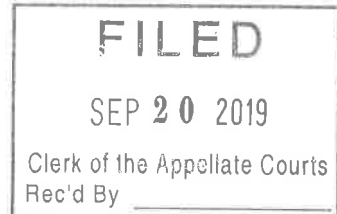


IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
August 5, 2019 Session

CHERYL LYNN WILLIAMS v. SWS LLC D/B/A SECUREWATCH

**Appeal from the Circuit Court for Knox County
No. 2-326-13 William T. Ailor, Judge**

No. E2018-00922-SC-R3-WC – Mailed August 19, 2019



Cheryl Lynn Williams (“Employee”) alleged that she sustained a compensable injury and/or an occupational disease as a result of exposure to mold during the course and scope of her employment with SWS LLC d/b/a SecureWatch (“Employer”). Employer filed a motion for summary judgment, asserting that the one-year statute of limitations barred Employee’s claim. The trial court granted the motion and dismissed the case. Employee has appealed. The 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 pursuant to Tennessee Supreme Court Rule 51. Having determined that genuine issues of material fact exist concerning the commencement of the statute of limitations, we reverse the judgment and remand for proceedings on the merits.

**Tenn. Code Ann. § 50-6-225(e) (2014) (applicable to injuries
occurring prior to July 1, 2014) Appeal as of Right;
Judgment of the Circuit Court Reversed; Case Remanded**

THOMAS R. FRIERSON, II, SP.J., delivered the opinion of the court, in which SHARON G. LEE, J., and WILLIAM B. ACREE, SR.J., joined.

Donald K. Vowell, Knoxville, Tennessee, and Martin L. Ellis, Luttrell, Tennessee, for the appellant, Cheryl Lynn Williams.

Lynn C. Peterson and Jennifer C. Schmidt, Knoxville, Tennessee, for the appellees, SWS LLC d/b/a SecureWatch and Travelers Insurance Company.

OPINION

I. Factual and Procedural Background

Employee began working for Employer in March 2010. Shortly after Employer moved into a new building in June 2010, Employee began experiencing symptoms of a condition in her upper airway and hypopharyngeal airway. She attributed the condition to her work environment. She missed time from work when she had two surgeries, which included removing a portion of her lingual tonsils, in January 2011 and July 2011.

On August 1, 2011, Employer received from Employee the following letter in relevant part:

This letter is to inform you in writing that per our conversation on Tuesday July 26, 2011, I was advised by my E.N.T. Physician that the medical condition that I have had continuous treatment for since December of 2010 and have had two surgeries required since then is caused from Mold/Mildew, most likely in the workplace due to the recent construction and water problems that occurred in the building.

I had asked that this building please be tested for Mold/Mildew, and have the Air Vents also tested due to other people on the sixth and third floor talking about the different symptoms that they were having.

I feel that for myself, I am going to pursue this as a workman compensation issue.

Employee subsequently presented to Employer a note written on a prescription from her physician, dated September 16, 2011, stating that “[Employee] has clinical evidence of toxic mold exposure.”

Starting in October 2011, Employee began searching for other employment because she believed that the building where she worked was making her sick. Employee found another job and voluntarily terminated her employment with Employer on April 25, 2012.

On December 17, 2012, Employee filed a request for assistance with the Tennessee Department of Labor and Workforce Development. On June 24, 2013, Employee filed this workers’ compensation complaint, alleging that she sustained a

compensable injury and/or an occupational disease as a result of exposure to harmful substances, including mold, during the course and scope of her employment and that her last exposure was the last day she worked for Employer. Employer filed an answer, denying material allegations in the complaint and asserting that the applicable statute of limitations barred Employee's claim.

More than three years before Employer filed the motion for summary judgment at issue here, Employer filed a similar motion for summary judgment, asserting that the statute of limitations barred Employee's claim. In denying the previous motion for summary judgment, the trial court reasoned that the proper application of the statute of limitations depended on whether Employee's condition was a gradually occurring injury or an occupational disease, which the trial court found it could not determine from the information provided to it.

In subsequently granting the instant motion for summary judgment, the trial court concluded that Employee's claim was barred by the statute of limitations because Employee did not file her request for assistance until "more than one year from when she knew or should have known that she had sustained a work related injury, and that said work related injury had caused her to lose time from work as a result of her alleged exposure to mold at the workplace as required by T.C.A. § 50-6-203(b)(1)." Employee timely appealed.

II. Issue Presented

Employee presents five sub-issues within what we determine to be the overarching, dispositive issue, which we have restated as follows:

Whether the trial court erred by dismissing Employee's workers' compensation action as barred by the applicable statute of limitations.

III. Standard of Review

The grant or denial of a motion for summary judgment is a matter of law; therefore, our standard of review is *de novo* with no presumption of correctness. *See Rye v. Women's Care Ctr. of Memphis, M PLLC*, 477 S.W.3d 235, 250 (Tenn. 2015); *Dick Broad. Co. of Tenn. v. Oak Ridge FM, Inc.*, 395 S.W.3d 653, 671 (Tenn. 2013) (quoting *Kinsler v. Berkline, LLC*, 320 S.W.3d 796, 799 (Tenn. 2010)). As such, this Court must "make a fresh determination of whether the requirements of Rule 56 of the Tennessee

Rules of Civil Procedure have been satisfied.” *Rye*, 477 S.W.3d at 250 (citing *Estate of Brown*, 402 S.W.3d 193, 198 (Tenn. 2013)).

IV. Timeliness of Employee’s Claim

The determinative issue is whether Employee’s claim was timely filed. The applicable statute of limitations 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.

Tenn. Code Ann. § 50-6-203(b)(1) (2008). As relevant here, if a request for assistance is filed within the time prescribed by section 50-6-203(b)(1), the time within which to file a request for a benefit review conference will not expire until sixty days after the issuance of a benefit review report by the workers’ compensation specialist making the determination on the request for assistance. Tenn. Code Ann. § 50-6-238(a)(1)(B)(i) (2008). The trial court concluded that the statute of limitations expired before Employee filed her request for assistance.

Initially, Employee and Employer agree that the last-day-worked rule governs determination of the date of injury in this case for statute of limitations purposes, citing *Building Materials Corp. v. Britt*, 211 S.W.3d 706 (Tenn. 2007). They disagree, however, concerning how to apply the last-day-worked rule. In *Britt*, the Court observed that because gradually occurring injuries constitute a new injury each day, “it is unfair to start the running of the statute of limitations on the date the injury was first reported if the employee continues to work after having given notice of his injury.” *Id.* at 712 (citations omitted). The Court held that the date of an employee’s gradually occurring injury should be determined using the last-day-worked rule, under which the statute of limitations does not start to run until the employee is prevented from working due to the injury. *Id.* at 712-13. Employee argues that because the last day she worked for Employer was April 25, 2012, she timely filed her request for assistance on December 17, 2012, less than one year later. Employer argues that when, as in this case, an employee returns to work after surgery, the last day worked before surgery constitutes the date of injury under the last-day-worked rule.

Employee underwent surgery in January 2011 and again in July 2011 for the condition at issue. Employee argues that her absence from work due to the surgery, as opposed to absence due to the condition itself, did not constitute incapacity to work and therefore did not trigger the statute of limitations, citing *Brown v. Erachem Comilog, Inc.*, 231 S.W.3d 918 (Tenn. 2007). In *Brown*, the Court held that “an employee’s absence from work for treatment will not begin the running of the statute of limitations in an occupational disease case if the employee’s capacity to work is affected only by the treatment, not by the disease.” *Id.* at 923. Employer argues that Employee’s reliance on *Brown* is misplaced because it concerns an occupational disease claim that is governed by a different statute of limitations. *See id.* at 922 (quoting Tenn. Code Ann. § 50-6-306(a), which provides that the limitations period commences “as of the date of the beginning of the incapacity for work resulting from an occupational disease”).¹ Employer argues that for purposes of the motion for summary judgment, we must assume that Employee sustained a gradually occurring injury rather than an occupational disease. We disagree.

At the hearing on the motion for summary judgment at issue here, Employee indicated that her claim concerns a gradually occurring injury, not an occupational disease. The trial court’s order granting the motion for summary judgment makes no reference to this apparent concession. The trial court did not apply the last-day-worked rule. Instead, the trial court applied the discovery rule. *See Gerdau Ameristeel, Inc. v. Ratliff*, 368 S.W.3d 503, 508 (Tenn. 2012) (holding that the limitations period “does not commence until a plaintiff discovers, or in the exercise of reasonable diligence, should have discovered that he has a claim”). The discovery rule has no application in this case, however, where Employee was well aware of her claim.

We are not required to accept Employee’s apparent concession and decline to do so in this instance. *See Barron v. State, Dep’t of Human Servs.*, 184 S.W.3d 219, 223 (Tenn. 2006) (citations omitted). Upon careful review, we determine that genuine issues of material fact exist concerning whether Employee’s condition was a gradually occurring injury and/or an occupational disease. *See Wagner v. Washington Cnty. Dep’t of Educ.*, No. E2007-00868-WC-R3-WC, 2008 WL 880287, at *4 (Tenn. Workers’ Comp. Panel Apr. 3, 2008) (citing *Fritts v. Safety Nat’l Cas. Corp.*, 163 S.W.3d 673, 680 (Tenn. 2005) (noting overlap between an injury and an occupational disease in a case holding that a school teacher failed to establish that her condition was caused by exposure

¹ The Court held that the Panel had erred in relying on a gradually occurring injury case in affirming the trial court’s finding of untimeliness because such claims were governed by Tennessee Code Annotated § 50-6-224(1) (2005), the one-year statute of limitations for accidental injuries. *See Brown*, 231 S.W.3d at 922.

to mold in the workplace). We further determine that genuine issues of material fact exist concerning Employee's incapacity for work and reason for leaving Employer.

Inasmuch as “questions involving the commencement of the running of the statute of limitations in workers’ compensation cases most often are factual in nature,” summary judgment should be entered cautiously with respect to such issues. *Blocker v. Reg’l Med. Ctr. at Memphis*, 722 S.W.2d 660, 662 (Tenn. 1987) (quoting *McLerran v. Mid-South Stone, Inc.*, 695 S.W.2d 181, 182 (Tenn. 1985) (citing *Hibner v. St. Paul Mercury Ins. Co.*, 619 S.W.2d 109, 110 (Tenn. 1981)). If any evidence indicates that a genuine issue of material fact exists, summary judgment is not appropriate. *Id.* Taking all facts in the light most favorable to Employee, we find that genuine issues of material fact exist on questions involving the commencement of the statute of limitations. We therefore conclude that the trial court erred in granting Employer’s motion for summary judgment and dismissing the case.

V. Conclusion

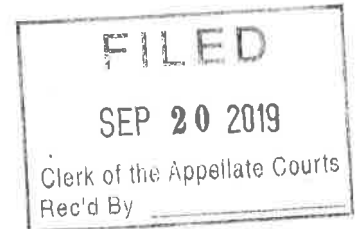
For the foregoing reasons, we reverse the judgment of the trial court. This case is remanded to the trial court for proceedings on the merits and collection of costs below. Costs on appeal are taxed to the appellees, SWS LLC d/b/a SecureWatch and Travelers Insurance Company, for which execution may issue if necessary.

THOMAS R. FRIERSON, II, SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE
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No. 2-326-13**



No. E2018-00922-SC-R3-WC

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 are assessed to the appellees, SWS LLC d/b/a Secure Watch and Travelers Insurance Company for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM