NO. COA05-1623

NORTH CAROLINA COURT OF APPEALS

Filed: 19 December 2006

OCTAVIO L. ALVARADO,
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 371596

TYSON FOODS, INC.,
Employer,
Self-Insured,
Defendant.

Appeal by defendant from opinion and award entered 6 September 2005 by the North Carolina Industrial Commission. Heard in the Court of Appeals 16 August 2006.

Walden & Walden, by Daniel S. Walden, for plaintiff-appellee.

Orbock, Ruark & Dillard, P.C., by Barbara E. Ruark and Tina F. Rizzi, for defendant-appellant.

GEER, Judge.

Defendant Tyson Foods, Inc. appeals from an opinion and award of the North Carolina Industrial Commission entered 6 September 2005, awarding plaintiff Octavio L. Alvarado disability benefits and medical compensation. On appeal, defendant challenges the Commission's finding that plaintiff's current back condition is causally related to his September 2003 compensable workplace injury. Because defendant's argument rests on its contention that

its evidence was more credible and entitled to greater weight than plaintiff's evidence - an argument that we may not consider on appeal - we affirm the decision of the Full Commission.

Facts

The evidence before the Full Commission included the following.**[Note 1]** On 24 September 2003, plaintiff, an employee of Tyson Foods, sustained a compensable injury when he slipped on the plant floor and twisted his lower back. He was examined the following day at the office of Dr. John Bond, the plant physician, who diagnosed an acute lumbar sacral strain and treated him for pain and inflammation. For four weeks following the accident, plaintiff worked reduced hours and received temporary partial disability benefits.

On 20 October 2003, Dr. Bond cleared plaintiff to return to full-time work. Although plaintiff worked without incident over the following two months, he testified that his pain persisted throughout this period. Plaintiff's supervisor acknowledged that when plaintiff returned to work, he wasn't "back to like he was, but he acted like he was moving better than he was when it first happened."

On 18 December 2003, plaintiff took a one-month leave and returned to Mexico to visit a sick relative. Both plaintiff and his daughter testified that plaintiff did very little driving and spent most of the drive reclined either in the front seat or on a fold-down bed in the back of the van. While in Mexico, plaintiff sought treatment from a local doctor for his back pain.

Plaintiff returned to work on 19 January 2004, but, in late February, his condition deteriorated. On 1 March 2004, plaintiff notified defendant that due to his painful back condition he could not report to work. He was examined again by Dr. Bond, who concluded that the back pain was caused by a congenital spinal disorder that had been discovered during plaintiff's treatment for the September 2003 workplace injury. Dr. Bond stated in his deposition that he

believed plaintiff's pre-existing spondylolisthesis had not been affected by the workplace injury, but rather had been aggravated by the round-trip drive to Mexico.

Plaintiff's condition never improved, and he never returned to work. On 10 August 2004, plaintiff was evaluated by Dr. Joseph Alexander, a spine specialist at Wake Forest University Medical Center. Dr. Alexander concluded that the September 2003 accident aggravated and made symptomatic plaintiff's preexisting non-symptomatic spondylolisthesis and degenerative disc conditions. In his deposition, Dr. Alexander indicated that the care plaintiff received from Dr. Bond was appropriate initial symptomatic treatment, but he disagreed with Dr. Bond's assertions (1) that the plaintiff's condition was congenital and (2) that the Mexico trip was the sole reason the underlying spondylolisthesis became symptomatic. Dr. Alexander concluded instead that plaintiff's condition was not congenital, but rather had developed prior to the accident and had become symptomatic because of the accident.

On 27 May 2004, plaintiff requested a hearing before the North Carolina Industrial Commission. The case was heard before Deputy Commissioner Lorrie L. Dollar, who denied plaintiff's claim. Plaintiff appealed to the Full Commission, which reversed the deputy's decision and held that plaintiff was entitled to the following: (1) temporary partial disability compensation for the period 24 September 2003 through 20 October 2003; (2) temporary total disability compensation from 1 March 2004 and continuing until further order of the Commission; and (3) payment for medical care related to his injuries. Defendant timely appealed to this Court.

Discussion

On appeal from a decision of the Full Commission, this Court reviews only (1) whether the Commission's findings of fact are supported by competent evidence in the record and (2) whether the Commission's findings justify its legal conclusions. *Perkins v. U.S. Airways*, ___

N.C. App. ___, ___, 628 S.E.2d 402, 406 (2006). Findings of fact by the Full Commission are conclusive on appeal "'when supported by competent evidence, even when there is evidence to support a finding to the contrary.'" *Gutierrez v. GDX Auto.*, 169 N.C. App. 173, 176, 609 S.E.2d 445, 448 (quoting *Plummer v. Henderson Storage Co.*, 118 N.C. App. 727, 730, 456 S.E.2d 886, 888,*disc. review denied*, 340 N.C. 569, 460 S.E.2d 321 (1995)), *disc. review denied*, 359 N.C. 851, 619 S.E.2d 408 (2005). Indeed, if "there is any evidence at all, taken in the light most favorable to the plaintiff, the finding of fact stands, even if there is substantial evidence to the contrary." *Alexander v. Wal-Mart Stores, Inc.*, 166 N.C. App. 563, 573, 603 S.E.2d 552, 558 (2004) (Hudson, J., dissenting), *adopted per curiam*, 359 N.C. 403, 610 S.E.2d 374 (2005).**[Note 2]**

I

Defendant first argues, citing *Gutierrez*, that the Commission erred in failing to consider Dr. Bond's testimony. We disagree.

Although this Court held in *Gutierrez* that the Commission had erred by "failing to consider testimony and to adjudicate evidence" from all the testifying physicians, it reached this conclusion because the Commission had failed to make any findings of fact at all regarding the testimony of one of the treating physicians. 169 N.C. App. at 176, 609 S.E.2d at 448. In contrast, the Commission's numerous findings of fact in this case discussing Dr. Bond's treatment, diagnosis, and opinions demonstrate that the Commission committed no such error in the present case.

Dr. Bond's testimony was thoroughly considered, but the Commission ultimately found Dr. Alexander more credible and his testimony entitled to greater weight. As we noted in *Gutierrez*, it is within the discretion of the Commission to "'reject a witness'[s] testimony

entirely if warranted by disbelief of that witness.'" *Id.* (alteration original) (quoting *Plummer*, 118 N.C. App. at 731, 456 S.E.2d at 888).

It is apparent from defendant's brief that its actual concern is not that Dr. Bond's testimony was ignored by the Commission, but rather that his testimony was not given the weight defendant desired. As our Supreme Court has repeatedly made clear, however, "the full 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). It is not the role of this Court to "second-guess those determinations." *Alexander*, 166 N.C. App. at 573, 603 S.E.2d at 558. Defendant's assignments of error on this point are overruled.

II

Defendant next argues that the evidence presented by plaintiff was insufficient to establish that the workplace injury caused plaintiff's pre-existing condition to become symptomatic and lead to his current debilitated condition. It is well established that an employee is due compensation even when, as in this case, the root cause of his disability is a "pre-existing, nondisabling, non- job-related condition" if that condition "is aggravated or accelerated" by a workplace injury. *Morrison v. Burlington Indus.*, 304 N.C. 1, 18, 282 S.E.2d 458, 470 (1981) (emphasis omitted). Defendant acknowledges that Dr. Alexander testified that the compensable accident aggravated and accelerated plaintiff's asymptomatic condition, but argues that this testimony was incompetent speculation in violation of *Holley v. ACTS, Inc.*, 357 N.C. 228, 234, 581 S.E.2d 750, 753 (2003).

The Commission's decision in this case rested not on the kind of equivocal language deemed insufficient in *Holley*, but on Dr. Alexander's repeated assertion of a "probable" causal relationship. On at least six separate instances in the course of his deposition, Dr. Alexander

stated that it was "probable" that the September 2003 accident "aggravated or accelerated" plaintiff's symptoms and that his current condition was "probably" the result of the accident. In fact, when asked by plaintiff's counsel if there were any symptoms reported by plaintiff that Dr. Alexander believed were not "probably accelerated or aggravated" by his September 2003 accident, Dr. Alexander responded, "No." Dr. Alexander's repeated, unwavering statements affirming a "probable" relationship between the September 2003 accident and plaintiff's current condition are more than sufficient to meet the standard for competent and sufficient medical testimony required by this Court. *See, e.g.*, *Whitfield v. Lab. Corp. of Am.*, 158 N.C. App. 341, 351, 581 S.E.2d 778, 785 (2003) (finding Commission's determination based on "probability" to be sufficient evidence of causation).

Defendant, however, points to two places in Dr. Alexander's testimony where he used the word "speculate." While it is true that "an expert's 'speculation' is insufficient to establish causation," *Holley*, 357 N.C. at 234, 581 S.E.2d at 754, an expert witness' passing use of the word "speculate" does not necessarily establish that the witness engaged in speculation. Indeed, our Supreme Court has recently rejected precisely the approach argued by defendant in this appeal by adopting the dissenting opinion in *Alexander*, which stressed that it is not "the role of this Court to comb through testimony . . . to find a few excerpts that might be speculative." 166 N.C. App. at 573, 603 S.E.2d at 558. Rather, it is the role of this Court to "'determine whether the record contains any evidence tending to support the [Commission's] finding.'" *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)). Dr. Alexander's testimony satisfies this standard and we, therefore, affirm the opinion and award of the Commission.

III

Plaintiff has filed a separate motion in this Court, pursuant to Rule 34 of the North Carolina Rules of Appellate Procedure, seeking attorney's fees on appeal. "N.C.G.S. §97-88 allows an injured employee to move that its attorney's fees be paid whenever an insurer appeals to the Full Commission, or to a court of the appellate division, and the insurer is required to make payments to the injured employee." *Troutman v. White & Simpson, Inc.*, 121 N.C. App. 48, 53, 464 S.E.2d 481, 485 (1995), *disc. review denied*, 343 N.C. 516, 472 S.E.2d 26 (1996). We hold that plaintiff has satisfied the requirements of N.C. Gen. Stat. §97-88 (2005) and, because defendant has raised only issues of credibility and evidentiary weight that were not properly before this Court, we exercise our discretion and grant plaintiff's motion for attorney's fees. We remand to the Commission to determine the amount of reasonable attorney's fees incurred by plaintiff on this appeal.

Affirmed and remanded.

Judges CALABRIA and JACKSON concur.

Report per Rule 30(e).

NOTES

1. We note that the briefs of both parties fail to conform with Rule 28 of the Rules of Appellate Procedure, which directs that the fact section of a brief should be a "non-argumentative summary of all material facts . . . necessary to understand all questions presented for review." N.C.R. App. P. 28(b)(5). Both parties improperly interject argument into their fact sections. Defendant even includes actual discussion of the law and argues weight and credibility. This approach is improper. See *Consol. Elec. Distribs., Inc. v. Dorsey*, 170 N.C. App. 684, 687, 613 S.E.2d 518, 520 (2005) (noting a violation of Rule 28(b)(5) where "[d]efendant's statement of the facts [was] intertwined with the statement of the case and the argument section" as part of a holding dismissing the appeal for numerous rules violations).

2. Five of defendant's assignments of error (3, 4, 8, 13, 14) are not addressed substantively in defendant's brief, and three other assignments of error (1, 2, 11) are not set out in the brief at all. Under N.C.R. App. P. 28(b)(6), these assignments of error are deemed abandoned. See, e.g., *Silva v. Lowe's Home Improvement*, __ N.C. App. __, __, 625 S.E.2d 613, 621 (2006) (holding assignments of error not argued in brief are abandoned).