IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT NASHVILLE

(October 22, 1996 Session)

ROBERT E. LIVELY, Plaintiff/Appellant, VS. TEXTRON AEROSTRUCTURES, A Division of Avco Corporation, Defendant/Appellee.	)))))))))))	RUTHERFORD CHANCERY Hon. Robert E. Corlew, III, Chancellor No. 01S01-9604-CH-00070

For the Appellant:

Christopher K. Thompson
Murfreesboro, Tennessee

For the Appellee:

John J. Hancock
Tracy Shaw
HOWELL & FISHER
Nashville, Tennessee

MEMORANDUM OPINION

Members of Panel:

Frank F. Drowota, III, Associate Justice, Supreme Court
Robert S. Brandt, Senior Judge
Joe C. Loser, Jr., Special Judge

AFFIRMED

Brandt, Judge

MEMORANDUM OPINION

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 of findings of fact and conclusions of law.

The plaintiff appeals from the trial court's finding that the permanent impairment did not result from 1992 injuries at Textron Aerostructures. Finding no error in the trial court's decision, we affirm.

Dr. Wesley Coker started treating the plaintiff in March 1994 for herniated discs that were causing nerve root pressure. The plaintiff was in bad shape when he first saw him, according to Coker, as he had to be helped into the doctor's office and told the doctor about two months of excruciating pain. After switching to the care of a chiropractor, the plaintiff returned to Coker who performed surgery in June 1994. Dr. Coker testified that the plaintiff suffers a 13% whole body impairment. But Dr. Coker did not offer any testimony about what caused the plaintiff's back trouble.

The issue in this case is whether the plaintiff established by a preponderance of the evidence that his impairment resulted from two injuries at Textron, one on March 5, 1992 and another on October 3, 1992. The trial court decided that the plaintiff did not prove his case, and there is ample evidence to support the decision.

The plaintiff and his wife were injured in a car wreck on the way to work on the morning of February 10, 1994. The plaintiff had worked regularly before the accident, but did not work any after it. This tends to suggest that the car wreck, not the injuries years earlier, caused the back trouble Dr. Coker treated.

The plaintiff called Textron following the wreck to report that he was not coming to work. The reason, he said, was that he slipped a disc in his back while

driving to work. The plaintiff's wife worked at Textron, too, and she also called in saying her back hurt as a result of the car wreck.

The plaintiff applied for sickness and accident benefits for the back injury he said he sustained in the wreck. He certified that he did not injure himself at work and that the injury did not arise out of the employment. Receipt of those benefits and the statements the plaintiff made to get them are totally contrary to his contention that the 1992 injuries caused his disability.

When the plaintiff first visited Dr. Coker, he filled out a form indicating that the onset of pain came from the car wreck. When Dr. Coker compared the results of a December 1992 MRI with the one he ordered in March 1994 - that is, an MRI after the 1992 work injuries and an MRI after the 1994 wreck - the doctor found that the disc herniation that would cause nerve root compression did not appear in the first MRI as it did in the second.

Dr. David Gaw provided the only that evidence that the 1992 work incidents caused the plaintiff's back injury that Dr. Coker treated. Dr. Gaw saw the plaintiff once, in April 1995, at the request of the plaintiff's attorney. This was over three years after the first 1992 work injury. Dr. Gaw's conclusion on causation is obviously based upon the history the plaintiff gave him.

Much of what the plaintiff told the doctor turns out to be untrue. The plaintiff told Dr. Gaw he had no previous back problems until the March 1992 injury at work. In truth, he hurt his back in July 1983 and again in January 1991. The plaintiff was treated in 1992 for a back problem sustained while playing basketball. He apparently did not tell Dr. Gaw about that, either.

Dr. Gaw recollects that the plaintiff told him that he and his wife were on the way to see a doctor for treatment for the 1992 injuries when the car wreck occurred in 1994. In truth, they were on their way to work. The plaintiff did not tell Dr. Gaw that he worked between the 1992 incidents and the 1994 wreck and did not tell Dr. Gaw that he started missing work after the wreck. Dr. Gaw based

his causation conclusion in part upon his assumption, incorrect it turns out, that the plaintiff did not seek any medical treatment for the car wreck.

Moreover, when asked about a note from another doctor who treated the plaintiff following the 1992 injuries, Dr. Gaw testified that it would appear that the plaintiff had recovered from the 1992 back injuries.

The plaintiff saw his family physician, Gary Schwartz, following the February 1994 car wreck, and their is nothing in Dr. Schwartz's notes indicting any complaint about back problems related to employment. Schwartz sent the plaintiff to Coker. Dr. Schwartz saw the plaintiff before that off and on for a year, and the only complaint of back pain came from moving.

And, finally, there is the timing of the suit. The plaintiff did not make a claim for workers compensation until 1994 - after the wreck.

Review by this Court is de novo, accompanied by a presumption of correctness of the findings of the trial court, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). The preponderance of the evidence supports the trial court's decision. We affirm the decision at the plaintiff's costs.

_____
Robert S. Brandt, Judge

CONCUR:

_____
Frank F. Drowota, III, Associate Justice

_____
Joe C. Loser, Jr., Judge

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

ROBERT E. LIVELY,	}	*RUTHERFORD CHANCERY*
	}	*No. 94WC-314 Below*
Plaintiff/Appellant	}	
	}	*Hon. Robert E. Corlew, III,*
vs.	}	*Chancellor*
	}	
TEXTRON AEROSTRUCTURES,	}	*No. 01S01-9604-CH-00070*
A Division of Avco Corporation,	}	
	}	
Defendant/Appellee	}	*AFFIRMED.*

JUDGMENT ORDER

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 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 paid by Plaintiff/Appellant and Surety for which execution may issue if necessary.

IT IS SO ORDERED on January 17, 1997.

PER CURIAM