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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1006

Filed: 17 April 2018

North Carolina Industrial Commission, I.C. No. 15-010508

LISA POWELL, Employee, Plaintiff,

v.

O'REILLY AUTO PARTS, INC., Employer, SAFETY NATIONAL INSURANCE COMPANY, Carrier (CORVEL CORPORATION, Third-Party Administrator), Defendants.

Appeal by defendants from Opinion and Award of the North Carolina Industrial Commission filed 9 June 2017 by Commissioner Christopher C Loutit. Heard in the Court of Appeals 21 February 2018.

Oxner & Permar, PLLC, by Daniel R. Lehrer and Jamie E. Rudd, for plaintiff-appellee.

McAngus Goudelock & Courie, PLLC, by Melissa R. Clearly, for defendants-appellants.

ARROWOOD, Judge.

Employer O'Reilly Auto Parts, Inc. ("O'Reilly"), carrier Safety National Insurance Company, and third-party administrator Corvel Corporation (together "defendants") appeal from Opinion and Award of the North Carolina Industrial

Commission (the "Commission") awarding workers' compensation benefits in favor of employee Lisa Powell ("plaintiff"). For the following reasons, we affirm.

I. Background

Plaintiff was employed by O'Reilly as a truck driver when, on 19 February 2015, she slipped and fell while making a delivery. Specifically, plaintiff was unloading a trailer when she slipped on ice and fell. As she fell, plaintiff hit her head and a pallet jack rolled over her left foot.

Plaintiff initially reported injuries to her head and left foot. Defendants accepted plaintiff's initial claims and filed a Form 63 "Notice to Employee of Payment of Compensation Without Prejudice" dated 13 March 2015. That form indicated that defendants would pay workers' compensation benefits to plaintiff for a head concussion and left foot contusion suffered on 19 February 2015.

Plaintiff later claimed to have additionally experienced TMJ and hearing loss as a result of her fall. In response to plaintiff's additional claims, defendants filed a Form 61 "Denial of Workers' Compensation Claim" dated 3 June 2015. Defendants stated that "[w]hile [they] admit plaintiff suffered a [sic] compensable injuries for her head concussion and left foot contusion (which were identified on the original Form 63), [they] deny [p]laintiff['s] alleged TMJ and hearing loss conditions are causally related to the compensable accident on [19 February 2015]."

On 16 June 2015, plaintiff filed a Form 18 "Notice of Accident to Employer and Claim of Employee" specifying her initial claim of injuries to her head and left foot. On 23 June 2015, plaintiff filed an Amended Form 18, adding TMJ and hearing loss to the injuries purportedly suffered as a result of the 19 February 2015 fall. Also on 23 June 2015, plaintiff completed a Form 33 "Request that Claim be Assigned for Hearing." Defendants responded by filing a Form 33R "Response to Request that Claim be Assigned for Hearing" dated 9 July 2015. Defendants asserted that "[p]laintiff has received all benefits to which she is entitled."

Prior to the matter coming on for hearing, defendants filed a Form 24 "Application to Terminate or Suspend Payment of Compensation." Defendants' Form 24 was heard on 8 December 2015 and approved by an Administrative Decision and Order filed 16 December 2015, thereby allowing defendants to terminate the payment of workers' compensation benefits to plaintiff.

On 19 January 2016, the underlying matter was heard before Deputy Commissioner Thomas H. Perlungher. At the conclusion of the hearing, the deputy commissioner ordered that the record remain open to allow the submission of evidence, including expert depositions, and for the submission of contentions and proposed Opinion and Awards. The record was closed on 17 June 2016. On 24 October 2016, the deputy commissioner filed an Opinion and Award in favor of plaintiff. Defendants gave notice of appeal from the deputy commissioner's Opinion

and Award to the Full Commission on 7 November 2016 and completed a Form 44 "Application for Review" on 17 January 2017.

The Full Commission reviewed defendant's appeal on 5 April 2017 and filed its Opinion and Award on 9 June 2017. The Full Commission's Opinion and Award affirmed the decision of the deputy commissioner by (1) reversing the granting of defendants' Form 24 and ordering defendants to continue to pay plaintiff temporary total disability compensation; (2) ordering defendants to pay for all medical treatment necessitated by plaintiff's compensable fall, including "treatment for [p]laintiff's aggravated depression, adjustment disorder, and somatoform disorder[,]" and for "another ENT evaluation and any treatment recommended; an evaluation by a neurologist; and a psychiatric evaluation and psychological counseling[;]" and (3) awarding a reasonable attorney's fee. The Full Commission's award was based on its conclusions that "[p]laintiff's need for treatment for her aggravated depression, inner ear pathology, adjustment disorder, and somatoform disorder is a direct and natural result of her compensable injury" and that plaintiff has carried her burden of proving continuing temporary total disability from the compensable fall on 19 February 2015.

Defendants gave notice of appeal from the Full Commission's Opinion and Award to this Court on 6 July 2017.

II. Discussion

On appeal, defendant challenges the Full Commission's determinations that plaintiff's psychological conditions are compensable and that plaintiff has established disability as a result of her compensable fall.

This Court's 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. This '[C]ourt's duty goes no further than to determine whether the record contains any evidence tending to support the finding.' " *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (citation omitted) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)). "The findings of the Commission are conclusive on appeal when such competent evidence exists, even if there is plenary evidence for contrary findings. This Court reviews the Commission's conclusions of law *de novo*." *McLaughlin v. Staffing Solutions*, 206 N.C. App. 137, 143, 696 S.E.2d 839, 844 (2010) (citation omitted).

1. Compensability

Defendants first argue that the Full Commission erred in determining plaintiff's depression, adjustment disorder, and somatic symptom disorder are compensable.

Our Supreme Court has explained that

> [f]or an injury to be compensable under the terms of the Workmen's Compensation Act, it must be proximately caused by an accident arising out of and suffered in the course of employment. There must be competent evidence to support the inference that the accident in question resulted in the injury complained of, *i.e.*, some evidence that the accident at least might have or could have produced the particular disability in question. The quantum and quality of the evidence required to establish prima facie the causal relationship will of course vary with the complexity of the injury itself. There will be many instances in which the facts in evidence are such that any layman of average intelligence and experience would know what caused the injuries complained of. On the other hand, where 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) (internal citations and quotation marks omitted).

> When a pre-existing, nondisabling, non-job-related condition is aggravated or accelerated by an accidental injury arising out of and in the course of employment . . . so that disability results, then the employer must compensate the employee for the entire resulting disability even though it would not have disabled a normal person to that extent.

Morrison v. Burlington Industries, 304 N.C. 1, 18, 282 S.E.2d 458, 470 (1981) (emphasis omitted).

In this case, the Full Commission made detailed findings of fact regarding the testimony of the physicians who treated plaintiff, Drs. Gualtieri, Bellard, Herfkens, and Fozdar. The Commission also made findings reflecting the observations of

plaintiff's mother, boyfriend, and daughter regarding plaintiff's symptoms following the accident. Based on the testimony, the Commission made the following findings of fact:

> 39. The Full Commission assigns greater weight to the testimony and expert medical opinions of Drs. Bellard, Gualtieri, and Herfkens and less weight to the testimony and expert medical opinions of Dr. Fozdar.
>
> . . . .
>
> 43. All of the deposed experts and physicians who have either treated or evaluated [p]laintiff have found her to be credible with her complaints and presentation. Additionally, these opinions have been confirmed by objective neuropsychological testing [p]laintiff has undergone. Therefore, the Full Commission finds [p]laintiff to be credible.
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> 44. The Full Commission finds that [p]laintiff suffered from depression prior to her February 19, 2015 accident. Prior to the accident, [p]laintiff's depression was non-disabling as evidenced by the fact that she continued working for [O'Reilly] throughout the time she treated with Dr. Sood. Further, Dr. Gualtieri opined that [p]laintiff's concussion precipitated, or aggravated, her current depressive condition. Based upon the preponderance of the evidence in view of the entire record, the Full Commission finds that [p]laintiff's pre-existing depression was materially aggravated by her February 19, 2015 accident.
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> . . . .
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> 47. Drs. Gualtieri, Bellard, and Herfkens have all provided medical expert opinions that [p]laintiff's need for medical treatment for her current conditions is the direct result of her compensable injury.

> Therefore, the Full Commission finds that [p]laintiff's need for medical treatment for her aggravated depression, adjustment disorder, and somatoform disorder is a direct and natural result of her compensable work-related injury she sustained on February 19, 2015.
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> 48. Dr. Gualtieri testified [p]laintiff needs to receive psychiatric treatment before anything else. Dr. Bellard testified neuropsychological battery testing, and referral to an ENT physician and neurologist are all necessary medical treatment to treat [p]laintiff's current condition as a result of her work-related injury. Dr. Herfkens testified her recommendations that [p]laintiff be seen by a neurologist for her head and face pain, dizziness, and vomiting, and a psychologist for her depression and somatoform disorder were necessary medical treatment to treat [p]laintiff's conditions as a result of her work-related injury. Based upon the medical evidence of record and expert testimony obtained through deposition, the Full Commission finds [p]laintiff is entitled to past and ongoing medical compensation for her work injuries, including all past and ongoing necessary treatment for her aggravated depression, inner ear pathology, adjustment disorder, and somatoform disorder. The Full Commission further finds that these conditions are a direct and natural result of [p]laintiff's compensable injury.

From these findings, the Commission issued the following conclusions of law concerning plaintiff's psychological conditions:

> 6. . . . the Full Commission concludes that [p]laintiff's depression was a pre-existing, non-disabling, non-job-related condition, and the February 19, 2015 injury resulted in a material aggravation of her pre-existing depression causing it to become severe and disabling. Therefore, [p]laintiff is entitled to benefits based upon the material aggravation of her pre-existing

> depression. . . .
>
> 7. . . . the Full Commission concludes [p]laintiff's need for treatment for her aggravated depression, inner ear pathology, adjustment disorder, and somatoform disorder is a direct and natural result of her compensable injury. . . .

Defendant's arguments concerning compensability do not specify any particular finding or conclusion by number, but instead seek to have this Court review the competency of the evidence and the Commission's determinations on credibility and the weight assigned to the doctors' testimony.

At the outset, we note that it has long been held that "[t]he 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. Nevertheless, "[a]lthough it is well established that [t]he [Industrial] Commission is the sole judge of the credibility of the witnesses and the [evidentiary] weight to be given their testimony, findings of fact by the Commission may be set aside on appeal when there is a complete lack of competent evidence to support them." *Young v. Hickory Business Furniture*, 353 N.C. 227, 230, 538 S.E.2d 912, 914 (2000) (internal quotation marks and citations omitted). Thus, this Court's review is limited to whether the Commission's findings are supported by competent evidence.

Defendants first challenge the Full Commission's finding that plaintiff is credible. The Commission found plaintiff credible in finding of fact number 43, which provides:

> 43. All of the deposed experts and physicians who have either treated or evaluated [p]laintiff have found her to be credible with her complaints and presentation. Additionally, these opinions have been confirmed by objective neuropsychological testing [p]laintiff has undergone. Therefore, the Full Commission finds [p]laintiff to be credible.

Defendants argue the "findings regarding credibility are not supported by competent evidence of record and are contrary to the specific opinions of [p]laintiff's physicians regarding credibility." Defendants contend the Commission has mischaracterized the physician's testimony and has taken the testimony out of context. Defendants also contend lay witness testimony from plaintiff's mother, boyfriend, and daughter "is clearly biased" and lacks competence. Upon review, we disagree with defendants' arguments.

Although the physicians expressed concern that plaintiff did not reveal she suffered from psychological issues before the workplace accident and testified that they did not observe all the symptoms that plaintiff alleged to be experiencing during their evaluations, all four doctors testified to the effect that plaintiff was credible with her complaints and presentation. Dr. Gualtieri testified that he "always thought [plaintiff] was sincere" and "[he] never thought she was deliberately faking." Dr. Bellard initially testified that he found plaintiff's complaints to be credible. After receiving and reviewing plaintiff's records from before the workplace accident, Dr. Bellard stated that plaintiff's reports were "not as credible." Dr. Bellard, however, later clarified that despite his comment that he did not consider plaintiff's reports as

credible as before he reviewed the records, "[h]er complaints are credible in my opinion." Similar to Drs. Gualtieri and Bellard, Dr. Herfkens testified that based on her evaluation and tests performed on plaintiff, she found plaintiff to be credible. Even Dr. Fozdar's testimony supports the Commission's credibility finding. Although Dr. Fozdar expressed doubt that plaintiff's issues were related to the workplace accident and that plaintiff had not experienced improvement so long after the accident, Dr. Fozdar did not think plaintiff was making up the complaints. At two different points in his testimony, Dr. Fozdar stated that he did not believe plaintiff was "outright malingering[.]" After stating plaintiff was not malingering for the second time, Dr. Fozdar added, "[t]rust me, I would put that as my diagnosis without hesitation if I had any doubt about that."

We hold the above testimony is competent evidence to support the Full Commission's finding of fact number 43. Furthermore, although it does not appear the Commission's credibility determination was based on the testimony of plaintiff's mother, boyfriend, and daughter, we find the Full Commission's findings regarding that testimony was also supported by competent evidence. Any bias in the lay witness testimony is a consideration for the Commission in determining the weight to be given the testimony. This Court will not second guess the credibility and weight determinations by the Commission.

Defendants also argue the Commission's reliance on the testimony of Drs. Gualtieri, Bellard, and Herfkens was error because they did not testify with certainty that the compensable fall caused plaintiff's psychological conditions. Thus, defendants assert there is not competent causation evidence. Defendants also contend the testimony is not competent causation evidence because Drs. Gualtieri, Bellard, and Herfkens had not reviewed all of plaintiff's records at the time of their examinations of plaintiff. Defendants contend the Commission should have given more weight to Dr. Fozdar's testimony that the compensable fall did not cause plaintiff's psychological issues. We are not convinced.

At the outset, we reiterate that "[t]he 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. Thus, we review only to determine whether the Commission's findings are supported by competent evidence.

> In a worker's compensation claim, the employee has the burden of proving that his claim is compensable. An injury is compensable as employment-related if any reasonable relationship to employment exists. Although 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.
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> In cases involving 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. 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. [T]he evidence must be such as to take the case out of the realm of conjecture and remote possibility, that is, there must be sufficient competent evidence tending to show a proximate causal relation.

Holley v. ACTS, Inc., 357 N.C. 228, 231-32, 581 S.E.2d 750, 752-53 (2003) (internal quotation marks and citations omitted). Medical certainty is not required. *Id.* at 234, 581 S.E.2d at 754.

In this case, Drs. Gualtieri, Bellard, Herfkens, and Fozdar were all tendered and accepted without objection as experts in either psychiatry or psychology. In the course of their deposition testimony, Drs. Gualtieri, Bellard, and Herfkens all opined that plaintiff's psychological issues were related to plaintiff's compensable fall.

Dr. Gualtieri testified that he thought "what happened was that [plaintiff] had a concussion, and the concussion reawakened the premorbid psychiatric condition which got out of hand. . . ." Dr. Gualtieri further testified that, at the time of his deposition and after reviewing plaintiff's records from before the workplace accident, his primary diagnosis is recurrent depression. Dr. Gualtieri explained that plaintiff's recurrent depression is a life condition and not the result of plaintiff's' concussion. Dr. Gualtieri, however, added that it was not unlikely plaintiff's concussion precipitated the severe depressive episode plaintiff was suffering from, explaining further that by precipitated, he means "something that tips you over the edge." Dr.

Gualtieri later agreed that precipitated and aggravated probably mean the same thing.

Dr. Bellard testified that he diagnosed plaintiff with (1) adjustment disorder with depression and anxiety and (2) mild neurocognitive disorder. Dr. Bellard opined that both were caused by plaintiff's workplace injury. Dr. Bellard further testified that plaintiff may have developed a somatization disorder and, therefore, neuropsychological battery testing is necessary. When directly asked if it is "your opinion that [plaintiff's] current condition and problems are caused by her work injury?", Dr. Bellard replied, "[y]es." Dr. Bellard's causation opinion did not change after reviewing plaintiff's records predating the workplace accident. Dr. Bellard indicated that his responses were to a reasonable degree of medical certainty.

When Dr. Herfkens was asked if plaintiff's deficits and symptoms were consistent with the workplace injury, Dr. Herfkens responded that it was a tough question. Dr. Herfkens explained that although she would not expect plaintiff's array of deficits, there was no evidence of malingering or response bias and she was of the opinion that it was more likely than not that plaintiff's conditions were caused by the workplace injury. Thus, she was also of the opinion that the treatments prescribed were necessary to address plaintiff's workplace injury. Dr. Herfkens testified that her opinions were to a reasonable degree of medical certainty. Upon review of plaintiff's records from before the workplace injury, Dr. Herfkens did not change her

diagnosis that plaintiff was suffering from psychological issues. Dr. Herfkens, however, did testify that the prior records changed her perception of the length of plaintiff's depression, asserting it was clear from the records that the workplace injury was not the sole cause of plaintiff's depression. Nevertheless, Dr. Herfkens explained that plaintiff's depression appears to be consistently worse following the workplace accident and that it appears the accident aggravated plaintiff's depression. Yet, Dr. Herfkens hedged her statements by stating there were a lot of unknowns. Dr. Herfkens indicated plaintiff's prior medical records did not change her opinion regarding the diagnostic impressions of mild neurocognitive disorder or somatic symptom disorder. Dr. Herfkens testified that plaintiff may have had the somatization disorder prior to the accident, even dating back to childhood, but that "the accident was the stressor that allowed it to show itself in its severe -- in its full form."

Considering the above testimony and other evidence in the record, we hold the Full Commission's findings are supported by competent evidence and the Commission's ultimate findings and conclusions that plaintiff's psychological issues and related treatment are the result of plaintiff's compensable fall are supported by competent causation evidence. This Court will not go back and reweigh the evidence to give Dr. Fozdar's testimony greater weight.

2. Disability

Defendants also argue the Full Commission erred in determining that plaintiff established disability as a result of the compensable fall.

"Establishing disability is a separate question from establishing the compensability of an injury . . . ." *Gonzalez v. Tidy Maids, Inc.*, 239 N.C. App. 469, 478, 768 S.E.2d 886, 894 (2015). This Court explained disability in *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 425 S.E.2d 454 (1993), as follows:

> An employee injured in the course of his employment is disabled under the Act if the injury results in an "incapacity . . . to earn the wages which the employee was receiving at the time of injury in the same or any other employment." Accordingly, disability as defined in the Act is the impairment of the injured employee's earning capacity rather than physical disablement.
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> The burden is on the employee to show that he is unable to earn the same wages he had earned before the injury, either in the same employment or in other employment. The employee may meet this burden in one of four ways: (1) the production of medical evidence that 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 he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

Id. at 765, 425 S.E.2d at 457 (internal citations omitted).

In this case, the Full Commission's disability determination was based on the first prong of *Russell*. The Full Commission found as follows:

> 46. Dr. Gualtieri testified [p]laintiff is unable to work either as a result of a psychiatric problem or inner ear pathology. Similar to Dr. Gualtieri's testimony, Drs. Bellard and Herfkens testified that [p]laintiff is incapable of any employment given her current psychological state as a result of her work-related injury sustained on February 19, 2015. Based upon the expert medical testimony and opinions of Drs. Gualtieri, Bellard, and Herfkens, the Full Commission finds [p]laintiff is incapable of work in her prior position and in any employment.

Based on finding of fact number 46, the Full Commission concluded as follows:

> 10. Plaintiff has carried her burden of proving temporary total disability under prong one of *Russell* from February 19, 2015, and continuing, with medical evidence that she is physically or mentally, as a result of her work-related injury, incapable of work in any employment. Plaintiff has established she is unable to earn the same wages she earned before her injury, either in the same employment or in other employment, and that her incapacity to earn those wages was caused by her work-related injury. The Full [C]omission concludes, as a result of the compensable workplace injury that took place on February 19, 2015, [p]laintiff has been temporarily totally disabled and is entitled to ongoing temporary total disability compensation at a rate of $751.94 per week for the period of February 19, 2015, and continuing until [p]laintiff returns to work or further order of the Commission.

(Citations omitted).

Defendants' challenge to the Full Commission's finding and conclusion regarding disability is based on their argument that the testimony of Drs. Gualtieri, Bellard, and Herfkens was not competent evidence to relate plaintiff's psychological issues to the compensable fall. Having determined the challenged evidence is sufficient, we hold the Full Commission did not err in its disability determination. The deposition testimony of Drs. Gualtieri, Bellard, and Herfkens supports the Full Commission's finding of fact number 46, which in turn supports the Full Commission's conclusion of law number 10.

III. Conclusion

For the reasons discussed above, we affirm the Full Commission's opinion and award.

AFFIRMED.

Judges STROUD and DAVIS concur.

Report per Rule 30(e).