Affirmed
Author, Bolch
Concurring: Mavretic
Riggsbee

NO. COA01-38

NORTH CAROLINA COURT OF APPEALS

Filed: 4 December 2001

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SAMUEL S. DAVIS,
Employee,
Plaintiff,

v.

North Carolina
Industrial Commission
I.C. File No. 849274

THE BOWLING CENTER,
Employer,

and

CASUALTY RECIPROCAL EXCHANGE,
(JAMES C. GREEN COMPANY),
Carrier,
Defendants.

Court of Appeals Slip Opinion

Appeal by defendant from Opinion and Award entered 19 October 2000 by Commissioner Thomas J. Bolch of the North Carolina Industrial Commission. Heard in the Court of Appeals 17 October 2001.

Keel O'Malley, L.L.P., by Susan M. O'Malley for plaintiff appellee.

Young Moore and Henderson, P.A., by Dawn Dillon Raynor and Zachary C. Bolen, for defendant appellants.

McCULLOUGH, Judge.

Defendants, The Bowling Center and Casualty Reciprocal Exchange, appeal from a ruling by the North Carolina Industrial Commission holding that plaintiff, Samuel S. Davis, sustained a compensable specific traumatic incident to his back, and granting medical treatment and temporary total disability.

Plaintiff was 58 years old with a high school education at the time of the initial hearing. He had worked for defendant The Bowling Center and its predecessors for fifteen years, during which time he was head mechanic overseeing maintenance of all the machinery.

Medical evidence presented to the Industrial Commission showed that plaintiff had an extensive history of back trouble dating back to the 1960's. Plaintiff had numerous trips to the doctor over the next 20 years for many different types of back pain and ailments. In 1989, plaintiff had surgery in which a lumbar decompression was performed and Steffee plates and screws were implanted into his back. Plaintiff returned to work under permanent restrictions to lift no more than 15 pounds.

The 1989 surgery did not end plaintiff's back troubles. Plaintiff had numerous visits complaining of chronic back pain. In 1994, he was diagnosed with fibromyalgia syndrome. Plaintiff continued to go to the doctor for his back pain, even going approximately three times in 1998 before June.

On 22 June 1998, plaintiff was working at The Bowling Center tightening a bolt when he felt a sharp pain in his lower back. Plaintiff apparently could not climb out of the machine he was working on because of the pain. Defendant points out that plaintiff reported to Dr. Reeg that "he was lifting a heavy object" when he hurt his back. Plaintiff testified that he did not tell his manager until the next morning because she had gone home for the day, but his complaint was apparently dismissed as another instance

of plaintiff complaining about his back. His manager did remember plaintiff asking for workers' compensation forms. Plaintiff did not receive any forms from his employer but obtained a Form 18 directly from the Industrial Commission and submitted it directly to them. During this time, plaintiff was still going to work.

The owner of The Bowling Center was upset when he found out about plaintiff's filing for workers' compensation. On 11 August 1998, the owner and plaintiff met to discuss the claim. During this meeting, the conversation became heated and plaintiff was suspended from work.

Defendant had not made arrangements for plaintiff to see a doctor, so plaintiff went to his family doctor on 18 August 1998. His family doctor referred plaintiff to Dr. Hardy, who in turn referred him to Dr. Reeg on 4 September 1998. Dr. Reeg performed emergency surgery in which he performed a decompressive laminectomy of the lumber spine that night.

In his deposition, Dr. Reeg testified that the injury for which he treated plaintiff was the result of a work-related injury on 22 June 1998. The doctor was aware of plaintiff's prior back problems and surgery. Dr. Reeg also recommended a second reconstructive surgery, the need for which was also caused in part by the injury suffered on 22 June 1998. Dr. Reeg testified that plaintiff reached maximum medical improvement (MMI) on 21 May 1999 with a 15% permanent partial disability rating to his back as a result of the 1998 surgery. Dr. Reeg further testified that it was possible that plaintiff could have needed the reconstructive

surgery even without the alleged injury on 22 June 1998, given his chronic back problems.

Defendants make the following assignments of error: (I) that the Industrial Commission erred in finding and concluding that plaintiff is entitled to additional medical treatment, including reconstructive spinal surgery, as a result of his alleged 22 June 1998 injury; and (II) that the Industrial Commission erred in concluding that plaintiff was entitled to continuing temporary total disability compensation.

Standard of Review

The standard for appellate review of an opinion and award of the Industrial Commission is well settled. Review "is limited to a determination of (1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are supported by the findings." *Barham v. Food World*, 300 N.C. 329, 331, 266 S.E.2d 676, 678 (1980); *see also Calloway v. Memorial Mission Hosp.*, 137 N.C. App. 480, 484, 528 S.E.2d 397, 400 (2000); *Shah v. Howard Johnson*, 140 N.C. App. 58, 61, 535 S.E.2d 577, 580 (2000) *disc. review denied*, 353 N.C. 381, 547 S.E.2d 17 (2001).

In addition, "so long as there is some 'evidence of substance which directly or by reasonable inference tends to support the findings, this Court is bound by such evidence, even though there is evidence that would have supported a finding to the contrary.'" *Id.* at 61-62, 535 S.E.2d at 580, (quoting *Porterfield v. RPC Corp.*, 47 N.C. App. 140, 144, 266 S.E.2d 760, 762 (1980)). The *Calloway* Court went further stating that "our task on appeal is not to weigh

the respective evidence but to assess the *competency* of the evidence in support of the Full Commission's conclusions." *Calloway*, 137 N.C. App. at 486, 528 S.E.2d at 401.

I

Defendants, in their first assignment of error, argue that the Industrial Commission erred in concluding that the 22 June 1998 injury resulted in the need for surgery on 4 September 1998 and for the recommended reconstructive surgery, thus making them liable.

We review the Commission's findings of fact and conclusions of law in light of the standard of review set forth above. The Industrial Commission made the following finding of fact:

> 9. On June 22, 1998, when plaintiff pulled to tighten the nut in machine number 14, he sustained a specific traumatic incident of the work assigned. As a result of the incident, he injured his back. *The acute neurologic condition from the herniated disc and spinal stenosis, for which Dr. Reeg performed surgery, was a proximate result of the back injury on June 22, 1998. In addition, the incident was one of the proximate causes for the spinal instability which plaintiff continued to have as of the date of hearing before the Deputy Commissioner, although he clearly had preexisting problems which also contributed significantly to that condition.* Further surgery was necessary in order to address that problem.

(Emphasis added.) The Commission made the following conclusion of law:

> 3. Plaintiff is entitled to have defendants provide all medical compensation arising from this injury by accident, *including the treatment by Dr. Reeg and the recommended surgery.* N.C. Gen. Stat. §§ 97-2(19); 97-25.

(Emphasis added.) The Commission made the following award:

> 2. Defendants shall pay all medical expenses incurred by plaintiff as a result of this injury by accident, *including those arising from the treatment by Dr. Reeg and the additional surgery he has recommended.*

(Emphasis added.)

In this case, it is apparent from the record that plaintiff had a pre-existing infirmity concerning his back. North Carolina adopted the principle of compensation for aggravation and acceleration of a pre-existing infirmity in *Anderson v. Motor Co.*, 233 N.C. 372, 64 S.E.2d 265 (1951). In *Anderson*, the Supreme Court held:

> While there seems to be no case on the specific point in this State, courts in other jurisdictions hold with virtual uniformity that when an employee afflicted with a pre-existing disease or infirmity suffers a personal injury by accident arising out of and in the course of his employment, and such injury materially accelerates or aggravates the pre existing disease or infirmity and thus proximately contributes to the death or disability of the employee, the injury is compensable, even though it would not have caused death or disability to a normal person.

Id. at 374, 64 S.E.2d at 267. The Supreme Court revisited this area in *Morrison v. Burlington Industries*, 304 N.C. 1, 282 S.E.2d 458 (1981). In summarizing the pertinent law and its holding, the Court set forth the following:

> In summary: (1) an employer takes the employee as he finds her with all her pre-existing infirmities and weaknesses. (2) When a pre-existing, *nondisabling, non-job-related* condition is aggravated or accelerated by an accidental injury arising

> out of and in the course of employment or by an occupational disease so that disability results, then the employer must compensate the employee for the entire resulting disability even though it would not have disabled a normal person to that extent. (3) On the other hand, when a pre-existing, nondisabling, non-job-related disease or infirmity eventually causes an incapacity for work without any aggravation or acceleration of it by a compensable accident or by an occupational disease, the resulting incapacity so caused is not compensable. (4) When a claimant becomes incapacitated for work and part of that incapacity is caused, accelerated or aggravated by an occupational disease and the remainder of that incapacity for work is not caused, accelerated or aggravated by an occupational disease, the Workers' Compensation Act of North Carolina requires compensation only for that portion of the disability caused, accelerated or aggravated by the occupational disease.

Id. at 18, 282 S.E.2d at 470.

Defendants argue that the Full Commission erred in finding that the 22 June 1998 injury was a proximate cause of plaintiff's spinal instability and the need for future reconstructive surgery based on the comments by Dr. Reeg. In his deposition, Dr. Reeg testified as to the following:

> Q. And, Doctor, isn't it true that, given Mister Davis' past chronic back problems, that despite - assuming that the June '98 incident didn't happen for this question, that Mister Davis could have been having these problems; it's conceivable that these problems could have been his status when he came to you, even if this June '98 . . .
>
> Ms. O'Malley: Objection.
>
> Q. . . . injury had not occurred; is that possible, Doctor?

A. I guess it's - if I understand it, is it possible he could present with . . .

Q. The same symptoms that he came to you with, given his chronic back problems, even if he had not described this June '98 incident to you or even if this June '98 incident had not occurred?

Ms. O'Malley: Continuing objection.

A. I think it is possible he could present with back and leg related complaints, the severity of which I think would depend on whether they were consistent with how he presented to Doctor Wooten years before. But I guess it is possible he could present with similar complaints in that regard, yes.

Q. And, Doctor, are you familiar with Mister Davis' job duties as a mechanic at the Bowling Center, generally?

A. He has described them in some capacity throughout our encounters. Yes, I think I have some rough idea as to what they might entail.

Q. And does that idea, or did his descriptions to you indicate that he did do some occasional lifting and twisting and that sort of work in that job?

A. Yes.

Q. Are those types of duties consistent with activities which may lead to the conditions or symptoms he presented to you with?

A. Yes.

. . . .

Q. Okay. Doctor, it's possible, and maybe even likely, that Mister Davis, in light of his prior back condition and chronic condition, may have needed reconstructive surgery of the type that you're recommending with or without the alleged described

exacerbating injury in June of 1998; isn't that correct?

A. That's correct.

These comments, along with plaintiff's extensive medical history of back problems and disease, are presented by defendants to show that the 22 June 1998 injury was not a proximate cause of the surgery and future surgery. Thus, defendants contend, they are not liable for the surgeries because plaintiff was destined to need the surgery regardless.

It appears to this Court that defendants' ultimate position is that there was no injury on 22 June 1998. Accordingly, defendants would have the third example summarized by the Supreme Court in *Morrisville* apply that "when a pre-existing, nondisabling, non-job-related disease or infirmity eventually causes an incapacity for work without any aggravation or acceleration of it by a compensable accident or by an occupational disease, the resulting incapacity so caused is not compensable." However, since the Full Commission found that there was a compensable accident, defendants have shifted to a different theory. Defendants argue that, although plaintiff had a compensable injury, it did not disable him beyond his pre-existing condition. The accident proximately contributed nothing to his back condition, and thus is not compensable. In other words, defendants are still trying to characterize the facts of the case *sub judice* into the third example in *Morrisville*, except now they account for the finding of the Full Commission that a compensable accident occurred.

We hold that this position is untenable in light of further testimony from Dr. Reeg. Dr. Regg discussed how much of the accident changed plaintiff's condition.

> Q. And I believe the next office note that I have is May of 1999, May 21st of '99?
>
> A. Correct.
>
> Q. And how was he doing during that office visit?
>
> A. About the same. He's still losing weight. Some issues were brought up with reaching maximum medical improvement with respect to his original surgery, and a rating was provided at that time. We continued to discuss an eventual reconstructive operation.
>
> Q. And what was the rating that was provided at that time?
>
> A. 15 percent.
>
> Q. And, Doctor, were you aware that he had had previous back surgery?
>
> A. Yes.
>
> . . . .
>
> Q. Doctor, earlier you testified, Ms. O'Malley asked you how you would break down your rating between the first and second surgeries, and I'm sorry, I just didn't understand your answer. Could you clarify that for me. The 15 percent rating that you gave on May 21st, 1999, is for what, for the second surgery, for both the surgeries? I just didn't understand your answer.
>
> A. I would give that rating based on just the second surgery, not the first surgery.

Thus, there is evidence on the record that he was injured by the accident, the injury materially aggravated his pre-existing infirmity, and it proximately contributed to plaintiff's need for

the 4 September 1999 surgery, and further reconstructive surgery. The Full Commission relied on this testimony in support of the finding of fact previously set forth. The present case thus fits squarely within the second example summarized by the Supreme Court in *Morrisville*.

This assignment of error is overruled.

II.

Defendants' final assignment of error is that the Industrial Commission erred when it concluded that plaintiff was entitled to continuing temporary total disability compensation.

The Industrial Commission made the following finding of fact:

> 11. Since plaintiff had not reached maximum medical improvement by the date Dr. Reeg was deposed, no finding is made regarding the extent of permanent disability he may sustain as a result of his June 22, 1998 injury at work.

Based on this finding of fact, the Industrial Commission awarded plaintiff continuing temporary total disability.

> "Temporary total disability is payable only 'during the healing period.' N.C. Gen. Stat. § 97-31 (1991). The 'healing period' ends when an employee reaches 'maximum medical improvement.' Only when an employee has reached 'maximum medical improvement' does the question of her entitlement to permanent disability arise."

Demery v. Converse, Inc., 138 N.C. App. 243, 251, 530 S.E.2d 871, 877 (2000) (quoting *Franklin v. Broyhill Furniture Industries*, 123 N.C. App. 200, 204-05, 472 S.E.2d 382, 385, *cert. denied*, 344 N.C. 629, 477 S.E.2d 39 (1996)).

As the portion reproduced above relates, Dr. Reeg did testify that "[s]ome issues were brought up with reaching maximum medical improvement *with respect to his original surgery*, and a rating was provided at that time. We continued to discuss an eventual reconstructive operation." (Emphasis added.) Taking this for face value, the doctor is saying that plaintiff had reached a particular point in his recovery in that he would not get any better until the second recommended surgery was performed. The MMI that the doctor was referring to was not the overall MMI, but an intermediate MMI. It can be presumed that plaintiff will not reach complete MMI until the second surgery is performed.

This assignment of error is thus overruled.

Affirmed.

Judges WYNN and BRYANT concur.

Report per Rule 30(e).