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

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

CHILDRESS, SP. J., concurring in part and dissenting in part.

I concur fully in the majority's conclusion on the issue of estoppel. On the statute of limitations issue, however, I respectfully dissent.

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

> 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). The discovery rule applies to this statute of limitations, *Gerdau Ameristeel, Inc. v. Ratliff*, 368 S.W.3d 503, 508 (Tenn. 2012) and in a loss of hearing case the statute of limitations begins to run when "the plaintiff knew or as a reasonably prudent person should have known, that his hearing loss was work connected." *Hawkins v. Consol. Aluminum Corp.*, 742 S.W.2d 253, 254 (Tenn. 1987).

The majority relies on the decisions of, among others, *Hawkins* and *Ferrell v. Cigna Property & Casualty Insurance Co.*, 33 S.W.3d 731 (Tenn. 2000), to support its conclusion that the statute of limitations did not begin to run until *after* Employee received a medical diagnosis from Dr. Studtmann in April of 2010. In my opinion this case is distinguishable from *Hawkins* and *Ferrell*.

Specifically, the employees in both *Hawkins* and *Ferrell* did not know their gradually occurring injuries were work related until after a doctor told them their injuries were related to their employment. In this case, however, Employee's own testimony establishes that he knew as early as 1991 that he had ringing in his ears; he knew from the hearing tests he was taking at work that his hearing was getting worse year by year; he knew that the noise levels at his work were causing his hearing problems; and he knew all these things well *before* he visited Dr. Studtman in April of 2010.

I do not disagree that under both *Hawkins* and *Ferrell* the statute of limitations would not have began to run if Employee had not known what his injury was or that it was related to his work until after being told so by Dr. Studtman. Those, however, are not the facts of this case. Instead, the evidence establishes Employee knew what his injury was, and he knew what caused his injury before he went to see Dr. Studtman. Thus, in my opinion, the evidence establishes Employee knew his injury was work related before he went to the doctor. Since Employee knew his injury was work related before being diagnosed by Dr. Studtman in April of 2010, I conclude the evidence preponderates against the trial court's conclusion that Employee discovered the cause of his injury after the medical diagnosis. Thus, I would respectfully reverse the trial court and dismiss this case.[1]

For these reasons, I concur in part and dissent in part.

TONY A. CHILDRESS, SPECIAL JUDGE

[1] The last-day-worked rule is discussed in footnote 4 of the majority's opinion as being a possible "separate and independent basis for affirming the trial court's judgment that Employee's claim was timely." Under the last-day-worked rule, the statute of limitations begins to run on "the last day the employee was exposed to the work activity that caused the injury." *Barnett v. Earthworks Unlimited, Inc.*, 197 S.W.3d 716, 721 (Tenn. 2006), *overruled on other grounds by Bldg. Materials Corp. v. Britt*, 211 S.W.3d 706, 713 (Tenn. 2007). Determining when was the last day Employee was exposed to the work activity that required him to be around the loud noises that caused his hearing loss would require a presentation of facts to the trial court, and it does not appear that Employee tried that issue in the trial court. Also, Employee did not raise that issue in the brief he filed with this court. Thus, although the majority does not rely on the last-day-worked rule to affirm the trial court, in my opinion this rule could not be used in this case to affirm the trial court since the possible application of that rule to this case has been waived.