

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

December 18, 2002 Session

LUCILLE COTHAM, ET AL. v. PERRY COUNTY, ETC.

**Direct Appeal from the Circuit Court for Perry County
No. 3243 Timothy L. Easter, Judge**

**No. M2002-01723-WC-R3-CV - Mailed - March 5, 2003
Filed - April 7, 2003**

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 appellants insist the trial court erred in summarily dismissing the claim. As discussed below, the panel has concluded there is no genuine issue as to a material fact and that the employer is entitled to judgment of dismissal as a matter of law.

Tenn. Code Ann. § 50-6-225(e) (2002 Supp.) Appeal as of Right; Judgment of the Circuit Court Affirmed

JOE C. LOSER, JR. SP. J., delivered the opinion of the court, in which ADOLPHO A. BIRCH, JR., J., and JOHN K. BYERS, SR. J., joined.

Gene Hallworth, Columbia, Tennessee, for the appellant, Pamela J. Honey

Robert E. Kolarich and L. R. DeMarco, Nashville, Tennessee, for the appellant, Lucille Cotham

Bradford D. Box and Geoffrey A. Lindley, Jackson, Tennessee, for the appellees, Perry County and Perry County Sheriff's Department

MEMORANDUM OPINION

This civil action to recover workers' compensation benefits was initiated by the former wife, Pamela Jean Honey, of the deceased employee, Ricky Dale Cotham, to recover workers' compensation benefits for two of his dependent children. His widow, Lucille Cotham, intervened. The trial court granted summary judgment of dismissal. The plaintiff and intervening plaintiff have appealed.

The standard of review on appeal of a grant of summary judgment is de novo upon the record without a presumption of correctness to determine whether the absence of genuine and material factual issues entitle the movant to a judgment as a matter of law. Goodloe v. State, 36 S.W.3d 62, 65 (Tenn. 2001). The movant must either affirmatively negate an essential element of the non-movant's claim or conclusively establish an affirmative defense. Mere conclusory assertions that the non-movant has no evidence are insufficient; and if the movant does not negate a claimed basis for the suit, the non-movant's burden to produce evidence establishing the existence of a genuine issue for trial is not triggered and the motion for summary judgment must fail. If, however, the movant successfully negates a claimed basis for the suit, the non-movant may no longer simply rely upon the pleadings, but must then establish the existence of the essential elements of the claim or the non-existence of the defense. Finister v. Humboldt General Hosp., Inc., 970 S.W.2d 435, 438 (Tenn. 1998).

The complaint avers that the deceased employee, Mr. Cotham was killed in an automobile accident which arose out of and in the course of his employment as a deputy sheriff. The employer answered that the injury did not occur in the course of employment because the employee was off duty and on his way home from work at the time of the accident.

The undisputed evidence presented before the trial court was that on the day of the accident, the employee was scheduled to work from 7:00 a.m. to 5:00 p.m.. Near the end of the shift, he returned his patrol car, went off duty, picked up his personal vehicle and headed home. On his way home, still armed and in uniform, Deputy Cotham was involved in a fatal accident.

The appellants contend that it could be inferred from the facts that the employee was in the course of employment at the time of the accident, because a police officer is on call at all hours. However, our examination of the record reveals no evidence that Deputy Cotham was responding to a call when the accident occurred. He was simply on his way home after work. The appellee relies on the general rule that employees are not covered by the Workers' Compensation Act while traveling to and from work. However, in Mayor and Alderman of Town of Tullahoma v. Ward, 173 Tenn. 91, 114 S.W.2d 804 (1937), cited by the appellants, the Court held that a police officer, who was killed by a drunk driver while walking home from work, was entitled to workers' compensation benefits. In that case, the Supreme Court, finding material evidence to support the trial court's finding that Ward was on duty at the time of his fatal accident, affirmed an award of benefits. The case is clearly distinguishable from the one before this tribunal, as the trial court duly noted, on the facts.

Summary judgment is almost never an option in workers' compensation cases. Berry v. Consolidated Systems, Inc., 804 S.W.2d 445, 446 (Tenn. 1991). However, when there is no dispute over the evidence establishing the facts that control the application of a rule of law, summary judgment is an appropriate means of deciding such issues as whether an action is barred by the applicable statute of limitations or by *res judicata*; whether a party has standing; or whether the court has jurisdiction. Id at 446.

The applicable rule here is the general rule that an injury which occurs while an employee is en route to or from work is not compensable because it does not occur in the course of employment. McCurry v. Container Corp. of America, 982 S.W.2d 841, 844 (Tenn. 1998). Unfortunately for the appellants, this case does not fit within any exception to that rule. From our examination of the record on appeal, it is undisputed that Deputy Cotham was off duty and on the way home from work when the fatal accident occurred on a public road. Under such circumstance, summary judgment is appropriate.

The judgment is therefore affirmed. Costs are taxed to the appellants.

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 will be paid by the Appellants, Pamela J. Honey and Lucille Cotham, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM