IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
Assigned on Briefs August 31, 2020

VICKI PILLOW v. STATE OF TENNESSEE

Appeal from the Tennessee Claims Commission
No. 0546-WC-17-0001629 James A. Haltom, Commissioner

No. M2019-02274-SC-R3-WC - Mailed November 4, 2020

An employee sustained severe injuries when she was run over by a public transit bus on her way to work. The employer denied the employee's workers' compensation claim, and she filed a complaint with the Tennessee Claims Commission. Both parties filed competing motions for summary judgment on the issue of whether the employee was within the course and scope of her employment when the injury occurred. The Claims Commission answered the question in the negative and determined that the case was subject to the "coming and going" rule. Therefore, the Claims Commission granted summary judgment in favor of the employer. Upon our review of the record and applicable case law, we affirm the decision of the Claims Commission.

Tenn. Code Ann. § 50-6-225(a) (2014) Appeal as of Right;
Judgment of the Tennessee Claims Commission Affirmed

JEFFREY S. BIVINS, CJ., delivered the opinion of the court, in which DON R. ASH and ROBERT E. LEE DAVIES, SR. JJ., joined.

Steven Fifield and Samuel C. Wright, Hendersonville, Tennessee, for the appellant, Vicki Pillow.

Herbert H. Slatery III, Attorney General and Reporter; Amanda S. Jordan, Senior Assistant Attorney General, for the appellee, State of Tennessee – Civil.

OPINION

Factual and Procedural Background

Vicki Pillow ("Employee") worked for the State of Tennessee ("Employer/State") for over twenty years and was employed with the Department of Mental Health and Substance Abuse Services on October 28, 2016. At that time, her office was located in the Andrew Jackson Building at 500 Deaderick Street in downtown Nashville, and her work hours were 7:30 a.m.–4:00 p.m. Employee was a participant in the State's Smart Commute Swipe and Ride Program, which provides a transit pass for any full-time or 120-day state employee to "ride all Nashville Metro Transit Authority and Regional Authority buses as well as the Music City Star commuter train free of charge" for work-related purposes. Any qualifying employee who wishes to participate must fill out a request to join the program and is then issued a card to swipe on each ride. The State pays the fare associated with each swipe for all participants in a monthly invoice.

Employee used the Swipe and Ride program to travel to work on October 28, 2016, boarding a Metropolitan Transit Authority ("MTA/WeGo") bus from Murfreesboro to Nashville at approximately 5:30 a.m. and arriving in downtown Nashville at approximately 6:45 a.m. Employee exited the bus at a designated bus stop at the intersection of 5th Avenue and Charlotte Avenue,[1] entered the crosswalk heading toward the Andrew Jackson Office Building, and was run over by the bus she had previously disembarked. The bus dragged Employee for almost one city block, and she sustained multiple injuries including a broken hip, lacerations, and a femoral fracture, which required amputation of her leg. The bus Employee traveled on, that subsequently ran her over, was "owned and operated by [Davidson County Transit Authority] and MTA," and "MTA determine[d] where bus stops [were] located." Additionally, the intersection "where [Employee] exited the bus [wa]s not located on [Employer's] premises."[2] Employee's office was located across the street from the bus stop.

Employee filed a workers' compensation claim on November 8, 2016, which Employer denied on the grounds that Employee's injury did not occur within the course and scope of her employment. Employee filed a timely complaint in the Claims

[1] In 2016, this street was named Charlotte Avenue, but it has since been renamed to Dr. Martin Luther King Jr. Blvd.

[2] Employee agreed to the facts regarding Employer's lack of control over the bus routes and the bus stop in response to Employer's statement of material facts; however, she stated that she did not believe that these facts "support a conclusion that the claim is not compensable."

Commission of the State of Tennessee, Middle Division. The claim was "place[d] into Abeyance to allow for [Employee] to reach Maximum Medical Improvement" and was placed back on the active docket in September 2018. On July 24, 2019, Employee filed a Motion for Partial Summary Judgment on the sole issue of whether she was in the course and scope of her employment when the injury occurred. Employer filed a competing motion for summary judgment, arguing that Employee was outside the course and scope of her employment when the injury occurred and that the injury was not compensable.

In support of her motion, Employee argued that her case falls within an exception to the general "coming and going" rule, which precludes recovery for employees who are merely commuting to and from work when they are injured. According to Employee, the State "furnished" the transportation because it made "deliberate and substantial payment" towards the Swipe and Ride Program, regardless of whether the State owned or controlled the bus itself. Employee asserted that the State's designees agreed in their depositions that the purpose of the program was to furnish transportation for the employees, and, because the program was intended to be a "pure employee benefit" for which the State paid 100% of the costs and did not seek reimbursement from employees, the Swipe and Ride Program was part of her compensation.

In the alternative, Employee argued that, even if the Claims Commission held that the State did not furnish the transportation, the facts of this case are a natural extension of the exception to the "coming and going" rule in Copeland v. Lead, Inc., 829 S.W.2d 140, 144 (Tenn. 1992). Employee argued that even if the bus stop was not on the "employer's premises," as required by the rule in Copeland, the State nonetheless created the necessity for her to cross the street from the bus stop to her office through the Swipe and Ride Program.

In response, Employer argued that the case should be dismissed, Employee's motion should be denied, and the Commission should grant summary judgment in its favor because "(1) the Swipe and Ride Program [did] not fall within the employer-provided transportation exception to the 'coming and going rule;' and (2) [Employee] was not in the course and scope of her employment while walking from the MTA . . . bus to her office." Employer distinguished the facts in this case from recognized exceptions to the "coming and going" rule in which an employee drives an employer-provided vehicle, gets reimbursed for mileage or meals during work-related travel, or is compensated for the actual time spent traveling. Employer asserted that Employee's commute using the Swipe and Ride Program "was not an integral part of her job nor[] was she performing a special assignment or task for the State at the time of her injury." Employer argued that the Swipe and Ride Program served merely as an alternate travel arrangement facilitated by the State, and Employee

was free to use her own car to travel to and from work. Moreover, the bus stop where Employee exited the bus was not State property and does not qualify as being "on the employer's premises" for purposes of the Copeland exception to the "coming and going" rule.

Employee, Larry Sanborn, and Susan Steffenhagen provided deposition testimony in support of the competing motions. Employee's deposition confirmed the previously mentioned facts about her employment and events leading up to the time of her injury. Mr. Sanborn, the Assistant Director of the Multimodal Transportation Resources Division at Tennessee Department of Transportation, and Ms. Steffenhagen, a planning specialist in the Long Range Planning Division at the Tennessee Department of Transportation, provided testimony regarding the details of the State's Swipe and Ride Program.

According to Mr. Sanborn's and Ms. Steffenhagen's testimony, the goals of the Swipe and Ride Program are "to contribute to air quality improvements, . . . to reduce congestion in the Metro Davidson County area, and . . . to furnish transportation to its employees." The Program is intended to not only benefit the community at large but also to benefit the employee. Any qualifying state employee can request the transit card through an application process and the employee can then use the card on most "normal" MTA and other regional transportation routes for work-related purposes by swiping the card upon entering the bus. MTA sends a monthly invoice to the State totaling, on average, $100,000 for the cost of all rides taken by Swipe and Ride Program participants that month, and the State allocates a maximum of 1.75 million dollars annually to fund the program. The State does not seek reimbursement from employees for the cost of their rides. The State also does not factor the Swipe and Ride Program into the employee's salary or compensation. Mr. Sanborn specifically rejected the idea that the State controls the MTA bus route or location of the bus stops in any way, and maintained that "the State is not able to tell MTA they need to alter [routes or bus stops] for any reason" because "that [is] their end of things." Additionally, the State relies on and directs Swipe and Ride participants to the MTA website for accurate and up-to-date information on bus routes. At the time of the depositions, the State's website described the Swipe and Ride Program as an "alternative transportation mode[]" that "transforms the monotony and stress of your daily commute."

Ultimately, the Claims Commission granted Employer's Motion for Summary Judgment, denied Employee's Motion for Partial Summary Judgment, and held that Employee's injuries "occurred outside the course and scope of her employment." The Commission reasoned that the general "coming and going" rule precluded Employee from recovering for her injuries under workers' compensation law and that exceptions to the rule did not apply in this case. Employee filed an appeal pursuant to Rule 3 of the Tennessee

Rules of Appellate Procedure that has been referred to the Supreme Court of Tennessee Special Workers' Compensation Appeals Panel.

Analysis

Standard of Review

The issue in this appeal is whether the trial court erred in granting the Employer's Motion for Summary Judgment and denying Employee's Motion for Partial Summary Judgment. "[W]hen summary judgment has been granted in a workers' compensation case, the standard of review is governed by [Tennessee Rule of Civil Procedure 56]." Goodloe v. State, 36 S.W.3d 62, 65 (Tenn. 2001) (citing Downen v. Allstate Ins. Co., 811 S.W.2d 523, 524 (Tenn. 1991)). Accordingly, while conducting de novo review, the Panel "must 'review the record without a presumption of correctness to determine whether the absence of genuine and material factual issues entitle the movant to judgment as a matter of law.'" Id. (quoting Finister v. Humboldt Gen. Hosp., Inc., 970 S.W.2d 435, 437–38 (Tenn. 1998)). The Panel "must view the evidence in the light most favorable to the non-moving party and must also draw all reasonable inferences in favor of the non-moving party." McCann v. Hatchet, 19 S.W.3d 218, 219 (Tenn. 2000) (citing Byrd v. Hall, 847 S.W.2d 208, 210–11 (Tenn. 1993)). "[W]hen the moving party does not bear the burden of proof at trial, the moving party may satisfy its burden of production either (1) by affirmatively negating an essential element of the nonmoving party's claim or (2) by demonstrating that the nonmoving party's evidence at the summary judgment stage is insufficient to establish the nonmoving party's claim or defense." Rye v. Women's Care Ctr. of Memphis, MPLLC, 477 S.W.3d 235, 264 (Tenn. 2015) (emphasis removed).

The "Coming and Going" Rule

Under Tennessee workers' compensation law, an employee's injury is compensable when it "aris[es] primarily out of and in the course and scope of the employment." See Tenn. Code Ann. § 50-6-102(14)(A) (Supp. 2020). "An injury 'arises primarily out of and in the course and scope of employment' only if it has been shown by a preponderance of the evidence that the employment contributed more than fifty percent (50%) in causing the injury . . . ." Id. § 50-6-102(14)(B). The phrase "arising out of" generally refers to the "origin of the injury, while 'in the course of employment' refers to the time, place and circumstances" of the injury. Knox v. Batson, 399 S.W.2d 765, 770 (Tenn. 1966) (quoting Hendrix v. Franklin State Bank, 290 S.W. 30, 30 (Tenn. 1926). However, an employee's mere presence in the place of injury because of his or her employment is generally insufficient to obtain workers' compensation benefits. Id. at 770.

As a general rule, "an [accidental] injury received by an employee on his way to or from his place of employment does not arise out of his employment and is not compensable, unless the journey itself is a substantial part of the services for which the employee was employed and compensated." Smith v. Royal Globe Ins. Co., 551 S.W.2d 679, 681 (Tenn. 1977) (citations omitted); see also Lollar v. Wal-Mart Stores, Inc., 767 S.W.2d 143, 144 (Tenn. 1989) (stating general rule that "an injury sustained en route to or from work is not compensable, since 'the employee is not to be considered in the course of his employment until he actually arrive[s] at his place of employment ready to begin his activities in the employer's work'" (quoting Smith v. Camel Mfg. Co., 241 S.W.2d 771, 775 (Tenn. 1951)). There are other recognized exceptions to the "coming and going" rule, including when the "transportation is furnished by an employer as an incident of the employment," Eslinger v. F&B Frontier Constr. Co., 618 S.W.2d 742, 744 (Tenn. 1981), or when an employee is injured while completing a "special errand" in furtherance of his or her employment or at the direction of the employer, Stephens v. Maxima Corp., 774 S.W.2d 931, 934 (Tenn. 1989).

"Furnished" has been interpreted to include an employer-provided vehicle for purpose of conducting business-related activity such as traveling to and from a job site. See Eslinger, 618 S.W.2d at 744 ("The primary reason the accident arose out of and in the course and scope of the employment was that the company provided him a business use vehicle that he was authorized and expected to use in going to and from work sites to his home."). This is true even if the employer does not reimburse the employee for car or travel related expenses. Anderson v. Sam Monday Motors, 619 S.W.2d 382, 383 (Tenn. 1981) (holding that an employer furnished a vehicle and the employee's injury fell under an exception to the "coming and going" rule because the employer provided the employee with a demonstrator automobile to travel to and from the workplace even though the employee had to pay his own cost for gas and had no required route to take while traveling). Furthermore, Tennessee courts have found that an employer who makes "deliberate and substantial payments" towards an employee's travel, even when such travel is in the employee's own vehicle, provides "furnished" transportation for purposes of the exception because "there is little difference in principle between furnishing an amount in cash equivalent to the value of the use of the employee's own car and furnishing the car itself." Pool v. Metric Constructors, Inc., 681 S.W.2d 543, 545 (Tenn. 1984) (holding that an employee's injury was compensable and not subject to the "coming and going" rule when an employee contracted for travel reimbursements and had to drive his own truck to carry tools to and from job site because his travel became an inherent part of his employment).

In Lollar v. Wal-Mart Stores, Inc., 767 S.W.2d 143 (Tenn. 1989), the Tennessee

Supreme Court adopted a premises exception to the "coming and going" rule, in which the Court held that an employee is acting within the course of employment once he or she has arrived "on the employer's premises coming to and going from the actual work place." Lollar, 767 S.W.2d at 150. The Court defined "employer's premises" to include an employer-provided parking area "regardless of whether the lot [wa]s also available to customers or the general public." Id. The Court expanded the scope of the premises exception in Copeland v. Leaf, Inc., 829 S.W.2d 140 (Tenn. 1992), to include not only injuries that occur while physically on the employer's premises but also injuries that occur while crossing a "public way that bisects an employer's premises . . . [b]ecause such travel was [made] necessary by the [employer]." Copeland, 829 S.W.2d at 144. In Copeland, the employer's plant and the employee parking lot were bisected by a public street, and employees were required to cross the public street while coming to and going from the work place. Id. at 141. The Court reasoned that, while expanding the current exception to the "coming and going" rule may make application more difficult in future cases, "[t]o allow coverage from the plant to the public street, to disallow coverage while crossing the street, and to allow coverage while walking in the parking lot to [employee] automobile[s] would appear inconsistent and illogical." Id.

Discussion

Here, the "coming and going" rule is at the heart of the issue in the competing motions for summary judgment: whether Employee was within the course and scope of her employment when she was injured. In Employee's brief to this Panel, she renews her arguments from the original Motion for Partial Summary Judgment. Relying on Pool v. Metric Constructors, Inc., she contends that the State's $100,000 monthly payments to the Swipe and Ride Program qualify as "deliberate and substantial payments for the expense of travel" and the State's lack of ownership and control over the bus or bus stop is irrelevant. See Pool, 681 S.W.2d at 545. Additionally, Employee argues that the program was part of her compensation because the State did not seek reimbursement for her participation and intended the program to be a "pure employee benefit." Employee also recognizes that this case is outside the exception in Copeland but renews her request to expand the exception to the facts of this case.

Employer argues that this case fits squarely into the "coming and going" rule and Employee's injury is not compensable because no exception to the rule applies. Employer admits that the Swipe and Ride Program is for the benefit of its employees, but Employer argues that providing a benefit to Employee is not dispositive of the case. See Sharp v. Nw. Nat'l Ins. Co., 654 S.W.2d 391, 392 (Tenn. 1983) ("While this travel is some modicum of benefit to the employer, travel to and from work is primarily for the benefit of the

employee: if he doesn't present himself at the work place, he is not compensated for his labors."). While the State pays a considerable amount overall for the Swipe and Ride Program, Employer argues that deposition testimony shows that the transportation is not part of Employee's compensation and is provided to all employees as a convenient travel alternative, a benefit or option and not a requirement. Further, travel, and the risks associated therewith, are not incident to Employee's work-related responsibilities.

Employer analogizes the facts of this case to those in Knox v. Batson, 399 S.W.2d 765 (Tenn. 1966), in which two employees were killed while sleeping at a hotel close to their job site rather than driving home for the night. The employer in Knox helped to research and recommend hotel accommodations close to the job site and provided an allowance to employees to cover part of the cost of lodging. Id. at 768–69. Ultimately, the Court held that the employees injury was outside the course and scope of their employment because they decided to stay at the hotel of "their own volition," the lodging "relat[ed] exclusively to the comfort and convenience of the[] employees," and the employer did not direct the employees to stay overnight or sleep at any one hotel. Id. at 775. Similar to the choice the employees had in Knox to stay at a hotel arranged by their employer, Employer contends that Employee had the choice to use the Swipe and Ride Program arranged by the State or any other mode of transportation available to her to get to work. In this case, the Swipe and Ride Program was merely facilitated by the State for the benefit, comfort, and convenience of all State employees. Therefore, Employer argues, Employee's injury is not compensable.

Both parties, in their respective briefs, refer to Lashonda Smith v. Macy's Corp. Services, No. 2018-06-0810, 2019 WL 172175, at *1 (Tenn. Workers Comp. App. Jan. 8, 2019), a recent decision from the Workers' Compensation Appeals Board that discusses the "coming and going" rule.[3] In Macy's, an employee who lived in Murfreesboro, Tennessee was recruited by a third-party vendor to work at the Macy's distribution center in Portland, Tennessee as a seasonal worker. Id. at *1 The third-party vendor explained that transportation would be available to the distribution center and that certain fees would apply. Id at *1–2. The employee was later injured when the transportation she was riding caught fire and she had to jump from the moving vehicle. Id. at *2. The Appeals Board

[3] Of note, in addition to the Macy's case, Brewer v. Dillingham Trucking, Inc., No. M2016-00611-SC-R3-WC, 2017 WL 1328629, at *1 (Tenn. Workers Comp. Panel Apr. 11, 2017) and Dugger v. Home Health Care of Middle Tenn., No. M2016-01284-SC-R3-WC, 2017 WL 1547015, at *1 (Tenn. Workers Comp. Panel Apr. 13, 2017) were recently decided by the Special Workers' Compensation Appeals Panel and discuss the "coming and going" rule; however, these cases are less factually relevant to the instant case.

held that the employee's injury was subject to the general "coming and going" rule and was not compensable. Id. at *4. The Appeals Board reasoned that Macy's "did not require [the employee] to use the . . . bus but merely facilitated the use of that service to its . . . workers as a convenience" and the employee "could have driven a personal vehicle to and from work, could have hired a ride-sharmg [sic] service, could have sought a ride with a friend or co-worker, could have used some form of public transportation or could have chosen to use the bus service provided." Id. at *5. The Appeals Board specifically highlighted the fact that Macy's did not own or provide the transportation because it was done by the third-party. Id. Additionally, the employee was not being compensated for her time spent on the bus, only the time she spent actually working at the distribution center, and, relatedly, the time spent traveling on the bus was not "a substantial part of the services for which the employee was employed and compensated." Id. (quoting Dugger v. Home Health Care of Middle Tenn., No. M2016-01284-SC-R3-WC, 2017 WL 1547015, at *11 (Tenn. Workers Comp. Panel Apr. 13, 2017)).

While this analysis is certainly fact specific, we find the principles in Knox and Macy's to be applicable in this case. Employer provided a benefit to qualifying employees to ride the already-existing city transit system free of cost. Employee was left in control of choosing her own transportation to and from work, including riding the bus, driving her own vehicle, or carpooling with others. Both parties agree that Employer did not control or direct MTA or the Davidson County Transit Authority in any way regarding bus routes or bus stops. Payment for the Swipe and Ride Program is certainly a significant amount per month, approximately $100,000, but we do not believe this is dispositive of the case. See Howard v. Cornerstone Medical Assocs., P.C., 54 S.W.3d 238, 242 (Tenn. 2001). Furthermore, the deposition testimony, even when viewed in a light most favorable to Employee, only provides evidence that this benefit was not part of Employee's compensation and that traveling to and from her office was not a "substantial part of the services for which [Employee] was employed." Smith, 551 S.W.2d at 681. Employee provides no evidence by way of testimony, an employment contract, or the like that contravenes these points. This benefit was an employer-facilitated access to an already-existing public-transit system for the convenience of its employees.

Additionally, we decline Employee's offer to extend the exception in Copeland to the facts of this case. Copeland was predicated on the fact that the employer was responsible for creating the necessity for employees to cross a public street during their commute to and from work. That is not the case here. Simply put, Employer did not create the necessity of Employee crossing the street from the bus stop to the office building. Even if Employee had only one route available from Murfreesboro to Nashville via the Swipe and Ride Program, and the 5th Avenue bus stop was the most direct route to her office

building, Employee remained free to take any other mode of transportation to work. Therefore, we hold that Employee's claim is subject to the "coming and going rule," and no exceptions to the rule apply. As a result, Employee was outside the course and scope of her employment when she was injured, and Employer is entitled to judgment as a matter of law. Accordingly, we affirm the Claims Commission's grant of summary judgment in favor of Employer.

Conclusion

Employee was outside the course and scope of her employment when she was injured during her commute to work. Under the circumstances, the "coming and going" rule prohibits recovery for Employee's injuries under workers' compensation law, and no exceptions to the rule apply in this case. Therefore, we affirm the decision of the Claims Commission to grant Employer's Motion for Summary Judgment, and we dismiss the case. Costs are taxed to Employee, Vicki Pillow.

JEFFREY S. BIVINS, CHIEF JUSTICE

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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 are assessed to Employee, Vicki Pillow for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM