

Bunn: Affirmed in part  
Remanded in part  
Concurring: Ballance  
Scott unavailable due  
to illness

NO. COA99-1380

NORTH CAROLINA COURT OF APPEALS

Filed: 19 December 2000

FILED

DEC 19 2000

IN THE OFFICE OF  
CLERK COURT OF APPEALS  
OF NORTH CAROLINA

LINDA A. TRIVETTE,

Employee-Plaintiff

v.

Industrial Commission  
I.C. File No. 356305

MID-SOUTH MANAGEMENT, INC.,

Employer-Defendant,

and/or

CNA INSURANCE COMPANIES,

Carrier-Defendant.

Appeal by plaintiff from opinion and award entered 6 August 1999 by the North Carolina Industrial Commission. Heard in the Court of Appeals 19 September 2000.

*Tim L. Harris & Associates, P.C., by Rebecca L. Thomas, for plaintiff-appellant*

*Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Mel J. Garofalo and Colleen M. Crowley, for defendant-appellees.*

MARTIN, Judge

Plaintiff appeals from an opinion and award of the North Carolina Industrial Commission awarding her benefits for temporary total disability. Briefly summarized, the record discloses that plaintiff, Linda A. Trivette, injured her lower back on 21 June 1993 while engaged in her employment with defendant Mid-South Management, Inc. Dr. Philip Yount examined plaintiff the same day, diagnosed her with lumbosacral strain with spasm, and ordered her

out of work for two days. Notwithstanding these orders, plaintiff returned to work, taking no time off. On 9 July 1993, however, plaintiff submitted her resignation, but agreed to work for two weeks following her notice. Plaintiff returned to Dr. Yount's office on 12 July 1993 complaining of increasing back pain, and Dr. Yount prescribed stronger pain medication, ordered her out of work for two weeks, and scheduled a CT scan; the results of the CT scan were normal. Plaintiff worked the balance of her two week notice.

On 21 January 1994, plaintiff was examined by Dr. Andrea Stutesman of Rehabilitation Specialists in Hickory, who later testified, based on the results of a functional capacity exam, that plaintiff could carry up to 27 pounds on an occasional basis, but that she was unsteady in her movements and thus lifting would be unsafe. Dr. Stutesman and her colleague, Dr. Dean Lorenz, also diagnosed plaintiff with piriformis syndrome, a condition involving the piriformis muscle which causes lower back pain. Dr. Stutesman testified that in her opinion, the piriformis syndrome was caused by plaintiff's on-the-job injury. Dr. Yount examined plaintiff again in February 1994 and noted a deterioration in her condition. On 7 April 1994, Dr. Stutesman recommended an MRI, which showed abnormal signals in the periventricular white matter.

On 31 May 1994, Dr. Scott McCloskey performed surgery to repair the piriformis muscle in plaintiff's lower back. Plaintiff was then referred to neurologist Dr. Douglas Jeffery, who diagnosed plaintiff with multiple sclerosis. Dr. Jeffery testified that plaintiff's multiple sclerosis pre-existed her work injury; he

further testified that extra stress in the form of pain could worsen plaintiff's multiple sclerosis. Dr. Stutesman testified that plaintiff had a five percent permanent partial disability rating to her back as a result of her work-related injury.

Plaintiff sought benefits for permanent and total disability due to her back injury and resultant spasms, which she claimed worsened her multiple sclerosis. The deputy commissioner awarded plaintiff benefits for temporary total disability benefits from 22 June 1993 through 23 December 1994. On appeal, the Full Commission determined that plaintiff was entitled to benefits for temporary total disability for the period from 22 June 1993 through 9 July 1993, and for medical expenses.

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This Court reviews findings of fact made by the Industrial Commission using an "any competent evidence" standard of review:

"In passing upon an appeal from an award of the Industrial Commission, the reviewing court is limited in its inquiry to two questions of law, namely: (1) Whether or not there was any competent evidence before the Commission to support its findings of fact; and (2) whether or not the findings of fact of the Commission justify its legal conclusions and decision."

*Inscoe v. DeRose Indus., Inc.*, 292 N.C. 210, 216, 232 S.E.2d 449, 452 (1977) (citation omitted). The Commission's findings are "conclusive on this Court if [they are] supported by any competent evidence . . . and can only be set aside if there is a complete lack of competent evidence." *Sidney v. Raleigh Paving & Patching, Inc.*, 109 N.C. App. 254, 256, 426 S.E.2d 424, 426 (1993) (citations

omitted). In fact, if any competent evidence supports the Commission's findings, the decision can not be disturbed even if other evidence supports contrary findings. *Calloway v. Memorial Mission Hosp.*, 137 N.C. App. 480, 528 S.E.2d 397 (2000). Finally, "[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." *Weaver v. American Nat. Can Corp.*, 123 N.C. App. 507, 510, 473 S.E.2d 10, 12 (1996) (emphasis in original) (citation omitted). The conclusion of law drawn by the Commission from its findings of fact are fully reviewable. *Jackson v. State Hwy. Comm'n*, 272 N.C. 697, 158 S.E.2d 865 (1968).

Plaintiff argues that the Full Commission erred when it found no credible or convincing evidence that stress from plaintiff's work-related injury exacerbated plaintiff's pre-existing multiple sclerosis, and, as a result, that plaintiff did not prove that her permanent total disability resulted from her injury. When an employee who is injured on the job suffers from a pre-existing condition, compensability is determined by the following rules:

- (1) an employer takes the employee as he finds her with all her pre-existing infirmities and weaknesses.
- (2) When a pre-existing, *nondisabling, non-job-related* condition is aggravated or accelerated by an accidental injury arising out of and in the course of employment . . . then the employer must compensate the employee for the entire resulting disability even though it would not have disabled a normal person to that extent.
- (3) On the other hand, when a pre-existing, *nondisabling, non-job-related* disease or infirmity eventually causes an incapacity for work without any aggravation or acceleration

of it by a compensable accident . . . the resulting incapacity so caused is not compensable.

*Ballenger v. Burriss Indus., Inc.*, 66 N.C. App. 556, 560-61, 311 S.E.2d 881, 884, *disc. review denied*, 310 N.C. 743, 315 S.E.2d 700 (1984) (quoting *Morrison v. Burlington Industries*, 304 N.C. 1, 18, 282 S.E.2d 458, 470 (1981)) (emphasis in original). The plaintiff seeking workers' compensation benefits has the burden of proving every element of compensability. *Harvey v. Raleigh Police Dept.*, 96 N.C. App. 28, 384 S.E.2d 549, *disc. review denied*, 325 N.C. 706, 388 S.E.2d 454 (1989).

In the present case, the Commission made the following relevant findings of fact:

13. . . . Dr. Jeffery was of the opinion that plaintiff's injury of June 21, 1993 did not directly aggravate, exacerbate or worsen plaintiff's multiple sclerosis. However, he felt the stress caused by her pain and the stress associated with her injury more than likely did aggravate and exacerbate plaintiff's multiple sclerosis. Dr. Jeffery could not credibly or convincingly tell to what, if any, degree stress may have aggravated or exacerbated her multiple sclerosis.

14. Dr. Jeffery indicated that, although there is not any scientific data of how stress affects multiple sclerosis, it is common knowledge within the community of doctors who treat multiple sclerosis on a daily basis that stress does, in fact, have a direct impact on the course of multiple sclerosis patients and their care.

15. Dr. Jeffery indicated that he could not determine when plaintiff's disability due to her multiple sclerosis started, as she was working up until her injury of June 21, 1993. He noted that plaintiff had had multiple sclerosis for approximately twenty (20) years

prior to her injury.

16. All of plaintiff's treating physicians agree that plaintiff is presently permanently and totally disabled. They are unable, however, to determine whether her injury of June 21, 1993 or whether her multiple sclerosis is the cause of her disability. *This opinion, or lack thereof, is accepted as credible and convincing (emphasis added).*

Based on these findings, the Commission concluded that plaintiff was injured in the course of her employment with defendant Mid-South Management, Inc., and awarded her temporary total disability compensation, but only for the period from 22 June 1993 to 9 July 1993.

The Commission's findings are supported by the evidence. In this case, Dr. Jeffery testified that while a back injury itself will not make worse a patient's multiple sclerosis, the stress from the pain of a back injury can exacerbate the patient's multiple sclerosis; he cited anecdotal evidence from other specialists, as well as his personal experience in treating over one thousand multiple sclerosis patients. While it is clear that the Commission considered Dr. Jeffery's testimony, as it was required to do, it was free to accept or reject that testimony in the exercise of its role as fact-finder. *Weaver v. American Nat. Can Corp.*, 123 N.C. App. 507, 473 S.E.2d 10 (1996). The Commission also had before it the testimony of plaintiff's other treating physicians; based on the standard by which we review findings of the Industrial Commission, we cannot say the Commission's findings were unsupported by competent evidence.

Similarly, the Commission found that plaintiff failed to

establish that her temporary disability extended beyond 9 July 1993, two weeks and two days following her injury. Under the Workers' Compensation Act, disability is defined as an "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). An injury is defined as "only injury by accident arising out of and in the course of the employment . . . ." N.C. Gen. Stat. § 97-2(6).

In the present case, plaintiff's initial treating physician, Dr. Yount, wrote plaintiff out of work for two days, and later, for two additional weeks. He further testified that plaintiff's injury was normally one which would have improved within a few weeks of conservative treatment, testimony which the Commission expressly found "credible and convincing." Despite Dr. Yount's testimony that he did not agree with plaintiff's decision to quit her job, plaintiff resigned on 9 July 1993. According to her supervisor, Sandy Hurley, plaintiff resigned in part from the stress associated with the job and difficulties with a co-employee; she did not indicate to Ms. Hurley that she was resigning due to health reasons. Ms. Hurley testified that she wanted plaintiff to continue working in her existing job, and that she offered plaintiff another, less-stressful job in the company, but that plaintiff refused. This evidence supports the Commission's findings that plaintiff's disability began on 22 June 1993 and lasted until 9 July 1993 when she voluntarily removed herself from the workplace despite the availability of suitable work within the

restrictions placed upon her by her physicians.

Because the Commission found that no credible or convincing evidence established that the stress caused by the pain from plaintiff's injury exacerbated her multiple sclerosis, it follows that plaintiff failed to prove the necessary connection between her injury-related stress and the exacerbation of her multiple sclerosis. Thus, plaintiff was not entitled to an award of benefits for total disability compensating her for the worsening of her pre-existing condition, and the Commission's award in this regard must be affirmed.

Plaintiff also assigns error to the Commission's failure to make findings that plaintiff was entitled to a five percent permanent partial disability rating to her back. Her assignment of error has merit.

As noted above, before the Commission may make findings, it must consider all the evidence. *Weaver v. American Nat. Can Corp.*, 123 N.C. App. 507, 473 S.E.2d 10 (1996). In *Weaver*, the Industrial Commission failed to mention in its findings the testimony of the plaintiff's co-workers, both of whom supported the plaintiff-employee's version of events. *Id.* at 510, 473 S.E.2d at 12. This Court vacated the Commission's opinion and award and remanded the case for appropriate and complete findings. *Id.* at 511, 473 S.E.2d at 12.

In the present case, there was evidence that plaintiff sustained piriformis syndrome, which required surgery, as a result of her work-related injury and that she retained a five percent

permanent partial disability. The Commission made no findings at all on the issue of plaintiff's permanent partial disability. Accordingly, this case must be remanded to the Commission for findings regarding the issue of whether plaintiff has sustained, and is entitled to compensation for, permanent partial disability as a result of her work-related injury.

Affirmed in part, remanded in part.

Judges GREENE and EDMUNDS concur.

Report per Rule 30(e).