IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT NASHVILLE
(January 19, 1999 Session)

KENNETH PAXTON,	)	MAURY CIRCUIT
	)	
Plaintiff-Appellant	)	Hon. Jim T. Hamilton,
	)	Judge.
v.	)	
	)	No. 01S01-9710-CV-00230
FLOYD and FLOYD, INC., and LIBERTY MUTUAL INSURANCE COMPANY,	)	
	)	
Defendant-Appellee.	)	

For Appellant:

Jeffrey M. Levine
Nashville, Tennessee

For Appellee:

Paul Bates
Lawrenceburg, Tennessee

M E M O R A N D U M O P I N I O N

Members of Panel:

Adolpho A. Birch, Jr., Associate Justice
James L. Weatherford, Senior Judge
Joe C. Loser, Jr., Special Judge

AFFIRMED

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. Fairly stated, the issues on appeal are (1) whether the employee or claimant, Paxton, gave or was excused from giving timely notice of his injury, (2) whether the employee suffered a compensable injury by accident, and (3) whether the trial judge erred in ruling on the admissibility of a doctor's report. As discussed below, the panel has concluded the judgment should be affirmed.

The employee initiated this action for workers' compensation benefits resulting from an alleged back injury allegedly occurring on April 29, 1996. After a trial on the merits, the trial judge found that the employee's notice to the employer was not timely and that the employee did not suffer an injury by accident on April 29, 1996, as claimed. The trial judge expressly found the employee's testimony to be unworthy of belief. The claim was dismissed. 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).

In October of 1995, while working for another employer, the claimant injured his back lifting a cross tie. He received medical care and returned to work for the same employer. He began working for this employer, Floyd and Floyd, on December 7, 1995, and worked thirteen days between that date and April 7, 1996, when he began working full time and worked until May 26, 1996, when his employment was terminated.

On July 11, 1996, his attorney sent a letter to Floyd and Floyd, advising the employer that the employee was making a claim "as a result of a work related accident which occurred on or about 10-16-95." That letter was, as the trial judge found, the first notice to the employer, but the employee had complained to co-workers of back pain. The notice was also sent to the former employer, BEC/Allwaste. On July 31, 1996, his back condition was surgically repaired.

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; McCaleb v Saturn Corp., 910 S.W.2d 412 (Tenn. 1995). For an occupational disease, except asbestos-related disease or coal worker's pneumoconiosis, 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. Tenn. Code Ann. section 50-6-201. The written notice must state in plain and simple language the name and address of the employee, the time, place, nature and cause of the accident and must be signed by the claimant or someone acting in his behalf. Tenn. Code Ann. section 50-6-202. The only notice given in this case was defective in that it was not timely and did

not include the nature and cause of the accident. Moreover, the claimant was not an employee of the defendant on the date of the injury claimed in the notice.

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 at 415. The failure to give proper notice prejudiced the employer by depriving it of that opportunity. 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, 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 his claim. Jones v. Sterling Last Corp., 962 S.W.2d 469 (Tenn. 1998). The employee's contention that notice was excused or waived by the employer's failure to offer a choice of physicians or surgeons is without merit.

For the above reasons the notice issue is resolved in favor of the employer.

The claimant next contends the employer is liable under the successive rule. The rule is that where an employee is permanently disabled as a result of a combination of two or more accidents occurring at different times and while the employee was working for different employers, the employer for whom the employee was working at the time of the most recent accident is generally liable for permanent disability benefits. See Baxter v. Smith, 211 Tenn. 347, 364 S.W.2d 936 (Tenn. 1962), and its progeny.

Because the evidence failed to establish the occurrence of a second injury, the rule has no application in this case. The trial judge found a lack of credibility on the part of the claimant. Where the trial judge has seen and heard the witnesses, especially if issues of credibility and weight to be given oral testimony are involved, considerable deference must be accorded those circumstances on review. McCaleb at 415.

The claimant next insists the trial judge erred in not admitting or considering the treating doctor's written report. In a workers' compensation case, a signed medical report, on a form established by the commissioner of labor, may be introduced in evidence, subject to compliance with statutory procedures. Tenn. Code Ann. section 50-6-235(c)(1). In this case, the procedures were followed, but the doctor was also deposed and his deposition admitted in evidence. It contained evidence which materially contradicted the written report. Any error the trial court committed by refusing to admit or consider the written report is thus harmless in that the report could have served no purpose other than to cancel the doctor's testimony by deposition. Cancellation of that evidence would not have allowed the claimant to carry his burden to establish the occurrence of a compensable injury by accident by a preponderance of the evidence.

For the above reasons, the judgment of the trial court is affirmed. Costs on appeal are taxed to the plaintiff.

_____

Joe C. Loser, Jr., Special Judge

CONCUR:

_____

Adolpho A. Birch, Jr., Associate Justice

_____

James L. Weatherford, Senior Judge

IN THE SUPREME OF TENNESSEE

AT NASHVILLE

KENNETH PAXTON	}	*MAURY CIRCUIT*
	}	*No. Below 7637*
Plaintiff/Appellant	}	
	}	*Hon. Jim T. Hamilton*
vs.	}	
	}	
FLOYD AND FLOYD, INC. AND LIBERTY MUTUAL INSURANCE COMPANY	}	*No. 01S01-9710-CV-00230*
	}	
	}	
	}	
Defendant/Appellee	}	*AFFIRMED*

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 plaintiff/appellant, for which execution may issue if necessary.

IT IS SO ORDERED on April 7, 1999.

PER CURIAM