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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1156

Filed: 5 June 2018

North Carolina Industrial Commission, I.C. No. 15-036879

ERVIN WHITE, Employee, Plaintiff

v.

GUEST SERVICES, INC., Employer, SELF-INSURED (SEDGWICK CMS, Third-Party Administrator), Defendant.

Appeal by plaintiff from opinion and award entered 11 July 2017 by the North Carolina Industrial Commission. Heard in the Court of Appeals 20 March 2018.

Hardison & Cochran P.L.L.C, by Benjamin T. Cochran, for plaintiff-appellant.

Hedrick Gardner Kincheloe & Garofalo LLP, by M. Duane Jones, Linda Stephens, and Brooke A. Mulenex, for defendant-appellees.

BRYANT, Judge.

Where plaintiff fails to establish a causal relationship between an accident suffered in the course of his employment and a disability, we affirm the Full Commission's conclusion that plaintiff failed to establish a compensable injury under the Workers' Compensation Act.

Plaintiff, Ervin White, filed a Form 18, Notice of Accident to Employer, with the Industrial Commission on 18 August 2015. Plaintiff claimed that he "hit [his] head on a wood box." Plaintiff began working for defendant Guest Services, Inc., in 2005. On his Form 18, plaintiff described defendant's business as "[d]efensive training" and his occupation as a "[r]ange occupation." "His responsibilities included providing support to instructors prior to and during range activities, maintaining proper levels of chemical, incendiary and demolition materials on ranges, keeping inventory of all equipment, explosives, and ordinances, and receiving shipments of explosives and incendiary materials." Plaintiff also unlocked the facility each morning.

On 24 July 2015, a member of the housekeeping staff asked plaintiff to open an office door. While he was unlocking the door, plaintiff turned his head and struck a corner of a wooden storage rack. The staffer found plaintiff lying on the ground. Plaintiff was transported to Albemarle Hospital, where he reported suffering from an acute headache and back pain. Medical personnel advised him to stay out of work and seek follow-up treatment with a primary care physician.

Four days later, plaintiff reported to Coastal Carolina Family Practice and was seen by Jacob Brannen, PA-C. Plaintiff reported back pain and a migraine headache and also that he may have lost consciousness. He was diagnosed as having suffered a concussion but was otherwise "normal" physically. Plaintiff was directed to stay

out of work until 7 August 2015. After follow-up appointments on 7 and 20 August 2015, Brannen recommended that plaintiff undergo an MRI and/or referral to a neurologist.

On 22 September 2015, plaintiff reported to Dr. Eric Goldberg, a board-certified neurologist. During his examination, "Dr. Goldberg noted some nystagmus and some significant cognitive issues, including partial orientation to time and place, short term memory zero out of three, and difficulty following two part commands. Dr. Goldberg ordered a brain MRI and EEG." On 9 October 2015, plaintiff returned to Dr. Goldberg. The MRI showed "chronic small vessel changes or white matter changes, which could be age-related or post-traumatic." Dr. Goldberg diagnosed plaintiff with post-concussive syndrome, post-traumatic migraines, and post-traumatic memory loss. Plaintiff was directed to stay out of work until 1 January 2016. Dr. Goldberg later testified that plaintiff's complaints of headaches, mood issues, and memory and concentration issues were consistent with his physical examination and that plaintiff's complaints to a reasonable degree of medical certainty were causally related to plaintiff's 24 July 2015 injury. Following his diagnosis, Dr. Goldberg wrote that plaintiff was permanently disabled—"he most likely was not going to get better."

At defendant's request, on 8 February 2016, plaintiff presented to Dr. C. Thomas Gualtieri, a board-certified psychiatrist whose patients often suffer from

neuropsychiatric disorders. As part of the evaluation, Dr. Gualtieri reviewed plaintiff's pre- and post- injury medical records, and during his evaluation, Dr. Gualtieri observed plaintiff sitting in a reclined position with his eyes closed, where plaintiff responded to questions with short answers, spoken in whispers. Plaintiff also moved very slowly. Dr. Gualtieri submitted plaintiff to extensive cognitive testing to which plaintiff scored well below average. Dr. Gualtieri concluded "to a reasonable degree of medical certainty" that plaintiff was exaggerating his difficulties: Plaintiff's description of his symptoms and the severity of those symptoms were far out of proportion to the severity of the injury he suffered. Dr. Gualtieri concluded that plaintiff did not suffer a head injury of any clinical importance in July 2015 and that it was not possible to relate plaintiff's complaints to a brain injury.

Upon reviewing the evidence, the Full Commission ("the Commission") placed greater weight on the evidence presented by Dr. Gualtieri than the evidence of Dr. Goldberg. The Commission noted that plaintiff's pre-injury medical history included treatment at the VA Hospital for a variety of conditions, including PTSD, anxiety, back pain, osteoarthritis, diabetes, glaucoma, hypertension, and hypercholesterolemia. On 8 August 2013, plaintiff presented to Dr. Jane Dicocco at the VA Mental Health Clinic with reports of anxiety, irritability, depressed mood, insomnia, social isolation, panic attacks, poor memory, decreased attention span, and

problems relating to others. On 21 May 2014, plaintiff reported having worsening memory and cognitive function. On 20 June 2014, VA physiatrist[1] Dr. Ifill-Taylor opined that plaintiff could be suffering from "alcohol hallucinosis and/or a manifestation of visual sequelae of diabetes." Moreover, from September through December 2015, following his head injury, plaintiff participated in multiple group therapy sessions at the VA and continued to see his VA psychiatrist[2] where it was noted that he had "no cognitive barriers to learning, his thoughts were well-organized, he was alert and oriented, his attention, concentration, and memory appeared to be intact, and his speech was coherent."

The Commission found that, based upon the preponderance of the evidence, to the extent to which plaintiff was disabled, his disability was not related to his 24 July 2015 injury or an aggravation of pre-existing cognitive and psychiatric problems due to injury. Thus, the Commission concluded that "Plaintiff failed to present competent expert opinion evidence sufficient to prove that he suffers from post-concussive syndrome, post-traumatic migraines and post-traumatic memory loss or that these conditions are causally related to the July 24, 2015 accident, and therefore his claim must be denied." Plaintiff appeals.

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[1] "A physician specializing in physical medicine." *Physiatrist*, American Heritage College Dictionary (3d ed. 1993).

[2] "The branch of medicine that deals with mental and emotional disorders." *Psychiatry*, *id.*

On appeal, plaintiff argues that the Commission erred by concluding (I) he did not sustain an injury by accident arising out of his employment; (II) he was not entitled to medical treatment; and (III) he was not entitled to disability benefits.

Standard of Review

Pursuant to General Statutes, section 97-84,

> [t]he Commission or any of its members or deputies shall hear the parties at issue . . ., and shall determine the dispute in a summary manner. The case shall be decided and findings of fact issued based upon the preponderance of the evidence in view of the entire record.

N.C. Gen. Stat. § 97-84 (2017). "Under this section the Commission is made the fact finding body. The finding of facts is one of its primary duties." *Brice v. Salvage Co.*, 249 N.C. 74, 82, 105 S.E.2d 439, 445 (1958) (citation omitted).

"Appellate review of an opinion and award from the Industrial Commission is generally limited to determining: '(1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are justified by the findings of fact.' " *Hassell v. Onslow Cty. Bd. of Educ.*, 362 N.C. 299, 305, 661 S.E.2d 709, 714 (2008) (quoting *Clark v. Wal–Mart*, 360 N.C. 41, 43, 619 S.E.2d 491, 492 (2005)). "Unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal." *Bishop v. Ingles Mkts, Inc.*, 233 N.C. App. 431, 434, 756 S.E.2d 115, 118 (2014) (citation omitted).

Establishing Disability

Under the North Carolina Workers' Compensation Act in order to support a legal conclusion of disability, an employee must prove three factual elements, one of which is that the "incapacity to earn was caused by plaintiff's injury." *Patillo v. Goodyear Tire & Rubber Co.*, ___ N.C. App. ___, ___, 794 S.E.2d 906, 912 (2016) (citation omitted).

I

Plaintiff first argues that he suffered a compensable injury by accident arising out of and within the scope of his employment. Plaintiff contends that this Court should find the testimony of Dr. Goldberg, plaintiff, and plaintiff's wife credible and "the opinions of Dr. Gualtieri . . . not credible." We disagree.

"[T]he Commission must find those facts which are necessary to support its conclusions of law." *Moody v. Mecklenburg Cty.*, 165 N.C. App. 869, 871–72, 600 S.E.2d 39, 41 (2004) (citation omitted). "[T]he Commission is the sole judge of the credibility of witnesses and may believe all or a part or none of any witness's testimony . . . ." *Faison v. Allen Canning Co.*, 163 N.C. App. 755, 757, 594 S.E.2d 446, 448 (2004) (alteration in original) (citation omitted). "This Court's 'duty goes no further than to determine whether the record contains any evidence tending to support the finding.' " *Id.* (quoting *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998)). "[W]e do not reweigh the evidence because the Commission is the factfinder." *Bishop*, 233 N.C. App. at 434, 756 S.E.2d at 118 (citation omitted).

On appeal, plaintiff argues that testimony presented by Dr. Goldberg, plaintiff, and plaintiff's wife should be accorded more weight than that of Dr. Gualtieri. Plaintiff contends that the record evidence indicates Dr. Goldberg found plaintiff credible—that plaintiff's subjective complaints were consistent with Dr. Goldberg's physical examination.

> Dr. Goldberg attributed the new and/or exacerbation of Plaintiff's symptoms [and post-concussive and cognitive issues] to be related to the 24 July 2015 work injury to a reasonable degree of medical certainty. . . . The only conflicting evidence comes from Dr. Gaultieri. However, the opinions of Dr. Gaultieri are not credible and should not be found to represent the greater weight of the competent and credible evidence in this case.

(alteration in original). Plaintiff argues that "Dr. Gualtieri's own testimony undercuts his ability to be . . . relied upon as a credible witness," and that Dr. Gualtieri's "one-time evaluation [was] paid for by . . . Defendants."

Plaintiff does not challenge specific finding of fact set forth by the Commission. Rather, plaintiff challenges the weight the Commission gave to the evidence presented by plaintiff and defendant, respectively. However, "[t]he Commission is the sole judge of the credibility of witnesses and may believe all or a part or none of any witness's testimony . . . ." *Faison*, 163 N.C. App. at 757, 594 S.E.2d at 448 (second alteration in original) (citation omitted). And "[t]his Court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Id.* "Unchallenged findings of fact are presumed to be supported by

competent evidence and are binding on appeal." *Bishop*, 233 N.C. App. at 434, 756 S.E.2d at 118 (citation omitted).

We note the following unchallenged findings of fact:

> 7. . . . Plaintiff sought treatment from Dr. Eric Goldberg, a board-certified neurologist. . . . Plaintiff did not tell Dr. Goldberg about his 1995 head injury or his PTSD, and Dr. Goldberg did not have Plaintiff's prior medical records to review. . . .
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> 8. On October 9, 2015, Plaintiff returned to Dr. Goldberg with complaints of continued headaches, mood issues, and issues with memory and concentration. The results of Plaintiff's . . . MRI showed chronic small vessel changes, or white matter changes, which could be age-related or post-traumatic. Dr. Goldberg's diagnoses, which he attributed to the July 24, 2015 work injury, were post-concussive syndrome, post-traumatic migraines, and post traumatic memory loss. . . .
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> . . . .
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> 10. With regard to the white matter changes reflected on the MRI of Plaintiff's brain, Dr. Goldberg was unable to opine whether those changes were related to trauma, as opposed to ischemic or nonspecific age-related white matter disease. However, he did concede that diabetes and high blood pressure can predispose people with small vessels disease, and that small vessel disease can cause behavioral abnormalities, as well as memory and concentration issues associated with vascular dementia, would develop and progress over time, as opposed to appearing suddenly, and that "if he were to see a pattern of him complaining about cognitive issues or memory problems, problems concentrating over . . . two to three years, he would possibly change his mind as far as what caused the white matter lesions."

11. . . . As part of his evaluation, Dr. Gualtieri reviewed Plaintiff's pre- and post-injury medical records, including Plaintiff's treatment records from the VA [Hospital]. . . .

12. . . . Plaintiff's medical records from the VA [Hospital] indicate that Plaintiff had been treating at the VA Hospital prior to July 24, 2015 for a variety of conditions, including PTSD, anxiety, back pain, osteoarthritis in the knees, diabetes, glaucoma, hypertension, and hypercholesterolemia. On August 8, 2013, Plaintiff presented to Dr. Jane Dicocco at the VA Mental Health Clinic reporting anxiety, irritability, depressed mood, insomnia, social isolation, panic attacks, poor memory, decreased attention span and relationship problems with others. On May 21, 2014, Plaintiff reported that he was having worsening memory and cognitive function and was actually forgetting people's names. On June 20, 2014, VA physiatrist Dr. Ifill-Taylor opined that Plaintiff could be suffering from alcohol hallucinosis and/or a manifestation of visual sequelae of diabetes. . . .

13. . . . [I]n the months preceding the injury, Plaintiff received two corrective actions at work – one for leaving a building open and unattended, and one for engaging in combative behavior with a staff member. Plaintiff was informed, prior to his injury, that if his actions did not improve, he would be suspended and/or terminated.

14. The post-injury VA records also call into question Plaintiff's allegation that he suffered a totally disabling head injury on July 24, 2015 . . . . *From September 2015 through December 2015, Plaintiff participated in multiple group therapy sessions at the VA and continued to see his VA psychiatrist, and it was noted that he had no cognitive barriers to learning, his thoughts were well organized, he was alert and oriented, his attention, concentration, and memory appeared to be intact, and his speech was coherent.*

15. Based upon the preponderance of the evidence in view of the entire record, the Full Commission finds that

> while Plaintiff did suffer an interruption of his normal work routine on July 24, 2015 when he turned his head and bumped it on the corner of a wood rack, that incident did not cause him to suffer a back injury or head injury resulting in post-concussive syndrome, post-traumatic migraines, post-traumatic memory loss, or other neurologic malady. . . . To the extent that Plaintiff has been disabled since July 24, 2015, his disability has not been proven to be related to the July 24, 2015 incident or an aggravation of his pre-existing cognitive and psychiatric problems by the incident at work on that date.

(emphasis added).

On these findings the Commission concluded that

> [d]ue to the nature of Plaintiff's alleged injury to his brain, competent expert opinion evidence is required to establish causation. . . . [And] Plaintiff [has] failed to present competent expert opinion evidence sufficient to prove that he suffers from post-concussive syndrome, post-traumatic migraines and post-traumatic memory loss or that these conditions are causally related to the July 24, 2015 accident, and therefore his claim must be denied.

As it is not within the province of this Court to weigh the evidence, *see Bishop*, 233 N.C. App. at 434, 756 S.E.2d at 118, and plaintiff fails to challenge any specific finding of fact made by the Commission, the unchallenged findings of fact are presumed to be supported (and indeed appear to be supported) and are binding on appeal. *See id.* On these findings of fact, we affirm the Commission's conclusion that plaintiff has failed to establish his 24 July 2015 accident resulted in a disability.

Because we affirm the Commission's conclusion that plaintiff failed to establish a causal relationship between his 24 July 2015 accident and a disability,

plaintiff cannot establish a compensable injury on these facts. *See Patillo*, ___ N.C. App. at ___, 794 S.E.2d at 912. Thus, we need not reach plaintiff's additional arguments. The opinion and award of the Commission is

AFFIRMED.

Judges DILLON and TYSON concur.

Report per Rule 30(e).