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NO. COA03-913

NORTH CAROLINA COURT OF APPEALS

Filed: 3 August 2004

WALTER TUCKER,
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 108073

STEGALL MILLING COMPANY, INC.,
Employer,

and

KEY RISK INSURANCE
COMPANY,
Carrier,
Defendants.

Appeal by defendants from opinion and award entered 18 March 2003 by the North Carolina Industrial Commission. Heard in the Court of Appeals 19 April 2004.

Poisson, Poisson, Bower & Clodfelter, PLLC, by Fred D. Poisson, Jr., for plaintiff-appellee.

Young Moore & Henderson, P.A., by J. D. Prather and Michael W. Ballance, for defendant-appellants.

THORNBURG, Judge.

Defendants appeal from an opinion and award by the Industrial Commission in a workers' compensation matter. Plaintiff was employed as a truck driver by defendant-employer at the time of the accident. On the day of the accident, 19 January 2001, plaintiff arrived in

Salisbury after spending a week on the road driving to Pennsylvania and Florida. After arriving in Salisbury, plaintiff had his trailer unloaded and drove to a local business for the trailer to be reloaded. While the trailer was being reloaded, plaintiff had a doctor's appointment with his doctor, Dr. Gary Henry, to evaluate his blood pressure. At that appointment, plaintiff complained of right shoulder pain and was diagnosed with bursitis. Plaintiff returned to pick up his truck after his doctor's appointment.

After pulling his truck away from the loading dock, plaintiff proceeded to the back of the truck to secure the doors on the trailer. Plaintiff noticed that the load locks in the trailer, which prevent the trailer's load from shifting during transit, were not locked in place. Plaintiff then climbed into the trailer and secured the load locks. Plaintiff attempted to exit the trailer by holding onto one of the doors to the trailer and stepping down to the trailer's bumper. The door had a vertical bar at the edge that plaintiff used to assist himself in exiting the trailer. Plaintiff was holding onto the bar with both hands when the trailer door swung open, carrying plaintiff out of the truck. Plaintiff hung onto the door for several seconds before falling to the pavement below, landing on his left side. At that point, plaintiff only noticed the pain in his left side.

Plaintiff originally sought treatment for his injuries in the local emergency room on the following morning, 20 January 2001. On 22 January 2001, plaintiff went to see Dr. Henry regarding his injuries. Dr. Henry referred plaintiff to Dr. Joseph J. King, an orthopedic surgeon. During his first appointment with Dr. King, on 24 January 2001, plaintiff primarily complained of the pain he was suffering on his left side, especially to his ribs and back. At plaintiff's second appointment with Dr. King, on 7 February 2001, plaintiff was still complaining about his ribs and back, but also about his right shoulder. On 16 February 2001, plaintiff underwent a bone scan which showed multiple fractures to plaintiff's left-side ribs and a possible right humeral

head fracture. The possible right humeral head fracture was diagnosed because the scan showed some increased uptake suggesting extra activity in the bone and the shoulder. Dr. King testified that this could be indicative of an injury, but would not be indicative of bursitis, which involves the tendons and bursas around the joint. On 26 April 2001, surgery was performed on plaintiff's right shoulder after he continued to suffer pain and an MR scan of his shoulder showed extensive degenerative changes in his AC joint, large inferior spurring of that joint and a tear of the front lip of the shoulder joint. Dr. King also recommended that plaintiff seek treatment with a chiropractor for his back pain and headaches. Plaintiff sought treatment from Dr. Douglas M. Burch, beginning on 21 March 2001.

The Deputy Commissioner, after hearing all the evidence, concluded that plaintiff had not proven that he had sustained an injury by accident in the course and scope of his employment. The Deputy Commissioner also determined that the plaintiff's right shoulder condition was not related to any work incident. Plaintiff appealed to the full Commission, which reversed the Deputy, concluding that plaintiff had suffered a compensable injury by accident to his right shoulder and awarded plaintiff benefits. The full Commission also concluded that plaintiff had suffered permanent impairment to his neck, back and shoulders related to his compensable injury by accident. From the full Commission's opinion and award, defendants appeal.

Defendants' argue on appeal: (1) that the Commission's finding that plaintiff's accident was the type of activity that would cause a tear to the plaintiff's front labrum of his shoulder joint was not supported by competent evidence; (2) that the Commission's findings and conclusions regarding the plaintiff's right shoulder injury are not supported by competent medical expert testimony; (3) that the Commission's conclusions regarding the plaintiff's disability are flawed because they depend primarily on plaintiff's right shoulder injury; and (4) that the Commission's

findings and conclusions regarding the plaintiff's other injuries are not supported by competent medical expert testimony because plaintiff's chiropractor was not qualified to give medical expert testimony. We find defendants' arguments to be unpersuasive and affirm the Commission's opinion and award.

Defendants first argue that part of one of the full Commission's findings was not supported by competent evidence. Defendants take issue with the Commission's finding #12:

Dr. King found that the MRI scan of plaintiff's right shoulder showed extensive degenerative changes in the acromioclavicular joint, large inferior spurring of that joint, which caused some impingement, and a tear of the front lip of the shoulder joint. The overextension and pulling of the right arm when plaintiff was hanging onto the bar on the back of the left trailer door is the type of activity that would have caused the tear to the front lip (labrum) of the shoulder joint.

Defendants argue that Dr. King's testimony was not competent to support the Commission's finding that plaintiff's fall would have caused the tear in plaintiff's shoulder joint. Defendants further assert that this finding was crucial to the Commission's conclusion that plaintiff suffered a compensable injury by accident to his right shoulder and thus the Commission's conclusion cannot stand.

When the Court of Appeals reviews a decision of the full Commission, it must determine, first, whether there is competent evidence to support the Commission's findings of fact and, second, whether the findings of fact support the conclusions of law. *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 186, 345 S.E.2d 374, 379 (1986). "[T]he appellate courts are bound by the Commission's findings of fact when supported by any competent evidence" *Lanning v. Fieldcrest-Cannon, Inc.*, 352 N.C. 98, 106, 530 S.E.2d 54, 60 (2000). Only where there is a complete lack of competent evidence may this court disregard a finding. *Click v. Pilot Freight Carriers*, 300 N.C. 164, 166, 265 S.E.2d 389, 390 (1980).

The only evidence regarding the connection between plaintiff's accident and the tear to the front labrum of plaintiff's shoulder joint is Dr. King's testimony. During Dr. King's deposition the following exchange took place:

Question: . . . would that type of overextension and pulling issue have been the type of activity that could or might have caused the labrum tear?

[Defense counsel objected.]

Question: To the right arm?

Answer: Possibly.

Even assuming *arguendo* that Dr. King's testimony is not sufficient to support the Commission's finding that plaintiff's accident would have caused the tear in plaintiff's shoulder joint, we conclude that there was sufficient evidence to support the Commission's numerous other findings regarding plaintiff's injury to his right shoulder and that this particular finding was not necessary to the Commission's conclusion that plaintiff suffered a compensable injury by accident. Defendants' assignment of error fails.

Defendants next argue that the Commission erred in concluding that plaintiff's right shoulder complaint was causally related to his accident because defendants claim that there was a lack of competent medical evidence. Defendants first assert that Dr. King's testimony regarding causation was not competent medical evidence because it was based on an improper hypothetical that assumed there was aggravation of plaintiff's right shoulder symptoms. Defendants also assert that Dr. King's opinion was not competent to support a conclusion of causation because his opinion was in the form of "could" and "might" testimony, thus failing to meet the standard for medical testimony regarding causation set out in *Holley v. ACTS, Inc.*, 357 N.C. 228, 581 S.E.2d 750 (2003). We disagree with both assertions.

As we have stated before, this Court is bound by the Commission's findings of fact where they are supported by any competent evidence. *Lanning*, 352 N.C. at 106, 530 S.E.2d at 60. Where an expert's opinion is based upon a hypothetical question that required the expert to assume the truth of certain facts that the record fails to support, the opinion is incompetent to support the Commission's finding that plaintiff's injury was causally related to his employment. *Thacker v. City of Winston-Salem*, 125 N.C. App. 671, 675, 482 S.E.2d 20, 23, *disc. review denied*, 346 N.C. 289, 487 S.E.2d 571 (1997).

During the hearing, the Commission received the deposition testimony of plaintiff's physician, Dr. King. Dr. King was asked whether plaintiff's right shoulder injury was causally related to the accident plaintiff had while on the job. Prior to giving his opinion, plaintiff's counsel asked Dr. King the following question:

Given the history that we have discussed of Mr. Tucker having some right shoulder pain but being able to work and having this fall and having his right arm extended out as the door swung open, as I recall his testimony, and I ask you to take this with the assumption the Commission will find it to be the truth, that the door opened, his feet were in the trailer, and he just kind of went out with his weight on his shoulder and fell on his left side. If the Commissioner finds that to be the case and his right shoulder got very much worse after that, to the point that it showed uptake in the bone of the right shoulder and the problems you observed when you went in there, do you believe that it is more probable than not that the injury that you operated on in April of 2001 was the result of the fall?

Based on those assumptions, Dr. King opined that the right shoulder injury was a result of the fall and that "we would not have been operating on that right shoulder had he not had the fall."

Defendants assert that there was no evidentiary support for assuming as fact that plaintiff's shoulder pain increased after the fall. However, plaintiff's testimony directly

supported a finding of increased shoulder pain, which Dr. King was asked to assume in rendering his opinion. During the hearing before the Deputy Commissioner, plaintiff testified:

Question: How did the pain that you had before the surgery compare with the pain that you had before your fall?

Answer: I just had a little bit of aching before and then after the fall, it just - it just - it felt like a broke bone or a broke collar bone or something to me - the way it felt.

Because plaintiff's testimony supports a finding that his right shoulder pain increased, we conclude that Dr. King's opinion based on the hypothetical question is competent medical testimony regarding causation. Accordingly, this argument fails.

Defendants also argue that Dr. King's opinion is incompetent to support a conclusion of causation because it was "could" or "might" opinion testimony. "[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) (quoting *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 915 (2000)). Testimony must be sufficient to take the case outside the realm of possibilities. *Holley*, 357 N.C. at 232-33, 581 S.E.2d at 753. "Could" and "might" evidence is not sufficient. *Id.*

In *Holley*, the court found that the doctor's opinion was not competent to support a finding of causation. *Id.* at 233, 581 S.E.2d at 753. The doctor there testified that several factors besides the plaintiff's accident could have caused the plaintiff's injury. *Id.* Specifically, the doctor in *Holley* thought it was a "low possibility" that the accident caused the injury and that the accident was just one in a "galaxy of possibilities." *Id.*

In the instant case, defendants point to several questions asked by plaintiff's counsel during Dr. King's deposition that use the terminology "could" or "might" in asking for Dr.

King's opinion about the cause of the right shoulder injury. However, following these general questions of causation, Dr. King was asked the question quoted above which finished with counsel asking "do you believe that it is more probable than not that the injury that you operated on in April of 2001 was the result of this fall?" Dr. King responded that the operation would not have been conducted if the plaintiff had not fallen. Following that answer, plaintiff's counsel followed up by asking:

Question: Is that more probably [sic] than not and to a reasonable degree of medical certainty?

Answer: Yes.

While medical certainty is not required, the expert's opinion as to causation must be more than speculation. *See Holley*, 357 N.C. at 234, 581 S.E.2d at 754. Dr. King's testimony was sufficient to show that his opinion was based on more than speculation. Defendants' argument is without merit.

Because we conclude that Dr. King's testimony was competent medical evidence, the Commission's findings were sufficient to support the conclusion that plaintiff suffered a compensable injury by accident to his right shoulder. Accordingly, defendants' assignment of error fails.

Defendants next argue that the Commission's findings and conclusions regarding plaintiff's disability are in error because they are based primarily on plaintiff's right shoulder injury. "To support a conclusion of disability, the Commission must find: (1) that the plaintiff was incapable after his injury of earning the same wages he earned before his injury in the same employment, (2) that the plaintiff was incapable after his injury of earning the same wages he earned before his injury in any other employment and (3) that the plaintiff's incapacity to earn was caused by his injury." *Hendrix*, 317 N.C. at 186, 345 S.E.2d at 378-79 (citing *Hilliard v.*

Apex Cabinet Co., 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982)). Defendants base this argument on their previous argument that there was not competent evidence to support the conclusion that plaintiff's right shoulder injury was caused by his accident. However, as we have already concluded that the Commission's findings and conclusion on this issue were supported by competent evidence, we find this assignment of error to be without merit.

Defendants also argue that any findings based on Dr. Burch's testimony should be disregarded because Dr. Burch, as a chiropractor, was not qualified to render medical expert testimony. Defendants contend that while Dr. Burch's testimony was admissible as expert testimony, it was not sufficient to meet the plaintiff's burden of proving medical causation by a preponderance of the evidence.

"Chiropractors are recognized as experts in their field and, when properly qualified, allowed to testify as to diagnosis, prognosis, and disability." *Mitchem v. Sims*, 55 N.C. App. 459, 460, 285 S.E.2d 839, 840 (1982). N.C. Gen. Stat. §90-157.2 outlines the circumstances in which a chiropractor can be an expert witness:

A Doctor of Chiropractic, for all legal purposes, shall be considered an expert in his field and, when properly qualified, may testify in a court of law as to:

(1) The etiology, diagnosis, prognosis, and disability, including anatomical, neurological, physiological, and pathological considerations within the scope of chiropractic, as defined in G.S. 90-151; and

(2) The physiological dynamics of contiguous spinal structures which can cause neurological disturbances, the chiropractic procedure preparatory to, and complementary to the correction thereof, by an adjustment of the articulations of the vertebral column and other articulations.

N.C. Gen. Stat. §90-157.2 (2003). N.C. Gen. Stat. §90-151 allows any person who obtains a license from the Board of Chiropractic Examiners to practice the science of chiropractic. N.C.

Gen. Stat. §90-151 (2003). Our statutes define “chiropractic” as “the science of adjusting the cause of disease by realigning the spine, releasing pressure on nerves radiating from the spine to all parts of the body, and allowing the nerves to carry their full quota of health current (nerve energy) from the brain to all parts of the body.” N.C. Gen. Stat. §90-143(a) (2003). Dr. Burch’s testimony was properly limited to his area of expertise. We find that Dr. Burch’s testimony was competent medical expert testimony to support a conclusion of causation. Defendants’ assignment of error fails.

Affirmed.

Judges MARTIN and HUNTER concur.

Report per Rule 30(e).