Affirmed
Author, Bolch
Concurring; Scott
Dissenting; Sellers

NO. COA00-1461

NORTH CAROLINA COURT OF APPEALS

Filed: 18 December 2001

FAYE N. BROWN,
Employee-Plaintiff

v.

North Carolina
Industrial Commission
I.C. No. 237849

HOECHST CELANESE,
Employer

SELF-INSURED (ESIS, INC.,
Servicing Agent),
Defendant

Appeal by defendant from judgment filed 25 July 2000 by the North Carolina Industrial Commission. Heard in the Court of Appeals 11 October 2001.

Elliot, Pishko, Gelbin & Morgan, P.A., by J. Griffin Morgan, for plaintiff-appellee.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Mel J. Garofalo and Shelley W. Coleman, for defendant-appellant.

WALKER, Judge.

Plaintiff instituted this action to recover benefits under the Workers' Compensation Act for the fibromyalgia she developed following an injury which she suffered while working for defendant-employer. A deputy commissioner conducted a hearing and concluded that plaintiff was not entitled to an award. On appeal, the Full Commission (Commission) reversed the deputy commissioner's opinion and award.

The Commission's findings with respect to the circumstances surrounding plaintiff's development of fibromyalgia are as follows in pertinent part:

> 1. At the time of the hearing, the plaintiff (born on October 20, 1955) was a 42-year-old female who had obtained a G.E.D. . . . She began working in textiles at age sixteen and for the following 21 years until her admittedly compensable injury was never without a job.
>
> 2. The defendant-employer hired plaintiff in 1987. Thereafter, plaintiff became a spin draw operator . . . .
>
> 3. On May 15, 1992, plaintiff suffered an admittedly compensable injury to her back when she bent over to repair a broken thread line. She leaned over with an air gun and her "back popped." She finished the doff and then sat in the break room for approximately fifteen minutes. When she tried to get up, she could not. She was treated at the emergency room of Rowan Memorial Hospital. She was diagnosed with an acute muscle strain.
>
> 4. Plaintiff returned to work on May 28, 1992, but continued to suffer persistent pain, soreness and tenderness in the area of her injury. She was still experiencing a lot of pain when she walked and moved. As plaintiff illustrated at the hearing before the Deputy Commissioner, the pain was in the lower left portion of her back and ran down to the upper portion of her buttocks. Following her return to work, plaintiff did not perform her job as she had prior to the May 15, 1992 accident....
>
> 5. On June 23, 1992, after being informed of her continuing persistent pain, Dr. Demming Ward kept plaintiff on Motrin, 400 milligrams, 3 to 4 times per day. Plaintiff was scheduled to be out of work for three weeks due to her department's being shut down and some vacation time. Plaintiff and Dr. Ward hoped that the additional three weeks out of work, plus the Motrin, would allow plaintiff to recover.

6. On July 18, 1992, plaintiff returned to work, but was only able to work for two days. Plaintiff was then taken out of work due to a viral infection. On July 23, 1992, she complained to Dr. Gamble of "soreness running down the left side of her neck extending down to her upper chest region" and that it "hurts almost with any movement...." Plaintiff had point tenderness "from the posterior region of [her] ears, extending down to the cervical region and left upper breast region." Dr. Gamble thought plaintiff might have a mild muscle pull and gave her Anaprox samples. She reported to Dr. Gamble that her muscle ache was much improved at her July 28, 1992 visit, and he allowed her to return to work on July 31, 1992, which she did.

7. After plaintiff returned to work on July 31, 1998, [sic] she worked seven or eight days until on or about August 8, 1992. During this period, she was still experiencing some "nagging" pain in her back, lower hip, and leg. On or about August 8, 1992, plaintiff worked extremely hard, and in addition to her regular work, assisted during a fire drill by carrying fire extinguishing equipment. Plaintiff had point tenderness "in the left cervical region extending down to her shoulder" on August 11, 1992, and she was again taken out of work by Dr. Gamble.

8. On August 14, 1992, plaintiff called Dr. Gamble's office, complaining of severe pain in her left shoulder. On August 17, 1992, she was examined by Dr. Gamble. She complained of "persistent left shoulder pain, neck pain, now proceeding to the right shoulder and neck region." During his exam, Dr. Gamble noted her cervical region was very tight, "with areas of muscle spasm noted in the left and right side, now extending to the shoulder regions bilaterally."

9. Dr. Mason examined plaintiff on August 20, 1992, and she reported "considerable problems with pain in her left shoulder and she is now even beginning to have problems with pain in her right shoulder." On August 25, 1992, she stated to Dr. Mason that she felt worse, and was now having pain in the "area of the costal cartilage on the left."

Plaintiff's condition continued to deteriorate and on September 21, 1992, Dr. Mason referred her to a rheumatologist.

10. Dr. Senter, the rheumatologist to whom she was referred, first examined plaintiff on October 22, 1992. Dr. Senter took an extensive history from plaintiff. The history given by plaintiff accurately reflected her 21 year uninterrupted work history. The history stated: "This lady apparently was quite well until May 15, 1992 when, while at work, she bent over to do her routine job. She simply could not get up because of pain in the left side of her back." Following his initial examination, Dr. Senter was uncertain of a diagnosis, but was concerned that she may have a cervical spine lesion, a disc, cyst or tumor. He ordered several tests and x-rays.

11. On December 2, 1992, Dr. Senter tentatively diagnosed post-traumatic fibromyalgia and a vitamin B-12 deficiency. From December 2, 1992, through March, 1993, Dr. Senter continued to treat plaintiff for post-traumatic fibromyalgia and vitamin B-12 deficiency while at the same time continuing diagnostic tests to rule out other causes of her problems.

12. By March 4, 1993, plaintiff's husband was sick and plaintiff was "pretty desperate to go back to work because she does not know when her husband is going to go back to work, and there is no income." Dr. Senter attempted to return plaintiff to light duty work beginning March 10, 1993 even though plaintiff's left leg had recently gotten so bad that she could barely walk. However, the employer's nurse would not allow her to return to work because she was still having a little trouble walking and she could not pull or push.

13. By April 15, 1993, Dr. Senter had ruled out other possible diagnoses and was treating plaintiff for fibromyalgia. Dr. Senter noted that her most severe symptoms were on her left side and that she was very tender over the posterior pelvis, in the buttock and over the greater trochanteric bursa on the left. Dr. Senter then stated: "It is very discouraging that she has not responded to treatment, but I

think at least we have cleared up what the problem is, that it is simply very severe post-traumatic fibromyalgia."

14. In his June and August, 1993 exams, Dr. Senter noted and the Full Commission finds as fact, that plaintiff's pain was spreading to the right side, just like she had on the left.

15. . . . In November, 1993, Dr. Senter allowed plaintiff to return to full duty work, but restricted her to six hours a day, rather than a normal 12 hour shift. After working for approximately three weeks, plaintiff had a great deal of tenderness and soreness. She was having trouble walking because of the pain in her low back. Dr. Senter was of the opinion that plaintiff had given work a good try, but that she should not return because it would continue to worsen her symptoms.

16. When Dr. Senter spoke with plaintiff regarding putting her on disability, plaintiff became tearful and depressed. After taking plaintiff out of work for one week, Dr. Senter again returned plaintiff to work, with a limit of six hours per day, beginning December 17, 1993. In a letter to the employer's rehabilitation nurse, to assist plaintiff in returning to work, Dr. Senter stated, in part: "Following is the information you had requested for Ms. Brown's employer before she begins to work on Friday, December 17, 1993. I have been treating her for post-traumatic fibromyalgia with pain in the low back and hip area on the left following an injury which she sustained on her job. Subsequently, the painful muscle spasms spread to involve most of the entire back, including the upper back and neck."

17. In January, 1994, plaintiff's work hours were increased from six hours per shift to eight hours per shift. It then became Dr. Senter's understanding that plaintiff was going to have to increase her hours to 12 hours per shift. Dr. Senter was pessimistic regarding plaintiff's ability to work 12 hours a day. "As best I can tell from talking with the patient and the rehabilitation nurse, if she is not able to work 12 hours (and I don't think she will be), her only option would be

> to go out on Disability. I think that is a terrible waste of a good worker, and it would be devastating emotionally and, I think, subsequently physically to this particular patient."
>
> . . .
>
> 20. Dr. Senter kept plaintiff out of work from February 17, 1994 until September 18, 1994. During that time, Dr. Senter wrote to the disability carrier regarding plaintiff's condition, stating that plaintiff had post-traumatic fibromyalgia related to her May 15, 1992 injury at work. Dr. Senter stated that her fibromyalgia was worsened by her worry over finances and her inability to work. He stated that her fibromyalgia symptoms worsened as time went on and spread to other parts of the body, including the upper parts of her back . . . .

Based on these and other findings cited later in the opinion, the Commission concluded:

> 1. On May 15, 1992, plaintiff sustained an admittedly compensable injury by accident arising out of and in the course of employment.
>
> 2. Plaintiff's fibromyalgia was a natural consequence and complication that resulted from her May 15, 1992 compensable injury.

Defendant's assignments of error are summarized as two issues: (1) was there competent evidence to support the Commission's conclusion that plaintiff's fibromyalgia was a natural consequence and complication which resulted from her 15 May 1992 admittedly compensable injury; and (2) did the Commission abuse its discretion in its calculation and award of attorney fees.

"The Commission is the fact-finding body under the Workmen's [sic] Compensation Act." *Watkins v. City of Wilmington*, 290 N.C. 276, 280, 225 S.E.2d 577, 580 (1976); *Norton v. Waste Management*,

Inc., ___ N.C. App. ___, ___, 552 S.E.2d 702, 704 (filed 2 October 2001). As such, the Commission "is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998)(*quoting Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965)). On appeal the Commission's findings may be set aside only when there is a "complete lack of competent evidence to support them." *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 914 (2000)(*citing Saunders v. Edenton OB/GYN Ctr.*, 352 N.C. 136, 140, 530 S.E.2d 62, 65 (2000)).

"[W]here 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. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980)(citation omitted). Nevertheless, an expert's opinion testimony must be sufficiently reliable to qualify as competent evidence. *See Young*, 353 N.C. at 230, 538 S.E.2d at 915. In *Young*, the plaintiff suffered a back injury which arose out of and during the course of her employment. Nearly three years later, a rheumatologist diagnosed the plaintiff with fibromyalgia and opined that it likely developed from her work-related back injury. However, in reaching this conclusion, the rheumatologist relied exclusively on the maxim *post hoc, ergo propter hoc* ("after this, therefore because of this") deducing that because the plaintiff's fibromyalgia developed subsequent to her accident, the

two must be causally linked. The Commission, in relying on this opinion, found that the plaintiff's fibromyalgia resulted from a work-related injury and issued an award of temporary total disability. However, our Supreme Court reversed, holding that the rheumatologist's opinion amounted to nothing more than conjecture and speculation, and therefore did not constitute competent evidence. *Id.* at 231-32, 538 S.E.2d at 914-17.

In this case, the Commission received the testimony of three medical experts before it concluded that plaintiff's fibromyalgia resulted from her 15 May 1992 work-related injury. Plaintiff presented two experts--Dr. Gordon Senter (Dr. Senter) and Dr. Charles Lapp (Dr. Lapp). Defendant presented one expert--Dr. John Rice (Dr. Rice). Defendant contends that because the opinions of Drs. Senter and Lapp are based on conjecture and speculation they are not sufficiently reliable as to be considered competent evidence.

In order to place defendant's contention in a proper context, we set forth the Commission's findings with respect to each expert. With respect to Dr. Senter's testimony, in addition to the findings previously cited, the Commission found:

> 22. Dr. Senter received his medical degree from Johns Hopkins University School of Medicine. He is board certified in rheumatology and internal medicine. Dr. Senter has been practicing for over 25 years. During that time he has treated between 3,000 and 5,000 patients with fibromyalgia. During his practice, Dr. Senter has seen many cases in which a traumatic event, such as surgery or an accident, has precipitated or triggered the onset of fibromyalgia. He has seen cases of post-traumatic fibromyalgia in which there has

been no litigation, and no secondary gain or a third party upon whom to make a claim.

23. At the time of his deposition, Dr. Senter had been treating plaintiff for almost six years. It is the opinion of Dr. Senter that there is a causal connection between the May 15, 1992 compensable injury and the onset of plaintiff's disabling fibromyalgia. The Full Commission finds that the compensable injury was a proximate cause of plaintiff's disabling fibromyalgia.

The following findings demonstrate Dr. Senter's use of the current medical literature to develop a protocol for determining the cause of a plaintiff's fibromyalgia:

34. "The Fibromyalgia Syndrome: A Consensus Report on Fibromyalgia and Disability" states that the "cause(s) of [fibromyalgia] are incompletely understood. There may be events reported by the patient as precipitating and/or aggravating, including physical trauma, emotional trauma, infection, surgery, and emotional or physical stress. *In determining the relationship between [fibromyalgia] and antecedent events, the physician should consider the patient's opinion, and review the events and pertinent collateral information, including current and past medical and psychosocial history. The chronology of symptoms should be documented*" (emphasis added).

35. Dr. Senter, in arriving at his opinion that the May 15, 1992 injury at work was the initial causal event in the onset of plaintiff's fibromyalgia, followed the guidance of the Consensus Report in arriving at his conclusion. He documented the chronology of symptoms. He considered the opinion of the patient. He reviewed pertinent events and collateral information, including past medical history. He obtained tests and experimented with treatments, which ruled out other possible causes of plaintiff's symptoms.

With respect to Dr. Lapp's testimony, the Commission found:

> 31. Dr. Charles Lapp is a graduate of the Albany Medical College. He is board certified in internal medicine and pediatrics. He has been in practice for 20 years. His practice focuses on the treatment of fibromyalgia and chronic fatigue syndrome. He is certified to give independent medical examinations. Dr. Lapp examined plaintiff and reviewed the medical records which were submitted into evidence. Dr. Lapp concurs with Dr. Senter's and Dr. Rice's diagnosis that plaintiff suffers from fibromyalgia.
>
> 32. Dr. Lapp agrees with Dr. Senter's opinion that there is a causal connection between the May 15, 1992 compensable injury and the onset of plaintiff's disabling fibromyalgia. Dr. Lapp opined that plaintiff suffered from fibromyalgia and that the first event leading to the fibromyalgia was the May 15, 1992, injury to her back and hip. Dr. Lapp in agreement with both Dr. Senter and Dr. Rice, opined that the July, 1992, viral infection was not a cause of the fibromyalgia. Dr. Lapp, again in agreement with Dr. Senter and Dr. Rice, was of the opinion that the August 6, 1992 incident was not the cause or precipitating event of plaintiff's fibromyalgia.
>
> 33. Dr. Lapp provided a common sense explanation for selecting the May 15, 1992 injury as the causal link to plaintiff's fibromyalgia. He stated that in retrospect, we can follow plaintiff's symptoms back to their source, much like we can follow the beam of light from a lighthouse back to its source. Dr. Lapp noted that plaintiff was symptom free prior to May 15, 1992, but had multiple symptoms of fibromyalgia following May 15, 1992. Similarly, plaintiff's pain migrated from a localized area (the lower back and hip area of the May 15, 1992 injury) to a more generalized area (all four quadrants of the body), but can be traced back to the area of the original injury, where the symptoms remain most severe.

Finally, with respect to Dr. Rice's testimony, the Commission found:

24. Dr. Rice obtained his medical degree from the University of Miami and is board certified in rheumatology and internal medicine. He has practiced for over 20 years and is on the faculty of the Duke University Medical Center. Dr. Rice helped author "The Fibromyalgia Syndrome: A Consensus Report on Fibromyalgia and Disability."

25. Dr. Rice examined plaintiff one time and reviewed the medical records which were submitted into evidence. Dr. Rice concurs with Dr. Senter's diagnosis that plaintiff sufferes from fibromyalgia. Dr. Rice disagrees with Dr. Senter's opinion that there is a causal connection between the May 15, 1992 compensable injury and the onset of plaintiff['s] disabling fibromyalgia.

26. Dr. Rice states that in all the years of his practice he has never seen a patient allege post-traumatic fibromyalgia who is not in a compensation related matter.

27. Dr. Rice's experience of never seeing a patient with trauma induced fibromyalgia is contrary to the experience of Dr. Senter and Dr. Lapp, both of whom have seen patients with trauma induced fibromyalgia who were not in a compensation, secondary gain or litigation setting.

28. It is Dr. Rice's opinion that if you look closely at the prior medical records of an individual claiming trauma induced fibromyalgia, you will find evidence that the fibromyalgia actually preceded the traumatic event and that the symptoms have expanded over time. Specifically, Dr. Rice states that you will find evidence of headaches, disturbances in bowel function and other preceding complaints.

29. Contrary to Dr. Rice's stated opinion, in reviewing plaintiff's prior medical records, Dr. Rice did not find evidence of headaches, disturbances in bowel function, or other preceding complaints. Dr. Rice found no evidence showing the onset of fibromyalgia prior to May 15, 1992.

> 30. Dr. Rice bases his opinion that there is no causal connection between plaintiff's injury and her subsequent fibromyalgia on a belief that in the literature there is "no proven cause-and-effect relationship between injury or trauma and subsequent symptoms of fibromyalgia." The literature does not support Dr. Rice's opinion. . . .

In its analysis of these experts' testimony, the Commission found:

> 36. Since Dr. Rice did not find a prior history of headaches, disturbances in bowel function, or other preceding complaints which normally support his opinion that there is not a relationship between trauma and fibromyalgia, and because Dr. Rice has never found, in his 20 plus years of practice, a causal relationship between trauma and the onset of fibromyalgia, and because Dr. Rice erroneously assumed that plaintiff on several occasions voluntarily removed herself from work by stating "I just can't do it" (see Rice deposition, p. 70), the opinion of Dr. Rice is not given the same weight or credibility as the opinion of plaintiffs [sic] treating physician, Dr. Senter.
>
> 37. The Full Commission finds as a fact that the opinion of Dr. Senter, as corroborated by Dr. Lapp and supported by several medical journal articles, that the May 15, 1992 compensable injury was the initial triggering event which led to the onset of her fibromyalgia is more credible and entitled to more deference than the opinion of Dr. Rice.

Our examination of the record supports the Commission's adoption of the opinions of Dr. Senter and Dr. Lapp as to the cause of plaintiff's fibromyalgia. Both physicians based their opinions on their examinations of plaintiff, a review of her medical history, and their experience in treating patients with fibromyalgia. Furthermore, these experts were entitled to rely on

the medical literature which supports the position that fibromyalgia may be traced to a prior traumatic event. *See generally Gilbert v. Entenmann's, Inc.*, 113 N.C. App. 619, 624-25, 440 S.E.2d 115, 118-19 (1994). Their consideration of all of these factors clearly demonstrates that they were not simply utilizing the temporal analysis specifically rejected by *Young*. In contrast to the medical expert in *Young*, both physicians considered and ruled out all other potential causes of plaintiff's fibromyalgia. Indeed, Dr. Senter did not conclude plaintiff suffered from fibromyalgia until 15 April 1993--almost six months after he began treating plaintiff. Up until then, he continued to conduct tests in order to form a proper diagnosis. With his years of experience treating patients with fibromyalgia, Dr. Lapp examined plaintiff and reviewed her medical history. He opined that she suffered from fibromyalgia and medically traced it to the lower back injury she incurred on 15 May 1992. Thus, neither Dr. Senter nor Dr. Lapp relied on a "false connection between causation and temporal sequence" in forming his opinion as to the cause of plaintiff's fibromyalgia. *Young*, 353 N.C. at 232, 538 S.E.2d at 916 (citation omitted).

Additionally, it is evident the Commission considered the testimony of Dr. Rice. *See Harrell v. J.P. Stevens & Co.*, 45 N.C. App. 197, 262 S.E.2d 830, *disc. review denied*, 300 N.C. 196, 269 S.E.2d 623 (1980). After examining plaintiff and reviewing her medical history, Dr. Rice agreed with Dr. Senter and Dr. Lapp that plaintiff suffered from fibromyalgia. However, he disagreed that

it was caused by the 15 May 1992 work-related injury. Dr. Rice asserted that one reason for discounting their conclusion was that a person who claims that his or her fibromyalgia was induced by a traumatic event often exhibits certain symptoms associated with fibromyalgia prior to the traumatic event. Yet, after reviewing plaintiff's medical history, he found no evidence that plaintiff exhibited any such symptoms prior to 15 May 1992. We must defer to the Commission's decision to give more credence to the testimonies of Dr. Senter and Dr. Lapp. *Lanning v. Fieldcrest-Cannon, Inc.*, 134 N.C. App. 53, 57, 516 S.E.2d 894, 898 (1999), *reversed on other grounds*, 352 N.C. 98, 530 S.E.2d 542 (2000)("[I]t is exclusively within the Commission's province to determine the credibility of the witnesses and the evidence and the weight each is to receive").

Therefore, we conclude that because the opinions of Dr. Senter and Dr. Lapp are based upon more than mere conjecture and speculation as contemplated by *Young*, their opinions constitute competent evidence. *Young*, 353 N.C. at 231-32, 538 S.E.2d at 914-16; *see also Norton*, ____ N.C. App. at ____, 552 S.E.2d at 707 (holding expert testimony on cause of plaintiff's chronic fatigue syndrome satisfied *Young's* concern regarding speculative and conjectural causal evidence).

Defendant next argues the Commission abused its discretion in awarding plaintiff's counsel an attorney's fee amounting to twenty-five percent (25%) of any credit allowed defendant for benefits paid. This identical issue has been presented to this Court on two separate occasions and, in both cases, this Court has found such an

award to be well within the Commission's discretionary authority. *See Church v. Baxter Travenol Laboratories*, 104 N.C. App. 411, 409 S.E.2d 715 (1991); *and Cole v. Triangle Brick*, 136 N.C. App. 401, 524 S.E.2d 79 (2000). As defendant has not cited any authority indicating that these decisions have been overturned by a higher court, we are bound by their result. *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Therefore, we overrule defendant's assignment of error.

Affirmed.

Judges TYSON and SMITH concur.

Report per Rule 30(e).