NO. COA06-1500

NORTH CAROLINA COURT OF APPEALS

Filed: 04 September 2007

MARILYN POLSTON,
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 465538

SIX STAR ECONOMIC DEVELOPMENT/GOLDEN CORRAL,
Employer,

and

ACCIDENT FUND INSURANCE COMPANY OF AMERICA (CRAWFORD & COMPANY, Third-Party Administrator),
Carrier,
Defendants.

Appeal by defendant from an opinion and award entered 14 August 2006 in the North Carolina Industrial Commission. Heard in the Court of Appeals 7 June 2007.

The Sumwalt Law Firm, by Vernon Sumwalt and Mark T. Sumwalt, for plaintiff-appellee.

McAngus, Goudelock & Courie, P.L.L.C., by Trula R. Mitchell and John S. Landry, for defendant-appellant.

STEELMAN, Judge.

When there is evidence in the record to support the Industrial Commission's findings of fact, they are binding upon the appellate court. Any issues of the weight to be given to the

evidence, and the credibility of the evidence are to be determined by the Industrial Commission. The testimony of plaintiff's medical expert established that plaintiff's compensable accident caused her injuries.

Marilyn Polston was involved in a non-work related automobile accident on 9 April 2003 that left her in a coma for approximately a month. Her injuries included multiple skull fractures, injury to her left eye, and a crushed right ankle and foot. Dr. Patrick K. Denton performed surgery to stabilize plaintiff's foot and ankle injuries, and repair a fracture of plaintiff's right medial malleolus, which is part of the tibia, the larger of the two lower leg bones. On 23 April 2003, Dr. G. Samuel Agnew performed a second surgery on plaintiff's right foot to repair a crushed calcaneous, the bone of the heel. Both operations required the use of pins or screws to repair broken bones and facilitate proper healing.

Dr. Agnew continued to monitor plaintiff's progress through regularly scheduled follow-up visits and on an as needed basis. X-rays were taken on occasion to more closely evaluate plaintiff's progress. Dr. Agnew released plaintiff to return to work at her job as a waitress with Golden Corral (along with Accident Fund Insurance Company of America and Crawford and Company, "defendants") on 2 December 2003. According to Dr. Agnew's notes from this time period and his later testimony, plaintiff was not complaining of any significant pain in her right foot, and was walking without a limp.

Plaintiff did not return to work with Golden Corral until 1 July 2004 because she had not been released to return to work as a result of her eye injury. Plaintiff subsequently worked at Golden Corral on a reduced schedule, and accommodations, such as more frequent breaks, were made in light of her condition. Plaintiff experienced some discomfort while performing her duties as a waitress, but she was able to continue working. During this period, plaintiff did not

return to Dr. Agnew, nor did she contact his office with any complaints of pain in her right foot or lower leg.

Plaintiff was working at Golden Corral on 31 July 2004 when an injury by accident occurred. Plaintiff carried a tray full of dishes and utensils to the wash station. She then proceeded to sort the dishes into bins on the dish rack to assist the dishwashers. The wash station was arranged so that the hard plastic cups used by the restaurant were placed into heavy plastic racks located on a shelf above plaintiff's head.

A dishwasher came to pick up the rack, and accidentally caused it to slide off of the shelf and strike plaintiff somewhere on her upper torso. The rack then slid down and hit plaintiff's tray before she managed to stop its descent. Some dishes fell to the floor, striking plaintiff's right foot. Exactly what dishes hit plaintiff, and how many, is disputed by the parties. Plaintiff was assisted by other employees, and she spent a few minutes holding on to a bar at the wash station before she sat down. The parties dispute whether plaintiff was able to work any more that evening, or the following day, but defendants stipulate that plaintiff" sustained an admittedly compensable injury by accident arising out of and in the course of her employment on July 31, 2004.

It is undisputed that plaintiff did not return to work following 1 August 2004, the day after the accident, and that she contacted Dr. Agnew's office on 2 August 2004 complaining of pain in her right foot and requesting a prescription for pain medication. Dr. Agnew examined plaintiff on 20 August 2004, and x-rayed her right foot. The x-rays showed that some of the screws supporting plaintiff's calcaneous had broken, causing portions of that bone to collapse. Dr. Agnew performed a second surgery to repair plaintiff's foot on 10 September 2004.

Plaintiff filed a claim for worker's compensation benefits with the North Carolina Industrial Commission (Commission) on 2 November 2004. In an Opinion and Award filed 21 December 2005, Deputy Commissioner Adrian A. Phillips concluded that plaintiff had suffered a compensable injury on 31 July 2004, and awarded her temporary total disability compensation at the rate of $66.79 per week from the date of the injury and to continue until plaintiff returned to work or further order of the Commission. Plaintiff was also awarded reasonable medical expenses. Defendants appealed to the Full Commission. The Full Commission affirmed the Deputy Commissioner in an Opinion and Award filed 14 August 2006. Defendants appeal.

In defendants' first argument, they contend that the Commission erred in its fourth finding of fact, because it was not supported by credible evidence. We agree in part.

"The standard of review on appeal to this Court from an award by the Commission is whether there is any competent evidence in the record to support the Commission's findings and whether those findings support the Commission's conclusions of law." *Oliver v. Lane Co.*, 143 N.C. App. 167, 170, 544 S.E.2d 606, 609 (2001). "Therefore, if there is competent evidence to support the findings, they are conclusive on appeal even though there is plenary evidence to support contrary findings." *Id*. "The Full Commission is the 'sole judge of the weight and credibility of the evidence.'" *Trivette v. Mid-South Mgmt., Inc.*, 154 N.C. App. 140, 144, 571 S.E.2d 692, 695 (2002) (citation omitted). This Court reviews the Commission's conclusions of law *de novo*." *Ramsey v. N.C. Indus. Comm'n S. Indus. Constructors, Inc.*, 178 N.C. App. 25, 30, 630 S.E.2d 681, 685 (2006) (internal citations and quotation marks omitted), *rev. denied*, 361 N.C. 168, 639 S.E.2d 652 (2006). Defendants contest the following finding of fact:

> 4. Plaintiff saw Dr. Agnew on four occasions following her two surgeries [on 10 April 2003 and 23 April 2003] until her release on December 2, 2003. She had no complaints of pain and there was no discernable swelling during these four visits.

> In addition, x-rays taken on two separate occasions indicated a normal recovery and a healed calcaneal fracture with maintenance of the height and alignment of her subtalar joint.

Defendants argue that this finding of fact is erroneous because medical records detailing plaintiff's routine follow-up appointment with Dr. Agnew on 5 August 2003 state: "[plaintiff] returns for routine check. She states that she has been compliant with restricted activity and has no complaints of pain except with prolonged activity." Plaintiff made three additional routine follow-up visits with Dr. Agnew for injuries sustained in her automobile accident; on 20 May 2003, 24 June 2003 and 2 December 2003, at which time Dr. Agnew released her to return to work. On all three of these additional visits Dr. Agnew indicated, without qualification, that plaintiff had no complaints of pain in her right foot.

Because of the 5 August 2003 note, we hold that a limited portion of this finding of fact is not supported by competent evidence; to the extent that it states plaintiff "had no complaints of pain" for any of her four visits. While as a technical matter, the record indicates that plaintiff, on 5 August 2003, complained of pain with prolonged activity, this does not impact the overall findings contained in finding of fact 4. The import of the finding is that plaintiff had a good and normal recovery from the surgery and after 5 August 2003 was experiencing no pain. Any defect in the finding is immaterial and this argument is without merit. Defendants failed to except to any of the other findings contained in finding of fact 4, and defendants have thus abandoned any argument as to the balance of this finding of fact. N.C. R. App. P. 10(a) & 28(b)(6).

In defendants' second argument, they contend that the Commission erred in its seventh finding of fact, because it is not supported by credible evidence. We disagree.

The Commission's seventh finding of fact states:

> 7. From the date that Dr. Agnew released plaintiff on December 2, 2003, until July 31,2004, plaintiff was not treated by

> Dr. Agnew or any other physician with respect to her right foot. Plaintiff did not complain to Dr. Agnew or any other physician with respect to her right foot, and had no medications prescribed or filled by Dr. Agnew or any other physician for problems with her right foot. During this period of time, plaintiff walked without a limp and did not have pain.

Defendants contend that this finding is not supported by the evidence because medical records show on three separate occasions, between 2 December 2003 and 31 July 2004, plaintiff visited Sandhills Medical Foundation, Inc. (Sandhills), complained of pain in her right foot, and was prescribed medication. Sandhills is plaintiff's regular primary care medical provider, is not affiliated with Dr. Agnew or his orthopedic practice, and does not have an orthopedic specialist on staff.

Medical records for plaintiff's 10 March 2004 visit show that she complained of pain from a "twisted" right ankle, and informed the medical staff that she had pins in that ankle. Plaintiff was prescribed pain medication for that ankle sprain. Records from plaintiff's 1 April 2004 visit indicate that she continued to have "ankle pain," and more pain medication was prescribed. Plaintiff also visited Sandhills on 8 July 2004. Records from this visit include a section titled "Nursing Assesment" (sic) with a handwritten note stating "[plaintiff] said she went back to work & she needs some pain med because of the pins in foot." Included in a section titled "Physician/Nurse Practitioner History and Physical Section" are notes indicating plaintiff's pain was located in her ankle where the pins were situated. Plaintiff was again prescribed pain medication for her discomfort. Plaintiff did not schedule these appointments specifically to address the pain in her ankle. Plaintiff was continuing ongoing evaluation for other conditions, including a persistent cough and ptosis (a drooping eyelid), which resulted from her automobile accident.

Plaintiff underwent two separate surgeries in the weeks following her automobile accident to repair damage to her right ankle and foot. In the first surgery, on 10 April 2003, Dr. Denton inserted two screws to facilitate recovery of a fracture to plaintiff's right medial malleolus. The medial malleolus is the bone which protrudes from the inside of the lower leg (the tibia), just above the foot. This protrusion is part of that portion of the lower leg commonly referred to as the "ankle." Dr. Agnew performed the second surgery, on 23 April 2003, to repair plaintiff's fractured calcaneous, or heel bone. It was necessary for Dr. Agnew to insert multiple screws and a plate to facilitate proper healing of the calcaneous and insure proper alignment with the other bones of the foot.

During the period in question, plaintiff did not return to Dr. Agnew complaining of pain in her right foot, and she was not treated by Dr. Agnew during this period, nor were any pain medications prescribed by him. The only evidence that plaintiff complained of pain and requested medication are the above referenced records from Sandhill. It appears that plaintiff was complaining of pain in her lower leg, specifically that portion of the tibia known as the medial malleolus, and commonly referred to as part of the ankle, and not her calcaneous, or heel, which is a part of her foot, the collapse of which precipitated this claim.

Giving defendant the most charitable reading of the evidence, the evidence is conflicting. It is the sole province of the Commission to weigh that evidence, resolve any conflicts, and find facts. *Moody v. Mecklenburg County*, 165 N.C. App. 869, 872, 600 S.E.2d 39, 41 (2004). This Court may not disturb findings of fact made by the Commission if they are supported by *any* competent evidence. *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 115, 530 S.E.2d 549, 552 (2000). Defendants have not argued any exception to the portion of finding of fact seven which states: "During this period of time, plaintiff walked without a limp and did not have pain."

Exception to this portion of the finding of fact has been abandoned. N.C. R. App. P. 28(b)(6). This argument is without merit.

In defendants' third argument, they contend that the Commission erred in its fifteenth finding of fact, because it is not supported by competent evidence. We disagree.

The Commission's fifteenth finding of fact states:

> 15. Dr. Agnew was concerned that plaintiff had suffered a segmental collapse that is characterized by a loss of height. He opined that the x-rays taken on June 24, 2003, and August 5, 2003, prior to plaintiff's work-related injury did not reveal any loss of height and were normal in all respects. However, the x-rays taken following her July 31, 2004, work-related accident revealed an acute segmental collapse as opposed to a gradual segmental collapse.

Defendants argue that Dr. Agnew's opinions on this matter constitute incompetent evidence because they are based on mere speculation and conjecture.

> Due to the complexities of medical science, particularly with respect to diagnosis, methodology and determinations of causation, this Court has held that "where 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." However, when such expert opinion testimony is based merely upon speculation and conjecture, it 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. Indeed, this Court has specifically held that "an expert is not competent to testify as to a causal relation which rests upon mere speculation or possibility."

Young v. Hickory Bus. Furniture, 353 N.C. 227, 230, 538 S.E.2d 912, 915 (2000) (citations omitted).

Defendants make three sub-arguments: 1) Dr. Agnew's testimony is not competent evidence because it was based upon an erroneous hypothetical set of facts, 2) it is not competent

evidence because it relies upon the maxim "*post hoc, ergo propter hoc*," or "after this, therefore because of this," and 3) it is not competent because it is mere speculation.

> It is well settled in the law of evidence that a physician or surgeon may express his opinion on the cause of the physical condition of a person if based either on facts within the personal knowledge or upon an assumed statement of facts supported by evidence and cited in a hypothetical question.

State v. Holton, 284 N.C. 391, 397, 200 S.E.2d 612, 616 (1973). Dr. Agnew was asked the following question during his deposition:

> I want to ask you a hypothetical question, if I can, Dr. Agnew, and I'd like for you, if you would, just to assume certain things: one is that [plaintiff] was injured in an automobile accident and had two surgeries in April of 2003, as you have described to us; that she then came under your care following those two surgeries, and you treated her from May of 2003 through December of 2003; that you released her in - that you took at least two x-rays during that period of time that did not reveal any changes in her condition; that you released her in December of 2003 to return to work as a waitress and to return on an as needed basis; that she did not come back in the office to see you between December of 2003 and August of 2004; that she was not prescribed any medications by your office during that time, nor were there any complaints or any indication in your notes that she called in to complain of any problems during that time. Assuming those facts - oh, and one other .... That on July 31, 2004 while she was waitressing, that she dropped a tray of dishes onto her foot and immediately had pain; that she was prescribed prescriptions by a - I think another doctor in your absence until she was able to see you on August 20, 2004; and then you saw her on August 20, 2004 and ultimately performed the surgery that you have described. If those - if the Industrial Commission would find by the greater weight that those facts are true, do you have an opinion satisfactory to yourself and to a reasonable degree of medical certainty as to whether it is more likely than not that the segmental collapse was caused by this incident on July 31, 2004 where she dropped a tray of dishes onto her foot causing this segmental collapse?

Dr. Agnew answered this hypothetical by stating:

> I think it's probably a strong contributing factor. Given what we found at the time of surgery, I think that she probably had some

> segment of her calcaneous that had not completely healed, and, therefore, had weakened it to the point where it couldn't sustain such an injury, whereas it was strong enough for her to walk on and be comfortable.

Dr. Agnew further stated that the changes in the x-rays of plaintiff's foot from before the accident to those taken after the accident also factored into his opinion.

Defendants argue that Dr. Agnew based his opinion on an incorrect hypothetical. They assert that Dr. Agnew was asked to assume: "(1) Plaintiff-Appellee was not prescribed any medications between December of 2003 and the time of her incident on 31 July 2004 and (2) Plaintiff-Appellee had no complaints of pain during this period of time." A cursory review of Dr. Agnew's testimony shows he was not asked to assume these things. Dr. Agnew was only asked to assume as fact that plaintiff did not return to *his* office during the relevant time period, that she did not obtain any prescriptions for pain medication from *his* office during the relevant time period, and that *he* had no indication that she had called in to his office to complain of pain during the relevant time period. Defendants make no argument that these assumed facts are erroneous, and we find nothing in the record indicating such.

Defendants next argue that Dr. Agnew improperly relied on *post hoc, ergo propter hoc* reasoning to form his opinion.

> It is permissible, but not compulsory for a fact-finder to infer causation where a medical expert offers a qualified opinion as to causation, along with an accepted medical explanation as to how such a condition occurs, and where there is additional evidence tending to establish a causal nexus.
>
> "[The Supreme] Court has allowed 'could' or 'might' expert testimony as probative and competent evidence to prove causation." However, "'could' or 'might' expert testimony [is] insufficient to support a causal connection when there is additional evidence or testimony showing the expert's opinion to be a guess or mere speculation." An expert witness' testimony is insufficient to establish causation where the expert witness is unable to express

> an opinion to "any degree of medical certainty" as to the cause of an illness. Likewise, where an expert witness expressly bases his opinion as to causation of a complex medical condition solely on the maxim *post hoc ergo propter hoc* (after it, therefore because of it), the witness provides insufficient evidence of causation.

Adams v. Metals USA, 168 N.C. App. 469, 476, 608 S.E.2d 357, 362 (2005) (citations omitted), *aff'd*, 360 N.C. 54, 619 S.E.2d 495 (2005).

The evidence in this case shows that Dr. Agnew began treating plaintiff for her foot injuries shortly after her automobile accident, and continued to treat and monitor her injuries through the segmental collapse of her calcaneous and its surgical repair. He testified that he has treated over five hundred patients with calcaneal fractures, and when patients are suffering from a gradual segmental collapse of the fractured calcaneous they will exhibit symptoms and complain of pain, stating "anyone else would have been complaining for weeks or months beforehand." Plaintiff was not complaining of any significant pain in the weeks and months before her work-related injury, and she was performing her duties as a waitress (albeit at a reduced level), which demand constant standing and walking. Immediately following her work-related injury, plaintiff was unable to continue her employment as a waitress. Plaintiff called Dr. Agnew's office a day after ceasing to work requesting pain medication. Subsequent x-rays showed plaintiff's calcaneous had, in fact, collapsed, and Dr. Agnew performed surgery to repair the damaged foot.

Dr. Agnew testified that both the x-rays and the surgery indicated to him that though plaintiff's injury had most likely not been healing in a satisfactory manner, which likely resulted in a weakening of the hardware maintaining the integrity of plaintiff's right calcaneous, the collapse itself appeared to have been acute, not gradual: "she wasn't having any problems beforehand and had normal appearing x-rays, and then returned after this incident with abnormal

x-rays. And then the surgical findings certainly corroborate that, ... that she had sustained a significant amount of acute injury to her right foot." Dr. Agnew further testified that in his expert opinion, and to a reasonable degree of medical certainty, it was more likely than not that plaintiff's work-related injury caused the acute collapse of her calcaneous, which was in a weakened state as a result of her automobile accident, incomplete union of the reconstructed bone, and repeated and ongoing stresses. There was ample evidence, in addition to his reliance on the sequence of events, in support of Dr. Agnew's opinion. We hold that Dr. Agnew's opinion was not improperly based on *post hoc, ergo propter hoc* reasoning.

Finally, defendants argue that Dr. Agnew's opinion was not competent evidence because it was mere speculation. In light of Dr. Agnew's testimony that both the x-rays and surgery following the work-related accident indicated an acute segmental collapse, we hold that his opinion was not based on mere speculation. This argument is without merit.

In defendants' final two arguments, they contend that the Commission erred in making findings of fact concerning what fell on plaintiff's foot, and whether plaintiff worked the day following the accident. We disagree.

Defendants first object to finding of fact nine, which details the circumstances surrounding plaintiff's work-related injury. Defendants argue that video evidence of the event contradicts the Commission's finding concerning how the accident occurred and what fell on plaintiff's foot. The Commission's ninth finding of fact states that assorted dishes and utensils fell on plaintiff's foot, whereas defendants contend only hard plastic cups were involved.

The video evidence is inconclusive, because it only depicts plaintiff from the waist up and does not show the floor. It is clear that the cup rack fell, striking plaintiff then partially landing on her tray before she stopped its descent. What was dislodged from the tray and what

might have struck and injured plaintiff's foot cannot be determined from viewing the video. There was conflicting testimony concerning what was on the floor after the accident, and it was the sole province of the Commission to weigh the evidence and make those fact determinations. *Moody*, 165 N.C. App. at 872, 600 S.E.2d at 41. Because there is competent evidence supporting the Commission's finding, we have no authority to challenge that finding. *Deese*, 352 N.C. at 115, 530 S.E.2d at552; *Hardin v. Motor Panels, Inc.*, 136 N.C. App. 351, 356-57, 524 S.E.2d 368, 372-73 (2000).

Defendants next object to finding of fact eleven, which states: "Plaintiff again attempted to return to work the following day [the day following the work-related accident] but she was unable and was again sent home." Once again, there is a conflict in the evidence. Plaintiff testified that she attempted to work, but could not and was sent home. Plaintiff's manager testified that she does not remember plaintiff complaining of pain that day, and that plaintiff was not sent home early that day. Time sheet records indicate plaintiff clocked in at 1:00 pm and clocked out at 5:06 pm. Conflicts in the evidence and issues of credibility are for the Commission to resolve. *Moody*, 165 N.C. App. At 872, 600 S.E.2d at 41. These arguments are without merit.

We note that the first stipulation by the parties included in the Commission's Opinion and Award of 14 August 2006 states: "Plaintiff sustained an admittedly compensable injury by accident arising out of and in the course of her employment on July 31, 2004." There is no evidence or indication in the record that plaintiff suffered any compensable injury on 31 July 2004 in the course of her employment with Golden Corral other than the injury to her right foot which is the subject of this appeal. Having stipulated that plaintiff suffered a compensable injury

on 31 July 2004 while in its employ, defendants are barred from now arguing she did not. *Moore v. Richard W. Farms, Inc.*, 113 N.C. App. 137, 141, 437 S.E.2d 529, 531 (1993).

AFFIRMED.

Judges ELMORE and STROUD concur.

Report per Rule 30(e).