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NO. COA12-424
NORTH CAROLINA COURT OF APPEALS

Filed: 20 November 2012

STONEW. AMMONS, Employee,
Plaintiff

v.

North Carolina Industrial
Commission
I.C. No. 622446

GOODYEAR TIRE & RUBBER COMPANY,
Employer, and LIBERTY MUTUAL
INSURANCE COMPANY, Carrier,
Defendants

Appeal by defendants from opinion and award entered 12
September 2011 by the North Carolina Industrial Commission.
Heard in the Court of Appeals 12 September 2012.

*Hardison & Cochran, P.L.L.C., by J. Adam Bridwell, for
plaintiff-appellee.*

*Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Matthew
J. Ledwith, Dana Moody Leonard, and M. Duane Jones, for
defendant-appellants.*

CALABRIA, Judge.

Goodyear Tire & Rubber Company ("Goodyear") and Liberty
Mutual Insurance Company (collectively "defendants") appeal from
an opinion and award by the Full Commission of the North
Carolina Industrial Commission ("the Commission") awarding

temporary total disability ("TTD") benefits to Stoney W. Ammons ("plaintiff") on the basis of plaintiff's 19 August 2009 exacerbation of a previous work-related shoulder injury. The Commission also ordered defendants to pay plaintiff attorney's fees pursuant to N.C. Gen. Stat. § 97-88.1 (2011) because defendants' defense of plaintiff's claim was unreasonable. We affirm.

I. Background

Plaintiff began working for Goodyear in April 1977. On 19 July 2005, while working at Goodyear, plaintiff sustained compensable injuries by accident to his left shoulder and cervical spine. Defendants admitted the compensability of plaintiff's injuries under the North Carolina Workers' Compensation Act.

On 19 December 2006, Dr. Jeffrey K. Kobs ("Dr. Kobs"), an orthopedic surgeon, performed surgery on plaintiff's left shoulder. Following surgery, Dr. Kobs released plaintiff at maximum medical improvement with a 15% permanent partial impairment rating to plaintiff's left shoulder. Dr. Kobs also placed work restrictions on plaintiff. Specifically, plaintiff was restricted from using his left shoulder to lift, push, or

pull in excess of 30 pounds and also from engaging in any type of repetitive overhead motion.

In early 2007, plaintiff returned to work at Goodyear in a position in the "bead room" ("the wrap bead position"). However, the wrap bead position required repetitive motion which bothered plaintiff's shoulder. Consequently, plaintiff filed a Form 33 request for hearing to determine the suitability of the wrap bead position. On 28 January 2009, Deputy Commissioner Adrian Phillips ("Deputy Commissioner Phillips") entered an opinion and award concluding that the physical demands of the wrap bead position were "unsuitable as it require[d] physical activity in excess of the work restrictions assigned by the treating physicians." Deputy Commissioner Phillips ordered defendants to authorize TTD benefits until plaintiff returned to more suitable employment.

Nevertheless, defendants did not authorize TTD benefits, but instead moved plaintiff to a new position as a "wind-up operator" at Goodyear in March 2009. Plaintiff's primary responsibility as a wind-up operator was to guide rubber and cloth through Goodyear's fabric calendar, an overhead machine that winds the materials into rolls. Due to plaintiff's physical limitations, a physical therapist employed by Goodyear

constructed a cable system that enabled plaintiff to hoist the materials into the overhead machine without having to raise his left arm above shoulder level. However, shortly after the cable system's construction, employees working on other shifts discarded it because it interfered with their work. With no viable alternative, plaintiff had to use both arms to perform his job.

As a wind-up operator, plaintiff was also responsible for assisting the mill operator with a procedure that required removing strips of rubber from the mill when it became jammed. Plaintiff was required to lift strips of rubber weighing between 25 to 60 pounds from the mill and place them on a rack. The rack was located at a height between plaintiff's lower chest and shoulder level. Jams in the mill typically occurred once a day and, on some occasions, as many as five times a day.

On 19 August 2009, as a result of lifting strips of rubber from the mill, plaintiff began experiencing pain and burning in his left shoulder and visited Goodyear's medical department. Two days later, he visited the medical department again and was placed on work restrictions of no lifting in excess of 10 pounds. After plaintiff's subsequent medical treatment, he was

continued on light duty restrictions and recommended for physical therapy.

On 28 October 2009, defendants authorized an evaluation with Dr. Kobs. Dr. Kobs diagnosed plaintiff with impingement syndrome and recommended an MRI to determine whether plaintiff suffered a rotator cuff tear in his left shoulder. On 25 November 2009, Dr. Kobs discovered a "partial high-grade undersurface tearing" in plaintiff's shoulder and recommended surgery. Following this evaluation, defendants refused to authorize or take responsibility to pay for any further treatments on plaintiff's shoulder.

On 28 January 2010, plaintiff filed a Form 33 request for hearing seeking additional medical treatment and workers' compensation benefits based upon his 19 August 2009 injury. Defendants denied the compensability of plaintiff's injury. On 8 March 2011, Deputy Commissioner George R. Hall ("Deputy Commissioner Hall") filed an opinion and award. Deputy Commissioner Hall found that the wind-up operator position was unsuitable, and that the 19 August 2009 incident was a compensable exacerbation of plaintiff's 19 July 2005 injury. Since plaintiff's injury was compensable, he was entitled to TTD

benefits until such time as he returned to suitable employment. Defendants appealed to the Full Commission.

On 12 September 2011, the Full Commission affirmed Deputy Commissioner Hall's findings and made the additional finding that defendants' defense of plaintiff's claims was unreasonable and "indicative of stubborn, unfounded litigiousness such that plaintiff was entitled to sanctions in the form of attorney's fees pursuant to N.C. Gen. Stat. § 97-88.1." The Commission ordered defendants to pay plaintiff's counsel an attorney's fee in the amount of \$2,000.00. Defendants appeal.

II. Standard of Review

Appellate review of an opinion and award of the Full Commission is generally confined "to two issues: (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." *Clark v. Wal-Mart*, 360 N.C. 41, 43, 619 S.E.2d 491, 492 (2005). The findings of the Commission are conclusive on appeal and will only be set aside if there is a complete lack of competent evidence to support them. *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977). "The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Anderson v.*

Constr. Co., 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965).
"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).

III. Causation

Defendants argue that the Full Commission erred in finding that the 19 August 2009 incident exacerbated plaintiff's previous compensable left shoulder injury. We disagree.

For an injury to be compensable under the Workers' Compensation Act, it must be proximately caused by an accident arising out of and suffered in the course of employment. N.C. Gen. Stat. § 97-2(6) (2011). "The quantum and quality of the evidence required to establish *prima facie* the causal relationship [between the accident and the employment] will of course vary with the complexity of the injury itself." *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980). "[W]here the exact nature and probable genesis of a particular type of injury 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.*

A. Date of Injury

Defendants first contend that there was no competent evidence to support the Commission's finding that plaintiff's 19 August 2009 injury exacerbated his previous compensable injury. The Commission's finding was based upon the following testimony by Dr. Kobs:

Q. If the Industrial Commission finds Mr. Ammons' testimony as fact, do you have an opinion, to a reasonable degree of medical certainty, whether the August 19, 2010 [sic], incident exacerbated his preexisting shoulder problems, causing a need for the surgery which you recommend?

A. Yes.

Q. Okay. And what's your opinion?

A. I think that it more likely than not exacerbated his condition.

Defendants seize upon the year "2010" in the question asked by plaintiff's counsel and argue that Dr. Kobs was offering an opinion on an injury that occurred in 2010, rather than the 2009 injury at issue in this case.

However, the context of Dr. Kobs's testimony clearly demonstrates that the inquiry about the 2010 date was merely a misstatement by plaintiff's counsel. Apart from this misstatement, the only dates that were discussed during Dr. Kobs's deposition were dates from the year 2009. Dr. Kobs testified that he examined plaintiff on 28 October 2009. At

that visit, plaintiff informed Dr. Kobs that his shoulder was hurting again after two separate events, on 10 and 19 August 2009, while he was working as a wind-up operator. Later, Dr. Kobs testified that plaintiff's last visit with him was on 25 November 2009, and he specifically stated that he had not seen plaintiff since that date. Thus, it is clear from the record that Dr. Kobs offered his opinion regarding plaintiff's 19 August 2009 injury, and this testimony was competent evidence to support the Commission's findings of fact related to the correct date and year of plaintiff's injury.

B. *Post Hoc Ergo Propter Hoc*

Defendants next argue that Dr. Kobs's opinion does not provide competent evidence as to causation because it is based on the maxim *post hoc ergo propter hoc*. This Court has previously held that "where an expert witness expressly bases his opinion as to causation of a complex medical condition solely on the maxim *post hoc ergo propter hoc* (after it, therefore because of it), the witness provides insufficient evidence of causation." *Adams v. Metals USA*, 168 N.C. App. 469, 476, 608 S.E.2d 357, 362 (2005).

Defendants rely on *Young v. Hickory Bus. Furniture*, 353 N.C. 227, 538 S.E.2d 912 (2000), to support their argument. In

Young, the testifying physician diagnosed plaintiff with fibromyalgia caused by a work-related accident. However, the physician acknowledged that although there were many potential causes of plaintiff's fibromyalgia, he did not pursue any testing to determine the cause of plaintiff's symptoms. Instead, the physician relied solely on the fact that "it was not there before and she developed it [after the accident]" when he determined that the plaintiff's injury "could have or would have aggravated or caused the fibromyalgia." *Id.* at 232, 538 S.E.2d at 916. Our Supreme Court noted that fibromyalgia was "a controversial medical condition," and held the physician's testimony to be far too speculative to be sufficiently competent to support the Commission's findings on causation. *Id.* at 233, 538 S.E.2d at 916-17.

In the instant case, plaintiff's shoulder injury is not the type of injury that is considered a controversial medical condition. Moreover, Dr. Kobs did not rely solely on the temporal relationship between plaintiff's lifting incident and the appearance of his symptoms. In June 2007, Dr. Kobs placed plaintiff on permanent work restrictions of lifting no more than 30 pounds. When plaintiff came to Dr. Kobs in October 2009, he reported that he had lifted rubber weighing more than 30 pounds

and that his shoulder began hurting at that time. Dr. Kobs testified that if plaintiff failed to adhere to his restrictions, Dr. Kobs would expect him to suffer pain and inflammation in his shoulder. Thus, Dr. Kobs's determination that, "to a reasonable degree of medical certainty," plaintiff's injury "more likely than not exacerbated [plaintiff's] condition," was not based upon mere speculation and conjecture, and provided sufficient support for the Commission's finding regarding causation. This argument is overruled.

IV. Length of Disability

Defendants argue that the Commission erred in concluding that plaintiff has been disabled since 7 December 2009. We disagree.

Under the Workers' Compensation Act, "disability" is defined as the "incapacity because of injury to earn the wages which the employee was receiving at the time of the injury in the same or any other employment." N.C. Gen. Stat. § 97-2(9) (2011). To prove disability, the claimant must show that, after his work-related injury, he was incapable of earning the same wages that he had earned before his injury in either the same or any other employment, and that his incapacity to earn was caused

by his compensable injury. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982).

The claimant can meet the burden of proving his disability in one of four ways:

(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, inexperience, 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.

Russell v. Lowes Prod. Distrib., 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (internal citations omitted).

In the instant case, the Commission found as fact that "given Plaintiff's eighth grade education, lack of transferable skills, advanced age, current medical restrictions, as well as the present economic conditions, . . . it would be futile for Plaintiff to search for employment prior to getting medical treatment and resolving the problems with his left upper extremity." Both plaintiff and vocational specialist Stephen D. Carpenter ("Carpenter") provided evidence supporting this

finding. According to plaintiff's testimony, he was unaware of any position for which he could apply that would compensate him at or near the amount he previously earned with defendant, particularly given his physical restrictions. In his 5 October 2010 rehabilitation evaluation report, Carpenter opined that "based on the medical and vocational factors presented, it is the opinion of this rehabilitation counselor, within a reasonable degree of rehabilitation vocational certainty, that [plaintiff] is not employable in any job at any functional capacity." Thus, the Commission's finding of fact was supported by competent evidence, and the finding supports the conclusion that plaintiff was disabled under the third prong of *Russell*. This argument is overruled.

V. Attorney's Fees

Defendants argue that the Commission abused its discretion by concluding that defendants defended plaintiff's claim without reasonable grounds and also by imposing sanctions in the form of attorney's fees. We disagree.

Review of an award of attorney's fees pursuant to N.C. Gen. Stat. § 97-88.1 requires a two-part analysis. First, "[w]hether the [party] had a reasonable ground to bring a hearing is reviewable by this Court *de novo*." *Troutman v. White & Simpson, Inc.*, 121 N.C. App. 48, 50-51, 464

S.E.2d 481, 484 (1995), *disc. review denied*,
343 N.C. 516, 472 S.E.2d 26 (1996).

. . .

If this Court concludes that the party requesting the hearing lacked reasonable grounds, "[t]he decision of whether to make such an award, and the amount of the award, is in the discretion of the Commission, and its award or denial of an award will not be disturbed absent an abuse of discretion." *Troutman*, 121 N.C. App. at 54-55, 464 S.E.2d at 486.

Meares v. Dana Corp., 193 N.C. App. 86, 93-94, 666 S.E.2d 819, 825 (2008).

In their brief, defendants only challenge the Commission's determination that defendants "unreasonably defended [plaintiff's] claim." In determining whether a claim was unreasonably defended, "the reviewing court should consider the evidence presented at the hearing to determine [the] reasonableness of a defendant's claim. ... As such, the burden is on the defendant to place in the record evidence to support its position that it acted on reasonable grounds." *Blalock v. Southeastern Material*, ___ N.C. App. ___, ___, 703 S.E.2d 896, 899 (2011) (internal quotations and citations omitted). "The determination of reasonable grounds is not whether the party prevails in its claim, but whether the claim is based on reason rather than stubborn, unfounded litigiousness." *Meares*, 193

N.C. App. at 93, 666 S.E.2d at 825 (internal quotations and citation omitted).

In the instant case, defendants contend their defense of plaintiff's claim was reasonable based upon two grounds. First, defendants argue that their defense was reasonable because plaintiff was required to provide expert medical testimony to establish the causation of his injury. Second, defendants contend that their defense was reasonable because plaintiff had unjustifiably failed to seek any employment after his injury.

The evidence before the Commission was that after plaintiff sustained and received treatment for a compensable injury on 19 July 2005, defendants placed plaintiff in a position that was later deemed unsuitable by Deputy Commissioner Phillips. Despite the fact that Deputy Commissioner Phillips ordered defendants to initiate TTD benefits until plaintiff was provided with more suitable employment, defendants again placed plaintiff in a position unsuitable for his physical limitations. Testimony from both plaintiff and Goodyear manager Paul Fisher indicated that the wind-up operator position required plaintiff to routinely lift pieces of rubber in excess of his 30-pound lifting restriction. Even though plaintiff was injured as a result of the unauthorized lifting, defendants refused to

initiate workers' compensation benefits and instead sought a hearing before the Commission.

Although defendants have the burden "to place in the record evidence to support [their] position that [they] acted on reasonable grounds[,]" *Blalock*, ___ N.C. App. at ___ , 703 S.E.2d at 899, they cite no evidence in the record which would suggest that plaintiff's 2005 compensable injury was not exacerbated by his 19 August 2009 injury. Moreover, defendants cite no evidence that plaintiff was employable in any job after he was injured. Thus, defendants have failed to meet their burden of showing that they acted on reasonable grounds in defending plaintiff's claim. Accordingly, the Commission correctly determined that defendants' defense of plaintiff's claim was unreasonable. This argument is overruled.

VI. Conclusion

The Commission's findings of facts are supported by competent evidence and fully support its determination that plaintiff's 19 August 2009 injury resulted in an exacerbation to his 19 July 2005 left shoulder injury. The Commission's findings of fact, supported by competent evidence, also support its determination that plaintiff remained disabled since 7 December 2009. The Commission did not err in finding that

defendants' defense of this matter was unreasonable, and consequently, it appropriately imposed sanctions against defendants in the form of attorney's fees. The Commission's opinion and award is affirmed.

Affirmed.

Judges ELMORE and STEPHENS concur.

Report per Rule 30(e).