

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
June 25, 2007 Session

DEW ROY NEAL v. TRW COMMERCIAL STEERING DIVISION

**Direct Appeal from the Criminal Court for Smith County
No. 04-96 J.O. Bond, Judge**

**No. M2006-01091-WC-R3-WC - Mailed - October 5, 2007
Filed - November 6, 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 a hearing and a report of findings of fact and conclusions of law. The trial court awarded 50% permanent partial disability for loss of hearing in both ears to the employee, Dew Roy Neal. The employer, TRW Commercial Steering Division (TRW), appealed, contending that the claim was barred by the statute of limitations; that the trial court erred in excluding excerpts from Mr. Neal's discovery deposition from evidence; that the trial court erred in apportioning the award to a scheduled member, rather than the body as a whole; that the amount of the award was excessive; and that the trial court did not have jurisdiction over the subject matter of the case. We hold that the award should have been apportioned to the body as a whole. As a result, Tennessee Code Annotated section 50-6-241(a)(1) limits the award to two and one-half times the impairment rating. The award is therefore modified to 5% permanent partial disability to the body as a whole. We also find that the trial court erred in excluding the deposition excerpts, but that the error was harmless. The judgment is affirmed in all other respects.

Tenn. Code Ann. § 50-6-225(e) (Supp. 2006) Appeal as of Right; Judgment of the Criminal Court modified

DONALD P. HARRIS, SR. J., delivered the opinion of the court, in which WILLIAM M. BARKER, C. J. and RICHARD E. LADD, SP. J., joined.

Richard Lane Moore, Cookeville, Tennessee for the appellant, TRW Commercial Steering Division

Debbie C. Holliman and E. Guy Holliman, Carthage, Tennessee, for the appellee, Dew Roy Neal

MEMORANDUM OPINION

I. FACTUAL AND PROCEDURAL BACKGROUND

Dew Roy Neal was 54 years old at the time of trial. He had a General Educational Development diploma. He began working for TRW in 1970. He testified that he had worked in virtually all areas

of the factory, and that several of those areas were very noisy. At the time of trial, he had worked in the “tool crib” for about two years, where he located and distributed tools to other workers. He described the tool crib as a quiet area.

Mr. Neal testified that he first noticed a ringing sound in his ears in 2001. At the time, he thought it was probably related to a particularly noisy machine, referred to as the vibrator, which he had worked on in the past. He did not request or receive medical attention at that time and did not miss any work.

After Mr. Neal moved to the tool crib, he noticed a persistent ringing in his ears. Shortly thereafter, he gave notice to TRW that he had a work related injury. TRW sent him to Dr. Roy P. Johnson. An employee of Dr. Johnson performed a hearing evaluation. At some point thereafter, Mr. Neal obtained a copy of the test results. He testified that he first conclusively knew he had a work-related hearing loss at that time. TRW had begun conducting hearing tests of its employees in the 1980s. The results of those tests, however, were not generally made available to the workers.

Mr. Neal was evaluated by Dr. Raymond Demoville at the request of his attorney, and by Dr. David S. Haynes at the request of his employer. Both doctors testified by deposition. Dr. Demoville diagnosed high frequency hearing loss and tinnitus. He testified that Mr. Neal had virtually no hearing loss according to the AMA Guides because no rating has been included in the Guides for frequencies greater than 3000 hertz. Mr. Neal’s hearing loss predominantly occurs a frequency of 4000 hertz. As a result, according to the Guides, he has an anatomical impairment of only 0.3% for his binaural hearing loss. To this rating, Dr. Demoville added 4.0% for the tinnitus. Using tables in the AMA Guides, this impairment converted to 2% to the body as a whole. Dr. Haynes reached the same diagnosis. He assigned impairment of 4.7% impairment for binaural hearing loss and 1.5% for tinnitus, a total of 6.2% to binaural hearing. This also converted to 2% to the body as a whole.

Mr. Neal missed no work as a result of his tinnitus and hearing loss. He testified that he had some difficulty understanding speech when his back was turned to the speaker, and some difficulty understanding speech in the presence of background noise. According to a questionnaire completed for Dr. Demoville, Mr. Neal’s tinnitus sometimes made it difficult for him to concentrate, caused sleep difficulties and some anxiety. Mr. Neal testified that his tinnitus did not cause headaches, nausea or dizziness.

The trial court awarded 50% permanent partial disability. The award was assigned to the scheduled member, loss of hearing in both ears. The trial court also ruled that the claim was not barred by the statute of limitations. Finally, the trial court found that the average weekly wage and workers’ compensation benefit rate should be calculated based upon the date that Mr. Neal gave his notice of injury to TRW in May 2004.

II. ISSUES PRESENTED FOR REVIEW

TRW has raised six issues on appeal:

- (1) Whether the claim was barred by the statute of limitations?
- (2) Whether the trial court erred in excluding portions of Mr. Neal's discovery deposition proffered by TRW?
- (3) Whether the trial court erred in making its award to a scheduled member (loss of hearing in both ears) rather than to the body as a whole?
- (4) Whether the amount of the award (50% binaural hearing) was excessive?
- (5) Whether the trial court had subject matter jurisdiction?
- (6) Whether the trial court selected the correct injury date to calculate the worker's comp benefit rate?

III. 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) (Supp. 2006). 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). Where 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); Elmore v. Travelers Ins. Co., 824 S.W.2d 541, 544 (Tenn. 1992). A trial court's conclusions of law are reviewed *de novo* upon the record with no presumption of correctness. Perrin v. Gaylord Entm't Co., 120 S.W.3d 823, 826 (Tenn. 2003); Ganzevoort v. Russell, 949 S.W.2d 293, 296 (Tenn. 1997).

IV. ANALYSIS

1. *Statute of Limitations*

Cases of work-related hearing loss present unique issues with respect to requirements for giving notice and the application of the statute of limitations. Many of these claims concern injuries which occur gradually over the course of many years. In addition, it is commonplace for

an employee who has sustained a gradual hearing loss to miss no work at all as a result of the condition. Both of those elements are present here.

TRW contends that this claim was barred by the one year statute of limitation set out in Tennessee Code Annotated section 50-6-203(a)(1999). This argument is based upon Mr. Neal's testimony that he first noticed problems with his hearing in 2001, and believed at that time that those symptoms were work-related.

Prior to July 1, 2004, section 50-6-203(a) read:

The right to compensation under the Workers' Compensation Law shall be forever barred, unless, within one (1) year after the accident resulting in injury or death occurred, the notice required by § 50-6-202 is given the employer and a claim for compensation under the provisions of this chapter is filed with the tribunal having jurisdiction to hear and determine the matter. . . .

Tennessee courts have consistently held that the one year period for filing suit does not begin to run until "the [employee] knew or as a reasonably prudent person should have known, that his hearing loss was work connected." Hawkins v. Consolidated Aluminum Corp., 742 S.W.2d 253, 254 (Tenn. 1987). In Ferrell v. CIGNA Prop. & Cas. Ins. Co., 33 S.W.3d 731, 735 (Tenn. 2000), the Court held that the statute did not begin to run until the employee saw a C-32 Standard Form Medical Report for Industrial Injuries, "literally the day before trial."

In this case, Mr. Neal missed no work due to his hearing loss or tinnitus. When he moved to a quieter work area, the tool crib, in April 2004, he noted that the ringing in his ears, which he had associated with the machines he had previously operated, persisted. At that time, Mr. Neal gave notice to TRW and requested medical attention. He testified, without contradiction, that he first knew that he had a permanent hearing loss when he received the results of Dr. Johnson's audiogram in May 2004. Suit was filed on June 3, 2004. Based upon Hawkins and Ferrell, we conclude that Mr. Neal's action was not barred by the statute of limitation.

2. Exclusion of Deposition Excerpts

As part of its proof at trial, TRW sought to read portions of Mr. Neal's discovery deposition into evidence. Mr. Neal objected, arguing that the deposition was inadmissible hearsay, and could only be used for cross-examination. The trial court sustained the objection, but permitted an offer of proof. Rule 32.01(2) of the Tennessee Rules of Civil Procedure states in pertinent part: "The deposition of a party...may be used by an adverse party for any purpose." This language is not ambiguous. The trial court's ruling directly conflicts with Rule 32.01(2), and was erroneous. However, upon review of the offer of proof, we find that the error was harmless, as Mr. Neal's testimony at trial covered virtually all of the subjects addressed in the deposition excerpts, and was consistent with his deposition testimony. The proffered evidence

was therefore cumulative. A previous Workers' Compensation Appeals Panel addressed the identical issue, and reached the same conclusion, in a case which arose from the same trial court. See, Shoulders v. TRW Commercial Steering Div., No. M2006-00300-WC-R3-CV, 2007 WL 1096887 (Tenn. Workers' Comp. Panel April 3, 2007).

3. *Scheduled Member*

In his complaint, Mr. Neal stated that he gradually developed tinnitus and hearing loss as a result of exposure to noise during the course of his employment. The "loss of hearing in both ears" is a scheduled member injury, valued at 150 weeks of benefits, pursuant to Tennessee Code Annotated section 50-6-207(3)(A)(ii)(r)(Supp. 2003). Tinnitus, however, is not mentioned in the workers' compensation statute. Tennessee Code Annotated section 50-6-207(3)(F) provides that permanent partial disability other than to a scheduled member shall be apportioned to the body as a whole. TRW contends that tinnitus is an unscheduled injury and should have been apportioned to the body as a whole. TRW further asserts that the tinnitus and hearing loss are concurrent injuries, and therefore the entire award must be apportioned to the body as a whole, pursuant to Tennessee Code Annotated section 50-6-207(3)(C)(Supp. 2003).¹

Mr. Neal contends that the apportionment of tinnitus should be determined on a case-by-case basis and that in this case, the disability should be assigned to the scheduled member. In the alternative, Mr. Neal argues that tinnitus and hearing loss are separate injuries for which separate awards should be made, to the scheduled member and to the body, respectively.

Both Dr. Haynes and Dr. Demoville testified that tinnitus is a distinct condition from hearing loss. It is characterized by the patient perceiving that he or she hears a static or ringing sound which is not externally produced. They explained that the cause was thought to be related to a dysfunction of the nerves connecting the ear to the brain, or of the brain itself. The condition is frequently associated with high frequency hearing loss. Its effects can include headaches, nausea and dizziness. Mr. Neal denied having those symptoms, although he did report to Dr. Demoville that his tinnitus caused anxiety, some difficulty with concentration and interfered with his sleep.

A recent Workers' Compensation Appeals Panel considered this question, and found tinnitus to be an unscheduled, thus "body as a whole," injury. In Shoulders v. Pasminco Zinc, Inc., No. M2004-02521-WC-R3-CV, 2006 WL 2716879 (Tenn. Workers' Comp. Panel, August 21, 2006), the panel considered the effects of the condition on the employee, specifically upon his ability to concentrate, in reaching its conclusion. Another panel reached a similar conclusion, based upon similar evidence in Sills v. Humboldt Nursing Home, Inc., No. W2000-03034-WC-R3-CV, 2002 WL 927434 (Tenn. Workers' Comp. Panel, May 2, 2002). In Woods

¹ "When an employee sustains concurrent injuries resulting in concurrent disabilities, such employee shall receive compensation only for the injury that produced the longest period of disability..."

v. Lockheed Martin Energy Sys., No. E2003-01789-SC-WC-CV, 2004 WL 2306714 (Tenn. Workers' Comp. Panel, Oct.12, 2004), however, the panel treated tinnitus as a scheduled member injury but the issue was not raised by the parties in that case.

We agree that the apportionment of tinnitus should be determined on a case by case basis. Section 11.2a of the *American Medical Association Guides to the Evaluation of Permanent Impairment, Fifth Edition* entitled "Criteria for Rating Impairment Due to Hearing Loss" provides:

Criteria for evaluating hearing impairment are established through hearing threshold testing. . . . **Tinnitus** in the presence of unilateral or bilateral hearing impairment may impair speech discrimination. Therefore, add up to 5% for tinnitus in the presence of measurable hearing loss if the tinnitus impacts the ability to perform activities of daily living. (emphasis in the original).

Id. at p. 246.

In our view, where the effects of tinnitus are limited to the impairment of speech discrimination in someone who has a hearing loss, they enhance the hearing loss and should be considered a part of it. In such a case, the tinnitus would be part of the hearing loss and result in a scheduled member injury. Where, however, the impairment rating relating to tinnitus is based upon effects of the condition outside an enhanced loss of hearing, it is not part of the hearing loss and should, in such cases, be apportioned to the body as a whole.

In the case before us, the trial court based its conclusions on the impairment ratings of Dr. Demoville and Dr. Haynes. Dr. Demoville based his impairment rating for tinnitus upon a questionnaire completed by Mr. Neal relating to the effects of his tinnitus upon the activities of daily living. Mr. Neal's responses indicated his tinnitus made it difficult for him to concentrate, caused sleep difficulties and some anxiety. Based upon these responses, Dr. Demoville assigned a 4% impairment rating for tinnitus. Dr. Demoville's impairment rating was, therefore, clearly based upon the effects of tinnitus other than an enhanced loss of hearing. Dr. Haynes based his impairment rating of 1.5% for tinnitus upon Mr. Neal's reporting that it interfered with his sleep. Because the impairment ratings of both physicians that were relied upon by the trial court were based upon the effects of tinnitus other than an enhanced loss of hearing, the reasoning of Shoulders and Sills suggests Mr. Neal's tinnitus is properly apportioned to the body as a whole.

The pleadings and proof are both to the effect that these two conditions were caused by the same exposure, which occurred over the same period, and manifested themselves at more or less the same time. On that basis, we find that the two injuries occurred concurrently, and a single award should be made in accordance with Tennessee Code Annotated section 50-6-207(3)(C). Both doctors found that Mr. Neal's combined impairment was 2% to the body as a whole. We modify the award to the maximum permitted by Tennessee Code Annotated section 50-6-241(a)(1)(1999), 5% permanent partial disability to the body as a whole.

4. Extent of Permanent Disability

In light of the modification of the trial court's award resulting from our conclusion that tinnitus should be apportioned to the body as a whole, we find it unnecessary to address TRW's contention that the trial court's award was excessive.

5. Subject Matter Jurisdiction

This case was filed and heard in the Criminal Court of Wilson County. Chapter 962, Public Acts of 2004, removed the jurisdiction of criminal courts over workers' compensation cases. The change was made by amending Tennessee Code Annotated section 50-6-225(a). This was done in Section 16 of Public Chapter 962. Section 51 of the same act states that Section 16 "shall apply to accidents or injuries occurring on or after January 1, 2005." The injury at issue in this case occurred no later than May 2004, when Mr. Neal gave notice of his injury to TRW.

6. Injury Date for Calculation of Average Weekly Wage

The average weekly wage, and thus the workers' compensation benefit rate, was based upon an injury date of May 2004. That date is consistent with our conclusions concerning the statute of limitations issue. As a consequence, we find that the trial court correctly used that date for the purpose of determining Mr. Neal's average weekly wage.

V. CONCLUSION

The judgment of is modified to award 5% permanent partial disability to the body as a whole to Mr. Neal. We find that the trial court erred in sustaining Mr. Neal's objection to the admission of his deposition testimony into evidence, but that error was harmless. The judgment is affirmed in all other respects. Costs are assessed one-half to TRW Commercial Steering Division and one-half to Dew Roy Neal, for which execution may issue if necessary.

DONALD P. HARRIS, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
JUNE 25, 2007 SESSION

DEW ROY NEAL v. TRW COMMERCIAL STEERING DIVISION

**Criminal Court for Smith County
No. 04-96**

No. M2006-01091-WC-R3-WC - Filed - November 6, 2007

JUDGMENT

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 appeals 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 will be assessed one-half to TRW Commercial Steering Division and one-half to Dew Roy Neal., for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM