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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-707

Filed: 21 January 2020

North Carolina Industrial Commission, I.C. No. 14-044292

CYNTHIA CLARK, Employee, Plaintiff,

v.

US AIRWAYS, INC., Employer, AMERICAN INSURANCE GROUP PLAN,
CARRIER (SEDGWICK CMS, Third-party Administrator), Defendants.

Appeal by plaintiff from opinion and award entered 30 April 2019 by the North Carolina Industrial Commission. Heard in the Court of Appeals 8 January 2020.

Laurie J. Meilleur for plaintiff appellant.

Wilson Ratledge, PLLC, by Frances M. Clement and Daniel C. Pope, Jr., for defendants-appellees.

TYSON, Judge.

Cynthia Clark (“Plaintiff”) appeals from an opinion and award filed 30 April 2019 by the North Carolina Industrial Commission (“Commission”). We affirm.

I. Background

Plaintiff has worked as a flight attendant for US Airways, Inc. (“Defendants”) and its predecessors for over thirty-six years. She is based out of the Charlotte

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Douglas International Airport. Plaintiff suffered an injury to her left wrist on 10 September 2014 while working aboard a company aircraft. Defendants filed a Form 60 on 15 October 2014, accepting her injury as compensable.

Plaintiff ceased working at the end of September 2014 and treated the injury with Mobic (meloxicam), a wrist brace, physical therapy, and a cortisone injection. Plaintiff was treated by Walter H. Wray, III, M.D. (“Dr. Wray”). Dr. Wray was a board-certified orthopedic hand surgeon at OrthoCarolina in Charlotte.

Plaintiff’s injury required further treatment and she underwent a left first carpometacarpal (CMC) arthroplasty by Dr. Wray on 21 May 2015. Plaintiff’s post-operative treatment included occupational therapy, splinting, and work conditioning. During Plaintiff’s post-operative treatment, Dr. Wray left OrthoCarolina. Dr. Paul C. Perlik, M.D. (“Dr. Perlik”) took over Plaintiff’s care and treatment at OrthoCarolina. Dr. Perlik is also a board-certified orthopedic hand surgeon.

Dr. Perlik evaluated Plaintiff on 29 October 2015. Dr. Perlik documented that Plaintiff’s wrist was “quite tender” near the base of the first metacarpal and diagnosed her with basilar left thumb pain. During this examination, Dr. Perlik did not think Plaintiff had achieved maximum medical improvement and noted there was “no identifiable reason why she should have persistent pain other than the possibility of a different source of pain at the outset.”

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Dr. Perlik recommended additional physical therapy and issued work restrictions for Plaintiff to lift no more than five pounds with her left hand. Following additional physical therapy, Dr. Perlik administered a left thumb corticosteroid injection on 18 November 2015. Plaintiff was also prescribed Voltaren gel to use on an as-needed basis.

Following work conditioning, Plaintiff returned to Dr. Perlik on 23 December 2015 and confirmed the 18 November 2015 injection had given her “tremendous relief.” During this visit, Dr. Perlik concluded Plaintiff had achieved maximum medical improvement, did not recommend any further treatment, assigned a 10% permanent partial impairment rating to the left hand, and released her to work without restrictions.

On 5 January 2016, Plaintiff returned to work without restrictions. Due to the amount of time Plaintiff had been out of work for her occupational injury, Plaintiff underwent recurrent training before returning to work as a flight attendant. Recurrent training requires a flight attendant to demonstrate the capacity of performing CPR, opening the emergency exits in a plane, and lifting up to fifty-five pounds.

Plaintiff completed and passed recurrent training in January 2016 and began working flights later that month. Plaintiff testified that during the recurrent training

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she felt “extreme pain and discomfort” in her left wrist and hand. However, she did not notify any of her supervisors or physician of these issues.

Dr. Perlik testified he would have diagnosed Plaintiff with a failed CMC arthroplasty if he would have examined her in January 2016, and if she had the same findings as she presented in November 2015.

On 25 January 2016, a Form 26A was sent to Plaintiff. The Form 26A offered twenty weeks of approved permanent partial disability compensation to be paid in a lump sum. Plaintiff signed the Form 26A on 17 February 2016. The Commission approved the Form 26A on 7 April 2016. Plaintiff received her lump sum payment and continued working full duty without restrictions.

Plaintiff testified her left wrist pain increased while she worked during January 2016 through August 2016. Plaintiff failed to report any problems with or pain in her left wrist or hand to Defendants or her physician during this period. Plaintiff only reported these problems to Defendants’ adjuster, Valerine Conerly (“Conerly”). In August 2016, Plaintiff reported her increasing pain to Defendant Employer and was authorized to return to Dr. Perlik.

Plaintiff returned to Dr. Perlik complaining of pain and weakness in her left wrist. Plaintiff reported some tenderness on stressing and grinding at the base of the metacarpal. Dr. Perlik examined Plaintiff’s left wrist and hand and did not find any crepitus or grinding. He noted Plaintiff had “quite good pinch strength, and she had

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normal sensation.” Plaintiff stated she was able to perform all of her required job duties.

Dr. Perlik assigned temporary restrictions including Plaintiff lifting no more than five pounds with the left hand or wrist and ordered diagnostic imaging testing on Plaintiff’s wrist and hand. Plaintiff underwent a CT Scan and returned to Dr. Perlik on 14 September 2016.

Dr. Perlik diagnosed Plaintiff as having a failed CMC arthroplasty with no abnormality other than post-surgical changes. Dr. Perlik could not “demonstrate any true objective change in condition and that therefore [Plaintiff] is at MMI.” Plaintiff did not notify Defendants of any restrictions placed on her during her August 2016 appointment prior to returning to Dr. Perlik on 14 September 2016. Dr. Perlik saw no objective reason to restrict Plaintiff’s activities and offered her no further treatment.

Plaintiff did not request to be excused from work due to her left wrist or hand between returning to work in January 2016 and the 2017 hearing before the Commission. Since September 2016, Plaintiff has continued to work full duty without restrictions. Conerly denied extending Plaintiff’s temporary total disability because Dr. Perlik documented no change in her condition.

Plaintiff filed a Form 33 request for hearing and claimed a change in the condition to her left wrist on 25 October 2016. She sought sanctions against

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Defendants for an alleged denial of the claim for a change of condition without any reasonable grounds.

On 6 July 2018, the deputy commissioner filed an opinion and award finding and concluding Plaintiff had sustained a change of condition to her left wrist. The deputy commissioner awarded temporary total disability benefits at the weekly compensation rate of \$735.46 from 18 August 2016 through 14 September 2016, a 10% late payment penalty, and sanctioned Defendants by awarding attorney's fees to Plaintiff for "stubborn unfounded litigiousness". On 13 August 2018, the deputy commissioner filed an Amended Order awarding attorney's fees to Plaintiff in the amount of \$6,434.50.

Defendants appealed to the Full Commission. On 30 April 2019, the Full Commission filed its opinion and award denying Plaintiff's claim for a change in condition. The Full Commission denied the award of attorney's fees for Plaintiff. A commissioner concurred in part and dissented from the Full Commission's finding Plaintiff had not sustained a change of condition. Plaintiff appealed.

II. Jurisdiction

Jurisdiction lies in this Court from an appeal of an opinion and award of the Full Commission pursuant to N.C. Gen. Stat. §§ 7A-29(a) and 97-86 (2019).

III. Issues

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Plaintiff argues the Commission erred by: (1) failing to find Plaintiff suffered a change in condition; and, (2) denying Plaintiff's request for resumption of temporary total disability for the period beginning 18 August 2016 to 15 September 2016. Plaintiff also argues the Commission erred in making its findings of fact numbers 8, 11, 15, 16, 17, and 19 and conclusions of law numbers 3 and 6. Plaintiff further argues the Commission erred by denying her motion for attorney's fees.

IV. Plaintiff's Change in Condition

A. Standard of Review

"Whether there has been a change of condition is a question of fact; whether the facts found amount to a change of condition is a question of law. Change of condition is a substantial change, after a final award of compensation, of physical capacity to earn and, in some cases, of earnings." *Pratt v. Upholstery Co.*, 252 N.C. 716, 722, 115 S.E.2d 27, 33-34 (1960). The Commission's findings of fact will be upheld if supported by any competent evidence, while "the Commission's conclusions of law . . . are reviewable *de novo*." *Snead v. Carolina Pre-Cast Concrete*, 129 N.C. App. 331, 335, 499 S.E.2d 470, 472, *cert. denied*, 348 N.C. 501, 510 S.E.2d 656 (1998).

B. Analysis

Plaintiff argues the Commission erred by concluding she did not sustain a change in condition. To support a conclusion of disability

the Commission must find: (1) that plaintiff was incapable after his injury of earning the same wages he had earned

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before his injury in the same employment, (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) that this individual's incapacity to earn was caused by plaintiff's injury.

Hilliard v. Apex Cabinet Co., 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982).

N.C. Gen. Stat. § 97-47 provides: “[u]pon its own motion or upon the application of any party in interest *on the grounds of a change in condition*, the Industrial Commission may review any award, and on such review may make an award ending, diminishing, or increasing the compensation[.]” N.C. Gen. Stat. § 97-47 (2019) (emphasis supplied).

While N.C. Gen. Stat. § 97-47 does not define “change in condition,” our Court has defined a “change in condition” as “[1] a change in the claimant's physical condition that impacts his earning capacity, [2] a change in the claimant's earning capacity even though claimant's physical condition remains unchanged, or [3] a change in the degree of disability even though claimant's physical condition remains unchanged.” *Pomeroy v. Tanner Masonry*, 151 N.C. App. 171, 179, 565 S.E.2d 209, 215 (2002) (citations omitted).

This Court has held: “[i]n determining if a change of condition has occurred entitling an employee to additional compensation under [N.C. Gen. Stat. §] 97-47 the primary factor is a change in condition *affecting the employee's physical capacity to earn wages*[.]” *Lucas v. Bunn Manuf. Co.*, 90 N.C. App. 401, 404, 368 S.E.2d 386, 388

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(1988) (emphasis supplied). “[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.” *Blair v. Am. Television & Commc’ns Corp.*, 124 N.C. App. 420, 423, 477 S.E.2d 190, 192 (1996).

Plaintiff can meet this burden by producing medical evidence showing “[s]he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment.” *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (citation omitted).

Plaintiff remained employed by US Airways, working the same job as before the accident, and without any work restrictions. Dr. Perlik released Plaintiff to return to work in December 2015 with no restrictions, determined she did not have any objective change in condition in August and September 2016, and testified Plaintiff did not have any physical change affecting her earning capacity or any change in her disability. Plaintiff’s argument is overruled.

Plaintiff further argues the Commission erred by denying her request for resumption of temporary total disability for the period beginning 18 August 2016 to 15 September 2016. For the reasons and analysis stated above, this argument is also overruled.

V. Plaintiff’s Challenges to Findings of Facts and Conclusions of Law

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Plaintiff argues the Commission erred in making its findings of fact numbers 8, 11, 15, 16, 17, and 19 and conclusions of law numbers 3 and 6.

A. Standard of Review

Review of an opinion and award of the Commission “is limited to consideration of whether competent evidence supports the Commission’s findings of fact and whether the findings support the Commission’s conclusions of law. This [C]ourt’s duty goes no further than to determine whether the record contains any evidence tending to support the finding.” *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (citations and internal quotations omitted).

B. Challenged Findings of Fact

Plaintiff challenges findings of fact 8, 11, 15, 16, 17, and 19 in the Commission’s opinion and award, as outlined above. Dr. Perlik was deposed concerning Plaintiff’s treatment. Plaintiff was released to return to work in December 2015 with no restrictions. In September 2016 after Dr. Perlik examined Plaintiff, he did not observe any objective change in Plaintiff’s condition.

This Court has reviewed the competent evidence in the entire record and the Commission’s findings thereon, and determines competent evidence exists “that a reasonable mind might accept as adequate” for each of the contested findings. *Andrews v. Fulcher Tire Sales and Service*, 120 N.C. App. 602, 605, 463 S.E.2d 425,

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427 (1995). We are bound by the supported evidentiary findings of the Commission.

Id. Plaintiff's challenges to the Commission's findings of fact are overruled.

C. Challenged Conclusions of Law

1. *Conclusion of Law No. 3*

Plaintiff challenges the Commission's Conclusion of Law 3, which provides:

In the present case, a preponderance of the evidence in view of the entire record, shows that Plaintiff has not suffered a change in her earning capacity, a change in her degree of disability, or a substantial change in her physical conditions that impact her earning capacity and she is not entitled to additional disability compensation. N.C. Gen. Stat. §§ 97-47; 97-29; *Blair*, 124 N.C. App. at 423, 477 S.E.2d at 192; *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982).

Plaintiff asserts Conclusion of Law 3 erroneously placed the burden of proving disability on Plaintiff. In support of this proposition, Plaintiff cites *Clark v. Wal-Mart*, 360 N.C. 41, 44-46, 619 S.E.2d 491, 493-494 (2005) and argues the executed Form 26A creates a presumption of disability in favor of an employee and must be disproven by the employer.

Plaintiff's reliance on *Clark* is misplaced. In *Clark*, our Supreme Court stated three instances under which the presumption of disability applies: "(1) when there has been an executed Form 21 'AGREEMENT FOR COMPENSATION FOR DISABILITY'; (2) when there has been an executed FORM 26, 'SUPPLEMENTAL AGREEMENT AS TO PAYMENT OF COMPENSATION'; or[,] (3) when there has

been a prior disability award from the Industrial Commission.” *Id* at 44, 619 S.E.2d at 493 (citation omitted).

In *Watkins v. Central Motor Lines, Inc.*, our Supreme Court held:

If an award is made by the Industrial Commission, payable during disability, there is a presumption that disability lasts until the employee returns to work and likewise *a presumption that disability ends when the employee returns to work at wages equal to those he was receiving at the time his injury occurred.*

Watkins v. Central Motor Lines, Inc., 279 N.C. 132, 137, 181 S.E.2d 588, 592 (1971) (emphasis supplied).

Plaintiff argues this Court must treat a Form 26A the same as a Form 26 to fit the second exception in *Clark*. However, Plaintiff provides no case, citation, or other authority to support this notion, nor can this Court locate any. Form 26A is a wholly distinct form than a Form 26. Form 26A is governed by N.C. Gen. Stat. § 97-31 (2019). Form 26 is governed by N.C. Gen. Stat. § 97-82 (2019). Plaintiff did not carry her burden before the Commission and now seeks to shift her burden to Defendants.

The Commission properly concluded “Plaintiff has not suffered a change in her earning capacity, a change in her degree of disability, or a substantial change in her physical conditions that impact her earning capacity and she is not entitled to additional disability compensation.” Plaintiff’s argument is overruled.

2. Conclusion of Law No. 6

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Plaintiff argues the Commission erred by denying her motion for attorney's fees.

a. Standard of Review

“The decision whether to award or deny attorney's fees rests within the sound discretion of the Commission and will not be overturned absent a showing that the decision was manifestly unsupported by reason.” *Thompson v. Federal Express Ground*, 175 N.C. App. 564, 570, 623 S.E.2d 811, 815 (2006).

b. Analysis

The deputy commissioner found Defendants' defense of Plaintiff's claim was unreasonable and awarded attorney's fees pursuant to N.C. Gen. Stat. § 97-88.1 (2019). The Full Commission is not bound by the deputy commissioner's findings and award. *Strezinski v. City of Greensboro*, 187 N.C. App. 703, 709, 654 S.E.2d 263, 267 (2007). The Full Commission found Defendants did not engage in “stubborn, unfounded litigiousness” during the course of defending this claim.

Plaintiff challenges the Commission's Conclusion of Law 6:

N.C. Gen. Stat. § 97-88.1 gives the Industrial Commission the discretionary authority to award attorney's fees in those cases it deems proper. *Taylor v. J.P. Stevens Co.*, 307 N.C. 392, 297-98, 298 S.E.2d 681-85 (1983). Specifically, N.C. Gen. Stat. § 97-88.1 provides for an assessment of costs, including reasonable fees for a defendant's attorney or plaintiff's attorney, if it is determined that any hearing has been brought, prosecuted, or defended without reasonable ground. The North Carolina Court of Appeals has explained that the purpose of N.C. Gen. Stat. § 97-88.1

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is to deter stubborn, unfounded litigiousness, which is inharmonious with the primary consideration of the Workers' Compensation Act: compensation for injured employees. *Sparks v. Mountain Breeze Restaurant and Fish House, Inc.*, 55 N.C. App. 663, 664, 286 S.E.2d 575, 576 (1982). In the present case, given the issues raised by Plaintiff in her Form 23, which was denied, Dr. Perlik's uncertainty regarding the cause of Plaintiff's ongoing left wrist/thumb complaints, and the objective diagnostic testing and results, it was reasonable for Defendants to defend Plaintiff's claim in this matter. *Id.*

Given Dr. Perlik's testimony regarding Plaintiff's lack of objective change in condition during the September 2016 examination, our review of the record shows Plaintiff failed to demonstrate any abuse of discretion in the Commission's findings and conclusion to deny her claim for attorney's fees. This argument is overruled.

VI. Conclusion

The Commission did not err by failing to find Plaintiff suffered a change in condition and by denying Plaintiff's request for resumption of temporary total disability for the period beginning from 18 August 2016 and ending 15 September 2016. Competent evidence in the whole record supports the Commission's findings of fact numbers 8, 11, 15, 16, 17, and 19, and those findings in turn support conclusions of law numbers 3 and 6.

Plaintiff failed to demonstrate any abuse of discretion in the Commission's findings and conclusion to deny her claim for attorney's fees. The order and award of the Commission is affirmed. *It is so ordered.*

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AFFIRMED.

Judges DILLON and MURPHY concur.

Report per Rule 30(e).