IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
November 30, 2005 Session

ROGER SHOULDERS v. PASMINCO ZINC, INC. and STATE OF TENNESSEE, DEPARTMENT OF LABOR, WORKERS' COMPENSATION DIVISION, SECOND INJURY FUND

Direct Appeal from the Circuit Court for Smith County
No. 5423-W Hon. John D. Wootten, Jr., Judge

No. M2004-02521-WC-R3-CV - Mailed - June 5, 2006
Filed - August 21, 2006

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Tennessee Supreme Court in accordance with the provisions of Tennessee Code Annotated section 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The Defendant Second Injury Fund has appealed the findings of the trial court, which determined that the Employee is entitled to recover permanent total disability until age sixty-six. We find that Employee is not permanently and totally disabled, and we therefore modify the decision of the trial court.

Tenn. Code Ann. § 50-6-225(e) (2005) Appeal as of Right;
Judgment of the Circuit Court is Affirmed as Modified.

ROBERT E. CORLEW, SP. J., delivered the opinion of the court, in which CORNELIA A. CLARK, J. joined. WILLIAM H. INMAN, SR. J., dissented, and filed a separate opinion.

Paul G. Summers, Richard M. Murrell (on briefs), Diane Stamey Dycus (oral argument) and Ronald W. McNutt (at trial), Office of the Attorney General and Reporter, Nashville, Tennessee, for the Appellant, Second Injury Fund.

Debbie Holliman (at trial), E. Guy Holliman (on appeal), Farrar & Holliman, Carthage, Tennessee, for the Appellee, Roger Shoulders.

Stacey Choate, Wimberly, Lawson, Seale, Wright & Daves, Cookeville, Tennessee, for the Appellee, Pasminco Zinc., Inc.

MEMORANDUM OPINION

Before the Court is an action in which the Employee seeks to receive compensation for a hearing loss injury for which he has been assigned no work restrictions and an anatomical impairment rating from one doctor of 1% apportioned to the body and from another doctor of 0%. Yet, the Employee asserts that this injury, coupled with other injuries he sustained previously, entitles him to receive payments of permanent and total disability.[1]

The facts are generally undisputed, yet the legal significance of those facts is the subject of a great dispute in which all three parties are vocal participants. The proof shows that the Employee worked for twenty-five years in a zinc mine.[2] His duties varied widely over the years, but for most of his career he worked in the field of vehicle maintenance. While there, he sustained a large number of injuries, the majority of which were not compensated under the terms of the workers' compensation laws. He suffered injuries to his two shoulders, his back, his knee, and his elbow. He also suffered bilateral carpal tunnel injuries. Dr. Robert Landsberg, who conducted an independent medical evaluation, testified that the Employee had sustained 55% anatomical impairment to the body as a whole, without consideration of any hearing loss issue.

Despite his prior injuries, the Employee continued to work. His only permanent restriction was a fifty pound lifting limit. Dr. Landsberg, in his independent medical evaluation, testified that he would recommend much more restrictive work restrictions, including maximum lifting of 25 pounds from the knee to the chest, 15 pounds occasionally, a maximum of 10 pounds above the left shoulder and no lifting above the right shoulder, limited stooping and bending, and no squatting, repetitive gripping or squeezing, or use of vibratory tools.

The Employee performed his routine maintenance duties, though there was some evidence that he received some accommodation from his employer, until the mine closed and he was laid off from work. Within a year of losing his job, the Employee filed two lawsuits. In the suit that is the subject of this appeal, the Employee alleges that he suffered a hearing loss during the course and scope of his employment. Although the treating physicians determined that the Employee suffered a hearing loss, they did not find that the hearing loss was sufficiently great enough that he was entitled to an anatomical impairment rating for the hearing loss. Both doctors found the existence of tinnitus, though both agreed that their findings were strictly subjective, inasmuch as there is no objective test to determine the presence of tinnitus. Dr. Raymond DeMoville opined that the Employee suffered 1% permanent partial impairment apportioned to the body for the finding of tinnitus. Dr. Bronn Rayne found only a 1.6% anatomical impairment apportioned to the ears as a

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[1]This is one of two actions tried during the same week involving the same Employee and the same attorneys, though tried before different judges. Many of the witnesses were the same and their testimonies similar. The two cases, both of which we decide today, contain closely related issues. However, we have considered the matters separately, as we are required to do under these circumstances.

[2]The business changed ownership several times throughout the years, though the Employee continued to work in the same mine.

scheduled member, but he testified that this rating extrapolated to 0% when apportioned to the body as a whole. Rodney Caldwell, a vocational expert presented by the Employee, testified that the Employee was some 95% vocationally disabled, when considering the vocational restrictions imposed by Dr. Landsberg. He testified that generally an Employee does not suffer a vocational disability where there are no work restrictions, but here, the finding of tinnitus, without any restrictions due to tinnitus, was still the "straw that broke the camel's back," resulting in permanent and total disability. Mr. Caldwell also testified, however, that the Employee's hearing loss was no impediment to his finding work. The main problem discussed by Mr. Caldwell was the Employee's prior condition during the time he was working full-time at the mine, including lifting restrictions resulting from arm and shoulder injuries.

Based upon these facts, the trial court found that the Employee suffered 4% vocational disability apportioned to the body as a whole from his hearing loss. The trial court further found that this injury, when combined with prior injuries suffered by the Employee, justified an award of permanent and total disability until age sixty-six.[3]

Nonetheless, the Employee testified that he was drawing unemployment compensation, a requirement for which was his declaration that he was ready and able to work. He further testified that he would have continued to perform his duties at the mine had it not closed. He testified that he felt he was able to perform a limited number of jobs. The evidence from the Employee and his wife shows that the Employee still has the ability to function and to perform chores at home. He and his wife testified that he has some trouble hearing in a noisy setting, such as a busy restaurant. While working at the mine, the Employee had trouble hearing the ringing of the telephone, but when he answered it, could hear sufficiently to converse on the telephone. The Employee did not experience dizziness or nausea as a result of any of his difficulties. Though Dr. DeMoville suggested the use of a hearing aid, the Employee did not obtain a hearing aid and had not seriously considered doing so even at the time of trial.

ANALYSIS

Our review is de novo upon the record of the trial court, accompanied by a presumption of correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tenn.

[3]We also decide the Employee's Chancery Court action today. In the Chancery Court action, the Employee sought to reopen prior injuries to his shoulders in which he had previously been limited to 2.5 times the anatomical rating by the provisions of Tennessee Code Annotated section 50-6-241. In that case, the Employee did not assert that he was permanently and totally disabled. Mr. Caldwell did not testify. Though the proof from the Employee, his wife, and the representative of the Employer were very similar, Wes Cox, another vocational expert, testified in that case that the Employee was only 78.3% vocationally disabled, and that the Employee had access to a small number of jobs in the local community. Because Mr. Cox's testimony was not introduced in this cause, we cannot consider it here, though we have found in the Chancery action that Mr. Cox's testimony there is more credible than the opinion of Mr. Caldwell in the present action. Though the Employee presented an expert in the related case who testified that the Employee is not permanently and totally disabled, no party has raised the issue of judicial estoppel. Because that issue is not raised by a party, we do not consider it here.

Code Ann. § 50-6-225(e)(2). Conclusions of law established by the trial court come to us without any presumption of correctness. *Perrin v. Gaylord Entm't Co.*, 120 S.W.3d 823, 825 (Tenn. 2003). Thus, we are required to conduct an independent examination of the record to determine the preponderance of the evidence, applying the presumption of correctness, and then determine the issues of law without according any presumption of correctness to the decisions of the trial court.

The existence of vocational disability is a question of fact which the court should determine from all of the evidence. *Collins v. Howmet Corp.*, 970 S.W.2d 941, 943 (Tenn. 1998). To find one totally and permanently disabled, the court must find that the Employee has no ability to return to gainful employment. *Davis v. Reagan*, 951 S.W.2d 766, 767 (Tenn. 1997).

Mr. Shoulders testified that the first time he knew he had a serious problem with his hearing was when Dr. Raynes told him he had a hearing loss. He described his hearing problem as follows:

> My ears ring all the time from the time I wake up until the time I go to sleep at night. And the pitch change would be the different tone in the ring. It would go from just the regular constant ring to a real high ring. When it does that, at times I'll just grab my head, both ears.

He was asked how his hearing was affected at trial, to which he responded,

> Today it's not that bad, but I've got some roar. When I talk, a lot of people tell me I talk too low, but I think I'm talking loud. ... I hear myself speaking kind of like—like if you was (sic) to stick your head down a drum and go to talking, that's about what it sound like.

Transcript of Proceedings, at 107.

He further indicated that he read lips "as best as possible." He testified that he turns the television too loud, and that in a restaurant, he requests "the waitress or waiter to repeat theirself (sic) several times." He testified that he had trouble hearing people talk at work when he was not facing them, and "a time or two" he was aware that he could not hear a bell or alarm at work. He testified that when talking on the telephone he has trouble hearing. He said the hearing affects his concentration.

Mr. Shoulders testified that he has problems in the classes he is now taking in vocational school. He indicated he has trouble reading and comprehending. He testified that he has had a problem transposing numbers since he was 30 or 35 years of age. He indicated that he had trouble spelling for a long period of time. Despite the testimony of the Employee, his vocational expert, Rodney Caldwell, testified that the Employee reads at the sixth grade level and performs arithmetic

skills at the twelfth grade level.[4] The Employee then went on to explain that he always hurt in his shoulder, his back, or his knee. He complained on eye strain and "an ache right over [his] eyes."

The Employee described how his work affected him shortly before he left the mine:

> Q. Before you left the mine—I'm going to ask you if you had any difficulties with any of these activities. Did you have any difficulty standing?
> A. Yes.
> Q. And how did you have difficulty standing?
> A. After a certain period of time my knees or my back would get to aching. I would have to be—when I was standing, if I was standing still, I would be repositioning myself quit a bit.
> Q. Walking?
> A. Yes. If I walked a lot, a lot, (sic) I would walk with a limp sometimes from the knee.
> Q. Lifting?
> A. Yes.
> Q. How was lifting affected?
> A. Just—some stuff I could lift around 25 pounds if I could get it close to my body. I probably—I have lifted some 50-pound stuff down there, I'm sure. But if it was on the ground I had a problem getting down to squat and lift it right because of the back and the knee. If I could get it up and get it close to my body and get it up, I had no problem after that.
> Q. Have any difficulty bending?
> A. Yes.
> Q. How so?
> A. I was just stiff at times. After part of a day's work, my back would be stiff.
> Q. Were you missing any work?
> A. None other than the time I was out for surgeries that I can remember that I missed.
> Q. You continued to go in to work on regular duty?
> A. I continued going to work.

Transcript of Proceedings, at 126-127.

The Employee testified that he has stopped doing woodwork on crafts, but continued to perform carpentry work on his own home. He explained that because contractors did not appear

[4] By contrast, Wes Cox, who did not testify in this cause, but testified in the Employee's other case two days earlier, presented proof that the Employee reads at the eighth or ninth grade level and performed arithmetic skills at only the ninth grade level. Mr. Cox thus found that the reading and arithmetic levels were relatively close to each other, while Mr. Caldwell testified that he found "the possibility of some type of a learn (sic) disability [because of the] discrepancy between the reading and arithmetic skills" that he found.

when scheduled, that he "put up molding and stuff," though he used a nail gun rather than a hammer. He complained that he has been required to make modifications in the way in which he performs "landscaping, mulching, bushes have to be changed which takes longer." He testified he "used to mulch every year, but the last two years [he] went to pine straw [because] I like it better, it's lighter and a lot easier to put down." He testified that he continues to drive motor vehicles, but has to switch hands when he drives "for a period of time," and that he has trouble getting out of the car. On trips from his home in Smith County to Atlanta, he has to stop at Chattanooga to walk and stretch.

Mrs. Shoulders testified consistently with her husband's testimony, but added that at church the Employee can hear better when he sits closer to the front. She indicated that the Employee may do some woodworking, and "nothing heavy anymore." She said he makes light crafts such as a "little birdhouse" or a "trinket." She also testified that he asks neighbors to come to help him with heavy lifting at the home.

We have considered the evidence of the duties that the Employee performed at the mine. We have considered the fact that the Employee has testified that there are some jobs he can perform and that he would still be working at the mine had it not closed. We have considered evidence of the duties the Employee performs at his home. We have recognized that he continues to draw unemployment compensation while representing his ability to work. He is now taking classes to better prepare him to return to the work force. The Employee is 54 years of age, has a high school diploma, and has developed some skills in the field of vehicle maintenance while working for the Employer. The burden rests on the Employee to demonstrate by a preponderance of the evidence that he is totally and permanently disabled. While he has sustained a number of injuries which limit him, the Employee's activities and record demonstrate that he is not totally and permanently disabled. *Oster v. Yates*, 845 S.W.2d 215, 217 (Tenn. 1992).

Having found that the proof does not preponderate in favor of a finding that the Employee is totally and permanently disabled, we must then determine the percentage of vocational disability the Employee is entitled to receive. We must consider, as did the trial court, the Employee's age, education, transferable job skills, his capacity to work, and the availability of employment in his local community. *Collins*, 970 S.W.2d at 943.

We must determine whether the finding of the existence of tinnitus should be apportioned to the body as a whole or to the scheduled member. Counsel for the Employee argued that the disability should be apportioned to the body as a whole, and the trial court so found. No published decision has considered whether tinnitus is a body as a whole injury or an injury to the scheduled member, and prior decisions of Workers' Compensation Panels are not in accord. *Sills v. Humboldt Nursing Home, Inc.*, 2002 WL 927434, at *2 (Tenn. Workers Comp. Panel, May 2, 2002) (treating tinnitus as an injury to the body when considered as an additional injury to hearing loss, which is considered a scheduled member injury); *McCoy v. T.T.C. Illinois Inc*., 14 S.W.3d 734, 735 (Tenn. 2000) (treating tinnitus as an injury to the body when combined with cervical injuries); *Cf. Woods v. Lockheed Martin Energy Sys*., 2004 WL 2306714 (Tenn. Workers Comp. Panel, Oct. 12, 2004)

(treating tinnitus as an injury to a scheduled member). The trial court found that the evidence showed that tinnitus had an effect upon the Employee's ability to concentrate, and thus, that it affected parts of the body other than the ears. We agree with this rationale. Thus, we affirm the trial court's decision that the apportionment of a vocational disability for tinnitus should be to the body. We are limited under the provisions of Tennessee Code Annotated § 50-6-241 to six times the anatomical impairment rating for this injury. The trial court adopted the anatomical rating established by Dr. DeMoville, and found that the injuries suffered by the Employee warrant an award of 4% permanent partial disability, apportioned to the body as a whole. We do not find that the proof preponderates against this finding.

CONCLUSION

Thus, we modify the findings of the trial court, noting that the proof does not preponderate in favor of a finding that the Employee is totally and permanently disabled. We affirm the decision of the trial court that the injury suffered by the Employee should be apportioned to the body as a whole, and we further modify the decision of the trial court and determine that the Employee is entitled to recover sixteen weeks for his hearing loss. Because the Employer has previously provided only 328 weeks compensation for other injuries, it is the duty of the Employer to pay the 16 weeks for the hearing loss. Thus, the action against the Second Injury Fund is dismissed.

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ROBERT E. CORLEW, SPECIAL JUDGE

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William H. Inman, dissenting opinion.

I cannot agree that the evidence justifies and supports finding four percent vocational disability for the purported hearing loss.

Hearing acuity may be scientifically determined. The two experts testified to zero percent and one percent, respectively, which as a matter of common knowledge is no hearing loss at all for a middle-aged man. To the contrary, the purported de minimis "hearing loss" of the employee is somewhat remarkable owing to its essential nonexistence. Any hearing loss is, beyond question, part of the aging process.

I concur in the opinion except with respect to the hearing loss award.

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No. M2004-02521-SC-WCM-CV - August 21, 2006

JUDGMENT

This case is before the Court upon the motion for review filed by Roger Shoulders pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), 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 Roger Shoulders and his surety for which execution may issue if necessary.

CLARK, J., NOT PARTICIPATING