IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
January 26, 2009 Session

CHARLES A. RUFFNER v. UNION CARBIDE CORP.

Direct Appeal from the Chancery Court for Roane County
No. 15755 Frank V. Williams III, Judge

Filed March 17, 2009

1 **No. E2008-01873-WC-R3-WC Mailed February 23, 2009**

Twenty-six years after his retirement, the employee sought workers' compensation benefits from his employer for hearing loss. The trial court denied the claim. Because the evidence does not preponderate against the holding of the trial court as to causation, the judgment is affirmed.

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

GARY R. WADE, J., delivered the opinion of the court, in which DONALD P. HARRIS, SP. J., and VERNON NEAL, SP. J., joined.

James D. Busch and Loring E. Justice, Knoxville, Tennessee, for the appellant, Charles Ruffner.

Robin M. King, Oak Ridge, Tennessee, for the appellee, Union Carbide Corporation.

MEMORANDUM OPINION

On March 6, 2007, Charles Ruffner ("Employee") filed suit against Union Carbide Corporation ("Employer") for workers' compensation benefits as a result of hearing loss. The Employee, who was born December 6, 1926, was hired by the Employer in 1961 to work at the Oak Ridge National Laboratory, operating and maintaining control equipment associated with the various experiments conducted there. Because he was exposed to noise from generators and other motors as a part of his job responsibilities, he was provided hearing protection throughout the term of his employment. When, at trial, the Employee was asked to describe the level of the noise, he answered, "[Y]ou can't even communicate. You can't even talk. To talk to someone next to you, you better have a good pad and pencil close or be a real good lip reader because it would be too much noise." He estimated that the high noise level continued for two to four hours a day, five days per week. The Employee, who did not indicate any ratable hearing loss when tested in 1979, retired in 1981 after approximately twenty-one years on the job.

On February 28, 2007, some twenty-six years after his retirement, the Employee, who was experiencing difficulty in making conversation, talking on the telephone, and hearing the television,

made an appointment with Dr. Charles Gregory Sewall for a hearing examination. An audiogram was conducted and the Employee, then eighty-one years of age, was diagnosed with tinnitus, which he described at trial as mainly "ringing in the ears." Because Dr. Sewall indicated that his condition may have been caused by noise, the Employee asked his attorneys to notify the Employer of his potential claim.

The background of the Employee indicates a term of service in the United States military where he was from time to time exposed to small arms fire and field artillery. The record of the trial indicates that he experienced symptoms of tinnitus when, after college, he was in the broadcasting business. The Employee testified that the condition worsened during his tenure with the Employer, explaining that his symptoms "slowly increased" until his retirement. Since that time, the Employee, who has resided in a rural area he calls "the jungle," has been exposed to the considerable noise levels generated by his tractor and bush hog. He regularly uses this equipment to mow some fifteen acres of open field. A guitar player and musician, the Employee described his condition as having "almost destroyed all my enjoyment for music."

Dr. Sewall, an ear, nose, and throat specialist, testified by deposition. During his examination of the Employee, he documented a medical history which included the industrial noise exposure for twenty-one years at Union Carbide and the Employee's complaints of moderate hearing loss, particularly in regard to telephone conversations and the audio of his television. According to Dr. Sewall, the Employee described his condition as involving a "brushing noise" in both ears. He performed an audiogram on the Employee which indicated "moderate to moderately severe sensorineural hearing loss"[1] in both ears, particularly at high frequencies, which suggested that the condition may have been noise induced. Dr. Sewall also found evidence of "presbycusis," hearing loss due to the aging process, "in the higher frequencies." It was his opinion that a portion of the Employee's hearing loss could have been related to the noise exposure during his term of employment with the Employer. Dr. Sewall placed the Employee's impairment at "52%, with a whole person [rating] of 18%." He ascribed 3% for tinnitus and 49% for loss of hearing. In making those assessments, Dr. Sewall utilized the American Medical Association Guidelines, 5th Edition. He prescribed hearing aids as the only helpful course of treatment.

Dr. Sewall explained that prolonged noise exposure generally has a more profound effect in the earlier part of an individual's life, before the age of forty, than in the years thereafter. He commented, however, that he could not rule out other sources or noise exposure since the Employee's retirement as causes for the hearing loss. After having been made aware of the result of the Employee's 1979 audiogram, Dr. Sewall remarked that the earlier test did not "preclude [the]

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[1] According to the contributors to Wikipedia, the root cause of sensorineural (or sensory) hearing loss lies in the vestibulocochlear nerve, the inner ear, or central processing centers of the brain. Abnormalities in the hair cells of the organ Corti in the cochlea is the primary cause of this kind of hearing loss but prolonged exposure to loud noise may also be a cause. Sensorineural hearing loss, Wikipedia, http://en.wikipedia.org/wiki/Sensorineural_hearing_loss (last visited Jan. 30, 2009); but see Flores v. State, No. 14-06-00813-CR, 2008 WL 4683960 at *2 n.3 (Tex. App. Oct. 23, 2008) (discussing the unreliability of Wikipedia). See also American Speech-Language Hearing Ass'n, Type, Degree, and Configuration of Hearing Loss, http://www.asha.org/public/hearing/disorders/types.htm (last visited Jan 30, 2009) (discussing the many potential causes of sensorineural hearing loss).

probability that a portion of his sensorineural loss measured in 2007" was not due to noise exposure. He explained that it was not possible to determine how much of his hearing loss was due to the noise exposure, "I can't say 50%[,] I can't say 90%[,] I can't say 10%." While under cross-examination, Dr. Sewall also conceded that he could not ascertain "whether it was due to small arms fire [or] explosions" incident to his military service, his "years in the lab," or other causes; however, he expressed the view "you can't go through what this gentleman's gone through over his life span and not have some of your hearing loss related to noise exposure." Dr. Sewall further admitted that the audiogram of the Employee was merely "suspicious," rather than "classic[,] for noise-induced hearing loss." Because there were no audiograms from 1979 through 2007, he acknowledged that he could not determine the source of the progression of the hearing loss, whether to the aging process or otherwise.

At the conclusion of the trial, the trial court denied recovery, holding that the Employee had failed to carry his burden of proof as to causation. The trial court described the nature of the injury as gradual due "to perhaps noises and perhaps other things," such as age. Based upon the proof introduced, the trial judge expressed an inability to establish "what loss, if any, should be attributed to Union Carbide, when it appears that there are things that have taken place during the intervening twenty-six years that could account for some, if not all, [of the loss]." The trial judge ascribed the delay by the Employee in making the claim as a factor in his assessment of the "weight or credence" of the testimony.

In this appeal, the Employee contends that the trial court erroneously denied compensability. In response, the Employer submits that the trial court properly held that the passage of twenty-six years and other circumstances have so obscured the indicia of causation that any award of benefits would qualify as conjecture.

Standard of Review

In workers' compensation cases, the standard of review is "de novo upon the record . . . accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." Tenn. Code Ann. § 50-6-225(e)(2) (2008). In such cases, the reviewing court must conduct an in-depth examination of the trial court's factual findings and conclusions. Wilhelm v. Krogers, 235 S.W.3d 122, 126 (Tenn. 2007). When the trial court has seen and heard the witnesses, considerable deference must be afforded any factual determinations. Tryon v. Saturn Corp., 254 S.W.3d 321, 327 (Tenn. 2008). The same deference need not be afforded findings based upon documentary evidence, such as depositions. Glisson v. Mohon Int'l, Inc./Campbell Ray, 185 S.W.3d 348, 353 (Tenn. 2006). Indeed, where medical testimony is presented by deposition, this Court may independently assess the medical proof to determine where the preponderance of the evidence lies. Crew v. First Source Furniture Group, 259 S.W.3d 656, 665 (Tenn. 2008). Nevertheless, the testimony of expert witnesses must be considered in conjunction with the testimony of an employee as a lay witness. Thomas v. Aetna Life & Cas. Co., 812 S.W.2d 278, 283 (Tenn. 1991). Reviewing courts afford no presumption of correctness to any conclusions of law. Perrin v. Gaylord Entm't Co., 120 S.W.3d 823, 826 (Tenn. 2003).

Applicable Law

Any employee seeking to recover workers' compensation benefits must prove that the injury both arose out of and occurred in the course of the employment. See Tenn. Code Ann. § 50-6-102(12) (2008). "The phrase 'arising out of' refers to the cause or origin of the injury and the phrase 'in the course of' refers to the time, place, and circumstances of the injury." Crew, 259 S.W.3d at 664. An injury arises out of employment when there is a causal connection between the conditions under which the work is required to be performed and the resulting injury. Fritts v. Safety Nat'l Cas. Corp., 163 S.W.3d 673, 678 (Tenn. 2005). Except in the most obvious cases, causation must be established by expert medical evidence. Glisson, 185 S.W.3d at 354. Although evidence of causation may not be speculative or conjectural, "absolute medical certainty is not required, and reasonable doubt must be resolved in favor of the employee." Id. Accordingly, "benefits may be properly awarded to an employee who presents medical evidence showing that the employment could or might have been the cause of his or her injury when lay testimony reasonably suggests causation." Id.; see also Fitzgerald v. BTR Sealing Sys. N. Am. – Tenn. Operations, 205 S.W.3d 400, 404 (Tenn. 2006). It is, therefore, appropriate for a trial judge to award benefits based upon medical testimony that an incident 'could be' the cause of an injury, "when the trial judge also has heard lay testimony from which it may reasonably be inferred that the incident was in fact the cause of the injury." Hill v. Eagle Bend Mfg., Inc., 942 S.W.2d 483, 487 (Tenn. 1997).

Equally well-settled is the principle that an employer takes an employee "as is" and assumes the responsibility of having a pre-existing condition aggravated by a work-related injury which might not affect an otherwise healthy person. Hill, 942 S.W.2d at 488. Thus, an employer is "liable for disability resulting from injuries sustained by an employee arising out of and in the course of his employment even though it aggravates a previous condition with resulting disability far greater than otherwise would have been the case." Baxter v. Smith, 364 S.W.2d 936, 942-43 (Tenn. 1961). Tennessee law likewise recognizes that a worker may sustain a compensable gradual injury, such as a hearing loss, as the result of continual exposure to the conditions of employment. See Cent. Motor Express, Inc. v. Burney, 377 S.W.2d 947, 948-50 (Tenn. 1964). This is so because there is no requirement that the injury be traceable to a definite moment in time or triggering event in order to be compensable. Trosper v. Armstrong Wood Prods., Inc., ___ S.W.3d ___, 2008 WL 5396844, at *5 (Tenn. 2008); Banks v. United Parcel Serv., Inc., 170 S.W.3d 556, 561 (Tenn. 2005). Gradually occurring injuries have been described as a new injury each day at work. Crew, 259 S.W.3d at 668; Barker v. Home-Crest Corp., 805 S.W.2d 373, 376 (Tenn. 1991). Employees are "relieved from the notice requirement until they know or reasonably should know that their injury was caused by their work . . . ." Banks, 170 S.W.3d at 561; see Tenn. Code Ann. § 50-6-201(b)(1) (providing the employee must give notice to the employer within thirty days after the employee "knows or reasonably should know" the injury is work related).

Analysis

In this instance, the Employee relies in great measure upon Clark v. Nashville Machine Elevator Co., 129 S.W.3d 42, 47 (Tenn. 2004). In that case, the employee suffered a heart attack while driving his company vehicle at the end of a physically intensive shift. A physician testified that it was "possible" that the physical demands of the job caused the heart attack. Our supreme court held that an award of benefits "may properly be based upon medical testimony to the effect that the employment could have or might have caused the workers injury." Id. at 48-49. Further, in

Woodland Memorial Park, Inc. v. Keith, 70 S.W.3d 691, 696 (Tenn. 2002), our supreme court held as follows:

> If, upon undisputed proof, it is conjectural whether disability resulted from a cause operating within petitioner's employment, or a cause operating without employment, there can be no award. If, however, equivocal medical evidence combined with other evidence supports a finding of causation, such an inference may nevertheless be drawn by the trial court under the case law.

Indeed, absolute certainty is not required because medical proof is often inconclusive. That our workers' compensation statute is remedial in nature suggests that doubts about the validity of the claim should generally be construed in a manner favorable to the employee. See Tenn. Code Ann. § 50-6-116 (2008). Because the Employer has failed to refute the claim by other medical evidence or through lay witnesses, the Employee here claims an entitlement to benefits and submits that any perplexity on the part of the trial court over the allocation or the apportionment of the loss to the Employer was not a sound basis for the denial of the claim.

Understandably, the trial court struggled in this instance with how to assess the passage of twenty-six years between the retirement of the Employee and his first treatment for hearing loss. The relatively advanced age of the Employee at the time of the claim was also unusual. Hearing loss may result from exposure to high levels of noise, but is inextricably related to the aging process. A musician, the Employee has lived in a rural area during his retirement and for years has regularly driven a tractor and utilized a bush hog, significant sources of noise, to mow some fifteen acres of his lands. On the other hand, the Employee was subjected to a noisy environment during his twenty-one years of employment at Union Carbide – to such an extent that he required a protective hearing device. Further, hearing loss due to noise, according to Dr. Sewall, is more common in middle age.

While the medical testimony established the possibility that the hearing loss could have been the result of noise exposure at work, the trial judge made note that some of the Employee's testimony qualified as "interesting." For example, the Employee talked about his life "in the jungle" and made references to his pets as Jane, Boy, and Cheetah, characters in old Tarzan films. He also joked about his work ethic, stating "Just thinking of work makes me tired." He also remarked, "I work on the tractor no longer than I have to because that brings on work."

The trial judge, who saw and heard his testimony first hand, appeared bemused by some of the testimony, but, in fairness, did express his belief that the Employee was not "trying" to be deceptive. The trial court observed that "age was a factor" in the assessment of the Employee's testimony, explaining that "it's a matter of recall." Although we must somewhat read between the lines as to any credibility assessment, the trial court, while observing the demeanor of the Employee, chose not to classify his testimony as corroborative of the "could be" medical assessment by Dr. Sewall. The observation that the Employee was "interesting," taken in context with the denial of the claim, suggests a lack of accreditation of his testimony. Further, Dr. Sewall described the Employee's condition as merely "suspicious" for noise induced hearing loss but not classically so. As stated, when the credibility and the weight to be given in court testimony are at issue, the trial

judge, who has the opportunity to observe the demeanor of a witness, must be afforded considerable deference. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002).

In summary, the trial court appears to have discounted the Employee's corroborating testimony as to causation, perhaps not due to any untrustworthiness of the Employee, but simply as a result of his difficulties in recollection. More than a quarter of a century of time had passed since his employment at Union Carbide. Absent corroboration that the noise at his workplace was a cause of the hearing loss, Dr. Sewall's testimony, which established only a possible link to the employment, cannot support an award of benefits.[2] In order to qualify for workers' compensation benefits, an employee must suffer an "injury by accident arising out of and in the course of the employment . . . ." Tenn. Code Ann. § 50-6-102(12). The term "arising out of" employment refers to causation. Reeser v. Yellow Freight Sys., Inc., 938 S.W.2d 690, 692 (Tenn. 1997). In our view, the trial court, by the denial of the claim, properly considered the other possible sources of the hearing loss, the 1979 audiogram indicating no ratable hearing impairment, and the long delay between the retirement and manifestation of any hearing loss.

Conclusion

Accordingly, the judgment of the trial court is affirmed. Costs are taxed to the Employee, Charles Ruffner, for which execution may issue if necessary.

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GARY R. WADE, JUSTICE

[2] The question of whether tinnitus should be apportioned to the body as a whole or to the scheduled member depends upon the effect of the tinnitus – specifically, whether it only effects the function of the ears or whether it effects the body as a whole. Neal v. TRW Comm'l Steering Div., No. M2006-01091-WC-R3-WC, 2007 WL 5231840 (Tenn. Workers' Comp. Panel, Nov. 6, 2007); Shoulders v. Pasminco Zinc, Inc., No. M2004-02521-WC-R3-CV, 2006 WL 2716879 (Tenn. Workers' Comp. Panel, Aug. 21, 2006). In Shoulders, the panel held that because the tinnitus impaired the employee's ability to concentrate, it impaired the body as a whole. In Pasminco, the panel held that when the tinnitus only enhances hearing loss, it should be apportioned only to the scheduled member. Because this issue was secondary in the case before us, it is pretermitted. We would acknowledge, however, that the case is very similar to Mullins v. Lear Corp., No. E2006-02577-WC-R3-WC, 2008 WL 802348 (Tenn. Workers' Comp. Panel, Mar. 26, 2008) wherein the panel held that tinnitus that caused sleep deprivation and some apparent psychological problems should have been apportioned to the body as a whole. Here, the Employee testified to sleep deprivation but did not claim any psychological problems.

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AT KNOXVILLE, TENNESSEE

CHARLES A. RUFFNER V. UNION CARBIDE CORP.
Roane County Chancery Court
No.15755

Filed March 17, 2009

No. E2008- 01873-WC-R3-WC

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 appellant, Charles Ruffner, and her surety, for which execution may issue if necessary.