

Workplace Injuries & *2012 NJAJ Meadowlands Seminar Guide*

Exclusive Remedy Doctrine Of Workers' Compensation Act Is Reaffirmed

N.J. Supreme Court reverses *Van Dunk* decision

By Robert J. Fitzgerald

The New Jersey Supreme Court has once again addressed the legal test surrounding the “intentional injury” exception to the New Jersey workers’ compensation bar in *Van Dunk v. Reckson Associates Realty Corp.*, 2012 N.J. LEXIS 678 (June 26, 2012).

Like most states, New Jersey’s Workers’ Compensation Act provides medical and disability benefits to workers injured on the job, without regard to fault. These benefits are the exclusive remedy for a worker’s injuries, unless the worker can prove that the injuries were “intentionally caused” by the employer. In the seminal cases of *Millison v. E.I. du Pont de Nemours & Co.*, 501 A.2d

Fitzgerald is a shareholder at Marshall Dennehey Warner Coleman & Goggin, where he devotes his practice to workers’ compensation defense litigation. He is based in the firm’s Cherry Hill office.

505 (N.J. 1986), and *Laidlow v. Hariton Machinery Co.*, 790 A.2d 884 (N.J. 2002), the court had previously described the two-pronged test (addressing the conduct of the employer and the context of the injury) to determine when an injury is considered intentional. Importantly, no single fact is dispositive. Rather, the court will look to the totality of the circumstances in reaching its determination.

In *Van Dunk*, the plaintiff sustained injuries while working as a laborer for James Construction Company, doing site preparation work. He was involved in relocating a dewatering pump for a retention pond. Prior to the accident date, the site was plagued by thunderstorms and heavy rain. Rain was expected on the accident date, so the employer sought to complete the sump relocation before the rain arrived. The sump relocation involved digging a sloped trench and laying down layers of filter fabric and stone, along with piping. As the trench excavation continued and its slope reached a depth greater than five feet, Van Dunk began laying

down the filter fabric from locations outside the trench. Eventually, the deepest part of the trench reached a depth of 18 to 20 feet. OSHA safety regulations mandate that workers cannot enter a trench that is deeper than five feet if protective systems are not in place.

The workers experienced difficulty when laying down the filter fabric from their locations outside the trench. Van Dunk volunteered to go into the trench to straighten the filter fabric, but his supervisor, Mr. Key, told him not to do so because of the possible risks attributable to the ground conditions. However, problems persisted with laying the filter fabric. In what Key later described as a moment of “frustration,” he told Van Dunk to go in and straighten the fabric. Van Dunk went into the trench, walked to the deeper end and began adjusting the fabric. He was in the trench for less than five minutes when a loud noise was heard, and a trench wall caved in, burying Van Dunk to his chest. He sustained multiple serious injuries, and an OSHA investigation ensued.

Key readily acknowledged to OSHA that he knew that the employer did not follow the OSHA standard for using a protective box for the trench’s depth and category of soil type, notwithstanding that such a box was on site. Also, there was no dispute that the sloping that was performed did not satisfy OSHA requirements. Those admissions led OSHA to find that the “non-compliance [with OSHA standards] was not an accident or negligence.” As a result,

the OSHA report concluded that James Construction committed a willful violation and assessed a fine.

Van Dunk filed suit in the Law Division, alleging that his injuries were intentionally caused by the employer and, therefore, not barred by the exclusive remedy doctrine. The trial court granted summary judgment to the employer. Based on its assessment of the totality of circumstances, the court concluded that Van Dunk did not demonstrate an intentional wrong, notwithstanding that the employer was issued an OSHA "willful violation" citation as a result of the incident.

However, the Appellate Division reversed the trial court's grant of summary judgment to the employer, finding that the totality of the circumstances showed that the employer knew the trench was unstable and could fail.

Although not finding the OSHA violation conclusive, the Appellate Division stated that the motion court "did not give significant credit to the OSHA citation or the fact that defendant could have made the trench more stable if it had used protective devices." On the context prong of the analysis, a purely legal question, the Appellate Division took the view that "the legislature would not have sanctioned the context within which this accident happened, or barred plaintiff's recovery from James."

In a unanimous 37-page decision, the New Jersey Supreme Court reversed the Appellate Division and dismissed the suit against the employer. First, the court reaffirmed the legal principle articulated in *Laidlow* that a finding of an OSHA violation does not equate to an intentional wrong:

As the trial court observed, one cannot glean from the OSHA finding of a willful violation whether the employer's violation of an OSHA requirement was "an intentional disregard or plain indifference." Secondly, that the regulatory noncompliance was, per the OSHA report, "not an accident or negligence" is a far cry from addressing, let alone disposing of, the requirement that the proofs demonstrate a finding of substantial certainty of injury or death. That is the pertinent standard...

Next, the court, addressing the totality of the circumstances, found that the employer's conduct was insufficient to be determined "intentional" from an objectively reasonable basis. The court noted that the on-site supervisor had made a quick and extremely poor decision, but was not faced with facts which provided an objectively reasonable basis to expect that a cave-in would almost certainly occur during the brief time that the claimant was in the trench. The court cautioned:

This was an exceptional wrong, not an intentional wrong. ... In our view, the Appellate Division's totality of the circumstances analysis overvalued the finding of a willful violation of known OSHA safety requirements, and parlayed the possibility or probability of a cave-in into satisfaction of the substantial-certainty test. However, some level of a "likelihood" of

injury or death is not substantial certainty of injury or death. The Act's exclusivity analysis should not shift into an amorphous "percentage of the risk" analysis.

Although the court determined that the conduct of the employer was insufficient to show an intentional injury, they went further and also stated that the "context" prong of the test had not been satisfied. The court found that, even considering the willful violation of OSHA safety requirements, it could not reasonably conclude that the type of mistaken judgment exhibited in this instance went so far "beyond anything the legislature could have contemplated" for inclusion in the Workers' Compensation Act's exclusivity bar, that it should overcome the legislative preference for the workers' compensation remedy.

The Supreme Court's decision clarifies the very high burden of proof a plaintiff has in attempting to prove an intentional work injury and overcome the exclusive remedy provided by the Workers' Compensation Act. Even where an avoidable accident occurs, through reckless behavior or willful violation of OSHA safety requirements, the workers' compensation bar may not necessarily be overcome. The plaintiff must be able to prove that the employer's pre-accident conduct was essentially fraudulent and substantially certain to lead to injury or death. Nevertheless, employers should continue to implement and follow through with workplace safety programs, not only to avoid workplace injuries, but to protect themselves from intentional injury claims that seek to circumvent the Workers' Compensation Act's exclusive remedy doctrine. ■