NO. COA04-1451

NORTH CAROLINA COURT OF APPEALS

Filed: 6 September 2005

THOMAS HUGH FOY,
Plaintiff-Employee,

v.

North Carolina Industrial Commission
I.C. File No. 173499

INTERSTATE BRANDS/MERITA,
Defendant-Employer,

SELF-INSURED (KEMPER INSURANCE COMPANY,
Servicing Agent).

Appeal by defendant from an Opinion and Award filed 25 May 2004 by the Full Commission. Heard in the Court of Appeals 17 August 2005.

Jeffery S. Miller for plaintiff-appellee.

Wilson & Ratledge, PLLC, by Maura K. Gavigan and Kristine L. Prati, for defendant-appellant.

BRYANT, Judge.

Defendant Interstate Brands/Merita (Merita) appeals from an Opinion and Award of the North Carolina Industrial Commission awarding plaintiff ongoing temporary total disability benefits and medical compensation.

Facts

Thomas Hugh Foy (plaintiff) is a fifty-two year old male who had worked for Interstate Brands/Merita (defendant) for 28 years as a route salesman delivering bread. His job entailed the

delivery of bread, cakes and rolls, sometimes in large quantities on large transport racks which weigh up to 450 pounds when fully loaded. On 5 July 2001, plaintiff was moving a fully loaded transport rack from his truck while making a delivery when the rack became lodged on the bumper of his truck and became stuck. The rack stopped, but plaintiff did not. Immediately after the incident with the transport rack, plaintiff realized something was wrong because his right leg and arm lost feeling and stopped functioning.

Plaintiff called his supervisor, Kenny King, and advised King of the loss of function in his leg and arm and that he would not be able to complete his route. King met plaintiff at the delivery location and helped plaintiff complete the remainder of his delivery route. While completing his deliveries, plaintiff could not move his right arm and had difficulty moving his right leg. King observed plaintiff's difficulties completing the deliveries, laughing at plaintiff when he repeatedly dropped bread as he attempted to take trays off the transport racks. After plaintiff completed his deliveries, his wife drove him to the emergency room at Onslow Memorial Hospital.

At the emergency room, plaintiff was diagnosed as having suffered a "mini stroke" and was referred to Dr. C.E. Ballenger at Coastal Neurological Associates for further examination. At his initial consultation with Dr. Ballenger, Mr. Foy did not mention the incident at work the previous day since he had been advised by personnel at the hospital that he had suffered a "mini stroke" and therefore did not feel the information was relevant. Dr. Ballenger performed numerous tests on plaintiff and eventually referred plaintiff to Dr. Sean Hsu, a neurosurgeon.

Plaintiff was initially seen by Dr. Hsu on 22 August 2001 where Dr. Hsu erroneously noted in his records plaintiff had been injured at work on 6 June 2001, which he later corrected to 5 July 2001 in a letter to plaintiff's counsel. Dr. Hsu admitted he had "no reason to doubt the

actual date of injury was 7-5-01." Dr. Hsu diagnosed plaintiff as having a cervical myelopathy and recommended surgery to remove the herniated disc and to decompress the spinal cord. The surgery was performed on 30 August 2001 and plaintiff did not return to work following the surgery.

Procedural History

On 27 August 2001, plaintiff completed a "Workers Compensation Claim Reporting Form" and submitted it to his supervisor. Defendant subsequently denied plaintiff's workers' compensation claim on 6 September 2001. Plaintiff filed a request that his claim be assigned for hearing on 12 October 2001, and a hearing was held before Deputy Commissioner Morgan S. Chapman on 3 June 2002. Subsequent to the hearing depositions of plaintiff's treating physicians were taken and included in the record. Deputy Commissioner Chapman filed an Opinion and Award on 26 November 2002, denying plaintiff workers' compensation benefits. Plaintiff timely filed a Notice of Appeal to the Full Commission.

In an Opinion and Award of the Full Commission filed 25 May 2004, the Commission modified the Opinion and Award of Deputy Commissioner Chapman and awarded plaintiff ongoing temporary total disability benefits and medical compensation. Defendant appeals.

On appeal, defendant raises the issues of whether the Full Commission erred by: (I) finding plaintiff sustained an injury by accident arising out of and in the course and scope of employment as the result of a specific traumatic event on 5 July 2001; (II) finding plaintiff did not suffer from a pre-existing injury; (III) concluding plaintiff is totally disabled and entitled to temporary total disability benefits and medical compensation; and (IV) finding plaintiff provided

defendant with adequate notice pursuant to N.C. Gen. Stat. §97-22. For the following reasons, we affirm.

Standard of Review

Review by this Court of a decision by the North Carolina Industrial Commission is limited to the determination of "whether any competent evidence supports the Commission's findings of fact and whether [those] findings . . . 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 Commission's findings of fact are conclusive on appeal even where there is contrary evidence, and such findings may only be set aside where there is a "complete lack of competent evidence to support them." *Johnson v. Herbie's Place*, 157 N.C. App. 168, 171, 579 S.E.2d 110, 113 (2003); *see also Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998). Our review "goes no further than to determine whether the record contains any evidence tending to support the finding." *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965). "[E]vidence 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." *Adams*, 349 N.C. at 681, 509 S.E.2d at 414, (citing *Doggett v. South Atl. Warehouse Co.*, 212 N.C. 599, 194 S.E. 111 (1937); *see also Hollman v. City of Raleigh*, 273 N.C. 240, 252, 159 S.E.2d 874, 882 (1968) ("[O]ur Workmen's Compensation Act should be liberally construed to effectuate its purpose to provide compensation for injured employees . . ., and its benefits should not be denied by a technical, narrow, and strict construction."). However, the Commission's conclusions of law are reviewed *de novo*. *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004).

I

Defendant first argues plaintiff's back injury is not the result of a specific traumatic event and plaintiff has failed to present any competent evidence that his back injury was caused by the alleged 5 July 2001 work accident. An employee arguing his or her injury is the result of a specific traumatic event must prove the injury occurred at a judicially cognizable point in time. *Ruffin v. Compass Group USA*, 150 N.C. App. 480, 483, 563 S.E.2d 633, 636 (2002); *see also, Goforth v. K-Mart Corp.*, __ N.C. App. __, __, 605 S.E.2d 709, 712 (2004). The phrase "judicially cognizable point in time" has been defined as a determination of "when, within a reasonable period, the specific injury occurred." *Fish v. Steelcase, Inc.*, 116 N.C. App. 703, 709, 449 S.E.2d 233, 238 (1994).

In addition to proving a specific traumatic event occurred, the employee must show the current medical condition he or she is suffering from is causally related to the work-related accident. *Snead v. Sandhurst Mills, Inc.*, 8 N.C. App. 447, 451, 174 S.E.2d 699, 702 (1970). On the issue of causation of injuries involving "complicated medical questions[,]" the North Carolina Supreme Court has held "only an expert can give competent opinion evidence as to the cause of the injury." *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980). "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." *Young v. Hickory Bus. Furniture*, 353 N.C. 227, 230, 538 S.E.2d 912, 915 (2000).

In its Finding of Fact #2, the Full Commission found plaintiff's injury occurred when he was attempting to move a fully loaded transport rack during one of his deliveries on 5 July 2001. While the wording used by the Commission in a portion of its finding may not be exactly as quoted in the record (plaintiff's hands "slipped from the rack, causing his head and body to snap

backwards"), the Commission's finding that plaintiff "felt immediate pain and loss of feeling in his leg and arm" is supported by competent evidence. Plaintiff testified the onset of his symptoms arose almost immediately after the incident involving the transport rack. Before the incident with the transport rack, plaintiff was moving around normally; he had loaded his truck earlier that morning and had unloaded several racks without any indication of a problem with his right arm or leg. The onset of plaintiff's symptoms occurred only after a transport rack got caught while plaintiff was pulling it.

Furthermore, Dr. Hsu testified at his deposition that "based on the history, if the symptoms began on July 5, . . . then more likely than not, that's when the injury occurred . . . ." Dr. Hsu further testified when "[c]ervical myelopathy from cord compression . . . sets in, the condition is more persistent. It doesn't just come and go." Dr. Hsu's testimony concerning the causation of the injury is more than mere speculation and is sufficient to establish the injury was caused by the work-related accident. These facts are sufficient to support the conclusion of the Commission that plaintiff sustained an injury resulting from a specific traumatic incident arising out of and in the course of his employment. This assignment of error is overruled.

II

Defendant next argues the Full Commission erred by finding the plaintiff did not suffer from a pre-existing injury. As defendant acknowledges in its brief, it is well established that "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). Furthermore, "[t]he work-related injury need not be the sole cause of the problems to render an injury compensable. If the work-related accident contributed in some reasonable degree to plaintiff's disability, [he] is entitled to

compensation." *Hoyle v. Carolina Associated Mills*, 122 N.C. App. 462, 465-66, 470 S.E.2d 357, 359 (1996) (citations omitted).

As discussed in Issue I, there is competent evidence to support the Commission's finding that plaintiff's injury was actually caused by a specific traumatic incident arising out of and in the course of his employment. Therefore, plaintiff has shown the work-related accident was the sole cause of his injury and not due to any pre-existing injury. This assignment of error is overruled.

III

Defendant also contends the Full Commission erred by concluding plaintiff is totally disabled and entitled to temporary total disability benefits. Defendant assigns error to two conclusions of law made by the Commission:

> 3. As a result of the compensable injury of 5 July 2001, plaintiff has incurred medical expenses that were reasonably necessary to effect a cure or give relief for his back injury. Plaintiff has not reached maximum medical improvement and further medical treatment may be necessary. Plaintiff is entitled to have defendants pay for all medical treatments, past and future, reasonably related to his compensable injury. N.C.G.S. 97-25.
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> 4. As the result of his injury by accident of 5 July 2001, plaintiff is disabled from work and is entitled to receive compensation for temporary total disability compensation at the rate of $546.67 per week for the period beginning 6 July 2001 and continuing thereafter until further order of the Industria1 Commission. N.C.G.S. 97-29.

To support a conclusion of disability, the Commission must find:

> (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 [plaintiff's] incapacity to earn was caused by [his] injury.

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

Plaintiff testified his employment with defendant has been terminated and he began drawing social security disability in early 2002. Furthermore, defendant has not objected to the Commission's Finding of Fact #3, which states:

> 3. The plaintiff sought immediate treatment from Onslow Memorial Hospital, where he was initially misdiagnosed as having suffered a "mini-stroke." The plaintiff was referred to Coastal Nuerological [sic] Associates and was evaluated there by Dr. Ballenger on 6 July 2001. After numerous tests, Dr. Ballenger diagnosed plaintiff's condition as a cervical myelopathy and referred the plaintiff to Dr. Sean Hsu, a neurosurgeon. Dr. Hsu saw plaintiff on 22 August 2001, diagnosed a cervical myelopathy, and recommended surgery to remove the herniated disc to decompress the spinal cord. This surgery was performed on 30 August 2001. **Plaintiff has been unable to work since the accident.**

(Emphasis added.) This finding is binding upon this Court and, when considered in light of our analysis in Issue I *supra*, suffices to show plaintiff is incapable of earning the same wages he previously earned because of his injury. These facts are sufficient to support the conclusion of the Commission that plaintiff is entitled to disability income as compensation for his injury resulting from a specific traumatic incident . This assignment of error is overruled.

IV

Finally, defendant claims the Full Commission erred by finding plaintiff provided defendant with adequate notice pursuant to N.C. Gen. Stat. §97-22. N.C. Gen. Stat §97-22 requires an injured employee to notify his employer in writing of the occurrence of a work-place accident. N.C.G.S. §97-22 (2003). Furthermore, if the employee does not provide written notice of the accident within thirty days the employee is not entitled to workers' compensation benefits unless "reasonable excuse is made to the satisfaction of the Industrial Commission for not giving such notice and the Commission is satisfied that the employer has not been prejudiced thereby."

Id.; *see also, Peagler v. Tyson Foods, Inc.*, 138 N.C. App. 593, 603-04, 532 S.E.2d 207, 214 (2000) (reasonable excuse found because employee did not know nature and character of injury where doctors originally told him he had a heart attack, not a herniated disk).

In its Findings of Fact the Full Commission found as follows:

> 4. On 27 August 2001, the plaintiff completed a "Workers Compensation Claim Reporting Form" and submitted it to his supervisor for transmittal to the Industrial Commission. On September 6, 2001, defendants denied liability using a Form 61.
>
> 5. Defendant was given immediate actual notice of plaintiff's injury and disability and was not prejudiced by the plaintiff's slight delay in filing the proper Industrial Commission form.

Defendant does not assign error to the Commission's Finding of Fact #4, and therefore, it is binding on this Court. The report submitted by plaintiff's supervisor, Kenny King, lists the date of notification of the injury as 5 July 2001. Kenny King is the same supervisor plaintiff called to report his accident and request assistance to complete his route. While defendant's Human Resources manager may not have been informed of the incident until he received the report from King, defendant was on actual notice of plaintiff's injury the day it occurred and therefore was not prejudiced by plaintiff's delay in filing the proper forms. *See Key v. Wagner Woodcraft, Inc.*, 33 N.C. App. 310, 314, 235 S.E.2d 254, 256 (1977) (employer had knowledge of the injury by accident through notification by plaintiff to his supervisor); *Lawton v. County of Durham*, 85 N.C. App. 589, 592, 355 S.E.2d 158, 160 (1987) (reasonable excuse includes "a belief that one's employer is already cognizant of the accident").

Furthermore, plaintiff established a reasonable excuse for the delay due to the fact that he was not diagnosed with cervical myelopathy until he was seen by Dr. Hsu on 22 August 2001. Two days after this diagnosis, plaintiff contacted defendant's Human Resources Manager who

informed plaintiff he should meet with his supervisor and fill out the required workers' compensation forms. These forms were filled out on 27 August 2001, five days after the diagnosis of plaintiff's injury, giving defendant written notice of plaintiff's claims. Competent evidence exists in the record before this Court to support the Commission's findings. This assignment of error is overruled.

Affirmed.

Judges McCULLOUGH and TYSON concur.

Report per Rule 30(e).