NO. COA02-223

NORTH CAROLINA COURT OF APPEALS

Filed: 6 May 2003

GLEN MOORE,
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 816522

CITY OF LEXINGTON,
Employer,

and

SELF-INSURED GALLAGHER BASSETT SERVICING AGENT,
Defendants.

Appeal by defendants from opinion and award filed 16 October 2001 by the North Carolina Industrial Commission. Heard in the Court of Appeals 21 January 2003.

Raymond M. Marshall for plaintiff appellee.

Robinson & Lawing, LLP, by Jolinda J. Babcock, for defendant appellants.

McCULLOUGH, Judge.

Plaintiff Glen Moore filed a workers' compensation claim against his employer, defendant City of Lexington. Plaintiff claimed that he had developed the occupational disease of carpel tunnel syndrome due to his duties as a firefighter. Defendant City of Lexington was self-insured, with defendant Gallagher Bassett Services acting as its third-party administrator.

Plaintiff's case was heard on 29 September 1999 by Deputy Commissioner Wanda Blanche Taylor. Following the receipt of depositions from three doctors and closing the record on 30 June 2000, Deputy Taylor filed her Opinion and Award on 8 August 2000.

The testimony showed, and the Deputy Commissioner's findings of fact reflected, that plaintiff became a part-time firefighter with defendant City of Lexington in September of 1991. Plaintiff was a full-time custodian for a local school during the same time period. In 1994, while still a part-time firefighter, plaintiff filed a workers' compensation claim against the school, alleging that he had developed carpel tunnel syndrome as a result of his duties as a custodian. Plaintiff's claim was successful and he received benefits. Plaintiff received conservative treatment for his symptoms.

Plaintiff remained a full-time custodian and a part-time firefighter. In 1995, he was involved in an automobile accident. He received more treatment for pain in his hands and arms. That same year, plaintiff became a full-time firefighter for defendant City of Lexington.

Much evidence was presented as to the duties of a firefighter where plaintiff was employed. Plaintiff's version of the duties of a City of Lexington firefighter concentrated on activities that could be performed by one so employed, but without regard to the frequency in which one would do them. Defendants' version detailed a daily routine for City of Lexington firemen, including a work schedule and frequency of activity.

The Deputy Commissioner found that a firefighter was on duty for 24 hours, and then off for the next 48 hours. While on duty, there are planned meetings, optional individual exercise, inspections, and other such activities in addition to responding to emergencies. Once a month, firefighters participate in drills which last from five minutes to an hour. These drills test the firefighters' skills with ladders, hoses, and other equipment. As for firefighting itself, firefighters

respond to 150 to 200 calls a year, most of which involve little action. An actual fire would be fought approximately three times a month. The Deputy Commissioner continued that while occasionally strenuous, firefighting does not involve "repetitive use of the hands in the same position for a sustained period of time." These findings are generally in accordance with defendants' version of duties. In addition, no firefighters that have worked for defendant City of Lexington have ever complained of hand or arm pain consistent with carpal tunnel syndrome.

The Deputy Commissioner also found that for six months of the year in 1996 and 1997, plaintiff worked as a landscape maintenance assistant, primarily using lawnmowers.

In 1997, growing pain and numbness in plaintiff's hands and arms caused plaintiff to seek medical assistance. Diagnosed with carpal tunnel syndrome *again* in January of 1998, plaintiff was treated by a Dr. H. Bryan Noah. In February of 1999, plaintiff began treatment with Dr. Gary G. Poehling. Dr. Poehling performed carpal tunnel release surgery on 4 May 1999 (left hand) and 4 August 1999 (right hand). Plaintiff never returned to work. Dr. Poehling gave plaintiff a 15% permanent partial disability rating on each hand. The Deputy Commissioner found that both of these doctors were of the opinion that claimant's carpal tunnel syndrome was not caused by his employment as a firefighter with defendant, and that job did not increase the risk of developing carpal tunnel syndrome. Further, defendants employed an expert, Dr. L. Andrew Koman, who testified after reviewing plaintiff's medical records and defendants' job description of firefighters. The Deputy Commissioner found that Dr. Koman agreed with the previous doctors as to the relationship between carpal tunnel syndrome and firefighting.

The Deputy Commissioner found as fact:

> 24. The job of a firefighter does not increase an individual's risk of contracting carpal tunnel syndrome or chronic pain syndrome and did not cause plaintiff's carpal tunnel syndrome and chronic pain syndrome.

The following conclusion of law was based on the above finding of fact:

> 1. Plaintiff's bilateral carpal tunnel syndrome and chronic pain were not proximately caused by causes and conditions characteristic of and peculiar to plaintiff's employment with defendant-employer, and plaintiff's job as a firefighter did not place plaintiff at an increased risk of contracting these conditions than members of the general public not so employed. Plaintiff, therefore, does not suffer from an occupational disease. N.C.G.S. §97-53(13).

Plaintiff's claim was denied.

Plaintiff appealed to the Full Commission on 23 August 2000. Just days before oral arguments, plaintiff made a motion for the Full Commission to take additional evidence. This additional evidence was an affidavit of Dr. Furr. According to the motion, plaintiff went to Dr. Furr after the hearing before the Deputy Commissioner due to continuing pain. Dr. Furr performed additional releases on plaintiff on 13 April 2000. In addition, Dr. Furr was of the opinion that plaintiff's position as a firefighter "was a substantial factor in the development of the disease; that his employment placed him at an [sic] greater risk of contracting the disease than the general public; and furthermore that the hazards of the employment at least substantially aggravated a pre-existing occupational disease causing his disability." Dr. Furr based his opinion, according to his affidavit, on job descriptions provided to him by *plaintiff*, facts assumed by him, and other records. While defendants opposed the motion, it was allowed by the Full Commission.

The Full Commission filed its Opinion and Award on 16 October 2001, reversing the Opinion and Award of the Deputy Commissioner. The Full Commission's findings of fact dealing with the duties of firefighters were much the same as the Deputy Commissioner's, but included the following: "Defendant did not expressly require weight lifting, but weight

equipment was provided and many of the firefighters, including plaintiff, used weightlifting equipment in the fire station with the full knowledge of defendant. Firefighters were required to maintain a level of physical fitness." Further,

> 5. By providing weight-lifting equipment at the fire station with the understanding that it would be used by firefighters who were on duty to maintain required levels of physical fitness, defendant fostered a work environment in which firefighters were encouraged to lift weights while on duty.

Notably missing from the Full Commission's Opinion and Award were the findings by the Deputy Commissioner relating to plaintiff's prior diagnosis and compensation for carpal tunnel syndrome. The evidence of the landscaping and lawn mowing was omitted, as were all doctors' opinions that there was no causal connection between firefighting and carpal tunnel syndrome. Instead, after noting plaintiff's treatment history, including that by Dr. Furr in March of 2000, the Full Commission concluded:

> 16. Plaintiff's carpal tunnel syndrome was caused by his employment with defendant.
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> 17. Plaintiff's employment with defendant placed him at an increased risk of developing carpal tunnel syndrome as compared to members of the general public not so employed.

The following conclusion of law was based on the previous findings:

> 1. Plaintiff's bilateral carpal tunnel syndrome is due to causes and conditions characteristic of and peculiar to his employment with defendant, is not an ordinary disease of life to which the general public not so employed is equally exposed, and is, therefore, an occupational disease. N.C. Gen. Stat. §97-53(13).

One of the Commissioners dissented from the Opinion and Award. In her dissent, the Commissioner noted that the majority ignored the greater weight of the medical evidence by concluding that this was an occupational disease, and that they allowed "the affidavit by Dr. Furr into the record and bas[ed] its decision on Dr. Furr's opinion that plaintiff's employment as a

firefighter was a substantial factor in the development of plaintiff's carpal tunnel syndrome and that his employment placed him at an increased risk of developing carpal tunnel syndrome." The dissent argued that the affidavit should not have come in because it was first raised "two days" before oral argument and defendants were denied an opportunity to cross-examine Dr. Furr.

Defendants appeal from the Full Commission's Opinion and Award. Defendants make several assignments of error and present the following questions on appeal: Did the Full Commission err by (I) ignoring the vast majority of the evidence and basing its findings of fact on an incompetent affidavit of an expert who did not have available to him the relevant facts at the time he rendered his opinions; (II) finding that plaintiff proved the essential elements of an occupational disease; and (III) admitting the affidavit of the medical expert after the close of the evidence and without allowing defendants the opportunity to cross-examine, and basing its decision on that affidavit.

Defendants contend that the Full Commission erred because its findings of fact are based upon incompetent evidence. The core of defendants' argument is that the only rational basis for the Full Commission's reversal of the Deputy Commissioner's Opinion and Award was complete reliance upon the affidavit of Dr. Furr. Defendants maintain the affidavit of Dr. Furr should not have been considered by the Full Commission as it was not subject to cross-examination. *See Goff v. Foster Forbes Glass Div.*, 140 N.C. App.130, 134-35, 535 S.E.2d 602, 605-06 (2000); *Allen v. K-Mart*, 137 N.C. App. 298, 304, 528 S.E.2d 60, 64-65 (2000) (These cases hold that it was reversible error for the Industrial Commission to deny the party the right to rebut or cross-examine opponent's medical experts: "[W]here the Commission allows a party to introduce new

evidence which becomes the basis for its opinion and award, it must allow the other party the opportunity to rebut or discredit that evidence."). *Id.*

The parties are in dispute as to when it was revealed that claimant was being treated by Dr. Furr and whether or not it was an abuse of discretion to allow the affidavit into evidence, as the record had been closed for a long period of time. Further, as mentioned earlier, there are competing descriptions of the job duties that claimant performed while employed with defendant City of Lexington. Dr. Furr was exposed to only one set of these duties, the plaintiff's version, before he rendered his opinion. Defendants claim that because of this, Dr. Furr's affidavit was incompetent evidence for the Full Commission to consider, much less base its opinion upon.

Defendants also contend that the Full Commission committed reversible error by failing to make mention in its Opinion and Award the testimony of each of the deposed experts that the job of a firefighter did not increase one's risk of developing carpal tunnel syndrome and that plaintiff's carpal tunnel syndrome was not caused by his job as a firefighter for the City of Lexington. *See Pittman v. International Paper Co.*, 132 N.C. App. 151, 510 S.E.2d705, *disc. review denied*, 350 N.C. 310, 534 S.E.2d 596, *aff'd*, 351 N.C. 42, 519 S.E.2d 524 (1999); *Jenkins v. Easco Aluminum Corp.*, 142 N.C. App. 71, 541 S.E.2d 510 (2001).

> 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." However, even though the Commission may choose not to believe some evidence, it cannot "wholly disregard or ignore competent evidence" and must at least consider and evaluate all of the evidence before rejecting it.

Pittman, 132 N.C. App. at 156, 510 S.E.2d at 709 (citations omitted) (quoting *Lineback v. Wake County Board of Commissioners*, 126 N.C. App. 678, 680, 486 S.E.2d 252, 254 (1997)).

In *Jenkins*, this Court held that it was error for the Full Commission to omit any and all mention of a physician's testimony, or at least some finding from which this Court could reasonably infer that the Commission gave proper consideration to the physician's testimony.

> In *Lineback*, plaintiff contended that the Industrial Commission erred in failing to consider the testimony of his orthopedic surgeon regarding the cause of plaintiff's injury to his left knee. The testimony of the orthopedist corroborated plaintiff Lineback's statement that his injury was caused by a twisting motion as he exited his work vehicle. In its opinion, however,
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> > the Commission made no definitive findings to indicate that it considered or weighed Dr. Comstock's testimony with respect to causation. Thus, we must conclude that the Industrial Commission impermissibly disregarded Dr. Comstock's testimony, and, in doing so, committed error.
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> Here, Dr. Downes' testimony was certainly relevant to the exact point in controversy, whether the quality inspector job performed by plaintiff was an adequate indicator of her ability to compete for similar jobs in the marketplace. There was, however, no mention at all of Dr. Downes' testimony in the opinion and award, nor any finding from which we can reasonably infer that the Commission gave proper consideration to his testimony. *Compare Pittman v. International Paper Co.*, 132 N.C. App. 151, 510 S.E.2d 705, *disc. review denied*, 350 N.C. 310, 534 S.E.2d 596, *affirmed*, 351 N.C. 42, 519 S.E.2d 524 (1999), where the plaintiff made a similar argument with regard to a Dr. Markworth's deposition testimony, but there were "various findings throughout the Opinion and Award of the Commission indicat[ing] consideration of Dr. Markworth's opinion."
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> As we are bound by the reasoning of *Lineback*, we hold that the Commission erred in failing to indicate that it considered the testimony of Dr. Downes. Consequently, the opinion and award of the Industrial Commission must be vacated, and the proceeding "remanded to the Commission to consider all the evidence, make definitive findings and proper conclusions therefrom, and enter the appropriate order."

Jenkins, 142 N.C. App. at 78-79, 541 S.E.2d at 515 (citations omitted).

Here, the three deposed doctors gave certain opinions when presented with facts, details, and hypothetical questions during their respective testimony. As the descriptions differed, so did their opinions. Yet, while the doctors who treated claimant were mentioned in the findings of fact as to the extent of their diagnosis and treatment, none of their opinions were set out in the findings of fact. Even Dr. Furr's opinion was omitted from the Opinion and Award. One doctor, the non-treating expert, was omitted completely from the findings of fact.

The Opinion and Award before this Court does not demonstrate that the Full Commission considered the opinions of any of the treating physicians or expert witnesses. Further, we cannot discern from the Opinion and Award whether it was based solely on Dr. Furr's affidavit, the testimony of the treating physicians or a combination thereof.

Thus, as was the Court in *Jenkins*, we feel compelled to follow the lessons of *Lineback* and vacate the Opinion and Award and remand the proceeding to the Industrial Commission "'to consider all the evidence, make definitive findings and proper conclusions therefrom[.]" *Jenkins*, 142 N.C. App. at 79, 510 S.E.2d at 515. This is so especially in light of the differing job descriptions and opinions as to the relationship between carpal tunnel syndrome and firefighting in the City of Lexington.

In addition, prior to any reconsideration by the Full Commission, defendants are entitled to depose Dr. Furr if his opinions are to be considered. Defendants should have been granted an opportunity to cross-examine Dr. Furr's opinions based upon the differing job description that it put forth, especially in light of the fact that the Opinion and Award tracked that very description. We are remanding this matter because the Full Commission did not make sufficient findings as to the experts' opinions in this case. This is the same reason we cannot discern whether Dr. Furr's affidavit was the sole basis of the Opinion and Award. Thus, because we are remanding

for an independent reason, this potential error can be avoided in the interest of fairness. *Goff*, 140 N.C. App. at 134-35, 535 S.E.2d at 605-06; *Allen*, 137 N.C. App. at 304, 528 S.E.2d at 64-65.

Reversed and remanded.

Chief Judge EAGLES and Judge ELMORE concur.

Report per Rule 30(e).