NO. COA03-921

NORTH CAROLINA COURT OF APPEALS

Filed: 15 June 2004

THOMAS W. FREEMAN, JR.,
Employee,
Plaintiff

v.

North Carolina Industrial Commission
I.C. File No. 857502

CRAWFORD AND COMPANY,
Employer,

SELF-INSURED,
Defendant

Appeal by defendant from an opinion and award entered 17 April 2003 by the North Carolina Industrial Commission. Heard in the Court of Appeals 26 April 2004.

The Jernigan Law Firm, by Leonard T. Jernigan, Jr. and Lauren R. Trustman, for plaintiff-appellee.

McAngus, Goudelock & Courie, P.L.L.C., by H. George Kurani and Louis A. Waple, for defendant-appellant.

HUNTER, Judge.

Crawford and Company ("defendant") appeals from an opinion and award of the Full Commission of the North Carolina Industrial Commission ("the Commission") filed 17 April 2003 awarding total disability benefits to Thomas W. Freeman, Jr. ("plaintiff").**[Note 1]** Because the Commission's findings are supported by competent evidence and in turn, those findings support the conclusions of law, we affirm.

The Commission made the following findings of fact, which are not challenged on appeal, and are therefore binding on this Court.

> 4. On [9 June] 1998, plaintiff was unloading a box of photocopy paper from the rear seat of a car when he experienced a pull in the right neck area that gradually produced right arm pain and weakness. He also developed some weakness of his right hand, to the extent that he could not place a key in a lock, and it took two hands to turn a car ignition. A subsequent myelography confirmed a right C7-T1 defect with compression of the right C8 nerve root.
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> 5. . . . A laminectomy was carried [out] medially to expose the lateral dura at the origin of the nerve root. A small protrusion could be seen. A very small fragment was removed first, and then a larger fragment was removed. . . .
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> 6. . . . [Plaintiff] worked until [10 August] 1999 when his physical condition prevented him from working any further. Plaintiff has not worked in any capacity since that date.
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> 7. Approximately three weeks after the surgery . . . , plaintiff's toes began to move constantly, and he experienced some numbness in his fingers. He developed blisters because of the involuntary movement of his toes.
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> 8. [Plaintiff's physician] eventually referred plaintiff to Arvo Kanna, M.D., a neurologist at East Carolina Medical Center, who diagnosed plaintiff with dystonia, a sustained, involuntary movement disorder that is recurrent and often has a twisting component. Plaintiff has been diagnosed with generalized dystonia, which involves different parts of the body; he has involuntary movements of the feet, jaw clinching, eye spasms, and closing of the eyelids. Some of these involuntary movements were apparent during the course of the hearing before the deputy commissioner . . . .
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> 9. In August of 1999, plaintiff was referred to Francis O. Walker, M.D., Professor of Neurology at Wake Forest University School of Medicine in Winston-Salem, North Carolina. Dr. Walker was licensed in 1984 and completed a fellowship in movement disorders and neuropharmacology. Dr. Walker is board certified in neurology and psychiatry, and set up a movement disorders clinic; he has been a referral for such disorders in this area for eighteen years.

The Commission then made the following finding of fact, to which defendant does assign error.

> 12. Dr. Walker opined that the peripheral trauma plaintiff sustained on [9 June] 1998 along with the cervical laminectomy performed on plaintiff, induced plaintiff's dystonia or triggered an underlying tendency for the condition. Peripheral trauma can be defined as trauma that does not typically involve the central nervous system, such as an arm, leg or trunk of the body. Dr. Walker's opinion was based on several factors, including the following: plaintiff's generalized dystonia spread rapidly after his surgery, which is uncommon with generalized dystonia; there was a temporal sequence between the onset of the illness and the surgical trauma; adults over the age of 50 do not normally develop generalized dystonia; surgical intervention, in itself, is a major trauma involving nerves that are intimately in contact with the central nervous system; and Dr. Walker has actually seen patients who have developed dystonia post-cervical laminectomy. Furthermore, according to Dr. Walker, a preponderance of the medical literature supports a relationship between trauma and the subsequent development of dystonia. An educational videotape for physicians and dystonia patients admitted into evidence also acknowledges the relationship between trauma and dystonia.

The Commission further made findings regarding defendant's medical expert.

> 13. Defendant's expert witness, Dr. William J. Weiner, was also trained in neurology and movement disorders. He has served as a professor of neurology for several universities, including being named Chairman of the Department of Neurology at the University of Maryland. Dr. Weiner also serves as Director of the Maryland Parkinson's Disease and Movement Disorder Center in Baltimore. He is board certified in both neurology and psychiatry, is considered an expert in movement disorders within neurology, and is recognized nationally for his extensive experience in treating and evaluating patients with movement disorders.
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> 14. Dr. Weiner was provided a comprehensive set of plaintiff's medical records and a transcript of the hearing of this matter. . . . Dr. Weiner offered his opinion that neither the trauma plaintiff sustained on [9 June] 1998, nor his subsequent cervical laminectomy are causally related to plaintiff's movement disorder. Dr. Weiner's opinion was based upon his supposition that there is very little evidence to support the idea that peripheral trauma can

> induce dystonia; that numbers of people undergo cervical laminectomies without resulting dystonia, and that when it does occur, it is an extraordinarily rare event . . . .

The Commission then ultimately found as fact:

> 15. Two very competent and accomplished physicians have offered differing opinions on the medical issues in dispute. However, competent credible evidence exists in the record to establish that plaintiff's injury by accident of [9 June] 1998 resulted in either the acquisition of, or the triggering of an underlying tendency for dystonia in plaintiff.
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> 16. As a result of plaintiff's injury by accident, . . . plaintiff has been unable to earn any wages since [10 August] 1999.

Based on these findings the Commission concluded as a matter of law:

> 1. Plaintiff's injury by accident of [9 June] 1998 resulted in plaintiff's acquisition of or triggered an underlying tendency for dystonia.

The dispositive issue is whether the Commission's findings of fact regarding the causation of plaintiff's dystonia were based upon competent expert medical evidence that was not merely speculation or conjecture.

Defendant argues that Dr. Walker's expert testimony was merely speculation and conjecture, contending that it is impossible to discern with any reasonable degree of medical probability whether the trauma plaintiff suffered as a result of the 9 June 1998 accident was in any way related to the onset of plaintiff's dystonia. Consequently, defendant contends that the Commission's findings are not supported by competent evidence and do not support the conclusions of law.**[Note 2]** We disagree.

"In reviewing an order and award of the Industrial Commission in a case involving workmen's compensation, [an appellate court] is limited to a determination of (1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are

supported by the findings." *Barham v. Food World*, 300 N.C.329, 331, 266 S.E.2d 676, 678 (1980). "In deciding an appeal from an award of the Industrial Commission, appellate courts may set aside a finding of fact only if it lacks evidentiary support." *Holley v. ACTS, Inc.*, 357 N.C. 228, 231, 581 S.E.2d 750, 752 (2003). The Commission's conclusions of law are, however, fully reviewable. *Id*. In *Holley*, the North Carolina Supreme Court discussed the requirements for an expert medical opinion to be competent evidence sufficient to support a finding of causation in workers' compensation cases involving complicated medical questions:

> 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). "However, when such expert opinion testimony is based merely upon speculation and conjecture, . . . it is not sufficiently reliable to qualify as competent evidence on issues of medical causation." *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 915 (2000). "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." *Gilmore v. Hoke Cty. Bd. of Educ.*, 222 N.C. 358, 365, 23 S.E.2d 292, 296 (1942) (discussing the standard for compensability when a work-related accident results in death).

Id. at 232, 581 S.E.2d at 753. In addition, the Court explained: "Although expert testimony as to the *possible* cause of a medical condition is admissible if helpful to the jury, it is insufficient to prove causation, particularly 'when there is additional evidence or testimony showing the expert's opinion to be a guess or mere speculation.'" *Id*. at 233, 581 S.E.2d at 753 (citations omitted).

We conclude this case is controlled by, and analogous to, this Court's decision in *Hedrick v. PPG Industries*, 126 N.C. App. 354, 484 S.E.2d 853 (1997). In that case, the plaintiff was injured while she was pulling a box, similar to the plaintiff in the case *sub judice*. *Id*. at 354, 484

S.E.2d at 854. After this incident, the plaintiff began to suffer from dystonia. *Id*. This Court upheld the award of workers' compensation benefits where the plaintiff's expert physician testified that, although there was no scientific proof that trauma caused dystonia, in his opinion to a reasonable medical probability, plaintiff's dystonia was related to trauma from her work related accident. *Id*. at 357-58, 484 S.E.2d at 856. The expert in that case based his opinion on the temporal relationship between the trauma and the development of dystonia, his observation of similar cases where dystonia developed after trauma, the documentation of such cases in medical literature, and his belief that "'most people agree that there is a relationship in some cases between antecedent trauma and the subsequent development of dystonia.'" *Id*. This Court held that this testimony was more than mere speculation or conjecture, and sufficient to support a finding that the greater weight of the evidence showed a reasonable medical probability of a causal connection between plaintiff's accident and the movement disorder. *Id*.

In the case now before us, Dr. Walker testified that it was his opinion "that the trauma is a likely cause of [plaintiff's]disability and the cause of his generalized dystonia, either as a direct cause of it or as something that predisposed or triggered an underlying tendency to dystonia to result in his problem." Dr. Walker also expressed that it was his opinion, based on his treatment of plaintiff, "to a reasonable degree of medical probability that the trauma [plaintiff] sustained on [9 June] 1998 was a causative factor in the development of his dystonia. If he had a dormant condition, the trauma most likely aggravated that non-disabling condition to the extent he is now totally disabled." Dr. Walker based his opinion on a number of factors: first, his own personal experience in which he had observed cases of people following cervical laminectomy, such as plaintiff, developing dystonia; second, a preponderance of the medical literature that recognized such a causal relationship between trauma and dystonia; third, the severity and rapid progression

of plaintiff's generalized dystonia, which was uncommon in people in his age group; fourth, the temporal relationship between the trauma and the onset of dystonia; and, fifth, the type of surgery plaintiff underwent following the 9 June 1998 accident, which involved nerves that are "intimately in contact with the central nervous system."

Furthermore, we note that a scholarly article on the subject authored by defendant's expert, Dr. Weiner, who testified to his opinion that trauma does not induce dystonia, stated, "[i]t might seem foolish to take up the side of the argument that peripheral trauma does not induce Dystonia. After all, the positive side of the argument is found in text books of movement disorders and theconcept of peripheral trauma inducing Dystonia is widely accepted." Therefore, Dr. Walker's expert opinion was more than mere speculation and conjecture, but was instead grounded in not only his own personal experience as a physician specializing in treating movement disorders, but also in the conclusions found in the majority of the medical literature, and in the wide acceptance among the medical community of the causal relationship between trauma and dystonia.

Thus, we conclude there was sufficient evidence to support the trial court's finding that competent credible evidence exists in the record to establish that plaintiff's injury by accident resulted in, or triggered, his dystonia, and that further the Commission's findings support its conclusions of law. Accordingly, we affirm the Commission's opinion and award.

Affirmed.

Chief Judge MARTIN and Judge THORNBURG concur.

Report per Rule 30(e).

NOTES

1. We note that the only appellant's brief filed in this case is entitled "Plaintiff Appellant's Brief." Plaintiff, however, did not appeal in this case. Also, the brief is argued from

defendant's point of view and was signed and filed by defendant's attorneys. We therefore, under Rule 2 of the Rules of Appellate Procedure, treat the brief as filed on behalf of defendant.

2. In the appellant's brief to this Court, defendant also appears to challenge not only the sufficiency of Dr. Walker's expert testimony, but also its admissibility. However, our review of the record on appeal reveals that no objection was raised before the Commission to the admission of Dr. Walker's opinion testimony. As such, to the extent that defendant seeks to raise the issue of the admissibility of Dr. Walker's testimony, it is waived on appeal and we decline to address it. *See* N.C.R. App. P. 10(b)(1).