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NO. COA12-438
NORTH CAROLINA COURT OF APPEALS

Filed: 4 December 2012

COREY CRUZ,
Employee, Plaintiff,

v.

North Carolina Industrial
Commission
I.C. No. W64612

DMSI STAFFING, LLC, Employer,
and THE HARTFORD, Carrier,
Defendants.

Appeal by defendants from opinion and award entered 5
January 2012 by the North Carolina Industrial Commission. Heard
in the Court of Appeals 9 October 2012.

*McAngus, Goudelock & Courie, P.L.L.C., by Jason C.
McConnell and Viral V. Mehta, for defendant-appellants.*

*Ken Harris & Associates, P.A., by Ken Harris, for
plaintiff-appellees.*

BRYANT, Judge.

Where there is competent evidence to support the Full
Commission's findings of fact, those findings of fact will be
held to be conclusive on appeal even if there is evidence that
would support findings to the contrary. *Hassell v. Onslow
County Bd. of Educ.*, 362 N.C. 299, 305, 661 S.E.2d 709, 714

(2008). Accordingly, we affirm the Full Commission's opinion and award.

Plaintiff was employed by defendant DMSI Staffing, LLC as a sorter. His duties included lifting and unloading boxes of clothing. The boxes weighed up to 70 lbs. On 12 November 2009, plaintiff was performing his duties when he picked up a box and felt a sharp pain in his back, "like a jolt." Plaintiff reported the incident to his supervisor, performed only light lifting for the remainder of the day, and did not return to work the following day.

On 15 November 2009, plaintiff sought treatment for back pain at the Matthew's Presbyterian Hospital Emergency Department. Plaintiff underwent an MRI of his lumbar spine. The results were viewed by Dr. Frank Lorche who diagnosed plaintiff as suffering from a foraminal disc extrusion, or herniation of L5-S1. Plaintiff was referred to Dr. Anthony Kwon of Total Spine Specialists in Charlotte who performed a microscopic discectomy on 19 January 2010. Because plaintiff continued to suffer back and leg pain after the surgery, plaintiff underwent a second surgery on a later date. As of 23 December 2011, the date the Full Commission drafted its opinion and award, Dr. Kwon had not released plaintiff to return to

work, and it was determined that plaintiff had yet to reach maximum medical improvement.

On 21 January 2010, plaintiff filed a Form 18, notice of accident to employer and claim of employee. On 5 February 2010, defendants filed a Form 61 denying plaintiff's workers' compensation claim. The matter came on for hearing before Deputy Commissioner Philip A. Baddour, III, on 23 September 2010. On 19 July 2011, Deputy Commissioner Baddour filed an opinion and award concluding that plaintiff sustained a back injury as a result of a specific traumatic incident arising out of and in the course of his employment with defendant DMSI Staffing, LLC. Deputy Commissioner Baddour ordered that defendants pay plaintiff temporary total disability and medical expenses. Attorney's fees in the amount of twenty-five percent of the sums due plaintiff were to be deducted and paid to plaintiff's attorney. Defendants appealed to the Full Commission (hereinafter "the Commission").

The matter was heard before the Commission on 7 December 2011. The Commission reviewed the deputy commissioner's opinion and award, as well as the briefs and records of the parties. No new evidence or arguments were submitted. On 5 January 2012, the Commission filed an opinion and award affirming the opinion

and award of the deputy commissioner with minor modifications. Defendants appeal.

On appeal, defendants question whether there was any competent evidence to support the finding (I) that plaintiff's back injury was connected to his 12 November 2009 accident and (II) that plaintiff suffered a specific traumatic incident resulting in a compensable injury to his back.

The standard for review in a workers' compensation case from the Commission "is generally limited to determining: (1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are justified by the findings of fact." *Id.* (citation and quotations omitted).

I

Defendants first argue that there is no competent evidence to support the Commission's finding that plaintiff's back injury was causally related to the accident he alleges occurred 12 November 2009. We disagree.

This Court has explained that the Commission's findings of fact are conclusive on appeal when supported by competent evidence, even though there be evidence that would support findings to the contrary. Thus, on appeal, this Court does not have

the right to weigh the evidence and decide the issue on the basis of its weight. The [C]ourt's duty goes no further than to determine whether the record contains any evidence tending to support the finding. 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. (citations and quotations omitted). "[W]here the exact nature and probable genesis of a particular type of injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury." *Click v. Pilot Freight Carriers*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980) (citations omitted).

In its 5 January 2012 opinion and award, the Commission made the following findings of fact:

11. The Full Commission finds that plaintiff's back condition and herniation is of such a severity that plaintiff could not have performed his job duties while not suffering from this condition. Therefore, the Full Commission finds that plaintiff's back condition, to its current degree, did not exist prior to November 12, 2009, plaintiff's last day of work for employer defendant.
12. Based upon the preponderance of the medical evidence of record, the Full Commission finds that plaintiff's large

disc herniation at L5-S1 was caused by the incident at work on November 12, 2009.

In a deposition taken 28 October 2010, Dr. Anthony Kwon gave his credentials as a board certified specialist in orthopedic spine surgery whose practice was limited to treatment of injuries to the spine. Plaintiff tendered Dr. Kwon as an expert, relative to the treatment of injuries to the spine. Defense counsel stipulated to Dr. Kwon's status as an expert in the field of orthopedic spine surgery.

Dr. Kwon testified that he first examined plaintiff on 6 January 2010 after plaintiff had been referred by Dr. Lorche. Dr. Kwon testified that plaintiff had a large disc herniation at L5-S1 upon which he performed a microscopic discectomy. When asked whether he had an opinion satisfactory to himself and based on a reasonable degree of medical certainty as to whether or not the back injury for which he treated plaintiff was caused by the 12 November 2009 work incident in which he lifted a box and strained his back causing a herniated disc and nerve root injury at L5-S1, Dr. Kwon testified as follows:

- A. . . . [B]ased on exam, history, and MRI findings, I do think that it was a result of the incident that he reported.

On cross-examination, Dr. Kwon was asked, the following:

- Q. Is it also possible that the disc herniation existed prior to November 12, 2009?
- A. Probably not, given the size of this disc herniation. This was a pretty massive disc herniation, so, if he was showing up to work, he would not have been able to go to work with that sized herniation. Absolutely no way.

Such is competent evidence of the cause of plaintiff's disc herniation which supports the Commission's findings of fact that plaintiff's disc herniation was causally connected to his 12 November 2009 accident. See *Hassell*, 362 N.C. at 305, 661 S.E.2d at 714. Accordingly, defendant's argument is overruled.

II

Next, defendants argue that there is no competent evidence to support the Commission's finding that plaintiff suffered a specific traumatic incident resulting in a compensable injury to his back. Defendants base this argument on the assertions that plaintiff alleged a 12 November 2009 injury that no one observed; that on that day, plaintiff informed his immediate supervisor that his back hurt but denied the pain was work-related; and that evidence indicates that plaintiff had been experiencing near-constant pain down his legs prior to the alleged incident. We disagree.

Again, "the Commission's findings of fact are conclusive on appeal when supported by competent evidence, even though there be evidence that would support findings to the contrary." *Id.* (citation and quotations omitted).

The Commission made the following findings of fact:

2. On November 12, 2009, plaintiff was performing his job duties as a sorter when he bent down to pick up a box and, as he was lifting, felt a sharp pain in his back, like a jolt. His back immediately became very tight. Plaintiff reported the incident to his supervisor. After the incident, plaintiff completed his shift and performed work that involved light lifting for the remainder of the day. Plaintiff notified his supervisor at the end of his shift that he might need to take a day off to rest his back.

3. Jannette Aponte[, plaintiff's supervisor,] . . . was working with plaintiff the day of the incident and encountered plaintiff in the break room after the incident. Plaintiff told Ms. Aponte that his back hurt and, according to Ms. Aponte, plaintiff told her that his back pain was not work related. Plaintiff stated that in this conversation with Ms. Aponte, plaintiff told her that he injured his back while lifting a box. The Full Commission finds that plaintiff is credible

In his hearing before Deputy Commissioner Baddour, plaintiff gave the following testimony regarding his 12 November 2009 injury:

I was doing my normal job, working hard,

lifting boxes. I bent down to lift a box. I had it in my hand, I was bringing it up, stepping on the stoop to send it down the conveyor belt, and I felt, like, a sharp pain like a jolt - like a jolt, like a pulling in my back. And my back became, like, very tight immediately afterwards and - that's what happened.

. . .

I went to break and I spoke with Ms. Aponte, Janet, and I told her that I thought I had done something to my back, that, you know, my back was really tight. And while I was - she asked me, you know, "what was you doing", [sic] and I told her I was lifting a box and it felt like I pulled something in my back.

Plaintiff further testified that he just did what he could to get through the day. "I was leaving, I stopped by the office and I told them that I might have to take a day off or so, I just wanted to see how my back was going to feel in the morning."

The evidence presented stated that on 15 November 2009, plaintiff was admitted to the Emergency Department of Presbyterian Hospital in Matthews. A clinical report from the visit indicates that plaintiff's complaint was the onset of back pain and chronic back pain two days prior to his admission. "It is described as being moderate in degree and in the area of the right lower lumbar spine, right SI joint and right gluteus and

radiating right thigh. . . . Patient notes the possibility of an injury. Mechanism of injury - he was lifting. Occurred at work."

During his deposition, Dr. Frank Lorche was proffered by plaintiff and stipulated by defendants to be an expert in non-surgical physical medicine and rehabilitation. Dr. Lorche testified that he examined plaintiff on 28 December 2009 and that plaintiff reported "the onset of severe right low back and leg pain on November 13, 2009." Reviewing the results of an MRI performed on plaintiff, Dr. Lorche testified that plaintiff "had an L5/S1 right paracentral disk extrusion with displacement of the right S1 nerve root."

Q. Was the MRI as you reviewed it consistent with I guess the complaints that [plaintiff] had when you saw him in December 28, 2009?

A. Yeah. I thought so.

Q. And would they also have been consistent with someone who represented a chronic 20-year history of back pain which he described as sciatica and for which he had previously received injections.

. . .

A. Yeah, I would say no, because - you know, a couple reasons. . . . [H]e was in enough pain to leave a heating pad on to burn his skin. . . . And people

don't do that to themselves unless they're in a lot of pain. And I don't see that very often.

The other thing is he has this weakness in his leg. And you can't put up with that for, you know, 20 years or something. So obviously something changed.

Furthermore, given Dr. Kwon testimony, quoted in issue I, that in his opinion plaintiff's disc herniation did not exist prior to 12 November 2009, there is competent evidence to support the Commission's challenged finding that plaintiff suffered a specific traumatic incident resulting in a compensable injury to his back. Therefore, defendants' argument is overruled.

Accordingly, we affirm the Commission's opinion and award.

Affirmed.

Judges McGEE and THIGPEN concur.

Report per Rule 30(e).