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NO. COA07-1343

NORTH CAROLINA COURT OF APPEALS

Filed: 20 May 2008

JOHN D. BENZ,
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 011668

AMERICAN AIRLINES/AMR CORP.,
Employer,

AIG VENDOR SERVICES (SPECIALITY
RISK SERVICES, Administrator),
Carrier,
Defendants.

Appeal by plaintiff from Opinion and Award entered 21 June 2007 by the North Carolina Industrial Commission. Heard in the Court of Appeals 19 March 2008.

Patterson Harkavy LLP, by Valerie A. Johnson, for plaintiff-appellant.

Brooks, Stevens & Pope, P.A., by Joy H. Brewer and James A. Barnes, IV, for defendant-appellee.

STROUD, Judge.

The Full Commission denied “[p]laintiff’s claim for additional compensation benefits related to his compensable 2000 injury[.]” The issues before us on appeal are whether competent evidence existed by which the Full Commission could find that (1) “[plaintiff] does not require further medical treatment under N.C. Gen. Stat. §97-25[;]” (2) “[plaintiff] is physically capable of returning to work in some capacity[;]” and (3) “[plaintiff] failed to prove that a causal

relationship existed between the work-related shoulder injury in 2000 and his disability following his 2003 heart surgery[.]” For the following reasons, we affirm.

I. Background

The Full Commission (“Commission”) by Chairman Buck Lattimore made the following uncontested findings of fact:

1. Plaintiff is 48 years old, having a date of birth of January 15, 1959. For more than 20 years, he has been employed by American Airlines. Eighteen of those years have been as an automotive mechanic. Although plaintiff continues to be employed by American Airlines, he has been on continuous medical leave since August, 2003.

2. Plaintiff’s work as a mechanic involved maintenance on heavy machinery for defendant-employer. His work was very strenuous, involving lifting, pulling, and overhead work. Often plaintiff’s job required overhead work on 200 - 300 pound transmissions that had to be balanced on stands and pushing and pulling up to 400 pounds.

3. On January 18, 2000, plaintiff was pulling a large dolly, or heavy cart, containing snow plows into position under a crane. There were two or three inches of snow on the ground, and the surface was very wet. Plaintiff slipped and fell to the ground. While he was holding onto the dolly with his left arm, the dolly rolled over him. Plaintiff sustained injuries to his low back, left shoulder, and leg.

4. Plaintiff was treated at the Rex Hospital Emergency Department immediately following the injury. He was also treated by Dr. Tejpal Dhillon at Dhillon Orthopedics and Dr. McDaniel of Raleigh Orthopedics and received physical therapy. Dr. Dhillon diagnosed plaintiff with acute thoracic spine and lumbrosacral sprain. Dr. McDaniel diagnosed him with left trapezius thoracic sprain.

5. From May 4, 2000, through August 2001, plaintiff saw Dr. Scott Sanitate, a physiatrist at Carolina Back Institute. Dr. Sanitate treated plaintiff with a TENS unit and a number of trigger point injections. Although the injections provided plaintiff with some relief, plaintiff continued to suffer pain and experienced aggravation of his pain at work.

6. Dr. Sanitate continued plaintiff on modified duty until June 12, 2000, when he released plaintiff to full duty. Although he returned to full duty, plaintiff occasionally had to miss work because of increasing pain.

7. Dr. Brian Szura at Cary Orthopedics saw plaintiff on July 14, 2000. Dr. Szura indicated that plaintiff suffered from a chronic periscapular strain with atrophy of supraspinatus. Dr. Szura indicated that plaintiff did not wish to have restrictions on his work activity and recommended continued trigger point injections and physical therapy.

8. After Dr. Sanitate indicated he had no other treatment options for plaintiff short of surgery, Dr. Peter Gilmer, an orthopedic surgeon at Triangle Orthopedics, saw plaintiff on August 8, 2001. Dr. Gilmer diagnosed chronic left shoulder periscapular pain and ordered a cervical MRI. On August 30, 2001, plaintiff again saw Dr. Gilmer. Pursuant to plaintiff's motion and an order by Special Deputy Commissioner Matthew D. Harbin on October 24, 2001, Dr. Gilmer became the authorized treating physician for plaintiff's shoulder condition.

9. After reviewing the results of the MRI, which did not reveal any clear pathology, Dr. Gilmer referred plaintiff to Dr. John Giusto, a physiatrist in the same practice, for chronic pain management.

10. Dr. Giusto began treating plaintiff on September 6, 2001, using various modalities, including osteopathic manipulation. He diagnosed plaintiff with chronic myofascial shoulder pain. Dr. Giusto prescribed physical therapy in October 2001 and began performing trigger point injections.

11. Dr. Giusto returned plaintiff to full duty work on November 5, 2001. On January 9, 2002, Plaintiff reported that the heavy labor he performed at work during the snowstorm had aggravated his condition, including his shoulder and low back. Dr. Giusto performed osteopathic manipulation and trigger point injections.

12. At his February 28, 2002 visit, plaintiff reported an additional aggravation that occurred while moving an alternator at work. Dr. Giusto removed plaintiff from work for the period from February 25, 2002, through March 4, 2002. Dr. Giusto noted that

plaintiff was doing fairly well and working full duty at the office visit of March 20, 2002.

13. Dr. Giusto saw plaintiff for increased pain on April 30, 2002, and treated plaintiff with injections, manipulation and medications. On July 19, 2002, plaintiff underwent electrodiagnostic testing to determine the cause of pain in his fingers and around the shoulder girdle. Dr. Giusto determined that the change was related to his myofascial pain. Plaintiff was noted to be doing better with the injections. No other abnormalities were found.

14. In late 2002 through mid-2003, plaintiff received monthly shoulder injections and took pain medication and muscle relaxants. Plaintiff typically would experience pain from the injection for a few days, then relief for a week or two, and then gradually increased pain. Plaintiff continued working for defendant-employer in his pre-injury job during this time period.

15. Plaintiff was able to work through August 25, 2003. Plaintiff had gone to the hospital a few days prior due to shoulder pain. However, when he arrived at the hospital complaining of shoulder pain, the doctors examined plaintiff's heart and discovered a blockage in plaintiff's main artery.

16. On August 26, 2003, plaintiff presented to Dr. Joseph Guzzo for a cardiology consultation regarding chest discomfort. Plaintiff complained of chest tightness associated with perspiration and a headache. Dr. Guzzo performed an exercise tolerance test which showed equivocal inferior EKG changes. Dr. Guzzo determined that plaintiff's symptoms suggested new onset angina. On that same day, Dr. Guzzo performed a cardiac catheterization to evaluate plaintiff's coronary anatomy and left ventricular function.

17. On August 27, 2003, plaintiff presented to Dr. Robert Peyton with Carolina Cardiovascular for a surgical consultation. Plaintiff complained of chest pain that radiated in his left shoulder as well as [sic] left finger tingling. He stated that he had been diagnosed with chronic, left shoulder pain, but that the pain felt different now. Specifically, he felt more heaviness in his chest than before and he actually began experiencing shortness of breath two or three months prior. On that same day, Dr. Peyton performed coronary artery bypass surgery. Plaintiff was discharged from the hospital on September 1, 2003.

18. On October 1, 2003, plaintiff returned to Dr. Giusto and complained that his shoulder pain had worsened. However, plaintiff admitted that his heart and shoulder pain symptoms were often similar and that it was difficult to differentiate between the two. Plaintiff also testified that following the open heart surgery he experienced pain and difficulties associated with an unstable sternum.

19. At his October 29, 2003, visit with Dr. Giusto, plaintiff's shoulder continued to be painful. His symptoms were tightness, binding, clicking, limited and painful range of motion. As far as symptoms related to the surgery, however, plaintiff was improving. After that visit, his condition overall continued to fluctuate but plaintiff continued to complain of the same shoulder joint pain as he had during his visits prior to the surgery.

20. Plaintiff first saw Dr. Michael Blazing on December 11, 2003. Dr. Blazing is board certified in internal medicine and cardiology. During his visit, plaintiff reported discomfort over his left breast area medially and up the middle of his sternum, discomfort with exertion, and sharp and knifelike pain in his left shoulder which radiated down his chest. Dr. Blazing testified that it was not uncommon for a patient to experience ongoing chest wall tenderness following a coronary artery bypass graft. Dr. Blazing also explained that the procedure can result in an unstable or non-union of sternum, which can cause ongoing pain.

....

25. Dr. Giusto further testified that it was his opinion that plaintiff's shoulder condition worsened as a result of the heart surgery. He opined that during the coronary artery bypass surgery, plaintiff's chest was opened and the rib cage was separated, which triggered plaintiff's nervous system, stimulated the nerves, and caused additional shoulder pain and dysfunction. However, on cross-examination, Dr. Giusto admitted that there was no objective evidence or nerve testing to document this alleged neuropathic pain of which plaintiff complained and that the EMG was negative for nerve damage. Dr. Giusto admitted that his opinion was based primarily on plaintiff's subjective complaints. When asked to provide a basis for his opinion that plaintiff's open heart surgery aggravated plaintiff's shoulder injury, Dr. Giusto indicated that it "seemed" causally related to the original injury because there was no problem with his left arm in terms of keeping him out of work before the open heart surgery and significant aggravation of the left shoulder condition after the open heart surgery.

....

27. The Full Commission gives greater weight to Dr. Blazing's testimony over Dr. Giusto's on the issue of whether plaintiff's heart surgery aggravated his shoulder injury.

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30. Drs. Callaway and Giusto agreed that plaintiff's condition cannot be corrected by surgery.

31. Dr. Callaway recommended that plaintiff be weaned from the narcotic medications and trigger point injections currently prescribed by Dr. Giusto as these forms of treatment create a dependency and make it hard for patients to break through the problem. With respect to narcotic medications, Dr. Callaway testified that narcotics were not good for treating or curing the underlying problem causing the pain; rather, narcotics mask the pain. Dr. Callaway also testified that he typically did not use narcotic medications to treat chronic muscular injuries.

32. Dr. Callaway testified that the trigger point injections were not medically necessary and that if they were going to cure the problem, a limited course would have been successful. Moreover, he testified that plaintiff having received an injection every 3 to 5 weeks since 2001 was excessive and that this was not the way to work toward a cure. Dr. Callaway further stated that the trigger point injections may have been carried on longer than appropriate based on the absence of improvement of plaintiff's condition. Dr. Giusto conceded that an argument could be made against administering the trigger point injections. . . .

Based upon the findings of fact and its conclusions of law the Commission denied "[p]laintiff's claim for additional compensation benefits related to his compensable 2000 injury[.]" Plaintiff appeals. The issues before us on appeal are whether competent evidence existed by which the Commission could find that (1) "[plaintiff] does not require further medical treatment under N.C. Gen. Stat. §97-25[;]" (2) "[plaintiff] is physically capable of returning to work in some capacity[;]" and (3) "[plaintiff] failed to prove that a causal relationship existed

between the work-related shoulder injury in 2000 and his disability following his 2003 heart surgery[.]”

II. Standard of Review

Our review of a decision of the Industrial Commission is limited to determining whether there is any competent evidence to support the findings of fact, and whether the findings of fact justify the conclusions of law. The findings of the Commission are conclusive on appeal when such competent evidence exists, even if there is plenary evidence for contrary findings. This Court reviews the Commission’s conclusions of law *de novo*.

Ramsey v. S. Indus. Constructors, Inc., 178 N.C. App. 25, 29-30, 630 S.E.2d 681, 685 (internal citations and internal quotation marks omitted), *disc. rev. denied*, 361 N.C. 168, 639 S.E.2d 652 (2006).

III. Further Medical Treatment

The Commission found, *inter alia*, “Dr. Callaway testified that no specific treatment would benefit plaintiff’s chronic muscular injury[.]” and “[p]laintiff failed to present competent medical evidence that he requires any further medical treatment related to his 2000 compensable injury.” Plaintiff assigned error to each of these findings and argues that “[t]he finding of the Industrial Commission that . . . [plaintiff] does not require further medical treatment under N.C. Gen. Stat. §97-25 is not supported by competent evidence in the record.”

Plaintiff quotes *Pomeroy v. Tanner Masonry*, in stating, “[s]ubsequent to the establishment of a compensable injury under the Workers’ Compensation Act, an employee may seek compensation under N.C.G.S. §97-25 for additional medical treatment when such treatment lessens the period of disability, effects a cure, or gives relief.” 151 N.C. App. 171, 182, 565 S.E.2d 209, 216 (2002). Citing *Pomeroy*, *see id.*, plaintiff contends, “Dr. Callaway’s testimony . . . does not provide competent evidence for the Commission’s finding because his testimony was

limited to treatment that could cure . . . [plaintiff's] condition without considering treatment that could provide relief." (Emphasis in original). However, we disagree.

During his deposition Dr. Callaway was asked, "In your report, you indicated you did not believe any specific treatment would be helpful for this type of chronic muscular injury exhibited by Mr. Benz. Could you explain the basis for your opinion that no specific treatment would be helpful?" Dr. Callaway responded, "Unfortunately some conditions we don't have a good treatment for, and people try in desperation a lot of different things, like chiropractic manipulation or massages or dry needling or acupuncture, but I'm not aware of any studies that have shown that any specific treatment helps chronic muscle injury."

Thus, Dr. Callaway's deposition provides "competent evidence to support the finding of fact[,]" *see Ramsey* at 29, 630 S.E.2d at 685, that "Dr. Callaway testified that no specific treatment would benefit plaintiff's chronic muscular injury." This finding of fact "justif[ies] the conclusion of law[,]" *see Ramsey* at 29, 630 S.E.2d at 685, that "[p]laintiff failed to present competent medical evidence that he requires any further medical treatment related to his 2000 compensable injury." Even though the record does contain other evidence which is favorable to plaintiff, "[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) (internal citation, internal quotation marks, ellipses, and brackets omitted). Therefore, this argument is overruled.

IV. Physically Capable of Returning to Work

The Commission found that

On August 16, 2004, plaintiff saw Dr. Hadley Callaway, board certified in orthopedic surgery, for an independent medical examination. . . . Dr. Callaway testified that at that time there was

no evidence that plaintiff needed any restrictions and that a full duty release was appropriate.

....

The greater weight of the evidence shows that, with respect to plaintiff's shoulder condition, plaintiff is physically capable of returning to work in some capacity. Further, plaintiff has failed to meet his burden under any of the other prongs of the *Russell* test. Accordingly, plaintiff has failed to establish ongoing disability due to his work-related injury.

Plaintiff assigned error and argues that “the finding of the Industrial Commission that Mr. Benz is physically capable of returning to work in some capacity is not supported by competent evidence in the record.”

An employee injured in the course of his employment is disabled under the Act if the injury results in an incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment. N.C.G.S. §97-2(9) (1991). Accordingly, disability as defined in the Act is the impairment of the injured employee's earning capacity rather than physical disablement. *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 434, 342 S.E.2d 798, 804 (1986).

The burden is on the employee to show that he is unable to earn the same wages he had earned before the injury, either in the same employment or in other employment. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 684 (1982). The employee may meet this burden in one of four ways: (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment, *Peoples*, 316 N.C. at 443, 342 S.E.2d at 809[.]

Russell v. Lowes Prod. Distribution, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (internal quotation marks and ellipses omitted). Plaintiff contends that there is competent evidence to support prong one of *Russell*, “the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment[.]” *See id.*

Dr. Callaway was asked, “What work restrictions would you assign to . . . [plaintiff], if any, just solely focusing on your speciality, which is the shoulder?” Dr. Callaway responded,

Based on my exam back in August 2004, I didn’t think he really needed any restrictions at that point. If a patient had bad rotator cuff tendonitis, you know, a hypothetical patient, then I would usually assign some restrictions about the amount of weight they could lift, perhaps 20 pounds below shoulder level and maybe restrictive lifting overhead. So I think it’s likely he could do regular work, but at the minimum, he could do work which didn’t require heavy lifting or overhead use of the arm.

This evidence qualifies as “any competent evidence[,]” *see Ramsey* at 29, 630 S.E.2d at 685, by which the Commission could find as fact that “Dr. Callaway testified that at that time there was no evidence that plaintiff needed any restrictions and that a full duty release was appropriate.” Furthermore this finding of fact supports the finding of fact and conclusion of law, *see Ramsey* at 29, 630 S.E.2d at 685, that

[t]he greater weight of the evidence shows that, with respect to plaintiff’s shoulder condition, plaintiff is physically capable of returning to work in some capacity. Further, plaintiff has failed to meet his burden under any of the other prongs of the *Russell* test. Accordingly, plaintiff has failed to establish ongoing disability due to his work-related injury.

See Faison at 757, 594 S.E.2d at 448. Therefore, this assignment of error is overruled.

V. Causal Relationship

Lastly, plaintiff contends “the finding of the Industrial Commission that . . . [plaintiff] failed to prove that a causal relationship existed between the work-related shoulder injury in 2000 and his disability following his 2003 heart surgery is not supported by competent evidence in the record.”

However, even assuming *arguendo*, that the Commission did not have “any competent evidence[,]” *see Ramsey* at 29, 630 S.E.2d at 685, by which it could determine that there was no

causal relationship between plaintiff's "work-related shoulder injury in 2000 and his disability following his 2003 heart surgery" plaintiff still would not be afforded any further compensation as we have already determined there was "competent evidence" from which the Commission could find further medical treatment was not required and plaintiff was physically capable of returning to work. Thus, this assignment of error is overruled.

VI. Conclusion

We conclude that there was competent evidence whereby the Commission could decline to extend plaintiff further medical treatment and find plaintiff physically capable of work. These two determinations make any review of a causal relationship unnecessary. Therefore, we affirm.

AFFIRMED.

Judges HUNTER and ELMORE concur.

Report per Rule 30(e).