



Google Custom Search

All Regions >> USA << Canada UK Europe Offshore Asia Pacific Australia Latin America Middle East & Africa

You Are Here: Show All Content Labour and Employment [X] USA [X]

Logoff

Your Profile

Help

Mondaq Topics

Labour and Employment

RSS >>Return to Homepage

Contract of Employment

Discrimination, Disability & Sexual Harassment

Employee Benefits & Compensation

Employee Rights

FAQ

Employment Tribunals

Health & Safety

Human Resources

Immigration

Pensions

Redundancy

Unfair/ Wrongful Dismissal

Accounting

Anti-trust/Competition

Consultancy Services

Consumer, Health and Family

Corporate/Company Law

Criminal Law

Energy & Natural Resources

Environment

Finance and Banking

Government & Public Sector

Immigration

Insurance

Intellectual Property

International Law

IT & Telecoms

Labour and Employment

Litigation, Mediation & Arbitration

Media & Entertainment

Offshore

Pharmaceutical, Healthcare & Life Sciences

Real Estate

Tax

Transport

Press Releases

Our Services

About This Site

About

Testimonials

Common Questions

Marshall, Dennehey, Warner, Coleman & Goggin

United States: Once Is Enough! When It Comes To Considering Evidence Of The Plaintiff's Intentional Injury By The Employer And Loss Of The Workers' Compensation Bar

16 February 2011

Article by Robert J. Fitzgerald

Comment | View All Comments

Key Points:

- The workers' compensation bar protects employers from bodily injury damages for workplace injuries.
- Employers lose the benefit of the workers' compensation bar for "intentional injuries."
- The court will consider many factors in determining intentional wrongdoing by the employer, even an employer's subsequent actions after a workplace injury has occurred.

The court once again tackles the issue of the "intentional injury" exception to the workers' compensation bar in *Van Dunk v. Reckson Associates Realty Corp., et al., and James Construction Co.*, 2010 N.J. Super LEXIS 179 (August 30, 2010). Like most "no-fault" jurisdictions, the New Jersey Workers' Compensation Act provides medical and disability benefits to injured workers, regardless of having to prove negligence on behalf of the employer. In return for these no-fault benefits, injured workers are barred from bringing negligence actions for bodily injuries against their employers under Section 8. The workers' compensation benefits are the exclusive remedy for workplace injuries. However, if an injured worker can prove that the injury was intentionally caused by the employer, then the workers' compensation bar (to a negligence action for bodily injuries) can be pierced.

In *Van Dunk*, the plaintiff sustained multiple injuries as the result of a trench collapse. The plaintiff was employed as a laborer by James Construction Co. The contract between Reckson Associates Realty and James required James to complete excavation work for a retention pond and storm water upgrades by a certain date so that other work on an overall construction project could be completed. Glenn Key ("Key") was James' superintendent and a "competent person" for purposes of OSHA.

James had experienced difficulties because of record rainfalls which impeded the progress of the project. On the day of the accident, a dewatering sump for the retention pond under construction was being relocated. The sump had to be relocated before it rained because the rest of the project could not advance if the sump was not relocated. In order to relocate the sump, there had to be an excavation and construction of a trench which would be lined with a geo-textile fabric. Initially, Key attempted to cover the trench, which was eighteen to twenty feet deep, by having his men stretch out the fabric and walk it over the trench. However, the crew experienced some difficulty as the fabric was not lying correctly against the trench and getting twisted.

At that point, the plaintiff volunteered to go into the trench and fix the fabric. However, Key stopped him and told him not to enter the trench because he was concerned about the plaintiff's safety. Key acknowledged that, considering the depth of the excavation, the soil type and conditions and the lack of room to cut the slopes back more, he did not want personnel to enter the excavation to install the filter fabric because he was worried about the trench failing.

After denying the plaintiff's initial offer to enter the trench, the crew continued to drape the fabric over the trench. Key saw some cracking in the bank of the trench as they tried to lay the fabric. However, they were still unsuccessful in laying it properly. In his frustration to get the fabric to install correctly, Key ultimately directed the plaintiff to enter the excavation to correct the problem with the fabric. The court noted that this direction was in violation of OSHA's nondiscretionary requirements because the trench had no protective system, such as a trench box, to make it more stable and protect against a cave-in. There was a trench box available, but Key did not use it because the bucket and backhoe were wider than the box and would not fit inside the trench. Additionally, Key could not slope the trench back any further, which would have made it more stable, because it was a confined area and the space for the trench would not allow it.

In less than five minutes after the plaintiff entered the trench, it caved in and buried the plaintiff to his chest. OSHA issued James a citation for a "willful" violation of its regulations based on the fact that it had failed to protect its employees from cave-ins by an adequate protective system; it had failed to properly slope the trench; and because it allowed the plaintiff into an unprotected trench of approximately twenty feet in depth.

The trial court, in a summary judgment ruling, dismissed the plaintiff's subsequent bodily injury action against James. The court found that James did not commit an "intentional wrong." On appeal, the plaintiff argued that the totality of the facts created a jury question on the issue of an intentional wrong. The court then went into an extensive analysis of the legal requirements to prove an "intentional injury" starting with *Millison v. E.I. Du Pont de Nemours & Co.*, 101 N.J. 161 (1985) and *Laidlow v. Hariton Mach. Co. Inc.*, 170 N.J. 602, (2002).

Related Information

- Labour and Employment
- Employee Benefits & Compensation
- Litigation, Mediation & Arbitration
- Employment

Related Headlines

- OSHA Annual Summary Posting Requirements (Larkin Hoffman Daly & Lindgren)
- Obama Administration's Revenue Proposals Address Worker Misclassification (McGuireWoods LLP)
- The Deadline For Pay Equity Exercises Under The Amended Quebec Equity Pay Act Has Passed. Is Your Company In Compliance? (Fisher & Phillips LLP)
- DOL Delays Service Provider Rules Disclosure (Bradley Arant Boult Cummings LLP)
- Civil Unions And Employment (Arnstein & Lehr LLP)
- IRS Delays Nondiscrimination Requirements (Ford & Harrison LLP)
- National Labor Relations Board Finds Union Banning Lawful (Blank Rome LLP)
- Service Provider Disclosure Requirements Delayed To 2012 (McGuireWoods LLP)
- SEC Issues Final Rules Regarding Say-On-Pay And Golden Parachute Requirements Under The Dodd-Frank Financial Reform Act (Morgan Lewis)
- Recently Enacted "Hospitality Wage Order" Imposes New Tip Rules (Sheppard Mullin Richter & Hampton)

Related Functions

- Ask the firm/author a question
- Bookmark this Article.
- Email a colleague with a synopsis and link to this article
- Printer-friendly version of this page
- Follow our USA feed on Twitter! (LawNewsAmerica)

Do you find this article useful?

Not very Very

In *Millison*, the Court stated that the "intentional wrong" exception was to be interpreted narrowly so as not to "swallow up" the "exclusivity" provision of the Act" and adopted the "substantial certainty" test:

The mere knowledge and appreciation of a risk--something short of substantial certainty--is not intent. The defendant who acts in the belief or consciousness that the act is causing an appreciable risk of harm to another may be negligent, and if the risk is great the conduct may be characterized as reckless or wanton, but it is not an intentional wrong.

Gross negligence by an employer, lack of concern for an employee's safety and the mere toleration of workplace hazards are insufficient. The Court adopted a two-prong test that had to be satisfied in order to establish that an employer has lost its immunity under the statute:

(1) The employer must know that his actions are substantially certain to result in injury or death to the employee (conduct prong);

and

(2) The resulting injury and the circumstances of its infliction on the worker must be:

(a) More than a fact of life of industrial employment; and

(b) Plainly beyond anything the Legislature intended to immunize (context prong).

In *Laidlow*, the Court refined the two-prong test stating that no one fact was dispositive— that there had to be an analysis based on the totality of the circumstances. The absence of a prior accident, or close-calls, does not necessarily mean that the employer did not appreciate that its conduct was "substantially certain" to cause death or injury. Furthermore, the removal or alteration of a safety device, although not an "intentional wrong" per se, could meet the conduct prong depending on the facts of the case. The same facts and circumstances will be relevant to both prongs of *Millison*.

First, the court must make an initial judicial finding to determine whether the evidence could lead a jury to conclude that the employer acted with knowledge that it was substantially certain that a worker would sustain injury. If so, the court must next then determine as a matter of law whether, if the employee's allegations are proved, they constitute a simple fact of industrial life or are outside of the purview of the conditions the Legislature could have intended to immunize. If the court finds, as a matter of law, that the employer's conduct was sufficient to overcome the "context prong" to the worker' compensation bar, then a jury trial is required on the "conduct prong" to determine if the injury that occurred was a substantial certainty.

On appeal, the plaintiff argued that the motion judge erred in finding that Key's conduct did not present a jury question under the conduct prong. The court agreed and reversed the matter for a jury trial. The court first focused on the testimony of Key and his acknowledgment that, considering the depth of the excavation, the soil type and the conditions and the lack of room to cut the slopes back more, he didn't want personnel to enter the excavation to install the filter fabric because he was worried about the trench failing. Additionally, Key indicated that he had said "no" to the plaintiff's initial request to enter the trench because he was worried about his safety. Moreover, Key's acknowledgement that there was an accumulation of water in the bottom of the trench, an indication that moisture was weeping from the soil, that there was cracking on the bank of the trench, coupled with his knowledge that Type C soil, the kind of soil he was working with, was the least stable, all show, in the totality of the circumstances, that he knew the trench was unstable and that it could fail.

In addition to Key's testimony, the court also found the non-use of the trench box to be "somewhat analogous" to a removal of a safety device. The court found that the motion judge did not give significant credit to the OSHA citation or the fact that the defendant could have made the trench more stable if it had used protective devices. Additionally, the court also noted the fact that OSHA gave the defendant a "willful" citation, although the court did not go into what OSHA defined as a willful violation.

Based on this, the court found that the defendant had knowledge that allowing its employees to enter the trench without any safety device could lead to injury or death. Although not required under the *Millison/Laidlow* analysis, the court also found that the employer's actions were motivated to increase the defendant's profit and productivity. Potash, James' president, acknowledged that the relocation of the sump was essential because, without it, the rest of the project could not go forward. The court found, therefore, that the defendant was under pressure to relocate the sump before it rained and sacrificed the plaintiff's safety accordingly.

Importantly, the court also referred to facts that occurred after the accident in its analysis. Specifically, the court noted that after OSHA had finished its investigation, the defendant was able to relocate the sump by using the trench box it had on site without harm to any of its employees. This fact, the court found, showed that the plaintiff's safety was sacrificed for the defendant's financial benefit.

Finally, the court found that, although construction sites have a dangerous nature, it does not excuse the failure to use safety devices to alleviate the dangers and risks, which were clearly known. Here, it is unlikely that the Legislature would have considered allowing an employee to enter an unstable trench without the use of a trench box or adequate sloping, coupled with the employer's knowledge that the trench was unstable and could fail at any moment, to constitute simple facts of industrial life.

The *Van Dunk* Court has seemingly expanded what evidence can be considered when considering if an employer has committed an "intentional wrong." Specifically, by considering facts that occurred after the accident, the court now puts employers in a very tough position. For example, what if this employer had not used the trench box after this accident and the same type of accident occurred a second time? Presumably, on the second accident the employer would be found to have committed an intentional wrong because it had knowledge of the first cave-in. Yet, by using the trench box after the accident and safely completing the project, the court now finds this to be evidence of the wrong doing by the employer on the first accident. Moreover, the court's focus on the possible overall financial motivations of the parties may lead to more complex discovery and litigation for these type of cases in the future since they may be included in the totality of the circumstances analysis.

Finally, the court's analysis does reinforce the notion that the workers' compensation benefit scheme does not employ concepts or defenses of negligence law, such as assumption of the risk. Even if an employee understands the dangerous nature of a task and volunteers to proceed, this will not shield the employer from liability for injuries. Obviously, employers, both large and small, should develop comprehensive safety programs for employees. Safety programs should be updated regularly and reviewed with experts in OSHA and the insurance industry as safety standards are ever changing and occupational medicine continues to evolve.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

Specific Questions relating to this article should be addressed directly to the author.