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

FILED

October 12, 1998

Cecil W. Crowson
Appellate Court Clerk

WILLIAM RANDY LITTRELL and ANITA CAROL LITTRELL, surviving kin and heirs at law and administrators of the Estate of EDITH CAROLYN LITTRELL,	)	
Plaintiffs/Appellees	)	LAWRENCE CIRCUIT
v.	)	01S01-9710-CV-00233
LAWRENCE COUNTY ADVOCATE INC.,	)	HON. JIM T. HAMILTON, JUDGE
Defendant/Appellant	)	

For the Appellant:

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M E M O R A N D U M O P I N I O N

Members of Panel:

Justice Janice M. Holder
Senior Judge William H. Inman
Special Judge William S. Russell

REVERSED and
DISMISSED

INMAN, Senior Judge

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.

This action was filed by the heirs at law and administrators of the estate of Edith Carolyn Littrell ["Decedent"] to recover the statutory benefits available in a non-dependency case.

On August 4, 1996, the Decedent was delivering newspapers for the defendant. She was 53 years old, single, and had delivered newspapers twice weekly for four years on a 10-mile route driving her personal automobile, a Ford Bronco.

The one-car accident occurred on the tertiary, non-paved Mt. Zion road in a remote section of Lawrence County at about the halfway point on her delivery route. The road was seventeen feet wide, graveled, straight, and the Decedent was west-bound, traveling up-grade. There were no witnesses to the accident, but the witness Richardson testified without objection that the Bronco "flipped over one and a-half times."

The precise time of the accident was not established. The witness Richardson testified that he "learned there had been a car wreck" about 9:00 a.m. and went to the scene. Trooper Paul Moore testified that he received a 911 message about 9:00 a.m. that an accident had occurred and that he arrived at the scene 20 - 30 minutes later. Mr. Richardson testified that Trooper Moore arrived more than an hour after he - Mr. Richardson - arrived.

The EMS people arrived before Trooper Moore, and were attending to the Decedent, who was taken to Crockett Hospital. Trooper Moore testified:

> " . . . there was a cooler inside the vehicle. There was a strong odor of an alcoholic beverage, beer . . . there was also open beer cans in the vehicle. It had a strong, strong smell of it . . . beer."

Trooper Moore further testified that the roadway surface - gravel - was dry, and when asked to assume that the Decedent's blood alcohol level of .21 or .22 at the time of the accident could be a contributing causative factor, this colloquy occurred:

MR. BATES: Objection, your honor. It's all speculation entirely. That's assuming that there's going to be proof that she was .22 and just because a person is intoxicated in a workers' compensation case has no probative value at all on the proximate cause.

THE COURT: Well, you know, all the years I've practiced law, you have some people that can drink two beers and register .22. You have people that can drink - - you know, it just affects different people different ways, so I'm going to sustain that objection.

MR. MANTOOTH: (CONTINUING)

Q: Officer Moore, what is the blood alcohol level in Tennessee for presumption of intoxication, in Tennessee?

A: Presumption of impairment is .10.

Q: If indeed the facts show she was .21 or .22, that would be more than twice the legal presumption?

A: Yes, sir, it would.

Q: Now, when you performed this investigation did you have any knowledge about the level of alcohol in Ms. Littrell's blood?

A: No, not at the time. No knowledge of that. I told you earlier when I had gotten to the hospital they were preparing her for life flight. I figured her safety and her health was the prime importance so I didn't proceed there.

Q: If indeed - blood alcohol level at the time of the accident you found out that it was indeed .21 or .22, how would that affect

your report with regard to causes of the accident?

MR. BATES: Same objection. There's been no foundation laid for this man, who I personally like and have a great deal of respect for, however, he has not been any foundation to qualify him as an expert witness on reconstruction whatsoever.

THE COURT: That's right.

MR. MANTOOTH: I'm not bringing it in for purposes of reconstruction, Your Honor. I'm just asking for purposes of his investigation at the time of the accident.

THE COURT: Well, he said he didn't examine the lady because she was hurt and he was more interested in her getting to wherever they life flighted her to, and all he can testify to is what he found in the car.

MR. MANTOOTH: Well, and I'm asking him if he had additional information today, would that change his opinion that he's expressed regarding what maybe caused the accident.

MR. BATES: But you sustained an objection on what caused it.

THE COURT: I don't see how he can testify about that, or anybody else unless you have a witness who saw what happened.

MR. MANTOOTH: Can I make an offer of proof and let him go ahead and testify what his answer would be.

THE COURT: Yes, you can make an offer of proof but it's not going to - - I'm going to sustain the objection.

MR. MANTOOTH: Okay.

THE COURT: Go ahead.

MR. MOORE: Are you asking what charges I would present?

MR. MANTOOTH: (CONTINUING)

Q: What would you have done in your investigation if you knew that she did, indeed, had a .21 or .22 at the time of the accident?

A: She would have been charged with D. U. I.[1]

Q As far as if indeed you were aware that she had a .21 or .22 level in her blood, how would that change your report regarding the cause of the accident? Or influence your report, if it would?

A: I would have stated that she had been drinking. Her ability would have been impaired.

Q: Did you find anything at the scene of the accident that would have explained why this lady ran off the road?

A: Other than physical evidence that was in the vehicle - - are you talking like a roadway hazard?

Q: Correct. Anything like that.

A: There was loose material on the surface is what I'd written in the report because it was a gravel road.

Q: Once again, this was a straight area of road; correct?

A: Yes, sir.

Dr. David Black, a toxicologist who is board certified in forensic toxicology, and is a diplomate of the American Board of Clinical Chemistry, the Board of Bio-Analysists, and the American Institute of Chemists, with over twenty years experience, testified that he performed a chemical analysis of the blood alcohol level of the Decedent on August 4, 1996. Made available to him were the medical information from Crockett Hospital, the Vanderbilt Hospital Medical Center, the autopsy report, and the accident report.

[1]By statute "It is unlawful for any person to drive . . . any automobile on any of the public roads . . . of the state . . . while (1) under the influence of any intoxicant . . . ; or (2) the alcohol concentration in such person's blood . . . is ten-hundredths of one percent (.10%) or more." T.C.A. § 55-10-401(1),(2).

He considered the time of the accident, the serum ethyl alcohol concentration measured at Crockett Hospital and at the Vanderbilt University Medical Center, the body weight of the Decedent, the time of death, and the blood alcohol concentration at the time of death.

For purposes of his analysis, he assumed[2] the accident occurred at 6:30 a.m., that the Decedent consumed no additional alcohol after that time, that the maximum blood alcohol concentration was at the time of the accident, that serum alcohol concentration overestimates blood alcohol concentrations by 16 percent, that normal rate of metabolism for a non-alcoholic user is .018% per hour and that a hundred milligrams per deciliter is equivalent to a .01% concentration.

If the Decedent was a 'chronic alcoholic,' the rate of metabolism would be faster,[3] and the level of alcohol at the time of the accident would be higher.

Three different blood alcohol tests were made available to Dr. Black. The first test was performed at Crockett Hospital on a sample collected at 11:30 a.m. The second sample was collected at Vanderbilt University Medical Center at 12:49 p.m. The third sample was collected post-mortem. Dr. Black testified that the blood alcohol level of the Decedent at 6:30 a.m. was .21 or .22 percent. If the accident occurred at 8:30 a.m., "that would take the value down to about .17 or .18 percent."

He further testified that "a subject with that concentration of alcohol would be described with gross intoxication," meaning overtly intoxicated with substantial impairment invoving difficulty in driving a vehicle.

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[2]These assumptions favored the plaintiff's case, or stated differently, gave the Decedent the benefit of all doubt.

[3]Family members testified that the Decedent drank beer on week-ends.

On cross-examination, Dr. Black was queried about the autopsy report, which indicated that the Decedent was 5 feet 3 inches tall and weighed 136 pounds, as contrasted to the testimony of a family member that she was 5 feet ten inches tall and weighed 180 pounds. Certain other data were questioned, none of which, according to Dr. Black, affected his conclusions and opinions.

The judgment contains these findings:

> "The Court further finds that although the Decedent, Edith Carolyn Littrell, may or may not have been under the influence at the time of the automobile accident which resulted in her death, the Court affirmatively finds that the defendant failed to prove intoxication was the proximate cause of the injury resulting in the death of Edith Carolyn Littrell. *Overall v. Southern Subaru Star, Inc.*, 545 S.W.2d 1 (Tenn. 1976). Moreover, it has been held that scientific evidence that the employee's blood contained a high level of intoxicants is insufficient to establish intoxication as the proximate cause. *Gentry v. The Lily Company*, 476 S.W.2d 252 (Tenn. 1971); *Wooten Transports Inc. V. Hunter,* 535 S.W.2d 858 (Tenn. 1976)."

. "It is undisputed that Edith Carolyn Littrell was delivering papers for the benefit of the defendant at the time of the automobile accident resulting in her death. The Court was not impressed with the conclusions of Dr. Black and has considered his demeanor and the many inaccuracies demonstrated in the autopsy report which Dr. Black candidly admitted was not reliable nor trustworthy. Depending upon the time of the accident, the Decedent may or may not have been under the influence, much less intoxicated. Considering the testimony of Trooper Paul Moore, the Court finds that even if full weight is given to the testimony of Dr. Black, the maximum the Decedent would have registered at the time of the accident was approximately .14 blood alcohol content but there is a margin of error and as aforesaid, there is no proof in the record as to intoxication being the proximate cause of the accident."

The defendant contested the right of recovery on two principal grounds: (1) that the Decedent was an independent contractor, and (2) that her intoxication was a proximate cause of her death, thus barring a recovery. The trial judge ruled that the Decedent (1) was an employee of the Defendant, and (2) that "if she was intoxicated," the Defendant failed to carry its burden of proving that such intoxication was the proximate cause of the accident, and awarded benefits accordingly. These are the issues presented for review, which

is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise, TENN. CODE ANN. § 50-6-225(e)(2), *Stone v. City of McMinnville*, 896 S.W.2d 548, 550 (Tenn. 1995), bolstered by the admonition that we must conduct an in-depth review of the factual findings and conclusions of the trial courts in workers' compensation cases. *See Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 456 (Tenn. 1988).

Employee or Independent Contractor?

In March, 1992 the Decedent began delivering newspapers for the defendant, which publishes the Lawrence County Advocate twice weekly. She was given written instructions that (1) motor route carriers are contract labor, (2) income tax and social security are not deducted from compensation, which (3) is "based on a piece-rate basis."

The most recent contract between the Decedent and the Defendant was executed February 28, 1995.[4] It provides that the Decedent is a "self-employed, independent contractor."

By this contract, the Decedent agreed to deliver newspapers on a designated route, using her personal vehicle. Compensation was 7.5 cents per newspaper plus 13 cents per mile travelled. The Decedent was required to arrange a substitute carrier if necessary. The contract provides that no taxes will be withheld, and that the contractor [Decedent] agreed that as an independent contractor she is not eligible for unemployment or workers' compensation. The contract expired March 1, 1996, according to its terms.[5]

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[4] *Prima facie* between Amber Littrell and the defendant. Amber was the 4-year old granddaughter of the Decedent. In the briefs and argument counsel were loath to discuss the reason for this scheme. It is conceded that the defendant was the signatory party.

[5] The Decedent continued to deliver newspapers as before; and the parties evidently agreed, inferentially, to extend the contract. The point is not crucial.

The Decedent was free to work for other entities. She had no fixed work hours, but was contractually bound to deliver the newspapers in her area of responsibility no later than 1:00 p.m. for the Sunday newspaper, and no later than 3:00 p.m. for the Wednesday edition.

These following factors must be considered in determining "whether an individual is an 'employee,' or a 'subcontractor' or an 'independent contractor':"

> (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 work hours; and
> (G) The freedom to offer services to other entities.

T.C.A. § 50-6-102(a)(9) (Supp. 1977).

As heretofore stated, there was no written contract in force with the Decedent on the date of her death, but the terms of the business relationship between her and the Defendant were established by the proof, which was not refuted: Decedent was paid based on the number of newspapers she delivered, and was paid thirteen cents per mile for the distance traveled on her delivery route. The Decedent and the Defendant had not had a written contract governing their business relationship since the previous contract had expired on March 1, 1996, but the business relationship between them continued to be handled in the same manner as before. Carriers were allowed a flexible delivery schedule, but were required to bag, tape, and fold the newspapers. Defendant directed where the newspapers should be delivered, and established the geographical route for that purpose. Carriers were allowed to select substitute carriers for their route, and were free to work for other entities. They had no set work hours, did not punch a time clock, and furnished their own

vehicle which they maintained. They were allowed to deliver other newspapers while delivering Defendant's newspaper, and enjoyed no typical fringe benefits such as paid vacations, holidays, or medical insurance. Compensation for delivery of newspapers on Decedent's route was paid by check payable to Decedent's granddaughter rather than the Decedent.

The right to control is the single most significant of the identifying factors. *See, Masiers v. Arrow Transfer & Storage Co.*, 639 S.W.2d 654 (Tenn. 1982); *Galloway v. Memphis Drum Service,* 822 S.W.2d 584 (Tenn. 1991). While the Defendant exercised some control over the Decedent [she was required to bag and fold the newspapers, was instructed as to when, where and how the newspapers were to be delivered], her independent contractor status clearly is shown by the proof. The Defendant may exercise some direction and control over the results of the work without creating the employee-employer relationship, *Masiers* at 656. In the case at Bar, the Decedent controlled the details of her work; the Defendant was concerned only with the final product.

While there was no written contract in force between the Defendant and the Decedent, the proof clearly establishes that the business relationship between the parties was treated the same as it was under the contract which expired on March 1, 1996, and which provided that "either party may terminate this contract for any reason and without cause by providing thirty (30) day notice of intention to terminate to opposite party on or prior to the first of any month." This method of termination is compatible with the existence of an independent contractor relationship. *Curtis v. Hamilton Block Co.,* 466 S.W.2d 220 (Tenn. 1971).

As to the method of payment, the proof revealed tht Defendant issued checks for Decedent's work payable to her granddaughter, based on the number

of newspapers delivered, which is consistent with the type of payment ordinarily made to an independent contractor. *See, Bargery v. Obion Grain Co.*, 785 S.W.2d 118(Tenn. 1990).

It was not disputed that Decedent was free to select and hire helpers, and that the Defendant did not provide Decedent with any tools or equipment, except the materials with which to wrap the newspapers.

We find the evidence preponderates against the finding that the Decedent was an employee of the Defendant and in favor of a finding that she was an independent contractor.

We next consider the issue of whether the intoxication of the Decedent was a proximate cause of the accident.

T.C.A. § 50-6-110(a) provides that "no compensation shall be allowed for . . . death . . . due to intoxication . . ." If the defense of intoxication is relied on, the burden of proof is upon the employer to establish that intoxication was the proximate cause of the injury or death (b), but not necessarily the sole cause. *See, Dobbs v. Liberty Mutual Ins. Co.*, 811 S.W.2d 75 (Tenn. 1991); *Overall, supra; Wooten, supra.*

Both *Gentry* and *Wooten,* cited by the trial court, were decided under the material evidence standard. Our standard of review is whether the findings and judgment are supported by a preponderance of the evidence, with a presumption of correctness, and subject to the requirement that we conduct a more in-depth review, as heretofore stated.

The burden of proof of intoxication and proximate cause is upon the employer, T.C.A. § 50-6-110(b), but if the employer has implemented a drug-free workplace and the employee has a blood concentration level of .10 percent or greater, it is presumed that the intoxication was the proximate cause of the

injury. T.C.A. § 50-6-110(c)(1). There is no proof that the Defendant had implemented a statutory, drug-free workplace, and thus no presumption of proximate cause arises.

It cannot reasonably be disputed that the evidence preponderantly established that the Decedent was intoxicated at the time of the accident, and thus the dispositive issue is whether her intoxication was a proximate cause of the accident resulting in her death.

In *Dobbs v. Liberty Mutual, supra,* the employee, a carpenter, fell from the second to the first story of a house under construction. He had consumed a quantity of alcohol the previous day, and a beer on the day of the injury. He "smelled like a brewery," and a blood alcohol expert testified that he had a significant amount of alcohol in his system which impaired his ability to function. The Court pointed out that while the employer has the burden of establishing proximate cause, the employee is not required to prove that the "intoxication was the sole cause." The Court observed that "he lost his balance, a known effect of alcohol, and there was no other apparent cause for the fall." Aproaching the case at Bar from a different vantage, it would strain a reasonable concept to find that gross intoxication was not a causative factor in the accident which occurred as we have described.

The trial court was critical of the testimony of Dr. Black for reasons not clear. Reference was made to the "many inaccuracies" of the autopsy report "which Dr. Black candidly admitted was not reliable nor trustworthy." To the contrary, Dr. Black testified:

> "If it's demonstrated that [the autopsy report] is not reliable and trustworthy then I would have to agree with that. *But I haven't any evidence before me that says it is."*

Moreover, Dr. Black testified that if the autopsy report was "thrown out" - not considered - his conclusions and opinion would remain the same.

The conclusion of the trial judge that "considering the testimony of Trooper Paul Moore, even if full weight is given to the testimony of Dr. Black, the maximum the Decedent would have registered at the time of the accident was approximately .14 blood alcohol content . . ." finds no support in the record. Trooper Moore testified that there was a cooler in the car, a strong odor of alcohol, i.e., beer, open beer cans, and that the accident occurred on a straight, gravelled road while the Decedent was traveling up-grade. He testified that the presumption of impairment was .10 blood alcohol level, and that the Decedent was impaired. We are unable to demonstrate from the record any evidence referable to Trooper Moore that the blood alcohol level of the Decedent was only .14 percent, if the point is relevant. Neither are we able to deduce or infer from this record that Dr. Black, whose competency, credentials, experience and education are unquestioned, is not credible, and in this connection it must be borne in mind that the Decedent's *blood alcohol level was unrefuted*.[6] Neither was it refuted that the Decedent's level of intoxication affected her time-distance judgment, cognitive functioning, peripheral vision and that she could not safely operate a vehicle. We agree with the appellant that causation was proved by circumstantial evidence.

The judgment is reversed and the case is dismissed at the costs of the appellee.

William H. Inman, Senior Judge

CONCUR:

[6]The comment of the trial judge that "you have some people that can drink two beers and register .22" cannot be considered.

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Janice M. Holder, Justice

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William S. Russell, Special Judge

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

WILLIAM RANDY LITTRELL AND ANITA CAROL LITTRELL, SURVIVING KIN AND HEIRS AT LAW AND ADMINISTRTORS OF THE ESTATE OF EDITH CAROLYN LITTRELL,	)	LAWRENCE CIRCUIT NO. CC-198-96 BELOW
APPELLEES	)	HON. JIM T. HAMILTON JUDGE
v.	)	
LAWRENCE COUNTY ADVOCATE, INC.,	)	NO. 01S01-9710-CV-00233
APPELLANT	)	REVERSED AND DISMISSED

JUDGMENT

This case is before the Court upon motion for review pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), 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 motion for review is not well taken and should be denied; 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 appellee, for which execution may issue if necessary.

It is so ordered.

PER CURIAM