NO. COA04-1256

NORTH CAROLINA COURT OF APPEALS

Filed: 5 July 2005

THOMAS SEES, JR.,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 191347

CLEVELAND CONTAINER SERVICE,
Employer,

GALLAGHER-BASSETT SERVICES, INC.,
Servicing Agent,
Defendants.

Appeal by Defendants from opinion and award entered 30 June 2004 by the North Carolina Industrial Commission. Heard in the Court of Appeals 13 June 2005.

Frederick R. Stann, for plaintiff-appellee.

McAngus Goudelock & Courie, PLLC, by Trula R. Mitchell and Katherine McCarthy, for defendant-appellants.

WYNN, Judge.

To receive compensation under section 97-29 of the North Carolina General Statutes, a claimant must prove the existence of a disability as well as its extent. N.C. Gen. Stat. §97-29 (2004). In this appeal, Defendant-Employer contends "[t]here is no competent medical evidence that [Plaintiff] was disabled . . . as a result of the alleged work injury." Because the record shows medical testimony that plaintiff's injury was more likely than not caused by his fall at work and

that his injury caused a decrease in his ability to perform physical work, we affirm the Commission's Opinion and Award for Plaintiff.

Defendant Cleveland Container Services employed Plaintiff Thomas Sees as a truck driver in August 2001. According to Mr. Sees, on 31 August 2001, while attempting to close a trailer door in the course of his employment, he slipped and fell to the ground injuring his lower back and extremities. On the morning of the next working day, 4 September 2001, Mr. Sees reported his injury to his immediate supervisor, Mr. James Adair. Cleveland Container Service placed Mr. Sees on light duty, until it no longer had any light duty work and terminated him in December 2001.

The next day, Mr. Sees visited a chiropractor, Dr. Rich Berkowitz, who diagnosed him with lumbar somatic dysfunction with associated facet syndrome. When his condition failed to improve after several chiropractic treatments, Mr. Sees consulted his family practitioner, Dr. Cathy McDowell, who referred him to an orthopedist, Dr. Robert Riedle. Dr. Riedle saw Mr. Sees in October 2001, and found "no structural pathology identifiable to account for . . . lower extremity symptoms, nor his progressive intensity of problems . . .." Dr. Riedle referred Mr. Sees to Dr. Steven Gudeman, a neurosurgeon, for a second opinion.

In January 2002, Dr. Gudeman saw Mr. Sees and noted that Mr. Sees had had a previous back surgery at the age of sixteen. He also noted that Mr. Sees weighed in excess of 350 pounds and that his tailbone (coccyx) had a "probable fracture of questionable age . . .." Dr. Gudeman's impression was "this [low back pain] most likely represents a severe lumbar strain which he continues to re-exacerbate due to his size." Dr. Gudeman testified that "from the history that I was able to obtain from Mr. Sees, it seemed that . . . the injury . . . was the etiology of the complaints that he was presenting with." Dr. Gudeman further testified that Mr. Sees's injury

had the potential to only minimally limit his physical work capacity and he issued no work restrictions when he released Mr. Sees from his care.

However, Mr. Sees's condition did not improve and he was next referred to Dr. Leon Dickerson, an orthopedist, in May 2002. Mr. Sees complained of low back pain, pain in his tailbone area, and pain down his leg. Dr. Dickerson ordered a CT myelogram of his lower spine to help locate the source of his pain and referred him to an associate, Dr. Ronald VanDerNoord, for diagnostic nerve blocks and a discography. Dr. Dickerson's impression was that Mr. Sees "was asymptomatic prior to this injury and had pain since that injury. The injury definitely had something to do with it." Dr. Dickerson testified that Mr. Sees's injury had the potential to cause pain, and, to a reasonable degree of medical certainty, Mr. Sees's pain as described by Mr. Sees was caused by his work accident on 31 August 2001. Moreover, he stated that Mr. Sees's injury caused a decrease in his ability to perform physical work.

Following a hearing before the Industrial Commission on 21 October 2002, Deputy Commissioner Phillip A. Holmes found that there was no credible medical evidence to establish any period of disability, that Mr. Sees did not sustain a compensable injury, and that Mr. Sees was not credible. Therefore, Mr. Sees's claim was denied. Mr. Sees appealed to the full Commission, which reached the opposite conclusion, determining that Mr. Sees's injury was the result of a traumatic incident of his work. In an Opinion and Award filed 30 June 2004, Defendants were ordered to pay temporary total disability benefits from December 2001 to 11 March 2002, medical expenses, and attorney's fees. Defendants appeal.

On appeal, Defendants argue that the full Commission erred in finding that Mr. Sees sustained an injury by accident as there is no competent evidence that (1) Mr. Sees was a credible witness and (2) Mr. Sees was disabled as a result of the alleged injury. We disagree.

The standard of review for this Court in reviewing an appeal from the full Commission is limited to determining "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). Our review "'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) (citation omitted). The full Commission's findings of fact "are conclusive on appeal when supported by competent evidence," even if there is evidence to support a contrary finding, *Morrison v. Burlington Indus.*, 304 N.C. 1, 6, 282 S.E.2d 458, 463 (1981), and may be set aside on appeal only "when there is a complete lack of competent evidence to support them[.]" *Young v. Hickory Bus. Furniture*, 353 N.C. 227, 230, 538 S.E.2d 912, 914 (2000). It is not the job of this Court to re-weigh the evidence. *Adams*, 349 N.C. at 681, 509 S.E.2d at 414. Further, all evidence must be taken in the light most favorable to the plaintiff, and the plaintiff "is entitled to the benefit of every reasonable inference to be drawn from the evidence." *Deese*, 352 N.C. at 115, 530 S.E.2d at 553.

Defendants argue that the full Commission erred in finding Mr. Sees a credible witness. However, determining credibility of witnesses is the responsibility of the full Commission, not this Court. *Adams*, 349 N.C. at 681, 509 S.E.2d at 414. This Court does not re-weigh the evidence. *Id*. Furthermore, "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, we must hold that this argument is without merit.

Defendants also argue that the full Commission erred in finding that Mr. Sees was disabled as a result of the alleged injury as there is no competent evidence to support this finding. We disagree.

To receive compensation under section 97-29 of the North Carolina General Statutes, a claimant has the burden of proving the existence of a disability as well as its extent. N.C. Gen. Stat. §97-29. Section 97-2(9) of the North Carolina General Statutes defines "disability" as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C. Gen. Stat. §97-2(9) (2004).

The full Commission made the following pertinent findings of fact on the issue of disability:

> 7. In May 2002, Dr. Dickerson, an orthopedist, diagnosed Plaintiff-Employee with chronic low back pain of unclear etiology. Dr. Dickerson opined that Plaintiff's August 31, 2001 injury had the potential to cause Plaintiff's pain and further states that to a reasonable degree of medical certainty, plaintiff's pain as described by Plaintiff-Employee was caused by Plaintiff's fall on August 31, 2001. Dr. Dickerson opined that Plaintiff's injury caused a decrease in his ability to perform physical work.
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> 8. Plaintiff-Employee presented to Dr. Gudeman, a neurosurgeon. Dr. Gudeman diagnosed Plaintiff-Employee with a severe lumbar strain that Plaintiff-Employee continues to re-exacerbate due to his size. Dr. Gudeman opined that the history given to him by Plaintiff-Employee regarding his injury of August 31, 2001, was indeed the etiology of Plaintiff's complaints. On March 11, 2002, Dr. Gudeman released Plaintiff-Employee and determined that he would not benefit from any surgical intervention. Dr. Gudeman further opined that Plaintiff's injuries would only minimally affect his ability to work and imposed no work restrictions upon Plaintiff-Employee.
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> 14. The competent evidence of record further establishes that the Plaintiff-Employee was temporally disabled from the period beginning on the date in December in 2001 as reflected by the employer's company records and noted as Plaintiff's last day of work for the employer and continuing until March 11, 2002.

The record reflects that there is competent evidence to support finding of fact number seven. Dr. Dickerson responded affirmatively when asked, "to a reasonable degree of medical certainty[, was]. . . the injury described by Mr. Sees . . . more likely than not caused by his injury on [31 August] of 2001 as described by Mr. Sees?" Dr. Dickerson testified to these opinions during his deposition on 4 February 2003. The record shows that Dr. Dickerson testified, "I think the fall did cause his low back pain for which he sought treatment . . .." He also remarked that Mr. Sees "was asymptomatic prior to this injury and had pain since that injury. The injury definitely had something to do with it."

The record reflects that there is competent evidence to support finding of fact number eight. Dr. Gudeman made note of his diagnosis in his letters to Mr. Sees's family doctor and testified to his opinions. Dr. Gudeman stated, "I believe, from the history that I was able to obtain from Mr. Sees, it seemed . . . the injury . . . was the etiology of the complaints that he was presenting with." He further stated, "I don't see, in my notes, that we made any actual restrictions, that I am aware of."

Moreover, the record reflects that there is competent evidence to support finding of fact number fourteen. Dr. Dickerson's testimony establishes support for a decrease in Mr. Sees's ability to work beginning on the date of the injury. Dr. Dickerson responded affirmatively when asked if "an injury such as the one that Mr. Sees has [can] cause a decrease in his ability to work and perform physical work[.]" Furthermore, Dr. Gudeman's testimony is support for Mr. Sees's

ability to work without restrictions on the date of his release from Dr. Gudeman's care on 11 March 2002.

Because the Commission's findings of fact regarding Mr. Sees disability are supported by competent evidence, we must affirm the Commission's conclusion of disability, which is supported by those findings of fact.

Affirmed.

Chief Judge MARTIN and Judge TIMMONS-GOODSON concur.

Report per Rule 30(e).