

NO. COA99-1475

NORTH CAROLINA COURT OF APPEALS

Filed: 29 December 2000

MORRIS YOUNG,

Employee, Plaintiff

v.

From North Carolina
Industrial Commission
I.C. No. 004933

P.H. GLATFELTER COMPANY,

Employer,

NATIONAL UNION FIRE INS. CO.,

Carrier,

and

AIG CLAIM SERVICES, INC.,

Servicing Agent, Defendants

Appeal by plaintiff from order of the Industrial Commission entered 13 July 1999 by Commissioner Renée C. Riggsbee. Heard in the Court of Appeals 18 October 2000.

Ganly, Ramer & Strom, by Thomas F. Ramer, for the plaintiff-appellant.

Teague, Campbell, Dennis & Gorham, L.L.P., by Dayle A. Flammia, for the defendants-appellees.

WYNN, Judge.

Morris Young appeals from an order of the North Carolina Industrial Commission affirming that Mr. Young had not experienced a change in condition after 29 September 1992 regarding his work-related foot injury.

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OF NORTH CAROLINA

P.H. Glatfelter Company employed Mr. Young as a winding machine operator for over 12 years. While performing his duties on 24 April 1989, a roll of paper rolled and crushed Mr. Young's left foot against the winding machine. Since that time, Mr. Young has suffered varying degrees of pain and discomfort in his left foot.

Before that foot injury, Mr. Young suffered from lower-back problems for which he had undergone surgery. In November 1989, Mr. Young again began suffering lower-back pain and discomfort. A year later, he underwent further back surgery. Despite his foot injury, as well as back pain, Mr. Young continued to work up until 2 January 1990, when he was medically released from work. Mr. Young repeatedly visited various doctors to treat the pain and discomfort that he experienced in his left foot as well as his lower back.

On 29 May 1992, Deputy Commissioner Richard B. Ford entered an Opinion and Award concluding that Mr. Young suffered a compensable injury to his left foot on 24 April 1989; but, he did not sustain a compensable back injury on the same date. Deputy Commissioner Ford further concluded that Mr. Young reached maximum medical improvement regarding his left foot "certainly by September 10, 1990." Furthermore, Deputy Commissioner Ford found that Mr. Young had been fully compensated for temporary total disability compensation benefits for his left foot injury, and that Mr. Young was entitled to a determination with respect to any permanent partial disability of his left foot. Deputy Commissioner Ford also found that the condition of Mr. Young's left foot and the pain that he experienced as a result of the 24 April 1989 work-related

accident did not, in and of itself, render Mr. Young disabled and unable to return to work. Mr. Young did not appeal from Deputy Commissioner Ford's 29 May 1992 Opinion and Award. Following that opinion, Mr. Young continued to seek medical treatment from various doctors for his lower back and foot problems.

Later, Mr. Young requested an additional hearing on the issue of whether he had sustained a change in his condition after the 29 May 1992 Opinion and Award. On 6 March 1998, Deputy Commissioner Kim L. Cramer filed an Opinion and Award finding that Mr. Young reached maximum medical improvement as to his left foot injury on 29 September 1992, and that Mr. Young's foot condition had not changed since that time. Therefore, Deputy Commissioner Cramer concluded that Mr. Young was not entitled to any further benefits pursuant to N.C. Gen. Stat. § 97-47; that Mr. Young retained a fifteen percent permanent impairment to his left foot as a result of the 24 April 1989 accident, for which he was entitled to compensation pursuant to N.C. Gen. Stat. § 97-31(14); and, that the defendants were responsible for providing ongoing medical treatment to Mr. Young as reasonably necessary to effect a cure or provide relief regarding his foot injury.

The Full Commission affirmed the 6 March 1998 Opinion and Award by Deputy Commissioner Cramer, with Commissioner Thomas J. Bolch dissenting. Mr. Young now appeals to us, contending in his first issue that the Commission erred in failing to find that he experienced a change in condition between 10 September 1990 and 29 September 1992.

In reviewing an opinion and award of the Industrial Commission, this Court's review is limited to two questions: (1) whether the Commission's findings of fact are supported by competent evidence in the record, and (2) whether the Commission's conclusions of law are supported by its findings of fact. *Hardin v. Motor Panels, Inc.*, 136 N.C. App. 351, 353, 524 S.E.2d 368, 371, *disc. review denied*, 351 N.C. 473, ___ S.E.2d ___ (2000) (citation omitted). As such, this Court must accept the Commission's findings of fact as conclusive on appeal if they are supported by any competent evidence, even though evidence may exist that would support a contrary finding. *Id.*; *Timmons v. North Carolina Dep't of Transp.*, 351 N.C. 177, 182, 522 S.E.2d 62, 65 (1999). We must therefore determine whether there is any competent evidence in the record to support the Commission's findings of fact in its 13 July 1999 Opinion and Award, and whether those findings of fact support the Commission's resulting conclusions of law.

The Commission's conclusions of law state that Mr. Young's condition remains unchanged since he reached maximum medical improvement in September 1992 regarding his foot injury. The Commission, however, did not render a specific conclusion of law addressing whether Mr. Young suffered a change of condition between September 1990 and September 1992, nor is this particular issue specifically addressed in the Commission's findings of fact.

However, the Commission's Opinion and Award specifically incorporates by reference the 29 May 1992 Opinion and Award entered by Deputy Commissioner Ford. Deputy Commissioner Ford's Opinion

and Award includes various stipulations by the parties, including a stipulation "that temporary total disability compensation benefits were paid from January 2, 1990 to September 10, 1990 that there was no disability prior to January 2, 1990 and a Form 24 was approved on September 10, 1990, which is stipulated into the record." The Industrial Commission approved a Form 24 application--"Application of Employer or Insurance Carrier to Stop Payment of Compensation"--on 10 September 1990 on grounds that Mr. Young had been medically cleared to return to regular work. Mr. Young did not appeal from that approval. Deputy Commissioner Ford also found that:

7. . . . [S]ince April 24, 1989, the plaintiff has continuously had pain and discomfort in his left foot and although he worked until he was medically taken out of work on January 2, 1990 he was not without pain with respect to his said left foot.

. . . .

10. Although the pain which the plaintiff suffers as a result of his low back condition is not related to the April 24, 1989 incident, the left foot pain which has been ongoing since said date of April 24, 1989 and is the result of the incident occurring on said date in combination with said back pain renders him disabled and unable to return to work.

11. The condition of the plaintiff's left foot and the pain which he experiences in connection therewith which result from the incident on April 24, 1989 does not in and of itself render him disabled and unable to return to work; in fact, the plaintiff was able to return to work with his foot condition from April 24, 1989 to January 2, 1990, when he medically was released from work.

. . . .

13. The plaintiff reached maximum medical improvement with respect to his left foot certainly by September 10, 1990 and the undersigned so finds.

Deputy Commissioner Ford did not make any relevant conclusions of law regarding the maximum medical improvement of the plaintiff's left foot; and, as previously noted, Mr. Young did not appeal from this Opinion and Award.

As to the 6 March 1998 Opinion and Award, Deputy Commissioner Cramer stated that the case was being heard "on the issues of any permanent injury to Plaintiff's left foot, and an alleged change of condition." Deputy Commissioner Cramer allowed the parties to present deposition testimony from Dr. Robert F. Eaton and Dr. Robert B. Anderson, two of Mr. Young's treating physicians. After presentation of the evidence, Deputy Commissioner Cramer entered her Opinion and Award, incorporating the 29 May 1992 Opinion and Award by reference, and finding that:

2. . . . By October 27, 1992, Dr. Francis found Plaintiff to be at maximum medical improvement with a ten percent permanent impairment to his left foot.

3. Around May, 1991, due to Plaintiff's ongoing foot complaints, Dr. Eaton referred Plaintiff to Dr. Robert Anderson, who specializes more in foot injuries. . . . On September 29, 1992, Dr. Anderson was of the opinion that Plaintiff had reached maximum medical improvement. He released Plaintiff from his care with a fifteen percent permanent impairment to his left foot due to his chronic left ankle pain from his crush injury.

. . . .

4. . . . Although Plaintiff's symptoms have persisted over the years, flaring up and then subsiding, the condition of his left foot has

not changed since 1992. He has neither improved nor worsened, and his functional limitations remain the same.

5. Dr. Anderson treated Plaintiff with injections, which gave him some temporary pain relief. Plaintiff has also been fitted with appropriate shoes. On July 17, 1995, Dr. Anderson noted that, with the use of accomodative footwear, Plaintiff should be able to continue in his former position as a paper plant worker. Dr. Anderson noted Plaintiff could stand for two hours, and then rest for about twenty minutes.

. . . .

7. Plaintiff reached maximum medical improvement from his left foot injury as of September 29, 1992, and his foot condition has not changed since that time. As a result of his accident, Plaintiff has sustained a fifteen percent permanent impairment to his left foot.

Deputy Commissioner Cramer also made the following relevant conclusions of law:

2. As of September 29, 1992, Plaintiff has reached maximum medical improvement with regard to his compensable left foot injury sustained on April 24, 1989. Plaintiff retains a fifteen percent permanent impairment to his left foot as a result of that injury, for which he is entitled to compensation pursuant to N.C. Gen. Stat. § 97-31(14).

3. Plaintiff's condition has not changed since he reached maximum medical improvement in September, 1992, and Plaintiff is not entitled to any further benefits under N.C. Gen. Stat. § 97-47.

Deputy Commissioner Cramer did not make any relevant findings of fact regarding any alleged change in Mr. Young's condition between 10 September 1990 and 29 September 1992.

Moreover, the findings of fact and conclusions of law entered

by the Commission are virtually identical to the findings of fact and conclusions of law in Deputy Commissioner Cramer's 6 March 1998 Opinion and Award. Again, nowhere has the Commission specifically addressed the issue raised by Mr. Young in his first assignment of error on appeal: Whether he experienced a change in his condition between 10 September 1990 (by which date Deputy Commissioner Ford found that the plaintiff had reached maximum medical improvement) and 29 September 1992 (by which date Deputy Commissioner Cramer concluded that the plaintiff had reached maximum medical improvement). Because we are unable to determine the Commission's intent regarding Mr. Young's first assignment of error, we remand this matter to the Commission for clarification and such further findings of fact and conclusions of law as the Commission may deem proper on this issue.

Mr. Young next argues that the Commission failed to conclude as a matter of law that he had undergone a change of condition regarding his disability because he suffered a diminished earning capacity and ability to secure work. Insofar as this assignment of error relates to the period of time from September 1990 to September 1992, as above, we remand to the Commission for findings of fact and conclusions of law relevant to whether Mr. Young experienced a change of condition during such time period. Regarding Mr. Young's condition subsequent to 29 September 1992, we find that the Commission did not commit error in concluding that his condition had not changed since September 1992.

N.C. Gen. Stat. § 97-47 provides that the Industrial

Commission may review a previous award of workers' compensation benefits on the grounds of a change in condition. N.C. Gen. Stat. § 97-47 (1991). A change in the claimant's condition since the previous final award of compensation provides the only recognized grounds for modifying a final award of compensation under the Workers' Compensation Act. *Watkins v. Central Motor Lines*, 10 N.C. App. 486, 491, 179 S.E.2d 130, 134, rev'd on other grounds, 279 N.C. 132, 181 S.E.2d 588 (1971); *Murray v. Nebel Knitting Co.*, 214 N.C. 437, 199 S.E. 609 (1938). A change in condition can consist of any of the following: A change in the physical condition of the claimant affecting his earning capacity, a change in the claimant's earning capacity regardless of a change in his physical condition, or a change in the degree of the claimant's disability although his physical condition may remain unchanged. *Blair v. American Television & Communications Corp.*, 124 N.C. App. 420, 423, 477 S.E.2d 190, 192 (1996) (citations omitted). This Court has often focused on the claimant's physical capacity to earn wages in reviewing whether a claimant has experienced a change in condition under N.C. Gen. Stat. § 97-47. See *Grantham v. R.G. Barry Corp.*, 127 N.C. App. 529, 491 S.E.2d 678 (1997), disc. review denied, 347 N.C. 671, 500 S.E.2d 86 (1998); *Dinkins v. Federal Paper Bd. Co., Inc.*, 120 N.C. App. 192, 461 S.E.2d 909 (1995); *Lucas v. Bunn Mfg. Co.*, 90 N.C. App. 401, 368 S.E.2d 386 (1988).

We have also held that the change in claimant's condition must be actual and substantial, and may not be based upon a mere change of opinion regarding the claimant's preexisting condition. *Edwards*

v. Smith & Sons, 49 N.C. App. 191, 192-93, 270 S.E.2d 569, 570 (1980), *disc. review denied*, 301 N.C. 720, 274 S.E.2d 228 (1981). A change in a treating physician's opinion regarding the claimant's degree of permanent partial disability, absent an actual intervening deterioration of the claimant's physical condition, is not evidence of a change in condition. *McLean v. Roadway Express, Inc.*, 307 N.C. 99, 103, 296 S.E.2d 456, 459 (1982). Furthermore, a discrepancy between two treating physicians' percentage disability ratings for a claimant is not evidence of a change in condition, when the discrepancy is based solely on a difference of opinion. *See Crump v. Independence Nissan*, 112 N.C. App. 587, 436 S.E.2d 589 (1993).

The Commission found that Mr. Young was diagnosed by Dr. Francis on 27 October 1992 to be at maximum medical improvement with a ten percent permanent impairment to his left foot. Following several visits to Dr. Anderson, Mr. Young was diagnosed on 29 September 1992 to be at maximum medical improvement with a fifteen percent permanent left foot impairment. The Commission found that Mr. Young's condition remained unchanged since 1992, and that his functional limitations also remained the same. We find that the Commission's findings were supported by ample competent evidence, as both Dr. Eaton and Dr. Anderson, each of whom treated Mr. Young on multiple occasions over an extended time period, stated in their depositions that Mr. Young's condition, and his symptoms, had remained largely the same since September 1992. We hold that the Commission's findings support its conclusion that Mr.

Young did not experience a change in condition between 1992 and 1995.

The Commission's 13 July 1999 Opinion and Award is therefore Affirmed in part, remanded in part.

Judges LEWIS and HUNTER concur.

Report per Rule 30(e).