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NO. COA09-1245

NORTH CAROLINA COURT OF APPEALS

Filed: 15 February 2011

LINDA CANTRELL,
Employee,
Plaintiff,

v.

DIEBOLD, INC.,
Employer,

BROADSPIRE,
Carrier,
Defendants.

North Carolina
Industrial Commission
I.C. No. 755904

Appeal by defendants from opinion and award entered 30 June 2009 by the North Carolina Industrial Commission. Heard in the Court of Appeals 9 March 2010.

Todd P. Oxner for plaintiff-appellee.

McAngus, Goudelock & Courie, P.L.L.C., by Trula R. Mitchell, for defendants-appellants.

GEER, Judge.

Defendants Diebold, Inc. and Broadspire appeal from the Industrial Commission's opinion and award awarding plaintiff Linda Cantrell, a Diebold employee, workers' compensation benefits. Defendants acknowledge that plaintiff suffered a compensable injury by accident that resulted in injuries to her left foot, right foot, and left hip. They contend, however, that the Commission erred in also determining that the accident caused an injury to her cervical

spine. Because we conclude that the expert medical testimony is sufficient to support the Commission's finding of causation as to the cervical spine injury, we affirm.

Facts

On the morning of 19 January 2007, plaintiff arrived at Diebold's facility and parked in the company parking lot. After plaintiff got out of her car, she slipped on ice and fell. According to plaintiff, she twisted an ankle, broke her foot in several places, and hit her head, neck, and shoulder on the bumper of her car.

Plaintiff reported her fall to Diebold's environmental health and safety manager. Plaintiff testified that she told the manager that she had hurt both feet (the left worse than the right), her neck, and her shoulder and that she had hit her head. Diebold's emergency medical response team member then prepared an incident report noting only that plaintiff had sustained a left foot injury. The team member ultimately testified, however, that plaintiff had told her not only that her foot was hurting, but that she had hit her shoulder and head as well. She focused on the foot because it was swelling. The team member took plaintiff to MedChoice for treatment.

Plaintiff testified that, at MedChoice, she gave a detailed list of her injuries. The records of Dr. Richard Lewis at MedChoice note that plaintiff reported falling on her left foot, hip, and back. His examination focused primarily on plaintiff's left foot — the doctor diagnosed a contusion to the foot, provided

plaintiff with an Ace bandage and crutches, and excused her from work for the week following 19 January 2007.

On 26 January 2007, plaintiff returned to MedChoice and reported that she had experienced pain in her right foot at the time of her fall, and that it had worsened in the days afterward. She also indicated that she was experiencing left hip and back pain. An examination revealed mild swelling in plaintiff's right foot, but X-rays of the right foot were negative. Plaintiff was diagnosed as having bilateral foot pain and given ACE bandages and special shoes. She was released to return to work with restrictions that she stay off her feet as much as possible, avoid squatting or climbing, and perform only occasional bending and overhead work.

Plaintiff returned to work for defendant employer on or about 30 January 2007. The next day, plaintiff presented at MedChoice complaining of pain and swelling in both feet – she explained that she was unable to elevate her feet at work. Plaintiff was diagnosed with left ankle and foot contusion with questionable ligament involvement. Plaintiff's left foot and ankle were placed in an air cast and her work restrictions were continued. In addition, an MRI was ordered, and plaintiff was referred to an orthopedic surgeon.

On 7 February 2007, plaintiff saw Dr. Gordon C. Kammire, an orthopedic surgeon. She completed a medical questionnaire noting that the examination was for her feet. Plaintiff denied that she was experiencing back problems. Dr. Kammire testified that it is

his practice only to treat workers' compensation-approved injuries during workers' compensation-authorized examinations and that if a patient complains about something other than an accepted injury, he does not treat that condition. Dr. Kammire diagnosed plaintiff as having a left midfoot sprain and gave her a fracture walker for ankle and foot support. He instructed plaintiff to remain on seated light duty work.

At some point, plaintiff also underwent an MRI of her left foot, which revealed nondisplaced fractures involving the second through fourth metatarsals with associated marrow edema. On 7 March 2007, Dr. Kammire continued plaintiff's work restrictions of seated light duty. Plaintiff continued to perform the work provided by defendant employer, although the parties dispute whether it was suitable.

Plaintiff filed a Form 18 on 3 April 2007 indicating an injury to both feet, her left knee, and toes on her left foot. On 1 May 2007, defendants filed a Form 60 admitting that a compensable injury occurred on 19 January 2007 — the Form 60 indicated that plaintiff had injured her right foot.

On 23 May 2007, Dr. Kammire released plaintiff to return to regular duty work with a 25% permanent partial disability rating to her left foot. Dr. Kammire clarified in his deposition that due to the severity of the injury to plaintiff's left foot, she would only be able to stand for an eight-hour day if she was able to wear proper footwear and take breaks as needed.

Subsequently, on 31 May 2007, plaintiff saw Dr. Thomas Long, a family medicine specialist. Plaintiff reported experiencing neck pain, among other complaints. At his deposition, Dr. Long testified that he recalled plaintiff relating her neck pain to a motor vehicle accident in 1993. Dr. Long expressed no opinion regarding the cause of plaintiff's neck pain.

On 26 July 2007, plaintiff presented to Dr. Mark Lyerly, at which time she reported that her 19 January 2007 fall had exacerbated her preexisting neck pain. On 1 August 2007, Dr. Lyerly performed a two-level cervical fusion. Plaintiff was removed from work on or before the date of the surgery. Following the surgery, Dr. Lyerly excused plaintiff from work at regular intervals through 1 March 2008. He ordered a functional capacity evaluation on 1 November 2007, but plaintiff could not afford the evaluation or a return appointment with Dr. Lyerly. Dr. Lyerly testified that if plaintiff did not require additional treatment, he would give her a rating of 15% permanent partial disability to her back/neck.

Plaintiff filed an amended Form 18 on 20 August 2007, stating that she had also injured her neck in the 19 January 2007 fall. At some point, the parties entered into a Form 21 agreement for plaintiff's right foot, although the rating used for the right foot was the one that had been given for her left foot.

On 7 September 2007, plaintiff filed a request that her claim be assigned for hearing. The matter was heard before the deputy commissioner on 14 March 2008. On 17 November 2008, the deputy

commissioner filed an opinion and award concluding plaintiff had sustained injuries to her feet, left hip, and cervical spine as a result of the 19 January 2007 fall.

Defendants appealed to the Full Commission from the opinion and award of the deputy commissioner. With respect to the claimed cervical spine injury, the Commission made the following findings after summarizing the medical evidence:

> 22. The parties have made several arguments and submitted contrasting testimony and evidence regarding Plaintiff's neck claim. Plaintiff contends that she consistently complained of injuring her neck in the January 19, 2007 slip and fall accident. Plaintiff further contends that during the period when she needed treatment for her neck and she pursued the Form 21 regarding her foot, she was experiencing ongoing neck pain. Defendants contend that Plaintiff never reported a neck injury until July 2007. After reviewing the evidence of record thoroughly and considering the credibility of Plaintiff and the various witnesses, the Full Commission finds that Plaintiff did injure her neck as alleged when she slipped and fell at work on January 19, 2007.
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> 23. Plaintiff's January 19, 2007 admittedly compensable injury by accident resulted in injuries to her left foot, right foot, left hip and her cervical spine.

The Commission further found that, as a result of the 19 January 2007 injury and causally related conditions, plaintiff has been unable to earn wages in any employment from 19 January to 29 January 2007 and from 1 August 2007 through the present. It determined that the Form 21 contained a clerical error and that it was actually approving payment for the rating for the left foot rather than the right foot.

The Commission concluded that plaintiff's admittedly compensable injury had resulted in injuries to her left foot, right foot, left hip, and cervical spine. It ruled that plaintiff was entitled to ongoing total disability compensation from 1 August 2007 through the present and continuing and that she was entitled to payment of all medical expenses related to the conditions caused by the compensable injury, including expenses for the treatment by Dr. Kammire and Dr. Lyerly. The Commission concluded that plaintiff had already been compensated for the 25% permanent partial disability rating to her left foot by virtue of the Form 21. The Commission ordered defendants to authorize and schedule the functional capacity evaluation requested by Dr. Lyerly, as well as a return appointment with Dr. Lyerly for evaluation of her current condition and review of the functional capacity evaluation results. Defendants timely appealed to this Court from the Commission's opinion and award.

Discussion

On appeal, defendants contend only that the Commission erred in concluding that plaintiff's 19 January 2007 accident caused her cervical condition. Appellate review of an award from the Commission is generally limited to two issues: whether the findings of fact are supported by competent evidence and whether the conclusions of law are supported by the findings of fact. *Gore v. Myrtle/Mueller*, 362 N.C. 27, 40, 653 S.E.2d 400, 409 (2007). "[A]ppellate courts may set aside a finding of fact only if it lacks evidentiary support. Although the Industrial Commission is

the sole judge of the credibility and the evidentiary weight to be given to witness testimony, the Commission's conclusions of law are fully reviewable." *Holley v. ACTS, Inc.*, 357 N.C. 228, 231, 581 S.E.2d 750, 752 (2003) (internal citations omitted).

In a claim for workers' compensation, the employee bears the burden of proving her claim is compensable. *Id.* Although an employment-related accident "'need not be the sole causative force to render an injury compensable,' the plaintiff must prove that the accident was a causal factor by a 'preponderance of the evidence[.]'" *Id.* at 231-32, 581 S.E.2d at 752 (internal citation omitted) (quoting *Hansel v. Sherman Textiles*, 304 N.C. 44, 52, 283 S.E.2d 101, 106 (1981); *Ballenger Through Husfelt v. ITT Grinnell Indus. Piping, Inc.*, 320 N.C. 155, 158, 357 S.E.2d 683, 685 (1987)). 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." *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980).

Defendants argue that the record does not contain expert testimony sufficient to establish causation of plaintiff's cervical spine injury. The parties agree that neither Dr. Kammire nor Dr. Long expressed an opinion as to the cause of plaintiff's cervical condition. As for Dr. Lyerly's testimony, defendants contend that he testified only that the compensable injury was a possible cause of the cervical condition and was, therefore, insufficient to support the Commission's finding under *Holley*, 357 N.C. at 233, 581

S.E.2d at 753 (holding that expert's opinion that particular event/incident "could" or "might" have produced result at issue is not sufficient to establish causation, even though it may be admissible). We disagree.

Based on our review of the record, Dr. Lyerly, who was tendered as an expert in the field of neurological surgery, provided competent evidence sufficient to support the Commission's finding of causation. According to his deposition, Dr. Lyerly first saw plaintiff on 26 July 2007. At that time, plaintiff reported neck pain, bilateral arm pain, and headaches for over three years, and she informed Dr. Lyerly that those pains were worse after the 19 January 2007 fall. Dr. Lyerly observed that plaintiff had discomfort when turning her head to the left, decreased range of motion in her neck, and weakness in extending her right arm. He also reviewed an MRI from 6 June 2007, which revealed disc degeneration at two levels, C3-4 and C6-7. Dr. Lyerly found that since she had had pain for years, "with these changes," she was ready to proceed with a surgical treatment for her condition, and on 1 August 2007, he performed a two-level fusion on plaintiff.

After the surgery, Dr. Lyerly saw plaintiff again on 4 September 2007 and 1 November 2007. On 7 September 2007, Dr. Lyerly sent plaintiff's counsel a letter stating: "'In reference to Ms. Linda Cantrell, she has at least three years' history of neck pain, but told us her pain's worsened after her 1/07 accident. If, indeed, this is a sequence . . . of events for her, then the

accident aggravated preexisting pains and, in my opinion, would be at least in part responsible for some of her pains, but not totally responsible."

During direct examination in Dr. Lyerly's deposition, plaintiff's counsel questioned Dr. Lyerly about whether plaintiff's account of her fall was a plausible cause of her recently increased back pain and whether, if she indeed had an increase in pain after the January 2007 accident, the increase in pain precipitated her need for surgery:

> Q Is the — if the Industrial Commission should find [plaintiff] credible that this occurred, is the history she's given you of, you know, sort of an injury of pain dating back into the '90s and been giving a problem the last couple of years, then she has this fall in January and it's gotten a lot worse since then — is that plausible, given your objective findings? Discounting everything she said, does that match up with what — you know, what you found objectively?
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> . . . .
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> A . . . [Y]es, her scenario, as you just described it, would be plausible.
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> Q Doctor, I think there's evidence or testimony in some of the other medical records of the initial motor vehicle accidents back in 1993 and 1994 or something. *And if she had been able to last 13 years without surgery, do you have an opinion as to whether or not this increase of pain, if it in fact occurred, precipitated the need for surgery sooner rather than go indefinitely, as it had the last 13 years?*
>
> A *Yes, I have an opinion.*
>
> Q *And that opinion is what, sir?*

> A *If, indeed, the exacerbation of pain in January '07 was linked to that traumatic event, then that event accelerated the need or caused the need for surgery*.

(Emphasis added.)

Later, on cross-examination, defense counsel inquired about the basis for Dr. Lyerly's assessments:

> Q . . . So you rely upon her presentation of the sequence of events, is that correct?
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> A Yes. That's all I have.
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> . . . .
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> Q If Ms. Cantrell's assertion that her pain was worsened after the 2007 accident at work was found not to be credible, would that change your opinion as to causation?
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> A Yes.
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> . . . .
>
> Q Okay. So, Doctor, you can't testify to a reasonable degree of medical certainty that the January 2007 accident aggravated Ms. Cantrell's preexisting condition?
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> A *I can only testify that if, indeed, the events were that she had pain that was greatly exacerbated with the fall, then I believe that fall triggered her need for surgery*. If there is demonstration to show significant discomfort on her part and it required chiropractic care and required physical therapy and you can't delineate a big change, that would change my opinion.

(Emphasis added.)

Finally, on redirect, plaintiff's counsel described plaintiff's account of the accident — getting out of the truck, slipping on ice, falling, hitting her head on an adjacent vehicle,

and landing on her left foot, hip, and back — and asked Dr. Lyerly: "[W]ould that type of an accident exacerbate a cervical condition?" Dr. Lyerly responded, "Yes, it may." Plaintiff's counsel followed up by asking, "[W]hy do you say 'may' rather than 'possible' or 'probable'?" Dr. Lyerly answered, "It doesn't necessarily have to cause an injury." Plaintiff's counsel then asked

> Q If Ms. Cantrell's testimony regarding this fall is corroborated by a coworker and by the doctor seen almost immediately thereafter [and] is deemed to be credible and her testimony of increased pain is, likewise, deemed to be credible, then does that support the position stated in your September 6th or 7th letter saying that, if it's all true, then, yeah, you think the need for surgery was precipitated by this fall?
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> . . . .
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> A If it is corroborated, yes.

Dr. Lyerly's testimony is similar to testimony found sufficient to show causation in *Adams v. Metals USA*, 168 N.C. App. 469, 476, 608 S.E.2d 357, 362 ("It is permissible, but not compulsory for a fact-finder to infer causation where a medical expert offers a qualified opinion as to causation, along with an accepted medical explanation as to how such a condition occurs, and where there is additional evidence tending to establish a causal nexus."), *aff'd per curiam*, 360 N.C. 54, 619 S.E.2d 495 (2005). In *Adams*, the medical expert could not testify to a reasonable degree of medical certainty that a workplace accident caused the plaintiff's herniated disk. *Id.* at 482, 608 S.E.2d at 365. The Court, however, emphasized that when asked if the Commission "were to find that [the plaintiff] fell off a ladder on October 1st, 2000

and landed on his back, do you have an opinion whether that incident caused his disk herniation at L5-S1[,]" the expert replied that "'if [the plaintiff] was asymptomatic before he fell off and then developed symptoms after he fell off, then I would certainly believe that the falling off the ladder was the cause of his difficulty.'" *Id.* at 479, 482, 608 S.E.2d at 364, 365.

The expert further testified that the development of the plaintiff's symptoms was consistent with the injury occurring from the fall and that, although the plaintiff's disk herniation could be caused by everyday activities, he had no indication that everyday activities caused the plaintiff's herniation. *Id.* at 482, 608 S.E.2d at 365. The Court concluded: "This testimony, combined with the additional evidence in the case, including the history and medical testimony, provided competent record evidence which supports the Commission's finding with respect to causation." *Id.*

Here, Dr. Lyerly testified that if plaintiff's account of her accident and increased neck pain were credible, then he believed the 19 January 2007 accident exacerbated plaintiff's cervical spine condition and precipitated the need for surgery. The Commission found that plaintiff was credible and that she "did injure her neck as alleged when she slipped and fell at work." In accordance with *Adams*, we hold that Dr. Lyerly's testimony, when combined with plaintiff's evidence — which was found to be credible — supported the Commission's finding as to causation. *See also Gore*, 362 N.C. at 49, 653 S.E.2d at 414 ("Further, the testimony of her physicians . . . that experiencing such an incident could in their opinions,

to a reasonable degree of medical certainty, exacerbate and render her preexisting degenerative back condition symptomatic was sufficient to support a finding of a causal relationship between the work-related incident and her disabling back pain."); *Brafford v. Brafford's Constr. Co.*, 125 N.C. App. 643, 647, 482 S.E.2d 34, 37 (1997) (overruling defendants' argument that expert's medical opinion amounted to nothing more than conjecture and speculation as to causal relationship between accident and injury because expert relied upon comparison between plaintiff's self-report of his level of activity before and after accident; concluding "it was permissible for the doctor to base his opinion on information provided by plaintiff"). We, therefore, affirm the opinion and award.

Affirmed.

Judges McGEE and ERVIN concur.

Report per Rule 30(e).