

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
June 10, 2003 Session

**WILLIE JEAN HEAD v. NISSAN MOTOR MANUFACTURING
CORPORATION, U.S.A., ET AL.**

**Direct Appeal from the Chancery Court for Davidson County
No. 00-1798-III Carol L. McCoy, Chancellor**

**No. M2002-1908-WC-R3-CV - Mailed -September 25, 2003
Filed - December 18, 2003**

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 employee insists the trial court erred in disallowing benefits for a left shoulder injury for failure to give timely written notice. As discussed below, the panel has concluded the evidence fails to preponderate against the findings of the trial court.

**Tenn. Code Ann. § 50-6-225(e) (2002 Supp.) Appeal as of Right; Judgment of the Chancery
Court Affirmed**

JOE C. LOSER, SP. J., delivered the opinion of the court, in which FRANK F. DROWOTA, III, C. J., and FRANK G. CLEMENT, JR., SP. J., joined.

William L. Underhill and Aubrey T. Givens, Madison, Tennessee, for the appellant, Willie Jean Head

Kenneth M. Switzer and Kitty Boyte, Ruth, Howard, Tate & Sowell, Nashville, Tennessee, for the appellees Nissan Motor Manufacturing Corporation, U.S.A. and Royal and SunAlliance Insurance Company

MEMORANDUM OPINION

The employee or claimant, Ms. Head, initiated this civil action to recover workers' compensation benefits for injuries to her right arm and both shoulders. Following trial, the trial court awarded medical and disability benefits for the right arm and shoulder, but disallowed benefits for the left shoulder injury because the employee failed to give timely written notice as required by Tenn. Code Ann. § 50-6-201. The employee has appealed contending she did give timely notice. Thus the issue to be reviewed is the trial court's finding with respect to notice.

Appellate review is de novo upon the record of the trial court, accompanied by a presumption of correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225 (e)(2). 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). 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).

The claimant is fifty-two years old with a general equivalency diploma. She has been a production worker for Nissan since 1985. From repetitive use of the hands, she gradually developed disabling pain in both hands, arms and shoulders, beginning in May 1999. She continued working with pain until January 13, 2000, when arthroscopic surgery was performed on her right shoulder.

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. Tenn. Code Ann. § 50-6-201. 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. Id. For gradually occurring injuries, the beginning date is when the employee either (1) knows or reasonably should know that he or she has suffered a work-related injury that has resulted in a permanent physical impairment, or (2) is rendered unable to continue to perform his or her normal work activities as a result of a work-related injury and the employee knows or reasonably should know that the injury was caused by work-related activities. Tenn. Code Ann § 50-6-201. Where the employer denies that a claimant has given the required written notice, the claimant has the burden of showing that the employer had actual notice, or that the employee has either complied with the requirement or has a reasonable excuse for his failure to do so, for notice is an essential element of the claim. Jones v. Sterling Last Corp., 962 S.W.2d 469, 471-72 (Tenn. 1998).

The record is replete with conflicting evidence relative to the notice issue. The claimant reported an injury to “both arms” on May 26, 1999. At trial, she testified that she verbally complained to her supervisor of pain in both shoulders in the summer of the same year. The supervisor testified that she does not remember any such complaints about the left shoulder, but does recall the claimant complaining about right shoulder pain. On July 19, 1999, the claimant made a written report of an injury to the right shoulder. The report, which was entered into evidence, did not mention the left shoulder, although the claimant testified that she thought it did.

Ms. Head testified that on August 19, 1999, she met with her case manager at Nissan and complained about pain in both shoulders. The case manager denied any knowledge of a claimed left shoulder injury before May 1, 2000, when the claimant made a written report of it. One of the doctors charted a left shoulder injury on September 10, 1999, but testified that it was probably an error made by his nurse. On January 14, 2000, one day after arthroscopic surgery on her right shoulder, Ms. Head complained to a physical therapist that her left shoulder was bothering her. The

therapist's report was the first written documentation of a left shoulder injury that was not erroneous.

Ms. Head testified that she reported her left shoulder pain to another doctor in November and December 2000, but the doctor testified that the first time Ms. Head complained to her of left shoulder pain was on April 4, 2001. She testified that she discussed her left shoulder injury with the case manager during that time frame. Again, the case manager denied it. The trial court resolved all the conflicting testimony against the claimant and concluded the employer did not have timely actual or written notice.

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 which 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). In the present case, the deposition testimony supports the trial court's findings.

Giving due deference to the findings of the trial court, we conclude the beginning date for giving written notice to be January 13, 2000, when she was disabled from working, and the date of notice to be May 1, 2000, considerably more than 30 days later. The evidence also fails to preponderate against the trial court's finding that the evidence fails to establish that the employer had actual notice or that the employee had a reasonable excuse for her failure to give written notice.

The judgment of the trial court is therefore affirmed. Costs are taxed to the appellant.

JOE C. LOSER, JR.

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

**WILLIE JEAN HEAD v. NISSAN MOTOR MANUFACTURING
CORPORATION, U.S.A., ET AL.**

**Chancery Court for Davidson County
No. 00-1798-III**

No. M2002-01908-WC-R3-CV - Filed - December 18, 2003

JUDGMENT ORDER

This case is before the Court upon the motion for review filed by Willie Jean Head pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), 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.

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 the plaintiff-appellant, Willie Jean Head, and her sureties, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Drowota, C.J., not participating