

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE

October 22, 2007 Session

LINDA S. MULLINS v. LEAR CORPORATION

**Direct Appeal from the Chancery Court for Claiborne County
No. 14139 Donald R. Elledge, Judge**

Filed March 26, 2008

E2006-02577-WC-R3-WC- Mailed February 20, 2008

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated section 50-6-225(e)(3) for a hearing and a report of findings of fact and conclusions of law. The sole issue presented by this appeal is whether the trial court was correct in awarding benefits for 50% permanent partial disability to a scheduled member, i.e. hearing loss, rather than the body as a whole. We hold that the award should have been apportioned to the body as a whole and therefore capped at two and one half times the anatomical impairment. We modify the judgement accordingly.

**Tenn. Code Ann. § 50-6-225(e) (2005 & Supp. 2007) Appeal as of Right; Judgment of the
Chancery Court Modified**

E. RILEY ANDERSON, Sp. J., delivered the opinion of the court, in which GARY R. WADE, J. and BEN W. HOOPER, II, Sp. J., joined.

Mary Dee Allen, Cookeville, Tennessee, for the appellant, Lear Corporation

Bruce David Fox and John A. Willis , Clinton, Tennessee, for the appellee, Linda Mullins

MEMORANDUM OPINION

Factual and Procedural Background

Linda Mullins began working for Lear Corporation ("Lear"), a manufacturer of automobile seats, in 1987. Prior to that time, she had worked as a dispatcher and secretary for

the Claiborne County Sheriff's Department. She was a high school graduate. She had also taken some classes at Walters State Community College.

Her work for Lear included assembly, welding, press operator, and "robot operator." She described the area in which she worked as very noisy. This was especially true near the press department.

In early 2003, Ms. Mullins noticed a loud ringing sound, primarily in her left ear. She sought treatment for this condition, and eventually ended up in the care of Dr. William Merwin, an otolaryngologist.

Ms. Mullins filed a workers' compensation complaint on June 3, 2003 in Claiborne County, Tennessee alleging a gradual injury of noise induced hearing loss and tinnitus that arose out of and in the course of her employment. Lear answered, denying causation and compensability. On July 28, 2006 the case was tried in Anderson County before the Circuit Court Judge Donald R. Elledge.

Ms. Mullins, aged 57 at the time of the trial, testified she had not missed any work as a result of her hearing loss. She testified that she had problems understanding speech, she often had to ask people who spoke to her to repeat themselves, she was unable to hear a telephone with her left ear, and adjusted the volume of her television set to a level which others found irritating. Asked specifically about the effects of tinnitus, she stated that it interfered with sleep, causing her to awaken "three and four" times per night. She further testified that "It's almost making me insane. It's maddening. I'd give everything I had if my ear would stop ringing."

Dr. Merwin testified by deposition. His diagnosis was sensorineural hearing loss and tinnitus. He opined that both conditions were caused by exposure to noise in the workplace. Dr. Merwin testified that, based upon the American Medical Association Guides, Ms. Mullins had a binaural hearing impairment of 7.8% for hearing loss, and an additional 5% as a result of the tinnitus. During direct examination, he stated that the combined impairments converted to 4% to the body as a whole. On cross-examination, however, Dr. Merwin testified that the correct impairment was 3% to the body as a whole.

Dr. Grady Arnold, also an otolaryngologist, conducted an independent medical examination of Ms. Mullins at the request of Lear. He testified by deposition and agreed that Ms. Mullins had sustained hearing loss and tinnitus. He, however, opined that these conditions were not caused by noise exposure. He based his opinion primarily upon the pattern of her hearing loss, which was relatively "flat" and that her hearing in her left ear was significantly worse than in the right. Dr. Arnold testified that this was unusual for an occupational hearing loss, which generally affects both ears equally. Dr. Arnold also noted that Ms. Mullins had reported a relatively sudden onset of the tinnitus, occurring at a time she was not working. Dr. Arnold considered all of these factors to be inconsistent with a noise-induced problem. Dr. Arnold opined that Ms. Mullins retained a 3.8% binaural hearing impairment. He also assigned a 5% impairment due to tinnitus, for a total impairment of 8.8% of her binaural hearing. This converted to 3% to the body as a whole.

The trial court found for the Ms. Mullins on the issue of causation and awarded 50% permanent partial disability to the hearing of both ears. Lear has appealed, asserting that the trial court erred by assigning Ms. Mullins's permanent partial disability to the hearing of both ears, a scheduled member, rather than to the body as a whole.

Standard of Review

The standard of review of issues of fact is de novo upon the record of the trial court accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (Supp. 2007). When credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge had the opportunity to observe the witness' demeanor and to hear in-court testimony. Humphrey v. David Witherspoon, Inc., 734 S.W.2d 315 (Tenn. 1987). This Court, however, may draw its own conclusions about the weight and credibility to be given to expert testimony when all of the medical proof is by deposition. Landers v. Fireman's Fund Ins. Co., 775 S.W.2d 355, 356 (Tenn. 1989). A trial court's conclusions of law are reviewed de novo upon the record with no presumption of correctness. Ridings v. Ralph M. Parsons Co., 914 S.W.2d 79, 80 (Tenn. 1996).

Analysis

At trial, Lear contested causation. However, the trial court's finding on that issue is not challenged on appeal. The sole issue is whether the award was properly apportioned to the scheduled member, hearing loss, rather than the body as a whole. If to the body as a whole, then the award would be "capped" at two and one-half times the anatomical impairment, by operation of Tennessee Code Annotated section 50-6-241(a)(1)(2005).

The proof at trial showed that Ms. Mullins gradually developed tinnitus and hearing loss as a result of exposure to noise during the course of her employment. The "loss of hearing in both ears" is a scheduled member injury, valued at 150 weeks of benefits, pursuant to Tennessee Code Annotated section 50-6-207(3)(A)(ii)(r)(2005 & Supp. 2007). Tinnitus, however, is not mentioned in the workers' compensation statute. Tennessee Code Annotated section 50-6-207(3)(F)(2005 & Supp. 2007) provides that permanent partial disability other than to a scheduled member shall be apportioned to the body as a whole. Lear contends that tinnitus is an unscheduled injury and should have been apportioned to the body as a whole. Lear further asserts that the tinnitus and hearing loss are concurrent injuries, and therefore the entire award must be apportioned to the body as a whole, pursuant to Tennessee Code Annotated section 50-6-207(3)(C)(2005 & Supp. 2007).¹

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"When an employee sustains concurrent injuries resulting in concurrent disabilities, such employee shall receive compensation only for the injury that produced the longest period of disability..."

Two recent decisions of the Workers' Compensation Appeals Panel have directly addressed the issue of whether tinnitus should be assigned to the scheduled member or to the body as a whole. In Shoulders v. Pasmenco Zinc, Inc., No. M2004-02521-WC-R3-CV, 2006 WL 2716879 (Tenn. Workers' Comp. Panel, August 21, 2006), the panel considered the effects of the condition on the employee, specifically upon his ability to concentrate, in reaching its conclusion that the award in that case was properly assigned to the body as a whole. The same approach was taken in Neal v. TRW Comm. Steering Div., No. M2006-01091-WC-R3-WC (Tenn. Workers' Comp. Panel, October 5, 2007). In that case, the panel stated that:

[T]he apportionment of tinnitus should be determined on a case by case basis. Section 11.2a of the American Medical Association Guides to the Evaluation of Permanent Impairment, Fifth Edition entitled "Criteria for Rating Impairment Due to Hearing Loss" provides:

Criteria for evaluating hearing impairment are established through hearing threshold testing. . . . **Tinnitus** in the presence of unilateral or bilateral hearing impairment may impair speech discrimination. Therefore, add up to 5% for tinnitus in the presence of measurable hearing loss if the tinnitus impacts the ability to perform activities of daily living. (emphasis in the original).

Id. at p. 246.

In our view, where the effects of tinnitus are limited to the impairment of speech discrimination in someone who has a hearing loss, they enhance the hearing loss and should be considered a part of it. In such a case, the tinnitus would be part of the hearing loss and result in a scheduled member injury. Where, however, the impairment rating relating to tinnitus is based upon effects of the condition outside an enhanced loss of hearing, it is not part of the hearing loss and should, in such cases, be apportioned to the body as a whole.

Neal, supra, at *11.

In this case, Ms. Mullins complained of sleep deprivation and stated that the tinnitus was "making me insane." These symptoms are also reflected in the records and testimony of Dr. Merwin. Dr. Merwin testified that he had referred Ms. Mullins to a psychotherapist for those problems; however, the record contains no additional information concerning that referral. Clearly, the effects of tinnitus on Ms. Mullins extended beyond her ability to hear and understand speech. Dr. Merwin assigned a separate impairment for the condition, in addition to the impairment for her hearing loss.

We agree with the reasoning and analysis of Shoulders and Neal. Applying that analysis, we find that the award for Ms. Mullins's hearing loss must be apportioned to the body as a whole.

The allegations of the complaint and the evidence at trial were both to the effect that the hearing loss and the tinnitus were caused by exposure to loud noise in the workplace over many years, and that both conditions manifested themselves at more or less the same time. On that basis, we find that the two injuries occurred concurrently, and a single award should be made in accordance with Tennessee Code Annotated section 50-6-207(3)(C). Dr. Merwin testified that the combined impairment was 3% to the body as a whole. Dr. Arnold assigned the same impairment. We therefore modify the award to the maximum permitted by Tennessee Code Annotated section 50-6-241(a)(1), 7.5% permanent partial disability to the body as a whole.

Conclusion

The judgment is modified to award benefits for 7.5% permanent partial disability to the body as a whole. Costs shall be taxed to Linda S. Mullins, for which execution may issue if necessary.

RILEY ANDERSON, SPECIAL JUSTICE

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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 appellee, Linda Mullins, and her surety, for which execution may issue if necessary.