

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
June 24, 2013 Session

LINDA CARTEN EX REL DANIEL JOHN CARTEN
v.
MBI AND/OR MR. BULT'S INC., ET AL.

Appeal from the Circuit Court for Benton County
No. 10-CV-40 C. Creed McGinley, Judge

No. W2012-01507-SC-WCM-WC - Mailed August 27, 2013;
Filed November 14, 2013

An employee died from “traumatic asphyxiation” after a front-end loader accidentally pushed him into a trailer loaded with garbage. The employee’s widow sought workers’ compensation death benefits. The employer denied that the employee was entitled to workers’ compensation benefits and raised the affirmative defenses of willful misconduct and willful failure to use a safety device. Following a trial, the trial court entered judgment in favor of the employer, and the employee’s widow appealed.¹ We affirm.

Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right;
Judgment of the Circuit Court Affirmed

TONY A. CHILDRESS, SP. J., delivered the opinion of the Court, in which JANICE M. HOLDER, J., and DON R. ASH, SR. J., joined.

Terry J. Leonard, Camden, Tennessee, for the appellant, Linda Carten.

David T. Hooper, Brentwood, Tennessee, for the appellees, Mr. Bult’s, Inc. and Dallas National Insurance Company.

¹This workers’ compensation appeal has been referred to the Special Workers’ Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law under Tennessee Supreme Court Rule 51.

OPINION

Factual and Procedural Background

Daniel Carten worked as a truck driver for Mr. Bult's, Inc. ("MBI") from January 2007, until his death on May 10, 2010. Mr. Carten's job required him to drive a truck and trailer from Camden, Tennessee, to a waste transfer station in Antioch, Tennessee. At the transfer station, city trucks owned by Waste Management, Inc. ("WMI") dump trash onto an area known as the "tipping floor." Large front-end loaders then push the piles of waste from the tipping floor into MBI's trailers. The load of waste is secured, and an MBI truck driver hauls the waste to a landfill near Camden.

Although no one witnessed the incident, the proof at trial revealed that on the evening of May 10, 2010, a front-end loader accidentally pushed Mr. Carten and a large pile of trash into the trailer of his truck. As a result, Mr. Carten died of "traumatic asphyxiation." Mr. Carten's widow, Linda Carten, timely filed a claim for workers' compensation death benefits with the Department of Labor and Workforce Development.

The parties exhausted the benefit review process on August 24, 2010, and Mrs. Carten filed the present lawsuit in Benton County Circuit Court later that same day. MBI filed an answer in which it alleged that Mr. Carten's death resulted from his willful misconduct and from his willful refusal to use a safety device and that Mrs. Carten's was precluded from receiving workers' compensation benefits on her husband's behalf.

Art Jelson, MBI's safety manager for the Camden and Antioch facilities, testified at trial that MBI's work rules required drivers to wear both a hard hat and a yellow safety vest any time that they were not inside their trucks. He also testified that MBI's work rules prohibited employees from scavenging items from the waste. Mr. Jelson said that he met with all drivers in early 2007 to explain these rules and showed them a video presentation about the safety rules. MBI entered as an exhibit a document signed by Mr. Carten in which he acknowledged receiving a copy of MBI's "General Work Company Guidelines."

Mr. Jelson testified that MBI's drivers were also required to follow WMI's safety rules. Mr. Jelson also testified that after a WMI employee at another facility died while scavenging for pens, WMI officials approached MBI to request that MBI's drivers be placed under WMI's safety rules while inside the Antioch facility. WMI's rules provide, that "[c]rossing the tipping floor is strictly forbidden." Mr. Jelson testified that he provided a copy of WMI's safety rules to each driver, including Mr. Carten, and that on April 24, 2009, Mr. Carten signed a document stating that he had received a copy of those rules. Mr. Jelson

specifically recalled telling Mr. Carten and other drivers that “absolutely nothing on that floor is worth getting killed over, nothing.”

Mr. Jelson further testified that no one had ever reported Mr. Carten or any other driver for being on the tipping floor or for scavenging through waste at the Antioch facility. Mr. Jelson testified that had he received such a report, he would have at least issued a written warning.

The Antioch facility had a motion-activated camera that was focused on the area of the tipping floor. This camera recorded a video of the events leading up to Mr. Carten’s death. Mr. Jelson viewed the video at trial and testified that it showed a person wearing a dark jacket and baseball cap in an area called the “apron,” where WMI and other trucks dumped their loads of waste. Mr. Jelson said that the person in the video waived his arms to get the attention of the loader operator and disappeared from the frame. Mr. Jelson testified that, like the tipping floor, MBI drivers were not permitted in the apron area.

Rick Wendt, a truck driver for WMI, testified that he was working at the Antioch transfer station on May 10, 2010. At trial, Mr. Wendt viewed the video footage of the apron area on the night of Mr. Carten’s death and identified the person in the video as Mr. Carten based on the clothing that Mr. Carten had been wearing that night. Mr. Wendt testified that Mr. Carten was not wearing a safety vest at the time, but he was unsure if Mr. Carten was wearing a hard hat. Mr. Wendt also testified that Mr. Carten approached him that evening and asked if he wanted a cowboy hat. Mr. Wendt added that Mr. Carten was not performing any work-related tasks at the time that he approached him.

David Owens, another driver for WMI, also testified at trial that Mr. Carten was the person shown in the May 10 video. Mr. Owens stated that Mr. Carten approached him carrying a bag of hats as Mr. Owens was preparing to unload his truck that night. Mr. Owens testified that Mr. Carten was not performing any work-related tasks at the time, and that Mr. Carten was not supposed to be in the unloading area. Mr. Owens further testified that he asked Mr. Carten to leave the area so that he could unload the waste from his truck. Mr. Owens said he later saw Mr. Carten speaking to Mr. Wendt and that Mr. Carten was still carrying the bag of hats. Mr. Owens testified that MBI drivers were permitted to get the attention of loader operators but that they were required to be behind a concrete barrier, which separated the MBI drivers from the tipping floor. Mr. Owens further testified that only loader operators and WMI drivers were allowed on the tipping floor or apron and that, even then, the drivers were required to stay within six feet of their trucks at all times. Mr. Owens expressed the opinion that Mr. Carten and Mr. Wendt were violating WMI’s safety rules when he saw them.

Chad Carroll, another MBI employee and former manager of the Antioch transfer station, testified that drivers have always been prohibited from crossing the tipping floor and from scavenging through waste. Mr. Carroll testified that he had not witnessed drivers scavenging on the tipping floor since MBI had taken over operation of the Antioch station. He also said that signs were posted at the Antioch station to alert employees that crossing the tipping floor was prohibited.

At the time of Mr. Carten's death, Jerry Mayberry was a loader operator at the Antioch transfer station. Mr. Mayberry testified that, although he had no supervisory authority over drivers, he had seen drivers scavenging through the waste and that he "had to run them off all the time." Mr. Mayberry also testified that loader operators were not permitted to operate their machines if anyone was seen on the tipping floor. He added that drivers were permitted to be in only two places inside the transfer facility – on the catwalk leading to the office where the drivers received their load tickets or inside their trucks. Mr. Mayberry stated that if he saw a driver on the apron, he would tell the driver to move to one of the two non-prohibited areas of the facility. As far as Mr. Mayberry knew, however, none of the drivers he caught scavenging were ever reprimanded.

Jeff Gill, who was the field supervisor over the Antioch transfer station, confirmed Mr. Mayberry's statement that loader operators had no authority to supervise drivers. Mr. Gill testified that he went to the Antioch station at least once each day to check on the plant's operations. He said that the MBI's drivers were to proceed as follows once they arrived inside the transfer station:

Once they exit the vehicle, have their [personal protective equipment] on, walk up, exit their vehicle, walk up the steps. Take the designated path area around the apron to the scale house. Proceed with a scale ticket to the catwalk and watch the loaders load their trailer and pack down the trailer.

Mr. Gill said that walking across the apron area was unacceptable for drivers and that scavenging was forbidden. Although Mr. Gill had seen third-party workers scavenging from the tipping floor, he testified that he had never seen nor had anyone complained about an MBI driver scavenging from the tipping floor. Mr. Gill stated that he had corrected every person whom he had witnessed either crossing the apron area or attempting to scavenge. Mr. Gill also stated that he verbally reprimanded any drivers he saw without their protective equipment. Mr. Gill testified that when a person came onto the tipping floor the protocol was to "[s]hut down the entire operation till the person is in a safe [], designated area." Mr. Gill denied ever knowingly "look[ing] the other way" while an employee committed a safety violation. Finally, Mr. Gill stated that MBI derived no benefit from Mr. Carten being on either the tipping floor or apron on May 10, 2010, and that Mr. Carten was not performing

a “legitimate job function” while in either of those areas. Mr. Gill, who was called to the scene after Mr. Carten’s accident, testified that he participated in the search for Mr. Carten, and that Mr. Carten was wearing a high visibility shirt under a black jacket when they found his body.

Mrs. Carten called several witnesses to rebut MBI’s proof, including Billy Rushing, who at the time of trial was still employed as an MBI driver. Mr. Rushing testified that Mr. Carten always wore his safety vest when he was not inside his truck. Mr. Rushing admitted that he had scavenged at the Antioch facility in the past and that he had also walked across the apron. Mr. Rushing said that he had seen other drivers doing the same things but that he was unaware of anyone being reprimanded for these activities. Mr. Rushing stated, however, that he had never seen anyone scavenging while Mr. Gill or any other MBI management were present in the facility. Mr. Rushing admitted that he knew scavenging violated company rules and that he could get in trouble if he was caught scavenging.

Mrs. Carten also called Jeremy Thompson, who was a loader operator for MBI from February 2008 until January 2010. Mr. Thompson testified that “everybody” scavenged at the Antioch transfer station, including Jeff Gill and Jerry Mayberry. Mr. Thompson described specific incidents involving Mr. Mayberry taking scrap metal and Mr. Gill taking some elk horns. He said that the rule or policy against scavenging was never enforced. Mr. Thompson testified that although he was “tired of getting drug tested all the time,” he left MBI because he had gotten a better employment offer. Mr. Thompson agreed that Mr. Mayberry did not have the authority to discipline drivers and acknowledged that he knew it was wrong for drivers to be on the tipping floor.

Similarly, Mrs. Carten called Cathy Britt, who worked as a driver for MBI from April 2008 until November 2008. Ms. Britt testified that while she worked for MBI, Mr. Carten wore a fluorescent yellow shirt, his jacket and his hard hat most of the time. She testified that although drivers were not permitted to scavenge, scavenging was “pretty bad” at the Antioch station. Ms. Britt added that “most everyone” scavenged, including Jerry Mayberry. Ms. Britt admitted, however, that she was not working for MBI in 2009 when MBI agreed to place its drivers under WMI’s safety rules.

Mrs. Carten presented similar testimony from several other former MBI drivers. All of her remaining witnesses either admitted to scavenging themselves or testified that they had seen other drivers scavenging. Some former drivers testified that Jerry Mayberry personally participated in scavenging activities, and other former drivers testified that management personnel ignored the scavenging. Although at least one of these witnesses testified that he did not know that scavenging and being on the tipping floor were against the rules, most of

these witnesses admitted to knowing that scavenging and being on the tipping floor were prohibited and could result in disciplinary action.

At the conclusion of the proof, the trial court issued its ruling from the bench. First, the trial court found that Mr. Carten was wearing a bright yellow shirt at the time of the accident but that Mr. Carten was also wearing a dark jacket over the yellow shirt, which reduced his visibility. The court also found that Mr. Carten was only wearing a “ball-type hat” instead of the company required hard hat. The court noted that each employee or former employee who testified at trial admitted knowing that being on the tipping floor was a violation of company rules and that MBI tried to “carry on a bona fide enforcement of the policy.” The court also found that MBI’s policy was “strict” and “continuous,” and “the fact that [] drivers were ignoring [the policy] among themselves is no[] indication that . . . action could have been taken by the employer.” After finding that MBI had proven its affirmative defenses of willful misconduct and willful failure to use a safety device, the trial court entered judgment in MBI’s favor. Mrs. Carten timely appealed.

Standard of Review

Appellate review of workers’ compensation cases is governed by Tennessee Code Annotated section 50-6-225(e)(2) which provides that appellate courts must review the trial court’s findings of fact “de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding[s], unless the preponderance of the evidence is otherwise.” Tenn. Code Ann. § 50-6-225(e)(2)(2008 & Supp.2012). As the Supreme Court has long observed, reviewing courts must conduct an in-depth examination of the trial court’s factual findings and conclusions. Wilhelm v. Krogers, 235 S.W.3d 122, 126 (Tenn. 2007). When credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge had the opportunity to observe the witness’ demeanor and to hear in-court testimony. Madden v. Holland Group of Tenn., 277 S.W.3d 896, 900 (Tenn. 2009).

Analysis

Mrs. Carten contends that the trial court erred in finding that MBI had proven the affirmative defenses of willful misconduct and willful failure to use a safety device.

Tennessee Code Annotated section 50-6-110 (a) precludes an award of workers’ compensation death benefits where the employee’s death is a result of “the employee's willful misconduct” or “willful failure or refusal to use a safety device.” Tenn. Code Ann. § 50-6-110(a)(1) & (4) (2008 & Supp. 2012). The burden of proof rests squarely with the

employer. Tenn. Code Ann. § 50-6-110(b) (2011). Moreover, to meet its burden, the employer must prove the following four elements:

- (1) the employee's actual, as opposed to constructive, notice of the rule;
- (2) the employee's understanding of the danger involved in violating the rule;
- (3) the employer's bona fide enforcement of the rule; and
- (4) the employee's lack of a valid excuse for violating the rule.

Mitchell v. Fayetteville Pub. Utils., 368 S.W.3d 442, 453 (Tenn. 2012)(quoting 2 Lex K. Larson, *Larson's Workers' Compensation Law*, § 35.04 (Matthew Bender, rev. ed.))(citations omitted).

On appeal, Mrs. Carten stipulates that the employer has proven elements one, two, and four of the Mitchell test. See Mitchell, 368 S.W.3d at 453. Therefore, the sole issue before the panel concerns the trial court's ruling on the third element of the Mitchell test – whether employer proved a “bona fide enforcement” of its work safety rules.

In support of her argument that MBI failed to consistently enforce its rules, Mrs. Carten highlights the testimony from a number of trial witnesses who indicated that drivers regularly scavenged on the tipping floor and were never disciplined. Additionally, Mrs. Carten points out that some witnesses testified that both Mr. Gill, a manager, and Mr. Mayberry, who had some authority over the loader operators, participated in scavenging. The majority of those witnesses, however, were also aware that scavenging or being on the tipping floor was prohibited and could result in discipline.

Mr. Jelson testified that he had neither observed drivers scavenging nor that had he received reports of such activity. Because he visited the Antioch site only once or twice a month, his opportunities to observe driver behavior were limited. Mr. Gill likewise denied seeing MBI drivers on the tipping floor, but he had seen and had reprimanded third-party workers for scavenging. Mr. Gill was present at the Antioch facility at least once each day but did not have a continuous presence because he also supervised two other locations. Mr. Mayberry testified that he had seen drivers scavenging on the floor. Although he had no authority over the drivers, he testified that when a person was seen on the tipping floor, he stopped the loading operation and instructed that person to leave the floor.

In sum, the trial court was presented with competing testimony on the issue of MBI's bona fide enforcement of its policies. The trial court obviously chose to accredit the testimony of MBI's witnesses that the policies at issue were regularly enforced. See In re Sidney J., 313 S.W.3d 772, 777 (Tenn. 2010)(citing Interstate Mech. Contractors, Inc. v.

McIntosh, 229 S.W.3d 674, 678 (Tenn. 2007)) (indicating that an appellate court “may infer the trial court's findings on issues of credibility and weight of testimony from the manner in which the trial court resolved conflicts in the testimony and decided the case.”). Because the witnesses testified in person, the trial court had the opportunity to observe their demeanor, and we give great deference to a trial court’s findings regarding credibility. Madden, 277 S.W.3d at 900.

After reviewing the record, we conclude that the evidence does not preponderate against the trial court’s finding that MBI sustained its burden of proving that Mr. Carten’s death was the result of his willful misconduct and willful failure to use a safety device. Therefore, the trial court correctly concluded that Mr. Carten’s death was not compensable under Tennessee Code Annotated section 50-6-110(a).

Conclusion

For the foregoing reasons, the trial court’s judgment is affirmed, and the costs of this appeal are taxed to Linda Carten and her surety, for which execution may issue, if necessary.

TONY A. CHILDRESS, SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

**LINDA CARTEN EX REL. DANIEL JOHN CARTEN v. MBI AND/OR MR.
BULT'S, INC. ET AL.**

**Circuit Court for Benton County
No. 10CV40**

No. W2012-01507-SC-WCM-WC - Filed November 14, 2013

JUDGMENT ORDER

This case is before the Court upon the motion for review filed by Linda Carten, as next of kin of Daniel John Carten, pursuant to Tennessee Code Annotated section 50-6-225(e)(5)(A)(ii), 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.

It appears to the Court that the motion for review is not well taken and is therefore denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed to Linda Carten and her surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Janice M. Holder, J., not participating.