NO. COA03-897

NORTH CAROLINA COURT OF APPEALS

Filed: 7 September 2004

CHARLES McCOLLUM,
Employee,
Plaintiff-Appellee.

v.

North Carolina Industrial Commission
I.C. File No. 007481

ATLAS VAN LINES,
Employer,

LEGION INSURANCE COMPANY,
Carrier,
Defendants-Appellants.

Appeal by defendants from an opinion and award entered 2 April 2003 by the North Carolina Industrial Commission. Heard in the Court of Appeals 1 April 2004.

The Roberts Law Firm, P.A., by Joseph B. Roberts, III, for plaintiff-appellee.

Alala Mullen Holland & Cooper, P.A., by Jesse V. Bone, Jr., for defendants-appellants.

McGEE, Judge.

Atlas Van Lines (Atlas) and Legion Insurance Company (collectively defendants) appeal from an opinion and award of the North Carolina Industrial Commission (the Commission) entered 2 April 2003 finding that Charles McCollum (plaintiff) suffered an injury by accident and ordering defendants to pay plaintiff permanent total disability compensation.

The evidence before the Commission tended to show that plaintiff began working for Tru-Pak Moving Systems (Tru-Pak) in February 1993. Tru-Pak leased its trucks and drivers to

Atlas. Although Tru-Pak paid plaintiff's salary, workers' compensation coverage was provided through Atlas. On the day of plaintiff's accident, 18 August 1999, he planned to drive a distance of about 650 miles. On a portion of this trip, plaintiff was driving on Interstate 70 through the Rocky Mountains. The highest altitude plaintiff reached was 12,517 feet. However, the accident occurred at a lower altitude of about 7,000 feet.

Plaintiff testified that just before the accident, he remembered being very sleepy. Plaintiff testified that in the twenty-four hours prior to this accident, he had slept only four hours. Plaintiff turned off the heat and rolled down the window to get some fresh air. Plaintiff planned to stop for coffee at one of the next couple of exits. Plaintiff pulled into the left lane to allow two trucks to merge onto the interstate from a rest area. The trucks built up momentum and plaintiff pulled back into the right lane behind them. Plaintiff testified that "the next thing [he] knew, [he] was going down the side of the mountain." Plaintiff did not remember actually leaving the road. Plaintiff further testified that he "kn[e]w what happened." He stated that he "went to sleep. This is my honest opinion."

As plaintiff's truck left the road, the truck hit an embankment which knocked the wheels out from under the front of his truck. The truck became airborne and then slid to a stop. Plaintiff got out of the truck and sat in a sand pile as he waited for help. As a result of the accident, plaintiff's truck was totaled.

Concerning injuries, plaintiff testified that he had a knot on his head and that his chest was hurting and bruised because the left side of his chest had hit the steering wheel and bent it. Plaintiff described his chest pain as "an outside pain" and stated that he did not "feel anything beyond that."

Plaintiff was first taken to a small hospital in Vail, Colorado and then to Presbyterian/St. Luke's Medical Center (St. Luke's) in Denver. At the Vail hospital, plaintiff was given medication to calm him down. Plaintiff stayed at St. Luke's for six or seven days where the doctors put a defibrillator in plaintiff's chest. Plaintiff returned to North Carolina and was seen by additional doctors. He testified that since returning from Colorado, he had been hospitalized "probably a dozen times" because of cardiovascular problems.

Plaintiff also testified about his medical history prior to the accident. He testified that he had a mild heart attack in 1981 but was released to return to truck driving. Plaintiff also testified that he was treated for congestive heart problems in December 1997 but was again released to return to work.

Dr. Mark D. Landers (Dr. Landers) of Denver Cardiology Group treated plaintiff at St. Luke's in Denver, Colorado. Dr. Landers testified in a deposition that he suspected that plaintiff suffered ventricular tachycardia, a fast abnormal heart rhythm for the lower chamber of the heart, and that this was the cause of plaintiff's accident. Dr. Landers stated that this irregular heartbeat caused plaintiff to pass out and lose control of his truck. Dr. Landers further testified that it was "certainly possible" that fatigue and stress contributed to the likelihood of plaintiff having an episode of ventricular tachycardia. Similarly, Dr. Landers testified that driving at a high altitude "with [plaintiff's] known heart problems certainly could have been a contributing factor [to] his losing consciousness[.]"

Dr. Jose Eusebio (Dr. Eusebio) with the Sanger Clinic, a clinic specializing in heart problems, was asked in a deposition whether the combination of fatigue and altitude could explain plaintiff's loss of consciousness on 18 August 1999. Dr. Eusebio responded that "[i]t

may." Dr. Eusebio further testified that fatigue could cause loss of consciousness even in persons without cardiovascular problems.

A deputy commissioner entered an opinion and award on 8 February 2002 finding that plaintiff's loss of consciousness was due to his pre-existing heart condition and the altitude. Thus, the deputy commissioner found that plaintiff's loss of consciousness was not compensable. However, the deputy commissioner found that "[p]laintiff's driving off the road and sliding down the side of the mountain and the resulting chest contusion and atrial fibrillation sinus tachycardia [were] the result of a compensable injury by accident[.]" Thus, the deputy commissioner concluded that "[p]laintiff's compensable injury by accident resulted in the need for plaintiff to be treated and transported by EMS and treated at Vail Valley Medical Center." Accordingly, defendants were ordered to pay only the expenses for EMS and the expenses at the Vail hospital.

Plaintiff and defendants appealed to the Commission. The Commission reversed in part and affirmed in part the deputy commissioner's award. The Commission concluded that plaintiff suffered an injury by accident arising out of and in the course of his employment and awarded him permanent total disability compensation. Defendants appeal.

We note that defendants failed to present an argument in support of assignments of error numbers eight, ten, and eighteen and they are therefore deemed abandoned pursuant to N.C.R. App. P. 28(b)(6).

On appeal from an opinion and award of the Commission, our Court is "limited to reviewing whether any competent evidence supports the Commission's findings of fact and 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). "Under our Workers' Compensation

Act, 'the Commission is the fact finding body.'" *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998) (quoting *Brewer v. Trucking Co.*, 256 N.C. 175, 182, 123 S.E.2d 608, 613 (1962)). "'The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony.'" *Adams*, 349 N.C. at 680, 509 S.E.2d at 413 (quoting *Anderson v. Construction Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965)). "The facts found by the Commission are conclusive upon appeal to this Court when they are supported by competent evidence, even when there is evidence to support contrary findings." *Pittman v. International Paper Co.*, 132 N.C. App. 151, 156, 510 S.E.2d 705, 709, *disc. review denied*, 350 N.C. 310, 534 S.E.2d 596, *aff'd*, 351 N.C. 42, 519 S.E.2d 524 (1999). So long as "there is any credible evidence to support the findings, the reviewing court is bound by it." *Roman v. Southland Transp. Co.*, 350 N.C. 549, 556, 515 S.E.2d 214, 219 (1999).

Defendants first argue in multiple assignments of error that there was insufficient evidence to support the findings and conclusions that plaintiff suffered an injury by accident. Defendants rely on several cases for the assertion that "death or disability from heart disease is not an injury by accident arising out of and in the course of the employment, nor an occupational disease, so as to be compensable[.]" Although this proposition is accurate, for the reasons stated below, we nonetheless hold that the Commission did not err in concluding that plaintiff suffered an injury by accident.

"Workers' compensation 'does not provide compensation for injury, but only for injury by accident.'" *Pitillo v. N.C. Dep't of Envtl. Health & Natural Res.*, 151 N.C. App. 641, 644, 566 S.E.2d 807, 811 (2002) (quoting *O'Mary v. Clearing Corp.*, 261 N.C. 508, 510, 135 S.E.2d 193, 194 (1964) (citation omitted)).

> An accident under the workers' compensation act has been defined as "'an unlooked for and untoward event which is not expected or

> designed by the person who suffers the injury,'" and which involves "'the interruption of the routine of work and the introduction thereby of unusual conditions likely to result in unexpected consequences.'"

Pitillo, 151 N.C. App. at 645, 566 S.E.2d at 811 (quoting *Calderwood v. Charlotte-Mecklenburg Hosp. Auth.*, 135 N.C. App. 112, 115, 519 S.E.2d 61, 63 (1999), *disc. review denied*, 351 N.C. 351, 543 S.E.2d 124 (2000) (citations omitted)).

As support for defendants' argument that plaintiff did not suffer an injury by accident, they contend that no evidence indicates that plaintiff "experienced anything unusual" in that there was nothing "unusual about Plaintiff's work hours or work conditions on August 18, 1999." Defendants point to plaintiff's testimony to argue that plaintiff was accustomed to driving at high altitudes through mountains and that he was used to driving long hours.

As further support, defendants cite *Dye v. Shippers Freight Lines*, 118 N.C. App. 280, 454 S.E.2d 845 (1995), a case involving a truck driver who had a heart attack while driving his route. The plaintiff in *Dye* argued that his heart attack resulted from strenuous working conditions, including long hours, a rough ride, and equipment failure. *Dye*, 118 N.C. App. at 281, 454 S.E.2d at 847. Our Court affirmed the Commission's opinion and award which had found that the plaintiff's disabling condition resulted from a pre-existing coronary artery disease rather than from an injury by accident or occupational disease. The case before us is distinguishable on the ground that, unlike the plaintiff in *Dye*, plaintiff in our case was actually involved in a motor vehicle accident. As stated above, plaintiff's truck ran off the road and slid down an embankment. Losing control of one's vehicle is unlooked for and untoward and not expected as contemplated under the Workers' Compensation Act.

In the case before our Court, the Commission found that

> 17. On August 18, 1999, plaintiff was performing his regular job but not under his normal working conditions. On that date, as a result of the combination of plaintiff's pre-existing congestive heart failure, fatigue, and the high altitude, plaintiff experienced a syncope event while driving in a place it was unusual for him to drive. Driving at that altitude cannot be considered a part of plaintiff's regular job duties, as the trip was made only an average of six times a year. Plaintiff's employment as a commercial truck driver placed him at risk of driving at high altitudes and driving such long hours that he became exhausted and fatigued. Both conditions were sufficient to cause plaintiff's loss of consciousness.

There was evidence in the record to support this finding of fact. For example, Dr. Landers testified that he suspected that ventricular tachycardia likely caused plaintiff to pass out and that it was "certainly possible" that fatigue and stress could have added to the likelihood of plaintiff having an episode of ventricular tachycardia. Dr. Landers also testified that altitude "certainly could have been a contributing factor" in plaintiff's loss of consciousness.

We recognize that defendants attempt to analogize this case to those where an employee has a heart attack while working his or her normal job. However, this case differs in that plaintiff was performing his job when he lost consciousness and wrecked his truck. Although plaintiff's heart problems likely contributed to his loss of consciousness, there is ample evidence that fatigue and altitude also played a role. Accordingly, defendants' reliance on cases holding that heart attacks are not compensable because they are not injuries by accident arising out of employment is misplaced. Thus, defendants' first argument is overruled.

Defendants next argue in multiple assignments of error that there was insufficient evidence to support a finding that the 18 August 1999 incident materially aggravated or exacerbated plaintiff's pre-existing heart condition. More specifically, defendants emphasize plaintiff's history of heart problems and argue that the testimony of both Dr. Eusebio and Dr.

Landers was not sufficient to prove causation. However, for the reasons stated below, we find this argument unpersuasive.

Defendants cite *Holley v. Acts, Inc.*, 357 N.C. 228, 581 S.E.2d 750 (2003) to challenge the sufficiency of the testimony of the doctors in the case before our Court. In *Holley*, the North Carolina Supreme Court stated that

> [i]n cases involving "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). "However, when such expert opinion testimony is based merely upon speculation and conjecture, . . . it is not sufficiently reliable to qualify as competent evidence on issues of medical causation." *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 915 (2000). "[T]he evidence must be such as to take the case out of the realm of conjecture and remote possibility, that is, there must be sufficient competent evidence tending to show a proximate causal relation." *Gilmore v. Hoke Cty. Bd. of Educ.*, 222 N.C. 358, 365, 23 S.E.2d 292, 296 (1942) (discussing the standard for compensability when a work-related accident results in death).

Holley, 357 N.C. at 232, 581 S.E.2d at 753. In Holley, one of the plaintiff's treating physicians "made a number of comments that demonstrate[d] the speculative nature of his opinion." *Id.* at 233, 581 S.E.2d at 753. For example, when discussing what caused the plaintiff's deep vein thrombosis (DVT), the physician stated, "'[i]t's just a galaxy of possibilities.'" *Id.* Similarly, in a letter regarding the plaintiff's DVT, another physician stated that he could not say "'with *any degree of certainty* whether or not the above mentioned work injury is related to the development of [the plaintiff's] DVT.'" *Id.* at 233, 581 S.E.2d at 753-54. Accordingly, our Supreme Court held that the testimony of neither of the physicians established the required causal connection between the plaintiff's accident and her injury. *Id.* at 234, 581 S.E.2d at 754.

However, in contrast to the physicians in Holley, the testimony of Dr. Eusebio and Dr. Landers was more than mere speculation. For example, when asked at his deposition whether, to a reasonable degree of medical certainty, the accident "could or might have aggravated or exacerbated [plaintiff's] prior existing heart disease[,]" Dr. Eusebio responded, "[i]t may have. It's quite possible." Further, Dr. Eusebio was asked by defendants' counsel whether his testimony about the accident exacerbating plaintiff's condition was to a reasonable degree of medical certainty. Dr. Eusebio responded that he did not think he could confirm that but stated "there's a reasonable degree of certainty that those things all played together and caused [plaintiff] to have worsening of his heart condition." Dr. Eusebio also described the accident as something that "set off a chain of events which ultimately worsened everything." At another point in his deposition, Dr. Eusebio was asked, to a reasonable degree of medical certainty, whether the accident may have worsened plaintiff's cardiac condition. Dr. Eusebio responded affirmatively.

Similarly, Dr. Landers responded affirmatively when asked in his deposition whether plaintiff's accident could have "result[ed] in some temporary damage or some temporary aggravation of [plaintiff's] preexisting cardio condition or disease." When questioned by defendants' counsel, Dr. Landers testified that "congestive heart failure can be exacerbated" by a motor vehicle accident. Dr. Landers continued his testimony and concluded that "[b]asically all of [plaintiff's] heart conditions could have been exacerbated temporarily from this accident."

We hold that the testimony by these doctors was more than mere speculation or conjecture. Their testimony constitutes competent evidence to support the finding that plaintiff's pre-existing heart condition was aggravated or exacerbated by the 18 August 1999 accident. Accordingly, we overrule this argument.

Defendants next argue that there was insufficient evidence to support a finding that plaintiff's pre-existing heart condition was aggravated or exacerbated to the extent that it necessitated plaintiff's extensive treatment, including the implantation of the defibrillator in Denver, the surgeries, and the implantation of the second pacemaker and defibrillator in North Carolina. Specifically, defendants challenge the portion of finding number fifteen which states that "Dr. Eusebio also causally related the implantation of the defibrillators to the accident[.]" Defendants also challenge finding eighteen which states that the defibrillators and subsequent treatment were necessitated by the 18 August 1999 accident. However, for the reasons stated below, we find this argument unpersuasive.

Testimony by Dr. Eusebio supports finding number fifteen. Dr. Eusebio was asked whether the defibrillator would have been implanted if plaintiff had not had the 18 August 1999 accident. Dr. Eusebio responded that he did not "know that anybody would have put it in" had the accident not occurred. He testified that he sees "lots of patients with hearts as bad as [plaintiff's] who don't have defibrillators, for whom we don't prescribe defibrillators." Further, Dr. Eusebio was asked whether it would be accurate to say, "but for the wreck, [plaintiff] probably would not have had the surgery in Colorado?" Dr. Eusebio responded, "[r]ight, he would not have had the surgery in Colorado." This testimony is sufficient to support the disputed portion of finding number fifteen.

In addition, testimony by Dr. Landers supported the findings that the treatment plaintiff received was appropriate and necessitated by the accident. For example, when Dr. Landers was asked whether the treatment plaintiff received in Colorado, including implantation of the first defibrillator, was appropriate for the injuries plaintiff sustained, he responded, "[f]rom a cardiovascular standpoint, I felt that they were." He also stated that he "would not have put in a

defibrillator if [plaintiff] had not had an episode of passing out, simply for someone who came in with coronary artery disease and heart muscle dysfunction." Dr. Landers further testified that, given plaintiff's symptoms, it was "certainly appropriate" for the defibrillator to subsequently be replaced with another defibrillator with a pacemaker. Accordingly, this argument is overruled.

Defendants last argue in assignment of error number seven that the Commission erred in finding that Tru-Pak had actual knowledge of plaintiff's pre-existing cardiovascular disease and that such knowledge was imputed to Atlas. Within this argument, defendants also contend that plaintiff should be barred from receiving workers' compensation benefits because plaintiff made a false statement about his health condition at the time he was hired by Tru-Pak.

The disputed portion of finding number sixteen states that "Tru-Pak had actual knowledge of plaintiff's pre-existing cardiovascular disease, including plaintiff's hospitalization in December 1997 for congestive heart failure, and such knowledge is imputed to Atlas Van Lines." We find that competent evidence in the record supports this finding. For example, Wallace Laughter (Laughter) testified that he worked for Tru-Pak for twenty-six years, had dealings with Atlas, and knew plaintiff. Laughter testified that he was aware that plaintiff had been hospitalized in1997 and that Tru-Pak was also aware of the hospitalization. He further testified that "Tru-Pak told [him] what was going on" and that John Segal, the owner of Tru-Pak, had "personally told" Laughter to clean out plaintiff's truck because plaintiff "was in the hospital, he had lung poisoning or something[.]" On cross-examination, Laughter stated that plaintiff did not tell him about any heart problems in 1997. However, Laughter testified that plaintiff's wife told Laughter that carbon monoxide "was causing [plaintiff] heart problems" and that fumes "started this heart attack thing[.]" Laughter further testified that he faxed plaintiff's hospital release to Tru-Pak because Atlas had apparently called Tru-Pak requesting the release.

This evidence supports the finding that both Atlas and Tru-Pak were aware that plaintiff had been hospitalized in 1997. Accordingly, we find defendants' argument to be without merit.

As stated above, defendants also contend that plaintiff should be barred from recovery due to allegedly false statements at the time of hire. Defendants urge this Court to adopt a three-part test from 3 *Larson's Workers' Compensation Law*, §66.04 (2001) which would bar recovery based on misrepresentations made by a potential employee regarding his or her physical condition. However, this same argument was made by the defendants in *Hooker v. Stokes-Reynolds Hosp.*, 161 N.C. App. 111, 587 S.E.2d 440 (2003), *disc. review denied*, 358 N.C. 234, 594 S.E.2d 192 (2004). In *Hooker*, although our Court did not reach the merits of the defendants' argument, our Court noted that "neither the Industrial Commission nor this Court has the authority to adopt such a defense, if it is not found in the Workers' Compensation Act. Our Supreme Court 'has warned against any inclination toward judicial legislation' in the construction of the Workers' Compensation Act." *Hooker*, 161 N.C. App. at 115, 587 S.E.2d at 443 (quoting *Johnson v. Southern Industrial Constructors*, 347 N.C. 530, 536, 495 S.E.2d 356, 359 (1998)). Accordingly, defendants' final argument is without merit.

Affirmed.

Judges CALABRIA and STEELMAN concur.

Report per Rule 30(e).