IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT NASHVILLE
(September 25, 1997 Session)

FILED

December 2, 1997

Cecil W. Crowson
Appellate Court Clerk

JAMES BUTTREY,	)	DAVIDSON CHANCERY
	)	
Plaintiff-Appellee,	)	Hon. Irvin Kilcrease,
	)	Chancellor.
v.	)	
	)	No. 01S01-9705-CH-00102
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,	)	
	)	
Defendant-Appellant.	)	

For Appellant:

Frank Thomas
Leitner, Williams, Dooley & Napolitan
Nashville, Tennessee

For Appellee:

David Burlison
Abbott & Burlison
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
William S. Russell, Special Judge
Joe C. Loser, Jr., Special Judge

AFFIRMED AND REMANDED

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 contends the injury did not arise out of and in the course of employment and that the employee failed to give proper notice of his injury. As discussed below, the panel has concluded the judgment should be affirmed.

The claimant is forty-five years old and has an eighth grade education. He was employed in the receiving department of Home Depot, responsible for unloading an average of eighteen or nineteen trailers per day.

He was so working on Thursday, April 6, 1995, when six or seven doors fell on his left shoulder and neck. He finished his shift and worked through his pain the next day. By Sunday, he could not move his head from side to side and the pain was so severe that he called the assistant manager of the store. The next day, he went to the company doctor, Barrett Rosen. The doctor told him to take off work and so advised the employer through the employee.

On June 18th, he told the store's manager he did not want to file for workers' compensation benefits unless he had to, even though the manager knew he was claiming an injury at work. On the same day, the employee visited Dr. Everett Howell, a neurosurgeon, on the referral of Dr. Rosen. Dr. Howell diagnosed a ruptured cervical disc and testified the injury could have been caused by the accident of April 6th, when the doors fell on the claimant. We find in the record no evidence of another possible cause.

The trial judge found the injury to have been one arising out of and in the course of employment and that the claimant had a reasonable excuse for his failure to give the required written notice. Appellate review is 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).

An injury arises out of and in the course 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. Fink v. Caudle, 856 S.W.2d 952 (Tenn. 1993). In a workers' compensation case, a trial judge may properly predicate an award on medical testimony to the effect that a given incident "could be" the cause of a claimant's injury, when, from other evidence, it may reasonably be inferred that the incident was in fact the cause of the injury. McCaleb v. Satum Corp., 910

S.W.2d 412 (Tenn. 1995). From a consideration of those principles of law, the evidence fails to preponderate against the chancellor's finding that the claimant's injury arose out of and in the course of employment.

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. 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., supra.

In light of the claimant's lack of education, his lack of understanding of the nature and cause of his injury and the absence of prejudice to the employer, the evidence fails to preponderate against the chancellor's finding that he had a reasonable excuse for failing to give written notice.

The judgment of the trial court is affirmed and the cause remanded to the trial court. Costs are taxed to the defendant-appellant.

_____

Joe C. Loser, Jr., Special Judge

CONCUR:

_____

Lyle Reid, Associate Justice

_____

William S. Russell, Senior Judge

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JAMES BUTTREY,	}	*DAVIDSON CHANCERY*
	}	*No. 95-3927-I Below*
Plaintiff/Appellee	}	
	}	*Hon. Irvin Kilcrease, Jr.,*
vs.	}	*Chancellor*
	}	
INSURANCE COMPANY OF THE	}	
STATE OF PENNSYLVANIA,	}	*No. 01S01-9705-CH-00102*
	}	
Defendant/Appellant	}	*AFFIRMED AND REMANDED.*

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 Insurance Company of the State of Pennsylvania and Surety, for which execution may issue if necessary.

IT IS SO ORDERED on December 2, 1997.

PER CURIAM