

**IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION PANEL
AT JACKSON**

ANTHONY RAY MORRIS,)	SHELBY CIRCUIT
Plaintiff/Appellant)	Hon. Charles M. Holt
v.)	Special Judge
KEEBLER COMPANY, INC. and)	NO. 02S01-9511-CV-00119
TRANSPORTATION INSURANCE)	(No. 51770 T.D. Below)
COMPANY OF ILLINOIS,)	
Defendants/Appellees)	

FILED

August 12, 1996

**Cecil Crowson, Jr.
Appellate Court Clerk**

For the Appellant:

Joseph K. Willcox
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For the Appellees:

Carol Mills Hayden
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MEMORANDUM OPINION

Members of Panel:

Justice Lyle Reid
Senior Judge John K. Byers
Special Judge Joe C. Loser

**AFFIRMED
AND REMANDED**

BYERS, Senior 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 held that plaintiff failed to provide timely notice as required by TENN. CODE ANN. § 50-6-201 and that he failed to meet his burden of proving that his injury arose in the course and scope of his employment. The plaintiff appeals these findings.

We affirm the judgment of the trial court.

Plaintiff, 28 at the time of trial, worked for defendant as a route salesman. He testified that in early October 1992, he felt "a sudden pain--not pain, but tingling." He testified that he first felt this when his leg hit the ground getting out of the delivery truck he drove for defendant. After the initial onset of symptoms, plaintiff began to feel that his leg was losing strength. At one point early in the same month, his supervisor noticed him limping and asked him about it. Plaintiff reported feeling numbness and tingling in his leg and that he thought he was losing strength in his leg. The supervisor felt his leg and testified that it felt like "mush." Plaintiff did not report any injury or onset of symptoms at work at this time.

Plaintiff testified that his left leg gave out on him in early November while he was shooting baskets. On November 10, 1992, he saw his wife's family practitioner, Dr. Walter Verner. He told Dr. Verner that he had pain in his left thigh and that he had been losing muscle strength in his left leg for about a month. Dr. Verner testified that his notes do not indicate a work-related injury, although that is something that he would normally record. Dr. Verner noted a marked reduction in the plaintiff's deep tendon reflex in his left knee and referred him to Dr. Barry Thompson, a neurologist. Dr. Thompson found left quadriceps weakness and ordered a variety of tests, including an EMG which indicated a possible L4-5 radiculopathy and an MRI which indicated a possible L3 herniated disc on the left. He referred plaintiff to Dr. Joseph Buchignani, a neurosurgeon.

Dr. Buchignani first saw plaintiff on November 24, 1992. He took a history of several weeks of discomfort and weakness in plaintiff's left thigh. No injury or onset of symptoms at work was reported. Dr. Buchignani found 80% weakness of plaintiff's left quadriceps muscle and gave his initial impression as a herniated disc at L3 left. On plaintiff's November 30, 1992 visit, Dr. Buchignani recommended surgery, which was performed on December 4, 1992. He testified that plaintiff recovered well from the surgery but developed a facet syndrome as a result of surgery. He assigned a ten percent permanent impairment to plaintiff's body as a whole under the AMA Guides.

Plaintiff notified his employer of a possible work-related injury on January 4, 1993. He reported that he did not know the time and date of his injury. He identified a long-term disability claim form, dated February 16, 1993, as one he had filled out. The claim form states that he noticed pain and numbness while lifting heavy boxes at work on November 10, 1992 followed by a progressive increase.

Our review is *de novo* on the record accompanied by a presumption that the trial court's findings of fact are correct unless the evidence otherwise preponderates. TENN. CODE ANN. § 50-6-225(e)(2).

We find that the evidence does not preponderate against the trial court's finding that plaintiff failed to provide adequate notice so we do not reach the issue of causation.

Plaintiff argues that his employer received actual knowledge of his work-related injury when he told his supervisor of his difficulties with his leg in early October 1992. However, for an employer to be considered to have actual knowledge in such circumstances, the information must be reasonably calculated to advise an employer that the employee has suffered an injury arising out of and in the course of employment. *Masters v. Industrial Garments Mfg. Co.*, 595 S.W.2d 811, 816 (Tenn. 1980). The trial court found that the plaintiff's discussion with his supervisor did not so advise the defendant, and we find the evidence supports that finding.

Alternatively, plaintiff argues that he was excused from giving notice until he knew the nature and severity of his injury. An employee's failure to provide notice is excused until by reasonable care and diligence it is discoverable and apparent that an injury compensable under the workers' compensation laws has been sustained. *Pentecost v. Anchor Wire Corp.*, 695 S.W.2d 183, 186 (Tenn. 1985). In this case, plaintiff testified to a sudden onset of symptoms at work. At the latest, by November 30, 1992, when surgery was recommended, he knew that he probably had a herniated disc on the left side at L3. He did not give notice until January 4, 1993, more than 30 days after he knew the full extent of his injury. Also, prejudice to the employer is relevant in determining reasonable excuse. *Gluck Brothers, Inc. v. Pollard*, 426 S.W.2d 763, 766 (Tenn. 1968). In this case, the employer was prejudiced because it had no opportunity to arrange for timely and proper medical care until a month after the plaintiff had undergone surgery.

We affirm the judgment of the trial court at the cost of the appellant, and we remand the case to the trial court.

John K. Byers, Senior Judge

CONCUR:

Lyle Reid, Justice

Joe C. Loser, Special Judge