

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

June 24, 2013 Session

JESSIE UPCHURCH v. GOODYEAR TIRE & RUBBER COMPANY

**Appeal from the Chancery Court for Obion County
No. 29,619 W. Michael Maloan, Judge**

No. W2012-01869-WC-R3-WC - Mailed September 17, 2013; Filed October 18, 2013

The trial court awarded an employee 85% permanent partial disability to both ears. The employer has appealed, arguing that the trial court erred in finding the employee's claim was not barred by the one-year statute of limitations in Tennessee Code Annotated section 50-6-203(b).¹ We affirm the trial court's determination that the employee's claim was timely filed.

**Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right;
Judgment of the Chancery Court Affirmed**

DON R. ASH, SR. J., delivered the opinion of the Court, in which JANICE HOLDER J., and TONY CHILDRESS, SP. J., joined.

Randy N. Chism, Union City, Tennessee, for the appellant, Goodyear Tire & Rubber Company

Jeffrey P. Boyd, Jackson, Tennessee, for the appellee, Jessie Upchurch

¹ This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law Pursuant to Tennessee Supreme Court Rule 51.

OPINION

Factual and Procedural Background

For thirty-nine years, Jessie Upchurch worked as both a bead operator and stock prep-worker at Goodyear Tire & Rubber Company's ("Goodyear") plant in Union City, Tennessee. After accepting a voluntary buyout from Goodyear, Mr. Upchurch retired on July 1, 2009.

On September 11, 2008, Mr. Upchurch filed a written report of his hearing loss injury with Goodyear. Goodyear denied Mr. Upchurch's claim on September 17, 2008, alleging that his injury was reported after the statute of limitations had expired. The next day, Mr. Upchurch filed a request for assistance with the Department of Labor and Workforce Development.

On January 17, 2012, the parties exhausted the benefit review process, and Mr. Upchurch filed his complaint for workers' compensation benefits on February 2, 2012, in the Obion County Chancery Court. In its answer, Goodyear moved to dismiss Mr. Upchurch's complaint on the ground that the one-year statute of limitations for workers' compensation cases had expired. See Tenn. Code Ann. § 50-6-203(b) (2008). Goodyear also alleged that Mr. Upchurch's hearing loss was not work-related and thus not compensable. The trial court later overruled Goodyear's motion to dismiss, and the case proceeded to trial on July 24, 2012.

At trial, Mr. Upchurch testified that he was sixty-five years old, had a high school education, and had only done factory-type work throughout his adult life. Mr. Upchurch said that when he first began working for Goodyear in the 1970s, he was not required to use hearing protection. Mr. Upchurch testified, however, that when Goodyear began offering him hearing protection in the "80s or 90s," he wore hearing protection "every day." Mr. Upchurch described noise level inside Goodyear's factory as "quite loud," louder than the other factories in which he had previously worked, and louder than anything that he had experienced outside his work for Goodyear.

Mr. Upchurch further testified that Goodyear tested his hearing annually and that no one from Goodyear ever notified him of his poor performance on these tests. In fact, Mr. Upchurch testified that a company doctor – a Dr. Eason – informed him in 2003 that his "ears were all right" and that "everything was ok." Dr. Eason imposed no restrictions, and Mr. Upchurch was returned to work. After another hearing test in 2008, Mr. Upchurch saw Dr. Eason again on September 11, 2008. At that time, Dr. Eason opined that Mr. Upchurch's hearing loss was age-related. Although Dr. Eason referred Mr. Upchurch to a hearing

specialist, Mr. Upchurch never saw a specialist because Goodyear refused to pay for the treatment.

Mr. Upchurch testified that he continued to work at Goodyear until he decided to accept Goodyear's buyout offer and retire in 2009. Mr. Upchurch decided to accept the buyout offer to "save what little hearing [he had] left," even though he had initially planned to work until he reached age sixty-five. Mr. Upchurch testified that he has not sought other employment because of his poor hearing. He obtained hearing aids after leaving his job with Goodyear, but he still has "great difficulty hearing." He testified that when he socializes or interacts with people, he "just ha[s] to sit there" because he cannot hear what people are saying.

Mr. Upchurch admitted that he began experiencing ringing in his ears as early as the 1980s and that he thought working in a loud environment could be the cause. He consulted an unidentified physician for the ringing in his ears in 1985. The doctor gave Mr. Upchurch "some medicine," and he returned to work. Mr. Upchurch also admitted experiencing hearing loss beginning in the early 1990s, which became worse over time. Mr. Upchurch again stated that he believed the loud noise inside Goodyear was the cause of his hearing loss.

Lucille Upchurch, Mr. Upchurch's wife, testified that her husband's hearing "progressively got worse" over the course of their marriage. Mrs. Upchurch also testified that when she questioned her husband about the results of the hearing tests administered by Goodyear, Mr. Upchurch always responded that he was informed "it was okay." According to Mrs. Upchurch, she encouraged her husband to retire before he lost the rest of his hearing.

The proof at trial also included the deposition testimony of two otolaryngologists, Dr. Karl Studtmann and Dr. Leonard Wright.² Dr. Studtmann testified that his partner, Dr. Keith Wainscott, first saw Mr. Upchurch in March of 2009 for a complaint of decreased hearing. Dr. Studtmann further testified that Mr. Upchurch denied any significant exposure to noise aside from his work at Goodyear. In May of 2009, Dr. Wainscott opined on a Department of Labor Request for Assistance form that Mr. Upchurch's hearing loss was work-related. Dr. Wainscott was the first physician to inform Mr. Upchurch that his hearing loss was work-related.

Dr. Studtmann also testified that he saw Mr. Upchurch on December 9, 2011, at which time Mr. Upchurch denied having any family history of hearing loss and or any significant noise exposure other than his work at Goodyear. After Dr. Studtmann conducted a physical

² Dr. Studtmann testified that otolaryngology is the medical and/or surgical treatment of problems and injuries involving the ear, nose, and throat.

examination and reviewed Mr. Upchurch's medical records (including an audiogram performed by an audiologist in Dr. Studtmann's office), Dr. Studtmann diagnosed Mr. Upchurch as having "significant difficulty hearing" and "difficulty understanding the words that he does hear." Dr. Studtmann indicated that Mr. Upchurch has "difficulty understanding basic conversation," even when the other party "us[es] a loud voice." Dr. Studtmann further testified that Mr. Upchurch's only "understands 4% of the words [in his right ear] even if they're loud," which results in "extremely poor understanding."

According to Dr. Studtmann, Mr. Upchurch has "no useful hearing" in his right ear and Mr. Upchurch's understanding of words in his left ear is reduced by 28%. Additionally, Dr. Studtmann said that Mr. Upchurch's hearing loss "affects the way he produces words." Dr. Studtmann testified that, based upon Mr. Upchurch's hearing tests, he experienced a "fairly steady drop-off" in his hearing from 1987 to 2003, at which point his hearing loss could be characterized as "profound." Based on Mr. Upchurch's denial of any significant noise exposure other than his work at Goodyear, Dr. Studtmann opined that Mr. Upchurch's hearing loss was most likely caused by "noise exposure through his workplace." Dr. Studtmann then assigned Mr. Upchurch a 57.4% binaural impairment, which equates to a 20% impairment to the body as a whole.

At Goodyear's request, Dr. Leonard Wright evaluated Mr. Upchurch on January 10, 2012. Based on Dr. Wright's testing and his review of Mr. Upchurch's medical records, Dr. Wright assigned a binaural impairment of 69%, or 24% to the body as a whole. Dr. Wright opined Mr. Upchurch had a "significant hearing loss which is communicatively debilitating," and it was "reasonable to assume his employment has contributed a significant portion to this loss." Dr. Wright further opined that, based upon the results of Mr. Upchurch's hearing tests conducted by Goodyear, Mr. Upchurch should have known that he had a hearing problem as far back as 1991. Dr. Wright conceded, however, that Goodyear's records from 1992 and 1993 indicated that Goodyear's medical department informed Mr. Upchurch that his hearing was actually improving in some respects. Dr. Wright acknowledged that even though Mr. Upchurch's hearing was declining, Goodyear told Mr. Upchurch "something different." Dr. Wright also acknowledged that Dr. Eason's 2003 diagnosis concluded that Mr. Upchurch's hearing loss was not work-related.

At trial, the only contested issues were whether Mr. Upchurch's claim was barred by the statute of limitations and, assuming the claim was not barred, the extent of his vocational disability.³ Goodyear argued that Mr. Upchurch's claim was untimely and that Mr. Upchurch's vocational disability was minimal because he was not working and had no plans

³ Before trial, Goodyear argued that Mr. Upchurch's hearing loss was not work-related; however, Goodyear presented minimal evidence to support this argument, and the question of causation has not been raised as an issue on appeal.

to return to work. Mr. Upchurch, however, argued that his claim was timely filed because no one from Goodyear ever told him that his hearing loss was related to, or caused by, his work during his thirty-nine years at the Goodyear plant.

After making its findings of fact, the trial court observed from the bench that the statute of limitations issue presented a “very close” question. The court, however, ruled that Mr. Upchurch’s claim was timely because it found that Mr. Upchurch was unaware that his hearing loss was work-related until Dr. Eason informed him he needed to see a hearing specialist in September of 2008. The trial court noted that Mr. Upchurch was aware that he had a hearing loss. The trial court also acknowledged that Mr. Upchurch “thought” his hearing loss “could” be caused by his work at Goodyear. The court found, however, that because Goodyear’s medical personnel continued to tell Mr. Upchurch that “his ears were okay, go back to work,” Mr. Upchurch did not know that his hearing loss was work-related until Dr. Eason finally instructed him to see a specialist in 2008. Additionally, the trial court found that Mr. Upchurch was receiving medical treatment ordered by the Department of Labor, and that his suit filed on February 2, 2012, was timely. See Tenn. Code. Ann. § 50-6-203(b)(2). The trial court subsequently filed its written judgment, finding that Mr. Upchurch’s hearing loss resulted in an 85% permanent partial disability to both ears.

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 the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). When credibility and weight to be given testimony are involved, considerable deference is given the trial court’s decision when the trial judge had the opportunity to observe the witness’s demeanor and hear in-court testimony. Tryon v. Saturn Corp., 254 S.W.3d 321, 327 (Tenn. 2008). A reviewing court may, however, draw its own conclusions about the weight and credibility to be given expert testimony when the medical proof is by deposition. Glisson v. Mohon Int’l, Inc./Campbell Ray, 185 S.W.3d 348, 353 (Tenn. 2006); Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997). A trial court’s conclusions of law are reviewed de novo upon the record with no presumption of correctness. Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009).

Analysis

The only issue before the panel is whether the one-year statute of limitations contained in Tennessee Code Annotated section 50-6-203(b) precludes an award of benefits

to Mr. Upchurch.⁴ Goodyear contends that Mr. Upchurch knew or should have discovered, through the exercise of reasonable diligence, that he had a hearing loss claim long before he submitted his claim on September 11, 2008. To support this contention, Goodyear cites to Mr. Upchurch's testimony that he began noticing ringing in his ears as early as the 1980s, that he thought it was due to working in Goodyear's Union City facility, and that he noticed his hearing was worsening over time. Goodyear also relies on Mr. Upchurch's acknowledgment that that the work environment at Goodyear's plant was the only loud noise to which he had been exposed. Mr. Upchurch, on the other hand, insists the trial court correctly concluded that his claim was timely because he neither knew nor should have discovered that his hearing loss was work-related until Dr. Eason so informed him in 2008.

It is well settled that workers' compensation claims must be filed within one-year following the occurrence of the accident which caused the injury or, if the employer has paid workers' compensation benefits, within one year following the later of the date of the last authorized treatment or the date the employer ceased to make payments of compensation to or on behalf of the employee. Tenn. Code. Ann. § 50-6-203(b).⁵ Because the discovery rule applies, the one-year limitation period “does not commence until [the employee] discovers or, in the exercise of reasonable diligence, should have discovered that he has a claim.” Gerdau Ameristeel, Inc. v. Ratliff, 368 S.W.3d 503, 508 (Tenn. 2012). Determining the time at which an employee has actual or constructive knowledge of his or her workers' compensation claim is a question of fact to which a presumption of correctness attaches on appeal. See Banks v. United Parcel Serv., Inc., 170 S.W.3d 556, 562 (Tenn. 2005).

Hearing loss injuries are usually gradual in nature, and “there is generally no particular event that should make it obvious to the employee that his or her hearing loss is work-related.” Hill v. Whirlpool Corp., No. M2011-01291-WC-R3-WC, 2012 WL 1655768, at *4 (Tenn. Workers' Comp. Panel May 10, 2012). Therefore, determining the date on which the injury occurred can be difficult “[b]ecause gradually occurring injuries are a new

⁴ Although the extent of vocational disability was an issue at trial, neither party raises that issue on appeal.

⁵ “In those instances where the employer has not paid workers' compensation benefits to or on behalf of the employee, the right to compensation under this chapter shall be forever barred, unless the notice required by § 50-6-202 is given to the employer and a benefit review conference is requested on a form prescribed by the commissioner and filed with the division within one (1) year after the accident resulting in injury.” Tenn. Code. Ann. § 50-6-203(b)(1). However, “[i]n those instances where the employer has paid workers' compensation benefits, either voluntarily or as a result of an order to do so, within one (1) year following the accident resulting in injury, the right to compensation is forever barred, unless a form prescribed by the commissioner requesting a benefit review conference is filed with the division within one (1) year from the latter of the date of the last authorized treatment or the time the employer ceased to make payments of compensation to or on behalf of the employee.” Tenn. Code. Ann. § 50-6-203(b)(2).

injury each day.” Bldg. Materials Corp. v. Britt, 211 S.W.3d 706, 712 (Tenn. 2007). Consequently, “it is unfair to start the running of the statute of limitations on the date the injury was first reported if the employee continues to work after having given notice of his injury.” Id. “To do so could place the employee in a trap by either forcing the employee to submit a claim before he or she is actually disabled or allowing the statute of limitations to bar the employee's claim if the employee waits to file a claim.” Jacks v. East Tennessee Mech. Contractors, Inc., No. E2008-02501-WC-R3-WC, 2009 WL 2589093, at *7 (Tenn. Workers’ Comp. Panel Aug. 24, 2009).

In Hardy v. Goodyear Tire & Rubber Co., No. W2012-00396-SC-WCM-WC, 2013 WL 1932193, at *8 (Tenn. Workers’ Comp. Panel May 9, 2013), another appeals panel reviewed a strikingly similar hearing loss case. The employee in Hardy had also worked for Goodyear Tire & Rubber Company for almost thirty-nine years before retiring in 2009. Id. at *2. Like Mr. Upchurch, the employee worked in a noisy environment and, for a least a decade, was not provided hearing protection. Id. The employee gradually developed hearing loss and ringing in his ears in 1991, but he never missed work because of that condition or as a result of any subsequent hearing loss. Id. The employee testified that he first learned that his hearing loss was work-related after being examined by Dr. Studtmann in 2010. Id. In affirming the trial court’s ruling that the claim was timely, the panel explained:

Employee's gradual hearing loss occurred during his thirty-nine-year career working for Employer. Employee candidly acknowledged that he noticed ringing in his ears as early as 1991, that he later noticed his loss of hearing, and that both conditions worsened over the years. Employee also testified that he thought these problems might have been caused by his noise exposure at work. However, the proof also establishes that during his lengthy career no one at Employer told Employee his hearing loss was work-related. Employee testified that he was not medically diagnosed with a permanent, work-related hearing loss until after his retirement and after he had filed his claim for benefits. * * * [T]he company doctor here sent Employee back to work, told him everything was fine, and wrote notes on company records indicating that Employee's hearing loss was not work-related. The trial court's refusal to charge Employee, a non-physician, with knowledge that his hearing loss was work-related is entirely reasonable in light of this proof.

Id. at *9. See also Douglas v. Goodyear Tire & Rubber Co., No. W2008-00533-SC-WCM-WC, 2009 WL 2567777 (Tenn. Workers' Comp. Panel Aug. 19, 2009) (finding that the statute of limitations began to run when the employee was informed by a physician that his hearing loss was work-related).

Much like Hardy, Mr. Upchurch's hearing loss occurred during his lengthy career at Goodyear. Mr. Upchurch candidly acknowledged that he noticed ringing in his ears in the 1980s and that he thought the loud working environment could be the cause. Mr. Upchurch also admitted that he went to a physician in 1985 about his hearing. Although Mr. Upchurch suspected that his hearing loss could be work-related, Mr. Upchurch relied upon the assurances of Goodyear's medical personnel who repeatedly told Mr. Upchurch through the years that his "ears were all right" and that "everything was ok."

Moreover, Dr. Wright – Goodyear's expert witness – conceded that Goodyear's records from 1992 and 1993 revealed that Goodyear's medical staff told Mr. Upchurch that his hearing was improving. Dr. Wright admitted that, although Mr. Upchurch's hearing was declining, Goodyear was "telling him something different." Dr. Wright also acknowledged that Dr. Eason diagnosed Mr. Upchurch in 2003 with hearing loss *unrelated* to his work at Goodyear. Finally, although Goodyear's hearing tests indicated a decrease in Mr. Upchurch's hearing, none of these tests connected Mr. Upchurch's hearing loss to the excessive noise inside Goodyear's plant nor did these tests indicate that Mr. Upchurch might have a compensable claim.

The trial court weighed the evidence and accredited Mr. Upchurch's testimony that he first learned his hearing loss was work-related when he was informed by his doctor in 2008. Because this is an issue that turns on the witnesses' credibility, the trial court's ruling is given considerable deference on appeal. Accordingly, we cannot conclude that the trial court erred in rejecting Goodyear's statute of limitation defense and in considering the merits of Mr. Upchurch's claim.

Conclusion

For the foregoing reasons, we affirm the trial court's judgment. Costs of this appeal are assessed to Goodyear, for which execution may issue if necessary.

DON R. ASH, SENIOR JUDGE

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

JESSIE UPCHURCH v. GOODYEAR TIRE & RUBBER COMPANY

**Chancery Court for Obion County
No. 29,619**

No. W2012-01869-WC-R3-WC - Filed October 18, 2013

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 fact 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 Appellant, Goodyear Tire & Rubber Company, and its surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM