

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
March 27, 2002 Session

DANIEL KEITH LINDEMAN v. CHARLES SAIN, ET AL.

**Direct Appeal from the Chancery Court for Rutherford County
No. 97WC-368 Robert E. Corlew, Chancellor**

**No. M2000-01803-WC-R3-CV - Mailed - May 15, 2002
Filed - June 17, 2002**

The trial court found that plaintiff was injured as a result of a work-related accident, was an employee of defendant Charles Sain d/b/a Sain Drywall [hereafter Sain] at the time of the accident and that Sain was a subcontractor of the defendant Summar Construction, LLC. The court further found that Sain had employed five or more people at one time and was subject to the requirement of the Worker's Compensation Act and that Sain would be responsible to Summar Construction for any payment made by them to the plaintiff for his injuries. We reverse the judgment which makes Sain liable and affirm the judgment as to Summar Construction, LLC.

**Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Chancery Court
Reversed and Remanded**

JOHN K. BYERS, SR. J., delivered the opinion of the court, in which FRANK F. DROWOTA III, C.J. and JOE C. LOSER, SP.J., joined.

Jim K. Duncan and Patrick J. McHale, Murfreesboro, Tennessee, attorneys for the appellant's, Charles Sain, individually and d/b/a Sain Drywall.

D. Brett Burrow and Gordon C. Aulgur, Nashville, Tennessee, attorneys for the appellee, Summar Construction, LLC.

MEMORANDUM OPINION

The trial court found that the plaintiff, Daniel Keith Lindeman, was injured as a result of a work-related accident and entitled to recover under the Workers' Compensation Act.¹

¹The plaintiff did not appeal or file a brief in this case. His attorney stated to the trial judge that the plaintiff did not care which of the defendants' owed him the judgment.

The only issue raised in this case on appeal is whether the trial court erred in finding that defendant Sain was an employer under the definition of an employer under the Act prior to the 1997 amendment.²

There is scant testimony in the record on the matter of how many employees the defendant Sain employed at any particular time. The plaintiff testified that at the time he was injured he was the sole employee of Sain.

Sain testified that the nature of doing drywall, the business he was in, was that a worker would come and go and he would obtain another in the departed worker's stead. The pertinent portion of Sain's testimony on the issue is as follows:

A: So we established Joey, Daniel Adams, Mr. Lindeman, Chris Engler, yourself and a couple of other individuals worked with you off and on from the year prior to this actual incident in February of '97, right?

A: (Witness nods head up and down.)

Q: And the other individuals we've identified, they worked with you in much the same way as Mr. Lindeman, correct?

A: That's correct.

Q: Their work for you was no different than the work that Mr. Lindeman performed for you during that same time frame, correct?

A: It was during the same time.

He further testified in response to a question about their normal workers:

A: Yeah. If you would understand the drywall business, these people work for an indefinite period of time and then there's someone else who takes their place when they're gone.

All of these questions were asked by the defendant, Summar Construction, in an effort to show Sain was subject to the provision of the Workers' Compensation Act and he, not they, were

² At the time of the accident, February 27, 1997, Tenn. Code Ann. § 50-6-102 defined an employer as one who employed not less than five people for purposes of determining whether the provision of the Act applied.

Effective July 1, 1997 Tenn. Code Ann. § 50-6-113, was amended to require sub-contractors to be employers under the Act whether they employed five or more persons or not.

liable for the plaintiff's injuries. There was not evidence, testimonial or documentary, to show Sain employed five (5) regular employees at the same time.

In ruling on the issue of whether the defendant employed five people was "somewhat equivocal and certainly in dispute" as to whether Sain employed five people. The trial judge held that based on the testimony of the plaintiff the other people who worked for Sain worked under the same condition as did the plaintiff and thus Sain employed five people and was thus liable under the Workers' Compensation Act.

The trial judge made no finding that Sain employed five persons at one time. The plaintiff testified that when he worked for Sain he was the only employee at that time.

Both parties have cited several cases in support of their positions. We see no need to cite them other than the case of *Garner v. Reed*, 856 S.W.2d 698 (Tenn. 1993), which cites and summarizes the applicable rules in this case.

At the time of the event, an employer was not subject to the provisions of the Workers' Compensation Act unless they employed five or more employees on a regular basis. If at any time an employer employed five or more employees they became subject to the act, and could not divest themselves of its obligations by merely reducing their staff to less than five employees. The employment of five or more employees must have been at the same time, i.e., at least five on one day. The burden is on the plaintiff who claims the employer is subject to the act to prove that there were five employees at any one time. [In this case, Summar Construction is attempting to show Sain is subject to the act because this would absolve them from liability, therefore the burden is on them to prove the fact by a preponderance of the evidence.]

In this case there is no evidence to support the finding of the trial judge that Sain employed five or more people at the same time.

The plaintiff testified he was the only employee when he was hurt. Sain testified the people who worked for him would come and go. The reliance of the trial judge upon the plaintiff's testimony to establish that five people were employed is insufficient to show that over a period of time Sain had employed five different people. However, the plaintiff's testimony more readily suggests that Sain employed only one person at a time rather than five employees at any one time.

We reverse the judgment of the trial court and set aside the judgment in so far as it holds Sain liable. We remand the case to the trial court for entry of a judgment, in the amount of compensation for which the trial court found the plaintiff was entitled, against Summar Construction LLC.

The cost of this appeal is taxed to Summar Construction LLC.

JOHN K. BYERS, SENIOR JUDGE

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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 appears to the Court that the Memorandum Opinion of the Panel should be accepted and approved; and

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs will be paid by Summar Construction, LLC, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM