

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

December 9, 2004 Session

JOHN BARDEN v. ALPHA BUILDING CORPORATION, ET AL.

**Direct Appeal from the Circuit Court for Shelby County
No. CT-000855-02 Kay Spalding Rubilio, Judge**

No. W2004-01279-WC-R3-CV - Mailed March 23, 2005; Filed April 25, 2005

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated section 50-6-225(e)(3) (Supp. 2003) for hearing and reporting to the Supreme Court, findings of fact and conclusions of law. The trial court found the employee proved that his injury was compensable. We affirm.

Tenn. Code Ann. § 5-6-225(e)(3) (Supp. 2003) Appeal as of Right; Judgment of the Trial Court Affirmed.

W. FRANK BROWN, III, SP. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and MARTHA B. BRASFIELD, SP. J., joined.

Carol M. Hayden, Memphis, Tennessee, for the Appellants, Alpha Building Corporation and Maryland Casualty Company

Carl Wyatt, Memphis, Tennessee, for the Appellee John Barden

MEMORANDUM OPINION

I. Facts

Plaintiff/Appellee, John Barden ("Mr. Barden") sued Alpha Building Corporation ("Alpha") and its workers' compensation insurance carrier, Maryland Casualty Company, (collectively referred to as the "Appellants") seeking workers' compensation benefits for an on-the-job injury that allegedly occurred while working as an employee of Alpha. The case was

tried in the Circuit Court for Shelby County on April 19 and 20, 2004, and the trial judge granted Mr. Barden's request for workers' compensation benefits.

Mr. Barden began working for Alpha in October of 1997. At the time of his injury, Mr. Barden was an Alpha Project Manager in charge of all Alpha projects at the Southwest Community College ("SCC") campus as well as six other locations. At SCC, Mr. Barden dealt with SCC's physical plant director, Mr. John Murry Harris ("Mr. Harris"). Mr. Harris testified that he asked Mr. Barden to move the steel straps and that Mr. Barden offered to add the steel strap project to the coal yard project, a/k/a Alpha D.O. # 9074.

Mr. Barden alleged that on Thursday, September 13, 2001, he suffered a back injury while unloading steel straps at the Macon Cove campus of SCC. He testified that he was trying to free a couple of pieces of steel that had gotten caught on the dump trailer when the steel jerked and caught him in the back. Mr. Barden testified that he was delivering steel straps as a part of Direct Work Order number ("D.O. #") 9074 for Alpha. D.O. # 9074 was dated June 19, 2001. At trial, Mr. Barden produced a version of D.O. # 9074 that noted the steel strap project and the Appellants produced its copy of D.O. # 9074 that only referenced a coal removal project. The Appellants contend that Mr. Barden altered the D.O. # 9074 for purposes of this lawsuit.

After suffering his back injury, Mr. Barden was terminated due to lack of work. Alpha initially paid workers' compensation benefits but stopped providing them upon receiving an anonymous tip that Mr. Barden had been working for his own company at the time of his injury. As a result of his injury, Mr. Barden suffered a 9% permanent medical impairment. The parties agreed upon such. He was awarded a 24% impairment rating at the trial.

The Appellants have appealed the decision of the trial court. They claim that Mr. Barden was not working for Alpha at the time of his injury because Alpha keeps extensive records and yet has no record of the project and that Mr. Barden was running his own small construction business during the time of his injury. Alpha produced payment records as well as its version of D.O. # 9074 to show that it had no record of Mr. Barden's steel strap work. In fact, the Alpha records show that D.O. # 9074 was final billed in June 2001. Mr. Barden testified that he might have forgotten initially to write down the steel strap project on D.O. # 9074 because he had many projects going at the same time. However, he testified that he knew about the steel strap project when he first created D.O. # 9074 in June 2001. Mr. Barden admitted that he ran a small construction company called ICS that brought in more than \$78,000 in revenue in 2001. However, he testified that ICS handled only two projects at SCC that Alpha rejected. The two projects were open bid projects to purchase a steam cleaner and to contract a drywall company to perform signage work for the school. Mr. Barden originally formed ICS in order to handle the steam cleaner project. According to Mr. Barden, both jobs were open contracts with the State of Tennessee, and Alpha did not want to bid for the work. Mr. Barden testified that he contacted his supervisor regarding the open contracts and that his supervisor allegedly said to "take care of it." However, Mr. Barden's supervisor testified that he would never have told Mr. Barden to start his own company to handle the projects. In any event, the Plaintiff did not maintain business records for ICS but was able to report approximately \$78,000 in revenue in 2001 and made a profit of over \$7,000.

Sometime after his termination in October 2001, Mr. Barden delivered his remaining files from his work at the SCC campus to David Lovejoy's office. Mr. Lovejoy was the project manager for Alpha at the University of Memphis. The files that Mr. Barden delivered included D.O. # 9074 that did not mention the steel straps.

The Appellants point to additional testimony that they contend supports their position. First, Mr. Barden testified that Devin McSorley performed some of the work on the steel strap project. However, no such payment is recorded in Alpha's records. Mr. Barden explained the lack of record by testifying that he probably paid Mr. McSorley with "petty cash." However, Alpha's petty cash records are tied to internal codes that the project manager is required to list, and the records do not show that any cash was used for job # 9074. In addition, Alpha points out that Mr. McSorley was terminated from Alpha on August 22, 2001, which was before Mr. Barden's injury.

Second, Alpha relies upon the fact that the physical plant work request mentioning the steel straps was dated July 10, 2001, had a start date of July 16, 2001, and had an end date of July 30, 2001. Mr. Barden produced and testified about a work order and work request reflecting the date of the request, the start date, and the finish date. Counsel for the Appellants also questioned the custodian of Alpha's records, David Lovejoy, about whether the work order document was included in Alpha's files. Mr. Lovejoy produced Alpha's entire file on D.O. # 9074 and testified that the work order was not part of the Alpha file that Mr. Barden had provided to him. Mr. Harris also testified that Mr. Barden's version of D.O. # 9074 contained an automatically generated document from the SCC physical plant from July 16, 2001, and a work request from the academic department to the SCC physical plant dated July 10, 2001. Despite the July dates, Mr. Barden testified that he knew of the steel strap project on June 19, 2001, when he created D.O. # 9074.

II. Standard of Review

The standard of review in a workers' compensation case is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (Supp. 2003); *Houser v. Bi-Lo, Inc.*, 36 S.W.3d 68, 70-71 (Tenn. 2001). The application of this standard requires us to weigh in more depth the factual findings and conclusions of the trial courts in workers' compensation cases to determine where the preponderance of the evidence lies. *Vinson v. United Parcel Serv.*, 92 S.W.3d 380, 383-84 (Tenn. 2002). When the trial court has seen the witnesses and heard the testimony, especially when issues of credibility and the weight of testimony are involved, we must extend considerable deference to the trial court's findings of fact. *Houser*, 36 S.W.3d at 71. Questions of law are reviewed *de novo* without a presumption of correctness. *Tucker v. Foamex, L.P.*, 31 S.W.3d 241, 242 (Tenn. 2000).

III. Analysis

The only issue presented for appeal is whether the trial court erred in finding that Mr. Barden sustained an injury in the course and scope of his employment with Alpha.

In a workers' compensation case, the plaintiff must prove by a preponderance of the evidence that his or her injuries have a rational connection to the work and have occurred while he or she was engaged in the duties of his or her employment. *Orman v. Williams Sonoma, Inc.*, 803 S.W.2d 672, 676 (Tenn. 1991). Meeting this causation standard requires the plaintiff to prove by a preponderance that the injury arose out of and "in the course of" the employment. *See e.g., Hill v. Eagle Bend Mfg., Inc.*, 942 S.W.2d 483 (Tenn. 1997). However, where there is doubt as to causation, all reasonable doubt must be resolved in favor of the employee. *See Long v. Tri-Con Indus., Ltd.*, 996 S.W.2d 173, 177 (Tenn. 1999).

The Appellants first contend that the trial judge's ruling establishes that Mr. Barden failed to prove causation. In this case, at the conclusion of the proof, the trial judge made a statement as to how she planned to rule. The Appellants have quoted part of the trial judge's statement suggesting that it reveals Mr. Barden's failure to meet his burden of proof. The trial court stated the following:

I have absolutely no reason to doubt the plaintiff, Mr. Barden.

He's articulate. He's intelligent. He was valued by the company for the work that [he] did.

...

But at any rate, there's no way to know. On an ordinary case, probably, I would be saying I have no reason to doubt the plaintiff and no reason to doubt the defendant if the plaintiff loses. In workers' comp we know that is not the law. The law is to give every favorable advantage to the plaintiff in this.

So in this situation, I would find for the plaintiff, resolving the doubt in his favor.

The trial judge's statement at the end of the trial shows that she resolved the doubt in favor of Mr. Barden. She found his testimony to be credible and made her decision on the principle that reasonable doubt must be resolved in the employee's favor. *See Reeser v. Yellow Freight Sys. Inc.*, 938 S.W.2d 690, 692 (Tenn. 1997). In this case the issue was whether Mr. Barden was working for Alpha or ICS when he was injured. Clearly the trial judge relied upon her impression of the credibility of the live witnesses and resolved the issue in favor of Mr. Barden. This court must give considerable deference to her findings.

The Appellants further argue that Alpha's records do not show that Mr. Barden performed the steel strap project, was paid for it, or represented Alpha in performing the task. Alpha contends that its records are extensive and that the absence of any record shows that Mr. Barden was not working for Alpha. However, at the trial, the following facts were established: (1) Mr. Barden had considerable leeway from Alpha as a project manager and was able to do various projects for SCC without supervision; (2) Besides Mr. Barden, the only other custodian of the records was a part-time administrative assistant; (3) Mr. Barden had many projects occurring at one time; and (4) Mr. Barden delivered the steel straps to the Macon Grove campus. Clearly Alpha depended heavily on Mr. Barden's organizational skills to assure that it kept extensive records. While the lack of records is some evidence that Mr. Barden may not have been working for Alpha at the time of his injury, Mr. Barden's testimony contradicts that

evidence with positive testimony that he was working for Alpha. A decision between the absence of records and Mr. Barden's testimony is clearly a question that depends heavily upon Mr. Barden's credibility. As such, we give considerable deference to the trial judge's decision.

The Appellants also argue that the trial court's error resulted from the judge's failure to carefully consider the evidence. Specifically, the Appellants point to the dates in which the events took place. The Appellants argue that the evidence shows that Mr. Barden falsified the copy of D.O. # 9074 that he submitted as exhibit 1. The Appellants' argument is based upon Mr. Barden's testimony that he knew about the steel strap project when he first began D.O. # 9074. The Appellants point out that Mr. Barden created D.O. # 9074 on June 19, 2001, and that the project was paid by Alpha by June 30, 2001. However, the first work request showing a need for moving the steel straps was submitted to the physical plant at SCC on July 10, 2001, requiring the work to begin on July 16, 2001, and be completed by July 30, 2001. The Appellants argue that it would be impossible for Mr. Barden to know on June 19, 2001, that the work request would be sent to the physical plant on July 10, 2001, and that the General Services department of the physical plant would not have the equipment to transport the steel straps themselves. As further evidence of Mr. Barden's falsification, they contend that the date of Mr. Barden's injury was after the date the steel straps were to be delivered and that Mr. Barden's signature on his version of D.O. # 9074 is different from the version he gave to Alpha.

However, without further evidence, the fact that the work request was dated July 10, 2001, does not establish that Mr. Barden did not know about the project before that date. Mr. Harris' testimony reveals that the work order is an automatically generated document. Mr. Harris also testified that he interacted with Mr. Barden on a regular basis during 2001. The record contains no testimonial or other evidence of whether Mr. Harris, as the director of the physical plant, could have known or did know about the steel straps before the work request was created on July 10, 2001. The Appellants never asked Mr. Harris whether he knew about the steel strap project before the work request was submitted. In addition, the record contains no evidence of when Mr. Harris told Mr. Barden about the steel strap project. Presumably, as the director of the physical plant, Mr. Harris may well have known that the general services department did not have the resources to move the steel. Without evidence of when Mr. Harris told Mr. Barden about the project, the trial court was left to consider only Mr. Barden's testimony. His testimony was consistent throughout the trial, and the trial judge properly weighed the credibility of his testimony in reaching her decision. For us to hold otherwise would require that we substitute our judgment for that of the trial court on issues of weight and credibility.

Although the Appellants have provided strong arguments for their positions, Mr. Barden also presented evidence on his own behalf. These are most difficult cases in which the trial court's decisions on credibility are crucial. The Appellants have the burden on appeal to prove the trial court erred in its judgment. They have failed to do so.

IV. Conclusion

The judgment of the trial court is affirmed. Costs of the appeal are taxed to the Appellants, for which execution may enter if necessary.

W. Frank Brown, III, Special Judge

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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 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, Alpha Building Corporation and Maryland Casualty Company, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM