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NO. COA12-1211
NORTH CAROLINA COURT OF APPEALS

Filed: 17 September 2013

STEVE MYERS,
Employee,
Plaintiff,

v.

North Carolina
Industrial Commission
I.C. No. W99855

BEN MYNATT CHEVROLET CADILLAC,
Employer (member of North
Carolina Auto Dealers'
Association) BRENTWOOD SERVICES
INC. (Third Party Administrator),
Defendant.

Appeal by defendant from opinion and award entered 25 July 2012 by the North Carolina Industrial Commission. Heard in the Court of Appeals 26 March 2013.

Charles G. Monnett III & Assoc., by Lauren O. Newton, for plaintiff-appellee.

Teague Campbell Dennis & Gorham, L.L.P., by Matthew W. Skidmore, for defendant-appellant.

GEER, Judge.

Defendant employer Ben Mynatt Chevrolet Cadillac and third party administrator Brentwood Services Inc. (collectively "defendant") appeal from an opinion and award of the North Carolina Industrial Commission awarding plaintiff Steve Myers

temporary total disability compensation and medical compensation. On appeal, defendant primarily argues that the Commission erred in finding that plaintiff's 16 August 2010 workplace injury caused or aggravated his thoracic spine condition because there was no competent evidence in the record supporting the Commission's ultimate findings on causation. We hold that competent expert testimony supported the Commission's findings on causation and, therefore, affirm.

Facts

On 16 August 2010, plaintiff was working for Ben Mynatt Chevrolet Cadillac as a technician in the truck shop. While helping a co-worker adjust a light in the back of a pickup truck, plaintiff was stretched over the back of the truck bed, lifting up the light, when he felt "extreme pressure" on his back. Plaintiff felt like "something might have popped" and experienced an almost paralyzing pain. Plaintiff immediately notified his supervisor of his injury and was seen that day by Dr. Marendra Dent at Lakeside Family Physicians for "mid back pain."

Dr. Dent ordered x-rays of the thoracic spine and an MRI. The thoracic spine is located in the mid-back area. Plaintiff was restricted from work until further notice, pending the results of his MRI. Based on the MRI, Dr. Dent diagnosed

plaintiff with a central disc protrusion at T7-T8, causing slight pressure on the spinal cord.

Upon referral from Dr. Dent, plaintiff was seen by Dr. Andrew Sumich, a physiatrist, at Carolina Neurosurgery and Spine on 7 September 2010. Plaintiff reported back pain in the mid-thoracic region with muscle spasms, which began with a pop he felt in his back at work on 16 August 2010. Dr. Sumich reviewed the MRI and, like Dr. Dent, diagnosed plaintiff with a T7-T8 disc protrusion with slight pressure on the cord. Dr. Sumich provided conservative treatment consisting of physical therapy and continued plaintiff's out of work restrictions until he completed physical therapy.

Plaintiff was out of work from 16 August 2010 until he requested to be returned to work on 22 September 2010. He applied for and received short-term disability during that time period. Plaintiff contributed payments to his short-term disability plan.

On 28 October 2010, Dr. Sumich gave plaintiff an epidural steroid injection to treat a flare up in plaintiff's back pain. Plaintiff paid out of pocket for the injection and received relief from the injection for approximately two and a half to three months. At his own expense, plaintiff received another epidural steroid injection from Dr. Sumich on 14 June 2011. In

order to limit a patient's exposure to the side effects of steroids, Dr. Sumich generally recommends no more than three injections within a period of six months. According to Dr. Sumich, such injections can provide relief for a period of weeks to months, and following each injection plaintiff would need to be out of work for two or more days, but not for an extended absence.

Prior to 16 August 2010, plaintiff had experienced lower back pain while working for defendant employer in February 2008 when he lifted a seat out of a car and felt and heard a pop in his lower back followed by the onset of pain. Plaintiff was seen once by Dr. Will Lane at Lakeside Family Physicians on 19 February 2008 and reported a "pop in his back" and a history of his back "'going in and out'" but no specific problems. Dr. Lane diagnosed plaintiff with a "[l]ow back to midback injury," without any evidence of a herniated disk, and prescribed an anti-inflammatory medication to address his complaints. Plaintiff did not seek further medical treatment for back pain, missed no time from work, and continued, without difficulty, to perform full-duty work at his normal automotive technician position. Plaintiff did not file a workers' compensation claim for his February 2008 injury.

Due to the nature of his work, which involved some heavy lifting, plaintiff occasionally experienced muscle pains and spasms in his lower back. In the days immediately preceding his 16 August 2010 thoracic spine injury, plaintiff had experienced some general lower-back pain for which he took anti-inflammatory medication left over from his February 2008 lower-back injury.

On 16 August 2010, defendant completed an Employer's Report of Employee's Injury, North Carolina Industrial Commission Form 19, in response to plaintiff's 16 August 2010 injury. The form provided that plaintiff "was assisting technician install tall lights on truck, employee was leaning over side of truck and started feeling a pain in the back." On 2 September 2010, defendant denied compensation to plaintiff for the 16 August 2010 injury because "[t]here [wa]s no credible evidence that indicate[d] there was an injury in the course and scope of the employment." On 27 October 2010, plaintiff requested a hearing on his claim because he believed he was entitled to compensation for days missed at work, medical expenses, and permanent partial disability.

On 18 January 2012, the deputy commissioner entered an opinion and award finding plaintiff "sustained a compensable injury by accident in the form [of] a specific traumatic incident to his mid-back on August 16, 2010" and that "[a]s a

result of the specific traumatic incident of August 16, 2010, Plaintiff injured or aggravated the condition of his thoracic spine, causing disc protrusion at T7-T8, and the need for medical treatment." The deputy commissioner therefore ordered defendant to pay all medical expenses incurred or to be incurred by plaintiff as a result of his compensable injury and to pay plaintiff compensation for temporary total disability for days plaintiff missed work or will miss work in the future due to the compensable injury. Defendant appealed to the Full Commission.

On 25 July 2012, the Full Commission entered an opinion and award affirming the deputy commissioner's opinion and award with minor modifications. The Commission concluded that "as a direct result of a specific traumatic incident of the work assigned to him by Defendant, Plaintiff sustained a compensable injury to his thoracic spine" and that "Plaintiff's specific traumatic incident at work on August 16, 2010 caused or aggravated the thoracic condition in his back, resulting in disc protrusions at T7-T8."

The Commission, therefore, ordered defendant (1) to pay "all medical expenses incurred or to be incurred by Plaintiff for reasonably necessary medical treatment for his August 16, 2010 compensable thoracic spine injury"; (2) to "pay Plaintiff compensation for temporary total disability from August 16, 2010

through September 22, 2010 at the agreed upon compensation rate of \$726.40 per week"; (3) to "pay Plaintiff compensation for any additional days for which Plaintiff was written out of work by Dr. Sumich, or any other medical provider due to his thoracic injury"; and (4) to pay the costs. Defendant timely appealed to this Court.

Discussion

Review of an opinion and award of the Industrial Commission "is limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law." *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008). "This 'court's duty goes no further than to determine whether the record contains any evidence tending to support the finding.'" *Id.* (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)).

"The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Anderson*, 265 N.C. at 433-34, 144 S.E.2d at 274. "'The evidence tending to support plaintiff's claim is to be viewed in the light most favorable to plaintiff, and plaintiff is entitled to the benefit of every reasonable inference to be drawn from the

evidence.'" *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 115, 530 S.E.2d 549, 553 (2000) (quoting *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998)).

Here, defendant challenges the following ultimate findings of causation made by the Commission:

18. Based upon a preponderance of the evidence in view of the entire record, the Full Commission finds that on August 16, 2010, while in the course and scope of his employment and as a direct result of a specific traumatic incident of the work assigned to him by Defendant, Plaintiff sustained a compensable injury to his thoracic spine when he felt extreme pressure and something that felt like a pop accompanied by extreme pain, while stretched out over the bed of a pickup truck trying to adjust a light.

19. Based upon a preponderance of the evidence in view of the entire record, the Full Commission finds that Plaintiff's specific traumatic incident at work on August 16, 2010 caused or aggravated the thoracic condition in his back, resulting in disc protrusions at T7-T8.

With respect to causation, our Supreme Court has explained that "[a]lthough the employment-related accident need not be the sole causative force to render an injury compensable, the plaintiff must prove that the accident was a causal factor by a preponderance of the evidence." *Holley v. ACTS, Inc.*, 357 N.C. 228, 231-32, 581 S.E.2d 750, 752 (2003) (internal citations and quotation marks omitted). Further, "aggravation of a pre-

existing condition which results in loss of wage earning capacity is compensable under the workers' compensation laws in our state." *Smith v. Champion Int'l*, 134 N.C. App. 180, 182, 517 S.E.2d 164, 166 (1999).

In this case, the Commission's ultimate findings on causation are supported by its supplemental finding regarding the deposition testimony of Dr. Sumich:

15. Dr. Sumich opined that the incident at work on August 16, 2010, described by Plaintiff, most likely caused the disc protrusions in Plaintiff's thoracic spine, especially if pre-existing back pain was primarily in Plaintiff's lower back. Dr. Sumich further opined that even if Plaintiff had experienced mid-back pain before August 16, 2010, it is unlikely that the discs had been protruding for over 2 years, i.e. since February 2008, but if they had, then the August 16, 2010 incident most likely aggravated the pre-existing thoracic spine condition.

Indeed, defendant does not dispute that finding of fact 15 supported the Commission's ultimate findings on causation.

Defendant argues, however, that finding of fact 15, regarding Dr. Sumich's causation opinions, is not supported by competent evidence. On direct examination, Dr. Sumich testified that based on plaintiff's history, his examination of plaintiff, and the MRI results, it was his opinion to a reasonable degree of medical certainty that plaintiff's thoracic spine condition was "caused at work" by the 16 August 2010 incident. Dr. Sumich

further testified that his opinion would not be affected by evidence showing that two years prior to the 16 August 2010 incident, plaintiff reported a lower-back injury from lifting at work that caused lower-back pain, which resolved in about two to three days with plaintiff then returning to work. Dr. Sumich specified his opinion would not be affected as long as the pain from the prior incident "was in the lower back in a different area."

On cross-examination, Dr. Sumich was presented, for the first time, with two of plaintiff's medical records, dated 19 February 2008 and 16 August 2010, tending to show plaintiff had experienced mid-back pain prior to 16 August 2010. Dr. Sumich then confirmed that when previously stating his opinion on direct examination, he did not know plaintiff's "full history" and, after learning of plaintiff's full history, his opinion had changed. He testified: "Based on that, there seems to be an underlying thoracic issue up to two years ago. So the more current exacerbation would be just that, and it's probably an exacerbation of the underlying problem."

Also on cross-examination, Dr. Sumich testified it was possible that, even in the absence of the 16 August 2010 incident, plaintiff's thoracic condition could have progressed and that without an MRI of plaintiff's back predating the 16

August 2010 incident, it was not possible to determine "with certainty" whether or not the 16 August 2010 workplace injury caused plaintiff's current thoracic condition. Dr. Sumich further stated that there were several "possibilities" that could have caused plaintiff's current thoracic condition, and that the determination whether one of those several possibilities was more likely than not the cause "would just be made on history."

On re-direct examination, Dr. Sumich was presented with one of plaintiff's medical records -- a form completed by Dr. Dent on 8 September 2010 -- indicating that plaintiff first had symptoms of mid-back pain following the 16 August 2010 workplace injury and that plaintiff's back pain prior to 16 August 2010 was lower-back pain. Dr. Sumich then testified that if it were established that plaintiff's back pain from the 2008 incident was only low-back pain, Dr. Sumich "would be pretty certain that the new thoracic pain was from the newer injury in August of 2010." Dr. Sumich also reaffirmed on re-direct examination his opinion that even if plaintiff had some preexisting mid-back condition, "that condition was exacerbated by his lifting incident on August 16th, 2010, when he reported feeling this pull or popping in his back."

After again viewing plaintiff's medical records on re-cross-examination, Dr. Sumich observed that plaintiff's 19 February 2008 record and 16 August 2010 record each indicated that plaintiff had mid-back pain prior to 16 August 2010 and were inconsistent with plaintiff's 8 September 2010 record which indicated plaintiff's pre-August 2010 back pain was only lower-back pain. Dr. Sumich additionally affirmed that causation of plaintiff's current thoracic condition "would largely be determined by whether there was the existence of mid-back pain prior to August 16th, 2010." Dr. Sumich then testified that if it were established that plaintiff had mid-back pain prior to 16 August 2010, he could not "determine the causative factor to the thoracic disk protrusion," but he "still could determine, based on the history, that the symptoms that he's experiencing are -- were exacerbated by the newer August 2010 injury."

With respect to his "exacerbation" opinion, Dr. Sumich additionally stated on re-cross-examination that it was "possible" that exacerbation of plaintiff's thoracic condition could have been caused by the natural progression of a disk protrusion at T7-T8 which could have pre-dated plaintiff's 16 August 2010 workplace injury. Dr. Sumich clarified, however, that he nonetheless related the exacerbation of plaintiff's thoracic condition to the 16 August 2010 injury "based on what

[plaintiff] told me on our initial visit," during which plaintiff did not indicate he had any prior mid-back pain. The "HISTORY OF PRESENT ILLNESS" section of Dr. Sumich's record from plaintiff's initial appointment with Dr. Sumich provides in relevant part that on 16 August 2010, plaintiff "was at work and felt a pop in his back and began to have midthoracic pain and back spasms that was [sic] debilitating."

Thus, as conceded by defendant, "Dr. Sumich provided testimony on direct and re-direct examination attributing plaintiff's 16 August 2010 symptoms to his alleged injury on the same date." Defendant argues, however, that the Commission's finding of fact 15 is erroneous because the Commission failed to consider "Dr. Sumich's additional, competing opinions on cross-examination." Defendant then reasons: "Taking Dr. Sumich's admission on re-cross examination that his opinion regarding exacerbation was based solely on plaintiff's incomplete reports . . . together with his prior testimony on cross examination that causation is not clear when considering plaintiff's full medical history . . ., it is evident that his testimony, taken in its entirety, is purely speculative."

Defendant's argument fails to recognize, however, that Dr. Sumich maintained his opinion that plaintiff's thoracic back symptoms, if not caused by, were at least "exacerbated" by

plaintiff's 16 August 2010 injury even after being made aware of plaintiff's full medical history, including the two records tending to show plaintiff had mid-back pain prior to 16 August 2010. Dr. Sumich's statement on re-cross-examination that his exacerbation opinion was "based on what he told me on our initial visit" does not undermine the competence of his opinion. Rather, it shows that Dr. Sumich was of the opinion, even after being made aware of plaintiff's full history, that plaintiff's 16 August 2010 workplace injury exacerbated any pre-existing mid-back symptoms because plaintiff reported to Dr. Sumich that he "was at work and felt a pop in his back and began to have midthoracic pain and back spasms that was [sic] debilitating."

Defendant nevertheless cites *Chambers v. Transit Mgmt.*, 360 N.C. 609, 636 S.E.2d 553 (2006), in support of its argument. There, our Supreme Court held that the Commission did not rely upon competent evidence to support its ultimate finding that the plaintiff's employment exposed him to a greater risk of contracting an occupational disease relative to the general public. *Id.* at 616, 636 S.E.2d at 557. The Court explained that the Commission's finding was based solely on the ambiguous direct examination testimony of a single witness and the Commission failed to consider the witness' "clarifying testimony on cross-examination" that the witness was unable to state an

opinion on the relevant issue. *Id.* at 615-16, 636 S.E.2d at 557.

In this case, however, Dr. Sumich consistently and unambiguously testified on cross, re-direct, and re-cross that if plaintiff had pre-existing mid-back pain, he would conclude that plaintiff's pain was exacerbated by the 16 August 2010 injury based on plaintiff's history. Moreover, there is no indication that the Commission did not consider Dr. Sumich's testimony in its entirety. Rather, the Commission's finding of fact 15 specifically includes Dr. Sumich's exacerbation opinion -- first testified to on cross-examination and reaffirmed on re-direct and re-cross -- and thus indicates the Commission considered all of Dr. Sumich's testimony. *Chambers* is, therefore, distinguishable.

Defendant additionally argues that Dr. Sumich's testimony did not provide an adequate basis for the Commission's ultimate findings on causation because Dr. Sumich's direct examination opinion that plaintiff's 16 August 2010 workplace injury caused, rather than aggravated, plaintiff's thoracic condition was based upon the "unsupported" factual assumption that, prior to 16 August 2010, plaintiff's only back pain was lower-back pain. Defendant contends that, contrary to that factual assumption,

"the overwhelming evidence" showed that plaintiff was experiencing mid-back pain before 16 August 2010.

However, the Commission made unchallenged findings of fact that plaintiff's mid-back pain following 16 August 2010 was "very different from any pain," including lower-back pain, that plaintiff had experienced prior to his 16 August 2010 injury. Further, despite finding plaintiff was diagnosed with a "low back to mid-back injury, without any evidence of a herniated disk" on 19 February 2008, the Commission noted, in an unchallenged finding, that plaintiff's pain from the 2008 incident was "low back pain."

Moreover, the Commission made additional, unchallenged findings of fact considering and rejecting an argument nearly identical to that made by defendant on appeal. In so doing, the Commission reviewed the evidence presented by defendant as tending to show plaintiff had mid-back pain prior to 16 August 2010, and nonetheless found credible plaintiff's testimony "that prior to August 16, 2010, 'I'd feel muscle spasms every once in a while in my lower back, depending on what I was doing, but other than that, nothing until August.'"

The Commission's unchallenged findings of fact are binding on appeal. *Clayton v. Mini Data Forms, Inc.*, 199 N.C. App. 410, 411, 681 S.E.2d 544, 545-46 (2009). Further, the Commission's

findings as to the nature of plaintiff's back symptoms prior to 16 August 2010 are supported by plaintiff's testimony and by plaintiff's 8 September 2010 medical record. We may not, therefore, reweigh the evidence.

Defendant additionally cites *Seay v. Wal-Mart Stores, Inc.*, 180 N.C. App. 432, 637 S.E.2d 299 (2006), and *Gross v. Gene Bennett Co.*, 209 N.C. App. 349, 703 S.E.2d 915 (2011), in support of its argument. In *Seay*, the Court held that an expert's testimony was not sufficient to establish causation, in part, because the expert's causation testimony was in response to a hypothetical question that assumed facts not supported by the record. 180 N.C. App. at 437-38, 637 S.E.2d at 303. In *Gross*, the Court held that the Commission's ultimate finding on causation was not supported by its findings or the evidence because it was based solely on a certain expert's opinion and that expert's opinion was, in turn, expressly based upon an assumed set of facts that the Commission found were *not* present in the case. 209 N.C. App. at 354, 357, 703 S.E.2d at 919, 920.

In contrast to both *Seay* and *Gross*, there was evidence here to support the factual assumption that plaintiff's pain prior to 16 August 2010 consisted only of lower-back pain, and the Commission relied upon that evidence to find as fact that plaintiff's pain prior to 16 August 2010 was "very different"

from plaintiff's mid-back pain after 16 August 2010. *Seay* and *Gross* are, therefore, distinguishable.

In sum, Dr. Sumich's causation and aggravation testimony supports the Commission's finding of fact 15. Dr. Sumich's testimony, and finding of fact 15, in turn, support the Commission's ultimate finding that "Plaintiff's specific traumatic incident at work on August 16, 2010 caused or aggravated the thoracic condition in his back, resulting in disc protrusions at T7-T8."

Defendant additionally argues on appeal that the testimony of Dr. Dent was insufficient to support the Commission's ultimate findings on causation. Dr. Dent testified that plaintiff's thoracic back pain was likely due to his disk protrusion, but she was unable to state an opinion as to the cause of the disk protrusion.

Nevertheless, because, as the Commission found, Dr. Sumich testified that plaintiff's 16 August 2010 injury either caused or aggravated plaintiff's thoracic spine condition, the Commission's ultimate finding on causation was supported by its supplemental findings and by competent evidence in the record. We, therefore, affirm the opinion and award of the Full Commission.

Affirmed.

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Judges MCGEE and DAVIS concur.

Report per Rule 30(e).