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

MARY ANNE CLARK, Plaintiff/Appellee v. PORELON, INC., Defendant/Appellee v. BERWIND INDUSTRIES MANAGEMENT COMPANY, Defendant/Appellant	)	PUTNAM CHANCERY NO. 01S01-9703-CH-00062 HON. VERNON NEAL, CHANCELLOR

FILED

November 7, 1997

Cecil W. Crowson
Appellate Court Clerk

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

Members of Panel:

Justice Frank F. Drowota, III
Senior Judge William H. Inman
Special Judge Joe C. Loser, Jr.

AFFIRMED and REMANDED.

INMAN, Senior 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.

This complaint was filed April 17, 1995, alleging that the plaintiff had been employed at Porelon since 1974 and that in 1993 she began to develop pain in her right shoulder and arm which was evidence of a gradually developing compensable injury.

Micropore, Inc. (formerly Porelon) filed its answer on June 7, 1995, alleging that it was sold on May 6, 1994 with a resulting change in workers' compensation insurers. It denied having notice of any claimed injury and affirmatively alleged that it is not liable for "any benefits due plaintiff which accrued on or after May 6, 1994."

The plaintiff amended her complaint on June 21, 1995 and joined Berwind Industries Management Company as a defendant. She alleged that in 1993 and until May 1994 the manufacturing plant known as Porelon, where she worked and developed the gradual injury, was owned by Johnson Worldwide Associates, Inc. ["JWA"], which sold the plant to Berwind in May 1994. The plant continued to operate under the name of Micropore, Inc., allegedly a subsidiary of Berwind.

Micropore, Inc. answered the amended complaint, acknowledging the sale of the plant by JWA to Berwind in May 1994. It again denied that, although the plaintiff was regularly employed by Porelon for 20 years and was so employed May 1994, when the change in ownership occurred, the plaintiff had developed a gradually occurring injury as alleged. It admitted that on November 30, 1993, the plaintiff reported to management that she had been diagnosed with fibromyosis, but that she did not relate that the condition was work related.

Berwind answered the amended complaint on July 26, 1995, asserting that the plaintiff was last employed on March 6, 1995, and that it was not liable for benefits under the gradual occurring rule.

The Chancellor ruled that the plaintiff's injuries were gradual "and manifested themselves in May 1993, but they did not progress to the point of making the plaintiff unable to work until March 3, 1995, and therefore March 3, 1995, under Tennessee

law, is considered the date of injury." We restate the issue as being whether, under the proof, this finding is supported by a preponderance of the evidence.

Our review of the findings of fact made by the trial court is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance to the evidence is otherwise. TENN. CODE ANN. § 50-6-225 (e)(2); *Stone v. City of McMinnville,* 896 S.W.2d 584 (Tenn. 1991).

The Notice Issue

Plaintiff testified that she believed in August and November 1993 that her condition was temporary.

Dr. Carl Mitchell eventually referred plaintiff to Dr. David Knapp, a rheumatologist in Nashville, who saw her on March 4, 1994. She reported on the following business day, March 7, to her supervisor Ernestine Goodwin that Dr. Knapp had told her that her condition "might be an over-use syndrome." Plaintiff testified that as a result of her visits to Dr. Knapp, she thought that her condition might be work related but that it had not been definitively stated as work related. Plaintiff thought her condition would go away and would be temporary instead of permanent.

Thereafter, plaintiff sought the services of a Cookeville chiropractor, Dr. Mitchell Shea on June 8, 1994. He told her for the first time definitively that it was her work that was causing her problem. Three or four days later, plaintiff went to the personnel office at Porelon and told Sheba Garrett that she wanted to file a workers' compensation claim. Ms. Garrett gave her some papers to sign, and she thought that she was filing a workers' compensation claim.

By this time, mid-June 1994, the Porelon factory in Cookeville, Tennessee, had been sold from JWA to Berwind Industries Management Company. The date of sale was May 6, 1994, but the plaintiff was unaware of this transaction until she filed this action. Plaintiff continued to work until March 3, 1995.

The record reveals that when Dr. Shea informed plaintiff that her shoulder pain was definitely the result of repetitive use of her hands, arms, and shoulders at Porelon, she immediately made a formal request that a workers' compensation file be opened and that her claim be treated as a workers' compensation claim. This was in mid-June 1994.

With the knowledge of the Porelon officials, she began seeing Dr. Carl Mitchell, the Nashville physician, and her bills from Dr. Mitchell were submitted for payment by the Porelon group health insurer. Porelon officials, i.e. Sheba Garrett, filed these health insurance claims for plaintiff and therefore had both actual and constructive knowledge of her condition from shortly after her first visit to Dr. Mitchell in June 1993.

Plaintiff notified Ernestine Goodwin, one of her supervisors, in approximately June 1993, of the pain she was experiencing in her shoulder, arm, and shoulder blade area. She also told James Burden, another supervisor, in approximately August 1993, of the pain she was experiencing. Ernestine Goodwin did essentially the same kind of work that plaintiff did, and James Burden, who had been her supervisor for some six years as of 1993, was familiar with her work, and knew the physical movements that were needed to do that work, i.e. repetitive use of the hands, arms, and shoulders. Both Goodwin and Burden knew from many years of working with plaintiff that she did not engage in athletic activities or activities outside of work which were strenuous or which involved repetitive use of the hands, arms, and shoulders.

In November 1993, plaintiff saw Dr. Mitchell at Baptist Hospital in Nashville and received a note from him which stated: "Mary Ann Clark -- under my care for health changes that will (have) make her temporarily inefficient with her work." Plaintiff gave this medical note to James Burden, her supervisor, and a meeting was held on November 30, 1993 *to discuss her health problems.*

An injured employee must generally provide the employer with written notice of the injury within thirty days of the injury. TENN. CODE ANN. § 50-6-201. Once any employee is aware that a compensable injury has been sustained these notice provisions must be complied with. *Pentecost v. Anchor Wire Corp.,* 695 S.W.2d 183 (Tenn. 1985). This requirement is applicable even when the employee sustains a gradual injury. *Lyle v. Exxon Corp.,* 746 S.W.2d 694 (Tenn. 1988).

An employee's lack of knowledge that her injury is work related, if reasonable under the circumstances, will excuse her failure to give notice within thirty days that he is claiming a work related injury. It is enough that the employee notifies the employer of the facts concerning his injury of which he is aware or reasonably should

be aware. We think the proof of notice is sufficient to satisfy the statutory requirements.

The Gradual Injury

In gradual injury cases, the date of the accident is the date the employee's condition was sufficiently severe to prevent her from working. *Barker v. Home-Crest Corp.,* 805 S.W.2d 373, 374 (Tenn. 1991). The plaintiff's condition was clearly a gradually occurring one, caused by many years of performing job duties requiring repetitive use of her arms. There was no specific accident, incident, or trauma which precipitated her complaints of pain, which began in May 1993 and gradually worsened. She testified that she gradually started feeling arm and shoulder pain in May 1993, but it progressively became worse, peaking around December 1994.

Following diagnosis of "overuse syndrome," plaintiff continued to work full time without restrictions until March 3, 1995. No modifications to her job duties were made, and no special accommodations were offered. Notwithstanding Dr. Mitchell's suggestion that the plaintiff would be inefficient with her work for some period of time in November 1993, there were no lighter duty jobs available to her and she did not receive any special treatment.

In late 1994, she continued to work full time and overtime, performing the same job duties as the other workers in her department, notwithstanding the worsening of shoulder and arm pain. She was then being treated by Dr. Knapp, who had not placed any restrictions upon her work.

In February 1995, the plaintiff applied for a job with the Board of Education because it was getting harder to do her job, and she felt like she was not going to be able to continue working much longer. On March 3, 1995, she met with James Burden and Sheba Garrett, who advised her that, due to recent medical restrictions imposed upon her by Dr. Clendenin, she was being placed on workers' compensation leave. Although the plaintiff requested light duty work at that time, both Burden and Long advised plaintiff that there was no light duty work available.

For the purposes of this case, the operative date is the date on which the plaintiff became unable to work on account of her gradually occurring condition. That date is March 3, 1995 as found by the Chancellor. Since Berwind was the plaintiff's employer on that date, liability attaches. *See Barker v. Home-crest Corp.,* 805

S.W.2d 373, 373-74 (Tenn. 1991). And beginning with *Baxter v. Smith,* 364 S.W.2d 936 (Tenn. 1962), the rule in this jurisdiction is that liability cannot be apportioned. *See Bennett v. Howard Johnsons Motor Lodge,* 714 S.W.2d 273 (Tenn. 1986).

The appellant next argues that JWA, owner of Porelon, should be estopped from denying benfits to the plaintiff, because Walsh, an official of JWA, promised the plaintiff that workers' compensation benefits would begin in March 1995. This issue was decided adversely to the appellant on the basis of the credibility of the witnesses, and the Chancellor's resolution is thus beyond our reach. *See Walls v. Magnolia Truck Lines,* 622 S.W.2d 526 (Tenn. 1981).

The judgment is affirmed at the costs of the appellant. The case is remanded for all purposes.

_____
William H. Inman, Senior Judge

CONCUR:

_____
Frank F. Drowota, III, Justice

_____
Joe C. Loser, Jr., Special Judge

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

MARY ANNE CLARK,	}	*PUTNAM CHANCERY*
	}	*No. 95-211 Below*
Plaintiff/Appellee	}	
	}	*Hon. Vernon Neal,*
vs.	}	*Chancellor*
	}	
PORELON, INC.,	}	*No. 01S01-9703-CH-00062*
	}	
Defendant/Appellee	}	
	}	
	}	
vs.	}	
BERWIND INDUSTRIES	}	
MANAGEMENT COMPANY,	}	*AFFIRMED AND REMANDED.*
	}	
Defendant/Appellant.	}	

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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 Berwind Industries Management Company and their Surety, for which execution may issue if necessary.

IT IS SO ORDERED on November 7, 1997.

PER CURIAM