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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-213

Filed: 7 April 2020

North Carolina Industrial Commission, I.C. No. 16-018941

TRAVIS MARTIN, Employee, Plaintiff

v.

WAKEMED, Employer, KEY RISK MANAGEMENT SERVICES, Carrier,
Defendants.

Appeal by plaintiff from opinion and award entered 9 November 2018 by the North Carolina Industrial Commission. Heard in the Court of Appeals 17 September 2019.

Hardison & Cochran P.L.L.C., by J. Carter Whittington, for plaintiff-appellant.

Cranfill Sumner & Hartzog LLP, by Carl Newman, Robin H. Terry, Walter M. Dennis, for defendant-appellees.

BRYANT, Judge.

Where record evidence supports the Full Commission's findings of fact and the findings of fact support the conclusion of law, we affirm the Commission's 9 November 2018 opinion and award awarding in part and denying in part plaintiff's claim for workers' compensation benefits.

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On 13 April 2016, plaintiff Travis Martin, an EMT worker, was driving an ambulance in Wake County along I-440 West when he was involved in a motor vehicle collision. Plaintiff was traveling between 40 and 45 mph when a vehicle in a lane to the left of the ambulance turned to the right, colliding with the front left side of the ambulance. The collision caused one of the ambulance's wheel covers to fall off and the "rub rail" to bend. Shortly after the collision, plaintiff's supervisor, Tammy Collie, traveled to the scene of the accident. Collie, who had spent twenty years as an ICU nurse and a flight nurse, questioned plaintiff about injuries he may have sustained. Plaintiff reported that his lower back and right knee were hurting, and he denied hitting his head or losing consciousness. Collie determined that plaintiff did not need an ambulance to transport him but recommended that plaintiff be evaluated at an emergency department. Collie noted that plaintiff engaged her in normal conversation, appeared to be able to hear and follow the conversation, and provided details about the collision consistent with other accounts of the accident. Another EMT worker transported plaintiff to Wake Medical Center (hereinafter "WakeMed") Emergency Department.

At the WakeMed Emergency Department, plaintiff was evaluated by Dr. David Rosenbaum. Plaintiff reported that he had been involved in a motor vehicle accident wherein he struck his knee on the dashboard of his vehicle and pulled his right lateral low back. Plaintiff complained of right lateral low back pain and right knee pain.

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Plaintiff denied pain, weakness, or numbness in his legs. Plaintiff denied blunt head trauma, headaches, or loss of consciousness. As to his medical history, plaintiff reported a right ACL repair but not any prior low back injuries. Plaintiff was noted to be alert, with no slurred speech, headache, numbness, or weakness. Medical care providers noted no trauma to plaintiff's head.

Dr. Rosenbaum found moderate tenderness over the right paraspinal lumbar back and mild tenderness to the anterior right knee. X-rays of the lumbar spine revealed mild degenerative disc space narrowing at T12-L1 with no acute findings. X-rays of the right knee revealed tri-compartmental degenerative joint space narrowing and osteophyte formation with no acute findings.

Later that day, plaintiff was discharged from WakeMed. Collie picked up plaintiff from the hospital, and plaintiff was able to provide Collie with directions to his home.

Three days after being discharged from the WakeMed Emergency Department, plaintiff presented to Dr. Scott Sanitate, board certified in physical medicine and rehabilitation, at WakeMed's Occupational Health Clinic. Plaintiff reported headaches, tinnitus, back pain, and resolving right knee pain following a motor vehicle accident. Dr. Sanitate noted that plaintiff "was not acting himself, although he denied head trauma, loss of consciousness or significant bruising or lacerations." Dr. Sanitate also noted that plaintiff was wearing sunglasses and earplugs, exhibited mild instability during positional changes and decreased hearing bilaterally for low-frequency sound. Plaintiff's symptoms were consistent with post-concussive

syndrome. Dr. Sanitate noted, “[Plaintiff’s] constellation of symptoms were rather significant for the described relatively minor impact with [no] loss of consciousness or other trauma identified.” Plaintiff was referred to Dr. James O’Neill, a board-certified otolaryngologist.

On 20 April 2016, Dr. O’Neill evaluated plaintiff and determined that plaintiff suffered from hearing loss in both ears, with greater hearing loss in the left ear. Dr. O’Neill found no visible signs of trauma to plaintiff’s face, head, neck, or ears. “Plaintiff presented normal mood and affect and was oriented to person, place, and time.” Plaintiff was diagnosed with asymmetric bilateral hearing loss with a recommendation that plaintiff be re-evaluated in three months.

Plaintiff returned to Dr. Sanitate on 26 April 2016. Plaintiff reported severe back pain, vertigo, dizziness, hyperacusis, photophobia, and right knee pain. Upon examination, Dr. Sanitate noted plaintiff was able to partially squat and rise without significant knee pain, and had no significant imbalance during positional changes and negative straight leg raises. Plaintiff was “comfortable and much more alert than he was on his previous visit.” Dr. Sanitate recorded the following: “[m]ultitude [sp] of symptoms described from a relatively low impact motor vehicle accident. Patient was driving a large ambulance that hit a car. He reports that he thinks that he may have struck his left forehead on the A[-]pillar of the vehicle. No loss of consciousness.”

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As part of an investigation of plaintiff's workers' compensation claim, plaintiff recorded a statement on 26 April 2016.

The only thing I remember [after the collision] is being outside the truck and not being able to hear and [I] was very dizzy at that point. And the next thing I know I was . . . in the emergency room that evening and pretty much everything's a blur after that until a couple days later.

On 28 April 2016, plaintiff filed a Form 18, notice of accident to employer and claim of employee, with the North Carolina Industrial Commission. In it, plaintiff claimed that on 13 April 2016, he suffered a compensable injury to his "right lower extremity, spine, and hearing loss." Subsequently, defendant WakeMed Center filed a Form 19, employer's notice of employee's injury, and Form 63, notice to employee of payment of compensation or medical benefits without prejudice. On the Form 63, defendant stated that in regard to plaintiff's claim for injury, which occurred on 13 April 2016 and resulted in low back pain and right knee strain, payment of worker compensation benefits would commence without prejudice to later deny plaintiff's claim or defendant's liability. Defendant also filed a Form 61, denial of worker's compensation claim in which defendant denied plaintiff's claim for concussion/head injury resulting in bilateral hearing loss. Plaintiff requested a hearing.

On 22 March 2017, the matter was heard before former Deputy Commissioner Philip A. Baddour, III. However, after former Deputy Commissioner Baddour was appointed to the Full Commission (hereinafter "the Commission"), Chief Deputy

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Commissioner William W. Peaslee transferred the matter to Deputy Commissioner Kevin V. Howell. On 25 September 2017, Deputy Commissioner Howell entered an amended opinion and award wherein defendant was ordered to pay for all medical expenses incurred as a result of plaintiff's compensable injuries to his low back, his right knee, and his head; however, plaintiff's claim based on injury to his ears was denied. Plaintiff and defendants WakeMed Center and Key Risk Management Services appealed to the Commission.

The Commission reviewed the matter on 7 February 2018. In an opinion and award entered 9 November 2018, the Commission considered whether plaintiff's 13 April 2016 injury by accident included post-concussive syndrome and bilateral hearing loss; whether plaintiff was entitled to benefits under the Workers' Compensation Act; and whether the burden of proof be placed upon plaintiff that additional medical treatment for plaintiff's low back and right knee was causally related to the 13 April 2016 injury by accident after defendant accepted compensability for those injuries.

The Commission noted that plaintiff continued to treat with Dr. Sanitate in May 2016 reporting ongoing pain to the low back and right knee, ongoing dizziness, tinnitus, decreased hearing in his left ear, increased blurred vision when not wearing sunglasses, and memory problems. Dr. Sanitate noted that "[p]laintiff's post-concussive complaints were resolving and maintained [p]laintiff's diagnoses of

mechanical low back pain without evidence of radiculopathy and right knee pain. Dr. Sanitate released plaintiff to return to work” but directed that he not lift patients unassisted.

On 30 July 2016, plaintiff returned to Dr. O’Neil complaining of tinnitus and a high-pitched ringing in his left ear, which had started after the 13 April 2016 accident. Dr. O’Neil performed an audiogram which yielded the same results as plaintiff’s 20 April 2016 evaluation. Dr. O’Neil noted that plaintiff’s hearing loss was most likely permanent.

During his deposition, regarding whether plaintiff suffered from post-concussive syndrome, Dr. Sanitate testified that “[plaintiff’s] symptoms are related to the accident. . . . Whether he truly had post-concussive syndrome is another question, I guess.” The Commission did not find plaintiff’s testimony and report of post-concussive symptoms following the accident to be credible. The Commission found that following the accident, “[p]laintiff was able to engage in conversations with his co-worker and supervisor, and [p]laintiff did not report any symptoms associated with post-concussive syndrome at the emergency department that same night.” The Commission noted that Dr. Sanitate’s medical records indicate plaintiff’s reported post-concussive symptoms were out of proportion to the severity of the motor vehicle accident and “Dr. Sanitate never documented any objective findings or deficits to explain [p]laintiff’s symptoms.” “Based on the preponderance of the competent,

credible evidence in view of the entire record, the . . . Commission [found] that [p]laintiff did not sustain a compensable head injury as a result of the 13 April 2016 motor vehicle accident.”

In his deposition, Dr. O’Neil testified that a motor vehicle accident can result in hearing loss if there is a temporal bone fracture, a bump to the head, or loud noises. More specifically, Dr. O’Neil testified that if plaintiff did not suffer from hearing loss before his motor vehicle accident, and then suffered a traumatic event to the head accompanied by a loud noise, plaintiff’s hearing loss was more likely than not caused by the traumatic event. The Commission found that the record evidence, including plaintiff’s testimony, did not reveal plaintiff ever discussing a loud noise or a certain degree of noise during the motor vehicle accident sufficient to cause plaintiff to sustain asymmetric bilateral hearing loss. Moreover, the motor vehicle collision on 13 April 2016 “resulted in only minimal damage to [the vehicle plaintiff was driving].” Based on the preponderance of evidence in view of the entire record, the Commission found that “insufficient evidence exists to establish a causal connection between the 13 April 2016 motor vehicle accident and [p]laintiff’s alleged injury to his ears, including bilateral hearing loss.”

Applying the reasoning of this Court as set forth in *Parsons v. Pantry, Inc.*, 126 N.C. App. 540, 485 S.E.2d 867 (1997), the Commission noted “that where a claimant’s injury has been proven to be compensable, there is presumption that the additional

medical treatment is directly related to the compensable injury[, the *Parsons* presumption].” (citing *Id.* at 542, 485 S.E.2d at 869). In regard to the issue of additional medical treatment of plaintiff’s low back and right knee, the Commission concluded that “[d]efendants failed to rebut the presumption that any additional medical treatment [p]laintiff may require for his low back and right knee injuries are related to the compensable 13 April 2016 injury by accident.”

As to plaintiff’s claims of post-concussive syndrome and bilateral hearing loss, the Commission concluded that “[p]laintiff failed to prove he sustained compensable injuries to his head in the form of post-concussive syndrome and bilateral hearing loss.” Thus, plaintiff’s claim for benefits under the Workers’ Compensation Act for alleged injuries to his head, in the form of post-concussive syndrome and bilateral hearing loss was denied. Plaintiff appeals.¹

On appeal, plaintiff argues that the Commission’s findings of fact and conclusion to deny workers’ compensation benefits for his bilateral, asymmetrical hearing loss was not supported by the evidence of record and applicable case law. Plaintiff contends that the Commission erred by failing to view the evidence in the light most favorable to him. Plaintiff contends that in the light most favorable to him

¹ On appeal, plaintiff does not challenge the Commission’s denial of his claim workers’ compensation benefits based on post-concussive syndrome.

the evidence was sufficient to find plaintiff's hearing loss was caused by a loud noise occurring during the automobile accident. We disagree.

“Appellate review of an award from the Industrial Commission is generally limited to two issues: (i) whether the findings of fact are supported by competent evidence, and (ii) whether the conclusions of law are justified by the findings of fact.” *Chambers v. Transit Mgmt.*, 360 N.C. 609, 611, 636 S.E.2d 553, 555 (2006) (citation omitted). “Unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal.” *Allred v. Exceptional Landscapes, Inc.*, 227 N.C. App. 229, 232, 743 S.E.2d 48, 51 (2013) (citation omitted). “However, when we review the challenged findings of fact, we do not reweigh the evidence because the Commission is the fact finder.” *Bishop v. Ingles Mkts., Inc.*, 233 N.C. App. 431, 434, 756 S.E.2d 115, 118 (2014).

“The Commission’s findings of fact are conclusive on appeal if supported by competent evidence, notwithstanding evidence that might support a contrary finding. Further, the Commission is the sole judge regarding the credibility of witnesses and the strength of evidence.” *Hobbs v. Clean Control Corp.*, 154 N.C. App. 433, 435, 571 S.E.2d 860, 862 (2002) (citations omitted). “The Commission’s findings of fact may only be set aside when ‘there is a complete lack of competent evidence to support them.’ ” *Evans v. Wilora Lake Healthcare*, 180 N.C. App. 337, —, 637 S.E.2d 194, 195 (2006) (quoting *Click v. Pilot Freight Carriers*, 300 N.C. 164, 166, 265 S.E.2d 389, 390 (1980)).

Austin v. Cont'l Gen. Tire, 185 N.C. App. 488, 491, 648 S.E.2d 570, 572 (2007). “The Commission’s conclusions of law are reviewable *de novo*.” *Allred*, 227 N.C. App. at 232, 743 S.E.2d at 51 (citation omitted).

Plaintiff challenges three findings of fact (numbers 35, 36, and 37) which stand for the general assertion that “there is no *direct* evidence of a loud noise” created during the vehicle collision on 13 April 2016 sufficient to cause plaintiff’s hearing loss. Challenging the Commission’s finding that it is unreasonable to *infer* there was a loud noise at the time of the collision (finding of fact 37), plaintiff makes two assertions about the record evidence: “first, that Plaintiff’s vehicle was [brak]ing and second, that there was minimal damage to the ALS vehicle.”

Plaintiff argues that “[w]ith respect to whether or not explicit evidence of a loud noise must be produced, . . . the law specifically provides for reasonable inferences, and explicitly mandates those inferences be made in the light most favorable to the Plaintiff.” Plaintiff points to record evidence that the impact between the vehicles on 13 April 2016 occurred while plaintiff was traveling around 45 mph. “If the Commission took this evidence in the light most favorable to . . . Plaintiff, it would have found that a 45 mph impact would create a loud noise and, if anything, Plaintiff’s application of the [brakes] would only support the notice of a ‘screech’ or some other noise associated with the breaking and simultaneous collision.”

As to plaintiff's second point—"there was minimal damage to the ALS vehicle"—plaintiff contends the Commission should have focused on the fact that the smaller vehicle, a Volkswagen sedan, traveled 50 feet following the collision and sustained a greater amount of damage than the ALS vehicle. In the light most favorable to plaintiff, the Commission should have found that just because the larger vehicle sustained less damage than the smaller this "in no way takes away from the speed at impact or whether or not that impact created a noise."

Additionally, plaintiff argues that the Commission neglected to include two significant facts in its findings: (1) that the motor vehicle collision on 13 April 2016 occurred on the left side of the vehicle plaintiff was driving; and (2) plaintiff's asymmetrical, bilateral hearing loss was greater on his left side—the side of impact—than his right side. "[T]hese facts viewed in the light most favorable to plaintiff only support the inference that Plaintiff experienced a loud noise during the collision."

We reiterate that "[t]he Commission's findings of fact may only be set aside when there is a complete lack of competent evidence to support them." *Austin*, 185 N.C. App. at 491, 648 S.E.2d at 572 (citation omitted). Here, plaintiff challenges the following three findings of fact (35, 36, and 37). We review each finding in turn.

35. The parties deposed Dr. O'Neil on 10 May 2017. Dr. O'Neil is board certified by the American Board of Otolaryngology. Dr. O'Neil testified that a motor vehicle accident can result in hearing loss if there is a temporal bone fracture, a bump to the head, or loud noises. Dr. O'Neil noted Plaintiff reported he had no hearing loss prior

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to the accident, which is part of the reason he associated Plaintiff's hearing loss with the accident. Specifically, Dr. O'Neil testified that if Plaintiff did not have hearing loss before the motor vehicle accident, and then suffered a traumatic event to the head which also had a very loud noise, Plaintiff's hearing loss was more likely than not caused by the traumatic event. When asked to assume Plaintiff did not sustain a traumatic event to the head, Dr. O'Neil did not change his position, but clarified that the basis of his opinion, in addition to the temporal relationship, was based upon the assumption that there was a reasonable degree of noise at the time of the accident.

In Dr. O'Neil's deposition, included in the record, he provides the following testimony on examination by plaintiff:

A. . . . [Plaintiff] had a normal sloping to mild sensorineural hearing loss in the right ear and normal sloping to moderate, so he had worse hearing loss in the left ear than the right ear. The type A tympanograms, that's where you bounce soundwaves off the eardrum to check for certain abnormalities, and his was normal. It means there is no fluid behind the ears. That can help tell you if there is an infection, things like that. He had no sign of that.

Q. What part of the audiogram let's you know there is mild or moderate?

A. That is called the pure tone audiogram. . . . He had a difference between what he could hear in the right ear and what he could hear in the left ear.

Q. And so, what was your assessment after the evaluation?

A. So, my assessment was that he had bilateral hearing loss but it was asymmetric. I wrote likely from his motor vehicle collision. . . .

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Q. Why did you feel at that point in time that it was most likely related to the motor vehicle collision?

A. He reported that he had normal hearing prior to the accident and then he had abnormal hearing afterwards. I did not have a documented audiogram before so it's impossible to say for sure but if there is a change and it happens after a major event, I usually associate it with that event.

Q. And is there anything about a mechanism of injury that you look for that causes these types of problems that you identified in [plaintiff]?

A. After a motor vehicle collision, its pretty hard. There is all kinds of mechanisms. The most common that would cause hearing loss would be a temporal bone fracture and I saw no evidence of that. Nerves can be kind of finicky and so a bump to the head can cause shearing of nerves and shearing of [sic] you have small hair cells in you cochlea that can cause it. You can also have hearing loss from loud noises too. So, I wasn't at the accident so I don't know for sure but if there was a crash or a bang it can cause traumatic damage to the nerve of hearing.

On examination by defendants, Dr. O'Neil reviewed the Emergency Department medical records recorded on 13 and 15 April 2016 following plaintiff's motor vehicle accident, as well as Dr. O'Neil's records of his evaluation of defendant on 20 April 2016. In those records, Dr. O'Neil found no objective indication that plaintiff suffered a head trauma on 13 April 2016; no abnormal findings during plaintiff's ear, nose, and throat evaluation; no loss of smell (sometimes indicative of "a bump to the head"); and "no evidence of any ear injury."

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Q. So, taking into account the lack of his subjective or objective evidence of a head injury at the initial ED[, Emergency Department,] visit, the lack of objective signs of head injury at the April 15, 2016 ED visit, the lack of objective signs of head injury or trauma at your April 20th evaluation, the lack of objective signs of head trauma ever in any of these medical records or ear trauma, and but for [plaintiff]'s testimony your inability to objectively date when the hearing loss began, can you actually testify to a reasonable degree of medical certainty that more likely than not that motor vehicle accident caused his condition.

....

A. . . . I wasn't there for the motor vehicle accident. In my opinion, if he had no hearing loss before, according to him, and then he does and he has an asymmetric hearing loss, it raises my suspicion that something caused that change.

....

Q. . . . The question is whether or not you can sit here and give an opinion to a reasonable degree of medical certainty that more likely than not that event [plaintiff] described caused his condition?

A. For me just seeing him without the asymmetry I would agree with you. . . . I do look for a cause much more vigorously in someone that has an asymmetry rather than bilateral [hearing loss]. Bilateral I see every day, asymmetric I don't.

Q. That is based on your assumption of the degree of noise at the time of the motor vehicle collision?

A. A hundred percent based on the assumption, absolutely.

As there is record evidence to support the Commission's finding of fact 35, we

uphold the finding of fact. *See Austin*, 185 N.C. App. at 491, 648 S.E.2d at 572.

Plaintiff next challenges, findings of fact 36 and 37.

36. The record evidence, including Plaintiff's testimony, does not reveal Plaintiff ever mentioning or reporting that he heard "a very loud noise" when the accident occurred. There is no evidence that the collision between the Volkswagen car and the ALS unit created "a very loud noise" or a "certain degree of noise" that would be sufficient to cause Plaintiff to sustain asymmetric bilateral hearing loss.

37. The Full Commission finds that it is not reasonable to infer that the collision in this case resulted in a noise level loud enough to cause Plaintiff's hearing loss. Plaintiff's testimony establishes that he was braking as he approached the New Bern Avenue exit, and he hit the brakes at the time of the collision. This resulted in only minimal damage to the ALS unit. As a result, the Full Commission finds Dr. O'Neil's causation opinion to be based upon assumptions not supported by the competent evidence of record.

Defendants point out that in plaintiff's testimony before the Commission and his recorded statement taken two weeks after the 13 April 2016 collision, plaintiff fails to indicate there was a loud noise at the time of the collision. Plaintiff, in his brief submitted to this Court, does not dispute the lack of evidence to indicate "a very loud noise" occurred during the collision. Rather, plaintiff challenges the Commission's finding "that it is not reasonable to infer that the collision in this case resulted in a noise level loud enough to cause Plaintiff's hearing loss." Plaintiff contends that because the 13 April 2016 collision happened while plaintiff's vehicle

was traveling at 45 mph, “a 45 mph impact would create a loud noise and, if anything, Plaintiff’s application of the [brakes] would only support the notice of a ‘screech’ or some other noise associated with the breaking and simultaneous collision.”

“[E]vidence 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.” *Holley v. ACTS, Inc.*, 357 N.C. 228, 232, 581 S.E.2d 750, 753 (2003) (quoting *Gilmore v. Hoke Cty. Bd. of Educ.*, 222 N.C. 358, 365, 23 S.E.2d 292, 296 (1942)). However, absent evidence of record, plaintiff is asking this Court to evaluate the Commission’s findings of fact on this matter, infer there was a loud noise created during his motor vehicle accident, and hold there is evidence of a proximate causal relation between that noise and plaintiff’s hearing loss. We cannot concede to plaintiff’s request. The record provides no indication that a loud noise occurred during plaintiff’s motor vehicle collision. We uphold the Commission’s findings of fact that “there is no evidence [of] . . . ‘a very loud noise’ or a ‘certain degree of noise’ that would be sufficient to cause Plaintiff to sustain asymmetric bilateral hearing loss,” and “that it is not reasonable to infer that the collision in this case resulted in a noise level loud enough to cause Plaintiff’s hearing loss.” Plaintiff’s arguments challenging the Commission’s findings of fact are overruled.

In his brief to this Court plaintiff contends that absent the challenged findings of fact, there is no support for the following challenged conclusion of law:

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8. Based upon the preponderance of the competent, credible evidence in view of the entire record, the Full Commission concludes that Plaintiff failed to prove he sustained compensable injuries to his head in the form of . . . bilateral hearing loss. [*Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998)]; [*Young v. Hickory Bus. Furniture*, 353 N.C. 227, 230, 538 S.E.2d 912, 915 (2000)].

However, as we have upheld the Commission's findings of fact, the Commission's conclusion of law is supported by its findings of fact. Accordingly, we affirm the Commission's 9 November 2018 opinion and award.

AFFIRMED.

Judges COLLINS and YOUNG concur.

Report per Rule 30(e).