

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

November 27, 2006 Session

RICKY SHOULDERS V. TRW COMMERCIAL STEERING DIVISION

:

**Direct Appeal from the Circuit Court for Trousdale County
No. 03-1-D-37 James O. Bond, Judge**

**No. M2006-00300-WC-R3-CV - Mailed: February 27, 2007
Filed - April 3, 2007**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Tennessee Supreme Court in accordance with Tennessee Code Annotated section 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The trial court awarded the employee benefits based on 54.75 percent of the scheduled member loss of hearing in both ears. On appeal, the employer contends that the claim is barred by the statute of limitations and that the trial court erred when it failed to allow counsel to read portions of the plaintiff's deposition. The employer also appeals the award being based on a scheduled member as opposed to the body as a whole and contends that the award is not supported by the preponderance of the evidence. Finally, the employer contends that the trial court erred in its determination of the compensation rate. After a careful review of the record, we find no error in the trial court's determination that the claim met the statute of limitations. We do find that the trial court erred in its ruling on the use of deposition testimony but find that error harmless. We find that the trial court erred in its determination of disability attributable to a scheduled member and we have modified that award. Finally, we find no error in the trial court's determination of the compensation rate. Accordingly, the judgment of the trial court is affirmed in part, modified in part and remanded.

**Tenn. Code Ann. § 50-6-225(e)(3) Appeal as of Right;
Judgment of the Circuit Court Affirmed in Part, Modified
in Part; Remanded**

J. S. (STEVE) DANIEL, Sr. J., delivered the opinion of the court, in which GARY R. WADE, J., and DONALD P. HARRIS, Sr. J., joined.

Richard Lane Moore, Cookeville, Tennessee, for the appellant, TRW Commercial Steering Division.

William Joseph Butler and E. Guy Holliman, Lafayette, Tennessee, for the appellee, Ricky Shoulders.

OPINION

I. Factual and Procedural History

Mr. Ricky Shoulders was fifty-seven years of age at the time of the trial. He had been employed for thirty-two years by TRW Commercial Steering Division when he retired in February 2003. On January 3, 2003, Mr. Shoulders filed a complaint against TRW Commercial Steering Division, hereinafter referred to as TRW, seeking workers' compensation benefits as a result of permanent hearing loss in both ears.

Mr. Shoulders had been employed for the entire length of his thirty-two-year work career with TRW as a maintenance mechanic working on or running plant machinery. Mr. Shoulders has a high school education and attended training furnished by TRW for four years to acquire his mechanical journeyman's status. He retired at the end of February 2003, not because of the hearing loss but in order to enjoy the benefits which he had earned from his employment. He never missed any work while employed by TRW because of his hearing loss. Mr. Shoulders had never been disciplined as an employee and had never filed any other workers' compensation actions although on one occasion, he had a work-related injury to his finger but this did not result in a claim.

The work environment in which Mr. Shoulders carried on his mechanical activities was a loud environment caused by machines producing varying degrees of noise. Mr. Shoulders testified that in the late 1980s he perceived that he was losing hearing capability and on December 23, 1993, he had a hearing test and bought a hearing aid for his right ear using his own funds. Recorded on the hearing test report of December 23, 1993, was a statement indicating that Mr. Shoulders had "twenty years-plus noise exposure." When asked if in fact Mr. Shoulders didn't know that the cause of his hearing loss in 1993 and 1994 was his work at TRW he explained that "well I couldn't say for sure, but it was a good possibility." He explained that he did not know how bad his hearing loss was until he saw Heather Dooley November 2, 2002 for a hearing test. Apparently, shortly before his retirement, Mr. Shoulders read an advertisement concerning a free hearing test at a local clinic. He attended the clinic and his hearing was tested by Ms. Dooley. This test revealed significant hearing loss in both ears and according to Mr. Shoulders this was the first time he realized the extent of his hearing loss in both ears.

Dr. John R. Chauvin is Mr. Shoulders' family physician who performed physical examinations of Mr. Shoulders from time-to-time. During the physical examination of June 28, 2000, Mr. Shoulders complained to Dr. Chauvin that he was not hearing as well as he normally did and that he attributed it to his work. Dr. Chauvin suggested that Mr. Shoulders check with his employer about having a hearing test and that he might need a referral to a specialist. However, no other action was taken by Dr. Chauvin nor does it appear that Mr. Shoulders took any further action until the 2002 test by Ms. Dooley. Subsequent to the commencement of this litigation and during a physical on January 12, 2005, Mr. Shoulders next discussed his hearing loss with Dr. Chauvin. As a result, Dr. Chauvin performed a cursory test which revealed hearing loss and this resulted in

a referral by Dr. Chauvin to an otolaryngologist, Dr. Matthew Speyer.

Dr. Speyer first saw Mr. Shoulders January 14, 2005. Based on his examination and an audiogram performed at his direction by Dr. Jewel Strehlau, Dr. Speyer concluded that Mr. Shoulders demonstrated bilateral severe high frequency hearing loss with mild asymmetry caused by exposure of industrial noise. According to Dr. Speyer, Mr. Shoulders has better hearing in his left ear than the right. Dr. Speyer indicated that noise induced hearing loss is gradual in its nature and described this loss as, "It's an accumulative effect over time much like erosion if you want to describe it as a metaphor." Dr. Speyer concluded that Mr. Shoulders "has a right ear monaural impairment of 26.2 percent. His left ear calculates to be a zero percent impairment based on the manual despite having high frequency hearing loss. His binaural impairment calculates to be 4.4 percent which calculates as a whole person impairment of 2 percent" based on the AMA Guidelines (5th Ed.). Dr. Speyer reviewed TRW's 1983 audiogram of Mr. Shoulders and agreed that he at that time had some demonstrated hearing loss but that loss would not have resulted in an impairment rating. He further agreed that in subsequent years, Mr. Shoulders' hearing diminished and this reduction of hearing could be related to ageing or reasons other than work noise. However, in considering all factors and the subjective report of Mr. Shoulders, the doctor concluded that more of the factors considered supported his conclusion of work noise related hearing loss.

After this lawsuit was filed, Mr. Shoulders was examined on behalf of TRW by Dr. David Scott Haynes, August 26, 2005. Dr. Haynes opined that Mr. Shoulders had and 18.8 percent impairment in the left ear, 31.9 percent in the right ear, 20.9 percent for both ears, and a 7 percent whole body impairment. This report was amended at his evidentiary deposition when counsel sought testimony from Dr. Haynes as to an allocation of this disability between that caused by the work environment and the ageing process. Dr. Haynes attributed 60 percent of the disability to the work environment and 40 percent to the ageing process. Dr. Haynes had not reported any disability associated with tinnitus in his written report although Mr. Shoulders had reported an occasional episode of hearing something "just a little off, very seldom, back in my ear." This experience was limited to one ear and our review of the doctor's testimony indicates that he considered it minimal to Mr. Shoulders' problems, assessing an impairment of 1 percent to the body as a whole during his deposition for these findings at the direction of the employer's counsel. The doctor concluded that Mr. Shoulders had a 20.9 percent impairment for his hearing loss, 1 percent whole body impairment for tinnitus which converted to 8 percent to the body as a whole and then attributed 60 percent of these findings to hearing loss attributable to the work place noise and the balance to the ageing process. Tinnitus is a noise that a person hears that's not being truly generated externally. It is a ringing or perception of a noise that is real to the patient but is centered in the brain. Tinnitus is not a hearing malady but one of the brain that can result in vertigo and loss of balance. Our review of the record indicates that Mr. Shoulders does not have balance or vertigo problems, had not complained of tinnitus to his treating physician, Dr. Speyer, and there is no medical evidence that establishes the causation of the tinnitus to his work activities.

The trial court accredited the testimony of Mr. Shoulders and awarded benefits for an injury

to the hearing in both of Mr. Shoulders' ears, based on 54.75 percent to the scheduled member. The court found the work-related injury to be a gradually-developing injury, the extent of which was not discovered until shortly before the lawsuit. TRW has appealed contending that the trial court erred in failing to find that the statute of limitations barred the claim. In this appeal they also contend that the trial court erred in prohibiting counsel from reading into evidence excerpts of Mr. Shoulders' deposition. TRW asserts that the trial court erred in making an award of 54.75 percent to the ears as a "scheduled hearing loss" rather than making an award to the "body as a whole" because of the fact that Mr. Shoulders had developed the unscheduled injury, tinnitus. TRW contends in this appeal that the award is excessive and not supported by the preponderance of the evidence. It also asserts that the trial court erred in making its award based on a compensation rate established in 2003 as opposed to 1994 when Mr. Shoulders first obtained a hearing aid.

II. Standard of Review

Review of the findings of fact made by the trial court is de novo upon the record of the trial court, accompanied by a presumption of the correctness of the findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2005). The reviewing court is required to conduct an independent examination of the record to determine where the preponderance of the evidence lies. The standard governing appellate review of the findings of fact of a trial judge requires this "panel to examine in depth the trial court's factual findings and conclusions." GAF Bldg. Materials v. George, 47 S.W.3d 430, 432 (Tenn. Workers' Comp. Panel March 26, 2001). When the trial court has seen the witnesses and heard the testimony, especially where issues of credibility and the weight of testimony are involved, the appellate court must extend considerable deference to the trial court's factual findings. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002); Townsend v. State, 826 S.W.2d 434, 437 (Tenn. 1992). Our standard of review of questions of law is de novo without a presumption of correctness. Perrin v. Gaylord Entm't Co., 120 S.W.3d 823, 626 (Tenn. 2003). When medical testimony is presented by deposition, this Court is able to make its own independent assessment of the medical proof to determine where the preponderance of the evidence lies. Cleek v. Wal-Mart Stores, Inc., 19 S.W.3d 770, 774 (Tenn. 2000); Houser v. Bi-Lo, Inc., 36 S.W.3d 68, 71 (Tenn. 2001).

III. Analysis Statute of Limitations

In this appeal TRW insists that Mr. Shoulders' claim is barred by the statute of limitations because of his knowledge of hearing loss and suspicion that it was work-related as early as 1993 when he obtained a hearing examination and purchased a hearing aid for his right ear. TRW contends Mr. Shoulders failed to give notice of his claim and did not initiate the workers' compensation lawsuit until January 3, 2003, resulting in the claim being barred by the statute of limitations.

The statute of limitations for claims and actions brought under the Tennessee Workers' Compensation Law is controlled by Tennessee Code Annotated section 50-6-203(a) which provided prior to the 2004 amendment, as follows:

The right to compensation under the Workers' Compensation Law shall be forever barred, unless, within one (1) year after the accident resulting in injury or death occurred, the notice required by § 50-6-202 is given the employer and a claim for compensation under the provisions of this chapter is filed with the tribunal having jurisdiction to hear and determine the matter. . . .

Tenn. Code Ann. § 50-6-203(a) (1999).

However, Tennessee courts have repeatedly recognized that gradually occurring injuries are compensable as accidental injuries under the Workers' Compensation Law. This is so even in situations where it is difficult to ascertain the date of the injury and/or accident or event giving rise to the injury. See Banks v. United Parcel Serv., Inc., 170 S.W.3d 556, 561 (Tenn. 2005); see also Mahoney v. NationsBank of Tennessee, N.A., 158 S.W.3d 340, 344 (Tenn. 2005). Our review of the medical evidence presented by deposition indicates that all of the expert testimony was to the effect that hearing loss attributable to workplace noise is a gradually-occurring injury in most cases and that Mr. Shoulders had experienced gradual loss of hearing associated with his work around noisy industrial machines to some degree.

Tennessee Code Annotated section 50-6-201(b) (2001) sets forth the notice requirements and the time from which to measure the statute of limitations for gradual work-related injury. This statute provides:

(b) In those cases where the injuries occur as the result of gradual or cumulative events or trauma, then the injured employee or such injured employee's representative shall provide notice to the employer of the injury within thirty (30) days after the employee:

(1) Knows or reasonably should know that such employee has suffered a work-related injury that has resulted in permanent physical impairment; or

(2) Is rendered unable to continue to perform such employee's normal work activities as the result of the work-related injury and the employee knows or reasonably should know that the injury was caused by work-related activities.

Tenn. Code Ann. § 50-6-201(b) (2003).

The notice requirement in the workers' compensation statutory scheme "exists so that an employer will have an opportunity to make a timely investigation of the facts while those facts are still readily accessible, and to enable the employer to provide timely and proper treatment for an injured employee." Jones v. Sterling Last Corp., 962 S.W.2d 469, 471 (Tenn. 1998). An employee who fails to notify his employer within the thirty days after he has sustained a work-related injury forfeits the right to workers' compensation benefits unless the employer has actual notice of the injury or unless the employee's failure to notify the employer was reasonable. Tenn. Code Ann. § 55-6-201(a) (1999 & supp. 2002).

Our Court interpreted Tennessee Code Annotated section 50-6-201 to provide that "employees are relieved from the notice requirement until they know or reasonably should know that their injury was caused by their work and that the injury has either impaired them permanently or prevented them from performing normal work activities." Banks v. United Parcel Serv., Inc., 170 S.W.3d 556, 561 (Tenn. 2005)

The issue of the running of the statute of limitations in workers' compensation claims which are based on gradual injuries to the employee was clarified by the recent decision of Barnett v. Earthworks Unlimited, Inc., 197 S.W.3d 716 (Tenn. 2006). In this case our court made the following observation:

Gradually occurring injuries have been described as "a new injury each day at work." Lawson, 944 S.W.2d at 341 (citing Barker v. Home-Crest Corp., 805 S.W.2d 373 (Tenn. 1991)). Thus 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.

.....

In sum, we hold that the one-year statute of limitations for bringing a claim for workers' compensation benefits for a gradually-occurring injury begins to run on the last day the employee worked for the employer, unless the employee has knowledge of the existence of a compensable, work-related injury and gives the required notice of that injury to his or her employer, in which case the date that notice is given is the date of the injury.

Barnett, 197 S.W.3d at 721-22.

The exception to the last work day rule mentioned in Barnett was fashioned by Bone v. Saturn Corp., 148 S.W.3d 69, 71 (Tenn. 2004), which addressed situations in which an employee gave notice of a gradually-occurring injury to his employer prior to missing work on account of the injury. However, the rationale of Bone has been reconsidered and overruled. See Building Materials Corporation d/b/a GAF Materials Corporation v. Melvin D. Britt, 2007 WL 171768 (Tenn. Jan. 24, 2007). In this case our review of the record indicates that Mr. Shoulders gave no notice to the employer of the gradual occurrence of his hearing loss. Mr. Shoulders had not received an expert

medical opinion that his hearing loss was work-related nor did he know the permanent nature of the injury until after he left his employment. The statute of limitations did not begin to run on his claim until his last day worked in February 2003, making his lawsuit which was filed in January 2003 timely. We find that the trial court did not err in determining that the Shoulders' claim was timely.

IV. Trial Court Error in Prohibiting the Reading of Selected Portions of Mr. Shoulders' Deposition

During the trial, counsel for TRW attempted to read portions of Mr. Shoulders' discovery deposition into evidence to establish the fact that Mr. Shoulders had knowledge of his hearing loss and that he had a belief that the hearing loss was attributable to his work several years prior to the filing of the workers' compensation lawsuit. The purpose of the reading of this portion of Mr. Shoulders' deposition was in order to convince the court that the statute of limitations should be considered to have run and the case be dismissed.

The exchange in which TRW complains was as follows:

THE COURT: Next Witness.

MR. MOORE: Judge, the next thing we would like to do is read into evidence portions of Mr. Shoulders' deposition.

THE COURT: You cross-examined him, and that deposition is not going to be read in here. You had an opportunity to ask him questions right up here. I don't want to hear the deposition.

MR. MOORE: Can I at least say it for, to make a record, the pages?

THE COURT: You can make a record. Don't read it. Just tell me what page numbers it is.

MR. MOORE: I will. I will. From Page 54, Lines 9 through 20. Page 55, Lines 17 through 25. Page 56, Lines 1 through 3. Page 57, Line 15 through 17. Page 82, Line 13 through 17. Page 87, Line 11 through 18. And for identification purposes to save time, Judge, we will just make his original, that way we don't have to

read it out loud.

THE COURT: You can make it an exhibit.

MR. MOORE: Can I make it an exhibit, or for identification?

THE COURT: Right. Just make it an exhibit.

MR. MOORE: All right. We'll make his deposition an exhibit, the portions I just listed out loud.

(EXHIBIT 8, DEPOSITION PORTION, RICKY SHOULDERS.)

THE COURT: And the Court's ruling is that you had a witness on the witness stand. The proper use of a deposition is not to read from it, but you ask the witness questions. If he answers the questions differently than you've got in the deposition, you have a right to read it to him. But you have to bring it to his attention and let him look at it before than can occur. And the Court is not going to get into this reading parts of the deposition after somebody has already testified. Go ahead. Next?

Our review of this colloquy leads us to conclude that the trial court prohibited the reading of the depositions requested by TRW because of its belief that this was an improper use of the deposition and should have been used when Mr. Shoulders was cross-examined.

Clearly, Tennessee Rules of Civil Procedure 32.01, Use of Depositions, controls this issue. Tennessee Rules of Civil Procedure 32.01(2) provides:

The deposition of a party or of anyone at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30.02(6) or 31.01 to testify on behalf of a public or private corporation, partnership or association, government agency or individual proprietorship which is a party may be used by an adverse party for any purpose.

Tenn. R. Civ. P. 32.01(2).

This rule is clear in all respects and allows the reading of the deposition passages. It was error for the trial court to have prohibited counsel from being able to read the selected portions of

the plaintiff's deposition. We have reviewed those portions of the deposition cited in the above colloquy and find that the substance of those passages were covered in other parts of the proof during the trial. Basically, those issues were that Mr. Shoulders was knowledgeable in 1993 that he had some hearing loss, that he suspected that the hearing loss was work-related, and that Dr. Chauvin had suggested to Mr. Shoulders that he take up his concern about any hearing loss with TRW on June 28, 2000. However, after reviewing these passages, we have to conclude under Tennessee Rules of Appellate Procedure 36(b) that the effect of this error is harmless as it appears that all of the facts supported by the deposition were in other parts of the record, and based on our

conclusion concerning the statute of limitations, the error did not affect the ultimate trial determination.

V. Award to "Scheduled Hearing Loss" Rather than Award to the "Body as a Whole"

It is TRW's contention that the trial court erred in making an award to Mr. Shoulders for a scheduled hearing loss to both ears as opposed to making an award to the body as a whole. The trial court made an award of benefits pursuant to Tennessee Code Annotated section 50-6-207(3)(A)(ii)(r) which provides, "For the complete permanent loss of hearing in both ears, sixty-six and two-thirds percent (66 2/3%) of the average weekly wages during one hundred fifty (150) weeks." The trial court's award was 54.75 percent of the scheduled member loss of hearing in both ears. The trial court in making this award, explained the award as a two and one-half (2½) times multiplier times the 21.9 percent finding testified to by Dr. David Scott Haynes. Dr. Haynes had ascribed the hearing loss as 20.9 percent for loss of hearing in both ears and 1 percent for the tinnitus. Due to the fact that Tennessee Code Annotated section 50-6-207 does not specifically list tinnitus as a scheduled injury, any tinnitus award must be associated and made to the body as a whole pursuant to Tennessee Code Annotated section 50-6-207(3)(F).

It is the contention of TRW that the court erred in failing to make an award solely to the body as a whole because of the concurrent finding of both injury to a scheduled member as well as to a nonscheduled member. It is their position that these are concurrent disabilities and under the provisions of Tennessee Code Annotated section 50-6-207(3)(C) that the court was obligated to make a concurrent injury determination to the body as a whole as opposed to making an award to the scheduled member because of the tinnitus finding. We would be more inclined to concur in TRW's analysis if in fact Mr. Shoulders had complained of injuries both to a scheduled member as well as a nonscheduled member, i.e., hearing loss and tinnitus. Cf. Crump v. B & P Const. Co., 703 S.W.2d 140 (Tenn. 1986). However, our review of the medical proof which was presented exclusively by deposition fails to reveal at any place where Mr. Shoulders had complained of an occasional episode of tinnitus which he related to his work activity with TRW. Dr. Chauvin, Mr. Shoulders' personal physician, received no complaint of tinnitus nor had Dr. Speyer received any complaint of tinnitus by Mr. Shoulders. Only Dr. Hayes had a finding of some occasional tinnitus based on a statement of Mr. Shoulders. Our review of the record fails to reveal any proof that relates the tinnitus to/or caused by Mr. Shoulders' employment at TRW. Dr. Haynes' deposition leads us

to conclude that he had never made a written report concerning tinnitus as it relates to Mr. Shoulders' employment and only made these findings at the time of his deposition at the inquiry of TRW's counsel. Of course, the whole basis for TRW advancing this argument that any award be to the whole body is an effort to obtain the limitations of any award by the multiplier provisions of Tennessee Code Annotated section 50-6-241(a)(1).¹ We conclude that in situations such as presented by these facts that the trial court did not err in limiting the award to the scheduled member. Construction of the workers' compensation laws require courts to recognize the remedial nature of the statutes and equitably construe the law to the end that objects and purposes of the law may be realized. Tenn. Code Ann. § 50-6-116. Those purposes entail an adequate and complete recovery for the complaint of the covered worker.

VI. Trial Court Award Computation

TRW complains on appeal that the trial court erred in making a 54.75 percent vocational disability award for the hearing loss as the proof fails to preponderate in favor of such an award. Principal in this complaint is the manner in which this award was determined. In announcing the award the court explained how it had reached its determination by stating,

I don't think he had any worsening after he left employment. The difference in the evaluations is just a difference in doctors, the examiners. I really think we ought to keep this as a scheduled member as to the ears. And that he'd get, left ear would be a multiplier of 2.5. So I think if we get the whole thing, 54.75 percent to each ear is what the Court is going to award.

Inquiring further to clarify the finding the following exchange occurred between counsel and the court.

Mr. Moore: Judge, there's one or two things we would like a ruling on. What do you find the impairment rating to be on binaural for Mr. Shoulders? Is it –

The Court: 21.9

Mr. Moore: And one other thing, Judge. The way the statute's worded - - I think Mr. Butler will agree with me on this. The scheduled member is 150 weeks for both ears. So what we do is multiply 54.75 percent times 150 weeks, and that's what we come up with?

The Court: Right.

These passages demonstrate that the court added the impairment ratings testified to by Dr.

¹ For injuries occurring after July 1, 2004, Tennessee Code Annotated section 50-6-241(d)(1)(A) excludes permanent hearing loss in both ears from the 1.5 times multiplier.

David Scott Haynes for impairment to the scheduled member, hearing loss to both ears, Tenn. Code Ann. § 50-6-207(3)(A)(ii)(r), with a rating to the body as a whole for the tinnitus which is an unscheduled member to be calculated as an impairment to the body as a whole. Tenn. Code Ann. § 50-6-207(3)(F). Thereafter, the court used a 2.5 multiplier of this blended impairment to make the finding of 54.75 percent to the scheduled member hearing loss to both ears. The trial court was not limited to 2.5 multiplier for injury to a scheduled member prior to July 1, 2004. All of the medical testimony in this case is presented by way of deposition and we are able to make our own independent assessment of the medical proof to determine where the preponderance of the evidence lies. Cleek v. Wal-Mart Stores, Inc., 19 S.W.3d at 774. We have agreed with the trial court in concluding that the insignificant occasional tinnitus should be disregarded as it was not complained of by Mr. Shoulders or shown to be work-related by the proof. However, it was error for the court to add the rating for tinnitus to the impairment rating for the scheduled member to calculate the award for a scheduled member award. Dr. Haynes ascribed an impairment of 20.9 percent to the loss of hearing in both of Mr. Shoulders' ears. Both Dr. Haynes and Dr. Speyer concurred that part of the loss of hearing was not work-related but the result of ageing or other processes. Dr. Speyer could not quantify which was attributed to the exposure to work-related noise and that which was not work-related. However, Dr. Haynes was of the opinion, based on his experience and training, that 60 percent of the hearing loss was work-related. Our review of the record demonstrates that Dr. Haynes is a physician that specializes in the treatment of ear disorders. He is board-certified in otolaryngology with a specialty certification in otology and neurotology. He is a board examiner with respect to board certifications in this area and is an associate professor and director of otology/neurotology department at Vanderbilt University. Our review of this record demonstrates that there was a significant difference in the ratings of Dr. Speyer and Dr. Haynes as to the hearing loss. TRW insisted that the additional loss demonstrated by Dr. Haynes report a few months after that of Dr. Speyer was evidence that Mr. Shoulders' hearing loss was attributed to something other than work as he had retired prior to seeing Dr. Speyer. However, Dr. Haynes dismissed that point of view and justified the difference as being related to different testers and different audiograms. In evaluating the relative persuasiveness of the testimony of the physicians, courts should consider the "qualifications of the experts, the circumstances of their examination, the information available to them, and the evaluation of importance of that information by other experts." Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 677 (Tenn. 1991).

We conclude that Dr. Haynes medical proof preponderates and that Mr. Shoulders suffered a 20.9 percent loss of hearing to both ears of which 60 percent was caused by exposure to noise in his work environment at TRW. In order to prevent the delay associated with a remand to the trial court to redetermine the award based on these conclusions, we have determined to follow the same rationale demonstrated by the trial court and make an award of 31.35 percent to the scheduled member loss of hearing both ears or for forty-seven weeks of compensation.

VII. Compensation Rate

TRW takes the position in this appeal that the trial court erred in applying a compensation rate as of February 28, 2003, when Mr. Shoulders retired, as opposed to the rate that was established

based on his work history in January 1994, when he obtained a hearing aid for his right ear and had a belief that his hearing loss was work-related.

This issue is resolved by our finding that Mr. Shoulders' hearing loss was a gradual work injury that is compensable under the rationale of Barnett, 197 S.W.3d at 721. Therefore, we find that the trial court did not err in determining the compensation rate applicable to this injury based on Mr. Shoulders' work history just prior to his retirement.

VIII. Conclusion

After a careful review, we hold that the trial court did not err in concluding that the claim of Mr. Shoulders was timely. However, we find that the trial court erred in refusing to allow counsel to read portions of Mr. Shoulders' deposition but find that error harmless. We also conclude that the trial court erred in the determination of the disability to the scheduled member, loss of hearing both ears, and we reverse and modify those findings. This case is remanded to the trial court for the entry of an order consistent with this opinion. Costs of this appeal are taxed to the appellant, Trw Commercial Steering Division, and its surety, for which execution may issue if necessary.

J. S. DANIEL, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
NOVEMBER 27, 2006 SESSION

RICKY SHOULDERS v. TRW COMMERCIAL STEERING DIVISION

**Circuit Court for Trousdale County
No. 03-1-D-37**

No. M2006-00300-WC-R3-CV - Filed - April 3, 2007

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 appeals 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, TRW Commercial Steering Division, and its surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM