IN THE SUPREME COURT OF TENNESSEE
WORKERS' COMPENSATION APPEALS PANEL
KNOXVILLE, JUNE 1998 SESSION

LISA M. BLANKENSHIP	)	BRADLEY
CHANCERY	)	
Plaintiff/Appellee	)	
V.	)	Earl H. Henley, Chancellor
MARS, INCORPORATED	)	
Defendant/Appellant	)	No. 03S01-9709-CH-00105

For the Appellant:

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For the Appellee:

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MEMORANDUM OPINION

Members of Panel:

William M. Barker, Justice
Joe C. Loser, Special Judge
Roger E. Thayer, Special Judge

REVERSED and DISMISSED.

THAYER, Special 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.

The employer, Mars, Incorporated, has appealed from a judgment entered by the trial court awarding the employee, Lisa Blankenship, 50% permanent partial disability to the body as a whole. The appeal presents issues concerning whether the court was in error (1) in finding the employee's injury was work-related, (2) in finding the employee gave proper notice of the injury, (3) in finding the one year statute of limitations had not expired, (4) in allowing discretionary costs and (5) in awarding medical expenses.

We have carefully examined the record and are of the opinion the evidence preponderates against the findings of the trial court that the claim was compensable.

Plaintiff was 30 years of age and was a high school graduate. When she was about 16 or 17 years of age, she was involved in an accident where she sustained a back injury as a result of a ruptured disc. The record indicates she made a good recovery but still had flair-ups with her back which continued up to the time in question.

She was employed with defendant at its plant, M & M Mars, in Cleveland, Tennessee, as a wrapper operator. Her duties required her to operate a candy wrapping machine and involved some lifting of equipment.

The complaint for workers' compensation benefits was filed November 12, 1992. Plaintiff testified she was injured on November 12, 1991 in the early morning hours between 4:30 to 5:00 a.m. while lifting at her work station. She said after she felt the pain, she asked co-worker Tom Carroll to watch her machine while she went to the nurse's station. She did not remember returning to work but said she did not leave until the end of her shift. She stated her mother took her to see a doctor but her mother testified she did not remember the date. She said she reported the incident to nurse Patsy James and also told Terry Lewis, a shift manager, about the injury as she left work.

It appears plaintiff did not work much during December but returned to work in January 1992 when defendant arranged for someone to help her do the lifting.

During all of this time she was seeing doctors and in April 1992 a M.R.I. report indicated she had a huge crushed disc and she testified she then reported the diagnosis to Ray Janis, a supervisor. She had surgery and has not worked since.

On the question of causation and notice, there is a great deal of conflicting evidence.

Her co-worker, Tom Carroll, testified that he watched her machine when she went to the nurse's station during the early morning hours but he did not recall the date. He said she did not indicate why she was going to the nurse's station.

Patsy James Gooden, a registered nurse in the defendant's medical office, testified plaintiff did not report an on-the-job injury to her and that the first notice of such injury was when the lawsuit was filed. She said she was aware plaintiff had back problems and she had discussions with her during her employment about same and doctor referrals but plaintiff never indicated the back problem was work-related. Nurse Gooden also testified she had a medical certificate dated November 12, 1991 from a Dr. R.D. Akers, saying she was under his care for low back pain and would return to work soon. [Plaintiff testified that prior to the incident in question, she saw Dr. Akers, a chiropractor, often for her pre-existing back problems.]

Terry Lewis, a shift manager for defendant, testified plaintiff never reported a work-related injury to him. He stated he was not working on November 12, 1991 because he was in the hospital. He said he was aware of her having back problems because of the accident some years earlier.

Ray Janis, a shift manager, also testified plaintiff did not report an on-the-job injury to him at any time but he was aware of her pre-existing back problems.

Several other witnesses who were co-workers testified plaintiff never mentioned being injured at work although they knew she had back problems.

Doris Donahue, defendant's personnel manager, testified all employees punched in with a time clock and these records were used to compute compensation. She introduced into evidence time records of the employee for the week of November 11th - November 17th 1991. The records indicated she only worked 2.1 hours on Monday, November 11th and that she did not work on November 12th, 13th or 14th as she was off on sick leave and received sick pay compensation for these days. She also testified that all of her medical bills were

processed as not being work-related and was paid by the group health insurance carrier.

Phillip M. Goodrich, an official with Cigna Group Insurance Company, testified by deposition and stated plaintiff drew long-term disability benefits with his company based on records signed by plaintiff certifying she was not eligible for workers' compensation benefits, etc. As to the date of the accident or qualifying illness, he said her record showed the answer as "November 1991." She drew benefits from October 11, 1992 to October 31, 1995.

When plaintiff was cross-examined and was shown the time cards indicating she was not present at work on November 12th, she replied the accident might not have been on the 12th. Also, when confronted by evidence which conflicted with her version of how notice was rendered, she replied that she told somebody as she left defendant's premises.

All of the medical evidence was presented by deposition. This evidence does not strengthen plaintiff's case.

Dr. Gerald K. Mazza, a family practice physician, testified he saw her on November 13, 1991 and she said she had been injured at work about one week earlier; that he felt she had a back strain and did not see her again.

Dr. Allan Chastain, a family practice physician, testified he saw her on November 22, 1991 and she said she had been suffering from back problems for about one week but did not indicate it was connected to an on-the-job accident. He stated she had a urinary tract infection and felt the back pain was probably coming from that.

Dr. Timothy Strait, a neurological surgeon, performed the ruptured disc surgery in 1984 and again in April 1992. In connection with the second surgery, he first saw her on December 9, 1991 when she was complaining of low back and leg pain. He said she did not give a history of having sustained an injury at work.

Dr. C. William Brown, an orthopedic surgeon, testified he saw her during March 1994 and she said she had sustained an injury at work.

The case is to be reviewed on appeal de novo accompanied by a presumption of the correctness of the findings of fact unless the preponderance of the evidence is otherwise. T.C.A. § 50-6-225(e)(2).

An employee has the burden in a workers' compensation action of proving every element of the case, including causation and permanency, by a preponderance of the evidence. *Tindall v. Waring Park Association,* 725 S.W.2d 672, 676 (Tenn. 1991).

On the other hand, the employer has the burden of proof to establish facts which the employer claims as a bar to the compensation claim, such as the expiration of the statute of limitations. *Lunsford v. A.C. Lawrence Leather Co.,* 225 S.W.2d 66 (Tenn. 1949).

In examining the evidence and considering the issues of causation of injury, notice to the employer and the expiration of the one year statute of limitations, we find the employee's testimony to be rather weak as opposed to the other evidence in the case. When pressed with conflicting evidence, she readily admits the accident may have occurred on a date other than November 12, 1991 and she is not sure who she gave the notice of injury to. We find plaintiff failed to carry the burden of proof in establishing the essential elements (causation and notice) of her claim and that the employer has established the alleged claim was not timely filed.

In view of this disposition, we need not consider the questions raised concerning the allowance of discretionary costs[1] and the allowance of medical expenses.[2]

The judgment is reversed and the case is dismissed. Costs of the appeal are taxed to plaintiff.

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[1] Discretionary costs were never requested by plaintiff but were allowed by the trial court sua sponte. Rule 54.04 T.R.Civ.P., requires a party requesting discretionary costs to file a post trial motion.

[2] Medical expenses were not stipulated. No medical bills were introduced into evidence.

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Roger E. Thayer, Special Judge

CONCUR:

_____
William M. Barker, Justice

_____
Joe C. Loser, Special Judge

FILED

February 18, 1999

Cecil Crowson, Jr.
Appellate Court
Clerk

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 plaintiff.

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

PER CURIAM

Barker, J. - Not participating.