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NO. COA06-89

NORTH CAROLINA COURT OF APPEALS

Filed: 3 October 2006

NICANDRO SOSA PARADA,  
Employee  
Plaintiff-Appellee

v.

North Carolina Industrial Commission  
I.C. File No. 022973

CUSTOM MAINTENANCE, INC.,  
Employer

and

HARBOR SPECIALITY  
INSURANCE CO., INC.,  
Carrier  
Defendants.

Appeal by plaintiff from an Opinion and Award filed 4 October 2005 by the Full Commission. Heard in the Court of Appeals 23 August 2006.

*Douglas S. Harris for plaintiff-appellant.*

*Teague, Campbell, Dennis, & Gorham, L.L.P., by Bruce A. Hamilton and Julia S. Hooten, for defendant-appellees.*

BRYANT, Judge.

Nicandro Sosa Parada (plaintiff) appeals from an Opinion and Award filed by the Full Commission on 4 October 2005 denying his claim for ongoing temporary total disability benefits.

Plaintiff, age 28 at the time of the hearing before the deputy commissioner, is an undocumented worker who speaks broken English and has a limited education. On 27 February 2000, plaintiff was working as a janitor for Custom Maintenance, Inc. (defendant-employer) and sustained a compensable injury by accident when he fell down steel and cement stairs onto a cement floor. Following the accident, plaintiff sought medical treatment at Urgent Medical and Family Care Center and was diagnosed as having sustained a contusion on his low back and hip, with a possible spondylolysthesis at the L5 level and cystic changes. Plaintiff was treated at the Center and assigned light duty work restrictions.

On 28 March 2000, plaintiff was referred to Dr. John Krege of Piedmont Orthopedic. After determining plaintiff's bone scan and radiographs were normal, Dr. Krege noted plaintiff was continuing to experience pain and that previously assigned light duty work restrictions were not being followed by defendant-employer. Dr. Krege medically excused plaintiff from work for two weeks and referred him to physical therapy.

One month later, plaintiff returned to Dr. Krege with spine pain that went from his neck down his back. Plaintiff experienced pain in his neck when turning and in his cervical area. Cervical x-rays taken on 12 May 2000 revealed a straightening of the normal curvature of the spine. On 1 June 2000, plaintiff reported neck, rib and chest pain. An MRI revealed degenerative changes at the C4-C5 level and a broad based disc bulge at the C3-C4 level. Dr. Krege indicated in his notes he could not find a definitive cause for plaintiff's pain. On 21 June 2000, plaintiff received a steroid injection and on 19 July 2000, Dr. Krege noted plaintiff was moving well and exhibited no signs of pain.

On 14 September 2000, plaintiff was examined by Dr. Frank Rowan, an orthopedic surgeon. Dr. Rowan assigned plaintiff a 0% permanent partial impairment rating, diagnosed

plaintiff with chronic cervical/thoracic strain and released plaintiff to sedentary work or plaintiff could “continue with work conditioning.” Dr. Rowan’s medical notes indicated that he was “at a loss to explain [plaintiff’s] complaints.” Subsequently, plaintiff underwent a Functional Capacity Evaluation (FCE) which Dr. Rowan interpreted to reveal that plaintiff was capable of working in a sedentary capacity for an eight hour day.

On 26 October 2000, Dr. Krege examined plaintiff who continued to experience pain in his lower back and neck stiffness. Plaintiff was diagnosed with ankylosing spondylitis, a progressive fusion of the spine, which was unrelated to the 27 February 2000 work injury. Dr. Krege found that plaintiff was at maximum medical improvement with regard to his work injury and plaintiff had sustained no permanent partial impairment rating as the result of his workplace injury.

On 11 February 2002, Dr. Scott J. Spillmann, a physiatrist examined plaintiff and determined he was not at maximum medical improvement and referred him to a rheumatologist who confirmed the diagnosis of ankylosing spondylitis. On 13 July 2002, plaintiff returned to Dr. Spillmann with continued neck pain with stiffness and limited neck mobility. Dr. Spillmann referred plaintiff to participate in an extensive work evaluation program which indicated plaintiff was performing within the heavy physical demand classification as outlined by the U.S. Department of Labor’s Dictionary of Occupational Titles. Dr. Spillmann released plaintiff to work without restrictions and assigned a two percent permanent partial disability rating to his neck and a four percent permanent partial disability rating to his back.

Plaintiff was also examined by a neurosurgeon, Dr. Rick Holmberg who stated plaintiff’s ankylosing spondylitis was not related to plaintiff’s workplace injury, but that the condition could complicate the symptoms from the incident. In their findings, the Full Commission gave

greater weight to Dr. Spillmann's testimony, an expert in preventive and occupational medicine, than that of Dr. Holmberg's and found that Dr. Holmberg should not be approved as plaintiff's authorized treating physician regarding the workplace injury. As a result, the Full Commission concluded "plaintiff is entitled to have defendants pay for all related medical expenses incurred in treatment of the compensable injury, with these not including expenses associated with treatment by Dr. Holmberg or ongoing treatment ankylosing spondylitis." The Full Commission further concluded, "[d]efendants are entitled to a credit for overpayment for any temporary total disability paid after September 9, 2003." From this Opinion and Award, plaintiff appeals.

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On appeal, plaintiff argues the Commission erred by making Findings of Fact fifteen, eighteen through twenty-two, twenty-four and Conclusions of Law two, three and five.

Plaintiff challenges the following findings of the Full Commission:

15. Dr. Spillmann has released plaintiff from his care, finding that he reached maximum medical improvement for all conditions related to his work injury. Additionally, Dr. Spillmann released plaintiff to work *without restrictions*, and assigned a two percent (2%) permanent partial disability rating to the neck and a four percent (4%) permanent partial disability rating to the back.

...

18. A labor market survey was completed which identified numerous jobs in plaintiff's geographical area which were within his restrictions and which plaintiff was capable of securing, many of which were available at the time the labor market survey was completed.

19. Dr. Spillmann specifically reviewed and approved four of the job descriptions represented in the labor market survey as being appropriate for plaintiff.

20. The [Full Commission] find[s] as fact that suitable employment was available within plaintiff's restrictions.

21. As plaintiff is an undocumented worker, he was unable to secure employment which he would be able to perform based on his restrictions but for his status as an undocumented worker.

22. Plaintiff has failed to prove that he is unable to earn pre-injury wages, regardless of his status as an undocumented worker.

...

24. Based upon the credible evidence of record, the [Full Commission] find[s] that ankylosing spondylitis is a condition that was not caused by plaintiff's compensable injury.

Plaintiff also challenges the following conclusions of the Full Commission:

2. Plaintiff's ankylosing spondylitis condition is not the direct and natural result of, or causally related to his February 27, 2000 injury by accident. N.C. Gen. Stat. §97-2(6).

3. Plaintiff is now capable of returning to work, and defendants have identified positions which plaintiff would be capable of getting, but for his status as an undocumented worker. *Gayton v. Gage*, 149 N.C. App. 346, 560 S.E.2d 870 (2002). Accordingly, Special Deputy Commissioner Kesler correctly terminated plaintiff's temporary total benefits as of September 9, 2003. *Id.*

...

5. Defendants are entitled to a credit for overpayment for any temporary total disability paid after September 9, 2003. N.C. Gen. Stat. §97-42.

On appeal our standard of review is limited to "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). This Court's review "goes no further than to determine whether the record contains any evidence tending to support the finding." *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (citation omitted). The Full Commission's findings of fact are conclusive on

appeal when supported by competent evidence, even if there is evidence to support a contrary finding, and may be set aside on appeal only “when there is a complete lack of evidence to support them[.]” *Morrison v. Burlington Indus.*, 304 N.C. 1, 6, 282 S.E.2d 458, 463 (1981); *see Young v. Hickory Bus. Furniture*, 353 N.C. 227, 230, 538 S.E.2d 912, 914 (2000) (citation omitted).

The evidence supports Finding of Fact fifteen. In Dr. Spillmann’s 19 November 2002 treatment note, plaintiff had “no restrictions.” In his deposition testimony, Dr. Spillmann reiterated his opinion that plaintiff had no work restrictions. Dr. Spillmann had placed plaintiff at maximum medical improvement, determined that he had no work restrictions and sent him back to work consistent with the results of his Functional Capacity Evaluation test. In his 29 July 2003 treatment note, Dr. Spillmann did not assign any work restrictions to plaintiff and indicated plaintiff’s work capacity “per the [FCE] places him in the Heavy category”. This assignment of error is overruled.

The evidence supports Findings of Fact eighteen through twenty-two and Conclusions of Law three and five. After having treated plaintiff, Dr. Spillmann specifically approved four fast-food job descriptions submitted by defendant-employer. A Labor Market Survey identified at least eleven job openings based on plaintiff’s work experience. These jobs paid wages within a dollar an hour of plaintiff’s pre-injury job and each fast-food job had opportunities for advancement and increased wages, unlike plaintiff’s pre-injury job with defendant-employer.

The burden is on the employee to prove his incapacity to earn, as a result of the compensable injury, the same wages he was earning at the time of the injury. . . . [A]lthough the Plaintiff’s post-injury earnings [would be] less than [his] pre-injury earnings, the focus should be on the issue of whether Plaintiff’s earning capacity or power has been diminished. Our Supreme Court has held that compensation must be based upon loss of wage earning power

rather than the amount actually received. It was intended by the statute to provide compensation only for loss of earning capacity.

*Derosier v. WNA, Inc.*, 149 N.C. App. 597, 601, 562 S.E.2d 41, 44 (2002) (citations and internal quotation marks omitted); *see Dixon v. City of Durham*, 128 N.C. App. 501, 495 S.E.2d 380, *disc. review denied*, 348 N.C. 496, 510 S.E.2d 381 (1998) (suitability of post-injury jobs offered is determined by factors including wage earning capacity). There is no medical evidence in the record that plaintiff's earning capacity was diminished by his 27 February 2000 workplace injury after 9 September 2003. The Full Commission properly concluded that as of 9 September 2003 plaintiff's temporary disability status had ended and plaintiff was "capable of returning to work, and defendants have identified positions which plaintiff would be capable of getting, but for his status as an undocumented worker." These assignments of error are overruled.

Finding of Fact twenty-four and Conclusion of Law two are supported by the evidence. Plaintiff has the burden to prove each element of compensability of his claim. *Holley v. ACTS, Inc.*, 357 N.C. 228, 234, 581 S.E.2d 750, 754 (2003) (citation omitted). "When dealing with a complicated medical question . . . expert medical testimony is necessary to provide a proper foundation for the Commission's findings." *Id.* While "medical certainty is not required, an expert's 'speculation' is insufficient to establish causation." *Id.*

The medical testimony in this case clearly indicates plaintiff's ankylosing spondylitis condition was not caused by his 27 February 2000 workplace injury. On 26 October 2000, Dr. Krege, at a loss for what caused plaintiff's pain, examined plaintiff and diagnosed him with ankylosing spondylitis. Dr. Krege found that plaintiff was at maximum medical improvement with regard to his work injury and plaintiff had sustained no permanent partial impairment rating as the result of his workplace injury.

On 13 July 2002, plaintiff was examined by Dr. Spillmann because he complained of continued neck pain with stiffness and limited neck mobility. After extensive evaluation and examination, Dr. Spillmann released plaintiff to work without restrictions. Plaintiff was also examined by a neurosurgeon, Dr. Rick Holmberg who stated plaintiff's ankylosing spondylitis was not related to plaintiff's workplace injury, but that the condition could complicate the symptoms from the incident. In their findings, the Full Commission gave greater weight to the testimony of Dr. Spillmann, an expert in preventive and occupational medicine, than that of Dr. Holmberg and found that Dr. Holmberg should not be approved as plaintiff's authorized treating physician regarding the workplace injury. When asked specifically if plaintiff's workplace injury could have triggered the manifestation of plaintiff's condition, Dr. Spillmann indicated that it was "speculative." Dr. Spillmann also stated that "[m]ost of the time [ankylosing spondylitis] just happens. It just starts. We don't know actually most of the time what triggers it." The Commission's finding that plaintiff's ankylosing spondylitis condition was not caused by his workplace injury, and was not the direct and natural result of or causally related to the work-related accident is supported by the evidence in this case. These assignments of error are overruled.

Affirmed.

Judges MCGEE and ELMORE concur.

Report per Rule 30(e).