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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-141

Filed: 4 October 2016

From the North Carolina Industrial Commission, I.C. No. 14-721937

FRED PASSMORE, Employee, Plaintiff,

v.

NATIONAL RETAIL SYSTEMS, INC., Employer, THE HARTFORD, Carrier (TRISTAR RISK MANAGEMENT, Third-Party Administrator), Defendants.

Appeal by defendants from opinion and award entered 23 November 2015 by the Industrial Commission. Heard in the Court of Appeals 11 August 2016.

Oxner + Permar, PLLC, by Justin Wraight, for plaintiff-appellee.

Dickie McCamey & Chilcote, P.C., by Susan H. Briggs, for defendants-appellants.

ZACHARY, Judge.

Where an expert witness' testimony revealed that he relied upon facts supported by the record in reaching his opinion, the Industrial Commission did not err in utilizing the expert's opinion to reach its findings and conclusion. Where the Industrial Commission's findings of fact were supported by the evidence, and in turn supported its conclusions of law, we affirm its opinion and award.

I. Factual and Procedural Background

Fred Passmore (plaintiff) has a history of chronic neck problems, and in 2005, he underwent surgery on his cervical spine. Sometime later, he underwent an additional neck surgery due to his diagnosis of thyroid cancer, but that operation was not conducted to address any cervical spine issues. Following these surgeries, plaintiff was incapacitated for "probably almost a year," and had to re-learn "how to walk, eat, everything."

On 9 November 2009, plaintiff became a patient at Cornerstone Health Care, where he presented with low back pain, neck pain, and chronic obstructive pulmonary disorder (COPD), and received chronic pain management. On 5 December 2011, plaintiff complained of neck discomfort after he sneezed and suffered "the abrupt onset of mid back pain with radiation into his left shoulder and arm[.]" These complaints continued for some years. Plaintiff was referred to physical therapy, but did not attend. On 16 July 2013, plaintiff experienced an exacerbation of his ongoing neck pain. His doctor once more recommended physical therapy, or failing that an MRI. The physical therapist was unable, however, to contact plaintiff. On 13 September 2013, plaintiff once more presented with neck pain to his doctor. An X ray taken at that time showed various orthopedic issues, which included "focal kyphosis"—i.e., humping of the spine or "cat back"—and bone spurring at the mid and lower spine. On 15 November 2013, plaintiff returned to his doctor with another

acute exacerbation of cervical pain. His doctor noted that this was a continuation of the pain plaintiff had been experiencing since 2011. However, while plaintiff visited Cornerstone Health Care twice in December 2013 for COPD-related issues, he made no complaints associated with neck pain.

In May of 2010, plaintiff began to work for National Retail Systems, Inc. (employer) as a truck driver. There was no lifting or climbing involved with his position; his duties entailed driving, inspecting the truck, and checking the tires. On 18 January 2014, plaintiff was working for employer in Charleston, West Virginia. As he was driving employer's truck back to North Carolina, he hit a pothole, and struck his head on an overhead cabinet. Plaintiff claimed that he injured his neck and shoulder as a result of this incident. Following this event, plaintiff presented at Thomasville Medical Center, and reported pain in the left and right trapezius, cervical spine, and upper thoracic spine. Plaintiff reported that these symptoms were "similar to prior episodes." He denied any injury to his head or chest, and admitted to a history of arthritis, back injury, intervertebral disc disease, prior back pain, and prior neck pain. Plaintiff was diagnosed with cervical strain and advised not to work for two days.

Plaintiff was out of work for two weeks, and upon return he was restricted to light-duty tasks, such as computer work, inventory, and paperwork. He worked light duty from February of 2014 to 17 June 2014.

Between his presentation at Thomasville Medical Center on 18 January 2014 and 31 March 2014, plaintiff sought treatment at several medical facilities. During this group of visits, he complained primarily of radicular cervical pain, received prescription medications, and had his past medical history noted in the facilities' records. On 31 March 2014, plaintiff returned to Cornerstone Health Care, complaining of pain in his right arm and the right side of his neck. Plaintiff was prescribed painkillers and encouraged to continue taking his other medications. He returned to Cornerstone twice in May 2014, but only for complaints of COPD. Plaintiff made no complaints of neck pain at either visit in May.

After more than two months with no documented neck problems, plaintiff returned to Cornerstone on 5 June 2014, complaining of neck pain. An MRI was ordered. Plaintiff returned on 27 June 2014 complaining of pain in his ribs; no mention was made of his neck pain. Plaintiff was briefly transferred to High Point Regional Hospital for treatment of pneumonia. After being released from the hospital, plaintiff returned to Cornerstone for a follow-up visit on 2 July 2014, where a physical examination revealed full range of motion of his neck without pain or tenderness; in addition, no complaints associated with his neck were noted.

Employer filed a Form 19 Report of Employee's Injury, and subsequently, plaintiff filed a Form 18 Notice of Accident to Employer and Claim of Employee. Plaintiff's claim was denied by employer, its insurance carrier Hartford Insurance

Company, and its third-party administrator Tristar Risk Management (collectively, defendants) on 21 March 2014. Plaintiff appealed this denial on 2 April 2014.

On 23 April 2015, the Deputy Commissioner issued an opinion and award denying plaintiff's claim. Plaintiff filed notice of appeal on 29 April 2015. On 23 November 2015, the Full Commission issued its opinion and award, reversing the Deputy Commissioner's opinion and award, and finding plaintiff's claim compensable. However, the Full Commission found that plaintiff had failed to engage in a reasonable job search, without presenting any evidence that a job search would be futile. The Full Commission therefore ordered that defendants pay to plaintiff all of plaintiff's necessary medical expenses resulting from the injury; temporary total disability compensation from 18 January 2014 to the time in February 2014 that he resumed work in a light-duty capacity; and temporary partial disability from that date to 17 June 2014.

Defendants appeal.

II. Standard of Review

Review of an opinion and award of the Industrial 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. [The appellate] '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)). As such, "[t]he Commission's findings of fact may be set aside on appeal only where there is a complete lack of competent evidence to support them." *Jones v. Chandler Mobile Vill.*, 118 N.C. App. 719, 721, 457 S.E.2d 315, 317 (1995) (citation omitted). Unchallenged findings of facts are presumed to be supported by competent evidence and are therefore binding on appeal. *Johnson v. Herbie's Place*, 157 N.C. App. 168, 180, 579 S.E.2d 110, 118 (2003). Finally, it is axiomatic that "[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.

III. Causation of Injury

In their first argument, defendants contend that the Full Commission erred in finding that plaintiff had proven a causal link between his injury and the workplace accident. We disagree.

The Full Commission reviewed the deposition testimony of Drs. Kalish and Brooks. Dr. Kalish was plaintiff's treating physician at Cornerstone. Dr. Brooks was plaintiff's treating physician at Greensboro Orthopedics, one of several facilities where plaintiff sought treatment during early 2014.

Defendants contend that the opinion expressed by Dr. Brooks in his deposition, upon which the Full Commission relied in determining that plaintiff suffered an

injury which caused his subsequent symptoms, lacked adequate support concerning causation. Defendants note that Dr. Brooks' determination was based in part on plaintiff's explanation that he struck a pothole. Defendants argue, however, that plaintiff could not have been injured by the truck striking a pothole because the truck was equipped with a special seat designed to absorb shock, and that the seat was functioning at the time of injury. Defendants also maintain that Dr. Brooks' opinion was based on the inaccurate understanding that plaintiff lacked prior medical complaints; his opinion was instead based on plaintiff's self-provided medical history, and Dr. Brooks was unaware of plaintiff's prior treatments for cervical strain other than a procedure in 2009.

It is clear that

> "[i]n order to be sufficient to support a finding that a stated cause produced a stated result, evidence on causation must indicate a reasonable scientific probability that the stated cause produced the stated result." *Johnson v. Piggly Wiggly of Pinetops, Inc.,* 156 N.C. App. 42, 49, 575 S.E.2d 797, 802 (2003) (quoting *Phillips v. U.S. Air, Inc.,* 120 N.C. App. 538, 542, 463 S.E.2d 259, 262 (1995), *aff'd,* 343 N.C. 302, 469 S.E.2d 552 (1996)). Expert testimony as to the possible cause of a medical condition is admissible if helpful but "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,* 357 N.C. at 233, 581 S.E.2d at 753 (quoting *Young v. Hickory Bus. Furn.,* 353 N.C. 227, 233, 538 S.E.2d 912, 916 (2000)). Ultimately, expert opinion testimony based on speculation and conjecture lacks the reliability to qualify as competent evidence on issues of medical causation. *Young,* 353 N.C. at 230, 538 S.E.2d at 915.

Seay v. Wal-Mart Stores, Inc., 180 N.C. App. 432, 436-37, 637 S.E.2d 299, 302 (2006).

In *Seay*, the plaintiff before the Full Commission relied upon the testimony of his expert witness to establish causation. The plaintiff asked his expert a hypothetical question, to which the expert responded with an opinion based upon the hypothetical facts presented by the plaintiff. The Commission concluded that the expert's testimony was "too speculative to meet plaintiff's burden of proof on causation." *Id*. at 437, 637 S.E.2d at 303. On appeal, this Court noted the following:

> [T]he response elicited by [the] plaintiff's hypothetical question required Dr. Davidson to assume the truth of facts that were not supported by the record. An expert's opinion that was solicited through the assumption of facts unsupported by the record is entirely based on conjecture. *Thacker v. City of Winston-Salem,* 125 N.C. App. 671, 675, 482 S.E.2d 20, 23 (1997). Specifically, Dr. Davidson was asked to assume that "prior to 04/04/2003 [the plaintiff] had no complaints of pain radiating into his legs, and the only medical history relating to any back pain was in a chiropractic treatment record dated 12/18 of 2000 where he was complaining of occasional soreness in his lower back." The Commission, however, found the plaintiff's medical records were filled with inconsistencies, including conflicting evidence on the onset of plaintiff's pain.

Id. at 437-38, 637 S.E.2d at 303.

In the instant case, defendants contend that, as in *Seay*, Dr. Brooks' opinion was based on inaccurate facts unsupported by the record, and was therefore entirely based on conjecture. Defendants argue that, as a result, the Full Commission erred in relying upon Dr. Brooks' testimony in establishing causation.

Dr. Brooks' testimony did not, however, consist of bare conjecture. Dr. Brooks reviewed the medical records that he had at his disposal and reached an opinion, to a reasonable degree of medical certainty, that causation existed. Nor was Dr. Brooks completely unaware of plaintiff's medical history; various facts were brought to his attention during the deposition, and he also considered Dr. Kalish's report.

It is well established that "[t]his Court may not weigh the evidence or make determinations regarding the credibility of the witnesses." *Id.* at 434, 637 S.E.2d at 301 (citing *Adams v. AVX Corp.,* 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998)). In essence, defendants are asking that we consider Dr. Brooks' testimony incredible, notwithstanding the facts upon which he relied, such that the Full Commission erred in relying upon it. We are not permitted to do so, and hold that the Full Commission did not err in relying upon Dr. Brooks' testimony with respect to the matter of causation.

This argument is without merit.

IV. Compensable Injury

Defendants further contend that the Full Commission erred in concluding that plaintiff had suffered a compensable injury. We disagree.

In order to be eligible to receive a workers' compensation award, the claimant's evidence must show that: " '(1) the claimant suffered a personal injury by accident; (2) such injury arose in the course of the employment; and (3) such injury arose out

of the employment.' " *Ard v. Owens-Illinois*, 182 N.C. App. 493, 496, 642 S.E.2d 257, 260 (2007) (citation omitted). "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[.]' " *Holley v. ACTS, Inc.*, 357 N.C. 228, 231-32, 581 S.E.2d 750, 752 (2003) (citations omitted).

Pursuant to N.C. Gen. Stat. 97-2(6) (2015), a compensable injury "shall mean only injury by accident arising out of and in the course of the employment . . . ." An accident has been described by this Court as

> an unlooked for event . . . produced by a fortuitous cause. If an employee is injured while carrying on his usual tasks in the usual way the injury does not arise by accident. However, if an interruption of the work routine occurs introducing unusual conditions likely to result in unexpected consequences, an accidental cause will be inferred.

Lineback v. Wake County Bd. of Comm'rs, 126 N.C. App. 678, 681, 486 S.E.2d 252, 254-55 (1997) (citations and internal quotation marks omitted). This Court has explained that

> [a]n "accident" is not established by the mere fact of injury but is to be considered as a separate event preceding and causing the injury. No matter how great the injury, if it is caused by an event that involves both an employee's normal work routine and normal working conditions it will not be considered to have been caused by accident.

Renfro v. Richardson Sports Ltd. Partners, 172 N.C. App. 176, 180, 616 S.E.2d 317, 322 (2005) (quoting *Searsey v. Perry M. Alexander Constr. Co.*, 35 N.C. App. 78, 79-

80, 239 S.E.2d 847, 849 (1978)).

However, our General Assembly has provided a distinct standard for back injuries:

> [W]here injury to the back arises out of and in the course of the employment and is the direct result of a specific traumatic incident of the work assigned, "injury by accident" shall be construed to include any disabling physical injury to the back arising out of and causally related to such incident.

N.C. Gen. Stat. § 97-2(6). As a result, section 97-2(6) "provides two theories on which a back injury claimant can proceed: (1) that claimant was injured by accident; or (2) that the injury arose from a specific traumatic incident." *Fish v. Steelcase, Inc.*, 116 N.C. App. 703, 707, 449 S.E.2d 233, 237 (1994) (citation omitted). To establish that the claimant was injured as the result of a specific traumatic incident, the plaintiff must prove that an injury occurred at a judicially cognizable point in time. *Id.* at 708, 449 S.E.2d at 237. The term "judicially cognizable"

> should be read to describe a showing by plaintiff which enables the Industrial Commission to determine when, within a reasonable period, the specific injury occurred. The evidence must show that there was some event that caused the injury, not a gradual deterioration. If the window during which the injury occurred can be narrowed to a judicially cognizable period, then the statute is satisfied.

Id. at 709, 449 S.E.2d at 238.

In the instant case, the compensability of plaintiff's cervical strain was assessed under the specific traumatic incident standard. *See Raper v. Mansfield Sys., Inc.*, 189 N.C. App. 277, 285, 657 S.E.2d 899, 906 (2008) (noting that the defendants conceded that the plaintiff's "cervical strain" was compensable as an injury that arose out of and was causally related to a specific traumatic incident); *Zimmerman v. Eagle Elec. Mfg. Co.*, 147 N.C. App. 748, 753-54, 556 S.E.2d 678, 681-82 (2001) (discussing neck pain which resulted in, *inter alia*, stiffness and radicular pain in the claimaint's right shoulder and hand as a back injury compensable upon the requisite showing of a causal relation to a specific traumatic incident). To that end, the Full Commission found in, pertinent part:

> 22. Dr. Brooks testified that the mechanism of injury reported to him by [p]laintiff was consistent with a cervical strain. Dr. Brooks testified that, even considering [p]laintiff's prior neck issues as treated by Dr. Kalish, prior to the January 2014 work event there was no immediate history of significant neck problems. He opined to a reasonable degree of medical certainty that a causal relationship exists between the January 2014 work injury and the condition for which Dr. Brooks was treating [p]laintiff, namely, his neck problems and diagnosed cervical strain.
>
> 23. The Full Commission finds [p]laintiff's testimony regarding his mechanism of injury on [18] January . . . 2014 as credible and finds as fact that [p]laintiff suffered a specific traumatic incident on [18] January . . . 2014 while driving a truck for [employer].

Pursuant to these and other findings, the Full Commission concluded that "[based]

on the preponderance of the evidence including the causation testimony of Dr. Brooks, . . . [p]laintiff suffered a compensable work injury on [18] January . . . 2014 that caused his cervical neck strain."

Defendants essentially revisit their prior argument, maintaining that the medical evidence, derived primarily from the testimony of defendants' expert Dr. Kalish, demonstrates that plaintiff had prior medical issues, that his medical treatment subsequent to the 18 January 2014 incident did not substantially change, and that "at most, [p]laintiff sustained a temporary exacerbation of a long standing pre-existing degenerative problem." In making these contentions, defendants are leveling another attack on causation.

We begin by rejecting defendants' claims that Dr. Brooks' causation testimony was made under "misunderstanding[s]" and "misimpression[s]" as to the nature and severity of plaintiff's prior neck problems. The gravamen of these arguments, once again, is that Dr. Brooks' medical opinion was not credible because it was based on an insufficient understanding of plaintiff's medical history. However, this Court, as previously stated, "may not weigh the evidence or make determinations regarding the credibility of the witnesses." *Seay*, 180 N.C. App. at 434, 637 S.E.2d at 301 (citing *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998)).

Furthermore, Dr. Brooks twice stated that it was his opinion, to a reasonable degree of medical certainty, that a causal relationship existed between the 18

January 2014 incident and the cervical strain plaintiff suffered immediately thereafter. Even when asked to consider plaintiff's prior neck problems that were treated by Dr. Kalish, Dr. Brooks maintained his opinion that the aforementioned causal link existed. Key to Dr. Brooks' determination was the fact that, in his view, there was no "immediate history of significant neck problems" prior to the injury plaintiff sustained on 18 January 2014:

> [I]f [plaintiff] did have a neck problem, it certainly wasn't as severe as what he was complaining about when he presented to me. So at worst, it's an acute exacerbation of an underlying problem. At best, . . . it's a new problem, an acute – at the time it would have been an acute problem due to an acute event.

The Full Commission considered this and other evidence in reaching its findings. Because these findings, including the finding "that [p]laintiff suffered a specific traumatic incident on 18 January . . . 2014[,]" are supported by competent causation evidence, the Full Commission properly concluded that plaintiff suffered a compensable injury. We will not overturn a conclusion supported by findings, which in turn are supported by evidence, based solely on defendants' arguments as to the weight of the evidence.

This argument is without merit.

V. Conclusion

Dr. Brooks' testimony was supported by competent evidence in the record, and the Full Commission properly relied upon Dr. Brooks' opinion in making its findings

on causation. Because the evidence supported those findings, the Full Commission did not err in finding that a causal relationship existed between plaintiff's 18 January 2014 work injury and his present condition. Further, because the finding that plaintiff suffered a specific traumatic incident is supported by competent evidence, the Full Commission did not err in concluding that plaintiff had suffered a compensable injury.

AFFIRMED.

Judges STEPHENS and McCULLOUGH concur.

Report per Rule 30(e).