NO. COA06-545

NORTH CAROLINA COURT OF APPEALS

Filed: 6 March 2007

GREG LUNDY,
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 221045

QUALITY BLINDS AND AWNING,
Employer,

EMPLOYERS MUTUAL CASUALTY COMPANY,
Carrier,
Defendants.

Appeal by plaintiff from opinion and award entered 5 October 2005 by the North Carolina Industrial Commission. Heard in the Court of Appeals 16 November 2006.

Oxner Thomas & Permar, PLLC, by Todd P. Oxner, for plaintiff-appellant.

Nexsen Pruet Adams Kleemeier, PLLC, by Sean M. Phelan, for defendants-appellees.

GEER, Judge.

Plaintiff Greg Lundy appeals from an opinion and award of the North Carolina Industrial Commission denying plaintiff's claims for workers' compensation benefits because, according to the Commission, plaintiff failed to present medical evidence causally relating his back pain to lifting rolls of carpet for his employer, defendant Quality Blinds and Awning. On appeal, plaintiff argues that the Commission erred by finding no evidence of causation.

Under N.C.R. App. P. 10(a), the appellate court's review is limited to those findings of fact and conclusions of law properly assigned as error. When a finding of fact is not assigned as error, the finding is presumed to be supported by competent evidence and is binding on appeal. *Dreyer v. Smith*, 163 N.C. App. 155, 156-57, 592 S.E.2d 594, 595 (2004). In this appeal, plaintiff has properly assigned error only to the Commission's finding of fact relating to whether there was competent medical evidence establishing causation. Based upon our review of the record, we hold that this finding is supported by the record. Because this finding together with the remaining findings not assigned as error provide ample support for the Commission's order, we affirm.

Facts

Plaintiff began working for defendant Quality Blinds and Awning in 1996 installing blinds, awnings, and carpets. In 1998, plaintiff suffered a compensable injury by accident when he fell from a ladder, sustaining injuries to his feet and left elbow and developing some back pain. Plaintiff was assigned permanent partial disability ratings to both lower extremities and his left arm, but not his back. That workers' compensation claim was settled later that year.

Plaintiff continued to work for defendant without incident until spring 2002 when plaintiff strained his back installing windows while at work. Plaintiff never, however, filed a workers' compensation claim with respect to that injury. Within several days of this strain, defendant took a car trip to Florida during which he experienced "considerable pain." On 19 April 2002, plaintiff sought medical attention for his back pain from Dr. Thomas M. Whyte, plaintiff's family doctor. Although plaintiff told Dr. Whyte about his trip to Florida, plaintiff did not discuss the back strain he experienced while installing windows.

An MRI showed plaintiff had bulging discs, and plaintiff was referred to neurologist Dr. Michael Applegate. Dr. Applegate noted that plaintiff had mild bulges at L4-5 and L5-S1 and recommended a course of three epidural steroid injections. Plaintiff received the injections and continued to work for defendant without interruption.

On either 16 or 23 October 2002, defendant received a truckload of carpet rolls. Defendant was short-handed, and it was left to plaintiff, the truck driver, and defendant's owner, Alan Pugh, to unload the carpet. While lifting one end of a carpet roll, plaintiff experienced a significant amount of pain in his lower back and told Mr. Pugh that "he had [done] more lifting than he could handle." Plaintiff did not, however, seek immediate medical treatment.

Several days later, plaintiff helped move his daughter to Georgia. During the drives to and from Georgia, plaintiff experienced an increase in the amount of his back pain. Plaintiff again saw Dr. Applegate on 31 October 2002, and, although Dr. Applegate's records from this visit indicate that plaintiff exacerbated his lower back pain while helping his daughter move, they do not indicate that plaintiff informed Dr. Applegate that plaintiff had re-injured his back while unloading carpet for defendant. On 15 November 2002, plaintiff had a lumbar myelogram that revealed a change at L5-S1. A subsequent CT myelogram indicated disc bulging at L5-S1 "with superimposed right paracentral to right foraminal disc protusion [sic] as well as a central inferiorly extruded disc fragment."

Dr. Applegate referred plaintiff to a neurosurgeon. On 19 December 2002, neurosurgeon Dr. Russell Amundson recommended surgery for plaintiff's symptoms and, on 12 February 2003, Dr. Amundson performed "a bilateral L5 decompressive laminectomy, bilateral L4 laminotomy, foraminotomy at L4-5, L5-S1, and a left L4-5 and right L5-S1 microdiskectomy." Although plaintiff was released to light-duty work on 12 March 2003 and medium-duty work on

24 April 2003, defendant had already terminated plaintiff's employment. Defendant did not offer plaintiff any work within his restrictions, and plaintiff has not returned to work elsewhere.

Plaintiff filed a Form 18 in December 2002, alleging he injured his back while "lifting rolls of carpet" for defendant. His claim was heard on 31 July 2003 before Deputy Commissioner Wanda Blanche Taylor, who entered an opinion and award in his favor. Defendants appealed to the Full Commission and, on 5 October 2005, the Full Commission entered an opinion and award reversing the deputy commissioner.

The Full Commission concluded that "expert medical testimony was necessary to determine the cause of plaintiff's back condition." Because the Commission found that "the record contains no medical evidence causally relating plaintiff's back pain to the incident lifting carpet on October 16, 2002," the Commission determined that plaintiff had failed to meet his burden of proving that his injury resulted from an accident arising out of and in the course of his employment. Commissioner Thomas J. Bolch dissented, reasoning that, under the circumstances of this case, expert medical evidence on the issue of causation was unnecessary. Plaintiff timely appealed to this Court.

In his appellate brief, plaintiff argues that the Commission erred in making various findings of fact. With a single exception, however, plaintiff neglected to specify any of those findings of fact in his assignments of error. Our review is limited to those findings of fact assigned as error. N.C.R. App. P. 10(a); *Dreyer*, 163 N.C. App. at 156-57, 592 S.E.2d at 595. While plaintiff did assign error to the "Commission's Order in its entirety, on the grounds it . . . is contrary to the competent evidence of Record," this assignment of error is broadside and, therefore, ineffective to preserve any appellate challenge to the Commission's findings of fact.

See, e.g., Haley v. ABB, Inc., 174 N.C. App. 469, 474, 621 S.E.2d 180, 184 (2005); *Wetchin v. Ocean Side Corp.*, 167 N.C. App. 756, 759, 606 S.E.2d 407, 409 (2005).

We, therefore, restrict our review to plaintiff's challenge of the Commission's finding of fact that "the record contains no medical evidence causally relating plaintiff's back pain to the incident lifting carpet on October 16, 2002" and to his contention that the findings of fact do not support the Commission's conclusion that he is not entitled to compensation. On review of a decision of the Industrial Commission, we "determin[e] whether there is any competent evidence to support the findings of fact, and whether the findings of fact justify the conclusions of law." *Cross v. Blue Cross/Blue Shield*, 104 N.C. App. 284, 285-86, 409 S.E.2d 103, 104 (1991). "The findings of the Commission are conclusive on appeal when such competent evidence exists, even if there is plenary evidence for contrary findings." *Hardin v. Motor Panels, Inc.*, 136 N.C. App. 351, 353, 524 S.E.2d 368, 371, *disc. review denied*, 351 N.C. 473, 543 S.E.2d 488 (2000). This Court reviews the Commission's conclusions of law de novo. *Deseth v. LensCrafters, Inc.*, 160 N.C. App. 180, 184, 585 S.E.2d 264, 267 (2003).

In order for a workers' compensation claim to be compensable, there must be proof of a causal relationship between the injury and the employment. *Davis v. Columbus County Schs.*, 175 N.C. App. 95, 101, 622 S.E.2d 671, 676 (2005). *See also* N.C. Gen. Stat. §97-2(6) (2005) ("With respect to back injuries, . . . 'injury by accident' shall be construed to include any disabling physical injury to the back arising out of and *causally related* to such incident." (emphasis added)). Our Supreme Court has held that evidence from an expert witness regarding the causation of an injury is required "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 .. . ." *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 167, 265

S.E.2d 389, 391 (1980). The Court acknowledged that cases could arise when "the facts are so simple, uncontradictory, and obvious as to permit a finding of a causal relationship between an accident and the injury absent expert opinion evidence." *Id.* at 168, 265 S.E.2d at 391-92. *See also Tickle v. Standard Insulating Co.*, 8 N.C. App. 5, 8, 173 S.E.2d 491, 494 ("'There are many instances in which the facts in evidence are such that any layman of average intelligence and experience would know what caused the injuries complained of.'" (quoting *Gillikin v. Burbage*, 263 N.C. 317, 325, 139 S.E.2d 753, 760 (1965))), *cert. denied*, 276 N.C. 728 (1970).

Since *Click* is materially indistinguishable from this case, plaintiff was required to present evidence from an expert _ either oral or documentary _ in order to prove causation. In *Click*, the plaintiff, who suffered from a herniated disc in his back, had presented "conflicting stories about the cause of his injury." 300 N.C. at 165, 265 S.E.2d at 390. Although the plaintiff originally explained that he felt back pain while pulling carts off a conveyor line at work, he later told a doctor that he had hurt his back while "bending to pick up something from the floor at his home" and then, at a hearing before the Industrial Commission, testified that his back pain began when he was "struck in the back by a cart while he worked on the conveyor line." *Id.* at 166, 265 S.E.2d at 390. Our Supreme Court concluded that, in light of the varying potential causes of his pain, plaintiff could not recover in the absence of expert testimony tending to establish a causal relationship between a work-related accident and the herniated disc. *Id.* at 167, 265 S.E.2d at 391.

In the present case, plaintiff's current back pain could have arisen from at least five different sources: his original injury in 1998 (which resulted in ongoing back pain), his back strain in the spring of 2002, his car trip to Florida, the unloading of the carpet rolls, or the drives to and from Georgia shortly after the lifting of the carpet. As in *Click*, the record contains

differing explanations for the genesis of the pain, including one medical note stating that plaintiff had reported "that he began having low back pain after his fall four years ago, but he did not report this to anybody at the time. According to office notes, he was improving until he went to Georgia and helped his daughter move." It was, therefore, necessary for an expert witness to provide evidence that the back pain was causally related to the carpet unloading rather than the result of prior incidents as exacerbated by the trip to Georgia.

In arguing that no expert evidence was necessary, plaintiff asserts that "[w]hile he had had treatment for his back in the past, the objective tests indicated that he had a new, worse, problem in the back than previously." Even if that is the case, the question still remains whether that allegedly "new, worse" problem was caused by the carpet incident. That issue required evidence from an expert witness. Contrary to plaintiff's contention, the absence of any evidence from defendants is immaterial since plaintiff bore the burden of proving causation.

In an alternative argument, plaintiff contends that two pieces of evidence provide expert opinion evidence indicating that his back pain was caused by his lifting rolls of carpet for defendant. First, he relies upon the records of Dr. Applegate's physician's assistant, Mark Payne, which state that plaintiff informed Mr. Payne that his back pain began when "he was lifting rolls of carpet." This statement, however, is merely a recitation of what Mr. Payne was told by plaintiff and does not express any opinion regarding the cause of plaintiff's current back pain.

Second, plaintiff points to Dr. Applegate's opinion on 19 November 2002 that the CT myelogram _ performed after both plaintiff's October carpet-lifting incident and drive to Georgia _ showed certain disc bulges, nerve impingements, facet and central disc spurring, extruded fragments, and a nerve root "not well filled with contrast." This opinion identifies the conditions that Dr. Applegate believed were leading to plaintiff's pain, but expresses no view on what had

caused those conditions. Further, although a previous MRI showed that plaintiff also had bulging discs following his back strain in spring 2002, nothing in Dr. Applegate's notes distinguishes the current conditions from the conditions identified earlier in 2002. To rule in plaintiff's favor would have required the Commission to make various assumptions not specifically supported by the evidence submitted to the Commission.

In short, given the numerous potential sources presented in the record for plaintiff's back pain and the absence of medical evidence causally relating that pain to the work-place incident unloading carpet in October 2002, plaintiff has failed to present sufficient evidence of causation. *See id.* at 167, 265 S.E.2d at 391 ("[O]ne of the most difficult problems in legal medicine is the determination of the causal relationship between a specific trauma and the rupture of an intervertebral disc.").**[Note 1]** The Commission's finding to this effect is fully supported by the record, and the Commission's findings support its conclusions of law denying plaintiff compensation. We, therefore, affirm.

Affirmed.

Judges LEVINSON and JACKSON concur.

Report per Rule 30(e).

NOTE

1. In his brief, plaintiff appears to attribute the lack of evidence to the Full Commission's failure to order Dr. Amundsen, plaintiff's neurosurgeon, to appear for a deposition. Even if true, "the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal . . . ." N.C.R. App. P. 10(a). As plaintiff has not assigned error to the Commission's failure to compel Dr. Amundson to appear for a deposition, we may not reach this issue. *See Johnson v. Jones Group Inc.*, 123 N.C. App. 219, 227, 472 S.E.2d 587, 592 (1996) (failure to assign error to Commission's determination that defendant's Form 24 was sufficient to terminate plaintiff's benefits placed the issue beyond this Court's scope of review).