

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
September 29, 2006

**MICHAEL SHANE BOST v. STAN McNABB CHEVROLET-OLDS-
CADILLAC, INC. ET AL.**

**Appeal from the Chancery Court for Coffee County
No. 04-195 John W. Rollins, Judge**

**No. M2006-00675-WC-R3-CV - Mailed: January 31, 2007
Filed - March 5, 2007**

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 of findings of fact and conclusions of law. In this appeal, the employee Michael Shane Bost argues that the trial court erred in denying him benefits based on his failure to comply with the notice provisions of the Workers' Compensation Law, Tenn. Code Ann. § 50-6-201 (Supp. 2003). We agree. Accordingly, we reverse the judgment of the trial court and remand this matter for entry of a judgment awarding the benefits due employee.

**Tenn. Code Ann. § 50-6-225(e) (2005) Appeal as of Right;
Judgment of the Trial Court Reversed; Remanded.**

MARIETTA M. SHIPLEY, SP. J., delivered the opinion of the court, in which CORNELIA A. CLARK, J., AND DONALD P. HARRIS, SP. J., joined.

Donald D. Zuccarello, Carey E. Kefauver, Nashville, Tennessee, for the appellant, Michael Shane Bost.

Andrew C. Rambo, Shelbyville, Tennessee, for the appellees, Stan McNabb Chevrolet-Olds-Cadillac, Inc., and Brentwood Services.

MEMORANDUM OPINION

FACTUAL BACKGROUND

The appellant, employee Michael Shane Bost, testified that he began working as an automobile mechanic for Stan McNabb Chevrolet-Olds-Cadillac, Inc. ("McNabb") in 1994 after

completing high school. Bost testified that he injured his back in October 2003 while performing work for McNabb on a Cadillac Northstar engine. As he was maneuvering the engine around, the pry bar slipped. As it did he twisted his back, felt a pop and then “kind of a rip.” He continued working with pain the rest of the day. Bost told his supervisor, Danny Robertson, that he had pulled his back but “nothing was really said.” On October 17, within two or three days of the injury, Bost went to his personal physician, Dr. Stephen Bills, and reported that he had “pulled [his] back when [he] was working on a car.” Bost testified that he told Dr. Bills’ nurse that he was “not sure” if it was a workers’ compensation claim because he did not know how the process worked. Dr. Bills treated the pain as a pulled muscle and told Bost to take it easy.

Bost continued to work for another month in spite of continuing pain. In mid-November, he suffered particularly severe pain at work while descending some steps. As he realized the pain was worsening, Bost told Robertson he had “pulled [his] back on the Northstar, it was getting worse and [he] was going to have to go back to the doctor because at that time [he] couldn’t go on with the job because [he] was hurting.”

Bost revisited Dr. Bills on November 14, 2003. Dr. Bills sent Bost for an MRI which was performed on November 17, 2003. Bost saw Dr. Bills again on November 20, 2003, to discuss the MRI results. Dr. Bills advised Bost to take some time off from work and to see Dr. Sayed Emadian for a surgical consult. Bost testified:

I went back and when I went back in that day after I had received Dr. Bills telling me what was going on and telling me I needed to take time off, when I went in excuse me, I went back to [McNabb’s] to tell them what was going on, [Robertson] was standing at the counter with a couple of customers and a couple of technicians and me and him were actually talking at that time about what Dr. Bills had said and I told him, I said

.....

I told him when I hurt my back back here, they’re talking now about sending me for a surgical consult to see what’s going on because Dr. Bills thinks I am possibly going to need surgery and basically [Robertson] was like, you know, more or less worrying about getting the cars out than anything.

Bost testified that Robertson did not tell him to fill out an injury report or send him to the front office to report his injury.

On Dr. Bills’ referral, Bost saw Dr. Emadian initially on November 21, 2003, for a surgical consult. Dr. Emadian prescribed physical therapy and medications. Bost signed up for physical therapy, but could not afford the co-pay through his personal health insurance. Bost testified that he told Robertson he was supposed to be receiving physical therapy but could not afford it. Instead, he kept working with great pain.

Dr. Emadian performed surgery on Bost on April 12, 2004, and Bost was off work for two weeks. Bost testified that he called Terry Jones, the office manager at McNabb, and asked whether he had disability and whether he could file under workers' compensation. Bost acknowledged that this was the first time he said the words "workers' compensation." Jones referred Bost to Alidia Gore, who handled workers' compensation matters for McNabb. Gore told Bost it was too late to file a claim. Bost stopped working on June 28, 2004, because he was no longer physically able to do the job.

Bost had a second surgery in April 2005. That surgery did little to ease the pain. Bost presently takes morphine, a muscle relaxant, and trigger point injections. He testified that he can no longer work as a mechanic, nor can he drive due to the pain medication.

John Damron testified that he worked at McNabb for nine years and was working as a mechanic there in October and November of 2003. Danny Robertson was his supervisor. Damron worked with Bost and recalled Bost's injury. Damron testified that Bost had been

working on a Cadillac with a Northstar engine. . . . At some point in time while [Bost] was working on that engine, I noticed him having trouble, you know, he was hobbling along when he was walking. He was having some trouble and in the process I remember I was in [Robertson's] office just talking to him about something and [Bost] came in and was complaining about his back hurting him.

According to Damron, Bost told Robertson that he had hurt his back working on the Cadillac engine. Prior to that time, Bost had had no problems with his back of which Damron was aware.

James Daniel Robertson, Bost's supervisor at McNabb, testified that he recalled Bost telling him that his back was hurting. Robertson stated that he "would have figured" from their conversation that Bost's pain resulted from his job working on cars. Robertson first became aware of Bost's problem in late October or early November 2003. Robertson did not report the injury to the head office or fill out an injury report. He testified that he "decided that someone in the office needed in on this" after Bost told him about his impending surgery the following spring.

Terry Jones, the office manager and comptroller for McNabb, testified that the procedure for making a workers' compensation claim at McNabb called for the employee to notify his department manager and one or both persons were then to report the injury to the human resource manager, "immediately." Records admitted through Jones indicate that Bost worked full days on October 13-17, 2003, and October 20 and 21, 2003. Bost apparently did not work on October 22, 2003. Bost clocked in on November 14, 2003, but not on the subsequent three workdays; he collected sick pay for those four days. According to Jones, Robertson authorized this sick pay.

Mr. Stan McNabb, owner of McNabb, testified that the employee handbook specified that, when an employee was injured, he was to notify "immediately" his supervisor or someone in the office. The relevant page from the handbook, introduced through Mr. McNabb, provides, "All work-

related injuries and illnesses, regardless of their extent or nature and unsafe working conditions and/o[r] practices must be immediately reported to management.” Also introduced through Mr. McNabb was a written form signed by Bost acknowledging his receipt of the employee handbook.

Dr. Bills, an internist, testified by way of deposition. Dr. Bills saw Bost on October 17, 2003, for “low back strain.” Dr. Bills’ findings were “primarily muscle strain without evidence of significant radiculopathy.” Dr. Bills gave Bost samples of a nonsteroidal medication. Dr. Bills testified that Bost told him he strained his back lifting an engine. On November 14, 2003, Bost returned to Dr. Bills complaining of increased pain. Dr. Bill’s notes indicate, “[Bost] can hardly sit down,” and that he had “significant tenderness in his LS spine, actually in the upper lumbar area radiating into his left leg.” Dr. Bills prescribed Medrol and Toradol and referred him to Dr. Robert Rabiea for an MRI.

According to Dr. Rabiea’s patient history notes, which were admitted through Dr. Bills, Dr. Rabiea described Bost as “a 27-year-old male with low back pain for one month. The patient was hurt lifting an engine.” According to Dr. Bills, the MRI revealed that Bost had “significant disc herniation at L4-L5 with probable impingement on left L5 nerve root along with a moderate left sided intervertebral neuroforamial stenosis.” Upon receipt of these results, Dr. Bills referred Bost to Dr. Sayed Emadian for a surgical consult.

Bost initially saw Dr. Emadian on November 21, 2003. Dr. Emadian prescribed physical therapy and epidural injections. Dr. Emadian’s notes, admitted through Dr. Bills, indicate that surgery would be a last resort. Bost returned to Dr. Emadian on February 19, 2004, and complained of radiating pain into his legs and pain in his low back. Dr. Emadian’s notes reflect that Bost described his symptoms as “severe” over the previous two weeks. Dr. Emadian gave Bost various options, and Bost decided to try a second epidural steroid injection and physical therapy.

Dr. Emadian performed surgery on April 12, 2004, which his notes describe as a “left L-5 microscopic lumbar discectomy.” Bost returned for follow-up on May 14, 2004, and stated that he had some modest improvement but that pain still radiated down his left buttock and thigh. Bost reported that he was on light duty at work. Bost returned to Dr. Emadian in June 2004 complaining of low back pain and greater pain radiating to the left leg than to the right leg. Bost eventually sought help from Dr. Doug Mathews, a neurological surgeon. Dr. Mathews performed a “decompressive lumbar laminectomy with pedicle screw fixation” in April 2005. Bost saw Dr. Mathews three times following this surgery and continued to have persistent back pain. Dr. Mathews sent him to a pain management clinic. Dr. Mathew’s August 2005 notes state, “Patient is totally disabled at this time.”

TRIAL COURT’S RULING

The trial court made a preliminary ruling on October 5, 2004, that Bost had not given adequate notice of his injury to McNabb. The court found by a preponderance of the evidence that the injury was “in all probability” work-related but that there was no notice given. Accordingly, the

court denied any temporary benefits and medical expenses. In March 2006, after a full trial, the trial court entered a “Final Order” providing as follows:

the Court finds that the Plaintiff has a 23% permanent impairment which renders him 100% permanently disabled as a result of the work related accident. The court finds that the plaintiff has a compensation rate of \$377.17, medical bills of \$35,695.18, out of pocket expenses [of] \$1,429.36, and a temporary total period of 84 weeks. Further, the court finds the plaintiff’s injury was a result of a work related accident but that the plaintiff failed to give the defendant employer proper notice of his injury as required by statute.

It is therefore ORDERED, ADJUDGED, AND DECREED that Plaintiff’s injury is not compensable under the Tennessee Workers’ Compensation Law and the case is dismissed with the Plaintiff receiving no benefits.

Only Bost appeals from this order, alleging that the trial court erred in its finding that he is not entitled to benefits due to his failure to give McNabb proper notice of his injury.

STANDARD OF REVIEW

This Court reviews a trial court’s findings of fact in a workers’ compensation case de novo with a presumption of correctness, “unless the preponderance of the evidence is otherwise.” Tenn. Code Ann. § 50-6-225(e)(2) (Supp. 2003). When the trial court has seen the witnesses and heard the testimony, especially where issues of credibility and the weight of testimony are involved, we must extend considerable deference to the trial court’s factual findings. Mahoney v. Nationsbank of Tenn., N.A., 158 S.W.3d 340, 343 (Tenn. 2005). We extend no deference to the trial court’s findings when reviewing documentary evidence such as depositions, however. Id. As to questions of law, our standard of review is de novo with no presumption of correctness. Id.

ANALYSIS

Tennessee’s Workers’ Compensation Law requires an employee who is injured while performing his job to give written notice of that injury to his employer within thirty days unless the employer has “actual notice” of the injury. Tenn. Code Ann. § 50-6-201(a) (Supp. 2003); see McCaleb v. Saturn Corp., 910 S.W.2d 412, 415 (Tenn. Workers’ Comp. Panel 1995). The reasons for requiring written notice are “(1) to give the employer an opportunity to make an investigation while the facts are accessible, and (2) to enable the employer to provide timely and proper treatment for the injured employee.” McCaleb, 910 S.W.2d at 415. Unless the employee has a reasonable excuse for failing to give his employer the required written notice, no benefits are recoverable. See Tenn. Code Ann. § 50-6-201(a) (Supp. 2003); McCaleb, 910 S.W.2d at 415. In order to determine whether an employee has shown a reasonable excuse for failure to give the required notice, this Court considers the following criteria: “(1) the employer’s actual knowledge of the employee’s injury, (2) lack of prejudice to the employer by an excusing of the requirement, and (3) the excuse

or inability of the employee to timely notify the employer.” McCaleb, 910 S.W.2d at 415. Moreover, “[d]elay in asserting a compensable claim is reasonable and justified if the employee has limited understanding of his condition and his rights and duties under the [Workers’ Compensation Law].” Id.

In this case, Bost argues that the preponderance of the evidence demonstrates that McNabb had actual notice of his injury, thereby relieving him of the duty to give McNabb written notice of his injury within thirty days. We agree.

According to Bost, he told his supervisor, Danny Robertson, that he injured his back while working on a Cadillac engine. While it is unclear whether Bost told Robertson on the day of the injury, Bost testified that he specifically told Robertson prior to his second visit to Dr. Bills that he had “pulled [his] back on the Northstar, it was getting worse and [he] was going to have to go back to the doctor because at that time [he] couldn’t go on with the job because [he] was hurting.” That second visit occurred on November 14, 2003, within thirty days from the date of the injury.

Robertson admitted that Bost told him that his back was hurting and further admitted that he realized Bost’s pain was work-related. Roberts acknowledged that he first became aware of Bost’s problem in late October or early November 2003, well within thirty days of Bost’s injury. Other proof established that Bost conformed with company policy by informing Robertson of his injury.

Bost’s co-worker John Damron corroborated Bost’s testimony that he told Robertson he had hurt his back while working on the Cadillac engine.

McNabb’s time records indicate that Bost missed work on October 22, 2003, and again in mid-November and that the latter four days were deemed “sick pay” by Robertson. These records corroborate Bost’s testimony that his back injury caused him to miss work during this period. They also corroborate the proof that Robertson knew of the injury at this time.

This evidence establishes that McNabb had actual notice of Bost’s injury within a short time of its occurrence and preponderates against the trial court’s finding that Bost failed to give McNabb adequate notice.

Even if we were to agree with the trial court that Bost failed to give proper notice to McNabb that he had suffered a workers’ compensation injury, the Workers’ Compensation Law also provides that “[n]o defect or inaccuracy in the notice shall be a bar to compensation, unless the employer can show to the satisfaction of the tribunal in which the matter is pending that the employer was prejudiced by the failure to give the proper notice, and then only to the extent of such prejudice.” Tenn. Code Ann. § 50-6-202(a)(2) (1999). The court below made no findings with respect to any prejudice allegedly suffered by McNabb. In its brief to this Court, McNabb argues only that it

was deprived the privilege of securing proper medical attention for Mr. Bost. He failed to complete the doctor ordered physical therapy which may have resolved his

future problems. Further, he was treated by at least two non approved doctors. Additionally, there would have been an opportunity for a prompt and general investigation of the alleged circumstances of the accident to determine the legitimacy of same.

McNabb cites to no proof establishing that Bost's injury would have been healed had he completed a course of physical therapy, or that he should have followed a different medical course of action. Moreover, there is no proof in the record that Bost's injury occurred in any manner different than he claims, or that he would not have suffered his eventual disability if he had seen different doctors.

The record establishes that Robertson knew Bost was seeing a doctor for his back. Neither Robertson nor anyone else at McNabb instructed Bost that he should be seeing a different doctor. Bost testified he told Robertson that he was supposed to be receiving physical therapy but could not afford the co-pay. Again, no one told Bost that he should see a different doctor or that he needed to file a workers' compensation claim in order to receive the physical therapy. McNabb's claim that it was "deprived of the privilege of securing proper medical attention" for Bost is therefore disingenuous. Had Robertson reported Bost's injury to the front office, as he should have done as soon as he learned of it, Bost's claim would have been handled appropriately within a month of the injury occurring. McNabb will not now be heard to complain about the results of Robertson's failure to report Bost's injury.

CONCLUSION

The judgment of the trial court denying benefits is reversed. This matter is remanded to the trial court for entry of a judgment awarding Bost benefits as previously determined. The costs of this cause are assessed against the defendant appellees, for which execution may issue.

MARIETTA M. SHIPLEY, SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
SEPTEMBER 29, 2006 SESSION

**MICHAEL SHANE BOST v. STAN McNABB CHEVROLET-OLDS-
CADILLAC, INC., ET AL**

**Chancery Court for Coffee County
No.04-195**

No. M2006-00675-WC-R3-CV - Filed - March 05, 2007

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 appeals 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 will be paid by the Defendant/Appellees, Stan McNabb Chevrolet-Olds-Cadillac, Inc. And Brentwood Services, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM