

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
MAY 17, 2006 SESSION

JENNIFER KELLY V. DOLLAR GENERAL CORPORATION

**Direct Appeal from the Chancery Court for Shelby County
No. CH-04-0828-2 Hon. Walter L. Evans, Chancellor**

No. W2005-01891-SC-WCM-CV - Mailed July 5, 2006; Filed September 25, 2006

and

**JENNIFER KELLY V. DOLLAR GENERAL CORPORATION
No. CH-04-0705-1 Hon. Walter L. Evans, Chancellor**

No. W2005-01174-SC-WCM-CV - Mailed July 5, 2006; Filed September 25, 2006

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Tennessee Supreme Court in accordance with Tennessee Code Annotated section 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. On appeal, the employee contends that the trial court erred in granting the employer's motion for summary judgment with regard to the employee's back injury claim based upon the expiration of the statute of limitations. The employee further contends that the trial court erred in dismissing her carpal tunnel claim at the conclusion of trial after finding that the claim was untimely and that the employee failed to provide the employer with proper notice. We conclude that the trial court erred in granting summary judgment regarding the employee's claim for her back injury because there are material issues of fact as to when the employee learned of the nature and extent of her back injury and the relationship of the injury to her work activity. We further conclude that the employee met the statute of limitations and notice requirements with regard to her carpal tunnel injuries. Accordingly, we reverse the judgment of the trial court and remand the case to the trial court for further proceedings consistent with this opinion.

Tenn. Code Ann. § 50-6-225(e)(3) Appeal as of Right;

Judgments of the Circuit Court Reversed and Remanded.

J. S. (Steve) Daniel, Sr. J. delivered the opinion of the court, in which Janice M. Holder, J., and Joe C. Loser, Jr., Sp. J., joined.
William Steven Taylor, Memphis, TN, for the appellant, Jennifer Kelly.
Gregory Dean Jordan, John D. Stevens & Todd D. Siroky, Jackson, TN, for the appellee, Dollar General Corporation.

OPINION I. Facts and Procedural History

Mrs. Jennifer Kelly filed two separate workers' compensation actions against Dollar General Corporation. One of these actions alleged a work-related back injury. A second case was filed by Mrs. Kelly seeking benefits for carpal tunnel injuries. At the trial level both cases were consolidated and remain so for this appeal. Prior to trial, Dollar General Corporation filed motions for summary judgment in both cases. The thrust of both those motions was that Mrs.

Kelly's claims were barred by the statute of limitations and that she had failed to give proper notice of her work-related injuries. The trial court granted the motion for summary judgment on the back injury and denied the motion for summary judgment on the carpal tunnel claim. After a trial of the carpal tunnel claim, the trial court dismissed Mrs. Kelly's claim based on a finding that she had failed to file her claim within one year of the work-related accident and that her claim was time barred under the provisions of Tennessee Code Annotated section 50-6-203. The trial court also found that Mrs. Kelly had failed to give timely notice to her employer of these work-related injuries under the provisions of Tennessee Code Annotated section 50-6-201.

Mrs. Kelly has a high school education and one year of college. After that one year of college in the early 1980s, she married and remained at home as a mother to her stepchildren and entered the work force at a later time. Her work experience has been that of a cashier, stocker, and general retail work. She was employed for eleven years with Fred's Discount Stores as a cashier, office clerk, and stocker prior to her employment with Dollar General Corporation. She began her employment at Dollar General Corporation in 2000 initially as a third key employee. By 2001, Mrs. Kelly had been named an assistant manager and ultimately was promoted to the manager position of the Brunswick Dollar General Corporation store. Her duties included those of a cashier and stocker, unloading trucks, and basically performing any and all duties necessary to operate the store. When Dollar General trucks delivered merchandise, it was the practice of Mrs. Kelly and her employees to unload those trucks by the use of a roller conveyer system from the truck into the stockroom or to the sales floor. This roller system connects together from the truck to the location where the merchandise was to be placed. In January or February of 2001, while in the process of assembling the conveyer system, one section of the conveyer fell to the floor, knocking Mrs. Kelly to the ground and injuring her back. Although her supervisor was present, no injury report was made, and Mrs. Kelly did not believe that she was injured. Two to three weeks after this incident she obtained an appointment with her family physician, Dr. Mike E. Lemonds. After first seeing her on February 21, 2001, Dr. Lemonds treated her conservatively. When Dr. Lemonds next saw Mrs. Kelly on March 9, 2001, some of her back pain had subsided. Dr. Lemonds did not on either of these occasions document whether the injury was work-related as Dr. Lemonds does not actively treat workers' compensation patients. Ultimately Dr. Lemonds obtained an MRI on March 20, 2001 which demonstrated a small central herniated nucleus pulposus, a herniated disk at the L-5, S-1 level. Although obtaining this information in March, Dr. Lemonds admitted that he explained the MRI results to Mrs. Kelly as being a back strain or "slipped disk" but did not relate it to any work activity.

On May 15, 2001, Mrs. Kelly complained of pain her arms, wrists, and elbow. According to Dr. Lemonds, at this point, Mrs. Kelly was complaining of pain that did not allow her to sleep. Dr. Lemonds sought a nerve conductive test which revealed that Mrs. Kelly had bilateral mild to moderate carpal tunnel syndrome which was slightly worse on the left than on the right side.

Ultimately, Mrs. Kelly was told of this diagnosis but was not informed of its permanency or that it might be work-related. Mrs. Kelly, with the aid of medication, continued to work at Dollar General Corporation. In order to perform her duties, she commenced wearing wrist braces and took prescription and over-the-counter medications. Mrs. Kelly was terminated in November 2003 for violating Dollar General Corporation's check cashing policy. Mrs. Kelly apparently authorized another employee to cash a small check out of the store cash register, which violated policy. After her termination she saw Dr. Joseph Boals and Dr. Tewfik Rizk. Dr. Boals first saw

Mrs. Kelly on April 15, 2004, at which time he diagnosed her bilateral carpal tunnel injuries to be permanent and related to her repetitive work activities. According to the affidavit of Mrs. Kelly, this was the first time that she learned that her upper extremity problems were related to her work activities at Dollar General Corporation. Dr. Tewfik Rizk first saw Mrs. Kelly on April 5, 2004, and he diagnosed Mrs. Kelly's herniated disk at L-4, S-1 as being a permanent injury and related that injury to the work-related accident described by Mrs. Kelly as occurring in January or February of 2001. Mrs. Kelly claims this was the first time she knew that her back injury was permanent and work-related.

Two issues are raised by this appeal. The first is whether the trial court erred in granting Dollar General Corporation's motion for summary judgment on the back injury after finding that there was no material issue of fact as to whether the statute of limitations had run on that claim. The second issue for consideration is whether the trial court erred in dismissing the carpal tunnel claim for failure to give notice of the injury as being untimely.

II. Standard of Review

Back Claim

Ordinarily, the standard of review in a worker's compensation case is *de novo* upon the record of the trial court, accompanied by presumption of the correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tennessee Code Annotated section 50-6-225(e)(2) (2005). However, when summary judgment has been granted in a workers' compensation case, the standard of review is governed by Rule 56 of the Tennessee Rules of Civil Procedure. See Downen v. Allstate Ins. Co. 811 S.W.2d 523, 524 (Tenn. 1991). Under Rule 56, a court must "review the record without a presumption of correctness to determine whether the absence of genuine and material factual issues entitle the movant to judgment as a matter of law." Finister v. Humboldt Gen. Hosp. Inc., 970 S.W.2d 435, 437-38 (Tenn. 1998).

Our inquiry involves purely a question of law; therefore, we review the record without a presumption of correctness to determine whether the absence of genuine and material factual issues entitle the movant to judgment as a matter of law. Furthermore, a court must view the evidence in a light most favorable to the non-moving party and must draw all reasonable inferences in that party's favor. Byrd v. Hall, 847 S.W.2d 208, 210-11 (Tenn. 1993). Summary judgment should be granted only when the facts and inferences permit a reasonable person to reach only one conclusion. Carvell v. Bottoms, 900 S.W.2d 23, 26 (Tenn. 1995).

Viewing the evidence in a light most favorable to Mrs. Kelly and drawing all reasonable inferences favorable to her, we conclude that the trial court erred in granting the summary judgment motion. A material issue of fact exists as to when Mrs. Kelly reasonably discovered that she was permanently injured as a result of a work-related accident thereby giving her a right to workers' compensation benefits.

Standard of Review

Carpal Tunnel Claim

The standard of review as to the trial court's decision to dismiss the carpal tunnel syndrome claim after a trial of this matter is *de novo* upon the record of the trial court accompanied with the presumption of correctness, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). The reviewing court is required to conduct an independent examination of the record to determine where the preponderance of the evidence lies. The standard governing appellate review of the findings of fact of a trial judge requires this panel to examine in depth the trial court's factual findings and conclusions. GAF Bldg. Materials v. George, 47S.W.3d 430, 432 (Tenn. Workers' Comp. Panel 2001). Conclusions of law are

subject to a de novo review on appeal without any presumptions of correctness. Niziol v. Lockheed Martin Energy Sys., Inc., 8 S.W.3d 622, 624 (Tenn. 1999). When medical testimony is presented by deposition, this court is able to make its own independent assessment of the medical proof to determine where the preponderance of the evidence lies. Cleek v. Wal-Mart Stores, Inc., 19 S.W.3d 770, 774 (Tenn. 2000).

III. Analysis

Back Injury - Motion for Summary Judgment

The trial court in announcing its decision in granting the motion for summary judgment, stated that, The court finds that the plaintiff knew when her fall at work occurred and, therefore, knew she had suffered an injury in January or February of 2001, that she sought medical care on her own at that time and was told by her doctor the general nature of her back injury, that she suffered continuous pain and discomfort from her back injury from that date to the present time seeking medical help periodically across the years, and that she did not file a lawsuit in this action until April 20, 2004. Therefore, the plaintiff failed to file her lawsuit within the appropriate statute of limitations found in Tenn. Code Ann. § 50-6-203 and § 50-6-224.

The commencement of the running of the statute of limitations is an issue of fact, and summary judgment should be entered cautiously when dealing with such issue. Blocker v. Reg'l Med. Ctr. at Memphis, 722 S.W.2d 660 (Tenn. 1987). In Blocker, the court stated that "[p]articularly in certain kinds of cases summary judgment should be entered cautiously, and this Court has previously emphasized that 'questions involving the commencement of the statute of limitations in workers' compensation cases most often are factual in nature.'" 722 S.W.2d at 662 (quoting McLerran v. Mid-South Stone, Inc., 695 S.W.2d 181, 192 (Tenn. 1985)). In the case of Hibner v. St. Paul Mercury Ins. Co., 619 S.W.2d 109 (Tenn. 1981), the court concluded that the statute of limitations commences to run when an employee was able to understand both her doctor's diagnosis and the nature of her injury.

The summary judgment procedure is not to be regarded as a substitute for a trial of disputed factual issues, and summary judgment is inappropriate to resolve the issue of when an employee becomes knowledgeable of the nature of her injuries and the relationship of those injuries to her work activities. Jones v. Home Indem. Ins. Co., 651 S.W.2d 213 (Tenn. 1983). Our court in Omar v. Robinson, 952 S.W.2d 423, 426 (Tenn. 1997), has provided clear guidance to trial courts in evaluating motions for summary judgment when they stated that, The movant must either affirmatively negate an essential element of the non-movant's claim or conclusively establish an affirmative defense. If the movant fails to negate a claimed basis for the suit, the non-movant's burden to produce evidence establishing the existence of a genuine issue for trial is not triggered and the motion for summary judgment must fail. If the movant successfully negates a claimed basis for the action, the non-movant may not simply rest upon the pleadings, but must offer proof to establish the existence of the essential elements of the claim. Courts must view the evidence and draw all reasonable inferences in the light most favorable to the nonmoving

party. If both the facts and conclusions to be drawn from the facts permit a reasonable person to reach only one conclusion, summary judgment should be granted.

(Citations omitted).

As demonstrated by this record, we conclude that a material factual issue exists as to when Mrs. Kelly was knowledgeable of the extent and nature of her injury. There is also a material issue of fact as to her knowledge of the relationship of the injury to her work activity. Therefore, it was inappropriate for the trial court to grant the summary judgment and dismiss her back claim. The judgment of the trial court is reversed. The case is remanded for a trial upon these issues. Analysis

Carpal Tunnel Claim

Carpal tunnel injuries are repetitive stress injuries which are characterized as accidental injuries. Brown Shoe Co. v. Reed, 350 S.W.2d 65, 69 (Tenn. 1961). Therefore, a suit to recover benefits for this type of injury must be filed within one year of the "accident resulting in the injury." Tenn. Code. Ann. § 50-6-203. The rule is simply stated, but its application is difficult because one must ascertain the date of the accident in order to begin the measured limitation period. Therefore, these injuries and symptoms may appear and worsen over an extended period of time, and such an employee suffers a new injury each day at work because of the repetitive stress. Baker v. Home-Crest Corp., 805 S.W.2d 373 (Tenn. 1991).

In repetitive stress injuries such as carpal tunnel, the "last day worked" is determined to be the clear point from which the limitation period begins to run. This last day of work is the date of the accident that initiates the running of the statute of limitations. Lawson v. Lear Seating Corp., 944 S.W.2d 340, 342 (Tenn. 1997). Therefore, since Mrs. Kelly was terminated in November of 2003 and her carpal tunnel lawsuit was initiated in April of 2004, it was timely.

Mrs. Kelly provided notice to Dollar General Corporation within thirty days of Dr. Joseph Boals' examinations and findings. Tennessee Code Annotated section 50-6-201 requires timely notice, and we conclude that Mrs. Kelly provided such notice upon being informed of the work relationship and nature of her claimed injuries.

We, therefore, conclude that the statute of limitations and notice requirements of Tennessee Code Annotated sections 50-6-201 and 203 were met by Mrs. Kelly for the carpal tunnel injuries and that the trial court erred in dismissing her claim for these reasons.

IV. Conclusion

After careful review of the record, this Panel reverses the trial court's grant of summary judgment as to the back injury and the trial court's dismissal of the carpal tunnel claim on statute of limitations and notice grounds. Both cases are remanded to the trial court for a trial on these issues. Costs of this appeal are assessed against the appellee, Dollar General Corporation, and its sureties in which execution may issue if necessary.

J. S. DANIEL, SENIOR JUDGE

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**Chancery Court for Shelby County
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**No. W2005-01891-SC-WCM-CV - Filed September 25, 2006
and W2005-01174-SC-WCM-CV - Filed September 25, 2006**

ORDER

This case is before the Court upon the motion for review filed by Dollar General Corporation pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), 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.

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 Dollar General Corporation, for which execution may issue if necessary.

PER CURIAM

Holder, J. - Not Participating