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NO. COA05-1287

NORTH CAROLINA COURT OF APPEALS

Filed: 2 May 2006

WILHELMINA FOSTER-LONG,
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 101235

DURHAM COUNTY,
Employer,

SELF-INSURED (COMPENSATION CLAIMS
SOLUTIONS, Servicing Agent),
Defendant.

Appeal by defendant and cross-appeal by plaintiff from opinion and award entered 1 July 2005 by Commissioner Christopher Scott for the North Carolina Industrial Commission. Heard in the Court of Appeals 19 April 2006.

William G. Goldston, for plaintiff-appellee/cross appellant.

Young Moore and Henderson P.A., by Dawn Dillon Raynor and Jennifer T. Gottsegen, for defendant-appellant/cross appellee.

TYSON, Judge.

Durham County (“defendant”) appeals from the Industrial Commission’s (“Commission”) approval of Wilhelmina Foster-Long’s (“plaintiff”) request to change her treating physician. Plaintiff cross-appeals asserting the Commission erred in denying her motion

to consider new evidence and to supplement her motion to consider new evidence, and in failing to consider plaintiff's form 18M. We affirm.

I. Background

A. History of Treatment

Plaintiff is employed with the Durham County Government Criminal Justice Resource Center and supervises the Substance Abuse Treatment Program. Plaintiff was injured at work on 29 March 2000. She was walking down a flight of stairs in the building at her workplace. Plaintiff was distracted by a bee in the window and fell down three or four stairs. Plaintiff developed pain in her back the day after the fall.

Plaintiff was seen by Dr. Aaron Miller ("Dr. Miller") at Research Triangle Occupational Health Service, who prescribed pain medication. She presented several more times to Dr. Miller and was referred to Dr. Peter Gilmer ("Dr. Gilmer") at Triangle Orthopaedic Associates ("Triangle Orthopaedics"). Dr. Gilmer diagnosed plaintiff with a lumbar strain on 11 May 2000 and recommended physical therapy. Plaintiff returned to Dr. Gilmer on 7 June 2000. Dr. Gilmer encouraged plaintiff to participate in physical therapy and to return to work.

Plaintiff returned to Dr. Gilmer's office on 2 October 2000 complaining of increased pain after a period of improvement. On 27 October 2000, plaintiff was seen by Dr. Ralph Orenstein ("Dr. Orenstein") with Triangle Orthopaedics. Dr. Orenstein performed a Magnetic Resonance Imaging examination ("MRI") which indicated disc desiccation and mild disc bulges. Dr. Orenstein also diagnosed degenerative disc disease and degenerative joint disease in the lower lumbar spine. Plaintiff underwent epidural steroid injections.

Plaintiff returned to Dr. Orenstein on 15 December 2000 reporting improvement and little pain. Dr. Orenstein recommended facet joint injections instead of epidural injections and a

course of physical therapy. On 2 January 2001, plaintiff returned to Dr. Orenstein and reported great improvement from pain after the injections. On 23 March 2001, plaintiff was seen by Dr. Orenstein for pain. On 29 June 2001, Dr. Orenstein recommended a course of chiropractic treatment and prescribed Darvocet for pain.

On 22 October 2001, plaintiff reported new neck pain without trauma to Dr. Orenstein. On 6 March 2002, plaintiff reported increased pain and underwent an MRI which revealed bulging and stenosis. Plaintiff reported increased pain radiating down her left leg on 10 May 2002.

Plaintiff returned to Dr. Gilmer on 29 May 2002 for a consultation regarding surgery on her back. Surgery was not indicated and Dr. Gilmer encouraged a conservative program with emphasis on walking. On 16 January 2003, plaintiff was seen by Dr. Scott Sanitate (“Dr. Sanitate”) for a second opinion regarding surgery. Dr. Sanitate found that surgery would be premature. Dr. Sanitate suggested a Lidoderm Patch and possible acupuncture or repeat injections. Plaintiff returned to Dr. Orenstein on 14 May 2003. Dr. Orenstein agreed that surgery was not indicated and found plaintiff to be at maximum medical improvement with a 10% permanent partial impairment rating.

On 26 June 2003, plaintiff was seen by Dr. T. Craig Darian (“Dr. Darian”) for a second opinion of Dr. Orenstein’s impairment rating. Dr. Darian is an orthopaedic surgeon specializing in adult reconstructive spinal surgery. Dr. Darian recommended another MRI, did not believe plaintiff to be at maximum medical improvement, but agreed with the other physicians that if plaintiff did not wish to consider further treatment options, she would have a 10% permanent partial impairment rating. Another MRI was performed and plaintiff has continued treatment with Dr. Orenstein.

B. Procedural History

On 28 December 2000, defendant filed a Form 60 admitting the compensability of plaintiff's claim. Since that time, defendant has paid for all of plaintiff's medical treatment for her back. However, defendant denied authorization for treatment by Dr. Derian.

On 4 August 2003, plaintiff filed a Motion to Change Treating Physicians with the Industrial Commission. Plaintiff sought an order designating Dr. Derian as her treating physician. The Commission granted plaintiff's motion to change physicians to a physician upon whom both parties would agree. The parties were unable to agree on a new physician. Plaintiff filed a Form 33 request for hearing on this issue.

The Deputy Commissioner entered an opinion and award on 18 December 2003 denying plaintiff's request to change physicians to Dr. Derian. The Deputy Commissioner concluded that plaintiff failed to show that a change of physicians is reasonably and medically necessary. The Deputy Commissioner concluded plaintiff is entitled to another MRI and continued treatment with Dr. Gilmer and Dr. Orenstein.

Plaintiff appealed to the Full Commission. Prior to the hearing before the Full Commission, plaintiff moved to have the Commission consider her most recent medical records. Plaintiff subsequently supplemented her motion with additional new medical records. Plaintiff further supplemented her evidence with a Form 18M. The Full Commission denied plaintiff's motion to consider new evidence.

The Full Commission reversed the Deputy Commissioner's Opinion and Award and concluded plaintiff had shown that a change of physicians is reasonably and medically necessary pursuant to N.C. Gen. Stat. §97-25 (2005). The Commission concluded that the "approval of Dr. Derian as plaintiff's authorized treating physician is not an approval of surgery if surgery is not

reasonably required to effect a cure, give relief, or lessen the plaintiff's disability." The Commission ordered Dr. Derian to be designated as plaintiff's treating physician. Defendant appeals. Plaintiff cross-appeals.

II. Issues

Defendant argues the Commission abused its discretion in approving plaintiff's request to change physicians.

Plaintiff argues on cross-appeal that the Commission erred in denying plaintiff's motion to consider new evidence and to supplement her motion to consider new evidence, and in failing to consider plaintiff's form 18M.

III. Defendant's Appeal: Plaintiff's Request to Change Physicians

Defendant argues the Commission abused its discretion in approving plaintiff's request to change physicians. We disagree.

N.C. Gen. Stat. §97-25 provides that if a controversy arises between the employer and the employee regarding treatment, the Commission "may order such further treatments as may in the discretion of the Commission be necessary." (Emphasis supplied). We review the Commission's decision to approve plaintiff's request to change physicians under an abuse of discretion standard. *Franklin v. Broyhill Furniture Industries*, 123 N.C. App. 200, 207, 472 S.E.2d 382, 387, cert. denied, 344 N.C. 629, 477 S.E.2d 39 (1996). An abuse of discretion occurs when the ruling "is manifestly unsupported by reason" or "is so arbitrary that it could not have been the result of a reasoned decision." *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998).

Evidence presented at the hearing tended to show plaintiff had undergone several years of conservative treatment under Dr. Gilmer and Dr. Orenstein including a number of medications,

physical therapy, chiropractic treatment, walking therapy, and injections. Plaintiff remained in pain after having undergone these treatments. Dr. Orenstein, as plaintiff's treating physician, referred plaintiff to Dr. Derian. On the record before us, defendant has failed to show how the Commission's decision to allow plaintiff to change treating physicians was "manifestly unsupported by reason" or "so arbitrary that it could not have been the result of a reasoned decision." *Briley*, 348 N.C. at 547, 501 S.E.2d at 656. This assignment of error is overruled.

IV. Plaintiff's Cross-Appeal: Motion to Consider New Evidence

Plaintiff argues the Commission abused its discretion in denying plaintiff's motion to consider new evidence and plaintiff's supplement to motion to consider new evidence, and failed to consider plaintiff's Form 18M. In light of our decision to affirm the Industrial Commission's approval of plaintiff's request to change physicians, this issue is moot

V. Conclusion

Defendant failed to show the Commission abused its discretion in approving plaintiff's request to change physicians. Plaintiff's assignments of error asserted on her cross-appeal are moot. The Commission's order and award is affirmed.

Affirmed.

Judge GEER and JACKSON concur.

Report per Rule 30(e).