NO. COA12-592

NORTH CAROLINA COURT OF APPEALS

Filed: 5 February 2013

BRENDA E. WRIGHT, EMPLOYEE,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. No. W66377

WAL-MART, INC. #1127, EMPLOYER,
and CLAIMS MANAGEMENT, INC.,
CARRIER,
Defendants.

Appeal by Defendants and cross-appeal by Plaintiff from opinion and award entered 12 January 2012 by the North Carolina Industrial Commission. Heard in the Court of Appeals 15 November 2012.

Poisson, Poisson & Bower, PLLC, by E. Stewart Poisson and Fred D. Poisson, Jr., for Plaintiff.

Hedrick Gardner Kincheloe & Garofalo, LLP, by M. Duane Jones and Elias W. Admassu, for Defendants.

STEPHENS, Judge.

Procedural History and Factual Background

This appeal arises from a workers' compensation claim for injuries involving Plaintiff-employee Brenda E. Wright's hands, wrists, and arms. Plaintiff worked for Defendant-employer Wal-Mart, Inc. #1127 ("Wal-Mart") in Wadesboro, North Carolina, as a manager in the men's and boys' apparel department. Her daily job duties included stocking merchandise, price-tagging merchandise with a hand-held pricing gun, unloading and unpacking shipments, placing merchandise on shelves, building modular units for displays, and operating a cash register. On 17 July 2009, Plaintiff was hanging clothes when a shelf fell and struck the inside of her right wrist causing a bruise and a knot. Plaintiff notified two other managers about her injury and filled out an incident report that day. Plaintiff testified that she continued to work for several months with increasing pain in her right wrist, but began to rely more and more on her uninjured left hand at work. Plaintiff testified that, eventually, she began to experience pain in her left wrist and, as a result, began wearing a brace.

In November 2009, Wal-Mart downsized and Plaintiff was required to cover additional departments, including the paint and hardware department. Managing the paint and hardware department required heavier lifting than Plaintiff's previous

work assignment. On 2 November 2009, Plaintiff sought treatment for pain and numbness in both wrists from Dr. Edward Blasko at Carolinas Primary Care. Blasko diagnosed Plaintiff with bilateral carpal tunnel syndrome and tendonitis. On 30 December 2009, Blasko noted that Plaintiff had experienced no carpal tunnel symptoms since treatment, but continued to have pain in both wrists extending to the elbow and tendonitis in her forearms. Blasko gave Plaintiff steroid injections in both wrists. On 18 January 2010, Plaintiff was complaining of increased pain in both wrists that was no longer improved by steroid injections. Blasko took Plaintiff out of work and referred Plaintiff to orthopedist Dr. Adam Fosnaugh.

On 21 January 2010, Fosnaugh diagnosed Plaintiff with bilateral de Quervain's tenosynovitis and suspected bilateral carpal tunnel syndrome. He continued to keep Plaintiff out of work. On 27 January 2010, neurologist Dr. Chock Tsering administered an EMG nerve conduction study to Plaintiff which revealed "evidence of median mononeuropathy at the wrists, mild on the right and moderate on the left." Fosnaugh then performed carpal tunnel release and de Quervain's tenosynovitis release of the first extensor compartment of Plaintiff's left and right wrists on 19 February and 21 May 2010, respectively.

In June 2010, Plaintiff reported increased pain in her left wrist due to increased use of it since her right wrist surgery. Fosnaugh recommended continued occupational therapy and gave Plaintiff work restrictions including an order not to use her right arm or hand. Upon reevaluating Plaintiff in July 2010, Fosnaugh released Plaintiff to do whatever motions and activities she could tolerate with her hands. As a result of Plaintiff's reported mild neck pain, Fosnaugh suggested evaluation of Plaintiff's cervical spine. Following evaluations by Fosnaugh and other physicians, Plaintiff was assigned light duty restrictions of no lifting, pulling, or pushing over ten pounds. The restriction on lifting more than ten pounds was continued by Fosnaugh on 5 October 2010.

From an opinion and award of a deputy commissioner filed 8 July 2011, both Plaintiff and Defendants appealed to the Full Commission. On 14 October 2011, Plaintiff filed a motion to reopen the record to receive additional evidence. The Full Commission entered its opinion and award on 12 January 2012. The Commission denied Plaintiff's motion to reopen the record to receive additional evidence and concluded that (1) Plaintiff sustained a compensable injury by accident to her right wrist on 17 July 2009, (2) Plaintiff's subsequent left and right wrist

conditions were compensable natural consequences of the 17 July 2009 compensable injury, (3) Plaintiff is entitled to temporary total disability compensation, (4) Plaintiff is entitled to past and ongoing medical expenses related to treatment of her wrist conditions, and (5) Defendants' continued denial of Plaintiff's claim "was without reasonable grounds and amounts to stubborn unfounded litigiousness[,]" entitling Plaintiff to sanctions against Defendants. From this opinion and award, Defendants appeal. Plaintiff cross-appeals from the denial of her motion to receive additional evidence.

Standard of Review

Our review in workers' compensation cases "is generally limited to two issues: (i) whether the findings of fact are supported by competent evidence, and (ii) whether the conclusions of law are justified by the findings of fact." *Chambers v. Transit Mgmt.*, 360 N.C. 609, 611, 636 S.E.2d 553, 555 (2006) (citation omitted), *reh'ing denied*, 361 N.C. 227, 641 S.E.2d 801 (2007). The Commission's conclusions of law are reviewable *de novo*. *Lewis v. Sonoco Prods. Co.*, 137 N.C. App. 61, 68, 526 S.E.2d 671, 675 (2000). However, "so long as there is some evidence of substance which directly or by reasonable inference tends to support the findings, this Court is bound by

such evidence, even though there is evidence that would have supported a finding to the contrary." *Shah v. Howard Johnson*, 140 N.C. App. 58, 61-62, 535 S.E.2d 577, 580 (2000) (internal citation and quotation marks omitted), *disc. review denied*, 353 N.C. 381, 547 S.E.2d 17 (2001).

Discussion

On appeal, Defendants argue that the Commission erred in awarding Plaintiff (1) any workers' compensation benefits for her bilateral carpal tunnel syndrome and de Quervain's tenosynovitis, (2) temporary total disability benefits, and (3) attorneys' fees as a sanction under N.C. Gen. Stat. § 97-88.1. We affirm in part and reverse and remand in part.

I. Findings of fact re: causal relation

Defendants first argue that the Commission erred in awarding Plaintiff compensation because Plaintiff failed to meet her burden of proving that her bilateral carpal tunnel syndrome and de Quervain's tenosynovitis were causally related to her compensable injury of 17 July 2009. Specifically, Defendants challenge findings of fact 6, 7, and 24.

In finding of fact 6, the Commission found that, "[i]n October 2009," Plaintiff's work assignments changed to include managing the paint and hardware department. The date of this

change in this finding is erroneous, as the uncontroverted evidence, including Plaintiff's own testimony, was that Plaintiff began managing the paint and hardware department on 7 November 2009. However, Defendants fail to explain how this error affected the Commission's conclusions regarding compensability. Conclusions of law 1 and 2, which explain why Plaintiff's wrist conditions are compensable, do not rely on the change in Plaintiff's work duties or the date when that change occurred. Rather, these conclusions of law are based upon the 17 July 2009 injury to Plaintiff's right wrist and her resulting overuse of her left wrist as described in unchallenged findings of fact 3, 4, 5, 30, and 31. *See Cornell v. W. & S. Life Ins. Co.*, 162 N.C. App. 106, 110-11, 590 S.E.2d 294, 297 (2004) (holding that the Commission's unchallenged findings of fact are conclusive on appeal). Thus, the date of Plaintiff's job duty change was irrelevant to the Commission's conclusions of law and any error therein was harmless.

Defendants make a related argument regarding finding of fact 7, in which the Commission found that "Plaintiff's testimony regarding her increased workload [after the change in her work assignment] was corroborated by her coworkers and managers. Plaintiff's testimony regarding her wrist pain was

also verified by her co-workers." Defendants do not assert this finding is not supported by competent evidence, but instead contend that, because Plaintiff sought medical treatment for her right wrist on 2 November 2009, one week before Wal-Mart changed her work assignment, finding of fact 7 "does not support Plaintiff's contention that her job duties in the hardware and paint[] department either caused or materially aggravated her condition." We are not concerned with whether this finding of fact supports ***Plaintiff's*** contentions, but rather whether any findings of fact support the ***Commission's*** conclusions of law. As with their argument regarding finding of fact 6, Defendants appear to misapprehend the basis for conclusions of law 1 and 2. As noted ***supra***, the Commission's determination that Plaintiff's bilateral wrist conditions were causally related to her 17 July 2009 compensable injury do not rely on any change or increase in Plaintiff's work duties. Thus, finding of fact 7 is not relevant or necessary to the Commission's conclusions of law on compensability.

Finally, Defendants contend that the Commission erred in making finding of fact 24: that Blasko ruled out the possibility Plaintiff's conditions occurred idiopathically and opined that the 17 July 2009 incident was likely the cause of

the chain of events leading to Plaintiff's bilateral condition. Defendants argue that Blasko based his opinion solely upon the theory of *post hoc, ergo propter hoc*, contrary to the well-established law on causation in North Carolina.

"[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. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980).

> The maxim *post hoc, ergo propter hoc*, denotes the fallacy of . . . confusing sequence with consequence, and assumes a false connection between causation and temporal sequence. . . . In a case where the threshold question is the cause of a controversial medical condition, the maxim of *post hoc, ergo propter hoc*, is not competent evidence of causation.

Young v. Hickory Bus. Furniture, 353 N.C. 227, 232, 538 S.E.2d 912, 916 (2000) (citation and quotation marks omitted). In *Young*, a physician acknowledged that the *only* basis for his testimony on causation was:

> Q. Is there any way that one can definitively assign a cause or aggravation of fibromyalgia to any particular event other than the application of the doctrine, *post hoc ergo propter hoc*?

> A. No.
>
> Q. Okay. In other words, there's nothing you can do to test it, to look at it, other than she didn't have it before, she has it now, what intervened, I'm going to blame it on that?
>
> A. Correct.

Id. (italics added). Our Supreme Court further noted that the physician's

> *total* reliance on this premise is shown near the end of his deposition testimony wherein he states: "I think that she does have fibromyalgia and I relate it to the accident primarily because, as I noted, it was not there before and she developed it afterwards. And that's the only piece of information that relates the two."

Id. (emphasis added).

Defendants draw our attention to the following portion of Blasko's testimony:

> Q. So basically it's because assuming that she didn't have pain in the wrist before and that incident happened and that there's nothing else in between that we know can explain it, and then she presents to you with these symptoms, then you draw the line between the two; that's a rational correlation?
>
> [Blasko]: Correct.

We first observe that Blasko's response merely affirmed that there was a "rational correlation" between Plaintiff's injury

and the onset of her symptoms. Correlation means "the state or relation of being correlated; specifically a relation existing between phenomena or things or between mathematical or statistical variables which tend to vary, be associated, or occur together in a way not expected on the basis of chance alone." *Correlation Definition*, Merriam-Webster.com, http://www.merriam-webster.com/dictionary/correlation (last visited Jan. 3, 2013). However, it is a basic premise of both logic and statistics that correlation does not imply causation. *See, e.g. United States v. Jacques*, 784 F. Supp. 2d 59, 65 (D. Mass. 2011) (discussing "the well-known principle that correlation does not imply causation."). Thus, the question to which Blasko responded was not an example of *post hoc, ergo propter hoc*. *See Young,* 353 N.C. at 232, 538 S.E.2d at 916 (noting that "*post hoc, ergo propter hoc*, denotes the fallacy of . . . confusing sequence with consequence, and assumes a false connection between *causation* and temporal sequence") (emphasis added). Further, even had the testimony quoted above been an example of *post hoc, ergo propter hoc*, Blasko testified that his opinion on causation was based on, *inter alia*, the nature of Plaintiff's injury by accident, her reported symptoms, her work duties, and overuse of her left hand due to the injury to her

right hand. Blasko testified that Plaintiff's right wrist condition was consistent with the injury she suffered at work and that her left wrist condition was consistent with Plaintiff's report of repetitive hand movements at work. Blasko agreed that he formed his opinion on causation based upon his "scientific background [and] medical training[.]" *See Carr v. Dep't of Health and Human Servs.*, __ N.C. App. __, __, 720 S.E.2d 869, 874 (2012) (rejecting an argument asserting *post hoc, ergo propter hoc* where the physician testified that "although 'a lot of it is based on timing,' his opinion was based on the mechanism of injury as well as the temporal relationship between the incident and symptoms").

Finally, we note that Defendants have not challenged findings of fact 22, 23, 25, and 26, which are actually summaries of the testimony of other medical providers about the causal link between Plaintiff's injury by accident at work and her later wrist and hand symptoms. These "findings" constitute the "preponderance of evidence" referred to in unchallenged findings of fact 30 and 31:

> 30. The Full Commission finds based upon the preponderance of evidence in view of the entire record that, on July 17, 2009, [P]laintiff sustained a compensable injury to her right wrist from a direct blow to the first extensor compartment when a shelf fell

> and struck her right wrist. As a result of the accident, [P]laintiff developed inflammation and de Quervain's disease in the right wrist requiring surgery.
>
> 31. The Full Commission finds based upon the preponderance of the evidence in view of the entire record that [P]laintiff's compensable injury caused her to alter the use of her right wrist, which in turn caused her to overuse her left hand. The overuse of [P]laintiff's left hand either caused or aggravated an existing condition in the left hand, which ultimately required surgical intervention. As a result of [P]laintiff's bilateral wrist surgeries, she has been temporarily totally disabled from employment.

These two findings of fact in turn fully support the Commission's conclusion on causation. Thus, even were Blasko's causation opinion not based upon competent evidence, the Commission's conclusions of law regarding causation are supported by findings of fact 30 and 31. Accordingly, this argument is overruled.

II. Temporary total disability benefits and Plaintiff's cross-appeal

Defendants next argue that the Commission erred in awarding Plaintiff temporary total disability benefits from 18 January 2010 "and continuing until she returns to work at the same or greater wages[.]" We agree in part.

To establish entitlement to workers' compensation benefits

for disability, an employee bears the burden of proving that: (1) she is incapable after her injury of earning the same wages she had earned before her injury in the same employment; (2) she is incapable after her injury of earning the same wages she had earned before her injury in any other employment; and (3) her incapacity to earn was caused by a compensable injury. *Russell v. Lowes Prod. Distrib.*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993). A plaintiff may show her inability to earn the same wages she had earned before the injury in one of four ways:

> (1) the production of medical evidence that [s]he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that [s]he is capable of some work, but that [s]he has, after a reasonable effort on h[er] part, been unsuccessful in h[er] effort to obtain employment; (3) the production of evidence that [s]he is capable of some work but that it would be futile because of preexisting conditions; or (4) the production of evidence that [s]he has obtained other employment at a wage less than that earned prior to the injury.

Id. (citations omitted). "If the findings of fact show [a] plaintiff is capable of performing some work, and there is evidence [the] plaintiff may have satisfied the . . . third prong of *Russell*, the Commission must make findings addressing th[at] method[] of proof." *Carr*, __ N.C. App. at __, 720 S.E.2d

at 874.

Here, Plaintiff was taken out of work by Blasko on 18 January 2010 and released back to work with restrictions of lifting no more than ten pounds on 5 October 2010 by Fosnaugh. The testimony and medical records from these physicians are competent evidence to support the Commission's findings of fact and conclusions of temporary total disability under the first prong of *Russell* for this time period.

As Plaintiff concedes, in light of her release back to work with restrictions on 5 October 2010, there is no evidence of record to support a finding of disability under the first prong of *Russell* after that date. Further, all of the evidence upon which the opinion and award is based was presented at the hearing before the deputy commissioner on 15 November 2010, and as noted *supra*, the Full Commission denied Plaintiff's motion to receive additional evidence. At the time of the hearing before the deputy commissioner, although she had not returned to work, Plaintiff was still employed by Wal-Mart, wished to remain so employed, and, as the Commission noted in finding of fact 19, Plaintiff therefore had not looked for other employment. Thus, as Plaintiff also concedes, the evidence before the Commission was insufficient under the second and fourth *Russell* methods of

proof to support the Commission's award of temporary total disability after 5 October 2010. We wholeheartedly agree with Plaintiff that the evidence before the Commission was insufficient to support an award of disability benefits after 5 October 2010 under the first, second, or fourth methods set forth in *Russell*.

However, we are not persuaded by Plaintiff's contention that, although the Commission did not make an explicit finding of futility under the third prong of *Russell*, the evidence before the Commission was sufficient to support a determination that it would have been futile for Plaintiff to seek other employment. *Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457. The evidence cited by Plaintiff, to wit, that she was 52 years old, had a GED, had worked as a cashier, store clerk, and bus driver, and had been released to work with restrictions not to lift more than ten pounds, does not support a finding of futility. *Compare Chavis v. TLC Home Health Care*, 172 N.C. App. 366, 376, 616 S.E.2d 403, 412 (2005) ("All of [the plaintiff's] previous employment had required her to work on her feet. [Plaintiff] had no computer, receptionist, or secretarial skills. This is competent evidence to support the full Commission's finding of fact that 'it would have been futile in

any event for her to have looked for sedentary work[.]'"), *appeal dismissed*, 360 N.C. 288, 627 S.E.2d 464 (2006). In sum, for the period after Plaintiff's release to work with restrictions, the evidence before the Commission cannot support a finding of disability under any of the *Russell* methods. Accordingly, we must reverse the Commission's award of temporary total disability benefits after 5 October 2010.

Nevertheless, Plaintiff has cross-appealed from the Commission's denial of her motion to receive additional evidence. The Commission's "decision on such a motion will be reversed only if the Commission has abused its discretion or has acted 'under a misapprehension of applicable principles of law.'" *Tanner v. State Dep't of Correction*, 19 N.C. App. 689, 692, 200 S.E.2d 350, 352 (1973) (quoting *Owens v. Mineral Co.*, 10 N.C. App. 84, 87, 177 S.E.2d 775, 777 ("Ordinarily, a motion for further hearing on the grounds of introducing additional or newly discovered evidence rests in the sound discretion of the Industrial Commission. This principle is not applicable where, as here, the Commission declines to consider such a motion under a misapprehension of applicable principles of law."), *cert. denied*, 277 N.C. 726, 178 S.E.2d 831 (1970)).

Here, the deputy commissioner heard the case on 15 November

2010, closed the record in the matter on 18 April 2011, and issued his opinion and award on 8 July 2011. In an affidavit attached to her motion to receive additional evidence, Plaintiff stated she was still employed by Wal-Mart until at least 28 July 2011 when she was offered a position as a door greeter at Wal-Mart. Plaintiff asserts she was not able to perform that job due to pain in her wrists and hands. As Plaintiff still hoped to continue working for Wal-Mart until this final offer, she had not engaged in any job search. Plaintiff's job search log, also attached to her motion, indicates that, thereafter, she began to seek other employment. Plaintiff filed her motion to receive additional evidence on 14 October 2011, only two and a half months after the alleged final job offer by Wal-Mart.

The evidence Plaintiff moved the Commission to receive included the affidavit about her job search efforts and a job search log, evidence which came into being only after the deputy commissioner issued his opinion and award and which is plainly relevant to the disability determination because Plaintiff was no longer waiting to see if returning to work at Wal-Mart was a viable option. We cannot conceive of a reason for the Commission to deny Plaintiff's motion to receive this additional evidence under these specific circumstances other than its

mistaken belief that Plaintiff's other evidence was sufficient to support findings and conclusions that she was entitled to disability benefits after 5 October 2010 on the basis of futility. Because it appears to this panel that, in denying Plaintiff's motion to receive additional evidence, the Commission acted "under a misapprehension of applicable principles of law[,]" *Owens*, 10 N.C. App. at 87, 177 S.E.2d at 777, we reverse and remand to the Commission. On remand, the Commission shall consider Plaintiff's motion to receive additional evidence in light of the changed circumstances after the deputy commissioner filed his opinion and award and in light of our decision that the evidence currently before the Commission is insufficient to support an award of temporary total disability benefits to Plaintiff after 5 October 2010 under any of the *Russell* methods for proving disability.

We do not address the merits of Defendant's appeal regarding attorneys' fees, but reverse that portion of the opinion and award in light of our remand for further proceedings. In entering a new opinion and award, the Commission may consider the question of attorneys' fees anew. Accordingly, the order of the Industrial Commission is

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

Judges GEER and MCCULLOUGH concur.

Report per Rule 30(e).