IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
(July 12, 1999 Session)

CHARLES TIMOTHY DUNCAN,	)	
	)	McNairy Chancery
Plaintiff/Appellee,	)	
	)	No. W1998-00093-WC-R3-CV
v.	)	
	)	Hon. Dewey Whitenton,
ROYAL INSURANCE COMPANY,	)	Chancellor
	)	
Defendant/Appellant.	)	

FILED

December 15, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

FOR THE APPELLANT:

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FOR THE APPELLEE:

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MEMORANDUM OPINION

Members of Panel:

Justice Janice M. Holder
Senior Judge F. Lloyd Tatum
Senior Judge L. T. Lafferty

AFFIRMED

L. T. LAFFERTY, SENIOR JUDGE

O P I N I O N

This worker's compensation appeal has been referred to the Special Worker's Compensation Panel of the Supreme Court in accordance with Tennessee Code Annotated § 50-6-225(e) for a hearing and reporting to the Supreme Court of findings of fact and conclusions of law.

This case involves injury to a Tennessee resident's knee alleged to have occurred during his employment with an Alabama company. The trial court assumed jurisdiction over this lawsuit after finding that Tennessee was the place of employment and found that the plaintiff sustained a work-related 15 percent permanent partial disability to the right leg.

The defendant asserts that the trial court erred in holding that it had jurisdiction over the subject matter of this case. The defendant submits two appellate issues for determination:

1. Whether the Chancery Court erred in finding that the plaintiff's place of employment was in the State of Tennessee?

2. Whether the Chancery Court erred in finding that plaintiff's contract of hire was made in Tennessee?

Review of the findings of fact made by the trial court is *de novo* upon the record, accompanied by a presumption of the correctness of the findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2); *Stone v. City of McMinnville,* 896 S.W.2d 548, 550 (Tenn. 1995). The application of this standard requires this Court to weigh in depth the factual findings and conclusions of the trial court in a worker's compensation case. *See Corcoran v. Foster Auto GMC, Inc.,* 746 S.W.2d 452, 456 (Tenn. 1988). However, considerable deference must be given to the trial court, who has seen and heard the witnesses, where issues of credibility and weight of oral testimony are involved. *Jones v. Hartford Accident & Indem. Co.,* 811 S.W.2d 516, 521 (Tenn. 1991).

After a thorough review of the evidence in this record, the briefs of the parties and appropriate law, we AFFIRM the trial court's judgment.

EVIDENTIARY FACTS

The plaintiff, a 29-year-old Tennessee resident, is a high school graduate whose previous job experience includes work in sawmills and manual labor positions in

construction. He began working for the defendant's insured, The Miller Group, Inc. (Company), in July of 1996 on a road construction crew in Birmingham, Alabama. The plaintiff first heard about possible employment with the Atlanta, Georgia-based Company from a friend. He testified at trial that he called the Company from his home in Tennessee on or about July 16 or 23, 1996, and spoke with Donnie Varnell about available job opportunities. Mr. Varnell told plaintiff that there were no jobs available at the time but possibly would be in a couple of weeks. About fifteen (15) minutes later, Mr. Varnell called the plaintiff and offered him a job. The plaintiff's account of the phone conversation is as follows:

> A: Donnie [Varnell] said that he had had an employee quit, and he was short-handed, and he needed somebody. I asked Donnie how much I would get paid and what the offer on the job would be, and he told me.
>
> Q: What did he say the pay was?
>
> A: He said $9.00 an hour, $15.00 a day basically eating expenses plus hotel room.
>
> ***
>
> A: And if I could be in Birmingham, Alabama by 5:30 that afternoon, I had the job.
>
> Q: And what did you say?
>
> A: I told him, yes sir, I wanted the job and that I would be there.
>
> ***
>
> Q: And what were your instructions as to where to report?
>
> A: I was to go to the Ramada Inn in Birmingham, Alabama. I can't remember what interstate it was off of, but it was right next to the interstate. Check in the hotel, there'd be a room waiting on me, and be ready to go to work at 5:30 that afternoon.

Mr. Varnell directed the plaintiff to report to supervisor, Eddie Kirkwood, in Birmingham to begin work. During the phone conversation between the plaintiff and Varnell, there was no mention of an application for employment or an orientation session, nor was there a request for a physical examination or drug screening.

The plaintiff then drove to Birmingham and checked into the Ramada Inn, where a room was reserved for him as promised. He began working on the road construction crew immediately upon checking in with Eddie Kirkwood. His duties included walking beside a conveyor used to load asphalt into dump trucks and climbing a twelve (12) to fifteen (15)

foot ladder to make sure the trucks were fully loaded. After the Birmingham job, the plaintiff worked on crews in Atlanta and Dothan, Alabama.

On August 19, 1996, at about 3:00 a.m., the plaintiff was climbing down the ladder on a conveyor when his right knee "twisted" and "popped" as he stepped onto the ground, causing him severe pain. The plaintiff denied any previous injury or problems with his right knee before this injury. He reported the injury to the conveyor operator, William Pannick, and to his supervisor, Eddie Kirkwood. Kirkwood released the plaintiff to return to his hotel room, where the plaintiff applied an ice pack to his swollen knee. Around 8:00 a.m. the same day, the plaintiff testified that he spoke with Kirkwood to let him know that he could not go back to work that evening and that he needed to see a doctor about his knee. According to the plaintiff, Varnell told the plaintiff to take his time and do what he needed to do but did not offer any medical treatment to him. Varnell instructed the plaintiff to rest his leg in the hotel and rejoin the crew in North Carolina.

The plaintiff was subsequently treated by Dr. Merryman, who requested $1200 to run a test on plaintiff's knee. The plaintiff testified that he called a Company secretary, Marty O'Kelly, regarding the cost of the test, and she angrily replied that the Company was not paying for his pre-existing condition. The plaintiff was able to return to work but experienced a lot of pain in his knee. He testified that his wife, Sandra, was present during a conversation in Atlanta in which Donnie Varnell told the plaintiff that he would have a job when he recovered from his knee problem. Assuming that he had health coverage, the plaintiff returned to Selmer, Tennessee, where he saw Dr. Keith Nord. When the plaintiff called Donnie Varnell about his treatment, Varnell told the plaintiff that he no longer worked for the Company because he had quit his job.

Dr. Nord operated on the plaintiff's right knee, but his recovery was not complete. The plaintiff can no longer work in the cold, run, or build houses due to his inability to climb. He testified that he also experiences swelling and stiffness in his right leg.

Sandra Bower, ex-wife of the plaintiff, testified that in August, 1996, she and her husband were in the midst of divorce proceedings. Ms. Bower testified she was present when the plaintiff called the Company but was advised there was no job. In about fifteen (15) or thirty (30) minutes, the plaintiff got a call from Atlanta offering him a job in

Birmingham that evening.

David Kirk, former employee of the Company, testified that in April, 1996, he called the Company about a job, and an employee had him to report to Birmingham for work. He filled out employment papers after he got on the job.

On behalf of the defendant, Robert Kibler, manager for BellSouth Telecommunications, testified that he reviewed the phone records for the Company covering June through August, 1996. Mr. Kibler's review of the records indicated that no phone calls were made by the Company on July 16 or July 23, 1996, to Tennessee.

Donnie Varnell, superintendent for the Company, testified that on July 23, 1996, he received a phone call from the plaintiff inquiring about a job. Varnell informed the plaintiff he could have a job, plus his motel room and $15 per day for food. Varnell told the plaintiff if he would be in Birmingham, Alabama, at 7:00 p.m. that night, he could start work and gave him the motel and phone numbers in case the plaintiff got lost. Varnell denied that he called the plaintiff and offered him a job. He testified that there was only one phone call, which was made by the plaintiff to him. Varnell stated that he is responsible for hiring road crews for the Company and had the authority to hire workers.

Edward C. Kirkwood, Jr., plaintiff's foreman, testified that he met the plaintiff on July 23, 1996, in Birmingham, Alabama at a job site. Varnell had told Kirkwood to expect the plaintiff. Kirkwood showed the plaintiff what he was to do and gave him a hard hat and some goggles. At the end of the shift, Kirkwood gave the plaintiff his employment papers to fill out. Kirkwood advised the plaintiff to return the papers by Saturday so he could get paid.

Martha "Marty" O'Kelly, an administrative assistant for the Company, testified that the plaintiff began working on July 23, 1996, and that the Company records on Varnell's mobile phone reveal no phone calls were made to the plaintiff on July 16 or 23, 1996.

LEGAL ANALYSIS

The defendant asserts that the trial court erred in holding that the plaintiff's place of employment was in Tennessee and that the contract for hire occurred in Tennessee.

The defendant is correct in that the uncontroverted evidence in this case shows that the plaintiff never performed any work for The Miller Group within the territorial limits of the State of Tennessee. However, Tennessee Code Annotated § 50-6-115 provides that an employee may receive benefits under our worker's compensation statutes when the employee is injured in another state if: (1) the employment was principally localized within Tennessee; or (2) the contract for hire was made in Tennessee. The record establishes that the employment was not principally localized in Tennessee. Thus, our inquiry must focus on whether the contract for hire was made in Tennessee.

In *Tolley v. General Accident, Fire & Life Insurance Corp.,* 584 S.W.2d 647, 649 (Tenn. 1979), our Supreme Court addressed contracts for hire by use of phone calls. In *Tolley,* James Romans, a resident of Missouri, called Tolley in Milan, Tennessee, seeking employment as a painter at a job site in Mountain Home, Arkansas. During Tolley's and Romans's phone call, Tolley agreed to pay Romans $4.00 per hour and notified superintendent, J.C. Mitchell, to expect Romans on the job site the next day in Mountain Home. Romans was injured on the job in Arkansas. The Supreme Court held that the contract of hire between Tolley and Romans was made in Tennessee and that the extraterritorial application of the Tennessee Workmen's Compensation Act was thereby invoked. The court stated that "[w]here an acceptance of an offer is given by telephone, it is generally held that the place of contracting is where the acceptor speaks his acceptance." *Id.* (*citing* 16 Am. Jur. 2D Conflicts of Law § 37 (1964); *accord,* Restatement of Conflicts of Law § 326 cmt. C (1934)).

In *Matthews v. St. Paul Property & Liability Insurance,* 845 S.W.2d 737, 739 (Tenn. 1992), the Supreme Court found Tennessee Code Annotated § 50-6-115(2) applicable to an employee injured in the state of Ohio while driving a truck for his employer. The employee, Matthews, contacted the company seeking employment as a truck driver after seeing an advertisement placed by Shawn-Davis Transit in a Tennessee newspaper. Shawn-Davis obtained the necessary information from Matthews over the phone and

referred Matthews to Schneider Specialized Containers. Schneider screened Matthew's application and approved him for employment. A representative of Shawn-Davis Transit placed a telephone call to Matthews in Tennessee, advising him that he had been hired as an independent contractor truck driver. The Supreme Court applied the reasoning of *Tolley* in finding that Matthew's hiring, via telephone, occurred in Tennessee.

The defendant asserts that the plaintiff was required to meet a condition precedent before the Company hired him; to wit, the plaintiff had to show up in Birmingham, Alabama. Thus, the defendant argues that the contract for hire could not occur until the plaintiff arrived in Birmingham, and jurisdiction of this subject matter rests in Alabama and not the state of Tennessee. In support of its position, the defendant cites *Perkins v. B.E. & K., Inc.,* 802 S.W.2d 215 (Tenn. 1990) (employee was required to travel to Virginia); *Alford Burns v. Werner Enterprises, Inc.*, No. 03S01-9504-CV-00043, 1995 WL 688889 (Tenn. Nov. 21, 1995) (employee was required to travel to Georgia); and *Fenner v. D.B.C. Enterprises & Travelers Ins. Co.*, No. 02S01-9703-CV-00023, 1998 WL 12058 (Tenn. Jan. 15, 1998) (employee was required to travel to Michigan). These cases can be distinguished on the facts, since none of the employees involved were hired over the telephone but had to travel to the foreign state to complete an application for employment, take a physical exam, or perform some other pre-employment procedure before actually being hired.

We recognize that this is a close case. However, after careful scrutiny of the testimonies of the plaintiff, Donnie Varnell, and Edward Kirkwood, we conclude that the plaintiff was hired during the phone conversation on or about July 23, 1996, and the place of employment is Tennessee. Mr. Varnell, who did the hiring for the Company road crews, testified that the plaintiff was hired over the phone as follows:

> Q: Now, whether there was one telephone call or two, and to me it really doesn't matter, after -- you say there was one phone call. After that phone call, the deal was done, wasn't it? It was just a matter of him going to where --
>
> A: Yes, sir.
>
> Q: Showing up and going to work.
>
> A: Yes, sir.
>
> Q: In other words, he didn't have to go through orientation. No orientation. Do you know what that is?

A: Yes, sir.

* * *

Q: Didn't have to talk to somebody else to see if he would be a suitable employee.

A: No, sir.

Q: Didn't have to do that. In other words, all he had to do after your phone call, whether it was him or you, who initiated it I don't care, was he had to go where you told him and be there by a certain time and he was going to work.

A: Yes, sir.

The preponderance of the evidence shows that Mr. Varnell had the authority to hire the plaintiff and that the plaintiff accepted the Company's offer of employment in Tennessee. Both Mr. Varnell and the plaintiff thought the plaintiff had a job when they finished their phone conversation, and the employment contract was made at that time. In addition, Edward Kirkwood, the plaintiff's foreman in Alabama, testified that he was told to expect the plaintiff at work on July 23, and put him right to work. The evidence does not preponderate against the trial court's findings. Therefore, we agree with the trial court that Tennessee has subject matter jurisdiction over this case.

The judgment of the trial court is affirmed. Costs of this appeal are taxed to the defendant.

_____
L. T. LAFFERTY, SENIOR JUDGE

CONCUR:

_____
JANICE M. HOLDER, JUSTICE

_____
F. LLOYD TATUM, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

CHARLES TIMOTHY DUNCAN,	)	McNairy Chancery
	)	NO. 7063
Plaintiff/Appellee,	)	
	)	Hon. Dewey Whitenton,
vs.	)	Chancellor
	)	
ROYAL INSURANCE COMPANY,	)	NO. W1998-00093-WC-R3-CV
	)	
Defendant/Appellant.	)	AFFIRMED

FILED

December 15, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

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, for which execution may issue if necessary.

IT IS SO ORDERED this 15th day of December, 1999.

PER CURIAM