IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
October 24, 2011 Session

DANIEL BOYD DAVIDSON v. BUSINESS PERSONNEL SOLUTIONS

Appeal from the Circuit Court for Washington County
No. 27999 Thomas J. Seeley, Jr., Judge

No. E2010-02366-WC-R3-WC-FILED-DECEMBER 12, 2011

The employee, who sustained injuries while removing tree limbs at a job site, filed a claim for workers' compensation. The employer denied benefits, contending that the injury was the result of the employee's intoxication and misconduct. While concluding that the employee was not guilty of willful misconduct, the trial court ruled that his intoxication was a proximate cause of the injuries and, therefore, denied the claim. The employee appealed, alleging that the trial court erred by finding that he was intoxicated at the time of his injuries and that the intoxication was the proximate cause. This appeal was referred to the Special Workers' Compensation Appeals Panel pursuant to Tennessee Code Annotated section 50-6-225(e)(3) and Tennessee Supreme Court Rule 51. Because the evidence does not preponderate against the trial court's finding that the employee was intoxicated and his intoxication proximately caused his injuries, the judgment is affirmed.

Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right; Judgment of the Trial Court Affirmed

GARY R. WADE, J., delivered the opinion of the court, in which JON KERRY BLACKWOOD, SR. J., and E. RILEY ANDERSON, Sp. J., joined.

Anthony A. Seaton and Amanda Inman Lowe, Johnson City, Tennessee, for the appellant, Daniel Boyd Davidson.

Brad C. Burnette, Knoxville, Tennessee, for the appellee, Business Personnel Solutions.

MEMORANDUM OPINION

Factual and Procedural Background

On July 28, 2009, Daniel Davidson (the "Employee"), who performed manual labor for Boehm Landscaping Company, was injured when he fell from a tree. Later, he filed suit

for workers' compensation benefits against Business Personnel Solutions (the "Employer"), which had contracted with Boehm Landscaping to handle its payroll and workers' compensation benefits.

At trial, the testimony established that the Employee reported to Boehm's place of business at approximately 7:00 a.m. on the date of his injury. After his arrival, Chris Boehm, the owner, conducted a safety meeting with Penny Wooten, a landscape supervisor, and the five-man work crew before sending the men to their job site in Johnson City. The purpose of the meeting was to describe the specific job for that day and to provide details as to the manner in which the workers were to carry out their duties. Boehm informed the crew that some large trees had sustained storm damage and that the company had been employed to cut the downed limbs and remove the brush. Several of the witnesses at trial confirmed that Boehm specifically instructed the work crew not to climb the trees because the necessary equipment for such work, if needed, would not be available until the next day.

Following the meeting, the Employee, who had served a sentence in 2007 and 2008 for drug-related offenses, and co-worker Donald Wooten stopped to rent a wood chipper before continuing on to the job site. According to Wooten, who testified by deposition because of his incarceration at the time of trial, the Employee smoked a marijuana joint on the way.[1]

At approximately 10:00 a.m., the work crew took their scheduled break and planned to remove a large limb that was only partially attached to a tree using a chain hooked to a Bobcat skid loader. During the break, the Employee began to scale the limb. The job foreman, Bill Benton, and other crew members testified that they reminded the Employee of

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[1] Rule 32.01 of the Tennessee Rules of Civil Procedure provides, in pertinent part:

> At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the Tennessee Rules of Evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof in accordance with any of the following provisions:
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> . . . .
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> (3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds that the witness is "unavailable" as defined by Tennessee Rule of Evidence 804(a). But depositions of experts taken pursuant to the provisions of Rule 26.02(4) may not be used at trial except to impeach in accordance with the provisions of Rule 32.01(1).

See also Tenn. R. Evid. 804(a)(5) (allowing the admission of testimony of an unavailable hearsay declarant).

Boehm's instructions not to climb trees and warned him to stop. Despite their warnings, the Employee continued until he fell from a height of eight to ten feet. One of the employees testified that it looked like the Employee "stepped into thin air."

When asked at trial what caused the fall, the Employee could offer no explanation. He testified that he was trying to ensure that all of the smaller limbs had been removed so that moving the larger limb would be easier, and he contended that he did not hear the warnings of the other men in the work crew. The Employee denied smoking marijuana on the morning of his fall, but did acknowledge that he used marijuana regularly.

While the Employee was in the hospital on the day after he was injured, hospital personnel took a urine sample from his catheter. The sample tested positive for THC, the active chemical in marijuana and contained a THC level of over 50 times the requisite threshold for a positive result. Despite these high levels, however, the other members of the work crew testified that the Employee appeared to be acting normally on the day of the accident and did not seem to be impaired or intoxicated.

Dr. James Baber, the president and CEO of Baber Medical Review Services, the medical review company that oversaw the administration of the Employee's drug test, testified by deposition. He confirmed that the drug test was administered according to standard procedures and described the Employee's THC level as "one of the more elevated . . . [he had] seen."

Dr. David Stafford, who qualified as an expert regarding the effects of marijuana use, testified as follows: "The first thing that happens is that the individual becomes less attentive, less aware of his surroundings. . . . He will also have some visual problems and a retention time deficit. . . . It [also] will affect visual acuity." Dr. Stafford described the Employee as a chronic marijuana user and, because of the "very high" level test results, stated that, in his opinion, the Employee was impaired at the time of his injury.

At the conclusion of proof, the trial court denied recovery based on the Employee's intoxication. While recognizing that none of the Employee's co-workers observed any noticeable signs of impairment, the trial court accredited the deposition testimony of Donald Wooten, who was incarcerated for a felony offense at the time of trial. The trial court remarked, "I just don't know why [Wooten] would have a motive to lie about [the Employee's] smoking marijuana that morning." In denying benefits, the trial court assigned significant weight to the toxicology test results and the testimony of Dr. Stafford, who described the Employee as a "chronic user of marijuana" based on the extraordinarily high levels of THC in his urine sample and who observed that chronic users do not always outwardly manifest the symptoms of marijuana use. The trial court concluded that impaired

vision, reduced reaction time, and a lack of memory and awareness as a result of the Employee's marijuana use constituted the "proximate cause of his fall and his consequent injuries."

While accrediting the testimony of Chris Boehm and that of the other crew members, who confirmed that they had been instructed not to climb the trees at the job site, the trial court nevertheless ruled that the Employee's level of intoxication was such that his behavior did not meet the definition of willful misconduct. See Tenn. Code Ann. § 50-6-110(a) (2008) ("No compensation shall be allowed for an injury or death due to the employee's willful misconduct . . . ."); Rogers v. Kroger Co., 832 S.W.2d 538, 541 (Tenn. 1992) (citing Ins. Co. of Am. v. Hogsett, 486 S.W.2d 730, 733 (Tenn. 1972)) ("[T]hree elements are needed to constitute willful misconduct for purposes of the statute: (1) an intention to do the act, (2) purposeful violation of orders, and (3) an element of perverseness.")

In this appeal by the Employee, he argues that the proof was insufficient to establish that he was intoxicated or that the intoxication proximately caused his injury. He also complains that the trial court should not have given credence to the deposition testimony of Donald Wooten. In response, the Employer, while agreeing with the trial court's denial of benefits, asserts that the Employee was also guilty of misconduct, which should have been an alternative ground for the dismissal of the claim.

Standard of Review

Findings of fact by the trial court must be reviewed "de novo upon the record . . . accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." Tenn. Code Ann. § 50-6-225(e)(2) (2008). This standard of review requires a careful examination of the factual findings and conclusions made by the trial court. Crew v. First Source Furniture Grp., 259 S.W.3d 656, 664 (Tenn. 2008); Galloway v. Memphis Drum Serv., 822 S.W.2d 584, 586 (Tenn. 1991). When credibility and weight to be given testimony are at issue, considerable deference must be afforded the trial court when the trial judge had the opportunity to observe the witnesses' demeanor and to hear in-court testimony. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). No such deference is extended to a trial court's findings when reviewing documentary evidence, such as depositions. Orrick v. Bestway Trucking, Inc., 184 S.W.3d 211, 216 (Tenn. 2006).

Questions of law, however, must be reviewed de novo with no presumption of correctness. Perrin v. Gaylord Entm't Co., 120 S.W.3d 823, 826 (Tenn. 2003). The interpretation and application of our workers' compensation statutes are questions of law. See Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009). When construing statutes, our primary objective is to carry out the intent of the legislature without unduly broadening or restricting the statute. Arias v. Duro Standard Prods. Co., 303 S.W.3d 256,

260 (Tenn. 2010).

Applicable Law

The law of workers' compensation creates a system in which employees can recover benefits for their injuries arising out of and in the course of employment without regard to fault. See Tenn. Code Ann. § 50-6-103(a) (2008). There are, however, some circumstances, such as when the employee engages in illegal drug use, in which an employee cannot recover for injuries that would otherwise be compensable. An employee who is injured on the job as a result of his or her "intoxication or illegal drug use" is not entitled to workers' compensation. Tenn. Code Ann. § 50-6-110(a).

When the employer has implemented a drug-free workplace, a positive drug test by the employee leads to a presumption that intoxication was the proximate cause of the injury. Tenn. Code Ann. § 50-6-110(c)(1).[2] When, however, the employer has not met the criteria for a drug-free workplace, as in this instance, the employer bears the burden of establishing intoxication as the proximate cause in order to avoid paying benefits. Tenn. Code Ann. § 50-6-110(b); see also Interstate Mech. Contractors, Inc. v. McIntosh, 229 S.W.3d 674, 680 (Tenn. 2007). To satisfy the requirement of establishing proximate cause, the employer does not have to prove that intoxication was the sole cause. Dobbs v. Liberty Mut. Ins. Co., 811 S.W.2d 75, 77 (Tenn. 1991); Overall v. S. Subaru Star, Inc., 545 S.W.2d 1, 4 (Tenn. 1976). Rather, proximate cause is shown where intoxication is more than "merely a remote or contributing cause." Overall, 545 S.W.2d at 4. Standing alone, expert testimony that the employee's blood contained intoxicants is not enough to show proximate cause. See Wooten Transps., Inc. v. Hunter, 535 S.W.2d 858, 861 (Tenn. 1976); Gentry v. Lilly Co., 476 S.W.2d 252, 254-55 (Tenn. 1971); see also Fireman's Fund Ins. Co. v. Mills, No. 03S01-9601-CH-00008, 1996 WL 724922, at *2 (Tenn. Workers' Comp. Panel Dec. 18, 1996).

An employer can also avoid paying workers' compensation benefits by proving the employee's willful misconduct. Tenn. Code Ann. § 50-6-110(a).[3] To successfully assert an employee's willful misconduct as a defense, an employer must show the employee's intention to commit the act, that the employee purposefully violated orders, and that an element of perverseness existed in doing the act. Rogers, 832 S.W.2d at 541; see also Hogsett, 486 S.W.2d at 733.

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[2] When an employee refuses to submit to a drug test, courts must presume that drugs were the proximate cause of the injury, absent "a preponderance of the evidence to the contrary." Tenn. Code Ann. § 50-6-110(c)(2).

[3] Like the intoxication defense, the employer also has to show that the willful misconduct was the proximate cause of the injuries. Tenn. Code Ann. § 50-6-110(b).

Analysis

I. Intoxication as the Proximate Cause

Here, the Employee was unable to explain how he fell. There was no indication that he slipped or that a limb or branch had broken. As asserted by the Employer, there was evidence that he merely took a step "into the air" where no step existed. The Employee's regular use of marijuana, his THC level, the deposition testimony of Dr. James Baber, and the live testimony of the forensic toxicologist tended to corroborate the proof offered by Donald Wooten, whose credibility might have otherwise been subject to impeachment. With no other explanation for the fall, it follows that the Employee's intoxication—and all of the side effects explained by Dr. Stafford—was more than "merely a remote or contributing cause." Overall, 545 S.W.2d at 4. Consequently, the trial court properly ruled that the Employer met its burden of establishing intoxication as the proximate cause of the Employee's injuries. See Tenn. Code Ann. § 50-6-110(b); McIntosh, 229 S.W.3d at 680.

II. Willful Misconduct

The Employer also alleged that the Employee's willful misconduct barred his workers' compensation recovery. In this case, the Employee received specific instructions from his supervisor not to climb any trees at the job site. When the Employee began to climb the tree, his co-workers reminded him of his supervisor's orders. The trial court nevertheless concluded that not all of the elements of willful misconduct, as developed by case law, were present because the Employee's level of intoxication prevented him from forming the requisite purposeful intent and did not meet the definition of "perverseness."[4] See Rogers, 832 S.W.2d at 541; see also Hogsett, 486 S.W.2d at 733. As indicated, two expert witnesses testified that the Employee's THC levels were extraordinarily high; thus, the trial court had an evidentiary basis for determining that the Employee had not acted willfully. In short, the

[4] The use of the word "perverseness" in the context of workers' compensation first appears in Am. Mut. Liab. Ins. Co. v. Gart, 125 S.W.2d 140, 141 (Tenn. 1939). In that case, the Court observed that "[n]ot only does wilful connote intentional, purposeful violation of orders . . . but also an element of perverseness." In Gart, the Court suggested that the "pertinent distinction" in cases where willful misconduct existed was that the "employee was motivated by self interest." Id. In Hogsett, 486 S.W.2d at 733, the Court laid out the "three elements, as deduced from the opinions of this Court, constituting wilful misconduct as contemplated by the statute and they are: (1) an intention to do the act, (2) purposeful violation of orders, and (3) an element of perverseness." Later, in Neely v. Fed. Rural Elec. Ins. Corp., No. 03S01-9410-CH-00099, 1995 WL 595598, at *4 (Tenn. Workers' Comp. Panel Aug. 21, 1995), a panel of the Court equated perverseness with being "obstinate or petulant" – implicitly, a stubborn insistence to engage in the prohibited activity. In Nance v. State Indus., Inc., 33 S.W.3d 222, 226-27 (Tenn. 2000), the Court opined that the perverseness element requires a determination of whether there is "willful disobedience to known and understood prohibitions" and observed that "[i]f there is a plausible explanation" for the employee's actions, the conduct cannot be said to contain an element of perverseness. (quoting Wright v. Gunther Nash Mining Constr. Co., 614 S.W.2d 796, 798 (Tenn. 1981)) (internal quotation marks omitted).

evidence in the record simply does not preponderate against the trial court's finding that the Employee's intoxication precluded willful misconduct.

Conclusion

Either intoxication or willful misconduct as the proximate cause of an employee's injuries will result in the denial of workers' compensation benefits. Because the evidence does not preponderate against the trial court's findings that the Employee's intoxication was the proximate cause of his injury, the judgment of the trial court is affirmed. Costs are adjudged against the Employee and his sureties, for which execution may issue if necessary.

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GARY R. WADE, JUSTICE

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
October 24, 2011 SESSION

Daniel Boyd Davidson v. Business Personnel Solutions

Washington County Circuit Court
No. 27999

No. E2010-02366-WC-R3-WC

JUDGMENT

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 appeals 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 of this appeal are taxed to the Employee and his sureties, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM