TENNESSEE BUREAU OF WORKERS' COMPENSATION
APPEALS BOARD

Larry Butler,	)	**Docket No.: 2016-07-0459**
Employee,	)	
v.	)	**State File Number: 43057-2016**
AAA Cooper Transportation,	)	
Employer,	)	**Date of Injury: 05/22/2016**
And	)	
North American Risk Services,	)	
Insurance Carrier.	)	
	)	

POSITION STATEMENT OF APPELLEE LARRY BUTLER

COMES NOW the Employee, Larry Butler, (herein after "Employee") pursuant to Rule 0800-02-22-02(1) of the Rules of the Tennessee Department of Labor and Workforce Development, and hereby submits this Position Statement in the above-styled matter.

STATEMENT OF THE CASE

Employee sustained injuries to his low back and right shoulder while working as an over-the-road truck driver for Employer on May 22, 2016. (EH Order at 2). Employee filed a Petition for Benefit Determination on July 15, 2016. The Dispute Certification Notice was issued on September 15, 2016. The issues certified in dispute were whether the Employee's right shoulder and low back injuries are compensable, whether he is entitled to medical benefits, and whether he is entitled to temporary benefits. Employee filed his request for an Expedited Hearing on November 14, 2016. The Expedited Hearing was held on May 15, 2017 at the Bureau of Workers' Compensation in Jackson, Tennessee, before Judge Allen Phillips. On June 8, 2017, the Court found that Employee suffered a compensable injury and was entitled to medical benefits but not entitled to temporary benefits. (EH Order at 4, 6). The Court ordered the

Employer and Carrier to provide a panel of physicians and to pay Employee's past medical expenses related to this on-the-job incident. (EH Order at 6). Employer filed a timely Notice of Appeal regarding this decision on June 15, 2017.The Appellants filed the transcript from the May 15, 2017 Expedited Hearing in this matter with the court clerk on June 26, 2017.

STATEMENT OF THE ISSUES

Whether the trial court erred in finding that Employee did not "willfully" violate a duty required of him by law in the context of Tenn. Code Ann. § 50-6-110(a)(5).

STATEMENT OF FACTS

Employee worked for AAA Cooper Transportation as an over-the-road truck driver. (EH Order at 1). On May 22, 2016 at approximately 1:20 a.m., Employee was involved in a single motor vehicle accident while driving on an interstate in Alabama. (EH Order at 1). On Interstate 22 near Jasper, Alabama, Employee lost control of his tractor trailer and the truck veered to the left. (EH Trans. at 33). The truck crossed over the median and the other lanes before crashing into a wooded area on the side of the roadway. (EH Order at 1).

Employee called 911 for assistance and notified his Employer of the accident. (EH Trans. at 34, 44-45). The Alabama Highway Patrol and an ambulance responded to the incident. (EH Order at 2, EH Trans. at 34). The highway patrol officer completed an accident report which diagrammed Employee's truck's path and recorded Employee's explanation that "the truck just went to the left and he had no control." (EH Order at 2, EH Trans. at 40). Employee testified that he was transported from the scene of the accident to a hospital in Jasper, Alabama shortly after the accident. (EH Trans. at 34).

Employee received emergency medical treatment for his right shoulder and low back injuries at Walker Baptist Medical Center in Jasper, Alabama. (EH Trans. at 42-44). He was diagnosed

with a T12 compression fracture of the thoracic spine and a likely ligament tear to his right shoulder. (EH Order at 2, EH Trans. at 44). He was discharged on May 22, 2016 and transported back to his home in Dyersburg, Tennessee by the Employer's project manager, Greg. (EH. Trans. at 45).

After returning home to Dyersburg, Employee followed up with his primary care physician, Dr. David Guthrie. (EH Order at 2). Dr. Guthrie confirmed the hospital's diagnosis of a T12 compression fracture of the thoracic spine and diagnosed Employee with a right shoulder rotator cuff tear. (EH Trans. 47). Dr. Guthrie's treatment notes indicate that Employee told Dr. Guthrie that he "flipped his 18 wheeler and does not recall what happened or how it happened." (EH Order at 2). Dr. Guthrie's treatment notes further indicated that Employee reported some fatigue due to "new stressors" in his life. (EH Trans. at 64). At the Expedited Hearing, Employee testified that his Employer "didn't know whether they was going to keep the account and how the trips were going to be" and he was "worr[ied] about that" but "as far as stress," he was no more stressed at the time of the accident than he was at the Expedited Hearing. (EH Trans. at 64-65).

Dr. Guthrie's treatment note also indicates that Employee reported "some dizziness" prior to the accident. (EH Order at 2, EH Trans. at 65-66). At the Expedited Hearing, Employee testified that Dr. Guthrie "asked [him] if [he] got dizzy." (EH Trans. at 65). Employee testified that he told Dr. Guthrie "I'm just like everybody else. Once in a while you'll get up and turn around. That's the only time . . . I didn't mean at the wreck." (EH Trans. at 65). Employee testified further that Dr. Guthrie "was just asking [him] all kind[s] of stuff" and that he told Dr. Guthrie he sometimes experienced dizziness "if [he got] up too fast or something and [he] didn't want to lie to him and say no, [he's] never been dizzy." (EH Trans. at 65).

Employee testified that, at the time of the accident, he was taking medication for cholesterol, high blood pressure and depression. (EH Trans. at 62, 69). Importantly, Employee testified that there were no known side effects to any of these medications and that he had been on all of the medications for over a year-and-a-half at the time of the accident. (EH Trans. at 62-63.) Employee testified that every time his physician, Dr. Guthrie, would "give him a prescription, [he and Dr. Guthrie] would follow through to make sure that there wasn't no side effects because . . . [he] didn't want nothing to happen to [his] driver's license because [he] love[d] driving." (EH Trans. at 63). Employee specifically testified that none of the medications ever affected him. (EH Trans. at 70).

At the Expedited Hearing, Employee testified that there was nothing unusual about his route on May 21, 2016 and May 22, 2016 and that he "felt good." (EH Order at 2 and EH Trans. at 32-33). Employee testified that he got a full night's sleep before embarking on his route at approximately 6:30 p.m. on May 21, 2016 and that he took a one to three hour nap before leaving his home in Dyersburg, Tennessee on May 21, 2016. (EH Trans. at 34-36, 54). Employee consistently testified that he "felt good," that he "was alert and awake" and was "trying to stop that truck" at the time of the accident. (EH Trans. at 32-33, 42, 63, 67, and 69). Employee testified at the Expedited hearing that he "would have stopped and got [himself] something to drink, coffee, took a break, [a] thirty (30)-minute break" if he had felt tired while driving. (EH Trans. at 70).

Employee testified that he has been employed as a commercial truck driver for approximately forty-seven (47) years and has never been involved in an incident like this before. (EH Trans. at 30, 36). Employee testified that he understands the rules and regulations which govern his driving and that he always complied with those rules. (EH Trans. at 37). At the

Expedited Hearing, Employee introduced a copy of 49 C.F.R. § 391.41 which lays out the physical qualifications mandated for all commercial truck drivers. (EH Order at 2, EH Trans. at 30-31). The Federal Department of Transportation Regulations mandate that, in order for one to hold a commercial driver's license, he or she must "not have an established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause consciousness or any loss of ability to control a commercial motor vehicle." (49 C.F.R. § 391.41(b)(8), EH Order at 2, EH Trans. at 30-32). Employee testified that he did not have any of those problems and noted that he passed all Department of Transportation physical exams up until December 2016, at which point he failed the physical examination due to his low back and right shoulder injuries. (EH Order at 2, EH Trans. at 29-32).

Employee testified that he is "proud of his driving record, [p]round of how [he] drives" and that he has "never hurt anybody" while driving. (EH Trans. at 36). He testified that drove for Employer for nine years and "gave them a million and over 200,000 miles safe driving" and, with regard to his prior employment as a truck driver, he gave "them 860,000 safe driving miles" and "two million miles safe driving." (EH Trans. 36).

Employee consistently testified that he did not feel impaired in any way, shape or form and that he did not have any indication that he was about to be involved in an accident. (EH Trans. at 70-71). He specifically testified that "*if* it did happen[,] it come on all at once and then it was gone" and that "if [he would] have felt sick or anything [he would] have pulled over." (EH Trans. at 70-71).

STANDARD OF REVIEW

In reviewing a trial court's decision, the standard of review to be applied is statutorily mandated and limited in scope. Specifically, "[t]here shall be a presumption that the findings and

conclusions of the workers' compensation judge are correct, unless the preponderance of the evidence is otherwise." Tenn. Code Ann. § 50-6-239(c)(7) (2016). The trial court's decision must be upheld unless "the rights of the party seeking review have been prejudiced because findings, inferences, conclusions, or decisions of a workers' compensation judge:

(A) Violate constitutional or statutory provisions;
(B) Exceed the statutory authority of the workers' compensation judge;
(C) Do not comply with lawful procedure;
(D) Are arbitrary, capricious, characterized by abuse of discretion, or clearly unwarranted exercise of discretion; or
(E) Are not supported by evidence that is both substantial and material in light of the entire record.

Tenn. Code Ann. § 50-6-217(a)(3) (2016).

LAW AND ARGUMENT

I. The trial court correctly held that Employee did not "willfully" violate any duty required of him by law.

Although Tennessee workers' compensation law generally provides coverage for work-related injuries without regard to fault, certain injuries arising from an employee's conduct may be excluded where there injury or death is due to "[t]he employee's willful failure to perform a duty required by law." Tenn. Code Ann. § 50-6-110(a)(5) (2016). "If the employer defends on the ground that the injury arose . . . [due to the employee's willful failure to perform a duty required by law] . . .the burden of proof shall be on the employer to establish the defense." Tenn. Code Ann. § 50-6-110(b) (2016).

Where the employer asserts the defense at an expedited hearing, the employer's burden of proof is to come forward with sufficient evidence from which the trial court can conclude the employer "would likely prevail" at a hearing on the merits. Tenn. Code Ann. § 50-6-

239(d)(1)(2016); *McCord v. Advantage Human Resourcing,* No. 2014-06-0063, 2015 TN Wrk. Comp. App. Bd. LEXIS 6, at *9 (Tenn. Workers' Comp. App. Bd. Mar. 27, 2015).

The Employer failed to provide evidence showing that Employee "willfully" violated a duty required of him by law. Specifically, Employer failed to produce evidence showing that Employee "willfully" failed to safely operate the truck on May 22, 2016 because he was allegedly suffering from "fatigue, illness, or any other cause" in violation of 49 C.F.R. § 392.3 (1995). Employer also failed to produce evidence showing that Employee "willfully" violated Alabama traffic law defining reckless driving and governing safe changing of lanes. *See* Ala. Code § 32-5A-190(a) (2016) and Ala. Code § 32-5A-88(1) and (2) (2016). Employer argued that Employee "should not have operated the truck if he could not do so safely" because of his "fatigue, illness or any other cause" and that Employee violated Alabama traffic laws which were designed to protect the safety of all motorists. (EH Order at 5).

The term "willful" is not defined in the Tennessee Workers' Compensation Act. The Tennessee Supreme Court has not addressed the specific defense asserted in the case at bar, but has addressed the related defenses of "willful violation of a safety rule" and "willful misconduct"[1] in *Mitchell v. Fayetteville Public Utilities*, 368 S.W.3d 442 (Tenn. 2012). In *Mitchell*, the employee was in a bucket lift near the top of a power pole preparing to attach a lightning arrestor (a copper ground wire) with his bare hands when the arrestor came into contact with a transformer. As a result, the employee was electrocuted and severely injured. The employer in that case had provided protective gloves but the employee removed the gloves to perform other work (ex. hammering nails on a light pole) which he believed to be safe to do

[1] *See* Tenn. Code Ann. § 50-6-110(a) (2016).

without the gloves. The dispute in *Mitchell* was whether the employee "willfully" violated the safety procedure by removing his gloves to perform other tasks.

The *Mitchell* decision is important because, in deciding the case, the Tennessee Supreme Court created a four-factor, "uniform approach to willful misconduct and willful failure to use a safety appliance." *Id.* at 453.[2] To prevail on either of the defenses analyzed by the *Mitchell* Court, an employer has the burden of establishing four elements: (1) "the employee's actual, as opposed to constructive 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 valid excuse for violating the rule." *Id.*

In *Roper v. Allegis Grp.,* 2017 Wrk. Comp. App. Bd. LEXIS 14 (Feb. 10, 2017), the Appeals Board reviewed a case in which the employer asserted that the employee's actions amounted to a "willful" violation because the first three factors of the *Mitchell* test were satisfied. The employer in that case relied on reasoning propounded by the Appeals Board in *Gonzales v. ABC Professional Tree Services,* 2014 TN Wrk. Comp. App. Bd. LEXIS 2 (Nov. 10, 2014); namely, the Appeals Board's statement that an "[e]mployee's lack of a valid excuse for [not following a safety rule], when the first three elements of the [safety rule violation] defense have been satisfied, amounts to willfulness." *Id.* at *29. However, the employer's reliance on *Gonzales* was misplaced because the statement was made in the context of the specific facts of the case. The *Roper* Board stated that this argument was "an overbroad interpretation of *Mitchell* that, if accepted, would allow employers to deny benefits to employees whose merely negligent or reckless actions resulted in violation of a known safety rule." *Roper* at *11.

[2] The *Mitchell* test is applied to post July 1, 2014 cases as well as pre-July 1, 2014 cases because the law was applied "fairly, impartially, and in accordance with basic principles of statutory construction." *See* Tenn. Code Ann. § 50-6-116 (2016) and *Roper v. Allegis Grp.,* 2017 Wrk. Comp. App. Bd. LEXIS 14 (Feb. 10, 2017).

Most importantly, the Board in *Roper* pointed out that, in *Mitchell,* the Supreme Court "reinforced longstanding precedent that an employee's negligent or reckless actions generally are not enough to defeat a claim for workers' compensation benefits" and that, in order to establish the fourth element of the *Mitchell* test, "an employer must come forward with evidence that the employee *intended* to take the action that violated the known safety rule without a valid excuse." *Id.* In *Mitchell*, the employee voluntarily elected to take off his protective gloves and thus the employer satisfied its burden of proof.

In the case at bar, the Employee's injuries cannot be said to have been caused by any intentional or "willful" act of the Employee. Unlike the employee in *Mitchell* who removed his protective gloves by his own volition, here the Employee did not voluntarily elect to take the action which ultimately led to his injury; namely, Employee did not intend to lose consciousness/"black out" or otherwise lose control of his truck in the wee hours of May 22, 2016. Employee consistently testified that he did not feel impaired in any way, shape or form and that he did not have any indication that he was about to be involved in an accident. (EH Trans. at 70-71). He specifically testified that "*if* it did happen[,] it come on all at once and then it was gone" and that "if [he would] have felt sick or anything [he would] have pulled over." (EH Trans. at 70-71). Employer has failed to produce evidence showing that Employee acted "willfully" or intentionally.

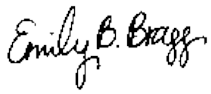
Even if the Board determines that the defense asserted in this case is not subject to the analytic framework established by the *Mitchell* Court, the Employer still must show that Employee's violation of the cited statutes was "willful." When interpreting a statute, courts should look first at the statute's text. *Engine Mfgs. Assn.*, 541 U.S. at 252. When a statute does not provide definitions of specific terms used, courts should construe the terms in accordance

with their ordinary or natural meaning. *FDIC v. Meyer,* 510 U.S. 471, 476 (1994). Because the term "willful" is not defined within Tenn. Code. Ann. § 50-6-110 (2016), the term's ordinary or natural meaning is helpful in determining applicability in the case at bar. The Merriam-Webster Dictionary defines "willful" as follows: "1) obstinately and often perversely self-willed" and "2) done deliberately." Merriam-Webster, Inc., The Merriam-Webster Dictionary (Frederick C. Mish et. al. eds., 6th ed. 2004). Applying the natural meaning of "willful," the same conclusion is reached: the Employee did not act deliberately, obstinately and/or perversely self-willed by losing consciousness/ "blacking out" or otherwise losing control of his truck on May 22, 2016.

CONCLUSION

For the foregoing reasons, this Honorable Court should affirm the decision of the trial court.

Respectfully Submitted:



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing has been served upon the following by email and U.S. Mail, postage prepaid, on this the 10th day of July, 2017:

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