NO. COA03-1078

NORTH CAROLINA COURT OF APPEALS

Filed: 3 August 2004

GEORGE C. BUTLER
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 746977

E.I. DUPONT DE NEMOURS & COMPANY,
Employer,

SELF-INSURED (KEMPER RISK MANAGEMENT SERVICES,
Servicing Agent),
Defendant.

Appeal by defendants from an opinion and award filed 13 June 2003 by the North Carolina Industrial Commission. Heard in the Court of Appeals 29 April 2004.

Scudder & Hedrick, by John A. Hedrick, for plaintiff.

Lewis & Roberts, P.L.L.C., by John D. Elvers and Jeffrey A. Misenheimer, for defendants.

LEVINSON, Judge.

Defendants appeal from an opinion and award of the North Carolina Industrial Commission finding that plaintiff (George C. Butler) suffered an employment-related injury by accident and awarding him compensation and medical benefits. We affirm.

Upon being fired by his employer ("Dupont") on 6 October 1997, plaintiff reported for the first time that he suffered a back injury three days earlier when he slipped while walking down a staircase at his job. After this incident, plaintiff was treated by numerous medical providers, including Dr. James Fulghum, Dr. Keith Kittleberger, Dr. Winston Lane, and Dr. Ira Hardy. Dr. Fulghum prescribed epidural steroid injections and performed back surgery on plaintiff; Dr. Kittleberger installed and adjusted a spinal cord stimulator for plaintiff; and Dr. Winston Lane treated plaintiff for an adjustment disorder and depression.

Drs. Fulghum, Kittleberger, and Lane provided evidence tending to show that the treatment they provided was causally related to the injury plaintiff sustained at work on 3 October 1997. Dr. Hardy testified for defendants and opined that plaintiff's back problems were not caused by his accident at work on 3 October 1997 and that he did not consider plaintiff a candidate for surgery.

In an opinion and award entered 26 January 2001, the Full Commission, with one commissioner dissenting, concluded that plaintiff was entitled to compensation for temporary total disability and medical compensation, including psychological treatment, related to his back injury. The Commission's 26 January 2001 opinion and award did not address the evidence offered by Dr. Hardy and stated that there was "no competent medical evidence produced by defendants . . . to refute the opinions of [plaintiff's doctors] concerning the necessity of the medical treatment rendered to plaintiff since the time of his injury, or the causal relationship between plaintiff's injury by accident and his disability." Following an appeal by defendants, this Court filed an unpublished opinion, *Butler v. E.I. Dupont de Nemours & Co.*, COA01-550, slip op. at 6 (filed 19 March 2002), vacating the Commission's 26 January 2001 opinion and award

and remanding with instructions that the Commission consider the deposition testimony of Dr. Ira Hardy relating to plaintiff's medical condition and the cause of his back injury.

On remand, the Full Commission filed an opinion and award, dated 13 June 2003, which expressly indicated that the Commission had considered the testimony of Dr. Hardy and again ruled that plaintiff was entitled to temporary total disability and medical compensation, including psychological treatment. From the Commission's 13 June 2003 opinion and award, defendants now appeal, contending (1) the Commission failed to consider the opinion of Dr. Ira Hardy on remand as instructed by this Court, and (2) the Commission erred by concluding that plaintiff sustained a compensable injury which resulted in disability and the need for medical treatment.

Our review of the Commission's opinion and award "is limited to a determination of (1) whether the Commission's findings of fact are supported by competent evidence in the record; and (2) whether the Commission's findings justify the conclusions of law." *Goff v. Foster Forbes Glass Div.*, 140 N.C. App. 130, 132-33, 535 S.E.2d 602, 604 (2000). "The facts found by the Commission are conclusive upon appeal to this Court when they are supported by competent evidence, even when there is evidence to support contrary findings." *Pittman v. International Paper Co*., 132 N.C. App. 151, 156, 510 S.E.2d 705, 709, *disc. review denied*, 350 N.C. 310, 534 S.E.2d 596, *aff'd*, 351 N.C. 42, 519 S.E.2d 524-25 (1999) (citation omitted). "[T]his Court is not at liberty to reweigh the evidence and to set aside the findings . . . simply because other . . . conclusions might have been reached." *Baker v. Sanford*, 120 N.C. App. 783, 787, 463 S.E.2d 559, 562 (1995) (citation and internal quotation marks omitted). "[T]he full Commission is the sole judge of the weight and credibility of the evidence. . . ." *Deese v. Champion Int'l Corp*., 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000) (citation omitted). "[T]he Commission does not have to explain its findings of fact by attempting to distinguish which evidence or witnesses it finds

credible." *Id*. However, this Court reviews the Commission's conclusions of law *de novo*. *Griggs v. E. Omni Constructors*, 158 N.C. App. 480, 483, 581 S.E.2d 138, 141 (2003).

We first address defendants' argument that the Commission failed to consider the evidence offered by Dr. Ira Hardy. This contention lacks merit.

The Commission must consider all of the competent evidence in the record and make definitive findings of fact before rendering its decision. *Harrell v. J.P. Stevens & Co., Inc.*, 45 N.C. App. 197, 205, 262 S.E.2d 830, 835 (1980). The Commission is required to indicate in its findings that it has considered all testimony bearing on the critical issues in a case, but it is not required to make exhaustive findings as to each statement made by the witnesses or make findings rejecting specific evidence. *Bryant v. Weyerhaeuser Co*., 130 N.C. App. 135, 139, 502 S.E.2d 58, 62 (1998). This Court has found that the Commission need only make findings sufficient to permit this Court to reasonably infer that the Commission considered all relevant testimony. *Pittman*, 132 N.C. App. at 156, 510 S.E.2d at 709. We have also held that, where the Commission's findings explicitly referred to evidence offered by specific witnesses, this Court could conclude that the Commission had properly considered the evidence presented by those witnesses, even though the Industrial Commission's opinion and award did not recount and disclaim the evidence given by those parties. *Smith v. Beasley Enters., Inc*., 148 N.C. App. 559, 562, 577 S.E.2d 902, 904 (2002).

In the instant case, the Commission made the following pertinent findings of fact:

> 34. Following the remand from the Court of Appeals, the Industrial Commission weighed, pondered, considered, and evaluated the medical evidence and testimony of Drs. Hardy, Koontz, Crisp, Harvell, Fulghum, Kittleberger and Lane.

> 35. The Commission gives more weight to the testimony and opinions of Drs. Kittleberger, Lane, and Fulghum than it does to those of Dr. Hardy.

These findings of fact are sufficient to permit this Court to infer that the Commission followed our instructions to consider the testimony of Dr. Hardy. As such, the Commission fully complied with this Court's instructions. Having done so, the Commission was under no obligation to find Dr. Hardy's testimony credible or persuasive. *See Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) ("[The Commission] may reject entirely the testimony of a witness if warranted by disbelief of the witness.") (citation omitted). This assignment of error is overruled.

We next address defendants' argument that the Commission erred by concluding that plaintiff sustained a compensable injury which resulted in disability and the need for medical treatment. The gravamen of this argument is that there was no competent record evidence from which the Commission could find and conclude that (1) plaintiff's accident at work caused plaintiff's back injury, (2) plaintiff is entitled to temporary total disability compensation, and (3) plaintiff's medical treatment was causally related to the incident at work.

With respect to defendants' argument that the Commission erred in finding that plaintiff's accident at work on 3 October 1997 caused his back injury, we conclude that this finding is supported by competent record evidence, though there is also evidence to the contrary.

For an injury to be compensable, it must be an "injury by accident arising out of and in the course of employment[.]" N.C.G.S. §97-2(6) (2003).

> With respect to back injuries . . . where injury to the back arises out of and in the course of the employment and is the direct result of a specific traumatic incident of the work assigned, "injury by accident" shall be construed to include any disabling physical

> injury to the back arising out of and causally related to such incident.

Id. "The phrase 'arising out of' refers to the requirement that there be some causal connection between the injury and claimant's employment." *Creel v. Town of Dover*, 126 N.C. App. 547, 552, 486 S.E.2d 478, 481 (1997) (citation omitted).

"The quantum and quality of the evidence required to establish *prima facie* the causal relationship will of course vary with the complexity of the injury itself." *Hodgin v. Hodgin*, 159 N.C. App. 635, 639, 583 S.E.2d 362, 365, *disc. review denied*, 357 N.C. 578, 589 S.E.2d 126 (2003) (citation omitted). "In cases involving 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." *Holley v. ACTS, Inc.*, 357 N.C. 228, 232, 581 S.E.2d 750, 753 (2003) (citation and internal quotation marks omitted). "However, when such expert opinion testimony is based merely upon speculation and conjecture, . . . it is not sufficiently reliable to qualify as competent evidence on issues of medical causation." *Id*. (citation and quotation marks omitted). "[T]he evidence must be such as to take the case out of the realm of conjecture and remote possibility, that is, there must be sufficient competent evidence tending to show a proximate causal relation." *Id*. (citation and internal quotation marks omitted). The opinion of a physician is not rendered incompetent merely because it is based wholly or in part on statements made to him by the patient in the course of treatment or examination. *Penland v. Bird Coal Co., Inc.*, 246 N.C. 26, 31, 97 S.E.2d 432, 436 (1957).

In the instant case, there is conflicting evidence as to whether the incident at work caused plaintiff's back injury. Dr. Hardy offered testimony from which it could be inferred that plaintiff's accident at work on 3 October 1997 did not cause his back injury, and that plaintiff did not require surgery for his back. However, Dr. Fulghum presented evidence tending to link the

back injury for which he treated plaintiff to the accident at work on 3 October 1997. Dr. Fulghum initially diagnosed plaintiff as having a herniated disc at the L3-L4 level, and treated plaintiff's back problems with epidural steroid injections. When this conservative approach was not successful, Dr. Fulghum recommended surgery. During surgery, Dr. Fulghum noted that the plaintiff had a deeply impacted L4 nerve root that was enclosed by bone and a disk bulge. Dr. Fulghum also noted that plaintiff had a congenital defect which combined with foraminal closure and disk bulging and spurring to produce "tremendous" L4 nerve root pressure in plaintiff's case. In Dr. Fulghum's opinion, all of these problems had to be addressed at the time of plaintiff's surgery. In deposition testimony presented to the Commission, Dr. Fulghum offered his opinion that the congenital problems with plaintiff's back were part of an "environment that . . . produced narrowing"; however, Dr. Fulghum continued to explain:

> th[e] presence of [pre-existing] narrowing set up the situation that when [plaintiff] turned and twisted . . . the nerve began to get swollen. It became impacted. The impaction never cleared and it continued to be under pain. It could not be fixed without going through all that narrowing to get the nerve decompressed. So that was the causative factor, was the twisting [from the slip at work]. . . .

Plaintiff testified that he twisted his back when he slipped on the stairs at Dupont on 3 October 1997, and Dr. Fulghum testified that in his opinion, to a reasonable degree of medical certainty, the problems plaintiff was experiencing with his back were consistent with the type of fall that plaintiff claimed to have had.

Defendants essentially argue that the Commission should have given more weight to the testimony of Dr. Hardy than to the testimony of Dr. Fulghum. However, the relative weight of the evidence is a question for the Commission. As the record contains competent evidence

causally linking plaintiff's back injury to his slip on the stairs at work, we will not disturb the Commission's finding of causation on appeal.

With respect to defendants' argument that the Commission erred by finding that plaintiff has been unable to earn wages in his former position with Dupont or in any other employment since 4 October 1997 and concluding that plaintiff is entitled to temporary total disability compensation, we conclude that there is competent record evidence to support the challenged finding of fact which in turn supports the challenged conclusion of law.

"The term 'disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C.G.S. §97-2(9) (2003). To establish disability, a claimant must prove:

> (1) [he] was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) [he] was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) [his] incapacity to earn was caused by [his] injury.

Hilliard v. Apex Cabinet Co., 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982).

In the instant case, Dr. Fulghum provided evidence that plaintiff's back injury was related to his accident at work. Dr. Fulghum then testified that, as of the time plaintiff reached maximum medical improvement, plaintiff "couldn't work in a job requiring more than 35 pounds of lifting. . . ." In Dr. Fulghum's opinion, to a reasonable degree of medical certainty, plaintiff "was unable to work and remains unable to work." This testimony provided competent evidence from which the Commission could find that plaintiff has been unable to earn wages as a result of the 3 October 1997 injury and conclude that plaintiff is entitled to temporary total disability.

With respect to defendants' argument that the Commission erred by awarding plaintiff medical compensation, including psychological treatment, we conclude that the Commission's award of medical compensation should be affirmed.

Defendants contend that the Commission's award of medical compensation for the medical treatment provided by Drs. Fulghum and Kittleberger, including, *inter alia*, back surgery and implantation and adjustment of a spinal cord stimulator in plaintiff's back, is not supported by competent record evidence. We disagree.

"Medical compensation shall be provided by the employer." N.C.G.S. §97-25 (2003). "The term 'medical compensation' means medical, surgical, hospital, nursing, and rehabilitative services, and medicines, sick travel, and other treatment, including medical and surgical supplies, as may reasonably be required to effect a cure or give relief and for such additional time as, in the judgment of the Commission, will tend to lessen the period of disability." N.C.G.S. §97-2(19) (2003). Logically implicit in the authority accorded the Commission to order medical treatment under G.S. §97-25 is the requirement that the treatment be directly related to the compensable injury. *See Pittman v. Thomas & Howard*, 122 N.C. App. 124, 130, 468 S.E.2d 283, 286 (1996).

In the instant case, Dr. Fulghum provided testimony tending to link plaintiff's accident at work to his treatment of plaintiff. Dr. Fulghum further testified that he first used epidural steroids and subsequently performed surgery on plaintiff's back to treat this injury, and that, when plaintiff continued to experience pain, he referred plaintiff to Dr. Keith Kittleberger. Dr. Kittleberger testified that an MRI of plaintiff's back showed that the back surgery had produced nerve root scarring, which often causes "a persistence of pain" that is "very difficult to treat." Dr. Kittleberger offered an opinion that, to a reasonable degree of medical certainty, plaintiff was a

"good candidate" for a spinal cord stimulator, and that it was reasonable to insert a spinal cord stimulator in plaintiffs' back and to subsequently make adjustments to the stimulator. As such, the Commission's award of medical compensation to plaintiff for the treatment provided by Drs. Fulghum and Kittleberger is supported by competent evidence in the record and must be affirmed.

Defendants also assert that the Commission erred by awarding plaintiff medical compensation for the medical treatment, in the form of psychological treatment, provided to plaintiff primarily by Dr. Lane. Defendants have abandoned this contention.

The Commission's Conclusion of Law No. 5 addresses whether defendants are required to pay for plaintiff's psychological treatment, and the Award's second paragraph directs defendants to "pay for all medical expenses incurred by the plaintiff as the result of his 3 October 1997 injury by accident, including expenses related [to] his psychological treatment." In Assignment of Error Nos. 2 and 3, defendants assign error to Conclusion of Law No. 5 and Award ¶ 2 on the grounds that they are "erroneous and are not supported by the record evidence in this case."

Rule 28(b)(6) of the Rules of Appellate Procedure requires that the appellant's brief include "[a]n argument, to contain the contentions of the appellant with respect to each question presented." Most importantly, Rule 28(b)(6) specifies: "Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned."

Neither of defendants' two questions presented address whether the Commission properly ordered payment for psychological treatment. Moreover, in the argument section of the brief, defendants have violated Rule 28(b)(6) by failing to specify the pertinent assignments of error

under each question presented. Nowhere in the text of the argument section is there any mention of Assignment of Error Nos. 2 and 3, Conclusion of Law No. 5, or Award ¶ 2.

In fact, in the argument section, there is only the briefest mention of psychological treatment:

> In spite of the fact of Dr. Fulghum's admission that plaintiff-appellee's residual impairment resulted from congenital and degenerative conditions and his admission that he was wrong in his diagnosis that there was a disc rupture at L3-L4, the Full Commission concluded as a matter of law that the plaintiff-appellee "sustained a spinal defect at the L3-L4 level which required surgical intervention and treatment for chronic pain . . . [which resulted in] psychological problems including anxiety, depression and an adjustment disorder." Such a conclusion was unsupported by the findings of fact and therefore error.
>
> Finally, the finding of fact that Dr. Lane "continued to treat plaintiff through 1998 and 1999 for depression and adjustment disorder related to his back pain, surgeries and other matters associated therewith" assumes that these conditions are related to a back injury causally related to plaintiff-appellee's employment with defendants-appellants.

(citation to record omitted). This text is, at best, simply a bare recitation of the issue contained in the assignment of error without presentation of any reason or argument as to why this Court should reverse the Commission.

Given the lack of argument and the failure of defendants to cite to any authority to support reversal, defendants have abandoned their challenge to the Commission's award of medical compensation for plaintiff's psychological treatment. *See Piedmont Triad Airport Auth. v. Urbine,* 354 N.C. 336, 343-44, 554 S.E.2d 331, 335 (2001) (deeming contentions abandoned where appellant made no further argument other than to baldly assert its contentions and cited no authority in support thereof), *cert. denied*, 535 U.S. 971, 152 L. Ed. 2d 381 (2002). The assignments of error are overruled.

Affirmed.

Judges McCULLOUGH and GEER concur.

Report per Rule 30(e).