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NO. COA01-636

NORTH CAROLINA COURT OF APPEALS

Filed: 16 April 2002

PATRICIA D. ROTH,  
Employee,  
Plaintiff

v.

North Carolina Industrial Commission  
I.C. File No. 078192

U.S. AIRWAYS, INC.,  
Self-Insured Employer,  
Defendant

Administered by: Kemper Risk  
Management Services

Appeal by defendant from opinion and award filed 30 January 2001 by the North Carolina Industrial Commission. Heard in the Court of Appeals 20 February 2002.

*Bollinger & Piemonte, PC, by Bobby L. Bollinger, Jr., for plaintiff-appellee.*

*Brooks, Stevens & Pope, P.A., by Robert H. Stevens, Jr. and Joy H. Brewer, for defendant-appellant.*

*R. James Lore; and Patterson, Harkavy & Lawrence, L.L.P., by Henry N. Patterson, Jr., for Amicus Curiae North Carolina Academy of Trial Lawyers.*

WALKER, Judge.

On 21 April 1990, plaintiff was employed by defendant as a flight attendant when she suffered a compensable injury to her right arm and hand. In early 1993, plaintiff was referred to Thomas Alexander Duc, M.D. for her continued pain. She had been diagnosed with Reflex Sympathetic Dystrophy (RSD) as a result of the injury. Dr. Duc also diagnosed her as having

developed winged scapula. He testified that this could be a result of the RSD because of the way that she held her arm, the extended periods of time the arm was in a sling, or her exercise protocol and pain.

Plaintiff received temporary total disability until 1 September 1993 when she returned to her regular job working a reduced schedule of fifteen hours per week. On 25 October 1993, plaintiff re-injured her right arm at work. Thereafter, during parts of 1993, 1994, 1995 and 1996, plaintiff missed work and the compensation due by defendant for these periods is not in contention.

On 13 May 1996, plaintiff returned to work with defendant in an administrative position updating and maintaining employee records, verifying time cards, processing bills, distributing mail, processing monthly reports, typing employee's evaluations, updating and maintaining training records, taking phone messages and sending faxes. Plaintiff testified that she attempted to do the work but was unable to perform the functions of the job because of her injuries and the restrictions placed on her by her physicians. She experienced pain in her right arm and hand when performing the tasks required by this position. She had difficulty writing, copying, filing, separating papers, lifting files, punching holes, and performing other aspects of her job.

T. Kern Carlton, III, M.D. saw the plaintiff for an independent medical evaluation in August of 1997. He testified that "[plaintiff] has some weakness that has developed in the muscles that support the scapula. And I think that's from not using that extremity." He stated that a cause of winged scapula was not using the arm and thus developing weakness in the muscles around the scapula. He further testified that "based on the history that she gave me, the records that I saw, and the fact that she denied any problems prior to that, [the winged scapula] appears to be related [to the 1990 injury]. I think it's related."

Michael Felix Freshwater, M.D. saw plaintiff in the spring of 1998 for a further impartial medical evaluation. He stated in his report the following in part:

I feel that it was a mistake to place this patient in the office type of environment, which was clearly unsuitable for her. Dr. Naso's report did state that she should not perform "any prolonged typing, stapling, etc.," and there appears to be a conflict regarding what her duties were at work. I believe her current work restrictions should exclude her from performing any type of office tasks, and should also include her not being exposed to temperatures under 68° Fahrenheit, vibrating machinery, tools, or equipment.

After a hearing on 25 October 2000, the North Carolina Industrial Commission (Commission) filed its opinion and award on 30 January 2001. The Commission found in part the following:

5. Plaintiff attempted to return to work from 1 December 1993 through 30 April 1994 as an airline attendant but was unable to maintain this job. On 13 May 1996, plaintiff returned to work with defendant-employer in an administrative position. The job required that plaintiff update and maintain employee attendance files, verify time cards, process station billing, distribute company mail and postings, gather and process monthly reports, type employee's evaluations, update and maintain training records, take phone messages for her supervisor and send faxes.

6. In the course of performing her administrative duties from 13 May 1996 through 23 October 1997, plaintiff experienced pain "like a toothache," her right arm turned red and blotchy and beaded with sweat. She experienced shoulder pain and when attempting fine motor skills, felt as if her hand was on fire. Plaintiff experienced difficulty writing, copying, filing, separating papers, lifting files, punching holes, etc.

7. Due to plaintiff's physical limitations, she was unable to perform the administrative job at an acceptable level and received several reprimands and disciplinary actions, both verbal and written. If plaintiff receives three levels of reprimands, then she will be terminated. Plaintiff had no prior disciplinary problems or reprimands before her compensable injury.

8. On any given day, plaintiff could perform her various duties for approximately an hour or an hour and 45 minutes and would experience pain, bright red discoloration of her hand, and sweat beading on her skin.

9. ... Plaintiff has been under work restrictions given to her by Dr. Duc since November 1993 as a direct and proximate result of her compensable injury. Plaintiff's work restrictions include no lifting of greater than five to ten pounds, no prolonged or repetitive use of the right hand and, as fine motor skills are painful with plaintiff's right hand, the avoidance of writing and typing. Dr. Duc was of the opinion that plaintiff's reflex sympathetic dystrophy was the result of her compensable 21 August 1990 injury and that plaintiff's winged scapula might also be a result of that injury. However, he was of the opinion that plaintiff's winged scapula could have been as an indirect result of plaintiff's RSD due to disuse or guarding of the right side. ... Dr. Duc was of the opinion that plaintiff retains a 25% permanent partial impairment of the right upper extremity due to her RSD and winged scapula. Dr Duc was further of the opinion that plaintiff could have trouble typing, writing and with extended filing.

...

11. On 18 August 1997, plaintiff presented to Dr. T. Kern Carlton, a physical medicine and rehabilitation physician board-certified in pain medicine, for an independent medical examination requested by the insurance company. Dr. Carlton concurred with plaintiff's diagnosis of RSD of the right upper extremity. Dr Carlton was of the opinion that plaintiff's RSD and winged scapula were caused by her 21 August 1990 compensable injury....

12. ... [Dr. Freshwater] was further of the opinion that she was in the chronic stages of reflex sympathetic dystrophy and that the worse thing that could happen to her was for her to be placed in a work environment which would "fan the flames and aggravate her condition."

...

14. Although Dr. Naso is the only doctor who did not diagnose plaintiff as having reflex sympathetic dystrophy, defendant-employer based all of plaintiff's job duties, assignments and requirements on Dr. Naso's evaluation and, according to the testimony of plaintiff's supervisor, Glenn Stryker, refused to

consider any other doctor's evaluations or opinions, or plaintiff's symptoms which they directly observed.

15. Because Dr. Duc has been plaintiff's primary treating physician and is most familiar with her case, and because the majority of physicians who examined plaintiff agree with Dr. Duc's diagnosis and permanent partial disability rating, the opinions of Dr. Duc regarding plaintiff's condition, rating, and ability to perform the administrative job with defendant-employer are accorded greater weight than contrary opinions of other physicians who have provided plaintiff with treatment.

...

20. Plaintiff's refusal to perform her employment in the administrative position with defendant-employer was justified as the position was not suitable for her. The position was not within her physical capabilities or her capabilities according to the medical opinions of any doctor other than Dr. Naso, and as such was not indicative of plaintiff's earning capacity. Plaintiff's physical inability to perform the job is the direct and proximate result of her compensable 21 August 1990 injury.

...

22. As a direct and proximate result of her 21 August 1990 compensable injury by accident, plaintiff sustained reflex sympathetic dystrophy of the right extremity and winged scapula.

The Commission concluded in part the following:

2. As a direct and proximate result of her 21 August 1990 compensable injury, plaintiff sustained reflex sympathetic dystrophy of the right upper extremity and winged scapula.

3. As a direct and proximate result of her 21 August 1990 compensable injury, from 24 October 1997 and continuing, plaintiff was and continues to be incapable of earning wages which she was receiving at the time of her injury at the same or in any other employment. N.C. Gen. Stat. §97-29.

4. Plaintiff's refusal to perform the administrative position with defendant-employer was justified as the position was not within her physical capabilities due to her 21 August 1990 compensable injury. N.C. Gen. Stat. §97-32.

The Commission awarded plaintiff temporary total disability compensation from 24 October 1997 until further order of the Commission.

“The findings of fact by the Industrial Commission are conclusive on appeal if supported by any competent evidence,” even if there is evidence to the contrary. *Adams v. AVX Corp.*, 349 N.C.676, 681, 509 S.E.2d 411, 414 (1998), *reh’g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999)(quoting *Gallimore v. Marilyn’s Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977)). “The 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.” *Id.* (citing *Doggett v. Warehouse Co.*, 212 N.C. 599, 194 S.E. 111 (1937)).

Defendant first contends that the Commission erred in finding that plaintiff’s winged scapula was a direct and proximate result of the 1990 compensable injury. Medical testimony which is speculative and based solely on supposition and conjecture is incompetent and insufficient on its own to support findings by the Commission. *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 538 S.E.2d 912 (2000). In *Young*, our Supreme Court held that medical testimony was insufficient when the sole basis of the medical opinion regarding the connection between the plaintiff’s fibromyalgia and the compensable injury was one physician’s testimony that such a connection was a possibility based on the fact that there was no fibromyalgia before the injury. *Id.* at 233, 538 S.E.2d at 917.

Here, Dr. Carlton testified that, based on plaintiff’s history, his review of her records, and the lack of problems before 1990, it was his opinion that plaintiff’s winged scapula was causally related to the 1990 injury. He testified that winged scapula can result from “disuse atrophy.” Dr. Duc testified that winged scapula could be the result of disuse and guarding of plaintiff’s right side because of her RSD. There also was evidence of weakness of the muscles around the

scapula resulting from disuse and the extensive time during which plaintiff's arm was in a sling. Unlike *Young*, the evidence here of a connection between plaintiff's winged scapula and the 1990 compensable injury is based on more than just timing and mere speculation. We find there is sufficient evidence to support the Commission's finding that plaintiff's winged scapula was a direct and proximate result of her 1990 injury.

Defendant further contends that the Commission erred in concluding that the plaintiff justifiably refused to perform the administrative position. N.C. Gen. Stat. §97-32 (1999) states, "If an injured employee refuses employment procured for him suitable to his capacity he shall not be entitled to any compensation at any time during the continuance of such refusal, unless in the opinion of the Industrial Commission such refusal was justified." Here, the Commission found that plaintiff's refusal to perform her employment in the administrative position was justified as the position was not suitable for her. Further, the position was not within her physical capabilities according to the medical opinions of the physicians other than Dr. Naso.

Dr. Duc testified that his restrictions for plaintiff included "obviously no lifting, no repetitive motion with the involved hand. And if fine motor skills are painful with that hand, avoidance of writing and typing and those types of things would probably be best for [plaintiff]." He also testified that typing was difficult for her. The administrative position offered to plaintiff required her to perform multiple tasks using her right arm and hand. Plaintiff testified that she experienced pain in her right arm, hand, and shoulder as a result of attempting to perform these tasks. She received several reprimands, both verbal and written, for failure to perform her job at an acceptable level. Prior to her 1990 injury, she had never had any disciplinary problems nor reprimands.

Based on all of the medical evidence, the Commission was entitled to find that plaintiff's refusal to perform her employment in the administrative position was justified as the position was not suitable for her.

In conclusion, we find there is competent evidence to support the findings which, in turn, support the conclusions of the Commission. The order of the Commission is

Affirmed.

Judges HUNTER and BRYANT concur.

Report per Rule 30(e).