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NO. COA01-869

NORTH CAROLINA COURT OF APPEALS

Filed: 6 August 2002

GERALD NUNNALLY,
Employee,
Plaintiff,

v.

N.C. Industrial Commission
I.C. File No. 881100

WAL-MART STORES,
Employer,

INSURANCE COMPANY OF
THE STATE OF PENNSYLVANIA,
Carrier,
Defendants.

Appeal by defendants from opinion and award entered 15 February 2001 by the Full Commission of the North Carolina Industrial Commission. Heard in the Court of Appeals 15 April 2002.

Smith, Debnam, Narron, Wyche, Story & Myers, L.L.P., by J. Michael Mackay and Roy G. Pettigrew, for plaintiff-appellee.

Young, Moore and Henderson, P.A., by J.D. Prather and Tina Lloyd Hlabse, for defendant-appellants.

HUDSON, Judge.

Defendants appeal the opinion and award of the Full Commission of the North Carolina Industrial Commission (the "Commission") awarding plaintiff worker's compensation benefits for his work-related injury. We affirm.

In 1998, Plaintiff was employed by Wal-Mart Stores

("defendant") in the tire shop of one of its Sam's Club stores. On 20 November 1998, plaintiff had difficulty removing the rim from a tire and felt "a tingle in his back" when he attempted to pull up on the rim. Plaintiff worked through the end of his shift, but began feeling "pain in his arms and shoulders and his back and right leg" on his way home. Plaintiff reported his injury when he returned to work the next day. His personnel manager drove him to Western Wake Medical Center, where he was seen by Dr. Joseph Williamson. Plaintiff reported pain in the right side of his neck and in his right shoulder, and was advised to do no lifting for three days. Plaintiff returned to Sam's Club on 23 November 1998 and was assigned light duty work, but he began experiencing back pain 30 minutes into his shift. That day, plaintiff went to Concentra Medical Center, and reported that he was having pain in his neck and lower back. The physician's assistant at Concentra signed a form allowing plaintiff to return to work with restrictions on his activities.

Plaintiff's pain continued so that he could not consistently report to work, even for light duty. He stopped reporting to work in the beginning of December. In January 1999, the radiology department at Wake Medical Center performed a cervical MRI and a lumbar MRI on plaintiff which showed a "small paracentral herniated disk at C6-7 and a herniated disk at L5-S1." On 11 March 1999, plaintiff went to see Dr. James Lawrence Frank, an orthopedic surgeon in Durham. Plaintiff's course of treatment under Dr. Frank is described later in this opinion.

After learning that Wal-Mart had denied his workers' compensation claim, plaintiff filed a Form 33 request for hearing with the Industrial Commission. After a hearing, a Deputy Commissioner found that plaintiff sustained a compensable injury by accident in the course and scope of his employment with Wal-Mart, and awarded him compensation. Defendants appealed to the Full Commission, which affirmed the findings, conclusions, and award of the Deputy Commissioner in an Opinion and Award filed 15 February 2001. The Commission concluded:

1. On November 20, 1998 plaintiff sustained an injury by accident arising out of and in the course of his employment with defendant-employer in that he sustained a specific traumatic incident of the work assignment. As a result plaintiff sustained injury to his neck and lower back. N.C. Gen. Stat. §97-2(6).

2. As a result of plaintiff's compensable injury by accident, plaintiff was unable to earn wages in any employment and was totally disabled from December 2, 1998 through July 29, 1999, and is entitled to temporary total disability compensation at the rate of \$224.72 per week during this period. N.C. Gen. Stat. §97-29.

3. As a result of the compensable injury by accident, plaintiff is entitled to 30 weeks of compensation at the rate of \$224.72 per week for the 10% permanent functional impairment to his back. N.C. Gen. Stat. §97-31(23).

4. Subject to the limitations of N.C. Gen. Stat. §97-25.1, plaintiff is entitled to have defendants provide all medical treatment arising from plaintiff's compensable injury to the extent it tends to effect a cure, provide relief, or lessen plaintiff's disability. N.C. Gen. Stat. §§97-2(19), 97-25.

Defendants appealed the Order and Award, assigning error to

numerous findings of fact and conclusions of law, including that plaintiff sustained a compensable work-related injury and that he was entitled to temporary total disability compensation after 29 June 1999. In their brief, defendants bring forward only assignments of error 8, 9, 10, 11, and 12; all other assignments of error are thus deemed abandoned. See N.C. R. App. Proc. 28(a) (2001).

On review of a decision of the Commission, we 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). An appellate court "does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (quoting *Anderson v. Construction Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999).

The Full 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. Furthermore,

the Commission does not have to explain its findings of fact by attempting to distinguish which evidence or witnesses 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.

Id. at 116-17, 530 S.E.2d at 553. Additionally, in making its determinations, the Commission "is not required . . . to find facts as to all credible evidence. That requirement would place an unreasonable burden on the Commission. Instead the Commission must find those facts which are necessary to support its conclusions of law." *Peagler v. Tyson Foods, Inc.*, 138 N.C. App. 593, 602, 532 S.E.2d 207, 213 (2000) (internal quotation marks omitted) (alteration in original); see N.C. Gen. Stat. § 97-86 (2001). Moreover, the Commission must "make specific findings with respect to crucial facts upon which the question of plaintiff's right to compensation depends." *Gaines v. Swain & Son, Inc.*, 33 N.C. App. 575, 579, 235 S.E.2d 856, 859 (1977).

In their first argument, defendants contend that the Commission "erred in finding that plaintiff's low back condition is causally related to the alleged incident at work on November 20, 1998." Defendants contend that there is no temporal relationship between the onset of plaintiff's lower-back symptoms and the incident at work, because he initially sought treatment for neck and shoulder complaints. The Commission found as fact that:

16. Plaintiff was seen again by Dr. Frank on June 29, 1999 and July 29, 1999. At the last visit on July 29, 1999, Dr. Frank found no signs of pressure on the disk and no indications of leg pain. Plaintiff had a good range of motion of his back and had only slight back pain and stiffness with changes in weather. Dr. Frank released plaintiff to return to work at maximum medical improvement

and found that plaintiff had a 10% permanent functional impairment to his back. It is Dr. Frank's opinion and the Commission finds that plaintiff's herniated lumbar disk was causally related to his lifting incident at work on November 20, 1998.

17. The greater weight of the evidence establishes that plaintiff sustained an injury by accident or specific traumatic incident on November 20, 1998, when he was performing work in the tire shop at defendant-employer. As a result, plaintiff sustained injury to his neck and lower back, including the herniated disk at L5-S1. There was no evidence of any prior or subsequent accident or incident which otherwise could have caused the neck and lower back injuries.

. . .

19. . . . The temporal relationship between the date of the accident and the discovery of the herniated disk at L5-S1, reinforced by Dr. Frank's opinion, leads to the finding that the accident caused the injury.

Dr. James Lawrence Frank, an orthopedic surgeon, testified that he first examined plaintiff on 11 March 1999. Plaintiff reported that he sustained an "on-the-job injury" on 20 November 1998, while pulling a tire off of a tire rim. Plaintiff told Dr. Frank that initially he had pain in his neck and back, but the pain in his neck improved while the back pain worsened. Dr. Frank also testified that plaintiff told him he had "intermittent radiation to the toes on the right leg and foot. He was only able to stand twenty minutes before he had an increase in the low back pain, and laying [sic] down seemed to make the toes numb on the right side." Dr. Frank examined plaintiff and tested his gait, stance, walk, knee bend, flexion, rotation of the spine, extension of the

fingers, lateral bending, straight leg raising, sensory loss, detectable motor weakness, and reflexes. Dr. Frank then reviewed plaintiff's cervical spine MRI performed on 22 January 1999 which showed a right disk bulge at C6-7, and a lumbar spine MRI performed on 27 January 1999 which "showed a large herniated disk at L5-S1 on the right." Dr. Frank's associate gave plaintiff an epidural steroid injection that provided him with only three days relief from the pain. Dr. Frank saw plaintiff again on 30 March 1999, and at that time, plaintiff's pain was still severe. As a result, Dr. Frank performed a hemilaminectomy and diskectomy on 30 April 1999 on plaintiff. Dr. Frank testified that the operation was a success, and that plaintiff improved somewhat after the surgery. Dr. Frank testified that he continued to see plaintiff, and that on 29 July 1999 Dr. Frank gave plaintiff a ten percent partial disability of the back and "encouraged him to go back to some employment." Dr. Frank also provided a "follow-up note" from his 29 July 1999 examination of plaintiff in which he stated, "[b]ecause of the on-the-job injury of 11/20/98 when he was pulling a tire off the rim and had sudden pain in his neck and back, and resultant HNP, requiring operation on 4/30/99, excision HNP L5-S1 right, the patient is felt to have a 10% partial permanent disability of his 'back.'"

Dr. Frank's testimony is entirely consistent with plaintiff's medical records, in which he repeatedly noted that plaintiff's injury was due to an "on-the-job injury." Plaintiff's medical records from examinations by doctors in addition to Dr. Frank

further document that plaintiff's back symptoms stemmed from the work place injury. After careful review, we conclude that the record contains competent evidence supporting the Commission's finding that plaintiff's condition was causally related to his injury on 20 November 1998. See *Adams*, 349 N.C. at 681, 509 S.E.2d at 414. Plaintiff satisfied his burden of proving that he suffered a work place injury and we will not disturb the Commission's findings of fact in this regard. See *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 185, 345 S.E.2d 374, 378 (1986).

Second, the defendants contend that the Commission erred in awarding plaintiff temporary total disability compensation after 29 June 1999. The Commission awarded plaintiff temporary total disability compensation for a period beginning 2 December 1998 and ending 29 July 1999, the date that Dr. Frank gave plaintiff a rating for his back. N.C. Gen. Stat. § 97-2(9) (2001) defines "disability" as an "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." The employee bears the burden of showing that he has suffered a loss of wage-earning capacity pursuant to N.C. Gen. Stat. § 97-29 (2001) or N.C. Gen. Stat. § 97-30 (2001). According to *Russell v. Lowes Product Distribution*, a plaintiff may satisfy this initial burden by one of several approaches:

- (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment;
- (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment;
- (3) the production of evidence

that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, experience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

108 N.C. App. 762, 765-66, 425 S.E.2d 454, 457 (1993) (internal citations omitted). Here, plaintiff's evidence established that he had limitations on his physical abilities and sought work to no avail. See *Kisiah v. W.R. Kisiah Plumbing*, 124 N.C. App. 72, 476 S.E.2d 434 (1996), *disc. rev. denied*, 345 N.C. 343, 483 S.E.2d 169 (1997) (noting that earning some wages does not, by itself, establish a resumption of wage earning capacity).

In this case, the Commission found that plaintiff's "disability" or loss of wage-earning capacity was total, meaning that the employee was "entitled to receive benefits for as long as the total loss of wage-earning capacity lasts." *Knight v. Wal-Mart Stores, Inc.*, ___ N.C. App. ___, ___, 562 S.E.2d 434, 441 (2002); see also *Gupton v. Builders Transport*, 320 N.C. 38, 42, 357 S.E.2d 674, 678 (1987) (defining "disability" for purposes of workers' compensation benefits). Dr. Frank testified that plaintiff was disabled from the time he first saw him in March 1999 until his last visit with him in July 1999. Although page 13 of Dr. Frank's deposition reflects some confusion about the dates of plaintiff's visits, Dr. Frank's records clarify that plaintiff was not able to do any work at all until his last visit with Dr. Frank on 29 July 1999. Dr. Frank testified that plaintiff could not "do any work of any strenuous nature at all" as of 29 June 1999, indicating that

plaintiff was still unable to return to his job. During plaintiff's 29 July 1999 appointment, Dr. Frank assigned him a rating for his back and encouraged him to find "some employment." Plaintiff satisfied his burden of proving that he suffered a loss of wage-earning ability until that date. Defendants have presented no evidence that plaintiff was capable of earning wages in a suitable job between 29 June 1999 and 29 July 1999, and we affirm the Commission's conclusion that defendant is entitled to temporary total disability benefits for a period ending 29 July 1999.

Therefore we conclude that: (1) competent evidence supports the Commission's finding that plaintiff suffered an injury arising out of the course of his employment, and (2) the Commission correctly concluded that defendant is entitled to temporary total disability benefits for a period ending 29 July 1999. Therefore, we affirm.

Affirmed.

Chief Judge EAGLES and Judge BRYANT concur.

Report per Rule 30(e).