

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

September 21, 2009 Session

THOMAS E. HALL v. TRW AUTOMOTIVE, U.S., LLC, ET AL.

**Direct Appeal from the Criminal Court for Wilson County
No. 04-0465 Clara Byrd, Judge**

**No. M2008-02312-WC-R3-WC - Mailed - December 30, 2009
Filed - February 3, 2010**

In this workers' compensation action, the employee, Thomas Hall, alleged that he sustained hearing loss due to exposure to noise in the workplace. The employer, TRW Automotive U.S., LLC, contended that most of the hearing loss occurred after Mr. Hall began wearing hearing protection, and was therefore not caused by his employment. The trial court awarded 75% permanent partial disability of the hearing of both ears. TRW has appealed, arguing that the trial court erred in that it failed to apportion the award to the body as a whole, selected an incorrect injury date, declined to view a video recording of an evidentiary deposition, and made an excessive award of benefits. We conclude that the award should have been assigned to the body as a whole, and that the trial court selected an incorrect injury date. The judgment is modified accordingly.¹

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

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

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

Hugh Green and John Meadows, Lebanon, Tennessee, for the appellee, Thomas E. Hall.

MEMORANDUM OPINION

¹This 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.

FACTUAL AND PROCEDURAL BACKGROUND

Mr. Hall began working for TRW, a manufacturer of automotive gears, in 1976. Other than occasional layoffs, he continued to work there as of the date the trial in this case occurred. He was fifty-six years old at that time. He is a high school graduate with no additional education. Prior to working for TRW, he had worked at a printing shop. While on layoff, he had started a janitorial business and had worked at Wal-Mart.

TRW conducted hearing tests of its employees beginning in approximately 1982. In 2002, TRW initiated a hearing protection program, through which it provided its employees with earplugs or ear muffs, and required that they be used in the production areas of the plant. In January 2004, TRW's Safety Director informed Mr. Hall that testing showed he had a permanent hearing loss. He was referred to a Dr. O'Quinn for additional testing which apparently confirmed the existence of a hearing loss.

At the request of his attorney, Mr. Hall was examined on October 27, 2004 by Dr. Scott Fortune, an otolaryngologist. Dr. Fortune testified that Mr. Hall gave him a history of "a slowly progressive hearing loss over the prior one to two years." In addition, Mr. Hall "had a severe complaint of tinnitus." Tinnitus is a condition which causes a person to experience false auditory sensations perceived as ringing sounds when no sound exists. Dr. Fortune testified that Mr. Hall "described it as a tremendous ringing noise that kept him awake all night." Dr. Fortune believed that both of these conditions were related to exposure to noise in the workplace. Based upon testing performed at his request, he also was of the opinion that Mr. Hall had a binaural hearing impairment of 17.2% due to hearing loss. Dr. Fortune also testified that, based upon the history he had received from Mr. Hall, the tinnitus "was severely interfering with his activities of daily living and causing insomnia." He assigned an additional impairment of 5%, the maximum permitted under the AMA Guides, for tinnitus. These impairments combined for a total hearing impairment of 22.2%, which equates to 8% to the body as a whole.

Dr. Fortune testified that the AMA Guides measure impairment based upon the frequency range of ordinary human speech, 500 to 3000 Hertz ("Hz"). Mr. Hall had a substantial loss of hearing in the higher range of sound, 4000 Hz and above. Dr. Fortune stated that hearing loss in this range could cause "difficulty when there's noise in the background . . . difficulty filtering out extraneous sounds from what you're actually trying to listen to. There would also be difficulty understanding higher pitched voices. In many cases, patients with this type of hearing loss will have difficulty understanding consonants, which will interfere significantly with their speech understanding." For that reason, he thought the Guides did not accurately reflect the actual impairment caused by high frequency hearing loss. He further testified that noise-induced hearing loss did not worsen after exposure to the noise ended, either by removal of the source of the noise or by use of adequate hearing protection.

Dr. David Haynes, an otologist, who is the Director of the Division of Otolaryngology and Neurotology in the Department of Otolaryngology at Vanderbilt University Hospital, testified by deposition. He examined Mr. Hall at the request of TRW's attorney on April 19, 2005. Mr. Hall reported to Dr. Haynes that he had a slowly progressing hearing loss which had worsened over the

last two years. He also reported having tinnitus for 8 to 10 years and “did note problems from the tinnitus with sleeping and interfering with his daily activities.” Like Dr. Fortune, Dr. Haynes ordered audiometric testing, including an additional procedure known as an otoacoustic emissions (OAE) test. He described this test as being somewhat more objective than a standard audiogram. Dr. Haynes’s diagnoses were hearing loss and tinnitus. Based upon the results of his testing, he opined that Mr. Hall had a binaural hearing impairment of 8.8%. He assigned an additional 3% for tinnitus. These impairments combined for a total of 4% to the body as a whole. Dr. Haynes agreed that noise-related hearing loss did not progress after exposure to noise ended. He also reviewed the results of an audiogram which was administered to Mr. Hall in August 2002. That test was the first such test done after the commencement of TRW’s hearing protection program. It was Dr. Haynes opinion that, under the AMA Guides, Mr. Hall had a 0% impairment for hearing loss at that time. He also agreed that high-frequency hearing loss could cause the type of problems described by Dr. Fortune, even though the AMA Guides did not provide impairment for loss in that range.

Dr. David Lipscomb, a consulting audiologist², testified on behalf of TRW. He conducted testing of the noise levels throughout TRW’s plant. He testified that the Occupational Safety and Health Administration standard for permissible noise exposure was 85 decibels “time-weighted average.” Prolonged exposure to noise below that level was considered to be safe. Dr. Lipscomb discussed the types of hearing protection which TRW provided to its employees. He stated that these were generally rated to provide 27 to 28 decibels or more of noise reduction, and would be expected to provide, at a minimum, 10 decibels of noise reduction. Based upon his measurements of noise in the plant, Dr. Lipscomb was of the opinion that an employee who wore the hearing protection devices which TRW provided beginning in February 2002, would have been exposed to less than 85 decibels thereafter. He testified that in his opinion, if Mr. Hall wore hearing protection devices “99.9%” of the time at work beginning in 2002, he would have sustained no additional work-related hearing loss after that time. Dr. Lipscomb also reviewed the results the August 2002 audiogram, and testified that it showed a 0% impairment according to the AMA Guides. He agreed with Drs. Fortune and Haynes, however, that the results showed a hearing loss in the high frequency range for which the Guides did not assign an impairment.

Mr. Hall testified that he continued to work for TRW, in the same job he had previously held. He had not missed any work and was able to perform his job duties. Since 2002, he had worn hearing protection in the plant at all times, except for brief periods when it was necessary to remove an earplug in order to carry on a conversation. He testified that he did not use hearing aids. He was able to use a normal cellular telephone, but had to adjust the volume to the highest level. He often had to ask people speaking to him to repeat themselves. He had difficulty understanding speech in the presence of background noise. He agreed that he had ringing in his ears, and testified that he had to keep a fan on at night to mask that sound and allow him to sleep. He stated that the ringing sometimes made it difficult for him to concentrate. He denied telling Dr. Fortune that he had insomnia.

²A non-physician specializing in the science of hearing and hearing loss.

The trial court found that Mr. Hall had sustained a work-related hearing loss. It found that because he had been able to “deal with” the effects of tinnitus that it “should totally disregard the impairment rating for tinnitus.” It awarded 75% permanent partial disability of the scheduled member, hearing. It found that the date of injury, for purposes of determining the compensation rate, was March 2004, the date upon which Mr. Hall gave notice of his claim for hearing loss to TRW. TRW has appealed, arguing that the trial court erred by attributing the award to the hearing of both ears, a scheduled member, rather than the body as a whole. TRW also contends that the trial court selected an incorrect date of injury and that the award is excessive. Finally, it asserts that the trial court erred by declining to view a video recording of the deposition of Dr. Lipscomb.

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). A trial court’s conclusions of law are reviewed de novo upon the record with no presumption of correctness. Perrin v. Gaylord Entm’t Co., 120 S.W.3d 823, 826 (Tenn. 2003); Ganzevoort v. Russell, 949 S.W.2d 293, 296 (Tenn. 1997).

ANALYSIS

Scheduled Member or Body as a Whole

TRW contends that the trial court erred by disregarding the impairments for tinnitus. It argues that Mr. Hall’s tinnitus was caused by the same exposure to noise that caused his hearing loss, and that its effects extend beyond interference with understanding speech. On that basis, it further asserts that the trial court should have found the tinnitus and hearing loss to be concurrent injuries pursuant to Tenn. Code Annotated section 50-6-207(3)(C), and should have apportioned the award to the body as a whole. Because Mr. Hall continues to work for TRW, any such award would necessarily be “capped,” at one and one-half or two and one-half times the anatomical impairment, in accordance with Tenn. Code Annotated section 50-6-241(a), or (d), depending on the date of injury.

A discussion of whether tinnitus should be apportioned to a scheduled member or the body as a whole occurs in Neal v. TRW Commercial Steering Div., No. M2006-01091-WC-R3-WC, 2007 WL 5231840 (Tenn. Workers’ Comp. Panel Nov. 6, 2007). In that case, the panel stated:

We agree that the apportionment of tinnitus should be determined on a case by case basis. . . . 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.

Id. at *4-5.

TRW points out testimony by Drs. Fortune and Haynes concerning the history given to them by Mr. Hall of “tremendous” ringing in his ears, insomnia, and interference with his ability to concentrate. It also points to Mr. Hall’s own testimony that he found it necessary to use a fan as a masking device in order to sleep. It argues that this evidence demonstrates that the effects of his tinnitus extend beyond “impairment of speech discrimination,” and, therefore, should be apportioned to the body as a whole.

Mr. Hall asserts that the trial court correctly disregarded his tinnitus in making an award, because this condition “was not a central part of his health concerns.” He cites Shoulders v. TRW Commercial Steering Div., No. M2006-00300-WC-R3-WC, 2007 WL 1096887 (Tenn. Workers’ Comp. Panel April 3, 2007), as an example of a case in which a hearing loss award was limited to the scheduled member, even though the employee also had tinnitus. Shoulders differs somewhat from the case at bar, in that the medical proof was that the effect of tinnitus on Mr. Shoulders was minimal. Id. at *8. See also, Hix v. TRW Inc., No. M2009-02822-WC-R3-WC, 2009 WL 1643448 (Tenn. Workers’ Comp. Panel June 12, 2009). In this case, however, Mr. Hall’s evaluating physician assigned the maximum impairment rating for tinnitus, and described his problem as “severe.” TRW’s evaluating physician gave a moderate impairment, and described the condition as affecting his activities of daily living. In that regard, the facts of this case are similar to those in Crowell v. TRW, Inc., No. M2007-2758-WC-R3-WC, 2009 WL 1260319 (Tenn. Workers’ Comp. Panel May 8, 2009). Crowell was decided while this case was in the briefing stage and were unavailable to the trial court when this case was decided.

In the case before us, both of the physicians who testified on the subject found that Mr. Hall had a significant degree of tinnitus. His evaluating physician, Dr. Fortune, described the condition as “severe,” and testified that “[i]t was so distracting to him it made it hard for him to concentrate on tasks.” He also testified that Mr. Hall reported that he “had a considerable problem with insomnia from the noise” of the tinnitus. Both physicians testified that Mr. Hall’s tinnitus affected his activities of daily living. This evidence clearly indicates that the effects of Mr. Hall’s tinnitus went beyond enhancing his hearing loss or the impairment of his speech discrimination. It follows that the impairment for Mr. Hall’s tinnitus should have been assigned to the body as a whole, based upon the standard set forth in Neal and Crowell. Since the evidence supports the conclusion that his

tinnitus was a concurrent injury with his hearing loss pursuant to Tennessee Code Annotated section 50-6-207(3)(C), the trial courts award should have been apportioned to the body as a whole.

Date of Injury

TRW asserts that the evidence shows that Mr. Hall was no longer exposed to an injurious level of noise on the job after it instituted a hearing protection program in 2002, and it should not be liable for any deterioration of his hearing after that point in time. This issue was directly addressed by a previous panel in Hix v. TRW. In that decision, a previous panel stated:

[The employee] 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. . . . Under these circumstances, [the employee] 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.

Hix v. TRW, 2009 WL 1643448 at *5.

The panel in Hix also fixed the injury date in February 2002, based upon application of the “last injurious exposure” rule as a result of the circumstances of that case. The proof in this case is substantially similar to the evidence considered by the appeals panel in Hix. All of the expert witnesses who testified in this case were in agreement that the use of adequate hearing protection would stop the progression of noise-induced hearing loss. Dr. Lipscomb testified, without contradiction, that based upon the levels of noise which he measured at TRW’s premises, the hearing protection provided reduced the level of noise exposure to a non-injurious level.

Mr. Hall was examined by Dr. Fortune on October 27, 2004, and by Dr. Haynes on April 19 2005. He reported to both doctors that his hearing loss had significantly progressed during the two years prior to the examination. This significant worsening must, then, have occurred after he began wearing the hearing protection at work. Dr. Lipscomb testified that the fact Mr. Hall exhibited hearing loss in the lower range frequencies after the August 20, 2002, examination when he was already wearing hearing protection at work, indicated the cause of his hearing loss was something other than noise exposure at the TRW plant. Moreover, Dr. Lipscomb testified that noise related hearing loss is normally symmetrical or similar in both ears. Mr. Hall’s significantly worse hearing loss in the right ear as opposed to the left is also indicative of a cause other than noise related hearing loss. Based upon this record, we must conclude that the analysis in Hix is applicable here. Therefore, the correct date of injury is February 1, 2002, and TRW is not liable for hearing loss which occurred after that date.

Excessive Award

Our conclusions that tinnitus was a concurrent injury with Mr. Hall's hearing loss, and that the date of injury was February 1, 2002 require a substantial reduction in the award. The injury is attributable to the body as a whole, and is therefore capped at two and one-half times the impairment by operation of Tenn. Code Ann. § 50-6-214(a). Mr. Hall had no ratable impairment for hearing loss on February 1, 2002.³ His tinnitus impairment, as determined by Dr. Fortune, was 5%. He assigned that impairment to the binaural hearing, which is the method given by the AMA Guides. According to Table 11-3, p. 250 of the Guides⁴, this equates to 2% to the body as a whole. The award will be modified to 5% permanent partial disability to the body as a whole. It is unnecessary to address TRW's remaining arguments concerning the size of the award.

Video Deposition

TRW submitted both a video recording and a typed transcript of the evidentiary deposition of Dr. Lipscomb to the trial court. The court read the transcript, but declined to view the video recording. This issue was also addressed directly in Hix v. TRW, Id. at *6. Consistent with the ruling in that case, we decline to hold that the trial court erred by failing to view the video recording of the deposition when it had already read the transcript.

CONCLUSION

The judgment is modified to find the date of injury to be February 1, 2002 and by reducing the award to 5% permanent partial disability to the body as a whole. It is affirmed in all other respects. Costs are taxed one-half to TRW Automotive U.S., LLC, American Home Assurance Company and their surety, and one-half to Thomas E. Hall, for which execution may issue if necessary.

DONALD P. HARRIS, SENIOR JUDGE

³Mr. Hall contends that the audiogram of August 2002 was unreliable because it was administered in a portable facility exposed to outside noise. However, Dr. Fortune testified that the results of a 2003 audiogram, given in the same facility, were consistent with his later testing. Additionally, Dr. Lipscomb testified that audiogram testing requires the subject to respond when he or she hears sounds. Any interference from outside noise would, therefore, cause the results to be one-sided by showing a worse than actual hearing loss. For these reasons, we find this argument unpersuasive.

⁴This section of the Guides was made an exhibit to the deposition of Dr. David Haynes.

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

THOMAS E. HALL v. TRW AUTOMOTIVE, U.S., LLC, ET AL.

**Criminal Court for Wilson County
No. 04-0465**

No. M2008-02312-WC-R3-WC - Filed - February 3, 2010

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 appears 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 one-half to TRW Automotive U.S., LLC, American Home Assurance Company and their surety, and one-half to Thomas E. Hall, for which execution may issue if necessary.

PER CURIAM