IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
August 6, 2018 Session

DARRY OSBORNE v. STARRUN, INC., ET AL.

Appeal from the Court of Workers' Compensation Claims
No. 2016-02-0562 Brian K. Addington, Judge

No. E2018-00282-SC-R3-WC – Mailed September 12, 2018

A truck driver, whose employer had no workers' compensation insurance coverage, was injured after falling from his employer's truck while tarping a load of goods at a manufacturer's facility. The truck driver filed a workers' compensation claim against the manufacturer, asserting that the manufacturer was the truck driver's statutory employer under Tennessee Code Annotated section 50-6-113 (2014 & Supp. 2017). The Court of Workers' Compensation Claims granted the manufacturer's motion for summary judgment, holding that the truck driver failed to establish that the manufacturer undertook work for an entity other than itself, retained the right of control over the conduct of the work, or that the truck driver's conduct in tarping the load was part of the manufacturer's regular business or the same type of work usually performed by its employees. After review, we affirm.

Tenn. Code Ann. § 50-6-225(a) (2014 & Supp. 2017) (applicable to injuries occurring on and after July 1, 2014) Appeal as of Right;
Judgement of the Court of Workers' Compensation Claims Affirmed

SHARON G. LEE, J., delivered the opinion of the Court, in which WILLIAM B. ACREE, SR.J., and DON R. ASH, SR.J., joined.

Dan Bieger, Bristol, Tennessee, for the appellant, Darry Osborne.

Eric Shen, Brentwood, Tennessee, for appellees, KPS Global and Liberty Mutual Insurance Company.

OPINION

I.

On October 21, 2016, Darry Osborne, a truck driver for Starrun, Inc., arrived at the manufacturing facility of KPS Global ("KPS")[1] in Piney Flats, Tennessee, to pick up a load of refrigerator panels for transport. After KPS employees had loaded the panels onto Starrun's flatbed truck, Osborne pulled away from the loading dock to tarp the load. As he was tarping the load, Osborne fell from the truck and was injured.

KPS had contracted with a broker, Meadow Lark Agency, Inc., which, in turn, had contracted with carrier Starrun to transport KPS's finished goods to its customers. Starrun had fewer than five employees and no workers' compensation insurance. *See* Tenn. Code Ann. § 50-6-102(13) (2016) (defining "employer" for purposes of the Workers' Compensation Act as entities "using the services of not less than five (5) persons for pay").

On November 30, 2016, Osborne filed a claim with the Tennessee Bureau of Workers' Compensation seeking workers' compensation benefits from KPS and asserting that KPS was his statutory employer under Tennessee Code Annotated section 50-6-113 (2014 & Supp. 2017).[2] KPS denied liability.

On May 31, 2017, the Court of Workers' Compensation Claims (the "trial court") held an expedited hearing on Osborne's claim against KPS. At the hearing, Osborne said that he was not an employee of KPS and that "all [he] was doing was hauler through Starrun to drive the truck to haul for KPS." He testified that Starrun supplied him with the truck and the tarp he used on the day of his injury. After arriving at KPS's facility, Osborne backed the truck into the loading dock and a KPS forklift operator loaded the refrigerator panels onto the truck. He then asked the forklift operator to lift the tarp on top of the load. Osborne testified that KPS had a tarping machine, but that it was not being used at that time. According to Osborne, a KPS employee asked him to pull the truck outside the loading bay (but still within KPS property) to finish tarping. Osborne admitted that it was his duty to put the tarp over the load. After moving the truck, Osborne climbed on top of the load and as he began to pull the tarp, "my feet come out from under me, and I went over the front down to the catwalk." He estimated he fell about ten feet.

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[1] The parties also refer to KPS as Kysor Panel Systems, LLC.

[2] Osborne also filed claims for workers' compensation benefits against his employer, Starrun, Inc., and Meadow Lark Agency. Those claims are not at issue in this appeal.

Several other witnesses testified. Dwayne Fillers, a truck driver who was present at KPS's facility at the time of the accident, testified that Osborne showed him how to use the tarping machine at KPS's loading dock and that he had "to finish bungee cording [the tarp over his load]" after using the tarping machine.

Kevin Bennett, a Quality Technician for KPS,[3] testified that KPS manufactures walk-in coolers and freezers and relies on transportation brokers, including Meadow Lark Agency, to get its products to customers. Bennett explained that KPS would send brokers a schedule with a pickup date and a delivery date; the brokers would procure carriers to transport the load. He stated that KPS was responsible for loading its products onto trucks and conducting a final inspection before tarping; the drivers were responsible for tarping the load. On the day of the accident, Bennett said that the tarping machine was not in use because drivers had been complaining about the machine tearing the tarps, but that it was possible that Fillers used it. Bennett stated that KPS had no direct contact with Starrun about the load Osborne was to transport, and that Meadow Lark Agency alone selected Starrun as the carrier for the load. He added that KPS did not hire or pay Starrun, did not supply trucks or equipment to Starrun, did not train or select any of Starrun's drivers (including Osborne), and did not choose the routes used by Starrun drivers.

Mollie O'Dell, environmental health and safety representative for KPS, was at the Piney Flats facility on the day of Osborne's injury. She testified that although KPS was not a shipping company, it had a shipping department in charge of loading and unloading trucks. O'Dell also said that KPS's involvement with the loading process ended once the forklift operators loaded the trucks.

The trial court denied Osborne's claim, holding that he had failed to establish that KPS was his statutory employer under Tennessee Code Annotated section 50-6-113 and that, therefore, he was not likely to prevail at a hearing on the merits. The trial court found that Tennessee Code Annotated section 50-6-113(d) applied because KPS controlled and managed the premises where Osborne's accident occurred, but that the evidence did not establish that KPS was a statutory employer based on the factors set forth by the Tennessee Supreme Court in *Lindsey v. Trinity Communications, Inc.*, 275 S.W.3d 411 (Tenn. 2009).

Osborne appealed to the Workers' Compensation Appeals Board, arguing that the work he performed was part of the regular business of KPS. Osborne asserted that the evidence established that loading the product and securing the load is the type of work usually performed or assisted by KPS's employees. The Board found, based on undisputed testimony, that tarping the load was a separate process from the loading of the

[3] Mr. Bennett was shipping supervisor for KPS at the time of Osborne's accident.

product and that there was "insufficient evidence to find that the actual tarping process was part of the regular business of KPS or the type of work usually performed by KPS's employees." Concluding that the evidence did not preponderate against the trial court's determination that KPS was not Osborne's statutory employer, the Board affirmed and remanded the case to the trial court.

On remand, KPS moved for summary judgment, asserting that the undisputed facts as found by the trial court on expedited hearing and affirmed by the Board on appeal showed that Osborne's evidence did not establish, as a matter of law, that KPS was Osborne's statutory employer. Osborne responded that he had established that the tarping process was a part of KPS's regular business because it was undisputed that KPS "owned two tarping machines and decided when to use or not to use them." Neither party introduced additional evidence on remand.

On February 13, 2018, the trial court granted KPS's motion for summary judgment and dismissed Osborne's claim. Applying the *Lindsey* factors to the facts, the trial court found that KPS did not work for an entity other than itself, control Starrun's or Osborne's conduct (including the tarping of the load), or secure tarps to trucks. It found that "the drivers, not KPS employees, [were] responsible for securing the tarps to the trucks." Concluding that there was no genuine issue of material fact about whether KPS was Osborne's statutory employer, the trial court held that KPS was entitled to judgment as a matter of law.

Osborne appealed to the Tennessee Supreme Court. His appeal was referred to this 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, Section 1.

II.

We review a trial court's ruling on a motion for summary judgment de novo with no presumption of correctness. *Martin v. Powers*, 505 S.W.3d 512, 517 (Tenn. 2016). This review requires "a fresh determination of whether the requirements of Rule 56 of the Tennessee Rules of Civil Procedure have been satisfied." *Rye v. Women's Care Ctr. of Memphis, MPLLC*, 477 S.W.3d 235, 250 (Tenn. 2015), *cert. denied*, 136 S. Ct. 2452 (2016). Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04.

A party who moves for summary judgment, but who does not bear the burden of proof at trial, may satisfy its burden of production under Rule 56 by "affirmatively negating an essential element of the nonmoving party's claim" or by showing "that the nonmoving party's evidence *at the summary judgment stage* is insufficient to establish the nonmoving party's claim or defense." *Rye*, 477 S.W.3d at 264. A party who pursues summary judgment by attacking the nonmoving party's evidence must do more than make a conclusory assertion that summary judgment is appropriate on this basis. *Id.* Rule 56.03 requires the moving party to support its motion with "material facts as to which the moving party contends there is no genuine issue for trial." Tenn. R. Civ. P. 56.03. In responding, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Rye*, 477 S.W.3d at 265 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)). The nonmoving party must establish the existence of facts in the record that could lead a rational trier of fact to find in its favor. *Id.*

Osborne challenges the trial court's conclusion that, under Rule 56, the evidence he presented did not establish that KPS was his statutory employer under Tennessee Code Annotated section 50-6-113. KPS responds that the trial court properly granted summary judgment because the evidence did not satisfy the *Lindsey* criteria for KPS to be deemed Osborne's statutory employer.

We begin our analysis with section 50-6-113, which allows a worker, whose employer does not have workers' compensation insurance, to receive workers' compensation benefits by extending liability to an intermediate or principal contractor that does have workers' compensation insurance coverage. This section prevents employers avoiding workers' compensation liability simply by contracting out work. *Lindsey*, 275 S.W.3d at 420 (citing *Stratton v. United Inter-Mountain Tel. Co.*, 695 S.W.2d 947, 951 (Tenn. 1985)).

Section 50-6-113 provides that

> (a) A principal contractor, intermediate contractor or subcontractor shall be liable for compensation to any employee injured while in the employ of any of the subcontractors of the principal contractor, intermediate contractor or subcontractor and engaged upon the subject matter of the contract to the same extent as the immediate employer.
>
> (b) Any principal contractor, intermediate contractor or subcontractor who pays compensation under subsection (a) may recover the amount paid from any person who, independently of this section,

would have been liable to pay compensation to the injured employee, or from any intermediate contractor.

(c) Every claim for compensation under this section shall be in the first instance presented to and instituted against the immediate employer, but the proceedings shall not constitute a waiver of the employee's rights to recover compensation under this chapter from the principal contractor or intermediate contractor; provided, that the collection of full compensation from one (1) employer shall bar recovery by the employee against any others, nor shall the employee collect from all a total compensation in excess of the amount for which any of the contractors is liable.

(d) This section applies only in cases where the injury occurred on, in, or about the premises on which the principal contractor has undertaken to execute work or that are otherwise under the principal contractor's control or management.

. . . .

A court may consider a company to be a principal contractor under section 50-6-113(a) if: (1) the company undertakes work for an entity other than itself; (2) the company retains the right of control over the conduct of the work and the subcontractor's employees; or (3) the work performed by a subcontractor's employees is part of the company's regular business or the same type of work usually performed by the company's employees. *Lindsey*, 275 S.W.3d at 421. The trial court held that the evidence was insufficient at the summary judgment stage to show that KPS worked for an entity other than itself; that it controlled the conduct of Osborne or other Starrun drivers; or that Osborne performed the same type of work usually performed by KPS employees, that is, building refrigerator panels and preparing them for placement on trucks.

As to the first prong of *Lindsey*, we conclude, as did the trial court, that Osborne presented no evidence that KPS undertook work for an entity other than itself. KPS submitted the affidavit of Kevin Bennett, stating that KPS manufactured refrigerator panels that it then sold to its customers, mainly grocery stores and wholesale clubs, and that KPS was not in the business of transporting items by trucks. Osborne did not dispute these facts. Nothing in the record suggests that KPS worked for any other entity. We are unpersuaded by Osborne's contention that KPS's loading of its products on carriers' trucks amounts to undertaking work for another entity.

As to the second prong – the right of control – we conclude that the evidence does not show that KPS retained the right to control Osborne's conduct or that of other employees of Starrun. A company may be deemed a principal contractor if it retains the

right to control (1) the subcontractor's employees, (2) the manner in which the job is performed, and (3) the materials to be used. *Dotson v. Bowater, Inc.*, No. 1:08-CV-191, 2009 WL 3584325, at *5 (E.D. Tenn. Oct. 26, 2009) (citing *Lindsey*, 275 S.W.3d at 421). Here, the evidence fails to establish that KPS retained control in all three aspects.

First, the record shows that KPS did not have control over Starrun's employees. The relevant inquiry here is not whether KPS controlled *how* the work was done, but *by whom* the work was done. *Dotson*, 2009 WL 3584325, at *7. KPS did not hire or pay Starrun for the job; Meadow Lark Agency did. Starrun in turn assigned the job to Osborne, its employee. Also, KPS did not train Osborne or any of Starrun's drivers, set their schedule, or have the authority to fire them.

Second, KPS did not control the manner in which Osborne performed the job. It "provided no instruction" to Osborne on how to tarp the load. *See Lindsey*, 275 S.W.3d at 421. KPS conducted a final inspection immediately after loading the refrigerator panels onto the truck and before the tarping of the load. Nor did KPS choose the route to be used by Osborne in delivering the panels to its customer. Osborne points to a KPS employee telling him to move his truck away from the loading dock before he had completed tarping the load. This fact alone is not evidence of control. The KPS employee could have asked the same of any customer picking up KPS products. KPS exercised control over its premises, not over Osborne's conduct. As the trial court aptly found, those instructions were merely "limited to the orderly movement of the trucks in and out of its loading bays."

Last, KPS did not control the materials used in the job. "A company controls the materials to be used when it provides those materials." *Dotson*, 2009 WL 3584325, at *7. The record shows that KPS did not supply Starrun with the truck, tarp, bungee cords, or any other equipment necessary for the transport of its refrigerator panels to customers.

Although KPS was in control of the loading process, as argued by Osborne, he was not involved in that process. A KPS employee was solely responsible for loading the refrigerator panels on Osborne's truck. KPS's sole interaction with Osborne consisted of giving him the "green light" to back up his truck into the loading dock, loading the refrigerators panels by forklift onto the truck, and asking him to move the truck out so that other trucks could access the loading dock. Based on these undisputed facts, we hold that KPS retained no right of control over Osborne's work conduct.

Osborne's reliance on the 1985 cases[4] of *Stratton v. United Inter-Mountain Telephone Company*, 695 S.W.2d 947 (Tenn. 1985) and *Carver v. Sparta Electric*

[4] These two cases pre-date the *Lindsey* opinion.

System, 690 S.W.2d 218 (Tenn. 1985) is misplaced. He cites these two cases – without providing any argument – for the proposition that manufacturers at the end of the supply chain, like KPS, can be statutory employers. In *Stratton*, an employee of a construction company hired by a telephone company to work on its utility poles was injured while working on one of the utility poles. 695 S.W.2d at 948. The employee sued the telephone company in tort, asserting that the construction company for which he worked was an independent contractor. *Id.* Finding that the telephone company had "control over the materials to be used, the employees to be used on the job and the general manner in which the job was to be performed," the court concluded that the telephone company was the employee's statutory employer. *Id.* at 953. Notably, the affidavit of a manager of the telephone company stated that all of the work assigned to the construction company was work usually done by the telephone company and that the work being performed by the employee when he was injured was work usually performed by employees of the telephone company. *Id.* at 949. The facts here are different. KPS did not contract directly with Starrun; it contracted with Meadow Lark Agency. KPS did not control the "materials" used by Starrun, other than requiring that a flatbed truck be used for transport of its refrigerator panels. KPS did not select which Starrun employees would perform the transport; it did not even select Starrun as a carrier. Unlike the facts in *Stratton*, the evidence here indicates that the work performed by Osborne (tarping the load) was not part of the regular duties of KPS employees.

In *Carver*, a tree service company contracted with a utility company to trim branches and limbs around power lines. 690 S.W.2d at 219. An employee of the tree service company was severely burned while working on a power line, and the trial court ordered the utility company to pay for workers' compensation benefits. *Id.* The Court, finding "abundant evidence that the right to control existed," affirmed the trial court's ruling. *Id.* at 220. The Court noted that the utility company assigned tasks each morning to the tree service company; that it could order the tree service company to stop work and go to a different location; that the tree service company was not free to accept other employment if it interfered with its work for the utility company; and that the utility company could force the tree service company to fire the employee. *Id.* Such a degree of "pervasive" control is not present here. KPS had no direct contract with Starrun and had no control over the choice of carrier or truck driver for any particular load. KPS had no authority to fire Osborne or to set his schedule.

Osborne emphasizes in this appeal the third prong of *Lindsey*. He contends that he was performing the same type of work usually performed by KPS employees. We disagree. Osborne was employed by Starrun, a trucking company; KPS was in the business of manufacturing refrigerator panels. Osborne did not participate in the manufacturing process. KPS used forklift operators to load its refrigerator panels onto

carriers' trucks for transport. Osborne's involvement with loading the panels onto his truck was limited to backing the truck to the loading dock. As he put it, "all I was doing was hauler through Starrun to drive the truck to haul for KPS." In short, nothing in the record shows that Osborne's work on the day of his injury was the type of work usually performed by KPS's employees.

Osborne next asserts that KPS's loading process included tarping the load. He argues that the trial court erred by construing KPS's regular business – building panels and placing them on trucks – too narrowly. We are unconvinced. There is no evidence that KPS was in the business of tarping loads or that its employees tarped any of the loads. To the contrary, the undisputed testimony of several witnesses, including Osborne, was that KPS employees did not tarp the panels after loading them on trucks for transport. Although a KPS forklift operator – at Osborne's request – placed a tarp on top of the refrigerator panels, Starrun had provided the tarp and Osborne brought it to KPS's facility on the day of his injury. Osborne later explained, "No, [the forklift operator] didn't put it *over* the load, now, sir. He put it *on top* of the load, and I rolled it out and put it over the load myself." O'Dell explained that KPS's involvement in the loading process ended with loading the panels onto the trucks. According to Bennett, KPS did its final inspection of the loads before tarping and that drivers, not KPS employees, were responsible for tarping the loads. Osborne agreed that it was his duty to put the tarp over the load. Bennett's testimony is also consistent with that of driver Fillers, who testified that he operated a KPS tarping machine after Osborne showed him how to use it and that he had to finish tarping his load outside. Even though KPS owned tarping machines, the undisputed testimony was that drivers, not KPS employees, used the tarping machine. Based on the witnesses' testimony, we cannot conclude that the fact that KPS owned tarping machines and that one of its forklift operators, upon request, placed a tarp on a load is sufficient evidence that tarping was part of KPS's *regular* business, a task *usually* performed by its employees, or that KPS had control over the tarping process.

Osborne relies on *Fayette Janitorial Services v. Kellogg USA, Inc.*, No. W2011-01759-COA-R3-CV, 2013 WL 428647, at *1 (Tenn. Ct. App. Feb. 4, 2013) to support his argument. In *Fayette*, a cereal manufacturer asserted that it was immune from a tort lawsuit brought by a janitor because it was the janitor's statutory employer under section 50-6-133. 2013 WL 428647, at *1. The issue on appeal was whether the work being performed by the janitor's employer was part of the manufacturer's regular business or the same type of work usually performed by the manufacturer's employees. *Id.* at *5. The work at issue involved a 28-day cleaning cycle of all production equipment during shutdown of the manufacturing plant, which had remained the same for over twenty years. *Id.* at *9. Notably, the manufacturer's own employees performed the cleaning for many years before the manufacturer hired the janitor's employer to do the

work. *Id.* at *10. Finding that the work performed during the cleaning cycle was done on a regular and continual basis and was of vital importance to the manufacturer's ongoing business operation, the Court of Appeals concluded that the manufacturer was the janitor's statutory employer. *Id.* at *11. Unlike *Fayette*, the record here contains no evidence that KPS employees tarped refrigerator panels at any time or that tarping was of vital importance for KPS's manufacturing business.

Osborne's reliance on *Patterson v. Bristol Timber Company*, 649 S.E.2d 795 (Ga. Ct. App. 2007), is likewise misplaced. In *Patterson*, a truck driver brought a tort lawsuit against a logging company after suffering injuries while picking up a load of wood chips. *Id.* at 797. As in *Fayette*, the issue before the court was whether the logging company was the driver's statutory employer. *Id.* at 801. The driver argued that the transport of finished goods was not part of the business of the logging company. *Id.* Finding that the logging company's supply contract with its customer "included the delivery of . . . wood chips," the appellate court held that the company was a principal contractor and statutory employer of the driver.[5] *Id.* at 802. This case differs from *Patterson* because the uncontested evidence shows that KPS's customers had the option to arrange for transport of the refrigerator panels. The record contains no copy of the agreement between KPS and its customer to show otherwise. In addition, in *Patterson*, the logging company contracted directly with the driver's immediate employer, while KPS arranged transport of its product through broker Meadow Lark Agency.

Osborne urges the Court to hold that the Workers' Compensation Act's goal of shifting the burden of work-related injuries from workers, their families, and society to employers entitles him to receive workers' compensation benefits from KPS. But Osborne's request requires more than an equitable construction of the statute, *see Martin v. Lear Corp.*, 90 S.W.3d 626, 629 (Tenn. 2002); it requires us to rewrite it. We decline to do so.

Having determined that the evidence presented by Osborne was insufficient to establish his claim that KPS was his statutory employer, we hold that KPS is entitled to judgment as a matter of law and that it is not liable to Osborne for workers' compensation benefits.

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[5] The applicable Georgia statute provides, in part: "A principal, intermediate, or subcontractor shall be liable for compensation to any employee injured while in the employ of any of his subcontractors engaged upon the subject matter of the contract to the same extent as the immediate employer." Ga. Code Ann. § 34-9-8.

III.

We affirm the decision of the Court of Workers' Compensation Claims granting summary judgment to KPS Global and remand this case to the Court of Workers' Compensation Claims for any further proceedings. We tax the costs of this appeal to Darry Osborne and his surety, for which execution may issue if necessary.

SHARON G. LEE, JUSTICE

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE

DARRY OSBORNE v. STARRUN, INC. ET AL.

Court of Workers' Compensation Claims County
No. 2016-02-0562

No. E2018-00282-SC-R3-WC

JUDGMENT ORDER

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 are assessed to Darry Osborne and his surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM