IN THE SUPERIOR COURT OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

RONALD L. COOK, and his wife ELLA COOK	)	
v.	)	C.A. No. 99C-01-023
E.I. DUPONT DE NEMOURS AND COMPANY, a Delaware corporation, Defendant.	)	

Submitted: May 15, 2001
Decided: August 20, 2001

UPON DEFENDANT E.I. DUPONT DE NEMOURS & COMPANY'S MOTION FOR SUMMARY JUDGMENT:

DENIED.

MEMORANDUM OPINION

W. Christopher Componovo, Esquire, and Joseph J. Rhoades, Esquire, of the Law Offices of Joseph J. Rhoades of Wilmington, Delaware for the Plaintiffs

Mark L. Reardon, Esquire, of Elzufon Austin Reardon Tarlov & Mondell, P.A. of Wilmington, Delaware for the Defendant

ABLEMAN, JUDGE

The present action concerns a work-site accident which resulted in personal injuries to Plaintiff Ronald L. Cook and loss of consortium to his wife, Plaintiff Ella Cook. For present purposes, it will be necessary to refer only to Plaintiff Ronald L. Cook's (hereafter referred to as "Plaintiff" or "Cook") claims and role in this action. Defendant, E.I. DuPont de Nemours & Company (hereafter "DuPont"), has filed a Motion for Summary Judgment. The issues presented are whether the facts, when viewed in the light most favorable to plaintiff, prove as a matter of law that (1) DuPont did not owe a duty to the plaintiff, and (2) that the plaintiff's knowledge of the danger negated DuPont's duty to warn. This is the Court's decision on defendant's motion.

STATEMENT OF FACTS

Plaintiff was a truck driver employed by Brandywine Construction Company, Inc. (hereinafter "BCCI"). Pursuant to a contract entered into between BCCI and DuPont on June 20, 1994, BCCI was to provide DuPont with around-the-clock hauling of press cake material, know as Iron Rich,[1] from DuPont's Edgemoor facility to DuPont's Cherry Island Landfill ("Cherry Island").[2] DuPont

[1] Iron Rich is a press cake byproduct of DuPont's Netsche filter process. Iron Rich is a neutral, soil-like material which is utilized as daily cover for landfills. *Defendant E.I. Dupont de Nemours & Company's Memorandum In Support of Its Motion for Summary Judgment* (hereafter "Defendant's Motion for Summary Judgment") at fn. 1.

[2] The contract incorporated two other documents into the agreement between DuPont and BCCI. The first of these documents is entitled "Scope of Work," the second is "General Conditions."

used Cherry Island, located approximately one mile from the Edgemoor facility, as a staging area for Iron Rich.

At approximately 4:00 a.m. on January 25, 1997, while plaintiff was working his usual 11:00 p.m. to 6:00 a.m. shift, he slipped and fell on an asphalt pad at the Cherry Island landfill during delivery of a load of Iron Rich. Plaintiff asserts that the accident occurred when his feet slipped out from under him, causing him to land on his tailbone and causing his helmet to hit the ground. As a result of his slip and fall, plaintiff suffered injuries to his head, neck, back and legs and underwent three lower back operations and one neck operation.

At the time of the delivery on January 25, 1997, plaintiff was the only BCCI employee working at either the Edgemoor facility or Cherry Island. Plaintiff, who was a BCCI truck driver at the Edgemoor facility for over two years at the time of his fall, kept to the following work routine: While inside the BCCI office trailer located on the Edgemoor site, plaintiff would receive a radio communication from DuPont indicating that a load of Iron Rich was ready for hauling. Plaintiff would then drive his dump truck to the specified bay where he would hook a trailer loaded with Iron Rich to the truck. Once connected, plaintiff would drive through the main gate of the Edgemoor facility to Cherry Island where he would dump the Iron Rich from the truck before returning to the BCC trailer to await the next

dispatch call. During his employment with BCCI, Cook would make anywhere from seven to nine of these round trips between the Edgemoor facility and Cherry Island per shift.

In order to fully perform the activity of dumping the press-cake at Cherry Island, it was necessary for plaintiff to use a paddle[3] to scrape or sweep the rear of the trucks and tailgates to ensure that press-cake would not fall onto the roadway once the vehicle left Cherry Island. The results of an investigation completed by BCCI after plaintiff's accident revealed that plaintiff neither acted unsafely nor violated any safety rules. Subsequent to plaintiff's fall, the President of BCCI, David M. McGuigan, wrote to the Safety, Health and Environmental Manager at DuPont, Leonard J. Fasullo, and confirmed DuPont's suggestion that an additional operator be brought in to work on weekend days to ensure that the dumping was cleared over the weekend. Mr. McGuigan additionally requested that a laborer with "non-slip" shoes be permitted to work each shift at the pad on Cherry Island. DuPont approved BCCI's request for hiring of a weekend operator, but denied BCCI's request for a laborer with "non-slip" shoes.

[3] The paddles were located on BCCI's trucks; however, they were owned by DuPont and provided by them for BCCI's use.

STANDARD OF REVIEW

Summary judgment may only be granted where the pleadings, depositions, answers to interrogatories, admissions on file and affidavits, if any, "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[4] The moving party bears the initial burden of showing that a genuine material issue of fact does not exist.[5] If a motion is properly supported, the burden shifts to the non-moving party to demonstrate that there are material issues of fact.[6] If, after viewing the record in the light most favorable to the nonmoving party, the Court finds no genuine issue of material fact, summary judgment is appropriate.[7] Summary judgment will be denied where the proffered evidence provides "a reasonable indication that a material fact is in dispute."[8]

CONTENTION OF PARTIES

Plaintiff filed suit alleging that his injuries were proximately caused by DuPont's failure to provide adequate footing and traction, failure to provide safety supervision, failure to provide adequate lighting, and failure to warn plaintiff of the dangers associated with hauling Iron Rich. In addition, plaintiff contends that his

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[4] Del. Super. Ct. Civ. R. 56(c).
[5] *Brzoska v. Olson*, Del. Supr., 668 A.2d 1355, 1364 (1995).
[6] *Id.*
[7] *Alabi v. DHL Airways, Inc.*, Del. Super., 583 A.2d 1358, 1361 (1990); *Hammond v. Colt Ind. Operating Corp.*, Del. Super., 565 A.2d 558, 550 (1989).
[8] *Ebersole v. Lowengrub*, Del. Super., 180 A.2d 467, 470 (1962).

injuries were caused because DuPont was negligent in requiring plaintiff to engage in dangerous conduct, and DuPont failed to observe and prevent BCCI, its independent contractor, from engaging in unsafe job processes.[9]

DuPont has filed this motion for summary judgment. It argues that it does not owe a duty to plaintiff since landowners are not liable for the torts created by the contracted work or the condition of the premises of an independent contractor hired by the owner, unless "the owner retains the power to control the methods and manner of doing the work."[10] Additionally, DuPont contends that plaintiff cannot recover because any duty it may have had to warn plaintiff was obviated by his knowledge of the conditions existing on the asphalt pad at Cherry Island.[11]

DISCUSSION

As to defendant's first contention, it is settled law in Delaware that the control exercised by the landowner must go directly to the manner and methods used by the independent contractor while performing the delegated task.[12] While the concept of active control is an "elastic one,"[13] it is "'ordinarily not inferred

[9] Complaint at ¶¶ 10 and 11.
[10] *Rabar v. E.I. duPont deNemours & Co., Inc.*, Del. Super., 415 A.2d 499, 506 (1980); *Williams v. Cantera*, Del. Super., 274 A.2d 698 (1971). *See also Boubaris v. Newark Newsstand*, Del. Super., C.A. No. 93C-09-064 (Oct. 22, 1996)(ORDER).
[11] *See Boubaris*, C.A. No. 93C-09-064 at 3 ("where a condition is obvious or easily discoverable by the plaintiff, the duty to make safe or warn is obviated")(citing *Niblett v. Pennsylvania Railraod Co.*, Del. Super., 169 A.2d 240 (1961)).
[12] *O'Connor v. Diamond State Telephone Co.*, Del. Super., 503 A.2d 661, 663 (1985)(citing *Cantera*, 274 A.2d at 700).
[13] *Id.* at 662 (citing *Seeney*, 318 A.2d 619).

from the mere retention by the owner or general contractor of a right to inspect the work of an independent contractor or to exercise general superintendence over such work in order to assure complicity with the contract terms.'"[14] However, if the authority exerted by the owner over the work is insufficient to render it liable under the general rule regarding active control, "'the owner may still be liable to some extent if it retained sufficient control over part of the work or if it retained possessory control over the work premises during the work.'"[15]

In the present case, plaintiff was an employee of an independent contractor hired by DuPont to haul press-cake from DuPont's plant to DuPont's landfill. In support of its argument that it did not exercise active control over the method and manner of BCCI's work, DuPont relies upon the following evidence of record.

Plaintiff testified that he was hired and paid by BCCI,[16] that his job training and work schedule were provided by BCCI,[17] that BCCI owned and maintained the trucks used for hauling the Iron Rich,[18] and that the only contact he had with a DuPont employee was the radio communications indicating a press cake load was

[14] *Id.* *See also Bryant v. Delmarva Power & Light Co.*, Del. Super., C.A. No. 89C-08-070, Babiarz, J. (Oct. 2, 1995)(Mem. Op.).
[15] *Bryant*, C.A. No. 89C-08-070 at 15 (citing Restatement (Second) of Torts) §§ 414, 422(a) (1965); *Rabar*, 415 A.2d at 506. *See Boubaris*, C.A. No. 93C-09-064 at 3.
[16] Deposition of Ronald L. Cook, p. 29, 32 (hereafter "Cook, p. ___").
[17] *Id.* at p. 34-35.
[18] *Id.* at p. 37.

ready to be hauled.[19] Leonard J. Fasullo,[20] testified that the responsibility for the day-to-day operations of hauling Iron Rich between the Edgemoor facility and Cherry Island was the responsibility of BCCI.[21] Fasullo also testified that BCCI designed and built (albeit with DuPont's permission and at DuPont's expense) the asphalt pad at Cherry Island to facilitate the hauling and dumping process.[22] Additionally, Fasullo testified that, at BCCI's request, DuPont installed lighting at Cherry Island to facilitate nighttime operations.[23]

Richard F. Rowe, Jr., BCCI's Superintendent on the Edgemoor project, testified that "we [BCCI] are in communications with their [DuPont] people and it is everyday . . . . We speak to DuPont everyday that we are there . . . . There is not a day that you don't talk to their supervisors."[24] Rowe also testified that, BCCI's haulers were satisfied with the improved lighting conditions.[25] Rowe also testified that he did not recall any complaints from his haulers after the lights were installed on the pad at Cherry Island and he confirmed that BCCI did not make any subsequent request of DuPont for additional lighting.[26]

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[19] *Id.* at p. 114.
[20] DuPont's Safety, Heath and Environmental Manager.
[21] Deposition of Leonard Joseph Fasullo, p. 22 (hereafter "Fasullo, p. ___").
[22] *Id.* at p. 21-22.
[23] *Id.* at p. 30-31.
[24] Deposition of Richard F. Rowe, p. 23 (hereafter "Rowe, p. ___").
[25] *Id.* at p. 87.
[26] *Id.* at p. 87-89.

In deciding defendant's summary judgment motion, the contractual agreements entered into between the parties represent additional relevant evidence regarding the existence of a duty owed to plaintiff. In the "Scope of Work" Contract (dated March 30, 1994 and incorporated in the June 20, 1994 "Price Agreement"), the operation of Cherry Island is identified as being "physically separate from the plant, [requiring] frequent communications to DuPont supervision on the status of the various operations."[27] The contract additionally states that "[t]he safety of the drivers when unloading trailers is the responsibility of the Contractor."[28] Regarding the clean up of spills, the contract notes that "[t]he Contractor shall perform all necessary housekeeping to insure work areas are properly maintained and that any spills are cleaned up immediately"[29] and "[t]he Contractor is also responsible for reporting and cleaning of all spills incurred during the transportation of materials . . . ."[30]

The Price Agreement, subsequently entered into between the parties on June 20, 1994, set forth the additional following conditions:

> Scope of Work – . . . CONTRACTOR (BCCI) will provide a sufficient number of skilled workers and appropriate supervision . . . .[31]

[27] Scope of Work Contract, dated March 30, 1994, at Section A, ¶ 3.
[28] *Id.* at Section A, ¶ 4.
[29] *Id.* at Section A, ¶ 5.
[30] *Id.* at Section C, ¶ 2, Summary.
[31] Price Agreement, dated June 20, 1994, at ¶ 2.

> Site Conditions – Contractor and their tier subcontractors shall be required to furnish to DuPont a written program that all Contractor and subcontractor employees shall be required to follow while on the job site. Minimum acceptable program shall meet OSHA and DuPont's requirements.[32]

Viewing the facts in the light most favorable to the plaintiff, the Court finds that DuPont sufficiently "interjected itself" into the day-to-day hauling operations of BCCI to such an extent that genuine issues of material fact exist on the issue of control. In making this ruling, the Court specifically relies upon the following evidence. First, there was a DuPont supervisor present at the construction site on a daily basis.[33] Second, there was a DuPont supervisor engaged in communication with BCCI on a daily basis. Third, DuPont supplied tools to BCCI, at least on one occasion. Fourth, DuPont actively controlled, directed, and restricted the movements of the BCCI employees, including plaintiff. Fifth, DuPont inspected BCCI's offices and vehicles, and retained the ability to search the premises in case of a problem. Based upon these facts, the Court finds that the question of whether defendant DuPont assumed control over plaintiff is an appropriate factual issue for the jury and cannot be determined as a matter of law.

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[32] *Id.* at ¶ 14.

[33] *See Boubaris*, C.A. No. 93C-09-064 at 3-4 (The court found that the defendant "shared possessory control of the work premises by remaining open for business while [an independent contractor performed its inventory duties]"). *But see, Bowles v. White Oak, Inc.*, Del. Super., 1988 Del. Super. LEXIS 314, Del Pesco, J. (Sept. 15, 1988)(Mem. Op.)(having a supervisor on the construction site on a daily basis who inspected the premises and who told subcontractors what needed to be done, was not supportive of active involvement in the contractor's work).

Turning to DuPont's second contention, that plaintiff's knowledge of the condition of the pad at Cherry Island negated any duty to warn on behalf of DuPont, the Court finds that the issue cannot be determined on a summary judgment motion. It is uncontroverted that at the time of Cook's injury, BCCI was an independent contractor of DuPont and plaintiff was an employee of BCCI. Delaware courts have long held that the duty owed to an independent contractor is that of a business invitee,[34] and that such a duty can be imposed upon a party "'by agreement or otherwise.'"[35] By imposing such a duty, "those who have responsibility for workplace safety must take reasonable measures to ensure the safety of those at the worksite."[36] However, where an independent contractor knows of dangerous conditions on the property, the landowner owns no duty to an employee of that independent contractor.[37] The condition itself is considered an adequate warning where the danger is so apparent that the invitee can be expected to notice and protect against it.[38] The Supreme Court has lightened this harsh rule, holding that "a business invitee's knowledge of a dangerous condition is not a

[34] *See DiOssi v. Maroney*, Del. Supr., 548 A.2d 1361 (1988).
[35] *Figgs v. Bellevue Holding Co.*, Del. Super., 652 A.2d 1084, 1092 (1994)(quoting *Rabar*, 415 A.2d at 505).
[36] Restatement (Second) of Torts § 343; *Li Capano Builders, Inc.*, Del. Dist., 1999 U.S. LEXIS 4427 (1999)(citation omitted); *Morris v. Hitchens*, Del. Super., C.A. No. 91C-05-045, Lee, J. (Mar. 18, 1993), Mem. Op. at 3.
[37] *Morris*, C.A. No. 91C-05-045 at 2 (citing *Seeney*, 318 A.2d at 623).
[38] *Niblett*, 158 A.2d at 582.

complete bar to a claim against a landowner."[39] The Court stated that, although a warning gives the invitee knowledge of the danger, the invitee may still claim damages for injuries resulting from the harm caused by the dangerous condition and, therefore, a landowner's duty is not fulfilled by merely warning the business invitee of the danger.[40]

In the present case, DuPont assumes that plaintiff's four or five prior trips to the same asphalt pad on the evening of his fall are sufficient to relieve it of its duty to warn with regard to the condition of the pad. Plaintiff, on the other hand, submits that DuPont can be held liable because it voluntarily assumed responsibility for implementing safety measures at the Cherry Island landfill. In support of this argument, plaintiff relies upon the testimony of Richard F. Rowe, Jr., who indicated to DuPont that changes needed to be made regarding safety at the dumping site.[41] Rowe also testified that he had conversations with DuPont regarding construction of a new pad "so that [BCCI haulers] could function" and because "[y]ou didn't want somebody getting hurt, falling."[42] In addition, Rowe testified that upon completion of the pad, DuPont reimbursed BCCI for its construction costs.[43]

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[39] *Boubaris*, C.A. No. 93C-09-064 at 4 (citing *Koutoufaris v. Dick*, Del. Supr., 604 A.2d 390, 394-98 (1992).
[40] *Id.*
[41] Rowe, p. 74.
[42] *Id.* at p. 73-74.
[43] *Id.* at p. 77.

This Court finds that, as a result of DuPont's acknowledgement of the dangerous condition of the pad, there is a genuine issue of fact as to whether plaintiff should have known of the condition at the time of his fall or whether DuPont's acknowledgement of the conditions of the danger fulfilled its duty to warn BCCI employees.[44] In addition, the issue of whether plaintiff's conduct constituted contributory negligence, considering his knowledge of the potential conditions that might exist on the pad, remains a question of fact for the jury to resolve.[45]

CONCLUSION

For all of the foregoing reasons, Defendant E.I. DuPont de Nemours & Company's Motion for Summary Judgment is hereby **DENIED**.

IT IS SO ORDERED.

Peggy L. Ableman, Judge

Oc: Prothonotary
Cc: W. Christopher Componovo, Esquire
Mark L. Reardon, Esquire

[44] *See Boubaris*, C.A. No. 93C-09-064 at 4-5.
[45] Since the Court finds that plaintiff's contributory negligence is a question of fact for the jury, it thereby refrains from ruling on the applicability of the peculiar risk doctrine raised by plaintiff.