FILED
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Clerk of the Appellate Courts
Rec'd By

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
September 30, 2019 Session

ESTATE OF CLARENCE TURNAGE, ET AL. v. DOLE REFRIGERATING CO., INC.

Appeal from the Court of Workers' Compensation Claims
No. 2017-05-0963 Dale A. Tipps, Judge

No. M2019-00422-SC-R3-WC – Mailed January 3, 2020

On August 3, 2017, Clarence Turnage ("Employee") died as a result of injuries arising out of and in the course of his employment with Dole Refrigerating Co., Inc. ("Employer"). Employee was unmarried at the time of his death, but resided with and had a child out-of-wedlock with Megan Black. It was undisputed that this child, EJT, is entitled to workers' compensation death benefits as a conclusively presumed wholly dependent child under Tennessee Code Annotated section 50-6-210(a)(2). Employee had two additional children out-of-wedlock, NRT and SMT, with another woman. However, prior to his death, Employee had surrendered his parental rights to NRT and SMT, and his mother had adopted these children. NRT and SMT sought workers' compensation death benefits as either conclusively presumed wholly dependent children of Employee under Tennessee Code Annotated section 50-6-210(a)(2), or, alternatively, as partial dependents of Employee under Tennessee Code Annotated section 50-6-210(d). The Court of Workers' Compensation Claims determined that NRT and SMT are not entitled to benefits as conclusively presumed wholly dependent children or as partial dependents. The court awarded EJT benefits equal to fifty percent (50%) of Employee's average weekly wage. The court denied the motions of the guardians ad litem for EJT and for NRT and SMT for attorney's fees and deferred any fee determination until after an appeal. NRT and SMT appealed the decision of the Court of Workers' Compensation Claims. 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. We award attorney's fees on appeal to the guardian ad litem for EJT and remand the case to the Court of Workers' Compensation Claims for a determination of the amount of such fees, together with a determination of what, if any, fees are to be awarded to the guardians ad litem for the prior proceedings in that court.

Tenn. Code Ann. § 50-6-225(a) (2014) Appeal as of Right; Judgment of the Court of Workers' Compensation Claims Affirmed

JEFFREY S. BIVINS, C.J., delivered the opinion of the court, in which DON ASH and ROBERT E. LEE DAVIES, Sr. JJ., joined.

R. Steven Waldron, Murfreesboro, Tennessee, for the appellants, Sarah M. T. and Noah R. T.

Richard T. Mathews and R. Holland Mathews, Columbia, Tennessee, for the appellee, Elijah J. T.

Nicholas S. Akins and Connor R. Sestak, Nashville, Tennessee, for the appellee, Dole Refrigerating Co., Inc.

OPINION

Factual and Procedural Background

The parties stipulated to the following facts: On August 3, 2017, Employee died from injuries arising out of and in the course of his employment with Employer. At the time of his death, Employee was unmarried but lived with and had a child out-of-wedlock, EJT, with Megan Black. Employee had two other children born out-of-wedlock, NRT and SMT, with another woman. Prior to his death, however, Employee had surrendered his parental rights to NRT and SMT and his mother had adopted them. EJT is entitled to workers' compensation death benefits as a conclusively presumed wholly dependent child of Employee under Tennessee Code Annotated section 50-6-210(a)(2).

NRT and SMT sought workers' compensation death benefits as either conclusively presumed wholly dependent children of Employee under Tennessee Code Annotated section 50-6-210(a)(2), or, alternatively, as partial dependents of Employee under Tennessee Code Annotated section 50-6-210(d).

Testimony of Deborah Dean

Ms. Dean is Employee's mother. Employee died on August 3, 2017. He had two children with Michelle Jewitt: NRT, born November 11, 2003; and SMT, born July 23, 2007. Employee and Ms. Jewitt were not married. According to Ms. Dean, while residing in Florida with Ms. Jewitt, NRT, and SMT, Employee got into trouble. He left

the children at home alone, and Ms. Jewitt did not return home. The Florida Department of Children's Services took custody of NRT and SMT. Employee went to jail for approximately six months, and NRT and SMT were placed in separate foster homes. While Employee was in jail, Ms. Dean took custody of NRT and SMT, and they came to live with her in Tennessee. A number of years later, on December 14, 2012, Ms. Dean adopted NRT and SMT. According to Ms. Dean, after Employee was released from jail, he came to Tennessee and initially lived with her daughter. He then moved in with Ms. Black, and they subsequently had a child, EJT.

Ms. Dean described Employee's relationship with NRT and SMT following their adoption as a good and close one. They resided with her Monday through Friday, and at other times, except for some weekends, holidays, and other occasions when they would reside with Employee. If Employee did not have food, NRT and SMT would spend the weekend with Ms. Dean. In addition, they would spend summers with Employee, "[a]s long as he had the food and stuff to feed them." Ms. Dean was unable to say how many days in a year the children spent with Employee.

According to Ms. Dean, Employee worked at times during this period, but went from job to job and sometimes did not work at all. Ms. Dean testified that Employee only provided her with support for NRT and SMT at income tax time. She explained that, on a couple of occasions, he provided her a small amount of money from his tax refunds after he had claimed the two children as exemptions. She testified that she did not receive any significant amount of financial support from Employee for NRT and SMT. The last time she received money from Employee for the children was in 2016 in the amount of $900. He did not provide the children with healthcare insurance. Ms. Dean received Social Security Disability, $249 per month in Social Security benefits for each child, and an additional $834 per month from the State of Florida for the two children. According to Ms. Dean, Employee did provide support for NRT and SMT when they were with him. He bought them school supplies, clothes, shoes, and other items if they needed them, if he had money.

Ms. Dean testified that an issue arose between Employee and her in the spring of 2017. They had a disagreement or misunderstanding about his returning NRT and SMT early from a weekend visit because of a school project. Ms. Dean testified that Employee yelled at her and told her, in front of the children, that he would chop off her head or stab her to death. As a result of this verbal confrontation, Employee had no interaction with NRT and SMT from approximately Easter Sunday of 2017 (April 16, 2017) through the date of his death on August 3, 2017. Ms. Dean heard from Employee on occasion about taking the children on a weekend after this, but it was only something rude by text.

Testimony of Megan Black

Megan Black is the mother of EJT. She testified that Employee returned to Tennessee on September 29, 2012, and that they began living together on September 30, 2012. They had one child, EJT, and though they never married, they all lived together as a family. According to Ms. Black, Employee was employed intermittently and had what she described as "in between jobs." At other times, he was a stay-at-home dad. Ms. Black was employed until Employee began working for Employer six months prior to his death, at which time she became a stay-at-home mom. Ms. Black testified that she worked more than Employee did. According to Ms. Black, between 2013 and 2017, NRT and SMT spent approximately one third of the time with Employee and her. She testified that Employee bought the children lots of things and spoiled them. She also testified, however, that when the children stayed with Employee and her, they would feed them, but that, at times, money was tight and Ms. Dean would provide the food.

Analysis

The brief of Appellants NRT and SMT fails to contain a statement of issues in accordance with Tennessee Rule of Appellate Procedure 27(a)(4).[1] We restate those issues as follows:

1. Whether NRT and SMT qualify as conclusively presumed wholly dependent children under Tennessee Code Annotated section 50-6-210(a)(2).

2. Whether NRT and SMT qualify as partial dependents under Tennessee Code Annotated section 50-6-210(d).

3. Whether the guardians ad litem should be awarded their respective attorney's fees on appeal.

For the reasons set forth below, we agree with the Court of Workers' Compensation Claims that NRT and SMT do not qualify as either conclusively presumed wholly dependent children or as partially dependent children of Employee. As a result, they are not entitled to workers' compensation death benefits. We award attorney's fees to the guardian ad litem for EJT.

[1] It does set out issues in the table of contents under each section of the argument, as well as at the beginning of each argument in the discussion section.

Standard of Review

Appellate review is governed by Tennessee Code Annotated section 50-6-225(a)(1)-(2) (2018 Supp.), which provides that appellate courts "[r]eview . . . the workers' compensation court's findings of fact . . . de novo upon the record of the workers' compensation court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." As the Supreme Court has observed many times, reviewing courts must conduct an in-depth examination of the trial court's factual findings and conclusions. Wilhelm v. Krogers, 235 S.W.3d 122, 126 (Tenn. 2007). When the trial court has seen and heard the witnesses, considerable deference must be afforded the trial court's factual findings. Tryon v. Saturn Corp., 254 S.W.3d 321, 327 (Tenn. 2008). No similar deference need be afforded the trial court's findings based upon documentary evidence such as depositions. Glisson v. Mohon Int'l, Inc./Campbell Ray, 185 S.W.3d 348, 353 (Tenn. 2006). Similarly, reviewing courts afford no presumption of correctness to a trial court's conclusions of law. Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009). The workers' compensation statutes are to be construed "fairly, impartially, and in accordance with basic principles of statutory construction" and in a way that does not favor either the employee or the employer. Tenn. Code Ann. § 50-6-116 (2014).

Issue 1: Conclusive Presumption of Dependency Under Tennessee Code Annotated Section 50-6-210(a)(2)

NRT and SMT contend that the trial court erred in determining they do not qualify for the conclusive presumption that they were wholly dependent under Tennessee Code Annotated section 50-6-210(a)(2) and entitled to death benefits on that basis. In making this contention, it appears that NRT and SMT are attempting to analogize the proper treatment of children in their situation (decedent's parental rights surrendered and children adopted) to the treatment of a decedent's stepchildren or illegitimate children for purposes of this statutory presumption. However, this attempted analogy is not consistent with the statute. Moreover, contrary to the suggestion of the parties, this is not an issue of first impression. The Supreme Court of Tennessee has already addressed this issue and rejected the argument of NRT and SMT. See Wilder v. Aetna Casualty & Surety Co., 477 S.W.2d 1 (Tenn. 1972).

With regard to the statute at issue, Tennessee Code Annotated section 50-6-210(a)(2) provides:

> (a) PERSONS WHOLLY DEPENDENT. For the purposes of this chapter, the following persons shall be conclusively presumed to be wholly dependent:

...

(2) Children under sixteen (16) years of age.

As noted, NRT and SMT contend that, despite Employee's surrender of his parental rights and their adoption by Ms. Dean, they qualify for the conclusive presumption of dependency. They first contend that the language of this provision does not place any qualifier of actual dependency on the presumption afforded to children under sixteen years of age. While this is true, it ignores the basis of the trial court's decision that, as a consequence of the surrender and adoption, NRT and SMT were not Employee's children at the time of his death.

Perhaps recognizing this, NRT and SMT suggest that their circumstances are analogous to those of illegitimate children or stepchildren. For this proposition, they rely on Williams v. Travelers Ins. Co., 530 S.W.2d 283 (Tenn. 1975). NRT and SMT are correct that in Williams the deceased employee's illegitimate daughter and his stepdaughter were found to be entitled to benefits. Id. at 285. As the Court in Williams noted, the law was and is clear that, as long as there is evidence of paternity, an illegitimate child is the child of the deceased employee and is entitled to the conclusive presumption under what is now subsection 210(a)(2). Id. However, this provides no support for the position of NRT and SMT in this case. In the case of an illegitimate child whose paternity is established, there is no issue of parentage. In this case, Employee indisputably surrendered all parental rights, and the children were adopted prior to Employee's death. Williams also fails to support NRT's and SMT's position relying on an analogy to stepchildren. In Williams, the deceased employee's stepchild was not awarded benefits on the basis of the statutory conclusive presumption. Rather, she was awarded benefits under what is now subsection 210(c) based on evidence of actual total dependency. Id. at 285-86. Thus, NRT's and SMT's reliance on Williams is misplaced.[2] See also Sullivan Electric Co. v. McDonald, 541 S.W.2d 112, 115 (Tenn. 1976) (citing Williams, 530 S.W.2d at 285) ("In determining eligibility for workmen's compensation benefits with respect to dependent children we have repeatedly concluded that mere relationship is not the test, but 'support and actual dependency; [sic] are the determinative criteria.").

[2] NRT and SMT vaguely suggest in passing that they also are entitled to benefits on the basis of actual total dependency under subsection 210(c) ("ACTUAL DEPENDENTS. Wife, husband, child, mother, father, grandparent, sister, brother, mother-in-law, father-in-law, who were *wholly supported* by the deceased employee at the time of death and for a reasonable period of time immediately prior to the time of death, shall be considered actual dependents, and payment of compensation shall be made in the order named." (Emphasis added)). They point to no evidence establishing total dependency, however, and the evidence actually contradicts any such claim.

NRT and SMT fail to offer any real response to the Court of Workers' Compensation Claims' determination that as a consequence of the surrender and adoption, they were not Employee's children at the time of his death. EJT correctly responds that one must consider the effects of Tennessee's adoption statutes and that these support the Court of Workers' Compensation Claims' holding in this regard.

With regard to case law, however, EJT incorrectly asserts that this is an issue of first impression in Tennessee and, as a result, relies on case law from other states. In fact, this is not an issue of first impression in Tennessee. The Supreme Court has directly addressed this issue and has rejected NRT's and SMT's position.

In Wilder v. Aetna Casualty and Surety Co., 477 S.W.2d 1 (Tenn. 1972), the Supreme Court held that, whether tested under the Indiana adoption statute or the Tennessee adoption statute, an Indiana decree of adoption of an out-of-wedlock child by the child's paternal grandparents so terminated the legal relationship between the child and his natural father that the child was not within the class of children entitled to the conclusive presumption of total dependency afforded by what is now Tennessee Code Annotated section 50-6-210(a)(2). In Wilder, the Court explained the history and development of the law in Tennessee with respect to this issue and the resulting resolution of the issue:

> It was early held that T.C.A. s 50—1013(a)(1), providing that 'minor children under the age of sixteen (16) years' are conclusively presumed to be dependent, applied only to legitimate children. Portin v. Portin, 149 Tenn. 530, 261 S.W. 362 (1923); Sanders v. Fork Ridge Coal & Coke Co., 156 Tenn. 145, 299 S.W. 795 (1927). Under these cases, illegitimate children were entitled to death benefits only when they were proved to be actually dependent upon the deceased workman. In the Sanders case a contrary result in England was distinguished on the ground that by statute England 'for many purposes. . . . puts an illegitimate child in the same position as a legitimate child.' 156 Tenn. 145, 148, 299 S.W. 795, 796.
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> Then, in Shelley v. Central Woodwork, Inc., 207 Tenn. 411, 340 S.W.2d 896 (1960), it was held that the Bastardy Act of 1955 (T.C.A. s 36—222 et seq.), which made the father of an illegitimate child responsible for its necessary support and education, operated to bring an illegitimate child within the class of children conclusively presumed to be dependent by virtue of T.C.A. s 50—1013(a)(1). Thus the sole basis for including an illegitimate child within the conclusive presumption of dependency is the statutory duty imposed upon the father by the provisions of the Bastardy Act.

There can be little doubt that in this case the adoption of Michael Colby Wilder by his paternal grandparents removed from the deceased any legal duty for the support of his illegitimate son. The Indiana statute, under which the decree of adoption was handed down, provides:

'3—122. Effects of adoption.—The natural parents of such adopted person, if living, shall after such adoption be relieved of all legal duties and obligations due from them to such person and shall be divested of all rights with respect to such person: Provided, That when the adoptive parent of a child shall be married to a natural parent of the child the parental relationship of such natural parent will be in no way affected by such adoption. After such adoption such adopting father or mother or both shall occupy the same position toward such child that he, she or they would occupy if the natural father or mother or both, and shall be jointly and severally liable for the maintenance and education of such person.' Burns Ind. Stat. Ann., s 3—122 (1967), IC 1971, 31—3—1—9.

We must, of course, give effect to the Indiana decree, insofar as it establishes the status of Michael as an adopted child. Finley v. Brown, 122 Tenn. 316, 123 S.W. 359 (1909). Under that decree, it is clear that any duty toward the child on the part of the deceased workman was abolished. Our own statute, T.C.A. s 36—126, while not so explicit, appears to accomplish the same result. It provides that 'The signing of a final order of adoption establishes from that date the relationship of parent and child between the adoptive parents and the adopted child as if the adopted child had been born to the adoptive parents in lawful wedlock . . . An adopted child shall not inherit real or personal property from a natural parent or relative thereof When the relationship between them has been terminated by adoption. . . .' (Emphasis added). Whether tested under the Indiana statute or our own, we feel that it is clear that the decree of adoption so terminated the legal relationship between Michael and his natural father that the provisions of our Bastardy Act can no longer have the effect of bringing him within the class of children conclusively presumed to be dependent under T.C.A. s 50—1013(a)(1).

Id. at 2-4.[3] The decision of the Court in Wilder controls this issue in this case.

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[3] The current versions of the Tennessee statutes relied on in Wilder are materially unchanged.

The relevant portion of former Tennessee Code Annotated section 50-1013(a)(1) is now codified at Tennessee Code Annotated section 50-6-210(a)(2) and is materially unchanged.

Partial Dependency Under Tennessee Code Annotated Section 50-6-210(d)

Tennessee Code Annotated section 50-6-210(d) provides:

> (d) PARTIAL DEPENDENTS. Any member of a class named in subsection (c) who *regularly derived part of the member's support from the wages of the deceased employee at the time of death and for a reasonable period of time immediately prior to the time of death* shall be considered a partial dependent, and payment of compensation shall be made to the

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The relevant portion of former Tennessee Code Annotated section 36-126 is now codified at Tennessee Code Annotated section 36-1-121 and similarly provides in pertinent part:

> (a) The signing of a final order of adoption terminates any existing guardianship orders and establishes from that date the relationship of parent and child between the adoptive parent or parents and the adopted child as if the adopted child had been born to the adoptive parent or parents and the adopted child shall be deemed the lawful child of such parent or parents, the same as if the child had been born to the parent or parents, for all legal consequences and incidents of the biological relation of parents and children.
>
> ...
>
> (e) An adopted child shall not inherit real or personal property from a biological parent or relative thereof when the relationship between them has been terminated by final order of adoption, nor shall such biological parent or relative thereof inherit from the adopted child.

Tenn. Code Ann. § 36-1-121(a) and (e).

In addition, Tennessee Code Annotated section 36-1-113(l)(1) regarding the effects of a termination of parental rights now provides:

> (l)(1) An order terminating parental rights shall have the effect of severing forever all legal rights and obligations of the parent or guardian of the child against whom the order of termination is entered and of the child who is the subject of the petition to that parent or guardian. The parent or guardian shall have no further right to notice of proceedings for the adoption of that child by other persons and shall have no right to object to the child's adoption or thereafter to have any relationship, legal or otherwise, with the child. It shall terminate the responsibilities of that parent or guardian under this section for future child support or other future financial responsibilities even if the child is not ultimately adopted; provided, that the entry of an order terminating the parental rights shall not eliminate the responsibility of such parent or guardian for past child support arrearages or other financial obligations incurred for the care of such child prior to the entry of the order terminating parental rights.

dependents in the order named.[4]

(Emphasis added). The trial court determined that NRT and SMT are within the class to which subsection (d) could apply as either Employee's children or, as a result of their adoption by Employee's mother, his brother and sister. The court further determined, however, that NRT and SMT are not entitled to benefits under this subsection because the evidence at trial failed to establish that they "regularly derived part of the [their] support from the wages of the deceased employee at the time of death and for a reasonable period of time immediately prior to the time of death," as required by the express language of the statute. Tenn. Code Ann. § 50-6-210(c). The trial court found from the evidence at trial that Employee had not provided support for NRT and SMT for the approximate four-month period preceding his death and that there was no evidence of an intention on his part to resume any support.

NRT and SMT contend that they should not be disqualified under this statutory provision because Employee's failure to provide support during the four months preceding his death resulted from a disagreement between Ms. Dean and Employee and was not the fault of Employee or of the children. There are two fatal flaws in this contention. First, in every case in which a parent fails to provide support to a minor child, there is an absence of fault on the part of the minor child which causes or contributes to the parent's failure. And yet, this statutory provision precludes an award of benefits to such a child on the basis of an absence of support/dependency without regard to fault. It is not the reason for the absence of support/dependency that is relevant. Rather, it is the fact of the absence of support/dependency. Second, there is no evidence, and NRT and SMT provided no proof, that Employee was precluded from providing support to them. The only evidence recited is that he either chose to or was precluded from having visitation with the children. Visitation and providing financial support are plainly distinct and it is not the absence of visitation, but rather the absence of support from Employee, which served to disqualify NRT and SMT from the receipt of benefits under this subsection.[5]

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[4] The class of persons identified in subsection (c) consists of the following: "Wife, husband, child, mother, father, grandparent, sister, brother, mother-in-law, father-in-law." Tenn. Code Ann. § 50-6-210(c).

[5] NRT and SMT also challenge the trial court's alternate ground for denying benefits under this subsection. The trial court determined that the absence of evidence quantifying Employee's support further precluded the award of benefits to NRT and SMT under this subsection pursuant to Tennessee Code Annotated section 50-6-210(e)(9). In light of our conclusion that the trial court correctly held NRT and SMT do not qualify for benefits because of the absence of support at the time of Employee's death and for four months prior thereto, this issue is moot.

Similarly moot is EJT's issue on appeal of whether, in the event NRT and SMT qualify as wholly

Issue 3: Attorney's Fees

The guardian ad litem for NRT and SMT has requested an award of attorney's fees on appeal for himself and for the guardian ad litem for EJT.[6] The guardians ad litem requested awards of attorney's fees in the Court of Workers' Compensation Claims under Tennessee Code Annotated section 50-6-238(a)(4). The court denied the motion and deferred any determination until after this appeal. The cited statute provides the workers' compensation judge with the authority and discretion to award "a reasonable fee for the services provided by the guardian ad litem" appointed by the judge. See also Tenn. R. Civ. P. 17.03 ("The court may in its discretion allow the guardian ad litem a reasonable fee for services . . . ."). The award of such fees on appeal, however, falls within the authority and discretion of the appellate court. We conclude that the guardian ad litem for EJT should be awarded reasonable attorney's fees on appeal, but decline to award fees on appeal to the guardian ad litem for NRT and SMT.

Conclusion

The judgment of the Court of Workers' Compensation Claims is affirmed. The case is remanded to the Court of Workers' Compensation Claims for determination of the amount of attorney's fees on appeal to be awarded the guardian ad litem for EJT, together with a determination of what, if any, fees are to be awarded to the guardians ad litem for EJT and for NRT and SMT for the prior proceedings in that court. Costs are taxed to NRT and SMT, for which execution may issue if necessary.

JEFFREY S. BIVINS, CHIEF JUSTICE

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dependent under Tennessee Code Annotated section 50-6-210(a)(2), the award to EJT of benefits in the amount of fifty per cent of Employee's average weekly wage was within the discretion of the trial court.

[6] The guardian ad litem for EJT has not independently requested an award of fees on appeal.

FILED
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Rec'd By

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SPECIAL WORKERS' COMPENSATION APPEALS PANEL
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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 NRT and SMT, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM