IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
January 13, 2014 Session

JO DEAN NUCHOLS v. BLOUNT COUNTY, TENNESSEE

Appeal from the Circuit Court for Blount County
No. L13765 Harold Wimberly, Judge

No. E2013-00574-WC-R3-WC-MAILED-MAY 23, 2014
FILED-SEPTEMBER 19, 2014

An employee alleged that she sustained a mental injury as a result of a confrontation with her supervisor, the Sheriff of Blount County. The trial court found that she had failed to provide notice of her injury as required by Tennessee Code Annotated section 50-6-201 (Supp. 2001) and dismissed her complaint. The trial court made an alternative finding that she was permanently and totally disabled as a result of the incident. The employee has appealed, contending that the evidence preponderates against the trial court's finding on the notice issue. 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 affirm the judgment of the trial court dismissing the employee's claim.

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

BEN H. CANTRELL, SR. J., delivered the opinion of the Court, in which SHARON G. LEE, J. and THOMAS R. FRIERSON II, J., joined.

Tasha C. Blakney, Troy S. Weston and David S. Wigler, Knoxville, Tennessee, for the appellant, Jo Dean Nuchols.

Frank Q. Vettori and Gary M. Prince, Knoxville, Tennessee and Norman Newton, Maryville, Tennessee, for the appellee, Blount County, Tennessee.

OPINION

Factual and Procedural Background

Jo Dean Nuchols began working as the personal secretary for Blount County Sheriff James Berrong in 1990. She was terminated in November 2002 after exhausting her sick leave benefits. Her last actual day of work was May 30, 2002. On that afternoon, she met with Sheriff Berrong, Chief Deputy Tony Crisp and then-Budget Director Jeffrey French. There are some factual disputes about what occurred during the meeting. However, it is not disputed that Sheriff Berrong believed that Ms. Nuchols had a telephone conversation with his wife, Gayle, on May 29, during which Ms. Nuchols implied that he had been involved in an inappropriate relationship with a female employee of the department. During the May 30 meeting, Sheriff Berrong told Ms. Nuchols that, if she spoke to his wife again, he would "shave her dog, sugar her gas tank and burn her house down." The meeting was adjourned at the suggestion of Chief Deputy Crisp, because both Sheriff Berrong and Ms. Nuchols were upset.

That evening, Ms. Nuchols contacted and spoke with an attorney concerning her situation. The next day, Ms. Nuchols called in sick[1] and went to her primary care physician, Dr. Mark Green. Dr. Green described Ms. Nuchols as very agitated and recommended that she receive inpatient hospital treatment. Ms. Nuchols was hospitalized for three days. Thereafter, she came under the treatment of a psychiatrist, Dr. William Hogan, and a psychologist, Dr. L. Michael Sherrod. Dr. Hogan ultimately diagnosed her with post-traumatic stress disorder ("PTSD"). Ms. Nuchols never returned to work for the Sheriff's department or any other employer.

On May 28, 2003, Ms. Nuchols sued Sheriff Berrong, Chief Deputy Crisp, and Blount County in the Circuit Court for Blount County. She alleged seven causes of action, including civil rights claims under 42 U.S.C. section 1983 and the First and Fourteenth Amendments to the United States Constitution, as well as claims under the Tennessee Human Rights Act, tort claims of outrageous conduct and intentional infliction of emotional distress, retaliatory discharge, civil conspiracy and a claim for workers' compensation benefits. On June 9, 2003, the defendants removed the case

[1] Ms. Nuchols recorded the conversation. The recording and a transcript thereof are Exhibits 3 and 3A in the record.

to the United States District Court for the Eastern District of Tennessee. On May 26, 2004, that court entered an order dismissing Ms. Nuchols' federal claims and remanding the remaining claims to the Circuit Court for Blount County.

On June 23, 2011, the trial court entered an order granting summary judgment to Chief Deputy Crisp and dismissed all claims against him. The trial court denied Sheriff Berrong's motion for summary judgment and granted an interlocutory appeal to Sheriff Berrong pursuant to Tennessee Rule of Appellate Procedure 9. On August 18, 2011, the Court of Appeals denied the Rule 9 application and the Supreme Court subsequently denied the Sheriff's application to appeal on October 18, 2011.

The trial court entered an order on May 22, 2012 setting the remaining claims for trial. On July 11, 2012, Ms. Nuchols filed a notice of voluntary nonsuit, and an order was entered dismissing all claims except for her workers' compensation claim. Also on July 11, Blount County, the only remaining defendant in the case, filed a "Supplemental Answer." Ms. Nuchols responded by filing a motion to strike the supplemental answer. Blount County thereafter filed a motion to amend its original answer, which had been filed in federal court. The trial court granted the motion to amend and denied the motion to strike on August 1, 2012. The case proceeded to trial on August 1 through 3, 2012.

At trial, Ms. Nuchols testified that she was sixty-eight years old. She was a high school graduate with no additional education. Prior to working for Sheriff Berrong, she had been a receptionist, a teacher's aide and a church secretary. During her twelve years working for the Sheriff, she had never received a negative evaluation, and she was unaware of any problems with her job performance prior to May 2002. However, during the last two or three years of her employment, some of her job duties were reassigned to other persons in the department. She had received treatment for depression and anxiety beginning in 1991, but was not being treated by a psychiatrist or psychologist prior to May 2002.

On May 29, 2002, Ms. Nuchols asked Sheriff Berrong if she could call his wife, Gayle, to discuss Gayle's recent vacation. According to Ms. Nuchols, during the conversation, Ms. Berrong asked her some questions about "Jimbo" (Sheriff Berrong's nickname) and Kathy, a female employee of the department. Ms. Nuchols testified that she told Ms. Berrong that she did not know anything about it. On the afternoon of May 30, she was called into the Sheriff's office, where Chief Crisp and

Mr. French were already present. She described the Sheriff as agitated and red-faced. He began by telling her, "Your ass is fired. You get your stuff and get out of here." When she asked the reason for her termination, Sheriff Berrong accused her of gossiping to his wife about the alleged improper relationship. He held up a cassette tape and said that the conversation had been recorded. Ms. Nuchols denied that she had said anything about the matter to Ms. Berrong. She was then asked if she was aware that Sheriff Berrong had recorded the conversation. Ms. Nuchols testified that the Sheriff's "face turned blood red and he leaned over his desk like this and he said, 'Jo, let me tell you something. If you tell Gayle or' -- 'if you tell David or Gayle about this conversation, so help me, I'll burn your house down, I'll set your dog on fire and there won't be a member of your family left. Do you understand me?'" Ms. Nuchols testified that she went into a state of panic. Chief Crisp then intervened, calling a "time out" and suggested that the meeting be adjourned and reconvened the next morning.

Sheriff Berrong, Chief Crisp and Mr. French testified that at the meeting, the Sheriff was upset because he believed Ms. Nuchols had gossiped to his wife about alleged improprieties. All testified that the Sheriff's actual words were that he would "shave her dog, sugar her gas tank and burn her house down." Chief Crisp and Mr. French stated that this was a phrase the Sheriff used frequently. Two other witnesses, Martha Reagan and Dennis Garner, also confirmed that the Sheriff often used that phrase. Sheriff Berrong denied that he terminated Ms. Nuchols during the May 29 meeting. Chief Crisp and Mr. French agreed.

Ms. Nuchols perceived Sheriff Berrong's statement to be an actual threat. She had been involved in a house fire when she was younger, and had been terrified by the experience. She went home, hoping to speak to her husband, David. When she did not find him there, she went to a home where he was performing some construction work. As she told him what had occurred, the more she discussed it, the more real the threat seemed to her. They called Adena Chumley, a friend who also worked for the Sheriff. Ms. Chumley advised her to write everything down. Mr. and Ms. Nuchols then decided to contact an attorney, Martha Meares. A ride to Ms. Meares' office was arranged because Ms. Nuchols did not believe she was able to drive. She returned home that night and was unable to sleep.

Although she testified that she thought she had been fired, Ms. Nuchols called Sheriff Berrong the next morning to tell him she was not coming in to work. She then

went to Dr. Green's office. While she was there, Dr. Green called Sheriff Berrong and asked if a meeting had taken place the previous afternoon. The Sheriff confirmed that a meeting had occurred. Dr. Green did not inquire about the specifics of the meeting. Dr. Green then sent Ms. Nuchols to Blount Memorial Hospital for treatment. After she was discharged from the hospital, she went on a previously scheduled vacation trip to visit an old friend in Pensacola, Florida. During this time, she was anxious, unable to sleep well and had nightmares. She returned home from the vacation earlier than planned.

David Nuchols testified that he made three to six calls to the county's risk management office to attempt to initiate a workers' compensation claim. He said that he left voice messages, but did not receive any return calls. On one occasion, he spoke to a person, whose name he could not recall. Ms. Nuchols testified that she understood workers' compensation claims were reported to Cynthia Morrow in the risk management department. Donna Wheeler, office manager for the sheriff's department, testified that workers' compensation claims were to be reported to her. She said a poster setting out the procedures for reporting a claim were posted on a bulletin board near Ms. Nuchols' desk, along with blank injury report forms. Ms. Wheeler testified that Ms. Nuchols contacted her concerning sick leave, and applied for use of leave from the county's sick leave bank. Mr. French testified that the sick leave bank could not be used for work injuries.

Dr. Green, Ms. Nuchols' primary care physician since 1990, testified by deposition. He acknowledged reviewing records of a gynecologist who treated her in 1990 that referred to nausea, dizziness and stomach problems caused by the stress of her job change. Dr. Green began treating Ms. Nuchols for anxiety-related problems and panic attacks in 1991 and had continued to treat her for symptoms of anxiety and depression. When she came to his office on May 31, 2002, her symptoms were much worse than he had ever observed previously. He stated, "Whatever happened [on the previous day], whatever the cause was, she was absolutely petrified." He considered her to be near "psychologic collapse" at the time and recommended immediate inpatient treatment.

Dr. Green continued to treat Ms. Nuchols in the following months and years. On June 12, 2002, her condition suggested PTSD to him, and he thought the May 30 incident might affect her permanently. Her symptoms waxed and waned over time. In November 2003, Dr. Green thought she was "coping" but was "not

uncompromised" by her condition. In May 2006, he thought that Ms. Nuchols' PTSD was "stable and controlled." However, she had subsequent episodes of gastric problems that he attributed to PTSD. As of May 2012, he described her PTSD as "controlled or done."

Dr. William Hogan, the psychiatrist who treated Ms. Nuchols after she was released from the hospital, also testified by deposition. His initial diagnosis was PTSD. He thought that the cause of that condition was the May 30, 2002 meeting. Dr. Hogan continued to follow Ms. Nuchols until his deposition was taken in July 2012. During this time, he treated her for depression, anxiety and sleep disturbance. He referred her to a psychologist, Dr. Sherrod, for psychotherapy. Dr. Hogan said that in his opinion, Ms. Nuchols' condition was chronic and that she had suffered a permanent psychological injury. Dr. Hogan testified that Ms. Nuchols had sustained a "marked" impairment of her ability to perform activities of daily living according to the Fifth Edition of the American Medical Association Guides and opined that she was incapable of working because of her PTSD.

During cross-examination, Dr. Hogan testified that Ms. Nuchols was "very vulnerable" to PTSD because of her pre-existing anxiety and depression. He did not find a contradiction between her stated fear of Sheriff Berrong and her continued attendance in the same church with him for many years after May 2002. Dr. Hogan agreed that he had noted in 2004 that he thought she could not work for the Sheriff again, but was undecided as to whether she could work elsewhere at that time. Although he had referred Ms. Nuchols to Dr. Sherrod, he had never received or reviewed any of Dr. Sherrod's reports.

Dr. James Alexander, a psychiatrist, conducted a medical records review at the request of Blount County. He reviewed the records of Dr. Green, Dr. Hogan, Dr. Sherrod and Blount Memorial Hospital, as well as the depositions of Ms. Nuchols, Mr. Nuchols, Sheriff Berrong, Chief Crisp, Mr. French, Dr. Green and Dr. Hogan. Dr. Alexander did not think that the events of May 30, 2002 caused Ms. Nuchols to develop PTSD. He believed that Ms. Nuchols' primary fear after the meeting was losing her job. He reviewed her documented episodes of depression and anxiety prior to the incident. Based on those incidents, Dr. Alexander expressed an opinion that she already suffered from chronic anxiety and depression by 2001. He found her acts and behaviors after the May 30 meeting to be inconsistent with her stated fear of Sheriff Berrong, noting that she consulted an attorney before going to Dr. Green,

continued to attend the same church as Sheriff Berrong, wrote a "thank you" note to him after the death of her mother in July 2002, and made an informal "chitchat" telephone call to him later that summer. He observed that she told Dr. Hogan that she was unable to socialize, but a report from Dr. Sherrod during the same time period stated that she was able to go anywhere she cared to. Dr. Anderson's diagnosis was dysthmic disorder (chronic depression) and a personality disorder, both of which existed before the May 30, 2002 incident.

During cross-examination, Dr. Anderson conceded that he had never examined or spoken to Ms. Nuchols. He agreed that Dr. Green's decision to hospitalize her on May 31 was appropriate. Her post-incident records noted instances of hypervigilance and hyperarousal, which are symptoms of PTSD. In addition, she had nightmares and insomnia, also consistent with PTSD. One of the bases of his opinions was his belief that Sheriff Berrong's statements on May 30 did not represent an actual threat to Ms. Nuchols' safety. However, he agreed that it would not have been unreasonable for her to be shocked and afraid during the meeting. Dr. Anderson also stated that Ms. Nuchols "looks like she's got PTSD, but she doesn't really have PTSD." He conceded that it was possible that the May 30 incident had exacerbated her pre-existing anxiety and depression, but did not consider it likely that this had happened.

After the presentation of the evidence, the trial court took the case under advisement and subsequently announced its decision from the bench. The trial court found that Ms. Nuchols did not provide notice of her injury as required by Tennessee Code Annotated section 50-6-201(a) (Supp. 2001). Her claim was therefore barred by operation of that statute. The trial court made an alternative ruling that, if Ms. Nuchols complied with the notice statute, she was permanently and totally disabled as a result of the work-related injury of May 30, 2002. Ms. Nuchols has appealed, contending that the trial court erred by permitting Blount County to amend its answer shortly before the trial and that the trial court erred by admitting testimony of pre-trial negotiations and basing its decision, at least in part, on that testimony. In the alternative, she asserts that the evidence preponderates against the trial court's finding on the notice issue.

Analysis

We are statutorily required to review the trial court's factual findings "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." Tenn. Code Ann. § 50-6-225(e)(2). Following this standard, we are further required "to examine, in depth, a trial court's factual findings and conclusions." Crew v. First Source Furniture Grp., 259 S.W.3d 656, 664 (Tenn. 2008) (quoting Galloway v. Memphis Drum Serv., 822 S.W.2d 584, 586 (Tenn. 1991)). We accord considerable deference to the trial court's findings of fact based upon its assessment of the testimony of witnesses it heard at trial, although not so with respect to depositions and other documentary evidence. Padilla v. Twin City Fire Ins. Co., 324 S.W.3d 507, 511 (Tenn. 2010); Glisson v. Mohon Int'l, Inc./Campbell Ray, 185 S.W.3d 348, 353 (Tenn. 2006). We review conclusions of law de novo with no presumption of correctness. Wilhelm v. Krogers, 235 S.W.3d 122, 126 (Tenn. 2007). Although workers' compensation law must be liberally construed in favor of an injured employee, the employee must prove all elements of his or her case by a preponderance of the evidence. Crew, 259 S.W.3d at 664; Elmore v. Travelers Ins. Co., 824 S.W.2d 541, 543 (Tenn. 1992).

We first address Ms. Nuchols' contention that the trial court erred by granting Blount County's motion to amend its answer shortly before the trial. Tennessee Rule of Civil Procedure 15.01 provides that leave to amend a pleading "shall be freely given when justice so requires." In Branch v. Warren, 527 S.W.2d 89 (Tenn. 1975), the Supreme Court observed that, "Under the very liberal rules allowing amendments, the court may admit material amendments at any stage of the proceedings." 527 S.W.2d at 91. A trial court's decision to grant a motion to amend "will not be reversed unless abuse of discretion has been shown." Cumulus Broad., Inc. v. Shim, 226 S.W.3d 366, 374 (Tenn. 2007) (citing Welch v. Thuan, 882 S.W.2d 792, 793 (Tenn. Ct. App. 1994)).

In its findings, the trial court noted that the United States District Court, in its order dismissing Ms. Nuchols' federal claims, found that her complaint "in essence boils down to one thing. The plaintiff claims that she was fired because she told Defendant Berrong's wife that he was having an affair." In our view, this is a fair reading of the original complaint, which alleged six claims based on intentional tort theories. Ms. Nuchols' workers' compensation claim, the seventh theory set out in

the complaint, was obviously an alternative to the others, because an intentional injury by an employer is, by definition, not accidental and does not fall within the parameters of the workers' compensation law. See Valencia v. Freeland & Lemm Constr. Co., 108 S.W.3d 239, 242 (Tenn. 2003). As noted by the trial court, Ms. Nuchols voluntarily nonsuited her remaining intentional tort claims only after the case had been set for trial. Indeed, her notice of voluntary nonsuit was filed on July 11, 2012, the same day that Blount County filed its "supplemental answer." Inasmuch as Ms. Nuchols substantially modified her theory of the case in this manner, we are unable to conclude that the trial court abused its discretion by permitting Blount County to amend its answer at that time.

Having concluded that the amendment was correctly permitted, we turn to the merits of the trial court's ruling on the notice issue. Tennessee Code Annotated section 50-6-201(a) (Supp. 2001) provides:

> 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 the provisions of the Workers' Compensation Law 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.

The Supreme Court has explained that:

> In the absence of actual knowledge of the injury by the employer, waiver of the notice by the employer, or reasonable excuse by the employee for not giving notice, the statutory notice to the employer is an absolute prerequisite to the right of the employee

> to recover benefits. Aetna Cas. & Sur. Co. v. Long, 569 S.W.2d 444, 449 (Tenn.1978). The plaintiff has the burden of proving that the required notice was given or excused. Id. at 448.

Jones v. Sterling Last Corp., 962 S.W.2d 469, 471-72 (Tenn. 1998).

The trial court found: "The first actual notice that there was a workers' compensation claim came in the complaint itself which was filed right at one year after the event." Ms. Nuchols asserts that this finding is erroneous. She contends that the notice requirement was fulfilled in five distinct ways. First, she argues that Blount County had actual knowledge of her injury by virtue of the presence and participation of Sheriff Berrong, Chief Crisp and Mr. French at the May 30, 2002 meeting. We must respectfully disagree. "[A]n employee who relies upon alleged actual knowledge of the employer must prove that the employer had actual knowledge of the time, place, nature and cause of the injury." Masters v. Indus. Garments Mfg. Co., Inc., 595 S.W.2d 811, 815 (Tenn. 1980). While it is undisputed that a confrontation occurred, there is nothing, even in Ms. Nuchols' own account of that event, that would suggest that any of the three officials present knew or should have known on May 30, 2002 that she had sustained an injury at that time. During the meeting, Ms. Nuchols responded to Sheriff Berrong's allegations, denying that she had made any inappropriate remarks to his wife. She suggested that, if he listened to the alleged recording of the conversation, he would find she had done nothing wrong. She displayed no physical symptoms of distress and left the meeting, and the office, under her own power. Thus, we conclude that the evidence supports a finding that none of the three officials had actual notice of a work injury on May 30.

Ms. Nuchols next asserts that her telephone conversation with Sheriff Berrong on the morning of May 31 satisfied the notice requirement. She recorded the conversation, and a transcript of the recording was placed in the record. The entire conversation is as follows:

> [Sheriff Berrong]: Hello?
> [Ms. Nuchols]: Sheriff Berrong?
> [Sheriff Berrong]: Uh-huh.
> [Ms. Nuchols]: This is Jo.
> [Sheriff Berrong]: Uh-huh.
> [Ms. Nuchols]: I'm sick. I can't make it in today. I've got to get

to the doctor.
[Sheriff Berrong]: (Unintelligible.)
[Ms. Nuchols]: Well, it's – (unintelligible) – yesterday. It's just – I don't know. I just – I've been up all night, had diarrhea. Just I've gotta get to the doctor. I'm sorry.

"In order for a communication to constitute either written notice or actual knowledge on the part of the employer it must be calculated to reasonably convey the idea to the employer that the employee claims to have suffered an injury arising out of and in the course of her employment." Masters, 595 S.W.2d at 816; Jones, 962 S.W.2d at 471. The conversation set out above clearly conveyed the information that Ms. Nuchols was ill and would not be able to work on May 31. Although she briefly mentioned the previous day, that reference fell well short of claiming that she had suffered a mental or physical injury as a result of the meeting on the previous afternoon.

Ms. Nuchols also contends that Dr. Green's telephone call to Sheriff Berrong on the morning of May 31, 2002 provided Blount County with actual notice of her injury. Dr. Green described the conversation as follows:

> I told him that she was in the office and very agitated about a meeting that they had yesterday. And he expressed concern and acknowledged that that meeting took place but we did not talk about -- he and I did not talk about anything about what was said in the meeting.
>
> * * * *
>
> I don't remember exactly what it was but I described to him in some terms that she was there and very agitated and distraught and panicking.
>
> * * * *
>
> He said something -- to let me know if there's -- let him know if there was anything he could do to help or something like that. I think that's exactly what he said; let me know if there's anything I can do to help.
>
> * * * *
>
> Q How did you leave the conversation with the sheriff?
> A Thank you very much. I'll talk to Ms. Nuchols and let you

> know or something. The last thing said was he said let me know if I can help or something, something along those lines.

Sheriff Berrong acknowledged receiving Dr. Green's call and that Dr. Green conveyed the idea that Ms. Nuchols felt threatened as a result of the meeting. Undoubtedly, this conversation provided Sheriff Berrong, and thus Blount County, with additional information concerning Ms. Nuchols. However, the conversation was, by both accounts, very brief. No substantive information about the meeting or Ms. Nuchols' condition was discussed, and Dr. Green suggested that he would contact Sheriff Berrong if necessary. We conclude that this evidence does not preponderate against the trial court's implicit finding that Dr. Green's telephone call failed to provide Sheriff Berrong with actual knowledge of Ms. Nuchols' claimed injury.

Ms. Nuchols also contends that the statutory notice requirement was satisfied by her husband's alleged attempts to report a workers' compensation claim to Blount County's risk management department. As set out above, Mr. Nuchols testified that he made three to six telephone calls, spoke to an unidentified person on one occasion and left voice messages on the others. A trial court's findings with respect to credibility may be inferred from the manner in which it resolves conflicts in the testimony and decides the case. Richards v. Liberty Mut. Ins. Co., 70 S.W.3d 729, 733-34 (Tenn. 2002). If the trial court had accepted Mr. Nuchols' testimony on this point, it would have found that notice was provided. The court did not do so, and we infer that it discredited that testimony. We give that finding the deference to which it is entitled. Padilla, 324 S.W.3d at 511; Glisson, 185 S.W.3d at 353.

Finally, Ms. Nuchols asserts that she provided notice of her injury to Blount County through a conversation with Randy Cruz, the chaplain of the Blount County Jail. Ms. Nuchols, who was a volunteer chaplain, testified that she told Mr. Cruz that she had suffered an injury at work. Mr. Cruz testified he spoke with Ms. Nuchols by telephone while he was attending an out-of-town training program. He said she told him that she had an argument with Sheriff Berrong. During that or a subsequent conversation, she expressed that she was fearful as a result of the argument. Mr. Cruz recalled that he later asked Sheriff Berrong what had happened. Ms. Nuchols became upset that he had mentioned the matter to Sheriff Berrong. Ms. Nuchols recorded part of a telephone conversation she had with Mr. Cruz, and the partial recording and a

transcript of it were introduced into evidence. The following statements are contained in the transcript:

> MS. NUCHOLS: It was in confidentiality. I told you that when I talked to you, Randy. I told you, I said, 'Randy, this has got to be confidential.' And you said, 'I've got to absorb this.' I cannot believe you've gone and done this.
>
> * * * *
>
> And I did, I told you, I said, 'Randy, nobody can know about this.'
>
> * * * *
>
> MS. NUCHOLS: Did you tell him I've been in the hospital?
> MR. CRUZE: No, I did not tell him anything.
>
> * * * *
>
> MR. CRUZE: What have I done to you?
> MS. NUCHOLS: You have betrayed my confidence.
> MR. CRUZE: How?
> MS. NUCHOLS: Been to the sheriff, that's how. I was talking to you chaplain to chaplain. I told you when I talked to you from California -- when you called me from California. 'Jo, what's the matter with you?' And I told you.
>
> * * * *
>
> MS. NUCHOLS: I'm scared to death, and you have done this to me. What did you say to him?
> MR. CRUZE: I asked him what happened.
> MS. NUCHOLS: How did he know anything happened?
> MR. CRUZE: Huh?
> MS. NUCHOLS: How did he know anything happened until you went to him? He didn't. He didn't know that there was a plan.
> MR. CRUZE: A plan. What kind of plan?
> MS. NUCHOLS: To take care of me so I can function. Do you know I slept two hours last night? I cannot sleep. I dream about fire constantly.
>
> * * * *
>
> MR. CRUZE: Jo, I'm really not understanding this.
> MS. NUCHOLS: You should have understood enough of what confidentiality is. And when I said I needed you, that you should

have come to me, not go to him.

* * * *

MS. NUCHOLS: You didn't have a right to talk to him, Randy. I don't care if you were employed by God Almighty Himself, and you were. And you and I had this chaplain thing. I cannot believe it how you talked about confidentiality, and only if the law was broke would you go to somebody. I didn't break the law.

Ms. Nuchols' remarks during this conversation support her contention that she feared harm from Sheriff Berrong after the May 30, 2002 meeting. Her remarks also clearly establish she did not want Mr. Cruz to share any information about her situation with Sheriff Berrong or anyone else. However, we are unable to agree with Ms. Nuchols' assertion that a confidential, "chaplain to chaplain" discussion with Mr. Cruz functioned as notice to Blount County of her alleged injury. To the contrary, Ms. Nuchols' remarks to Mr. Cruz suggest that she did not want Sheriff Berrong to know anything about her condition, a point that directly contradicts her assertions that Sheriff Berrong was aware of her condition and that statements made by her, her husband, or Dr. Green were intended to serve as notice to Blount County that she was claiming a work-related injury.

We conclude that the evidence does not preponderate against the trial court's finding that Ms. Nuchols failed to provide notice of her injury, as required by Tennessee Code Annotated section 50-6-201(a). Therefore, her workers' compensation claim was properly dismissed.

Ms. Nuchols also raised an issue about the trial court hearing evidence of pre-trial negotiations and basing its decision, in part, on that proof.

Tenn. R. Evid. 408 states in pertinent part:

> Evidence of (1) furnishing or offering to furnish or (2) accepting or offering to accept a valuable consideration in compromising or attempting to compromise a claim, whether in the present litigation or related litigation, which claim was disputed or was reasonably expected to be disputed as to either validity or amount, is not admissible to prove liability for or invalidity of a civil claim or its amount or criminal charge or its punishment.

A reading of the record in this case reveals the following:

1. The first reference to settlement negotiations appears in Ms. Nuchols' affidavit filed in response to the defendant's motion for summary judgment as follows:

> At the mediation in November of 2002, Mr. Berrong offered to let (sic) me a job as a jailor/deputy at the Juvenile Detention Center.

2. At the trial, during her cross examination, the following exchange took place without objection:

> Q And after all this came down, when we – there was a job offer to you over – outside of the courtroom at the juvenile place which you didn't want but you said, I want to be a bailiff for Kelly Thomas and a chaplain. Right?
> A I wasn't qualified for the one at the Juvenile Detention Center, but yes, I did. I wanted to try, but I couldn't do it.

Later on in cross examination the following appears:

> Q Ok, the Justice Center courthouse security office, the job that you wanted, have you ever seen the job duties?
> A No I haven't.
> Q Ok. All right. As far as what was offered you at the Juvenile Center, it's – it was a – you were just going to sit at a control thing with plastic or glass around you and open and shut doors and keep a log. Right?
> THE COURT: What time are you talking about now when you say offered to her?
> MR. PRINCE: Thank you.
> BY MR. PRINCE:
> Q After you had exhausted all your pay – we're up to November. And we're saying, are you going to come back to work? And we're offering you jobs. And you're saying, I want to go work here. And we said, Well, what about this? And so we're trying to get you a job. Okay?
> MS. BLAKNEY: Your Honor, I'm going to state an objection

at this point. It's my understanding that those communications that are being referenced by counsel now were the process of some mediation effort and some settlement discussions which took place between counsel. It was prior to our firm's involvement, but it is my understanding that that was settlement negotiations which would not be admissible.

MR. PRINCE: It was post – this happened post mediation and they're going back and forth on her job and what she wanted to do. That's what it goes to. She wanted –

MS. BLAKNEY: Your Honor –

MR. PRINCE: – a job. She wanted to go back to work and here's what she thought she was capable of doing. And she just asked her, Do you think you're 100 percent disabled? And I'm trying to – I'm trying to show a defense saying no, she didn't think she was 100 percent disabled.

MS. BLAKNEY: Your Honor, again, even if the mediation – if these discussions were continued following mediation, they're still settlement discussions. They're not appropriate for the Court to consider because they're covered by the rules of evidence. They're not admissible. I can ask the plaintiff about her own opinions about her –

THE COURT: Well, he's asking if she thought she could do one of these jobs or couldn't do one of these jobs. That's what he's asking her.

MS. BLAKNEY: I have no objection to that. It's just simply a question of – it's just simply a question of it being presented in the terms of offers going back and forth. That's the basis of my objection.

THE COURT: Well, that's not – that not a question for the Court in this type of proceeding anyway, so he's asking if – go ahead. Ask it.

BY MR. PRINCE:

Q You felt like you could return to work at something at Blount County, didn't you?

A I wanted to.

Q Okay. All right.

A But I couldn't.

Q All right.

3. Finally, during cross examination of Sheriff Berrong by Ms. Nuchols' counsel, the following took place:

> Q Did you tell Mr. Prince that she was incompetent?
> A Did I tell Mr. Prince?
> Q Yeah. In your direct examination here in this court did you say that she was incompetent?
> A I think I did.
> Q Okay. And yet you offered her a position –
> A Correct.
> Q – as a control operator?
> A Correct.
> Q In a detention facility.
> A Correct. It's a two person control room to start with.
> Q And these conversations – these offers that were made for reemployment or new employment or changes in employment, were they directly with her or were they through attorneys?
> A It was through the attorneys, but they would go back and talk to her and say, you know – and I think they came with this that she would do that, said, Would you be willing to do this? That's the best –
> Q So her –
> A – of my memory.
> Q Her lawyer wanted to see if she could do some useful work. Is that a fair statement?
> A I took it as she wanted to work at the – continue to work at the sheriff's office.

It is not clear that the statements elicited at the trial were offers made in an effort to compromise Ms. Nuchols' claim. There is a reference to mediation but that came first from Ms. Nuchols.

Assuming, however, that the negotiations fell within the technical scope of Rule 408, they are admissible if they were offered for another purpose. The rest of Rule 408 states in relevant part: "[t]his rule also does not require exclusion when the

evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay or proving an effort to obstruct a criminal investigation or prosecution." When the objection finally came in, the trial court recognized that the purpose of the questions was to find out if Ms. Nuchols thought, after she had exhausted her sick leave, that she was capable of returning to work at some job. On that basis, the trial court overruled the objection.

Finally, it is obvious that the evidence of the negotiations had no bearing on the trial judge's view of the amount or the validity of Ms. Nuchols' claim. See In Re: Spencer E., No. M2009-02572-COA-R3-JV, 2011 WL 295896 (Tenn.Ct.App. Jan. 20, 2011). In its alternative findings, the trial court held that Ms. Nuchols had a claim for 100% total disability. Unfortunately for Ms. Nuchols, she failed to perfect her claim by providing the defendants notice until she filed her claim almost a year later.

Conclusion

We affirm the judgment of the trial court dismissing the employee's claim. The judgment of the trial court is affirmed. Costs are taxed to Jo Dean Nuchols and her surety, for which execution may issue if necessary.

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BEN H. CANTRELL, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

JO DEAN NUCHOLS v. BLOUNT COUNTY, TENNESSEE

Circuit Court for Blount County
No. L13765

No. E2013-00574-SC-WCM-WC

JUDGMENT ORDER

This case is before the Court upon the motion for review filed by Jo Dean Nuchols, 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 Jo Dean Nuchols and her surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

LEE, Sharon G., C.J., Not Participating