NO. COA09-1373

NORTH CAROLINA COURT OF APPEALS

Filed: 17 August 2010

RAY G. GARDNER,

Employee,
Plaintiff-Appellee,

v.

N.C. Industrial Commission
I.C. Nos. 632226, 780073

MCLEAN FOODS, INC.,

Employer,

THE HARTFORD,

Carrier,

and

4438 MEISNER, INC. D/B/A/ IHOP,

Employer,

CRAWFORD & COMPANY,

Carrier,
Defendants-Appellants.

Appeal by defendants from opinion and award of the Full Commission of the North Carolina Industrial Commission entered 2 July 2009 by Commissioner J. Brad Donovan. Heard in the Court of Appeals 12 April 2010.

Lawyers East, by Curtis C. Coleman, III, for plaintiff-appellee.

Cranfill Sumner & Hartzog LLP, by Michael C. Connell and Ashley Baker White, for McLean Foods, defendant-appellee.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Erika Jones and Dana C. Moody, for defendants-appellants.

JACKSON, Judge.

Meisner, Inc. ("defendant Meisner") and Crawford & Company appeal from an opinion and award of the Full Commission of the North Carolina Industrial Commission ("Full Commission") granting worker's compensation benefits and attorneys' fees to Ray G. Gardner ("plaintiff"). For the reasons set forth below, we affirm in part, reverse in part, and remand.

On 16 May 2006, plaintiff suffered an admittedly compensable injury while employed at a Taco Bell restaurant owned by McLean Foods, Inc. ("defendant McLean"). Plaintiff received an electrical shock while changing a light bulb at work, causing him to fall from the ladder on which he had been standing. On 17 May 2006, plaintiff sought treatment for sharp and burning pain in his lower back and right leg stemming from the injury.

On 24 May 2006, plaintiff sought treatment from Dr. Barbara Lazio ("Dr. Lazio"), a neurosurgeon with Eastern Neurosurgical & Spine Associates. Dr. Lazio previously had performed an L4-5 bilateral laminectomy and discectomy on plaintiff in November 2005 to treat a herniated disc. On 30 May 2006, Dr. Lazio obtained an MRI of plaintiff's back that showed post surgical changes but did not indicate any nerve compression or disc herniation. On 7 August 2006, plaintiff underwent a myelogram that also did not show any herniation or nerve compression. On 19 September 2006,

Dr. Lazio referred plaintiff to pain management treatment with Dr. Ann Nunez ("Dr. Nunez") at the Brody School of Medicine.

On 11 November 2006, Dr. Lazio felt that plaintiff had reached maximum medical improvement and assigned a fifteen percent permanent impairment rating to plaintiff's back. Plaintiff continued with pain management treatment as recommended by Dr. Lazio.

In December 2006, plaintiff went to work at an IHOP restaurant owned by defendant Meisner in New Bern, North Carolina as an assistant manager. Plaintiff's weekly wage was $200.00 greater than he had earned while he was employed by defendant McLean at Taco Bell.

On or about 29 May 2007, plaintiff was working in the kitchen at IHOP when he dropped a spatula. Plaintiff stated that, when he reached to grab the spatula, he felt a pop in his back that resulted in pain. He was unable to continue the remainder of his shift and called his wife to come pick him up.

On 31 May 2007, plaintiff visited Dr. Nunez complaining of an increase in pain from the 29 May 2007 incident. Plaintiff described the pain as constant and stabbing, located in his back and right leg. Dr. Nunez wrote plaintiff out of work, advising him to return to light duty, part-time work beginning 4 June 2007 and to follow up with his back surgeon, Dr. Lazio. Plaintiff testified that, when he contacted defendant Meisner about his work restrictions, he was told that there was no work of that kind

available. On 25 June 2007, plaintiff obtained employment with a Wendy's restaurant in Tarboro, North Carolina.

On 2 June 2007, plaintiff was involved in a motor vehicle accident. Plaintiff was taken to the emergency room following the accident. Plaintiff testified that the accident neither hurt nor helped his back condition.

On 5 August 2007, plaintiff's back pain became so severe that he was unable to stand up unassisted after using the restroom. Plaintiff was taken to the emergency room and was evaluated by Dr. Michael Sharts ("Dr. Sharts") of Eastern Neurosurgical & Spine Associates. An MRI revealed severe disc degeneration. On 9 August 2007, Dr. Sharts performed a "redo" L4-5 laminectomy and fusion. Dr. Sharts noted that there was compression at the L5 nerve root, which was relieved during surgery. After the surgery, plaintiff was released for light duty work and returned to Wendy's, where he currently is employed.

On 25 June 2008, Deputy Commissioner J. Brad Donovan heard the matter. In an opinion and award filed 11 December 2008, the Deputy Commissioner ordered defendant Meisner to pay worker's compensation benefits and attorneys' fees to plaintiff. On 24 December 2008, defendant Meisner appealed to the Full Commission. On 12 May 2009, the matter came on for hearing. On 2 July 2009, the Full Commission adopted the Deputy Commissioner's opinion and award with minor modifications. Defendants Meisner and Crawford & Company appeal.

This Court reviews decisions made by the Full Commission to determine "'whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law.'" *Wooten v. Newcon Transp., Inc.*, 178 N.C. App. 698, 701, 632 S.E.2d 525, 528 (2006) (quoting *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000)). The Full Commission's findings "'are conclusive on appeal when such competent evidence exists, even if there is plenary evidence for contrary findings.'" *Ramsey v. Southern Indus. Constructors, Inc.*, 178 N.C. App. 25, 29, 630 S.E.2d 681, 685 (quoting *Hardin v. Motor Panels, Inc.*, 136 N.C. App. 351, 353, 524 S.E.2d 368, 371 (2000)), *disc. rev. denied*, 364 N.C. 168, 639 S.E.2d 652 (2006). It is well settled that the "'Commission is the sole judge of the credibility of the witnesses and the [evidentiary] weight to be given their testimony.'" *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 914 (2000) (quoting *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998)) (alteration in original). We review the Full Commission's conclusions of law *de novo*. *Ramsey*, 178 N.C. App. at 30, 630 S.E.2d at 685.

First, defendant Meisner argues that the Full Commission erred in concluding that plaintiff sustained an injury from a specific traumatic incident on or about 29 May 2007 and contends that plaintiff's injuries are a continuation of his previous 16 May 2006 injury. Defendant Meisner argues that the Full Commission erred by

finding Dr. Sharts's testimony to be credible and by relying upon it to reach the challenged conclusion. We disagree.

"The plaintiff in a workers' compensation case bears the burden of initially proving each and every element of compensability, including causation." *Whitfield v. Laboratory Corp. of Am.*, 158 N.C. App. 341, 350, 581 S.E.2d 778, 784 (2003) (citing *Porter v. Fieldcrest Cannon, Inc.*, 133 N.C. App. 23, 28, 514 S.E.2d 517, 521 (1999)). However, a pre-existing condition does not bar a workers' compensation claim. *Ard v. Owens-Illinois*, 182 N.C. App. 493, 498, 642 S.E.2d 257, 261 (2007). It is well settled that "aggravation of a pre-existing condition which results in loss of wage earning capacity is compensable under the workers' compensation laws in our state. 'The work-related injury need not be the sole cause of the problems to render an injury compensable.'" *Smith v. Champion Int'l*, 134 N.C. App. 180, 182, 517 S.E.2d 164, 166 (1999) (quoting *Hoyle v. Carolina Associated Mills*, 122 N.C. App. 462, 465, 470 S.E.2d 357, 359 (1996)). *See Goforth v. K-Mart Corp.*, 167 N.C. App. 618, 623, 605 S.E.2d 709, 713 (2004) (holding that the aggravation of a preexisting back condition caused by a specific traumatic accident is compensable).

In the case *sub judice*, the Full Commission made the following relevant finding of fact:

> 29. The Full Commission finds based upon the greater weight of the credible evidence that plaintiff suffered a specific traumatic incident on or about 29 May 2007 while working for defendant-employer Meisner at IHOP when he reached to catch a spatula that had fallen.

This finding of fact is supported by competent evidence. Plaintiff testified that, when he reached for the dropped spatula, he "felt a pop in [his] back." Notes from plaintiff's 31 May 2007 visit to his pain management physician, Dr. Nunez, affirm that "[u]nfortunately, this weekend while at work, [plaintiff] bent over to pick up a cooking utensil and he strained his back." Four days prior to the incident, on 23 May 2007, Dr. Nunez's notes describe plaintiff's pain as "localized in the low back, constant, dull" and a level two on a zero-to-ten scale. In contrast, plaintiff's pain at the 31 May 2007 visit was described as "localized in the back and in the right leg, constant, stabbing" and a level six or seven. Thus, the character, location, and degree of plaintiff's pain had changed following the incident at IHOP. Dr. Nunez also testified that the IHOP incident "aggravated [plaintiff's] back pain."

Furthermore, Dr. Sharts testified that "it seems reasonable to think that it's -- it was the work incident that caused [plaintiff's] condition." Dr. Sharts then confirmed that it was his opinion, within a reasonable degree of medical certainty, that the IHOP incident was a significant contributing cause of plaintiff's need for surgery in August 2007. Additionally, the MRI ordered by Dr. Sharts in August 2007 and plaintiff's subsequent surgery revealed nerve compression at the L4-5 level, which had been absent from the MRI taken on 30 May 2006 following plaintiff's fall at Taco Bell.

Defendant Meisner urges that the Full Commission erred in relying upon Dr. Sharts's testimony. However, our Supreme Court

has held that "[i]t is the Commission that ultimately determines credibility" and that "on appeal, [the Court of Appeals] 'does not have the right to weigh the evidence and decide the issue on the basis of its weight. The [C]ourt's 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 413-14 (quoting *Anderson v. Construction Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)). *See also Shah v. Howard Johnson*, 140 N.C. App. 58, 61-62, 535 S.E.2d 577, 580 (2000) ("[S]o long as there is some 'evidence of substance which directly or by reasonable inference tends to support the findings, this Court is bound by such evidence, even though there is evidence that would have supported a finding to the contrary.'") (quoting *Porterfield v. RPC Corp.*, 47 N.C. App. 140, 144, 266 S.E.2d 760, 762 (1980)), *disc. rev. denied*, 353 N.C. 381, 547 S.E.2d 17 (2001).

In the instant case, the Full Commission specifically found that the greater weight of the evidence favored plaintiff and gave little credibility to defendant Meisner's witnesses. The Full Commission is not required to explain its assessment of credibility of evidence or witnesses. *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116-17, 530 S.E.2d 549, 553 (2000).

Based upon its findings of fact, the Full Commission concluded that "[p]laintiff sustained an injury resulting from a specific traumatic incident of the work assigned arising out of and in the course of the employment on or about 29 May 2007 with defendant-employer Meisner."

Therefore, we hold that the relevant finding of fact, number 29, is supported by competent evidence and that it supports the Full Commission's challenged conclusion of law. We note that defendant Meisner assigned error to several other findings of fact and conclusions of law, but failed to identify or offer argument with respect to specific findings within its brief. Based upon our review of the record on appeal and counsel's argument, it appears that defendant Meisner's central focus is on finding number 29; however, the other findings to which defendant Meisner refers also are supported by competent evidence. Accordingly, defendant Meisner's first argument on appeal is without merit.

Next, defendant Meisner argues that defendant McLean failed to rebut the presumption that plaintiff's medical treatment was a direct result of the 16 May 2006 compensable injury sustained at Taco Bell. Defendant Meisner asserts that the Full Commission improperly applied precedent established by *Horne v. Universal Leaf Tobacco Processors*, 119 N.C. App. 682, 459 S.E.2d 797 (1995), and *Heatherly v. Montgomery Components, Inc.*, 71 N.C. App. 377, 323 S.E.2d 29 (1984), when it concluded that "there is sufficient evidence presented to overcome any presumption that additional medical treatment is directly related to the 16 May 2006 compensable injury, and defendant-employer McLean Foods is not responsible for any benefits under the Act after 27 May 2007." We disagree with defendant Meisner's contention.

In *Horne* and *Heatherly*, we held that, if the aggravation of a claimant's injury "is a natural consequence that flows from the

primary injury" and "not the result of an independent intervening cause," then the aggravation is compensable. *Horne*, 119 N.C. App. at 685, 459 S.E.2d at 799 (citing *Heatherly*, 71 N.C. App. at 379-80, 323 S.E.2d at 30). These cases are distinguishable from the case *sub judice*. In *Horne*, the plaintiff sustained a compensable work-related injury to his back. *Id.* at 683, 459 S.E.2d at 798. The plaintiff had not yet reached maximum medical improvement and had not yet been released to return to work when he was involved in a non-work-related motor vehicle accident. *Id.* at 688, 459 S.E.2d at 801. The plaintiff's treating physician testified that the plaintiff's work-related injury was the cause of the plaintiff's need for further surgery, rather than the motor vehicle accident. *Id.* at 686-87, 459 S.E.2d at 800. We held that the plaintiff's injuries resulting from the automobile accident were compensable because the plaintiff had not fully healed from his original injury, the motor vehicle accident had aggravated his original condition, and the motor vehicle accident was not an independent intervening cause. *Id.* at 688, 459 S.E.2d at 800-01.

Similarly, in *Heatherly*, the plaintiff slipped, forcing his weight onto his right leg, reinjuring a prior compensable injury. *Heatherly*, 71 N.C. App. at 378, 323 S.E.2d at 29. Although the plaintiff had been cleared to return to work under the condition that he "avoid torsional loading" due to a small "area of nonunion of the fracture," his second accident was not work-related. *Id.* The evidence showed that the plaintiff's previous fracture had not fully healed, causing the injured bone to be weaker than

surrounding bone. *Id.* at 380–81, 323 S.E.2d at 31. Therefore, the second injury was compensable as a "direct and natural result of his original injury." *Id.* at 381, 323 S.E.2d at 31.

In the case *sub judice*, Dr. Lazio determined that plaintiff had reached maximum medical improvement on 11 November 2006, with respect to the injury sustained at Taco Bell. Plaintiff's treating physician testified that, in his medical opinion, the spatula incident at IHOP was a significant contributing cause to plaintiff's need for surgery. Plaintiff's medical records also indicated significant changes in his medical condition that were not present after the 16 May 2006 injury. There was no medical evidence presented to contradict these findings or show the 29 May 2007 injury was the direct and natural cause of plaintiff's prior injury. Therefore, unlike *Horne* and *Heatherly*, plaintiff had reached maximum medical improvement from his previous compensable injury and had returned to full-time work, earning a greater wage, in the same industry in which he had been employed at the time of the 16 May 2006 incident.

Furthermore, the Full Commission made the following relevant finding of fact:

> 30. The May 2007 work-related incident resulted in a material change of condition in and aggravation of plaintiff's pre-existing back condition and substantially contributed to the necessity of plaintiff's August 2007 surgery by Dr. Sharts. *Further, the greater weight of the expert medical testimony shows that the conditions necessitating the August 2007 surgery were not causally related to the 16 May 2006*[] *incident.*

(Emphasis added).

On appeal, defendant Meisner failed to challenge the Full Commission's finding that the 16 May 2006 fall and the 29 May 2007 spatula incident were not causally related. The Full Commission's findings of fact "not challenged or in support of which no argument is made in the brief are binding on appeal." *Strezinski v. City of Greensboro*, 187 N.C. App. 703, 707, 654 S.E.2d 263, 266 (2007). Accordingly, finding of fact number 30 supports the Full Commission's conclusion that the evidence presented was sufficient to overcome the presumption that the 29 May 2007 injury was related to the 16 May 2006 injury, and the conclusion is correct in view of our holdings in *Horne* and *Heatherly*.

Finally, defendant Meisner argues that plaintiff has not proved that he suffers from an ongoing disability as a result of the 29 May 2007 incident and that the Full Commission's award of temporary partial disability benefits is unsupported by the findings of fact and conclusions of law. We agree.

The North Carolina Workers' Compensation Act defines disability 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) (2007). Plaintiff may meet his burden of proving 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 work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a 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 Product Distribution, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (internal citations omitted).

Here, the Full Commission made the following unchallenged findings of fact:

> 1. At the time of the hearing before the deputy commissioner, plaintiff was 46 years old. Plaintiff's relevant employment history consists of working in managerial positions for fast food restaurants. He is currently employed by a Wendy's restaurant in Tarboro, North Carolina earning an average weekly wage of $643.00.
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> 32. Plaintiff's average weekly wage while working for defendant-employer Meisner was $800.00 per week which yields a compensation rate of $533.32 per week.

"'[W]here no exception is taken to a finding of fact . . ., the finding is presumed to be supported by competent evidence and is binding on appeal.'" *Bass v. Morganite, Inc.*, 166 N.C. App. 605, 609, 603 S.E.2d 384, 386–87 (2004) (quoting *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991)) (alteration in original). Although these unchallenged findings of fact show that plaintiff currently is employed by Wendy's, earning a lesser wage than he earned while employed by defendant Meisner at IHOP, the findings fail to demonstrate that plaintiff's lower wage is a result of his compensable injury. Without more, we are constrained to remand the matter for entry of findings of fact and conclusions

of law with respect to plaintiff's disability as contemplated by North Carolina General Statutes, section 97-2(9). *See* N.C. Gen. Stat. § 97-2(9) (2007) (defining "disability" 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.") (emphasis added); *see also Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982) (explaining that, in order to support a conclusion of disability, whether temporary or permanent, the Commission must find that the employee has shown "(1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) that this individual's incapacity to earn was caused by plaintiff's injury.").

For the foregoing reasons, we affirm in part, reverse in part, and remand the Full Commission's opinion and award of workers' compensation benefits and attorneys' fees to plaintiff for proper findings of fact and conclusions of law to resolve the issue of plaintiff's disability as contemplated by North Carolina General Statutes, section 97-2(9) and our Supreme Court's instruction in *Hilliard*.

Affirmed in part; Reversed in part; Remanded.

Chief Judge MARTIN and Judge BEASLEY concur.

Report per Rule 30(e).