IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
March 25, 2019 Session

COREY BUNTON v. SANDERSON PIPE CORP. ET AL.

Appeal from the Court of Workers' Compensation Claims
No. 2016-06-0333 Kenneth M. Switzer, Judge

No. M2018-01028-SC-R3-WC – Mailed July 3, 2019

The appeal has been referred to the Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law pursuant to Tennessee Supreme Court Rule 51. This case arises out of an injury sustained by Corey Bunton ("Employee") while working at Sanderson Pipe Corporation ("Employer"). Employee's hand became trapped in a beller machine which resulted in Employee losing a finger and sustaining permanent damage to his hand. Employee claimed he turned the machine off prior to placing his hand into the machine to clean a pipe. However, Employer presented evidence challenging Employee's claim that he turned off the machine. Employer argued by failing to turn off the machine, Employee committed willful misconduct which barred any recovery. The trial court found Employee did not turn off the machine and therefore committed willful misconduct. Employee appealed arguing the trial court erred in its willful misconduct analysis. Employer also cross-appealed arguing that Tennessee Compilation Rules and Regulations 0800-02-21-.7 (2016) is unconstitutional. We affirm the judgment of the trial court.

Tenn. Code Ann. § 50-6-225(a) (2014) Appeal as of Right;
Judgment of the Trial Court Affirmed

JEFFREY S. BIVINS, C.J., delivered the opinion of the court, in which LEE DAVIES, SR. J. and DEANNA BELL JOHNSON, SP. J., joined.

Zachary Wiley, Nashville, Tennessee, for the appellant, Corey Bunton.

Catherine Dugan, Nashville, Tennessee, for the appellees, Sanderson Pipe Corp., Bridgefield Casualty Insurance Company, Inc.

Alexander Rieger, Nashville, for the intervening appellee, State of Tennessee.

OPINION

Factual and Procedural Background

Sanderson Pipe ("Employer") is a PVC pipe manufacturer with a plant location in Clarksville, Tennessee. Corey Bunton ("Employee") was employed by Employer beginning in January of 2013. On January 4, 2016, Employee was working as a line operator at Employer and suffered a severe injury to his left hand when he stuck his hand inside a machine to clean out the drain. As a result of the injury, Employee's left index finger was amputated, and the remaining fingers on his left hand also were injured. Employer denied Employee workers' compensation benefits for this incident, claiming that Employee's injury was a result of his knowing and willful violation of a safety rule. Employee filed for benefits, which Employer denied. Employee went through the agency process and then filed suit in the Tennessee Court of Workers' Compensation Claims on March 8, 2016.

The primary issue at trial was whether Employee tried to stop the machine before sticking his hand into it to clean the drain. Employer claimed Employee knew the policy was not to place hands inside moving machinery and that Employee intentionally did not stop the machine before placing his hand inside. Employee claimed he, in fact did turn the machine off, but in a freak accident, the machine came back on again, crushing his hand. The machine in which Employee stuck his hand is called a "beller," and it operates automatically to construct PVC pipe.

Employee did not dispute the policy, nor did he deny knowing about the policy at the time of the incident. In fact, Employee testified that he was trained on and understood the safety precautions set forth by Employer. Employee admitted that he signed a document indicating that he read and understood a memo that was circulated that stated, "As always, employees are prohibited from placing any body part into machinery that starts automatically. This memo serves as a written policy that is to be followed to the letter." Employee also acknowledged that he had been disciplined for putting his hand on the moving parts of a machine just a few months prior to his injury. Instead of challenging the policy or his knowledge of it, Employee claimed that he stopped the machine's automatic feature before reaching in to clean the drain.

As a lead line operator, it was Employee's job to monitor the machine lines at the plant, perform maintenance on the machines if needed, and ensure that high-quality pipes were being produced by the machines. On the date of the injury, Employee was working the night shift. During that shift, Employee testified he cleaned out the drain for the beller

twice. Employee testified that his supervisor, Jason Manley, told him to clean out the drain in the first instance. The injury occurred the second time Employee cleaned out the drain.

There are two ways that the automatic feature of the beller can be turned off. First, there is a button on the screen attached to the machine that stops the functions of the machine going on at that time. Second, there is an E stop button that shuts down the power. There is some confusion as to which stop feature, if any, Employee engaged before putting his hand into the machine. On direct examination, Employee testified that he put the machine into "auto stop" and then pressed the E stop button. Later, on cross examination, Employee clarified that he pressed both the button on the screen and the E stop button before sticking his hand in the machine. Employee said he reached his hand into the beller and began cleaning out the drain when his fingers got caught in the machine. The slide gate, a piece of the machine that acts as a safety mechanism, closed on Employee's fingers. Employee testified that once he realized his hand was caught in the machine, he called for help and pressed the same E stop button that he claims he pressed before he placed his hand in the machine.

Jason Manley came to Employee's aid. Mr. Manley is a supervisor for Employer, and he was the shift supervisor overseeing the night shift at the time of Employee's injury. Employee's hand remained in the machine for about an hour and a half until they could take the machine apart. Employee was airlifted to the hospital.

Although Employee testified that he stopped the machine's automatic feature by pressing the button on the screen and by engaging the E stop before putting his hand in the machine, Employer presented evidence challenging that assertion. First, on cross examination, Employee was asked about a statement he gave a few days after the injury.[1] In that statement, Employee did not mention pressing either of the stop buttons on the machine before sticking his hand into the beller. Employee explained that he was heavily medicated at the time that statement was made. Employee also did not say that he had pressed either stop button in the answers he provided in to response Employer's interrogatories.

Second, Employer called Jason Manley, the shift supervisor on the night in question as its first witness. In regard to whether Employee stopped the machine before

[1] Employee gave a statement to an investigator a few days after his injury.

inserting his hand, Mr. Manley testified that if Employee in fact had pressed either the E stop or the stop button on the computer screen attached to the machine, the injury would not have happened. Mr. Manley also testified that while Employee's hand was still in the machine, Employee told Mr. Manley that he thought he had timed it so that he could get his hand out in time. Mr. Manley also visited Employee at the hospital. Mr. Manley testified that while at the hospital, Employee told Mr. Manley the same story: "he said he knew it was his fault and that he just thought he would be able to get to it before the cycle finished." Mr. Manley also stated that Employee did not mention engaging any of the stop features.

Third, Employer called Brandon Conley to the stand. Mr. Conley worked in quality control at Employer, and he was present at the time of Employee's injury. Mr. Conley testified that he was standing ten to fifteen feet away from Employee at the time of the incident. Mr. Conley explained that when the E stop on a machine is activated, the machine makes a hissing sound from air being released, and the pipes would stop rotating. Mr. Conley said that he did not observe any signs that the machine had been turned off prior to Employee's injury. Mr. Conley also visited Employee in the hospital after the accident and testified that Employee said he thought he had timed everything out so that his hand would be out in time. Employee made no mention of stopping the machine before he stuck his hand inside.

Finally, Employer introduced a video from the night of the injury, including events leading up to the injury. The video first shows Mr. Conley performing quality checks on the pipe, while Employee can be seen near the beller. Then, as Mr. Conley testified explaining the video, he asked Employee what he was doing because Employee was bent down looking at the beller. At that point in the video, Employee is bent low working on the beller. Employee replied he was trying to determine why there was water on the floor. Just prior to Employee bending in front of the machine, the video shows Employee walk around the machine without stopping and kneeling next to the beller. A few moments later, Mr. Conley heard Employee screaming. The video shows Employee flinch and Mr. Conley immediately look towards Employee. Employee then begins waving his free hand. As the video continues more and more staff arrive, as well as paramedics. In reviewing the video, Mr. Conley identified where the stop buttons were located on the machine and testified that Employee did not press any of the stop buttons before sticking his hand in the machine to clean the drain.

Employer also presented evidence regarding its safety procedures and its enforcement of those procedures. For this, Employer called Chris Kiser, Employer's facility manager, to testify about the safety procedures in place at Employer. Mr. Kiser

also was injured from working on a machine while it was still in automatic mode in 2006, and he was written up for breaking the policy. Mr. Kiser also testified that he reviewed the video that had been shown to the Court and that it did not appear that Employee had stopped the machine prior to placing his hand inside it.

Following a bench trial, the trial court denied Employee's claim for workers compensation benefits. The primary focus of the trial was whether Employee committed willful misconduct by failing to turn off the machine. The trial court found that Employee did not turn off the machine, and, thus, concluded that Employer established that Employee committed willful misconduct which barred any recovery on the part of Employee. The Court also ordered that Employer pay the $150.00 filing fee under Tennessee Compilation Rules and Regulations 0800-02-21-.07 (2016). On May 29, 2018 Employee filed a timely notice of appeal.

Analysis

Appellate review of decisions in workers' compensation cases is governed by Tennessee Code Annotated section 50-6-225(e)(2) (2014) (applicable to injuries occurring prior to July 1, 2014), which provides that appellate courts must "[r]eview . . . the trial court's findings of fact . . . de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." Reviewing courts must conduct an in-depth examination of the trial court's factual findings and conclusions. Wilhelm v. Krogers, 235 S.W.3d 122, 126 (Tenn. 2007). When the trial court has seen and heard the witnesses, considerable deference must be afforded the trial court's factual findings. Tryon v. Saturn Corp., 254 S.W.3d 321, 327 (Tenn. 2008). No similar deference need be afforded the trial court's findings based upon documentary evidence such as depositions. Glisson v. Mohon Int'l, Inc./Campbell Ray, 185 S.W.3d 348, 353 (Tenn. 2006). Similarly, reviewing courts afford no presumption of correctness to a trial court's conclusions of law. Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009).

This case sits in a somewhat unusual procedural posture. First, Employee argues on appeal that the trial court incorrectly applied the "willful misconduct" standard and also incorrectly found Employee committed willful misconduct. Employer, as Appellee, argues the trial court correctly understood and applied the willful misconduct standard. Employer is also a cross-appellant and raises a constitutional challenge to Regulation 0800-02-21-.07. The State, through the Attorney General's office, has intervened to defend the constitutionality of that regulation. We will address Employee's claims of error first before addressing Employer's constitutional challenge.

We turn then to Employee's argument that the trial court incorrectly eliminated the "willful" requirement outlined by the Tennessee Supreme Court in Mitchell v. Fayettevill Pub. Utilities, 368 S.W.3d 442 (Tenn. 2012). Specifically, Employee argues that the trial court "held that *Mitchell* abolished the requirement that an employer asserting a willful misconduct defense must establish that the employee's misconduct was 'willful' in order to prevail." After our review of the trial court's ruling, it is clear the trial court did no such thing.

In Mitchell, the Tennessee Supreme Court outlined the four elements an employer must establish to prevail on the defense of willful misconduct:

> (1) the employee's actual, as opposed to constructive, notice of the rule; (2) the employee's understanding of the danger involved in violating the rule; (3) the employer's bona fide enforcement of the rule; and (4) the employee's lack of a valid excuse for violating the rule.

Mitchell, 368 S.W.3d at 452–53 (internal citations omitted).

The trial court addressed the first two factors of the test by finding that Employee "testified that he knew Employer's safety rules specifically prohibited placing body parts in moving machinery," and that "[Employee] testified that he understood the hazards of placing body parts in machinery while in operation. . . ." Thus the trial court concluded the Employer satisfied the first two elements of the Mitchell test. The evidence does not preponderate against these findings

Next, the trial court found that Employer engaged in a bona fide enforcement of its rule regarding placing body parts in machinery finding Employer "unquestionably enforced it against Mr. Raulerson, Mr. Kiser, and Employee. . . ." Again, the evidence does not preponderate against these findings.

Finally, the trial court addressed Employee's argument that he did not violate the rule because he had turned the machine off prior to placing his hand inside. The trial court rejected this argument based on its review of the testimony by Mr. Manley and Mr. Conley, both of whom the trial court found credible and a review of the video. After review of the record, including the video, we conclude the evidence does not preponderate against these findings.

Employee argues before this Court that the trial court's findings of fact and

conclusions of law removed the "willful" requirement from the "willful misconduct" affirmative defense. However, the trial court specifically found Employee "intended to place his hand inside the moving machine in violation of the safety rule. . . ." Again, after a thorough review of the record, we conclude that the trial court's finding that Employee willfully violated the Employer safety rules despite his clear knowledge of the safety regulations, does not preponderate against the evidence.

As a cross-appellant Employer raises constitutional challenges to Tennessee Compilation Rule and Regulation 0800-02-21-.07 (eff. Nov. 30, 2016). Specifically, Employer argues that its requirement to pay the full amount of the Workers' Compensation 0800-02-21-.07 violates the due process and equal protection clauses of the United States and Tennessee Constitutions. However, Employer admits that it did not raise these issues before the trial court. Instead, it argues that the Regulation is unconstitutional on its face. As such, Employer concedes that an as-applied challenge has been waived. Waters v. Farr, 291 S.W.3d 873, 918 (Tenn. 2009) (noting that "[t]his Court has expressly applied this principle in cases involving challenges to the constitutionality of a statute by holding that constitutional issues must be first raised in the trial court 'unless the statute involved is so obviously unconstitutional on its face as to obviate the necessity for any discussion.'" (quoting Lawrence v. Stanford, 655 S.W.2d 927, 929 (Tenn.1983)). Employer correctly notes that a facial challenge may be raised for the first time on appeal. See Lawrence v. Stanford, 655 S.W.2d 927, 929 (Tenn. 1983).

However, Employer attempts to argue an as-applied challenge by simply claiming it is a facial challenge. Specifically, Employer argues that Regulation 0800-02-21-.07 is "unconstitutional on its face because it imposes the cost burden on employers regardless of their liability under the Workers' Compensation Law." Employer continues arguing that this "rule requiring employers to pay the full amount of the filing fee in every workers' compensation case is arbitrary. . . ." The standard for a facial challenge is whether there exists any possible situation in which a rule or regulation can be constitutional. See Waters v. Farr, 291 S.W.3d 873, 921 (Tenn. 2009) (stating, "the challenger must establish that no set of circumstances exists under which the statute would be valid."). Employer does not once address this question. It is clear from both Employer's brief and oral argument before this Panel, that Employer is raising an as-applied challenge to Regulation 0800-02-21-.07. As previously outlined, an as-applied challenge cannot be raised for the first time on appeal. As such, we conclude Employer has waived its constitutional challenge to Regulation 0800-02-21-.07.

Conclusion

The judgment of the trial court is affirmed. Employer's argument that Regulation 0800-02-21-.07 is unconstitutional has been waived. Costs are taxed one half to Employer and one half to Employee, for which execution may issue if necessary.

JEFFREY S. BIVINS, CHIEF JUSTICE