

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
May 29, 2007 Session

RICK L. MORRISON v. CITY OF KNOXVILLE

**Direct Appeal from the Chancery Court for Knox County
No. 165528-2 Daryl R. Fansler, Chancellor**

Filed October 18, 2007

E2006-01658-WC-R3-WC - Mailed August 3, 2007

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Tennessee Supreme Court in accordance with the provisions of 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 found that Employee had sustained a hearing loss as a result of his employment and awarded 30% permanent partial disability to the hearing of both ears. Employer has appealed, arguing that the trial court erred in finding that Employee's hearing loss was work related. In the alternative, Employer argues that the trial court erred in finding the hearing loss to be related to Employee's work for Employer. Finally, Employer contends that the trial court used an incorrect burden of proof. We affirm the judgment.

Tenn. Code Ann. § 50-6-225(e) (Supp. 2006) Appeal as of Right; Judgment of the Chancery Court Affirmed

JON KERRY BLACKWOOD, SR. J., delivered the opinion of the court, in which GARY R. WADE, J. and JERRY SCOTT, SR. J., joined.

John P. Dreiser, Knoxville, Tennessee, for the appellant, City of Knoxville

Jimmy Brown Johnson, Knoxville, Tennessee, for the appellee, Rick L. Morrison

MEMORANDUM OPINION

Factual and Procedural Background

Rick Morrison ("Employee") worked for the Knoxville Department of Public Works ("Employer") beginning in 2001. His job consisted of cutting grass, trimming trees, running a street sweeper, collecting brush, and similar tasks. Many of these jobs required the use of heavy equipment, such as tractors, boom trucks, street sweeper trucks, and mowers. Employer provided

hearing protection in the form of earplugs and headsets. According to his testimony, Employee wore these devices most, but not all of the time.

His hearing was evaluated in April 2005 by Dr. Seals, an otolaryngologist. Dr. Seals found that Employee had sustained a hearing loss. He believed the cause of this to be congenital. That opinion was based upon the pattern of the hearing loss, which was described as “flat”, meaning that there was a similar amount of loss at all frequencies. He testified that noise-related hearing loss typically is greater in the higher frequencies. According to Dr. Seals, a congenital hearing loss may manifest itself at any stage of life. Dr. Seals found that Employee had an impairment of 25.3% to both ears. Dr. Seals testified at trial by deposition.

Employee was then examined by Dr. DePersio. Dr. DePersio’s test results were similar to those of Dr. Seals. However, Dr. DePersio opined that chronic long-term noise exposure was the cause of Employee’s hearing loss. He agreed with Dr. Seals that Employee’s “flat” pattern was not typical of noise-related hearing loss. However, in contrast to Dr. Seals, he believed that a congenital hearing loss would have manifested itself at an earlier stage of life. Employee had no other known risk factors for hearing loss, so Dr. DePersio reasoned that noise exposure was the most likely cause. He found that Employee had an impairment of 23% to 50% of both ears. Dr. DePersio also testified by deposition.

Employee was 51 years old on the date of trial. He had attended school through the eleventh grade, and later obtained a GED. He had previously worked in construction and in a cryogenics lab. He had also worked for a tree trimming service for about five years. In that job, he was exposed to noise from chain saws. For several years immediately preceding being hired by Employer, he had worked as a concrete finisher. He described this work as relatively quiet. He had not had any hearing problems until shortly before the hearing test in 2005. He said his wife and son often had to repeat themselves before he could understand what they were saying. He also had some difficulty in understanding speech in environments such as restaurants, where there was substantial background noise. He had no family history of hearing loss.

The case was tried on July 19, 2006. The trial court ruled from the bench finding that Employee’s hearing loss was caused by noise exposure while working for Employer, and awarded 30% permanent partial disability to both ears. Judgment was entered on August 2, 2006.

Issues Presented

Employer raises the following issues:

- 1) Did the trial court err in finding that Employee’s hearing loss was employment related?
- 2) If not, did the trial court err in finding that Employee’s hearing loss was caused by his work for Employer?

3) Did the trial court use an incorrect burden of proof?

Standard of Review

The standard of review in workers' compensation is de novo on the record, with a presumption of the correctness of the trial court's ruling, unless the preponderance of the evidence is contrary. Tenn. Code Ann. § 225(e)(2)(2005); Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). When the trial court has seen the witnesses and heard their 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, 69 S.W.3d at 167; Humphrey v. David Witherspoon, Inc., 734 S.W.2d 315 (Tenn. 1987). As to documentary evidence such as records and depositions of expert witnesses, appellate courts may make an independent assessment of the credibility of the documentary proof it reviews without affording deference to the trial courts findings. Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 676 (Tenn. 1991).

Analysis

1. Causation

Employer contends that the evidence preponderates against the trial court's finding on the issue of causation. In support of its position, it argues that Dr. Seals' opinion was more credible than Dr. DePersio's. It also contends that DePersio's opinion was based upon facts, or assumptions, which were not supported by the evidence at trial.

In examining the relative credibility of the medical testimony, we note that both doctors are board-certified and have relatively equal qualifications. Their examinations took place within a few weeks of each other. Their objective findings were similar. Both agreed that Employee's pattern of hearing loss was not typical for noise exposure. The only substantial area of disagreement was over the age at which congenital hearing loss normally manifests itself. Each of them provides a plausible explanation for his conclusion.

We have reviewed the medical depositions and Employee's testimony in accordance with familiar standards for evaluating such evidence. See Orman, 803 S.W.2d at 676-77. Based upon our independent review of the record, we cannot say that the evidence preponderates against the trial court's finding that Employee's hearing loss was caused by his employment.

2. Exposure at Prior Positions

As mentioned above, several years prior to coming to work for Employer, Employee had a job with a tree trimming service. This job involved exposure to the noise emanating from chain saws. Employee testified at trial that hearing protection was provided at that job, but that he sometimes did not use it for safety reasons. He gave similar testimony concerning his use of hearing protection for Employer, although his responses on cross-examination suggest that he used this protection more often than his responses on direct indicated.

Employer contends that Dr. DePersio did not have sufficient information about the previous exposure, or about the extent to which Employee used hearing protection at either job, to state which of these sources was the more likely cause of Employee's hearing loss.

Employer's cross-examination of Dr. DePersio did reveal that he had only a limited amount of information concerning the intensity and duration of the amount of noise Employee was exposed to on the job. He also did not know the extent to which Employee used the hearing protection that was available to him. Employee's testimony on those topics was fairly consistent with those relied upon in cross-examination. However, Employee testified concerning numerous tasks associated with his job which involved exposure to high levels of noise in situations where the use of hearing protection was impractical or even dangerous. In our view, that testimony provides a sufficient factual basis to support Dr. DePersio's conclusions.

3. Standard of Proof

In the course of issuing its ruling from the bench, the trial court stated "but for this being a Workers' Compensation case, the Court would find that the plaintiff has failed to carry the burden of proof here." On the basis of that remark, Employer argues that the trial court applied an incorrect standard to assess the proof on causation in this case.

The trial court's remark is perhaps inartful, but not entirely inaccurate. It has long been the law in Tennessee that equivocal medical testimony, combined with supporting lay testimony, is sufficient to carry the burden of proof on the causation issue in workers' compensation cases. Tindall v. Waring Park Ass'n., 725 S.W.2d 935, 937 (Tenn. 1987). This differs significantly from the standard applicable in negligence cases where "[t]he plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result." Lindsey v. Miami Dev. Corp., 689 S.W.2d 856, 861 (Tenn. 1985). As outlined above, we have examined the record and concluded that the evidence does not preponderate against the trial court's findings. In light of that conclusion, we find that the trial court's remark had no effect on the outcome of the case.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to the appellant, City of Knoxville, and its surety, for which execution may issue if necessary.

JON KERRY BLACKWOOD, SENIOR JUDGE