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

AT NASHVILLE
(January 23, 1997 Session)

CLARENCE WAYNE DUNN, Plaintiff-Appellee, v. SEQUATCHIE CONCRETE SERVICE, INC. and LIBERTY MUTUAL INSURANCE CO., Defendants-Appellees, and RDF TRANSPORTATION, INC. and LUMBERMEN'S MUTUAL INSURANCE, Defendants-Appellants.	)	BEDFORD CIRCUIT Hon. Lee Russell, Judge. No. 01S01-9606-CV-00121

For Appellants:

D. Randall Mantooth
Leitner, Moffitt, Williams, Dooley & Napolitan
Nashville, Tennessee

For Appellee, Clarence Wayne Dunn:

C. Kelly Wilson
Shelbyville, Tennessee

Thomas F. Bloom
Nashville, Tennessee

For Appellees, RDF Transportation Inc. and Lumbermen's Mutual Ins.:

Jerry R. Humphreys
Davies, Cantrell, Humphreys & McCoy

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

Members of Panel:

Adolpho A. Birch, Jr., Chief Justice, Supreme Court
Robert S. Brandt, Senior Judge
Joe C. Loser, Jr., Special Judge

AFFIRMED

Loser, Judge

MEMORANDUM OPINION

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. The appellant is seeking review of the findings of the trial court with respect to the following issues:

> (1) Whether the employee's claim against it is barred by Tenn Code Ann. section 50-6-203, a one-year statute of limitations[1];
>
> (2) Whether the claim should be disallowed for the employee's failure to give timely written notice of his claim, as required by Tenn. Code Ann. section 50-6-201;
>
> (3) Whether the appellee was an employee of the RDF at the time of the injury;
>
> (4) Whether the award of permanent partial disability benefits is excessive; and
>
> (5) Whether the trial judge abused his discretion by commuting permanent partial disability benefits to a single lump sum.

The employee contends the appeal is frivolous. As discussed below, the panel has concluded the judgment should be affirmed.

The employee or claimant, Dunn, is thirty-eight years old and has an eighth grade education. He has a commercial driver's license and has worked as a truck driver for some ten years. He gradually developed a ruptured disk in his lower back while driving a truck owned by the employer, RDF Transportation, Inc. After back surgery, he returned briefly to work for the appellant but resigned because the work exceeded his medical limitations.

As to issues (1) through (4), this appeal turns on factual determinations. Appellate review is therefore de novo upon the record of the trial court, accompanied by a presumption of correctness, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. section 50-6-225(e)(2). This tribunal is required to conduct an independent examination of the record to determine where the preponderance of the evidence lies. Wingert v. Government of Sumner County, 908 S.W.2d 921 (Tenn. 1995).

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. Humphrey v. David Witherspoon, Inc., 734 S.W.2d 315 (Tenn. 1987). This

---

[1] The appellant first moved for summary judgment on this issue. The motion was properly overruled because the pleadings, answers to interrogatories, depositions, admissions and affidavits on file failed to establish that there was no genuine issue as to a material fact and that the moving party was entitled to a judgment of dismissal as a matter of law, as required by Tenn. R. Civ. P. 56 for the allowance of a motion for summary judgment.

tribunal is, however, as well situated to gauge the weight, worth and significance of deposition testimony as the trial judge. Seiber v. Greenbrier Industries, Inc., 906 S.W.2d 444 (Tenn. 1995).

(1)

An action by an employee to recover benefits for an accidental injury, other than an occupational disease, must be commenced within one year after the occurrence of the injury. Tenn. Code Ann. section 50-6-224(1). However, the running of the statute of limitations is suspended until by reasonable care and diligence it is discoverable and apparent that a compensable injury has been sustained. Hibner v. St. Paul Mercury Ins. Co., 619 S.W.2d 109 (Tenn. 1981).

Where, as here, a condition gradually develops over a period of time resulting in a definite, work-connected, unexpected, fortuitous injury, it is compensable as an injury by accident. Brown Shoe Co. v. Reed, 209 Tenn. 106, 350 S.W.2d 65 (1961). The date of injury for a gradual injury is the date on which the claimant was forced to quit work because of severe pain. Barker v. Home-Crest Corp., 805 S.W.2d 373 (Tenn. 1991).

The date on which this claimant was forced to quit work because of severe pain was in August of 1993. This action was commenced less than one year later on June 2, 1994. However, the named defendant was Sequatchie, not RDF. RDF was added by amendment on February 3, 1995, more than one year after the date on which the claimant was forced to quit work because of pain. Thus the dispositive question is whether the amendment relates back to some time within a year of that date.

An amendment naming a party against whom a claim is asserted relates back to the date of the original pleading (or date of commencement) if the claim asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading and if, within the period provided by law for commencing an action or within 120 days after commencement of the action, the party to be brought in by amendment has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and if such party knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party. Tenn. R. Civ. P. 15.04. Notice is the critical element involved in determining whether amendments to pleadings relate back. Floyd v. Rentrop, 675 S.W.2d 165 (Tenn. 1984).

In this case, it is not disputed that the claim set out in the amended complaint does arise out of the occurrence set forth in the original complaint. The two defendants, Sequatchie and RDF are companion corporations owned and operated by the same family. RDF leases trucks and drivers to Sequatchie, which transports concrete blocks and bags of mortar to customers. Dunn was employed by Sequatchie until about two years before his injury, when he became employed by RDF but continued to work under a lease agreement for Sequatchie. Both companies operate out of the same office, but have different insurers. The claimant drove a truck with Sequatchie's name on it.

From those facts, we are persuaded that this action would have been brought originally against RDF but for a mistake, by a man with an eighth grade education, conceming the identity of the proper party. Consequently, the critical element is whether RDF had notice of the original commencement within one year from August of 1993.

The original complaint and summons were delivered to Robert Reese Thomas, Jr., who was the president of Sequatchie and the secretary-treasurer of RDF, on June 21, 1994, less than one year from the date of injury by almost two months. Moreover, Mr. Thomas testified that he knew the claimant was an employee of RDF, not Sequatchie, a fact which he promptly conveyed to the corporate attorney for both corporations. Yet the claimant and his attorney were not advised they had named the wrong corporate defendant until shortly before trial.

Thus the evidence fails to preponderate against the trial judge's finding that the amended pleading relates back to the original one and that the claim is therefore not time barred. We further find that the appellant is estopped by its own conduct from relying on the statute of limitations. See Humphreys v. Allstate Ins. Co., 627 S.W.2d 933 (Tenn. 1982). The first issue is resolved in favor of the claimant.

(2)

Immediately upon the occurrence of the 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. Tenn. Code Ann. section 50-6-201. Benefits are not recoverable from the date of the accident to the giving of such notice 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. Id.

Whether or not the excuse offered by an injured worker for failure to give timely written notice is sufficient, depends on the particular facts and circumstances of each case. A. C. Lawrence Leather Co. v. Britt, 220 Tenn. 444, 414 S.W.2d 830 (1967). The presence or absence of prejudice to the employer is a proper consideration. McCaleb v. Saturn Corp., 912 S.W.2d 412 (Tenn. 1995). Where the employer denies that a claimant has given the required notice, the claimant has the burden of showing that the employer had actual knowledge, 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. Aetna Casualty and Surety Company v. Long, 569 S.W.2d 444 (Tenn. 1978).

The reasons for the thirty day statutory notice requirement are (1) to give the employer an opportunity to make an investigation while the facts are accessible, and (2) to enable the employer to provide timely and proper treatment for the injured employee. Id. In determining whether an employee has a reasonable excuse for failure to give timely written notice, courts will consider the following criteria in light of the above reasons for the rule: (1) the employer's actual knowledge of the employee's injury, (2) lack of prejudice to the employer by an excusal of the notice requirement, and (3) the excuse or inability of the employee to timely notify the employer. McCaleb v. Saturn, supra.

Delay in asserting a compensable claim is reasonable and justified if the employee has limited understanding of his condition and his rights under the workers' compensation law. Underwood v. Zurich Ins. Co., 854 S.W.2d 94 (Tenn. 1993). It is significant that written notice is unnecessary in those situations where the employer has actual knowledge of the injury. Raines v. Shelby Williams Industries, 814 S.W.2d 346 (Tenn. 1992).

By the claimant's own testimony, he called his immediate supervisor within a few hours of his own discovery of the nature of his injury to give oral notice of his condition and the fact that it was work related. Thus the employer had actual knowledge of the accident and was not prejudiced by the lack of timely written notice. The record also clearly reflects that the claimant had limited understanding of his condition and his rights under the workers' compensation law. The second issue is resolved in favor of the claimant.

(3)

Unless expressly excluded, every employee of a covered employer, under an actual or implied contract of hire or apprenticeship, is entitled to the benefits of the Tennessee Workers' Compensation Act. Tenn. Code Ann. section 50-6-102(3). It is undisputed that at the time of his accident, the

claimant was operating a truck owned by RDF and was receiving wages from RDF. Additionally, RDF has not pointed to any provision in the Act which expressly excludes the claimant from its benefits. It is also undisputed that RDF is a covered employer.

The third issue is resolved in favor of the claimant.

(4)

When an injured employee is adjudged to be permanently disabled, he is entitled to benefits based on a percentage of disability. Corcoran v. Foster Auto GMC, Inc., 746 S.W.2d 452 (Tenn. 1988). For injuries occurring after August 1, 1992, in cases where an injured worker is entitled to permanent partial disability benefits to the body as a whole and the pre-injury employer returns the employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of the injury, the maximum permanent partial disability award the employee may receive is two and one-half times the medical impairment rating. Tenn. Code Ann. section 50-6-241(a)(1).

If the offer of the employer is not reasonable in light of the circumstances of the employee's physical disability to perform the offered employment, then the offer of employment is not meaningful and the injured employee may receive benefits up to six times the medical impairment. Newton v. Scott Health Care Center, 914 S.W.2d 884 (Tenn. 1995). On the other hand, an employee will be limited to disability benefits of not more than two and one-half times the medical impairment if his refusal to return to work is unreasonable. Id. The resolution of what is reasonable must rest on the facts of each case and be determined thereby. Id.

As already noted, the claimant did return to his pre-injury employment but was forced to quit because the work exceeded his medical limitations and caused disabling pain. He has since accepted, for less money, work as a bus driver for the county highway department, where his duties do not exceed his medical limitations. The panel finds therefore that the evidence fails to preponderate against the trial judge's finding that the offer of employment was not meaningful, that the employee's decision to quit because of disabling pain was reasonable, and therefore the multiplier of two and one-half times the impairment rating does not apply.

The operating surgeon estimated the claimant's permanent impairment at ten percent to the whole body. Another orthopedic surgeon estimated his permanent impairment at fifteen percent to the whole body. Both physicians used appropriate guidelines in making their assessments. Only the

non-operating doctor prescribed working restrictions.

In determining the extent of a claimant's permanent industrial disability, the courts will consider, in addition to the medical or anatomical impairment rating, the claimant's age, education, skills and training, local job opportunities and capacity to work at types of employment available in the claimant's disabled condition. Tenn Code Ann. section 50-6-241(c). From our independent examination of the record, particularly with respect to the facts relevant to the above factors, the panel finds the evidence fails to preponderate against an award of benefits based on fifty-five percent to the body as a whole. The fourth issue is resolved in favor of the claimant.

(5)

Ordinarily, disability benefits are payable periodically. However, they may be commuted to one or more lump sum payments on motion of any party subject to the approval of the court. Tenn. Code Ann. section 50-6-229(a). In determining whether to commute an award, the courts may consider (1) whether the commutation will be in the best interest of the employee and (2) the ability of the employee to wisely manage and control the award. Huddleston v. Hartford Accident and Indemnity Company, 858 S.W.2d 315 (Tenn. 1993). The decision whether to commute to a lump sum is within the discretion of the trial judge. Bailey v. Colonial Freight Systems, Inc., 836 S.W.2d 554 (Tenn. 1992).

Because virtually all of the claimant's disability benefits have accrued, the lump sum issue is moot. Nevertheless, we respectfully decline to make a finding, under the circumstances, that the trial judge abused his discretion by making the commutation.

When it appears that an appeal in a workers' compensation case is frivolous or taken solely for delay, the reviewing tribunal may, upon motion of either party or on its own initiative, award damages against the appellant and in favor of the appellee without remand, for a liquidated amount. Where, as here, an appeal requires a careful review of hotly disputed issues of fact, this panel does not consider the appeal to be frivolous.

The judgment of the trial court is accordingly affirmed in all respects and the cause remanded to the Circuit Court for Bedford County for such further proceedings as may be necessary. Costs on appeal are taxed to

RDF Transportation, Inc. and Lumbermen's Mutual Insurance Company.

_____
Joe C. Loser, Jr., Judge

CONCUR:

_____
Adolpho A. Birch, Jr., Chief Justice

_____
Robert S. Brandt, Judge

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

FILED

May 13, 1997

Cecil W. Crowson
Appellate Court Clerk

CLARENCE WAYNE DUNN,	}	*BEDFORD CIRCUIT*
	}	*No. 6993 Below*
Plaintiff/Appellee	}	
	}	*Hon. Lee Russell,*
vs.	}	*Judge*
	}	
SEQUATCHIE CONCRETE	}	
SERVICE, INC. and LIBERTY	}	
MUTUAL INSURANCE CO.,	}	*No. 01S01-9606-CV-00121*
	}	
Defendants/Appellees,	}	
and	}	
	}	
RDF TRANSPORTATION, INC. and	}	
LUMBERMEN'S MUTUAL	}	
INSURANCE,	}	*AFFIRMED.*
	}	
Defendants/Appellants.	}	

JUDGMENT ORDER

This case is before the Court upon 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 Memorandum Opinion of the Panel should be accepted and approved; 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 RDF Transportation, Inc. and Lumbermen's Mutual Insurance Company, Principals, and Surety for which execution may issue if necessary.

IT IS SO ORDERED on May 13, 1997.

PER CURIAM