IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
April 23, 2018 Session

PAUL A. WESTBY v. GOODYEAR TIRE & RUBBER COMPANY

Appeal from the Chancery Court for Obion County
No. 29622 W. Michael Maloan, Chancellor

No. W2017-01408-SC-R3-WC – Mailed June 20, 2018; Filed July 24, 2018

Paul A. Westby ("Employee") suffered gradual hearing loss during his employment with Goodyear Tire & Rubber Company ("Employer"). Employee filed a workers' compensation claim when Employer closed its plant. Employer argued the claim was barred by the statute of limitations because Employee failed to report his injury despite learning of his hearing loss years earlier. The trial court allowed the claim based on the "last-day-worked" rule and awarded Employee 60 percent permanent partial disability ("PPD") to both ears. Employer has appealed, arguing that the trial court erred in applying the last-day-worked rule and that the PPD award is excessive. This appeal has been referred to the Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law pursuant to Tennessee Supreme Court Rule 51. We affirm the judgment of the trial court in all respects.

Tenn. Code Ann. § 50-6-225(e) (2014) (applicable to injuries occurring prior to July 1, 2014) Appeal as of Right; Judgment of the Chancery Court Affirmed

WILLIAM B. ACREE, JR., SR. J., delivered the opinion of the court, in which ROGER A. PAGE, J. and DON R. ASH, SR. J., joined.

Randy N. Chism, Union City, Tennessee, for the appellant, Goodyear Tire & Rubber Co.

Jeffrey P. Boyd, Jackson, Tennessee, for the appellee, Paul A. Westby

OPINION

Factual and Procedural Background

Employee worked at Employer's plant from 1993 until the plant closed on July 9, 2011. Employee filed a claim for hearing loss, asserting his hearing loss was caused by noise exposure at the plant and alleging an injury date of June 6, 2011. After exhausting the benefit review process, Employee filed his complaint for worker's compensation benefits on February 2, 2012. In response, Employer asserted that Employee failed to give notice of injury as required by the Tennessee Workers' Compensation Act and that the applicable one-year statute of limitations expired prior to the filing of the claim. Employer also denied that Employee sustained his injury as a result of any work activity. The case proceeded to trial on May 22, 2017.

Employee, age 61 at the time of trial, testified that he began working in Goodyear's Madisonville, Kentucky plant after he graduated from high school. When the Kentucky plant closed, he transferred to the Goodyear plant in Union City, Tennessee, in March 1993. Employee worked eight to twelve hour shifts up to seven days per week in the tire room. He described his work environment as "very noisy" with loud machinery constantly operating around him. Initially, Employee was not required to wear hearing protection; however, such protection became mandatory in the last six or seven years of his employment.

According to Employee, Employer conducted periodic hearing screens. Employee occasionally failed the hearing test and was required to retake the test. However, Employer never suggested that Employee see a doctor for his hearing issues. Instead, he was told that Employer would continue to monitor his hearing. Employee knew he had hearing problems because he had tremendous difficulty hearing when in crowds and often did not hear or understand the conversations going on around him. His wife frequently told him the television was too loud.

When he arrived in Union City in 1993, Employee already knew he had sustained hearing damage from the Kentucky plant. When he saw Dr. Keith Wainscot, an otolaryngologist, in Jackson in 2002, Employee told Dr. Wainscot he had known of his hearing loss for ten to fifteen years. He believed most of his hearing damage was from Employer. Employee purchased hearing aids in 2002 and a second set in 2009 or 2010.

The proof at trial also included the deposition testimony of Drs. Karl Studtmann and Ronald Kirkland, otolaryngologists. According to Dr. Studtmann, his partner, Dr. Keith Wainscott, saw Employee in February 2002. At that time, an audiogram revealed hearing loss in both ears with slightly greater hearing loss in the left ear. When Dr. Studtmann saw Employee in August 2011, Employee complained of gradual hearing loss over a long period of time. By that time, Employee had been fitted for hearing aids. Employee told Dr. Studtmann he was employed by Employer for 37 years, and he wore hearing protection when mandated by Employer. Employee denied significant outside noise exposure other than occasionally firing his rifle when hunting. A follow-up audiogram confirmed noise-induced hearing loss and further confirmed that Employee's hearing had become progressively worse since the 2002 audiogram. This gradual decline in hearing was

consistent with hearing data from Goodyear for the years 1993 through 2011. However, Dr. Studtmann disagreed with the company doctor's opinion that the hearing loss was not work-related. Instead, Dr. Studtmann opined that Employee's work environment was the primary source of Employee's noise exposure and was the most likely cause of his hearing loss. Based on the American Medical Association ("AMA") Guidelines, Dr. Studtmann assessed a 30 percent monaural impairment in Employee's right ear; 18.8 percent in his left ear; 20.6 percent binaural impairment; and a 7 percent whole-body impairment.

At Employer's request, Dr. Ronald Kirkland evaluated Employee on December 3, 2015. In relaying his relevant history, Employee told Dr. Kirkland that he sustained hearing loss as early as late 1979 or early 1980 when his hearing tests conducted at Goodyear in Kentucky began to worsen. An audiogram performed during the visit produced results comparable to those from Dr. Studtmann's examination. Dr. Kirkland also reviewed the Goodyear hearing data from 1994 to 2011 and agreed that there was a definite trend of worsening over time. Dr. Kirkland agreed that Dr. Wainscott's 2002 audiogram and Dr. Studtmann's 2011 audiogram also showed a progression of hearing loss. Although he agreed that the noise exposure at Goodyear was a factor in the hearing loss, Dr. Kirkland did not concede that this exposure was the primary factor. Using the AMA Guidelines, Dr. Kirkland assigned an impairment rating of 22.5 percent to the right ear; 18.8 percent to the left ear; a 19.4 percent impairment to both ears, and a 7 percent impairment to the body as a whole.

After taking the matter under advisement, the trial court found that Employee was excused from giving notice under Tennessee Code Annotated section 50-6-201(b) due to Employer's actual notice of his injury; that Employee filed his action within the applicable statute of

limitations based on the "last-day-worked rule" and that Employee had sustained a compensable injury to his hearing system caused primarily by the noise exposure at Goodyear. The trial court accepted the 20.6 impairment rating assigned by Dr. Studtmann based on the 2011 audiogram and awarded permanent partial disability benefits of 60% to the scheduled member or 90 weeks for a total award of $71,010.00. Employer appealed.

Analysis

Standard of Review

Appellate review of decisions in workers' compensation cases is governed by Tennessee Code Annotated section 50-6-225(e)(2) (2008), which provides that appellate courts must "[r]eview . . . the trial court's findings of fact . . . de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." As the Tennessee Supreme Court (hereinafter "Supreme Court") has observed many times, reviewing courts must conduct an in-depth examination of the trial court's factual findings and conclusions. *Wilhelm v. Krogers*, 235 S.W.3d 122, 126 (Tenn. 2007). When the trial court has seen and heard the witnesses, considerable deference must be afforded the trial court's factual findings. *Tryon v. Saturn Corp*., 254 S.W.3d 321, 327 (Tenn. 2008). No similar deference need be afforded the trial court's findings based upon documentary evidence such as depositions. *Glisson v. Mohon Int'l, Inc./Campbell Ray*, 185 S.W.3d 348, 353 (Tenn. 2006). Similarly, reviewing courts afford no presumption of correctness to a trial court's conclusions of law. *Seiber v. Reeves Logging*, 284 S.W.3d 294, 298 (Tenn. 2009).

I.

Employer's primary argument is that Employee's claim is barred by the one-year statute of limitations contained in Tennessee Code Annotated section 50-6-203(b). Employer maintains that Employee knew, at least by 2002 when he purchased hearing aids, that he had suffered hearing loss as a result of his employment. Because Employee did not file his workers' compensation claim until June 6, 2011, Employer insists that the claim is time-barred.

The trial court found that Employee's claim was timely filed based on the last-day-worked rule. Employer now contends that the last-day-worked rule does not apply to Employee's claim because (1) Employee failed to give notice of his injury and (2) Employee obtained his maximum form of medical treatment when he purchased hearing aids in 2002.

A workers' compensation claim must be filed within one-year following the occurrence of the accident resulting in injury. Tenn. Code Ann. § 50-6-203(b).[1] However, hearing loss injuries are typically gradual in nature, and "there is generally no particular event that should make it obvious to the employee that his hearing loss is work-related." *Hill v. Whirlpool Corp.*, No. M2011-01291-WC-R3-WC, 2012 WL 1655768, at *4 (Tenn. Workers Comp. Panel May 10, 2012). Accordingly, identification of the "accident resulting in the injury" contemplated by the statute is extremely difficult in such cases. *Lawson*

[1] The statute provides that "[i]n those instances where the employer has not paid workers' compensation benefits to or on behalf of the employee, the right to compensation under this chapter shall be forever barred, unless the notice required by § 50–6–202 is given to the employer and a benefit review conference is requested on a form prescribed by the commissioner and filed with the division within one (1) year after the accident resulting in injury." Tenn. Code. Ann. § 50–6–203(b)(1).

v. Lear Seating Corp., 944 S.W.2d 340, 341 (Tenn. 1997).

In *Lawson*, the Supreme Court brought certainty to gradually-occurring-injury cases by adopting the last-day-worked rule to determine when the statute of limitations period is triggered. *Id.* at 343. Pursuant to the last-day-worked rule, the statute of limitations for filing a workers' compensation claim involving gradually occurring injuries does not begin to run until the date the employee was unable to work due to his injury.[2] *Id.* (describing a gradually occurring injury as a "new injury each day"). The Court has subsequently reaffirmed the last-day-worked rule. *Building Materials Corp. v. Britt* [hereinafter "*Building Materials*"], 211 S.W.3d 706 (Tenn. 2007) (rejecting a retreat from the bright line last-day-worked rule by overruling in part *Bone v. Saturn Corp.*, 148 S.W.3d 69 (Tenn. 2004) and its progeny). The last-day-worked rule seeks to avoid placing the employee in a potential trap by either forcing the employee to submit a claim before he is actually disabled or allowing the statute of limitations to bar the employee's claim if the employee waits to file a claim. *Building Materials,* 211 S.W.3d at 712.

In the instant case, the proof established that Employee suffered gradual hearing loss during his employment. Although Employee sought treatment on his own for his hearing problems, he never missed work due to his hearing loss. He filed his workers' compensation claim on June 6, 2011, which was near the time of the plant's closing. Thus, the "last day worked" was the day the plant closed. Applying the last-day-worked rule, the trial court concluded that Employee's claim was

[2] The Supreme Court has also explained 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." *Barnett v. Earthworks Unlimited, Inc.*, 197 S.W.3d 716, 721 (Tenn. 2006) (overruled in part on other grounds by *Building Materials*).

timely filed.

Employer contends, the last-day-worked rule contains a notice requirement or condition precedent. Consequently, the rule only applies when an employee has initially given his employer timely notice of injury but continues to work for employer. Employee avers that he knew his hearing loss was work-related in 2002, but he did not give Employer notice until 2011. In Employer's view, Employee may not rely on the last-day-worked rule.

Employer's argument is premised on the Court's dicta in *Building Materials*. While reflecting on the facts of its earlier *Lawson* decision, the Supreme Court stated that Employee gave notice to his employer that his injury was work-related but continued to work for employer. *Building Materials*, 211 S.W.3d at 712. The Court reasoned it would be unfair to start the running of the statute of limitations on the date the injury was first reported to the employer if the employee continued to work after having given notice. *Id.* (adding that "[i]f the rule were otherwise, the employee would have less incentive to provide notice to the employer). The Court reiterated that an employee who gives notice of a gradually occurring injury should not be penalized by using the notice date to start the running of the statute of limitations. However, the Court did not appear to place a notice condition on the application of the last-day-worked rule.

Interestingly, before *Building Materials* the Supreme Court had held "the last-day-worked rule does not apply in situations in which an employee provides actual notice of a gradually occurring injury to the employer." *Barnett*, 197 S.W.3d at 720-22 (relying on *Bone*, 148 S.W.3d at 73-74 and *Mahoney v. NationsBank of Tennessee, N.A.*, 158 S.W.3d 340, 345 (Tenn. 2005)). As noted, however, the court overruled

Bone and *Mahoney* to the degree those cases clouded the bright line last-day-worked rule. *See Building Materials*, 211 S.W.3d at 713 (rejecting the "first notice" rule announced in *Bone*).

In the instant case, however, we are not required to parse the remnants of these Supreme Court and panel decisions to determine the interplay, if any, between a notice requirement and the last-day-worked rule.[3] We observe that the notice described in both Tennessee Code Annotated sections 50-6-201 or 50-6-202 is mandatory in most instances unless, for example, the employer has actual notice of the injury. *See, e.g.*, *George v. Building Materials Corp. of America*, 44 S.W.3d 481 (Tenn. 2001). The proof at trial established that Employer conducted eighteen hearing screens during the course of Employee's employment between 1993 and 2011. In 1996, 2003, 2006, 2009, and 2011, Employer conducted two tests, presumably because Employee failed the initial test in those years. The tests revealed that Employee had suffered hearing loss and that the hearing loss progressed, notwithstanding the plant physician's opinion that the hearing loss was not work-related. Citing *George*, the trial court concluded that Employee was excused from giving notice under Tennessee Code Annotated § 50-6-201(b) due to Employer's actual notice of his injury. Thus, to the degree notice of a gradually occurring injury is required prior to filing a claim on the last day worked; we agree that Employer's actual notice of injury satisfied any notice requirement.

Employer also argues that the last-day-worked rule does not apply because Employee "had obtained his maximum form of medical

[3] Likewise, we are not required to resolve the dispute as to whether Employee knew his injury was work-related in 2002 when he obtained hearing aids (as argued by Employer) or in 2011 when Dr. Studtmann opined that Employee's hearing loss was work-related (as argued by Employee). *See, e.g.*, *Upchurch v. Goodyear Tire & Rubber Co.*, No. W2012-01869-WC-R3-WC (Tenn. Workers Comp. Panel Oct. 18, 2013).

treatment when he obtained his hearing aids." In other words, the statute of limitations began to run, at the latest, when Employee obtained hearing aids ("the maximum medical treatment possible" according to Employer) in 2002. Absent some authority to support this reasoning in the context of the last-day-worked rule, we are not persuaded by this argument.

Accordingly, we cannot conclude that the trial court erred in rejecting Employer's statute of limitation defense by applying the last-day-worked rule and in considering the merits of Employee's claim.

II.

Employer also argues that the trial court's award of PPD benefits was excessive. Specifically, Employer claims that because Employee sustained hearing loss in Kentucky prior to transferring to the Union City plant, Employee's claim should be limited to any progression of his hearing loss. Employer further maintains that hunting and smoking should have been considered as potential contributing causes to Employee's hearing loss. Finally, Employer submits that the absence of vocational disability should be considered in determining the award.

The trial court accredited the testimony of Dr. Studtmann, who assigned a 20.6 percent binaural impairment rating under the AMA Guidelines based on the August 2011 audiogram. In finding that Employee sustained a 60 percent permanent partial disability to both ears, the trial court noted that it considered Employee's age, education, work history, transferrable job skills, medical and lay testimony, job opportunities in the community, and the ability of Employee to compete in the job market with disabilities.

For the reasons cited above, Employer asks the panel to reduce the trial court's award as done in *Bain v. TRW, Inc.*, No. M2008-02311-WC-R3-WC, 2010 WL 1508519 (Tenn. Workers Comp. Panel Apr. 15, 2010) (discussing the "last injurious exposure rule" and reducing the award as excessive) and *Hix v. TRW, Inc.*, No. M2007-02822-WC-R3-WC, 2009 WL 1643448 (Tenn. Workers Comp. Panel June 12, 2009) (reducing the award upon a finding that the bulk of employee's hearing loss occurred after his exposure to workplace noise ended). Conversely, Employee requests that the panel affirm the award, relying on *Lang v. Nissan North America, Inc.*, 170 S.W.3d 564 (Tenn. 2005) (concluding that the trial court improperly discounted the extent of both the anatomical impairment and vocational disability and increasing the award from 9 percent to 45 percent).

Workers' compensation decisions, including gradual hearing loss cases, often turn on the unique facts of each case. Although we are guided by the prior decisions, we must consider the evidence presented in the case at hand and determine whether the evidence preponderates against the trial court's award. Giving deference to the trial court's factual findings and conducting our own review of the deposition testimony and record before us, we cannot conclude that the evidence preponderates against the trial court's award.

Conclusion

For the foregoing reasons, we affirm the judgment of the trial court. Costs of this appeal are assessed to Goodyear, for which execution may issue if necessary.

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HON. WILLIAM B. ACREE, JR., SR. J.

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
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Chancery Court for Obion County
No. 29622

No. W2017-01408-SC-R3-WC - Filed July 24, 2018

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 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 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 the Appellant, Goodyear Tire & Rubber Company, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM