

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
October 25, 2010 Session

WILLARD J. WATERS v. LIBERTY MUTUAL INSURANCE COMPANY

**Appeal from the Chancery Court for Polk County
No. 6528 Jerri S. Bryant, Chancellor**

No. E2010-00655-WC-R3-WC - Filed March 30, 2011

Pursuant to Tennessee Supreme Court Rule 51, this workers' compensation 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. The employee sustained a work-related injury to his back in 1988. The settlement of his claim included the right to future medical treatment. During the subsequent years, he received treatment from various physicians for his back. In 2006, his treating physician recommended a spinal fusion. His employer's insurer, Liberty Mutual, denied that the proposed surgery was necessary for the treatment of the 1988 injury. The employee filed a motion to compel the insurer to pay for the proposed surgery, which was granted by the trial court. The insurer has appealed, contending that the evidence preponderates against the trial court's decision. We affirm the decision.

Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right; Judgment of the Chancery Court Affirmed

JON KERRY BLACKWOOD, SR.J., delivered the opinion of the Court, in which GARY R. WADE, J., and WALTER C. KURTZ, SR.J., joined.

John G. Huisman, Chattanooga, Tennessee, for the appellant, Liberty Mutual Insurance Company.

Herbert A. Thornbury, Chattanooga, Tennessee, for the appellee, Willard Waters.

AMENDED MEMORANDUM OPINION

Factual and Procedural Background

Willard Waters sustained a compensable low back injury on May 25, 1988. Liberty Mutual was the employer's insurer at the time of the injury. The parties settled the claim, and the settlement was approved by the trial court in December 1991. The December 1991 order is not part of this record, but both parties agree that the approved settlement provided for lifetime medical treatment of the work injury.

Mr. Waters testified that various physicians were authorized to treat his injury over the years. He was originally treated conservatively for this injury by Dr. Paul Apyan, an orthopaedic surgeon. From 1990 until April 26, 1991, Dr. George Shelton treated Mr. Waters. Thereafter, Dr. George Seiters treated Mr. Waters until his retirement in 1997. In 2000, Dr. Craig Humphreys, an orthopaedic surgeon, was authorized to provide treatment for Mr. Waters. Mr. Waters was seen intermittently by Dr. Humphreys over the next several years. Mr. Waters consistently complained of lower back pain. In May 2006, Dr. Humphreys recommended a surgical fusion of the L3, L4, L5 and S1 vertebrae in an effort to alleviate Mr. Waters's pain. However, Mr. Waters developed a brain tumor and the proposed fusion was postponed. In 2008, Mr. Waters's condition had improved sufficiently to proceed with the proposed spinal fusion. Liberty Mutual, however, declined to approve the procedure. Mr. Waters thereafter filed a motion seeking an order requiring Liberty Mutual to approve the procedure.

The medical evidence at trial consisted of the depositions of Dr. Humphreys, the treating physician, and Dr. Timothy Strait, a neurosurgeon who conducted an independent medical evaluation at Liberty Mutual's request. Dr. Humphreys testified that in 2004, during his course of treatment of Mr. Waters, he ordered an MRI. The MRI revealed some disc bulging, but no evidence of narrowing that would be consistent with degenerative changes in the lumbar spine. Dr. Humphreys also ordered a series of discograms, which is a procedure wherein dye is injected into the patient's vertebral discs for the purpose of attempting to determine if pain is caused by an injured disc. These discograms revealed damaged discs at the L3-4 and L5-S1 levels. Dr. Humphreys expressed the opinion that Mr. Waters's 1988 work injury had accelerated the natural degenerative process in his spine, and that his treatment, as well as the proposed surgery, were related to his 1988 work injury. Dr. Humphreys explained his opinions at length, and made it clear that he considered the matter to be close:

I think this injury played a role in all of this because I think [Mr. Waters has] been consistent and you may have data that makes me look like an idiot. I'm happy to accept that and look at it openly. But I will tell you I think that a part of this was his injury that necessarily progressed, but part of it was the injury, and on top of that, a natural progression. So the honest answer, it's both.

Medical records of various physicians who treated Mr. Waters over the years were attached as exhibits to the deposition of Dr. Strait. These medical records indicated that Mr. Waters last saw Dr. Shelton on April 1, 1991. He began his treatment with Dr. Humphreys in August 2000. There are no records of any treatment of Mr. Waters's back during the interim. However, both Mr. Waters and his wife testified that Dr. Seiders was authorized to treat Mr. Waters until 1997, when Dr. Seiders retired. This testimony was unrefuted. Additionally, Mr. Waters introduced a spreadsheet from Liberty Mutual that indicated payments were made for medical treatment each year from 1995 through 1999.

Dr. Strait examined Mr. Waters at the request of Liberty Mutual on April 21, 2009. Dr. Strait opined that Mr. Waters's back problem was degenerative disc disease and not related to the 1988 injury. Dr. Strait stated, "There's really no science, that I know of, that indicates just because someone has a lumbar strain that they're more likely to have problems in the future." Dr. Strait further opined that the spinal fusion proposed by Dr. Humphreys held "very little promise in providing [Mr. Waters] any significant relief to his chronic pain syndrome." Dr. Strait also testified that there were "no evidence based studies that indicate that discograms are reliable in terms of identifying pain generators." Dr. Strait believed Dr. Humphreys's reliance upon these discograms to be "precarious." Consistent with Dr. Humphreys's findings, Dr. Strait found no evidence of radiculopathy.

A hearing was conducted by the trial court on December 16, 2009. At the conclusion of the hearing, the trial court accredited the testimony of Dr. Humphreys that the proposed surgery was causally related to the work injury of 1988 and ordered Liberty Mutual to approve it. The trial court further found that the surgery was medically necessary to treat Mr. Waters's injury. A second hearing occurred on March 12, 2010, wherein the trial court ordered Liberty Mutual to pay for medications certified by Dr. Humphreys to be related to Mr. Waters's injury. Liberty Mutual has appealed the trial court's findings accrediting Dr. Humphreys's opinion that the proposed surgery is causally related to Mr. Waters's previous injury and that the surgery is medically necessary.

Standard of Review

In Tennessee workers' compensation cases, review of the trial court's findings of fact is *de novo* accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2008); Wilhelm v. Krogers, 235 S.W.3d 122, 126 (Tenn. 2007). "This standard of review requires us to examine in depth, a trial court's factual findings and conclusions." Galloway v. Memphis Drum Serv., 822 S.W.2d 584, 586 (Tenn. 1991). Having seen and heard the in-court testimony, the trial court is entitled to considerable deference to its factual findings as

to credibility or its assessment of the weight to be given the testimony. Trosper v. Armstrong Woods Prods., Inc., 273 S.W.3d 598, 604 (Tenn. 2008); Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). The same deference need not be afforded findings based upon documentary evidence, such as depositions. Glisson v. Mohon Int'l, Inc./Campbell Ray, 185 S.W.3d 348, 353 (Tenn. 2006). On questions of law, our standard is *de novo* with no presumption of correctness. Wilhelm, 235 S.W.3d at 126 (citing Perrin v. Gaylord Entm't Co., 120 S.W.3d 823, 826 (Tenn. 2003)). “Although workers’ compensation law must be construed liberally in favor of an injured employee, it is the employee’s burden to prove causation by a preponderance of the evidence.” Crew v. First Source Furniture Grp., 259 S.W.3d 656, 664 (Tenn. 2008).

Analysis

(1) *Causation*

Liberty Mutual argues that the trial court erred by accrediting the testimony of Dr. Humphreys rather than that of Dr. Strait concerning the causal relationship between Mr. Waters’s 1988 back injury and his current condition. Liberty Mutual describes Dr. Humphreys’s testimony as “internally inconsistent and biased due to non-medical factors.” In support of this contention, Liberty Mutual points out that Dr. Humphreys relied substantially upon Mr. Waters’s subjective reports of his chronic lower back pain from the time of the original injury to the present. Liberty Mutual argues that Mr. Waters reported that he was doing fairly well from December 2001 until August 2003. Liberty Mutual also notes Dr. Strait’s testimony that discograms are not reliable as a diagnostic tool. Further, Liberty Mutual contends that Mr. Waters’s current condition is one of degenerative arthritis and nothing more.

The supporting evidence is consistent with Dr. Humphreys’s testimony that Mr. Waters’s symptoms continued from the original injury until surgery was recommended. Mr. Waters’s testimony indicated that he has been treated throughout this period of time for his chronic back pain, and Liberty Mutual’s payment records support that testimony. Dr. Humphreys found that Mr. Waters was reliable in his description of his symptoms and did not exaggerate his pain. Finally, Dr. Humphreys maintained throughout his testimony that the 1988 injury was a component of Mr. Waters’s present condition.

Liberty Mutual also argues that Dr. Humphreys’s opinion was biased and based on non-medical factors. Liberty Mutual’s basis for this argument is the following testimony of Dr. Humphreys:

I realize if I agree with [Liberty Mutual’s attorney], [Mr. Waters is] totally out,

which I don't think is fair. I don't think if completely, there's a degenerative component either. Because I think the injury did have to do with this. I mean, because he's been seeing me for eight years due to that injury.

After a thorough review of Dr. Humphreys's deposition, we conclude that the reference that Mr. Waters would be "totally out" is not sufficient to support an inference of bias. There is no other evidence in the record to substantiate Liberty Mutual's argument on this issue. Dr. Humphreys's testimony, viewed as a whole, appears to be a sober assessment and analysis of Mr. Waters's condition based upon his years of treatment. Dr. Humphreys was candid in recognizing the difficulty of this case given the time span from the date of injury to the present. Based upon the record as a whole, we are unable to conclude that the evidence preponderates against the trial court's finding that the surgery proposed by Dr. Humphreys was causally related to the 1988 work injury.

(2) Medical Necessity

Liberty Mutual argues that the Dr. Humphreys's recommendation of a three-level spinal fusion was based upon the results of the discograms that Dr. Strait considered to be unreliable. Dr. Humphreys conceded that the proposed surgery may not alleviate Mr. Waters's symptoms, but testified that it is a reasonable risk in light of the duration and intensity of his symptoms. Additionally, Dr. Humphreys opined that if the surgery was not tiered, further surgery might be required. As with the issue of causation, resolution of this issue depends on the relative weight of the testimony of the two physicians. We conclude that the record does not preponderate against the trial court's finding that the proposed surgery is medically necessary.

Conclusion

The judgment of the trial court is affirmed. The case is remanded to the trial court for assessment of attorney's fees pursuant to Tennessee Code Annotated section 50-6-204(b)(2). Costs are taxed to Liberty Mutual Insurance Company and its surety, for which execution may issue.

JON KERRY BLACKWOOD, SENIOR JUDGE

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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 are taxed to Liberty Mutual Insurance Company and its surety, for which execution may issue.

IT IS SO ORDERED.

PER CURIAM