IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION PANEL
KNOXVILLE, JULY 1996 SESSION

KEVIN G. McKENZIE,	)	
	)	BLOUNT CIRCUIT
Plaintiff/Appellant	)	
	)	Hon. W. Dale Young,
v.	)	Circuit Judge
	)	
BLOUNT MEMORIAL HOSPITAL, INC.,	)	NO. 03S01-9603-CV-00028
ROYAL INSURANCE COMPANY and	)	
THA WORKERS' COMPENSATION	)	
GROUP,	)'	
	)	
Defendants/Appellees	)	

For the Appellant:

Steve E. Fox
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For the Appellees:

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MEMORANDUM OPINION

Members of Panel:

Penny J. White, Justice
Roger E. Thayer, Special Judge
Joe c. Loser, Jr., Special Judge

REVERSED AND REMANDED **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, Kevin G. McKenzie, has appealed from the action of the trial court in dismissing his claim by sustaining a motion for summary judgment filed by defendants, Blount Memorial Hospital, Inc., and THA Workers' Compensation Group. The circuit judge ruled the claim was barred by reason of the expiration of the one year statute of limitations.

The complaint was filed on November 4, 1994, alleging plaintiff had sustained an injury on September 13, 1993, and on May 7, 1994. The hospital was provided insurance coverage by THA Workers' Compensation Group to December 31, 1993, and Royal Insurance Company for the period in question during 1994.

The hospital and THA Group filed the motion for summary judgment contending any claim for the September, 1993, injury was barred. The motion is supported by two affidavits and Plaintiff's Answers To Interrogatories.

The affidavit of Joe B. Hill, Jr., the Director of Human Resources, recites plaintiff originally injured himself during January, 1993; he reported on September 13, 1993, he had experienced a recurrence of pain from the injury and he received two sessions of therapy; the last medical treatment for the September 13, 1993, work-related aggravation of his pre-existing condition was on September 15, 1993; that on May 7, 1994, he reported to their emergency room requesting treatment; and the hospital did not make any voluntary payments to any health care providers nor was plaintiff billed for any treatment by the hospital.

The other affidavit was executed by Mary Jane Johnson, a family nurse-practitioner of the hospital. This document indicates she saw plaintiff during January, 1993, for evaluation of a neck and shoulder injury which plaintiff said he had sustained a few days earlier; on September 13, 1993, he reported he had re-injured his neck and shoulder; he was referred to a medical group where he was seen the same day but he did not return for a follow-up appointment on October 4,

1993.

Plaintiff was requested by Interrogatory number 8 to describe how he was injured on September 13, 1993. The answer states: I was carrying some boxes of slides to the stock room. As I was trying to open the door they slid. I tried to catch them, something popped and my shoulders and neck was hurting."

Interrogatory number 9 requested plaintiff to describe the alleged accident which occurred on or about May 7, 1994. The answer stated: "My back had been bothering me all week before May 7 due to work at the hospital. I told John Blezewy (lab supervisor) he said go home and rest the weekend. During weekend I was in pain from my back, bent over to pick up something and realized neck and back hurt so bad I needed to go to emergency room."

In opposition to the motion, plaintiff relies upon his discovery deposition which is a part of the summary judgment record. This deposition indicates he was 27 years of age at the time of the trial and had a 9th grade education. He testified he suffered an injury on September 13, 1993, while carrying three boxes of slides, each box weighing about 50 pounds; he felt a pop in his back and neck; he was off work about two weeks; he was furnished medical treatment and was advised he had just pulled a muscle; he continued to work until May 7, 1994, when his condition required him to stop working and seek treatment; he knew it was not a pulled muscle because it never got better but he just kept working because he had been released to return to work; during the last part of April 1994, his arm began to tingle and his hand became numb; on one occasion he dropped a tray while walking down the hall at the hospital because of numbness.

Counsel for Defendants asked plaintiff if anything specific had occurred after September 13, 1993, to cause him any injury while working. He answered there was no such occurrence; he just continued to work and while performing his usual and normal duties he continued to hurt until he realized he needed further treatment.

Plaintiff testified that during May, 1994, he attempted to file a workers' compensation claim but was told by a hospital employee his problem was not work-

related. He then sought treatment on his own; had surgery and was terminated by the hospital before he was released to return to work.

Ordinarily, the review of a workers' compensation case is *de novo* on the record accompanied by a presumption of the correctness of the findings of fact unless the preponderance of the evidence is otherwise. TENN. CODE ANN. § 50-6-225(e)(2).

However, an appeal from a summary judgment order in a workers' compensation case is not controlled by the *de novo* standard of review provided by the Workers' Compensation Act but is governed by RULE 56, T.R.CIV.P.; *Downen v. Allstate Ins. Co.,* 811 S.W.2d 523 (Tenn. 1991).

Also, no presumption of correctness attaches to decisions granting summary judgment because they involve only questions of law; thus, on appeal the reviewing court must make a fresh determination concerning whether the requirements of RULE 56 have been met. *Gonzales v. Alman Const. Co.,* 857 S.W.2d 42 (Tenn. 1993).

In ruling on motions for summary judgment both the trial court and the supreme court must consider the matter in the same manner as a motion for a directed verdict made at the close of plaintiff's proof, i.e., it must view all affidavits in the light most favorable to the opponent of the motion and draw all legitimate conclusions of fact therefrom in that favor. If after so doing a disputed issue of a material fact is made out, the motion must be denied, *Keene v. Cracker Barrel Old Country Store, Inc.,* 853 S.W.2d 501 (Tenn. Ct. App. 1992).

Plaintiff argues he was not involved in another "accident" during May, 1994, and his physical condition, which resulted from the September 13, 1993 accident, continued to cause him problems until he decided to seek further treatment during May, 1994. Reviewing the summary judgment record in the light most favorable to plaintiff causes us to concur in this contention. Thus a question of fact arises as to whether there is any evidence in the record that the statute of limitations was tolled. Our statute provides the voluntary payment of compensation within the one year period will toll the statute. TENN. CODE ANN. § 50-6-203. Likewise, the voluntary

furnishing of medical services is sufficient to toll or waive the statute of limitations, *Norton v. Coffin,* 553 S.W.2d 751 (Tenn. 1977); *Crowder v. Klopman Mills,* 627 S.W.2d 930 (Tenn. 1982).

We note the Hill affidavit recited plaintiff appeared at the emergency room of defendant hospital on May 7, 1994, but carefully avoided stating whether the request for treatment was honored. Also, counsel for defendants never posed the treatment question to plaintiff in the discovery deposition.

In searching the record, we find plaintiff answered interrogatory number 25 by stating he was furnished medical treatment by the hospital on May 7, 1994. Any treatment on this date would toll the statute and result in the November, 1994 filing to be timely.

Finding material issues of fact to exist, we are of the opinion the trial court was in error in sustaining the motion for summary judgment. The judgment is reversed and the case is remanded for further proceedings. Costs of the appeal are taxed equally to defendants and sureties.

_____
Roger E. Thayer, Special Judge

CONCUR:

_____
Penny J. White, Justice

_____
Joe C. Loser, Jr., Special Judge

IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

KEVIN G. McKENZIE,	)
	)Blount Circuit, No. L-9300
Plaintiff-Appellant,	)
	)Hon. W. Dale Young,
	)Judge
	)
V.	)No. 03S01-9603-CV-00028
	)
	)
BLOUNT MEMORIAL HOSPITAL,	)
INC., ROYAL INSURANCE	)
COMPANY AND THE WORKERS'	)
COMPENSATION GROUP,	)
	)
Defendants-Appellees.	)REVERSED AND REMANDED.

JUDGMENT ORDER

This case is before the Court upon motion for review 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, which are incorporated herein by reference;

Whereupon, it appears to the Court that the motion for review is not well taken and should be denied; 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 defendants-appellees and surety, for which execution may issue if necessary.

IT IS SO ORDERED this ___ day of November 1996.

PER CURIAM

White, J. - Not participating.