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

ARETIES McKAMEY v. LOCKHEED MARTIN ENERGY SYSTEMS, INC., ET AL.

Direct Appeal from the Circuit Court for Anderson County
No. A8LA0025 Donald R. Elledge, Judge

No. E2009-00715-WC-R3-WC - Filed March 12, 2010

This workers' compensation 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. The trial court found that the employee had sustained a hearing loss as a result of exposure to noise during her work from 1944 to 1989 as a telephone operator for her employer, and awarded 50% permanent partial disability ("PPD") of the hearing of both ears. The employer has appealed, contending that the evidence preponderates against the trial court's finding on the issue of causation. Alternatively, it argues that the award is excessive. We reverse the judgment and dismiss the complaint.

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

SHARON G. LEE, J., delivered the opinion of the court, in which JON KERRY BLACKWOOD, SR. J., and THOMAS R. FRIERSON, II, SP. J., joined.

Timothy W. Conner, Knoxville, Tennessee, for the appellants, Lockheed Martin Energy Systems, Inc. and Union Carbide Corporation.

Loring E. Justice, Knoxville, Tennessee, for the appellee, Areties McKamey.

Stephen P. Miller and Lisa A. Overall, Memphis, Tennessee, for amicus curiae, Tennessee Defense Lawyers' Association.

Rocky McElhaney, Nashville, Tennessee, for amicus curiae, Tennessee Association for Justice.

MEMORANDUM OPINION

Factual and Procedural Background

Areties McKamey ("Employee") worked for Lockheed Martin ("Employer") and its predecessors at the federal nuclear energy reservation at Oak Ridge. She was employed as a telephone operator, assistant chief operator, and chief operator from 1944 until her retirement in 1989. She testified that, initially, she worked in a "long, narrow room," with approximately forty other employees, twenty-five of whom were operators like herself. She stated that ringing telephones and the speech of her fellow employees created "lots of background noise." The job required her to wear a headset[1] "[e]ight hours a day, five days a week." On occasion, when the "data lines would go out of order, they would have a tone on there that would be magnified about ten times. Also when we had inclement weather, it would bring signals that would knock you off your chair." Such events "would happen not daily, but when we had inclement weather . . . really, it came in with just something that went out of order sometimes."

Employee was promoted to assistant chief operator in 1967. She continued to wear a headset. She would use this to "plug in with the operators. I was hearing what they were hearing." She also continued to use a headset and work on the switchboard after her promotion to chief operator in 1977. During this time, if she connected a call to a phone that was out of order, a ringing sound would continue to be heard in the headset. On cross-examination, she testified that no sound came over the headset when she wasn't connecting calls.

Dr. Timothy Ragsdale, an otolaryngologist, conducted an independent medical evaluation ("IME") at the request of Employee's attorney on January 4, 2008. He administered an audiogram which showed "a high frequency hearing loss in both ears." Based upon the history given to him by Employee, he also made a diagnosis of tinnitus. He opined that she had a hearing impairment of 13.1% of the right ear and 9.4% of the left ear due to her hearing loss. These figures combine for 10% binaural hearing loss. He assigned an additional 2% impairment for tinnitus, for a total of 12% binaural hearing impairment, which converts to 4% to the body as a whole. Dr. Ragsdale examined the results of audiograms administered to Employee while she worked for Employer. He opined that, beginning in 1968, those results were consistent with a noise-induced hearing loss. He testified, based upon his experience in the Air Force, that hearing loss could continue to progress, even after exposure to loud noise ended.

On cross-examination, Dr. Ragsdale testified that the headset worn by Employee "could be associated with noise exposure." However, he did not know the decibel level of exposure of the headset, stating that "[Employee] just said the headsets were noisy." He stated that normal telephone usage did not usually cause hearing loss. He had not previously treated any other telephone operators

[1] Employee was asked by her attorney if the headset was worn over one ear or both ears. Her answer was not responsive, but she described the devices used early in her employment as being like "earmuffs on our ears." The devices used later in her employment were "like a hearing aid but . . . directly down into your ear."

for hearing loss caused by a telephone headset. He agreed that age could have contributed to deterioration of Employee's hearing during the interval between her retirement in 1989 and his test in 2008.[2] He also stated that the results an audiogram taken in 1988, the last such test before Employee's retirement, "probably" did not result in an impairment under the American Medical Association Guides to the Evaluation of Permanent Impairment ("AMA Guides"), because her hearing loss at that time was limited to the higher frequencies, for which impairment is not assigned. He was unable to state whether there was any medical literature to support his assertion that noise-induced hearing loss could progress after exposure to the noise was ended.

On redirect examination, Dr. Ragsdale was asked a series of hypothetical questions concerning the effects of loud noises such as those described by Employee in connection with data lines and inclement weather. He responded that "[i]t would depend on how loud the noise and how frequent they are. If it was loud and frequent, it could have affected her hearing."

Dr. Grady Arnold, also an otolaryngologist, conducted an IME at the request of Employer's attorney on June 19, 2008. Like Dr. Ragsdale, he took a history, conducted a physical examination, and administered an audiogram. He had also reviewed "at least a portion" of Employee's discovery deposition. On the basis of that information, Dr. Arnold opined that she had a binaural hearing impairment of 1.3%. He did not assign any impairment for her tinnitus. He testified that the pattern of her hearing loss was consistent with noise exposure, but was also consistent with age-related hearing loss or inherited hearing loss. Based primarily upon Employee's description of her noise exposure while working for Employer, Dr. Arnold opined that the exposure was not the cause of her hearing loss. He further stated that the audiograms taken prior to Employee's retirement showed a high frequency hearing loss, but did not qualify for assessment of impairment under the AMA Guides.

Dr. Arnold disagreed with Dr. Ragsdale's opinion that noise-related hearing loss could progress after the exposure was ended. He testified:

> Well, of course, the worst hearing you're going to see due to noise-induced hearing loss is going to be right at the time of the employment or right during at the final episode of when they were exposed to noise.
>
> Once they've not been exposed to noise, they get no progression in their hearing loss, so . . . if you do have a progression, it would definitely be due to other factors . . . .

On cross examination, Dr. Arnold stated that the audiograms taken of Employee while she worked for Employer showed a "noise notch," a finding characteristic of early noise-related hearing loss. He admitted that he did not know the decibel level of noise exposure for a phone operator. However, he stated that he had a general familiarity with the amount of noise involved in that job,

[2] Employee was eighty-two years of age at the time she was tested by Dr. Ragsdale.

because his mother had been an operator at one time. Dr. Arnold agreed that high-frequency hearing loss, though not assigned an impairment in the AMA Guides, could impair an individual's ability to hear.

Employee was eighty-three years of age when the trial occurred. Although she had been aware for some years that she had difficulty with her hearing, it was not until her examination by Dr. Ragsdale in January 2008, that she believed her condition to be related to her work for Employer. There is no evidence that she worked, or applied for work, after her retirement in 1989. It is clear from the transcript that Employee had some difficulty hearing the questions asked of her by counsel. She testified that, in church, she could not understand hymns sung by the choir. She had adjusted the telephones in her home to maximum volume. She reported that on occasion she had not heard her doorbell ring when friends or neighbors came to visit her.

The trial court accredited the testimony of Dr. Ragsdale, and discredited the testimony of Dr. Arnold, for reasons discussed below, and found that Employee's hearing loss was work-related. It determined the date of injury to be January 2008, and awarded benefits at the maximum rate in effect on that date. The trial court awarded 50% PPD, assigned to the hearing of both ears, a scheduled member. Tenn. Code Ann. § 50-6-207(3)(A)(ii)(r). Employer has appealed, contending that the trial court erred by finding that Employee's hearing loss was caused by her employment and by determining, for purposes of establishing the workers' compensation benefit rate, the date of injury to be the date of diagnosis (January 2008), rather than the last date of employment (1989). Alternatively, Employer asserts that the award is excessive.

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. Madden v. Holland Group of Tenn., 277 S.W.3d 896, 900 (Tenn. 2009). When the issues involve expert medical testimony that is contained in the record by deposition, however, 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. Foreman v. Automatic Systems, Inc., 272 S.W.3d 560, 571 (Tenn. 2008). A trial court's conclusions of law are reviewed *de novo* upon the record with no presumption of correctness. Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009).

Analysis

The trial court based its decision upon the conclusion that Dr. Ragsdale's testimony was more credible than Dr. Arnold's. The trial court stated the following reasons, at various points in its findings:

> [Dr. Arnold] said . . . noise exposure in the employment is not great enough to have caused hearing loss. First of all, there's no way he could even know that, none whatsoever. It's pure speculation on his part. [He also testified] any progression after leaving exposure is due to other factors. I'll have to say that is totally inconsistent with the professional proof that I have heard, and certainly inconsistent with what Dr. Ragsdale said.
> . . .
> I also give great weight to Dr. Ragsdale because of his experience with loud noises, and he acknowledges that, with his experience with loud noises, you can have tests that, at the time of the test and after the loud noise and the damage that it will do or has already done, the hearing can progressively get worse, and I have to state for the record, that is consistent with every other hearing deposition I have ever had, ever had other than Dr. Arnold.

These statements are problematic. The trial court's references to "professional proof that I have heard," and "every other hearing deposition I have ever had," suggest that the court considered matters outside the record. In that regard, the statements set out above are similar to trial court remarks discussed in Blackwood v. Berkline Corp., No. 01S01-9609-CV-00190, 1997 WL 271700 (Tenn. Workers' Comp. Panel May 21, 1997). In that case, the Panel stated: "[It] is inappropriate and, generally, reversible error, for a fact finder, to base a decision on observations outside the particular judicial proceeding." Id. at *2.

Additionally, there is no basis in the record to support the trial court's apparent conclusion that Dr. Arnold had less information than Dr. Ragsdale about the level of noise exposure associated with Employee's job. Dr. Ragsdale's only testimony on the subject was "[Employee] just said the headsets were noisy." His report does not contain any additional information about Employee's exposure to loud noise in the workplace. He had not seen Employee's discovery deposition. Dr. Ragsdale conceded that he had never before treated a case of hearing loss allegedly resulting from use of a telephone headset. Based upon the information in the record, Dr. Arnold's fund of knowledge regarding Employee's exposure to noise was at least as great, if not greater, than Dr. Ragdale's. Dr. Arnold read Employee's discovery deposition, and had at least limited awareness of the level of noise in a telephone operator's headset due to his mother's employment as an operator.

Finally, Dr. Ragsdale was not able to state whether or not his opinion concerning post-exposure progression of hearing loss was supported by any medical literature, and the record contains no other information indicating whether such support exists. Dr. Arnold was not asked if his opinion had such support.

Employee points to Aerostructures Corp. v. Rader, No. M2006-01361-WC-R3-WC, 2008 WL182245 (Tenn. Workers' Comp. Panel Jan. 18, 2008) as a case in which an award of benefits for hearing loss based upon anecdotal evidence, similar to the proof in this case, was upheld on appeal. In that case, the employee worked in a factory which assembled airplane parts. The evidence showed that his work area was adjacent to an area where sheet metal parts were riveted

together. The only proof concerning the extent of noise exposure was anecdotal testimony of the employee, his wife and co-workers. His doctor testified that his pattern of hearing loss was consistent with a noise-related hearing loss. The trial court ruled against the employee, but the Panel reversed, holding that the anecdotal evidence in that case was sufficient, in conjunction with the medical testimony, to support a finding of causation.

Employee argues that there are clear parallels between the facts in Rader, and those of this case, and we agree with that assertion. However, there are also obvious and significant differences between the two cases. Mr. Rader worked in an area in which mechanical tools were used to rivet metal parts together. It does not go too far to say that it is within common knowledge that riveting metal is an extremely loud activity. The same cannot be said with regard to use of a telephone operator's headset. In addition, Mr. Rader's exposure to a high level of noise was more or less constant during the work day. In this case, Employee testified that her exposure to loud noises primarily arose from intermittent equipment failures or inclement weather. She testified that these events did not occur on a daily basis. There was no other evidence concerning the frequency of these exposures. In light of these factors, Rader is instructive, but not controlling.

Both physicians in this case testified by deposition. We therefore review their contents without a presumption of correctness of the trial court's findings. Foreman, 272 S.W.3d at 571. We have examined the expert medical proof in accordance with the factors described in Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 676 (Tenn. 1991): "[T]he qualifications of the experts, the circumstances of their examination, the information available to them, and the evaluation of the importance of that information by other experts." The qualifications of Dr. Arnold and Dr. Ragsdale are relatively similar. Both are board-certified otolaryngologists, though Dr. Arnold has been in practice somewhat longer. Both examined Employee in 2008, roughly nineteen years after her retirement. Dr. Ragdale's sole information concerning the frequency and nature of Employee's workplace noise exposure was her statement that "the headsets were noisy." Dr. Arnold had access to Employee's discovery deposition, and also some personal knowledge derived from his mother's employment as a telephone operator. Both doctors agreed that Employee's hearing had worsened after her 1989 retirement. Dr. Ragsdale was unable to identify any medical literature to support his contention that Employee's work-related hearing loss continued to progress after her exposure to noise ended. Dr. Arnold explained his contrary opinion in greater detail, but was not asked to identify any supporting medical authority. On balance, we find Dr. Arnold's opinion to be more persuasive than that of Dr. Ragsdale. We therefore conclude that the evidence preponderates against the trial court's ruling on the issue of causation. Having reached this conclusion, it is unnecessary to address the remaining issues raised by the parties and the *amici curiae*.

Conclusion

The judgment of the trial court is reversed. The complaint is dismissed. Costs are taxed to Areties McKamey, for which execution may issue if necessary.

_____

SHARON G. LEE, JUSTICE