NO. COA02-717

NORTH CAROLINA COURT OF APPEALS

Filed: 15 April 2003

JEFFREY E. MARTIN,
Employee/Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 976548

IDLEWILD HOUSE, INC.,
Employer/Defendant.

and

CINCINNATI INSURANCE COMPANY,
Carrier/Defendant.

Appeal by defendants from opinion and award filed 4 April 2002 by the North Carolina Industrial Commission. Heard in the Court of Appeals 12 March 2003.

J. Kevin Morton for plaintiff appellee.

Jones Hewson & Woolard, by Lawrence J. Goldman, for defendant appellants.

McCULLOUGH, Judge.

For over a decade, plaintiff Jeffrey Martin worked as an interior design assistant and showroom manager for defendant Idlewild House, Inc. (Idlewild). Part of his job duties included moving and installing furniture in customers' homes. Plaintiff had no difficulty performing his job, even though he was born with scoliosis, a congenital condition involving curvature of the spine. On Friday, 17 September 1999, plaintiff went on a routine visit to his orthopedic surgeon,

Dr. Timothy W. McGowen, and complained of muscular back pain. Plaintiff told Dr. McGowen he had recently driven to North Dakota and moved household furniture on a non-work-related trip. Dr. McGowen told plaintiff to avoid heavy lifting, take two weeks off work, and return for an appointment only if the pain worsened. Thereafter, plaintiff took three days off work and returned to normal working hours on Tuesday, 21 September 1999. Plaintiff experienced no back pain on Tuesday. The next day, 22 September 1999, plaintiff suffered a compensable injury to his back at work when he moved a dolly of furniture. Plaintiff had difficulty walking the next day and had pain in his legs. He informed his boss at Idlewild that he could not work and was going to see a doctor.

Plaintiff went to Salem Family Practice and saw Dr. Christakos because his regular doctor, Dr. John Davis, was not available. For the next two days, plaintiff experienced spasm-like pain and was uncomfortable whenever he moved. On 24 September 1999, plaintiff saw Dr. Davis and told him that, when he returned from North Dakota a week earlier, he felt some soreness and stiffness in his lower back. Plaintiff explained that he rested for three days, then went back to work with no problems. Plaintiff also related that, on 22 September, he was lifting some heavy furniture and equipment at work and felt a severe pulling sensation in his lower back. Dr. Davis placed plaintiff on strict bed rest, gave him medication, and advised him to stay out of work through 1 October 1999. When plaintiff returned for a follow-up visit with Dr. Davis two weeks later, he reported that his back pain persisted, that the medication did not seem to work, and that both his feet were cold with decreased sensation. Dr. Davis noted that plaintiff was in "obvious discomfort" and his legs were cool to the touch.

Dr. Davis referred plaintiff to Dr. John Whitley, an orthopedic surgeon, who saw plaintiff on 18 October 1999. Dr. Whitley referred plaintiff to Dr. McGowen, who examined plaintiff on

5 November 1999 for the first time since his 17 September routine office visit. Dr. McGowen's notes reflected that plaintiff was "in significant discomfort. He is hunched over and unable to straighten secondary to spasm. He has pain diffusely and I have difficulties with him regaining upright stance." Dr. McGowen discovered plaintiff had "altered sensation in the left leg[,]" which was a new finding. After a course of conservative treatment, Dr. McGowen opined that plaintiff's pain stemmed from an injured disk in his scoliotic curve. With regard to the diagnosis, Dr. McGowen stated:

> I believe that there was an injured disk [sic] in the region of his curve. I think the curve is integral to how we treated it. It's kind of an aggravation of a pre-existing condition. The spine being curved puts all sorts of abnormal pressure points on disks [sic] that are otherwise not really bothering him. And with some event, he injured that disk. [sic] And then you have to take into account the whole condition in order to treat it.

Dr. McGowen recommended a posterior spine fusion with segmental instrumentation at T2-L3.

Upon learning of Dr. McGowen's proposal of surgery, defendant Idlewild and its carrier, Cincinnati Insurance Company, refused toauthorize the surgery and sought a second opinion from Dr. Bruce Darden, an orthopedic surgeon located in Charlotte, North Carolina. On 4 April 2000, Dr. Darden examined plaintiff, reviewed his medical history, and opined that "I think Dr. McGowen's recommendations are completely reasonable." Despite the second opinion, defendants refused to authorize the surgery. Due to his continuing pain, plaintiff eventually elected to undergo surgery. The surgery completely eliminated plaintiff's lower back and leg pain. Dr. McGowen testified plaintiff had not regained the ability to return to work prior to his surgery, and that plaintiff's inability to return to work was related to his 22 September 1999 injury at work.

In February of 2000, plaintiff filed a Form 18 Notice of Accident to Employer and a Form 33 Request for Hearing. His case was heard on 20 February 2001 before Deputy Commissioner Philip A. Baddour, III. In an opinion and award dated 14 September 2001, the Deputy Commissioner found that "no competent medical evidence establishes a causal relationship between plaintiff's accident at work on September 22, 1999 and his back surgery on August 22, 2000." The Deputy Commissioner denied plaintiff's claim for worker's compensation benefits related to his back surgery and gave defendants a credit for the temporary total disability benefits they paid to plaintiff after 22 August 2000.

On 27 December 2001, plaintiff filed a Form 44 Application for Review. In its opinion and award filed 4 April 2002, the Full Commission awarded plaintiff the following:

> 1. Subject to a reasonable attorney's fee, defendants shall pay to plaintiff temporary total disability benefits after August 22, 2000 and continuing until plaintiff returns to work at the same or greater wages or until further order of the Commission.
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> 2. Subject to the limitations of N.C. Gen. Stat. §97-25.1, defendants shall pay for all reasonably necessary medical treatment for plaintiff's September 22, 1999 injury by accident, including the August 22, 2000 surgery, for so long as such treatment tends to effect a cure, provide relief or lessen the period of plaintiff's disability. N.C. Gen. Stat. §97-25.
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> 3. A reasonable attorney's fee in the amount of 25% of the compensation due plaintiff is hereby allowed to be paid directly to plaintiff's counsel in one lump sum of the accrued amount due plaintiff and thereafter by deducting every fourth compensation check due plaintiff.
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> 4. Defendants shall pay the costs due the Commission.

Defendants appealed.

On appeal, defendants argue the Full Commission erred by finding that (I) plaintiff's 22 August 2000 back surgery and follow-up medical care were the result of his 22 September 1999

work injury; and (II) plaintiff's total disability since the 22 August 2000 surgery was caused by the 22 September 1999 work injury. For the reasons stated herein, we disagree with defendants' arguments and affirm the opinion and award of the Full Commission.

Under the North Carolina Workers' Compensation Act, "the Commission is the fact finding body[.]" *Brewer v. 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." *Anderson v. Construction Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965). Accordingly, "appellate courts reviewing Commission decisions are 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). *See also Adams v. AVX Corp.*, 349 N.C. 676, 680-81, 509 S.E.2d 411, 413-14 (1998), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999). "The evidence which makes for plaintiff's claim, or tends to support his cause of action, is to be taken in its most favorable light for the plaintiff, and he is entitled to the benefit of every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom." *Doggett v. Warehouse Co.*, 212 N.C. 599, 601, 194 S.E.2d 111, 113 (1937). With these principles in mind, we turn to the case before us.

Defendants first argue that plaintiff's 22 August 2000 surgery was necessitated by his pre-existing scoliosis condition rather than the injury he suffered at work on 22 September 1999. Plaintiff, on the other hand, contends there is a causal relationship between the injury and his employment. When presented with this issue, the Full Commission determined there was a causal relationship between the injury and the employment. We agree.

An injury is compensable under the Worker's Compensation Act if "'it is fairly traceable to the employment' or 'any reasonable relationship to the employment exists.'" *Rivera v. Trapp*, 135 N.C. App. 296, 301, 519 S.E.2d 777, 780 (1999) (quoting *Shaw v. Smith & Jennings, Inc.*, 130 N.C. App. 442, 445, 503 S.E.2d 113, 116, *disc. review denied*, 349 N.C. 363, 525 S.E.2d 175 (1998)); *see also* N.C. Gen. Stat. §97-2(6) (2001). "[W]here 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. Freight Carriers*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980). "[T]he expert testimony need not show that the work incident caused the injury to a 'reasonable degree of medical certainty.' *Cooke v. P.H. Glatfelter/Ecusta*, 130 N.C. App. 220, 224, 502 S.E.2d 419, 422 (1998). Rather, the 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) (quoting *Click*, 300 N.C. at 167, 265 S.E.2d at 391). *See also Porter v. Fieldcrest Cannon, Inc.*, 133 N.C. App. 23, 28, 514 S.E.2d 517, 522 (1999).

The North Carolina Supreme Court "has allowed 'could' or 'might' expert testimony as probative and competent evidence to prove causation[,]" although such testimony is "insufficient to support a causal connection when there is additional evidence or testimony showing the expert's opinion to be a guess or mere speculation." *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 233, 538 S.E.2d 912, 916 (2000).

With regard to the causation element of plaintiff's injury, the Full Commission made the following pertinent finding of fact:

> 7. The greater weight of the lay and medical evidence of record, including plaintiff's testimony, Dr. Davis' medical

> records and the testimony of Dr. McGowen, indicates that plaintiff sustained an injury to a disc in the curve of his spine on September 22, 1999 while moving a dolly of furniture at work which resulted in back pain, an aggravation of plaintiff's pre-existing scoliosis and eventually plaintiff's back surgery of August 22, 2000.

Upon review of the record, we believe this finding of fact was supported by the evidence.

Plaintiff presented testimony from Dr. McGowen, who indicated that plaintiff's work injury was not only capable of injuring his disc, but that it probably produced that injury. Dr. McGowen explained that he saw plaintiff on 17 September, and that plaintiff complained of muscular back pain. Thereafter, plaintiff took three days off work, returned to work for one day without incident, then suffered the work injury on 22 September. Two days after the work injury was sustained, plaintiff saw Dr. Davis and complained of a severe pulling sensation in his lower back, with spasms and constant pain. During the deposition, the following exchange took place:

> Q. . . . The question is, however, he took a couple of days off from work. He testified that he felt better. The issue again is, could the pulling incident of September 22 have caused the kinds of symptoms you found in November of 1999 when you saw him where he was unable to straighten secondary to spasm?
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> A. I believe it is possible and I believe it is probable, but I can't say with any degree of medical certainty.
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> Q. You believe it is probable?
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> A. I believe it is possible and probable. I can't say with any -- the terms you-all use, I cannot show that ---
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> Q. Well, forget those terms. Just use your terms.
>
> A. I think it is possible and I think it is probable that the pain he was having in November, November 5, was the same pain that he was having when he saw Dr. Davis [on 24 September 1999] and when he subsequently saw Dr. Whitley [on 18 October 1999].

Dr. McGowen further explained:

> A. I believe it is more accurate to say that the pain he had in November was the same pain that he had when he saw Dr. Davis, just because there was an interim history not only documented by Dr. Davis but also -- it just indicates that Jeff did get better for a short period of time. But it's very difficult. . . . So the only thing I can say is that the pain that Dr. Davis was treating in late September of 1999 is the same pain that I was seeing Jeff for in November 1999 and was the same pain that Jeff ultimately ended up having the surgery for.

Additionally, plaintiff testified that he had a sore back after his trip to North Dakota. He related the problem to Dr. McGowen at a routine office visit on 17 September 1999 and was advised to rest. After three days' rest, plaintiff returned to work on Tuesday, 21 September 1999, and completed a full day's work without incident. The next day, plaintiff hurt his back while moving furniture, and the pain soon spread to his legs. Plaintiff stated that he never experienced leg pain prior to 22 September1999. He explained that the leg pain

> would go from my waist area all the way down to my feet, just constant like needles shooting down my legs all the time. Whether I slept, sat, walked, they were always there. My feet would get ice cold a lot, and I just couldn't stand the pain in my legs mainly.

Dr. McGowen testified this was a new finding which worsened but was fully corrected by the surgery.

Based on the foregoing, we believe the Full Commission's findings of fact were fully supported by the evidence and that plaintiff's surgery was the result of his work-related injury of 22 September 1999. *See Lockwood v. McCaskill*, 262 N.C. 663, 668-69, 138 S.E.2d 541, 546 (1964); *Buck v. Proctor & Gamble Co.*, 52 N.C. App. 88, 94-95, 278 S.E.2d 268, 272-73 (1981); and *Peagler*, 138 N.C. App. 593, 532 S.E.2d 207. Dr. McGowen's testimony was fully corroborated by plaintiff's testimony regarding the onset of his pain. Moreover, plaintiff did not experience leg pain prior to the 22 September work injury, and the surgery performed in August 2000 eliminated that pain. We believe the Full Commission's findings of fact were supported by

competent evidence of record and are therefore conclusive on appeal. Accordingly, defendants' first assignment of error is overruled.

By their second assignment of error, defendants argue that plaintiff's total disability from 22 August 2000 onward was not caused by the work injury he suffered on 22 September 1999. We disagree.

"'When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to claimant's own intentional conduct." *Starr v. Paper Co.*, 8 N.C. App. 604, 611, 175 S.E.2d 342, 347, *cert. denied*, 277 N.C. 112 (1970) (quoting *Larson's Workmen's Compensation Law* §13.00). "Disability" is "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C. Gen. Stat. §97-2(9) (2001). To support a conclusion of disability, the Full Commission must find "(1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) that this individual's incapacity to earn was caused by plaintiff's injury." *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982).

In the present case, the parties stipulated that plaintiff suffered a compensable work injury on 22 September 1999, and the Full Commission found that plaintiff's total disability after the 22 August 2000 surgery was the result of his compensable work injury. Dr. McGowen testified that plaintiff did not regain the ability to work prior to his surgery in August 2000, and that plaintiff's inability to return to work was related to his 22 September 1999 injury at work.

Thus, the surgery was necessary to alleviate plaintiff's pain, and was therefore compensable under the Workers' Compensation Act. It follows, then, that the resulting disability from that surgery is also compensable pursuant to N.C. Gen. Stat. §§97-2 and 97-25 (2001). The mere fact that the surgery included the curve caused by plaintiff's pre-existing scoliosis is of no import; according to Dr. McGowen, "we had to include the curve because there would be no way of not including the curve and having a reliable result." As the Full Commission's finding of fact is supported by competent evidence, defendants' final assignment of error is overruled.

After careful consideration of the record and the arguments presented by the parties, we conclude the Full Commission acted properly in all respects. Accordingly, the opinion and award of the Full Commission is

Affirmed.

Judges TYSON and CALABRIA concur.

Report per Rule 30(e).