NO. COA05-176

NORTH CAROLINA COURT OF APPEALS

Filed: 17 January 2006

MIKHAIL STAVISSKY,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 184548

COMARK, INC.
Employer,

FEDERAL INSURANCE COMPANY
Carrier,
Defendants.

Appeal by plaintiff from opinion and award entered 5 November 2004 by the North Carolina Industrial Commission. Heard in the Court of Appeals 12 October 2005.

Ledbetter & Titsworth, P.A. by Daniel B. Titsworth, for plaintiff-appellant.

Hedrick, Eatman, Gardner & Kincheloe by Edward L. Eatman, Jr. and W. James Flynn, for defendants-appellees.

JOHN, Judge.

Plaintiff Mikhail Stavisky appeals a 5 November 2004 Opinion and Award of the North Carolina Industrial Commission ("the Commission"). For the reasons stated herein, we affirm the Commission.

Pertinent facts and procedural history include the following: Plaintiff was employed as a quality assurance technician by Comark Inc. ("employer"), which was insured by Federal Insurance Company ("insurer") (collectively "defendants"). On 25 May 2001, plaintiff suffered

injury during a touch football game at work. He was subsequently treated at Rex Urgent Care by Dr. Derek L. Reinke, Jr. ("Dr. Reinke"), of Cary Orthopaedic & Sports Medicine Center, who diagnosed plaintiff's condition as right elbow dislocation. Dr. Reinke reduced the injury and released plaintiff with instructions to wear a sling and to follow up in four days. Plaintiff returned to light duty work. At defendants' request, plaintiff was seen at Concentra Medical Center on 29 & 30 May 2001. Dr. Reinke examined plaintiff again on 12 June 2001, 10 July 2001 and 22 August 2001. On 27 August 2001, Dr. Reinke assigned plaintiff a 10% partial disability rating for his elbow and released him to work without restrictions.

Plaintiff did not return to Dr. Reinke until 8 July 2002. At that time he complained of pain in his right shoulder radiating into his forearm. On a 5 August 2002 visit, he described numbness from his forearm and elbow radiating into his right hand. Dr. Reinke ordered a nerve conduction study which was performed by Dr. Pamela Whitney ("Dr. Whitney") on 3 September 2002. Dr. Whitney reported the study results might be consistent with posterior interosseous nerve involvement, but advised clinical correlation. On 17 September 2002, plaintiff received an injection from Dr. Reinke for pain along the interosseous nerve. Returning to Dr. Reinke on 15 October 2002, plaintiff reported some improvement, but not complete alleviation, of the pain.

Dr. Reinke referred plaintiff to Raleigh Hand Clinic for further evaluation. Dr. George S. Edwards, Jr. ("Dr. Edwards"), upon diagnosing plaintiff with carpal tunnel syndrome and extensor tendonitis at the elbow, but not finding any symptoms of interosseous nerve palsy, recommended a cortisone injection. On 10 January 2003, plaintiff returned to Dr. Reinke, whose examination indicated "a positive Tinel's and Phalen's sign over the median nerve" and tenderness in the areas of the posterior interosseous nerve and the lateral epicondyle. As a result, Dr. Reinke advised further carpal tunnel treatment by Dr. Edwards. However, defendants viewed

the carpal tunnel injection and medical treatment as unrelated to plaintiff's elbow dislocation and declined authorization.

After his 25 May 2001 injury, plaintiff continued to work for employer until its facility closed on 27 July 2001. Plaintiff thereafter received weekly unemployment benefits of $334.00 from 27 August 2001 to 24 November 2001. In November 2001, plaintiff obtained employment as a help desk analyst with ARC in Research Triangle Park at an hourly wage of $17.50. Upon being discharged by ARC for lack of experience, plaintiff again received unemployment benefits of $339.00 per week from 9 March 2002 until 3 May 2003.

Following a 30 October 2003 hearing on plaintiff's claim for benefits under the Workers' Compensation Act, a deputy commissioner's Opinion and Award was entered 5 February 2004 finding plaintiff entitled to ongoing medical treatment related to his original 25 May 2001 injury, but not entitled to any recommended treatment for carpal tunnel syndrome "which is unrelated to his injury by accident." Plaintiff was also awarded benefits for "the 10% permanent partial impairment to his right arm."

Plaintiff appealed to the Commission which, in an Opinion and Award filed 5 November 2004, determined plaintiff sustained an injury by accident on 25 May 2001 resulting in an elbow dislocation, but "failed to prove by the greater weight of the evidence that [said] injury . . . resulted in interosseous nerve palsy, a shoulder condition, or carpal tunnel syndrome." The Commission also awarded plaintiff permanent partial disability benefits "for his 10% impairment rating to his right arm." Plaintiff appeals.

On appeal, plaintiff in the main attacks the Commission's conclusion, based upon its almost identical finding, set out above. Plaintiff also challenges the Commission's rejection of

his claim for temporary total disability benefits. In both instances, we find plaintiff's arguments unpersuasive.

Upon review of an Opinion and Award issued by the Commission, this Court considers but two issues: (1) whether any competent evidence of record sustains the Commission's findings of fact, and (2) whether those findings support the Commission's conclusions of law. *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). "When there is any evidence in the record that tends to support a finding of fact, the finding of fact is supported by competent evidence and is conclusive on appeal." *Cannon v. Goodyear Tire & Rubber Co.*, __ N.C. App. ___, ___, 614S.E.2d 440, 444, *disc. rev. denied*, __ N.C. __, __S.E.2d __ (No. 418P05) (6 October 2005). Moreover, the Commission is the "sole judge of the credibility of witnesses and may believe all or a part or none of any witness's testimony[.]" *Faison v. Allen Canning Co.*, 163 N.C. App. 755, 757, 594 S.E.2d 446, 448 (2004) (quotation and citation omitted).

Plaintiff "has the burden of proving that his claim is compensable under the [Workers' Compensation] Act." *Henry v. Leather Co.*, 231 N.C. 477, 479, 57 S.E.2d 760, 761 (1950). An injury is compensable if "it is fairly traceable to the employment or any reasonable relationship to the employment exists." *Rivera v. Trapp*, 135 N.C. App. 296, 301, 519 S.E.2d 777, 780 (1999) (quotation marks and citations omitted). "In evaluating the causation issue, this Court can do no more than examine the record to determine whether any competent evidence exists to support the Commission's findings as to causation." *Peagler v. Tyson Foods, Inc.*, 138 N.C. App. 593, 599, 532 S.E.2d, 207, 210 (2000) (quotation marks and citation omitted).

In the case *sub judice*, it is without question that the Commission's conclusion of law assailed by plaintiff is supported by its finding of fact stated in nearly identical terms. The

critical issue, therefore, is whether any competent evidence of record supports the Commission's finding, *see Deese*, 352 N.C. at 116, 530 S.E.2d at 553, that "plaintiff has failed to prove by the greater weight of the evidence that his carpal tunnel syndrome or any of his current symptoms [such as shoulder and forearm pain with numbness radiating to his right hand] are related to his original injury by accident" to his elbow on 25 May 2001.

In cases "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. Freight Carriers*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980). "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." *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 915 (2000). "[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[.]" *Gilmore v. Board of Education*, 222 N.C. 358, 365, 23 S.E.2d 292, 296 (1942).

In the instant case, two witnesses provided expert testimony concerning plaintiff's current medical condition and the potential cause thereof. When asked if plaintiff's posterior interosseous nerve condition might have been caused by the 25 May 2001 elbow dislocation, Dr. Reinke, plaintiff's treating physician, replied:

> I have never heard of that, that it is related to an elbow dislocation. You can injure a nerve at the time of elbow dislocation. I've not specifically seen it, a posterior interosseous nerve injury, related to an elbow dislocation, however.

Further, Dr. Reinke stated, "I don't think that the carpal tunnel issues are related to the elbow dislocation." Questioned regarding the cause of plaintiff's shoulder pain, Dr. Reinke stated, "I'm

not sure of the cause of that . . . . I was unclear at the time what the cause of his residual right upper extremity pain was." Finally, explaining his referral of plaintiff for nerve conduction studies and for a second opinion following the studies, Dr. Reinke indicated he "d[idn]'t know" what kind of pattern plaintiff's symptoms fit, that he "couldn't explain the -- a lot of the symptoms that [plaintiff] was having from an -- elbow dislocation," and that it was "unclear . . . why he was having these symptoms related to an elbow dislocation."

Dr. Edwards, from whom plaintiff received a one-time evaluation upon being referred for a second opinion regarding a diagnosis of posterior interosseous nerve syndrome, testified he diagnosed plaintiff as being afflicted with "residual carpal tunnel syndrome" or "a sort of low-grade carpal tunnel syndrome." When asked on direct examination, "Does it mean residual from the nerve injury to the arm or at the elbow?", Dr. Edwards replied:

> Possibly. And that -- I don't know that I really -- you know, when I dictated that, I think he reported that he had not had the symptoms before the injury. So I would just sort of assume that it may have been from the elbow injury and may have just been left over from that.

On cross examination, Dr. Edwards elaborated as follows:

> Q: [C]an you say to a reasonable degree of medical certainty that the cause of this residual carpal tunnel syndrome that you talked about in December of 2002 is as a result of the elbow dislocation from May of 2001?
>
> A: It's really hard to say with certainty what is the cause of the carpal tunnel. For one thing, there are so many factors that cause it. You have to have basically an innately tight carpal tunnel to begin with.
>
> It could be that the injury stretched the median nerve, which may have secondarily affected the carpal tunnel, but actually that's quite rare with elbow fractures and dislocations. And I didn't see that mentioned in Dr. Reinke's previous records. And it's -- and again, it's difficult to prove whether or not he had any symptoms or

> signs of carpal tunnel before the injury. So a lot of what my impression was based upon was, in fact, the patient's own history.
>
> Q: Would there have been things in Dr. Reinke's earlier notes that you would have looked for in trying to answer that question?
>
> A: Yes. Basically, if there had been any complaints from a patient of numbness, particularly in the thumb, index or middle fingers, tingling at night or when he was driving a car, and on exam, any signs that I had mentioned in my report, such as a Tinel's and a Phalen's. And I don't recall seeing that.

Dr. Edwards added that, "[t]he cause, I can't really say. It's not common to see carpal tunnel syndrome even with wrist injuries, and you wouldn't expect it with an elbow injury."

In addition, the evidence of record is that Dr. Reinke released plaintiff for work without restrictions on 22 August 2001 and assigned him a 10% permanent partial disability rating on week later, noting he did not "feel [plaintiff] w[ould] require any permanent restrictions as a result of th[e 25 May 2001 injury]." It was only nearly one year later that plaintiff returned to Dr. Reinke reporting right upper extremity pain. At that time, Dr. Reinke indicated he saw no evidence this pain was related to plaintiff's elbow and that he was "unable to [] relate [plaintiff's] symptoms that he came back with to his previous injury."

Reviewed carefully, the expert testimony herein at best only tangentially suggests that plaintiff's residual or "low-grade" carpal tunnel syndrome was, in the words of Dr. Edwards, "possibly" from nerve injury to the arm or at the elbow. *See Click,* 300 N.C. at 167, 265 S.E.2d at 391 (expert testimony "not sufficiently reliable" on issues of medical causation when "based merely upon speculation and conjecture"); *Young*, 353 N.C. at 230, 538 S.E.2d at 915 (expert evidence "must be such as to take the case out of the realm of conjecture and remote possibility"). Neither physician was able to express an opinion to any degree of medical certainty

that plaintiff's carpal tunnel syndrome was caused by his elbow injury. However, a plethora of testimony sustains the lack of any causal connection between plaintiff's elbow injury and his claimed posterior interosseous nerve syndrome, shoulder pain and carpal tunnel syndrome.

We note that the Commission "is free to accept or reject all or part of [the testimony] of a witness[]," *Cross v. Blue Cross/Blue Shield*, 104 N.C. App. 284, 288, 409 S.E.2d 103, 105 (1991), and reiterate that it is the "sole judge of the credibility of witnesses," *Faison*, 163 N.C. App. at 757, 594 S.E.2d at 448, as well as "the weight to be given their testimony." *West v. Stevens*, 6 N.C. App. 152, 156, 169 S.E. 2d 517, 519 (1969). According the foregoing deference to the role of the Commission, *see Adams v. AVX Corp*., 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (this Court on appeal "'does not have the right to weigh the evidence and decide the issues on the basis of its weight'" (citation omitted)), we hold its finding that "plaintiff failed to prove by the greater weight of the evidence that his carpal tunnel syndrome or any of his current symptoms are related to his original injury by accident" is supported by competent evidence. *See Peagler*, 138 N.C. App. at 598, 532 S.E.2d at 210 (task of appellate court is only "to examine the record to determine whether any competent evidence exists to support the Commission's findings as to causation"). Plaintiff's arguments directed at this finding and the Commission's like-worded conclusion of law are thus unavailing.

Secondly, plaintiff maintains the Commission "erred by failing to view the evidence in the light most favorable to plaintiff when it held he was not entitled to temporary total disability benefits." We do not agree.

The term "disability" is defined as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C. Gen. Stat. §97-2(9) (2003).

> To support a conclusion of disability, the Commission must find: (1) that the plaintiff was incapable after his injury of earning the same wages he earned before his injury in the same employment, (2) that the plaintiff was incapable after his injury of earning the same wages he earned before his injury in any other employment and (3) that the plaintiff's incapacity to earn was caused by his injury.

Daughtry v. Metric Construction Co., 115 N.C. App. 354, 357, 446 S.E.2d 590, 593, *disc. review denied*, 338 N.C. 515, 452 S.E.2d 808 (1994). An injured employee may meet this burden by:

> (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

Russell v. Lowes Product Distribution, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (citations omitted).

Plaintiff focuses his attention primarily upon the first two prongs set out in *Russell*. He insists he has met his burden under either. Plaintiff is mistaken.

Regarding the first prong, plaintiff relies solely upon his own testimony regarding interference with his ability to work caused by the 25 May 2001 injury. However, the record contains no "medical," *id*., evidence that the injury has caused plaintiff to be physically or mentally "incapable of work in any employment," *id.* Indeed, plaintiff's treating physician, Dr. Reinke, expressed the contrary opinion that plaintiff could work "without restriction based on the last time [he] saw him," 10 January 2003, and earlier released him to "regular work" on 22 August 2001 "without restrictions." Further, plaintiff continued to work for employer until his

employment was terminated 27 July 2001 by virtue of employer's contract with IBM being concluded and not for any reasons related to plaintiff's 25 May 200l injury.

As to the second *Russell* prong referencing a reasonable, but unsuccessful, effort to obtain other employment, plaintiff testified he was employed by ARC for four months beginning in November, 2001, but that he was terminated for reasons unrelated to any physical limitations. On direct examination, moreover, plaintiff claimed he had unsuccessfully sought work at between one hundred fifteen and one hundred twenty locations. When cross-examined, however, plaintiff was unable to recollect (1) the names of the places he had looked for work, (2) the individuals with whom he had interviewed, or (3) the number of interviews in which he had participated. In short, plaintiff failed to present credible evidence he had made reasonable efforts to obtain employment. *See Russell*, 108 N.C. App. at 766, 425 S.E.2d at 457 (Commission rejected as "not credible" plaintiff's testimony he had been refused employment upon "seven or eight" job applications where plaintiff "was unable to name the exact names of employers to whom he had made application nor the dates upon which he had made application nor for what jobs he had applied . . . .").

We thus conclude competent record evidence sustains the Commission's finding of fact that "plaintiff failed to prove by the greater weight of the evidence that [any] inability [on his part] to earn wages beginning July 27, 2001 was due to his injury by accident" on 25 May 2001. Accordingly, the Commission did not err in denying plaintiff temporary total disability benefits based upon its conclusion of law to similar effect.

Finally, we note plaintiff has interspersed numerous other arguments and assertions in advancing his major contentions addressed herein. Suffice it to state that we have examined each

with care and find no error by the Commission. Based upon all the foregoing, therefore, the 5 November Opinion and Award of the Commission is affirmed.

Affirmed.

Judges TYSON and JACKSON concur.

Report per Rule 30(e).