IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
January 23, 2012 Session

MELVIN HILL v. WHIRLPOOL CORPORATION ET AL.

Appeal from the Chancery Court for Coffee County
No. 10-53 Vanessa A. Jackson, Judge

No. M2011-01291-WC-R3-WC - Mailed April 9, 2012
Filed - May 10, 2012

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 accordance with Tenn. Sup. Ct. R. 51. The employee filed a complaint in the Chancery Court for Coffee County seeking workers' compensation benefits for his loss of hearing. Following a bench trial, the trial court concluded that the employee's hearing loss was caused by his exposure to noise at the workplace. Accordingly, the trial court awarded the employee $68,759.73 in permanent partial disability benefits after concluding that the employee had a vocational disability of 78% to his hearing. The court also awarded the employee his reasonable and necessary medical expenses and discretionary costs. The employer raises two issues on this appeal: (1) whether the employee gave timely notice of his alleged injury; and (2) whether the employee failed to prove that his hearing loss was work-related. We hold that the trial court did not err in finding that the employee gave timely notice and that the employee proved his hearing loss was work-related. Accordingly, we affirm the trial court's judgment.

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

WILLIAM C. KOCH, JR., J., delivered the opinion of the Court, in which WALTER C. KURTZ, SR.J. and J.S. DANIEL, SP.J., joined.

David T. Hooper, Brentwood, Tennessee, for the appellant, Whirlpool Corporation.

Steve C. Norris, Nashville, Tennessee, for the appellee, Melvin Hill.

MEMORANDUM OPINION

I.

Melvin Hill began working in a manufacturing plant in LaVergne in February 1985. The plant was later acquired by Whirlpool Corporation. During the twenty-three years working in the plant, Mr. Hill was exposed to loud noises associated with the brazing equipment and air wrenches he used and engine noises of the forklift he drove.

In 2007, as a result of a company-administered hearing test, Mr. Hill, then 57 years old, learned that he had a hearing loss. Whirlpool advised Mr. Hill to consult his personal physician, and his personal physician referred Mr. Hill to Dr. Jeffrey B. Marvel, an otolaryngologist practicing in Tullahoma. An audiologist performed another hearing exam in May 2007, but Mr. Hill was not examined by Dr. Marvel, and he was provided with no explanation for the cause of his hearing loss.

The Whirlpool plant closed on August 13, 2008, and Mr. Hill's employment at Whirlpool was terminated at that time. Later in 2008, Mr. Hill discussed his loss of hearing with his personal physician and was again referred to Dr. Marvel. Dr. Marvel examined Mr. Hill in February 2009 and informed Mr. Hill that his hearing loss was work-related.

Mr. Hill immediately filed a request for a benefit review conference with the Tennessee Department of Labor and Workforce Development. The parties participated in a benefit review conference on February 10, 2010, but were unable to reach an agreement. Accordingly, Mr. Hill filed a complaint in the Chancery Court for Coffee County on February 10, 2010, seeking workers' compensation disability benefits and the payment of the medical expenses related to his hearing loss.

The trial court conducted a bench trial on April 12, 2011. Dr. Marvel, testifying by deposition, recounted that he had questioned Mr. Hill about the noise level in the Whirlpool plant and that Mr. Hill had told him about his work environment and that "his job was very noisy [and] that he spent most of his days driving a forklift or operating compressed air tools." Dr. Marvel also testified that he had asked Mr. Hill about his hobbies and other activities and that Mr. Hill had told him that he hunted and "shot guns." Dr. Marvel "took [Mr. Hill's answers] to mean sort of a limited amount of shooting." Further, "[Mr. Hill] did not, like I say, shoot skeet or, you know, sort of a hobby where you would go through a whole case of shells in a weekend."

Based on the results of the hearing test and on the history provided by Mr. Hill, Dr. Marvel testified that Mr. Hill's loss was in the 4,000 kilohertz frequency[1] and that Mr. Hill's hearing improved above this frequency. He also testified that this type of hearing loss was symptomatic of noise-induced hearing loss and was not likely to be age-related. Dr. Marvel also eliminated shooting as the cause of Mr. Hill's hearing loss and found no indication that Mr. Hill previously had a lot of ear infections, ruptured ear drums, scar tissue in his ears, or fluid in his ears. Accordingly, Dr. Marvel concluded that "all the records and the history indicated that he had sustained significant noise exposure while at Whirlpool to cause the hearing loss that he presented with." He further opined that, based upon the Guides to the Evaluation of Permanent Impairment, Mr. Hill sustained a 26% binaural hearing impairment.

Doug Hagewood, Whirlpool's human resources manager and its only remaining employee in Middle Tennessee, testified that Whirlpool's two million square foot plant was "pretty good sized." He stated that he was aware that noise sampling tests had been conducted in the past but that he had been unable to find any records of these tests. Mr. Hagewood also confirmed that employees were required to wear hearing protection in the press shop and that they were not required to wear hearing protection on the assembly line or when driving forklifts. While he stated that he found no record that Mr. Hill had complained about or visited the company's medical department about hearing problems, he acknowledged that Whirlpool had "sent him [Mr. Hill] out" for a hearing test in 2007 and that the company had been informed that the test results showed that Mr. Hill had some hearing loss.

The trial court found (1) that Mr. Hill "was a very credible witness," (2) that Whirlpool "had actual knowledge of [Mr. Hill's] injury during the time that the injury was occurring[,]" (3) that Mr. Hill gave "adequate" notice of his claim to Whirlpool, and (4) that his "noise-induced hearing loss" was work-related. After finding that Mr. Hill had sustained a vocational disability of 78% to his hearing, the trial court awarded him permanent partial disability benefits in the amount of $68,759.73. The court commuted the award to a lump sum, minus an attorney's fee of 20%. In addition, the court awarded Mr. Hill his reasonable and necessary medical expenses and discretionary costs.

[1]The transcript reflects that Dr. Marvel testified that Mr. Hill exhibited a "notch" in his hearing at the 4,000 kilohertz level. However, because the range of human hearing extends from approximately 20 hertz to only 20,000 hertz, 11 Roscoe N. Gray & Louise J. Gordy, *Attorneys' Textbook of Medicine* ¶ 84A.14 (3d ed. 2010), we presume that Dr. Marvel intended to testify that Mr. Hill's hearing loss was at the 4,000 hertz level.

II.

Courts reviewing an award of workers' compensation benefits 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 conducting this examination, Tenn. Code Ann. § 50-6-225(e)(2) (2008) requires the reviewing court to "[r]eview . . . 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, unless the preponderance of the evidence is otherwise." The reviewing court must also give considerable deference to the trial court's findings regarding the credibility of the live witnesses and to the trial court's assessment of the weight that should be given to their testimony. *Tryon v. Saturn Corp*., 254 S.W.3d 321, 327 (Tenn. 2008); *Whirlpool Corp. v. Nakhoneinh*, 69 S.W.3d 164, 167 (Tenn. 2002). However, the reviewing courts need not give similar deference to a trial court's findings based upon documentary evidence such as depositions, *Orrick v. Bestway Trucking, Inc.*, 184 S.W.3d 211, 216 (Tenn. 2006); *Bohanan v. City of Knoxville*, 136 S.W.3d 621, 624 (Tenn. 2004), or to a trial court's conclusions of law, *Seiber v. Reeves Logging*, 284 S.W.3d 294, 298 (Tenn. 2009).

III.

Whirlpool first asserts that Mr. Hill did not provide timely notice of his injury. It states that when a gradually-occurring injury is involved, Tenn. Code Ann. § 50-6-201(b) (2008) requires an employee to notify his or her employer of the injury within thirty days after the employee knows or reasonably should know that he or she has suffered a work-related injury. Whirlpool argues that it received notice on February 19, 2009, when Mr. Hill filed his request for a benefit review conference and that this notice came six months after its plant closed and Mr. Hill's last day of work. As a result of this delay, Whirlpool asserts that it "was prejudiced in that it was unable to conduct an appropriate investigation, which among other things might have included noise sampling in any particular area, due to the fact that the plant was closed and noise levels impossible to replicate."

Tenn. Code Ann. § 50-6-201(b)'s notice requirement "exists so that an employer will have an opportunity to make a timely investigation of the facts while still readily accessible, and to enable the employer to provide timely and proper treatment for an injured employee." *Jones v. Sterling Last Corp.*, 962 S.W.2d 469, 471 (Tenn. 1998). An employee who fails to notify his or her employer within thirty days after sustaining a work-related injury forfeits the right to workers' compensation benefits unless the employer has actual notice of the injury or unless the employee's failure to notify the employer was reasonable. Tenn. Code Ann. § 55-6-201(a).

This statutory notice requirement is not inflexible. The Tennessee Supreme Court has held 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." *Banks v. United Parcel Serv., Inc.*, 170 S.W.3d 556, 561 (Tenn. 2005) (citing *Whirlpool Corp. v. Nakhoneinh*, 69 S.W.3d at 169-70; *Pentecost v. Anchor Wire Corp.*, 695 S.W.2d 183, 186 (Tenn. 1985)). Accordingly, employees may be relieved from the notice requirement until they know or reasonably should know that the injury was caused by their work and that the injury has either impaired them permanently or has prevented them from performing normal work activities. *Banks v. United Parcel Serv., Inc.*, 170 S.W.3d at 561.

In response, Mr. Hill points out that only two dates could trigger the start of his statutory obligation to give Whirlpool notice of his injury – either August 13, 2008 (his last day of employment) or February 13, 2009 (the day Dr. Marvel told him that his hearing loss was work-related). He asserts that the most appropriate date is February 13, 2009 because until that date, he was unaware that his hearing loss was work-related.

Mr. Hill also argues that Whirlpool knew as much as he did about his hearing loss and its cause because it was also aware of the results of his 2007 hearing test. In addition, he points out that Whirlpool dismantled its plant and removed the equipment within thirty days after the plant closed and, therefore, that it could not have tested the noise conditions in the plant after that time. Accordingly, Mr. Hill insists that Whirlpool's inability to test the sound levels in the plant is due primarily to its decision to dismantle the plant rather than the timing of his notice.

Mr. Hill has the better argument on this point for two reasons. First, we have already noted that hearing loss is a gradual injury and that, unlike an injury caused by a machine or a fall on a slippery surface, there is generally no particular event that should make it obvious to the employee that his or her hearing loss is work-related. *Ferrell v. Cigna Prop. & Cas. Ins. Co.*, 33 S.W.3d 731, 735 (Tenn. 2000). Even though these cases can present close factual questions regarding when the employee knew or should have known that his or her hearing loss was work-related, *see Hawkins v. Consolidated Aluminum Corp.*, 742 S.W.2d 253, 255 (Tenn. 1987), we find that the record contains sufficient evidence to support the trial court's conclusion that Mr. Hill did not learn that his hearing loss was work-related until Dr. Marvel examined him in February 2009.

Second, the testimony of Whirlpool's human resources manager indicates that even if Mr. Hill had provided written notice to Whirlpool soon after his last day worked on August 13, 2008, Whirlpool still would have been unable to conduct any meaningful investigation of the noise levels in the plant because the plant had already been closed and the machinery

had been removed. For that reason, Whirlpool has not shown any prejudice resulting from the asserted delay in receiving written notice of Mr. Hill's claim.

IV.

Whirlpool also asserts that Mr. Hill failed to prove that his hearing loss was caused by his work in the Whirlpool plant. It insists that the only evidence in the record regarding the noise levels in the plant was Mr. Hill's "unsupported anecdotal comment that the press room was noisy." Whirlpool also argues that Dr. Marvel's testimony concerning causation was based upon the history provided to him by Mr. Hill and that the record does not support those "historical facts."

Except in the most obvious cases, injured workers seeking workers' compensation benefits must establish the causal connection between their work and their injury. *Cloyd v. Hartco Flooring Co.*, 274 S.W.3d 638, 643 (Tenn. 2008) (quoting *Orman v. Williams Sonoma, Inc.*, 803 S.W.2d 672, 676 (Tenn. 1991)). That connection must be established by the preponderance of the expert medical testimony and lay evidence, if any. *Orman v. Williams Sonoma, Inc.*, 803 S.W.2d at 676. Reviewing courts must resolve all reasonable doubts with regard to the injury's causation and its relationship to the employee's work. *Excel Polymers, LLC v. Broyles*, 302 S.W.3d 268, 275 (Tenn. 2009); *Phillips v. A&H Constr. Corp.*, 134 S.W.3d 145, 150 (Tenn. 2004).

Dr. Marvel provided the only expert testimony on the issue of causation in this case. He concluded that Mr. Hill's hearing loss was causally related to his work at the Whirlpool plant. Dr. Marvel testified that the pattern of Mr. Hill's hearing loss "is quite characteristic of hearing loss due to heavy noise exposure." He also testified that he asked Mr. Hill about other possible causes of his hearing loss and that Mr. Hill's responses to these questions eliminated other possible causes. As Dr. Marvel testified, Mr. Hill's hearing loss "far exceeded what we would anticipate for a man of 58 years old who had not had any of these other cofactors, such as . . . shotgun shooting or concussions or ototoxic medication usage." When asked for his expert opinion as to what caused Mr. Hill's hearing loss, Dr. Marvel replied, "[m]y opinion would be that all the records and the history indicated that he had sustained significant noise exposure while at Whirlpool to cause the hearing loss that he presented with."

Whirlpool continues to insist that Mr. Hill's testimony regarding the noise inside the plant is "thin anecdotal evidence" and that his hearing loss could also have been caused by his failure to use hearing protection while shooting his deer rifle or shotgun. Despite Whirlpool's arguments, we decline to find that the evidence in this record preponderates against the trial court's finding that Mr. Hill's hearing loss was caused by noise in the plant

for two reasons. First, the record does not support Whirlpool's argument that Mr. Hill has an "extensive history" of shooting. Second, Dr. Marvel was fully informed about Mr. Hill's hunting activities and factored these activities into his conclusion that Mr. Hill's hearing loss was caused by the noise in the plant. Dr. Marvel's testimony, complemented by Mr. Hill's testimony, fully supports the trial court's finding that Mr. Hill's hearing loss was work-related.

V.

We affirm the trial court's judgment in favor of Mr. Hill. We tax the costs of this appeal to Whirlpool Corporation and its surety for which execution, if necessary, may issue.

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WILLIAM C. KOCH, JR., JUSTICE

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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 by Whirlpool Corporation and its surety, for which execution may issue if necessary.

PER CURIAM