

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
March 25, 2019 Session

**TENNESSEE CLINICAL SCHOOLS, LLC, D/B/A HERMITAGE HALL
V. JEFFREY E. JOHNS**

**Appeal from the Chancery Court for Davidson County
No. 17-127-IV Russell T. Perkins, Chancellor**

**No. M2018-00985-SC-R3-WC - Mailed June 20, 2019
Filed August 2, 2019**

This 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 pursuant to Tennessee Supreme Court Rule 51. The trial court entered a final order that Employee was entitled to benefits. The trial court found that Employer failed to prove willful misconduct under Tenn. Code Ann. § 50-6-110(a)(1) because Employer failed to prove bona fide enforcement of its policy and that Employee had a valid subjective belief for violating said policy. We reverse the trial court's finding that Employer failed to prove bona fide enforcement of its policy, but we affirm the trial court's finding that Employee did not willfully violate Employer's policy. As a result, we affirm the trial court's judgment in favor of the Employee.

**Tenn. Code Ann. § 50-6-225(e) (2014) (applicable to injuries
occurring prior to July 1, 2014) Appeal as of Right;
Judgment of the Chancery Court Affirmed**

ROBERT E. LEE DAVIES, SR. J., delivered the opinion of the court, in which JEFFREY S. BIVINS, C. J., and DEANNA BELL JOHNSON, SP. J., joined.

Gregory Fuller and Peter French, Brentwood, Tennessee, for the appellant, Tennessee Clinical Schools, LLC, D/B/A Hermitage Hall.

Donald Zuccarello and Hayley Vos, Brentwood, Tennessee, for the appellee, Jeffrey E.

Johns.

OPINION

Factual and Procedural Background

Tennessee Clinical Schools, LLC (“Employer”) filed a petition for determination of workers’ compensation benefits in the Chancery Court of Davidson County on February 7, 2017. On February 27, 2017, Jeffrey E. Johns (“Employee”) filed his answer. The Chancellor heard the case on February 21, 2018, and took the matter under advisement. On May 3, 2018, the court issued a written memorandum and order finding in favor of Mr. Johns. Employer then properly perfected its appeal.

The issues in this case concern whether Mr. Johns engaged in disqualifying willful misconduct pursuant to Tennessee Code Annotated section 50-6-110(a)(1) which provides in part that:

(a) No compensation shall be allowed for an injury or death due to:

(1) The employee’s willful misconduct . . .

(b) If the employer defends on the ground that the injury arose in any or all of the ways stated in subsection (a), the burden of proof shall be on the employer to establish the defense.

Tennessee Clinical Schools, LLC doing business as Hermitage Hall, is a therapeutic residential treatment facility for trauma-based teenagers. Hermitage Hall had a physical restraint policy for the treatment of its residents. At the time of the incident in question, Policy 7.3 provided in part:

PURPOSE:

To support each resident’s right to be free from restraint and therefore *limit the use of these interventions to emergencies in which there is an imminent risk of a resident physically harming him/herself or others.* (emphasis added)

DEFINITIONS:

Code Blue – Situation necessitating immediate staff (including nurse) response due to potential or immediate risk and/or harm to person(s) served and/or staff . . .

Physical Restraint – The application of any manual method that immobilizes or reduces the ability of the resident to move his or her arms, legs, body, or head freely (also named therapeutic hold, protective hold, or manual restraining).

Emergency Safety Situation – *An instance in which there is imminent risk of an individual harming him/herself or others.*(emphasis added).

Less Restrictive Measures – Measures which modify the environment, enhance interpersonal interaction, or provide treatment so as to minimize or eliminate the problems/behaviors which place the resident at risk ...

POLICY:

Physical restraint may only be used when less restrictive interventions have been determined to be ineffective to protect the resident or others from harm . . . Restraint use must be performed in a manner that is safe, proportionate, and appropriate to the severity of the behavior, and the resident’s chronological and developmental age; size; gender; physical; medical; and psychiatric condition; and personal history (including any history of physical or sexual abuse).

D. Use of Less – Restrictive Measures:

Prior to the application of restraints or initiation of seclusion, when possible, attempts will be made to use less-restrictive measures to control the behavior that may [sic] potentially cause injury to the resident or others .

..

M. Application of Physical Restraints:

Physical restraints (holds) may only be done using techniques trained through the aggression management program. In no case may a resident be taken to the floor or held in a prone position. Additional [sic] except in extreme emergency one-person holds are not to be used. Furthermore, Heritage Hall expressly prohibits the following:

2. Excessive or inappropriate use of restrictive behavior management techniques.

On December 15, 2013, Mr. Johns was employed as a healthcare worker by Hermitage Hall. Mr. Johns had been employed a little less than two months. During his initial week of orientation, he was provided with Employer's written policy for the use of physical restraint; however, Mr. Johns did not recall reviewing Employer's physical restraint policy during his orientation. Mr. Johns did admit he had some training on the overall policy, including the use of Code Blue request for assistance. He also acknowledged that he understood the dangers of failing to follow Policy 7.3.

Mr. Johns' normal shift began at 11:00 p.m. and ended at 7:00 a.m. However, on December 15, 2013, Hermitage Hall was short staffed and requested Mr. Johns to work past the end of his normal shift. That morning, Mr. Johns was assigned to awaken a group of residents and get them ready for their morning medications and breakfast. This was the first occasion Mr. Johns was requested to get some of the residents up for breakfast, and it was during this assignment that an altercation ensued between Mr. Johns and one of the residents.

The only evidence of the encounter between Mr. Johns and the resident came from Mr. Johns' testimony and a video tape.¹

Based on the testimony of Mr. Johns and Employer's representative, who reviewed the video tape, the trial court found that:

When Mr. Johns entered the boys' resident's hall bedroom shortly after 8:00 a.m. on December 15, 2013 to get the young men up and ready for breakfast and medications, he attempted to verbally prompt the three male students in the room to get up. He walked around the room from bed to bed for about three minutes or so in this effort. Mr. Johns then began to remove the cover (blanket) from the bed of the thirteen-year-old in question. In response, the young man pulled the blanket back up above his shoulders. After that, Mr. Johns continue [*sic*] to walk around the room. Mr. Johns tugged at this particular young man's cover a second time, with the same result. On the third time that he pulled the blanket off the young man, Mr. Johns held on to it, the young man moved to a sitting position, grabbed the cover and began striking Mr. John [*sic*] in the area of his lower arm, wrist

¹ The trial court described the video tape as follows: "The video quality is not particularly good, consistent with it being a surveillance video. Additionally, the video has no sound. Despite these limitations, it is valuable probative evidence. The parties carefully addressed the video in briefs, through witnesses, and in opening and closing statements."

and hands. There was a brief tug-of-war over the blanket. Mr. Johns eventually released the cover to the young man. After this, the young man remained sitting on the bed.

Mr. Johns then walked as if he was going to walk past the young man, threw down a reddish folder/clipboard on the floor, apparently with the plan of restraining the young man from behind, although the young man was still sitting on the bed and not necessarily posing a continuing threat. The young man turned, and Mr. Johns grabbed him as they were facing each other (Mr. Johns standing and the young man still sitting on the bed). A scuffle ensued. The other two young men in the bedroom were watching; one of them eventually got up and began calmly folding his cover and the scuffle between Mr. Johns and the other young man apparently ensued out of the range of the camera. Mr. Johns appeared to be a bit taller than the young man although both of them were of medium to husky build. The young man was strong, and Mr. Johns could not restrain him. Mr. Johns had apparently been calling for assistance after he realized that the young man was not going to get out of the bed at this prompting.

After that, three women employed by Hermitage Hall came into the room and helped restore order, but not before Mr. Johns fell to the floor. One of the other employees talked with the young man who was in the scuffle, with Mr. Johns, and with one of the other young men in the room. She left, returned shortly thereafter, and appeared to be having an easy exchange (she was laughing at one point) with the young man who had been scuffling with Mr. Johns. The young man eventually got out of bed a few minutes after Mr. Johns left the room.

Mr. Johns acknowledged that he utilized a one-person hold to restrain the youth and that under Policy 7.3 such a restraint was only to be used when there was a threat of imminent harm. He also admitted that it was his responsibility to apply what he had learned to the situation at hand and that he made the conscious decision to engage the youth, to respond to his assault, and to utilize the hold. Because the youth struck Mr. Johns several times, Mr. Johns testified that he was uncertain what the youth would do next. In his mind, the situation presented an imminent danger which permitted the use of the hold according to Policy 7.3. Mr. Johns based his decision on the youth's actions, which indicated to Mr. Johns that he was comfortable striking staff. Mr. Johns testified that he did not knowingly or intentionally violate Policy 7.3 and that based on the

circumstances and his prior experience² his use of physical restraint and of a one-person hold was proper.

The parties stipulated that Mr. Johns suffered a compensable permanent injury to his shoulder which arose out of and during the course and scope of his employment with Employer, on or about December 15, 2013, and the injury was causally related to Mr. Johns' work with the Employer as defined by the Tennessee Workers' Compensation Act.

The next day, Mr. Johns met with the nightshift supervisor.³ Over the objection of Employer, Mr. Johns testified that his impression or understanding from his meeting with the supervisor was that he had done nothing wrong. Mr. Johns testified that he was not told during that meeting that he could not return to work; however, as a result of Mr. Johns' injury, he was unable to return to work

Mr. Johns said he first learned he was accused of having violated Policy 7.3 and was being terminated when he met with DiMario Blackwell, the HR Director for Employer at that point in time, on January 2, 2014. However, Mr. Johns testified he had observed other employees use physical restraint, and he was unaware of those employees being disciplined as a result. He did concede that he had not been employed for very long and did not know many of the other employees.

The chief operations officer at Hermitage Hall, Cory Jackson, testified regarding Policy 7.3. He explained under that policy, physical intervention is the last resort when there is imminent danger in that moment to the resident involved, staff, or other residents. Based upon his review of the video, Mr. Jackson believed Employee violated 7.3 by utilizing a one-man hold. According to Mr. Jackson, there was no imminent danger at the moment immediately prior to the execution of the hold, but he did acknowledge that the youth initiated the physical contact and that the situation could have escalated.

Mr. Jackson believed the presence of imminent danger was not a subjective determination, and therefore, was not a judgment call for an employee to make. However, in somewhat of a contradiction, Mr. Jackson acknowledged that it is the employee in the moment who must decide to use force and that the staff of Hermitage

² Mr. Johns testified that he had jobs similar to the one with Hermitage Hall as a mental health worker or counselor and had worked in similar facilities as Hermitage Hall.

³ Mr. Johns was not able to identify this individual, and she did not testify at trial or by deposition.

Hall is expected “to make proper judgment calls regarding [Policy 7.3].”

Mr. Jackson testified whenever there is an incident concerning Policy 7.3., an investigation is conducted, and if a violation is found, the employee is always terminated. In addition, Policy 7.3 requires a staff debriefing within twenty-four hours of an incident, and therefore, an investigation will occur regarding any disciplinary action. He also provided examples of two other employees’ violations of Policy 7.3, both of whom were terminated for improper use of physical restraint.

Finally, Mr. Jackson acknowledged that the State of Tennessee issued a notice of noncompliance to Hermitage Hall dated January 2, 2014, based upon its determination that Mr. Johns had used an unapproved behavior intervention. However, Mr. Jackson stated that the notice was not the basis for Mr. Johns’ termination on that same date.

DiMario Blackwell, the former HR Director for Employer, testified by deposition. Mr. Blackwell testified he reviewed the video on January 2, 2014 and determined that Mr. Johns had violated Policy 7.3 by engaging in inappropriate physical restraint. As part of his investigation, he also interviewed the other employees involved in the incident. Mr. Blackwell found that Mr. Johns did not have a valid excuse for failing to follow Policy 7.3; and that there was not an emergency posing an imminent risk of harm to justify the use of physical restraint. Mr. Blackwell decided to terminate Mr. Johns. However, his decision to fire Mr. Johns was based solely on the video which Mr. Blackwell acknowledged contained no sound. Without the benefit of sound, Mr. Blackwell conceded he could not know the complete situation. Based on his review of the video, Mr. Blackwell admitted that he could not conclude that Mr. Johns purposefully or intentionally violated Policy 7.3.

Mr. Blackwell acknowledged that it is always up to an employee’s judgment whether or not a resident who makes a verbal threat, actually presents a real threat; that in the moment of the encounter, it is a matter of the employee’s perception, which may vary from person to person. Finally, Mr. Blackwell conceded that it is up to the employee to determine whether or not there is an imminent risk of harm under Policy 7.3 and if the employee feels he or she is at imminent risk, Policy 7.3 allows for the use of physical restraint. He agreed that Policy 7.3 ultimately defaults to the employee to make a judgment call as to whether or not to initiate physical restraint. He concluded if an employee was wrong in their assessment of the existence of an imminent risk of harm, they would be terminated based on a bad judgment call following an investigation into the use of physical restraint.

The Trial Court

The trial court found Employer met its burden of showing that Mr. Johns had actual notice of Policy 7.3; that Mr. Johns recognized the danger in violating Policy 7.3; and that Mr. Johns' excuses for violating Policy 7.3 were not objectively sufficient. However, the trial court concluded Employer did not meet its burden of showing that it had engaged in bona fide enforcement of Policy 7.3. Specifically, the trial court found Mr. Johns would have been allowed to work following the incident but for the fact that he had been injured and that he was not suspended pending an investigation into the incident. The trial court also found the unnamed supervisor told Mr. Johns during the initial debriefing that he would not be subject to discipline; and instead, discharged Mr. Johns only after it received a citation from the State.

Finally, although the trial court did not believe Mr. Johns had a valid objective excuse for violating Policy 7.3, the trial court went on to find: "[Employee] found himself in a situation where he may have subjectively believed (in the heat of the moment) that he needed to restrain this student who had attacked him. ... The court found [Employee] to be a credible witness whose testimony supports the conclusion that he did not willfully, in a subjective sense, violate the restraint policy or otherwise engage in willful misconduct."

Issues

On appeal, Employer raises four issues, which can be reduced to the following:

1. Whether the trial court erred in finding that Employer had not established the third element under Mitchell v. Fayetteville Public Utilities, 368 S.W.3d 442 (Tenn. 2012) of bona fide enforcement of its policy; and
2. Whether the trial court erred in finding under the fourth element of Mitchell that subjectively Mr. Johns' conduct was not willful after finding objectively that Mr. Johns' excuses were not valid.

Standard of Review

The standard of review of issues of fact in a workers' compensation case is *de novo* upon the record of the trial court accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2014) (applicable to injuries occurring prior to July 1, 2014). When credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge had the opportunity to observe the witness' demeanor and to hear in-court testimony. Madden v. Holland Group of Tennessee Inc., 277 S.W.3d 896, 900 (Tenn. 2009). When the issues involve expert medical testimony that is

contained in the record by deposition, determination of the weight and credibility of the evidence necessarily must be drawn from the contents of the depositions, and the reviewing court may draw its own conclusions with regard to those issues. Foreman v. Automatic Sys., Inc., 272 S.W.3d 560, 571 (Tenn. 2008). A trial court's conclusions of law are reviewed de novo upon the record with no presumption of correctness. Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009).

Analysis

Although the general policy of our Workers' Compensation Law is to create a system in which employees can recover benefits for their injuries during the course of employment without regard to fault, Perry v. Transamerica Ins. Group, 703 S.W.2d 151, 153 (Tenn. Ct. App. 1985), there are some circumstances in which employees cannot recover for injuries that would otherwise be compensable. Tennessee Code Annotated section 50-6-110 (a)(1) prohibits recovery of benefits where an injury results from an employee's willful misconduct. In Mitchell v. Fayetteville Public Utilities, 368 S.W.3d 442, 453 (Tenn. 2012), our Supreme Court adopted Professor Larson's four-part test for evaluating claims of willful misconduct or willful failure to follow safety rules as a defense under this statute. Under that four-part test, the elements necessary for the establishment of this statutory defense are:

- 1) The employee's actual, as opposed to constructive, notice of the rule.
- 2) The employee's understanding of the danger involved in violating the rule;
- 3). The employer's bona fide enforcement of the rule; and
- 4). The employee's lack of a valid excuse for violating the rule.

Id at 453.

Here, neither party has challenged the trial court's conclusion that Employer established the first two elements of actual notice and Mr. Johns' understanding of the danger involved in violating the rule. However, Employer contends the trial court erred in finding that Employer had not established its bona fide enforcement of Policy 7.3. In particular, Employer argues the trial court relied upon inadmissible hearsay in reaching that finding.

In concluding Hermitage Hall had not established its bona fide enforcement of Policy 7.3, the trial court appears to have failed to consider the testimony and documentary evidence of Employer's prior and subsequent enforcement. Mr. Johns had worked for less than two months before he was injured. He did not know many of the other employees, and so his testimony about his lack of awareness of other disciplinary actions, is afforded little weight. Moreover, the trial court appears not to have considered the undisputed testimony from Mr. Jackson, the COO, and Mr. Blackwell, the former HR Director, that Employer had a zero tolerance policy for violations of Policy 7.3 and that in the event of any such violation, Employer terminated the violator one-hundred percent of the time.

Instead, the trial court appeared to base its determination of this issue on its assessment of the termination of Mr. Johns. The trial court relied on the fact that Mr. Johns was not suspended after his initial debriefing, although it acknowledged that Mr. Johns was unable to work due to his injury. The trial court also relied on the fact that Mr. Johns had been informed by his night supervisor during initial debriefing that he had done nothing wrong. Although the trial court sustained objections to testimony regarding what the supervisor allegedly said to Mr. Johns, it allowed Mr. Johns to testify regarding "his impression" following his debriefing by the unidentified supervisor. Mr. Johns testified after his discussion with the supervisor, his impression was that he had done nothing wrong. In other words, this impression was the direct result of what the unidentified supervisor told Mr. Johns, which was indirect hearsay, and improperly admitted. State v. Pratt, 2018 WL 4005390 at *9 (Tenn. Ct. App. 2018).

The trial court ultimately determined that Employer terminated Mr. Johns as the result of a notice of noncompliance from the State of Tennessee, dated January 2, 2014, informing Employer that Mr. Johns had used unapproved behavior intervention and requiring a corrective action plan from Employer. Although Mr. Johns was terminated on January 2, 2014, there was no evidence that the notice of noncompliance had been *received* by Employer on January 2, 2014. Even if the State's notice had played a role in Mr. Johns' termination, the notice was based on a finding that essentially Mr. Johns violated Policy 7.3, which resulted from Employer's report of Mr. Johns' conduct to the State.

Excluding the inadmissible hearsay and considering the other unrefuted evidence produced by Employer, we believe that the evidence preponderates against the trial court's finding that Employer failed to establish bona fide enforcement of Policy 7.3.

We next turn to Employer's argument that the trial court erred in its application of

the four-part test under Mitchell for determining willful violation of a rule pursuant to Tenn. Code Ann. § 50-6-110(a)(1). According to Employer, the trial court interjected a subjective calculus into the fourth element of the test (the valid excuse), after expressly finding that under an objective standard, Mr. Johns lacked a valid excuse for violating Policy 7.3.

In adopting the four-part test for willful misconduct, the Mitchell Court noted: “the first three elements, by our reading are identical to those set out in Nance,⁴ and the fourth is similar, abandoning, however, the use of ‘perverseness’ as a consideration in the analysis of the term ‘willful.’” Mitchell, 368 S.W.3d at 453. In Nance, the Panel also made the following observation regarding the fourth element: “In evaluating whether the employee’s conduct was willful . . . the court must distinguish between those cases in which the employee’s conduct was accidental, negligent, inadvertent, thoughtless, and *error of judgment*, or even reckless, and those cases in which the conduct was willful.” Id. at 452 (quoting Nance, 33 S.W.3d at 226) (emphasis added).

We do not believe the Mitchell Court eliminated the requirement that the employee’s conduct be more than merely an error in judgment, negligent, or even reckless. In Mitchell, the Court ultimately concluded that “[T]he lack of a valid excuse for the failure to use a safety appliance or device, when the first three elements have been satisfied, amounts to willfulness.” Id. at 455. In reaching this conclusion, the Court found that Policy 7.3 was clear and that even though the employee knew the safety policy required using protective gloves, he elected to take them off anyway, which “clearly established that his act was willful-and not merely negligent or reckless.” Id. We conclude that the Court’s analysis of the fourth element in Mitchell did not eliminate the necessity that the employer proved the employee’s conduct was more than mere error in judgment, negligence, or even recklessness.

Our decision is in line with a post-Mitchell decision by the Special Workers’ Compensation Appeals Panel in Hawks v. Christian, 2016 WL 3476719 (Tenn. Special W.C. Panel 2016). In Hawks, the employee fell from a roof after unhooking a safety cable while standing near the edge of the roof. Id. at *1. The employee asserted the cable had become wrapped around his leg. Id. at * 2. The trial court found the employee had a valid reason for violating the employer’ rule, but the Panel reversed finding that “Employee chose to violate the rule at the very edge of the roof, where the possibility of falling was greatest. The employee’s belief that he would be safe while unharnessed

⁴ Nance v. State Industries, Inc., 33 S.W.3d 222 (Tenn. Special W.C. Panel 2000).

because of his experience is not an excuse in the circumstances of this case.” *Id.* at *5. In its analysis, the Panel explained: “The purpose of safety rules in general is to avoid employees applying their own individual determinations of what is safe. While there may be circumstances in which an experienced employee *must make a decision in emergency situations*, this case does not provide such circumstances.” *Id.* (emphasis added).

Here, Policy 7.3 is not a hard and fast rule prohibiting the use of physical restraint or of a one-person hold under all circumstances. Rather, it permits such actions when it is determined by the employee in the moment that the resident poses an imminent threat of danger to the resident, to the employee, or to other residents. The former HR Director conceded that it is up to an employee’s judgment whether a resident making a verbal threat actually presents a real threat and that in the moment of an encounter, it is up to an employee to determine whether there is an imminent risk of harm under Policy 7.3. Although Employer’s COO first denied that employees are given any discretion to determine if a physical hold should be applied, he ultimately conceded that he expected employees “to make proper judgment calls regarding [Policy 7.3].” Likewise, the former HR Director concluded that Policy 7.3 leaves it as a judgment call to employees as to whether or not to initiate physical restraint.

It seems to us that Policy 7.3 contemplates an emergency situation in which an employee must make a judgment call based not only on his or her training and experience, but also upon his or her subjective perception and judgment of the situation in the moment. While, with the benefit of twenty-twenty hindsight, an objective review might indicate Mr. Johns’ judgment was incorrect, and his action was a violation of Policy 7.3, it does not indicate that Mr. Johns acted willfully. Rather, he merely made an error in judgment or acted negligently or recklessly.

Conclusion

The trial court’s finding that Employer failed to meet its burden of proof that it had engaged in bona fide enforcement of Policy 7.3 is reversed. However, we affirm the trial court’s finding that Employer failed to prove that Employee’s violation of Policy 7.3 was willful. Accordingly, the judgment of the trial court in favor of Employee is affirmed with the costs taxed to Employer.

ROBERT E. LEE DAVIES, SENIOR JUDGE