NO. COA05-48

NORTH CAROLINA COURT OF APPEALS

Filed: 18 October 2005

BONNIE MCLAWHORN, Administratix
of the Estate of Edsel McLawhorn,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 368231

CASWELL CENTER,
Employer,
Self-Insured,
Defendant.

Appeal by Plaintiff from Opinion and Award entered 29 September 2004 by the North Carolina Industrial Commission. Heard in the Court of Appeals 20 September 2005.

The Law Office of Faith Herndon, by Faith Herndon, for plaintiff-appellant.

Attorney General Roy Cooper, by Assistant Attorney General Patrick S. Wooten, for defendant-appellee.

WYNN, Judge.

Plaintiff appeals from the 29 September 2004 Opinion and Award of the Industrial Commission denying additional benefits to her husband, Edsel McLawhorn.**[Note 1]** Plaintiff contends that the Commission failed to make adequate findings of fact to support its conclusion of law that Mr. McLawhorn did not suffer a compensable occupational disease. Because there was no occupational disease claim properly before the Industrial Commission, we affirm the full Commission's Opinion and Award.

Mr. McLawhorn worked as a plumber for the Caswell Center from 1974 until 1993. His duties included maintenance and repair work and required him to kneel and bend, work on his knees, climb ladders, carry heavy equipment, and occasionally dig ditches.

On 27 August 1993, Mr. McLawhorn suffered an injury by accident when he slipped in a ditch while carrying a pipe on the job. He reported his injury to the plant nurse who referred him to Dr. Eugene Pate, who diagnosed him with a possible meniscus tear. Mr. McLawhorn sought a second opinion from Dr. Max Kasselt, an orthopaedic surgeon, who diagnosed him with calcium pyrophosate induced crystal arthritis in his left knee. On 17 September 1993, Defendant completed a Form 19 report of the 27 August 1993 accident, which stated the injury as being Mr. McLawhorn's "left knee."

On 24 September 1993, Mr. McLawhorn alleged another injury to his left knee from using a shovel. Dr. Kasselt placed him on light duty at work for four weeks with restrictions, including no shovel or ditch work. In October 1993, Dr. Kasselt performed diagnostic arthroscopy on Mr. McLawhorn's knee. Dr. Kasselt found no evidence of any meniscal pathology (tear) that could account for Mr. McLawhorn's symptoms, but he did find advanced degenerative joint disease involving three compartments of Mr. McLawhorn's left knee. In a physician's note dated 15 October 1993, Dr. Kasselt stated that Mr. McLawhorn had an arthritic condition which preceded his work injury, but that his knee was temporarily aggravated by the injury.

On 10 November 1993, Mr. McLawhorn and Defendant signed a Form 21 Agreement for Compensation for Disability for a period of 3 and 5/7 weeks. Defendant stated on the Form 21 that the accident resulted in injury to Mr. McLawhorn's "left knee." Pursuant to the Form 21 and the Industrial Commission's approval, Defendant paid Mr. McLawhorn for all time lost due to

his left knee problems from September through October 1993, as well as his medical bills from Dr. Kasselt.

On 29 November 1993, Dr. Kasselt noted that Mr. McLawhorn was at maximum medical improvement and gave him permanent restrictions of no prolonged repetitive bending, climbing or kneeling, as well as no prolonged working in ditches. On 19 January 1994, Dr. Kasselt diagnosed Mr. McLawhorn with three compartment degenerative joint disease, calcium pyrophosphate arthropy, and status post arthroscopy. Dr. Kasselt further stated that Mr. McLawhorn's knee was predestined to fail. In response to Mr. McLawhorn's request for information regarding his permanent disability, Dr. Kasselt stated that his knee condition was degenerative and was not work related. Dr. Kasselt gave Mr. McLawhorn a fifty percent disability rating due to the degenerative tear and arthritis in his knee.

Mr. McLawhorn did not work again after 4 February 1994. On 9 February 1994, Dr. Kasselt saw Mr. McLawhorn and diagnosed him with polyarticular psoriatic arthritis with involvement of the left finger and both knees. Mr. McLawhorn went on short-term disability due to degenerative arthritis on 5 April 1994. On 13 March 1995, Mr. McLawhorn wrote a resignation letter in which he stated, "I sincerely regret having to leave but due to arthritis in my knees, ankles, and hands [sic] I have no choice." On 6 April 1995, Mr. McLawhorn went on long-term state disability due to his arthritic condition. **[Note 2]**

On 5 January 2001, Mr. McLawhorn filed a Form 33 Request for Hearing, seeking additional disability benefits related to this claim. In its response to Mr. McLawhorn's Form 33, Defendant stated "Claimant's arthritic conditions preceded his injuries at work." Defendant also denied any occupational disease claim.

A hearing was held before Deputy Commissioner Phillip A. Holmes on 25 July 2002. An Opinion and Award was filed on 30 October 2002, denying Mr. McLawhorn's claim for additional benefits. On appeal, the full Commission issued its Opinion and Award on 29 September 2004, adopting and affirming the holding of the Deputy Commissioner. Mr. McLawhorn appealed from the Opinion and Award of the full Commission.

On appeal, Plaintiff argues that the full Commission erred in failing to make adequate findings of fact to support its conclusions of law in its Opinion and Award. We disagree.

The full Commission, having exclusive original jurisdiction over workers' compensation proceedings, is required to hear the evidence and file its award, "together with a statement of the findings of fact, rulings of law, and other matters pertinent to the questions at issue. . . ." N.C. Gen. Stat. §97-84 (2004). While the full Commission is not required to make findings as to each fact presented by the evidence, it must find those crucial and specific facts upon which the right to compensation depends so that a reviewing court can determine on appeal whether an adequate basis exists for the Commission's award. *Guest v. Brenner Iron & Metal Co.*, 241 N.C. 448, 451, 85 S.E.2d 596, 599 (1955). *See also Singleton v. Durham Laundry Co.*, 213 N.C. 32, 34-35, 195 S.E. 34, 35-36 (1938) (requiring the full Commission to make specific findings of fact upon the evidence).

The full Commission's findings of fact "are conclusive on appeal when supported by competent evidence even though" evidence exists that would support a contrary finding. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 684 (1982). As a result, appellate review of an award from the full 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. *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 186, 345 S.E.2d 374, 379 (1986). "[W]hen the findings are insufficient to determine the rights of the parties, the court may remand to the Industrial Commission for additional findings." *Hilliard*, 305 N.C. at 595, 290 S.E.2d at 684.

Plaintiff first contends that the full Commission failed to make adequate findings of fact to support its conclusion of law that Mr. McLawhorn did not suffer a compensable occupational disease. Because there was no occupational disease claim properly before the full Commission, we reject Plaintiff's argument.

Mr. McLawhorn filed a Form 33 Request for Hearing on 5 January 2001, seeking "additional benefits" due to a "change in law" for a workplace injury. Mr. McLawhorn did not note the existence of an occupational disease on the Form 33. On 14 February 2001, Defendant filed a Form 33R Response to Request for Hearing and specifically stated, "No" beside "Occupational disease." Mr. McLawhorn did not file an amended Form 33 to address any possible issue of an occupational disease, nor did he file a Form 18 indicating the existence of an occupational disease claim. Finally, the issues for determination raised by Mr. McLawhorn and Defendant for the full Commission were questions concerning only an injury by accident. None of the issues raised by either party relate to the existence of an occupational disease. Because the record on appeal is void of any evidence that an occupational disease claim was ever properly before the full Commission, Plaintiff's argument is without merit and her assignment of error is therefore overruled.

Plaintiff next contends the full Commission failed to make adequate findings of fact and conclusions of law on whether Defendant accepted liability for Mr. McLawhorn's degenerative knee disease in its execution of Form 21. We disagree.

The Commission is only required to make findings as to "those crucial and specific facts upon which the right to compensation depends so that a reviewing court can determine on appeal whether an adequate basis exists for the Commission's award." *Johnson v. S. Tire Sales & Serv.*, 358 N.C. 701, 705, 599 S.E.2d 508, 511 (2004). The full Commission made the following findings of fact relating to whether Defendant accepted liability of Mr. McLawhorn's degenerative knee disease in executing Form 21:

> 2. The employee suffered a work place injury on August 27, 1993 when he slipped in a ditch, which was accepted as a compensable claim by the defendant.
>
> 3. The parties entered into a Form 21 agreement for the August 27, 1993 injury which was approved by the Industrial Commission on November 16, 1993 for the specified 3 and 5/7 weeks and an average weekly wage of $476.30.
>
> 5. On January 19, 1994, Dr. Kasselt made the diagnosis of three compartment degenerative joint disease, calcium pyrophosphate arthropy and status post arthroscopy. He further stated that McLawhorn's knee was predestined to fail and in response to McLawhorn's request of information regarding his permanent disability, the doctor stated that his condition was degenerative rather than a sudden tear and was not work related.

The full Commission made the following conclusion of law determining whether Defendant accepted liability for Mr. McLawhorn's degenerative knee disease in its execution of Form 21:

> 1. The employee suffered a compensable injury on August 27, 1993 which was completely resolved as of January 19, 1994 and was no longer disabling under the Worker's Compensation Act. N.C.G.S. §97-2(6).

Here, we find that the full Commission made all necessary findings of fact to determine whether Defendant accepted liability for Mr. McLawhorn's degenerative knee disease in its execution of Form 21. The Form 21 executed by both parties states that Mr. McLawhorn sustained an injury to his "left knee" on 27 August 1993, and that Mr. McLawhorn would receive

compensation for this injury for 3 and 5/7 weeks. Additional evidence in the record, including Mr. McLawhorn's own testimony about the injury that occurred on 27 August 1993, and the compensation he received thereafter is more evidence to support the full Commission's Finding of Fact Numbers Two and Three. With respect to the full Commission's Finding of Fact Number Five, Dr. Kasselt testified that by January 1994, any injury suffered by Mr. McLawhorn "was resolved and the patient [Mr. McLawhorn] was just suffering from the underlying condition of his knee." Finally, Dr. Kasselt's note of 19 January 1994, states that Mr. McLawhorn's "knee was predestined to fail, it just happened to fail at work." Because we find some competent evidence to support the full Commission's Findings of Fact Numbers Two and Three, we find that the full Commission's Conclusion of Law Number One, that Mr. McLawhorn was no longer disabling under the Worker's Compensation Act, was supported by the full Commission's findings of fact. This assignment of error is therefore overruled.

Finally, Plaintiff contends that the Commission failed to make adequate findings of fact on the issue of whether Mr. McLawhorn's degenerative knee condition was aggravated by his work conditions. We disagree.

Where the plaintiff asserts that he has a compensable claim due to workplace aggravation of a pre-existing condition, the full Commission is obligated to include specific findings regarding the extent to which the workplace conditions contributed to the onset of the disability. *See Barnes v. O'Berry Ctr.*, 55 N.C. App. 244, 247, 284 S.E.2d 716, 718 (1981) (holding that specific findings on crucial issues are necessary if the reviewing court is to ascertain whether the findings of fact are supported by competent evidence and whether the findings support the conclusion of law). Failure to include such findings is error requiring remand. *See Lawton v. County of Durham*, 85 N.C. App. 589, 592, 355 S.E.2d 158, 160 (1987) (failure of the full

Commission to make sufficient findings to enable the court to determine the rights of the parties requires remand). However, Mr. McLawhorn never asserted that he had a pre-existing condition that was aggravated by his work conditions. In the Form 33, Mr. McLawhorn contended that his claim stemmed from a workplace injury occurring on 27 September 1993. The mere fact that Dr. Kasselt testified that Mr. McLawhorn may have had a pre-existing condition aggravated by his work conditions does not place such a claim properly before the Commission. The Commission was therefore not required to include any findings regarding workplace aggravation of a pre-existing condition. Accordingly, this assignment of error is also overruled.

Because we find that there was no claim of a pre-existing knee condition aggravated by work conditions properly before the full Commission, Plaintiff's final argument, that the full Commission erred by failing to consider and place sufficient weight on portions of Dr. Kasselt's testimony that Mr. McLawhorn's knee injury was permanently aggravated by work conditions, is therefore moot.

Affirmed.

Judges CALABRIA and LEVINSON concur.

Report per Rule 30(e).

NOTES

1. Mr. McLawhorn gave notice of appeal to this Court on 18 October 2004; however, he died on 4 February 2005. On 27 April 2005, this Court allowed Bonnie B. McLawhorn, as administratix of Mr. McLawhorn's estate, to be substituted for the late plaintiff.

2. Mr. McLawhorn elected to convert his retirement to disability retirement pursuant to the court's decision in *Faulkenbury v. Teachers' & State Employees' Retirement Sys.*, 345 N.C. 683, 483 S.E.2d 422 (1997) on 9 September 2000, and was paid back due benefits under the *Faulkenbury* ruling.