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NO. COA09-571

NORTH CAROLINA COURT OF APPEALS

Filed: 6 July 2010

TAREEK DUBOSE,

Plaintiff,

v.

From the North Carolina  
Industrial Commission  
No. TA-18758

THE NORTH CAROLINA  
DEPARTMENT OF CORRECTION,

Defendant.

Appeal by plaintiff from Decision and Order entered 11 December 2008 by the North Carolina Industrial Commission. Heard in the Court of Appeals 28 October 2009.

*Scudder & Hedrick, PLLC, by Samuel A. Scudder and April D. Seguin, for plaintiff.*

*Attorney General Roy Cooper, by Assistant Attorney General Melody Hairston, for the State.*

ELMORE, Judge.

Tareek Dubose (plaintiff) appeals from an opinion and award of the North Carolina Industrial Commission in favor of plaintiff and against the North Carolina Department of Corrections (defendant) modifying an award in favor of plaintiff from an opinion and award by a Deputy Commissioner.

On appeals from the Industrial Commission, this Court's scope of inquiry is limited to two inquiries: (1) whether competent

evidence supports the Commission's findings and (2) whether the Commission's findings justify its conclusions and decision. *Simmons v. N.C. Dept. of Transportation*, 128 N.C. App 402, 405-06, 496 S.E.2d 790, 793 (1998). In the instant case, plaintiff makes arguments only as to the Commission's findings of fact. If supported by competent evidence, findings of fact by the Commission are conclusive on appeal, even when evidence exists which could support a contradictory finding. *Bullman v. Highway Comm.*, 18 N.C. App. 94, 98, 195 S.E.2d 803, 806 (1973). Based on the testimony heard at trial, we hold that the Full Commission's findings of fact were based on competent evidence, and we therefore affirm the Commission's opinion and award.

On 24 March 2004, plaintiff was an inmate in custody of defendant and was being transferred from Caledonia Correctional Institution to Scotland Correctional Institution along with a few other inmates. Upon arrival at Scotland Correctional Institution in one of defendant's transfer vans, plaintiff was instructed to step down out of the van to await intake processing. As was customary during the transfer of inmates, plaintiff was in full restraints -- handcuffs, leg irons, and a "black box," which is a device that secures an inmate's handcuffs to his waist chain, further limiting his mobility. Despite protocol to the contrary, none of the officers assigned to the area was close enough to plaintiff to assist him in stepping down from the van, nor was any officer close enough to plaintiff to catch him if he were to fall from the van. Plaintiff stepped out of the van as instructed, but

part of plaintiff's leg irons got caught in the metal step, and he fell. As his hands were still restricted by the black box and handcuffs, plaintiff was unable to brace himself for the fall, and he struck his face on the concrete floor of the receiving area. Plaintiff was transferred to the medical facility at Scotland Correctional and was later transferred to Scotland Memorial Hospital where he was treated for minor injuries and released later that evening.

Over the next few months, plaintiff complained of headaches and dizziness, which were treated by defendant's medical staff. Several months later, plaintiff began complaining of loss of vision in both eyes which he attributed to the 24 March 2004 fall.

On 13 December 2004, an eye test revealed that plaintiff had 20/20 vision in his right eye and 20/50 vision in his left eye. On 27 April 2005, more than 12 months after the accident, an eye test showed that plaintiff had 20/200 vision in his right eye and 20/40 in his left eye and that plaintiff was able to read at 20/20 vision with both eyes.

Plaintiff was seen by Dr. Robert Toler, an optometrist contracted by defendant, on 1 September 2005. Dr. Toler's visual acuity test showed plaintiff's vision to be 20/400 in both eyes. After examining plaintiff's optic nerves, Dr. Toler diagnosed plaintiff with presumed optic nerve pathway damage, an irreversible condition that causes permanent vision loss. Dr. Toler suggested that the fall from the van was the cause of plaintiff's vision loss.

After his release from prison, plaintiff sought treatment at the New York Hospital Queens Eye Center on 5 May 2006. An eye test showed that plaintiff's vision was less than 20/400 in both eyes. However, the ophthalmologist who saw plaintiff at Queens Eye Center found no damage to plaintiff's optic nerves.

Pursuant to N.C. Gen. Stat § 143-291, plaintiff filed an affidavit with the North Carolina Industrial Commission alleging negligence on the part of defendant. An evidentiary hearing took place on 22 January 2008, at which Deputy Commissioner Wanda Blanche Taylor heard testimony from Dr. Toler as well as from Dr. Jeffrey Viscardi, the chief of the Division of Ophthalmology at East Carolina School of Medicine, who testified as defendant's expert witness. Deputy Commissioner Taylor found Dr. Toler's testimony more persuasive than Dr. Viscardi's, and accordingly filed a Decision and Order in favor of plaintiff on 2 April 2008, awarding \$450,000.00 in damages for defendant's negligence.

Defendant filed a timely notice of appeal to the Full Commission, which reheard the case on 18 September 2008. The Full Commission gave greater weight to the testimony of Dr. Viscardi than Dr. Toler and found as a matter of law that plaintiff did not suffer traumatic optic neuropathy as a result of the fall from the van. The Commission filed a Decision and Order on 11 December 2008 to modify the Deputy Commissioner's holdings regarding causation and damages and reduced plaintiff's award to \$10,000.00.

Plaintiff brings two arguments on appeal against the Full Commission's reduction of damages: first, that the Commission

overstepped its authority by re-examining findings of fact and law determined by the Deputy Commissioner; and, second, that the Full Commission's conclusions of law were based on findings of fact that were made from incompetent evidence, and were therefore invalid. We find both of plaintiff's arguments lacking and affirm the decision of the Full Commission.

Plaintiff first argues that the Full Commission was bound by both the Deputy Commissioner's findings of fact and the determination of witnesses' credibility. Plaintiff's argument on this point is based solely on this Court's holding in *Brewington v. North Carolina Department of Correction*, where we stated that "the responsibility of weighing the credibility of the witnesses lies solely with the hearing commissioner." *Brewington v. N.C. Dept. of Correction*, 111 N.C. App. 833, 839, 433 S.E.2d 798, 801 (1993). Plaintiff's argument misconstrues the law.

Our General Assembly gave the Full Commission total review power when considering appeals from a decision of a Deputy Commissioner:

Such appeal, when so taken, shall be heard by the Industrial Commission, sitting as a Full Commission, on the basis of the record in the matter and upon oral arguments of the parties, and the said full Commission, may amend, set aside, or strike out the decision of the hearing commissioner and may issue its own findings of fact and conclusions of law.

N.C. Gen. Stat. § 143-292 (2009). Further, this Court has already determined that the above quote from *Brewington* relied on by plaintiff was "merely dicta." *Fennell v. N.C. Dept. of Crime Control & Pub. Safety*, 145 N.C. App. 584, 591, 551 S.E.2d 486, 491

(2001). Under the *Fennell* holding and the language of N.C. Gen. Stat. § 143-292, the Full Commission was well within its bounds to make its own findings of fact and conclusions of law.

Plaintiff also asserts that the Full Commission had no authority to reweigh the credibility of the witnesses from the Deputy Commissioner's hearing. This Court has previously held that it is well within the scope of the Full Commission to perform both the ultimate fact-finding and the determination of credibility, regardless of whether the Commission holds a new hearing or looks at a cold record. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 413 (1998) (holding that the Commission, not the hearing officer, has the ultimate fact-finding responsibility). The Full Commission reviewed the same videotaped testimony as the Deputy Commissioner used to make her determination of credibility. It was within its bounds to place more weight on the testimony of Dr. Viscardi when determining that plaintiff's fall was not the proximate cause of his vision loss. Accordingly, we reject plaintiff's assignments of error regarding the Full Commission's findings of fact and conclusions of law on this basis.

Plaintiff's second argument is that the Full Commission's findings of fact were not based on competent evidence, and therefore should not have been considered at all by the Full Commission. Plaintiff further contends that Dr. Viscardi's entire testimony was speculative, and therefore did not meet the threshold of medical certainty.

Plaintiff's argument centers on the fact that, during his deposition, Dr. Viscardi failed to establish that his medical opinions were made with any degree of medical certainty, and as such should be treated as non-competent evidence. This assertion appears to be based primarily on the decision in *Holley v. ACTS, Inc.*, where our Supreme Court held that evidence establishing a causal link in damages from an accident must meet a reasonable degree of medical certainty. 357 N.C. 228, 234, 581 S.E.2d 750, 754 (2003).

However, in *Holley*, the doctor specifically testified that he was unable to state to a reasonable degree of medical certainty that his particular diagnosis was caused by the injury in question. *Id.* This is distinguishable from the instant case, where Dr. Viscardi's testimony merely omitted a statement to the effect that he had a reasonable degree of medical certainty during his testimony. Plaintiff's assertion - that failing to make such a statement means that the testimony necessarily lacks that reasonable degree of medical certainty - directly opposes our previous holding that "[t]he Commission's reliance on expert testimony regarding medical causation . . . does not . . . rise or fall on a doctor's use of the term 'reasonable degree of medical certainty.'" *Edmunds v. Fresenius Med. Care*, 165 N.C. App. 811, 816, 600 S.E.2d 501, 505 (2004), *rev'd on other grounds*, 359 N.C. 313, 608 S.E.2d 755 (2005). Rather, our Courts have consistently held that an *inability* to testify to a reasonable degree of medical certainty is required to prove testimony as incompetent evidence.

See *Holley* at 234, 581 S.E.2d at 754; *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 233, 538 S.E.2d 912, 916-17 (2000). As such, Dr. Viscardi's testimony is taken as being made to a reasonable degree of medical certainty based on his assertion at his deposition that he was, given the information available to him, able to render a reliable and complete opinion.

Plaintiff further asserts that Dr. Viscardi's testimony was *de facto* speculation because Dr. Viscardi himself never examined plaintiff, but merely relied on his reading of plaintiff's medical records. However, this Court has previously held that "[m]edical opinions given may be based either on 'personal knowledge or observation or on information supplied him by others . . . .'" *Keel v. H & V Inc.*, 107 N.C. App. 536, 540, 421 S.E.2d 362, 366 (1992) (quoting *Booker v. Medical Center*, 297 N.C. 458, 479, 256 S.E.2d 189, 202 (1979)). Dr. Viscardi was thus not required to perform a personal examination of plaintiff in order to reach a valid medical opinion on plaintiff's condition.

We hold that the Full Commission was within its authority to take a fresh look at the findings of fact and conclusions of law, and that those findings of fact were valid as they were based on competent evidence. As such, we affirm the decision of the Full Commission in modifying the award granted by the Deputy Commissioner.

Affirmed.

Judges STEELMAN and HUNTER, JR., Robert N., concur.

Report per Rule 30(e).