NO. COA05-612

NORTH CAROLINA COURT OF APPEALS

Filed: 16 May 2006

CLAUDE D. BERRY,
Employee,
Plaintiff-Appellee,

v.

North Carolina Industrial Commission
I.C. File No. 270126

HOLIDAY INN SELECT,
Employer,

and

PMA INSURANCE GROUP
Carrier,
Defendant-Appellants,

Appeal by defendants from an opinion and award entered 15 February 2005 by the Full Commission of the North Carolina Industrial Commission. Heard in the Court of Appeals 24 January 2006.

Scudder & Hedrick, by Samuel A. Scudder, for plaintiff-appellee.

Hedrick Eatman Gardner & Kincheloe, L.L.P., by Neil P. Andrews, Nadia Zaidi Schroth, and Jennifer S. Anderson, for defendant-appellants.

JACKSON, Judge.

On 16 November 2001, Claude D. Berry ("plaintiff") suffered a right ankle sprain in the course and scope of his employment as a bellman with Holiday Inn Select ("defendant").

Plaintiff's injury constituted a compensable injury under the North Carolina Workers' Compensation Act. Following his injury, plaintiff returned to work with defendant, but began to experience pain and discomfort, and was unable to stand for long periods of time. On 4 January 2002, plaintiff was terminated from his employment with defendant as a result of a lack of business.

Plaintiff sought other employment following his termination, but was unable to find any due to increasing pain and restricted mobility in his right ankle and leg. Plaintiff was diagnosed as having a peroneal nerve injury as a result of his original ankle sprain. Plaintiff underwent treatment for the nerve injury and pain relief, and on 14 August 2002, plaintiff filed a Form 33 Request that Claim be Assigned for Hearing with the North Carolina Industrial Commission, seeking ongoing payment of medical expenses, along with payment for permanent and total disability. Defendant filed a Form 61 Denial of Workers' Compensation Claim and a Form 33R Response to Request that Claim be Assigned for Hearing, citing that plaintiff had failed to provide sufficient information to determine medical causation, and that plaintiff's pre-existing condition was the cause of any current condition.

In an opinion and award resulting from a 5 May 2003 hearing before Deputy Commissioner Wanda Blanche Taylor of the North Carolina Industrial Commission, plaintiff was found to suffer from a right peroneal neuropathy which developed into complex regional pain syndrome ("CRPS") as a direct and natural result of his initial compensable injury. Plaintiff was awarded temporary total disability, and was found to be entitled to unemployment benefits as of 4 January 2002. Defendants were ordered to pay for plaintiff's attorney's and expert witness fees, along with his medical treatment for his compensable injury to his right lower leg, along with his CRPS. Defendants appealed the decision to the Full Commission, who affirmed

the opinion and award of the Deputy Commissioner in an opinion and award entered 15 February 2005. Defendants now appeal the opinion and award of the Full Commission.

"Our review of an award by the Industrial Commission is limited to: (1) whether there was competent evidence before the Commission to support its findings; and (2) whether such findings support its legal conclusions." *Thompson v. Federal Express Ground*, __ N.C. App. __, __, 623 S.E.2d 811, 813 (2006) (citing *Lewis v. Orkand Corp.*, 147 N.C. App. 742, 744, 556 S.E.2d 685, 687 (2001)). We do not have the authority to weigh or re-weigh the evidence or to make determinations regarding the credibility of the witnesses. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (citations omitted). Our review "goes no further than to determine whether the record contains any evidence tending to support the Commission's findings." *Thompson*, __ N.C. App. at __, 623 S.E.2d at 813 (citing *Adams*, 349 N.C. at 681, 509 S.E.2d at 414). Findings of fact from an opinion and award of the Commission, if supported by competent evidence, are deemed to be conclusive, even though there may be evidence which would support findings to the contrary. *Hedrick v. PPG Industries*, 126 N.C. App. 354, 357, 484 S.E.2d 853, 856, *disc. review denied*, 346 N.C. 546, 488 S.E.2d 801 (1997).

Defendants contend the Full Commission erred in finding that plaintiff met his burden of proving that his condition known as complex regional pain syndrome ("CRPS") was a direct and natural consequence of his initial compensable injury to his right ankle. Specifically, defendants contend the Full Commission's reliance on the deposition testimony of doctors Brown and Van Ness was in error, as their testimony was speculative and legally incompetent. It is undisputed between the parties that plaintiff's initial sprain to his right ankle constituted a compensable injury. However, the parties dispute the issue of whether plaintiff's subsequent development of CRPS is an injury that naturally and unavoidably resulted from his initial injury. *See* N.C. Gen.

Stat. §97-2(6) (2005). The Full Commission found, based primarily on the testimony of doctors Donald H. Brown, II, and William C. Van Ness, III, that plaintiff's CRPS developed as a direct result of the peroneal nerve injury that was caused by his initial compensable injury.

An expert witness's opinion must be based "upon facts within his own knowledge." *Dean v. Carolina Coach Co.*, 287 N.C. 515, 522, 215 S.E.2d 89, 93-94 (1975). Further, when an expert's opinion is based upon mere speculation or possibility, the opinion will not be considered to be competent evidence on the issue of medical causation. *Cannon v. Goodyear Tire & Rubber Co.*, 171 N.C. App. 254, 262, 614 S.E.2d 440, 445 (citing *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 915 (2000)), *disc. review denied*, 360 N.C. 61, 621 S.E.2d 177 (2005). "Expert testimony that a work-related injury 'could' or 'might' have caused further injury is insufficient to prove causation when other evidence shows the testimony to be 'a guess or mere speculation.'" *Cannon*, 171 N.C. App. at 264, 514 S.E.2d at 446-47 (quoting *Young*, 353 N.C. at 233, 538 S.E.2d at 916).

In the instant case, both doctors Brown and Van Ness thoroughly reviewed all of plaintiff's medical information, tests, and test results, and both of them examined or treated plaintiff. Dr. Brown, an anesthesiologist who concentrates in anesthesia and pain management, began treating plaintiff in September 2002 and continued to treat him for the next year. When Dr. Brown initially treated plaintiff, he diagnosed plaintiff with a nerve injury in his lower right extremity. Dr. Brown testified that he saw evidence of a peroneal nerve injury, and that he began treating plaintiff with lumbar sympathetic blocks, which is a treatment designed to provide a patient with pain relief. Dr. Brown stated that plaintiff responded favorably to the four to five lumbar sympathetic blocks, and that his favorable response to this treatment indicates that he likely suffered from CRPS. Dr. Brown, along with Dr. Van Ness, testified that a patient who did

not suffer from CRPS would not have had a favorable response to the lumbar sympathetic blocks, as plaintiff did. Dr. Brown testified that CRPS is a poorly understood disease, for which no test can be performed to confirm a diagnosis of the syndrome.

Dr. Brown testified, as did Dr. Van Ness, that symptoms which are indicative of CRPS include: burning diffuse pain, decreased range of motion, swelling of the area, muscle atrophy, the extremity being cool to touch, and discoloration of the skin. CRPS is not the type of syndrome that will develop spontaneously, and as Dr. Brown testified, but for plaintiff's peroneal nerve injury, plaintiff would not have developed CRPS. Dr. Brown determined that plaintiff suffered from CRPS based on a review of his notes and tests, his favorable response to the lumbar sympathetic blocks, the coolness in plaintiff's right foot, and his decreased range of motion due to pain.

Dr. Van Ness, who is board-certified in physical medicine and rehabilitation, with a specialization in the treatment of pain, was contracted by plaintiff's counsel to provide an independent review of plaintiff's condition. Dr. Van Ness reviewed all of plaintiff's medical history information, including his previous tests and results, and he examined plaintiff in March 2003. Dr. Van Ness testified, as did Dr. Brown, that plaintiff's peroneal nerve injury would not have resulted from plaintiff's prior hernia surgery, as a nerve injury from this type of surgery would be in the patient's groin or interior thigh area, and not in the area where plaintiff complained of pain. He also stated that the type of ankle sprain that plaintiff suffered was consistent with the type of injury that would cause a peroneal nerve injury. Based on a review of tests and evaluations completed by Dr. Brown and other doctors by whom plaintiff had been treated, Dr. Van Ness diagnosed plaintiff as suffering from a peroneal nerve injury, which had developed into CRPS. Dr. Van Ness' diagnosis of CRPS was based upon plaintiff's response to

the lumbar sympathetic blocks, swelling present in plaintiff's ankle, the difficulty he experienced in getting a pulse in plaintiff's right lower extremity, the significant decrease in plaintiff's range of motion in his right ankle, the loss of feeling and response to touch in plaintiff's lower right leg and bottom of his right foot, his right foot being cool to touch, and the discoloration in plaintiff's right foot. Dr. Van Ness testified that the appearance of a discoloration in the skin of plaintiff's right foot one and a half years after his initial injury also is indicative of CRPS.

Neither Dr. Brown's testimony nor that of Dr. Van Ness is couched in the form of "could" or "might." Their testimony is based on more than mere speculation or guesses, and is in fact based on their diagnoses of plaintiff following thorough evaluations. Therefore, we hold the Commission did not err in relying on the doctors' testimony in making its findings. The testimony of the doctors constitutes competent evidence which supports the Commission's finding that "[a]s a direct and proximate result of plaintiff's compensable injury to his right lower extremity, plaintiff sustained right peroneal neuropathy that developed into complex regional pain syndrome as a direct and natural result of his compensable injury." Defendants' assignment of error is overruled.

Defendants next contend the Full Commission erred in finding plaintiff satisfied his burden of proving that he was disabled as of 4 January 2002, and that he was entitled to temporary total disability compensation as of this date.

The North Carolina Workers' Compensation Act defines a "disability" as a "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) (2005). In order for a plaintiff to establish a claim for disability under the Act,

> the Commission must find: (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in

> the same employment, (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) that this individual's incapacity to earn was caused by plaintiff's injury.

Hilliard v. Apex Cabinet Co., 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). A plaintiff may show that he has a disability in one of four ways:

> (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) (internal citations omitted). Defendants contend plaintiff did not present evidence sufficient to satisfy his burden.

As noted previously, we do not have the authority to weigh the evidence or the credibility of witnesses. Our sole duty is to determine whether there is competent evidence in the record to support the Commission's findings. *See Adams*, 349 N.C. at 681, 509 S.E.2d at 411-14; *Hedrick*, 126 N.C. App. at 357, 484 S.E.2d at 856.

In the instant case, plaintiff returned to work following his compensable injury, however he experienced pain in his right foot and leg, and was unable to stand for long periods of time, as he had been able to do prior to his injury. On 4 January 2002, plaintiff was terminated from his employment with defendant Holiday Inn Select, due to a lack of business and in no part to his compensable injury. The Commission found as fact that plaintiff's peroneal nerve injury, which developed into CRPS, was the direct and natural result of plaintiff's compensable injury.

Following his termination from his employment with defendant, plaintiff was unable to function as he did prior to his injury due to the increasing pain he experienced as a result of the nerve injury. In addition, he experienced a decrease in strength and his mobility was restricted. Dr. Brown testified that plaintiff could do light-duty office work, but that he would need to sit down to perform his work. Dr. Brown also stated that during the entire time in which he treated plaintiff, plaintiff had never moved beyond the capacity to perform a light category of work capacity. Dr. Allen O. Smith testified that plaintiff was unable to function properly, drive, or perform remedial work as a result of all of his problems, including the pain in his right foot.

Following his termination, plaintiff applied for and received unemployment compensation benefits for twenty-eight weeks. During that time he searched for employment at multiple retail locations, along with other area hotels. He stopped looking for employment only when he believed that his doctor told him that he could no longer drive. Plaintiff, who at the time of his injury was sixty-seven years of age with an eleventh grade education, also attempted to obtain employment as a dry cleaning delivery person, but due to his age and mental and physical limitations, he was not hired for the position.

Based on the evidence presented to the Commission, we hold plaintiff satisfied his burden of proving disability, in that he presented sufficient evidence to show 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." *Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457. Therefore, we hold there was competent evidence to support the Commission's finding that plaintiff was disabled as of 4 January 2002 and thus entitled to temporary total disability. Defendant's assignment of error is overruled.

Affirmed.

Judges WYNN and HUNTER concur.

Report per Rule 30 (e).