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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-002059-MR

KEOLIVER MCCALL — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE OLU A. STEVENS, JUDGE
ACTION NO. 06-CI-001893

ZURICH AMERICAN INSURANCE COMPANY;
CAMBRIDGE INTEGRATED SERVICES
GROUP, INC.; JHT HOLDINGS, INC.;
AND ACTIVE TRANSPORTATION CO., LLC — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MAZE, STUMBO AND THOMPSON, JUDGES.

STUMBO, JUDGE: Keoliver McCall appeals from an Opinion and Order of the Jefferson Circuit Court holding that he was not using and occupying his employer's motor vehicle within the meaning of KRS 304.39-020(6)(b) thus rendering him ineligible for Basic Reparation Benefits ("BRB"). McCall argues

that he was occupying the vehicle within the statutory framework and that the trial court erred in failing to so rule. We find no error, and accordingly affirm the Opinion and Order on appeal.

McCall began working for Active Transport Company, LLC, as a truck driver in 1995. On March 1, 2004, McCall's job duties included transporting new Ford vehicles on a large "car hauler" truck. As part of his employment, McCall was required to load new vehicles onto the car hauler, secure the vehicles with chains, drive to dealerships and unload the vehicles. On the date at issue, McCall allegedly was injured in two separate incidents. The first injury occurred when McCall was standing near the back of the trailer with his feet on a ramp. He was using a ratchet to tighten a chain, when the chain broke. McCall fell against the trailer "and then rolled to the ground". The second event occurred a few minutes later when McCall was standing on a platform that runs across the front bumper of the tractor portion of the car hauler. The platform was covered with non-skid material and is designed to provide access to the front of the trailer so that the driver can secure the vehicles to the trailer with chains. While again tightening a chain with a ratchet, the chain broke and McCall fell to the ground where he suffered injuries to his neck, back and right shoulder.

McCall sought BRBs pursuant to KRS 304.39-030, and when they were denied he filed the instant action in Jefferson Circuit Court against Active, Zurich American Insurance Company and related entities. Active, et al., defended the action by arguing that McCall was not entitled to relief under KRS Chapter 304

because he was not occupying the vehicle at the time of the accident. Thereafter, McCall moved for Summary Judgment. On August 30, 2011, the Jefferson Circuit Court rendered an Opinion and Order denying the motion. As a basis for the ruling, the court found that McCall was not "occupying, entering into, or alighting from" the vehicle as required by KRS 304.39-020(6) to establish entitlement to BRBs. The court cited *Clark v. Young*, 692 S.W.2d 285 (Ky. App. 1985), wherein a panel of this Court found that an injury suffered while the plaintiff was standing on a flatbed trailer in the course of securing a load did not qualify as "occupying" the vehicles for purposes of KRS Chapter 304. Based on its application of *Clark*, the court denied McCall's motion for Summary Judgment.

McCall subsequently renewed the motion for Summary Judgment upon arguing that the court had not addressed his argument that he was also "standing in the trailer in the rear of the carhauler [sic]" when the first incident occurred. The court cited McCall's deposition testimony to conclude that McCall's feet were on a ramp and not "in" the trailer at the time of the accident, and it rendered a second Opinion and Order on October 7, 2011, so stating. These Orders were made final and appealable by way of a subsequent Order rendered on October 20, 2011. This appeal followed.

McCall now argues that the Jefferson Circuit Court committed reversible error in denying his motion and renewed motion for Summary Judgment. At issue is the same argument raised and rejected below, to wit, whether he was "occupying, entering into, or alighting from" the vehicle at the moment the first

chain broke (at the back of the trailer) or the second chain broke (when McCall was standing on the platform at the front of the vehicle). In support of his contention that he was occupying the vehicle during one or both of those events, McCall directs our attention to several cases addressing the definition and application of whether an injured party was "occupying" a motor vehicle. The most helpful of these, in his view, is *Goodin v. Overnight Transp. Co.*, 701 S.W.2d 131 (Ky. 1985). In *Goodin*, the plaintiff was unloading goods from inside of an unlit tractor-trailer when he stepped through a hole in the trailer bed and suffered an injury. The Kentucky Supreme Court concluded that the use of a motor vehicle as defined in KRS 304.30-020(6) included the unloading of a trailer under the limited facts of that case. McCall contends that his act of tightening the chains on the exterior of the vehicle is no different in this regard, and that it constitutes "occupying" for purposes of BRB coverage. He seeks an Opinion reversing the trial court's denial of his motion and renewed motion for Summary Judgment.

KRS 304.39-030(1) provides that, "[i]f the accident causing injury occurs in this Commonwealth every person suffering loss from injury arising out of maintenance or use of a motor vehicle has a right to basic reparation benefits, unless he has rejected the limitation upon his tort rights as provided in KRS 304.39-060(4)." The use of a motor vehicle, in the context of loading and unloading a vehicle, is defined in KRS 304.39-020(6)(b) and is as follows:

> "Use of a motor vehicle" means any utilization of the motor vehicle as a vehicle including occupying, entering into, and alighting from it. It does not include . . . (b)

> Conduct in the course of loading and unloading the vehicle unless the conduct occurs while occupying, entering into, or alighting from it.

In rejecting McCall's contention that he was "occupying" the vehicle, the Jefferson Circuit Court found that "the facts of this case are analogous to those in *Clark* because McCall was standing on a platform outside the vehicle and that platform was there for the sole purpose of aiding in the loading and unloading of the vehicle." In its Order addressing McCall's renewed motion, the court determined that McCall's first accident occurred when he was standing on a ramp and not on the trailer carrier itself.

We find no error in the circuit court's reasoning, nor its application of KRS Chapter 304 and the case law. *Goodin*, upon which McCall relies, is distinguished from the instant facts in that the plaintiff therein was *inside* the vehicle when he fell through a hole in the trailer. Conversely, McCall was not inside the car carrier at the time of either of the accidents in question. The record demonstrates that he was standing on a ramp the first time he fell, and then standing on a platform at the front of the cab when the second fall occurred. The particulars of these falls are similar to the facts of various cases holding that being outside the vehicle (*Clark*, *supra)*, under the vehicle (*Commercial Union Assurance Companies v. Howard*, 637 S.W.2d 647 (Ky. 1982)), or beside the vehicle (*State Farm Mut. Auto. Ins. Co. v. Hudson*, 775 S.W.2d 922 (Ky. 1989)) do not constitute "occupying" the vehicle for purposes of BRB coverage.

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, 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." CR 56.03. "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.,* 807 S.W.2d 476, 480 (Ky. 1991). Summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. *Id*. "Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact." *Id.*

When viewing the record in a light most favorable to Active, et al., and resolving all doubts in their favor, we cannot conclude that the Jefferson Circuit Court erred in concluding that McCall was not occupying the car hauler within the statutory framework necessary to establish entitlement to BRB. The trial court's conclusions on this issue are supported by the record and the law, and we find no error.

For the foregoing reasons, we affirm the Opinion and Order of the Jefferson Circuit Court denying McCall's motion and renewed motion for Summary Judgment.

ALL CONCUR.

BRIEF FOR APPELLANT:

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