

IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
AT JACKSON  
(April 13, 1998, Session)

**FILED**  
  
October 21, 1998  
  
Cecil Crowson, Jr.  
Appellate Court Clerk

RITA TRULL, )  
 )  
Plaintiff/Appellant, ) HENRY COUNTY CIRCUIT  
 )  
v. ) NO. 02S01-9707-CV-00062  
 )  
KENTUCKY LAKE OIL CO. ) HONORABLE C. CREED  
MCGINLEY, )  
 ) JUDGE  
Defendant/Appellee. )

**For the Appellant:** \_\_\_\_\_

**For the Appellee:** \_\_\_\_\_

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**MEMORANDUM OPINION**

**MEMBERS OF PANEL:**

**JUSTICE JANICE M. HOLDER  
SENIOR JUDGE JOHN K. BYERS  
SPECIAL JUDGE J. STEVEN STAFFORD**

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

**STAFFORD, SPECIAL JUDGE**

## OPINION

This worker's 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) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law.

The parties have raised two issues for the Panel's consideration:

- I. Whether the trial court properly granted the defendant's motion for summary judgment finding the plaintiff to be an independent contractor?
- II. Whether the trial court properly denied the defendant's motion for summary judgment on the issue of notice?

The plaintiff asserts that the trial court erred when it granted the defendant's motion for summary judgment and found the plaintiff to be an independent contractor. The defendant asserts that the trial court erred when it failed to rule that the plaintiff's claim for worker's compensation benefits was barred due to the plaintiff's failure to timely notify the defendant of the claimed injury. For the following reasons, we find that genuine issues of material fact exist as to both issues making summary judgment inappropriate.

## FACTS

On December 1, 1994, the plaintiff and defendant entered into a contract in which the plaintiff agreed to manage a self-service station and grocery store owned by the defendant in Paris, Tennessee. The plaintiff asserts that as the result of the stress associated with her job, she suffered psychological injuries which rendered her unable to work. The plaintiff subsequently filed a complaint seeking to recover worker's compensation benefits. Both parties filed motions for summary judgment with supporting affidavits. Based on the record, the trial judge granted the defendant's motion for summary judgment and found the plaintiff to be an independent contractor but denied the defendant's motion for summary judgment on the issue of notice.

The contract provides that the plaintiff and her employees would not be employees of the defendant. It additionally provides that the plaintiff was operating as an independent lease company and that all benefits provided by the defendant to its employees including workers' compensation insurance, unemployment insurance, medical insurance, bonuses or other fringe benefits were not available to the plaintiff or her employees.

The contract required the plaintiff to hire, fire, and supervise the employees and to purchase, store, display, and sell the usual and customary goods. It required the plaintiff to maintain stock in

sufficient quantities as the business required and prohibited the plaintiff from ordering in excess of \$2,000.00 in a single order without the defendant's prior written approval.

The plaintiff was responsible for all repairs and maintenance to the building and facilities on a day-to-day basis. The defendant was responsible for all other repairs and maintenance.

The defendant paid the plaintiff \$942.83 per week. This fee was to be utilized for the plaintiff's compensation as well as the compensation of all her other employees including the payment of all social security, unemployment taxes, workers' compensation insurance, and any other employee benefits, wages, withholding or compensation. The plaintiff could also receive a bonus based on the gross sales of all products except for gasoline and lottery. The bonus could be reduced due to cash shortages, credit card charge backs, monthly inventory shortages and uncollected checks.

The contract provided that it could be terminated at any time by the defendant for the plaintiff's incompetence, gross negligence, or dishonesty. If the plaintiff breached any other condition of the contract, the defendant was required to inform the plaintiff in writing of the breach and the plaintiff would have ten days to cure the breach. If the breach was not cured within the ten-day period, the defendant could terminate the contract.

The contract was to remain in force for a period of one year and thereafter on a monthly basis unless terminated by either party by giving thirty days written notice to the other party.

Attached to the contract were four exhibits which were titled respectively as the "Leasing Company Requirements," "Leasing Company Responsibilities," "Operating Procedure and Policies for the Leasing Company," and "Leasing Company Performance Packages."

The plaintiff does not dispute the existence or the effect of the contract. However, the plaintiff asserts in two separate affidavits that the defendant exercised more control than the contract provided. In pertinent part, her affidavits provide as follows:

1. The defendant set the hours of store operations and set the hours and times at which the plaintiff was expected to be at the store.
2. The defendant made all final decisions regarding store operations.
3. The defendant retained final approval of all decisions made regarding the hiring and firing of employees. Specifically, the plaintiff attempted to terminate an employee but was overruled by the defendant and the employee was reinstated against the wishes of the plaintiff.
4. All of the equipment used in the course of the job was provided by the defendant.
5. The plaintiff was requested to submit a written proposal regarding the salary of each employee to the defendant. The defendant used this proposal to determine the weekly fee paid to the plaintiff.

6. The defendant provided the plaintiff with money to purchase workers' compensation insurance for her employees. In January 1995, funds were refunded to the plaintiff from the workers' compensation insurance company as an overpayment of premium. The defendant demanded that the refunded premium be returned to the defendant and warned her in writing that failure to return the funds would be considered a breach of contract.
7. The plaintiff was instructed to personally work shifts which would coincide with the times that the defendant's office was open and was specifically instructed not to work on weekends. When the plaintiff was not at the store, personnel from the defendant would call her at home or stop by her home to find out why she was not at the store.
8. The defendant's supervisors would come to the store to review the plaintiff's operations on a regular basis.
9. The defendant would hold periodic meetings which the plaintiff was required to attend for training and to review policies and procedures. The defendant would reimburse the plaintiff for having to pay someone to cover the store while she attended these meetings.
10. The defendant would conduct periodic inspections of the premises. After the inspection, a detailed evaluation would be completed by a supervisor from the defendant.
11. Christmas bonuses were paid to the store employees. The defendant would dictate the amount of the bonus and would put the money in an envelope to be given to the appropriate employee.
12. All utility and telephone service was in the name of the defendant.

A majority of these allegations are controverted by Chuck Baker, the defendant's Vice President. Mr. Baker states in his affidavit executed May 9, 1997, that the defendant operates convenience stores by way of a contract manager and that this was the case between the plaintiff and the defendant. The plaintiff operated the store for a gross payment from the defendant and from the gross payment the manager was expected to staff the store. The difference between the contract payments and what the manager spends on wages, payroll taxes, workers' compensation premiums, and related expenses is the profit or loss for the contract manager. The defendant provides some guidance and consultation for contract managers but the contract managers ultimately make all decisions regarding the selection, hiring and firing, and rates of compensation for the employees of the stores. The manager obtains his own federal employer's identification number and necessary state tax numbers as an independent business.

The plaintiff had her own bank account in the name of Trull Leasing and used this account for payroll purposes. She withheld payroll taxes on her employees, filed quarterly federal payroll tax returns, filed Tennessee unemployment tax returns, and carried workers' compensation insurance on her employees.

The parties' agreement was not terminable at will. Additionally, the contract manager was at risk financially. She could lose money if her expenses exceeded the contract payments. The contract manager determined the number of employees as well as the rates of compensation. The manager also determined when she would work even though the store was required to be open a minimum number of hours. The plaintiff was not personally active in the store for substantial amounts of time in the summer of 1996 prior to the termination of the contract. Despite this lack of personal involvement, she continued to receive the same monthly payment and the store continued to operate.

### **INDEPENDENT CONTRACTOR STATUS**

The trial court found as a matter of law that the plaintiff was an independent contractor. The status of the plaintiff is determined by the factors set out in T.C.A. § 50-6-102(a)(9) which provides as follows:

“In a work relationship, in order to determine whether an individual is an ‘employee,’ or whether an individual is a ‘subcontractor’ or an ‘independent contractor,’ the following factors shall be considered:

- (A) The right to control the conduct of the work;
- (B) The right of termination;
- (C) The method of payment;
- (D) The freedom to select and hire helpers;
- (E) The furnishings of tools and equipment;
- (F) Self scheduling of working hours; and
- (G) The freedom to offer services to other entities.”

The Supreme Court held in *Galloway v. Memphis Drum Service*, 822 S.W.2d 584, 586 (Tenn. 1991) that:

“While a plaintiff in a workers’ compensation action has the burden of proving each element of his case by a preponderance of the evidence, once it is established that an employment relationship exists, the burden is on the employer to prove the worker was an independent contractor rather than an employee. In addition, because ‘the Workers’ Compensation Law must be rationally but liberally construed to promote and adhere to the Act’s purpose of securing benefits to those workers who fall within its coverage,’ this Court will resolve doubts in favor of a finding that a worker is an employee rather than an independent contractor. . .

. . . While no single factor is determinative, this Court has repeatedly emphasized the importance of the right to control, the relevant inquiry

being whether the right existed, not whether it was exercised.”  
(Citations omitted.)

Likewise, labels placed upon workers in contracts are not binding. In *Stratton v. United Inter-Mountain Telephone*, 695 S.W.2d 947, 953 (Tenn. 1985), the Supreme Court stated:

“The provision in the contract that purports to establish that Wright and Lopez is an independent contractor is likewise not dispositive of the case. When the facts are essentially undisputed, as in this case, the question of whether one is an employee or an independent contractor is one of law for the courts. The parties cannot by contract take this responsibility from the court. Presumably the provision was intended by the Telephone Company to insulate it from worker's compensation liability. Such a provision is of no effect. No contract or agreement, written or implied, or rule, regulation, or other device, shall in any manner operate to relieve any employer . . . of any obligation created by [the Worker's Compensation Act] except as herein provided.”  
(Citations omitted.)

Rule 56 of the Tennessee Rules of Civil Procedure provides that summary judgment shall be rendered if the pleadings show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

In *Byrd v. Hall*, 847 S.W.2d 208, 214-215 (Tenn. 1993), the Supreme Court stated:

“Rule 56 comes into play only when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Thus, the issues that lie at the heart of evaluating a summary judgment motion are: (1) whether a factual dispute exists; (2) whether the disputed fact is material to the outcome of the case; and (3) whether the disputed fact creates a genuine issue for trial. . .

“. . . to preclude summary judgment, a disputed fact must be "material". A disputed fact is material if it must be decided in order to resolve the substantive claim or defense at which the motion is directed. Therefore, when confronted with a disputed fact, the court must examine the elements of the claim or defense at issue in the motion to determine whether the resolution of that fact will effect the disposition of any of those claims or defenses. . .

“. . . when the evidence or proof in support of or in opposition to a summary judgment motion establishes a disputed fact, and the fact is material, as we have defined that term, the court must then determine whether the disputed material fact creates a genuine issue within the meaning of Rule 56.03. Proceeding from the premise that Rule 56 is intended to avoid unnecessary trials, the test for a ‘genuine issue’ is whether a reasonable jury could legitimately resolve that fact in favor of one side or the other. If the answer is yes, summary judgment is inappropriate; if the answer is no, summary judgment is proper because a trial would be pointless as there would be nothing for the jury to do and the judge need only apply the law to resolve the case. In making this determination, the court is to view the evidence in a light favorable to the nonmoving party and allow all reasonable inferences in his favor. And, again, ‘genuine issue’ as used in Rule 56.03 refers to disputed, material facts and does not include mere legal conclusions to be drawn from those facts.”

Supreme Court discussed the proper use of summary judgment and stated that:

“Summary judgment is to be rendered only when it is shown that there is no genuine issue as to a material fact and that the moving party is entitled to a judgment as a matter of law. It is almost never an option in workers' compensation cases. In a summary judgment hearing, even where the parties have no right to a jury trial, the trial judge is not at liberty to weigh the evidence.” (Citations omitted.)

Based upon the parties' affidavits, we find that a factual dispute exists, that the factual dispute is material to the outcome of the case, and that the disputed fact creates a genuine issue for trial. As a result of this finding, we reverse the decision of the trial court and remand this case for a trial on the issue of whether the plaintiff was an independent contractor or an employee.

“Our action should not be interpreted as a suggestion that the claim is necessarily meritorious. We make no judgment in that regard. That decision is for the trial court after a full opportunity for both sides to present their witnesses. The claimant is not relieved of the burden of proving the necessary elements of her claim.” *Hilliard* at 345.

#### **NOTICE**

The defendant asserts that the trial judge erred when he failed to grant its motion for summary judgment on the issue of notice.

The plaintiff stated in an affidavit dated May 15, 1997, that she told personnel of the defendant that her health problems were related to stress. She also answered an interrogatory and stated that she had another store manager notify Kenneth Mott, the defendant's marketing director, of her injury. Mr. Mott filed an affidavit dated May 9, 1997, stating that the only thing he was told was that the plaintiff was out of the store with an upset stomach.

As discussed earlier in this opinion, summary judgment should only be granted when there are no genuine issues of material fact and the moving party is entitled to a judgment as a matter of law. Using this analysis, we find that the trial judge properly denied the defendant's motion for summary judgment on the issue of notice.

#### **CONCLUSION**

Genuine issues of material fact exist on both issues raised in this case. Accordingly, we reverse the decision of the trial court granting the defendant summary judgment on the employment status of the plaintiff and affirm the trial court's denial of summary judgment on the issue of notice.

This case is remanded to the trial court for further proceedings. The costs on appeal are taxed to the defendant.

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**J. STEVEN STAFFORD, SPECIAL JUDGE**

**CONCUR:**

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**JANICE M. HOLDER, JUSTICE**

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**JOHN K. BYERS, SENIOR JUDGE**

AT JACKSON

**FILED**

October 21, 1998

Cecil Crowson, Jr.  
Appellate Court Clerk

RITA TRULL,	)	Henry County Circuit
	)	No. 673
Plaintiff/Appellant	)	
	)	Hon. C. Creed McGinley,
v.	)	Judge
	)	
KENTUCKY LAKE OIL CO.,	)	S. Ct. No. 02-S-01-9707-CV-00062
	)	
Defendant/Appellee	)	REVERSED IN PART, AFFIRMED
	)	IN PART, 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.

Cost will be paid by defendant/appellee, for which execution may issue if necessary.

PER CURIAM

Holder, J., not participating