IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
January 16, 2004 Session

ROGER D. REYNOLDS v. TENNESSEE MUNICIPAL LEAGUE RISK MANAGEMENT POOL and SUE ANN HEAD, DIRECTOR OF DIVISION OF WORKERS' COMPENSATION, STATE OF TENNESSEE

Direct Appeal from the Chancery Court for Weakley County
No. 17561 William D. Acree, Jr., Judge

No. W2003-00448-WC-R3-CV- Mailed January 29, 2004; Filed March 10, 2004

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with Tennessee Code Annotated section 50-6-225(e)(3) for hearing and reporting to the Supreme Court of the finding of fact and conclusions of law. The trial court found that the Employee failed to prove causation and failed to give notice as required by Tennessee Code Annotated section 50-6-201. We affirm.

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

JOE H. WALKER, III, SP.J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and JAMES L. WEATHERFORD, SR.J., joined.

Jeffrey P. Boyd, Jackson, Tennessee, for the appellant, Roger D. Reynolds

John D. Burleson and Michael L. Mansfield, Jackson, Tennessee, for the appellee, Tennessee Municipal League Risk Management Pool

MEMORANDUM OPINION

FACTUAL BACKGROUND

At the time of trial, Employee was 50 years of age. He has a twelfth grade education, and a history of factory work. He was working for the City of Sharon as director of public works in May 2001. As he was getting off a backhoe he felt pain in his right shoulder.

The next day Employee went to his family physician because his brother had bone cancer in the shoulder and he wanted to be sure he did not have the same problem. His family physician

referred him to Dr. Peter Lund. After diagnostic tests, Dr. Lund determined that the problem was not bone cancer and performed surgery for a torn rotator cuff. After surgery, the Employee had a discussion with Dr. Lund and determined that possibly the shoulder problem was related to work. Employee then reported this injury to his Employer.

CAUSATION

The trial judge found that causation was not proven.

Regarding the issue of causation, it is well-settled that in order to be eligible for workers' compensation benefits, an employee must suffer "an injury by accident arising out of and in the course of employment which causes either disablement or death." Tenn. Code Ann. § 50-6-102(a)(5). The phrase "arising out of" refers to causation. The causation requirement is satisfied if the injury has a rational, causal connection to the work. Reeser v. Yellow Freight Sys., Inc., 938 S.W.2d 690 (Tenn. 1997) (citations omitted); Fink v. Caudle, 856 S.W.2d 952 (Tenn. 1993). Although causation cannot be based upon merely speculative or conjectural proof, absolute certainty is not required. Any reasonable doubt in this regard is to be construed in favor of the employee. We have thus consistently held that an award may properly be based upon medical testimony to the effect that a given incident "could be" the cause of the employee's injury, when there is also lay testimony from which it reasonably may be inferred that the incident was in fact the cause of the injury. Reeser v. Yellow Freight Sys., Inc., 938 S.W.2d 690 (Tenn. 1997).

Employee testified that in May 2001 he was cleaning a plot of land for his Employer and mentioned to an employee that his shoulder had been bothering him a little bit. As he started to get off the backhoe a pain hit him in the shoulder. He went to the doctor the next day because his brother had bone cancer in the shoulder.

Employee did not relate to his Employer or his doctors any injury at work. Employee filled out a form for Dr. Lund in which he indicated the reason for his visit was neck, shoulder, and elbow problems, and that the duration of the symptoms was three months. Employee indicated to his doctor that the problems were not work-related.

Dr. Lund testified that the history he took from Employee and the record does not reflect that there is any direct relationship between the injury and the job. There was no one-time injury to his shoulder nor was there any repetitive work-related activity that would indicate that the job was the cause of the injury. Dr. Lund testified that he told his patient that he could not necessarily support his position that the job was the cause. Dr. Lund felt that there had not been enough “information provided that really was enough evidence to me to say that there was a direct cause-and-effect relationship.”

Dr. Lund testified that he first saw Employee shortly after the day that he felt the pain at work, and Employee indicated the pain had been present three months. When he first came to Dr. Lund he indicated his brother had cancer in the shoulder and wanted to check out his pain in the shoulder. When pressed whether the torn rotator cuff could be related to his work, Dr. Lund responded, “if the question is could he have had – could he have developed a rotator cuff tear that day, anything’s possible.”

Employee was seen for an evaluation by Dr. Boals, who testified he was given a history that Employee was injured when driving a backhoe and developed severe pain in his right shoulder. Dr. Boals testified that he based causation on the history given and that if the history was not correct or incomplete that his opinion on causation might change.

We find that the evidence does not preponderate against the trial court's finding that causation was not proven in this case. From our independent examination of the record, we are not persuaded the trial court abused its discretion by accepting the opinion of Dr. Lund, the treating physician.

NOTICE

Where, as here, the failure to give notice is pleaded, the burden is on the employee to prove that the notice was given, that he had a reasonable excuse for not giving it, or that the employer had actual knowledge. Aetna Casualty and Surety Co. v. Long, 569 S.W.2d 444 (Tenn. 1978).

Tennessee Code Annotated section 50-6-201, provides in pertinent part:

> Every injured employee or his representative shall, immediately upon the occurrence of an injury, or as soon thereafter as is reasonable and practical, give or cause to be given to the employer who has not actual notice, written notice of injury, . . . and no compensation shall be payable under the provisions of this chapter unless such written notice is given to the employer within thirty (30) days after the occurrence of the accident, unless reasonable excuse for failure to give such notice is made. . . .

Employee asserts that he has a "reasonable excuse" for failing to give notice within the thirty days. However, the trial judge found that Employee did not present a reasonable excuse for failure to provide notice. Employee did not relate a sudden pain to his Employer. He was in a supervisory capacity and knew about the notice requirement, gave a history of pain for three months in the shoulder to his doctor, and feared cancer from which his brother had suffered.

We find that the evidence does not preponderate against the trial court's finding that the Employee did not have a reasonable excuse for failure to give timely notice.

The judgment of the trial court is therefore affirmed. Costs are taxed to the appellant.

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JOE H. WALKER, III, SP.J.

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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 on appeal are taxed to the Appellant, Roger D. Reynolds, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM