

Affirmed in part, Remanded in part

Author, Ballance

Concurring: Bolch

(Bunn retired prior to decision)

NO. COA01-95

NORTH CAROLINA COURT OF APPEALS

Filed: 28 December 2001

GALE C. HOWARD,
Employee-Plaintiff

v.

N. C. Industrial Commission
I.C. Nos. 143065, 640111

SPEECHCENTER, INC.,
Employer,

and

NORTH CAROLINA FARM BUREAU
MUTUAL INSURANCE COMPANY,
Carrier,

Defendants,

and

GALE C. HOWARD
Employee Plaintiff,

v.

ROTECH MEDICAL CORPORATION,
Employer

CONTINENTAL CASUALTY CO.,
Carrier,

Defendants.

Appeal by defendants-appellants from Opinion and Award of the North Carolina Industrial Commission entered 10 August 2000. Heard in the Court of Appeals 28 November 2001.

Wells Jenkins Lucas & Jenkins, PLLC, by R. Michael Wells and Ellis B. Drew, III, for the plaintiff appellee.

Young Moore and Henderson, P.A., by Joe E. Austin, Jr., Dawn M. Dillon and Zachary C. Bolen, for the defendants-appellants.

Jones, Hewson & Woolard, by R.G. Spratt III and Kenneth H. Boyer, for the defendants-appellees.

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CLERK OF COURT
NORTH CAROLINA

WYNN, Judge.

Defendants-appellants SpeechCenter, Inc. and North Carolina Farm Bureau Mutual Insurance Company appeal from an opinion and award of the Industrial Commission entered 10 August 2000, awarding plaintiff Gail C. Howard workers' compensation benefits for disability and medical expenses resulting from a compensable neck injury by accident at work on 12 February 1990. The evidence presented at the hearing before the deputy commissioner tended to show that plaintiff sustained a neck injury while working for SpeechCenter when she tripped and fell to the floor. Over the next several months, plaintiff developed increasing problems with her neck and right arm.

In November 1990, plaintiff saw Dr. William Bell, a neurosurgeon, who performed an anterior cervical discectomy on 29 May 1991 to decompress the C5-6 interface. In May 1992, plaintiff saw Dr. O. Del Curling, Jr., another neurosurgeon; Dr. Curling performed another anterior cervical discectomy in September 1992, as well as a crest graft interbody fusion with Caspar plates, to C5-6 and C6-7. Plaintiff returned to Dr. Curling in June 1993 complaining of increased pain. X-rays revealed that one of the screws inserted during the September 1992 procedure had broken, but Dr. Curling believed this finding to be insignificant as the bones showed good signs of fusion.

Also in June 1993, plaintiff ceased working for SpeechCenter. In September 1993, plaintiff returned to Dr. Curling with

complaints of increased arm pain, but additional diagnostic tests were unremarkable. On 14 November 1993, Dr. Curling advised that plaintiff had reached maximum medical improvement with respect to the 12 February 1990 injury with a fifteen percent permanent partial disability. Dr. Curling expected that plaintiff would continue to have chronic pain, and gave her several permanent work restrictions. Appellant SpeechCenter and its carrier, appellant Farm Bureau Insurance, accepted liability for plaintiff's 12 February 1990 injury, and compensated plaintiff for temporary total disability as well as for permanent partial disability as rated by Dr. Curling. The last compensation check for this injury was forwarded to plaintiff on 3 February 1995.

By that time, plaintiff was employed by defendant-appellee Rotech Medical Corporation as a customer service representative. On 21 February 1996, plaintiff sustained another compensable injury by accident to her neck while working for Rotech. Dr. William Brown, a neurosurgeon, examined plaintiff on 13 March 1996, and determined that some of her symptoms were preexisting from her earlier injury; he also diagnosed plaintiff with a cervical strain resulting from the 21 February 1996 injury.

On 4 September 1996, Dr. Brown re-examined plaintiff but could find nothing new; he expressed the opinion that plaintiff reached maximum medical improvement by 4 September 1996 with respect to the 21 February 1996 injury, that said injury did not result in any permanent partial disability, and that plaintiff's continued problems related back to her first injury of 12 February 1990. Dr.

Brown reported that, as of 4 September 1996, plaintiff was back to her baseline condition with no additional work restrictions or permanent partial disability resulting from the 21 February 1996 injury.

Rotech and its carrier, defendant-appellee Continental Casualty Co., accepted liability for plaintiff's 21 February 1996 injury, and compensated plaintiff for temporary total disability for said injury up to 4 September 1996; plaintiff sustained no permanent partial disability as a result of the 21 February 1996 injury. Rotech took the position that it had paid all of the benefits due to plaintiff as a result of the 21 February 1996 injury. However, Farm Bureau Insurance denied liability for any further benefits to plaintiff after 4 September 1996 resulting from her earlier injury on 12 February 1990.

By letter dated 31 October 1996, plaintiff timely re-opened her claim against SpeechCenter by filing a Notice of Change/Worsening of Condition with the Commission. Dr. Brown examined plaintiff on 10 December 1996 and found there to be good fusion at C5-6 but non-union at C6-7. In his opinion, surgery to repair the C6-7 union would offer plaintiff a significant chance of reducing her pain symptoms, although it would not provide complete pain relief. Both Farm Bureau Insurance and Continental Casualty Co. refused to pay for the recommended surgery, and plaintiff did not undergo the procedure until 14 September 1998. Subsequent to the surgery, plaintiff's symptoms began to resolve, and by 9 January 1999, plaintiff's neck pain, right arm pain and numbness

had all improved. In Dr. Brown's opinion, plaintiff remained totally disabled due to the numerous restrictions placed upon her ability to resume working; Dr. Brown did not testify that plaintiff had reached maximum medical improvement.

The Commission found that plaintiff suffered a substantial change of condition regarding her 12 February 1990 injury due to the non-union of her prior fusion at C6-7. Plaintiff was found to be incapable of earning wages in any employment after 4 September 1996 as a result of continuing pain from her 12 February 1990 injury. That is, plaintiff became totally disabled as of 5 September 1996 as a result of her 12 February 1990 injury due to her change in condition; plaintiff remained totally disabled through her surgery on 14 September 1998, and continuing until she reaches maximum medical improvement. The Commission further found that Rotech's obligation to compensate plaintiff ended on 4 September 1996, when she reached maximum medical improvement with respect to her second injury on 21 February 1996.

The Commission concluded that plaintiff had demonstrated a change in condition resulting in total disability following the final award from her 12 February 1990 injury, thereby warranting an increase in her previously-awarded compensation by appellants. Because plaintiff's continuing disability after 4 September 1996 was not related to her 21 February 1996 injury, defendants-appellees Rotech and Continental Casualty Co. were not obligated to provide medical or disability compensation after 4 September 1996. Instead, the Commission concluded that plaintiff was entitled to

temporary total disability compensation to be paid by appellants SpeechCenter and Farm Bureau Insurance from 5 September 1996 and continuing until plaintiff reaches maximum medical improvement from her 12 February 1990 injury. Additionally, plaintiff was entitled to receive medical compensation from appellants for medical treatment rendered after 4 September 1996 that was a proximate result of the 12 February 1990 injury.

Accordingly, the Commission awarded (1) reimbursement to Rotech and Continental Casualty Co. by appellants for compensation paid to plaintiff after 4 September 1996; (2) reimbursement to plaintiff by Rotech and Continental Casualty Co. for medical expenses incurred by plaintiff up through 4 September 1996 as a result of the 21 February 1996 injury; (3) temporary total disability compensation to plaintiff, to be paid by appellants, accruing from 5 September 1996 and continuing until further order of the Commission; and (4) medical expenses incurred by plaintiff after 4 September 1996 as a result of the 12 February 1990 injury, to be paid by appellants.

Appellants bring forth thirty-eight assignments of error. Appellants have abandoned assignments of error 2-17 and 38 by failing to argue them in their brief. See N.C.R. App. P. 28(a), (b)(5) (2000).

Appellants first argue that the opinion and award is invalid as it was not rendered in compliance with the Workers' Compensation Act. This argument is without merit.

Commissioner Bernadine S. Ballance authored the opinion, and

Commissioner Thomas J. Bolch concurred; former Commissioner J. Howard Bunn, Jr., participated in the review of the case, but retired before the decision was filed. Appellants contend that the prior award of the deputy commissioner was therefore not reviewed by the "full Commission," in violation of N.C. Gen. Stat. § 97-85 (1999). However, this argument was previously rejected by this Court in *Tew v. E.B. Davis Elec. Co.*, 142 N.C. App. 120, 122, 541 S.E.2d 764, 766, *disc. review denied*, 353 N.C. 532, 548 S.E.2d 742 (2001) (holding that the "full Commission" requirement of G.S. § 97-85 is met where the case is reviewed by three commissioners and rendered by a majority of that panel).

Appellants next argue that plaintiff failed to show a "change of condition" pursuant to N.C. Gen. Stat. § 97-47 (1999) to warrant an increase in the compensation previously awarded as a result of her 12 February 1990 injury. We disagree.

In reviewing an appeal of an award from the Industrial Commission, this Court must determine whether any competent evidence in the record supports the Commission's findings of fact, and whether those findings in turn support the Commission's conclusions of law. *See Bailey v. Sears Roebuck & Co.*, 131 N.C. App. 649, 652, 508 S.E.2d 831, 834 (1998). Where the Commission's findings are supported by competent evidence, those findings are conclusive on appeal, even where the evidence may support a contrary finding. *See id.* at 652-53, 508 S.E.2d at 834. "Furthermore, the Commission is the sole judge of the credibility of the witnesses as well as how much weight their testimony should

be given." *Id.* at 653, 508 S.E.2d at 834.

A change of condition for purposes of N.C. Gen. Stat. § 97-47, is a substantial change in physical capacity to earn wages, occurring after a final award of compensation, that is different from that existing when the award was made. To recover compensation for changed conditions caused by aggravation of an injury, plaintiff must prove by the greater weight of the evidence that her change in condition was a natural consequence of the [compensable] injury.

Id. at 654, 508 S.E.2d at 835 (internal citations omitted).

The Commission found as fact that plaintiff "reached maximum medical improvement with respect to her second injury by 4 September 1996, having sustained no permanent partial disability. After that date, her condition was due solely to the first injury of 12 [February] 1990." This finding of fact is not contested by appellants, and is amply supported by evidence in the record. Furthermore, while there is conflicting evidence in the record, there is some competent evidence to support the Commission's finding that plaintiff presented sufficient evidence of a substantial change of condition regarding her 12 February 1990 injury, due to the non-union of her prior fusion at C6-7. Dr. Brown testified during his 3 June 1998 deposition that plaintiff's pain had progressed or worsened since 1994. He further testified that her increased pain after 4 September 1996 was solely due to the non-fusion at C6-7.

There is also evidence supporting the finding that plaintiff was totally incapable of earning wages in any employment after 4 September 1996. Marge Myers, a rehabilitation consultant with

Armstrong & Associates, prepared rehabilitation progress reports regarding plaintiff's condition following her second injury in February 1996. Myers' notes indicated that, after seeing plaintiff on 4 September 1996, Dr. Brown provided plaintiff with an out of work note through 16 September 1996, based upon "his opinion on the client's persistent, consistent complaints of severe neck and right arm pain." Dr. Brown later provided plaintiff a note indicating that she should remain out of work from 10 December 1996 forward indefinitely. In his 3 June 1998 deposition, Dr. Brown testified that plaintiff's chronic pain, relating back to her 12 February 1990 injury, prevented her from returning to work. Furthermore, the Commission found that in Dr. Brown's opinion, plaintiff remains totally disabled; appellants did not challenge this finding of fact.

We conclude that competent evidence in the record supports the Commission's findings of fact, which in turn support its conclusions of law. Appellants' arguments to the contrary are without merit.

Appellants next argue that plaintiff is not entitled to temporary total disability compensation from 4 September 1996 as plaintiff failed to demonstrate a total loss of earning capacity. We disagree.

A disability as defined in the Workers' Compensation Act "is the impairment of the injured employee's earning capacity rather than physical disablement." *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993). "The burden is

on the employee to show that [s]he is unable to earn the same wages [s]he had earned before the injury, either in the same employment or in other employment." *Id.* An employee may meet this burden by producing "medical evidence that [s]he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment[.]" *Id.*

The only question with respect to this argument is whether plaintiff presented sufficient credible evidence that, as of 4 September 1996, she was incapable of work in any employment, such that she was totally disabled as of that date. As previously noted, there is competent evidence supporting the finding that plaintiff was totally incapable of earning wages in any employment after 4 September 1996. While there was conflicting evidence, our Workers' Compensation Act "places the ultimate fact-finding function with the Commission," even though the Commission's findings and conclusions may differ from those of the hearing officer. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 413 (1998), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999). Furthermore, in carrying out its fact-finding function, the Commission is the sole judge of the witnesses' credibility and the weight to be afforded their testimony. *See id.* at 680, 509 S.E.2d at 413. We conclude that there was competent evidence supporting the Commission's findings, which in turn support its conclusions of law. Appellants' argument to the contrary is without merit.

Lastly, appellants argue that the Commission's award is overbroad. The Commission awarded reimbursement to Rotech and

Continental Casualty Co. by appellants for any disability compensation paid to plaintiff after 4 September 1996. The Commission also awarded plaintiff disability compensation from appellants "in the weekly amount of \$241.02 from 5 September 1996 and continuing until further order" of the Commission. Appellants argue that this awards plaintiff a double recovery, allowing her to retain the disability benefits already paid by Rotech and Continental Casualty Co. for the period after 4 September 1996, while also ordering appellants to pay plaintiff additional benefits (\$241.02 weekly) for the same period. We agree.

Evidently the Commission intended that appellants should reimburse Rotech and Continental Casualty Co. to the extent such benefits have already been paid (or, rather, overpaid) to plaintiff for the period after 4 September 1996. Furthermore, appellants should pay plaintiff disability benefits to the extent she has been underpaid by Rotech and Continental Casualty Co. for the same period (according to the Commission's award of \$241.02 weekly). As the Commission's award is unclear on this matter, we remand in part for clarification of the award.

The Commission's award also provides that appellants "shall pay all medical expenses incurred by plaintiff as a result of" the 1990 injury by accident, for "treatment rendered to plaintiff after 4 September 1996." Appellants argue that this award is overbroad, as it does not specifically enumerate limitations imposed by N.C. Gen. Stat. § 97-25.1 (1999) and the definition of "medical compensation" in N.C. Gen. Stat. § 97-2(19) (1999). This argument

- is without merit. Clearly the Commission's award is subject to all applicable limitations imposed by the Workers' Compensation Act, without the Commission being required to restate all such limitations in the body of its award.

The Commission's 10 August 2000 opinion and award is,
Affirmed in part, and remanded in part.

Judges WALKER and THOMAS concur.

Report per Rule 30(e).