11-0210

IN THE CIRCUIT COURT OF WAYNE, COUNTY WEST VIRGINIA

ENTERED

JAN 4-2011

CIVIL ORDER
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BYRON BOWENS,

Plaintiff,

v.

CIVIL ACTION NO.: 08-C-291
Judge James H. Young

ENTERED

JAN 4-2011

CIVIL ORDER
BOOK PAGE

ALLIED WAREHOUSING SERVICES, INC.
d/b/a Allied Logistics, a West Virginia Corporation

ORDER GRANTING ALLIED WAREHOUSING SERVICES, INC.'S MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S DELIBERATE INTENT CLAIM

On December 20, 2010, Defendant Allied Warehousing Services, Inc. ("Allied Warehousing"), by counsel, Thomas E. Scarr, and Jenkins Fenstermaker, PLLC, came on for hearing of Allied Warehousing's Motion for Summary Judgment on Plaintiff's Deliberate Intent claim. Plaintiff Byron Bowens was not present in person nor by counsel, Richard W. Weston and Weston Law Office, PLLC, despite being served with Notice of hearing on December 7, 2010.

Allied Warehousing originally filed its Motion for Summary Judgment on Plaintiff's Deliberate Intent claim, along with a supporting Memorandum of Law, on November 15, 2010, and on December 7, 2010, scheduled and noticed the Motion for Hearing on December 20, 2010. Neither Plaintiff nor his counsel has filed any written response in opposition to Allied Warehousing's Motion for Summary Judgment. In fact, according to counsel for Allied Warehousing, he was contacted by Plaintiff's counsel last week and advised that, although the Plaintiff was not prepared to voluntarily agree to a grant of summary judgment and dismissal of his deliberate intent claim, Plaintiff's counsel did advise that they did not intend to file a

response in opposition to the Motion and that they would probably not attend the hearing in person.

In considering Allied Warehousing's Motion for Summary Judgment on Plaintiff's deliberate intent claim, the Court notes that on October 23, 2008, the Plaintiff filed suit against Commercial Help, Ltd. ("Manpower"), Allied Warehousing, and Allied Realty Co. ("Allied Realty"), the parent company of Allied Warehousing. The Plaintiff voluntarily dismissed Allied Realty from the action on September 4, 2009. In his original Complaint, Plaintiff alleged various negligence claims against Allied Warehousing, a deliberate intent claim against Manpower and Workers' Compensation related fraud claims against Manpower and Allied Warehousing. On April 15, 2009, the Court dismissed the fraud claims against both Allied Services and Manpower. Shortly thereafter, the Plaintiff settled his deliberate intent claim against Manpower, and those claims were dismissed on August 28, 2009. The Court subsequently considered Plaintiff's remaining negligence claim against Allied Warehousing and concluded that Allied Warehousing was a "special employer" for Workers' Compensation purposes thereby entitling Allied Warehousing to employer immunity. As a result, on June 8, 2010, Plaintiff's negligence claim against Allied Warehousing was dismissed. By leave of the Court, Plaintiff amended his Complaint on July 7, 2010 to assert a deliberate intent claim against Allied Warehousing pursuant to West Virginia Code §23-4-2(d)(2)(ii).

Since Plaintiff had already been deposed during the pendency of the negligence claims, another deposition was not taken. Instead, Allied Warehousing served an additional set of discovery focused on identifying any evidence allegedly supporting his newly asserted deliberate intent claim against Allied Warehousing. Plaintiff failed to timely response to discovery as required by the Rules of Civil Procedure, but eventually submitted a response which failed to

provide any information regarding and in support of his deliberate intent claim. The response merely indicated that Plaintiff would supplement his response upon receipt of a report from the expert witness he intended to call at trial. A supplemental response to that discovery still failed to identify any evidence or identify any witnesses in support of Plaintiff's deliberate intent claim.

In its Motion, Allied Warehousing seeks summary judgment on Plaintiff's deliberate intent claim on the grounds that Plaintiff has failed to identify and provide admissible evidence that a specific unsafe working condition existed absent his own conduct and failed to identify and provide admissible evidence that Allied Warehousing had actual knowledge of any specific unsafe working condition presenting a high degree of risk or strong probability of injury or death. Allied Warehousing further claims that Plaintiff cannot show that Allied Warehousing violated any statute, rule, regulation or industry standard, or that Allied Warehousing intentionally exposed him to the alleged specific unsafe working condition. Because Plaintiff has not established the necessary elements to pursue a deliberate intent claim, Allied Warehousing argues that its Motion for Summary Judgment should be granted and Plaintiff's claim must be dismissed.

Plaintiff's deliberate intent claim against Allied Warehousing involves an April 23, 2007 accident that occurred while Plaintiff was working at an Allied Warehousing facility. He sustained certain injuries when bumped by a fork lift operated by a fellow employee. Apparently, while loading and transferring Ethafoam, a product similar to heavy Styrofoam, a task he had performed between 50 to 75 times per day during the seven months he worked at Allied Warehousing, the plaintiff backed his forklift through a warehouse door, and started down a small ramp. He stopped and parked his loaded forklift on the bottom edge of the ramp directly in the lane of traffic and exited his forklift to adjust his load, putting himself in the direct path of

oncoming vehicles, despite his knowledge that a fellow forklift operator would be following right behind him. The other forklift operator backed through the entrance and began down the small ramp and slid into the Plaintiff, pinning the Plaintiff between the other operator's forklift and the Plaintiff's load of Ethafoam. The Plaintiff remained in the lane of traffic even after he heard the other forklift coming towards him. He remained in the lane of traffic and was ultimately struck by the forklift which slid into him even after shouting four or five times to warn his fellow employee.

The evidence identified by Allied Warehousing in its Motion and Supporting Memorandum of Law, and supported by various documents and deposition testimony, indicates that Plaintiff was an experienced and trained forklift operator whose training and experience had been verified and/or certified by Allied Warehousing. Allied Warehousing argues, and the Court must agree, that Plaintiff has failed to establish or to identify any question of fact that a specific unsafe working condition existed. Furthermore, to the extent a specific unsafe working condition was found to exist, it was created by the Plaintiff himself who had the responsibility to watch, listen and observe the activities and progress around him, and he admittedly failed to do so. Moreover, Allied Warehousing contends, and the Court must agree, that the Plaintiff has not established, and has identified no evidence, that Allied Warehousing had actual knowledge of any specific unsafe working condition presenting a high degree of risk and strong probability of serious injury or death. No history exists of similar incidents in Allied Warehousing's facility, and Allied Warehousing's records demonstrate that both the Plaintiff and his fellow employees received training in forklift operation. To the extent that a specific unsafe working condition existed, it was created by the conduct of the Plaintiff and was not a static condition, but rather was a combination of multiple circumstances that occurred in a manner of minutes.

Accordingly, the alleged specific unsafe working condition constituted a "sudden occurrence" and there is no evidence to indicate that Allied Warehousing had actual knowledge of the development and existence of the alleged specific unsafe working condition. See, *Deskins v. S.W. Jack Drilling Co.*, 600 S.E.2d 237 (W.Va. 2004). As the Court indicated in *Deskins*, "obviously, an unsafe working condition that develops or first springs into existence close to the time of the accident and presents less of an opportunity for the employer to realize and appreciate the risk." The alleged specific unsafe working condition in this case arguably originated when the Plaintiff incorrectly loaded his forklift, and it existed only as long as Plaintiff remained stopped in the lane of traffic. Plaintiff's description of the incident during his deposition clearly indicates that mere minutes elapsed between the stop and the collision. Plaintiff's position in the lane of traffic created a dynamic, not a static condition, which only existed for a short duration. Multiple circumstances, namely Plaintiff's improper loading and/or driving of the forklift, and parking of his forklift in the lane of traffic, allegedly combined to create an unsafe working condition that resulted in his injury. Due to the sudden, unexpected occurrence of the specific unsafe working condition, Allied Warehousing had no time to learn that it existed and take any action to remedy the situation before the accident occurred.

Allied Warehousing also contends that although the Plaintiff's supplemental discovery responses list various OSHA regulations applicable to forklift operations, the Plaintiff fails to provide any evidence of a violation by Allied Warehousing. In his Complaint, Plaintiff alleges potential issues of lack of training and inadequacy of alarms on the forklifts. However, Plaintiff has offered no evidence to support these allegations. At the same time, Allied Warehousing has offered evidence proving compliance with all promulgated regulations and industry safety standards specifically applicable to Plaintiff's working conditions. Allied Warehousing never

received a citation from OSHA or other regulatory body concerning unsafe forklift operations or inadequate training. There is no evidence that any employee ever complained to management regarding dangerous work conditions in the warehouse, no record exists of similar accidents. Moreover, through its in-house observation and certification procedure, Allied Warehousing ensured that it properly instructed and certified that its temporary employees were competent forklift operators, thereby rendering its facility as free as possible to potential hazards. Finally, Allied Warehousing contends, and the Court must agree, that the Plaintiff has failed to show that Allied Warehousing intentionally exposed him to an alleged specific unsafe working condition.

Based on Allied Warehousing's Motion for Summary Judgment and Memorandum of Law in support of its Motion, based on the lack of any response filed by or on behalf of the Plaintiff in opposition thereto, and based on the representations and arguments of Allied Warehousing's counsel, and even considering the undisputed facts in a light most favorable to the Plaintiff, the Court specifically finds that the Plaintiff has failed to satisfy its burden and that it clear that there is no genuine issue as to any material fact and that Allied Warehousing is entitled to judgment as a matter of law. Accordingly, it is hereby ORDERED, ADJUDGED AND DECREED that Allied Warehousing's Motion for Summary Judgment on Plaintiff's deliberate intent claim, is granted and is dismissed with prejudice.

Entered this 3 day of ~~December, 2010.~~ June 2011

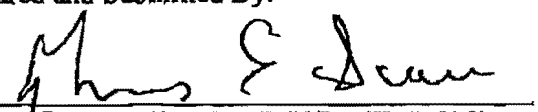
James H. Young Jr.
JAMES H. YOUNG, JR., JUDGE

WAYNE COUNTY CIRCUIT COURT WEST VIRGINIA

A COPY TESTE
Milton J. Ferguson
By R. Mudding

Submitted per the direction of the Court, this Order was submitted directly to the Court with a copy to opposing counsel with a notice to note exceptions and objections to the Order within five (5) days after receipt of same.

Prepared and Submitted By:



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Submitted for inspection, approval and/or objection to:

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Counsel for Plaintiff

Counsel shall notify the Court, in writing, of approval of, or objection to the Order, or any portion thereof, within five (5) days of receipt.