IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
September 24, 2018 Session

BETTYE SHORES v. STATE OF TENNESSEE

Appeal from the Tennessee Claims Commission
No. 0546-WC-17-0001657
Robert N. Hibbett, Commissioner

No. M2018-00954-SC-R3-WC – Mailed January 9, 2019
Filed February 12, 2019

Bettye Shores ("Employee") alleged she suffered a mental injury during the course and scope of her employment with the State of Tennessee ("Employer") when a reprimand from her supervisor "lit up" her preexisting post-traumatic stress disorder. Employer moved to dismiss the claim, asserting Employee failed to give timely notice of her alleged injury as mandated by Tenn. Code Ann. § 50-6-201. After a hearing, the Commissioner granted Employer's motion to dismiss. Employee has appealed. 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 Commissioner's judgment.

Tenn. Code Ann. § 50-6-225(a)(Supp. 2017) Appeal as of Right;
Judgment of the Claims Commission Affirmed

ROSS H. HICKS, SP. J., delivered the opinion of the court, in which JEFFREY S. BIVINS, C.J. and DON R. ASH, SR. J., joined.

Constance F. Mann, Franklin, Tennessee, for the appellant, Bettye Shores.

Herbert H. Slatery, III, Attorney General & Reporter, Andrea Sophia Blumstein, Solicitor General, W. Michael Evans, Assistant Attorney General, Nashville, Tennessee, for the appellee, State of Tennessee.

OPINION

Factual and Procedural Background

Employee worked for Employer as a Program Coordinator with the Department of Human Services. She had been a state employee for approximately 14 years and had served without incident under her supervisor, Nancy McLean, since 2009. However, on July 1, 2016, Ms. McLean chided Employee purportedly for remarks she had made to a coworker about a promotion. According to Employee, the incident "lit up" her pre-existing, but asymptomatic, post-traumatic stress disorder (PTSD) resulting from an automobile accident during her childhood.

On November 9, 2016, Employee gave notice to Employer that she had suffered a workers' compensation injury on July 1, 2016. On November 18, 2016, the State's workers' compensation carrier, Corvel Corporation ("Insurer"), denied the claim and informed Employee of her right to request a benefit review conference within 90 days. Employee did not file her petition for benefit determination until June 6, 2017. The mediator issued a dispute resolution certificate on July 21, 2017, indicating the matter was unresolved. Employee appealed to the Tennessee Claims Commission on August 18, 2017.

On October 6, 2017, Employer filed a Motion to Dismiss, or in the alternative, Motion for Summary Judgment, claiming Employee (1) failed to notify Employer within 15 days of the alleged date of injury as required by Tenn. Code Ann. § 50-6-201 and (2) failed to request alternative dispute resolution within 90 days of the denial of the claim. An in-person hearing was held on March 16, 2018, at which Employee, her husband, and her supervisor, Ms. McLean, testified.

Employee testified that her injury occurred on July 1; however, she could only "vaguely" recall what happened on that date. According to Employee, Ms. McLean accused her of being "untrustworthy," "a liar," and "[d]ishonest." She felt the reprimand stemmed from earlier remarks she had made in jest to a coworker about a promotion. Employee believed the incident reactivated her PTSD from a 1968 automobile accident that left her comatose and with injuries requiring "a thousand stitches." She recalled that when she returned to school upon recovery, the other children referred to her in disparaging terms. According to Employee, her mistreatment by the other children caused her to lose trust in others. However, she thought she could trust the coworker to

understand she was only joking about "the promotion, ... moving offices and this other stuff."

Employee could not recall if she finished working on July 1 after the incident. She said all she could think about was suicide. Employee went to see her physician, Dr. Michael Mertens, the next day.[1] She said she did not realize she had an injury, and she did not recall reporting her injury in November 2016, when she was hospitalized for four weeks due to suicidal ideations. Employee said she could vaguely recall an in-take staffer at the hospital telling her she had a workers' compensation injury.

On cross-examination, Employee agreed she took family medical leave in July 2016, and had taken family medical leave in early 2016 that was unrelated to her PTSD. Employee could not recall when she gave notice of her injury, but she acknowledged that her C-20 form indicated the first notice of injury was in November 2016.

Terry Shores, Employee's husband, testified how the alleged injury affected his wife. He opined that she was incapable of reporting a workers' compensation injury from August through October.

Nancy McLean testified she is employed by the State of Tennessee as the managing attorney for appeals and hearings. She held that position in 2016 when she supervised Employee. Ms. McLean became aware of Employee's claim of a work-related injury in mid-November when she received a telephone call from Insurer. Ms. McLean saw no evidence of an injury on July 1. She was aware Employee took Family Medical Leave Act (FMLA) leave in July 2016, but she was unaware of the reason for the leave. Ms. McLean recalled Employee had previously taken family medical leave in 2009 regarding problems with her leg, and possibly again in 2015. She assumed the July 2016 leave was for the same purpose. Ms. McLean explained that a supervisor never discusses an individual's medical history with an Employee and never asks why an employee is seeking medical leave. Instead, the supervisor gets a cover letter from the

[1] The record contains conflicting proof about the actual date of Employee's doctor's visit. Employee testified she saw Dr. Mertens the following day (July 2) while other portions of the record suggest the visit occurred on July 1, 2016. We note, however, that any such discrepancy is immaterial to our ultimate determination.

assistant commissioner of the department indicating leave has been approved.

Employee messaged Ms. McLean on July 28 while on leave indicating she would be returning to work on August 1. Employee worked much of August, missing August 8 for a CT scan and August 11 and 12 due to pain. Employee worked much of September and October during which time Ms. McLean saw no evidence of injury. She recalled Employee missed a week in October to assist her husband who had returned home after a hospital stay.

Ms. McLean said she had excellent rapport with Employee during these months. In fact, she had spoken with the assistant commissioner about the quality of Employee's work and had recommended that Employee "get an advance" in her evaluation. Ms. McLean recalled Employee told her in December she had been in a psychiatric facility; had been diagnosed with a personality disorder; and was considering retirement. Employee came into the office on December 29 and announced her retirement. She informed Ms. McLean she planned to file the necessary paperwork to take the balance of her family leave.

At the close of the testimony, the Claims Commissioner gave the parties additional time to brief the notice issue. By Order filed May 8, 2018, the Commissioner (1) granted the Employer's Motion to Dismiss for failure to give timely notice of her injury but (2) denied Employer's Motion to Dismiss or for Summary Judgment for failure to timely file a Petition for Benefit Determination. Employee has appealed.

Analysis

Standard of Review

Appellate review of the Commissioner's findings of fact is "de novo upon the record" of the Commissioner accompanied by a presumption of correctness, unless the evidence preponderates otherwise. *See* Tenn. Code Ann. § 50-6-225(a)(1), (2) (2014). As the Supreme Court has consistently observed, reviewing courts must conduct an in-depth examination of the lower tribunal's factual findings and conclusions. *Wilhelm v. Krogers*, 235 S.W.3d 122, 126 (Tenn. 2007). When the Commissioner has seen and heard the witnesses, considerable deference must be afforded the Commissioner's factual

findings. *See Tryon v. Saturn Corp.*, 254 S.W.3d 321, 327 (Tenn. 2008). No similar deference need be afforded the Commissioner's findings based upon documentary evidence such as depositions. *See 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 the Commissioner's conclusions of law. *See Seiber v. Reeves Logging*, 284 S.W.3d 294, 298 (Tenn. 2009).

Our primary inquiry is whether the Commissioner erred in granting Employer's motion to dismiss based on Employee's failure to give timely notice. The notice requirement is contained in Tenn. Code Ann. § 50-6-201 which provides that:

> (a)(1) Every injured employee or the injured employee's representative shall, immediately upon the occurrence of an injury, or as soon thereafter as is reasonable and practicable, give or cause to be given to the employer who has no actual notice, written notice of the injury, and the employee shall not be entitled to physician's fees or to any compensation that may have accrued under this chapter, from the date of the accident to the giving of notice, unless it can be shown that the employer had actual knowledge of the accident. No compensation shall be payable under this chapter, unless the written notice is given to the employer within fifteen (15) days after the occurrence of the accident, unless reasonable excuse for failure to give the notice is made to the satisfaction of the tribunal to which the claim for compensation may be presented.
>
> (2) The notice of the occurrence of an accident by the employee required to be given to the employer shall state in plain and simple language the name and address of the employee and the time, place, nature, and cause of the accident resulting in injury or death. The notice shall be signed by the claimant or by some person authorized to sign on the claimant's behalf, or by any one (1) or more of the claimant's dependents if the accident resulted in death to the employee.
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> (3) No defect or inaccuracy in the notice shall be a bar to compensation, unless the employer can show, to the satisfaction of the workers' compensation judge before which the matter is pending, that the employer was prejudiced by the failure to give the proper notice, and then only to the extent of the prejudice.

(4) The notice shall be given personally to the employer or to the employer's agent or agents having charge of the business at which the injury was sustained by the employee.

(b) In those cases where the injuries occur as the result of gradual or cumulative events or trauma, then the injured employee or the injured employee's representative shall provide notice of the injury to the employer within fifteen (15) days after the employee:

(1) Knows or reasonably should know that the employee has suffered a work-related injury that has resulted in permanent physical impairment; or

(2) Is rendered unable to continue to perform the employee's normal work activities as the result of the work-related injury and the employee knows or reasonably should know that the injury was caused by work-related activities.

Tenn. Code Ann. § 50-6-201 (Supp. 2017) (applicable to injuries occurring ***on or after July 1, 2016***)[2].

To satisfy section 50–6–201, the notice must reasonably convey to the employer that the employee has suffered an injury arising out of and in the course of her employment. *Jones v. Sterling Last Corp.*, 962 S.W.2d 469, 471 (Tenn. 1998) (citing *Masters v. Indus. Garments Mfg. Co.*, 595 S.W.2d 811, 816 (Tenn.1980)). "In the absence of ***actual knowledge*** of the injury by the employer, ***waiver*** of the notice by the employer, or ***reasonable excuse*** by the employee for not giving notice, the statutory notice to the employer is an absolute prerequisite to the right of the employee to recover benefits." *Jones*, 962 S.W.2d at 471 (citing *Aetna Cas. & Sur. Co. v. Long*, 569 S.W.2d 444, 449 (Tenn. 1978) (emphasis added)). The employee carries the burden of proving that the requisite notice was given or excused. *Id.* at 448.

[2] Throughout the pleadings, the parties occasionally cite to the earlier version of the statute which includes a thirty-day notice window. However, the legislature reduced the time period to fifteen days for injuries occurring on or after July 1, 2016. Employee claims July 1, 2016, is her date of injury.

Actual Knowledge

Initially, we note it is undisputed Employee did not give written notice of her alleged injury in July 2016.[3] Thus, we first consider whether Employer had actual knowledge of Employee's injury. The testimony revealed that Employee worked the entire day on July 1, 2016, and she gave no indication she may have suffered an injury. Employee went to her medical doctor the following day; however, she never informed Ms. McLean or anyone else in the department she was seeing her doctor as a result of the incident on July 1.

Employee nonetheless suggests Employer had actual knowledge of her injury because Employee was approved for family medical leave during July. The leave form did not indicate that Employee's condition was attributable to the July 1 incident. In fact, nothing about the July 2016 family medical leave placed the assistant commissioner on notice of a work-related injury. Likewise, the family medical leave did not impute knowledge of the alleged injury to Ms. McLean. According to Ms. McLean, she never discusses medical issues with an employee, and family medical leave requests are filed directly with the assistant commissioner. Because Employee had taken family medical leave on prior occasions for recurring knee/leg issues, Ms. McLean assumed the July 2016 leave was for the same purpose. Furthermore, Employee worked much of August, September, and October without mention of the July 1 incident or of any resulting mental or emotional issues.

In *Nuchols v. Blount County*, which was cited with approval by the Commissioner and which we find persuasive, the panel correctly explained that "an employee who relies upon alleged actual knowledge of the employer must prove that the employer had actual knowledge of the time, place, nature and cause of the injury." No. E2013-00574-WC-R3-WC, 2014 WL 4656904, *7 (Tenn. Workers' Comp. Panel Sept. 19, 2014) (quoting *Masters v. Indus. Garments Mfg. Co., Inc.*, 595 S.W.2d 811, 815 (Tenn. 1980)). Employee has failed to show Employer had actual knowledge of *any* of these aspects of her injury prior to November 9, 2016.

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[3] Employee's counsel candidly admitted during argument at the close of the in-person hearing that "Up until yesterday, I . . . thought we had evidence that [Employee] had reported [the injury] in July."

Waiver of Notice

Second, Employee claims Employer waived notice by failing to raise the notice issue during the benefit review conference. Employee relies solely on Tenn. Code Ann. § 50-6-239(b) which provides that the parties must participate in a benefit review conference "that addresses all issues related to a final resolution of the matter." Employer responds that Employee should have raised waiver before the Claims Commissioner in her response to Employer's motion to dismiss, asserting that waiver cannot be raised for the first time in the appeal to the Panel. We agree.

The notice issue was clearly raised in the Employer's motion to dismiss, and testimony was specifically elicited about notice. At the close of the hearing, Employee's counsel remarked that the notice issue caught her by surprise. Nonetheless, the Commissioner gave the parties additional time to submit their respective arguments about the various components of the notice issue. According to Employer, Employee made only a brief reference to waiver in her supplemental submissions to the Commissioner and failed to include supporting law or facts. The supplemental submissions are not included in the record. Accordingly, we must conclude Employee has failed to establish Employer's waiver of notice.

Reasonable Excuse

Finally, Employee alternatively claims she had a reasonable excuse for failing to give notice within fifteen days of the July 1, 2016 incident. More specifically, Employee suggests that although she saw her personal physician near the time of the reprimand, she was unaware her suicidal ideations could be attributable to her work injury until she was hospitalized in November. Relying on other panel decisions, Employee argues notice was therefore excused until the hospital staff "linked the two." *See, e.g., McCall v. Nat'l Health Corp.*, No. M2014-00261-WC-R3-CV, 2006 WL 3177621 (Tenn. Workers' Comp. Panel Nov. 3, 2006); *Craven v. Corr. Corp. of Am.*, No. W2005-01537-SC-WCM-CV, 2006 WL 3094121 (Tenn. Workers' Comp. Panel Oct. 26, 2006); and *Rector v. Bridgestone (U.S.A.), Inc.*, No. M1999-02284-WC-R3-CV, 2001 WL 637367 (Tenn. Workers' Comp. Panel June 11, 2001).

We agree with the Claims Commissioner that these cases are distinguishable because those employers had actual or constructive knowledge of the employee's injury at or near the time the injury occurred. As noted, we have concluded Employer did not have actual knowledge of Employee's injury, and we see no evidence of Employer's constructive knowledge. Furthermore, Employee's assertion she was unaware of her injury on or about July 1, 2016 is belied by her own testimony of the almost immediate onset of pervasive suicidal thoughts; the return of her childhood trust issues; her visit to her medical doctor the following day; and her resulting July 2016 medical leave.[4] Even if causation was medically confirmed at a later time, Employee was not excused from giving timely notice of a known injury.

Employee also cursorily suggests she was unable to report her injury, citing her own testimony and her husband's testimony that all she could think about was suicide. However, as Employer observed, the proof established that during this time Employee performed special tasks for the assistant commissioner, organized attorneys' files, and, by all accounts, performed her normal tasks well. We find no merit to this argument.

Finally, Employee argues Employer was not prejudiced by the delayed notice, citing Tenn. Code Ann. § 50-6-202 (now found in Tenn. Code Ann. § 50-6-201(3) (Supp. 2017)). Employer responds that the question of prejudice is outside the scope of this appeal, adding the prejudice consideration only applies when an employee provides some type of notice to the employer, but the notice is deemed defective or inaccurate. These arguments were not adequately developed below, and the Commissioner did not speak to the issue. Because the issue is not squarely presented, we cannot excuse the notice requirement on this basis.

The Commissioner concluded there was no credible evidence Employer knew of Employee's alleged mental injury before November 9, 2016. Having reviewed the entire record, we also conclude Employee presented no evidence Employer had any type of notice of a July 1, 2016 injury prior to Employee filing her claim. Likewise, Employer

[4] Employee maintains the Commissioner incorrectly suggested she was aware her injury was work-related in July 2016 based on a letter from Dr. Mertens which Employee claims was not created until May 18, 2017. Based on our review of the record and the Commissioner's order, we do not agree the Commissioner clearly made an erroneous factual finding or that any perceived error changes the result.

Commissioner's findings. We conclude the Commissioner properly dismissed Employee's claim for failure to satisfy the notice requirement of Tenn. Code Ann. § 50-6-201.[5]

Conclusion

For the foregoing reasons, the judgment of the Claims Commissioner is affirmed. Costs of this appeal are assessed to Ms. Shores for which execution may issue, if necessary.

ROSS H. HICKS, JUDGE

[5] Employer raised an alternative issue, arguing the Commissioner had a second ground for dismissal based on Employee's failure to request alternative dispute resolution within 90 days of the denial of her claim. This issue, however, is pretermitted by our holding herein.