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NO. COA09-1588

NORTH CAROLINA COURT OF APPEALS

Filed: 15 March 2011

DAVID JACOBS,  
Employee,  
Plaintiff,

v.

DEPARTMENT OF CORRECTION,  
Employer,

North Carolina  
Industrial Commission  
I.C. No. 546756

KEY RISK MANAGEMENT,  
Carrier,  
Defendants.

Appeal by defendant from opinion and award entered 17 August 2009 by the North Carolina Industrial Commission. Heard in the Court of Appeals 28 April 2010.

*Hardison & Cochran PLLC, by J. Jack Hardison, for plaintiff-appellee.*

*Attorney General Roy Cooper, by Assistant Attorney General Marc X. Sneed, for defendant-appellant North Carolina Department of Correction.*

GEER, Judge.

The North Carolina Department of Correction ("DOC") appeals from the Industrial Commission's opinion and award concluding that plaintiff David Jacobs is entitled to compensation for an additional 5% permanent partial disability ("PPD") rating to his left knee. The DOC's sole argument on appeal is that plaintiff's claim is barred by the statute of limitations in N.C. Gen. Stat. §

97-47 (2009). Since the Commission determined that plaintiff's knee condition was an aggravation of his previous knee injury and not a change of condition, the Commission correctly concluded that N.C. Gen. Stat. § 97-47 was inapplicable. We, therefore, affirm.

#### Facts

The DOC has not assigned error to any of the following findings of fact of the Commission, and they are, therefore, binding on appeal. On 9 January 1995, plaintiff suffered an admittedly compensable injury by accident to his left knee when a fight erupted between inmates. While plaintiff was trying to subdue a struggle between two prisoners, the three men fell to the floor, slamming both of plaintiff's knees into the corner of a metal door.

Dr. David Fedder at Pinehurst Surgical Clinic initially provided plaintiff with conservative treatment. Both of plaintiff's knees were injured and, at first, the right knee was more symptomatic than the left. Ultimately, however, the injury to the left knee was more significant. As a result of the fall, plaintiff suffered a lateral meniscus tear and a partial ACL tear in the left knee. Dr. Fedder performed a left knee arthroscopy and partial lateral meniscectomy to repair the tears. Dr. Fedder released plaintiff to limited duty work on 1 May 1995.

Plaintiff returned to work for the DOC performing his regular duties. The DOC did not accommodate his physical restrictions. On 19 June 1995, Dr. Fedder released plaintiff from his care with a 5% PPD rating to his left knee. Plaintiff, however, subsequently

returned to Dr. Fedder with continued symptoms. On 31 October 1995, plaintiff was given a steroid injection, and Dr. Fedder continued treating plaintiff conservatively. On 8 May 1997, Dr. Fedder recommended, as the only treatment option for plaintiff's continued pain, that plaintiff be referred for a second opinion and a repeat arthroscopic evaluation.

Dr. Lyman Smith at Raleigh Orthopedic Clinic performed an independent medical examination of plaintiff's left knee on 5 August 1997. Dr. Smith found that plaintiff had fraying of the posterior lateral fibers in the ACL and a small tear of the lateral meniscus. On 23 September 1997, Dr. Smith performed arthroscopic surgery on plaintiff's left knee, including a partial lateral meniscectomy and abrasion chondroplasty in the femoral trochlea. Post-surgery, Dr. Smith referred plaintiff for physical therapy.

Plaintiff returned to Dr. Smith for treatment on 26 May 1998. Dr. Smith determined that plaintiff had arthritis in his femoral trochlea and predicted that plaintiff would experience progressive difficulties with his left knee over time. He released plaintiff to return to heavy work as tolerated on 3 March 1998 and assigned plaintiff a 15% PPD rating to his left knee. On 21 August 1998, however, plaintiff was given significant physical limitations of no strenuous physical activity and walking as tolerated. Plaintiff sought additional treatment on 10 November 1998 and orthotics were ordered to help reduce patellofemoral pain.

In September 1998, the DOC paid the PPD benefits in a lump sum. Although the DOC claimed the final payment of benefits was 30

September 1998, it did not introduce into evidence any Form 28B (Report of Employer or Carrier/Administrator of Compensation and Medical Compensation Paid and Notice of Right to Additional Medical Compensation).

On 13 July 2000, Dr. Smith again treated plaintiff who had complaints of worsening pain in his left knee after an incident at work aggravated the pain in the knee. Plaintiff had to restrain a prisoner, which required him to kneel on his knee for an extended period of time. Plaintiff was experiencing popping and clicking in his left knee with episodic incidents of swelling. The Commission found: "The left knee, consistent with Dr. Smith's opinion in 1998, had become progressively worse and the incident in 2000 accelerated the deterioration."

Plaintiff returned to Dr. Smith on 6 October 2004, and Dr. Smith set permanent work restrictions of no squatting, climbing, or running. On 8 December 2004, Dr. Smith recommended that plaintiff avoid prolonged standing for more than 45 to 60 minutes and noted that plaintiff's job did not have a foot rest available that would prevent dangling of plaintiff's legs.

Plaintiff's work with the DOC, despite his restrictions, continued to require that he climb stairs. The climbing resulted in swelling and inflammation in the knees. Plaintiff returned to Dr. Smith on 15 September 2006 with continued left knee problems, and Dr. Smith recommended additional physical therapy. On 24 October 2006, Dr. Smith observed that plaintiff's right knee was painful. Plaintiff's right knee symptoms had slowly increased over

time to the point that the right knee was almost as bad as the left knee. Plaintiff's right knee was painful when climbing stairs, kneeling, or squatting. Dr. Smith concluded that plaintiff's injury to his left knee progressively required him to put an abnormal amount of stress on his right knee. Dr. Smith noted that plaintiff appeared to have patellar femoral issues in the right knee similar to those in the left knee.

On 20 March 2007, Dr. Smith noted that both of plaintiff's knees were bothering him. Bionic care and Hyalgan injections had been used for the left knee, but plaintiff continued to experience difficulties with both knees. Dr. Smith performed a partial lateral meniscectomy and a chondroplasty of the femoral trochlea on plaintiff's left knee on 25 June 2007. When plaintiff returned to Dr. Smith post-surgery, Dr. Smith noted that plaintiff's biggest problem was, at that point, his right knee. The Commission specifically found: "Dr. Smith's opinion is convincing that Plaintiff experiences right knee patellar femoral pain, a similar process as effecting [sic] his left knee."

On 18 April 2008, Dr. Smith declared that plaintiff had reached maximum medical improvement as to his left knee. He assigned an additional 5% PPD rating to plaintiff's left knee because of the continued arthritis and the additional meniscectomy. Dr. Smith testified that he would consider diagnostic treatment for plaintiff's right knee if he did not respond to conservative treatment. Dr. Smith believes that plaintiff is at substantial risk of needing future treatment for both of his knees and that he

will probably need a left total knee replacement in the future. Dr. Smith expressed the opinion that plaintiff's right knee pain is directly related to plaintiff's compensable left knee condition.

On 27 August 2007, plaintiff filed a Form 18 Notice of Accident to Employer and Form 33 Request for Hearing, alleging he was entitled to additional workers' compensation benefits. Defendants filed a Form 33R Response on 1 October 2007. A hearing was held before the Deputy Commissioner on 21 August 2008.

The DOC argued to the Deputy Commissioner that plaintiff's claim for benefits arising out of the additional 5% PPD rating assigned to his left knee was a claim for a change in condition pursuant to N.C. Gen. Stat. § 97-47 and was, therefore, barred by the statute, which "provides a limitations period requiring any claim for additional compensation on the grounds of a change in condition to be made within two years of the date the last payment of compensation was received by the claimant." *Hunter v. Perquimans County Bd. of Educ.*, 139 N.C. App. 352, 355, 533 S.E.2d 562, 565, *cert. denied*, 352 N.C. 674, 545 S.E.2d 424 (2000). On 15 January 2009, the Deputy Commissioner filed an opinion and award concluding that plaintiff's claim was not barred and that he was entitled to compensation for the 5% PPD rating to his left knee assigned by Dr. Smith.

Defendants appealed to the Full Commission, and on 17 August 2009, the Full Commission entered an opinion and award affirming the opinion and award of the Deputy Commissioner with minor modifications. The Commission concluded that "[p]laintiff has

proven by the greater weight of the evidence that he is entitled to receive any and all treatment to his left knee that is related to the compensable injury and is 'reasonably necessary to effect a cure, provide relief or lessen the period of disability.'" It also concluded that "NCDOC's contention that [p]laintiff is barred from further benefits two years following the alleged last payment of benefits on September 30, 1998 is not well taken" and that "[p]laintiff is legally entitled to compensation for the five percent additional permanent partial rating [to] his left knee as assigned by Dr. Smith on April 18, 2008."

As for the right knee, the Commission concluded that "[p]laintiff has proven by the greater weight of the evidence that his right knee condition is a result of his compensating for the injury to his left knee." The Commission finally concluded that "[p]laintiff has proven by the greater weight of the evidence that there is a substantial likelihood that his right and left knees will require treatment into the future, including but not limited to a full left knee replacement." The Commission, therefore, ordered that "[t]he NCDOC shall pay all medical expenses incurred or to be incurred by [p]laintiff as a result of his compensable left and right knee injuries, for so long as such examinations, evaluations and treatments may reasonably be required to effect a cure, or give relief or may tend to lessen [p]laintiff [sic] period of disability, when medical bills have been submitted according to established Industrial Commission procedures." The DOC timely appealed to this Court.

Discussion

The DOC's sole contention on appeal is that the Commission erred in concluding that plaintiff is entitled to additional disability benefits for the 5% PPD rating assigned to his left knee in 2008. "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).

The DOC argues plaintiff is claiming a change in condition and that this claim, brought more than two years after the date of the last payment of compensation received by plaintiff, is barred by the statute of limitations in N.C. Gen. Stat. § 97-47. To the contrary, we believe this case is squarely controlled by *Moore v. Fed. Express*, 162 N.C. App. 292, 590 S.E.2d 461 (2004).

In *Moore*, the plaintiff sustained an admittedly compensable injury to his back while working for Federal Express in 1992. *Id.* at 294, 590 S.E.2d at 463. He underwent surgery on his back in 1994 and returned to work. *Id.* In 1997, the plaintiff was assisting a customer loading a boxed computer into a car when the customer inadvertently dropped his end of the box, requiring the plaintiff to suddenly hold the box by himself, which caused a sharp pain in the plaintiff's back. *Id.*, 590 S.E.2d at 463-64.

The Commission found that although the plaintiff had experienced flare-ups of pain since the surgery in 1994, those



flare-ups always resolved, while the pain in 1997 after the customer incident was different and more pronounced. *Id.* at 295, 590 S.E.2d at 464. It noted that the plaintiff's physician testified that the 1997 incident substantially aggravated the plaintiff's pre-existing back condition. *Id.* The Commission then concluded the plaintiff was entitled to benefits for the injury in 1997. *Id.* at 296, 590 S.E.2d at 464.

On appeal, just like the DOC in this case, the defendants contended that the plaintiff's claim was a claim for a change of condition stemming from the 1992 injury and was barred by the statute of limitations in N.C. Gen. Stat. § 97-47. *Moore*, 162 N.C. App. at 297, 590 S.E.2d at 465. This Court, however, agreed with the Commission that the case involved a separate, compensable injury rather than a change in condition:

In this case, the medical evidence presented and the Commission's evidentiary findings of fact establish that although there may have been some causal connection to plaintiff's original 1992 injury, plaintiff's current back problems were a result of the 3 April 1997 incident, which substantially aggravated his pre-existing back condition. Additionally, the Commission found that the pain plaintiff experienced from the 3 April 1997 incident was different and substantially more severe than from the original 1992 back injury. Furthermore, plaintiff's 3 April 1997 injury directly resulted from the incident in which the customer dropped one end of the computer box.

*Id.* at 298, 590 S.E.2d at 465.

The Court concluded that "plaintiff's injury was the result of a specific traumatic incident occurring in the course of plaintiff's employment, and not simply a change in his condition

that was a natural consequence of his prior injury." *Id.*, 590 S.E.2d at 466. It, therefore, held that the Commission did not err in awarding the plaintiff workers' compensation benefits. *Id.*

Similarly, in this case, plaintiff is contending that the aggravation in 2000 of his left knee condition and the resulting 5% PPD rating represents a separate compensable injury. The Commission found:

Dr. Smith treated Plaintiff again on July 13, 2000. Plaintiff had complaints of worsening pain in his left knee *after an incident at work aggravated it. Plaintiff aggravated the knee when he had to restrain a prisoner*, which required him to kneel on his knee for an extended duration. Plaintiff was experiencing popping and clicking in his knee with episodic incidents of swelling. The left knee, consistent with Dr. Smith's opinion in 1998, had become progressively worse *and the incident in 2000 accelerated the deterioration.*

(Emphasis added.)

The Commission's finding supports its conclusions that (1) plaintiff's claim is not a claim for a change in condition and is not, therefore, barred by the statute of limitations in N.C. Gen. Stat. § 97-47, and (2) plaintiff is entitled to additional disability benefits. *See also Horne v. Universal Leaf Tobacco Processors*, 119 N.C. App. 682, 687, 459 S.E.2d 797, 801 (holding that physician's testimony was sufficient evidence that aggravation of prior compensable injury was compensable when, before car accident, plaintiff was making progress in recovering from work-related injury, but, after accident, condition worsened),

*disc. review denied*, 342 N.C. 192, 463 S.E.2d 237 (1995). We, therefore, affirm.

Affirmed.

Judges ROBERT C. HUNTER and STEPHENS concur.

Report per Rule 30(e).