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NO. COA 02-383

NORTH CAROLINA COURT OF APPEALS

Filed: 15 April 2003

TIMOTHY AMBROSE,
Employee,
Plaintiff;

v.

North Carolina Industrial Commission
I.C. File No. 967002

TIDEWATER CONSTRUCTION COMPANY,
Employer;

LIBERTY MUTUAL INSURANCE COMPANY,
Carrier,
Defendants.

Appeal by defendants from opinion and award filed 28 September 2001 by the North Carolina Industrial Commission. Heard in the Court of Appeals 11 February 2003.

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

Cranfill, Sumner & Hartzog, L.L.P., by P. Collins Barwick, III and Tracy C. Myatt, for defendant-appellants.

ELMORE, Judge.

Tidewater Construction Company (“Tidewater”) and Liberty Mutual Insurance Company (collectively, “defendants”) appeal from the Industrial Commission’s (“Commission”) opinion and award, which concluded that Timothy Ambrose (“plaintiff”) sustained bilateral inguinal hernias resulting from an injury by accident arising out of and in the course of his employment,

and awarded plaintiff (1) temporary partial disability compensation, (2) temporary total disability compensation, (3) all medical expenses, and (4) reasonable attorney fees and costs. We find that the Commission's findings of fact are supported by competent evidence, and that the Commission's conclusions of law are in turn supported by its findings of fact. Accordingly, we affirm the Commission's opinion and award.

Plaintiff, who was twenty-two years old at the time of his injury, was hired by Tidewater on 9 August 1999 to work on construction of a bridge in Fairfield, North Carolina. Although hired as a pile driver, plaintiff's primary job responsibilities were driving a truck hauling girders and helping to set girders. Plaintiff had a history of hernias, having been diagnosed at age eighteen with bilateral hernias which were surgically repaired by Dr. Robert W. Youngblood ("Dr. Youngblood"). Between his earlier hernia repair and his employment by Tidewater, plaintiff worked at various times as a farmer, a welder, a pallet builder, a forklift operator, and a pile driver.

According to plaintiff, on 3 September 1999, a Friday, he was directed to secure the job site in preparation for an approaching hurricane. These preparations consisted of tying everything down and securing all loose materials. After stacking several sheets of plywood, plaintiff decided to place an anchor chain across the plywood to secure it against the wind. When plaintiff attempted to lift the anchor chain, which weighed over 300 pounds, he felt a "pop" as he pulled it across the plywood. Despite the "pop" and subsequent nagging pain in his groin, plaintiff did not immediately tell anyone at Tidewater about the incident, and he continued to work the remainder of the day securing the job site.

Plaintiff's discomfort eased somewhat over the long Labor Day weekend, which contributed to his initial belief that the injury was a muscle pull which would heal with time.

However, plaintiff did not report to work on 7 September 1999, the next work day following the incident, because the roads were flooded and impassable by motorcycle, plaintiff's only means of transportation. Plaintiff maintains that he called Christy Davenport, Tidewater's field administrator, that morning and told her he would not be coming in, but he did not tell her about the previous Friday's incident or the resulting pain. Plaintiff contends that he rode to and from work in the rain the next day, and as a result got sick, causing him to miss work for the rest of the week. Plaintiff continued to experience pain in his groin area but did not inform anyone at Tidewater about his injury.

Plaintiff reported to work on Monday, 13 September 1999, and was told by Davenport that because of his absences due to illness, he had to get a doctor's authorization before returning to work. Plaintiff left work and went to his family physician, M.K. Jeon ("Dr. Jeon"). Plaintiff told Dr. Jeon about the incident at work and the pain in his groin area. Dr. Jeon examined plaintiff and determined that he had a hernia. Plaintiff returned home and called Davenport, telling her for the first time about the incident with the anchor chain and informing her of Dr. Jeon's hernia diagnosis. Davenport made an appointment for plaintiff to see Dr. Charles O. Boyette ("Dr. Boyette") the next day.

On 14 September 1999, Dr. Boyette examined plaintiff and noted pain and tenderness in the groin area bilaterally and a bulge. Plaintiff told Dr. Boyette's nurse practitioner that he had "sustained an injury lifting an anchor chain at work . . . a couple of weeks prior to being seen and felt a pull in his groin." Plaintiff also disclosed his prior history of bilateral hernias. Dr. Boyette diagnosed bilateral inguinal hernias and referred plaintiff to Dr. Youngblood for a surgical consultation. Dr. Boyette released plaintiff to return to work on light duty restrictions, with instructions not to lift over five pounds.

Plaintiff contends he then went to the job site and asked for work assignments within these parameters and also asked if he could ride to work with one of the foremen, since he was no longer allowed to lift his motorcycle onto its center parking stand. According to plaintiff, Tidewater's job superintendent indicated that he did not care whether plaintiff returned to work and refused to offer any light-duty work. Plaintiff thereafter remained out of work and was terminated by Tidewater on 29 September 1999. Plaintiff then secured light-duty employment as a carpenter for A.R. Chesson, but the project on which he was working ended after approximately three weeks and he was let go. Plaintiff filed a Form 18 notice of accident and claim on 15 October 1999, which claim defendants subsequently denied. On 11 November 1999, plaintiff filed a Form 33 request that his claim be assigned for hearing.

Plaintiff's pain persisted and he was examined by Dr. Youngblood on 6 December 1999, by Dr. Walter J. Pories on 20 December 1999, and by Dr. Youngblood again on 14 February 2000. Dr. Youngblood diagnosed bilateral inguinal hernias and recommended surgery, which he performed on 2 March 2000. Approximately one month after the surgery, plaintiff accepted a position with Barnhill Construction Company as a flag man, earning approximately the same wages as he had at Tidewater.

On 15 August 2000, plaintiff's claim was heard by Deputy Commissioner W. Bain Jones, Jr. By amended opinion and award filed 18 January 2001, Deputy Commissioner Jones concluded that plaintiff had "sustained an injury by accident as a result of a specific traumatic incident of work assigned" and awarded plaintiff (1) temporary total disability compensation, (2) temporary partial disability compensation, (3) all medical expenses, and (4) reasonable attorney fees and costs. The Full Commission heard defendants' appeal on 20 August 2001. By opinion and award filed 28 September 2001, the Commission affirmed Deputy Commissioner Jones'

decision, with modifications as to how the disability payments were to be calculated. Defendants gave notice of appeal to this Court on 29 October 2001.

Defendants bring forth eight assignments of error challenging a number of the Commission's findings of fact and conclusions of law. However, in their brief defendants have combined them all into a single argument under a general heading stating that the "Commission's findings of fact relating to the issue of whether plaintiff sustained a compensable injury on September 3, 1999, are not supported by competent evidence in the record, and its conclusions of law on this issue are not supported by competent findings of fact." Although defendants list all eight assignments of error under this heading, their brief does not specifically discuss any particular finding of fact. Defendants instead argue that "plaintiff did not establish the necessary 'causal relation' between his hernia and his employment, and the Full Commission erred in awarding compensation in this instance." Defendants proceed to challenge this "causal relation" by contending that there is no competent evidence that plaintiff was even at work on 3 September 1999, the date he claims to have suffered the job-related injury which gave rise to his bilateral hernias. Defendants also contend that the evidence shows the condition for which plaintiff seeks compensation was a gradual recurrence of his previous hernias and unrelated to any specific work-related injury, and therefore "causally unrelated" to his employment by Tidewater. We thus review the Commission's findings and conclusions in light of these contentions.

It is well-settled that when reviewing an opinion and award of the Commission, this Court is "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, 530S.E.2d 549, 553 (2000). The

Commission's findings of fact are conclusive if they are supported by any competent evidence in the record, even though there is evidence that would support contrary findings. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (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." *Id.* The Commission's conclusions of law, however, are reviewed *de novo* by this Court. *Allen v. Roberts Elec. Contr'rs*, 143 N.C. App. 55, 63, 546 S.E.2d 133, 139 (2001).

Here, the Commission made findings of fact, in pertinent part, as follows:

8. On September 3, 1999, Hurricane Dennis was approaching the North Carolina coast. Plaintiff was working that day and after lunch he was instructed to secure the jobsite in preparation for the hurricane. Plaintiff had never performed this type of work.

9. Plaintiff stacked four or five 4x8 sheets of plywood and looked for something to place across the plywood to secure it against the wind. Plaintiff saw an anchor chain and decided the weight of the chain would be sufficient to hold the wood.

10. Plaintiff walked over to the chain, bent down and when he attempted to lift the chain, he realized the chain was heavier than expected. The chain weighed over 300 pounds. Plaintiff felt a pop as he pulled the chain. Plaintiff felt nagging pain in his groin area and thought that he had pulled a muscle which would resolve in a matter of days.

...

14. . . . Dr. Boyette diagnosed plaintiff with bilateral inguinal hernias and felt that this was the result of plaintiff's injury while picking up the anchor chain.

...

26. Dr. Youngblood indicated the most reasonable explanation for the hernia was the lifting of the anchor chain.

...

31. Plaintiff described feeling a pop and subsequent nagging pain right above his groin area after pulling on the heavy chain on September 3, 1999. Ten days later plaintiff received medical treatment for the pain and tenderness in his groin. The Full Commission finds that plaintiff's testimony regarding the specific incident leading to his bilateral hernias is credible.

32. After considering the greater weight of the evidence, the Full Commission finds that plaintiff's bilateral hernias appeared suddenly on or about September 3, 1999 as the result of a specific traumatic incident of the work assigned. Plaintiff's prior bilateral hernias had resolved and he did not have a hernia prior to the injury by accident on September 3, 1999.

Defendants argue that these findings are erroneous because certain evidence of record, specifically (1) a warning notice to plaintiff concerning absenteeism, (2) plaintiff's time card from 3 September 1999, and (3) Davenport's testimony, indicates that plaintiff was not at work on 3 September 1999 and could not have suffered a work-related injury on that date. We stress that 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, and this Court's "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 v. Memorial Mission Hosp.*, 137 N.C. App. 480, 486, 528 S.E.2d 397, 401 (2000). Further, if there is any "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." *Porterfield v. RPC Corp.*, 47 N.C. App. 140, 144, 266 S.E.2d 760, 762 (1980).

With these principles in mind, we hold that there was plenary evidence in the record to support the Commission's findings of fact numbers 8, 9, 10, 31, and 32, in which the Commission found that plaintiff was indeed at work on 3 September 1999 and that he suffered an injury by accident on that date when he lifted the anchor chain while securing materials at the job

site. Plaintiff specifically testified before the Commission that he worked on 3 September 1999 and was injured on that date when he tried to lift the anchor chain, testimony consistent with plaintiff's assertions in his Forms 18 and 33. Plaintiff gave oral and written statements on 14 September 1999 in which he dated his injury as occurring while securing the job site on 3 September 1999. At his deposition, Dr. Boyette testified that his nurse practitioner's notes indicate that plaintiff "picked up the chain, pulling on the chain at work on September the 3rd with a tearing sensation in the groin." Further, plaintiff's supervisor at Tidewater, Karl Riedel, testified concerning preparations on 3 September 1999 for the approaching hurricane as follows:

I was [plaintiff's] direct supervisor in the field and in the process of building the bridge, but in this particular situation, I sent him along with another _ a couple _ another man _ I can't think who it was _ to work on the north side because they had so much more activity to secure.

Riedel also testified that he later observed the anchor chain "laid [sic] across the plywood," consistent with plaintiff's description of how he was injured. We hold the Commission's findings of fact that plaintiff was at work on 3 September 1999 and suffered an injury while lifting the anchor chain on that date are supported by the evidence.

As to findings of fact numbers 14, 26, and 32, in which the Commission found Dr. Boyette and Dr. Youngblood each believed that plaintiff's bilateral hernias resulted from the incident in which he lifted the anchor chain, and that he did not have a hernia prior to the injury by accident on 3 September 1999, we hold that these findings are also supported by competent evidence. At his deposition, Dr. Boyette testified that "[p]icking up an anchor chain certainly can cause a herniation. And the symptoms that he presented with were consistent with an individual who had suffered an inguinal strain or an inguinal recurrent herniation." Similarly, Dr. Youngblood testified at his deposition that "the most reasonable explanation for the hernia was

that [plaintiff] had a very considerable force to disrupt the previous surgery . . . I think that it's reasonable to believe that this disruption of his previous operative sites were secondary to the injury which he described." Despite evidence that plaintiff had previously sustained bilateral hernias, the deposition testimony of Dr. Boyette and Dr. Youngblood supports the Commission's findings that "he did not have a hernia prior to the injury by accident on September 3, 1999." Thus, we hold the Commission's findings of fact relating to whether plaintiff sustained a compensable injury on September 3, 1999 are supported by the evidence.

Next, we must determine whether these findings of fact support the Commission's conclusions that plaintiff suffered a compensable injury on 3 September 1999. *Deese*, 352 N.C. at 116, 530 S.E.2d at 553. Defendants except to the Commission's conclusions as follows:

2. As a result of the incident on September 3, 1999, plaintiff sustained bilateral hernias that appeared suddenly and immediately following an injury by accident within the course and scope of his employment with defendant-employer as [a] result of a specific traumatic incident of work assigned. N.C. Gen. Stat. §97-2(18).

3. As a result of plaintiff's specific traumatic incident on September 3, 1999, plaintiff is entitled to payment by defendants of all medical expenses related to the treatment of the bilateral hernias. N.C. Gen. Stat. §97-25.

4. Plaintiff was justified in not returning to work due to defendant-employer's refusal to provide work within his restrictions. N.C. Gen. Stat. §97-32.

5. As a result of his compensable injury, plaintiff was partially disabled from work and is entitled to receive temporary partial disability compensation . . . for the period from the date of his discharge from employment on September 29, 1999 through March 1, 2000. N.C. Gen. Stat. §97-30.

6. As a result of his compensable injury by accident, plaintiff was temporarily totally disabled from any employment and is entitled to receive temporary total disability compensation from the date of his hernia surgery, March 2, 2000, until April 1,

2000, when plaintiff reached maximum medical improvement and regained his wage earning capacity by returning to work at wages greater than his preinjury wages. N.C. Gen. Stat. §97-29.

We hold that the Commission's findings of fact justify its conclusions of law. The Workers' Compensation Act provides that in order to recover compensation for a hernia, plaintiff must prove (1) there was an injury resulting in hernia or rupture; (2) the hernia or rupture appeared suddenly; (3) the hernia or rupture immediately followed an accident or specific traumatic incident; and (4) the hernia or rupture did not exist prior to the accident for which compensation is claimed. N.C. Gen. Stat. §97-2(18) (2001).

The Commission found that plaintiff was working to secure the job site on 3 September 1999 when he attempted to lift the anchor chain and place it on top of a stack of plywood, and that plaintiff "felt a pop as he pulled the chain" and thereafter "felt nagging pain in his groin area." The Commission further found that plaintiff was subsequently diagnosed with bilateral inguinal hernias, which "appeared suddenly on or about September 3, 1999 as the result of a specific traumatic incident of the work assigned," and that "[p]laintiff's prior bilateral hernias had resolved and he did not have a hernia prior to the injury by accident on September 3, 1999." The Commission's findings of fact support its conclusions that plaintiff's bilateral hernias were compensable as defined by N.C. Gen. Stat. §97-2(18) and as interpreted by case law. *Pernell v. Piedmont Circuits*, 104 N.C. App. 289, 292, 409 S.E.2d 618, 619 (1991), *rev. denied*, 330 N.C. 613, 412 S.E.2d 87 (1992). Accordingly, the award of the Commission is

Affirmed.

Judge HUNTER and Judge BRYANT concur.

Report per Rule 30(e).