NO. COA09-831

NORTH CAROLINA COURT OF APPEALS

Filed: 6 April 2010

HAROLD BABBERT,
Employee, Plaintiff,

v. N.C. Industrial Commission
I.C. No. 676214

SANDERS FORD,
Employer,

and

BRENTWOOD SERVICES,
Carrier, Defendants.

Appeal by defendants from Opinion and Award entered 26 February 2009 by the North Carolina Industrial Commission. Heard in the Court of Appeals 25 January 2010.

Brumbaugh, Mu & King, P.A., by Nicole D. Hart, for plaintiff-appellee.

Teague Campbell Dennis & Gorham L.L.P., by Tracey L. Jones and Daniel N. Kluttz, for defendants-appellants.

MARTIN, Chief Judge.

Plaintiff began working for defendant-employer in 1990 as a warranty technician and then began work in the paint and auto body section of defendant-employer's Jacksonville location. In 2000, plaintiff moved to Ohio where he performed auto body repair work for a Saturn dealership. While in Ohio, plaintiff was diagnosed with carpal tunnel syndrome ("CTS"), mostly in his left hand, but

received no treatment at that time. After a year, plaintiff moved back to North Carolina and did auto body repair work for MAACO for about four months and then performed similar work for Auto Works for a year. In about 2005, plaintiff returned to defendant-employer to work as a warranty technician. When the numbness and pain in his hands worsened, plaintiff sought treatment and was referred to Dr. David Esposito. Dr. Esposito performed a bilateral carpal tunnel release. On 14 December 2005, Dr. Esposito's physician's assistant diagnosed plaintiff with probable reflex sympathetic dystrophy ("RSD"). Plaintiff continues to have numbness and pain in his hands. He returned to work for defendant-employer as an estimator because he could no longer use his hands enough to be a warranty technician. He still has some problems with his hands in that capacity.

On 17 November 2006, plaintiff filed a Notice of Accident to Employer and Claim of Employee ("Form 18") with the Industrial Commission. On 17 July 2008, a deputy commissioner awarded plaintiff temporary total compensation at the rate of $495.02 per week from 25 October 2005 through 17 June 2007, permanent partial disability compensation for his thirty percent (30%) permanent partial disability to each hand at the rate of $495.02 per week, payment for medical treatment relating to his compensable occupational disease, and attorney's fees. On appeal to the Full Commission, the deputy commissioner's Opinion and Award was affirmed, with some modifications. Defendants appeal to this Court.

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).

In their first two arguments, defendants assert that the Full Commission erred with regard to its findings and conclusions that there was a causal connection between plaintiff's CTS and his employment with defendant-employer, that plaintiff has RDS, and that he is entitled to a permanent partial impairment rating of thirty percent (30%) in each hand. Defendants' arguments may be distilled to a contention that the Commission's findings and conclusions were contrary to the opinions of defendant's expert witnesses, Dr. Rowland and Dr. Edwards. However, it is, by now, basic law that the Commission has full and sole authority as the fact-finder to determine the credibility and weight to be afforded the testimony of any witness, including experts, and it is free to accept or reject the testimony and opinions of any witness, even if uncontradicted. *Anderson v. Nw. Motor Co.*, 233 N.C. 372, 376, 64

S.E.2d 265, 268 (1951); *Hassell v. Onslow Cty. Bd. of Educ.*, 362 N.C. 299, 305, 661 S.E.2d 709, 714 (2008).

Through his expert witness, Dr. Esposito, an orthopedist, plaintiff presented evidence that there was a "potential causal relationship between" plaintiff's job description as an auto body technician and CTS and that "more likely than not" his job as a warranty technician placed him at an increased risk of developing CTS. In addition, defendants' expert, Dr. Edwards, testified in his deposition that plaintiff's employment placed him at an increased risk for developing CTS and could have aggravated plaintiff's CTS. This evidence supports the Commission's Finding of Fact 21 which states:

> The greater weight of the evidence establishes and the Full Commission finds that Plaintiff's employment with Defendant-Employer placed him at an increased risk of contracting carpal tunnel syndrome as compared to the general public. The Full Commission further finds that Plaintiff contracted carpal tunnel syndrome as a result of his employment with Defendant-employer.

This finding supports the Commission's Conclusion of Law 1 which states, "Plaintiff contracted the occupational disease of bilateral carpel tunnel syndrome as a result of his employment with Defendant-Employer. N.C. Gen. Stat. § 97-53(13)."

Likewise, Dr. Esposito testified in his deposition that plaintiff had a disability rating of thirty percent (30%) in each hand. Dr. Esposito also testified that plaintiff's RSD "is a secondary diagnosis to" CTS and the carpel tunnel release. Although Dr. Esposito's physician's assistant noted some improvements in

plaintiff's condition, Dr. Esposito explained that this improvement was relative to the condition he had been in previously. In addition, after the noted improvement plaintiff reported tingling and numbness on subsequent visits. Dr. Esposito referred plaintiff to Dr. Scott Johnston, an expert in anesthesiology and pain management. Dr. Johnson diagnosed plaintiff with RSD. Dr. Johnston referred plaintiff to Dr. Kenneth Lee, a neurosurgeon, who believed plaintiff's pain was attributable to his hands rather than to his cervical spine. Dr. Lee "tended to agree" with Dr. Johnston's diagnosis of RSD. This competent evidence supports the finding that "[p]laintiff also developed RSD or CRPS in his hands as a result of his carpal tunnel syndrome" and that "[p]laintiff sustained a 30% permanent partial disability to each hand as a result of his carpal tunnel syndrome." These findings support Conclusions of Law 2 and 6 which state, respectively, "As a result of his compensable bilateral carpal tunnel syndrome, Plaintiff also suffered from complex regional pain syndrome/reflex sympathy dystrophy. N.C. Gen. Stat. § 97-53(13)," and "As a result of his compensable bilateral carpal tunnel syndrome, Plaintiff sustained a thirty percent (30%) permanent partial disability to each of his hands. N.C. Gen. Stat. § 97-31." Therefore, we overrule these assignments of error.

Defendants next argue that the Full Commission erred in failing to address their argument that they are not liable to plaintiff because plaintiff was not "last injuriously exposed" during his employment with defendants. N.C. Gen. Stat. § 97-57 (2009). We conclude that defendants have not preserved this issue for appeal.

It is "the duty and responsibility of the full Commission to decide all of the matters in controversy between the parties." *Joyner v. Rocky Mt. Mills*, 92 N.C. App. 478, 482, 374 S.E.2d 610, 613 (1988). Although this Court has stated in *Hardin v. Motor Panels, Inc.*, 136 N.C. App. 351, 524 S.E.2d 368, *disc. review denied*, 351 N.C. 473, 543 S.E.2d 488 (2000), that, even "[a]ssuming a causal link is established between plaintiff's carpal tunnel syndrome and [his] employment, plaintiff must still prove the last injurious exposure to the hazards of the disease occurred during the course of employment with defendant," in *Hardin* the record reflects that the issue of last injurious exposure was placed at issue by the defendant. *Hardin*, 136 N.C. App. at 358, 524 S.E.2d at 373. However, in the present case, no issue of last injurious exposure was raised before the Commission, and the Commission was not required to resolve an issue which was not in controversy. This Court does not consider the issue where it is raised for the first time on appeal. *See Booker v. Med. Ctr.*, 297 N.C. 458, 481-82, 256 S.E.2d 189, 204 (1979).

Finally, defendants argue that the trial court erred in finding that plaintiff's claim was not time barred pursuant to N.C.G.S. § 97-22. N.C.G.S. § 97-22 states that written notice of the accident must be given within thirty days. However, a plaintiff can be excused from giving this notice if "reasonable excuse is made to the satisfaction of the Industrial Commission for not giving such notice and the Commission is satisfied that the employer has not been prejudiced thereby." N.C. Gen. Stat. § 97-22 (2009). In Finding

of Fact 27, the Commission found both that plaintiff had a reasonable excuse for not notifying defendants and that defendants were not prejudiced by the delay.

"Section 97-22 gives the Industrial Commission the discretion to determine what is or is not a reasonable excuse." *Chavis v. TLC Home Health Care*, 172 N.C. App. 366, 377, 616 S.E.2d 403, 412 (2005) (internal quotation marks omitted), *appeal dismissed*, 360 N.C. 288, 627 S.E.2d 464 (2006).

> The question of whether an employee has shown reasonable excuse depends on the reasonableness of his conduct under the circumstances. Where the employee does not reasonably know of the nature, seriousness, or probable compensable character of his injury and delays notification only until he reasonably knows, he has established reasonable excuse as that term is used in G.S. 97-22.

Lawton v. Cty. of Durham, 85 N.C. App. 589, 592, 355 S.E.2d 158, 160 (1987) (internal quotation marks omitted). Plaintiff testified at a hearing before the Full Commission as to why he waited to file a worker's compensation claim. He testified that he did not file because "[I] just felt that it was going to get better." Following his CTS release, plaintiff expected to return to work after six weeks. Thus, the Commission's finding that plaintiff had a reasonable excuse for his delay in filing is supported by evidence that plaintiff "[did] not reasonably know of the nature, seriousness, or probable compensable character of his injury" and delayed "notification only until he reasonably [knew]." *Lawton*, 85 N.C. App. at 592, 355 S.E.2d at 160.

Regarding the delay's prejudice to defendants,

> [w]hether prejudice exists requires an evaluation of the evidence in relationship to the purpose of the statutory notice requirement. The purpose is dual: First, to enable the employer to provide immediate medical diagnosis and treatment with a view to minimizing the seriousness of the injury; and second, to facilitate the earliest possible investigation of the facts surrounding the injury.

Jones v. Lowe's Cos., 103 N.C. App. 73, 76-77, 404 S.E.2d 165, 167 (1991) (internal quotation marks omitted). "The burden is on the employer to show prejudice." *Chavis*, 172 N.C. App. at 378, 616 S.E.2d at 413. Defendants have failed to show how plaintiff's delay in filing his claim has prejudiced them. When plaintiff's CTS worsened, he sought treatment and attempted to recuperate so that he could return to work. Dr. Esposito testified that his treatment of plaintiff was not uncommon. Defendants presented no evidence of what would have been done differently had they been informed in advance of plaintiff's appointments with Dr. Esposito, or that their investigation was impeded by plaintiff's delay. Therefore, we overrule this assignment of error.

Affirmed.

Judges HUNTER and ERVIN concur.

Report per Rule 30(e).