IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
December 10, 2012 Session

# DAVID HARDY v. GOODYEAR TIRE & RUBBER CO.

**Appeal from the Chancery Court for Obion County**
**No. 28,407 W. Michael Maloan, Chancellor**

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**No. W2012-00396-SC-WCM-WC - Mailed March 4, 2013; Filed May 9, 2013**

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Pursuant to Tennessee Supreme Court Rule 51, this workers' compensation 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. In this hearing-loss case, the employer raises a single issue on appeal: whether the trial court erred in finding that employee's workers' compensation claim is not barred by the applicable one-year statute of limitations. We affirm the trial court's judgment finding that the claim was timely.

**Tenn. Code Ann. § 50-6-225(e) (2008 & Supp. 2012) Appeal as of Right;**
**Judgment of the Chancery Court Affirmed**

CORNELIA A. CLARK, J., delivered the opinion of the Court, in which DONALD E. PARISH, SP. J., joined. TONY A. CHILDRESS, SP. J., filed a concurring and dissenting opinion.

Randy N. Chism, Union City, Tennessee, for the appellant, Goodyear Tire & Rubber Company.

Jeffrey P. Boyd, Jackson, Tennessee, for the appellee, David Hardy.

## MEMORANDUM OPINION

### Factual and Procedural Background

David Hardy ("Employee") began working for Goodyear Tire & Rubber Company ("Employer") on July 6, 1970, when he was twenty years old. Employee continued working for Employer for almost thirty-nine years. He accepted Employer's offer of a voluntary

buyout and retired, effective July 1, 2009, when he was fifty-nine years old. Employee's last day of work was June 30, 2009.

On June 25, 2009, Employee filed a claim with Employer seeking workers' compensation benefits for hearing loss. Employer's workers' compensation insurer denied the claim, and Employer refused to provide Employee with a panel of physicians. Employee filed a complaint on January 1, 2010, seeking workers' compensation benefits. The case was tried on December 14, 2011.

Employee testified that when he began working at Employer's plant—a noisy manufacturing facility—workers were not given hearing protection. At some point in the 1980s, Employer initiated a hearing protection program and began providing workers with hearing protection devices, such as ear plugs or ear muffs. Although Employer did not mandate the use of these devices until approximately six years prior to Employee's retirement, Employee used hearing protective devices consistently from the time of their introduction into the plant. Workers who failed to use hearing protection devices after they were made mandatory were "written up" and given time off from work. Employee stated that he was never written up or disciplined for failing to use hearing protection.

In 1982, Employer began providing Employees with regular hearing tests. According to Employer's records, Employee underwent eighteen hearing tests from 1982 through 2004. Employee acknowledged receiving copies of the written hearing test results, which indicated that Employee initially had a mild hearing loss that progressed first to a moderate hearing loss, and eventually to a severe hearing loss. Employee also testified that he "failed" some of the Employer-provided hearing tests and had to be retested. When asked on direct examination if he ever had a conversation "with the nurse or anyone at [Employer] around those hearing tests about what the results were," Employee responded: "The way they presented it to us, to me, they would say well, your hearing is a little bit worse than it was last year. But they never would say you have got a significant hearing loss."

After Employee's 2004 test, a company nurse told him that he needed to see a doctor. On May 24, 2004, Employee saw "Dr. Shah," a physician who had contracted with Employer to examine employees at the plant and provide treatment for a wide variety of conditions. Employee testified that Dr. Shah "looked in my ears and sent me back to work and said everything was fine." According to Employee, no one at Employer—neither a doctor nor a nurse nor a manager—ever told him that his hearing loss was caused by his work. Employee testified that he first learned the problems with his ears were caused by his work for

Employer from Dr. Karl Studtmann, an otolaryngologist,[1] who examined Employee in April 2010.

Employee acknowledged on cross-examination that he first noticed ringing in his ears, a condition known as tinnitus, in 1991, and that he thought at the time it could be caused by his work. Employee agreed that the tinnitus and his hearing worsened over time. Employee also identified Employer's plant as the only source of loud noise to which he was consistently exposed. Employee described the tinnitus as a "bother," but he said it did not disrupt the activities of his daily life. Employee said he never missed work because of the tinnitus or hearing loss, and he testified that his retirement on July 1, 2009, was unrelated to his hearing loss. When asked why he filed a claim for workers' compensation benefits less than a week before his retirement, Employee responded: "It had got to a point where it was getting unbearable to go on. I knew it was a point to turn it in."

Employer's former Manager of Workers' Compensation and Employee Benefits ("Manager") testified that her investigation of Employee's workers' compensation claim revealed that Employee's hearing had progressively worsened over the years he worked for Employer. She testified that a document from Employee's company-maintained medical records confirmed Employee's testimony that Dr. Shah had examined Employee on May 24, 2004. She acknowledged that a handwritten notation—"STS both ears, not related to noise/work"—appeared on this document and likely had been written by Dr. Shah. A similar handwritten notation—"Not Noise Related Not at Work Inj."—appeared on a copy of Employee's 2004 hearing test results found in Employee's company-maintained personnel file. Employee testified that this notation had not appeared on the 2004 test results he received. The Manager testified that Dr. Shah likely received a separate copy of Employee's 2004 test results and wrote the note after reviewing them.

The proof at trial also included the deposition testimony of two otolaryngologists, Dr. Studtmann and Dr. Leonard Wright.[2] Dr. Studtmann testified that he first saw Employee on April 23, 2010, for a primary complaint of decreased hearing. At that time Employee denied any family history of hearing loss and any significant noise exposure aside from his work at Employer's plant. After examining Employee and having an audiologist in his office

[1] Dr. Studtmann testified that otolaryngology "is the medical and/or surgical treatment of problems and injuries involving the ear, nose, and throat."

[2] The proof also included the deposition testimony of Dr. Marilyn Gresham, a doctor of audiology employed in Dr. Wright's office. Dr. Gresham testified that she computed the binaural hearing impairment that Dr. Wright stated in his deposition. She also testified generally about how the decibel levels of sound are related to the loss of hearing, and she explained how the use of hearing protection minimizes the hearing damage caused by noise exposure.

perform an audiogram, Dr. Studtmann diagnosed Employee as having high-frequency and nerve-type hearing loss. Based on Employee's denial of any family history of hearing loss or any significant noise exposure outside his workplace, Dr. Studtmann opined that "the most likely cause" of Employee's hearing loss was "noise exposure within the workplace." Dr. Studtmann assigned Employee a 22.8% binaural impairment, or 8% to the body as a whole, based upon the American Medical Association's Guide to the Evaluation of Permanent Impairment, Sixth Edition ("AMA Guides"). Dr. Studtmann recommended that Employee receive appropriately fitted hearing aids as treatment for his hearing loss and to improve his activities of daily living.

At Employer's request, Dr. Wright evaluated Employee in September 2011. Based on testing and his review of Employee's medical records, Dr. Wright assigned a binaural impairment of 16.9%, or 6% to the body as a whole, based on the AMA Guides. Dr. Wright opined, based upon the results of Employee's 2004 hearing test at Employer, that Employee "would have known" that he had a hearing problem at that time. He conceded, however, that Employer's personnel who administered the regular hearing tests would have understood better than Employee that Employee was developing a significant hearing loss. Dr. Wright conceded that, to his knowledge, no one from Employer advised Employee of his significant hearing loss or its cause. Based on the information and data he received, Dr. Wright testified that Employee's noise exposure at Employer's plant was at least a contributing factor to Employee's high frequency hearing loss and that Employee's tinnitus was directly related to his hearing loss. Dr. Wright agreed that Employee needs hearing aids to treat his hearing loss.

The only two contested issues at trial were: (1) whether Employee's claim was barred by the statute of limitations; and (2) assuming that the claim was not barred, the extent of Employee's vocational disability. Employer argued that Employee's claim was untimely and that Employee's vocational disability was "minimal," if any. Employee responded that the claim was not barred by the statute of limitations because at no point during his thirty-nine years of employment did anyone tell him either that his hearing loss was getting worse or that it was related to or caused by his job for Employer. Employee argued that his complaint was timely because he was not diagnosed with work-related hearing loss until April 2010, when Dr. Studtmann "connected the dots."

After stating its findings of fact, the trial court ruled from the bench:

> This is a very close case as to when Mr. Hardy knew or should have known that he had a work-related injury that was permanent in nature. The evidence certainly is contradictory and you can take out any part of it to support either position, but

> I think taking all the testimony as a whole, the Court finds that the statute of limitation[s] in this case has not run and this is a compensable injury. In assessing vocational disability and considering all of the evidence in this case, the Court assigns a 30 percent permanent partial disability to both ears. His future medicals will remain open.

The trial court subsequently filed its written judgment, finding that Employee sustained a 30% permanent partial disability ("PPD") to both ears and awarding Employee PPD benefits of $33,840.00, discretionary costs of $975.90, and future medical expenses.

In this appeal, Employer raises a single issue: whether Employee's workers' compensation claim is barred by the one-year statute of limitations.

**Standard of Review**

Appellate review of workers' compensation cases is governed by Tennessee Code Annotated section 50-6-225(e)(2) (2008 & Supp. 2012), which provides that appellate courts must review 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[s], unless the preponderance of the evidence is otherwise." As the Supreme Court has observed many times, reviewing courts 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 the trial court has seen and heard the witnesses, considerable deference must be afforded the trial court's factual findings. *Tryon v. Saturn Corp*., 254 S.W.3d 321, 327 (Tenn. 2008). No similar deference need be afforded the trial court's findings based upon documentary evidence such as depositions. *Glisson v. Mohon Int'l, Inc./Campbell Ray*, 185 S.W.3d 348, 353 (Tenn. 2006). Similarly, we review de novo without a presumption of correctness a trial court's conclusions of law. *Seiber v. Reeves Logging*, 284 S.W.3d 294, 298 (Tenn. 2009).

**Analysis**

Before determining whether Employee's claim was timely, we first address Employee's assertion that Employer should be estopped from relying on the statute of limitations based upon Employer's "actions, or inactions, and plain silence in the face of superior knowledge of the facts surrounding [Employee's] hearing loss." In support of this argument, Employee relies upon *Frayser v. Dentsply Int'l, Inc.*, 78 S.W.3d 242, 247 (Tenn. Workers' Comp. Panel 2002), in which the Appeals Panel stated that an employer may be estopped from relying on the one-year statute of limitations if the employee "justifiably relies upon a misrepresentation or concealment of a material fact on the part of the employer"

which results in the employee failing to file suit within the one-year period of limitations. According to Employee, Employer knew from the annual hearing test results that the noise inside its plant was adversely affecting Employee's hearing. Because Employer never disclosed this information, Employee says Employer should be estopped from relying upon the statute of limitations. Based upon our review of the record, however, we find no evidence that Employer made any misrepresentation or concealed any material fact that resulted in a delay in Employee filing his claim for benefits. To the contrary, on two separate documents Employer's physician wrote that the hearing loss was *not* work-related. Had this information been communicated to Employee, an estoppel argument might have had more traction, but Employee testified that he never saw these notations. We therefore reject Employee's estoppel argument.

Employer asserts that the evidence shows Employee knew or, through the exercise of reasonable diligence, should have discovered that he had a hearing-loss claim many years before he made this claim. Employer relies on Employee's testimony that he noticed ringing in his ears in 1991, that he thought at the time that the ringing in his ears was caused by working at Employer, and that Employee noticed the ringing in his ears and his hearing worsening as time passed. Employer also relies on Employee's testimony that the work environment at Employer was the only loud noise to which he was exposed. Employer emphasizes that Employee received written copies of the results of the Employer-administered hearing tests, which showed the progressive worsening of Employee's hearing loss during his years of employment. Employer contends that these facts show that Employee knew of his work-related hearing loss many years before he made this claim for benefits and therefore demonstrate that Employee's claim was not timely. Employee responds that his claim was timely under the "discovery rule" because Employee did not know, nor should he have discovered, that his hearing loss was work-related prior to the diagnosis by Dr. Studtmann in April 2010.

The relevant statute of limitations for workers' compensation claims arising after January 1, 2005 provides:

> In those instances where the employer has not paid workers' compensation benefits to or on behalf of the employee, the right to compensation under this chapter shall be forever barred, unless the notice required by § 50-6-202 is given to the employer and a benefit review conference is requested on a form prescribed by the commissioner and filed with the division within one (1) year after the accident resulting in injury.

Tenn. Code Ann. § 50-6-203(b)(1) (2008); *see also Gerdau Ameristeel, Inc. v. Ratliff*, 368 S.W.3d 503, 507 (Tenn. 2012). The discovery rule applies to this one-year statute of limitations. *Gerdau Ameristeel, Inc.*, 368 S.W.3d at 508. Thus, the one-year limitations period "does not commence until [an employee] discovers or, in the exercise of reasonable diligence, should have discovered that he has a claim." *Id.* Determining the time at which an employee has actual or constructive knowledge of his workers' compensation claim is a question of fact to which a presumption of correctness attaches on appeal. *See Banks v. United Parcel Serv., Inc.*, 170 S.W.3d 556, 562 (Tenn. 2005); *Mayton v. Wackenhut Servs., Inc*, No. E2010-00907-WC-R3-WC, 2011 WL 2848198, at *3 (Tenn. Workers' Comp. Panel July 18, 2011).

The statute of limitations is not an uncommon defense in hearing loss cases. The Supreme Court addressed this defense in *Hawkins v. Consolidated Aluminum Corp.*, 742 S.W.2d 253, 254-55 (Tenn. 1987). The employee in *Hawkins* worked for the employer from 1961 through July 1984, when he was laid off due to a labor dispute. *Id.* at 254. The employee's hearing was tested once or twice during his employment, but the employee was never told he had a loss of hearing. On April 17, 1981, a physician advised the employee that he had "some [hearing] loss but not to worry about it." *Id.* In late December 1984, the employee underwent a hearing examination with another physician who advised the employee that he had a serious and permanent loss of hearing and that it had been caused by the loud noise to which he had been exposed during his employment. *Id.* The employee sought workers' compensation benefits, and the employer defended based on the statute of limitations. The trial court found that the claim was timely, and the Supreme Court affirmed. In doing so, the Court explained that the statute of limitations "did not begin to run until the plaintiff knew or as a reasonably prudent person should have known, that his hearing loss was work connected." *Id.* The Court acknowledged that the case presented a "close" factual question, but concluded that material evidence supported the trial court's finding that the employee "did not become aware that he had a serious impairment of hearing caused by noise on the job until late December 1984." *Id.* at 255.

In *Ferrell v. Cigna Property & Casualty Insurance Co.*, 33 S.W.3d 731 (Tenn. 2000) the Court again considered whether a workers' compensation claim for hearing loss was barred by the statute of limitations. The employee began working for the employer in 1970 and continued working for twenty-eight years as a bulldozer operator and a foreman on construction sites. *Id.* at 733. The employee had experienced hearing problems since childhood, but these problems worsened after he began working for the employer, and the employee experienced ringing in his ears, headaches, and dizziness. *Id.* In 1974, the employee sought treatment with Dr. Bell, an ear, nose, and throat specialist, who treated the employee for the ensuing twenty-four years. Dr. Bell's treatment included three surgeries and hearing aids, for which the employee did not seek workers' compensation coverage.

By the time the employee stopped working for the employer in April 1998, he had sustained 100% hearing loss in his right ear, 81% hearing loss in his left ear, and bilateral hearing loss of 84%. *Id.* The employee then consulted an attorney and sought workers' compensation benefits for his hearing loss. *Id.* The employer defended based on the statute of limitations.

The employee testified "that he did not seek to determine whether his hearing loss was work-related until he stopped working for [the employer] in April 1998." *Id.* The employee also testified that "he first thought his hearing loss was in fact work-related on August 25, 1999, the day before trial, when he saw a Standard Form Medical Report for Industrial Injuries ('C-32 Form') which Dr. Bell filled out in March 1999." *Id.* The employee further testified that "Dr. Bell never told him that his exposure to noise had anything to do with his hearing problem" and "that they never discussed the possible causal relation between his work environment and hearing loss in their twenty-four-year relationship." *Id.* at 734.

In reversing the trial court's finding that the statute of limitations barred the employee's claim, the Supreme Court first concluded that the employee "had no actual knowledge that his condition was work-related until after he filed his complaint." *Id.* at 735. The Supreme Court also concluded that the employee "exercised reasonable diligence in determining the cause of his hearing loss." *Id.* The Court explained this conclusion as follows:

> Unlike an accident caused by a machine or a slippery surface, no particular event or series of events would have made it obvious to [the employee] that he had sustained a compensable injury. He first encountered problems with his ears as a child. After starting work for [the employer], his hearing condition began to decline and then gradually deteriorated over the course of twenty years. [The employee], unable to determine the cause of his hearing loss, sought out Dr. Bell for advice and treatment. He told Dr. Bell about his working conditions, but according to [the employee's] testimony, Dr. Bell never discussed with him the possibility that his work caused or aggravated his hearing loss, nor did [Dr. Bell] caution [the employee] to limit his exposure to loud noise. Instead, Dr. Bell consistently diagnosed [the employee] for over twenty years as having conductive hearing loss.

> Because of his doctor's consistent advice and the absence of any warnings to avoid exposure to loud noise, [the employee] reasonably believed that he had not sustained a compensable injury. Normally, an employee ought to be able to rely on his doctor's advice. This is especially true in the case of a gradual injury whose cause cannot be determined by a layperson. We find that [the employee] neither knew nor should have known that he sustained a compensable injury until literally the day before trial. We therefore hold that the statute of limitations had not expired.

*Ferrell*, 33 S.W.3d at 735.

The decisions in *Hawkins* and *Ferrell* teach that for a gradually occurring hearing-loss claim the statute of limitations does not begin to run until the employee discovers, or in the exercise of reasonable diligence, should have discovered that his hearing loss is permanent and work-related. *See also Banks*, 170 S.W.3d at 561 (interpreting the notice requirement of Tennessee Code Annotated section 50-6-201(b) and stating that "an employee who sustains a gradually-occurring injury may be unsure of the cause of his or her injury, and therefore relieved of the notice requirement, until the diagnosis is confirmed by a physician"); *Whirlpool Corp. v. Nakhoneinh*, 69 S.W.3d 164, 169 (Tenn. 2002) ("[A]n employee is excused from giving notice of a gradually occurring injury until the employee has reason to know that the injury is work-related.").[3]

This general rule has been applied in a number of cases, and its application produces differing outcomes, depending upon the proof in the case. *See, e.g.*, *Blair v. Inland Container Co.*, No. 03-S-029105CH00039, 1991 WL 231114 (Tenn. Nov. 12, 1991); *Hill v. Whirlpool Corp.*, No. M2011-01291-WC-R3-WC, 2012 WL 1655768 (Tenn. Workers' Comp. Panel May 10, 2012); *Mayton v. Wackenhut Servs., Inc*, No. E2010-00907-WC-R3-WC, 2011 WL 2848198 (Tenn. Workers' Comp. Panel July 18, 2011); *Jacks v. E. Tenn. Mech. Contractors, Inc.*, No. E2009-02501-WC-R3-WC, 2009 WL 2589093 (Tenn. Workers' Comp. Panel Aug. 24, 2009); *Neal v. TRW Commercial Steering Div.*, No. M2006-01091-WC-R3-WC, 2007 WL 5231840 (Tenn. Workers' Comp. Panel Nov. 6, 2007); *Sutton*

[3] In *Banks* and *Nakhoneinh*, the issue on appeal was whether the employee had given timely notice of his injury pursuant to Tennessee Code Annotated section 50-6-201(b), while the issue in the pending case is whether Employee's claim is timely under the one-year statute of limitations provided in section 50-6-203(b)(1). Although the issue in *Banks* and *Nakhoneinh* differs from the issue in this case, this difference is immaterial for purposes of analysis because the time for giving notice of injury under section 50-6-201(b) and the time for filing a claim under section 50-6-203(b)(1) are both subject to the discovery rule. *Hawkins*, 742 S.W.2d at 254.

*v. Wackenhut Servs., Inc.*, No. E2006-00427-WC-R3-WC, 2007 WL 293185 (Tenn. Workers' Comp. Panel Jan. 31, 2007); *Smith v. Ga. Pac. Corp.*, No. 03S01-9803-CH-00028, 1999 WL 172741 (Tenn. Workers' Comp. Panel Mar. 25, 1999).

For example, in *Mayton*, the Appeals Panel applied *Hawkins* and *Ferrell* but affirmed the trial court's finding that the claim was barred by the statute of limitations. The Appeals Panel explained that other evidence in the record contradicted the employee's testimony "that he had no knowledge that his illness was work-related until he was so advised by his doctors in September of 2006." 2011 WL 2848198, at *5. The contradictory evidence in *Mayton* was the employee's signed application for federal workers' compensation benefits stating that his conditions, COPD and pulmonary embolism, were work-related. *Id.*; *see also Sutton,* 2007 WL 293185, at *3 (reversing the trial court's finding that the employee's 2005 claim was timely filed because the evidence showed that the employee learned in the mid-1990s that his severe hearing loss was work-related).

On the other hand, in *Blair* the Supreme Court affirmed the trial court's finding that the claim had been timely filed. *Blair*, 1991 WL 231114, at *3. The employee in *Blair* worked in the employer's noisy manufacturing facility from 1960 to 1990. The employer began administering hearing tests in 1983, and, as here, employees were given copies of the results of their hearing tests. *Id.* at *1. In 1988 and 1989, the employee received letters informing him that he had a hearing problem and advising him to see a physician, but the letters did not elaborate on the nature of his hearing loss or indicate that the hearing loss was work-related. *Id.* The employee did not seek medical advice in response to these letters. *Id.* In September 1989, the employee experienced pain and roaring in his ears after a machine in the employer's plant malfunctioned, causing a great deal of noise. The employee eventually sought treatment for these symptoms with a surgeon specializing in hearing loss. *Id.* In March 1990, the surgeon advised the employee that he had a significant hearing loss in both ears caused at least in part by his exposure to noise at the employer's plant. The employee immediately notified the employer of his workers' compensation claim. The employer argued that the claim was untimely because the employee received written notice of his hearing loss in 1988 and because the employee had recognized the symptoms of his hearing loss several years before receiving the 1988 notice advising him to see a doctor. *Id.* at *2.

In affirming the trial court's decision finding the claim timely, the Supreme Court stated that the employee "did not know that his hearing loss was substantial in degree or that it was work-related, until he had the benefit of [the surgeon's] diagnosis." *Id.* at *3. The Supreme Court stated that the 1988 and 1989 notices "did not relate the [employee's] hearing loss to excessive noise or otherwise give any indication that he might have a compensable claim in this regard." *Id.* The Court concluded that the statute of limitations "did not begin

to run until the [employee] was diagnosed with a serious, work-related injury." *Id.*; *see also Hill*, 2012 WL 1655768, at *4 (affirming the trial court's finding that the employee's February 19, 2009 notice was timely because, even though the employee learned of his hearing loss in 2007, he did not learn from a physician that his hearing loss was work-related until February 13, 2009); *Jacks*, 2009 WL 2589093, at *4, *6 (affirming the trial court's finding that the employee provided timely notice of his hearing loss claim and explaining that the first time the employee learned from a physician that his hearing loss was permanent and work-related was several months after he notified the employer); *Neal*, 2007 WL 5231840, at *3 (finding that even though the employee noticed ringing in his ears in 2001 and thought it was caused by the noisy environment at work, his June 3, 2004 claim was timely based on the employee's uncontradicted testimony that he did not know he had a permanent, work-related hearing loss until he received the results of a physician's audiogram in May 2004).

In *Douglas v. Goodyear Tire & Rubber Co.*, No. W2008-00533-SC-WCM-WC, 2009 WL 2567777 (Tenn. Workers' Comp. Panel Aug. 19, 2009), a case factually similar to the present appeal, the employee began working for the employer in 1969, continued working for the employer for thirty-eight years, and was still working for the employer at the time of trial. *Id.* at *1. The employee began wearing hearing protection "100% of the time" in 1983. *Id.* at *2. Additionally, the employee underwent hearing tests in 1988-1992, 1994, 1995, 1997, 1998, 2003, 2004, and 2005. Tests administered in August and September of 2003 showed that the employee had suffered a permanent change in his hearing, and the employee was then told for the first time that he had bilateral moderately severe hearing loss. *Id.* The employee was sent to the company doctor, who in turn recommended that the employee visit an ear specialist. The employer provided a panel of doctors, and the employee selected Dr. Rowland, whom he visited on September 11, 2003. *Id.* Dr. Rowland informed the employee that he had "'significant [hearing] loss'" and tinnitus. *Id.* The employee filed a workers' compensation claim on October 17, 2003, and the employer argued it was barred by the one-year statute of limitations. *Id.*

At trial, the employee admitted that he noticed his hearing loss in 1996, but he testified that "it was not until his visit with Dr. Rowland in September 2003 that he connected his hearing loss to his employment." *Id.* at *4. The trial court rejected the employer's argument that the action was untimely, explaining that the employee "'did not become aware that he had a permanent hearing loss due to his work until he sought medical treatment in 2003, and his suit was filed within the appropriate period' thereafter." *Id.* at *5. In affirming the trial court's judgment, the Appeals Panel stated:

> In this case, although [the employee] admitted that he noticed his hearing was worsening as early as 1996, he testified that he did not relate this hearing loss to his employment until

> his hearing test results noted "moderately severe loss in hearing," the company doctor recommended that he see a specialist, and the specialist, Dr. Rowland, informed him that his hearing loss was work-related. Based on this testimony, the trial court found that [the employee] did not discover that his hearing loss was a compensable injury until September 2003. As this Court has observed many times, when credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge has had the opportunity to observe the witness' demeanor and hear in-court testimony.
>
> In this case, the evidence does not preponderate against the trial court's finding that the one-year statute of limitation[s] commenced on September 11, 2003, the day Dr. Rowland informed [the employee] that he had significant hearing loss and that, therefore, the suit filed on October 17, 2003, was timely.

*Id.* at *7 (citation omitted).

Considering the proof in this case in light of the foregoing precedent, we conclude that the trial court did not err in finding the claim timely. As *Hawkins* and *Ferrell* instruct, the statute of limitations did not begin to run until Employee discovered, or in the exercise of reasonable diligence, should have discovered that his hearing loss was permanent and work-related. Employee's gradual hearing loss occurred during his thirty-nine-year career working for Employer. Employee candidly acknowledged that he noticed ringing in his ears as early at 1991, that he later noticed his loss of hearing, and that both conditions worsened over the years. Employee also testified that he thought these problems might have been caused by his noise exposure at work. However, the proof also establishes that during his lengthy career no one at Employer told Employee his hearing loss was work related. Employee testified that he was not medically diagnosed with a permanent, work-related hearing loss until after his retirement and after he had filed his claim for benefits. Unlike *Douglas*, in which the company doctor suggested the employee see a hearing specialist, the company doctor here sent Employee back to work, told him everything was fine, and wrote notes on company records indicating that Employee's hearing loss was not work-related. The trial court's refusal to charge Employee, a non-physician, with knowledge that his hearing loss was work-related is entirely reasonable in light of this proof, particularly since Employee's hearing loss occurred gradually as he aged from twenty to fifty-nine. The trial court applied the legal principles articulated in *Hawkins* and *Ferrell*. Admittedly, as the trial court recognized, this case presents a close factual question, as do many hearing loss cases in which the statute of limitations is raised as a defense. *See, e.g.*, *Hawkins*, 742 S.W.2d at 255; *Hill*, 2012 WL

1655768, at *4. However, the trial court observed Employee's in-court testimony and demeanor and evaluated Employee's credibility. Based on our review of the record on appeal, the evidence considered in its entirety does not preponderate against the trial court's finding that Employee's claim was timely because Employee was not medically diagnosed with a permanent, work-related loss of hearing until *after* his employment had ended.[4]

**Conclusion**

For the reasons stated above, we hold that the trial court did not err in finding Employee's claim for workers' compensation benefits was timely. Accordingly, we affirm the trial court's judgment. Costs of this appeal are assessed to Employer, for which execution may issue if necessary.

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CORNELIA A. CLARK, JUSTICE

[4] In *Building Materials Corp. v. Britt*, 211 S.W.3d 706 (Tenn. 2007), the Supreme Court stated that the date of a gradually occurring injury for purposes of the statute of limitations "should be determined using the last day worked rule." *Id.* at 713. The Court explained that, under the last day worked rule, the statute of limitations begins to run on the date the employee becomes unable to work due to the gradual injury. *Id.* at 711-712; *see also Crew v. First Source Furniture Grp.*, 259 S.W.3d 656, 670 (Tenn. 2008) (describing *Britt* as "[u]sing the last-day-worked rule" and holding "that the statute of limitations set forth in Tennessee Code Annotated section 50-6-203 does not begin to run until the employee is prevented from working due to the employee's injury").

Employee's hearing loss did not prevent him from working, and he did not retire because of his hearing loss, so Employee has not relied upon the last-day-worked rule. We note, however, that the last-day-worked rule has been applied by Appeals Panels in at least three cases to determine the commencement of the statute of limitations even though the employees had not missed work because of their hearing loss. *See Jacks,* 2009 WL 2589093, at *8 (noting that the employee never missed work because of his hearing loss but applying the last day worked rule to determine when the statute of limitations began to run); *Shoulders v. TRW Commercial Steering Div*., No. M2006-00300-WC-R3-CV, 2007 WL 1096887, at *6 (Tenn. Workers' Comp. Panel Apr. 3, 2007) (noting that the employee never missed work because of his hearing loss but concluding that "[t]he statute of limitations did not begin to run on his claim until his last day worked"); *Luna v. GAF Fiberglass Corp.*, No. M2001-01155-WC-R3-CV, 2002 WL 975147, at *2 (Tenn. Workers' Comp. Panel May 9, 2002) (noting that the employee never missed work as a result of his hearing loss but applying the last-day-worked rule and holding the action was timely). If the last-day-worked rule applies even when an employee does not miss work because of his hearing loss, then the last-day-worked rule is a separate and independent basis for affirming the trial court's judgment that Employee's claim was timely. *See Cont'l Cas. Co. v. Smith*, 720 S.W.2d 48, 50 (Tenn. 1986) (holding that a judgment may be affirmed on different grounds than those relied on by the trial court when the trial court reached the correct result).

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

**DAVID HARDY v. GOODYEAR TIRE & RUBBER COMPANY**

**Chancery Court for Obion County**
**No. 28407**

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**No. W2012-00396-SC-WCM-WC - Filed May 9, 2013**

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**JUDGMENT ORDER**

This case is before the Court upon the motion for review filed by Goodyear Tire & Rubber Company pursuant to Tennessee Code Annotated section 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 Goodyear Tire & Rubber Company, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Cornelia A. Clark, J., not participating