NO. COA08-1039-2
NORTH CAROLINA COURT OF APPEALS

Filed: 2 August 2011

WILLIAM SYKES,
Employee-Plaintiff

v. FROM NORTH CAROLINA INDUSTRIAL COMMISSION FILE NO. 106105

MOSS TRUCKING COMPANY, INC

Employer,

PROTECTIVE INSURANCE COMPANY,

Carrier
Defendants.

Appeal by defendants from opinion and award entered 22 May 2008 by the Industrial Commission. This case was originally heard in the Court of Appeals 11 February 2009. *See Sykes v. Moss Trucking Co.*, 199 N.C. App. 540, 685 S.E.2d 1 (2009). Upon remand by order from the North Carolina Supreme Court, filed 25 June 2010. *See Sykes v. Moss Trucking Co.*, 363 N.C. 743, 689 S.E.2d 378, 2009 N.C. LEXIS 1293 (2009).

*Teague, Campbell, Dennis & Gorham, LLP, by John A. Tomei, for defendants-appellants*

*Plaintiff-appellee appears pro se.*

ELMORE, Judge.

## I. Background

This Court initially heard the appeal by Moss Trucking Company, Inc. (defendant Moss Trucking), and Protective Insurance Company (together, defendants) from an opinion and award entered 22 May 2008 by the Industrial Commission. *See Sykes v. Moss Trucking Co.*, 199 N.C. App. 540, 685 S.E.2d 1 (2009) (unpublished). A unanimous panel of this Court reversed the award, which had found in favor of William Sykes (plaintiff) and had reinstated his temporary total disability benefits and medical compensation benefits. The Supreme Court then granted plaintiff's petition for discretionary review, and the matter was remanded to this Court "for reconsideration in light of N.C.G.S. § 97-86, *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998)[,] and *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 115, 530 S.E.2d 549, 553 (2000)."

As we stated in our previous opinion, the appeal from the Industrial Commission's award was based on the following positions:

> Defendants argue that the findings of fact made by the Industrial Commission majority are not supported by competent evidence, nor are its conclusions of law justified by its findings of fact. Defendants maintain that plaintiff is not in compliance with a

> previous order of the Industrial Commission, and, therefore, his benefits should remain suspended.

*Sykes*, 199 N.C. App. at 541, 685 S.E.2d at 2. This Court agreed with defendants and reversed the Industrial Commission on that basis.

As we related in our previous decision:

> On 4 October 1990, plaintiff sustained an admittedly compensable injury to his lower back while working as a long haul truck driver for defendant Moss Trucking. The North Carolina Industrial Commission approved an Agreement for Compensation for Disability, and defendant Moss Trucking's insurance carrier, Protective Insurance Company, began paying temporary total disability compensation to plaintiff. Plaintiff received the payments from 6 November 1990 until 30 November 1998 at the rate of $399.00 per week. During this time, plaintiff sought treatment from a number of different doctors and specialists. Two of these doctors, Dr. George Charron and Dr. Alan Towne, provided differing recommendations about plaintiff's medical recovery and his ability to return to gainful employment. Dr. Charron, an orthopedic surgeon, believed that plaintiff had reached maximum medical improvement and could return to work. Dr. Towne, a neurologist, did not believe that plaintiff had reached maximum medical improvement and recommended further treatment. Because of the differing recommendations, on 24 February 1997, a full evidentiary hearing was held before Deputy Commissioner W. Bain Jones, Jr., and he entered his opinion and award on 15 July 1997. In his opinion and award, Deputy Commissioner Jones held that defendants were entitled to direct plaintiff's medical treatment, the parties were to use good faith efforts in proceeding with the vocational rehabilitation and prescribed medical treatment, and defendants were not entitled to terminate or suspend benefits. One of the conclusions of law specifically states that plaintiff must "use all good faith efforts to comply with the

medical treatment provided by Dr. Gilbert Snider, a physician authorized by defendants."

In January 1998, Dr. Snider confirmed that he was plaintiff's treating physician, but also noted that "plaintiff had repeatedly and in no uncertain terms expressed his dissatisfaction with Dr. Snider and his desire to have Dr. Snider removed as his treating physician." In the meantime, plaintiff had filed two additional motions to change his treating physician to Dr. Towne; these motions were denied by the Industrial Commission on 11 February 1998. Deputy Commissioner Jones entered an opinion and award on 11 February 1998 designating Dr. Robert Hansen as plaintiff's new treating physician. The opinion also stated that plaintiff's failure to comply with Dr. Hansen's treatment would result in termination of compensation. Between March 1998 and November 1998, plaintiff saw Dr. Hansen several times and underwent a series of tests at Dr. Hansen's recommendation. In April 1999, Dr. Hansen opined that plaintiff had reached maximum medical improvement, that plaintiff's pain could be managed with medication, and that plaintiff could be retrained to do sedentary work. Plaintiff expressed dissatisfaction with Dr. Hansen's treatment and refused further treatment or evaluation.

The matter was reviewed again by the Industrial Commission, and the Full Commission entered an opinion and award on 1 October 1999. The Industrial Commission unanimously suspended plaintiff's compensation benefits upon finding that, as of 30 November 1998, plaintiff had admittedly and unjustifiably refused to comply with the treatment instructions of Dr. Hansen, and plaintiff had admittedly and unjustifiably refused to comply with the vocational rehabilitation programs offered by defendants specifically, that plaintiff had "failed to use good faith efforts to comply with the treatment instructions of Dr. Hansen[.]" Plaintiff appealed to this Court, which unanimously affirmed the Industrial Commission's decision in its decision of 20 February 2001.

Following a gap in treatment of approximately six years, plaintiff returned to Dr. Hansen on 14 February 2005. During this visit, plaintiff represented to Dr. Hansen that he was getting treatment from Dr. Towne and two other doctors at the Medical College of Virginia, and that he wished to continue treatment from those doctors. Not knowing the details of the litigation on this matter, Dr. Hansen acquiesced to plaintiff's request. Dr. Hansen later testified that his "referral" to plaintiff's existing physicians was made at plaintiff's request after he expressed a strong preference to continue treatment with those physicians. On 14 February 2005, Dr. Hansen did not render any medical treatment to plaintiff and no follow-up appointments were made.

On 14 June 2005, the case was returned to Deputy Commissioner Philip A. Baddour, III, "for the taking of additional evidence and further hearing regarding the issue of plaintiff's compliance with medical treatment as it relates to the possible reinstatement of plaintiff's benefits." In the opinion and award entered 31 December 2006, Deputy Commissioner Baddour found plaintiff to be in compliance with the medical treatment requirements that were established by the 1 October 1999 opinion and award of the Industrial Commission based on Dr. Hansen's referral of plaintiff to Drs. Towne, Hyman, and Bullock. Defendants appealed to the Full Commission, arguing that, since plaintiff had not complied with the medical treatment ordered, they were unwilling to offer vocational rehabilitation services to plaintiff and that his benefits should remain suspended. On 22 May 2008, the majority opinion and award of the Full Commission affirmed Deputy Commissioner Baddour's finding that plaintiff was now in compliance with the treatment of Dr. Hansen. The majority concluded that "[p]laintiff cannot further comply with the 1 October 1999 order of the Full Commission ordering him to cooperate with vocational rehabilitation until Defendants offer it" and "[a]ny failure of Plaintiff to cooperate with the vocational rehabilitation services under the circumstances is justified." Defendants were ordered

> to reinstate temporary total disability benefits and medical compensation to plaintiff as of 31 December 2006. Commissioner Diane Sellers dissented from the opinion and award, stating that plaintiff did not substantially comply with the 1 October 1999 order, and that plaintiff had not provided a justifiable reason for his continued noncompliance with the order. (Footnote omitted; alterations in original).

*Sykes*, 199 N.C. App. at 541-53, 685 S.E.2d at 2-4.

In our previous opinion, we reversed on the basis of our holding that the Industrial Commission's finding that Sykes had made a good faith effort to comply with Dr. Hanson's medical treatment, as set out in its 1 October 2009 order, was unsupported by evidence, and that, in turn, conclusions of law based on that finding of fact were not appropriately supported. *See Holley v. Acts, Inc.*, 357 N.C. 228, 231, 581 S.E.2d 750, 752 (2003) (in reviewing the Industrial Commission's award, "appellate courts may set aside a finding of fact only if it lacks evidentiary support"). On remand from our Supreme Court we now review that decision.

## II. Analysis

Defendants first argue that the Industrial Commission majority opinion and award erred in concluding that plaintiff had made a good faith effort to comply with the treatment of Dr. Hansen as required by the 1 October 1999 order. Specifically, defendants contend that, due to its erroneous findings and

conclusions in the 22 May 2008 opinion and award, the Industrial Commission incorrectly awarded additional workers' compensation benefits to plaintiff on and after 31 December 2006. In light of the standard of review highlighted by our Supreme Court, we disagree.

When an appellate court reviews an award entered by the Industrial Commission, the review "is generally limited to two issues: (1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are justified by the findings of fact." *Clark v. WalMart*, 360 N.C. 41, 43, 619 S.E.2d 491, 492 (2005) (citations omitted). The Industrial Commission's conclusions of law are fully reviewable by the appellate courts. *Saunders v. Edenton Ob/Gyn Ctr.*, 352 N.C. 136, 140, 530 S.E.2d 62, 65 (2000).

However, per N.C. Gen. Stat. § 97-86, the "award of the Commission . . . shall be conclusive and binding as to all questions of fact[.]" *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998); *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 115, 530 S.E.2d 549, 553 (2000) ("Under our Worker's Compensation Act, 'the Commission is the fact finding body.'"); *Brewer v. Powers Trucking Co.*, 256 N.C. 175, 182, 123 S.E.2d 608, 613 (1962). "The Commission is the sole judge of

the credibility of the witnesses and the weight to be given their testimony." *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965). "[T]he findings of fact of the Industrial Commission are conclusive on appeal when supported by competent evidence, even though there be evidence that would support findings to the contrary." *Adams,* 349 N.C. at 681, 509 S.E.2d at 414 (quoting *Jones v. Myrtle Desk Co.*, 264 N.C. 401, 141 S.E.2d 632 (1965)). Commenting on the quanta of evidence that is sufficient to decide whether a finding of fact is adequately supported, our Supreme Court has noted that it is the role of the appellate court to "determine whether the record contains any evidence to support the finding." *Id.* (quoting *Anderson v. Lincoln Ins. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)).

The purpose of section 97-25 of the Workers' Compensation Act is "to authorize the Commission to direct the course of treatment and penalize noncompliance by suspending compensation." *Matthews v. Charlotte Mecklenburg Hosp. Auth.*, 132 N.C. App. 11, 18, 510 S.E.2d 388, 394 (1999); see also N.C. Gen Stat. § 97-25 (2007) ("In case of a controversy arising between the employer and employee relative to the continuance of medical, surgical, hospital, or other treatment, the Industrial

Commission may order such further treatments as may in the discretion of the Commission be necessary.").

> The refusal of the employee to accept any medical, hospital, surgical or other treatment or rehabilitative procedure when ordered by the Industrial Commission shall bar said employee from further compensation until such refusal ceases, and no compensation shall at any time be paid for the period of suspension unless in the opinion of the Industrial Commission the circumstances justified the refusal, in which case, the Industrial Commission may order a change in the medical or hospital service.

N.C. Gen Stat. § 97-25 (2007). This Court has held that suspension of compensation benefits is permitted under section 97-25 upon the "refusal of the employee to accept any medical, hospital, surgical or other treatment or rehabilitative procedure." *Scurlock v. Durham County Gen. Hosp.*, 136 N.C. App. 144, 148, 523 S.E.2d 439, 441 (1999) (quoting N.C. Gen. Stat. § 97-25) (remanding case to Industrial Commission to determine whether the plaintiff was willing to cooperate with the defendant's offers of medical treatment and rehabilitative services with her authorized physician). Noncompliance with an order directing medical treatment by a designated physician is proper grounds to suspend compensation. *Matthews*, 132 N.C. App. at 19, 510 S.E.2d at 394

The Industrial Commission in this case made the following relevant and contested findings of fact:

22. In response to further questioning, Dr. Hansen agreed that it is his medical opinion that Plaintiff should continue to follow up with Dr. Towne, Dr. Bullock, and Dr. Hyman as necessary for the treatment of his chronic back problems.

23. Plaintiff has established by the greater weight of the evidence, and the Commission so finds as fact, that he is in compliance with the treatment recommendations of Dr. Hansen. Plaintiff returned to Dr. Hansen, his authorized treating physician, on 14 February 2005, and is complying with the recommendations and referrals of Dr. Hansen. Plaintiff, therefore, contends that his benefits should be reinstated. Defendants contend that Plaintiff's visit to Dr. Hansen was clearly pre-textual, and was designed only to obtain referrals to Drs. Towne and Hyman, and that this does not constitute compliance with medical treatment. The Full Commission finds Defendants' arguments unpersuasive, and further finds as fact that Plaintiff has made good faith efforts to comply with the 1 October 1999 Opinion and Award of the Full Commission.

24. Until Defendants offer vocational rehabilitation services to Plaintiff, he cannot demonstrate his willingness to cooperate. Defendants have had sufficient opportunity to offer vocational rehabilitation services to Plaintiff since he returned to Dr. Hansen on 14 February 2005, and at least after the Opinion and Award of Deputy Commissioner Baddour filed 31 December 2006.

25. Since Plaintiff is in compliance with the 1 October 1999 Opinion and Award of the Full Commission, and since Defendants have not offered vocational rehabilitation services, Defendants are obligated to reinstate temporary total disability and medical compensation to the Plaintiff as of 31 December 2006, when Deputy Commissioner Baddour entered his opinion and award.

From its findings of fact, the Industrial Commission drew the following contested conclusions of law:

> 2. Plaintiff has made a good faith effort to comply with, and has complied with, that portion of the Full Commission Opinion and Award dated 1 October 1999 ordering him to comply with the treatment of Dr. Hansen. N.C. Gen. Stat. § 97-25.
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> 3. Although the Full Commission's 7 April 2005 Order remanding this case to the Deputy Commissioner section for hearing only dealt with "the issue of [P]laintiff's compliance with medical treatment as it relates to the possible reinstatement of [P]laintiff's benefits," Defendants have admitted through counsel that they have not and are unwilling to offer vocational rehabilitation services to Plaintiff because they contend he is not in compliance with the medical treatment ordered in the 1 October 1999 Opinion and Award. Defendants have a Deputy Commissioner Opinion since 31 December 2006 ruling that Plaintiff has complied with the medical treatment offered. Plaintiff cannot further comply with the 1 October 1999 order of the Full Commission ordering him to cooperate with vocational rehabilitation until Defendants offer it. Any failure of Plaintiff to cooperate with vocational rehabilitation services under the circumstances is justified. N.C. Gen. Stat. § 97-25.
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> 4. Accordingly, Defendants shall reinstate temporary total disability benefits and medical compensation benefits to Plaintiff as of 31 December 2006. N.C. Gen. Stat. § 97-25.

From this recitation of the relevant facts as found by the Full Commission, it is clear that plaintiff's purpose in his meeting with and getting a referral from Dr. Hansen was susceptible of two interpretations. As we noted in our previous

decision it appears possible that his appointment was not to resume treatment with Dr. Hansen; rather, that his purpose was to obtain a referral to the physicians of his choice, none of whom was authorized to treat him by the Industrial Commission. The record reflects the following: Dr. Hansen later testified that his referral to Drs. Towne, Hyman, and Bullock was made at plaintiff's request. At this visit, plaintiff represented to Dr. Hansen that the only reason for his visit was to obtain a referral that would allow a reinstatement of the terminated benefits. Dr. Hansen also testified that he was willing to continue treating plaintiff and that plaintiff would be welcomed back as a patient. However, based on plaintiff's preference to continue treatment with his existing doctors, Dr. Hansen acquiesced to plaintiff's request. Dr. Hansen did not examine plaintiff or prescribe any medications, and plaintiff did not schedule any follow-up appointments. However, it was also Dr. Hansen's testimony, as noted in the Industrial Commission's uncontested findings of fact, that he felt that Sykes's continuing to see his preferred physicians was "appropriate" and his testimony shows that he freely gave the referral in this case based upon his medical understanding of what was good for the patient. Further, the Industrial Commission, having first-

hand knowledge of the testimony and facts in this case, and as primary decider of fact, examined defendants' arguments as to plaintiff's motive and rejected those assertions, finding instead that "Plaintiff [had] made good faith efforts to comply with the 1 October 1999 Opinion and Award of the Full Commission." (R at 115). Given that "[t]he Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony," *Anderson*, 265 N.C. at 433-34, 144 S.E.2d at 274, and given that there is evidence in the record to support the Industrial Commission's finding, it is "conclusive and binding as to all questions of fact." *Adams*, 349 N.C. at 680, 509 S.E.2d at 413. The findings of the Industrial Commission stand.

Defendant next argues that the Industrial Commission erred in its conclusion that defendants had sufficient opportunity to offer vocational rehabilitation services to plaintiff and that plaintiff's failure to cooperate with vocational rehabilitation services was justified. Specifically, defendant assigns error to the following finding of fact made by the Industrial Commission:

> 24. Until Defendants offer vocational rehabilitation services to Plaintiff, he cannot demonstrate his willingness to cooperate. Defendants have had sufficient opportunity to

> offer vocational rehabilitation services to Plaintiff since he returned to Dr. Hansen on 14 February 2005, and at least after the opinion and award of Deputy Commissioner Baddour filed 31 December 2006.

Defendant also assigns error to the following conclusion of law entered by the Industrial Commission:

> 3. Although the Full Commission's 7 April 2005 Order remanding this case to the Deputy Commissioner section for hearing only dealt with the issue of [P]laintiff's compliance with medical treatment as it relates to the possible reinstatement of [P]laintiff's benefits, Defendants have admitted through counsel that they have not and are unwilling to offer vocational rehabilitation services to Plaintiff because they contend he is not in compliance with the medical treatment ordered in the 1 October 1999 opinion and award. Defendants have had a Deputy Commissioner opinion since 31 December 2006 ruling that Plaintiff has complied with the medical treatment ordered. Plaintiff cannot further comply with the 1 October 1999 order of the Full Commission ordering him to cooperate with vocational rehabilitation until Defendants offer it. Any failure of Plaintiff to cooperate with vocational rehabilitation services under the circumstances is justified. N.C. Gen. Stat. § 97-25.

(Alterations in original.)

According to the 1 October 1999 order, defendants' vocational rehabilitation efforts to allow plaintiff to return to the work force should be made under the supervision of plaintiff's authorized treating physician. *See* N.C. Gen. Stat. § 97-25.5 (2007) ("The Commission may adopt utilization rules

and guidelines, consistent with this Article, for vocational rehabilitation services and other types of rehabilitation services."). As we have noted above, consistent with the findings of fact of the Industrial Commission, plaintiff was in compliance with the orders of his treating physician in seeking treatment from his currently treating physicians. It is uncontroverted that Deputy Commissioner Baddour's Order and award of 31 December 2009, found that Sykes was in compliance with the "medical treatment requirements of the Full Commission's October 1, 1999 Opinion and Award, and [that] this issue [was] no longer an impediment to a reinstatement of his benefits." As the "refusal of the employee to accept any medical, hospital, surgical or other treatment or rehabilitative procedure[,]" *Scurlock v. Durham County Gen. Hosp.*, 136 N.C. App. 144, 148, 523 S.E.2d 439, 441 (1999), is a precondition for the suspension of benefits in this case and that we have determined that the findings of the Full Commission that Sykes is in compliance with the 1 October 1999 order and award of the Full Commission are justified by evidence in the record, then it follows that the conclusion of law of the Full Commission that Sykes is due back rehabilitation therapy, from the time that defendants became aware that he was in compliance with that

Order, that is to say, from the date of Deputy Commissioner Baddour's 31 December 2006 Order should also stand. Further, given that plaintiff has been in compliance with that order and it is apparent that no vocational rehabilitation has been offered to or received by plaintiff, the Commission's conclusion of law that his non-compliance with that therapy is justified is apt.

## III. Conclusion

Plaintiff is in compliance with the 1 October 1999 order of the Industrial Commission ordering him to comply with the medical treatment of Dr. Hansen. We therefore affirm the 22 May 2008 opinion and award of the Industrial Commission and hold that the suspension of plaintiff's workers' compensation benefits should cease. We also hold that, given plaintiff's compliance with the medical treatment ordered by the Commission, his failure to cooperate with vocational rehabilitation is justified. *See Johnson v. Jones Group, Inc.*, 123 N.C. App. 219, 226, 472 S.E.2d 587, 591 (1996).

Affirmed.

Judges CALABRIA and STROUD concur.

Report per Rule 30(e).