IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT NASHVILLE
(September 25, 1997 Session)

JIMMY DALE SHELTON,	)	GILES CIRCUIT
	)	
Plaintiff-Appellee,	)	Hon. Jim T. Hamilton,
	)	Judge.
v.	)	
	)	No. 01S01-9704-CV-00092
THE TORRINGTON COMPANY d/b/a/ INGERSOLL RAND,	)	
	)	
Defendant-Appellant.	)	

For Appellant:	For Appellee:
J. Michael Morgan	Tracy W. Moore
Ortale, Kelley, Herbert & Crawford	Moore & Peden
Nashville, Tennessee	Columbia, 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

REVERSED and DISMISSED 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 employer contends the evidence preponderates against any award of benefits for a claimed occupational disease because (1) the claim is barred by the applicable statute of limitations, (2) the claimant failed to give timely written notice of his claim, (3) the disease did not arise out and in the course of employment, (4) the claimant is not permanently disabled or, if he is, the award of permanent disability benefits is excessive, and (5) the defendant is not the employer for which the claimant was working at the time of the last injurious exposure. As discussed below, the panel has concluded the judgment should be reversed and the case dismissed.

The employee or claimant, Shelton, is thirty-eight years old with a high school diploma, twenty-seven credit hours toward an Associate of Arts degree and a certificate in automotive technology. He worked in the employer's ball bearing manufacturing plant from April 14, 1980 until September 28, 1990, when he quit because something in the plant made breathing difficult for him. He did not tell anyone at Torrington the reason for his quitting.

During his employment at Torrington's ball bearing plant, he held positions in different areas of the plant, including the steel yard, the cast iron department, the screw machine department and the shipping department. He testified that breathing was difficult for him in all those areas. Before becoming employed by Torrington, he worked for other employers and had no breathing problems. In the spring of 1989, there was a fire in the plant. The claimant was exposed to smoke for about five minutes. In the spring of 1990, he was briefly exposed to steam from an overheated battery.

He first received medical treatment for chest pain and tightness on May 25, 1989 and for shortness of breath on May 22, 1990. Two pulmonary specialists, Dr. A. Clyde Heflin and Dr. Alan H. Arrington, testified at the trial by deposition as to the claimant's physical condition. At the time of the trial on October 1, 1996, the claimant was employed by Advance Auto Parts as an assistant manager and had been so employed for almost two years.

The trial judge found the claimant first knew he had an occupational disease on September 22, 1993, when Dr. Arrington sent a letter to the claimant's attorney, and that the claimant had a compensable permanent partial disability of thirty-five percent to the body as a whole, which the trial judge commuted to a lump sum judgment of $36,360.20, using the agreed upon compensation rate. Appellate review is de novo upon the record of the trial court, accompanied by a presumption of correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. section 50-6-225(e)(2).

(1) Statute of Limitations.

By statute, the right to compensation for any occupational disease other than coal worker's pneumoconiosis is barred unless suit is filed within one year after the beginning of the incapacity for work resulting therefrom. Tenn. Code Ann. section 50-6-306(a). 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. Adams v. American Zinc Co. 205 Tenn. 189, 326 S.W.2d 425 (1959).

The claimant began working for the employer on or about April 14, 1980 in the steelyard, where he was responsible for moving steel to floor locations and screw machines. He worked there about a year and had no adverse reactions. In May of 1981, he was moved to the position of chucking machine operator, where he spent four years and was not exposed to chemicals, but developed shortness of breath infrequently, for which he received treatment a few times.

In June of 1985, the claimant applied for a transfer to the shipping department because, he said, the air was cleaner and working conditions better. The application was granted. Then, for two years beginning in 1987, he worked as a screw machine operator, where he was bothered by dust from the floor-dry, a substance used to absorb oil spills. He worked briefly as a serviceman in 1989, but was returned to his machine operating duties and the accompanying dust.

Following a fire in the plant, he returned to work in the shipping department, but had all day problems breathing while at work and after leaving work. On another occasion, he was exposed to fumes from a battery which had spilled over. There was "pretty much constant irritation" following those two events until the claimant voluntarily resigned in September of 1990. Asked why he resigned, the claimant responded, "because of the condition, my medical condition," a reference to breathing difficulties. By that time, he had been treated or examined by three other doctors.

This action for workers' compensation benefits was commenced more than three years later on January 12, 1994. Accepting the claimant's own testimony, the panel is persuaded that he knew, or in the exercise of reasonable caution should have known, no later than September 30, 1990, that he had an occupational disease that injuriously affected his ability to work to the point that he was incapacitated. His claim is consequently barred by the statute of limitation.

(2) Notice.

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., 910 S.W.2d 412 (Tenn. 1995).

Generally the beginning date for computing notice is the date on which the effects of the injury manifest themselves to the employee or could have been discovered by the employee in the exercise of reasonable care and diligence. Hawkins v. Consolidated Aluminum Corp., 742 S.W.2d 253 (Tenn. 1987). For a claimed occupational disease, the required written notice must be given within thirty days after the first distinct manifestation of the occupational disease. Tenn. Code Ann. section 50-6-305(a). 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. McCaleb v. Saturn Corp., supra.

Where, as here, the employer denies that the employee has given the required written notice, the employee has the burden of showing that the employer had actual notice, 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 the claim. Masters v. Industrial Garments Mfg. Co., 595 S.W.2d 811 (Tenn. 1980).

The trial judge found that the first knowledge by the claimant that he had a work-related occupational disease was on September 22, 1993, when Dr. Arrington sent a letter to his attorney, and that timely notice was given. There is evidence of a letter from the claimant's attorney to the employer on October 19, 1993, but the letter itself is not found in the record. Apparently it was nothing more than notice that the claimant had retained an attorney.

Before voluntarily terminating on September 28, 1990, the claimant had seen at least three physicians regarding his breathing difficulties at work. Moreover, the claimant testified his supervisor had actual knowledge in May of 1990, and when asked why he did not tell the employer why he was quitting when he did, he replied that Dr. Heflin had advised him not to give the reason that he had asthma because to do so would make it difficult for him to obtain other employment.

The evidence accordingly preponderates against the trial judge's finding that timely written notice was given. The preponderance of the evidence also fails to establish that the employer had actual notice or that the employee had a reasonable excuse for failure to give the required written notice.

(3) Causation.

Under the Tennessee Workers' Compensation Law, an injury by accident arising out of and in the course of employment which causes disablement of the employee, or an occupational disease arising out of and in the course of employment which causes disablement, is compensable. Tenn. Code Ann. section 50-6-101 et seq. An occupational disease arises out of the employment only if the disease can be determined to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment, the disease can be fairly traced to the employment as a proximate cause, the disease has not originated from a hazard to which the worker would have been equally exposed outside of the employment, the disease is incidental to the character of the employment and not independent of the relation of employer and employee, the disease originated from a risk connected with the employment and flowed from that source as a natural consequence, though it need not have been foreseen or expected prior to its contraction, and there is a direct causal connection between the disease and the conditions under which the work is performed. Tenn. Code Ann. section 50-6-301.

Except in the most obvious cases, causation may only be proved by expert medical testimony. Thomas v. Aetna Life and Casualty Ins. Co., 812 S.W.2d 278 (Tenn. 1991). An award may not be based on conjecture or speculation. Reeser v. Yellow Freight Systems, Inc., 938 S.W.2d 690 (Tenn. 1997). The record contains the testimony of two medical experts.

Dr. Alan H Arrington specializes in pulmonary diseases and internal medicine in Huntsville, Alabama. He testified by deposition that he examined the claimant on July 31, 1992 and found no evidence of obstructive lung disease. Nevertheless, based entirely on the history provided by the claimant, he opined the claimant had "asthma induced by exposures to benzene solvents as part of his employment." Taken as a whole, the doctor's testimony as to causation was equivocal and conjectural concerning whether the claimant's

asthma had its origin in a risk connected with his employment by the employer. Additionally, we find no evidence in the record to support the doctor's finding of exposure to benzene solvents.

Dr. Asa Clyde Heflin, Jr. testified also by deposition. He specializes in internal medicine and pulmonary diseases and is the medical director for primary care at St. Thomas Hospital in Nashville and an assistant professor at the Vanderbilt University Medical School. He first saw the claimant on August 16, 1990 and found his examination to be normal with "some evidence of what we call small airway obstruction, meaning a variant of asthma or an asthma like illness." Dr. Heflin did not find any causal connection between that condition and the claimant's employment by the employer.

The evidence fails thus to establish the claimant's condition as one arising out of and in the course of employment.

(4) Permanency.

Except in the most obvious cases, permanency may only be established by expert medical testimony. Dorris v. INA Insurance Company, 764 S.W.2d 538 (Tenn. 1989). An injured employee is competent to testify as to his own assessment of his physical condition and such testimony should not be disregarded. Uptain Construction Co. v. McClain, 526 S.W.2d 458 (Tenn. 1975). The trial court's finding of permanency was based in part on the claimant's former wife's testimony that his condition was better when he stayed away from the employer's manufacturing plant.

Dr. Arrington's testimony concerning permanency included the following questions and answers:

> Q. Now, what does that diagnosis mean for Mr. Shelton's occupational future? And by that, I mean what environments should he avoid, due to this diagnosis?
>
> A. Well, as he's related to me clinically that he is hyper-responsive and hyperreactive to these nonspecific airway irritants, then he should not work in environments that are going to cause him to have heavy exposure or confined exposure to such things.
>
> And that includes, you know, industrial solvents, dusts, fumes, smokes. He needs a clean air working environment. And that will impact his -- his working ability if he was wanting to go back to work in a closed-in factory situation that dealt with a lot of dust, smokes, fumes,

et cetera.

In terms of his overall health, his condition is mild. And if he takes good care of himself, his life span and overall health should be the same as anyone else's.

Q. Doctor, if Mr. Shelton were sitting here in what I presume is a clean air environment here in your office, would he have any degree of permanent impairment under the guidelines for permanent impairment?

A. No. His condition is asthma. And asthma, by definition, no matter what textbook you pick up, is reversible airways disease, reversible airways obstruction.

Okay. If you have fixed airways obstruction like these chronic bronchitics who smoked a pack a day for twenty years, they don't have asthma. They might wheeze like an asthmatic, but do not have asthma, because they do not reverse between attacks all the way back to normal. That is an axiom of the diagnosis of asthma.

And so when he is doing well, his lung function test status is as well as yours and mine. If he has had one of these irritants and exposures triggered his asthma, he could test out at an extremely impaired range and require immediate treatment for it.

His history has been one of mild impairment during his attacks. But that's based solely on history.

The sum of Dr. Heflin's testimony was that the claimant had little or no permanent impairment, none according to approved guidelines. The claimant testified at trial that he was "in very good physical condition now." The evidence thus preponderates against a finding of thirty-five percent permanent partial disability to the body as a whole, although there is some evidence of minimal disability.

(5) Last Injurious Exposure

Where an employee becomes disabled as a result of an occupational disease, the employer for whom the employee was working when he was last injuriously exposed to the hazards of the disease is solely responsible for the payment of compensation benefits. Tenn. Code Ann. section 50-6-304.[1] "Last

[1] **50-6-304. Last employer liable. ---** When an employee has an occupational disease, the employer in whose employment such employee was last injuriously exposed to the hazards of the disease, and the employer's insurance carrier, if any, at the time of the exposure, shall alone be liable therefor, without right to contribution from any prior employer or insurance carrier.

injurious exposure" means any exposure which directly augments the disease to any extent, however slight. Morell v. Asarco, Inc., 611 S.W.2d 830 (Tenn. 1981).

Since leaving the Torrington Company, the claimant has, according to his own testimony, worked for at least three other employers where he suffered from breathing problems brought on by exposure to dust or other irritants. The panel therefore finds Torrington not liable under the last injurious exposure rule.

The judgment of the trial court is accordingly reversed and the cause dismissed. Costs are taxed to the plaintiff-appellee.

_____

Joe C. Loser, Jr., Special Judge

CONCUR:

_____

Lyle Reid, Associate Justice

_____

William S. Russell, Senior Judge

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

JIMMY DALE SHELTON,	)	GILES CIRCUIT
	)	NO. 9252
PLAINTIFF/APPLICANT,	)	
	)	HON. JIM T. HAMILTON,
v.	)	JUDGE
	)	
THE TORRINGTON COMPANY	)	S. CT. NO. 01S01-9704-CV-00092
d/b/a INGERSOLL RAND,	)	
	)	
DEFENDANT/RESPONDENT.	)	REVERSED AND DISMISSED

JUDGMENT

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.

Costs will be paid by plaintiff/applicant, for which execution may issue if necessary.

It is so ordered this 13th day of March, 1998.

PER CURIAM

REID, J. NOT PARTICIPATING