NO. COA10-1402

NORTH CAROLINA COURT OF APPEALS

Filed: 2 August 2011

BEVERLY BERTHELOT, Employee,
Plaintiff,

v.

From the North Carolina
Industrial Commission
I.C. File Nos. 693582, 764219

MOUNTAIN AREA HEALTH EDUCATION CENTER, INC., Employer,

and

FARMINGTON CASUALTY COMPANY (TRAVELERS), Carrier,

and

THE HARTFORD, Carrier,
Defendants.

Appeal by Plaintiff from opinion and award entered 12 July 2010 by the North Carolina Industrial Commission. Heard in the Court of Appeals 11 May 2011.

Ganly & Ramer, PLLC, by Thomas F. Ramer, for Plaintiff-Employee.

Jones, Hewson & Woolard, by Lawrence J. Goldman, for Defendant-Carrier The Hartford.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Mathew E. Flatow and M. Duane Jones, for Defendant-Carrier Farmington Casualty Company (Travelers).

STEPHENS, Judge.

Factual and Procedural History

This matter arises from a workers' compensation action. In December 2006, Plaintiff Beverly Berthelot, then age 59, was employed by Defendant-Employer Mountain Area Health Education Center, Inc., as a business office manager. Prior to December 2006, Plaintiff had undergone a left knee surgery, a right total knee replacement, and two subsequent right knee surgeries, all related to degenerative arthritis.

Plaintiff sustained a compensable left knee injury from a fall on 8 December 2006, for which Defendant-Carrier The Hartford ("Hartford") admitted liability and paid temporary total disability and medical benefits. Plaintiff was released to unrestricted work on 27 February 2007 with a 0% impairment rating.

On 17 April 2007, Plaintiff experienced another fall, this one outside of the workplace. On the day of the fall, Plaintiff was examined by Defendant's physician Dr. Lisa Ray. An MRI of Plaintiff's left knee was performed on 26 April 2007 which

revealed degenerative changes in all three knee joint compartments. Dr. Ray opined that it was Plaintiff's underlying knee conditions which contributed to Plaintiff's pain. In July 2007, Plaintiff received arthroscopic surgery, and on 14 August 2007, Plaintiff received a total knee replacement; both surgeries were performed by Dr. Paul Saenger, an orthopedic surgeon who had also treated Plaintiff for knee issues prior to her compensable injury. In his deposition, Dr. Saenger stated that Plaintiff had "some bilateral knee arthritis [which] was ultimately going to deteriorate to the point where knee replacement would be needed [which] was independent of the [fall] in December of '06." Following the total knee replacement surgery, Plaintiff did not work from 14 August 2007 through 17 September 2007, after which Plaintiff worked reduced hours. On 10 March 2008, Plaintiff was referred to another orthopedist, Dr. Daniel Eglinton. Dr. Eglinton performed an excision of Plaintiff's infrapatellar branch of the saphenous nerve and the prepatellar bursa. Following the infrapatellar surgery, Plaintiff was out of work from 31 March 2008 through 19 August 2008.

As a result of her injuries from the April 2007 fall, Plaintiff petitioned to re-open her December 2006 claim with

Hartford. Hartford denied Plaintiff's new claim and moved to add Defendant-Carrier Farmington Insurance Company ("Travelers") as a party.[1] By order of Executive Secretary Tracey Weaver, Travelers was added as a party.

Plaintiff then moved to compel payment of benefits pursuant to N.C. Gen. Stat. § 97-86.1, and, on 29 January 2008, Executive Secretary Weaver filed an order stating that Hartford's acceptance of Plaintiff's December 2006 left knee injury and payment of benefits therefor established a presumption of medical causation as to Plaintiff's injuries resulting from her April 2007 fall. Hartford was ordered to continue Plaintiff's benefits subject to its "right to a full credit should [Hartford] prevail after a full evidentiary hearing . . . ." All parties requested a hearing, and the case was heard before Deputy Commissioner Victoria Homick on 26 May 2009. By an opinion and award filed 11 January 2010, the deputy commissioner concluded that the greater weight of the evidence established that the treatment and surgeries to Plaintiff's left knee following the 17 April 2007 fall "were not necessitated by the December 8, 2006 injury or the April 17, 2007 fall, but were

[1]Hartford was Employer's worker's compensation insurance carrier at the time of the 8 December 2006 fall. Traveler's was Employer's worker's compensation insurance carrier at the time of the 17 April 2007 fall.

related to Plaintiff's pre-existing . . . condition." Accordingly, the deputy commissioner denied Plaintiff's claim for additional medical and indemnity benefits. Plaintiff appealed to the Full Commission, which by opinion and award filed 12 July 2010, affirmed the deputy commissioner.[2] Plaintiff appeals.

Discussion

Plaintiff makes four arguments on appeal: that the Commission erred in (1) placing the burden of proof on Plaintiff after the entry of an order compelling payment of benefits which created a presumption of disability; (2) relying on medical testimony that was biased and speculative; (3) concluding that Plaintiff's post-April 2007 knee condition and subsequent surgeries were not causally related to the admittedly compensable injury of December 2006; and (4) denying her continuing medical care and indemnity benefits as a result. For the reasons which follow, we affirm the decision of the Commission.

Standard of Review

Our task when reviewing an opinion and award from the North Carolina Industrial Commission is well defined:

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[2]One commissioner dissented without written opinion.

> The Workers' Compensation Act provides that the Industrial Commission is the sole judge of the credibility of the witnesses and the weight of the evidence. N.C.G.S. § 97-84,-85,-86 (2005); *Adams v. AVX Corp.*, 349 N.C. 676, 680-81, 509 S.E.2d 411, 413 (1998) (citing *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965)). We have repeatedly held that the Commission's findings of fact "are conclusive on appeal when supported by competent evidence, even though there be evidence that would support findings to the contrary." *E.g. Jones v. Myrtle Desk Co.*, 264 N.C. 401, 402, 141 S.E.2d 632, 633 (1965) (per curiam). Further, "[t]he evidence tending to support [the] plaintiff's claim is to be viewed in the light most favorable to [the] plaintiff, and [the] plaintiff is entitled to the benefit of every reasonable inference to be drawn from the evidence." *Adams*, 349 N.C. at 681, 509 S.E.2d at 414 (citation omitted); *accord Deese v. Champion Int'l Corp.*, 352 N.C. 109, 115, 530 S.E.2d 549, 553 (2000). Appellate review of an opinion and award from the Industrial Commission is generally limited to determining "(1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are justified by the findings of fact." *Clark v. Wal-Mart*, 360 N.C. 41, 43, 619 S.E.2d 491, 492 (2005) (citing *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 186, 345 S.E.2d 374, 379 (1986)).

Davis v. Harrah's Cherokee Casino, 362 N.C. 133, 137-38, 655 S.E.2d 392, 394-95 (2008). We review alleged errors of law by the Full Commission *de novo*. *Hawley v. Wayne Dale Constr.*, 146 N.C. App. 423, 427, 552 S.E.2d 269, 272 (2001).

Burden of Proof

Plaintiff first argues that the Commission erred in placing the burden of proof on her after the entry of an order compelling payment of benefits which created a presumption of disability. We disagree.

Plaintiff's contentions on this issue are based on the *Parsons* presumption:

> A party seeking additional medical compensation pursuant to N.C. Gen. Stat. § 97-25 must establish that the treatment is "directly related" to the compensable injury. *See Pittman v. Thomas & Howard*, 122 N.C. App. 124, 130, 468 S.E.2d 283, 286, *disc. review denied*, 343 N.C. 513, 472 S.E.2d 18 (1996). Where a plaintiff's injury has been proven to be compensable, there is a presumption that the additional medical treatment is directly related to the compensable injury. *See Reinninger v. Prestige Fabricators, Inc.*, 136 N.C. App. 255, 259, 523 S.E.2d 720, 723 (1999); *Parsons v. Pantry, Inc.*, 126 N.C. App. 540, 542, 485 S.E.2d 867, 869 (1997). The employer may rebut the presumption with evidence that the medical treatment is not directly related to the compensable injury. *Reinninger*, 136 N.C. App. at 259, 523 S.E.2d at 723.

Perez v. Am. Airlines/AMR Corp., 174 N.C. App. 128, 135, 620 S.E.2d 288, 292 (2005), *disc. review allowed*, 360 N.C. 364, 630 S.E.2d 186, *disc. review improvidently allowed*, 360 N.C. 587, 634 S.E.2d 887 (2006).

We do not disagree with Plaintiff's citations of law or analysis regarding the *Parsons* presumption. However, our review of the Commission's opinion and award does not suggest any burden-shifting by the Commission from Defendants to Plaintiff. The opinion and award does not, in fact, explicitly mention either burden of proof or the *Parsons* presumption. However, both the evidence presented and the Commission's findings establish that Defendants "rebut[ted] the presumption with evidence that the medical treatment is not directly related to the compensable injury." *Perez*, 174 N.C. at 135, 620 S.E.2d at 292.

Plaintiff contended that her injuries from the 17 April 2007 fall were caused by or were an exacerbation of her compensable December 2006 injury. A careful reading of the evidence before the Commission, including the depositions of all three medical experts, reveals that the evidence was nearly undisputed on the causation issue, including the question of aggravation. Only Dr. Eglinton, the orthopedist who began treating Plaintiff in 2008, ventured the speculation that the treatment he provided Plaintiff might be connected to the compensable injury:

> It would seem at this point that any reasonable and prudent person would have to

> connect the two; that an injury occurred, the patient not having problems prior to that time; falling, injuring the knee, and then having pain after that; and then persisting in having pain after that; that obviously it would seem that the fall played at least some role in the development of or sustaining of that pain.

However, upon further questioning, Dr. Eglinton acknowledged that Dr. Saenger, the orthopedist who had treated Plaintiff before her 2006 fall and throughout the entire course of the case, was in the better position to understand Plaintiff's injuries.[3] Dr. Eglinton noted that Dr. Saenger had a long treatment relationship with Plaintiff, while Dr. Eglinton had only seen her very late in the course of her treatment:

> [Dr. Eglinton]: Yeah. I saw her at the end of all this, kind of after Thanksgiving dinner and all had been eaten.
>
> [Defense Counsel]: You just came for the dessert.
>
> [Dr. Eglinton]: I got the dessert.

[3]Dr. Saenger first treated Plaintiff in approximately 2001 or 2002. In 2002, Dr. Saenger performed an arthroscopic procedure on Plaintiff's left knee, which revealed torn cartilage in one of the meniscal cushions and evidence of degenerative arthritis. Also, prior to the 8 December 2006 fall, Dr. Saenger performed a total knee replacement for degenerative arthritis and two subsequent surgical procedures on Plaintiff's right knee.

The Commission made a finding to this effect,[4] noting that it found Dr. Saenger's testimony the most credible for this reason. *See Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683-84 (1982) (noting that "the Industrial Commission is the sole judge of the credibility of witnesses and the weight to be given to their testimony"). In sum, nothing in the Commission's opinion and award reflects an improper shifting of the burden of proof, and Defendants presented overwhelming evidence at the hearing to rebut any presumption that Plaintiff's later medical treatment and disability were related to the compensable injury. We overrule this argument.

Medical Testimony

Plaintiff next argues that the Commission erred in relying on medical testimony that was biased and speculative. We disagree.

"Although medical certainty is not required, an expert's 'speculation' is insufficient to establish causation" between a pre-existing condition and a work-related injury. *Holley v.*

[4] "22. Dr. Saenger is the only physician who treated [P]laintiff before the December 8, 2006 fall, between the December 8, 2006 and the April 17, 2007 falls, and thereafter. Accordingly, the Full Commission finds that Dr. Saenger is in the best position to assess the effect of the December 8, 2006 and April 17, 2007 falls on [P]laintiff's left knee and therefore, give greater weight to his testimony."

ACTS, Inc., 357 N.C. 228, 234, 581 S.E.2d 750, 754 (2003). Further, expert testimony is insufficient to prove causation when "there is additional evidence or testimony showing the expert's opinion to be a guess or mere speculation." *Id.* at 233, 581 S.E.2d at 753. In *Holley*, our Supreme Court held that a doctor's statement, "I don't know what caused [plaintiff's medical condition]," was incompetent to establish medical causation. *Id.* at 233, 581 S.E.2d at 754.

In the present case, the Commission made findings of fact relying on the testimony of Dr. Saenger who stated that Plaintiff's knee replacements were "inevitable," even without any intervening injuries, due to her pre-existing condition of degenerative osteoarthritis. When Dr. Saenger was asked when he thought the knee replacements would be needed, he replied: "I can't say when . . . I tell people I don't know." Plaintiff contends that Dr. Saenger's testimony was speculative, citing *Holley*, and thus, that the Commission erred in relying on it. We find the testimony in *Holley* easily distinguishable from that here and believe Plaintiff's argument otherwise wholly lacks merit.

Here, Dr. Saenger stated that pre-existing degenerative osteoarthritis caused Plaintiff's condition and that both of

Plaintiff's knees would inevitably need to be replaced. He further stated that he "really can't say when" knee replacement surgery will take place because, after weighing many factors, it is a patient's decision when to undergo the surgery. We find Plaintiff's reliance on *Holley* misplaced. While a doctor's lack of knowledge as to what caused a medical condition is insufficient to establish causation, a doctor's inability to determine exactly when a patient will require surgery has no bearing on proof of causation. Accordingly, this argument is overruled.

Commission's Conclusions on Causation

Lastly, Plaintiff argues that the Commission erred in finding and concluding that Plaintiff's post-April 2007 knee condition and subsequent surgeries were not causally related to the admittedly compensable injury of December 2006. We disagree.

Our careful reading of Plaintiff's brief on this issue shows that she has not directly challenged any specific findings of fact as unsupported by competent evidence. Instead, she contends that competent evidence would have supported a *different* finding; namely, that injuries from the compensable 2006 fall continue to contribute to her medical condition. As

noted above, the Commission's findings of fact "are conclusive on appeal when supported by competent evidence, *even though there be evidence that would support findings to the contrary*." *Davis*, 362 N.C. at 138, 655 S.E.2d at 394 (emphasis added). Here, Dr. Saenger released Plaintiff back to work on 27 February 2007 with a 0% impairment rating. Dr. Saenger also testified that Plaintiff's knee surgeries were "inevitable," even without either of her falls, due to her pre-existing condition of degenerative osteoarthritis. The Commission "is the sole judge of the credibility of the witnesses and the weight of the evidence." *Id.* As such, the Commission determined that Dr. Saenger, who had the longest treatment history with Plaintiff, was the most credible medical expert in this matter. We conclude that competent evidence supports the Commission's findings which in turn support its conclusions, and as a result, we overrule this argument. In addition, because Plaintiff's final argument, regarding denial of continuing benefits is premised upon the success of her contentions here, we overrule it as well. The opinion and award of the Commission is

AFFIRMED.

Judges STEELMAN and HUNTER, Jr., Robert N., concur.

Report per Rule 30(e).