IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
August 27, 2012 Session

JACKIE PERRY V. LENNOX HEARTH PRODUCTS

Appeal from the Chancery Court for Obion County
No. 28,552 William Michael Maloan, Chancellor

No. W2011-02389-SC-WCM-WC - Mailed February 1, 2013; Filed April 11, 2013

An employee alleged that he suffered a work-related hearing loss. After finding that the employee established a compensable injury, the trial court awarded 40% permanent partial disability benefits. The employer appealed, contending that the evidence preponderates against the trial court's finding that the employee suffered a compensable injury. Alternatively, the employer contends that the award was excessive. We affirm the decision of the trial court.

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

JANICE M. HOLDER, J., delivered the opinion of the Court, in which TONY A. CHILDRESS, SP. J., and DONALD E. PARISH, SP. J., joined.

R. Dale Thomas and Matthew R. Courtner, Jackson, Tennessee, for the appellant, Lennox Hearth Products.

Jeffrey P. Boyd, Jackson, Tennessee, for the appellee, Jackie Perry.

MEMORANDUM OPINION

Factual and Procedural Background

Jackie Perry began working for Lennox Hearth Products ("Lennox") in the refractory department in 1983. His job included making bricks by filling metal molds and extracting the bricks by beating the molds on a metal table. He described this job as "very noisy." After making bricks for six months, Mr. Perry began working in Lennox's fabrication department. He described this job, which required the use of a machine press, as being

"noisy all the time." Mr. Perry worked ten-hour shifts in the fabrication department until 1998 when he became a spot welder. Mr. Perry began wearing hearing protection in 1985 as required by Lennox.

In 2009, Mr. Perry reported a hearing loss to Lennox. He filed a complaint for workers' compensation benefits in the Chancery Court for Obion County on April 13, 2010. When a trial was conducted on September 1, 2011, Mr. Perry was fifty-nine years old.

Mr. Perry was evaluated by Dr. Karl Studtmann, a specialist in otolaryngology who testified by deposition. Otolaryngology is the medical and surgical treatment of problems and injuries involving the ear, nose, and throat. Dr. Studtmann examined Mr. Perry on December 3, 2009, following an audiogram given on November 30, 2009. Mr. Perry told Dr. Studtmann that he had worked in a "very loud noise environment" for twenty-seven years and that he had a gradual decrease in his hearing over the last ten years. Dr. Studtmann noted that Lennox had given Mr. Perry hearing screens in 1992 and 1998. According to Dr. Studtmann, those screens were not as accurate as an audiogram, but they did show that Mr. Perry had a noticeable hearing loss in 1992.

Dr. Studtmann testified that Mr. Perry's hearing loss was "made worse by . . . noise exposure." Based on his evaluation of Mr. Perry and the results of the audiogram, Dr. Studtmann was of the opinion that Mr. Perry had "high-frequency sensorineural hearing loss." Utilizing the Sixth Edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment ("AMA Guides"), Dr. Studtmann concluded that Mr. Perry's monaural impairment was 0% in his right ear, 7.5% in his left ear, and that his binaural impairment was 1.3%.

Dr. Studtmann, however, considered the AMA Guides to provide an inadequate basis for determining Mr. Perry's impairment. According to Dr. Studtmann, an audiogram tests frequencies from two hundred fifty hertz to eight thousand hertz. Dr. Studtmann testified that the AMA Guides "use a simplification of an audiogram to assess the hearing loss . . . at . . . five hundred, one thousand, two thousand, and three thousand[]" hertz. Dr. Studtmann opined that because an audiogram tests a person's hearing loss outside the range assessed under the AMA Guides, a person can have hearing loss that "has a significant effect on [his] ability to function, even though it's not reflected in . . ." the AMA Guides.

Dr. Studtmann stated that the pattern of Mr. Perry's hearing loss is "typical for noise-induced, high-frequency hearing loss" and that Mr. Perry had mild conductive hearing loss and sensorineural hearing loss. According to Dr. Studtmann, Mr. Perry's hearing loss exceeded the range reflected in the AMA Guides. Since Mr. Perry's "hearing loss [was] in the high frequencies that impinges [sic] on the speech frequencies," Dr. Studtmann was of

the opinion that Mr. Perry had 20% binaural impairment. Dr. Studtmann acknowledged that his opinion was not based on the AMA Guides and that the 20% impairment rating was based on his assessment of Mr. Perry in conjunction with Mr. Perry's audiogram.

Dr. Studtmann agreed that high-frequency hearing loss such as Mr. Perry's may be age related and that his hearing loss was not equal in his right and left ears. Dr. Studtmann noted that hearing protection is not always effective against higher frequencies and that a person may be sensitive to noise at decibel levels that are within the guidelines set by the Occupational Safety and Health Administration ("OSHA").

Dr. Mitchell Schwaber, a physician who is board certified in otology and neurotology, testified by deposition that he had reviewed a noise study conducted by Lennox. Dr. Schwaber stated that "the time-weighted average" of noise levels at Mr. Perry's workplace was below the noise levels that can cause damage and that the hearing protection worn by Mr. Perry would mitigate those noise levels even further. Dr. Schwaber concluded that Mr. Perry's hearing loss was not noise induced because "the audiogram is rather gently sloped and doesn't fit a noise pattern" and because the hearing loss was worse in one ear than the other.

Dr. Schwaber explained that the AMA Guides base hearing loss impairment on a range of frequencies from 500 to 3,000 hertz because most day-to-day activities and normal speech occur within those frequencies. Dr. Schwaber calculated Mr. Perry's impairment by taking four frequencies from the audiogram for the right and left ear and by placing those totals into a formula that determines the monaural and the binaural impairment of the individual.

Dr. Schwaber testified that Mr. Perry had a 0% monaural impairment in the right ear and a 3.8% monaural impairment in his left ear. Using these values, Dr. Schwaber concluded that Mr. Perry had a 0.6% binaural impairment based on the AMA Guides. Dr. Schwaber acknowledged that the AMA Guides were not intended to determine a person's work disability and that it was possible for a person to have a work disability more significant than the percentage outlined in the AMA Guides.

John Kevin Jones, Lennox's environmental health and safety manager, testified that Lennox conducted a noise analysis in December 2008. According to Mr. Jones, the loudest noise registered in Mr. Perry's work area was 103.8 decibels and the average level registered during an eight-hour shift was 83.43 decibels. The loudest noise registered within ten feet of a machine located near Mr. Perry's work area was 105.7 decibels, and the average noise level of that machine was 86.54 decibels. All of these decibel levels were within OSHA requirements. Mr. Jones also testified that Lennox requires employees to wear hearing-

protection devices with noise-reduction ratings of twenty-six to thirty-three decibels. Mr. Jones acknowledged that he did not know how often the noise level exceeded the average level or achieved its maximum level during an eight-hour shift.

Mr. Perry testified that he worked for Lennox for twenty-seven years and that his work areas were "very noisy." His workplace has become "a lot noisier than it was" during the last ten years and there is "constant banging" from a machine located near his work station. He began wearing hearing protection in 1985. As a result of his hearing loss, he cannot hear approaching forklifts and his coworkers have difficulty getting his attention. He continues to work for Lennox and has not been prescribed a hearing aid. Mr. Perry agreed, however, that his hearing loss would not prevent him from doing the types of work he has done in the past if he no longer worked for Lennox and that his current job as a spot welder was not as noisy as his previous jobs. Mr. Perry experiences ringing in his ears at the end of his work day, cannot hear the television, and has problems communicating with his wife.

After considering the in-court testimony and the depositions of the medical experts, the trial court accredited the testimony of Dr. Studtmann, determined that Mr. Perry suffered a compensable hearing loss, and awarded 40% binaural vocational disability, attorney's fees, and discretionary costs.[1] Lennox has appealed. This appeal has been referred to a Special Workers' Compensation Appeals Panel for a report of findings of fact and conclusions of law. See Tenn. Sup. Ct. R. 51, § 1.

Analysis

Lennox argues that the trial court erred in finding that Mr. Perry suffered a work-related injury. Alternatively, Lennox argues that the award is excessive. Mr. Perry contends that the evidence in the record does not preponderate against the trial court's judgment. We review factual issues in a workers' compensation case de novo upon the record of the trial court, accompanied by a presumption of correctness of the trial court's factual findings unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2008); Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). Questions of law are reviewed de novo with no presumption of correctness afforded to the trial court's conclusions. Gray v. Cullom Mach., Tool & Die, 152 S.W.3d 439, 443 (Tenn. 2004).

[1] The judgment makes reference to and incorporates findings and conclusions set forth in correspondence to the parties dated September 21, 2011.

Causation

Except in the most obvious cases, a workers' compensation claimant must establish by expert medical evidence the causal relationship between the alleged injury and the claimant's employment activity. Cloyd v. Hartco Flooring Co., 274 S.W.3d 638, 643 (Tenn. 2008). Causation must be demonstrated by the preponderance of the expert medical testimony as supplemented by the lay evidence. Cloyd, 274 S.W.3d at 643.

Medical proof of causation need not be certain, but causation cannot be based on speculation or conjecture. Clark v. Nashville Mach. Elevator Co., 129 S.W.3d 42, 47 (Tenn. 2004). All reasonable doubts as to the causation of an injury and whether the injury arose out of the employment should be resolved in favor of the employee. Phillips v. A&H Constr. Co., 134 S.W.3d 145, 150 (Tenn. 2004). The trial court may properly award benefits based upon medical testimony that the employment "could or might have been the cause" of the employee's injury when there is also lay testimony supporting a reasonable inference of causation. Fritts v. Safety Nat'l Cas. Corp., 163 S.W.3d 673, 678 (Tenn. 2005) (quoting Clark, 129 S.W.3d at 47).

Dr. Studtmann's opinion differed from that of Dr. Schwaber, and the trial court placed greater weight on Dr. Studtmann's testimony. The trial court also accredited Mr. Perry's testimony about his noisy workplace environment. When expert medical testimony differs, it is within the trial court's discretion to accept the opinion of one expert over another. Hinson v. Wal-Mart Stores, Inc., 654 S.W.2d 675, 676-77 (Tenn. 1983). Live testimony may influence the trier of fact when considering medical proof contained in depositions. Cunningham v. City of Savannah, No. W2010-02411-WC-R3-WC, 2012 WL 2126015, at *6 (Tenn. Workers' Comp. Panel Feb. 28, 2012). When credibility and weight to be given testimony are involved, considerable deference is given to the trial court when the trial judge had the opportunity to observe the witness' demeanor while testifying. Madden v. Holland Grp. of Tenn., Inc., 277 S.W.3d 896, 900 (Tenn. 2009).

We have reviewed the record, and we are unable to conclude that the evidence preponderates against the trial court's decision that Dr. Studtmann was the more reliable expert and that Mr. Perry suffered a hearing loss arising out of and in the course of his employment.

Vocational Disability

When determining an employee's vocational disability, the trial court considers an employee's skills and training, education, age, local job opportunities, anatomical impairment rating, and capacity to work at the kinds of employment available in the employee's disabled

condition. Tenn. Code Ann. § 50-6-241 (2008); Worthington v. Modine Mfg. Co., 798 S.W.2d 232, 234 (Tenn. 1990). The claimant's own assessment of his or her physical condition and resulting disabilities cannot be disregarded. Uptain Constr. Co. v. McClain, 526 S.W.2d 458, 459 (Tenn. 1975). The trial court is not required to accept physicians' opinions regarding the extent of the plaintiff's disability but is entitled to consider all the evidence, including expert and lay testimony, to decide the extent of an employee's disability. Hinson, 654 S.W.2d at 677.

Lennox contends that the trial court erred in relying on Dr. Studtmann's testimony that Mr. Perry suffered a 20% binaural impairment and by failing to give weight to Mr. Perry's continued work at Lennox in the same capacity. Lennox cites Hix v. TRW, Inc., M2007-02822-WC-R3-WC, 2009 WL 1643448 (Tenn. Workers' Comp. Panel June 12, 2009), and Bain v. TRW, Inc., M2008-02311-WC-R3-WC, 2010 WL 1508519 (Tenn. Workers' Comp. Panel April 15, 2010), as support for its argument.

As for the cases on which Lennox relies, we find them inapposite. In Hix, the employee suffered a high-frequency hearing loss and was assigned a 6.6% binaural impairment rating by one physician and a 5.3% binaural impairment rating by a second physician. Hix, 2009 WL 1643448, at *2. The last test administered prior to the introduction of the employee's use of hearing protection showed an impairment of 0.3%. Hix, 2009 WL 1643448, at *5. Although one expert testified that post-exposure hearing loss is possible, the Panel accredited the testimony of two experts that no additional work-related hearing loss occurred after the employee began to use earplugs and that any additional hearing loss was due to aging. Hix, 2009 WL 1643448, at *5, *7.[2] The Panel concluded that "[u]nder the circumstances of the present case, the date of this gradual injury should be set at the date of last injurious exposure." Hix, 2009 WL 1643448, at *7. The Panel reduced the trial court's award from 50% disability to 5%. Hix, 2009 WL 1643448, at *8. The Panel opinion does not clearly state the impairment rating on which the award was based, but the award of 5% apparently was based on the impairment rating of 0.3% obtained from the last test administered before the employee began to use hearing protection. Hix, 2009 WL 1643448, at *5.

[2] An appellate court is in the same position as a trial court to evaluate expert medical testimony when all of the proof is provided by deposition. Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997). When a trial court hears in-court testimony, however, it is afforded considerable deference in determining credibility of witnesses. Madden, 277 S.W.3d at 900. The Hix opinion establishes that one of the experts testified by deposition but does not describe the manner of testimony of all the other experts and whether the trial court was entitled to deference in a determination of the credibility of those witnesses.

The cessation of work-related hearing loss was also at issue in Bain.[3] In Bain, the employee was diagnosed with noise-induced hearing loss in the higher frequencies. Bain, 2010 WL 1508519, at *1. One physician assigned a binaural impairment rating of 18.1%, and a second physician assigned a binaural impairment rating of 12.8%. Bain, 2010 WL 1508519, at *2. A prior hearing test performed "closest in time to the initiation of the hearing protection program," however, showed an impairment of 2.8%. Bain, 2010 WL 1508519, at *3. Three experts testified that noise-induced hearing loss does not worsen after exposure to noise ceases. Bain, 2010 WL 1508519, at *1-2. The Panel concluded that the medical and technical testimony established that the devices used by Mr. Bain reduced the level of noise entering his ear to a level that was not injurious and that the employer was responsible only for the hearing loss that occurred prior to the use of hearing protection. Bain, 2010 WL 1508519, at *4. The Panel modified the trial court's award of 65% permanent partial disability to 15%. Bain, 2010 WL 1508519, at *5. The Panel apparently based the reduction of the employee's award on the 2.8% impairment rating closest in time to the introduction of the hearing protection program. See Bain, 2010 WL 1508519, at *4.

In this case, the trial court credited the expert testimony of Dr. Studtmann that Mr. Perry's hearing loss after he began using hearing protection was caused by his work environment. Unlike Bain and Hix, no expert testimony to the contrary was introduced. Dr. Studtmann assessed a 20% binaural impairment. Dr. Studtmann explained that the AMA Guides "use a simplification of an audiogram to assess the hearing loss" and that one can suffer hearing loss above the range assessed under the AMA Guides that "has a significant effect on [one's] ability to function." Dr. Schwaber also acknowledged that it was possible for a person to have a work disability that was more significant than the percentages outlined in the AMA Guides. Although the question is close, we conclude that the evidence does not preponderate against the trial court's reliance on Dr. Studtmann's opinion.

In this case, Mr. Perry has continued to work for Lennox. Although his hearing loss has not prevented him from performing the job he has performed since 1998 and he is able to work overtime when overtime is offered, Mr. Perry testified that he has difficulty hearing forklifts in the workplace and that his coworkers have trouble getting his attention. As a result of his hearing loss, Mr. Perry has difficulty hearing the television and communicating with his wife. The evidence does not preponderate against the trial court's award of 40% vocational disability.

[3] The defendant in both Bain and Hix was TRW, Inc., and the same experts testified on behalf of the defendant in both cases.

Conclusion

The trial court's judgment is affirmed. Costs are assessed to Lennox Hearth Products and its surety, for which execution shall issue if necessary.

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JANICE M. HOLDER, JUSTICE

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

JACKIE PERRY v. LENNOX HEARTH PRODUCTS

Chancery Court for Obion County
No. 28,552

No. W2011-02389-SC-WCM-WC - Filed April 11, 2013

ORDER

This case is before the Court upon the motion for review filed on behalf of Lennox Hearth Products pursuant to Tenn. Code Ann. § 50-6-225(3)(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 Lennox Hearth Products and its surety, for which execution shall issue if necessary.

PER CURIAM

JANICE M. HOLDER, J., not participating