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NO. COA05-1356

NORTH CAROLINA COURT OF APPEALS

Filed: 5 July 2006

ESTATE OF JOEY MICHAEL QUESENBERRY,  
Deceased Employee,  
Plaintiff,

v.

BIG CREEK UNDERGROUND,  
Employer,

ISURITY INSURANCE SERVICES,  
Carrier,

Defendants.

North Carolina  
Industrial Commission  
I.C. No. 276369

Appeal by defendants from an opinion and award filed 9 August 2005 by the North Carolina Industrial Commission. Heard in the Court of Appeals 13 April 2006.

*Law Offices of Franklin Smith, by Franklin Smith, for plaintiff appellee.*

*Orbock Ruark & Dillard, PC, by Barbara E. Ruark, for defendant appellants.*

McCULLOUGH, Judge.

Defendants appeal from a unanimous opinion of the North Carolina Industrial Commission awarding compensation. We affirm, but remand for the Commission to rule on defendants' motion for attorneys' fees.

Facts

On 21 June 2002, Joey Quesenberry was burying underground cable for his employer, Big Creek Underground, when a tractor accidentally hit Quesenberry crushing his left leg. The tractor reversed direction and ran over Quesenberry's left leg a second time. Big Creek and its workers' compensation carrier, Isurity Insurance Services (hereinafter "defendants"), admitted that this accident caused a compensable injury, and Quesenberry was paid temporary total disability benefits.

Quesenberry subsequently filed a claim for additional medical treatment, including psychiatric treatment rendered by Dr. Adrian Griffin. Defendants responded by contending (1) that Quesenberry was not entitled to treatment with Dr. Griffin; (2) that defendant has already provided or attempted to provide the remaining medical treatment sought, and Quesenberry had refused to take certain actions necessary to enable his medical treatment to go forward. Defendants also sought attorneys' fees on the ground that Quesenberry's claims for medical treatment were frivolous.

The evidence presented at a hearing before the Industrial Commission tended to show the following: Immediately after the tractor incident, Quesenberry was taken by ambulance to North Carolina Baptist Hospital in Winston-Salem for treatment. Dr. David Ruch diagnosed Quesenberry with multiple fractures to the left tibia and fibula, and proceeded to operate on decedent, fitting him with an external fixation to the left tibia. On 12 July 2002, Dr. Ruch recommended the use of a bone stimulator to facilitate healing. In August of 2002, Dr. Ruch made the

determination that Quesenberry had a non-union of the tibia, and referred Quesenberry to the care of Dr. Robert D. Teasdall.

Dr. Teasdall saw Quesenberry on 20 September 2002, and recommended that the external fixation be removed and Quesenberry's left leg be placed in a long cast; and in October of 2002, Dr. Teasdall proceeded with the operation. When Quesenberry showed little improvement, Dr. Teasdall recommended an intramedullary nail be used to move the ends of the tibia closer together. At this point, defendants referred Quesenberry to Dr. Stephen Sims at Miller Orthopaedic Clinic for a second opinion.

Quesenberry met with Dr. Sims on 27 November 2002. Dr. Sims advised that Quesenberry should opt to have a screw and plate fixation procedure, and to have an intramedullary nailing procedure if the screw and plate procedure was unsuccessful.

Quesenberry returned to see Dr. Teasdall on 7 February 2003, and informed Dr. Teasdall that he wished to undergo the intramedullary nailing procedure. Dr. Teasdall ordered Quesenberry be placed on a fracture boot, pending authorization of the intramedullary nail surgery by defendant-carrier. On 19 March 2003, Dr. Teasdall performed the procedure to place the intramedullary nail in the tibia, and also indicated that Quesenberry should stop smoking to expedite the healing process. In July of 2003, Dr. Teasdall reviewed an x-ray of Quesenberry's left leg which showed the bone was not healing.

Dr. Teasdall recommended additional treatment for the non-union of Quesenberry's left tibia, but indicated that, because

Quesenberry's leg had not healed, he was not willing to perform any additional procedures until Quesenberry had given up smoking. Defendants thereafter paid for medication and treatment to help Quesenberry quit smoking. Quesenberry was able to reduce his smoking from two packs to a few cigarettes per day, but was not able to quit smoking entirely. Defendants also arranged to enroll Quesenberry in a GED course, which defendants required in order to maximize Quesenberry's employment potential once he was fully recovered.

On 3 February 2004, Dr. Teasdall again saw Quesenberry, found him to be physically capable of attending GED classes, and informed Quesenberry that he would not undertake additional procedures unless Quesenberry stopped smoking. Dr. Teasdall further informed Quesenberry that smoking inhibits bone healing. Dr. Teasdall indicated that Quesenberry had made good progress in reducing his smoking and that doing so demonstrated Quesenberry's commitment to the recovery process.

While enrolled in the post-injury GED classes, Quesenberry began to experience panic attacks, cold sweats and nightmares about the tractor running over his leg. Quesenberry sought treatment for these symptoms with Dr. Adrian Griffin, a psychiatrist, whom he had previously seen in February of 2001 for depression related to the death of his wife. Quesenberry met with Dr. Griffin on 30 April 2004, at which point Dr. Griffin diagnosed Quesenberry with post-traumatic stress disorder. Dr. Griffin considered other sources of stress, including the death of Quesenberry's wife

several years before, but felt that the compensable work-related accident was the most likely cause of the post-traumatic stress disorder. Dr. Griffin suggested that Quesenberry remove himself from the GED program because, in his opinion, Quesenberry had a learning disability, and the frustration, aggravation, embarrassment, and panic associated with the GED courses greatly increased Quesenberry's general stress levels.

Dr. Griffin also addressed concerns about Quesenberry's blood pressure and suggested medication to lower it because he felt Quesenberry was at high risk for a heart attack or a stroke. Dr. Griffin testified that Quesenberry's hypertension was being exacerbated by the stress he was under, and specifically cited the pain he was in as contributing to his current hypertension problems. Dr. Teasdall and Cindy Felix, the medical case manager assigned to Quesenberry's case, both testified that pain and stress could contribute to increases in blood pressure.

Based on the foregoing evidence, the Full Commission ("the Commission") determined that Dr. Griffin's psychiatric treatment of Quesenberry was causally related to the 21 June 2002 compensable injury. The Commission further determined the pain and stress brought on by the compensable injury had exacerbated Quesenberry's hypertension. Therefore, the Commission ordered defendants to pay for Quesenberry's medical expenses associated with the psychiatric care and treatment for hypertension. The Commission did not rule on defendants' motion for attorneys' fees.

Defendants now appeal.

Standard of Review

The standard of review for an opinion and award of the North Carolina Industrial Commission is "(1) whether any competent evidence in the record supports the Commission's findings of fact, and (2) whether such findings of fact support the Commission's conclusions of law." *Creel v. Town of Dover*, 126 N.C. App. 547, 552, 486 S.E.2d 478, 480 (1997). "The Commission's findings of fact are conclusive on appeal if supported by competent evidence, notwithstanding evidence that might support a contrary finding." *Hobbs v. Clean Control Corp.*, 154 N.C. App. 433, 435, 571 S.E.2d 860, 862 (2002). In determining the facts of a particular case, "[t]he Commission is the sole judge of the credibility of the witnesses and the weight accorded to their testimony." *Effingham v. Kroger Co.*, 149 N.C. App. 105, 109-10, 561 S.E.2d 287, 291 (2002). "This Court reviews the Commission's conclusions of law *de novo*." *Deseth v. LensCrafters, Inc.*, 160 N.C. App. 180, 184, 585 S.E.2d 264, 267 (2003).

Legal Discussion

I.

In their first argument on appeal, defendants contend that there is no competent evidence in the record which supports the Commission's findings and conclusions that Quesenberry's psychiatric treatment with Dr. Griffin was related to his 21 June 2002 compensable injury. This contention lacks merit.

If the link between an employee's condition and an accident at work involves a complex medical question, as in the instant case,

a finding of causation must be premised upon the testimony of a medical expert. *Click v. Freight Carriers*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980). Medical certainty from the expert is not required, but if an expert's opinion as to causation is based on speculation, his opinion is not competent evidence which supports a finding that an accident at work caused the employee's injury. *Holley v. ACTS, Inc.*, 357 N.C. 228, 234, 581 S.E.2d 750, 754 (2003); *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 233, 538 S.E.2d 912, 916 (2000). Even if an expert is unable to state with certainty that there is a nexus between an event and an injury, his testimony relating the two is at least some evidence of causation if there is additional evidence which establishes that the expert's testimony is more than conjecture. See *Singletary v. N.C. Baptist Hosp.*, \_\_ N.C. App. \_\_, \_\_, 619 S.E.2d 888, 893-94 (2005); *Adams v. Metals USA*, 168 N.C. App. 469, 482, 608 S.E.2d 357, 365, *aff'd per curiam*, 360 N.C. 54, 619 S.E.2d 495 (2005).

In the instant case, Dr. Griffin testified that he treated Quesenberry for depression following the death of his wife in 2001, but that he did not see Quesenberry again until April of 2004, after the compensable injury. Dr. Griffin testified that, when he saw Quesenberry in 2004, Quesenberry "was wrestling with the residual of the accident that he had suffered at work." Quesenberry was complaining of problems with chronic pain, nightmares about the work-related injury, and hypertension. Based on these complaints, Dr. Griffin diagnosed him with post-traumatic stress disorder.

Dr. Griffin's testimony tended to link decedent's hypertension with his elevated stress. Dr. Griffin stated "essential hypertension -- or any medical illness . . . can be accentuated and worsened by any psychological stress we're under . . . [a]nd certainly by pain." The related treatment that Dr. Griffin provided for Quesenberry included therapy, counseling and medication.

Dr. Griffin further testified that traumatic work injuries are one of the leading causes of post-traumatic stress disorder:

Usually, if you get post-traumatic stress, it--you are involved in a catastrophic overwhelming incident where you could possibly lose your life.

And the number one (1), of course, reason for post-traumatic stress is women who are raped, certainly. Then after that, it's the military. Then after that, it's work-related injuries.

Defendants contended that there was another possible cause of Quesenberry's disorder. Specifically the defense linked Quesenberry's condition to the accidental death of his wife in 2001, which occurred while she was coming to bail him out of jail. Dr. Griffin's testimony tended to eliminate this as a possible cause. When a defense attorney asked if the death of decedent's wife could have been traumatic enough to cause the post-traumatic stress disorder Dr. Griffin replied, "[S]tatistically, in the literature, you don't see it . . . . It would [be traumatic enough] except he himself wasn't in the accident. If he had been in the accident with his wife and had survived, yes."



Although defendants presented evidence which would have supported a contrary finding, Dr. Griffin's testimony provided competent medical evidence from which the Commission could find and conclude that the psychiatric care which he provided to Quesenberry was related to the 21 June 2002 compensable injury. Accordingly, the Commission's findings and conclusions in this regard must be affirmed.

The corresponding assignments of error are overruled.

II.

In their second argument on appeal, defendants contend that there is no competent evidence in the record which supports the Commission's findings and conclusions that Quesenberry's hypertension was related to his 21 June 2002 compensable injury. This contention also lacks merit.

The evidence before the Commission tended to show that Dr. Griffin had taken Quesenberry's blood pressure on at least one occasion and found it to be high and that he provided treatment for what he determined to be a hypertension problem. Dr. Griffin was unable to state with certainty whether or not the hypertension was caused by the injury; however, he did state his opinion that it was "exacerbated by his injury." When asked whether Quesenberry's high blood pressure was separate and apart from his compensable injury, Dr. Griffin replied, "[Y]es; it's separate and apart that he had it before the injury, but the injury can certainly exacerbate it."

Defendants presented testimony, specifically by Dr. Teasdall, which tended to show that Quesenberry's smoking was the primary

cause of his hypertension. Although Dr. Griffin testified that smoking can cause high blood pressure, he never equivocated as to his contention that Quesenberry's high blood pressure was worsened by his injury.

It was the exclusive province of the Commission to determine whether Dr. Griffin was credible and the weight, if any, to give to his testimony. As Dr. Griffin's testimony was competent medical evidence upon which the Commission could find and conclude that Quesenberry's hypertension was causally related to his 21 June 2001 compensable injury, the Commission's determinations in this regard must be confirmed.

The corresponding assignments of error are overruled.

III.

In their third argument on appeal, defendants contend that Quesenberry was not entitled to treatment with Dr. Griffin. This contention lacks merit.

In their brief to this Court, defendants have cited no legal authority which supports their contention that Quesenberry was not entitled to treatment with Dr. Griffin. Furthermore, defendants' brief is devoid of any rationale as to why such treatment was impermissible other than their assertion the evidence presented by the defense was more credible. Pursuant to Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure, an appellant's brief must contain:

An argument, to contain the contentions of the appellant with respect to each question presented. Each question shall be separately

stated. Immediately following each question shall be a reference to the assignments of error pertinent to the question, identified by their numbers and by the pages at which they appear in the printed record on appeal. Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.

N.C. R. App. P. 28(b)(6) (2006). Pursuant to Rule 28, defendants' corresponding assignments of error are abandoned to the extent they assert that, as a matter of law, Quesenberry was not entitled to treatment with Dr. Griffin.

However, defendants have cited authority for the hornbook proposition that expert medical testimony was required for the Commission to determine that there was a causal link between Quesenberry's treatment and his compensable injury. See *Click*, 300 N.C. at 167, 265 S.E.2d at 391. As already indicated in sections I and II of this opinion, Dr. Griffin's expert medical testimony provided competent record evidence which supported the Commission's causation determination.

The corresponding assignments of error are overruled.

#### IV.

In their fourth argument on appeal defendants contend that the Commission erred by failing to rule on their motion for attorneys' fees. Defendants' motion for attorneys' fees was premised upon their contention that there were at least some unfounded allegations in Quesenberry's motion for medical treatment and expenses. Significantly, our disposition of the issues presented

in sections I, II, and III of this opinion do not affect some of the issues raised in defendants' motion for attorneys' fees.

"Where the issue has been raised before the Commission, it is error for the Commission to fail to rule on whether attorneys' fees should be awarded." *Estate of Apple v. Commercial Courier Express, Inc.*, 165 N.C. App. 514, 519, 598 S.E.2d 625, 628 (2004). Accordingly, we remand this case to the Commission for a determination as to whether defendants are entitled to attorneys' fees.

#### Conclusion

For the foregoing reasons, the Commission's opinion and award is affirmed, but this case is remanded for consideration of defendants' motion for attorneys' fees.

Affirmed; remanded for consideration of defendants' motion for attorneys' fees.

Judges CALABRIA and STEELMAN concur.

Report per Rule 30(e).