IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT MEMPHIS
October 12, 2015 Session

THE ESTATE OF JAMES ALFRED JENKINS v. GOODYEAR TIRE & RUBBER COMPANY

Appeal from the Chancery Court for Obion County
No. 31180 W. Michael Maloan, Judge

No. W2014-02303-SC-R3-WC – Mailed February 12, 2016; Filed March 15, 2016

Two years after he left work for the employer, an employee alleged that he sustained a compensable hearing loss. He died prior to filing suit. His estate subsequently filed this action. The employer denied that the condition was work-related and also asserted that the claim was barred by the applicable statute of limitations. The trial court found for the estate and awarded benefits. The employer has appealed, and 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 conclude that the action was barred by the statute of limitations and reverse the judgment.

Tenn. Code Ann. § 50-6-225(a)(2) (2014) Appeal as of Right; Judgment of the Chancery Court Reversed.

BEN H. CANTRELL, SR. J., delivered the opinion of the Court, in which HOLLY M. KIRBY, J. and PAUL G. SUMMERS, SR. J., joined.

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

Jeffrey P. Boyd, Jackson, Tennessee, for the appellee, Estate of James Alfred Jenkins

OPINION

Factual and Procedural History

James Alfred Jenkins ("Employee") was employed by Goodyear Tire & Rubber Company ("Employer") from 1988 until 2009, when he accepted a buyout offer. October 11, 2011, he filed a Request for Benefit Review Conference with the Department of Labor and Workforce Development, alleging that he had sustained a compensable hearing loss during his employment. Employee died on November 13, 2013. His estate filed this action in the Chancery Court for Obion County on February 7, 2014. Employer answered, asserting, inter alia, that Employee's hearing loss was not caused by his employment and that his action was barred by the applicable statute of limitations.

The case was tried on August 26, 2014. The only witness to testify in person was Employee's son, James Anthony Jenkins. Mr. Jenkins testified as to the dates of his father's employment. He said that his father was a deer hunter, had an all-terrain vehicle that he used for hunting and also had a small tractor. He stated that his father died of a heart attack. During cross-examination, he testified that his father was ambidextrous. He added that his father hunted mainly with a bow. He believed his father had used shotguns and rifles throughout his life.

Dr. Karl Studtmann, an otolaryngologist, submitted a C-32 medical report and also testified by deposition. His C-32 report indicates that he first reviewed certain medical records of Employer at the request of the estate's attorney on April 28, 2014. These records consisted of documents generated at the time Employee was hired and subsequent reports of hearing tests conducted between 1992 and 2005. Based on that information, Dr. Studtmann issued a report containing the following conclusions:

> Patient's initial screen on his preemployment evaluation it was noted that this patient had normal whisper hearing test at 15 decibels in the left ear, suggesting grossly normal hearing. Again, that was 1988. Patient's initial screening audiogram was dated 07/30/1992. That did reveal a downsloping high frequency sensorineural hearing loss dropping to the profound range with the left ear being worse than the right ear. Screening audiograms were provided, initial date is 07/30/1992, most recent date is 12/09/2005. These screening audiograms were evaluated. Patient was found to have gradual worsening of his hearing in his left ear with relatively

> stable hearing in his right ear. Given the severity of hearing loss noted in his screen in 1992, having worked in the Goodyear environment for only four years at that point, I find it very unlikely that the hearing loss demonstrated on that hearing screen was solely from noise exposure at Goodyear. I would suggest this is much more likely from previous noise exposure.
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> Given this patient's complex history, while it is likely his hearing was impaired related to this employment at Goodyear, patient's hearing loss is certainly multifactorial.

The trial court took the case under advisement. It issued its findings and conclusions in the form of a letter to counsel. It found that Employee's estate had carried the burden of proof of demonstrating that he sustained work-related hearing loss. It awarded 40% permanent partial disability to the hearing of both ears. The court made no explicit finding concerning the statute of limitations, although it had discussed the issue with counsel at the close of the hearing. Judgment was entered in accordance with the court's findings. Employer has appealed, asserting that the evidence preponderates against the finding of causation, that the claim is barred by the applicable statute of limitations and, in the alternative, that the award is excessive.

Analysis

The standard of review for 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's demeanor and to hear in court testimony. Madden v. Holland Group of Tenn., 277 S.W.3d 896, 900 (Tenn. 2009). 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).

Statute of Limitations

We address the statute of limitations first because we conclude that the issue is

dispositive in this case. Tennessee Code Annotated section 50-6-203(b)(1), as applicable to claims arising between 2008 and 2014, reads:

> 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 (2008).

In this case, the plaintiff alleges that he sustained a gradual hearing loss as a result of exposure to noise in the workplace. The time for providing notice of a gradual injury was set out in Tennessee Code Annotated section 50-6-201(b):

> (b) In those cases where the injuries occur as the result of gradual or cumulative events or trauma, then the injured employee or the injured employee's representative shall provide notice of the injury to the employer within thirty (30) days after the employee:
> (1) Knows or reasonably should know that the employee has suffered a work-related injury that has resulted in permanent physical impairment; or
> (2) Is rendered unable to continue to perform the employee's normal work activities as the result of the work-related injury and the employee knows or reasonably should know that the injury was caused by work-related activities.

Tenn. Code Ann. § 50-6-201 (2008).

The statute applicable to gradually-occurring injuries, Tenn. Code. Ann. § 50-6-201(b), contains its own discovery rule, and our Supreme Court has also applied the discovery rule to other statutes of limitations contained in title 50 of the Code. See Gerdau Ameristeel Inc. v. Ratliff, 368 S.W.3d 503 (Tenn. 2012). The Court said, the applicable statute of limitations begins to run when "through the exercise of reasonable care and diligence it becomes discoverable and apparent that the employee sustained a compensable injury." Id. at 508.[1]

[1] The Supreme Court has also applied the "last day worked" rule to gradually occurring injuries. In Lawson v. Lear Seating Corp., 944 S.W.2d 340 (Tenn. 1997), the Court said that the statute of limitations for filing a worker's compensation claim did not begin to run until the date

The plaintiff argues that the statute of limitations did not begin to run until Mr. Jenkins had a doctor's opinion that his hearing loss was work-related. There is language from which that inference could be drawn in several Supreme Court opinions. See Ferrell v. Cigna Property & Casualty Co. 33 S.W.3d 131 at 735 (Tenn. 2000); Banks v. United Parcel Service, Inc. 170 S.W.3d 556 (Tenn. 2005); Whirlpool Corporation v. Nakhoneinh, 69 S.W.3d 556 (Tenn. 2005); Pentecost v. Anchor Wire Co., 695 S.W.2d 183 (Tenn. 1985).

We are persuaded, however, that the Court has not established an absolute rule that a doctor's opinion connecting an injury to the employee's work is the only factor that can be considered as the starting point for the statute of limitations. In the cases cited, the employee testified that he did not know that the injury was permanent and work related until the doctor advised him of his opinion. The Courts, therefore, cite the date of the medical opinion as the only conclusive proof of when the employee knew he had a work-related injury. In Mayton v. Wackenhut Inc., No E2010-00907-WC-R3-WC 2011 WL 2848198 (Tenn. Workers Compensation Panel July 18, 2011), the Panel recognized that other proof in the record could show that the statute began to run at an earlier date that the date of the doctor's opinion. In that case the Panel said:

> Although employee argues that he cannot be found to have had knowledge that his illness was work-related until he received information from a doctor to that effect, he presents no authority providing that a doctor's diagnosis is required to establish that an employee has knowledge that his or her condition is work-related where evidence is presented showing that the employee has specifically stated that the condition is work-related.

2011 WL 2848198 *4.

We return, therefore, to the general rule stated in Gerdau: when, through the exercise of reasonable care and diligence, did it become discoverable and apparent that the employee sustained a compensable injury?

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the employee was unable to work due to her injuries. Id. at 343. See also Building Material Corp. v. Britt, 211 S.W.3d 706 (Tenn. 2007). We have our doubts that the rule would apply to this case to bar Mr. Jenkins' claim since he did not leave work because of the injury. See Hardy v. Goodyear Tire & Rubber Co. No. W2012-00396-SC-WCM-WC Dec. 10, 2012, 2013 WL 1932193. In addition, we believe the rule is remedial in effect and was designed to save claims, not to bar them.

The only evidence in the record other than Dr. Studtmann's testimony came from the employee's son. He stated that Mr. Jenkins last day on the job was June 3, 2009. The record shows that Mr. Jenkins requested a Benefit Review Conference on October 11, 2011. His estate filed suit on February 7, 2014 after Mr. Jenkins' death on November 13, 2013.

Unfortunately, there is no evidence in the record from Mr. Jenkins himself. So, the only proof of what Mr. Jenkins knew is in his medical records. They show that he had a significant hearing loss before being hired by the employer, a condition "common to factory workers." Subsequent tests through the years showed his condition gradually got worse.

The records reviewed by Dr. Studtmann were made exhibits to his deposition. Mr. Jenkins signed each yearly report which indicated that the results were discussed with him. These records show he was informed that he had severe high frequency loss and mild to moderate loss in the speech range after each hearing evaluation performed by employer. He was also informed to wear proper hearing protection in designated areas on the job.

We think this undisputed proof is sufficient to permit an inference that Mr. Jenkins knew he had a work-related injury by the time he left work in 2009. The burden then shifted to his estate to show at least a colorable basis for concluding that the statute had not run. See Smith v. Houck, 469 S.W.3d 564 (Tenn. Ct. App. 2015). There is no countervailing proof.

But if we assume he didn't know, the question becomes: Could he have known by the exercise of reasonable care and diligence? We think that the answer to that question must be "yes." The record shows that Mr. Jenkins never sought a doctor's opinion - even up to the time of his death. We think a reasonably prudent person, knowing that he had significant hearing loss, which got worse through twenty-one years of employment, would not wait until two years after his last day of work to take any action, and would have sought medical advice before the various periods of limitation ran.

Conclusion

The judgment of the court below is reversed and the case is dismissed. Tax the costs to the appellee, for which execution may issue if necessary.

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BEN H. CANTRELL, SR. JUDGE

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON

THE ESTATE OF JAMES ALFRED JENKINS v. GOODYEAR TIRE & RUBBER COMPANY

Chancery Court for Obion County
No. 31180

No. W2014-02303-SC-R3-WC – Filed March 15, 2016

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 on appeal are taxed to the Appellee, The Estate of James Alfred Jenkins, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM