

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

**FILED**

March 30, 1998

Decil Crowson, Jr.  
Appellate Court Clerk

WALTER LEE AUSTEIN, )

Plaintiff/Appellant, )

VS. )

RIVERWOOD INTERNATIONAL )  
USA, INC. )

Defendant/Appellees. )

SHELBY COUNTY

HON. D. J. ALISSANDRATOS  
CHANCELLOR

No. 02S01-9704-CH-00037

FOR APPELLANT:

Russell C. Winston  
707 Adams Avenue  
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FOR APPELLEE:

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MEMORANDUM OPINION

MEMBERS OF PANEL:

JANICE M. HOLDER, JUSTICE  
HEWLITT P. TOMLIN, JR., SENIOR JUDGE  
CORNELIA A. CLARK, SPECIAL JUDGE

AFFIRMED

CLARK, SPECIAL JUDGE

This worker's compensation appeal has been referred to the special worker's

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. The sole issue on appeal is whether the one-year statute of limitations under T.C.A. §50-6-203 ran prior to the filing of the lawsuit.

This marks the second appearance of this case before this panel. In Austein v. Riverwood International USA, Inc., No. 02S01-9507-CH-00059 (Tenn. Work. Comp. App., February 23, 1996), this panel found that the trial court erred in granting summary judgment on the statute of limitations issue because issues of material fact existed concerning both the date the statute of limitations began to run and the estoppel issue. The case was remanded to the trial court for trial on the merits. Plaintiff again appeals the trial court's finding that the statute of limitations ran before he filed this action.

The injury for which the plaintiff seeks compensation is a hearing loss which developed over a period of time. Plaintiff worked for the defendant for thirty-nine (39) years as a printing pressman. Beginning in 1983 the plaintiff underwent yearly hearing tests given by the defendant. In 1983 plaintiff was notified that his hearing test indicated he had a medically significant loss of hearing and that he should consult an ear specialist. Plaintiff denies receiving this notice. On July 31, 1992, the plaintiff again received notice of the results of an audiology test that confirmed he had a medically significant hearing loss. Plaintiff admits receiving this notice but contends that the relationship of his hearing impairment to his employment was not made known and that he did not learn of the relationship until December 8, 1992, which was within one year of the filing of this suit.

The statute of limitations and the time for giving notice of an injury is suspended until by reasonable care and diligence it is discoverable and apparent

that an injury compensable under the Workers' Compensation Act has been sustained. Livingston v. Shelby Williams Industries, Inc., 811 S.W.2d 511 (Tenn. 1991). Hawkins v. Consolidated Aluminum Corporation, 742 S.W.2d 253 (Tenn. 1987). Plaintiff's attorney sent a letter to defendant dated November 23, 1992, specifically giving notice of work-related hearing loss he suffered prior to that date. However, plaintiff contends the statute was tolled because defendant's counsel in later correspondence made reference to the date of loss as December 8, 1992, thereby leading him to believe he had one year from that date in which to file his action.

After a hearing on the merits the trial court found as follows:

1. For some months prior to July 31, 1992, the plaintiff began to notice that when he was on vacation or away from the plant, his hearing improved. More importantly, for the first time the plaintiff noticed that he had difficulty hearing while in the course and scope of his employment as a printing pressman with Riverwood International.

2. On or about July 31, 1992, the plaintiff received the results of a yearly Hearing Screening which revealed that the plaintiff had a hearing loss and recommended he seek an audiological and/or otological evaluation. The plaintiff took this to mean he should go see a doctor.

3. When the plaintiff received the July 31, 1992 test results, a duty was imposed upon him to use due diligence to determine the nature and extent of the hearing loss and whether or not it was work related. The plaintiff continued to work at the factory until the plant closed in October of 1992 and still did not consult a doctor or any other health care professional regarding his hearing. The plaintiff waited until December of 1992 to have his hearing tested at Beltone Hearing Aids and waited until February of 1993 to consult with a physician. Thus, the court finds that the plaintiff did not act with due diligence in discovering his hearing loss was related to his employment.

4. The plaintiff's complaint for workers' compensation for the loss of his hearing is barred by the applicable statute of limitations. The plaintiff did not file suit in this matter until December 7, 1993, which was beyond the one year statute of limitations.

5. The court does not find that the reference by the defendant of December 8, 1992, as being the date of the loss is a misrepresentation upon which the plaintiff relied and which resulted in his filing suit on December 7, 1993.

After a careful review of the record, we cannot conclude that the evidence preponderates against the trial court's findings. The judgment of the trial court is affirmed. Costs of appeal are taxed to the plaintiff/appellant.

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CORNELIA A. CLARK, SPECIAL JUDGE

CONCUR:

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JANICE M. HOLDER, JUSTICE

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HEWLITT P. TOMLIN, JR., SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

WALTER LEE AUSTEIN	)	Shelby Chancery No. 103627-3
	)	
Plaintiff/Appellant	)	Hon. D. J. Alissandratos,
	)	Chancellor
v.	)	
	)	Supreme Court No.
RIVERWOOD INTERNATINAL USA, INC.	)	02-S-01-9704-CH-00037
	)	
Defendant/Appellee	)	Affirmed

<p><b>FILED</b></p> <p><b>March 30, 1998</b></p> <p><b>Cecil Crowson, Jr.</b> Appellate Court Clerk</p>
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JUDGMENT ORDER

This case is before the Court upon motion for review pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), 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 motion for review is not well-taken and should be denied; 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.

Cost will be paid by plaintiff/appellant, and surety, for which execution may issue if necessary.

It is so ordered this \_\_\_\_\_ day of \_\_\_\_\_, 1998.

PER CURIAM

Holder, J., not participating