NO. COA10-1532
NORTH CAROLINA COURT OF APPEALS

Filed: 6 September 2011

ROBERT BELCH, Employee,
Plaintiff

v.

North Carolina Industrial Commission
I.C. Nos. 093568 & 793827

DELHAIZE AMERICA, INC., d/b/a/ FOOD LION, LLC, Employer, SELF-INSURED (RISK MANAGEMENT SERVICES, INC., Servicing Agent),
Defendant.

Appeal by Defendant from Opinion and Award entered 4 August 2010 by the full North Carolina Industrial Commission. Heard in the Court of Appeals 28 April 2011.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by M. Duane Jones and Jerry L. Wilkins, Jr., for Defendant.

Brumbaugh, Mu & King, PA, by Nicole D. Hart, for Plaintiff.

THIGPEN, Judge.

Robert Belch ("Plaintiff") was awarded compensation for a material aggravation to a pre-existing back condition which occurred on 30 August 2007 while Plaintiff was working for Delhaize America, Inc., doing business as Food Lion, LLC, ("Defendant"). Defendant appeals, arguing the only evidence

supporting causation for the material aggravation was the speculative and incompetent testimony of Dr. David Miller ("Dr. Miller") and Dr. Divya Patel ("Dr. Patel"). After a thorough review of the record, we conclude the testimony was not speculative, but sufficiently reliable, and not incompetent, but based on statements made by Plaintiff to his physician for the purposes of treatment. Therefore, we affirm the Opinion and Award of the Full Commission.

The record shows that Plaintiff had a history of back pain and injuries, having injured his back in work related incidents in 2005 and 2006. Plaintiff began working for Defendant as a meat cutter at the Robersonville, North Carolina store in August of 2006. This job required Plaintiff to spend between two and one-half and five hours out of every eight hour workday retrieving beef from the cooler, cutting it, and wrapping it for display. Plaintiff's work also included unloading trucks and moving boxes.

On 30 August 2007, Plaintiff's work for Defendant required him to stack eighty pound boxes onto a rack. As he picked up a box, he felt a pop and severe stabbing pain in his lower back and in both legs. The pain was similar to what he experienced in 2005 and 2006, but "harder." His primary care physician, Dr.

Wan Chung, diagnosed Plaintiff with a back strain, "wrote him out of work," and referred him to Dr. Miller, an orthopedic surgeon. Dr. Miller believed Plaintiff's pain was related to nerve root irritation in his lower lumbar spine, and he also believed Plaintiff's lifting injury on 30 August 2007 exacerbated Plaintiff's pre-existing back condition. Dr. Miller kept Plaintiff out of work until 12 November 2007, at which time he began light duty work. After five days of light duty work, Plaintiff returned to full duty. Dr. Miller last saw Plaintiff on 4 February 2008. Plaintiff began seeing Dr. Patel, a physiatrist, for pain management.

Based on the evidence of record, the Full Commission entered an Opinion and Award on 4 August 2010 concluding the 30 August 2007 lifting injury caused a material aggravation of Plaintiff's pre-existing back condition and that Plaintiff was temporarily totally disabled during the period from 31 August 2007 to 12 November 2007. The Full Commission awarded Plaintiff compensation for medical treatment for his compensable aggravation to his back condition and granted Plaintiff temporary total disability compensation for the period of time Plaintiff was out of work. From this Opinion and Award, Defendant appeals.

I: Standard of Review

In reviewing a decision by the Industrial Commission, our Court's role "is limited to determining whether there is any competent evidence to support the findings of fact, and whether the findings of fact justify the conclusions of law." *Cross v. Blue Cross/Blue Shield*, 104 N.C. App. 284, 285-86, 409 S.E.2d 103, 104 (1991) (citation omitted). "The Commission's findings of fact are conclusive upon appeal if supported by competent evidence, even if there is evidence to support a contrary finding." *Kelly v. Duke Univ.*, 190 N.C. App. 733, 738, 661 S.E.2d 745, 748 (2008), *disc. review denied*, 363 N.C. 128, 675 S.E.2d 367 (2009) (citation omitted). On appeal, this Court "does not have the right to weigh the evidence and decide the issue on the basis of its weight[;] [t]he court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999) (quotation omitted). "The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Id.* at 680, 509 S.E.2d at 413 (quotation omitted). "[F]indings of fact by the Commission may [only] be set aside on appeal when there is a

complete lack of competent evidence to support them[.]" *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 914 (2000) (citation omitted).

"The Commission's conclusions of law are reviewed *de novo*." *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004) (citation omitted).

I: Material Aggravation to Pre-existing Condition

Preliminarily, we note that in its brief on appeal Defendant has not specifically challenged any of the findings of fact in the Full Commission's Opinion and Award. "[F]indings of fact which are left unchallenged by the parties on appeal are presumed to be supported by competent evidence and are, thus conclusively established on appeal." *Chaisson v. Simpson*, 195 N.C. App. 463, 470, 673 S.E.2d 149, 156 (2009) (quotation omitted).

Rather, Defendant first argues that the Industrial Commission erred in concluding that the 30 August 2007 incident caused a material aggravation of Plaintiff's pre-existing lower back condition. Specifically, Defendant contends that the sole evidence of causation – the testimony of Dr. Miller and Dr.

Patel – was incompetent and not sufficiently reliable to qualify as expert evidence as to causation.[1] We disagree.

"[W]hen 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." *Holley v. ACTS, Inc.*, 357 N.C. 228, 232, 581 S.E.2d 750, 753 (2003) (quotation omitted). "The 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." *Id.* (quotation omitted).

Medical opinions may be "based either on personal knowledge or observation or on information supplied him by others, including the patient," as "[s]tatements made by a patient to his physician for the purposes of treatment and medical information obtained from a fellow-physician who has treated the same patient are 'inherently reliable.'" *Booker v. Medical*

[1]Defendant also argues Plaintiff did not meet his burden of proof with regard to causation before the Full Commission. We do not address this argument because, on appeal, our Court's role "is limited to determining whether there is any competent evidence to support the findings of fact, and whether the findings of fact justify the conclusions of law." *Cross*, 104 N.C. App. at 285-86, 409 S.E.2d at 104. This Court "does not have the right to weigh the evidence and decide the issue on the basis of its weight[.]" *Adams*, 349 N.C. at 681, 509 S.E.2d at 414.

Center, 297 N.C. 458, 479, 256 S.E.2d 189, 202 (1979) (citations and quotations omitted).

In the present case, the Full Commission made the following relevant findings of fact and conclusions of law with regard to Dr. Miller and Dr. Patel's opinions on causation:

> 29. Dr. Miller is fellowship-trained in spinal surgery, and spinal surgery makes up about 95 percent of his practice. As Dr. Miller testified, the August 30, 2007 lifting incident caused an exacerbation of Plaintiff's pre-existing back condition. As he further testified, Plaintiff's pain level remained exacerbated from said incident as of Plaintiff's last visit to Dr. Miller on February 4, 2008.
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> . . .
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> 31. Dr. Miller stated his opinions in light of Plaintiff's history of back issues prior to the incident, and based upon the assumptions that Plaintiff did not seek medical treatment for his low back condition during the period from July 27, 2006 through August 30, 2007 and that Plaintiff was truthful that his pain substantially worsened with the incident.
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> 32. Dr. Miller noted that the findings on Plaintiff's September 19, 2007 MRI were much worse than those on his July 28, 2005 myelogram. However, he could not state that any of the findings on the 2007 MRI were directly related to the August 30, 2007 incident, and he stated that his causation opinions were based purely on Plaintiff's subjective descriptions of his pain levels before and after the incident. Nonetheless, as Dr. Miller testified, he never had any

> reason to doubt the sincerity of Plaintiff's history and complaints.
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> 33. Also purely based on Plaintiff's pain complaints, Dr. Patel opined that the August 30, 2007 incident materially aggravated Plaintiff's pre-existing low back condition. As Dr. Patel further testified, her ongoing pain management treatment of Plaintiff has been related to the incident.
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> 36. As between the causation opinions of Drs. Miller and Patel and Dr. Getz, the Full Commission accords more weight to the testimony of Drs. Miller and Patel, as the physicians who have actually treated Plaintiff since the August 30, 2007 incident.

Based on the foregoing and other findings of fact, the Full Commission concluded the following:

> 1. The greater weight of the evidence in his claim, including expert medical opinion, establishes that the August 30, 2007 incident caused a material aggravation of Plaintiff's pre-existing low back condition. As such, Plaintiff has shown that he sustained a compensable aggravation of his pre-existing low back condition by specific traumatic incident on August 30, 2007. N.C. Gen. Stat. § 97-2(6).

On appeal, Defendant cites *Holley v. Acts, Inc.*, 357 N.C. 228, 581 S.E.2d 750 (2003), and argues Dr. Miller and Dr. Patel's testimony regarding the Plaintiff's material aggravation

of his preexisting back condition was speculative and insufficient to establish causation.

Our review reveals that when asked in a deposition whether he had an "opinion to a reasonable degree of medical certainty as to whether [Plaintiff's] back condition . . . was caused by . . . the lifting event that occurred on August 30th, 2007[,]" Dr. Miller responded, "I believe that an exacerbation of his pain . . . was caused by the lifting incident on [30 August 2007]." Specifically, Dr. Miller stated he believed the 30 August 2007 lifting incident "exacerbated" Plaintiff's prior back condition. Dr. Miller admitted, however, that his opinion was "based purely on what I was presented by him in regards to the nature of the injury, as well as the patient reporting to me that his pain was worse."

When Dr. Patel was asked, "do you have an opinion to a reasonable degree of medical certainty as to the cause of [Plaintiff's] chronic lower back and bilateral lower extremity pain[,]" Dr. Patel responded "it's related to that [30 August 2007] event." Dr. Patel stated, in her opinion, Plaintiff's history of episodes of back pain followed by periods of improvement "helps more to decide that [this current condition]

was related to that event" on 30 August 2007. Later in her deposition, Dr. Patel was again asked the following question:

> Q: Do you have an opinion to a reasonable degree of medical certainty as to whether the lifting event on August 30, 2007 materially aggravated or exacerbated [Plaintiff's] underlying back condition or injury?
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> A: Yes, ma'am.
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> Q: And what is that opinion?
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> A: That it did.

Based on the foregoing testimony, we believe this case is distinguishable from *Holley* and analogous to *Carey v. Norment Sec. Indus.*, 194 N.C. App. 97, 103, 669 S.E.2d 1, 5 (2008). In *Holley*, the doctor could not say with any degree of medical certainty what caused the plaintiff's condition. When asked, the doctor responded, "I don't really know what caused the [condition]." *Holley*, 357 N.C. at 233, 581 S.E.2d at 754. *Carey* distinguished *Holley* on facts similar to those at issue in the present case. In *Carey*, a doctor stated that he believed a fall caused the plaintiff's condition. Here, two doctors stated that, in their opinion, the 30 August 2007 lifting incident caused the material aggravation to Plaintiff's pre-existing back condition. Based on the foregoing, we conclude Dr. Miller and

Dr. Patel's testimony was not speculative, but sufficiently reliable.

Defendant also argues that Dr. Miller and Dr. Patel's opinion – that the lifting incident on 30 August 2007 materially aggravated Plaintiff's preexisting back condition – was incompetent because Dr. Patel and Dr. Miller based their opinions solely on what Defendant refers to as Plaintiff's "self-serving subjective complaints of pain" and "verbalization of symptoms." This argument fails. *Booker*, 297 N.C. at 479, 256 S.E.2d at 202 ("Statements made by a patient to his physician for the purposes of treatment . . . are 'inherently reliable'") (citations omitted); *see also Cawthorn v. Mission Hosp., Inc.*, __ N.C. App. __, __, __ S.E.2d, __, __ (2011) (The defendant challenged the physician's reliance on the plaintiff's subjective reports of her injuries and symptoms, to which the Court responded, "it is well-established that a patient's statements to her treating physician are reliable"); *Adams v. Metals USA*, 168 N.C. App. 469, 476, 608 S.E.2d 357, 362 (2005) ("The opinion of a physician is not rendered incompetent merely because it is based wholly or in part on statements made to him by the patient in the course of treatment or examination")

(citation omitted); *Brafford v. Brafford's Constr. Co.*, 125 N.C. App. 643, 647, 482 S.E.2d 34, 37 (1997).

We conclude the expert testimony provided by Dr. Miller and Dr. Patel was competent and not speculative, and we further conclude their testimony, as reiterated in the Full Commission's unchallenged findings of fact, supports the Full Commission's conclusion of law associated with the causation of Plaintiff's material aggravation of his back condition. The Full Commission did not err in concluding the 30 August 2007 incident caused a material aggravation of Plaintiff's pre-existing lower back condition.

II: Disability Compensation

In Defendant's second argument, Defendant argues the Full Commission erred in concluding Plaintiff was temporarily totally disabled by his compensable lower back condition from 31 August 2007 through 12 November 2007 and in awarding Plaintiff temporary total disability compensation. We disagree.

Our review "is limited to determining whether there is any competent evidence to support the findings of fact, and whether the findings of fact justify the conclusions of law." *Cross*, 104 N.C. App. at 285-86, 409 S.E.2d at 104. On appeal, Defendant does not challenge any of the Full Commission's

findings of fact associated with temporary total disability.[2] "[F]indings of fact which are left unchallenged by the parties on appeal are presumed to be supported by competent evidence and are, thus conclusively established on appeal." *Chaisson*, 195 N.C. App. at 470, 673 S.E.2d at 156.

Defendant challenges the conclusion of law that Plaintiff was temporarily totally disabled, citing *Morrison v. Burlington Industrie*s, 304 N.C. 1, 18, 282 S.E.2d 458, 470 (1981) for the proposition that "when a pre-existing, nondisabling, non-job-related disease or infirmity eventually causes an incapacity for work without any aggravation or acceleration of it by a compensable accident or by an occupational disease, the resulting incapacity so caused is not compensable." Essentially, Defendant argues that because there was no aggravation or acceleration of Plaintiff's back condition on 30 August 2007, there could be no compensation as a matter of law.

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[2]Without challenging the Commission's findings of fact associated with temporary total disability, Defendant argues that Plaintiff did not meet his burden of proof with regard to temporary total disability compensation before the Full Commission. We do not address this argument because, on appeal, our Court's role "is limited to determining whether there is any competent evidence to support the findings of fact, and whether the findings of fact justify the conclusions of law." *Cross*, 104 N.C. App. at 285-86, 409 S.E.2d at 104. This Court "does not have the right to weigh the evidence and decide the issue on the basis of its weight[.]" *Adams*, 349 N.C. at 681, 509 S.E.2d at 414.

However, as we have stated, the testimony supporting the causation of Plaintiff's material aggravation of his back condition was competent and reliable. As such, the foregoing proposition in *Morrison*, which deals with cases in which there is no material aggravation, is inapplicable here. Furthermore, the unchallenged findings of fact support the conclusion of law that Plaintiff suffered from a compensable material aggravation of his back condition.

Likewise, the unchallenged findings regarding Plaintiff's temporary total disability support the Full Commission's conclusion that Plaintiff is entitled to temporary total disability compensation.

For the foregoing reasons, we affirm the Opinion and Award of the Full Commission.

AFFIRMED.

Judges CALABRIA and ERVIN concur.

Report per Rule 30(e).