

IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
AT NASHVILLE  
July 24, 2006 Session

**BUILDERS MUTUAL INSURANCE COMPANY, ET AL. v. PAUL SIMMS**

**Direct Appeal from the Chancery Court for Davidson County  
No. 03-3062-II Carol L. McCoy, Chancellor**

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**No. M2005-02417-WC-R3-CV - Mailed - October 27, 2006  
Filed - November 29, 2006**

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This appeal has been referred to the Special Workers' Compensation Appeal Panel pursuant to Tennessee Code Annotated section 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. On April 29, 2003, the appellant, Paul J. Simms, fractured his ankle at a construction site in Spring Hill, Tennessee. The trial court determined Mr. Simms' injury did not arise out of or in the course of employment. Mr. Simms has appealed, contending that the evidence preponderates against the trial court's holding. Mr. Simms also alleges the trial court erred in allowing the testimony of Jack Russell, the subcontractor whom Mr. Simms claims employed him on the day of his accident, because Mr. Russell invoked the Fifth Amendment at trial. After carefully considering the evidence adduced at trial, we affirm the trial court's judgment.

**Tenn. Code Ann. § 50-6-225(e) (2005) Appeal as of Right; Judgment of the Trial Court  
Affirmed**

DONALD P. HARRIS, SR. J, delivered the opinion of the court, in which CORNELIA A. CLARK, J., and FRANK F. DROWOTA, III, SP. J., joined.

Steve Coleman Norris, Nashville, TN, for the Appellant, Paul J. Simms.

Steven Bradford Morton, Nashville, TN, for the Appellees, Builders Mutual Insurance Company and Classic Homes B.O.S., L.P.

**MEMORANDUM OPINION**

The Appellant, Paul J. Simms, a fifty-three-year-old day laborer, had worked with and for Jack Russell, a brick mason, over the course of twenty to thirty years. For several years, Russell and another brick mason, Cory Nelson, maintained a business partnership doing masonry work. Simms

worked for this partnership as a helper. When the partnership dissolved in 2002, Simms continued working for Nelson. For several weeks prior to the alleged injury, however, Nelson had been out of work and Simms would, from time to time, phone Russell to see if he needed a helper. According to Simms, Russell knew he was out of work and asked that he come to work for him. Simms claimed to have been working for Russell for over two weeks on a construction site in the Wyngate subdivision in Spring Hill, Tennessee. The Appellee, Classic Homes, was the general contractor for that development, and the Appellee, Builders Mutual Insurance Company, was the workers' compensation insurance carrier for Classic Homes. Russell subcontracted the project's brickwork from Classic Homes.

Simms alleged he fractured his ankle on April 29, 2003, when he slipped on a board used to traverse an excavated area next to a house that was under construction. According to Simms, he was transporting bricks and other materials used to complete the masonry work on the home at the time of his injury.

At trial, Mr. Simms testified that when he arrived at work on the morning of his accident, he told Mr. Russell that he may not be able to work due to pain from a chronic shoulder injury. He also related, however, that he had taken a painkiller and would see how he felt after the medicine took effect. Mr. Simms further testified that, when the pain dulled around lunchtime, he told Mr. Russell he would try to work. Simms testified the accident happened at 1:00 p.m. He admitted that during his earlier discovery deposition he testified the accident happened at 9:00 a.m. Simms also admitted that he observed two of Russell's bricklayers, Lawrence Jones and Doug Copeland, smoking marijuana that afternoon but denied smoking any himself.

Mr. Russell presented a starkly different version of the events. He testified that Mr. Simms had never worked for him at the Wyngate site and was not working for him at the time of Simms' injury. According to Mr. Russell, by April 29, 2003, the project was 99% complete and all the remaining tasks required skills and expertise that Mr. Simms did not have. Mr. Russell acknowledged that Mr. Simms had worked for him on a few previous occasions at another development known as Chapman's Retreat. Russell would use Simms to pick up broken brick and other debris for four or five hours and would pay him \$10.00 per hour in cash. He estimated that he had paid Mr. Simms approximately \$300 for work after dissolution of his partnership with Cory Nelson. According to Mr. Russell, when Mr. Simms needed work, he would call at night and ask if Mr. Russell had anything for him to do the next day. Mr. Simms did not telephone Mr. Russell on the night prior to Simms' injury.

Mr. Russell further testified that Mr. Simms had made the thirty-eight-mile drive from his home to the site to drop off Lawrence Jones, a bricklayer who worked on the project. At the time, Jones was living with Paul Simms' sister, Deborah Wright. Mr. Simms then stayed at the site to socialize with Mr. Russell and members of his crew, but did not work. Simms told Russell that his shoulder was hurting and that he had taken a Lortab that morning. Russell observed him take two more Lortab during the course of the day.

Mr. Russell denied that Mr. Simms ever asked for or received permission to work. Shortly after lunch, Mr. Russell went to check on the progress of another project. As he was leaving, Mr. Simms was still at the Wyngate site but indicated he thought he would go home and rest his shoulder. Russell and Simms both testified that Mr. Russell had not yet returned to the site when Mr. Simms injured his ankle. Russell testified that he had Lawrence Jones and Doug Copeland, both masons, and two Spanish laborers working for him that day. According to Simms, both Mr. Jones and Mr. Copeland were present when the accident occurred and helped pull him out of the hole into which he fell when he slipped off the board. Mr. Russell testified that when he returned to the site, the work had stopped, and Copeland indicated they had smoked some marijuana. Russell shut the job down and fired both Jones and Copeland. Neither Mr. Jones nor Mr. Copeland testified at trial.

Juanita Fay Simpson testified that she had lived with Paul Simms for fifteen years. Simms worked for the partnership composed of Cory Nelson and Jack Russell for seven or eight years. When the partners split up in December 2002, Simms stayed with Mr. Nelson. The work was seasonal, depending on the weather and the availability of work. According to Ms. Simpson, Simms might work for Nelson for three weeks before being laid off and then work for someone else. When he injured his ankle, he had worked for Jack Russell for over two full weeks. During the two weeks he worked at the Wyngate Subdivision, he worked every day and took Lawrence Jones to the job site. On Tuesday, April 29, 2003, Mr. Russell phoned and asked if Mr. Simms had made it home. He indicated that Mr. Simms had hurt his foot. Ms. Simpson testified that for two or three days after Mr. Simms returned home, his foot continued to swell, became discolored and worsened to the point he was unable to move it. She insisted he get medical treatment and, on May 1, 2003, took him to Centennial Hospital's emergency room. She testified she phoned Russell while at the hospital in order to obtain insurance information, and Russell told her he would settle with Simms. According to Ms. Simpson, he never denied that Simms was working for him at the time of the injury. Ms. Simpson also testified that she knew both Doug Copeland and Lawrence Jones, having been raised with Lawrence Jones' brother and sister.

There was no documentary evidence to corroborate Mr. Simms' claim that he worked at the Wyngate site. Mr. Simms claimed that Mr. Russell had paid him in cash. When asked whether he had kept time sheets or had filed wage statements that could verify Mr. Simms' claim, Mr. Russell invoked his Fifth Amendment privilege against self-incrimination. He also asserted the privilege when asked whether he maintained workers' compensation insurance. During his earlier deposition, he invoked the privilege approximately twenty-five times in response to questions that addressed subjects ranging from his record-keeping to his policy on drug use at the job site.

The trial court held that Mr. Simms had failed to prove by a preponderance of the evidence that his injury arose out of and in the course of employment. Mr. Simms provided no testimony from witnesses who actually saw the accident or worked at the Wyngate site. The court found Mr. Russell's testimony regarding Mr. Simms' employment status more credible than Mr. Simms'. The trial court also noted that Simms had not sought to call either Lawrence Jones or Doug Copeland as a witness nor any other person present at the construction site on that day.

From the trial court's judgment denying his claim for workers' compensation benefits, Mr. Simms has appealed. Mr. Simms asks this panel to review two related issues: (1) whether the evidence preponderates against the trial court's finding that his injury did not arise out of and in the course of employment and (2) whether the trial court erred in allowing the testimony of Mr. Russell when he had refused to answer questions on the grounds of self-incrimination.

The standard of review of issues of fact 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); Lollar v. Wal-Mart Stores, Inc., 767 S.W.2d 143, 149 (Tenn. 1989);. Where the trial judge has seen and heard the witnesses, especially if issues of credibility and weight to be given oral testimony are involved, considerable deference must be afforded those circumstances on review because the trial court had the opportunity to observe the witness' demeanor and to hear the in-court testimony. Long v. Tri-Con Indus., Ltd., 996 S.W.2d 173, 178 (Tenn. 1999).

To qualify for workers' compensation benefits, an employee must suffer "an injury by accident arising out of and in the course of employment." Tenn. Code Ann. § 50-6-102(a)(13) (2005). The trial court found that because Mr. Simms was not an employee when he was injured, his accident could not have arisen out of or in the course of employment.

Mr. Simms presented only three witnesses at trial: himself, his girlfriend, and his sister. The trial court discounted Mr. Simms' girlfriend and sister's corroboration of his employment status as biased and unsubstantiated accounts from interested parties. Thus, the court's decision came down to a credibility determination between Mr. Simms and Mr. Russell. As the trial court noted, Mr. Simms presented no witnesses who were at the Wyngate site on the day his accident occurred. Despite Mr. Simms' claim that two of his longtime friends, Mr. Jones and Mr. Copeland, came to his aid when he fell, he made no effort to obtain the testimony of either of these men. Moreover, Mr. Simms presented a different version of the incident at his discovery deposition than he did at trial. The trial court was justified in finding these factors supported Mr. Russell's testimony regarding Mr. Simms' employment status on April 29, 2003. After carefully reviewing the record and affording the trial court deference with regard to the credibility of witnesses who testified before it, we find the evidence presented at trial does not preponderate against the trial court's finding. Thus, we affirm the judgment of the trial court.

During the trial Mr. Russell refused to answer two questions on the ground his answer might incriminate him. During his discovery deposition, he refused to answer many more questions on the same ground. Inherent in our affirmation of the judgment of the trial court is our belief that the trial judge did not err in allowing Mr. Russell's testimony, despite the invocation of the Fifth Amendment right against self-incrimination.

This action was filed on October 15, 2003. On November 13, 2003, by way of a third-party complaint, Jack Russell was made a party to this action. A cross-claim against Russell was later filed by the Appellee, Builders Mutual Insurance Company. On January 28, 2004, Mr. Russell's

discovery deposition was taken. During that deposition, he invoked his Fifth Amendment privilege against self incrimination on several occasions with regard to questions relating to his payroll practices and his policies relating to loitering and drug use on the job site. There is no evidence in this record that the Appellant attempted to have the court to compel Mr. Russell to respond to discovery. There is no indication in the record that the Appellant requested the production of or attempted to subpoena records maintained by Russell.

On October 4, 2004, an order was filed indicating Mr. Russell had been discharged in bankruptcy on June 29, 2004. Thereafter the case was set for trial. On the morning of the trial, the attorney for Mr. Simms made an oral motion to exclude Mr. Russell from testifying on the basis of his having exercised his Fifth Amendment privilege during his earlier discovery deposition. That motion was taken under advisement by the trial court until the trial judge had heard the testimony of Mr. Russell. During his trial testimony, Mr. Russell claimed his Fifth Amendment privilege when asked about his lack of workers' compensation insurance and his lack of payroll records. After hearing the testimony, Mr. Russell's testimony was allowed by the trial court.

During his trial testimony, Mr. Russell indicated he had purchased workers' compensation insurance in January 2003. He had the insurance company send via a facsimile machine a certificate of insurance to Classic Homes since Classic Homes would not allow him to work on a project unless he and his workers were insured. The insurance was cancelled in February 2003, although Russell claimed he was not aware of the cancellation. At trial, Mr. Simms sought to have the court award him workers' compensation benefits to be paid by Classic Homes under the provision of Tennessee Code Annotated section 50-6-133 which makes a principal contractor liable for injuries to the workers of any of its subcontractors. Thus, the exclusion of Russell's testimony, under these circumstances, would have been grossly unfair to Classic Homes and its insurer, Builders Mutual.

In support of its position, the Appellant cites State v. Stapleton, 638 S.W.2d 850 (Tenn. Crim. App. 1982). In Stapleton, a criminal defendant called a witness to testify that the defendant was not present at the scene of the crime, a murder. 638 S.W.2d at 855. While the witness did not admit to being involved in the murder, he did testify that he knew the defendant was not there when the crime occurred. When the prosecutor attempted to cross-examine the witness, the witness claimed his Fifth Amendment privilege. The trial court found that the witness had waived his Fifth Amendment privilege with regard to matters to which he had testified on direct examination. In upholding the action of the trial court, the Court of Criminal Appeals stated:

A witness has no right to refuse to answer any and every question asked him in a judicial proceeding. He has only the right to invoke the Fifth Amendment with respect to matters that will incriminate him. A witness cannot discontinue testimony as to transactions already disclosed by the witness. Once he discloses a fact, though incriminatory, he must testify with respect to the details of that fact. A witness who testified on direct examination is bound to answer questions on cross examination with respect to the testimony that he gave on direct.

The judge properly permitted further cross examination as it was the prerogative of the court and not the witness or the witness's attorneys to determine whether the witness could properly refuse to answer any specific question on Fifth Amendment grounds.

638 S.W.2d at 855 (citations omitted).

In the case before us, it does not appear the Appellant at any time sought to have the trial court determine that the witness had waived his Fifth Amendment privilege and direct the witness to answer the questions put to him. Error cannot, therefore, be based upon the Appellant's claim it was denied the right to cross examine Mr. Russell.

Mr. Simms also claims Mr. Russell's assertion of his Fifth Amendment privilege denied him the right to full discovery. Again, there is no indication in the record that the Appellant sought to have the trial court to compel answers to questions asked during the discovery deposition. Certainly, Mr. Russell's testimony was relevant to the proceeding before the trial court. Relevant evidence may be excluded by the trial court only if its probative value is substantially outweighed by the danger of unfair prejudice. Tenn. R. Evid. 403 (2006). Our Supreme Court has emphasized that Rule 403 is a rule of admissibility, and it places a heavy burden on the party seeking to exclude the evidence. Excluding relevant evidence under this rule is an extraordinary remedy that should be used sparingly, and those seeking to exclude otherwise admissible and relevant evidence have a significant burden of persuasion. State v. Robinson, 146 S.W.3d 469, 490-91 (Tenn. 2004). We find the trial court did not abuse its discretion in admitting the testimony of Mr. Russell and, in our view, would have erred had it excluded his testimony under the circumstances of this case.

In addition to determining that Mr. Simms was not an employee when this accident occurred, the trial court correctly made alternative findings pertaining to the award to which Mr. Simms would have been entitled if his had been compensable. Because we affirm the trial court's findings on the aforementioned issues, we need not address those findings.

For the foregoing reasons, we affirm the judgment of the trial court. The costs of this appeal are assessed to the appellant, Paul J. Simms.

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DONALD P. HARRIS, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
JULY 24, 2006 SESSION

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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 appeals 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 the Appellant, Paul J. Simms, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM