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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-823

Filed 06 June 2023

North Carolina Industrial Commission I.C. No. 20-005666

JIMMIE GODLEY, Employee, Plaintiff,

v.

NEW HANOVER MEDICAL GROUP, Employer, MAG MUTUAL INSURANCE COMPANY, Carrier, Defendants.

Appeal by Defendants from opinion and award entered 26 May 2022 by the North Carolina Industrial Commission. Heard in the Court of Appeals 11 April 2023.

Hedrick Gardner Kincheloe & Garofalo LLP, by M. Duane Jones, Kari L. Schultz, and Lauren E. Travers, for Defendants-Appellants.

Sumwalt Anderson Law Firm, by Mark T. Sumwalt, Richard L. Anderson, and Lauren H. Walker, for Plaintiff-Appellee.

COLLINS, Judge.

Defendants appeal an opinion and award of the North Carolina Industrial Commission awarding Plaintiff ongoing medical expenses necessary to treat a compensable shoulder injury. Defendants argue that the Commission’s “conclusions of law are supported by findings of fact that are contrary to the competent evidence of record and must be reversed.” Because the findings of fact are supported by

competent evidence and those findings support the Commission's conclusions of law, the opinion and award is affirmed.

I. Factual Background and Procedural History

On 24 September 2019, Plaintiff, who has a history of pre-existing osteoarthritis in his left shoulder, sustained an injury during the course of his employment when a pickup truck struck the company van Plaintiff was driving. Plaintiff was referred to Dr. Douglas Messina, whose physician's assistant diagnosed Plaintiff with left shoulder osteoarthritis that had been exacerbated by a work-related motor vehicle accident. Dr. Messina discussed treatment options with Plaintiff, including "a possible injection if [Plaintiff's] symptoms flare[,]" and "the possibility of arthroplasty if [Plaintiff] has a progression of his symptoms." Plaintiff declined "any aggressive treatment," and planned to continue his home exercise program. Accordingly, Dr. Messina placed Plaintiff at maximum medical improvement and assigned a 10% permanent partial impairment rating to Plaintiff's left shoulder. Dr. Messina later reduced Plaintiff's permanent partial impairment rating to 5% after reviewing Plaintiff's medical history, which included medical treatment for Plaintiff's pre-existing left shoulder arthritis that existed prior to the 24 September 2019 accident.

After Dr. Messina's updated permanent partial impairment rating, Defendants accepted compensability for a "slight exacerbation of significant pre-existing underlying glenohumeral arthritis of [the] left shoulder" but were unable

to reach an agreement with Plaintiff regarding compensation. Defendants requested a hearing to determine an award for Plaintiff's permanent partial impairment.

The parties deposed Dr. Messina on 10 December 2020, where Dr. Messina had the following exchange with Defendants:

[DEFENDANTS]: Is [Plaintiff's] current need, if any, for an injection to his left shoulder causally related to the slight exacerbation injury suffered in the September 24, 2019 motor vehicle accident?

[DR. MESSINA]: I'm not sure that I can definitively say yes or no to that, because I don't know what his interim history was between the last time I saw him and at this time, and he – yeah, I don't – I don't know. I – I can't say for sure whether it is or it isn't.

. . . .

[DEFENDANTS]: Okay. And so what information, if any, would you need . . . to decide whether or not the need for an injection in late 2020 is related to this accident more than a year earlier?

[DR. MESSINA]: I don't know that any – information would make it definitive. I mean, he had a prior history more – in my opinion, he likely – whether or not he needed the injection was not directly related to the accident. He, you know, has a history of needing intermittent injections, and so I don't – I don't know that there's any information other than his history to know, you know, whether or not this was related to the accident. If he didn't need an injection, you know, a few months after the accident, I don't know that any exacerbation requiring an injection several months later would be directly related to the accident and more likely related to his underlying condition.

[DEFENDANTS]: Do you have an opinion, more likely than not, as to whether or not [Plaintiff's] current need, if any, for an injection to his left shoulder is causally related to the slight exacerbation injury suffered in the September 24, 2019 motor vehicle accident?

[DR. MESSINA]: Yes.

[DEFENDANTS]: And what is that opinion?

[DR. MESSINA]: It's more likely not directly related to the accident.

....

[DEFENDANTS]: Okay. What additional treatment, if any, . . . does [Plaintiff] require related to his slight exacerbation injury suffered in the September 24, 2019 motor vehicle accident?

[DR. MESSINA]: I think that he probably received maximum treatment for that exacerbation. And, again, I don't know whether he returned to his baseline or not, but any further treatment such as arthroplasty, which had been prior mentioned to him, would likely, again, be a result of the underlying condition and not necessarily directly a result of the exacerbation.

Dr. Messina then responded to Plaintiff's questions:

[PLAINTIFF]: Okay. Now, I sent you a letter . . . and specifically asked you . . . do you have an opinion to a reasonable degree of medical certainty as to whether it's more likely than not that [Plaintiff] aggravated or exacerbated his preexisting left shoulder condition in the motor vehicle accident on . . . September 24, 2019, and you answered yes, is that correct?

[DR. MESSINA]: Yes, that he exacerbated his condition yes.

[PLAINTIFF]: And is that still your opinion, that he exacerbated his preexisting left shoulder condition?

[DR. MESSINA]: Yes.

....

[PLAINTIFF]: Okay. And you've not seen [Plaintiff] since March 18, 2020, have you?

[DR. MESSINA]: No.

[PLAINTIFF]: And you have no way of knowing whether

his condition has gotten better or worse since March 18, 2020, do you?

[DR. MESSINA]: No.

Defendants further questioned Dr. Messina:

[DEFENDANTS]: Would you need to see [Plaintiff] again to determine his needs related to this accident?

....

[DR. MESSINA]: I don't know that I could assess whether that condition is a result of the accident or whether it was preexisting at this point.

....

[DEFENDANTS]: Does [Plaintiff's] lack of treatment support your previous testimony that, more likely than not, he does not require additional medical treatment related to the incident on September 24, 2019?

[DR. MESSINA]: Yes.

[DEFENDANTS]: And that any subsequent – how about any subsequent requests for injections after that big of a gap in treatment?

[DR. MESSINA]: The same, other than the fact that it may have still been hurting and he finally decided he wanted an injection. I don't know whether it has gotten better, gotten worse, or stayed the same over that period of time.

Dr. Messina also confirmed that a possible course of treatment for Plaintiff would include injections if Plaintiff's condition remained the same as it had been in March 2020.

The matter was heard by Deputy Commissioner Lori A. Gaines, who issued an opinion and award on 28 June 2021 finding that “[P]laintiff's pre-existing left shoulder condition was exacerbated or aggravated by his September 24, 2019 left

shoulder compensable injury.” Gaines concluded that “Plaintiff is entitled to permanent partial disability benefits based on the 10% rating originally assigned by Dr. Messina[,]” and “Defendants are liable for all medical compensation necessitated by Plaintiff’s compensable left shoulder exacerbation injury, including left shoulder injections.”

Defendants filed a notice of appeal to the Full Commission on 13 July 2021. Meanwhile, Defendants paid Plaintiff based on the 10% permanent partial disability rating. The Commission heard Defendants’ appeal on 1 December 2021, and it issued an opinion and award on 26 May 2022. The Commission limited its review to the issues of (1) whether Plaintiff is entitled to additional medical treatment for his left shoulder injury, and (2) the amount that Defendants should reimburse Plaintiff’s counsel for a second opinion evaluation that Plaintiff had previously requested. The Commission did not address Plaintiff’s impairment rating, “as Defendants ha[d] tendered payment to Plaintiff for the ten percent (10%) permanent partial impairment rating for his left shoulder and ha[d] not appealed the determination of Plaintiff’s rating[.]”

The Commission found as fact:

11. Dr. Messina opined, to a reasonable degree of medical certainty, that Plaintiff’s pre-existing left shoulder condition was exacerbated by the September 24, 2019, accident. Dr. Messina confirmed that he was aware of Plaintiff’s pre-existing left shoulder condition and noted that Plaintiff reported increased pain and diminished range of motion after the accident, which he believed to

be an exacerbation of the pre-existing condition. While Dr. Messina initially testified that if Plaintiff currently needed a shoulder injection, it was “more likely not directly related to the accident,” he later agreed that he had no way of knowing whether Plaintiff’s condition has improved or worsened since March 2020, because he has not evaluated Plaintiff since that time, noting that “I don’t know whether it has gotten better, gotten worse, or stayed the same over that period of time.” Further, when asked whether he would need to reevaluate Plaintiff to determine his current need for treatment and whether the need for treatment is related to the September 24, 2019, accident, he explained: “I don’t know that I could assess whether that condition is a result of the accident or whether it was preexisting at this point.” Dr. Messina confirmed that if he reevaluated Plaintiff’s left shoulder condition and found it to be the same as it presented in March 2020, Plaintiff would be a candidate for injection therapy.

12. Based upon the preponderance of the evidence in view of the entire record, the Full Commission finds that Defendants have failed to show that Plaintiff’s current need for treatment of his left shoulder is unrelated to his September 24, 2019, accident. Dr. Messina opined to a reasonable degree of medical certainty that the September 24, 2019, car accident exacerbated Plaintiff’s pre-existing left shoulder condition but was unable to say with any certainty whether Plaintiff’s current need for treatment is related to the September 24, 2019, exacerbation of his left shoulder condition.
13. Based upon the preponderance of the evidence in view of the entire record, the Full Commission finds additional medical treatment for Plaintiff’s left shoulder is reasonably necessary to effect a cure, provide relief, or lessen the period of Plaintiff’s disability.

Based upon these findings, the Commission concluded:

1. Plaintiff sustained an admittedly compensable injury to

his left shoulder on September 24, 2019. By filing a *Form 60 Employer's Admission of Employee's Right to Compensation* on July 29, 2020, Defendants accepted Plaintiff's left shoulder exacerbation claim, thereby admitting compensability and liability for the injury. Defendants' "filing of a Form 60 is an admission of compensability."

2. As a result of Defendants' acceptance of Plaintiff's left shoulder injury, Plaintiff is entitled to a rebuttable presumption that further medical treatment for his left shoulder condition is directly related to his admittedly compensable accident. Thus, it is Defendants' burden to show that the current treatment recommended by Plaintiff's authorized treating physicians is not related to Plaintiff's compensable left shoulder condition. In cases involving complicated medical questions, only an expert can give competent opinion testimony as to the issue of causation. However, if expert testimony is speculative, it is not competent evidence of causation. "[T]he 'mere possibility of causation,' as opposed to the 'probability' of causation is insufficient to support a finding of compensability." Evidence of causation is not sufficient if it merely indicates an injury "could have been related to plaintiff's work related activity[.]"
3. In the present matter, Defendants have failed to rebut the *Parsons* presumption. Dr. Messina testified that Plaintiff's pre-existing left shoulder condition was aggravated or exacerbated by the September 24, 2019, accident. With regard to Plaintiff's current need for medical treatment, Dr. Messina admitted that he does not know whether Plaintiff's current left shoulder condition is the result of his accident at work or his pre-existing condition. Accordingly, Dr. Messina's testimony is insufficient to rebut the *Parsons* presumption afforded Plaintiff.
4. Subject to the provisions of N.C. Gen. Stat. § 97-25.1, Plaintiff is entitled to payment of medical expenses incurred, or to be incurred, as a result of his left shoulder injury as may reasonably be required to effect

a cure, provide relief, or lessen the period of disability. Plaintiff's medical providers have not definitively recommended surgical treatment for Plaintiff's left shoulder injury. Accordingly, it is unnecessary to address Plaintiff's entitlement to left shoulder surgery at this time.

(internal citations omitted).

The Commission awarded Plaintiff "all medical expenses incurred, or to be incurred, by Plaintiff with Dr. Messina for medical treatment for his compensable left shoulder injury." Defendants timely appealed.

II. Discussion

A. Standard of Review

"[A]ppellate courts reviewing Commission decisions are limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). "The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965). Thus, when a party challenges the Commission's findings of fact, "[t]he court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Id.* at 434, 144 S.E.2d at 274 (citation omitted). If there is any competent evidence to support a challenged finding, the finding is conclusive on appeal, even if there is evidence that would support findings

to the contrary. *Medlin v. Weaver Cooke Constr., LLC*, 367 N.C. 414, 423, 760 S.E.2d 732, 738 (2014) (citations omitted). Unchallenged findings of fact are binding on appeal. *Id.* (citations omitted). The Commission's conclusions of law are reviewed de novo. *Id.* (citation omitted).

B. Challenged Findings of Fact

Defendants challenge findings of fact 11, 12, and 13, arguing that the findings are not supported by competent evidence.

Finding of fact 11 states:

Dr. Messina opined, to a reasonable degree of medical certainty, that Plaintiff's pre-existing left shoulder condition was exacerbated by the September 24, 2019, accident. Dr. Messina confirmed that he was aware of Plaintiff's pre-existing left shoulder condition and noted that Plaintiff reported increased pain and diminished range of motion after the accident, which he believed to be an exacerbation of the pre-existing condition. While Dr. Messina initially testified that if Plaintiff currently needed a shoulder injection, it was "more likely not directly related to the accident," he later agreed that he had no way of knowing whether Plaintiff's condition has improved or worsened since March 2020, because he has not evaluated Plaintiff since that time, noting that "I don't know whether it has gotten better, gotten worse, or stayed the same over that period of time." Further, when asked whether he would need to reevaluate Plaintiff to determine his current need for treatment and whether the need for treatment is related to the September 24, 2019, accident, he explained: "I don't know that I could assess whether that condition is a result of the accident or whether it was preexisting at this point." Dr. Messina confirmed that if he reevaluated Plaintiff's left shoulder condition and found it to be the same as it presented in March 2020, Plaintiff would be a candidate for injection therapy.

This finding is a summary of Dr. Messina's testimony, taken directly from his deposition and is thus supported by competent evidence in the record.

Finding of fact 12 states:

Based upon the preponderance of the evidence in view of the entire record, the Full Commission finds that Defendants have failed to show that Plaintiff's current need for treatment of his left shoulder is unrelated to his September 24, 2019, accident. Dr. Messina opined to a reasonable degree of medical certainty that the September 24, 2019, car accident exacerbated Plaintiff's pre-existing left shoulder condition but was unable to say with any certainty whether Plaintiff's current need for treatment is related to the September 24, 2019, exacerbation of his left shoulder condition.

This finding is also drawn directly from Dr. Messina's testimony. When asked whether the 24 September 2019 accident aggravated or exacerbated Plaintiff's preexisting left shoulder condition, Dr. Messina responded, "[y]es, that he exacerbated his condition, yes." Dr. Messina also repeatedly expressed that it would be difficult to determine whether Plaintiff's current need for treatment is related to the accident. When asked what information he would need to decide whether Plaintiff's current need for treatment was related to the accident, Dr. Messina responded, "I don't know that any – information would make it definitive." Dr. Messina was later asked whether he would need to see Plaintiff again to determine Plaintiff's medical needs related to the accident. Dr. Messina responded:

So I would – you know, it would be difficult to know what – I mean, I could assess his needs based on his condition. . . . I don't know that I could assess whether that condition

is a result of the accident or whether it was preexisting at this point.

Dr. Messina's testimony supports the Commission's finding that Defendants failed to show that Plaintiff's current need for treatment is unrelated to the accident.

Finding of fact 13 states,

Based upon the preponderance of the evidence in view of the entire record, the Full Commission finds additional medical treatment for Plaintiff's left shoulder is reasonably necessary to effect a cure, provide relief, or lessen the period of Plaintiff's disability.

Dr. Messina testified in his deposition that steroid injections are effective to temporarily treat Plaintiff's condition, that people suffering from Plaintiff's condition often get repeat injections because symptoms can reoccur, and that further injections would be a possible course of treatment for Plaintiff specifically. These statements support the Commission's finding that additional medical treatment is reasonably necessary to provide relief for Plaintiff's disability.

Defendants argue that the Commission "failed to consider the entirety of Dr. Messina's testimony and only focused on a small snippet of his testimony." However, "[t]he Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony; it may accept or reject all of the testimony of a witness; it may accept a part and reject a part." *Blalock v. Roberts Co.*, 12 N.C. App. 499, 504, 183 S.E.2d 827, 830 (1971) (citations omitted). If there is any competent evidence to support a challenged finding, the finding is conclusive on appeal, even if there is

evidence that would support findings to the contrary. *Medlin*, 367 N.C. at 423, 760 S.E.2d at 738 (citation omitted). Thus, whether the Commission “failed to consider the entirety of Dr. Messina’s testimony” is not within the purview of this Court.

Because the challenged findings of fact are supported by competent evidence, they are conclusive on appeal. *Id.*

C. Conclusions of Law

Defendants argue that the Commission “erred in concluding that the testimony of Dr. Messina was ‘insufficient to rebut the *Parsons* presumption afforded to Plaintiff.’”

A plaintiff seeking workers’ compensation benefits bears the initial burden of proving that a causal relationship exists between their injury and a work-related accident. *Whitfield v. Lab. Corp. of America*, 158 N.C. App. 341, 351-52, 581 S.E.2d 778, 785 (2003) (citations omitted). When that initial burden is met, additional medical treatment is presumed to be directly related to the compensable injury. *Parsons v. Pantry, Inc.*, 126 N.C. App. 540, 542, 485 S.E.2d 867, 869 (1997). “The employer may rebut the presumption with evidence that the medical treatment is not directly related to the compensable injury.” *Perez v. Am. Airlines/AMR Corp.*, 174 N.C. App. 128, 135, 620 S.E.2d 288, 292 (2005) (citation omitted). If an employer successfully rebuts the *Parsons* presumption, the burden shifts back to the plaintiff to prove that the additional medical treatment is related to the compensable injury. *Miller v. Mission Hosp., Inc.*, 234 N.C. App. 514, 519, 760 S.E.2d 31, 35 (2014)

(citation omitted).

In cases involving complicated medical questions, only an expert can give competent opinion testimony as to the issue of causation. *Click v. Pilot Freight Carriers*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980) (citations omitted). However, if expert testimony is speculative, it is not competent evidence of causation. *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 915 (2000). “[T]he ‘mere possibility of causation,’ as opposed to the ‘probability’ of causation, is insufficient to support a finding of compensability.” *Whitfield*, 158 N.C. App. at 351, 581 S.E.2d at 785 (citation omitted).

Here, the Commission concluded:

In the present matter, Defendants have failed to rebut the *Parsons* presumption. Dr. Messina testified that Plaintiff’s pre-existing left shoulder condition was aggravated or exacerbated by the September 24, 2019, accident. With regard to Plaintiff’s current need for medical treatment, Dr. Messina admitted that he does not know whether Plaintiff’s current left shoulder condition is the result of his accident at work or his pre-existing condition. Accordingly, Dr. Messina’s testimony is insufficient to rebut the *Parsons* presumption afforded Plaintiff.

This conclusion is supported by finding of fact 12, which states that Dr. Messina “was unable to say with any certainty whether Plaintiff’s current need for treatment is related to the September 24, 2019, exacerbation of his left shoulder condition.” Thus, the Commission correctly concluded that Defendants failed to rebut the *Parsons* presumption. *See Whitfield*, 158 N.C. App. at 341, 581 S.E.2d at 785.

Opinion of the Court

Defendants argue that the Commission erroneously treated Dr. Messina's testimony as speculative because Dr. Messina "repeatedly opined to a reasonable degree of medical certainty that additional treatment, including injections and arthroplasty, were not related to the 24 September 2019 accident." Defendants again ask this Court to assign weight to testimony that they believe the Commission should have credited but did not. Defendant's request is beyond the scope of this Court's authority. *See Anderson*, 265 N.C. at 434, 144 S.E.2d at 274 ("The court does not have the right to weigh the evidence and decide the issue on the basis of its weight.").

Because the Commission's conclusions of law are supported by its findings of fact, the Commission did not err by concluding that Defendants failed to rebut the *Parsons* presumption.

III. Conclusion

Because the challenged findings of fact are supported by competent evidence in the record and the Commission's conclusions of law are supported by its findings, the opinion and award is affirmed.

AFFIRMED.

Chief Judge STROUD and Judge FLOOD concur.

Report per Rule 30(e).