

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
(March 14, 1996 Session)

MARY CHARMAGNE PERDUE,)
)
) Plaintiff-Appellant,)
)
 v.)
) No. 01S01-9508-CH-00142
)
) NATIONAL HEALTHCORP, L.P., or)
) NATIONAL HEALTH CORPORATION,)
) or NHC, INC., and/or COLUMBIA)
) HEALTH CARE,)
)
) Defendant-Appellee.)

FILED

July 8, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

For Appellant:

Debra A. Wall
Clarksville, Tennessee

Gary A. Gober
Nashville, Tennessee

For Appellee:

Billy C. Jack
Columbia, Tennessee

MEMORANDUM OPINION

Members of Panel:

Adolpho A. Birch, Jr., Associate Justice, Supreme Court
Ben H. Cantrell, Special Judge
Joe C. Loser, Jr., Special Judge

AFFIRMED

Loser, 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. section 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. In this appeal, the employee or claimant, Perdue, contends (1) that the evidence preponderates against the trial judge's finding that she failed to give the required notice of a claimed injury by accident occurring on January 23, 1993, (2) that the said injury was suffered within the course and scope of employment with the defendant, and (3) that she is entitled to compensation for an injury on April 3, 1994. The panel concludes that the judgment awarding benefits for an injury by accident arising out of and in the course of the claimant's employment in August of 1994 should be affirmed.

The claimant is twenty-nine years old and has an associates degree in nursing. At all material times she was employed by the employer, Columbia, as a registered nurse.

She claims to have strained her lower back in January of 1993 at work but continued to work. She did not give any written notice of the injury to the employer and there is conflicting evidence as to whether she verbally reported it.

In April of 1993 she saw a chiropractor. On April 17, 1993, she noticed numbness in her hip and leg and began seeing Dr. Jeffrey Adams, who diagnosed a herniated lumbar disk. She did not tell the doctor that the condition was a result of an injury at work, according to the doctor, who performed corrective surgery.

On August 5, 1993, the claimant was grabbed around the neck by a patient and pulled down to the patient's bed. Dr. Adams diagnosed a herniated disk at the same location as the previous one and performed a second corrective surgery. She has not returned to work.¹

The trial judge found that, as to the claimed January injury, the claimant had failed to carry the burden of proof that her superiors at work had actual notice of her injury or that a work-related injury had occurred on that date.² Appellate review 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. Tenn. Code Ann. section 50-6-225(e)(2). Where the trial judge has seen and heard the witnesses, especially if issues of credibility and weight to be given oral testimony are involved, considerable deference must be accorded those circumstances on review. McCaleb v. Saturn Corp., 910 S.W.2d

¹ The claimant had another surgery in 1994 by a different surgeon.

² The trial judge did award medical and hospital benefits for the August injury, from which no issue has been raised in this appeal.

412 (Tenn. 1995).

Immediately upon the occurrence of an injury, or as soon thereafter as is reasonable and practicable, an injured employee must, unless the employer has actual knowledge of the accident, give written notice of the injury to her employer. Tenn. Code Ann. section 50-6-201. Where the employer denies that a claimant has given the required written notice, the claimant has the burden of showing that the employer had actual notice, or that the employee has either complied with the requirement or has a reasonable excuse for her failure to do so, for notice is an essential element of her claim. Masters v. Industrial Garments Mfg. Co. Inc., 595 S.W.2d 811 (Tenn. 1980).

In this case, the trial judge was faced with conflicting oral testimony concerning notice and the employer's position was supported by the deposition of Dr. Adams. The evidence fails to preponderate against the trial judge's finding with respect to notice. For the same reason and because the claimant has apparently made conflicting out of court statements about the origin of her injury, the evidence also fails to preponderate against the trial judge's findings as to the other issues.

The judgment of the trial court is accordingly affirmed. Costs on appeal are taxed to the plaintiff-appellee.

Joe C. Loser, Jr., Judge

CONCUR:

Adolpho A. Birch, Jr., Associate Justice

Ben H. Cantrell, Special Judge