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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-119

Filed: 18 October 2016

North Carolina Industrial Commission, I.C. File No. 13-731311

DONNA KIRKMAN, Employee-Plaintiff,

v.

N.C. DEPARTMENT OF PUBLIC SAFETY, Employer, SELF-INSURED (CORVEL CORPORATION, Third-Party Administrator), Defendant.

Appeal by Plaintiff from the opinion and award of the Industrial Commission entered 13 October 2015. Heard in the Court of Appeals 23 August 2016.

*Jeffrey P. Lewis for Plaintiff.*

*Attorney General Roy Cooper, by Assistant Attorney General Brittany K. Brown, for the North Carolina Department of Public Safety.*

STEPHENS, Judge.

Plaintiff Donna Kirkman appeals from an opinion and award filed by the Industrial Commission (“the Commission”) denying her claim for compensation for ongoing symptoms allegedly caused by an injury sustained during on-the-job training. Kirkman argues that the Commission erred in finding that her claim was not compensable under the Worker’s Compensation Act because she presented sufficient evidence to prove the injury caused her symptoms. We affirm.

*Evidence and Procedural Background*

The evidence before the Commission tended to show the following:

The North Carolina Department of Public Safety (“DPS”) employed Donna Kirkman as a correctional officer at the North Piedmont Correctional Center for Women from November 2010 until 14 May 2013. In February 2013, Kirkman participated in an annual Controlled Restraints Defensive Tactics (“CRDT”) training for correctional officers. This training lasted for one week and “involve[d] passive resistance techniques, simulated strikes, escape techniques, floor exercises, baton training, weapon take-away techniques, and self-defense techniques.”

Kirkman alleged that she was hit in the head multiple times during the CRDT training on 22 February 2013. First, she was partnered with a male a foot taller than she for a self-defense technique drill. Kirkman testified that she was hit in the head and knocked to the floor by the larger officer during this drill.

Another exercise required Kirkman to try to get her instructor, who pretended to be an inmate, back into a cell. Kirkman testified she was struck twice on the head by the instructor during this exercise. Kirkman wore a padded helmet, but the helmet was “ill-fitting.”

Kirkman did not report any injuries at the time of the training and continued to work. However, she testified that she had headaches for the month following the training which prevented her from sleeping. In addition, Kirkman informed her

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supervisor that she was having the headaches, but she did not report to her supervisor or to DPS that the headaches were connected to the training until May 2013. On 14 May 2013, Kirkman made a report of her alleged injuries to DPS. Kirkman's last day of work as a correctional officer with DPS was also 14 May 2013.

Between 22 February 2013, the date of the incident at issue, and 14 May 2013, Kirkman saw her primary care physician, Dr. Rajan Mitchell, three times. On 12 March 2013, Kirkman complained of insomnia, numbness in her extremities, and an issue with her ear, and Dr. Mitchell diagnosed allergic rhinitis. Kirkman did not mention the CRDT training at this appointment. On 30 April 2013, Kirkman reported having severe headaches. At this time, she informed Dr. Mitchell that she had been hit in the head during the training. Dr. Mitchell sent Kirkman for a CT scan on 9 May 2013. The CT scan showed a small abnormality, which prompted Dr. Mitchell to order an MRI.

After reporting her injury to her supervisor, during the time period from 14 May 2013 through 25 February 2014, Kirkman had the MRI ordered by Dr. Mitchell; saw Amy Kearns, a neurologist physician's assistant, in June, July, August, and December 2013; saw neurologist Dr. Mitchell Isaac on 16 and 30 September 2013; saw neurologist Dr. Eliot Lewit on 3 October and 3 December 2013, and on 25 February 2014; and saw neuropsychologist Dr. Catherine Clodfelter on 25 October 2013. DPS accepted Kirkman's claim for medical costs for these visits on a medical

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benefits only basis without prejudice to later deny her worker's compensation claim. DPS filed a Form 63 dated 30 May 2013 providing notice to Kirkman of payment on a medical benefits only basis. Kirkman subsequently filed her Form 18 notice of accident and worker's compensation claim with DPS on 5 July 2013. On 25 February 2014, DPS filed a form 61 denying Kirkman's worker's compensation claim.

Kirkman requested a hearing on the denial of her claim. On 22 October 2014, Deputy Commissioner Robert J. Harris heard Kirkman's case. All of the medical professionals Kirkman saw between May 2013 and February 2014 testified regarding their examinations. Dr. Mitchell offered no opinion on the cause of Kirkman's injuries. Ms. Kearns diagnosed Kirkman with post-concussion syndrome, and testified that she assumed that the injury was caused by the CRDT training based on the fact that the onset of symptoms occurred after the training. Dr. Isaac was the only witness designated as an expert. He also diagnosed Kirkman with post-concussion syndrome, and testified that it was possible for the CRDT training injury to have caused Kirkman's symptoms, but that typically, the duration of her symptoms would be caused by a more severe injury. Dr. Isaac further testified that it was difficult to determine whether Kirkman's injuries were caused by the CRDT training, because he only examined her twice in a short span of time and was unable to observe her symptoms over a longer period. Dr. Lewit testified that, while it was a possibility, he was "by no means . . . certain" that Kirkman's symptoms were caused by an injury

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during the CRDT training because of the delay in the onset of Kirkman's symptoms and the intensification of her headaches. Lastly, Dr. Clodfelter diagnosed Kirkman with somatoform disorder and found her symptoms consistent with conversion disorder, in which a patient converts stress into physical symptoms. Dr. Clodfelter testified that Kirkman "was most likely overestimating how bad some of her cognitive problems might have been."

Deputy Commissioner Harris filed an opinion and award on 9 March 2015 which denied compensation to Kirkman on two bases: (1) Kirkman did not show that her symptoms were caused by the CRDT training injury, and (2) Kirkman's claim was barred because she did not notify DPS of her injury for more than thirty days, and DPS was prejudiced by the delay. Kirkman sent a letter to the Industrial Commission with a notice of appeal "to the Court of Appeals" on 18 March 2015. However, the Commission interpreted this as an appeal to the Full Commission pursuant to N.C. Gen. Stat. § 97-85. Neither Kirkman nor DPS objected.

The Full Commission heard Kirkman's case on 25 August 2015. Kirkman's counsel did not appear in court until after the hearing. Thus, the Commission reviewed the record before Deputy Commissioner Harris and the briefs of the parties, but did not hear oral argument. On 13 October 2015, the Commission issued its opinion and award affirming and modifying Deputy Commissioner Harris's opinion, and denying compensation for Kirkman's claim on the bases that (1) Kirkman did not

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demonstrate that her continuing symptoms or conditions were caused by the CRDT training injury, and (2) she did not have a reasonable excuse for the lack of timely notice to DPS of her injury. The Commission made the following findings of fact regarding the cause of Kirkman's symptoms:

17. When asked if [Kirkman]'s diagnosis of post-concussion syndrome was related to or caused by the head trauma she claims she sustained at work, Dr. Isaac testified:

It is hard to answer that as a yes or no because of the fact that the diagnosis can evolve over time. . . .

On this point, Dr. Isaac was further questioned:

Q: What other factors or potential diagnosis would cause the symptomatology to get worse over time?

A: In my experience, the – again, this is something based on progression over time, and I only saw [Kirkman] the two times right in – close together. So I have no information about the arc of symptoms, but in my experience, if somebody gets worse or develops new symptoms along the way, then I believe that depression or anxiety are often the main drivers of ongoing symptoms . . . .

18. Additionally, Dr. Isaac testified that it is possible for a patient to still have symptoms over a year and a half from a head injury, but generally this results from a more severe head injury with signs of trauma on imaging, factors not present in [Kirkman]'s case. Further, Dr. Isaac agreed that while it was possible that [Kirkman]'s alleged injury was causing continued symptoms, it was not likely.

. . . .

21. . . . When asked if [Kirkman]'s headaches were secondary to the traumatic incident of February 2013, Dr.

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Lewit was uncertain. When asked if he could testify with any degree of medical certainty regarding whether [Kirkman]'s symptoms were related to a specific traumatic event, Dr. Lewit opined:

. . . [A]t this juncture, all I could say is, if I'm given options between possible and probable, I would say is, possibly it's related to the head injury. But I cannot state with any certainty that it probably was.

22. . . . When PA Kearns was asked on direct examination if she had an opinion as to whether [Kirkman]'s alleged work injury was the cause of the headaches that Ms. Kearns treated, she answered, “[t]hey didn’t start until after the injury, so I have to assume that was the cause.” Additionally, PA Kearns testified that the alleged injury “could” be the cause of [Kirkman]'s ongoing symptoms.

23. . . . Dr. Mitchell opined it is abnormal for headache symptoms to worsen over time with treatment. Further, Dr. Mitchell did not observe any signs of physical trauma when he treated [Kirkman]. . . . There was no causation opinion from Dr. Mitchell . . . .

24. . . . Dr. Clodfelter testified that testing indicated [Kirkman] was “most likely overestimating how bad some of her cognitive problems might have been.”

. . . .

26. [T]he only medical provider that testified with certainty that [Kirkman]'s symptoms or conditions were causally related to the alleged workplace incidents of 22 February 2013 was PA Kearns. While PA Kearns testified [Kirkman]'s symptoms were caused by the work injury, she acknowledged that was an assumption based upon the temporal relationship between the date of the alleged injury and onset of [Kirkman]'s symptoms. Further, Ms. Kearns was equivocal later in her deposition, stating the alleged mechanism of injury “could” be the cause of

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[Kirkman]'s symptoms. To the extent Ms. Kearns offered an opinion on this causal relationship, the Full Commission assigns no weight to this opinion.

27. The Full Commission finds that Dr. Isaac, Dr. Mitchell, Dr. Clodfelter, and Dr. Lewit did not offer testimony, to a reasonable degree of medical certainty, or more likely than not, that [Kirkman]'s symptoms or conditions were related to her alleged work-related injury.

On 6 November 2015, Kirkman filed a notice of appeal to this Court from the opinion and award of the Commission.

*Discussion*

On appeal, Kirkman argues that (1) Deputy Commissioner Harris erred in his conclusion that DPS was prejudiced by Kirkman's untimely notice of her injury, and (2) the Full Commission erred in its conclusion that Kirkman did not show that her continuing symptoms were caused by the CRDT training injury. This Court does not have jurisdiction over an appeal from Deputy Commissioner Harris's opinion and award, and we thus do not consider Kirkman's first argument. As to Kirkman's second argument, because the Commission's findings of fact are binding on appeal, and the findings support its conclusions of law, we find no error in the Commission's denial of compensation to Kirkman. We affirm the Commission's opinion and award.

1. *Deputy Commissioner Harris's opinion*

Kirkman first argues that Deputy Commissioner Harris erred in his second conclusion of law that DPS was prejudiced by Kirkman's failure to timely give notice



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of her injury to DPS. Because this court lacks subject matter jurisdiction over an appeal of Deputy Commissioner Harris's order, we do not consider this argument.

[E]ither party to the dispute may, within 30 days [from the date of the award of the Full Commission or 30 days after notice] . . . appeal from the decision of said Commission to the Court of Appeals for errors of law under the same terms and conditions as govern appeals from the superior court to the Court of Appeals in ordinary civil actions.

N.C. Gen. Stat. § 97-86 (2015). Section 97-85 provides that “[i]f application is made to the Commission within 15 days . . . the full Commission shall review the award [of the deputy commissioner], . . . and, if proper, amend the award . . .” N.C. Gen. Stat. § 97-85 (2015). The North Carolina Court of Appeals has jurisdiction over appeals “[f]rom any final order or decision of . . . the North Carolina Industrial Commission.” N.C. Gen. Stat. § 7A-29 (2015). “A final judgment is one that determines the entire controversy between the parties, leaving nothing to be decided in the trial court.” *Ratchford v. C.C. Mangum, Inc.*, 150 N.C. App. 197, 199, 564 S.E.2d 245, 247 (2002) (citations omitted).

Here, Kirkman filed a notice of appeal with the Full Commission purporting to appeal Deputy Commissioner Harris's opinion and award to the Court of Appeals. Despite the styling of this notice of appeal, the Commission treated Kirkman's appeal as one to the Full Commission, pursuant to N.C. Gen. Stat. § 97-85. Kirkman did not object and filed her brief with the Commission accordingly. The Full Commission subsequently modified Deputy Commissioner Harris's opinion and disposed of

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Kirkman's claim in its entirety. Thus, the opinion and award of the Full Commission constitutes the final order of the Commission in this case. Because the opinion of Deputy Commissioner Harris is not a final order from the Industrial Commission, this Court is without subject matter jurisdiction to decide any argument based on that order. N.C. Gen. Stat. § 7A-29; *see also Martin v. Piedmont Asphalt & Paving*, 337 N.C. 785, 788, 448 S.E.2d 380, 381 (1994) (noting that the Court of Appeals correctly determined that it had no jurisdiction to hear an appeal of an award entered by a deputy commissioner in a case that was subsequently reviewed by the Full Commission).

2. *The Commission's conclusion that Kirkman did not prove causation*

Kirkman takes issue with the Commission's conclusion of law that she sustained an injury by accident arising out of and in the course of her employment, arguing that this conclusion means she sustained a *compensable* injury in the CRDT training. Kirkman significantly misinterprets this conclusion of the Full Commission. The conclusion states that "[a]lthough [Kirkman proved] that she sustained an injury by accident arising out of and in the course of the employment," she still bore the burden of proving the injury was the proximate cause of her symptoms. The opinion did not determine that Kirkman's injury was compensable. On the contrary, the Commission concluded that Kirkman did not demonstrate that the CRDT training injury caused her continuing symptoms and conditions.

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Kirkman argues that the Commission erred in this conclusion<sup>1</sup> because she “did meet her burden” of proving her symptoms were caused by the CRDT training injury by a preponderance of the evidence by offering the testimony of Dr. Isaac and physician assistant Kearns. In doing so, she conflates the standard of review of this Court with [Kirkman]’s burden of proof before the Commission.

This Court’s review of an opinion and award of the Industrial Commission “is limited to consideration of whether competent evidence supports the Commission’s findings of fact and whether the findings support the Commission’s conclusions of law.” *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (citation omitted), *reh’g denied*, 363 N.C. 260, 676 S.E.2d 472 (2009). “The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony.” *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965).

“[O]n appeal, this Court does not have the right to weigh the evidence and decide the issue on the basis of its weight.” *Hassell v. Onslow Cty. Bd. of Educ.*, 362 N.C. 299, 305, 661 S.E.2d 709, 714 (2008) (citations and internal quotation marks

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<sup>1</sup> In her brief, Kirkman assigns error to the Commission’s “conclusion of law [number] 1 that [Kirkman]’s claim was not compensable.” However, the first conclusion of law states that Kirkman sustained an injury in the course of her employment, but still bore the burden of proving that her symptoms were caused by that injury. Kirkman’s assignment of error and argument in her brief that the “accident . . . was the proximate cause of [Kirkman]’s injuries” actually address the second conclusion of law, in which the Commission determined that Kirkman did “not demonstrate that her continuing symptoms or conditions [were] causally related to the incidents of 22 February 2013.”

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omitted). Findings of fact are “conclusively established on appeal” when the appellant fails to assign any error to them. *Johnson v. Herbie's Place*, 157 N.C. App. 168, 180, 579 S.E.2d 110, 118 (citations omitted), *disc. review denied*, 357 N.C. 460, 585 S.E.2d 760 (2003).

This Court cannot reweigh the evidence to determine whether we think Kirkman presented evidence sufficient to meet her burden of proving a compensable injury by a preponderance of the evidence. *See Hassell*, 362 N.C. at 305, 661 S.E.2d at 714. Additionally, Kirkman does not assign error to any of the Commission’s findings of fact and, therefore, the Commission’s findings are binding on appeal. We are thus limited to determining whether the Commission’s findings support its conclusion that Kirkman did not prove her continuing symptoms were caused by the injury during CRDT training. *See Wyatt v. Sharp*, 239 N.C. 655, 658, 80 S.E.2d 762, 764 (1954). We hold that they do.

The plaintiff bears the burden of proving causation as an element of compensability. *Whitfield v. Lab. Corp. of America*, 158 N.C. App. 341, 350, 581 S.E.2d 778, 784 (2003). “[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.” *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980) (citations omitted). “To establish the

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necessary causal relationship for the injury to be compensable under the Act, the evidence must be such as to take the case out of the realm of conjecture and remote possibility.” *Whitfield*, 158 N.C. App. at 350, 581 S.E.2d at 785 (citations and internal quotation marks omitted).

The Commission made findings regarding the testimony of each of the medical professionals that examined Kirkman following the onset of her symptoms. The Commission did find that Ms. Kearns “testified [Kirkman]’s injuries were caused by the work injury,” but also noted in its finding that “she acknowledged that was an assumption” based on a temporal relationship. Thus, the Commission “assign[ed] no weight to this opinion.”<sup>2</sup> After examination of the testimony of Drs. Isaac, Mitchell, Clodfelter, and Lewit, the Commission found that none “offer[ed] testimony, to a reasonable degree of medical certainty, or more likely than not, that [Kirkman]’s symptoms or conditions were related to her alleged work-related injury.” Specifically, the Commission found that Dr. Isaac, the only doctor presented as an expert witness, testified that he could not provide an opinion to a degree of medical certainty that Kirkman’s symptoms were caused by the CRDT injury. Thus, the Commission found no credible evidence of causation.

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<sup>2</sup> Although the Commission did not and is not required to explain its credibility determinations, *Trivette v. Mid-South Mgmt., Inc.*, 154 N.C. App. 140, 144, 571 S.E.2d 692, 695 (2002) (citation omitted), the fact that Kirkman’s symptoms began after her CRDT training injury is not sufficient evidence to prove causation. See *Young v. Hickory Bus. Furniture*, 353 N.C. 227, 232, 538 S.E.2d 912, 916 (2000) (holding that “the maxim of ‘*post hoc, ergo propter hoc*’ is not competent evidence of causation”).

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These unchallenged findings directly support the Commission's second conclusion of law that Kirkman did not prove "that her continuing symptoms or conditions are causally related to the incidents of 22 February 2013," because she "failed to provide sufficient expert medical evidence establishing causation in this case." Therefore, the Commission did not err in concluding that Kirkman's injury was not compensable. Kirkman's argument is overruled.

The opinion and award of the Commission is

**AFFIRMED.**

Judges BRYANT and DILLON concur.

Report per Rule 30(e).