IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT KNOXVILLE
(March 16, 1999 Session)

FILED

June 2, 1999

Cecil Crowson, Jr.
Appellate Court
Clerk

GREG WILLIAMS,	)	RHEA CHANCERY
	)	
Plaintiff,	)	Hon. Jeffrey F. Stewart,
	)	Chancellor.
v.	)	
	)	No. 03S01-9806-CH-00062
SUBURBAN MANUFACTURING,	)	
	)	
Defendant.	)	

For Plaintiff:

Alexander W. Gothard
Hatcher, Johnson, Meaney & Gothard
Chattanooga, Tennessee

For Defendant:

William A. Lockett
Michael A. Kent
Cleary & Lockett
Chattanooga, Tennessee

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

Members of Panel:

William M. Barker, Associate Justice
Howell N. Peoples, Special 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 in accordance with Tenn. Code Ann. section 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. In this appeal, the employee or claimant, Williams, insists the evidence preponderates against the trial court's denial of medical benefits and temporary total disability benefits. The employer, Suburban, insists the evidence preponderance against the trial court's finding that the employee suffered an injury by accident and that the claim should be disallowed because the employee failed to give notice of his claim as required by Tenn. Code Ann. section 50-6-201. As discussed below, the panel has concluded the judgment should be affirmed.

The employee initiated this civil action seeking workers' compensation benefits for an injury which occurred when he slipped and fell on ice on his way to work at the employer's plant. The defendant, in its responsive pleading, admitted the employee gave "notification of an occurrence," but denied that the employee "gave proper notice" of an injury. After a trial on the merits, the trial court awarded permanent partial disability benefits, but denied any recovery for temporary total disability benefits and medical expenses for treatment not authorized by the employer. This panel has reviewed the case *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, pursuant to Tenn. Code Ann. section 50-6-225(e)(2).

On February 1, 1996, the claimant slipped on ice as he was entering the employer's plant to begin the day's work. He promptly informed his supervisor of the accident and said he did not know if he would be able to complete the shift or not. The employer did not make a written record of the occurrence or investigate it because the claimant did not request medical care. Four months later, the employer received written notice of the accident from the claimant's attorney.

Without consulting the employer, the claimant sought treatment from a chiropractor, Jeffrey C. Hamilton. Dr. Hamilton opined that the February 1st accident caused a new injury superimposed on preexisting back problems, including degenerative disc disease. He referred the claimant to his family physician, who prescribed physical therapy.

Dr. Richard B. Donaldson examined and evaluated the claimant. Dr. Donaldson diagnosed low back and knee sprains and chronic pain syndrome.

As to the cause of the claimant's injuries, the doctor opined the accident could have aggravated the preexisting condition and initiated the knee problem.

Unless admitted by the employer, the employee or claimant has the burden of proving, by competent evidence, every essential element of his claim. Oster v. Yates, 845 S.W.2d 215 (Tenn. 1992). The claimant must prove, among other things, that he suffered an injury by accident, and that such injury by accident arose out of and in the course of his employment by the employer.

The employer, relying primarily on Cunningham v. Goodyear Tire and Rubber Co., 811 S.W.2d 888 (Tenn. 1991), contends there was no compensable injury by accident. In that case, there was no claimed accident. The employee merely complained of pain while performing duties to which he was unaccustomed. Moreover, the undisputed medical proof was that the employee's pain was the result of preexistent arthritis. The Supreme Court affirmed the trial court's dismissal of the case because there was no proof of an injury by accident. Cunningham is distinguishable from the present case in that the trial judge found from competent proof that there was a precipitating event which either caused the injury or aggravated the preexistent condition. The evidence does not preponderate against that finding.

The employer takes the employee with all preexisting conditions, and cannot escape liability when the employee, upon suffering a work-related injury, incurs disability far greater than if he had not had the preexisting conditions; Kellerman v. Food Lion, Inc., 929 S.W.2d 333 (Tenn. 1996); but if work aggravates a preexisting condition merely by increasing pain, there is no injury by accident. Id. To be compensable, the preexisting condition must be advanced, there must be anatomical change in the preexisting condition, or the employment must cause an actual progression of the underlying disease. Sweat v. Superior Industries, Inc., 966 S.W.2d 31, 32-33 (Tenn. 1998). There is medical proof in the instant case that the preexisting condition could have been advanced by the work related accident or caused an actual progression of the underlying disease. In a workers' compensation case, a trial judge may properly predicate an award on medical testimony to the effect that a given incident could be the cause of a claimant's injury, when, from other evidence, it may reasonably be inferred that the incident was in fact the cause of the injury. Reeser v. Yellow Freight Systems, Inc., 938 S.W.2d 690 (Tenn. 1997).

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). It is significant that written notice is unnecessary in those situations where the employer has actual knowledge of the injury. Raines v. Shelby Williams Industries, 814 S.W.2d 346 (Tenn. 1991). It is undisputed that the employer had actual knowledge of the claimant's injury. It's failure or refusal to fill out a form or provide medical benefits does not excuse it from liability.

By the Workers' Compensation Act, compensable disabilities are divided into four separate classifications: (1) temporary total disability, (2) temporary partial disability, (3) permanent partial disability and (4) permanent total disability. Tenn. Code Ann. section 50-6-207. Temporary total disability refers to the injured employee's condition while disabled to work because of his injury and until he recovers as far as the nature of his injury permits. Redmond v. McMinn County, 209 Tenn. 463, 354 S.W.2d 435 (1962). Benefits for temporary total disability are payable until the injured employee is able to return to work or, if he does not return to work, until he attains maximum recovery from his injury, at which time his entitlement to such benefits terminates. Prince v. Sentry Ins. Co., 908 S.W.2d 937 (Tenn. 1995). We find in the record no evidence as to when the claimant reached maximum medical recovery or returned to work. As we have noted, the burden of proof is on the plaintiff.

When a covered employee suffers an injury by accident arising out of and in the course of his employment, his employer is required to provide, free of charge to the injured employee, all medical and hospital care which is reasonably necessary on account of the injury. Tenn. Code Ann. section 50-6-204(a)(1). The injured employee is required to accept the medical benefits provided by the employer, and must consult with the employer before choosing a treating physician or operating surgeon; State Auto Mutual Ins. Co. v. Cupples, 567 S.W.2d 164 (Tenn. 1978); and, unless the injured employee has a reasonable excuse for the failure to consult with the employer first, the injured employee may be responsible for his own medical expenses. Emerson Electric Co. v. Forrest, 536 S.W.2d 343 (Tenn. 1976). The claimant failed to consult with the employer first and the chancellor correctly disallowed his claimed medical expenses.

For the above reasons the evidence fails to preponderate against the findings of the trial court, whose judgment is affirmed in all respects. Costs on

appeal are taxed to the parties, one-half each.

_____

Joe C. Loser, Jr., Special Judge

CONCUR:

_____

William M. Barker, Associate Justice

_____

Howell N. Peoples, Special Judge

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GREG WILLIAMS,	)	
	)	RHEA CHANCERY
	)	No. 8710
Plaintiff-Appellee,	)	
	)	No.03S01-9806-CH-00062
v.	)	
	)	
SUBURBAN MANUFACTURING,	)	Hon. Jeffrey F. Stewart
	)	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 parties, Appellant, Suburban Manufacturing and William A. Lockett, surety, and to appellee, Greg Williams, one-half each, for which execution may issue if necessary.

06/02/99