NO. COA04-1333

NORTH CAROLINA COURT OF APPEALS

Filed: 16 August 2005

JEFFREY H. METCALF,
Employee,
Plaintiff-Appellant,

v.

North Carolina Industrial Commission
I.C. File No. 144351

MPW CARPENTRY AND CONSTRUCTION,
Employer,

CAPITAL CITY INSURANCE,
(SOUTHEASTERN CLAIM SERVICES, Administrator)
Carrier,
Defendants-Appellees.

Appeal by plaintiff from opinion and award entered 4 August 2004 by the North Carolina Industrial Commission. Heard in the Court of Appeals on 7 June 2005.

Brumbaugh, Mu & King, P.A., by Nicole D. Wray, for plaintiff-appellant.

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

McGEE, Judge.

Plaintiff began working for MPW Carpentry and Construction (MPW) on 28 April 2000, performing miscellaneous carpentry work. Plaintiff's job duties required lifting heavy objects and involved frequent bending and climbing, as well as working at heights up to thirty feet.

Plaintiff was injured on 19 May 2001 as he and two coworkers were putting felt on a roof. As plaintiff's coworker was handing a roll of felt to plaintiff, the roll became caught in the

rafters. Plaintiff and his coworker attempted to dislodge the roll by wiggling and shoving it. Plaintiff lost his balance as his coworker shoved the roll towards plaintiff. As plaintiff lunged forward to stop himself from falling, he twisted his lower body and immediately felt pain in his right side, hip, and leg.

Plaintiff believed the pain would subside, so he waited until the morning of 21 May 2001 to inform his boss of the injury. That same day, plaintiff saw Dr. Thomas Mearns (Dr. Mearns) at Sneads Ferry Clinic. Plaintiff complained of pain in his back and was given muscle relaxers and pain medication. Dr. Mearns also instructed plaintiff not to work for two days and to return on 23 May 2001 for a follow-up appointment. At that appointment, plaintiff complained of pain in his right leg as well as his back. Dr. Mearns referred plaintiff to an orthopedist and recommended that plaintiff remain out of work. Plaintiff again saw Dr. Mearns on 1 June 2001, and Dr. Mearns recommended that plaintiff have magnetic resonance imaging (MRI). Dr. Mearns wrote a note on 11 June 2001 recommending that plaintiff remain out of work pending further evaluation. Dr. Mearns referred plaintiff to Dr. Robert E. Abraham (Dr. Abraham), a neurologist.

Plaintiff filed a claim for his back injury on 3 July 2001. MPW and Southeastern Claim Services (collectively defendants) accepted plaintiff's workers' compensation claim through a Form 60 agreement and began payment of temporary total disability benefits to plaintiff.

Plaintiff saw Dr. Abraham at Neurosurgery Consultants on 11 July 2004. Plaintiff reported pain in the middle of his back, his lower back, his right hip, and buttocks, as well as numbness and weakness in his right leg. Dr. Abraham diagnosed plaintiff with right lumbar radiculopathy. Plaintiff underwent a lumbar MRI on 19 July 2001, which yielded normal results. Dr. Abraham recommended that plaintiff undergo physical therapy three times per week and return in four to six months.

Plaintiff completed the physical therapy regime and saw Dr. Abraham on 1 October 2001. Plaintiff informed Dr. Abraham that his back pain had improved, but that he was experiencing groin area and inguinal pain. Dr. Abraham instructed plaintiff to continue his home physical therapy exercises and referred him to a surgeon in order to rule out a right inguinal hernia. Dr. Abraham approved plaintiff's return to work with the restrictions of only lifting up to forty pounds and refraining from wood framing work.

Plaintiff returned to the Sneads Ferry Clinic on 18 October 2001, stating that he was experiencing right groin pain after sexual intercourse. Plaintiff was referred to Dr. Kyle B. Potts (Dr. Potts) at Onslow Surgical Clinic. Dr. Potts examined plaintiff on 22 October 2001 and diagnosed plaintiff with a probable severe groin strain associated with his 19 May 2001 injury. Dr. Potts recommended that plaintiff continue light activity and take Motrin or Advil for pain. Dr. Potts further noted that he believed plaintiff's injury would resolve over time.

Defendants denied plaintiff's groin injury claim, and plaintiff filed a Form 33 Request for Hearing to dispute the denial on 13 November 2001.

Plaintiff returned to see Dr. Abraham on 7 March 2002. Dr. Abraham wrote a note stating that plaintiff could return to full work duty on 8 March 2002. Dr. Abraham subsequently assigned a seven percent permanent partial disability rating to plaintiff's back.

Plaintiff saw Dr. Alan Tamadon (Dr. Tamadon) at Rehabilitation Medical Services on 11 June 2002 to get a second opinion. Dr. Tamadon noted that plaintiff had an unremarkable MRI, a normal hip x-ray, and normal electrodiagnostic results. Dr. Tamadon also noted that plaintiff "does not satisfy a disability criteria and receives a [permanent partial disability] rating of 0%."

Plaintiff saw Dr. Rufus Warren (Dr. Warren), plaintiff's family doctor, on 17 July 2002. Dr. Warren diagnosed plaintiff with radiculopathy of the right leg and recommended that

plaintiff not lift over forty pounds, use a shovel, or drive for long trips without stopping every one to one and a half hours. The record indicates that "[d]efendants were not informed of, and did not authorize, this appointment."

Dr. Abraham released plaintiff to full work duty on 8 March 2002, and defendants filed a Form 24 Application to Terminate or Suspend Payment of Compensation on 18 April 2002. During an informal telephone hearing conducted by the Industrial Commission on 29 May 2002, plaintiff asserted that he remained disabled due to his groin injury that was related to his admittedly compensable injury that occurred on 19 May 2001. However, in an administrative order entered 5 June 2002, Deputy Commissioner Myra L. Griffin noted that defendants had "denied liability for plaintiff's groin strain condition." Commissioner Griffin approved defendants' Form 24 application and ruled that defendants could terminate plaintiff's benefits effective 22 April 2002.

A hearing was held on 30 July 2002 before Deputy Commissioner Phillip A. Baddour, III. At the end of the hearing, Commissioner Baddour left the record open for the parties to obtain depositions from Doctors Abraham, Potts, Tamadon, and Warren. Commissioner Baddour also ordered that a functional capacity evaluation (FCE) be performed on plaintiff. The FCE was performed on 8 October 2002 and assessed plaintiff at a "heavy work" physical demand category pursuant to U.S. Department of Labor guidelines.

After the depositions and the FCE results were received, Commissioner Baddour closed the record and issued an opinion and award on 21 November 2003. Commissioner Baddour found that plaintiff was not temporarily totally disabled after 8 March 2002, and that plaintiff was not entitled to total disability compensation after 22 April 2002, the date on which

defendants filed the Form 24. Commissioner Baddour denied plaintiff's claim for total disability compensation after 22 April 2002.

Plaintiff appealed to the Full Commission (the Commission). In an opinion and award entered 4 August 2004, the Commission made the following pertinent finding of fact:

> 12. [Plaintiff] was not temporarily totally disabled after 8 March 2002, the date Dr. Abraham released him to return to full work duty.

Based on that finding of fact, the Commission concluded that:

> 2. Plaintiff is not entitled to total disability compensation after April 22 2002, the date defendants filed a Form 24 Application to Terminate Payment of Compensation.

The Commission upheld Commissioner Baddour's decision. Plaintiff appeals.

Our Court has a "quite narrow" standard of review for workers' compensation cases. *Calloway v. Memorial Mission Hosp.*, 137 N.C. App. 480, 484, 528 S.E.2d 397, 400 (2000). As the Commission is the "sole judge of the weight and credibility of the evidence," our review of the Commission's opinion and award 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." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). "When there is any evidence in the record that tends to support a finding of fact, the finding of fact is supported by competent evidence and is conclusive on appeal." *Cannon v. Goodyear Tire & Rubber Co.*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___ (July 5, 2005) (No. COA04-168) (citing *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414, (1998)).

Plaintiff argues that the Commission's opinion and award should be reversed because the Commission's findings that plaintiff was not disabled after 8 March 2002 and that he was not

entitled to total disability compensation, are not supported by any competent evidence. We disagree.

The record shows there is competent evidence to support the Commission's findings that plaintiff was not totally disabled after 8 March 2002. Dr. Abraham released plaintiff to full work duty on that date. Dr. Tamadon noted that plaintiff was at maximum medical improvement on 11 June 2002 and that plaintiff had a zero percent permanent partial disability rating. Dr. Tamadon did not note any work restrictions for plaintiff. Furthermore, an FCE conducted on 8 October 2002 showed that plaintiff could perform "heavy work." This is competent evidence to support the Commission's findings of fact, and the Commission's conclusions of law are supported by its findings of fact. Plaintiff's argument is therefore without merit.

Plaintiff next argues that he is entitled to an ongoing presumption of disability due to his admitted disability from 19 May 2001 to 7 March 2002, and that defendants must rebut this presumption in order to deny plaintiff's benefits. We disagree.

A Form 21 agreement between an employer and an employee that has been approved by the Commission entitles employees to an ongoing presumption of disability. *Kisiah v. W.R. Kisiah Plumbing*, 124 N.C. App. 72, 76-77, 476 S.E.2d 434, 436 (1996). A Form 60 allows an employer to admit that the injury suffered by the employee is compensable and that the employer is liable for compensation. *Sims v. Charmes/Arby's Roast Beef*, 142 N.C. App. 154, 159, 542 S.E.2d 277, 281, *disc. review denied*, 353 N.C. 729, 550 S.E.2d 782 (2001). The Form 60 also serves as notification to the Commission that such action has taken place. *Id.*

Our Court has held that

> admitting compensability and liability, whether through notification of the Commission by the use of a Form 60 or through paying benefits beyond the statutory period provided for in G.S. §97-18(d), does not create a presumption of continuing disability

> as does a Form 21 agreement entered into between the employer and the employee.

Sims, 142 N.C. App. at 159-60, 542 S.E.2d at 281-82. In the present case, defendants admitted liability by a Form 60, and not by a Form 21. Therefore, the burden of proving disability remains with plaintiff. Plaintiff has presented no evidence other than his own testimony that he is still disabled. The evidence shows that plaintiff was released to full work duty by Dr. Abraham on 8 March 2002, that Dr. Tamadon gave plaintiff a zero percent permanent partial disability rating on 11 June 2002, and that plaintiff's FCE results did not indicate a disability. Accordingly, we find no error by the Commission and affirm the Commission's opinion and award.

Affirmed.

Judges HUNTER and LEVINSON concur.

Report per Rule 30(e).