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NO. COA09-259

NORTH CAROLINA COURT OF APPEALS

Filed: 20 October 2009

TERRY D. PETERS,
Employee-Plaintiff,

v.

North Carolina
Industrial Commission
I.C. File No. 631658

ONslow COUNTY SCHOOL
DISTRICT & N.C. DEPARTMENT
OF PUBLIC INSTRUCTION,
Employer-Defendant,

and

KEY RISK MANAGEMENT
SERVICES, INC.,
Third Party Administrator.

Appeal by plaintiff from an Opinion and Award entered 7 November 2008 by the North Carolina Industrial Commission. Heard in the Court of Appeals 16 September 2009.

Brumbaugh, Mu & King, P.A., by Nicole D. Wray, for employee-appellant.

Attorney General Roy Cooper, by Assistant Attorney General Vanessa N. Totten, for defendant-appellees.

STEELMAN, Judge.

Where competent evidence in the record supported the Commission's findings of fact that the medical experts' testimony tended to show that it was merely a possibility that plaintiff's spinal injury was causally related to the 13 June 2006 work accident, the Commission correctly concluded that plaintiff had

failed to establish causation and properly denied his claim for workers' compensation benefits for that injury.

I. Factual and Procedural Background

Terry D. Peters (plaintiff) was employed in the landscape maintenance department for the Onslow County School District (defendant). On 13 June 2006, plaintiff was operating a weed eater when he lost his footing and slid into a four to six foot deep ditch. Plaintiff twisted around and attempted to break his fall with his right arm, but landed on his bottom. Plaintiff attempted to continue to work, but his right arm "hurt too much" to hold the weed eater. Plaintiff reported his injury to his supervisor and was transported to Onslow Doctors Care. Plaintiff was examined by a physician and was restricted from using his right arm at work. Plaintiff was also prescribed Vicodin for pain. That same day, defendant filed a Form 60 accepting an injury by accident to plaintiff's right shoulder. Plaintiff returned to Onslow Doctors Care three days later and was diagnosed with a contusion on his right wrist, elbow, and shoulder, and a right shoulder sprain. Plaintiff's work restrictions were continued and he was referred to an orthopedic doctor for evaluation.

On 26 June 2006, plaintiff was examined by Richard Ulstad, a certified physician assistant, and was diagnosed as having a right wrist sprain, resolved right elbow pain, moderate to severe right shoulder pain, and a possible rotator cuff injury. An MRI of plaintiff's right shoulder revealed that plaintiff sustained a right shoulder rotator cuff strain and mild AC joint arthroses.

Plaintiff remained out of work and began physical therapy on 20 July 2006. On 7 August 2006, plaintiff complained of pain in the middle of his back for the first time to his physical therapist. On 9 August 2006, plaintiff's work restrictions were removed. Plaintiff testified that once he returned to work, his back pain intensified. However, plaintiff believed his pain was associated with his kidney problems.

On 23 October 2006, plaintiff visited Dr. Mark A. Roberts, D.C., and complained that he had pain in his thoracic and lumbar spine, his neck, and his posterior shoulder. Plaintiff stated that he discontinued treatment at Dr. Roberts' office after one week because the treatments were not improving his pain. On 25 October 2006, plaintiff saw Dr. Philip D. Green at Eastern Carolina Internal Medicine, P.A. Dr. Green's medical report stated that plaintiff was "[a] 45-year-old man with a history of kidney stones [who] presents to Urgent Care with left flank pain for 2 days. . . ." Dr. Green diagnosed plaintiff with left flank pain and strongly suspected urethral lithiasis. Dr. Green ordered a CT Scan to determine whether plaintiff had a kidney stone. The results of the scan were negative.

On 14 November 2006, plaintiff saw his family doctor, Dr. John M. Smith at Eastern Carolina Internal Medicine, P.A. Plaintiff complained of back pain and weakness, numbness, and tingling in his legs. Dr. Smith's medical report noted that plaintiff "dates his most recent problems with his back and legs to about 3 weeks ago." Dr. Smith ordered an MRI of plaintiff's thoracic and lumbar spine,

which revealed "evidence of dis[c] herniation at T10 with significant cord impingement and an unusual epidural hematoma, radiating up to T7." Dr. Smith could not definitively state the cause of plaintiff's herniated disc, but testified that if plaintiff had hurt his back in the 13 June 2006 accident, plaintiff would have noticed back pain within three weeks.

Plaintiff was referred to Dr. Ira M. Hardy, II, who was board certified in neurological surgery. Plaintiff informed Dr. Hardy that he injured his back on 5 November 2006. Dr. Hardy reviewed plaintiff's thoracic MRI scan and confirmed that plaintiff had a "prominent T9-T10 left sided protruded and extruded disc" Dr. Hardy opined that the June accident "may" have caused the protrusion, but not the extrusion. Dr. Hardy stated that he had no opinion when asked whether to a reasonable degree of medical certainty the protrusion was caused by the June accident. Dr. Hardy determined that plaintiff's condition required surgery and referred him to Dr. Scott E. Reeg. On 20 December 2006, Dr. Reeg performed surgery on the herniated disc.

Prior to surgery, on 11 December 2006, plaintiff filed a Form 33, requesting that his claim be assigned for hearing in order to determine whether his "spinal injury [was] causally related to [a] compensable injury by accident." On 7 November 2007, the Commission filed their Opinion and Award and held that plaintiff had failed to establish (1) continuing disability or permanent impairment from his compensable right shoulder injury and (2) that the injury to his thoracic spine was causally related to the 13

June 2006 accident. Plaintiff was awarded temporary total disability benefits in the amount of \$245.80 from 14 June 2006 until he returned to work in August. The Commission noted that these benefits had been paid. Plaintiff appeals.

II. Standard of Review

The standard of review in workers' compensation cases is well-settled: "Appellate review of an opinion and award from the Industrial 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.'" *Hassell v. Onslow Cty. Bd. of Educ.*, 362 N.C. 299, 305, 661 S.E.2d 709, 714 (2008) (citations omitted). The Commission's findings of fact are conclusive on appeal if they are supported by competent evidence even though there may be evidence to support a contrary finding. *Id.* The Commission is the sole judge of the credibility of the witnesses and the weight to be given to the evidence before it. *Id.* Thus, North Carolina appellate courts do 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." *Id.* (quotation omitted).

Further, "failure to assign error to the Commission's findings of fact renders them binding on appellate review." *Estate of Gainey v. Southern Flooring & Acoustical Co.*, 184 N.C. App. 497, 501, 646 S.E.2d 604, 607 (2007) (citation omitted). We review the

Commission's conclusions of law *de novo*. *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004).

III. Causal Relationship

In his only argument, plaintiff contends the Commission erred by finding plaintiff failed to establish that his spinal injury was causally related to his 13 June 2006 accident. We disagree.

It is well-established that "[t]he claimant in a workers' compensation case bears the burden of initially proving 'each and every element of compensability,' including a causal relationship between the injury and his employment." *Adams v. Metals USA*, 168 N.C. App. 469, 475, 608 S.E.2d 357, 361 (citation omitted), *aff'd per curiam*, 360 N.C. 54, 619 S.E.2d 495 (2005); *see also Holley v. ACTS, Inc.*, 357 N.C. 228, 231, 581 S.E.2d 750, 752 (2003) ("In a workers' compensation claim, the employee 'has the burden of proving that his claim is compensable.'" (quotation omitted)). "Although the employment-related accident 'need not be the sole causative force to render an injury compensable,' the plaintiff must prove that the accident was a causal factor by a 'preponderance of the evidence[.]'" *Holley*, 357 N.C. at 231-32, 581 S.E.2d at 752 (citations omitted). When a case 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." *Id.* at 232, 581 S.E.2d at 753 (quotation omitted). However, if an expert's medical opinion is based upon mere conjecture or

speculation, it does not qualify as competent evidence on the issue of causation. *Id.*

In the instant case, the Commission made the following findings of fact regarding the expert medical testimony presented pertaining to the causal relationship between plaintiff's spinal injury and work accident:

18. Dr. Smith believed that Plaintiff's [spinal] condition may be traumatic; however, the late onset of Plaintiff's symptoms was not consistent with a June 2006 accident. Dr. Smith testified that based on Dr. Green's records, Plaintiff's pain more than likely started about 23 October 2006. Further, the report from Plaintiff that his pain started about 3 weeks prior to his 14 November 2006 office visit was consistent with a 23 October 2006 onset date for his back pain. Moreover, Dr. Smith expressed that if Plaintiff had injured his back in the June 2006 accident, he would anticipate that Plaintiff's back pain would have been noticed within a week, at least within three weeks, from the accident date and that he would have expected an orthopedic surgeon to notice and report the pain within that time period, if the pain was from the June 2006 accident. Dr. Smith could not report with any definite degree of medical certainty the cause of Plaintiff's herniated disc.

19. Plaintiff was seen by Ira M. Hardy, II, M.D., on 18 December 2006. Dr. Hardy is Board Certified in the field of Neurological Surgery. Plaintiff reported a spontaneous onset of severe pain in his mid-lumber region with discomfort in the leg and difficulty with bowel movements. Plaintiff reported that he was injured on 5 November 2006 and that his problems started on 10 November 2006. Dr. Hardy explained that by MRI Scan the extruded disc was recent relative to his examination on 18 December 2006. Based on a hypothetical question from Plaintiff's counsel, Dr. Hardy expressed that the 13 June 2006 accident "may have caused" a protrusion, but he did not believe that it caused an extrusion. He had no

opinion as to the cause of the protrusion. Protrusions can occur without trauma. Dr. Hardy had no opinion as to whether the fall in June 2006 caused any trauma to the T9-10 area of Plaintiff's spine. Dr. Hardy determined that [plaintiff] required surgery and referred him to Dr. Reeg for further workup.

20. Scott E. Reeg, M.D., performed surgery on the herniated disc[] in Plaintiff's thoracic spine on 20 December 2006. Dr. Reeg is Board Certified in the field of [Orthopedic] Surgery. In response to a hypothetical question posed by Plaintiff's counsel, Dr. Reeg testified that the 13 June 2006 accident "could" have caused the extruded disc in Plaintiff's back. Dr. Reeg, however, explained that it would be unusual for Plaintiff to be completely asymptomatic after the accident and then suddenly develop problems referable to an event eight weeks prior. Prior to his deposition, Dr. Reeg was not aware that Plaintiff was injured, in any capacity, on 13 June 2006. Dr. Reeg had not received any medical records or other information to establish the factors that he was asked to assume in the hypothetical question posed by Plaintiff's counsel. A complete reading of Dr. Reeg's testimony is that Dr. Reeg does not know the cause of Plaintiff's herniated disc; Dr. Reeg is not able to relate this condition to "any one specific event."

21. The greater weight of the competent medical evidence fails to establish that Plaintiff's back condition, particularly the T9-10 herniated disc for which he had spinal surgery, was caused by the 13 June 2006 accident at work. . . .

Based upon these findings of fact, the Commission concluded that plaintiff "failed to establish that the injury to his thoracic spine was causally related to the 13 June 2006 accident" and that "[t]he evidence does not show that Plaintiff's complaints of back pain in August and October 2006 are consistent with the June accident date."

Plaintiff failed to assign error to findings of fact 18 and 19. As such, they are presumed to be supported by competent evidence and are binding on appeal. *Gainey*, 184 N.C. App. At 501, 646 S.E.2d at 607. Plaintiff challenges findings of fact 20 and 21, but does not argue that these findings are not supported by competent evidence.¹ Rather, plaintiff contends that because "[a]ll of the doctors in this case agree that the accident *might have or could have* produced Plaintiff's back injury[,] . . . [t]his evidence supports Plaintiff's claim that his back injury occurred as a result of his [13 June 2006 accident]." Plaintiff's contention is not supported by the law of this State.

This Court has stated:

"The Supreme Court has allowed 'could' or 'might' expert testimony as probative and competent evidence to prove causation." *Young v. Hickory Bus. Furniture*, 353 N.C. 227, 233, 538 S.E.2d 912, 916 (2000). However, "'could' or 'might' expert testimony is insufficient to support a causal connection when there is additional evidence or testimony showing the expert's opinion to be a guess or mere speculation." *Id.* (citing *Maharias v. Weathers Bros. Moving & Storage Co.*, 257 N.C. 767, 767-68, 127 S.E.2d 548, 549 (1962)). An expert witness' testimony is insufficient to establish causation where the expert witness is unable to express an opinion to "any degree of medical certainty" as to the cause of an illness.

Adams, 168 N.C. App. at 476, 608 S.E.2d at 362 (alterations omitted). In response to the question "can you state to a reasonable degree of medical certainty" that plaintiff's spinal

¹We note that any argument of this nature would necessarily fail because the Commission's findings of fact 18 through 20 correctly summarize each of the doctors' deposition testimony.

injury was caused by the 13 June 2006 accident, each of the three doctors deposed in this case answered in the negative.² Further, Dr. Smith and Dr. Reeg opined that it would be unusual for plaintiff to be asymptomatic for two months after his 13 June 2006 accident if that accident were the cause of his spinal injury, while Dr. Hardy testified that plaintiff's herniated disc was "recent" relative to his examination on 18 December 2006. A close review of the doctors' deposition testimony reveals that any reference to the fact that the 13 June 2006 accident "could" or "may have caused" plaintiff's injury was nothing more than a statement that it was a mere possibility and could not be completely ruled out. *See Holley*, 357 N.C. at 234, 581 S.E.2d at 754 ("Doctors are trained not to rule out medical possibilities no matter how remote; however, mere possibility has never been legally competent to prove causation." (citation omitted)).

It is well-established that conflicts in the evidence are for the Commission to resolve in its role as the fact-finder in workers' compensation cases. *Cauble v. The Macke Co.*, 78 N.C. App. 793, 795, 338 S.E.2d 320, 321 (1986). It is not the province of this Court to reweigh the evidence before the Commission, but only

²We note that on direct examination, after being given a hypothetical describing only the events that had taken place on 13 June 2006, Dr. Reeg testified that to a reasonable degree of medical certainty, plaintiff's accident "could" have caused his extruded disc. However, on cross-examination, defense counsel posed a hypothetical describing all of the events that had taken place from 13 June 2006 until December 2006, including all doctor reports, documented complaints of pain, and inconsistent reports of the date of injury. Dr. Reeg then testified that he could not state to a reasonable degree of medical certainty that plaintiff's spinal injury was caused by the 13 June 2006 accident.

to determine whether the record contains any evidence tending to support the Commission's findings. *Haskell*, 362 N.C. at 305, 661 S.E.2d at 714. Because unchallenged findings of fact 18 and 19 are binding on appeal, and findings of fact 20 and 21 are supported by competent evidence in the record, the Commission correctly concluded that plaintiff had failed to establish his spinal injury was casually related to the 13 June 2006 accident and properly denied his claim for workers' compensation benefits for that injury.

AFFIRMED.

Judges MCGEE and JACKSON concur.

Report per Rule 30(e).