

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
August 31, 2020 Session

MEMPHIS LIGHT, GAS & WATER DIVISION V. CHARLES NESBIT

**Appeal from the Shelby County Chancery Court
No. CH-15-1540 JoeDae Jenkins, Chancellor**

**No. W2019-02275-SC-WCM-WC – Mailed December 18, 2020;
Filed March 26, 2021**

Charles Nesbit (“Employee”) worked as a bucket truck driver for Memphis Light, Gas & Water Division (“Employer”). Employee sought workers’ compensation benefits for a gradually occurring injury to his knees. Relevant to the issues on appeal, the trial court found Employee suffered a compensable gradually occurring injury at work, and gave timely notice of his claim. Employer has appealed. The appeal has been referred to this 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 find that Employee did not give timely notice of his claim, and we reverse the judgment.

**Tenn. Code Ann. § 50-6-225(e) (2014) (applicable to injuries
occurring prior to July 1, 2014) Appeal as of Right;
Judgment of the Chancery Court Reversed**

DON R. ASH, SR. J., delivered the opinion of the court, in which JEFFREY S. BIVINS, C.J., AND ROBERT E. LEE DAVIES, SR. J., joined.

Salwa Adnan Bahhur, Memphis, Tennessee for the appellant Memphis Light, Gas & Water Division.

Steve Taylor, Memphis, Tennessee for the appellee Charles Nesbit.

OPINION

Factual and Procedural Background

Employee filed a request for benefit review conference on February 21, 2015. Employer initiated this action after the benefit review conference resulted in an impasse. Employee then filed an answer and a counter-claim. The case proceeded to trial on June 19, 2019.

Trial Testimony of Employee

Employee worked for Employer for 30 years, and was 67-years-old at the time of trial. Employee's occupation was as a bucket truck driver repairing street lights. As part of his job, he had to climb up several steps to get into the truck to drive, and also to get into the bucket at the back of the truck to operate it. Employee entered and exited both the truck and the bucket multiple times a day.

On April 19, 2013, Employee was stepping up into the bucket and felt a pain in his right knee. Employee reported the injury to Employer on April 20, 2013, and saw several orthopedic surgeons through his workers' compensation coverage. According to Employee, these physicians told him he needed a knee replacement, but the need for the knee replacement was not work-related. Employee subsequently had his right knee replaced on March 4, 2014, using his private insurance, with Dr. Apurva Dalal performing the surgery. Employee never returned to work after his April 19, 2013 injury, and ultimately resigned in a letter dated August 14, 2014, stating he was resigning as a result of continued pain in both of his knees.

Employee went to see an attorney in the summer of 2014, and his counsel wrote a letter to Dr. Dalal on September 29, 2014, asking whether Employee's right knee replacement, and need for a left knee replacement, was due to Employee's repetitive work for Employer. Dr. Dalal responded in a letter dated December 9, 2014, stating the right knee replacement was made necessary by the repetitive work Employee performed on behalf of his Employer, and for the same reasons Employee would also need a left knee replacement. On December 11, 2014, Employee sent Employer a letter stating he had just been informed by Dr. Dalal that his right knee replacement, and need for left knee replacement, were due to his work for Employer, and requesting workers' compensation benefits. Employer declined to provide any workers' compensation benefits.

On cross-examination, Employee testified he had issues with his right knee dating back to 2005, and had sought treatment at the Campbell Clinic in September 2005 after he stepped into a ditch and injured his knee. Employee was told he had underlying osteoarthritis in his knee and there could be some degenerative meniscal tears within the knee. Years later, on August 8, 2009,

Employee injured his left knee and again sought treatment at the Campbell Clinic, complaining about increasing pain from the arthritis in his right knee. Employee once again sought treatment at the Campbell Clinic in September 2009, and complained he had been having severe pain in his right knee, including when going up and down stairs and on an incline. Employee had x-rays performed in September 2009, which showed severe osteoarthritis in his right knee and moderate osteoarthritis in his left knee.

Trial Testimony of Dr. David Ross Strauser

Dr. David Ross Strauser testified as a vocational expert. Based on the restrictions provided by Dr. Dalal, Employee's work history, and Employee's academic reading level, Dr. Strauser testified Employee had a seventy-percent vocational impairment.

Deposition Testimony of Dr. Apurva Dalal

Dr. Dalal, an orthopedic surgeon, testified by deposition on February 15, 2018. On March 4, 2014, Dr. Dalal performed Employee's right knee replacement surgery, and he discharged Employee from his care on June 6, 2014. He testified to a reasonable degree of medical certainty "seventy percent more likely than not" Employee's repetitive work for Employer aggravated or accelerated Employee's pre-existing knee arthritis. Dr. Dalal further testified the first time he made a connection that Employee's need for a knee replacement was work related was when Employee's attorney sent him a letter. He examined Employee at the request of Employee's counsel on January 7, 2015, and assigned a thirty-seven percent impairment rating to the right lower extremity, fifteen percent to the body as a whole, using the AMA Guidelines.

On cross-examination, Dr. Dalal agreed Employee had a number of degenerative conditions that existed prior to Employee's April 2013 injury, including, among other things, a complex medial and lateral meniscus abnormality, and a complex flat tear of the medial meniscus extending to the posterior tibial root attachment. He agreed Employee was a potential candidate for total knee replacement in 2005, and also agreed Employee's degenerative changes were not caused by his work activity. Dr. Dalal further testified Employee's work activity aggravated the pre-existing degenerative disease requiring him to have surgery.

Dr. Dalal again testified by deposition on November 1, 2018. He testified that Employee's knee replacement surgery was the result of pain and anatomical changes. He testified the anatomical changes occurred in 2013 when a physician found Employee's knee was swollen and there was fluid collected in the knee. Dr. Dalal stated the decision to perform a knee replacement is based on the entire clinical picture, including pain, inflammation, the knee locking up or clicking, instability, limitation on motion, and radiographic findings. Dr. Dalal testified he did not perform surgery on Employee only because of pain. Dr. Dalal again testified, to a reasonable degree of medical certainty, Employee's repetitive work activities caused an anatomical change in his knees and aggravated his pre-existing knee problems to the point the knee replacement surgery

was medically necessary.

Deposition Testimony of Dr. Christopher Ferguson

Dr. Christopher Ferguson, an orthopedic surgeon, testified by deposition on November 4, 2016. Employee first saw one of Dr. Ferguson's partners, Dr. John Lochemes, on May 9, 2013, regarding his right knee after the April 19, 2013 work incident. Employee saw Dr. Lochemes again on May 16, 2013, and Dr. Lochemes stated in the medical records Employee "will likely require a total joint replacement at some time in the future." Dr. Ferguson agreed with this assessment by Dr. Lochemes. Dr. Lochemes also stated in his medical notes "[t]he on-the-job injury component has not hastened or worsened his condition overall. As a result, he may continue to have pain. But as such, the work related nature was just a minor strain component." Again, Dr. Ferguson agreed with Dr. Lochemes's assessment. On May 31, 2013, Dr. Lochemes saw Employee again, and Employee told him he had been seen a few years prior at the Campbell Clinic, where they discussed performing surgery. Employee saw Dr. Ferguson on June 7, 2013. At this appointment, Employee stated he did not want to do a functional capacity evaluation because he did not wish to have any work restrictions, and Dr. Ferguson placed Employee at maximum medical improvement.

Dr. Ferguson testified Employee has "a chronic ACL rupture with advanced degenerative changes of all three compartments," including "complex degenerative tears of medial and lateral menisci and osseous loose bodies within the knee as well as . . . osteophyte formation." Dr. Ferguson diagnosed Employee with an acute sprain of the right knee superimposed on chronic posttraumatic degenerative arthritis and chronic meniscal tears. Dr. Ferguson felt Employee's advanced degenerative changes could only be addressed through a knee replacement. Dr. Ferguson also did not believe the April 19, 2013 work incident significantly contributed to his findings, or caused Employee's advanced arthritic changes. Dr. Ferguson also testified the April 19, 2013 event did not change the structural condition of Employee's knee.

On cross-examination, counsel read Dr. Ferguson the September 29, 2014 letter that was sent to Dr. Dalal. Dr. Ferguson then read Dr. Dalal's December 9, 2014 letter in response, which stated Employee's right knee replacement was made necessary by the repetitive work Employee performed on behalf of Employer, and that Employee would also need a left knee replacement for the same reasons. Dr. Ferguson declined to testify Dr. Dalal was incorrect, but rather there was room to disagree. Dr. Ferguson further testified activity is not the sole predictor of the development of degenerative problems. Dr. Ferguson also explained Employee had a chronic ACL rupture, causing instability of the knee, which overtime will develop arthritis. Dr. Ferguson also stated Employee's work activity could have increased Employee's symptoms, but it would be more difficult to say whether his work activity structurally changed his knees, although he testified it was possible. Dr. Ferguson also would not agree Employee's work activity was the reason he needed a knee replacement. Dr. Ferguson further testified whenever individuals have an ACL deficient knee, at some point they will require a knee replacement regardless of activity or the type

of work they do.

Decision of the Trial Court

Relevant to the issues on appeal, the trial court found the Employee suffered a compensable, gradually occurring injury at work and gave timely notice of his claim.

Analysis

“Review of the trial court’s findings of fact shall be de novo upon the record of the trial court, accompanied by a presumption of correctness of the finding, unless the preponderance of the evidence is otherwise.” Tenn. Code Ann. § 50-6-225(e)(2) (2014) (applicable to injuries occurring prior to July 1, 2014). When the trial court has seen and heard the witnesses, considerable deference must be afforded the trial court’s credibility and factual determinations. *Tryon v. Saturn Corp.*, 254 S.W.3d 321, 327 (Tenn. 2008). No similar deference need be afforded the trial court’s findings based on medical testimony presented by deposition. *Id.* Questions of law are reviewed de novo with no presumption of correctness. *Id.*

As the trial court explained, there is no dispute that the April 19, 2013 work incident, which resulted in a knee sprain, was a compensable injury. There also is no dispute that the April 19, 2013 work incident did not cause Employee to need a knee replacement. Instead, the dispute is whether Employee’s claim for a gradually occurring injury--based on the repetitive work activity of climbing in and out of a bucket truck over many years--is compensable.

We first turn to Employer’s argument Employee’s claim is time-barred. In those instances where the employer has not paid workers’ compensation benefits--such as here with respect to Employee’s alleged gradually occurring injury--the right to compensation shall be forever barred, unless the required notice is given to the employer within the time prescribed by statute, and a benefit review conference is requested within one year after the accident resulting in injury. Tenn. Code Ann. § 50-6-203(b)(1) (2014) (applicable to injuries occurring prior to July 1, 2014). In cases where an employee’s injuries occur as the result of gradual or cumulative events, the employee shall provide notice of the injury to the employer within thirty days after the employee either:

- (1) Knows or reasonably should know that the employee has suffered a work-related injury that has resulted in permanent physical impairment; or
- (2) Is rendered unable to continue to perform the employee’s normal work activities as the result of the 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(b) (2014) (applicable to injuries occurring prior to July 1, 2014). In

essence, this statute applies the discovery rule to the notice provision for gradually-occurring injuries. *Estate of Jenkins v. Goodyear Tire & Rubber Co.*, No. W2014-02303-SC-R3-WC, 2016 WL 1020832, at 3* (Tenn. Workers' Comp. Panel Mar. 15, 2016).

In *Estate of Jenkins v. Goodyear Tire & Rubber Co.*, the employee argued the limitations period did not begin to run until he had a doctor's opinion stating his hearing loss was work-related. No. W2014-2303-SC-R3-WC, 2016 WL 1020832, at 3* (Tenn. Workers Comp. Panel Mar.15, 2016). The court recognized there was language in previous cases from which an inference could be drawn but was persuaded "the Court has not established an absolute rule that a doctor's opinion connecting an injury to the employee's work is the only factor that can be considered as the starting point for the statute of limitations." *Id.* at *3. The court further recognized "other proof in the record could show that the statute began to run at an earlier date than the date of the doctor's opinion." *Id.* Thus, the court looked to *Gerdau Ameristeel, Inc. v. Ratliff*, 368 S.W.3d 503, 508 (Tenn. 2012), in which the Supreme Court applied the discovery rule to the statute of limitations period for workers' compensation claims, and explained "[t]he statute of limitations commences to run at that time when the employee, by a reasonable exercise of diligence and care, would have discovered a compensable injury had been sustained." Applying this principle to the facts in *Jenkins*, the court concluded "a reasonably prudent person, knowing that he had significant hearing loss, which got worse through twenty-one years of employment, would not wait until two years after his last day of work to take any action[.]" *Id.* at *4.

Based on the factual record before this court, we conclude a reasonably prudent person in Employee's position, knowing he had significant knee problems, which got worse over years of employment, would not wait until nine months after having knee replacement surgery to take any action. Employee has argued, and the trial court accepted, that Employee could not have known he had a work-related injury any earlier because his physicians told him his injury was not work-related. Those physicians, however, were treating Employee for his acute injury following his April 19, 2013 work incident. The instant action relates to Employee's separate claim for a gradually occurring injury.

In concluding Employee's claim was timely, the trial court relied on *Pentecost v. Anchor Wire Corp.*, 695 S.W.2d 183 (Tenn. 1985). Here, the employee had two surgeries in May and September 1981 for degenerative disc disease. The employee's son suggested in early January 1982 her degenerative disc disease might be work-related. As a result of the conversation, the employee contacted an attorney on January 27, 1982. The attorney consulted with the employee's physician to obtain his opinion regarding whether the employee's condition might be connected to her work, and the physician stated the condition was work-related. The employee then provided notice to the employer on February 2, 1982. The trial court dismissed the action, finding the notice was untimely. The Tennessee Supreme Court reversed, finding the employee had a reasonable excuse for failing to give notice earlier. Notably, the Supreme Court found the employee could not be charged with knowledge of the cause of her condition "until early January, 1982, when the possibility her condition was work-related was first brought to her attention by her son." *Id.* at

185. The employee then gave notice to her employer on February 2, 1982, within thirty days of the conversation with her son.

The trial court also relied on *Livingston v. Shelby Williams Industries, Inc.*, 811 S.W.2d 511 (Tenn. 1991). Here, the employee fell at work in October or November 1986, and appeared to sustain only superficial bruises. He later had surgery on his back in July 1987. The employee testified he did not associate his need for back surgery with his previous fall until he discussed the cause with his physician at a post-operative visit on October 6, 1987. The employee then provided notice to his employer “immediately after that visit.” Relying on *Pentecost*, the Tennessee Supreme Court affirmed the trial court’s finding the employee’s failure to give notice within thirty days of his fall was reasonable because he was not aware that his condition could have been caused by trauma until his October 1987 appointment. *Livingston*, 811 S.W.2d at 514.

Applying *Pentecost* and *Livingston* to the instant case, we still find the Employee’s claim is untimely. The employee in *Pentecost* gave notice within thirty days of becoming aware of the possibility her condition was work-related, and the employee in *Livingston* provided notice to his employer “immediately” after learning his condition could have been caused by his previous fall at work. Here, in contrast, Employee had his knee replacement surgery on March 4, 2014, and then met with his attorney in “the summer of 2014,” yet he did not provide notice to Employer until December 11, 2014. Employee was on notice, at the latest, he may have a compensable injury when he met with his attorney in the summer of 2014, and under *Jenkins* was not entitled to wait until he received a letter from Dr. Dalal. Thus, Employee’s December 11, 2014 notice was untimely and his claim is time-barred. Having found Employee’s claim is untimely, all other issues are pretermitted.

Conclusion

The judgment of the Chancery Court is reversed. Costs are taxed to Charles Nesbit, for which execution may issue if necessary.

Don R. Ash, Senior Judge

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

MEMPHIS LIGHT GAS & WATER DIVISION v. CHARLES NESBIT

**Chancery Court for Shelby County
No. CH-15-1540**

No. W2019-02275-SC-WCM-WC

JUDGMENT ORDER

This case is before the Court upon the motion for review filed by Charles Nesbit pursuant to Tennessee Code Annotated section 50-6-225(e)(5)(A)(ii), the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's 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 Charles Nesbit, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Jeffrey S. Bivins, J., not participating