Affirmed

Bolch
Ballenger
Martin

NO. COA00-309

NORTH CAROLINA COURT OF APPEALS

Filed: 17 October 2000

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IN THE OFFICE OF
CLERK COURT OF APPEALS
OF NORTH CAROLINA

DAVID HYLTON,
Employee,
Plaintiff;

v.

N.C. Industrial Commission
I.C. Number 248591

BRIDGESTONE/FIRESTONE, INC.,
Employer;

GALLAGHER BASSETT SERVICES, INC.,
Carrier,
Defendants.

Appeal by defendants from opinion and award entered 18 November 1999 by the North Carolina Full Commission. Heard in the Court of Appeals 2 October 2000.

Hodgman and Oxner, by Todd P. Oxner, for plaintiff-appellee.

Cranfill, Sumner & Hartzog, L.L.P., by David A. Rhoades and Kari R. Johnson, for defendant-appellants.

MARTIN, Judge.

Plaintiff David Hylton injured his back while employed by defendant Bridgestone/Firestone, Inc. in July of 1992. Plaintiff sought treatment for his back from neurosurgeon Dr. Henry Elsner, who eventually referred plaintiff to Dr. Charles Branch. Dr. Branch performed a cervical fusion on plaintiff in December of 1994. Upon returning to Dr. Elsner for treatment, Dr. Elsner suggested plaintiff seek help from a psychiatrist.

Plaintiff filed a workers' compensation claim and defendants denied the claim on the grounds that "plaintiff's current condition is the result of a prior injury and not the result of a work related injury." A Deputy Commissioner of the North Carolina Industrial Commission conducted a hearing concerning plaintiff's claim, concluded that plaintiff was totally disabled as a result of his back problems, and awarded plaintiff compensation.

On 12 February 1997, defendants requested a hearing seeking to terminate plaintiff's temporary total disability compensation payments. Defendants contended that plaintiff was no longer disabled and that they were entitled to stop payment of compensation. After a hearing, Deputy Commissioner Phillip Holmes filed an opinion and award on 15 February 1999. Deputy Commissioner Holmes found that plaintiff "should not stoop or bend" and that he was entitled to undergo a course of treatment at the High Point Pain Clinic. Deputy Commissioner Holmes concluded that defendants had failed to meet their burden of establishing that suitable employment existed for plaintiff given his physical and psychiatric limitations.

Defendants appealed to the Full Industrial Commission alleging that Deputy Commissioner Holmes's finding of fact that plaintiff should not stoop or bend was not supported by the evidence given certain testimony by plaintiff's treating physician, Dr. Elsner. The Full Commission affirmed the Deputy Commissioner's opinion and award. Defendants appeal from the Commission's opinion and award.

The standard of appellate review of an opinion and award of

the Industrial Commission in a workers' compensation case is whether there is any competent evidence in the record to support the Commission's findings of fact and whether these findings support the Commission's conclusions of law. *Sidney v. Raleigh Paving & Patching*, 109 N.C. App. 254, 426 S.E.2d 424 (1993). The findings of fact made by the Commission are conclusive upon appeal when supported by competent evidence, even when there is evidence to support a contrary finding. *Morrison v. Burlington Industries*, 304 N.C. 1, 282 S.E.2d 458 (1981). In weighing the evidence, the Commission is the sole judge of the credibility of the witnesses and the weight to be given to their testimony, and may reject a witness' testimony entirely if warranted by disbelief of that witness. *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 425 S.E.2d 454 (1993).

On appeal, defendants do not dispute the Full Commission's finding that plaintiff is totally disabled at this time. Defendants, however, contend the finding of fact made by the Full Commission that plaintiff should not stoop or bend is not supported by competent evidence. The Commission's number 11 finding of fact provides in pertinent part: "At the present time, plaintiff could physically work in an environment that did not require greater than 15 pounds lifting on an occasional basis. He should not stoop or bend. He should not stand or sit for more than two hours at a time."

After reviewing the record, we conclude this finding of fact was supported by competent evidence in the record. In Dr. Elsner's

deposition, he testified that plaintiff was having problems with his cervical spine and his lumbar spine. The following colloquy occurred during defendants' examination of Dr. Elsner:

> Q. --there is a note here from Dr. Branch. I'm not sure if you-all stipulated it or not, but just from May of '95, "Mr. Hylton may return to some form of restrictive work. It certainly appears that he could work in an environment that did not require greater than 15 pounds lifting on an occasional basis. He should not stoop or bend. He should not stand or sit for more than two hours at a time. I don't believe he should operate heavy equipment."
>
> A. That would be -- I mean, that would be an accurate assessment in terms of his cervical problems. In regards to his lumbar problems, it would probably be along the same lines, although my lifting restriction for his lumbar problem would probably be -- would probably allow more lifting. . . .
>
> Q. So, basically, the restrictions I just read from Dr. Branch, you would concur and give an opinion that that is what -- you would agree with those restrictions and then--?
>
> A. Yes, sir.
>
> Q. But would allow 40 pounds for--
>
> A. Yeah.
>
> Q. --the lumbar?
>
> A. Exactly.
>
> Q. Okay. And in your opinion, would those have been restrictions, from a physical standpoint, since essentially '95?
>
> A. Yes, sir.
>
> Q. And you have not seen anything recently with an additional myelogram and CT you did in April of '98 and subsequent evaluations here in 1998 that would change that opinion, as far as those restrictions?

A. No sir.

Furthermore, when plaintiff's attorney asked Dr. Elsner if he concurred with Dr. Branch's assessment that "Mr. Hylton should not stoop or bend or should not stand or sit for more than two hours at a time," he responded, "Correct." Dr. Elsner's testimony supports the Commission's findings which, in turn, support its conclusion that defendant is totally disabled. The opinion and award of the Industrial Commission is affirmed.

Affirmed.

Judges LEWIS and SMITH concur.

Report per Rule 30(e).