NO. COA05-1302

NORTH CAROLINA COURT OF APPEALS

Filed: 5 July 2006

WESLEY JEFFERSON,
Employee,
Plaintiff

v.

North Carolina Industrial Commission
I.C. File No. 323983

WASTE INDUSTRIES,
Employer

THE INSURANCE COMPANY OF
THE STATE OF PENNSYLVANIA,
Carrier

AIG CLAIMS SERVICES,
Third-Party Administrator,
Defendants

Appeal by defendants from an opinion and award entered 20 July 2005 by the North Carolina Industrial Commission. Heard in the Court of Appeals 12 April 2006.

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

Cranfill, Sumner & Hartzog, L.L.P., by Kirk D. Kuhns, Jaye E. Bingham, and Kari R. Johnson, for defendant-appellants.

HUNTER, Judge.

Defendants appeal from an opinion and award of the North Carolina Industrial Commission ("Commission") entered 20 July 2005. For the reasons stated herein, we affirm the order and award.

The Commission found that Wesley Jefferson ("plaintiff") was employed by Waste Industries on 19 July 2002. On that date, plaintiff was struck in the back by a falling pallet. Plaintiff reported the accident to his employer, but did not seek medical treatment at that time.

On 12 February 2003, plaintiff got out of bed and found he was unable to stand. Plaintiff went to the emergency room and sought treatment for his back pain. The emergency room physician referred plaintiff to Dr. Khan Vu ("Dr. Vu") and took plaintiff out of work for two days.

Following the examination by Dr. Vu, plaintiff was excused from work for ten days and began receiving physical therapy. Dr. Vu extended the period plaintiff was excused from work through 26 February 2003. Plaintiff attempted a trial return to work on 3 March 2003.

Plaintiff was evaluated by Dr. J. E. Kenney ("Dr. Kenney")on 17 March 2003, who referred plaintiff to Dr. Gary L. Kaplowitz ("Dr. Kaplowitz"). Plaintiff was again excused from work through 24 March 2003. Dr. Kaplowitz ordered an MRI of plaintiff and diagnosed a herniated disc at the L4-L5 level. Dr. Kaplowitz recommended physical therapy before considering surgery and excused plaintiff from work until he could be evaluated by a neurosurgeon.

On 13 August 2003, plaintiff was examined by Dr. Bruce Kihlstrom ("Dr. Kihlstrom"). Dr. Kihlstrom also diagnosed plaintiff with a herniated disc at the L4-L5 level with bilateral lower extremity paresthesia consistent with radiculopathy, and recommended surgery. Plaintiff underwent an operation on 23 December 2003. Dr. Kihlstrom's final evaluation of plaintiff occurred on 3 March 2004, at which time Dr. Kihlstrom continued to excuse plaintiff from all work.

The Commission gave greater weight to the testimonies of Dr. Kihlstrom and Dr. Klapowitz that plaintiff's condition was caused by or significantly contributed to by the workplace accident which occurred on 19 July 2002. The Commission awarded plaintiff temporary total disability and payment of all existing and future medical expenses for treatment of the 19 July 2002 injury. Defendants appeal from this order.

I.

We briefly address plaintiff's contention that defendants' assignments of error fail to comply with the North Carolina Rules of Appellate Procedure and that the appeal should be dismissed for violations of those Rules. A review of defendants' assignments of error shows that they are sufficient to comply with N.C.R. App. P. 10, and we therefore proceed to review the merits of the appeal.

II.

Defendants first contend that the Commission's factual findings regarding causation of plaintiff's back problems were not supported by competent evidence. We disagree.

The standard of review for appeals from the North Carolina Industrial Commission is well settled. "It is well established that 'the Industrial Commission is the fact finding body and . . . the findings of fact made by the Commission are conclusive on appeal, . . . if supported by competent evidence. . . . This is so even though there is evidence which would support a finding to the contrary.'" *Hunter v. Perquimans County Bd. of Educ.*, 139 N.C. App. 352, 355, 533 S.E.2d 562, 564 (2000) (citation omitted). "'The commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony. . . .' [W]here the evidence is conflicting, the Commission's findings of fact are conclusive on appeal." *Avery v. Phelps Chevrolet*, ___ N.C. App. ___, ___, 626 S.E.2d 690, 696 (2006) (citation omitted). "Therefore,

the appropriate standard of review by this Court is to determine only whether the Commission's findings of fact are supported by competent evidence and whether those findings indeed support the Commission's conclusions of law." *Hunter*, 139 N.C. App. at 355, 533 S.E.2d at 564.

Defendants contend that the Commission improperly found that "plaintiff endured on-going back symptoms after the July incident, and that plaintiff reported as such to his health care providers." A review of the record shows competent evidence to support these findings. Plaintiff testified that he continued to experience back pain and leg numbness in the months following the 19 July accident. The record also shows testimony by Ms. Margaret Hicks ("Hicks"), the dispatcher for Waste Industries, that plaintiff reported some continued pain to her over the months following the accident. Medical records presented to the trial court show that plaintiff stated to emergency room personnel, and to each doctor seen thereafter with the exception of Dr. Vu, that he had experienced a back injury at work. Although Dr. Vu's medical records indicate that plaintiff stated he injured his back while working on a car immediately prior to his February visit to the emergency room, plaintiff testified that Dr. Vu had misunderstood him, and that plaintiff had stated to Dr. Vu that he had only watched as a family member worked on his car. Although there is conflicting testimony as to what plaintiff reported to Dr. Vu, the Commission is the sole judge of the credibility of witnesses. *See Avery*, ____ N.C. App. at ___, 626 S.E.2d at 696.

As competent evidence supports the Commission's findings that plaintiff continued to experience back and leg pain following his 19 July 2002 accident and that plaintiff reported such pain to the various physicians who treated him when he sought medical care, this assignment of error is overruled.

III.

Defendants next contend that the opinion and award is not supported by competent expert medical testimony as to causation. We disagree.

"For an injury to be compensable under the terms of the Workmen's Compensation Act, it must be proximately caused by an accident arising out of and suffered in the course of employment." *Click v. Freight Carriers*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980). "There must be competent evidence to support the inference that the accident in question resulted in the injury complained of, *i.e.*, some evidence that the accident at least might have or could have produced the particular disability in question." *Id*. "The quantum and quality of the evidence required to establish *prima facie* the causal relationship will of course vary with the complexity of the injury itself." *Id*.

Our Supreme Court has made clear that testimony by experts "based merely upon speculation and conjecture . . . can be of no more value than that of a layman's opinion. As such, it is not sufficiently reliable to qualify as competent evidence on issues of medical causation." *Young v. Hickory Bus. Furn*., 353 N.C. 227, 230, 538 S.E.2d 912, 915 (2000). However, expert opinion to a reasonable degree of medical certainty as to the cause of an injury has been found sufficient to establish the causal relationship necessary for compensation under the Workers' Compensation Act. *See Norton v. Waste Mgmt., Inc*., 146 N.C. App. 409, 416, 552 S.E.2d 702, 707 (2001).

Here, the record reveals that both Drs. Kaplowitz and Kihlstrom opined that plaintiff's injury on 19 July 2002 was the incident which caused or was a significant contributing factor in plaintiff's herniated disk, assuming that plaintiff had continued to experience some pain and numbness over the intervening months. Both Drs. Kaplowitz and Kihlstrom testified to a reasonable degree of medical probability that plaintiff's injury was caused by the workplace

accident. Such testimony is neither speculative nor unreliable. Furthermore, although there is evidence to the contrary in the record, as noted *supra*, the Commission's findings are conclusive on appeal when supported by competent evidence. *See Hunter*, 139 N.C. App. at 355, 533 S.E.2d at 564.

As competent evidence supports the Commission's findings of fact and conclusions of law regarding plaintiff's reports of pain, injury, and causation, we affirm the order and award.

Affirmed.

Judges McGEE and STEPHENS concur.

Report per Rule 30(e).