IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
August 22, 2017 Session

UNITED PARCEL SERVICE, INC. ET AL. v. ROBERT CHARLES MILLICAN, JR.

Appeal from the Circuit Court for Hamilton County
No. 14-C-985 L. Marie Williams, Judge

No. E2016-02424-SC-R3-WC

An employer filed a complaint to resolve a dispute with an employee regarding workers' compensation benefits. The employee alleged he suffered gradual hearing loss arising out of and in the course of his employment. The trial court held that the employee's claim, filed three years after his doctor advised him that his hearing loss was work related, was barred by the statute of limitations. Further, the trial court found the statute of limitations was not tolled because the employee failed to prove that any work-related noise caused a progression of the employee's hearing loss. The employee appealed.[1] We affirm the trial court's judgment.

Tenn. Code Ann. § 50-6-225(a) (2014) (applicable to injuries occurring prior to July 1, 2014) Appeal as of Right;
Judgment of the Circuit Court for Hamilton County Affirmed

SHARON G. LEE, J., delivered the opinion of the court, in which THOMAS R. FRIERSON, II, J., and DON R. ASH, SR.J., joined.

Joe Timberlake, Signal Mountain, Tennessee, for the appellant, Robert Charles Millican, Jr.

C. Scott Johnson, Chattanooga, Tennessee, for the appellees, United Parcel Service, Inc., and Liberty Mutual Insurance Company.

[1] 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.

OPINION

I.

Robert Charles Millican, Jr., drove a tractor-trailer for United Parcel Service, Inc. ("UPS") for forty-eight years until he retired in September 2014. On October 29, 2009, Mr. Millican saw Dr. Jack Greer for an earache. At that time, Dr. Greer advised Mr. Millican that he had significant hearing loss caused by the engine noise from the UPS trucks. Mr. Millican did not report his hearing loss to UPS at that time.

On October 30, 2012, Mr. Millican reported his hearing loss to UPS and filed a Request for Benefit Review Conference with the Department of Labor and Workforce Development. The Benefit Review process did not result in a resolution of the case. On August 12, 2014, UPS filed a complaint and subsequently an amended complaint in the Circuit Court for Hamilton County to resolve Mr. Millican's hearing loss claim. Mr. Millican responded that his hearing loss was caused by his employment and was timely filed. He asserted that the last-day-worked rule tolled the statute of limitations because he sustained additional hearing loss every day that he worked. UPS filed a second amended complaint to allege a statute of limitations and notice defense.

At trial on October 25, 2016, Mr. Millican testified that he drove a tractor-trailer for UPS for forty-eight years until he retired in September 2014. Over the years, as a feeder driver, he drove dedicated routes from Chattanooga to locations in Kentucky, Indiana, and Georgia. From 2003 until 2012, Mr. Millican primarily drove an International conventional large cab around sixty to eighty percent of the time and drove a Mack CH-600 tractor-trailer most other times. From 2012 and until he retired, Mr. Millican primarily drove a Mack Pinnacle. Although Mr. Millican identified these vehicles in his interrogatory responses, he testified at trial that the International conventional large cab came in two variations, including a single screw with four wheels in the back and a twin screw with eight wheels in the back, and that the twin screw International he drove was much louder than the model UPS tested.

Mr. Millican testified that he went to Dr. Greer in 2009 with complaints of an earache. Based on the results of hearing tests performed by an audiologist, Dr. Greer informed Mr. Millican that he had suffered hearing loss. When Mr. Millican told Dr. Greer he was employed as a truck driver, Dr. Greer told him that the truck noise was causing his hearing loss. Mr. Millican was fitted with hearing aids at his expense.

Mr. Millican testified he may have mentioned the hearing loss to a supervisor at UPS. He said he was aware of the UPS policy to report any work injury, illness, or problem to a supervisor but admitted that he did not formally notify UPS until he retained

an attorney. Mr. Millican believed that a broken leg or cracked rib was an on-the-job injury but was not aware that UPS could be responsible for hearing loss.

Dr. Francisco G. Moreno testified by deposition that Mr. Millican had suffered noise-related hearing loss that was likely work related. He stated that Mr. Millican suffered noise-related hearing loss of 43 percent on his left ear and 46.9 percent on his right ear, for a combined, or binaural, hearing loss of 41.9 percent. Dr. Moreno relied primarily on background information provided by Mr. Millican to determine the cause of the noise. From the history provided, Dr. Moreno found no other source of noise exposure other than workplace noise to cause the hearing loss. He explained that noise-induced hearing loss can start at eighty to eighty-five decibels, depending on the length of exposure. Dr. Moreno added that exposure at a level of eighty-five decibels would take many years to cause hearing loss. He stated that anything above eighty decibels will cause some damage, depending on exposure over time. Dr. Moreno agreed that if hearing loss had occurred years earlier, continued exposure to truck noise at or below eighty decibels would not further damage hearing. Any further damage would be familial or not work related.

Michael Schepige, a senior consulting industrial hygienist with Liberty Mutual Insurance Company, testified at trial on behalf of UPS that he performed noise level evaluations on the trucks listed in Mr. Millican's interrogatory responses as the trucks Mr. Millican had most recently driven. He tested the International and Mack CH models on routes to and from Chattanooga and Atlanta and tested the Mack Pinnacle in a second test. The time-weighted averages for noise levels were sixty-eight decibels in the Mack Pinnacle, sixty-nine decibels in the International, and seventy-six decibels in the Mack CH-600. These levels did not exceed the acceptable industry standard of eighty decibels.

In a follow-up supplemental deposition on October 20, 2016, Dr. Moreno testified that he reviewed the testing performed by Mr. Schepige, along with articles and journals related to noise level testing. According to these sources, Dr. Moreno said that exposure for twenty-four hours a day, seven days a week, 365 days a year to levels eighty decibels or below would not result in noise-induced hearing loss. However, he said that any noise above eighty decibels would cause damage, depending on the length of exposure. Dr. Moreno added that it is acceptable for an individual to be exposed to a level of eighty-five decibels up to ten to twelve hours a day. Dr. Moreno agreed that none of the decibel levels from the testing of the three trucks would make hearing loss worse.

The trial court reviewed a C-32 medical report, which was admitted as evidence under Tennessee Code Annotated section 50-6-235 (2008), prepared by Dr. Joseph A. Motto with the Michigan Evaluation Group in Southfield, Michigan. In his report, Dr. Motto stated that Mr. Millican's hearing loss continued to progress at a rate that far

exceeded the age-expected changes when comparing a population of sixty-five-year-old men to sixty-one-year-old men. Dr. Motto noted that UPS had tested the noise in the cabs of Mr. Millican's trucks and that the noise inside the cabs was well within the limits tolerated by the Occupational Safety and Health Administration guidelines. As a result, Dr. Motto believed that an unidentified source other than the UPS trucks must have caused Mr. Millican's hearing loss since his hearing loss occurred at all frequencies.

The trial court held that Mr. Millican's hearing loss claim was barred by the statute of limitations. The trial court noted that Mr. Millican learned from Dr. Greer that his hearing loss was work related in 2009 but failed to give UPS notice of his injury until 2012. The trial court did not find Mr. Millican's testimony that he drove the twin screw model International truck, rather than the single screw model, credible based on his demeanor and the inconsistency between his interrogatory responses and testimony at trial. Based on the testimony of Dr. Moreno and Mr. Schepige, the trial court found no evidence that the progression of Mr. Millican's hearing loss was noise induced. The trial court held that if the progression was not noise induced, then there was no extension of the statute of limitations for a repetitive injury. Mr. Millican appealed.

II.

We review issues of fact in a workers' compensation case "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." Tenn. Code Ann. § 50-6-225(e)(2) (2008). When the weight and credibility of testimony are at issue, we afford considerable deference to the trial court when the judge had the opportunity to observe the demeanor of the witnesses and hear in-court testimony. *Mitchell v. Fayetteville Pub. Utils.*, 368 S.W.3d 442, 447–48 (Tenn. 2012) (citing *Whirlpool Corp. v. Nakhoneinh*, 69 S.W.3d 164, 167 (Tenn. 2002)). However, we draw our own conclusions on the weight and credibility of expert medical testimony given by deposition. *Kilburn v. Granite State Ins. Co.*, No. M2015-01782-SC-R3-WC, 2017 WL 1316266, at *4 (Tenn. Apr. 10, 2017) (citing *Foreman v. Automatic Sys., Inc.*, 272 S.W.3d 560, 571 (Tenn. 2008)). We review the trial court's conclusions of law de novo with no presumption of correctness. *Id.* (citing *Seiber v. Reeves Logging*, 284 S.W.3d 294, 298 (Tenn. 2009)).

The determinative issue is whether Mr. Millican's claim was timely filed. The statute of limitations for workers' compensation claims provides:

> (b)(1) . . . where the employer has not paid workers' compensation benefits to or on behalf of the employee, the right to compensation . . . shall be forever barred, unless the notice required by § 50-6-202 is given to the

> employer and a benefit review conference is requested . . . and filed with the division within one (1) year after the accident resulting in injury.

Tenn. Code Ann. § 50-6-203(b)(1) (2008).

Mr. Millican filed his claim for workers' compensation benefits well beyond the one-year statute of limitations period. On October 29, 2009, Dr. Greer advised Mr. Millican that he had sustained significant hearing loss due to his employment. Mr. Millican did not report his hearing loss to UPS or seek workers' compensation benefits until October 30, 2012—three years later. Mr. Millican claimed he was unaware that his hearing loss was the type of injury covered by workers' compensation. However, Mr. Millican's mistaken belief or misunderstanding of the law did not relieve him of his obligation to timely file his claim. Thus, the evidence does not preponderate against the trial court's finding that Mr. Millican filed his claim more than one year after his doctor advised him that his hearing loss was related to his employment.

Mr. Millican contends his claim was timely filed because he suffered a gradual injury governed by the last-day-worked rule, which tolled the statute of limitations. The last-day-worked rule prevents workers with gradually occurring injuries from losing the right to bring their workers' compensation claims because of the statute of limitations. *Bldg. Materials Corp. v. Britt*, 211 S.W.3d 706, 711 (Tenn. 2007). Under the last-day-worked rule, the statute of limitations to bring a workers' compensation claim begins to run on the first day the employee misses work due to his injury. *Crew v. First Source Furniture Grp.*, 259 S.W.3d 656, 670 (Tenn. 2008); *Britt*, 211 S.W.3d at 711. This rule is based on the idea that a gradually occurring injury is a new injury each day the employee works. *Britt*, 211 S.W.3d at 711 (citing *Lawson v. Lear Seating Corp.*, 944 S.W.2d 340, 342–343 (Tenn. 1997); *Barker v. Home-Crest Corp.*, 805 S.W.2d 373, 375–76 (Tenn. 1991)).

Mr. Millican claims that his hearing loss continued to worsen each day he worked at UPS; therefore, the last-day-worked rule effectively tolled the statute of limitations. Mr. Schepige tested the noise levels in the trucks that Mr. Millican listed in his interrogatory answers as trucks he drove while at UPS. These tests showed the average time-weighted readings on the three trucks were below the eighty-decibel threshold established in the trucking industry. Dr. Moreno agreed that if there was no significant exposure to noise over eighty decibels, Mr. Millican's hearing should not become worse due to his work. As the trial court noted, both Dr. Moreno and Dr. Motto testified that any hearing loss progression could be attributed to non-work-related factors, such as aging or familial, hereditary issues. Mr. Millican provided no countervailing evidence.

Mr. Millican attempted to discredit Mr. Schepige's findings by testifying about a previously-undisclosed truck he purportedly drove during recent years. Contrary to his interrogatory responses, Mr. Millican insisted that he had driven an International conventional large cab described as a twin screw joint, rather than a single screw joint as previously disclosed. He asserted that the twin screw joint truck was much louder. The trial court chided Mr. Millican for failing to supplement his interrogatory responses and found him not to be credible as to the newly-added truck. The trial court suggested that Mr. Millican mentioned the louder truck specifically to undermine Mr. Schepige's testing.

The evidence does not preponderate against the trial court's decision that Mr. Millican's gradual hearing loss was not caused by his employment. Therefore, Mr. Millican cannot rely on the last-day-worked rule to toll the statute of limitations. We hold that Mr. Millican's claim is barred by the statute of limitations. All other issues raised by the parties are pretermitted.

III.

We affirm the judgment of the trial court. Costs are taxed to Mr. Millican and his surety, for which execution may issue if necessary.

SHARON G. LEE, JUSTICE