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

DAVID HIX v. TRW, INC. ET AL.

Direct Appeal from the Criminal Court for Wilson County
No. 04-0120 J. O. Bond, Judge

No. M2007-02822-WC-R3-WC- Mailed - March 30, 2009
Filed - June 12, 2009

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) (2008) for a hearing and a report of findings of fact and conclusions of law. An employee sustained a work-related repetitive exposure hearing loss injury. After he retired for reasons unrelated to the injury, he filed suit in the Criminal Court for Wilson County seeking workers' compensation benefits. Following a bench trial, the trial court (1) determined that the injury should be assigned to the scheduled member (hearing) rather than to the body as a whole, (2) awarded 50% permanent partial disability to that member, and (3) set the date of injury as the date that the employee first gave notice to the employer of the injury. The employer appealed arguing that injury should have been assigned to the body as a whole and that the award was excessive. While disagreeing as to the proper date, both the employer and employee argue that the trial court erred in setting the date of injury. We affirm the trial court's decision to assign the award to the scheduled member (hearing). However, we find that the award was excessive and modify it to 5% permanent partial disability to the hearing of both ears. We have also determined that the trial court erred with regard to its determination of the date of the injury.

Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right;
Judgment of the Criminal Court Affirmed in Part and 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, David Hix.

MEMORANDUM OPINION

I.

David Hix graduated from high school in 1966 and began working for TRW Inc. ("TRW"), a manufacturer of gears, the same year. He worked at TRW for one year, left, and returned in 1969. He continued to work for TRW, primarily as a towmotor operator, until his retirement in February 2004. As a result of testing conducted in 2002, Mr. Hix became aware that he had a high-frequency hearing loss. During the same period of time, TRW began providing hearing protection devices to all its workers. Mr. Hix testified that he used the hearing protection devices at all times thereafter. On February 12, 2004, Mr. Hix filed a complaint in the Criminal Court for Wilson County seeking workers' compensation benefits.

Following his retirement from TRW, Mr. Hix was employed as a towmotor operator by Campbell-Hausfeld, a distribution center. On July 30, 2004, as part of a pre-employment physical, Mr. Hix completed a medical history questionnaire stating that he did not have "defective" hearing.[1] A hearing test conducted as part of his examination revealed a loss of hearing, primarily in the higher frequencies. However, when evaluated in accordance with the American Medical Association Guides to the Evaluation of Permanent Impairment ("AMA Guides"), Mr. Hix had a 0% anatomical impairment for hearing loss.

Dr. Scott Fortune, an otolaryngologist, conducted an independent medical examination on October 1, 2004, at the request of Mr. Hix's lawyer. Based upon audiometric testing administered during that examination, Dr. Fortune opined that Mr. Hix had hearing impairments of 3.8% to the left ear and 20.6% to the right ear. These ratings combined for a binaural hearing impairment of 6.6%, which converted to 2% to the body as a whole. Dr. Fortune attributed Mr. Hix's hearing loss to noise exposure while working for TRW. Mr. Hix denied having tinnitus at the time of that examination.

On January 7, 2005, Dr. David Haynes, an otologist and neurotologist, conducted an independent medical examination at the request of TRW's lawyer. Based upon audiometric testing during that examination, Dr. Haynes opined that Mr. Hix had a 3.8% hearing impairment of the left ear and a 13.1% impairment of the right ear. These combined for a binaural hearing impairment of 5.3%, or 2% to the body as a whole. Dr. Haynes also concluded that Mr. Hix's high frequency hearing loss was caused, in part, by his employment at TRW.

Based upon the July 30, 2004 audiogram, Dr. Haynes further opined that Mr. Hix had a 0% impairment. He also concluded that any deterioration in Mr. Hix's hearing occurring after his retirement, or after he began using earplugs in 2002, was likely not related to his work for TRW. On cross-examination, Dr. Haynes agreed with Mr. Hix's lawyer that the AMA Guides did not "reflect high-frequency hearing losses as adequately as it should." Dr. Haynes placed no restrictions upon Mr. Hix's activities and stated that his hearing loss would not affect his ability to work.

[1] Mr. Hix admitted at trial that this response was untruthful.

Dr. David Lipscomb, a consulting audiologist,[2] also testified by deposition on behalf of TRW. Dr. Lipscomb reviewed the audiograms previously discussed and additional tests administered to Mr. Hix in 1999, 2000, 2001, and 2002. He concluded that these showed no impairment until 2001. The audiogram administered in 2001 showed a 0.3% impairment, and the 2002 test showed a 1.6% impairment. Dr. Lipscomb also measured noise levels at TRW's plant. Based upon those considerations, he opined that Mr. Hix's hearing loss after he began using earplugs was related to aging rather than exposure to noise at work.

During the trial conducted on September 25, 2007, Mr. Hix testified that he had difficulty understanding speech in the presence of background noise. In addition, he testified that he kept the volume of his television set at a high level. Finally, he testified that he did not miss any work as a result of hearing loss prior to retirement from TRW and that his hearing loss did not interfere with his work at Campbell-Hausfeld.

The trial court filed its order on November 7, 2007. It found that Mr. Hix had sustained a work-related hearing loss and that the injury should be assigned to the scheduled member – hearing. The court then awarded Mr. Hix a 50% permanent partial disability to his hearing in both ears.

TRW raises several issues in this appeal. First, it contends that the trial court erred by awarding benefits to a scheduled member – hearing, rather than the body as a whole. Second, it asserts that the trial court erred by finding that all of Mr. Hix's hearing loss was due to his work for TRW. Third, it insists that the trial court erred by declining to view Dr. Lipscomb's videotaped deposition. Fourth, it claims that the trial court erred by concluding that the date of injury was the date that Mr. Hix gave TRW notice of the injury rather than the date of last exposure (the date when Mr. Hix began wearing earplugs). Finally, TRW insists that the award, if properly assigned to the scheduled member, 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.

[2] Audiologists are experts who specialize in hearing. While they are not physicians, they often administer tests and otherwise work in conjunction with physicians.

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.
THE ASSIGNMENT OF THE AWARD TO A SCHEDULED MEMBER

TRW contends that the trial court erred in making its award to the scheduled member rather than to the body as a whole. This is significant because, if the impairment is assigned to the body as a whole, the award would be capped by Tenn. Code Ann. § 50-6-241(a)(1) (2008) at two and one-half times the impairment.[3] In support of its argument, 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* sustained both a hearing loss and tinnitus due to noisy conditions at his place of employment. 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*, *Mullins v. Lear Corp.*, No. E2006-02577-WC-R3-WC, 2008 WL 802348 (Tenn. Workers' Comp. Panel, Mar. 26, 2008); *Shoulders v. Pasminco Zinc, Inc.*, No. M2004-02521-WC-R3-CV, 2006 WL 2716879 (Tenn. Workers' Comp. Panel, Aug. 21, 2006).

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.

Mr. Hix asserts that the operative facts in this case more closely resemble those described in *Shoulders v. TRW Commercial Steering Division*, No. M2006-0300-WC-R3-CV, 2007 WL 1096887 (Tenn. Workers' Comp. Panel, Apr. 3, 2007), rather than *Neal v. TRW Commercial*

[3] Mr. Hix apparently does not dispute that his retirement was voluntary and unrelated to his work injury.

Steering Division. In *Shoulders v. TRW Commercial Steering Division*, an award to the scheduled member was affirmed, even though the employee had also been diagnosed with tinnitus. However, the opinion noted that there was no "medical evidence that establishes the causation of the tinnitus to [the employee's] work activities." *Shoulders v. TRW Commercial Steering Div.*, 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.

Mr. Hix testified that he had a constant ringing in his ears. He also testified that he had difficulty sleeping, but he did not know if that was the result of the tinnitus or some other cause. There was no evidence that Mr. Hix had nausea, vertigo, anxiety, or any other symptom caused by tinnitus. Dr. Haynes, who performed TRW's independent medical examination considered the condition to be intermittent and minor. The trial court did not mention tinnitus or its effects as part of its ruling. Rather, the trial court based its award solely upon the effects of Mr. Hix's high frequency hearing loss. Our review of the record leads us to the conclusion that the evidence does not preponderate against the finding that Mr. Hix's injury in this case was limited to hearing loss. The award of disability was, therefore, properly assigned to the scheduled member, rather than to the body as a whole.

IV.
POST-EMPLOYMENT HEARING LOSS

TRW conceded at trial that Mr. Hix's hearing loss prior to the introduction of hearing protection in 2002 was work-related. Mr. Hix testified that he used earplugs continuously at work after that time. Dr. Haynes and Dr. Lipscomb both testified that noise-induced hearing loss does not continue after the noise exposure ends. Based upon these facts, TRW submits that its liability should be based only upon an impairment of 0.3%. That figure is based upon Dr. Lipscomb's testimony concerning the 2001 audiogram, which was the last test administered before Mr. Hix began to use hearing protection.

Mr. Hix responds that the evidence was sufficient to permit a finding that he continued to sustain work-related hearing loss, even after he began to use earplugs. He bases his position upon testimony of Dr. Fortune that post-exposure hearing loss is possible. However, that testimony concerned the effects of exposure to extremely high levels of noise, such as explosives. The measurements taken by Dr. Lipscomb at TRW's facility show that the amount of noise there did not approach such a level, even in the absence of hearing protection.

Mr. Hix alleges that he sustained a gradual injury to his hearing as a result of exposure to high noise levels in the workplace. He testified, without contradiction, that he was no longer exposed to high noise levels after TRW began to provide earplugs in 2002. The weight of the medical testimony is that noise-induced hearing loss worsens as long as the exposure continues, but does not continue to worsen after the exposure ceases. Mr. Hix's hearing loss did not interfere with the performance of his job and did not play any role in his decision to leave. *Cf. Aerospace Testing Alliance v Anderson*, No. M2007-0959-WC-R3-WC, 2008 WL 2199785, *8 (Tenn. Workers' Comp. Panel, May, 23 2008). Under these circumstances, Mr. Hix ceased to be gradually injured when he began to use hearing protection in 2002. The weight of the evidence indicates that his future hearing

loss was more likely than not the result of the aging process and not related to his work. TRW is, therefore, only liable for the hearing loss sustained prior to 2002.

V.
THE VIDEO DEPOSITION

TRW submitted the evidentiary deposition of Dr. Lipscomb to the trial court both in video format and in the form of a typed transcript. TRW's lawyer explained that "I just think that the videotape adds a little bit because you get the flavor of him articulating his opinions. But I understand if the Court doesn't want to watch the video. It will take about an hour." The trial judge stated that he had "read the transcript in its entirety, and I feel like I've got all I can get from that." TRW contends that the trial court's failure to view the videotape constitutes reversible error but offers no authority to support its position. TRW does not explain what, if any, additional information or insight the trial court would have gained by viewing the video in addition to reading the transcript. We decline to hold that the trial court erred by failing to watch the video copy of the deposition when it had already read the transcript of the deposition.

VI.
THE DATE OF INJURY

The trial court concluded that the date of injury was June 25, 2003 – the date Mr. Hix first reported his injury to TRW. However, TRW insists that the date of injury was February 1, 2002 – the date Mr. Hix began the using hearing protection TRW provided to its employees. Mr. Hix argues that the correct injury date is neither of these dates but rather February 2004 when he retired from TRW. Mr. Hix's argument is based upon the "last day worked" rule. TRW concedes that Mr. Hix's injury is a gradually occurring injury but asserts that the injury should be deemed to have occurred on the last day Mr. Hix was exposed to the activity which caused the injury rather than on the date of his retirement. The injury date is significant because it affects the applicable compensation rate.

The trial court erred in fixing the date of Mr. Hix's gradually occurring injury based upon Mr. Hix giving notice to his employer of the injury. In *Building Materials Corp. v. Britt*, 211 S.W.3d 706, 708 (Tenn. 2007), an employee reported to his employer that he suffered a work-related injury in 1997. He was treated with a conservative course of treatment, which improved his condition, allowing him to continue working. The employee did not file a workers' compensation claim at that time. In 2001, the employee notified his employer that his condition was worsening. He continued working for the employer but brought a workers' compensation claim in 2002. The Tennessee Supreme Court overruled prior decisions that had set the date of injury for gradually occurring injuries as the date when the employee first gave notice to the employer of the injury. Instead, the Court held that "the date of an employee's gradually occurring injury should be determined using the last-day worked rule." *Building Materials Corp. v. Britt*, 211 S.W.3d at 713.

In *Aerospace Testing Alliance v. Anderson*, a special workers' compensation appeals panel addressed the application of the "last day worked" rule. The employee in that case sustained a gradually occurring hearing loss injury. The employer argued that the date of injury should be set at the last date the employee was exposed to excessive noise levels because no further harm was

caused after that time. The employer and employee disagreed as to whether there was further deterioration of the employee's condition related to his workplace injury after his last injurious exposure. The employer terminated the employee in 2006 because the employee's injury could no longer be accommodated.

The employer argued to the appeals panel that the "last day worked" rule should not apply because the employee's last injurious exposure occurred prior to the last day worked and according to the employer, though the contention was disputed by the employee, no additional hearing loss occurred after the last injurious exposure in 2005. The appeals panel determined the "last day worked" rule should set the date of injury, in part, because "in spite of his gradually occurring injury, [the employee] continued to work for [the employer] until [the employer] terminated him because of his hearing problems." *Aerospace Testing Alliance v. Anderson*, 2008 WL 2199785, at *8.

The appeals panel's choice of the date of termination of employment in *Aerospace Testing Alliance v. Anderson* for setting the date of injury can trace its underpinnings to the foundation of the "last day worked" rule. The rule grew out of setting a date of injury for gradually occurring repetitive stress injuries as the date upon which the injury rendered the employee unable to continue to perform his or her work. *See*, *e.g.*, *Barnett v. Earthworks Unlimited, Inc.*, 197 S.W.3d 716, 721 (Tenn. 2006), *rev'd on other grounds by Building Materials Corp. v. Britt*, 211 S.W.3d 706, 714 (Tenn. 2007); *Lawson v. Lear Seating Corp.*, 944 S.W.2d 340, 341-43 (Tenn. 1997); *Edwards v. Saturn Corp.*, No. M2007-01955-WC-R3-WC, 2008 WL 4378188, at *10 (Tenn. Workers' Comp. Panel, Sept. 25, 2008).

Unlike the employee in *Aerospace Testing Alliance v. Anderson*, Mr. Hix continued to be capable of performing his job and his employment with TRW ended for reasons unrelated to his work injury. Accordingly, the question before this panel is whether the "last day worked" rule should be applied where the evidence clearly establishes a date prior to the last day worked where injurious exposure ceased, the testimony clearly establishes that no further deterioration of the employee's condition occurred as a result of a workplace injury after the last day of injurious exposure, and the employee ceased working for the employer for reasons unrelated to the workplace injury.

While the appeals panel in *Aerospace Testing Alliance v. Anderson* applied the "last day worked" rule even though the injurious exposure ceased prior to the employee's last day of work, significant factual distinctions exist between that case and the present one. Mr. Hix's injury did not render him incapable of performing his work, and he left his employment for reasons unrelated to the work injury. Furthermore, the weight of the evidence in this case clearly establishes that there was no further deterioration in Mr. Hix's condition as a result of the workplace injury after the date of his last injurious exposure. Where there is a clear point of last injurious exposure, no further deterioration related to the workplace injury beyond that point, and the employee's ability to perform his or her work does not cease either temporarily or permanently as a result of a workplace injury, setting the date of injury based upon the last day worked would allow this determination to be governed by factors wholly unrelated to the injury itself, for example, the date Mr. Hix opted to retire from TRW and pursue employment in the same capacity with another employer. Such an approach is inappropriate.

The Tennessee Supreme Court has set the date of injury as "the last day the employee was exposed to the work activity that caused the injury. Other jurisdictions have also taken this approach with gradually occurring injury, holding that the date of injury is the last day worked or last date of 'exposure.'" *Barnett v. Earthworks Unlimited, Inc.,* 197 S.W.3d at 721-22. Under the circumstances of the present case, the date of this gradual injury should be set at the date of last injurious exposure. Accordingly, TRW is correct that the trial court erred and the date of injury for purposes of compensation is February 1, 2002.

VII.
THE EXCESSIVENESS OF THE TRIAL COURT'S AWARD

TRW contends that the award of a 50% permanent partial disability to the scheduled member is excessive. It notes the medical and vocational testimony that Mr. Hix's hearing loss did not have a significant impact on his ability to work or find work. It further points out that he missed no work as a result of his condition, even working overtime on a regular basis prior to his retirement. In addition, TRW notes that Mr. Hix was able to find another job fairly quickly after his retirement, and that he represented to his new employer's physician that he had no hearing problems. Mr. Hix relies upon his and his wife's testimony concerning the difficulty he has understanding speech, especially in the presence of background noise.

As noted above, the bulk of Mr. Hix's hearing loss occurred after his exposure to workplace noise ended, and was more likely than not a result of the aging process. The last audiogram taken prior to the introduction of hearing protection showed a very small impairment. Mr. Hix's hearing loss did not cause him to leave his job, did not impair his ability to find work after leaving TRW, and did not cause him any significant difficulty in his subsequent job. Taking these factors into consideration, we agree that the award was excessive. Accordingly, the judgment will be modified to award a 5% permanent partial disability to the hearing of both ears.

VIII.

The judgment is modified to award a 5% permanent partial disability to the hearing of both ears. This case is remanded to the trial court to determine the correct compensation rate in accordance with this opinion. The trial court's judgment is affirmed in all other respects. Costs are taxed one-half to TRW Inc., TRW Automotive U.S., LLC, and American Home Assurance Company, and their sureties, and one-half to David Hix, for which execution may issue if necessary.

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WILLIAM C. KOCH, JR., JUSTICE

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

DAVID HIX v. TRW, INC. ET AL.

Criminal Court for Wilson County
No. 04-0120

No. M2007-02822-SC-WCM-WC

JUDGMENT ORDER - Filed - June 12, 2009

This case is before the Court upon the motion for review filed by TRW, Inc. 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 one-half to TRW Inc., TRW Automotive U.S., LLC, and American Home Assurance Company, and their sureties, and one-half to David Hix, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

WILLIAM C. KOCH, JR., J., not participating