IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
June 11, 2004 Session

ELLIS L. WOODS v. LOCKHEED MARTIN ENERGY SYSTEMS, INC. ET AL.

Direct Appeal from the Chancery Court for Morgan County
No. 01-04 Frank Williams III, Chancellor

Filed October 12, 2004

No. E2003-01789-WC-R3-CV - Mailed June 29, 2004

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of Findings of fact and conclusions of law. The Plaintiff sustained a gradual hearing loss while working for successive employers performing essentially the same duties. The trial judge held that the last-injurious employment rule applied. We affirm.

Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Circuit Court Affirmed

WILLIAM H. INMAN, SR. J., delivered the opinion of the court, in which E. RILEY ANDERSON, J., and ROGER E. THAYER, SP. J., joined.

Gary T. Dupler, Knoxville, Tennessee, attorney for appellant, Operations Management International, Inc.

John P. Dreiser, Knoxville, Tennessee, attorney for Appellee, Ellis L. Woods.

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

MEMORANDUM OPINION

The plaintiff filed this action seeking benefits for loss of hearing. He alleged that on February 2, 2000 "he was notified" of noise-induced hearing loss while employed "with all [D]efendants," and that on August 3, 2001 he "was notified" of increased work-related hearing loss

as a result of his regular employment duties, from April 1,1998 to the present time, with the Defendant, Operations Management International [hereafter"OMI"].

Defendant OMI argued that the Plaintiff was its employee from April 1, 1998 through December 27, 2000 when he retired, and denied knowledge of the asserted loss of hearing of the Plaintiff, or notice thereof.

The Defendant, Union Carbide Corporation, Inc. [hereafter "Union Carbide"], agreed that it employed the Plaintiff but denied that it received proper notice of an injury or hearing loss.[1]

The trial court found that the Plaintiff sustained a loss of hearing at the low to mid-range level as a result of his employment with the three Defendants, but that Defendant OMI is solely responsible for the injury to the Plaintiff because he was last injuriously exposed while in its employ. The court further found that the Plaintiff suffered a 50 percent disability "to his ears" and awarded benefits accordingly. The Defendants, Lockheed Martin Energy Systems, Inc. [hereafter "Lockheed Martin"], and Union Carbide were dismissed. The Defendant OMI appeals and presents for review these issues:

I. Whether the trial court erred in determining that the Plaintiff/Appellee was "injuriously" exposed while employed by Defendant/Appella[nt] OMI.

II. Whether the Plaintiff has met his burden and presented sufficient medical proof to show that Plaintiff's compensable hearing loss occurred during his employment with the Appellant (April 1998 to December 2000)?

III. Whether the trial court erred in substituting its own personal observations and life experiences in place of expert medical testimony presented by deposition at trial.

Our review is *de novo* on the record accompanied by the presumption that the findings of fact are correct unless the evidence preponderates against the judgment. Tenn. Code Ann. § 50-6-225(e)(2); Rule 13(d) Tenn. R. App. P. This standard requires that we weigh in more depth the factual findings of the trial court and its conclusions. ***Corcoran v. Foster Auto GMC Inc.***, 746 S.W.2d 452 (Tenn. 1988). Deference must be accorded to the trial judge who has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved. ***Story v. Legion Ins. Co.***, 3 S.W.3d 451 (Tenn. 1999).

Analysis

[1] The disclaimer of Union Carbide Corporation apparently was intended to serve as the answer for Lockheed Martin also.

The Plaintiff is a sixty-three-year-old high school graduate. He worked for Union Carbide from 1972 to 1975, where his regular duties demanded frequent use of a jackhammer and paving surfaces. He thereafter began working at another plant (K-25) in 1975 as a laborer whose chief duties included grounds-keeping and required the use of an industrial-sized lawnmower and weed-eater. During the winter months the Plaintiff worked indoors around convertors and very large motors. According to the Plaintiff, early in his career with Union Carbide hearing protection was not provided and not worn. By 1991 the Plaintiff had suffered significant noise-related loss as indicated by audiograms taken by the medical staff at the K-25 site.

In April 1998 the Plaintiff retired from Lockheed Martin and immediately was employed by OMI where he worked until December 2000. At OMI, during the summer months, he performed many of the same duties he performed at the end of his employment with Lockheed Martin, as contrasted by his earlier duties with Union Carbide, but OMI insisted that he wear specific foam ear plug protection and provided protective ear pieces for this purpose. The Plaintiff wore this protective equipment.

The Plaintiff worked for Union Carbide and Lockheed Martin from 1972 until April 1, 1998. When he left Lockheed Martin he had a hearing loss impairment rating of 3.8 percent. On the day he left Lockheed Martin, he began his work with OMI at the same facility he had been working at for twenty-six years under Union Carbide and Lockheed Martin.

The work that he performed at OMI was substantially the same as the work he had performed while at Union Carbide. During the summer months, he would mow the grass using the same equipment he had used while he was employed with Union Carbide and Lockheed Martin. The amount of hours that he spent mowing with OMI were also substantially the same as the hours spent mowing with Union Carbide and Lockheed Martin. He used the same type of hearing protection at OMI that he used while he was with Union Carbide. When he left OMI in 2000, his impairment rating had increased to 21.8 percent.

Dr. Overholt opined that the Plaintiff's hearing loss was noise induced and related to work. Dr. Brown, OMI's physician, stated that the Plaintiff's hearing loss was noise induced hearing loss. As a result of being exposed to noise at work, he now suffers from noise induced hearing loss and tinnitus. Tinnitus is a condition that subjects him to a constant "ringing or buzzing in [his] ears." Dr. Overholt testified that the tinnitus is related to the noise induced hearing loss.

The Plaintiff testified that he first began to notice his hearing loss "eight to ten to fifteen years ago[,]" indicating the time he worked for Union Carbide and Lockheed Martin, and that he "think[s]" his hearing grew worse after April 1, 1998 when he began work for OMI.

The dispositive issue is whether the last injurious-exposure rule is applicable as was concluded by the trial judge. OMI argues that the rule does not apply unless the proof reveals that the employee was actually injuriously exposed, and that the evidence does not establish that the Plaintiff was injuriously exposed while working for OMI. It is not controverted that the Plaintiff

worked for Union Carbide and its successors, including Lockheed Martin, for twenty-six years, from 1972 until 1998. During this time the Plaintiff's duties included cleaning, maintenance, jack hammering, paving, and mowing the lawns at the K-25 and Y-12 sites in Oak Ridge, Tennessee, with an industrial-sized lawn mower and weed eater. During the winter with Union Carbide, the Plaintiff worked indoors around convertors and very large motors. He testified that early in his career with Union Carbide he did not wear ear protection, and it was during his work with Union Carbide and Lockheed Martin that the Plaintiff first noticed a ringing in his ears. He underwent numerous audiograms while employed with Union Carbide and Lockheed Martin and according to the Plaintiff's medical expert, Dr. Overholt, these audiograms evidenced a high frequency work-related hearing loss occurring before 1991.

As we stated, in April of 1998, the Plaintiff began working for OMI where he continued working until retirement in December of 2000. At OMI, during the summer months, the Plaintiff performed many of the same duties he performed at the end of his employment with Lockheed Martin, as opposed to his earlier duties with Union Carbide. In 1999, while employed by OMI, the Plaintiff had an audiogram performed which indicated a binaural hearing impairment of 3.8 percent. By 2001, when a second audiogram was performed, the Plaintiff's binaural hearing impairment had increased to 20.3 percent, mostly in the low to mid-frequency ranges. Dr. Overholt testified that a hearing loss in the lower frequencies, is typically age-related and not noise-related, and that was the case with Mr. Woods. In fact, Dr. Overholt testified that Mr. Wood's rateable hearing loss (3000 Hz or less) was more likely than not due to age or some other degenerative condition.

The Appellant concludes that although the Plaintiff's hearing impairment score increased during his employment with OMI, his *noise-related*, or *work-related* hearing loss remained in status quo because the Plaintiff was not "injuriously" exposed.

Dr. Samuel Mark Overholt, M.D., testified by deposition that hearing loss is measured by a person's ability to hear different frequencies of sound. These frequencies are high, low and mid range. High frequency hearing loss occurs when an individual has difficulty hearing high pitch sounds with frequencies of above 3000. Low to mid range frequency hearing loss occurs when an individual has difficulty hearing sounds with frequencies in the 250 to 3000 Hz range.

Dr. Overholt further testified that high frequency hearing loss is most often caused by noise related trauma and, as stated, low frequency hearing loss is most often caused by old age or ear disease. The Plaintiff suffers from both high and low frequency hearing loss, and his audiograms prior to 1991 indicated that he was already suffering from significant high frequency hearing loss. He was then working for Union Carbide and Lockheed Martin.

The Plaintiff's hearing problems continued to worsen. In 2001, a year after the Plaintiff retired from OMI, another audiogram was taken which revealed that his ability to hear low frequency sounds had decreased.

The somewhat disjointed and confusing testimony of Dr. Overholt is, at times, frustrating and

difficult to follow. He clearly testified that the Plaintiff has a high frequency [above 3000 Hz] hearing loss which would not be noise induced but would be part of the ageing process or a degenerative condition. But he also stated that some of the Plaintiff's hearing loss is in the lower frequency - a mixed loss - and the precise amount of loss cannot be quantified. The employer must therefore be burdened with the entire impairment. *See,* ***Sweat v. Superior Industries, Inc.***, 966 S.W.2d 31 (Tenn. 1998). In avoidance of this rule, OMI argues that the Plaintiff was not injuriously exposed to the loss-producing noises while in its employ, because he wore noise-protection. The medical proof indicated that the hearing loss increased after he left Lockheed Martin.

The trial judge opined, in part:

> [I]f I accept what Dr. Overholt said, that the loss in the lower ranges is more often than not cause by age . . . . then I have to find for both Defendants because [Dr. Overholt] cannot attribute any of this man's loss to what happened to him on the job, and I'm not going to do that . . . . I think this man has sustained a hearing loss on the job . . . and in my opinion they were, given all the facts.

When studied in its entirety, or with no statement out of context, we think the proof established that a portion of the employee's hearing loss, at all range levels, occurred while he was employed by OMI. This being so, the last-injurious rule applies.

The Appellant complains that the trial judge discarded Dr. Overholt's opinion as evidenced by his statement that "there is a chance" that the Plaintiff's low frequency hearing loss is work-related. We understand this comment to mean that the loss was not subject to apportionment between these employers.

We are unable to find that the evidence preponderates against the judgment of the trial court and it is affirmed at the costs of the Appellant, Operations Management International.

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WILLIAM H. INMAN, SENIOR JUDGE

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JUDGMENT

This case is before the Court upon the motion for review filed by Operations Management International pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), 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 Operations Management International, for which execution may issue if necessary.

ANDERSON, J., NOT PARTICIPATING