IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
KNOXVILLE, AUGUST 1999 SESSION

JUDY ANN WALKER	)	HAWKINS CIRCUIT
	)	
Plaintiff/Appellee	)	
	)	
VS.	)	Ben K. Wexler,
	)	Circuit Judge
KINGSTON WARREN CORPORATION	)	
and HARTFORD CASUALTY	)	
INSURANCE COMPANY	)	
	)	
Defendants/Appellants	)	No. 03S01-9902-CV-00025

For the Appellants:

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For the Appellee:

James M. Davis
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M E M O R A N D U M O P I N I O N

Members of Panel:

E. Riley Anderson, Chief Justice
John K. Byers, Senior Judge
Roger E. Thayer, Special Judge

AFFIRMED.

THAYER, Special Judge

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, Judy Ann Walker, 56% permanent disability benefits to the body as a whole. In ruling on the issues, the court found plaintiff had sustained two ruptured discs and held the first injury was compensable but the second injury was not work-related.

The employer, Kingston Warren Corporation, has appealed insisting the trial court was in error in holding the first ruptured disc was work-related and also raising a notice question regarding the first injury.

The employee also appeals arguing the award for the first injury should be increased and that the second injury was work-related.

We have carefully examined the record and must conclude the evidence does not preponderate against the findings of the trial court.

Plaintiff was 50 years of age and had been working for Kingston several years. She was assigned to new work duties about two weeks before the day in question. The new job required her to operate a molding machine. She stated the machine was new and it was difficult to open and close and it involved a great deal of movement of her arms to operate it correctly. She testified that on Friday, April 26, 1996, while working at the machine, she began to experience pain in her back; she started perspiring and became nauseated. She testified she finished the work shift and was not feeling any better as she left work; that she thought she had a kidney infection as she had these same symptoms before with an infection of this nature.

Plaintiff testified that upon reaching her home, she could not get out of the car and she sounded the horn until her husband came out and assisted her into the house. At this time she said she was having severe muscle spasm along with back and leg pain. On Monday, April 29, 1996, she stated she called the company nurse and told her she was sick and that she had started having a backache at work but thought she just had a kidney infection. Sometime later she applied for short-term disability insurance benefits and indicated on the application the event was not work-related.

On about May 6, 1996, she said her condition had not improved and she saw her family physician who admitted her to the hospital where tests were conducted. Her family physician made her an appointment with Dr. Randy Trudell who saw her on May 29, 1996. On June 25, 1996, she said Dr. Trudell called her and stated he had just reviewed her C.T. Scan and it indicated she had a ruptured disc. She stated she immediately called Vickie Smith, the company nurse, and told her she had a ruptured disc and that her claim should be considered as a work injury. She also wrote a letter dated June 28, 1996 confirming the telephone conversation. The defendant insurance carrier denied the claim.

Plaintiff testified surgery was performed by Dr. William A. Tyler, Jr. during July 1996 and her condition improved to some extent but sometime later she was still having problems with numbness, pain and difficulty in walking straight. Plaintiff remained off work and she was operated on again during March 1997 for another ruptured disc. Having not returned to work, she was terminated by Kingston during April 1997 since she had been off over one year. The termination notice indicated she had quit but a company employee told the trial court that was error on the termination notice.

Witness Sharon Cooper, a co-worker, testified that the molding machine was hard to open and shut and that it would stick. She saw plaintiff at noon on the day in question and said she was not feeling well and she could not sit down complaining of back pain. She also stated that as they left work she noticed plaintiff looked sick; was pale and sweaty; and was limping.

Witness J. D. Walker, plaintiff's husband, testified his wife could not get out of the car and he helped her into the house; that she complained of her leg jumping and he looked down above her left knee and observed the muscles moving up and down and then they just collapsed.

All of the expert medical evidence was by deposition.

Dr. Randy Trudell, a neurologist, testified plaintiff was complaining of back and leg pain which she associated with back and forth movement of her arms; that on April 27, 1996, she reported she sat down and had a sudden onset of severe pain in her low back; that she had a herniated disc at L3 and he referred her to Dr. Tyler, a surgeon. As to the cause of the ruptured disc he opined "It sounds as if when she

sat down it was probably the time when it popped out, when she developed that severe pain, but I don't know if I can tell you a cause any better than that."

Dr. William A. Tyler, Jr., a neurological surgeon, testified he performed both surgical procedures and that after the first surgery she developed new pain and further testing indicated she had another ruptured disc. As to the causation issue, he said he would relate the first ruptured disc to when she had the onset of pain while at work but he could not determine the cause of the second disc condition. When questioned about Dr. Trudell's history he replied "If that is the accurate history and there's no other history that I'm unaware of, that would be the time when you thought the disk had herniated."

Dr. Gilbert L. Hyde, an orthopedic surgeon, saw plaintiff only one time for evaluation purposes and was of the opinion that her work duties caused both ruptured discs. Dr. Wayne C. Page, an occupational medicine physician, examined plaintiff and was also of the opinion her disc injuries were both work-related.

We are required to review the case *de novo* with a presumption of correctness in favor of the findings of the trial court unless we find the preponderance of the evidence is otherwise. T.C.A. § 50-6-225(e)(2).

If there is conflicting medical testimony, the trial judge has discretion to conclude that the opinion of a particular expert should be accepted over that of another expert and that one expert's testimony contains a more probable explanation than another expert's testimony. *Thomas v. Aetna Life & Cas. Co.*, 812 S.W.2d 278 (Tenn. 1991).

We consider first the issues raised by the employer. Kingston contends the history given to Dr. Randy Trudell indicates plaintiff never had a problem until she sat down in a lawn chair at home on April 27th, the day after the alleged date of injury. In this connection, plaintiff testified she did not remember giving the history in that sense but she may have told an emergency room doctor that day that she had trouble getting up out of a chair; she stated she did tell Dr. Trudell that she had difficulty in getting up after sitting down.

There is a great deal of other evidence that conflicts with the argument her first onset of pain started when she attempted to get up from the lawn chair on April 27th. The testimony of witness Sharon Cooper, a co-worker, and husband J. D.

Walker support plaintiff's testimony the onset of pain began on April 26th during the work day. Also Dr. Tyler's history indicated she began having back pain while working on the molding machine.

While Dr. Trudell's history is not explainable the trial court resolved the issue by accepting the conflicting evidence and we are of the opinion that the evidence is not of such quality to preponderate against this finding on causation.

The second issue raised by the employer is the contention plaintiff failed to give proper notice of the injury which occurred on April 26, 1996 and actual notice was not given until the telephone call on June 25th, approximately 60 days after the event.

Our notice statute, T.C.A. § 50-6-201, generally requires that written notice of injury be given within 30 days after the occurrence of an accident unless the employer has actual notice of such event. The statue also provides that failure to comply with the notice requirement may be excused where a reasonable excuse exists.

Since notice in this case was not rendered within the 30 day period, the question arises as to whether the failure to give notice was reasonable under the facts and circumstances of the case.

The employee's reasonable lack of knowledge of the nature and seriousness of injury has been held to excuse the failure to give the 30 day notice. *See e.g., CNA Insurance v. Transou*, 614 S.W.2d 335, 337 (Tenn. 1981); *Davis v. Traveler's Insurance Co.,* 496 S.W.2d 458 (Tenn. 1973); *Brown Shoe Co. v. Reed,* 350 S.W.2d 65 (Tenn. 1961). Likewise, an employee's lack of knowledge that the injury is work-related, if reasonable under the circumstances, must also excuse the failure to give notice within 30 days. *Livingston v. Shelby Williams Industries,* 811 S.W.2d 511 (Tenn. 1991); *Pentecost v. Anchor Wire Corp.,* 695 S.W.2d 183 (Tenn. 1985). It is enough that the employee notifies the employer of the facts concerning the injury of which the employee is aware or reasonably should be aware.

Under the circumstances of the present case, we find it was reasonable for the employee to conclude she could be suffering from a kidney infection since she had previously experienced symptoms of this nature with such physical condition. Although it is evident she later became aware she did not have a kidney infection,

she was not aware she had sustained "an injury" until the telephone call from her doctor on June 25, 1996. We must note that she gave the employer all the pertinent information which she was aware of concerning the event at issue. Also, the delay in notice did not prejudice the rights of the employer in any respect. Thus, we find the delay in giving notice was reasonable under the circumstances.

Plaintiff has raised two issues on appeal. First it is contended the 56% award of disability should be increased. The opinion of medical impairment by various doctors ranged from 10% to 16% for the physical injury and there was evidence of mental impairment ranging from 0% to 20%. We cannot conclude the evidence preponderates against the award fixed by the trial court.

As to the second issue raised by plaintiff, we concur with the finding the second ruptured disc was not work-related. The evidence indicated she had degenerative disc disease and that new complaints of pain did not occur until February 1997, approximately nine months after the date of injury.

The judgment is affirmed. Costs of the appeal are taxed to the employer and insurance carrier.

_____
Roger E. Thayer, Special Judge

CONCUR:

_____
E. Riley Anderson, Chief Justice

_____
John K. Byers, Senior Judge

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

FILED

January 12, 2000

Cecil Crowson, Jr.
Appellate Court
Clerk

JUDY ANN WALKER	)	HAWKINS CIRCUIT
Plaintiff-Appellee	)	No. 7846
	)	No. E 1999-00888-WC-R3 CV
v.	)	
	)	Hon. Ben K. Wexler,
	)	Judge
KINGSTON WARREN CORPORATION	)	
And HARFORD CASUALTY	)	
INSURANCE COMPANY	)	
Defendant-Appellants	)	

JUDGMENT ORDER

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.

Costs on appeal are taxed to the defendant/Appellants and surety, Lynn C. Peterson, for which execution may issue if necessary.

01/12/00