

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

November 26, 2012 Session

**PAMELA INGRAM v. HEADS UP HAIR CUTTING CENTER**

**Appeal from the Chancery Court for Davidson County**  
**No. 11-0768-I Claudia C. Bonnyman, Chancellor**

---

**No. M2012-00464-WC-R3-WC - Mailed March 1, 2013**  
**Filed April 10, 2013**

---

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law in accordance with Tennessee Supreme Court Rule 51. The employee alleged she sustained a gradual injury to her cervical spine as a result of her job. Her employer denied her condition was work-related and contended that her claim was barred by her failure to provide timely notice of her claim and the operation of the statute of limitations. The employer also argued subsequent employers were liable per the last injurious injury rule. The trial court found for the employee and awarded benefits. On the employer's motion to alter or amend, the trial court held that the employee's award was capped at one and one-half times the anatomical impairment rate pursuant to Tennessee Code Annotated section 50-6-241(d)(1). The employer appeals, contending the evidence preponderates against the trial court's findings concerning compensability and the statute of limitations. The employee asserts the trial court erred by capping her disability award. We affirm the judgment of the trial court.

**Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right; Judgment of the Chancery Court Affirmed**

SHARON G. LEE, J., delivered the opinion of the Court, in which WALTER C. KURTZ, SR.J., and DONALD P. HARRIS, SP.J., joined.

Robert L. Gatewood, Memphis, Tennessee, for the appellant, Heads Up Hair Cutting Center.

Michael L. Underhill, Nashville, Tennessee, for the appellee, Pamela Ingram.

## MEMORANDUM OPINION

### Factual and Procedural Background

Pamela Ingram (“Employee”) was employed as a hair stylist by Heads Up Hair Cutting Center (“Employer”) from 1996 until 2009. Her job required her to perform as many as twenty to thirty haircuts per day. In 2006, she began having discomfort and pain in her neck and shoulders. Employee received treatment from a chiropractor in 2006, with little benefit. She subsequently consulted her primary care physician, Dr. Roger Wallace. Dr. Wallace prescribed pain medication and administered trigger point injections from 2006 until 2009. Employee did not give Employer notice of a potential work injury because, according to Employee, neither Dr. Wallace nor the chiropractor advised her that her symptoms were related to her employment.

Employee was terminated on August 12, 2009. According to Employee, problems arose concerning charges for haircuts for two of her customers. Employee testified that the charges were adjusted and that she did not argue with either customer. Desirae Cochran, Employee’s manager, recalled the incident differently and testified that she was called to the front desk because Employee was “having words with a client.” Ms. Cochran subsequently received a telephone call from the client, who complained about the quality of her haircut and Employee’s demeanor. Ms. Cochran added that there had been various problems with Employee’s performance in the preceding months. Later that evening Ms. Cochran told Employee she was terminated for overcharging the two customers.

After her termination, Employee worked for one or two months at the Green Hills Barbershop. Employee testified that she was unable to continue at the Green Hills Barbershop because the “chairs were way too high,” which caused her to have pain as a result of holding her arms outstretched. She then worked at a hair salon called Cutting Loose from January 2010 until July 2010. She also worked for a short period of time at Vie Hair Design. Employee testified that she performed only two or three haircuts per week for these employers.

Because she continued to have pain in her neck and shoulders, Employee again saw a chiropractor, Dr. Joe Ellen. Dr. Ellen advised Employee that she had degenerative disk disease. In January 2010, Employee was treated at the emergency room of Vanderbilt Medical Center for neck pain. She was advised to follow up with her primary care physician and schedule an MRI. Her primary physician, Dr. Saeda Tutsi, performed a nerve conduction study. None of the doctors Employee saw told her that her condition was work-related. In June 2010, Employee saw Dr. Wallace, her previous primary care physician, who referred her to Dr. Jacob Schwarz, a neurosurgeon. Dr. Schwarz ordered an MRI and on the basis of

that study, recommended surgery. Employee underwent a C5-6 anterior cervical discectomy and fusion on July 20, 2010. On August 23, 2010, Employee, at her father's urging, asked Dr. Schwarz if her neck injury was work-related. Dr. Schwarz affirmatively diagnosed Employee with a work-related injury. On September 23, 2010, Employee gave written notice to Employer of her claim for workers' compensation benefits. After an investigation by Employer's insurer, the claim was denied on the basis of the statute of limitations and failure to provide timely notice of the injury. After an unsuccessful benefit review conference, Employee filed this action on June 9, 2011.

At trial, Employee presented the deposition testimony of Dr. David Gaw. Dr. Gaw, an orthopaedic surgeon, evaluated Employee at the request of her attorney on March 8, 2011. Based on his examination and Employee's medical history, Dr. Gaw opined that Employee had sustained a gradual injury to her cervical spine and that "her work as a hair stylist" was the most likely cause of that injury. He assigned 7% permanent anatomical impairment to the body as a whole for the injury and surgery, based on the Sixth Edition of the American Medical Association Guides ("AMA Guides"). Dr. Gaw described her present condition as "painful, but not harmful," and recommended that she "use common sense and let pain be the guide" to limiting her activities. Dr. Schwarz's records were made exhibits to Dr. Gaw's deposition. Dr. Schwarz's records included a letter to Employee's attorney in which he indicated that it was possible that Employee's gradual injury was causally related to her "high volume hair stylist duties." Dr. Schwarz also assessed Employee with a 6% permanent impairment and included various restrictions which prohibited lifting over twenty-five pounds or working with her arms extended for more than ten minutes at a time.

Employee was forty-one years old when the trial occurred. She was a high school graduate and had completed vocational school in order to become a hair stylist. In addition to styling hair, her work history included being a cashier at Wal-Mart and a meter reader for a local utility company. She had not worked after being released by Dr. Schwarz, and did not consider herself capable of performing any of her previous jobs. She testified that she was no longer able to participate in sports activities with her son, work in her garden, ride a motorcycle, fold laundry, or style her own hair due to the effects of her injury. The only witnesses at trial were Employee, Employee's husband, and Ms. Cochran, who was called by Employer to testify regarding the reason for Employee's termination.

The trial court ruled that Employee's neck injury was caused by her work for Employer. The court further found that Employee was unaware that her neck symptoms were work-related until August 23, 2010, when she discussed the matter with Dr. Schwarz in her first post-operative visit. For that reason, the trial court held that the statute of limitations and time period for giving notice of her injury to her employer did not commence until that date. The court found that Employer's termination of Employee was reasonable and that

Employee had sustained a 7% anatomical impairment and a 35% permanent disability as a result of the injury. In addition, the trial court directed that Employer hold Employee harmless for medical expenses associated with Dr. Schwarz's surgery. Judgment was entered in accordance with those findings. Employer filed a motion to alter or amend the judgment. The trial court granted the motion in part, ruling that Employee's award of disability benefits was capped at one and one-half times the anatomical impairment, and amended her award to 10.5% to the body as a whole. The court also found that Employer was not liable for medical treatment rendered before September 23, 2010, the date on which Employee gave notice of her injury. Employer has appealed, contending that the trial court erred by finding that the claim was not barred by the statute of limitations and by finding that Employee's injury was compensable. Employee contends that the court erred by applying the one and one-half cap to her award.

### **Standard of Review**

We are statutorily required to review the trial court's factual findings "de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." Tenn. Code Ann. § 50-6-225(e)(2). Following this standard, we are further required "to examine, in depth, a trial court's factual findings and conclusions." *Crew v. First Source Furniture Grp.*, 259 S.W.3d 656, 664 (Tenn. 2008) (quoting *Galloway v. Memphis Drum Serv.*, 822 S.W.2d 584, 586 (Tenn. 1991)). We accord considerable deference to the trial court's findings of fact based upon its assessment of the testimony of witnesses it heard at trial, although not so with respect to depositions and other documentary evidence. *Padilla v. Twin City Fire Ins. Co.*, 324 S.W.3d 507, 511 (Tenn. 2010); *Glisson v. Mohon Int'l, Inc.*, 185 S.W.3d 348, 353 (Tenn. 2006). We review conclusions of law de novo with no presumption of correctness. *Wilhelm v. Krogers*, 235 S.W.3d 122, 126 (Tenn. 2007). Although workers' compensation law must be liberally construed in favor of an injured employee, the employee must prove all elements of his or her case by a preponderance of the evidence. *Crew*, 259 S.W.3d at 664; *Elmore v. Travelers Ins. Co.*, 824 S.W.2d 541, 543 (Tenn. 1992).

### **Analysis**

#### *Thirty Day Notice Requirement*

Employer argues that because Employee provided notice of her injury to Employer thirty-one days after she became aware her injury was work-related, she failed to comply with the thirty day notice requirement as set forth in Tennessee Code Annotated section 50-6-201.

Tennessee Code Annotated section 50-6-201 provides:

(a) Every injured employee or the injured employee's representative shall, immediately upon the occurrence of an injury, or as soon thereafter as is reasonable and practicable, give or cause to be given to the employer who has no actual notice, written notice of the injury, and the employee shall not be entitled to physician's fees or to any compensation that may have accrued under this chapter, from the date of the accident to the giving of notice, unless it can be shown that the employer had actual knowledge of the accident. No compensation shall be payable under this chapter, unless the written notice is given the employer within thirty (30) days after the occurrence of the accident, *unless reasonable excuse for failure to give the notice is made to the satisfaction of the tribunal* to which the claim for compensation may be presented.

(b) In those cases where the injuries occur as the result of gradual or cumulative events or trauma, then the injured employee or the injured employee's representative shall provide notice of the injury to the employer within thirty (30) days after the employee:

(1) Knows or reasonably should know that the employee has suffered a work-related injury that has resulted in permanent physical impairment; or

(2) Is rendered unable to continue to perform the employee's normal work activities as the result of the work-related injury and the employee knows or reasonably should know that the injury was caused by work-related activities.

(Emphasis added).

An employee is relieved from the thirty day notice requirement until she knows or reasonably should know that her injury was caused by her work and that the injury has either permanently impaired her or prevented her from performing normal work activities. *Banks v. United Parcel Serv., Inc.*, 170 S.W.3d 556, 560-61 (Tenn. 2005). The notice requirement "exists so that an employer will have an opportunity to make a timely investigation of the facts while still readily accessible, and to enable the employer to provide timely and proper treatment for an injured employee." *Jones v. Sterling Last Corp.*, 962 S.W.2d 469, 471 (Tenn. 1998). Failure to give notice within thirty days may be excused if the excuse is reasonable. Tenn. Code Ann. § 50-6-201(a); *see Hill v. Whirlpool Corp.*, No. M2011-01291-WC-R3-WC, 2012 WL 1655768, at \*3-4 (Tenn. Workers' Comp. Panel May 10, 2012); *Bldg. Materials Corp. v. Austin*, No. M2006-00262-WC-R3-CV, 2007 WL 1364657, at \*4 (Tenn.

Workers' Comp. Panel May 9, 2007); *Grace v. KEHE Food Distribs., Inc.*, No. E2005-00064-WC-R3-CV, 2006 WL 784785, at \*3 (Tenn. Workers' Comp. Panel Mar. 29, 2006), *overruled in part on other grounds by Bldg. Materials Corp. v. Britt*, 211 S.W.3d 706, 713 (Tenn. 2007). To determine whether an excuse is reasonable, we consider: "(1) the employer's actual knowledge of the employee's injury, (2) lack of prejudice to the employer by an excusing of the requirement, and (3) the excuse or inability of the employee to timely notify the employer." *McCaleb v. Saturn Corp.*, 910 S.W.2d 412, 415 (Tenn. Workers' Comp. Panel Nov. 2, 1995) (citing *Gluck Bros., Inc. v. Pollard*, 426 S.W.2d 763, 766 (Tenn. 1968)). "[T]hese laws should be rationally but liberally construed to promote and adhere to the Act's purposes of securing benefits to those workers who fall within its coverage." *Watt v. Lumbermens Mut. Cas. Ins. Co.*, 62 S.W.3d 123, 128 (Tenn. 2001) (quoting *Lindsey v. Smith & Johnson, Inc.*, 601 S.W.2d 923, 926 (Tenn. 1980)).

Employee became aware that her neck injury was work-related on August 23, 2010. She gave written notice of her injury to Employer on September 23, 2010—thirty-one days later. The trial court ruled that Employee's claim should not be dismissed for failing to meet the thirty day notice requirement by one day, finding that Employer failed to demonstrate any prejudice resulting from the one-day delay, and applying the principle that the workers' compensation law is to be construed liberally in favor of the employee. *See* Tenn. Code Ann. § 50-6-116; *Watt*, 62 S.W.3d at 128.

Employee presented a reasonable excuse for missing the thirty day notice requirement by one day. Employee first learned her injury was work-related in her first post-operative visit with Dr. Schwarz on August 23, 2010. After this consultation, Employee sought legal representation but the lawyer with whom she consulted declined to represent her approximately one week later. Employee then hired her current counsel, who prepared a letter and had Employee hand-deliver notice of her work-related injury that same day, on September 23, 2010. These circumstances indicate that Employee attempted to comply with the law well before the thirty day notice requirement. Moreover, as the trial court found, Employer demonstrated no prejudice resulting from its receipt of notice thirty-one days instead of thirty days after Employee learned her injury was work-related. *See McCaleb*, 910 S.W.2d at 415 (excusing noncompliance with notice requirement where "[t]he employer was not prejudiced by the employee's failure to give timely written notice."). The Supreme Court has observed that our courts "favor a construction of timing provisions that preserves a worker's right to benefits." *Banks*, 170 S.W.3d at 563. Given these circumstances and that the workers' compensation laws are generally to be liberally construed in favor of the Employee, we agree with the trial court that Employee's recovery was not barred by Tennessee Code Annotated section 50-6-201, because Employee presented a reasonable excuse for the one-day delay and Employer demonstrated no prejudice.

### *Statute of Limitations*

Employer argues that based on the application of the last day worked rule, the statute of limitations period began to run on Employee's last day of employment—the day she was terminated, August 12, 2009. As a result, Employer argues the one year limitation period expired on August 12, 2010, which was before Employee learned from Dr. Schwarz that her injury was work-related. Tennessee Code Annotated section 50-6-203(b)(1) provides:

In those instances where the employer has not paid workers' compensation benefits to or on behalf of the employee, the right to compensation under this chapter shall be forever barred, unless the notice required by § 50-6-202 is given to the employer and a benefit review conference is requested on a form prescribed by the commissioner and filed with the division within one (1) year after the accident resulting in injury.

Recently, the Tennessee Supreme Court held “that the limitations period for workers' compensation cases pursuant to Tennessee Code Annotated section [50-6-203(b)(1) does not commence until a plaintiff discovers or, in the exercise of reasonable diligence, should have discovered that he has a claim.” *Gerdau Ameristeel, Inc. v. Ratliff*, 368 S.W.3d 503, 508 (Tenn. 2012). For Employee, the date of discovery was August 23, 2010, the day Dr. Schwarz diagnosed her with a work-related neck injury. Because Employee gave notice of the work-related injury to Employer and requested a benefit review conference within one year of this date, Employee's claim is not barred by Tennessee Code Annotated section 50-6-203(b)(1).

### *Last Injurious Injury Rule*

Employer argues it is not responsible due to the “last injurious injury” rule because Employee performed similar work for other employers after Employer terminated her employment. The last injurious injury rule applies to gradually-occurring injuries. *See Mahoney v. NationsBank of Tenn., N.A.*, 158 S.W.3d 340, 346 (Tenn. 2005), *overruled in part on other grounds by Britt*, 211 S.W.3d at 713. “[T]he rule operates to place liability for an employee's disability on the last employer if working conditions at the last employer aggravated the employee's pre-existing injury.” *Id.* (citing *Baxter v. Smith*, 364 S.W.2d 936, 942-43 (Tenn. 1962)). Tennessee does not apportion liability between successive employers. *Id.* The pertinent rule of law as stated in *Mahoney* provides:

To determine whether a subsequent employer is responsible for a gradually-occurring injury that began at a prior employer, we must consider whether the employee's condition was aggravated or advanced due to working

conditions at the second employer. It is not enough that the employee continued to suffer from the effects of an injury while employed by a second employer; rather, to be compensable, there must be a progression of the employee's injury. This requirement is consistent with the general requirement that there be a second accidental injury to trigger liability on the part of a second employer.

*Id.* (citations omitted). In order for the last injurious injury rule to apply to impose liability on the subsequent employer, "there must be some showing that the employee's condition worsened due to the working conditions at the second employer, either by *advancement or aggravation of the injury.*" *Crew*, 259 S.W.3d at 668 (citing *Mahoney*, 158 S.W.3d at 346)). Additionally, "there is a compensable injury only 'if the severity of the condition is advanced, or if it results in a disabling condition other than increased pain.'" *Id.* at 669 (quoting *Townsend v. State*, 826 S.W.2d 434, 436 (Tenn. 1992)).

Employee worked for Employer from 1996 to August 12, 2009, often cutting twenty to thirty clients' hair per day while standing and lifting her arms. After Employer terminated her employment in August of 2009, Employee went to work for another employer in December of 2009 and left that job approximately one to two months later. Employee then worked for two subsequent employers where she only cut two to three clients' hair per week. Employee only worked five to six months for one employer and two to three months for the other. Employer argues that the last injurious injury rule operates to place responsibility on one of Employee's subsequent three employers. We disagree.

Both Dr. Gaw and Dr. Schwarz opined that Employee's injury was caused by her work as a hair stylist. There is no medical evidence in the record regarding the actual or potential effect of Employee's later employment on her condition. Employee herself testified at trial that prior to working for Employer she did not have any work-related problems with her neck, indicating her problems arose during her employment with Employer. She also testified that after being terminated by Employer, her problems continued and she never indicated that any aggravation or new injury developed at any subsequent employer. Employee further stated that her work for the subsequent employers was much less strenuous than that for Employer—in the later jobs she was cutting the hair of two to three clients per week, as opposed to twenty to thirty per day with Employer.

The trial court, considering whether Employee may have been further injured while working for a subsequent employer, found "a failure of proof . . . that might show that another employer should be liable." Simply stated, as the trial court correctly found, there is no proof in the record that "the employee's condition was aggravated or advanced due to working conditions" at the subsequent employers. *Mahoney*, 158 S.W.3d at 346; *see also*



*Crew*, 259 S.W.3d at 668. Given the medical proof as developed and presented at trial, Employee's testimony, and the short durations and much lighter workloads of the three jobs worked after her employment with Employer, the evidence does not preponderate against the trial court's finding that Employer should not be relieved of its responsibility for workers' compensation benefits by operation of the last injurious injury rule.

#### *Meaningful Return to Work*

Employee contends that the trial court erred by limiting her award of disability benefits to one and one-half times her impairment pursuant to Tennessee Code Annotated section 50-6-241(d)(1)(A). She argues that, because she was terminated before she reached maximum medical improvement, she did not have a meaningful return to work and her award should not be subject to the lower cap. The evidence showed that Employee was fired after a disagreement with a customer concerning the amount Employee charged for a haircut. There is no question that a disagreement occurred, or that the customer made a complaint concerning Employee to Ms. Cochran. There were differences between Employee's description of the incident and Ms. Cochran's understanding of what occurred. However, the trial court found that Ms. Cochran's decision to fire Employee was reasonable under the circumstances, and the evidence does not preponderate against that finding.

In *Carter v. First Source Furniture Group*, 92 S.W.3d 367 (Tenn. 2002), our Supreme Court held that the award of permanent disability benefits to an employee terminated for violation of workplace rules prior to reaching maximum medical improvement was subject to the lower cap. *Id.* at 371; *see also Pigg v. Liberty Mut. Ins. Co.*, No. M2007-01940-WC-R3-WC, 2009 WL 585962 (Tenn. Workers' Comp. Panel Mar. 9, 2009); *Krantz v. Nissan N. Am., Inc.*, No. M2007-01812-WC-R3-WC, 2008 WL 4645192 (Tenn. Workers' Comp. Panel Oct. 6, 2008). Under *Carter*, "courts must determine (1) that the actions allegedly precipitating the employee's dismissal qualified as misconduct under established or ordinary workplace rules and/or expectations; and (2) that those actions were, as a factual matter, the true motivation for the dismissal." *Durham v. Cracker Barrel Old Country Store, Inc.*, No. E2008-00708-WC-R3-WC, 2009 WL 29896, at \*3 (Tenn. Workers' Comp. Panel Jan. 5, 2009).

The actions precipitating Employee's dismissal, specifically the argument with the client, qualified as misconduct and appear to be the true motivation for the dismissal. The evidence does not preponderate against the trial court's decision to apply the lower cap to Employee's disability award.

### **Conclusion**

The judgment is affirmed. Costs are assessed to the appellant, Heads Up Hair Cutting Center, and its surety, for which execution may issue if necessary.

---

SHARON G. LEE, JUSTICE

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

**PAMELA INGRAM v. HEADS UP HAIR CUTTING CENTER**

**Chancery Court for Davidson County  
No. 11-0768-I**

---

**No. M2012-00464-WC-R3-WC - Filed April 10, 2013**

---

**JUDGMENT**

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 the appellant, Heads Up Hair Cutting Center, and its surety, for which execution may issue if necessary.

PER CURIAM