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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-315

Filed: 3 October 2017

From the North Carolina Industrial Commission, I.C. Nos. 14-708059, 15-720823

STEVEN AND DEBORAH BRADY, Next of Kin of ERIC A. BRADY, Deceased Employee, Plaintiff-Appellees,

v.

BEST BUY CO., INC., Employer, NEW HAMPSHIRE INS. CO., Carrier (GALLAGHER BASSETT SERVICES, INC., Third-Party Administrator), Defendant-Appellants.

Appeal by defendants from Opinion and Award of the North Carolina Industrial Commission entered 8 December 2016. Heard in the Court of Appeals 7 September 2017.

Lennon, Camak & Bertics, PLLC, by George W. Lennon and Michael W. Bertics, for plaintiff-appellees.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Paul C. Lawrence and M. Duane Jones, for defendant-appellants.

ARROWOOD, Judge.

Appeal by Best Buy Co., Inc. (“employer”), New Hampshire Insurance Company (“carrier”), and third-party administrator Gallagher Bassett Services, Inc. (“administrator”) (together “defendants”) from opinion and award of the North

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Carolina Industrial Commission (the “Commission”) in favor of Steven and Deborah Brady (“plaintiffs”), next of kin of Eric A. Brady (“decedent”). For the following reasons, we affirm the Commission’s opinion and award.

I. Background

Decedent injured his back on 9 June 2010 while lifting a heavy appliance. Decedent was working for employer as a delivery driver at the time. On the day of the injury, employer completed a Form 19 “Employer’s Report of Employee’s Injury or Occupational Disease to the Industrial Commission.” Employer acknowledged on the Form 19 that decedent “was moving a refrigerator and has pain in his lower back.” Decedent did not initially file a claim with the Commission, but sought treatment with a family physician at the direction of defendants. That physician, Dr. Abdul Sadat, diagnosed decedent with back pain and a muscle strain and prescribed physical therapy and lifting restrictions. Decedent returned to work for employer with the lifting restrictions for a brief period in June, but voluntarily resigned soon thereafter on 22 June 2010.

Decedent’s condition improved with the physical therapy ordered by Dr. Sadat. However, in late 2010 and early 2011, decedent began to experience an increase in symptoms in his lower back and sought additional treatment on his own. An MRI ordered by Dr. Denis Becker, an endocrinologist, revealed that decedent was suffering a broad based disc bulge and a disc protrusion at L5-S1. Decedent requested

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additional medical treatment from defendants on 13 July 2011 and returned to Dr. Sadat at the direction of defendants. Dr. Sadat treated decedent with prescription medications and later referred decedent to Carolina Back Institute on 25 June 2012. In August 2012, Dr. Mark Reznik, with the Carolina Back Institute, began treating decedent with steroid injections and prescription pain medications. Dr. Reznik continued to treat decedent until November 2013.

Before and during the treatment of decedent's back injury, decedent was also treated for depression by Dr. David Zarzar, a psychiatrist. Prior to decedent's 9 June 2010 back injury, decedent's mental condition was under fair to good control. Decedent's mental condition, however, worsened after the injury. Dr. Zarzar opined that the injury more likely than not aggravated decedent's pre-existing mental condition.

On 3 December 2013, decedent completed a Form 18 "Notice of Accident to Employer and Claim of Employee, Representative, or Dependant" relating to the 9 June 2010 injury. The Form 18 was filed with the Commission on 31 January 2014. Decedent completed a Form 33 "Request that Claim be Assigned for Hearing" on 18 February 2014. Defendants agreed to the payment of medical compensation, but reserved the right to later deny the compensability of decedent's claim by completing a Form 63 "Notice to Employee of . . . Payment of Medical Benefits Only Without Prejudice" on 28 February 2014. Employer later denied the compensability of

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decedent's claim in a Form 33R "Response to Request that Claim be Assigned for Hearing" completed on 31 March 2014.

Decedent was found dead in his apartment on 1 May 2014. An autopsy concluded that decedent died as a result of the combined respiratory depressive effects of prescribed medications and a previously unknown lung infection. An order filed by a deputy commissioner on 30 September 2014 removed decedent's claim from the Commission's hearing docket.

On 23 January 2015, plaintiffs completed a Form 33 "Amended Request that Claim be Assigned for Hearing." On 13 April 2015, plaintiff's completed an additional Form 18 "Notice of Accident to Employer and Claim of Employee, Representative, or Dependant." In plaintiffs' Form 33, plaintiffs asserted a new claim for death benefits. Plaintiffs described the claim as a "death claim secondary to back injury and treatment which was denied and pending before [the Commission]." On 7 May 2015, defendants completed a Form 61 "Denial of Workers' Compensation Claim." Defendants "denie[d] decedent's death was a proximate result of any occupational injury[.]"

The case was heard before Deputy Commissioner Myra L. Griffin on 26 August 2015. In an opinion and award filed on 24 May 2016, the deputy commissioner concluded "[d]ecedent's death was a proximate result of his original compensable back injury" and awarded plaintiffs temporary total disability

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compensation for the periods from 10 June 2010 through 27 July 2010 and from 11 September 2013 through 1 May 2014, death benefits, and funeral expenses. Defendants appealed to the Full Commission.

The case was heard before the Full Commission on 27 October 2016. The Full Commission filed an opinion and award on 8 December 2016. The Full Commission concluded that “[o]n June 9, 2010, decedent sustained an injury by accident to his low back arising out of and in the course of his employment with defendant-employer.”

The Full Commission further concluded as follows:

Decedent suffered from back pain, including lumbar spine pain, as a result of his compensable injury. Decedent used medications prescribed by his authorized treating physician, Dr. Resnik, for back pain due to his compensable injury, as well as medications prescribed by Dr. Zarzar for his mental health condition, which was exacerbated by his June 9, 2010 compensable back injury. The preponderance of the evidence in view of the entire record establishes that decedent’s death from an accidental drug overdose was caused by the use of prescription narcotics to treat his compensable low back injury, combined with his prescription medication for treatment of depression, other prescription medications, and a latent lung infection. Consequently, because defendants cannot establish that decedent’s death was caused by an independent intervening event, the Commission concludes that decedent’s death was a proximate result of his original compensable back injury of June 9, 2010.

Based on its findings of fact and conclusions of law, the Full Commission awarded plaintiffs medical compensation, funeral expenses, and death benefits. Defendants appealed to this Court on 28 December 2016.

II. Discussion

On appeal, defendants first argue the Full Commission erred in concluding decedent's 9 June 2010 work injury exacerbated his pre-existing mental condition. Defendants also argue the Commission erred in concluding plaintiffs were entitled to death benefits. In asserting these arguments, defendants challenge specific findings of fact supporting the Full Commission's conclusions.

Review of an opinion and award of the Commission "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) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)). "Findings not supported by competent evidence are not conclusive and will be set aside on appeal." *Penland v. Bird Coal Co.*, 246 N.C. 26, 30, 97 S.E.2d 432, 436 (1957). "[W]here findings of fact are not challenged and do not concern jurisdiction, they are binding on appeal." *Medlin v. Weaver Cooke Const., LLC*, 367 N.C. 414, 423, 760 S.E.2d 732, 738 (2014). Moreover, "[t]he Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Anderson*, 265 N.C. at 433-34, 144 S.E.2d at 274.

A. Aggravation of Psychiatric Condition

Defendants first argue the Full Commission erred in concluding decedent's 9 June 2010 work injury exacerbated decedent's pre-existing mental condition because plaintiff failed to present competent medical evidence of causation. Thus, defendants contend "the Full Commission's findings and conclusions as to the connection should be reversed."

Defendants' argument relates to conclusion of law number 4, in which the Full Commission "conclude[d] that decedent's compensable low back injury of June 9, 2010 and its consequences caused or exacerbated his psychiatric condition." In support of their argument that the conclusion was in error, defendants specifically challenge findings of fact numbers 31 and 32. Those findings provide as follows:

31. In 2007, Dr. David Zarzar, a psychiatrist, began treating decedent for major depression and continued to treat decedent until the time of his death. Dr. Zarzar described decedent's mental condition, prior to the June 9, 2010 work event, as under fair to good control. Following the June 9, 2010 work injury, decedent's mental condition worsened. Dr. Zarzar testified there was a magnification of decedent's depression with "more of a chronicity to it." He explained that the significant back pain decedent experienced, as well as the loss of his job, were significant stressors for decedent. Dr. Zarzar opined, and the Commission so finds, that decedent's June 9, 2010 work injury, and the stressors associated with that injury, more likely than not aggravated decedent's pre-existing mental health condition.

32. Dr. Zarzar testified, and the Commission finds as fact,

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that the medical treatment decedent received for his mental health condition subsequent to his compensable work injury of June 9, 2010, has been reasonably required to effect a cure and provide relief for said condition.

Upon review of the transcript of Dr. Zarzar's deposition, it is clear that the Commission's findings of fact are supported by Dr. Zarzar's testimony. The issue on appeal, however, is whether Dr. Zarzar's testimony is competent evidence.

Our courts have consistently held that workers injured in compensable accidents are entitled to be compensated for all disability caused by and resulting from the compensable injury. . . .

The law in this state is that the aggravation of an injury or a distinct new injury is compensable [w]hen the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury arises out of the employment, unless it is the result of an independent intervening cause attributable to claimant's own intentional conduct. . . . When a first cause produces a second cause that produces a result, the first cause is a cause of that result.

Heatherly v. Montgomery Components, Inc., 71 N.C. App. 377, 379-80, 323 S.E.2d 29, 30 (1984) (citations and quotation marks omitted), *disc. review denied*, 313 N.C. 329, 327 S.E.2d 890 (1985).

Although the employment-related accident need not be the sole causative force to render an injury compensable, the plaintiff must prove that the accident was a causal factor by a preponderance of the evidence[.]

In cases involving complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion

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evidence as to the cause of the injury. However, when 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. [T]he 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.

. . . Although expert testimony as to the *possible* cause of a medical condition is admissible if helpful to the jury, it is insufficient to prove causation, particularly when there is additional evidence or testimony showing the expert's opinion to be a guess or mere speculation[.]

Holley v. ACTS, Inc., 357 N.C. 228, 231-33, 581 S.E.2d 750, 752-53 (2003) (quotation marks and citations omitted). “Our Supreme Court has held ‘that the entirety of causation evidence’ must ‘meet the reasonable degree of medical certainty standard necessary to establish a causal link between plaintiffs’ accident and their injury. ‘Although medical certainty is not required, an expert’s “speculation” is insufficient to establish causation.’” *Workman v. Rutherford Elec. Membership Corp.*, 170 N.C. App. 481, 494, 613 S.E.2d 243, 252 (2005) (quoting *Holley*, 357 N.C. at 234, 581 S.E.2d. at 754).

In the present case, defendants contend “Dr. Zarzar’s testimony is at best speculative and not competent medical evidence to support causation for several reasons.” Although defendants acknowledge that “Dr. Zarzar did in fact testify that the pain and stress from [decedent’s] work injury more likely than not aggravated [decedent’s] preexisting psychiatric condition,” defendants discount the testimony

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because Dr. Zarzar's medical notes did not reference decedent's work injury and back pain. In pointing out the absence of medical notes concerning decedent's back pain, defendants insinuate decedent did not experience continuing back pain from the 9 June 2010 work injury in the years leading up to decedent's death. The Full Commission's unchallenged findings, however, establish that plaintiff was suffering from, and receiving treatment for, continuing back pain resulting from his 9 June 2010 work injury. Moreover, the absence of medical notes does not render Dr. Zarzar's testimony incompetent, but goes to the credibility and weight afforded his testimony. This Court will not second guess the Commission's determinations on the credibility and the weight afforded Dr. Zarzar's testimony. *See Anderson*, 265 N.C. at 434, 144 S.E.2d at 274.

Relying on *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 538 S.E.2d 912 (2000), defendants also argue Dr. Zarzar's causation testimony is not competent because it's based merely on temporal sequence. In *Young*, this court held that expert testimony relating the plaintiff's fibromyalgia to a work place injury was incompetent evidence of causation where the expert acknowledged that there were at least three potential causes of the plaintiff's fibromyalgia and the expert found it necessary to rely on the maxim "*post hoc, ergo propter hoc.*" *Id.* at 232, 538 S.E.2d at 916. The Court in *Young* pointed out that, "[the expert's] total reliance on this premise is shown near the end of his deposition testimony wherein he states: 'I think that she does have

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fibromyalgia and I relate it to the accident primarily because, as I noted, it was not there before and she developed it afterwards. And that's the only piece of information that relates the two.'” *Id.* The Court explained that, “[i]n a case where the threshold question is the cause of a controversial medical condition, the maxim of ‘*post hoc, ergo propter hoc,*’ is not competent evidence of causation[]” because “[t]he maxim ‘*post hoc, ergo propter hoc,*’ denotes ‘the fallacy of . . . confusing sequence with consequence,’ and assumes a false connection between causation and temporal sequence.” *Id.*

In this case, Dr. Zarzar described how his treatment of patients is based on his interactions with the patient and what the patient tells him. Although Dr. Zarzar responded affirmatively at times during cross-examination when questioned whether his opinion was based on temporal sequence, it is evident from Dr. Zarzar’s testimony that his opinion is not based solely on temporal sequence. Dr. Zarzar explained that he treated decedent both before and after decedent’s 9 June 2010 work place injury, and was able to compare decedent’s psychiatric symptoms. Dr. Zarzar testified that prior to the injury, decedent’s psychiatric symptoms were under “fair to good” control, but that decedent’s psychiatric condition worsened after decedent’s injury. Dr. Zarzar explained that he observed a magnification of decedent’s depression, with more of a chronicity to it. He also observed that decedent became isolated, was poorly motivated, and had feelings of helplessness, guilt, and hopelessness. Based on his interactions with decedent, Dr. Zarzar related the increased psychiatric symptoms to

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decedent's back pain stemming from the 9 June 2010 injury. Dr. Zarzar testified that, more likely than not, decedent's back pain from the 9 June 2010 injury was the stressor that caused the increase in psychiatric symptoms, which Dr. Zarzar treated with prescription medications.

Although Dr. Zarzar's testimony has a temporal component, and parts of Dr. Zarzar's testimony appear speculative when isolated, taken in its entirety, we hold Dr. Zarzar's testimony is competent evidence of causation and that the testimony supports the Full Commission's findings of fact numbers 31 and 32.

B. Death Benefits

Defendants also challenge the Commission's finding of fact number 43, asserting the Commission erred in concluding plaintiff is entitled to death benefits. That finding of fact provides as follows:

43. Based upon the preponderance of the evidence in view of the entire record, the Commission finds decedent died from the combined respiratory depressive effects of the prescription medications that he took for his compensable low back injury and his mental health condition, other prescription medications decedent took and a previously undiagnosed lung infection. The Commission further finds that the manner of death was accidental and not due to the intentional conduct of decedent.

Specifically, as an extension of defendants' first argument, defendants argue as follows:

As argued above, the Full Commission's conclusion that Decedent's mental health condition was aggravated by his

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compensable injury is error. As the Full Commission further found and concluded that Decedent's death was at least in part caused by Decedent's taking of prescription medications related to his mental health condition, the Full Commission's conclusion that Decedent's death is compensable is also in error.

Because we have held findings of fact numbers 31 and 32 were not in error, defendants' argument fails.

However, even without finding of fact number 43, we hold the award of death benefits is proper based on other unchallenged findings of fact. Specifically, finding of fact number 38 provides as follows:

38. Dr. McMillen concurred with Dr. Venuti's conclusion that decedent's death was caused by the combined respiratory depression [sic] effects of his medication use and his lung infection. Dr. McMillen further opined, and the Commission finds as fact, that the medications decedent took for his compensable lumbar spine pain and his mental health condition were substantial contributors to his death.

We agree with plaintiffs that this unchallenged finding of fact, which relates the prescription medications decedent took for his back pain to his death, supports the Commission's award of death benefits independent of finding of fact number 43.

III. Conclusion

For the reasons discussed above, we affirm the Full Commission's opinion and award.

AFFIRMED.

Judges HUNTER, Jr., and DILLON concur.

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Report per Rule 30(e).