NO. COA99-1620

NORTH CAROLINA COURT OF APPEALS

Filed: 29 December 2000

WENDLE SHEEHAN,
Employee-Plaintiff,

v.

From the North Carolina
Industrial Commission
I.C. File No. 261808

PERRY M. ALEXANDER
CONSTRUCTION COMPANY,
Employer,

SELF-INSURED
PCA SOLUTIONS,
Servicing Agent,
Defendants.

Appeal by plaintiff from Opinion and Award for the North Carolina Industrial Commission entered 1 September 1999. Heard in the Court of Appeals 9 November 2000.

H. Paul Averette, Attorney at Law, by H. Paul Averette, for plaintiff-appellant.

Teague, Rotenstreich & Stanaland, L.L.P., by Elizabeth M. Stanaland, for defendant-appellee.

EDMUNDS, Judge.

Plaintiff appeals an opinion and award of the North Carolina Industrial Commission (the Commission) denying him workers' compensation benefits. We vacate and remand.

Plaintiff Wendle Sheehan, a fifty-two year old male with a ninth grade education, has been employed in heavy construction for most of his life. In November 1990, plaintiff began working for defendant Perry M. Alexander Construction Company as an equipment

operator. His duties primarily consisted of operating a bulldozer to move and flatten dirt in preparation for building construction.

On 13 April 1992, plaintiff was allegedly injured while operating a bulldozer during the course of his employment with defendant. Plaintiff testified that after he backed a bulldozer over a rock, the machine subsequently fell three to four feet. Plaintiff stated that the drop caused a "real sudden hard jar as I backed over the rock," and he experienced a sudden sharp pain in his low back and right leg.

Plaintiff testified that following his accident he told Randy Keever, an equipment operator for defendant, "to tell Jerry Cochran, who was the foreman over there at the time - he was the grade foreman - that I'd hurt myself and that I needed him to come over and take over." Plaintiff stated that he relayed the same information to Tony Keever, another equipment operator for defendant. Plaintiff testified that after speaking to Randy Keever, Jerry Cochran approached him, and he told Mr. Cochran that he had hurt his back and needed to be relieved of his duties. Plaintiff believed a workers' compensation claim had been filed with defendant after he allegedly notified Mr. Cochran of his injury. Plaintiff did not work for the rest of the day, and Mr. Cochran completed plaintiff's duties. The muffler on the bulldozer operated by plaintiff at the time of his alleged accident was replaced on 15 April 1992.

Randy Keever, however, testified that plaintiff never reported an injury to him. Similarly, Leroy Peek, a project superintendent

for defendant at the time of plaintiff's alleged accident, and Kevin Hensley, a field mechanic for defendant, both testified that plaintiff never reported an injury to them. Randy Keever further stated that there were no rocks at defendant's job site at the time plaintiff was allegedly injured. Neither Jerry Cochran or Tony Keever testified at the hearing.

Several days after his accident, plaintiff was transferred to a different job site because of his ability to operate a track hoe. He testified that his "back kept getting worse. It never - I thought it would ease up, but it never did ease up. It kept getting worse." Plaintiff continued to work for defendant until 19 May 1992.

Plaintiff first sought treatment for his injuries on 4 May 1992 at the Transylvania Community Hospital. Subsequently, he received medical care through the Veteran's Administration Medical Center. He described the circumstances of the 13 April 1992 accident on several occasions to his treating physicians. In 1993, after suffering a fall at home when his leg gave way, plaintiff was treated by Dr. Glyndon Shaver, Chief of Orthopaedic Surgery at the Veteran's Administration Medical Center. Dr. Shaver diagnosed plaintiff with degenerative arthritis and degenerative disk disease of the lumbar spine with chronic pain and radiculopathy secondary to prior operative procedures and gave plaintiff an impairment rating of forty to fifty percent. He found plaintiff's symptoms to be consistent with plaintiff's statement that he hurt his back while seated on a bulldozer that dropped about three to four feet

and determined that plaintiff would not have been forty to fifty percent impaired prior to 13 April 1992. In Dr. Shaver's opinion, "Mr. Sheehan, by history, had a definite exacerbation of a preexisting condition as the result of the bulldozer accident."

Prior to his 13 April 1992 accident, plaintiff had a history of back problems including four work-related injuries for which he received workers' compensation. Three of these injuries required surgery. Plaintiff also injured his back when he was involved in automobile accidents in 1987 and 1994. In 1994, plaintiff underwent a fourth back surgery; Dr. Shaver testified that plaintiff needed this surgery because of his 13 April 1992 accident.

Plaintiff filed a Form 18, Notice of Accident to Employer, on 18 September 1992, and defendant subsequently denied workers' compensation to plaintiff. Plaintiff thereafter filed a Form 33, Request for Hearing, with the Commission, and his claim was heard by a Deputy Commissioner on 26 November 1996. The Deputy Commissioner found plaintiff to be credible, determined that he sustained an injury by accident in the form of a specific traumatic incident arising out of and in the course of his employment with defendant, and awarded "compensation at the rate of $246.55 beginning April 13, 1992." Defendant appealed, and on 1 September 1999, over a dissent, the Commission reversed the Deputy Commissioner's opinion and award. Plaintiff appeals.

I.

Plaintiff first argues that the Commission committed reversible error by making findings of fact two through five, contending that these findings were not relevant and do not support the Commission's conclusion of law. Each of these findings relates to plaintiff's prior back injuries:

> 2. Prior to his employment with defendant, plaintiff had a long-standing history of lower back problems, including prior work-related injuries. In 1980, plaintiff was involved in a fork lift accident and suffered a lower back injury. He underwent an L4-5 diskectomy. Plaintiff was involved in another accident in 1992 which caused a reherniation and he underwent a second surgery at L4-5. In 1986 he strained his lower back.
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> 3. Due to his ongoing back problems, plaintiff was examined by Dr. Keith Maxwell of Spine Surgery Associates on 22 June 1989. Dr. Maxwell assessed segmental spine instability at L4-5, degenerative disk disease at L4-5, and status post L4-5 diskectomy times two. Plaintiff continued with conservative treatment in follow-up.
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> 4. An MRI done in April, 1990 showed a large herniated disc. On 20 April 1990, plaintiff underwent another surgery, a left L4-5 microdiskectomy performed by Dr. Maxwell.
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> 5. Post-operatively, by 21 May 1990, plaintiff had significant pain relief and Dr. Maxwell released him to return to full duty. Plaintiff continued to experience pain, although it did not prevent him from engaging in gainful employment, as evidence by the fact that he began working for defendant in November, 1990, operating a bulldozer.

Our review of workers' compensation cases is limited to consideration of two questions: "(1) whether the Full Commission's findings of fact are supported by competent evidence; and (2)

whether its conclusions of law are supported by those findings." *Calloway v. Memorial Mission Hosp.*, 137 N.C. App. 480, 484, 528 S.E.2d 397, 400 (2000) (citation omitted). As to the first inquiry, "the findings of fact are conclusive on appeal so long as they are supported by *any* competent evidence, even if other evidence would support contrary findings." *Id.* (citation omitted). Indeed, "[t]he 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." *Anderson v. Construction Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965) (citation omitted).

The record reveals that there is competent evidence to support findings of fact two through five. Plaintiff testified as to his prior work-related back injuries on direct examination at the 26 November 1996 hearing before the Deputy Commissioner, and he revealed this information during discovery. In addition, the Commission's findings are supported by the medical records and deposition testimony of Dr. Shaver and Dr. Keith Maxwell. Finally, plaintiff concedes in his appellate brief that these findings are based on competent evidence, arguing only that they are not relevant. We disagree. This information is relevant as to whether plaintiff's injuries were caused by his 13 April 1992 accident or some pre-existing condition, particularly in light of the similarity and number of previous injuries. Because there is sufficient evidence to support the Commission's findings of fact,

these findings are conclusive on appeal. This assignment of error is overruled.

II.

Plaintiff next argues that the Commission erred in finding as fact that "[p]laintiff claimed that he backed up over a large rock, causing the bulldozer to drop three to four feet," because such finding was not supported by the evidence. This argument is also without merit.

Plaintiff testified before the Deputy Commissioner that:

> Well, I went through - pushed my load through, and pans were coming in, making their drops. And I'd been bouncing in rock all - you know, like I say, off and on all day. They'd bring dirt. They'd bring rock. I was backing up. I wasn't paying no attention because I'd been in rock all day, like I say. And when I backed up, I went over rock that was a little bit bigger than ones that I'd been getting in. And it felt like the machine fell about three, four foot - just come down with a real sudden hard jar as I backed over the rock.

Plaintiff made a similar statement in response to defendant's first set of interrogatories, and his medical records indicate that he made such statements to his treating physicians. This evidence is competent to support the Commission's finding and is binding on appeal. This assignment of error is overruled.

III.

Plaintiff also argues that it was error for the Commission to include finding seven in its findings of fact, because it was not based on competent evidence. Finding of fact seven states:

> Randy Lee Keever, plaintiff's co-worker, testified that there were no large rocks on the Marion project site at the time plaintiff

was operating his bulldozer. Plaintiff was scraping topsoil and spreading dirt, and no rocks were unearthed until later in the project when the digging was much deeper. Plaintiff's explanation of the cause of the alleged specific traumatic incident is deemed not credible.

Randy Keever testified on direct examination before the Deputy Commissioner:

Q: Do you recall there being any rocks anywhere the size of three to four feet ---

A: No, I don't.

Q: --- in diameter?

A: No.

Q: Do you recall there being rocks on the terrain when you first started that project?

A: No, not when we first started it, no.

Q: Well, now, what do you mean, not when you first started? Explain that.

A: Well, when you first start a project, you strip all the topsoil and all that off - where you're going to build and stuff like that. And mainly where you hit your rock is when you get into the project pretty good. And the deeper you go - you know, depending on the cut or where the dirt's got to be moved to - is where you run into your rock at.

Q: And at that point when you were working on the Marion County project, had Mr. Sheehan already been moved to the Rutherford County project?

A: Excuse me, ma'am?

Q: When you came to that point when you started getting into the hard rock further along in the project, had Mr. Sheehan already been moved ---

A: Yes.

Although Mr. Keever admitted on cross-examination that he was working approximately two hundred feet from plaintiff and that plaintiff could have backed over a rock without him knowing about it, his testimony on direct examination is competent evidence to support the Commission's finding. Moreover, our Supreme Court has established that "[t]he Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Anderson*, 265 N.C. at 433-34, 144 S.E.2d at 274. While there may have been conflicting evidence as to the presence of rock at defendant's work site, the Commission had the authority to weigh the credibility of the witnesses and to decide the issues. Particularly, it was within the province of the Commission to find Randy Keever's testimony more credible than plaintiff's testimony as to the cause of the alleged accident. Accordingly, this assignment of error is overruled.

IV.

Plaintiff next assigns error to the Commission's findings of fact eight and nine arguing that these findings are not supported by competent evidence. The findings are as follows:

> 8. Plaintiff claimed to have told one of the pan operators, probably Randy Keever, to report to Jerry Cochran that plaintiff had hurt himself. Thereafter, plaintiff testified that he told Cochran himself of the injury. Plaintiff stated that Mr. Cochran was the grading foreman and in charge of the job. Plaintiff did not work the rest of the day, and Cochran finished the dozing. Plaintiff stated that he also told another co-worker, Tony Keever, of his injury.
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> 9. Randy Keever testified that plaintiff never told him of a back injury. Karen Smyly,

> personnel manager and bookkeeper for defendant, testified that she never received an injury report regarding plaintiff's alleged incident. Kevin Hensley, a field mechanic for defendant, was on the Marion job site checking the equipment at least once every day while plaintiff was there. He testified that plaintiff never told him he had injured his back while working there. Leroy Peek, superintendent of the job at which plaintiff claimed to have been injured, testified that plaintiff never reported to him that he had been injured. Further, Mr. Peek worked with plaintiff daily at the next job he worked on, and plaintiff never mentioned that he had incurred a back injury on the Marion job. Mr. Peek also testified that had plaintiff injured his back on the job, he knew the procedures for notifying the office of the injury and obtaining medical care.

Our review of the record, including the testimony of plaintiff, Randy Keever, Leroy Peek, Kevin Hensley and Karen Smyly, reveals that both findings are supported by competent evidence. Because findings of fact are conclusive on appeal when supported by any competent evidence, *see Adams v. AVX Corp.*, 349 N.C. 676, 509 S.E.2d 411 (1998), this assignment of error is overruled.

V.

Finally, plaintiff assigns error to the Commission's findings of fact eleven and thirteen. These findings, relating to plaintiff's credibility, state:

> 11. Plaintiff's claim that he injured his back while operating a bulldozer on 13 April 1992 is not credible.
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> . . . .
>
> 13. Given our finding that plaintiff's claim that he suffered an accidental, work-related injury is not credible, his current condition is due to non-compensable causes.

As stated above, the Commission is "'the sole judge of the credibility of the witness and the weight to be given its testimony.'" *Weaver v. American National Can Corp.*, 123 N.C. App. 507, 510, 473 S.E.2d 10, 12 (1996) (citation omitted). However, "[b]efore making findings of fact, the Industrial Commission must consider *all* of the evidence. The Industrial Commission may not discount or disregard any evidence, but may choose not to believe the evidence *after* considering it." *Id.* (citation omitted).

> It is the duty of the Commission to consider *all* of the competent evidence, make *definitive* findings, draw its conclusions of law from these findings, and enter the appropriate award. In making its findings, the Commission's function is "to *weigh and evaluate* the *entire* evidence and determine as best it can where the truth lies." To weigh the evidence is not to "discount" it. To weigh the evidence means to ponder it carefully; it connotes consideration and evaluation; it involves a mental balancing process. To "discount" the evidence, on the other hand, is to disregard it, to treat it as though it had never existed, to omit it from consideration. While the Commission is the sole judge of the credibility of witnesses and may believe all or a part or none of any witness's testimony, it nevertheless may not wholly disregard competent evidence. Contradictions in the testimony go to its weight, and the Commission may properly refuse to believe particular evidence. But, it must first consider the evidence . . . .

Harrell v. Stevens & Co., 45 N.C. App. 197, 205, 262 S.E.2d 830, 835 (1980) (internal citations omitted) (vacating opinion and remanding the case for consideration of all the evidence after the Commission impermissibly discounted the testimony of plaintiff's treating physician).

In the case at bar, the Commission impermissibly disregarded the testimony of Dr. Shaver. The Commission made no reference to Dr. Shaver's testimony in its findings of fact or conclusion of law. This omission was error, particularly because Dr. Shaver's testimony corroborated plaintiff's testimony. Accordingly, we vacate the opinion and remand the case to the Commission for it to consider all of the evidence, make complete findings of fact and proper conclusions of law, and enter an appropriate award. *See Lineback v. Wake County Board of Commissioners*, 126 N.C. App. 678, 486 S.E.2d 252 (1997); *Weaver*, 123 N.C. App. 507, 473 S.E.2d 10; *Lefler v. Lexington City Schools*, 60 N.C. App. 194, 298 S.E.2d 404 (1982). Because of our holding, it is not necessary to address plaintiff's remaining assignment of error, which relates to the Commission's conclusion of law.

Vacated and remanded.

Judges MARTIN and TIMMONS-GOODSON concur.

Report per Rule 30(e).