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NO. COA02-735

NORTH CAROLINA COURT OF APPEALS

Filed: 1 April 2003

GWYNN SPRUILL,
Employee,
Plaintiff

v.

North Carolina Industrial Commission
I.C. File No. 902116

B & B STAFFING, INC.,
Employer,

SELF-INSURED (KEY
BENEFIT SERVICES, INC.,
Servicing Agent),
Defendants

Appeal by defendants from an opinion and award entered 27 February 2002 by the North Carolina Industrial Commission (“Commission”). Heard in the Court of Appeals 18 February 2003.

Taft, Taft & Haigler, P.A., by Thomas F. Taft, Sr.; Patterson, Harkavy & Lawrence, L.L.P., by Valerie A. Johnson, for plaintiff-appellee.

Orbock, Bowden, Ruark & Dillard, P.C., by Roger L. Dillard, Jr. and Mark A. Leach, for defendant-appellants.

HUNTER, Judge.

B & B Staffing, Inc. (“B & B”) and Key Benefits Services, Inc. (“Key Benefits”) (collectively “defendants”) appeal from an opinion and award in which the Commission concluded that Gwynn Spruill (“plaintiff”) was entitled to workers’ compensation benefits for a

work-related back injury. Defendants argue there was insufficient evidence by which the Commission could find the cause and specific date of plaintiff's alleged workplace injury. We affirm.

Plaintiff, a forty-seven year old man, was employed by B & B, a temporary staffing service, on 21 August 1998. B & B was a duly qualified self-insured company, with Key Benefits as the servicing agent. During his employment with B & B, plaintiff was assigned to work at Waste Management Services, where his duties included picking up trash, driving a truck, and sorting items for recycling. Effective performance of some of these duties required plaintiff to repeatedly jump off a recycling truck to lift and empty wet recycling bins.

On or around 31 August 1998, plaintiff first began experiencing pain in his shoulders and neck. As the pain gradually intensified, plaintiff consulted Dr. Robert Moore ("Dr. Moore"), an orthopedic surgeon, on 11 September 1998. He informed Dr. Moore that he had first felt the pain while lifting and throwing items into the recycling truck. After examining plaintiff, Dr. Moore diagnosed him as "suffering cervical radiculopathy or, in other words, a pinched nerve." Dr. Moore recommended "conservative measures" to assist plaintiff in his recovery and removed plaintiff from work. Plaintiff subsequently returned to work at B & B even though he was still experiencing some pain.

On 18 November 1998, plaintiff returned to Dr. Moore. He was still experiencing pain in his left neck, shoulder, and arm, as well as numbness in the fingers on his left hand. Dr. Moore diagnosed persistent cervical radiculopathy and recommended plaintiff remain out of work while continuing to pursue conservative measures.

Plaintiff again visited Dr. Moore in March of 1999 when his symptoms returned. Dr. Moore referred plaintiff to Dr. George Huffmon ("Dr. Huffmon") to consider surgery. On 1

September 1999, plaintiff underwent surgery to reduce his pain and numbness through the correction of herniated discs. However, plaintiff continued to experience pain after the surgery. Around June of 2000, Dr. Huffmon eventually concluded that plaintiff could not do any type of work and gave him a rating of 28.57% to the spine.

Plaintiff timely filed a workers' compensation claim with B & B. B & B denied the claim after determining "[n]o injury by accident occurred within the course and scope of employment. The employee[']s credibility is at issue." Plaintiff requested a hearing on the matter, which was heard before Deputy Commissioner Lorrie L. Dollar ("Deputy Commissioner Dollar"). On 20 June 2000, Deputy Commissioner Dollar denied plaintiff's claim after concluding "plaintiff ha[d] failed to carry the burden of proof of establishing either that he sustained a compensable injury or that the cervical condition he experienced was caused by the work he performed in 1998." Plaintiff gave notice of appeal to the Commission.

The Commission reviewed the matter on 29 June 2001. After reconsidering the evidence, it concluded that plaintiff had sustained a compensable specific traumatic incident on or about 31 August 1998 as a result of his employment with B & B. Defendants were ordered to pay, *inter alia*, for plaintiff's surgery and all other medical costs resulting from his injury, as well as "temporary total compensation [to plaintiff] of \$213.44 per week . . . from September 5, 1998, until he returns to work at the same or greater wages or until further order of the Industrial Commission." Defendants appeal.

Appellate review of "an opinion and award of the Industrial Commission is limited to a determination of (1) whether the Commission's findings of fact are supported by any competent evidence in the record; and (2) whether the Commission's findings justify its conclusions of law." *Goff v. Foster Forbes Glass Div.*, 140 N.C. App. 130, 132-33, 535 S.E.2d 602, 604 (2000).

“If there is competent evidence to support the findings, they are conclusive on appeal even though there is evidence to support contrary findings.” *Boles v. U.S. Air, Inc.*, 148 N.C. App. 493, 498, 560 S.E.2d 809, 812 (2002). When considering the testimony of witnesses to make its findings, the Commission is the sole judge of the credibility of those witnesses and the weight to be given their testimony. *Id.*

I.

Defendants initially argue that the Commission’s finding that plaintiff’s injury was caused by workplace incidents was not supported by sufficient evidence. Specifically, defendants take issue with finding of fact number 25, which states in pertinent part: “The uncontroverted medical testimony of Dr. Huffmon causally related plaintiff’s back problems to the August 31, 1998 incident.” Defendants contend Dr. Huffmon’s testimony *was* controverted and insufficient to establish a causal relationship between plaintiff’s injury and the work he performed as an employee of B & B.

Admittedly, we note that there was some evidence suggesting Dr. Huffmon’s opinion was controverted. However, such an error is harmless if the remaining findings by the Commission are based on competent evidence and support the Commission’s conclusions. *See Griffey v. Town of Hot Springs*, 87 N.C. App. 290, 292, 360 S.E.2d 457, 458 (1987). Here, Dr. Moore testified that cervical radiculopathy could be triggered by trauma, such as that experienced by plaintiff while repeatedly jumping off a recycling truck to lift and empty wet recycling bins. The Commission found, and defendants do not dispute, that plaintiff had not experienced any problems related to cervical radiculopathy prior to his employment with B & B. Therefore, even if Dr. Huffmon’s opinion was controverted, there was still competent evidence to support the Commission’s opinion and award.

Furthermore, with respect to the causal relationship between plaintiff's injury and his work, Dr. Huffmon testified as follows:

I believe the cause of [plaintiff's] pain and the cause of his cervical radiculopathy was caused by his injury at work. I cannot tell you with 100 percent accuracy. I can tell you with a substantial degree of medical certainty that I felt that his herniated discs were due to the work accident. However, as we all know there is nothing I can give you a 100 percent accuracy on. The fact that he may have had the herniated disc prior to this is a moot point because the pain started whenever he did this action at work. He did not have any pain prior to that so if he did have the herniated discs prior to that they were asymptomatic. So what caused his cervical radiculopathy which is what I addressed in the surgical procedure was the accident at work.

When viewing this testimony and the remainder of Dr. Huffmon's expert testimony in the light most favorable to plaintiff, there was "some evidence that the accident at least might have or could have produced" plaintiff's injury. *Buck v. Procter & Gamble Co.*, 52 N.C. App. 88, 96, 278 S.E.2d 268, 273 (1981). The Commission was entitled to determine the weight to be given this testimony and conclude that the testimony established a causal relationship between plaintiff's injury and his work.

Accordingly, even if the Commission erred in finding Dr. Huffmon's testimony was "uncontroverted," there was still sufficient and competent evidence to support the Commission's finding that plaintiff's back problems were related to a work incident.

II.

Defendants also argue the Commission erred in finding that plaintiff sustained a compensable specific traumatic incident on or about 31 August 1998. We disagree.

Defendants contend that plaintiff's testimony regarding when his injury occurred was not competent because he alleged numerous dates for his workplace injury at various times. In support of their argument, defendants draw this Court's attention to the following: (1) Plaintiff

testified that the workplace incident occurred on 25 August 1998; (2) several of plaintiff's medical records indicated the incident occurred on 28 August 1998; (3) Form 18 alleged the incident occurred on 1 September 1998; and (4) another medical record indicated the incident occurred on 3 September 1998. We recognize this evidence does indicate that plaintiff's injury first took place sometime on or between 25 August 1998 and 3 September 1998. Nevertheless, (1) the parties stipulated that an employment relationship existed between them during this time period, and (2) the closeness of the dates signifies plaintiff's ability to point to a series of contemporaneous events that occurred during a cognizable time period. This Court has held that such evidence is sufficient to fit the legislature's definition of a "specific traumatic incident." *See Ricards v. Town of Valdese*, 92 N.C. App. 222, 225, 374 S.E.2d 116, 119 (1988).

Additionally, defendants argue that Deputy Commissioner Dollar, who heard the evidence first hand, did not find plaintiff's testimony regarding when his injury occurred to be credible. However, "[w]hether the full Commission conducts a hearing or reviews a cold record, N.C.G.S. §97-85 places the ultimate fact-finding function with the Commission -- not the hearing officer. It is the Commission that ultimately determines credibility, whether from a cold record or from live testimony." *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 413 (1998).

The Commission, as the ultimate fact-finder, found and concluded in the instant case that there was credible evidence by which to find plaintiff's specific traumatic incident was sustained on or about 31 August 1998. This date accurately represented plaintiff's employment with B & B as well as the various dates given by defendant. Thus, this finding by the Commission was supported by competent evidence.

For the reasons stated herein, we affirm the Commission's award of workers' compensation benefits to plaintiff.

Affirmed.

Judges BRYANT and ELMORE concur.

Report per Rule 30(e).