IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT NASHVILLE

FILED

February 26, 1997

Cecil W. Crowson
Appellate Court Clerk

GLORIA PERKINS, Plaintiff/Appellee	)	RUTHERFORD CHANCERY
v.	)	NO. 01S01-9603-CH-00053
WHIRLPOOL CORPORATION, Defendant/Appellant	)	HON. DON R. ASH, JUDGE

FOR APPELLANT:

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FOR APPELLEE:

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MEMORANDUM OPINION

MEMBERS OF PANEL:

ADOLPHO A. BIRCH, JR., CHIEF JUSTICE, SUPREME COURT
WILLIAM H. INMAN, SENIOR JUDGE
WILLIAM S. RUSSELL, RETIRED JUDGE

AFFIRMED RUSSELL, RETIRED JUDGE

This appeal from the judgment of the trial court in a workers' compensation case 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 hearing and reporting to the Supreme Court of findings of fact and conclusions of law.

THE CASE

Gloria Perkins began working for the defendant in its manufacturing plant in 1985. In 1993 she was elected to work as a group leader. This required her to see that the workers in her group were timely supplied with parts, and she also personally substituted for workers who had to temporarily leave their jobs to go to a rest room or first aid station.

On May 7, 1993, an employee in her group, working on the opposite side of a moving conveyor line, needed to leave her station and go to first aid. Responding to this summons, the plaintiff crossed the moving conveyor line and fell off of it. She severely injured her right shoulder and has been unable to return to work.

The trial court judged that the plaintiff sustained a 95% permanent partial disability to the body as a whole, and entered judgment accordingly.

THE ISSUE

The sole dispositive issue before this court is whether or not plaintiff is barred from compensation benefits by reason of an alleged violation of Tennessee Code Annotation Section 50-6-110, which at the time of the injury provided:

> 50-6-110. Injuries not covered. - (a) No compensation shall be allowed for an injury or death due to the employee's willful misconduct or intentional self-inflicted injury, or due to intoxication, or willful failure or refusal to use a safety appliance or perform a duty required by law.
>
> (b) If the employer defends on the ground that the injury arose in any or all of the above state ways, the burden of proof shall be on the employer to establish such defense.

The employer alleges that the plaintiff's crossing the moving conveyor line was such a conscious violation of the company rules as to constitute the willful misconduct proscribed by the foregoing statute.

The trial court explicitly held as follows:

> The next issue is whether or not Ms. Perkins is entitled to permanent partial disability. Tennessee Code Annotated Section 50-6-110 provides that no compensation shall be allowed for an injury due to an employee's willful misconduct or willful failure or refusal to use a safety appliance. The Court has considered the case of Insurance Company of America v. Hogsett, 488 S.W. 2d 730 (Tenn. 1972). In this case, the Court held that three elements are needed to constitute willful misconduct for the purpose of the statute:
>
> (1) An intention to do the act. Obviously Ms. Perkins intended to climb onto the conveyor belt;
>
> (2) The purposeful violation of the orders. There can be no questions that the orders were that employees were not to climb on a moving conveyor belt. Ms. Perkins, in her position as a group leader was in better position than anyone to be aware [sic] those

> rules and also aware of her violation of those rules;
>
> (3) An element of perverseness. The Court finds in this case that the Plaintiff was not shown to have been perverse. Instead, we think the evidence revealed only that she was impulsively careless in her zeal to help one of her fellow employees take a break. To brand her action as willful misconduct is to paint with too broad a stroke. She was about her master's business, even though too eagerly so and not on a lark of her own.
>
> In Bryan v. Paramount Packaging Corporation, 677 S.W. 2d 453, (Tenn. 1984) "we have held that where an employee is performing the duties assigned to him by his employment contract and is acting in furtherance of his employer's interest, regardless of the fact that he performs those duties in an unnecessarily dangerous or rash manner, it cannot be said that his resulting injury did not arise out of employment, provided that his conduct would be reasonably contemplated." See Wright v. Gunther Nash Min. Const. Co., 614 S.W. 2d 796 (Tenn. 1981).
>
> It is also important to note in Bryan, it was held that disobedience of a work rule is not willful misconduct within the meaning of the statute where the "rule is habitually disregarded with knowledge and acquiescence of the employer. In such case, the employer waives the rule" or is estopped to invoke it against employees. There can be little question that there is a continuing problem, even after the signs were posted, with people climbing over the line. The testimony clearly showed that the group leaders were aware of this and in fact, even the supervisor had been aware that this was a continuing problem, even though it had eased up some after the signs were posted.

THE EVIDENCE

The plaintiff, her supervisor, another group leader and two co-workers all testified that a message had come from the supervisor through the group leaders to the line employees that no one was to cross the conveyor line. However, the plaintiff and a

co-worker in her group testified that later there was a message that they could cross over the areas of the conveyor belt that did not have the electricity overlay above it. The other three aforesaid witnesses denied that there had been a second message. The plaintiff testified that she crossed at a place where there was no electricity overlay. Another worker disputed this. The testimony, for the most part, indicated that it was not uncommon for employees to cross the conveyor line, and they for this were not consistently "written up" or reprimanded.

CONCLUSION

We review the case de novo with a presumption of correctness. Tennessee Code Annotated Section 50-6-225 (e)(2).

The key factual issue is whether or not the perverseness necessary to willful misconduct was present. The trial judge found that it was not. The evidence does not preponderate against that finding.

The judgment of the trial court is affirmed. Costs on appeal are assessed to the appellant.

WILLIAM S. RUSSELL, RETIRED JUDGE

CONCUR:

ADOLPHO A. BIRCH, JR.,
CHIEF JUSTICE

_____
WILLIAM H. INMAN, SENIOR JUDGE

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GLORIA PERKINS,	)	
	)	Rutherford Chancery
Plaintiff/Appellee,	)	Trial Court No. 94WC-309
	)	
VS.	)	Hon. Don R. Ash, Judge
	)	
	)	
WHIRLPOOL CORPORATION	)	No. 01S01-9603-CH-00053
	)	
Defendant/Appellant.	)	AFFIRMED.

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 defendant/appelllant and its surety, for which execution may issue if necessary.

IT IS SO ORDERED this 26th day of February, 1997.

PER CURIAM