

Affirmed

Author: Ballance

Concurring: Mavretic

Bunn (Retired prior to filing date)

No. COA00-901

NORTH CAROLINA COURT OF APPEALS

Filed: 17 July 2001

LESTER S. JONES,
Employee,
Plaintiff

v.

CROWN AUTOMOTIVE
MANAGEMENT COMPANY,
Employer,

RELIANCE INSURANCE
COMPANY,
Carrier,
Defendants

From the North Carolina
Industrial Commission
I.C. No. 625017

Appeal by defendants from an opinion and award entered 1 May 2000 by the North Carolina Industrial Commission. Heard in the Court of Appeals 25 April 2001.

Lennard D. Tucker for plaintiff-appellee.

Orbock Bowden Ruark & Dillard, PC, by Barbara E. Ruark, for defendant-appellants.

HUNTER, Judge.

Crown Automotive Management Company and Reliance Insurance Company ("defendants") appeal from an opinion and award of the North Carolina Industrial Commission ("Commission"). In its opinion and award, the Commission ordered defendants to pay Lester S. Jones ("plaintiff") temporary total disability compensation, permanent partial disability compensation, and for the medical expenses related to his avascular necrosis. On appeal, defendants assign error to: (1) the Commission's findings of fact and conclusions of

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Court of Appeals Slip Opinion

law, and (2) the Deputy Commissioner's denial of defendants' motion to add an additional defense. After a careful review of the record and briefs, the opinion and award of the Commission is affirmed.

On 2 August 1989, plaintiff was employed by Crown Automotive Management Company ("defendant-employer"). On that date, plaintiff, in the course of his employment, sustained an admittedly compensable injury to his back. Initially, plaintiff visited a chiropractor for his injury, and he was out of work for approximately four weeks. Plaintiff returned to work, although he missed additional days through April 1990, and was compensated for a total of ten weeks.

In April 1990, plaintiff's condition worsened, hence he sought the care of a physician. On this occasion, plaintiff was diagnosed as having a severe lumbar strain and prescribed a steroid dose pack. Plaintiff was out of work from April to July 1990, and was compensated for this period. For the second time, plaintiff returned to work, and he continued to work until 16 January 1991 -- the date that his deteriorating back condition necessitated that he visit the emergency room. After this visit to the emergency room, a physician prescribed plaintiff a steroid dose pack, and placed him out of work.

Next, plaintiff was referred to Dr. Vincent Paul, who prescribed plaintiff another steroid dose pack, administered steroid injections, and performed back surgery upon plaintiff on 12 March 1991. Plaintiff was compensated for his time out of work, and his treatment was paid for by Reliance Insurance Company

("defendant-carrier"). In all, plaintiff received a number of steroid treatments for pain following his original back injury before and after his surgery.

However, plaintiff continued to experience pain. Thus, in September 1991, Dr. Paul referred plaintiff to Dr. T. Craig Derian. Dr. Derian diagnosed plaintiff with a re-herniated disc and recommended spinal fusion surgery, and on 17 December 1991, this surgery was performed. Following this surgery, Dr. Derian assigned plaintiff a twenty-five percent permanent partial disability rating to his back, and plaintiff was compensated for this disability.

In August 1992, plaintiff received a letter from Delphine Goines, adjuster for defendant-carrier. The letter dealt with plaintiff's back disability, his compensation, and lifetime medical benefits that would be afforded him. In an attempt to resolve his claim, and at the request of Ms. Goines, plaintiff presented a proposal to defendant-carrier. As a result of the proposal, an agreement was reached whereby plaintiff was allowed to attend Winston-Salem State University to obtain a college degree, and defendant-carrier agreed to pay (1) plaintiff's temporary total disability compensation while he was in college, (2) half of his tuition and books, and (3) the twenty-five percent partial disability compensation for his back.

Beginning in June 1992, plaintiff developed groin and buttock pain, which radiated into his thigh. Thereafter, on 2 December 1992, plaintiff consulted a physician, who prescribed a steroid

injection. Ultimately, in July 1993, Dr. Derian diagnosed plaintiff with avascular necrosis,

a condition in which the blood supply to the head of the thigh bone is decreased and the bone which supports the head of the femur then undergoes necrosis -- or death, resulting in collapse of the shank of the head of the thigh bone, which results in arthritis of the hip.

Plaintiff's avascular necrosis eventually necessitated three hip surgeries and the replacement of both hips. As a result of these surgeries, plaintiff sustained a fifty percent partial disability rating for each hip. While defendant-carrier paid all of the medical bills associated with plaintiff's hip surgeries, defendants have not compensated plaintiff for the disability related to his avascular necrosis.

Plaintiff began his studies at Winston-Salem State University in the Fall of 1992, and was originally expected to graduate in June 1996. However, due to the complications associated with his hips, plaintiff was neither able to complete his college studies (until at least May 1998), nor was he able to return to gainful employment.

Prior to March 1991, plaintiff admittedly participated in occasional weekend beer drinking. Then from March 1991 to December 1991, the same period that plaintiff was receiving steroid treatments, plaintiff drank an average of one six-pack of beer per day. At the time, plaintiff was experiencing severe back pain, and he contended that he was using the alcohol to reduce his pain. During the years 1992 to 1995, plaintiff limited his alcohol

consumption to approximately three to four beers each Friday and Saturday.

Plaintiff instituted this action against defendants alleging that he is entitled to compensation as a result of his having developed avascular necrosis after his treatment for his back injury. Conversely, defendants argue that plaintiff's avascular necrosis developed completely independent of his compensable back injury and solely due to his history of excessive drinking. On 20 June 1997, this matter was heard before Deputy Commissioner Chrystal Redding Stanback. The primary issues before the Deputy Commissioner were whether plaintiff's disability related to his avascular necrosis was causally related to his compensable back injury, and if so, the amount of compensation due plaintiff.

After the hearing was complete, the record was held open and the parties submitted the depositions of three of plaintiff's treating physicians, Drs. James R. Urbaniak, Donald E. McCollum, and T. Craig Derian. After considering all of the evidence, including the arguments of the parties and the doctors' depositions, Deputy Commissioner Stanback entered an opinion and award ordering defendants to pay plaintiff temporary total disability compensation, permanent partial disability compensation, and for the medical expenses related to his avascular necrosis. Specifically, Deputy Commissioner Stanback, relying on the deposition testimony of the three doctors, found that (1) plaintiff's avascular necrosis was caused by a combination of plaintiff's steroidal treatments received for his back injury and

his excessive alcohol drinking during the periods he used alcohol as a self-medicating remedy for his back pain and depression, and (2) plaintiff's drinking was insufficient to break the chain of causation between his original back injury and his avascular necrosis. Consequently, Deputy Commissioner Stanback concluded that (1) plaintiff's avascular necrosis was causally related to and was a natural consequence of his admittedly compensable back injury of 2 August 1989, and (2) plaintiff's avascular necrosis was caused by a combination of steroid treatments administered for his back pain and his increased alcohol consumption in an attempt to further alleviate his pain.

Defendants appealed Deputy Commissioner Stanback's opinion and award to the Full Commission. The Full Commission reviewed the matter and filed its opinion and award, with detailed findings and conclusions, on 1 May 2000. In its decision, the Full Commission affirmed the opinion and award of Deputy Commissioner Stanback with some minor modifications. Significantly in its opinion and award, the Commission found:

14. Plaintiff's acquisition of avascular necrosis, which ultimately necessitated three hip surgeries, was a direct and natural result of the treatments plaintiff received for his original admittedly compensable injury by accident of August 2, 1989. The credible and convincing medical evidence in this case suggests that the avascular necrosis condition from which plaintiff suffered, in all likelihood, was caused, at least in part, by a combination of the steroidal treatments plaintiff received for his back injury and his excessive drinking during the periods he used alcohol as his self-medicating remedy for his back pain and depression. Plaintiff's drinking was insufficient to break the chain

of causation between the original injury and the avascular necrosis.

Additionally, the Commission concluded:

4. Plaintiff's acquisition of avascular necrosis, which eventually necessitated left and right hip surgeries, was causally related to and was a natural consequence of his admittedly compensable injury by accident of August 2, 1989, in that the avascular necrosis was caused by a combination of steroidal treatments plaintiff was administered for back pain, and his increased alcohol consumption in plaintiff's ill-fated attempt to further alleviate his physical and mental pain. Plaintiff is entitled to compensation for disability caused by his avascular necrosis and subsequent hip surgeries. . . .

Defendants now appeal to this Court.

First, defendants assign error to the Commission's findings of fact and conclusions of law. Particularly, defendants argue the Commission's findings and conclusions that (1) plaintiff's alcohol consumption was used for pain control, and (2) plaintiff's avascular necrosis was causally related to his compensable back injury, are not supported by competent evidence. After a careful review of the record, we find that some competent evidence supports the Commission's findings, and the Commission's findings support its conclusions. Therefore, we reject this assignment of error.

"The standard of review for an appeal from an opinion and award of the Industrial Commission is limited to a determination of (1) whether the Commission's findings of fact are supported by any competent evidence in the record; and (2) whether the Commission's findings justify its conclusions of law." *Goff v. Foster Forbes Glass Div.*, 140 N.C. App. 130, 132-33, 535 S.E.2d 602, 604 (2000).

Furthermore, "[t]he facts found by the Commission are conclusive upon appeal to this Court when they are supported by competent evidence, even when there is evidence to support contrary findings." *Pittman v. International Paper Co.*, 132 N.C. App. 151, 156, 510 S.E.2d 705, 709, *aff'd*, 351 N.C. 42, 519 S.E.2d 524 (1999). In other words, "[t]he findings of fact by the Industrial Commission are conclusive on appeal if supported by any competent evidence.'" *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999) (quoting *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977)).

Moreover, "[t]he Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony.'" *Dolbow v. Holland Industrial*, 64 N.C. App. 695, 697, 308 S.E.2d 335, 336 (1983) (quoting *Anderson v. Construction Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965)). "Thus, the Commission may assign more weight and credibility to certain testimony than other." *Dolbow*, 64 N.C. App. at 697, 308 S.E.2d at 336.

First, defendants argue that "[t]here is absolutely no medical evidence in this case documenting the fact that plaintiff's alcohol consumption was used for pain control." (Emphasis added.) However, the standard in determining the conclusiveness of the Commission's findings of fact is not whether the findings are supported by sufficient "medical evidence"; rather, the standard is that the findings of fact of the Commission are conclusive on

appeal if supported by ". . . 'any competent evidence.'" See *Adams*, 349 N.C. at 681, 509 S.E.2d at 414 (emphasis added) (quoting *Gallimore*, 292 N.C. at 402, 233 S.E.2d at 531). During the hearing before the Deputy Commissioner, defendants' counsel inquired of plaintiff:

Q: I believe you indicated earlier that you did [drink a six-pack of beer a day] in part because of pain?

A: Yes.

. . .

Q: And were you telling your doctors that you were being required to drink all this alcohol for pain?

A: Oh, yes. I told them I was drinking way too much.

Q: But did you tell them you were drinking that for pain?

A: Yes.

Thus, although *medical evidence* may not support the Commission's finding, *competent evidence* in the record -- specifically, plaintiff's own admission -- does support the Commission's finding that plaintiff "used alcohol as [a] self-medicating remedy for his back pain"

Secondly, "[d]efendants contend that the medical evidence in this case indicates plaintiff's avascular necrosis developed completely independent of his work-related injury and fully as a result of his alcohol consumption." In the instant case, the Commission's findings of fact with regards to the cause of plaintiff's avascular necrosis were based upon the depositions of

Drs. Urbaniak, McCollum, and Derian. Thus, we must analyze the competency of the doctors' depositional testimony to determine whether the Commission's finding is supported by competent evidence in the record.

Our Supreme Court has stated, "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." *Click v. Freight Carriers*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980). However, "an expert is not competent to testify as to a causal relation which rests upon mere speculation or possibility." *Dean v. Coach Co.*, 287 N.C. 515, 522, 215 S.E.2d 89, 94 (1975). Thus, "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." *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 915 (2000).

At bar, a review of the depositions of Drs. Urbaniak, McCollum, and Derian reveals that the finding that plaintiff's avascular necrosis was causally related to his compensable back injury -- in that the avascular necrosis was caused, at least in part, by a combination of plaintiff's steroidal treatments and his excessive drinking of alcohol -- is supported by competent evidence and based upon more than guesses, mere speculation, or conjecture.

First, Dr. Urbaniak, an orthopaedic surgeon at Duke University Medical Center, was deposed. In his practice, Dr. Urbaniak treats a number of patients who have avascular necrosis. During his deposition, Dr. Urbaniak noted that there are many causes of avascular necrosis; alcohol and cortisone are two of the causes; and the quantity of cortisone necessary to cause avascular necrosis is unknown. Dr. Urbaniak further stated, "[w]e think the disease is multifactorial; that means it's caused by sometimes more than one--more than one factor."

During his direct-examination, plaintiff's counsel presented Dr. Urbaniak with a hypothetical fact pattern involving plaintiff's original back injury, his subsequent medical history (including steroid treatments), and his consumption of a six-pack of beer a day for a period of approximately ten months, and asked whether the alcohol alone, the steroids alone, or the combination of the two caused the avascular necrosis. Dr. Urbaniak responded, "[i]t's my opinion that the combination of the two [steroids and alcohol] could've caused it." During cross-examination, defendants' counsel presented Dr. Urbaniak with her own hypothetical fact pattern, adopting the facts of plaintiff's counsel and adding a history of excessive alcohol use. Defendants' counsel then asked for Dr. Urbaniak's opinion as to the cause of the avascular necrosis under her hypothetical. To which, Dr. Urbaniak answered, "based on the additional information I have now, I'd say it's more likely that it's the alcohol than the steroids. *However, you know the steroids could be the cause, the agent that could set it off.*" (Emphasis

added.) Finally, in regards to plaintiff, Dr. Urbaniak opined, "[m]y belief is that I think the alcohol is the major factor here, but I also know that he may have never had [avascular] necrosis if he hadn't taken steroids, and it may have set it off." (Emphasis added.)

Next, Dr. McCollum, also an orthopaedic surgeon at Duke University Medical Center, was deposed. Like Dr. Urbaniak, Dr. McCollum treats a number of patients who have avascular necrosis. During his deposition, Dr. McCollum stated that there are many different causes of avascular necrosis. When confronted with plaintiff's counsel's hypothetical fact pattern (the same as was presented to Dr. Urbaniak), Dr. McCollum responded, "I have an opinion, and the opinion is that it is possible that the two things combined -- the steroids plus his alcohol could have together caused his avascular necrosis." Regarding plaintiff, Dr. McCollum opined:

It is my opinion that he did not have sufficient steroids to cause the problem alone. It is my opinion that the amount of alcohol, which he related that he consumed, is sufficient to have caused avascular necrosis by itself. It is my opinion that the basic cause of his avascular necrosis is his alcohol consumption. *His avascular necrosis may have been accelerated or aggravated by the small amount of steroids that he received in the treatment of his low back.*

[But] I would think that the steroids did not accelerate the process.

(Emphasis added.)

Lastly, Dr. Derian, an orthopaedic surgeon at Durham Clinic, P.A., was deposed. As to the causes of avascular necrosis, Dr. Derian stated that alcohol is the most common cause, however, Dr. Derian later admitted, "either an injection or oral preparation [of steroids] can probably contribute to avascular necrosis" When faced with the identical hypothetical posed to the previous two doctors, Dr. Derian answered:

I believe it is much more likely that the patient's alcohol use contributed to his avascular necrosis; but that doesn't mean that I'm not saying that the patient's steroids could not have contributed in part to his avascular necrosis. . . .

But my opinion is that his alcohol was probably the greater contributor.

(Emphasis added.) Ultimately, as to plaintiff, Dr. Derian opined, "I believe that the alcohol use was the likely cause of his avascular necrosis"

In the past, this Court has held that expert testimony need not show that the work-related incident caused the injury to a "reasonable degree of medical certainty," *Peagler v. Tyson Foods, Inc.*, 138 N.C. App. 593, 599, 532 S.E.2d 207, 211 (2000) (quoting *Cooke v. P.H. Glatfelter/Exusta*, 130 N.C. App. 220, 224, 502 S.E.2d 419, 422 (1998)). Instead, all that is necessary is that competent evidence provide some evidence that the accident at least "might" have or "could" have produced the particular disability in question. See *Peagler v. Tyson Foods, Inc.*, 138 N.C. App. at 599, 532 S.E.2d at 211. We recognize that our Supreme Court

has allowed "could" or "might" expert testimony as probative and competent evidence to prove

causation. However, [our Supreme Court] has also found "could" or "might" expert testimony 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.

Young, 353 N.C. 227, 233, 538 S.E.2d 912, 916 (citations omitted).

At bar, three doctors, two of whom have vast experience in treating patients with avascular necrosis, opined that "the steroids could be the cause, the agent that could set it off," plaintiff "may have never had [avascular] necrosis if he hadn't taken steroids," plaintiff's "avascular necrosis may have been accelerated or aggravated by the small amount of steroids that he received in the treatment of his low back," and "I'm not saying that the patient's steroids could not have contributed in part to his avascular necrosis." These opinions are based on the doctors' expertise, experience, and examination of plaintiff -- not guesses, mere speculation, or conjecture.

Significantly, the Commission did not find that plaintiff's avascular necrosis was solely caused by plaintiff's steroidal treatment, because we believe that such a finding is not supported by competent evidence in the record. Instead, the Commission found that plaintiff's avascular necrosis, "was caused, at least in part, by a combination of the steroidal treatments plaintiff received for his back injury and his excessive drinking during the periods he used alcohol" and "[p]laintiff's drinking was insufficient to break the chain of causation between the original injury and the avascular necrosis." Based on our review of the record, including the depositional testimony of Drs. Urbaniak, McCollum, and Derian,

we find some competent evidence supporting the Commission's findings as to the causal relationship between plaintiff's avascular necrosis and his back injury -- even though there is evidence to support a contrary finding. Therefore, we hold those findings of fact are conclusive on appeal.

As to the Commission's conclusions of law that (1) plaintiff's alcohol consumption was used for pain control, and (2) plaintiff's avascular necrosis was causally related to his compensable back injury, we acknowledge that "[t]he Industrial Commission's conclusions of law are reviewable *de novo* by this Court." *Lewis v. Sonoco Prods. Co.*, 137 N.C. App. 61, 68, 526 S.E.2d 671, 675 (2000). However, having reviewed the record before us, we find that the Commission's conclusions of law are supported by the findings of fact.

In sum, "[w]hen called upon to review the findings of fact, conclusions of law, and awards of the . . . Commission in compensation cases, the courts determine as a matter of law whether the facts found support the Commission's conclusions, and whether they justify the awards." *McRae v. Wall*, 260 N.C. 576, 578, 133 S.E.2d 220, 222 (1963). Here, we find that, as a matter of law, the facts support the Commission's conclusions and justify the award. Thus, we affirm the Commission's award.

Next, defendants assign error to the Deputy Commissioner's denial of their motion to add an additional defense, willful intent to injure pursuant to N.C. Gen. Stat. § 97-12 (1999). Moreover, defendants argue that the Commission erred in failing to address

the issue in its opinion and award. After a thorough review of the record, we find that this assignment was neither properly preserved nor raised before the Commission. Thus, this assignment must be dismissed.

Rule 701(2) of the Workers' Compensation Rules of the North Carolina Industrial Commission states:

After receipt of notice of appeal, the Industrial Commission will supply to the appellant a Form 44 Application for Review upon which appellant must state the grounds for the appeal. The grounds must be stated in particularity, including the specific errors allegedly committed by the Commissioner or Deputy Commissioner and, when applicable, the pages in the transcript on which the alleged errors are recorded. Failure to state with particularity the grounds for appeal shall result in abandonment of such grounds

Workers' Comp. R. of N.C. Indus. Comm'n 701(2), 2001 Ann. R. 763, 763 (Lexis).

We note that, "[t]he record must in some way reflect that the matter was before the full Commission." *Joyner v. Rocky Mount Mills*, 85 N.C. App. 606, 608, 355 S.E.2d 161, 162 (1987) (emphasis in original). Here, there is no evidence in the record that the matter was ever raised before the Commission, or that the Commission even addressed the matter. All that can be gleaned from the record is that defendants orally made their motion during the hearing before Deputy Commissioner Stanback; the Deputy Commissioner denied the motion; defendants inquired whether the motion and denial would be part of the record for purposes of preservation for appeal to the Full Commission; defendants filed a Form 44 appealing from the opinion and award of the Deputy

Commissioner; and the Form 44 and attachment did not include the Deputy Commissioner's denial of their motion as grounds for appeal. Accordingly, having failed to properly preserve this argument, this assignment is deemed abandoned.

Thus, the Commission's opinion and award is

Affirmed.

Judges WALKER and TYSON concur.

Report per Rule 30(e).