NO. COA12-871
NORTH CAROLINA COURT OF APPEALS

Filed: 15 January 2013

CRAIG L. MURPHY,
Employee,
Plaintiff-Appellant,

v.

North Carolina
Industrial Commission
I.C. No. 062227

THE GOODYEAR TIRE & RUBBER COMPANY,
Employer,

LIBERTY MUTUAL INSURANCE GROUP,
Carrier,
Defendants-Appellees.

Appeal by Plaintiff from opinion and award entered 27 March 2012 by the North Carolina Industrial Commission. Heard in the Court of Appeals 27 November 2012.

Law Offices of Kathleen G. Sumner, by Kathleen G. Sumner, for Plaintiff-Appellant.

Cranfill, Sumner & Hartzog, L.L.P., by Robin H. Terry, Michael C. Connell, and Ashley Baker White, for Defendants-Appellees.

McGEE, Judge.

Craig L. Murphy (Plaintiff) initiated this action by filing a Form 18 with his employer, The Goodyear Tire & Rubber Company, on 19 March 2002, giving notice of Plaintiff's claim arising from a workplace accident that occurred on 10 April 2000. Plaintiff identified his injury as a "[b]urn and crush injury to left arm, hand." Plaintiff filed a Form 33, dated 19 May 2009, requesting that his claim be assigned for a hearing. In the Form 33, Plaintiff also alleged that his back had been "twisted" in the 10 April 2000 accident. Plaintiff's claim was heard before Deputy Commissioner Myra L. Griffin on 21 September 2010. The deputy commissioner entered an opinion and award dated 30 September 2011, in which she concluded Plaintiff had failed to establish that his back condition was related to his 10 April 2000 accident. Plaintiff appealed to the Industrial Commission (the Commission). The Commission entered and opinion and award on 27 March 2012, in which it also concluded that Plaintiff had failed to establish a causal relationship between his 10 April 2000 accident and his back condition. Commissioner Christopher Scott filed a dissenting opinion. Plaintiff appeals.

The undisputed findings of fact in the Commission's opinion and award show that Plaintiff was employed by The Goodyear Tire & Rubber Company (Employer) as a gum calendar operator on 10 April 2000. Plaintiff was standing on a platform on a gum

calendar machine when the platform collapsed and Plaintiff fell into the machine. Plaintiff's left hand was caught between two sets of rollers, and his left arm was pulled into the machine. Another gum calendar operator attempted to reverse the machine, but accidentally caused the machine to go forward, which caused Plaintiff to be drawn further into the machine. Plaintiff was trapped in the machine for thirty minutes and sustained severe burn injuries to his left arm.

Plaintiff was taken to the UNC Burn Center in Chapel Hill, where he underwent procedures administered by Dr. Michael Peck. Dr. Peck placed Plaintiff on morphine and Percocet for pain. Thereafter, Plaintiff was required to undergo numerous skin graft procedures and, at the time of the 21 September 2010 hearing before the deputy commissioner, Plaintiff had undergone twenty-six surgeries, including multiple skin graft procedures. Plaintiff has regained only minimal use of his left arm.

Plaintiff began treatment with Dr. Michael Sharp (Dr. Sharp) on 14 June 2000. Dr. Sharp performed acupuncture treatment on Plaintiff and "administered trigger points to [P]laintiff's upper back, neck, and calves[,]" on 28 June 2000. Plaintiff was treated by Dr. William Blau (Dr. Blau) for pain management "associated with left arm injury and insomnia" on 24 April 2001. Plaintiff again presented to Dr. Sharp on 23 May

2001, complaining of low back pain "which [Plaintiff] attributed to riding in the car for 8 hours." Dr. Sharp treated Plaintiff for approximately five months during 2001. Thereafter, Plaintiff did not return to Dr. Sharp until July 2006.

Plaintiff returned to Dr. Blau on 11 December 2001 and again complained of arm pain and insomnia. Plaintiff also complained of "'chronic back pain since his injury.'" Plaintiff also presented to Dr. Anthony DeFranzo (Dr. DeFranzo), a plastic surgeon, on 27 November 2002. Dr. DeFranzo provided treatment to Plaintiff's left arm, including laser surgery. Plaintiff sought treatment from Dr. Toby Okons (Dr. Okons) on 27 August 2009 for back pain and diabetes. Dr. Okons referred Plaintiff to a pain clinic and to a neurologist for Plaintiff's back pain. The evidence presented to the Commission, including the opinion testimony of Plaintiff's physicians, will be discussed in further detail below.

Issues on Appeal

Plaintiff raises on appeal the issues of whether: (1) the Commission erred as "as a matter of law when it concluded that [Plaintiff] did not sustain a compensable back injury by accident or specific traumatic incident[;]" and (2) the Commission erred in holding that Plaintiff's "evidence did not rise above the level of mere speculation and conjecture when the

medical opinions were given within a reasonable degree of medical certainty[.]"

Standard of Review

> [O]n appeal from an award of the Industrial Commission, review 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. This "court's duty goes no further than to determine whether the record contains any evidence tending to support the finding."

Richardson v. Maxim Healthcare/Allegis Grp., 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (citation omitted). "The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Anderson v. Construction Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965). Plaintiff states that "where there is no dispute over the relevant facts, a lower court's interpretation of statutory interpretation will be reviewed de novo on appeal . . . . Therefore, the de novo standard of review is appropriate in this case." Reviewing Plaintiff's brief, we find that Plaintiff challenges none of the Commission's findings of fact and, therefore, the Commission's findings of fact are binding on appeal.

Compensable Back Injury

Plaintiff argues that the Commission erred by concluding that Plaintiff did not suffer a compensable back injury on 10 April 2000. Plaintiff asserts: "The medical evidence from [Plaintiff's] treating physicians supports this conclusion, [D]efendants presented no conflicting medical opinions, and there is no evidence that [Plaintiff's] condition was due to his intentional conduct." However, as stated above, the Commission made the following unchallenged findings of fact:

> 9. On December 11, 2001, [P]laintiff presented to Dr. Blau with left upper extremity pain, insomnia, and "chronic back pain since his injury". Plaintiff described his low back pain was as severe as his left upper extremity pain. Dr. Blau noted that he did not recall [P]laintiff mentioning any low back pain prior to this visit. Dr. Blau recommended lumbar spine films, which he intended to review the next visit.
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> 14. Dr. Sharp stated he began to understand the severity of the back component of [P]laintiff's problems about a year after [P]laintiff's accident. Dr. Sharp is a board certified pediatrician. He left UNC Hospitals to open an alternative medicine clinic in which he specializes in functional medicine. Dr. Sharp opined to a reasonable degree of medical certainty that [P]laintiff's back problems were materially and directly caused by [P]laintiff's compensable April 10, 2000 workplace accident.
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> 17. Dr. Okons is board certified in internal

medicine. During his treatment, [P]laintiff did not relate his back problems to any mechanism of injury. Dr. Okons was unable to offer an opinion regarding a causal connection between [P]laintiff's back problems and his compensable accident of April 10, 2000.

18. Dr. DeFranzo is an expert in plastic and reconstructive surgery. During the course of his treatment, [P]laintiff did not express any complaints of back pain. He provided treatment for [P]laintiff's left arm only and would not be in a position to express an opinion regarding a causal connection between [P]laintiff's back problems and his compensable accident of April 10, 2000. Dr. DeFranzo would defer an opinion on causation to an expert in the field of orthopedics and/or neurology.

19. In June of 2000, Dr. Sharp administered multiple trigger points to [P]laintiff's upper back, neck, and calves. In July of 2000, there is a report of cervical and scapular pain to Dr. Sharp. However, [P]laintiff does not report low back pain to any of his physicians until approximately one year after the accident. On May 23, 2001, [P]laintiff reports low back pain to Dr. Sharp, which he attributes to riding in a car to the mountains for eight hours. The first documented report of low back pain that [P]laintiff relates to the April 10, 2000 accident is in the medical record of Dr. Blau dated December 11, 2001.

20. The Full Commission finds [P]laintiff has failed to establish by the preponderance of the evidence that he sustained an injury to his back by accident or a specific traumatic incident of the work assigned arising out of and in the course of his employment with defendant-employer on April 10, 2000.

> 21. Notwithstanding the testimony from Dr. Sharp which is given less weight in this opinion as he has only practiced alternative intervention medicine since the mid-1990s and who practiced in pediatrics prior to that, and given [P]laintiff's lack of back-related complaints to Drs. Peck, Blau, and DeFranzo, [P]laintiff has not met his burden of showing by a preponderance of the evidence in light of all the available evidence that his back condition is a direct and natural result of the incident of April 10, 2000, or that the incident of April 10, 2000, materially exacerbated or aggravated a pre-existing back condition.

The essence of Plaintiff's argument is that, because Dr. Sharp opined as to causation and the remaining doctors either deferred to Dr. Sharp's opinion or declined to opine themselves, the Commission erred as a matter of law in making findings and conclusions that contradicted Dr. Sharp's opinion. However, we note that "[t]he plaintiff in a workers' compensation case bears the burden of initially proving each and every element of compensability, including causation." *Whitfield v. Laboratory Corp. of Am.*, 158 N.C. App. 341, 350, 581 S.E.2d 778, 784 (2003). And, while "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.* at 341, 581 S.E.2d at 785 (citations and quotation marks omitted), the Commission is still

the ultimate finder of fact. *See, e.g., Cooper v. Cooper Enters., Inc.*, 168 N.C. App. 562, 564, 608 S.E.2d 104, 106 (2005) ("The Industrial Commission is the 'sole judge of the weight and credibility of the evidence,' and this Court '"does not have the right to weigh the evidence and decide the issue on the basis of its weight."'" (citations omitted)).

The Commission is bound to consider all competent evidence, but it is entitled to weigh that evidence as it sees fit. "We re-emphasize that the Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony; it may accept or reject all of the testimony of a witness; it may accept a part and reject a part." *Ballenger v. ITT Grinnell Industrial Piping*, 83 N.C. App. 55, 57, 348 S.E.2d 814, 815 (1986) *aff'd*, 320 N.C. 155, 357 S.E.2d 683 (1987). "The proper view is that the Commission must weigh the evidence, and as the sole judge of credibility and weight, may then find in favor of either plaintiff or defendant." *Id.*

"The Commission 'is the sole judge of the credibility of the witnesses and the weight to be given to their testimony, and may reject a witness' testimony entirely if warranted by disbelief of that witness.'" *Pittman v. International Paper Co.*, 132 N.C. App. 151, 156, 510 S.E.2d 705, 709 (1999) (citation omitted). "However, even though the Commission may

choose not to believe some evidence, it cannot 'wholly disregard or ignore competent evidence' and must at least consider and evaluate all of the evidence before rejecting it." *Id.* (citation omitted). "[I]t is well-established that the Commission may accept or reject the testimony and opinions of any witness, even if that testimony is uncontradicted." *Nobles v. Coastal Power & Elec., Inc.*, 207 N.C. App. 683, 693, 701 S.E.2d 316, 323 (2010).

In the present case, the Commission clearly weighed Dr. Sharp's deposition testimony and considered it, particularly by including among its findings of fact a finding that Dr. Sharp "opined to a reasonable degree of medical certainty that [P]laintiff's back problems were materially and directly caused by [P]laintiff's compensable April 10, 2000 workplace accident." However, the Commission also directly stated in its findings that Dr. Sharp's opinion was "given less weight in this opinion as he has only practiced alternative intervention medicine since the mid-1990s and who practiced in pediatrics prior to that[.]"

As stated above, it is the Commission's prerogative to review the evidence and make determinations of weight and credibility with respect to that evidence, and it is not our role to re-evaluate those determinations. The Commission went on to weigh Dr. Sharp's opinion against "[P]laintiff's lack of

back-related complaints to Drs. Peck, Blau, and DeFranzo[.]" The Commission ultimately found that "[P]laintiff ha[d] not met his burden of showing by a preponderance of the evidence in light of all the available evidence that his back condition [was] a direct and natural result of the incident on April 10, 2000[.]" While the evidence is to be viewed in the light most favorable to the employee, *Doggett v. Warehouse Co.*, 212 N.C. 599, 194 S.E. 111 (1937), we nevertheless find that the unchallenged and binding findings of fact do support the Commission's conclusion in this case. While we recognize that Plaintiff suffered a horrific injury on 10 April 2000, we find no error as a matter of law in the Commission's finding regarding causation. Plaintiff's argument is therefore without merit.

Speculation and Conjecture

Plaintiff next argues the Commission erred by holding that Plaintiff's evidence was mere speculation and conjecture. In this argument, Plaintiff directs our attention to the following conclusion of law by the Commission:

> Based upon the preponderance of the entire evidentiary record, [P]laintiff has produced insufficient evidence to prove that his back condition is a direct and natural result of any incident that took place on April 10, 2000, or that any incident that took place on April 10, 2000 materially exacerbated or aggravated a preexisting back condition.

> N.C. Gen. Stat. §97-2(6); *Holley v. ACTS, Inc.*, 357 N.C. 228, 581 S.E.2d 750 (2003); *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 538 S.E.2d 912 (2000); *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 265 S.E. 2d 389 (1980); *Peagler v. Tyson Foods, Inc.*, 138 N.C. App. 593, 532 S.E.2d 207 (2000). To establish causation, the evidence must rise above the level of mere speculation and conjecture. *Holley*, 357 N.C. 228, 581 S.E.2d 750 (2003).

Plaintiff argues that this conclusion of law is incorrect because Dr. Sharp testified with a reasonable degree of medical certainty and, therefore, was not speculating. We disagree. First, in that conclusion, the Commission does not state that it considered Dr. Sharp's opinion mere speculation or conjecture. Rather, as discussed above, the Commission considered Dr. Sharp's opinion but gave it little weight. The remaining opinions regarding causation were inconclusive. The Commission stated clearly in its conclusion of law that Plaintiff "produced insufficient evidence to prove" causation "[b]ased upon the preponderance of the entire evidentiary record." Weighing the evidence in this manner is the role of the Commission and not the role of this Court. We therefore find Plaintiff's argument without merit.

Affirmed.

Judges HUNTER, Robert C. and ELMORE concur.

Report per Rule 30(e).