IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
October 22, 2012 Session

TINA SHANNON v. ROANE MEDICAL CENTER

Appeal from the Chancery Court for Roane County
No. 2011-3 Frank V. Williams, III, Chancellor

No. E2011-02649-WC-R3-WC-Mailed January 2, 2013/Filed March 13, 2013

The employee, a surgical technician, worked full-time for the employer at a hospital. In addition to her regular hours, the employee worked on-call shifts on a rotating basis subject to specific rules and restrictions. During an on-call shift, the employee was required to return to the hospital during the early morning hours for emergency surgery. After leaving the hospital to drive home but while still subject to call, the employee was seriously injured in an automobile accident. The employee filed suit for workers' compensation benefits. The trial court denied recovery, and the employee appealed. In accordance with Tennessee Supreme Court Rule 51, the appeal has been referred to the Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law. Because the evidence establishes that the employee falls within an exception to the "coming and going rule," the judgment of the trial court is reversed and the case is remanded for an award of benefits.

Tenn. Code Ann. § 50-6-225(e) (2008 & Supp. 2012) Appeal as of Right; Judgment of the Trial Court Reversed

GARY R. WADE, C.J., delivered the opinion of the Court, in which E. RILEY ANDERSON, SP. J., and J. S. "STEVE" DANIEL, SP. J., joined.

Patrick C. Cooley, Kingston, Tennessee, for the appellant, Tina Shannon.

R. Kim Burnette, Knoxville, Tennessee, for the appellee, Roane Medical Center.

MEMORANDUM OPINION

I. Facts and Procedural Background

Tina Shannon (the "Employee"), a surgical technician employed by the Roane

Medical Center (the "Employer") in Harriman, Tennessee, worked a regular schedule from 7:00 a.m. to 3:00 p.m., Monday through Friday. In addition, the Employee worked on-call shifts on a rotating basis. On April 19, 2010, the Employee, while still on call as she returned to her residence after assisting with emergency surgery, was injured in an automobile accident when another driver crossed over the center line into the path of her vehicle. As a result of the collision, the Employee suffered several injuries, including a splinter fracture to her tibia that required three separate surgeries over a period of time. Because of her injuries, the Employee missed thirty-seven weeks of work.

On January 7, 2011, after the benefit review process had been exhausted as provided by Tennessee Code Annotated section 50-6-203(a) (2008), the Employee filed suit seeking workers' compensation benefits. In response, the Employer denied compensability, maintaining that the Employee was not injured in the course and scope of her employment.

At trial, the Employee, then forty-nine years of age, testified that after graduating high school she had worked at a factory for twenty-one years before it closed. Afterward, she received training as a surgical technician and was hired by the Employer. In addition to working 7:00 a.m. to 3:00 p.m., Monday through Friday, her employment included on-call shifts as scheduled by the nurse supervisor. As a matter of policy, up to four employees were subject to being called in by the Employer for emergency room duty at any given time. During her regular hours, the Employee was paid just over $12.00 per hour. While on call but not on duty, she received $2.00 per hour, which increased to 1.5 times her regular pay for the time she was called into the hospital for surgery. Her on-call shifts were subject to Operating Room On-Call System Rules established by the Employer. Among other things, the rules required that the Employee be available for contact either by telephone or by pager at all times during her on-call shift, that she stay within thirty minutes' travel time to the emergency room, that she refrain from using alcohol or drugs during this time, and that she otherwise remain alert and able to perform the responsibilities of her job.

The Employee testified that on April 19, 2010, she worked her normal shift until 3:00 p.m. Thereafter, she immediately clocked back in to begin an on-call shift and went into surgery. The Employee clocked out again at 9:10 p.m. and drove to her residence in Sunbright before being paged shortly after midnight on April 20 for a second on-call shift. She clocked back in and assisted in a surgery, following which she clocked out at 2:26 a.m. and left the hospital. While driving toward her residence, the Employee was seriously injured in an automobile accident when another driver crossed into her lane of traffic. She was knocked unconscious as a result of the collision. Her injuries included a compound fracture of the fibula and tibia and broken ribs on both sides. She bruised her liver and lung and required surgery to remove her spleen. Because her tibia had splintered, she underwent three surgical procedures over a period of time and was unable to work for the succeeding

thirty-seven weeks. Her employment was terminated in September of 2010, but she was told that she would be eligible for rehire when she was physically able to do her former job. In February of 2011, the Employee accepted a part-time position with Complete RX, a pharmacy at the hospital that operated independently of the Employer. During the trial, Sherman Shannon, the Employee's husband, attested to the limitations on the Employee's physical activities as a result of her injuries.

Sandra Giguere, the Director of Pharmacy for Complete RX, was called as a witness for the Employer. She acknowledged that she had hired the Employee on February 7, 2011, as a pharmacy technician. She testified that the Employee walked with a limp but did not complain about her physical condition. According to Giguere, the Employee's new job did not require any significant lifting.

Sherry Holt, the former human resources director for the Employer, was also called as a witness for the Employer. She testified that the Employee was removed from the hospital payroll on September 10, 2010, explaining that the Employee had exhausted her twelve weeks of family medical leave and more. She stated that the Employee was terminated because there was no indication of when she would be able to return to her former job. On cross-examination, Holt acknowledged that the Employer did not have a full second or third surgical shift at its hospital and that the Employer benefitted financially by developing an on-call system during those times. She confirmed that the Employee and others who were on call were required to carry a pager, be alert, and report to the hospital within thirty minutes of any call made by the Employer during the shift.

Sharon McBay, a registered nurse and manager of surgery for the Employer, testified that the Employee performed capably as a surgical technician. She stated that an on-call system had also been developed for employees in departments besides surgery. McBay offered as an exhibit a copy of the rules governing on-call employees in effect at the time the Employee was injured. She confirmed that the Employee had clocked out from her 1.5 times hourly rate just prior to the accident, indicating that the lower hourly rate was in effect at the time of the Employee's injury.

At the conclusion of the proof, the trial court found in favor of the Employer and denied benefits, holding that an injury sustained while merely traveling to or from a place of employment was not compensable, despite the on-call status of the Employee. After observing that the case presented a compensability issue of first impression, the trial court concluded that the Employee would have been entitled to a 70% impairment for the injury to her leg had she qualified for benefits.

II. Standard of Review

Initially, the trial court's findings of fact are subject to "de novo [review] 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). "'This standard of review requires us to examine, in depth, a trial court's factual findings and conclusions.'" Williamson v. Baptist Hosp. of Cocke Cnty., Inc., 361 S.W.3d 483, 487 (Tenn. 2012) (quoting Galloway v. Memphis Drum Serv., 822 S.W.2d 584, 586 (Tenn. 1991)). When the trial court has seen and heard the witnesses, considerable deference must be afforded to the trial court's findings of credibility and the weight that it assessed to those witnesses' testimony. Tryon v. Saturn Corp., 254 S.W.3d 321, 327 (Tenn. 2008) (citing Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002)). On questions of law, such as the issue before us, our standard of review is de novo with no presumption of correctness. Wilhelm v. Krogers, 235 S.W.3d 122, 126 (Tenn. 2007) (citing Perrin v. Gaylord Entm't Co., 120 S.W.3d 823, 826 (Tenn. 2003)).

III. Analysis

The sole issue in this case is whether being injured while on call under these particular circumstances constitutes an injury arising out of and occurring in the course of employment. In order for a workers' compensation claim to be compensable, the injury giving rise to the claim must arise out of and occur in the course of employment. See Tenn. Code Ann. §§ 50-6-102(12), 50-6-103(a) (Supp. 2012); Cunningham v. Shelton Sec. Serv., Inc., 46 S.W.3d 131, 135 (Tenn. 2001). The burden of proof is on the employee to prove that her injuries not only arose out of the employment but also occurred in the course of the employment. Crew v. First Source Furniture Grp., 259 S.W.3d 656, 664 (Tenn. 2008). The Workers' Compensation Act, however, should be liberally construed in favor of compensation, and any reasonable doubts should be resolved in the employee's favor. Id.; Wait v. Travelers Indem. Co. of Ill., 240 S.W.3d 220, 224 (Tenn. 2007) (citing Knox v. Batson, 399 S.W.2d 765, 772 (Tenn. 1966)).

"Arising out of" refers to the origin of the incident in terms of causation. McCurry v. Container Corp. of Am., 982 S.W.2d 841, 843 (Tenn. 1998). An accidental injury arises out of employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. GAF Bldg. Materials v. George, 47 S.W.3d 430, 432 (Tenn. Workers' Comp. Panel 2001) (citing Fink v. Caudle, 856 S.W.2d 952, 958 (Tenn. 1993)). "In the course of" relates to the time, place, and circumstances in which the injury occurred. McCurry, 982 S.W.2d at 843. An accident occurs in the course of employment if it occurs while an employee is performing a duty that he or she was employed to do. Fink, 856 S.W.2d at 958.

In this instance, there is clearly a causal connection between the Employee's injury and her employment because she would not have been driving home at 2:30 a.m. but for her work at the hospital as a surgical technician. The real issue, therefore, is whether the injury occurred in the course of employment.

The general rule is that an employee is not acting within the course of employment when the employee is going to or from work unless the injury occurs on the employer's premises. Hubble v. Dyer Nursing Home, 188 S.W.3d 525, 534 (Tenn. 2006); Lollar v. Wal-Mart Stores, Inc., 767 S.W.2d 143, 150 (Tenn. 1989); see also 1 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 13.01[1] (2009) [hereinafter Larson's] (explaining that the general rule is that "for an employee having fixed hours and place of work, going to and from work is covered only *on the employer's premises*" (footnotes omitted)). The primary basis for this rule, often referred to as the "coming and going rule," see, e.g., Howard v. Cornerstone Med. Assoc., 54 S.W.3d 238, 240 (Tenn. 2001), is that travel to and from work is not ordinarily a risk of employment and instead falls into the category of things any employee must do "in preparation for the work day" or as a "prerequisite to getting home." Sharp v. Nw. Nat'l Ins. Co., 654 S.W.2d 391, 392 (Tenn. 1983). While travel to and from work may provide a modicum of benefit to the employer, such travel is typically considered to be primarily for the benefit of the employee. That is, unless employees travel to the workplace, they are not entitled to be compensated for their labors. Id.

The coming and going rule does, however, have exceptions. If the employee is injured "while performing some special act, assignment, or mission at the direction of the employer," then the injury may be compensable. Stephens ex rel. Stephens v. Maxima Corp., 774 S.W.2d 931, 934 (Tenn. 1989); see also Larson's § 14.05[1] (describing the "special errand" exception to the coming and going rule). Likewise, an injury that occurs while an employee is traveling to or coming from work in a company vehicle may also be compensable. See Eslinger v. F & B Frontier Constr. Co., 618 S.W.2d 742, 744 (Tenn. 1981). Additionally, our supreme court has recognized that an injury occurring while an employee travels to or from work is compensable when the travel 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). Factors that may lead to a finding that the travel was a substantial part of the employment services include the use of a vehicle by an employee to transport materials used in the employment or the compensation of the employee for food and travel expenses. See Pool v. Metric Constructors, Inc., 681 S.W.2d 543, 544 (Tenn. 1984).

Three cases in Tennessee have at least partially addressed the issue of whether an on-call employee who is injured on the way to or from work has sustained an injury in the

course of employment. The facts in these cases, however, are distinguishable from the facts before us.

In Howard, a physician whose employer required him to report to various job sites was injured while on his way to a nursing home to evaluate some new patients. 54 S.W.3d at 239. Our supreme court observed that the physician was no different than other employees injured while traveling to or from work and, therefore, did not fall within any of the exceptions to the coming and going rule. Id. at 242. The physician in Howard was not on call at the time of his injury. Although his job required him to travel to various medical sites, he was not subject to any restrictions in terms of his readiness, he was not required to stay within a certain radius of his job site, and he was not compensated for the time he spent waiting for an assignment to visit a particular job site. Id. at 239, 241-42.

Sharp v. Northwestern National Insurance Co. is also distinguishable. Sharp was employed by Pinkerton's, Inc. as a "roving sergeant," which required him to go to various job sites. Sharp, 654 S.W.2d at 391. When he was injured while driving home from one of these job sites, he alleged that his injury was compensable because he was "on call" at the time the injury occurred. Id. The court held that the coming and going rule precluded an award of benefits. Id. at 392. Sharp was not subject to any restrictions in his travel and was only paid for the hours he actually worked at a job site. Id. Moreover, his duties did not "require that he travel for the benefit of his employer." Id.

The facts in Douglas v. Lewis Bros. Bakeries, 477 S.W.2d 202 (Tenn. 1972), while closer to this case, are also distinguishable. Douglas was a maintenance engineer who worked regular weekday shifts but was also subject to being called in at any hour to make repairs on machinery at the employer's facility. Id. at 203. He died in an automobile accident one morning while en route to the facility to make repairs at his employer's behest. Id. In denying recovery, the court reasoned that the employee was paid only for the hours worked after reaching the facility. Id. It does not appear that the employer imposed any significant restrictions on the employee during the time he was subject to call, and, while the court acknowledged the employer's interest in the availability of the employee to come in and make repairs, it did not find that interest sufficient to make an exception to the general coming and going rule. Id.

Our survey of other states applying the equivalent of our coming and going rule indicates that there is no clear-cut majority rule to as to whether injuries to on-call employees qualify as having occurred in the course of employment. In California, for example, the fact that a police officer was "on call" twenty-four hours a day was not sufficient to render the general coming and going rule inapplicable. Garzoli v. Workmen's Comp. Appeals Bd., 467 P.2d 833, 835 (Cal. 1970); see also State Lottery Comm'n v. Workers' Comp. Appeals Bd.,

57 Cal. Rptr. 2d 745, 746, 748-49 (Cal. Ct. App. 1996) (noting that mere fact of being subject to call at all times, without more, is insufficient to make off-duty injury compensable). In Ohio, however, an employee who was subject to call was injured in an automobile accident on his way to work after being summoned to duty; in awarding benefits, the court emphasized that the employer required the employee to carry a pager and to respond immediately when paged. Durbin v. Ohio Bureau of Workers' Comp., 677 N.E.2d 1234, 1238 (Ohio Ct. App. 1996).

Courts that have decided cases with facts virtually identical to the case before us have also reached different results. For example, in Kent General Hospital v. Napolitano, No. 84A-SE-1, 1986 WL 1256, at *2 (Del. Super. Ct. Jan. 21, 1986), a Delaware court found that the coming and going rule did not bar recovery for an on-call surgical technician who was injured returning to her residence after being summoned for duty at a hospital. Because the employee was being compensated "while traveling" at a rate of $1.50 per hour for continuing to be on-call at the time of her injury, the court found that she was injured while subject to the employer's control. Id. Similarly, in Wythe County Community Hospital v. Turpin, No. 0208-11-3, 2011 WL 4552277, at *3 (Va. Ct. App. Oct. 4, 2011), a divided panel of the Virginia Court of Appeals awarded benefits to an on-call nurse who was injured in an automobile accident while driving home from work. The court emphasized that the employee's "job required her to monitor her cell phone at all times, including while driving." Id.

In Smith v. Dallas County Hospital District, 687 S.W.2d 69, 72-73 (Tex. App. 1985), however, the court found that a nurse who was injured while traveling home from on-call duties at the hospital did not have a compensable claim because she was neither being paid for her traveling expenses nor subject to the control of the employer at the time. A dissent in that case made the following observations, placing emphasis on the greater benefit to the employer and the greater risk of injury to the employee:

> Smith's injury was . . . related to and originated in her employer's work or business. The Hospital District is . . . in the business of providing [medical] services. Smith's "on call" travel, as a result of which her injury occurred, directly facilitated the Hospital District's ability to provide these services. The "on call" arrangement benefited the Hospital District in at least two ways: (1) it enabled the Hospital District to provide . . . services at nights and on weekends; and (2) it enabled the Hospital District to provide these services at a lower cost to the Hospital District, in that it is doubtless less expensive to bring in "on call" personnel to provide . . . services at nights and on weekends than it would be to maintain a twenty-four hour per day, seven day per week . . . staff.

. . . .

> . . . . By virtue of the[] numerous trips [required by the on-call system], Smith was subjected to a *greater* risk of injury during travel than were other members of the traveling public. Thus, the rationale underlying the "coming and going" rule does not apply to these trips made while "on call."
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> . . . .
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> In conclusion, Smith should not be penalized as a consequence of the Hospital District's decision to provide its night and weekend . . . services by means of the "on call" system, which exposed Smith to risks greater than those borne by the general traveling public.

Id. at 74-76 (Akin, J., dissenting).

The relevant authorities from Tennessee and other jurisdictions demonstrate that it is not possible to categorically grant or deny benefits when an on-call employee is injured while in transit to or from work. In our view, therefore, courts should consider the totality of the circumstances in determining whether the coming and going rule applies to an on-call employee, including but not limited to the following factors: (1) whether the employee is paid for time spent on call, either in the form of an hourly wage or increased annual salary; (2) the nature of any restrictions imposed by the employer during the employee's on-call hours; (3) the extent to which the employer benefits from the on-call system; and (4) the extent to which the on-call system requires additional travel that subjects the employee to increased risk compared to an ordinary commuter.

Although the Employee in the case before us was not directly compensated for her travel, she was paid an hourly wage by the Employer for the time she spent on call. Cf. Sharp, 654 S.W.2d at 392 (denying benefits because, among other things, the employee was only compensated for time he spent at his work site rather than being compensated while on call); Douglas, 477 S.W.2d at 203 (same). The Employer imposed several restrictions during the Employee's on-call hours, requiring that she remain in contact by pager or telephone, that she stay within thirty minutes' travel time of the Employer's facility, that she refrain from using alcohol and other substances, and that she otherwise remain alert and able to perform the responsibilities of her job. Compare Durbin, 677 N.E.2d at 1238 (awarding benefits where the employer imposed a restriction by requiring the employee to carry a pager and to respond immediately when paged), with Howard, 54 S.W.3d at 241-42 (denying benefits where the employee was required to report to different job sites but was not subject to any significant restrictions).

As for the third factor, the on-call system permitted the Employer to offer operating room services on a twenty-four hours per day, seven days per week basis without having to pay for full staffing, thereby providing the Employer a substantial savings in salary expense. This factor is of particular relevance in light of the fact that the basis for the coming and going rule is that travel to and from work generally benefits the employee to a much greater extent than the employer. In Sharp, for example, our supreme court denied recovery because "travel to and from work [was] primarily for the benefit of the employee" and provided only "a modicum of benefit to the employer." 654 S.W.2d at 392. In this instance, the reverse is true. Moreover, the irregular commuting required of the Employee during her on-call shifts not only provided a significant benefit to the Employer; it also subjected the Employee to a greater risk by requiring more frequent and extensive travel, often at odd hours. Cf. Howard, 54 S.W.3d at 241 (denying benefits where the employee's travel to a different job site "placed him at no greater risk than any other motorist on the highway").

The fact that the Employer benefited significantly from an on-call system that required additional travel by the Employee places this case in the category of those exceptional circumstances in which an employee's travel may be considered a significant part of the employment. See, e.g., Pool, 681 S.W.2d at 544 (finding that the need to carry tools in the employee's truck and the provision of travel expenses made the travel a substantial part of the employee's services to the employer); Cent. Sur. & Ins. Corp. v. Court, 36 S.W.2d 907, 907-08 (Tenn. 1931) (noting that employee's job required travel to various schools to collect payments for the employer). As a matter of policy, if travel provides a significantly greater benefit to the employer and results in greater risk to the employee, then injuries to the employee during that travel should be compensable as "a substantial part of the services for which the [employee] was employed." See Smith v. Royal Globe Ins. Co., 551 S.W.2d at 681.

IV. Conclusion

In summary, upon consideration of the totality of the circumstances, we hold that the Employee's injury occurred in the course of her employment because (1) the Employee was compensated for the time she spent on call; (2) the Employer imposed significant restrictions that the Employee had to follow while on call; (3) the on-call system provided significant benefits to the Employer; and (4) the on-call system required additional travel that subjected the Employee to increased risk.

The judgment of the trial court is, therefore, reversed, and the cause is remanded for a determination of benefits. Costs are adjudged against the Employer, for which execution

may issue if necessary.

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GARY R. WADE, CHIEF JUSTICE

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

TINA SHANNON v. ROANE MEDICAL CENTER

Chancery Court for Roane County
No. 20113

No. E2011-02649-SC-WCM-WC

JUDGMENT ORDER

This case is before the Court upon the motion for review filed by Roane Medical Center pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(A)(ii), 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.

It appears to the Court that the motion for review is not well-taken and is therefore denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court, and the Court directs the publication of the opinion of the Special Workers' Compensation Appeals Panel at Knoxville, October 22, 2012 Session.

Costs are assessed to Roane Medical Center, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

GARY R. WADE, C.J., NOT PARTICIPATING