NO. COA02-306

NORTH CAROLINA COURT OF APPEALS

Filed: 18 March 2003

JIM H. HARRISON, JR.,
Employee,
Plaintiff

v.

North Carolina Industrial Commission
I.C. File No. 977819

BEAR GRASS LOGGING CORPORATION,
Employer,

and

N.C. FORESTRY ASSOCIATION
MUTUAL INSURANCE COMPANY,
Carrier,
Defendants.

Appeal by defendants from the Opinion and Award of the North Carolina Industrial Commission filed 2 November 2001. Heard in the Court of Appeals 30 October 2002.

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

Lewis & Roberts, P.L.L.C., by Jack S. Holmes and by Christopher M. West, for defendant-appellant

TYSON, Judge.

Bear Grass Logging Corporation ("employer") and N.C. Forestry Association Mutual Insurance Company, collectively referred to as "defendants", appeal the award of temporary total

disability compensation to Jim H. Harrison, Jr. ("plaintiff") by the North Carolina Industrial Commission ("Commission"). We affirm the Commission's order.

I. Background

Plaintiff worked for his father's company, Bear Grass Logging Corporation. Plaintiff was employed as a foreman and was responsible for cutting trees, loading logs, operating equipment and any job duties of crew members who did not show up for work.

On 28 January 1999, while performing his regular duties, plaintiff manually lifted the landing gear on a logging trailer and immediately felt pain in his lower back. Plaintiff reported his injury to the president of employer, his mother, who instructed him to obtain medical attention.

Later that day, Dennis A. Czuchra, P.A., of Family Medical Care, examined plaintiff and diagnosed him with acute muscular strain of the lower back with a history of spondylosis. Mr. Czuchra prescribed medication and gave plaintiff a note for light duty work after plaintiff declined a note to stay out of work. Mr. Czuchra also instructed plaintiff to follow up with an orthopedic physician.

Plaintiff did not return to light duty work with employer, and failed to keep the two separate appointments with Talley Lassiter, M.D., an orthopedic physician with Orthopaedics East. Plaintiff testified that his failures were due to his wife's emergency surgery and to Hurricane Floyd. On his third scheduled appointment on 5 October 1999, more than eight months after the incident, plaintiff was examined by Dr. Lassiter, who diagnosed plaintiff with Grade 1 spondylolisthesis at the L5-S1 vertebrae. Plaintiff was treated conservatively with a prescription for a lumbar corset, Vioxx and a Sterapred Dosepak.

On 17 February 2000 plaintiff was examined by James C. Harvell, M.D., another physician with Orthopaedics East. Dr. Harvell took x-rays, confirmed Dr. Lassiter's diagnosis, and continued plaintiff's conservative treatment. A myelogram taken in May 2000 again confirmed the diagnosis of isthmic spondylolisthesis of L5-S1. Dr. Harvell opined that (1) plaintiff had a pre-existing condition of isthmic spondylolisthesis at L5-S1, (2) plaintiff's 28 January 1999 lifting incident exacerbated that pre-existing condition and provoked symptoms of low back, buttock and some element of leg pain, and (3) with treatment, plaintiff's symptoms would settle, but that sudden flare ups and exacerbations might occur with increasing intensity. Dr. Harvell restricted plaintiff from bending, stooping, lifting or operating heavy equipment and restricted plaintiff to light or sedentary work.

The Commission concluded in part:

> 1. On 28 January 1999, plaintiff sustained a compensable injury by accident or specific traumatic incident arising out of and in the course of his employment.
>
> 2. As a direct and proximate result of plaintiff's compensable injury, plaintiff has been incapable of earning wages which he was receiving at the time of his compensable injury at the same or in any other employment from 28 January 1999 and continuing.

The Commission awarded plaintiff temporary total disability compensation from 29 January 1999 and continuing until further order of the Commission. The Commission also awarded "past and future medical expenses incurred by plaintiff which reasonably related to his compensable injury by accident and reasonably designed to effect a cure, give relief or lessen the period of disability when bills for the same have been approved by procedures adopted by the Commission." Defendants appeal.

II. Issues

Defendants contend that the Commission erred by finding that the plaintiff was disabled as a result of the injury by accident or a specific traumatic incident and argue (1) the testimony of Dr. Harvell is neither credible nor competent evidence and (2) the Commission ignored pertinent evidence.

III. Standard of Review

Upon appeal of an award from the Commission, this Court's review is limited to whether competent evidence supports the Commission's findings of fact and whether those findings support the Commission's conclusions of law. *Effingham v. Kroger Co.*, 149 N.C. App. 105, 109, 561 S.E.2d 287, 291 (2002). The findings of fact are conclusive on appeal if there is competent evidence to support them, even if evidence is presented to the contrary. *Id*. The Commission's conclusions of law are reviewable *de novo. Id*.

IV. Testimony of Dr. Harvell

Defendants contend Dr. Harvell's testimony is neither credible nor competent evidence to support a finding by the Commission. We disagree.

This Court noted in *Effingham* that "[t]he Commission is the sole judge of the credibility of the witnesses and the weight accorded to their testimony." 149 N.C. App. at 109-10, 561 S.E.2d at 291. The Commission "may reject entirely the testimony of a witness if warranted by disbelief of the witness." *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993).

> [T]he Commission does not have to explain its findings of fact by attempting to distinguish which evidence or witness it finds credible. Requiring the Commission to explain its credibility determinations and allowing the Court of Appeals to review the Commission's explanation of those credibility determinations would be inconsistent with our legal system's tradition of not requiring the fact finder to explain why he or she believes one

> witness over another or believes one piece of evidence is more credible than another.

Skillin v. Magna Corp./Greene's Tree Serv., Inc., 152 N.C. App. 41, 47-48, 566 S.E.2d 717, 721-22 (2002) (citing *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116-17, 530 S.E.2d 549, 553 (2000)).

Defendants argue that Dr. Harvell's testimony is neither credible nor competent, and assert factors including the length of time between the 28 January 1999 incident and the date Dr. Harvell first examined plaintiff and contrary opinions offered by Mr. Czuchra, the physician's assistant who examined plaintiff the day of the incident. Defendants suggest that the record contains evidence of Dr. Harvell's bias, and attempt to discredit Dr. Harvell's explanation of his conclusions concerning plaintiff's condition.

Defendants argued these credibility issues to the Commission at the hearing. The Commission's findings of fact reflect its acceptance of Dr. Harvell's credibility. Defendants are asking this Court to substitute our credibility determination for that of the Commission.

Although the defendants do not directly address their contention that Dr. Harvell's testimony is not competent, we note that this testimony is competent evidence. Dr. Harvell testified that,

> [i]t is my opinion that Mr. Harrison had a pre-existing condition involving his lumbar spine; namely, that of isthmic spondylolisthesis involving the lowest mobile segment, or L5-S1. It is my opinion that on January 28, 1999, Mr. Harrison exacerbated the pre-existing condition involving his lumbar spine and prevoked symptomatology of low back, buttock, and some element of leg pain.

This testimony does not demonstrate an opinion "based solely on supposition and conjecture." *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 233, 538 S.E.2d 912, 917 (2000). Any delay between plaintiff's injury and seeking treatment from Dr. Harvell would affect the weight of the

testimony not its admissibility as competent evidence. Credibility and weight of the evidence rests in the hands of the Commission not this Court. *Effingham*, 149 N.C. App. at 109-10, 561 S.E.2d at 291. This testimony is competent evidence on which the Commission may base its decision. *See, Young* 353 N.C. 227, 538 S.E.2d 912. This assignment of error is overruled.

V. Pertinent Evidence

Defendants contend the Commission ignored pertinent evidence in making its findings of fact.

The Commission must adjudicate and may not ignore competent evidence. It is free to choose not to believe the evidence after considering it. *Jenkins v. Easco Aluminum Corp.*, 142 N.C. App. 71, 78, 541 S.E.2d 510, 515 (2001). The Commission is not required to make "exhaustive findings as to each statement made by any given witness or make findings rejecting specific evidence." *Smith v. Beasley Enters. Inc.*, 148 N.C. App. 559, 562, ___ S.E.2d ___, ___ (2002) (quoting *Bryant v. Weyerhaeuser Co.*, 130 N.C. App. 135, 139, 502 S.E.2d 58, 62 (1998)). "The Commission must make findings from which this Court may reasonably infer that it gave proper consideration to all [competent] testimony." *Id.* at 562, ___ S.E.2d at ___.

Here, defendants argue that the Commission ignored certain evidence in determining its findings of fact. Defendants point out plaintiff's testimony that his condition got progressively worse and that he was not able to do anything other than sit and walk about the house. This testimony was contradicted by evidence that plaintiff (1) passed a Department of Transportation physical, (2) was able to care for his wife, and (3) used his boat. Plaintiff also testified to the absence of prior back problems which was contradicted by undisputed evidence that he suffered from a pre-existing back condition. Defendants also claim the Commission accepted Dr. Harvell's testimony in some instances and not in others. Defendants assert that the Commission

failed to consider that plaintiff certified that he was able to work on his unemployment application. Finally, defendants argue the Commission failed to consider plaintiff's failure to seek additional medical treatment from an orthopedist until October of 1999, more than eight months after the injury.

The Commission began its decision, "[u]pon review of the competent evidence of [the] record." The record consists of depositions of Dr. Harvell and Mr. Czuchra, and a transcript of the evidence from the hearing before Deputy Commissioner Wanda Taylor, with attached exhibits, including medical records. All of the evidence defendants argue is contained in this record.

"Upon review of the competent evidence of [the] record," the Commission is not required to make "exhaustive findings as to each statement made by any given witness or make findings rejecting specific evidence." *Smith,* 148 N.C. at 561-2, ___ S.E.2d at ___. This assignment of error is overruled.

VI. Conclusion

The Commission did not err in accepting the testimony of Dr. Harvell as competent and credible. We hold that the Commission's findings of fact are supported by competent evidence in the record and that the findings of fact support the Commission's conclusions of law.

Affirmed.

Judges MCGEE and HUDSON concur.

Report per Rule 30(e).