IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
September 15, 2006 Session

ALAN HALE v. U.S. XPRESS ENTERPRISES, INC.

Direct Appeal from the Chancery Court for Claiborne County
No. 13385 Honorable Billy Joe White, Chancellor

Filed February 27, 2007

No. E2006-00159-WC-R3-CV - Mailed December 21, 2006

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 dismissed the employee's complaint. On appeal, the employee contends that the employer had actual notice of his injury on a timely basis. The employee also contends that he sustained a gradually occurring injury and that timely notice of injury was given. We affirm the judgment of the trial court.

Tenn. Code Ann. § 50-6-225(e)(3)(2005) Appeal as of Right; Judgment of the Chancery Court is Affirmed.

THOMAS R. FRIERSON, II, SP. J., DELIVERED THE OPINION OF THE COURT, IN WHICH CHIEF JUSTICE WILLIAM M. BARKER, PRESIDING AND CHANCELLOR TELFORD E. FORGETY, JR., SPECIAL JUDGE, joined.

K. O. Herston, Knoxville, Tennessee, for Appellant, Alan Hale.

Donald D. Howell, Knoxville, Tennessee, for Appellee, U.S. XPress Enterprises, Inc.

MEMORANDUM OPINION

I. FACTUAL AND PROCEDURAL BACKGROUND

The claimant, Alan Hale, was 62 years of age at the time of trial. In early 2000, Mr. Hale became employed by U.S. XPress Enterprises, Inc., in the capacity of a truck driver. In connection with his work, Mr. Hale traveled long distances, maintaining the responsibilities and duty of driving the tractor trailer.

The employee asserts that on August 11, 2000, while making a delivery in Kent, Washington, he exited the cab of his tractor and stepped on a rock, twisting his right ankle. Mr. Hale first sought medical attention from Dr. Randall Willis on January 15, 2001. In February 2001, the claimant presented a physician's slip to his employer indicating a need to be off from work.

During the hearing on the merits, the issue of the required notice of injury proved to be a primary question of fact. Following the trial, the court concluded that the evidence preponderated against a finding that the claimant had provided the statutory notice of his injury to the employer within 30 days thereof. The court further concluded that the employee had not suffered a gradually occurring injury which would have extended the notice period. By Judgment entered August 15, 2005, the trial court dismissed the employee's claim against the employer.

II. STANDARD OF REVIEW

The standard of review in a workers' compensation case 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, T.C.A. 50-6-225(e)(2); Houser v. Bi-Lo, Inc., 36 S.W.3d 68 (2001). We are required to conduct an independent examination of the record to determine where the preponderance of the evidence lies, Wingert v. Government of Sumner Co., 908 S.W.2d 921 (1995). Moreover, we are required by law to examine in depth a trial court's factual findings and conclusions, GAF Building Materials v. George, 47 S.W.3d 430 (2001). "Where the trial judge has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, on review considerable deference must still be accorded to those circumstances", Orman v. Williams-Sonoma, Inc., 803 S.W.2d 672 (1991).

Where the medical testimony in a workers' compensation case is presented by deposition, we may make an independent assessment of the medical proof to determine where the preponderance of the proof lies, Cooper v. INA, 884 S.W.2d 446 (1994). Conclusions of law are subject to *de novo* review on appeal without any presumption of correctness, Nutt v. Champion International Corp., 980 S.W.2d 365 (1998).

III. NOTICE OF INJURY

The giving of notice of an injury is not an act precedent to filing the compensation action, but it is precedent to recovery unless notice is excused, R.W. Hartwell Motor Co. v. Hickerson, 26 S.W.2d 153 (1930). The notice requirements existing at the time of the claimant's injury were prescribed by T.C.A. 50-6-201 (2001):

50-6-201. Notice of injury

> (a) Every injured employee or such injured employee's representative shall, immediately upon the occurrence of an injury, or as soon thereafter as is reasonable and practicable, give or cause to be given to the employer who has no actual notice, written notice of the injury, and the employee shall not be entitled to physician's fees or to any compensation that may have accrued under the provisions of the Workers' Compensation Law, compiled in this chapter, from the date of the accident to the giving of such notice, unless it can be shown that the employer had actual knowledge of the accident. No compensation shall be payable under the provisions of this chapter, unless such written notice is given the employer within thirty (30) days after the occurrence of the accident, unless reasonable excuse for failure to give such notice is made to the satisfaction of the tribunal to which the claim for compensation may be presented.
>
> (b) In those cases where the injuries occur as the result of gradual or cumulative events or trauma, then the injured employee or such injured employee's representative shall provide notice to the employer of the injury within thirty (30) days after the employee:
>
> (1) Knows or reasonably should know that such employee has suffered a work-related injury that has resulted in permanent physical impairment; or
>
> (2) Is rendered unable to continue 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 work-related activities.

Under the express provisions of the statute, the thirty day notice period is tolled by a "reasonable excuse for failure to give such notice"; Grace v. Kehe Food Distributors, 2006 LEXIS 210 (W.C.A.P. 2006). If the employee fails to provide the notice within 30 days of the occurrence of an injury, the Court must determine whether the claimant's failure to recognize the work-related character of the injury was reasonable, Pentecost v. Anchor Wire Corporation, 695 S.W.2d 183 (1985). The Court in Pentecost explained in pertinent part as follows:

> Under the terms of T.C.A., § 50-6-201, the 30-day notice period is tolled by "reasonable excuse for failure to give such notice." An employee's reasonable lack of knowledge of the nature and seriousness of his injury has been held to excuse his failure to give notice within the 30-day period. *See, e.g.*, CNA Insurance Co. v. Transou, Tenn., 614 S.W.2d 335, 337 (1981), Davis v. Traveler's Insurance Co., Tenn. 496 S.W.2d 458 (1973); Brown Shoe Co. v. Reed, 209 Tenn. 106, 350 S.W.2d 65 (1961). Likewise, an employee's lack of knowledge that his injury is work-related, if reasonable under the circumstances, must also excuse his failure to give notice within 30 days that he is claiming a work-related injury. *See* Larson, *Workmen's Compensation*, Vol 3, § 78.41(f), pp. 15-216 to 15-217. It is enough that the employee notifies the employer of the facts concerning his injury of which he is aware or reasonably should be aware.

These notice requirements afford the employer an opportunity to make an investigation while material facts are accessible and to provide timely and proper treatment for the injured employee, Masters v. Industrial Garments Manufacturing Company, 595 S.W.2d 811 (1980). "In determining whether an employee has shown a reasonable excuse for failure to give such notice, courts will consider the following criteria in light of the above reasons for the rule: (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 v. Saturn Corporation, 910 S.W.2d 412 (1995).

Having conducted an independent examination of the record, this panel concludes that

the preponderance of the evidence supports the findings of fact by the trial court. The employee testified that following his claimed injury, he moved his tractor trailer to a truck stop in the surrounding area. Mr. Hale asserts that he thereupon contacted his weekend driver manager by means of the company SAT-Comm messaging system to alert his employer of the injury. This system is designed to provide drivers with information for order pickup and delivery as well as to receive information from the drivers concerning the employee's current status. The communication system is not designed to be used as a notification of a claim of personal injury. Such a claim is to be sent to the employer's safety/claims department.

The evidence further preponderates in favor of a finding that Mr. Hale could not recall the name of the weekend driver manager with whom he communicated his alleged notice of injury. As company policy requires records of the SAT-Comm communication system to be maintained for a 14 day period, no written evidence was presented to substantiate Mr. Hale's claim of notice to the employer. The employer's records indicated that its first notice of a claim of injury was in February 2001. This panel concludes that the employer did not have actual knowledge of the employee's injury within thirty (30) days of the August 2000 incident. Mr. Hale failed to provide his employer with the required statutory notification of a work related injury. The employee has not shown a reasonable excuse for his failure to give such notice.

Mr. Hale further argues that the evidence preponderates in favor of a finding that he sustained a gradual injury that did not become disabling until February 2001 such that his notification of injury at that time was timely and sufficient. Tennessee courts recognize that "an employee is excused from giving notice of a gradually occurring injury until the employee has reason to know that the injury is work related", Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164 (2002).

Where the employee is unaware of the work-connected nature of his injury, the employer's interest must yield to the remedial purpose of the statute, Banks v. United Parcel Service, Inc., 170 S.W.3d 556 (2005). In addressing the question of timing in gradually occurring injury cases, the Supreme Court in Banks explained as follows:

> When construing statutory time limits and requirements in such cases, we have favored a construction that preserves a worker's right to benefits and have emphasized that the worker must be aware that he has sustained a work related injury before time limits apply. This is consistent with the statutory admonition to give the Workers' Compensation Act "an equitable construction". (Citations omitted.)

Having conducted an independent examination of the record, this panel concludes that the evidence preponderates in favor of the trial court's finding that Mr. Hale did not sustain a gradually occurring injury to his right lower extremity. Instead, the evidence supports a finding that his alleged injury occurred on August 11, 2000. The employee failed to provide timely notice of his work related injury as statutorily required.

IV. CONCLUSION

The judgment of the trial court is affirmed. Costs of the appeal are taxed to the employee.

_____

Thomas R. Frierson, II, Special Judge

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

ALAN HALE v. U.S. XPRESS ENTERPRISES, INC.

Chancery Court for Claiborne County
No. 13385

Filed February 27, 2007

No. E2006-00159-SC-WCM-WC

JUDGMENT ORDER

This case is before the Court upon the motion for review filed by Alan Hale 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.

The appellant's motion for determination of indigency is also denied.

Costs are assessed to Alan Hale and his surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Chief Justice William M. Barker, not participating