

IN THE SUPREME COURT OF THE STATE OF NEVADA

ISIDRO SOTO,
Appellant,
vs.
EUGENE BURGER MANAGEMENT
AND JACKIE MISITI,
Respondents.

No. 40323

FILED

AUG 20 2003

JANETTE M. BLUM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

ORDER AFFIRMING JUDGMENT,
AND DIRECTING COUNSEL TO SHOW CAUSE WHY
SANCTIONS SHOULD NOT BE IMPOSED

This is an appeal from a district court order dismissing appellant's lawsuit against respondents on the basis that the Nevada Industrial Insurance Act's exclusive remedy provision bars appellant's claims.¹ Appellant's March 2001 complaint alleged that he inhaled sulfuric acid fumes in March 1999 while performing his maintenance job duties for respondents, and sustained disabling injuries as a result, because respondents knowingly created a dangerous workplace.

Respondents moved to dismiss for failure to state a claim, based on the NIIA's exclusive remedy provision, appellant's acceptance of more than \$46,000 in workers' compensation benefits and Conway v. Circus Circus Casino, Inc.,² in which we upheld the dismissal of injured employees' intentional tort claims arising from their workplace exposure to noxious fumes. Appellant did not oppose the motion to dismiss.

¹Under NRAP 34(f)(1), we have determined that oral argument is not warranted in this appeal.

²116 Nev. 870, 8 P.3d 837 (2000).

Expressly relying on Conway, the court dismissed the complaint for failure to state a claim upon which relief could be granted. Appellant moved for reconsideration, but then filed a notice of appeal before the court could decide the motion; consequently, the court declined to consider it.

Appellant's opening brief characterizes the action as a negligence suit, and argues that specific intent to harm is not always required in a tort action against an employer. The brief does not address or distinguish Conway,³ which holds that an employee pleading an intentional tort to avoid the NIIA's exclusive remedy provision must allege facts showing the employer deliberately and specifically intended to injure the employee. The brief also does not address or distinguish Advanced Countertop Design v. District Court,⁴ which holds that an employee cannot accept workers' compensation benefits for an accidental injury, then change his position, assert the injury was not accidental and pursue an intentional injury claim. Despite this controlling authority, the brief argues that an illness resulting from workplace exposure is not subject to the NIIA's exclusive remedy provision.

Respondents contend the appeal is frivolous, because it fails to address controlling authority and does not argue in good faith for reversal of existing law, and request attorney fees and costs as sanctions for having to respond. NRAP 38 authorizes this court to award such sanctions for a frivolous appeal, and NRAP 28A authorizes sanctions against an attorney who inaccurately certifies that his brief is not frivolous or interposed for


³Id. at 875, 8 P.3d at 840.


⁴115 Nev. 268, 984 P.2d 756 (1999).

any improper purpose, such as needlessly increasing the costs of the litigation. Appellant did not file any reply brief.

We agree that the appeal lacks merit, and we affirm the district court's dismissal order. In light of appellant's counsel's continued failure to address controlling case law, sanctions appear warranted. Accordingly, appellant's counsel shall have fifteen days from this order's date within which to show cause why he should not be personally sanctioned for filing and pursuing a frivolous appeal. Respondents may file any reply within ten days from the date that appellant's counsel's response is served.

It is so ORDERED.


_____, J.
Shearing


_____, J.
Leavitt


_____, J.
Becker

cc: Hon. Allan R. Earl, District Judge
Anthony R. Lopez
Gugino Law Firm
Clark County Clerk