IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
June 11, 2004 Session

LORI ANN JOHNSON v. MCKEE FOODS CORPORATION

Direct Appeal from the Chancery Court for Hamilton County
No. 03-0818 Howell N. Peoples, Chancellor

Filed October 12, 2004

No. E2003-02899-WC-R3-CV - Mailed August 3, 2004

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. The trial court dismissed the claim holding it was barred by the expiration of the one year statute of limitations. The judgment is reversed as an issue of fact exists as to whether the statute of limitations should be suspended until the employee learned of her disability from her doctor.

Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Chancery Court Reversed and Remanded

ROGER E. THAYER, SP. J., delivered the opinion of the court, in which E. RILEY ANDERSON, J., and WILLIAM H. INMAN, SR. J., joined.

Daniel K. Habenicht, Chattanooga, Tennessee, for Appellant, Lori Ann Johnson.

Bruce C. Bailey and Charles D. Lawson, Chattanooga, Tennessee, for Appellee, McKee Foods Corporation.

MEMORANDUM OPINION

The employee, Lori Ann Johnson, has perfected an appeal from an order of the Chancery Court dismissing her claim on the defense the one year statute of limitations had expired.

Facts

The complaint alleges that on about July 1, 2002, the employee was transferred to a different job with Mckee Foods Corporation, which involved more strenuous work than she had been performing; that within two weeks in the new position, she began to experience pain in her lower

back and she requested a transfer out of this new position; that on Saturday, July 13, 2002 the pain became so severe she saw a doctor on July 16, 2002 and he scheduled an MRI examination; on July 19, 2002 the doctor advised her she had three ruptured discs in her low back that necessitated immediate surgery; and that she alleges the ruptured discs were caused by her last work activities.

Defendant employer filed a motion to dismiss under Rule 12, Tenn. R. Civ. P. that stated the complaint alleged the injury had occurred on or before July 13, 2002 and that the complaint was not filed within one year of said date.

The record indicates the complaint was filed on July 17, 2003.[1] It also appears that the employee's last work day was July 11, 2002 and that she never returned to work and she was terminated by her employer on July 15, 2003 as there was a company policy which provided employees with less than five years of seniority may miss work for no more than a maximum of twelve months.[2]

The Chancellor sustained the motion to dismiss based on the ruling in the case of ***Lawson v. Lear Seating Corp.***, 944 S.W.2d 340 (Tenn. 1997), and holding the action was filed more than one year after the employee's last work day.

Standard of Review

Generally the standard of review of factual issues in a workers' compensation case is *de novo* upon the record of the trial court accompanied by a presumption of correctness of the trial court's findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). The review of legal issues is *de novo*. ***Tucker v. Foamex, LP***, 31 S.W.3d 241, 242 (Tenn. 2000). Appeals from summary judgment proceedings are not controlled by the *de novo* standard of review. ***Blocker v. Regional Medical Center,*** 722 S.W.2d 660 (Tenn. 1987).

Analysis of Issue

Tennessee Code Annotated § 50-6-302 requires a claim must be filed within one year of the accident or within one year of the cessation of the payment of compensation benefits. However, the courts have held that the running of the statute is suspended until by reasonable care and diligence it is discoverable and apparent that an injury compensable under the workers' compensation law has been sustained. ***Ferrell v. Cigna Property & Cas. Ins. Co.***, 33 S.W.3d 731 (Tenn. 2000); ***Ogden v. Matrix Vision***, 838 S.W.2d 528 (Tenn. 1992); ***Norton Co. v. Coffin***, 553 S.W.2d 751 (Tenn. 1977). Under the rule regarding suspension of the statute, it is the date that an employee's disability manifests itself to a person of reasonable diligence, rather than the date of the accident, that triggers

[1] Defendant's brief refers to the filing date as July 19, 2003.

[2] These facts were not apparent in the complaint but were facts disclosed by the parties to the trial court for consideration on the issue of dismissal.

the statute of limitations. ***McLerran v. Mid-South Stone, Inc.***, 695 S.W.2d 181 (Tenn. 1985); ***Jones v. Home Indem. Ins. Co.***, 679 S.W.2d 445 (Tenn. 1984).

In evaluating a case under these rules, it must be determined (1) when the accident is considered to have occurred and (2) whether the circumstances are such as to justify the suspension of the limitation period.

The sole purpose of a motion to dismiss under Rule 12.02(6), Tenn. R. Civ. P., is to test the legal sufficiency of the complaint, ***Dobbs v. Guenther***, 846 S.W.2d 270 (Tenn. Ct. App. 1992), and such motion is a request by a party for the court to enter a judgment on the pleadings. When a Rule 12 motion to dismiss is filed, the court is required to construe the complaint in favor of the plaintiff. ***Huckeby v. Spangler,*** 521 S.W.2d 568 (Tenn. 1975); ***Holloway v. Putnam Co.***, 534 S.W.2d 292 (Tenn. 1976).

However, Rule 12 provides that if matters outside the pleadings are presented to the court and not excluded, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 and all parties shall be given reasonable opportunity to present all material pertinent to the motion by Rule 56. Tenn. R. Civ. P. 12.02, 12.03.

The party who moves for summary judgment has the burden of showing that no genuine issue of material fact exists, and the court must view the record in the light most favorable to the motion's opponent. ***Taylor v. Nashville Banner Publishing Co.***, 573 S.W.2d 476 (Tenn. Ct. App. 1978), cert. denied, 441 U.S. 923, 99 S. Ct. 2032, 60 L.Ed2d 396 (1979).

On a motion for a summary judgment disputes as to material facts must be evidence by affidavits or other sworn evidence of facts, and not merely by unsworn generalized assertions in pleadings. ***Wachovia Bank & Trust Co. v. Glass***, 575 S.W.2d 950 (Tenn. Ct. App. 1978).

An appeal from a summary judgment in a workers' compensation case is not controlled by the *de novo* standard of review provided by the Workers' Compensation Act but is governed by Rule 56, Tenn. R. Civ. P.; ***Downen v. Allstate Ins. Co.***, 811 S.W.2d 523 (Tenn. 1991). No presumption of correctness attaches to decisions granting summary judgment because they only involve questions of law; on appeal the reviewing court must make a fresh determination concerning whether the requirements of Rule 56 have been met. ***Gonzales v. Alman Const. Co.***, 857 S.W.2d 42 (Tenn. Ct. App. 1993).

In the present appeal, the employee argues that she was not aware she had sustained a serious injury until July 19, 2002, when her doctor advised her she had three ruptured discs and that her action was filed on July 17, 2003 which was within one year of said date. The employer contends that Ms. Johnson was well aware of a problem with her back as of July 13, 2002 and that the trial court was correct in holding her last work day on July 11, 2002 started the running of the limitation period and that the filing of the suit was not timely.

We find that facts outside the complaint were presented to the court and under the authorities cited the motion must be considered as one for summary judgment. The record in support of a summary judgment in favor of the employer is extremely meager with only the complaint and generalized assertions of fact in an unsworn response to this pleading. No affidavits or other sworn evidence exists.[3]

We agree with the trial court that if the record establishes the employee was injured over a period of two weeks as a result of repetitive work activity, then the general rule is that the "accident resulting in injury" is considered to have occurred on the last day the employee worked. *See* ***Lawson v. Lear Seating Corp.***, 944 S.W.2d 340 (Tenn. 1997). However, we find that there is a separate question in this case as to whether the one year statute was suspended until the employee learned of her disability from her doctor on July 19, 2002. A genuine issue of fact does exist on the suspension question and we hold it was inappropriate to dismiss the action. *See* ***Jones v. Home Indem. Ins. Co.***, 679 S.W.2d 445 (Tenn. 1984); ***Osborne v. Burlington Ind.,Co., Klopman Div.***, 672 S.W.2d 757 (Tenn. 1984); and ***Hibner v. St. Paul Mercury Ins. Co.***, 619 S.W.2d 109 (Tenn. 1981).

Conclusion

The judgment of the trial court is reversed and the case is remanded for further proceedings. Costs of the appeal are taxed to McKee Foods Corporation.

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ROGER E. THAYER, SPECIAL JUDGE

[3] After the trial court dismissed the case, the employee filed an affidavit in support of a motion to reconsider and/or new trial.

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JUDGMENT

This case is before the Court upon the motion for review filed by McKee Foods Corporation 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 McKee Foods Corporation, for which execution may issue if necessary.

ANDERSON, J., NOT PARTICIPATING