

IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
AT JACKSON  
April 24, 2017 Session

**CLIFFORD BARKER v. THE GOODYEAR TIRE & RUBBER COMPANY**

**Appeal from the Chancery Court for Obion County  
No. 31224 W. Michael Maloan, Chancellor**

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**No. W2015-01893-SC-R3-WC - Mailed June 27, 2017; Filed August 2, 2017**

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Clifford Barker (“Employee”) worked for The Goodyear Tire & Rubber Company (“Employer”) from 1969 until 1999, when he retired. He filed this action seeking benefits for alleged work-related hearing loss on March 18, 2014. Employer disputed that Employee’s hearing loss was work-related. The trial court awarded benefits for 30% permanent partial disability to both ears. Employer has appealed from that award, contending the evidence preponderates against the trial court’s finding of causation. In the alternative, Employer argues that Employee sustained no vocational disability as a result of his hearing loss. The appeal has been referred to a Special Workers’ Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law pursuant to Tennessee Supreme Court Rule 51. We affirm the judgment in part, modify in part, and remand to the trial court for entry of a judgment consistent with this opinion.

**Tenn. Code Ann. § 50-6-225(e)(2) (2014) (applicable to injuries occurring  
prior to July 1, 2014) Appeal as of Right;  
Judgment of the Chancery Court Affirmed in Part and Modified in Part**

PAUL G. SUMMERS, SR. J., delivered the opinion of the court, in which ROGER A. PAGE, J. and WILLIAM ACREE, SR. J., joined.

Randy N. Chism and Kirk L. Moore, Union City, Tennessee, for the appellant, Goodyear Tire & Rubber Co.

Jeffrey P. Boyd, Jackson, Tennessee, for the appellee, Clifford Barker

**OPINION**  
**Factual and Procedural Background**

Employee worked as a maintenance man for Employer. His job took him to all areas of Employer's plant. He testified that for the first twenty years he worked there, no hearing protection was required. He stated that in 1989, hearing protection was made available but was not mandatory. Employee testified that he wore hearing protection part of the time during his last ten years of employment. Employee also stated that he received hearing tests throughout his tenure at Employer, but he had never been told he had hearing loss or advised to go to a doctor about his hearing.

Employee first noticed that he had hearing problems five or six years prior to the July 23, 2015 trial. He testified that his wife told him the volume of their television was too loud after he watched it. He further testified that he had not seen a doctor for hearing problems at any time between 1999 and 2013. However, Dr. Karl Studtmann, an otolaryngologist, testified that he administered an audiogram to Employee in 2009. Employee did recall seeing a doctor in Jackson for an ear infection around that time. Employee saw Dr. Studtmann and Dr. Leonard Wright during 2014 for audiograms related to this litigation. Employee stated that Dr. Wright recommended that he get hearing aids.

Employee testified briefly about the functional problems caused by his hearing loss. His functional issues include his wife's complaining about the volume of the television set and his needing to look directly at persons talking to him in order to completely understand what they were saying. Since retiring from Employer, Employee has worked for a company that builds levees and installs pipes. His job includes performing "laser work" to set grades for the projects.

During cross-examination, Employee stated that he had been a smoker for thirty years. Employee did not recall seeing Dr. Studtmann in 2000, but did recall seeing him for an ear infection in 2009. Dr. Studtmann testified that he saw Employee in 2000, 2009, and 2014.

Dr. Studtmann's deposition was placed into evidence. He examined Employee on April 8, 2014, at Employee's attorney's request. Employee gave a history of thirty years of noise exposure at Employer. As an example, Employee said that when he was working, he would find the volume of his car radio to be loud in the mornings because he had to increase the volume so he could hear properly when he traveled home at that end of his shift. Dr. Studtmann described this phenomenon as a "temporary threshold shift." He added that multiple threshold shifts over time could lead to permanent hearing damage. Dr. Studtmann also reported that he had seen Employee for eczema in his ear canal in 2000 and for an ear infection in 2009.

Dr. Studtmann performed an audiogram during his 2014 examination of Employee. He found that Employee had “borderline hearing at the lower frequencies with a high-frequency, sensorineural hearing loss in a checkmark pattern.” He stated that the checkmark pattern was typical for noise-induced hearing loss. Dr. Studtmann opined that Employee had a 12.5% binaural hearing loss. He further opined that the pattern of Employee’s hearing loss was consistent with noise-induced hearing loss.

During cross-examination, Dr. Studtmann agreed that an audiogram measures a subject’s hearing as of the date it is given. The impairment he found in 2014 was not necessarily present in 1999, when Employee last worked for Employer. He also agreed that hearing declines over time for everyone. He was shown the results of a “hearing screen” performed at Employer’s facility on September 9, 1998. In Dr. Studtmann’s opinion, such tests are not as accurate as tests performed in a doctor’s office. When compared to the 1998 screen, the 2014 test showed a significant worsening of Employee’s hearing. He disagreed with Employer’s assertion that hearing screens performed by Employer were consistent over the years. However, Dr. Studtmann agreed that they demonstrated a worsening of Employee’s hearing during that period. When asked to review his own 2009 audiogram according to the Sixth Edition of the *American Medical Association Guides to the Evaluation of Permanent Impairment*, (AMA Guides) Dr. Studtmann opined that Employee had a binaural hearing impairment of 1.3% at that time. Dr. Studtmann stated that the most likely cause of Employee’s increased hearing impairment between 2009 and 2014 was age-related hearing loss, not Employee’s work at Employer. During redirect examination, Dr. Studtmann added that a person with baseline noise-induced hearing loss will notice age-related hearing loss to a greater extent than he otherwise would.

Dr. Wright, also an otolaryngologist, examined Employee in June of 2014 at the request of Employer’s attorney. Employee gave a history of gradual decrease in his hearing over time. Dr. Wright performed an audiogram that showed a significant binaural hearing loss. He assigned 17.5% permanent impairment to Employee’s binaural hearing. Like Dr. Studtmann, Dr. Wright opined that the pattern of Employee’s loss was consistent with noise exposure. Dr. Wright testified that while aging causes hearing loss in all frequencies, it primarily affects the in the higher ranges. He examined the 1998 screening test results and found that they showed signs of binaural hearing loss —moderate in the left ear and mild in the right.

Dr. Wright said that Employee had sustained progressive hearing loss between 1998 and 2014. He opined that Employer was not the cause of Employee’s post-retirement hearing loss. Unlike Dr. Studtmann, he found the hearing screens performed by Employer over the years to be reasonably consistent. On cross-examination, he stated that the 1998 test showed a classic noise notch. He repeated that Employee’s post-retirement hearing loss was not caused by his work for Employer but that it was worse because of his earlier, work-related hearing loss.

The trial court issued its findings and conclusions from the bench. After a brief recitation of the evidence, the court found that Employee's work for Employer was a "major contributing factor" to his hearing loss. The court then found that Employee sustained a 30% permanent partial disability to the hearing of both ears. A judgment was entered in accordance with those findings. Employer has appealed from that judgment, contending the evidence preponderates against the finding of causation; and Employee sustained no vocational disability from his hearing loss.

### **Analysis**

The standard of review of issues of fact in a workers' compensation case 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) (2014) (applicable to injuries occurring prior to July 1, 2014). 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. Madden v. Holland Grp. of Tenn. Inc., 277 S.W.3d 896, 898 (Tenn. 2009) (citation omitted). When 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. Foreman v. Automatic Sys., Inc., 272 S.W.3d 560, 571 (Tenn. 2008) (citation omitted). A trial court's conclusions of law are reviewed de novo upon the record with no presumption of correctness. Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009) (citations omitted).

Employer asserts that the evidence preponderates against the trial court's finding that Employee sustained a compensable hearing loss from his work for Employer. In support of this assertion, it argues that Employee had no hearing impairment when he retired from Employer and also that the hearing impairment identified by Drs. Studtmann and Wright occurred after Employee retired from Employer.

First, Employer points to the September 1998 hearing screen administered to Employee. Notwithstanding Dr. Studtmann's opinion that industrial hearing tests are not as accurate as those administered by otolaryngologists or audiologists, he testified that the test showed 0% impairment according to the Sixth Edition of the AMA Guides. Dr. Wright was advised that the parties had stipulated to that fact, and he did not make an independent calculation. However, Dr. Wright agreed there had been a substantial post-retirement decline in Employee's hearing. Employer contends that these facts demonstrate that Employee had no hearing loss at the time of his retirement in 1999. That is not entirely accurate. Dr. Wright, Employer's examining physician, stated that Employer's screening tests from 1974 until 1998 showed a gradual hearing loss and that the 1998 study contained a "notch" consistent with noise-related hearing loss.

In Lambdin v. Goodyear Tire & Rubber Co., 468 S.W.3d 1 (Tenn. 2015), our Supreme Court held that an actual hearing loss, although not ratable pursuant to the AMA Guides, could provide a basis for a permanent disability award under appropriate circumstances. 468 S.W.3d at 10-13. Lambdin also involved testimony from Dr. Studtmann and Dr. Wright, among other physicians. Id at 4-8. In any event, the absence of an anatomical impairment in 1998 is not a bar to recovery in this case. The testimony of both physicians supports a conclusion that Employee suffered some amount of noise-related hearing loss during his period of work for Employer.

However, both doctors testified that Employee's hearing loss after his retirement was substantial. Both doctors also testified that the primary cause of that decline was the aging process that affects all persons. Both doctors also testified that age-related hearing loss was worse for persons who had sustained hearing loss earlier in life. Only vague explanations were given for the practical meaning of "worse" in this context. "Although causation in a workers' compensation case cannot be based upon speculative or conjectural proof, absolute certainty is not required because medical proof can rarely be certain. . . ." Clark v. Nashville Mach. Elevator Co., 129 S.W.3d 42, 47 (Tenn.2004). Nevertheless, viewed in its entirety, the evidence in this record does not preponderate against the trial court's finding of causation.

We turn to Employer's argument that the Employee suffered no vocational disability as a result of his industrial hearing loss. Employer cites Bain v. TRW, Inc., No. M2008-02311-WC-R3-WC, 2010 WL 1508519 (Tenn. Workers Comp. Panel Apr. 15, 2010), and Hix v. TRW, Inc., No. M2007-02822-WC-R3-WC, 2009 WL 1643448 (Tenn. Workers' Comp. Panel June 12, 2009), in which we reduced permanent disability awards for hearing loss based on the limited evidence supporting those awards and a limited impact on the employee's vocational abilities.

It is undisputed that Employee was not exposed to harmful industrial noise after retiring in 1999. The 1998 hearing screen showed noise-related hearing loss but no impairment. However, this test was less accurate than a more formal audiogram. A formal audiogram from 2009 showed additional hearing loss and that Employee had a 1.3% impairment at that time. Additional audiograms from 2014 demonstrated that his impairment had increased to a level between 12.5% to 17.5%. Both physicians testified that this increase was not caused by Employee's work for Employer.

Employee testified that after his retirement, he had worked part-time operating a laser level for a construction firm. The length of that employment was not specified. He denied that his hearing loss affected his ability to work. He stated that he first began to notice his hearing loss in 2008 or 2009, roughly nine years after his 1999 retirement. Employee's testimony is consistent with the medical testimony that the bulk of Employee's hearing loss took place after his employment ended.

Employee further testified that Dr. Wright had recommended that he have hearing aids. Employee also opined that his wife still told him the volume of their television was too loud and that he had to look directly at persons speaking to him in order to understand them. Employee also testified that he had some difficulty hearing the attorneys during the trial. There is no additional evidence concerning Employee's ability to obtain and hold employment, nor is there any additional evidence concerning the effect of hearing loss on Employee's activities of daily living.

Considering these factors, we conclude that evidence in the record is similar to Hix and does not support an award of 30% permanent partial disability to both ears. The award is modified to 15% permanent partial disability to both ears.

### **Conclusion**

The finding of causation is affirmed. The award of benefits is modified to 15% permanent partial disability to the hearing of both ears. This case is remanded to the trial court for entry of a judgment consistent with this opinion. Costs are taxed one-half to The Goodyear Tire & Rubber Company and its surety and one-half to Clifford Barker, for which execution may issue if necessary.

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PAUL G. SUMMERS, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
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**Chancery Court for Obion County  
No. 31224**

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**No. W2015-01893-SC-R3-WC – Filed August 2, 2017**

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**JUDGMENT ORDER**

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 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 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 are assessed one-half to The Goodyear Tire & Rubber Company and its surety and one-half to Clifford Barker, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM