NO. COA04-839

NORTH CAROLINA COURT OF APPEALS

Filed: 7 June 2005

RONNIE SMITH,
Plaintiff-Employee,

v.

North Carolina Industrial Commission
I.C. File No. 456736

GOODYEAR TIRE & RUBBER CO.,
Defendant-Employer,

TRAVELERS INSURANCE CO.,
Defendant-Carrier.

Appeal by defendants from an Opinion and Award dated 31 March 2004 by the North Carolina Industrial Commission. Heard in the Court of Appeals 3 February 2005.

Cranfill, Sumner & Hartzog, L.L.P., by Nicole Dolph Viele, for defendants appellants.

Gregory B. Thompson for plaintiff appellee.

BRYANT, Judge.

Goodyear Tire & Rubber Company (defendant-employer) and Travelers Insurance Company **[Note 1]** (defendant-carrier), collectively defendants, appeal from an Opinion and Award of the North Carolina Industrial Commission (Commission) dated 31 March 2004 awarding Ronnie Smith (plaintiff-employee) ongoing total disability compensation at the rate of $466.00 per week from "26 February 1999 and ongoing."

Plaintiff (DOB 9/26/1954) began working for defendant-employer in 1978 and worked as a tire builder for seven years, until 1985, when he became a serviceman, which required him to

engage in repetitive lifting of tire-building materials. Plaintiff lifted 100 to 150 pounds independently, and up to 300 pounds with assistance.

On 27 June 1994, plaintiff sustained a compensable back injury (radiculopathy) working for defendant-employer when a tread trap loosened and plaintiff twisted his back to repair it. Plaintiff's injury caused him to be out of work on disability from 27 June until December 1994. Dr. Atassi, a neurosurgeon, treated plaintiff's injury and on 10 October 1995, performed a lumbar laminectomy and discectomy for plaintiff's herniated disc at L4-L5. While he recovered from surgery, plaintiff sustained an additional period of disability from 10 October 1995 through 27 February 1996, at which time he returned to his job as serviceman , experiencing intermittent pain.

In December 1996 and March 1997, plaintiff returned to Dr. Atassi, complaining of moderate pain in his lower back and legs and was advised to avoid frequent bending and prolonged sitting. Dr. Atassi referred plaintiff to Dr. Jaufmann, also a neurosurgeon, on 12 March 1997. MRI results from that visit showed plaintiff had an L4-L5 disc protrusion or possible scarring from the 1995 surgery, with no evidence of nerve root compression or spinal stenosis. In April 1997, plaintiff underwent a myelogram and CT scan, indicating a possible disc protrusion, but otherwise the results were within normal limits. After examining plaintiff, Dr. Jaufmann allowed plaintiff to continue to work without restrictions on 18 April 1997.

On 3 June 1997, after undergoing nerve conduction studies, plaintiff's test results showed he suffered from chronic bilateral L5 and S1 radiculopathies and abnormal diabetic polyneuropathy. The diabetic polyneuropathy was a condition that developed from plaintiff having diabetes, unrelated to his job. On 10 October 1997, Dr. Jaufmann allowed plaintiff to return to work to perform light duty, in observance of permanent restrictions: no lifting over 45

pounds; alternate periods of sitting and standing; and no repetitive bending. Plaintiff returned to see Dr. Jaufmann in April 1998 and September 1998, with continued complaints of leg and back pain. Based on Dr. Jaufmann's 1997 restrictions, defendant-employer's nurse signed a "Modified Work Authorization" for plaintiff on 28 June 1998, limiting the amount plaintiff could lift without assistance and having plaintiff avoid certain repetitive motions and positions at work. While on these light duty work restrictions, plaintiff continued to complain of "very severe right lower extremity pain" and, consequently, was taken out of work for the last time by Dr. Jaufmann on 26 February 1999. Defendants reinstated temporary total disability benefits on 19 March 1999 pursuant to Form 62 based on plaintiff's seven and one-half percent rating of permanent impairment to his back for his 1994 injury.

On 15 March 2002, defendants filed a Form 24 "Application to Terminate Benefits" on grounds that plaintiff's current condition preventing him from being able to work was unrelated to his compensable workplace injury. On 17 April 2002, a Special Deputy Commissioner filed an order approving the termination of plaintiff's benefits effective 15 March 2002. In response to plaintiff's motion for reconsideration, an order dated 21 May 2002 was issued, affirming the Deputy Commissioner's prior decision. Plaintiff's Form 33 "Request for Hearing" before the Deputy Commissioner was filed on 25 July 2002. The parties obtained medical deposition testimony from Dr. Bruce Jaufmann prior to filing Form 24. On 25 September 2002, the parties presented stipulated medical records to the Deputy Commissioner.

At the hearing before the Deputy Commissioner, the sole issue was whether plaintiff was entitled to disability benefits as of 26 February 1999 and ongoing. After hearing live testimony, reviewing deposition testimony, exhibits and other submissions of the parties , the Deputy

Commissioner issued an Opinion and Award filed 30 April 2003 denying plaintiff's claim for ongoing total disability compensation benefits.

Plaintiff appealed to the Full Commission on 1 May 2003. At the pre-trial hearing, the parties stipulated to plaintiff having "suffered a compensable injury arising out of and in the course of his employment with defendant-employer" on 27 June 1994. In an Opinion and Award dated 31 March 2004, the Commission reversed the Opinion and Award of the Deputy Commissioner and found plaintiff to be totally disabled. The Commission ordered defendants to pay total disability compensation at the rate of $466.00 per week from "26 February 1999 and ongoing." In addition, defendants were ordered to pay all of plaintiff's medical expenses incurred, or to be incurred, as a result of his work related injury, reasonable attorney's fees and costs . Defendants appealed.

The dispositive issue on appeal is whether the Commission erred in concluding and awarding plaintiff total disability benefits after 26 February 1999 and finding and concluding plaintiff's compensable back injury (radiculopathy) is a contributing factor in his ongoing disability.

"[W]hen reviewing Industrial Commission decisions, appellate courts must examine 'whether any competent evidence supports the Commission's findings of fact and whether [those] findings . . . support the Commission's conclusions of law.'" *McRae v. Toastmaster, Inc.*, 358 N.C. 488 , 496, 597 S.E.2d 695, 700 (2004) (quoting *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000)); *Cox v. City of Winston-Salem*, 157 N.C. App. 228, 231, 578 S.E.2d 669, 673 (2003); *Pernell v. Piedmont Circuits*, 104 N.C. App. 289, 292, 409 S.E.2d 618, 619 (1991). The Commission's findings of fact are conclusive on appeal even where

there is contrary evidence, and such findings may only be set aside where there is a "complete lack of competent evidence to support them." *Johnson v. Herbie's Place*, 157 N.C. App. 168, 171, 579 S.E.2d 110, 113 (2003) (citation omitted); *See also Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998). It is the Commission's duty to judge the credibility of the witnesses and to determine the weight given to each testimony. *Bailey v. Sears Roebuck & Co.*, 131 N.C. App. 649, 653, 508 S.E.2d 831, 834 (1998).

Disability under the Workers' Compensation Act is defined as "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) (2003). Plaintiff may meet his burden of showing disability in one of four ways:

> (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of working in any employment; (2) the production of evidence that he is capable of some kind of work but that he has, after reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e. age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

Russell v. Lowes Prod. Distribution, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993). "Medical evidence that the plaintiff suffers from pain as a result of physical injury, combined with the plaintiff's own testimony that he is in pain has been held to be sufficient to support a conclusion of total disability." *Weatherford v. Am. Nat'l Can Co.*, --- N.C. App. ---, ---, 607 S.E.2d 348, 351 (2005) (citation omitted); *Webb v. Power Circuit, Inc.*, 141 N.C. App. 507, 512, 540 S.E.2d 790, 793 (2000); *Barber v. Going West Transp. Inc.*, 134 N.C. App. 428, 436, 517 S.E.2d 914, 920 (1999); *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 443-44, 342 S.E.2d 798,

808-09 (1986) (holding that an injured employee shall retain benefit eligibility if the employee's age, inexperience, lack of education, or any other preexisting factors preclude the employee from procuring alternative employment).

"The work-related injury need not be the sole cause of the problems to render an injury compensable. If the work-related accident contributed in some reasonable degree to plaintiff's disability, [he] is entitled to compensation." *Smith v. Champion Int'l*, 134 N.C. App. 180, 182, 517 S.E.2d 164, 166 (1999) (citing *Hoyle v. Carolina Associated Mills*, 122 N.C. App. 462, 465-66, 470 S.E.2d 357, 359 (1996)). "[A]pportionment is not proper where the evidence before the Commission renders an attempt at apportionment between work-related and non-work related causes speculative or where there is no evidence attributing a percentage of the claimant's total incapacity to her compensable injury, and a percentage to the non-compensable condition." *Royce v. Rushco Food Stores, Inc.*, 139 N.C. App. 322, 327-28, 533 S.E.2d 284, 288 (2000) (quoting *Counts v. Black & Decker Corp.*, 121 N.C. App. 387, 390-91, 465 S.E.2d 343, 346 (1996) (citations omitted)); *Konrady v. United States Airways, Inc.*, 165 N.C. App. 620, 629, 599 S.E.2d 593, 599 (2004).

Defendant challenges Findings of Fact 4, 19, 20, 21, 22, and 23:

> 4. On 27 June 1994, plaintiff sustained an admittedly compensable injury by accident to his back, which caused him to miss time from work. The parties executed a Form 21 agreement for payment of compensation, which was approved by the Industrial Commission on 10 August 1994. Plaintiff returned to work in December 1994 and continued to work until 10 October 1995. At the time of his injury, plaintiff's average weekly wage was $1,062.59, which entitled plaintiff to a compensation rate of $466.00, the maximum rate for 1994. . . .
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> 19. Dr. Jaufmann testified that diabetic polyneuropathy, which is a slowly progressing problem, and plaintiff's severe bilateral L5 and S1 radiculopathies are problems that affect the same nerves and each can compound the other. Plaintiff's diabetes

appears to have pre-existed his 27 June 1994 injury. He also has a history of hypertensive cardiovascular disease that resulted in a heart attack subsequent to his 1994 back surgery.

20. From December 1996 through 26 February 1999 when he was taken out of work, plaintiff consistently complained of moderate to severe low back pain, left hip pain, and bilateral lower extremity pain. The nerve conduction studies in 1997 showed chronic bilateral L5-S1 radiculopathies and also findings associated with diabetic neuropathy. The nerve conduction studies performed on 9 August 1999 showed interval progression of the diabetic polyneuropathy, more motor axon loss and subsequent distal slowing of conduction. Dr. Walsh noted that he could not determine whether plaintiff's L5-S1 radiculopathies were present due to the severity of plaintiff's diabetic neuropathy. Plaintiff's 1998 MRI showed desiccated and bulging discs at L4-L5, unchanged since the previous study in 1997. Dr. Jaufmann related plaintiff's disc problems to his 27 June 1994 injury. Based on the nerve conduction study by Dr. Walsh, Dr. Jaufmann was of the opinion that by 23 September 1999, plaintiff had two problems that contributed to the severity of his symptoms, but the diabetic polyneuropathy was plaintiff's primary problem. He also opined, however, that an EMG nerve conduction study cannot distinguish between a malfunction of the nerve based on nerve impingement or the diabetic neuropathy.

21. Plaintiff's incapacity to work since 26 February 1999 is due to the compound effect of his chronic, bilateral L5-S1 radiculopathies and his diabetic polyneuropathy. Based on plaintiff's educational level, his limited ability to read and write, his prior heavy manual labor, work history, his physical limitations caused by his work-related injury and his non-work-related medical conditions, plaintiff is incapable of working in any employment.

22. Even if plaintiff did not have diabetic polyneuropathy, he would only be capable of 'doing something' in the sedentary work classification, according to Dr. Jaufmann.

23. Based on plaintiff's educational level, aptitude and past work history, it would be futile for plaintiff to seek employment considering the physical limitations and pain caused by his work-related injury even if he did not have diabetic polyneuropathy.

Specifically, defendant argues the Commission erred in awarding benefits because plaintiff failed to prove his ongoing disability, and further, failed to prove plaintiff's low back radiculopathy alone makes him incapable of any employment. In support of their argument, defendants point to Dr. Jaufmann's 15 November 2001 deposition in which he testified:

> I think that if he did not have the diabetic polyneuropathy, maybe he couldn't build tires or do heavy lifting. I think he'd be able to do something. I think he'd be able to drive a car. I think he'd be able to be in a job where he could sit and stand and, you know, have some better quality of life than what he has right now. But I think the polyneuropathy and the neurological condition is what really prevents him from having even a sedentary job or a light duty job.

Dr. Jaufmann further testified to plaintiff's conditions:

> A. There are two problems going on here. One is the diabetic polyneuropathy, which is a slowly progressive problem. The other is the lumbar radiculopathy. They both affect the same nerves. So if you have two injuries at the same time they can each compound each other.
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> . . .
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> Q. So, in Mr. Smith's case, where he's been injured and he has diabetes . . . could [that] be indicative of the fact that the surgery he had . . . [was] slow to heal because of the diabetes?
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> A. Well, his E.G.'s that I have here have--have shown a bilateral radiculopathy, . . . so clearly he had a chronic injury that persisted. That didn't go away. But what has changed is the--the degree of polyneuropathy. . . .
>
> Q. Okay. And you said previously that a traumatic incident to--to the spine or to the nerve could exacerbate the polyneuropathy; is that correct?
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> A. Sure.

When asked to explain the impact plaintiff's non-work related condition (diabetic polyneuropathy) had on the healing of plaintiff's work related injury (radiculopathy) , Dr. Jaufmann stated:

> [Plaintiff] had a radiculopathy. . . . [Whether a nerve heals or not from a mechanical injury, like a disk pressing up against it, can be influenced by the diabetes. For instance, a diabetic may--the success rate in operating on a diabetic, or, particularly, a poorly controlled diabetic or someone with longstanding diabetics [sic] who have, say, a disk rupture or a nerve impingement syndrome, in all likelihood, the odds are it won't be as successful as an individual who is healthy, who has no other medical problems, because of the diabetes.

Although the parties stipulated to compensability and disability arising out of the 27 June 1994 injury, defendant asserts plaintiff is not entitled to additional medical compensation because plaintiff's present inability to return to pre-injury wages was caused by his diabetic polyneuropathy, and not his work related injury. However, competent medical evidence supports the Commission's findings and conclusions that apportionment of plaintiff's disability was speculative and his work related disability continued after 26 February 1999. Accordingly, plaintiff has satisfied the first and third *Russell* prongs as reflected in the pertinent Commission's conclusions of law:

> 3. In an action for additional compensation for medical treatment, the medical treatment sought must be directly related to the original compensable injury. If additional medical treatment is required, a rebuttable presumption arises that the treatment is directly related to the original compensable injury and the employer has the burden of producing evidence showing the treatment is not directly related to the compensable injury. *Parsons v. Pantry, Inc.*, 126 N.C. App. 540, 541-42, 485 S.E.2d 867, 869 (1997). Here, defendants admitted the claim on a Form 21 and acknowledged plaintiff's continuing disability when compensation was reinstated on the Form 62. It is defendants' burden to rebut through medical and other evidence . . . that plaintiff's disability is not related to his admittedly compensable injury by accident. *Id.* Defendants have not met their burden of proof. Moreover, even if

> plaintiff did not have diabetic neuropathy, he would still be incapable of earning suitable wages due to his admittedly compensable injury.
>
> 4. Plaintiff is disabled due to the compounding of his diabetic neuropathy with his low back radiculopathies. Apportionment is not permitted when an employee becomes totally and permanently disabled due to a compensable injury's aggravation or acceleration of the employee's non-disabling, pre-existing disease. *Errante v. Cumberland County Solid Waste Management*, 106 N.C. App. 114, 119, 415 S.E.2d 583, 586 (1992). In addition, in *Counts v. Black & Decker Corp.*, 121 N.C. App. 387, 390-391, 465 S.E.2d 343, 346, *disc. rev. denied*, 343 N.C. 305, 471 S.E.2d 68 (1996), the Court stated that 'apportionment is not proper where the evidence before the Commission renders an attempt at apportionment between work-related and non-work related causes speculative or where there is no evidence attributing a percentage of the claimant's total incapacity [to work] to her compensable injury, and a percentage to the non-compensable condition.'

In concluding plaintiff's disability continued, the Commission considered that Dr. Jaufmann had restricted plaintiff from returning to work because plaintiff was "an individual who has an injury but also has a serious medical and neurological problem on top of that injury." In other words, plaintiff's condition, as well as his medical restrictions, prevented him from performing his job with defendant-employer, even after having exhausted light duty assignments. The parties stipulated to plaintiff's disability, which indicated defendant's liability and a presumption of plaintiff's disability. Based on the evidence of plaintiff's disability, the Commission concluded plaintiff was entitled to ongoing benefits:

> 5. As a direct result of the 27 June 1994 work-related injury, plaintiff became totally disabled beginning on 26 February 1999 and continuing. N.C. Gen. Stat. . 97-2.
>
> 6. [P]laintiff is entitled to have defendants pay ongoing total disability compensation at the rate of $466.00 per week, from 26 February 1999 and ongoing. N.C. Gen. Stat. . 97-29.

> 7. [P]laintiff is entitled to have defendants pay for all related medical expenses incurred or to be incurred in the future which are reasonably required to effect a cure or provide relief. N.C. Gen. Stat. .. 97-25; 97-25.1.

Defendant claims plaintiff is not entitled to a presumption of continuing disability, citing *Pittman v. Thomas & Howard*, 122 N.C.App. 124, 468 S.E.2d 283 (1996), because plaintiff's worsening condition is directly related to a pre-existing condition and is not caused by a work related accident. In *Pittman* however, the Commission found and concluded, based on the treating physician's testimony, that the "plaintiff's worsening condition [was] due to severe lumbar spinal stenosis, which was not caused by the [workplace] incident of 25 August 1987." *Id.* at 128, 468 S.E.2d at 285. The Commission determined competent evidence existed to support findings that the treating physician could not relate the plaintiff's lumbar spinal stenosis to any specific event and concluded the plaintiff's worsening lumbar spinal stenosis was "symptomatic just by performing daily duties and other activities." *Id.* No such findings exist in the present case.

Here, in findings 21, 22, and 23, the Commission found plaintiff went beyond proving his disability and his inability to earn a wage, stating "based on plaintiff's educational level, aptitude and past work history, plaintiff would be capable of some sedentary work. . . . [H]owever, it would be futile for plaintiff to seek employment considering the physical limitations and pain caused by his work-related injury even if he did not have diabetic polyneuropathy." We agree.

Here, plaintiff was unable to return to work after 26 February 1999 because of severe back pain caused by the combination of his radiculopathies and diabetic polyneuropathy. Leading up to plaintiff's last day of work, plaintiff fulfilled light duties, as assigned under the defendant-employer 28 June 1998 Modified Work Authorization. Plaintiff continued to see Dr. Jaufmann, complaining of moderate to severe low back pain in 1999. Based on the results of

plaintiff's nerve conduction studies in 1997 and 1999, Dr. Jaufmann concluded plaintiff had two problems contributing to the severity of his symptoms and that plaintiff's incapacity to work since 26 February 1999 was due to the compound effect on his nerves from his chronic, bilateral L5-S1 radiculopathies and his diabetic polyneuropathy. Effective 27 February 1999, plaintiff was taken out of work, complaining of severe pain and relying on a cane to help him walk. On 25 March 1999, Dr. Jaufmann wrote to defendant-carrier stating plaintiff's existing disability was consistent with his 1994 work related injury. While defendants stipulated to plaintiff's 1994 disability for a specific time period, credible medical records and testimony supported the fact that plaintiff was physically unable to return to work as either a serviceman or perform light duties as assigned; and, based on his age, limited education and lack of requisite skills to perform a sedentary job, the presumption of plaintiff's disability was ongoing. Therefore, defendants failed to meet their burden of proof by failing to show which other jobs plaintiff was capable of, despite his disability, when he became unable to perform light duty assignments. Notwithstanding plaintiff's work related radiculopathy, which was complicated by his diabetic polyneuropathy, plaintiff lacked the capacity to return to work, or earn a wage. The Commission properly concluded plaintiff suffered from an ongoing disability which rendered him incapable of any employment after 26 February 1999. The Opinion and Award of the Commission is affirmed.

Affirmed.

Judges TIMMONS-GOODSON and LEVINSON concur.

Report per Rule 30(e).

NOTE

1. Travelers is the employer's qualified self-insurer.