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NO. COA10-1286
NORTH CAROLINA COURT OF APPEALS

Filed: 3 May 2011

DAVID E. SMITH, Employee,
Plaintiff

v.

N.C. Industrial Commission
I.C. Nos. 784900, 907581

GUY C. LEE BUILDING MATERIALS,
Employer, WAUSAU UNDERWRITERS
INSURANCE COMPANY, Carrier,
Defendants.

Appeal by Plaintiff from opinion and award entered 9 July 2010 by the North Carolina Industrial Commission. Heard in the Court of Appeals 22 March 2011.

Brumbaugh, Mu & King, P.A., by Nicole D. Hart, for Plaintiff.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by M. Duane Jones and Benton L. Toups, for Defendants.

STEPHENS, Judge.

Factual and Procedural Background

On 13 August 2007, Plaintiff David E. Smith ("Smith") filed a notice of accident and workers' compensation claim with his employer, Defendant Guy C. Lee Building Materials ("Guy"),

alleging a compensable injury that occurred 20 July 2007 and that arose during the course of his employment with Guy. Smith later alleged another compensable injury arising from an incident that occurred on 7 November 2007. Smith's claims were consolidated for hearing by order filed 7 August 2008. The consolidated claims were heard by Deputy Commissioner Ronnie E. Rowell ("Deputy Commissioner Rowell") on 24 July 2008.

The evidence before Deputy Commissioner Rowell tended to show the following: On 20 July 2007, while working as a truck driver for Guy, Smith slipped carrying sheetrock through a doorway at a construction site. Guy, along with Defendant-carrier Wausau Underwriters Insurance Company (collectively, "Defendants"), paid for Smith's subsequent medical visit with Dr. Michael Gray ("Dr. Gray") on 30 July 2007. Dr. Gray diagnosed Smith with a "right calf strain and a lumbrosacral strain" and assigned work restrictions of "no lifting over 15 pounds, no repeated bending, stooping or lifting, and no ladder or overhead work for the next three days." Dr. Gray also noted from x-rays of the lumbosacral spine "no acute changes." Following his visit with Dr. Gray, Smith returned to work with Guy as a "gate guard."

On 7 August 2007, Dr. Gray referred Smith to Dr. Christopher S. Delaney ("Dr. Delaney"), and on 15 October 2007, Smith appeared for a scheduled appointment with Dr. Delaney.

Based upon his physical examination of Smith, Dr. Delaney noted that Smith "was obese and did not appear well, including that he was grunting and had remarkably poor activity tolerance, becoming short of breath even with simple maneuvers involved in the examination." Dr. Delaney also noted Smith's medical history, which included "obesity, heart attack, coronary artery bypass grafting, hypertension, diabetes and benign prostatic hypertrophy." Although Dr. Delaney observed that Smith's examination was "disturbing" due to multiple non-organic indicators of pain, Dr. Delaney assigned Smith restrictions of "no prolonged ambulation and frequent rest breaks, pending a MRI."

On 23 October 2007, Smith underwent a lumbar MRI that revealed "spondylosis centered upon L4-5 and L5-S1 with right neuroforaminal stenosis at each level." On 29 October 2007, Smith again visited Dr. Delaney, who (1) noted that "[o]n examination again, [Smith] appears overweight and generally just not a well man[,]"; (2) found no abnormal findings on the physical examination, and (3) observed that Smith continued "to demonstrate non-physiologic indicators of pain" and exhibited "obvious symptom exaggeration." After interpreting Smith's MRI, Dr. Delaney opined that the MRI findings "are obviously not traumatic; they are the result of degenerative changes over time."

On 7 November 2007, Smith returned to work, and, on that same day, allegedly fell down in Guy's parking lot. Smith was taken by ambulance to the hospital, where he was kept overnight out of concern that he had suffered a possible stroke. Smith was discharged after numerous tests revealed no evidence of a stroke.

At the hospital, Smith's MRI report was reviewed by Dr. Thomas Bates ("Dr. Bates"), who found evidence of spondylosis and assessed Smith with "low back pain with facet athrosis and degenerative disc disease." Dr. Ruth Skarda ("Dr. Skarda") also treated Smith at the hospital and found nothing specific to account for Smith's fall.

Upon discharge from the hospital, Smith was referred to his primary care physician, Dr. Donald Reece ("Dr. Reece"), for physical therapy. Although initially Smith was not referred to a back specialist, upon his insistence Smith was subsequently referred to Dr. James Harvell ("Dr. Harvell").

On 20 November 2007, Smith saw Dr. Reece, who restricted Smith to sedentary duty for two weeks.

On 17 January 2008, Smith saw Dr. Harvell, who referred Smith for a "CT myelogram and EMG and nerve conduction studies." Dr. Harvell's review of the CT myelogram led him to diagnose Smith with "degenerative spondylolisthesis with stenosis involving L4-5 and mild to moderately severe degenerative disc

disease involving L3-4, L4-5 and L5-S1." Dr. Harvell suggested surgery, but Smith has not yet undergone any surgical procedures. Following his 7 November 2007 fall, Smith never returned to work at Guy, and on 31 January 2008, Smith's employment at Guy was terminated.

Based on the forgoing evidence, Deputy Commissioner Rowell made the following findings of fact:

17. No physician in this case has opined that [Smith's] alleged back pain and radiating leg pain (or any other alleged injury or condition to any other body part) were the result of either [] incident at work. . . .

. . . .

20. No physician in this case testified [Smith's] current complaints of continuing pain are causally related to either [] incident[].

. . . .

22. [Smith] has made no attempts to seek other employment since his termination from [Guy].

23. No physician has written [Smith] completely out of work.

24. [Smith's] testimony of complaints of ongoing pain related to either [incident] is given little to no weight, as this testimony is deemed not credible.

25. [Smith's] fall at work on [7 November 2007] did not arise out of the job. It was also not caused by any effects of the [20 July 2007 incident]. Rather, the greater weight of the evidence shows that [it] was

solely the result of an idiopathic condition.

26. Any continuing medical treatment [Smith] may require is not causally related [to] the alleged injuries of [20 July 2007] or [7 November 2007].

Based on the foregoing findings, Deputy Commissioner Rowell concluded that Smith "failed to establish that he suffered any compensable injury on [20 July 2007]" and that "even if [Smith] suffered some injury on [20 July 2007], the greater weight of the evidence indicates that, to the extent [Smith] suffers from any ongoing pain, he has failed to establish that such pain is a result of the [20 July 2007] incident." Deputy Commissioner Rowell further concluded that Smith "failed to meet his burden of establishing the compensability of the [7 November 2007] fall at work." Deputy Commissioner Rowell issued an opinion and award denying Smith's claim for benefits from his alleged injuries.

Smith appealed to the Full Commission, which affirmed Deputy Commissioner Rowell's opinion and award on 9 July 2010. On 23 July 2010, Smith gave notice of appeal of the Full Commission's opinion and award to this Court.

Discussion

On appeal, Smith argues that "the Industrial Commission erred in finding and concluding that [Smith] failed to show that he suffered a compensable injury on [20 July 2007] and [7

November 2007].” Specifically, Smith argues that his testimony established the compensability of each incident. We disagree.

Appellate review of an award from the Industrial Commission is generally limited to two issues: (1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are justified by the findings of fact. *Clark v. Wal-Mart*, 360 N.C. 41, 43, 619 S.E.2d 491, 492 (2005). It is well established that the facts found by the Commission are conclusive on appeal to this Court when they are supported by competent evidence, even when there is evidence to support contrary findings. *Lineback v. Wake Cty. Bd. of Commissioners*, 126 N.C. App. 678, 680, 486 S.E.2d 252, 254 (1997). The Commission “is the sole judge of the credibility of the witnesses and the weight to be given to their testimony, and may reject a witness’ testimony entirely if warranted by disbelief of that witness.” *Id.*

In arguing that the Industrial Commission erroneously concluded that Smith failed to establish that he suffered a compensable injury on 20 July 2007, Smith contends that the Industrial Commission’s conclusion “is totally unsupported” and that Smith’s own testimony “clearly satisfies the requirements of a specific traumatic incident.” We are unpersuaded.

First, the Industrial Commission gave Smith’s testimony “little to no weight, as this testimony is deemed not credible.”

As noted above, the Commission "is the sole judge of the credibility of the witnesses and the weight to be given to their testimony, and may reject a witness' testimony entirely if warranted by disbelief of that witness." *Id.* Second, as set out in the Commission's factual determinations, "[n]o physician in this case has opined that [Smith's] alleged back pain and radiating leg pain (or any other alleged injury or condition to any other body part) were the result of either [] incident at work[.]" As Smith does not dispute any of the findings of the Industrial Commission, these findings are binding on this Court on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) (holding that "[w]here no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal"). Accordingly, because the Commission's conclusion is adequately supported by its findings that there was no evidence Smith's alleged injuries were caused by the incidents at work, which findings were in turn supported by competent evidence or are undisputed on appeal, we hold that the Industrial Commission did not err in concluding that Smith did not establish that he suffered a compensable injury on 20 July 2007.

Smith next argues that the Commission erred by concluding that he failed to establish that he suffered a compensable injury on 7 November 2007 in that "[t]here is an abundant amount

of evidence to show that [Smith] suffered a compensable injury" on that date. The abundant evidence Smith points to in support of his argument is the following: his own testimony; the tests ordered by Dr. Harvell, which Smith argues show that he "definitely has a problem with his lumbar spine[;]" and the fact that Smith "was placed at an increased risk of developing symptomatic degenerative disc disease in his cervical spine and accompanying spinal cord damage by virtue of his working conditions with [Guy,]" which conditions Smith alleges "conceivably" could have aggravated his "pre-existing asymptomatic degenerative disc disease." Again, we are unpersuaded.

As discussed above, the Commission, in its role as fact finder, was free to and did reject Smith's testimony as unreliable. With respect to Dr. Harvell's tests showing problems with Smith's spine, we agree with Smith's contention that the tests showed Smith has back problems. However, as found by the Commission, based on competent evidence presented by each of Smith's doctors, the spinal problems were not related to Smith's employment with Guy. Finally, regarding Smith's contention that his employment with Guy aggravated his degenerative disc disease, we note that Smith presents absolutely no evidence, and none was presented by Smith or any of the physicians before the Commission, to support an argument that Smith's work with Guy

placed him "at an increased risk." Smith's argument is mere speculation and fails to establish error in the Commission's adequately supported conclusion that Smith did not suffer a compensable injury on 7 November 2007. Accordingly, Smith's argument is overruled.

Lastly, Smith argues that the Commission erred in finding that Smith failed to prove disability. Smith contends that he "has been unable to work since [8 November 2007] as a result of his back injury on [20 July 2007] and [7 November 2007] and is therefore entitled to weekly compensation at a rate of two-thirds his average weekly wage[.]" We disagree.

The Workers' Compensation Act defines "disability" as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." N.C. Gen. Stat. § 97-2(9) (2009). The term "injury," as used in the Act, means "only injury by accident arising out of and in the course of the employment." N.C. Gen. Stat. § 97-2(6). With respect to back injuries, such as those alleged by Smith, the Act provides that

where injury to the back arises out of and in the course of the employment and is the direct result of a specific traumatic incident of the work assigned, "injury by accident" shall be construed to include any disabling physical injury to the back arising out of and causally related to such incident.

Id. In this case, the Commission found that any continuing pain and medical treatment required by Smith are not causally related to the injuries alleged by Smith. As such, Smith's back injuries do not fall within the statutory definition of injury and, thus, cannot be the source of Smith's disability. The Commission's findings regarding Smith's failure to establish a compensable disability (1) are adequately supported by the testimony of the physicians, none of whom testified that Smith's pain resulted from the alleged injuries, and (2) adequately support the Commission's conclusion that Smith has failed to establish disability under the Act.

Based on the foregoing, we conclude that the Commission did not err in denying Smith's workers' compensation claim. The opinion and award of the Full Commission is

AFFIRMED.

Judges HUNTER, ROBERT C., and ERVIN concur.

Report per Rule 30(e).