

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA04-1342

NORTH CAROLINA COURT OF APPEALS

Filed: 18 October 2005

PARIS A. BROWN,
Employee,
Plaintiff

v.

North Carolina Industrial Commission
I.C. File No. 034333

N.C. DEPARTMENT OF CORRECTION,
Employer
SELF-INSURED (KEY
RISK MANAGEMENT, Third-
Party Administrator),
Defendants

Appeal by plaintiff from an opinion and award entered 29 July 2004 by the North Carolina Industrial Commission. Heard in the Court of Appeals 16 August 2005.

The Law Firm of Hutchens, Senter & Britton, by William L. Senter and Rudolph G. Singleton, Jr., for plaintiff-appellant.

Attorney General Roy A. Cooper, III, by Assistant Attorneys General Marc X. Sneed and Richard J. Votta, for defendant-appellees.

HUNTER, Judge.

Paris A. Brown (“plaintiff”) appeals the opinion and award of the Industrial Commission (“Commission”) dated 29 July 2004. For the reasons stated herein, we affirm the opinion and award.

Plaintiff was employed by the North Carolina Department of Correction (“DOC”) as a correctional officer at the Hoke County Correctional Institution. On 1 February 2000, plaintiff

injured his hand while unlocking a cell door. Plaintiff was initially treated by Dr. Louis P. Clark (“Dr. Clark”), an orthopaedist with the Cape Fear Orthopaedic Clinic in Fayetteville. On 12 May 2000, Dr. Clark performed surgery on plaintiff to remove an arthritic spur in his right hand. On 12 December 2000, Dr. Clark assigned plaintiff a five percent (5%) permanent partial impairment of his right hand. Plaintiff filed for workers’ compensation for the injury and, pursuant to a Form 21 Agreement approved by the Commission, plaintiff was paid ten weeks of benefits for the five percent (5%) permanent partial impairment on 1 March 2001.

Plaintiff continued to complain of pain, cramping, and discomfort in his right hand at the site of the surgery. On 5 April 2001, plaintiff requested a second opinion which was approved by defendants. Dr. Clark referred plaintiff to Dr. James H. Askins (“Dr. Askins”), an orthopaedist with the Fayetteville Orthopaedic Clinic. Dr. Askins examined plaintiff on 1 May 2001 and found no further surgery or change in treatment was indicated. Dr. Askins also concurred with Dr. Clark’s assignment of a five percent (5%) permanent partial impairment in plaintiff’s right hand.

Plaintiff continued to complain of pain in his right hand and requested an additional opinion and evaluation by Dr. Jon Kolkin (“Dr. Kolkin”) of the Raleigh Hand Clinic. Dr. Kolkin is a board-certified orthopaedic surgeon with a certified sub-speciality in hand and upper extremity surgery. Dr. Kolkin had previously treated plaintiff for unrelated problems with his left hand in 1998. Defendants approved the request. Plaintiff saw Dr. Kolkin on 12 July 2001. Initially conservative treatment was prescribed, but when plaintiff’s complaints did not respond to the treatment, Dr. Kolkin performed a second surgery on 26 September 2001 to fuse a joint in plaintiff’s right hand.

Plaintiff returned to light duty work in December 2001 after undergoing physical therapy, and returned to full duty work sometime in late January 2002. Plaintiff filed a Form 28 with the Commission on 6 February 2002. Plaintiff was released to full duty work without restrictions by Dr. Kolkin on 28 March 2002, with a finding of twelve percent (12%) permanent partial impairment of plaintiff's right hand. Plaintiff continued to complain of swelling, pain, and discomfort in his wrist at that time. Plaintiff applied for payment of permanent partial disability for the additional seven percent (7%) disability on 28 May 2002. Plaintiff received fourteen weeks of benefits pursuant to a Form 26 Agreement, which was approved by the Commission on 28 May 2002.

Plaintiff returned to Dr. Kolkin on 29 April 2002 with continued complaints of pain, and requests for pain medication. Dr. Kolkin recommended plaintiff see his family physician for pain management, as there was no further need for orthopaedic care. Dr. Kolkin made no changes in his assessment of plaintiff's impairment or release to full duty work.

Plaintiff was examined by his family physician, Dr. Carolyn M. Sampson ("Dr. Sampson"), with Fayetteville Family Medical Care on 30 April 2002. Dr. Sampson ordered an MRI on 5 May 2002 and recommended plaintiff stay out of work. Plaintiff did not return to work after 29 April 2002. On 29 May 2002, Dr. Sampson restricted plaintiff from work, and referred plaintiff to Dr. Terry M. Messer ("Dr. Messer"), a board eligible orthopaedist with Carolina Orthopaedics. Plaintiff moved the Commission for an order authorizing additional treatment for change of condition and for change of treating physician prior to his first visit with Dr. Messer. Defendants objected to the motion, and the Commission issued an order on 10 October 2002 allowing a one time only visit with Dr. Messer, and deferring all other issues in dispute for a full evidentiary hearing.

Dr. Sampson continued to treat plaintiff and continued to restrict plaintiff from work, completing forms on 1 August 2002, 27 August 2002, and 30 September 2002 identifying specific job functions she believed plaintiff could not perform. Plaintiff also saw Dr. Messer on three occasions, beginning on 28 August 2002. After examining plaintiff, Dr. Messer ordered a CT scan to confirm whether the surgery to fuse the joint was successful. On 6 November 2002, Dr. Messer met with plaintiff again, examined the scan which showed the bone to be fused, and ordered a specialized splint to limit plaintiff's wrist mobility for recovery. Dr. Messer believed that the discomfort was from swollen tendons in the surgery area. When given a work-functions questionnaire, Dr. Messer marked seven of twenty-one activities that plaintiff "might" have trouble performing, but did not think plaintiff was incapable of doing the work. Dr. Messer generally agreed with Dr. Kolkin's conclusion that there was nothing objectively preventing plaintiff from performing his duties. On 8 January 2003, Dr. Messer again reviewed the CT scan, found no clinical explanation for plaintiff's continued pain, and identified no further recommended treatment options. Dr. Messer released plaintiff with no further follow-up appointments, but did restrict plaintiff from working as a correctional officer, opining that plaintiff could not perform all the essential functions of that job.

Plaintiff filed a Form 33 on 29 July 2002, asserting that he had experienced a change of condition and had been unable to work since 29 April 2002. The deputy commissioner found no substantial change of condition, and denied plaintiff's recovery of additional disability benefits. Defendant appealed to the Full Commission. On 29 July 2004 the Full Commission affirmed the denial of plaintiff's claim for additional benefits. Plaintiff appeals.

I.

Plaintiff first contends the Commission erred in finding that plaintiff's job was available to him after release by his treating physician. We disagree.

We first note this Court's well-established standard for review of the Commission's orders and awards of workers' compensation. In reviewing an appeal from the Full Commission, this Court is limited to review of "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 court does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Anderson v. Construction Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965).

We note that plaintiff has failed to follow our Rules of Appellate Procedure, which require that plaintiff present citations to the authorities upon which plaintiff relies in the body of his argument. N.C.R. App. P. Rule 28(b)(6) (stating "[a]ssignments of error . . . in support of which no . . . authority [is] cited, will be taken as abandoned). Plaintiff cites no authority whatsoever in support of this assignment of error. This assignment of error is therefore rejected. *See Little v. Stogner*, 162 N.C. App. 25, 35, 592 S.E.2d 5, 12 (2004).

Furthermore, we note that the record contains competent evidence to support the finding of fact that Dr. Kolkin, plaintiff's treating workers' compensation physician, released plaintiff to return to work in December 2001 without restrictions, that plaintiff testified that he understood that he had been released to return to work without restrictions, and that his job was available to him at that time. Therefore, this assignment of error is without merit.

II.

Plaintiff also contends the trial court erred in concluding that plaintiff had failed to establish by the greater weight of the evidence that he had suffered a substantial change of condition. We disagree.

As noted *supra*, this Court is limited to review of “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*, 352 N.C. at 116, 530 S.E.2d at 553. “Furthermore, ‘[t]he facts found by the Commission are conclusive upon appeal to this Court when they are supported by competent evidence, even when there is evidence to support contrary findings.’” *Allen v. Roberts Elec. Contr’rs*, 143 N.C. App. 55, 60, 546 S.E.2d 133, 137 (2001) (citations omitted). “In weighing the evidence, the Commission is the sole judge of the credibility of witnesses and the weight to be given their testimony[.]” *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993).

N.C. Gen. Stat. §97-47 (2003) permits application of a party in interest for review of an award on the grounds of a change in condition. “[T]he burden is on the party seeking the modification to prove the existence of the new condition and that it is causally related to the injury that is the basis of the award the party seeks to modify.” *Allen*, 143 N.C. App. at 62, 546 S.E.2d at 138 (citation omitted).

Change of condition “refers to conditions different from those existent when the award was made; and a continued incapacity of the same kind and character and for the same injury is not a change of condition . . . the change must be actual, and not a mere change of opinion with respect to a pre-existing condition.”

Pratt v. Upholstery Co., 252 N.C. 716, 722, 115 S.E.2d 27, 33 (1960) (citation omitted).

Here, evidence was presented that Dr. Kolkin, the physician specifically authorized at plaintiff’s request as his treating workers’ compensation physician, found no clinical reason for

plaintiff to be restricted from work, and found no evidence of change of condition in plaintiff's condition at the time of plaintiff's last visit with him on 29 April 2002. We note that defendants had the right to direct plaintiff's medical treatment, as they had accepted plaintiff's claim as compensable. *See Kanipe v. Lane Upholstery*, 141 N.C. App. 620, 624, 540 S.E.2d 785, 788 (2000). The record also reflects that Dr. Sampson, a family physician not authorized to provide workers' compensation care for plaintiff's orthopaedic injury, noted that plaintiff had no significant increase in pain during her treatment of him from 30 April 2002 to 29 May 2002. Dr. Messer, an orthopaedic specialist who was only authorized to examine plaintiff once for workers' compensation purposes, after three visits made a final assessment "quite similar" to that of Dr. Kolkin's, determining that there was no clinical basis for plaintiff's continued complaints. Although the record reflects a difference of opinion among the testifying physicians as to the pre-existing condition, "the Commission is the sole judge of the credibility of witnesses and the weight to be given their testimony[.]" *Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457. As the record contains competent evidence which supports the Commission's conclusion that "[p]laintiff has failed to establish by the greater weight of the evidence, medical and otherwise, that he underwent a substantial change of condition[.]" we affirm the Commission's denial of additional weekly benefits.

Affirmed.

Judges McGEE and LEVINSON concur.

Report per Rule 30(e).