

IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
AT NASHVILLE  
November 27, 2006 Session

**BUILDING MATERIALS CORPORATION, D/B/A GAF MATERIALS  
CORPORATION V. JOYCE AUSTIN AND JOYCE AUSTIN V. BUILDING  
MATERIALS CORPORATION, D/B/A GAF MATERIALS  
CORPORATION**

**Direct Appeal from the Chancery Court for Davidson County  
No. 02-3885 III, 04-2553 III Ellen Hobbs Lyle, Chancellor**

---

**No. M2006-00262-WC-R3-CV - Mailed - January 23, 2007  
Filed - May 9, 2007**

---

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Tennessee 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. On appeal, the employee contends that the trial court erred when it dismissed the employee's back injury claim based on her failure to comply with the notice provisions of Tennessee Code Annotated section 50-6-201. Although dismissing the employee's claim, the trial court made an alternative finding that the back injury was work-related and resulted in a 20% vocational impairment to the body as a whole. The employer appeals this alternative ruling contending that the trial court erred in finding the injury work-related. We conclude that the trial court erred in dismissing the employee's claim based on the notice provisions and affirm the trial court's finding that the back injury is work-related and results in a 20% impairment to the body as a whole. We conclude that the alternative finding is supported by the record. Therefore, we affirm in part and reverse in part, remanding this case to the trial court for further proceedings consistent with this opinion.

**Tenn. Code Ann. § 50-6-225(e)(3) Appeal as of Right;  
Judgment of the Chancery Court Reversed in Part, Affirmed in Part,  
and Remanded**

J. S. DANIEL, SR., J. delivered the opinion of the court, in which GARY R. WADE, J., and DONALD P. HARRIS, SR., J.,

Joseph K. Dugham and James W. Tiller, Nashville, Tennessee, for the appellant, Joyce Austin.

James H. Tucker, Jr., Nashville, Tennessee, for the appellee, Building Materials Corporation, d/b/a GAF Materials Corporation.

## OPINION

### I. Facts and Procedural History

Two separate workers' compensations actions were initiated at the trial court and ultimately consolidated for trial. Ms. Joyce Austin initiated a lawsuit May 23, 2003, in which she alleged two separate work-related injuries. The first injury, a gradual injury to her lumbar spine, was alleged to have occurred in the course and scope of her employment in August of 2002. After having surgical repair of her back, Ms. Austin returned to work and on December 21, 2002, suffered a second work-related injury when she slipped and fell during the course and scope of her employment, fracturing her hip. Ms. Austin initiated her lawsuit in the Davidson County Circuit Court seeking compensation for these two separate injuries. Unknown to Ms. Austin, the employer, Building Materials Corporation, d/b/a GAF Materials Corporation, (hereafter referred to as GAF), filed a workers' compensation lawsuit in the Chancery Court of Davidson County on December 31, 2002, following Ms. Austin's hip injury. The employer did not file and/or issue a summons contemporaneous with the complaint and Ms. Austin was never on notice of this lawsuit until she had initiated her own suit. Ultimately, the Circuit Court case and the Chancery Court case were consolidated into one action in the Davidson County Chancery Court in case #02-3885-III. The parties compromised and settled the hip injury on June 9, 2005, and the gradual back injury was tried and the judgment of that claim is the subject of this appeal. The trial judge found that Ms. Austin's back injury was a gradual injury which was caused by her work. As a result of this work-related injury, the court was of the opinion that Ms. Austin sustained a 20% partial impairment to the body as a whole. However, the court found that Ms. Austin had failed to comply with the notice requirements of Tennessee Code Annotated section 50-6-201 in that she had failed to notify her employer of her back injury within thirty days of the time she knew or should have known that she had suffered a work-related injury. Ms. Austin did not notify GAF of this injury until her May 23, 2003 lawsuit. It was the trial court's finding that Ms. Austin realized as of October of 2002 that her back injury was work-related and failed to make this report. Ms. Austin appeals the trial court's dismissal of her back injury claim and GAF appeals the court's determination that the gradual back injury has a causal relationship to Ms. Austin's work.

At the time of the trial of these proceedings, Ms. Austin was forty-one years of age. Her birthday is February 17, 1964. Ms. Austin completed the eighth grade and has a GED. She has no formal vocational training and her work history is limited to jobs consisting of labor intensive activities. She has held three jobs prior to her employment by GAF. These jobs include working for three years at Motel 6 starting when she was sixteen years of age. Thereafter, she worked for eleven years as a waitress with Shoney's Restaurant and she worked some four years and eleven months as a production employee with Aladdin Industries. Ms. Austin was employed by GAF in 1999. Her supervisors and co-employees testified that she is a good, hard-working, and honest employee. Ms. Austin has had no previous workers' compensation claims.

The record reveals that Ms. Austin's work at GAF consisted of working on a production line

manufacturing fiberglass for roofing shingles. Her activities required her to do a great deal of reaching, twisting, lifting and squatting throughout her work which was carried out while standing on concrete for twelve hour shifts. Her work shift was from 7:00 p.m. in the evening until 7:00 a.m. in the morning and she averaged a considerable amount of overtime prior to her injuries. After these injuries she returned to her employer and currently works for GAF at the same or higher wages than she enjoyed prior to her work-related injury.

According to Ms. Austin, between March and May of 2001, she experienced back discomfort while engaged in her job duties and she sought medical care through her personal physician. She did not relate her back problems to her work activities. Her personal physician, Dr. David McCoy, conducted an MRI which revealed no herniated disk. He treated Ms. Austin with an epidural steroid injection which had good results. Her symptoms were relieved and she continued her work without further episode or intervention. In August of 2002, her symptoms reappeared and quickly intensified commencing August 19, 2002. After this particular date, the pain increased each day with each shift of work that she performed. By August 22, 2002, she was having a great deal of pain in her left leg going down into her left thigh. By Saturday, August 24, during her work shift, the pain had intensified to such a degree that Ms. Austin was limping as she walked. According to Austin's testimony, her supervisor, Mr. Pat Moses, inquired of her as to what she had done to her leg, to which she replied that she did not know. After her work shift, she continued to have progressively worse pain during the night such that she asked a fellow employee, a Mr. Daniel Galloway, to take her next work shift so that she might seek medical attention. On Monday, August 26, she went to Southern Hills Hospital and was treated by an attending physician who x-rayed her hip and leg and diagnosed her with a pulled thigh muscle. Medication was prescribed and she went back to work for her Monday night shift. According to her, she arrived at the plant with the use of a cane, which was observed by her supervisor. Her supervisor, Mr. Tom Ladd, on this occasion had another employee, one Michelle Brown, assist Ms. Austin throughout her shift, moving the work product from place to place as Ms. Austin could not walk or carry the fiberglass material. According to Ms. Austin, by the Wednesday shift, she was in such pain that she was crying and unable to bear the pain in the work environment. Mr. Ladd testified that he remembers Ms. Austin's work difficulties and the use of a cane but was of the view that these events occurred after her second injury. According to Ms. Austin, supervisor Ladd substituted another employee for her work line responsibilities and authorized her to sit the entire shift in a break area. After this particular episode, Ms. Austin again went to see her personal physician, Dr. David McCoy, who referred her to Dr. Thomas J. O'Brien. Dr. O'Brien examined her but did not specifically inquire as to whether her injuries were work-related or get the detailed job history of Ms. Austin's employment. Dr. O'Brien's medical records reveal that Ms. Austin completed a questionnaire in which one of the questions asked her if her medical problem was work-related and she failed to answer that question. Dr. O'Brien prescribed pain medication and muscle relaxers as well as gave her anti-inflammatory medications. An MRI on her back was performed that revealed a herniated disk at L5-S1 which was repaired surgically. The surgery occurred October 4, 2002. Ms. Austin was off work for six weeks and her medical expenses were paid through her private health insurance. Dr. O'Brien made no indication in his medical records that the injury was work-related or caused any permanent impairment until February 4, 2005, when he completed a Standard Form Medical Report for Industrial Injuries, C-32. In

November of 2002, she was released to return to her normal duties. According to Ms. Austin, when she returned to her employer she brought her doctor's release to the assistant human resource representative, Ms. Kirsten Mullins, and informed her for the first time that she believed her back injury was work-related. According to Ms. Austin, Ms. Mullins asked her why she did not file a workers' compensation claim and Ms. Austin explained that she thought at the time that it was a pulled muscle and didn't realize until she was out of work that it was a back-related injury and assumed it was too late to make such a claim.

Ms. Austin testified that after her surgery, she continued to have back pain and ultimately sought a second opinion from Dr. John Wayne Bacon who informed Ms. Austin that her back injury was potentially work-related and had caused a permanent disability. Dr. Bacon first saw Ms. Austin on December 3, 2004. Dr. Bacon completed a Standard Form Medical Report For Industrial Injuries, C-32, on December 16, 2004, in which he concluded that the back injury more probably than not arose out of Ms. Austin's employment.

## II. Standard of Review

Review of the findings of fact made by the trial court is de novo upon the record of the trial court, accompanied by a presumption of the correctness of the findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2)(2002). The reviewing court is required to conduct an independent examination of the record to determine where the preponderance of the evidence lies. The standard governing appellate review of the findings of fact of a trial judge requires this panel to examine in depth the trial court's factual findings and conclusions. GAF Bldg. Materials v. George, 47 S.W.3d 430, 432 (Tenn. Workers' Comp. Panel 2001). 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. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002); Townsend v. State, 826 S.W.2d 434, 437 (Tenn. 1992). Our standard of review of questions of law is de novo without a presumption of correctness. Perrin v. Gaylord Entm't Co., 120 S.W.3d 823, 826 (Tenn. 2003). When medical testimony is presented by deposition, this court is able to make its own independent assessment of the medical proof to determine where the preponderance of the evidence lies. Cleek v. Wal-Mart Stores, Inc., 19 S.W.3d 770, 774 (Tenn. 2000); Houser v. Bi-Lo, Inc., 36 S.W.3d 68, 71 (Tenn. 2001).

## III. Analysis

### Dismissal for Failure to Comply with the Notice Provisions of Tennessee Code Annotated section 50-6-201

The trial court's order reveals the basis for its conclusion. The order states:

The first finding the Court makes with respect to notice is that the injury was the result of gradual events. The Court basis [sic] this finding upon the medical proof cited above and the employee's

explanation of the worsening of her condition from 2001 through August of 2002.

Next, the court finds that the employer did not have actual notice of the injury. In so finding, the court credits the testimony of Mr. Ladd, the employee's supervisor, that he was never told that the employee injured her back at work. The Court credits Ladd's testimony in which he denied that in August of 2002 the employee told him she hurt her back on the job. The Court credits his testimony that his first notice came after the lawsuit was filed when he was called for a deposition.

In the absence of actual notice to the employer, the worker's [sic] compensation notice statute requires the employee to provide notice within thirty days of a gradual injury after the employee knows or reasonably should know that the employee has suffered a work-related injury that has resulted in permanent physical impairment. With respect to this requirement, the Court finds from the proof that the employee clearly testified at trial that in October of 2002, when she consulted with Dr. O'Brien, she realized that her back injury was work related [sic]. She then additionally testified that even after she realized the injury was work-related she did not report the injury to her employer because she thought it was too late to report and file it. The proof established that it was not until the date that the lawsuit was filed, May 23, 2003, that the employee gave notice that the injury was work-related.

These facts establish that the employee knew or reasonably should have known that she had suffered a work-related injury as of October 2002. She did not provide notice, however, until her lawsuit was filed in May of 2003. The employee, therefore, did not comply with the requirements that she provide notice within 30 days of reasonably knowing that she had suffered a work-related injury.

It is clear from the trial court's finding of fact that Ms. Austin suffered a gradual work-related injury that culminated in a herniated disk. Therefore, the notice requirements which were imposed upon Ms. Austin were imposed by Tennessee Code Annotated section 50-6-201(b). This section provides as follows:

(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.

Tenn. Code Ann. § 50-6-201(b) (2006).

The notice requirement in the workers' compensation statutory scheme "exists so that an employer will have an opportunity to make a timely investigation of the facts while those facts are still readily accessible, and to enable the employer to provide timely and proper treatment for an injured employee." Jones v. Sterling Last Corp. 962 S.W.2d 469, 471 (Tenn. 1998). An employee who fails to notify his employer within the thirty days after he has sustained a work-related injury forfeits the right to workers' compensation benefits unless the employer has actual notice of the injury or unless the employee's failure to notify the employer was reasonable. Tenn. Code Ann. § 55-6-201(a) (1999 & supp. 2002).

The notice requirement of Tennessee Code Annotated section 50-6-201(b) is an attempt to address the notice needed for a gradually occurring injury such as the one sustained by Ms. Austin. An employee has a reasonable excuse from the notice requirement when the employee is ignorant of the work-connected nature of the injury and that the injury has either impaired her permanently or prevented her from performing normal work activities. Banks v. United Parcel Serv., Inc., 170 W.W.3d 556, 561 (Tenn. 2005). Until the employee knows or reasonably should know that the work-related injury has either impaired her permanently or prevented her from performing normal work activities, there is no requirement to notify the employer of the work-related injury under Tennessee Code Annotated section 50-6-201(b) as the employee is reasonably excused from this requirement. Banks, 170 S.W.3d at 561; see also Barnett v. Earthworks Unlimited, Inc., 197 S.W.3d 716 (Tenn. 2006). The notice requirement provided by this code section exists once the employee knows or should reasonably know of the work-related nature of the injury and that the injury resulted in permanent physical impairment or the injury prevents them from performing normal work activities. Once this knowledge is obtained, Tennessee Code Annotated section 50-6-201(b) triggers the thirty-day notice requirement. In other words, the notice provision serves to protect the employer from prejudice and to secure the employer's right to control the provision of treatment. "Where the employee is ignorant of the work-connected nature of his injury, however, the employer's interest must yield to the remedial purpose of the statute." Banks, 170 S.W.3d at 562; see also Long v. Mid-Tenn. Ford Truck Sales, Inc., 160 S.W.3d 504, 510 (Tenn. 2005)

We find that the trial court erred in applying Tennessee Code Annotated section 50-6-201(b) to the facts of this case when the court concluded that Ms. Austin had failed to give proper notice in October of 2002. Our review of the record demonstrates that Ms. Austin did not know that she

had suffered a permanent injury or that her injury had prevented her from performing normal work activities until Dr. John Wayne Bacon rendered such an opinion in the Standard Form Medical Report for Industrial Injuries, C32, on December 16, 2004. The records of Dr. Thomas J. O'Brien, who performed the surgical procedure to correct Ms. Austin's herniated disk, made no indication as to whether her back condition was related to any work activities, and his medical impairment rating of 10% to the body as a whole was first reached when he prepared again a Standard Form Medical Report for Industrial Injuries, C32, in preparation for his deposition on February 4, 2005. Therefore, there was no basis for Ms. Austin to report this gradual back injury until she was knowledgeable of its permanency and/or that the injury would prevent her from performing normal work activities.

The entire purpose of the notice provision is to supply the employer an opportunity to timely investigate and to provide medical treatment. The sequence of events in this case should be considered with this purpose in mind in reviewing whether the employer was prejudiced by the lack of any formal notice. It is significant to note that the trial judge found that this work-related injury was associated with a gradual work injury that began in 2001 with back pain which abated with minimal treatment. The back pain recurred in August of 2002 when it manifested itself in debilitating pain which ultimately resulted in Ms. Austin leaving work at the end of August 2002, and having the surgical procedure on October 2, 2002, with the employer's full knowledge of her medical problems, albeit without notice that the employee was asserting that the medical problems were work-related. After six weeks of recuperation, Ms. Austin returned to work at her same job after providing the employer the medical statement releasing her for employment duties in November of 2002. On December 21, 2002, Ms. Austin suffered a second work-related injury when she broke her hip. On December 31, 2002, GAF initiated a workers' compensation lawsuit which Ms. Austin was not knowledgeable of as they did not have a summons issued or served upon her. However, clearly the employer had investigated the circumstances surrounding Ms. Austin's work-related hip injury and was knowledgeable of her previous absence from work for other medical reasons in order to file their December 31, 2002 action. We conclude, from the evaluation of this record, that GAF has not demonstrated prejudice in any way. We find that Ms. Austin's filing of her lawsuit on May 23, 2003, provided adequate notice of her gradual work-related back injury and that the trial court erred in dismissing her claim based on Tennessee Code Annotated section 50-6-201(b).

#### IV. Finding that Back Injury was Work-Related

The employer in this cause has appealed the trial court's finding that the herniated disk suffered by Ms. Austin was work-related. The trial court based its finding on the medical proof presented and the employee's explanation of the worsening of her condition from work activities from 2001 through August of 2002. In making this determination, the trial court heard the testimony and observed the demeanor of Ms. Austin as well as witnesses Michelle Brown, Gordon B. Gray, Shawn Taylor and Tom Ladd. These witnesses were carefully considered by the trial court and when a trial court has seen the witnesses and heard their testimony and especially where issues of credibility and the weight of testimony are involved, this court must extend considerable deference to the trial court's factual findings. Nakhoneinh, 69 S.W.3d at 167; Townsend, 826 S.W.2d at 437. When medical testimony is presented by deposition or records as it is in this case, this court is able

to make its own independent assessment of that medical proof in determining where the preponderance of the evidence lies. Cleek, 19 S.W.3d at 774; Houser, 36 S.W.3d at 71. A review of the depositions and C32s reveal that Dr. Bacon found that the back injury was work-related. “In most cases of work-related injury, causation must be established by expert medical evidence.” Fritts v. Safety Nat’l Cas. Corp., 163 S.W.3d 673, 678 (Tenn. 2005). Absolute certainty in the medical evidence, however, is not required, because “expert opinion by its very nature is always more or less uncertain and speculative.” Id. Therefore, any reasonable doubt must be construed in the employee’s favor. Id. “Benefits may properly be awarded upon medical testimony that shows the employment ‘could or might have been the cause’ of the employee’s injury when there is lay testimony from which causation reasonably can be inferred.” Id. (quoting Clark v. Nashville Mach. Elevator Co., 129 S.W.3d 42, 47 (Tenn. 2002)). We conclude that the trial court did not err in finding that the back injury was work-related and gradual in nature.

## V. CONCLUSION

After a careful review of the record, we reverse the trial court’s determination that the action should be dismissed for failure to comply with the notice provision of Tennessee Code Annotated section 50-6-201(b) for the reasons set forth in this opinion. In addition, this court affirms the trial court’s conclusion that Ms. Austin’s back injury was work-related and the trial court’s assessment of a 20% whole body impairment. The case is remanded to the trial court for enforcement of this order. Costs of this appeal are assessed against the appellee, Building Materials Corporation, d/b/a GAF Materials and its sureties in which execution may issue if necessary.

---

J. S. DANIEL, SENIOR JUDGE



IN THE SUPREME COURT OF TENNESSEE  
AT NASHVILLE

**BUILDING MATERIALS CORP. D/B/A GAF MATERIALS CORP. v.  
JOYCE AUSTIN**

**Chancery Court for Davidson County  
Nos. 02-3885-III and 04-2553-III**

---

**No. M2006-00262-SC-WCM-CV - Filed - May 9, 2007**

---

**JUDGMENT ORDER**

This case is before the Court upon the motion for review filed by Building Materials Corp., d/b/a GAF Materials Corp., 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.

Costs are assessed to appellant Building Materials Corp., d/b/a GAF Materials Corp. and its sureties, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Wade, J., Not Participating