IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-594

Filed: 7 November 2017

North Carolina Industrial Commission, I.C. Nos. 14-022081, 14-044570, 15-018910

ANTHONY M. KYLES, Employee, Plaintiff,

v.

THE GOODYEAR TIRE & RUBBER CO., Employer, LIBERTY MUTUAL INSURANCE CO., Carrier, Defendants.

Appeal by plaintiff and cross-appeal by defendants from opinion and award entered 7 April 2017 by the Full North Carolina Industrial Commission. Heard in the Court of Appeals 18 October 2017.

Kathleen G. Sumner and David P. Stewart for plaintiff-appellant and cross-appellee.

Hedrick Gardner Kincheloe & Garofalo LLP, by M. Duane Jones and Matthew J. Ledwith, for defendant-appellees and cross-appellants.

TYSON, Judge.

Anthony M. Kyles ("Plaintiff") and The Goodyear Tire & Rubber Company ("Defendant-Employer") and Liberty Mutual Insurance Company (collectively, "Defendants") appeal and cross-appeal, respectively, from an Opinion and Award filed 7 April 2017 by the Full North Carolina Industrial Commission (the

"Commission"). We affirm the Commission's Opinion and Award in part and remand for further findings of fact.

I. Background

Defendant-Employer hired Plaintiff to work as a VMI service trucker at its tire plant on 13 January 2014. Plaintiff's job duties included using a truck to transport tire-building materials to VMI tire machines to build tires. In addition to the tasks listed on the functional job description, Plaintiff's job also required him to manually move tread spools, carts, and carrying machines. Plaintiff was working in the service trucker position on 23 May 2014, 23 July 2014, and 12 September 2014.

On 23 May 2014, Plaintiff had been employed by Defendant-Employer for a period of 131 days and was transporting materials to a VMI tire machine. He was driving behind a scrubber, which wets and scrubs the floors of the factory. When he started to turn his truck toward the tire machine, the water on the floor caused the tires on his truck to slip and the steering wheel to jerk. Plaintiff's left arm was pulled by the jerking of the steering wheel, and he felt a pop in his left shoulder. After this incident, Plaintiff immediately felt pain, which continued to worsen over time.

Prior to the 23 May 2014 incident, Plaintiff's truck had slid on wet areas, but he had never suffered an injury as a result of the truck sliding or the wheel jerking. Plaintiff testified the floors at the factory were constantly wet where he drove.

On 27 May 2014, Plaintiff was involved in an automobile accident after his privately-owned truck left the road in a curve near a stop sign and crashed into a tree. Plaintiff sustained injuries to his right elbow and back, for which he received treatment at the emergency room. While in the emergency room, Plaintiff received two cortisone shots in his right elbow and no additional treatment.

On or around 23 July 2014, Plaintiff re-injured his left shoulder when he was dropping off tread spools at a VMI tire machine with his truck. While attempting to turn the pivot wheel of his truck, Plaintiff's steering wheel became stuck. When Plaintiff pulled hard, he testified his left shoulder "popped" again.

On 29 August 2013, Defendant-Employer's company nurse evaluated Plaintiff for pain in his left and right shoulders allegedly caused by lifting. On 12 September, the nurse again evaluated Plaintiff for pain in his left shoulder. The nurse informed Plaintiff his workers' compensation claim was denied, and he needed to see his own physician.

On 17 September 2014, Plaintiff presented to Dr. Barnes for medical treatment due to his left shoulder injury. Dr. Barnes diagnosed Plaintiff as suffering with "left shoulder subacromial bursitis with possible partial thickness rotator cuff tear" and recommended "shoulder arthroscopy with subacromial bursetomy and distal clavical excision" and removed Plaintiff from work until 8 October 2014.

Plaintiff told Dr. Barnes that he could not undergo the recommended surgery on his left shoulder because Defendant-Employer's workers' compensation carrier was not going to cover the costs, he could not afford to be out-of-work, and he must wait for the surgery to be approved.

Plaintiff filed a Form 18 Notice of Accident on 4 June 2014 for the 23 May 2014 incident, and another Form 18 Notice of Accident on 22 September 2014 for the 23 July 2014 incident. Defendant-Employer subsequently denied Plaintiff's workers' compensation claims, in part, on the grounds that Plaintiff "did not sustain an injury by accident arising out of and in the course and scope of his employment."

Plaintiff filed a Form 33 Request for a Hearing on 9 February 2015. The case was heard before Deputy Commissioner Lori A. Gaines on 5 November 2015. On 20 June 2016, Deputy Commissioner Gaines issued an Opinion and Award, finding Plaintiff was credible in his claim of an incident at work on 23 May 2014, and concluding such incident qualified as an "accident." The Commission concluded Plaintiff was entitled to indemnity benefits for the period of 17 September 2014 to 10 October 2014, and awarded medical benefits.

Defendants appealed to the Commission. The Commission concluded Plaintiff sustained an injury by accident on 23 May 2014, but that Plaintiff's injury had resolved by 17 July 2014. The Commission also concluded Plaintiff was not entitled to indemnity compensation as a result of the injury. Defendants and Plaintiff appeal.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-29(a) (2015) and N.C. Gen. Stat. § 97-86 (2015).

III. Issues

Plaintiff contends: (1) although the Commission found and concluded that he had sustained an unspecified left shoulder injury by accident on 23 May 2014, it committed reversible error by failing to specifically identify the injury, other than as "left shoulder pain"; (2) the Commission committed reversible error by failing to properly consider the stipulated medical records of Defendant-Employer's company physician, Dr. Perez, because he was not deposed; (3) the Commission committed reversible error by improperly relying upon the opinion of Plaintiff's medical expert, Dr. Barnes, as to the absence of causation of Plaintiff's injury, when that opinion was based upon Dr. Barnes' purportedly mistaken assumption that Plaintiff did not sustain an injury by accident on 23 May 2014; and, (4) the Commission committed reversible error by discounting Dr. Barnes' opinion that the 23 May 2014 incident was the inciting event that lead to Plaintiff's current left shoulder problems.

Defendants contend the Commission erred in finding and concluding Plaintiff had sustained a compensable injury by accident arising out of and in the course of his employment. We affirm the Commission's Opinion and Award in part, which concluded Plaintiff had sustained a compensable injury by accident, hold the

Commission properly considered Dr. Barnes' opinions, but failed to address the stipulated medical records of Dr. Perez. We remand for further findings of fact on the injury by accident suffered by Plaintiff.

IV. Standard of Review

Our review of the Commission's decision is limited to a determination of "whether there was any competent evidence before the Commission to support its findings of fact and whether the findings of fact justify its legal conclusions and decision." *Buchanan v. Mitchell Cty,* 38 N.C. App. 596, 599, 248 S.E.2d 399, 401 (1978) (citation omitted). "The findings of fact by the Industrial Commission are conclusive on appeal, if there is any competent evidence to support them, and even if there is evidence that would support contrary findings." *Richards v. Town of Valdese,* 92 N.C. App. 222, 225, 374 S.E.2d 116, 118 (1988) (citations 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).

V. Analysis

A. *Injury by Accident*

Defendants argue that Plaintiff's driving a truck upon a wet surface and experiencing jerks of the steering wheel had become a part of Plaintiff's normal work routine and any injury caused by Plaintiff's truck sliding and the steering wheel jerking does not constitute a compensable injury under our workers' compensation

act. We disagree. Competent evidence in the record supports the Commission's findings and conclusion of law that Plaintiff sustained a compensable injury by accident.

Chapter 97 defines "injury" to mean "only injury by accident arising out of and in the course of the employment[.]" N.C. Gen. Stat. § 97-2(6) (2015). "Under the North Carolina Workers' Compensation Act, an injury arising out of and in the course of employment is compensable only if it is caused by an 'accident' and the claimant bears the burden of proving an accident has occurred." N.C. Gen. Stat. § 97-2(6); *Calderwood v. Charlotte-Mecklenburg Hosp. Auth.*, 135 N.C. App. 112, 115, 519 S.E.2d 61, 63 (1999). "An accident is an unlooked for and untoward event which is not expected or designed by the person who suffers the injury." *Calderwood*, 135 N.C. App. at 115, 519 S.E.2d at 63 (citation and quotation omitted).

"The Workers' Compensation Act should be liberally construed to effectuate its purpose to provide compensation for injured employees and its benefits should not be denied by a narrow, technical and strict construction." *Gunter v. Dayco Corp.*, 317 N.C. 670, 676-77, 346 S.E.2d 395, 399 (1986) (citations omitted).

"The elements of an 'accident' are the interruption of the routine of work and the introduction thereby of unusual conditions likely to result in unexpected consequences." *Adams v. Burlington Industries, Inc.*, 61 N.C. App. 258, 260, 300 S.E.2d 455, 456 (1983) (citation omitted). "[I]f the employee is performing his regular

duties in the usual and customary manner and is injured, there is no accident and the injury is not compensable." *Porter v. Shelby Knit, Inc.*, 46 N.C. App. 22, 26, 264 S.E.2d 360, 363 (1980) (citation and quotation omitted).

"[O]nce an activity, even a strenuous or otherwise unusual activity, becomes a part of the employee's normal work routine, an injury caused by such activity is not the result of an interruption of the work routine or otherwise an 'injury by accident' under the Workers' Compensation Act." *Bowles v. CTS of Asheville*, 77 N.C. App. 547, 550, 335 S.E.2d 502, 504 (1985). "[T]he mere fact of injury does not of itself establish the fact of accident." *Beamon v. Stop & Shop Grocery*, 27 N.C. App. 553, 554, 219 S.E.2d 508, 509 (1975) (citations omitted).

With regard to Plaintiff's 23 May 2014 incident, and whether Plaintiff was performing his normal duties in their normal manner, the Commission made the following relevant findings of fact:

> 6. On May 23, 2014, Plaintiff was driving a VMI service truck, taking a load of materials to VMI Machine Number 3. The floor was wet because scrubbers scrub the floor continuously. As Plaintiff was backing his truck up and turning the steering wheel to reach the VMI machine, the wheel on his truck slipped on the wet floor, causing the steering wheel in the VMI Service truck to jerk and snatch his left arm. When his left arm was snatched, Plaintiff felt a "pop" in his left shoulder and immediate pain. Plaintiff continued to back the truck out of the aisle way and in between the two machines. Once stopped, he detached the truck and went to ask his area manager if he could get some ice for his shoulder. He then went to the dispensary. Plaintiff's pain subsequently worsened.

> 7. The floor in the area where Plaintiff was driving is constantly wet because the scrubbers come through and clean the floor on a routine basis. The accident occurred because the truck slipped due to the wetness of the floor and caused the jerking of the steering wheel. After the accident occurred, Plaintiff immediately felt pain, which did not develop gradually over a period of time.
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> 8. Prior to May 2014, Plaintiff's truck had slid on wet spots, but he never sustained an injury until May 23, 2014, when he felt a pop in his left shoulder when the truck slid on water and jerked the wheel which snatched his left arm causing injury to his left shoulder.
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> 9. Although the scrubbers create a condition where the floors are constantly wet, it is not in the written functional job description or regular job description that Plaintiff must drive as part of his job duties on wet slippery floors, and his truck is usually not out of control while driving on the slippery floors.
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> 70. Based upon the preponderance of the evidence in view of the entire record, the Full Commission finds that Plaintiff's injury on May 23, 2014, which occurred when the VMI truck full of materials that he was driving, slipped due to the wetness of the floor causing the steering wheel to jerk his left arm and he felt an immediate pop and pain in his left shoulder. When his steering wheel jerked due to his truck slipping on a wet floor, this incident interrupted his usual work routine and thereby introduced unusual conditions likely to result in unexpected consequences.

Based in part upon these findings, the Commission made the following conclusion of law:

> 2. On May 23, 2014, Plaintiff sustained a compensable

> injury by accident to his left shoulder, arising out of and in the course of his employment with Defendant-Employer. Plaintiff's injury on May 23, 2014, which occurred when the VMI truck full of materials that he was driving, slipped on the wet floor, causing the steering wheel to jerk his left arm and an immediate pop and pain in his left shoulder. When his steering wheel jerked due to his truck slipping on a wet floor, this incident was an unlooked for and untoward event not expected or designed by Plaintiff which interrupted his usual work routine and thereby introduced unusual conditions likely to result in unexpected consequences. N.C. Gen. Stat. § 97-2(6); *Id*.

Defendants do not dispute Plaintiff suffered an injury arising in the course of his employment with Defendant-Employer. They dispute Plaintiff's injury was caused by an "accident" under N.C. Gen. Stat. § 97-2. Competent and undisputed evidence supports the Commission's findings of fact that "[w]hen [Plaintiff's] steering wheel jerked due to his truck slipping on a wet floor, this incident interrupted his usual work routine and thereby introduced unusual conditions likely to result in unexpected consequences."

Defendants do not dispute Plaintiff's steering wheel jerked when he was injured on 23 May 2014. Defendants assert Plaintiff's steering wheel jerking as a result of his truck's wheels slipping on wet floors had become a part of Plaintiff's usual work routine. Although the Commission found that the floors were constantly wet at Defendant-Employer's factory, competent evidence of Plaintiff's job description and his functional job duties do not show it was part of Plaintiff's usual work routine to drive on wet floors.

Even though Plaintiff testified the steering wheel on his truck had jerked as a result of hitting wet spots on the floor in the past, the record evidence of Plaintiff's testimony, response to interrogatories, and recorded statement supports the conclusion that it was not so common for the steering wheel to jerk to become part of Plaintiff's usual work routine. The Commission's findings of fact supports its conclusion of law that Plaintiff sustained a compensable injury by accident.

The Commission's conclusion of law that Plaintiff suffered an injury by accident is supported by the Commission's findings of fact, which are, in turn, supported by competent evidence. Defendants' argument is overruled.

B. *Plaintiff's Injury*

Plaintiff contends the Commission erred in failing to make a finding of what his 23 May 2014 injury specifically was, after finding it was "left shoulder pain." We agree.

This Court stated in *Gaines v. L.D. Swain & Son, Inc.*:

> While the commission is not required to make findings as to each fact presented by the evidence, it is required to make specific findings with respect to crucial facts upon which the question of plaintiff's right to compensation depends. *Smith v. Construction Co.,* 27 N.C. App. 286, 218 S.E.2d 717 (1975). If the findings of fact of the commission are insufficient to enable the court to determine the rights of the parties upon the matters in controversy, the proceeding must be remanded to the commission for proper findings of fact. *Young v. Whitehall Co.,* 229 N.C. 360, 49 S.E.2d 797 (1948).

33 N.C. App. 575, 579, 235 S.E.2d 856, 859 (1977).

The Commission made the following relevant finding of fact in its Opinion and Award:

> 26. Although Plaintiff does not remember every detail correctly, the Full Commission finds him to be credible about the May 23, 2014 accident due to his consistent reporting of his injury, consistency in the accident report and the medical records in reporting that he sustained an injury to his left shoulder when the steering wheel on his VMI truck jerked and snatched his left arm causing his left shoulder to pop, and his continued efforts to work for Defendant-Employer in spite of his injury.

While the Commission clearly found Plaintiff had sustained a workplace injury, the Commission never found what specific injury Plaintiff had sustained. The medical condition giving rise to Plaintiff's left shoulder "pop" and pain is a critical fact upon which his right to compensation benefits depends.

This Court addressed a similar issue of the Commission concluding an employee experienced a compensable injury, but not specifying what the specific injury was, in *Jackson v. Fayetteville Area System Of Transportation,* 78 N.C. App. 412, 337 S.E.2d 110 (1985). This Court held:

> It is obvious that the fact plaintiff sustained an injury is a critical fact upon which her right to compensation depends; thus, a specific finding of that fact is required. The Commission's finding that plaintiff experienced pain as a result of what occurred while she was performing her duties on 13 December 1982 is not sufficient as pain is not in and of itself a compensable injury. *See* N.C. Gen. Stat. § 97-31 (1985); *Branham v. Panel Co.*, 223 N.C. 233, 25

> S.E.2d 865 (1943) (There is no provision in the Workers' Compensation Act for compensation for physical pain or discomfort).

Jackson, 78 N.C. App. at 414, 337 S.E.2d at 111-12.

"If the findings of the Commission are insufficient to determine the rights of the parties, the appellate court may remand to the Industrial Commission for additional findings." *Lanning v. Fieldcrest-Cannon, Inc.*, 352 N.C. 98, 106, 530 S.E.2d 54, 60 (2000).

Following *Jackson* and *Fieldcrest*, we remand this matter to the Commission for further findings of fact concerning the actual injury or medical condition, which resulted in or from Plaintiff's left shoulder pain arising from his 23 May 2014 workplace injury by accident. The Commission may take further testimony and obtain additional evidence from the parties, if necessary.

C. *The Medical Testimony of Dr. Barnes*

Plaintiff asserts the Commission committed reversible error regarding the testimony of Dr. Barnes, a medical specialist to whom Dr. Perez had referred Plaintiff. Plaintiff argues the Commission improperly relied upon Dr. Barnes' opinion in its conclusion "that Plaintiff has not presented sufficient evidence to show that his bursitis is causally related to, or a direct and natural consequence of his May 23, 2014, injury by accident."

Plaintiff has not assigned error to any of the Commission's findings of fact

bearing on the causal relationship between his 23 May 2014 injury and his subsequent bursitis. These unchallenged findings of fact "are presumed to be supported by competent evidence and are, thus conclusively established . . . ." *Chaisson v. Simpson*, 195 N.C. App. 463, 470, 673 S.E.2d 149, 156 (2009) (internal quotation marks and citation omitted).

We review the Commission's undisputed findings of fact to determine if they justify its conclusion Plaintiff did not establish a causal relationship between his bursitis and his 23 May 2014 accident by injury. *See Buchanan*, 38 N.C. App. at 599, 248 S.E.2d at 401 (reviewing an Opinion and Award of the Commission to ascertain "whether there was any competent evidence before the Commission to support its findings of fact and whether the findings of fact justify its legal conclusions and decision.").

The Commission made the following relevant findings and conclusions of law concerning the lack of causal relationship between Plaintiff's 23 May 2014 injury by accident and his later diagnosis of bursitis:

> 4. In addition to establishing the existence of a compensable event, an employee must also prove a causal relationship between the event and the condition for which he seeks compensation. *Henry v. A.C. Lawrence Leather*, Co., 231 N.C. 477, 479, 57 S.E.2d 760, 761 (1950). The North Carolina Supreme Court has held that "where 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." *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980). "Although medical certainty is not required, an expert's 'speculation' is insufficient to establish causation." *Holley v. ACTS, Inc.*, 357 N.C. 228, 234, 581 S.E.2d 750, 754 (2003). In this case, Plaintiff currently has bursitis for which Dr. Barnes has recommended surgery. The Full Commission concludes that Plaintiff has not presented sufficient evidence to show that his bursitis is causally related to, or a direct and natural consequence of his May 23, 2014, injury by accident. Dr. Barnes opined that he did not think Plaintiff had traumatic bursitis from an injury. He felt that Plaintiff has ongoing shoulder pain and bursitis from repetitive use. Dr. Barnes did not opine that the pop in Plaintiff's shoulder led to his bursitis. He also did not opine that Plaintiff had pre-existing bursitis which was aggravated by his May 23, 2014, injury by accident.
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> 6. In cases involving multiple claims of accidents resulting in injury to the same body part, as in this case, it is well established that "a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury." *Starr v. Charlotte Paper Co.,* 8 N.C. App. 604, 612, 175 S.E.2d 342, 347 (1970). Dr. Barnes did not provide competent medical testimony establishing that Plaintiff's alleged subsequent injuries were direct and natural results of his compensable May 23, 2014, injury. He only testified that continuing to do repetitive job duties will continue to cause Plaintiff problems due to his bursitis. Dr. Barnes has not opined that Plaintiff's bursitis is related to the incident involving the pop in his left shoulder on May 23, 2014. *Id.*

These conclusions of law are based upon the following unchallenged findings of fact:

54. When Plaintiff reported to Dr. Barnes on September 22, 2014, he gave a history of an injury on May 23, 2014, but he did not report any subsequent re-injuries on either July 23, 2014, or September 12, 2014. On Dr. Barnes' physical exam, Plaintiff had a good range of motion, but pain with range of motion, tenderness over the acromioclavicular (AC) joint and the rotator cuff insertion, and some pain and weakness with testing of the rotator cuff. Dr. Barnes testified that Plaintiff appeared to have pain in the arc during the passive range of motion of the shoulder, and moderate tenderness at the AC joint. He had significant pain in the anteriorlateral bursal region, with moderate pain and moderate weakness with supraspinatus testing and a positive impingement, as well as a very painful rotator cuff.

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65. With regard to causation, Dr. Barnes opined that the reason for the surgery he recommended was "recalcitrant bursitis." He testified that the pop in the shoulder on May 23, 2014, did not seem like a significant trauma that would cause ongoing pain. Dr. Barnes was asked, "[D]o you have an opinion … within a reasonable degree of medical certainty whether the 23rd May, 2014 accident at work caused the left shoulder subacromial bursitis and partial-thickness bursal-sided supraspinatus tendon tear which you diagnosed on the 22nd of September, 2014?" Dr. Barnes testified that he did not have an opinion and further responded stating, "Here's what I think: I don't think he's got traumatic bursitis from an injury. I think he's got ongoing shoulder pain and bursitis probably from repetitive use because – and I do think the accident is not the major contributor."

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69. Dr. Barnes reviewed the accident report from the May 27, 2014, auto accident and subsequent emergency room medical records, and opined that Plaintiff really

complained more of pain in his right elbow, low back, and right arm, and was diagnosed with an elbow fracture and cervical strain. However, he further agreed that Plaintiff's initial presentation for treatment with him was not inconsistent with someone who had been in a motor vehicle accident.

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71. The preponderance of the credible evidence of record does not show Plaintiff sustained an injury by accident on July 23, 2014. Plaintiff's testimony does not show an accident under the Act. Despite Plaintiff's receipt of over-the-counter medication, there is no medical treatment associated with a July 23, 2014 injury. Plaintiff's counsel in her hypothetical question to Dr. Barnes, asked him to assume Plaintiff's pain increased while he was performing his job duty of lifting tread spools on July 12, 2014 [now corrected to July 23, 2014]. The Full Commission finds Plaintiff was performing his normal job duties when he experienced pain while lifting tread spools on July 23, 2014.

72. The preponderance of the credible evidence of record does not show Plaintiff sustained an injury by accident on September 12, 2014. Plaintiff testified that on September 12, 2014, while trying to move a tread spool into place, he re-injured his left shoulder again Plaintiff did not give any specific details establishing the happening of an injury by accident. When Plaintiff reported to CHS Health Services, on September 12, 2014, he gave an history of moderate to severe left shoulder pain with an onset date of one month ago. Plaintiff did not report he had injured his left shoulder at work on that date. Plaintiff did not report that he sustained an injury at work when he presented to the Emergency Room on September 12, 2014. Plaintiff's counsel in her hypothetical question to Dr. Barnes, asked him to assume Plaintiff's pain increased while he was performing his job duty of lifting tread spools on September 12, 2014. In his Associate Report of Incident, Plaintiff

referenced that he re-injured his left shoulder while pushing and pulling tread spools and this was an aggravation of his prior May 23, 2014, injury. The Full Commission finds Plaintiff was performing his normal job duties on September 12, 2014, and he did not identify a specific incident of lifting that would constitute an injury by accident.

73. Based upon the preponderance of the evidence in view of the entire record, the Full Commission finds that Plaintiff currently has bursitis for which Dr. Barnes has recommended surgery. Plaintiff has not presented sufficient evidence to show that his bursitis is causally related to, or a direct and natural consequence of his May 23, 2014, injury by accident. Dr. Barnes opined that he did not think Plaintiff had traumatic bursitis from an injury. He felt that Plaintiff has ongoing shoulder pain and bursitis from repetitive use. Dr. Barnes did not opine that the pop in Plaintiff's shoulder led to his bursitis. Dr. Barnes also did not give an opinion on whether Plaintiff had pre-existing bursitis which was aggravated by his May 23, 2014, injury by accident.

74. The Full Commission finds that to the extent Dr. Barnes relates Plaintiff's shoulder pain to his May 23, 2014, injury [at] work, his opinion is insufficient to prove causation. Although Dr. Barnes did opine that the pop in Plaintiff's shoulder on May 23, 2014, was "the inciting event' which "kicked up" his shoulder problems, this opinion was based upon Plaintiff's report to him that he did not have shoulder pain before and he had shoulder pain afterwards. Dr. Barnes testified that the problem for him was that he did not feel Plaintiff had a "clear-cut" injury by accident, like a fractured clavicle, AC joint dislocation, or rotator cuff tear. Plaintiff has ongoing bursitis that's not responding to normal, non-operative treatment, so Dr. Barnes testified he is relying on Plaintiff who is telling him, "This really hurts when I work."

75. Based upon the preponderance of the evidence in view

> of the entire record, the Full Commission finds that shoulder pain which began with a pop in Plaintiff's left shoulder when his arm was jerked by a steering wheel on May 23, 2014, stabilized by July 17, 201[4], when he was released to return to work without restrictions, although Dr. Perez did not address whether Plaintiff was at maximum medical improvement, Plaintiff has not shown that his current complaints of left shoulder pain are related to the May 23, 2014, injury by accident where he sustained a pop and pain when his arm was jerked by a steering wheel. Plaintiff's ongoing complaints of left shoulder pain are related to his continuing performance of his usual job duties. Dr. Barnes opined that the pop in the shoulder on May 23, 2014, did not seem like a significant trauma that would cause ongoing pain.

These undisputed findings of fact clearly support the Commission's conclusion of law that Plaintiff's bursitis is not causally related to the left shoulder injury he sustained on 23 May 2014. These findings demonstrate the Commission considered and weighed the opinion testimony of Dr. Barnes regarding a causal connection between the 23 May 2014 injury and the ongoing shoulder pain and bursitis Dr. Barnes diagnosed. We affirm the Commission's conclusion that Plaintiff failed to establish a causal connection between his 23 May 2014 incident at work and his later diagnosis of bursitis in his left shoulder. Plaintiff's arguments are overruled.

Plaintiff also argues the Commission improperly discounted Dr. Barnes' opinion testimony that the 23 May 2014 incident was the "inciting event" leading to Plaintiff's subsequent shoulder bursitis and pain. On this point, the Commission's finding of fact 5 reads:

> 5. The Full Commission further concludes based upon the preponderance of the evidence that the opinion testimony of Dr. Barnes that the injury Plaintiff sustained when his left arm was jerked by the steering wheel on May 23, 2014, was the inciting event which led to shoulder pain, is insufficient to establish causation as it was based upon Plaintiff's report to Dr. Barnes that he did not have shoulder pain before and he had shoulder pain afterwards. Dr. Barnes testified, that when someone comes in and tells me, "I was doing this. I heard a pop and it's been hurting since," that he tends to believe them even though the incident did not sound like a major trauma. The Full Commission also concludes that although shoulder pain and bursitis are not controversial medical conditions, like the fibromyalgia discussed in *Young*, Plaintiff's ongoing left shoulder problems in this case could have been causally related to other events. Dr. Barnes agreed that Plaintiff's initial presentation for treatment with him was not inconsistent with someone who had been in a motor vehicle accident. Dr. Barnes also testified, "I think he's got ongoing shoulder pain and bursitis probably from repetitive use because -- and I do think the accident is not the major contributor." Dr. Barnes' testimony on this issue is too speculative to qualify as competent evidence on the issue of whether Plaintiff's ongoing bursitis and shoulder pain are causally related to his May 23, 2014, injury by accident. *Young v. Hickory Bus. Furniture*, 353 N.C. 227, 231-233, 538 S.E.2d 912, 915-917 (2000).

Plaintiff failed to except to or show error in any of the findings of fact upon which the Commission relied in reaching this conclusion. We presume these findings of fact are supported by competent evidence. *See Chaisson*, 195 N.C. App. at 470, 673 S.E.2d at 156.

After reviewing the record and the Commission's conclusion of law 5, the Commission did not err in concluding that Dr. Barnes' opinion testimony regarding

the injury sustained by Plaintiff on 23 May 2014 as being "the inciting event" was incompetent. Dr. Barnes, when questioned by Plaintiff's counsel, testified:

> Q. Now, Doctor, do you have an opinion within a reasonable degree of medical certainty whether Mr. Kyles' job as a production service VMI trucker was a significant contributing factor in the development of the subacromial bursitis and the low-grade partial-thickness rotator cuff tear?
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> A. Yes. I go based on what the patient tells me, and he told me that he started having pain after doing a job activity, and, you know, the details to me are still a little sketchy because I'm not an attorney; I'm a doctor. *But, you know, when somebody comes in and says, "I was doing this. I heard a pop, and it's been hurting since," I tend to believe them, so in his case I think that that's probably what was the inciting thing.*

(Emphasis supplied.)

Dr. Barnes' opinion testimony of the 23 May 2014 incident being the "inciting event" relies upon the *post hoc, ergo propter hoc* fallacy.

"The maxim *post hoc, ergo propter hoc* [ ] denotes the fallacy of confusing sequence with consequence, and assumes a false connection between causation and temporal sequence." *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 232, 538 S.E.2d 912, 916 (2000) (citation, internal quotation marks, and ellipsis omitted). This "after this, therefore because of this" is the *post hoc, ergo propter hoc* fallacy, and does not constitute competent evidence of causation. *Id.*

If such a temporal relationship is the sole basis for a physician's opinion on causation, the physician's causation opinion is not competent evidence. *See id.*

Dr. Barnes' opinion that the 23 May 2014 injury sustained by Plaintiff was the inciting event, which caused Plaintiff's ongoing shoulder pain, is solely premised on the *post hoc, ergo propter hoc* fallacy. Dr. Barnes' testimony shows he based his opinion of the 23 May 2014 incident being the inciting event of Plaintiff's ongoing shoulder pain upon Plaintiff telling him he did not have shoulder pain before the incident, but did have shoulder pain after the incident.

The Commission correctly concluded Dr. Barnes' testimony about the 23 May 2014 being the "inciting event" of Plaintiff's continuing shoulder pain was not competent evidence. Plaintiff's argument is overruled.

D. *Stipulated Medical Records*

Plaintiff argues the Commission improperly failed to consider the stipulated medical records of Defendant-Employer's company physician, Dr. Perez, because he was not deposed. "It is reversible error for the Commission to fail to consider the testimony *or records* of a treating physician." *Whitfield v. Laboratory Corp. of Am.*, 158 N.C. App. 341, 348, 581 S.E.2d 778, 784 (2003) (emphasis supplied) (citations omitted).

The Commission's finding of fact 15 states:

> On June 2, 2014, Plaintiff presented to [the dispensary], where he was treated by Dr. Perez. Plaintiff was diagnosed

> with "Impingement with Bursitis-Tendonitis." With regard to the left shoulder, Plaintiff was assigned sedentary work only and referred to physical therapy. *Dr. Perez was not deposed, so there is no evidence showing the reason for his diagnosis.*

(Emphasis supplied.) The stipulated records of Dr. Perez indicate Dr. Perez first examined Plaintiff on 2 June 2014, ten days after Plaintiff's 23 May 2014 accident. As the Commission notes in finding of fact 15, Dr. Perez diagnosed "Impingement with Bursitis-Tendonitis." In the section of Dr. Perez's 2 June 2014 office note, submitted as part of the stipulated medical records, labeled "Reasons for Visit/History of Present Illness," Dr. Perez noted the following about Plaintiff's left shoulder pain: "Severity level is mild-moderate. It occurs constantly and is fluctuating. . . . There is no radiation. The pain is aching and sharp. *Context: there is an injury. Trauma occurred at work, 1 week 3 days ago on 05/23/2014*." (Emphasis supplied).

The last sentence of finding of fact 15 indicates the Commission did not consider Dr. Perez's 2 June 2014 office note, which appears to indicate the cause of the diagnosis of "Impingement with Bursitis-Tendonitis," because Dr. Perez was not deposed. Dr. Perez's 2 June 2014 office note was included in the medical records, stipulated to be authentic by the parties.

In making findings of fact, "the Industrial Commission must consider *all* of the evidence. The Industrial Commission may not discount or disregard any evidence, but may choose not to believe the evidence *after* considering it." *Weaver v. American*

Nat'l Can Corp., 123 N.C. App. 507, 510, 473 S.E.2d 10, 12 (1996) (citations omitted). The Commission failed to consider all of the stipulated medical records of Dr. Perez.

On remand, the Commission should consider all of the stipulated and competent medical records of Dr. Perez, including the 2 June 2014 office note. After giving due consideration, the Commission's role is to choose what weight, if any, to give to these records as the finder of fact. *See id.*

VI. Conclusion

We affirm the Commission's conclusion of law that Plaintiff sustained an injury by accident on 23 May 2014. We also hold the Commission correctly concluded the testimony of Dr. Barnes regarding the 23 May 2014 incident being the "inciting event" of Plaintiff's shoulder pain was not competent evidence. The Commission did not err in concluding Plaintiff had failed to establish a causal connection between the 23 May 2014 incident and his later diagnosed bursitis based solely upon the testimony of Dr. Barnes.

The Commission's Opinion and Award is affirmed in part. We remand to the Commission with instructions to consider the stipulated medical records of Dr. Perez and to make further findings of fact and conclusions of law on the specific injury Plaintiff sustained on 23 May 2014. *It is so ordered.*

AFFIRMED IN PART AND REMANDED.

Judges STROUD and HUNTER concur.

Report per Rule 30(e).