NO. COA02-225

NORTH CAROLINA COURT OF APPEALS

Filed: 1 April 2003

JOSEPH GUNTER,
Employee,
Plaintiff-Appellant,

v.

North Carolina Industrial Commission
I.C. File No. 733184

CITY OF RALEIGH,
Self-Insured Employer,
Defendant-Appellee.

Appeal by plaintiff from opinion and award entered 22 October 2001 by the full Industrial Commission. Heard in the Court of Appeals 27 January 2003.

Patterson, Harkavy & Lawrence, L.L.P., by Martha A. Geer, and Webb & Webb, by William D. Webb, for plaintiff-appellant.

City Attorney Thomas A. McCormick, by Associate City Attorney Dorothy K. Leapley, for defendant-appellee.

EAGLES, Chief Judge.

Officer Joseph Gunter ("plaintiff") appeals from the opinion and award of the full Industrial Commission denying him compensation for his cervical injuries. Plaintiff argues four issues on appeal: (1) that the Commission failed to consider all of the expert testimony before it; (2) that the Commission's findings are not supported by competent evidence; (3) that the Commission applied an incorrect standard in its review of the medical evidence; and (4) that the

Commission incorrectly applied the law of causation to deny plaintiff workers' compensation benefits. After review of the record and briefs, we affirm.

The evidence tends to show the following. In May 1997, plaintiff was employed by the City of Raleigh ("defendant") as a police officer. On 17 May 1997, plaintiff was injured in an automobile accident while he was on active police duty. Plaintiff stated that he swerved and drove off the road in order to avoid a car approaching head-on in his lane of travel. His car jumped over a ditch and came to a stop as it wedged between two small trees. The trees were described by plaintiff's supervisor as "little bitty saplings." On the date of the accident, plaintiff complained of minor injuries to his mouth.

On the day after the accident, plaintiff began to experience sharp pain in his back, neck, shoulders, and lower back. Plaintiff saw his family physician, Dr. Wayne Harper, on 21 May 1997. Dr. Harper suspected a herniated disc in the lower back. Dr. Harper did not order a magnetic resonance imaging (MRI) of plaintiff's upper back or neck, although plaintiff had some pain in the upper right area of his back.

Plaintiff continued to experience pain despite treatment. Dr. Harper referred plaintiff to a chiropractor and a physical therapist. Plaintiff returned to work as a police officer on 28 July 1997. Plaintiff experienced pain in his lower back and upper neck while seated in his patrol car. Plaintiff was removed from work because of this pain from 8 August 1997 until 25 August 1997. Defendant stipulates that "plaintiff suffered a compensable injury to his low back during his employment" with defendant, as a result of the 17 May 1997 accident. Defendant paid plaintiff temporary total disability benefits for the period he was out of work in August 1997.

Plaintiff returned to work on 25 August 1997 and continued his duties until 20 April 1998. However, he continued to see Dr. Harper because of pain. In March 1998, plaintiff felt

tingling, trembling, and then numbness in his left hand and fingers. Plaintiff saw Dr. Harper again on 16 March 1998 and complained of neck pain and numbness in his left hand and fingertips. Dr. Harper diagnosed plaintiff with left cervical root impingement.

Plaintiff called Dr. Harper and complained of increased pain. On 3 April 1998, Dr. Harper saw plaintiff in his office due to the shoulder pain and numbness of plaintiff's fingers on his left hand. Dr. Harper concluded that plaintiff's injuries to his back and neck were the result of the motor vehicle accident that occurred on 17 May 1997.

Dr. Harper referred plaintiff to Dr. Rich. Dr. Rich performed an MRI on plaintiff. The MRI revealed a disc protrusion in plaintiff's cervical spine. Dr. Rich operated on plaintiff's disc on 1 May 1998. Dr. Harper testified that he believed plaintiff's cervical disc ruptured in March 1998 as a result of injury sustained in the 17 May 1997 accident. Dr. Rich felt that the ten-month time lapse between the accident and the plaintiff's onset of cervical pain reduced the probability that the accident caused plaintiff's cervical pain. However, Dr. Rich could not rule out the 17 May accident as the cause of plaintiff's cervical injuries.

After plaintiff's surgery, he was unable to perform his duties as a police officer, but continued working for Kroger Corporation. Plaintiff had been hired by Kroger in 1996 to coordinate security for several Kroger stores. Kroger terminated plaintiff in summer 1998.

During plaintiff's convalescence, his supervisor Sergeant Medlin visited him at home. Sgt. Medlin mentioned the possibility of light duty work. Plaintiff claims that Medlin never actually offered plaintiff a light duty job. However, Medlin stated that offering plaintiff a light duty job was the reason for his visit to plaintiff's home. Medlin testified that plaintiff refused light duty work because he felt his pain medication made it impossible to drive himself.

On 1 September 1998, plaintiff returned for a follow-up visit with Dr. Harper. Dr. Harper found that plaintiff's lower back problem had worsened when he stopped taking pain medication. Dr. Harper opined that plaintiff would require an additional four months out of work for further treatment. On 21 October 1998, plaintiff reported that he was suffering from intense pain on the right side of his back with pain radiating into his right leg. Dr. Rich performed an MRI on 14 October 1998 on plaintiff, but could not find an explanation of plaintiff's complaints of pain.

On 3 November 1998, Dr. Rich assigned plaintiff a 10% permanent partial disability rating for the cervical condition. Dr. Rich believed that plaintiff had reached maximum medical improvement. Dr. Harper continued to release plaintiff from work because of the pain. On 22 January 1999, Dr. Harper concluded that plaintiff was "still unable to return to work as a police officer."

Plaintiff was seen by Dr. Paul Suh of the North Carolina Spine Center on 23 September 1999 for an evaluation. Dr. Suh was unable to draw a conclusion as to whether the motor vehicle accident on 17 May 1998 was a cause of plaintiff's neck and back pain. However, Dr. Suh stated that he could not rule out the accident as a cause of plaintiff's neck symptoms.

The Deputy Commissioner, after hearing all of the evidence, found that plaintiff's lower back and neck/cervical injuries stemming from the motor vehicle accident on 17 May 1997 were compensable. The Deputy Commissioner awarded plaintiff continuing temporary total disability compensation for both injuries. Defendant appealed from the Deputy Commissioner's award to the full Commission. The full Commission concluded that plaintiff's evidence linking the cervical injury to the motor vehicle accident was not persuasive. As a result, the Commission found that plaintiff was not entitled to disability payments or medical treatments resulting from his cervical condition. From that opinion and award, plaintiff appeals.

Plaintiff contends that the Commission erred by failing to consider all of the medical evidence presented. Plaintiff argues that the Commission neglected to consider the deposition testimony of Dr. Harper. We disagree.

The full Commission specifically referred to the testimony of Drs. Suh and Rich on the causation of plaintiff's cervical injury in its findings of fact. Plaintiff contends that Dr. Harper's opinion that the motor vehicle accident caused plaintiff's cervical disk injuries was ignored by the full Commission. The full Commission did not specifically mention Dr. Harper's opinion on causation or state why it did not find Dr. Harper's opinion persuasive.

Plaintiff correctly asserts that the Industrial Commission must consider the evidence presented to it. "Before making findings of fact, the Industrial Commission must consider all of the evidence. The Industrial Commission may not discount or disregard any evidence, but may choose not to believe the evidence after considering it." *Weaver v. American National Can Corp.*, 123 N.C. App. 507, 510, 473 S.E.2d 10, 12 (1996); *see also Lineback v. Wake County Board of Commissioners*, 126 N.C. App. 678, 486 S.E.2d 252 (1997). The Industrial Commission "is the sole judge of the credibility of the witnesses and the weight to be given to their testimony, and may reject a witness' testimony entirely if warranted by disbelief of that witness." *Lineback*, 126 N.C. App. at 680, 486 S.E.2d at 254 (citing *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 425 S.E.2d 454 (1993)).

Plaintiff relies on several opinions, namely *Lineback* and *Weaver*, to support his argument. In *Lineback*, a doctor gave an expert opinion on causation. *See Lineback*, 126 N.C. App. 678, 486 S.E.2d 252. However, the Industrial Commission did not mention the doctor's testimony. This Court decided that the Commission had ignored the doctor's testimony and found error. Similarly, in *Weaver*, the Industrial Commission dismissed a plaintiff's testimony

about his injury as not being credible. *See Weaver*, 123 N.C. App. 507, 473 S.E.2d 10. However, the Commission did not mention the testimony by plaintiff's coworkers, which corroborated his account of the injury. This Court found that the coworkers' testimony was also "impermissibly disregarded."

Plaintiff's reliance on these cases is unfounded. Here, the facts are distinguishable from those in both *Lineback* and *Weaver*. The Industrial Commission did not specifically discount Dr. Harper's opinion on causation in its findings of fact. However, the Commission did mention Dr. Harper in nine of its sixteen findings of fact. It cannot be said that the Commission ignored Dr. Harper or the testimony he presented. On occasion, when the Industrial Commission does not mention a testifying expert in its findings of fact, we are "forced to conclude that the Commission ha[s] impermissibly disregarded the testimony . . . ." *Sheehan v. Perry M. Alexander Constr. Co.*, 150 N.C. App. 506, 515, 563 S.E.2d 300, 306 (2002). However, the instant case does not require this presumption. Instead, this case falls under the general rule, as stated by our Supreme Court:

> This Court in *Adams* made it clear that the Commission does not have to explain its findings of fact by attempting to distinguish which evidence or witnesses it finds credible. Requiring the Commission to explain its credibility determinations and allowing the Court of Appeals to review the Commission's explanation of those credibility determinations would be inconsistent with our legal system's tradition of not requiring the fact finder to explain why he or she believes one witness over another or believes one piece of evidence is more credible than another.

Deese v. Champion Int'l Corp., 352 N.C. 109, 116-17, 530 S.E.2d 549, 553 (2000); *see also Sheehan*, 150 N.C. App. 506, 563 S.E.2d 300. Just as the Industrial Commission is not required to make specific findings on the credibility of evidence, "the Commission is not required . . . to find facts as to all credible evidence. That requirement would place an unreasonable burden on

the Commission. Instead the Commission must find those facts which are necessary to support its conclusions of law." *Peagler v. Tyson Foods, Inc.*, 138 N.C. App. 593, 602, 532 S.E.2d 207, 213 (2000) (quoting *London v. Snak Time Catering, Inc.*, 136 N.C. App. 473, 476, 525 S.E.2d 203, 205 (2000)).

Under these general rules, the Commission was not required to state why it did not find Dr. Harper's opinion to be credible on the question of causation. Instead, the Commission only had to support its conclusions of law with its findings of fact. Here, the Commission concluded: "Plaintiff did not sustain an injury to his cervical spine as a result of plaintiff's work-related injury . . . therefore, plaintiff is not entitled to any disability benefits related to his cervical condition." In order to support this conclusion, the Commission adopted the following finding of fact:

> 14. The onset of plaintiff's cervical symptoms on March 16, 1998, is too remote from the date of the auto accident which occurred on May 17, 1997, to adequately establish causation to a reasonable degree of medical probability without competent expert medical testimony. None of the medical testimony provides sufficient evidence to establish that the May 17, 1997, accident caused plaintiff's cervical injury.

Here, the Commission's findings of fact regarding the causation of plaintiff's cervical injury fully support its conclusion that the cervical injury was not compensable. Accordingly, this assignment of error is overruled.

Plaintiff's second assignment of error is substantially related to his first argument. Plaintiff contends that no competent evidence supports the Commission's conclusion that the cervical injury was not caused by the motor vehicle accident. Plaintiff argues that in order to draw the conclusion that the accident was unrelated to the injury, the Commission improperly substituted its own medical judgment about causation. We disagree.

The review of an appeal from a decision of the Industrial Commission "is limited to a determination of whether the findings of fact are supported by any competent evidence and whether those findings support the legal conclusions. If the Commission's findings are supported by any competent evidence, they are conclusive on appeal even if there is evidence to support contrary findings." *Jarvis v. Food Lion, Inc.*, 134 N.C. App. 363, 367, 517 S.E.2d 388, 391 (1999)(citations omitted).

Despite the Commission's broad ability to determine its factual findings, "where 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 the injury." *Peagler v. Tyson Foods, Inc.*, 138 N.C. App. 593, 598, 532 S.E.2d 207, 210-11 (2000) (quoting *Porter v. Fieldcrest Cannon, Inc.*, 133 N.C. App. 23, 29, 514 S.E.2d 517, 522 (1999)). Since this case involves the complex medical question of the causation of plaintiff's cervical injury, only an expert can render an opinion regarding that causation. "However, when such expert opinion testimony is based merely upon speculation and conjecture, it can be of no more value than that of a layman's opinion. As such, it is not sufficiently reliable to qualify as competent evidence on issues of medical causation." *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 915 (2000).

Here, all three of the medical experts asked to testify in the case at some point in their testimony expressed uncertainty about the cause of plaintiff's cervical injury. Dr. Rich stated repeatedly that the time interval between the accident and the onset of plaintiff's symptoms did not indicate a causal relationship. Dr. Suh deferred to Dr. Harper and Dr. Rich, but stated that he was unable to determine what effect the motor vehicle accident had on plaintiff's injury, but thought it had some effect. Dr. Harper testified that he thought plaintiff's injury was caused by

the accident, but could not rule out other possible causes. None of the doctors ruled out the accident as a possible cause of plaintiff's cervical injuries, but none of the doctors ruled out other possible causes either. Other possible causes for plaintiff's injury were discussed, such as age, smoking, or gradual degeneration from another injury or another car accident. In these circumstances, the evidence regarding the causation of plaintiff's cervical injury amounts to little more than speculation. Since the medical evidence of causation here is not competent evidence, the Commission's finding of fact that no medical evidence supported plaintiff's claim was appropriate. Therefore, this assignment of error is overruled.

Plaintiff further assigns error to the standard used by the full Commission to evaluate the medical evidence. Plaintiff contends that the Commission reviewed the medical evidence on causation of plaintiff's cervical injury under an incorrect standard. We disagree.

Plaintiff contends that the Commission incorrectly applied the "reasonable standard of medical certainty" test to his medical evidence. Plaintiff correctly suggests that plaintiffs do not have to prove causation of their injuries by a "reasonable degree of medical certainty." Application of the certainty standard to medical evidence has been expressly disapproved by this Court. *See Kennedy v. Martin Marietta Chemicals*, 34 N.C. App. 177, 181, 237 S.E.2d 542, 545 (1977); *also see Peagler v. Tyson Foods, Inc.*, 138 N.C. App. 593, 532 S.E.2d 207 (2000).

However, the Commission's findings of fact, specifically # 13 and 14, do not mention "medical certainty" at any point. Instead, finding of fact # 13 states that "the greater weight of the evidence" fails to establish a causal link between plaintiff's cervical injury and the accident of 17 May 1997. Finding of fact# 14 states that the medical evidence did not "adequately establish causation to a reasonable degree of medical probability." Nowhere in the Commission's findings of fact or conclusions of law is the standard emphasized by plaintiff ever mentioned.

The only appearance of the medical certainty standard occurs in the deposition transcripts, where both plaintiff and defendant's counsel use the phrase "medical certainty" in questioning the medical experts. Plaintiff has failed to show that the incorrect "certainty" standard was applied by the Commission. Accordingly, this assignment of error is overruled.

In the final assignment of error, plaintiff contends that the Commission misapplied the law of causation. Plaintiff argues that the Commission erred by failing to consider the work-related motor vehicle accident as a possible contributing cause of plaintiff's injury.

It is well-established law that "[t]he work-related injury need not be the sole cause of the problems to render an injury compensable. If the work-related accident contributed in some reasonable degree to plaintiff's disability, [he] is entitled to compensation." *Hoyle v. Carolina Associated Mills*, 122 N.C. App. 462, 465-66, 470 S.E.2d 357, 359 (1996)(citations omitted). In this case, plaintiff argues that the accident 17 May 1997, may be compensable because it contributed to his disability, even if the accident was not the sole cause of the cervical injury. However, plaintiff did not raise this argument during the hearing before the Industrial Commission. Plaintiff argued that the accident was the sole cause of the cervical injury. Plaintiff did not offer evidence of a pre-existing injury or condition that was aggravated by the accident in May 1997. Plaintiff cannot argue two alternate theories on the appellate level unless both theories of causation were raised before the Industrial Commission. The Industrial Commission is required to examine only the issues that are actually presented. Therefore we overrule this assignment of error.

For the reasons stated above, we affirm.

Affirmed.

Judges McCULLOUGH and ELMORE concur.

Report per Rule 30(e).