

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA11-974
NORTH CAROLINA COURT OF APPEALS

Filed: 6 March 2012

MELVIN CLARK, Employee
Plaintiff,

v.

N.C. Industrial Commission
I.C. No. W33098

PEPSI BOTTLING VENTURES, Employer;
and LIBERTY MUTUAL INSURANCE
COMPANY, Carrier;
Defendants.

Appeal by Plaintiff from Opinion and Award entered 24 March 2011 by the North Carolina Industrial Commission. Heard in the Court of Appeals 12 January 2012.

Hardison & Cochran PLLC, by J. Jackson Hardison, for Plaintiff-Appellant.

Cranfill Sumner & Hartzog, LLP, by P. Collins Barwick, III, for Defendant-Appellees.

BEASLEY, Judge.

Melvin Clark (Plaintiff) appeals an Opinion and Award entered by the North Carolina Industrial Commission denying his claims for indemnity benefits and medical compensation. For the following reasons, we affirm.

Plaintiff began employment with Pepsi Bottling Ventures (Employer) as a temporary employee and was hired as a permanent employee on 13 September 2004. Plaintiff was hired as a forklift operator and performed other duties including working the chip pile. Working the chip pile involved separating good products from bad products and dumping the out-of-date products into large cardboard boxes, as well as lifting and stacking crates.

On 13 April 2009, Plaintiff was working the chip pile which entailed dumping out-of-date sodas. Plaintiff testified that while working he felt a pain in his neck, but he kept working. The pain grew worse during the day and Plaintiff informed his supervisor, Brad Spears, that he was having problems with his neck. Plaintiff worked the rest of the day, and later that evening he went to the emergency room where he was diagnosed with muscle spasms. Plaintiff returned to work later in the week. On 16 April 2009, Plaintiff informed Spears that his neck was still bothering him. While operating the forklift, Plaintiff testified that the pain in his neck was so extreme that he could no longer operate the forklift. He asked his supervisor for the rest of the day off and Plaintiff never returned to work.

On 4 May 2009, Plaintiff sought treatment from Dr. Ibrahim Oudeh with a chief complaint of neck pain and numbness in both

shoulders. A CT scan of Plaintiff's neck revealed metallic pellets throughout the soft tissue¹, as well as degenerative changes of the spine with anterior osteophytes and slight sclerosis in the posterior articulations. On 6 June 2009, a MRI of Plaintiff's cervical spine revealed severe right central disc extrusion with severe decompression of the cervical cord at the C3-4 level, as well as a moderate disc bulge with moderate compression of the cervical cord at C4-5. On 8 June 2009, Plaintiff underwent surgery and on 11 June 2009, Plaintiff began physical therapy.

On 4 August 2009, Plaintiff filed a Form 18 with the North Carolina Industrial Commission claiming a cervical injury. A hearing was conducted and on 14 September 2010, Deputy Commissioner Myra L. Griffin filed an Opinion and Award concluding that Plaintiff suffered injuries by accident arising out of and in the course of his employment, and awarding him temporary total disability. On 28 September 2010, Defendants appealed to the Full Commission. On 24 March 2011, the Full Commission filed an Opinion and Award reversing the Deputy Commissioner's Opinion and Award. On 6 April 2011, Plaintiff appealed to this Court.

¹ The pellets were presumably from an injury sustained in the 1970's that left Plaintiff with multiple gunshot pellets in his neck, face, and skull.

Plaintiff argues that the Full Commission erred when it determined that Plaintiff's allegation that he sustained work-related specific traumatic incidents was not supported by the competent evidence. We disagree.

"On appeal, the standard of review of a workers' compensation case is whether there is any competent evidence in the record to support the Commission's findings and whether those findings support the Commission's conclusions of law." *Faison v. Allen Canning Co.*, 163 N.C. App. 755, 757, 594 S.E.2d 446, 448 (2004) (internal quotation marks and citations omitted). "The facts found by the Commission are conclusive upon appeal to this Court when they are supported by competent evidence, even when there is evidence to support contrary findings." *Pittman v. International Paper Co.*, 132 N.C. App. 151, 156, 510 S.E.2d 705, 709 (1999). "The Commission's findings of fact may be set aside on appeal only where there is a complete lack of competent evidence to support them." *Jones v. Candler Mobile Village*, 118 N.C. App. 719, 721, 457 S.E.2d 315, 317 (1995) (citation omitted).

Plaintiff challenges the Full Commission's finding of fact number 40 which states,

Based upon the greater weight of the evidence, including all lay and medical testimony and the medical records, the Full Commission finds that Plaintiff did not sustain an injury by accident or specific

traumatic incident on April 13, 2009, or April 16, 2009.²

Plaintiff essentially argues that there was competent evidence in the record to support his assertion that he suffered a work-related injury and the Full Commission's finding to the contrary was erroneous. The issue is not whether there was competent evidence to support Plaintiff's contention on appeal, but whether there was competent evidence to support the Full Commission's finding that Plaintiff's testimony regarding work injuries was not credible.

First, we must note that "[t]he 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) (citation omitted). In this case, the Full Commission made the following uncontested findings of fact:

6. Although Plaintiff testified he did not have problems with his neck prior to April 2009, Plaintiff underwent occupational therapy for his neck on January 21, 2009.

. . . .

9. On Monday, April 13, 2009, the date Plaintiff claims to have first experienced neck pain, Plaintiff presented to the emergency room at Betsy Johnson Memorial Hospital with a chief complaint of neck

² We admonish Plaintiff for challenging the findings in the Proposed Opinion and Award, instead of the filed Opinion and Award. Because the finding that Plaintiff challenges in the proposed Opinion is substantially similar to the finding in the filed Opinion and Award, we will interpret Plaintiff's argument as a challenge to the proper finding of fact in the filed Opinion and Award.

pain. . . . The record from that visit indicates Plaintiff reported his symptoms began that day, and the onset of symptoms was gradual. The record further indicates Plaintiff denied a significant trauma injury.

. . . .

14. Brad Spears, warehouse supervisor, for Defendant-Employer and Plaintiff's direct supervisor in April 2009, testified that when an employee reports a work incident, an accident report form is immediately completed pursuant to company policy and procedure. Mr. Spears testified that soon after Plaintiff reported his neck was hurting, Plaintiff applied for short-term disability benefits. Mr. Spears pointed out that Plaintiff was asked specifically whether his neck complaints were work-related, and Plaintiff indicated they were not.

15. Mr. Spears pointed out that Plaintiff had a history of ongoing problems, and it was difficult to define what was really bothering him from one day to the next.

. . . .

20. On May 19, 2009, Plaintiff presented to Core Heath Systems Urgent Care for his neck. . . . Plaintiff also reported that he had these problems since April 6, 2009.

21. On June 5, 2009, Plaintiff presented to Dr. Kenneth Price (Dr. Price), a neurosurgeon, upon a referral[.] An intake form from Plaintiff's treatment with Dr. Price on June 5, 2009, indicated Plaintiff's problem was related to an on-the-job injury that began on April 1, 2009.

Based on the aforementioned findings of fact, the Full Commission had competent evidence on the record to determine

that Plaintiff's injury was not work related where Defendant specifically told his supervisor he was not injured on the job. In addition to Plaintiff initially denying a work related injury, Plaintiff was not consistent with the date of the onset of neck pain. Plaintiff stated he had no neck pain prior to 13 April 2009, but the record reveals that he received occupational therapy for his neck nearly three months prior to the date of the incident. He also told physicians that the neck pain began prior to 13 April 2009. Therefore, the Full Commission's finding that Plaintiff's assertion that he sustained an on the job injury was not credible is supported by competent evidence and Plaintiff's argument is meritless.

Next, Plaintiff challenges the Full Commission's conclusion that Plaintiff did not prove that his injury was casually related to his employment. We disagree.

Plaintiff argues the Full Commission misapplied the law and did not lend proper weight to the testimony of the expert and treating physician, Dr. Price. More specifically, Plaintiff argues that the Full Commission incorrectly interpreted *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 538 S.E.2d 912 (2000) and *Holley v. Acts, Inc.*, 357 N.C. 228, 581 S.E.2d 750 (2003).

Plaintiff contends that the facts of *Young* and *Holley* are distinguishable from the present case and are therefore inapplicable. As Defendants correctly highlight, the Full

Commission relied on the aforementioned cases for their broad holdings which were applicable in this case. In *Young*, our high court stated

when [] expert opinion testimony is based merely upon speculation and conjecture, it can be of no more value than that of a layman's opinion. As such, it is not sufficiently reliable to qualify as competent evidence on issues of medical causation. Indeed, this Court has specifically held that an expert is not competent to testify as to a causal relation which rests upon mere speculation or possibility.

Young, 353 N.C. at 230, 538 S.E.2d at 915 (internal quotation marks and citations omitted). In *Holley*, the Supreme Court applied the same principle outlined in *Young*. See *Holley*, 357 N.C. at 232, 581 S.E.2d at 753. In this case, the Full Commission properly applied the rule outlined in *Young* where it found that Dr. Price's opinion testimony regarding the cause of Plaintiff's injury was based entirely on Plaintiff's subjective account of his injury which the Full Commission found not to be credible.

Plaintiff further argues that Dr. Price's opinion should have been given more weight where Dr. Price testified to a reasonable degree of medical certainty that Plaintiff's condition was causally related to his employment. Plaintiff's argument ignores the fact that the Full Commission found Plaintiff's contention that he injured himself at work was not

credible. Moreover, Dr. Price testified and the Full Commission found as fact that Dr. Price's testimony was based on Plaintiff's accounts of the injury being work related. (R. 69) The Full Commission did not discredit Dr. Price's medical diagnosis simply because Dr. Price's opinion was based on information supplied by Plaintiff. As Plaintiff asserts "[a] physician, as an expert witness, may give his opinion, including a diagnosis, based either on personal knowledge or observation or on information supplied him by others, including the patient, *if such information is inherently reliable* even though it is not independently admissible into evidence." *Booker v. Duke Medical Center*, 297 N.C. 458, 479, 256 S.E.2d 189, 202 (1979) (emphasis added). Here, Dr. Price's opinion concerning how Plaintiff was injured was based solely on Plaintiff's information which the Full Commission found was not credible and therefore unreliable. Following *Young*, the Full Commission had the authority to find that Dr. Price's testimony concerning the cause of Plaintiff's injury was purely speculative and to give no weight to his testimony concerning the cause of Plaintiff's injury. As we have already stated, the Full Commission is the sole judge of credibility of witnesses and there was competent evidence in the record to support the finding that Plaintiff's testimony that he suffered a work-related injury was not credible. Therefore, Plaintiff's argument that Full Commission misapplied the law is

meritless.

Affirmed.

Judges STEPHENS and STROUD concur.

Report per Rule 30(e).