

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

December 18, 2001 Session

BILLY JOE CLUBBS v. CRESENT MANUFACTURING CO., ET AL.

**Direct Appeal from the Circuit Court for Sumner County
No. 19997-C C. L. Rogers, Judge**

**No. M2001-WC-R3-CV - Mailed - January 25, 2002
Filed - March 4, 2002**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. In this appeal, the injured employee insists the trial court erred in dismissing his claim for benefits for failure to give timely written notice of his injury. As discussed below, the panel has concluded the judgment should be reversed and the cause remanded for further consideration.

Tenn. Code Ann. § 50-6-225(e) (2001) Appeal as of Right; Judgment of the Circuit Court Reversed. Cause Remanded.

JOE C. LOSER, JR., SP. J., delivered the opinion of the court, in which ADOLPHO A. BIRCH, JR., J., and JAMES WEATHERFORD, SR. J., joined.

Mary A. Parker, Nashville, Tennessee, for the appellant, Bobby Joe Clubbs

D. Andrew Saulters, Nashville, Tennessee, for the appellees, Crescent Manufacturing Company and CNA Insurance Company

MEMORANDUM OPINION

The employee or claimant, Clubbs, is a supervisor for the employer, Crescent, and familiar with the procedure for reporting injuries. In January or February of 1999, he felt "an intense jolt" when a wrench he was using slipped. The claimant did not report the occurrence to the employer. He testified that it is customary, though not encouraged, at Crescent not to make written report of a minor injury when the employee believes the injury will resolve itself quickly. His pain quickly subsided and he finished his shift and continued working without pain. At the time, the claimant did not realize he had suffered an injury. Seven to ten days later, he began experiencing severe headaches. However, he had suffered headaches in the past and was not alarmed by it.

He began visiting Dr. Sid King, whom he had seen from time to time for other headaches. When conservative care did not relieve the headaches and tests revealed a spur, Dr. King referred the claimant to a neurologist, Dr. Mary Ellen Clinton, whom the claimant first saw on March 17, 1999. On the same day, Dr. Clinton advised him that she thought the condition was the result of the wrench slipping episode at work. The claimant retained an attorney, who, on April 2, 1999, reported the injury to the employer by letter.

Dr. Ray Hester, to whom the claimant was referred by Dr. Clinton, diagnosed a herniated cervical disc, which he repaired surgically. Dr. Hester opined at trial that the injury was work related and assigned a permanent impairment rating. The claimant was totally disabled to work for a period of time and has incurred medical expenses.

Following a trial on the merits, the trial court found the claimant, without a reasonable excuse, had failed to give timely notice of his injury. Appellate review of findings of fact is de novo upon the record of the trial court accompanied by a presumption of correctness of the findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). Conclusions of law are subject to de novo review on appeal without any presumption of correctness. Nutt v. Champion Intern. Corp., 980 S.W.2d 365, 367 (Tenn. 1998).

This tribunal is not bound by the trial court's findings but instead conducts an independent examination of the record to determine where the preponderance lies. Galloway v. Memphis Drum Serv., 822 S.W.2d 584, 586 (Tenn. 1991). Where the trial judge has seen and heard the witnesses, especially if issues of credibility and weight to be given oral testimony are involved, considerable deference must be accorded those circumstances on review, because it is the trial court that had the opportunity to observe the witnesses' demeanor and to hear the in-court testimony. Long v. Tri-Con Ind., Ltd., 996 S.W.2d 173, 178 (Tenn. 1999). The appellate tribunal, however, is as well situated to gauge the weight, worth and significance of deposition testimony as the trial judge. Walker v. Saturn Corp., 986 S.W.2d 204, 207 (Tenn. 1998).

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. Benefits are not recoverable from the date of the accident to the giving of such notice, and no benefits are recoverable unless such written notice is given within 30 days after the injurious occurrence, unless the injured worker has a reasonable excuse for the failure to give the required notice. The notice may be given by the employee or his representative. Tenn. Code Ann. § 50-6-201. The reasons for the 30 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. McCaleb v. Saturn Corp., 910 S.W.2d 412, 415 (Tenn. 1995).

Whether or not the excuse offered by an injured worker for failure to give timely written notice is sufficient depends on the particular facts and circumstances of each case. A. C. Lawrence Leather Co. v. Britt, 220 Tenn. 444, 454, 414 S.W.2d 830, 834 (1967). The presence or absence of prejudice to the employer is a proper consideration. Marshall Construction Co. v. Russell, 163

Tenn. 410, 414, 43 S.W.2d 208, 209 (1931). Generally, the beginning date for computing notice is the date on which the effects of the injury manifest themselves to the employee or could have been discovered by the employee in the exercise of reasonable care and diligence. McCaleb at 415.

In determining whether an employee has shown a reasonable excuse for failure to give such notice, courts will consider the following criteria in light of the above reasons for the rule: (1) the employer's actual knowledge of the employee's injury, (2) lack of prejudice to the employer by an excusal of the notice requirement, and (3) the excuse or inability of the employee to timely notify the employer. McCaleb at 415. Delay in asserting the compensable claim is reasonable and justified if the employee has limited understanding of his condition and his rights and duties under the workers' compensation law. Id.

The appellant contends, based on the above principles, the notice provided by his attorney was timely, the delay is reasonably excused by his lack of earlier knowledge of his condition and the fact it was work related, and the employer was not prejudiced by the delay. We agree. Although he knew of the employer's policy of promptly reporting on the job injuries, it is undisputed in the proof that he was not aware he had one until March 17, 1999. He gave written notice within thirty days of that date. Moreover, from our independent examination of the evidence, it appears the employer and its insurer, CNA, were not prejudiced by the delay.

In a number of cases, the Supreme Court has requested that trial courts make conditional findings of all issues, even when a case is being dismissed, thus permitting all issues to be reviewed in the same appeal. In the present case, we find no such conditional findings. For that reason, and because other important issues are unresolved, though hotly contested, the panel recommends the case be remanded for further consideration by the court of original jurisdiction.

Accordingly, the judgment of the trial court is reversed and the cause remanded to the Circuit Court for Sumner County for further consideration. Costs are taxed to the appellees.

JOE C. LOSER, JR.

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

BILLY JOE CLUBBS v. CRESENT MANUFACTURING CO., ET AL.

**Circuit Court for Sumner County
No. 19997-C**

No. M2001-01069-WC-R3-CV - Filed - March 4, 2002

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 appellees, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM