

IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT KNOXVILLE  
(March 16, 1999 Session)

**FILED**  
September 24, 1999  
Cecil Crowson, Jr.  
Appellate Court  
Clerk

VIVIAN L. RUSSELL, )  
CIRCUIT )  
 )  
Plaintiff-Appellee, )  
 )  
v. )  
 )  
ADVANCE TRANSFORMER )  
COMPANY, )  
 )  
Defendant-Appellant. )

ANDERSON )  
 )  
Hon. James B. Scott, Jr., )  
Judge. )  
No. 03S01-9808-CV-00077 )

For Appellant:

Arthur G. Seymour, Jr.  
Robert L. Kahn  
Knoxville, Tennessee

For Appellee:

Roger L. Ridenour  
Ridenour, Ridenour & Fox  
Clinton, Tennessee

MEMORANDUM OPINION

Members of Panel:

William M. Barker, Associate Justice  
Howell N. Peoples, Special Judge  
Joe C. Loser, Jr., Special Judge

AFFIRMED  
Judge

Loser,

## MEMORANDUM OPINION

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. In this appeal, the employer contends (1) the employee failed to give notice of her injury, (2) the claimant's injury did not arise out of the employment relationship and (3) the award of permanent partial disability benefits is excessive. As discussed below, the panel has concluded the judgment should be affirmed.

The claimant initiated this action on May 23, 1997 to recover workers' compensation benefits for her injuries. By its answer, the employer admitted the claimant had, in December of 1995, "complained of an injury to her right arm," but denied "that she complained of an injury to her left arm." It affirmatively averred that it provided her with a panel of three physicians, from which she chose Dr. Randall Robbins; and that Dr. Robbins treated her, referred her to other specialists, and performed surgery on her in April of 1996. The employer did not raise the issue of lack of written notice in its answer.

The case was tried on May 29, 1998, when, according to the judgment, the only issues submitted to the trial court were "the extent of permanent, partial disability to be awarded to the plaintiff's right arm and whether the plaintiff is entitled to a judgment for a permanent, partial disability to the left arm, and whether the defendant should reimburse unto the plaintiff and her attorney a portion of the pretrial expenses incurred in preparing this matter for trial, and whether Roger L. Ridenour should receive his attorneys fees in a lump sum." After a trial, the court awarded, *inter alia*, permanent partial disability benefits based on eighty-five percent to the right arm and sixty percent to the left arm, which equates to or seventy-two and one-half percent to both arms. We have 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, as required by Tenn. Code Ann. § 50-6-225(e)(2).

The employee or claimant, Ms. Russell, is fifty-two years old with a tenth grade education and experience as a factory assembler, first at Burlington Hosiery, then Robbins Seat Belt Company, then at Oliver Springs Apparel and finally with this employer, Advance Transformer Company. She gradually developed disabling pain in both arms, but has continued to work.

On December 1, 1995, she began experiencing pain and numbness in both arms and, according to her own testimony, so reported to the employer. However, the report prepared by the employer reflected only that she complained of pain in the right elbow. Dr. Robbins injected cortisone and temporarily restricted her from lifting and using her right hand at work. She first improved, then worsened, and the doctor restricted the use of her left arm. Unsuccessful surgery was performed on the right arm and post-surgical restrictions to the right arm caused her to develop overuse syndrome in the left arm. The claimant continues to work with bilateral elbow pain, diagnosed as chronic tennis elbow. She continues to work for the same employer.

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. § 50-6-201. 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 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. Id. 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). The presence or absence of prejudice to the employer is a proper consideration. McCaleb v. Saturn Corp., 910 S.W.2d 412 (Tenn. 1995).

Although the trial judge did not make specific findings concerning the notice issue, probably because it was not an issue submitted to him, he did accredit the claimant's testimony, which was that the employer had actual notice of both injuries. Moreover, even if the employer's written report is accurate, it appears that the employer was able to control the claimant's medical care and was not prejudiced by the lack of written notice. The first issue is resolved in favor of the plaintiff.

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). In order to establish that an injury was one arising out of the employment, the cause of the death or injury must be proved; and if the claim is for permanent disability benefits, permanency must be proved. Hill v. Royal Ins. Co., 937 S.W.2d 873 (Tenn. 1996). In all but the most obvious cases, causation and permanency may only be established through expert medical testimony; Thomas v. Aetna Life and Cas. Ins. Co., 812 S.W.2d 278 (1991); but an injured employee is competent to testify as to his own assessment of his physical condition and such testimony should not be disregarded. Uptain Construction Co. v. McClain, 526 S.W.2d 458 (Tenn. 1975).

The treating physician testified unequivocally and without contradiction that the claimant's injuries were caused by her work. He opined that her right arm was fourteen percent permanently impaired and he permanently restricted her from lifting more than five pounds with either arm. We are aware of no rule or authority which prohibits an award of permanent disability benefits for the loss of use of a scheduled member unless a clinical impairment rating is given, particularly where permanent restrictions are prescribed; and none has been cited. Thus, the evidence fails to preponderate against the trial court's finding that the claimant has a permanent disability to both arms, arising out of her employment by the defendant. The second issue is resolved in favor of the plaintiff.

Once the causation and permanency of an injury have been established by expert testimony, the trial judge may consider many pertinent factors, including age, job skills, education, training, duration of disability, and job opportunities for the disabled, in addition to anatomical impairment, for the purpose of evaluating the extent of a claimant's permanent disability. Tenn. Code Ann. § 50-6-241(a)(2). A vocational expert testified, without contradiction that Ms. Russell reads at a below average level and performs arithmetic functions at the low end of average; and he assessed her vocational disability at ninety to ninety-four percent. From a careful consideration of all of the above facts and circumstances, we cannot fairly say the evidence preponderates the trial court's finding as to the extent of the claimant's permanent disability.

The judgment of the trial court is consequently affirmed. Costs on appeal are taxed to the defendant and the cause is remanded to the trial court for an award of interest on accrued but unpaid benefits and any other further proceedings.

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Joe C. Loser, Jr., Special Judge

CONCUR:

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William M. Barker, Associate Justice

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Howell N. Peoples, Special Judge

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VIVIAN L. RUSSELL, COUNTY	)	ANDERSON
	)	NO. 97LA0217
PLAINTIFF/APPELLEE,	)	
	)	HON. JAMES B. SCOTT, JR.,
v.	)	JUDGE
	)	
ADVANCE TRANSFORMER 00077 COMPANY,	)	S. CT. NO. 03S01-9808-CV-
	)	
DEFENDANT/APPELLANT.	)	AFFIRMED

**JUDGMENT**

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 will be paid by Defendant/Appellant, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM

BARKER, J. NOT PARTICIPATING