IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL

DONNA THWEATT v. TRAVELERS PROPERTY & CASUALTY INSURANCE COMPANY

Chancery Court for Sumner County
No. 98C-186

No. M1999-01903-WC-R3-CV - Decided - July 27, 2000

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 the appellant, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE

DONNA THWEATT v. TRAVELERS PROPERTY & CASUALTY INSURANCE COMPANY

Direct Appeal from the Chancery Court for Sumner County
No. 98C-186 Tom E. Gray, Chancellor

No. M1999-01903-WC-R3-CV - Mailed - June 26, 2000
Filed - July 27, 2000

The issues in this workers' compensation appeal are whether the chancellor erred in determining the plaintiff to be an employee; was the injury from inhaling chemicals compensable; was the award of 90% to the body as a whole excessive; and was commutation to lump sum appropriate. This panel affirms the decision of the trial judge. On appeal the appellant requests costs for a frivolous appeal which this panel declines to grant.

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

KURTZ, SP.J., delivered the opinion of the court, in which BIRCH, J., and LOSER, SP.J., joined.

Deanna Bell Johnson, Nashville, Tennessee, for the appellant, Travelers Property &Casualty Insurance Company.

George Ellis Copple, Jr., Nashville, Tennessee, for the appellee, Donna Thweatt.

MEMORANDUM OPINION

FACTS

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. §50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of

law. For the reasons stated below, the judgment of the trial court granting benefits is affirmed.

This action by the employee to recover workers' compensation benefits arose out of an incident in which she was exposed to a chemical substance in the workplace. After a trial before the Chancery Court for Sumner County, the chancellor held that the plaintiff suffered an accident arising out of and in the course and scope of her employment, and that the employer had actual notice of the accident. The chancellor found the plaintiff to be 90 percent vocationally disabled to the body as a whole and commuted the award of periodic benefits to a lump sum. The chancellor ordered the reimbursement of medical bills to Dr. Faith, and that future medicals remain open.

On September 2, 1997, Donna Thweatt (plaintiff) reported to her job as a cosmetologist at Guys & Gals Beauty Salon ("Guys & Gals") in Gallatin, Tennessee. Upon entering the business at 7:00 a.m., she found puddles on the floor of a clear, colorless liquid with white foam on top. Additionally, she found either white foam or a film of dried white powder on nearly all of the surfaces of the work space. She began cleaning the puddles and telephoned her manager, Shirley Rodgers, to report the situation. Ms. Rodgers arrived approximately 15 minutes later and helped with the clean up effort.[1] While cleaning up the substance, plaintiff felt a burning in her throat. She remained in the shop for five hours and left because she was feeling ill. On her drive home, she began feeling dizzy, her chest started hurting, and she later vomited. She also had a dry powdery mouth, coughed frequently, and had trouble breathing.

The substance to which Ms. Thweatt was exposed was later determined to have come from

[1]Ms. Rodgers was a witness in this case and she also experienced similar breathing problems. She brought a separate lawsuit and was granted benefits. That case is also before this panel on appeal. See Shirley B. Rodgers v. Guys & Gals, Inc. and The Travelers Property and Casualty Insurance Company No. M1999-01538-WC-R3-CV.

the air conditioning system that had been cleaned during the Labor Day weekend of 1997.

At the time of her exposure to the chemical substance, Ms. Thweatt was 53 years old and had worked at Guys & Gals since August 1996. Prior to that, she had worked as a cosmetologist at Morrison's Hair Designs for 13 years.

On September 8, 1997, Ms. Thweatt saw her family doctor, Dr. Sid King, M.D. She began seeing Dr. William Faith M.D., a pulmonary lung specialist, shortly thereafter. She returned to work intermittently from September 1997 through January 1998, taking time off in each of those months at the recommendation of Dr. Faith. She returned to work January 18, 1998, worked for a week, and then stopped working permanently because she, along with Dr. Faith, determined she was unable to continue her work as a cosmetologist. She continued to see Dr. Faith who diagnosed her as having chronic asthma after a chemical exposure which he also referred to as occupational asthma. Dr. Faith assigned Ms. Thweatt an impairment rating of 20-25 percent based on the A.M.A. Guidelines. He indicated that in order to work, Ms. Thweatt would need a relatively sedentary job in an environment that is dust-free, chemical-free, and controlled for heat and humidity.

THE ISSUES ON APPEAL

The defendant Travelers Property & Casualty Insurance Company ("Travelers") (the workers' compensation carrier) appeals and raises four issues: (1) whether the trial court erred in ruling plaintiff was an employee rather than an independent contractor; (2) whether the trial court erred in holding plaintiff's injury to be compensable; (3) whether the trial court's award of 90 percent to the body as a whole was excessive; and (4) whether the trial court erred in commuting plaintiff's award to a lump sum payment.

The employee presents the issue of whether Travelers' appeal was frivolous within the

meaning of T.C.A. §50-6-225(h) and T.C.A. §27-1-122.

Our review is de novo upon the record of the trial court, accompanied by a presumption of the correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. §50-6-225(e)(2).

EMPLOYEE VS. INDEPENDENT CONTRACTOR

The Tennessee Workers' Compensation Act covers only "employees." Once the existence of an employment relationship is established, the employer has the burden of proving the worker was an independent contractor rather than an employee. See Galloway v. Memphis Drum Serv., 822 S.W.2d 584, 586 (Tenn. 1991). In addition, the Workers' Compensation Law is to "be rationally but liberally construed to promote and adhere to the Act's purposes of securing benefits to those workers who fall within its coverage." See id. (citing Hodge v. Diamond Container General, Inc., 759 S.W.2d 659 (Tenn. 1988)).

In the present case, it is undisputed that an employment relationship existed. Therefore, we turn to the factors to be considered in determining whether an individual is an employee or an independent contractor. Under T.C.A. §50-6-102(10), the factors to consider are "(A) The right to control the conduct of the work; (B) The right of termination; (C) The method of payment; (D) The freedom to select and hire helpers; (E) The furnishing of tools and equipment; (F) Self scheduling of working hours; and (G) The freedom to offer services to other entities." See also Masiers v. Arrow Transfer & Storage Co., 639 S.W.2d 654, 656 (Tenn. 1982) (citing Jackson Sawmill v. West, 619 S.W.2d 105 (Tenn. 1981)). No one factor is dispositive, but the right to control and the right to terminate are usually deemed to be strong evidence of an employer-employee relationship. See Starflight, Inc. v. Thoni 773 S.W.2d 908, 910 (Tenn. 1989).

In the present case, Travelers addressed the right to control the conduct of the work, the method of payment, the furnishing of tools and equipment, and self scheduling, with its emphasis being the right to control. In discussing the right to control issue, Travelers indicated that plaintiff selected and scheduled her own working hours and vacation time, was paid on a commission basis, and provided equipment such as hair dryers, shears, clippers, and rollers. Travelers also pointed out that plaintiff provided most of her clientele by bringing them with her from her previous job. Travelers gives great weight to the fact that plaintiff had a right to supervise or inspect her own work, and that the shop owner did not supervise or inspect plaintiff's work. Taking all of these things into consideration, Travelers argues that plaintiff was an independent contractor.

In support of its contention, Travelers relied on Lindsey v. Smith & Johnson, Inc., 601 S.W.2d 923 (Tenn. 1980) and Foster v. Liberty Mut., (No Number in Original) 1990 LEXIS 413 (Tenn. 1990). In Lindsey, Mr. Lindsey was a carpenter who was a partner in a subcontracting partnership which was working for the defendant general contractor at the time of his injury. 601 S.W.2d at 924-25. The court determined that right of control was maintained in Lindsey and his partners in that the partnership offered special skills, negotiated contracts, hired and paid its own workers (and made the standard wage deductions), and negotiated payment on a square foot of completion basis with partial payment in advance and the balance due upon completion of the work. Id. at 926. Mr. Lindsey indicated that he never intended to be a salaried employee of the general contractor. Id. Based on the preceding factors, the court determined that Mr. Lindsey was an independent contractor. Id.

In Foster, the plaintiff obtained a job hanging cable for a television cable company. 1990 LEXIS 413. As in Lindsey, he hired his own employees to help with the work and paid them

from his earnings. Id. Plaintiff furnished his own truck and scheduled his own work hours. Id. He was paid according to how many feet of strand were laid and reported his payments as "other income" on his tax return instead of as "wages, salaries, tips, etc." Id. Based on the preceding factors, the court determined that Foster was an independent contractor. Id.

Both Lindsey and Foster are markedly different from the present case. In the present case, Ms. Thweatt did schedule her own work hours and vacations and stated that her customers were her boss, but she also testified that she had two managers and the owner, Sue Newby, is the "boss of the shop." There was nothing in the record to indicate that Ms. Thweatt had power to control other employees or to hire and fire other employees. Therefore, her control was limited.

Travelers also emphasized that Ms. Thweatt provided her own equipment. While Ms. Thweatt did provide hair dryers, shears, clippers, rollers, and some other miscellaneous items, for the most part she used equipment and facilities furnished by Guys & Gals. Guys & Gals provided Ms. Thweatt her work station and barber chair along with towels, shampoo bowls, mirrors, garbage cans, cash registers, hair solutions, dyes, perms, conditioners, and shampoos. Tennessee case law is clear that the furnishing of tools by an employee "is insufficient, without more, to establish the relationship of independent contractor." See Carver v. Sparta Elec. Sys. 690 S.W.2d 218, 221 (Tenn. 1985). In this case it is clear that Guys & Gals provided the majority of required equipment.

Additionally, Ms. Thweatt was paid on a commission basis, but Guys & Gals deducted federal income tax and FICA from her paycheck and paid its portion of the payroll taxes. At the end of the year, Ms. Thweatt received a W-2 form for employees as opposed to a 1099 form issued to independent contractors. Most importantly, Guys & Gals purchased workers'

compensation insurance on Ms. Thweatt as well as others working at the salon. These factors all strongly support Ms. Thweatt's claim that she was an employee. In fact, where an employer carries workers' compensation insurance and the employee's earnings are included in computing premiums paid for such insurance, neither the employer nor the insurer is in a position to question the relationship of the parties under the Workers' Compensation Law. See Carter v. Hodges, 175 Tenn. 96, 101, 132 S.W.2d 211, 213 (Tenn. 1939) (citing Employers' Liability Assurance Corp. v. Warren, 172 Tenn. 403, 112 S.W.2d 837, 839 (Tenn. 1938)).

Finally, this Court has consistently emphasized that where doubt exists, the Workers' Compensation Law is to be rationally construed in favor of finding employee status. See Galloway 822 S.W.2d at 586; Wooten Transports, Inc. v. Hunter 525 S.W.2d 858, 860 (Tenn. 1976); Armstrong v. Spears 393 S.W.2d 729, 731 (Tenn. 1965); Barker v. Curtis 287 S.W.2d 43, 46 (Tenn. 1956).

Having carefully reviewed the record and considered the relevant case law, we affirm the trial court's holding that Ms. Thweatt was an employee rather than an independent contractor.

COMPENSABILITY OF INJURY

Appellant Travelers argues that Ms. Thweatt must prove that she has an occupational disease (See T.C.A. §50-6-301 et. seq.) in order to recover because her complaint is that she suffered a lung injury. Ms. Thweatt, however, claims that she suffered an accidental injury (See T.C.A. §50-6-102(12)) as opposed to having an occupational disease.

The chancellor determined that Ms. Thweatt had proven by expert medical testimony that her "problem" was caused by the "accident" that occurred in September 1997 when she breathed fumes from a chemical as a result of Derryberry Air Conditioning either putting some chemical on

the air conditioner's coils or as a result of their work on the air conditioner.

In Brown Shoe Company v. Reed, 350 S.W.2d 65 (Tenn. 1961), this Court gave a definition of the word "accident" as used in our workers' compensation statute in the following language.

> An accident is generally an unlooked for mishap, an untoward event, which is not expected or designed. Generally in most such cases this Court has repeatedly said that a compensable injury should be the result of something happening by accidental means though the act involving the accident was intentional. Accidental means ordinarily mean an effect which was not the natural or probable consequence of the means which produced it, an effect which does not ordinarily follow and cannot be reasonably anticipated from the use of those means, an effect which the actor did not intend to produce and which he cannot be charged with the design of producing. It is produced by means which were neither designed nor calculated to cause it. It cannot be reasonably anticipated, it is unexpected, it is produced by unusual combinations of fortuitous circumstances and such an injury is an injury by accidental means.

350 S.W.2d at 69.

This Court has reviewed other matters involving lung injuries and found them to be compensable injuries by accident as defined by the statute. See Hill v. Royal Ins. Co., 937 S.W.2d 873, 875 (Tenn. 1996) (injury by accident when employee was exposed to chemicals during her employment and suffered physical reactions); Evans v. Olin Corp., 686 S.W.2d 76, 78 (Tenn. 1985) (employee exposed to liquid chlorine on three occasions while at work held to have suffered an industrial accident); Manis v. Peterbilt Motors Co., (No. 01S01-9407-CV-00065) 1995 Tenn. LEXIS 223 (worker with pre-existing emphysema attributable to smoking held to have sustained a gradual injury amounting to an accidental injury when condition was exacerbated by repeated exposure to diesel fumes while at work).

This case is consistent with the definition of "accident" as stated previously as well as with those cases in which lung injuries were found to be accidental injuries as opposed to occupational diseases. The trial court found that Ms. Thweatt proved through expert medical testimony that she

was exposed to a chemical at work on September 7, 1997, that her employer had notice of the chemical exposure, and that exposure to the chemical resulted in her occupational asthma. We would note that the chancellor found Dr. Faith, Ms. Thweatt's pulmonologist, to be credible, but found a lack of credibility with Dr. Myron Mills, the doctor Travelers hired to evaluate Ms. Thweatt.[2] The trial court's holding on this issue is affirmed.

WHETHER AWARD OF 90 PERCENT TO BODY AS A WHOLE WAS EXCESSIVE

Travelers argues that the trial court's determination that the plaintiff has a vocational disability of 90 percent to the body as a whole is excessive, claiming that Ms. Thweatt did not suffer a permanent impairment rating of 20 percent to the body as a whole according to the A.M.A. Guidelines. In support of this argument, Travelers asserts that Dr. Faith was incorrect in his assessment of Ms. Thweatt's impairment rating in that he gave her a vocational disability rating as opposed to a permanent impairment rating. Travelers relies on the testimony of Dr. Mills that Ms. Thweatt has no permanent impairment and does not suffer from severe asthma.

The chancellor, however, found Dr. Faith to be credible and further found that he properly gave Ms. Thweatt a permanent impairment rating. Dr. Faith testified that he used Tables 8 and 10 respectively found on pages 162 and 164 of the A.M.A. Guidelines. He indicated that there was no specific impairment rating expressed in the asthma category found in Table 10 so he used Table 8 to arrive at an impairment, and placed Ms. Thweatt in category 2, giving her an impairment rating of 20-25 percent because of the severity of her symptoms and the ease with which her asthma is invoked.

[2]Specifically the chancellor held, "The Court finds that Dr. Faith is credible in his testimony. The Court finds a lack of credibility with Dr. Mills. So the Court relies upon the testimony of Dr. Faith."

The chancellor further determined that Ms. Thweatt had been unable to return to work earning a wage equal to or greater than the wage she received prior to the accident.

Once causation and permanency have been established by expert medical testimony, the trial judge may consider a number of pertinent factors to determine the extent of a worker's industrial disability. See Worthington v. Modine Mfg. Co., 798 S.W.2d 232, 234 (Tenn.1990) (citing Holder v. Wilson Sporting Goods Co., 723 S.W.2d 104, 107 (Tenn. 1987); Robertson v. Loretto Casket Co., 722 S.W.2d 380, 384 (Tenn. 1986)). In this case, the chancellor looked at Ms. Thweatt's age, education, past work experience, whether she had any transferable job skills, and restrictions placed on her by her by Dr. Faith.

Ms. Thweatt is 55 years old. After graduating from high school, she worked in a factory for a short period of time. She then sold cosmetics at Castner-Knott before going to beauty school and obtaining her cosmetology license around 1984. She has no advanced skills. For fifteen years prior to her chemical exposure, Ms. Thweatt worked solely as a beautician, a profession she is no longer able to perform as a result of developing chemically induced asthma. Dr. Faith testified that Ms. Thweatt is now limited to a sedentary job in a working environment that is as much as possible climate-controlled, dust-free, chemical-free, fume-free, temperature-controlled, and humidity-controlled.

Based on the foregoing, we conclude that the evidence does not preponderate against the trial court's award of a 90 percent vocational disability. Therefore, the trial court's holding on this issue is affirmed.

COMMUTATION TO LUMP SUM PAYMENT

Travelers argues that lump sum commutation in this case is inappropriate because Ms.

Thweatt has not supplied proof of special needs or exceptional circumstances. Travelers relies on Davenport v. Taylor Feedmill, 784 S.W.2d 923 (Tenn. 1990) in support of this argument. Unfortunately, Travelers' reliance on this case is misplaced since the commutation statute was amended in 1990, after the Davenport decision was issued. The statutory amendment eliminated the requirement that an employee must show proof of special needs.

An award of workers' compensation benefits may be commuted to one or more lump sum payments upon motion of a party subject to the approval of the trial court. Tenn. Code. Ann. §50-6-229(a). The controlling statute, Tenn. Code. Ann. §50-6-229(a), says,

> In determining whether to commute an award, the trial court shall consider whether the commutation will be in the best interest of the employee, and such court shall also consider the ability of the employee to wisely manage and control the commuted award irrespective of whether there exist special needs.

Under this two-prong test (best interest and wise management of the commuted award), courts must exercise their discretion on an ad hoc basis since the amendment does not specify the factors to be considered. See North Am. Royalties, Inc. v. Thrasher, 817 S.W.2d 308 (Tenn. 1991).

In this case, Ms. Thweatt testified that she plans to invest the lump sum award in order to live off it for the remainder of her life. The chancellor found that Ms. Thweatt met the two-prong test, and stated that she has the ability to manage her money wisely.

Under the statute, the trial court has the discretion to permit or refuse commutation of an award to a lump sum. See Clayton v. Cookeville Energy, Inc., 824 S.W.2d 167, 168 (Tenn. 1992). Unless the reviewing tribunal finds that the trial court has abused its discretion, the award of a lump sum payment must be affirmed on appeal. Id. There is no evidence in the record to suggest that the trial court abused its discretion, and therefore, the lump sum award is affirmed.

STATUTORY FRIVOLOUS APPEAL PENALTY

The plaintiff contends that she should be awarded frivolous appeal damages because there was no reason for the appeal other than as a delay tactic. We cannot say that the appeal in this case was so devoid of merit as to justify the imposition of a penalty. Therefore, in our discretion we decline to assess appellant with fees and damages for a frivolous appeal.

The judgment of the trial court is affirmed. Costs are taxed to the appellant.