

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA11-248
NORTH CAROLINA COURT OF APPEALS

Filed: 1 November 2011

SAMI ALAWAR,
Employee, Plaintiff,

v.

N.C. Industrial Commission
I.C. No. 494525

COURTYARD MARRIOTT NORTH,
Employer, SELF-INSURED
(MARRIOTT CLAIMS SERVICES,
Servicing Agent),
Defendant.

Appeal by Defendant from Opinion and Award entered 20
December 2010 by the North Carolina Industrial Commission.
Heard in the Court of Appeals 31 August 2011.

Scudder & Hedrick, PLLC, by John A. Hedrick and April D. Seguin, for Plaintiff-Appellee.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Susan J. Vanderweert and M. Duane Jones, for Defendant-Appellants.

BEASLEY, Judge.

Courtyard Marriott North and Marriott Claims Services
(Defendants) appeal from an Opinion and Award issued by the
North Carolina Industrial Commission (the Commission) ordering
Defendants to pay indemnity benefits, medical expenses, and

litigation and attorney's fees to Sami Alawar (Plaintiff). For the reasons stated below, we affirm in part and reverse in part.

On 6 May 2003, Plaintiff suffered a back injury in the course of his duties while employed by Defendants. Neither party disputes the compensability of this original injury. On 24 May 2004, Plaintiff went to work as a maintenance helper at the Raleigh Residence Inn. On 6 October 2004, Plaintiff sought treatment for back pain at WakeMed Emergency Services. In an Opinion and Award filed 28 September 2006, Deputy Commissioner Philip A. Baddour, III found that the continued back pain that Plaintiff suffered was related to his 2003 injury, and therefore Defendants were liable for his medical expenses. Dr. William F. Lestini began treating Plaintiff on 19 November 2004, and was authorized by Deputy Commissioner Baddour to be Plaintiff's treating physician.

On 19 March 2009, Special Deputy Commissioner Christopher B. Rawls ordered that Plaintiff be allowed to see a new physician on whom both Plaintiff and Defendants could agree. In May 2009, Plaintiff began seeing Dr. Shehzad Choudry. On 16 September, Dr. Choudry referred Plaintiff to a spine surgeon for an evaluation. Defendants refused to authorize this evaluation. On 21 October 2009, Special Deputy Commissioner Jennifer S.

Boyer ordered Defendants to authorize the evaluation by an orthopedic surgeon. On 6 November 2009, Deputy Commissioner Theresa B. Stephenson also ordered that Plaintiff's motion for a surgical evaluation be granted. On 12 November 2009, Defendants filed a Motion for Reconsideration in response to Deputy Commissioner Stephenson's order, and that motion was denied on 13 November 2009 by Deputy Commissioner Stephenson. On 10 December 2009, Plaintiff had his surgical evaluation with Dr. Leonard D. Nelson, Jr.

Defendants employed an investigator to observe Plaintiff for several hours on 10 December, 11 December, 18 December, 21 December, 29 December, and 31 December 2009, as well as on 1 January and 2 January 2010. In addition to preparing a report of Plaintiff's activities, the investigator provided Defendants with surveillance videos.

On 11 June 2010, Deputy Commissioner Robert Wayne Rideout, Jr. issued an Opinion and Award, which resolved the following issues: (1) whether Plaintiff is entitled to any medical or indemnity benefits beyond what had already been paid and (2) whether Defendants had reasonable grounds to contest Plaintiff's entitlement to back surgery or indemnity benefits. Deputy Commissioner Rideout found that Plaintiff's current back

problems were related to his 2003 injury, and ordered Defendants to pay all medical expenses incurred for the treatment of that injury, including the surgery recommended by Dr. Nelson. Defendants were also ordered to pay Plaintiff's disability compensation from 21 October 2009, when he was excused from work, until such time that he was able to return.

Defendants filed a notice of appeal on 17 June 2010, and Plaintiff filed one on 21 June 2010. Defendants also filed an application for review of the case by the Full Commission on 13 August 2010. The case was heard before the Full Commission on 5 November 2010. The Commission issued an Opinion and Award on 20 December 2010 finding that Plaintiff's current need for medical treatment is related to his 2003 injury, and awarding Plaintiff attorney's fees pursuant to N.C. Gen. Stat. § 97-88.1 on grounds that Defendants' defense of the claim was unreasonable.

I.

We review an Opinion and Award of the North Carolina Industrial Commission by determining "whether there is any competent evidence in the record to support the Commission's findings of fact and whether these findings support the Commission's conclusions of law." *Lineback v. Wake County Board of Commissioners*, 126 N.C. App. 678, 680, 486 S.E.2d 252, 254

(1997) (citing *Sidney v. Raleigh Paving & Patching*, 109 N.C. App. 254, 426 S.E.2d 424 (1993)). It is well settled that "[o]n appeal from the Industrial Commission, this court is unable to weigh evidence," and "if the evidence before the Commission is capable of supporting two contrary findings, the determination of the Commission is conclusive on appeal." *Johnson v. Herbie's Place*, 157 N.C. App. 168, 175, 579 S.E.2d 110, 115 (2003) (quoting *Johnson v. Southern Tire Sales & Service*, 152 N.C. App. 323, 327, 567 S.E.2d 773, 776 (2002)).

II.

The Commission found that Plaintiff's current back condition is a result of the compensable back injury that he suffered while working for Defendants in 2003. In support of this finding, Plaintiff emphasizes the testimony of Drs. Choudry and Nelson. During his deposition, Dr. Choudry expressed his opinion to a reasonable degree of medical certainty that Plaintiff's current need for surgery is related to his 2003 injury. Dr. Nelson also opined that Plaintiff's current condition is a "natural consequence" of his original injury. Defendant argues that both doctors also gave conflicting testimony during their depositions that cast doubt on the causal connection between Plaintiff's 2003 injury and his current

condition. This Court has acknowledged that "[t]he fact that the treating physician in [a] case could not state with reasonable medical certainty that plaintiff's accident caused his disability, is not dispositive -- the degree of the doctor's certainty goes to the weight of his testimony." *Adams v. Metals USA*, 168 N.C. App. 469, 483, 608 S.E.2d 357, 365 (2005) (citing *Martin v. Martin Brothers Grading*, 158 N.C. App. 503, 507-08, 581 S.E.2d 85, 88 (2003)). The fact that the doctors gave conflicting testimony that lessened their certainty concerning the cause of Plaintiff's current condition goes to the weight of their testimony, but it does not preclude consideration of the testimony altogether.

Defendants also point to our Supreme Court's holding in *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 538 S.E.2d 912 (2000), for the proposition that when a case turns on the cause of a medical condition, a finding of causation based on the maxim of *post hoc, ergo propter hoc* assumes "a false connection between causation and temporal sequence" and "is not competent evidence of causation." *Id.* at 232, 538 S.E.2d at 916. Defendants' reliance is misplaced. In *Young*, the expert medical witness testified that the *only* piece of information that related the plaintiff's fibromyalgia to her accident was the

fact that she did not have the condition before the accident but developed it after. *Id.* In the case *sub judice*, Dr. Choudry responded to defense counsel's question as to whether there was some degree of speculation in his conclusion that Plaintiff's current back problems are related to his 2003 injury by stating that "because this is a workmen's [sic] comp case and he came to me because of an injury in 2003, I draw the causation line." At no point did Dr. Choudry state that he based his entire opinion as to the cause of Plaintiff's current condition on this temporal speculation. Moreover, conflicting evidence does not render evidence incompetent, even when the evidence is one party's conflicting testimony. See *Click v. Freight Carriers*, 300 N.C. 164, 166, 265 S.E.2d 389, 390 (1980) (rejecting the defendant's argument that the plaintiff's testimony before the Commission contradicted his earlier statements and thus could not reasonably support a finding of injury by accident). This argument is overruled.

III.

Defendants next contend that the Commission erred by affirming Deputy Commissioner Rideout's denial of Defendants' Motion to Add an Additional Party. Defendants assert that Plaintiff suffered a back injury while working at the Residence

Inn that is the true cause of his current discomfort. Thus, they sought to add the Residence Inn as an additional party. The Commission found that Plaintiff never sustained a back injury while employed by the Residence Inn. There is ample evidence in the record to support this finding, including Plaintiff's own testimony, and the testimony of Matthew Paul Smith, the General Manager of the Residence Inn. Defendants argue that there were also statements made by Plaintiff to his doctors that suggest Plaintiff did injure himself while working at the Residence Inn. It is important to note that "[i]t is the Commission that ultimately determines credibility, whether from a cold record or from live testimony." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 115, 530 S.E.2d 549, 552 (2000). The Commission found the testimony of Plaintiff and Mr. Smith at the hearing to be worth more weight. It is not for this Court to re-evaluate the credibility of testimony. Consequently, this argument is overruled.

IV.

Defendants also allege that the Commission erred in awarding ongoing disability benefits to Plaintiff. The Commission found that as a result of his 2003 injury, Plaintiff has been unable to earn wages from any employer since 21 October

2009. This finding was based on the fact that Dr. Choudry excused Plaintiff from all work beginning on that date. The finding was further supported by Dr. Choudry again excusing Plaintiff from all work on 20 November 2009, and Dr. Nelson doing the same after evaluating Plaintiff's lumbar spine condition on 10 December 2009. Defendants argue that these notes are not competent evidence for the Commission to rely on because in his deposition Dr. Choudry stated that he concluded that Plaintiff should be excused from work after Plaintiff complained he felt pain when putting weight on his leg throughout the day. Defendants also point to the deposition testimony of Dr. Lestini, who opined that it seemed that Plaintiff could perform some work-related duties after watching Defendants' surveillance videos. Again, it is not within the purview of this Court to re-weigh evidence presented to the Commission, or to second guess the credibility of testimony. The presence of conflicting testimony does not render the supporting testimony incompetent. As such, we find there was sufficient evidence for the Commission to rely on in reaching this conclusion, and this argument is overruled.

Finally, Defendants allege that the Commission erred when concluding that their defense of this claim was unreasonable, and awarding Plaintiff attorney's fees under the Workers' Compensation Act, which states that "[i]f the Industrial Commission shall determine that any hearing has been brought, prosecuted, or defended without reasonable ground, it may assess . . . reasonable fees for defendant's attorney or plaintiff's attorney upon the party who has brought or defended them." N.C. Gen. Stat. § 97-88.1 (2009). The Commission "is authorized under N.C.G.S. § 97-88.1 to assess attorney's fees . . . against a party prosecuting or defending a hearing without reasonable grounds[,]'" and that decision "is in the discretion of the Commission, and its award or denial of an award will not be disturbed absent an abuse of discretion.'" *Lewis v. Sonoco Prods. Co.*, 137 N.C. App. 61, 70-71, 526 S.E.2d 671, 677 (2000) (quoting *Troutman v. White & Simpson, Inc.*, 121 N.C. App. 48, 54-55, 464 S.E.2d 481, 486 (1995)). An abuse of discretion will be found only where the Commission's decision "is manifestly unsupported by reason or [is] so arbitrary that it could not have been the result of a reasoned decision." *Long v. Harris*, 137 N.C. App. 461, 465, 528 S.E.2d 633, 635 (2000) (internal quotation marks omitted).

The Commission found Defendants offered no competent medical evidence to contradict Plaintiff's claim that his current injury was related to his 2003 injury, and that as a result of this injury Plaintiff has been restricted from all work since 21 October 2009. This finding led the Commission to conclude that Defendants' defense of Plaintiff's claim was unreasonable, and therefore Plaintiff is entitled to payment of his litigation costs and attorney's fees. We disagree. As detailed in Sections II and III, *supra*, the evidence in this case is conflicting. Although we affirm the Commission's other findings because there is competent evidence to support them, we also recognize that there is some competent evidence to support Defendants' claims. We cannot agree that their defense of Plaintiff's claim was unreasonable. Accordingly, we reverse the Commission's award of litigation costs and attorneys' fees to Plaintiff.

Affirmed in part; Reversed in part.

Judges STEPHENS and ERVIN concur.

Report per Rule 30(e).