IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

ZURICH-AMERICAN INSURANCE COMPANY v. CLAUDIA MOSLEY KENT, ET AL.

Chancery Court for Davidson County
No. 95-2771-III & 96-3702-I & III

No. M1998-00886-SC-WCM-CV
Filed - June 13, 2000

JUDGMENT ORDER

This case is before the Court upon motion for review of Claudia Mosley Kent, et al., pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), 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 motion for review is not well-taken and should be denied; 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 are taxed to the appellee, Nord Associates, Inc., for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Birch, J., Not Participating

IN THE SUPREME COURT FOR TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE

ZURICH-AMERICAN INSURANCE COMPANY,	)	NO. M1998-00886-SC-WCM-CV
	)	DAVIDSON COUNTY
Plaintiff/Appellee,	)	Hon. Ellen Hobbs Lyle
vs.	)	No. 95-2771-III
CLAUDIA MOSLEY KENT, NORD ASSOCIATES, INC. and DINA TOBIN, DIRECTOR OF DIVISION OF WORKERS' COMPENSATION, TENNESSEE DEPARTMENT OF LABOR/SECOND INJURY FUND,	)	
Defendant/Appellant.	)	

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MEMORANDUM OPINION
Mailed - March 13, 2000
Filed - June 13, 2000

MEMBERS OF PANEL:

ADOLPHO A. BIRCH, JR., JUSTICE
LLOYD TATUM, SENIOR JUDGE
CAROL L. MCCOY, SPECIAL JUDGE

OPINION FILED: REVERSED IN PART, AFFIRMED IN PART AND REMANDED

CAROL L. MCCOY

Special Judge

OPINION

This workers' compensation appeal has been referred to the Special Workers Compensation Appeals Panel of the Supreme Court pursuant to T.C.A. § 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. The workers compensation carrier, Zurich American Insurance Company (Zurich), has appealed from the trial court's finding that the employee, Claudia Kent (Kent), had sustained a compensable work related injury during the effective dates of Zurich's policy. The employer, Nord Associates (Nord), has appealed the trial court's finding that Zurich was not required to pay Nord's costs of defense and discretionary costs.

Appellate review is *de novo* upon the record of the trial court accompanied by a presumption of correctness of the findings of fact, unless the preponderance of the evidence is otherwise. T.C.A. § 50-6-225(e). To satisfy this standard of review, this Court must conduct an independent examination to determine where the preponderance of the evidence lies. Williams v. Tecumseh Products Co., 978 S.W.2d 932, 935 (Tenn. 1998). There is no presumption of correctness accompanying conclusions of law. Union Carbide Corp. v. Huddleston, 854 S.W.2d 87, 91 (Tenn. 1993).

Kent, a 48 year old woman, began working for Nord in 1988 as a general office clerk. Her employer, Nord Associates, Inc., is an insurance company with fewer than five employees. Her duties included typing, filing, customer service and bookkeeping. In November of 1993, Kent began having problems with both wrists. Her hands ached and she would have shooting pain down her wrists and into her fingers after using her hands for half a day. Kent was seen by Dr. Phillips in November, 1993. He told her that she had carpal tunnel syndrome and that she could either have surgery or treatment with anti-inflammatory medication, vitamins and wrist braces. She chose the non-surgical treatment and her hands improved. In September of 1994, Kent noticed that she began having problems in her hands

again - shooting pains, numbness and tingling. In October she began wearing her wrist brace on her right hand. On November 10, 1994, she reached behind for a file with her left hand, felt something pop, and experienced a sudden pain so severe it brought tears to her eyes. This severe pain subsided shortly after this episode; however she continued to experience the symptoms that had reappeared in September.

On November 10th or 11th, 1994, Kent told her employer Nord of her injury. He requested the First Report of Work Injury Form from Hale Insurance Agency. Kent completed the form and gave it to her employer. Mr. Nord, the owner of Nord, submitted the form to Hale on November 14, 1994. In her First Report, Kent stated that she wore braces on both hands, except when she washed dishes and bathed, and that the pain and weakness of her hands interfered with every aspect of her life.

After the November 10th incident, Kent began wearing a brace on her left hand, as well as her right, and made an appointment to see Dr. Vernon Allen about her hands. Some of Kent's typing duties were transferred to her assistant, but she continued performing the rest of her duties. Kent saw Dr. Allen on December 2, 1994 and surgery was scheduled for December 12, 1994. By December 2nd, Kent felt she had to have the surgery because she was unable to endure the pain and loss of function in her hands any longer.

Mr. Hale, from Hale Insurance Agency, called Mr. Nord shortly after receiving the First Report and told Mr. Hale that Nord's worker's compensation insurance had lapsed in January of 1993 due to non-payment of the premium. Mr. Nord asked Mr. Hale to obtain new workers compensation insurance. Mr. Hale submitted a worker's compensation application on behalf of Nord to the assigned risk pool. Zurich, a member of the assigned risk pool, issued a worker's compensation policy and coverage was provided to Nord beginning November 19, 1994. On December 5, 1994, Mr. Nord filled out a second First Report of Work

Injury for Kent detailing Kent's hand problem, had her sign it and submitted it to Zurich. Her symptoms continued and increased in severity until the December 12th surgery. On December 12th, Dr. Allen performed carpal tunnel release surgery on Kent.

Dr. Allen testified that in a two or three week period, even where there is increasing severity of carpal tunnel symptoms, anatomic changes to the nerve are unlikely. Even though continuing irritation of the nerve would result in an increase of symptoms, there is no direct correlation between the anatomic carpal tunnel syndrome and pain. He stated that, from November 10th until her December 12th surgery, he could not state that there was any further damage done to her carpal tunnel areas. He stated that, given Kent's medical history, if he had seen Kent on November 11, 1994 he would have recommended the same surgery he recommended on December 2, 1994.

In September of 1995, Zurich filed a declaratory judgment action in Davidson County Chancery Court asking that the court find it had no workers compensation liability for Kent's carpal tunnel disability and also asking that it be refunded all payments it had made to Kent as a result of an Order of Temporary Total Disability and Medical Benefits issued in August of 1995 by the Tennessee Department of Labor. In November of 1996, Kent filed a workers compensation claim against Nord in Davidson County Circuit Court. These two matters were consolidated and heard in Chancery Court.

WHEN DOES A CLAIM BECOME COMPENSABLE

The trial court, citing Lawson v. Lear Seating Corporation, 944 S.W.2d 340 (Tenn. 1997) and Barker v. Home-Crest Corporation, 805 S.W.2d 373 (Tenn. 1991), found that since Kent's last day of work prior to her surgery was December 10, 1994 and the Zurich policy was in effect at the time, Zurich was liable for coverage for her carpal tunnel disability. The trial court's reliance on Lawson and Barker is inappropriate to determine when a claim for a gradual injury is compensable in cases where notice of First Report of

Work Injury has been properly filed by the employee. Those two cases involved determining the date when the gradual injury of carpal tunnel syndrome occurred, not when the claim becomes compensable. As explained in Story v. Legion Ins. Co., 3 S.W.3d 450 (Tenn. 1999), Lawson was limited to identifying a date to trigger the running of the statute of limitations. Id. at 454. Barker applied the "last day worked" rule to determine which insurer would pay benefits. Id. According to the Story court, the "last day worked" rule was adopted in this state to prevent workers with gradual and repetitive injuries from losing the opportunity to bring claims due to the statute of limitations. Id at 454. Its intent is to benefit the employee who is unaware of his or her injury and/or the causal relationship between the injury and work. It has been repeatedly held that the time for giving notice does not begin to run until such time as the employee knows, or in the exercise of reasonable diligence should have known, of the existence of a work-related claim. Livingston v. Shelby Williams Industries, 811 S.W.2d 511, 515 (1991). Thus, the purpose for the "last day worked" rule was to fix a date certain when the employee knew he or she had sustained a work related injury. As the Court stated in Central Motor Express, Inc. v. Burney, 377 S.W.2d 947 (Tenn. 1964), citing Professor Larson's treatise on workmen's compensation:

> [T]he underlying practical reason for insisting on a definite date of the accident is that a number of important questions cannot be answered unless a date is fixed, such as which employer or insurance carrier is on the risk, whether notice of injury and claim is within the statutory period, and many others. . . It is, therefore, most important in the gradual injury cases to determine when the accident occurred . . . 'In the absence of definiteness in time of either cause or effect . . . many courts find accident by treating each [new] impact . . . as a separate accident.'

Id. at 949 (emphasis added) (internal citation omitted).

When a definite date of injury is known, i.e., when the employee knows the nature of her injury and files a written notice of a work related injury, there is no reason to use another date. As stated above, the rationale for the "last day worked" rule was to benefit the employee who had not timely filed a First Report of Work Injury because the nature of the injury was not known and the employee delayed or failed to give written notice of the injury. Such is not the case here. When Kent filed notice of her injury on November 14,

1994, she complied with T.C.A. § 50-6-201 (notice of injury) and T.C.A. § 50-6-202 (contents and service of notice). She completed the standard form which requires the employee to state in plain and simple language the time, place, nature and cause of the accident resulting in injury. Kent described her injury as carpal tunnel syndrome on a First Report of Work Injury form which was received and stamped by the employer on November 14, 1994. Attached to the form was an extensive statement by Kent regarding the time, place and nature of her injury. She described her injury in writing as follows: "Both wrist (sic) - carpal tunnel syndrome." In response to a question on the form regarding date of injury, she wrote:

> ...I've been employed...since 8-1-88. My job duties consist of office manager, accounting manager, and administrative assistant. I work on the computer and calculator daily. I use my hands all day long.
>
> I first sought medical attention for my hands on 11-13-93... Dr. Phillips prescribed an inflamatory drug...and braces for both hands. He advised me at that time that I needed surgery on both hands.
>
> ...
>
> This past Thursday, November 10, 1994, I reached behind me to my computer station to get a file, when I felt as if something was pulling in my left hand. I felt the pulling then it felt like something broke. When that happened it really hurt. It brought tears to my eyes. I had been wearing my brace on my right hand for several days when this happened. Now, I am wearing braces on both hands all the time...
>
> ...
>
> Wearing the braces limit you in what you can do. I still use the computer, but now the pain in my wrist seems less, the aching of my arm between the wrist and the elbow have (sic) increased.
>
> This problem with my hands not only hinders me at work, but in all other aspects of my life...

Kent's filing of the First Report on November 14, 1994 fixed the date that must be used in answering the key questions posed by Professor Larson in his treatise. The First Report clearly demonstrated that Kent was aware of both the nature and cause of her injury and her filing the notice triggered her right to compensation. Once such a report is filed, the

employer may not delay compliance with the statute because he did not have worker's compensation insurance in effect at the time of the notice.

The transcript reflects extensive discussion on whether there was actual misrepresentation, or misrepresentation by omission, when Nord sought workers' compensation coverage after receiving the First Report of Work Injury. This discussion was unnecessary. In compliance with the statute, Kent had properly put Nord on notice that she had been injured at work and that such injury was a gradual injury, identifying it as carpal tunnel syndrome. As stated in Lyle v. Exxon Corp., 746 S.W.2d 694, 698 (Tenn. 1988):

> [O]nce the employee is aware or reasonably should have been aware that he has sustained a compensable injury, the employee must comply with the notice provisions of T.C.A. § 50-6-201 . . . whether the employee has sustained a gradual injury . . . or an injury from one single event . . .

An employee's failure to provide notice is excused, until by reasonable care and diligence, it is discoverable and apparent that an injury compensable under the workers' compensation law has been sustained. Pentecost v. Anchor Wire Corporation, 695 S.W.2d 183, 185 (Tenn. 1985), Puckett v. N.A.P. Consumer Electronics Corporation, 725 S.W.2d 674, 676 (Tenn. 1987).

In this case, Kent did not fail to give notice. Therefore, application of the "last day worked" rule serves no purpose. The statute of limitations is not an issue. Neither the date of the injury nor the nature of the injury is an issue. Notice is not an issue. The only issue is which party, Nord or Zurich, should be liable for payment of Kent's benefits.

As evidenced by the record, Kent knew on or before November 14, 1994, that she had carpal tunnel syndrome, a gradual occurring injury, which she sustained at work. The record reflects that she properly filed her notice by using the standard form for First Report of Work Injury. That document clearly states on its face that the use of the form is required under the provisions of the Tennessee Workers' Compensation Law and must be completed and filed with the insurance carrier immediately after notice of injury. By filing this notice, Kent identified her injury and established the date to be used for purposes of triggering worker's compensation benefits under the statute. This placed responsibility for her worker's compensation benefits upon her employer. He had no worker's compensation coverage at

the time of the notice. Acquiring worker's compensation coverage after this notice did not relieve the employer of liability, even if the employee's injury required extensive medical care and treatment, including surgery.

The second First Report of Work Injury was superfluous. It repeated the nature and date of the employee's injury and her need for medical treatment, but neglected to mention that Nord had previously been given written notice of the work injury on November 14, 1994 and that Kent was entitled to benefits beginning on that date. This second Report was prepared by Mr. Nord. However, an employer cannot escape his responsibility for workers' compensation benefits simply by refiling a notice of injury and alleging an aggravation of that injury. The evidence here preponderates in favor of finding that Kent knew she had a work-related injury at the time she filed the First Report of Injury on November 14, 1999.

If the trial court is affirmed and Nord's conduct sanctioned, self-insured employers may easily avoid their legal responsibility. When a First Report of Work Injury is filed, an employer would only need to postpone the employee's right to benefits until worker's compensation insurance coverage was obtained and have the employee file a second First Report of Work Injury. The result would be that a self-insured employer who receives proper written notice would never be at risk for a gradual occurring injury. This was not the intent of the statute, nor the principle underlying the "last day worked" rule.

The Workers' Compensation Act provides employees with benefits for work-related injuries. The notice requirement is to protect the employer from unfounded demands, to allow the employer an opportunity to make an investigation while the facts are accessible and to enable the employer to provide timely and proper treatment for the injured employee. Aetna Casualty & Surety Co. v. Long, 569 S.W.2d 444, 449 (Tenn. 1978). Absent notice, the employer is not liable for benefits unless there was a reasonable excuse for failure to give such notice. Id. Once the written notice is filed, the nature and time of the injury is established and the employee is entitled to physicians fees, medical treatment and to other compensation accruing under the statute. This notice also fixes who is responsible for providing the employee with benefits.

This focus in this case should be on the date the employee's claim matured so as to entitle her to benefits. The record reflects that Kent was diagnosed by Dr. Phillips with carpal tunnel syndrome in November, 1993. Dr. Allen's testimony confirmed that diagnosis and lent support to Kent's hand written statement that she had a work related injury on November 10, 1994. Her filing of a First Report of Work Injury conclusively established *the date when she knew* the nature of her injury and its relationship to her work. Her claim matured on November 14, 1994, the date she filed the First Report and it is that date which fixes her right to benefits and determines whether the employer, rather than the insurance carrier, is at risk. Since Nord allowed the workers' compensation insurance to lapse, Nord, as the employer, is responsible for payment of her worker compensation benefits.

WHETHER THE EMPLOYER IS SUBJECT TO THE ACT

In 1991, Nord filed a notice with the Department of Labor not to accept provisions of the Workers' Compensation Act of Tennessee. The record reflects that after 1991, Nord voluntarily acquired Workers' Compensation Insurance from ITT Hartford. That policy lapsed in 1993 for failure to pay the premium. There is no evidence that Nord, which had less than five employees, took any steps to comply with T.C.A. § 50-6-106(4). That statute's subsection states that the Workers' Compensation Act does not apply when less than five persons are regularly employed, provided that in cases where the employer accepts the provisions of the Workers' Compensation Act, the employer may withdraw at any time by giving notice of withdrawal. Nord never gave notice that it was withdrawing from the provisions of the law after 1993. Accordingly, Nord is deemed to have elected to remain subject to the Act until notice of its withdrawal was filed with the Division of Workers' Compensation, pursuant to T.C.A. § 50-6-106 (4). See Karstens v. Wheeler Millwork, Cabinet & Supply Co., 614 S.W.2d 37, 40 (Tenn. 1981).

CONCLUSION

Unlike Barker, where the Court was required to establish as a matter of fact when the date of the accidental injury occurred, it is clear from a preponderance of the evidence that Kent knew of her injury, and the causal relationship between the injury and her employment, by November 14, 1994 when the First Report of Work Injury was filed.

Therefore, her employer, Nord, bears responsibility for her worker's compensation benefits. The trial court erred in holding Zurich liable for coverage of the worker's compensation claim and, accordingly, that decision is reversed. Further, Zurich is entitled to recover from Nord all of the benefits which it paid on behalf of Kent arising out of her work related injury.

The holding pretermits the issue of whether or not the trial court correctly denied Nord's request for attorney's fees and expenses. Nord is not entitled to its fees or expenses. There was no challenge to the trial court's award to Kent of temporary total disability, future medicals or 25% permanent partial disability to each arm and accordingly, that portion of the order is affirmed.

The judgment of the lower court is reversed in part and affirmed in part, and the cause is remanded to the Chancery Court of Davidson County for further proceedings in accordance with this order. Costs on appeal are taxed to the Appellee, Nord.

It is so ORDERED.

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Carol L. McCoy, Special Judge

CONCUR:

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Adolpho A. Birch, Associate Justice

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Lloyd Tatum, Senior Judge