NO. COA08-778

NORTH CAROLINA COURT OF APPEALS

Filed: 5 May 2009

KATHY MURRAY,
Plaintiff-Employee,

v.

North Carolina Industrial Commission
I.C. File No. 393942

LORILLARD TOBACCO COMPANY,
Defendant-Employer,

and

LIBERTY MUTUAL INSURANCE COMPANY,
Defendant-Carrier.

Appeal by plaintiff-employee from Opinion and Award entered 20 February 2008 by the Full Industrial Commission. Heard in the Court of Appeals 9 March 2009.

Kenneth M. Johnson for employee-appellant.

Davis and Hamrick, L.L.P., by Shannon Warf Beach, for employer-appellee and carrier-appellee.

MARTIN, Chief Judge.

Plaintiff-appellant Kathy Murray ("plaintiff") appeals from an Opinion and Award of the North Carolina Industrial Commission ("Commission") concluding that plaintiff failed to prove by the greater weight of the evidence that she sustained an injury by accident or specific

traumatic injury arising out of and in the course of her employment with defendant-employer Lorillard Tobacco Company ("defendant-employer"). We affirm.

Plaintiff filed a claim seeking benefits under the North Carolina Workers' Compensation Act for injuries she contended were sustained on 6 October 2003. Arguing that plaintiff did not sustain an injury by accident or by aggravation of her preexisting back condition, defendant-employer and its insurer, Liberty Mutual Insurance Company ("defendant-carrier"), denied plaintiff's claim. After hearing evidence, a deputy commissioner entered an opinion and award finding plaintiff's claim to be compensable. Defendants appealed the deputy commissioner's ruling to the Full Commission. On 28 February 2008, the Full Commission filed an Opinion and Award unanimously reversing the decision of the deputy commissioner. Included in the Full Commission's Opinion and Award were the following findings of fact:

> 1. At the hearing before the Deputy Commissioner, plaintiff was 53 years of age. She had been employed by defendant-employer since 1998 as a packing operator. Plaintiff's job consisted of watching cigarettes on a conveyor belt to make certain the packages were correctly filled and refilling materials such as foil and cellophane.
>
> 2. Plaintiff had to check a pack of cigarettes every five minutes but other than that, could sit on a stool that was provided to her by defendant-employer. The stool provided to her was a bar-type stool with a back.
>
> 3. Beginning in February 2002, plaintiff presented to Dr. Ernesto M. Botero, a neurologist, for back conditions unrelated to her employment. Plaintiff's problems appeared to have come on spontaneously and were not secondary to any injury or automobile accident. An MRI revealed degenerative disc disease. According to Dr. Botero's testimony, a person with degenerative disc disease could develop a herniation without trauma or a specific injury.
>
> 4. Plaintiff was eventually diagnosed as having a left L4-5 herniated disc and Dr. Botero indicated plaintiff most likely developed this herniation for basically no reason whatsoever other than having degenerative disc disease.

5. On February 28, 2002, Dr. Botero performed a diskectomy and foraminotomy with a partial facet removal. Subsequent to this surgery in 2002, plaintiff complained of pain in her left leg that had caused her to fall twice, thereby increasing the pain in her back. Plaintiff's back pain continued to increase and Dr. Botero ordered an MRI that was performed May 15, 2002, which revealed scar tissue and the possibility of a recurrent herniated disc. Dr. Botero was concerned that plaintiff could have had another spontaneous herniation without any type of trauma or injury. Dr. Botero performed exploratory surgery on June 4, 2002, and plaintiff was found to have a recurrent herniated disc at the L4-5 level on the left.

6. On June 20, 2002, plaintiff related to Dr. Botero that the night before she suddenly developed a sharp onset of pain that went across her spine and down her left leg without any precipitating event. On August 5, 2002, Dr. Botero opined plaintiff had a recurrent radiculopathy now involving both of her legs and that whatever problem she had with her spine was now causing problems on the right side. Dr. Botero opined that it is not unusual for someone with degenerative disc disease to continue to develop problems.

7. On January 12, 2003, plaintiff presented for treatment and this time she was complaining of pain radiating into her right leg. Her prior complaints had been of pain in her left leg. X-rays showed scar tissue at L4-5 and L5-S1. Dr. Botero opined that these complaints could be an indication of possible disc involvement on the opposite side and ordered a new MRI. Dr. Botero opined that the results of the MRI had changed completely and were "quite dramatic." At this time, plaintiff had no space between bones 4 and 5 and quite a bit of inflamation [sic] at the recurring disc. The absence of this cushion between the bones indicated an acceleration of the degenerative disc disease without any type of trauma or injury. Dr. Botero was surprised that the degeneration had happened so quickly.

8. Dr. Botero performed a fusion surgery at L4-5 and L5-S1 on April 7, 2003. This contrasted with the prior two surgeries that had only involved one level. Dr. Botero opined that the L5-S1 level had been compromised as a result of plaintiff having degenerative arthritis which caused her facets to be loose.

9. Dr. Botero returned plaintiff to work without restriction on June 30, 2003, but told her not to bend and that if she

had to pick up something from the floor she was to squat or kneel. On June 30, 2003, plaintiff returned to the same job she had prior to taking a leave of absence for her surgeries.

10. Subsequent to her return to work, plaintiff continued to have back pain that caused her to limp and affected her ability to perform her job. Plaintiff's co-employees helped her perform her job on various occasions. On at least one occasion in August 2003, the pain was substantial enough for plaintiff to go to the medical department for treatment and to cause her to miss approximately one and one-half days of work. Plaintiff informed the medical department staff that she had leaned over to pick up a pack of cigarettes that she had dropped on the floor twisting her back and developed left buttock and left leg pain that radiated to her knee. She further related that she had done something that she had been instructed by the doctors not to do, which was to bend straight over. Defendant-employer's clinical chart introduced into evidence at the hearing before the Deputy Commissioner indicated that plaintiff said the incident was "not work-related" and "not related to anything I did at work."

11. On September 4, 2003, plaintiff had a follow-up visit with Dr. Botero and was still experiencing sciatic pain.

12. On October 3, 2003, the machine on which plaintiff was working had been shut down to fix a glue spot. After plaintiff cleaned her work area, she sat on her stool and was facing Aaron Sams, a co-worker and Clyde Smithy, another co-worker. Plaintiff testified that as she was sitting watching Mr. Sams and Mr. Smithy, her supervisor, George Nauman, approached her from her right, poked her in the back, and startled her in such a way that she rose up on the seat turning to the right, and sat down hard in a twisted manner on the stool, experiencing immediate pain in her back. Although Mr. Sams and Mr. Smithy testified at the hearing before the Deputy Commissioner, neither one could corroborate plaintiff's testimony regarding an incident with her supervisor, Mr. Nauman.

13. On October 6, 2003, plaintiff presented to Dr. Botero, with complaints of increased pain radiating to her left foot, which she stated was caused when her supervisor came up behind her and hit her in the back, causing her to fall to the floor. Dr. Botero opined that this incident more likely than not caused the problems with which plaintiff presented in October 2003. However, Dr. Botero also opined that more likely than not and to a reasonable degree of medical certainty the bending incident in

> August 2003 was the source of the problems plaintiff was having instead of this event with a supervisor.
>
> 14. Dr. Botero further opined to a reasonable degree of medical certainty and more likely than not that the treatment he rendered to plaintiff from October 2003 to the time of the hearing before the Deputy Commissioner was secondary to the act of plaintiff bending over to pick up a pack of cigarettes on [sic] August 2003.
>
> 15. Dr. Botero also opined that it was more likely than not that the need for plaintiff's surgeries and treatment after October 2003 was based solely on her degenerative disc disease.
>
> 16. There is insufficient evidence of record, including the medical testimony of Dr. Botero, from which to prove by the greater weight that plaintiff's back complaints were causally related to an October 3, 2003 incident or that the incident significantly aggravated her pre-existing back condition.
>
> 17. Plaintiff has failed to prove by the greater weight of the evidence that on October 3, 2003, she sustained an injury by accident or a specific traumatic incident arising out of and in the course of his [sic] employment with defendant-employer.

Based on these findings of fact, the Full Commission made the following conclusions of law:

> 1. Plaintiff has failed to prove by the greater weight of the evidence that on October 3, 2003, she sustained an injury by accident or a specific traumatic incident arising out of and in the course of her employment with defendant-employer. North Carolina Gen. Stat. §97-2(6).
>
> 2. Plaintiff's claim, therefore, is not compensable under the provisions of the North Carolina Workers' Compensation Act. North Carolina Gen. Stat. §97-2(6).

On appeal, plaintiff has assigned error to the Full Commission's Findings of Fact 14-17, as well as Conclusions of Law 1 and 2. Because plaintiff has not assigned error to the remaining findings of fact, these findings are "presumed to be supported by competent evidence" and are thus "conclusively established on appeal." *See Johnson v. Herbie's Place*, 157 N.C. App. 168, 180, 579 S.E.2d 110, 118, *disc. review denied*, 357 N.C. 460, 585 S.E.2d 760 (2003).

We initially address defendants' argument on appeal that, because plaintiff's brief violates Rule 28 of the North Carolina Rules of Appellate Procedure, her appeal should be dismissed. Plaintiff's brief failed to include a cover page, a subject index and table of authorities, a statement of the questions presented for review, a statement of the procedural history of the case, and a statement of grounds for appellate review, all as prescribed by Appellate Rule 28. Though we elect not to sanction counsel for this violation, we admonish counsel that the Rules of Appellate Procedure are mandatory, and violations thereof may subject a party or counsel to sanctions. *State v. Hart*, 361 N.C. 309, 311, 644 S.E.2d 201, 202 (2007).

On appeal, we review decisions from the Industrial Commission to determine whether any competent evidence supports the Commission's findings of fact and whether those findings of fact support the Commission's conclusions of law. *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 700 (2004). "The findings of fact by the Industrial Commission are conclusive if supported by any competent evidence." *See Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (citing *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977)), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999). This is true "even though there be evidence that would support findings to the contrary." *Jones v. Myrtle Desk Co.*, 264 N.C. 401, 402, 141 S.E.2d 632, 633 (1965). "The evidence tending to support plaintiff's claim is to be viewed in the light most favorable to plaintiff, and plaintiff is entitled to the benefit of every reasonable inference to be drawn from the evidence." *Lanning v. Fieldcrest-Cannon, Inc.*, 352 N.C. 98, 106, 530 S.E.2d 54, 60 (2000). However, this Court "does not have the right to weigh the evidence and decide the issue on the basis of its weight." *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965). Instead, our duty goes no further than to

determine whether the record contains any evidence tending to support the Commission's findings. *See id.* In turn, we review the Commission's legal conclusions to determine whether they are justified by those findings. *See Aaron v. New Fortis Homes, Inc.*, 127 N.C. App. 711, 714, 493 S.E.2d 305, 306 (1997).

Plaintiff first assigns error to the Commission's Findings of Fact 14-17. These findings essentially provide that plaintiff's condition was not caused or significantly aggravated by the 3 October 2003 incident, as illustrated by Dr. Botero's opinion testimony. We have held that the burden of proving each and every element of compensability is upon the plaintiff. *Harvey v. Raleigh Police Dep't*, 96 N.C. App. 28, 35, 384 S.E.2d 549, 553 (citing *Moore v. J.P. Stevens & Co.*, 47 N.C. App. 744, 269 S.E.2d 159 (1980)) *disc. review denied*, 325 N.C. 706, 388 S.E.2d 454 (1989). Accordingly, plaintiff must provide evidence that indicates, to a reasonable scientific probability, that the stated cause produced the stated result. *Phillips v. U.S. Air, Inc.*, 120 N.C. App. 538, 542, 463 S.E.2d 259, 262 (1995) (quoting *Hinson v. Nat'l Starch & Chem. Corp.*, 99 N.C. App. 198, 202, 392 S.E.2d 657, 659 (1990)), *aff'd per curiam*, 343 N.C. 302, 469 S.E.2d 552 (1996). "Where the link between a plaintiff's condition and an accident at work involves a complex medical question, . . . a finding of causation must be premised upon the testimony of a medical expert." *Singletary v. N.C. Baptist Hosp.*, 174 N.C. App. 147, 154, 619 S.E.2d 888, 893 (2005). The medical expert must testify to the cause of plaintiff's condition to some degree of medical certainty. *See generally Adams v. Metals, USA*, 168 N.C. App. 469, 608 S.E.2d 357, *aff'd per curiam*, 360 N.C. 54, 619 S.E.2d 495 (2005). In reviewing the testimony of the medical expert and other witnesses, the Commission is the ultimate fact finding body and the sole judge of the credibility of the witnesses and the weight to be given their testimony. *See AVX Corp.*, 349 N.C. at 680, 509 S.E.2d at 413.

Here, the record on appeal contains the deposition of Dr. Botero, whom the parties stipulated is an expert in neurosurgery. Although plaintiff testified that she began experiencing increased pain after the 3 October 2003 incident, Dr. Botero's deposition testimony revealed that plaintiff's degenerative disc condition could likely cause increased back pain and problems absent any specific trauma. Dr. Botero, when shown the medical department clinical notes describing plaintiff's pain after bending over to pick up a pack of cigarettes in a non-work related incident, testified that this bending, which he had warned against, could have caused plaintiff's increased back problems. Dr. Botero also testified that the treatment he rendered plaintiff from October 2003 up until the time of the deposition was, to a reasonable degree of medical certainty, "secondary about the act of bending over and picking up the pack of cigarettes," instead of the 3October 2003 event with her supervisor. In Dr. Botero's opinion, the act of bending over, which he had told plaintiff not to do, "most likely than not" caused plaintiff's increased back problems. Although the record contains evidence that somewhat contradicts the testimony of Dr. Botero concerning the cause of plaintiff's increased back pain and problems after 3 October 2003, we do not weigh the evidence, but must only determine whether the record contains any evidence tending to support the Commission's findings. *Anderson*, 265 N.C. at 434, 144 S.E.2d at 274. Accordingly, we conclude that competent record evidence supports the Commission's Findings of Fact 14-17, and these assignments of error are overruled.

Plaintiff also assigns error to the Commission's Conclusions of Law 1 and 2, which essentially provide that, because plaintiff failed to prove a causal relationship between her increased back pain and problems and a specific traumatic incident arising out of and in the course of her employment, she is not entitled to compensation under the Workers' Compensation Act. Although the Commission's Findings of Fact 14-17 were cast in the form of negative

findings, they provide a sufficient basis for the conclusion of law that plaintiff's back pain and problems are noncompensable because a claimant's right to compensation for an occupational disease under N.C.G.S. §97-2(6) depends upon proper proof of causation. *See* N.C. Gen. Stat. §97-2(6) (2007); *Johnson v. S. Tire Sales & Serv.*, 358 N.C. 701, 706, 599 S.E.2d 508, 512 (2004). The burden of proving each and every element of compensability is upon the plaintiff. *See Aylor v. Barnes*, 242 N.C. 223, 226, 87 S.E.2d 269, 271 (1955). We have already determined that the Commission's finding with respect to causation is supported by competent evidence found in the record. Therefore, plaintiff has failed to meet her burden, the Commission's Conclusions of Law 1 and 2 are justified, and these assignments of error are also overruled.

AFFIRMED.

Judges WYNN and ERVIN concur.

Report per Rule 30(e).