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NO. COA03-415

NORTH CAROLINA COURT OF APPEALS

Filed: 04 May 2004

JOE L. ANDERSON,  
Employee,  
Plaintiff,

v.

North Carolina Industrial Commission  
I.C. File Nos. 014208, 977407, & 983955

N.C. DEPARTMENT OF  
TRANSPORTATION,  
Employer,  
Self-Insured,  
Defendant.

Appeal by defendant from opinion and award entered 20 December 2002 by the North Carolina Industrial Commission. Heard in the Court of Appeals 15 January 2004.

*David Gantt for plaintiff-appellee.*

*Roy Cooper, Attorney General, by Donna B. Wojcik, Assistant Attorney General, for the State.*

STEELMAN, Judge.

Defendant, the North Carolina Department of Transportation, appeals an opinion and award concluding that plaintiff, Joe L. Anderson, is permanently and totally disabled and awarding him medical treatment. For the reasons discussed herein, we affirm the determination of the Industrial Commission (Commission).

In case 983955, on 27 September 1999, defendant-employee, by filing I.C. Form 19, reported an injury to plaintiff's left foot, which occurred on 15 September 1997, when a paint

barrel slipped and struck his foot. In case 014208, plaintiff filed a notice of accident (I.C. Form 18) dated 22 February 2000, alleging he injured his back on 28 April 1999 while moving fifty pound bags of material. In case 977407, by filing I.C. Form 19, defendant-employer reported an injury to plaintiff's back, which occurred on 6 October 1999 while plaintiff was lifting a barrel. Defendant denied plaintiff's claims regarding the 15 September 1997 and 28 April 1999 injuries. Defendant stipulated that plaintiff sustained an injury by accident on 6 October 1999, but contends there were no compensable consequences as a result of this injury. Defendant retired from the employ of the State on 1 December 1999. These three cases were consolidated for hearing on 16 January 2001.

On 20 December 2002, the Full Commission entered an Opinion and Award finding that: (1) plaintiff was fifty-five years old and functionally illiterate; (2) plaintiff suffered from preexisting, unrelated conditions such as diabetes, hypertension, high cholesterol, heart problems, and a speech impediment due to an unrepaired cleft palate; (3) at the time of the injuries, plaintiff had been working as a transportation worker; (4) plaintiff first reported an injury to his foot to Dr. Kristi Schleder on 9 June 1999, although the incident occurred on 15 September 1997; (5) Drs. Schleder and Milch both concluded plaintiff's problems with his left foot began in 1999 and were not related to any trauma, but stemmed from the normal aging process; (6) plaintiff had injured his back occasionally during his lifetime; (7) plaintiff was able to continue working despite these prior back injuries; (8) an MRI was performed on plaintiff in 1999, which led Dr. Schleder to diagnose degenerative disc disease and facet arthropathy; (9) the medical evidence corroborated that plaintiff developed back pain after lifting and moving bags or barrels on 28 April 1999; (10) plaintiff did not miss any significant time from work after the 28 April 1999 incident; (11) after plaintiff's 6 October 1999 injury, his diagnoses of degenerative

disc disease and facet arthropathy did not change; (10) plaintiff has been permanently restricted to light to medium duty work, with rare to occasional lifting of thirty to forty pounds; (12) plaintiff stopped working on 21 October 1999 due to his back pain and took sick and vacation leave until he retired on 1 December 1999; (12) an MRI taken in 2000 showed no need for surgical intervention; and (13) Dr. David diagnosed an exacerbation of previous degenerative changes in plaintiff's spine, and assigned a 3% permanent partial rating to plaintiff's spine.

The Full Commission concluded that: (1) plaintiff did not sustain a compensable injury by accident to his left foot on 15 September 1997, nor to his back on 28 April 1999; (2) plaintiff sustained a compensable injury by accident to his back on 6 October 1999, which materially aggravated his preexisting back condition; and (3) plaintiff was permanently and totally disabled. Defendant appeals.

Our review of an award by the Industrial Commission is limited to: (1) whether there was competent evidence before the Commission to support its findings; and (2) whether such findings support its legal conclusions. *Lewis v. Orkland Corp.*, 147 N.C. App. 742, 744, 556 S.E.2d 685, 687 (2001). Findings of fact from an opinion and award of the Commission, if supported, are deemed conclusive, even if there is evidence that would support findings to the contrary. *Id.* On appeal, this Court “does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court’s duty goes no further than to determine whether the record contains any evidence tending to support the finding.” *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (citations omitted). “The evidence tending to support plaintiff’s claim is to be viewed in the light most favorable to plaintiff, and plaintiff is entitled to the benefit of every reasonable inference to be drawn from the evidence.” *Id.*

In its first assignment of error, defendant argues the Commission erred by finding and concluding that plaintiff was permanently and totally disabled as a result of the 6 October 1999 injury. We disagree.

In order for the Industrial Commission to find that an employee is “permanently and totally disabled,” the employee bears the burden of demonstrating he is “*totally incapable of earning wages.*” *Demery v. Converse, Inc.*, 138 N.C. App. 243, 250, 530 S.E.2d 871, 876 (2000) (emphasis in original). A compensable back injury is defined by statute in N.C. Gen. Stat. §97-2(6), which states that where an employee injures their back during the course of employment and such injury “is the direct result of a specific traumatic incident of the work assigned, ‘injury by accident’ shall be construed to include any disabling physical injury to the back arising out of and causally related to such incident.” N.C. Gen. Stat. §97-2(6) (2003). “When a pre-existing, non-disabling, non-job-related condition is aggravated or accelerated by an accidental injury arising out of and in the course of employment...so that disability results, then the employer must compensate the employee for the entire resulting disability” even though the average person would not have been impaired to that extent. *Hoyle v. Carolina Associated Mills*, 122 N.C. App. 462, 466, 470 S.E.2d 357, 359 (1996) (internal quotations omitted) (citations omitted). Here, plaintiff had pre-existing degenerative disc disease and facet arthropathy, pre-existing conditions which were aggravated by the injury he sustained at work, thus resulting in a compensable injury.

In the present case, there was ample evidence plaintiff has serious back pain. He testified he cannot walk far or stand up for longer than thirty minutes before his back begins to hurt. Plaintiff has trouble sleeping at night due to the pain and must spend a significant amount of time during the day reclining. Plaintiff is unable to take pain medication because of his diabetes.

Dr. Schleder, plaintiff's family physician, testified plaintiff was employable, but only in a different position. She stated plaintiff could not return to "labor-type work" in the future, but he "should be confined to light medium to medium work... 30 to 40 pounds of lifting occasionally; 15 to 20 pounds he could do more frequently; and...6 to 9 pounds constantly."

Dr. James J. Hoski, an orthopedic surgeon, testified plaintiff had a chronic back problem that would not benefit from surgery. Dr. Hoski testified plaintiff also had underlying lumbar degenerative disc disease and facet arthropathy in addition to the back pain.

Randy Adams, a vocational rehabilitation counselor, testified plaintiff wanted to work, but his back was hurting and his supervisor had encouraged him to retire. Adams also stated plaintiff had no transferable skills and was functionally illiterate. He noted difficulty understanding plaintiff due to plaintiff's "very severe cleft palate." Adams noted this was significant considering that for most of his life plaintiff had done "heavy unskilled labor-type jobs[.]" Furthermore, plaintiff scored low on intelligence testing. Adams concluded "[t]here's no way that [plaintiff] could return to work. He has no capabilities that would be accepted in competitive employment at any level."

The Full Commission found that:

12. After the injury by accident on 6 October 1999, the plaintiff's diagnoses of degenerative disc disease and facet arthropathy did not change; surgery was not warranted in the plaintiff's case at the time. In addition, the restrictions imposed as a result of the functional capacity evaluation remained in effect. The plaintiff has been permanently restricted to light to medium duty work, with rare to occasional lifting of 30-40 pounds.

13. The plaintiff's vocational situation is extraordinarily difficult. Plaintiff scored in the lowest 1 percentile on a verbal communication test given during his vocational assessment. Furthermore, plaintiff has difficulty spelling his own name and cannot speak understandably due to an unrepaired cleft pallet.

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17. As a result of the material aggravation on 6 October 1999 of his preexisting, previously nondisabling back condition, the plaintiff is unable to return to work in his preinjury job with the defendant. Furthermore, due to the material aggravation on 6 October 1999 of his preexisting, previously nondisabling back condition, and taking into account the plaintiff's age, education, previous employment history of only manual labor work, his lack of transferable skills, and his other medical conditions, the plaintiff is unable to return to work in any capacity in the competitive labor market.

The Commission concluded that plaintiff's retirement did not effect his ability to collect workers' compensation benefits under the holding of *Troutman v. White & Simpson, Inc.*, 121 N.C. App. 48, 464 S.E.2d 481 (1995). The Commission awarded plaintiff permanent total disability at the weekly rate of \$337.93 from 22 October 1999 for the remainder of his lifetime or until there is a change of condition. We hold that there was competent evidence before the Commission to support its findings and the findings, in turn, support the conclusions of law.

To complete our analysis of this assignment of error we also address defendant's objection to the full commission's finding of a compensable injury where defendant asserts the doctor's testimony was insufficient as to medical causation. The North Carolina Supreme Court has stated that "only an expert can give competent opinion evidence as to the cause of the injury" where the issue of causation is complicated. *Holley v. ACTS, Inc.*, 357 N.C. 228, 232, 581 S.E.2d 750, 753 (2003). The opinion testimony presented cannot be based solely on "speculation or conjecture." *Id.* If it were, it would not be, "sufficiently reliable to qualify as competent evidence on issues of medical causation." *Id.* To be sufficient, the expert's opinion testimony must "take the case out of the realm of conjecture and remote possibility...." *Id.* However, just because a physician's opinion is based wholly or in part on statements made to him by the patient in the

course of treatment or examination, such opinion will not be forfeited as entirely incompetent. *Penland v. Bird Coal Co.*, 246 N.C. 26, 31, 97 S.E.2d 432, 436 (1957).

In this case, the medical testimony was sufficient to establish causation regarding plaintiff's back injury. Dr. David, a specialist in orthopedic spine surgery, based his medical opinion on plaintiff's medical history, statements made to Dr. David during the course of treatment, and the objective diagnostic tests he conducted, including radiographs, x-rays, and a physical examination. From these, the doctor diagnosed plaintiff as having an "exacerbation of an underlying condition related to degenerative disk disease in regard to injuries sustained 4/28/1999 and 10/6/1999." Defense counsel asked Dr. David whether he had any opinion, "to a reasonable degree of medical certainty, as to what caused the exacerbation of the degenerative changes[.]" To which Dr. David responded in the positive, that the injuries plaintiff sustained on 28 April 1999 and 6 October 1999 were the cause of the exacerbation of plaintiff's degenerative disk disease. Because there was competent evidence in the record to support the Commission's findings, we are bound by the Commission's finding of compensable injury. Accordingly, this assignment of error is without merit.

In its second assignment of error, defendant argues the Commission erred in awarding plaintiff medical treatment with Drs. Schleder and David when plaintiff did not suffer a material aggravation of his preexisting back condition on 6 October 1999. We disagree.

What treatment is appropriate for a particular employee is a matter within the exclusive jurisdiction of the Industrial Commission. *North Carolina Chiropractic Assoc. v. Aetna Casualty & Surety Co.*, 89 N.C. App. 1, 6, 365 S.E.2d 312, 315 (1988).

Under N.C. Gen. Stat. §97-25, the Industrial Commission may order treatment or rehabilitative procedures that the Commission determines in its discretion to be reasonably

necessary to effect a cure or give relief for an injured employee. *Cooke v. P.H. Glatfelter/Ecusta*, 130 N.C. App. 220, 224, 502 S.E.2d 419, 422 (1998). Future medical treatment must be provided at the employer's expense as long as it is reasonably required to effect a cure or give relief. *Id.*

As discussed above, there was competent evidence before the Commission to support its findings and conclusions. Thus, the Commission did not err in awarding medical treatment to plaintiff. This assignment of error is without merit.

AFFIRMED.

Judges HUDSON and TYSON concur.

Report per Rule 30(e).