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NO. COA12-440
NORTH CAROLINA COURT OF APPEALS

Filed: 5 March 2013

CRISTAL MOORE,
Employee,
Plaintiff,

v.

North Carolina
Industrial Commission
I.C. No. 661765

BELL SENIOR LIVING,
Employer,
KEY RISK INSURANCE COMPANY,
Carrier,
Defendants.

Appeal by defendants from opinion and award entered 21
November 2011 by the North Carolina Industrial Commission.
Heard in the Court of Appeals 11 October 2012.

*Curtis C. Coleman, III, P.A., by Curtis C. Coleman, III,
for plaintiff-appellee.*

*Hedrick Gardner Kincheloe & Garofalo, LLP, by Erica B.
Lewis, Jerry L. Wilkins, Jr. and M. Duane Jones, for
defendants-appellants.*

GEER, Judge.

Defendants Bell Senior Living and Key Risk Insurance
Company appeal from an opinion and award of the North Carolina
Industrial Commission awarding plaintiff Cristal Moore ongoing

total disability benefits and medical compensation. On appeal, defendants primarily argue that the Commission erred in concluding that plaintiff's chronic pain and depression were causally related to her compensable injury. We hold that the record contains competent evidence supporting the Commission's causation findings and, therefore, those findings are binding on appeal. Because we also find defendants' remaining arguments unpersuasive, we affirm the Commission's opinion and award.

Facts

As of the date of the hearing before the deputy commissioner, plaintiff was 37 years old. She had been first employed by defendant employer in 2006 as a Medical Technician/Certified Nursing Assistant. In that position, plaintiff's duties required her to be able to lift 25 pounds alone, to lift 125 pounds with a coworker, and to transfer-lift, turn, and position without assistance residents weighing 125 pounds and with assistance residents weighing more than 125 pounds.

On 23 September 2006, plaintiff and a coworker were pulling an approximately 300-pound resident into bed when plaintiff experienced a popping sensation in her left side and down her back. After completing her shift, plaintiff reported the incident, and defendant employer directed her to seek medical

treatment. On 24 September 2006, Dr. Kevin Geer diagnosed plaintiff with back and left shoulder strain. He prescribed medication, excused plaintiff from work for two days, and instructed her to seek further treatment if her symptoms did not improve.

On 26 September 2006, plaintiff sought treatment at New Bern Family Practice where she was diagnosed with a lumbar strain. Plaintiff was medically excused from work for an additional seven days. On 3 October 2006, plaintiff reported not only that she was continuing to suffer back symptoms, but that she was also experiencing pain radiating into her legs. She was, however, released on that date to return to sedentary work with restrictions of no bending, squatting, or climbing.

On 5 October 2006, plaintiff returned to work in a light-duty position. Defendants admitted the compensability of plaintiff's low back strain, left cervical strain, and left arm strain on 6 October 2006 by way of a Form 60.

On 18 October 2006, plaintiff underwent a lumbar MRI. The MRI revealed a disc herniation into the right foraminal region with nerve root abutment at L3-L4, a disc protrusion in the left foramen at L4-L5 with L4 nerve root compression, probable abutment of the L5 nerve root within the thecal sac, and an annular bulge with annular fissure at L5-S1.

On 30 October 2006, plaintiff sought treatment from Dr. Kurt Voos, reporting that she was experiencing neck, left shoulder, and low back pain. Dr. Voos noted herniations at L3-L4 and L4-L5. He recommended conservative treatment, including medication, physical therapy, and light-duty work restrictions. Plaintiff participated in physical therapy, but she returned to Dr. Voos on 4 December 2006 because she was continuing to experience left lower extremity pain. Dr. Voos recommended epidural steroid injections, but the injections did not alleviate plaintiff's symptoms.

On 7 February 2007, Dr. Voos continued plaintiff's light-duty work restrictions. Plaintiff underwent an electromyogram ("EMG") to evaluate her continuing lower extremity pain. The EMG produced normal results. On 2 April 2007, plaintiff reported continued left shoulder pain to Dr. Voos. She was then examined by Dr. Hodges, who diagnosed left rotator cuff tendonitis -- Dr. Voos agreed with that diagnosis.

Although plaintiff had continued in her light-duty position with Bell Senior Living, plaintiff was instructed on 25 April 2007 not to return to work until she was able to work full-duty. Plaintiff participated in another round of physical therapy from 12 July 2007 to 10 August 2007. In addition, Dr. Voos

restricted plaintiff to light-duty work with no use of her left arm.

Plaintiff underwent a left shoulder MRI on 7 September 2007, which revealed a possible tear of the posterior labrum. Plaintiff then underwent a left shoulder surgical evaluation with Dr. Christopher Barsanti on 8 October 2007. Dr. Barsanti did not believe the left shoulder symptoms were the result of a labral tear and did not recommend surgery. Based on Dr. Barsanti's evaluation, Dr. Voos ordered a cervical MRI and an EMG of the left upper extremity, both of which were normal. As a result of these studies, Dr. Voos concluded that cervical spine pathology was not the source of plaintiff's left shoulder and left arm symptoms. Dr. Voos continued plaintiff's work restrictions limiting her to light duty with no use of the left arm and no driving of more than 30 minutes round trip.

On 10 January 2008, plaintiff underwent a lumbar discogram, the results of which were consistent with plaintiff's ongoing back pain. Dr. Voos then recommended an interbody fusion surgery at L3-S1 that he believed would improve plaintiff's condition and increase her functionality.

Defendants sought a second opinion, and, on 1 July 2008, plaintiff was examined by Dr. Robert Lacin. Dr. Lacin reviewed an incomplete set of plaintiff's medical records and, following

his examination of plaintiff, Dr. Lacin concluded that plaintiff's lower extremity pain was not related to any radicular symptoms. He recommended that plaintiff not undergo lumbar surgery. Based on this recommendation, defendants refused to authorize the surgery.

On 11 September 2008, Dr. Robert Martin examined plaintiff for a second opinion regarding her left shoulder symptoms. Dr. Martin recommended that plaintiff undergo an arthroscopic procedure to determine whether there was an existing pathology that had not been seen in previous diagnostic studies.

Dr. Voos last examined plaintiff on 17 September 2008 and noted that plaintiff had exhausted non-surgical procedures. He further noted plaintiff's condition left her "miserable." Plaintiff underwent an arthroscopic subacromial decompression of the left shoulder on 16 October 2008. She was subsequently excused from all work until 20 March 2009. While recovering from the surgery, plaintiff participated in physical therapy, but she reported continued neck pain and little improvement in her left shoulder. Dr. Martin diagnosed plaintiff as having a work-related cervical sprain-strain with continued cervicalgia and muscle spasms leading to radicular left arm pain.

On 15 May 2009, plaintiff was evaluated by Dr. Divya Patel for pain management as a result of a referral by Dr. Martin.

Dr. Patel diagnosed plaintiff with chronic neck, left shoulder, and low back pain, as well as intermittent bilateral upper and lower extremity parasthesis. Dr. Patel was of the opinion that plaintiff's work injury materially aggravated plaintiff's neck, low back, and lower extremity conditions. Dr. Patel prescribed medication and referred plaintiff to a psychiatrist for depression related to chronic pain. Defendants refused to authorize treatment by a psychiatrist.

Plaintiff underwent an additional cervical and lumbar MRI. Although the cervical MRI was normal, the lumbar MRI revealed two disc bulges at L3-4 and L4-5 and a small disc herniation at L5-S1. On 19 August 2009, plaintiff underwent a functional capacity evaluation that placed plaintiff in the light physical demand category. Based on these results, Dr. Patel gave plaintiff permanent restrictions of light-duty work with no driving more than 30 minutes one way.

Dr. Patel concluded that plaintiff had reached maximum medical improvement for her cervical and low back conditions and gave plaintiff a permanent partial disability rating of two percent for her back, four percent for her left lower extremities, and four percent for her right lower extremities. Dr. Martin concluded that plaintiff had reached maximum medical

improvement with respect to her left shoulder and gave her a 12 percent permanent partial disability rating for her shoulder.

A vocational counselor was assigned to assist plaintiff with her job search efforts. Ultimately, the counselor recommended to defendants and defendants approved that plaintiff undergo re-education at a community college as an alternative to an ongoing job search. Plaintiff enrolled in the medical office administration program at the Craven County Community College. She was scheduled to complete the program in June 2012.

Prior to her compensable accident on 23 September 2006, plaintiff had suffered various other injuries to her back, left arm, left upper extremity, and left leg. She had been treated for pain in her feet and legs and pain in her left lower waist. Plaintiff had also been diagnosed with fibromyalgia and migraine headaches. She received treatment for depression in November 1998 and July 1999 and had reported that she was experiencing depression and back pain in December 2001.

On 14 July 2010, plaintiff requested a hearing because defendants contended that plaintiff's left hand, left fingers and left knee symptoms were not causally related to her compensable accident and because defendants denied that plaintiff was permanently totally disabled. The deputy commissioner awarded plaintiff ongoing total disability benefits

and medical compensation for expenses related to plaintiff's "23 September 2006 injury by accident and causally related cervical and low back conditions, as well as her chronic pain, lower extremity conditions and depression, subject to the provisions of G.S. § 97-25.1, including the lumbar fusion procedure recommended by Dr. Voos, but not including expenses associated with her upper extremity conditions and headaches" Defendants appealed to the Full Commission, which, on 21 November 2011, entered an opinion and award affirming the deputy commissioner's opinion and award. Defendants timely appealed to this Court.

Discussion

Our review of the Commission's opinion and award "is limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law. This 'court's duty goes no further than to determine whether the record contains any evidence tending to support the finding[s].'" *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (internal citation omitted) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)). "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.

I

Defendants first argue that the Commission erred in determining that plaintiff's chronic pain was compensable. The Commission concluded in relevant part:

4. Based upon the preponderance of the credible evidence of record, plaintiff's chronic pain, including the pain in her lower extremities, is the direct and natural result of and causally related to her September 23, 2006 injury by accident.

Defendants contend generally that the Commission failed to make sufficient findings of fact to support this conclusion of law. More specifically, defendants argue that the Commission's conclusion of law does "not address what this 'chronic pain' is related to" and that it must, therefore, include chronic pain from plaintiff's pre-existing, non-work-related fibromyalgia.

However, a review of the entire opinion and award indicates that the "chronic pain" addressed in the conclusion of law was the pain diagnosed by Dr. Patel -- "chronic neck, left shoulder, and low back pain" -- together with, as the conclusion itself states, "the pain in [plaintiff's] lower extremities." While Dr. Patel acknowledged in her testimony that plaintiff would have some pain from her fibromyalgia, nothing in the opinion and

award suggests that the Commission was concluding that any pain or treatment for plaintiff's fibromyalgia was compensable.

Further, the Commission's conclusion of law is supported by the extensive, detailed findings of fact regarding the pain resulting from plaintiff's compensable injury by accident, the progression of that pain, and her treating physicians' diagnoses and opinions causally relating the pain in plaintiff's neck, left shoulder, lower back, and lower limbs to her injury by accident. Those findings, in turn, are supported by the physicians' testimony and medical records. The Commission, therefore, did not err in making conclusion of law four.

II

Defendants next contend that the Commission erred in concluding that "plaintiff's depression is the direct and natural result of and causally related to her September 23, 2006 injury by accident and related compensable chronic pain." Since we have already upheld the Commission's conclusion regarding the "compensable chronic pain" related to the injury by accident, the question is whether the Commission properly concluded that plaintiff's depression was causally related to that chronic pain.

The Commission made the following pertinent findings of fact in support of its conclusion:

34. On May 15, 2009, plaintiff was evaluated by Dr. Divya Patel for pain management upon the referral of Dr. Martin. Following an examination, Dr. Patel diagnosed plaintiff as having chronic neck, left shoulder, and low back pain, as well as intermittent bilateral upper and lower extremity parasthesis for which she was prescribed medications.

. . . .

37. In addition to providing plaintiff treatment for pain management related to her physical symptoms, Dr. Patel also referred plaintiff to a psychiatrist for depression that he [sic] causally related to her chronic pain. This referral was not approved by defendants. The Full Commission finds, based on Dr. Patel's testimony, that plaintiff's depression is causally related to her chronic pain.

Defendants argue, however, that these findings and the conclusion of law are not supported by the record because "Dr. Patel never testified to a reasonable degree of medical certainty that Plaintiff's depression was related to her compensable injuries." Our appellate courts do not, however, require that the expert witness specifically state his or her opinion to a reasonable degree of medical certainty. *See Adams v. Metals USA*, 168 N.C. App. 469, 483, 608 S.E.2d 357, 365 ("The fact that the treating physician in this case could not state with reasonable medical certainty that plaintiff's accident caused his disability, is not dispositive -- the degree of the

doctor's certainty goes to the weight of his testimony."), *aff'd per curiam*, 360 N.C. 54, 619 S.E.2d 495 (2005).

In this case, Dr. Patel testified that she referred plaintiff to a psychiatrist "for depression related to chronic pain." Plaintiff's medical records indicate that on 8 June 2010, Dr. Patel diagnosed plaintiff with chronic neck, low back, and lower limb pain and noted that plaintiff had "definite depression secondary to her current pain syndrome." The records further indicate that on 21 September 2010 and 26 October 2010, Dr. Patel again diagnosed plaintiff with chronic neck and lower back pain and "[d]epression related to chronic pain." The records additionally show that on 26 October 2010, Dr. Patel noted: "Again, we have written for a referral to psychiatry for the patient's depression related to her chronic pain."

In *Craven v. VF Corp.*, 167 N.C. App. 612, 616, 606 S.E.2d 160, 163 (2004), the defendant challenged a finding by the Commission which "suggest[ed] a causal relationship between [plaintiff's] back injury and mental condition[.]" The Court held that the finding was supported by evidence of the plaintiff's family physician's report that noted the plaintiff's "'chronic pain' and 'developing symptoms of depression.'" *Id.* The Court further relied on a statement in the same physician's report that plaintiff "'has had increasing depressive symptoms

largely related to her ongoing back pain." *Id.* (emphasis added).

Similarly, in *Toler v. Black & Decker*, 134 N.C. App. 695, 700, 518 S.E.2d 547, 550 (1999), the Court held that there was evidence in the record supporting a challenged finding that "plaintiff's neck injury had a role in exacerbating her pre-existing PTSD and depression." The evidence relied on by the Court was deposition testimony by "a masters-level psychologist . . . that 'the [neck] injury exacerbated the P.T.S.D.,' that '[t]he depression is related to the work injury,' and that 'it appeared that the injury just really intensified the P.T.S.D. and, in my opinion, added to her psychological distress or pain.'" *Id.* (emphasis added).

Dr. Patel's testimony is materially indistinguishable from the testimony found sufficient in both *Craven* and *Toler*. We, therefore, hold that the Commission's determination that plaintiff's depression was "causally related to her chronic pain" is supported by competent evidence and, therefore, binding on appeal.

III

Finally, defendants argue that the Commission erred in concluding that plaintiff was "entitled to have defendants pay

for all related medical expenses incurred, . . . including the lumbar fusion procedure recommended by Dr. Voos." We disagree.

In support of its conclusion, the Commission found that Dr. Voos treated plaintiff from 30 October 2006 to 17 September 2008, that Dr. Voos initially recommended several non-operative treatment plans for plaintiff, that none of the non-operative procedures resolved plaintiff's symptoms, that plaintiff underwent diagnostic tests regarding her back pain, and that based on the tests and the ineffectiveness of non-operative procedures, Dr. Voos recommended a lumbar fusion procedure.

The Commission acknowledged that plaintiff saw Dr. Lacin for a second surgical opinion and that Dr. Lacin recommended against the lumbar surgery. The Commission then found:

31. The Full Commission assigns greater weight to the testimony and opinions of Dr. Voos as opposed to those of Dr. Lacin. This finding is based in part upon Dr. Voos having a significant history of treating plaintiff, as opposed to Dr. Lacin, who examined her on only one occasion. This finding is also based largely upon the stated bases of Dr. Lacin's opinions.

Defendants argue that the Commission erred in assigning greater weight to Dr. Voos' opinion recommending surgery because Dr. Voos did not clarify the basis for his opinion and, accordingly, his opinion was not competent evidence. However, Dr. Voos testified as follows:

Q. Okay. Was the discogram that we discussed earlier in this -- and was introduced into evidence, was that your sole basis for your opining that [plaintiff] would benefit from this lumbar fusion?

A. Well, it's in concert with the post discogram CT, the previous MRI, her lack of improvement with other non-operative measures. This is a treatment option for her, as is being referred to -- or continuing with the pain clinic and pain medications.

Thus, despite defendants' assertions otherwise, Dr. Voos testified that his surgical recommendation was based upon his reading of multiple diagnostic medical tests -- the discogram, an MRI, and a post discogram CT -- and plaintiff's lack of improvement with non-operative treatment.

Defendants additionally argue that Dr. Voos' opinion should have been disregarded because "he never evaluated Plaintiff for any sources of localized lower extremity pain because of the findings on the MRI and CT scans of Plaintiff." This argument goes to the credibility of Dr. Voos' testimony and the weight that it should be afforded. It is well established, however, that "[t]he 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. We may not revisit the Commission's decision to give greater weight to Dr. Voos' testimony

Defendants next contend that the Commission erred in assigning greater weight to the opinion of Dr. Voos than to the opinion of Dr. Lacin because the Commission based that decision on an erroneous understanding of the bases for Dr. Lacin's opinion. The Commission made the following evidentiary findings regarding Dr. Lacin's opinion:

24. On July 1, 2008, plaintiff underwent a second surgical opinion examination by Dr. Robert Lacin, who also reviewed medical records. Thereafter, Dr. Lacin opined that there was no clear evidence of lumbar radiculopathy, and that he did not believe plaintiff's lower extremity pain was related to any radicular symptoms. Additionally, Dr. Lacin recommended that plaintiff not undergo lumbar surgery. In light of Dr. Lacin's opinion, defendant-carrier has not authorized the spinal fusion procedure recommended by Dr. Voos.

25. The evaluation of plaintiff on July 1, 2008, was the only one performed by Dr. Lacin. Additionally, the medical records Dr. Lacin reviewed prior to his evaluation were incomplete, lacking records from New Bern Family Practice from September 26, 2006, that reflect reports by plaintiff of radiating pain in her lower extremities, as well as the lumbar MRI performed on October 18, 2006.

26. Dr. Lacin's opinion to not recommend surgery was based in part on a[n] MSNBC.com web-based report regarding workers' compensation claimants with back injuries, which concluded that their conditions were more likely to worsen with surgery. Dr. Lacin's surgical opinion was also based upon his view that there were no

real significant findings in plaintiff's case.

27. Regarding Dr. Lacin's opinions, Dr. Voos testified that MSNBC.com is not a recognized authoritative source in the field of orthopedics, neurosurgery, or back treatment. Dr. Voos further testified that many of his patients have been referred to Dr. Lacin for a second opinion, and that regardless of the patient or their symptoms, Dr. Lacin consistently recommends against surgical intervention.

Defendants contend that, contrary to the Commission's findings, Dr. Lacin did not base his opinion, in part, on an MSNBC.com report. Defendants acknowledge that during his deposition, Dr. Lacin did provide a report from MSNBC.com to counsel for both parties, but argue that "Dr. Lacin clearly stated that he was providing this article to counsel because it was a layman's recitation of a study published in the Spine Journal, a learned publication on spinal surgery." Defendants assert that "[a]t no point in the record does Dr. Lacin say, or even imply, that he was basing his expert opinion on an article from MSNBC.com. Instead, Dr. Lacin was providing it to counsel in the hopes that they would better understand the complicated nature of spinal surgery."

On this issue, Dr. Lacin testified as follows:

Q. Okay. Based on your review of Dr. Voos' notes, the imaging studies and your own examination and evaluation of [plaintiff], did you formulate an opinion --

an opinion satisfactory to yourself and to a reasonable degree of medical certainty as to whether or not [plaintiff] would be a good candidate for or would benefit from the fusion surgery recommended by Dr. Voos?

A. Yes, I do.

Q. And what was that opinion?

A. I believe that it will be not in her best -- best interest to undergo an operation of this nature by virtue of the fact that the likelihood that she'll get worse is higher than she will get better.

I think a lot of people who have some kind back [sic] problem, they can manage their back pain with medication, exercise, weight loss and so on and so forth.

I think that the objective data that we have -- and I actually brought you guys something that may be useful for all of you, which is a copy of a article [sic] that was reported in Spine Journal, which is a professional magazine on spine surgery. And that was reported on MSNBC on October the 14th.

And essentially what the article shows -- I didn't bring you the original article, the medical article because for laymen it's harder to understand. But essentially what it says is that if you have back pain and you are in a workers compensation claim and your findings on your radiological studies are not focal, essentially the likelihood that you'll get worse is higher than the likelihood of you getting better.

For that reason and based on the fact that there were no real significant findings in this case, I thought it would be

better for this patient not to have the surgery.

While Dr. Lacin may have read the actual study in Spine Journal, his testimony does not specifically say so. The above testimony can be read as indicating that Dr. Lacin read about the study on MSNBC.com rather than going back to the source article in the professional journal. While the Commission could have interpreted this ambiguous testimony consistent with defendants' contentions, we cannot conclude that it was required to do so. Accordingly, this testimony is sufficient to support the Commission's finding of fact regarding Dr. Lacin's reliance on an MSNBC.com article.

We note further that the finding regarding the MSNBC.com article was only one of several reasons that the Commission chose to give greater weight to Dr. Voos' opinion. The Commission pointed to Dr. Voos' significant history of treating plaintiff as compared to Dr. Lacin's single examination, as well as the bases for Dr. Lacin's opinion, which not only included the MSNBC.com article, but also Dr. Lacin's belief -- inconsistent with the Commission's findings of fact -- that there were no significant clinical findings in plaintiff's case. The Commission noted Dr. Lacin's incomplete review of plaintiff's medical records, including his failure to review records from New Bern Family Practice from 26 September 2006

that indicated plaintiff was suffering radiating pain in her lower extremities and his failure to review the lumbar MRI performed on 18 October 2006. Regarding the bases for Dr. Lacin's opinion, the Commission further pointed to Dr. Voos' testimony that Dr. Voos had had "numerous patients referred to Dr. Lacin for a second opinion, and his opinion, regardless of who the patient [sic] or what the patient had in terms of back pain -- his opinion is always the same. And that's -- there's nothing surgical to do."

Thus, the order indicates that the Commission considered the bases for Dr. Voos' and Dr. Lacin's opinions and ultimately found Dr. Voos' opinion to be more credible and entitled to greater weight. While defendants attempt to cast Dr. Lacin's testimony in a different light than that presented in the Commission's opinion and award, the Commission's view of that testimony is a reasonable one and, therefore, cannot be revisited on appeal.

Defendants do not present any other argument regarding plaintiff's prospective surgery. Since we have upheld the findings determining that Dr. Voos' opinion was entitled to greater weight and since Dr. Voos' testimony supports the Commission's order that defendants pay for the surgery recommended by Dr. Voos, we affirm.

Affirmed.

Judges STEPHENS and McCULLOUGH concur.

Report per Rule 30(e).