NO. COA05-833

NORTH CAROLINA COURT OF APPEALS

Filed: 21 March 2006

JOBY L. HENSLEY,
Employee,
Plaintiff

v.

North Carolina Industrial Commission
I.C. File Nos. 262983 & 263001

ASHLAND, INC., d/b/a APAC-CAROLINA INC.-ASHEVILLE,
Employer,

and

INA INSURANCE by ESIS/ACE USA,
Carrier,
Defendants

Appeal by defendants from an opinion and award entered 3 February 2005 by the North Carolina Industrial Commission. Heard in the Court of Appeals 20 February 2006.

David Gantt for plaintiff-appellee.

Womble, Carlyle, Sandridge, & Rice, P.L.L.C., by Clayton M. Custer and Philip J. Mohr, for defendant-appellants.

MARTIN, Chief Judge.

Ashland, Inc. ("employer") and INA Insurance ("carrier") (collectively "defendants") appeal an opinion and award by the North Carolina Industrial Commission (the "Commission")

ordering temporary total disability compensation to Joby L. Hensley ("plaintiff") for an injury by accident occurring on 5 July 2001. We affirm.

Prior to commencing work with employer, plaintiff suffered a back injury in 1994 and underwent a right L4 laminectomy and right L5 hemilaminectomy by Dr. Frank Brown ("Dr. Brown"), resulting in a fifteen percent permanent partial disability rating to his back and permanent restrictions of no lifting greater than fifty pounds and no frequent lifting of more than twenty-five pounds. Following a workers' compensation award, plaintiff obtained a medical release to return to work from Dr. Brown and commenced working for employer in 1995. Plaintiff worked for employer from 1995 to 2002 in a variety of positions associated with road paving. The Commission noted in an uncontested finding of fact that plaintiff's "job responsibilities involved heavy lifting and other very physically demanding duties" and that plaintiff had performed "all physical requirements of each job he performed during his more than [six and one-half] years of employment[.]" Although medical records reveal plaintiff sought treatment for back pain in early 2001, plaintiff neither missed work nor requested accommodation for back problems during his tenure with employer prior to 5 July 2001.

On 5 July 2001, plaintiff was working as an asphalt screed operator, which required stretching, bending, pushing, pulling, twisting, throwing, walking, standing, reaching, squatting, regular lifting of twenty-five pounds, and occasional lifting of up to 100 pounds. Plaintiff testified that on 5 July 2001, while turning a crank on paving equipment, he "felt something pull" in his back and told the foreman that he thought he had hurt his back. Plaintiff differentiated the pain he felt on 5 and 6 July from other incidents of back pain prior to that time during his work with employer. The following day, plaintiff received steroid injections to ease his back pain from Dr. Brown. Dr. Brown continued this treatment and removed plaintiff from work; however, the

injections were not effective, and Dr. Brown performed a L5-S1 laminectomy on 15 November 2001.

Dr. Brown testified that plaintiff's second surgery resolved plaintiff's pain approximately ninety-five percent, with minor discomfort in his right leg and very minimal back pain. Although Dr. Brown wanted to keep plaintiff out of work for a longer time, Dr. Brown honored plaintiff's request to release him to work on 4 March 2002 without restrictions other than the previously imposed permanent restrictions. Plaintiff returned to work for employer on 25 March 2002, performing the same duties as those for which he was responsible prior to 5 July 2001. On 28 March 2002, plaintiff reinjured his back when he stepped off some paving equipment and twisted his back. Dr. Brown again removed plaintiff from work, and plaintiff has not returned to work since that time.

Plaintiff submitted notices of accident to employer for both the 5 July 2001 and the 28 March 2002 incidents. Defendants denied the claims, and after a hearing on 26 August 2003, a deputy commissioner issued an opinion and award in favor of plaintiff for ongoing temporary total disability compensation beginning on 5 July 2001. The Commission affirmed, finding plaintiff was totally disabled as a result of his 5 July 2001 injury by accident arising out of and in the course of his employment. Defendants appeal.

"Appellate review of an award from the Industrial Commission is generally limited to two issues: (1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are justified by the findings of fact." *Clark v. Wal-Mart*, 360 N.C. 41, 43, 619 S.E.2d 491, 492 (2005). If any competent evidence supports a finding, viewed in the light most favorable to the plaintiff, it is conclusively established, even if the evidence

would support a contrary finding. *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 115, 530 S.E.2d 549, 552-53 (2000). The Commission's conclusions of law are reviewed *de novo*. *Griggs v. Eastern Omni Constructors*, 158 N.C. App. 480, 483, 581 S.E.2d 138, 141 (2003).

Experts alone are permitted to provide competent evidence of medical causation of an injury in cases involving "complicated medical questions far removed from the ordinary experience and knowledge of laymen[.]" *Click v. Freight Carriers*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980). Such complicated medical questions include causation of a herniated disc. *Gillikin v. Burbage*, 263 N.C. 317, 325, 139 S.E.2d 753, 760 (1965). Probability, as opposed to mere possibility, that an injury resulted from an accident or specific traumatic incident is the standard required for expert testimony to constitute competent evidence to support a finding of causation. *Accord Cannon v. Goodyear Tire & Rubber Co.*, ___ N.C. App. ___, ___, 614 S.E.2d 440, 446-47, *disc. review denied*, ___ N.C. ___, ___ S.E.2d ___ (2005).

On appeal, defendants assert the "record as a whole does not support the Full Commission's finding that any 'accident' occurred" on 5 July 2001 and "the medical evidence clearly establishes that Plaintiff's back problems" in July 2001 resulted from progressive, post-surgical changes and scarring in his back that commonly develop following the type of surgery plaintiff underwent in 1994 as opposed to any accident on the job. Defendants first argue, in support of this assertion, that plaintiff "fabricated [an accident] after the fact" and cite medical evidence of record indicating plaintiff complained of back pain prior to 5 July 2001. This argument fails.

First, the determination of whether testimony is credible or a fabrication is a function solely within the province of the Commission, not a reviewing appellate court. *Deese*, 352 N.C. at 115, 530 S.E.2d at 552. Second, plaintiff readily admitted to back pain prior to 5 July 2001;

however, he further testified he felt a pull in his back on that date as a result of operating a crank on paving equipment and differentiated the pain from other instances of pain he had felt prior to 5 July 2001.

Defendants additionally contend the medical testimony fails to establish the required causal nexus between plaintiff's recounting of the events of 5 July 2001 and the injury to his back. Nonetheless, defendants concede Dr. Brown was asked his medical opinion of causation, accepting as true facts consistent with plaintiff's version of events on 5 July 2001 and consistent with plaintiff's medical history. Those predicate facts were found by the Commission and, based upon those facts, Dr. Brown opined that the 5 July 2001 incident aggravated, accelerated, or contributed to plaintiff's back problems. Defendants argue this testimony is insufficient as a matter of law because it created a factual scenario not supported by the testimony. Specifically, citing *Thacker v. City of Winston-Salem*, 125 N.C. App. 671, 482 S.E.2d 20, *disc. review denied*, 346 N.C. 289, 487 S.E.2d 571 (1997), defendants argue Dr. Brown's opinion should be disregarded because it was given in response to a question which included a reference to the equipment bumping plaintiff while he was turning the handle, to which plaintiff never testified.

In *Thacker*, this Court held evidence elicited by plaintiff's hypothetical question was not competent because it required the testifying doctor to (1) accept as true facts that were inconsistent with the record evidence and (2) base the question of causation on those facts accepted as true. By way of comparison, in the instant case, there is no opposing record evidence to the facts accepted as true by Dr. Brown and, more importantly, the assumed fact that plaintiff was bumped by the machine was not the basis of Dr. Brown's opinion that plaintiff's injury was caused by the incident. In fact, both the record evidence and the question asked of Dr. Brown contemplated whether he believed there would be a causal connection between plaintiff feeling

something pull in his back during the time he was turning a crank and plaintiff's back problems treated by Dr. Brown on 6 July 2001. Accordingly, *Thacker* does not render Dr. Brown's testimony as to causation incompetent and the testimony constitutes competent evidence of causation supporting the following finding by the Commission: "Dr. Brown opined and the Full Commission so finds that Plaintiff has been totally disabled since his July 5, 2001 injury."

Dr. Brown's testimony likewise defeats defendants' third argument that plaintiff did not suffer any wage loss after 5 July 2001. Defendants argue plaintiff was never qualified for the position of screed operator given his permanent restrictions following the 1994 surgery; therefore, defendants assert, "[p]laintiff was medically able to perform the same type of manual labor as in 1995" because his work restrictions following 5 July 2001 remained the same. It is sufficient for purposes of resolving this argument to note that (1) plaintiff never missed work for back problems for over six years with defendants prior to 5 July 2001 but has been unable to return to any work save for a brief three-day period since that time, (2) Dr. Brown opined that, under the facts as found by the Commission, the incident on 5 July aggravated, contributed, or accelerated plaintiff's back problems, and (3) both plaintiff's testimony and Dr. Brown's testimony indicate that, as a result of the incidents on 5 July 2001 and 28 March 2001, plaintiff is not a candidate to return to any kind of gainful employment.

In summary, the Commission was presented with two versions of events. Defendants asserted plaintiff suffered from a failed post-laminectomy result unrelated to his job duties, and plaintiff asserted he suffered an accident on 5 July 2001. The Commission accepted as credible plaintiff's version of the events, notwithstanding some evidence to the contrary. Dr. Brown's opinion, based on the Commission's acceptance of plaintiff's version of events, supports the necessary causal nexus between the injury sustained on 5 July 2001 and plaintiff's disability.

Accordingly, the Commission properly awarded benefits, and this assignment of error is overruled.

In their final assignment of error brought forward on appeal, defendants assert plaintiff did not suffer an injury by accident on 28 March 2002 that prevented him from returning to work or reduced his wage earning capacity. The record on appeal indicates plaintiff's recovery from the surgery following the 5 July 2001 incident appeared, initially, to be very favorable. Although Dr. Brown did not feel plaintiff was yet capable of returning to work, he honored plaintiff's emotional desire to see if he could regain his earning capacity. That decision resulted in plaintiff returning to work on 25 March 2002 and re-injuring his back on 28 March 2002. Dr. Brown opined that plaintiff, following the 28 March 2002 injury, could not return to any kind of gainful employment because the 28 March 2002 injury showed the full results of the 5 July 2001 injury:

> [Plaintiff] is a two-time loser. That is to say, we reoperated at the same disc space level [following the 5 July 2001 incident], and because he wasn't able to work any length of time and because he . . . simply was doing the routine aspects of his job [on 28 March 2002], which was a sitting job . . . operating some controls. And a guy with a ninth-grade education who has had two major back operations and has failed again, in my experience and considerable number of years, I don't think I have ever seen anyone that fit that description get back to gainful employment.

In short, the two incidents illustrated the full nature of the 5 July 2001 injury. Dr. Brown's opinion makes clear that the 28 March 2002 injury highlighted that plaintiff was, in fact, totally disabled following the 5 July 2001 incident. The Commission indicated its acceptance of Dr. Brown's testimony by finding as fact that "[p]laintiff's earning[s] upon his return to work from March 25, 2002 through March 28, 2002 were not indicative of his capacity to earn wages in the competitive job market" and that plaintiff "has been totally disabled since his July 5, 2001

injury." These findings, in turn, support the Commission's award of continuing temporary total disability benefits beginning on 5 July 2001. This assignment of error is overruled.

Affirmed.

Judges WYNN and STEPHENS concur.

Report per Rule 30(e).