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

JAMES M. JACKS v. EAST TENNESSEE MECHANICAL CONTRACTORS, INC.

Direct Appeal from the Circuit Court for Anderson County
No. A7LA0557 Donald R. Elledge, Judge
Filed August 24, 2009

No. E2008-02501-WC-R3-WC Mailed July 21, 2009

The employee filed a workers' compensation complaint against his employer for hearing loss and tinnitus, injuries which he claimed had occurred gradually over his nearly four years of working as a truck driver. Shortly before trial, the employee voluntarily dismissed his tinnitus claim but proceeded with his hearing loss claim. The trial court awarded the employee compensation for permanent partial hearing loss and the Employer appealed. Upon referral, the Special Workers' Compensation Appeals Panel, sitting in accordance with Tennessee Code Annotated section 50-6-225(e)(3), affirms.

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

GARY R. WADE, J., delivered the opinion of the court, in which E. RILEY ANDERSON, SP. J., and DONALD P. HARRIS, SR. J., joined.

Aundreas W. Smith, Nashville, Tennessee for the appellant, East Tennessee Mechanical Contractors, Inc.

George H. Buxton, Oak Ridge, Tennessee for the appellee, James M. Jacks.

MEMORANDUM OPINION

Facts and Procedural Background

James M. Jacks (the "Employee"), who was 60 years old at the time of trial, worked as a truck driver for East Tennessee Mechanical Contractors, Inc. (the "Employer") from April of 2004 through February of 2008. His job duties included driving trucks, changing tires, and re-fueling heavy equipment at the Department of Energy's K-25, Y-12, and X-10 sites in Oak Ridge. During the course of his employment, he was exposed to a variety of loud noises, including heavy equipment operations, gunfire from a firing range, truck engines without exhaust systems, truck tire-changing,

and hoe ram rock-breaking. He discovered that he was suffering from hearing loss when his family began to notice that he talked loudly and turned the sound of the television to a high volume. Further, the Employee experienced difficulty hearing transmissions on the two-way radios used at work and often was unable to hear the presentations at weekly safety meetings. Gary Ellison, a weapons repairman for Wackenhut Services at the Department of Energy's central training facility at Oak Ridge, confirmed that the Employee routinely refueled vehicles near the firing range. Boyd Kitts, a former operations manager for the Employer, testified that the Employee also worked around unusually loud noises in the mechanic shop.

The Employee testified that he first told a physician that he was experiencing signs of hearing loss in September of 2004, when he was treated for pneumonia by Dr. Christopher Sewell, but that at that time he believed that his condition had been caused by the illness. He first notified the Employer that the hearing loss might be work-related on August 17, 2006. Six days later, the Employee underwent a physical examination offered by the Building Trades Union to employees working at the Department of Energy's Oak Ridge facility. In a letter dated October 12, 2006, the examining physician confirmed that the Employee's "hearing test showed hearing loss, and the pattern is typical for hearing damage caused by exposure to noise." Moreover, the Employee's hearing exam showed that the hearing loss was possibly related to his employment.

On January 9, 2007, the Employee sought an examination from Dr. John Jernigan, a board-certified otolaryngologist, whom the Employee selected from a panel of physicians provided by the Employer pursuant to Tennessee Code Annotated section 50-6-204(a)(4)(A). The Employee informed Dr. Jernigan, whose deposition was introduced into evidence at trial, that he had experienced a gradual hearing loss for several years, but that the problem had become more noticeable during the two years prior to his visit. Dr. Jernigan conducted a physical and hearing examination that indicated that the Employee had hearing loss in both ears, with the loss greater in the left ear than the right. He testified that an audiometric evaluation established that "that there was at least a component of noise-induced injury to the inner ear." Specifically, the Employee's hearing loss "was predominantly in the high frequency range . . . which is a classic pattern . . . in noise-induced hearing loss." It was Dr. Jernigan's opinion that although ear fragility varies among patients, an individual's exposure to a noise level of 80 decibels for eight hours a day, five days a week would be hazardous. In accordance with the American Medical Association Guidelines, Fifth Edition, Dr. Jernigan assigned the Employee a 9.4 percent hearing loss impairment to the right ear and a 24.4 percent hearing loss impairment to the left ear, with a binaural figure of 11.9 percent. Because the Employee also complained of tinnitus,[1] Dr. Jernigan assigned the Employee an additional three percent impairment to the body as a whole.

In February 2007, the Employer hired Manual Feliciano, a noise level expert employed by Allied Consultants, to accompany the Employee during one work day and conduct a noise exposure test. Feliciano recorded the Employee's workplace noise levels on February 21, 2007, through two monitors, one placed on the Employee's body and the other placed in the cab of his truck. During

[1] Tinnitus is a "ringing, buzzing, roaring, or booming" in the ears that is typically associated with hearing loss. Stedman's Medical Dictionary 1992 (28th ed. 2006).

the period of observation, which included a brief work stoppage due to inclement weather, the Employee and Feliciano went to the central training facility but did not encounter gunfire from the firing range, the sound of truck engines without exhaust systems, or the breaking of rock with a hoe ram. Further, the Employee was not required to change any tires or operate any compressors or pneumatic wrenches on that date. On the day that he accompanied the Employee, Feliciano recorded noise levels in an average range of 47.2 decibels to 76.5 decibels, with a time-weighted average of 72.6 decibles and a peak level of 141 decibels. The loudest noise that he recorded during the day was the closing of a truck door and hood. According to Feliciano, a time-weighted noise average of 90 decibels or more over an eight-hour day is considered injurious to employees under both Occupational Safety and Health Administration (OSHA) and Tennessee Occupational Safety and Health Administration (TOSHA) standards, while 85 decibels is considered injurious to employees under Department of Energy standards. Feliciano testified, therefore, that the recorded noise levels on the day of the test were not hazardous. He also stated, however, that testing on only one day was a "shot in the dark," and the only way to test the noise levels of an average workday would be to conduct studies over multiple days.

The Employee filed a workers' compensation claim on October 4, 2007, almost fourteen months after he had first notified the Employer of his hearing loss, seeking recovery for permanent hearing loss and tinnitus. A permanent hearing loss in both ears is a scheduled member injury valued at 66 2/3 percent of the average weekly wages during 150 weeks. Tenn. Code Ann. § 50-6-207(3)(A)(ii)(r) (2008). Tinnitus is an unscheduled injury and therefore apportioned to the body as a whole. Tenn. Code Ann. § 50-6-207(3)(F). Thirteen days prior to trial, the Employee withdrew his claim for tinnitus and voluntarily dismissed that portion of the complaint.

The Employer contends that the Employee was aware of his work-related hearing loss as early as September of 2004 when he was treated by Dr. Sewell, his family physician, for pneumonia. The Employer argues, therefore, that the Employee failed to provide timely notice of his injury, first making his hearing loss known to the Employer on August 17, 2006, almost two years later. The Employee submits that the first time that he was informed by a medical professional that his hearing loss was permanent was during his examination by Dr. Jernigan on January 9, 2007.

At trial, counsel for the Employer attempted to impeach the Employee's testimony with statements the Employee made during a discovery deposition that purportedly indicated his belief, as early as September of 2004, that his hearing loss was work-related. The Employer contends that the deposition testimony contains a detailed account of the Employee's complaints to Dr. Sewell that suggests the Employee thought his hearing loss was related to noise exposure at his place of employment. This deposition testimony, however, was never entered into evidence. During the cross-examination of the Employee, the Employee's attorney objected to the reading of large portions of uncontradictory testimony from the deposition transcript into the record. The trial court, which sustained the objection, made the following observations to counsel for the Employer:

> There's nothing that you said here or read here that contradicts anything [the Employee] has said. That's not the proper use of a deposition. If you're going to ask

> him about inconsistent statements, I will allow you to ask about inconsistent statements. I will not allow you to continue to read his deposition on things he's just testified to, because it's totally consistent."

Later in the cross-examination, the Employer's attorney questioned the Employee as to whether he had told Dr. Sewell that he suffered from work-related hearing loss. The trial court sustained an objection by the Employee's counsel on the ground that the testimony was repetitious. The Employer's attorney again referenced the Employee's allegedly inconsistent deposition testimony during closing argument. The trial court observed that the Employee's deposition was not in proof. Although the trial court acknowledged that the deposition could have been filed as an exhibit during the course of the trial, it ruled that the Employer could not submit the document after the close of the proof. As a result, the Employee's discovery deposition is not a part of the trial record.

At the conclusion of trial, the trial court found that the Employee had sustained permanent hearing loss arising out of and in the course of his employment, that the Employer received timely notice of the injury, and that the medical proof established that the Employee had a 75 percent permanent partial disability for loss of hearing, a scheduled injury. The trial court accredited the Employee's unrebutted testimony that he was exposed to loud noises on a consistent basis during the course of his employment. While finding that Feliciano was also credible, the trial court gave little weight to his testimony, concluding that one day of noise-level testing did not provide a true representation of the Employee's work conditions. For example, Feliciano's tests did not record weapons being fired, hoe ram operations, or tires being changed by pneumatic wrenches and compressors, and the loudest noise that he recorded was the closing of a truck door and hood. The trial court further found that the Employer had received timely notice of the injury, because the Employee had first discovered that his hearing loss was both permanent and likely related to his employment when he saw Dr. Jernigan in January 2007.

In this appeal, the Employer advances the following arguments: (1) the trial court erred by excluding portions of the Employee's discovery deposition from evidence; (2) the trial court erred by finding that the Employee provided the Employer with a timely notice of his injury; (3) the trial court erred by finding that the Employee filed his claim within the applicable statute of limitations; (4) the trial court erred by finding that the Employee's hearing loss was caused by his employment; (5) the trial court erred by allowing the Employee to voluntarily dismiss his claim of work-related tinnitus prior to trial, thereby resulting in a single award for an injury to a scheduled body part rather than for an injury to the body as a whole; and, (6) the 75 percent permanent partial disability award for hearing loss was excessive.

Standard of Review

In Tennessee workers' compensation cases, review of a trial court's findings of fact is de novo, accompanied by a presumption of correctness of the finding, unless the evidence preponderates otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2008); Wilhelm v. Krogers, 235 S.W.3d 122, 126 (Tenn. 2007). "This standard of review requires us to examine, in depth, a trial court's factual findings and conclusions." Galloway v. Memphis Drum Serv., 822 S.W.2d 584, 586 (Tenn. 1991) (citing Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 675 (Tenn. 1991)). When the trial court

has seen and heard in-court testimony, we must give considerable deference to its factual findings as to credibility or its assessment as to the weight to be given to that testimony. Trosper v. Armstrong Wood Prods., 273 S.W.3d 598, 604 (Tenn. 2008); Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). 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). On questions of law, our standard of review is de novo with no presumption of correctness. Wilhelm, 235 S.W.3d at 126 (citing Perrin v. Gaylord Entm't Co., 120 S.W.3d 823, 826 (Tenn. 2003)). "Although workers' compensation law must be construed liberally in favor of an injured employee, it is the employee's burden to prove causation by a preponderance of the evidence." Crew v. First Source Furniture Group, 259 S.W.3d 656, 664 (Tenn. 2008).

Analysis

1. Exclusion of Employee's Discovery Deposition

The Employer argues that the trial court erred by excluding portions of the Employee's discovery deposition from evidence. The Employer construes the trial court's ruling as limiting its use of the deposition to cross-examination. The Employer also argues that the trial court's ruling was contrary to Rule 32.01(2) of the Tennessee Rules of Civil Procedure, which states that "[t]he deposition of a party . . . may be used by an adverse party for any purpose," and asserts that the deposition would have demonstrated that the Employee had knowledge that his hearing loss was work-related in September of 2004.

Based upon our review of the transcript, we believe that the Employer has misinterpreted what actually occurred during the course of the trial. During the cross-examination of the Employee, the trial court sustained an objection to the reading of large portions of the Employee's deposition that were consistent with his in-court testimony. The trial judge made the following observation: "There's nothing that you said here or read here that contradicts anything he has said. That's not the proper use of a deposition. That's just simply taking up the Court's time. If you're going to ask him about inconsistent statements, I will allow you to ask about inconsistent statements." Contrary to the Employer's assertion, the trial court did not limit the use of the Employee's deposition to cross-examination. In fact, the trial court specifically stated that "[o]f course a deposition can be used for any purpose," acknowledging that at that time it was "being used to cross-examine the witness."

The use of a deposition is subject to the applicable rules of procedure and evidence. The introductory sentence of Rule 32.01 provides that "[a]t the trial . . . , any part or all of a deposition, so far as admissible under the Tennessee Rules of Evidence applied as though the witness were then present and testifying, may be used against any party . . . ." Tenn. R. Civ. P. 32.01 (emphasis added). Rule 30.03 provides that "[e]xamination and cross-examination of witnesses may proceed as permitted at the trial under the Tennessee Rules of Evidence." Tenn. R. Civ. P. 30.03. Rule 611(a) of the Tennessee Rules of Evidence permits courts to "exercise appropriate control over the presentation of evidence and conduct of the trial when necessary to avoid abuse by counsel." Tenn. R. Evid. 611(a). It is, therefore, within the trial court's discretion to limit the examination of a witness when the counsel's questioning is repetitious and concerns facts that have already been established. See Lester v. State, 370 S.W.2d 405, 409-10 (Tenn. 1963); Hale v. State, 281 S.W.2d 51, 58 (Tenn. 1955); see also Neil P. Cohen et al., Tennessee Law of Evidence § 6.11[3][b], at 6-118

(5th ed. 2005).

When reading parts of the Employee's deposition testimony into the record, counsel for the Employer effectively restated much of the Employee's in-court testimony. Under these circumstances, the trial court acted within its discretion by limiting the Employer's use of the deposition to those portions, if any, that were inconsistent with the in-court testimony. See Tenn. R. Evid. 613(b) (permitting extrinsic evidence of a prior inconsistent statement by a witness for impeachment purposes); Davis v. Hall, 920 S.W.2d 213, 216-17 (Tenn. Ct. App. 1995) ("In order for a statement to be used to impeach a witness, the statement must be inconsistent with the statement given at trial." (emphasis added)). Despite being given the opportunity to do so, the Employer's attorney did not question the Employee about any specific inconsistent statements during cross-examination. Moreover, the trial court appropriately refused to consider the portions of the deposition transcript to which the Employer's attorney made reference during closing argument. At that time, the proof was closed. Parties are limited to the evidence presented during the course of a trial. See State v. Sutton, 562 S.W.2d 820, 823 (Tenn. 1978); Russell v. State, 532 S.W.2d 268, 271 (Tenn. 1976). Finally, the Employer failed to make an offer of proof in order to preserve the evidence for appeal. Thus, we are unable to determine whether the Employee's deposition testimony concerning his visit to Dr. Sewell in September of 2004 would have affected the result of the trial had it been admitted into evidence.

2. Notice

The Employer argues that the trial court erred by finding that the Employee had provided timely notice of his hearing loss. It contends that the Employee informed his family physician that he suffered from work-related hearing loss in September of 2004 but did not notify the Employer of the injury until August 17, 2006, which was well beyond the thirty-day period provided in Tennessee Code Annotated section 50-6-201. In response, the Employee contends that the first time that he learned from a physician that his hearing loss was permanent and caused by his employment was on January 9, 2007, several months after he notified his Employer that his impairment might be work-related.

The Employer and the Employee agree that the Employee's hearing loss occurred continuously and gradually during his employment with the Employer. Tennessee Code Annotated section 50-6-201(b) (2008), which governs the notice requirement when an employee's injury is gradually occurring, provides as follows:

> (b) In those cases where the injuries occur as the result of gradual or cumulative events or trauma, then the injured employee or the injured employee's representative shall provide notice of the injury to the employer within thirty (30) days after the employee:
>
> (1) Knows or reasonably should know that the employee has suffered a work-related injury that has resulted in permanent physical impairment; or

> (2) Is rendered unable to continue to perform the employee's normal work activities as the result of the work-related injury and the employee knows or reasonably should know that the injury was caused by work-related activities.

"Thus, employees [who suffer gradually occurring injuries] are relieved from the notice requirement until they know or reasonably should know that their injury was caused by their work and that the injury has either impaired them permanently or has prevented them from performing normal work activities." Banks v. United Parcel Serv., Inc., 170 S.W.3d 556, 561 (Tenn. 2005). Additionally, "an employee who sustains a gradually-occurring injury may be unsure of the cause of his or her injury, and therefore relieved of the notice requirement, until the diagnosis is confirmed by a physician." Id. (citing Whirlpool Corp., 69 S.W.3d at 169-70; Pentecost v. Anchor Wire Corp., 695 S.W.2d 183, 186 (Tenn. 1985)).

Here, the Employee's hearing loss neither caused him to miss work nor prevented him from performing his job duties. Thus, the Employee was relieved from the notice requirement until he knew or reasonably should have known that his hearing loss was both work-related and a permanent physical impairment. See Tenn. Code Ann. § 50-6-201(b)(1). Whether the Employee had such knowledge before being treated by Dr. Jernigan on January 9, 2007, is a question of fact. See Banks, 170 S.W.3d at 562.

As noted, there is no evidence in the record to establish that the Employee informed Dr. Sewell in 2004 that his hearing loss was caused by his employment. Further, the trial court accredited the Employee's testimony that he was unaware his hearing loss was a permanent impairment caused by his employment until being treated by Dr. Jernigan. Even assuming the Employee's discovery deposition shows that he was aware in September of 2004 that his hearing loss was work-related, the Employer does not argue, and there is no evidence in the record to suggest, that the Employee knew that his hearing loss was a permanent impairment prior to January 2007. Accordingly, the evidence does not preponderate against the trial court's finding that the Employee provided the Employer with timely notice of his gradually occurring hearing loss.

3. Statute of Limitations

In a related argument, the Employer submits that the Employee's claim is barred by the one-year statute of limitations set out in Tennessee Code Annotated section 50-6-203 because the limitations period allegedly began to run in September of 2004. 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) (2008). Gradually occurring injuries are considered "accidental" injuries even though it is difficult to attribute the employee's injury to a single incident. Lawson v. Lear Seating Corp., 944 S.W.2d 340, 341 (Tenn. 1997). There is difficulty, therefore, in determining the date on which a gradual injury occurred. "Because gradually occurring injuries are a new injury each day, . . . 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." Bldg. Materials Corp. v. Britt, 211 S.W.3d 706, 712 (Tenn.

2007). 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. Id.

In assessing the claims of an employee with a gradually occurring injury, Tennessee courts have used the last-day-worked rule to establish the date on which the statute of limitations begins to run. Britt, 211 S.W.3d at 712; see also Crew, 259 S.W.3d at 669-70; Lawson, 944 S.W.2d at 342; Barker v. Home-Crest Corp., 805 S.W.2d 373, 375-76 (Tenn. 1991). Under this rule, the date that the employee is prevented from working due to his injury controls. Crew, 259 S.W.3d. at 670; Britt, 211 S.W.3d at 712; Lawson, 944 S.W.2d at 343; Barker, 805 S.W.2d at 375. This rule is consistent with the proposition that an employee who suffers from a gradually occurring injury sustains a new injury each day that he or she works. It also provides incentive for an employee to report his or her claim to their employer and promotes "the spirit and purpose of the workers' compensation system" by not unfairly barring an employee's claim due to a running of the statute of limitations. Britt, 211 S.W.3d at 712.

Here, the Employee provided notice of his hearing loss to the Employer on August 17, 2006, was treated by Dr. Jernigan on January 9, 2007, filed his workers' compensation complaint on October 4, 2007, and continued to work for the Employer until February of 2008 when the Employer's contract at Oak Ridge ended. Thereafter, the Employee continued as a truck driver with the replacement contractor hired by the Department of Energy. At no time during his employment was the Employee prevented from working due to his hearing loss.

In Barnett v. Earthworks Unlimited, Inc., 197 S.W.3d 716 (Tenn. 2006), the Supreme Court considered a case in which the employee suffered from carpal tunnel syndrome, a gradually occurring injury. The employee did not miss any work due to his injury, but his employment terminated when he was laid off due to a lack of work. The employee filed his claim for workers' compensation benefits approximately six months after his last day worked. At issue was whether the employee's claim for workers' compensation benefits was barred by the statute of limitations. The Court held that the last-day-worked rule applied even though the employee was not forced to miss work due to his injury, reasoning that "the last day worked, regardless of the reason for leaving work, is the last day the employee was exposed to the work activity that caused the injury." Id. at 721.[2] Under Barnett, the limitations period for the Employee's claim here would not have begun until the last day that he worked for the Employer in February of 2008. Accordingly, the statute of limitations does not bar the Employee's claim, and the trial court properly considered its merits.

4. Causation

The Employer next argues that the trial court erred by ruling that the Employee's hearing loss was caused by his employment. The Employer points to the following facts to support its argument: (1) Dr. Jernigan knew only that the Employee was a truck driver but did not know details about his specific work environment; (2) the Employee failed to inform Dr. Jernigan that he was exposed to

[2] Although Barnett was overruled by Britt on another point of law, the case still stands for the proposition that the last-day-worked rule will apply to gradually occurring injuries even when the employee did not miss work due to his injury.

hazardous noises while participating in activities outside of his workplace such as volunteer firefighting, woodworking, hunting, and operating a chain saw, farm equipment, and power tools; (3) the Employee, while undergoing a Department of Transportation physical examination on December 7, 2006, signed a statement that he did not suffer from any hearing disorders; (4) Feliciano, the Employer's noise level expert, recorded noise levels lower than that which Dr. Jernigan testified would cause a person to sustain hearing loss; (5) the Employee did not hire an expert to conduct noise-level testing of his workplace; and (6) Dr. Jernigan testified that he could not state with a reasonable degree of medical certainty that the Employee's hearing loss was caused by his employment.

The Employee responds that he sufficiently established causation. He points to Dr. Jernigan's expert medical testimony that his hearing loss was likely noise-induced and "could have been caused" by the hazardous noise levels at the place of employment, as well as his own lay testimony and that of other employees concerning the numerous hazardous noises that he routinely encountered while working for the Employer. Based upon this evidence, the Employee argues that the trial court properly inferred that his hearing loss was caused by his employment. He also challenges the results of the tests conducted by Feliciano, noting that Feliciano acknowledged that a more accurate way to ascertain the actual noise levels at the workplace would have been to conduct testing over a longer period of time and asserting that the testing date was not representative of a typical work day.

The plaintiff in a workers' compensation case has the burden of proving every element of his or her claim, including causation, by a preponderance of the evidence. Tindall v. Waring Park Ass'n, 725 S.W.2d 935, 937 (Tenn. 1987). Except in the most obvious cases, causation must be established through expert medical testimony. Orman, 803 S.W.2d at 676. However, "the testimony of expert witnesses must be considered in conjunction with the testimony of an employee as a lay witness." Trosper, 273 S.W.3d at 604. Although proof of causation cannot be speculative or conjectural, absolute medical certainty is not required and any reasonable doubt must be resolved in favor of the employee. Id.; White v. Werthan Indus., 824 S.W.2d 158, 159 (Tenn. 1992). "It is entirely appropriate for a trial judge to predicate an award on medical testimony to the effect that a given incident 'could be' the cause of the employee's 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); see also Orman, 803 S.W.2d at 676; Clarendon v. Baptist Mem'l Hosp., 796 S.W.2d 685, 688 (Tenn. 1990).

In its findings of fact, the trial court accredited the substantial, unrebutted testimony that the Employee had driven a truck and was exposed throughout the course of his employment to a variety of loud noises. The trial court also observed that Dr. Jernigan had attributed at least a portion of the Employee's hearing loss to noise exposure and had assigned a greater percentage of medical impairment to the Employee's left ear than his right ear, which was consistent with his left ear being closest to the door of the truck while he was driving. The trial court specifically determined that the noise-level testing by the Employer on February 21, 2007, did not provide a true representation of

the Employee's work conditions. Although the trial court found Feliciano to be a credible witness, it also observed that Feliciano himself had characterized the one-day test as a "shot in the dark."

In summary, Dr. Jernigan's expert medical testimony indicated that the Employee's hearing loss was noise-induced and could have been caused by his employment. Further, there was credible lay testimony that the Employee was regularly exposed to loud noises at his place of work. The evidence, therefore, does not preponderate against the trial court's finding that the Employee's hearing loss was attributable to his employment.

5. Dismissal of Tinnitus Claim

The Employer also submits that the trial court erred by allowing the Employee to voluntarily dismiss his claim of work-related tinnitus prior to trial. It contends that the Employee established a sufficient basis in his complaint to prove tinnitus but withdrew that claim in an effort to have his injury apportioned to a scheduled member rather than to the body as a whole, thereby avoiding the statutory cap on benefits. The Employer asserts that the Employee should not be allowed to disregard his tinnitus injury in order to receive greater permanent partial disability benefits.

The "loss of hearing in both ears" is a scheduled member injury, valued at 66 and 2/3 percent of the employee's average weekly wages during 150 weeks. Tenn. Code Ann. § 50-6-207(3)(A)(ii)(r). Tinnitus is not mentioned in the workers' compensation statute and, in consequence, is apportioned to the body as a whole. See Tenn. Code Ann. § 50-6-207(3)(F). The Employer contends that the Employee's hearing loss and tinnitus are concurrent injuries and that, accordingly, he may only receive compensation for the injury that produced the longer period of disability. See Tenn. Code Ann. § 50-6-207(3)(C). The Employer argues, therefore, that any benefits awarded to the Employee must be apportioned to the body as a whole and capped at one and one-half times the medical impairment rating as set forth in Tennessee Code Annotated section 50-6-241(d)(1)(A) (2008).

When dealing with concurrent hearing loss and tinnitus injuries, panel opinions have distinguished between tinnitus that exacerbates the employee's hearing loss and tinnitus that affects the employee in other ways. See, e.g., Mullins v. Lear Corp., No. E2006-02577-WC-R3-WC, 2008 WL 802348, at *5 (Tenn. Workers' Comp. Panel Mar. 26, 2008); Neal v. TRW Commercial Steering Div., No. M2006-01091-WC-R3-WC, 2007 WL 5231840, at *5 (Tenn. Workers' Comp. Panel Nov. 6, 2007). If an employee's tinnitus only adds to his or her hearing loss, then the employee has a single compensable injury that is apportioned as a scheduled hearing loss injury. In contrast, if the effects of an employee's tinnitus extend beyond the loss of hearing to include other symptoms, then the employee has two concurrent injuries and the hearing loss and tinnitus are both apportioned to the body as a whole. The limited record in this instance precludes any determination of whether a tinnitus injury should be apportioned to a scheduled member or to the body as a whole. Because the Employee voluntarily nonsuited his tinnitus claim, the record contains no evidence to support it other than Dr. Jernigan's three percent impairment rating.

It is well-established that a plaintiff is master of his suit and may voluntarily dismiss a cause of action without prejudice by filing a written notice of dismissal prior to trial and serving a copy upon all parties. Tenn. R. Civ. P. 41.01(1). The Employer, arguing that the trial court erred by granting the Employee's pre-trial motion to voluntarily dismiss his tinnitus claim, appears to rely on ADVO, Inc. v. Phillips. 989 S.W.2d 693 (Tenn. Workers' Comp. Panel 1998). That case, however, did not involve a voluntary dismissal and provides no support for granting an exception to Rule 41.01. In Phillips, the employee suffered a single, compensable injury to her rotator cuff and argued that the remedial nature of the workers' compensation statute should permit her to choose whether the injury should be apportioned to the arm, a scheduled member, or to the body as a whole. The panel ruled that a claimant "does not have the right to select whether the injury is treated as an injury to a scheduled member or as an injury to the body as a whole." Phillips, 989 S.W.2d at 696. Here, the Employee's complaint contained not one, but two separate maladies: hearing loss in both ears, a scheduled injury, and tinnitus, an unscheduled injury. He voluntarily dismissed the latter and does not challenge the trial court's apportionment of the former.

The Employer argues, in essence, that a tinnitus claim that was voluntarily dismissed and unsupported by any evidence at the trial should determine the apportionment of the Employee's hearing loss injury. We decline to so hold, and find no error in the trial court's decision to grant the voluntary dismissal of the tinnitus claim.

6. Excessive Award

To the extent that the Employer argues that the trial court's award of benefits for 75 percent permanent partial disability was excessive and unsupported by sufficient evidence, the classification of the hearing loss as a scheduled member injury pretermits the issue. Tennessee Code Annotated section 50-6-241(d)(1)(A) exempts awards for hearing loss in both ears, among other things, from the one and one-half times impairment cap.[3] The 75 percent permanent partial disability award was not, therefore, excessive on this basis.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to the Employer, East Tennessee Mechanical Contractors, Inc., and its surety, for which execution may issue if necessary.

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GARY R. WADE, JUSTICE

[3] Because the statutory benefits cap does not apply to the Employee's scheduled member injury, we also need not consider whether the Employee had a meaningful return to work.

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE, TENNESSEE

JAMES M. JACKS V. EAST TENNESSEE MECHANICAL CONTRACTORS, INC.
Anderson County Circuit Court
No. A7LA0557

Filed August 24, 2009

No. E2008-02501-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, East Tennessee Mechanical Contractors, Inc. and their surety, for which execution may issue if necessary.