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

FILED

March 25, 1999

Cecil Crowson, Jr.
Appellate Court
Clerk

JACKIE W. SMITH	)	BRADLEY CHANCERY
	)	
Plaintiff/Appellee	)	
	)	
V.	)	Hon. Earl H. Henley,
	)	Chancellor
GEORGIA PACIFIC CORPORATION	)	
	)	
Defendant/Appellant	)	No. 03S01-9803-CH-00028

For the Appellant:

William G. McCaskill, Jr.
2908 Poston Ave.
Nashville, Tenn. 37203

For the Appellee:

Bert Bates
P.O. Box 177
Cleveland, Tenn. 37364-0177

MEMORANDUM OPINION

Members of Panel:

E. Riley Anderson, Chief Justice
John K. Byers, Senior Judge
Roger E. Thayer, Special Judge

AFFIRMED. 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 appeal has been perfected by the defendant-employer, Georgia Pacific Corporation, from the action of the trial court in awarding the employee, Jackie W. Smith, 50% loss of hearing in both ears. The trial judge dismissed a claim for a back injury and the appeal only relates to the award of benefits for the loss of hearing injury.

On appeal the employer contends (1) proper notice of the loss of hearing injury was not given, (2) the claim was not filed within the one year statute of limitations period, and (3) the 50% award is excessive and should be reduced.

Plaintiff has worked at defendant's plant for about 25 years. He testified that there was a great deal of noise at the production line and his job duties required him to wear a headset which covered his ears and he had to communicate with co-workers with a microphone attached to the head unit. He stated he was 55 years of age and had a sixth grade level of education.

The record indicates the employer tested employees yearly for hearing loss and that during November 1995, plaintiff received a letter from defendant indicating that recent testing showed a reduced hearing level and that he may need to see a doctor for an examination and possible medical treatment. Upon receiving the form letter, he stated he asked Shawna Burke, the company's human resource administrator, to send him to a doctor for this testing. He said she refused his request saying the workers' compensation carrier would not pay for it. Plaintiff continued to work and eventually went to see Dr. Timothy Viser for the examination. This visit was on May 14, 1996 and he also saw the doctor during August 1996 and a last visit on September 30, 1997.

Plaintiff testified that on the first visit to the doctor he was told the hearing loss was probably due to conditions at work but he was not told he had a permanent injury until the last visit. He stated on the second visit the doctor requested that he wait one year before returning for the third visit and further testing.

Plaintiff had filed a complaint on March 19, 1997 for a back injury and the complaint was amended on December 16, 1997 alleging the loss of hearing injury.

The review of the case is de novo on the record 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).

The first issue raises a question of whether notice of the hearing loss injury was rendered to defendant. The notice of injury statute, T.C.A. § 50-6-201, generally requires that written notice of injury be given within 30 days after the occurrence of an accident unless the employer has actual notice of such event. The statute also provides that failure to comply with the notice requirement may be excused where a reasonable excuse exists.

In gradual injury cases, it is difficult to pinpoint when an accidental injury occurs when the injury results from repetitive work-related causes over a long period of time. Thus, the rule has developed that in this type of case the accidental injury is considered generally to have occurred when the employee becomes disabled to work. *Barker v. Home-Crest Corporation,* 805 S.W.2d 373, 375 (Tenn. 1991); *Brown Shoe Company v. Reed,* 350 S.W.2d 65, 70-71 (Tenn. 1961).

The employer contends that it only had notice of the loss of hearing claim a few weeks before the trial and this resulted from a communication from their attorney. During plaintiff's examination, he testified that he had complained about the noise to Gary Auberry and to Shawna Burke and on page 19 of the transcript the following question and answer appears:

Q. Did you discuss with Shawna whether or not in your opinion that the hearing environment that you were working in caused that hearing loss?

A. Yeah. I talked to her about it, yeah.

On cross-examination, plaintiff was asked why he did not go back and notify his employer the doctor had said the loss of hearing was work-related. He replied that the company was aware it was work-related because they had sent him the letter concerning the loss of hearing.

The reasons for the 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.,* 910 S.W.2d 412 (Tenn. 1995); *Masters v. Industrial Garments Mfg. Co.,* 595 S.W.2d 811 (Tenn. 1980).

Under all of the circumstances of the case, we are of the opinion the notice defense is not valid. Notice of injury and notice of lawsuit are two distinct things. We believe defendant is insisting on lack of notice of the latter in respect to this issue.

The second issue deals with the statute of limitations. Plaintiff testified that after he was told by the doctor that his loss of hearing was work-related, he thought the condition was treatable and was not aware he had sustained a permanent injury until September 30, 1997. His suit against defendant for an alleged back injury was amended on December 16, 1997 to assert the hearing loss injury.

The general rule is that the date the employee's disability manifests itself to a person of reasonable diligence, not the date of the accident, triggers the statute of limitations. *Hibner v. St. Paul Mercury Ins. Co.,* 619 S.W.2d 109 (Tenn. 1981); *Jones v. Home Indem. Ins. Co.,* 679 S.W.2d 445 (Tenn. 1984).

We are of the opinion the statute of limitations did not commence to run in this case until September 30, 1997, when plaintiff was first informed he had sustained a permanent loss of hearing. Thus, the amended complaint which was filed about 2 ½ months later on December 16, 1997 was timely.

The last issue relates to the award of 50% loss of hearing in both ears. Dr. Viser, who was board certified in otolaryngology, testified plaintiff had a 16.25 binaural hearing impairment. The evidence does not preponderate against the award of 50% legal disability to both ears. *See Hawkins v. Consolidated Aluminum Corp.,* 742 S.W.2d 253 (Tenn. 1987) where 18% binaural disability was fixed as a 50% permanent injury award for loss of hearing resulting from a noisy work environment.

The judgment of the trial court is affirmed. Costs of the appeal are taxed to defendant-employer.

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Roger E. Thayer, Special Judge

CONCUR:

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E. Riley Anderson, Chief Justice

____
John K. Byers, Senior Judge

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JACKIE W. SMITH,) BRADLEY CHANCERY
) No. 97-088
Plaintiff-Appellee,)
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) No. 03S01-9803-CH -
00028
v.)
)
GEORGIA PACIFIC CORPORATION) Hon. Earl H. Henley
) Chancellor
Defendant/Appellant .)
)

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 facts 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 defendant, Georgia Pacific Corporation and William Ritchie Pigue, surety,for which execution may issue if necessary.

03/25/99