IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
August 2000 Session

HAROLD W. FERRELL, JR. v. APAC-TENNESSEE, INC. AND CIGNA PROPERTY & CASUALTY INSURANCE CO.,

Direct Appeal from the Circuit Court for Warren County
No. 9961 J. Richard McGregor, Special Judge

No. M2000-00223- WC-R3-CV - Mailed - October 30, 2000
Filed - December 1, 2000

Tenn. Code Ann. § 50-6-225(e) (2000) Appeal as of Right; Judgment of the Circuit Court Affirmed

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with Tenn. Code Ann. section 50-6-225 (e)(3). The employer contends this claim for work related hearing loss is time barred by notice and statute of limitations provisions, and that the award is excessive. We conclude that notice was timely given, suit was timely filed, and the award is supported by the evidence.

JOHN A. TURNBULL, SP. J., delivered the opinion of the court, in which FRANK F. DROWOTA, III, J., and FRANK G. CLEMENT, Jr., Sp. J, joined.

Tyree B. Harris, IV, and Alan D. Johnson, Nashville, TN, for the Appellants APAC-Tennessee, Inc. and Cigna Property and Casualty Insurance Company

William Joseph Butler and Frank D. Farrar, LaFayette, TN, for the Appellee Harold W. Ferrell, Jr.

MEMORANDUM OPINION

Facts

The employee, Harold Ferrell, Jr., a 38 year old heavy construction worker with an eleventh grade education, had worked for APAC for eighteen years. In this work he performed such jobs as running a jackhammer, loading dynamite behind a track drill, and operating large equipment in which tasks he was exposed to loud noises approximately ninety percent of the time. In 1985, Mr.

Ferrell noticed a ringing in his ears. The problem gradually worsened, and in February, 1994, he consulted Dr. Bell who did not offer an explanation for the cause of his condition, or advise him that his condition was permanent.

For the purpose of having his hearing checked by a company doctor, Mr. Ferrell wrote the following letter to APAC on May 10, 1995:

> I went for a checkup on 2/22/94, and my hearing was bad. Since then it has gotten worse and [is] bothering me. I want this letter to be put in my file. I also want to know what company doctor I need to go to.

APAC followed this letter by sending Mr. Ferrell to see Dr. Steele for an examination. During this exam, he specifically asked Dr. Steele if his hearing condition was job related. By letter dated May 25, 1995, the employer advised Mr. Ferrell to wear hearing protection on the job and stated: "According to Malcolm Steele, M.D., you have a hearing condition. This condition is probably inherited instead of job related." Dr. Steele did not advise the employee that his condition was permanent.

Shortly thereafter, Mr. Ferrell asked APAC about going to a doctor and was advised that he could go to any doctor he chose at the expense of his own insurance. Mr. Ferrell's hearing continued to worsen and in April, 1998, he returned to Dr. Bell. At that visit, Mr. Ferrell did not ask, nor was he told that his hearing problem was work related. However, in August, 1998, Mr. Ferrell was consulting his attorney, Frank Farrar, on another matter when he was advised that his hearing problem might be work related. This suit was filed the next day, August 20, 1998. The country lawyer's opinion on causation was confirmed by the only medical evidence presented at trial, a C-32 Form, and attached medical records of Dr. Bell, a board certified otolaryngologist. This medical evidence, which APAC chose not to cross-examine, indicates that between 1994 and 1998, Mr. Ferrell's hearing had deteriorated. The 1994 audiogram showed a 0% combined hearing loss, but the 1998 tests indicated a combined hearing loss of 7% with increased loss of hearing levels to speech. Dr. Bell also expressed the opinion that Mr. Ferrell's permanent hearing impairment more probably than not arose out of his employment with APAC. The C-32 Form was dated March 25, 1999.

Mr. Ferrell had been permanently laid off by APAC in April of 1998, but at the time of trial, was working for another construction company wearing noise protection with no reduction in pay.

The trial judge, who had the opportunity to observe Mr. Ferrell's reaction to sound at trial, found that notice was timely, the suit was filed within the statute of limitations, and that Mr. Ferrell had suffered a permanent vocational bilateral hearing loss of 40%. The trial judge specifically found Mr. Ferrell's testimony to be credible.

Issues

1. Did the trial court err in finding that Mr. Ferrell's claim was not time barred by notice and the statute of limitations provisions?

2. Did the trial court err in finding that Mr. Ferrell had sustained a 40% permanent partial hearing loss to both ears, a scheduled member?

Notice and Statute of Limitations

APAC argues that Mr. Ferrell knew he had a serious hearing loss in February, 1994, and did not notify APAC until May, 1995. APAC contends the statute of limitations began to run when he knew that his hearing was deteriorating. Moreover, APAC insists that Mr. Ferrell did not satisfy the notice requirement because he did not report his injury to his employer within 30 days of learning his hearing problem was serious.

Appellant takes the legal position that the time for giving notice or bringing suit begins to run at the time he learns his injury is serious, even though he does not know it is work related. [1] That position is not supported by logic or law. An injury is not compensable unless it arises out of employment. If an injury were not work related, or reasonably believed to be so, there would be no reason to report it to the employer. Thus, logic would dictate that the time to report an injury, or file a workers' compensation suit, would not begin to run until the employee knew, or should reasonably have been aware that the injury was work related.

The law dictates the same result. It is well settled that the running of the statute of limitations is suspended until by reasonable care and diligence it is discoverable and apparent that an injury compensable under the workers' compensation laws has been sustained. *Pentecost vs. Anchor Wire Corp.*, 695 SW2d 183, 185 (Tenn. 1985) (emphasis added) Therefore, an employee's lack of knowledge that her injury is work related, if reasonable under the circumstances, must also excuse her failure to give notice within 30 days that she is claiming a work-related injury. *Pentecost*, Id., 185. See *Hawkins vs. Consolidated Aluminum Corp.*, 742 SW2d 253, 255 and numerous cases cited therein. Given the common basis for the two provisions (notice and limitations), the above rules are fully applicable to both. See Larson, *Workmen's Compensation*, Vol. 3, Section 78.41(a), p. 15-155 (stating similar standards for both notice and limitations issues.) *Pentecost*, Id., 185.

The trial court was required to determine whether Mr. Ferrell's failure to recognize the work-

[1] APAC bases this argument on a quote they twice cite to *Lyle vs. Exxon Corp.*, 746 SW2d 694, 697 (Tenn. 1988) ("Once an employee becomes aware that an injury is serious or work-related, the employer must be notified within 30 days that the employee is claiming workers' compensation.") (emphasis added) This quote actually appears in the *Blair -v- Inland Container Constr.*, 1991 WL 231114 (Tenn.) Not for publication.

related character of his injury was reasonable. The trial court found Mr. Ferrell's reliance on the opinion of causation given by the doctors who examined him was reasonable, though he may have suspected that his hearing loss was work related. We agree. Notice was timely and the suit was filed within the statute of limitations.

Vocational Disability

APAC further complains that the trial court's award of 40% disability to both ears was excessive since the medical evidence only indicated a 7% impairment of hearing with increased loss of hearing to levels of speech. The ultimate issue is not the extent of anatomical impairment, but the extent of vocational disability, which results when the employee's ability to earn wages in any form of employment that would have been available to him in an uninjured condition is diminished by injury. *Walker vs. Saturn Corporation*, 986 SW2d 204, 208 (Tenn. 1998). The trial court considered the fact that Mr. Ferrell was employed at the time of trial at equal or better wages, as well his age, education, skills and training, and capacity to work at types of work available. He found the testimony of Mr. Ferrell to be credible. He was able to observe and assess Mr. Ferrell's reaction to sound at trial. Conclusions of the trial judge based upon his personal examination and observation are entitled to special weight on appeal. *United States Rubber Products vs. Cannon*, 113 SW2d 1184, 1189 (Tenn. 1938). In addition, loss of hearing is a scheduled member with a maximum benefit of 150 weeks. Tenn. Code Ann. Section 50-6-207(3)(A)(ii)(r), to which the caps do not apply. *Atchley vs. Life Care Center of Cleveland*, 906 S.W.2d 428, 431 (Tenn. 1995)

Although the award may be generous, we cannot say that the evidence preponderates against the trial court's award. Accordingly, we affirm the judgment of the trial court is affirmed. Costs on appeal are assessed to appellant.

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JOHN A. TURNBULL, SPECIAL JUDGE

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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 fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs will be paid by the appellant, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM