NO. COA04-1431

NORTH CAROLINA COURT OF APPEALS

Filed: 4 October 2005

CAROLYN M. MUNFORD,
Employee,
Plaintiff-Appellee,

v.

North Carolina Industrial Commission
I.C. File Nos. 228995 & 264682

NEUSE SENIOR HOUSING, INC.,
Employer,

AIG INSURANCE,
Carrier,
Defendants-Appellants.

Appeal by defendants from opinion and award entered 30 June 2004 by the North Carolina Industrial Commission. Heard in the Court of Appeals 16 August 2005.

*Brumbaugh, Mu & King, P.A., by Angela D. Vandivier-Stanley, for plaintiff-appellee*.

*Cranfill, Sumner & Hartzog, L.L.P., by James B. Black IV, for defendants-appellants*.

McGEE, Judge.

Carolyn M. Munford (plaintiff) began working for Neuse Senior Housing, Inc. on 8 August 2000. Plaintiff was employed as head cook and was responsible for preparing breakfast and lunch for approximately sixty senior residents. Plaintiff's job duties required lifting heavy industrial pots and pans and bags of food, such as fifty-pound bags of potatoes. Plaintiff, a fifty-seven-year-old widow with a ninth grade education, weighed approximately 304 pounds and had

a history of hypertension and hypothyroidism at the time of plaintiff's hearing before the North Carolina Industrial Commission (the Commission).

Plaintiff slipped and fell on a wet floor in the dining room of the nursing home on 2 August 2001. Plaintiff testified that she fell so hard "[she] thought [she] cracked every bone in [her] body." An ambulance transported plaintiff to Craven Regional Medical Center, where she was treated for low back pain and right foot pain. Plaintiff's lumbar spine and her right foot were x-rayed. Plaintiff was out of work for two days. Neuse Senior Housing, Inc. and AIG Insurance (collectively defendants) paid plaintiff's medical bills from her fall.

Belinda M. Dillahunt (Ms. Dillahunt) was plaintiff's supervisor and the administrator of Neuse Senior Housing, Inc. Ms. Dillahunt testified that she knew about plaintiff's fall as soon as it occurred. Ms. Dillahunt completed an Industrial Commission Form 19 on 2 August 2001, reporting plaintiff's fall and an injury to plaintiff's hip, and filed the form with the Commission the following day. Plaintiff completed an Industrial Commission Form 18 on 10 April 2002, reporting injury to her hips, back, shoulders, and both arms, and filed the form with the Commission on 12 April 2002.

Plaintiff testified that on or about 1 November 2001, she fell at work a second time. According to the testimony of plaintiff and plaintiff's coworker, Ryan Horton (Ms. Horton), plaintiff slipped in water on the kitchen floor and fell as she walked from her serving station to a refrigerator. Plaintiff testified that she fell forward and caught herself with her hands. Ms. Horton testified that plaintiff fell, and then pulled herself up by grabbing hold of a nearby steam table. Plaintiff testified that she reported her fall to Ms. Dillahunt. Ms. Dillahunt testified that it was "possible" that plaintiff had reported the accident to her, though Ms. Dillahunt denied any recollection of the event.

Following the November fall, plaintiff saw Dr. Mark Larnick (Dr. Larnick), her primary physician, on 16 January 2002. Plaintiff complained of pain in her left shoulder. Dr. Larnick treated plaintiff with anti-inflammatory drugs. Plaintiff's shoulder did not improve, and Dr. Larnick ordered an MRI of plaintiff's left shoulder and cervical spine on 4 February 2002. The MRI revealed a rotator cuff tear, and Dr. Larnick referred plaintiff to an orthopedic surgeon, Dr. Ray Armistead (Dr. Armistead). Dr. Armistead performed surgery on plaintiff's left rotator cuff on 13 February 2002. After receiving various medicines, injections, and physical therapy, plaintiff again underwent surgery on her left shoulder in July 2002, for a second repair to her rotator cuff and for the removal of a bone fragment. Dr. Armistead testified that plaintiff could not return to her job as head cook due to the heavy lifting required.

Plaintiff completed a Form 18 on 5 February 2003, reporting injury to her left arm and shoulder from her November 2001 accident. Ms. Dillahunt completed a Form 19 on 3 April 2003.

Plaintiff's two claims, one for injuries sustained in August 2001 and one for injuries sustained in November 2001, were consolidated prior to a hearing before a deputy commissioner in April 2003. In an opinion and award filed 28 October 2003, the deputy commissioner found that plaintiff sustained a compensable injury and was entitled to medical treatment and temporary total disability for both accidents.

Defendants appealed to the Full Commission on 6 November 2003. In an opinion and award filed 30 June 2004, the Commission made the following pertinent findings of fact:

> 2. On August 2, 2001, plaintiff slipped and fell on a wet floor . . . . Plaintiff had pain in her left shoulder following the accident. . . . Plaintiff's supervisor, Ms. Dillahunt, stated that Plaintiff told her she experienced pain in her left shoulder following the August 2, 2001 incident.

3. Plaintiff was again injured on or about November 1, 2001 when she once again slipped and fell on a wet floor at work. Ms. Ryan Horton, a co-worker, witnessed this accident. Plaintiff fell to the floor, first on her hands and then to her knees. Plaintiff reported this accident to Ms. Dillahunt. Plaintiff did not seek medical treatment immediately following this accident. Plaintiff experienced pain later that evening in her left arm and shoulder and took Extra Strength Tylenol to ease the pain. Plaintiff believed the pain would subside in a few days.

4. Ms. Dillahunt, the defendant-employer's administrator, knew plaintiff had shoulder pain following the August 2001 fall. . . . Ms. Dillahunt provided assistance to lift heavy pots off the stove and pans out of the oven . . . . Ms. Dillahunt testified, at the hearing before the Deputy Commissioner, plaintiff was an outstanding and credible employee. Ms. Dillahunt further testified plaintiff might have told her about the second fall, even though [Ms. Dillahunt] did not prepare an accident report.

. . .

6. Ms. Horton knew plaintiff only as a co-worker and has not had contact with her outside of work.

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8. . . . Dr. Larnick believed plaintiff to be a credible patient.

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12. When asked about [p]laintiff's prognosis, Dr. Armistead stated plaintiff would not regain full function and would continue to have pain.

. . .

16. Dr. Armistead opined plaintiff's work-related fall more likely than not caused the rotator cuff tear.

17. Dr. Armistead was willing to complete an Industrial Commission Form 25R for the purpose of assigning a permanent partial disability rating.

. . .

> 19. Dr. Armistead stated that a person can start with a small tear which gradually extends and the pain gradually increases over time. . . . Dr. Armistead opined plaintiff had a large unilateral tear caused by trauma. Dr. Armistead further opined pain caused by a tear progresses and becomes more symptomatic over time. He also opined Tylenol may have suppressed plaintiff's pain.
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> 20. Dr. Armistead has treated [p]laintiff over the past ten years and found plaintiff to be credible.

The Commission then concluded as a matter of law that plaintiff sustained a compensable injury by accident arising out of and in the course of her employment on 2 August 2001 and on or about 1 November 2001. The Commission awarded plaintiff: (1) temporary total disability compensation at the rate of $185.74 per week from 13 February 2002 until further order of the Commission, and (2) payment of all medical expenses incurred or to be incurred as a result of plaintiff's compensable injuries. Defendants appeal.

I.

Our Court's appellate standard of review in workers' compensation cases is "quite narrow." *Calloway v. Memorial Mission Hosp.*, 137 N.C. App. 480, 484, 528 S.E.2d 397, 400 (2000). Our review is limited to a determination of (1) whether the Commission's findings of fact are supported by any competent evidence in the record; and (2) whether the Commission's findings justify its legal conclusions. *Counts v. Black & Decker Corp.*, 121 N.C. App. 387, 389, 465 S.E.2d 343, 345 (internal citation omitted), *disc. review denied*, 343 N.C. 305, 471 S.E.2d 68 (1996). If supported by competent evidence, the Commission's findings are conclusive *even if* the evidence might also support a contrary finding. *Jones v. Candler Mobile Village*, 118 N.C. App. 719, 721, 457 S.E.2d 315, 317 (1995) (emphasis added). "The Commission's findings of fact may be set aside on appeal only where there is a complete lack of competent evidence to support them." *Id*.

Defendants argue that there is no competent evidence to support the Commission's findings of fact that plaintiff sustained an injury to her left shoulder on either 2 August 2001 or 1 November 2001. We disagree. Testimony by plaintiff, Ms. Horton, Dr. Larnick, Dr. Armistead, and Ms. Dillahunt offer competent evidence to support the Commission's findings. While some of the testimony is conflicting, there is competent evidence in the record to support the Commission's findings. *See Adams v. AVX Corp.*, 349 N.C. 676, 682, 509 S.E.2d 411, 414 (1998).

Defendants first assign error to the Commission's finding that plaintiff began having pain in her left shoulder following the 2 August 2001 accident. Defendants argue that the Commission's finding is contradicted by the stipulated medical records, testimony of defendants' witnesses, and plaintiff's testimony. Again, while the evidence is somewhat conflicting, there is competent evidence in the record to support the Commission's finding.

Plaintiff testified at the hearing that she began experiencing shoulder pain in October 2001. Plaintiff testified that her left arm began to hurt in October 2001, but that she did not seek medical attention because she thought taking Tylenol would cause her pain to "ease off." Plaintiff testified that she did not seek medical attention for her left shoulder until January 2002. She explained that she went to the doctor for her shoulder pain when Tylenol "wasn't doing [her] any good" and she got to "the point where [she] couldn't hold anything in [her] hand."

Defendants argue that plaintiff testified to two more conflicting dates on which she began to experience pain in her left shoulder: immediately following the fall on 2 August 2001 and after the November 2001 fall. On direct examination, plaintiff testified that she had pain in her left arm "all the way up to [her] shoulder" on the night of her November fall. However, plaintiff did not specify that this was the first time she had experienced pain in her left shoulder. On

cross-examination, plaintiff was asked if her left shoulder hurt on 2 August 2001, the day of her first fall. Plaintiff responded, "Not that much, just some. Very little, not that much." Defendants contend that this "conflicting" testimony means that plaintiff could not establish when her shoulder pain began, and that the Commission should have relied on medical records, instead of plaintiff's testimony, as evidence of the onset date of her shoulder pain.

Defendants emphasize that plaintiff's stipulated medical records show no complaint of shoulder pain until 16 January 2002. Indeed, plaintiff's medical records from 2 August 2001 do not show any complaint of shoulder pain. According to an ambulance call report from 2 August 2001, plaintiff's chief complaint immediately following her fall was of right hip and lower back pain. The record from her visit to Craven Regional Medical Center on 2 August 2001 indicates that plaintiff's "upper extremities [were] without complaint."

Dr. Larnick's testimony, however, corroborates plaintiff's testimony that she began having shoulder pain following the August 2001 fall but believed the pain would ease by taking Tylenol. Dr. Larnick testified that if plaintiff was taking an anti-inflammatory drug after tearing her rotator cuff, she could have coped with the pain of the tear "for awhile." Dr. Larnick stated that plaintiff was credible. He opined that plaintiff "certainly [had] legitimate medical issues" and did not "run[] [to the doctor] for every ache and pain."

Dr. Armistead's testimony also corroborates plaintiff's testimony that she began having shoulder pain following the August 2001 fall. Dr. Armistead testified that "[r]otator cuffs, by their very nature, gradually worsen over time." He stated that a person can start with a small tear which gradually extends and that pain can gradually increase over time. He also stated that Tylenol could have suppressed plaintiff's pain from a tear. Dr. Armistead testified that he found plaintiff "entirely credible." He stated that plaintiff had never "present[ed] falsely" since he

began treating her in 1993. Defendants also emphasize that prior to plaintiff's undergoing an MRI scan on 4 February 2002, plaintiff had completed the medical center's patient information sheet and had checked "No" where the form asked if plaintiff's shoulder pain was associated with an injury. At the hearing, plaintiff explained that she "made a mistake" and "probably didn't have [her] glasses" when she filled out the form. "The evidence tending to support [the] plaintiff's claim is to be viewed in the light most favorable to [the] plaintiff, and [the] plaintiff is entitled to the benefit of every reasonable inference to be drawn from the evidence." *Adams*, 349 N.C. at 681, 509 S.E.2d at 414. Viewed in the light most favorable to plaintiff, granting plaintiff the benefit of every reasonable inference to be drawn from the evidence, we hold there was competent evidence to support the Commission's finding that plaintiff began suffering shoulder pain following the August accident. Accordingly, we overrule this assignment of error.

Defendants next argue that there is no competent evidence to support the Commission's finding that plaintiff suffered a second fall on or about 1 November 2001. Defendants contend the only evidence supporting plaintiff's claim of a November fall is plaintiff's own testimony and the "inaccurate" testimony of Ms. Horton.

Plaintiff testified that on or about 1 November 2001, she slipped and fell in some water on the kitchen floor as she walked from her serving station to a refrigerator. Plaintiff testified that she fell forward and caught herself with her hands. Ms. Horton's testimony corroborates plaintiff's testimony. Ms. Horton stated that plaintiff fell as plaintiff was walking to get a cup of ice for a resident. Ms. Horton stated that after plaintiff fell, plaintiff pulled herself up by grabbing hold of a steam table that was the source of the spilled water. Ms. Horton testified that she was approximately five to ten feet away from plaintiff when plaintiff fell. Although Ms. Horton could not recall the exact date of the fall, Ms. Horton stated, "It happened before

Thanksgiving, I know that." Ms. Horton testified that she had not seen plaintiff since Ms. Horton left employment with Neuse Senior Housing in November 2002. There is no evidence in the record of bias on the part of Ms. Horton.

In addition to the testimony of plaintiff and Ms. Horton, there is also some evidence that Ms. Dillahunt had knowledge of plaintiff's November 2001 fall. At the hearing, Ms. Dillahunt stated that it was "possible" that plaintiff had told her about the November fall and that she simply did not remember being told.

The Commission found the testimony of plaintiff, Ms. Horton, and Ms. Dillahunt regarding the November fall to be credible. Specifically, the Commission found that Ms. Horton knew plaintiff only as a co-worker and had not had contact with plaintiff outside of work. The Commission is the "sole judge of the weight and credibility of the evidence[.]" *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). As it is the role of the Commission to determine the credibility of witnesses, we hold that the testimony of Ms. Horton and plaintiff is competent evidence that plaintiff suffered a fall in November 2001. Accordingly, we overrule this argument.

Defendants argue that even assuming *arguendo* that there was competent evidence to support the finding of the November fall, there is no competent evidence to support the finding that the November fall was the cause of plaintiff's left shoulder condition. We disagree.

"In order for there to be a compensable claim for workers' compensation, there must be proof of a causal relationship between the injury and the employment." *Peagler v. Tyson Foods, Inc.*, 138 N.C. App. 593, 597, 532 S.E.2d 207, 210 (2000). "[W]hen conflicting evidence is presented, 'the Commission's finding of causal connection between the accident and the disability is conclusive.'" *Bailey v. Sears Roebuck & Co.*, 131 N.C. App. 649, 655, 508 S.E.2d

831, 835 (1998) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 275 (1965)).

In cases involving "'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.'" *Holley v. ACTS, Inc.*, 357 N.C. 228, 232, 581 S.E.2d 750, 753 (2003) (quoting *Click v. Pilot Freight Carriers*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980)). Such opinion testimony, however, cannot be based "'merely upon speculation and conjecture.'" *Holley*, 357 N.C. at 232, 581 S.E.2d at 753 (physician's statement that there was a "galaxy of possibilities" for plaintiff's condition held insufficient to establish causation) (quoting *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 915 (2000)). Rather, "the 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." *Holley*, 357 N.C. at 232, 581 S.E.2d at 753 (internal quotation and citation omitted). "Our Supreme Court has stated that 'could' or 'might' expert testimony is probative and competent evidence to prove causation, where there is no additional evidence showing the expert's opinion to be a guess or mere speculation." *Jarrett v. McCreary Modern, Inc.*, 167 N.C. App. 234, 241, 605 S.E.2d 197, 202 (2004) (quoting *Holley*, 357 N.C. at 233, 581 S.E.2d at 753; *Young*, 353 N.C. at 233, 538 S.E.2d at 916). In the case before us, both physicians testified that plaintiff's November fall could have or might have produced plaintiff's shoulder injury, and there is no additional evidence that either opinion was a guess or mere speculation. Dr. Larnick testified that given plaintiff's weight, if plaintiff had fallen in November 2001 and landed on her arms, the November fall "could [have] cause[d] a rotator cuff tear." He further testified that if plaintiff began taking an anti-inflammatory drug after tearing her rotator cuff, she could have coped with

the pain of the tear for awhile. Dr. Larnick also testified that plaintiff had never made a "specific complaint" of left shoulder pain prior to January 2002.

When Dr. Armistead was asked to assume that plaintiff fell on her side in August 2001, began experiencing shoulder pain in October 2001, and then fell again in November 2001, catching herself with her arms, he testified that it was "more likely than not" that the November fall caused plaintiff's rotator cuff tear. When Dr. Armistead was asked to assume that plaintiff fell on her buttocks rather than her side in the August fall, he opined that the August fall would not then be responsible for plaintiff's symptoms. Dr. Armistead did not, however, change his earlier opinion that the November fall was "more likely than not" the cause of plaintiff's shoulder injury. Dr. Armistead further testified that plaintiff was relatively young to have a degenerative cuff tear. Dr. Armistead testified that for a person of plaintiff's age to have a large, unilateral rotator cuff tear, such as the one plaintiff suffered, "[the tear was] almost invariably [caused by] trauma." We hold that the testimony by these two physicians was more than mere speculation or conjecture. Their testimony was competent evidence to support the finding that plaintiff's shoulder injury was caused by her fall on 1 November 2001. Accordingly, we overrule this argument.

Defendants also assign error to the Commission's finding of a statement by Ms. Dillahunt that plaintiff complained of pain in her left shoulder following the August fall. On direct examination, Ms. Dillahunt was asked if she recalled when plaintiff began to complain of left shoulder pain. Ms. Dillahunt responded, "I really don't know, but I do know it was after the fall." She did not specify the August or November fall. When asked if plaintiff complained of pain close in time to when plaintiff left her employment with Neuse Senior Housing in February 2002, Ms. Dillahunt responded affirmatively. On cross-examination, Ms. Dillahunt was asked if

she recalled plaintiff having any shoulder pain after plaintiff's August fall. Ms. Dillahunt responded that she remembered plaintiff complaining about pain in the shoulder, but she did not recall the exact date. When asked if the date was before Christmas, Ms. Dillahunt responded, "I really don't know." In light of this testimony, we conclude that the Commission's finding that Ms. Dillahunt stated that plaintiff complained to her of left shoulder pain following plaintiff's August fall was not supported by competent evidence. Nevertheless, we hold that the Commission's conclusions of law were justified by the remaining findings of fact.

II.

Defendants also argue that plaintiff's claim for benefits related to the alleged November 2001 fall is barred by N.C. Gen. Stat. §97-22. They ask that the claim be remanded for findings by the Commission regarding the application of N.C. Gen. Stat. §97-22, which requires that "[e]very injured employee or his representative shall immediately on the occurrence of an accident, or as soon thereafter as practicable, give or cause to be given to the employer a written notice of the accident[.]" N.C. Gen. Stat. §97-22 (2003). N.C.G.S. §97-22 further provides that:

> no compensation shall be payable unless such written notice is given within 30 days after the occurrence of the accident or death, unless reasonable excuse is made to the satisfaction of the Industrial Commission for not giving such notice and the Commission is satisfied that the employer has not been prejudiced thereby.

The statute sets out two requirements for excusing a claimant's failure to give timely notice: the Commission must be satisfied that (1) a plaintiff has a reasonable excuse for failing to provide timely written notice and (2) the employer suffered no prejudice from lack of timely notice.

In this case, the evidence shows that plaintiff did not give written notice of injury to her employer until she filed Form 18 on 5 February 2003, more than thirty days after the November 2001 accident. Since plaintiff failed to provide written notice within the thirty-day period, the

Commission must be satisfied that (1) plaintiff had a reasonable excuse for not giving written notice and (2) defendants were not prejudiced thereby.

On the first issue, the Commission made the pertinent finding of fact that plaintiff reported the November 2001 accident to Ms. Dillahunt, her supervisor. Our Court has held that a reasonable excuse for failing to give timely notice includes "'a belief that[the] employer is already cognizant of the accident.'" *Westbrooks v. Bowes*, 130 N.C. App. 517, 528, 503 S.E.2d 409, 416 (1998) (quoting *Lawton v. County of Durham*, 85 N.C. App. 589, 592, 355 S.E.2d 158, 160 (1987)). However, the Commission made no finding about the reasonableness of plaintiff's excuse. Nor did the Commission make any finding regarding prejudice to defendants. "While the Industrial Commission is not required to make specific findings of fact on every issue raised by the evidence, it is required to make findings on crucial facts upon which the right to compensation depends." *Watts v. Borg Warner Auto., Inc.*, ___ N.C. App. ___, ___, 613 S.E.2d 715, 719 (2005) (citing *Gaines v. Swain & Son, Inc.*, 33 N.C. App. 575, 579, 235 S.E.2d 856, 859 (1977)). "Where the findings are insufficient to enable [this] [C]ourt to determine the rights of the parties, the case must be remanded to the Commission for proper findings of fact." *Lawton*, 85 N.C. App. at 592, 355 S.E.2d at 160 (citing *Hansel v Sherman Textiles*, 304 N.C. 44, 383 S.E.2d 101 (1981) (case remanded for additional findings to support Commission's conclusion that the plaintiff lacked reasonable excuse); *see Watts*, ___ N.C. App. at ___, 613 S.E.2d at 719-20 (where Commission made finding of fact that "late reporting did not prejudice [the] defendant and [the] plaintiff's failure to timely report the injury is excused," but failed to make findings of fact to support the conclusion that the delay was due to a reasonable excuse, matter remanded for additional findings on reasonableness and prejudice); *Westbrooks*, 130 N.C. App. at 527-29, 503 S.E.2d at 416-17 (where Commission concluded that claim was not barred

by N.C. Gen. Stat. §97-22, but did not make a finding regarding the issue of prejudice, matter remanded for specific findings as to whether the defendants were prejudiced by the plaintiff's failure to tender written notice of the injury within thirty days).

In the case before us, whether plaintiff provided a reasonable excuse for not giving timely written notice to her employer, and whether defendants were prejudiced, are crucial facts upon which the right to compensation depends and without which we are unable to determine the rights of the parties. We must therefore remand this case to the Commission for specific findings on the applicability of N.C. Gen. Stat. §97-22.

Remanded.

Judges HUNTER and LEVINSON concur.

Report per Rule 30(e).