NO. COA01-550

NORTH CAROLINA COURT OF APPEALS

Filed: 19 March 2002

GEORGE C. BUTLER,
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 746977

E.I. DUPONT DE NEMOURS
& COMPANY,
Employer,
Self-Insured,

and

KEMPER RISK MANAGEMENT
SERVICES,
Risk Manager,
Defendants.

Appeal by defendants from Opinion and Award of the North Carolina Industrial Commission entered 26 January 2001. Heard in the Court of Appeals 20 February 2002.

Voerman Law Firm, P.L.L.C., by David P. Voerman, for the plaintiff-appellee.

Wallace, Morris & Barwick, P.A., by Elizabeth A. Heath, for the defendants-appellants.

WYNN, Judge.

The deciding issue in this workers compensation appeal from an award favoring the employee, George C. Butler, is whether the full Commission failed to consider the medical opinion of Dr. Ira Hardy who treated Butler's back injury. Because the record fails to show that

the Commission weighed and pondered the deposition testimony of Dr. Hardy, we remand this matter to the Commission for reconsideration.

Defendants are employer E.I. DuPont de Nemours & Company (DuPont) and its risk manager, Kemper Risk Management Services. Upon being fired by DuPont on 6 October 1997, Butler reported for the first time that he suffered an unwitnessed back injury three days earlier when he slipped while walking down a staircase at his job. Before that accident, Butler had received lower-back-pain treatment from an orthopaedic surgeon who diagnosed degenerative changes.

After his work-related injury, Butler saw various medical providers including Drs. Jack Koontz, Laddie Crisp, James Harvell, James Fulghum, Keith Kittleberger, Winston Lane; and the one that concerns this appeal, Dr. Hardy. Following a hearing on this matter, Deputy Commissioner Theresa B. Stephenson concluded that Butler was not entitled to reimbursement for medical expenses incurred after 29 October 1997 nor to any temporary total disability as a result of his injury on 3 October 1997. On appeal, the full Commission reversed Deputy Commissioner Stephenson's opinion and award with Commissioner Renee C. Riggsbee dissenting. Defendants appeal.

Defendants argue on appeal that the Commission failed to consider Dr. Hardy's deposition testimony as to Butler's medical condition and the causation of his back injury. We agree.

In reviewing an opinion and award from the full Commission, this Court must determine whether there is any competent evidence to support the Commission's findings of fact, and whether those findings support the Commission's conclusions of law. *See Sidney v. Raleigh Paving & Patching*, 109 N.C. App. 254, 426 S.E.2d 424 (1993). The Commission's findings are

conclusive on appeal if supported by any competent evidence, even though there may be competent evidence to the contrary. *See Morrison v. Burlington Industries*, 304 N.C. 1, 282 S.E.2d 458 (1981). "Furthermore, the Commission is the sole judge of the credibility of the witnesses as well as how much weight their testimony should be given." *Bailey v. Sears Roebuck & Co.*, 131 N.C. App. 649, 653, 508 S.E.2d 831, 834 (1998).

The Commission "may reject entirely the testimony of a witness if warranted by disbelief of the witness." *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993). However, "[b]efore making findings of fact, the Industrial Commission must consider *all* of the evidence. The Industrial Commission may not discount or disregard any evidence, but may choose not to believe the evidence *after* considering it." *Weaver v. American National Can Corp.*, 123 N.C. App. 507, 510, 473 S.E.2d 10, 12 (1996) (citing *Harrell v. Stevens & Co.*, 45 N.C. App. 197, 205, 262 S.E.2d 830, 835, *disc. review denied*, 300 N.C. 196, 269 S.E.2d 623 (1980)). That is, the Commission must weigh and ponder all of the evidence, and may not wholly disregard competent evidence; however, it may, after proper consideration and evaluation, properly refuse to believe particular evidence. *See Harrell*. The Commission may therefore choose to reject a witness' testimony entirely if warranted by disbelief of that witness, so long as the Commission at least first considers and evaluates the testimony. *See Lineback v. Wake County Board of Commissioners*, 126 N.C. App. 678, 486 S.E.2d 252 (1997).

In the instant case, Deputy Commissioner Stephenson found that Dr. Koontz referred Butler to Dr. Hardy, who first saw Butler in October 1997; an MRI revealed no evidence of nerve root compromise, and Butler's symptoms were not indicative of problems at this level. A post-contrast CT scan indicated a right L3-L4 foraminal disc protrusion, consistent with Butler's status prior to his fall on 3 October 1997 according to his medical records. Dr. Hardy did not

restrict Butler from working. Further studies on 28 October 1997 indicated a small lateral protrusion at L3-L4, below the nerve root exit. At this time, the extruded disc appeared to have resolved and Butler was improving. Objective testing revealed no nerve impaction at L4 and Dr. Hardy did not consider Butler to be a candidate for surgery.

Deputy Commissioner Stephenson also found that Dr. Harvell treated Butler on 18 November 1997, diagnosing him with moderately severe to severe degenerative disc disease at L5-S1 and to a lesser extent at L3-L4 and L4-L5; however, Dr. Harvell did not restrict Butler from working. On 17 December 1997, Butler consulted Dr. Greg Hardy, a neurologist; however, nerve conduction studies demonstrated no abnormalities. Deputy Commissioner Stephenson placed greater weight on the testimony of Dr. Ira Hardy than that of Dr. Fulghum or Dr. Kittleberger, finding that no objective tests performed on Butler in October through December 1997 indicated results necessitating the "three level hemilaminectomy" Butler underwent on 26 February 1998.

In contrast, the Commission's 26 January 2001 opinion and award barely mentions Dr. Hardy, finding only that:

> 15. [Butler] was [] referred [by Dr. Koontz] to an examination by Dr. Ira Hardy who ordered a MRI and CT Scan. The CT scan results revealed a mild right lateral bulge below the level of the nerve root exit. Conservative treatment and physical therapy were ordered for [Butler's] back.
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> 16. While [Butler] was being treated by Dr. Ira Hardy, he was also seeking treatment from his family physician, Dr. Laddie Crisp. . . . .

The Commission also found, in relevant part:

> 30. There is no competent medical evidence produced
>
> by the defendants herein to refute the opinions of Dr[.]

> Kittleberger, Dr. Lane or Dr. Fulghum concerning the necessity of the medical treatment rendered to [Butler] since the time of his injury, or the causal relationship between [Butler's] injury by accident and his disability.

The Commission made no definitive findings indicating that it considered or weighed Dr. Hardy's testimony regarding the necessity of the medical treatment rendered to Butler following his injury or the causal relationship between his injury and his disability. *See Lineback*. We note that Dr. Hardy testified in his deposition that he never saw any indication for any surgical intervention for Butler's condition. He further testified that, in his opinion, Butler's condition in February 1998 and thereafter was not related to Butler's fall on 3 October 1997 for which Dr. Hardy treated him. Moreover, Dr. Fulghum testified that he had a difference of opinion with some of Butler's other physicians in regards to what Butler's test results revealed. Dr. Fulghum also testified that he was wrong when he believed that Butler's tests indicated a disc rupture or disc herniation, for which Dr. Fulghum had operated.

We conclude that the Commission failed to make adequate findings of fact; accordingly, the Commission's 26 January 2001 opinion and award is vacated, and the matter remanded to the Commission to properly consider all of the evidence, make definitive and complete findings of fact and proper conclusions therefrom, and enter the appropriate order.

Vacated and remanded.

Judges TIMMONS-GOODSON and TYSON concur.

Report per Rule 30(e).