

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
August 26, 2013 Session

**LORRAINE ENGLISH v. COMPASS GROUP USA, INC. d/b/a CANTEEN
VENDING SERVICES**

**Appeal from the Chancery Court for Sullivan County
No. K0037909(B) R. Jerry Beck, Chancellor**

**No. E2012-02732-WC-R3-WC-MAILED-NOVEMBER 7, 2013
FILED - DECEMBER 9, 2013**

An employee was injured when she fell from a stack of soft drinks while attempting to climb a wall to rescue and remove a feral cat from her employer's premises. Her employer denied the claim, contending that she was on a private mission at the time of her injury and also that she had violated a safety rule by failing to use a ladder. The employee filed this action seeking workers' compensation benefits. The trial was bifurcated. After the initial hearing, the trial court found that the employee's action was related in part to her employment and, therefore, compensable. After a subsequent hearing, the court awarded benefits. The employer has appealed, contending that the evidence preponderates against the trial court's findings on compensability and, in the alternative, that the claim is barred by Tennessee Code Annotated section 50-6-110(a) (2008). The 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 pursuant to Tennessee Supreme Court Rule 51. We affirm the judgment of the trial court.

**Tenn. Code Ann. § 50-6-225(e) (2008 & Supp. 2013) Appeal as of Right; Judgment
of the Chancery Court Affirmed**

LARRY H. PUCKETT, SP. J., delivered the opinion of the Court, in which GARY R. WADE, C.J., and J. S. "STEVE" DANIEL, SP. J., joined.

Thomas M. Horne, Chattanooga, Tennessee, for the appellant, Compass Group USA, Inc. d/b/a Canteen Vending Services.

George Todd East, Kingsport, Tennessee, for the appellee, Lorraine English.

OPINION

I. Facts and Procedural Background

Lorraine English (“Employee”) worked for Compass Group USA, Inc. d/b/a Canteen Vending Services (“Employer”) as a route driver servicing snack machines located on the premises of Tennessee Eastman Company in Kingsport. Her typical workday began with her arrival to pick up her inventory at Employer’s warehouse in Blountville, Tennessee at approximately 3:00 a.m. Her routine practice was to gather stock that had been pre-loaded on buggies the night before, load her truck, activate her handheld computer, and then leave to place snacks into and remove cash from vending machines on the Eastman premises. She was usually the first person to report to the warehouse and often left before any other drivers arrived.

She was the lone employee in the warehouse when the injury occurred on January 11, 2011. When Employee arrived at the warehouse, she heard a cat making a “horrible sound” and “a blood-curdling noise” that she determined was coming from the maintenance shop. The maintenance shop is separated from the rest of the warehouse by a divider wall that is ten to twelve feet high. Packaged snacks and soft drinks are stored outside the maintenance area. Prepared foods, such as sandwiches and microwave items, are stored in a cooler. No food products are stored in the maintenance area other than items contained in vending machines awaiting repair. The maintenance area was locked and was not normally accessible by employees outside business hours. Employee testified that she “could tell” the cat was in distress and that it would likely urinate or defecate on something in the maintenance area. While she acknowledged that she was a cat lover, had approximately twenty cats at her home, and thought something was wrong with the cat, she testified that she wanted to get it out of the building to prevent it from causing any damage to food products.

Employee said that she had encountered a similar situation six months earlier. On that occasion, she found a ladder, climbed over the maintenance shop wall to a partial set of stairs on the other side, and opened an outside door, permitting the cat to escape. She testified that she later told Tony Woods, the district manager, about this incident. Mr. Woods denied that such a conversation occurred. On January 11, 2011, however, Employee was unable to locate a ladder. She therefore decided to attempt to gain access to the maintenance area by stacking crates of soft drinks on a cart next to the shop wall, near where she believed the shop stairs to be. After she climbed the stack of drinks, she realized that the stairs were too far away to access. When she attempted to climb down, the stack of crates collapsed, and she fell, injuring her right ankle.

Employee testified that she was aware of Employer’s rule requiring ladders to be used for climbing, but she considered the presence of the cat in the maintenance area to be an

“extenuating circumstance” that justified her decision to disregard the rule. She conceded that attempting to climb in this manner was a safety violation. Excerpts from her discovery deposition were read into the record, and she agreed that, at the time her deposition was taken, she did not make any reference to product spoilage or health issues when explaining her actions. Rather, in the immediate aftermath of her fall, Employee said that her main concern was that the cat seemed to be in distress and that she wanted to get into the maintenance area to determine if it was injured. In her deposition testimony, she also stated that she wanted to prevent anyone from getting in trouble because of the cat’s presence in the building. In her trial testimony, she added that she was concerned about the possibility of the cat getting into the main warehouse area and spoiling the products stored there.

Employee also testified that she was aware of Employer’s twenty-four-hour “hotline” that she could call to report problems in the building. She did not attempt to call the hotline because she believed that “[t]hey weren’t going to come if I called and said, ‘There’s a cat shrieking at the top of its lung. It’s hurt.’ They weren’t going to come to see. There’s no doubt in my mind.”

The problem with cats near or in the warehouse had existed for some time. Employee testified that a group of feral cats was often present near a dumpster located outside the warehouse.¹ At one time in the past, she had arranged for a professional to trap some of the cats, remove them from the premises, and have them spayed and neutered. After her injury, two or three cats were caught in the dumpster area and brought to Employee at her request.

Tony Woods, Employer’s district manager at the time of the incident, testified that normal business hours for the Blountville warehouse were 8:00 a.m. to 5:00 p.m. He usually arrived at 7:30 or 8:00 a.m., by which time Employee had left on her route. Other drivers came and went in accordance with the requirements of their routes. Mr. Woods testified that, because food was prepared on the premises, the warehouse was periodically inspected by the local department of health. He confirmed that cats were often present in the dumpster area outside the building, but he did not recall any previous incidents involving cats in the building itself. The building had no pest problems other than mice, and the company had a pest control program to address those issues.

Initially, Mr. Woods testified that a cat locked in the maintenance area could not get into the food storage area of the building. He later conceded that it would be possible for a cat to escape from the shop by using the inside stairs. He believed that the presence of a cat in the warehouse would probably violate health regulations. However, Employer had never been cited for such a violation, and Mr. Woods did not consider cats to be a pest problem at

¹ A “feral” cat is one that has reverted to its wild, undomesticated state.

the site. The cat discovered by Employee on January 11, 2011, did not cause any damage to equipment or contaminate any food products.

Although Mr. Woods considered Employee to be a good worker, he stated that pest control was not part of her job responsibilities. He further denied that she had ever discussed with him removing a cat from the building prior to her January 2011 injury.

Mr. Woods testified that each employee was given a handbook containing safety rules. The handbook contained a specific instruction that ladders were always to be used when climbing. No special training was given to employees concerning the contents of the handbook. Mr. Woods was not aware of any violations of this policy by other employees. He acknowledged that a ladder was usually kept in the maintenance area “behind a locked door,” to which only the maintenance personnel had access.

Daniel Hallahan, also a route driver for Employer and usually the second driver to arrive at the Blountville warehouse, received a call from Employee on the morning of the incident. He could hear the cat when he arrived at the warehouse, but he did not see it. Employee explained to him that she had attempted to climb the wall to let the cat out. She did not mention any health or safety issues concerning the cat. Mr. Hallahan stated that cats had been able to get into the building before but had not caused any problems. To his knowledge, no one had ever been reprimanded about those incidents. He agreed that it would be possible for the cat to get out of the maintenance area. He testified that he was not aware of the rule requiring the use of ladders to climb.

After hearing this evidence, the trial court issued its decision from the bench. It found that Employee was acting within the scope of her employment by attempting to release the cat from the maintenance area because the cat’s removal from the warehouse would benefit Employer. Her injury was, therefore, compensable. The court entered an order consistent with those findings. Employer filed a motion to alter or amend, restating its argument that the injury was not related to Employee’s job. The trial court heard that motion and also heard evidence on the subject of Employee’s disability at a subsequent hearing. The motion was denied. The court awarded 90% permanent partial disability benefits to the right leg, as well as temporary disability and medical benefits.² Judgment was entered accordingly, and Employer has timely appealed, contending that the evidence preponderates against the trial court’s finding that the injury arose from Employee’s work. In the alternative, Employer argues that recovery is barred pursuant to Tennessee Code Annotated section 50-6-110(a) (2008) because Employee willfully disobeyed Employer’s safety rule that required her to use

² Employer has not raised any issues concerning the amount of the award. We therefore omit a summary of the evidence presented at the second hearing.

a ladder for climbing.

II. Standard of Review

The standard of review for issues of fact is “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. 2013). When credibility and the weight to be given testimony are involved, considerable deference is given to the trial court where the trial judge had the opportunity to observe the witnesses’ demeanor and to hear in-court testimony. Madden v. Holland Grp. of Tenn., Inc., 277 S.W.3d 896, 898, 900 (Tenn. 2009). A trial court’s conclusions of law are reviewed de novo upon the record with no presumption of correctness. Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009).

III. Analysis

A. Compensability

Employer first argues that Employee’s injury arose from a personal mission, separate from and unrelated to her job duties, and thus did not arise from her employment as required by Tennessee law. Of course, an injury is not compensable unless it “aris[es] out of and in the course of employment.” Tenn. Code Ann. § 50-6-103(a) (2008 & Supp. 2013). An injury has occurred “in the course of” employment if it occurred while the employee was performing a duty he or she was employed to do; an injury is “arising out of” employment if it is caused by a hazard incident to such employment. Bell v. Kelso Oil Co., 597 S.W.2d 731, 734 (Tenn. 1980) (quoting Travelers Ins. Co. v. Googe, 397 S.W.2d 368, 371 (Tenn. 1966)).

The “mutual benefit test,” which aids a court’s determination of when a personal mission of an employee sufficiently deviates from the course of employment so as to render an injury non-compensable, was articulated in Jones v. Hartford Accident & Indemnity Co.:

On one hand, an employee who is engaged in the pursuit of a personal mission, wholly unrelated to employment, at the time of an injury, is not entitled to workers’ compensation benefits. On the other hand, “it is clear that as long as [a deviation from the employee’s normal job duties] is for the benefit of the employer, it does not matter that it also serves purposes of the employee.”

811 S.W.2d 516, 519 (Tenn. 1991) (citations omitted) (quoting Herron v. Fletcher, 503 S.W.2d 84, 87 (Tenn. 1973)); see also id. at 519-20 (holding that an employee’s activity is “in the course of employment” when the “activity is of mutual benefit to the employee and employer”).

In Lennon Co. v. Ridge, 412 S.W.2d 638, 646 (Tenn. 1967), the Tennessee Supreme Court held that an injury suffered by an employee who was attempting to rescue an employee of another employer working in the same area did not arise out of the employment and was therefore not compensable. The court stated that “compensation should not be permitted unless the employee acts in some way for the benefit of or in furtherance of the interests of his employer, or pursuant to instructions given by the employer.” Id. at 644. The court held that “the injury sustained by the [employee] while undertaking to rescue a third person under circumstances with which the employer had no connection, financial or otherwise, did not arise out of his employment.” Id. at 646. As the court explained, the facts in Lennon presented a “somewhat narrow” issue:

The rescue involved here was an attempt to assist a person who was not a fellow employee of claimant, *nor was there any property of the employer involved in the rescue*. So far as the record before us discloses, *there was no pecuniary or other interest of [the employer] involved*, and [the employer] was in no way legally responsible for the dangerous condition which resulted in the rescue effort by claimant.

Id. at 640 (emphasis added).

Here, the evidence at trial, mainly through Mr. Woods’ testimony, shows that removing cats from Employer’s warehouse was not part of Employee’s job as a route driver, and Employee has made no assertions to the contrary. Thus, the issue of compensability in this case turns on a question of fact: Did Employee’s attempt to remove the cat from Employer’s premises, unwise as it may have been, provide a benefit to Employer?

The trial court found that Employer would benefit from the removal of the cat. We will not disturb that finding of fact unless the evidence preponderates otherwise. See Tenn. Code Ann. § 50-6-225(e)(2). In our assessment, the evidence in the record sufficiently supports the trial court’s finding that removal of the cat provided a benefit to Employer. Mr. Woods testified that the cat’s presence in the building was likely a violation of food safety regulations. He also agreed that it was possible, though not probable, that the cat could have escaped from the maintenance shop and contaminated products in the food storage area. Moreover, the cat could have either damaged or fouled the equipment in the maintenance shop. Thus, through the circumstances that led to Employee’s injury, Employer benefitted by avoiding both a disruption to its business operation and additional financial costs associated with health department fines and damaged equipment.

The evidence presented to the trial court and set out above leaves little doubt that Employee was motivated by her personal concern for the welfare of the cat. Employee,

however, also testified at trial that concerns for Employer’s business and financial interests partially motivated her rescue effort. The trial court found that Employee’s actions “were connected with the business,” and the court’s decision was necessarily based on its assessment of the credibility of Employee’s testimony. We must grant deference to that assessment. Madden, 277 S.W.3d at 898, 900. Unlike the facts in Lennon, here the property of Employer was involved in the rescue, and Employee’s actions benefitted Employer’s business and financial interests. Thus, applying the “mutual benefit test” and affording the proper deference to the trial court’s findings of fact, we are unable to conclude that the evidence preponderates against the trial court’s finding on the issue of compensability.

B. Violation of Safety Rule

Employer also contends that Employee should be barred from recovery of workers’ compensation benefits because her injury resulted from her willful violation of its safety rule requiring employees to use ladders for climbing.

The Workers’ Compensation Law provides employers a statutory affirmative defense to liability where an injury results from an “employee’s willful misconduct . . . or willful failure or refusal to use a safety appliance.” Tenn. Code Ann. § 50-6-110(a).³ If the employer contends that an injury arose in any of these ways, “the burden of proof shall be on the employer to establish the defense.” Id. § 50-6-110(b). If the employer succeeds in establishing the defense, the statute operates as a complete bar to recovery by the employee. Id. § 50-6-110(a) (“*No compensation shall be allowed for an injury . . . due to the employee’s willful misconduct . . . or willful failure or refusal to use a safety appliance.*” (emphasis added)).

In Mitchell v. Fayetteville Public Utilities, 368 S.W.3d 442, 448-52 (Tenn. 2012), the Tennessee Supreme Court examined the history of the defenses of willful misconduct and willful failure or refusal to use a safety appliance. After examining the elements required to prove each defense, see Rogers v. Kroger Co., 832 S.W.2d 538, 541 (Tenn. 1992) (establishing the elements required to prove an employee’s willful misconduct); Nance v. State Indus., Inc., 33 S.W.3d 222, 226 (Tenn. Workers’ Comp. Panel 2000) (establishing the elements required to prove an employee’s willful failure or refusal to use a safety appliance), the court determined that a uniform approach should be applied to each defense. Mitchell, 368 S.W.3d at 452-53. Accordingly, an employer asserting the defenses of an employee’s willful misconduct, willful disobedience of a safety rule, or willful failure to use a safety appliance, must prove the following: “(1) the employee’s actual, as opposed to constructive,

³ A recent amendment to the Workers’ Compensation Law replaced the term “safety appliance” with “safety device.” See Tenn. Code Ann. § 50-6-110(a)(4) (Supp. 2013). Consistent with the laws in effect at the time of Employee’s injury, we will use the term “safety appliance.”

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." Id. (emphasis added) (citations omitted).

The evidence here demonstrates that Employer had a rule requiring its employees to use a ladder when climbing, and Employee testified at trial that she was aware of this rule. Thus, Employer established the first element of the Mitchell test—Employee's actual knowledge of a safety rule. Regarding the second element, Employer contends in its brief that Employee "understood the danger involved in violating the rule since she alleges she used a ladder on one occasion prior to the subject injury in order to climb the wall." In fact, Employee testified that she had used a ladder on a previous occasion and that she had searched for a ladder prior to sustaining her injury in January of 2011. She also conceded that it was a safety violation to attempt to climb the wall by stacking crates of soft drinks on a cart. We can infer from these facts that Employee understood the danger involved in climbing a ten- to twelve-foot wall without using a ladder. Employer, therefore, has carried its burden as to the second element of the Mitchell test.

Unfortunately, there was little evidence or argument presented as to the third Mitchell element—Employer's bona fide enforcement of the ladder rule. Although the rule was contained in the employee handbook, Employer neither provided training to employees concerning the contents of the handbook nor any explanation of the reasons behind the rules in the handbook. Mr. Woods testified that he did not recall that any employee had ever been disciplined for violating the rule. However, there was no testimony or other evidence that any employee had actually violated the rule in the past and then escaped discipline by Employer. Based upon these limited facts, we are unable to determine whether the third element weighs more in favor of Employer or Employee. Because the record is scant on this element but is more developed as to the fourth element, and because Employer must prove each and every element of the Mitchell test, we will assume without deciding that Employer carried its burden as to the third element.

Assuming that Employer met its burden as to the third element, we now turn to the fourth element of the Mitchell test—whether Employee had a "plausible explanation" for her failure to use a ladder when climbing, which would qualify as a "valid excuse" for violating the safety rule. 368 S.W.3d at 454. In Salazar v. Concrete Form Erectors, Inc., No. M2002-03040-SC-WCM-CV, 2003 WL 22970953, at *3 (Tenn. Dec. 15, 2003) (per curiam order), the Tennessee Supreme Court affirmed a Panel's decision holding that an employee's failure to use a safety harness was not willful when there was no place for the employee to attach the harness while working on a scaffold.

The evidence in this case demonstrated that Employee had previously used a ladder

to remove a cat from the maintenance shop. However, on the occasion when the injury occurred, Employee looked for a ladder but was unable to locate one. Mr. Woods testified that Employer usually kept the ladder in the maintenance area to which only maintenance personnel had a key. In that location, the ladder that Employee was required to use was inaccessible. As was the case in Salazar, where the required safety appliance was unusable due to circumstances outside the employee's control, Employee, who previously had demonstrated a willingness to follow Employer's rule, was unable to comply with the rule through no fault of her own.

Application of the Salazar rule is consistent with the trial court's finding that Employee's conduct in stacking soda cases to climb the wall was negligent but not willful. The court explained:

After hearing the cat she began to stack up cases of what appeared to be soft drinks to . . . attempt to climb up to open a door to let the cat out [T]he cat had the potentiality of doing damage. Also, according to Mr. Tony Woods, the cat would have had access to the area where food was stacked, not the warehouse, but where [Employee] was in the process of loading her food stuffs that . . . appear to be in boxes or what she described as trays.

Now, she recognized that the cat could potentially urinate To a certain extent I think we've all been around cats and they do tend to create a problem sometimes and it's not unreasonable a cat might be more apt to do that if they were under stress. Evidently this cat was under some type of stress because of its . . . squeal or something that's bloodcurdling in sound.

I guess she could've left the cat in the maintenance area. The cat, described as a feral cat, . . . could've easily entered into where the foods were . . . stored temporarily while they were being loaded in the trucks, could have remained and soiled . . . not only the maintenance area but also the holding area which [was] where [Employee] was working at the time.

She chose to act in a negligent matter [sic]. There's no question she was negligent in trying to climb up those stack of cases but in [a] workers' compensation case that does not bar recovery Under workers' comp . . . her negligence does not bar recovery

Moreover, the trial court credited Employee's testimony that had she called Employer's "hotline," no one would have responded to her request for help. As noted, the trial court found that a cat under distress, as in this case, would be more likely to "create a

problem.” Therefore, the trial court implicitly determined that Employee was justified in violating the ladder rule because of the damage that was likely to be caused by the cat, while Employer was unlikely to respond to the situation in time to prevent the potential damage. Under these circumstances, coupled with the fact that the ladder was inaccessible by Employee, we find that Employee has provided a “plausible explanation” that qualifies as a “valid excuse” for her failure to comply with Employer’s rule that required her to use a ladder.

In summary, Employer failed to prove its affirmative defense of willful violation of a safety rule. Although Employer carried its burden with regard to the first and second elements of the Mitchell test, even if we assume that Employer also carried its burden with regard to the third element, Employer nevertheless failed to prove the fourth element—Employee’s lack of a valid excuse in violating the ladder rule. We conclude, therefore, that Employee’s claim was not barred by operation of Tennessee Code Annotated section 50-6-110(a).

IV. Conclusion

The judgment of the trial court is affirmed. Costs are taxed to Compass Group USA, Inc. d/b/a Canteen Vending Services and its surety, for which execution may issue if necessary.

LARRY H. PUCKETT, SP. JUDGE