NO. COA06-381

NORTH CAROLINA COURT OF APPEALS

Filed: 2 January 2007

ROBERT DEEM,
Employee,
Plaintiff

v.

North Carolina Industrial Commission
I.C. File No. 141741

HBE CORPORATION d/b/a
ADAMS MARK HOTEL,
Employer

CORPORATE CLAIMS
MANAGEMENT,
Carrier,
Defendants

Appeal by plaintiff from an opinion and award entered 17 January 2006 by the North Carolina Industrial Commission. Heard in the Court of Appeals 6 December 2006.

Seth M. Bernanke for plaintiff-appellant.

Cranfill, Sumner & Hartzog, L.L.P., by James B. Black, IV, for defendant-appellees.

HUNTER, Judge.

Robert Deem ("plaintiff") appeals from an opinion and award of the North Carolina Industrial Commission ("Commission") entered 17 January 2006. For the reasons stated herein, we affirm the order and award.

The Commission found that plaintiff severely injured his left elbow in 1993 while working for a prior employer. As a result of the 1993 injury, plaintiff developed reflex

sympathetic dystrophy("RSD") in his left arm. Plaintiff received physical therapy and pain management from Dr. Jeffrey Kneisl ("Dr. Kneisl") of Carolinas Medical Center, and treatment for psychological problems stemming from his chronic pain and disability from Dr. J. Scott Wallace ("Dr. Wallace") of Eastover Psychiatric Group. By 1998, plaintiff's pain had became controllable and his medication usage had stabilized. Plaintiff sought to rejoin the work force in 1999.

Plaintiff was hired by the Adams Mark Hotel ("Adams Mark") in Charlotte on 26 August 1999 as a senior maintenance worker. Plaintiff's primary duties were painting and supervision of other painters, as well as minor mechanical, plumbing, and electrical work. On 16 November 1999, plaintiff's left elbow was injured at work when a board flew out from beneath an air shaft that was being shifted and struck plaintiff.

Following the injury on 16 November 1999, plaintiff was referred back to the physician who had treated him for the 1993 injury, Dr. Kneisl, for further evaluation. Plaintiff continued working following the 16 November 1999 injury, but contacted Dr. Kneisl for pain medication and began regular visits on 15 March 2000. Plaintiff also resumed visits to Dr. Wallace for psychological problems. Plaintiff continued working with increasing difficulty.

In 2001, the maintenance manager who had hired plaintiff left Adams Mark and plaintiff was terminated by a new hotel manager on 29 May 2001. On 27 August 2001, plaintiff was hired by Carolinas Medical Center ("CMC") in a light maintenance position. Defendants filed a Form 21 accepting the injury of plaintiff's elbow on 16 November 1999 as a compensable material reaggravation of the preexisting elbow injury, and agreed that the period of time between plaintiff's termination with Adams Mark and his hiring at CMC was a period of total disability caused by the compensable injury.

Plaintiff continued to struggle with pain and had difficulty in working at CMC as a result. Dr. Kneisl provided increased medication to enable plaintiff to continue to work and discussed the possibility of surgery to remove hardware remaining from plaintiff's original 1993 surgery which could potentially lessen his pain. However, Dr. Kneisl also informed plaintiff that the surgery could worsen plaintiff's RSD. Plaintiff elected to undergo the surgery to remove some hardware previously affixed to his elbow.

The surgery performed on 21 November 2002 was unsuccessful and exacerbated plaintiff's pain, and plaintiff has been unable to work since the surgery. The Commission found that plaintiff was temporarily totally disabled and ordered defendants to continue to pay the weekly disability compensation agreed upon in the Form 21 agreement, to pay for all medical treatment for plaintiff's left arm resulting from the 16 November 1999 injury, and for plaintiff's psychiatric treatment from 21 November 2002. Plaintiff appeals from this order.

I.

We first note the well-settled standard of review for appeals from the North Carolina Industrial Commission. "'[I]n reviewing a decision of the Commission, this Court is "limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law."'" *Gay-Hayes v. Tractor Supply Co.*, 170 N.C. App. 405, 407, 612 S.E.2d 399, 401, *disc. review denied*, 359 N.C. 851, 619 S.E.2d 505 (2005) (citations omitted). "Such findings supported by competent evidence are conclusive on appeal, even if there is plenary evidence for contrary findings." *Id.* "'The commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony.'" *Avery v. Phelps Chevrolet*, ___ N.C. App. ___, ___ 626 S.E.2d 690, 696 (2006) (citation omitted). "'An appellate court "does not have the right to weigh the evidence and decide

the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding."'" *Allen v. SouthAg Mfg.*, 167 N.C. App. 331, 334, 605 S.E.2d 209, 211-12 (2004) (citations omitted).

II.

Plaintiff first contends the Commission erred in finding plaintiff's need for psychiatric and psychological treatment compensable only beginning with plaintiff's surgery 21 November 2002. We disagree.

The Commission found, "based on the totality of [the] evidence, including Dr. Wallace's medical notes before and after November 16, 1999, that plaintiff's psychological condition was not aggravated by the November 16, 1999 accident until the hardware removal of November 21, 2002."

Dr. Wallace testified that it was his opinion that the "physical injury suffered by [plaintiff] to his left elbow in November of 1999 resulted in a material aggravation of his preexisting psychiatric condition[.]" On cross-examination, however, Dr. Wallace stated that plaintiff's medication levels had been constant since October of 1998, and that he had advised plaintiff to go back into therapy before he reinjured his elbow in 1999. Dr. Wallace also stated that plaintiff had appeared "pretty good[,]" and "not nearly as sad as he had been[,]" with his affect "about as bright as I've seen it[,]" in plaintiff's February visit following the accident, according to his notes regarding plaintiff. On cross-examination, Dr. Wallace testified when asked when the material exacerbation of plaintiff's injury occurred, that, "it's been a chronic process, you know, through the -- through his recovery process and further surgeries and other medical treatments since that time because it is an ongoing thing." Although there is evidence to the contrary, the deposition testimony contains evidence tending to support the Commission's

findings of fact. *See Allen*, 167 N.C. App. at 334, 605 S.E.2d at 211-12. We therefore overrule this assignment of error.

III.

Plaintiff next contends that the Commission erred in finding that plaintiff is not permanently and totally disabled. We disagree.

A disability is defined as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C. Gen. Stat. §97-2(9) (2005). "A loss of wage-earning capacity may . . . be total, in which case the employee is entitled to benefits pursuant to N.C. Gen. Stat. §97-29[.]" *Knight v. Wal-Mart Stores, Inc*., 149 N.C. App. 1, 10, 562 S.E.2d 434, 441 (2002). "If the loss of wage-earning capacity is total, the employee is entitled to receive benefits for as long as the total loss of wage-earning capacity lasts with no limitation as to duration." *Id*.

> [A]s to claims involving a loss of wage-earning capacity, it is important to recognize that, although the Act does not define the terms "temporary" or "permanent," an incapacity to earn wages (whether total under N.C. Gen. Stat. §97-29 or partial under N.C. Gen. Stat. §97-30) is often further categorized as either "temporary" or "permanent."

Id. at 11, 562 S.E.2d at 441-42 (citations omitted). In *Effingham v. Kroger Co*., 149 N.C. App. 105, 561 S.E.2d 287 (2002), this Court held that "an employee may seek a determination of . . . entitlement to permanent disability under [N.C. Gen. Stat.] §§97-29, 97-30, or 97-31, only after reaching maximum medical improvement." *Id*. at 114, 561 S.E.2d at 294.

The Commission noted that there was conflicting evidence as to whether plaintiff was totally and permanently disabled. The Commission found that plaintiff was temporarily totally disabled and that "plaintiff has alternative treatment modalities available and . . . is not permanently totally disabled at this time."

We first note that the record reveals no testimony that plaintiff had reached maximum medical improvement, and that the Commission did not find that plaintiff had reached maximum medical improvement. Further, Dr. Thomas Carlton ("Dr. Carlton") testified that following an examination of plaintiff, he believed that "an interdisciplinary pain management and pain rehabilitation program would help him . . . [and would] provide some relief or try to lessen his disability[.]" Dr. Carlton stated that plaintiff had previously successfully completed the program following his 1993 injury. Although Dr. Kneisl opined that plaintiff was not employable, he also stated that it was possible that plaintiff would be able to return to work if the pain in his left arm lessened. Leanna Hollenback, a rehabilitation consultant, also opined that she believed plaintiff was unable to work both now and in the future, but agreed that if plaintiff's pain lessened her opinion would change. As plaintiff had not reached maximum medical improvement and as competent evidence supports the Commission's findings, we overrule this assignment of error. *See Allen*, 167 N.C. App. at 334, 605 S.E.2d at 211-12.

IV.

Plaintiff next contends that the Commission erred in finding that plaintiff could participate in vocational services. We disagree.

Plaintiff appears to premise his argument in this assignment of error upon successfully establishing that the trial court erred in finding that he was not permanently and totally disabled. As discussed *supra*, the Commission did not err in this finding. For the reasons discussed in the previous assignment of error, the trial court did not err in finding that plaintiff could participate in vocational services when the trial court had previously found that the comprehensive interdisciplinary program would "provide plaintiff relief, help effect a cure, or lessen his disability." As competent evidence supports this finding, the Commission did not err in the

conclusion that plaintiff was entitled to vocational rehabilitation services. *See Gay-Hayes*, 170 N.C. App. at 407, 612 S.E.2d at 401. This assignment of error is overruled.

V.

Plaintiff next contends that no competent evidence supported the Commission's finding that plaintiff should participate in a pain management program, and in a related assignment of error that the Commission abused its discretion in finding that plaintiff had not shown good cause to receive further evidence. We disagree.

We first address plaintiff's contention that the Commission abused its discretion in failing to receive further evidence.

N.C. Gen. Stat. §97-85 (2005) states in pertinent part that:

> If application is made to the Commission within 15 days from the date when notice of the award shall have been given, the full Commission shall review the award, and, if good ground be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives, and, if proper, amend the award[.]

Id. "The Commission's power to receive additional evidence is a plenary power 'to be exercised in the sound discretion of the Commission.'" *Moore v. Davis Auto Service*, 118 N.C. App. 624, 629, 456 S.E.2d 847, 851 (1995) (citation omitted). "'[W]hether "good ground be shown therefore" in any particular case is a matter within the sound discretion of the Commission, and the Commission's determination in that regard will not be reviewed on appeal absent a showing of manifest abuse of discretion.'" *Id*. (citation omitted).

Here, the Commission declined to hear additional evidence, specifically an additional response by Dr. Kneisl regarding plaintiff's participation in a pain management program, which was discussed at length in Dr. Kneisl's deposition reviewed by the deputy commissioner. We

find no abuse of discretion by the Commission in finding that good cause was not shown to receive this additional evidence.

The evidence properly before the Commission was competent to support the Commission's finding that plaintiff should participate in a pain management program under Dr. Carlton. The Commission found that "Dr. T. Kern Carlton's treatment recommendation will provide plaintiff relief, help effect a cure, or lessen his disability." The Commission further concluded that "[p]laintiff is ordered to treat with Dr. T. Kern Carlton in the interdisciplinary program recommended by Dr. Carlton and is entitled to have Defendants provide vocational rehabilitation services."

As discussed *supra*, the record reveals that Dr. Carlton opined "an interdisciplinary pain management and pain rehabilitation program would help [plaintiff] . . . [and would] provide some relief or try to lessen his disability[.]" Although Dr. Kneisl opined that he was not sure that there would be another pain management group that would take plaintiff or would have something different to offer, he also stated that he thought it was "worthwhile offering legitimate pain management techniques from a different personality[.]" As competent evidence supports the finding of fact and conclusion of law regarding plaintiff's participation in the pain management program, this assignment of error is overruled. *See Gay-Hayes*, 170 N.C. App. at 407, 612 S.E.2d at 401.

VI.

Plaintiff next contends the trial court erred in failing to use the correct statutory method of calculation to revise the average weekly wage based on plaintiff's post-injury earnings. We disagree.

"Where the employer and employee have entered into a Form 21 agreement, stipulating the average weekly wages, and the Commission approves this agreement, the parties are bound to its terms absent a showing of error in the formation of the agreement." *McAninch v. Buncombe County Schools*, 347 N.C. 126, 132, 489 S.E.2d 375, 378-79 (1997). "'Thus, where there is no finding that the agreement itself was obtained by fraud, misrepresentation, mutual mistake, or undue influence, the Full Commission may not set aside the agreement, once approved.'" *Id*. at 132, 489 S.E.2d at 379 (citation omitted).

Here, the Commission found that a "Form 21 agreement was approved on February 6, 2002. The Form 21 agreement stipulates an average weekly wage of $451.66, yielding a compensation rate of $301.10." A review of the record shows that in the approved Form 21 agreement, the parties stated plaintiff's weekly wage at $451.66 and further listed as a matter agreed upon by the parties that plaintiff's compensation was $301.10 weekly. The Commission found that there was no fraud, misrepresentation, undue influence, or mutual mistake in the Form 21 agreement and competent evidence supports this finding. As the parties are bound by the approved Form 21 agreement, we overrule this assignment of error.

VII.

Plaintiff next contends that the Commission erred in finding and concluding that plaintiff was not entitled to a ten percent penalty pursuant to N.C. Gen. Stat. §97-12.

N.C. Gen. Stat. §97-12 (2005) requires: "When the injury or death is caused by the willful failure of the employer to comply with any statutory requirement or any lawful order of the Commission, compensation shall be increased ten percent (10%)." *Id*. "An act is considered willful 'when there exists "a deliberate purpose not to discharge some duty necessary to the safety of the person or property of another," a duty assumed by contract or imposed by law.'"

Brown v. Kroger Co., 169 N.C. App. 312, 318, 610 S.E.2d 447, 451, *appeal dismissed*, 359 N.C. 850, 619 S.E.2d 403 (2005) (citations omitted).

Here, the sole evidence that a safety violation occurred was the deposition of Raymond Bolyston ("Bolyston"), an expert offered by plaintiff. Bolyston opined that although no OSHA citation was issued, in his opinion, the failure to properly brace the shaft being moved, although temporary, violated OSHA secure storage regulations. Bolysten further opined that the employees involved may not have understood and comprehended the significance of the insecure storage. The Commission indicated that it reviewed the deposition of Bolysten, but found that defendants did not willfully violate the statue. As the Commission is the sole judge of the credibility of the witnesses, we find no error in the Commission's finding and conclusion. *Avery*, ___ N.C. App. at ___, 626 S.E.2d at 696.

VIII.

Plaintiff finally contends that there is no competent evidence to find that defendants defended the claim with reasonable grounds and for the Commission to conclude that plaintiff is not entitled to attorney's fees.

N.C. Gen. Stat. §97-88.1 (2005) states that, "[i]f the Industrial Commission shall determine that any hearing has been brought, prosecuted, or defended without reasonable ground, it may assess the whole cost of the proceedings including reasonable fees for defendant's attorney or plaintiff's attorney upon the party who has brought or defended them." *Id.* "'The decision of whether to make such an award, and the amount of the award, is in the discretion of the Commission, and its award or denial of an award will not be disturbed absent an abuse of discretion.'" *Clark v. Sanger Clinic*, ___ N.C. App. ___, ___, 623 S.E.2d 293, 299 (2005) (citation omitted). "'An abuse of discretion results only where a decision is manifestly

unsupported by reason or . . . so arbitrary that it could not have been the result of a reasoned decision.'" *Id*. (citation omitted).

Plaintiff fails to demonstrate that the Commission's decision is manifestly unsupported by reason. We therefore overrule this assignment of error.

As competent evidence supports the Commission's findings of fact and conclusions of law, we affirm the opinion and award.

Affirmed.

Judges McCULLOUGH and ELMORE concur.

Report per Rule 30(e).