IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
January 10, 2002 Session

MELINDA F. PEELER v. KIMBERLY-CLARK CORPORATION, ET AL.

Direct Appeal from the Chancery Court for Loudon County
No. 9819 Frank V. Williams, III, Chancellor

Filed March 8, 2002

No. E2001-00541-WC-R3-CV

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The trial court dismissed the complaint finding proper notice of injury had not been given and that a reasonable excuse did not exist for the failure to give notice. The employee appealed insisting she was not aware that she had a work-related injury. Judgment of the trial court is affirmed.

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

THAYER, SP. J., delivered the opinion of the court, in which BYERS, SR. J., joined. ANDERSON, J., did not participate.

James H. Hickman, III, of Knoxville, Tennessee, for Appellant, Melinda F. Peeler.

Robert R. Davies, of Knoxville, Tennessee, for Appellees, Kimberly-Clark Corporation and Sentry Insurance Company.

MEMORANDUM OPINION

In this case the trial court dismissed the complaint finding proper notice of the injury had not been given and that a reasonable excuse did not exist for the failure to give notice.

Facts

The employee, Melinda F. Peeler, completed the 9th grade and was 52 years of age at the time

of her injury. She began working for the defendant, Kimberly-Clark Corporation, during February 1993. Prior to this employment, she had worked at several sewing factories where there was assembly-line work.

Her job with Kimberly-Clark involved working on the tissue line where bathroom tissue was produced. She was required to watch the machine but when problems with production arose, she had to do a lot of pulling and tearing to get the tissue unwrapped from the rolls and she would have to pull logs off which weighed about ten to fifteen pounds. Without going into other details, it could be stated her work required repetitive use of her hands.

She testified she was aware that an injury on the job was to be reported to her supervisor and that during September 1996 when she injured her shoulder at work she reported same. She stated that after she had been working for Kimberly-Clark about four years, she began to notice problems with her fingers and hands. During late 1998 and the early part of 1999, the swelling and pain became so bad she had difficulty sleeping at night. She talked to the company nurse and told her about her symptoms. The nurse scheduled an appointment with an orthopedic surgeon.

Dr. Rick Parson, the orthopedic, saw her on April 13, 1999 and took a history from her that "the movement of her hands interfered with her activities at work." Dr. Parsons' testimony was by deposition and he stated her condition was osteoarthritis which was not caused by her work. He said the actual cause of osteoarthritis was unknown but was frequently associated with the aging process. He saw her on three other visits up to August 1999 and then referred her to a rheumatologist as he felt he could not do much for her from an orthopedic standpoint.

The record indicates her last day of work was on July 9, 1999 and at that time, she applied for short-term disability benefits which paid 100 percent of her wages for a period of six months. After that ended, she could apply for long-term disability benefits which would pay 70 percent of her wages. She testified that she was not aware any of her problems with her hands was related to her work and that during January 2000, she became concerned about paying her debts and decided to see a lawyer about bankruptcy and also because she was afraid she was not going to obtain long-term disability benefits. From this visit with a lawyer, she was referred to another lawyer who determined, after obtaining the medical records, she had a workers' compensation claim. This suit was instituted on January 25, 2000.

Dr. Kenny R. Sizemore, the rheumatologist, testified by deposition and said he first saw her on September 7, 1999 and again for a second time during October 2000. Most all of his testimony deals with the initial visit. He took a history that her hands had been bothering her for several years. He said he told her she had osteoarthritis in both hands and he advised her to stop repetitive use of her hands either by taking an alternate job or even pursuing disability status as her condition was quite severe and advanced and would not improve as she aged. He was specifically asked several times whether he told her work activities was aggravating or contributing to her condition and he answered that he had so told her on this first visit. He said he did not send a copy of his medical report to her employer but forwarded same to Aetna Managed Disability.

During the employee's examination, she repeatedly said she did not recall Dr. Sizemore telling her that her work activities was aggravating or contributing to the problem. Her husband accompanied her on the initial visit and also testified he did not recall the doctor making that statement. As to her present condition, she testified she had not worked since leaving her employment with Kimberly-Clark and was not really able to work.

Findings of Trial Court

In rendering a decision, the trial court accepted Dr. Sizemore's testimony over that of the employee and her husband as to the notice to her that her work activities was causing or contributing to her problems. The court found notice to the employer was lacking and no reasonable excuse existed for such failure to notify. The trial judge also made an alternative ruling if it was later determined the claim was compensable, the award of disability should be fixed at 80 percent to each hand.

Standard of Review

The case is to be reviewed on appeal *de novo* accompanied by a presumption of the correctness of the findings of fact unless we find the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2).

In weighing conflicting testimony, the trial court is not bound by any witnesses' testimony but has the discretion to conclude that the testimony of one witness should be accepted over the testimony of another witness. ***Thomas v. Aetna Life & Cas. Co.,*** 812 S.W.2d 278 (Tenn. 1991); ***Orman v. Williams-Sonoma, Inc.***, 803 S.W.2d 672, 676 (Tenn. 1991). The trial court is primarily charged with the duty to resolve conflicts in the evidence and that decision will not be overturned on appeal unless the appellate court concludes the evidence preponderates against the decision made.

Analysis

The employee argues she did not know a gradual injury could result in a compensable claim; that she knew osteoarthritis was something that occurred unconnected with work conditions; that she was not aware of her claim until informed of same by her attorney; and that suit was instituted within 30 days of so being informed. Against this argument, the employer contends she was directly informed by her doctor that her work activities was causing her problems and that she elected to go for long-term disability benefits (70 percent of wages) instead of pursuing a workers' compensation claim (66 2/3 percent of wages).

Our statute, Tenn. Code Ann. § 50-6-201, requires an employee to give written notice to the employer of a work-related injury unless the employer has actual notice of the injury. The notice must be given within 30 days after the accident or becoming reasonably aware of the injury unless a reasonable excuse exists for not complying with the rule.

In determining whether an employee has shown a reasonable excuse for failure to give such notice, courts will consider the following criteria: (1) the employer's actual knowledge of the employee's injury, (2) lack of prejudice to the employer by an excusing of the requirement, and (3) the excuse or inability of the employee to timely notify the employer. ***McCaleb v. Saturn Corp.***, 910 S.W.2d 412 (Tenn. 1995). Delay in asserting a compensable claim is reasonable and justified if the employee has limited understanding of his condition and his rights and duties under the Act. ***Livingston v. Shelby Williams Industries***, 811 S.W.2d 511 (Tenn. 1991).

In cases of this nature, we find it is reasonable for a lay person to not be aware that a gradual injury may result in a compensable workers' compensation claim as opposed to an accident on-the-job causing an immediate injury. However, upon being examined by a physician and being told that work activities is causing, or aggravating or contributing to the employee's physical problems, a reasonable person would be on notice of a work-related injury.

In the present action, both the employer and employee had the same knowledge about the employee's physical condition from her last day of work, July 9, 1999, until her doctor visit on September 7, 1999. On the later date, the trial court found she was told by her doctor that her condition was related to her work and she had to stop repetitive use of her hands. No notice of any nature was given to the employer until suit was instituted on January 25, 2000, a lapse of time of about 4 ½ months.

We find no reasonable excuse to exist for failing to give notice of the injury after being informed of the injury on September 7. While lack of prejudice to the employer is also a factor to consider in cases of this nature, this factor standing alone is insufficient to excuse the failure to give notice. ***Jones v. Helena Truck Lines, Inc.***, 833 S.W.2d 62 (Tenn. 1992); ***Aluminum Company of America v. Rogers***, 364 S.W.2d 358 (Tenn. 1962).

Conclusion

The evidence does not preponderate against the finding and conclusion of the trial court. The judgment is affirmed. Costs of the appeal are assessed against the employee.

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ROGER E. THAYER, SPECIAL JUDGE

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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 facts and conclusions of law are adopted and affirmed and the decision of the Panel is made the Judgment of the Court.

The costs on appeal are taxed to the employee, Melinda F. Peeler, for which execution may issue if necessary.