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NO. COA05-926

NORTH CAROLINA COURT OF APPEALS

Filed: 16 May 2006

GLORIA CORREA,
Employee,
Plaintiff

v.

North Carolina Industrial Commission
I.C. File No. 139423

KMART CORP.,
Employer

SELF-INSURED (CAMBRIDGE
INTEGRATED SERVICES,
Servicing Agent),
Defendants

Appeal by plaintiff from an opinion and award entered 21 January 2005 by the North Carolina Industrial Commission. Heard in the Court of Appeals 8 February 2006.

Oxner Thomas & Permar, PLLC, by R. H. Permar, III, for plaintiff-appellant.

Hill, Evans, Duncan, Jordan & Beatty, PLLC, by Richard T. Granowsky, for defendant-appellees.

HUNTER, Judge.

Gloria Correa (“plaintiff”) appeals from an opinion and award of the North Carolina Industrial Commission (“Commission”) entered 21 January 2005. For the reasons stated herein, we reverse in part the opinion and award of the Industrial Commission.

Plaintiff was employed by Kmart in Greensboro, North Carolina. On 2 May 2001, plaintiff sustained a lower-back injury in the course of her employment. Defendants admitted

liability for plaintiff's claim in a Form 21 agreement for temporary total disability benefits was approved by the Commission on 10 December 2001.

Plaintiff began treatment on 12 May 2001 and came under the care of Dr. Samuel Sue ("Dr. Sue") on 31 July 2001. Plaintiff was initially diagnosed with lower-back pain and muscle spasms. Dr. Sue referred plaintiff for physical therapy and prescribed Vioxx and other medications for her symptoms.

Plaintiff returned to limited duty work on 23 October 2001. On 6 November 2001, plaintiff was prescribed and administered a sacroiliac joint injection, and Dr. Sue instructed plaintiff to return to full-duty work the following week. Plaintiff returned to full-duty work, but at a lower weekly wage. On 17 December 2001, a Form 26 agreement for temporary partial disability was approved by the Commission.

In a follow-up appointment on 12 December 2001, plaintiff exhibited severe pain from bending and stooping at work, and had trouble walking. Plaintiff was referred by Dr. Sue to Dr. Richard Ramos ("Dr. Ramos") for epidural steroid injections, which she received on 18 January 2002. Plaintiff returned to full-duty work on 21 January 2002.

Plaintiff testified that she did not tolerate the epidural steroid injections well and experienced bilateral leg numbness following the procedure. On 25 January 2002, plaintiff awoke to leg weakness and shaking and was unable to walk. Plaintiff testified she experienced the same symptoms following the epidural injections. Plaintiff was admitted to the hospital for her symptoms, but no physiological cause was found at that time. Plaintiff was discharged from the hospital on 27 January 2002, but was not released to work.

Dr. Ramos examined plaintiff on 28 January 2002, but did not find that plaintiff's symptoms were directly related to the epidural steroid injections given on 18 January 2002. Dr. Ramos suggested that plaintiff might be suffering from a conversion disorder.

On 2 February 2002, plaintiff was again taken to the hospital with uncontrollably shaking limbs and was examined by Dr. Michael Reynolds ("Dr. Reynolds"), a neurologist. Dr. Reynolds also opined that plaintiff's problems were likely caused by a psychological reaction, possibly a conversion disorder.

Plaintiff was examined by Dr. Sue on 5 February 2002 and 12 February 2002. Plaintiff exhibited abnormal jerking motions during both of these examinations. On 13 February 2002, plaintiff followed up with Dr. Keith Willis ("Dr. Willis"), also a neurologist. Dr. Willis opined that plaintiff had probable hysterical gait disorder.

Plaintiff then sought treatment with a neuropsychologist, Dr. John Rodenbough ("Dr. Rodenbough") on four occasions between 20 February 2002 and 8 July 2002. Dr. Rodenbough opined that he believed plaintiff's medical conditions developed first and any subsequent psychological reactions were secondary.

On 14 March 2002, Dr. Ramos examined plaintiff for the last time. Dr. Ramos declined to complete a Form 28U, as he believed the form was more appropriately reviewed by Dr. Sue. On 21 March 2002, Dr. Sue signed a Form 28U reinstating plaintiff's total disability benefits after an unsuccessful return to work. Plaintiff filed the Form 28U and began receiving temporary total benefits again on 1 April 2002. Plaintiff continued under Dr. Sue's care until June 2002, when Dr. Sue retired.

Plaintiff then came under the care of Dr. Elaine R. Feraru ("Dr. Feraru") on 27 August 2002. Dr. Feraru administered a MMPI personality test to plaintiff. Based on the results of the

test and the lack of objective neurologic findings, Dr. Feraru opined that plaintiff had a somatization or conversion disorder.

Defendants filed a Form 33 request that plaintiff's claim for continued compensation due to a failed trial return to work be assigned for a hearing as to benefits due on 21 February 2001. In an opinion and award dated 27 June 2003, the deputy commissioner ordered defendants to continue to pay plaintiff temporary total disability benefits. Defendants appealed to the Commission. The Commission modified the deputy commissioner's opinion and award, awarding temporary total disability from 17 August 2001 to 25 October 2001, temporary partial disability from 26 October 2001 to 25 January 2002, and ending all subsequent compensation. Plaintiff appeals.

I.

We first note the applicable standard of review for appeals from the North Carolina Industrial Commission. "It is well established that 'the Industrial Commission is the fact finding body and . . . the findings of fact made by the Commission are conclusive on appeal, . . . if supported by competent evidence. . . . This is so even though there is evidence which would support a finding to the contrary.'" *Hunter v. Perquimans County Bd. of Educ.*, 139 N.C. App. 352, 355, 533 S.E.2d 562, 564 (2000) (citation omitted). "Therefore, the appropriate standard of review by this Court is to determine only whether the Commission's findings of fact are supported by competent evidence and whether those findings indeed support the Commission's conclusions of law." *Id.*

II.

Plaintiff first contends that the Industrial Commission erred in finding as fact that the Form 28U was signed in error. We disagree.

N.C. Gen. Stat. §97-32.1 (2005) states that:

[A]n employee may attempt a trial return to work for a period not to exceed nine months. During a trial return to work period, the employee shall be paid any compensation which may be owed for partial disability pursuant to G.S. 97-30. If the trial return to work is unsuccessful, the employee's right to continuing compensation under G.S. 97-29 shall be unimpaired unless terminated or suspended thereafter pursuant to the provisions of this Article.

Id. “To expedite reinstatement of an employee’s compensation pending a determination by the Commission of whether an employee’s return to work was unsuccessful, the Commission’s rules provide that an employee may file a Form 28U ‘Request that Compensation be Reinstated.’”
Jenkins v. Public Service Co. of N.C., 134 N.C. App.405, 411, 518 S.E.2d 6, 10 (1999) (citation omitted). “The determination of whether an employee’s trial return to work was unsuccessful is made by the Commission.” *Id.* When a properly completed Form 28U is filed, the employer resumes payment of compensation for total disability; however, if the Commission determines that the trial return to work was not unsuccessful due to the compensable injury, then the employer is entitled to a credit for the sums paid pursuant to the Form 28U. *Id.*

Here, plaintiff contends that the Commission erred in finding that Dr. Sue’s testimony indicated he signed the Form 28U in error. A review of Dr. Sue’s testimony shows that competent evidence supports the Commission’s finding, as Dr. Sue testified that plaintiff’s inability to work was not related to her original back injury, but due to other conditions. The Form 28U requires a certification by the treating physician that the employee was unable to continue the trial return to work due to the injury for which compensation has been paid. Therefore, competent evidence supports the Commission’s finding of fact.

Moreover, the Commission ultimately found that plaintiff’s failed return to work was not due to her compensable injury. Therefore, any error in the Commission’s findings as to the Form

28U would not require reversal, as the Commission's conclusion on the issue is ultimately determinative. *See Jenkins*, 134 N.C. App. at 412, 518 S.E.2d at 10. Plaintiff's assignment of error is overruled.

III.

Plaintiff next contends the Industrial Commission erred in concluding that plaintiff's presumption of total disability ended on 17 December 2001. We disagree.

Plaintiff bases her contention on our case law holding that a presumption of disability attaches in favor of an employee once a Form 21 agreement is entered into by the parties. Plaintiff is correct that our courts have "consistently held that once a Form 21 agreement is entered into by the parties and approved by the Commission, a presumption of disability attaches in favor of the employee." *Saums v. Raleigh Community Hospital*, 346 N.C. 760, 763, 487 S.E.2d 746, 749 (1997).

However, our Supreme Court has also considered the impact of the filing of a later agreement on the presumption of disability. In *Saunders v. Edenton Ob/Gyn Ctr.*, 352 N.C. 136, 139-40, 530 S.E.2d 62, 64 (2000), a Form 21 agreement to temporary total disability was replaced by a Form 26 agreement to temporary partial disability. The Supreme Court held that when a Form 21 agreement to temporary total disability was revised by a Form 26 supplemental agreement to temporary partial disability, the Form 26 agreement terms were the final binding terms on the parties. *Id.* at 140, 530 S.E.2d at 65. *Saunders* held:

Based on the terms of the Form 26 agreement, the presumption that plaintiff was temporarily partially disabled, and not totally disabled, was created through plaintiff's agreement to, and the Commission's approval of, those terms. When plaintiff thereafter petitioned the Commission for a hearing and claimed entitlement to permanent total disability, a status substantially different in economic impact from partial disability, she bore the burden of proving total disability.

Id. at 140, 530 S.E.2d at 64.

Here, plaintiff does not contest the finding of fact that a Form 26 supplemental agreement was approved by the Commission on 17 December 2001, providing for temporary partial disability benefits rather than temporary total disability benefits. The Commission found as a result that “the presumption of continuing temporary total disability ended when the parties filed the Form 26. Plaintiff is entitled to temporary partial disability compensation after October 25, 2001 when she returned to work at a reduced wage.” As the presumption of total disability ended with the filing of the Form 26, the Commission did not err in concluding that “[t]he approval of the Form 26 by the Commission on 17 December 2001 ended the presumption of total disability and plaintiff received temporary partial disability.” Plaintiff’s assignment of error is overruled.

IV.

Plaintiff finally contends that the Industrial Commission erred in concluding that plaintiff is entitled to neither temporary total disability nor temporary partial disability benefits subsequent to 25 January 2002. Although the findings support the Commission’s conclusion that plaintiff was not entitled to temporary total disability, we agree that the Commission erred in finding plaintiff was not entitled to continued temporary partial disability.

“The Form 26 agreement between the parties established an ongoing presumption of ‘temp[orary] partial disability,’ and plaintiff has the burden of rebutting that presumption in moving to establish a claim for total disability.” *Saunders*, 352 N.C. at 141, 530 S.E.2d at 65-66.

We first review plaintiff’s contention that the Commission erred in finding plaintiff was not entitled to continued temporary total disability. Here, as discussed *supra* in Section III, the Form 26 agreement approved by the Commission on 17 December 2001 established a presumption of temporary partial disability. Plaintiff therefore bore the burden of rebutting the

presumption of partial disability in moving to establish her claim for total disability. A review of the record shows that competent evidence supports the Commission's finding that plaintiff failed to establish "that any total disability after October 25, 2001 is related to her injury by accident." The Commission found that all medical evidence indicated plaintiff's numbness, weakness, and tremors were not related to her injury by accident. As plaintiff failed to rebut the presumption that temporary *partial* disability, rather than temporary *total* disability, existed, the Commission properly concluded that plaintiff was not entitled to temporary total disability.

However, the Commission also found that "plaintiff is not entitled to compensation as of 25 January 2002 and subsequent because her disability starting 25 January 2002 and continuing is not related to the compensable low back condition." We hold that the Commission's findings fail to support this conclusion.

In *Saunders*, our Supreme Court further held that when a Form 26 establishing temporary partial disability exists, "in order to rebut plaintiff's claim of ongoing partial disability, in the event such issue arises, defendants have the burden of proving "not only that suitable jobs are available, but also that the plaintiff is capable of getting one, taking into account both physical and vocational limitations." " *Saunders*, 352 N.C. at 141-42, 530 S.E.2d at 66 (citations omitted).

We find the case of *Radica v. Carolina Mills*, 113 N.C. App. 440, 439 S.E.2d 185 (1994), instructive. In *Radica*, the plaintiff sustained a back injury and entered into an approved Form 26 agreement for temporary total disability in May. *Id.* at 441, 439 S.E.2d at 187. The plaintiff was released to work with maximum medical improvement in September, but continued to allege pain and did not return to work. *Id.* Medical evidence failed to reveal a physiological cause for the plaintiff's pain, however. The Commission found that the plaintiff's continued complaints of

pain were not causally related to the work injury, and denied additional workers' compensation benefits following the plaintiff's release to work. *Id.* at 444-45, 439 S.E.2d at 188-89. This Court vacated the Commission's order on the grounds that no evidence supported the finding that the plaintiff retained any earning capacity on the date of her release to return to work. *Id.* at 447, 439 S.E.2d at 190. *Radica* stated that a release to return to work does not equal a finding that a plaintiff is no longer disabled, that is, capable of earning the same wage prior to injury, and therefore no longer entitled to workers' compensation. *Id.* *Radica* further noted that the plaintiff had met her initial burden of establishing her disability through the Form 26 agreement previously approved by the Commission. *Id.* Because the plaintiff had established disability through the Form 26 agreement, and the defendant had failed to meet its burden of showing that the plaintiff was capable of earning the same wage earned prior to injury as of the date of release to return to work, the defendant failed to overcome the presumption that disability continued until "the employee returns to work at wages equal to those [s]he was receiving at the time [her] injury occurred." *Id.* (citation omitted).

Similarly here, although the Form 26 agreement entered into by the parties and approved by the Commission on 17 December 2001 destroyed the presumption of continued total disability, it established a presumption of continued partial disability, which defendants had the burden to rebut. The Commission's order is devoid of any findings that plaintiff was able to return to work at wages equal to those she was receiving at the time the injury occurred. As plaintiff established a presumption of temporary partial disability, and as no findings support the conclusion that defendants overcame this presumption, we find the Commission erred in terminating plaintiff's temporary partial disability as of 25 January 2002. *See Radica*, 113 N.C. App. at 447, 439 S.E.2d at 190.

For the foregoing reasons, we find no error in the Commission's findings as to total disability, but find error in the Commission's conclusions as to partial disability. We therefore remand to the Commission for disposition in accordance with this opinion.

Affirmed in part, reversed and remanded in part.

Judges BRYANT and CALABRIA concur.

Report per Rule 30(e).