STATE OF MICHIGAN

COURT OF APPEALS

DELPHINE BUSS, Personal Representative of the Estate of JAMES BUSS, Deceased,

Plaintiff-Appellant,

v

NATIONAL STEEL CORPORATION, a subsidiary of NKK USA CORPORATION, GREAT LAKES DIVISION OF NATIONAL STEEL CORPORATION,

Defendants-Appellees.

UNPUBLISHED
February 11, 1997

No. 180156
Wayne Circuit Court
LC No. 93-301885-NP

Before: Jansen, P.J., and Young and R.I. Cooper,* JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court order which granted summary disposition to defendants based on the exclusive remedy provision of the Workers' Disability Compensation Act, MCL 418.131(1); MSA 17.237(131)(1). Plaintiff's decedent was killed in his job in 1992, when the train he was operating with remote control derailed. The trial court determined that defendants' actions of converting from three-man train operation crews to one-man crews with remote control did not come within the intentional tort exception. We affirm.

Defendants moved for summary disposition pursuant to MCR 2.116(C)(1), (4), (8), and (10), but the trial court did not state under which subrule it granted the motion. Because both parties relied on documents outside the pleadings, we will review the motion under MCR 2.116(C)(10). See *Travis v Dreis & Krump Mfg Co*, 453 Mich 149, 183-184; 551 NW2d 132 (1996). Under this subrule, a court must consider all pleadings, deposition testimony, and other documentary evidence in a light most favorable to the nonmoving party and determine as a matter of law whether there exists a genuine issue of material fact. *Id*., 183. On appeal, a trial court's grant or denial of summary disposition will be reviewed de novo. *Pinckney Community Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995).

The exclusive remedy provision of the Workers' Disability Compensation Act, MCL 418.131(1); MSA 17.237(131)(1), provides:

> The right to the recovery of benefits as provided in this act shall be the employee's exclusive remedy against the employer for a personal injury or occupational disease. The only exception to this exclusive remedy is an intentional tort. An intentional tort shall exist only when an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury. An employer shall be deemed to have intended to injure if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge. The issue of whether an act was an intentional tort shall be a question of law for the court. This subsection shall not enlarge or reduce rights under law.

To recover for personal injuries under the intentional tort exception to the exclusive remedy provision, the employer must have determined to injure the employee. *Travis, supra,* 453 Mich 172. That is, the employer must have made a conscious choice to injure an employee and have deliberately acted or failed to act in furtherance of that intent. *Id.*, 180.

When there is no direct evidence of intent to injure and intent must be proved with circumstantial evidence, the employer's intent to injure may be inferred if the employer had actual knowledge that an injury was certain to occur under circumstances indicating deliberate disregard of that knowledge. *Id.*, 173, 180. The phrase "certain to occur" sets an extremely high standard. The laws of probability play no part, and the fact that something has happened previously, or the fact that something has never happened previously, is not proof of the certainty, or lack of certainty, of occurrence. *Id.*, 174.

Plaintiff alleges that (1) petitions signed by railroad services employees in 1985 and 1989 expressing concern about the safety of the one-man remote control train operation, (2) post-1989 discussions between the union and defendants regarding the safety of this type of operation, and (3) a statement by defendants' general foreman in response to the question, "Penny, you know, this job's going to kill people," of "We know it will and we expect it and we will pay," constitute proof that defendants' actions come within the intentional tort exception to the exclusive remedy provision. Plaintiff also raises an inference of lack of concern for safety in the fact the defendants reaped significant cost savings by the conversion to the one-man remote control crew.

We hold that plaintiff's allegations are insufficient to meet the standard for actual knowledge of certainty of occurrence set forth in *Travis, supra*. An employer's knowledge that a dangerous condition exists is not enough. The employer must be aware that injury is certain to occur from what the employer does. *Travis, supra,* 453 Mich 176. The most serious of plaintiff's allegations is the general foreman's alleged statement. A corporate employer's actual knowledge may be established by showing that a supervisory or managerial employee had actual knowledge that an injury would follow from what the employer did or did not do. *Id.*, 173-174. However, the statement in this case was made five years before the instant accident. Further, while it certainly acknowledges the dangerousness of the job, it does not meet the *Travis* extremely high standard of certainty of injury. *Id.*, 174.

Gradually converting from three-man crews to one-man remote control crews over several years is not anywhere near the level of conduct evidencing an intent to injure cited in *Travis*, such as in its companion case of *Golec v Metal Exchange Corp*, in which an explosion had occurred earlier that evening and the plaintiff was sent back to the same conditions to continue working, only to have a larger explosion seriously injure the plaintiff four hours later. *Id*., 157-159. Also, *Travis* refers to the *People v Film Recovery Systems* case, discussed in *Beauchamp v Dow Chemical Co*, 427 Mich 1, 23-25; 398 NW2d 882 (1986). In *Film Recovery*, an employer hired only people who could not read labels to work in an area where they were exposed to fumes without informing them of the danger. *Travis, supra*, 453 Mich 177-178. Here, while operating trains on narrow tracks is clearly a dangerous job, the certainty of injury by the action of converting to one-man remote control crews is lacking.

Significantly, plaintiff presented no evidence showing that use of a two- or three-man crew could have avoided the accident. The cause of the accident was not determined. While a gap in the rails at the switch point was discovered after the derailment, there is no evidence that the gap existed before the accident. Further, even if there were proof that a pre-existing gap caused the accident, there is no evidence that additional people on the train could have noticed it in time to avoid the accident.

The facts of this case do not come within the intention tort exception of the exclusive remedy provision. Hence, the trial court did not err in granting defendants summary disposition to defendants.

Affirmed.

/s/ Kathleen Jansen
/s/ Robert P. Young, Jr.
/s/ Richard I. Cooper