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NO. COA09-1019

NORTH CAROLINA COURT OF APPEALS

Filed: 1 June 2010

BARBARA BLACKBURN, Employee,
Plaintiff,

v.

DUKE UNIVERSITY, Employer,
SELF-INSURED,
Defendant.

North Carolina
Industrial Commission
I.C. File No. 444529

Appeal by defendant from Opinion and Award entered 14 May 2009 by the North Carolina Industrial Commission. Heard in the Court of Appeals 24 February 2010.

Law Offices of James Scott Farrin, by Matthew D. Harbin and J. Gabe Talton, for plaintiff-appellee.

Cranfill, Sumner & Hartzog, L.L.P., by Kirk D. Kuhns and Jaye E. Bingham, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

In an Opinion and Award, the North Carolina Industrial Commission (the "Full Commission") determined that Barbara Blackburn ("plaintiff") injured her shoulder while recovering from a compensable injury arising during her employment with Duke University ("employer"). The Full Commission ordered employer to pay for medical expenses incurred or to be incurred as a result of plaintiff's shoulder injury, and employer appeals, claiming the Full Commission erred by: (1) finding there was competent evidence

in the record to support a finding of fact that plaintiff's shoulder condition was causally related to the compensable injury; and (2) failing to make findings of fact on essential issues in the case. We affirm the Full Commission's Opinion and Award.

BACKGROUND

On 22 June 2004, plaintiff sustained injuries when another vehicle struck the right, rear side of her vehicle while she was transporting paperwork on employer's campus. Plaintiff had her right arm extended forward on the steering wheel when the other vehicle made impact. The next day, plaintiff went to employer's Employee Occupational Health and Wellness Clinic. The medical records from the clinic note that plaintiff sustained a "jerk to the arm" in connection with the accident. On 1 July 2004, employer filed a Form 19 First Report of Injury.

On 11 August 2004, plaintiff saw Dr. James Albert Nunley, II, for complaints of right ankle pain. Dr. Nunley ordered an air cast with stirrup support and physical therapy for her right ankle. On 13 August 2004, Dr. Alison Patricia Toth, an orthopedist, diagnosed plaintiff with a probable triangular fibro-cartilage complex ("TFCC") injury to her right wrist. Dr. Toth referred plaintiff to Dr. David Allen Thompson, another orthopedist.

On 23 August 2004, Dr. Thompson confirmed the TFCC diagnosis, and recommended that plaintiff's right arm remain immobilized in a long-arm cast. The same day, plaintiff filed a Form 18 alleging injuries to her neck, lower back, right hand and wrist, and right

ankle. Eventually, Dr. Thompson recommended surgery for plaintiff's wrist injury.

On 22 September 2004, plaintiff returned to Dr. Nunley, who felt her right ankle had improved enough to remove the air cast. On 20 October 2004, Dr. Nunley concluded that plaintiff's right ankle was going to recover completely, and he discharged her from his care.

On 22 October 2004, Dr. Thompson performed an arthroscopic repair of plaintiff's right wrist injury, and following the surgery, he ordered physical therapy. On 17 December 2004, employer filed a Form 28T indicating that plaintiff returned to work on 1 December 2004. Upon Dr. Thompson's recommendation, plaintiff continued physical therapy for 28 weeks through 6 May 2005. On 9 May 2005, Dr. Thompson recommended that plaintiff perform a home exercise program rather than continue physical therapy.

On 23 July 2005, plaintiff visited Dr. Thompson, who noted soreness in plaintiff's posterior right shoulder as well as continued complaints with plaintiff's right wrist. On 29 August 2005, plaintiff underwent a second surgery on her right wrist, performed by Dr. David Simms Ruch, an orthopedist with a sub-specialty in hand surgery. Plaintiff underwent another 10 weeks of physical therapy following the surgery. Dr. Thompson testified later that the physical therapy plaintiff underwent following her two wrist surgeries involved extensive use of her right upper extremity.

On 13 September 2005, employer admitted the compensability of plaintiff's 22 June 2004 work injury via a Form 60. The Form 60 described plaintiff's injury as follows: "[Plaintiff] was exiting the parking lot and a woman backed into [her] and impacted the right rear fender of car." On 23 September 2005, plaintiff filed a Form 18 alleging injuries to her right upper extremity and hand. Employer did not file a Form 61 denying liability with respect to plaintiff's right upper extremity.

On 4 October 2005, Dr. Claude Thurman Moorman, III, an orthopedist, saw plaintiff for her right shoulder pain. Dr. Moorman noted that "[b]ecause of alterations in her [plaintiff's] upper extremity kinematics she has developed a secondary compensatory pain along the shoulder blade of her right shoulder" which is "markedly limiting with both her ADLs and her attempts to return to work type activities." Dr. Moorman diagnosed plaintiff with snapping scapular syndrome in the right upper extremity, ordered more physical therapy, and administered cortico-steroid injections to her right shoulder. Employer paid for both the visit with Dr. Moorman and his treatment recommendations.

On 21 March 2006, Dr. Louis Cornelis Almekinders, an orthopedist, saw plaintiff for continued right shoulder complaints. Dr. Almekinders noted plaintiff had an onset of intermittent pain in the right, posterior shoulder when she started rehabilitation for injuries stemming from the motor vehicle accident. Dr. Almekinders noted plaintiff's shoulder symptoms were aggravated by

lifting weight, and diagnosed plaintiff with bursitis and impingement syndrome.

On 18 September 2006, plaintiff filed a Motion to Compel Medical Treatment for her shoulder; and on 20 September 2006, plaintiff visited Dr. Kevin Paul Speer, an orthopedist with a sub-specialty in shoulder surgeries, to seek her own evaluation. During plaintiff's visit, Dr. Speer noted that "[a]t some point during plaintiff's early convalescence in the cast, her shoulder scapula pain, ache and discomfort became more apparent" and now "[plaintiff] complains of rather significant constant unremitting pain in her scapula." Dr. Speer diagnosed plaintiff with refractive scapulo-thoracic bursitis of the right shoulder, and recommended an open superomedial angle scapula ostectomy with bursectomy procedure. Dr. Speer concluded, to a "reasonable degree of medical certainty," that plaintiff's scapula pain was the direct consequence of her motor vehicle accident on 22 June 2004.

On 6 November 2006, the Special Deputy Commissioner entered an order denying plaintiff's Motion to Compel Medical Treatment for her right shoulder. On 9 November 2006, plaintiff filed a Form 33 Request for Hearing appealing the order. On 7 December 2006, employer filed a Form 33R denying liability for plaintiff's right shoulder injury.

On 26 December 2006, plaintiff filed a second Motion to Compel Medical Treatment for her right shoulder injury. A hearing was held in the matter on 6 February 2007, and on 9 October 2008, the Deputy Commissioner entered an Opinion and Award finding that the

plaintiff's right shoulder condition was caused by plaintiff's compensable injury on 22 June 2004. The Opinion and Award granted plaintiff medical treatment for her shoulder with Dr. Speer.

Employer thereafter filed a Notice of Appeal to the Full Commission. On 14 May 2009, the Full Commission entered an Opinion and Award with two commissioners affirming the Opinion and Award of the deputy commissioner and one commissioner dissenting.

In its Opinion and Award, the majority of the Full Commission reviewed the medical evidence presented, and made several findings of fact relevant to the issues in this appeal.

12. Dr. Speer testified that he reviewed Plaintiff's medical records prior to his September 20, 2006 visit with her. The medical records that Dr. Speer reviewed were the same as those contained in Stipulated Exhibit Two (2). Based upon Dr. Speer's review of Plaintiff's medical records, and his physical examination of her, he was of the opinion and the Full Commission finds as fact that the June 22, 2004 work injury which caused her right wrist injury also caused her right shoulder complaints. Dr. Speer further opined, to a reasonable degree of medical certainty, and the Full Commission finds as fact, that the treatment that Plaintiff underwent for her right wrist injury caused her right shoulder condition. Dr. Speer opined, and the Full Commission finds as fact, that repetitive strain injuries and excessive stress injuries can cause the right shoulder condition that he diagnosed, and that the long arm casting that Plaintiff underwent from June 2004 through May 2005, along with the lengthy course of physical therapy that Plaintiff underwent, put an excessive strain on her right shoulder joint. This excessive strain caused Plaintiff's scapula to irritate the bursa, giving rise to her refractive scapulo-thoracic bursitis of the right shoulder.

. . . .

14. Dr. Nunley and Dr. Thompson both testified that overuse of an upper extremity such as the shoulder could be a cause of scapulo-thoracic bursitis. Neither Dr. Nunley nor Dr. Thompson evaluated or treated Plaintiff for her right shoulder condition, and neither of them reviewed Plaintiff's entire medical record prior to offering their opinions. With respect to causation, Dr. Nunley opined that either Plaintiff's underlying scoliosis or the unrelated trauma she reported to her elbow following the June 22, 2004 work injury was more likely the cause of her refractive scapulo-thoracic bursitis of the right shoulder. Dr. Thompson opined that it was unlikely that the June 22, 2004 work injury was the direct cause of Plaintiff's refractive scapulo-thoracic bursitis of the right shoulder; however, the fact that Plaintiff performed her work duties differently because of the work injury would be a more likely cause. The Full Commission gives greater weight to the opinion testimony of Dr. Speer over any contrary opinions of Dr. Nunley and Dr. Thompson.

Contrary to the majority, the dissenting commissioner did not give as much credence to Dr. Speer's analysis on the following grounds.

While the majority finds Dr. Speer's testimony to be competent and based upon sufficient objective evidence, I do not believe that his opinion is based upon a complete review of the medical treatment plaintiff received for her wrist injury. After examining plaintiff once, 27 months following the injury by accident, Dr. Speer unequivocally opined that plaintiff's scapulothoracic bursitis was caused by the medical treatment, including the wearing of a long-arm cast plaintiff received for her wrist injury. Dr. Speer testified that knowledge of the amount of time plaintiff was in the cast combined with when she first reported shoulder pain would be relevant to determining if the scapulothoracic bursitis was causally related. Despite this testimony, Dr. Speer conceded that he was not aware of the extent and duration of time plaintiff spent in a cast or when plaintiff first

complained of shoulder pain. Thus, Dr. Speer's causation opinion is clearly based upon assumptions he has made about her medical treatment rather than the actual, objective evidence of plaintiff's medical treatment.

In giving more weight to Dr. Speer's testimony, the majority of the Full Commission found that plaintiff's refractive scapulo-thoracic bursitis of the right shoulder was a direct and natural consequence of the 22 June 2004 work injury. The Full Commission further found that the treatment recommended by Dr. Speer that plaintiff undergo the superomedial angle scapula ostectomy with bursectomy procedure was necessary, and ordered employer to pay for medical expenses incurred or to be incurred as a result of plaintiff's shoulder injury. Employer now appeals the decision of the Full Commission to this Court.

ANALYSIS

I.

Employer alleges the Full Commission erred in finding and concluding as a matter of law that plaintiff's injury was causally related to the automobile accident on 22 June 2004. We disagree.

A. Standard of Review

This Court reviews an Opinion and Award from the Full Commission to determine: "(1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are justified by the findings of fact." *Hassell v. Onslow Cty. Bd. of Educ.*, 362 N.C. 299, 305, 661 S.E.2d 709, 714 (2008) (citations omitted). If the Full Commission's findings of fact are supported by competent evidence, they are conclusive on appeal

though other evidence may support a contrary finding. *Id.* The Commission's findings may only be set aside where there is a complete lack of competent evidence. *Munns v. Precision Franchising, Inc.*, __ N.C. App. __, __, 674 S.E.2d 430, 433 (2009). "Competent evidence is evidence 'that a reasonable mind might accept as adequate to support the finding.'" *Eley v. Mid/East Acceptance Corp. of N.C.*, 171 N.C. App. 368, 369, 614 S.E.2d 555, 558 (2005) (quoting *Andrews v. Fulcher Tire Sales & Serv.*, 120 N.C. App. 602, 605, 463 S.E.2d 425, 427 (1995)).

As the finder of fact, "[t]he Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 115, 530 S.E.2d 549, 552 (2000) (citation omitted). "[O]n appeal, this Court 'does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding.'" *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (citation omitted). Conclusions of law are reviewed *de novo*. *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004).

B. Causal Relationship

"In order to prevail on a disability claim for workers' compensation, the plaintiff bears the burden of proving by a preponderance of the evidence the existence and extent of his disability[.] *Lanier v. Eddie Romanelle's*, 192 N.C. App. 166, 170, 664 S.E.2d 609, 611 (2008). This burden applies to a finding of

causation. See, e.g., *Phillips v. U.S. Air, Inc.*, 120 N.C. App. 538, 541-42, 463 S.E.2d 259, 261 (1995), *aff'd*, 343 N.C. 302, 469 S.E.2d 552 (1996). To carry this burden, a plaintiff must present "competent, credible evidence that her disability is causally related to her employment with [the] defendant." *Hardin v. Motor Panels, Inc.*, 136 N.C. App. 351, 356, 524 S.E.2d 368, 372 (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. Freight Carriers*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980). Medical opinions may be based either on ""personal knowledge or observation or on information supplied [to the physician] by others, including the patient. . . ." *Keel v. H & V Inc.*, 107 N.C. App. 536, 540, 421 S.E.2d 362, 366 (1992) (citations omitted).

Under the standard of review in this case, we must be careful not to reweigh the expert opinions considered by the Full Commission. In evaluating whether an expert opinion satisfies the requirement of competent evidence, this Court has recently summarized the scope of our examination.

[I]t appears that our Supreme Court has created a spectrum by which to determine whether expert testimony is sufficient to establish causation in worker's compensation cases. 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." However, when expert testimony establishes that a

work-related injury "likely" caused further injury, competent evidence exists to support a finding of causation.

Cannon v. Goodyear Tire & Rubber Co., 171 N.C. App. 254, 264, 614 S.E.2d 440, 446-47 (2005) (citations omitted).

Here, looking at the evidence in the light most favorable to plaintiff, we must affirm the Full Commission's finding that the shoulder injury was causally related to plaintiff's compensable injury. The evidence showed that Dr. Speer is an orthopedist with a sub-specialty in shoulder surgeries, and he testified that the 22 June 2004 work injury eventually led to plaintiff's right shoulder complaints. Dr. Speer stated, in his own words, that to a "reasonable degree of medical certainty" the surgeries to treat plaintiff's right wrist injury, as well as the repetitive nature of her rehabilitations, caused plaintiff's right shoulder condition. Dr. Speer's testimony and conclusions were based upon his physical examination of plaintiff's condition, a review of plaintiff's medical history and documentation, and plaintiff's own statements. Because Dr. Speer's medical opinion was based upon these observations and his personal knowledge, the Full Commission's findings as to the causal relationship between the 22 June 2004 accident and plaintiff's shoulder injury are supported by competent evidence.

In light of the foregoing, because the findings of fact as to causation are supported by competent evidence and these findings support the correlating conclusions of law, the Opinion and Award must be affirmed. These assignments of error are overruled.

II.

Employer alleges the Full Commission erred in failing to make necessary findings of fact regarding the evidence presented. We disagree.

This Court has held that the Full Commission "must make 'definitive findings to determine the critical issues raised by the evidence,' and in doing so must indicate in its findings that it has 'considered or weighed' all testimony with respect to the critical issues in the case[.]" *Bryant v. Weyerhaeuser Co.*, 130 N.C. App. 135, 139, 502 S.E.2d 58, 62 (1998) (citations omitted). The Full Commission is not mandated to delineate "'exhaustive findings as to each statement made by any given witness or make findings rejecting specific evidence[.]'" *Smith v. Beasley Enterprises, Inc.*, 148 N.C. App. 559, 562, 577 S.E.2d 902, 904 (2002). Rather, "[t]he [Full] Commission must make findings from which this Court may reasonably infer that it gave proper consideration to all relevant testimony." *Id.*

[T]he Commission does not have to explain its findings of fact by attempting to distinguish which evidence or witnesses it finds credible. Requiring the Commission to explain its credibility determinations and allowing the Court of Appeals to review the Commission's explanation of those credibility determinations would be inconsistent with our legal system's tradition of not requiring the fact finder to explain why he or she believes one witness over another or believes one piece of evidence is more credible than another.

Deese, 352 N.C. at 116-17, 530 S.E.2d at 553.

Here, the Full Commission gave greater weight to Dr. Speer's testimony. We do not require the Full Commission to make exhaustive

findings as to each statement made by witnesses, and we decline to require the Full Commission to explain in more detail why it believed Dr. Speer's testimony over the testimony of Dr. Nunley and Dr. Thompson. The Opinion and Award, as it stands, is adequate to address employer's concerns. That the Full Commission considered Dr. Speer's testimony more credible is beyond the scope of our review. These assignments of error are overruled, and the Opinion and Award of the Full Commission is

Affirmed.

Judges HUNTER, Robert C., and CALABRIA concur.

Report per Rule 30(e).