IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT MEMPHIS
February 1, 2016 Session

JOHN E. HOUSTON v. CONAGRA FOODS PACKAGED FOODS, LLC

Appeal from the Chancery Court for Gibson County
No. H5918 George R. Ellis, Chancellor

No. W2015-01257-SC-WCM-WC – Mailed March 30, 2016; Filed June 30, 2016

John E. Houston ("Employee") alleged he sustained a compensable injury to his back in June 2013. He initially sought medical treatment through his health insurer and told his doctors his injury occurred in the course of his employment at Conagra ("Employer"). When Employee submitted a claim for short-term disability benefits and FMLA leave through Employer, however, he stated his condition was not related to his employment. He ultimately had back surgery on August 22, 2013. On September 13, 2013, Employee gave notice of what he alleged to be a work-related injury to Employer by means of a letter from counsel. Employer denied the claim, based in part on the lack of timely notice. The trial court found Employee's application for short-term disability benefits provided notice that Employer had an injured employee, and, had Employer conducted an investigation at that time, it would have become aware the injury was work related. The court determined notice, therefore, was timely. It awarded permanent partial disability benefits and entered judgment accordingly. Employer has appealed from that judgment. 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. We reverse the judgment.

Tenn. Code Ann. § 50-6-225(a)(2) (2014) Appeal as of Right; Judgment of the Chancery Court Reversed

RHYNETTE N. HURD, delivered the opinion of the Court, in which HOLLY KIRBY, J. and JAMES F. RUSSELL, joined.

Terry L. Hill, Nashville, Tennessee, for the appellant, Conagra Foods Packaged Foods, LLC

Scott G. Kirk, Jackson, Tennessee, for the appellee, John E. Houston

OPINION

Factual and Procedural History

Employee is a 44-year-old high school graduate. After serving approximately six months in the U.S. Army, he was discharged due to financial problems. Employee has approximately one and one-half years of college but did not earn a degree. Prior to working for Employer, Employee worked at several jobs including driving a forklift and loading trailers; loading airplanes for FedEx; woodworking; HVAC installation and repair; servicing heavy machinery; and roofing. He attended truck driving school and obtained a commercial driver's license, which was still valid when the trial of this matter took place on May 13, 2015. Employee testified that he was unable to find "on the record" employment for seven years as a result of a conviction for domestic violence. During this time he worked for cash and did not pay taxes or child support. He then worked for a grocery store, a trucking company, and a temporary agency before being hired by Employer.

Employee started working in Employer's sanitation department in February 2012. His job consisted of cleaning equipment used in cooking prepared food items. The process had three stages: removing waste from large kettles; cleaning the kettles with a chemical solution and rinsing; and then sanitizing the equipment with a different chemical. Performing those tasks required him to carry a heavy, high-pressure water hose on stairs and catwalks. Employee testified that on an unspecified date in June 2013, he felt a "catch" in his back. He did not report this event or seek medical care at that time. He continued to work, and his back pain gradually increased. He began to have symptoms in his leg as he drove to work on June 24. He completed his shift at five o'clock a.m. on June 25. At seven o'clock p.m., he drove himself to the emergency department of Humboldt General Hospital. He saw a physician who advised him not to go to work that evening. That physician also advised Employee to see his primary care doctor on the next day. Employee did not have an established primary care doctor at that time, so he went to Jackson Clinic Convenient Care, where he saw Dr. Sharon Hopkins. Dr. Hopkins instructed Employee to remain off work for two weeks and wrote a note to that effect for him to take to Employer.

Employee took the note directly to Employer, where he met with Vickie Granade, a human resources representative. Although the records of the emergency room physician and Dr. Hopkins state Employee had given a history that his condition was work related, he did not disclose that information to Ms. Granade or any other representative of Employer at that

time. Employee later would testify that his union representative, Kevin Todd, had advised him not to report his injury as work related because doing so would likely cause a delay in medical treatment. Ms. Granade did assist Employee with completing paperwork for short-term disability benefits and FMLA leave. The form contained the question, "Does Ailment Result From Your Occupation?" Employee answered "No" to that question. The form also asked, "Is Ailment Due to Injury?" Employee answered "No" to that question. Additional questions concerning the date, place and mechanism of injury were answered "N/A."

Dr. Hopkins provided conservative treatment, but Employee's condition did not improve. Dr. Hopkins referred Employee to Dr. Head, a neurologist. Employee told Dr. Head he had awakened on June 17 with back pain that gradually worsened thereafter. Dr. Head ordered an MRI. Based on the results of that study, Dr. Head recommended surgery. Employee conducted some research and chose Dr. John Neblett, a neurosurgeon for further treatment.

Employee first saw Dr. Neblett on August 16, 2013. Dr. Neblett testified the MRI ordered by Dr. Head showed a large, free fragment of disc at the L2-3 level of the spine. On August 22, 2013, Dr. Neblett performed a surgical laminectomy and disc removal. He described Employee's post-operative course as excellent. By October 2, Employee reported complete relief of leg pain and was making progress with physical therapy. Because of the strenuous nature of Employee's job, Dr. Neblett ordered additional physical therapy before allowing Employee to return to work. Dr. Neblett allowed him to return to work on November 13, 2013, with temporary restrictions of no repetitive bending and no lifting more than twenty pounds. Employee did not actually return to work until January 7, 2014. He was initially placed as a janitor. He strained his back while mopping in February and was again off work until April 14, 2014, when he was released by Dr. Neblett. He worked as a janitor for "a month or two" before returning to his regular job in the sanitation department. He still held that job when the trial occurred on May 13, 2015. Employee testified he is able to perform all the tasks required by his job but is slower than he had been before his injury. His back becomes stiff at times, but he is able to obtain relief by performing extension exercises he learned in physical therapy. Employee testified his hobbies are art and music, but he has little time to engage in these pursuits because of the number of hours he works.

Employee testified on cross-examination that in September 2013, after he had surgery, he consulted a lawyer concerning a possible workers' compensation claim. His attorney sent a letter to Employer on September 12 giving notice of a workers' compensation claim. Employee further testified he had not told any representative of Employer he believed his back injury was work related until that letter was sent.

Dr. Neblett testified Employee reached maximum medical improvement on April 9, 2014. Dr. Neblett did not place any permanent restrictions on Employee's activities, but he did advise Employee to be very careful. He testified that, statistically, Employee had a 10%

to 15% chance of having another ruptured disc in the future. Dr. Neblett assigned a permanent impairment of 10% to the body as a whole due to the injury and surgery. Dr. Neblett had not seen the records of the Humboldt General Hospital ER or the notes of Jackson Clinic Convenient Care until the morning of his deposition. In response to a hypothetical question including Employee's statements as set out in those records, Dr. Neblett opined it was more likely than not the injury was caused by work activities. During cross-examination, he testified Employee stated to him the injury was spontaneous and that Employee did not describe any injury as a cause, nor that the injury was related to work. Dr. Neblett said there was no information in his own records to cause him to believe Employee's condition was work related.

The trial court issued its ruling from the bench. In those findings, the court stated:

> There is no proof that Ms. Granade made any investigation of the cause of John Houston's injury, even though he put "N/A" on the form she provided to him. The employer acknowledged that they had an injured employee. And had they made any investigation, the proof was readily apparent that Mr. Houston had sustained a work-related injury.
>
> There is no proof that Ms. Granade even inquired from Mr. Houston as to what was the cause of his injury.
>
> The Court finds that the employer was given notice of John Houston's injury under any rational but liberal construction to promote and adhere to the Act's purpose of securing benefits to those workers who fall within this coverage.

The parties had previously stipulated that any award of disability benefits was subject to the one and one-half times impairment cap pursuant to Tennessee Code Annotated section 50-6-241(d)(1)(A). The court found Employee had sustained 15% permanent partial disability. Employer has appealed, contending the trial court erred by finding Employee gave timely notice of his injury as required by Tennessee Code Annotated section 50-6-201 (2008).

Analysis

Courts reviewing an award of workers' compensation benefits must conduct an in-depth examination of the trial court's factual findings and conclusions. *Wilhelm v. Krogers*, 235 S.W.3d 122, 126 (Tenn. 2007). When conducting this examination, the reviewing court, pursuant to Tennessee Code Annotated section 50-6-225(a)(2) (2014), must "[r]eview . . . the trial court's findings of fact . . . 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." The reviewing court must also give considerable deference to the trial court's findings regarding the credibility of the live witnesses and to the trial court's assessment of the weight that should be given to their testimony. *Tryon v. Saturn Corp.*, 254 S.W.3d. 321, 327, (Tenn. 2008); *Whirlpool Corp. v. Nakhoneinh*, 69 S.W.3d 164, 167 (Tenn. 2002). The reviewing courts need not, however, give similar deference to a trial court's findings based upon documentary evidence such as depositions, *Orrick v. Bestway Trucking, Inc.*, 184 S.W.3d 211, 216 (Tenn. 2006); *Bohanan v. City of Knoxville*, 136 S.W.3d 621, 624 (Tenn. 2004), or to a trial court's conclusions of law, *Seiber v. Reeves Logging*, 284 S.W.3d 294, 298 (Tenn. 2009).

Employer in this case asserts the trial court erred by finding Employee gave appropriate notice of his injury as required by Tennessee Code Annotated section 50-6-201. That statute states, in pertinent part:

> 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.

Tenn. Code Ann. § 50-6-201(a) (2008).

Chief Justice Lee has summarized the law concerning the notice requirement in *Ingram v. Heads Up Hair Cutting Center*, No. M2012–00464–WC–R3–WC, 2013 WL 1458872 (Tenn. Workers Comp. Panel April 10, 2003):

> 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*, 221 Tenn. 383, 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)).

2013 WL 1458872, at *4

The undisputed evidence in this record establishes that Employee's injury occurred prior to June 25, 2013, and that notice was given on September 12, 2013. Employer raised the issue of notice in its answer (Tech 3-4), and the issue was acknowledged by both parties at trial. (Trans. 4-9) "Where the question of notice is raised by the pleadings the burden of showing notice or reason why same was not given is upon the employee." *Aluminum Co. of Am. v. Rogers*, 364 S.W.2d 358, 360 (Tenn. 1962); *Bradshaw v. Claridy*, 375 S.W.2d 852, 857 (Tenn. 1964). Here, because the Employer had no actual knowledge of the alleged June 25 injury until September 12, 2013, the burden was on Employee to show he had a reasonable excuse for failing to provide timely notice.

Employee argues that notice was timely because he neither knew nor reasonably should have known his work injury would result in physical impairment until Dr. Neblett recommended surgery to him on August 16, 2013. The evidence indicates otherwise. Employee testified that Dr. Head advised him that surgery was necessary on August 8, 2013. (Trans. 22-23) He saw Dr. Neblett on August 16, and surgery took place on August 22, 2013. Employee knew, or believed, that his back injury was work related no later than June 25, 2013, when he told the emergency room physician that his injury occurred at work. He made the same statement to Dr. Hopkins on June 26, and he discussed the matter with his union representative on the same date. Yet, also on June 26, he completed paperwork with Ms. Granade denying his back condition was related to his work or caused by an injury. He declined to answer questions about the time, place and mechanism of his injury because those

questions were not applicable to his application for leave. Employee made these misrepresentations deliberately because he wanted to circumvent the medical treatment structure provided by the workers' compensation system.

We conclude that knowingly giving false information in response to an employer's direct questions about the cause of his condition does not constitute a reasonable excuse for failing to give timely notice as required by section 50-6-101.

We further conclude that the trial court erred by finding that Employer was obligated to launch an investigation into the cause of Employee's back injury. "[M]ere knowledge of an employee's illness, unless it is obvious that a work related injury has occurred, is insufficient to charge the employer with knowledge that the employee sustained a work related injury." *McKinney v. Berkline Corp.*, 503 S.W.2d 912, 915 (Tenn. 1974); *see also Moe v. T.O.C. Retail, Inc.*, No. 03S01-9212-CV-00116, 1994 WL 901483, at *3 (Tenn. Workers' Comp. Panel Nov. 15, 1994). Here, Employer inquired directly about the circumstances of the injury. In response, Employee stated the condition was not work related, even though he knew, or believed, otherwise. Having asked Employee and received a negative answer, we find that Employer was not required to investigate further. Therefore, the judgment of the trial court is reversed.

Conclusion

The judgment of the trial court is reversed. The case is remanded for entry of an order dismissing the complaint. Costs are taxed to John E. Houston, for which execution may issue if necessary.

_____

RHYNETTE N. HURD, JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

JOHN E. HOUSTON v. CONAGRA FOODS PACKAGED FOODS LLC

Chancery Court for Gibson County
No. H5918

No. W2015-01257-SC-WCM-WC – Filed June 30, 2016

JUDGMENT ORDER

This case is before the Court upon the motion for review filed by John E. Houston, pursuant to Tennessee Code Annotated section 50-6-225(e)(5)(A)(ii), 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.

It appears to the Court that the motion for review is not well taken and is, therefore, denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed to John E. Houston, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

HOLLY KIRBY, J., not participating.