

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

December 9, 2004 Session

**GINA GUNN, ET AL. v. INDEPENDENT RADIOLOGY ASSOC., P.C., ET AL.**

**Direct Appeal from the Chancery Court for Dyer County  
No. 02C312 J. Steven Stafford, Chancellor**

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**No. W2004-01243-SC-WCM-CV - Mailed March 29, 2005; Filed June 21, 2005**

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This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court 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. In this appeal, the issue is which of the multiple insurance carriers is responsible for paying the workers' compensation benefits of Ms. Gina Gunn, the injured employee. The trial court ruled that Hartford Insurance Company, the insurance carrier when Ms. Gunn underwent surgery for carpal tunnel syndrome, was responsible for payment. On the basis of recent developments in the law, the Panel has concluded that the judgment of the trial court should be reversed and that Realm National Insurance Company, the insurance carrier when Ms. Gunn filed the notice of her injury, is liable for payments of Ms. Gunn's benefits.

**Tenn. Code Ann. § 50-6-225(e) (Supp. 2003) Appeal as of Right;  
Judgment of the Chancery Court Reversed**

MARTHA B. BRASFIELD, SP.J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and W. FRANK BROWN, III, SP.J., joined.

S. Newton Anderson and Mildred Sabbatini, Memphis, Tennessee, for Defendant/Appellant, The Hartford Insurance Company.

Jason A. Lee and David Brett Burrow, Nashville, Tennessee, for the Defendant/Appellee, Realm National Insurance Company.

Paul Todd Nicks, Germantown, Tennessee, for Intervening Plaintiff, Travelers Insurance Company.

## MEMORANDUM OPINION

### Background

The issue in this appeal is which of three insurance carriers is liable for the payment of workers' compensation benefits to Ms. Gina Gunn ("Ms. Gunn") for a work-related injury she sustained while employed by Independent Radiology Assoc., P.C. ("Independent Radiology"). Travelers Insurance Company ("Travelers") was the insurance carrier from November 27, 1998 until November 27, 1999. Realm National Insurance Company ("Realm") was the insurance carrier from November 27, 1999 through November 27, 2000. The Hartford Insurance Company ("Hartford") was the insurance carrier beginning November 28, 2001.

In May 1999, Ms. Gunn began to experience problems with her hands, which arose in the course and scope of her employment with Independent Radiology. She completed a First Report of Injury and was referred to Dr. Keith Douglas Nord for treatment. Dr. Nord diagnosed carpal tunnel syndrome and treated Ms. Gunn conservatively with injections and splints. Her condition improved substantially. Her last visit was on December 3, 1999.<sup>1</sup> Travelers was the workers' compensation insurance carrier at this time and paid the medical expenses.

Ms. Gunn continued her employment with Independent Radiology. In May 2001, she again began to experience significant problems with her hands. She notified her employer and prepared another First Report of Injury, listing the date of injury as May 16, 2001, the date she filed the report. On this date, Realm was the workers' compensation carrier for Independent Radiology.

On June 22, 2001, Ms. Gunn returned to Dr. Nord for treatment of her carpal tunnel syndrome. At this visit, Dr. Nord advised Ms. Gunn that surgery was inevitable.

Neither Travelers nor Realm accepted liability for the payment of Ms. Gunn's May 2001 workers' compensation claim. Although Realm was the workers' compensation insurance carrier for Independent Radiology on May 16, 2001, the date Ms. Gunn gave notice of her injury, Realm denied that it was liable, arguing that Ms. Gunn's condition was a continuation of her carpal tunnel syndrome that had been diagnosed in May 1999. Travelers argued that Realm was liable. Neither insurer paid benefits. In September 2001, Ms. Gunn filed a Request for Assistance with the Department of Labor. By order dated January 23, 2002, the Department of Labor ordered Travelers to pay Ms. Gunn's medical expenses and other benefits.<sup>2</sup>

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Ms. Gunn cancelled an appointment scheduled for May 12, 2000.

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By January 23, 2002, Travelers had agreed to pay the medical expenses and other benefits, and Ms. Gunn had

On December 18, 2001, Ms. Gunn underwent carpal tunnel surgery.<sup>3</sup> Ms. Gunn did not miss any work until the surgery. On December 18, 2001, Hartford was the workers' compensation insurance carrier.

On May 29, 2002, Travelers filed an action against Ms. Gunn, seeking to recover the benefits paid to Ms. Gunn from December 18, 2001 forward. On June 26, 2002, Ms. Gunn filed a workers' compensation lawsuit against Realm and Hartford. The two causes of action were consolidated for trial.

On November 17, 2002, Travelers filed a motion for summary judgment, alleging that it should not be liable for the payment of Ms. Gunn's workers' compensation benefits. On November 18, 2002, Hartford filed a similar motion for summary judgment. On February 5, 2004, the trial court granted Travelers' motion for summary judgment, ruled that Travelers was not liable for the payment of Ms. Gunn's workers' compensation benefits, and dismissed Travelers from the lawsuit. No ruling was entered on Hartford's motion for summary judgment.

On February 20, 2004, Travelers filed a motion to intervene to protect its subrogation rights for the medical treatment and temporary total disability payments it had paid pursuant to the order from the Department of Labor. The trial court granted Travelers' motion to intervene.

On May 5, 2004, the trial court approved the proposed workers' compensation settlement as to the benefits Ms. Gunn would receive under her workers' compensation claim. All four parties stipulated to the amount of benefits paid by Travelers for Ms. Gunn's surgery and other benefits. As to the disputed issue, which insurance carrier was liable for payment of benefits, the trial court relied on Barker v. Home-Crest Corp., 805 S.W.2d 373, 375 (Tenn. 1991), which sets forth the "last day worked" rule, and found that Hartford was liable for the payment of Ms. Gunn's workers' compensation benefits because it was the carrier on December 17, 2001, the last day that Ms. Gunn worked.

Hartford appealed, arguing equitable principles. When Ms. Gunn's second flare-up of carpal tunnel syndrome occurred in May 2001, Realm was the insurance carrier and initially authorized and paid for medical treatment. When Realm learned of the May 1999 injury, a dispute arose between Travelers and Realm as to which insurer was responsible for payment of benefits. When this dispute arose, Hartford was not involved. Because of this dispute, no further medical benefits were provided, and surgery was delayed until December 18, 2001. Hartford argued that Realm was avoiding its legal responsibility by delaying needed medical treatment and surgery to its insured employee, which is not the intent of the workers' compensation law.

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already undergone carpal tunnel surgery.

3 Ms. Gunn underwent 4 separate surgeries for carpal tunnel syndrome.

Realm contended that the ruling of the trial court was correct and that Barker was the proper authority upon which to rely.

Travelers, as an intervenor, stated that the amount of money owed to Travelers under its subrogation claim had been stipulated at trial, and the only issue to be determined was whether Realm or Hartford was responsible for reimbursing Travelers for the benefits it paid on behalf of Ms. Gunn, and which insurer would pay Ms. Gunn for her permanent partial disability.

After the trial court's ruling on May 5, 2004, and prior to oral argument before the Panel, the Supreme Court of Tennessee issued its decision in Bone v. Saturn Corp., 148 S.W.3d 69 (Tenn. 2004).<sup>4</sup> In Bone, the Court ruled, "we hold that the last day worked rule does not apply when determining an employee's compensation rate if the employee has given the employer actual notice of a gradually occurring injury prior to missing time from work on account of the injury." Id. at 74. At oral argument, the Panel brought the Bone case to the attention of the attorneys and gave them ten days in which to file supplemental briefs and apply the Bone decision to this case.

In its supplemental brief, Travelers argued that the issue of whether it was liable for the payment of Ms. Gunn's workers' compensation benefits was determined when the trial court granted its motion for summary judgment and dismissed it from the lawsuit. Neither Realm nor Hartford had raised the issue of Travelers' liability on appeal, and thus they were now barred from raising that issue. Travelers also argued that, under Bone, Realm, not Travelers, should be liable.

In its supplemental brief, Hartford also argued that, under Bone, Realm is liable because it was the insurance carrier on May 16, 2001, when Ms. Gunn gave notice of her injury and filed her report of injury.

In its supplemental brief, Realm argued that, under Bone, Travelers is the liable carrier as Ms. Gunn filed her First Notice of Injury in May 1999, while the Travelers policy was in effect. Realm further maintains that if Bone does not apply, then Hartford is the responsible carrier under the "last day worked" rule of Barker.

### **Standard of Review**

No disputed issues of facts are to be determined in this appeal. The disputed issues deal with conclusions of law, which are subject to *de novo* review on appeal, without any

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The opinion in Bone was issued on November 2, 2004.

presumption of correctness. Hill v. Wilson Sporting Goods Co., 104 S.W.3d 844, 846 (Tenn. 2002).

### Analysis

The issue in this lawsuit has always been which of three insurance carriers was legally responsible for the payment of Ms. Gunn's workers' compensation benefits. Realm cannot reasonably argue that it was caught by surprise by the Bone decision. In June 2001, Realm argued that Travelers was the liable insurer, and later, in December 2001, Realm argued that Hartford was the liable insurer. Realm should have raised the issue of Travelers' liability in its appeal. It did not. The issue is now waived. Travelers cannot be found to be the responsible insurer.<sup>5</sup>

The finding that Travelers cannot be the responsible carrier leads to the original issue on appeal: which insurance carrier, Realm or Hartford, pays the workers' compensation benefits of Ms. Gunn.

The Court in Bone stated as follows: “[W]e hold that the last day worked rule does not apply when determining an employee's compensation rate if the employee has given the actual notice of a gradually occurring injury prior to missing time from work on account of the injury.” 148 S.W.3d at 74.

The Supreme Court in Bone discussed two unreported cases from the workers' compensation panel, Keel v. Saturn Corp., No. 01S01-9803-CV-00046, 1999 Tenn. LEXIS 97, 1999 WL 85521 (Tenn. Workers' Comp. Panel Feb. 22, 1999), and Frazier v. Saturn Corp., No. M2002-01564-SC-WCM-CV, 2003 Tenn. LEXIS 1214, 2003 WL 22976605 (Tenn. Workers' Comp. Panel Dec. 19, 2003), in which the respective panels applied the “last day worked” rule to establish the date of injury in order to determine the employees' weekly compensation rate. The Bone Court declined to follow these rulings. 148 S.W.3d at 73.

The Bone Court also discussed two other unreported cases from the workers' compensation panel, Zurich-Am. Ins. v. Kent, No. M1998-00886-SC-WCM-CV, 2000 Tenn. LEXIS 313, 2000 WL 765100 (Tenn. Workers' Comp. Panel June 13, 2000), and Carey v. Camden Castings Ctr., Inc., No. W2002-01367-WC-R3-CV, 2003 Tenn. LEXIS 716, 2003 WL 21999382 (Tenn. Workers' Comp. Panel Aug. 18, 2003). The Bone Court noted that in these

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<sup>5</sup> In its supplemental brief, Travelers raised the issue that it could not now be held liable because it was dismissed from this lawsuit on February 5, 2004. Neither Realm nor Hartford appealed that decision, nor did either raise the issue of Travelers' liability in the appeal from the order of May 5, 2004. The Panel declines to rule which of these two dates determines the time for filing the appeal as to Travelers' liability. Regardless of which date is determinative, the time for appealing the issue of Travelers' liability expired well before December 2004, when the supplemental briefs were filed.

two cases, the respective panels held that the application of the “last day worked” rule serves no useful purpose “[w]hen a definite date of injury is known, i.e., when the employee knows the nature of her injury and files a written notice of a work-related injury . . . .” 148 S.W.3d at 73. The Bone Court agreed with the reasoning in Zurich and Carey. Id.

It appears from the language in Bone that, in cases involving gradually occurring injuries, the date of the injury is determined when the employee gives actual notice of the work-related injury to the employer prior to missing work on account of the injury.<sup>6</sup> It is not necessary to rely on the “last day worked” rule in this case, because both the employer and the employee were aware that an injury had occurred and written notice had been given and filed with the employer.

Ms. Gunn and Independent Radiology knew that Ms. Gunn had sustained a work-related injury on May 16, 2001, when she gave notice of the work-related injury by filing a report of injury with Independent Radiology. As the date of the injury has been established, there is no reason to apply the “last day worked” rule to establish a different date of injury.

Realm was the insurance carrier on May 16, 2001, when the report of injury was filed; therefore, Realm is the insurance carrier liable for the payment of Ms. Gunn’s workers’ compensation benefits.

### **Conclusion**

In light of the foregoing and the Bone decision, the Panel reverses the decision of the trial court and holds that the “last day worked” rule does not apply to a gradually occurring injury when the injured employee knows that he or she has suffered a work-related injury and has given actual notice of the injury to the employer. Actual notice of this injury was given on May 16, 2001; Realm was the workers compensation insurance carrier on that date. Therefore, Realm is liable for paying Ms. Gunn’s workers’ compensation benefits.

Court costs are assessed against Realm and its sureties, for which execution shall issue if necessary.

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MARTHA B. BRASFIELD, SPECIAL JUDGE

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On February 23, 2005, the Supreme Court issued its decision in Mahoney v. Nationsbank of TENN., \_\_\_\_\_ S.W.3d \_\_\_\_\_ (Tenn. 2005), in which the Court applied Bone and held that the employee suffered a compensable accidental injury for carpal tunnel syndrome when she first provided notice of the injury to the employer.

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**ORDER**

This case is before the Court upon motion for review filed by the appellant, Independent Radiology Associates, P.C., et al., pursuant to Tenn. Code. Ann. § 50-6-225(e)(5)(B) the entire record, including the order of referral to the Special Workers' Compensation Appeal 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. Also the "Motion to Strike" filed by Travelers Insurance Company is 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 Realm National Insurance Company, for which execution may issue if necessary.

PER CURIAM

Holder, J., not participating