NO. COA05-913

NORTH CAROLINA COURT OF APPEALS

Filed: 7 March 2006

RANDALL SWINEY,
Employee,
Plaintiff-Appellee,

v.

North Carolina Industrial Commission
I.C. File No. 189631

ARVIN MERITOR, INC.,
Employer,
Defendant-Appellant.

Appeal by defendant from opinion and award entered 15 April 2005 by the North Carolina Industrial Commission. Heard in the Court of Appeals 8 February 2006.

Jay Kerr, P.A., by J.A. Kerr, Jr., for plaintiff-appellee.

Willson, Jones, Carter & Baxley, LLC, by Richard B. Kale, Jr. and Daniel B. Eller, for defendant-appellant.

McGEE, Judge.

Randall Swiney (plaintiff) began working for Arvin Meritor, Inc. (defendant) in April 1996 as a welding technician. While operating a welding machine on 16 November 2001, plaintiff tripped on the lip of the platform on which he was standing, fell to the floor, and landed on his left side. Plaintiff fractured his left arm and left leg as a result of the accident. Plaintiff was taken to the emergency room of Park Ridge Hospital in Fletcher, North Carolina, where plaintiff complained of pain in his hip and left thigh. Dr. Robyn Peckham (Dr. Peckham), an

orthopedic surgeon, diagnosed plaintiff with a left hip femoral neck fracture and a left elbow radial head fracture.

Dr. Peckham performed surgery on plaintiff on 17 November 2001. Plaintiff continued to experience pain in his hip and thigh, and returned for follow-up visits with Dr. Peckham on 27 November 2001 and 11 and 18 December 2001. Plaintiff continued to see Dr. Peckham throughout 2002, and in February 2003, Dr. Peckham assigned a permanent partial disability rating of fifteen percent to plaintiff's left leg and a one percent permanent partial disability rating to his left arm.

Plaintiff visited Dr. Peckham on 21 May 2003, complaining of the onset of severe pain in his left buttock and hip, and down his left leg. Dr. Peckham diagnosed a herniated nucleus pulposus and ordered a lumbar MRI. The lumbar MRI revealed a bulging disc at L4-L5. Dr. Peckham took plaintiff out of work on 27 May 2003 due to the disc herniation.

Following a hearing, a deputy commissioner filed an opinion and award on 29 July 2004 finding that plaintiff did not suffer an injury to his lower back from his 16 November 2001 fall. Plaintiff appealed to the Industrial Commission. In an opinion and award entered 15 April 2005, the Industrial Commission found that plaintiff injured his back as a direct result of his fall at work on 16 November 2001. Defendant appeals.

When reviewing a decision of the Industrial Commission, this Court is "limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact 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). Our Court examines whether there was competent evidence to support the Industrial Commission's findings of fact, but we do not

re-examine or weigh the evidence. *Gilberto v. Wake Forest Univ.*, 152 N.C. App. 112, 116, 566 S.E.2d 788, 792 (2002). We are bound by the Industrial Commission's findings, if those findings are supported by competent evidence. However, conclusions of law are fully reviewable. *Id.* at 116, 566 S.E.2d at 792; *Richards v. Town of Valdese*, 92 N.C. App. 222, 225, 374 S.E.2d 116, 118 (1988), *disc. review denied*, 324 N.C. 337, 378 S.E.2d 799 (1989). This Court's duty is "to determine whether the record contains any evidence tending to support the finding." *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998). The Industrial Commission is the "sole judge of the weight and credibility of the evidence[.]" *Deese*, 352 N.C. at 116, 530 S.E.2d at 553.

In the case before us, defendant argues there was no competent evidence to support the Industrial Commission's finding that plaintiff sustained an injury by accident to his back as a direct result of the work assigned to him on 16 November 2001. We disagree.

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) (internal quotation marks and citations omitted).

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). Medical certainty is not required; however, there must be more than a "mere possibility" to be legally

competent evidence of causation. *Holley v. ACTS, Inc.*, 357 N.C. 228, 234, 581 S.E.2d 750, 754 (2003).

We conclude that in this case there was competent expert opinion evidence concerning the cause of plaintiff's injury. Plaintiff's treating physician, Dr. Peckham, gave the following expert opinion on the causation issue.

> Q. Doctor, I'm going to ask you if you have any opinions as to the issues . . . [b]ut before doing so, to clarify for the record, will you agree to base any and all your opinions on a reasonable degree of medical certainty?
>
> A. Yes.
>
> Q. Will you specifically agree to base your opinion on a degree of certainty that involves the stated cause of being more probable than not? Do you understand what I'm asking you?
>
> A. I believe so. Yes, I think I can agree to that.
>
> Q. Now back to the first issue which was whether Mr. Swiney had sustained an injury to his back as a direct result of the 16 November2001 fall trauma, I ask you do you have an opinion as to that particular issue?
>
> A. Yes.
>
> Q. What is that opinion?
>
> A. I believe that the disc herniation that he had at L5-S1 level most probably occurred at the time of his fall.
>
> Q. Now can you tell us upon what do you base that opinion?
>
> . . . .
>
> A. Mr. Swiney complained of pain in his hip over an extended period time, the hip and the thigh, and only in the latter presentation shortly before we got the MRI was I aware of symptoms radiating distal to the knee. But having obtained that history, I went back and questioned him fairly closely about the characterization of the pain he was having then

> and the pain that he had been having up until that time, and he was not able to distinguish a difference in the pain at that time.
>
> So it was my assessment that the radicular kind of pain he was having which occasionally radiated all the way to his foot was in fact the same pain he had been complaining of essentially since the injury. So my assessment of the chronology is that his radicular symptoms started at the time of the injury, and the radicular symptoms being particularly the pain radiating distal to the knee into the foot.
>
> That then correlates with the MRI findings of a disc herniation at L5-S1, so you have correlation of the physical examination and the radiographic examination which then correlates with the history that was then obtained that this was in fact probably the same pain that had been present all along.

Defendant argues that the first time plaintiff presented with back pain or radicular pain was 21 May 2003 and thereforeplaintiff's back problems were not caused by the 16 November 2001 injury. Dr. Peckham, however, explained that plaintiff's symptoms were due to radiculopathy but that he had mis-diagnosed the symptoms in earlier examinations of plaintiff. The following colloquy occurred on cross-examination:

> Q. [T]here was a period of one and a half years where he never complained of any back pain, never complained of any radicular symptoms that you were able to identify as radiculophathy. Correct?
>
> A. In retrospect I identify his symptoms as being due to radiculopathy. At the time I did not identify them that way.
>
> . . . .
>
> Q. So based solely on your medical records and the examinations that you performed, you had one and a half years where you had no indication that made you think that he had any kind of back problem.

A. In retrospect I think the indications were there and I missed them. And because I was missing it, I didn't do the examination that might have shown it.

Q. Well, is it not feasible that he herniated a disc in May of 2003?

A. That's certainly possible.

Q. Why do you rule that out?

A. Because when a diagnosis changes so dramatically, as physicians we question ourselves and say "How could I have missed that?" And that's the first thing that comes into my mind when the realization that he has herniated nucleus pulposus comes, and the first thing I do is ask him "Is this a new pain or is this the same pain you've been having all along?" And he flat out says "No, this really isn't new. This is just a worsening of the pain I've been having all along."

The expert opinion of Dr. Peckham is legally sufficient on the issue of causation and it is neither speculation nor conjecture as defendant contends. As noted above, "the Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *West v. Stevens*, 6 N.C. App. 152, 155-56, 169 S.E.2d 517, 519 (1969). In this case, the Industrial Commission chose to give greater weight to Dr. Peckham's testimony. We hold the Industrial Commission's finding that "plaintiff sustained an injury by accident to his left arm, left leg and to his back as a direct result of the work assigned to him on November 16, 2001" is supported by competent evidence. The opinion and award of the Industrial Commission is affirmed.

Affirmed.

Judges BRYANT and CALABRIA concur.

Report per Rule 30(e).