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

STEVEN BELL v. GOODYEAR TIRE & RUBBER COMPANY

Appeal from the Chancery Court for Obion County
No. 29826 W. Michael Maloan, Chancellor

No. W2015-01675-SC-R3-WC - Mailed June 27, 2017; Filed August 7, 2017

Steven Bell ("Employee") worked for Goodyear Tire & Rubber Company ("Employer") for thirty-seven years. He retired when Employer's plant closed in 2011. Shortly thereafter, he filed a request for benefit review conference, contending that he had sustained hearing loss as a result of noise exposure in the course of his work for Employer. He filed this civil action on May 4, 2012. Hearing screens taken by Employer from 1974 through 2010 showed that Employee had moderate to severe hearing loss when he was hired. Employer, therefore, denied the claim. The trial court awarded permanent partial disability benefits of 40% to the hearing of both ears. Employer has appealed. The appeal has been referred to the 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 of the trial court.

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

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, Union City, Tennessee, for the appellant, Goodyear Tire & Rubber Co.

Jeffrey P. Boyd, Jackson, Tennessee, for the appellee, Steven Bell.

OPINION

Factual and Procedural Background

Employee was fifty-nine years old when the trial of this matter took place. He graduated from high school in Illinois in 1974. He moved to Murray, Kentucky the same year and began working for Employer in October 1974. His father also worked for Employer. For the first eight years of his employment, Employee worked in the "final finish" department. Employee described this area as very loud. In 1983, he moved to the "tire room." He continued to work in that department until the closure of the plant in 2011. His job consisted of operating an "R1" machine, into which he placed various components and created partially assembled tires. Employee testified that the machine itself was noisy and that there was a machine nearby that made a loud squealing noise. When Employee began working for Employer, hearing protection was not required. However, in the late 1980s or early 1990s, use of hearing protection devices was made mandatory.

Employee worked six days per week from 1975 to 1998. In 1998, Employer changed to twelve hour shifts three to four days per week. At all times, Employee worked as much overtime as he was able.

Employee testified that he owned and rode motorcycles from 1974 to 1978. However, he sold his motorcycle in 1978 because he did not have time to ride it. He later began collecting classic motorcycles but stated that he rode them only occasionally for short distances. Employee also testified that he hunted "a little bit" between 1974 and 2011 because his primary recreational activity was fishing.

Employee testified that he did not perceive problems with his hearing when he began to work for Employer. He explained that he claimed for hearing loss in 2011 after he noticed that he had to play his television at a high volume in order to hear it. He also had difficulty understanding conversations when around groups of people, such as in a restaurant.

Employee stated that during routine hearing tests and screenings, unidentified representatives of Employer had told him his hearing was getting worse when regular hearing tests were given. Employee saw a physician for a wax blockage on one occasion. Employee denied exposure to any source of loud noise away from the workplace.

Dr. William Wainscott, an otolaryngologist, saw Employee on February 8, 2012. Employee provided a history of hearing problems for several years. Employee also complained of ringing in his ears. He reported noise exposure at work and some limited gun noise exposure in the past Dr. Wainscott administered an audiogram, which showed high frequency hearing loss in both ears, and lesser hearing loss in lower frequencies. He

reviewed the result of a hearing screen administered through Employer in October 1974.[1] Dr. Wainscott testified that the study showed severe high frequency hearing loss at 4000 and 6000 Hertz. Comparing his February 2012 study to the 1974 test, he stated that the later study showed some worsening in lower frequencies, that there was still a "notch" in the higher frequencies, and that there was some worsening at the 4000 Hertz level.

Dr. Wainscott opined that both the 1974 study and the 2012 study showed patterns consistent with noise-induced loss. He also said that the 2012 study showed some age-related hearing loss. He added that the greater part of Employee's hearing loss occurred prior to being hired by Employer. During cross-examination, Dr. Wainscott agreed that Employee's hearing worsened after 1974. He could not identify the cause but reiterated that the vast majority of Employee's hearing loss occurred before 1974.

Employee saw Dr. Karl Studtmann, Dr. Wainscott's partner, on March 28, 2012. Employee gave him a personal history consistent with the one given to Dr. Wainscott. He told Dr. Studtmann that he wore hearing protection at work when it became mandatory to do so. Employee also said that his wife complained about the volume of their television set and that he had difficulty understanding conversations when there was background noise present. Employee told Dr. Studtmann that he had a family history of hearing loss.

Dr. Studtmann administered an audiogram. The results produced showed a binaural hearing impairment of 20.6% according to the Sixth Edition of the *American Medical Association Guides to the Evaluation of Permanent Impairment*, (AMA Guides). However, the majority of Employee's hearing loss was in higher frequencies, for which the AMA Guides provide no impairment. See Lambdin v. Goodyear Tire & Rubber Co., 468 S.W.3d 1, 5 (Tenn. 2015).

Dr. Studtmann was of the opinion that Employee should receive an additional 15% permanent impairment for hearing loss in those frequencies. Dr. Studtmann based his conclusion on difficulties revealed by a "discrimination test" that showed Employee had problems discerning the letters S, K, and F in normal speech. Dr. Studtmann further opined that Employee's difficulty in discriminating between letters containing high frequency sound would likely make it difficult for Employee to use a telephone or participate in conversations if background noise was present or if he was in a crowded room.

Dr. Studtmann reviewed the results of all hearing screens taken by Employee while working for Employer. He testified that the 1974 test showed that Employee had high-frequency sensorineural hearing loss. Subsequent tests showed that the hearing loss progressed over the years. He opined that the worsening was caused by noise exposure at

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[1] Dr. Wainscott's testimony indicates he reviewed an audiogram record dated September 14, 1974. The actual date of the audiogram was October 1974 as confirmed by Exhibit 2 to Dr. Wainscott's deposition.

work because it was the primary source of noise to which Employee was exposed between 1974 and 2011. During cross-examination, Dr. Studtmann agreed that Dr. Wainscott found that Employee's hearing loss was most likely related to noise exposure and presbyscusis.[2] He agreed that presbyscusis played a role in Employee's hearing loss. He also agreed that there were variations between his results and Dr. Wainscott's. Dr. Studtmann agreed that his audiogram showed hearing loss in Employee's right ear of 24 decibels ("dB") at 2000 Hertz, 33 dB at 4000 Hertz and 16 dB at 8000 Hertz. The only decrease detected in Employee's left ear hearing was 15 dB at 2000 Hertz.

Dr. Studtmann stated that in 1974, Employee already had abnormal hearing at three frequency levels in the right ear, with severe loss at 6000 Hertz and moderate loss at 4000 and 8000 Hertz. Employee's hearing loss in his left ear was severe to profound at 4000, 6000 and 8000 Hertz. These results showed that Employee had been exposed to destructive levels of noise before 1974. Dr. Studtmann conceded that hearing loss prior to 1974 was not caused by Employee's work for Employer. He also agreed that Employee's hearing was unchanged in four of six measured levels from 1974 to 2012.

Dr. Marilyn Gresham is a licensed audiologist who assesses, diagnoses, and treats hearing and balance problems. She conducted a review of medical records concerning Employee's hearing.[3] All of the audiograms were abnormal. She stated that the October 1974 test showed severe hearing loss in both ears. Based on the audiograms of Drs. Wainscott and Studtmann and a February 16, 2014 test by West Tennessee Hearing and Speech, Dr. Gresham opined that Employee had mild to severe to profound hearing loss, the left ear being worse than the right. Noting that Employee had a history of hunting and shooting, she stated that the 1974 hearing test was consistent with hearing loss for a right-handed shooter. She also said that gunfire was "impulse" noise, capable of causing structural damage by tearing away inner ear hair cells. Dr. Gresham also testified that most gunfire created sound in the 140 to 160 dB range. She added that riding a motorcycle at speeds above 30 miles per hour could also affect hearing due to wind turbulence in the area of the ears. This was true even if a helmet was worn. She also stated that hearing protection was not effective to prevent hearing loss from gunfire or motorcycling.

Dr. Gresham also testified on the subject of hearing protection. She said that the most common forms of protection were foam plugs or earmuff-type protectors. Although hearing protectors have decibel ratings, they actually provide less protection than their ratings suggest. Thus, earplugs or earmuffs with a 32 dB rating actually provide about 12.5 dB of actual protection. Dr. Gresham stated that OSHA standards for workplace noise required hearing protection to be provided at 85 db. At 90 dB hearing protection was mandatory.

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[2] Presbyscusis is defined as age-related hearing loss.

[3] Dr. Gresham reviewed, but did not consider, a report from a Dr. Williams, because its results were inconsistent with all other tests performed by other doctors. Dr. Williams's report was not placed into evidence.

Dr. Ronald Kirkland is an otolaryngologist like Dr. Studtmann and Dr. Wainscott. He reviewed medical records pertinent to Employee's claim; the depositions of Drs. Studtmann, Wainscott, and Gresham; and Employee's discovery deposition. Based on the October 1974 hearing test, Dr. Kirkland opined that Employee had substantial bilateral hearing loss when he was hired by Employer. The pattern of the hearing loss was consistent with noise exposure. He stated that Employee's left ear hearing in 1974 was at or near normal at 500, 1000, and 2000 Hertz. Normal hearing is considered to be 25 dB or lower. In the higher frequencies, Employee's left ear hearing loss was severe: 80 dB at 4000 Hertz; 80 dB at 6000 Hertz; and 75 dB at 8000 Hertz. Employee's right ear hearing was mildly impaired at 500 and 4000 Hertz, moderately impaired at 8000 Hertz, and severely impaired at 6000 Hertz.

Dr. Kirkland articulated that the pattern of Employee's 1974 hearing loss was consistent with exposure to noise. Based on Employee's history, Dr. Kirkland believed that the problem could have been caused by the noise from shooting a weapon. However, it was possible that it was related to some other noise exposure.

Dr. Kirkland testified that differences between audiograms, such as those of Dr. Wainscott and Dr. Studtmann, were not unusual. There were many potential reasons for such variations, including patients' recent noise exposure or lack of attentiveness and alertness. He observed that the patterns in the various audiograms were consistent. He did not disagree with Dr. Studtmann's 20.6% impairment rating per the AMA Guides. He stated that Dr. Wainscott's audiogram resulted in a 24.7% binaural impairment. Dr. Kirkland testified that the discrimination scores on both tests were similar, — Dr. Wainscott's testing showed a score of 96% in the left ear and 92% in the right ear, while Dr. Studtmann's testing revealed a score of 92% in each ear. Those scores indicated to Dr. Kirkland that Employee should understand conversational speech very well.

The December 2014 audiogram by West Tennessee Hearing and Speech was significantly worse than either one of the 2012 studies. The extent of the change was greater than would normally be expected for presbyscusis. Dr. Kirkland testified that the decline in Employee's hearing between 2012 and 2014 was not caused by his earlier noise exposure from his work for Employer. He also stated that gunfire created noise in the 140 dB range and could create hearing problems even over a short time.

During cross-examination, Dr. Kirkland agreed that he had limited knowledge about the extent of Employee's exposure to gunfire prior to 1974. He said that based on the 1974 hearing test, Employer should have been aware that Employee had significant hearing loss at the time he was hired. Dr. Kirkland also agreed that industrial hearing screens, such as those administered by Employer, are generally not as reliable as audiograms performed by an audiologist. He further stated that Employee's hearing had worsened in his left ear while he was working for Employer by 15 dB at 4000 Hertz and 10 dB at 8000 Hertz. In his right ear, his hearing had decreased by 29 dB at 2000 Hertz and 21 dB at 8000 Hertz.

Dr. Kirkland testified that a person with high-frequency hearing loss would have some difficulty with conversation in the presence of background noise. However, in his experience, persons complaining of this problem typically had poor discrimination scores, unlike Employee. He agreed that the presence of poor baseline hearing made later hearing loss more troublesome. Finally, Dr. Kirkland reiterated that there was no reasonable explanation for Employee's hearing loss other than noise exposure prior to working for Employer.

The trial court took the case under advisement. It issued its findings in the form of a letter to counsel. The court found that Employee had not sustained his burden of proof to demonstrate that his high frequency hearing loss was primarily caused by noise exposure at work. See Tenn. Code Ann. § 50-6-102(12)(C)(ii) (Supp. 2011). However, the court also found that Employee had sustained his burden as to his lower frequency hearing loss. The court adopted Dr. Studtmann's 20.6% impairment and awarded 40% permanent partial disability to the hearing of both ears. Judgment was entered in accordance with those findings. Employer timely appealed the judgment, and the appeal was referred to this Panel for findings of fact and conclusions of law. We affirm the judgment of the trial court.

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(a)(2) (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 Group 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). 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).

In this appeal, Employer contends that the evidence preponderates against the trial court's finding that Employee's low-frequency hearing loss was primarily caused by exposure to noise in its workplace. In the alternative, Employer argues that the award of permanent partial disability benefits is excessive.

Causation

Tennessee Code Annotated section 50-6-102(12)(C)(ii), as it existed on the date of Employee's injury, stated:

> (12) "Injury" and "personal injury":
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> * * *
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> (C) Do not include:
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> * * *
>
> (ii) Cumulative trauma conditions, hearing loss, carpal tunnel syndrome, or any other repetitive motion conditions unless such conditions arose primarily out of and in the course and scope of employment[.]

We discussed this statute in DeGalliford v. United Cabinet Co., LLC, No. M2013-00943-WC-R3-WC, 2014 WL 1018170 (Tenn. Workers' Comp. Panel Mar. 17, 2014), appeal denied (Mar. 17, 2014), stating: "The language of [section] 50-6-102(12)(C)(ii) defines the law regarding aggravation of preexisting medical conditions resulting from repetitive work activity. However, by its explicit terms, it does not prohibit recovery of benefits for such conditions." 2014 WL 1018170 at, *7.

Employer argues that the evidence does not demonstrate that noise in its workplace was the "primary" cause of Employee's hearing loss. In support of this position, Employer points to Employee's substantial hearing loss prior to 1974. It also relies on Dr. Kirkland's testimony that based on the periodic hearing tests, Employee's hearing loss did not progress substantially during his first twenty years of work for Employer. Employer also notes that Employee's hearing worsened significantly between 2012 and 2014, a time when he was no longer working for Employer. Finally, it relies on Dr. Kirkland's statement that the irregular progression of Employee's hearing loss suggested that "other factors" caused the worsening of his condition.

All physicians who testified in this case agreed that Employee had a substantial hearing loss, especially in the higher frequencies, when he began working for Employer in 1974. Further, all agreed that Employee's hearing worsened in the lower frequencies during the time Employee worked for Employer. Dr. Studtmann opined that the worsening was attributable to noise exposure in the workplace. Dr. Wainscott was unable to state the cause of the decline, but he testified that the majority of Employee's hearing loss was noise related. Dr. Kirkland testified that noise and the aging process were possible causes for the decline in Employee's hearing, but he stated that the timing of the decline suggested "other factors" were responsible.

When a trial court faces conflicting expert testimony, it generally has the discretion to

choose which expert to accredit. Kellerman v. Food Lion, Inc., 929 S.W.2d 333, 335 (Tenn. Workers' Comp. Panel 1996) (citation omitted); Johnson v. Midwesco, Inc., 801 S.W.2d 804, 806 (Tenn. 1990). In this case, the trial court chose to accredit Dr. Studtmann's opinion that workplace noise was the primary cause of the aggravation of Employee's low-frequency hearing loss. However, because Employee already had a severe to profound hearing loss in the higher frequencies in 1974, the court also concluded that Employee failed to sustain his burden of proof that that workplace noise was the primary cause of the aggravation of his hearing loss in the higher frequencies. Based on our review of the record, the trial court's analysis of the evidence was reasonable. Therefore, we affirm the finding that workplace noise was the primary cause of the aggravation of Employee's low frequency hearing loss.

Extent of Disability

In the alternative, Employer argues that the award of 40% permanent partial disability to the hearing of both ears is excessive. Employer contends that the major portion of Employee's hearing loss occurred before his employment and argues that the advancement that occurred thereafter was relatively minor. "The extent of an injured worker's permanent disability is a question of fact." Lang v. Nissan N. Am. Inc., 170 S.W.3d 564, 569 (Tenn. 2005) (citing Jaske v. Murray Ohio Mfg. Co., Inc., 750 S.W.2d 150, 151 (Tenn. 1988)). This is a scheduled member injury. Vocational disability is "not an essential ingredient to recovery for the loss of use of a scheduled member." Duncan v. Boeing Tenn., Inc., 825 S.W.2d 416, 417 (Tenn. 1992) (citing Oliver v. State, 762 S.W.2d 562, 566 (Tenn. 1988)). Further, "It is well settled that an employee may recover for injury to a scheduled member without regard to loss of earning capacity." Lang 170 S.W.3d at 569.

Employee testified that he had difficulty understanding conversation in noisy environments and that he had to adjust his television to an extremely high volume in order to understand the dialogue. Dr. Wainscott recommended that Employee be fitted with hearing aids. The trial court had the opportunity to directly observe Employee as he heard and answered questions. Considering the record as a whole, we are unable to conclude that the evidence preponderates against the trial court's assessment of disability.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to Goodyear Tire & Rubber Co. and its surety, 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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STEVEN BELL v. GOODYEAR TIRE & RUBBER COMPANY

Chancery Court for Obion County
No. 29826

No. W2015-01675-SC-R3-WC – Filed August 7, 2017

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 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 are assessed to the Appellant, Goodyear Tire & Rubber Co., and its surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM