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

BEECHER KENT BILBREY	)	PUTNAM CHANCERY
	)	
Plaintiff/Appellant	)	HON. VERNON NEAL
	)	Chancellor
v.	)	
	)	
ROADWAY EXPRESS, INC.,	)	
	)	
Defendant/Appellee	)	NO. 01S01-9511-CH-00215

For the Appellant:

Nolan R. Goolsby
Bennett & Goolsby
107 South Washington Avenue
Cookeville, TN 38501

For the Appellee:

Eugene Stone Forrester, Jr.
Farris, Mathews, Gilman,
Branan & Hellen
One Commerce Square, Suite 2000
Memphis, TN 38103

MEMORANDUM OPINION

Members of Panel:

Frank F. Drowota, III, Justice
John K. Byers, Senior Judge
Roger E. Thayer, Special Judge

AFFIRMED. **THAYER, Special Judge**

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.

Plaintiff, Beecher Kent Bilbrey, has appealed from the action of the trial court in dismissing his claim for benefits because he failed to render proper notice of the claim to defendant, Roadway Express, Inc. The Chancellor made alternative findings regarding all other aspects of the claim in the event it was determined the notice requirement had been complied with or reasonably excused.

Plaintiff is 50 years of age and has a 9th grade education. He was employed as a driver for defendant trucking company. On about June 20, 1993, while at a trucking terminal in Huntsville, Alabama, he testified he injured his back when hooking a set of double trailers. He said he called his dispatcher and told him he had pulled his back but didn't think it was going to be any problem.

He told the trial court that upon returning to the Nashville terminal, Robert Anderson, a supervisor, asked him if he had been drinking and would he consent to take a blood alcohol test. He denied having drank anything and consented to take the test. He said he told Anderson he did not want to wait a long period of time to be given the test but left after waiting about 15 minutes. He returned to Cookeville where he went to the hospital emergency room.

The record indicates that he returned to the emergency room on about June 30th and saw several doctors during June and July, 1993, concerning his physical condition.

Plaintiff testified that shortly after the incident on June 20th he also called Roger Morrison, a relay manager, and told him he had hurt his back, had been to the hospital and wanted to go on sick leave. He said Morrison told him he was terminated for leaving the job. When asked if he had told how he hurt his back, he replied, "No. I didn't like his attitude. He made me mad." Plaintiff testified he knew it was a violation of company policy to leave without taking the blood test after he had agreed to do so. He also acknowledged that he was aware that he would be terminated for this reason.

A union representative later told plaintiff if he was injured on the job, he needed to fill out a work-related accident report. The parties have stipulated this report was filed on August 13, 1993, which was about 54 days after the accident.

Defense witness Robert Anderson testified plaintiff had called him on the night in question but did not mention he had been hurt or anything about an accident. He said two dispatchers advised him plaintiff had been drinking and this was why he requested the blood alcohol test. He said when he observed him he looked glassy eyed; his face was red; and he smelled like he had been drinking. He called for other personnel to transport him to the hospital for the test. He said plaintiff left shortly before they arrived.

Defense witness Roger Morrison testified plaintiff called him the day following his return from Huntsville and asked to be placed on the sick board; that he did not mention an accident or even being hurt. He told him he could not place him on sick status as he had failed to take the blood alcohol test.

The review of the case is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the findings of fact unless the preponderance of the evidence is otherwise. T.C.A. § 50-6-225(3)(2).

Where the trial court had seen and heard witnesses and issues of credibility and the weight of oral testimony are involved, the trial court is in a better position to judge credibility and weight evidence and considerable deference must be accorded to those circumstances. Landers v. Fireman's Fund, Inc., 775 S.W.2d 356 (Tenn. 1989).

From our independent review of the case, we cannot say the evidence preponderates against the finding of the trial court on the question of notice.

T.C.A.§ 50-6-201 requires written notice to an employer who does not have actual notice and it must be given within 30 days after the accident unless reasonable excuse exists for not complying with the rule.

First, it is conceded by plaintiff he did not give written notice within 30 days of the date of the accident. Secondly, we find the record is insufficient to establish actual notice to Defendant. In Masters v. Industrial Garments Manufacturing Co.,

595 S.W.2d 811 (Tenn. 1980), the Supreme Court stated "an employee who relies upon alleged actual knowledge of the employer must prove that the employer had actual knowledge of the time, place, nature and cause of the injury." The opinion continues on to hold that in order for a communication to constitute actual knowledge on the part of the employer, it must be calculated to reasonably convey the idea to the employer that the employee claims to have suffered an injury arising out of and in the course of employment. Although the testimony regarding what plaintiff allegedly told company representatives is in conflict, we find plaintiff's version of the conversations would not impute notice to the Defendant that he was hurt or injured while working.

Last, plaintiff argues the circumstances of the case should support a reasonable excuse for not giving the notice. In this connection, it is stated plaintiff did not realize how serious his injury was until informed by his doctor on about July 14, 1993, which was within 30 days of the rendition of notice on August 13th. We are unable to agree with this contention. If we were to follow plaintiff's argument, we would be altering the rules to excuse notice to an employer until a final medical diagnosis was made. There are no circumstances to support the position that notice should be excused.

It results the judgment of the trial court is affirmed. Costs of the appeal are taxed to plaintiff and sureties.

_____
Roger E. Thayer, Special Judge

CONCUR:

_____
Frank F. Drowota, III, Justice

_____
John K. Byers, Senior Judge