SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
June 29, 2009 Session

BARRY R. MOORE v. HOWARD BAER, INC., et al.

Direct Appeal from the Chancery Court for Davidson County
No. 07-1314-IV Richard H. Dinkins, Chancellor

No. M2008-02357-WC-R3-WC - Filed - October 15, 2009

In this workers' compensation case, the employee, Barry R. Moore, was a truck driver. He was employed by a small corporation owned by a senior vice president of a large trucking company, Howard Baer, Inc. The smaller company leased his services to the larger one. He suffered a significant on-the-job injury. Mr. Moore obtained a judgment for workers' compensation benefits against his employer, Ronald Baker, Inc. That corporation did not have workers' compensation insurance and immediately discharged the debt in bankruptcy. He sought to receive benefits from Howard Baer, Inc., that he had been leased to, arguing that his employer was the "alter ego" of the larger company. The trial court found that the larger company was not liable for benefits, based upon the provisions of Tennessee Code Annotated section 50-6-106(1)(A). We reluctantly affirm the judgment.[1]

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

DONALD P. HARRIS, SR. J., delivered the opinion of the court, in which CORNELIA A. CLARK, J., and JEFFREY S. BIVINS, SP. J., joined.

George E. Copple, Jr., Nashville, Tennessee, for the appellant, Barry R. Moore.

Dale A. Tipps, Nashville, Tennessee, for the appellee, Howard Baer, Inc.

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[1]This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated section 50-6-225(e)(3) for a hearing and a report of findings of fact and conclusions of law.

MEMORANDUM OPINION

Factual and Procedural Background

Barry Moore was an over-the-road truck driver. It is undisputed that he was employed by defendant, Ronald Baker, Inc. ("RBI"), at the time he sustained a compensable gradual injury to both shoulders in late 2004 and early 2005.

RBI was a corporation owned by Robert Baker. It owned semi-tractors and hired drivers to drive them. Pursuant to a written lease agreement, RBI leased the tractors and drivers to Howard Baer, Inc. ("Baer"). At the time Mr. Moore worked for RBI, Mr. Baker was vice-president of Baer, and by the time of the trial, he had become president of that company. Baer had a contract with the Kroger supermarkets to deliver milk to its retail stores. All of RBI's drivers and tractors made such deliveries, using trailers provided by Baer. There is no evidence in the record that RBI performed any business function other than leasing tractors and drivers to Baer. Baer also directly employed drivers to perform the same function.

Mr. Moore was paid by RBI and received annual W-2 forms from RBI. His tractor was titled to RBI, but was registered to Baer. The tractor and all of the trailers bore Baer's logo. While on the job, Mr. Moore wore hats and shirts which also bore that logo. RBI did not employ any dispatchers or maintenance workers. Therefore, job assignments, vehicle repairs and all functions other than the driving of the vehicles were performed by employees of Baer. Baer maintained personnel files concerning RBI's drivers, as required by regulations of the U. S. Department of Transportation ("DOT"). There is no evidence that RBI maintained any files pertaining to its drivers other than payroll records.

Baer maintained a seniority list of its drivers. The purpose of the list is not clear. However, Mr. Moore and the other RBI drivers were placed on that list along with Baer's other drivers. Mr. Moore received occasional safety awards and bonuses directly from Baer. All paperwork concerning Mr. Moore's deliveries, all drivers' logs, and other reports required by either Baer or DOT were filed by Mr. Moore directly with Baer.

Mr. Moore worked for RBI, and occasionally directly for Baer, off and on for more than fifteen years. During this time, RBI had as many as seven and as few as three trucks and drivers leased to Baer. RBI's contract with Baer required it to provide workers' compensation insurance, and it had done so until shortly before Mr. Moore's injury. At that time, it had only four trucks and drivers. However, it had not filed the necessary paperwork to opt out of workers' compensation coverage. RBI obtained occupational and accidental injury insurance for its employees. Mr. Baker testified that he thought this was the equivalent of workers' compensation insurance.

Mr. Moore had two surgeries on his left shoulder and one surgery on his right shoulder as a result of his work injury. His treating physician, Dr. Michael Pagnani, assigned a 29% permanent anatomical impairment to the body as a whole, and restricted Mr. Moore to lifting no more than ten pounds. Mr. Moore reached maximum medical improvement in April 2006. He was unable to return to work for RBI and has worked only sporadically since that time.

Mr. Moore was forty-four years old when the case was initially tried. He was a high school graduate. He had no other education or specialized training. He had been a truck driver for most of his adult life, including fifteen or more years with RBI.

RBI provided no benefits, because it was uninsured for workers' compensation purposes. Some of Mr. Moore's medical expenses were paid through an insurance policy maintained by his wife. Suit was filed against RBI and Baer in the Chancery Court of Sumner County in April 2005. The case was tried on February 22, 2007. After Mr. Moore had presented his case, both defendants moved to dismiss, based upon improper venue.[2] The trial court initially granted the motion, but upon motion to reconsider by Mr. Moore, the dismissal was vacated and the case was transferred to the Chancery Court of Davidson County. The case was tried in that court on November 26, 2007, on the transcript of the earlier trial and some additional evidence.[3]

The trial court issued a written decision awarding 72.5% permanent partial disability against RBI, along with temporary total disability benefits and payment of medical expenses. The trial court found that Baer was not an employer of Mr. Moore and was not liable for workers' compensation benefits. RBI subsequently filed bankruptcy, rendering the judgment worthless. Mr. Moore appealed the trial court's ruling as to Baer's liability. RBI is not a party to the appeal.

Standard of Review

The standard of review of issues of fact is de novo upon the record of the trial court accompanied by a presumption of correctness. We may not overturn a trial court's findings of fact unless we find the preponderance of evidence is contrary to those findings. Tenn. Code Ann. § 50-6-225(e)(2) (2008). 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. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). Where the issues involve expert medical testimony that is contained in the record by deposition, determination of the weight and credibility of the evidence necessarily must be drawn from the contents of the depositions, and the reviewing court may draw its own conclusions with regard to those issues. Bohanan v. City of Knoxville, 136 S.W.3d 621, 624 (Tenn. 2004); Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997); Elmore v. Travelers Ins. Co., 824 S.W.2d 541, 544 (Tenn. 1992). A trial court's conclusions of law are reviewed de novo upon the record with no presumption of correctness. Perrin v. Gaylord Entm't Co., 120 S.W.3d 823, 826 (Tenn. 2003); Ganzevoort v. Russell, 949 S.W.2d 293, 296 (Tenn. 1997).

Analysis

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[2]Mr. Moore was a resident of Robertson County.

[3]At the time of the continued trial, Mr. Moore had been working for three weeks packaging steaks for Tyson Foods.

The trial court presented the threshold issue as "whether or not Baer is the joint employer of [Mr. Moore] for purposes of the workers' compensation statute." It explicitly based its analysis upon Tennessee Code Annotated section 50-6-211. That statute applies when an employee is "employed and paid jointly by two (2) or more employers." In such situations, each employer is liable for workers' compensation benefits in proportion to its share of the injured employee's compensation. The trial court found that the evidence submitted by Mr. Moore "in support of his contention that he was the joint employee of Baer, e.g., that he was dispatched for his runs by the Baer dispatcher; that accidents were handled through the Baer safety department; that receipts for fuel were to be placed in the name of Baer; were matters that further defined how the agreement between [RBI] and Baer was to be performed and did not make [Mr. Moore] an employee of Baer in accordance with the workers' compensation statute."

Mr. Moore contends that the trial court applied an incorrect analysis to the facts. He argues that the trial court should have found that RBI was the "general" or "lending" employer, while Baer was the "special" or "borrowing" employer. He bases his argument primarily upon the analysis of Professor Arthur Larsen, and cases from various states cited in support of that analysis. See 3 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law, Ch. 67 (2002).

Baer contends, in effect, that Mr. Moore's argument is irrelevant. It relies upon Tennessee Code Annotated section 50-6-106(1)(A), a statute which specifically addresses the trucking industry. That section provides, in pertinent part: "[No] common carrier by motor vehicle operating pursuant to a certificate of public convenience and necessity shall be deemed the employer of a leased-operator or owner-operator of a motor vehicle or vehicles under a contract to such a common carrier."

There have been very few cases interpreting section 50-6-211, the "joint employer" statute. In Riverside Mill Co. v. Parsons, 176 Tenn. 381, 141 S.W.2d 895 (1940), the Supreme Court found that the statute applied when an employee works jointly for two or more employers and is paid by both. Id., 176 Tenn. at 389-90. While the first condition is met in this case, the second is not. We conclude that the trial court correctly interpreted and applied section 50-6-211 in this case.

Mr. Moore's alternative argument, that Baer was his "special employer" and should therefore be liable for his benefits has more merit. Tennessee has recognized the potential for joint liability of multiple employers for workers' compensation benefits under the "borrowed employee" theory. See Winchester v. Seay, 219 Tenn. 321, 409 S.W.2d 378, 381 (1966). The decision sets our three conditions for application of the rule: "(a) The employee has made a contract of hire, express or implied, with the special employer; (b) The work being done is essentially that of the special employer; and (c) The special employer has the right to control the details of the work." Id. (quoting 1 Larson on Compensation at 710, § 48). In this case, the second and third factors are clearly satisfied. Based upon the evidence in this case, we would imply a contract between Baer and Mr. Moore and conclude that he was a "borrowed employee" of Baer, were it not for section 50-6-106(1)(A). However, the language of that statute precludes the imposition of liability upon Baer.

In that regard, Mr. Moore argues the section 106 envisions an arms-length transaction between two separate entities, rather than an agreement in which a single individual (in this case, Baker) represents both parties to the transaction. He describes RBI as an "alter-ego" of Baer, and contends that it is "not fair, just, or equitable" to permit Baer to avoid liability under these circumstances. He points out that an unscrupulous trucking firm could use section 106(1)(A) to escape coverage for its drivers under the workers' compensation law by contracting with multiple entities, all with fewer than five employees, to provide it with trucks and drivers.

We are in agreement with Mr. Moore's argument that the application of section 106(1)(A) creates a result which is inequitable, unfair, and at odds with the overall purpose of the workers' compensation statute. Mr. Moore sustained a serious injury, which severely limited his ability to earn a living. The injury was a direct result of work which he performed which was directed by Baer, which benefitted Baer, and for which Baer paid his nominal employer, RBI. Moreover, Baker's parallel positions as owner of RBI and senior executive of Baer are suggestive of collusion. If Mr. Moore had simply loaded the trucks rather than drive them, or if he had been a dispatcher or a bookkeeper injured under identical circumstances, both Baer and RBI would be liable for his benefits.

The language of the statute, however, is unambiguous. Baer is a common carrier, and Mr. Moore was clearly a leased-operator. Unfortunately for Mr. Moore and regrettably for us, we have no choice but to affirm the decision of the trial court, and leave it to the General Assembly to review section 50-6-106 and, if it deems it appropriate to do so, revise it in a manner that will prevent similar inequitable results in the future.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to Barry Moore and his surety, for which execution may issue, if necessary.

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DONALD P. HARRIS, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
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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 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, Barry R. Moore, and his surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM