IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
May 17, 2006 Session

WILLIAM ERIC BREWER V. THE HARTFORD

Direct Appeal from the Circuit Court for Carroll County
No. 4458 C. Creed McGinley, Circuit Judge

No. W2005-01147-WC-R3-CV - Mailed July 27, 2006; Filed August 30, 2006

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Tennessee Supreme Court in accordance with Tennessee Code Annotated section 50-6-225(e)(3) for a hearing and reporting of findings of fact and conclusions of law. William Eric Brewer suffered a work-related injury December 17, 2001, while employed at the Courier Chronicle. The Hartford, the defendant, is the workers' compensation insurance carrier of the employer and has litigated this case in its individual name. The defendant contends that the trial court erred when it failed to find that Mr. Brewer's injury was proximately caused by his voluntary intoxication. After carefully considering the record, we affirm the trial court and conclude that the defendant failed to prove that the voluntary intoxication was a proximate cause of Mr. Brewer's accident.

Tenn. Code Ann. § 50-6-225(e)(3) Appeal as of Right;
Judgment of the Circuit Court Affirmed.

J.S. (Steve) Daniel, Sr. J., delivered the opinion of the court, in which Janice M. Holder, J., and Joe C. Loser, Sp. J., joined.

Blakeley D. Matthews and James K. Simms, IV, Cornelius & Collins, LLP, Nashville, Tennessee, for the appellant, The Hartford.

Kyle C. Atkins, Adams, Flippin & Atkins, P.C., Humboldt, Tennessee, for the appellee, William Eric Brewer.

OPINION

I. Facts and Procedural History

William Eric Brewer has worked for fourteen years as a printing press operator. However, he had only worked for The Courier Chronicle for a few weeks prior to his injury on December 17, 2001. On this particular day, Mr. Brewer and his fellow employees were running the newspaper press creating advertising inserts of multiple colors. In operating printing presses, from time to time situations develop where the ink blotts up or streaks, which is caused by the press running too dry. Correcting this blotting or streaking is called "scumming." The process for correcting this problem

is the application of water to the press and its ink. Mr. Brewer was attempting to flick water on the running printing press with his hands when the accident occurred. His explanation of how the accident occurred was that on this particular occasion he got his fingers too close to the press. Mr. Brewer indicated that he was "scumming" in a manner in which he had been trained and testified that he was not intoxicated at the time of the accident. Mr. Brewer admitted to the use of methamphetamine, marijuana and, alcohol on a regular basis. However, he denied the use of any intoxicants at his place of employment on the day in question. He readily admitted that he drank a large quantity of alcohol over the weekend but denied recent use of marijuana or methamphetamine. After the incident, Mr. Brewer's cup, containing stale beer, was found in the press area.

Mr. Brewer's direct supervisor, Danny Wade, was working in close proximity to Mr. Brewer at the time of the incident and had worked with him throughout the day. Mr. Wade testified that he had neither noticed any problems with Mr. Brewer doing his work nor had he received any complaints about how Mr. Brewer was performing his assigned tasks. Mr. Wade testified that Mr. Brewer had no problems in making the necessary adjustments to get the press running and keep the press running before the accident. Mike Enochs, who was working within three to four feet from Mr. Brewer, testified that he did not notice anything about Mr. Brewer that made him think that he was intoxicated or under the influence of drugs or alcohol. Mr. Enochs indicated that if he had any suspicion or noticed that Mr. Brewer was under the influence, he would not have allowed him around the machinery.

After Mr. Brewer's injury he was transported to Jackson, Madison County General Hospital for treatment. The emergency room nurse who initiated care was nurse Maryann Patterson, who noted in the medical records that Mr. Brewer's breath had an odor of alcohol. Nurse Patterson made the doctor aware of her finding. Mr. Brewer's blood was drawn during his hospitalization and tested for alcohol and drugs. The results of the blood tests were examined by Dr. Donna Seger who testified by deposition. Dr. Seger is a Tennessee-licensed physician who is board certified in emergency medicine and medical toxicology. She testified as an expert toxicologist in this cause. The records that Dr. Seger examined indicated that the blood sample of Mr. Brewer had been taken at 6:15 p.m. on December 17, 2001, the date of the accident. It was also revealed that the accident in question occurred at approximately 3:45 p.m. on that same day. Therefore, the blood sample had been obtained within approximately two and one-half hours of the incident. Notably the results of this test showed that Mr. Brewer had 5900 nanograms per milliliter of methamphetamine in his blood system which Dr. Seger testified as being a fairly high level. Mr. Brewer had testified that he had not had any methamphetamine within two days of the incident. Dr. Seger found this testimony to be not credible because of the time it takes for methamphetamine to dissipate from the blood system. Upon examining the report, Dr. Seger found a positive finding for marijuana in the blood system but those findings did not enable her to testify that Mr. Brewer was under the influence of marijuana. The blood test was positive for alcohol as well with a result of 12 milligrams per deciliter. This would be the equivalent of .01 as it relates to the terms of what is considered legally drunk at .10. She was of the opinion that the test revealed a sufficient amount of alcohol and drugs in Mr. Brewer's system that their combination would affect his balance, dexterity, motor skills, reaction time, judgment, perception, and depth perception. She was of the opinion that Mr. Brewer was impaired by drugs and alcohol at the time of the incident. However, Dr. Seger agreed that she could not say that drugs or alcohol impairment caused the accident. In summary, Dr. Seger testified that without question Mr.

Brewer was impaired to a reasonable degree of medical certainty and that this impairment would affect his depth perception but she could not quantify and say to what degree the impairment would affect depth perception.

At the conclusion of the trial, the trial court ruled that The Hartford had not proven the defense of voluntary intoxication because it had failed to establish that the plaintiff's voluntary intoxication was a proximate cause of the injury. The trial court then found the injury compensable and awarded 95% vocational impairment to the right arm. The Hartford perfected this appeal seeking appellate review of the trial court's determination and asserting one issue for that review: whether the trial court erred in failing to find that the proof established that intoxication was a proximate cause of the injury and therefore that the action should be dismissed. Mr. Brewer's counsel raised two issues on appeal and seeks to have this court dismiss the appeal alleging that The Hartford failed to comply with Rule 5 of the Tennessee Rules of Appellate Procedure in failing to serve notice of the appeal on opposing counsel no later than seven days after the filing of the appeal and failing to comply with Rule 20 of the Tennessee Rules of Appellate Procedure by not providing a copy of the brief to counsel. It appears that the explanation of The Hartford's counsel should be and is accepted for any technical difficulties. Therefore, the request to dismiss the appeal on these bases is hereby denied.

II. Standard of Review

Review of the findings of fact made by the trial court is de novo upon the record of the trial court, accompanied by a presumption of the correctness of the findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). The reviewing court is required to conduct an independent examination of the record to determine where the preponderance of the evidence lies. The standard governing appellate review of the findings of fact of a trial judge requires this panel to examine in depth the trial court's factual findings and conclusions. GAF Bldg. Materials v. George, 47 S.W.3d 430, 432 (Tenn. Workers' Comp. Panel 2001). Conclusions of law are subject to a de novo review on appeal without any presumptions of correctness. Niziol v. Lockheed Martin Energy Sys., Inc., 8 S.W.3d 622, 624 (Tenn. Workers' Comp. Panel 1999). When medical testimony is presented by deposition, we are able to make its own independent assessment of the medical proof to determine where the preponderance of the evidence lies. Cleek v. Wal-Mart Stores, Inc., 19 S.W.3d 770, 774 (Tenn. 2000).

III. Analysis

The sole basis for The Hartford's appeal is the contention that the trial court erred in finding that Mr. Brewer's intoxication was not a proximate cause of his injury on December 17, 2001. It is the basic contention of The Hartford that it has established by expert medical proof that Mr. Brewer was impaired by intoxicates and/or drugs to such a degree that his cognitive function, balance, dexterity, motor skills, coordination, reaction time, judgment, sensory perception, and depth perception were altered by the drugs and alcohol that he had voluntarily ingested. The Hartford asserts that having proven that these functions had been impaired that this equates to proof that the proximate cause of the accident was voluntary intoxication. This is particularly so in light of Mr. Brewer's testimony that the accident occurred because he got a little bit to close to the press in the

scumming process, implying that the accident occurred because of a mistake in depth perception.

Tennessee Code Annotated section 50-6-110 provides a defense to worker compensation cases for the employer who is able to establish that the work injury is "due to intoxication or illegal drug usage." However, it is the employer's burden of proof to establish such a defense. A different standard exists where the employer has implemented a drug-free workplace pursuant to state law. When a drug-free workplace has been established, a positive drug or alcohol test that meets very low quantitative levels, creates a presumption that the drug or alcohol use was the proximate cause of the injury and therefore not compensable unless the worker rebuts the presumption and proves otherwise. Our review of this record fails to reveal that a drug-free workplace had been established by the Courier Chronicle. Without the creation of a statutory drug-free work place, the employer must plead and prove that the injury was proximately caused by the voluntary intoxication of the injured worker. This burden has proven to be difficult to accomplish in large part due to the remedial nature of workers' compensation actions. Workers' compensation benefits are payable without regard to fault of the employer or the care exercised by the employee, Morrison v. Tennessee Consol. Coal Co., 39 S.W.2d 272 (Tenn. 1931). Therefore, because of the liberal nature of the workers' compensation law, inadvertence or even recklessness on the part of the worker that results in work related injuries are compensable.

The most complete statement of the obligation imposed on the employer for the proof of the defense of intoxication is that which may be found in the case of Overall v. Southern Subaru Star, Inc., 545 S.W.2d 1, 3 (Tenn. 1976). The Tennessee Supreme Court explained,

> Under this statute the burden of proving that the employee's injury or death was "due to intoxication", and therefore not compensable, rests solely upon the employer.
>
> In the present case, the evidentiary question concerns whether the employee's death was "due to intoxication". Professor Larson, in Volume 1A of his treatise on Workmen's Compensation Law, at section 34.33, discusses the meaning of this statutory phrase and concludes with the following language:
>
> When a statute says merely "caused by" or "due to", this can refer neither to remote cause nor to sole cause. It must mean proximate cause.
>
> Larson characterizes such "proximate cause" as "something resembling ordinary legal causation." Other commentators have characterized the Tennessee version of this statute in a similar manner.
>
> We, therefore, hold that in order to successfully invoke Section 50-910, T.C.A. as a defense to a work-related injury or death "due to" the employee's intoxication, the employer has the burden of establishing proximate cause. This does not, however, mean that the employer may establish such a defense where the employee's intoxication was merely a remote or contributing cause. Neither does it require the employer to prove that the employee's intoxication was the sole cause, as some

Tennessee commentators have suggested.

(Internal citations omitted.)

In this case the trial court had the opportunity to hear the evidence and weigh the credibility of the witnesses, and for this reason the court's determination is given great deference to its finding as to credibility and the weight of oral testimony. Seals v. England/Corsair Upholstery Mfg. Co., 984 S.W.2d 912, 915 (Tenn. 1999); Jones v. Hartford Accident & Indem. Co., 811 S.W.2d 516 (Tenn. 1991). The trial court concluded that the employer had not proven that the proximate cause of the accident was Mr. Brewer's impairment from voluntary ingestion of drugs and alcohol. The court's finding was that the depth perception mistake that caused Mr. Brewer to lose his hand was not the result of intoxication as advanced by the employer. Here as in Overall, there is material evidence that could support a finding that the injury was a work-related inadvertence on Mr. Brewer's part or that the injury was caused by the voluntary intoxication of Mr. Brewer. The trial court concluded it was inadvertence and the proof could be viewed to support that conclusion. Under those circumstances, we will not disturb the findings of the trial court. Wooten Transports, Inc. v. Hunter, 535 S.W.2d 858 (Tenn.1976).

Therefore, after a careful review of the record, this panel affirms the trial court's finding that Mr. Brewer's injury is compensable. The costs of this appeal are assessed against the appellant, The Hartford, and its sureties in which execution may issue if necessary.

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J. S. DANIEL, SENIOR JUDGE

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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 on appeal are taxed to the Appellant, The Hartford, and its sureties, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM