An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA02-1250

NORTH CAROLINA COURT OF APPEALS

Filed: 4 November 2003

GEORGE T. CROWDER,
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 986270

PRESTON TRUCKING COMPANY,
Employer, SELF-INSURED
(N.C. SELF-INSURANCE GUARANTY
ASSOCIATION, Servicing Agent),
Defendant.

Appeal by defendant from opinion and award entered 14 June 2002 by the North Carolina Industrial Commission. Heard in the Court of Appeals 18 August 2003.

Bollinger & Piemonte, PC, by Bobby L. Bollinger, Jr., for the plaintiff-appellee.

Stuart Law Firm, PLLC, by Charles C. Kyles, for the defendant-appellant.

EAGLES, Chief Judge.

The North Carolina Self-Insurance Guaranty Association ("defendant") appeals from an Industrial Commission opinion and award in a workers' compensation matter. Defendant succeeded Preston Trucking Company ("Preston") in this action because Preston became insolvent. Defendant argues four issues on appeal: (1) that the Commission was barred from hearing the matter due to lack of notice as required by N.C. Gen. Stat. §97-22; (2) that the Commission failed to consider competent evidence in the record; (3)that the Commission's

findings are not supported by competent evidence in the form of medical evidence; and (4) that the Commission erroneously calculated the amount of the award.

The evidence tends to show the following. In May 1999, plaintiff was employed by Preston as a truck driver. On 19 May 1999, while driving Preston's truck from Ohio to Charlotte, North Carolina, plaintiff ran over a bump in the highway somewhere in West Virginia, causing his "air-ride" truck seat to "bottom out." Plaintiff testified that he immediately felt pain in his lower back and pulled off to the side of the road to walk around. Plaintiff drove on to Charlotte, North Carolina, where he personally unhooked the tandem trailers he was pulling. After arriving in North Carolina, plaintiff pushed the dolly of the tandem trailer and felt an additional aggravation of his back pain.

On 20 May 1999, the day after the accident, plaintiff continued to experience pain in his back. Plaintiff, who usually worked third shift, felt unable to work that evening and called Preston's central dispatch office in Maryland and reported his back injury. Plaintiff testified that before returning to work he called the central dispatch office and was referred to Ms. Jean Farmer, the company nurse, in order to be cleared to return to work. Plaintiff testified that Ms. Farmer cleared him to return to work that night. Plaintiff returned to work on 24 May 1999.

Plaintiff continued to work for Preston until approximately 24 July 1999, when the company laid him off in anticipation of their filing for bankruptcy. Plaintiff then found a new job driving for Yellow Freight. Plaintiff began driving for Yellow Freight on 2 August 1999 but had to stop on 30 September 1999 because of the pain in his back.

Plaintiff had complained of back pain to his family physician on 11 February 1999, three months before his injury on 19 May 1999. Plaintiff reported to the doctor that he mainly experienced the pain while doing activities that required him to stand. Plaintiff's back pain did

not radiate down his legs. The doctor ordered an x-ray in February 1999 which showed possible degenerative disc disease at multiple levels in the lower lumbar spine.

Plaintiff sought further medical care in October 1999 and was eventually referred to Dr. Elmer Pinzon, a physician with a specialty in physical medicine rehabilitation at Charlotte Orthopedic Specialists. Plaintiff first saw Dr. Pinzon on 7 January 2000. Plaintiff complained then of back pain that radiated into his lower extremities. Dr. Pinzon ordered several tests, including a magnetic resonance imaging (M.R.I.) exam, and an electromyography (E.M.G.) nerve conduction study. Dr. Pinzon found evidence of degenerative disc disease with signs of lumbar radiculopathy. Plaintiff was not a candidate for surgery at that time.

The Deputy Commissioner, after hearing all the evidence, found that plaintiff sustained an injury by accident to his back arising out the course of his employment with Preston and as a direct result of a specific traumatic incident of the work assigned on 19 May 1999 which aggravated or exacerbated the plaintiff's pre-existing back condition. Defendant appealed to the full Commission which affirmed the Deputy's findings and awarded benefits. From the full Commission's opinion and award, defendant appeals.

Defendant contends that the Commission erred in finding a reasonable excuse for plaintiff's failure to give written notice of the accident within 30 days of its occurrence. Defendant also contends that the Commission erred in finding that there was no prejudice to the defendant due to the lack of written notice. We disagree.

N.C. Gen. Stat. §97-22 provides that an injured employee must give written notice to his employer "immediately on the occurrence of an accident, or as soon thereafter as practicable . . .; but no compensation shall be payable unless such *written* notice is given within 30 days after the occurrence of the accident . . . ." N.C.G.S. §97-22 (2001) (emphasis added). Here, plaintiff never

gave his employer written notice. However, an employee is excused from this 30-day notice requirement if the employee has a "reasonable excuse . . . for not giving such notice and . . . the employer has not been prejudiced thereby." N.C.G.S. §97-22.

> A "reasonable excuse" has been defined by this Court to include "a belief that one's employer is already cognizant of the accident . . ." or "[w]here the employee does not reasonably know of the nature, seriousness, or probable compensable character of his injury and delays notification only until he reasonably knows . . . ." The burden is on the employee to show a "reasonable excuse."

Jones v. Lowe's Companies, 103 N.C. App. 73, 75, 404 S.E.2d 165, 166 (1991)(citation omitted).

Plaintiff testified that he called Preston's central dispatch office in Maryland and spoke about his injury with the dispatcher on duty and with Ms. Jean Farmer, the company nurse. Defendant disputes this and argues that plaintiff gave no notice of the injury. The Commission, however, rejected defendant's evidence on this point and found as a fact that plaintiff had actually notified his employer of his injury. In that there is competent evidence from plaintiff's testimony that he notified Preston of his injury, we are bound by that finding. *Jones* at 75, 404 S.E.2d at 166. Accordingly, the Commission did not err when it excused the requirement for written notice on the grounds that plaintiff's employer had already been informed of the accident.

N.C. Gen. Stat. §97-22 would also bar an employee's claim if the Commission found that the employer was prejudiced by the lack of written notice, even where the employee has shown reasonable excuse. Defendant bears the burden of showing prejudice. *Id.* at 76, 404 S.E.2d at 167. In order to find prejudice to the employer, the court must evaluate the evidence of prejudice in relation to the purpose of the notice requirement:

> The purpose is dual: First, to enable the employer to provide immediate medical diagnosis and treatment with a view to minimizing the seriousness of the injury; and second, to facilitate the earliest possible investigation of the facts surrounding the injury.

Id. at 76-77, 404 S.E.2d at 167.

The evidence tends to show that immediate medical diagnosis and treatment would not have minimized the injury to plaintiff's back, that the exact location of the accident was unknown and that the truck that plaintiff was driving, though sold as part of the bankruptcy proceeding, could have been located for examination through the use of the vehicle identification number. The Commission found as a fact that the defendant was not prejudiced by the lack of notice. Since there was competent evidence in the record to support it, we are bound by this finding. Because we find no error in the Commission's determination of actual notice and no prejudice, we reject defendant's assignment of error.

Defendant's second argument is that the Commission failed to consider all of the competent evidence present in the record. The Commission is charged with the statutory duty to consider and weigh all of the competent evidence in the record and to make definitive findings of fact before rendering its decision. *Harrell v. Stevens & Co.*, 45 N.C. App. 197, 205, 262 S.E.2d 830, 835 (1980), *cert. denied*, 300 N.C. 196, 269 S.E.2d 623 (1980). The Commission is required to indicate in its findings that it has considered or weighed all testimony with respect to the critical issues, but is not required to make exhaustive findings as to each statement made by any given witness or make findings rejecting specific evidence. *Bryant v. Weyerhaeuser Co.*, 130 N.C. App. 135, 139, 502 S.E.2d 58, 62 (1998), *disc. rev. denied*, 349 N.C. 228, 515 S.E.2d 700 (1998).

Defendant contends that the Commission failed to consider the evidence its witnesses presented to the Commission. Defendant presented Preston's former vice-president, one of Preston's dispatchers, the terminal manager in Charlotte and the company nurse as witnesses and other evidence regarding the lack of records concerning plaintiff's injury. The Commission in its opinion and award found as fact that it had reviewed the entire record and specifically referred to the defendant's witnesses.

This Court has found that the Commission need only make findings sufficient to permit this Court to reasonably infer that the Commission considered all relevant testimony. *Pittman v. International Paper Co.*, 132 N.C. App. 151, 510 S.E.2d 705 (1999), *disc. rev. denied,* 350 N.C. 310, 534 S.E.2d 596, *aff'd,* 351 N.C. 42, 519 S.E.2d 524 (1999). We have also held that where the Commission's findings explicitly referred to evidence offered by specific witnesses, this Court could conclude that the Commission had properly considered the evidence presented by those witnesses, even though the Industrial Commission's opinion and award did not recount and disclaim the evidence given by those parties. *Smith v. Beasley Enters., Inc.*, 148 N.C. App. 559, 562, 577 S.E.2d 902, 904 (2002).

The opinion and award here includes a specific finding that the testimony and evidence of the defendant was duly considered by the Commission. This finding is sufficient for this Court to infer that the Commission properly considered all testimony with respect to the critical issues. Defendant's assignment of error fails.

Defendant's third argument concerns the competency of the testimony regarding plaintiff's injury. Defendant argues that the plaintiff's injury is not compensable under the statute because the plaintiff's proof of causation is based on incompetent medical testimony.

A compensable back injury is defined by statute in N.C. Gen. Stat. §97-2(6). The statute has been construed by this Court to include two ways of showing a compensable back injury: either injury by accident or injury from a specific traumatic incident. *Richards v. Town of Valdese*, 92 N.C. App. 222, 224, 374 S.E.2d 116, 118 (1988), *disc. rev. denied*, 324 N.C. 337, 378 S.E.2d 799 (1989). "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 Industries*, 304 N.C. 1, 18, 282 S.E.2d 458, 470 (1981). Here, despite plaintiff's pre-existing diagnosis of degenerative disc disease, it is possible for the plaintiff to have sustained a compensable injury where his pre-existing condition was exacerbated by an accident or specific traumatic incident.

Defendant challenges the finding of compensable injury by asserting that the evidence that supports the finding of injury is incompetent medical evidence. Specifically, defendant argues that Dr. Pinzon's testimony as to causation is merely speculative. Dr. Pinzon began seeing plaintiff in January 2000. Dr. Pinzon utilized several objective tests, including x-rays, M.R.I.s and an E.M.G. nerve conduction study. Based on the objective tests and the plaintiff's description of his history, Dr. Pinzon testified that the bottoming out of the truck seat had exacerbated plaintiff's back condition.

The issue of medical causation is particularly complicated and the North Carolina Supreme Court has found that in such cases "only an expert can give competent opinion evidence as to the cause of the injury." *Holley v. ACTS, Inc.*, 357 N.C. 228, 232, 581 S.E.2d 750, 753 (2003) (quoting *Click v. Freight Carriers*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980)).

"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." *Id.* (quoting *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 915 (2000)). Testimony must be sufficient to take the case outside the realm of possibilities. *Id.* at 232-33, 581 S.E.2d at 753. "Could" and "might" evidence is not sufficient. *Id.* The opinion of a physician is not rendered incompetent merely because it is based wholly or in part on statements made to him by the patient in the course of treatment or examination. *Penland v. Bird Coal Co.*, 246 N.C. 26, 31, 97 S.E.2d 432, 436 (1957).

In *Holley* the court found that the doctor's opinion was not competent to support a finding of causation. *Holley* at 233, 581 S.E.2d at 753. The doctor there testified that several factors besides the plaintiff's accident could have caused the plaintiff's injury. *Id.* Specifically, the doctor in *Holley* thought it was a "low possibility" that the accident caused the injury and that the accident was just one in a "galaxy of possibilities." *Id.*

Here, Dr. Pinzon testified that based on the plaintiff's medical history and objective diagnostic tests he conducted, it was his medical opinion that the bottoming out of the truck seat exacerbated the plaintiff's pre-existing back condition. The doctor related that the pain plaintiff described in February 1999 was different from the pain described in January 2000. In February 1999 the plaintiff's pain did not extend below the plaintiff's buttocks, but in January, the plaintiff was complaining of pain down in his legs as well. The doctor found to a "reasonable degree of medical certainty" that this difference, in conjunction with the objective diagnostic tests he performed, supported his conclusion that the accident had exacerbated the plaintiff's condition. Because there was competent evidence in the record to support the Commission's findings, we

are bound by the Commission's finding of compensable injury. Accordingly, this assignment of error fails.

Defendant's fourth argument is that the Commission erred in calculating the amount of plaintiff's award. Defendant contends that the award should be reduced by the amount of unemployment benefits that plaintiff received while eligible for workers' compensation.

N.C. Gen. Stat. §97-42.1 provides "[i]f an injured employee has received unemployment benefits under the Employment Security Law for any week with respect to which he is entitled to workers' compensation benefits for temporary total or permanent and total disability, the employment benefits paid for such weeks may be deducted from the award to be paid as compensation." N.C. Gen. Stat. §97-42.1 (2001). This statute is similar in nature to N.C. Gen. Stat. §97-42, which also allows the Commission to award credits. *Jenkins v. Piedmont Aviation Servs.*, 147 N.C. App. 419, 557 S.E.2d 104 (2001), *disc. rev. denied,* 356 N.C. 303, 570 S.E.2d 724 (2002). Like N.C. Gen. Stat. §97-42, the statutory language places the decision of whether to grant a credit within the sound discretion of the Industrial Commission. *Moretz v. Richards & Associates,* 316 N.C. 539, 342 S.E.2d 844 (1986). There is record evidence that the plaintiff received unemployment benefits during the period to which plaintiff was entitled to workers' compensation benefits. However, the Commission failed to make any findings concerning these benefits. Accordingly, we remand this case to the Commission for findings and a conclusion with regard to the unemployment benefits and whether the unemployment benefits are to be deducted from the benefits to be paid pursuant to the opinion and award.

Affirmed in part and remanded in part.

Judges TYSON and STEELMAN concur.

Report per Rule 30(e).