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NO. COA 01-117

NORTH CAROLINA COURT OF APPEALS

Filed: 2 July 2002

LOWELL S. SMITH,
Employee-Plaintiff-Appellant,
v.

North Carolina Industrial Commission
I.C. File No. 744427

HARE PIPELINE CONSTRUCTION
COMPANY,
Employer

USF&G INSURANCE COMPANY,
Insurer,
Defendant-Appellees.

Appeal by plaintiff from an opinion and award of the North Carolina Industrial Commission filed 24 August 2000. Heard in the Court of Appeals 29 November 2001.

Jeannette Griffith Congdon for plaintiff-appellant.

Lewis & Roberts, P.L.L.C., by John H. Ruocchio, for defendant-appellees.

McGEE, Judge.

Lowell S. Smith (plaintiff) appeals from the Industrial Commission's denial of workers' compensation benefits. Plaintiff sustained an injury to his shoulder on 22 May 1997, arising out of and in the course of his employment as a mechanic with Hare Pipeline Construction Company (defendant). Plaintiff continued working that day and for the following two days. When he reported to work on 27 May 1997, he worked for two hours and left because of pain in his shoulder. Plaintiff was treated by Dr. George Moore, Jr. (Dr. Moore) on 27 May 1997. Dr.

Moore began conservative treatment with plaintiff over the next two months, finally concluding that plaintiff had rotator cuff tendinitis and a medial epicondylitis of the right elbow. Dr. Moore testified plaintiff never complained about neck pain or neck stiffness during plaintiff's initial treatment. Dr. Moore referred plaintiff to Raleigh Orthopedic Clinic, where plaintiff met with Dr. Joel D. Krakauer (Dr. Krakauer) on 22 July 1997. Dr. Krakauer also recommended conservative treatment and treated plaintiff until 12 August 1997. Dr. Krakauer testified in his opinion the pain plaintiff was experiencing was from his shoulder and not a cervical disc problem. Dr. Krakauer diagnosed plaintiff with an impingement of the right shoulder and referred him to Dr. Jeffrey Kobs (Dr. Kobs), a shoulder specialist.

Dr. Kobs first examined plaintiff on 19 August 1997. Dr. Kobs also diagnosed a shoulder impingement and recommended surgery, which he performed on 24 September 1997. Dr. Kobs released plaintiff to return to work at light duty on 6 October 1997; however, by this time plaintiff had been terminated from his job with defendant. Plaintiff saw Dr. Kobs again on 28 October 1997 and informed him that he had experienced mild sensory changes in his right arm and that he had been seeing a chiropractor who made adjustments to his neck. Dr. Kobs ordered x-rays of plaintiff's cervical spine, which showed moderate to significant degenerative disc disease.

Dr. Kobs referred plaintiff to Dr. Daniel J. Albright (Dr. Albright), an orthopedic surgeon, who ordered a myelogram and CAT scan following his initial visit on 24 November 1997. Dr. Albright's medical notes included a statement by plaintiff that he had been having neck pain since May 1997; however, Dr. Albright's review of plaintiff's medical records showed plaintiff had not complained of neck pain until 28 October 1997. Dr. Albright diagnosed plaintiff

as having cervical radiculopathy, and he recommended and performed an anterior cervical diskectomy with fusion on 10 December 1997.

Plaintiff continued to complain of arm pain, severe at times, and was prescribed an antidepressant by Dr. Albright. Dr. Albright also performed another myelogram/CT scan on 25 February 1998 to determine if another operation might correct plaintiff's continuing arm pain. The test showed no evidence of nerve root compression. The following day plaintiff was admitted to the hospital because of headache, nausea and vomiting. Plaintiff was tested for meningitis with negative results, and Dr. Albright suspected plaintiff might have had an allergic reaction to the dye of the myelogram. Dr. Albright called in Dr. David A. Konanc (Dr. Konanc), a neurologist, for an evaluation of plaintiff's confused behavior. Plaintiff was diagnosed with acute meningitis. He was released from the hospital on 10 March 1998.

When Dr. Albright saw plaintiff on 26 March 1998, plaintiff's right shoulder and upper extremity radicular pain had dramatically improved. However, plaintiff had persistent headaches and fatigued easily following his hospitalization. Plaintiff saw Dr. Konanc on 1 April 1998 and complained of continuing headaches, numbness or tingling at the base of his spine and back, and neck pain. Dr. Konanc prescribed nortriptyline to treat the presumed neuropathic pains and mild depressive symptoms.

Plaintiff failed to return to Dr. Kobs for a recommended final evaluation; consequently, Dr. Kobs could not give plaintiff a rating for permanent partial impairment.

Plaintiff filed a Form 18 on 16 September 1997 indicating he had suffered an injury to his right shoulder on 22 May 1997 during his employment as a mechanic with defendant. Plaintiff filed a Form 33 on 13 October 1997 requesting a hearing of his claim for an injury to his right shoulder on 22 May 1997. A deputy commissioner denied plaintiff's claim for compensation for

a cervical spine injury and any resulting disability arising from treatment of the cervical injury. Plaintiff was awarded 38 and 1/7ths weeks of temporary total disability and any permanent partial disability rating arising out of the compensable injury by accident to his right shoulder. Plaintiff appealed to the Industrial Commission on 23 September 1999. The Industrial Commission filed an opinion and award affirming the decision of the deputy commissioner on 24 August 2000. Plaintiff appeals.

Plaintiff first argues the Industrial Commission erred in finding and concluding that plaintiff's cervical spine condition was not a proximate result of plaintiff's work-related accident on 22 May 1997.

On an appeal from an opinion and award from the Industrial Commission, the standard of review for this Court "is limited to a determination of (1) whether the Commission's findings of fact are supported by any competent evidence in the record; and (2) whether the Commission's findings justify its conclusions of law." *Goff v. Foster Forbes Glass Div.*, 140 N.C. App. 130, 132-33, 535 S.E.2d 602, 604 (2000). "The facts found by the Commission are conclusive upon appeal to this Court when they are supported by competent evidence, even when there is evidence to support contrary findings." *Pittman v. International Paper Co.*, 132 N.C. App. 151, 156, 510 S.E.2d 705, 709, *aff'd*, 351 N.C. 42, 519 S.E.2d 524 (1999). Furthermore, the "findings of fact by the Industrial Commission are conclusive on appeal if supported by any competent evidence." *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (quoting *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977)).

Plaintiff asserts many facts and points of evidence in his brief in an attempt to argue a causal relationship exists between his work-related accident and his cervical spine injury. In essence, plaintiff asks this Court to examine and to weigh the evidence in the case. However, "on

appeal, this Court ‘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 414 (quoting *Anderson v. Construction Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)).

In plaintiff’s initial treatment with Dr. Moore, plaintiff never complained about neck pain or neck stiffness. Dr. Moore testified he did not feel the cervical injury “would have any relationship” with the work injury. Dr. Krakauer also testified in his opinion the significant amount of pain plaintiff was experiencing was from his shoulder and not from a cervical disc problem. Dr. Kobs testified that his first record of plaintiff complaining of neck pain occurred on 28 October 1997. Dr. Kobs treated this complaint as a “new complaint.” This complaint followed plaintiff’s filing a Form 18 and a Form 33; both forms indicate only an injury to plaintiff’s right shoulder.

The only evidence of plaintiff having neck pain dating back to May 1997 was a notation by Dr. Albright in his initial evaluation of plaintiff on 24 November 1997. Dr. Albright made the notation after plaintiff told him that plaintiff had experienced neck pain since May 1997. However, Dr. Albright acknowledged that upon a review of the medical records presented to him by plaintiff’s previous doctors, the first mention plaintiff made to any doctor of neck pain did not occur until 28 October 1997. In evaluating witness testimony, the Industrial Commission

“is the sole judge of the credibility of the witnesses and the weight to be given their testimony.” Thus, the Commission may assign more weight and credibility to certain testimony than other. Moreover, if the evidence before the Commission is capable of supporting two contrary findings, the determination of the Commission is conclusive on appeal.

Dolbow v. Holland Industrial, 64 N.C. App. 695, 697, 308 S.E.2d 335, 336 (1983), *disc. review denied*, 310 N.C. 308, 312 S.E.2d 651(1984) (quoting *Anderson v. Construction Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)).

After a careful review of the record, we determine there is competent evidence to support the Industrial Commission's finding of no causal relationship between plaintiff's cervical injury and his work-related accident. As a result, this finding is conclusive on appeal. We overrule this assignment of error.

Plaintiff's remaining assignments of error are all premised on a finding of a causal connection between the work-related accident and the cervical spine injury. Because the Industrial Commission has properly determined this causal relationship does not exist, these assignments of error are dismissed.

We affirm the award of the Industrial Commission.

Affirmed.

Judges HUNTER and BRYANT concur.

Report per Rule 30(e).