

IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT JACKSON
(November 27, 1996 Session)

FILED

January 23, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

MARY A. MARSHALL,)	SHELBY CIRCUIT
)	
Plaintiff-Appellant,)	Hon. Irma Merrill,
)	Special Judge.
v.)	
)	No. 02S01-9606-CV-00058
BLUE CROSS / BLUE SHIELD OF)	
MEMPHIS and BLUE CROSS / BLUE)	
SHIELD, IPA APPLE PLAN MEMPHIS,)	
ALSO KNOWN AS SOUTHERN)	
HEALTH PLAN, INC.,)	
)	
Defendants-Appellees.)	

For Appellant:

James V. Ball
Memphis, Tennessee

For Appellees:

Robert D. Meyers
Spicer, Flynn & Rudstrom
Memphis, Tennessee

MEMORANDUM OPINION

Members of Panel:

Lyle Reid, Associate Justice, Supreme Court
Joe C. Loser, Jr., Special Judge
Cornelia A. Clark, Special Judge

REVERSED AND REMANDED

Loser, Judge

MEMORANDUM OPINION

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. section 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. In this appeal, the employee contends it was error to summarily dismiss her claim as being barred by Tenn. Code Ann. section 50-6-203, a statute of limitation. As discussed below, the panel has concluded the judgment should be reversed and the case remanded for trial of all issues raised by the pleadings.

The action was commenced by the filing of a complaint and summons on February 24, 1995 seeking workers' compensation benefits for injuries and disabilities arising out of and in the course of the claimant's employment with the defendant, Blue Cross / Blue Shield of Memphis. In particular, the employee claims that she has become permanently disabled from the repetitive trauma of operating a key punch machine.

By their responsive pleading, the defendants deny the existence of the injury and deny that they received timely notice, but do not assert the affirmative defense that the claim is barred by any statute of limitations. The defendants then took the claimant's discovery deposition and interrogated her concerning, among other things, when she first knew her work was causing pain. Her deposition reveals that her pain began in 1992 and was reported to the employer. The employer, however, chose to treat her claim not as one for workers' compensation benefits, but for group health benefits.

On January 18, 1996, the defendants served a pre-trial "Motion to Dismiss" the claimant's claim "pursuant to Rule 41.02 of the Tennessee Rules of Civil Procedure" for "failure to file such cause of action within the time prescribed by Section 50-6-203 of the Tennessee Code Annotated." The motion was, according to the trial judge's order of dismissal, "supported by" the claimant's discovery deposition. The trial judge treated the motion as a Tenn. R. Civ. P. 56 motion for summary judgment, found from the deposition that the claimant "was told in 1992 that she was suffering work related injuries to her wrists, shoulders, neck and back by her physicians (sic) statement to her employer so stating and was told by her employer she did not have a workers' compensation claim," and dismissed the claim as being time-barred.

By Tenn. R. Civ. P. 56.03, summary judgment will lie if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Summary judgment is almost never an option in workers' compensation cases; however, when there is no dispute over the evidence establishing the facts

that control the application of a rule of law, summary judgment is an appropriate means of deciding such issues as whether an action is barred by the applicable statute of limitations or by *res judicata*; whether a party has standing; or whether the court has jurisdiction. Berry v. Consolidated Systems, Inc., 804 S.W.2d 445 (Tenn. 1991).

Appellate review of a summary judgment order is also governed by Rule 56. Downen v. Allstate Ins. Co., 811 S.W.2d 523 (Tenn. 1991). Consequently, there is no presumption of correctness.

The complaint in this case contains a claim that the injury occurred gradually over a period of time and suggests an injury date of February 28, 1994. The answer admits the claimant was employed by the defendant on that date, but we find no assertion that the claim is barred by Tenn. Code Ann. section 50-6-203.

The claimant's discovery deposition contains undisputed evidence that she began having work-related pain in 1992 and that the employer informed her that she was not entitled to workers' compensation benefits. We find in the record no answers to interrogatories, admissions or affidavits.

An action by an employee to recover benefits for an accidental injury, other than an occupational disease, must be commenced within one year after the occurrence of the injury. Tenn. Code Ann. sections 50-6-203 and 50-6-224(1). However, the running of these statutes of limitation is suspended until by reasonable care and diligence it is discoverable and apparent that a compensable injury has been sustained. Hibner v. St. Paul Mercury Ins. Co., 619 S.W.2d 109 (Tenn. 1981). It is the date on which the employee's *disability* manifests itself to a person of reasonable diligence - not the date of accident - which triggers the running of the statute of limitations for an accidental injury. Id.

The record on appeal fails to establish that the claimant's disability manifested itself more than one year before this action was commenced.

A condition which develops gradually over a period of time resulting in a definite, work-connected, unexpected, fortuitous injury, is compensable as an injury by accident. Brown Shoe Co. v. Reed, 209 Tenn. 106, 350 S.W.2d 65 (1961). For the purpose of determining whether the claim is time-barred, the date of injury may be fixed as the date on which the claimant was forced to quit work because of severe pain. Barker v. Home-Crest Corp., 805 S.W.2d 373, 374. From our review, there appears to be a genuine issue as to when that occurred.

We note from the claimant's deposition that the employer may have knowingly, willfully and intentionally caused her medical claim to be paid by its group health insurance provider, instead of workers' compensation, in violation of Tenn. Code Ann. section 50-6-128. If so, the employer may be subject to the penalty provided therein. Since the case is being remanded for trial, counsel for the claimant may wish to inquire further about it.

Accordingly, we conclude the employer is not entitled to judgment as a matter of law. The judgment of the trial court is reversed and the case remanded to the Circuit Court for Shelby County. Costs on appeal are taxed to the defendants-appellees.

Joe C. Loser, Jr., Judge

CONCUR:

Lyle Reid, Associate Justice

Cornelia A. Clark, Judge

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vs.

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and BLUE CROSS/BLUE SHIELD, IPA APPLE
PLAN MEMPHIS, ALSO KNOWN AS SOUTHERN
HEALTH PLAN, INC.,

Defendant/Appellees.

) SHELBY CIRCUIT
) NO. 68101-7 T.D.

)
) Hon. Irma Merrill,
) Special Judge

)
) 02S01-9606-CV-00058

)
) REVERSED AND
) REMANDED.

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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 fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs will be paid by Appellees, for which execution may issue if necessary.

IT IS SO ORDERED this 23rd day of January, 1997.

PER CURIAM

(Reid, J., not participating)