

Affirmed  
Author, Ballance  
Concurring;  
Mavretic  
Sellers

NO. COA00-1508

NORTH CAROLINA COURT OF APPEALS

Filed: 16 October 2001

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COURT OF APPEALS  
OF NORTH CAROLINA

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FILED

WILLIAM DANIEL WALKER,  
Plaintiff-Employee,

v.

DAVE'S CONSTRUCTION SVS., INC.  
Defendant-Employer,

FEDERATED MUTUAL INSURANCE CO.,  
Defendant-Carrier.

North Carolina  
Industrial Commission  
I.C. No. 757315

Appeal by plaintiff-employee from Opinion and Award entered by the North Carolina Industrial Commission on 4 August 2000. Heard in the Court of Appeals 8 October 2001.

*David P. Stewart for plaintiff-appellant.*

*Ball Barden & Bell, P.A., by Thomas R. Bell, for defendant-appellees.*

SMITH, Judge.

Plaintiff was employed by defendant-employer in July of 1996. On 18 August 1997, he sought treatment at an emergency room for a back injury. On 7 October 1997, plaintiff asked defendant-employer's office manager, Ms. Beverly Patterson, to file a workers' compensation claim for the injury. She reported the injury to the Industrial Commission in a report filed 7 October 1997. Defendant-carrier denied plaintiff's claim on 1 December 1997, stating that the "injury was not promptly reported; employee delayed treatment; employee postponed surgery against medical

advice, medical records do not substantiate employee's version of events." Plaintiff filed a notice of accident with his employer on 3 December 1997 and filed a request on 28 January 1998 that his claim be assigned for hearing.

Deputy Commissioner Amy L. Pfeiffer heard the claim on 19 November 1998. At the hearing, plaintiff testified that he was using an electric chipping hammer to cut a concrete floor at a job site. After doing so for several hours, plaintiff felt pain in his lower back that radiated down his right side into his leg. He testified that he used the chipping hammer on his last day at work, which was a Thursday. Plaintiff's time sheet indicates his last day of work was Thursday, 7 August 1997. His time sheet, which was filled out by plaintiff, indicates that he used a chipping hammer on 6 August 1997 rather than on 7 August 1997.

Plaintiff asserted that he was unable to get out of his truck without assistance upon his arrival at home on the day that he used the chipping hammer. He told his wife and his brother that same night about hurting himself at work, and he did not return to work. Plaintiff informed his supervisor and a secretary on the following day that he had hurt his back at work. Mike Porter, plaintiff's co-worker on the dates in question, testified that plaintiff used the chipping hammer on 6 August 1997. He said plaintiff was at work on the following day, but would not pick up anything heavy. Mr. Porter also related that plaintiff had previously complained about his lower back, hip and leg hurting any time that they had to make a long trip.

Plaintiff first sought medical attention on 18 August 1997. Dr. James Parsons testified in a deposition that he examined plaintiff on 22 August 1997. Plaintiff gave a medical history of chronic low back pain and reported that the problem had become progressively worse over the last three weeks. Plaintiff did not relate any specific incident or injury to Dr. Parsons. An MRI scan revealed a herniated disc at L5-S1, and Dr. Parsons referred plaintiff to a neurosurgeon.

The office manager testified plaintiff brought a note from his doctor which stated that plaintiff would be out of work for about a week. The office manager inquired at that time if this injury was a workers' compensation injury or a personal injury. Plaintiff told her that "I've had back problems for many years and, you know, I don't know how I hurt my back. This is not a workers' comp injury. I'm not claiming it as that."

Dr. Ernesto Botero, a neurosurgeon, saw plaintiff on 27 August 1997. Plaintiff described having back and leg pain for the preceding six weeks. He told Dr. Botero that he had injured his back on 9 July 1997 while doing some lifting. On 2 September 1997, Dr. Botero performed a discectomy for a large herniated disc at L5-S1.

On 7 October 1997, plaintiff asked the office manager to file a workers' compensation claim for his injury. She reported the injury to the Industrial Commission for defendant-employer in a report filed 7 October 1997, although she mistakenly dated the report as 7 August 1997.

On 27 March 1998, plaintiff underwent a second surgery for a recurrent large paracentral disc extrusion at L5-S1 and has not returned to work. Deputy Commissioner Pfeiffer denied the claim in an opinion and award filed on 18 January 2000. Petitioner then appealed to the Full Commission, which heard the matter on 11 July 2000.

Upon review of the record, the Full Commission adopted the deputy commissioner's findings of fact and conclusions of law with minor modifications. The Full Commission found defendant's testimony that he injured his back on 7 August 1997 was not credible on the basis of the following findings of facts:

14. Due to the paucity of evidence corroborating plaintiff's allegations relating to the onset and cause of his back and right leg pain, and also in part for the following reasons, the Deputy Commissioner did not accept plaintiff's claims as credible:

a.) Plaintiff's medical notes reveal that plaintiff has a long history of back problems, and plaintiff's diagnostic test results show that he has degenerative disc disease;

b.) Plaintiff's medical notes all list different dates of onset of plaintiff's back pain that is the subject of this claim;

c.) Plaintiff first sought medical treatment almost two weeks after allegedly injuring his back at work on 7 August 1997, and the medical notes from the hospital indicate that plaintiff injured his back on 17 August 1997 while lifting a bucket of water; and

d.) Plaintiff's daily time sheet from 7 August 1997 does not indicate that plaintiff used a jack hammer or a chipping hammer that day, and this time

sheet makes no reference to any alleged back injury.

15. Due to plaintiff's lack of credibility, the Deputy Commissioner was unable to find by the greater weight of the evidence that plaintiff sustained an injury by accident or by specific traumatic incident to his back on 7 August 1997. Having reviewed the record, the Full Commission affirms the credibility findings of the Deputy Commissioner.

On the basis of these and other findings of fact, the Full Commission concluded that:

1. Plaintiff did not meet his burden of proving by the greater weight of the evidence that he sustained a compensable injury by accident or specific traumatic incident arising out of the course of his employment on 7 August 1997. N.C. Gen. Stat. § 97-2(6).

2. Therefore, plaintiff is not entitled to benefits under the North Carolina Workers' Compensation Act. N.C. Gen. Stat. § 97-2(6).

The Full Commission then denied plaintiff's claim. From the Full Commission's Opinion and Award, plaintiff appeals.

Plaintiff contends the Full Commission erred in disregarding the testimony of a disinterested eyewitness (Mike Porter). He hypothesizes that the Full Commission required him to prove his injury occurred on the specific date which he claimed it did, and that the Full Commission therefore disregarded Mr. Porter's testimony about plaintiff's activities on the preceding day. We are not persuaded by plaintiff's argument.

The standard of review of a workers' compensation case is whether there is any competent evidence in the record to support the Full Commission's findings of fact, and whether those findings support the Full Commission's conclusions of law. *Sidney v.*

*Raleigh Paving & Patching*, 109 N.C. App. 254, 256, 426 S.E.2d 424, 426 (1993). In weighing the evidence, the Full Commission is the sole judge of the credibility of the witnesses and the weight to be given to their testimony. *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993). A witness' testimony may be entirely rejected by the Full Commission if warranted by disbelief of that witness. *Id.*

The Full Commission here made specific findings as to why it did not find plaintiff's testimony to be credible, and those findings "are conclusive on appeal when supported by competent evidence even though there be evidence to support a contrary finding." *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 684 (1982). The information which plaintiff provided to his medical providers was inconsistent as to the date and manner of his injury, and his hearing testimony was inconsistent with both of the accounts he gave the doctors. Plaintiff's testimony of using the chipping hammer and of being injured on his last day of work was inconsistent both with Mr. Porter's testimony of plaintiff's activities and with the time sheet which plaintiff had filled out on that date. The record does not support plaintiff's contention that the Full Commission disregarded Mr. Porter's testimony, rather the Full Commission found plaintiff's testimony was not credible. Having reviewed the record, we find competent evidence to support the Full Commission's findings of fact, and we hold that those findings in turn support its conclusions of law.

In his remaining argument, plaintiff claims that "[a]lthough

the Full Commission does not explicitly state in its Opinion and Award that it denied [his] claim because he failed to prove the specific date of his injury, the evidence is overwhelming that it did exactly that." We disagree.

As plaintiff notes, "[w]hile the case law interpreting the specific traumatic incident provision of N.C. Gen. Stat. § 97-2(6) requires the plaintiff to prove an injury at a cognizable time, this does not compel the plaintiff to allege the specific hour or day of the injury." *Fish v. Steelcase, Inc.*, 116 N.C. App. 703, 708, 449 S.E.2d 233, 237 (1994), cert. denied, 339 N.C. 737, 454 S.E.2d 650 (1995). However, plaintiff's testimony that his injury occurred on his last day of work while using a chipping hammer was inconsistent with Mr. Parker's testimony that plaintiff returned to work on the day after using the chipping hammer. The information which plaintiff gave Dr. Parsons indicated the injury occurred on 1 August 1997, and the information which plaintiff gave Dr. Botero indicated the injury occurred on 16 July 1997. Plaintiff indicated to both doctors that he had a prior history of back pain, yet he denied any such prior back pain at the hearing. The Full Commission found plaintiff's claim was not credible because the evidence did not support his allegations as to the onset and cause of his back and leg pain. As noted previously, the Full Commission is the sole judge of the credibility of the witnesses and the weight to be given to their testimony. *Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457. Accordingly, the opinion and award of the Full Commission is affirmed.

Affirmed.

Judges MCGEE and HUNTER concur.

Report per Rule 30(e).