

Affirmed  
Author: Ballance  
Concurring: Mauretic  
Riggsbee

NO. COA00-534

NORTH CAROLINA COURT OF APPEALS

Filed: 3 July 2001

JAMES JOSEPH PAGE,  
Employee,  
Plaintiff

v.

MOSES H. CONE  
MEMORIAL HOSPITAL,  
Employer

North Carolina  
Industrial Commission  
I.C. No. 048818

SELF-INSURED (KEY RISK  
MANAGEMENT SERVICES,  
Servicing Agent),  
Defendant

Appeals by plaintiff and defendant from judgment filed 5  
January 2000 by the North Carolina Industrial Commission  
(Commission). Heard in the Court of Appeals 14 March 2001.

*Barron and Berry, L.L.P., by Vance Barron, Jr., for plaintiff-  
appellant-appellee.*

*Smith Helms Mulliss & Moore, L.L.P., by Caroline H. Lock, for  
defendant-appellee-appellant.*

WALKER, Judge.

The underlying injury prompting plaintiff's claims in this  
case occurred on 10 May 1990, when he suffered a compensable injury  
to his back while attempting to lift a patient. On 19 December  
1994, the Commission approved a Form 26 awarding plaintiff  
temporary total disability for a 27.5 percent permanent partial  
impairment to his back. On 2 July 1996, the parties entered into  
a Form 26 supplemental agreement whereby defendant agreed to

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increase plaintiff's disability rating five percent to 32.5 percent. The Form 26 supplemental agreement was approved by the Commission on 28 February 1997.

Thereafter, on 12 November 1997, plaintiff filed a request for a hearing seeking compensation for additional medical services. Plaintiff claimed he had been wrongfully refused compensation for medical treatment of his depression, bowel and bladder dysfunction, male impotence and chronic back pain, each of which was causally related to his compensable back injury.

The deputy commissioner concluded that plaintiff was only entitled to receive treatment for his back pain. Plaintiff appealed the deputy commissioner's decision to the Full Commission and defendant contemporaneously filed a motion to set aside the parties' Form 26 supplemental agreement.

After a hearing, the Commission made findings which include, in pertinent part:

1. On 25 August 1995, Deputy Commissioner Scott Taylor entered an Opinion and Award finding plaintiff had suffered a compensable injury to his back. Deputy Commissioner Taylor denied plaintiff's claim for a ten percent penalty, denied plaintiff's request that defendant-employer pay for a drafting table and equipment, denied plaintiff's request for an Order requiring defendant to change administrators and allowed plaintiff's request to change his treating physician to James Califf.

2. On 18 May 1996, the Full Commission affirmed Deputy Commissioner Taylor's Opinion and Award. On 12 November 1997, plaintiff filed a Form 33 request for hearing seeking medical coverage for the following: depression, bowel and bladder dysfunction, male impotence, and chronic back pain.

3. Plaintiff has abandoned that portion of his appeal from the Opinion and Award of the Deputy Commissioner alleging error in the denial of his claim for dental caries.

4. Plaintiff asserts that he suffers from male impotence or erectile dysfunction. However, plaintiff's complaints have been inconsistent and sporadic. Plaintiff has a history of genitourinary complaints. Two urologists, two orthopaedic surgeons, a neurologist and a neurosurgeon have been unable to give an opinion to a reasonable degree of medical certainty that plaintiff's impotence or erectile dysfunction are causally related to his compensable injury.

5. Plaintiff also contends that his depression and resulting counseling or psychotherapy are related to his compensable injury. Plaintiff has a life-long history of emotional and psychological problems relating to his childhood obesity, his parents' alcoholism, his recognition of his sexuality and his parents' inability to deal with that recognition, his father's untimely death the day after plaintiff and his father had a heated argument relating to his sexuality, his attention deficit disorder, and other emotional problems.

6. There is conflicting evidence as to the cause of plaintiff's current depression. However, there is insufficient evidence of record from which to determine by its greater weight that plaintiff's depression is causally related to his compensable injury.

7. Plaintiff's bowel and bladder problems are related to his compensable injury. On 2 July 1996, the parties submitted a Form 26 Supplemental Agreement as to Payment of Compensation Pursuant [sic] to N.C. Gen. Stat. § 97-82 in which defendants agreed to increase plaintiff's permanent partial disability rating from 27.5% to 32.5%. In a letter dated 24 June 1996, Dr. Mark W. Roy stated that the increase to plaintiff's disability rating was the result of "increased bowel and bladder dysfunction." The Form 26 was approved by the Commission on 28 February 1997.

8. Defendants' allegations of mutual mistake regarding the Form 26 Agreement are not supported by the evidence, nor is there sufficient evidence of fraud, misrepresentation, or undue influence on the part of either party in entering into the Agreement.

9. Plaintiff is entitled to medical treatment that directly relates to his back injury and related bowel and bladder dysfunction so long as this treatment would effectuate a cure, give relief or lessen plaintiff's period of disability. This treatment would not include anti-depressant medications and psychotherapy relating to plaintiff's depression.

10. Defendants have not defended this action without reasonable ground.

Based on these findings, the Commission concluded:

1. Plaintiff's complaints relating to male impotence and depression are not causally related to plaintiff's compensable back injury of 10 May 1990, and thus he is not eligible for compensation based upon these complaints. N.C. Gen. Stat. § 97-25.

2. The Form 26 Agreement approved by the Commission on 28 February 1997 constitutes an award of the Commission on the issue of compensability. N.C. Gen. Stat. § 97-82(b). As such, the Form 26 is binding on the parties and may not be set aside absent a showing of fraud, misrepresentation, mutual mistake, or undue influence. *Glenn v. McDonald's*, 109 N.C. App. 45, 425 S.E.2d 727 (1993). Defendants have failed to present evidence of fraud, misrepresentation, mutual mistake, or undue influence; therefore, the Agreement is binding and enforceable. *Id.*

3. Plaintiff is entitled to receive treatment for his compensable back injury and the related bowel and bladder dysfunction. However, this does not include psychological or psychiatric treatment for depression. N.C. Gen. Stat. § 97-25.

4. Plaintiff is not entitled to attorney's fees. Defendants have not defended this action without just cause. N.C. Gen. Stat. § 97-88.1; *Sparks v. Mountain Breeze Restaurant*, 55 N.C. App. 663, 286 S.E.2d 575 (1982).

Both parties appealed the Commission's opinion and award. Plaintiff contends that the Commission erred in concluding that insufficient evidence existed that his depression and male impotence were causally related to his compensable back injury and in denying his claim for attorney's fees. Plaintiff further argues the Commission failed to consider evidence that his depression was a pre-existing condition which was "aggravated or accelerated" by the injury.

Defendant contends that the Commission erred in failing to set aside the Form 26 supplemental agreement, in overruling defendant's objections to plaintiff's examination of physicians, and in concluding that plaintiff's bowel and bladder dysfunction was causally related to his compensable back injury.

This Court's review of Commission decisions is limited to two questions: (1) whether competent evidence exists to support the Commission's findings, and (2) whether the Commission's findings justify its conclusions and award. *Simmons v. N.C. Dept. of Transportation*, 128 N.C. App. 402, 496 S.E.2d 790 (1998). "Findings of fact by the Commission, if supported by competent evidence, are conclusive on appeal even though there is evidence which would support a contrary finding." *McGee v. North Carolina Dep't of Revenue*, 135 N.C. App. 319, 324, 520 S.E.2d 84, 87 (1999). On appeal, this Court "does 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." *Anderson v. Construction Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965).

Here, the Commission considered evidence that plaintiff had an extensive history of emotional and psychological problems including behavioral problems, personality disorders and depression preceding his compensable back injury. The Commission acknowledged in its opinion and award that "[t]here is conflicting evidence as to the cause of plaintiff's current depression;" however, the Commission weighed this evidence and concluded that it did not support a finding that plaintiff's depression was causally related to his compensable back injury. We hold this finding is supported by competent evidence and is conclusive on appeal.

Furthermore, there is no evidence the Commission failed to consider plaintiff's argument that his depression was a pre-existing condition which was "aggravated or accelerated" by his back injury. In *Wilkins v. J.P. Stevens & Co.*, 100 N.C. App. 742, 398 S.E.2d 66 (1990), the plaintiff argued that the Commission failed to make a finding as to whether his exposure to cotton dust was an aggravating factor in the development of respiratory problems. This Court held that a finding by the Commission that plaintiff's exposure was not a "significant contributing factor" in his disease was "tantamount to a finding that his disease was not aggravated by his exposure to cotton dust." *Id.* at 745, 398 S.E.2d at 68. Further, this Court stated that it was not necessary for the

Commission to make two separate findings regarding causation and aggravation in order to evidence its consideration of the issue.

*Id.*

Similarly, in this case, the Commission found "there is insufficient evidence of record from which to determine by its greater weight that plaintiff's depression is causally related to his compensable injury." Thus, the Commission properly determined that plaintiff's depression was not aggravated or accelerated by reason of his compensable injury.

Plaintiff next challenges the Commission's finding that there was insufficient evidence to establish that his male impotence was causally related to his compensable back injury. In particular, plaintiff asserts that the Commission failed to make sufficient findings based on the testimony of Dr. Mark Roy, plaintiff's neurosurgeon, to whom plaintiff had continually complained of erectile dysfunction.

The degree of proof required of plaintiff is a showing that the "greater weight" of the evidence or a "preponderance of the evidence" supports causation. *Phillips v. U.S. Air, Inc.*, 120 N.C. App. 538, 541, 463 S.E.2d 259, 261 (1995). In order to meet this burden, expert testimony regarding causation "must be such as to take the case out of the realm of conjecture and remote possibility." *Gilmore v. Board of Education*, 222 N.C. 358, 365, 23 S.E.2d 292, 296 (1942). While experts need not base their testimony on medical certainties in order to establish causation, they must "indicate a reasonable scientific probability that the

stated cause produced the stated result." *Cooke v. P.H. Glatfelter/Ecusta*, 130 N.C. App. 220, 224, 502 S.E.2d 419, 422 (1998). Furthermore, our Supreme Court has held that a physician's failure to adequately explore alternative causes of the injury is evidence that a physician's opinion is "based solely on supposition and conjecture." *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 233, 538 S.E.2d 912, 917 (2000). Where such testimony is the sole evidence of causation, it is "incompetent and insufficient" to support a finding of causation. *Id.*

In this case, Dr. Roy testified that he had not undertaken a "comprehensive evaluation" of plaintiff's complaints of male impotence. In fact, Dr. Roy admitted that at the time he was treating plaintiff, he felt plaintiff's male impotence would "best be pursued with a urologist." He further testified that "[i]mpotence is a rather large problem, and there can be a number of contributions to it. And I don't pretend to be very good at evaluating them other than as they apply to compression of the spine." Finally, when asked if it was probable that plaintiff's back injury was the cause of his male impotence, Dr. Roy stated that "I would say it's at -- at least possible. Probable, tough to say."

The Commission found that Dr. Roy, as with plaintiff's other physicians, was "unable to give an opinion to a reasonable degree of medical certainty that plaintiff's impotence or erectile dysfunction are [sic] causally related to his compensable injury." We conclude the Commission properly determined that plaintiff's



evidence, including Dr. Roy's testimony, was insufficient to support a finding that plaintiff's male impotence was caused by his compensable back injury.

Plaintiff's final assignment of error is that the Commission improperly denied his claim for attorney's fees. The Commission is authorized to award attorney's fees pursuant to N.C. Gen. Stat. § 97-88.1 if it finds the hearing was defended "without reasonable ground." N.C. Gen. Stat. § 97-88.1 (1999). The decision to award such fees is within the discretion of the Commission. *Wilkins v. J.P. Stevens & Co.*, 100 N.C. App. 742, 398 S.E.2d 66 (1990). The Commission found that "[d]efendants have not defended this action without reasonable ground." In light of the Commission's decision in this case, we cannot find the Commission abused its discretion in denying plaintiff's request for attorney's fees.

Turning to defendant's assignments of error, defendant first asserts that the Commission erred in its conclusion that the parties' Form 26 supplemental agreement is binding on the issue of plaintiff's bowel and bladder dysfunction being causally related to his compensable back injury. Alternatively, defendant claims the Commission should have granted its motion to set aside the agreement on the basis that there was evidence of fraud, misrepresentation and mutual mistake.

N.C. Gen. Stat. § 97-17 (1999) provides that the employee and employer may make settlements as to compensation and "no party to any agreement for compensation approved by the Industrial Commission shall thereafter be heard to deny the truth of the

matters therein set forth, unless it shall be made to appear to the satisfaction of the Commission that there has been error due to fraud, misrepresentation, undue influence or mutual mistake, in which event the Industrial Commission may set aside such agreement." Furthermore, our Supreme Court has held a Form 26 is binding on the parties and "as conclusive as if made upon a determination of the facts in an adversary proceeding." *Pruitt v. Publishing Co.*, 289 N.C. 254, 258, 221 S.E.2d 355, 358 (1976).

Notwithstanding these principles, defendant asserts that the Form 26 should not have a binding effect as to plaintiff's bowel and bladder dysfunction because those problems were not at issue when the agreement was reached. However, in his letter of 24 June 1996, Dr. Roy stated that in his opinion plaintiff's permanent partial disability rating had increased from 27.5 percent to 32.5 percent. This rating increase was due to plaintiff's "increased bowel and bladder dysfunction." As a result of Dr. Roy's assessment, the parties executed a Form 26 supplemental agreement which increased plaintiff's permanent partial disability rating from 27.5 percent to 32.5 percent on 2 July 1996. Thus, defendant is now precluded from arguing plaintiff's bowel and bladder dysfunction is not related to plaintiff's compensable injury by N.C. Gen. Stat. § 97-17.

Further, the Commission did not err in finding defendant produced insufficient evidence that the Form 26 supplemental agreement was a product of fraud, misrepresentation or mutual mistake. Defendant argues that later tests revealed that

plaintiff's bowel and bladder dysfunction were not a result of his compensable back injury; thus, the Form 26 supplemental agreement was made as the result of mutual mistake. The defendant failed to produce evidence that it was misled or somehow mistaken as to plaintiff's medical history or his symptoms. The plaintiff had continually maintained that his bowel and bladder dysfunction were related to his compensable back injury. Therefore, any mistake on the part of defendant in agreeing to the Form 26 supplemental agreement cannot be said to be a mutual mistake of the parties. Thus, the Commission did not err in finding "[d]efendant's allegation of mutual mistake regarding the Form 26 Agreement are not supported by the evidence, nor is there sufficient evidence of fraud, misrepresentation, or undue influence on the part of either party in entering into the agreement."

In a related argument, defendant next contends the Commission erred in concluding plaintiff's bowel and bladder dysfunction was causally related to his compensable back injury. However, as previously discussed above, N.C. Gen. Stat. § 97-17 prevents the parties to such an agreement from denying the "truth of the matters therein set forth" absent fraud, misrepresentation, undue influence or mutual mistake. We agree with the Commission that the Form 26 supplemental agreement was not the product of fraud, misrepresentation, undue influence or mutual mistake; thus, it is "as conclusive as if made upon a determination of the facts in an adversary proceeding." *Pruitt v. Publishing Co.*, 289 N.C. 254, 258, 221 S.E.2d 355, 358 (1976). Therefore, the Commission

correctly concluded that plaintiff's bowel and bladder dysfunction was causally related to his compensable back injury on the basis of the Form 26 supplemental agreement.

After careful review, we deem defendant's remaining assignments of error to be without merit.

Affirmed.

Judges BIGGS and BRYANT concur.

Report per Rule 30(e).