IN THE SUPREME COURT OF TENNESSEE
WORKERS' COMPENSATION APPEALS PANEL
KNOXVILLE, MARCH 1998 SESSION

WILLIAM FLETCHER Plaintiff/Appellee V. WAUSAU INSURANCE COMPANY Defendant/Appellant NATIONAL SURETY CORPORATION and TANKNOLOGY CORPORATION INTERNATIONAL Defendants/Appellees	)	ROANE CHANCERY Hon. Frank V. Williams, Chancellor NO. 03S01-9708-CH-00096

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:

Adolpho A. Birch, Jr., Justice
William H. Inman, Senior Judge
Roger E. Thayer, Special Judge

AFFIRMED. THAYER, Special 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.

The trial court awarded plaintiff, William Fletcher, 20% permanent partial disability to the body as a whole and other statutory benefits against defendant, Wausau Insurance Company, and defendant-employer, Tanknology Corporation International. The claim was dismissed as to defendant, National Surety Corporation, and there has been no appeal from the order of dismissal.

Defendant Wausau has appealed insisting (1) it was not the employer's insurer in Tennessee and therefore not subject to being sued in Tennessee, (2) that T.C.A. § 50-6-115 has no application to the case as plaintiff's contract for hire was not made in Tennessee nor was the employment principally localized within Tennessee, and (3) the action in Tennessee should be barred under the doctrine of election of remedies.

Plaintiff began employment with Tanknology during January 1990 as a result of a contract for hire in Texas. He was employed as a tester and traveled with a mobilized unit conducting tests on underground storage tanks for major oil companies. He was assigned to the southeast region and this territory covered seven states including Tennessee. He testified he traveled in his work about seventy-five percent of the time and he spent about 30% of his time working in Tennessee.

On March 26, 1991, he sustained a back injury while working in Asheville, North Carolina. He saw Dr. Rick Longie on March 28, 1991 in Chattanooga, Tennessee. He later was treated by Dr. Alvin Spunt in Harriman, Tennessee, because Dr. Spunt was closer to his residence in Kingston, Tennessee, where he and his family were living.

Dr. Longie, a chiropractor, testified by deposition and stated his office received permission from plaintiff's employer in Houston, Texas to treat plaintiff and that Wausau Insurance Company, Houston, Texas, was identified as the employer's workers' compensation insurance carrier. He forwarded claims to the insurance

company and was paid certain benefits by Wausau on plaintiff's account. His total bill was $1645.

Dr. Spunt, also a chiropractor, first saw plaintiff on April 12, 1991. His testimony was by deposition and he stated he had received permission to treat plaintiff from both the employer and Wausau Insurance Company. His total bill was $5300 and a balance of $1420 existed when the deposition was taken. He testified Wausau had made certain payments on the account. At one point, Wausau disputed certain charges and the doctor's office had to fill out some forms which were mailed to the Texas Workers' Compensation Board.

In awarding benefits to plaintiff, the trial court found plaintiff was a resident of Tennessee; his injury occurred out-of-state in North Carolina; that plaintiff's employment was "principally localized" within Tennessee; that the doctrine of election of remedies did not bar the action as plaintiff had made no choice or election of remedies but merely received benefits from Wausau by payment of certain medical expenses; and that the employer, Tanknology, identified Wausau as the workers' compensation insurance carrier, it had paid benefits on plaintiff's behalf and should not now be heard to deny responsibility for benefits in the present action.

The case is to be reviewed on appeal de novo accompanied by a presumption of the correctness of the findings of fact unless the preponderance of the evidence is otherwise. T.C.A. § 50-6-225(e)(2).

Wausau Insurance Company argues that it merely provided compensation benefits under Texas workers' compensation insurance laws and that plaintiff failed to establish that it provided compensation coverage for claims in Tennessee. We do not find the burden of proof rests on the employee in this respect. While the general burden of proof is on the employee to establish the essential elements of a claim, we are of the opinion an employer and/or insurer has the burden of proof to establish facts which the employer or insurer claims as a bar to the compensation claim. *See Lunsford v. A.C. Lawrence Leather Co.,* 225 S.W.2d 66 (Tenn. 1949).

Wausau did not offer any evidence to establish it did not insure claims in Tennessee. The only witness to testify other than plaintiff and the two chiropractors was an insurance adjuster with employment connections for defendant National Surety Corporation. The witness admitted she had no knowledge whether Wausau

provided workers' compensation insurance coverage for claims in Tennessee. While our findings may differ in some respect from the trial court's reasons for not dismissing the case on this issue, the evidence does not preponderate against the trial court's ultimate conclusion.

Wausau contends that T.C.A. § 50-6-115 has no application to the facts of the case. This statute provides an employee may receive benefits under our workers' compensation statutes when the employee is injured in another state if (1) the employment was principally localized within Tennessee or (2) the contract for hire was made in Tennessee. Plaintiff's contract of hire was in Texas. The evidence indicated plaintiff was traveling in his employment throughout seven states most of the time. The trial court found his employment in Tennessee was about 30% of his total work time and was sufficient to constitute being "principally localized" under our extraterritorial statute. We do not find the evidence preponderates against this conclusion.

Lastly, Wausau argues the claim should be barred by the doctrine of election of remedies. We do not agree with this insistence. Plaintiff was never in a position to make an informed choice between two remedies. He only benefited by having a portion of his medical expenses paid as a result of his medical providers contacting his employer and insurance company for permission to treat. This is not sufficient to invoke the doctrine in bar of the claim. *See Hale v. Commercial Union Assur. Cos.* 637 S.W.2d 865 (Tenn. 1982) and *Hale v. Fraley's, Inc.,* 825 S.W.2d 690 (Tenn. 1992).

The judgment of the trial court is affirmed. Costs of the appeal are taxed to Wausau Insurance Company.

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Roger E. Thayer, Special Judge

CONCUR:

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Adolpho A. Birch, Jr., Justice

_____
William H. Inman, Senior Judge

IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

FILED

June 18, 1998

Cecil Crowson, Jr.
Appellate Court Clerk

WILLIAM FLETCHER.,	)	ROANE CHANCERY
	)	
Plaintiff/Appellee,	)	No. 12,620
	)	
vs.	)	
	)	Hon Frank V. Williams,
	)	Chancellor
WAUSAU INSURANCE COMPANY,	)	
	)	No. 03S01-9708-CH-00096
Defendant/Appellant.	)	
	)	
NATIONAL SURETY CORPORATION and TANKNOLOGY CORPORATION INTERNATIONAL	)	
	)	
Defendants/Appellees.	)	

JUDGMENT ORDER

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation 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 on appeal are taxed to Wausau Insurance Company and Robert R. Davies, surety, for which execution may issue if necessary.

06/18/98