

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

J. W. ALLEN,)	
)	
Plaintiff/Appellee,)	SHELBY COUNTY
)	
VS.)	HON. JAMES M. THARPE
)	JUDGE
)	
BOB JONES, Defendant/Appellee;)	
LIBERTY MUTUAL INSURANCE)	No. 02S01-9512-CV-00127
COMPANY, Defendant/Appellant;)	
WEST TENNESSEE CONTRACTORS,)	
INC., Defendnat/Appellee; and)	
SUE ANN HEAD, DIRECTOR OF)	
THE DIVISION OF WORKERS')	
COMPENSATION, TENNESSEE)	
DEPARTMENT OF LABOR, SECOND)	
INJURY FUND, Defendants/)	
Appellee.)	

FILED

November 1, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

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MEMORANDUM OPINION

MEMBERS OF PANEL:

LYLE REID, JUSTICE
HEWITT TOMLIN, JR., SENIOR JUDGE
CORNELIA A. CLARK, SPECIAL JUDGE

**AFFIRMED IN PART, REVERSED IN PART
AND REMANDED**

CLARK, SPECIAL JUDGE

This worker's compensation appeal has been referred to the special worker's 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 trial court found (1) that plaintiff was employed by Defendant Bob Jones at the time he sustained permanent injury in the course and scope of his employment; (2) that defendant Liberty Mutual Insurance Company ("Liberty Mutual") was the workers' compensation insurer of Bob Jones at the time of plaintiff's injury; and (3) that the plaintiff is permanently and totally disabled. The court awarded the maximum compensation available under the act, with 77.5% of the total to be paid by defendant Liberty Mutual and 22.5% to be paid by the Tennessee Department of Labor Second Injury Fund. The court also awarded discretionary costs to defendant West Tennessee Contractors, Inc. ("West Tennessee") against defendant Liberty Mutual.

Defendant Liberty Mutual appeals the ruling of the trial court and raises three issues:

1. Did the trial court err in ruling that plaintiff was an employee of Bob Jones and not an independent contractor at the time of his injury?
2. Did the trial court err in ruling that Liberty Mutual provided workers' compensation coverage for the sole proprietorship owned by Bob Jones?
3. Did the trial court err in assessing discretionary costs for the benefit of West Tennessee against Liberty Mutual?

Bob Jones also appeals the court's ruling on the first issue.

For the reasons set forth below, we affirm the judgment of the trial court on the first two questions, but reverse the award of discretionary costs to West Tennessee.

Appellate review 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). This tribunal 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 (Tenn. 1995).

EMPLOYMENT RELATIONSHIP

In October 1990, J. W. Allen (“plaintiff”) was engaged in work through Bob Jones on a project on Flamingo Street in Memphis, Tennessee. The Flamingo project was not a partnership job, but was obtained by Jones in his capacity as a sole proprietor. Jones was working as a subcontractor for West Tennessee. On October 16, 1990, plaintiff slipped from the roof, fell and broke his hip. He ultimately had multiple surgeries, including a hip replacement. At the time of his accident plaintiff was an insulin dependent diabetic, a pre-existing condition that caused multiple physical problems. Plaintiff had also received a prior workers’ compensation award.

Plaintiff, who was thirty years old at the time of his injury, is Jones’ stepson. He was one of a pool of ten to twelve roofers Jones utilized on roofing subcontracts. Jones’ method of operation involved his obtaining a roofing subcontract and then hiring roofers to complete it, subject to his quality control. Each roofer he contacted could accept or reject his offer for work on a particular project. If a roofer accepted a job, Jones required that he stay on the job until it was finished. Plaintiff testified that he was not free to accept a job with anyone else during the Jones’ job.

Although Jones required roofers to provide their own small tools, he provided all the materials for a roofing job and also larger tools such as power saws and ladders. Plaintiff testified that he never hired or fired any helpers on the job, and that those persons were engaged by Jones. Although some dispute existed about

who set working hours, plaintiff testified that Jones set the time at which employees were to report to work. The workers generally met Jones at his home or at a coffee shop and then traveled to the job together. At that point Jones would go over an explanation of the work that needed to be done. Jones further instructed them to work as late into the evening hours as possible, until it became too dark. Plaintiff stated that if he did not have a good reason for leaving early he probably would have been fired.

Jones did not withhold deductions from any payments to the roofers. Plaintiff, like other roofers, was paid by the “square” installed. Jones did visit the job site from time to time to inspect the work, and did exercise control over the quality of the final work. Jones also retained the right to fire plaintiff and, in fact, had terminated him from several earlier jobs because he found his work unsatisfactory.

The basis of liability under the Workers’ Compensation Act is the employer-employee relationship. If a worker is an independent contractor, he is not entitled to benefits under the Act. Stratton v. United Inter-Mountain Telephone Company, 695 S.W.2d 945, 950 (Tenn. 1985). In determining the nature of the work relationship, several factors must be considered, including (1) the right to control the conduct of the work, (2) the right of termination, (3) the method of payment, (4) the freedom to select and hire helpers, (5) the furnishing of tools and equipment (6) self-scheduling of work hours, and (7) being free to render services to other entities. Galloway v. Memphis Drum Service, 822 S.W.2d 584, 586 (Tenn. 1991). While no single factor is dispositive of the relationship, courts emphasize the importance of the right to control, even if the right is not exercised. Id. Because the Act is liberally construed to secure benefits to those workers who fall within its coverage, courts will resolve doubts in favor of a finding that a worker is an employee rather than an independent contractor. Id.

The testimony concerning the relationship between plaintiff and Jones was

conflicting. Our review of the record convinces us that the evidence does not preponderate against the trial court's finding that plaintiff was an employee of Jones rather than an independent contractor. The trial court's judgment on this issue is affirmed.

LIBERTY MUTUAL COVERAGE

In late 1989, Bob Jones and W. L. Dotson formed a partnership to do roofing contract work. The partners completed an application for workers' compensation insurance for their partnership. The partnership application was rejected by two workers' compensation carriers and ultimately was sent to the NCCI southern division for assignment of a carrier through the assigned risk pool. The terms of the application indicated that the name of the employer was "W. L. Dotson and Bob Jones", that the business was a partnership, and that Dotson and Jones were partners. The application was signed by both partners. NCCI assigned the coverage to Liberty Mutual . Liberty Mutual thereafter issued a policy to cover "W. L. Dotson and Bob Jones". The listed address for the partnership was Dotson's home address. Liberty Mutual also made appropriate filings with the State of Tennessee, one for each of the named partners.

At the time the initial policy application was completed Jones asked his insurance agent to provide a certificate of insurance to West Tennessee to evidence his procurement of a workers' compensation policy. The insurance agency issued the certificate as requested, but did so prior to the actual issuance of a policy by Liberty Mutual. The certificate sent to West Tennessee listed the insured as "W. L. Dotson and Bob Jones". It did not list a company or policy number. David McCabe, president of West Tennessee, called the agent's office as soon as he received the certificate and verified coverage. However, he did not ever call again to verify an assigned insurance company or actual policy number.

The Liberty Mutual policy extended coverage from November 9, 1989 to November 9, 1990. Jones paid the initial premium for the coverage. He intended to have this policy cover his West Tennessee work. On November 22, 1989, Liberty Mutual submitted proof of insurance on behalf of W. L. Dotson and Bob Jones to the Tennessee Department of Labor Workers' Compensation Division.

Shortly after the application was completed, Dotson and Jones decided to dissolve their partnership. On December 8, 1989, they executed a document to that effect. Jones never informed West Tennessee that the partnership listed on the certificate had been dissolved or that he had paid insurance premiums for only three or four weeks. Therefore, West Tennessee never withheld workers' compensation premiums from Bob Jones' fees. Jones did not obtain a new policy because he assumed the Liberty Mutual policy covered him during a grace period. He never received a refund of any premiums paid nor a notice of cancellation from Liberty Mutual.

Five weeks after plaintiff's accident, Liberty Mutual issued a termination/cancellation notice effective November 11, 1990. The State of Tennessee, Division of Workers' Compensation, issued its notice of cancellation for Jones on November 21, 1990.

_____The trial court found that defendant Liberty Mutual was the workers' compensation insurer of Bob Jones at the time of plaintiff's injury and that a certificate of insurance was still on file with the workers' compensation division with respect to Liberty Mutual's coverage of Bob Jones. The evidence does not preponderate against this finding.

Every employer subject to the Workers' Compensation Act must file with the Division of Workers' Compensation proof of insurance. T.C.A. §§50-6-405-406. An employer remains subject to the workers' compensation law until notice of

withdrawal is filed with the Division of Workers' Compensation. Karstens v. Wheeler Millwork, Cabinet & Supply Company, Inc., 614 S.W.2d 37, 40 (Tenn. 1981). Liberty Mutual did not file a withdrawal notice until November 21, 1990, after plaintiff received his injuries. It is liable for coverage for plaintiff's injury. The trial court's determination on this issue is affirmed.

AWARD OF DISCRETIONARY COSTS TO WEST TENNESSEE

The trial court awarded West Tennessee \$1,026.10 in discretionary costs to be paid by co-defendant Liberty Mutual.

Rule 54.04(2) of the Tennessee Rules of Civil Procedure provides that certain costs are allowable in the court's discretion upon proper application by the "prevailing party". A reviewing court will not reverse the trial court's award of such costs unless it finds a clear abuse of discretion in the award of such fees. See Perdue v. Green Branch Mining Company, 837 S.W.2d 56, 60 (Tenn. 1992).

Liberty Mutual argues that Allen was the "prevailing party" in this matter, and that West Tennessee, having made no recovery in the case and being simply a co-defendant, cannot be awarded discretionary costs against it under Rule 54. Resolution of this issue requires an analysis of the term "prevailing party" as it applies to this case.

In Tennessee a prevailing party is a party who has successfully maintained a claim against the other at the end of the suit. McReynolds v. Cates, 26 Tenn. 29, 7 Hump. 29 (Tenn. 1846). Other courts have held that a party must succeed on a significant issue in the litigation that achieves some of the benefit the party sought when it brought the suit. E.g., McIntyre v. Traughber, 884 S.W.2d 134, 138 (Tenn. App. 1994).

Some courts in other jurisdictions have held that a prevailing party is one that receives a favorable judgment on the merits. See Nemeroff v. Abelson, 469 F.Supp. 630, 641 (S.D.N.Y. 1979). Other courts have held that if a defendant is put through the burden of defending a charge until it is abandoned, it becomes the prevailing party as to that charge. Id. In each case, however, the issue of cost assessment arose between plaintiff(s) and defendant(s), rather than among co-defendants.

In this case both West Tennessee and Jones/Liberty Mutual were sued by Allen for potential liability. The court ultimately determined that Jones, and thus Liberty Mutual, was liable to pay the benefits due. While West Tennessee may be a “prevailing party” as to plaintiff, that issue is not before us today. West Tennessee is not a “prevailing party” as to Liberty Mutual or Jones because no cross action was ever filed by West Tennessee against those co-defendants. The award of discretionary costs to West Tennessee must be reversed.

The decree of the trial court is affirmed in part and reversed in part. This case is remanded to the trial court for such further proceedings as may be necessary. Costs of this appeal are taxed to appellant Liberty Mutual.

CORNELIA A. CLARK, SPECIAL JUDGE

CONCUR:

LYLE REID, JUSTICE

HEWITT TOMLIN, JR., SENIOR JUDGE

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AT JACKSON

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) SUE ANN HEAD, DIRECTOR OF)
) THE DIVISION OF WORKERS')
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) DEPARTMENT OF LABOR, SECOND)
) INJURY FUND, Defendant/Appellee.)

AFFIRMED IN PART;
REVERSED IN PART; AND
REMANDED.

FILED

November 1, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

JUDGMENT ORDER

This case is before the Court upon a motion for review 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; 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 appellant, Liberty Mutual Insurance Company, and its surety, for which execution may issue if necessary.

IT IS SO ORDERED this ____ day of November, 1996.

PER CURIAM

Reid, J., Not Participating