**IN THE SUPREME COURT OF TENNESSEE**

**SPECIAL WORKERS' COMPENSATION APPEALS PANEL**

**AT NASHVILLE**

(January 23, 1997 Session)



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| TRANSPORTATION INSURANCE COMPANY and THE STARR COMPANY, INC. d/b/a ROCK HARBOR MARINA, | ) | DAVIDSON CIRCUIT |
| Plaintiffs/Appellees, | ) | Hon. J. Russell Heldman, Special Judge |
| VS. | ) | No. 01S01-9606-CV-00123 |
| CLAYTON B. REES, | ) | |
| Defendant/Appellant. | ) | |

For the Appellant:

Nader Baydoun
John I. Harris, III
BAYDOUN, HARRIS & REESE
Nashville, Tennessee

For the Appellees:

Terry L. Hill
James H. Tucker, Jr.
MANIER, HEROD, HOLLABAUGH & SMITH
Nashville, Tennessee

## MEMORANDUM OPINION

Members of Panel:

Adolpho A. Birch, Jr., Chief Justice, Supreme Court
Robert S. Brandt, Senior Judge
Joe C. Loser, Jr., Special Judge

AFFIRMED

Brandt, Senior Judge

# MEMORANDUM OPINION

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 of findings of fact and conclusions of law.

This case presents the question of whether an employee's possession or business use of a portable telephone converts an otherwise noncompensable injury into a compensable one. We conclude that it does not and affirm the trial court's denial of benefits.

The employee, Clayton Rees, had been employed by Rock Harbor Marina in Nashville for only four weeks when he was injured while driving to work. He was a commission boat salesman. Rock Harbor paid Rees a draw against future commissions, but at the time of the injury, he had yet to sell a boat for Rock Harbor.

Rees lived in Tullahoma, about equal distance between Nashville where he worked and Chattanooga where his fiancé lived. On the morning of March 12, 1994, while commuting to work from Tullahoma to Nashville in his own truck, Rees was injured in a vehicle collision on US 231 just north of Shelbyville. A drunk driver caused the collision.

To be covered by workers' compensation, the injury must arise out of and in the course and scope of employment. Tenn. Code Ann. § 50-6-103. An injury sustained en route to or from work is not considered in the course of employment. *Lollar v. Wal-Mart Stores, Inc.* 767 S.W.2d 143, 144 (Tenn. 1989). There are exceptions to this rule, such as when the employee is on the employer's premises, *Id.* 150, but none of the exceptions apply here.

Rees seeks to avoid this firm and long-standing rule because he had a portable telephone with him on his commute and, according to him, was

attempting to place a business call when the wreck happened. Rees acknowledges, however, that his use of the telephone at the time had nothing to do with the collision.

He also stresses that Rock Harbor paid for the portable telephone service. That was a mistake, though. When Rees signed up for service with the provider, he listed Rock Harbor as the purchaser of the service. Rock Harbor never agreed to pay for the service, except to reimburse Rees for business calls. Moreover, even if Rock Harbor provided the telephone and service to Rees, his use of it on his commute would still not make this a compensable injury. It would not alter the fact that his injury, caused by a drunk driver while he was commuting to work in his own vehicle, neither arose out of nor occurred within the course and scope of his employment at Rock Harbor.

If Rees's position were adopted, then most any injury, wherever it occurred - at home, at work, or at play - would be compensable under workers' compensation - that is, so long as the worker was carrying a portable telephone.

Rees contends he really was at work because his truck was an "extended office." But he merely testified that he carried contracts and literature in his truck so he would have them available with him. This is not a case in which an outside worker uses his or her own personal vehicle as an integral part of performing his or her duties.

If Rees's "extended office" theory were adopted, the result would be the same as with the portable telephone. Any employee carrying business papers in his vehicle would be covered by workers' compensation.

In addition, Rees contends that he should be covered by workers' compensation because he was going to work earlier than normal. The receptionist had to be out that Saturday morning, and she asked Rees to come to work early to open the store. He was already planning on meeting a customer as soon as he arrived at work that morning, and rescheduled his customer meeting for an earlier time. Going to work earlier than usual as a favor to another employee, or even to

help the employer, does not remove this case from the firm rule that en route injuries are not compensable.

Finally, Rees asserts that Rock Harbor's failure to file a notice of controversy pursuant to Tenn. Code Ann. § 50-6-205(d) precludes Rock Harbor from denying the claim. The statute has no applicability here, for it only applies to cases in which the employer has voluntarily made payments and later elects to contest compensability. Rock Harbor never made payments to Rees.

It is, of course, regrettable that a drunk driver injured Rees. But he has no workers compensation claim. For that reason, we affirm the trial court's denial of the claim. Costs are taxed to the defendant-appellant.

_____
Robert S. Brandt, Senior Judge

CONCUR:

_____
Adolpho A. Birch, Jr., Chief Justice

_____
Joe C. Loser, Jr., Special Judge

*IN THE SUPREME COURT OF TENNESSEE*

*AT NASHVILLE*



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| *TRANSPORTATION INSURANCE COMPANY and THE STARR COMPANY, INC., d/b/a ROCK HARBOR MARINA,* | } | *DAVIDSON CIRCUIT* |
| | } | *No. 94C-1383 Below* |
| *Plaintiffs/Appellees* | } | |
| | } | *Hon. J. Russell Heldman,* |
| *vs.* | } | *Special Judge* |
| *CLAYTON B. REES,* | } | *No. 01S01-9606-CV-00123* |
| *Defendant/Appellant* | } | *AFFIRMED.* |

*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 will be paid by Defendant/Appellant and Surety, for which execution may issue if necessary.*

*IT IS SO ORDERED on April 25, 1997.*

*PER CURIAM*