NO. COA02-779

NORTH CAROLINA COURT OF APPEALS

Filed: 15 April 2003

DAVID MERCK,
Employee-Plaintiff,

v. North Carolina Industrial Commission
I.C. File No. 967437

ANTHONY CRANE RENTAL,
Employer-Defendant,

and

GAB ROBINS,
Carrier-Defendants.

Appeal by defendant from Opinion and Award filed 8 February 2002 by the North Carolina Industrial Commission. Heard in the Court of Appeals 19 February 2003.

McAngus, Goudelock & Courie, P.L.L.C., by Louis A. Waple, for employer-defendant.

Doran, Shelby, Pethel and Hudson, P.A., by David A. Shelby, for employee-plaintiff.

LEVINSON, Judge.

On 23 July 1999, plaintiff suffered compensable injury when he slipped and fell, injuring his back. Prior to the accident, plaintiff had suffered from chronic low back pain. Starting in 1990 plaintiff began treatment for his back problems, and that treatment ultimately included four surgeries and lasted until 1999, just prior to his accident.

Defendant denied plaintiff was disabled as a result of his accident. Rather, defendant argues that plaintiff's pre-existing condition was only temporarily exacerbated. The matter was heard before a deputy commissioner on 17 August 2000. Plaintiff was awarded ongoing disability benefits and medical treatment. Defendant appealed to the Full Commission (Commission) and on 8 February 2002, the Commission affirmed the deputy commissioner's award.

Defendant contends that as a matter of law the Commission improperly concluded that plaintiff was currently disabled. Defendant couches this contention by arguing eight assignments of error, all of which assert the Commission's findings of fact are unsupported by competent record evidence.

We review defendant's assignments to determine whether any competent evidence in the record supports the Commission's findings of fact. *McAninch v. Buncombe County Schools*, 347 N.C. 126, 489 S.E.2d 375 (1997); *Barber v. Going West Transp., Inc.*, 134 N.C. App. 428, 517 S.E.2d 914 (1999). Even where the record would support a finding to the contrary, the Commission's findings are binding provided the record contains any competent evidence to support them. *Adams v. AVX Corp.*, 349 N.C. 676, 509 S.E.2d 411 (1998). "[T]his Court is 'not at liberty to reweigh the evidence and to set aside the findings . . . simply because other . . . conclusions might have been reached.'" *Baker v. City of Sanford*, 120 N.C. App. 783, 787, 463 S.E.2d 559, 562 (1995) (quoting *Rewis v. Insurance Co.*, 226 N.C. 325, 330, 38 S.E.2d 97, 100 (1946)), *disc. review denied*, 342 N.C. 651, 467 S.E.2d 703 (1996). Furthermore, the Commission is the sole judge of the credibility of witnesses and the weight to be assigned to their testimony. *Adams*, 349 N.C. at 681, 509 S.E.2d at 413.

We take each of defendant's assignments in turn:

Finding of Fact Number 8:

> 8. Plaintiff testified that after his fall on 23 July 1999, his back pain substantially intensified and he began to experience pain radiating down into his left leg, the intensity of which he had not experienced prior to 23 July 1999. Plaintiff's testimony is accepted as credible. Defendants began paying plaintiff indemnity compensation pursuant to Form 63 Payment of Compensation Without Prejudice which was filed on 25 August 1999.

The only contested portion of this finding relates to plaintiff's pain. Plaintiff testified that prior to his fall he had a "nagging" pain but that after the fall the pain was "really killing [him] like it used to before [he] had the surgeries." He also testified that before the accident he did not have pain radiating into his legs but afterwards he did. Furthermore, this testimony was supported by Dr. Hartman's examination notes. Therefore, there is competent evidence to support the Commission's finding.

Findings of Fact Numbers 12 and 14, respectively:

> 12. Due to continued complaints of pain, plaintiff's rehabilitation nurse scheduled a second opinion with Dr. William T. Mason on 31 January 2000. Dr. Mason noted that plaintiff was "still having significant problems with his back," and diagnosed plaintiff with post-operative pain and lumbar strain and a "possible break loose of the left side of the fusion at L4-5." Dr. Mason opined that plaintiff's current condition was related to his 23 July 1999 fall or certainly aggravated by it. Dr. Mason further opined that plaintiff was not able to return to gainful employment at that time and he suggested a referral to a neurosurgeon.
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> 14. On 7 January 2000, plaintiff saw Dr. Ranjan Roy, a neurosurgeon. Dr. Roy ordered an MRI. After reviewing the MRI, Dr. Roy felt surgery gave plaintiff little chance of success and recommended the comprehensive pain management program at North Carolina Baptist Hospital. Dr. Roy opined that plaintiff's July 1999 fall caused an aggravation of his back symptoms. Dr. Roy further opined that the major purpose of a comprehensive pain clinic was to give relief to plaintiff's pain. Dr. Roy further opined that without surgery, plaintiff is at maximum medical improvement.

Finding of fact number 12 is taken almost verbatim from Dr. Mason's testimony and from a letter written by Dr. Mason dated 31 January 2000. Similarly, with the inconsequential exception of the date on which Dr. Roy saw plaintiff, finding of fact number 14 is squarely supported by Dr. Roy's examination notes and his deposition testimony. Furthermore, although defendant contends the Commission erred in relying upon the physicians' statements and opinions because they were based, in part, upon plaintiff's description of his pain and medical history, as we have previously stated, such determinations of credibility are within the sole purview of the Commission. *Adams*, 349 N.C. at 681, 509 S.E.2d at 414.

Findings of Fact Numbers 15 and 16, respectively:

> 15. During parts of five separate weeks between 6 April 2000 and 5 May 2000, plaintiff worked for Bobby Safrit performing lawn maintenance. Plaintiff worked [for] a total of two to three hours per day on five occasions. He earned $10.00 per hour for a total of $150.00. . . .
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> 16. Plaintiff testified that on each occasion he worked, he had to take pain medications to tolerate two to three hours of activity and could not work the entire day due to his pain. Plaintiff's testimony concerning these activities and the difficulties plaintiff experienced performing these activities were corroborated by Bobby Safrit at the hearing.

Plaintiff's and Mr. Safrit's testimonies directly support and provide competent evidence for these findings. These findings are the accurate summaries of numerous pages of testimony, surveillance reports, and exhibits.

Finding of Fact Number 17:

> 17. The wages earned by plaintiff while working for Bobby Safrit sporadically two to three hours per day on five different occasions over a period of five weeks are not indicative of plaintiff's ability to compete with others for wages in the competitive job market.

This finding is supported by the testimony of plaintiff and Mr. Safrit that the two were friends and that Mr. Safrit allowed plaintiff to work only when he was able and even paid plaintiff when he had done little or no work. The finding is also supported by Dr. Mason's opinion that plaintiff was not capable of gainful employment.

Finding of Fact Number 18:

> 18. Having reviewed the testimony of both parties, the Full Commission gives greater weight to the testimony of plaintiff.

Finding of fact number 18 is essentially a determination of credibility, and as previously stated, that determination is within the province of the Commission, not this Court. *Adams*, 349 N.C. at 681, 509 S.E.2d at 414.

Finding of Fact Number 19:

> 19. The competent evidence in the record establishes that from 13 September 1999 and continuing, plaintiff has been unable to earn wages he was receiving at the time of his compensable injury at the same or in any other employment

An injured employee has the initial burden to prove he is disabled and eligible for disability compensation. *Franklin v. Broyhill Furniture Industries*, 123 N.C. App. 200, 205, 472 S.E.2d 382, 386, *cert. denied*, 344 N.C. 629, 477 S.E.2d 39 (1996). "Disability" is an "incapacity" to earn wages, N.C.G.S. §97-2(9) (2001), and a plaintiff may show such an incapacity through the production of evidence that, as a result of his work-related injury, he is incapable of work in any employment. *Trivette v. Mid-South Mgmt., Inc.*, __ N.C. App. __, __, 571 S.E.2d 692, 696-97 (2002).

Finding of fact number 19 is supported by plaintiff's testimony that his pain was so severe that he was unable to drive the distance to work or stand or sit for even a few hours at a time while performing a job answering phones taking crane orders. Also, Dr. Mason wrote in a

letter dated 31 January 2000 to plaintiff's rehabilitative nurse, "Is he able to return to gainful employment? I don't believe so at this time." Dr. Mason further wrote, "I feel he is at [Maximum Medical Improvement]. As far as I am concerned, I don't think I can make him any better." This evidence, together with plaintiff's own testimony, was sufficient evidence for the Commission to find fact number 19.

Aside from defendant's assertions that the Commission's findings are not supported by competent evidence, defendant argues the Commission relied upon the premise that plaintiff did not have back pain prior to his 23 July 1999 accident. This argument is wholly without merit, as the Commission made multiple detailed findings concerning plaintiff's prior back problems. The Commission specifically found:

> 3. Prior to working for defendant-employer, plaintiff had had previous back surgeries. On 26 June 1992, plaintiff underwent a percutaneous laser disc decompression at L4-5. On 5 January 1993, plaintiff underwent a left L3-4 hemilaminotomy and excision of a foraminal and far lateral HNP. On 10 January 1995, plaintiff underwent bilateral decompressions, partial diskectomies and an L3-4 instrumental fusion.
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> 4. After these surgeries, plaintiff had continuing back pain. However, plaintiff continued to work as a crane operator for defendant-employer during 1995 and 1996. Additionally, plaintiff lived in Georgia during the Olympics and worked as a traffic control coordinator.
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> 5. Upon his return to North Carolina in 1999, plaintiff resumed working for defendant-employer in their Charlotte offices and although plaintiff had back pain from his prior surgeries, he continued to work on a daily basis until 23 July 1999.
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> 6. On 22 April 1999, plaintiff presented to Dr. Mark Hartman, orthopaedist. Dr. Hartman diagnosed plaintiff with "discogenic back pain with no radiation really into plaintiff's arms or legs."

Defendant has failed to show that the Commission's findings are not supported by competent evidence. Although there may have been sufficient evidence to support defendant's contentions, the Commission is the fact finding body, and its findings of fact are conclusive on appeal. *McAninch*, 347 N.C. at 131, 489 S.E.2d at 378. Because the sole support for defendant's argument, that the Commission improperly found plaintiff was currently disabled, was premised upon the Commission's finding of facts in error, that argument must fail. Additionally, as defendant has not argued his remaining assignments of error, they are deemed abandoned. N.C.R. App. P. Rule 28(b)(6).

Affirmed.

Judges WYNN and TIMMONS-GOODSON concur.

Report per Rule 30(e).