

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
(January 27, 2000 Session)

HOPE COBB v. ADVANTAGE MANUFACTURING CORPORATION

**Direct Appeal from the Chancery Court for Crockett County
No. 7268 George R. Ellis, Chancellor**

No. W1999-01147-WC-R3-CV - Mailed June 8, 2000; Filed July 19, 2000

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court pursuant to *Tennessee Code Annotated* §50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The employee, Hope Cobb, insists that the trial court erred in dismissing her claim at the conclusion of a bench trial on the grounds that she failed to carry the burden of proof that she had given proper notice of her injury to her employer, Advantage Manufacturing Corporation. The employer moves that we find this appeal to be frivolous and grant attorney fees and expenses incurred as a result of this appeal. For the reasons stated in this opinion, we affirm the judgment of the trial court.

Tenn Code Ann. §50-6-225 (e) (1999) Appeal as of Right; Judgment of the Chancery Court Affirmed

WEATHERFORD, SR. J., delivered the opinion of the court, in which HOLDER, J. and, MALOAN SP. J., joined.

Michael A. Jaynes, Jackson, Tennessee for the appellant, Hope Cobb

William F. Kendall, III and B. Duane Willis, Jackson, Tennessee for appellee, Advantage Manufacturing Corporation.

MEMORANDUM OPINION

The employee, Hope Cobb, was twenty-eight years old at the time of trial. Although there are conflicts in Ms. Cobb's testimony as to whether she completed the ninth grade, she did not have any further education or vocational training after she left Crockett County High School. Ms. Cobb worked almost exclusively in the sewing field for several years.

On July 25, 1996, Ms. Cobb began working for Advantage Manufacturing Corporation. She was assigned to the plastic molder machine, a job which required her to "mash this button that would close the door and then it would make the product. I'd have to pull it out, sand it down, turn it upside

down, clip it, inspect it, put it in a plastic bag and put it in a box." This job required repetitive work with both of her hands and involved the manufacture of anywhere from 380 products to 9,000 products per shift.

According to Ms. Cobb, she soon began experiencing pain, numbness and tingling in her hands, and when the problems gradually worsened, she reported the injury to her supervisor, Ricky Ange. She testified that they had a discussion about her hands, at which time she told him she was going to see Carol Haynes, a family nurse practitioner, and he "okayed" it. Ms. Cobb stated that Mr. Ange told her to file it with her TennCare insurance.

On August 8, 1996, Ms. Cobb saw Carol Haynes, a family nurse practitioner, for the problems with her hands. Nurse Haynes had been treating Ms. Cobb and her children for approximately ten years. According to Haynes, Ms. Cobb specifically described the repetitive work that she had been performing for Advantage in relation to her symptoms. Nurse Haynes also noted in her records that Ms. Cobb indicated that she had "numbness in both hands, hurts at night. This started while she was at Little King [previous employer]."

After obtaining a history and performing a physical examination, Nurse Haynes suspected bilateral carpal tunnel syndrome and prescribed medication and wrist splints for Ms. Cobb to wear at work. Ms. Cobb returned to work wearing the wrist splints.

When asked whether she had any other discussions with Ricky Ange after she saw Carol Haynes, Ms. Cobb stated, "He never mentioned it again. I told him that it just got, you know, so severe that I had to quit. I couldn't hold the job."

Ms. Cobb testified that she told Mr. Ange, "that my hands, you know, were becoming real numb and I couldn't hardly perform the job anymore, I know two or three times, but he never did anything or offered me anything."

When questioned about how many conversations she had with Mr. Ange regarding her hands after she saw Carol Haynes, Ms. Cobb also stated: "Yes, well I thought maybe we had more than one occasion because he works right there beside us-well, did. When he was my supervisor, he would come around and check all the employees, and he saw me with them on.... Now, I might not have. I don't know. I can't recall."

Mr. Ange, a supervisor during Ms. Cobb's employment, later left the employ of Advantage under adverse circumstances. However, Mr. Ange testified that he did not remember Ms. Cobb, or whether he had ever discussed anything with her before. He stated he did not remember her complaining about any injury, but that if she had reported an injury to him he would have followed procedure by filling out an accident report and turning it in to the office.

Cynthia Jones, Human Resources Manager, testified that when she noticed Ms. Cobb wearing the wrist braces, she briefly questioned her and that Ms. Cobb told her, "It's nothing. It's where I hurt them [her hands] at my previous job." According to Ms. Jones, Ms. Cobb did not state

that the work at Advantage was aggravating her previous condition. Ms. Jones stated that she did not ask any further questions because Ms. Cobb's supervisor had not reported any problems with her ability to work. Ms. Jones indicated that one of her responsibilities as Human Resources Manager was Workers' Compensation and that she had heard of the condition of carpal tunnel syndrome.

After reviewing Ms. Cobb's attendance records, Ms. Jones stated that her last day of work was August 19, 1996, and the reason given for leaving was "went home sick". She started working for Advantage on July 25, 1996, less than a month before she left, and missed work on August 1, 16 and 17, either going home or calling in sick each time.

Ms. Jones also produced documentation from Carol Haynes, FNP, which stated that Ms. Cobb had been under her care on August 1, 2, and 20, 1996, but nothing was marked as far as work restrictions. Ms. Jones further testified that anytime she spoke with Ms. Cobb about her absences from work, Ms. Cobb told her it was due to "female problems". Ms. Jones testified that Advantage did not have any documentation that Ms. Cobb had reported to her supervisor that she had been injured while working at Advantage.

According to Ms. Cobb, she never had a conversation with Ms. Jones where she "told [Ms. Jones] that the problems [she was] having with [her] wrists for which [she was] wearing the wrist braces was related to anything other than [her] employment at Advantage Manufacturing." According to Ms. Jones the first time she knew that Ms. Cobb was claiming a work-related injury at Advantage was when Advantage was "served the papers".

Mr. Robert Fine, President of Advantage, also testified that he first learned that Ms. Cobb was claiming a work-related injury when he learned she had filed suit against the company.

Ms. Judy Ange, ex-wife of Ricky Ange, testified she had worked for Advantage for five years and part of her job as training instructor involved showing new hires how to operate the machines and going over safety rules. Ms. Ange also produced forms that Ms. Cobb had signed concerning safety rules which required an employee to report injuries to the employer. She remembered Hope Cobb because there was a height issue when she started to work for the plant. She worked with Ms. Cobb for two weeks and they never had any discussion about Ms. Cobb being injured at Advantage.

Ms. Cobb quit working for Advantage on August 19, 1996. Ms. Cobb testified at trial that she quit due to pain. She described her injury as "numbness and tingling - in both [her] hands that [she] never had before." She then stated that she had tingling while working at a previous employer, but had not had any numbness before working for Advantage.

After conservative measures failed to improve her symptoms, Carol Haynes referred Ms. Cobb to Dr. Hugh Glenn Barnett. Dr. Barnett testified that she had been sent to see him in August of 1996, but she had backed out because of fear. On March 5, 1997, Dr. Barnett examined Ms. Cobb and recommended surgery for bilateral carpal tunnel syndrome. Dr. Barnett testified in his

deposition that Ms. Cobb, “made no specific mention at that point about this [her symptoms] being, in her mind, caused by work”.

On or about March 11, 1997, Ms. Cobb filed a workers' compensation complaint in the Crockett County Chancery Court.

She underwent a carpal tunnel release on the left extremity on March 11, 1997, and a release on the right on June 23, 1997. Dr. Barnett released Ms. Cobb from his care on September 12, 1997, and opined that she retained a five (5%) percent permanent partial impairment to each upper extremity.

Dr. Joseph Boals examined Ms. Cobb on April 27, 1998, and opined that based upon the history he was given that he felt this was a work related injury and that she retained a ten (10%) percent permanent partial impairment to each upper extremity.

Immediately following the trial on April 12, 1999, the trial court held that, “the plaintiff has failed to carry the burden of proof as to notice, so the matter will be dismissed.”

ANALYSIS

The scope of review of issues of fact is *de novo* upon the record of the trial court, accompanied by a presumption of correctness of the findings, unless the preponderance of the evidence is otherwise. *Tennessee Code Annotated §50-6-225 (e)(2); Lollar v. Wal-Mart Stores, Inc.*, 767 S.W.2d 143 (Tenn. 1989). When a trial court has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, considerable deference must be accorded the trial court’s actual findings, *Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315 (Tenn. 1987).

Ms. Cobb has presented one issue in this appeal:

- (I) Whether the trial court erred in holding that Ms. Cobb failed to give proper notice to her employer of her work related injury.

Advantage has presented an additional issue:

- (II) Was Ms. Cobb’s appeal frivolous.

I. Did Ms. Cobb fail to give proper notice of her work related injury?

Tennessee Code Annotated §50-6-201 provides:

“**Notice of Injury.**—Every injured employee or such 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 which may have accrued under the provisions of the Workers' Compensation Law from the date of the accident to the giving of such notice, unless it can be shown that the employer had actual knowledge of the accident; and no compensation shall be payable under the provisions of this chapter unless such written notice is given the employer within thirty (30) days after the occurrence of the accident, unless reasonable excuse for failure to give such notice is made to the satisfaction of the tribunal to which the claim for compensation may be presented."

Where the employer denies that a claimant has given the required written notice, the claimant has the burden of showing that the employer had actual notice, that the employer has waived written notice, or that the claimant has either complied with the requirement or has a reasonable excuse for her failure to do so, for notice is an essential element of the claim. *Masters v. Industrial Garments Mfg. Co.*, 595 S.W.2d 811 (Tenn. 1980); See *Aetna Casualty and Surety Co. v. Long*, 569 S.W.2d 444 (Tenn. 1978).

In this case, Ms. Cobb testified that she told her supervisor, Ricky Ange, that she was having problems with her hands that were related to her work. However, Mr. Ange testified that he did not recall Ms. Cobb, or recall discussing anything with her before. He stated that if Ms. Cobb had reported an injury to him, he would have followed procedure by filling out an accident report and turning it into the office.

Cynthia Jones testified that Advantage did not have any documentation that Ms. Cobb had reported to her supervisor that she had been injured while working at Advantage. Ms. Jones also testified that when she saw Ms. Cobb with wrist braces, she questioned her and was told by Ms. Cobb, "[I]t's nothing, it's where I hurt them [her hands] at my previous job." According to Ms. Jones, Ms. Cobb did not state that the work at Advantage was aggravating her condition.

Ms. Jones produced documentation from Carol Haynes, FNP, which stated that Ms. Cobb had been under her care but nothing was marked as far as work restrictions. Ms. Cobb started working for Advantage on July 25, 1996, and quit less than a month later on August 19, 1996, giving her reason for leaving as "went home sick." She missed work on August 1, 16, and 17, either going home or calling in sick each time.

The record also contains inconsistent testimony regarding (1) how many discussions Ms. Cobb had with Ricky Ange regarding her hands and (2) whether the "numbness" in her hands began at her previous employment or at Advantage.

It is clear that the trial judge saw, heard and ultimately rejected the testimony of Ms. Cobb and accepted the testimony of the other witnesses.

Accordingly, the trial judge after weighing all of the facts and delineating those same facts in a six page ruling of the court, found that Ms. Cobb had not met the burden of proof as to notice pursuant to Tennessee Code Annotated § 50-6-201.

We find that the evidence does not preponderate against the findings of the trial court.

II. Was Ms. Cobb's appeal frivolous?

After considering all the facts of this case, this panel cannot say the appeal was without any merit and frivolous. Advantage's motion for this panel to find this appeal frivolous is denied.

CONCLUSION

The judgment of the trial court that the plaintiff, Ms. Cobb, failed to carry the burden of proof that she had given proper notice of her injury to her employer is affirmed. Ms. Cobb is taxed with the costs of this appeal.

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JUDGMENT

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 on appeal are taxed to the Appellant, Hope Cobb, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM