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

BEATRICE SCOTT NALL v. E. I. DUPONT DE NEMOURS AND COMPANY , ET AL.

Direct Appeal from the Probate Court for Humphreys County
No. P0749-93, Allen W. Wallace, Judge

No. M1999-00375-WC-R3-CV - Mailed May 23, 2000
Filed - January 9, 2001

The employer avers that the trial judge erred in finding that the claim was not barred by the employee's willful misconduct, failure to use a safety appliance and failure or refusal to perform a duty required by law. Tenn. Code Annotated § 50-6-110.

Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of right; Judgment of the Probate Court Affirmed.

LOSER, SP. J., delivered the opinion of the court, in which DROWOTA, J., and GAYDEN, SP. J., joined.

John R. Lewis, Nashville, and Wm. J. Peeler, Waverly, for the appellant, E. I. DuPont de Nemours and Company.

Charles L. Hicks, Camden, for the appellee, Beatrice Scott Hall.

Paul G. Summers, Attorney General and Reporter, E. Blaine Sprouse, Assistant Attorney General, for the appellee, Second Injury Fund.

OPINION

This workers' compensation case 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 or claimant, Beatrice Nall, was 59 years old at the time of the trial, which began on October 9, 1998 and ended on October 12, 1998. She has a high school education, some business college and experience as a factory worker, waitress and secretary, as well as 16 years with DuPont, where she worked as a utility worker from 1977 until 1981, when she was promoted to a wet treatment operator. She suffered a previous injury in 1983, from which she received an award based on eighteen percent to the body as a whole.

The claimant's duties as a wet treatment operator required her to unload railroad tank cars, which she had done for 12 to 15 years before suffering the present injury in 1993. Because some of the tank cars contained hazardous material, DuPont had established specific standard job procedures (SJP'S) for the unloading of railcars on the plant site. The claimant was intimately familiar with the SJP for unloading sulfuric acid cars. As the SJP'S were updated and changed, the claimant would review them again and initial them to document her review and understanding of the procedure. She last reviewed the SJP for unloading sulfuric acid from railcars on February 11, 1993, two months before her second acid related accident. All safety procedures were strictly enforced by the company. None of the several DuPont employees who testified was aware of anyone unloading acid cars without having on an acid suit.

The applicable SJP required that the operator wear safety equipment and specifically required the wearing of an acid suit while unloading a railcar containing acid. On the day of her injury, the claimant attempted to inspect such a railcar, before commencing the unloading procedures, without donning the required safety equipment, particularly the acid suit. As she was doing so, she was sprayed with sulfuric acid and severely burned.

The claimant initiated this action to recover medical and disability benefits as provided by the Workers' Compensation Act. Tenn. Code Ann. § 50-6-101 et seq. By its answer, the employer, DuPont, denied that the injury was compensable and affirmatively asserted, in general terms, that the injury was barred by Tenn. Code Ann. § 50-6-110. After a trial on the merits, the trial judge found that the injury was one arising out of and in the course of employment, that the employer had failed to establish by a preponderance of the evidence that the claimant willfully violated a safety rule or refused to wear a safety device and that the claimant is permanently and totally disabled as a result of her injuries. The award was correctly apportioned between the employer and the second injury fund.

The employer has appealed, contending (1) the trial judge erred in finding that the claim is not barred by Tenn. Code Ann. § 50-6-110(a) and (2) the trial judge erred in entering an order finding that the plaintiff was permanently and totally disabled. Our review of the trial court's findings is de novo upon the record of the trial court, accompanied by a presumption of the correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). The reviewing court is not bound by a trial court's factual findings but instead conducts an independent examination of the record to determine where the preponderance of the evidence lies. Galloway v. Memphis Drum Serv., 822 S.W.2d 584, 586 (Tenn. 1991).

Workers' compensation benefits are payable without regard to the fault of the employer or the care exercised by the employee, Morrison v. Tennessee Consol. Coal Co., 39 S.W.2d 272, 162 Tenn. 523 (1931), except in cases where the employee is guilty of willful misconduct, intentional self-inflicted injury, intoxication or willful failure or refusal to use a safety appliance or to perform a duty required by law. Tenn. Code Ann. 50-6-110. By its first issue, DuPont contends its employee, Ms. Nall, should be barred from recovering benefits because of willful misconduct, failure to use a safety appliance and failure to perform a duty required by law. Specifically, the employer

argues that the employee's claim is barred because she attempted to vent the tank car by loosening the dome top lid without following proper unloading procedures and without wearing an acid suit, and because she was not wearing safety shoes. It further insists that OSHA requires the wearing of an acid suit, but fails to cite us to any particular section of that federal act.

We understand the Occupational Safety and Health Act (OSHA) to be one which places certain requirements on employers to provide safe working conditions for its employees. The fact that an employer complies with those requirements, however, is no defense to a claim for workers' compensation benefits under Tennessee law. It is undisputed that the claimant was not wearing a safety suit or safety shoes at the time of her injury. However, she denied that she was loosening the dome lid at the time, but testified that she was simply inspecting the railcar and preparing to unload it, before donning the acid suit. We find in the record no direct evidence otherwise, although the company doctor, Dr. McClure, testified that the claimant told him that she was loosening the dome lid so she would not have to wear the hot acid suit for a long period of time. She denied making that statement to Dr. McClure.

The trial judge believed Ms. Nall. Where, as here, the trial judge has seen and heard the witnesses, especially if issues of credibility and weight to be given oral testimony are involved, considerable deference must be accorded those circumstances on review. Humphrey v. David Witherspoon, Inc., 734 S.W.2d 315 (Tenn. 1987).

The essential elements of the defense of willful misconduct are (1) an intention to do an act, (2) purposeful violation of orders and (3) an element of perverseness. Insurance Company of America v. Hogsett, 486 S.W.2d 730 (Tenn. 1972). None of those elements is shown to exist in the present case.

Where, as here, an employee is performing the duties assigned to her by her employment contract and is acting in furtherance of the employer's interests, regardless of the fact that she performs those duties in an unnecessarily dangerous or rash manner, it cannot be said that her resulting injuries did not arise out of her employment, provided that her conduct could be reasonably anticipated. Wright v. Gunther Nash Mining Construction Co., 614 S.W.2d 796 (Tenn. 1981).

For all of the above reasons, the evidence fails to preponderate against the trial court's finding that the injury is compensable.

The remaining issue involves the extent of the claimant's resulting vocational disability. When an injury, not otherwise specifically provided for in the Act, totally incapacitates a covered employee from working at an occupation which produces an income, such employee is considered totally disabled. Tenn. Code Ann. § 50-6-207(4)(B).

The claimant received sulfuric acid burns to twenty-three percent of her body. The physician who treated those injuries, Dr. Shack, estimated her permanent impairment from those injuries to be at least fifty-five percent to the whole body. The claimant also suffered a shoulder injury when

she fell while attempting to escape the spray. Another doctor estimated her permanent medical impairment from that injury to be sixteen percent to the whole body. A vocational expert testified by deposition in October of 1998 that the claimant is unemployable. Her own testimony is that she cannot work.

While the record does contain conflicting expert testimony as to whether the claimant can work, that conflict was resolved by the trial judge and we are not persuaded that the preponderance of the evidence is other than as found by the trial judge. The judgment of the Probate Court for Humphreys County is affirmed and the cause remanded to that court for any further proceedings which may be necessary. Costs on appeal are taxed to the appellants.

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

BEATRICE SCOTT NALL v. E.I. DUPONT DE NEMOURS AND COMPANY and KEMPER INSURANCE COMPANIES

Probate Court for Humphreys County
No. P0749-93

No. M1999-00375-SC-WCM-CV - Filed - January 9, 2001

JUDGMENT ORDER

This case is before the Court upon motion for review filed by the appellants, E.I. Dupont De Nemours and Company and Kemper Insurance Companies, pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B) 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 motion for review is not well-taken and should be denied.

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

Costs will be paid by the defendants-appellants, E. I. duPont deNemours & Company and Kemper Insurance Companies, and their surety, for which execution may issue if necessary.

PER CURIAM

Drowota, J., not participating