NO. COA09-1624

NORTH CAROLINA COURT OF APPEALS

Filed: 21 September 2010

JOSEPH E. BURROUGHS,
Employee, Plaintiff,

v.

North Carolina
Industrial Commission
I.C. File No. 584372

LASER RECHARGE OF
CAROLINAS, INC.
Employer,

NORGARD INSURANCE COMPANY,
Carrier, Defendants.

Appeal by defendants from Opinion and Award entered 31 August 2009 by the North Carolina Industrial Commission. Heard in the Court of Appeals 17 August 2010.

Lennon & Camak, PLLC, by George W. Lennon and Michael W. Bertics, for plaintiff-appellee.

Teague, Campbell, Dennis, & Gorham, L.L.P., by Jacob H. Wellman, for defendants-appellants.

MARTIN, Chief Judge.

Plaintiff Joseph E. Burroughs began working for defendant-employer Laser Recharge of the Carolinas, Inc. in 1997. He was employed as a delivery driver and his job duties included delivering laser cartridges and occasionally moving printers. Defendant-employer is insured by defendant-carrier Norguard Insurance Company (collectively "defendants").

On 30 November 2005, while performing his normal job duties, plaintiff suffered a herniated cervical disk. Plaintiff's claim was accepted as compensable by defendants. In addition to his compensable neck injury, plaintiff has a number of pre-existing health conditions, including hypertension, hypercholesterolemia, diabetes, complications of diabetes, high blood pressure, gout, depression, and anxiety.

Dr. Brett Foreman, plaintiff's family doctor, testified that plaintiff's other pre-existing health conditions were aggravated by his neck injury. He also testified that plaintiff will require significant future treatment for all of those conditions. Dr. Foreman testified further that he could not apportion the percentage of each of plaintiff's medical conditions that were work-related as opposed to those which were non-work-related, and to do so would be speculation.

Plaintiff's workers' compensation claim was heard on 23 May 2008 before Deputy Commissioner J. Brad Donovan. On 30 January 2009, the deputy commissioner entered an Opinion and Award finding plaintiff to be permanently and totally disabled and entitled to medical compensation for his pre-existing medical conditions. Defendants appealed the latter of these determinations to the Full Industrial Commission. On 31 August 2009, the Industrial Commission entered an Opinion and Award affirming the deputy commissioner's determination that plaintiff is entitled to treatment for his pre-existing medical conditions. Defendants appealed.

On appeal, defendants argue that the Industrial Commission erred in (I) concluding that plaintiff's pre-existing medical conditions are compensable; and (II) awarding plaintiff medical compensation beyond what was or will be the result of the compensable injury.

Preliminarily we note that appellate review of an award of the Industrial Commission "is limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law." *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008), *reh'g denied*, 363 N.C. 260, 676 S.E.2d 472 (2009). In addition, "[t]he Commission's findings of fact are conclusive on appeal if supported by competent evidence. This is true even if there is evidence to support a contrary finding." *Nale v. Allen*, __ N.C. App. __, __, 682 S.E.2d 231, 234, *disc. review denied*, 363 N.C. 745, 688 S.E.2d 454 (2009).

I.

Defendants first argue that the Industrial Commission erred in concluding that plaintiff's pre-existing medical conditions are compensable.

Defendants highlight the Industrial Commission's conclusion, citing *Brown v. Family Dollar Distribution Center*, 129 N.C. App. 361, 499 S.E.2d 197 (1998), that where an employee contends a work-related injury has aggravated a pre-existing medical condition, he

must demonstrate that the injury materially aggravated or accelerated the pre-existing injury.

Defendants acknowledge that the Commission found plaintiff's compensable injury had aggravated his pre-existing conditions. Defendants contend, however, mere aggravation is insufficient and therefore the Commission's finding is inadequate to support the conclusion that plaintiff is entitled to compensation for his pre-existing conditions. Defendants assert that this Court has made clear the aggravation must be material and, absent a showing of materiality, aggravated pre-existing conditions are not compensable. They argue the Commission's findings do not meet this higher bar of *material* aggravation. Plaintiff, on the other hand, maintains the evidence established that his pre-existing conditions were *materially* aggravated by the work-related injury.

We do not need to resolve the question of the degree, whether material or not, to which the work-related injury aggravated the plaintiff's pre-existing conditions. Our cases have not uniformly required a showing of materiality. Indeed, not all of our cases have even included the word in their recitation of the rule. For example, our Supreme Court stated that "[w]hen a pre-existing, nondisabling, non-job-related condition is aggravated or accelerated by an accidental injury arising out of and in the course of employment . . . then the employer must compensate the employee for the entire resulting disability . . . ." *Morrison v. Burlington Indus.*, 304 N.C. 1, 18, 282 S.E.2d 458, 470 (1981) (emphasis omitted). Moreover, this Court has held that

"[a]ggravation of a pre-existing condition caused by a work-related injury is compensable under the Workers' Compensation Act." *Moore v. Fed. Express*, 162 N.C. App. 292, 297, 590 S.E.2d 461, 465 (2004); *see also Smith v. Champion Int'l*, 134 N.C. App. 180, 182, 517 S.E.2d 164, 166 (1999) ("Clearly, aggravation of a pre-existing condition which results in loss of wage earning capacity is compensable under the workers' compensation laws in our state."). Thus, we hold the Commission did not err in basing its award upon a finding that plaintiff's compensable injury aggravated (as opposed to "*materially* aggravated") his pre-existing conditions.

Defendants argue further that there is no evidence of the degree of aggravation. They argue, without citing any precedent for support, that "evidence of the degree of aggravation is mandatory to support findings and conclusions on the subject of aggravation." We have stated, however, that "'where an injury has aggravated an existing condition and thus proximately caused the incapacity, the relative contributions of the accident and the pre-existing condition will not be weighed.'" *Cox v. City of Winston-Salem*, 157 N.C. App. 228, 232, 578 S.E.2d 669, 673 (2003) (quoting *Wilder v. Barbour Boat Works*, 84 N.C. App. 188, 196, 352 S.E.2d 690, 694 (1987)). There is evidence that the plaintiff's compensable injury did aggravate his pre-existing conditions. Therefore defendants' argument that the Commission erred in determining there was aggravation of the pre-existing conditions without having evidence as to the specific degree of aggravation is without merit.

II.

Defendants next argue that the Industrial Commission erred in awarding medical compensation beyond what was or will be the result of the compensable injury.

Defendants first argue that the record before the Commission does not support its finding that plaintiff will require treatment of his pre-existing conditions as a result of his compensable injury. The Commission found in Finding of Fact 5 that "Dr. Foreman testified that . . . plaintiff will require treatment for all those [pre-existing] conditions at least in part as a result of plaintiff's compensable neck injury and chronic pain." This finding is supported by the following testimony of Dr. Foreman:

> Q: And, in your opinion, will [plaintiff] require treatment for all of those [pre-existing] conditions at least in part as a result of his injury and chronic neck pain?
>
> A: Yeah. He will require continued care for all those -- for all those medical issues.

Defendants also argue that the Commission erred in Conclusion of Law 5 when it awarded plaintiff medical treatment for his pre-existing conditions. The Commission concluded:

> [p]laintiff is entitled to have defendant pay for medical expenses incurred or to be incurred as a result of the compensable injury as may be required to provide relief, effect a cure or lessen the period of disability . . . for his compensable neck condition, chronic pain, hypertension, hypercholesterolemia, diabetes, complications of diabetes, high blood pressure, gout, depression, and anxiety . . . .

Defendants maintain the Commission must ensure that the medical expenses were incurred as a result of the compensable injury, citing *Errante v. Cumberland County Solid Waste Management*, 106 N.C. App. 114, 415 S.E.2d 583 (1992). The plaintiff-employee in *Errante* suffered a work-related injury while employed by the defendant as a landfill inspector. *Id.* at 116, 415 S.E.2d at 584-85. The plaintiff's doctor determined the plaintiff's injury had aggravated a pre-existing arthritic condition and resulted in shoulder tendonitis. *Id.* at 117, 415 S.E.2d at 585. "Part of plaintiff's disability award included . . . compensation for all of plaintiff's continuing reasonable and necessary nursing services, medicines, sick travel, medical, hospital, and other treatment or course of rehabilitative services when the bills for same have been submitted . . . and approved by the [Industrial] Commission." *Id.* at 120, 415 S.E.2d at 587 (alterations in original) (internal quotation marks omitted).

On appeal, the defendant-employer in *Errante* argued the Commission failed to specify those conditions for which the defendant must provide medical treatment. *Id.* at 121, 415 S.E.2d at 587. This Court agreed, holding that "reasonable and necessary worker's compensation awards for continuing medical expenses pursuant to Sections 97-29 and 97-25 contemplate only those reasonable and necessary expenses that are related to the compensable injury or injuries." *Id.* (emphasis and internal quotation marks omitted). We remanded the Opinion and Award "for modification to provide expressly for plaintiff's medical expenses

to include only those expenses incurred as a result of plaintiff's compensable injuries." *Id.* at 121, 415 S.E.2d at 587-88.

A number of factors distinguish the present case from *Errante*. First, unlike the Opinion and Award at issue in *Errante*, the Commission's Conclusion of Law 5 in the present case explicitly provides that plaintiff is entitled to have defendant pay for medical expenses incurred "as a result of the compensable injury." Thus, we need not remand the Opinion and Award as we did in *Errante* for the Commission to specify that defendant is liable only for the expenses incurred as a result of his compensable injury. Defendants' concern that the Commission ensure that the treatment sought is the result of the compensable injury has been adequately addressed by the Commission's Opinion and Award.

Moreover, we cautioned in *Errante* that, "if it cannot be determined which portion of plaintiff's medical expenses relate solely to his compensable injuries, then, in keeping with [*Harrell v. Harriet & Henderson Yarns*, 314 N.C. 566, 336 S.E.2d 47 (1985)], plaintiff would be entitled to compensation for his total expenses." *Errante*, 106 N.C. App. at 119, 415 S.E.2d at 586. Our Supreme Court held in *Harrell* that where the medical evidence does not permit any reasonable apportionment of the disability between occupational and nonoccupational lung disease and where a doctor characterized the task of doing so as "speculative[,]" plaintiff was entitled to an award for the entire disability. *Harrell*, 314 N.C. at 575, 336 S.E.2d at 53. In the present case, Dr. Foreman testified that it would be speculation to attempt to apportion the

percentage of each medical condition which is work-related and non-work-related. The Commission therefore did not err in concluding that plaintiff is entitled to compensation for medical expenses incurred in the treatment of his pre-existing conditions.

For the foregoing reasons, the Industrial Commission's decision awarding plaintiff compensation is affirmed.

Affirmed.

Judges HUNTER and CALABRIA concur.

Report per Rule 30(e).