NO. COA10-626
NORTH CAROLINA COURT OF APPEALS

Filed: 17 May 2011

KENNETH BREWER,
Employee,
Plaintiff,

v.

OAKS OF CAROLINA,
Employer,
TRAVELERS INSURANCE COMPANY,
Carrier,
Defendants.

North Carolina
Industrial Commission
I.C. No. 855204

Appeal by defendants from opinion and award entered 8 January 2010 by the North Carolina Industrial Commission. Heard in the Court of Appeals 27 October 2010.

Law Offices of James Scott Farrin, by Douglas E. Berger, for plaintiff-appellee.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Jennifer V. Ruiz and M. Duane Jones, for defendants-appellants.

GEER, Judge.

Defendants Oaks of Carolina and Travelers Insurance Company appeal the opinion and award entered by the Industrial Commission awarding plaintiff Kenneth Brewer temporary total disability compensation and medical expenses resulting from a compensable

injury to plaintiff's right shoulder. Defendants argue that there was insufficient evidence to establish that plaintiff's injury was caused by his work-related accident. Plaintiff, however, presented expert witness testimony that, assuming the existence of certain facts, the work-related accident was a "likely cause" of plaintiff's condition. Since the Commission found the existence of those assumed facts, the expert witness testimony was sufficient to support the Commission's finding of causation. Accordingly, we affirm.

Facts

The Industrial Commission made the following findings of fact. At the time of the hearing before the deputy commissioner, plaintiff was employed as a floor technician by defendant employer Oaks of Carolina, a nursing home. Although plaintiff had a pre-existing neck condition from a prior work-related incident with another employer, he had no prior history of complications with his right shoulder.

On 25 September 2007, plaintiff was pulling a laundry cart and pushing a food tray cart down a hallway when a patient stepped in front of him, causing him to lose control of the laundry cart. The laundry cart swung out and twisted plaintiff's right arm, causing plaintiff to experience pain in his right shoulder and neck.

Following this incident, plaintiff's supervisor, Gerald Simmons, transported plaintiff to Wake Med Emergency. Plaintiff

reported pain in his right shoulder, but he left the emergency room before receiving treatment. Plaintiff believed at the time that the source of his pain was the area of his neck that he had previously injured while employed with a former employer. Plaintiff informed Mr. Simmons that he did not know whether his neck or shoulder was injured but that any potential neck injury was not related to work with Oaks of Carolina.

Mr. Simmons testified that he did not take plaintiff to the emergency room and that the accident could not have happened as plaintiff described. Mr. Simmons also testified that plaintiff told him the injury occurred at home. The Commission, however, found "plaintiff's description of the incident on September 25, 2007, to be credible and gives greater weight to his testimony than to that of Mr. Simmons."

Defendants admitted in the Form 19 that plaintiff reported a work-related injury by 1 October 2007. Following the 25 September 2007 incident, plaintiff returned to work but was directed to see his primary physician. On 4 October 2007, plaintiff sought treatment for pain in his shoulders and neck at Wake Health Services. He informed Wake Health Services that on 25 September 2007, he injured himself when "pulling and pushing a heavy cart/laundry (bin)." Plaintiff was taken out of work for two weeks and was directed to

have x-rays taken. On 8 October 2007, plaintiff's neck and his shoulders were x-rayed.

Plaintiff's pain in his right shoulder then worsened and, on 5 November 2007, he sought treatment at the Wake Med Emergency Room. Plaintiff informed David Goodman, a physician's assistant, that he injured his right shoulder pulling a linen cart at work a few weeks earlier. Mr. Goodman referred plaintiff to an orthopedist.

On 12 November 2007, plaintiff sought treatment for his right shoulder with orthopedist Dr. Jonathan Chappell. A progress sheet completed in Dr. Chappell's office noted plaintiff reported that the pain in his right shoulder began at work when he was pushing and pulling a cart. Dr. Chappell recommended that plaintiff undergo an MRI. The MRI revealed that plaintiff had sustained a superior labral tear of his right shoulder. On 5 December 2007, Dr. Chappell kept plaintiff out of work pending an evaluation after his scheduled surgery. On 3 January 2008, Dr. Chappell performed a surgical repair of the labrum in plaintiff's right shoulder.

On or about 2 March 2008, plaintiff returned to work for a different employer earning wages comparable to those he was earning at the time of his injury. As of the date of the last medical record submitted to the Commission, Dr. Chappell had not yet determined that plaintiff had reached maximum medical improvement, and Dr. Chappell

had not assigned a permanent partial disability rating for plaintiff's right shoulder.

Plaintiff filed a Form 18 with the Industrial Commission on 4 January 2008. Defendants filed a Form 61 denial of plaintiff's claim on 24 March 2008. The Commission noted that defendants had, therefore, failed to file a timely response within 30 days following notice that plaintiff's Form 18 was filed with the Commission.

On 15 July 2009, the deputy commissioner filed an opinion and award in favor of plaintiff, finding that plaintiff was entitled to temporary total disability benefits from 5 December 2007 through 2 March 2008, but reserving plaintiff's right to elect permanent partial disability benefits at a later date. On 27 July 2009, defendants gave timely notice of appeal to the Full Commission.

On 8 January 2010, the Full Commission issued an opinion and award affirming the decision of the deputy commissioner with minor modifications. The Commission found:

> The set of circumstances on September 25, 2007 whereby plaintiff injured his right shoulder as the result of losing control of a laundry cart while also pushing a food tray cart constitutes an interruption of plaintiff's regular work routine and the introduction of an unlooked for and untoward event which was not expected or designed by plaintiff. Therefore, plaintiff sustained a compensable injury by accident on September 25, 2007, resulting in an injury to his right shoulder which was surgically treated by Dr. Chappell.

Based on its findings of fact, the Commission concluded that "[o]n September 25, 2007, plaintiff sustained an injury by accident arising out of and in the course of his employment with defendant-employer in which he sustained a right shoulder injury." The Commission awarded plaintiff temporary total disability compensation for the period 5 December 2007 through 2 March 2008 subject to defendants receiving a credit for unemployment benefits paid to plaintiff during that period. The Commission reserved plaintiff's right to receive compensation for permanent functional impairment to his right shoulder, if any. Defendants timely appealed to this Court.

Discussion

Defendants' sole argument on appeal is that plaintiff failed to prove that the accident on 25 September 2007 caused his right shoulder condition. This Court's "review of an award from the Industrial Commission is generally limited to two issues: (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). When supported by competent evidence, the Commission's findings of fact are conclusive on appeal, even if there is evidence supporting contrary findings. *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 700 (2004). "The Commission's conclusions of law are reviewed *de novo*." *Id.*, 597 S.E.2d at 701.

"For an injury to be compensable under the terms of the Workmen's Compensation Act, it must be proximately caused by an accident arising out of and suffered in the course of employment." *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980) (citing N.C. Gen. Stat. § 97-2(6)). In instances "where the exact nature and probable genesis of a particular type of injury 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." *Id.*

Defendants acknowledge that Dr. Chappell testified regarding causation but argue that his testimony was comparable to that found insufficient in *Edmonds v. Fresenius Med. Care*, 165 N.C. App. 811, 817, 600 S.E.2d 501, 505 (2004) (Steelman, J., dissenting), *rev'd per curiam for reasons stated in dissent*, 359 N.C. 313, 608 S.E.2d 755 (2005). In *Edmonds*, the critical issue was the linking of the administration of non-steroidal anti-inflammatory drugs to the plaintiff's reduced renal function. The dissent adopted by the Supreme Court, in concluding that the record did not contain expert testimony adequate to support a finding of causation, explained: "In this case, the only medical testimony linking the administration of non-steroidal anti-inflammatory drugs to plaintiff's reduced renal function was that of Dr. Burgess. As found by the Commission, his

testimony was only that the drugs 'possibly' or 'could or might' have caused plaintiff's renal problems." *Id.* at 818, 600 S.E.2d at 506.

As this Court has previously observed, "the 'mere possibility of causation,' as opposed to the 'probability' of causation, is insufficient to support a finding of compensability." *Whitfield v. Lab. Corp. of Am.*, 158 N.C. App. 341, 351, 581 S.E.2d 778, 785 (2003) (quoting *Swink v. Cone Mills, Inc.*, 65 N.C. App. 397, 398, 309 S.E.2d 271, 272 (1983)). In this case, Dr. Chappell's testimony addressed probability and not mere possibility.

Dr. Chappell testified as follows:

> A Assuming the cart was heavy, assuming that he had no prior symptoms, and assuming the incident occurred as he described it in Exhibit C, that mechanism, that amount of force *could and likely would have caused* some type of injury to his shoulder that often would be consistent with a lesion of the superior labrum.
>
> Q And would that be more likely than not?
>
> [DEFENDANTS' COUNSEL]: Objection.
>
> Q Making those assumptions you've just described --
>
> A *It would be a likely cause.*
>
> Q All right.
>
> A "More likely than not," I guess, is the term you want to use.

(Emphasis added.)

When cross-examined by defendants' counsel, Dr. Chappell testified as follows:

> Q Okay. You stated that, based on the hypothetical [plaintiff's counsel] provided you with and all the various assumptions, that you assumed, it was more likely than not that, based on all his assumptions, that Plaintiff's Exhibit C [statement of the incident] is what caused his shoulder injuries, is that correct?
>
> A *Based on all his assumptions, yes. It's likely -- more than likely this -- that could have caused his injury.*
>
> Q Okay. But can you -- you can -- you cannot say that to a reasonable degree of medical certainty, can you?
>
> A *I can't say definitively, but I can say with a reasonable degree of medical certainty, yes, based on all those assumptions.*

(Emphasis added.)

This Court has held repeatedly that testimony of this nature is sufficient to establish causation. As this Court explained in *Cannon v. Goodyear Tire & Rubber Co.*, 171 N.C. App. 254, 264, 614 S.E.2d 440, 446-47, *disc. review denied*, 360 N.C. 61, 621 S.E.2d 177 (2005):

> [I]t appears that our Supreme Court has created a spectrum by which to determine whether expert testimony is sufficient to establish causation in worker's compensation cases. Expert testimony that a work-related injury "could" or "might" have caused further injury is insufficient to prove causation when other

> evidence shows the testimony to be a "guess or mere speculation." *Young* [*v. Hickory Bus. Furn.*], 353 N.C. [227,] 233, 538 S.E.2d [912,] 916 [(2000)]. However, when expert testimony establishes that a work-related injury "likely" caused further injury, competent evidence exists to support a finding of causation.

See also Erickson v. Lear Siegler, 195 N.C. App. 513, 525, 672 S.E.2d 772, 780 (2009) (holding that expert's inability to testify to reasonable degree of medical certainty did not render testimony incompetent and insufficient when he testified that he "'would have to say it is more likely'" that accident caused plaintiff's neck injury); *Castaneda v. Int'l Leg Wear Group*, 194 N.C. App. 27, 29, 32, 668 S.E.2d 909, 912, 913 (2008) (finding testimony that annular tear was "'quite possibl[y]'" and "'more likely than not'" caused by plaintiff's work related injury sufficient to support causation), *aff'd per curiam*, 363 N.C. 369, 677 S.E.2d 454 (2009); *Kelly v. Duke Univ.*, 190 N.C. App. 733, 739, 661 S.E.2d 745, 749 (2008) (finding sufficient physician testimony that accident occurring at work was "'*more likely than not*'" cause of particular injury), *disc. review denied*, 363 N.C. 128, 675 S.E.2d 367 (2009).

Defendants point to additional excerpts of testimony by Dr. Chappell and assert that those excerpts establish that his testimony regarding causation was speculative.

> Q So would it -- would it be fair to say you -- you can't say that it more likely than not caused it?

A In the absence -- if the patient has absence of symptoms prior to this event, that mechanism is likely -- I would not say more than likely -- but likely to have caused potential injury to the arm.

. . . .

Q So your testimony is that the heavy carts could have caused --

A Could have with -- it's a plausible -- would I say it's more than likely? I can't say that. But it is a described possible mechanism.

. . . .

A I don't think it definitively says one way or the other. I don't think it's fair for me to say definitively one way or the other, because pushing and pulling a cart in itself is unlikely to cause that injury.

However, if you had the injury as -- you had the mechanism as described in Exhibit C, which where there was a cart where his arm was -- where a cart swung out and twisted his arm, is a different mechanism than what is stated right here in this -- on this -- that sentence there.

The above testimony does not negate Dr. Chappell's prior testimony that causation was more likely than not. It confirms that Dr. Chappell was basing his opinion that causation was "likely" on certain assumptions as described in the statement of the incident, identified above as Exhibit C. Although Dr. Chappell testified that he could state with a "reasonable degree of medical certainty" that

plaintiff's accident caused his injury based on those assumptions, in this testimony, Dr. Chappell simply stated that he could not say that causation was "more than likely," which he clarified meant to him a definitive opinion that causation in fact existed.

Defendants' argument that Dr. Chappell's unwillingness to state that causation was "more than likely" is contrary to his testimony that causation was "likely" and "more likely than not" is not persuasive. In any event, it is insufficient to warrant reversal under *Alexander v. Wal-Mart Stores, Inc.*, 166 N.C. App. 563, 573, 603 S.E.2d 552, 558 (2004) (Hudson, J., dissenting) (holding that it is not "the role of this Court to comb through the testimony and view it in the light most favorable to the defendant, when the Supreme Court has clearly instructed us to do the opposite. Although by doing so, it is possible to find a few excerpts that might be speculative, this Court's role is not to engage in such a weighing of the evidence."), *rev'd per curiam for reasons stated in dissent*, 359 N.C. 403, 610 S.E.2d 374 (2005).

In sum, Dr. Chappell testified that if certain factual assumptions were true, then it was his opinion that the accident on 25 September 2007 likely caused plaintiff's right shoulder injury. Since the Commission found the existence of those factual assumptions, sufficient evidence of causation existed to support the

Commission's determination that plaintiff's right shoulder condition was a compensable injury. We, therefore, affirm.

Plaintiff seeks attorney's fees pursuant to N.C. Gen. Stat. § 97-88 (2009), citing *Flores v. Stacy Penny Masonry Co.*, 134 N.C. App. 452, 518 S.E.2d 200 (1999). In *Flores*, this Court affirmed the Commission's opinion and award and, in its discretion, granted attorney's fees, remanding the matter to the Commission to determine the appropriate amount of fees due to the plaintiff for expenses related to the appeal. *Id.* at 459, 518 S.E.2d at 205. We agree with plaintiff that an award of attorney's fees is appropriate with respect to this appeal given the small sum being awarded and, therefore, remand to the Commission to determine the amount of attorneys' fees incurred as a result of the appeal to this Court.

Affirmed in part; remanded in part.

Judges ROBERT C. HUNTER and CALABRIA concur.

Report per Rule 30(e).