NO. COA04-669

NORTH CAROLINA COURT OF APPEALS

Filed: 3 May 2005

STANLEY NORRIS,
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 921410

COASTAL TRANSPORT, INC.,
Employer,

and

PROTECTIVE INSURANCE COMPANY,
Carrier,
Defendants.

Appeal by defendants from opinion and award entered 13 February 2004 by the North Carolina Industrial Commission. Heard in the Court of Appeals 21 February 2005.

Jerry D. Parker, Jr. for plaintiff-appellee.

Morris, York, Williams, Surles & Barringer, L.L.P., by Stephen Kushner, for defendants-appellants.

GEER, Judge.

Defendants Coastal Transport and Protective Insurance Company appeal the decision of the North Carolina Industrial Commission awarding temporary and permanent partial disability benefits to plaintiff Stanley Norris for a herniated disc in his lumbar spine. Because the record contains no evidence supporting the Commission's finding of causation, we reverse.

Facts

Plaintiff began his employment as an over-the-road truck driver for defendant Coastal Transport in August 1998. On 9 November 1998, plaintiff drove a flatbed trailer to Kingstree, South Carolina to pick up a load. While he was rolling back the tarps used to secure the load on his trailer bed, his left leg caught between two rolls of tarp. Plaintiff described what happened next:

> I fell around and . . . spun around to the right, and I felt something burn in my back. I didn't really think nothing about it because I had been having a kidney stone problem for two or three days, and the symptoms I was having _ I did feel my back burn and sting, but you're all the time getting bumps and bruises doing what we do. . . . And with the problem and the pain that I had had with my stones, I really didn't pay any attention to it . . . .

Plaintiff described the pain as "a real bad burning, stinging sensation in my lower back. That was the only thing that I felt, but at the same time, I had pulled muscles before, so I didn't really think anything about that either." As the day progressed, however, the pain worsened until plaintiff had difficulty operating the truck's brakes and clutch. The following day, plaintiff contacted his dispatcher at Coastal and asked to be rerouted back to North Carolina, believing he "was having a kidney stone problem." After receiving authorization, he returned home.

Medical records during the remainder of 1998 do not mention any back pain. On 18 November 1998, plaintiff went to the emergency room of Good Hope Hospital because of a migraine headache. On 24 November 1998, plaintiff presented to his physician, Dr. Abraham Oudeh, with "headache associated with nausea and vomiting." On 17 December 1998, Dr. Oudeh noted the possibility of a kidney stone based on frequency, urgency, and pressure in the lower abdomen. Plaintiff returned to Dr. Oudeh on 4 January 1999, complaining of "abdominal pain." An X-ray and ultrasound on 5 January 1999 were negative for kidney stones.

On 21 January 1999, plaintiff presented to Dr. Oudeh with "pain in lower abdomen left side, left testicle, [and] down into left leg [and] foot [for] 2 weeks." An x-ray of plaintiff's lumbar spine taken on 21 January 1999 revealed "normal alignment" with "well preserved" intervertebral disc spaces and vertebral body heights and no other abnormalities. On 5 February 1999, Dr. Oudeh diagnosed "[b]ack pain secondary to kidney stone."

Dr. Oudeh referred plaintiff to Dr. H. Willy Chu, who examined him on 16 February 1999. Based on plaintiff's report of a "two week history" of severe groin pain with no precipitating incident, Dr. Chu diagnosed a left inguinal hernia and scheduled surgery to repair it. On the day of the scheduled surgery, Dr. Chu re-examined plaintiff and found no evidence of a hernia. In light of plaintiff's complaint of "pain along the back of his left leg" and "pins and needles on the lateral aspect of his left foot," Dr. Chu ordered physical therapy and referred plaintiff to orthopaedist Dr. William Y. Oh.

Dr. Oh examined plaintiff on 2 March 1999 and ordered an MRI of plaintiff's lumbar spine on 4 March 1999, which revealed a herniated nucleus pulposus at L4-5. After a regimen of physical therapy proved unsuccessful in treating plaintiff's condition, Dr. Oh performed a laminectomy on 6 April 1999.

Until February 1999, plaintiff had continued to work for Coastal. After his back surgery, plaintiff worked as a short-distance truck driver for Winn Dixie from 1 July 1999 until he was laid off on 5 July 2000. Defendant next worked for a company in Dunn, North Carolina, hauling salvage vehicles from 25 May 2001 to 14 August 2001, but he was ultimately unable to perform the bending, stooping, and lifting required for the job. After working four or five months as a hospital security guard, plaintiff took a job fueling school buses for the Wake County Public Schools in February 2002.

Plaintiff submitted a Form 18 "Notice of Accident to Employer" dated 23 March 1999, claiming his herniated disc was caused by the work-related tarp accident on 9 November 1998. Coastal denied the claim on the ground that it did not receive notice of the injury until 8 March 1999, four months after the accident. In an opinion and award filed on 19 March 2003, Deputy Commissioner Phillip A. Holmes found plaintiff's herniated disc to be a compensable "injury by accident arising out of and in the course of his employment on November 9, 1998." Defendants appealed to the Full Commission. In affirming the deputy commissioner's award with modifications, the Full Commission likewise found and concluded that "plaintiff sustained a back injury by accident arising out of and in the course of his employment on November 9, 1998. This injury caused plaintiff to suffer a herniated disc and necessitated that plaintiff undergo a lumbar laminectomy."

On appeal to this Court, defendants claim the Full Commission erred in finding a causal link between plaintiff's herniated disc and his accident on 9 November 1998 because of the absence of competent evidence to support such a finding. Our review of a workers' compensation opinion and award is limited to determining "(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).

It is well established that "[t]he plaintiff in a workers' compensation case bears the burden of initially proving each and every element of compensability, including causation." *Whitfield v. Lab. Corp. of Am.*, 158 N.C. App. 341, 350, 581 S.E.2d 778, 784 (2003). The record must contain "competent evidence to support the inference that the accident in question resulted

in the injury complained of . . . .” *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980).

Plaintiff does not dispute defendants’ contention that the record contains no expert opinion evidence of causation. The only expert testimony presented by the parties was the deposition of Dr. Barry Katz, a neurosurgeon who first began treating plaintiff for back pain on 4 October 2000, six months after plaintiff’s back surgery. On the issue of causation, Dr. Katz testified during his direct examination as follows:

> Q. Did [plaintiff] relay to you that he had hurt it while he was throwing a tarp, I believe, over _
>
> . . . .
>
> A. He may have, but I don’t remember that.
>
> Q. If that were the testimony that he gave to the Industrial Commission, that he injured himself by throwing a tarp over the trailer, is that _ would that be something that would be consistent with this type of injury, a lumbar herniated disk?
>
> . . . .
>
> A. I mean, you can injure your back doing anything, but it’s a pretty nonspecific thing.
>
> Q. So it wouldn’t be something that would be ruled out by that type of activity?
>
> . . . .
>
> A. You can’t _ I would say that you can’t rule it out. You know, it’s not common that someone says I threw a tarp over something and now I’ve got back pain and leg pain, I’ve got a herniated disk. But someone can injure their back, you know, doing any activity.
>
> Q. Well, let’s see, the Form 19 that was stipulated into evidence says, rolled tarp out over the load and stepped between a long roll of roofing and short roll and twisted his

> back to the right. . . . [I]s that something that would be consistent with herniating a disk?
>
> . . . .
>
> A. I mean, it's kind of like what I just said. It's _ you know, people injure their back doing all sorts of things. That specific thing is, you know, pretty nonspecific. You know, theoretically anything can cause an injury in the back.

On cross-examination, Dr. Katz repeated that one could herniate a disc "doing almost anything," including sneezing or walking down the street. He further stated that he generally could not determine when a disc herniation occurred based upon an MRI.

In short, Dr. Katz never expressed an opinion that the tarp incident caused the disc herniation beyond saying "you can't rule it out" and "anything can cause an injury in the back." This testimony is not sufficient to support a finding of causation. *Edmonds v. Fresenius Med. Care*, __ N.C. App. __, __, 600 S.E.2d 501, 504 (2004) ("Where the expert's opinion is that there 'could' or 'might' be a causal relationship, it is admissible if helpful for purposes of showing medical causation; however, it is not sufficiently reliable to constitute competent evidence of medical causation, especially if additional evidence suggests such testimony was merely a guess."), *rev'd per curiam on other grounds*, __ N.C. __, 608 S.E.2d 755 (2005).

We have also carefully reviewed the medical records admitted into evidence. Those records likewise do not contain any opinion suggesting that the tarp incident caused plaintiff's herniated disc. In fact, Dr. Oh's notes for the initial comprehensive orthopedic consultation dated 2 March 1999 state: "About two weeks ago patient developed severe pain in the low back. He does not recall any particular injury at this time. He was in a car accident about 1993 and 1995 and each time he sustained a back injury. This time his pain is different and it radiates down to the left hip and left leg." In the surgery note dated 6 April 1999, Dr. Oh reported: "Early

February of 1999, patient developed severe pain in the low back. He does not recall any particular injury at this time." Thus, neither Dr. Katz' testimony nor the medical records provide any expert evidence supporting the Commission's causation finding.

Plaintiff argues that an expert opinion was not necessary. Our Supreme Court has held, however, that the etiology of a herniated disc is a complicated medical question that ordinarily requires expert testimony: "'One of the most difficult problems in legal medicine is the determination of the relationship between an injury or a specific episode and rupture of the intervertebral disc.'" *Gillikin v. Burbage*, 263 N.C. 317, 325, 139 S.E.2d 753, 760 (1965) (quoting 1 *Lawyers' Medical Cyclopedia of Personal Injuries and Allied Specialties* §7.16 (1st ed. 1958)). The Supreme Court reaffirmed the holding of *Gillikin* in *Click*:

> The difficulty of pinpointing the precise causative factors of disc injuries remains today. Indeed, full knowledge of the spine is still wrapped in uncertainty, mystery, and enigma. Thus, although cases involving "slipped" or ruptured discs continue to provide livelihood for the compensation lawyer, they remain the anathema of the orthopedic and neurosurgeon, not only because of the difficulties of treatment but also because it is . . . extremely difficult at times to sort out the complaints due to injury from those of nontraumatic origin.
>
> In light of the continuing medical difficulty in determining the etiology of intervertebral diseases and injuries, this Court is not disposed to modify the holding in *Gillikin*.

Click, 300 N.C. at 168, 265 S.E.2d at 391 (internal citations and quotation marks omitted). The Court did, however, recognize "the possibility that a disc injury case may arise in the future wherein the facts are so simple, uncontradictory, and obvious as to permit a finding of a causal relationship between an accident and the injury absent expert opinion evidence." *Id.* at 168, 265 S.E.2d at 391-92.

The Supreme Court held in *Click* that the disc injury at issue there did not present such a case. At the hearing, the employee testified that he was struck in the back by a cart, resulting in severe pain that worsened until he was forced to remain in bed. Other statements of the employee suggested, however, that he may have injured his back while picking something up at home. The Court held: "Although [the employee's] testimony tended to link the herniated disc with the accident at his work place, other evidence in the case suggested that his injury was caused by an occurrence at his home. In the absence of guidance by expert opinion as to whether the accident could or might have resulted in his injury, the Commission could only speculate on the probable cause of his condition." *Id.* at 169, 265 S.E.2d at 392.

This case is materially indistinguishable from *Click*. While plaintiff testified that he injured his back when tangled in the tarps, he told Dr. Oh that he did "not recall any particular injury" that led to the back pain he was experiencing in February 1999. Medical records contain no mention of pain arguably related to the back until January 1999 and from that date through February 1999, doctors reached tentative diagnoses of kidney stones or a hernia. Only in March 1999, four months after the accident, did Dr. Oh diagnose a herniated disc.

Because of the conflicting reports, the passage of time, and the varying medical diagnoses, this is not an "'uncomplicated situation'" that can be resolved without expert opinion. *Id.* (quoting *Uris v. State Comp. Dep't*, 247 Or. 420, 426, 427 P. 2d 753, 756 (1967)). Since the record contains no expert opinion to support the Commission's finding that plaintiff's herniated disc was caused by his 9 November 1998 accident, we reverse.

Reversed.

Judges WYNN and TYSON concur.

Report per Rule 30(e).