

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON

October 29, 2018 Session at Memphis

**JERRY COLEMAN v. ARMSTRONG HARDWOOD FLOORING
COMPANY AND INDEMNITY INSURANCE COMPANY OF NORTH
AMERICA**

**Appeal from the Court of Workers' Compensation Claims
No. 2015-07-0445 Allen Phillips, Judge**

No. W2017-02498-SC-R3-WC – Mailed March 1, 2019; Filed April 12, 2019

In this appeal from the judgment of the Court of Workers' Compensation Claims, the employer and its insurer argue that the employee did not establish by a preponderance of the evidence that his injury arose primarily out of the course and scope of his employment, and that the employee's physician expert did not use an appropriate method to opine on the impairment rating for the employee's right ear. Discerning no error, we affirm.

**Tenn. Code Ann. § 50-6-225(a) (2014) (applicable to injuries occurring on or
after July 1, 2014) Appeal as of Right;
Judgment of the Court of Workers' Compensation Claims Affirmed**

HOLLY KIRBY, J., delivered the opinion of the court, in which ROBERT E. LEE DAVIES, SR.J. and WILLIAM B. ACREE, SR.J., joined.

William F. Kendall, III, Jackson, Tennessee, for the appellants, Armstrong Hardwood Flooring Company, and Indemnity Insurance Company of North America.

Jeffrey P. Boyd, Jackson, Tennessee, for the appellee, Jerry Coleman.

OPINION

FACTUAL AND PROCEDURAL BACKGROUND

Appellant Armstrong Hardwood Flooring Company (“Armstrong”)¹ employed Appellee Jerry Coleman during two periods, the first from November 8, 1996, to January 1, 2010, and the second from May 6, 2013, to June 16, 2015. After completing the second stint of employment with Armstrong, Mr. Coleman alleged that he had sustained a work-related hearing loss due to the noise exposure in the course of his work for Armstrong. He sought compensation benefits for his injury.

In his work for Armstrong, Mr. Coleman’s job duties included driving a dump truck in or around an area containing a courtroom-sized wood chipper commonly referred to as “the hog.” The hog is an exceptionally loud machine. Mr. Coleman described the experience of being near the hog: “[I]t could feel like the whole thing jar you. Feel like you could feel it all through your body. It would just jar you.” During his second stint with Armstrong, Mr. Coleman testified that he worked in the vicinity of the hog for eight hours, and sometimes up to twelve hours, a day.

Armstrong maintained a hearing loss prevention program for employees. The program included mandatory protective devices and annual hearing tests of Armstrong employees.

In June 2015, Mr. Coleman voluntarily retired. Around this time, Mr. Coleman alleged, he became aware that he suffered from “severe” hearing loss in both ears, albeit to a greater extent in his right ear. Mr. Coleman said that, when others spoke to him, they “sounded muffled or distant,” and the hearing loss generally made communication “difficult.”

Mr. Coleman filed a Petition for Benefit Determination regarding his hearing loss. After an expedited hearing, the Bureau of Workers’ Compensation ordered Armstrong and its co-Appellant, Indemnity Insurance Company of North America, to provide Mr. Coleman with a panel of physicians from whom to choose. Mr. Coleman selected otolaryngologist Christopher Hall, M.D. Dr. Hall’s deposition testimony was introduced

¹ The other appellant, Indemnity Insurance Company of North America, is the workers’ compensation insurer for Armstrong as of June 16, 2015. For simplicity, in the Analysis section of this opinion, we refer to both appellants collectively as “Armstrong.”

as evidence in the workers' compensation hearing that followed the filing of Mr. Coleman's petition for workers' compensation benefits. We summarize it below.

Dr. Hall Deposition Testimony

Dr. Hall examined Mr. Coleman in August 2016. The general physical examination revealed nothing out of the ordinary, but audiometric testing revealed "essentially normal sloping to severe, rising to moderate sensorineural hearing loss" in the left ear and "severe sloping to profound, rising to severe mixed [sensorineural and conductive] hearing loss" in the right ear. Sensorineural, or sensory, hearing loss results from damage to the cochlea of the ear and the hair cells in that area. Dr. Hall explained:

[W]hen we talk about conductive [hearing], we're talking about vibration and transmitting the vibration to the inner ear. . . . we're talking about either the external ear or the ear canal, the eardrum, or the hearing bones in the middle ear. So those are the three, three areas that can cause conductive hearing loss. And [Mr. Coleman] has that in the right ear and the right ear only, does not have that in the left ear.

Dep. of Christopher Hall 24:23–25:10 (Aug. 31, 2017). Dr. Hall distinguished between sensorineural hearing loss and conductive hearing loss, noting that their causes are not the same. Conductive hearing loss is caused by things such as eardrum damage, infection-related scarring, and otosclerosis. In contrast, sensorineural hearing loss can be caused by exposure to loud noise.

Because of the disparity in hearing loss between Mr. Coleman's left ear and his right ear, Dr. Hall ordered an MRI. However, the MRI showed no "source for the asymmetry" in hearing loss.

Dr. Hall said that the results of the annual hearing tests Armstrong conducted on Mr. Coleman as part of its hearing loss prevention program showed significant changes during both periods of Mr. Coleman's employment with Armstrong. The 2013 hearing test, performed as part of Armstrong's decision to rehire Mr. Coleman, showed mostly mild sensorineural hearing loss in Mr. Coleman's left ear. However, it showed severe hearing loss in his right ear. Dr. Hall also considered the results of the 2009 test, which was Mr. Coleman's last annual test from his first period of employment with Armstrong; it showed that the level of hearing loss in Mr. Coleman's right ear was "slightly worse." In 1997, Mr. Coleman's test results showed he had effectively normal hearing overall, with a very mild hearing loss in his left ear. In the ensuing years, the hearing tests on Mr.

Coleman's left ear revealed "a steady decrease in hearing." The mild hearing loss in Mr. Coleman's right ear in 1997 became effectively severe by 2014.

By the time Dr. Hall examined him in 2016, Mr. Coleman was sixty-two years old, and so was subject to the type of hearing loss that happens to most individuals as they age. Dr. Hall also noted that Mr. Coleman had been treated for high blood pressure since 2003. Dr. Hall said it is recognized that certain medications used to treat high blood pressure cause hearing loss. Mr. Coleman had used one of the blood pressure medications reputed to cause hearing loss, namely, Hydrochlorothiazide. According to Dr. Hall, there is not a way to delineate the causation of Mr. Coleman's hearing loss, to attribute a percentage among the potential causes of age, high cholesterol, high blood pressure medication, and noise exposure. He said, however, that certain hearing test results are associated with old age rather than noise exposure. Mr. Coleman's results contained some indications of hearing loss associated with old age, but also showed hearing loss that Dr. Hall characterized as noise-related.

Starting in 2007 and up to the 2016 examination by Dr. Hall, Mr. Coleman visited a medical clinic several times a year for congestion and ear infections in his right ear that required medical care. In some of those visits, Mr. Coleman reported pain in the right ear. He was diagnosed with having fluid in both ears. Dr. Hall said that the difference between Mr. Coleman's left ear and his right ear could be related to either recurrent infections in the right ear or to exposure to carbon monoxide. The record indicates that Mr. Coleman was exposed to carbon monoxide, but does not indicate the date of the exposure. If Mr. Coleman's exposure to carbon monoxide occurred during the period of 1999 to 2009, Dr. Hall said, it could be related to Mr. Coleman's ear infections and his conductive hearing loss. Based on the nature of Mr. Coleman's hearing test results, however, Dr. Hall did not believe that carbon monoxide exposure was the likely cause of the conductive hearing loss.

Ultimately, based on Mr. Coleman's stated medical history and his medical record, Dr. Hall concluded that Mr. Coleman's sensorineural hearing loss was "likely, more likely than not[,] related to workplace noise exposure."

Pursuant to the AMA Guides, Sixth Edition, Dr. Hall gave Mr. Coleman an impairment rating to the body as a whole of seventeen percent. However, that impairment rating included both sensory (caused by exposure to loud noise) and conductive hearing loss (not caused by exposure to loud noise). To determine the work-related impairment, Dr. Hall extrapolated the level of Mr. Coleman's sensorineural hearing loss in the right ear based on the measurable level of sensorineural hearing loss in

the left ear, working on the assumption that both of his ears had been exposed to the same level of noise. Dr. Hall admitted that, under the AMA Guides, the level of sensorineural hearing loss and the level of conductive hearing loss normally are not separated out. In Mr. Coleman's case, however, Dr. Hall said it was helpful to do so because, unlike the sensorineural hearing loss, the conductive hearing loss was likely related to ear infections and not work-related noise exposure. Using this extrapolation method, Dr. Hall testified that the appropriate work-related impairment rating would be fourteen percent to the body as a whole.

Trial Court Findings and Conclusions

After holding a hearing on November 2, 2017, the trial court issued its order on November 22, 2017, setting forth its findings of fact and conclusions of law. The trial court noted initially that "Dr. Hall checked 'yes' in the section of the C-32 form that asked if Mr. Coleman's hearing loss had 'more probably than not arose out of his employment' when 'considering the nature of [his] occupation and medical history,'" even though Mr. Coleman had mixed hearing loss in his right ear. It said that this supported a finding that Mr. Coleman "suffered a noise-related hearing loss at Armstrong." Considering the entirety of Dr. Hall's deposition, including Armstrong's cross-examination, the trial court commented that Dr. Hall had "considered 'all causes' of Mr. Coleman's hearing loss" in reaching his conclusion it was more likely than not noise-related. It noted that Dr. Hall distinguished the sensorineural, noise-related hearing loss from hearing loss that may have been caused by other factors. The trial court held that Mr. Coleman had "established by a preponderance of the evidence that he sustained a sensorineural hearing loss to both ears due to noise exposure at Armstrong."

Next, the trial court turned its attention to the extent of Mr. Coleman's disability. Mr. Coleman argued that the trial court should adopt Dr. Hall's seventeen percent impairment rating to the body as a whole "because it considers the total 'functional loss' of hearing as required by the AMA Guides." The trial court rejected this argument. Because of the non-work-related conductive component of Mr. Coleman's hearing loss, the trial court found appropriate Dr. Hall's extrapolation of the sensorineural hearing loss in the left ear in order to determine the work-related hearing loss in the right ear. It concluded that Dr. Hall's impairment rating of fourteen percent to the body as a whole was appropriate because Mr. Coleman "did not prove the [additional hearing] loss was work-related." The trial court rejected Mr. Coleman's argument that such a "parsing" of the percentage was inappropriate under the AMA Guides; it found that Dr. Hall's extrapolation method of differentiating between work-related causes and non-work-related causes was permissible because "[t]he estimation of the relative contributions of

different causes of hearing impairment is in the apportionment process as described in Chapter 2.” The trial court held that Mr. Coleman’s disability from his bilateral hearing loss was fourteen percent to the body as a whole.

The trial court held that Mr. Coleman was entitled to permanent disability benefits, as well as future medical benefits made reasonably necessary by his hearing loss injury. Citing subsection 50-6-207(3)(D)(i) of the Tennessee Code Annotated, the trial court declined to award increased benefits based on Mr. Coleman’s failure to return to work, in light of the fact that Mr. Coleman voluntarily retired from Armstrong for reasons unrelated to his hearing loss.

Mr. Coleman was granted an award of \$21,800.52 in permanent partial disability benefits, an attorney fee of \$4,360.10, and future medical benefits pursuant to Tennessee Code Annotated subsection 50-6-204(a)(1)(A).

On December 19, 2017, the appellants filed the present appeal. Pursuant to Supreme Court Rule 51, section 1, the appeal was referred to this Special Workers’ Compensation Appeals Panel.

STANDARD OF REVIEW

The applicable standard of review as to issues of fact in workers’ compensation appeals is governed by statute: “Review of the workers’ compensation court’s findings of fact shall be de novo upon the record of the workers’ compensation court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise.” Tenn. Code Ann. § 50-6-225(a)(2) (2014) (applicable to injuries occurring on and after July 1, 2014). We give considerable deference to the trial court’s factual determinations when the trial judge had the opportunity to hear in-court testimony and observe the witness’s demeanor. *Kilburn v. Granite State Ins. Co.*, 522 S.W.3d 384, 389 (Tenn. 2017) (citing *Madden v. Holland Grp. of Tenn., Inc.*, 277 S.W.3d 896, 898 (Tenn. 2009)). However, when expert testimony is presented by deposition, “we may draw our own conclusions with regard to those issues” because the credibility of the witness “must be drawn from the contents of the depositions.” *Id.* (citing *Foreman v. Automatic Sys., Inc.*, 272 S.W.3d 560, 571 (Tenn. 2008)). The trial court’s conclusions on issues of law are reviewed de novo with no presumption of correctness. *Id.* (citing *Seiber v. Reeves Logging*, 284 S.W.3d 294, 298 (Tenn. 2009)).

ANALYSIS

At the outset, we note that this case falls under the “new” workers’ compensation statutes, termed “Draconian”² by Mr. Coleman’s counsel. Under the prior workers’ compensation statutes, causation sufficient to justify compensation might be established by “medical testimony that the employment “could or might have been the cause” of the employee’s injury when there is also lay testimony supporting a reasonable inference of causation.” *Willis v. All Staff*, No. M2016–01143–SC–R3–WC, 2017 WL 3311318, at *3 (Tenn. Workers Comp. Panel Aug. 3, 2017) (quoting *Excel Polymers, LLC v. Broyles*, 302 S.W.3d 268, 274–75 (Tenn. 2009)). Under the “old” statutes, courts were instructed to liberally construe the workers’ compensation law in order “to secure the beneficiaries every protection which it authorizes, resolving any reasonable doubt as to whether the act or injury arose out of the employment, in favor of the employee whenever rationally possible.” *Ward v. Commercial Ins. Co.*, 372 S.W.2d 292, 297 (Tenn. 1963) (citing *Tapp v. Tapp*, 236 S.W.2d 977, 978 (Tenn. 1951)); *see also* Tenn. Code Ann. § 50-6-116 (2014) (applicable to injuries occurring prior to July 1, 2014); *Turner v. Bluff City Lumber Co.*, 227 S.W.2d 1, 2 (Tenn. 1950) (collecting cases in support of this point).

Under the “new” workers’ compensation statutes, a claimant must establish “by a preponderance of the evidence that the employment contributed more than fifty percent (50%) in causing the injury, considering all causes.” Tenn. Code Ann. § 50-6-102(13)(B) (2014) (applicable to injuries occurring on and after July 1, 2014). The new statutes instruct that the workers’ compensation law “shall not be remedially or liberally construed but shall be construed fairly, impartially, and in accordance with basic principles of statutory construction . . . [without] favoring either the employee or the employer.” Tenn. Code Ann. § 50-6-116 (2014) (applicable to injuries occurring on and after July 1, 2014).

Under the new statutes, however, the central tenet remains: “Every employer and employee subject to this chapter, shall, respectively, pay and accept compensation for personal injury or death by accident arising primarily out of and in the course and scope of employment without regard to fault as a cause of the injury or death.” Tenn. Code Ann. § 50-6-103(a) (2014) (applicable to injuries occurring on and after July 1, 2014).

² Draco was an Athenian lawgiver who “fixed death as the penalty for most offences . . . [because] he thought small offences deserved it, and he knew no greater penalty for great ones.” Douglas M. MacDowell, *The Law in Classical Athens* 42 (1978) (quoting Plutarch, *Solon* 17. 2–4). It was later said that Draco “wrote his laws in blood, not in ink.” *Id.*

Armstrong asserts that Dr. Hall's testimony fails to establish that Mr. Coleman's employment contributed more than fifty percent to the cause of his injury, as required under the new workers' compensation statutes, because Dr. Hall did not adequately separate the work-related hearing loss from the non-work-related hearing loss. In response, Mr. Coleman argues that Dr. Hall "stated without equivocation that noise induced hearing loss part of Mr. Coleman's hearing damage was primarily caused by the noise exposure at work for Armstrong."

As noted above, the workers' compensation statutes permit compensation "for personal injury or death by accident arising primarily out of and in the course and scope of employment without regard to fault as a cause of the injury or death." Tenn. Code Ann. § 50-6-103(a). The phrase "arising primarily out of and in the course and scope of employment" is defined in the statutes. To satisfy this criterion, the claimant must show "by a preponderance of the evidence that the employment contributed more than fifty percent (50%) in causing the injury, considering all causes." Tenn. Code Ann. § 50-6-102(13)(B).³

Here, Dr. Hall testified that the "sensorineural component of [Mr. Coleman's] hearing loss is likely, more likely than not related to workplace noise exposure based on his history." As Armstrong points out, the sensorineural hearing loss is not the entirety of Mr. Coleman's hearing loss; it includes both sensorineural and conductive components. Dr. Hall testified that "[t]he conductive hearing loss cannot be . . . stated as related to noise exposure." Because Dr. Hall did not delineate Mr. Coleman's injury into sensory and conductive components, one of which was caused by employment-related noise exposure and the other not, Armstrong contends that his testimony does not meet the fifty percent threshold required by the statute.

In this case, Mr. Coleman's work-related injury consists of his sensorineural hearing loss. Dr. Hall's testimony adequately establishes Mr. Coleman's sensorineural hearing loss as an injury arising in the course and scope of Mr. Coleman's employment. Dr. Hall's testimony also makes it clear that the conductive hearing loss is not work-related. There is no competing medical testimony, and Armstrong has not presented

³ We note that the phrase "arising primarily out of and in the course and scope of employment" is used in an overlapping manner in the new workers' compensation statutes, in that the term "injury" is defined as "an injury by accident, a mental injury, occupation disease . . . or cumulative trauma conditions . . . arising primarily out of and in the course and scope of employment, that causes death, disablement or the need for medical treatment of the employee . . ." Tenn. Code Ann. § 50-6-102(13) (emphasis added).

sufficient reason to doubt Dr. Hall's credibility or expertise. The trial court limited Mr. Coleman's compensation to his work-related injury. *See* Tenn. Code Ann. § 50-6-102(13).

The real question presented is Armstrong's contention that Dr. Hall's methodology for determining Mr. Coleman's work-related injury—extrapolating the hearing loss from the left ear, which was entirely sensorineural, to delineate the hearing loss in the right ear, which was mixed—is not supported by the preponderance of the evidence. Armstrong bases this argument on a statutory provision requiring an impairment rating to be “based on the applicable edition of the AMA guides or, in cases not covered by the AMA guides, an impairment rating by any appropriate method used and accepted by the medical community.” Tenn. Code Ann. § 50-6-204(k)(2)(C) (2014) (applicable to injuries occurring on and after July 1, 2014). The statute states that an impairment rating that does not comport with this requirement shall not be “admissible into evidence at the trial of a workers' compensation claim.” *Id.*

As noted above, Mr. Coleman's conductive hearing loss is not work-related and does not constitute a compensable injury under the applicable workers' compensation statutes. Dr. Hall's extrapolation method was an effort to separate Mr. Coleman's work-related injury from his non-work-related injury, for the purpose of establishing an impairment rating. The trial court found Dr. Hall's extrapolation to be well within the bounds of propriety. We agree.

As Armstrong accurately points out, in response to cross-examination, Dr. Hall admitted that the use of extrapolation was not expressly authorized by the AMA Guides. However, Dr. Hall qualified his answer. In determining Mr. Coleman's *overall* hearing loss, he noted that the conductive hearing loss should not be removed. Mr. Coleman's actual total hearing loss—his binaural disability—is accurately stated as seventeen percent in Dr. Hall's estimation. He explained that he used extrapolation solely because Mr. Coleman's conductive hearing loss was *not* work-related, and thus not compensable.

Moreover, the provision of the AMA Guides that Dr. Hall read as part of his deposition testimony states, “[I]n the calculation of hearing impairment rating, no correction for presbycusis should be made” The term “presbycusis” refers to age-related hearing loss. *Dorland's Illustrated Medical Dictionary* 1349 (28th ed. 1994) (defining presbycusis as “a progressive, bilaterally symmetrical perceptive hearing loss occurring with age”). Thus, the portion of the AMA Guides read into the record advises against correcting for age-related hearing loss. However, age-related hearing loss is a type of *sensorineural* hearing loss and Dr. Hall used extrapolation only to exclude

conductive (non-work-related) hearing loss. Mary Helen McNeal, *Say What? The Affordable Care Act, Medicare, and Hearing Aids*, 53 Harv. J. on Legis. 621, 627 (2016) (citing Debra Busacco, *Audiologic Interpretation Across the Lifespan* 3 (2010); Stephen A. Gelfand, *Essentials of Audiology* 159 (3d ed. 2009)).

Under all of these circumstances, we conclude that the AMA Guides do not prohibit Dr. Hall’s use of extrapolation. Questions regarding the admissibility of evidence are within the sound discretion of the trial court. *White v. Beeks*, 469 S.W.3d 517, 527 (Tenn. 2015); *Otis v. Cambridge Mut. Fire Ins. Co.*, 850 S.W.2d 439, 442–43 (Tenn. 1992). The trial court was well within its discretion to hold that Dr. Hall’s use of extrapolation was an “appropriate method” to arrive at an impairment rating that reflected Mr. Coleman’s work-related injury. Tenn. Code Ann. § 50-6-204(k)(2)(C).

For these reasons, we hold that the trial court’s finding that Mr. Coleman was entitled to permanent partial disability benefits equaling fourteen percent permanent partial disability to the body as a whole is supported by a preponderance of the evidence in the record.

CONCLUSION

Discerning no error, the decision of the trial court is affirmed. Costs are taxed to Armstrong Hardwood Flooring Company and Indemnity Insurance Company of North America, for which execution may issue if necessary.

HOLLY KIRBY, JUSTICE

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
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**JERRY COLEMAN v. ARMSTRONG HARDWOOD FLOORING
COMPANY ET AL.**

**Court of Workers' Compensation Claims
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JUDGMENT ORDER

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 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 Opinion of the Panel should be accepted and approved; and

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs are assessed to Armstrong Hardwood Flooring Company and Indemnity Insurance Company of North America, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM