IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT JACKSON
(April 18, 1996 Session)



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| BILL PURCELL, | ) | SHELBY CIRCUIT |
| | ) | |
| Plaintiff-Appellant, | ) | Hon. George H. Brown, Jr., |
| | ) | Judge. |
| v. | ) | |
| | ) | No. 02S01-9508-CV-00073 |
| THE LILLY COMPANY and | ) | |
| FEDERATED INSURANCE COMPANY, | ) | |
| | ) | |
| Defendant-Appellee. | ) | |

For Appellant:

John M. Moore
Memphis, Tennessee

For Appellee:

Bruce E. Williams
Memphis, Tennessee

M E M O R A N D U M  O P I N I O N

Members of Panel:

Lyle Reid, Associate Justice, Supreme Court
John K. Byers, Senior 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, Purcell, contends that the evidence preponderates against the trial court's findings (1) that he did not have a reasonable excuse for failure to give the written notice required by Tenn. Code Ann. section 50-6-201 and (2) that there was insufficient proof of a causal connection between his injury and a work-related accident. The panel has concluded that the judgment should be affirmed.

The claimant worked for the employer, The Lilly Company, as a field service battery technician, replacing or servicing heavy duty batteries. In November of 1992, during a week-long trip servicing customers in the Tupelo, Mississippi area, he awoke with pain in his right buttock and leg. The pain subsided after about half an hour. The claimant later was diagnosed with a ruptured disk.

There is no evidence that the pain was precipitated by any particular fortuitous occurrence, but the claimant's own testimony was that "I thought maybe I just bumped myself on some equipment the day before at the customer's location...." He told his supervisor about the pain but gave no written notice and said nothing about his thought concerning the source of it.

In fact, he filed a claim with his health insurance carrier on January 27, 1993, claiming that the injury was work-related, although he had never made such a claim to the employer. It was also during that month that his doctors had told him his injury could be work-related.

He had been terminated by the employer on January 15, 1993, and had consulted an attorney, because he suspected he had a workers' compensation claim. The employer did not know of any claim that the injury was work-related until April 8, 1993, when it received written notice, dated two days earlier, from the claimant's attorney.

The trial judge dismissed the case for failure of notice, or a reasonable excuse for such failure, and because the proof failed to establish that the claimant's injury was one arising out of and in the course of the employment. 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).

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 his employer; and no benefits are recoverable unless such written notice is given within thirty days after the injurious occurrence, unless the injured worker has a reasonable excuse for the failure to give the required notice. Tenn. Code Ann. section 50-6-201. The claimant failed to give timely notice.

Where, as here, 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 his failure to do so, for notice is an essential element of his claim. See Aetna Casualty and Surety v. Long, 569 S.W.2d 444 (Tenn. 1978). The evidence in this case fails to preponderate against the finding of the trial court with respect to notice.

An accidental injury arises out of one's employment when there is apparent to the rational mind, upon a consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury, and occurs in the course of one's employment if it occurs while an employee is performing a duty he was employed to do. See Fink v. Caudle, 856 S.W.2d 952 (Tenn. 1993) and cases cited therein. The evidence also fails to preponderate against the findings of the trial court in this regard.

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

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Joe C. Loser, Jr., Judge

CONCUR:

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Lyle Reid, Associate Justice

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John K. Byers, Judge