IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
August 16, 2002 Session

SANDRA KAY POWERS, ET AL. v. AMERICAN INTERSTATE INSURANCE COMPANY, ET AL.

Direct Appeal from the Chancery Court for Gibson County
Nos. H4259 and H4372 George R. Ellis, Chancellor

No. W2001-02751-WC-R3-CV - Mailed November 5, 2002; Filed December 11, 2002

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. In this appeal, the employer insists the competent evidence preponderates against the trial court's finding that the deaths of two employees occurred in the course of their employment and in favor of a finding that the employees had materially deviated from their employment at the time of their deaths in a vehicular accident. As discussed below, the panel has concluded the judgment of the trial court should be affirmed.

Tenn. Code Ann. § 50-6-225(e) (2001 Supp.) Appeal as of Right; Judgment of the Chancery Court Affirmed

JOE C. LOSER, JR., SP. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and W. MICHAEL MALOAN, SP. J., joined.

Stephen Craig Kennedy, Selmer, Tennessee, for the appellants, Staton's Home Furnishings and American Interstate Insurance Company

Art D. Wells, Jackson, Tennessee, for the appellee, Sandra Kay Powers, as guardian and next friend of Jessica Witherspoon, Billy Joe Witherspoon and Cody Witherspoon, minor children of David Witherspoon, deceased

Gayden Drew, Jackson, Tennessee, for the appellee, Robbie McEwen, administrator of the Estate of Timothy Gallimore, deceased

MEMORANDUM OPINION

By these consolidated civil actions, the claimants sued to recover workers' compensation benefits, as provided by the Workers' Compensation Act, Tenn. Code Ann. § 50-6-101 et seq, for the accidental deaths of David Witherspoon and Charles Timothy Gallimore on July 29, 1999. The employer, Staton's Home Furnishings, and its insurer, American Interstate Insurance Company, denied liability. After a trial on the merits, the trial court awarded death benefits to the estate of Gallimore and dependents' benefits to the children of Witherspoon. The employer and its insurer have appealed.

For injuries occurring on or after July 1, 1985, appellate review is de novo upon the record of the trial court, accompanied by a presumption of correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2001 Supp.). The reviewing court is required to conduct an independent examination of the record to determine where the preponderance of the evidence lies. Wingert v. Government of Sumner County, 908 S.W.2d 921, 922 (Tenn. 1995). The standard governing appellate review of findings of fact by a trial court requires the Special Workers' Compensation Appeals Panel to examine in depth a trial court's factual findings and conclusions. GAF Bldg. Materials v. George, 47 S.W.3d 430, 432 (Tenn. 2001). Where 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, because it is the trial court which had the opportunity to observe the witnesses' demeanor and to hear the in-court testimony. Long v. Tri-Con Ind., Ltd., 996 S.W.2d 173, 178 (Tenn. 1999). The trial court's findings with respect to credibility and weight of the evidence may generally be inferred from the manner in which the court resolves conflicts in the testimony and decides the case. Tobitt v. Bridgestone/Firestone, Inc., 59 S.W.3d 57, 61 (Tenn. 2001).

Gallimore and Witherspoon were employed by Staton's on the date of their fatal accident. Their duties included delivering and picking up furniture, using a company van, and collecting past due accounts from customers who rented furniture from the employer. Around noon on the day of the accident, they delivered a piece of furniture to Witherspoon's mother. Sometime thereafter, they delivered a table to Mark Russell's house in Dresden. After leaving the Russell house in the company van, they were involved in the fatal accident. There is a factual dispute as to whether the employee's had permission to deliver the table, which did not belong to the employer but had been abandoned and left there by a former tenant. The trial court resolved conflicting testimony on the issue in favor of the appellees. In any event, the appellants contend benefits should be denied because the employees deviated from their usual route in order to deliver the table to Russell.

Under the Tennessee Workers' Compensation Law, injuries by accident arising out of and in the course of employment which cause either disablement or death of the employee, Tenn. Code Ann. § 50-6-103(a), and occupational diseases arising out of and in the course of employment which cause either disablement or death of the employee are compensable. Tenn. Code Ann. § 50-6-102(a)(12). An accidental injury arises out of one's employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury, GAF Bldg.

Materials v. George, 47 S.W.3d 430, 432 (Tenn. 2001), and occurs in the course of one's employment if it occurs while an employee is performing a duty he was employed to do. Fink v. Caudle, 856 S.W.2d 952, 958 (Tenn. 1993).

The appellants first contend the trial court erred in allowing David Witherspoon's mother to testify that David had told her earlier in the day that he had permission to take the table to Mark Russell's home. We agree that the statement should have been excluded as inadmissible hearsay. However, there was other credible evidence on which the trial court could have found the same fact. Sandra Kay Powers testified that Lee Blackwell, Staton's district manager, told her he had instructed Witherspoon and Gallimore to take the table to Russell's house; and Marguerite Frazier testified that Cindy Uselton, Staton's store manager, told her she had instructed Witherspoon and Gallimore to do the same thing.

We are not at liberty to set aside a final judgment from which relief is available and otherwise appropriate unless, from a consideration of the whole record, an error involving a substantial right more probably than not affected the judgment or would result in prejudice to the judicial system. TRAP 36(b). From our independent examination of the whole record, we are persuaded the error was harmless in light of that rule.

The appellants next contend the trial court erred in excluding Cindy Uselton's answers to questions as to what she knew and when and how she knew it. Since no offer of proof was made, we do not have the benefit of knowing what her answers would have been. The evidence probably should have been allowed but we are not persuaded her answers would have affected the judgment or resulted in prejudice to the judicial system.

The appellants next contend the trial court erred in finding that the table delivered to Russell was owned by the employer. The table had been left in Staton's warehouse or showroom by a previous tenant and the managers wanted it removed. Regardless of the ownership, the table was removed by the decedents to accommodate the employer. The finding of ownership was not essential to the outcome of the case and the finding, if error, was harmless.

The appellants finally contend the trial court erred in finding that the accident occurred in the course of the deceased employees' employment because the chancellor stated in his ruling, "The court finds that the defense has failed to rebut the presumptions of 55-10-311 and 55-10-312 and, therefore, finds that the accident occurred while Tim Gallimore and David Witherspoon were in the course of employment under the workmen's comp laws of the State of Tennessee." Tenn. Code Ann. §§ 55-10-311 and 312 create a rebuttable presumption by which the negligence of the driver of a motor vehicle may be imputed to the vehicle's owner. The sections have no application in workers' compensation cases. We agree with the appellant that the trial court's application of the statutes to this case was error. However, the preponderance of the proof is that the main purpose of the employees' trip was to carry out the employer's business, either the collection of past due accounts or removal the table from the store, and that the accident occurred during a deviation from the usual course of travel.

An injury which occurs while an employee is engaged in a trip made necessary by the requirements of his employment is compensable unless the injury occurs while the employee is deviating from a route mandated by his employer and which materially increases the risk of injury. Watson v. U. S. Fire Ins. Co., 577 S.W.2d 668, 669 (Tenn. 1979). Generally, a detour or deviation which does not cause or contribute to an employee's death or injury is of no consequence. Dailey v. Russann Lumber Co., Inc., 590 S.W.2d 933, 935 (Tenn. 1979). Thus, the determinative factual issue in the case is whether the deviation materially increased the risk of injury or caused or contributed to the deaths of Mr. Gallimore and Mr. Witherspoon. The only evidence on that point is that the accident occurred during the deviation.

From our independent examination of the record in this case, we are not persuaded that the detour or deviation of the deceased employees materially increased the risk of injury or caused or contributed to their deaths. It is not enough to say the accident occurred during the deviation. For that reason, the judgment is affirmed. Costs on appeal are taxed to the appellants.

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JOE C. LOSER, JR.

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JUDGMENT

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 fact 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 Appellants, Staton's Home Furnishings and American Interstate Insurance Company, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM