IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
January 12, 2009 Session

RAYMON DOUGLAS v. GOODYEAR TIRE & RUBBER COMPANY

Direct Appeal from the Chancery Court for Obion County
No. 24,704 William Michael Maloan, Chancellor

No. W2008-00533-SC-WCM-WC - Mailed April 14, 2009; Filed August 19, 2009

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeal Panel of the Supreme Court in accordance with Tennessee Code Annotated section 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. On appeal, Employer contends that the trial court erred in finding that Employee suffered a compensable work-related injury and that Employee's workers' compensation claim was not barred by the one-year statute of limitations. Because the evidence does not preponderate against the trial court's findings, we affirm the judgment of the trial court.

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

D.J. ALISSANDRATOS, SP. J., delivered the opinion of the court, in which CORNELIA A. CLARK, J., joined. TONY CHILDRESS, SP. J., not participating.

W. Lewis Jenkins, Jr., and Dean P. Dedmon, Dyersburg, Tennessee, for the appellant, Goodyear Tire & Rubber Company.

Jeffrey P. Boyd, Jackson, Tennessee, for the appellee, Raymon Douglas.

OPINION

Facts & Procedural History

Raymon Douglas ("Employee"), fifty-nine at the time of trial, has a ninth grade education with a GED. Employee's work history is varied, having worked: in a hospital delivering food to patients; for a sewing company fetching bundles of cloth for the sewing technicians; in a shoe factory cutting department; in a wire basket welding shop; and in a manufacturing plant assembling M16 rifles. In 1969, Employee began working for Goodyear Tire & Rubber Company ("Employer").

Employee had worked for Employer for approximately 38 years at the time of trial and was still employed with Employer at that time.

While working for Employer, Employee has held several different positions, including: "final finish area, sorting tires and checking the balance on tires"; "presses"; shipping department; tire room; and "alfa shears." When Employee began working for Employer, he was not required to wear hearing protection. From 1969 to 1978, while working in "final finish" and "presses," Employee, according to his own testimony, was subjected to a "high noise level." There is no evidence in the record defining what the decibel levels were in "final finish" and "presses" between 1969-1978. While in the shipping department, from 1978-1983, Employee was not subjected to loud noises as "there's no machinery back there [in shipping]."

In approximately 1983, Employer started a hearing conservation program, based in part on the regulations promulgated by the Occupational Health and Safety Administration ("OSHA"). See 29 C.F.R. 1910.95 (2009).[1] Under subsection 1910.95(c)(1),

> The employer shall administer a continuing, effective hearing conservation program . . . whenever employee noise exposures equal or exceed an 8-hour time-weighted average sound level . . . of 85 decibels.

The generally accepted scientific threshold for noise exposure tending to cause hearing loss is 90 decibels over an eight hour period. For a twelve hour period, the noise exposure threshold tending to cause hearing loss drops to 86.7 decibels. For a five-year period from 1998-2003, Employee worked twelve-hour shifts. At all other times in his tenure with Employer, he worked an eight-hour shift.

John Keel, a staff industrial engineer for Employer, testified that the decibel levels in the "tire room," where Employee worked from 1983-1987 and again from 1992-2007, averaged 87 decibels but could exceed 90 decibels. For "alfa shears," where Employee worked from 1987-1992, the decibel level averaged between 85-89.

As part of Employer's hearing protection program, employees are required to wear hearing protection at all times. Employee testified that, from 1983 until the date of trial, he wore hearing protection "100% of the time." Employee wore "foam type plugs" that are placed into the ear canal. The particular type of earplug worn by Employee indicated that it would provide a reduction in noise of 29 decibels. The medical testimony offered by both Employee and Employer suggested, however, that these plugs offered more of a 12 to 15 decibel reduction, and in some cases could offer as little as a 5 decibel reduction if not inserted correctly.

In addition to wearing hearing protection, Employer required an "annual" hearing test. These

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[1]During trial, Employer asked the Court to take judicial notice of 29 C.F.R. 1910.95 "Occupational noise exposure." No objection was made.

tests occurred in 1988-1992, 1994, 1995, 1997, 1998, 2003, 2004, and 2005.[2] The August 21, 2003, test indicated a "temporary threshold shift," which occurs when there is a "change from an individual's baseline test of equal to or greater than a 10 decibel average of the 2000Hz, 3000Hz, and 4000Hz frequencies." A follow-up test, conducted on September 8, 2003, indicated that Employee had suffered a "standard (permanent) threshold shift" of greater than 10 decibels. Following these tests, Employee was told, for the first time, that he had a "moderately severe loss in hearing" in both ears.

Based on his hearing tests' results, Employee was sent to see Dr. Eason, the company doctor, for more tests. Dr. Eason suggested that Employee visit an ear specialist. From a panel of eight doctors, Employee chose Dr. Rowland. Employee visited Dr. Rowland on September 11, 2003. Dr. Rowland informed Employee that he had "significant loss" and should consider a hearing aid to help with his inability to hear. Dr. Rowland also diagnosed Employee as having tinnitus, a loud ringing, swishing, or hissing noise that originates in the ear. Employee testified that he hears a hissing noise all day, every day.

On October 17, 2003, Employee filed this workers' compensation claim, arguing that he suffered a compensable work injury as a result of his exposure to loud noises while working for Employer. In its answer, Employer argued that Employee's hearing loss was not caused by his employment with Employer, or in the alternative, that Employee's workers' compensation claim was barred by the one-year statute of limitations. See Tenn. Code Ann. § 50-6-203(a) (1999).[3]

On February 27, 2004, Employee visited Daniel J. Orchik, Ph.D., an audiologist. After reviewing Employee's medical records, including Employee's hearing tests, and performing several hearing tests, Dr. Orchik determined that Employee had sensory neural hearing loss. Dr. Orchik was deposed on January 11, 2007. During the deposition, Dr. Orchik noted that Employee had relatively good low-frequency hearing but impaired high-frequency hearing. Dr. Orchik noted that Employee's 1988 hearing test, the first test conducted by Employer, indicated that Employee had already suffered significant high-frequency hearing loss. Dr. Orchik explained "high-frequency hearing loss" this way:

> Well, typically, the hearing loss of this nature is gradual in progression. Noise-induced hearing loss typically occurs in the high frequencies first, and the most significant loss or the most rapid progression of loss typically occurs in the first 10 or so years, 10 to 15 years, of exposure, with a maximum loss being typically in the region of about 3,000 to 6,000 Hz . . . .

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[2]The record does not explain why Employee did not have a hearing test between 1998 and 2003.

[3]This provision currently appears at Tennessee Code Annotated section 50-6-203(b)(1) (2008).

Based on the hearing tests and Employee's history, Dr. Orchik concluded that Employee's noise exposure while working for Employer caused Employee's hearing loss, that Employee has a 15% impairment in the right ear, a 20.6% impairment in the left ear, and a binaural impairment of 16%.[4]

Dr. Karl Studtmann, an otolaryngolist, examined employee on February 20, 2007. Following this examination, Dr. Studtmann reviewed Dr. Orchik's notes, all of Employee's hearing tests, and "sound data"[5] from Employer regarding the noise exposure at Employer's plant. Dr. Studtmann was deposed on April 18, 2007. During his deposition, Dr. Studtmann testified that he was unsure in what year the "sound data" was taken, whether Employee worked in the department or departments where the "sound data" was taken, or whether Employee was required to wear noise protection at the time the "sound data" was taken. He did state, however, that the sound data indicated that there was "significant noise exposure" of 84 to 90 decibels in Employer's plant.

Based on his own evaluation of Employee and the information he was provided by Employee's counsel, Dr. Studtmann determined that Employee had "downsloping high frequency sensorial hearing loss." He testified that noise exposure is one of the causes of high frequency sensorial hearing loss and stated that the noise exposure at Employer's plant caused Employee's hearing loss. Dr. Studtmann noted that Employee had no genetic history of hearing loss, no significant hearing impairment based on ear infections, and no significant noise exposure outside of work. Based on these medical findings, Dr. Studtmann determined that Employee had a 15% impairment in the right ear and a 20.6% impairment in the left ear.

On cross-examination, Dr. Studtmann agreed with this hypothetical: if an employee is exposed to an average decibel level of 90 decibels and wears hearing protection with a noise reduction rating of 20, then the employee's actual exposure to noise is 70 decibels, well below the generally accepted scientific threshold for noise exposure tending to cause hearing loss. Dr. Studtmann also stated, however, that Employee did experience temporary threshold shifts in hearing while at work, such that his work environment caused his hearing loss. When pressed about this issue, however, Dr. Studtmann admitted, given the sound data from Employer's plant, the noise reduction rate of the hearing protection Employee wore, and Employee's own statement that he wore hearing protection 100% of the time, that typically, temporary threshold shifts would not occur under these conditions.

On redirect, Dr. Studtmann testified that Employee suffered from moderate hearing loss - 40 to 60 decibels. Additionally, Employee's counsel directed Dr. Studtmann to Employee's September 27, 2006, hearing test results which noted a temporary threshold shift. This test was conducted

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[4]Employer filed a motion to the trial court to exclude any testimony from Dr. Orchik regarding permanency and causation because Dr. Orchik is not a medical doctor. This motion was granted.

[5]"Sound data" is the amount of decibels an employee is exposed to while working.

immediately following Employee's shift. This, Dr. Studtmann explained, showed that the noise levels at the plant were high enough to cause "temporary threshold shifts" in Employee's hearing which can lead to permanent hearing loss. Finally, Dr. Studtmann explained that Employee's hearing tests from 1988 to 2006 indicated a progression of hearing loss.

Dr. Schwaber, an otolaryngologist, testified via deposition on November 9, 2007, at the request of Employer. Dr. Schwaber did not examine Employee. He did, however, review all of Employee's hearing tests and the sound data from Employer's plant. From this data, Dr. Schwaber stated that "the noise [at the plant] was not sufficient to cause [Employee's] hearing loss." Dr. Schwaber explained that Employee's ear protection would have more likely blocked out 12 to 15 decibels of noise instead of the 29 decibels of noise protection listed on the earplugs' label. So, as Dr. Schwaber explained, in an environment where an employee is exposed to 90 decibels, while wearing earplugs he would have only been exposed to 75 to 78 decibels, "depending on how tightly [the earplugs] are pushed in." And, 75 to 78 decibels is not enough to cause hearing loss.

On cross-examination, Dr. Schwaber explained that even if Employee was hypersensitive to noise, exposure to 83 or 84 decibels over an eight-hour period would not be enough to cause hearing loss.

In addition to Dr. Schwaber's testimony, attached as the last page to exhibit 2 to his deposition is a diagram titled "noise mapping-plant 10/06/04." This one-page diagram contains the decibel levels of various areas of the plant, presumably on October 6, 2004.[6] Each area of the plant is designated with a four-digit number. The record indicates that the four-digit code of "alfa shear" is 1412 and the code for "tire room" is 1512. No other codes are known. According to the diagram, the decibel level on that day for "alfa shear" was 86.23, while the level for "tire room" was 87.69. Looking at the entire plant, the noise levels range from 80.36 decibels to 90.11 decibels. It is unclear whether these numbers are the average decibels for an area or the maximum decibels in an area. According to Dr. Schwaber, if hearing protection is properly worn, hearing loss would not be possible in any part of the plant according to the numbers provided in this exhibit.

The trial court's hearing was held on December 3, 2007. During the hearing, Employee admitted that he started to notice hearing loss around 1996. Employee also testified, however, that it was not until his visit with Dr. Rowland in September 2003 that he connected his hearing loss to his employment with Employer.

After listening to the in-court testimony and reviewing the medical depositions, the trial court found, on the issue of causation, that Employee suffered a compensable workers' compensation injury. The court noted: "The unique facts of this case [are] that it appears from all the testimony that [Employee's] injury to his hearing occurred at a time prior to the hearing protection program and the requirement of any type of hearing protection device being implemented . . . . Unfortunately, the . . . noise data that we have in the record begins in 1988[;] so, there's not any data prior to that time."

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[6]If Employee worked on October 6, 2004, he would have been in the "tire room."

On the issue of the one-year statute of limitations, the trial court found that Employee "did not become aware that he had a permanent hearing loss due to his work until he sought medical treatment in 2003, and his suit was filed within the appropriate period" thereafter.

Finally, the trial court, noting that hearing loss is a scheduled member injury under Tennessee Code Annotated section 50-6-207(3)(A)(ii)(r), assigned a 50% permanent partial disability to the hearing in both ears.

Analysis

Standard of Review

We review factual issues in a workers' compensation case de novo upon the record of the trial court, accompanied by a presumption of correctness of the trial court's factual findings. Tenn. Code Ann. § 50-6-225(e)(2) (2008); Rhodes v. Capital City Ins. Co., 154 S.W.3d 43, 46 (Tenn. 2004); Perrin v. Gaylord Entm't Co., 120 S.W.3d 823, 825-26 (Tenn. 2003). When the trial court has seen the witnesses and heard the testimony, especially where issues of credibility and the weight of testimony are involved, the court on appeal must extend considerable deference to the trial court's factual findings. Houser v. Bi-Lo, Inc., 36 S.W.3d 68, 71 (Tenn. 2001). This Court, however, may draw its own conclusions about the weight and credibility to be given to expert medical testimony when it is presented by deposition. Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997). With these principles in mind, we review the record to determine whether the evidence preponderates against the trial court's findings.

Causation

An employee seeking workers' compensation benefits must prove that the injury, which causes either disablement or death, both arose out of and occurred in the course of employment. See Tenn. Code Ann. § 50-6-102(12) (2008). In Tennessee, as in most other jurisdictions, these two statutory requirements are not synonymous. Glisson v. Mohon Int'l, Inc./Campbell Ray, 185 S.W.3d 348, 353 (Tenn. 2006). An injury occurs in the course of employment if it takes place while the employee is performing a duty he or she is employed to perform. Fink v. Caudle, 856 S.W.2d 952, 958 (Tenn. 1993). Thus, the "course of employment" requirement focuses on the time, place, and circumstances of the injury. Wilhelm v. Krogers, 235 S.W.3d 122, 127 (Tenn. 2007).

In contrast, the "arising out of employment" requirement refers to causation. Reeser v. Yellow Freight Sys., Inc., 938 S.W.2d 690, 692 (Tenn. 1997). 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). The injury must result from a danger or hazard peculiar to the work or be caused by a risk inherent in the nature of the work. Thornton v. RCA Serv. Co., 188 Tenn. 644, 647, 221 S.W.2d 954, 955 (1949). Our courts have "consistently held that an award may properly be based upon medical testimony to the effect that a given incident 'could be' the cause of the employee's injury,

when there is also lay testimony from which it reasonably may be inferred that the incident was in fact the cause of the injury." Reeser v. Yellow Freight Sys., Inc., 938 S.W.2d 690, 692 (Tenn. 1997). Absolute certainty with respect to causation is not required, however, and the Panel must recognize that, in many cases, expert opinions in this area contain an element of uncertainty and speculation. Fritts v. Safety Nat'l Cas. Corp., 163 S.W.3d 673, 678 (Tenn. 2005). Nevertheless, all reasonable doubts as to the causation of an injury and whether the injury arose out of the employment should be resolved in favor of the Employee. Phillips v. A & H Constr. Co., 134 S.W.3d 145, 150 (Tenn. 2004); Reeser, 93 S.W.2d at 692; see Tenn. Code Ann. § 50-6-102(a)(5) (2008).

In this case, both medical doctors, Drs. Studtmann and Schwaber, testified that if the noise levels in the plant were 90 decibels (the highest decibel reading from the sound data in the record) and if Employee was wearing his hearing protection every day, the noise levels in the plant would not have caused Employee's hearing loss. Therefore, for Employee's work to cause his hearing loss, one of two facts must be true: (1) the damage to his hearing occurred before Employer required Employee to wear hearing protection, i.e. earlier than 1983; or (2) the decibel numbers in the hypothetical above do not reflect the noise being emanated in the plant and/or the noise reduction of Employee's hearing protection.

With regard to the latter option, both Employee's August 21, 2003, and September 27, 2006, hearing tests showed that Employee had temporary threshold shifts in his hearing. These tests were conducted immediately after Employee completed his work day. Therefore, these results suggest that the noise in the plant, even while wearing hearing protection, was negatively affecting Employee's hearing.

With regard to the first option, the trial court concluded that Employee's hearing injury most likely occurred prior to 1983, the year Employer instituted its hearing conservation program. Given the facts in this case, under either option, the evidence does not preponderate against the trial court's finding that Employee suffered a compensable work related injury.

Statute of Limitations

Work-related hearing loss claims can present unique issues with respect to the application of the statute of limitations. Many hearing loss claims concern injuries which occur gradually over the course of many years. Additionally, it is commonplace for an employee who has sustained a gradual hearing loss to miss no work at all as a result of the condition. In this case, both of these elements are present.

Employer contends that Employee's claim was barred by the one year statute of limitation set out in Tennessee Code Annotated section 50-6-203(a). This argument is based upon Employee's testimony that he first noticed his hearing loss as early as 1996.

Prior to July 1, 2004, section 50-6-203(a) read:

> The right to compensation under the Workers' Compensation Law shall be forever barred, unless, within one (1) year after the accident resulting in injury or death occurred, the notice required by § 50-6-202 is given the employer and a claim for compensation under the provisions of this chapter is filed with the tribunal having jurisdiction to hear and determine the matter.

Tenn. Code Ann. § 50-6-203(a) (1999). Tennessee courts have consistently held that the one year period for filing suit does not begin to run until the employee "knew or as a reasonably prudent person should have known, that his hearing loss was work connected." Hawkins v. Consolidated Aluminum Corp., 742 S.W.2d 253, 254 (Tenn. 1987). In Ferrell v. CIGNA Prop. & Cas. Ins. Co., 33 S.W.3d 731, 735 (Tenn. 2000), the Court held that the statute did not begin to run until the employee saw a C-32 Standard Form Medical Report for Industrial Injuries, literally "the day before trial."

In this case, although Employee admitted that he noticed his hearing was worsening as early as 1996, he testified that he did not relate this hearing loss to his employment until his hearing test results noted "moderately severe loss in hearing," the company doctor recommended that he see a specialist, and the specialist, Dr. Rowland, informed him that his hearing loss was work-related. Based on this testimony, the trial court found that Employee did not discover that his hearing loss was a compensable injury until September 2003. As this Court has observed many times, when credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge has had the opportunity to observe the witness' demeanor and hear in-court testimony. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002).

In this case, the evidence does not preponderate against the trial court's finding that the one-year statute of limitation commenced on September 11, 2003, the day Dr. Rowland informed Employee that he had significant hearing loss, and that, therefore, the suit filed on October 17, 2003, was timely.

CONCLUSION

For the reasons stated above, we affirm the decision of the trial court in all respects. Costs of this appeal are taxed to Goodyear Tire & Rubber Company, and its surety, for which execution may issue if necessary.

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D.J. ALISSANDRATOS, SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE
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JUDGMENT ORDER - Filed August 19, 2009

This case is before the Court upon the motion for review filed by Goodyear Tire & Rubber Company pursuant to Tennessee Code Annotated section 50-6-225(e)(5)(A)(ii), 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.

It appears to the Court that the motion for review is not well-taken and is therefore denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed to Goodyear Tire & Rubber Company, and its surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

CORNELIA A. CLARK, J., not participating