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NO. COA02-1698

NORTH CAROLINA COURT OF APPEALS

Filed: 3 February 2004

MICHAEL H. SUTTON,
Employee-Plaintiff-Appellant,

v.

North Carolina Industrial Commission
I.C. File No. 057576

MISSION ST. JOSEPH'S HOSPITAL,
Employer/self insured
(Cambridge Integrated
Services Group, Inc.,
servicing agent)-Appellees.

Appeal by plaintiff from opinion and award filed 21 August 2002 by the North Carolina Industrial Commission. Heard in the Court of Appeals 9 October 2003.

Root & Root, P.L.L.C., by Louise Critz Root, for plaintiff-appellant.

Van Winkle, Buck, Wall, Starnes & Davis, P.A., by Allan R. Tarleton, for defendants-appellees.

McGEE, Judge.

Plaintiff worked for defendant-employer Mission St. Joseph's Hospital (St. Joseph's) as a cardiovascular technologist. On the morning of 18 July 2000, plaintiff assisted hospital personnel in moving a patient using a mechanism known as a surgi-lift. Plaintiff experienced a sharp pain in his lower back radiating into his left leg. Plaintiff worked for the remainder of that day and the following day.

Plaintiff experienced difficulty getting up on 20 July 2000 and went to St. Joseph's emergency room complaining of increasing pain and spasms in his lower back. Plaintiff requested that the emergency room physician contact Dr. Cleveland Thompson (Dr. Thompson), an anesthesiologist and pain specialist who had been treating plaintiff since October 1999, following cervical disc surgery in June 1999. Dr. Thompson was unable to see plaintiff, but a referral was made for plaintiff to see Dr. Paul Saenger (Dr. Saenger), an orthopedic surgeon. Dr. Saenger noted, during plaintiff's examination on 20 July 2000, plaintiff's extensive history of back trouble and in particular that plaintiff had been experiencing three months of significant pain in his lower back extending into his left lower extremity. Dr. Saenger referred plaintiff to Dr. Stephen David (Dr. David).

Dr. David, an orthopaedic spine surgeon, saw plaintiff on 21 July 2000 and reviewed plaintiff's myelogram and CAT scan of 29 May 2000. Dr. David suggested plaintiff return to Dr. Thompson for management of his chronic pain. Dr. David released plaintiff to return to work with restrictions on the scope of his duties; however, plaintiff did not return to work.

Plaintiff saw Dr. David again on 1 August 2000 and reported that he was experiencing pain in his back and leg, which prevented him from working. Dr. David exempted plaintiff from work pending the results of a scheduled MRI examination. After reviewing the results of the MRI examination and plaintiff's medical history, Dr. David wrote to St. Joseph's workers' compensation administrator on 21 September 2000 stating that he believed plaintiff was capable of driving to work. Plaintiff had previously explained he was unable to get to work due to the pain in his back. Dr. David wrote that, in his opinion, plaintiff's subjective complaints "appeared to be mostly similar to that documented before his occurrence on July 1[8]th. There is obvious understandable fluctuation in his level of symptoms, which is typical of his diagnosis."

In June 2000, Dr. Thompson had stopped providing medical management to chronic pain patients and on 27 July 2000 plaintiff began to see Dr. Lesco Rogers (Dr. Rogers). Dr. Rogers continued plaintiff's medications throughout the summer and fall of 2000. In addition, plaintiff saw Dr. Keith Maxwell (Dr. Maxwell), the spine surgeon who had performed plaintiff's cervical disk surgery in June 1999. Dr. Maxwell ordered a discogram procedure on 19 December 2000. Based on plaintiff's history and the findings of the discogram, Dr. Maxwell performed an anterior discectomy and a fusion utilizing BAK cages on 29 January 2001. Plaintiff developed increased back and leg pain following surgery.

Plaintiff filed a claim with the North Carolina Industrial Commission in August 2000 alleging he had experienced a lower back injury while working for St. Joseph's. Plaintiff's claim was denied by a deputy commissioner in an opinion and award filed 21 November 2001, which concluded that plaintiff had failed to show by the greater weight of the evidence that he had sustained an aggravation of his pre-existing back problems on or about 18 July 2000. Plaintiff appealed to the Industrial Commission (Commission). The Commission filed an opinion and award on 21 August 2002 affirming the holding of the deputy commissioner. Plaintiff appeals.

I.

In his first assignment of error plaintiff contends that the Commission erred in finding that plaintiff had not accurately and fully reported his past medical history regarding his lower back to Dr. David. Based on this finding, the Commission gave little weight to the opinion of Dr. David.

“The findings of fact by the Industrial Commission are conclusive on appeal if supported by any competent evidence.” *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977). Upon review of a workers' compensation claim, the appellate 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) (quoting *Anderson v. Construction Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)). The Commission is the sole judge of the weight and credibility of the evidence. *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). However, "[t]he 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.* at 115, 530 S.E.2d at 553 (citations omitted).

In the case before us, plaintiff argues that the Commission's findings of fact sixteen and seventeen are actually contradicted by evidence in the record itself. Finding of fact sixteen reads as follows:

16. Despite the May 15, 2000 medical record from Dr. Thompson to the contrary, on July 21, 2000, plaintiff reported to Dr. David that it was unusual for him to have pain below his knees.

Even though plaintiff provides conflicting evidence, there is competent evidence in the record to support the Commission's finding of fact. According to Dr. David's records of 21 July 2000, plaintiff reported back pain radiating down his legs bilaterally. Plaintiff also indicated that this pain was not unusual for him. Dr. David further noted in his records that plaintiff was experiencing a new onset of pain below his knees and into the heel. This statement is in marked contrast to the medical records of Dr. Thompson. Plaintiff had complained on 15 May 2000 to Dr. Thompson of an aching and burning pain in his left lower back, radiating down his left leg into his toes. It is evident that plaintiff had experienced pain below his knees prior to his examination by Dr. David and Dr. David mistakenly concluded the pain was novel.

Therefore, because there exists competent evidence to support the Commission's finding of fact sixteen, the finding is conclusive on appeal and plaintiff's assignment of error is without merit.

Plaintiff also argues that the Commission's finding of fact seventeen is not supported by the record. Finding of fact seventeen reads as follows:

17. On July 21, 2000, plaintiff sought medical treatment from Dr. David for his lower back pain. In the history recorded by Dr. David, there is no mention of plaintiff's ongoing treatment for lower back pain by Dr. Thompson. Plaintiff's lower back history as recorded by Dr. [David] only includes mention of his 1983 and 1984 surgeries. Dr. David opined in his medical record and in his testimony that plaintiff sustained an exacerbation of his pre-existing lower back problems based upon a lack of knowledge of plaintiff's ongoing treatment for his lower back pain by Dr. Thompson. Because Dr. David did not consider plaintiff's history as recorded in Dr. Thompson's records, the Full Commission gives little weight to his opinion.

According to Dr. David's medical records relating to plaintiff, there is no indication that Dr. David knew the extent of plaintiff's recent history of lower back pain as it is detailed in the records of Dr. Thompson. As early as 19 January 2000, plaintiff had complained to Dr. Thompson of lower back pain radiating to his toes on his left side. Again, plaintiff described that same pain to Dr. Thompson in May 2000. Dr. David's records fail to detail plaintiff's medical history relating to the condition of his lower back in the months precedent to the incident of 18 July 2000, indicating he lacked adequate knowledge of whether plaintiff had exacerbated a pre-existing condition. Furthermore, we note the Commission "does not have to explain its findings of fact by attempting to distinguish which evidence or witnesses it finds credible." *Deese*, 352 N.C. at 116, 530 S.E.2d at 553. Accordingly, there is competent evidence to support the Commission's finding of fact seventeen and plaintiff's assignment of error twelve is overruled.

Plaintiff next assigns error to the Commission's decision to give little weight to Dr. Maxwell's opinion that plaintiff had suffered an exacerbation of a pre-existing condition due to the incident of 18 July 2000. The Commission found that Dr. Maxwell's conclusion that plaintiff had experienced an exacerbation of a pre-existing condition was dependent on the credibility of plaintiff's description of the development of the pain. The Commission's finding was predicated on several other findings of fact regarding plaintiff's failure to fully disclose his past medical history and on the results of diagnostic testing which indicated that there had been no permanent worsening of plaintiff's condition.

Specifically, the Commission found that Dr. Maxwell had failed to state that plaintiff's exacerbation was permanent and not merely temporary. While plaintiff concedes the Commission is correct, he argues that Dr. Maxwell remarked that plaintiff's exacerbation was not improving. Despite plaintiff's argument, it is evident that Dr. Maxwell did not denote plaintiff's exacerbation to be permanent.

Plaintiff's assignment of error thirteen, in general, seeks this Court's review of the Commission's determination as to the credibility of Dr. Maxwell. We reiterate our Supreme Court's concern that "requiring the Commission to explain its credibility determinations and allowing the Court of Appeals to review the Commission's explanation of those credibility determinations would be inconsistent with our legal system's tradition of not requiring the fact finder to explain why he or she believes one witness over another or believes one piece of evidence is more credible than another." *Deese*, 352 N.C. at 116-117, 530 S.E.2d at 553. Inasmuch as it is not for this Court to substitute its judgment on the credibility and weight to be provided a witness's testimony, we do not disturb the Commission's finding regarding the weight it chose to give Dr. Maxwell's testimony. Plaintiff's assignment of error is without merit.

III.

The sum of plaintiff's remaining assignments of error are that the Commission erred as a matter of law in concluding plaintiff had failed to prove that he experienced a material aggravation of his pre-existing lumbar disc disease. Although this Court is bound by the Commission's findings of fact when supported by competent evidence, the Commission's conclusions of law are fully reviewable. *Lanning v. Fieldcrest-Cannon, Inc.*, 352 N.C. 98, 106, 530 S.E.2d 54, 60 (2000).

As a general rule, "aggravation of a pre-existing condition which results in loss of wage earning capacity is compensable under the workers' compensation laws in our state." *Smith v. Champion, Int'l.*, 134 N.C. App. 180, 182, 517 S.E.2d 164, 166 (1999). In a workers' compensation action, the plaintiff bears the burden of proving the claim is compensable. *Pitillo v. N.C. Dep't of Env'tl. Health & Natural Res.*, 151 N.C. App. 641, 645, 566 S.E.2d 807, 811 (2002).

"Although the employment-related accident 'need not be the sole causative force to render an injury compensable,' *Hansel v. Sherman Textiles*, 304 N.C. 44, 52, 283 S.E.2d 101, 106 (1981), the plaintiff must prove that the accident was a causal factor by a 'preponderance of the evidence.'" *Holley v. ACTS, Inc.*, 357 N.C. 228, 231-32, 581 S.E.2d 750, 752 (2003)(quoting *Ballenger v. ITT Grinnell Industrial Piping*, 320 N.C. 155, 158-59, 357 S.E.2d 683, 685 (1987)); *See also* 1 Kenneth S. Broun, Brandis and Broun on North Carolina Evidence §41, at 137 (5th ed. 1998). In order to support a conclusion that the disability claim is compensable, the plaintiff must show:

- (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2)
- that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment,

and (3) that this individual's incapacity to earn was caused by plaintiff's injury.

Hilliard v. Apex Cabinet Co., 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982).

Plaintiff in this case fails to meet his burden of proof. Plaintiff asserts that Dr. Maxwell and Dr. David testified that plaintiff had experienced an aggravation of his pre-existing lower back problems as a result of the incident of 18 July 2000. We have already determined that there existed competent evidence supporting the Commission's findings of fact regarding the testimony of Dr. David and Dr. Maxwell. We reiterate that the Commission's determinations as to weight and credibility to be afforded a witness are conclusive. As to both orthopaedists, the Commission gave little weight to their opinions because the Commission found that plaintiff had not fully disclosed the status of his pre-existing condition to either treating physician. The record is replete with evidence that plaintiff suffered from degenerative disk disease, cervical and lumbar, prior to 18 July 2000. Also, Dr. Lawrence Blinn, a diagnostic radiologist, and Dr. David, after reviewing the diagnostic tests performed on plaintiff before and after 18 July 2000, agreed that there was no change in the condition of plaintiff's lumbar spine after 18 July 2000.

While plaintiff may have presented conflicting evidence as to the aggravation of his pre-existing condition, we conclude that there was competent evidence in the record to support the Commission's findings of fact. Those findings support the Commission's conclusion of law that plaintiff had failed to prove by a preponderance of the evidence that he sustained an aggravation of his pre-existing condition as a result of the incident of 18 July 2000. Plaintiff's assignments of error are thus overruled.

Plaintiff has failed to present any argument in support of his remaining assignments of error and they are thus deemed abandoned. N.C.R. App. P. 28(b)(6).

Affirmed.

Judges HUNTER and CALABRIA concur.

Report per Rule 30(e).