

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
September 22, 2008 Session

GARRY W. CROWELL v. TRW, INC. ET AL.

**Direct Appeal from the Criminal Court for Wilson County
No. 04-467 J. O. Bond, Judge**

**No. M2007-02758-WC-R3-WC - Mailed - April 7, 2009
Filed - May 8, 2009**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Tennessee Supreme Court in accordance with Tenn. Code Ann. § 50-6-225(e)(3) (2008) for a hearing and a report of findings of fact and conclusions of law. An employee who experienced both hearing loss and tinnitus filed suit in the Criminal Court for Wilson County seeking workers' compensation benefits. Following a bench trial, the trial court assigned the injury to the employee's hearing as a scheduled member and awarded the employee a 33⅓% permanent partial disability to his hearing. The employer asserts on appeal that the trial court erred by assigning the injury to the employee's hearing rather than to the body as a whole. We agree with the employer and reverse the trial court's decision to assign the injury to the employee's hearing rather than to the body as a whole.

**Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right;
Judgment of the Criminal Court Modified**

WILLIAM C. KOCH, JR., J., delivered the opinion of the court, in which ALLEN W. WALLACE and JON KERRY BLACKWOOD, SR. JJ., joined.

Richard Lane Moore, Cookeville, Tennessee, for the appellants, TRW, Inc., TRW Automotive U. S., LLC, and American Home Assurance Company.

Hugh Green and John Meadows, Lebanon, Tennessee, for the appellee, Garry W. Crowell.

MEMORANDUM OPINION

I.

Garry Crowell began working for TRW, Inc., a manufacturer of automotive gears, after he graduated from high school in 1966. He left TRW to serve in the United States Navy from 1968 to 1972. Following the completion of his service, Mr. Crowell returned to TRW where he worked until his retirement in June 2007.

In 2002, following a company-administered hearing test, Mr. Crowell became aware that he had sustained a high-frequency hearing loss. TRW provided him with hearing aids and began providing hearing protection to Mr. Crowell and all its other workers. During this same period, Mr. Crowell became aware of constant ringing in his ears which was later diagnosed as tinnitus.¹ Neither condition caused Mr. Crowell to miss any work or interfered with his ability to perform his job in the “tool crib” at TRW.

On March 26, 2004, Mr. Crowell filed a complaint seeking workers’ compensation benefits for both the hearing loss and tinnitus in the Criminal Court for Wilson County. Dr. Scott Fortune, an otolaryngologist who conducted an independent medical examination at Mr. Crowell’s request, testified by deposition at the trial which was conducted on September 24 & 25, 2007. Dr. Fortune testified that Mr. Crowell had a hearing loss at the 4,000 to 6,000 hertz range which is higher than the range of human hearing.² Even though he believed that the American Medical Association Guides to the Evaluation of Permanent Impairment (“AMA Guides”) “under-appreciated” hearing loss in the higher frequencies, Dr. Fortune testified that Mr. Crowell’s hearing loss did not qualify for an impairment rating. However, Dr. Fortune assigned a 5% permanent impairment to Mr. Crowell’s binaural hearing for tinnitus. This converted to an impairment of 2% to the body as a whole, the maximum permissible rating for Mr. Crowell’s condition.

Dr. Fortune conceded on cross-examination that Mr. Crowell’s condition was not in the most severe category. However, he did not adopt a different rating and noted that Mr. Crowell’s condition was “quite severe” because “it was causing him insomnia and beginning to interfere with his ability to communicate with others and to distract him occasionally from his daily activities.” While Dr. Fortune placed no restrictions upon Mr. Crowell’s activities, he recommended the use of earplugs in “industrial and recreational environments.”

Dr. David Haynes, an otologist and neuro-otologist, also testified by deposition after performing an independent medical examination at TRW’s request. After conducting tests similar to those conducted by Dr. Fortune, Dr. Haynes concluded that Mr. Crowell had tinnitus and a high-frequency hearing loss. He assigned a hearing impairment of 2%, which converted to 1% to the body as a whole. He also opined that Mr. Crowell’s high frequency hearing loss resulted in a 0% impairment under the AMA Guides.³ Dr. Haynes opined that Mr. Crowell’s hearing loss and tinnitus

¹Mr. Crowell later testified that the tinnitus interfered with his ability to understand speech, affected his concentration, and interfered with his sleep. In a history provided to one of his examining physicians, Mr. Crowell described using a “masking device” to improve his sleep. He also testified that he often asked people to repeat themselves and that he set the volume of his television so loud that his wife would not watch it with him.

²Dr. Haynes testified that 4,000 hertz was the frequency of the highest note on a piano.

³Dr. Haynes explained that the AMA Guides do not assign impairment for hearing loss at frequencies above 3,000 hertz because “our speech and language thresholds at which we use on a regular basis are 500 to 3,000 hertz, so that’s what’s felt to be . . . the functional hearing loss.” He also testified that the effect of high-frequency hearing loss was primarily “in the background noise and the loud noisy environment. So where a high-frequency hearing loss wouldn’t impair someone in a quiet room . . . it may impair them in a restaurant.”

would not interfere with his ability to work. Accordingly, he imposed no restrictions upon Mr. Crowell's activities.

Dr. Rodney Caldwell, a vocational evaluator, testified on behalf of TRW. Based upon the depositions of both Dr. Fortune and Dr. Haynes, he opined that Mr. Crowell retained a 0% vocational disability as a result of his hearing loss and tinnitus.

In its November 7, 2007 order, the trial court found that Mr. Crowell had sustained hearing loss and tinnitus as a result of his employment at TRW. It found that the injury should be assigned to the scheduled member – hearing, and awarded a 33 $\frac{1}{3}$ % permanent partial disability to that member. TRW has appealed, asserting that the trial court erred by awarding benefits to the scheduled member rather than to the body as a whole. In the alternative, TRW contends that, if the award was properly assigned to the scheduled member, it is excessive.

II.

Courts reviewing an award of workers' compensation benefits 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 conducting this examination, Tenn. Code Ann. § 50-6-225(e)(2) (2008) requires the reviewing court to “[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.” The reviewing court must also give considerable deference to the trial court's findings regarding the credibility of the live witnesses and to the trial court's assessment of the weight that should be given to their testimony. *Tryon v. Saturn Corp.*, 254 S.W.3d 321, 327 (Tenn. 2008); *Whirlpool Corp. v. Nakhoneinh*, 69 S.W.3d 164, 167 (Tenn. 2002). However, the reviewing courts need not give similar deference to a trial court's findings based upon documentary evidence such as depositions, *Orrick v. Bestway Trucking, Inc.*, 184 S.W.3d 211, 216 (Tenn. 2006); *Bohanan v. City of Knoxville*, 136 S.W.3d 621, 624 (Tenn. 2004), or to a trial court's conclusions of law, *Perrin v. Gaylord Entm't Co.*, 120 S.W.3d 823, 826 (Tenn. 2003).

III.

TRW contends that the trial court erred in making its award to the scheduled member rather than to the body as a whole. The difference between an award to a scheduled member and an award to the body as a whole is significant because Tenn. Code Ann. § 50-6-241(a)(1) (2008) requires that awards for impairments assigned to the body as a whole be capped at two and one-half times the impairment.⁴

TRW relies primarily on a recent panel decision, *Neal v. TRW Commercial Steering Division*, No. M2006-01091-WC-R3-WC, 2007 WL 5231840 (Tenn. Workers' Comp. Panel, Nov. 6, 2007). The employee in *Neal v. TRW Commercial Steering Division* had sustained both a hearing loss and

⁴Mr. Crowell apparently does not dispute that his retirement was voluntary and unrelated to his work injury.

tinnitus due to noisy conditions at his workplace. The trial court based its award on the scheduled member – hearing. The panel reversed, stating “the apportionment of tinnitus should be determined on a case by case basis.” *Neal v. TRW Commercial Steering Div.*, 2007 WL 5231840, at *4. The panel then set out the following criteria for making that determination:

In our view, where the effects of tinnitus are limited to the impairment of speech discrimination in someone who has a hearing loss, they enhance the hearing loss and should be considered a part of it. In such a case, the tinnitus would be part of the hearing loss and result in a scheduled member injury. Where, however, the impairment rating relating to tinnitus is based upon effects of the condition outside an enhanced loss of hearing, it is not part of the hearing loss and should, in such cases, be apportioned to the body as a whole.

Neal v. TRW Commercial Steering Div., 2007 WL 5231840, at *5. See also, *Shoulders v. Pasmenco Zinc, Inc.*, No. M2004-02521-WC-R3-CV, 2006 WL 2716879 (Tenn. Workers’ Comp. Panel, Aug. 21, 2006); *Mullins v. Lear Corp.*, No. E2006-02577-WC-R3-WC, 2008 WL 802348 (Tenn. Workers’ Comp. Panel, Mar. 26, 2008). In *Neal v. TRW Commercial Steering Division*, the employee’s tinnitus caused sleep disturbance, problems with concentration, and anxiety. Because those symptoms went beyond enhanced hearing loss, the panel determined that the tinnitus should be assigned to the body as a whole. The panel then held that the concurrent injury rule, Tenn. Code Ann. § 50-6-207(3)(C) (2008), required a single award, apportioned to the body as a whole.

Based on the evidence that Mr. Crowell was having difficulty with sleep and concentration, TRW asserts that *Neal v. TRW Commercial Steering Division* is applicable here. Mr. Crowell responds that his tinnitus primarily interferes with his hearing and that the evidence regarding sleep disturbance and lack of concentration is limited. Accordingly, he insists that *Shoulders v. TRW Commercial Steering Division*, No. M2006-0300-WC-R3-CV, 2007 WL 1096887 (Tenn. Workers’ Comp. Panel, Apr. 3, 2007) provides a more appropriate precedent than *Neal v. TRW Commercial Steering Division*.

We do not agree that *Shoulders v. TRW Commercial Steering Division* is more applicable to this case than *Neal v. TRW Commercial Steering Division*. The panel noted in *Shoulders v. TRW Commercial Steering Division* that there was no “medical evidence that establishes the causation of the tinnitus to [the employee’s] work activities.” 2007 WL 1096887, at *3. Moreover, the symptoms of the condition were minimal and did not extend beyond the employee’s hearing. *Shoulders v. TRW Commercial Steering Div.*, 2007 WL 1096887, at *3.

In this case, Mr. Crowell testified on cross-examination as follows:

Q. . . .And it’s bothersome, the ringing is bothersome?

A. You never get any peace from it. Never.

- Q. Does your ringing, like when you are doing your job and have to read something . . . does that bother you from a concentration standpoint?
- A. If you concentrate on that ringing, it's frustrating
- Q. So your ringing in your ear affects your concentration if you can't figure out a way to get rid of it?
- A. Right.

Mr. Crowell also testified that his tinnitus "bothered" his sleep. This is consistent with the history he gave to Dr. Fortune that his tinnitus was "extremely severe and was interfering with his activities of daily living. In particular, it was causing insomnia, and he was requiring the use of a tinnitus masker at night in order to sleep."

The logical conclusion from the evidence is that the effects of Mr. Crowell's tinnitus are not just limited to enhancement of his hearing loss but extend into insomnia and loss of concentration. In accordance with the principles set out in *Neal v. TRW Commercial Steering Division*, Mr. Crowell's injury should be assigned to the body as a whole, rather than to the scheduled member. Pursuant to Tenn. Code Ann. § 50-6-241(a)(1), the award is therefore "capped" at two and one-half times the anatomical impairment. The judgment is modified to award benefits for a 5% permanent partial disability to the body as a whole. In view of this finding, it is not necessary to address the second issue raised by TRW.

IV.

The judgment is modified to award Mr. Crowell permanent partial disability benefits of 5% to the body as a whole. The judgment is affirmed in all other respects. Costs are taxed to Garry Crowell, for which execution, if necessary, may issue.

WILLIAM C. KOCH, JR., JUSTICE

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
SEPTEMBER 22, 2008 SESSION

GARRY W. CROWELL v. TRW, INC., ET AL

**Criminal Court for Wilson County
No. 04-467**

No. M2007-02758-WC-R3-WC - Filed - May 8, 2009

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 Garry Crowell, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM