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NO. COA13-356

NORTH CAROLINA COURT OF APPEALS

Filed: 5 November 2013

CHARLENE BASS, Employee,
Plaintiff,

v.

From the North Carolina
Industrial Commission
I.C. No. W93571

HARNETT COUNTY, Employer, SELF-
INSURED (KEY RISK MANAGEMENT
SERVICES, Servicing Agent),
Defendant.

Appeal by Defendant from opinion and award filed 10 September 2012 by the North Carolina Industrial Commission. Heard in the Court of Appeals 11 September 2013.

Kevin Bunn, Attorney at Law, PC, by Kevin Bunn, for Plaintiff.

Prather Law Firm, P.C., by J.D. Prather, for Defendant.

STEPHENS, Judge.

Procedural History and Factual Background

Plaintiff-employee Charlene Bass contends that she developed a compensable occupational disease in June 2010 while

working as a bus driver for Defendant-employer Harnett County ("the County"). As a result, Plaintiff filed a claim for workers' compensation benefits, which the County denied on 14 July 2010. Following a 9 May 2011 hearing, a deputy commissioner issued an opinion and award on 25 January 2012, finding Plaintiff's claim compensable and awarding her medical benefits and ongoing temporary total disability benefits. Specifically, the deputy commissioner concluded that Plaintiff had developed right shoulder problems as a result of her employment with the County. The County appealed to the Full Commission, which on 10 September 2012 filed an opinion and award upholding the award of benefits to Plaintiff. The County appeals.

Plaintiff began working as a bus driver for the County in June 2008. Her responsibilities included driving a van-type bus used to transport elderly and infirm patients to and from their medical appointments. Those patients entered and exited the van by way of a mechanically operated door located near the front of the bus. Plaintiff used her right hand to operate the door mechanism and estimated that she did so twenty-five to thirty times per day.

In early June 2010, Plaintiff began experiencing pain and weakness on her right side from her neck down her right arm when operating the door mechanism. On the morning of 22 June 2010,

Plaintiff woke to find she could not move her right arm. She sought medical treatment at Betsy Johnson Regional Hospital, where an X ray revealed that she had "[m]ild degenerative arthrosis." Plaintiff was diagnosed with pain in her right shoulder joint. The "mechanism" of Plaintiff's shoulder injury was characterized as "frequent use." Plaintiff was given an arm sling, prescribed pain medication, and told to limit the use of her arm for several days. Shortly thereafter, Plaintiff attempted to return to work, but her supervisor would not permit her do so until she had been released to full duty and taken off pain medication.

Thereafter, Plaintiff received medical treatment from various providers for continued pain in her right arm and shoulder. On 11 February 2011, Dr. R. Alexander Creighton, a board-certified orthopedic surgeon at UNC Hospitals, began treating plaintiff for pain in her right shoulder and her neck. Creighton conducted a physical examination of Plaintiff and reviewed X rays and an MRI of her shoulder, which led him to diagnose Plaintiff with arthritis at the right acromioclavicular joint, rotator cuff inflammation, tendinosis, bursitis, right shoulder impingement, and a small bone spur. At that time, Creighton recommended physical therapy.

On 18 April 2011, Plaintiff returned to Creighton, who noted that Plaintiff had degenerative cervical spine issues in

addition to her right shoulder condition. Accordingly, Plaintiff was referred to a spine specialist whose evaluation revealed that Plaintiff was also suffering from spinal stenosis and nerve root entrapment.

Creighton, who provided the only expert medical testimony before the Commission, testified that Plaintiff's right shoulder condition was complicated by her cervical spine issues. Creighton further testified that repeatedly opening and closing a mechanical bus door "obviously put more stress on [Plaintiff's] shoulder and upper extremity[.]" Creighton opined that Plaintiff's employment substantially contributed to her right shoulder condition.

Discussion

Defendant brings forward two arguments on appeal: that the Commission erred in concluding that Plaintiff (1) developed a compensable occupational disease of the shoulder and (2) remains disabled as a result of her shoulder condition. We affirm.

Standard of Review

In workers' compensation cases, our review is "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), *reh'g denied*, 361 N.C. 227, 641 S.E.2d 801 (2007). We review the Commission's

conclusions of law *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) (citations and internal quotation marks omitted), *disc. review denied*, 353 N.C. 381, 547 S.E.2d 17 (2001). Determinations of the weight and credibility to be given the competent evidence are left to the Commission. *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116-17, 530 S.E.2d 549, 553 (2000).

A. Compensable Nature of Plaintiff's Shoulder Condition

The County first argues that the Commission erred in concluding that Plaintiff developed a compensable occupational disease. We disagree.

Section 97-53(13) defines an occupational disease as: Any disease which is proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment.

For an occupational disease to be compensable under [section] 97-53(13) it must be (1) characteristic of persons engaged in the particular trade or occupation in which the [plaintiff] is engaged; (2) not an ordinary disease of life to which the public generally

is equally exposed with those engaged in that particular trade or occupation; and (3) there must be a causal connection between the disease and the [plaintiff's] employment.

Chambers, 360 N.C. at 612, 636 S.E.2d at 555 (citations, internal quotation marks, and ellipses omitted). On appeal, the County challenges only the third element of compensability, to wit, the existence of a causal relationship between Plaintiff's shoulder condition and her employment. However, the causation element *is satisfied* if the employment "significantly contributed to, or was a significant causal factor in, the disease's development[,] even if other non-work-related factors also make significant contributions, or were significant causal factors." *Rutledge v. Tultex Corp./Kings Yarn*, 308 N.C. 85, 101, 301 S.E.2d 359, 369-70 (1983).

"[W]here the exact nature and probable genesis of a particular type of injury involves complicated medical questions, . . . 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) (citations omitted). Medical certainty about causation is not required. *Holley v. ACTS, Inc.*, 357 N.C. 228, 234, 581 S.E.2d 750, 754 (2003). "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." *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 915 (2000). In addition, a mere temporal relationship between employment and a medical condition "is not competent evidence of causation." *Id.* at 232, 538 S.E.2d at 916 (rejecting the concept of "*post hoc, ergo propter hoc*" (*i.e.*, "after it, therefore because of it") as a basis for establishing medical causation).

Relying on Creighton's testimony, the Commission made the following findings of fact regarding causation:

21. Dr. Creighton testified that Plaintiff was diagnosed as having "impingement and rotator cuff inflammation and bursitis . . . [and] also obviously had some nerve irritation in that arm too." Dr. Creighton further testified that Plaintiff's shoulder condition was complicated by her neck issues. Dr. Creighton opined that Plaintiff's right shoulder condition developed over time and was not the result of a specific trauma and that Plaintiff's job substantially contributed to her shoulder condition.

22. Dr. Creighton opined that Plaintiff's employment . . . and [] the opening and closing of the door substantially contributed to her developing [the shoulder] condition. . . .

Based on its findings, the Commission concluded that "Plaintiff has proven by the preponderance of the evidence that the tasks required by her employment as a bus driver with Defendant caused or significantly contributed to the development of her right shoulder problems."

At deposition, Creighton testified that the type of repetitive shoulder motions involved in Plaintiff's job with the County "put more stress on your rotator cuff [and the] bones of your shoulder." Further, after reviewing a video depicting Plaintiff operating the mechanical door, Creighton concluded that the process demonstrated a "classic impingement[,]"" which "definitely put[] more stress on her shoulder and that side of her body[.]" Creighton further testified that the release mechanism on the bus door "put[] some traction on [Plaintiff's] shoulder" because "it's not a normal motion." Creighton explicitly confirmed that Plaintiff's job substantially contributed to her right shoulder condition:

Q[:] Do you believe that her employment places her at increased risk for the kind of shoulder conditions that she has?

A[:] Yeah. Yes.

Q[:] All right. And do you believe, based on her testimony, that it only occurred at first when she was opening and closing the door, that the opening and closing the door *substantially contributed to her developing that condition?*

A[:] Yes.

(Emphasis added).

The County contends that Creighton's expert medical opinion was speculative in that (1) Creighton's direct testimony as quoted above was contradicted by his cross-examination testimony

and Creighton (2) had "no objective medical basis for concluding that a causal relationship exists" or (3) improperly based his determination of causation upon the notion of *post hoc, ergo propter hoc*. We reject each of these assertions and conclude that Creighton's medical opinion as to causation was not speculative.

In support of its first contention, the County cites Creighton's statement on cross-examination that "it's sometimes just the straw that breaks the camel's back" in reference to the effect of operating the door mechanism on Plaintiff's shoulder condition. The County argues that this testimony "clarif[ied]" Creighton's direct examination testimony to show that it is "equally plausible that [Plaintiff's] condition ha[s] no causal relationship to her employment whatsoever." The County misapprehends the context of Creighton's remark. Creighton's comment was in response to a question from the County about why it took several months of operating the door mechanism (i.e., from roughly January to June 2010) before Plaintiff had symptoms. Creighton responded by explaining that Plaintiff's degenerative shoulder condition was exacerbated by operating the door mechanism over those months until she began to experience pain and weakness. No fair reading of Creighton's testimony on this point can be construed as anything but supportive of his original, clear statement regarding causation. Indeed, after

the "camel's back" remark, on redirect examination, Creighton explicitly reaffirmed his opinion regarding causation:

Q[:] Your opinions about the relationship between her employment and her – and her medical condition with her shoulder; you comfortable with that?

A[:] Yes.

Q[:] All right. And you're – and – and that it substantially contributed to it?

A[:] Yes.

The above-quoted portions of Creighton's testimony provide ample competent evidence to support the Commission's finding that Plaintiff's employment caused or *substantially contributed to* her right shoulder condition.¹

As for the County's second and third contentions, our

¹ We further note that, even if Creighton's testimony was contradictory at times, it is still competent evidence to support the Commission's findings of fact. See *Click*, 300 N.C. at 167, 265 S.E.2d at 391 (holding that a workers' compensation claimant's "testimony was competent even though it was contradicted by his prior statements"). That a witness provides contradictory testimony goes to the weight of the evidence and its credibility, *Harrell v. J. P. Stevens & Co., Inc.*, 45 N.C. App. 197, 206, 262 S.E.2d 830, 835, *cert. denied*, 300 N.C. 196, 269 S.E.2d 623 (1980), and those are determinations reserved for the Commission alone. *Hassell*, 362 N.C. at 306, 661 S.E.2d at 715 (stating that "the Commission may believe all or a part or none of any witness's testimony"); see also *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (stating that our appellate courts may not re-weigh the evidence or assess credibility), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999). Thus, while Creighton's testimony was less than clear at times, this circumstance is neither unique to this witness nor an issue for this Court to address on appeal.

review of the record reveals that Creighton (1) examined Plaintiff multiple times, (2) reviewed diagnostic tests including, *inter alia*, X rays and MRIs, (3) considered Plaintiff's other medical records and history, and (4) reviewed a video recording of Plaintiff operating the door mechanism. This information, in conjunction with Creighton's training, experience, and expertise in orthopedic medicine, served as the bases for Creighton's medical opinion regarding causation, not a mere temporal relationship between Plaintiff's employment and her shoulder condition. Thus, contrary to the County's contention, Creighton's opinion on causation was non-speculative and had an adequate basis that did not rely on *post hoc, ergo propter hoc*. In sum, Creighton's testimony provided competent evidence to support the Commission's findings of fact, and those findings of fact in turn support the Commission's determination of a causal connection. Accordingly, all of the County's arguments as to causation are overruled.

B. Plaintiff's Continuing Disability

The County also argues that the Commission erred as a matter of law in finding that Plaintiff remains disabled as a result of her shoulder condition. Specifically, the County notes that (1) no doctor is currently holding Plaintiff out of work and, (2) even if Plaintiff *is* disabled, that disability

could be due to her non-compensable neck condition. We reject each of these arguments.

Disability is defined as "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) (2011).

[I]n order to support a conclusion of disability, the Commission must find: (1) that plaintiff was incapable after [her] injury of earning the same wages [she] had earned before [her] injury in the same employment, (2) that plaintiff was incapable after [her] injury of earning the same wages [she] had earned before [her] injury in any other employment, and (3) that plaintiff'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) (citation omitted). "Initially, the claimant must prove the extent and degree of his disability. On the other hand, once the disability is proven, there is a presumption that it continues until the employee returns to work at wages equal to those he was receiving at the time his injury occurred." *Watson v. Winston-Salem Transit Auth.*, 92 N.C. App. 473, 475-76, 374 S.E.2d 483, 485 (1988) (citations omitted).

It is well established that "an employer takes the employee as he finds her with all her pre-existing infirmities and weaknesses." *Morrison v. Burlington Indus.*, 304 N.C. 1, 18, 282 S.E.2d 458, 470 (1981). Thus, a plaintiff's employment need not

"be the sole cause of the worker's incapacity for work [for] full benefits [to] be allowed when it is shown that the employment is a contributing factor to the disability." *Rutledge*, 308 N.C. at 104, 301 S.E.2d at 371 (citation and internal quotation marks omitted). Because a plaintiff's employment "need not be the sole causative force" in her disability, in order to receive disability benefits, an employee must only prove that her employment contributed in "some reasonable degree to the disability." *Brafford v. Brafford's Constr. Co.*, 125 N.C. App. 643, 646-47, 482 S.E.2d 34, 37 (1997) (citations omitted).

We are not persuaded by the County's contention that Plaintiff did not establish the existence of her current disability because no doctor is holding her out of work. The Commission made the following findings of fact, which the County has not challenged on appeal and which are thus binding on this Court:

8. Plaintiff could not work while on Vicodin as she was not permitted to drive the [C]ounty bus while taking this medication. When Plaintiff returned to her employment on June 22, 2010 she was advised by Mr. Thurman [Plaintiff's supervisor] to return when she had been released to full duty.

9. Mr. Thurman, Defendant's Transit Service Manager, talked with Plaintiff about her shoulder. After being asked by Mr. Thurman how she was opening the van door, Plaintiff demonstrated with her right hand only. Mr.

Thurman recommended she should use two hands when operating the door. Plaintiff notified Mr. Thurman she believed she had a right shoulder condition related to her job on or about June 28, 2010 and Mr. Thurman directed Plaintiff to Edgewater Medical Center Urgent Care.

. . .

23. Dr. Creighton opined that Plaintiff is "disabled from her current employment" because she "would have a tough time doing everything that's required in her job."

. . .

28. Plaintiff has been out of work since June 23, 2010. Melinda Bethune, risk management safety coordinator for Harnett County, testified at the hearing before the Deputy Commissioner that there was no light duty work for Plaintiff available with Defendant.

This Court has repeatedly held that "evidence of an employer's refusal to allow an employee to return to work because there was no light work available supports a finding that the employee was not capable of earning wages in the same employment." *Moore v. Davis Auto Serv.*, 118 N.C. App. 624, 628, 456 S.E.2d 847, 851 (1995); see also *Chavis v. TLC Home Health Care*, 172 N.C. App. 366, 375, 616 S.E.2d 403, 411-12 (2005), appeal dismissed, 360 N.C. 288, 627 S.E.2d 464 (2006). Accordingly, the findings of fact quoted above support the Commission's finding of fact 29, that "Plaintiff is disabled from her current employment."

As for the County's assertion that conclusion of law 6, that Plaintiff's disability was "a result of [her] right

shoulder problems" is not supported, we must again disagree. The County contends that Creighton never explicitly linked Plaintiff's disability to her compensable shoulder condition, as opposed to her non-compensable neck condition. As noted *supra*, Plaintiff need not show that her compensable shoulder condition is the sole cause of her disability, but only that it "contributed in some reasonable degree" to her inability to work. *Brafford*, 125 N.C. App. at 647, 482 S.E.2d at 37. Therefore, whether Plaintiff's non-compensable neck condition is a partial or contributing factor to her disability is irrelevant. Plaintiff's burden was merely to establish, by competent evidence, a connection between her compensable shoulder condition and her disability. *See id.*

Our review reveals that testimony from both Creighton and Plaintiff herself was competent evidence of this connection. On cross-examination, the County's counsel asked about the physical movements required to operate the door mechanism as depicted in the video Creighton had reviewed. Creighton affirmed that the position of Plaintiff's arm and the amount force required to operate the door, along with the repetitive nature of the motion, all played roles in the development of Plaintiff's compensable shoulder condition. Then, after a lengthy line of questions about the field of ergonomics, the County's counsel asked if Creighton believed Plaintiff was "disabled from

employment?" Creighton replied, "I think she's currently - would have a tough time doing everything that's required in her job." Immediately thereafter, on redirect, Creighton testified that Plaintiff was "disabled from her current employment[,]" and, when asked again about Plaintiff's disability, repeated, "Yes. I don't think she could do [her job] currently." These opinions were plainly made in reference to Plaintiff's compensable shoulder condition, about which Creighton had been testifying for the preceding nine pages of deposition transcript. This competent evidence supports finding of fact 23, that "Dr. Creighton opined that Plaintiff is disabled from her current employment" because she "would have a tough time doing everything that's required in her job" which in turn supports the conclusion that "Plaintiff's disability was "a result of [her] right shoulder problems."

In addition, Plaintiff's own testimony supports the connection between her disability and her compensable shoulder condition. Plaintiff testified that she had been employed as a van driver for the County since June 2008. She further testified that she had been able to perform her job until June 2010, some six months after she began driving the van with the door mechanism. In June 2010, the symptoms of Plaintiff's compensable shoulder condition began and were always associated with operation of the door mechanism. Those symptoms led to the

prescription of medication that prevented Plaintiff from being able to drive the van, resulted in her being restricted for a period of time to work "without the use of [her] right upper extremity[,]" and, as noted *supra*, even after her release to return to work, the County has refused to allow her to do so. In sum, Plaintiff's own testimony that she was *able to work prior* to the onset of the compensable shoulder condition and *unable to work or not permitted to work after* its onset indicates that her compensable shoulder condition "contributed in some reasonable degree to the disability." *Id.* Accordingly, we hold that the Commission did not err in concluding that Plaintiff remains totally disabled as a result of her compensable shoulder condition and is entitled to continuing disability benefits.

For these reasons, the Commission's opinion and award is
AFFIRMED.

Judges CALABRIA and ELMORE concur.

Report per Rule 30(e).