NO. COA10-592

NORTH CAROLINA COURT OF APPEALS

Filed: 21 June 2011

WARREN ADAMS,
Employee,
Plaintiff-Appellee,

v.

N.C. Industrial Commission
I.C. Nos. 878401 and 891600

PARTS UNLIMITED,
Employer,

CNA,
Carrier,
Defendants-Appellants.

Appeal by Defendants from opinion and award entered 24 February 2010 by the North Carolina Industrial Commission. Heard in the Court of Appeals 15 November 2010.

David Gantt for Plaintiff-Appellee.

Teague, Campbell, Dennis & Gorham, L.L.P., by Matthew W. Skidmore and Leslie B. Price, for Defendants-Appellants.

McGEE, Judge.

During the course of his employment with Parts Unlimited, Warren Adams (Plaintiff) sustained back injuries on 15 June 2007

and 6 December 2007. Parts Unlimited, insured by CNA, (together, Defendants) filed a Form 19 report of Plaintiff's 6 December 2007 injury with the Industrial Commission (the Commission) on 28 January 2008 and a Form 60 "Admission of Employee's Right to Compensation" regarding that injury on 13 February 2008. Plaintiff filed a Form 18 notice of his 15 June 2007 injury on 17 March 2008.

Plaintiff stopped working on 18 January 2008 as a result of his injuries. Since that date, Defendants have paid Plaintiff temporary total disability benefits. Defendants filed a Form 24 application to terminate payment of compensation dated 10 June 2008, in which Defendants contested the extent of Plaintiff's disability. A special deputy commissioner denied Defendants' Form 24 application on 1 August 2008. Defendants appealed and the matter was heard before Deputy Commissioner Robert J. Harris on 14 November 2008. Deputy Commissioner Harris filed an opinion and award on 10 August 2009, determining that Plaintiff was entitled to ongoing temporary total disability payments, as well as further medical treatment. Defendants appealed to the Commission.

The Commission filed an opinion and award on 24 February 2010, in which it concluded that Plaintiff was disabled as a result of his injuries on the grounds that "it would be futile,

given his education and work experience, for [Plaintiff] to seek employment that comports with his physical limitations related to his compensable back condition." The Commission also concluded that "Plaintiff [was] entitled to a rebuttable presumption that further medical treatment recommended for his low back condition is directly related to his original compensable injuries. . . . [and that] Defendants have failed to rebut this presumption." The Commission then awarded Plaintiff, *inter alia*, continuing temporary total disability payments and further medical treatment. Defendants appeal.

I.

Defendants first challenge the Commission's determination that Plaintiff was entitled to ongoing temporary total disability payments, arguing that: (1) "Plaintiff has failed to produce medical evidence that he is physically or mentally incapable of work in any employment, and the Commission erred by concluding that it would be futile for him to seek employment that comports with his physical limitations related to his compensable back condition[;]" (2) the Commission failed to make a finding of fact regarding whether Plaintiff was "capable of some work[;]" and (3) the Commission did not properly determine whether Plaintiff's original compensable injuries were causally related to his current symptoms.

> To support a conclusion of disability, the Commission must find: (1) that the plaintiff was incapable after his injury of earning the same wages he earned before his injury in the same employment, (2) that the plaintiff was incapable after his injury of earning the same wages he earned before his injury in any other employment and (3) that the plaintiff's incapacity to earn was caused by his injury.

Hendrix v. Linn-Corriher Corp., 317 N.C. 179, 186, 345 S.E.2d 374, 378-79 (1986). In *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 425 S.E.2d 454 (1993), this Court described the methods by which a plaintiff can meet the burden of proof of ongoing disability, stating that:

> [t]he burden is on the employee to show that he is unable to earn the same wages he had earned before the injury, either in the same employment or in other employment. The employee may meet this burden in one of four ways: (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

Id. at 765, 425 S.E.2d at 457 (citations omitted).

In arguing that the Commission erred because Plaintiff failed to produce medical evidence that he was incapable of work in any employment, Defendants appear to misread the opinion and award. It is clear from the opinion and award that the Commission found that Plaintiff was disabled under the third prong of the *Russell* test. The Commission concluded that "Plaintiff ha[d] shown that he remain[ed] disabled as a result of his compensable injuries, in that it would be futile, given his education and work experience, for him to seek employment that comports with his physical limitations related to his compensable back condition." "The absence of medical evidence does not preclude a finding of disability under one of the other three [*Russell*] tests." *White v. Weyerhaeuser Co.*, 167 N.C. App. 658, 672, 606 S.E.2d 389, 399 (2005). Because a plaintiff may prove disability without medical evidence, and because the Commission in this case did not find Plaintiff disabled under the first prong of *Russell*, we find Defendants' argument concerning medical evidence inapposite. *See id.*

Defendants make three arguments related to a finding of disability under the third *Russell* test: (1) that there were insufficient findings concerning Plaintiff's physical limitations; (2) that there was no evidence that the disability was a consequence of his compensable injuries; and (3) that the

opinion and award did not contain a finding that Plaintiff was capable of some work. We address each in turn.

II.

First, Defendants contend that "there are no findings of fact regarding [P]laintiff's physical limitations, thus the . . . Commission's conclusion of law regarding [P]laintiff's disability is not supported by the findings of fact." However, Defendants cite no authority in support of their argument that the Commission's findings regarding Plaintiff's physical limitations are insufficient. The Commission's opinion and award contains the following unchallenged findings of fact:

> 27. As of the hearing before the Deputy Commissioner, Plaintiff was having sharp, stabbing pain that shot down into both legs as well as weakness in his legs. He started using a walking stick in May 2008. He also had weakness in his hands and fingers and tremors in his right hand with weakness in his right arm. . . .
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> 28. Plaintiff has fallen many times since the December 6, 2007 incident because his right leg keeps going out from under him. He fell twice while still at work and has fallen several more times at home. A fall at home on August 15, 2008, in particular, seemed to aggravate his symptoms.
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> 29. Before the December 6, 2007 incident, Plaintiff was not only working full duty but was also regularly bowling, golfing, hiking and gardening. He has not engaged in any of those pastimes since December 6, 2007.

The Commission also found that Plaintiff informed Defendants that he was willing to return to work for a "modified" position. However, the Commission also found that Plaintiff "was basically unable to drive, sit up, walk, or fulfill the duties of the offered position." In light of the unchallenged findings in the opinion and award, we are not persuaded by Defendants' argument that the opinion and award "is devoid of facts establishing . . . physical limitations." We therefore overrule Defendants' argument that the Commission's conclusion of law regarding Plaintiff's disability was erroneous, based on insufficiency of facts regarding physical limitations.

III.

Defendants next argue that, even if there was evidence of a disability which prevented Plaintiff from working, there was no evidence to support a conclusion that such a disability was caused by Plaintiff's admittedly compensable injuries. We disagree.

The Commission made the following finding:

> 31. Dr. Loomis is a neurosurgeon with 20 years of practice. As he testified, within a reasonable degree of medical certainty, Plaintiff's June 15, 2007 injury caused Plaintiff's low back condition and the symptoms he currently has.

Defendants contend that finding 31 is not supported by competent evidence. However, in Dr. Loomis' deposition, he testified: "I

think that based upon a reasonable degree of medical certainty the injury occurring June 15 of '07 indeed caused [Plaintiff's] injury and the symptoms that he has." Dr. Loomis also testified concerning other possible causes of Plaintiff's symptoms. He did not feel qualified, however, to opine as to whether any of those possible causes could actually have been the cause of Plaintiff's injuries. We note that on appeal, our Court "'does not have the right to weigh the evidence and decide the issue on the basis of its weight. The [C]ourt's duty goes no further than to determine whether the record contains any evidence tending to support the finding.'" *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (citation omitted). "When there is any competent evidence to support a finding of fact by the . . . Commission, such finding is conclusive on appeal, even though there is evidence that would support a finding to the contrary." *Champion v. Tractor Co.*, 246 N.C. 691, 692, 99 S.E.2d 917, 917 (1957).

Defendants also contend that the opinion of Dr. Loomis was insufficient for the Commission to rely upon, based on the maxim of *post hoc, ergo propter hoc*. Defendants assert that Dr. Loomis has "'confus[ed] sequence with consequence.'" (Citation omitted). Our Supreme Court has stated that "[t]he maxim '*post hoc, ergo propter hoc*,' denotes 'the fallacy of . . . confusing

sequence with consequence,' and assumes a false connection between causation and temporal sequence." *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 232, 538 S.E.2d 912, 916 (2000) (citation omitted). "In a case where the threshold question is the cause of a controversial medical condition, the maxim of '*post hoc, ergo propter hoc*,' is not competent evidence of causation." *Id.*

Defendants point to the following exchange during the deposition of Dr. Loomis. Dr. Loomis was asked: "Would it be fair to say that your opinion that the June 15th, 2007 accident caused his current condition . . . was based on the temporal sequence of events as relayed by the patient . . . [a]nd not on the diagnostic films or the objective studies?" Dr. Loomis replied: "Yes." However, reviewing the record, we find that these exchanges show that Dr. Loomis was answering a question regarding the source of his information. We do not interpret Dr. Loomis' statement as indicative that he arrived at his conclusion as to cause simply because Plaintiff's current condition followed in time after Plaintiff's injuries.

Defendants point to *Young* as support for their contention that Dr. Loomis' testimony was based on *post hoc, ergo propter hoc*. However, in *Young*, the physician providing the challenged testimony engaged in the following exchange:

> "Q. Is there any way that one can definitively assign a cause or aggravation

> of fibromyalgia to any particular event other than the application of the doctrine, post hoc ergo propter hoc?
>
> A. No.
>
> Q. Okay. In other words, there's nothing you can do to test it, to look at it, other than she didn't have it before, she has it now, what intervened, I'm going to blame it on that?
>
> A. Correct."

Young, 353 N.C. at 232, 538 S.E.2d at 916. In the case before us, Dr. Loomis answered affirmatively when asked whether he based his opinion on "the temporal sequence of events *as relayed by the patient* . . . [a]nd not on the diagnostic films or the objective studies[.]" (Emphasis added). Dr. Loomis did not testify that his opinion was based on the flawed reasoning indicated by the maxim *post hoc, ergo propter hoc*. We interpret Dr. Loomis' answer as indicating that he based his opinion on the information provided to him by Plaintiff, rather than on his review of diagnostic films and studies.

We further note that the Commission herein did not find as a fact that Dr. Loomis' opinion on causation was based on *post hoc, ergo propter hoc*. *Contrast Gay-Hayes v. Tractor Supply Co.*, 170 N.C. App. 405, 410, 612 S.E.2d 399, 403 (2005) ("As a result, the Commission concluded that the expert testimony relied on mere speculation or possibility in concluding, *post*

hoc, *ergo propter hoc*, that plaintiff's exposure to naphthalene at defendant's workplace was the cause of her subsequent symptoms. Thus, the Commission concluded such evidence was insufficient to establish the causal connection necessary to conclude plaintiff suffered a compensable occupational disease.").

Defendants are essentially requesting that this Court re-weigh the evidence before the Commission. As stated above, it is not the role of this Court to do so. We, therefore, find competent evidence in the record to support the Commission's finding. Finding 31 alone supports the Commission's conclusion regarding causation. *Compare Adams v. Metals USA*, 168 N.C. App. 469, 483, 608 S.E.2d 357, 365, *aff'd*, 360 N.C. 54, 619 S.E.2d 495 (2005) ("The fact that the treating physician in this case could not state with reasonable medical certainty that plaintiff's accident caused his disability, is not dispositive—the degree of the doctor's certainty goes to the weight of his testimony.").

IV.

As noted above, the Commission concluded that Plaintiff was entitled to total temporary disability payments because "it would be futile, given his education and work experience, for him to seek employment that comports with his physical

limitations related to his compensable back condition." Our Court stated in *Russell* that a plaintiff may prove disability by producing evidence that "he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment[.]" *Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457. Defendants argue that, under *Russell*, "[i]t necessarily follows that for a finding of disability to be valid under the second or third prong of [*Russell*], the opinion and award must include a finding that [P]laintiff is capable of some work." The opinion and award does not contain such a finding, and Defendants contend that "[t]herefore, no finding of disability is legally sustainable based on the second or third prong of [*Russell*]." Defendants cite no authority in support of their argument that "it necessarily follows" that the Commission must make an explicit finding that a plaintiff is capable of some work.

Rather, *Russell* provides that a plaintiff may prove disability by "the *production of evidence* that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment[.]" *Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457 (emphasis added). Our Court has held that "[w]here . . . *the findings show* that 'plaintiff, although limited in the work

he can perform, is capable of performing some work,' and there is evidence that plaintiff may have satisfied *Russell* methods two or three, the Commission must make findings addressing those two methods of proof." *Britt v. Gator Wood, Inc.*, 185 N.C. App. 677, 684, 648 S.E.2d 917, 922 (2007) (emphasis added) (quoting *Workman v. Rutherford Elec. Membership Corp.*, 170 N.C. App. 481, 490, 613 S.E.2d 243, 250 (2005)).

In *Workman*, our Court quoted the following findings of fact from the Commission's opinion and award:

> "19. Anthony H. Wheeler, a neurologist and pain management doctor, testified that plaintiff was unable to do the job of assistant staking technician, and that requiring plaintiff to do this job would probably cause him to 'eventually become unemployable.'
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> 20. Dr. Alan F. Jacks, a general surgeon, testified that using a bush axe or shovel, and walking over rough terrain, would cause 'significant strain within the abdomen,' and 'may create symptoms of pain and significant exertion.'
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> 21. Dr. Leon A. Dickerson, an orthopaedic surgeon, testified that plaintiff would be unable to do a job that required him to do repetitive lifting, and that doing work such as using a bush axe or shovel would cause considerable pain.
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> 22. Dr. Wheeler testified as follows regarding plaintiff's ability to return to work:
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> '. . . My opinion is that he needs guidance and training and he needs a lighter job

> activity that would include, you know, no lifting over, say, ten pounds occasionally and the ability to change position as necessary, no static forward bending postures, limit reaching postures, and I wouldn't want him crawling, bending or squatting on a frequent basis or even on an occasional basis.'
>
> 23. Plaintiff has been temporarily totally disabled since 7 February 2000, the day his employment was terminated."

Workman, 170 N.C. App. at 489-90, 613 S.E.2d at 249-50. We stated that these findings, reciting the opinions of several witnesses regarding the plaintiff's ability to work, "show[ed] [that the] plaintiff, although limited in the work he [could] perform, [was] capable of performing some work." *Id.* at 490, 613 S.E.2d at 250. We note that in *Workman*, none of the findings relied upon by our Court was an explicit finding that the plaintiff was "capable of some work." Our Court then stated that, based on the findings which showed the plaintiff's capability to work, the Commission was required to make findings concerning the remaining elements under *Russell*. *Id.*

Thus, the Commission is merely required to make findings of fact that "show" that a plaintiff is capable of some limited work, and such findings can be mere recitations of the evidence offered pursuant to *Russell*. *See id.* Therefore, we are not persuaded by Defendants' argument that, because "the . . . Commission failed to make any such finding . . . . no finding of

disability is legally sustainable based on the second or third prong of [*Russell*]."

V.

Defendants also argue that the Commission erred in determining that Defendants failed to overcome the presumption of compensability of future medical treatment which arose in favor of Plaintiff upon Defendants' admission of the compensability of Plaintiff's injuries. Defendants concede they admitted the compensability of the lower back injuries that Plaintiff sustained on 15 June 2007 and 6 December 2007. Defendants also concede that, because of their admission of compensability, Plaintiff was entitled to a presumption of compensability as to future medical treatment, and thus for compensation of medical treatment related to the original injuries. However, Defendants contend they presented sufficient evidence to overcome the presumption in favor of Plaintiff.

"Where a plaintiff's injury has been proven to be compensable, there is a presumption that the additional medical treatment is directly related to the compensable injury." *Perez v. Am. Airlines/AMR Corp.*, 174 N.C. App. 128, 135, 620 S.E.2d 288, 292 (2005). This presumption arises even where the employer stipulates to the compensability of the underlying injury. *Id.* at 136, 620 S.E.2d at 293 ("As compensability has

been determined by the employer's Form 60 payments, the . . . presumption applies to shift the burden to the employer."). "The employer may rebut the presumption with evidence that the medical treatment is not directly related to the compensable injury." *Id.* at 135, 620 S.E.2d at 292.

Defendants contend that the testimony they presented of Dr. Michael Goebel (Dr. Goebel) was the only medically competent testimony presented before the Commission. Defendants assert that Dr. Goebel's testimony was sufficient to rebut the presumption. The Commission made the following findings as to Dr. Goebel:

> 33. Dr. Goebel is an orthopedic surgeon with 10 years of practice. He saw Plaintiff one time, for less than an hour, on May 14, 2008. Dr. Goebel felt that "most likely (Plaintiff) had a psychological component to his pain" and that there was not a good explanation for his work-related injuries "causing all of his complaints." He did not assign any work restrictions based on Plaintiff's work injuries. He could not say, though, that Plaintiff did not really have pain.
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> . . . .
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> 39. As to whether Plaintiff's current symptoms are related to his compensable work injuries, the Full Commission accords the most weight to the opinions of Drs. Loomis and Rowe. Dr. Loomis has a wealth of experience and saw Plaintiff several times, whereas Dr. Goebel saw Plaintiff once.

Thus, the Commission clearly weighed Dr. Goebel's testimony, but found it unpersuasive. Even assuming that Dr. Goebel's testimony,

> if found to be credible and given sufficient weight, was enough to rebut the . . . presumption, "[t]he [F]ull Commission is the sole judge of the weight and credibility of the evidence. This Court is not at liberty to reweigh the evidence and to set aside the findings simply because other conclusions might have been reached."

McLeod v. Wal-Mart Stores, Inc., ___ N.C. App. ___, ___, 703 S.E.2d 471, 475 (2010) (citation omitted). Therefore, we hold that the Commission did not err in concluding that Defendants did not rebut the *Perez* presumption.

We also note that Defendants challenge the competence and credibility of every witness presented except for Dr. Goebel. However, because Plaintiff had the benefit of the presumption, the burden was on Defendant and not on Plaintiff to present evidence. We note that the presumption originated in *Parsons v. Pantry, Inc.*, 126 N.C. App. 540, 485 S.E.2d 867 (1997), and was extended by *Perez* to apply to cases where an employer filed a Form 60. In *Parsons*, our Court determined that a plaintiff, having proven the initial compensation of her injuries, had "met her causation burden[.]" *Id.* at 542, 485 S.E.2d at 869. Our Court then held that "[l]ogically, defendants now have the responsibility to prove the original finding of compensable

injury is unrelated to her present discomfort." *Id.* We stated in *Perez* that: "To require plaintiff to re-prove causation each time she seeks treatment for the very injury that the Commission has previously determined to be the result of a compensable accident is unjust and violates our duty to interpret the Act in favor of injured employees." *Id.*

Thus, the burden in the present case was not on Plaintiff to present evidence that his current symptoms were related to his compensable injuries – rather, the burden was on Defendants to prove that they were not. *See Id.* ("[l]ogically, defendants now have the responsibility to prove the original finding of compensable injury is unrelated to her present discomfort."). Having upheld the Commission's determination that Defendants failed to meet this burden, we affirm the Commission's opinion and award.

Affirmed.

Chief Judge MARTIN and Judge ERVIN concur.

Report per Rule 30(e).