

Affirmed
Author: Bolch
Concurring: Scott
Sellers

NO. COA00-838

NORTH CAROLINA COURT OF APPEALS

Filed: 17 July 2001

RANDY LEE FISHER,

Employee-Plaintiff,

v.

Industrial Commission
I.C. No. 555169

ARKANSAS BEST FREIGHT SYSTEM,

Employer-Defendant,

SELF-INSURED.

Appeal by defendant from opinion and award entered 9 March 2000 by the North Carolina Industrial Commission. Heard in the Court of Appeals 21 May 2001.

Charles Darsie, for plaintiff-appellee.

Morris York Williams Surles & Barringer, L.L.P., by William J. Garrity, for defendant-appellant.

TYSON, Judge.

Arkansas Best Freight System ("defendant") appeals the entry of an opinion and award by the North Carolina Industrial Commission awarding Randy Lee Fisher ("plaintiff") total disability compensation, medical expenses, and attorney's fees. We affirm.

I. Facts

Plaintiff was employed by defendant as a truck driver on 12 July 1995. On that date, plaintiff sustained a compensable injury by accident while unloading tires from a tractor-trailer. When plaintiff attempted to open the tractor-trailer door, the pressure of the tires inside caused the door to swing open and strike

FILED
01 JUL 17 AM 6:47
NORTH CAROLINA
COURT OF APPEALS

plaintiff. Plaintiff was knocked to the ground, and approximately four tires weighing 256 pounds each fell upon him.

Plaintiff was diagnosed as sustaining fractures of the left patella, left and right ankles, a grade I left open tibular-fibular fracture, and compression fractures of the spine at T12 and L1. On 31 July 1995, plaintiff was admitted to the hospital for a pulmonary embolism resulting from his multiple fractures. Plaintiff was discharged on 8 August 1995. He continued treatment under the care of Dr. Robert Fitch.

On 19 January 1996, plaintiff underwent surgery to remove some of the "hardware" from his lower extremities that had been implanted to heal the fractures. On 6 February 1996, Dr. Fitch reported that plaintiff was experiencing increased pain following the surgery. Plaintiff again underwent surgery to remove "hardware" from his right ankle on 24 June 1996. Following the surgery, on 13 August 1996, plaintiff was released to work at light duty, subject to restrictions. However, plaintiff continued to experience pain.

On 15 October 1996, Dr. Fitch noted that plaintiff was experiencing difficulty walking. Dr. Fitch assigned plaintiff a 40% disability rating for each of his feet on 5 December 1996. He assigned plaintiff a 5% disability rating for his left leg. Following the assignment of disability, plaintiff submitted to a functional capacity evaluation at Southwinds Spinal Rehabilitation Center in February 1997. The evaluation indicated that plaintiff could engage in sedentary work.

On 14 May 1997, plaintiff was seen by an orthopaedic surgeon, Dr. Andrew Bush. Plaintiff complained of back pain, and lower right and left extremity pain. Dr. Bush diagnosed plaintiff with a spinal compression fracture, degenerative disc problems, and peroneal neuropathy. Dr. Bush referred plaintiff to Dr. Craig Derian, a board-certified orthopedic surgeon with a specialty in spinal problems of the lower back.

Dr. Derian testified in his deposition that plaintiff sustained compression fractures of the spine at T12 and L1, and that he "was noted to have persistent back and bilateral lower extremity pain." Plaintiff underwent an MRI scan, revealing "compression fractures at T12-L1, decreased signal intensities consistent with disc degeneration at T11-12 and T12-L1, and disc degeneration at L4-5, L5-S1, with bulging of the L5-S1 disc centrally and to the left." Dr. Derian testified that he additionally diagnosed plaintiff with having "severe left peroneal nerve neuropathy, and mild peroneal neuropathy, right lower extremity, status post open reduction and internal fixation of multiple lower extremity fractures, including the right ankle, left tibia, and left patella."

In response to being asked the cause of such injuries, Dr. Derian testified:

I think that the injury that occurred in 1995, June 12, 1995, when the truck tires fell on him resulted in compression fractures at T12-L1 and symptomatic aggravation of disc degeneration symptoms at the thoracolumbar junction at T11-12 and T12-L1 and at L4-5 and L5-S1, and that these injuries also resulted in the multiple lower extremity injuries that

occurred, including the right ankle fracture, left tibia fracture, left patella fracture, and peroneal nerve injury, particularly on the left.

Dr. Derian⁴ opined that plaintiff "is permanently and totally disabled from work."

A hearing was held before the deputy commissioner. On 30 July 1999, the deputy commissioner concluded that plaintiff was permanently and totally disabled from gainful employment. Defendant appealed to the full Commission. On 9 March 2000, the Commission entered an order affirming the opinion of the deputy commissioner, and awarded plaintiff total disability compensation "until otherwise ordered by [the] Commission," continued payment of plaintiff's medical expenses, and attorney's fees of 25% of plaintiff's disability compensation. Defendant appeals.

II. Issue

The sole issue on appeal is whether the Commission erred in finding and concluding that plaintiff is permanently and totally disabled from gainful employment. Defendant argues that the majority of the evidence presented to the Commission tended to establish that plaintiff was capable of some form of gainful employment. Although we agree with defendant that the majority of the evidence tended to show that plaintiff was able to perform light duty or sedentary work, we must affirm the decision of the Commission where its findings are supported by any competent evidence. We hold that the Commission's findings were supported by competent evidence, and that these findings, in turn, support its conclusions of law.

"The Commission's findings of fact are conclusive on appeal if they are supported by any competent evidence." *Johnson v. Lowe's Companies, Inc.*, __ N.C. App __, __, 546 S.E.2d 616, 618 (2001) (citing *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977)). "Accordingly, this Court 'does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding.'" *Id.* (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)). "Therefore, if there is competent evidence to support the findings, they are conclusive on appeal even though there is plenary evidence to support contrary findings." *Oliver v. Lane Co., Inc.*, __ N.C. App. __, __, 544 S.E.2d 606, 608 (2001) (citing *Hedrick v. PPG Industries*, 126 N.C. App. 354, 357, 484 S.E.2d 853, 856, disc. review denied, 346 N.C. 546, 488 S.E.2d 801 (1997)) (emphasis added).

In the present case, the Commission made the findings of fact that on two occasions, Dr. Derian opined that plaintiff "was permanently and totally disabled." These findings are supported by Dr. Derian's medical reports contained in the record, as well as his deposition testimony. Dr. Derian testified in some detail concerning the medical basis for his determination that plaintiff "is permanently and totally disabled from work." Dr. Derian testified that his opinion was based on "the complexity of his low back injury, including significant symptoms related to disc degeneration . . . as well as his lower extremity injuries and

other limitations."

Dr. Derian disagreed with the results of plaintiff's functional capacity evaluation which found that plaintiff could engage in sedentary work. He stated, "I don't think in the long term, or even the short term, the patient has the capacity to perform sedentary or even a light-duty type of job." Dr. Derian explained that such a job

would require frequent position changes and because just sitting greatly increases his back pain, because he is unable to sit and perform upper extremity tasks because he is unable to position himself in a way that would reasonably be expected to allow him to produce on a . . . fine-manipulation upper extremity assembly line type of job.

"Our Supreme Court has approved the use of expert medical testimony on the issue of a claimant's ability to earn wages." *Kennedy v. Duke University Medical Center*, 101 N.C. App. 24, 31, 398 S.E.2d 677, 681 (1990) (citing *Fleming v. K-Mart Corp.*, 312 N.C. 538, 544, 324 S.E.2d 214, 217 (1985)). Moreover, the testimony of one doctor has been held to be sufficient "competent evidence" upon which to uphold the Commission's determination of disability. See *Bailey v. Smoky Mountain Enterprises, Inc.*, 65 N.C. App. 134, 137, 308 S.E.2d 489, 491 (1983), *disc. review denied*, 311 N.C. 303, 317 S.E.2d 678 (1984) ("All of the evidence concerning plaintiff's disability comes from the testimony and letters of Dr. Schulhof. Although there . . . appear to be slight contradictions in the doctor's testimony, that testimony, when taken as a whole, constitutes competent evidence to support the

Commission's findings of fact.").

Though we agree with defendant that the testimony of other doctors presented to the Commission could support a finding that plaintiff was capable of some form of gainful employment, we are constrained to hold that the Commission's findings of fact that plaintiff was fully disabled are supported by at least some competent evidence, and are therefore conclusive. See *Dishmond v. International Paper, Co.*, 132 N.C. App. 576, 580, 512 S.E.2d 771, 774, *disc. review denied*, 350 N.C. 828, 537 S.E.2d 820 (1999) ("the Commission's findings, when supported by competent evidence, will not be overturned on appeal, even where there is expert testimony to the contrary.").

The Commission's conclusive findings that plaintiff was permanently and totally disabled support its conclusion of law that plaintiff is entitled to the compensation awarded by the Commission.

Affirmed.

Chief Judge EAGLES and Judge McGEE concur.

Report per Rule 30(e).