

**IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
June 29, 2009 Session**

EDDIE AINSWORTH v. IWASH ONE, LLC

**Direct Appeal from the Chancery Court for Smith County
No. 7295 C. K. Smith, Chancellor**

**No. M2008-02460-WC-R3-WC - Mailed - September 3, 2009
Filed - October 6, 2009**

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) for a hearing and a report of findings of fact and conclusions of law. The Plaintiff was injured when he fell from a ladder during the construction of the Defendant's auto wash. The trial court held that the Plaintiff was a casual employee of the Defendant, and therefore not entitled to workers' compensation benefits. It further held that the Defendant was not subject to the Workers' Compensation Act because it did not have the required number of employees and because it was not in the construction business. On appeal, the Plaintiff contends that these findings were erroneous. We disagree, and affirm the judgment of the trial court.

**Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right;
Judgment of the Chancery Court Affirmed**

JEFFREY S. BIVINS, SP. J., delivered the opinion of the court, in which CORNELIA A. CLARK, J., and DONALD P. HARRIS, SR. J., joined.

Aubrey T. Givens, Nashville, Tennessee, for the appellant, Eddie Ainsworth.

James C. Bradshaw, III, and D. Andrew Amonette, Nashville, Tennessee, for the appellee, iWash One, LLC.

MEMORANDUM OPINION

Factual and Procedural Background

The Plaintiff, Eddie Ainsworth (“Ainsworth”), is a resident of Smith County, Tennessee. He is a licensed plumbing master and electrical master. At all times relevant to this action, Ainsworth was employed by Allinder Plumbing Company (“APC”) as a plumbing superintendent. Defendant iWash One, LLC (“iWash”) was a limited liability company formed for the purpose of owning and operating an auto wash on Old Hickory Boulevard in Nashville, Tennessee. George Hetzel was the managing partner of iWash.

Beginning sometime in 2005, iWash contracted with Conrad Construction (“Conrad”) to serve as the general contractor to build the auto wash. Conrad subcontracted the plumbing portion of the job to APC. Ainsworth was APC’s superintendent on the iWash job. In approximately early 2006, Hetzel, on behalf of iWash, and Ainsworth made an agreement for Ainsworth to “moonlight” for iWash on the project during the hours he was not working for APC. Under the moonlighting agreement, Ainsworth performed specified tasks for iWash, mostly involving installation or troubleshooting of plumbing, at the direction of Hetzel.¹ He was paid \$25.00 per hour. Ainsworth testified that he was primarily paid in cash for his work. Hetzel testified that payment was made by check, but no checks were introduced into evidence.

Ainsworth testified that Hetzel would notify him at some point during the portion of the day that he was working for APC if and when he should return to the job that evening to moonlight. Hetzel would tell him what specific project needed to be done, explain how to do it, and then Ainsworth would complete the task. Ainsworth supplied his own hand tools, but also used tools that were already present on the site. Ainsworth testified that he believed iWash owned those tools. On one occasion, Hetzel purchased and provided a specific die to be used in the threading of a pipe by Ainsworth. Ainsworth testified that Hetzel had the right to terminate his employment. He also testified that he did not have the authority to hire assistants, but that he would advise Hetzel if he needed help. Hetzel would then direct one of the other workers on the site to assist.

Ainsworth also testified that iWash had at least four (4) other employees. The only other evidence on that subject was the testimony of Hetzel, who stated that he hired four (4) men to place shrubbery on the site. He stated that their work had taken two (2) days to complete. The record does not indicate the dates these men worked at the site. Likewise, the record is devoid of any evidence that these workers ever worked for iWash again or if they were employed by iWash at the time Ainsworth was moonlighting for iWash.

¹ On cross-examination, Ainsworth admitted that his agreement with iWash violated the terms of his employment with APC. He further admitted that he initially told his supervisor at APC that his injury occurred as the result of a fall from a hayloft at home. He also agreed that some of his testimony at trial conflicted with his discovery responses and/or his previous deposition.

Ainsworth was injured on March 23, 2006, when he fell from a ladder at the construction site for the auto wash. The accident happened while Ainsworth was moonlighting for iWash. Ainsworth alleged that he was an employee of iWash, that iWash was subject to the workers' compensation law, and that he was entitled to receive benefits as a result of his injury.

Ainsworth was forty-two (42) years old at the time of trial. He is a high school graduate and attended UCLA for one and one-half (1-1/2) years. He is a licensed master plumber and master electrician. After his injury, he returned to work for APC for only a few days in April 2006. He testified that he was unable to perform any of his job functions due to pain. He later worked as a traveling project manager for a construction company known as Enhanced Construction from August 2006 until April 2007. He stated that he left that position because he was unable to do the amount of driving required because of pain. He has not worked since.

At trial, Ainsworth claimed that he was a regular employee of iWash and that iWash was subject to the Tennessee Workers' Compensation Act. iWash contended that Ainsworth was an independent contractor. Alternatively, iWash asserted that Ainsworth was a casual employee and therefore not entitled to benefits under the Tennessee Workers' Compensation Act. Ainsworth further claimed that iWash is subject to liability for workers' compensation benefits pursuant to Tennessee Code Annotated section 50-6-113(f)(1) because iWash was engaged in the construction business.

The trial court found that Ainsworth was not an independent contractor. Instead, it found that he was a casual employee of iWash, and therefore was not entitled to benefits under the workers' compensation law. It further found that iWash was not subject to the workers' compensation law because it did not have five (5) employees. In making the latter finding, the trial court found that the workers hired to install shrubbery at the auto wash were also casual employees. Finally, the trial court found that iWash was engaged in the business of "washing cars," not in the construction business. Ainsworth has appealed, contending that the trial court erred in making these findings.

Standard of Review

The standard of review of issues of fact is de novo upon the record of the trial court accompanied by a presumption of correctness. We may not overturn a trial court's findings of fact unless we find the preponderance of evidence is contrary to those findings. Tenn. Code Ann. § 50-6-225(e)(2) (2008). When credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge had the opportunity to observe the witness' demeanor and to hear in-court testimony. *Whirlpool Corp. v. Nakhoneinh*, 69 S.W.3d 164, 167 (Tenn. 2002). Where the issues involve expert medical testimony that is contained in the record by deposition, determination of the weight and credibility of the evidence necessarily must be drawn from the contents of the depositions, and the reviewing court may draw its own conclusions with regard to those issues. *Bohanan v. City of Knoxville*, 136 S.W.3d 621, 624 (Tenn. 2004); *Krick v. City of Lawrenceburg*, 945 S.W.2d 709, 712 (Tenn. 1997); *Elmore v. Travelers Ins. Co.*, 824 S.W.2d 541, 544 (Tenn. 1992). A trial court's conclusions of law are reviewed de novo upon the record with no presumption of correctness. *Perrin v.*

Gaylord Entm't Co., 120 S.W.3d 823, 826 (Tenn. 2003); *Ganzevoort v. Russell*, 949 S.W.2d 293, 296 (Tenn. 1997).

Analysis

The trial court denied Ainsworth workers' compensation benefits for three reasons. First, it found that he was a casual employee under Tennessee Code Annotated section 50-6-106(2), and therefore, not covered by the workers' compensation law. Second, it held that the four (4) landscape workers were also casual employees, and therefore, iWash was not subject to the workers' compensation law because it did not have the minimum five (5) employees required by Tennessee Code Annotated section 50-6-102(11). Third, the trial court found that iWash was not in the construction business. Therefore, Ainsworth also could not recover benefits under Tennessee Code Annotated section 50-6-113(f)(1).

Tennessee Code Annotated section 50-6-106(2) provides that the workers' compensation law does not apply to "[a]ny person whose employment at the time of injury is casual, that is, one who is not employed in the usual course of trade, business, profession or occupation of the employer." In *Travelers Ins. Co. v. Dozier*, 410 S.W.2d. 904, 907 (Tenn. 1966), the Supreme Court held that "as a general rule, an employee employed for the direct and exclusive purpose of repair and construction work (where the employer is not a contractor or builder) is a casual employee under the statute." In this case, the trial court found that Ainsworth performed only a limited amount of plumbing work and some electrical work while employed by iWash. ²

Additionally, the trial court found that iWash's usual course of business was "washing cars." Ainsworth argues that iWash had undertaken to act as its own general contractor in the construction of the building. In such a case, the construction project may become part of the employer's usual course of business, making the casual employee exception inapplicable. See *Black v. Corder*, 399 S.W.2d 762, 765 (Tenn. 1966); *Blake v. Auto-Owners Ins. Co.*, No. W2005-01545-WC-R3-CV, 2007 WL 258314, at *4 (Tenn. Workers' Comp. Panel Jan. 30, 2007). Ainsworth contends that his position is supported by the length of the period of time (roughly six weeks) and the number of hours that he worked for iWash. He also submits that, because the car wash had not begun to operate, iWash's primary business at the time of his injury was to attend to its construction.

In support of the trial court's decision, iWash points out that it hired Conrad Construction as the general contractor on the job. In our view, this fact presents a critical distinction between this case and the facts of both *Black* and *Blake*. Neither of the defendants in *Black* or *Blake* had hired a general contractor to be responsible for construction. Moreover, the trial court made a specific finding that iWash had not become engaged in the construction business as a result of its involvement in bringing the building to completion.

² The record provides little credible evidence concerning the amount of work performed by Ainsworth or how much Ainsworth earned from iWash prior to this accident. Ainsworth testified that he had received between three thousand dollars (\$3,000) and four thousand dollars (\$4,000) from iWash prior to his injury. Hetzel testified that the amount was between twenty-five hundred dollars (\$2,500) and three thousand dollars (\$3,000). iWash did not issue a W-2 or 1099 to Ainsworth. Ainsworth did not file a tax return for 2004, 2005, or 2006.

Based upon these findings, the trial court found that Ainsworth was a casual employee of iWash. After a thorough review of the record, we conclude that the evidence does not preponderate against these findings.

Even if Ainsworth were found to be a regular employee of iWash, Ainsworth must establish that iWash had four (4) other regular employees to satisfy Tennessee Code Annotated section 50-6-102(11). Ainsworth has the burden of proof to demonstrate that iWash regularly employed at least five (5) persons. *Garner v. Reed*, 856 S.W.2d 698, 700 (Tenn. 1993). The evidence concerning the other four (4) alleged employees was extremely limited. It consists entirely of testimony by Hetzel, on cross-examination. He stated that four (4) men were hired at an unspecified time to plant shrubs on the site, that they were paid by the hour, and that it took them two (2) days to complete the work they were hired to do. These alleged employees are not identified by name. The record is devoid of any proof that these workers ever worked again for iWash. Likewise, there is no proof that these workers were employed by iWash at the same time that Ainsworth was moonlighting for iWash. Accordingly, the evidence clearly does not preponderate against the trial court's finding that these other workers were casual employees of iWash.

Finally, Ainsworth makes one other alternative argument. He contends that iWash was in the construction business, and therefore, subject to Tennessee Code Annotated section 50-6-113(f)(1). That section requires "any person involved in the construction industry" to carry workers' compensation insurance, "whether or not the person employs fewer than five (5) employees." The following subsection, Tennessee Code Annotated section 50-6-113(f)(2), however, provides that "[n]othing in this subsection (f) shall be construed to impact any person whose employment at the time of injury is casual as provided in § 50-6-106." Again, the trial court expressly found Ainsworth to be a casual employee and, moreover, that iWash was not in the construction business. Therefore, Ainsworth's argument on this issue is also without merit.

Conclusion

In summary, the trial court found that Ainsworth was a casual employee of iWash, that iWash did not employ five (5) regular employees, and that iWash was in the business of washing cars as opposed to the construction business. The evidence in the record does not preponderate against any of these findings by the trial court. Accordingly, the judgment of the trial court is affirmed. Costs are taxed to Eddie Ainsworth and his surety, for which execution may issue, if necessary.

JEFFREY S. BIVINS, SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
JUNE 29, 2009 SESSION

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**Chancery Court for Smith County
No. 7295**

No. M2008-02460-WC-R3-WC - Filed -October 6, 2009

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 appeals 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 Eddie Ainsworth and his surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM