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NO. COA10-563

NORTH CAROLINA COURT OF APPEALS

Filed: 4 January 2011

JOSHUA ADAMS POWELL,
Employee-Plaintiff,

v.

N.C. Industrial Commission
I.C. No. 779960

CITY OF RALEIGH
Employer,

NORTH CAROLINA LEAGUE OF
MUNICIPALITIES,
Servicing Agent-Defendant.

Appeal by defendant from Opinion and Award entered 6 January 2010 by the North Carolina Industrial Commission. Heard in the Court of Appeals 13 October 2010.

Mast, Mast, Johnson, Wells & Trimyer P.A., by Charles D. Mast, for plaintiff-appellee.

Teague, Campbell, Dennis & Gorham, L.L.P., by Tamara Nance and Natalia Isenberg, for defendant-appellant.

HUNTER, Robert C., Judge.

The City of Raleigh ("defendant") appeals from an opinion and award of the North Carolina Industrial Commission (the "Commission") awarding Joshua Adams Powell ("plaintiff") temporary total disability compensation for time missed from work due to a motor vehicle accident occurring on 28 June 2007. After careful review, we affirm the Commission's opinion and award in part and remand in part.

Background

The undisputed findings of fact of the Commission establish that on the morning of 28 June 2007 plaintiff was stung by at least 30 yellow jackets while weed-eating around a manhole during the course and scope of his employment with defendant. Following the yellow jacket stings, plaintiff felt "lightheaded and dizzy, kind of out of it[,] " and sought medical attention from defendant's Occupational Health Nurse, Sandra Perry ("Ms. Perry"), at 10:35 a.m. Ms. Perry noted in her medical report that there were "bite marks" on both of plaintiff's arms and legs, as well as on his stomach and "bottom." Ms. Perry testified at the hearing in this matter and stated that plaintiff's blood pressure was "borderline high[,] " but his pulse and respirations were normal. Ms. Perry told plaintiff to go home if "lightheadedness persists."

After seeing Ms. Perry, plaintiff rode back to the shop with his co-worker, Eric Bolin ("Mr. Bolin"). When they arrived, their superintendent, Elvis Medlin ("Mr. Medlin"), instructed them to go to lunch and then to resume their morning work. After lunch, plaintiff told Mr. Bolin that he was not feeling well and could not go back to work. Plaintiff remained in the shop for the remainder of the afternoon. At approximately 2:15 p.m., plaintiff met with the Utilities Supervisor, Parrish Leonard ("Mr. Leonard"), to complete the necessary workers' compensation paperwork. As plaintiff was leaving the shop at around 2:30 p.m. to go home for the day, Mr. Medlin asked plaintiff how he was feeling and plaintiff responded that "everything was fine."

While driving home, plaintiff was involved in a motor vehicle accident when he went off the road and hit a tree. Plaintiff testified that he has no memory of the accident or the moments leading up to the accident. The investigating police officer reported that plaintiff did not apply the brakes at any time prior to hitting the tree. Plaintiff suffered an open dislocation fracture of the right ankle, which required surgery. Plaintiff was out of work from 28 June 2007 until 21 August 2007. Plaintiff returned to his regular duties with a permanent work restriction that allows him to sit as needed. Plaintiff may need further medical treatment for his ankle in the future, such as an arthrodesis or ankle fusion.

On 8 February 2008, plaintiff filed a Form 33 in which he claimed that the vehicular accident was a result of the compensable injury he suffered when he was attacked by the yellow jackets on 28 June 2007. On 3 March 2008, defendant filed a Form 33R in which it denied any causal relationship between the yellow jacket stings and the vehicular accident. Defendant refused to pay temporary total disability benefits for the time period during which plaintiff was out of work recovering from surgery. On 11 December 2008, the case was heard before Deputy Commissioner Myra Griffin. On 28 May 2009, Deputy Commissioner Griffin filed an Opinion and Award denying plaintiff's request for compensation. On 6 January 2010, the Full Commission reversed the Deputy Commissioner's Opinion and Award and ruled in favor of plaintiff, holding that the vehicular accident was causally related to the yellow jacket stings and requiring

defendant to pay temporary total disability benefits from 28 June 2007 through 21 August 2007. Defendant timely appealed to this Court.

Standard of Review

The standard of appellate review of an opinion and award of the Commission in a workers' compensation case is 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). As the "Commission is the sole judge of the credibility of the witnesses and the weight of the evidence[.]" *Hassell v. Onslow County Bd. of Educ.*, 362 N.C. 299, 305, 661 S.E.2d 709, 714 (2008), its findings are conclusive and binding on appeal "so long as there is some 'evidence of substance which directly or by reasonable inference tends to support the findings, . . . even though there is evidence that would have supported a finding to the contrary[.]'" *Shah v. Howard Johnson*, 140 N.C. App. 58, 61-62, 535 S.E.2d 577, 580 (2000) (quoting *Porterfield v. RPC Corp.*, 47 N.C. App. 140, 144, 266 S.E.2d 760, 762 (1980)), *disc. review denied*, 353 N.C. 381, 547 S.E.2d 17 (2001). The Commission's findings may be set aside on appeal 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). The Commission's conclusions of law are reviewed *de novo* on appeal. *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004).

Analysis

In the present case, the central issue to be determined is whether the Commission erred in finding a causal relationship between the yellow jacket stings and the motor vehicle accident. "To show that the prior compensable injury caused the subsequent injury, the 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." *Cooper v. Cooper Enters., Inc.*, 168 N.C. App. 562, 564, 608 S.E.2d 104, 106 (2005) (citation and quotation marks omitted).

I.

Defendant argues that "the record in this case is simply devoid of any competent evidence that would support the Commission's findings that Plaintiff 'developed a toxic reaction to the yellow jacket stings which caused him to lose his mental status, pass out, and run off the road[,] and that 'Plaintiff's automobile accident . . . flowed directly from and was causally related to the . . . yellow jacket stings he sustained at work.'"

Defendant takes issue with the medical expert testimony relied upon by the Commission. Dr. Vincent Firrincieli, who physically examined plaintiff, testified on behalf of plaintiff and Dr. Robert M. Ross, who performed a medical records review, testified on behalf of defendant. The following findings of fact by the Commission detail the testimony of these physicians:

15. On August 13, 2008, plaintiff presented to Dr. Vincent Firrincieli, a specialist in allergy and immunology. Dr. Firrincieli was of the opinion that plaintiff was

stung at least 30 times by yellow jackets on June 28, 2007 and passed out while driving home from work when he was involved in a motor vehicle accident. Dr. Firrincieli opined that the multiple yellow jacket stings resulted in plaintiff's dizziness and a likely decrease in his mental status, possibly loss of consciousness, and resulted in the motor vehicle accident. Dr. Firrincieli was of the opinion that plaintiff developed a toxic reaction to the yellow jacket stings which caused him to lose his mental status and run off the road and hit the tree. Dr. Firrincieli did not find plaintiff to be allergic to the venom of yellow jackets. Dr. Firrincieli also opined that being stung 30 times placed plaintiff at an increased risk of passing out or experiencing decreased mental status. He also felt that plaintiff's medication (atenenol) could have contributed to a decrease in blood pressure.

16. Dr. Firrincieli's opinion that plaintiff developed a toxic reaction to yellow jacket stings was based upon his assumption that plaintiff was stung at least 30 times. He was less certain of his opinion when asked to assume plaintiff was stung 15 times. During cross examination, defendant also questioned Dr. Firrincieli concerning his opinion that plaintiff experienced low blood pressure which contributed to his passing out and provided him with blood pressure readings indicating that plaintiff's blood pressure was borderline high after the stings and also after his accident. After seeing the two blood pressure readings Dr. Firrincieli was less certain of his opinion that plaintiff had a drop in blood pressure.
17. Defendant also challenged Dr. Firrincieli's opinion that plaintiff had a toxic reaction to the yellow jacket stings, suggesting that plaintiff did not have a sufficient number of stings to develop a toxic reaction, that he did not exhibit the classic symptoms and that his

opinions were not supported by medical literature. With respect to whether a person might pass out without a drop in blood pressure, Dr. Firrincieli testified that some people can have a vasovagal syncope episode and may pass out without a blood pressure drop. Based upon the greater weight of the evidence, the Full Commission finds as fact that the blood pressure reading plaintiff had after the accident does not establish what his reading was at the time of the accident and that the trauma from his injuries could have caused a rise in plaintiff's blood pressure. At the parties' request, after his deposition Dr. Firrincieli provided medical literature which tended to support his opinions.

18. Defendants retained Dr. Robert M. Ross, an expert in the field of allergy and immunology, to perform a medical records review in this claim for the purpose of providing expert opinion testimony. Dr. Ross also reviewed the deposition testimony of Dr. Firrincieli.
19. Dr. Ross was of the opinion that a toxic reaction may mimic an allergic reaction in some respects, but with a toxic reaction a person is not likely to feel a severe response immediately. The condition is likely to progress over a period of an hour or two and gradually gets worse. He opined that some people may have delayed toxic responses to fifteen to eighteen stings and may appear perfectly normal after three or four hours, but develop severe symptoms later. Dr. Ross has never treated or researched toxic responses to bee stings. He reviewed some articles for the purpose of offering opinions in this case. Dr. Ross found three articles that indicated it took 50 or more honeybee stings to develop a systemic toxic response. Based upon his reading of the literature, he opined that, more likely than not, plaintiff did not pass out due to a toxic reaction, causing his motor vehicle accident. The main reason Dr. Ross does not attribute the automobile accident to

plaintiff's yellow jacket stings is due to the number of times plaintiff was stung. He felt that a systemic response to 15-30 bee stings would be rare, but admitted it is possible to have a toxic reaction with below 50 stings. He agreed that lightheadedness can be a toxic systemic reaction. His opinions appeared to be based on articles dealing with honeybees.

. . . .

22. After careful review of all the evidence presented, the Full Commission gives greater weight to the opinion testimony of Dr. Firrincieli and finds as fact that plaintiff was stung at least 30 times by yellow jackets on June 28, 2007 and as a result, developed a toxic reaction to the yellow jacket stings which caused him to lose his mental status, pass out and run off the road and hit a tree.
23. Plaintiff's automobile accident, which occurred while he was on his way home from work approximately five hours after being stung, flowed directly from and was causally related to the 30 or more yellow jacket stings that he sustained at work. The opinion of Dr. Ross that plaintiff's passing out which led to the motor vehicle accident was more likely caused by a vasovagal response to all the events of the day, including the yellow jacket stings, would also satisfy plaintiff's burden of showing a causal relationship between the yellow jacket stings and the subsequent motor vehicle accident.

In sum, Dr. Firrincieli testified that it was his belief that plaintiff suffered a toxic reaction to the yellow jacket stings which caused him to pass out, but it was possible that plaintiff had a vasovagal syncope episode. Dr. Ross testified that he did not believe that a toxic reaction occurred, but that plaintiff suffered from a vasovagal syncope episode brought on, in part, by

the stings. While the Commission relied on Dr. Firrincieli's testimony and determined that the greater weight of the evidence established that plaintiff had a toxic reaction to the yellow jacket stings, the Commission acknowledged that Dr. Ross' testimony also supported a decision in plaintiff's favor.

Defendant claims that "[t]o the extent that the Full Commission in this case at bar found Dr. Firrincieli's testimony competent on the issue of causation, it erred in ignoring the import of his response on cross-examination." Defendant overlooks the Commission's detailed findings of fact concerning Dr. Firrincieli's testimony during cross-examination. As noted in finding of fact 16, Dr. Firrincieli stated that he was less certain that a drop in blood pressure occurred when he was told that plaintiff's blood pressure was slightly elevated when he went to see Ms. Perry as well as after the vehicular accident. However, the Commission determined in finding of fact 17 that plaintiff's two elevated blood pressure readings do not establish what his blood pressure was at the time of the vehicular accident. Moreover, Dr. Firrincieli testified that a person could pass out without having a drop in blood pressure.

Defendant accurately asserts that Dr. Firrincieli expressed hesitation regarding the toxicity of 15 yellow jacket stings on cross-examination. Nevertheless, as the Commission found, plaintiff was stung at least 30 times and Dr. Firrincieli provided medical literature after his deposition to support his opinion that 30 yellow jacket stings could cause a toxic reaction. Despite Dr.

Firrincieli's vacillations during cross-examination, upon re-direct examination the doctor testified:

Well, as I've already stated, . . . dizziness and nausea are very common side effects of toxic insect sting reactions. Thirty (30) stings are significant, and if he had those symptoms that day and he got stung by those number of insects within that period of time, I think it's more likely than not that the reaction to the insect stings caused him to lose his mental status and run off the road and hit the tree and get into the accident.

Defendant relies on two cases, *Cooper* and *Clark v. Sanger Clinic*, 175 N.C. App. 76, 623 S.E.2d 293 (2005), to support its assertion that Dr. Firrincieli's testimony was purely speculative and insufficient to establish a causal link between the stings and the syncope. Defendant's reliance on these cases is misplaced. In *Cooper*, this Court held that competent evidence existed to support the Commission's finding of fact that the plaintiff's car accident was not the result of a compensable arm injury he suffered approximately five years prior. 168 N.C. App. at 563-666, 608 S.E.2d at 105-06. There, "[t]he only relevant medical evidence produced was limited testimony by [plaintiff's treating physician], who characterized his testimony as 'just conjecture' by someone who is 'no expert in the[e] area' of driving with impaired extremities." *Id.* at 565, 608 S.E.2d at 106. Moreover, the plaintiff's only testimony established that his accident likely resulted from him "jerking his car to the left upon hitting gravel in the road." *Id.* at 566, 608 S.E.2d at 107.

In *Clark*, this Court held that there was competent evidence to support the Commission's finding of fact that the plaintiff's

dental problems were not causally related to a compensable back injury. 175 N.C. App. at 81-82, 623 S.E.2d at 297-98. The plaintiff claimed that the medications she was taking for her back injury caused dry mouth, which led to her dental problems. *Id.* at 81, 623 S.E.2d at 297. The plaintiff initiated the action in the Commission in which she related the back injury to her dental problems eight years after the back injury. *Id.* at 77, 623 S.E.2d at 295. The Court reasoned that not only were there other potential causes of her dental problems, there was "no testimony as to what *actually* caused plaintiff's dental condition. While [one of plaintiff's physicians] may have testified with certainty that many of plaintiff's medications have 'dry mouth' syndrome as a side effect, there [wa]s no testimony that plaintiff's dental condition was caused by 'dry mouth' syndrome." *Id.* at 81, 623 S.E.2d at 297-98.

In both *Clark* and *Cooper*, the connection between the compensable injury and the subsequent injury was tenuous and there was no competent medical testimony to relate the two injuries. Moreover, in each case, the plaintiff's subsequent injury occurred years after the original injury. In the present case, plaintiff's vehicular accident occurred approximately five hours after the yellow jacket stings; plaintiff complained of feeling lightheaded after being stung; plaintiff could not work the rest of the day; and two physicians testified that plaintiff likely passed out, which was supported by the police department's accident report in

which the reporting officer concluded that plaintiff had not applied the brakes at all.

Additionally, Dr. Ross' testimony supports plaintiff's claims. While defendant attempts to cast doubt on its own expert's opinion, the Commission found as fact, "[t]he opinion of Dr. Ross that plaintiff's passing out which led to the motor vehicle accident was more likely caused by a vasovagal response to all the events of the day, including the yellow jacket stings, would also satisfy plaintiff's burden of showing a causal relationship between the yellow jacket stings and the subsequent motor vehicle accident." This finding of fact is supported by Dr. Ross' testimony in which he stated:

You know, the most likely reason why he passed out, you know I really - I really don't know. I would say that the most likely thing is that because of all of these reactions . . . he could have become, you know, upset and fearful and started to worry about this whole event, and he - more likely that he had a vasovagal reaction in which he suddenly dropped his blood pressure and lost consciousness and ran off the road.

Dr. Ross further stated that the yellow jacket stings placed plaintiff at an increased risk of syncope.

The evidence of record in this case establishes that the most likely cause of plaintiff's accident was sudden syncope. Whether the syncope was brought about by a toxic reaction or a vasovagal response is debatable. Nevertheless, there was competent evidence to support the Commission's findings of fact, and these findings in turn support the Commission's conclusions of law.

Defendant argues that even if this Court finds that there was competent evidence to support the Commission's findings of fact, we should still remand this case back to the Commission for entry of a finding of fact that plaintiff's shoulder injury is unrelated to the 28 June 2007 incident. The Commission found as fact:

Plaintiff will likely require cortisone injections to his right shoulder indefinitely Based upon the evidence of record, the Full Commission is unable to determine whether plaintiff's shoulder complaints are related to his vehicular accident. Plaintiff's treating physician recommends an MR/arthrogram for further evaluation of the right shoulder problem. The Full Commission is leaving this issue open for subsequent determination.

The Commission then concluded as a matter of law: "Plaintiff failed to prove that his shoulder condition is causally related to his compensable injury." We agree with defendant that the Commission's finding of fact is inconsistent with its conclusion of law; however, we are unable to ascertain the Commission's intent. Accordingly, we remand to the Commission as to this issue.

III.

Finally, plaintiff requests that this Court award reasonable attorney's fees in connection with this appeal.

If the Industrial Commission at a hearing on review or any court before which any proceedings are brought on appeal under this Article, shall find that such hearing or proceedings were brought by the insurer and the Commission or court by its decision orders the insurer to make, or to continue payments of benefits, including compensation for medical expenses, to the injured employee, the Commission or court may further order that the cost to the injured employee of such hearing or proceedings including therein reasonable

attorney's fee to be determined by the Commission shall be paid by the insurer as a part of the bill of costs.

N.C. Gen. Stat. § 97-88 (2009).

Under [this statute], the Commission or a reviewing court may award costs, including attorney's fees, to an injured employee if (1) the insurer has appealed a decision to the full Commission or to any court, and (2) on appeal, the Commission or court has ordered the insurer to make, or continue making, payments of benefits to the employee.

Brooks v. Capstar Corp., 168 N.C. App. 23, 30, 606 S.E.2d 696, 701 (2005) (citation and quotation marks omitted). Here, the insurer appealed to this Court the Commission's decision ordering the insurer to make payments to benefit the employee. We have affirmed the Commission's opinion and award as to plaintiff's compensable ankle injury. The requirements of N.C. Gen. Stat. § 97-88 are therefore satisfied.

We point out that plaintiff received an award of \$370.44 per week from 29 June 2007 through 20 August 2007 (or approximately \$2,593.00). Plaintiff's regular attorney's fees would, therefore, be nominal in this case. Consequently, denying reasonable attorney's fees in a situation where the monetary award is quite small would serve as a deterrent for attorneys whose clients wish to appeal from the Commission's opinion and award, which would be detrimental to the employee. Accordingly, we grant plaintiff's request for attorney's fees and remand to the Commission for a determination of the reasonable attorney's fees to be awarded.

Conclusion

We hold that the Commission's findings of fact support its conclusion of law that defendant's ankle injury is compensable. However, the Commission's finding of fact and conclusion of law regarding the shoulder injury are inconsistent. Consequently, we remand to the Commission as to this issue. We further remand this case to the Commission with instruction that the Commission determine the amount of reasonable attorney's fees to be paid on behalf of plaintiff.

Affirmed in part and Remanded.

Judges CALABRIA and GEER concur.

Report per Rule 30(e).