

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON

September 11, 2003 Session

JIMMY HICKS v. TRAVELERS INSURANCE COMPANY

**Direct Appeal from the Chancery Court for Dyer County
No. 02C46 J. Steven Stafford, Chancellor**

No. W2003-00768-SC-WCM-CV - Mailed December 23, 2003; Filed April 7, 2004

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. In this appeal, the injured employee insists the trial court erred in disallowing his claim for failure to give timely written notice. As discussed below, the panel has concluded the evidence preponderates in favor of a finding that written notice was unnecessary because the employer had actual notice. The judgment of dismissal for lack of notice is therefore reversed, the trial court's conditional award of benefits is affirmed, and the cause is remanded for all purposes.

Tenn. Code Ann. § 50-6-225(e) (Supp 2002.) Appeal as of Right; Judgment of the Chancery Court Reversed in Part; Affirmed in Part

JOE C. LOSER, JR., SP. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and JOE H. WALKER, III, SP. J., joined.

James R. Krenis, Hill & Boren, Jackson, Tennessee, for the appellant, Jimmy Hicks

Paul Todd Nicks, Walker Law Office, Memphis, Tennessee, for the appellee, Travelers Insurance Company

MEMORANDUM OPINION

The employee or claimant, Jimmy Hicks, initiated this civil action against his employer's former insurance carrier, Reliance, to recover workers' compensation benefits for work related carpal tunnel syndrome. Travelers was substituted for Reliance by amendment. Travelers denied liability for failure to give timely written notice and affirmatively averred the claim was barred by the statute of limitations. After a trial on the merits, the trial court, noting that it had "struggled" with the issue, disallowed the claim upon a finding that "there was not proper notice given." The conclusion was

based on a decision contained in an unpublished opinion. As to the statute of limitations issue, the trial court concluded that it was “not really an issue and is not dispositive of this case.” The trial court also issued a conditional award of benefits. Mr. Hicks has appealed, seeking review only of the trial court’s finding that he failed to give proper notice of his injury.

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).

The essential facts are undisputed. The claimant is approximately fifty-three years old with a high school education and experience as a factory worker. He worked for the employer, Dyersburg Fabrics, for over 30 years in jobs requiring repetitive use of the hands and arms. He first reported discomfort in his hands in 1995 and the employer provided him with splints to wear while working. He did not know at the time that the condition was work related or was a permanent condition, but he told the employer what he did know, that he was having pain at work. He continued working and, in 2000, visited Dr. Michael Roland, who ordered a nerve conduction study. The test revealed carpal tunnel syndrome.

Dr. Roland referred the claimant to Dr. Gary Kellett, whom the claimant told he thought the condition might be related to his work. Dr. Kellett recommended surgery. Notwithstanding that recommendation, the claimant continued working for Dyersburg Fabrics until the plant closed in August 2001. Shortly after the plant closure, the claimant contacted Travelers, the employer’s insurer, seeking workers’ compensation benefits. Travelers denied the claim as being barred by the statute of limitations. Surgery was eventually performed by Dr. Lowell Stonecipher.

The claimant testified that he did not tell the employer about his visit to Dr. Kellett on April 17, 2000. He stated that he did have an idea, at that time, that his injury could be work related, but had no such idea in 1995, when he first reported his pain to the employer. He was able to work until December 10, 2001, when surgery was performed. Travelers had actual notice of the claim before the surgery was done.

Immediately upon the occurrence of an injury, or as soon thereafter as is reasonable and practicable, an injured employee must, unless the employer has actual knowledge of the accident, give written notice of the injury to his employer. Tenn. Code Ann. § 50-6-201(a). From the undisputed facts of this case, we are persuaded the employer had actual notice of the claimant’s injury, or at least as much knowledge as he was able to articulate, as early as 1995, when he first reported to the employer that his arms were hurting at work and the employer provided him with

splints.

However, even if no actual notice were given to the employer, we would nonetheless hold that proper notice was given in this case. Tenn. Code Ann. §§ 50-6-201(b)(1) and 50-6-201(b)(2) provide alternatives for when an employee with an injury that occurred as the result of gradual or cumulative events or trauma must give notice. We conclude that the injury in this case, carpal tunnel syndrome, is just such an injury.

Under Tenn. Code Ann. § 50-6-201(b)(1), the employee may give the employer notice of an injury that occurs as the result of gradual or cumulative events or trauma within thirty days after the employee “[k]nows or reasonably should know that such employee has suffered a work-related injury that has resulted in permanent physical impairment.” Here, the employee was unaware that his injury was permanent until late 2001.

Under Tenn. Code Ann. § 50-6-201(b)(2), the employee may give the employer notice of an injury that occurs as the result of gradual or cumulative events or trauma within thirty days after the employee “[i]s rendered unable to perform such employee’s normal work activities as the result of the work-related injury and the employee knows or reasonably should know that the injury was caused by the work-related activities.” In the present case, the employee was not rendered unable to continue to perform his normal work activities until surgery was performed on December 10, 2001 and January 14, 2002 by Dr. Stonecipher.

The appellee’s reliance on unpublished authority, particularly Zurich-American Ins. Co. v. Kent, M1998-00886-SC-WCM-CV, 2000 WL 765100 (Tenn. Workers Comp. Panel), is misplaced.

The judgment of dismissal for lack of notice is therefore reversed. The trial court’s conditional award of benefits is affirmed. Costs are taxed to the appellee and the cause remanded for all purposes.

JOE C. LOSER, JR.

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON
September 11, 2003 Session

JIMMY HICKS v. TRAVELERS INSURANCE COMPANY

**Chancery Court for Dyer County
No. 02C46**

No. W2003-00768-SC-WCM-CV - Filed April 7, 2004

ORDER

This case is before the Court upon the motion for review filed by Travelers 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 Travelers Insurance Company, for which execution may issue if necessary.

PER CURIAM

Holder, J. - Not Participating