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

WILLIAM R. SMOTHERS v. MARKEL LIGHTING, INC; CIGNA INSURANCE CO.; GENERAL ACCIDENT INSURANCE CO. and SUE ANN HEAD, DIRECTOR OF DIVISION OF WORKERS' COMPENSATION, STATE OF TENNESSEE

Direct Appeal from the Circuit Court for Henry County
No. 1137 Julian P. Guinn, Judge

No. W2002-02933-WC-R3-CV- Mailed February 6, 2004; Filed March 11, 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 findings of fact and conclusions of law. The trial court found that the Employee failed to give notice as required by TennesseeC.Annotated section 50-6-201. We affirm.

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

Jay E. Degroot, Jackson, Tennessee, for the appellant, William R. Smothers.

Lawrence W. White and Mark W. Raines, Memphis, Tennessee, for the appellees, Markel Lighting and General Accident Insurance Company.

Robert O. Binkley, Jr., Tennessee, for the appellee, CIGNA Insurance Company.

Paul Todd Nicks, Memphis, Tennessee, for the appellee, Revell Construction Company.

Attorney General Paul G. Summers, and Dianne Dycus, Deputy Attorney General, Nashville, Tennessee, for the appellee, Second Injury Fund.

MEMORANDUM OPINION

FACTUAL BACKGROUND

At the time of trial, Employee was 42 years of age, with a GED diploma. He worked at Mar-Kel Lighting from 1993 until December 1996. His right shoulder was injured in 1994 and a worker's compensation claim was settled. He began work for Revell Construction in June 1997.

Employee alleges on June 10, 1997, he was taking pipe off a truck, and after work his shoulder began to hurt.

Employee testified that he told his supervisor, Mr. Vaughn, on the day of the alleged injury, at lunch, "I hurt my shoulder a little bit and I'm going to, you know, probably need to go see the doctor about it."

He did not ask for a doctor from Revell Construction, but called his former employer, Mar-Kel, for permission to see his approved doctor from the worker's compensation injury there, and saw Dr. St. Clair on June 11, 1997. Dr. St. Clair testified he treated Employee for the injury suffered at Mar-Kel Lighting, and saw him on June 11, 1997. Employee did not give Dr. St. Clair a history of injury at Revell Construction.

After diagnostic tests, it was determined Employee had a torn rotator cuff. Dr. St. Clair believed the continuous work at Mar-Kel Lighting could have caused Employee's shoulder problems.

Dr. William Fly took over treatment, and performed surgery for a torn rotator cuff. The only history of injury given to Dr. Fly was what Employee told another physician in l998, which was a history of injury at Mar-Kel in 1994 when Employee was pushing bins. Dr. Fly did not know if the injury to the rotator cuff was a re-injury in 1997, or was a natural progression from the 1994 injury.

Employee testified that after he learned he had a torn rotator cuff, he gave written notice to both Mar-Kel and to Revell Construction, since he was not sure which would be responsible for the treatment. Employee testified he called Revell Construction to find out where they were working and went to the job site in McKenzie, Tennessee, and handed a note to his foreman, Richard Vaughn, about the on-the-job injury.

Richard Vaughn testified that Employee never reported an on-the-job injury to him at any time, did not tell him about his shoulder hurting after pulling pipe on June 10, 1997, and did not give him a note or paper in McKenzie. He first learned about the alleged injury when Revell Construction was served with the Complaint.

Mike Revell testified that he owns Revell Construction with his brother, and the first notice that they had of an alleged on-the-job injury was when he was served with the Complaint on June 28, 1998.

NOTICE

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. Tenn. Code Ann. § 50-6-225 (e)(2).

This tribunal is not bound by the trial court's findings but instead conducts an independent examination of the record to determine where the preponderance lies. Galloway v. Memphis Drum Serv., 822 S.W.2d 584, 586 (Tenn. 1991). Where the trial judge has seen and heard the witnesses, especially if issues of credibility and weight to be given oral testimony are involved, considerable deference must be accorded those circumstances on review, because it is the trial court which had the opportunity to observe the witnesses' demeanor and to hear the in-court testimony. Long v. Tri-Con Ind., Ltd., 996 S.W.2d 173, 178 (Tenn. 1999).

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).

T.C.A. § 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. . . .

The testimony of Employee about notice of the alleged injury was directly opposite to the testimony of Employer's witnesses. The trial judge observed the witnesses and accredited the witnesses who testified that no notice was given about an alleged injury at Revell until a year after Employee alleges an incident occurred. This conclusion is supported by other evidence in the record, including the history given by Employee in the medical depositions. In addition, Employee had multiple inconsistencies in his testimony and between his trial and deposition testimonies. We can not say that the trial judge was in error accrediting the testimony of Employer's witnesses.

We find that the evidence does not preponderate against the trial court's finding that notice was not proven in this case.

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

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, William R. Smothers, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM