IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT NASHVILLE
(October 22, 1996 Session)

INSURANCE COMPANY OF NORTH AMERICA,	)	FENTRESS CIRCUIT
Plaintiff-Appellee,	)	Hon. Conrad E. Troutman, Judge.
v.	)	No. 01S01-9602-CV-00037
RONNIE STORIE,	)	
Defendant-Appellant.	)	

For Appellant:

Randall A. York
Crossville, Tennessee
Finley

William J. Campbell
Jamestown, Tennessee

For Appellee:

Robert M. Shelor
Kennerly, Montgomery &

Knoxville, Tennessee

M E M O R A N D U M O P I N I O N

Members of Panel:

Frank F. Drowota, III, Associate Justice, Supreme Court
Robert S. Brandt, Senior Judge
Joe C. Loser, Jr., Special Judge

REVERSED AND REMANDED Loser, 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. section 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. The issue presented by this appeal is whether the evidence preponderates against the trial court's finding that the employee's injury was proximately caused by intoxication. As discussed below, the panel has concluded the judgment should be reversed and the case remanded for an award of benefits.

The claimant or employee, Storie, is forty-five years old and has an eighth grade education. On March 18, 1993, he reported to work at 6:30 p.m. at Kentucky Apparel to perform his usual duties as a maintenance mechanic. During the course of the shift, he needed to obtain some copper tubing and light bulbs to perform his duties. Those supplies were stored above a dropped ceiling above the maintenance office and accessible by a ladder and some loose boards.

The claimant negotiated the ladder without a problem, but slipped and fell when one of the loose boards moved. He fell through the ceiling and onto a concrete floor in the men's rest room below, frightening a user, who beat a hasty exit and reported the accident. The claimant suffered multiple injuries, including a broken arm and back injury. We find in the record no direct evidence the claimant was intoxicated at the time. In fact, he had apparently performed his duties satisfactorily until the accident occurred. The injurious accident occurred shortly before 2:45 a. m. on March 19th.

After some delay, he was driven to the Fentress County Hospital by a co-worker, arriving at about 3:00 a. m. When no doctor was available to treat his arm injury, he was transported to the Putnam County Hospital. When he arrived there at about 6:30 a. m., he smelled of alcohol and a blood alcohol test revealed an alcohol content of approximately .20 percent. The claimant insists he consumed the alcohol, retrieved from his own vehicle at the plant and provided by a friend while waiting for medical attention, after the accident, to help relieve pain associated with his injuries.

The trial court disallowed the claim as being proximately caused by intoxication. Appellate review is de novo upon the record of the trial court, accompanied by a presumption of correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. section 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. Galloway v. Memphis Drum Service, 822 S.W.2d 584 (Tenn. 1991).

Workers' compensation benefits are payable without regard to fault of the employer or care exercised by the employee, Morrison v. Tennessee Consolidated Coal Co., 162 Tenn. 523, 39 S.W.2d 272 (1931), except in

cases where the employee is guilty of willful misconduct, intentional self-inflicted injury, intoxication, or willful failure to use a safety appliance or to perform a duty required by law. Tenn. Code Ann. section 50-6-110. Moreover, the purposes, among others, of the Workers' Compensation Act are to provide the injured employee with compensation for his loss of earning capacity without imposing upon him the burden of establishing liability under traditional principles of negligence and to place upon industry, rather than the public, the ultimate cost of risks incident to, and injuries and death resulting from, the production of goods and services. See, e.g., Crane Company v. Jamieson, 192 Tenn. 41, 237 S.W.2d 546 (1951).

In order to defeat an injured employee's claim for benefits because of intoxication, the employer must prove that the employee had voluntarily become intoxicated and that such intoxication was the proximate cause of the injury or death. Overall v. Southern Subaru Star, Inc., 545 S.W.2d 1 (Tenn. 1976). Evidence that the blood alcohol content in the injured or deceased worker's blood exceeded 0.10 percent is not sufficient to establish intoxication as the proximate cause. Gentry v. Lilly Co., 225 Tenn. 708, 476 S.W.2d 252 (1971), Wooten Transports, Inc. v Hunter, 535 S.W.2d 858 (Tenn. 1976).

While this claimant's explanation for his blood alcohol content may be implausible, even incredible, it is clear from the record that he was able to perform his duties until injured and there is no direct evidence he was intoxicated at the time of the injury. Moreover, the high blood alcohol content, because it was not discovered until some four hours after the accident, is a circumstance that seems to support, rather than contradict, that explanation. Consequently, the evidence preponderates against the trial court's finding of intoxication as the proximate cause of the employee's injuries.

The judgment of the trial court is accordingly reversed and the cause remanded to that court for such further proceedings as may be necessary. Cost on appeal are taxed to the plaintiff-appellee.

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Joe C. Loser, Jr., Judge

CONCUR:

_____

Frank F. Drowota, III, Associate Justice

Separate Dissenting Opinion

Robert S. Brandt, Judge

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(October 22, 1996 Session)

INSURANCE COMPANY OF NORTH AMERICA,	)	
Plaintiff/Appellee,	)	FENTRESS CIRCUIT
VS.	)	Hon. Conrad E. Troutman, Judge
RONNIE STORIE,	)	No. 01S01-9602-CV-00037
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For the Appellant:

Randall A York
Crossville, Tennessee

William J. Campbell
Jamestown, Tennessee

For the Appellee:

Robert M. Shelor
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Knoxville, Tennessee

Members of Panel:

Frank F. Drowota, III, Associate Justice, Supreme Court
Robert S. Brandt, Senior Judge
Joe C. Loser, Jr., Special Judge

DISSENTING OPINION — Brandt, Judge

DISSENT

I respectfully dissent. The evidence supports the trial court's conclusion. The decision should be affirmed.

At the Cookeville hospital five hours after the accident, the plaintiff's blood alcohol level was 200.8 milligrams per deciliter. In common courthouse parlance, this was a .20 - twice the level necessary to presume drunk driving. The question for the trial court was whether it was more likely than not that the plaintiff was intoxicated when he injured himself, and if so, whether the intoxication was a contributing cause. The plaintiff could have consumed the alcohol before he reported for work around 6:30 p.m., or he could have consumed it at work, or he could have consumed it after the accident.

The plaintiff could not have consumed the alcohol before he started work. If he had consumed enough alcohol to test as he did more than twelve hours after the accident, he could not have functioned at work. That leaves during work and after the accident as the two alternatives.

The plaintiff contends he drank some whiskey after the accident. He claims that after he fell, he went outside to his car and drank whiskey and then drank more whiskey at the Jamestown hospital. But his story is not credible.

In the first place, when the other workers came to his aid, the plaintiff was still lying on the bathroom floor. Several people were around following the accident, but no one testified that they saw the plaintiff leave and return to the building. Indeed, the security guard stationed at the door testified she never saw the plaintiff leave.

If the plaintiff is to be believed, he got off the bathroom floor, walked to the factory door, propped it open so he could get back in, struggled to his car, opened his car door, pulled a bottle of whiskey from beneath the front seat, opened the bottle and maybe broke the seal - there is a conflict between his trial

testimony and his deposition testimony - returned the bottle, made his way back to the factory, moved the door stop, went back into the bathroom, and positioned himself as if he had just fallen through the ceiling. He did all this, he claims, with a broken wrist and in a weakened, dazed condition.

He does not drink whiskey, he testified. He just happened to have a pint of it in his car for his "friends down in Pickett County." A pint of whiskey will not go very far with a group of drinkers in Pickett County or anywhere else. The bottle was not in the trunk or glove compartment, likely places to store it for his travels into Pickett County. Instead, the whiskey bottle was conveniently located under the front seat. The plaintiff drank half of the pint, he says, in one or two sips.

The plaintiff, who says he does not even drink whiskey, testified he drank even more whiskey at the Jamestown hospital. His friend J. R. Reynolds brought him some in a Pepsi can. Yet co-worker James Adams who was with the plaintiff the whole time the plaintiff was at the Jamestown hospital, except when the plaintiff was taken to X-ray, testified he never saw the plaintiff drinking whiskey from a Pepsi can. The plaintiff said his father was with him at the hospital. But his father did not testify. Neither did J. R. Reynolds, though the plaintiff did testify that he had tried to find Reynolds before the trial.

Given the incredible nature of the plaintiff's story, the trial court was justified in rejecting it. The trial court was justified in concluding that the plaintiff did not drink after the accident.

The only logical conclusion is that the plaintiff drank at work. And given the level of his blood alcohol hours later at the Cookeville hospital, he surely was intoxicated at work. The question then becomes whether the intoxication contributed to the accident.

The plaintiff had gone above the ceiling to retrieve some light bulbs and copper tubing. He knew the area well. Yet he fell. And he gave two different versions of how he fell, one in which he says he lost his footing and another in which he says a board moved. Intoxication slows a person's response and makes him less agile. A logical inference from the intoxication and the fall is that intoxication was a contributing cause.

I would affirm the denial of workers compensation.

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Robert S. Brandt, Judge

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

FILED

October 9, 1997

Cecil W. Crowson
Appellate Court Clerk

INSURANCE COMPANY OF NORTH AMERICA,	)	Fentress Circuit No. 7085
Plaintiff-Appellee,	)	Hon. Conrad E. Troutman, Judge
v.	)	NO. 01-S-01-9602-CV-00037
RONNIE STORIE,	)	
Defendant-Appellant.	)	Reversed and remanded.

JUDGMENT ORDER

This case is before the Court upon 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 are taxed to the plaintiff-appellee.

IT IS SO ORDERED this 9th day of October, 1997.

PER CURIAM

Drowota, J., not participating