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NO. COA09-986

NORTH CAROLINA COURT OF APPEALS

Filed: 20 July 2010

AARON RANDY BOLEJACK,  
Employee-Plaintiff,

v.

North Carolina  
Industrial Commission  
IC File No. 655056

MOBILIFT OF BURLINGTON, INC.,  
Employer-Defendant,

and

KEY RISK INSURANCE  
COMPANY,  
Carrier-Defendant.

Appeal by defendants from an Opinion and Award filed 20 March 2009 by the North Carolina Industrial Commission. Heard in the Court of Appeals 9 December 2009.

*Robert A. Lauver for employee-plaintiff-appellee.*

*Prather Law Firm, by J.D. Prather, for employer-carrier-defendant-appellants.*

STEELMAN, Judge.

Plaintiff was required to prove, by expert medical testimony, that his pre-existing lower back condition was aggravated as a direct and natural result of his admittedly compensable work-related injury. This causal link was established by plaintiff's expert witnesses.

I. Factual and Procedural Background

In May 2006, Aaron Randy Bolejack (plaintiff) was employed at Mobilift of Burlington, Inc. (defendant) where he worked as a forklift service mechanic. Plaintiff's job required him to lift parts weighing 150-200 pounds. Plaintiff had been employed with defendant since 1990.

Starting in 1994, plaintiff began experiencing problems with his lower back. Plaintiff required intermittent treatment for his back condition prior to the injury giving rise to this case. In August 2003, Dr. Stanley Shaeffer (Dr. Shaeffer) began treating plaintiff for his lower back complaints. Between 2003 and 2006, Dr. Shaeffer continually treated plaintiff for aggravation of his back condition and ordered Magnetic Resonance Imaging (MRI) of his lower back. Dr. Shaeffer diagnosed plaintiff with degenerative disk disease at L4-L5 and disc protrusion at L5-S1 without nerve impingement. Plaintiff's condition allowed him to continue working.

On 1 April 2005, plaintiff's back condition was again evaluated by Dr. Shaeffer. Dr. Shaeffer continued to prescribe only medication and did not remove plaintiff from work.

On 31 May 2006, plaintiff sustained an injury at work. Plaintiff was repairing a forklift when his left foot slipped and he began to fall. Plaintiff jumped off the forklift and landed awkwardly, injuring his hip, right leg, and lower back. Defendants filed Form 60 with the Industrial Commission (Commission) admitting plaintiff's right to compensation for the injury to his right hip.

In June 2006, plaintiff sought treatment from Dr. Shaeffer, mainly for his right hip. Dr. Shaeffer ordered an MRI of plaintiff's hip, which revealed avascular necrosis of the right femoral head with a non-displaced cortical fracture. Dr. Shaeffer referred plaintiff to Dr. W. Bryan Jennings for an orthopaedic evaluation.

On 23 August 2006, plaintiff was referred by Key Risk Insurance Company (Key) to Dr. Peter Dalldorf (Dr. Dalldorf) for further evaluation and treatment. Dr. Dalldorf took a history of the accident as well as a history of plaintiff's lower back problems going back as far as 1994. Dr. Dalldorf concluded that plaintiff's hip condition was a result of his work-related injury. Dr. Dalldorf diagnosed plaintiff with a collapse of his femoral head and recommended a total hip replacement.

On 21 September 2006, Dr. Dalldorf performed a replacement of plaintiff's right hip. Dr. Dalldorf subsequently testified that there was a ninety-five percent chance that plaintiff would not have pain in his hip after surgery, and he would be able to return to work. After surgery, plaintiff had a "waddling gait," which Dr. Dalldorf testified could aggravate plaintiff's pre-existing degenerative lower back condition. The altered walking put more stress on one side of plaintiff's spine. Plaintiff's pre-existing back condition had narrowed the area where the nerves exited the spine. Plaintiff's change in gait resulted in further compression of the nerves as they exited the spine.

On 10 January 2007, plaintiff filed Form 18 with the Commission asserting that his work-related accident caused injury to his right hip, right leg, and back. On 17 January 2007, defendants filed Form 61 with the Commission, denying the claim and asserting there was no evidence that plaintiff had suffered injury to his back. On 26 January 2007, plaintiff requested that his claim be assigned for hearing.

On 7 February 2007, Dr. Dalldorf examined plaintiff and reviewed plaintiff's prior MRIs from 1999 and 2004. Neither of these previous scans revealed stenosis. On 7 March 2007, Dr. Dalldorf again examined plaintiff and determined that he was past the point of adjusting to his hip surgery, and his lower back problems were the significant cause of his continued pain. On 9 August 2007, an MRI of plaintiff's spine was performed. It revealed bilateral stenosis at L3-L4, L4-L5, and L5-S1. These findings were different from the findings of the previous MRIs and were consistent with plaintiff's symptoms of pain.

Dr. Dalldorf concluded that the trauma plaintiff sustained when he fell at work on 31 May 2006, and his subsequent altered gait, resulted in an aggravation of his pre-existing back condition and the compression of the nerves in plaintiff's spine. The compression of the nerves in plaintiff's spine caused pain and resulted in plaintiff's additional medical treatment.

On 20 March 2009, the Commission issued an Opinion and Award in which it concluded that plaintiff's "fall at work on May 31, 2006 . . . materially augmented, significantly aggravated or

otherwise combined with plaintiff's pre-existing back condition to produce his current back condition." The Commission awarded plaintiff temporary total disability benefits at the rate of \$644.63 per week, continuing until further Order of the Commission. Past, present and future medical expenses were also awarded.

Defendants appeal.

## II. Standard of Review

The standard of review of an Opinion and Award of the Industrial Commission is "whether there is any competent evidence in the record to support the Commission's findings of fact and whether these findings support the Commission's conclusions of law." *Lineback v. Wake County Board of Commissioners*, 126 N.C. App. 678, 680, 486 S.E.2d 252, 254 (1997) (citing *Sidney v. Raleigh Paving & Patching*, 109 N.C. App. 254, 426 S.E.2d 424 (1993)). The Commission's findings of fact are conclusive on appeal if supported by any competent evidence. Evidence to support a contrary finding does not change this standard. *Morrison v. Burlington Industries*, 304 N.C. 1, 6, 282 S.E.2d 458, 463 (1981). "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) (quoting *Anderson v. Construction Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)). To determine if competent evidence supports the findings of fact, the evidence must be viewed in the light most favorable to plaintiff. *Davis v. Harrah's Cherokee Casino*, 362 N.C. 133, 137,

655 S.E.2d 392, 395 (2008). Plaintiff is entitled to benefit from all reasonable inferences drawn from the evidence. *Id.*

### III. Abandoned Assignments of Error

We first address plaintiff's argument that defendants have violated Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure by failing to present an argument or cite authority for assignments of error in their brief.

Rule 28(b)(6) provides: "Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned." N.C.R. App. P. 28(b)(6) (2010). Although the heading of Argument I of defendants' brief refers to assignments of error 1-15, which challenge several findings of fact and conclusions of law, defendants have presented no argument in the body of their brief regarding any of the individual conclusions of law and have only presented an argument regarding findings of fact 36 and 39. Only assignments of error 5, 6, and 7 pertain to findings of fact 36 and 39. Thus, assignments of error 1-4 and 8-15 (challenging findings 10, 11, 13, 15, 40, 41-45 and conclusions 2, 5, 7 and 8) are deemed abandoned. *Hooker v. Stokes-Reynolds Hosp.*, 161 N.C. App. 111, 114-15, 587 S.E.2d 440, 443 (2003), *disc. review denied*, 358 N.C. 234, 594 S.E.2d 192 (2004); *see also* N.C.R. App. P. 28(b)(6).

### IV. Plaintiff's Lower Back Condition Was Causally Related to Hip Injury

In their only argument, defendants contend that the Commission erred in finding plaintiff's aggravated back condition was causally related to the compensable hip injury. We disagree.

The Workers' Compensation Act "was never intended to provide the equivalent of general accident or health insurance." *Vause v. Equipment Co.*, 233 N.C. 88, 92, 63 S.E.2d 173, 176 (1951). An injury is compensable only if it arises "out of and in the course of the employment." N.C. Gen. Stat. § 97-2(6) (2009). Plaintiff bears the burden of proving each element of compensability. *Holley v. ACTS, Inc.*, 357 N.C. 228, 234, 581 S.E.2d 750, 754 (2003). A subsequent injury is compensable if it is the direct and natural result of a compensable primary injury. As long as the primary injury is shown to have arisen out of and in the course of employment, then every natural consequence flowing from that injury likewise arises out of the employment. *Starr v. Paper Co.*, 8 N.C. App. 604, 611, 175 S.E.2d 342, 347 (1970).

The subsequent injury is not compensable if it is the result of an independent, intervening cause. "'An intervening cause is one occurring entirely independent of a prior cause. When a first cause produces a second cause that produces a result, the first cause is a cause of that result.'" *Cannon v. Goodyear Tire & Rubber Co.*, 171 N.C. App. 254, 260, 614 S.E.2d 440, 445 (quoting *Petty v. Transport, Inc.*, 276 N.C. 417, 426, 173 S.E.2d 321, 328 (1970)), *disc. review denied*, 360 N.C. 61, 621 S.E.2d 177 (2005). "To show causal relation, 'the evidence must be such as to take the case out of the realm of conjecture and remote possibility, that is, there must be sufficient competent evidence tending to show a proximate causal relation . . . .'" *Everett v. Well Care & Nursing Servs.*, 180 N.C. App. 314, 319, 636 S.E.2d 824, 828 (2006) (quoting

*Gilmore v. Board of Education*, 222 N.C. 358, 365, 23 S.E.2d 292, 296 (1942)).

Plaintiff offered the medical expert opinion of Dr. Dalldorf to show that plaintiff sustained a low back injury at the time of the 31 May 2006 accident. Defendants specifically challenge the following findings of fact:

36. Plaintiff continued to develop increasing back pain. Dr. Dalldorf reviewed plaintiff's 1999 and 2004 MRI studies. He testified that neither of those previous scans revealed stenosis. Following his examination of plaintiff on March 7, 2007, Dr. Dalldorf felt that plaintiff had passed the point of adjusting to his hip replacement and that his lower back was a significant cause of his ongoing pain. Dr. Dalldorf testified that plaintiff aggravated his lower back as a result of the fall itself and as a result of his altered gait. It is Dr. Dalldorf's opinion that plaintiff had lower back pain as a result of the fall that was masked by the fact that he had extremely severe hip pain.

. . . .

39. An MRI of plaintiff's spine was obtained on August 9, 2007. The MRI revealed a lateral disc protrusion at L2-L3 abutting the left L2 nerve root, central disc protrusions at L4-L5 and L5-S1, and bilateral stenosis at L3-L4, L4-L5 and L5-S1. Dr. Dalldorf stated that the findings on the MRI were consistent with and explained plaintiff's complaints of back and leg pain. The findings on the August 9, 2007 MRI of plaintiff's back are significantly different from the pre-injury scans.

"The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Anderson*, 265 N.C. at 433-34, 144 S.E.2d at 274 (citations omitted). The Commission's findings of fact may be set aside on appeal if there



is a complete lack of competent evidence to support them. *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 914 (2000).

The Commission's finding that plaintiff's back condition was causally related to his compensable hip injury is based on expert medical testimony. If "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 injury." *Click v. Freight Carriers*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980). Expert medical testimony is not sufficiently reliable to qualify as competent evidence on issues of medical causation when it is based solely upon conjecture and speculation. *Holley*, 357 N.C. at 232, 581 S.E.2d at 753.

Defendants contend that Dr. Dalldorf's expert opinion "was based upon inaccurate assumptions regarding plaintiff's prior low back condition and therefore is not competent to support plaintiff's burden of proving the necessary element of causation." Dr. Dalldorf testified as follows:

Q. Doctor . . . to a reasonable degree of medical probability, was the MRI scan of Mr. Bolejack's lumbar spine necessary to evaluate the cause of his pain as a result of his . . . work injury of May 31st, 2006?

[Defense Counsel]: Objection.

THE WITNESS: Yes, in my opinion, it was.

. . . .

Q. That's okay. The question I was going to ask was, do you have an opinion satisfactory to yourself and stated to a reasonable degree

of medical probability, whether the findings on the August 9th, 2007, MRI scan -- related to Mr. Bolejack's complaints of low back pain?

. . . .

A. Yes.

Q. And would you describe to the Deputy Commissioner what findings on the MRI of August 9th, 2007, would be consistent with Mr. Bolejack's complaints of low back pain?

A. Well, he has pain, for one thing, in his left leg, which is completely explained by this finding at L2-3. He has low back pain which is explained by these mild stenoses at several levels, and this could also account for some of his right leg pain.

. . . .

Q. In your opinion, are the findings on the August 9th, 2007, MRI scan, significantly different than those reported on the two previous scans of Mr. Bolejack's lumbar spine back from August of 1999, and the other from October, 2004?

A. Yes, based on the readings, they are different.

Q. And in your opinion, how are those readings significant ---

A. Well, now he has -- he has real stenosis now and pressure on the nerve roots, where on the other studies he did not have that.

Q. Do you have an opinion satisfactory to yourself and stated to a reasonable degree of medical probability whether the differences reflected on the August 9th, 2007, MRI scan of Mr. Bolejack's lumbar spine, would be consistent with trauma from the May 31st, 2006, work incident, and/or changes to his gait or biomechanics following the right hip replacement surgery performed in September of 2006?

A. Right. So he had some underlying degenerative change, but I think the portion

of his problem which causes the symptoms at this point is related to his fall, yes.

Dr. Dalldorf explicitly testified that while plaintiff did have underlying degenerative problems with his back, the cause of plaintiff's current back pain and symptoms was "related to his fall." He further testified that the 9 August 2007 MRI showed findings different from the previous MRI scans. Dr. Dalldorf explained the differences and how plaintiff now has real stenosis and pressure on the nerve roots, which occurred after the 31 May 2006 work injury. This testimony is not mere speculation or conjecture but a direct statement that plaintiff's current back problems were causally related to his work injury.

Dr. Dalldorf's testimony provides competent evidence for the Commission's finding that plaintiff's current back problems are a direct and natural consequence of his work injury. We further note that defendants have failed to challenge findings of fact 27, 40, and 42, which state:

27. At his deposition, Dr. Dalldorf testified and the Full Commission finds that the trauma plaintiff sustained when he slipped and jumped from the forklift on May 31, 2006, was sufficient to aggravate a pre-existing condition in plaintiff's lower back.

. . .

40. Dr. Dalldorf testified that plaintiff had underlying degenerative changes in his back, but the problems that are causing plaintiff's symptoms at this point are related to his fall at work. It is Dr. Dalldorf's medical opinion and the Full Commission finds that the fall plaintiff sustained at work exacerbated his underlying spine condition and caused the compression of the nerves that plaintiff is currently experiencing.

. . . .

42. Neither Dr. Schaeffer nor Dr. Jennings was involved in plaintiff's care when he began expressing complaints of increasing back pain in February 2007. To the extent that they did evaluate plaintiff's injury, both Dr. Schaeffer and Dr. Jennings agree that the trauma from plaintiff's fall, which caused the fracture of his hip, was sufficient to aggravate the pre-existing condition in plaintiff's spine. Both Dr. Schaeffer and Dr. Jennings agree that mechanical changes in plaintiff's gait following hip replacement surgery "certainly" could have aggravated the underlying degenerative condition in plaintiff's spine. The testimony of Dr. Schaeffer and Dr. Jennings supports the testimony and expert medical opinions of Dr. Dalldorf.

Because defendants have not challenged these findings of fact, they are presumed to be supported by competent evidence and are binding on appeal. *Estate of Gainey v. Southern Flooring & Acoustical Co.*, 184 N.C. App. 497, 501, 646 S.E.2d 604, 607 (2007) (citation omitted); *see also* N.C.R. App. P. 28(b)(6).

Dr. Dalldorf's testimony, as well as the unchallenged findings of fact, provide a causal link, rising to a level above mere possibility, between plaintiff's compensable work injury and his back condition. Plaintiff has satisfied his burden of establishing that his aggravated back condition was the direct and natural result of the compensable work injury.

This argument is without merit.

AFFIRMED.

Judges MCGEE and STEPHENS concur.

Report per Rule 30(e).