NO. COA06-81

NORTH CAROLINA COURT OF APPEALS

Filed: 17 October 2006

BARRY EDWIN BRANHAM,
Employee,
Plaintiff-Appellant,

v.

North Carolina Industrial Commission
I.C. File No. 370507

WHALEY FOOD SERVICE,
Employer,

THE HARTFORD,
Carrier,
Defendants-Appellees.

Appeal by Plaintiff from opinion and award entered 24 August 2005 by the North Carolina Industrial Commission. Heard in the Court of Appeals 23 August 2006.

Hall & Hall Attorneys at Law, P.C., by Douglas L. Hall, for Plaintiff-Appellant.

Morris York Williams Surles & Barringer, LLP, by Stephen Kushner, for Defendants-Appellees.

McGEE, Judge.

Barry Edwin Branham (Plaintiff) began working for Whaley Food Service (Whaley) on 6 January 1992 as a service technician, primarily responsible for repairing various pieces of commercial kitchen equipment. At the time of Plaintiff's claim, he had a history of chronic back pain, which was managed with pain medication and epidural injections. Plaintiff underwent back surgery on 7 March 1997 as a result of a workplace injury by accident not at issue in this case.

Plaintiff was also involved in an automobile collision on 23 May 1997, and he was thrown from a horse in July 2001.

Plaintiff was treated by multiple medical providers prior to the 14 August 2003 incident at issue here. Plaintiff began treatment with Dr. John Sarzier of Catawba Valley Neurosurgical and Spine Services on or about 4 April 2003 for low back pain that had been present for four years. At that time, Plaintiff reported stiffness and numbness on his left side, including his left leg. Dr. Sarzier ordered x-rays of Plaintiff's back and an MRI of Plaintiff's neck and low back. Plaintiff saw Dr. Sarzier again on 15 April 2003, at which time Plaintiff reported the same symptoms. The MRI revealed some collapse of the L5-S1 level, but Dr. Sarzier made no definite diagnosis at that time. Dr. Sarzier noted that a discogram would help to localize the source of Plaintiff's pain and determine whether Plaintiff was a candidate for a fusion operation. The record does not indicate the discogram was performed.

Dr. Christopher Hunt, an expert in anesthesiology and pain management, began treating Plaintiff on 20 April 1998 for back pain resulting from piriformis syndrome. Dr. Hunt performed epidural injections at that time, and Plaintiff indicated that his symptoms improved after the injections. Plaintiff returned to Dr. Hunt on 28 February 2003, reporting complaints similar to those Plaintiff reported in 1998. Plaintiff was given repeat epidural injections on 28 February 2003, 30 April 2003 and 9 May 2003. Dr. Hunt also testified that on 13 August 2003, the day before the incident at issue in this case, Plaintiff called Dr. Hunt's office to request an additional injection. Dr. Hunt noted the only time Plaintiff requested an injection outside of his regular visits was on 13 August 2003.

Dr. Martin Henegar of Carolina Neurosurgical and Spine Associates treated Plaintiff for low back pain beginning 2 July 2002. Dr. Henegar's notes indicate that Plaintiff returned on 23

July 2002 complaining of pain "in the left greater than right mid-back region [in] a band-like distribution." At that time, Plaintiff also indicated he had experienced "some trouble with walking and motion clumsiness for about a year[.]" Plaintiff saw Dr. Henegar again on 10 December 2002. Dr. Henegar's notes show that Plaintiff complained of "severe low back pain which radiates into both lower extremities, numbness and tingling in his left leg [and] thoracic pain which waxes and wanes, generally worse on the right than on the left and sometimes wraps around [Plaintiff's] body." Dr. Henegar arranged epidural injections of the lumbar spine in an attempt to relieve Plaintiff's pain.

Plaintiff was using a ratchet and a "cheater bar" to remove a drain valve from a fryer during the course of his employment on 14 August 2003. Plaintiff testified that while attempting to loosen a bolt on the fryer with the cheater bar, he "felt a sharp pain in [his] lower back and a burning on . . . [his] right side." Plaintiff maintained that prior to the 14 August 2003 incident, "[m]ost of [his] chronic pain [was] on [his] left-hand side." However, after the 14 August 2003 incident, the pain "was on the right-hand side and went down the right leg." By the next morning, Plaintiff reported severe pain and was referred by Whaley to the Hart Clinic. Plaintiff was seen at the clinic on 2 September 2003, where he was treated with muscle relaxers, pain medication and anti-inflammatory drugs.

Plaintiff had an additional MRI performed on 22 September 2003. The September MRI revealed a herniated disk and further disk collapse at L5-S1. As a result, Dr. Sarzier performed lumbar fusion at L5-S1 on 30 January 2004. Dr. Scott McCloskey assumed Plaintiff's care when Dr. Sarzier left the practice and relocated to Florida.

Dr. McCloskey testified that after comparing Plaintiff's April MRI with the results of Plaintiff's September MRI, he believed the 14 August 2003 incident was a substantial causative

factor in Plaintiff's back condition which resulted in the fusion surgery. On cross-examination, Dr. McCloskey testified that an individual who had received prior surgery would be somewhat more susceptible to a disk rupture. Dr. McCloskey also stated that without the results of a discogram there would be no way to determine whether Plaintiff was a surgical candidate in April 2003.

Plaintiff completed a Form 18 on 13 November 2003, reporting injury to his back after "straining in [an] awkward position to remove a machine drain valve" on 14 August 2003. Defendants completed a Form 61 and denied that Plaintiff sustained a compensable injury. Plaintiff filed a Form 33 requesting a hearing. In an opinion and award filed 4 January 2005, Deputy Commissioner Theresa B. Stephenson found that Plaintiff failed to prove that he sustained an injury by accident or a material aggravation of a pre-existing condition on 14 August 2003. Further, the deputy commissioner concluded that Plaintiff failed to prove that his subsequent medical treatment was related to the 14 August 2003 incident. Accordingly, Plaintiff's claim was denied.

Plaintiff appealed to the Full Commission (the Commission) on 5 January 2005. In an opinion and award filed 24 August 2005, the Commission made the following pertinent findings of fact:

> 6. In July 2001, [P]laintiff was thrown from a horse. Plaintiff denied at the hearing that he sustained back pain as a result of that accident. However, based on the credible medical records, [P]laintiff complained of pain, including low back pain, following that accident. Plaintiff reported to Dr. Henegar in 2002 that his back pain was so severe he was having difficulty walking.
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> 7. Plaintiff began treating with Dr. Sarzier on or about April 4, 2003. At that time he gave a history of back pain for several years getting progressively worse. He mentioned shooting pains in both hips, right worse than left. Dr. Sarzier obtained an

> MRI and recommended a [discogram] that was never performed. The MRI revealed disk collapse at L5-S1.
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> 9. Plaintiff testified that he sustained an injury by accident on or about August 14, 2003. Plaintiff testified he was attempting to change a vat on a fryer, and was using a socket wrench with a ratchet to take the drain valve off of the fryer. Plaintiff claimed this was different from his prior symptoms in that his complaints were primarily on his right side, a claim squarely contradicted by the more credible medical records.
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> 12. Plaintiff redirected his own care to Dr.Sarzier. Plaintiff returned to Dr. Sarzier on December 11, 2003. Dr. Sarzier had been considering fusion surgery in April 2003, but Dr. Sarzier had postponed making a decision on the surgery pending the results of the discogram. Dr. McCloskey, who assumed [P]laintiff's care following Dr. Sarzier's relocation to Florida, confirmed that it was impossible to know, without having the discogram, whether [P]laintiff required the surgery as of April 2003. Dr. Sarzier ultimately performed the fusion.
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> 15. Plaintiff suggested at hearing that his complaints had essentially resolved prior to August 13, 2003, or were at least manageable. This testimony is not accepted as credible in light of [P]laintiff's call to Dr. Hunt's office on August 13, 2003, the day before his alleged injury. Plaintiff had called on that date with complaints of increased pain, and wanted to come in for another injection. This was an option that was always available to [P]laintiff, even as far back as 1998. However, in the six and a half years that Dr. Hunt has been treating Plaintiff, the only time he called and asked to come in for an injection which was not previously scheduled was the day before his alleged injury at work.

The Commission then concluded that Plaintiff failed to prove he sustained an injury by accident or a material aggravation of a pre-existing condition. Further, the Commission concluded that Plaintiff failed to prove that his subsequent medical treatment was related to the incident of 14 August 2003 and denied Plaintiff's claim. Plaintiff appeals.

Standard of Review

Our Court's appellate standard of review in workers' compensation cases is "quite narrow." *Calloway v. Memorial Mission Hosp.*, 137 N.C. App. 480, 484, 528 S.E.2d 397, 400 (2000). Our Supreme Court has stated that when the Commission's findings of fact are supported by competent evidence in the record, the findings are conclusive on appeal, even though there may also be evidence that would support a contrary finding. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998). To set aside a finding made by the Commission, there must be a complete lack of competent evidence to support the finding. *Jones v. Candler Mobile Village*, 118 N.C. App. 719, 721, 457 S.E.2d 315, 317 (1995). Further, this Court cannot re-weigh evidence or engage in credibility determinations, and our "'duty goes no further than to determine whether the record contains any evidence tending to support the finding.'" *Adams*, 349 N.C. at 681, 509 S.E.2d at 414 (quoting *Anderson v. Lincoln Construction Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)).

Analysis

In his first assignment of error, Plaintiff argues that the greater weight of the evidence showed he sustained a compensable workplace injury on or about 14 August 2004 which materially aggravated a prior back condition. Plaintiff contends the Commission erred in finding the evidence did not support a finding that Plaintiff's herniated disk was causally related to the alleged incident of 14 August 2003 and that it was another temporary flare-up of Plaintiff's pre-existing condition. However, Plaintiff has failed to assign error to either of these findings, and therefore, they are binding on appeal to this Court. *See Johnson v. Herbie's Place*, 157 N.C. App. 168, 180, 579 S.E.2d 110, 118 (2003), *disc. review denied*, 357 N.C. 460, 585 S.E.2d 760 (2003). This assignment of error is overruled.

Plaintiff next argues there was no competent evidence to support the Commission's finding that Plaintiff denied that he sustained back pain after a horseback riding accident. At the hearing, Plaintiff testified he had been thrown from a horse "a couple of years" prior to the 14 August 2003 incident and that the fall had "hurt [his] upper back, [his] thoracic area[.]" On cross-examination, Plaintiff was asked whether he sustained some low back pain as a result of the horse accident. Plaintiff said he did not experience low back pain, but thoracic pain.

Plaintiff fails to note, however, that the remainder of the Commission's finding points to Plaintiff's medical evidence, which supports that Plaintiff reported back pain, including low back pain, after the July 2001 horseback riding accident. The stipulated medical records show Plaintiff did complain of back pain before the 14 August 2003 incident. Dr. Henegar's office note dated 10 December 2002 states that Plaintiff's symptoms had worsened and that "he [had] severe low back pain which radiate[d] into both lower extremities[.]" Even if the Commission incorrectly characterized Plaintiff's testimony as a "denial," there is competent evidence to support the finding that the medical records showed Plaintiff experienced low back pain after the July 2001 horse riding accident. Thus, we affirm this finding because there is competent evidence to support it. *See Adams,* 349 N.C. at 681, 509 S.E.2d at 414.

Plaintiff next argues the Commission's finding that Dr. Sarzier recommended a discogram, which was never performed, is not supported by competent evidence. Plaintiff complains that the finding "clearly implies that the [discogram] was ordered by Dr. Sarzier but not performed due to some fault of the Plaintiff." We disagree and affirm the Commission's finding.

First, we fail to read any implication of Plaintiff's improper motive into the Commission's finding regarding the discogram. Further, Dr. Sarzier's notes indicate that Plaintiff

presented for a follow up of Plaintiff's most recent MRI on 15 April 2003. Dr. Sarzier indicated that he would obtain a discogram to help determine whether Plaintiff "might be a candidate for a fusion." Plaintiff's September MRI revealed further disk collapse at L5-S1. Dr. Sarzier then recommended fusion surgery, which he ultimately performed. No further mention of the discogram was made in Dr. Sarzier's notes. Dr. McCloskey testified there was no record or mention of the discogram after the 15 April 2003 note, and no results of the test appeared in the medical reports. This competent evidence supports the finding that Dr. Sarzier "recommended a [discogram] that was never performed."

Plaintiff next challenges the Commission's finding that Plaintiff's testimony regarding the location of his pain prior to the 14 August 2003 incident was contradicted by the more credible medical records. We uphold the Commission's finding. Dr. Sarzier's notes and Dr. McCloskey's testimony indicate that Plaintiff's complaints had progressed to his right side before April 2003. For example, in Dr. Sarzier's consult note dated 4 April 2003, Dr. Sarzier stated that Plaintiff reported experiencing "shooting pains into both hips" and "severe low back pain[.]" Further, Dr. Henegar's office note, dated 10 December 2002, reveals that Plaintiff complained of "severe low back pain which radiate[d] into both lower extremities [and] thoracic pain which waxe[d] and wane[d], generally worse on the right than on the left, and sometimes [wrapped] around his body." Plaintiff correctly notes that Dr. Hunt's testimony and records reflect that Plaintiff primarily complained to him of left side pain, but it is not the role of this Court to make credibility determinations. *See Adams*, 349 N.C. at 681, 509 S.E.2d at 414. Thus, this finding is supported by competent evidence and we therefore affirm.

Plaintiff next argues there was no competent evidence to support the Commission's finding number twelve that "Plaintiff redirected his own care to Dr. Sarzier." Dr. Hunt testified

that after Plaintiff received an epidural injection on 21 October 2003 and saw no improvement, Dr. Hunt "felt that it was important [to] consider [a] surgical opinion from Dr. Sarzier" and referred Plaintiff back to Dr. Sarzier. In support of this finding, Defendants point to Dr. McCloskey's testimony that Dr. Sarzier ordered a discogram to determine whether Plaintiff was a surgical candidate, and that no such test was completed.

Plaintiff confines his argument regarding finding number twelve to the first sentence of the finding, but Plaintiff fails to indicate how the finding changes the conclusions of the Commission. Dr. McCloskey's testimony supports the fact that as of the date of Plaintiff's April MRI, Dr. Sarzier had not concluded Plaintiff needed surgery, and that Dr. Sarzier did not recommend surgery until Plaintiff's September MRI showed further disk collapse. Also, while the Commission's finding that Plaintiff "redirected his own care to Dr. Sarzier" appears erroneous in light of Dr. Hunt's referral back to Dr. Sarzier, this error is not material or prejudicial. "To warrant reversal, the Industrial Commission's error must be material and prejudicial." *Taylor v. Pardee Hospital*, 83 N.C. App. 385, 387, 350 S.E.2d 148, 150 (1986), *disc. review denied*, 319 N.C. 410, 354 S.E.2d 729 (1987). Plaintiff has not shown how this finding is material or prejudicial to him. Additionally, Plaintiff did not assign error to the Commission's findings that (1) Plaintiff failed to prove a compensable injury by accident on 14 August 2003; or (2) Plaintiff's herniated disk was caused by the 14 August 2003 incident. Thus, those findings are binding on this Court. *See Johnson*, 157 N.C. App. at 180, 579 S.E.2d at 118. We overrule this assignment of error.

Plaintiff next argues there was no competent evidence to support the Commission's finding that the only time Plaintiff requested an unscheduled piriformis muscle injection was the day before his alleged workplace injury. Plaintiff states that his medical records demonstrate that

he sought other injections on 30 April 2003 and 9 May 2003. Since the Commission relied in part upon this discrepancy to conclude that Plaintiff's testimony was not credible, Plaintiff argues that the entire finding must be vacated. We disagree.

First, the record shows that Plaintiff's 30 April 2003 piriformis injection was a scheduled injection, which would not undermine the Commission's finding. Next, the report from that visit indicates that Plaintiff would return in seven to ten days, indicating that the 9 May 2003 injection was also scheduled. Ultimately, however, neither party disputes that Plaintiff called Dr. Hunt's office on 13 August 2003, the day before the 14 August 2003 incident, requesting an additional injection. This evidence supports the Commission's finding that Plaintiff's testimony was not credible, and because we do not assess credibility or re-weigh evidence, we affirm the Commission's finding of fact. *See Adams*, 349 N.C. at 681, 509 S.E.2d at 414.

Finally, Defendants request that this Court invoke its power to impose sanctions for the filing of a frivolous appeal pursuant to Rule 34 of the Rules of Appellate Procedure. N.C.R. App. P. 34(a). We decline to do so. Plaintiff presented good-faith, though ultimately unsuccessful, arguments and we find sanctions inappropriate.

Affirmed.

Judges BRYANT and ELMORE concur.

Report per Rule 30(e).