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NO. COA11-804
NORTH CAROLINA COURT OF APPEALS

Filed: 20 March 2012

THOMAS BRIGGS, Employee,
Plaintiff,

v.

North Carolina Industrial
Commission
I.C. No. 890917

UNIVERSITY OF NORTH CAROLINA—
CHAPEL HILL, Employer, SELF-
INSURED (CORVEL, INC., Third-Party
Administrator),
Defendant.

Appeal by Defendant from Opinion and Award entered 3 March 2011 by the North Carolina Industrial Commission. Heard in the Court of Appeals 30 November 2011.

Hardison & Cochran, P.L.L.C., by J. Adam Bridwell, for Plaintiff-appellee.

Attorney General Roy Cooper, by Assistant Attorney General Karissa J. Davan, for Defendant-appellant.

HUNTER, JR., Robert N., Judge.

On 2 May 2007, Plaintiff Thomas Briggs sustained an injury during and within the scope of his employment when he stepped on a piece of construction debris and twisted his left ankle. Defendant-Employer University of North Carolina—Chapel Hill

appeals from an Opinion and Award entered 3 March 2011 by the Full Commission of the North Carolina Industrial Commission ("the Commission") awarding Plaintiff temporary total disability benefits and present and future medical costs. Defendant contends the evidence is insufficient to support certain challenged findings of fact and conclusions of law. For the following reasons, we affirm the Commission's Opinion and Award.

I. Factual Background & Procedural History

The evidence of record tends to show the following. In August 2000, Plaintiff began working for Defendant as a maintenance mechanic. Plaintiff's position requires him to perform general maintenance and renovations of buildings on the University of North Carolina-Chapel Hill campus. The physical demands of the position require Plaintiff to lift approximately fifty pounds and to be on his feet for the majority of his working shift.

In 2003, Plaintiff was diagnosed with an osteochondral defect in his left foot. An osteochondral defect, as explained through expert testimony, is an area of damaged cartilage found in a joint, e.g., the ankle joint. The condition occurs when healthy cartilage separating the bones comprising the joint degrades or wears away completely. As the cartilage detaches

from the bones, the bones rub against one another causing injury and pain. Plaintiff was also treated for gout, arthritis of the foot caused by joint inflammation.

On 27 October 2004, Plaintiff injured his left ankle when he fell approximately twenty inches while attempting to hang a giant steel door with three other workers. Upon reviewing Plaintiff's medical records, Defendant denied Plaintiff's workers' compensation claim. Defendant cited Plaintiff's osteochondral defect as the cause of Plaintiff's condition.¹

Plaintiff sought medical treatment, without workers' compensation insurance, from Dr. Robert Creighton. On 18 November 2004, Dr. Creighton performed arthroscopic surgery on Plaintiff's left ankle. Following this procedure, Dr. Creighton released Plaintiff to work without restriction.

Plaintiff returned to his position as a maintenance mechanic with Defendant in January 2005. Plaintiff experienced aching and swelling in his ankle but continued to work through 2 May 2007, when Plaintiff again sustained an injury to his left ankle during and within the scope of his employment with Defendant. Plaintiff was carrying a ladder when he stepped on a

¹ Our review of the record indicates Plaintiff did not request a hearing before the North Carolina Industrial Commission with respect his 2004 injury.

piece of brick mortar and twisted his ankle. Plaintiff immediately reported his injury to his supervisor and filled out an accident report form. Plaintiff was evaluated at the University of North Carolina Employee Occupational Health Clinic ("UNC Health") that day; x-rays taken showed no acute fracture to Plaintiff's ankle. Plaintiff was diagnosed with a sprained ankle and advised to return for a follow-up evaluation in two days.

Plaintiff returned to UNC Health on 4 May 2007. Plaintiff reported decreased swelling in his ankle and stated his ankle was feeling much better. Plaintiff returned to work that day with limited work restrictions in place for the following week.

Plaintiff continued working as a maintenance mechanic for Defendant following his 2 May 2007 injury. However, Plaintiff experienced increasing pain in his left foot, to the point where he could not put any weight on his left ankle. On 22 February 2008, Plaintiff returned to Dr. Creighton seeking medical treatment. Dr. Creighton recommended orthotics to assist Plaintiff with walking on uneven surfaces but did not recommend an MRI.

On 25 February 2008, Plaintiff sought a second opinion evaluation from Dr. Hardayal Singh, an orthopedic surgeon at

Southeastern Orthopedics Sports Medicine and Shoulder Center. Plaintiff informed Dr. Singh of his 2004 ankle injury and the arthroscopic surgery performed by Dr. Creighton. Plaintiff did not mention the 2 May 2007 injury. Dr. Singh ordered an MRI, which revealed a "pretty significant size osteochondral defect, which is basically a tear of the bone and the cartilage in one end of the ankle joint." Dr. Singh discussed possible treatment options with Plaintiff, including osteochondral autologous transfer surgery ("OATS"), which would require transplantation of cartilage and bone into Plaintiff's ankle joint.

As of 18 March 2008, Plaintiff was unable to continue performing his maintenance duties for Defendant due to pain in his left ankle. At the direction of his attorney, Plaintiff returned to UNC Health on 20 March 2008 to discuss workers' compensation coverage. Dr. Liska Lackey informed Plaintiff that workers' compensation was administratively managed, but encouraged Plaintiff to seek treatment without delay.

Plaintiff returned to Dr. Singh on 7 April 2008. Plaintiff underwent a steroid injection to alleviate the pain in his ankle as he contemplated further treatment options. Dr. Singh referred Plaintiff to Dr. Mark Easley, an orthopedic surgeon at Duke University Medical Center.

Per Dr. Singh's referral, Plaintiff sought treatment from Dr. Easley on 17 June 2008. Dr. Easley evaluated the condition of Plaintiff's ankle and noted Plaintiff's 2004 arthroscopic surgery performed by Dr. Creighton. Dr. Easley also noted that Plaintiff had sustained an injury to his left ankle in May 2007, and that Plaintiff had been unable to fully recover from that injury. Dr. Easley recommended the OATS grafting procedure previously recommended by Dr. Singh. Plaintiff agreed and underwent the OATS procedure on 23 February 2009. The OATS procedure required Dr. Easley to break Plaintiff's ankle and implant a cadaver talus² for Plaintiff's body to accept. The procedure was delayed until February 2009 as Dr. Easley waited for an appropriate cadaver. Plaintiff's ankle gradually improved following the OATS procedure and, on 24 November 2009, Plaintiff indicated to Dr. Easley that he was ready to return to work. Plaintiff returned to his maintenance mechanic position with Defendant on 4 January 2010.

Defendant agreed to pay Plaintiff short-term disability benefits for his "ankle sprain" for the period covering April 2008 through July 2009. Defendant refused to provide Plaintiff with additional compensation and costs of medical treatment for

² The talus bone is one of a group of bones comprising the ankle joint.

his ankle, claiming that Plaintiff's ankle condition was a result of his 2004 injury and his osteochondral defect, not his 2 May 2007 injury.

This matter came before Deputy Commissioner of the North Carolina Industrial Commission John B. Deluca on 1 December 2009. Plaintiff offered the expert medical testimony of Dr. Singh and Dr. Easley in support of his position that he had suffered a compensable injury on 2 May 2007. The Deputy Commissioner concluded the 2 May 2007 incident aggravated Plaintiff's preexisting osteochondral defect and awarded Plaintiff temporary total disability benefits from 18 March 2008 through 4 January 2010 at Plaintiff's stipulated compensation rate. Defendant timely appealed to the Commission on 30 August 2010.

On 3 March 2011, the Commission entered an Opinion and Award affirming the Deputy Commissioner's Opinion and Award with modifications. The Commission awarded Plaintiff, *inter alia*, temporary total disability benefits from 18 March 2008 to 4 January 2010 at a weekly rate of \$ 492.13, and costs for all medical expenses incurred and to be incurred as a result of Plaintiff's 2 May 2007 injury. Defendant filed its notice of appeal with this Court on 1 April 2011.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-29(a) (2011), as Defendant appeals from a final decision of the North Carolina Industrial Commission as a matter of right.

III. Analysis

On appeal from the Commission's Opinion and Award, Defendant argues that the Commission erred in concluding that Plaintiff's 2 May 2007 injury aggravated his preexisting osteochondral defect. Defendant specifically challenges Plaintiff's expert medical testimony as speculative, and therefore insufficient, to establish a causal relationship between the 2 May 2007 incident and any subsequent aggravation of Plaintiff's preexisting condition.

We note from the outset that our review of the Commission's Opinion and Award is "limited to reviewing whether *any* competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000) (emphasis added). "The full Commission's findings of fact 'are conclusive on appeal when supported by competent evidence,' even if there is evidence to support a contrary finding." *Chavis v. TLC Home Health Care*, 172 N.C.

App. 366, 369, 616 S.E.2d 403, 408 (2005) (citation omitted).
"Although the Industrial Commission is the sole judge of the credibility and the evidentiary weight to be given to witness testimony, the Commission's conclusions of law are fully reviewable. *Holley v. ACTS, Inc.*, 357 N.C. 228, 231, 581 S.E.2d 750, 752 (2003) (internal citation omitted). "The evidence tending to support plaintiff's claim is to be viewed in the light most favorable to plaintiff, and plaintiff is entitled to the benefit of every reasonable inference to be drawn from the evidence.'" *Poole v. Tammy Lynn Center*, 151 N.C. App. 668, 672, 566 S.E.2d 839, 841 (2002) (citation omitted).

Defendant contends that four of the Commission's findings of fact are not supported by competent evidence. Defendant further contends that these unsupported findings of fact, in turn, do not support three of the Commission's conclusions of law.

Specifically, Defendant challenges the following findings of fact:

17. Dr. Singh further testified to an opinion herein deemed credible and accepted as fact, that plaintiff's May 2, 2007 twisting of his ankle exacerbated/aggravated his underlying left ankle condition.

. . . .

28. Dr. Easley testified to an opinion herein deemed credible and accepted as fact, that plaintiff had a pre-existing left ankle condition which had improved until the inciting event, the May 2, 2007 twisting injury, and that injury aggravated plaintiff's pre-existing left ankle condition.

. . . .

36. The Full Commission finds that the greater weight of the medical evidence of record indicates that plaintiff's pre-existing left ankle condition was materially aggravated for the worse by his May 2, 2007 injury by accident.

. . . .

38. The Full Commission finds that the greater weight of the medical evidence of record indicates that plaintiff's present medical condition, and any necessary medical treatment related thereto, are causally related to plaintiff's injury by accident on May 2, 2007.

Defendant likewise challenges the following conclusions of

law:

1. On May 2, 2007, plaintiff sustained an aggravation to his left ankle condition by accident arising out of and in the course of his employment with defendant-employer.

2. There is sufficient medical evidence of record upon which to conclude that plaintiff's aggravated left ankle condition for which he seeks treatment is the direct and natural result of and causally related to his May 2, 2007 injury by accident.

3. . . . Plaintiff has met his burden [of proving disability under the Workers' Compensation Act]. The medical evidence in this case shows plaintiff was not capable of gainful employment from March 18, 2008, until his return to work on January 4, 2010. Plaintiff was temporarily totally disabled pursuant to N.C. Gen. Stat. §97-29 for the period of March 18, 2008, through January 4, 2010, as a result of his May 2, 2007 left ankle condition aggravation.

(Citations omitted).

Defendant bases his challenge to the foregoing findings of fact and conclusions of law on his assertion that the testimony offered by Plaintiff's physicians, Dr. Singh and Dr. Easley, was speculative in nature and therefore insufficient to prove that Plaintiff's 2 May 2007 injury aggravated his preexisting left ankle condition. We disagree.

It is well established that:

When a pre-existing, *nondisabling, non-job-related* condition is aggravated or accelerated by an accidental injury arising out of and in the course of employment or by an occupational disease so that disability results, then the employer must compensate the employee for the entire resulting disability even though it would not have disabled a normal person to that extent.

Morrison v. Burlington Indus., 304 N.C. 1, 18, 282 S.E.2d 458, 470 (1981).

The claimant in a workers' compensation claim "has the burden of proving that his claim is compensable." *Henry v. A.C. Lawrence Leather Co.*, 231 N.C. 477, 479, 57 S.E.2d 760, 761 (1950). The plaintiff must "produce competent evidence establishing each element of compensability, including a causal relationship between the work-related accident and his or her injury." *Castaneda v. Int'l Leg Wear Grp.*, 194 N.C. App. 27, 31, 668 S.E.2d 909, 913 (2008), *aff'd*, 363 N.C. 369, 677 S.E.2d 454 (2009). "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.'" *Holley*, 357 N.C. at 231-32, 581 S.E.2d at 752 (citations omitted). "To show causal relation, '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'" *Everett v. Well Care & Nursing Servs.*, 180 N.C. App. 314, 319, 636 S.E.2d 824, 828 (2006) (quoting *Gilmore v. Hoke County Bd. of Educ.*, 222 N.C. 358, 365, 23 S.E.2d 292, 296 (1942)) (alteration in original).

In *Holley*, our Supreme Court opined on the role of expert medical testimony in workers' compensation cases involving complex medical issues:

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.' '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.' '[T]he 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.'

Holley at 232, 581 S.E.2d at 753 (internal citations omitted) (alterations in original).

In the instant case, the deposition testimony offered by Dr. Singh and Dr. Easley provided competent evidence to support the challenged findings of fact. Dr. Singh indicated several times during his testimony that if Plaintiff did in fact incur the 2 May 2007 injury to his left ankle, and if the pain stemming from that injury continued to grow worse from that date onward, then it was his opinion that the 2 May 2007 incident aggravated Plaintiff's preexisting osteochondral defect. For example, Dr. Singh stated that "[i]f [Plaintiff] rolled his

ankle [on 2 May 2007] and he's not getting better from that day . . . you could then state that his ankle *got worse, not just inflamed, but truly got worse from that ankle sprain.* (Emphasis added). The Commission found as fact both that Plaintiff incurred the 2 May 2007 ankle injury (finding of fact 8) and that Plaintiff's ankle pain "progressively became worse" thereafter (finding of fact 11). Defendant does not challenge these findings of fact, and, therefore, they are binding on appeal. See *Ferreyra v. Cumberland County*, 175 N.C. App. 581, 583, 623 S.E.2d 825, 826 (2006). Thus, Dr. Singh's testimony that the 2 May 2007 incident aggravated Plaintiff's preexisting condition was not merely speculative, but rather was contingent upon specific facts found by the Commission. Likewise, Dr. Easley testified that Plaintiff's 2 May 2007 injury made Plaintiff's condition "worse" and "from my standpoint, it was a pre-existing condition that was aggravated by this injury." We therefore conclude that Plaintiff's expert medical testimony meets the any competent evidence standard to support the Commission's findings.

We stress in reaching this conclusion that it is not the function of this Court to reweigh the evidence presented before the Commission. See *Alexander v. Wal-Mart Stores, Inc.*, 166

N.C. App. 563, 573, 603 S.E.2d 552, 558 (2004) (Hudson, J., dissenting), *adopted per curiam*, 359 N.C. 403, 610 S.E.2d 374 (2005). Rather, as previously stated, we review the record before us merely for *any* evidence in support of the Commission's findings. *See Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998). Thus, while we note that some portions of Dr. Singh's testimony appear speculative—for instance, he declined to testify to a degree of medical certainty that the 2 May 2007 incident aggravated Plaintiff's preexisting condition—Dr. Singh's testimony nonetheless provides evidence that is competent to support the Commission's findings, and our standard of review precludes us from delving further. *See id.* at 682, 509 S.E.2d at 414 (notwithstanding conflicting testimony, the fact that there was *some* competent evidence was sufficient to uphold the Commission's findings); *see also Alexander*, 166 N.C. App. at 573, 603 S.E.2d at 558 ("If there is any evidence at all, taken in the light most favorable to the plaintiff, the finding of fact stands, *even if there is substantial evidence to the contrary.*" (emphasis added)). In addition, we note that "[a]bsolute medical certainty is not required" to establish the causal connection between Plaintiff's 2 May 2007 injury and

aggravation of his preexisting condition. See *Keel v. H&V Inc.*, 107 N.C. App. 536, 540, 421 S.E.2d 362, 366 (1992).

Having concluded that the expert medical testimony in the instant case met the any competent evidence standard for review and given the unchallenged findings of fact, we conclude that these findings of fact support the Commission's conclusions of law. Accordingly, we hold that there was sufficient competent evidence from which the Commission could conclude that Plaintiff's 2 May 2007 injury aggravated his preexisting osteochondral defect.

For the foregoing reasons, the Commission's Opinion and Award is hereby

Affirmed.

Judges HUNTER, Robert C., and GEER concur.

Report per Rule 30(e).