NO. COA03-1148

NORTH CAROLINA COURT OF APPEALS

Filed: 17 August 2004

DAVID F. OGLE,
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 063665

W & O MASONRY,
Employer,

and

N.C. FARM BUREAU
MUTUAL INSURANCE COMPANY,
Carrier,
Defendants.

Appeal by defendants from opinion and award entered 16 June 2003 by the North Carolina Industrial Commission. Heard in the Court of Appeals 25 May 2004.

John W. Watson, Jr., for plaintiff-appellee.

Young Moore & Henderson P.A., by Dawn Dillon Raynor and Zachary C. Bolen, for defendant-appellants.

LEVINSON, Judge.

Defendants (W & O Masonry Company and North Carolina Farm Bureau Mutual Insurance Company) appeal an opinion and award of the Industrial Commission awarding plaintiff (David Ogle) temporary total disability, medical payments, permanent partial disability

compensation, as well as costs, interest, and attorney's fees. We affirm the Industrial Commission.

The record establishes the following uncontested facts: Plaintiff was employed as a stonemason for over 20 years. His job required him to lift rocks ranging from small five-pound rocks to large slabs weighing as much as 200 pounds. As a result, he suffered chronic low-level back pain "from muscle strains." In 2000 he was being treated by Dr. Dale Williams, a chiropractor whom plaintiff saw several times a week for chiropractic spinal adjustments. Plaintiff seldom missed work due to back problems.

During the first week of May, 2000, plaintiff worked on a masonry job that required him to lift rocks at the heaviest end of his normal range. On Thursday, 4 May 2000, plaintiff worked with rocks about two inches thick, twelve inches wide, several feet long, and weighing between 50 and 200 pounds. These were "some of the heaviest" stones lifted by plaintiff. He did not experience unusual back pain while working, and reported no new symptoms to Williams at his 4 May chiropractic appointment. However, that night plaintiff's right hip and leg began to grow numb, which plaintiff had never experienced before. The next morning he had pain in his right leg and hip. By noon the pain was so severe that plaintiff left work and sought treatment at the VA hospital. Thus, within eighteen hours of performing the heavy lifting on 4 May 2000, plaintiff suffered debilitating pain and numbness in his right hip and leg.

During May 2000 plaintiff sought treatment with Dr. Bruce Kihlstrom, a neurosurgeon. Kihlstrom diagnosed plaintiff with degenerative disc disease and herniated disc compressing a spinal nerve. On 13 June 2000 Kihlstrom performed a right L4-5 laminectomy and diskectomy at which time he found a decompressed nerve root from a ruptured disc. Plaintiff recuperated

during the summer of 2000, and returned to work full time in September 2000. Dr. Kihlstrom assigned plaintiff a 15% permanent disability rating to his back.

On 8 August 2000 plaintiff filed a claim for workers' compensation, which was denied by defendants. Following a hearing, a deputy Commissioner entered an order on 27 March 2002 denying plaintiff's claim. Plaintiff appealed to the Full Commission. On 16 June 2003 the Full Commission issued an opinion reversing the deputy Commissioner, and awarding plaintiff temporary total disability, medical compensation, compensation for the 15% permanent partial disability rating to his back, and costs, interest, and attorney's fees. From this award defendants appeal.

Standard of Review

Appellate review of an opinion and award of the North Carolina Industrial Commission is "limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp*., 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). "The full Commission is the sole judge of the weight and credibility of the evidence." *Id.* Thus, the Commission's "findings of fact are conclusive on appeal if supported by competent evidence even though there is evidence to support a contrary finding." *Murray v. Associated Insurers, Inc*., 341 N.C. 712, 714, 462 S.E.2d 490, 491 (1995). The Commission's conclusions of law, however, are reviewed *de novo*. *Griggs v. E.Omni Constructors*, 158 N.C. App. 480, 483, 581 S.E.2d 138, 141 (2003).

In the instant case, defendant assigned error to only three of the Commission's findings of fact: numbers eight, ten, and thirteen. "Because 'defendants failed to assign error to any of the Commission's [other] findings of fact . . . these findings are conclusively established on appeal.'" *Robertson v. Hagood Homes, Inc*., 160 N.C. App. 137, 140, 584 S.E.2d 871, 873

(2003) (quoting *Johnson v. Herbie's Place*, 157 N.C. App. 168, 180, 579 S.E.2d 110, 118 (2003)).

Preliminarily, we note that defendants did not challenge the findings pertaining to plaintiff's late filing of a workers' compensation claim. Accordingly, we do not address this issue.

Defendants argue that the Industrial Commission erred by awarding plaintiff workers' compensation benefits, on the grounds that there is no competent evidence that plaintiff's back injury was causally resulted to a specific traumatic incident. We disagree.

N.C.G.S. §97-2(6) (2003) provides in pertinent part that:

> "Injury and personal injury" shall mean only injury by accident arising out of and in the course of the employment[.] . . . With respect to back injuries, however, where injury to the back arises out of and in the course of the employment **and 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.

(emphasis added). "By amending the act to say that an accident includes an injury that is the 'result of a specific traumatic incident' we believe the General Assembly intended to relax the requirement that there be some unusual circumstance that accompanied the injury." *Bradley v. E. B. Sportswear, Inc.*, 77 N.C. App. 450, 452, 335 S.E.2d 52, 53 (1985). Thus, N.C.G.S. §97-2(6) "allows for coverage when a specific traumatic incident occurs within the normal work routine." *Fish v. Steelcase, Inc.*, 116 N.C. App. 703, 709, 449 S.E.2d 233, 237 (1994).

In the instant case, the Industrial Commission made findings of fact including the following:

2. Plaintiff, David Ogle, worked as a stonemason for W&O Masonry for approximately 20 years. His job duties included shaping and laying stone[.] . . . He was regularly required to lift from 10 to 200 pounds.

3. Plaintiff experienced chronic back pain since beginning in stonework. He missed work sporadically prior to 4 May 2000 because of low back pain and often wore a back brace while working to alleviate his pain.

4. Prior to 4 May 2000, plaintiff treated with chiropractor, Dale Williams, for approximately six months, three times per week, for relief of low back pain and realignment of plaintiff's neck. . . .

5. Around 4 May 2000, plaintiff and other employees of W&O Masonry were . . . installing a sidewalk, fieldstone on a foundation, step treads and caps on a retaining wall in a rose garden. These activities required him to lift the usual 50 to 200 pounds with the assistance of another employee. . . .

6. On Thursday, 4 May 2000, plaintiff was working placing caps on a rose bed retaining wall. The caps consisted of pieces of stone approximately two inches thick and 12 inches wide, and were in different lengths from two to four feet. Each stone weighed between 50 to 200 pounds. In addition to the retaining wall, plaintiff worked placing paving stones as step treads for a stairway in the garden. The stones used here weighed between 150 and 200 pounds each, with smaller stones laid around the treads. Plaintiff testified that this particular work constituted the heaviest stonework of the project.

7. After work on 4 May 2000, plaintiff went to . . . Dale Williams, D.C. She adjusted his back normally. He did not describe unusual pain or any event occurring at work on 4 May 2000 to Dr. Williams. That night, while in the shower, he noticed his right leg was going numb.

. . . .

9. Initially, plaintiff treated with the VA hospital. . . . As plaintiff convalesced at home, his pain increased[.] . . . Plaintiff went to his family physician, Dr. James Winslow, who referred him to neurosurgeon, Dr. Bruce Kihlstrom.

. . . .

> 11. Plaintiff did not report his back problems as a workers' compensation claim until 8 August 2000. Plaintiff paid for his surgery himself, and did not report the claim as a workers' compensation injury until he was referred to his counsel by a vocational rehabilitation worker at Innovation Rehabilitation in Roxboro, North Carolina.
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> 12. Following the 13 June 2000 surgery, Dr. Kihlstrom released plaintiff from his care on 21 September 2000, with a 15% permanent partial impairment rating. Plaintiff returned to work for defendant-employer on 22 September 2000, at full duty.
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> . . . .
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> 14. Defendants were noticed of plaintiff's injury on 5 May 2000, one day after plaintiff began exhibiting symptoms of the ruptured disc. Defendants were not prejudiced by plaintiff's delay in filing a claim for workers' compensation benefits relating to the 4 May 2000 injury.

Defendants did not assign error to any of these findings of fact, which are thus conclusively established on appeal. Defendant challenges only three findings of fact:

> 8. The next morning, plaintiff went to work as usual. His right leg remained numb and felt the same as it had the night before. He worked briefly on the morning of 5 May 2000, and then told his supervisor that he was going to the hospital to find out what was wrong with his leg. Plaintiff did not return to work until 22 September 2000.
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> 10. Dr. Kihlstrom ordered an MRI which was performed on 23 May 2000 and revealed a herniated disc at L4-5 which was compressing the right L4 nerve. Dr. Kihlstrom diagnosed plaintiff with a ruptured disc at L4-5 and performed a laminectomy and diskectomy on 13 June 2000. Dr. Kihlstrom wrote plaintiff out of work as of the date of his back surgery. Dr. Kihlstrom recorded in his initial examination of plaintiff that he reported low back pain, hip pain and leg numbness without antecedent event, by which he meant that plaintiff did not recall an incident that resulted in the disc rupture. However, Dr. Kihlstrom opined that the detailed list of events which occurred on May 4 and May 5 was consistent with plaintiff's injury. He further stated that it was reasonable that when the disc actually ruptured, plaintiff did

> not experience immediate problems, but rather developed progressive problems as the nerve began to swell.
>
> 13. On 4 May 2000, plaintiff experienced the onset of back pain resulting from a specific traumatic incident of the work assigned which occurred at a cognizable time. As a result of the specific traumatic incident, plaintiff suffered a ruptured disc at L4-5 which required surgery and which left plaintiff with a 15% permanent partial disability rating to his back.

Defendants first challenge the medical evidence supporting plaintiff's claim. "The quantum and quality of the evidence required to establish *prima facie* the causal relationship will of course vary with the complexity of the injury itself." *Hodgin v. Hodgin*, 159 N.C. App. 635, 639, 583 S.E.2d 362, 365, *disc. review denied*, 357 N.C. 578, 589 S.E.2d 126 (2003) (citation omitted). "In cases involving complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury." *Holley v. ACTS, Inc*., 357 N.C. 228, 232, 581 S.E.2d 750, 753 (2003) (citation and internal quotation marks omitted). "However, when such expert opinion testimony is based merely upon speculation and conjecture, . . . it is not sufficiently reliable to qualify as competent evidence on issues of medical causation." *Id*. (citation and quotation marks omitted). Moreover, "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 (2000).

In the instant case, Dr. Kihlstrom testified as follows regarding the ruptured disc that plaintiff suffered within 18 hours of lifting rocks weighing close to 200 pounds:

> COUNSEL: Based upon your training and experience, would you have an opinion to reasonable certainty whether the herniated disc more probably than not occurred as a result of the exertion on May 4 . . . with his underlying degenerative disc disease?

KIHLSTROM: I think that that is consistent. He had had back problems in the past, and we knew he had degenerative changes, but these were all new, temporally related to that particular scenario; and I think it's very likely related _ more likely than not.

Defendants argue that Kihlstrom's opinion was "based entirely on speculation and temporal sequence, rather than medical expertise." They also argue that there was no competent evidence to support the Commission's finding and conclusion that plaintiff's ruptured disc was causally related to a specific traumatic incident, and that the evidence showed that plaintiff's injury was caused solely by gradual deterioration. However, in response to questions by defendant, Kihlstrom testified as follows:

COUNSEL: And, Dr. Kihlstrom, is the basis of [your] opinion that Mr. Ogle seemed to be doing all right prior to the first week in May, and then reported pain following that week?

KIHLSTROM: He had dealt with back pain in the past, and something in the _ the **character and quality changed**. This was the first time he had hip pain. This was the first time he had pre-tibial numbness. Something changed. And that's the basis of that opinion.

COUNSEL: So _ okay. And the only way you know that something changed is that Mr. Ogle said "I did not have this degree of pain prior to the first week in May; and following the first week in May, these are my symptoms," is that right?

KIHLSTROM: More than that, he **had objective muscle weakness and absent reflex, and there were objective findings**. They weren't all just subjective. It wasn't just pain. It was **pain in combination with his neurological exam**.

. . . .

> COUNSEL: Could the disc have actually ruptured prior to May 4th, 2000?
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> KIHLSTROM: Well, the constellation of symptoms changed at that point. . . . [W]ith a ruptured free disc fragment, . . . you don't rupture a disc in January and have pain in September to this magnitude. . . . This is a different constellation of symptoms for him. . . . So, the whole temporal relationship of doing that activity with his change in symptoms and his neurological abnormalities leads me to that conclusion.

We conclude that Kihlstrom's opinion was not based "entirely on speculation," and that Kihlstrom's testimony provided support for the Commission's conclusion that plaintiff's injury was caused by more than gradual deterioration. This assignment of error is overruled.

Defendants also argue that compensation should be denied because plaintiff did not experience pain while working on 4 May 2000, and did not report an unusual occurrence to Dr. Williams at his 4 May chiropractic appointment. However, evidence that a claimant's back injury is causally related to a specific traumatic incident does **not** require that the plaintiff experience pain contemporaneously with the incident. *See, e.g.*, *Beam v. Floyd's Creek Baptist Church*, 99 N.C. App. 767, 769, 394 S.E.2d 191, 192 (1990) ("The fact that claimant did not experience pain contemporaneously with that incident does not, by itself, justify defendant's decision to contest this claim"); *Roach v. Lupoli Constr. Co.*, 88 N.C. App. 271, 272, 362 S.E.2d 823, 824 (1987) (reversing Commission's conclusion that "since the 'plaintiff experienced no pain while performing the work assigned with [employer],' recovery must be denied."). We conclude that the fact that plaintiff developed debilitating pain over the eighteen hours following work, rather than during the work day itself, does not defeat his claim.

Defendants next argue that plaintiff failed to identify the exact time of the specific traumatic incident that triggered his ruptured disc. However, "[w]hile the case law interpreting

the specific traumatic incident provision of N.C. Gen. Stat. §97-2(6) requires the plaintiff to prove an injury at a cognizable time, this does not compel the plaintiff to allege the specific hour or day of the injury." *Fish*, 116 N.C. App. at 709, 449 S.E.2d at 237. Instead, the term "judicially cognizable time" has been defined as:

> a showing by plaintiff which enables the Industrial Commission to determine when, within a reasonable period, the specific injury occurred. The evidence must show that there was some event that caused the injury, not a gradual deterioration. If the window during which the injury occurred can be narrowed to a judicially cognizable period, then the statute is satisfied.

Id. at 709, 449 S.E.2d at 238.

In the instant case, there was evidence that on or around 4 May 2000 plaintiff was working with heavy rocks and slabs weighing close to 200 pounds. By that evening his leg and hip were numb, and by the next day he was suffering a great deal of pain, which a neurological exam revealed to be caused by a ruptured disc. Dr. Kihlstrom testified that in his expert medical opinion, the ruptured disc was more likely than not caused by the heavy lifting of 4 May 2000 in conjunction with plaintiff's preexisting back condition. We conclude that this is sufficient evidence of a specific traumatic incident, occurring at a judicially cognizable time, that was causally related to plaintiff's injury. This assignment of error is overruled.

We conclude that the challenged findings of fact were supported by competent evidence, and that the Commission's findings of fact support its conclusions of law. Accordingly, the opinion and award of the Industrial Commission is

Affirmed.

Judges WYNN and CALABRIA concur.

Report per Rule 30(e).