VIRGINIA: IN THE WORKERS' COMPENSATION COMMISSION

THE ESTATE OF JUVENTINO LOPEZ GARCIA, Claimant
v.
ELECTRIFIERS, INC., Employer
FEDERATED MUTUAL INSURANCE CO., Insurer

VWC File No. 213-75-80
Decided: August 2, 2006

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Opinion by DIAMOND, Commissioner

REVIEW on the record by Commissioner Tarr, Commissioner Diamond, and Commissioner Dudley at Richmond, Virginia.

This case is before the Commission on the employer's request for Review of the Deputy Commissioner's December 20, 2005, Opinion. The employer takes exception to the findings that the employee's accident arose out of and in the course of his employment; that the claim is not barred by willful misconduct; and that the employee's widow is entitled to death benefits. We AFFIRM.

The employee's estate filed a Claim for Benefits on August 4, 2003, seeking death benefits as a result of the employee's fatal accident on March 25, 2003. The Certificate of Death (Claimant's Exhibit 1) reflects that Cruz was a pedestrian struck by an automobile while crossing a highway, sustaining blunt force head injury. The Police Accident Report and Accident Reconstruction (Defendant's Exhibits 1 & 2) reflect that a vehicle traveling west on Route 267 in the left lane at approximately 55 miles per hour, struck Lopez who had begun crossing the four lanes from the right shoulder. Lopez was struck in the far left-hand portion of the left lane. The weather was reportedly clear and the roadway was dry with no visible defects.

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On August 17, 2004, the employer filed a notice of intent to rely on the defense of willful misconduct pursuant to Virginia Code § 65.2-306. The employer based its defense on the decedent's traveling on foot "across approximately three or four lanes of Route 267" in "violation of Virginia Code § 46.2-100 et. seq. and 46.2-923 et. seq. generally and specifically Virginia Code §§ 46.2-923, 926 and 935" as well as Fairfax County Ordinance §§ 82-9-1 and 82-9-7. The employer attached the primary section relied upon, Ordinance § 82-9-1, which provides in relevant part that "pedestrians shall not carelessly or maliciously interfere with the orderly passage of vehicles. They shall cross whenever possible only at intersection or marked crosswalks. . . ." The employer additionally defended on the grounds of no injury by accident arising out of and in the course of the employment, and that there are no statutory beneficiaries.

At the hearing, Chandergupt Bajwa, owner of Electrifiers, Inc., testified that his company has designated foremen and operators who are obeyed by laborers. The decedent was a laborer, and Milton Flores was an operator. Bajwa testified that he asked the foremen to bring the workers to certain locations, and that the employees arrived in groups. However, Bajwa also stated that Flores provided transportation to the decedent by their own arrangement.

On the morning of March 25, 2003, Flores went to the wrong work location and called Bajwa, who directed him to the correct location. Bajwa testified that after Flores arrived at the correct work location, he parked on the opposite side of the road from the jobsite. Bajwa testified that on other days they were working on the side of the road where Flores parked, but not on March 25, 2003. Bajwa stated that Flores crossed the street in a direct route from where he parked to where the work was being done. Bajwa testified that Flores parked on the right shoulder, and the job was on the left shoulder, of a four-lane highway, the Dulles Toll Road. The other workers parked on the left shoulder. Bajwa testified that Flores could have parked on the left shoulder.

Bajwa testified that on the Employer's Accident Report (Claimant's Exhibit 3), he indicated the decedent had two dependents. Bajwa testified that the decedent claimed his mother and his wife on his W2 form.

At his deposition, made a part of the record, Bajwa testified that Flores had been employed as an operator for Electrifiers since 2002. He stated that Flores drove himself to job sites, but he brought "almost all the laborers who live in his neighborhood, give them a ride and take them back home." Bajwa testified that he was introduced to the decedent by Flores. Lopez did not drive and did not have a driver's license. Bajwa understood that Lopez could not read or write in English. Flores brought Lopez to job sites.

Bajwa testified that on March 25, 2003, there was construction work on both sides of the Dulles Access Road. Bajwa's company was working on the "slip ramp job" at the Access Road. The night before, he had told Flores to come to the slip ramp job. Bajwa did not tell Lopez because he would not understand. He testified that it was his practice to tell Flores where to report. He relied on Flores to bring the workers to the site.

However, on the morning of March 25thFlores went to the Spring Hill Toll Plaza, where they had worked the day before, instead of the slip ramp job. Bajwa spoke to Flores on the radio and told him to come to the slip ramp job. Flores subsequently arrived at the jobsite but parked on the side of the road where they had previously been doing some work behind the sound wall. Bajwa testified that on March 25, 2003, they were not working on that side of the road; they were instead working on the Access Road. After the accident Flores told Bajwa that he was not sure which side of the road they were working on that day.

At the time of the accident, Bajwa was about 600 feet away from the westbound lane of the Dulles Toll Road where Lopez was struck. He did not see the collision. Bajwa testified that instead of walking across the highway, Flores could have driven to the other side of the road by going westbound for a mile or so, turning around and going eastbound for a mile or so, and then turning around again and going westbound to access the job site.

On Review, we first address whether the Deputy Commissioner erred in finding that the employee's accident arose out of and in the course of his employment. The employer argues there was no “accident” because being struck by a vehicle on a busy highway is not unusual. The employer also argues that the case is controlled by the going and coming rule, which holds that an employee going to and from his place of employment is not engaged in any service growing out of and incidental to the employment, therefore the injury does not arise out of and in the course of the employment. *Barnes v. Stokes*, 233 Va. 249, 251, 355 S.E.2d 330, 331 (1987).

One of the exceptions to the rule is where the means of transportation is provided by the employer. *Bristow v. Cross*, 210 Va. 718, 173 S.E.2d 815 (1970). “It is not necessary that the employee be compensated for the time spent traveling to the worksite. Neither is it necessary that he be required by the employer to use the proffered transportation. Rather, the question is whether the practice was customary and conferred a benefit to both the employer and the employee.” *Asplundh Tree Expert Co. v. Pac. Employers Ins. Co.*, 269 Va. 399, 611 S.E.2d 531, (2005).

In *Bristow*, the employee was injured in a collision that occurred while he was being transported to the employer's office by the employer's supervisor who was driving a company truck. The evidence showed that the employee did not have an operable car at the time, and he was not paid for the travel time nor was he required to accept the transportation. The Court held that the transportation arrangement “was not a gratuitous gesture made by the employer at the request of Bristow or other employees. It was by prearrangement and grew out of the employment of men to work for Century Concrete. Plaintiff's riding in the vehicle was but another incident to his employment and was one of mutual benefit.” 210 Va. at 722, 173 S.E.2d at 818.

In the case at bar, Bajwa testified it was his company's practice for the supervisor to transport laborers to the job sites. Bajwa relied on this transportation arrangement to secure the presence of workers on jobs. Lopez did not drive and did not have a driver's license so he could not have transported himself to work. Bajwa could not even tell Lopez where to go because he would not have understood. Bajwa therefore told the supervisor, Flores, where to report for work. Lopez was in turn dependent on Flores to

transport him to the work sites. Lopez's riding in the supervisor's vehicle was incident to his employment and clearly was one of mutual benefit.

The evidence shows that Flores was confused on the morning of March 25, 2003, as to where to go. He transported Lopez first to the wrong jobsite and then to the wrong side of the road in the vicinity of the right jobsite. Although it was a public street, Lopez was required to cross the highway, as did his supervisor, Flores, by the fact that Flores parked on the eastbound side across from where the work was being performed. We find that these facts bring this case within the employer-provided transportation exception to the going and coming rule.

We next address the employer's argument that there was no "accident" because the result was not unusual as it occurred on a busy public street not a part of the employer's premises. Essentially, the employer is arguing that the fatality was the expected result of non-employment activity, similar to an argument we rejected in *Matinata v. Matt, Inc.*, 03 WC UNP 2058013, VWC File No. 205-80-13 (2003). As we noted in the discussion above, the decedent was crossing a highway to reach a jobsite from the place where his supervisor parked. The intent of Lopez and Flores was to reach the correct jobsite after having gone to the wrong place in the morning. There is no evidence that the decedent expected to be struck by an automobile enroute to the jobsite under the direction of his supervisor who also crossed the street. We conclude the decedent suffered an injury by accident as contemplated by Virginia Code § 65.2-101, specifically an identifiable incident or sudden precipitating event that occurred as a result of a condition of the claimant's work.

We next address whether the claim is barred by willful misconduct. It appears that the Deputy Commissioner did not address the decedent's alleged violation of the Code and the County Ordinance, and instead erroneously analyzed the defense under the more typical frame work of safety rules. *See Spruill v. C.W. Wright Constr. Co.*, 8 Va. App. 330, 334, 381 S.E.2d 359, 360-61 (1989). On Review, the employer does not put forth any argument on safety rules, asserting only that the decedent's actions violated the Virginia Code and the County Ordinances pled in its notice of reliance on the defense of willful misconduct. We will therefore consider whether there was a violation of the cited Code Sections and Ordinances.

Code § 65.2-306(A)(4) prohibits an award "for an injury or death caused by. . .[an] employee's willful failure or refusal to. . . perform a duty required by statute." Proof of negligence alone, even gross negligence, will not support the defense of willful misconduct, which "imports something more than a mere exercise of the will in doing the act. It imports a wrongful intention." *Uninsured Employer's Fund v. Keppel*, 1 Va. App. 162, 164, 335 S.E.2d 851, 852 (1985). "Willful" misconduct involves premeditation and determination to do a forbidden act. *Brockway v. Easter*, 20 Va. App. 268, 271, 456 S.E.2d 159, 161 (1995).

The primary sections relied upon by the employer are Virginia Code § 46.2-923 and Fairfax County Ordinance § 82-9-1, which both provide in relevant part that "pedestrians shall not carelessly or maliciously interfere with the orderly passage of vehicles. They shall cross whenever possible only at intersection or marked crosswalks. . . ." The employer also cited Code § 46.2-926, which prohibits

pedestrians from stepping into a highway open to traffic between intersections where their presence would be obscured from the vision of drivers. The employer argues that the decedent violated these laws and ordinances by "running across a highway."

Lopez crossed the four-lane highway after his supervisor parked on the opposite side of the road from the job site. His supervisor also crossed the highway. The evidence showed that Flores was confused about where they were working that day, and had already transported Lopez to the wrong site. Then, he parked on the side of the road where they had previously worked and they attempted to reach the jobsite by the most direct route across the street. Lopez did not drive and had no control over where Flores parked. It was the supervisor's action in parking on the opposite side of the road that gave rise to Lopez's presence on the highway when he was struck. We can find no willful violation of the cited statutes and ordinances under these circumstances. Lopez had no control over his route to the jobsite and did not determine with premeditation to disregard a statutory duty. Accordingly, the defense of willful misconduct must fail.

Finally, we address whether the Deputy Commissioner erred in finding the decedent's widow a beneficiary under the Act. The evidence on this issue consists of the testimony of Cruz Bonilla Lainez, the personal representative of the estate. Lainez testified that Juventino Lopez sent money to his wife, Maria Esarel Andelso, while he worked for Electrifiers. He testified that "they," meaning the wife and Lopez's mother, Maria Adelida Garcia, are now receiving no financial help, so Lainez helps whenever he can. Lainez testified that the wife and mother live in Santa Marta in El Salvador. Lainez stated that he paid the funeral bill in this case.

Code § 65.2-515(A)(1) provides that a wife shall be presumed to be totally dependent upon a husband as long as she had not voluntarily deserted or abandoned him, and was actually dependent upon him. The widow must show that she relied on her husband's contributions at least in part for support and maintenance. *Caudle-Hyatt, Inc. v. Mixon*, 220 Va. 495, 260 S.E.2d 193 (1979). The fact that her husband went to work in the United States is not evidence of abandonment. Moreover, the evidence is uncontradicted that the decedent worked regularly and earned money and sent money to his wife. The evidence also showed that since her husband's death, she has been receiving no financial help. We agree with the Deputy Commissioner that the evidence sufficiently establishes dependency and that Maria Esarel Andelso qualifies as a beneficiary under the Act.

The Opinion is AFFIRMED.

This matter is hereby removed from the Review docket.

APPEAL

This Opinion shall be final unless appealed to the Virginia Court of Appeals within 30 days of receipt.

cc:

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