

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

February 18, 2004 Session

**MICHAEL L. COLLINS v. ADVENT ELECTRIC d/b/a ENCOMPASS
ELECTRICAL TECHNOLOGIES OF EAST TENNESSEE, INC., ET AL.**

**Direct Appeal from the Circuit Court for Jefferson County
No. 18094-IV O. Duane Slone, Circuit Judge**

Filed May 25, 2004

No. E2003-01072-WC-R3-CV - Mailed April 19, 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. The trial court awarded the employee 70 percent permanent partial disability. The insurance carrier contends the trial court was in error in finding (1) proper notice of injury had been given, (2) the action was timely filed and not barred by the one year statute of limitations, and (3) the expert medical testimony was sufficient to establish causation of injury. Judgment is affirmed.

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

ROGER E. THAYER, SP. J., delivered the opinion of the court, in which WILLIAM M. BARKER, J., and H. DAVID CATE, SP. J., joined.

Linda J. Hamilton Mowles, Knoxville, Tennessee, for Appellant, Insurance Company Of The State Of Pennsylvania.

James M. Davis, Morristown, Tennessee, for Appellee, Michael L. Collins.

MEMORANDUM OPINION

The insurance carrier, Insurance Company Of The State Of Pennsylvania, has appealed from the trial court's action in awarding the employee, Michael L. Collins, 70 percent permanent partial disability to the body as a whole.

Factual Background

Employee Collins, a forty-eight-year-old high school graduate with vocational training, was employed as an electrician by Advent Electric Company¹ during November 1999 when he sustained an injury as a result of falling from a ladder at the Nova Corporation job site. He stated he was pulling electrical wires when the ladder twisted causing him to fall to the concrete floor where he struck his head and shoulder. He testified he immediately felt a burning sensation in the back of his neck and he cut his back by striking the corner of a metal transformer. The incident happened near the end of the workday and he said he did not think he was seriously hurt. Several days later, his supervisor, Rick McIntosh, came to the job site to pick up some materials and he stated he told McIntosh that he had fallen from the ladder. He said the supervisor then asked if he had gone to see a doctor and he replied he did not think it was necessary.

After several months, he began to experience problems with his arm becoming numb and shoulder pain and he finally went to see his family doctor, Dr. Kenneth Hill. He told the doctor he thought he was having some bursitis problems and he was later given cortisone injections. After some period of time while under Dr. Hill's care, it was decided that the employee should have an MRI examination. When he went to have the MRI exam, he was in so much pain he could not lay down long enough to take the examination. It was then rescheduled and Dr. Hill gave him a shot immediately before going for the MRI exam. The result of the test was positive and Dr. Hill referred the employee to Dr. Robert E. Finelli, a neurosurgeon. Dr. Finelli saw him for the first time during May 2001 and told him he had a serious injury which would require two surgical procedures.

The employee then notified his employer of the doctor's diagnosis and recommendations and requested that he be allowed to file a workers' compensation claim. Advent Electric Company declined to treat the matter as a workers' compensation claim since the employee's supervisor denied being aware of the injury and also because of the elapse of time since the incident allegedly happened. Dr. Finelli operated on the employee during May 2001; this suit was instituted on July 20, 2001 and the employee was terminated from employment because of his physical condition on August 27, 2001. During the next month of September, a second surgical procedure was performed.

As to his condition at the time of the trial, he told the trial court the first surgery eliminated a great deal of his pain and the second surgery also helped his condition but he was still having a lot of problems. He stated he was still having pain in his right shoulder and his neck and he felt it was moving on to his left side; that he could not sleep well and still had some numbness down his right arm into his fingers; that sometimes his hand would "go dead". Since leaving employment with Advent Electric he said he had worked at some odd jobs here and there and was employed at the time of the trial with Precision Electric Company but his employer was not aware of his physical problems and he would have to stop working as soon as he was called on to do electrician work.

¹ Advent Electric Company d/b/a Encompass Electrical Technologies of East Tennessee, Inc., was originally a party defendant but plaintiff took a voluntary nonsuit before trial after his employer filed a voluntary petition in bankruptcy.

Witness Burt Day, also an electrician, testified he was working with Collins when the accident happened and that he saw him fall from the ladder to the floor. He stated that as he fell, the employee's elbow struck him as he came down. Day also testified he was present several days later when supervisor McIntosh came to the job site and that he heard Collins tell him that he had fallen from the ladder.

Witness Ann Collins, the employee's wife, testified that when he came home on the day in question he appeared to be "all stoved up"; that he could not lay down and he slept in a recliner chair in a straight up position. She stated he remained under Dr. Hill's care for a long time thinking the problem was just bursitis and they were never aware of the seriousness of the injury until Dr. Finelli told them of his condition in May 2001.

Dr. Robert E. Finelli, a neurosurgeon, was the only witness to testify by deposition. His records indicate a history of falling from the ladder at work during November 1999 and also of his condition becoming much worse about two months before the first visit. He stated the MRI exam was positive at three different levels on the right, C4-5, C5-6 and C6-7, and treatment would involve two separate surgical procedures. The first cervical fusion was performed on May 31, 2001 and the second on August 30, 2001. He was of the opinion the surgeries eliminated a lot of his problems and he had a 30.5 percent impairment rating. Certain permanent restrictions were imposed and the doctor said that eventually the employee could function at some level in the labor market but he did not know what that would be.

Defense witness Rick McIntosh testified he was a job foreman over employee Collins at one time but he denied ever being told or notified by Collins that he had been involved in an accident at work. He also stated he was not working near the Nova Corporation job site in November 1999.

Defense witness Frank Ensor, safety director at the time in question, testified he frequently visited all the job sites and he was never notified or given a report of any injury by Mr. Collins.

Finding of Trial Court

The trial court found the employee sustained his injuries at work during November 1999; that proper notice of the injury was rendered and the action was timely filed; that plaintiff had a 30.5 percent impairment and that he did not make a meaningful return to work. The employee was awarded 70 percent permanent partial disability to the body as a whole.

Issues on Appeal

On appeal the insurance carrier contends the trial court was in error in finding (1) proper notice of the injury was given, (2) the claim was timely filed and not barred by the statute of limitation, and (3) the expert medical testimony was sufficient to establish causation of the injury.

Standard of Review

The standard of review of factual issues in a workers' compensation case is *de novo* upon the record of the trial court, accompanied by a presumption of correctness of the trial court's findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). The review of legal issues is *de novo*. **Tucker v. Foamex, LP**, 31 S.W.3d 241, 242 (Tenn. 2000).

Analysis - Notice of Injury

The insurance company contends employee Collins did not give proper notice of his injury. Tennessee Code Annotated § 50-6-201 requires an employee to give written notice to the employer of a work-related injury unless the employee has actual notice of the injury. The notice must be given within thirty days after the accident or after becoming reasonably aware of the injury unless a reasonable excuse exists for not complying with the rule. Case law provides that the notice must be given to an agent or representative of the employer who is in a supervisory or management capacity. **Kirk v. Magnavox Consumer Electronics Co.**, 665 S.W.2d 711 (Tenn. 1984).

In the present case there was a sharp conflict in the evidence on the notice issue and the trial court resolved the conflicting evidence by accepting the employee's testimony and the testimony of his co-worker. When the trial court has seen the witnesses and heard the testimony, especially where issues of credibility and the weight of testimony are involved, the appellate court must extend considerable deference to the trial court's factual findings. **Richards v. Liberty Mut. Ins. Co.**, 70 S.W.3d 729 (Tenn. 2002). In our review we cannot say the evidence preponderates against the court's conclusion on this issue.

Analysis - Statute of Limitations

An issue is raised that the claim was barred by the running of the one year statute of limitations, Tenn. Code Ann. § 50-6-302. The statute requires a claim must be filed within one year of the accident or within one year of the cessation of the payment of compensation benefits. However, the running of the statute is suspended until by reasonable care and diligence it is discoverable and apparent that an injury compensable under workers' compensation law has been sustained. **Ferrell v. Cigna Property & Cas. Ins., Co.**, 33 S.W.3d 731 (Tenn. 2000); **Ogden v. Matrix Vision**, 838 S.W.2d 528 (Tenn. 1992); **Norton Co. v. Coffin**, 553 S.W.2d 751 (Tenn. 1977). Thus, under the last rule, it is the date that an employee's disability manifests itself to a person of reasonable diligence, rather than the date of the accident, that triggers the statute of limitations. **McLerran v. Mid-South Stone, Inc.**, 695 S.W.2d 181 (Tenn. 1985); **Jones v. Home Indem. Ins. Co.**, 679 S.W.2d 445 (Tenn. 1984).

The record indicated this action was filed on July 20, 2001, which was approximately twenty months after the accident during November 1999. Although the employee began having problems several months after the accident date, he did not associate his symptoms with the accident and was not aware he had serious permanent injuries to his neck until advised by his doctor on May 11, 2001.

Under the authorities herein cited, we hold the statute of limitations was suspended until May 11, 2001 and that the filing of the case on July 20, 2001, was well within the one year statutory period.

Analysis - Causation

Lastly, it is insisted the deposition testimony of Dr. Finelli was not legally sufficient to establish the injury was caused by the accident. In reviewing the doctor's testimony it is evident he did not form a definite opinion that the accident caused the injury. However, he did testify that the injuries appeared to be of long-term duration because he did not find a soft ruptured disc but found evidence more in the nature of bone spurs which would give more support to a November 1999 accident and injury. The nature of this testimony is in effect saying that the accident during November 1999 could have caused the injuries in question. That is all that is necessary when the court has other evidence to indicate the accident in fact did cause such injuries. *See, Long v. Tri-Con Indus.*, 996 S.W.2d 173, 177 (Tenn. 1999).

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. An award may be properly based upon medical testimony to the effect that a given incident "could be" the cause of the employee's injury. *Reeser v. Yellow Freight Sys. Inc.*, 938 S.W.2d 690 (Tenn. 1997).

Conclusion

The evidence does not preponderate against the findings of the trial court and the judgment is affirmed. Costs of the appeal are taxed to the insurance company.

ROGER E. THAYER, SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE
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**MICHAEL L. COLLINS VS. ADVENT ELECTRIC D/B/A ENCOMPASS
ELECTRICAL TECHNOLOGIES OF EAST TENNESSEE, INC. AND
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA**

**Jefferson County Circuit Court
No. 18094 IV**

May 25, 2004

No. E2003- 001072-WC-R3-CV

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 appellant, Insurance Company Of The State of Pennsylvania, for which execution may issue if necessary.