IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
October 28, 2013 Session

JOSE UMANZOR v.
ZURICH AMERICAN INSURANCE COMPANY ET AL.

Appeal from the Circuit Court for Shelby County
No. CT-000040-12 Rhynette N. Hurd, Judge

No. W2012-02568-WC-R3-WC - Mailed March 10, 2014; Filed April 10, 2014

An employee asserted that he injured his lower back while working as a construction laborer for his employer. Approximately two years after the incident, the employee provided written notice of his injury to his employer. The employer denied the claim, contending that the employee failed to give timely notice of his injury and that his claim was barred by the statute of limitations. The trial court agreed with the employer and entered judgment in its favor. After a thorough review of the record, we affirm the judgment of the trial court.

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

JANICE M. HOLDER, J., delivered the opinion of the Court, in which BEN H. CANTRELL, SR. J., and DONALD E. PARISH, SP. J., joined.

Steve Taylor, Memphis, Tennessee, for the appellant, Jose Umanzor.

Margaret Sams Gratz, Tupelo, Mississippi, for the appellee, Zurich American Insurance Company and F.L. Crane and Sons, Inc.

OPINION

Factual and Procedural Background

For approximately ten years, Jose Umanzor was employed as a construction laborer for F. L. Crane and Sons, Inc. ("Crane"). Mr. Umanzor claims that he injured his lower back on October 28, 2008, while carrying a large bag of cement on his shoulder. Although Mr. Umanzor contends that he informed his direct supervisor of his injury shortly after it occurred, all of Crane's employees deny learning of an injury to Mr. Umanzor on that date. On October 30, 2008, Mr. Umanzor sought treatment from a chiropractor, Dr. Erskine

Williams but discontinued his treatment with Dr. Williams because he could not afford the expense of treatment. On October 31, 2008, Mr. Umanzor signed Crane's Weekly Injury Record, certifying that he had not been injured on the job during that week.

Despite his persistent back pain, Mr. Umanzor continued to work for Crane for several months after October 28, 2008, but was eventually terminated for reasons that are unclear in the record. In June 2010, Mr. Umanzor was referred by his attorney to Dr. Tewfik Rizk, a rheumatologist and pain management specialist. Dr. Rizk conducted a series of tests and ordered an MRI of Mr. Umanzor's spine. In a letter dated September 23, 2010, Dr. Rizk wrote to Mr. Umanzor's attorney that the MRI of Mr. Umanzor's spine revealed a disc herniation at the L5-S1 level. Dr. Rizk opined that the herniation arose from the October 28, 2008 incident at Crane. On September 28, 2010, Mr. Umanzor's attorney prepared a written notice of injury, which Mr. Umanzor hand delivered to Crane later that day.

On October 14, 2010, Mr. Umanzor filed a request for a benefit review conference with the Department of Labor and Workforce Development. After the parties exhausted the benefit review process, Mr. Umanzor filed the present lawsuit in the Circuit Court for Shelby County, Tennessee, on January 5, 2012.

Mr. Umanzor testified at trial.[1] He stated that on October 28, 2008, he was working at a construction site on Riverside Drive in Memphis, Tennessee, unloading ninety-pound bags of cement from a trailer and carrying them to the onsite mixer. While carrying one of the bags, he bent to pick up a tape measure that had fallen from his pocket. As he straightened up, he felt a sharp pain in his lower back. He testified that he informed his on-site supervisor, Moises Vasquez, of his injury but that Mr. Vasquez did not offer to send him for medical treatment, instead replying, "My back hurts a little too."

Mr. Umanzor acknowledged that at the end of each week, Crane required its workers to sign a report indicating whether the worker had been injured on the job during that week. Mr. Umanzor admitted that he signed the weekly report for the week ending on October 31, 2008, certifying that he had not sustained an injury during that week. He explained, however, that he signed the report because he believed that it referred only to "accidents," which he defined as "where there's blood or something is broken." Mr. Umanzor further testified that he informed "Ashley" in Crane's office in Southhaven, Mississippi, about his injury.[2] Mr. Umanzor stated that Ashley contacted "Beverly" at Crane's office in Fulton, Mississippi.

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[1] Mr. Umanzor is a native of El Salvador and does not speak English. He therefore testified with the assistance of an interpreter who was present throughout the trial.

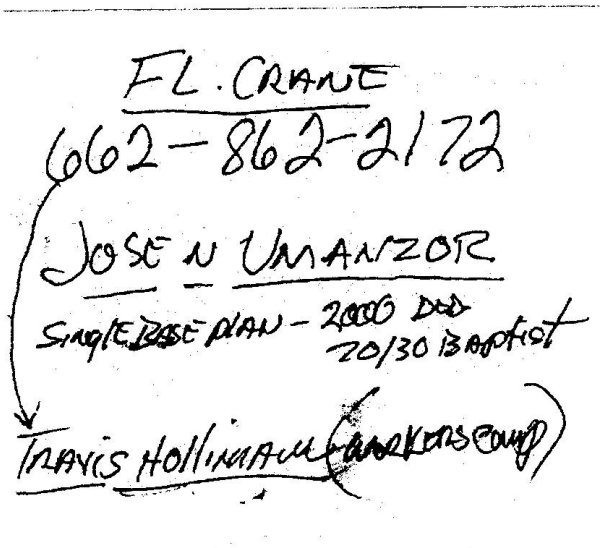
[2] The record does not reflect the date on which Mr. Umanzor claims that he spoke with "Ashley" about his October 28, 2008 injury.

Mr. Umanzor testified that his back pain persisted after he reported the injury and that he therefore sought medical treatment from Dr. Williams. He continued to work for Crane for several months and did not miss any work during this period. Eventually, however, Mr. Umanzor was terminated for reasons that are unclear from the record.

Mr. Umanzor also testified that he had previously been a foreman for Crane. He was aware of the procedures for reporting on-the-job injuries and had reported at least three prior injuries during his employment with Crane. On June 14, 2006, he injured his back while operating a jackhammer and reported his injury. On July 5, 2007, he reported an injury to his eye and subsequently signed Crane's Weekly Injury Record on July 6, 2007. On May 9, 2008, Mr. Umanzor reported a cut finger and signed Crane's Weekly Injury Record. After each of these injuries, Crane created an injury report and sent Mr. Umanzor to Desoto Family Medical Clinic where he was given a drug test and examined.

Mr. Umanzor introduced the transcript of Dr. Williams' deposition. Dr. Williams testified that he first saw Mr. Umanzor on October 30, 2008, when he reported an onset of low back pain after he bent over to pick up an object while carrying a bag of cement. Dr. Williams testified that he personally contacted Travis Holiman, a representative of Crane, who informed him that Mr. Umanzor's injury "wasn't covered." Dr. Williams saw Mr. Umanzor approximately six times over the following weeks, and he performed spinal adjustments on those occasions.

Dr. Williams' office file was made a collective exhibit to his deposition, and within his records was the following handwritten note:



When asked how he obtained this information, Dr. Williams admitted that he could not recall the source but speculated that "[i]t could have been given to me by the patient." He

acknowledged, however, that the writing on this note was his and that the "little arrow going down . . . is one of my quirky ways of doing things." Although he specifically remembered making the telephone call to Travis Holiman, Dr. Williams could not recall the substance of this purported conversation. He testified with certainty that Travis Holiman was a man.

Moises Vasquez held the position of foreman in October 2008. Mr. Vasquez testified that he speaks English and Spanish fluently and that no language barrier existed between him and Mr. Umanzor. Mr. Vazquez did not remember having any discussion with Mr. Umanzor about an injury in October 2008. If he had received such a report from Mr. Umanzor, he would have completed an "injury sheet" and sent it to the office. Mr. Vasquez also testified that Crane required its workers to sign the Weekly Injury Report to document work injuries.

Ashley Wilson, Crane's office manager, also testified at trial. Ms. Wilson stated that one of her job duties included receiving "accident/injury forms." When she receives an accident form, Ms. Wilson sends the injured employee for drug testing and completes an electronic claim form that she sends to Crane's corporate office in Fulton, Mississippi. She testified that she did not complete a claim form on behalf of Mr. Umanzor for an October 28, 2008 injury and that she has no record of sending him for drug testing at or near that time.

Ms. Wilson also testified that she had no recollection of meeting with Mr. Umanzor at any time to discuss an injury that occurred on October 28, 2008. Although she confirmed that Crane does have an employee named Beverly Whigle in its office in Fulton, Mississippi, Ms. Wilson clarified that she would not have called Ms. Whigle about a workers' compensation claim because the proper person to call in October 2008 was Travis Holiman. In conclusion, Ms. Wilson testified that she first became aware of Mr. Umanzor's alleged injury when he hand delivered a letter to Crane's office in September 2010.

Travis Holiman was Crane's "loss control coordinator" in 2008. She testified that she was responsible for processing all of Crane's workers' compensation claims and described her primary function as "the contact between the insurance company and the employee if there was a need on either side for anything." Ms. Holiman admitted that she often spoke directly with health care providers about pending workers' compensation claims. When asked how she responded to calls from these providers, Ms. Holiman explained the process as follows:

> If [the health care provider] call[ed] me and I did not have a report of injury then I would tell them I did not have a report of injury and to ask whoever was there if they considered this a workman's comp to call and make a report of injury. At that time I would go ahead and call the foreman or whoever the supervisory person for that person is and ask if they were aware of any injury. Usually call their field rep to see if they were aware of any injury. If any of the supervisors said, yes, I'm aware of the injury, you just don't have the

> paperwork yet, then I would go ahead and authorize it. And if I didn't I wouldn't if no one knew about it.

Ms. Holiman further testified that she did not recall having any conversation with Dr. Williams about his treatment of Mr. Umanzor. She stated that her search for documentation of this alleged phone call proved unsuccessful.

The trial court took the case under advisement and entered its written findings of fact and conclusions of law on October 11, 2012. Relying on the testimony of Mr. Vasquez, Ms. Wilson, and Ms. Holiman, the trial court found that Crane did not have actual knowledge of Mr. Umanzor's injury until September 28, 2010, when Mr. Umanzor hand delivered the written notice that his attorney had prepared. The trial court further concluded that Mr. Umanzor had not proven a "reasonable excuse" for his failure to provide timely notice of his injury and that his claim was therefore barred. See Tenn. Code Ann. 50-6-201(a).

The trial court also determined that Mr. Umanzor's claim was barred by the statute of limitations because his request for a benefit review conference was filed almost two years after his alleged injury. See Tenn. Code Ann. § 50-6-203(b)(1). The trial court accordingly entered judgment in favor of Crane, and Mr. Umanzor appealed. This case was referred to the Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law pursuant to Tennessee Supreme Court Rule 51.

Analysis

Mr. Umanzor's first argument on appeal is that the trial court erred by finding that he did not provide timely notice of his injury. Tennessee Code Annotated section 50-6-201(a) (2008) provides that unless the employer has "actual knowledge" of the employee's injury:

> 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.

Tenn. Code Ann. § 50-6-201(a). Unless the preponderance of the evidence is otherwise, the trial court's findings of fact are reviewed de novo on the record and are accompanied by a presumption of correctness. Tenn. Code Ann. § 50-6-225(e)(2) (2008). Mr. Umanzor argues that the evidence preponderates against the trial court's finding that Crane lacked actual knowledge of his injury. We disagree.

When an employee alleges that his employer had actual knowledge of his injury, he must prove that "the employer had actual knowledge of the time, place, nature, and cause of the injury." Masters v. Indus. Garments Mfg. Co., Inc., 595 S.W.2d 811, 815 (Tenn.1980).

Although Mr. Umanzor testified that he informed Mr. Vasquez about his injury shortly after it occurred, Mr. Vasquez testified that he had no recollection of the incident or of Mr. Umanzor telling him about it. Similarly, Ms. Wilson and Ms. Holiman testified that they had no knowledge of Mr. Umanzor's injury at or near the time of its occurrence.

The trial court also reviewed the deposition testimony of Dr. Williams, who unequivocally testified that he called Travis Holiman on October 30, 2008, to determine whether Mr. Umanzor's treatment would be covered by workers' compensation. Although Dr. Williams could not remember "how that conversation went," he was certain he was told that Mr. Umanzor's treatment "wasn't covered" and that Ms. Holiman was a man. The trial court considered all of the testimony and concluded that Crane had no actual knowledge of Mr. Umanzor's injury until he hand delivered a notice letter to Crane on September 28, 2010. The trial court's conclusion is therefore a reflection of its assessment of the witnesses' credibility, which is entitled to great deference on appeal.[3] See Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002) ("When the trial judge has seen and heard a witness's testimony, considerable deference must be accorded on review to the trial court's findings of credibility and the weight given to that testimony.").

On the record before us, we cannot conclude that the evidence preponderates against this finding of the trial court. We therefore conclude that Crane lacked actual knowledge of Mr. Umanzor's injury until September 28, 2010.

Mr. Umanzor also argues, however, that even if Crane lacked actual knowledge of his injury, he provided a "reasonable excuse" for his failure to give Crane written notice within thirty days. See Tenn. Code Ann. § 50-6-201(a). Specifically, Mr. Umanzor contends that he did not learn that his injury was permanent and work-related until Dr. Rizk prepared the letter to his attorney. See Pentecost v. Anchor Wire Corp., 695 S.W.2d 183, 185 (Tenn. 1985) (holding that an employee with a gradual injury had a reasonable excuse for reporting her injury more than one year after the date on which she took medical leave). Mr. Umanzor therefore submits that the relevant time period for giving notice commenced on that date. We find this argument to be without merit.

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[3] Our standard of review permits us to "draw [our] own conclusions" about the weight and credibility of expert medical testimony that is contained in the record by deposition. Foreman v. Automatic Sys., Inc., 272 S.W.3d 560, 571 (Tenn. 2008). The rationale for this standard of review is that deposition evidence reaches the appellate court in the same form in which it was presented to the trial court. See State v. Binette, 33 S.W.3d 215, 217 (Tenn. 2000); Humphrey v. David Witherspoon, Inc., 734 S.W.2d 315, 315-16 (Tenn. 1987). Accordingly, the trial court occupies no better position than the appellate court in reviewing and interpreting that evidence. Binette, 33 S.W.3d at 217. We are not required, however, to consider a medical expert's deposition testimony in isolation when determining if the evidence preponderates against the trial court's findings. The trial court was persuaded by Ms. Holiman's testimony that she could not recall a conversation with Dr. Williams. Consequently, the trial court reviewed Dr. Williams' deposition in light of its assessment of Ms. Holiman's credibility, and we must therefore defer to the trial court on this issue.

Mr. Umanzor's testimony clearly shows that in his view, he suffered an acute, work-related injury on October 28, 2008. He described his actions leading up to the injury and claimed throughout his testimony that he attempted to give Crane notice of his injury on the date that it occurred. He sought treatment within a few days, his symptoms continued, and he took no further action for over a year. Moreover, Mr. Umanzor testified that he had been a foreman for Crane, was familiar with the company's procedures for reporting work injuries, and had personally reported three prior work injuries. Based on these facts, we conclude that Mr. Umanzor's failure to provide notice in accordance with Tennessee Code Annotated section 50-6-201(a) bars his claim. We therefore affirm the judgment of the trial court.

Mr. Umanzor next contends that the trial court erred by finding that his claim was barred by the statute of limitations. We disagree.

Tennessee Code Annotated section 50-6-203(b)(1) provides that:

> [if] 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 . . . and filed with the [Department of Labor] within one (1) year after the accident resulting in injury.

Tenn. Code Ann. § 50-6-203(b)(1) (2008). The limitations period described in Tennessee Code Annotated section 203(b)(1) does not commence, however, until the employee "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). Whether a plaintiff exercised reasonable diligence is a question of fact. Id. at 509. Our standard of review of this issue is therefore de novo upon the record of the trial court accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2008).

For the reasons discussed above, the evidence does not preponderate against the trial court's finding that Mr. Umanzor knew or should have known that his injury was work-related "at least by October 30, 2008, the day he visited Dr. Williams." Mr. Umanzor therefore had until October 30, 2009, to file his request for a benefit review conference with the Department of Labor. See Tenn. Code Ann. § 50-6-203(b)(1). It is undisputed, however, that Mr. Umanzor's request was filed approximately two years after the date he claims he was injured. We therefore affirm the judgment of the trial court that his claim was barred by the statute of limitations.[4]

[4] Mr. Umanzor introduced the transcript of Dr. Rizk's deposition in which Dr. Rizk testified concerning causation and permanent impairment. Dr. David Strauser, a vocational expert, also testified on Mr. Umanzor's behalf at trial. Because we have concluded that Mr. Umanzor's claim is barred by his failure to give timely notice and by the statute of limitations, we need not address the issues of causation, anatomical

Conclusion

The judgment of the trial court is affirmed. The costs of this appeal are taxed to Jose Umanzor and his surety, for which execution may issue if necessary.

JANICE M. HOLDER, JUSTICE

impairment, or vocational disability.

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SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON

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Circuit Court for Shelby County
No. CT-000040-12

No. W2012-02568-WC-R3-WC - Filed April 10, 2014

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 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 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 on appeal are taxed to the Appellant, Jose Umanzor, and his surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM