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NO. COA10-607

NORTH CAROLINA COURT OF APPEALS

Filed: 5 April 2011

BOBBY STEELE,  
Plaintiff-employee,

v.

North Carolina  
Industrial Commission  
I.C. No. 786901

SURRY COUNTY, SELF-INSURED,  
Defendant-employer,

and

COMPENSATION CLAIMS SOLUTIONS,  
Third Party Administrator.

Appeal by defendants from Opinion and Award entered 25 February 2010 by the North Carolina Industrial Commission. Heard in the Court of Appeals 17 November 2010.

*Law Offices of Timothy D. Welborn, P.A., by Timothy D. Welborn, for plaintiff-appellee.*

*Smith Law Firm, PC, by John Brem Smith; and Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by M. Duane Jones, for defendant-appellants.*

STEELMAN, Judge.

Where competent evidence in the record supported the Commission's finding that plaintiff's heat-related illness on 9 August 2007 was a significant contributing factor to plaintiff's seizures, the Commission did not err in awarding plaintiff temporary total disability compensation.

I. Factual and Procedural Background

Bobby Steele (plaintiff) was employed by Surry County as a heavy equipment operator at the Surry County Public Works landfill. Plaintiff operated a 973 track loader to pack and push dirt over household garbage, and to make roads for the trucks to enter the pit when dumping garbage. The landfill was the size of a football field and shaped like a bowl. Plaintiff spent most of his time at the bottom of the pit where there was nothing to circulate the air. Plaintiff frequently had to exit the cab to remove debris from the tracks of the loader.

On 9 August 2007, plaintiff was attempting to remove a piece of metal cable from the loader's track for approximately thirty minutes. Plaintiff was successful and dragged the metal cable forty to fifty feet to the edge of the landfill. It weighed ten to fifteen pounds. The temperature that day was 98 degrees with 60 percent humidity. Upon re-entering the cab, plaintiff told his co-worker, Joseph Roger O'Neal (O'Neal), that he was not feeling well. Plaintiff stated that "he was hot and he was going to go get a drink and cool off." This occurred at approximately 3:00 p.m. When plaintiff returned, O'Neal observed plaintiff sitting down with perspiration soaking a "good portion" of his shirt. At 3:40 p.m., plaintiff called him over to his vehicle. Plaintiff opened the door, stepped out of the loader, and fell face down upon the ground. He appeared to be lifeless. O'Neal radioed for help, rolled plaintiff over, unzipped his pants, pulled his shirt up, and sponged him with water. O'Neal called plaintiff's name and smacked

him in the jaw. Plaintiff was "really red and dry like he had sweated out . . . ." Plaintiff subsequently had a seizure.

Surry County Emergency Services initially transported plaintiff to Northern Hospital of Surry County. The "prehospital patient care report" stated that plaintiff was having seizures due to a heat-related illness. Several hours later, plaintiff was transferred to Forsyth Medical Center for treatment of his continued seizures. Plaintiff remained in Forsyth Medical Center for nine days. When plaintiff was released from the hospital, he continued to have seizures up to two to three times a day. Plaintiff subsequently attempted to return to work, but was unable to do so.

On 26 September 2007, plaintiff filed a Form 18 alleging that he had a "[h]eat stroke due to excessive exposure to excessive heat while performing [his] employment." Surry County filed a Form 61 denying plaintiff's workers' compensation claim. The case was heard by the Full Commission on 18 August 2009. The main issue before the Commission was whether the heat-related event caused plaintiff's seizures.

On 25 February 2010, the Commission entered its Opinion and Award, concluding that plaintiff sustained an injury by accident arising out of and in the course of his employment with Surry County. Plaintiff was awarded temporary total disability compensation in the amount of \$375.20 per week from 10 August 2007 until he returned to work. Defendants were also ordered to pay for all of plaintiff's related medical expenses. Plaintiff's counsel

was awarded attorney's fees in the amount of twenty-five percent of the compensation awarded, with this fee being deducted from the amounts paid to plaintiff.

Defendants appeal.

## II. Standard of Review

The applicable standard of appellate review in workers' compensation cases is well established. 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)).

*Hassell v. Onslow Cty. Bd. of Educ.*, 362 N.C. 299, 305, 661 S.E.2d 709, 714 (2008). The failure to assign error to the Commission's findings of fact renders them binding on appeal. *Cornell v. Western & S. Life Ins. Co.*, 162 N.C. App. 106, 110-11, 590 S.E.2d 294, 297 (2004).

The Commission is the sole judge of the credibility of the witnesses and the weight to be given to the evidence before it. *Hassell*, 362 N.C. at 305, 661 S.E.2d at 714. Thus, North Carolina appellate courts do not "have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Id.* (quotation omitted). We review the Commission's conclusions of law *de novo*. *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004).

## III. Compensable Injury

In their first argument, defendants contend that the Commission erred in concluding that plaintiff sustained a compensable injury by accident on 9 August 2007. We disagree.

It is well-established that "[i]n a workers' compensation claim, the employee has the burden of proving that his claim is compensable." *Holley v. ACTS, Inc.*, 357 N.C. 228, 231, 581 S.E.2d 750, 752 (2003) (quotation omitted). "An injury is compensable as employment-related if any reasonable relationship to employment exists. Although the 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 quotations omitted); *see also Perry v. Bakeries Co.*, 262 N.C. 272, 274, 136 S.E.2d 643, 645 (1964) ("To be compensable an injury must spring from the employment or have its origin therein. An injury arises out of the employment when it is a natural and probable consequence or incident of the employment and a natural result of one of its risks, so that there is some causal relation between the injury and the performance of some service of the employment." (citations omitted)).

When a case 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." *Holley*, 357 N.C. at 232, 581 S.E.2d at 753 (quotation omitted). If an expert's medical opinion is based upon mere

conjecture or speculation, it does not qualify as competent evidence on the issue of causation. *Id.*

On appeal, defendants contend that plaintiff failed to present competent evidence to show that: (1) plaintiff suffered from a "heat-related incident" on 9 August 2007; and (2) plaintiff's seizure activity was causally related to the 9 August 2007 work incident.

A. Heat-Related Incident

The Commission made the following findings of fact, which are challenged by defendants as not being supported by the evidence:

6. On August 9, 2007, plaintiff suffered a heat-related incident and a seizure at work that he contends were caused by the weather conditions on that date. . . .

. . . .

10. Plaintiff was then transported by the emergency personnel to Northern Surry County Hospital. Records of the first responders reflect that plaintiff had sustained a heat-related illness. Records from the hospital reflect that plaintiff had sustained a heat stroke.

Defendants contend that "[w]hile the medical evidence suggests that Plaintiff suffered a seizure at work on 9 August 2007, the competent medical evidence does not support a finding that Plaintiff sustained a heat-related incident." Contrary to defendants' contention, the following evidence was presented to the Commission: The Commission heard eye-witness testimony of the events leading up to plaintiff's collapse and seizure. O'Neal testified that plaintiff spent approximately 30 minutes attempting to remove a metal cable from the track. It was 98 degrees outside

and the humidity was 60 percent. When plaintiff was finished, he told O'Neal that he was not feeling well. Plaintiff stated that "he was hot and he was going to go get a drink and cool off." When plaintiff returned, O'Neal observed him sitting down with perspiration soaking a "good portion" of his shirt. At 3:40 p.m., plaintiff asked O'Neal to "come over here for a minute." Plaintiff opened the door and collapsed. O'Neal testified that plaintiff was "really red and dry like he had sweated out . . . ." O'Neal sponged plaintiff with water and called for help.

Medical records from the Surry County Emergency Services stated that the "EMS crew dispatched to the Mt. Airy Landfill in [reference] to possible heat exhaustion." The report listed plaintiff's condition as "SEIZURES (HEAT RELATED ILLNESS)." The report also documents the EMS crew's assessment of plaintiff. At 4:11 p.m., plaintiff's skin was "Normal/Pink" and his temperature was listed as "Hot." The Emergency Physician Record indicated that once at the hospital, plaintiff was diagnosed with heat stroke by Dr. Jason Edsall. Medical records from when plaintiff was transferred from Northern Hospital to Forsyth Medical Center state the following:

EMS brought PT to the ED earlier today. PT was at work on a dozer in the heat. Friends advised that he was sweating and was pale today and they states [sic] that he said he didn't feel well all day. They advised that when he was getting off the dozer that he passed out and fell to the ground. EMS on scene saying that PT's skin was hot and drying. Then having seizure activity and was given Valium. PT was taken to NHSCED where he had another seizure that wasn't broken with

Valium and Dilantin. PT then was RSI'D. Temp was 100. . . .

On 7 September 2007, plaintiff presented to Dr. Kevin Brown (Dr. Brown) at Forsyth Comprehensive Neurology because of his continued seizure activity. Dr. Brown's medical report notes that plaintiff presented with a "generalized seizure secondary to a heat stroke." In a letter to the workers' compensation carrier, Dr. Brown stated the following: "Regarding future heat exposure, Mr. Steele's current heat related illness suggest[s] some degree of heat intolerance when exposed to extreme temperatures. . . . It is recommended that he avoid exposure to extreme temperatures."

In addition, Dr. Brandon Chandos (Dr. Chandos) opined that plaintiff had a heat-related illness, *i.e.*, a heat stroke or heat exhaustion, on 9 August 2007. Dr. Chandos further opined that working outdoors for thirty minutes doing strenuous activity with an outside temperature of 98 degrees with 60 percent humidity would place plaintiff at a higher risk of having a heat-related event than someone not in such an environment.

We hold that competent evidence supports the Commission's findings that plaintiff suffered a heat-related illness on 9 August 2007. This argument is without merit.

#### B. Causation

Defendants also contend that plaintiff failed to show that his seizures were causally related to the heat-related illness on 9 August 2007. We disagree.

Three physicians gave deposition testimony on this question, Dr. Chandos, Dr. Brown, and Dr. Gwendolyn Bolling (Dr. Bolling).



The opinions of the experts are in direct conflict. Dr. Chandos opined that plaintiff experienced heat exhaustion or a heat stroke, which was a significant contributing factor to his seizures. Dr. Brown and Dr. Bolling disagreed with this assessment. The Commission made the following findings of fact regarding each physician's expert testimony:

18. . . . Dr. Chandos . . . opined that plaintiff's work conditions on August 9, 2007 exposed him to a greater risk of experiencing a heat-related event, and that the heat-related event plaintiff experienced on August 9, 2007 was a significant contributing factor in the development and continuation of plaintiff's headaches and seizures.

19. According to Dr. Chandos, if someone were placed in an environment with elevated temperatures and high humidity such that their core body temperature rose, that could be a trigger for seizure activity, and prolonged seizure activity is an insult to the brain which could cause additional seizure activity. Based on Dr. Chandos' training and clinical observations of plaintiff, he diagnosed him with seizure activity which he referred to as "cortical irritability" or "abnormal electrical or metabolic activity that's causing symptoms." Dr. Chandos identified no other possible cause of the seizure activity, including anything plaintiff "was doing on purpose or even unconsciously."

19. [sic] Dr. Kevin Brown, who is also a neurologist, also testified in this matter. Initially, Dr. Brown was of the opinion that plaintiff sustained a heat stroke that led to a seizure. However, at the time of his deposition, Dr. Brown opined that the condition for which he treated plaintiff is non-epileptic, paroxysmal seizures that are not causally related to his heat exposure on August 9, 2007. Dr. Brown felt that there was most likely a psychiatric reason for plaintiff's seizures. He would not give an opinion on whether the conditions under which plaintiff worked on August 9, 2007 exposed him

to a greater risk of overheating or developing heat exhaustion, or whether these conditions reasonably contributed to the development of plaintiff's seizure activity.

20. Dr. Gwendolyn Wigand Bolling, who is board-certified in internal medicine, is medical director of the Surry County Health and Nutrition Center and performed a records review in this matter at the request of defendant-employer. Based upon that records review, Dr. Bolling opined that plaintiff's fall on August 9, 2007 and subsequent condition had nothing to do with heat exposure. Dr. Bolling occasionally provides general care to seizure patients who are being treated by neurologists, but does not keep up with current research in the areas of epilepsy and seizure disorders.

. . . .

24. The Full Commission gives greater weight to the testimony and opinions of Dr. Chandos as opposed to those of Dr. Brown, who did not have the benefit of an examination of plaintiff contemporaneous to the event, and also those of Dr. Bolling, who did not physically examine plaintiff. Dr. Chandos is board-certified in neurology and has additional fellowship training in neurophysiology. Dr. Chandos was the chief of neurology at Saint Agnes Medical Center, a teaching hospital in Baltimore, Maryland, for four (4) years, and since coming to North Carolina approximately three (3) years prior to his deposition, his practice at Forsyth Medical Center has included treating patients with strokes, epilepsy, infections of the nervous system, headaches, Parkinson's disease and a variety of general neurological conditions. Dr. Chandos also has a subspecialty in sleep medicine.

Defendants argue that the Commission erred in assigning greater weight to the testimony of Dr. Chandos because his testimony is at best speculative and that there was not competent medical evidence to support causation. Defendants contend that Dr.

Chandos improperly based his opinion solely upon the temporal relationship between plaintiff's heat stroke and seizures pursuant to the maxim of *post hoc ergo propter hoc* ("after this, therefore because of this").

Defendants cite the following testimony in support of their contentions: "I can tell you what I believe I recall telling Mr. Steele, is that the temporal relationship implies causality or that there was a contributing factor." However, this Court has held that even though temporal relationship may have played a role in a diagnosis, the expert's testimony was competent evidence of causation because he "considered, tested for, and excluded other causes of her condition." *Singletary v. N.C. Baptist Hosp.*, 174 N.C. App. 147, 156, 619 S.E.2d 888, 894 (2005). Dr. Chandos testified that plaintiff's case was challenging in that he had continued, reoccurring headaches and seizure-like activity. Dr. Chandos testified:

Our focus was really, one, to make him feel better and, number two, to make sure we weren't missing something. Was there anything else that could have brought this event on? Was there some sneaky medical condition that was lurking behind the scenes that was some other explanation for everything that was going on, which we pursued rather exhaustively, I'm afraid for him - a variety of blood tests, spinal fluid test, pictures of his brain, pictures of his arteries, to make sure we weren't missing any infections, inflammatory condition in the body.

Dr. Chandos testified that he did not find any infectious state such as meningitis or anything of a bacterial or viral nature that would explain the seizure activity. Dr. Chandos further stated

that "[t]here was nothing in his history or physical examination that indicated he had a genetic condition that predisposed him to seizures." Therefore, while it is true that Dr. Chandos took into consideration the temporal relationship between plaintiff's heat-related illness and his continued seizure activity, he also identified and rejected other possible causes of the seizures. *Id.* Based upon this assessment, Dr. Chandos opined that the heat-related illness was a "significant contributing factor" to plaintiff's seizures. Dr. Chandos's testimony was competent to support the Commission's finding that plaintiff's seizures were causally related to his heat-related illness on 9 August 2007.

Defendants essentially argue that the medical evidence presented by Dr. Brown and Dr. Bolling should have been given greater weight than that of Dr. Chandos. However, conflicts in the evidence are for the Commission to resolve in its role as the fact-finder in workers' compensation cases. *Cauble v. The Macke Co.*, 78 N.C. App. 793, 795, 338 S.E.2d 320, 321 (1986). It is not the province of this Court to reweigh the evidence. The Commission did not err by concluding that plaintiff's seizures were causally related to his heat-related illness on 9 August 2007.

This argument is without merit.

## II. Continuing Disability

In their second argument, defendants contend that the Commission erred in awarding plaintiff continuing disability as a result of the 9 August 2007 incident. We disagree.

Defendants' argument is predicated upon their contention that plaintiff did not sustain a compensable injury at work. As stated in the preceding section of this opinion, this argument is without merit.

The Commission found that:

23. Upon being released from the hospital, plaintiff continued to experience seizures and severe headaches. At times, the seizures occurred daily. As of the date of the hearing before the Deputy Commissioner, plaintiff continued to experience seizures, through [sic] their frequency had decreased to approximately two (2) per week. The Full Commission finds, based upon the greater weight of the evidence, that *plaintiff is incapable of working due to his ongoing seizures and headaches.*

(Emphasis added.)

Defendants failed to challenge this finding and, thus, it is binding on appeal. Plaintiff is entitled to continuing disability benefits. *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993).

This argument is without merit.

AFFIRMED.

Judges STEPHENS and HUNTER, JR. concur.

Report per Rule 30(e).