NO. COA02-1359

NORTH CAROLINA COURT OF APPEALS

Filed: 16 September 2003

CHARLES H. IRBY,
Plaintiff-Appellee,

v.

North Carolina Industrial Commission
I.C. File No. 972374

THE NEW TELEPHONE COMPANY, INC.,
Defendant-Appellant,

Appeal by defendant from Opinion and Award entered 26 April 2002 by the North Carolina Industrial Commission. Heard in the Court of Appeals 19 August 2003.

Maynard & Harris, P.L.L.C., by Celeste M. Harris and John J. Korzen, for plaintiff-appellee.

McAngus, Goudelock & Courie, P.L.L.C., by Andrew R. Ussery and Sally G. Boswell, for defendant-appellant.

WYNN, Judge.

Defendant-employer, The New Telephone Company, appeals from an Opinion and Award of the North Carolina Industrial Commission awarding workers' compensation benefits to plaintiff-employee, Charles H. Irby. Defendant contends that the Commission's findings that plaintiff's on-the-job injury resulted in a mild-traumatic- brain injury and loss-in-wage earning capacity were not supported by sufficient evidence. On appeal, we affirm the Opinion and Award.

Defendant employed plaintiff since June 1987 as an installation manager responsible for supervising installers, scheduling work orders, and working in the field servicing and installing office telephone equipment. On 6 October 1999, while installing data cables in the ceiling of a textile facility, plaintiff fell through the ceiling onto the concrete floor eight- to-ten feet below. At the hospital, he was treated for two dislocated fingers and diagnosed with a pulmonary contusion. He was later treated by an orthopedic surgeon for bruising to his chest wall, shoulders and an injury to his knee. Plaintiff returned to work on 11 October 1999 and continued to work through 17 February 2000.

Although plaintiff had returned to work, plaintiff's wife complained that he was behaving erratically, had crying spells, and was depressed. Plaintiff subsequently saw several doctors including his family physician, Dr. John H. Bowen, who performed several tests including an EEG and an MRI but found no neurological reason for plaintiff's problems.

Dr. Bowen referred plaintiff to Dr. Richard W. Marcus, a neurologist, and Dr. Mark A. Graham, a psychiatrist. Dr. Marcus ran several tests and diagnosed plaintiff with severe sleep apnea for which a CRAP machine was prescribed. Dr. Graham concluded that plaintiff sustained a personality change secondary to a closed-head injury during the fall at work and prescribed several medications to treat the symptoms. Plaintiff continued to be treated by Dr. Graham. After Dr. Graham moved away, plaintiff received his psychiatric care from Dr. Charles Davis who concurred with Dr. Graham's diagnosis and continued plaintiff on the same prescriptions.

In February and May 2000, again upon Dr. Bowen's referral, plaintiff saw Gary Indenbaum, Ph.D., neuropsychologist, for an evaluation. Dr. Indenbaum found plaintiff's cognitive skills functioned at a very high level, but he displayed symptoms of severe emotional turmoil, with obsessive tendencies and problems in making decisions. Although Dr. Indenbaum

believed the tests showed plaintiff's abilities were generally consistent with intact frontal-lobe functions, given his reported personality changes, Dr. Indenbaum was unwilling to say plaintiff had not sustained a head injury.

Plaintiff was also evaluated by Lynn Flowers, Ph.D., a neuropsychologist at Wake Forest University. Dr. Flowers found plaintiff's intellectual abilities were at least normal, if not above normal, and there was no evidence of cognitive dysfunction consistent with traumatic-brain injury. Dr. Flowers did not observe any of the behavioral changes described by Mrs. Irby, but stated that if plaintiff experienced those behaviors, there would be a strong suggestion that the injury led to the personality and behavioral changes.

Later, in the early months of 2001, plaintiff saw Dr. Edgardo Diez, a physician at Thoms Rehabilitation, who found that plaintiff might be able to drive again. He had a prescreening driver's test administered and sent plaintiff to Earl Rhoades, Ph.D., neuropsychologist, for a current evaluation. Dr. Rhoades found that plaintiff had sustained a mild-traumatic-brain injury evidenced in the form of frontal-lobe syndrome with personality changes including performing repetitive behaviors, such as constant wringing of hands, loss of inhibition, problems with impulse control and problems with non-goal directed behaviors. Dr. Rhoades believed the frontal-lobe syndrome prevented plaintiff from working.

Plaintiff filed a claim seeking compensation for his medical expenses as well as for disability caused by the 6 October 1999 fall. When the parties were unable to resolve the claim regarding the alleged head injury, the claim was assigned for hearing. Deputy Commissioner Morgan S. Chapman heard this matter on 5 March 2001 and on 21 September 2001 filed an Opinion and Award holding plaintiff's current disability, labeled frontal-lobe syndrome, was caused by mild-traumatic-brain injury incurred during the 6 October 1999 injury by accident. On

appeal, the Commission affirmed the Opinion and Award of Deputy Commissioner Chapman. Defendants appeal.

Defendant first argues that the Commission erred in finding there was sufficient evidence to support a finding that plaintiff suffered a loss in wage earning capacity due to his frontal-lobe injury. While defendant makes several arguments to support the contention that the Commission *could* have found that plaintiff does not suffer from a closed-head injury manifesting itself in personality changes, this is not our standard of review. "Our review of an Industrial Commission's award is limited to two questions: (1) whether there was competent evidence before the Commission to support its findings of fact, and (2) whether the findings support the legal conclusions." *Gilliam v. Perdue Farms*, 112 N.C. App. 535, 536, 435 S.E.2d 780, 781 (1993). The findings of the Industrial Commission are conclusive on appeal when supported by competent evidence even though there may be evidence to support a contrary finding. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 684 (1982). "The Commission's conclusions of law are reviewable de novo." *Arnold v. Wal-Mart Stores*, 154 N.C. App. 482, 484, 571 S.E.2d 888,891 (2002).

In this case the Commission found in its Opinion and Award that:

> 19. Although plaintiff had preexisting anxiety disorder and sleep apnea, his behavior worsened and became significantly different following the fall. The Commission finds the testimony of Mrs. Irby and Ms. Smith credible regarding the personality changes experienced by plaintiff after the fall.
>
> 20. The greater weight of the evidence shows that plaintiff injured his head in the fall, based upon the nature of the fall and the nature of the symptoms plaintiff developed later. Drs. Marcus, Graham, Diez, Davis and Rhoades attributed plaintiff's condition to a closed-head injury sustained as a result of the fall, based upon their personal observations and examinations of

plaintiff, his history and test results. Dr. Rhoades indicated that a head injury could have impaired plaintiff's ability to be a reliable historian immediately after the fall due to an alteration in consciousness. Dr. Davis believed that head injury was the best and most reasonable explanation for plaintiff's on-going psychiatric problems. No other cause has been identified. The Commission gives greater weight to the opinions of Drs. Marcus, Graham, Davis, Diez and Rhoades than to Drs. Idenbaum and Flowers, who based their opinions on limited observations of plaintiff.

21. Consequently, despite the lack of direct evidence of a head injury, plaintiff is found to have sustained a closed-head injury which caused some mild, traumatic brain damage which subsequently manifested itself in the form of personality changes. Plaintiff became withdrawn and passive, had difficulty initiating conversations, had a lack of judgment in social interactions, became disinhibited regarding sexual matters and experienced difficulty controlling impulses.

22. Due to the October 6, 1999 injury at work, plaintiff was unable to work in any capacity from February 18, 2000 through the date of the Deputy Commissioner hearing on March 5, 2001...

CONCLUSIONS OF LAW

1. Plaintiff sustained a mild, traumatic brain injury as a result of the October 6, 1999 injury by accident which caused personality changes and symptoms that have been labeled as frontal-lobe syndrome. N.C. Gen. Stat. §97-2(6); *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 265 S.E.2d 389 (1980).

2. As a result of the compensable injury by accident, plaintiff was disabled and is entitled to compensation for temporary total disability at the rate of $560.00 per week from February 18, 2000 and continuing thereafter until he returns to work or until further order of the Commission. N.C. Gen. Stat. §97-29.

Plaintiff bore the burden of showing that he had suffered a "disability" (loss of wage-earning capacity) pursuant to N.C. Gen. Stat. §97-29 (2001). *Cox v. City of Winston-Salem,*_____N.C. App. ___, 578 S.E.2d 669, 674 (2003). *See* N.C. Gen. Stat. §97-2(9) (2001).

Plaintiff presented evidence that at least six doctors, Drs. Davis, Graham, Bowen, Diez, Rhoades and Lesage, diagnosed him with a personality disorder secondary to a closed-head injury or a closed-head injury resulting in frontal-lobe syndrome/dysfunction. Plaintiff also presented evidence that at least three doctors found the frontal-lobe syndrome prevented him from working. Dr. Rhoades testified that he did not believe plaintiff could return to work because of his frontal-lobe syndrome and was unable to give an opinion as to when he might be able to work again. Dr. Davis testified that plaintiff's difficulty in initiating activity or using proper judgment means he would have great difficulty in all but the most supervised tasks. Dr. Bowen agreed, testifying that plaintiff has been unable to work since 17 February 2000 and will continue to be unable to work for the foreseeable future because he might endanger himself or others. Finally, plaintiff also offered evidence that he was receiving social security disability, was found incompetent by order of the Clerk of Superior Court of Caldwell County on 8 March 2001, and had been unable to work at his second, part-time job following the fall. Thus, the record shows competent evidence to support the Commission's findings that plaintiff is disabled.

Defendant next contends that the Commission used improper *post hoc ergo propter***[Note 1]** analysis in violation of *Young v. Hickory Bus. Furniture*, 353 N.C. 227, 538 S.E.2d 912 (2000) and there was insufficient evidence to support a finding that the alleged personality changes resulted from the 6 October 1999 accident. To establish "a compensable claim for workers' compensation, there must be proof of a causal relationship between the injury and the employment." *Peagler v. Tyson Foods*, 138 N.C. App. 593, 597, 532 S.E.2d 207, 210 (2000). An injury is compensable as employment-related if "'any reasonable relationship to employment exists.'" *Kiger v. Bahnson Service Co.*, 260 N.C. 760, 762, 133 S.E.2d 702, 704 (1963). The plaintiff must show by a preponderance of the evidence standard that the work-related injury

caused the disability for which he seeks compensation. *See Holley v. Acts, Inc.*, ___ N.C. ___, 581 S.E.2d 750 (2003); *Ballenger v. ITT Grinnell Industrial Piping, Inc.*, 320 N.C. 155, 158, 357 S.E.2d 683, 685 (1987).

However, when "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." *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980). In *Young*, our Supreme Court stated that "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*, 353 N.C. at 230, 538 S.E.2d at 915. Although medical certainty is not required, an expert's "speculation" is insufficient to establish causation. *Holley*, ___ N.C. at ___, 581 S.E.2d at 754.**[Note 2]**

In this case, at least six doctors diagnosed plaintiff with the disability. Dr. Bowen, who treated plaintiff both before and after his work-related accident, testified to a reasonable degree of medical certainty that plaintiff suffered a closed-head injury as a result of his fall that aggravated his previous medical conditions. Drs. Davis, Rhoades, and Indenbaum also testified that plaintiff's closed-head injury/frontal-lobe syndrome was caused by his fall, although they were unable to do so with a reasonable degree of medical or neuropsychological certainty. The cause of plaintiff's injury is not mere speculation and is supported by the preponderance of the evidence. We therefore find there is competent evidence to support the Commission's finding that plaintiff's brain damage was caused by his work-related accident.

Defendant's final argument that the opinion and award is not supported by competent evidence because plaintiff's diagnosis was overly dependent on Mrs. Irby's descriptions of his

symptoms is without merit. Under our Workers' Compensation Act, "the Commission is the fact finding body." *Brewer v. Powers Trucking Co.*, 256 N.C. 175, 182, 123 S.E.2d 608, 613 (1962). "The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998). The Commission was able to weigh the testimony given by Mrs. Irby as well as that of the testifying doctors. They found her testimony credible. Further, at least two doctors testified that it was unlikely that plaintiff's symptoms could be faked while no evidence to the contrary was offered.

Accordingly, the Commission's Opinion and Award is,

Affirmed.

Judges HUDSON and CALABRIA concur.

Report per Rule 30(e).

NOTES

1. "After this, therefore because of this"

2. In *Holley v. ACT's, Inc.*, our Supreme Court held "that the entirety of causation evidence before the Commission failed to meet the reasonable degree of medical certainty standard necessary to establish a causal link between plaintiff's twisting injury and her DVT." *Holley*, ____ N.C. at ____, 581 SE.2d at 754. "A decision of the Supreme Court must be interpreted within the framework of the facts of that particular case." *Ohio Casualty Ins. Co. v. Anderson*, 59 N.C. App. 621, 624, 298 S.E.2d 56, 58 (1982). In that case, the plaintiff's leg became swollen five weeks after twisting her leg at work. After reviewing the record, our Supreme Court determined that none of the experts "could establish the required causal connection between plaintiff's accident and her DVT." Rather, "the entirety of the expert testimony ... suggest[ed] that a causal connection between plaintiff's accident and her DVT was possible, but unlikely." Acknowledging that "doctors [were] trained not to rule out medical possibilities no matter how remote," our Supreme Court reiterated that "mere possibility has never been legally competent to prove causation" and that "although medical certainty [was] not required, an expert's speculation [was] insufficient to establish causation." The Court's statement that "medical certainty was not required" is inconsistent with its holding that "the entirety of causation evidence ...failed to meet the reasonable degree of medical certainty standard necessary to establish a causal link..." In *Holley*, the Court determined that "plaintiff's doctors were unable to express an opinion to any degree of medical certainty as to the cause of plaintiff's DVT." Accordingly, *Holley*, was an opinion reemphasizing the rule that "speculation [was] insufficient to establish causation" in a worker's compensation case and not an opinion

overruling the established rule that "competent evidence must provide some evidence that the accident at least might have or could have produced the particular disability in question." *Peagler v. Tyson Foods, Inc.*, 138 N.C. App. 593, 599, 532 S.E.2d 207, 211 (2000).