IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
March 26, 2007 Session

JERRY SCOTT v. VOUGHT AIRCRAFT INDUSTRIES, INC., ET AL.

Direct Appeal from the Circuit Court for DeKalb County
No. 8489 John Maddux, Circuit Judge

No. M2006-01306-WC-R3-CV - Mailed - August 2, 2007
Filed - October 10, 2007

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated § 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. In this case, the trial court found the employee's hearing loss to be compensable, and awarded benefits for ninety percent hearing loss to both ears. The employer has appealed, contending that the trial court erred in reopening the proof and ordering an independent medical examination after the case had been tried and a ruling had been issued. The employer also contends that the trial court erred in finding that the employee's hearing loss was work-related, and that the size of the award is excessive. We hold that the evidence is sufficient to support the trial court's finding on causation, even if the post-trial evidence is not considered, and affirm the amount of the award of permanent partial disability.

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

DONALD P. HARRIS, SR. J., delivered the opinion of the court, in which CORNELIA A. CLARK, J., and JERRY SCOTT, SR. J., joined.

Aaron S. Guin and Stephen W. Elliot, Nashville, Tennessee, for the appellants, Vought Aircraft Industries and American Home Assurance Company.

Frank F. Buck, Dowelltown, Tennessee for the appellee, Jerry Scott.

MEMORANDUM OPINION

I. FACTUAL BACKGROUND

At the time of trial, Jerry Scott was 61 years of age. He began working for a predecessor of Vought Aircraft Industries (Vought), an aircraft parts manufacturer, in 1966. He worked at the same

location until he voluntarily retired in 2003. For most of his tenure with Vought, he was an inspector. His primary duties were installing and examining rivets in airplane wings. Inspections were performed as the wings were being built, while riveting was taking place. Mr. Scott and two co-workers testified that the workplace was extremely noisy.

Beginning in 1996, Vought administered hearing tests to its employees. The initial test of Mr. Scott showed that he had some hearing loss. In 2003, Vought referred him to Dr. Schwaber, an otolaryngologist. A C-32, Standard Form Medical Report for Industrial Injuries, from Dr. Schwaber as well as his deposition were introduced into evidence. Dr. Schwaber ultimately determined that Mr. Scott had sustained a permanent binaural hearing loss of 23.1%. Dr. Schwaber was of the opinion this hearing loss was caused by prolonged noise exposure associated with Mr. Scott's employment. Dr. Schwaber based his opinion, in part, on anecdotal information from Mr. Scott. He did not have any data concerning measured noise levels in the plant. He also testified that the type of hearing loss which Mr. Scott had sustained was consistent with long term exposure to high noise levels.

Mr. Scott testified that he hunted occasionally. He also operated a small farm, which required the use of tractors and other noisy equipment. In 2003, Vought offered an incentive retirement package which Mr. Scott accepted. He testified that concern about his progressive loss of hearing was one of the factors he considered in making that decision. In May 2003, shortly after his retirement, he began working part-time at Tractor Supply Company, assisting customers and stocking merchandise. He still held that job at the time of trial and worked about 30 hours per week. Mr. Scott was also a member of the DeKalb County Commission. Mr. Scott had hearing aids which he used primarily at church. He did not use them at Tractor Supply or at County Commission meetings.

The case was tried in July 2005. The contested issues were causation and the extent of disability. At the conclusion of the proof, the trial court ruled from the bench that Mr. Scott had sustained his burden of proof on causation, and found Mr. Scott had sustained an eighty-five percent permanent partial disability to his binaural hearing. Counsel for Mr. Scott submitted a proposed judgment, but this judgment was never signed or entered. The trial court sent a letter to counsel, and later entered a *nunc pro tunc* order, requiring Mr. Scott to submit to an independent medical examination by Dr. Raymond Demoville, and ordering Vought to provide Dr. Demoville with all available reports of noise level testing done during the time Mr. Scott worked there.

The parties complied with the trial court's order. Dr. Demoville examined Mr. Scott on July 28, 2005, and issued a report on or about the same day. He opined that Mr. Scott's hearing loss was, more likely than not, related to his job. He concluded that Mr. Scott had a permanent impairment of 30.6 % to his binaural hearing. Dr. Demoville completed a C-32 form which was placed in the record. His deposition was also taken and placed in the record.

After receiving Dr. Demoville's report and deposition, the trial court found that Mr. Scott's hearing loss was caused by his employment, and awarded 90% permanent partial disability to his binaural hearing. Vought has appealed alleging the trial court erred in re-opening the proof and ordering an independent medical examination; in finding that Mr. Scott's hearing loss was caused by his employment; and, in finding a ninety percent permanent partial disability to hearing in both ears.

II. STANDARD OF REVIEW

The standard of review of issues of fact 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(e)(2) (2005). 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' demeanor and to hear in-court testimony. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). 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. Bohanan v. City of Knoxville, 136 S.W.3d 621, 624 (Tenn. 2004); Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997). A trial court's conclusions of law are reviewed *de novo* upon the record with no presumption of correctness. Ganzevoort v. Russell, 949 S.W.2d 293, 296 (Tenn. 1997).

III. ANALYSIS

Vought first contends that the trial court erred in by re-opening the proof and ordering an independent medical examination of Mr. Scott after the parties had rested and the trial court had rendered its decision. Initially, we note that Tennessee Code Annotated section 50-6-204(d)(5)(Supp. 2002)[1] and Rule 706 of the Tennessee Rules of Evidence authorize a trial court to appoint expert witnesses on its own motion. While the trial court did not follow the procedures described in the rule and did not refer to the statute, it clearly had the authority to appoint an expert. The issue is whether the trial court misused that authority by re-opening the proof and appointing an expert after the trial had been completed.

The standard for review of a trial court's decision to permit re-opening of proof after the parties have rested is "abuse of discretion." Simpson v. Frontier Comm. Credit Union, 810 S.W.2d 147, 149 (Tenn. 1991); Higgins v. Steide, 47 Tenn. App. 42, 335 S.W.2d 533 (1959). In general, the cases that have considered a trial court's decision on the issue concern rulings on motions made by the parties, rather than an order of the court re-opening the proof on its own motion. See, e.g. Robinson v. LeCorps, 83 S.W.3d 718 (Tenn. 2002); Higgins, supra; Crews v. United Ben. Ins. Of Omaha, Neb., 63 Tenn. App. 376, 472 S.W.2d 887 (1971). In Simpson, the trial court re-opened the proof after closing statements by counsel, apparently on its own motion. However, the additional proof consisted of asking a small number of additional questions of the plaintiff concerning a relatively straightforward matter-the number of persons employed on the date of injury. This occurred before the court had issued its decision.

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[1] This section provided, "In case of dispute as to the injury, the court may, at the instance of either party, or on its own motion, appoint a neutral physician of good standing and ability to make an examination of the injured person and report such physician's findings to the court, the expense of which examination shall be borne equally by the parties." A similar Code section, excepting "disputes as to the degree of medical impairment," is now designated Tennessee Code Annotated section 50-6-204(d)(9).

Vought cites Rainbo Baking Co. of Louisville v. Release Coatings of Tenn., No. 02A01-9510-CH-00223, 1996 WL 710928 (Tenn. Ct. App. December 12, 1996), as the decision most analogous to the facts of this case. In Rainbo, the parties had rested, and the trial court issued its ruling, holding that the plaintiff had satisfied its burden of proof on liability, but had not done so as to the amount of damages. The trial court referred the case to a special master to take evidence on the damage issue. The Court of Appeals held that this constituted an abuse of discretion, and reversed.

In workers' compensation matters, the courts play a somewhat different role than in other types of civil litigation, as illustrated by the statutory requirement that settlements be approved by a court or the Department of Labor and Workforce Development. Tenn. Code. Ann. § 50-6-206. Moreover, the statute instructs the courts to give an "equitable construction" to its provisions. Tenn. Code Ann. § 50-6-116. Nevertheless, workers' compensation lawsuits are subject to the same rules of evidence and procedure applicable to all civil actions. Tenn. Code Ann. § 50-6-225(b).

Vought alleges the action of the trial court, coming after its initial ruling had been made and requiring that new evidence be gathered and presented, gave Mr. Scott the opportunity to correct the deficiency in establishing causation during the trial of this case. We are of the opinion the trial court's action can equally be viewed as an effort to reach a just result. Because we conclude that the evidence presented at trial prior to the re-opening of proof was sufficient to sustain the finding that Mr. Scott's hearing loss arose from his employment, Vought was not prejudiced by the action of the trial court with regard to liability and, thus, the issue has no merit. Tenn. R. Evid. 103.

Vought contends that Dr. Schwaber's testimony is unreliable, and not sufficient to support a finding of causation because he had only anecdotal evidence concerning the noise levels that Mr. Scott was exposed to. Mr. Scott contends the evidence does not preponderate against the trial court's finding. Neither party cites any cases directly on point.

When Dr. Schwaber was asked what caused Mr. Scott's hearing loss, he responded:

> Well, we measured something called otoacoustic emissions, which is a test for the tiny little hairs that are inside the inner ear. . . . Little tiny hairs are in the inner ear that move back and forth with sound, and they transmit to the nerve and then ultimately to the brain. Noise damages the hairs. We know that. The test shows that his hairs are damaged. So we're certain it's noise. We have no doubt that it's noise exposure, and it's the shearing forces on the hairs that it damages. Its just the sheer amount of vibration that's transmitted to these hair cells that damages.

Dr. Schwaber was also asked the principal cause of Mr. Scott's hearing loss, assuming that he occasionally hunted, bush-hogged and drove a tractor around his farm. Dr. Schwaber responded: "I think that more than likely it's the noise exposure from that many years of working on airplane wings, et cetera."

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); Reeser v. Yellow Freight Sys., Inc., 938 S.W.2d 690, 692 (Tenn. 1997). Our Courts have "consistently held that an award may properly be based upon medical testimony to the effect that a given incident 'could be' the cause of the employee's injury, when there is also lay testimony from which it reasonably may be inferred that the incident was in fact the cause of the injury." Reeser, 938 S.W.2d at 692; accord, Long v. Tri-Con Indus., Ltd., 996 S.W.2d 173, 177 (Tenn. 1999); P & L Constr. Co. v. Lankford, 559 S. W.2d 793, 794 (Tenn. 1978); GAF Bldg. Materials v. George, 47 S.W.3d 430, 433 (Tenn. Workers' Comp. Panel 2001). Mr. Scott and two other workers from the factory testified, in layman's terms, that the environment was extremely noisy. Although Dr. Schwaber did not have precise measurements of the noise level in the factory, he did have substantial anecdotal evidence, which was corroborated at trial.

Absolute certainty on the part of a medical expert is not necessary to support a workers' compensation award, for expert opinion must always be more or less uncertain and speculative. Where equivocal medical evidence combined with other evidence supports a finding of causation, such an inference may be drawn under our case law. McCaleb v. Saturn Corp., 910 S.W.2d 412, 415 (Tenn. 1995). Viewing the evidence presented at trial in light of the standards set out above, we conclude that the evidence was sufficient to establish that Mr. Scott's hearing loss was caused by his prolonged exposure to loud noise at work and does not preponderate against the finding of the trial court with respect to this issue.

Dr. Demoville was supplied with noise level monitoring results from the Vought plant. As we view the evidence presented at trial, his testimony could only have exonerated Vought from liability. Dr. Demoville, however, reached the same conclusion based on objective evidence as Dr. Schwaber reached based upon anecdotal evidence.

We turn to the last issue, which is whether the award of ninety percent (90%) permanent partial disability to Mr. Scott's binaural hearing is excessive. The trial court's determination of the extent of vocational disability is reviewed "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." Nelson v. Wal-Mart Stores, Inc., 8 S.W.3d 625, 629 (Tenn. 1999). This case presents virtually the same facts as were presented the trial court in George v. Bldg. Materials Corp. of Am., 44 S.W.3d 481 (Tenn. 2001). In George, the employee had sustained a seventeen percent binaural hearing loss. The trial court awarded him a ninety percent permanent partial disability that was reduced by the Workers' Compensation Hearing Panel to fifty percent. Noting that Mr. George was sixty-two years of age, had worked for thirty-eight years in the employer's industrial setting and had no education, skills or training that would enable him to earn an income in any other environment, the Tennessee Supreme Court reversed the findings of the Panel and reinstated the award of the trial court.[2]

[2]Compare, Lang v. Nissan North Am., Inc., 170 S.W.3d 564 (Tenn. 2005). In Lang, the employee's binaural hearing loss was measured by two qualified experts at 22.5 and 26.6 percent. The employee in that case was 43 years of age and had worked for Nissan for approximately 17 years. He had continued in his job at Nissan, missed no time from his work as a result of the injury and performed well there. The Tennessee Supreme Court approved the Workers' Compensation Appeals panel increasing the trial court's 9% permanent partial disability award to 45%.

Mr. Scott was sixty-one years of age at the time of trial. He had worked at Vought or previous owners of the plant for thirty-eight years. He left his employment at Vought, in part, because of a retirement incentive they offered him and, in part, because he did not want to further damage his hearing ability. At Vought he earned over twenty dollars per hour and frequently worked overtime. At the time of the trial he was working part-time for Tractor Supply earning $7.20 per hour. To preserve his hearing, he can no longer work in an industrial setting. The record does not indicate he has any education, skills or training that would enable him to work in an environment where he could achieve the level of income he was earning at Vought. In order to understand what others are saying, they must speak directly to him and he must be looking at them. Lynn Adcock, a manager at Tractor Supply, indicated Mr. Scott had difficulty operating a cash register because when he had to look at the cash register instead of the customer, he had difficulty hearing what the customer was saying. He cannot understand some voices over the telephone. He has hearing aids but does not wear them because they magnify all incoming sounds and, when there is more than one sound or voice, they become jumbled. As a result, Mr. Scott is frequently unable to understand what is being said while wearing hearing aids. After a careful review of the evidence and considering the instruction in George, we are unable to find the evidence preponderates against the finding of the trial court that Mr. Scott had sustained a ninety percent permanent binaural hearing loss.

VI. CONCLUSION

The judgment of the trial court is affirmed in all respects. Costs are taxed to Vought Aircraft Industries and American Home Assurance Company.

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DONALD P. HARRIS, SENIOR JUDGE

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ORDER

This case is before the Court upon the motion for review filed by American Home Assurance Company and Aerostructures/Vought Aircraft Industries 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 Vought Aircraft Industries and American Home Assurance Company, for which execution may issue if necessary.

PER CURIAM

CLARK, J. - NOT PARTICIPATING