

No. COA10-149

NORTH CAROLINA COURT OF APPEALS

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TERESA L. GARNER,)
)
 Plaintiff,)
)
 v.)
)
 CAPITAL AREA TRANSIT,)
 Employer, AMERICAN HOME)
 INSURANCE CO., Carrier, and)
 AIG CLAIMS SERVICES,)
 Servicing Agent, :)
)
 Defendants.)

From the North Carolina
Industrial Commission
 I.C. File No. 761639

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PLAINTIFF-APPELLANT'S BRIEF

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ISSUES PRESENTED

- I. IS THERE COMPETENT EVIDENCE TO SUPPORT THE INDUSTRIAL COMMISSION'S FINDING THAT DR. SUH'S OPINION WAS BASED UPON UNPROVEN FACTS PROVIDED BY THE PLAINTIFF?

- II. IS THERE COMPETENT EVIDENCE CONTRARY TO DR. SUH'S OPINION THAT PLAINTIFF'S BUS ACCIDENT AGGRAVATED HER PRE-EXISTING CONDITION?

STATEMENT OF THE CASE

Plaintiff Teresa L. Garner, who injured her back when another bus hit her bus on March 9, 2007, filed a claim for workers' compensation benefits on June 13, 2007, and requested that the claim be assigned for hearing. (R. pp. 5-7) The workers' compensation case was heard in the Industrial Commission on February 20 and March 17, 2008, before Deputy Commissioner Philip A. Baddour, III. (R. p. 13) Deputy Commissioner Baddour issued an Opinion and Award on February 12, 2009, granting the claim for compensation on the grounds that plaintiff suffered a compensable injury by accident on March 9, 2007, the bus accident significantly aggravated plaintiff's pre-existing condition, thus causing her disabling condition, and she is entitled to past and continuing temporary total disability benefits for her time out of work, and payment of medical expenses. (R. pp. 13-21)

Defendants appealed to the Full Commission, which issued a decision on October 23, 2009. (R. pp. 33-41) The Full Commission found that some part of plaintiff's testimony was inconsistent with the greater weight of the evidence. (R. p. 39) The Full Commission also found that Dr. Paul Suh's medical opinion concerning plaintiff's condition was based on unproven facts provided by the plaintiff, and was therefore not sufficiently

reliable and contrary to some other evidence in the record. (R. pp. 39-40) The Full Commission thus denied plaintiff's claim for compensation on the grounds that she had not proved that she suffered a compensable injury by accident that aggravated her pre-existing condition. (R p. 41) Plaintiff timely filed a notice of appeal on November 20, 2009. (R pp. 42-43)

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

The opinion and award of the Industrial Commission is a final decision pursuant to N.C. Gen. Stat. §§ 7A-29(a) and 97-86, and appeal lies to the Court of Appeals pursuant to those statutes.

STATEMENT OF FACTS

I. PLAINTIFF'S EMPLOYMENT AND INJURY BY ACCIDENT

Plaintiff Teresa L. Garner is 52 years old. (R. p. 35) She has an 11th grade education and has been employed with defendant Capital Area Transit ("CAT") since 2001. (R. p. 35) Prior to this employment, she worked in food service jobs. (R. p. 35) During her employment with defendant-employer, plaintiff has driven buses and vans. (R. p. 15) She is a very good employee and has received excellent reports on her driving. (R. p. 15)

Before working for defendant, plaintiff had never been treated for any neck or back injuries. (R. p. 15) Prior to 2007,

plaintiff was involved in three vehicular accidents while driving buses for defendant. (R. p. 35) She was not at fault in any of the accidents. (R. p. 35) Plaintiff injured her neck, back and arm in the incidents and defendants paid for her medical treatment. (R. p. 35) Immediately prior to the accident in March 2007, plaintiff had not been experiencing any pain in her neck or back. (R. p. 35)

On March 9, 2007, plaintiff was driving bus #103. (R. p. 35) Plaintiff parked her bus behind another bus, #1235, while waiting to commence her 4:15 pm route at the bus station. (R. p. 35; App. pp. 1-2) Bus #1235 began to roll backwards toward plaintiff's bus. (R. pp. 35-36) Plaintiff blew her horn to no avail, and the bus hit the front of plaintiff's bus. (R. p. 16; App. p. 2)

As the plaintiff testified at the hearing, the impact "threw" her neck backwards as she was seated in the driver's seat at the time. (App. pp. 2, 5) In a recorded statement that she gave to defendants on March 20, 2007, plaintiff similarly described the effects of the collision: "[Bus #1235] hit the bus with force and you know just juggled me, just thrown me back." (App. p. 61) She also said that bus #1235 "just jerked my head and my body when it hit." (App. p. 62)

Vickie Black, also a CAT bus driver, observed the accident. She confirmed plaintiff's account of bus #1235 rolling back and hitting bus #90, and described the noise from the accident as "loud enough that you know that [the buses] collided." (App. p. 30) Black left to drive her bus route and returned after about one hour, finding plaintiff and her bus in the same spot. (1st App. pp. 30-31) Black asked plaintiff if she was well, and plaintiff told her that "she was okay," and that because of the impact, "she jerked in the seat." (App. p. 31)

Witness Barbara Shields was another CAT bus driver whose bus was next to bus #1235 at the time of the accident. (App. p. 40-42) She observed bus #1235 rolling backwards and heard the collision. (App. p. 42) Both Black and Shields confirmed that the video taken from bus #1235 and admitted into evidence showed the accident in question. (App. pp. 27-28, 42) The video shows the passengers standing on bus #1235 stumbling due to the impact from the accident and records the exclamations of the passengers. (Def.'s Ex. 5)

Stephanie Wright, the driver of bus #1235, testified that the impact of the two buses was "just a bump . . . like a little nudge." (App. p. 47) During the incident, Wright did not see plaintiff and could not observe the impact's effect on plaintiff. (App. pp. 56-57) Wright did not talk to plaintiff

that day after the accident. (App. p. 50) Wright saw plaintiff a few days later, at which point plaintiff indicated that her arm was injured and Wright apologized to her. (App. pp. 50-51, 59)

Plaintiff initially felt no pain after the accident. (App. pp. 7-8) Immediately after the accident, plaintiff completed an accident report and did not note any injury to herself. (Def Ex. 1) The Raleigh Police Officer that came to the scene did not file a report due to the lack of reported injuries and damage to the vehicles. (R. p. 36) At approximately 5:15 pm, plaintiff continued her shift. (R. p. 36)

Plaintiff began to feel soreness in her neck while she was driving her bus during her shift, approximately one hour following the incident. (App. pp. 7-8) After she finished her shift that night, around 7:20 pm, plaintiff submitted a written injury report. (App. p. 8-9) In the report, plaintiff identified the nature of her injury by underlining the word "pain" and specifying that the pain was in her neck, back, and shoulder. (App. p. 64) Plaintiff identified the collision with bus #1235 as the cause of her injury. (Id.)

Plaintiff's prior recorded statement was completely consistent with her testimony and injury report. In the statement, plaintiff said that "at the time [of the accident], I

didn't really hurt. I really wasn't hurting." (App. p. 62)
"About thirty minutes or an hour later, I felt, I started feeling the pain in my neck getting stiff and it was hurting my shoulders turning the bus." (Id.)

Plaintiff's neck pain increased throughout the evening. (App. pp. 7-8) Plaintiff first sought treatment the next morning at the Wake Medical Center emergency room. (App. pp. 8, 11, 14-17) The first page of the medical note from the emergency room visit states "Chief Complaint Subjective: States she was sitting in bus (driver) yesterday when another bus rolled approx. 10 feet and hit front end of her vehicle. Minor damage to vehicle." (App. p. 65) It further stated that plaintiff complained of "pain to lateral neck radiating into lower back. Also c/o bilateral arm achiness." (Id.) The third page of the report described the incident slightly differently, noting that bus #1235 "rolled approximately 10 feet and tapped the patient[']s bus." (App. p. 67) It also stated of plaintiff that "she felt fine initially and then an hour later felt sore." (Id.) Without explanation, the last page of the note states that "Patient's mechanism of injury and exam appear to be physiologically impossible to relate to her accident." (App. p. 68) However, the physician who treated plaintiff in the

emergency room did not testify at the hearing and was not deposed by the parties.

On March 12, 2007, plaintiff began treatment at the Concentra Medical Center with Dr. Michael Landolf. (R. p. 40) At plaintiff's initial visit, she stated that she had been injured by the low-speed accident on March 9, and that she was experiencing pain in her back, neck, and shoulders. (R. p. 40) Dr. Landolf diagnosed plaintiff as having a cervical strain, put her on restricted duty, prescribed Ibuprofen, and referred plaintiff to physical therapy. (R. p. 40) Plaintiff continued to follow up with Dr. Landolf and was able to resume her regular duties a few days later. (R. pp. 40-41) After her treatment with Dr. Landolf ended in April 2007, plaintiff continued to experience increasing pain, and so sought treatment from Dr. Suh. (App. pp. 20-21)

II. THE TREATMENT AND TESTIMONY OF DR. SUH

Dr. Paul B. Suh is a board certified orthopedist who has been licensed to practice in North Carolina for 24 years. (App. p. 71) He holds a clinical instructor position at the University of North Carolina, specializes in spinal disorders, and performs approximately 200 spinal surgeries annually. (App. pp. 71-72)

Plaintiff first saw Dr. Suh on June 13, 2007, complaining of continuing neck, back, and left-arm pain from the accident. (App. p. 74) Regarding the accident, she told Dr. Suh that "she was the driver of a city bus and she was stopped and another bus rolled into her and 20 minutes later she developed pain." (Id.)

After examining plaintiff and taking x-rays, Dr. Suh diagnosed her with cervical and thoracic degenerative disc disease. (App. p. 76) Dr. Suh then had an MRI performed, which showed multiple levels of disk desiccation and a disc bulge at C6-7, which caused left foraminal stenosis. (App. p. 77) Based on the MRI and further review of plaintiff's condition, Dr. Suh clarified the diagnosis to be cervical degenerative disc disease and cervical radiculopathy. (App. p. 82)

Dr. Suh concluded that the March 2007 accident significantly aggravated plaintiff's pre-existing condition of cervical degenerative disc disease. (App. pp. 69, 84-86, 88-91) Dr. Suh stated this opinion in a letter he wrote before his deposition, as well as in his deposition testimony. In reaching this conclusion, Dr. Suh took into account the nature of the accident - as he specifically considered the video recording of the bus accident - and plaintiff's medical treatment prior to seeing him. (App. pp. 85, 88-90) As Dr. Suh testified, plaintiff's symptoms and condition that he treated were caused

by the March 2007 accident in that the accident exacerbated her pre-existing degenerative disc disease. (App. pp. 90-91)

At the June 13, 2007 visit with Dr. Suh, he instructed plaintiff to restrict her lifting and to take a break from a driving position each hour. (App. pp. 76-77) Defendant CAT did not provide plaintiff work from June 13 until August 3, 2007, when Dr. Suh temporarily released her to work full duty again. (App. pp. 23, 80)

Plaintiff continued to experience symptoms and treat with Dr. Suh, though she also continued to work. (App. p. 80; R. p. 17) By February 2008, plaintiff was experiencing pain on a constant basis that was threatening her ability to function. (App. p. 26) Plaintiff underwent surgery on February 28, 2008, as Dr. Suh performed an anterior cervical discectomy and fusion. (App. p. 86) Following the surgery, as of the date of Dr. Suh's deposition, plaintiff remained unable to work in any capacity, though her prognosis was good and Dr. Suh anticipated that she would be able to return to her job. (App. pp. 87-88)

III. DEFENDANTS' BIOMECHANICAL "EXPERT"

Defendants introduced the testimony of Michael Woodhouse for an opinion on the causation of plaintiff's injury. Woodhouse testified that, in his opinion, plaintiff's March 2007

bus accident did not cause her particular physical injuries. (Woodhouse pp. 67-69)¹

Woodhouse is not a medical doctor and is not licensed in any jurisdiction to practice medicine. (Woodhouse p. 9) He has never attended medical school, except for a two-week seminar unrelated to the practice of medicine. (Woodhouse pp. 9-10) Although he claims to be a professor of orthopedics at the Eastern Virginia Medical School, (Woodhouse Dep. Ex. 1), he has never treated a patient orthopedically, he does not teach medical students, and he is not even paid by the school. (Woodhouse pp. 10-11) All he has done is give about six lectures, presumably about physical therapy, over 18 years. (Woodhouse p. 11)

Woodhouse is neither an engineer nor an accident reconstructionist. (Woodhouse p. 10) He does not have a degree in engineering. (Woodhouse p. 13) His Ph.D. was from the university's department of education. (Woodhouse p. 14) Woodhouse is not licensed or certified in the field of biomechanics. (Woodhouse p. 23) His professional society memberships require only sending a resume and paying dues. (Woodhouse p. 25) Despite this lack of training, over the past

¹ The transcript of the deposition of Michael Woodhouse has been included in the record on appeal.

ten years, Woodhouse has been representing employers or insurance companies to offer opinions as to the validity of testimony concerning how an event occurred and usually opining that plaintiffs are untruthful. (Woodhouse pp. 16-19)

Woodhouse did not demonstrate any special expertise in his testimony. All he claims to have done in preparation is input certain values (e.g., plaintiff's age, weight, gender, seat belt usage, "delta-v") into a publically available computer program and then compare the outputs to purported force levels that cause injury, which are found in publically available documents. (Woodhouse pp. 44-61, 76-77, 88-89, 103) There is no evidence that Woodhouse had any part in creating the computer program, verifying its validity, conducting the underlying studies on crash-test dummies, or doing any sort of medical testing or experiments. (Woodhouse pp. 76-77, 80)

Woodhouse's methodology is also flawed in significant respects. His methodology entirely fails to account for accident victims who have pre-existing spinal conditions. (Woodhouse pp. 79, 102-03) Moreover, the methodology is not able to determine which accidents cause pain to the victims. (Woodhouse p. 106)

IV. THE DEPUTY COMMISSIONER'S AND FULL COMMISSION'S DECISIONS

In his February 12, 2009 Opinion and Award, the Deputy Commissioner concluded that Ms. Garner's injury on March 9 arose out of and was in the course of her employment. (R. p. 18) With regard to the bus accident, he found that the collision caused plaintiff to jerk her neck and back as she was seated in the driver's seat at the time. (R. p. 16) Having observed all of the witnesses firsthand, he found that "Plaintiff's testimony regarding the accident is more credible than the testimony to the contrary." (R. p. 16)

The Deputy Commissioner concluded that Woodhouse's testimony on medical causation was inadmissible because his methodology is unreliable, he has no expertise in medicine or engineering, and he is not qualified to testify to medical causation. (R. pp. 18-19) In any event, the Deputy Commissioner found that even if admissible, Woodhouse's testimony would be entitled to no weight. (R. pp. 17-18) Based upon the testimony of Dr. Suh, the only medical expert in the case, the Deputy Commissioner concluded that Ms. Garner's accident contributed to a significant degree to her condition and resulting disability. (R. pp. 17-18). He further concluded that plaintiff was disabled from June 13 to August 13, 2007, and on a continuing basis since her surgery on February 28, 2008. (R. p. 18)

Accordingly, the Deputy Commissioner concluded that plaintiff is entitled to temporary total disability benefits and payment for all medical expenses incurred as a result of the injury, including the treatment provided by Dr. Suh. (R. pp. 18-19) Defendants appealed to the Full Commission. (R. p. 22)

In its October 23, 2009 Opinion and Award, the Full Commission reversed the Deputy Commission, overruling both his findings of fact and conclusions of law. (R. pp. 33-41) Finding 19 of the decision stated: "Based upon the medical evidence, lay and expert testimony, and video of the accident from Ms. Wright's bus, the Full Commission finds plaintiff's testimony to be inconsistent with the greater weight of the evidence." (R. p. 39) The Full Commission did not specify what specific portion of plaintiff's testimony to which the finding referred. And though the Full Commission referred to "expert testimony," the Full Commission nowhere addressed Woodhouse's testimony, and did not either affirm or reverse the Deputy Commissioner's conclusion that Woodhouse's testimony was inadmissible as expert evidence.

Conclusion of Law 2 stated, in relevant part: "As Dr. Suh's testimony regarding the causation of plaintiff's cervical condition was based upon unproven facts presented by plaintiff, Dr. Suh's opinion is not sufficiently reliable to qualify as competent evidence concerning the nature and cause of

plaintiff's injuries." (R. p. 40) The Full Commission did not specify what "unproven facts" were relied on by Dr. Suh in reaching his opinion. Finding 20 of the decision also stated, in relevant part, that Dr. Suh's "opinion regarding causation and aggravation of plaintiff's preexisting condition is inconsistent with the greater weight of the evidence." (R. p. 39) Again, the Full Commission did not specify what evidence in the record contradicted Dr. Suh's opinion on causation.

In conclusion, the Full Commission denied plaintiff's claim for compensation on the grounds that she had not proved that she suffered a compensable injury by accident that aggravated her pre-existing condition. (R p. 41) Plaintiff timely filed a notice of appeal on November 20, 2009. (R pp. 42-43)

STANDARD OF REVIEW

The essential issues in this case are whether the Industrial Commission's findings regarding Dr. Suh's medical opinion are adequately supported. "The standard of review for an appeal from an opinion and award of the Industrial Commission is limited to a determination of (1) whether the Commission's findings of fact are supported by any competent evidence in the record; and (2) whether the Commission's findings justify its conclusions of law." Goff v. Foster Forbes Glass Div., 140 N.C.

App. 130, 132-33, 535 S.E.2d 602, 604 (2000). Findings of fact by the Full Commission may be set aside on appeal if there is a complete absence of competent evidence to support them. Young v. Hickory Bus. Furn., 353 N.C. 227, 230, 538 S.E.2d 912, 914 (2000). "If the conclusions of the Commission are based upon a deficiency of evidence or misapprehension of the law, the case should be remanded so 'that the evidence may be considered in its true legal light.'" Clark v. Wal-Mart, 360 N.C. 41, 43, 619 S.E.2d 491, 492 (2005) (quoting McGill v. Town of Lumberton, 215 N.C. 752, 754, 3 S.E.2d 324, 326 (1939)). Furthermore, "[t]he 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." Adams v. AVX Corp., 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998).

ARGUMENT

Dr. Suh's opinion that plaintiff's March 2007 accident aggravated her pre-existing condition was based on undisputed facts: plaintiff's bus was hit by another bus on March 9, 2007, plaintiff began to experience pain after she started driving her bus about an hour later, and plaintiff received medical treatment for the injury in the days and weeks after the

accident. While the Full Commission apparently found some part of plaintiff's testimony inconsistent with other evidence, there is no competent evidence in the record to support the Commission's conclusion that Dr. Suh's opinion was fatally undermined by unproven facts supplied by the plaintiff. To the contrary, the facts relied on by Dr. Suh were corroborated, not contradicted, by all of the testimony of other witnesses and the documentary evidence.

The Full Commission also had no basis for concluding that Dr. Suh's opinion was contradicted by other competent evidence. There was no competent expert testimony regarding the causation of plaintiff's condition other than the opinion of Dr. Suh. Though unaddressed in its opinion, the Full Commission appears to have inappropriately relied upon the testimony of Michael Woodhouse, even though it did not question, much less reverse, the Deputy Commissioner's conclusion that the Woodhouse testimony was inadmissible. As Woodhouse's opinion is plainly inadmissible expert testimony, the Full Commission's findings and conclusions regarding Dr. Suh cannot be sustained. Therefore, the Full Commission's decision, which is predicated on its rejection of Dr. Suh's opinion, must be reversed and vacated by this Court.

I. THERE IS NO COMPETENT EVIDENCE TO SUPPORT THE INDUSTRIAL COMMISSION'S FINDING THAT DR. SUH'S OPINION WAS BASED UPON UNPROVEN FACTS PROVIDED BY THE PLAINTIFF.

A. According to Dr. Suh's opinion, plaintiff's neck condition is compensable because it was the result of the March 2007 accident's aggravation of her pre-existing condition.

"All natural consequences that result from a work-related injury are compensable under the Workers' Compensation Act." Cannon v. Goodyear Tire & Rubber Co., 171 N.C. App. 254, 260, 614 S.E.2d 440, 444 (2005). "The rule of causation in the field of workers' compensation where the right to recover is based on injury by accident has been that the employment need not be the sole causative force to render an injury compensable." Moore v. J. P. Stevens & Co., 47 N.C. App. 744, 749, 269 S.E.2d 159, 162 (1980). "If the work-related accident 'contributed in 'some reasonable degree'' to plaintiff's disability, she is entitled to compensation." Hoyle v. Carolina Associated Mills, 122 N.C. App. 462, 465-66, 470 S.E.2d 357, 359 (1996) (quoting Kendrick v. City of Greensboro, 80 N.C. App. 183, 187, 341 S.E.2d 122, 124 (1986)). "Clearly, 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 (2000).

"The claimant in a workers' compensation case bears the burden of initially proving 'each and every element of compensability,' including a causal relationship between the injury and his employment." Adams v. Metals USA, 168 N.C. App. 469, 475, 608 S.E.2d 357, 361 (2005) (quoting Whitfield v. Lab. Corp. of Amer., 158 N.C. App. 341, 350, 581 S.E.2d 778, 784 (2003)). Evidence from an expert medical witness regarding the causation of an injury is required "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...." Click v. Pilot Freight Carriers, Inc., 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980).

On March 9, 2007, plaintiff sustained an injury when bus #1235 rolled backwards into the stopped bus she was driving, and the impact jerked her neck back. Plaintiff initially felt no pain, but her neck began to feel sore when she resumed her bus-driving duties, approximately one hour following the incident. After she finished her shift, plaintiff filled out an injury report stating that she had pain in her neck, back, and shoulders due to the bus collision.

Dr. Suh testified that in his opinion, to a reasonable degree of medical certainty, the March 2007 accident significantly aggravated plaintiff's pre-existing condition of

cervical degenerative disc disease. In reaching this conclusion, Dr. Suh took into account not only plaintiff's report, but also the nature of the accident - as he specifically considered the video recording of the bus accident - and plaintiff's medical treatment prior to seeing him. He concluded that plaintiff's symptoms and condition that he eventually treated with surgery were caused by the March 2007 accident in that the accident exacerbated her pre-existing degenerative disc disease. Because the March 2007 accident contributed to a significant degree to plaintiff's condition and resulting disability, she is entitled to compensation. See Smith, 134 N.C. App. at 182, 517 S.E.2d at 166; Hoyle, 122 N.C. App. at 465-66, 470 S.E.2d at 359.

B. None of the facts underlying Dr. Suh's opinion on causation are contradicted by evidence in the record.

In its opinion and award, the Full Commission concluded that Dr. Suh's opinion is not sufficiently reliable to qualify as competent evidence because it "was based upon unproven facts presented by plaintiff." The Full Commission did not specify what "unproven facts" were relied on by Dr. Suh in reaching his opinion. It could not because there are none. The facts relied upon by Dr. Suh in reaching his opinion - concerning the fact of the bus collision, plaintiff's delayed onset of pain, and

plaintiff's subsequent medical treatment - are not contradicted by any evidence of the record. Therefore, there is no competent evidence to support the Commission's finding that Dr. Suh's opinion was undermined by the facts supplied to him by plaintiff.

When plaintiff first saw Dr. Suh, she provided the following description of the accident: "she was the driver of a city bus and she was stopped and another bus rolled into her and 20 minutes later she developed pain." (App. p. 74) Dr. Suh then conducted a physical examination, had plaintiff undergo an MRI scan, and began treating her. Dr. Suh was also provided with the records concerning plaintiff's other medical treatment and the bus video of the accident. (App. p. 84) Before his deposition, Dr. Suh wrote a letter about his opinion on causation based on the evidence submitted to him and experience with plaintiff. (App. p. 84) In the letter, dated December 13, 2007, Dr. Suh opined that plaintiff's March 2007 accident aggravated her pre-existing condition of cervical degenerative disc disease. (App. p. 69) Although Dr. Suh's letter was written in response to an inquiry from plaintiff's counsel, Dr. Suh testified that his opinion "was based primarily on Ms. Garner's report." (App. pp. 98-99)

Therefore, the facts provided by plaintiff to Dr. Suh that underlay his opinion are that (1) bus #1235 rolled toward and hit her bus while she was in the driver's seat; and (2) she had a delayed onset of pain following the accident. Dr. Suh was also provided with the video of the accident and plaintiff's other medical records, but these are definitive pieces of evidence, and obviously are not contradicted by any other piece of evidence. Accordingly, these two facts are the only possible "unproven facts" provided to Dr. Suh. These facts, however, are undisputed; there is no competent evidence to support a finding that they are "unproven."

In addition to plaintiff, all of the witnesses on the scene - including Vicky Black, Barbara Shields, and Stephanie Wright - corroborated plaintiff's testimony that bus #1235 rolled back and hit her bus while she was in the driver's seat. The video of the incident taken from bus #1235 corroborated this fact as well. Moreover, plaintiff's account of the accident remained consistent over time, as documented by her incident report, recorded statement provided to defendants, and numerous descriptions given to medical providers.

It is also undisputed that plaintiff initially felt no pain, but her neck began to feel sore when she resumed her bus-driving duties, approximately one hour following the incident.

This fact is corroborated by the injury report plaintiff filed at the end of her shift, the description she provided the next day at the Wake Med emergency room, the description she provided to Dr. Landolf at Concentra, and the description she gave to defendants in her recorded statement eleven days later.

Plaintiff's interactions with Vicky Black are also consistent with her account. Black testified that about one hour after the accident, she talked to plaintiff, who had still had not left the scene of the collision. At that point, plaintiff mentioned that the collision jerked her in her seat, but did not mention any pain or injury. As plaintiff was still at the scene of the collision, she had not yet resumed driving her bus. Because her pain only started when she restarted her route, she had no reason to mention any pain or injury to Black during their conversation.

Therefore, the key facts plaintiff provided to Dr. Suh are undisputed, and there is no competent evidence to support a finding that they are "unproven." Accordingly, the Full Commission's rejection of Dr. Suh's medical opinion based on the facts provided to him by plaintiff should be reversed by this Court.

II. THERE IS NO COMPETENT EVIDENCE CONTRARY TO DR. SUH'S OPINION THAT PLAINTIFF'S BUS ACCIDENT AGGRAVATED HER PRE-EXISTING CONDITION.

In its opinion and award, the Full Commission made a finding that Dr. Suh's "opinion regarding causation and aggravation of plaintiff's preexisting condition is inconsistent with the greater weight of the evidence." Again, the Commission did not specify what evidence in the record contradicted Dr. Suh's opinion on causation because there is no such evidence.

The only evidence defendants presented to the Commission to contradict Dr. Suh's opinion was the testimony of Michael Woodhouse.² As the Deputy Commissioner concluded, however, Woodhouse's testimony on medical causation is inadmissible because his methodology is unreliable, he has no expertise in medicine or engineering, and he is not qualified to testify to medical causation.

The North Carolina Supreme Court comprehensively addressed the admissibility of expert testimony in State v. Goode, 341 N.C. 513, 461 S.E.2d 631 (1995), and clarified its analysis in Howerton v. Arai Helmet Ltd., 358 N.C. 440, 597 S.E.2d 674

² While the Commission discussed the medical note of the emergency room physician that treated plaintiff, the isolated comment in the note about the causation of plaintiff's injury is not competent expert evidence because the emergency room physician never testified, was never qualified as an expert, never explained the comment, and did not provide the basis for his comment.

(2004). Following the Court's standard, Woodhouse's testimony is inadmissible because his method of proof is unreliable, he lacks any particular expertise, and the testimony is irrelevant to the question of medical causation at issue here.

Under Goode and Howerton, the first step in the admissibility analysis is to determine whether the "expert's method of proof is sufficiently reliable as an area for expert testimony." Howerton, 358 N.C. at 459, 597 S.E.2d at 686. Initially, courts should look to precedent for guidance as to whether a particular methodology is reliable. Id. at 459, 597 S.E.2d at 687. Where there is no precedent, a court is to look at other indices of reliability: "the expert's use of established techniques, the expert's professional background in the field, the use of visual aids before the jury so that the jury is not asked to sacrifice its independence by accepting the scientific hypotheses on faith, and independent research conducted by the expert." Id. at 460, 597 S.E.2d at 687 (quotation marks omitted).

As for precedent, numerous courts have rejected the biomechanical methodology relied upon by Woodhouse. For instance, in Smelser v. Norfolk Southern Railway, 105 F.3d 299 (6th Cir. 1999), the Sixth Circuit found that the purported expert admitted that "biomechanics are qualified to determine

what injury causation forces are in general and can tell how a hypothetical person's body will respond to those forces, but are not qualified to render medical opinions regarding the precise cause of a specific injury." Id. at 305. The court concluded that the expert was "not a medical doctor who had reviewed [the plaintiff's] complete medical history, and his expertise in biomechanics did not qualify him to testify about the cause of [the plaintiff's] specific injuries." Id.

Similarly, in Combs v. Norfolk and Western Railway, 507 S.E.2d 355 (Va. 1998), the Virginia Supreme Court found that an expert in the field of biomechanical engineering was competent to render an opinion on the forces placed on the plaintiff's spine at the time of the incident. Id. at 358. It held, however, that the expert "was not a medical doctor and, thus, was not qualified to state an expert medical opinion regarding what factors cause a human disc to rupture and whether the plaintiff's twisting movement to catch the toilet could have ruptured his disc." Id. at 358-59; see also Cromer v. Mulkey Enter., Inc., 562 S.E.2d 783, 787 (Ga. App. 2002) (finding a lack of evidence that "the field of biomechanics includes a technique of determining if specific injuries result from specific accidents, let alone that that technique has reached a scientific stage of verifiable certainty").

Woodhouse testified to his opinion as to whether Ms. Garner's accident caused her particular physical injuries. As these other courts have concluded, however, a biomechanical expert cannot give an opinion as to the medical causation of a particular injury with sufficient reliability to be admissible. See Howerton, 358 N.C. at 459, 597 S.E.2d at 687. In addition, Woodhouse's testimony lacks the other recognized indices of reliability. See id. at 460, 597 S.E.2d at 687. Biomechanics is not an established technique for making a medical diagnosis, Woodhouse has no background in medicine or in engineering, and he has not conducted any independent research on the causation or aggravation of degenerative disc disease. Therefore, his testimony fails the first step of the admissibility analysis.

The second step of the admissibility analysis is to determine "whether the witness is qualified as an expert in the subject area about which that individual intends to testify." Id. at 461, 597 S.E.2d at 688. The expert must possess "scientific, technical or other specialized knowledge [that] will assist the trier of fact to understand the evidence or to determine a fact in issue." Id. at 462, 597 S.E.2d at 688 (quoting N.C. Gen. Stat. § 8C-1, Rule 702(a)). Woodhouse does not meet this standard.

Woodhouse is not a medical doctor and is not licensed in any jurisdiction to practice medicine. He has never attended medical school, except for a two-week seminar unrelated to the practice of medicine. Although he claims to be a professor of orthopedics at the Eastern Virginia Medical School, he has never treated a patient orthopedically, he does not teach medical students, and he is not even paid by the school. All he has done is give about six lectures, presumably about physical therapy, over 18 years.

Moreover, Woodhouse is neither an engineer nor an accident reconstructionist. He does not have a degree in engineering. His Ph.D. was from the university's department of education. Woodhouse is not licensed or certified in the field of biomechanics. His professional society memberships require only sending a resume and paying dues. Despite this lack of training, over the past ten years, Woodhouse has been representing employers or insurance companies to offer opinions as to the validity of testimony concerning how an event occurred and usually opining that plaintiffs are untruthful.

Finally, Woodhouse has not even demonstrated any special expertise in his testimony. All he claims to have done is inputted certain values (e.g., plaintiff's age, weight, gender, seat belt usage, "delta-v") into a publically available computer

program and then compared the outputs to purported force levels that cause injury, which are found in publically available documents. There is no evidence that Woodhouse had any part in creating the computer program, verifying its validity, conducting the underlying studies on crash-test dummies, or doing any sort of medical testing or experiments. The ability to enter numbers into a computer program is not specialized knowledge that can assist the Commission to find facts. See Howerton, 358 N.C. at 462, 597 S.E.2d at 688.

The third and final step of the admissibility analysis is to determine whether the expert's testimony is relevant. Id. Under the Act, evidence regarding the causation of an injury must be from an expert medical witness "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" Click v. Pilot Freight Carriers, Inc., 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980). Plaintiff's case presents just such a complicated medical question, but Woodhouse is not an expert medical witness and cannot testify to medical causation. Thus, his testimony is not relevant to this case. Accordingly, Woodhouse's testimony fails all three steps of the Supreme Court's analysis, and his allegedly expert testimony is inadmissible.

There being no other expert evidence on causation in the record, the Full Commission's finding that Dr. Suh's opinion regarding "is inconsistent with the greater weight of the evidence" is not supported by competent evidence. Because the Full Commission's decision is predicated on its erroneous rejection of Dr. Suh's opinion, it must be reversed and vacated by this Court. See Clark v. Wal-Mart, 360 N.C. 41, 43, 619 S.E.2d 491, 492 (2005).

CONCLUSION

For the foregoing reasons, the Court should conclude that the Industrial Commission's findings are not supported by competent evidence, reverse and vacate the Commission's opinion and award, and remand the case for decision consistent with the Court's opinion and the competent evidence in the record.

This the 24th day of March, 2010.

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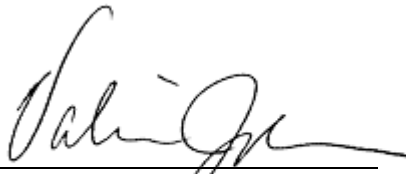
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CERTIFICATE OF SERVICE

The undersigned counsel for the plaintiff-appellant hereby certifies that a copy of Plaintiff-Appellant's Brief was sent via first class mail, postage prepaid, addressed as follows:

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