IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE

THOMAS RICHARD CATE, Plaintiff/Appellant, vs. CHARLES TOOLEY, d/b/a TOOLEY AUTOMATIC TRANSMISSION SERVICE, Defendant/Appellee.	)	JEFFERSON CIRCUIT NO. 03S01-9810-CV-00118 HON. RICHARD R. VANCE, JUDGE

For the Appellant:

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For the Appellee:

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MEMORANDUM OPINION

Members of Panel:

Justice William M. Barker
Senior Judge John K. Byers
Special Judge Howell N. Peoples

AFFIRMED **PEOPLES, SPECIAL JUDGE**

OPINION

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. §50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The employee appeals the dismissal of his claim for workers' compensation benefits. The trial court found (1) that Thomas Richard Cate was not acting in the course and scope of his employment with Charles Tooley d/b/a Tooley Automatic Transmission Service (hereafter "Charles Tooley") when he was injured, and (2) that Mr. Cate failed to give the required statutory notice of the injury to his employer. We affirm.

Review of the findings of fact made by the trial court is *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. Tenn. Code Ann. §50-6-225 (e)(2). Stone v. City of McMinnville, 896 S.W.2d 548, 550 (Tenn. 1995). The application of this standard requires this Court to weigh in more depth the factual findings and conclusions of the trial court in workers' compensation cases. *See* Corcoran v. Foster Auto GMC, Inc., 746 S.W.2d 452, 456 (Tenn. 1998).

Thomas Richard Cate contends he was injured while performing a task at the instructions of Roger Tooley, as he had customarily done in his employment with Charles Tooley. In order to be compensable under the workers' compensation law, an injury must arise out of and in the course of employment. Tenn. Code Ann. §50-6-103(a). The phrases "arising out of " and "in the course of" are not synonymous and both must be satisfied to impose liability for benefits on the employer. Woods v. Harry Woods Plumbing Co., 967 S.W.2d 768, 771 (Tenn. 1998). An injury arises out of employment when it has a rational connection to the employee's work duties. Braden v. Sears, 833 S.W.2d 496, 498 (Tenn.1992). An injury "in the course of" employment occurs while the employee is performing a duty that he was employed to do. Travelers Insurance Company v. Googe, 217 Tenn. 272, 397 S.W.2d 368, 371 (1966). Conceding that the evidence is disputed, appellant relies on Bell v. Kelso Oil Company, 597 S.W.2d 731 (Tenn. 1980), holding that "an injury arises out of and in the course of employment if it has rational causal connection to the work and occurs while the employee is engaged in duties of his

employment; and any reasonable doubt as to whether an injury 'arose out of the employment' is to be resolved in favor of the employee." 597 S.W.2d 734.

Appellant also contends that Roger Tooley was his supervisor and had actual knowledge of the injury on the day it occurred, which would satisfy the statutory notice requirement. Tenn. Code Ann. §50-6-201. An employee who relies upon the actual knowledge of the employer has the burden of proving the employer had actual knowledge of the time, place, nature and cause of the injury. Masters v. Industrial Garment Mfg. Co., Inc., 595 S.W.2d 811 (Tenn. 1980).

The appellant, Thomas Richard Cate, testified that:

(1) he first went to work for Charles Tooley in the early to mid '70s pulling and replacing vehicle transmissions;

(2) he subsequently worked as a miner, and then worked for Roger Tooley, who sold rebuilt transmissions;

(3) he stopped working for Roger Tooley in 1991 when the business closed, and went back to work for Charles Tooley,

(4) his job involved rebuilding transmissions and picking up parts, and

(5) while working for Charles Tooley, he took instructions from Rick Tooley, Charles Tooley, Ron Bunch, Roger Tooley, and Barbara Tooley.

Appellant testified that, on March 9, 1992, Roger Tooley "had come to my house early that morning and woke us up. He woke my wife first, and he was drinking pretty heavy which was usual, you know. And he was wanting me to go pick up some parts, and I was telling him I was needing to go to work that day. But I felt obligated to do that, too. So he told me to go to Chris Cate's and pick them up. He had already talked to him about it. And I don't know for sure if I took him straight home or if we run around. You know, he would have me run around places because he would get drunk like that and have me run him a lot of places here and there and talk to people." Appellant drove to Chris Cate's garage to pick up parts as requested by Roger Tooley; he had an accident when a dog or fox ran in front of the truck he was driving. As a result of the accident, he injured his back and has undergone several surgeries.

Lisa Cate, wife of the appellant, testified that appellant and Roger Tooley were "drinking buddies." On the morning when appellant was injured, Roger Tooley had come to appellant's mobile home around 5:30 a.m.; he was drinking and very loud, and he wanted appellant to pick up parts at the garage operated by appellant's brother. Chris Cate, brother of the appellant, testified that he operated a garage and that Roger and Rick Tooley would sometimes buy parts from him. He testified that appellant had wrecked at his place of business, and had not picked up any parts before he wrecked.

Charles Tooley testified that:

(1) Roger Tooley did not work for him,

(2) he never heard Roger Tooley give instructions to appellant to do something while he was on the clock at Charles Tooley's,

(3) he never authorized Roger Tooley to give instructions to Charles Tooley's employees,

(4) he never instructed his employees to do things for Roger Tooley,

(5) he did not pay them to do anything for Roger Tooley,

(6) he learned of the appellant's accident a day or two after it occurred, but it had nothing to do with him, and

(7) he first learned of appellant's worker's compensation claim when he was served with process in this lawsuit about a year later.

Roger Tooley did not testify and no other evidence was elicited to establish whether Roger Tooley was an employee of Charles Tooley.

Appellant was terminated and rehired by Charles Tooley on several occasions. In the calendar year, 1992, appellant worked less than three weeks for Charles Tooley, and had been paid a total of $808.10 at the time of his injury on March 9, 1992. Barbara Tooley wrote a letter on Tooley Automatic Transmission service letterhead, dated April 14, 1992, "to verify that Thomas R. Cate, Jr. was employed by us at the time of his accident for the gross amount of $300.00 per week." Appellant insists that the trial judge failed to give appropriate weight to this letter. The issue, however, was not whether Charles Tooley employed appellant, but whether he was at work and engaged in activity in furtherance of his employer's business at the time of the injury. Other evidence in the

record addressed that issue directly. Following cross-examination about inconsistent statements he had made in an affidavit and in his deposition, the following testimony of the appellant (on the issues of notice and whether he was injured in the course and scope of employment) is very enlightening:

Q And you didn't get paid for the date this accident happened, did you, by Charles Tooley?

A No, sir

Q And in fact, you had no expectation of being paid by him because you were working for Roger that day, isn't that true?

A Well, I was doing the errands for Roger. I don't know who – Roger is the one that had me to do it, yes.

Q You didn't have any expectation of being paid by Charles Tooley for the mission that you had done that morning, did you?

A Not that I know of.

. . . . . .

Q If Roger asked you to do him a favor, a personal favor, you felt obligated because of the relationship and friendship and the history between you; is that true?

A Yes.

. . . . . .

Q Well, you are sure Roger would have paid you?

A Well, one of them would have.

Q Do you remember saying that you were pretty sure Charles wouldn't pay you?

A I'd say he wouldn't have, yes.

Q All right. You didn't call Tooley Transmission on the day of this accident, did you?

A No sir. I don't believe I did.

Q Okay. You didn't call them the next day either, did you?

A I was thinking I called them the next morning to let them know I didn't come to work. Now, I'm not for sure, but I think I did.

Q So sitting here today, you can't say with any degree of certainty that you called them to tell them what had happened or where you were or why you were doing it when it happened?

A No, sir.

Q But it's your testimony today that based upon the information available to you, what you were doing at the time of the accident had nothing to do with Charles Tooley or Tooley Automatic Transmission Services?

A Not that I know of, no.

Upon this record, the trial judge said: "But on the date and time of this accident and injury, the court must further find that the plaintiff was not acting within the scope or purpose of the employment with Charles Tooley and, in fact, was without the knowledge of Charles Tooley." He further found: "Where the employee had failed to show up for work, was not performing any business on behalf of the employer, did not tell his employer that he was doing something for Roger Tooley that day, the mere fact that the employer knew that the employee had been injured does not rise to the implied notice permissible under the law."

Where the trial judge has made a determination based upon the testimony of witnesses whom he has seen and heard, great deference must be given to that finding in determining whether the evidence preponderates against the trial judge's determination. *See* Humphrey v. David Witherspoon, Inc. 734 S.W.2d 315 (Tenn. 1987). The appellant's testimony was contradicted by the testimony of other witnesses and by his own inconsistent statements in his affidavit and deposition. He admitted that he was not doing anything for his employer at the time of the injury and that he did not expect to be paid by his employer. He also failed to prove that Roger Tooley, who allegedly had actual knowledge of the injury, was his supervisor.

The evidence does not preponderate against the findings of the trial judge and the judgment of dismissal is affirmed. The cost of this appeal is taxed to the appellant/plaintiff.

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Howell N. Peoples, Special Judge

_____
William M. Barker, Justice

_____
John K. Byers, Senior Judge

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AT KNOXVILLE

FILED

January 12, 2000

Cecil Crowson, Jr.
Appellate Court
Clerk

THOMAS RICHARD CATE Plaintiff-Appellant	)	JEFFERSON CIRCUIT No. 12701, 13485
v.	)	No. E 1998-00220-WC-R3 CV
	)	Hon. Richard R. Vance
	)	Judge
CHARLES TOOLEY,dba TOOLEY AUTOMATIC TRANSMISSION SERVICE Defendant-Appellee	)	

JUDGMENT ORDER

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference;

Whereupon, it appears to the Court that the memorandum Opinion of the Panel should be accepted and approved; and

It is, therefore, ordered that the Panel's findings of facts and conclusions of law are adopted and affirmed and the decision of the Panel is made the Judgment of the Court.

Costs on appeal are taxed to the appellant/plaintiff, Thomas Richard Cate and surety, Richard Baker, for which execution may issue if necessary.

01/12/00