IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT JACKSON
(May 23, 1997 Session)

GARY KEITH HIGGINBOTHAM,

Plaintiff- Appellee,

vs.

Chester Chancery, No. 8867
Honorable Joe C. Morris
No. 02S01-9611-Ch-00101

GRINNELL CORPORATION
Defendant- Appellant.

For Appellant:

P. Allen Phillips
Waldrop and Hall, P.A.
Jackson, Tennessee

For Appellee:

T. Verner Smith
Jackson, Tennessee

MEMORANDUM OPINION

Mailed June 1997

Members of Panel:

Janice M. Holder, Associate Justice, Supreme Court
Robert A. Lanier, Special Judge
Don R. Ash, Special Judge

AFFIRMED

Lanier, Judge

MEMORANDUM OPINION

This worker's compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated § 50-6-225 (e) (3) for hearing and reporting of findings of fact and conclusions of law.

The first issue for this panel to decide is whether or not this action is barred by the limitations contained within the Workers' Compensation Act, T.C.A. § 50-6-203 and § 50-6-224. Those sections read as follows:

> 50-6-203. Limitation of Time. - The right to compensation under the Workers' Compensation Law shall be forever barred, unless within one (1) year after the accident resulting the injury or death occurred the notice required by Section 50-6-202 is given the employer and a claim for compensation under the provisions of this Chapter is filed with the Tribunal having jurisdiction to hear and determine the matter; provided, that if within the one (1) year period voluntary payments of compensation are paid to the injured person or the injured person's dependents, an action to recover any unpaid portion of the compensation, payable under this Chapter, may be instituted within one (1) year from the time the employer shall cease making such payments, except in those cases provided for by [the provisions on lump sum settlements] . . .
>
> 50-6-224. Limitation of Actions. - The time within which the following Acts shall be performed under this chapter shall be limited to the following periods, respectively:
>
> (1) Actions or proceedings by an injured employee to determine or recover the compensation, (1) year after the occurrence of the injury, except as provided in 50-6-203 . . .

The ambiguity created by these two statutes, one of which begins the period of limitations with "the accident resulting in injury," and the other of which begins the period with "the occurrence of the injury," has been resolved somewhat by judicial interpretation. In Imperial Shirt Company vs. Jenkins, 217 Tenn. 602, 299 S.W.2d 757 (1966), the Supreme Court reconciled the two statutes by pointing out that T.C.A. § 50-6-224 was enacted after the other section and, therefore, controls, so that Tennessee considers that the statute of limitations begins to run from the date of the "occurrence of the injury." Having settled this question, one might be forgiven for thinking that, at least in cases where there is a discrete incident resulting in pain and medical treatment, the period of limitations would run from the date when such an event occurred. However, such is not the case. A number of years ago, the Supreme Court indicated

approval of the philosophy, expressed by Professor Arthur Larson, that " . . . the claim period runs from the time compensable injury becomes apparent . . . " the Court further quoted with approval Professor Larson's belief that a claimant's suit should not be barred under circumstances in which the claimant, "through a technicality which involves no fault of his own, could never at any time have filed a valid claim." The Court pointed out that the Workers' Compensation Act contemplates liberality, not only in the admission of evidence, but also in the inferences to be drawn therefrom, and in borderline cases the Court will endeavor to carry out the benevolent object of the Act and resolve doubts in favor of the claimant. Imperial Shirt Company vs. Jenkins, *supra.*

Apparently some confusion persisted in the cases for, in 1974, the Supreme Court felt called upon to further "clarify" the matter by explaining the event which triggers the running of the statute of limitations. In Reed vs. Genesco, 512 S.W.2d 1 (Tenn. 1974), the Court held that the statute begins to run "when disability manifests itself; disability being synonymous with injury." The Court went on to hold that the period of limitations is suspended "until by reasonable care and diligence it is discoverable and apparent that a compensable injury has been sustained." Of course, this decision raised the additional question of what a "compensable" injury may be. From a review of subsequent cases, it appears that a compensable injury is one that requires more than medical treatment. Apparently, medical treatment furnished or paid for by the employer is not the type of "compensation" to which the Court is referring. In the following cases, the worker had sufficient problems to consult and be treated by a physician, but this was not sufficient to trigger the running of the statute of limitations: Hibner vs. St. Paul, 619 S.W.2d 109 (Tenn. 1981); Jones vs. Home, 679 S.W.2d 445 (Tenn. 1984); Blocker vs. Regional Medical, 722 S.W.2d 660 (Tenn. 1987); Smith vs. Smith's Transfer, 735 S.W.2d 221 (Tenn. 1987); Hawkins vs. Consolidated, 742 S.W.2d 253 (1987); White vs. United, 742 S.W.2d 635 (Tenn. 1987); Imperial Shirt Company vs. Jenkins, *supra*; Murray Ohio vs. Vines, 498 S.W.2d 897 (Tenn. 1973). Even receipt of temporary total disability benefits is apparently not sufficient to put a claimant upon notice that he has sustained a "compensable" injury. See Blocker vs. Regional Medical, 722 S.W.2d 660 (Tenn. 1987); Murray Ohio vs. Vines, 498 S.W.2d 897 (Tenn. 1973)].

What, then, constitutes a "probable compensable injury," so as to trigger the running of

the statute of limitations? Despite some indications to the contrary (e.g., Taylor vs. Clayton, 516 S.W.2d 72 (Tenn. 1974), where the worker sues for permanent disability, it is apparently the law that the worker is not charged with knowledge which will begin the running of the statutory period (in the absence of obvious conditions, such as amputations) until he knows both the ultimate diagnosis and that the condition is probably permanent. Jones vs. Home, 679 S.W.2d 445 (Tenn. 1984); McLerran vs. Mid-South, 695 S.W.2d 181 (1985); Smith vs. Smith's Transfer, 735 S.W.2d 221 (1987); Osborne vs. Burlington, 672 S.W.2d 757 (Tenn. 1984); Murray Ohio vs. Vines, 498 S.W.2d 897 (Tenn. 1973); Union Carbide vs. Cannon, 523 S.W.2d 360 (Tenn. 1975).

Let us apply these rules to even the facts urged upon this Court by the employer: The claimant in this case was advised by the treating physician on July 6, 1994, that he had a "torn rotator cuff." The doctor did not testify, but there is nothing in his notes stating that he advised the claimant at that time of any permanent disability from his condition. The doctor's notes indicate that he wrote to claimant's employers that he should be able to work, but cautioned claimant to watch for "signs and symptoms of worsening problems . . ." if he did not improve. The doctor's notes on June 22, 1995, state that the doctor explained to him that his problems were "common with rotator cuff strain tendonitis." On that date the doctor also noted for his records that "it is possible that he has a partial tear. I don't think he has a complete tear clinically . . ." He did not feel at that time that symptoms were enough to warrant surgical intervention. This opinion was repeated on August 24, 1995, although the doctor said then that "he may need something done in the future." The treatment up to that time had been "conservative." On October 26, 1995, the doctor repeated his opinion that no complete tear of the rotator cuff was visualized on an MRI test and he was unable even to make a definitive diagnosis of a partial tear of the rotator cuff. He was unable to fit the claimant's condition into the AMA guidelines specifically and released the claimant with no restrictions. However, because of the findings on the MRI which had recently taken place, the doctor gave his opinion that the claimant had sustained a 5% permanent impairment to "the shoulder." Suit was filed on August 7, 1995. For some reason, the trial court sustained an objection at trial to testimony to what information the doctor had given the claimant regarding whether or not his condition was permanent. Such testimony would be admissible, and not subject to a hearsay objection, as it

was clearly offered not for the truth of the doctor's statement but to show what information the claimant had about his condition and when he had it. Tennessee Rule of Evidence 801 (c). Claimant testified that his physician, who saw him in July of 1994, never indicated to him that he had a permanent condition. He was allowed to return to work after two weeks and did not miss any time from work after that.

Applying the rules extracted from the cases cited above, and applying them to the undisputed facts in this case, we see that the claimant sustained an injury which was not definitely diagnosed even after an MRI examination and which caused him to miss little time from work. In addition, the record does not indicate that any permanent impairment was opined or communicated to the claimant earlier than October 26, 1995, a few months after suit was filed. Therefore, the filing of this suit was timely.

In view of our ruling above, it is not necessary to discuss the somewhat arcane and confused question of whether claimant's last treatment, or the last payment for that treatment, tolls the running of the statute.

No question is raised as to the appropriateness of the amount of the disability award by the trial court. Therefore, the judgment of the trial court is affirmed. Costs of this appeal are taxed to the defendants-appellants.

_____
ROBERT A. LANIER,
SPECIAL JUDGE

CONCUR:

_____
Janice M. Holder, Associate Justice, Supreme Court

_____
Don R. Ash, Special Judge

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

GARY KEITH HIGGINBOTHAM,	)	CHESTER CHANCERY
	)	NO. 8867
Plaintiff/Appellee,	)	
	)	Hon. Joe C. Morris,
vs.	)	Chancellor
	)	
GRINNELL CORPORATION,	)	NO. 02S01-9611-CH-00101
	)	
Defendant/Appellant.	)	AFFIRMED.

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 will be paid by Appellant, and surety, for which execution may issue if necessary.

IT IS SO ORDERED this 18th day of August, 1997.

PER CURIAM

(Holder, J., not participating)