

Affirmed

Riggsbee
Sellers
Balchile dissenting

NO. COA00-42

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NORTH CAROLINA COURT OF APPEALS

Filed: 17 October 2000
THE OFFICE OF
CLERK COURT OF APPEALS
OF NORTH CAROLINA

ALLEN Z. MORRIS,
Employee,
Plaintiff,

v.

N.C. Industrial Commission
I.C. No. 662718

R.J. REYNOLDS,
Employer,

SELF INSURED,
(Kemper Insurance, Servicing Agent)
Defendant.

Appeal by plaintiff from opinion and award entered 1 September 1999 by the North Carolina Industrial Commission. Heard in the Court of Appeals 2 October 2000.

Gray, Newell, Johnson & Blackmon, LLP, by S. Camille Payton and Angela Newell Gray, for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, PLLC, by Clayton M. Custer and Laura M. Wolfe, for defendant-appellee.

SMITH, Judge.

Plaintiff Allen Z. Morris was employed by defendant R.J. Reynolds (RJR) as a tractor-trailer driver. On 11 April 1996, plaintiff drove his truck to pick up a load of cigarettes. While the truck was being loaded, there was a malfunction and plaintiff went to investigate. When plaintiff stepped off of a platform, he slipped on an oil spot and fell to the ground, landing on his back and knee. Plaintiff informed his supervisor and was sent to the

company nurse. Plaintiff was given ibuprofen and told to return the next day. The next day, plaintiff complained to the nurse of pain in his lower back. The nurse gave plaintiff medication, and plaintiff returned to work. On 15 April 1996, plaintiff reported to RJR that the pain in his back was resolved. However, on 25 April 1996, after reporting continued pain in his back and knee, plaintiff was referred to physical therapy.

On 18 May 1996, plaintiff was seen by his regular physician, Dr. Gerald B. Hogsette, Jr. Plaintiff told Dr. Hogsette of his fall and complained of pain in his lower back and right shoulder. X-rays revealed no abnormality in the shoulder and no significant evidence of degenerative disc disease. Plaintiff's next visit to Dr. Hogsette was on 24 May 1996; plaintiff complained that pain in his shoulder had progressed to his entire arm. Plaintiff was diagnosed with cervical radiculopathy, placed in a cervical collar, and given prescriptions for an anti-inflammatory medication and a narcotic. Dr. Hogsette then referred plaintiff to Dr. Louis Pikula, Jr., a neurosurgeon. Dr. Pikula diagnosed plaintiff with a disc protrusion and performed a cervical discectomy and fusion on 2 July 1996. Plaintiff was released to return to work without restrictions on 16 September 1996.

Prior to returning to work, plaintiff was examined by Dr. Hubert F. Bonfili, head of RJR's medical department. Plaintiff reported to Dr. Bonfili that he was still in pain and was taking pain medications that left him drowsy. Consequently, Dr. Bonfili prohibited plaintiff from returning to work as a truck driver.

There were no alternative positions available in plaintiff's department, so plaintiff did not return to work. Instead, Dr. Bonfili certified plaintiff for long-term disability. Because plaintiff had been released to work without restrictions, Aetna, the disability insurance carrier, sent plaintiff to Dr. Carlos P. Yuson for another opinion. Dr. Yuson examined plaintiff on 21 January 1997 and could not find any neurological abnormality to explain plaintiff's continuing complaints of pain. Accordingly, Dr. Yuson released plaintiff to return to work. However, Dr. Bonfili still refused to release plaintiff to drive trucks for RCR. On 12 May 1997, plaintiff returned to see Dr. Pikula with complaints of pain in his arms, neck, legs, and lower back. Plaintiff's MRI was found to be within normal limits. Dr. Pikula found "no true neurological distribution" and opined that plaintiff might have a "peripheral neuropathy."

On 16 September 1996, plaintiff filed a Form 18 notice of accident. On 22 July 1997, plaintiff filed a Form 33 request that his claim be assigned for hearing with the Industrial Commission. On 12 September 1997, defendant denied the claim. On 28 September 1998, Deputy Commissioner Morgan S. Chapman entered an opinion and award finding that the cervical spine condition for which plaintiff was being treated was not a proximate result of his injury by accident. Accordingly, the deputy commissioner concluded that plaintiff had not sustained any temporary total or permanent partial disability and was not entitled to disability compensation.

On 1 September 1999, the Full Commission entered an opinion and award affirming the deputy commissioner. Plaintiff appeals.

Plaintiff's sole argument on appeal is that the Industrial Commission erred by finding that he did not sustain any temporary or permanent disability as a result of his injury by accident. Plaintiff argues that the record supports his claim that his cervical spine condition was the result of the injury he suffered on 11 April 1996. First, plaintiff argues that the medical records from the company doctor showing defendant's complaints of ongoing pain and the proximity in time between the fall and the discovery of plaintiff's cause of ongoing pain support his claim. Second, plaintiff asserts that he regularly sought treatment from the date of the fall until he was diagnosed with a herniated disc by Dr. Hogsette. Third, plaintiff argues that Dr. Hogsette testified that plaintiff's herniated disc could have been caused by his fall on 11 April 1996. See *Lockwood v. McCaskill*, 262 N.C. 663, 138 S.E.2d 541 (1964) (testimony by an expert using the words "could" or "might" refer to probability and not possibility and is competent evidence based on reasonable probabilities known to the expert). Finally, plaintiff asserts that he has not been released to return to work by RJR's doctor, and RJR had no other work to offer plaintiff. Thus, plaintiff argues that he did sustain a temporary total or permanent partial disability because he is unable to earn the wages he was receiving at the time of his injury in the same or other employment. See N.C. Gen. Stat. § 97-2(9) (1999).

In response, RJR contends there was competent evidence in the record to support the Commission's findings that any possible injury that plaintiff may have suffered from the 11 April 1996 accident was treated and resolved within a few weeks of the accident and was not disabling. Additionally, it argues there was competent evidence to support the Commission's findings that any causal relationship between the accident and plaintiff's cervical disc rupture was unlikely. RJR asserts that, because of the questionable nature of the cause of plaintiff's disc rupture, his cervical disc condition was a "complex medical question" and expert medical testimony was required. See *Phillips v. U.S. Air, Inc.*, 120 N.C. App. 538, 463 S.E.2d 259 (1995), *aff'd per curiam*, 343 N.C. 302, 469 S.E.2d 552 (1996). RJR contends that Dr. Bonfili's testimony regarding the unlikely causal relationship between the accident and injury was sufficient medical evidence to support the Commission's findings and that Dr. Hogsette's testimony was unrelated to causation and only speculated as to plaintiff's injuries. Accordingly, RJR argues that the Commission properly rejected plaintiff's evidence in favor of the expert opinion of Dr. Bonfili and that plaintiff is not entitled to disability compensation.

After careful review of the record, briefs, and contentions of the parties, we affirm. Findings of fact made by the Industrial Commission are conclusive on appeal if supported by any competent evidence. See *Watkins v. City of Asheville*, 99 N.C. App. 302, 303-04, 392 S.E.2d 754, 756 (1990). This Court's review is limited to

determining "(1) whether there was competent evidence before the Commission to support its findings and (2) whether such findings support its legal conclusions." *McLean v. Roadway Express*, 307 N.C. 99, 102, 296 S.E.2d 456, 458 (1982) (citations omitted).

Here, the Commission found that plaintiff's injuries from his 11 April 1996 accident were not disabling and were "resolved with conservative treatment" after a few weeks. Further, the Commission found that plaintiff did not develop pain in his shoulder, neck, or arm until one month or more after his injury. Consequently, any causal relationship between plaintiff's work injury and his cervical disc rupture was questionable and required expert medical evidence. The Commission then found that Dr. Hogsette would not state to a reasonable degree of medical certainty that plaintiff's cervical disc condition resulted from the accident, whereas Dr. Bonfili testified that a causal relationship was possible but unlikely. Accordingly, the Commission determined that plaintiff had not proven that his cervical spine condition was the result of his injury by accident and denied his claim for compensation. We find there was competent evidence to support the Commission's findings.

First, Dr. Bonfili testified that he treated plaintiff "conservatively and symptomatically" for his discomfort and that plaintiff's pain resolved. Second, Dr. Bonfili testified to a reasonable degree of certainty that plaintiff's cervical spine condition was possibly, but not likely, causally related to his accident. Dr. Bonfili based his opinion on the facts that:

(1) plaintiff did not complain of neck pain until more than one month after the accident; (2) plaintiff did not receive any direct trauma to his neck in the accident; (3) all of plaintiff's symptoms after the accident were related to his left chest area and his knee; and (4) plaintiff had related pains in his neck to Dr. Hogsette in an examination conducted over four months prior to the accident.

Plaintiff offered the testimony of Dr. Hogsette to support his claim. While Dr. Hogsette's testimony was admissible, Dr. Hogsette merely offered his "personal opinion" that the herniated disc "could" be related to plaintiff's fall. Dr. Hogsette refused to testify with a degree of reasonable certainty to a causal connection between plaintiff's accident and his cervical spine condition. "[E]vidence on causation 'must indicate a reasonable scientific probability that the stated cause produced the stated result.' Evidence is insufficient on causation if it 'raises a mere conjecture, surmise, and speculation.'" *Phillips*, 120 N.C. App. at 542, 463 S.E.2d at 262 (citation omitted). Therefore, the Commission was free to reject plaintiff's lay testimony and accept Dr. Bonfili's expert testimony. See *Pittman v. International Paper Co.*, 132 N.C. App. 151, 156, 510 S.E.2d 705, 709 ("The Commission 'is the sole judge of the credibility of the witnesses and the weight to be given to their testimony.'"), *aff'd per curiam*, 351 N.C. 42, 519 S.E.2d 524 (1999). Accordingly, we affirm.

Affirmed.

Judges LEWIS and MARTIN concur.

Report per Rule 30(e).