NO. COA08-353

NORTH CAROLINA COURT OF APPEALS

Filed: 7 April 2009

REMEDIOS SAAVEDRA,
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 520594

CANDOR HOSIERY MILLS,
Employer,

LIBERTY MUTUAL INSURANCE COMPANY,
Carrier,
Defendants.

Appeal by defendants from opinion and award entered 14 December 2007 by the North Carolina Industrial Commission. Heard in the Court of Appeals 8 October 2008.

No brief filed on behalf of plaintiff-appellee.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Vachelle Willis and Dana C. Moody, for defendants-appellants.

GEER, Judge.

Defendants Candor Hosiery Mills and Liberty Mutual Insurance Company appeal from the Industrial Commission's decision awarding plaintiff Remedios Saavedra temporary total disability benefits for a closed period and medical compensation. Defendants primarily contend that there is insufficient evidence that the specific traumatic incident that plaintiff sustained is the

cause of her on-going back pain. Because we conclude that the expert medical testimony is sufficient to support the Commission's finding of causation, we affirm.

Facts

Plaintiff was born on 1 September 1954 in Mexico and has completed the sixth grade. She has worked as a seamstress for almost 20 years. On 9 April 2001, plaintiff started working for defendant employer as a sewing machine operator and seamstress. Plaintiff's work required her to bend down to pick up material at floor level and lift the material onto a work table that was about chest high.

On 20 December 2004, plaintiff bent over and picked up a bag of socks that weighed roughly five to six pounds. As plaintiff was bent over, she felt pain in her back and was unable to stand up. Plaintiff felt as if the pain "paralyzed" her. She moved back and felt a burning sensation run through her legs and back. Prior to this incident, plaintiff had never experienced any back or knee problems.

Although there was a plant nurse at the facility, plaintiff did not visit the nurse because her co-workers gave her Vicks VapoRub and pain medication. Plaintiff did not report the incident to defendant employer the day it occurred as her supervisor was not at work. She did, however, report the incident the next day, 21 December 2004, to another supervisor and that supervisor filled out an accident report. Plaintiff stayed at work on 21 December 2004 and completed her shift, but missed work on 22 December 2004 due to back pain.

On 4 January 2005, plaintiff was examined by Larry Elliott, a physician's assistant at HealthPlus. Plaintiff told Mr. Elliott that her back was hurting and that she did a lot of heavy lifting and bending at work. Plaintiff was given pain medication, but it made her drowsy.

On 11 January 2005, at the end of her shift, plaintiff felt pain in her side and collapsed. Plaintiff went again to see Mr. Elliott, complaining of back and leg pain. Mr. Elliott changed plaintiff's medication and wrote her out of work for three days. On 14 January 2005, plaintiff was x-rayed, and her out-of-work note was extended until 20 January 2005. An MRI performed on 22 January 2005 showed no significant degeneration or protrusions.

In January 2005, plaintiff began receiving chiropractic treatment from Dr. Lawrence M. Bridge for her back pain and a feeling of coldness in her legs. Dr. Bridge wrote plaintiff out of work from 19 January 2005 through 2 February 2005. On 25 January 2005, plaintiff requested leave under the Family Medical Leave Act. Defendant employer approved the request and plaintiff remained out of work. On 7 February 2005, Mr. Elliott wrote plaintiff out of work until 3 March 2005.

On 1 March 2005, plaintiff was seen by Dr. Ranjan Roy at Piedmont Neurosurgery and Spine, P.A. Based on his examination, Dr. Roy believed that plaintiff's symptoms were more likely muscular in her back and hip and that her pain was probably not radiculopathy. Dr. Roy recommended an orthopedic consultation and an evaluation by a pain clinic. Dr. Roy wrote plaintiff out of work until 11 April 2005.

On 10 March 2005, plaintiff was seen by Dr. Henry Tellez with Sandhills Neurologists, P.A., who conducted plaintiff's examination in Spanish. Plaintiff told Dr. Tellez about the incident at work on 20 December 2004. Dr. Tellez did not find a "clearcut [sic] neurology problem" that supported plaintiff's complaints of pain, but recommended that she have a bone scan to rule out any underlying malignancy, as well as nerve conduction studies to exclude any radicular problem or plexopathy. The nerve conduction test was negative, and the bone scan showed mild degenerative changes involving plaintiff's right knee and feet.

On 5 April 2005, Mr. Elliott continued plaintiff out of work until 5 May 2005. Three days later, on 8 April 2005, Dr. Tellez saw plaintiff again for chronic pain in the upper right and lower back, ipsilateral knee, and both feet. Dr. Tellez referred plaintiff to Dr. Vann Austin, a rheumatologist, and to Dr. James Rice, an orthopedist.

On 20 April 2005, plaintiff was seen by Dr. Rice, who diagnosed plaintiff as suffering from lumbar disc disease, placed plaintiff on a Medrol DosePak and Flexeril, and kept her out of work. Plaintiff was seen by Dr. Rice's physician's assistant, Charles Kelley, on 22 April 2005 and again on 6 May 2005. He continued plaintiff out of work for one month due to her continued complaints of pain. On 1 June 2005, Dr. Rice referred plaintiff to Dr. Zane Walsh, a physiatrist, for pain management and released plaintiff to return to work. At that time, Dr. Rice did not believe that plaintiff was at maximum medical improvement and did not give plaintiff a permanent partial rating.

On 25 April 2005, plaintiff was laid off by defendant employer when the mill at which she had been working was closed. Plaintiff had not worked for defendant employer since 11 January 2005. On 2 May 2005, plaintiff filed a Form 18 with the Industrial Commission, reporting that she had injured her back at work on 20 December 2004.

On 11 June 2005, Dr. Bridge saw plaintiff and diagnosed her with a lumbar disc displacement, lumbosacral radiculitis, lumbar/sacrum myofascitis, sacroiliac pain, and sciatica. Dr. Bridge stated in his report that there was a reasonable probability that plaintiff's back pain resulted from the 20 December 2004 incident. On 30 June 2005, plaintiff was examined by Dr. Walsh, a physiatrist, for pain management regarding the pain in her hip and back. Dr. Walsh diagnosed plaintiff with chronic lower back pain with no evidence of a disc injury. Dr. Walsh recommended physical therapy.

On 2 November 2005, Dr. Dennis Yun of UNC Hospitals saw plaintiff. He diagnosed her as having chronic lower back pain and recommended both a functional capacity evaluation and an evaluation by a physiatrist. On 23 May 2006, plaintiff was last seen by her family doctor, Dr. John Woodyear, for her continued back pain.

Plaintiff had not looked for any work since 1 June 2005. From 1 February 2005 to 30 April 2005, plaintiff received $1,400.00 in short-term disability benefits. The disability premiums had been paid for by plaintiff.

Defendants denied plaintiff's claim in a Form 61 on 9 August 2005. Plaintiff requested a hearing on 26 September 2005. In an opinion and award filed 31 May 2007, the deputy commissioner concluded that "[p]laintiff did experience back pain while lifting five pounds of socks on December 20, 2004, and pain in her side causing her to collapse on January 11, 2005[,]" but that "the greater weight of the competent evidence fails to establish that either of these instances was casually related to the conditions for which Plaintiff was treated from January 2005 forward." The deputy commissioner, therefore, denied plaintiff's claim for workers' compensation benefits.

Plaintiff appealed the denial of benefits to the Full Commission, and, on 14 December 2007, the Commission entered an opinion and award reversing the deputy commissioner's decision. The Commission found that plaintiff sustained a specific traumatic incident while bending and lifting the bag of socks on 20 December 2004. Based on the deposition testimony of Dr. Rice and Dr. Tellez, the Commission further found that "plaintiff's current back problems are causally related to her injury on December 20, 2004." The Commission concluded that plaintiff sustained an injury by accident to her back arising out of and in the course of her

employment with defendant employer as a result of the specific traumatic incident. The Commission then concluded:

> [d]ue to her injury by accident, plaintiff was disabled from any employment from January 11,2005 until June 1, 2005, when plaintiff was released to return to work. However, plaintiff did not meet her burden to prove that after June 1, 2005, she was unable to obtain employment after a reasonable effort or that it was futile for her to seek employment because of other factors. She was capable of some work and no doctor took her out of work.

Accordingly, the Commission awarded plaintiff temporary total disability compensation from 11 January until 1 June 2005. The Commission further ordered defendants to "pay all related medical expenses incurred or to be incurred by plaintiff as the result of her injury by accident, for so long as such examinations, evaluations and treatments may reasonably be required to effect a cure, give relief or tend to lessen plaintiff's period of disability, including physical therapy and pain management." Defendants timely appealed to this Court.

Discussion

Defendants contend that there is no competent evidence in the record to support the Commission's determination that any back injury suffered by plaintiff was caused by the incident on 20 December 2004 when plaintiff picked up the socks. Alternatively, defendants contend that, even assuming that plaintiff suffered a compensable back injury, the Commission erred in concluding that plaintiff is entitled to ongoing medical compensation.

Appellate review of a decision by the Industrial Commission is limited to "reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). The Commission's findings of fact are conclusive on appeal when supported by competent evidence, despite evidence in the record that

would support contrary findings. *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 700 (2004). As the fact-finding body, "'[t]he Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony.'" *Deese*, 352 N.C. at 115, 530 S.E.2d at 552 (quoting *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998)). The Commission's conclusions of law are reviewed de novo. *McRae*, 358 N.C. at 496, 597 S.E.2d at 701.

N.C. Gen. Stat. §97-2(6) (2007) "provides two theories on which a back injury claimant can proceed: (1) that claimant was injured by accident; or (2) that the injury arose from a specific traumatic incident." *Fish v. Steelcase, Inc.*, 116 N.C. App. 703, 707, 449 S.E.2d 233, 237 (1994), *cert. denied*, 339 N.C. 737, 454 S.E.2d 650 (1995). Defendants in this case do not dispute that plaintiff sustained a specific traumatic incident on 20 December 2004. Rather, defendants argue that there is no evidence of a causal connection between the specific traumatic incident and plaintiff's back condition.

The Commission made the following findings of fact as to this issue:

> 18. In his deposition, Dr. Tellez testified that he could not pinpoint a clear reason or etiology for plaintiff's back pain, but that arthritis probably explained her leg pain. . . . Dr. Tellez testified that the problems for which he treated plaintiff could be related to her December 20, 2004 injury and that there was a possibility that the injury was a significant contributing factor to her current problems.
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> 21. In his deposition, Dr. Rice stated that plaintiff was not at maximum medical improvement and did not have a permanent partial impairment rating. Dr. Rice testified that as of June 1, 2005, plaintiff had a lumbar strain that had not resolved, although most lumbar strains resolve within three to six months. *Dr. Rice testified that plaintiff's back pain is more likely than not related to the December 20, 2004 injury and that the incident is more than likely a significant contributing to [sic] factor to her*

> *current condition. Based on the testimony of Dr. Tellez and Dr. Rice, the Full Commission finds that plaintiff's current back problems are causally related to her injury on December 20, 2004.*

(Emphasis added.) Based on these findings, the Commission concluded:

> In order to qualify for compensation under the Workers' Compensation Act, a claimant must prove both the existence and extent of disability. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 290 S.E.2d 682 (1982). In this case, Dr. Rice testified that plaintiff's back condition was more likely than not related to the December 20, 2004 injury and that it is more than likely a significant contributing factor to her current condition. Dr. Tellez testified that the problems for which he treated plaintiff could be related to her December 20, 2004 injury and that there was a possibility that the injury was a significant contributing factor to her current problems. Thus, the opinions of Dr. Rice and Dr. Tellez, taken together, are more than mere speculation and are sufficient to support a finding that plaintiff's back problems are related to her December 20, 2004 injury. *Young v. Hickory Business Furniture*, 353 N.C. 227, 538 S.E.2d 912 (2000).

Defendants argue, however, that the testimony of Dr. Rice and Dr. Tellez "is insufficient to prove that Plaintiff's ongoing back complaints are related to the alleged December 20, 2004 lifting incident." Based on the applicable standard of review, we cannot agree.

In his deposition, Dr. Rice testified that plaintiff's subjective complaints of pain were consistent with the objective findings from his physical evaluation. Dr. Rice specifically testified, with respect to the 20 December 2004 incident, "[t]hat in the absence of any contradictory evidence, that [plaintiff's] complaints of pain in her back are, more likely than not, related to this injury, within a reasonable degree of medical certainty." Dr. Rice additionally expressed the opinion that "more likely than not" plaintiff's work duties of bending and lifting were a significant contributing factor to her back problems. Dr. Rice also testified on redirect that he had not learned of any other incident that may have caused the pain in her back other than

the lifting of the socks and that he had not, upon his examination, discovered any other pathological reasons to explain the tenderness and problems in plaintiff's lumbar region.

As defendants argue, expert testimony based merely on speculation and conjecture "is not sufficiently reliable to qualify as competent evidence on issues of medical causation." *Young v. Hickory Bus. Furniture*, 353 N.C. 227, 230, 538 S.E.2d 912, 915 (2000). Dr. Rice's testimony is, however, sufficient to support the Commission's causation determination. All that is required is that it is "likely" that the workplace accident caused plaintiff's injury. *See, e.g.*, *Kelly v. Duke Univ.*, ___ N.C. App. ___, ___, 661 S.E.2d 745, 749 (2008) (holding doctor's testimony sufficient to support causation when doctor testified that "it was 'more likely than not' that decedent's diabetes caused her death" and diabetes was compensable condition); *Cannon v. Goodyear Tire & Rubber Co.*, 171 N.C. App. 254, 264, 614 S.E.2d 440, 447 (explaining that "when expert testimony establishes that a work-related injury 'likely' caused further injury, competent evidence exists to support a finding of causation"), *disc. review denied*, 360 N.C. 61, 621 S.E.2d 177 (2005); *Workman v. Rutherford Elec. Membership Corp.*, 170 N.C. App. 481, 495, 613 S.E.2d 243, 252 (2005) (holding that expert's testimony that plaintiff's workplace injury "more likely than not" caused plaintiff's injury was sufficient to prove causation).

Defendants, however, contend that Dr. Rice later qualified his medical opinion such that it is now insufficient to support a finding of causation. Defendants point to Dr. Rice's negative reply when he was asked: "Would you expect a strain to the degree of pain complaints exhibited in [plaintiff]'s notes to be caused by lifting five pounds?" Defendants contend that this particular testimony shows that "Dr. Rice d[id] not believe that Plaintiff's lifting five pounds would have resulted in the gravity of Plaintiff's symptoms[.]" We read this testimony not as recanting Dr.

Rice's prior opinion, but instead as addressing only whether he ordinarily would have expected that lifting five pounds would have resulted in the degree of pain reported by plaintiff.

It was for the Commission, not this Court, to decide what effect Dr. Rice's "expect[ation]" should have on his credibility and the weight to be afforded his causation opinion. As Judge Hudson stated in a dissenting opinion adopted by the Supreme Court in *Alexander v. Wal-Mart Stores, Inc.*, 359 N.C. 403, 610 S.E.2d 374 (2005) (*per curiam*), it is not "the role of this Court to comb through the testimony and view it in the light most favorable to the defendant, when the Supreme Court has clearly instructed us to do the opposite. Although by doing so, it is possible to find a few excerpts that might be speculative, this Court's role is not to engage in such a weighing of the evidence." *Alexander v. Wal-Mart Stores, Inc.*, 166 N.C. App. 563, 573, 603 S.E.2d 552, 558 (2004) (Hudson, J., dissenting). Thus, we hold Dr. Rice's testimony is sufficient to support the finding and conclusion of causation.

The Commission, however, also relied upon the testimony of Dr. Tellez. Defendants challenge that testimony on the ground that it was based on a mere possibility rather than a probability. Defendants note that such testimony is insufficient to prove causation. *See Young*, 353 N.C. at 233, 538 S.E.2d at 916 ("'[C]ould' 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."). Our Supreme Court in *Holley v. ACTS, Inc.*, 357 N.C. 228, 233, 581 S.E.2d 750, 753 (2003), however, clarified that "expert testimony as to the *possible* cause of a medical condition is admissible if helpful to the jury" even if insufficient to prove causation.

Consequently, the Commission was entitled to rely upon Dr. Tellez' testimony as corroborating Dr. Rice's testimony, even though Dr. Tellez' opinion could not support a finding

of causation standing alone. Because the Commission's determination of causation is supported by competent evidence, we affirm the Commission's award of temporary total disability benefits.**[Note 1]**

Defendants also challenge the Commission's conclusion that "[p]laintiff is entitled to all medical expenses incurred or to be incurred as a result of her compensable injury, for so long as such examinations, evaluations and treatments may reasonably be required to effect a cure, give relief or tend to lessen plaintiff's period of disability, including physical therapy and pain management." When an employee sustains a compensable injury, "N.C. Gen. Stat. section 97-25 requires employers to pay future medical compensation when the treatment lessens the period of disability, effects a cure or gives relief." *Parsons v. Pantry, Inc.*, 126 N.C. App. 540, 541-42, 485 S.E.2d 867, 869 (1997).

Defendants contend that "[p]laintiff has been evaluated by two neurologists, an orthopedist, a rheumatologist, a physiatrist and a chiropractor[, and] [n]one of these medical providers have any additional treatment to offer plaintiff." Defendants have, however, overlooked the two treatments specifically mentioned in the Commission's decision: physical therapy and pain management.

The record contains competent evidence supporting the need for both forms of treatment. On 20 May 2005, plaintiff saw Dr. Timothy Carey with UNC Hospitals to obtain a second opinion. Dr. Carey diagnosed plaintiff with chronic back pain and referred her to a general medical practice, noting in his report that "ultimately she will likely need a pain management program." In addition, Dr. Walsh, a physiatrist, recommended that plaintiff receive "physical therapy intervention." Since this evidence supports the Commission's determination that plaintiff is entitled to ongoing medical compensation, and defendants have made no further arguments on

this issue or as to any other aspect of the Commission's opinion and award, we affirm that opinion and award.

Affirmed.

Judges ROBERT C. HUNTER and ELMORE concur.

Report per Rule 30(e).

NOTE

1. Defendants also address the opinion of the chiropractor, Dr. Bridge, that plaintiff's condition probably resulted from the 20 December 2004 incident. Because the Commission did not base its determination of causation on that opinion, we need not address it.