IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
SEPTEMBER 29, 2006 Session

JAMES BRADLEY v. PLUS MARK, INC.

Appeal from the Chancery Court for Williamson County
Case No. 30478 Russ Heldman, Judge

No. M2006-00476-WC-R3-CV - Mailed: February 28, 2007
Filed - April 3, 2007

This worker's compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with Tennessee Code Annotated section 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. In this appeal, the employee, James Bradley, alleges that the trial court erred in dismissing his suit because his employer, Plus Mark, Inc., had actual notice of his injury or, in the alternative, the employee's failure to provide timely notice of his injury was excused. In addition, the employee asserts that the trial court erred when it found that the employee's injury did not occur in the course of his employment. We affirm the judgment of the trial court.

Tenn. Code Ann. § 50-6-225(e) (2005) Appeal as of Right; Judgment of the Trial Court Affirmed

MARIETTA M. SHIPLEY, SP. J., delivered the opinion of the court, in which CORNELIA A. CLARK, J. and DONALD P. HARRIS, SR. J., joined.

Steve C. Norris, Nashville, Tennessee, for the appellant, James Bradley.

Michael W. Jones, Nashville, Tennessee, for the appellee, Plus Mark, Inc.

MEMORANDUM OPINION

I. FACTUAL BACKGROUND

At the time of the trial, the employee, James Bradley, was 50 years old. His formal schooling stopped in the 9th grade, but he did obtain his GED. Prior to working as a press operator at employer Plus Mark, Inc., he had previously worked as a grave digger, an electrician's helper, an aircraft mechanic, a foreman on a rice farm, a mason's helper, a caretaker of grounds and exotic animals, a heavy equipment operator, and a self-employed contractor. He had worked at Plus Mark

from October 9, 2001, until he was terminated in January 2004 because he was, in the words of his Plus Mark termination letter, "at a much greater risk for injury than the existing populations of [his] peers."

In October or November of 2003, Bradley was pulling a dresser blade out of a printing press, which was done by squatting and reaching arm's length over into the machine, when he allegedly felt a "burning knife stab in my shoulder, in my right shoulder." To get the blade out, he needed the assistance of his co-worker, Tim. When asked about the first time he told anyone at work about his injury, Bradley stated, "I had a relationship with that guy, he was a friend of mine [Tim]. And I was telling him, you know, that it hurt my shoulder [pulling the blade out of the press]. . . . I mentioned it to Lonnie [Arnette, his supervisor] on the way by. It was not a formal thing, it was just a telling-him-on-the-way-by kind of thing." Bradley hoped his shoulder would get better, but it got worse. He testified that he told Lonnie Arnette, his supervisor, that his shoulder was getting worse and that he "wanted to go see a doctor about it." Bradley also testified that he had told Joe Wright, the supervisor over the entire department, about the accident. Specifically, Mr. Bradley indicated that he told Wright that he was having trouble with his shoulder and that he had injured it.

Bradley went to his personal physician on December 18, 2003. When he returned to work, he reported his physician visit to his safety supervisor, James Robinson. Robinson told him to report the accident. As Bradley could not remember the exact date of the accident, he said that it occurred on November 8, or 9, 2003. The report listed an injury date of November 8, 2003. On January 12, 2004, he was terminated.

Lonnie Arnette, Bradley's supervisor and an employee of Plus Mark for 34 years, testified that he did not know that Bradley was having a problem with his right shoulder, that Bradley was favoring his right shoulder, or that Bradley or anyone else had told him of Bradley's injuries. Arnette did not recall any occasion when he had asked another employee to help Bradley with his work. Arnette said he vaguely remembered when Bradley was fired but did remember that the termination occurred because of excessive accidents. He did not remember any discussions at safety meetings of how to remove blades from a press.

Joe Wright testified that he had not been aware of Bradley having problems with his right shoulder near to the time of the alleged injury. He testified that he first knew of the injury after the accident report was filed in late December 2003.

Reginald Tidwell, a co-worker of Bradley's, testified that the first time he learned that Bradley was injured was when he was asked to work an overtime shift. He said that Lonnie Arnette told him to "go work on Press 6 because somebody's hurt." He stated that normally two people worked that press; when Arnette sent him to work there, he was the third. When he saw Bradley at work, "I saw he was cringing [in pain], and that's when I went and asked him." Bradley told him that he had hurt his shoulder taking out a blade. In a dialogue at trial about a discussion of press blades at a plant safety meeting, Tidwell testified:

Q: When was it that they had that safety meeting and talked about the press blades?

A: It was a few weeks later.

Q: Was that before or after you noticed [Bradley] having trouble with his right shoulder?

A: It was after.

When asked what month he was referring to, Tidwell could not pinpoint a precise month or date on which Bradley hurt himself. He testified only that "it was still cold, so I was thinking it was, like January, February, somewhere in there."

Following his termination from Plus Mark, Bradley testified that he helped a friend remodel a house, but he worked so that he did not lift his arms above his head. Vickie Daniel, the human resources manager for Plus Mark, testified that she observed Bradley doing work at the home of her fiancee's mother where they were remodeling a den and laundry room**.** She stated that she saw him "doing construction work, at one point laying on his back working on some pipes. And at another time point he was . . . [lifting] some material." When asked by defense counsel on direct examination if Bradley appeared to be favoring his right arm in any way, she said "No." She also indicated that she saw him working at these tasks "two days in a row."

In June 2004, Bradley had surgery for a torn rotator cuff, performed by Dr. David M. Bratton. After recovering from surgery, Bradley worked as an apartment maintenance technician.

II. MEDICAL TESTIMONY

Dr. David Bratton testified by way of deposition. Dr. Bratton is a board-certified orthopedic surgeon at the Bone and Joint Clinic in Franklin. He testified that Bradley came to see him on December 18, 2003. Bradley described pain and discomfort in his shoulder that occurred while lifting a blade drawer out of a machine. Dr. Bratton's intake sheet shows "October 2003" as the date of injury. Bradley complained of pain in his right shoulder and difficulty elevating his arm. Dr. Bratton found pain and tenderness in the shoulder when he raised his arm. He ordered a MRI. The January 8, 2004, MRI showed "no evidence of full thickness or partial thickness rotator cuff tear." He gave him an injection.

Bradley returned to Dr. Bratton on January 13, 2004, the day after Plus Mark terminated him, complaining of pain in his shoulder and tenderness in the shoulder when he raised his arm. After an examination, Dr. Bratton found "positive impingement signs." Dr. Bratton gave him an injection. He explained to Bradley potential surgery options if the symptoms recurred. Bradley did not return until May 25, 2004, stating then that the injection had helped for a short while. During that visit, Bradley and Dr. Bratton decided that surgery was the best option, and surgery was performed in June

2004. The surgery was described in the medical record as a shoulder arthroscopy, subacrominal decompression, distal clavicle excision and repair of his small rotator cuff tear and supraspinatus.

Prior to the surgery, Dr. Bratton did not know of the rotator cuff tear. He stated it was "possible" that the tear could have occurred between January 2004 and June 2004, but that it was also "possible" the MRI just missed the tear. By August 10, 2004, Bradley recovered full motion in his shoulder and had no great pain or discomfort remaining in it. Dr. Bratton considered the surgery successful, with no further treatment necessary.

Dr. Bratton found, per the subjective testimony of Bradley on his initial visit, that the injury was related to the "October 2003" work injury. The common indications are pain and difficulty with pushing, pulling, or carrying. Dr. Bratton assigned Bradley an impairment rating of 10% to the upper extremity and 6% to the body as a whole, based on a distal clavicle excision. Although Bradley's range of motion could vary on any day, Dr. Bratton found visually on his exam that it was within normal limits, although he did not use a goniometer.

The plaintiffs requested Dr. David Gaw to undertake an independent evaluation. Dr. Gaw is a member of the American Board of Orthopedic Surgery and American Board of Independent Medical Evaluators. He saw Bradley in January 2005. Dr. Gaw testified that Bradley did not have full movement of his shoulder and had some weakness in it, particularly with when he used his arm above his shoulder level to push, pull or lift. Bradley had no problems when he kept his hands at the waist level, Dr. Gaw found. Dr. Gaw found a mild degree of loss of flexion, abduction and internal and external rotation, with slight tenderness around his clavicle. Dr. Gaw found that the condition that necessitated a shortening of the clavicle and repair of the rotator cuff was due to the lifting incident at Plus Mark. Dr. Gaw did note that, prior to the surgery, Dr. Bratton had diagnosed Bradley with an impingement syndrome, but, during the surgery, he discovered the rotator cuff tear. Dr. Gaw assigned Bradley a 14% impairment rating to the upper extremity and an 8% impairment rating to the body as a whole. He restricted him to lifting no more than ten to fifteen pounds over his head.

III. RULING OF THE OF THE TRIAL COURT

As described above, the trial court heard live testimony from five witnesses: Bradley, Arnette, Wright, Tidwell, and Daniel. After finding that Bradley was not a credible witness but that Daniel was, the trial court ruled that Bradley had failed to meet his burden of proof that he provided requisite notice of his injury to Plus Mark or that his failure to provide notice was reasonably excused. The court ruled all other issues in the case moot, but the trial court did indicate that, if it had ruled on the issue of causation, it would have found that Bradley also did not carry his burden of proof on that issue. The case was dismissed.

IV. STANDARD OF REVIEW

The standard of review in workers' compensation cases is de novo on the record, with a presumption of the correctness of the trial court's ruling, unless the preponderance of evidence is to the contrary. Tenn. Code Ann. § 50-6-225(e)(2) (2005). An appellate court must extend considerable deference to the trial court's factual findings where the trial court has seen and heard witnesses and issues of the credibility or the weight of oral testimony are involved, Gray v. Cullom Mach. Tool & Die, Inc., 152 S.W.3d 439, 442 (Tenn. 2004), but it does not grant such deference when reviewing documentary proof or expert testimony presented by deposition, Lane v. Nissan N. Am., Inc., 170 S.W.3d 564, 569 (Tenn. 2005).

V. ANALYSIS

The primary issue in this case was whether Bradley was able to prove by a preponderance of the evidence that he had given notice to his employer of his accident or that his failure to provide notice was excused. In pertinent part, Tennessee Code Annotated section 50-6-201(a)(1) (Supp. 2003) provides:

> Every injured employee . . . 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 . . . unless it can be shown that the employer had actual knowledge of the accident; and no compensation shall be payable . . . unless such written notice is given the employer within thirty (30) days after the occurrence of the accident, unless reasonable excuse for failure to give such notice is made to the satisfaction of the tribunal to which the claim for compensation may be presented.

The record clearly demonstrates that Bradley's written notice to Plus Mark did not comply with the statute. After Bradley's December 18, 2003, physician's visit, he provided written notice to Plus Mark that indicated his injury occurred in early November, more than thirty days after he alleged his injury occurred.

When written notice is not given within thirty days, the statute nevertheless permits an employee to collect benefits if he has a "reasonable excuse" for not providing timely written notice of the injury. When a court determines whether a "reasonable excuse" exists, it considers three factors: (1) whether the employer had actual knowledge of the employee's injury, (2) whether the employee's failure to provide notice prejudiced the employer, and (3) whether the employee had the capacity to provide timely notice. Gluck Bros., Inc. v. Pollard, 426 S.W.2d 763, 766 (Tenn. 1968). Considering the evidence in this record in light of each of the Pollard factors, we agree with the trial court that Bradley's failure to provide timely notice should not be excused.

The record does not support a finding that Plus Mark had actual knowledge of Bradley's injury. Bradley testified that he orally informed Arnette and Wright of his injury around the time it occurred. However, the trial court found Bradley not to be a credible witness, and, given the deference we must offer a trial court's assessment of live testimony, we cannot credit that testimony on appeal. Tidwell testified that Arnette assigned him to work as a third member of a team working

on Bradley's machine. While the trial court did not make a specific credibility finding regarding Tidwell, "it is the established law of this State that . . . knowledge of a fellow workman of the injury cannot be imputed to the employer." Gluck Bros., Inc. v. Breeden, 387 S.W.2d 825, 830 (Tenn. 1965). Only the knowledge of the employee's superior will a court impute to the employer. Id. Tidwell's testimony is not legally sufficient to support a finding of Plus Mark's actual knowledge of the injury.

Thus, we are left to consider the testimony of the employee's superiors, Arnette and Wright. Both unequivocally assert that they did not have any knowledge of the accident until at least well after the injury allegedly occurred. Though the trial court does not explicitly state whether it found Arnette and Wright credible, we can infer that it did, given that it specifically credited the testimony of Daniel, who saw Bradley outside of work after his termination from Plus Mark performing tasks that he logically should not have been able to perform if he was injured as he alleged. Without sufficient credible evidence in the record to the contrary, we agree that Plus Mark did not have actual knowledge of the injury.

We also conclude that Plus Mark was prejudiced by Bradley's failure to provide timely written notice. The statute's notice requirements exist for two reasons: (1) to give an 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. Workers' Comp. Panel 1995). Bradley's failure to provide timely written notice robbed Plus Mark of an opportunity both to investigate the circumstances of his injury near to the time it occurred and to provide contemporaneous medical treatment. Thus, we conclude that Plus Mark was prejudiced by Bradley's untimely written notice.

Finally, we do not find evidence in the record that Bradley lacked the capacity to provide timely notice. A delay in providing written notice can be excusable if an employee has a limited understanding of his injury and his rights and duties under the Workers' Compensation Laws. See Livingston v. Shelby Williams Indus., 811 S.W.2d 511, 514 (Tenn. 1991). Though he was allegedly in pain and working on his machine only with another employee's assistance, he nevertheless was able to maintain some level of productivity in his position. If he was able to remain productive in his position, he possessed the capacity to file a written report of his injury with Plus Mark. In addition, the record indicates that Bradley had filed several previous injury reports with Plus Mark, demonstrating that he knew of his rights and duties under the statute. Bradley had the capacity to comply with the written notice requirement.

Finding insufficient evidence to support a finding in favor of Bradley on any of the Pollard factors, we affirm the trial court's judgment that Bradley's did not provide timely written notice under the statute and that the failure to provide notice was not excused.

CONCLUSION

For the reasons stated above, we affirm the trial court's dismissal of Bradley's suit because he did not to provide timely written notice of his injury to Plus Mark and his failure to provide notice was not excused. The costs of this appeal are taxed to the appellant, James Bradley.

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MARIETTA M. SHIPLEY, SPECIAL JUDGE

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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 appeals 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 Appellant, James Bradley, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM