicably placed the drill within 23 inches of the highwall edge. Therefore, the Defendant could not have had a subjective realization as to

that specific unsafe working condition. Furthermore, it is not reasonable to place an absolute burden on employers or regulatory agencies to prevent employees from bringing harm on themselves.

13. Additionally, the Defendant argues that Plaintiff cannot meet part (D) of the deliberate intent test. Part (D) of the statutory test requires a plaintiff to prove that the employer "exposed an employee to such specific unsafe working condition intentionally."

14. In *Tolley v. ACF Industries, Inc.* 212 W.Va. 548, 575 S.E.2d 158 (2003), the West Virginia Supreme Court noted that to meet part (D) of the test "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.**" *Id.* at 212 W.Va. 558 (emphasis added). In other words, "where a **conscious decision**" is made to "**to require an employee to work in a situation that [presents] an unsafe working condition**" the element of intentional exposure is met. *Id.*

15. There is no evidence in the instant case that the Defendant was aware of the Plaintiff, Kyle Ramey's, actions which were in direct contravention to his training, experience, and his own common sense. A successful deliberate intent claim must involve supervisory personnel (the employer) **directing** employees to work in knowingly unsafe conditions. In order to direct a person, one must have the authority to do so. In other words, the person directing the employee to work, must be his boss and capable of binding the employer. In this case, the affidavit of Mark Kennedy states that Mr. Kennedy told an unnamed supervisor of the potential danger. There is no evidence as to who this supervisor is or whether or not he had the authority to direct the Plaintiff. Moreover, even if this supervisor had actual knowledge of the potential danger, there is no evidence that anyone affirmatively did anything to direct the Plaintiff to "do" something potentially dangerous. Parking so close to the highwall is clearly the act of the Plaintiff and there is no evidence that anyone told him to park in such a way. Therefore, the Defendant could not have made a conscious decision to require him to work in a situation that it

had specifically trained him not to do. Furthermore, there is no evidence that a specific unsafe working condition existed before the employee parked too close to the edge of the highwall and exited the drill.

16. Plaintiffs' own expert, Homer Grose, opined that the unsafe working condition was created when the Plaintiff positioned his drill within 23 inches of the highwall edge.

17. The MSHA investigator also stated that the hazardous condition was created when the Plaintiff positioned his drill within 23 inches of the highwall edge which was in direct contravention of the Defendant's established ground control plan.

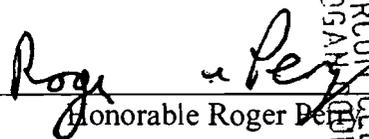
18. There is no genuine issue of material fact relating to plaintiffs' case against the Defendant and there is no issue of fact on elements (B) and (D) of the deliberate intent statute which should or can be submitted to the jury concerning plaintiffs' case against the Defendant.

19. The uncontroverted facts demonstrate that the Defendant is entitled to judgment as a matter of law and that its Motion for Summary Judgment should be granted. The factual showing made by the Defendant in its supported motion has not been successfully rebutted by the Plaintiff to show the existance of a genuine issue of material fact with respect to the disputed elements of the five part test.

Accordingly, it is hereby **ORDERED** that the Defendant's motion shall be and it is hereby **GRANTED**.

The Clerk is directed to send a certified copy of this Order to each counsel of record.

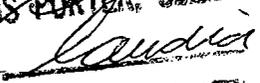
Enter this 27th day of June, 2008.

  
Honorable Roger Beatty

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