IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
(April 13, 1998, Session)

CAROL DOUGLAS,	**)**	
	)	
Plaintiff/Appellant,	**)**	**MADISON COUNTY CHANCERY**
	)	
v.	**)**	**NO. 02S01-9801-CH-00011**
	)	
GRAVES GOLD LEAF GALLERY OF WEST TENNESSEE, INC., a/k/a MARSHA S. GRAVES, d/b/a GRAVES GOLD LEAF GALLERY,	**)**	**HON. JOE C. MORRIS, CHANCELLOR**
	)	
Defendant/Appellee.	**)**	

For the Appellant:

[illegible]

For the Appellee:

[illegible]

MEMORANDUM OPINION

MEMBERS OF PANEL:

JUSTICE JANICE M. HOLDER
SENIOR JUDGE JOHN K. BYERS
SPECIAL JUDGE J. STEVEN STAFFORD

REVERSED IN PART,
AFFIRMED IN PART,
AND REMANDED

STAFFORD, SPECIAL JUDGE

OPINION

This worker's 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) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law.

The parties have raised two issues for the Panel's consideration:

I. Whether a preponderance of the evidence supports the trial court's finding that the defendant did not employ five or more persons making it subject to the Worker's Compensation Act?

II. Whether a preponderance of the evidence supports the trial court's finding that the plaintiff provided notice to the defendant within thirty days of the plaintiff's discovery of a work-related injury?

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 findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2); *Stone v. City of McMinnville,* 896 S.W.2d 548, 550 (Tenn. 1995). The application of this standard requires this Court to weigh in more depth the factual findings and conclusions of the trial court in a worker's compensation case. *See Corcoran v. Foster Auto GMC, Inc.,* 746 S.W.2d 452, 456 (Tenn. 1988). However, considerable deference must be given to the trial judge, who has seen and heard witnesses especially where issues of credibility and weight of oral testimony are involved. *Jones v. Hartford Accident and Indemnity Company,* 811 S.W.2d 516 (Tenn. 1991).

FACTS

The plaintiff is a 48-year old married woman. She is a high school graduate with some additional training. She has previously worked in a factory and as a building caretaker.

The defendant is a corporation. Robert Graves is the president and Marcia Graves is the vice-president and secretary-treasurer of the corporation.

In July 1990, the plaintiff began work for the defendant. She testified that her job required her to fill frames as they were made, clean glass, and assemble products. Sometime in 1994, the plaintiff began experiencing problems with her right arm. She continued to work for the defendant until May 4, 1995, when she left to have surgery.

MEDICAL TESTIMONY

In August 1994, the plaintiff visited her family physician, Dr. Hayden, because of a cyst that developed on her wrist. After examining her, Dr. Hayden referred her to Dr. Johnson who performed

an ultrasound on the plaintiff's arm. Dr. Johnson referred her to Dr. Bingham who ultimately diagnosed the plaintiff with carpal tunnel syndrome. After making his diagnosis, Dr. Bingham referred the plaintiff back to Dr. Johnson who told the plaintiff she needed to have surgery. In January 1995, the plaintiff saw Dr. Hayden and was informed that her carpal tunnel injury was work-related. As the result of this information, Dr. Hayden wrote a letter dated January 24, 1995, advising the defendant that the plaintiff's injuries could be work-related. The plaintiff delivered this letter to the defendant within thirty days of the date it was received. On May 4, 1995, Dr. Kee operated on the plaintiff's right arm. She was released to return to work in October 1995. However, the plaintiff was never allowed to return to work with the defendant.

COVERAGE BY THE ACT

The trial court found that the defendant did not regularly employ five or more persons thereby excluding it from coverage under the Workers' Compensation Act. We respectfully disagree.

Tenn. Code Ann. § 50-6-102(a)(3)(A) defines an employee as follows:

> "'Employee' includes every person, including a minor, whether lawfully or unlawfully employed, the president, any vice president, secretary, treasurer or other executive officer of a corporate employer without regard to the nature of the duties of such corporate officials, in the service of an employer, as employer is defined in subdivision (a)(4), under any contract of hire or apprenticeship, written or implied. . . ."

Tenn. Code Ann. § 50-6-102(a)(4) defines an employer as:

> "'Employer' includes any individual, firm, association or corporation, or the receiver, or trustee of the same, or the legal representative of a deceased employer, using the services of not less than five (5) persons for pay, except as provided in § 50-6-113, and in the case of an employer engaged in the mining and production of coal, one (1) employee for pay. If the employer is insured, it shall include the employer's insurer, unless otherwise herein provided."

The evidence introduced at trial revealed that on September 26, 1994, October 10, 1994, October 17, 1994, and October 24, 1994, the defendant employed Robert S. Pettigrew, Carol Douglas, Amy Leeper, and Anna Williams. During this same time, Robert Graves served as president and Marcia Graves served as vice-president and secretary-treasurer of the defendant.

Counting the corporate officers, the defendant would have six employees. However, the defendant submits that the corporate officers should not be counted as employees because they are not under any contract of hire. In *Garner v. Reed,* 856 S.W.2d 698, 701 (Tenn. 1993), the Supreme

Court discussed this issue and cited Professor Larson's treatise, *Larson's Workmen's Compensation Law,* § 47.10, p. 8-145:

> "[t]he word 'hire' connotes payment of some kind. By contrast with the common law of master and servant, which recognized the possibility of having a gratuitous servant, the compensation decisions uniformly exclude from the definition of 'employee' workers who neither receive nor expect to receive any kind of pay for their services.
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> * * *
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> The element of payment, to satisfy the requirement of a contract of hire, need not be in money, but may be in anything of value. Board, room, and training, such as might be furnished to a student nurse or hospital intern, are treated as the equivalent of wages. Indeed, food and lodging have figured as payment in as diverse employments as college football and county prisoner. And even refreshments which were the sole payment given a casual porter for the odd jobs he did, were held sufficient to sustain a finding of employment. On the other hand, mere gratuities or gifts, unless understood by the parties to constitute the equivalent of wages, are not considered payment under a contract of hire. The same is true of various discounts that may go with claimant's position. . . ."

The undisputed proof at trial revealed that Marcia Graves did not receive any payment from the defendant. Therefore, she cannot be counted as an employee of the defendant. However, Robert Graves testified at trial that he was paid in his capacity as president when there was money. This statutorily qualifies him as an employee of the corporation. Counting Mr. Graves, the defendant would have the requisite five employees and would subject it coverage under the Workers' Compensation Act.

NOTICE OF INJURY

The trial judge found that the plaintiff gave the defendant notice of her injury within thirty days of the date that she became aware that the injury was work-related. The defendant asserts that the trial court erred in this finding.

Tenn. Code Ann. § 50-6-201 requires an employee to immediately notify the employer in writing of the occurrence of an injury. This notice must be given within thirty days after the injurious occurrence unless the injured employee has a reasonable excuse for the failure to give the notice.

> "Where the employer denies that a claimant has given the required written notice, the claimant has the burden of showing that the employer had actual notice, that the employer has waived written notice, or that the claimant has either complied with the requirement or has a reasonable excuse for her failure to do so, for notice is an essential element of her claim." *Masters v. Industrial Garments Mfg. Co.,* 595 S.W.2d 811 (Tenn. 1980).

The plaintiff testified that she had a carpal tunnel syndrome in the fall of 1994. She did not give the defendant notice of her injury until January 1995, at the earliest. She testified that even though she was aware that she had a carpal tunnel problem, she did not know that it was definitely work-related until January 1995. Although she was questioned on cross-examination about inconsistencies with her deposition testimony, the trial judge accredited her testimony. Additionally, no medical testimony was introduced from any of her treating physicians that was inconsistent with her testimony. In short, the only evidence the trial judge had to consider on this issue was the plaintiff's testimony.

> 'Where the trial judge has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, on review considerable deference must still be accorded to those circumstances.' *Humphrey v. David Witherspoon, Inc.*, [illegible] (Tenn. 1995).

Although the trial judge stated that it was a close issue, he found that the plaintiff gave proper notice because she was not sure that her problem was work-related until informed by Dr. Kepler. She then gave the defendant notice of the injury within thirty days of the receipt of this information. Based on these factors, we cannot say that the evidence preponderates against the finding of the trial judge and therefore find this issue to be without merit.

PERMANENT PARTIAL DISABILITY AWARD

In the judge's order, the trial court stated that in the event that the plaintiff's injuries were compensable, she would be entitled to an award of 5% permanent partial disability to the left arm and 5% permanent partial disability to the right arm. The only evidence introduced regarding the extent of the plaintiff's disability was the plaintiff's testimony and Dr. Joseph Boals' independent medical evaluation. Dr. Boals opined that the plaintiff had suffered a 5% impairment to both the right and left arms. The plaintiff also testified about the effect the injuries had upon her.

> 'Once causation and permanency have been established by expert medical testimony, the trial judge may consider any pertinent factors, including age, job skills, education, training, duration of disability, anatomical disabilities established by medical experts, and job opportunities available to a worker with those anatomical disabilities, to determine the extent of the worker's industrial disability.' *Hill v. Royal Ins. Co.*, [illegible] (Tenn. 1995).

The Panel finds that the evidence does not preponderate against the trial court's finding of 5% permanent partial disability to the left arm and 5% permanent partial disability to the right arm.

The judge's order of the trial court is reversed on the issue of the applicability of the Workers' Compensation Law and affirmed on the issues of notice of the injury and award of permanent

disability benefits. The case is remanded to the trial court for implementation of this order. The costs of this appeal are taxed to the defendant.

J. STEVEN STAFFORD, SPECIAL JUDGE

CONCUR:

JANICE M. HOLDER, JUSTICE

JOHN K. BYERS, SENIOR JUDGE

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 on appeal are taxed to the appellee.

IT IS SO ORDERED this ____ day of _____, 1998.

PER CURIAM

Holder, J. - Not participating.