



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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November 18, 2009

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Counsel for Defendants, James Wesley Tate, II, et al.

Re: Kyle E. Skopic, Personal Representative, etc. v. James Wesley Tate, II, et al.
Case No. CL-2005-1319

Dear Counsel:

This matter came before the Court on July 10, 2009 upon the Defendants' Special Plea in Bar to the Complaint of Kyle E. Skopic, Personal Representative of the Estate of Alejandro Enrique Aguilar Ho, deceased ("the Estate"). After considering the pleadings, the transcript of the hearings before the Workers' Compensation Commission (the "Commission"), and the arguments of counsel, the Court took the matter under advisement. The following embodies the Court's ruling.

OPINION LETTER

## FACTS<sup>1</sup>

On April 14, 2003 in Fairfax County, Virginia, Alejandro Ho (“Ho”) was in a fatal automobile accident involving an automobile driven by Defendant James Tate (“Tate”) and occupied by Ho, and an automobile driven by Juan Yanes Cambara (“Yanes”).

Yanes testified that while driving on Interstate 66 Tate’s car approached his from behind at twice his speed. According to Yanes, Tate subsequently pulled alongside him, began yelling at him, and threw a water bottle that struck his car. Yanes said that Tate alternated speeds to keep him from switching lanes, then braked, swerved, and lost control of his vehicle, causing it to overturn. Ho was ejected from the car, and he died in an ambulance on the way to a hospital.

At the time of the accident Tate and Ho were employed by Information Technology Solutions (“ITS”). Part of Tate’s job was to pick up Ho and drive him to work.

## PROCEDURAL BACKGROUND

On September 24, 2003, ITS and its insurer, Erie Insurance Exchange, filed an application with the Commission requesting that it “determine the compensability of the claim of Alejandra [sic] Ho, who was killed in an automobile accident on April 24, 2003, while traveling to a job site.”

On March 4, 2005 this suit was filed by the Estate against ITS and Tate alleging negligent hiring of Tate, negligent retention of Tate, and that ITS is responsible for Ho’s death under *respondeat superior*.

The suit was stayed, over the objection of the Estate, pending the outcome of the Commission hearings.

Before the Commission ITS contended that the accident arose out of Ho’s employment and, thus, the Estate was only entitled to whatever relief the Commission afforded it.

The Estate contended that the accident did not arise out of Ho’s employment. A Commissioner found that Ho was an independent contractor and that he was not

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<sup>1</sup> These facts are derived from the transcript of the Commission’s Hearings of January 23, 2004, March 25, 2004, and March 26, 2004.

injured in the course of his employment. ITS appealed, and the Court of Appeals remanded the matter back to the Commission to determine whether the injury arose in the course of employment. On remand another Commissioner found that the injury did arise in the course of Ho's employment.

That decision was appealed by the Estate to the Court of Appeals, which affirmed the Commission, finding that Ho was injured during the course of his employment.<sup>2</sup>

This Special Plea in Bar was then set down for hearing.

## ANALYSIS

### *A. A Workers' Compensation Commission Decision Does Not Bar a Civil Action if the Commission Lacked Jurisdiction to Hear the Case.*

A civil action is not barred if the Commission had no jurisdiction to hear the claim. The legislative scheme makes these jurisdictional underpinnings clear.

[I]f death results from the accident ... the employer shall pay, or cause to be paid, compensation ...to those persons presumed to be wholly dependent upon the deceased employee ... or if there are no total dependents ... to those persons presumed to be wholly dependent ... or if there are no total dependents, to partial dependents in fact.<sup>3</sup>

No provision provides compensation for an employee who has no dependents. Compensation is either awarded to the employee *or* to his dependents. Here, there could be no decision awarding compensation because there was no employee and there were no dependents.<sup>4</sup>

ITS asserts that deceased employees without dependents are provided for in Subsection B of the Workers' Compensation Act (the "Act"). "The employer shall *also* pay burial expenses not exceeding \$10,000 and reasonable transportation

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<sup>2</sup> *Estate of Ho v. Information Technology Solutions*, No. 2742-05-4, 2006 Va. App. LEXIS 460 (October 17, 2006).

<sup>3</sup> Va. Code Ann. § 65.2-512(A).

<sup>4</sup> "[W]e find that the evidence fails to establish the existence of any statutory or actual dependents entitled to benefits under the Act." VWC File No. 214-14-35.

expenses for the deceased not exceeding \$1,000.”<sup>5</sup> Nowhere does this subsection provide compensation for employees who have no dependents. Moreover, the use of the word “also” suggests that burial expenses are *in addition* to any compensation paid to dependents.<sup>6</sup>

Finally, the claim filed in this court could not be asserted in the Commission because the Act only allows filing by a guardian or trustee under limited circumstances. “If an injured employee is incapacitated or is under eighteen years of age at the time when any right or privilege accrues to him under this title, his guardian, trustee or conservator may in his behalf claim and exercise such right or privilege.”<sup>7</sup> Thus, the Estate could not file a claim with the Commission for Ho. He was neither incapacitated nor under the age of eighteen. He was dead.

In short, Ho was neither injured, incapacitated, nor under the age of eighteen. He did not have any dependents. Given the statutory requirements, there was no possible way to file any claim with the Commission. As a result, the Commission had no jurisdiction.

*B. An Employer May File Only if There Is a Disagreement Between Employee and Employer.*

An employer may not file absent statutory prerequisites.

If the employer and the injured employee or his dependents fail to reach an agreement in regard to compensation under this title, or if they have reached such an agreement which has been signed and filed with the Commission and compensation has been paid or is due in accordance therewith and the parties thereto then disagree as to the continuance of any weekly payment under such agreement, either party may make application to the Commission for a hearing in regard to the matters at issue and for a ruling thereon.<sup>8</sup>

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<sup>5</sup> Va. Code Ann. § 65.2-512(B) (emphasis added).

<sup>6</sup> To whom would the Commission award burial expenses? There are no dependents. The Estate cannot recover expenses.

<sup>7</sup> Va. Code Ann. § 65.2-527.

<sup>8</sup> Va. Code Ann. § 65.2-702.

The Act requires a disagreement between the employer and the employee. Here, Ho and ITS never even had a discussion, much less a disagreement, about compensation. Notwithstanding, ITS filed with the Commission. The statutory provisions of the Act require a disagreement between the employee and employer. Here, one did not exist. As a result, again, there was no basis for jurisdiction.

*C. The Virginia Workers' Compensation Act Is Identical to That of Indiana, Which Does Not Allow Recovery Under the Act if There Are No Dependents.*

The Act was first adopted in 1918 and is "a virtual copy of [the] Indiana statute."<sup>9</sup> In *Barksdale v. Engen, Inc.*, the Supreme Court stated that: "the Virginia Workmen's Compensation Act is based upon the Indiana statute, so that the construction placed upon the Indiana law by the courts of that state merits our consideration."<sup>10</sup>

The Indiana Act does not permit compensation to be paid to the personal representative, estate, or heirs of a deceased employee without dependents. *Federal Cement & Title Co. v. Pruitt, Admr.*, 128 Ind. App. 126, 146 N.E.2d 557 (1957). "While the Worker's [sic] Compensation Act should be liberally construed on behalf of the claimant, such construction does not authorize the Board to interpret the law so that compensation will be granted without a specific statutory provision."<sup>11</sup>

In *Pruitt* the claimant was Louise Pruitt, Administratrix of the Estate of William Pruitt ("Pruitt"), deceased. "Pruitt was injured in an accident which arose out of and in course of employment."<sup>12</sup> He died later from a cause other than the initial injury.

Pruitt left no dependents.<sup>13</sup> Prior to his death Pruitt had not reached an agreement with his employer regarding his injury and had not filed a

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<sup>9</sup> *Morris v. Morris*, 238 Va. 578, 584, 385 S.E.2d 858, 861 (1989).

<sup>10</sup> 218 Va. 496, 499, 237 S.E.2d 794, 796 (1977) (citing *Hoffer Bros. v. Smith*, 148 Va. 220, 138 S.E.2d 474 (1927)).

<sup>11</sup> *B&V Distributing, Inc. v. Mayo*, 613 N.E.2d 499, 500 (1993) (citing *Federal Cement & Tile Co. v. Pruitt, Admr.*, 128 Ind. App. 126, 146 N.E.2d 557 (1958)).

<sup>12</sup> *Pruitt*, 128 Ind. App. at 128, 146 N.E.2d at 558.

<sup>13</sup> *Id.* (Louise Pruitt was not a dependent.)

claim with the Industrial Board (“Board”).<sup>14</sup> Notwithstanding, the Board awarded a monetary sum to Pruitt’s Administratrix.

In reviewing the Board’s decision, the court stated that the Act created a “new remedy, unknown to the common law and no rights are created thereby except those specifically provided for therein.”<sup>15</sup> The court further stated that, “the right of an injured employee to compensation *is not such a vested right, that, in the absence of statute survives upon the death of the employee.* Such right does not on the death of the employee, pass to his heirs or personal representatives.”<sup>16</sup> The court vacated the award.

The court held that because there were no dependents, there could be no compensation. Because the Act in Virginia is mirrored after Indiana’s, the *Pruitt* decision is exactly on point. Here, because Ho had no dependents, there could also be no compensation awarded. Because no compensation could be awarded, the Commission lacked jurisdiction to hear the case.

*D. Absent Jurisdiction, the Commission’s Decision Is Not Binding on This Court.*

Finally, ITS argues that the Commission’s final decision binds this Court.<sup>17</sup> When “the facts presented [in the Commission are] substantially the same as the factual allegations advanced in [the] common-law action ... *the Commission’s ruling [as to jurisdiction under the Act] ... is conclusive.*”<sup>18</sup> Here, however, the Commission’s jurisdiction was neither properly invoked nor in fact actually addressed.<sup>19</sup> Thus, the “substantially the same” test question begs the real issue, namely, whether *any* finding by the Commission absent jurisdiction could be correct. As a result, any finding by the Commission – even as to jurisdiction – would not be conclusive.

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<sup>14</sup> The Indiana Court of Appeals noted that the Board “disclose[d] that the decedent left no widow or children under the age of eighteen and no dependents.” *Pruitt*, 1218 Ind. App. at 129, 146 N.E.2d at 559.

<sup>15</sup> *Pruitt*, 129 Ind. App. at 132, 146 N.E.2d at 560.

<sup>16</sup> *Id.* (citing *Wenning v. Turk*, 78 Ind. App. 355, 358, 135 N.E. 665, 666 (1922)).

<sup>17</sup> Va. Code § 65.2-706.1.

<sup>18</sup> *Plummer v. Landmark Communications, Inc.*, 235 Va. 78, 84, 366 S.E.2d 73, 75 (1988).

<sup>19</sup> Jurisdiction is an issue that can be raised at any time, including by a reviewing court. *Commonwealth v. Smith*, 230 Va. 354, 337 S.E.2d 278 (1985).

*E. Allowing an Employer to File a Claim with the Commission in Order to Avoid Liability Contravenes the Purpose of the Act.*

The final question presented is whether an employer may implicate the Act where the result is to shield the employer from civil liability? Put differently, if the employer can bring a claim with the Commission which prevents the employee from attempting recovery in a civil court, is the employee limited to the findings of the Commission?

Workers' compensation is a system designed to provide cash benefits, medical care and vocational rehabilitation to *employees* receiving injuries arising out of and in the course of employment... It is a system of justice based not upon theories involving fault, but upon a theory of providing support in a dignified and certain manner which would otherwise have to be provided in some less satisfactory form.<sup>20</sup>

Workers' compensation statutes were first adopted in Germany in 1884 based on the concern that it was the duty of the state to care for those who cannot care for themselves.<sup>21</sup> In 1897 Great Britain enacted a Workers' Compensation Act which contained the language "arising out of and in the course of employment" that is now found in workers' compensation acts around the United States.<sup>22</sup> Although Maryland was the first state to enact a Workers' Compensation Act in 1902, the Commonwealth of Virginia soon ratified her own in 1918.

[The Act] places upon industry as an expense of the business the pecuniary loss, measured by the compensation provided in the statute, attendant upon all accidents to employees within the hazards of the industry. It extends the employer's liability to all accidental personal injuries "arising out of and in the course of the employment," the expense of which is added to the cost of production.<sup>23</sup>

It is clear beyond argument that workers' compensation statutes view the employee as the aggrieved party who needs the protection of workers compensation.

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<sup>20</sup> 1-1 Virginia Workers' Compensation § 1.01 (emphasis added).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Feitig v. Chalkley*, 185 Va. 96, 98, 38 S.E.2d 73, 74 (1946).

But if the protection of the claim is for the worker, should the employer against whom a claim might be asserted be permitted via the Act to avoid the employee's claims?

The Supreme Court of Virginia in *Plummer* recognized, but did not address, a strikingly similar situation.

Parenthetically, it should be observed that the normal position of the parties is reversed resulting in an unusual twist to the case. The employee is denying that she is entitled to workers' compensation, even though she affirmatively claimed entitlement to it before the Commission, in order to escape the exclusive remedy rule. The employer, which denied compensation was owed under the Act before the Commission, is now steadfastly asserting that the employee would be entitled to benefits under the Act based on her present allegations in order to take advantage of the exclusive remedy rule.<sup>24</sup>

Although the *Plummer* court did not address the issue – nor was it called upon to do so – it clearly recognized the anomaly. That anomaly is presented head on in this case.

## CONCLUSION

The Estate has asserted several claims in the circuit court against ITS. The suit was stayed as a result of the prior filing of a claim by ITS with the Commission. ITS asserts that the grant of the stay demonstrates this Court's belief that the filing by ITS was appropriate. That is not so in the least. To the contrary, the Court never granted approval as to the merits of the action, but, rather, permitted the initiated process to finish. It has now been completed.

When the employer here, ITS, filed a claim with the Commission, the result – whether intended or not – was that the Act became a shield to its liability. The public policy behind the Act is to protect the employee. Here, only ITS benefits by paying virtually no costs associated with Ho's death. To permit such a practice would confound the entire rationale of workers' compensation. Neither the policy behind the Workers' Compensation Act nor its jurisdictional bases provide a statutory framework for resolution of these claims under the Act.

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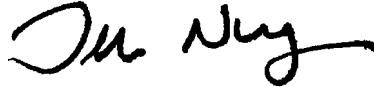
<sup>24</sup> *Plummer v. Landmark Communications, Inc.*, 235 Va. 78, 84, 366 S.E.2d 73, 75-76 (1988).

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For these reasons, the Court holds that Defendant ITS' Special Plea in Bar to the Complaint is overruled. This suit may proceed.

An Order is enclosed.

Very truly yours,

A handwritten signature in black ink, appearing to read "R. Terrence Ney". The signature is fluid and cursive, with a long horizontal stroke at the end.

R. Terrence Ney

Enclosure

**OPINION LETTER**

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

KYLE E. SKOPIC, PERSONAL  
REPRESENTATIVE OF THE  
ESTATE, etc.,

Plaintiff,

v.

JAMES WESLEY TATE, II, et al.,

Defendants.

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CL-2005-1319

ORDER

This matter came before the Court on July 10, 2009 upon Defendants' Special Plea in Bar to the Complaint of Kyle E. Skopic, Personal Representative of the Estate, etc.

Upon consideration of the arguments made by counsel in court and in their respective briefs filed with the Court, it is hereby

ORDERED that for the reasons stated in the Court's Opinion Letter of November 18, 2009, a copy of which is attached hereto and made a part hereof, the Defendants' Special Plea in Bar is OVERRULED.

The exceptions of the Defendants to the Court's ruling are noted.

ENTERED this 18<sup>th</sup> day of November, 2009.

  
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JUDGE R. TERRENCE NEY

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE RULES OF THE VIRGINIA SUPREME COURT.