

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
March 15, 2001 Session

HAROLD LIFORD v. AFG INDUSTRIES, INC., ET AL.

**Direct Appeal from the Circuit Court for Hawkins County
No. 8452 Ben K. Wexler, Circuit Judge**

No. E2000-01474-WC-R3-CV - Mailed

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The employer and insurance company have appealed from an award of permanent total disability insisting the evidence preponderates against the trial court's finding the employee's leg condition was causally related to his work injury. The employee contends the award of disability should have been determined to be of a permanent partial nature so that he would qualify for benefits under Tenn. Code Ann. § 50-6-242. Judgment of the trial court is affirmed.

Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Circuit Court is Affirmed.

THAYER, SP. J., delivered the opinion of the court, in which ANDERSON, C.J., and BYERS, SR. J., joined.

Richard M. Currie, Jr., of Kingsport, Tennessee, for the Appellants, AFG Industries, Inc. and Insurance Company of the State of Pennsylvania.

David N. Wedekind and Kristi M. Davis of Knoxville, Tennessee, for Appellee, Harold Liford.

OPINION

The employer, AFG Industries, Inc., and the insurance carrier, Insurance Company of the State of Pennsylvania, have appealed the trial court's ruling finding the employee, Harold Liford, to be totally and permanently disabled.

Basic Facts

Employee Liford was 59 years of age when he was injured on August 27, 1997 while pushing against a machine when he felt a pain in his stomach. Upon checking himself, he noticed a bulge of his stomach and said he pushed it back in. He was seen by the company doctor and was referred to a surgeon who examined him the next day and performed surgery the following day on August 29th.

He testified that soon after the surgery, he began feeling pain down his right leg and around the area where the surgical procedure was performed; that eventually the leg would give away and he could stand or walk with a cane for only fifteen or twenty minutes because his leg hurt so badly; and that his knee now buckles and he was not able to do any type of work. He also testified he had no problems of this nature prior to the incident at work and having the surgery.

Most of the expert medical testimony was presented by deposition and several written medical reports from other doctors were filed in evidence.

Dr. T. H. Robertson, Jr., a family practice physician, testified by deposition and stated he had been Liford's family physician for a period of about forty years. He had been treating him for a lumbosacral disorder, osteoarthritis, and had prescribed medicine for pain. He began seeing him for the complaints at issue during November 1997 and saw him on a regular monthly basis for a long period of time. He said the patient still complained of the bulge in his stomach and of pain and numbness down his right leg. He was of the opinion the surgery had resulted in an impingement of the lateral femoral cutaneous nerve and that it was causing his leg problems. He gave a 9 percent impairment rating to the body as a whole and testified that the employee was totally disabled from any gainful activity.

Dr. Berta M. Bergie, a neurologist, testified by deposition and stated she did an independent medical examination during November 1998; that she observed a protrusion near his belly button; that he had difficulty in walking and standing and she was of the opinion the femoral nerve had been damaged or entrapped by scar tissue from a blood clot which occurred after the surgical procedure or that there had been a stretching of the nerve at the time of the incident at work. She gave a 5 percent impairment rating.

The surgeon, Dr. Walid Abou-Jaoude, testified by deposition and stated he initially thought the patient might have an incisional hernia at the site of a previous gall bladder surgery; that surgery revealed he did not have a true hernia but the defect was the lack of sufficient muscle in the abdominal wall. He said a blood clot later developed and it was successfully treated. He was of the opinion the leg pain and problems were not related to the incident at work and/or the surgical procedure.

Dr. John M. Marshall, a physical medicine and rehab physician, testified by deposition and said he did an independent medical examination during April 1999 and that he could not relate the problems in the lower extremity to the incident at work or the surgery.

Three written medical reports were filed in evidence. One report was from Dr. R. Scott Macdonald, a neurologist, who examined the employee during November 1997. The report stated the employee had complaints of abdominal pain and pain in the right lower extremity. Dr. Scott's impression was that (1) the abdominal pain was related to the hernia surgery and (2) the leg pain and numbness was related to the right lateral femoral cutaneous nerve involvement. Another medical report was from Dr. Paul C. Peterson, a neurosurgeon, who performed an independent medical exam and concluded there was no causal connection between the leg complaints and the prior abdominal surgery. The report of Dr. Harland Simpson indicated there was a possible lateral femoral cutaneous nerve entrapment from a hematoma.

The court also heard the oral testimony of Michael T. Galloway, a vocational consultant, who testified the employee did not have any transferable job skills and there were no employment opportunities for him.

Findings of the Trial Court

The trial court issued a written opinion finding the employee's complaints and problems were causally related to the incident at work and that the employee was totally and permanently disabled. The judgment directed that benefits be paid until the employee became 65 years of age pursuant to the provisions of Tenn. Code Ann. § 50-6-207(4)(A)(i).

After the court's decision was announced, a motion for the allowance of discretionary costs and a separate motion to amend the findings of fact were filed. The motion to amend the findings of fact sought to change the award of disability from total disability to "100 percent permanent partial disability" payable for a period of four hundred weeks. The court granted the motion for discretionary costs but denied the motion to amend expressly noting again that the employee was totally disabled pursuant to Tenn. Code Ann. § 50-6-207(4).

Issues on Appeal

The sole issue raised by the employer and insurance company is that the evidence preponderates against the finding of the trial court that the leg condition was causally related to the injury at work and/or the abdominal surgery. The employee argues the trial court should have found the disability to be permanent partial but at 100 percent and payable for a period of four hundred weeks.

Standard of Review

_____ In a workers' compensation case, the review on appeal is *de novo* accompanied by a presumption of the correctness of the findings of fact unless we find the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). Where there is conflicting medical testimony, the trial judge has discretion to conclude that the opinion of a particular expert should be accepted over that of another expert. *Thomas v. Aetna Life & Cas. Co.*, 812 S.W.2d 278 (Tenn.

1991); *Johnson v. Midwesco, Inc.*, 801 S.W.2d 804 (Tenn. 1990).

Analysis

With reference to the issue regarding the preponderance of the evidence, we find the trial court was confronted with sharp conflicting testimony on the causation question and the court chose to accept the testimony of Drs. Roberson and Bergie over the other testimony. Defendants argue this opinion evidence was speculative testimony and should not have been accepted. We have carefully reviewed the record and find that each doctor gave his or her best opinion based upon a reasonable degree of medical certainty and this evidence does not fall with the speculative testimony rule. Absolute certainty is not required. From our independent review of the record, we cannot say the evidence preponderates against the conclusion of the trial court on this issue.

The employee's contention the trial court was in error in finding the employee to be totally disabled rather than a finding of permanent partial disability is likewise without merit. This contention apparently results from the fact that the employee was 59 years of age at the time of his injury and a finding of total disability would be payable pursuant to Tenn. Code Ann. § 50-6-207(4)(A)(i) until the employee reaches the age of sixty-five (65) years. This would be a shorter period of time as compared to a finding of permanent partial disability which could be payable for a period of four hundred weeks under Tenn. Code Ann. § 50-6-242 if the employee satisfied three out of the four factors set out in the statute.

The employee testified that he was not able to work and his family physician and the vocational consultant both testified he had no employment opportunities. This evidence supports the court's finding of total disability and the remaining evidence does not preponderate against this conclusion.

Conclusion

The judgment of the trial court is affirmed in all respects. Costs of the appeal are taxed to the employer and insurance company.

ROGER E. THAYER, SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE, TENNESSEE

HAROLD LIFORD V. AFG INDUSTRIES, INC., ET AL
Hawkin County Circuit Court
No. 8452

No. E2000-001474-WC-R3-CV - Filed: June 12, 2001

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 appears 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 facts and conclusions of law are adopted and affirmed and the decision of the Panel is made the Judgment of the Court.

Costs on appeal are taxed to the defendant, AFG Industries, Inc., for which execution may issue if necessary.

06/12/01