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NO. COA02-629

NORTH CAROLINA COURT OF APPEALS

Filed: 6 May 2003

JAMES G. PHILLIPS,
Employee,
Plaintiff

v.

North Carolina Industrial Commission
I.C. File No. 921744

DON HERR CONSTRUCTION CO.,
Employer,

and

INTERSTATE INSURANCE SERVICES
GROUP,
Carrier,
Defendants.

Appeal by defendants from Opinion and Award entered 30 January 2002 by the North Carolina Industrial Commission. Heard in the Court of Appeals 14 April 2003.

The Twiford Law Firm, P.C., by Branch W. Vincent, III, for plaintiff-appellee.

Teague, Campbell, Dennis & Gorham, L.L.P., by Mallory T. Underwood, for defendants-appellants.

ELMORE, Judge.

This appeal arises out of an on-the-job accident, in which plaintiff James G. Phillips fell backwards from a scaffold onto a piece of lumber and injured himself. Although defendants Don Herr Construction Company (“defendant-employer”) and Interstate Insurance Services Group,

Incorporated (“defendant-carrier”) initially paid plaintiff’s medical bills, they later declined plaintiff’s request for further compensation and plaintiff requested that his claim be assigned for hearing in the Industrial Commission.

Plaintiff’s claim was first heard by Deputy Commissioner Morgan S. Chapman on 6 March 2000. The evidence tended to show the following: On or about 25 January 1999, plaintiff was employed by defendant-employer as a framer/carpenter, when he fell some three feet from a scaffold and landed straddling a board. Plaintiff’s boss, Donald S. Herr, was present and witnessed the fall and testified that plaintiff hurt himself during the fall. After the fall, defendant-employer prepared an IC Form 19, dated 29 January 1999, in which defendant-employer indicated that plaintiff had suffered a “possible twisted testicle.” Though in pain, plaintiff did not immediately seek medical attention. Plaintiff thought he would “get over it.” When the pain made it difficult for plaintiff to work, plaintiff went to Outer Banks Medical Center on 28 January 1999, where he was seen by Dr. Charles Hoidal.

After briefly discussing the 25 January 1999 fall which led to the visit, Dr. Hoidal examined plaintiff. Dr. Hoidal noted that plaintiff’s right testicle was hard and swollen. The doctor diagnosed plaintiff with “testicular pain.” Concerned that the testicle could be permanently damaged, Dr. Hoidal referred plaintiff to Dr. Joseph Alvarez, a urologist. After an ultrasound was performed on plaintiff’s scrotum on 29 January 1999, he was seen by Dr. Alvarez on 3 February 1999. The ultrasound showed that the scrotum was “totally normal,” and Dr. Alvarez opined that plaintiff “had no significant injury.” When plaintiff’s pain persisted and he began to experience other symptoms, such as rectal bleeding and epigastric pain, plaintiff returned to Outer Banks Medical Center on 6 February and 1 March 1999. Notably, plaintiff had a history of gastritis and the epigastric pain was attributed to that pre-existing condition.

Plaintiff was next referred to Dr. Jeffrey S. Levine, an associate at Albermarle Gastroenterology Associates. Dr. Levine first saw plaintiff on 5 March 1999, whereupon he took plaintiff's history and conducted a physical examination. Dr. Levine subsequently diagnosed plaintiff with internal hemorrhoids. A subsequent sigmoidoscopy, on 12 March 1999, confirmed that diagnosis.

Unable to return to work due to pain, plaintiff was seen on referral by Dr. David Carter on 27 April 1999. Dr. Carter's notes indicated that plaintiff had been suffering right testicular and inguinal pain since a 25 January 1999 on-the-job accident. The doctor took a full medical history and examined plaintiff before diagnosing him with a right inguinal hernia. On 25 May 1999, Dr. Carter performed surgery to repair the hernia, and released plaintiff with no restrictions on 14 September 1999.

During his deposition, Dr. Hoidal stated that although he found no palpable hernia during his examination, plaintiff's hernia could have resulted from the 25 January 1999 fall. Dr. Hoidal testified that he was not surprised by Dr. Carter's diagnosis, especially since the hernia was noted to be very small. Dr. Carter also gave a deposition, during which he opined that the 25 January 1999 fall could have caused the subject hernia. When asked about Dr. Alvarez's negative findings, Dr. Carter explained that a ultrasound would not show the presence of a hernia. Dr. Carter noted that a hernia may not be appreciated by an examiner, especially in cases where, as here, the patient suffered trauma. The stipulated Form 22 showed that plaintiff last worked on 11 February 1999.

After hearing the testimony and reviewing the depositions of plaintiff's treating physicians, Deputy Commissioner Chapman found and concluded that plaintiff failed to prove that the 25 January 1999 fall resulted in the hernia that was repaired by Dr. Carter. The deputy

commissioner concluded that plaintiff had only “sustained one week of temporary total disability as a result of his injury,” and therefore, “his disability period did not exceed the waiting period and he is not entitled to compensation.” The deputy commissioner denied plaintiff’s claims for any compensation for treatment of his inguinal hernia and internal hemorrhoids.

Plaintiff appealed to the Full Commission, and without receiving any further evidence the Full Commission filed an opinion and award reversing the deputy commissioner. The Full Commission found and concluded that plaintiff had shown that the 25 January 1999 fall resulted in the subject hernia. The Full Commission further found and concluded that plaintiff was entitled to temporary total disability compensation from 12 February 1999 through 14 September 1999. Finally, the Full Commission concluded that plaintiff was entitled to medical compensation for all medical treatment with the exception of that treatment for his internal hemorrhoids. Defendants appeal.

On appeal, defendants argue that the Full Commission erred in reversing the Deputy Commissioner’s determination that plaintiff failed to meet his burden of proving that he sustained a compensable injury as a result of the 25 January 1999 on-the-job accident. This Court’s review of an opinion and award of the Industrial Commission is limited to the following determination: “(1) whether there is competent evidence to support the Commission’s findings of fact; and (2) whether these findings of fact support the Commission’s conclusions of law.” *Bryson v. Phil Cline Trucking*, 150 N.C. App. 653, 660-61, 564 S.E.2d 585, 590 (2002). The Commission is the sole judge of the credibility of the witnesses and the weight to be accorded their testimony. *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993). Accordingly, “[i]f there is any evidence of substance which directly or by reasonable inference tends to support the findings, the court is bound by such evidence, even though there is

evidence that would have supported a finding to the contrary.” *Russell v. Yarns, Inc.*, 18 N.C. App. 249, 252, 196 S.E.2d 571, 573 (1973). The Industrial Commission’s conclusions of law, however, are not binding on this Court, and are reviewable *de novo*. *Grantham v. R.G. Barry Corp.*, 127 N.C. App. 529, 534, 491 S.E.2d 678, 681 (1997), *disc. review denied*, 347 N.C. 671, 500 S.E.2d 86 (1998). “The evidence tending to support plaintiff’s claim is to be viewed in the light most favorable to plaintiff, and plaintiff is entitled to the benefit of every reasonable inference to be drawn from the evidence.” *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998), *reh’g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999).

N.C. Gen. Stat. §97-2 (2001) provides that a plaintiff must “definitely” prove the following to establish a claim for a hernia “resulting from injury by accident arising out of and in the course of the [plaintiff’s] employment”: (1) “[t]hat there was an injury resulting in an hernia or rupture”; (2) “[t]hat the hernia or rupture appeared suddenly”; (3) “[t]hat the hernia or rupture immediately followed an accident”; (4) “[t]hat the hernia or rupture did not exist prior to the accident for which compensation is claimed.” N.C. Gen. Stat. §97-2(18)(2001).

In the instant case, the Full Commission made the following pertinent findings:

2. On January 5, 1999, plaintiff was putting up ceiling joists in a house under construction. While standing on a platform two to three feet above the floor and reaching up to hammer a nail into a ceiling joist, he lost his balance and fell backwards, landing on his buttocks on some scrap pieces of lumber. He immediately experienced pain in his groin and buttock region, right inguinal pain, and he subsequently developed pain in his right leg. Mr. Herr was standing nearby when he fell and was aware of the fall. Plaintiff advised that he was in pain, so he was sent out to the porch to rest for a while. He subsequently resumed his work activities but was working noticeably slower than normal.

3. Plaintiff did not ask for medical treatment on January 25 because he thought the symptoms would resolve. However, on January 28, 1999, he went to the Outer Banks Medical Center with complaints of pain and swelling in his right testicle

and pain in his buttock and right leg. Dr. Hoidal examined him and found that his right testicle was hard and swollen. Plaintiff denied direct groin trauma. Since there were several possible diagnoses, Dr. Hoidal referred him to Dr. Alvarez, a urologist, for evaluation. Dr. Alvarez ordered a scrotal ultrasound, which was normal, and then examined plaintiff on February 3, 1999. At that time the testicle and scrotal exam was normal and Dr. Alvarez did not recommend further treatment.

4. On February 6, 1999, plaintiff returned to Outer Banks Medical Center complaining of rectal bleeding. He was noted to have had the problem for five days. He was subsequently referred to Dr. Levine for evaluation regarding that problem. Dr. Levine performed an endoscopy which revealed no lesions in the colon but several internal hemorrhoids. Plaintiff was treated with suppositories and his condition improved.

5. Plaintiff returned to the Outer Banks Medical Center on March 26, March 28, April 2, and April 10, 1999 with complaints of sacral and coccyx pain. There was some question as to whether he had a contusion or an occult fracture of his coccyx, so he was referred to an orthopedic surgeon. If he ever saw an orthopedist, the notes were not placed into evidence. No further medical evidence was offered regarding any spinal injury. However, plaintiff apparently went to a Dr. Phillips in April and those medical records were not placed into evidence either. Dr. Phillips referred him to Dr. Carter, a general surgeon, who examined him on April 27, 1999. Dr. Carter found a small inguinal hernia on the right side and recommended surgery. On May 25, 1999, Dr. Carter performed surgery to repair the hernia found. There is no evidence of plaintiff ever having a hernia prior to the injury on January 25, 1999.

6. The Full Commission finds as fact that on January 25, 1999 plaintiff sustained an injury by accident arising out of and in the course of his employment with defendant. The fact that he fell from the platform and landed on some lumber constituted an unusual occurrence which interrupted his regular work routine. As a result of the accident, he injured his right testicle and developed buttock and right leg pain as well as right inguinal pain that was found to be a hernia. However, the internal hemorrhoids for which he was subsequently treated were not proven to have been a proximate result of the accident.

7. Dr. Carter found a small inguinal hernia upon examining plaintiff. When asked if a hernia can result from a

traumatic incident, Dr. Carter testified, and the Full Commission finds as fact, “absolutely.” Neither Dr. Hoidal nor Dr. Alvarez found a hernia when they examined plaintiff shortly after the accident. Dr. Carter testified, and the Full Commission finds as fact, that “when someone has a traumatic injury, he could very well have a very small tear that resulted in a small hernia that might not be more--he might have had pain and symptoms, but on physical exam, he might not have been able to find it for months.” Dr. Carter testified, and the Full Commission finds as fact, that a small tear resulting in a hernia is difficult to find on physical examination in comparison to a hernia that results in a bulge that is usually easy to see.

8. The stipulated Form 22 shows February 11 as the last day plaintiff worked. As a result of the January 25, 1999 injury by accident, plaintiff was unable to work from February 12 through September 14, 1999. Dr. Carter testified, and the Full Commission finds as fact, that plaintiff was released to full duty work with no restrictions following his appointment with Dr. Carter on September 14, 2001.

9. Plaintiff was clearly disabled for a period of time due to his hernia operation and that disability was proven to have been the result of his injury at work in January. Dr. Carter testified, and the Full Commission finds as fact, that the fall that occurred on January 25, 1999 “absolutely” could have caused the hernia which he had to repair surgically. Although Dr. Hoidal found no palpable hernia on examination, he testified that the hernia could have resulted from the injury plaintiff sustained on January 25, 1999 and testified that he was not surprised by Dr. Carter finding the hernia based on Dr. Carter’s note indicating the hernia was very small.

The Commission, therefore, made the following pertinent conclusions of law:

1. On January 25, 1999, plaintiff sustained an injury by accident arising out of and in the course of his employment which resulted in an injury to his right testicle and the onset of buttock and right leg pain. N.C. Gen. Stat. §97-2(6)[.]

2. Plaintiff has proved that the injury by accident on January 25, 1999 resulted in a compensable hernia. N.C. Gen. Stat. §97-2(18).

3. Plaintiff is entitled to temporary total disability compensation from February 12, 1999 through September 14, 1999. N.C. Gen. Stat. §97-29.

4. Plaintiff is entitled to have defendants provide all medical compensation arising from this injury by accident. However, defendants are not liable for treatment rendered for his internal hemorrhoids or his pre-existing gastrointestinal problems. Otherwise, the treatment provided at the Outer Banks Medical Center and by Dr. Alvarez is compensable. N.C. Gen. Stat. §97-2(19); N.C. Gen. Stat. §97-25.

At the outset, we note that defendants have only assigned error to three findings of fact-- findings 6, 7, and 9. The remaining findings, to which defendants failed to assign error, are “presumed to be correct.” See *Okwara v. Dillard Dep’t Stores, Inc.*, 136 N.C. App. 587, 591, 525 S.E.2d 481, 484 (2000) (“Where an appellant fails to assign error to the trial court’s findings of fact, the findings are ‘presumed to be correct.’”) (citation omitted)).

Moving to those three findings with which defendants take issue, we further note that they are mixed findings of fact and law as they relate to the issue of whether plaintiff’s injury arose out of his employment with defendant-employer. See *Janney v. J.W. Jones Lumber Co.*, 145 N.C. App. 402, 404, 550 S.E.2d 543, 546 (2001)(noting that the issue of whether an injury “arises out of employment” is a mixed question of law and fact and review is, therefore, limited to whether “the findings and conclusions are supported by competent evidence.”) (citation omitted)). Review of those findings are, therefore, only for a determination as to whether the findings and conclusions are supported by the evidence. *Creel v. Town of Dover*, 126 N.C. App. 547, 552, 486 S.E.2d 478, 481 (1997) (citing *Hoyle v. Isenhour Brick and Tile Co.*, 306 N.C. 248, 251, 293 S.E.2d 196, 198 (1982)).

When viewed in the light most favorable to plaintiff, the evidence here tends to show that plaintiff fell from scaffolding during and in the course of his employment on 25 January 1999, and as a result, began to experience right testicular and inguinal pain. When the pain did not abate, plaintiff was seen by Dr. Hoidal at Outer Banks Medical Center, where it was observed

that his right testicle was hard and swollen. His right testicle was also noted to be higher than the other. Dr. Hoidal noted that it was reasonable for plaintiff to be out of work pending consultation with a specialist. On the referral of Dr. Hoidal, plaintiff was examined by Dr. Alvarez, a urologist, who conducted an ultrasound and found no abnormalities. Particularly, Dr. Alvarez failed to detect any signs of a hernia. After continued pain and several other referrals, however, Dr. Carter diagnosed plaintiff with a very small right inguinal hernia. Subsequent surgery confirmed that diagnosis. At his deposition, Dr. Carter testified that the 25 January 1999 fall could have caused plaintiff's hernia. In explanation for why other physicians had not diagnosed the hernia, Dr. Carter testified that in cases of trauma, a hernia may not be appreciated by a physician for several months. Dr. Hoidal also testified during his deposition that based upon the notes from plaintiff's visits to Outer Banks Medical Center and Dr. Carter's office, plaintiff's hernia might or could have resulted from plaintiff's 25 January 1999 fall. The stipulated evidence tended to show that plaintiff last worked on 11 February 1999. Dr. Carter released plaintiff to full duty work on 14 September 1999.

To the extent that findings 6, 7, and 9 are factual findings, we conclude that the findings are amply supported by the evidence. The question then becomes whether, in light of the factual findings, the Full Commission's conclusions as stated in findings 6, 7, and 9, and corresponding conclusions of law, are legally proper.

While defendants argue to the contrary, we conclude that the evidence of record supports not only the Full Commission's findings, but also its conclusion that plaintiff suffered a compensable hernia as a result of his 25 January 1999 fall from scaffolding. Though plaintiff's hernia was not diagnosed by Dr. Carter until some four months after the 25 January 1999 fall, this Court finds it compelling that plaintiff was seen by several physicians during the four-month

period between the 25 January 1999 accident and his 27 April 1999 visit to Dr. Carter. Further, both Dr. Carter and Dr. Hoidal gave an explanation for why previous examinations had failed to reveal the existence of a hernia. Finally, contrary to defendant's assertion, this Court finds the testimony of Dr. Carter and Dr. Hoidal sufficient to establish causation between plaintiff's 25 January 1999 fall and his right inguinal hernia. The doctors' testimony that the subject fall "could have" or "possibl[y]" caused plaintiff's hernia is more than speculation and sufficient to establish causation. *See Young v. Hickory Bus. Furniture*, 353 N.C. 227, 233, 538 S.E.2d 912, 916 (2000) (Our supreme court "has allowed 'could' or 'might' expert testimony as probative and competent evidence to prove causation."). Accordingly, we hold that the evidence supports the Full Commission's findings of fact, and in turn those findings support its conclusions of law that plaintiff showed entitlement to workers compensation benefits for his right inguinal hernia.

In light of our conclusion in this regard, the opinion and award of the Full Commission is affirmed.

Affirmed.

Judges HUNTER and BRYANT concur.

Report per Rule 30(e).