IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
October 22, 2008 Session

BYRON D. SMALLEN v. ARVINMERITOR, INC., ET AL.

Direct Appeal from the Chancery Court for Loudon County
No. 10812 Frank V. Williams, III, Chancellor

Filed March 5, 2009

No. E2007-02179-WC-R3-WC - Mailed February 3, 2009

In this workers' compensation action, the employee, Byron Smallen, alleged that he had sustained a gradual hearing loss as a result of exposure to noise in the workplace. Ownership of his employer had changed approximately one year prior to his last day worked. The trial court awarded 50% permanent partial disability to the hearing of both ears, and assigned liability to the new owner of the business, International Muffler. That party has appealed, contending that the trial court incorrectly applied the last injurious exposure rule. The appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated § 50-6-225(e)(3) for a hearing and a report of findings of fact and conclusions of law. We affirm the judgment.

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

DONALD P. HARRIS, SR. J., delivered the opinion of the court, in which GARY R. WADE, J., and WALTER C. KURTZ, SR. J., joined.

Kristi M. Davis, Knoxville, Tennessee, for the appellant, International Muffler Company.

John P. Dreiser, Knoxville, Tennessee, for the appellee, Byron D. Smallen.

Debra L. Fulton and Beverly D. Nelms, Knoxville, Tennessee, for the appellee, ArvinMeritor, Inc.

MEMORANDUM OPINION

Factual and Procedural Background

This is a hearing loss case. Byron Smallen began working for Maremont, an automobile parts manufacturer in 1975. Maremont was owned by ArvinMeritor from 1975 until March 2006. At that time, the Maremont facility was sold to International Muffler. Mr. Smallen continued to work at

Maremont until February 2007, and stopped working there in February 2007, due to a strike which was ongoing at the time of the trial.

Mr. Smallen testified that the noise level in the plant was essentially the same in 2007 as it was when he began working there. At some point in time, he began to use hearing protection while working in the facility. Maremont apparently began to test its employees' hearing in 1981. The results of those tests showed a gradual decrease in Mr. Smallen's hearing. The evidence revealed that Mr. Smallen had a high frequency hearing loss of unknown etiology as early as 1975, when he was rejected for military service due to his hearing. Both employers argued at trial that some or all of his hearing loss could be attributed to the pre-existing condition combined with the aging process. That argument has not been made on appeal.

The medical evidence consisted of the depositions of three physicians, all otolaryngologists, who conducted independent medical evaluations of Mr. Smallen. Dr. James Denneny examined Mr. Smallen at the request of his attorney. He believed that Mr. Smallen had a noise-induced hearing loss caused by his exposure to noise in the workplace. Dr. Denneny assigned a binaural hearing impairment of 32.5% based upon the A.M.A. Guidelines, Fifth Edition. He testified that exposure to the same noise level for the eleven months Mr. Smallen worked after the change of ownership could produce additional hearing loss. He reviewed audiograms taken from 1981 through 2005 and stated they clearly indicated there had been a progression of Mr. Smallen's hearing loss. Dr. Denneny testified that the results of audiograms taken in October 2005, compared to the results of subsequent tests, including those taken at the direction of Drs. John Jernigan and Taite Seals, did not reveal additional hearing loss.[1]

Dr. Jernigan conducted an independent medical evaluation at the request of International Muffler. He testified that Mr. Smallen had a work-related hearing loss which resulted in a binaural impairment of 17.8%. He stated that differences between audiograms performed in October 2005 and October 2006 were within the range test/retest reliability. He acknowledged that exposure to noise in the workplace after March 2006 could potentially have caused increased hearing loss.

Dr. Taite Seals also conducted an independent medical evaluation at the request of International Muffler. He assigned a binaural hearing impairment of 22.8%. Based upon a comparison of tests from 2003 to 2007, he did not believe that Mr. Smallen had a significant decrease in hearing during that time. He also considered the differences between tests performed in 2005 and thereafter to be within the margin of error for testing. During Dr. Seals' testimony, the following dialogue took place:

[1]According to Dr. Denneny, the audiogram upon which Dr. Jernigan based his evaluation was not reliable because it indicated a significantly lesser loss of hearing when compared to a series of audiograms taken both before and after this test.

MS. FULTON[2]: And would you expect that if this patient were exposed to the same levels of noise after March of '06 that he was exposed to prior to March of '06, that that exposure after March '06 would contribute to the ultimate damage, if any, caused by noise?

DR. SEALS: It would be such a slow progression, the noise exposure would be such a slow progression, that yes, it would contribute, but it would be very minute.

MS. FULTON: There would be a contribution to his impairment as a result of noise exposure at work after March '06.

DR. SEALS: Correct.

The trial court found that Mr. Smallen had sustained a work-related hearing loss; that the last injurious exposure rule was applicable, and that International Muffler, the later employer, was liable for the entire award of 50% permanent partial disability to the hearing of both ears. International Muffler has appealed, contending that the trial court erred by applying the last injurious exposure rule.

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) (2008). 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. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). Where the issues involve expert medical testimony that is contained in the record by deposition, determination of the weight and credibility of the evidence necessarily must be drawn from the contents of the depositions, and the reviewing court may draw its own conclusions with regard to those issues. Bohanan v. City of Knoxville, 136 S.W.3d 621, 624 (Tenn. 2004); Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997); Elmore v. Travelers Ins. Co., 824 S.W.2d 541, 544 (Tenn. 1992). A trial court's conclusions of law are reviewed de novo upon the record with no presumption of correctness. Perrin v. Gaylord Entm't Co., 120 S.W.3d 823, 826 (Tenn. 2003); Ganzevoort v. Russell, 949 S.W.2d 293, 296 (Tenn. 1997).

Analysis

Tennessee Code Annotated section 50-6-304 (2008) provides that "[w]hen an employee has an occupational disease, the employer in whose employment the employee was last injuriously exposed to the hazards of the disease . . . shall alone be liable, for the occupational disease . . . ."

[2]Debra L. Fulton is counsel for ArvinMeritor, Inc.

"Under this statute, it is not the last employment nor the last exposure to the hazards of the disease which imposes liability; it is the last such exposure that is injurious to the employee." Morell v. ASARCO, Inc., 611 S.W.2d 830, 831 (Tenn. 1981). Although hearing loss is not an occupational disease, a similar rule, referred to as the "last injurious injury" rule, applies to gradually occurring injuries. Mahoney v. NationsBank of Tenn., N.A., 158 S.W.3d 340, 346 (Tenn. 2005)(overruled on other grounds, Building Materials Corp. v. Britt, 211 S.W.3d 706, 713 (Tenn. 2007). The rule "operates to place liability for an employee's disability on the last employer if working conditions at the last employer aggravated the employee's pre-existing injury." Id. The rule was summarized by the Court in Mahoney as follows:

> [A] subsequent employer is responsible for a gradually-occurring injury that began at a prior employer [if] the employee's condition was aggravated or advanced due to working conditions at the second employer. It is not enough that the employee continued to suffer from the effects of an injury while employed by a second employer; rather, to be compensable, there must be a progression of the employee's injury.

Id. (citations omitted). See also Ferrell v. Cigna Prop. & Cas. Ins. Co., 33 S.W.3d 731, 735-6 (Tenn. 2000).

International Muffler contends that the trial court erred by applying the last injurious exposure rule to the facts of this case. It notes that all three doctors testified, to a greater or lesser extent, that audiograms performed after the change of ownership of Maremont did not show a significant change in Mr. Smallen's hearing, or were within the margin of error for such testing. It also notes that Mr. Smallen himself testified that he did not notice any deterioration of his hearing after March 2006. On that basis, it contends that the evidence does not demonstrate a progression of Mr. Smallen's hearing loss after the change of ownership.

International Muffler cites Huffaker v. St. Mary's Health Sys., Inc., No. E2005-02428-WC-R3-WC, 2006 WL 2522141 (Tenn. Workers' Comp. Panel Sept. 1, 2006) and Garland v. St. Mary's Health Sys., Inc., No. E2005-01512-WC-R3-WC, 2006 WL 709054 (Tenn. Workers' Comp. Panel March 21, 2006) in support of its position. In those cases, the employees developed an allergy to latex while working for the employer. In each case, the trial court held that the last injurious exposure rule did not apply to the facts, and assigned liability to the earlier employer, and in each case the Workers' Compensation Appeals Panel affirmed. See also, Buckingham v. Fidelity and Guaranty Ins. Co., No. M2006-01587-WC-R3-WC, 2007 WL 3120710 (Tenn. Workers' Comp. Panel Oct. 25, 2007). Unlike the present case, however, in each of those cases, there was affirmative testimony was that the condition continued, but did not worsen, during subsequent employments.

In this case, the trial court relied upon the testimony of Dr. Seals that if Mr. Smallen continued to be exposed to the same level of noise after the change of ownership, there would also continue to be a slow progression of his hearing loss, though the amount of additional damage would be minute. The Supreme Court addressed similar evidence in an occupational disease case, Oman Const. Co. v. Bray, 583 S.W.2d 303 (Tenn. 1979). In Oman, the employee developed silicosis as a result of exposure to silica dust in the workplace over a period of twenty years. Id. at 305. He had

worked for the last employer for only two days before he was unable to continue due to the effects of the disease. Id. The evidence showed that he had been exposed to silica dust during the two days he worked for the last employer. Id. at 306. The Court stated that it is not the last employment nor the last exposure to the hazards of the disease which imposes liability; it is the last such exposure that is injurious to the employee. Id. The only doctor to testify said that the significance of the employee's exposure to silica during the two days he worked for his last employer was "each day was a contributing day and that was just the last one he could make it through." Id. In affirming the trial court's finding that the last employer was responsible for the employee's disease, the Court quoted the following from Haynes v. Feldspar Producing Co., 222 N.C. 163, 22 S.E.2d 275 (1942): "'last injuriously exposed' means any exposure which proximately augments the disease to any extent, however slight." Id.

We believe that a similar analysis would apply to gradually occurring injuries and, thus, to our evaluation of the evidence in this case. Dr. Seals testified that if Mr. Smallen was exposed to the same level of noise after March 2006 that he had previously been exposed to, there would be "a slow progression" of his hearing loss, "but it would be very minute." Dr. Jernigan testified continued exposure to noise could "potentially" result in additional hearing loss. Dr. Denneny said that such exposure was "capable of producing injury." Dr. Denneny testified that the audiograms taken after October 2005 did not reveal an increased hearing loss. Drs. Seals and Jernigan stated that the testing showed a slight increase, but that the change was within the margin of error of the testing equipment and procedure.

While the evidence is open to interpretation, the trial court concluded that Mr. Smallen sustained some additional hearing loss as a result of his exposure to noise in the workplace after the March 2006 change in ownership. In light of the medical evidence, we are not able to find that the evidence preponderates against the trial court's finding. Thus, we are of the opinion the trial court correctly applied the "last injurious injury" rule to the facts of this case.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to the appellant, International Muffler Company, and its surety, for which execution may issue if necessary.

_____

DONALD P. HARRIS, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE, TENNESSEE

BYRON D. SMALLEN V. ARVINMERITOR, INC. ET. AL.
Loudon County Chancery Court
No. 10812

Filed March 5, 2009

No. E2007- 02179-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, International Muffler Company, and its surety, for which execution may issue if necessary.