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NO. COA09-1061

NORTH CAROLINA COURT OF APPEALS

Filed: 1 June 2010

CLYDE LYNN, SR., Employee,
Plaintiff,

v.

GUILFORD COUNTY SCHOOLS,
Employer, SELF-INSURED (KEY
RISK MANAGEMENT SERVICES INC.,
Third-Party Administrator),
Defendant.

North Carolina
Industrial Commission
I.C. File No. 227414

Appeal by plaintiff from Opinion and Award entered 6 April 2009 by the North Carolina Industrial Commission. Heard in the Court of Appeals 10 December 2009.

R. Steve Bowden & Associates, by Jarvis T. Harris, for plaintiff appellant.

Attorney General Roy Cooper, by Assistant Attorney General Marc X. Sneed, for defendant appellee.

HUNTER, JR., Robert N., Judge.

I. BACKGROUND

On 20 November 2000, Clyde Lynn, Sr. ("plaintiff"), broke up a fight between several students at High Point Central High School while executing his duties as assistant principal. During the intervention, plaintiff fell to the floor and injured his left knee. Plaintiff wrote a report after the incident indicating an injury only to his left knee, and Guilford County Schools

("employer") later admitted compensability for the left knee injury.

Following the fight, plaintiff's condition in his left knee worsened. On 10 July 2001, Dr. Ronald Gioffre, plaintiff's orthopedist, performed a total left knee replacement. On 25 September 2001, plaintiff went to Dr. Gioffre for a follow-up appointment after his surgery, and plaintiff indicated for the first time that he was having discomfort in his right knee. On 12 November 2001, plaintiff visited Dr. Gioffre's office to report that he had fallen on his right knee¹ the previous week. During these visits with Dr. Gioffre, plaintiff did not indicate whether the right knee pain was connected to the fight in November 2000 or whether the fall on his right knee was due to the complications with his left knee.

On 11 December 2001, plaintiff claimed to Dr. Gioffre, for the first time, that the right knee injury occurred during the fight in November 2000. On 29 January 2002, Dr. Gioffre recommended that plaintiff undergo a right knee arthroscopy to repair several tears of the posterior horn of the lateral and medial menisci.

Plaintiff began to complain of back pain on 1 September 2004, and an MRI revealed a small protrusion at the L4-5 disk and an extraforaminal extrusion at the L2-3 disk. On 29 September 2004, Dr. Gioffre performed surgery on plaintiff's L2-3 disk. However, in December 2004, plaintiff's symptoms returned, and Dr. Max Cohen

¹ The record does not explain the circumstances surrounding the fall.

performed lumbar fusion surgery between the L2 and L3 levels of plaintiff's spine. Neither Dr. Cohen nor Dr. Gioffre testified that plaintiff's spinal condition was causally related to either the November 2000 fight or plaintiff's compensable left knee injury.

In a Form 33 dated 23 February 2007, plaintiff requested a hearing seeking payment of future compensation, future medical expenses, permanent partial disability, and permanent total disability for all of his injuries. Employer responded, claiming that plaintiff was only entitled to permanent partial disability due to the injury in his left knee.

In an Opinion and Award filed on 3 September 2008, Deputy Commissioner Bradley W. Houser awarded plaintiff: (1) total disability compensation from 28 August 2002 through 21 September 2002, but not thereafter; (2) permanent partial disability compensation for a 20% disability rating to plaintiff's left leg; (3) permanent partial disability compensation for a 10% disability rating to plaintiff's right² leg; and (4) medical expenses for plaintiff's left and right knee injuries, including expenses for a lift chair. The Deputy Commissioner specifically found as a fact that plaintiff's back complications were not related to his compensable injuries.

² Conclusion of Law 6 states that the 10% rating applies to plaintiff's right leg; however, the Award section mistakenly refers to plaintiff's left leg with respect to this rating. This appears to be a scrivener's error, as the conclusions clearly address both legs.

Employer appealed to the Full Commission in a letter dated 24 September 2008. In an Opinion and Award filed 6 April 2009, the Commission reversed the Deputy Commissioner in part, and found that neither plaintiff's right knee injury nor plaintiff's back condition were causally related to plaintiff's compensable left knee injury. The Commission accordingly awarded plaintiff: (1) temporary total disability compensation from 10 July 2001 through 13 January 2002, but not ongoing; (2) permanent partial disability compensation for a 20% disability rating to plaintiff's left leg; and (3) medical expenses for plaintiff's left knee injury. In concluding that plaintiff's left knee was the only compensable injury, the Commission found that a lift chair was not medically necessary.

Plaintiff has appealed the Commission's Opinion and Award to this Court, and he raises two issues: (1) whether plaintiff is disabled due to compensable injuries beyond 10 September 2002; and (2) whether plaintiff is permanently and totally disabled due to compensable injuries stemming from the November 2000 fight.

II. ANALYSIS

A. *Standard of Review and Jurisdiction*

When reviewing findings of fact by the Commission, this Court examines only "whether the record contains any [competent] evidence tending to support the finding." *Anderson v. Construction Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965). "The Commission's findings of fact may only be set aside in the complete absence of competent evidence to support them." *Gore v. Myrtle/Mueller*, 362

N.C. 27, 42, 653 S.E.2d 400, 410 (2007). Findings of fact that remain uncontested on appeal are "presumed to be supported by competent evidence[.]" *Johnson v. Herbie's Place*, 157 N.C. App. 168, 180, 579 S.E.2d 110, 118 (2003). Findings of fact supported by competent evidence are conclusive on appeal though other evidence may support a contrary finding. *Hassell v. Onslow Cty. Bd. of Educ.*, 362 N.C. 299, 305, 661 S.E.2d 709, 714 (2008).

As the finder of fact, "[t]he Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony.'" *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 115, 530 S.E.2d 549, 552 (2000) (citation omitted). "[O]n 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) (quoting *Anderson*, 265 N.C. at 434, 144 S.E.2d at 274).

This appeal is properly before this Court from a final decision of the Commission pursuant to N.C. Gen. Stat. § 7A-29(a) (2009).

B. Disability

Plaintiff argues that the Commission erred in finding that: (1) plaintiff is not disabled due to compensable injuries beyond 10 September 2002; and (2) plaintiff is not permanently and totally disabled as a result of compensable injuries arising out of the November 2000 fight. Plaintiff contends that his left knee, right

knee, and back injuries have left him totally disabled, and that the evidence regarding these three injuries supports a finding of permanent total disability. We disagree.

In support of its findings that plaintiff's right knee is not compensable, the Commission relied on the following testimony from Dr. Gioffre.

[Dr. Gioffre:] No. . . . I'm just looking at my notes I made from last time. I put down that this right knee I did not feel was related to his injury. And I put down, see my note from 5/19/05. I'd have to go back through those. I've got 5/10/05, 5/19/05 I said this, "Clyde Lynn comes in to see me for his knees. The left total knee still has some discomfort, but the motion is good, minimal swelling. I did give him 20 percent permanent partial disability of his left lower extremity for the knee. The second problem he came in was for his right knee. This is not under his workman's compensation." That's where I left it.

And when I gave a disability, I did not include his right knee.

. . . .

Q[:] Based on your earlier testimony that if the need for the left knee surgery caused an over use syndrome in the right knee---

A[:] I don't think that that had anything to do with his surgery. . . .

Because, you know, if you think about this, let's go back and think about this. When you do a total knee on a patient, the next day when you get that patient up to walk, your physical therapy order is full weight bearing on that knee. It's not like a total hip where you can't put weight on it for six weeks and all the weight has to go on the other side. So [plaintiff] had from day one permission to put full weight on that left total knee. So I really can't say that all

that stuff with that right knee happened because of him having a left total knee.

With respect to the compensability of plaintiff's back condition, Dr. Gioffre further testified:

Q[:] On October 27, 2004, I think you and Mr. Lynn had an interesting discussion about the cause of his back problems. Could you just kind of review for the court what was going on October 27, 2004?

. . . .

A[:] . . . "Mr. Lynn, at the end of the exam, asked me once again about if there was any change in his back problem as far [as] his herniated disk, if this could have come from his work injury. I told him that there was always a slight degree of probability of that, although this is very late down the road since he has had his herniated disk from the time -- I said this was very late down the road since he has had this herniated disk from the time he has his initial injury. And we never had any real proof that he had a herniated disk at that time, but there is always a slight degree of probability he could have ruptured a disk from an old injury."

In other words, I wasn't relating that disk rupture to be on the job. That has never been an issue since I saw him. It was always just his knees.

After Dr. Gioffre testified that it was unlikely that either plaintiff's right knee injury or back condition were related to the November 2000 fight, Dr. Gioffre further testified that plaintiff may be capable of some work if only his left knee injury were taken into consideration.

Q[:] Taking just Mr. Lynn's left knee condition in isolation, if you take that knee condition in isolation and you disregard the back, you disregard the right knee, would Mr. Lynn be able to do any kind of work?

A[:] Yes, but under the certain specifications that I said.

Q[:] Okay.

A[:] No question. I had a total knee, and I'm back working. I operate on that total knee, I stand, I take call[s], but there are [certain] things that I wouldn't do. I wouldn't go and do his job as a principal and try to break up a fight and have somebody knock me down, because I'd be in deep trouble.

Q[:] Sure.

A[:] . . . So, there are certain kinds of work, to answer your question, you can do.

. . . .

Now I don't know enough about the school system. I know that there are certain companies in this town that if I say go back to work and do light duty, they'll say, "We don't have light duty." So, I -- I don't know what was available for him to do. But to answer your question, just because you have a total knee doesn't mean you can't work.

This evidence, provided by plaintiff's treating physician, is sufficient to support the Commission's findings that plaintiff is not totally disabled due to compensable injuries. "Disability" under the North Carolina Workers' Compensation Act means "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) (2009). In this case, plaintiff could have carried his burden of proving "disability" by providing evidence satisfying one of the following four methods of proof:

(1) the production of medical evidence that he is physically or mentally, as a consequence of

the work related injury, incapable of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

Russell v. Lowes Product Distribution, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (citations omitted).

Throughout his brief, plaintiff points to other evidence in the record tending to support a finding under one of these methods of proof. However, all the evidence relied upon by plaintiff presupposes that the right knee injury and plaintiff's back condition are compensable, and plaintiff presents no medical evidence contradicting Dr. Gioffre's statements to the contrary. Moreover, even if such evidence were present in the record, we would be precluded from reaching a conclusion in plaintiff's favor under the applicable standard of review because competent evidence supports the Commission's findings that: (1) plaintiff has not proven disability due to compensable injuries beyond 10 September 2002, and (2) plaintiff has not carried his burden of showing that he is permanently and totally disabled due to compensable injuries.

III. CONCLUSION

The Commission relied upon Dr. Gioffre's competent testimony to make its findings, and those findings support the Commission's conclusions of law on the issue of plaintiff's disability.

Accordingly, under the standard of review, the Opinion and Award of the Commission must be

Affirmed.

Judges STROUD and ERVIN concur.

Report per Rule 30(e).