IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
March 27, 2002 Session

MARK EDWARD WARF v. ZION CHRISTIAN ACADEMY, ET AL.

Direct Appeal from the Circuit Court for Maury County
No. 9263 Stella Hargrove, Judge

No. M2001-01583-WC-R3-CV - Mailed - May 15, 2002
Filed - September 9, 2002

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 judge found the plaintiff had suffered an injury arising out of his employment, but found the plaintiff was barred from recovering benefits under the Workers' Compensation Act because he failed to file timely notice of the injury which he suffered. We reverse the judgment of the trial court and remand this case thereto for further proceedings.

Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Circuit Court Reversed and Remanded

JOHN K. BYERS, SR. J., delivered the opinion of the court, in which FRANK F. DROWOTA III, C. J. and JOE C. LOSER, SP. J., joined.

Richard T. Matthews, Columbia, Tennessee, attorney for the appellant, Mark Edward Warf.

Luther E. Cantrell, Jr., Nashville, Tennessee, attorney for the appellees, Zion Christian Academy and Church Mutual Insurance Company.

MEMORANDUM OPINION

The plaintiff has a Bachelors of Science degree, was born September 13, 1959, is married and the father of three children. The plaintiff was a teacher, coach and athletic director at Zion Christian Academy (Zion). His work history is that of a teacher and coach.

On March 16, 1999, a student at Zion was electrocuted. The plaintiff was the first adult to reach the student after the accident. The plaintiff gave CPR to the student, however, this was not successful and the student died in his arms. During the course of the CPR, the student regurgitated

and the vomit was projected into the plaintiff's mouth and on his clothes and on the student. After the event, the plaintiff and others met with the headmaster and a member of the Board of Directors of Zion. The plaintiff was emotional and upset at the time.

The school brought a counselor, a psychologist, to the academy to meet with the teacher. The plaintiff was very upset and expressed his grief at seeing the student for the last time as he lay dead in vomit. The counselor, with the headmaster, helped arrange for the plaintiff to see the student in the casket at a private viewing.[1]

The plaintiff testified that when school resumed a few days after the event he was unable to concentrate and perform his duties. He was admitted to the hospital on May 18, 1999 with chest pains which apparently were stress related.

The plaintiff resigned from Zion at the end of the school year in May 1999. He testified his mental status was not the cause of this but was because of changes made by the headmaster. The headmaster testified the plaintiff's work performance was deficient prior to the death of the student and the retention of the plaintiff was not likely because of this.

The plaintiff attempted to teach at other schools but was unable to do so because of his mental condition. Ultimately, the plaintiff began to receive medical care for his condition.

The trial judge made the following finding of facts concerning the plaintiff's injury:

> WORK-RELATED MENTAL INJURY: The Court finds that Plaintiff has suffered a permanent mental injury, arising out of his employment, caused by an identifiable, stressful work-related event producing sudden mental stimulus of fright, shock and excessive, unexpected anxiety; to-wit: the electrocution death of a student. Further, that Plaintiff's stress is extraordinary and unusual in comparison to stress that is ordinarily expected. As a result, the Court finds that Plaintiff's vocational ability has been diminished.

The trial court further found that plaintiff knew of his mental illness by November 30, 1999 and that he should have given notice to Zion within thirty days of this. The plaintiff did not give notice, written or otherwise, until July 6, 2000 when he delivered a message to the headmaster concerning his mental injury. The trial judge found the plaintiff gave no reasonable excuse for failure to do so. The insurance company sent a letter to the plaintiff after he delivered the message to the head master that the plaintiff would receive no compensation because he suffered no physical injury.

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[1]The viewing and funeral was to be closed casket.

Discussion

Tennessee Code Annotated § 50-6-201 requires that an employee or an employee representative shall, immediately upon the occurrence of an injury, or as soon thereafter as practical, give or cause to be given to the employer who has no actual notice, written notice of the injury. This notice must be given within thirty days after the occurrence of the accident, unless reasonable excuse for failure to give the notice is shown.

Tennessee Code Annotated § 50-6-202 deals with the content of the notice which is to be given and further provides that no technical deficit in the notice shall bar recovery of benefits unless the employer can show prejudice as a result of the deficit.

There is no question the plaintiff did not give written notice in this case prior to July 6, 2000, some sixteen months after the incident at Zion. Further, the record indicates the plaintiff did not give written notice within thirty days after being diagnosed with a mental illness caused by the incident at Zion. The plaintiff's right to recover in this case, if at all, depends on whether the defendant had actual notice of the injury or whether, if not, they were prejudiced by the failure to receive the notice.

When the plaintiff did give notice, the defendant's insurance company wrote him letter denying benefits on the basis he did not sustain a physical injury. At the trial a representative of the insurance company gave two conclusory responses to show they were prejudiced by the failure of the plaintiff to give notice – they were unable to manage any temporary loss of wages and they were not able to select and furnish medical care for the plaintiff. The witness gave no details of how they would have mitigated the temporary loss of employment, if any, by the plaintiff or what medical help they would have furnished.

It strikes us that the insurance company would not likely have done either, based upon their claim of non-compensability because of the lack of any physical injury.

There is no doubt in the record that Zion had actual notice of the traumatic event that precipitated the plaintiff's mental illness. Further, the school was aware that the plaintiff had been more emotionally disturbed by the event than others. The school helped arrange a private viewing of the student's body, on the suggestion of the psychologist whom the school furnished, in an effort to relieve some of the plaintiff's stress.

We conclude that the defendant had actual knowledge of the accident which caused the injury as well as actual notice of the mental distress suffered by the plaintiff. Thus the failure to give thirty days written notice of the injury is not a bar to recovery in this case. *See,* ***Gluck Bros. v. Pollard***, 426 S.W.2d 763 (Tenn. 1968).

We conclude further that the lack of notice as a defense is not viable because there is a lack of showing of prejudice to the defendant. The purpose of the notice is to give the employer an opportunity to make an investigation while the facts are know and to furnish medical care to the

plaintiff. ***McCaleb v. Saturn Corp.***, 910 S.W.2d 412 (Tenn. 1995). As we said before, the defendant knew the facts and based on the claim of non-compensability there is no indication they would have furnished medical care.

We find the failure of notice within thirty days of the occurrence of the accident and injury does not bar the plaintiff from compensation. We therefore reverse the judgment of the trial court and remand the case to trial court for further proceedings.

The costs of this appeal are taxed to the defendant.

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JOHN K. BYERS, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

MARK EDWARD WARF v. ZION CHRISTIAN ACADEMY AND CHURCH MUTUAL INSURANCE COMPANY

Circuit Court for Maury County
No. 9263

No. M2001-01583-SC-WCM-CV - Filed - September 9, 2002

ORDER

This case is before the Court upon the motion for review filed by Zion Christian Academy and Church Mutual Insurance Company 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.

It appears to the Court that the motion for review is not well-taken and is therefore denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed to Zion Christian Academy and Church Mutual Insurance Company, for which execution may issue if necessary.

PER CURIAM

DROWOTA, J. - NOT PARTICIPATING