

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
AUGUST 2, 2004, Session

**JOYCE R. KROLL, and CIGNA HEALTHCARE, Intervenor v. CARADON
CUSTOM CONTROLS, INC., HEATCRAFT, INC., GENERAL ACCIDENT
INSURANCE COMPANY OF AMERICA, AND PACIFIC EMPLOYERS
INSURANCE COMPANY.**

Direct Appeal from the Chancery Court of Rutherford County
No. 43324 Robert Corlew, Judge

**No. M2003-01973-WC-R3-CV - Mailed: January 14, 2005
Filed - March 17, 2005**

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 of findings of fact and conclusions of law. The employee contends the trial court erred (1) when it held that the employee's phlebitis did not arise out of and in the scope of her employment, (2) in finding that the employee's torn rotator cuff was not timely reported, and (3) in finding that the employee's torn rotator cuff did not arise out of and in the scope of her employment. We affirm the trial court's finding that the employee's phlebitis did not arise out of her employment. However, we reverse the trial court's findings that the employee's rotator cuff was not timely reported and did not arise out of and in the course of her employment.

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

STAFFORD, SP. J., delivered the opinion of the Panel, in which DROWOTA, C.J., and SCOTT, SR. J., joined.

Ann Buntin Steiner, Law Offices of Steiner and Steiner, Nashville, TN, for the appellant, Joyce Kroll.

A. Scott Derrick, Gullet, Sanford, Robinson, and Martin, PLLC, Nashville, TN, for the intervenor/appellant, CIGNA Healthcare

John R. Lewis, Nashville, TN, for the appellees, Heatcraft, Inc. and Pacific Employers Insurance Co.

Diana Benson Burns, Mitchell & Mitchell, Murfreesboro, TN, for the appellee, Caradon Custom Controls, Inc.

MEMORANDUM OPINION

The employee, Joyce R. Kroll, is a fifty-four-year-old woman. She began working for the employer, Heatcraft, Inc. in 1992. Heatcraft, Inc. was bought by Caradon Custom Controls, Inc. in August of 1999. In 1997 the employee's legs began to swell and cause her a great deal of pain. The employee's family physician examined her legs and concluded that she had varicose veins and found that the swelling and pain in her legs was caused by phlebitis, a recurring condition commonly suffered by those with varicose veins. The bouts of pain and swelling increased in frequency until September 1999 when her physician told her that she could no longer work because of the phlebitis.

In September 1999, the employee took medical leave to have surgery to correct her varicose veins. This surgery was successful and she has enjoyed a full recovery.

In June 1999, the employee began working at a new job in the factory. In this position she was required to use hydraulic tools. These tools generated a great deal of twisting force which put stress on her right shoulder. Once she began using these tools, the employee's shoulder ached, but she dismissed this pain as being a result of her unfamiliarity with this sort of work. After a month of working with the hydraulic tools, the employee returned to her previous job, and shortly afterwards told her supervisor, Crystal Wells, that she was feeling pain in her shoulder.

The employee's shoulder pain initially subsided after she stopped using the hydraulic tools, but as time went on, it worsened. By November 1999, the employee's condition had deteriorated; her shoulder constantly hurt, and she was hardly able to move her right arm. The employee called her supervisor, Ms. Wells, and the Human Resources Director at Caradon, C.J. Maloney, to inform them that her shoulder was badly injured and that this injury occurred in the course of her employment. In addition, after speaking with the employee, Ms. Wells called Ms. Maloney and told her about the employee's injury.

The testimony of Dr. Susan Andrews, a general practitioner and Dr. Roderick Vaughn, an orthopaedic surgeon, was presented by deposition. Dr. Andrews treated the employee for phlebitis from 1997, when the employee first developed the condition, until September 1999, when Dr. Andrews referred her to a specialist. Dr. Andrews would not express an opinion as to whether the employee's phlebitis arose out of her employment, although she did testify that the employee's work could possibly have caused or aggravated the condition.

On November 18, 1999, the employee met with Dr. Vaughn regarding her shoulder injury. After taking X-rays, Dr. Vaughn discovered that the employee had a torn rotator cuff. Dr. Vaughn attributed this tear to the employee's work with hydraulic tools. He explained that once

the employee damaged her shoulder using the hydraulic tools, the shoulder began a slow process of degeneration. He believed that her daily activities worsened her condition, causing the shoulder to degenerate until the rotator cuff finally tore.

The trial court found that neither of the employee's injuries arose out of her employment and that the employee did not give timely notice of her shoulder injury.

STANDARD OF REVIEW

Our review of findings of fact in a workers' compensation case is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the trial court's findings of fact, unless the preponderance of the evidence is otherwise. Tenn.Code Ann. § 50-6-225(e)(2) (2003 Supp.); Walker v. Saturn Corp., 986 S.W.2d 204, 207 (Tenn.1998).

Phlebitis

We find that the evidence does not preponderate against the trial court's finding that the employee's phlebitis did not arise out of her employment. This finding is amply supported by the record. The only evidence that supports the link between the injury and employment is the testimony of the employee's family physician, Dr. Andrews, who testified that the phlebitis *could have* arisen in the course of employment. However, Dr. Andrews refused to opine that the employee's phlebitis actually did arise from her employment despite the repeated entreaties of employee's counsel. As Dr. Andrews testimony is the only evidence introduced regarding the source of the phlebitis, we find that the employee failed to establish a causal link between her phlebitis and her employment. Therefore, we affirm the trial court's findings with respect to the employee's phlebitis condition.

Notice of Injury

The trial court determined that the employee did not give timely notice of her shoulder injury. We respectfully disagree with this determination.

Tennessee Code Annotated § 50-6-201 requires an employee to immediately notify an employer of the occurrence of an injury. Notice must be given within thirty days after the injury occurs unless the employee has a reasonable excuse for failure to give the notice, or unless the employer has actual notice of the injury. Where the injury is the result of gradual or cumulative events, notice must be given within thirty days of the time that the employee realizes that she has suffered a permanent physical impairment. Tenn. Code Ann. § 50-6-201(b)(1). “[T]he notice must reasonably convey to the employer that the employee has suffered an injury arising out of

and in the course of the employment.” Jones v. Sterling Last Corp. 962 S.W.2d 469, 471 (Tenn. 1998). Defects or inaccuracies in notice do not bar compensation unless the employer was prejudiced by the failure to give proper notice. Clarendon v. Baptist Memorial Hospital, 796 S.W.2d 685, 689 (Tenn.1990).

It is undisputed that the employee did not specifically inform the employer that she was making a workers’ compensation claim until May 2000. It is also undisputed that the employee informed the defendant of her shoulder problem when it occurred, and that as soon as the employee’s injury became debilitating, she informed the employer of that as well.

A review of the record reveals that the employer had ample actual notice of the employee’s injury. The employee informed her supervisor, Ms. Wells, as soon as her shoulder began to hurt. In addition, as soon as the shoulder degenerated to the point where the employee could no longer work, the employee told Ms. Wells and the Human Resources Director, C.J. Maloney, that her shoulder was badly injured and that this damage had occurred in the course of her employment. Additionally, C.J. Maloney testified that the employer was not prejudiced by the employee’s failure to provide written notice of the injury. This evidence clearly preponderates against a finding that the employee did not give timely notice. Therefore, we find that timely notice of the shoulder injury was given.

INJURY ARISING OUT OF AND WITHIN THE COURSE AND SCOPE OF EMPLOYMENT

An employee’s right to receive workers’ compensation depends on proof of two elements. The employee must show that (1) the injury occurred in the course of her employment and (2) arose out of her employment. Tenn.Code Ann. § 50-6-103(a); Anderson v. Save-A-Lot, Ltd. 989 S.W.2d 277, 279 (Tenn. 1999); McCurry v. Container Corp. of America, 982 S.W.2d 841, 843 (Tenn. 1998). “[I]n the course of employment” refer[s] to the time, place, and circumstances in which the injury occurred.”McCurry, 982 S.W.2d 841, 843. ““Arising out of” refers to the origin of the incident in terms of causation.” Phillips v. A&H Const. Co., Inc.134 S.W.3d 145, 150 (Tenn. 2004).

At trial the employee asserted that her injuries arose from working with hydraulic tools. The plant supervisor admitted that the employee used those tools in the course of her employment, but the defense disputed any causal connection between her employment and the shoulder injury. Thus, the crucial inquiry is whether the employee’s shoulder injury arose out of her employment.

The trial court found that the employee’s shoulder injury was not compensable under the Workers' Compensation Act because the employee did not demonstrate a causal relationship between her employment and the injury. We find that the evidence preponderates against this conclusion.

The trial court listed a number of facts in support of its conclusion. However, we find that these facts do not support that conclusion. The trial court found the deposition testimony of the treating physician, Dr. Vaughn, to be ambivalent as to the cause of the employee's injuries. We have carefully reviewed Dr. Vaughn's deposition and find that he attributed the cause of the employee's injury to her employment without qualification.

The trial court found it significant that the employee did not check a box used to indicate that her shoulder injury was work related when she filled out a medical history form at Dr. Vaughn's office. From this omission, the trial court reasoned that the employee did not believe her injury was caused by her employment. On this same form, however, the employee wrote that she had injured herself while using a hydraulic tool at work. Viewing this form as a whole, it is clear that the employee believed her injury was caused by her employment.

The employee asserted that her shoulder injury, which occurred in November 1999, was caused by her work with hydraulic tools in June 1999. The trial court found that the five months between these two dates made the employee's use of the tools too remote in time from her injury to have been the cause. In addition, on the medical form mentioned above, the employee wrote that she had been experiencing two weeks of continuous pain in response to a query asking how long "the condition" had been present. The trial court found this response to be evidence that the employee injured her shoulder after she had left Caradon.

We are unable to agree with the conclusions of the trial court. We find that the deposition testimony of Dr. Vaughn satisfactorily explains the gradual onset of the employee's injury and the resulting appearance of continuous pain five months later. Dr. Vaughn testified that the employee's injury was a degenerative, gradual condition. After the employee initially injured her shoulder with the hydraulic tools, her normal daily activities caused the shoulder to degenerate. The onset of continuous pain in November was the result of the normal progression of an injury that arose out of employment. Consequently, based on Dr. Vaughn's testimony, we find the employee's shoulder injury to be compensable.¹

CONCLUSION

We have determined that the judgment of the trial court should be affirmed in part and reversed in part. We find that the trial court correctly determined that the employee's phlebitis was not a compensable injury. However, we find that the evidence preponderates against the trial court's determinations that the employee did not give timely notice of her shoulder injury or suffer a compensable injury to her shoulder. Accordingly, the judgment of the trial court is reversed, and the case is remanded for a determination of the benefits due to the employee, a determination of which employer is liable, and a determination of whether CIGNA Insurance should be reimbursed for the employee's medical expenses. The costs of this appeal are taxed equally to Heatcraft, Inc. and Caradon Custom Controls, Inc.

J. STEVEN STAFFORD, SPECIAL JUDGE

¹ We note in passing that when a trial court has heard medical proof but rules in the employer's favor precluding all recovery, as here, the court should also make contingent findings concerning the extent the employee would otherwise be entitled to recover. See Jones v. Helena Truck Lines, Inc., 833 S.W.2d 62, 65 (Tenn.1992).

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No. M2003-01973-SC-WCM-CV - Filed - March 17, 2005

JUDGMENT

This case is before the Court upon Heatcraft, Inc., and Pacific Employers Insurance Company, and Caradon Custom Controls, Inc., motions for review 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 are incorporated herein by reference.

Whereupon, it appears to the Court that the motions for review are not well-taken and should be DENIED; 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 will be assessed to Heatcraft, Inc., Pacific Employers Insurance Company, and Caradon Custom Controls, Inc., for which execution may issue if necessary.

PER CURIAM

Drowota, J., not participating.