IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT NASHVILLE

FILED

February 24, 1998

Cecil W. Crowson
Appellate Court Clerk

JOSEPH D. LEWIS, Plaintiff/Appellant	)	No. 01S01-9702-CV-00036
v.	)	CIRCUIT COURT, RUTHERFORD COUNTY
INSURANCE COMPANY OF PENNSYLVANIA and BRIDGESTONE (USA), INC. Defendants/Appellees.	)	HON. DON R. ASH, JUDGE

FOR APPELLANT:

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FOR APPELLEE:

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MEMORANDUM OPINION

MEMBERS OF PANEL:

LYLE REID, ASSOCIATE JUSTICE, SUPREME COURT
JOSEPH C. LOSER, JR., RETIRED JUDGE
WILLIAM S. RUSSELL, RETIRED JUDGE

MODIFIED AND REMANDED RUSSELL, SP. J.

This appeal in a workers' compensation case has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated Section 50-6-225 (e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law.

This case involves an employee's affliction with contact dermatitis from handling chemicals present in vehicle tire components being manufactured by the employer.

No question exists as to the injury being work related. The symptoms waxed and waned for more than ten years. At various times the employer furnished the employee medical treatment by company nurses and three different physicians.

The employee, Joseph D. Lewis, never missed a day from work. When the dermatitis flared up he worked in pain until medication and time partially alleviated his symptoms.

The precise chemical or chemicals causing the reaction are not identified in the record. The skin on his fingers, hands and on one occasion his arm would become inflamed, crack and peel, resulting in a very painful experience.

Because his system became chemically sensitized over time, his off-work activities were impacted. He could no longer be exposed to paint, or refinishing liquids, or the oils and greases encountered in mechanic work; hence, these hobbies could no longer be pursued.

This suit was filed on March 25, 1993. In early 1993 the plaintiff chose to use his company seniority rights and transfer to a different department where he would not be required to constantly handle the offending rubber compound. He continues to work in this new department for the same employer at a very slightly reduced rate of pay. Since changing jobs, Mr. Lewis still has contact dermititis problems if he touches the offending compound or participates in his hobbies of restoring automobiles, mechanic work, painting or refinishing furniture.

Two of the attending physicians, Drs. Alvin Meyer and William Freeman, opined that Mr. Lewis' impairment belonged under Table II, Class 2, "Impairment Classes and Percents for Skin Disorders", AMA Physicians Guide to the Evaluation of Permanent Impairment, which carries a 10% - 24% impairment rating. Dr. Meyer testified that his opinion was that Mr. Lewis had a 12%-15% permanent partial impairment to the body as a whole.

The defendants relied upon the statute of limitation. Tennessee Code Annotated Section 50-6-306 (a) provides:

> The right to compensation for any other occupational disease is barred unless suit is filed within one (1) year after the beginning of the incapacity for work resulting therefrom * * *.

Adams v. American Zinc Co., 326 S.W. 2d 425 (Tenn 1959), defines the incapacity to work:

> The beginning of incapacity to work occurs when an employee has knowledge, or in the exercise of reasonable caution should have knowledge, that he has an occupational disease and that it has progressed to the point that it injuriously affects his capacity to work to a degree amounting to a compensable injury.

The trial court found that the suit was barred by the one year statute of limitation; but expressed a degree of uncertainty, and offered a judgment based upon a 20% vocational disability should this court find that the suit was not time barred. The trial court found that the running of the statute was triggered on October 21, 1991, "when the plaintiff became incapacitated". The court stated from the bench: "I am going to specifically find

that it applied in 1991, when he made that last visit to the doctor".

The record shows that Mr. Lewis saw Dr. Meyer on October 22, 1991; October 29, 1991; and November 12, 1991. On his October 22, 1991, visit to Dr. Meyer Lewis was directed by the doctor to "continue regular work at this time" and he did so.

Apparently the plaintiff did not consider himself incapacitated until he applied for a transfer to his present job. His complaint alleges: "In an effort to avoid the offending agent, in early 1993 plaintiff was forced to change jobs, all of which has caused a loss of income and an industrial disability."

Because the statute is tolled by the payment of medical bills by the employer during the initial year, and extended for a year after the last medical payment made during the period in which the case is not time barred, it would have been relevant to know when the company chosen doctors were paid. Presumably they were, because the employee testified that he did not pay them. However, the employer's representative at the trial testified that he did not have that information. The burden of proving an affirmative defense is upon the defendant.

We find no evidence that the plaintiff knew or should have known that he had an occupational disease that injuriously affected his capacity to work to a degree amounting to a compensable disability prior to early 1993, when he changed jobs; and this suit was brought within a few days thereafter. Mr. Lewis did his regular job, sometimes in pain, until his condition forced him to seek a transfer. The evidence supports that being the time that the statute began to run. Hence, this suit is not time barred.

It was the opinion of the trial judge that Mr. Lewis sustained a 20% whole body disability, and that he should have lifetime medical treatment and discretionary costs. Appellant contends for a greater disability award. We hold that the trial judge's alternative judgment should be the judgment of the court, and we remand the case for the entry and enforcement of same. Costs on appeal are assessed to the appellees.

WILLIAM S. RUSSELL, SPECIAL JUDGE

CONCUR:

LYLE REID, ASSOCIATE JUSTICE

JOE C. LOSER, JR., SPECIAL JUDGE

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JOSEPH D. LEWIS,	}	RUTHERFORD CIRCUIT
	}	No. 31664 Below
Plaintiff/Appellant	}	
	}	Hon. Don R. Ash,
vs.	}	Judge
	}	
INSURANCE COMPANY OF PENNSYLVANIA and BRIDGESTONE (USA), INC.,	}	No. 01S01-9702-CV-00036
	}	
Defendants/Appellees	}	MODIFIED 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 Pennsylvania and Bridgestone (USA), Inc., for which execution may issue if necessary.

IT IS SO ORDERED on February 24, 1998.

PER CURIAM