NO. COA10-107

NORTH CAROLINA COURT OF APPEALS

Filed: 7 December 2010

RANDY HYATT,
Employee,
Plaintiff

v. N.C. Industrial Commission
I.C. No. 672659

N.C. DEPARTMENT OF CORRECTION,
Employer,
SELF-INSURED
(KEY RISK MANAGEMENT SERVICES, Third-Party Administrator),
Defendant

Appeal by plaintiff from Opinion and Award entered 29 September 2009 by the North Carolina Industrial Commission. Heard in the Court of Appeals 1 September 2010.

Root & Root, P.L.L.C., by Louise Critz Root, for plaintiff-appellant.

Attorney General Roy Cooper, by Assistant Attorney General Vanessa N. Totten, for the State.

CALABRIA, Judge.

Randy Hyatt ("plaintiff") appeals an Opinion and Award of the North Carolina Industrial Commission ("the Commission") denying his claim for benefits for his right arm, shoulder, and hand. We affirm.

I. BACKGROUND

On 2 November 2006, plaintiff was employed as a Correctional Officer for the North Carolina Department of Correction ("defendant") at Craggy Correctional Center and was working inside one of the guard towers. He went outside and began "walking fast" to reach his supervisor when he turned his left ankle on the edge of a "routed out" section of pavement. As a result, he fell on the ground on both hands, jamming both elbows into his ribs. At the time of plaintiff's fall, he was in the process of completing re-certification for In-Service Training of Firearms, which required shooting drills. Although plaintiff subsequently passed his re-certification training, he claimed his shooting efficiency "was way off."

On 14 November 2006, plaintiff completed a Form 19 "Employer's Report of Employee's Injury or Occupational Disease to the Industrial Commission" and sought treatment for a left ankle sprain and a rib contusion at Sisters of Mercy Urgent Care ("Sisters of Mercy"). From 14 November 2006 through 21 November 2006, plaintiff was placed on light duty restrictions, including no prolonged standing or walking.

At the time plaintiff injured his ankle and ribs, he did not report any right shoulder pain. Therefore, plaintiff never received additional medical treatment and never requested insurance coverage from Key Risk Management Services ("third-party administrator").

On 27 December 2007, more than one year after plaintiff's fall where he sustained a sprained ankle and a rib contusion, he sought

treatment for his right shoulder pain at Sisters of Mercy. Plaintiff contended that his right shoulder problems occurred as a result of his fall on 2 November 2006. On 31 December 2007, Dr. Donald L. Mullis ("Dr. Mullis") of Asheville Orthopedic Associates treated plaintiff and noted that he did not have an acute problem in his right shoulder. Dr. Mullis concluded that plaintiff had degenerative osteoarthritis in the acromioclavicular ("AC") joint of the right shoulder with a possible rotator cuff problem.

On 2 January 2008, an MRI of plaintiff's right shoulder revealed a full thickness tear of the distal anterior supraspinatus tendon. On 4 January 2008, Dr. Mullis recommended shoulder surgery for plaintiff. Plaintiff was referred to Dr. Angelo Cammarata ("Dr. Cammarata") of Blue Ridge Bone & Joint for a second opinion.

On 10 January 2008, plaintiff filed a revised Form 18 "Notice of Accident to Employer and Claim of Employee, Representative, or Dependant [sic]" with the Commission and requested that his claim be assigned for a hearing. Plaintiff believed that he was entitled to compensation from 2 November 2006 to 10 January 2008 for missing work, for medical expenses/treatment, and for permanent partial disability for his right and left hand, right and left shoulder, ribs, left foot, and right thigh. On 5 February 2008, defendant filed a Form 33R "Response to Request That Claim be Assigned for Hearing," denying compensability for plaintiff's "current problems" on the ground that they were not "causally related to his November 2, 2006 claim."

On 8 February 2008, according to Dr. Cammarata's diagnosis, plaintiff sustained a right shoulder full thickness rotator cuff tear, AC joint arthropathy, and Type II acromion. Dr. Cammarata's notes stated, "It was explained to [plaintiff] that I can document the facts as he does present those, but I am not the one ultimately responsible for determining Workmens' [sic] Comp injuries, especially with this being a year-and-a-half old, but I would gladly forward current documentation as he requests." On 13 March 2008, Dr. Cammarata performed surgery on plaintiff's shoulder.

On 13 August 2008, Dr. Cammarata concluded that plaintiff reached maximum medical improvement, and assigned a 10% permanent partial disability rating to his right arm. Plaintiff returned to employment with defendant at the same or greater wages.

On 6 October 2008, the parties deposed Dr. Cammarata. On direct examination, he was asked to make certain assumptions. Specifically, he was asked to assume that plaintiff had not experienced any other traumatic events or sustained any accidental injuries between the 2 November 2006 fall and the 13 March 2008 surgery. Dr. Cammarata was then asked, based on these assumptions, whether he thought the fall, as described by plaintiff, produced the problems that required surgery on plaintiff's shoulder. Dr. Cammarata answered:

> I think a fall on a shoulder definitely can cause a rotator cuff tear, and by the history that [plaintiff] provided and, really, with no interim injuries, then with it being temporally related to what he is describing, I think it's plausible that that could have happened at that time.

Dr. Cammarata testified that: (1) he did not review plaintiff's medical records in November 2006; and (2) he did not know 27 December 2007 was the first time plaintiff had been treated for right shoulder pain. When Dr. Cammarata was asked the most common causes for a rotator cuff tear, he answered that the most common causes were falls or lifting types of injuries and degenerative tears from natural deterioration. He also added that weight lifting can cause rotator cuff tears, and a person can develop a rotator cuff tear without trauma. Finally, he said it was difficult to determine whether plaintiff's rotator cuff tear was a degenerative tear or a traumatic tear. Plaintiff testified that he lifted weights three times per week for over 10 years on a regular basis, and also would bench press between 135 to 300 pounds.

On 30 December 2008, following a hearing, Deputy Commissioner George R. Hall, III, filed an Opinion and Award denying plaintiff's claim for benefits for his right arm, shoulder, and hand. Plaintiff appealed to the Full Commission. On 29 September 2009, following a hearing, the Commission filed an Opinion and Award denying plaintiff's claim for benefits for his right arm, shoulder, and hand. Plaintiff appeals.

II. STANDARD OF REVIEW

A party may appeal an Opinion and Award of the Commission "to the Court of Appeals for errors of law under the same terms and conditions as govern appeals from the superior court to the Court of Appeals in ordinary civil actions." N.C. Gen. Stat. § 97-86

(2009). "[W]hen reviewing Industrial Commission decisions, appellate courts must examine 'whether any competent evidence supports the Commission's findings of fact and whether [those] findings . . . support the Commission's conclusions of law.'" *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 700 (2004) (quoting *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 such competent evidence, 'even though there [is] evidence that would support findings to the contrary.'" *Id.* (quoting *Jones v. Myrtle Desk Co.*, 264 N.C. 401, 402, 141 S.E.2d 632, 633 (1965)). This Court may set aside findings of fact only "when 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). Furthermore, findings of fact not assigned as error are binding on appeal. *Johnson v. Herbie's Place*, 157 N.C. App. 168, 180, 579 S.E.2d 110, 118 (2003). We review the Commission's conclusions of law *de novo*. *McRae*, 358 N.C. at 496, 597 S.E.2d at 701.

As an initial matter, plaintiff objected to only Findings of Fact numbers 22, 24, and 25. Therefore, findings of fact to which plaintiff does not object are binding. *Johnson*, 157 N.C. App. at 180, 579 S.E.2d at 118.

III. STANDARD OF LAW

Plaintiff argues that the Commission applied an incorrect standard of law in determining that he produced insufficient evidence to prove that his compensable injury of 2 November 2006

caused, exacerbated, or aggravated his right shoulder and arm condition. More specifically, plaintiff argues that the Commission erred in concluding that Dr. Cammarata's expert medical testimony was "speculation or conjecture" because Dr. Cammarata did not testify to a reasonable degree of medical certainty that plaintiff's right arm and shoulder condition were causally related to the 2 November 2006 fall.[1] We disagree.

In order for a workers' compensation claim to be compensable, a plaintiff must provide proof of a causal relationship between the injury and the employment. *Davis v. Columbus Cty. Schools*, 175 N.C. App. 95, 101, 622 S.E.2d 671, 676 (2005).

> This court has repeatedly held that a doctor is not required to testify to a reasonable degree of medical certainty. *See Peagler v. Tyson Foods, Inc.*, 138 N.C. App. 593, 599, 532 S.E.2d 207, 211 (2000). *See also Davis v. Columbus County Sch.*, 175 N.C. App. 95, 101, 622 S.E.2d 671, 676 (2005) (citing *Peagler* and stating that "[e]xpert testimony need not show that the work incident caused the injury to a reasonable degree of medical certainty").

Erickson v. Lear Siegler, 195 N.C. App. 513, 524, 672 S.E.2d 772, 780 (2009). Nonetheless, plaintiff must still show that "it is 'likely' that the workplace accident caused plaintiff's injury." *Id.*

In the instant case, in Finding of Fact 24, the Commission stated, "Dr. Cammarata gave no definitive opinion to a reasonable

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[1]We note that plaintiff does not challenge the Commission's Finding of Fact 26, which states, "Plaintiff did not present any medical evidence to support a claim for disability to his right hand." Therefore, this finding is binding upon this Court. *Johnson*, 157 N.C. App. at 180, 579 S.E.2d at 118.

degree of medical certainty as to causation based on his medical treatment of plaintiff." However, Dr. Cammarata was not required to testify to a reasonable degree of medical certainty. *See id.* Therefore, the Commission's reliance on this particular portion of Finding 24 was error.

Plaintiff must still show that "it is 'likely' that the workplace accident caused plaintiff's injury." *Id.* In *Holley v. ACTS, Inc.*, our Supreme Court stated, "Although expert testimony as to the *possible* cause of a medical condition is admissible if helpful to the jury, it is insufficient to prove causation, particularly 'when there is additional evidence or testimony showing the expert's opinion to be a guess or mere speculation.'" 357 N.C. 228, 233, 581 S.E.2d 750, 753 (2003) (internal citations omitted).

In the instant case, Findings of Fact 8, 13, 17, 19, and 23, to which plaintiff did not object, state, in pertinent part:

> 8. On December 31, 2007, Dr. Donald L. Mullis of Asheville Orthopedic Associates noted that Plaintiff did not have an acute problem in his right shoulder. [] Dr. Mullis opined that Plaintiff had degenerative osteoarthritis in the acromioclavicular joint of the right shoulder with a possible rotator cuff problem.
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> 13. On February 8, 2008, Dr. Cammarata diagnosed Plaintiff with a right shoulder full thickness rotator cuff tear, AC joint arthropathy, and Type II acromion. Dr. Cammarata's notes state, "It was explained to [plaintiff] that I can document the facts as he does present those, but I am not the one ultimately responsible for determining Workmens' [sic] Comp injuries, especially with this

> being a year-and-a-half old, but I would gladly forward current documentation as he requests."
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> 17. On October 6, 2008, the parties deposed Dr. Cammarata. On direct examination, Dr. Cammarata was asked to assume that if Plaintiff had no other traumatic events or accidental injury between November 2, 2006 and the March 13, 2008 surgery, did he think the fall as described by [plaintiff] produced the problems that resulted in surgery. Dr. Cammarata replied, "I *think* a fall on a shoulder definitely *can* cause a rotator cuff tear, and by the history that [plaintiff] provided and, really, with no interim injuries, then with it being temporally related to what he is describing, I *think it's plausible* that that *could* have happened at that time."
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> . . .
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> 19. Dr. Cammarata's opinion was . . . based on speculation that Plaintiff's right shoulder problems started on November 2, 2006.
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> . . .
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> 23. Dr. Cammarata also testified that a person can develop a rotator cuff tear without trauma and stated that it is *hard to determine* whether Plaintiff's rotator cuff tear was a degenerative tear or a traumatic tear.

(emphases added). These findings are binding on this Court. *Johnson*, 157 N.C. App. at 180, 579 S.E.2d at 118.

Dr. Cammarata's testimony that he "think[s]" a fall on the shoulder "can" cause a rotator cuff tear, that he "think[s] it's plausible" that plaintiff's fall caused his rotator cuff injuries, and that it was "hard to determine" if plaintiff's rotator cuff problems resulted from the fall, suggests that a causal connection between plaintiff's accident and his problems with his right arm

and shoulder "was possible, but unlikely." *Holley*, 357 N.C. at 234, 581 S.E.2d at 754. Our Supreme Court has held:

> Doctors are trained not to rule out medical possibilities no matter how remote; however, mere possibility has never been legally competent to prove causation. Although medical certainty is not required, an expert's "speculation" is insufficient to establish causation.

Id. (internal citations omitted).

While Dr. Cammarata was not required to testify as to a reasonable degree of medical certainty that plaintiff's right arm and shoulder problems were causally related to the 2 November 2006 fall, the above unchallenged findings support the Commission's further findings that "Dr. Cammarata's testimony does not persuasively establish that Plaintiff's right arm and shoulder problems are related to his November 2, 2006 injury and does not establish a causal relationship" and that "[t]he evidence fails to show that Plaintiff's right shoulder and arm problem is causally related to his November 2, 2006 fall." "Since there is competent evidence in the record supporting the finding of no causal link, that finding must stand." *Kashino v. Carolina Veterinary Specialists Med. Servs.*, 186 N.C. App. 418, 423, 650 S.E.2d 839, 842 (2007).

These findings, in turn, support the Commission's conclusion that:

> Expert medical testimony that is speculation or conjecture is insufficient to support a causal connection between a Plaintiff's condition and a workplace incident. In this case, Plaintiff has produced insufficient evidence to prove that his compensable injury

> on November 2, 2006 caused, exacerbated, or aggravated his right shoulder and arm condition.

Dr. Cammarata's testimony relating to the cause of plaintiff's shoulder and arm problems amounted to "speculation," and was therefore insufficient to show that plaintiff's injury was caused by the 2 November 2006 fall. Plaintiff's argument is overruled.

IV. EXPERT OPINION TESTIMONY

Plaintiff argues that the Commission erred in concluding that the expert opinion of Dr. Cammarata was solicited through the assumption of facts unsupported by the record and entirely based on conjecture. We disagree.

"Evidence is insufficient on causation if it 'raises a mere conjecture, surmise, and speculation.'" *Phillips v. U.S. Air, Inc.*, 120 N.C. App. 538, 542, 463 S.E.2d 259, 262 (1995) (quoting *Hinson v. National Starch & Chem. Corp.*, 99 N.C. App. 198, 202, 392 S.E.2d 657, 659 (1990)). "In a case where the threshold question is the cause of a controversial medical condition, the maxim of '*post hoc, ergo propter hoc*,' is not competent evidence of causation." *Young*, 353 N.C. at 232, 538 S.E.2d at 916. "The maxim '*post hoc, ergo propter hoc* [after this, therefore because of this],' denotes 'the fallacy of . . . confusing sequence with consequence,' and assumes a false connection between causation and temporal sequence. As such, this Court has treated the maxim as inconclusive as to proximate cause." *Id.* (quoting BLACK'S LAW DICTIONARY 1186 (7th ed. 1999)).

Findings 18 and 20, to which plaintiff did not object, state:

> 18. The competent evidence showed that Dr. Cammarata based his opinion on the medical history provided by Plaintiff that his right shoulder problems happened at the time of the fall.
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> . . .
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> 20. Dr. Cammarata admitted that he did not review Plaintiff's medical records in November 2006, and that he did not know that the first time Plaintiff was treated for right shoulder pain was on December 27, 2007.

These findings, in addition to Finding 17, are binding on this Court. *Johnson*, 157 N.C. App. at 180, 579 S.E.2d at 118.

Furthermore, Dr. Cammarata testified that he was surprised to learn that plaintiff's original injury occurred on 2 November 2006, but that plaintiff had not sought treatment for his right shoulder pain until 27 December 2007. Plaintiff testified that he lifted weights, and Dr. Cammarata testified that a "rotator cuff tear can happen with weight lifting." These findings and evidence support the Commission's finding that "[w]hen viewed in the entirety, Dr. Cammarata's testimony was based on a *post hoc, ergo propter hoc* theory" and the Commission's conclusion that "[a]n expert's opinion that [is] solicited through the assumption of facts unsupported by the record is entirely based on conjecture." Plaintiff's argument is overruled.

V. CAUSES OF ROTATOR CUFF INJURIES

Plaintiff argues that the Commission's Finding of Fact No. 22, that "Dr. Cammarata stated that a rotator cuff tear can happen from weight lifting," is unsupported by the evidence. We disagree.

In the instant case, plaintiff testified that he lifted weights, and Dr. Cammarata testified that a "rotator cuff tear can

happen with weight lifting." This is competent evidence to support Finding 22, which states, "Dr. Cammarata stated that a rotator cuff tear can happen from weight lifting. One of Plaintiff's hobbies is weight lifting." Plaintiff's argument is overruled.

VI. BURDEN OF PROVING COMPENSABLE DISABILITY

Plaintiff argues that the Commission erred in finding that he failed to meet his burden of proving compensable disability subsequent to 21 November 2006, when he was released from light duty restrictions. We disagree.

Under the North Carolina Rules of Appellate Procedure, the body of the argument in an appellant's brief "shall contain citations of the authorities upon which the appellant relies." N.C.R. App. P. 28(b)(6) (2010). Furthermore, "[i]t is not the duty of this Court to supplement an appellant's brief with legal authority or arguments not contained therein." *Goodson v. P.H. Glatfelter Co.*, 171 N.C. App. 596, 606, 615 S.E.2d 350, 358 (2005).

Plaintiff fails to cite any North Carolina constitutional provisions, statutes, or cases from our courts to support his contention that the Commission erred in finding that he failed to meet his burden of proving compensable disability subsequent to 21 November 2006. Since plaintiff's argument does not "contain citations of the authorities upon which [he] relies," his argument is abandoned pursuant to N.C.R. App. P. 28(b)(6).

VII. CONCLUSION

The Commission's Opinion and Award denying plaintiff's claim for benefits for his right arm, shoulder, and hand is affirmed.

Affirmed.

Judges McGEE and GEER concur.

Report per Rule 30(e).