NO. COA00-1487

NORTH CAROLINA COURT OF APPEALS

Filed: 19 March 2002

EMILY ANN TARPLEY,
Employee,
Plaintiff-Appellee,

v.

North Carolina Industrial Commission
I.C. File No. 848309

CONE MILLS CORPORATION,
Employer,

SELF-INSURED,
Defendant-Appellant.

Appeal by defendant from opinion and award entered 8 September 2000 by the North Carolina Industrial Commission. Heard in the Court of Appeals 8 November 2001.

Patterson Harkavy & Lawrence, L.L.P., by Valerie A. Johnson and Martha A. Geer, for plaintiff-appellee.

Smith Helms Mulliss & Moore, L.L.P., by Jeri L. Whitfield, Laura Deddish Burton and Angela L. Little, for defendant-appellant.

McGEE, Judge.

Defendant appeals from the award of workers' compensation benefits to plaintiff Emily Ann Tarpley. At the time of plaintiff's accident, she had been employed by defendant Cone Mills for approximately twenty-three years, and she had been in the position of spinner for approximately twelve years. Her primary responsibilities as a spinner included monitoring seven spinning frames with 144 spindles per frame. The duties of a spinner included replacing yarn

packages on the end of a frame with full or nearly full packages of yarn. Plaintiff was required to place the new yarn packages on a spool which was six feet from the floor. Because plaintiff is five feet, five inches tall, she used a two-step stool to place the yarn on the frame. On 24 August 1996, while she was attempting to complete this task, she noticed her shoe was untied. She placed the spool on the frame and sat down on the stool to tie her shoe. While plaintiff was sitting on the stool, the spool slipped off the top of the frame and hit her in the back of her neck.

Plaintiff reported the accident to her immediate supervisor; however, the supervisor did not fill out an injury report that day. At plaintiff's insistence, the supervisor later completed an injury report.

Shortly after the accident, plaintiff began experiencing headaches, pain in her back, and weakness in her arms. She did not immediately relate this pain to her accident at work. She was treated by Dr. David Keller (Dr. Keller), her family physician, on 6 November 1996. Plaintiff later recalled the 24 August 1996 accident and began to suspect the accident was the cause of her pain. Plaintiff went to defendant's medical department on 16 December 1996. The company doctor concluded she had suffered a contusion with neck pain. Plaintiff returned to Dr. Keller, who prescribed physical therapy. Plaintiff began physical therapy and showed some improvement by 19 February 1997. Throughout 1997 and 1998 plaintiff experienced pain that was sometimes reduced with physical therapy.

Dr. Keller referred plaintiff to Dr. Anna Voytek (Dr. Voytek)in April 1998. Dr. Voytek concluded plaintiff had a C6 radiculopathy which resulted in secondary rotator cuff tendinitis. Plaintiff's symptoms were at first relieved with medication, but they returned in June 1998. Plaintiff had an MRI which revealed a ruptured disc and a pinched nerve. Dr. Voytek referred plaintiff to Dr. Henry Pool (Dr. Pool), a neurosurgeon. Dr. Pool concluded plaintiff's symptoms

were consistent with disc herniation and recommended an anterior cervical diskectomy and fusion. This surgery was successfully performed on 14 August 1998.

An opinion and award by the deputy commissioner was filed 7 October 1999. The deputy commissioner found a compensable injury to plaintiff's cervical spine and ordered defendant to pay workers' compensation benefits for temporary total disability, permanent partial disability, and medical expenses. The Industrial Commission affirmed the award on 8 September 2000, with Commissioner Dianne Sellers dissenting. Defendant appeals from this opinion and award.

I.

Defendant argues the Industrial Commission erred in concluding that plaintiff's disc surgery is compensable because plaintiff has failed to establish a direct causal link between the accident at work and plaintiff's ruptured disc. Defendant supports its argument through the testimony of Dr. Pool:

> [M]y opinion is that she suffered an injury to her neck. This certainly caused additional damage to her neck when she was struck. Did that necessarily cause the disc to rupture? No. From what I see, probably not. I think it probably injured that disc and that joint somewhat and caused it to be more likely to subsequently rupture at a later time. . . . I think that indications are that [the work injury] did accelerate the degenerative disease that was already present in her neck and may have made her more likely to suffer a subsequent disc rupture, but, you know, that's all speculative. . . . But I don't, you know -- I don't see a definite causation that the injury caused the ruptured disc acutely in '96. It may have made it more likely to happen subsequently.

Defendant contends that because the medical expert testimony amounted only to a speculative causal relationship between the accident and the ruptured disc, the evidence is insufficient to establish legal causation. Based on this testimony, defendant contests the Industrial Commission's finding that the "greater weight of the evidence is that plaintiff sustained an injury to her cervical spine arising out of and in the course of her employment with defendant on 24

August 1996. As a result of this injury, plaintiff sustained a C5-6 disc herniation resulting in surgery."

On an appeal from an opinion and award of the Industrial Commission, the standard of review for this Court "is limited to a determination of (1) whether the Commission's findings of fact are supported by any competent evidence in the record; and (2) whether the Commission's findings justify its conclusions of law." *Goff v. Foster Forbes Glass Div.*, 140 N.C. App. 130, 132-33, 535 S.E.2d 602, 604 (2000). This Court cannot weigh the evidence in the record. "It is the Commission's role to resolve conflicts in the evidence." *Knight v. Cannon Mills Co.*, 82 N.C. App. 453, 463, 347 S.E.2d 832, 839, *disc. review denied*, 318 N.C. 507, 349 S.E.2d 861 (1986).

Defendant relies on *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 915 (2000), in arguing

> 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. Indeed, this Court has specifically held that "an expert is not competent to testify as to a casual relation which rests upon mere speculation or possibility."

Id. (quoting *Dean v. Coach Co.*, 287 N.C. 515, 522, 215 S.E.2d 89, 94 (1975)). Defendant argues that because Dr. Pool used the word "speculative," his testimony does not meet the requirements for expert testimony which establish a causal connection. As a result, defendant contends plaintiff has failed to prove the element of causation because the only expert medical evidence plaintiff has provided should be declared incompetent because it is based on speculation and conjecture.

"The burden of proving each and every element of compensability is upon the plaintiff." *Harvey v. Raleigh Police Dept.*, 96 N.C. App. 28, 35, 384 S.E.2d 549, 553, *disc. review denied*,

325 N.C. 706, 388 S.E.2d 454 (1989). "There must be competent evidence to support the inference that the accident in question resulted in the injury complained of, *i.e.*, some evidence that the accident at least might have or could have produced the particular disability in question." *Click v. Freight Carriers*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980). Furthermore, "where the exact nature and probable genesis of a particular type of injury involves complicated medical questions . . . only an expert can give competent opinion evidence as to the cause of the injury." *Id.* Expert medical testimony is required "to establish causation between a specific trauma and the rupture of the plaintiff's invertebral disc." *Peagler v. Tyson Foods, Inc.*, 138 N.C. App. 593, 598, 532 S.E.2d 207, 211 (2000).

However, the medical testimony is not automatically incompetent because the medical expert could not offer a definite and certain causal link. The "expert testimony need not show that the work incident caused the injury to a 'reasonable degree of medical certainty.'" *Peagler*, 138 N.C. App. at 599, 532 S.E.2d at 211 (quoting *Cooke v. P.H. Glatfelter/Ecusta*, 130 N.C. App. 220, 224, 502 S.E.2d 419, 422 (1998)). A sufficient causal relationship to make the injury compensable will exist if the injury "is 'fairly traceable to the employment' or 'any reasonable relationship to employment exists.'" *Shaw v. Smith & Jennings, Inc.*, 130 N.C. App. 442, 445, 503 S.E.2d 113, 116, *disc. review denied*, 349 N.C. 363, 525 S.E.2d 175 (1998) (quoting *White v. Battleground Veterinary Hosp.*, 62 N.C. App. 720, 723, 303 S.E.2d 547, 549, *disc. review denied*, 309 N.C. 325, 307 S.E.2d 170 (1983)) (other citations omitted).

In the case before us, there is sufficient evidence that the accident "at least might have or could have produced the particular disability in question." *Click*, 300 N.C. at 167, 265 S.E.2d at 391. Dr. Pool testified:

> This is something where someone's neck begins to wear out. They may be injured. That injury may cause things to wear out more,

> and a subsequent episode down the road may cause things to finally herniate. Is the injury previous to that solely responsible? No. But is it in some degree responsible? Certainly.
>
> And this was my opinion that I think the injury she described could very likely have caused the condition she suffered from.
>
> I think that it's very likely that the injury in '96 may have accelerated the degenerative processes ongoing in her neck and made her possibly more likely to suffer a subsequent ruptured disc.

Furthermore, even in the part of Dr. Pool's testimony defendant relies on, Dr. Pool stated:

> I think that indications are that [the work injury] did accelerate the degenerative disease that was already present in her neck and may have made her more likely to suffer a subsequent disc rupture, but, you know, that's all speculative. *But, yes, I think, in my opinion, that is consistent with what's happened here.* (Emphasis added).

Defendant contends Dr. Pool's testimony is speculative because he uses words such as possible and speculative. However, our appellate courts have held that the use of the word "speculation," or testimony that indicates other possible causes, does not in and of itself render an expert's opinion incompetent.

Our Supreme Court held that expert

> opinion is based on the reasonable probabilities known to the expert from scientific learning and experience. A result in a particular case may stem from a number of causes. The expert may express the opinion that a particular cause "could" or "might" have produced the result - indicating that the result is capable of proceeding from the particular cause as a scientific fact, *i.e.*, reasonable probability in the particular scientific field.

Lockwood v. McCaskill, 262 N.C. 663, 668-69, 138 S.E.2d 541, 545(1964). In *Peagler*, our Court accepted, as competent evidence of a causal link, testimony by a doctor that included admissions that a herniated disc could have many causes, including "[s]neezing," "rolling over in bed," "bending over to tie your shoe," and also testimony that the doctor could not be sure to a

"reasonable degree of medical certainty" what caused the herniated disc. *Peagler,* 138 N.C. App. at 598-99, 532 S.E.2d at 211.

In the case before us, despite the fact that the doctor could not say for certain what caused the accident and any attempt to discern a cause was speculation, the doctor immediately followed that statement with his opinion that the injury at work accelerated a degenerative disease and made plaintiff more likely to suffer a disc rupture. This statement indicates a "reasonable probability." *Lockwood,* 262 N.C. at 669, 138 S.E.2d at 545. "All that is necessary is that an expert express an opinion that a *particular* cause was *capable* of producing the injurious result." *Buck v. Procter & Gamble Co.*, 52 N.C. App. 88, 95, 278 S.E.2d 268, 273 (1981) (emphasis in original). Dr. Pool's statement meets this requirement; therefore, it is sufficient and competent evidence which supports the Industrial Commission's finding of a causal connection. We overrule this assignment of error.

II.

Defendant next argues no competent medical evidence supports the findings by the Industrial Commission that plaintiff suffered consistent and continuous pain from the time of the accident until the time of the surgery. Defendant contends expert medical testimony is the only evidence capable of showing causation, and the Industrial Commission erred by relying on plaintiff's own testimony in reaching its decision.

However, the Industrial Commission based its findings on plaintiff's testimony as to when she had pain and what type of pain she experienced, in addition to the medical evidence. In *Webb v. Power Circuit, Inc.*, 141 N.C. App. 507, 540 S.E.2d 790 (2000), *cert. denied,* 353 N.C. 398, 548 S.E.2d 159 (2001), the defendants argued the Industrial Commission erred in relying on the plaintiff's testimony that his depression increased, when there was no medical testimony

supporting this increase. This Court stated that although *Click* "held that expert testimony is required to establish the cause of an injury in certain situations," the Industrial Commission "properly relied on plaintiff's testimony to support a finding that his depression has increased, not in support of a finding of causation." *Webb*, 141 N.C. App. at 513, 540 S.E.2d at 794.

The fact that Dr. Pool relied on plaintiff's testimony in forming his opinion as to causation is also acceptable. In *Jenkins v. Public Service Co. of N.C.*, 134 N.C. App. 405, 518 S.E.2d 6 (1999), our Court stated a "physician's diagnosis often depends on the patient's subjective complaints, and this does not render the physician's opinion incompetent as a matter of law." *Id*. at 410, 518 S.E.2d at 9. We stated that "[a]lthough the Commission could have given [the physician's] opinion less weight due to the fact that it was based on Plaintiff's subjective complaints rather than objective testing, it was not required to do so." *Id*. In the case before us, the Industrial Commission found plaintiff's testimony regarding her pain to be credible, and this testimony supports its findings of fact. We overrule this assignment of error.

The opinion and award of the Industrial Commission is affirmed.

Affirmed.

Judges HUNTER and BRYANT concur.

Report per Rule 30(e).