Circuit Court for Montgomery County
Case No. 423148

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 303

September Term, 2017

ADP TOTALSOURCE SERVICES, INC., et al.

v.

KENNETH REFFELL

Meredith,
Nazarian,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: June 7, 2018

This appeal had its origin on October 20, 2015, when Kenneth K. Reffell filed a worker's compensation claim against his employer, ADP Totalsource Services, Inc. ("ADP") and its insurer, New Hampshire Insurance Co. He asserted that his left hand and wrist were injured in a September 18, 2015 accident while he was working for ADP.

Mr. Reffell's claim was heard before the Maryland Workers' Compensation Commission ("the Commission") on May 3, 2016. The employer/insurer contended before the Commission that Mr. Reffell was not entitled to compensation because, purportedly, his injury was caused by his willful misconduct. The employer/insurer relied on Md. Code (2016 Repl. Vol.), Labor and Employment Article, § 9-506(e), which reads, in material part: "[a] covered employee . . . is not entitled to compensation or benefits under this title as a result of an accidental personal injury . . . if the accidental personal injury . . . was caused by the willful misconduct of the covered employee." The Commission, after a hearing, issued an order stating that: 1) claimant's injury was not caused by his willful misconduct; 2) claimant was temporarily totally disabled from September 19, 2015 to September 24, 2015 inclusive; and 3) claimant was entitled to temporary total disability at the rate of $898, payable weekly, beginning September 19, 2015 until September 24, 2015 inclusive. In the Commission's order, the employer/insurer was also ordered to pay medical expenses related to the September 18, 2015 accident.

The Commission subsequently filed a second order reiterating its finding that the claimant did not engage in willful misconduct that barred his claim. The new order stated that as a result of his disability the claimant was temporarily totally disabled from September 19, 2015 to December 4, 2015 inclusive. The employer/insurer filed motions

for rehearing and/or reconsideration of the aforementioned orders but those motions were denied by the Commission. Thereafter, appellants filed timely petitions for judicial review in the Circuit Court for Montgomery County.

After pre-trial statements were filed, the employer/insurer filed a motion for summary judgment in which they contended: 1) "the Commission's failure to allow the Employer to fully present [its] case for a 'willful misconduct' defense to the [c]laimant's accidental injury claim is an error of law that requires remand for a new evidentiary hearing"; and 2) that the Commission's decision that there was no willful misconduct "was not supported by sufficient evidence." The employer/insurer concluded their motion for summary judgment by asking the court to vacate the orders of the Commission "and remand the matter to the Commission for a full evidentiary hearing before a different Commissioner." The only support for the motion was: 1) a transcript of the May 3, 2016 hearing before the Commission; and 2) copies of two orders signed by the Commission that: 1) rejected the assertion that claimant's accident was due to his willful misconduct; and 2) spelled out the benefits to which Mr. Reffell was entitled.

Mr. Reffell filed an opposition to the motion for summary judgment and a cross-motion for summary judgment. In support of his motions, Mr. Reffell, like the employer/insurer, relied on the May 3, 2016 transcript of the proceedings before the Commission. In his cross-motion for summary judgment, Mr. Reffell contended that the undisputed evidence presented to the Commission showed that the Commission did not err in finding that the subject accident was not caused by his willful misconduct.

A hearing concerning the pending motions was held in the Circuit Court for Montgomery County on February 21, 2017. The circuit court denied the employer/ insurer's motion for summary judgment[1] and granted the cross-motion for summary judgment filed by the claimant.[2] In its oral opinion, the court stated that it was granting claimant's cross-motion for summary judgment because no evidence had been presented to show that Mr. Reffell's injury was caused by his willful misconduct. In the words of the motions court: "there was no evidence presented to the Commission that the employee had intentionally placed himself in a position to be injured."

In this appeal, the employer/insurer raises one question, which they phrase as follows: "Did the circuit court err in granting claimant's cross-motion for summary judgment when there existed a genuine dispute of material fact?"

I.

BACKGROUND FACTS

Starting in 2010, Kenneth Reffell was employed by Crest Cleaners, trading as ADP. His employer was in the business of providing dry cleaning services for customers in the Washington metropolitan area. At the time of his injury, on September 18, 2015, the claimant was a senior manager for ADP.

[1] In this appeal, the employer/insurer does not contend that the court erred in denying their motion for summary judgment.

[2] Appellants' record extract does not contain either a transcript of the February 21, 2017 hearing before the circuit court or a copy of either the motion for summary judgment the employer/insurer filed, or the cross-motion for summary judgment filed by the claimant. Both are, however, in the record, which we have reviewed.

In late August 2015, the claimant's employer acquired a new machine that was to be used as part of their dry cleaning operation at one of ADP's facilities. The installation process was completed on September 2, 2015. The machine had three basic functions: 1) to assemble the dry cleaning; 2) to bag the clothing that has been cleaned; and 3) to print out a label for each of the bagged items.

On September 18, 2015, the machine malfunctioned and the claimant was injured while trying to fix the machine.

A. Testimony of the Claimant, Kenneth Reffell

The machine that Mr. Reffell was trying to fix when the accident occurred was at his employer's facility located on Traville Gateway Drive in Montgomery County, Maryland. The problem that Mr. Reffell was trying to fix was that the machine was not bagging the clothing that had been dry cleaned. The machine's robotic arm that was supposed to grab a plastic "poly bag" (from a large roll of them) and place the bag over each customer's dry cleaning would not come down with a bag. According to Mr. Reffell, the "grippers" on the robotic arm were slipping and as a consequence the dry cleaning was being placed on a conveyer belt without being covered by a bag.

At approximately 9:00 a.m. on September 18, 2015, Mr. Reffell was asked by one of his supervisors to go to the Traville location and try to fix the problem. As directed, Mr. Reffell went to the Traville facility that morning and found that none of the laundry that had been dry cleaned in the last four hours had been bagged.

In his testimony, Mr. Reffell described what he did next to attempt to address the problem:

> I went to the machine. Check to make sure that all the power was on. I checked the on button. I checked the bagging button to see, make sure that the bagging button itself was energized.
>
> And I went beyond - - I looked at the computer to see if the computer was actually set at the appropriate setting, which was supposed to be linking with the conveyor. So those were just physical observations.
>
> * * *
>
> I started the machine. I started the conveyor. The clothes went into the bagging section. The robotic arms that were supposed to bring the poly bags over the garments came down without the poly bags itself, completing the process and sending the clothes out without poly bags. So they were not bagged. There was no label on them.

Next he turned off the power to the machine and also turned off the computer and then restarted everything "afresh." Despite these efforts, he was not able to fix the problem. He then called Freddy Caceres, his employer's "I.T. manager," who was in Virginia. Mr. Caceres agreed to come to the Traville location and to try to fix the problem.

Believing that there was nothing further he could do, Mr. Reffell left the facility and went elsewhere to perform his managerial duties. Thereafter, at approximately 10:30 a.m., Mr. Reffell spoke to Mr. Caceres by phone and the latter told him that he was at the Traville location and was going to try to fix the machine.

At approximately 4:00 p.m., Mr. Reffell received a call from Jason Yerby, who was ADP's second vice-president. Mr. Yerby instructed Mr. Reffell to "go over to the Traville location and assist them, because we were very much running against time" inasmuch as

customers were promised that if the laundry was received by 11:00 a.m. it would be finished by 5:00 p.m., which meant that his employer only had a "one[-]hour window to get all of the production done."

When Mr. Reffell returned to the Traville facility, the machine was "powered on." He turned the machine off and then turned the machine back on and did so by pushing a "big red button" located in front of the bagging machine. According to Mr. Reffell, he touched the red button while standing on a mat in front of the machine. He did not, however, turn the conveyer on, nor did he enter any information into the computer that regulated the machine.

Mr. Reffell explained that he cut his left wrist when attempting to pull down one of the plastic poly bags while the machine was powered on. His exact explanation as to how the accident happened was as follows:

> I got hurt when I was changing the bag . . . . [T]he purpose of changing the bag is: at the end you need to hold the pol[]y bags, grab it with one hand, and then press the bagging button, you know, to activate the machine . . . . The arm, it's supposed to come in and grab the pol[]y bags itself. By holding it, you assist the robotic arm to be able to engage with the poly [bags]. And at that time, the robotic arm, as it grabbed the bag, the force of it cut my left wrist.

Mr. Reffell went on to testify that the laceration he received was "from one side to the other side of my wrist," which caused heavy bleeding.

Mr. Reffell testified that prior to the accident he was given relatively little training in regard to the machine that injured him. In his words, the training "was mostly to show us how to turn on the machine, how to turn on the computers" and how to "replace the poly

rolls." When he received this training, Freddy Caceres, the I.T. manager for ADP, gave Mr. Reffell a sheet of paper with instructions as to how to change the "poly rolls" and how to "change the labels on the machine."

On cross-examination, Mr. Reffell admitted that the manufacturer of the machine also provided training to him. That training lasted, according to Mr. Reffell, for only ten minutes. When being cross-examined by the attorney for the employer/insurer, Mr. Reffell denied that he had ever been trained or instructed to power down the machine whenever there was a machine malfunction. Counsel for the employer/insurer also asked Mr. Reffell if he was told during his training "that there were three power points at which the machine would stop" or that if he stepped on the mat, located in front of the machine, the machine would turn off. Mr. Reffell said that he received no such training nor was he instructed that if you pushed "the big red button that's on the side of the machine," that also would turn off the machine. Mr. Reffell denied that in his training he was instructed that you could turn the machine off by punching a "computer diode" on the side of the machine. Lastly, Mr. Reffell denied that, in training, he was told that "anytime there's an anomaly with the machine . . . it automatically powers down."

On cross-examination claimant reiterated that he started the machine up on the date of the accident by pressing the red button and that he was standing on the mat in front of the machine, when he turned the power back on. He denied that he ever entered any information into the computer or that he turned the conveyer back on at any time immediately prior to the accident. At the conclusion of the employer/insurer's cross-

examination, Mr. Reffell summarized his version of events by saying that he was standing on the mat in front of the machine at the time he hit the red button and the machine then operated.

B. Testimony of Freddy Caceres

Freddy Caceres testified before the Commissioner that on the day of the accident he was working for ADP as a "mechanical technician." Mr. Caceres corroborated Mr. Reffell's testimony that on September 18, 2015 he went to the Traville location to try and fix the machine. He described the problem by saying that when the robotic arm went up "to grasp the actual [plastic bag], [the arm] was slipping." Prior to the accident, he had been unsuccessfully trying to fix the machine for about two to three hours. But, sometime on the afternoon of September 18, he left the Traville location because he had received a call from his family saying that he had to pick up his son from school. As a consequence, he was not at the Traville location when Mr. Reffell arrived for the second time.

On direct examination, Mr. Caceres described the training he gave to Mr. Reffell by saying that the claimant was trained as to how "to replace the poly bag." Mr. Caceres also trained the claimant in regard to "all the safety issues with the machine." In his words "[w]e trained him on everything." He testified that the training he gave the claimant was done in conjunction with training by the company that installed the machine at the Traville location.

According to Mr. Caceres's testimony, the "written instructions" that he gave to the claimant while he was being trained are hooked to the side of the machine so that "anybody has access to it." In his testimony, however, Mr. Caceres never said what the instructions said nor was any photographic or other evidence introduced at the hearing before the Commission concerning the actual wording of the instructions.

Counsel for the employer/insurer also asked Mr. Caceres on direct-examination to "[b]riefly describe what training [the manufacturer]" provided to the claimant and what safety procedures were covered. Mr. Caceres answered: "[F]irst of all, they showed us all the safety switches and basically how the machine turns off." He was then asked, how did the "machine turn off?" He answered: "[t]here's two parts to the machine. There's an assembly line, and then there's . . . ." At that point, Mr. Caceres's testimony was interrupted by a discussion between the Commissioner, counsel for the employer/insurer and Mr. Caceres. But that colloquy had nothing to do with the issue of what instructions were received by the claimant.

After the colloquy just mentioned, the witness stated, although no question was pending, that the mat in front of the machine was designed to turn the power off if someone stepped on the pad. In his words, "you have to literally step over the mat to actually make that machine work." He further testified that on the date of the accident, but prior to his leaving to pick up his son from school, the mat was operating as designed. Mr. Caceres further testified as follows:

> So, in order for you to actually make that machine work while you're changing the bag, it's impossible because there's three safety mechanisms.

> If you open the back door, to remove the poly bag, it goes into an anomaly switch. You have to literally sit there, hit the start button and go, two times process, two button process, to make that thing go.
>
> So, in order for the machine to actually work, you have to actually go and close the door, literally come around, hit the start button and hit the go button, two buttons to make the machine run.
>
> If you walk up in the front of the machine, and literally a minute part of that mat, if you step on it, it's a pressure-sensitive mat. If you step on it, it's going to automatically shut off, and it shuts the power completely off.
>
> So, in order to have the machine working and you bypass it, I mean, that's the only way you can do it, is if you have one foot over [the mat].

II.

DISCUSSION

One of the main obstacles that appellants have in this appeal is that, in the circuit court, they did not come anywhere close to complying with the requirements of Md. Rule 2-501(b), which spells out what a litigant should do when opposing a summary judgment motion. Rule 2-501(b) reads:

> A response to a motion for summary judgment shall be in writing and shall (1) identify with particularity each material fact as to which it is contended that there is a genuine dispute and (2) as to each such fact, identify and attach the relevant portion of the specific document, discovery response, transcript of testimony (by page and line), or other statement under oath that demonstrates the dispute. A response asserting the existence of a material fact or controverting any fact contained in the record shall be supported by an affidavit or other written statement under oath.

(Emphasis added).

The only facts that were before the circuit court, when it granted appellee's cross-motion for summary judgment, were the facts developed at the hearing before the Commission.

In their opposition to appellee's cross-motion for summary judgment, appellants simply stated that there was a "dispute of material fact as to whether the [c]laimant committed [w]illful [m]isconduct and therefore a dispute as to whether [c]laimant's injury arose out of and in the course of his employment." Appellants, in their opposition, did not attach any affidavit, nor did they state, as Rule 2-501(b) requires, where in the record, a dispute of material fact was shown. In their opposition, although they attached a copy of the transcript of the hearing before the Commission, they did not specifically refer to any particular part of the testimony heard by the Commission. In other words, appellants did not direct the court's attention to any testimony that would show that claimant willfully caused his own injury.

In reviewing whether the circuit court erred in granting summary judgment in this case, we must take the facts presented to the Commission, as well as all reasonable inferences that may be drawn from these facts, in the light most favorable to the non-moving party (i.e., the appellants). *Injured Workers' Insurance Fund v. Orient Express Delivery Service, Inc., et al.*, 190 Md. App. 438, 450 (2010).

In their brief, appellants contend that there was a material issue of fact as to whether the claimant willfully caused his own injuries because, purportedly, claimant acted intentionally to violate rules of his employer that were known to him. In *Board of*

Education v. Spradlin, 161 Md. App. 155, 213 (2005), this Court, quoting from *Williams Construction Company vs. Garrison*, 42 Md. App. 340, 346 (1979), defined "willful misconduct" as:

> the intentional doing of something either with the knowledge that it is *likely to result in serious injury or with a wanton and reckless disregard of its probable consequences.*
>
> *Misconduct includes the exposure by an employee to an injury if he knows of, and appreciates, his liability to injury*. An employee is not guilty of willful misconduct because he is negligent or because he acted imprudently, thoughtlessly, or unwisely.

The *Spradlin* Court, again quoting from the *Williams Construction Company* case (42 Md. App. at 346), went on to say:

> *willful misconduct may be found where the employee intended to place himself in a position whereby he might expect to meet with injury or death*, and in carrying out his intention meets his death as a result of the injuries sustained. *The actions of the employee must be such as to show that he intended thereby to place himself in such a hazardous position that injury or death might result as the reasonable consequence of his act*.

161 Md. App. at 213.

In *Harris v. R.P. Dobson & Co*., 150 Md. 71 (1926), the Court of Appeals stressed:

> [t]hat wil[l]ful misconduct may consist in disregard of rules or orders, has been decided in many cases. But there must be something more than thoughtlessness, heedlessness or inadvertence in it. There must be, at least, a wil[l]ful breach of the rule or order.

150 Md. at 76 (citations omitted).

In their brief, appellants, quoting from Clifford Sobin, *1 MD Workers' Compensation* § 5:7 (2017) and relying on the portion of the excerpt from the Sobin treatise that is emphasized below, contend:

> the rule which may be extrapolated from all of the reported cases and the statute is that for the conduct of the employee to result in a finding that the injury is not compensable, the employee must have:
>
> 1) the specific intent to injure or kill themselves;
> 2) the specific intent to injure or kill another; or
> 3) acted intentionally to violate rules of the employer that are known by the employee and that are beyond the normal range of violations common in the work place to the extent that it indicates a willful disregard of the employer's rules and their own safety without any countervailing basis to do so (i.e., extraordinary and in violation of a direct immediate directive by the employer).

(Emphasis added).

We agree with the appellants that the above excerpt from the Sobin treatise accurately summarizes Maryland law. But the language relied upon does not support appellants' contention that a material issue of fact existed that would justify the denial of the claimant's summary judgment motion. We explain.

Appellants contend that, taking the evidence in the light most favorable to them, they presented evidence that would support a finding that claimant willfully disregarded his employer's safety rules. The trouble with that argument is that nowhere in the evidence that was before the motions judge can we find any indication of what safety rules (or safety protocols) that claimant violated. In an attempt to fill this gap, appellants, without providing citation to anything in either the record or record extract,[3] baldly assert that

[3] In this case, we carefully reviewed the record to determine if the transcript of the testimony heard by the Commission contained any support for the employer/insurer's assertion. We were not, however, required to make such a review. "We cannot be expected to delve through the record to unearth factual support favorable to [the] appellant." *Rollins v. Capital Plaza Assocs., L.P.*, 181 Md. App. 188, 201(2008) (quoting *von Lusch v. State*, 31 Md. App. 271, 282 (1976), *rev'd on other grounds*, 279 Md. 255 (1977)).

claimant "was injured as a result of his improper operation of the bagging machine, which deviated from the safety and operational training he received . . . ." In a similar vein, appellants argue that "[c]laimant intentionally disregarded the safety protocols he understood and intentionally bypassed safety mechanisms, factors which ultimately lead to [c]laimant's injury[.]"

It is true, taking the evidence in the light most favorable to appellants, that there was testimony from Mr. Caceres that, prior to the accident, the claimant was shown "all the safety switches and basically how the machine turns off." And, at one point in his testimony, Mr. Caceres said that appellant "intentionally bypassed the safety procedures to turn the machine on to try to go up and grab the poly [bags]." But what is missing is any evidence indicating that during claimant's safety training, he was told not to turn the machine on when trying to fix a machine malfunction.

Under such circumstances, there simply was no evidence presented to the motions court that claimant willfully disregarded any rule of his employer or any directive by his employer. The evidence, taken in the light most favorable to appellants, may have shown that claimant was negligent in his effort to fix the machine after being instructed by his superiors to try and do so. But there was no evidence that would fit this case within the ambit of the language of the Sobin treatise, upon which appellants rely, i.e., proof that claimant's negligence was "extraordinary" or that his violations were "beyond the normal range of violations common in the work place," or that claimant "acted intentionally to violate rules of the employer that [were] known by the employee[.]"

Lastly, appellants contend that:

> even if there was no genuine dispute of material fact in the case *sub judice* and all of the requirements for a proper grant of summary judgment in favor of the Claimant were present, the trial judge still erred in granting Claimant's Cross-Motion for Summary Judgment because a determination of willful misconduct is a *question of fact*, which should have been determined by the fact-finder – here, the jury.[4]

For the aforementioned proposition, appellant cites *Karns v. Liquid Carbonic Corp.*, 275 Md. 1, 15 (1975). *Karns* does not support appellant's position. Instead, *Karns* stands for the proposition that it sometimes is proper to allow a jury to consider the issue of "willful misconduct." *Karns* discusses two cases where a material dispute of fact existed as to whether a worker's injury was caused by claimants' intentional disregard of his employer's safety rules. But in those cases, unlike the case *sub judice*, there was evidence presented (if believed) that established: 1) a safety rule that the employee knew about; 2) disregard of that rule by the employee; and 3) proof that the claimant was injured due to disregard of the rule that was ignored. *Id.* at 15-17. Nothing in *Karns* suggests that a jury issue is presented concerning willful misconduct when, as here, the employer/insurer never even identifies what safety rules they contend that the claimant disregarded.

JUDGMENT AFFIRMED; APPELLANTS TO PAY THE COSTS.

[4] Appellants' last argument is, on its face, a *non sequitur*. It is impossible to have, on the one hand, "no genuine dispute of material fact in this case," but still have in this case "a genuine issue of material fact" as to whether appellant engaged in "willful misconduct."