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NO. COA02-27

NORTH CAROLINA COURT OF APPEALS

Filed: 4 March 2003

STEVEN A. WHISNANT,  
Employee/Plaintiff,

v.

North Carolina Industrial Commission  
I.C. File No. 694601

NEWTON TRANSPORTATION  
COMPANY, INC.,  
Employer,

KEY RISK MANAGEMENT,  
SERVICES, INC.,  
Carrier/Defendants.

Appeal by defendants from opinion and award entered 7 August 2001 by the North Carolina Industrial Commission. Heard in the Court of Appeals 9 October 2002.

*Starnes, Teele, Aycock, Haire & Triebert, P.A., by H. Dockery Teele, Jr., Esquire, for plaintiff-appellee.*

*Womble Carlyle Sandridge & Rice, P.L.L.C., by Philip J. Mohr, for defendant-appellants.*

LEVINSON, Judge.

Defendants appeal from the Industrial Commission's opinion awarding plaintiff temporary total disability. We affirm.

The essential facts are not in dispute: At the time of the hearing, plaintiff was a 44 year old high school graduate, employed as a truck driver for the preceding 20 years. On 9 February 1997 plaintiff, was injured in a motor vehicle accident arising from, and during the course of, his

employment with defendant-employer. Defendants concede that this was a compensable accident, and that plaintiff's injuries required xiphoidectomy, which is a surgical procedure. During the xiphoidectomy, plaintiff suffered a heart attack, which defendants concede was caused by the xiphoidectomy. Tests performed immediately after plaintiff's heart attack revealed that plaintiff had a pre-existing blocked left artery. In response to this discovery, surgeons performed quadruple bypass surgery on plaintiff within two hours of the xiphoidectomy and resultant heart attack. Following the bypass surgery, plaintiff received continued treatment for heart disease, and also continued to experience swelling, stiffness, phlebitis, and severe leg pain where a vein was removed for the bypass surgery. In January, 1999, plaintiff's treating physician, Dr. Croft, determined plaintiff to be "totally and permanently disabled from both his cardiac status and also from the problem with his persistent deep vein and superficial thrombosis of his right leg." Plaintiff did not return to work between the time of the bypass surgery and the date of the hearing.

Defendants disputed whether the bypass surgery performed on plaintiff was causally related to his compensable injury. A hearing was conducted before a deputy commissioner on 26 August 1999. In his opinion of 30 March 2000, the deputy Commissioner found that the bypass surgery was performed in response to plaintiff's heart attack, in order to restore blood flow to the heart and minimize permanent heart damage. He also found that plaintiff was totally disabled following the initial motor vehicle accident, except for a brief two-week period of employment shortly after the collision, and that plaintiff had not been released by his doctor to return to work. Plaintiff was awarded temporary total disability, payment for all medical expenses, including the bypass surgery, and attorneys fees.

Defendants appealed to the full Commission, which issued an opinion and award on 7 August 2001. The Commission's findings of fact included, in pertinent part, the following:

5. Near the completion of the xiphoidectomy, plaintiff suffered an episode of low blood pressure and decreased heart rate. . . . a cardiac catheterization was performed which revealed coronary artery disease with total blockage to the left main artery. . . .

6. . . . As a result of the stress placed on plaintiff's heart during the xiphoidectomy in conjunction with plaintiff's pre-existing coronary artery disease . . . plaintiff suffered . . . a heart attack. . . . Plaintiff's heart is damaged as a result of both his pre-existing disease, including the occlusion of his left artery, and the [heart attack.]

7. Plaintiff underwent an emergency coronary bypass grafting operation within approximately two hours of the xiphoidectomy[.] . . . The timing of this bypass [surgery] is vital in that if bypass surgery is performed within six hours of a [heart attack] further damage to the heart can be reduced or prevented. . . .

....

11. . . . Plaintiff continues to be temporarily totally disabled due to his heart condition in combination with the superficial thrombosis that is present at the vein harvest site in his right leg.

....

13. While there is medical testimony that plaintiff needed bypass surgery due to the severity of his occlusion regardless of the cardiac events resulting from the stress of the xiphoidectomy, the greater weight of the medical evidence demonstrates that the bypass surgery became imminent and was actually necessitated by the combination of the stress of the xiphoidectomy, the resulting [heart attack] and consequent cardiac damage, plaintiff's pre-existing cardiac condition and his heart's inability to compensate under stress in its occluded condition. Accordingly, the bypass surgery, which served in part to prevent or reduce further damage, is a natural and direct result of plaintiff's xiphoidectomy and its effect on his pre-existing cardiac condition.

The Industrial Commission awarded plaintiff temporary total disability, payment for medical expenses arising out of the accident, including the bypass surgery, and attorney's fees. From this opinion and award, defendants appeal.

#### Standard of Review

“The standard of appellate review of an opinion and award of the Industrial Commission in a workers’ compensation case is whether there is any competent evidence in the record to support the Commission’s findings of fact and whether these findings support the Commission’s conclusions of law.” *Lineback v. Wake County Board of Commissioners*, 126 N.C. App. 678, 680, 486 S.E.2d 252, 254 (1997). Moreover, “[t]he judgment of credibility of the witness and the weight to be given their testimony is entirely with the Commission.” *Frazier v. McDonald’s*, 149 N.C. App. 745, 750, 562 S.E.2d 295, 299 (2002) (citing *Melton v. City of Rocky Mount*, 118 N.C. App. 249, 255, 454 S.E.2d 704, 708, *disc. review denied*, 340 N.C. 568, 460 S.E.2d 319 (1995)). “The appellate court does not retry the facts[, but] merely determines from the proceedings before the Commission whether sufficient competent evidence exists to support its findings of fact.” *Morrison v. Burlington Industries*, 304 N.C. 1, 6, 282 S.E.2d 458, 463 (1981) (citation omitted). Accordingly, “findings of fact by the Industrial Commission are conclusive on appeal if supported by any competent evidence[.]” *Gallimore v. Marilyn’s Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977), even if there is evidence to support a contrary finding. *Deese v. Champion Int’l Corp.*, 352 N.C. 109, 530 S.E.2d 549 (2000). The Industrial Commission’s findings of fact may be set aside on appeal only “when there is a complete lack of competent evidence to support them[.]” *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 914 (2000).

Defendant argues on appeal that there is no competent evidence that plaintiff's bypass surgery was necessitated by the heart attack which he suffered during the xiphoidectomy. Defendants contend that, because plaintiff had pre-existing atherosclerosis, he would eventually have required bypass surgery anyway. They argue that the sole reason for the bypass surgery was plaintiff's occluded artery, which was unrelated to the heart attack arising from his compensable injury. We disagree.

Defendants correctly summarize evidence that (1) the general medical purpose of bypass surgery is to remedy occluded cardiac arteries; and (2) plaintiff's pre-existing heart condition might have required bypass surgery in the future, even without the heart attack brought on by the xiphoidectomy. Defendants' focus on the overall purpose of bypass surgery fails to recognize that the specific timing of *plaintiff's* bypass surgery was determined by his heart attack. Once plaintiff suffered a heart attack, he then required bypass surgery immediately, to minimize permanent damage to his heart. The Industrial Commission's findings in this regard are supported by competent evidence, including testimony elicited from Dr. Annex, that after a heart attack "the sooner [bypass surgery] is done, the better," and from Dr. Kennedy that physicians "generally feel it has to be done within six hours [of a heart attack] to prevent damage." Accordingly, the Commission's findings are binding, and are accepted by this Court.

The Industrial Commission's findings of fact in turn support its conclusion that, because the immediate need for bypass surgery was plaintiff's compensable heart attack, "the bypass surgery was a direct and natural result of his xiphoidectomy." This assignment of error is overruled.

Defendants also argue that the Industrial Commission erred in finding plaintiff remained totally disabled as a result of complications from the xiphoidectomy. However, in their brief,

defendants “acknowledge that in the event [that this Court] determines plaintiff’s by-pass operation was a natural and direct consequence of plaintiff’s heart attack, then there is sufficient evidence to determine plaintiff remains disabled from a condition related to his compensable injury.” This Court has found that plaintiff’s bypass surgery was causally related to his compensable injury and, as recognized by defendants, that the Industrial Commission’s conclusion that plaintiff is temporarily totally disabled is therefore supported by competent evidence. This assignment of error is overruled.

For the reasons discussed above, the opinion and award of the Industrial Commission is Affirmed.

Judges WYNN and TIMMONS-GOODSON concur.

Report per Rule 30(e).