

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
January 24, 2011 Session

**VICTOR POWELL ET AL. v. BRETT MARTER, INDIVIDUALLY and D/B/A
QUALITY FLOOR COVERING**

**Appeal from the Circuit Court for Marion County
No. 18193 Thomas W. Graham, Judge**

**No. M2010-01746-WC-R3-WC - Mailed - May 4, 2011
Filed - June 7, 2011**

This 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. The employee filed a workers' compensation action contending his injury while cutting trees at his employer's home was in the usual course of his employment at his employer's floor covering business. The trial court held that employee's work was casual employment not in the usual course of his employer's business as defined by TCA § 50-6-106(2) and not covered by the workers' compensation statute. We affirm the judgment.

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

E. RILEY ANDERSON, SP.J., delivered the opinion of the Court, in which WILLIAM C. KOCH, J. and DONALD P. HARRIS, SR.J., joined.

Thomas L. Wyatt, Chattanooga, Tennessee, for the appellant, Victor Powell.

Catherine L. Grant, Nashville, Tennessee, for the appellee, Brett Marter.

MEMORANDUM OPINION

Factual and Procedural Background

The plaintiff, Victor Powell broke his femur or thigh bone on February 16, 2008, while cutting down a tree at the home of his part-time employer, Brett Marter d/b/a Quality Floor Coverings. The broken femur required surgery and several months of rehabilitation. The plaintiff filed a worker's compensation action alleging that he was employed by Marter

and that his injury at Marter's home occurred in the usual course of that employment. Marter agreed Powell was a part-time employee in his floor covering installation business, Quality Floor Coverings, but denied that Powell's injury occurred in the usual course of that employment. Instead he insisted that the work Powell was doing for him at his home at the time of his injury was purely personal and completely unrelated to his floor covering business. Marter therefore contends that Powell was a "casual employee" and not covered by the Tennessee Workers' Compensation Act.

Powell was 46 years old and a high school graduate. Prior to 2007 he had worked in the produce department of a supermarket. During that time Powell and Marter were neighbors and knew each other socially. In 2007 Powell lost his job and Marter hired him to work part-time for Quality Floor Coverings, a sole proprietorship owned by Marter.

Marter's business was installing carpet or vinyl flooring in commercial buildings. Marter had 2 employees who worked for him on a more or less regular basis and he hired others including Powell when the size of the job warranted it. Powell worked for Quality for nine weeks during 2007 and 2008, including work at a Cleveland Tennessee motel which was ending by February 8, 2008. Marter testified that when the job ended, he told Powell he had no additional work to offer him and Powell responded that "his wife needed him to work."

On February 15, Marter called Powell and asked him to come to his house the next morning with a chain saw. He testified that he wanted Powell to assist him in cutting down a number of trees so that he would be able to move a power line on his property. He said that he intended to pay Powell in cash for this work.

Powell testified that he came to Marter's house on February 16 and began work cutting trees along with Marter. He was injured and taken to Erlanger hospital in Chattanooga. Powell testified that he had worked on Marter's property on previous occasions, and had been paid for that work by a Quality Floor Covering check. He specifically recalled cleaning out a trailer used to transport tools to and from job sites. He also testified that he had performed "brush and tree work" for Marter on at least one previous occasion, but was unable to recall the year or any additional details concerning that work. Marter agreed that Quality had paid Powell to clean the trailer which was used to store tools and other materials for the floor covering business. He denied that Powell had performed any other work at his home before the date of his injury, February 15, 2008.

Marlon Hancock, a former employee of Quality, testified that he had also performed work at Marter's home and that Marter had paid him in cash for the work at his home.

The trial court found that Powell was a casual employee, as defined in Tennessee Code Annotated section 50-6-106(2), at the time of the injury, and was therefore not eligible for workers' compensation benefits. Powell has appealed, contending the trial court's decision was erroneous.

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 of the findings, unless the preponderance of evidence is otherwise. 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's demeanor and to hear in-court testimony. Madden v. Holland Grp. of Tenn., 277 S.W.3d 896, 900 (Tenn. 2009). When 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. Foreman v. Automatic Sys., Inc., 272 S.W.3d 560, 571 (Tenn. 2008). 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).

Analysis

The issue in this case is whether Powell was a casual employee and therefore not covered by the Workers' Compensation Act. We first examine the language of the casual employee exclusion statute:

Tennessee Code Annotated section 50-6-106(2) provides that the workers' compensation law does not apply to “[a]ny person whose employment at the time of injury is casual, that is, one who is not employed in the usual course of trade, business, profession or occupation of the employer.”

Powell contends that he was employed as a “general laborer” and because of the general nature of his employment any work he performed for Marter was in the course of that employment whether or not it involved the installation of flooring.

Powell contends that Yearout v. Trusty, 684 S.W.2d 612 (Tenn. 1984), is controlling authority. In Yearout, the employee was a laborer for a paving company who did not work a forty hour week, but reported to work daily and if the employer had work in progress he

was assigned various tasks for which he was paid. On the day before Yearout's injury he reported to work and was assigned by his employer to apply a sealant to the roof of his employer's building. On the day of Yearout's injury he had reported to work and was assigned by his employer to apply a sealant to the roof of a garage owned by the mother-in-law of his employer. Yearout was transported to the work site by his employer in a company truck and received instructions about the job from his employer. The materials for the job were furnished by the employer and Yearout was never told that the job was not for the benefit of the company.

The trial court found that he was not entitled to recover workers' compensation benefits because roofing work was "not within the usual course of business" of the paving company. The Supreme Court reversed and held that the casual employee exception was not applicable. The Court explained:

The statute excludes those persons employed for the purpose of engaging in activity that is not in the usual course of business of the employer. It cannot be used to exclude employees *employed* for the purpose of performing work in the usual business of the employer who happened to be, at the time of the accident, engaged in work outside the usual course of the employer's business, at the direction and under the supervision of the employer.

Id. at 614. See also U.S. Rubber Products Co. v. Cannon, 172 Tenn. 665, 669, 113 S.W.2d 1184, 1185-86 (Tenn. 1938).

Marter cites Travelers Ins. Co. v. Dozier, 219 Tenn. 525, 410 S.W.2d 904 (Tenn. 1966) and Creek v. MacLennan, 752 S.W.2d 511 (Tenn. 1988) as examples of cases in which injured workers have been found to be casual employees because the work they were engaged in at the time of injury was not within the usual business of their employers. These cases, however, are distinguishable from this case because in each, the injured person was not otherwise employed by the alleged employer in the course of his regular business. In this case, it is undisputed that Powell did, in fact, work part-time for Quality Floor Coverings in the course of its normal business of installing flooring.

Marter contends that the Yearout v. Trusty case is not applicable here. He points out that Yearout reported to work every day to see if he had an assignment; that he had no choice in the assignments he received, which were various kinds of work; that he was transported to the injury work site where he was directed and supervised by his employer and used materials provided by his employer.

In contrast, in this case Powell did not report to work every day, but was offered work which he could refuse, on specific flooring projects when Marter had enough work to make such an offer. He did not do various kinds of work, only that related to flooring. In between his work assignments, he did not work for Marter, and was free to seek work elsewhere.

Marter testified that all of the work which Powell had previously performed for him was directly related to his flooring installation business, either assisting in the installation of the flooring itself, or in the maintenance of the trailer which Marter used to transport tools and equipment to the work site. Marter testified that the tree removal work which Powell was performing at the time of his injury was voluntary, wholly unrelated to the flooring business and that Powell brought his chainsaw to the job site at Marter's home.

Powell testified that he had performed work at Marter's home in the past, and had been paid for that work by checks from Quality Floor Coverings. Powell could not recall details about the work or when it occurred. Powell's trial testimony was inconsistent with statements in his discovery deposition. Marter denied at trial that Powell had ever performed any personal work at his home. The trial court did not make a finding on that issue. It may be inferred from its ultimate ruling that it accepted Marter's version of events. See Richards v. Liberty Mut. Ins. Co., 70 S.W.3d 729, 733 -734 (Tenn. 2002).

This case is clearly distinguishable from and not controlled by the Yearout decision. Powell was a part-time employee of Quality Floor Covering. His employment, however was intermittent and had been limited solely to tasks associated with the installation of flooring, or maintenance of the company trailer. In addition, Powell and Marter were neighbors. They had a social relationship which existed before the employment relationship and had frequently gone fishing together. Powell does not dispute that after the flooring job in Cleveland was finished and he was told there were no more flooring projects available that he told Marter that his wife needed him to work. The tree cutting which Powell was performing at Marter's home on February 15, 2008 was completely unrelated to the flooring business, and Marter's hiring of Powell was a personal favor, not business related, and was voluntary on Powell's part. Powell was not transported to the job site by his employer and he used his own chain saw. The type of control, direction and supervision by the employer that the Yearout court found important was not present here.

Taking all of these circumstances into consideration, we are unable to conclude that the evidence preponderates against the trial court's finding that Powell was a casual employee for workers' compensation purposes, at the time of his injury.

We note that Marter also contends that he is shielded from liability for workers' compensation benefits by Tennessee Code Annotated section 50-6-113(f)(1)(C), the

“ownership exemption.” See Bostic v. Dalton, 158 S.W.3d 347 (Tenn. 2005). This issue was raised before the trial court, but was not addressed in the trial court’s decision. Because we affirm the trial court’s finding that Powell was a casual employee, we find it unnecessary to address that issue.

Conclusion

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

E. RILEY ANDERSON, JUSTICE

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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 Victor Powell and his surety, for which execution may issue if necessary.

PER CURIAM