IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
December 15, 2005 Session

LEE FRANKLIN GRACE v. KEHE FOOD DISTRIBUTORS, INC.

Direct Appeal from the Chancery Court for Roane County
No. 14617 Honorable Frank V. Williams, III, Chancellor

Filed March 29, 2006

No. E2005-0064-WC-R3-CV - Mailed February 22, 2006

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 awarded plaintiff seventy-five (75) percent permanent, partial vocational disability to the left leg. On appeal, the employer contends that the employee's injury was not work related and therefore not compensable. The employer also contends that benefits should be denied because the Plaintiff failed to provide the requisite notice of injury to the employer and that the action was not timely filed within the applicable statute of limitations. We affirm the judgment of the trial court.

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

THOMAS R. FRIERSON, II, SP. J., DELIVERED THE OPINION OF THE COURT, IN WHICH E. RILEY ANDERSON, JUSTICE, AND ROGER E. THAYER, SP. J., joined.

Lindsey B. Lander, Knoxville, Tennessee, for Appellant, KEHE Food Distributors, Inc.

Jimmie D. Turner, Oliver Springs, Tennessee, for Appellee, Lee Franklin Grace.

MEMORANDUM OPINION

I. FACTUAL AND PROCEDURAL BACKGROUND

The Plaintiff, Lee Franklin Grace, was 48 years of age at the time of trial. In February 2000, Mr. Grace became employed by Defendant, KEHE Food Distributors, Inc., in the capacity of a route salesman. In connection with his work, the Plaintiff traveled to various grocery stores,

monitored food product inventory and processed orders. Mr. Grace would deliver the product ordered while grocery store personnel would stock and shelve the inventory.

In March 2000, upon standing from a sitting position on the floor while cleaning and rotating stock, Mr. Grace experienced a painful pop in the lateral aspect of his left knee. An M.R.I. scan of Plaintiff's left knee conducted May 10, 2000 showed evidence of a small tear in the posterior horn of the medial meniscus. On May 22, 2000, Dr. Duncan L. McKellar, Jr. performed arthroscopic surgery by partially resecting the medial meniscus. Having missed approximately five weeks of work, Mr. Grace thereupon was released to return to work without permanent restrictions. Mr. Grace did not file a claim for workers' compensation benefits in connection with that injury.

In June 2000, Plaintiff learned through an employer's district meeting that certain routes would be changed and route salesmen would be required to shelve product at the grocery stores. In connection with his new employment responsibilities, Mr. Grace began placing product upon top, middle and bottom shelves in the stores. In furtherance of these work activities, Plaintiff routinely was required to squat and get down in the floor.

By July or August 2000, Mr. Grace began to experience pain in his left knee while performing his work responsibilities. As his work continued, pain developed in his right knee as well. On occasion, Mr. Grace's supervisors witnessed his difficulty in standing and the pain associated therewith. In October 2002, Mr. Grace requested family medical leave in order to receive surgery regarding his right knee. On November 8, 2002, Dr. McKellar replaced the medial compartment of the right knee for treatment of advanced arthritic changes in the medial femoral condyle.

Following the surgery, Mr. Grace was released to return to work with restrictions on April 14, 2003. Upon Mr. Grace contacting his employer with reference to returning to work, his supervisor presented him a layoff slip on April 18, 2003.

On July 10, 2003, Mr. Grace, by counsel, filed a complaint seeking an award of benefits under the Tennessee Workers' Compensation Act. Mr. Grace initially sought an award in connection with claimed injuries sustained to his back and both knees. Prior to trial, the Plaintiff withdrew all claims regarding his back and right knee. Following trial, the trial court concluded that Mr. Grace had sustained an accidental, repetitive stress injury to his left knee arising out of and in the course of his employment with Defendant. The court further concluded that due notice of the injury had been provided to the Defendant pursuant to standards governing repetitive stress injuries and that Plaintiff's action was timely filed within the applicable statute of limitations.

II. STANDARD OF REVIEW

The standard of review in a workers' compensation case 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, T.C.A. 50-6-225(e)(2); Houser v. Bi-Lo, Inc., 36 S.W.3d 68 (2001). We are required to conduct an independent examination of the record to determine where the preponderance of the evidence lies, Wingert v. Government of Sumner Co., 908 S.W.2d 921 (1995). Moreover, we are required by law to examine in depth a trial court's factual findings and conclusions, GAF Building Materials v. George, 47 S.W.3d 430 (2001). "Where the trial judge has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, on review considerable deference must still be accorded to those circumstances", Orman v. Williams-Sonoma, Inc., 803 S.W.2d 672 (1991).

Where the medical testimony in a workers' compensation case is presented by deposition, we may make an independent assessment of the medical proof to determine where the preponderance of the proof lies, Cooper v. INA, 884 S.W.2d 446 (1994). Conclusions of law are subject to *de novo* review on appeal without any presumption of correctness, Nutt v. Champion International Corp., 980 S.W.2d 365 (1998).

III. NOTICE OF INJURY

The giving of notice of an injury is not an act precedent to filing the compensation action, but it is precedent to recovery unless notice is excused, R.W. Hartwell Motor Co. v. Hickerson, 26 S.W.2d 153 (1930). The notice requirements existing at the time of Plaintiff's injury were prescribed by T.C.A. 50-6-201 (2001):

> **50-6-201. Notice of injury**
>
> (a) Every injured employee or such 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, compiled in this chapter, from the date of the accident to the giving of such notice, unless it can be shown that the employer had actual knowledge of the accident. No compensation shall be payable under the provisions of this chapter, 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.
>
> (b) In those cases where the injuries occur as the result of gradual or cumulative events or trauma, then the injured employee or such injured employee's representative shall provide notice to the employer of the injury within thirty (30) days after the employee:
>
> (1) Knows or reasonably should know that such employee has suffered a work-related injury that has resulted in permanent physical impairment; or
>
> (2) Is rendered unable to continue to perform such 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.

Under the express provisions of the statute, the thirty day notice period is tolled by a "reasonable excuse for failure to give such notice." If the employee fails to provide the notice within 30 days of the occurrence of an injury, the Court must determine whether the Plaintiff’s

failure to recognize the work-related character of the injury was reasonable, Pentecost v. Anchor Wire Corporation, 695 S.W.2d 183 (1985). The Court in Pentecost explained in pertinent part as follows:

> Under the terms of T.C.A., § 50-6-201, the 30-day notice period is tolled by "reasonable excuse for failure to give such notice." An employee's reasonable lack of knowledge of the nature and seriousness of his injury has been held to excuse his failure to give notice within the 30-day period. *See, e.g.*, CNA Insurance Co. v. Transou, Tenn., 614 S.W.2d 335, 337 (1981), Davis v. Traveler's Insurance Co., Tenn. 496 S.W.2d 458 (1973); Brown Shoe Co. v. Reed, 209 Tenn. 106, 350 S.W.2d 65 (1961). Likewise, an employee's lack of knowledge that his injury is work-related, if reasonable under the circumstances, must also excuse his failure to give notice within 30 days that he is claiming a work-related injury. *See* Larson, *Workmen's Compensation*, Vol 3, § 78.41(f), pp. 15-216 to 15-217. It is enough that the employee notifies the employer of the facts concerning his injury of which he is aware or reasonably should be aware.

These notice requirements afford the employer an opportunity to make an investigation while material facts are accessible and to provide timely and proper treatment for the injured employee, Masters v. Industrial Garments Manufacturing Company, 595 S.W.2d 811 (1980). "In determining whether an employee has shown a reasonable excuse for failure to give such notice, courts will consider the following criteria in light of the above reasons for the rule: (1) the employer's actual knowledge of the employee's injury, (2) lack of prejudice to the employer by an excusing of the requirement, and (3) the excuse or inability of the employee to timely notify the employer", McCaleb v. Saturn Corporation, 910 S.W.2d 412 (1995).

Where the employee is unaware of the work-connected nature of his injury, the employer's interest must yield to the remedial purpose of the statute, Banks v. United Parcel Service, Inc., 170 S.W.3d 556 (2005). In addressing questions of timing in gradually occurring injury cases, the Supreme Court in Banks explained as follows:

> When construing statutory time limits and requirements in such cases, we have favored a construction that preserves a worker's right to benefits and have emphasized that the worker must be aware that he has sustained a work related injury before time limits apply. This is consistent with the statutory admonition to give the Workers' Compensation Act "an equitable construction". (Citations omitted.)

When questioned upon direct examination whether he had notified his employer of pain in his left knee in connection with work activities, Mr. Grace provided the following responses:

> Q. Did you feel any pain on your left knee when doing this repetitive work?
>
> A. Yes, I did.
>
> Q. And did you ever tell your supervisor that this was causing you any pain?
>
> A. I told my supervisors.
>
> ...

Q. Okay. And did they observe you putting the items in the bottom shelves?

A. Yes, they did.

Q. And how -- what did they notice as they would -- what were you doing that they noticed?

A. Well, they noticed I'd have trouble getting up, I'd have a lot of pain, and by the end of the day I was getting pretty stiff and sore.

Q. And did you -- they couldn't see pain, but how did they know that you were in pain?

A. They could see the grimace on my face some days and just the way I walked.

Q. Would you ever talk to them about pain?

A. Yes, I did.

Q. What did you say to them about the pain?

A. I told them that my knees were hurting and that it was -- it was -- the work I was doing was very hard, hard on my knees.

During cross-examination, Mr. Grace testified as follows:

Q. Okay. You also testified that you told your supervisors about pain in your left knee after you went back to work. About how soon after you went back to work in June did you start to experience pain in your left knee?

A. Probably a month or two.

Q. Okay. So July or August of 2000?

A. That would be close.

Q. Did you realize at that time that it was the new work load that you were doing that was causing pain?

A. I was aware that -- I felt that it was.

Q. Okay. And you told your supervisors at that time?

A. I did.

Whether Mr. Grace knew or reasonably should have known that he had suffered a work related injury that had resulted in permanent physical impairment is a question of fact. Clearly the Plaintiff brought to the attention of his employer the existence of pain which he experienced in connection with his work activities shortly following his return to work in June 2000. By reason of Mr. Grace's preexisting left knee condition, however, a question then arose as to whether mere pain in connection with his work constituted a compensable injury.

An injury is compensable, even though the claimant may have been suffering from a serious pre-exiting condition or disability if a work connected accident can be fairly said to be a contributing cause of such injury. An employer takes an employee as he is and assumes the risk of having a weakened condition aggravated by an injury which might not affect a normal person, Fink v. Caudle, 856 S.W.2d 952 (1993); White v. Werthan Industries, 824 S.W.2d 158 (1992). The employer takes the employee with all pre-existing conditions and cannot escape liability when the employee, upon suffering a work related injury, incurs disability far greater than if he had not had the pre-exiting conditions, Rogers v. Shaw, 813 S.W.2d 397 (1991). However, if the work aggravates a pre-existing condition merely by increasing pain, there is no injury by accident, McCaleb v. Saturn Corporation, *supra*; Townsend v. State, 826 S.W.2d 434 (1992). If the work aggravates a pre-existing condition by advancing the severity of the condition or if it results in a disabling condition other than increased pain, the claimant has suffered a compensable injury, Cunningham v. Goodyear Tire and Rubber Co., 811 S.W.2d 888 (1991).

Whether Mr. Grace's lack of knowledge and understanding regarding the nature and work-related character of his left knee injury, prior to his last day of work in October 2002, was reasonable is determined in significant part from the diagnoses of his health care professionals. Medical records dating as early as 1998 reflect that Mr. Grace presented degenerative arthritis of his knees. With reference to Plaintiff's March 2000 left knee injury, Dr. McKellar opined that Mr. Grace's chondromalacia in his knee was preexisting to that injury. During Dr. McKellar's care and treatment of Mr. Grace since 1998, Dr. McKellar has determined that both knees have "progressed in their arthritis fairly substantially." According to Dr. McKellar, Mr. Grace's chondromalacia is multi-factoral, relating to genetic predisposition, mechanical issues (bowleggedness) and the Plaintiff's physical weight of approximately 350 pounds. The medical evidence in the case at bar reflects no instance when Mr. Grace was informed by a physician that he had sustained a work related injury resulting in permanent physical impairment to the left knee prior to his departure from work in October 2002.

This panel concludes that Mr. Grace's notification to his employer that he was experiencing left knee pain in connection with certain work activities did not constitute notice to the employer that he had suffered a work-related injury resulting in permanent physical impairment. However, his lack of knowledge of the nature and work-related character of his injury was reasonable under the circumstances and excused his failure to provide the statutory notice of injury.

IV. STATUTE OF LIMITATIONS

The employer argues that the employee's claim for benefits was untimely filed and therefore barred by the applicable statute of limitations. The statutory limitation of time for claims and actions brought under the Tennessee Workers' Compensation Act is controlled by T.C.A. 50-6-203(a) which provided, prior to the 2004 amendment, as follows:

> (a) The right to compensation under the Workers' Compensation Law shall be forever barred, unless, within one (1) year after the accident resulting in injury or death occurred, the notice required by § 50-

> 6-202 is given the employer and a claim for compensation under the provisions of this chapter is filed with the tribunal having jurisdiction to hear and determine the matter; provided, that if within the one-year period voluntary payments of compensation are paid to the injured person or the injured person's dependents, an action to recover any unpaid portion of the compensation, payable under this chapter, may be instituted within one (1) year from the latter of the date of the last authorized treatment or the time the employer shall cease making such payments, except in those cases provided for by § 50-6-230. Where a workers' compensation suit is brought by the employer or the employer's agent and the employer or agent files notice of non-suit of the action at any time on or after the date of expiration of the statute of limitations, either party shall have ninety (90) days from the date of the order of dismissal to institute an action for recovery of benefits under this chapter.

The trial court concluded that Plaintiff's complaint was timely filed within the applicable statute of limitations governing repetitive stress injuries. The court specifically relied upon the "last day worked" rule, generally applicable to repetitive stress injuries. The "last day worked" rule was announced by the Supreme Court in Lawson v. Lear Seating Corp., 944 S.W.2d 340 (1997) and applies only to repetitive stress injuries so that an action to recover workers' compensation benefits for such an injury must be filed within one year of the accident resulting in the injury. The purpose of the rule is to "fix a date certain when the employee knows or should know he or she sustained a work related injury so that workers with gradual injuries will not lose the opportunity to bring claims due to time limitations", Bone v. Saturn Corp., 148 S.W.3d 69 (2004). The court in Bone made clear that the "last day worked" rule is inapplicable to circumstances where the employee gives actual notice of the injury to the employer prior to missing time from work on account of the injury.

In the case at bar, Mr. Grace's last day of employment in October 2002 was necessitated by his need for surgery to his right knee. That departure from work was not by reason of a repetitive stress injury to his left knee. As such, the "last day worked" rule is inapplicable to this case.

In Imperial Shirt Corp. v. Jenkins, 399 S.W.2d 757 (1966), the Supreme Court recognized a similar rule that the applicable statute of limitations does not begin to run against a claim of an employee until the employee discovers that his permanent injury is connected with an accident at work. In Imperial Shirt, the employee reported an accident immediately, was sent to and examined by a doctor and continued to work for approximately two years before discovering that he had sustained a permanent injury connected with the accident. The employee's action was deemed timely filed. The Court later affirmed the Imperial Shirt rule in Norton Co. v. Coffin, 553 S.W.2d 751 (1977) by stating that "the running of the statute of limitations is suspended until by reasonable care and diligence it is discoverable and apparent that an injury compensable under the workman's compensation laws has been sustained". Where an employee experiences a gradual progression of symptoms over a period of time following a work connected trauma, the statute of limitations will not begin to run until the employee is advised, even after surgery, that his condition was caused by the trauma, Livingston v. Shelby Williams, Inc. Industries, 811 S.W.2d 511 (1991).

This panel concludes that the Imperial Shirt rule is applicable to the case at bar as Mr. Grace continued to work for his employer from August 2000 through October 2002 with continuing

pain in his left knee but without knowing that he had sustained a repetitive stress injury compensable under the workman's compensation laws. As such, the applicable statute of limitations was suspended until by reasonable care and diligence it was discovered by Mr. Grace that his left knee injury was permanent and connected to a repetitive stress injury at work. Hence, Mr. Grace's complaint was timely filed within the applicable statute of limitations.

V. CAUSATION AND COMPENSABILITY

Under the Tennessee Workers' Compensation Act, injuries by accident arising out of and in the course of employment which cause either disablement or death of the employee are compensable, T.C.A. 50-6-102(13). An accidental injury is one which cannot be reasonably anticipated, is unexpected and is precipitated by unusual combinations of fortuitous circumstances, A. C. Lawrence Company v. Loveday, 455 S.W.2d 141 (1970). It is the resulting injury which must be unexpected in order for the injury to qualify as one by accident, R. E. Butts Company v. Powell, 463 S.W.2d 707 (1971). An injury has been defined as including "whatever lesion or change to any part of the system (that) produces harm or pain or lessened facility of the natural use of any bodily activity or capability," Brown Shoe Company v. Reed, 350 S.W.2d 65 (1961).

The claimant has the burden of proving causation and permanency of the injury by a preponderance of the evidence, Roark v. Liberty Mutual Insurance Company, 793 S.W.2d 932 (1990). "While causation and permanency of an injury must be proved by expert medical testimony, such testimony must be considered in conjunction with the lay testimony of the employee as to how the injury occurred and the employee's subsequent condition", Thomas v. Aetna Life and Casualty Co., 812 S.W.2d 278 (1991). Absolute certainty on the part of the medical expert is not necessary to support a workers' compensation award and the Court may properly predicate an award on medical testimony to the effect that a given incident could be the cause of the claimant's injury, McCaleb v. Saturn Corp., *supra*. Any reasonable doubt regarding causation is to be construed in favor of the employee, Reeser v. Yellow Freight System, Inc., 938 S.W.2d 690 (1997).

Tennessee courts have recognize that gradually occurring injuries are compensable as accidental injuries under the Act even though difficulty exists in connecting such injuries to a particular accident, Mahoney v. NationsBank of Tennessee, 158 S.W.3d 340 (2005). Repetitive stress injuries are considered as "accidental" for purposes of the Workers' Compensation Act, see Brown Shoe Co. v. Reed, *supra*. Repetitive stress injuries have been defined as "the unexpected or unusual injuries that result from the ordinary or usual strain or exertion of the employee's job", Lawson, *supra.*

In concluding that Mr. Grace suffered a repetitive stress injury to his left knee arising out of and in the course of his employment with the Defendant, the trial court considered both lay and expert testimony. Dr. McKellar did not expressly determine that Mr. Grace's work aggravated a preexisting condition by advancing the severity of the condition or that his work resulted in a disabling condition other than increased pain. Dr. Kennedy, however, made the following

conclusion:

> The work-related incident briefly described above as having occurred in March 2000 caused the tearing of the medial meniscus and necessitated the subsequent testing and treatment for the left knee including the arthroscopic surgery of 5/22/00. That same work-related incident through its injury to the medial meniscus advanced and aggravated the osteoarthritis of the left knee from dormancy into a continuously painful disabling reality. The rapid progression of the medial compartment osteoarthritic changes in the left knee described above as visible in the x-rays between April 2000 and March 2003 were consistent with posttraumatic aggravation and advancement of the osteoarthritis and not simply the natural progression of the disease. The injury to the medial meniscus and the necessity of resecting part of the medial meniscus made Mr. Grace more vulnerable for developing osteoarthritis in the medial compartment of the left knee than had he not suffered the injury of March 2000.

Having made an independent examination of the evidence, this panel concludes that the preponderance of the evidence lies in favor of the trial court's conclusion that by reason of his work related, repetitive stress injury to his left knee, Mr. Grace sustained a compensable injury under the provisions of the Tennessee Workers' Compensation Act. The employer has not challenged the trial court's determination regarding the extent of permanent, partial vocational disability.

VI. CONCLUSION

The judgment of the trial court is affirmed. Costs of the appeal are taxed to the employer and its surety.

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Thomas R. Frierson, II, Special Judge

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AT KNOXVILLE, TENNESSEE

LEE FRANKLIN GRACE V. KEHE FOOD DISTRIBUTORS, INC.
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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 appears 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 facts and conclusions of law are adopted and affirmed and the decision of the Panel is made the Judgment of the Court.

The costs on appeal are taxed to the appellant, Kehe Food Distribution, Inc., for which execution may issue if necessary.