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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-246

Filed: 18 December 2018

North Carolina Industrial Commission, I.C. No. 15-029812

JAY SCHNEEMAN, Employee, Plaintiff

v.

FOOD LION, LLC/DELHAIZE AMERICA, LLC, Employer, SELF-INSURED (RISK MANAGEMENT SERVICES, INC., Third-Party Administrator), Defendant.

Appeal by defendants from opinion and award entered 13 October 2017 by the North Carolina Industrial Commission. Heard in the Court of Appeals 19 September 2018.

Campbell & Associates, by Bradley H. Smith, for plaintiff-appellee.

Hedrick Gardner Kincheloe & Garofalo LLP, by M. Duane Jones and Samuel E. Barker, for defendant-appellant.

DAVIS, Judge.

Food Lion, LLC/Delhaize America, LLC and its third-party administrator Risk Management Services, Inc. (collectively “Defendants”) appeal from the 13 October 2017 opinion and award of the North Carolina Industrial Commission awarding Jay Schneeman workers’ compensation benefits for an injury sustained during the course

of his employment at Food Lion. After a thorough review of the record and applicable law, we affirm.

Factual and Procedural Background

On 23 June 2015, Schneeman was working as a produce sales associate at a Food Lion grocery store in Concord. As a part of his job duties that day, he was lifting watermelons out of a bin that was three and a half feet deep. In order to pick up the watermelons, Schneeman had to bend over at the waist and “scoop[]” them out of the bin with his right arm.

While engaged in this task, he “experienced the sudden onset of a sharp pain, like a bee sting, in the back of his right arm” as he was lifting a watermelon. Schneeman had never experienced that sensation before, and the pain lasted for approximately twenty minutes before subsiding. He reported the injury to his supervisor the following day after his “right arm, from the back of his shoulder down to his elbow, started to hurt” again.

On 30 June 2015, Schneeman presented to Dr. Marc Ward, an orthopedic surgeon at Piedmont Orthopedic Specialists in Concord, with complaints of a “sharp, burning pain in his shoulder” that radiated down the length of his right arm to his hand. Schneeman informed Dr. Ward that the pain had worsened in the week since the injury occurred. Dr. Ward conducted a physical examination, during which Schneeman exhibited “decreased strength in his right upper extremity, in particular

his triceps, wrist extension and grip strength” as well as “decreased deep tendon reflexes on the right side compared to his left side.” Dr. Ward determined that Schneeman’s “shoulder exam was normal and that that wasn’t the source of his problem.” Rather, he believed that Schneeman’s problems correlated with a neurologic injury and recommended that he obtain an MRI.

After undergoing an MRI on 15 July 2015, Schneeman returned to Dr. Ward on 28 July 2015. In Dr. Ward’s opinion, the MRI showed multilevel degenerative disc disease with some “acute on chronic” changes as well as severe central stenosis. With regard to the “acute on chronic” changes indicated by the MRI, Dr. Ward stated as follows:

[H]e’s got some chronic changes on his MRI, but he had an acute onset of symptoms. So I -- most likely those were caused by an acute event -- a near event.

I can’t say there’s anything specific on the MRI specifically . . . an MRI is a static finding. You can’t tell whether it happened right then or earlier. It’s -- I’m basing that statement more on his -- his physical exam and history . . . than I am that true MRI.

According to Dr. Ward, Schneeman’s MRI also indicated a “narrowing of his spinal cord . . . where his nerve roots exit, which would correlate with his symptoms[.]” Based upon the MRI results, Dr. Ward recommended that Schneeman see a neurosurgeon.

On 31 August 2015, Schneeman was examined by Dr. Mark Van Poppel, a neurosurgeon at Carolina Neurosurgery and Spine. Dr. Van Poppel believed that Schneeman's physical examination and MRI results were consistent with cervical radiculopathy, which is "essentially inflammation or injury to a nerve root." He ordered a CT scan of Schneeman's spine, the results of which indicated degenerative changes to the cervical spine. In Dr. Van Poppel's opinion, these degenerative changes predated 23 June 2015, and the structural abnormality in Schneeman's spine was not caused by his workplace injury. However, he also testified that "some type of traumatic event" could aggravate spinal stenosis and that it was "within medical reason to believe that lifting that watermelon potentially or hypothetically contributed to a preexisting condition."

On 11 September 2015, Schneeman underwent a surgical procedure for decompression of the right C-7 nerve root. The following month, Schneeman returned to Dr. Van Poppel complaining of ongoing neck stiffness as well as weakness, numbness and tingling in his right arm. Dr. Van Poppel subsequently discussed the possibility of additional surgery with Schneeman, who asked for a second opinion. At that point, Dr. Van Poppel referred him to Dr. John Ziewacz, another neurosurgeon at Carolina Neurosurgery and Spine.

Schneeman was seen by Dr. Ziewacz on 19 January 2016 to determine whether "further surgery or intervention was warranted given that [Schneeman] was

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not . . . pleased with his initial surgical result.” Because Schneeman reported improvement in his strength over the preceding two weeks, Dr. Ziewacz recommended that he delay any further surgical intervention. In his deposition, Dr. Ziewacz stated that the stenosis present in Schneeman’s MRI was a “chronic degenerative finding.” With regard to whether Schneeman’s 23 June 2015 injury “materially aggravated” his preexisting neck condition, Dr. Ziewacz testified as follows:

In the absence of objective evidence, I cannot give a solid opinion with a reasonable degree of medical certainty. All I have is his story with no corroborating evidence, and the only evidence we have objectively is that this was chronic.

Meanwhile, Schneeman filed a Form 18 (Notice of Accident) on 6 July 2015 alleging that he sustained an injury to his “upper right arm, forearm, and hand” by “lifting watermelons out of a bin.” On 15 July 2015, Defendants filed a Form 61 in which they asserted that Schneeman “did not sustain an injury by accident, arising out of and in the course and scope of [his] employment.” Schneeman filed a Form 33 (Request that Claim be Assigned for Hearing) on 25 September 2015. On 9 October 2015 Defendants filed a Form 33R (Response to Request that Claim be Assigned for Hearing).

On 10 March 2016, a hearing was held before Deputy Commissioner Jesse M. Tillman. Schneeman testified in support of his claim at the hearing, and the parties presented the testimony of Dr. Ward, Dr. Van Poppel, and Dr. Ziewacz by deposition.

On 17 November 2016, the deputy commissioner issued an opinion and award denying Schneeman's claim for benefits because he "failed to meet the burden of proof required to show that the workplace incident is causally related to his medical condition[.]" Schneeman appealed to the Full Commission.

On 13 October 2017, the Commission issued an opinion and award reversing the deputy commissioner's decision and granting Schneeman's claim for benefits. In its opinion and award, the Commission made the following pertinent findings of fact:

22. While [Schneeman] initially reported pain in his right arm on June 23, 2015, Dr. Ward determined within a week of [Schneeman's] alleged injury that his right arm complaints were related to pathology in, or possible injury to, the cervical spine. It is uncontroverted that [Schneeman]'s complaints of pain arose at a cognizable time as the result of a specific traumatic incident of the work assigned when he was lifting a watermelon out of a bin with his right arm.

. . . .

25. Dr. Ward, the first specialist to see [Schneeman] after June 23, 2015, testified to a reasonable degree of medical certainty that the pathology shown on the July 15, 2015 MRI reflected "acute on chronic" changes. Dr. Ward explained that the "chronic" means "you have pathology present," and the "acute" suggests that something happened relatively close in time to the MRI. According to Dr. Ward, one can have degenerative changes and be asymptomatic and then a trauma can aggravate the degenerative changes and make them symptomatic. . . . Dr. Ward testified that [Schneeman]'s symptoms were objectively verified on exam and that [Schneeman] described a consistent progression of symptoms. The fact that [Schneeman]'s symptoms did not

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start until he lifted the watermelon, and that no witness can point to a finding on the MRI which was caused by the lifting incident, does not mean that Dr. Ward's opinion is premised solely on a temporal connection.

26. The Full Commission places great weight on the testimony of Dr. Ward[.]

27. The Full Commission places no weight on the testimony of Dr. Ziewacz on the issue of whether the June 23, 2015 specific traumatic incident could have materially aggravated [Schneeman]'s preexisting chronic cervical spine condition, because Dr. Ziewacz did not consider the consistency of [Schneeman]'s complaints and was unwilling to consider an aggravation of [Schneeman]'s preexisting chronic changes because "all I have is his story." The Full Commission finds [Schneeman]'s "story" credible and places greater weight on the testimony of the physicians who were willing to consider [Schneeman]'s complaints when rendering an opinion on causation.

....

29. On June 23, 2015, [Schneeman] sustained an injury by accident as a result of a specific traumatic incident of the work assigned when he was lifting a watermelon out of a bin. As a result of the specific traumatic incident, [Schneeman] suffered a material aggravation of his preexisting cervical spine stenosis[.]

Based upon these findings of fact, the Commission concluded that Schneeman was entitled to workers' compensation benefits. Vice-Chairman Yolanda K. Stith dissented from the Commission's opinion. On 15 November 2017, Defendants filed a timely notice of appeal.

Analysis

Defendants' sole argument on appeal is that the Commission erred in awarding workers' compensation benefits to Schneeman because it relied upon incompetent expert medical testimony in determining that a causal relationship existed between the 23 June 2015 incident and the aggravation of his preexisting cervical spine condition. Specifically, they contend that Dr. Ward's testimony regarding causation was incompetent because it was based solely upon the temporal relationship between the workplace injury Schneeman suffered while lifting watermelons and the aggravation of his cervical spine condition. We disagree.

Appellate review of an opinion and award of the Industrial Commission is typically "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." *Philbeck v. Univ. of Mich.*, 235 N.C. App. 124, 127, 761 S.E.2d 668, 671 (2014) (citation and quotation marks omitted). "The findings of fact made by the Commission are conclusive on appeal if supported by competent evidence even if there is also evidence that would support a contrary finding. The Commission's conclusions of law, however, are reviewed *de novo*." *Morgan v. Morgan Motor Co. of Albemarle*, 231 N.C. App. 377, 380, 752 S.E.2d 677, 680 (2013) (internal citation omitted), *aff'd per curiam*, 368 N.C. 69, 772 S.E.2d 238 (2015).

In order for an injury to be compensable under the North Carolina Workers' 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[.]” *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980) (internal citation omitted). “[W]here 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.” *Id.* (citation omitted).

This Court has held that “when expert opinion is based merely upon speculation and conjecture, it cannot qualify as competent evidence of medical causation.” *Pine v. Wal-Mart Assocs. Inc.*, __ N.C. App. __, __, 804 S.E.2d 769, 777 (2017) (citation and quotation marks omitted), *disc. review allowed*, 370 N.C. 578, 809 S.E.2d 588 (2018). Rather, “[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, 232, 581 S.E.2d 750, 753 (2003) (citation and quotation marks omitted). Furthermore, “expert medical testimony based solely on the maxim *post hoc, ergo propter hoc* — which denotes the fallacy of confusing sequence with consequence — does not rise to the necessary level of competent evidence.” *Pine*, __ N.C. App. at __, 804 S.E.2d at 777 (citation, quotation marks, and ellipsis omitted).

In *Carr v. Dep't of Health and Human Servs.*, 218 N.C. App. 151, 720 S.E.2d 869 (2012), the plaintiff suffered injuries to her hand and neck in a workplace fall. *Id.* at 152, 720 S.E.2d at 871. Two days later she saw a doctor and complained of neck pain radiating down her shoulder into her hand. A subsequent MRI revealed spinal stenosis and disc herniation. *Id.* at 152, 720 S.E.2d at 871-72. One of the physicians who treated the plaintiff opined as follows:

Theoretically, if your neck moves in this sort of direction, and it was, you know, from an accident, theoretically, you can cause, you know, symptoms like she was describing if she had stenosis or a herniated disc prior. And theoretically it could get a little bit worse with this kind of mechanism.

Id. at 155, 720 S.E.2d at 873 (brackets omitted).

In affirming the Commission's decision to award the plaintiff benefits, this Court rejected the defendant's argument that the opinion of plaintiff's physician was based entirely on the *post hoc, ergo propter hoc* fallacy. We held that the physician's opinion "was based on more than merely the sequence of events" because he "stated that although a lot of it is based on timing, his opinion was based on the mechanism of the injury as well as the temporal relationship between the incident and symptoms." *Id.* at 156, 720 S.E.2d at 873-74 (quotation marks omitted).

In *Pine*, this Court reached a similar conclusion. That case also involved a plaintiff who was injured during a fall at work. *Pine*, __ N.C. App. at __, 804 S.E.2d at 771. Following her fall, the plaintiff complained of numbness and pain in her upper

extremities. A cervical MRI indicated that she had degenerative disc disease causing stenosis. *Id.* at ___, 804 S.E.2d at 771-72. One of the plaintiff's treating physicians testified "within a reasonable degree of medical certainty that Plaintiff's cervical arthritis and carpal boss were pre-existing conditions exacerbated by her . . . fall." *Id.* at ___, 804 S.E.2d at 778. As in *Carr*, this Court rejected the defendants' challenge to the physician's testimony as based entirely on the temporal relationship between the workplace accident and the plaintiff's injuries.

Here . . . there were no other potential causes of Plaintiff's injuries, and while Dr. Koman did rely on the maxim *post hoc, ergo propter hoc*, his reliance was relevant and necessary. Dr. Koman testified that based on Plaintiff's medical history and a lack of any other potential cause, the fall was more likely than not the cause of Plaintiff's additional medical conditions. Dr. Koman testified that in reaching his opinion he took a history, he reviewed the medical records, did a physical exam, x-rays, and diagnostic testing, and fit that all into his experience, the literature, the probabilities of what happened, and when and whether it was all consistent. Because a full review of Dr. Koman's testimony demonstrates that his opinion was based on more than merely *post hoc, ergo propter hoc* . . . we hold the Commission properly determined it to be competent evidence.

Id. at ___, 804 S.E.2d at 778 (quotation marks, brackets, and ellipsis omitted).

Conversely, in *Young v. Hickory Bus. Furniture*, 353 N.C. 227, 538 S.E.2d 912 (2000), we held that a medical expert's opinion as to the cause of the plaintiff's fibromyalgia was not competent where the physician relied exclusively upon the maxim *post hoc, ergo propter hoc*. *Id.* at 233, 538 S.E.2d at 917. In *Young*, the

plaintiff's physician failed to rule out "at least three potential causes of fibromyalgia in [the plaintiff] other than her injury[.]" *Id.* at 232, 538 S.E.2d at 916. In addition, the physician testified as follows with regard to the basis for his opinion that the plaintiff's work injury caused her fibromyalgia: "I think that she does have fibromyalgia and I relate it to the accident primarily because . . . it was not there before and she developed it afterwards. And that's the only piece of evidence that relates the two." *Id.*

In the present case, Dr. Ward's physical examination of Schneeman revealed a loss of strength in his right arm as well as a decrease in his reflexes. Dr. Ward testified that these objective findings were supported by the cervical stenosis indicated on Schneeman's MRI and represented a "consistent progression of symptoms" from the occurrence of the injury on 23 June 2015 until the examination on 30 June 2015. With regard to whether lifting a watermelon while bent over at the waist could exacerbate Schneeman's spinal condition, Dr. Ward further testified as follows:

I think it's more of a -- what we call a Valsalva maneuver, where you strain, and that strain produces a -- the pressure that you could herniate a disc or aggravate your disc. Not how he reached or that he bent over, it's the actual strain of lifting something or pulling something that we -- that's when I tend to see these injuries.

Ultimately, Dr. Ward concluded as follows: “[H]is history was consistent; it matched his objective findings on the exam. . . . And so I feel that, within medical certainty, that that event caused his symptoms.”

Defendants contend that *Young* is indistinguishable from the present case and that Dr. Ward’s testimony was not competent evidence of causation because it was based exclusively on *post hoc, ergo propter hoc*. We disagree.

In *Young*, the physician whose testimony was deemed incompetent by our Supreme Court explicitly stated that his opinion was based *solely* upon the temporal connection between the plaintiff’s accident and her later development of fibromyalgia. *Young*, 353 N.C. at 232, 538 S.E.2d at 916. Here, conversely, although Dr. Ward’s opinion with regard to causation was based in part upon the timing of the injury suffered by Schneeman on 23 June 2015 in relation to the aggravation of his preexisting condition, it was not entirely premised upon chronological sequence. Rather, Dr. Ward also took account of Schneeman’s medical history, consistent progression of symptoms, MRI results, and the Valsalva maneuver he was performing at the time of his injury. Consequently, we believe that Defendants’ reliance upon *Young* is misplaced.

Therefore, we are satisfied that Dr. Ward’s testimony constituted competent evidence of causation. Accordingly, we hold that the Commission did not err in awarding Schneeman workers’ compensation benefits.

Conclusion

For the reasons stated above, we affirm the Commission's 13 October 2017 opinion and award.

AFFIRMED.

Judges ELMORE and DILLON concur.

Report per Rule 30(e).