NO. COA02-457

NORTH CAROLINA COURT OF APPEALS

Filed: 18 February 2003

MICHAEL BRAGG,
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 955375

AMERISTEEL,
Employer,

LIBERTY MUTUAL INSURANCE COMPANY,
Carrier,
Defendants.

Appeal by defendants from opinion and award filed 19 November 2001 by the North Carolina Industrial Commission. Heard in the Court of Appeals 28 January 2003.

Sellers, Hinshaw, Ayers, Dortch and Lyons, P.A., by John F. Ayers, III, for plaintiff appellee.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Neil P. Andrews and Terry L. Wallace, for defendant appellants.

BRYANT, Judge.

Ameristeel and Liberty Mutual Insurance Company (collectively, defendants) appeal from an opinion and award of the Full Commission of the North Carolina Industrial Commission (the Commission) filed 19 November 2001 in favor of Michael Bragg (plaintiff) and affirming the deputy commissioner's opinion and award.

The evidence presented by plaintiff in a 20 July 2000 hearing before the deputy commissioner tends to show plaintiff had been employed by Ameristeel or its predecessor since 1977. In 1992, plaintiff was assigned to the position of ladle tender. This position required plaintiff to handle a jackhammer to dislodge steel from the nozzles in the ladles used to hold molten steel. Plaintiff was working overtime in that capacity on 2 April 1999 in the evening shift beginning shortly before 7:00 p.m. After cleaning out the nozzle of a ladle using a jackhammer, which took about fifteen minutes, plaintiff turned around to place the jackhammer out of the way. As he did so, plaintiff felt a sharp pain in his back and legs and dropped the jackhammer. Plaintiff "wobbled" to the shack where his supervisor, Bill Baker (Baker), was located and said a "sharp pain ha[d] hit [him] in [his] back and down [his] legs." Baker refused to allow plaintiff to see the company doctor, since plaintiff had been to the doctor the day before about a cold from which he was suffering. Plaintiff eventually went home and the next morning his wife attempted to make an appointment with the family doctor, Dr. Cardwell. Dr. Cardwell, however, was on vacation and unable to see plaintiff until 7 April 1999.

Medical evidence presented tends to show in July 1996, plaintiff suffered a medial meniscus tear in his left knee while at work. Following knee surgery, plaintiff experienced back, hip and leg pain, and received treatment for a herniated disc as well as other various treatments for continuing back and leg pain, including surgeries for a hernia and a vascular condition in his left leg. In May 1998, Dr. McBride, one of plaintiff's treating physicians, diagnosed plaintiff with severe degenerative disc disease at his L5-S1 discs. Subsequent to these various treatments, plaintiff was cleared to return to work without restrictions on 21 September 1998.

Following the 2 April 1999 incident, plaintiff received treatment from both Dr. Cardwell and Dr. McBride, and also underwent surgery to fuse his L4-5 and L5-S1 discs. In a letter dated

20 January 2000, Dr. McBride opined, based on his review of his records, the 2 April 1999 incident aggravated plaintiff's degenerative disc disease ultimately leading to the fusion of the L4-5 and L5-S1 segments of plaintiff's spine. Dr. McBride re-asserted this opinion in a deposition taken on 23 August 2000. Dr. McBride was asked if the 2 April 1999 incident was "significant enough to require [p]laintiff to stop work . . . would that be the type of activity that would contribute in a significant way to . . . aggravation of [p]laintiff's degenerative disc condition . . . ?" Dr. McBride responded, "Yes, sir. I believe so."

An Ameristeel incident report taken by plaintiff's supervisor at 8:40 p.m. on 2 April 1999 contained the following description of the incident: "[plaintiff] had alleged to have hurt his leg and foot when was [sic] finished digging out a Noz and returning jack hammer to table." An Ameristeel "Supervisor's Occupational Injury/Illness Investigation Report" also completed by plaintiff's supervisor confirmed the incident report. In a "Recorded Claims Statement" taken by defendants, plaintiff stated the incident occurred at "approximately 8:40, well about 8:20. 8:40."

Based on the evidence presented at the hearing before the deputy commissioner, the Commission found in pertinent part:

> 8. On [2 April 1999], [plaintiff] reported for work on the evening shift at 6:50 p.m. At approximately 8:20 p.m., [plaintiff] had to change a nozzle on a ladle. [Plaintiff] picked up a jackhammer and began to dig vigorously and continuously for fifteen minutes in an effort to clear the nozzle . . . .
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> 9. After digging the nozzle out, [plaintiff], still holding the jackhammer, turned sideways and suddenly felt sharp pains in his back and down his legs. [Plaintiff] immediately dropped the jackhammer without returning it to its regular location.
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> . . . .
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> 20. Dr. McBride opined that [plaintiff's] jackhammer work aggravated his pre-existing degenerative disc disease.

> 21. . . . [Plaintiff] sustained an injury by accident arising out of the course of employment with the defendant-employer as a direct result of a specific traumatic incident of the work assigned and which resulted in aggravating and exacerbating . . . [plaintiff's] pre-existing condition.

The Commission then concluded:

> 1. Plaintiff sustained an injury by accident arising out of the scope of his employment . . . as a direct result of a specific traumatic incident . . . on [2 April 1999] . . . .

The issues are whether there is any competent evidence to support the finding of fact by the Commission that: (I) plaintiff sustained an injury from a specific traumatic incident, and (II) the 2 April 1999 incident caused the aggravation of plaintiff's degenerative disc disease.

Appellate courts reviewing decisions of the Commission are "limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). "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 which may be drawn from the evidence." *Id.* at 115, 530 S.E.2d at 552.

I

Defendants first argue the greater weight of the evidence shows plaintiff's back condition was not the result of a specific traumatic incident and thus, the Commission erred in finding and concluding plaintiff's injury resulted from a specific traumatic incident. In reviewing the Commission's findings of fact, an appellate court, however, must not weigh the evidence presented to the Commission or decide the case on the basis of the weight of the evidence.

Adams v. AVX Corp., 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998). Rather, the Commission is the "sole judge of the weight and credibility of the evidence." *Deese*, 352 N.C. at 116, 530 S.E.2d at 553. Instead, an appellate court must determine only whether the record contains any evidence tending to support facts found by the Commission. *Adams*, 349 N.C. at 681, 509 S.E.2d at 414.

A back injury arising out of and in the course of employment and as the direct result of a specific traumatic incident of the work assigned is to be construed as "an injury by accident" under the Workers' Compensation Act. N.C.G.S. § 97-2(6) (2001). Events occurring contemporaneously, during a cognizable time period, and which cause a back injury constitute a specific traumatic incident. *See Richards v. Town of Valdese*, 92 N.C. App. 222, 225, 374 S.E.2d 116, 118-19 (1988).

In this case, the evidence shows that at approximately 8:20 p.m. on 2 April 1999, plaintiff was performing his assigned duty of cleaning out a nozzle on a ladle using a jackhammer. After finishing the task, he was turning to replace the jackhammer when he felt pain in his back and shooting through his legs. The pain was later determined to have been caused by an aggravation of his degenerative disc disease. This is evidence plaintiff sustained an injury to his back while moving the jackhammer during an easily cognizable time period and this movement caused the aggravation of degenerative disc disease in plaintiff's back. Thus, there is competent evidence in the record to support the Commission's findings of fact that plaintiff sustained an injury by accident, and these findings of fact support the Commission's conclusion of law, "[p]laintiff sustained an injury by accident arising out of the scope of his employment as a direct result of a specific traumatic incident of the work assigned."

II

Defendants next contend there is no evidence in the record to support the Commission's finding of fact that "Dr. McBride opined that [plaintiff's] jackhammer work aggravated his pre-existing degenerative disc disease" and thus, the Commission's findings of fact do not support the conclusion of law that plaintiff's injury was caused by moving the jackhammer. Specifically, defendants maintain Dr. McBride was unable to provide a definitive causal connection between the 2 April 1999 incident and plaintiff's degenerative disc disease.

Initially, we note aggravation of a pre-existing condition caused by a work-related injury is compensable under the Workers' Compensation Act. *See Smith v. Champion Int'l*, 134 N.C. App. 180, 182, 517 S.E.2d 164, 166 (1999). Expert testimony does not have to show to a reasonable degree of medical certainty that the work incident caused the injury asserted. *Peagler v. Tyson Foods, Inc.*, 138 N.C. App. 593, 599, 532 S.E.2d 207, 211 (2000). Thus, it is not necessary for an expert to testify that the work incident definitively caused the injury asserted. Instead, there must be "some evidence that the accident at least might have or could have produced the particular disability in question." *Id.* (internal quotations omitted); *see also Young v. Hickory Bus. Furn.*, 353 N.C. 227, 233, 538 S.E.2d 912, 916 (2000) ("could" or "might" expert testimony may be probative and competent evidence); *Holley v. ACTS, Inc.*, --- N.C. App. ---, ---, 567 S.E.2d 457, 461 (2002) (our courts allow "could" or "might" expert testimony); *Porter v. Fieldcrest Cannon, Inc.*, 133 N.C. App. 23, 28, 514 S.E.2d 517, 522 (1999) (plaintiff must present some evidence accident at least might have or could have produced particular disability).

In this case, the expert evidence consisted of a letter from Dr. McBride stating his opinion the 2 April 1999 incident aggravated plaintiff's degenerative disc disease resulting in surgery to fuse together discs in plaintiff's back. This evidence was supported by Dr. McBride's

deposition testimony. Accordingly, there was competent evidence the 2 April 1999 incident could have aggravated plaintiff's degenerative back condition to support the Commission's finding of fact, and those finding of fact support the Commission's conclusions of law. The Commission therefore did not err in affirming the opinion and award of the deputy commissioner.

Affirmed.

Judges WYNN and GEER concur.

Report per Rule 30(e).