

IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
AT NASHVILLE  
September 21, 2009 Session

**GEORGE CECIL RESH v. BUILDING MATERIALS CORPORATION  
d/b/a GAF FIBERGLASS CORPORATION**

**Direct Appeal from the Circuit Court for Wilson County  
No. 13703 Clara Byrd, Judge**

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**No. M2009-00028-WC-R3-WC - Mailed - December 30, 2009  
Filed - March 11, 2010**

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In this workers' compensation case, the employee, George Cecil Resh, alleged that he sustained hearing loss due to exposure to a harmful level of noise in his workplace. The employer, Building Materials Corporation, denied that the employee's hearing loss was work-related. The trial court found in favor of the employee and awarded 50% permanent partial disability of the hearing of both ears. The employer has appealed, contending that the evidence preponderates against the trial court's finding. Because we find that the expert medical evidence failed to establish that Mr. Resh's hearing loss was work-related, we agree and reverse the judgment.<sup>1</sup>

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

DONALD P. HARRIS, SR. J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., J., and JON KERRY BLACKWOOD, SR. J., joined.

Fred J. Bissinger and J. Brent Wilkins, Nashville, Tennessee, for the appellant, Building Materials Corporation.

Ann Buntin Steiner, Frank J. Steiner, Nashville, Tennessee, for the appellee, George Cecil Resh.

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<sup>1</sup>This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated § 50-6-225(e)(3) for a hearing and a report of findings of fact and conclusions of law.

## MEMORANDUM OPINION

### Factual and Procedural Background

Building Materials Corporation is a manufacturer of fiberglass shingles. George Cecil Resh was hired in 1985 as a “batch tech,” and worked in that position until he retired in January 2008. His job duties included, among other things, monitoring the delivery of raw materials used to make shingles. Prior to 1991, the materials were delivered primarily by railroad cars. Thereafter, they were mainly delivered by trucks. Until approximately 2002, the delivery trucks were not equipped with mufflers. Thereafter, mufflers were required.

Mr. Resh worked twelve-hour shifts. During each shift, there were an average of five deliveries made at an area called the loading bay. Mr. Resh’s primary work station was in the “batch house,” an office located adjacent to the loading bay. When a delivery was received, he would go into the loading bay and meet with the driver of the truck. He verified the company making the delivery, the material being delivered, and that the truck was connected to the correct silo. The driver would then begin the unloading process and Mr. Resh would return to the “batch house” office. It took approximately five to fifteen minutes for him to process each truck, but the actual unloading time was much longer. The loading and unloading of the rail cars and trucks was the primary source of noise exposure for Mr. Resh.

Building Materials had a hearing protection program in place when Mr. Resh was hired. Workers were provided with a choice of ear plugs or ear “muffs,” and were required to wear them in designated areas of the plant. The loading bay was such an area. Mr. Resh testified that he had, at one time, used the ear plugs, but developed an ear infection. Thereafter, he used ear muffs. He testified that he wore the ear muffs at all times in the loading bay and the other designated areas in the plant. He also wore them in the office when it was noisy in the loading bay except when he had to answer the phone or carry on a conversation. The actual level of noise in the office was the subject of some dispute at trial. None of the testing done by the parties, however, indicated a noise level in the office, even with the door open, sufficient to create a risk of hearing loss.

In addition to the ear muffs, Mr. Resh was required to, and did, wear safety glasses. He testified that the sides of the glasses prevented the ear muffs from completely “sealing” over his ears. Because of this failure to seal, he took the position at trial that the ear muffs did not provide adequate hearing protection. He testified: “I took my glasses off and put my earmuffs on and you could tell there was a slight – not a lot but there was a slight [reduction in noise level].” During cross examination, he was asked if he wore hearing protection if he was exposed to loud noise in the office area. He responded: “We would – yes, I’d put my earmuffs on. Then again, you have to take them off to answer the phone. People [would] come in to talk to you, you’d have to take it off because you couldn’t hear. On redirect examination, he added: “A lot of times, I’m scared to walk out with the earmuffs on because I don’t hear without – that makes it even worse avoiding a tow motor or something like that.”

Mr. Resh and several of his former colleagues described the noise levels in the loading bay when railroad cars and trucks were unloading as similar to a jackhammer. They compared the noise

level in the office during unloading to the sound of a lawnmower. One of those witnesses, Carson Lewis, testified that he also wore ear muff hearing protectors with safety glasses. He was asked: “[W]hen you take that earmuff off, if you’re around noise, can you tell that the earmuff is decreasing the noise you’re hearing?” Mr. Lewis responded: “Oh, yeah. Yeah. Like I said before, the earmuff was the best ear protection that they had available to me.”

Studies of noise levels in Mr. Resh’s work area were conducted as part of Building Materials’ hearing protection program in 2001 and 2006.<sup>2</sup> The 2001 study showed exposure to a “time-weighted” average of 85.6 decibels. The 2006 study showed a time-weighted average of 66 decibels in the office area and 88.9 decibels in the loading area. Industrial hygienists who testified on behalf of both sides agreed that a time-weighted average of 82.1 decibels over a twelve-hour shift was an “action level,” meaning that a risk of hearing loss existed, and hearing protection measures were required. Hearing protection devices are assigned noise reduction ratings (“NRR”) measured in decibels. The hearing devices distributed by Building Materials had NRR’s of 25 or more. However, both experts agreed that the actual amount of protection provided by any given device was significantly less than its NRR. Under a method used by the Occupational Safety and Health Administration (OSHA), the actual protection for a device with an NRR of 25 decibels would be 9 decibels. Gregory Booth, the industrial hygienist who testified on behalf of Mr. Resh explained that “[Y]ou first off have to subtract 7 from the NRR because the NRR is based upon the dB(C) reading.<sup>3</sup> . . . Then the next thing you do is divide it in half. And that is a letter of interpretation from federal OSHA that basically says we’re going to use a safety factor because these devices don’t fit exactly perfect.”<sup>4</sup>

Dr. James Fordice was the only medical doctor to testify. Mr. Resh was referred to him by Building Materials when an audiogram indicated that he had a standard threshold shift, or permanent hearing loss. In September 2003, Dr. Fordice administered an audiogram, which confirmed the hearing loss. He performed an additional audiogram in May 2004, which showed slightly improved results. Dr. Fordice opined on the basis of the May 2004 test that Mr. Resh had a binaural hearing impairment of 13.4%. His testimony concerning causation is set out at length below. In general, when provided information, actual or hypothetical, concerning noise levels at Building Materials’ plant, he stated his opinion that those levels were sufficient to cause hearing loss if hearing protection was not worn, but were not sufficient to cause hearing loss if hearing protection was worn.

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<sup>2</sup>Prior studies of noise levels had been made. However, these were no longer available at the time Mr. Resh’s claim arose. Tennessee OSHA regulations required this data to be kept for two years.

<sup>3</sup>Noise exposure is typically measured in dB(A), a different scale.

<sup>4</sup>A study, introduced into evidence, entitled *The Effect of Safety Glasses on Earmuff Attenuation*, dated February, 26, 2007, by R. W. Kieper and E. H. Berger, indicated the decrease in attenuation caused by safety glasses was roughly equivalent to or less than the reduction in the NRR required by OSHA.

On cross-examination, Dr. Fordice stated that conditions such as diabetes and high blood pressure could contribute to hearing loss. Mr. Resh had both conditions for several years.

Mr. Resh and his spouse testified concerning the effects of his hearing loss. He used hearing aids, though not at all times. He found it difficult to hear and understand speech unless the speaker spoke loudly, and stood in front of him. He also had difficulty understanding speech in the presence of background noise.

The trial court found that Mr. Resh had sustained his burden of proof on the issue of causation. It awarded 50% permanent partial disability of the hearing of both ears. Building Materials has appealed, contending that the trial court erred by finding that Mr. Resh's hearing loss was caused by his work.

### **Standard of Review**

The standard of review of issues of fact is de novo upon the record of the trial court accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2008). When credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge had the opportunity to observe the witness' demeanor and to hear in-court testimony. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). Where the issues involve expert medical testimony that is contained in the record by deposition, determination of the weight and credibility of the evidence necessarily must be drawn from the contents of the depositions, and the reviewing court may draw its own conclusions with regard to those issues. Bohanan v. City of Knoxville, 136 S.W.3d 621, 624 (Tenn. 2004); Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997); Elmore v. Travelers Ins. Co., 824 S.W.2d 541, 544 (Tenn. 1992). Where medical expert testimony is presented by deposition, the reviewing court may independently assess the medical proof to determine where the preponderance of the evidence lies. Crew v. First Source Furniture Group, 259 S.W.3d 656, 665 (Tenn. 2008).

### **Analysis**

Building Materials contends that the evidence preponderates against the trial court's finding that Mr. Resh's hearing loss was caused by his employment. It specifically relies upon Dr. Fordice's testimony on cross examination that the noise levels at its facility were not likely to cause hearing loss if hearing protection was used. Building Materials also argues that Dr. Fordice's testimony on direct examination concerning causation was based upon his stated assumption that no hearing protection was used, an assumption not consistent with the evidence.

Mr. Resh contends that the trial court's conclusion is supported by the evidence. Specifically, he points to the testimony of Mr. Booth, who took noise level measurements at Building Materials' premises, and testified as an expert concerning noise exposure; his own anecdotal testimony, and that of his co-workers, concerning noise levels in the loading area; and his testimony that his ear muffs did not fit correctly because of his safety glasses, as providing support

for the trial court's decision. He also contends that Dr. Fordice's testimony that the pattern of his hearing loss was consistent with being noise-induced is sufficient to support the judgment.

In order to be eligible for workers compensation benefits, an employee must suffer "an injury by accident arising out of and in the course of employment that causes either disablement or death." Tenn. Code Ann. § 50-6-102 (13). The phrase "arising out of" refers to causation. The causation requirement is satisfied if the injury has a rational, causal connection to the work. Reeser v. Yellow Freight Systems, Inc., 938 S.W.2d 690, 692 (Tenn. 1997). "It is well settled in [this state] that a plaintiff in a workers' compensation case has the burden of proving every element of the claim by a preponderance of the evidence." Elmore v. Travelers Ins. Co., 824 S.W.2d 541, 543 (Tenn. 1992). "Medical causation and permanency of an injury must be established in most cases by expert medical testimony." Thomas v. Aetna Life & Cas. Co., 812 S.W.2d 278, 283 (Tenn. 1991). "Except in an obvious case, such as the amputation of a limb . . . , the employee must establish by expert medical evidence that the injury and disability of which he or she complains was caused by an accident arising out of his or her employment." Masters v. Industrial Garments Mfg. Co., Inc. 595 S.W.2d 811, 812 (Tenn. 1980). The proof of the causal connection may not be speculative, conjectural, or uncertain. Clark v. Nashville Mach. Elevator Co., Inc., 129 S.W. 3d 42, 47 (Tenn. 2004); Simpson v. H.D. Lee Co., 793 S.W.2d 929, 931 (Tenn. 1990); Tindall v. Waring Park Ass'n, 725 S.W.2d 935, 937 (Tenn. 1987). Absolute certainty with respect to causation is not required, however, and our courts have recognized that, in many cases, expert opinions in this area contain an element of uncertainty and speculation. Fritts v. Safety Nat'l Cas. Corp., 163 S.W.3d 673, 678 (Tenn. 2005).

The deposition testimony of Dr. Fordice, the only physician to testify in this case, must be evaluated in the context of these requirements. During direct examination, he testified as follows:

Q. Okay. Now, assuming that Mr. Resh testifies that he worked for GAF for a number of years --I think from . . . 1985 through today's date even. And assuming that when he worked there he was in the control room batch house working; and assuming that he was wearing the . . . ear muffs that weren't really connected to his ears because he wore the goggles; and assuming that all the way up until about 2003 . . . they were using trucks that didn't have mufflers to unload the material; and assuming that he was both inside the batch house and outside the batch house working around the trucks that didn't have the mufflers, inside the batch house and back outside again, and varied from day-to-day; and assuming he wasn't exposed to any loud noises on any consistent basis outside of that, do you have an opinion with regard to what caused his hearing loss?

[COUNSEL FOR DEFENDANT]: Object to form.

THE WITNESS: *Are we assuming then are you saying that he didn't have hearing protection?*

[COUNSEL FOR PLAINTIFF]: Q. He was wearing the muffs that he wore the goggles with. The muffs were on over the top, and the muffs didn't connect to his ears because of the goggles.

A. And not wearing anything else?

Q. Yes, nothing else.

A. Okay.

[COUNSEL FOR DEFENDANT]: Same objection.

[COUNSEL FOR PLAINTIFF]: Q. Let me add something else, too. Assuming he didn't want to wear the actual earplugs you stick in your ears because it was dusty and he thought he'd get an ear infection. So he never wore the ear plugs.

A. Well, *I think that if he wore no hearing protection with the exposure*, then there would be risk of hearing loss. I think it would depend on just how long he was outside that room. Because it looks like the noise levels inside the room --no. It would depend on how long he was out of the room.

\* \* \*

Q. And the audiograms that were taken of Mr. Resh's hearing, are those consistent with what you would expect to see . . . for someone who has been exposed to a noise-induced hearing loss?

A. Yes. And at least the May 2004 is completely consistent. The first audiogram had a conductive component in September of 2003, which is not consistent with noise exposure or hearing loss. That conductive component, not surprisingly, disappeared. It was temporary. So the May 2004 audiogram is consistent with noise exposure and hearing loss in the pattern.

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Q. And I'm assuming that the history that I gave you is accurate of Mr. Resh working for GAF for so many years, from 1985 to 2003, around the trucks that would unload the materials without mufflers, going inside and outside the batch house with mitts or muffs that weren't connected to his ears because of his goggles. Last time for the record, within a reasonable degree of medical certainty assuming that history is accurate, what do you believe caused the hearing loss that you treated him for?

[COUNSEL FOR DEFENDANT]: Object to form.

THE WITNESS: *Assuming that he had no hearing protection?*

[COUNSEL FOR PLAINTIFF]: Q. Yes. The muffs that weren't really connected to his ears because he's wearing goggles.

A. I think *assuming no hearing protection*, then most likely this is noise-induced hearing loss. And that's a difficult thing. Was there hearing protection or was there not hearing protection? But *assuming no hearing protection*, I think it's --and then noise levels. It's most likely a hearing induced hearing loss. (sic)

(Emphasis supplied).

During cross examination, Dr. Fordice was shown the results of the 2001 noise level testing of Building Materials' plant. He was then asked:

Q. All right. Now, assuming that Mr. Resh testifies in court like he testified at his deposition that he was provided with hearing protection from the time he started at GAF in 1985; and assuming he testifies at court like he testified in his deposition that he wore hearing muffs the entire time he was at GAF; and assuming that he did not testify at his deposition about anything to do with goggles interfering with his hearing with his ear muffs[, that] what he testified was that the glasses like he's wearing tonight he thought in some matter interfered with the ear muffs fitting on. He also testified that the hearing muffs he felt definitely decreased the noise, okay? Assuming that testimony, what if any opinion do you have on what effect hearing muffs would have on in terms of what effect the ear muffs would have In terms of protecting his hearing?

A. Well, if worn I think at this level they would be protective.

Dr. Fordice was then shown information concerning the types of hearing protection which Building Materials provided to its employees. He was asked:

Q. Okay. So if this type of hearing protection or something equivalent was provided to Mr. Resh consistently since 1985, how would that affect your opinion on the issue of causation?

A. Well, I think if he wore those hearing muffs as listed consistently then he would not have had a noise-induced hearing loss from the [dosimeter] readings presented.

Finally, Dr. Fordice was shown the results of the 2006 noise level testing, and was asked how that information affected his opinion concerning the cause of Mr. Resh's hearing loss. He answered: "I think if he was wearing hearing protection that this --that he would not have had noise-induced hearing loss from this noise level."

The hypothetical questions posed by counsel for Mr. Resh provide a reasonable summary of the evidence presented at trial. If Dr. Fordice had answered any of those questions affirmatively, without equivocation, the evidence would be sufficient to support the trial court's finding that Mr. Resh's hearing loss was caused by exposure to noise in his workplace. Dr. Fordice, however, qualified his answers, in every case, with the additional assumption that Mr. Resh "didn't have hearing protection," "wore no hearing protection," or "had no hearing protection." That assumption is not supported by the evidence in the record.

Mr. Resh testified that he wore hearing protection, ear plugs for a short period of time and thereafter ear muffs, throughout his employment. He also testified that his safety glasses interfered with the fit of the ear muffs. He testified on direct examination, however, that the difference in noise reduction when he wore the ear muffs without the safety glasses was slight. He also testified that he sometimes had to remove the ear muffs in order to hear other employees speak to him, and that he was less likely to hear a tow motor while wearing the ear muffs. These statements lead to an inference that the ear muffs reduced exposure to noise in the workplace, even when worn with the safety glasses. This inference was directly confirmed by the testimony of Mr. Resh's co-worker, Mr. Lewis, recited above, who also wore ear muffs with safety glasses. In addition, Dr. Fordice was asked if Mr. Resh wore the ear muffs over his glasses such that they prevented the muffs from performing a perfect seal, would that allow sufficient noise to have reached his eardrums to cause the damage reflected on the audiograms. Dr. Fordice responded, "I don't feel comfortable saying that. I think that's very, very highly debatable. So I guess my answer would have to be no."

Dr. Fordice opined that, at the level of exposure in his workplace, Mr. Resh would not have noise-induced hearing loss if he wore hearing protection. The evidence establishes that Mr. Resh wore devices which reduced the level of noise he was exposed to. His safety glasses may have reduced the effectiveness of those hearing protection devices. He described the difference between the protection afforded with the glasses and without as slight. The OSHA method for determining the actual amount of protection afforded by hearing devices appears to account for at least some level of incorrect fit or usage. Using OSHA's methodology, it would appear from the evidence that the devices would have attenuated the noise to which Mr. Resh was exposed, as shown by the various studies, sufficiently to prevent a work-related hearing loss. In that regard, the evidence corroborates the opinion of Dr. Fordice that Mr. Resh would not have suffered a noise induced hearing loss if he wore the ear muffs over his glasses. The evidence also establishes that Mr. Resh suffered from diabetes and high blood pressure. Dr. Fordice testified that these conditions were known to cause hearing loss. He also testified that hearing loss may be age related.<sup>5</sup> Dr. Fordice acknowledged that he was unable to distinguish what part of Mr. Resh's hearing loss may have been caused by his diabetes, his high blood pressure, his age or his work-place environment. In consideration of all of these factors, we conclude that the expert medical evidence fails to establish causation and, therefore, preponderates against the trial court's finding that Mr. Resh's hearing loss was caused by his employment.

### **Conclusion**

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<sup>5</sup>Mr. Resh was 66 years old at the time of trial.



The judgment of the trial court is reversed. The complaint is dismissed. Costs are taxed to George Cecil Resh, for which execution may issue if necessary.

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DONALD P. HARRIS, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE  
AT NASHVILLE

**GEORGE CECIL RESH v. BUILDING MATERIALS MANUFACTURING  
CORPORATION d/b/a GAF FIBERGLASS CORPORATION**

**Circuit Court for Wilson County  
No. 13703**

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**No. M2009-00028-SC-WCM-WC - Filed March 11, 2010**

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**JUDGMENT ORDER**

This case is before the Court upon the motion for review filed by George Cecil Resh pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(A)(ii), 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 George Cecil Resh, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

William C. Koch, Jr., J., not participating