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NO. COA 07-1052

NORTH CAROLINA COURT OF APPEALS

Filed: 5 August 2008

BARBARA BRADLEY,
Employee, Plaintiff

v.

North Carolina
Industrial Commission
I.C. No. 483665

MAXIM HEALTHCARE SERVICES,
Employer, Defendant.

Appeal by employee from Opinion and Award of the North Carolina Industrial Commission entered 5 April 2007. Heard in the Court of Appeals 19 February 2008.

William G. Giddston for plaintiff-appellee.

Hedrick, Gardner, Finchelle & Garofalo, L.L.P., by Tonya D. Davis, for defendant-appellant.

WYNN, Judge.

"[W]hen a work-related injury leaves an employee in a weakened state that results in further injury, the subsequent injury is compensable."¹ Here, Defendant argues the Full Commission erred by concluding that Plaintiff's depression is compensable under the Workers' Compensation Act. Because the record contains competent evidence that Plaintiff's depression was a direct and natural consequence of her back injury arising out of the course of her

¹*Cannon v. Goodyear Tire & Rubber Co.*, 171 N.C. App. 254, 260, 614 S.E. 2d 440, 445 (2005) (citation omitted), *dsic. review denied*, 360 N.C. 61, 621 S.E.2d 177.

employment with Defendant, we affirm.

While working as a certified nursing assistant for Defendant Maxim Healthcare, Plaintiff Barbara Bradley provided home care to her mother, who suffers from dementia and other health conditions including osteoporosis, high blood pressure, asthma, and high cholesterol. Ms. Bradley's job duties included bathing her mother, giving her mother medications, using a Hoyer lift to remove her mother from the bed, dressing her mother, housekeeping, cooking meals, and assisting her mother with eating.

On 29 October 2004, Ms. Bradley began her shift at 7:00 a.m. She bathed and dressed her mother. Since her mother weighed approximately two hundred pounds, Ms. Bradley used a Hoyer lift to remove her mother from the bed and place her into a wheelchair. After placing her mother into a wheelchair, Ms. Bradley fed her mother breakfast and pushed her in the wheelchair in and out of the elevator into the lobby of the apartment building so she could be picked up by a transportation service that would transport her to an appointment. After pushing her mother into the lobby of the apartment building, Ms. Bradley sat in a chair. When she stood up, she felt sharp excruciating pain in her lower back.

On 30 October 2004, Ms. Bradley visited Durham Regional Hospital where she was examined in the emergency room. A physical examination of Ms. Bradley's low back revealed tenderness around the L5 paraspinals. Dr. Ronald McLear diagnosed Ms. Bradley with an acute lumbar myofascial strain, but saw no evidence of any herniated nucleus pulposus. Ms. Bradley was excused from work for

five days and instructed to rest and take Motrin. On 2 November 2004, Ms. Bradley returned to the Durham Regional Hospital Emergency Room due to soreness in her legs. After another physical examination, Dr. Mario Malvey diagnosed Ms. Bradley with an acute lumbar strain.

On 3 November 2004, Dr. Ambrose, Ms. Bradley's general practitioner, examined her at Lincoln Community Health Center as a result of complaints of constant aching low-back pain associated with numbness and tingling. Dr. Ambrose diagnosed Ms. Bradley with sciatica and prescribed Prednisone and Tylenol. Ms. Bradley was released to return to her employment with a fifteen pounds lifting restriction and she was ordered not to lift her arms above her shoulders. Dr. Ambrose also referred Ms. Bradley to the Behavioral Health Clinic at Lincoln Community Health Center to receive a consult for depression. After Ms. Bradley's examination at Lincoln Community Health Center, she visited Concentra Medical Centers on three separate occasions in November 2004. During each visit, the examining doctor recommended that she receive physical therapy and continued her modified work restrictions.

On 16 December 2004, Ms. Bradley was evaluated at the Lincoln Community Health Center's Behavioral Health Clinic and formally diagnosed with depression and referred for additional treatment. On 8 February 2005, Ms. Bradley was evaluated by Outpatient Therapist Michelle Wetherby at the North Carolina Division of Mental Health. During the session, Ms. Bradley verbalized feelings of depression and stress due to her present situation of not having

an income and having to care for her mother. Ms. Bradley's visits with Ms. Wetherby continued until 22 July 2005.

On 15 February 2005, Ms. Bradley was evaluated by Dr. David Musante of Triangle Orthopaedic Associates. Dr. Musante's impression of Ms. Bradley was that she suffered from lumbar pain with possible internal disk derangement. Dr. Musante ordered an MRI to evaluate Ms. Bradley for degenerative disc disease. On 29 March 2005, Ms. Bradley returned to Dr. Musante's office and he reviewed her MRI results. Dr. Musante diagnosed Ms. Bradley with lumbar pain, possibly discogenic secondary to internal disc disruption and posterior annular disruption L4-5. Dr. Musante instructed Ms. Bradley to continue taking nonsteroidal anti-inflammatories as previously prescribed and to continue home physical therapy as previously instructed during physical therapy sessions. In addition, Dr. Musante referred Ms. Bradley for an evaluation by Dr. Leslie Phillips for chronic pain management and a psychological evaluation for depression.

On 23 May 2005, Ms. Bradley was evaluated by Dr. Phillips, who opined that Ms. Bradley could benefit from a brief course of psychological care to help her develop pain coping skills for her chronic pain condition. Dr. Phillips also referred Ms. Bradley for a more thorough neuropsychological assessment. Ms. Bradley had behavioral pain management visits with Dr. Phillips on six subsequent visits. During these visits, Dr. Phillips diagnosed Ms. Bradley with major depressive disorder and a pain disorder. On 7 July 2005, Ms. Bradley received a neurocognitive evaluation

performed by Dr. Kristine Herfkens of Triangle Neuropsychology Services. After a thorough evaluation, Dr. Herfkens opined that Ms. Bradley was overwhelmed with depression and anxiety, and recommended that Ms. Bradley participate in a structured intensive psychiatric program.

On 8 November 2004, Maxim Healthcare filed a Form 19, the employer's report to the Industrial Commission, noting that Ms. Bradley's injuries were to her "low back area." Maxim Healthcare's insurance carrier subsequently denied Ms. Bradley's claim. On 15 December 2004, Ms. Bradley filed a Form 33 requesting a hearing for her back injury sustained on 29 October 2004. On 15 February 2006, Deputy Commissioner Robert J. Harris determined that Ms. Bradley sustained a compensable injury by accident arising out of her employment that resulted in an injury to her low back. Deputy Commissioner Harris also determined that the development of Ms. Bradley's depression was a direct and natural result of her low back injury. On 6 March 2006, Maxim Healthcare filed a notice of appeal to the Full Commission.

On 5 April 2007, the Full Commission determined that Ms. Bradley sustained an injury to her back by accident arising out of her employment with Maxim Healthcare. The Full Commission further determined that as a direct and natural consequence of the injury to her back, Ms. Bradley developed and/or aggravated her pre-existing depression to such a degree that she required psychological treatment and that the depression contributed to her disability. The Commission awarded Ms. Bradley temporary total

disability benefits in the amount of \$186.68 per week beginning 30 October 2004 and medical compensation for her low back injury, anxiety, and depression. Chairman Buck Lattimore dissented in part from the Full Commission's Opinion and Award because he believed that "plaintiff's depression was neither caused nor aggravated by her October 29, 2004 injury." As a result, Maxim Healthcare appeals from the Order and Award of the Full Commission.

Maxim Healthcare's sole argument on appeal is that the Full Commission erred by concluding that Ms. Bradley's depression is compensable under the Workers' Compensation Act. Specifically, Maxim Healthcare argues the evidence in the record establishes that Ms. Bradley's depression existed before the date in which she injured her low back, and that none of Ms. Bradley's doctors could testify to any degree of medical certainty that her pre-existing depression was aggravated by her low back injury. We disagree.

Our review of an Opinion and Award of the Full Commission is limited to two inquiries: (1) whether any competent evidence supports the Commission's findings of fact and (2) 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) (citation omitted). It is well settled that the Full Commission is the "sole judge of the weight and credibility of the evidence." *Id.* This Court "does not have the right to weigh the evidence and decide the issue on the basis of its weight[;]" rather, we may set aside findings of fact only upon the ground that they lack evidentiary support. *Anderson v. Lincoln Constr. Co.*,

265 N.C. 431, 434, 144 S.E. 2d 272, 274 (1965). However, we review the Commission's conclusions of law *de novo*. *Johnson v. Herbie's Place*, 157 N.C. App. 168, 171, 579 S.E. 2d 110, 113, *disc. review denied*, 357 N.C. 460, 585 S.E. 2d 760 (2003).

Under our Workers' Compensation Act, a claimant may receive compensation only for injury by accident "arising out of and in the course of" employment. N.C. Gen. Stat. § 97-2(6) (2007). "The phrase 'arising out of' refers to the requirement that there be some causal connection between the injury and claimant's employment." *Creel v. Town of Dover*, 126 N.C. App. 547, 552, 486 S.E.2d 478, 481 (1997). We have held "when a work-related injury leaves an employee in a weakened state that results in further injury, the subsequent injury is compensable." *Cannon v. Goodyear Tire & Rubber Co.*, 171 N.C. App. 254, 260, 614 S.E. 2d 440, 445 (2005) (citation omitted), *disc. review denied*, 360 N.C. 61, 621 S.E.2d 177. Further,

when a pre-existing, nondisabling, non-job-related condition is aggravated or accelerated by an accidental injury arising out of and in the course of employment so that disability results, then the employer must compensate the employee for the entire resulting disability. As long as the work-related accident contributed in some reasonable degree to the plaintiff's disability, the plaintiff is entitled to compensation.

Id. at 262, 614 S.E.2d at 445.

Maxim Healthcare challenges, *inter alia*, the following findings of fact:

22. Dr. Phillips was of the opinion that the depression and anxiety for which he treated

Plaintiff were due in significant part to her pain resulting from her October 29, 2004 injury and that if the injury did not cause her depression, the injury probably aggravated the depression. Dr. Phillips was aware that Plaintiff had traumatic incidents in her childhood, but did not document these incidents in detail. Dr. Phillips testified that he did not have any medical records indicating that Plaintiff had received treatment or had been diagnosed with depression prior to the injury. Dr. Phillips, in response to Defendant's questioning, testified that if Plaintiff's medical records reflect a long history of treatment for depression, he would agree that he could not state whether her depression was aggravated or worsened by her injury. The Full Commission finds as fact that the evidence of record does not contain any records of treatment by Plaintiff for depression or anxiety prior to her injury of October 29, 2004. Plaintiff testified, however, that she might have been prescribed an anti-depressant some years ago that she did not take.

. . .

25. Dr. Phillips is a psychologist with a specialty in chronic pain management and he is accepted as an expert herein. Dr. Phillips opined and the Full Commission finds as fact that the pain resulting from Plaintiff's October 29, 2004 back injury probably aggravated Plaintiff's pre-existing, non-disabling depression.

Here, the record contains competent evidence to support the challenged findings of fact. Dr. Phillips, a psychologist with a specialty in chronic pain management, testified to a reasonable degree of medical certainty that Ms. Bradley's compensable back injury was a proximate cause of her stress, depression, and anxiety. Dr. Phillips clarified his opinion by stating that "no independent sources of information were used other than [Ms. Bradley's] self-report and the records I had from Dr. Musante.

Those records indicate that [Ms. Bradley] did not have a prior history of mental illness or treatment." Dr. Phillips also testified on re-direct examination that if Ms. Bradley's depression was pre-existing, her compensable back injury more likely than not aggravated her depression:

Q. [B]ased on what you learned from Ms. Bradley and the tests you gave her, if the -- in her particular case, if the depression itself were not actually originally caused by the injury to her back, do you have an opinion in her case particularly as to whether or not it was -- the injury was an aggravating factor?

A. In all probability, I would say yes.

Additionally, on re-cross examination, the following colloquy occurred:

Q. I have one question for you, Dr. Phillips. Assuming the Industrial Commission finds that Ms. Bradley suffered from depression prior to the date of this alleged incident and well in advance of the time she began treating with you, and assuming her medical records reflect a long history of depression, would you agree that you are unable to state whether or not her depression was aggravated or worsened as compared to the degree of depression from which she suffered prior to the date of this incident?

A. Without a baseline assessment, yes, I would agree with that.

Maxim Healthcare argues Dr. Phillips's response to the hypothetical question supports a finding that there was no competent evidence that Ms. Bradley's compensable back injury aggravated her pre-existing depression.

However, as the Commission found, there was no competent evidence presented to the Commission to support the premise of the

hypothetical question. See *Haponski v. Constructor's Inc.*, 87 N.C. App. 95, 100, 360 S.E.2d 109, 112 (1987) ("An interrogator may form his hypothetical question on any theory which can be deduced from the evidence and may select as a predicate such facts as the evidence reasonably tends to prove."). In this case, the Commission found that "the evidence of record does not contain any records of treatment [of] Plaintiff for depression or anxiety prior to her injury of October 29, 2004." In fact, the record does not contain any competent evidence that Ms. Bradley even suffered from depression prior to 29 October 2004.

Only an expert can testify regarding "complicated medical questions far removed from the ordinary experience and knowledge of laymen[.]" *Click v. Freight Carriers*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980). As such, the only evidence that Ms. Bradley may have suffered from depression prior to 29 October 2004 came from Ms. Bradley's own statements to medical personnel following the 29 October 2004 incident and from Ms. Bradley's testimony at the hearing. Ms. Bradley was not qualified to make such a self-diagnosis.

Aside from Ms. Bradley's statements to medical personnel following the 29 October 2004 incident and her testimony at the hearing, the record on appeal does not contain any medical records that indicate that Ms. Bradley was diagnosed with depression prior to 29 October 2004. Moreover, no expert witness testified that Ms. Bradley suffered from depression prior to 29 October 2004. Therefore, the premise of Maxim Healthcare's hypothetical question

lacked evidentiary support, and Dr. Phillips' opinion that the compensable back injury caused and/or aggravated Ms. Bradley's depression remains intact. Accordingly, the Commission's findings of fact were supported by the competent expert testimony of Dr. Phillips. See *Cannon*, 171 N.C. App. at 264, 614 S.E.2d at 446-47 ("[W]hen expert testimony establishes that a work-related injury 'likely' caused further injury, competent evidence exists to support a finding of causation."). Moreover, these findings of fact support the Commission's conclusion of law that "as a direct and natural consequence of her injury to her back, [Ms. Bradley] developed and/or aggravated her pre-existing, non-disabling anxiety and depression to such a degree that she required psychological treatment and these conditions contributed to her disability."

Furthermore, the evidence demonstrates that even if Ms. Bradley had suffered from depression prior to 29 October 2004, her depression had not interfered with her life prior to her compensable back injury. Ms. Bradley testified that even though she had experienced traumatic events in her life prior to 29 October 2004, she had been able to keep her mind off them by working, walking, and engaging with her family. Ms. Bradley testified that the first psychological treatment she had ever sought or received was in December 2004 when she went to Lincoln Community Health Center. Ms. Bradley stated that from 1992 until 2003, she had worked full-time as a certified nursing assistant at the Forest at Duke. For three of those years, Ms. Bradley also worked part-time for an agency called Geri-Care, providing nursing

assistance for her mother. After Ms. Bradley left her employment with the Forest at Duke, she worked exclusively for Geri-Care. Ms. Bradley began her employment with Maxim Healthcare in September 2004.

However, after her back injury, Ms. Bradley testified as follows:

Once my body, my physical body stopped working, I wasn't the person that I used to be. I couldn't do the things--- I can't do the things that I used to do. So that gave my mind a chance to work overtime. I mean, so it seems like everything that's happened to me from the time that I was a child has come forward in my life, and it has affected me now. So everything that ever happened to me has resurfaced.

Additionally, Dr. Wilson testified that as of 11 October 2005, Ms. Bradley's pain along with "the overall pre-morbid problems with stress, anxiety, and depression presented a situation that . . . at this time make return to work less likely." Dr. Wilson clarified that Ms. Bradley was "incapable of any employment whatsoever." This evidence supports the Commission's finding that

[a]lthough Plaintiff had several emotionally traumatic experiences earlier in her life and may have experienced some depression, by self-report, prior to October 29, 2004, she was still able to work full time. She had endured the stress of taking care of her ailing mother for four (4) years, without seeking psychological or psychiatric treatment prior to her injury. Plaintiff believed that at least part of the reason she was able, prior to October 29, 2004, to deal with her earlier traumas in life was that she was always able to focus elsewhere by working, walking or doing other activities and thus keeping her mind relatively clear. Plaintiff's testimony concerning her psychological state prior to her injury is

found to be credible.

This finding in turn supports the Commission's conclusion that "as a direct and natural consequence of her injury to her back, [Ms. Bradley] developed and/or aggravated her pre-existing, non-disabling anxiety and depression to such a degree that she required psychological treatment and these conditions contributed to her disability."

The record contains competent evidence that Ms. Bradley's depression was a direct and natural consequence of her back injury arising out of the course of her employment. Because the record contains competent evidence to support the findings of fact, and in turn, the findings of fact support the conclusions of law, we affirm the Opinion and Award of the Full Commission.²

Affirmed.

Judges McGEE and CALABRIA concur.

Report per Rule 30(e).

² Because we affirm the Opinion and Award of the Full Commission, we do not address Ms. Bradley's cross-assignments of error.