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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-409

Filed: 20 December 2016

North Carolina Industrial Commission, I.C. No. 15-001839

MICHAEL SPARROW, Plaintiff, Employee,

v.

TYCO INTEGRATED SECURITY, Employer, ACE AMERICAN INSURANCE COMPANY (SEDGWICK CLAIMS MANAGEMENT SERVICES), Carrier, Defendants.

Appeal by Defendants from opinion and award entered 12 February 2016 by the North Carolina Industrial Commission. Heard in the Court of Appeals 4 October 2016.

The Segnere Law Firm, PLLC, by Jennifer Iliana Segnere, for Plaintiff.

Wilson Ratledge, PLLC, by James E.R. Ratledge and Brian C. Tarr, for Defendants.

STEPHENS, Judge.

In this appeal from a worker's compensation opinion and award of the North Carolina Industrial Commission ("the Commission"), an employer asks this Court to second-guess credibility determinations and re-weigh the evidence presented below.

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Because our General Assembly and long-standing precedent forbid this Court from doing either, we affirm the Commission's opinion and award.

Factual and Procedural Background

In 2014, Plaintiff-employee Michael Sparrow worked as a lead installer of security systems for Defendant-employer Tyco Integrated Security (along with Carrier-Defendant Ace American Insurance Company, "Tyco"). On 31 December 2014, Sparrow felt a sudden pop and experienced the onset of lower back pain while lifting some servers. On 2 January 2015, Sparrow sought treatment at an urgent care facility and was referred to Triangle Orthopaedic Associates ("Triangle"). Following his evaluation at Triangle, Sparrow's treating physician, orthopedist Gerald Musante, M.D., recommended physical therapy and placed Sparrow on light-duty work restrictions. Tyco accepted Sparrow's claim for workers' compensation benefits in early February 2015.

Sparrow returned to Triangle on 12 February 2015 for a follow-up visit and reported continued low back pain and pain in his buttocks, although he believed that physical therapy seemed beneficial. Sparrow reported continuing low back and buttock pain at follow-up visits in March, April, and May 2015. By late May 2015, Sparrow's symptoms had worsened, and, in June 2015, Dr. Musante recommended work conditioning. Sparrow was unable to complete the work conditioning, however,

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because he developed bladder incontinence¹ while on the treadmill. On 13 July 2015, Sparrow saw his primary care physician, Randall Crumpler, M.D., about his urinary control issues. Dr. Crumpler suggested Sparrow see Dr. Musante for a urology referral, but when Sparrow contacted Triangle, he was told Dr. Musante did not need to see him until completion of the work-conditioning program. Later in July 2015, Sparrow twice saw urologist Jerome Parnell, M.D., about his exercise-induced incontinence. Dr. Parnell suggested that the incontinence could be related to Sparrow's back condition and suggested he seek a second opinion.

On 29 July 2015, Sparrow submitted to Tyco a written request for a second-opinion examination by either Dennis Bullard, M.D., a neurosurgeon, or Craig Derian, M.D., an orthopedist. The following day, Sparrow returned to Dr. Crumpler, who recommended that Sparrow suspend work conditioning until he was evaluated by a neurosurgeon. Sparrow forwarded Dr. Crumpler's recommendation to Tyco, still seeking authorization for a neurosurgical consultation. Tyco declined to authorize the consultation, but Sparrow saw Dr. Bullard on his own initiative on 6 August 2015. Dr. Bullard had Sparrow undergo an MRI, which revealed disc dessication at L4-5. Dr. Bullard recommended surgery. On 26 August 2015, Sparrow returned to Dr. Crumpler, reporting symptoms suggestive of deep vein thrombosis ("DVT"), but no evidence of blood clots was detected.

¹ At some point, Sparrow also developed bowel incontinence. However, most of the testimony before the Commission and the record on appeal focus on Sparrow's urinary incontinence.

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On 8 October 2015, Sparrow filed a motion for a hearing to change his treating physician. On 16 October 2015, Tyco denied Sparrow's claims that his urological and bowel conditions and his DVT were related to his compensable injury of 31 December 2014. Following a hearing on 26 October 2015, on 16 December 2015, Deputy Commissioner Myra Griffin issued an opinion and award denying Sparrow's motion. Sparrow appealed to the Commission, which issued its opinion and award on 12 February 2016, reversing in part and affirming in part the opinion and award of the deputy commissioner. Specifically, the Commission found as fact:

26. On November 11, 2015, [Sparrow] presented to Dr. Robert Lacin for an Independent Medical Evaluation scheduled by Defendants. [Sparrow] reported back pain which improved while sitting in a comfortable position in a recliner, and an "achy feeling in the right leg" following work conditioning for which he took Tramadol. In his review of the radiology studies, Dr. Lacin did not find significant compression of any nerve root. In his opinion, [Sparrow's] "small disc herniation is certainly not the cause of his urinary problem." He was unable to provide a diagnosis of [Sparrow's] leg pain, but opined it was not radiculopathy. Dr. Lacin recommended that [Sparrow] follow[]up with a physiatrist who specializes in back problems.

27. With regard to whether [Sparrow's] incontinence is causally related to his compensable injury, Dr. Bullard opined that [Sparrow] did not have cauda equina compression due to the back injury, but it is his opinion that, more likely than not, [Sparrow's] urinary incontinence issues are related to his back pain from his injury. It is the opinion of Dr. Lacin that the cause of [Sparrow's] urinary problem is not related to his compensable back condition.

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28. With regard to [Sparrow's] deep vein thrombosis condition, Dr. Bullard opined that this condition is related to [Sparrow's] back condition and resulting immobility. He also opined that the delay in [Sparrow] receiving appropriate treatment is the reason [Sparrow] has a blood clot in his leg. Dr. Lacin opined that [Sparrow's] deep vein thrombosis may be due to immobility and therefore indirectly related to his back condition.

29. With regard to [Sparrow's] current back condition, Dr. Bullard determined that since [Sparrow] had failed a fairly reasonable trial of conservative therapy for his current back condition, he would recommend decompression surgery at the L4-5 level to address [Sparrow's] narrowing spinal stenosis. Dr. Bullard opined that the "preponderance of the data is that [Sparrow] is a surgical candidate." He further opined that the recommended decompression surgery is reasonably necessary to lessen [Sparrow's] pain and period of disability.

30. Dr. Musante does not agree with Dr. Bullard's surgical recommendation. Dr. Musante noted that throughout his entire course of treatment, [Sparrow's] overwhelming complaints have been back pain and pain in the buttock. The thigh has been a relatively minor component of his pain. Dr. Musante opined that decompression discectomy is not appropriate to correct back pain and that a fusion surgery with rods and screws is the only somewhat acceptable surgery to treat back pain. Dr. Musante opined that the recommended back surgery will not be of any benefit to [Sparrow's] primary complaint of back pain. Dr. Lacin opined that [Sparrow] is not a surgical candidate for a discectomy or any other back surgery at this time.

31. The Full Commission has reviewed and carefully weighed all of the evidence and the testimony, including that of Drs. Bullard, Lacin[,] and Musante. Based upon a preponderance of the evidence in view of the entire record, the Full Commission assigns greater weight to the

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testimony of Dr. Bullard regarding [Sparrow's] current back condition and the need for surgery over any contrary testimony or opinions by Drs. Lacin or Musante. Based upon his interpretation of the MRI results, his examination findings, and the fact that [Sparrow] had failed a fairly reasonable trial of conservative therapy, [Dr.] Bullard recommended that [Sparrow] undergo an outpatient medial facetectomy, foraminotomy and microdiskeotomy at L4-5 from the right, which he also refers to as decompression surgery. Dr. Bullard testified that he recommended decompression at the L4-5 level to address [Sparrow's] narrowing[] spinal stenosis. While Dr. Bullard agreed that surgery is generally not indicated when there is only back pain, he opined other symptoms are also influential, such as whether a patient has symptoms of paresthesia, numbness going into his groin, bowel or bladder dysfunction, weakness in the leg, or cramping. Dr. Bullard reported that when [Sparrow] presented on August 6, 2015, [he] had begun having episodes of bilateral leg and feet burning, urinary incontinence, and right leg weakness which were more significant indicators than leg pain alone. Dr. Bullard also noted that if [Sparrow] was sitting in his recliner all day, then he might not experience leg pain consistently as he was not stressing his system enough to have symptoms of leg pain. Dr. Bullard further opined that, in [Sparrow's] situation, the "preponderance of the data is that he is a surgical candidate."

32. The Full Commission finds, based upon a preponderance of the evidence in view of the entire record, that [Sparrow's] current back condition is causally related to his compensable December 31, 2014 back injury.

33. Based upon a preponderance of the evidence in view of the entire record, the Full Commission finds that the medical treatment [Sparrow] has received, including but not limited to, the treatment by Dr. Bullard and the evaluation and testing for cauda equina compression, has been reasonable and medically necessary to either effect a cure, give relief or lessen [Sparrow's] disability from his

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December 31, 2014 compensable injury. [Sparrow] sought authorization in writing from Defendants for a second opinion examination pursuant to N.C. Gen. Stat. [§] 97-25 with Dr. Dennis Bullard or Dr. Craig Derian to determine if his urinary and bowel incontinence was caused by cauda equina compression related to his compensable injury. Defendants denied the request. According to Dr. Bullard, the cauda equina is “the distal nerve roots as they leave spinal cord, and it is an area that can be very susceptible to injury, often with severe consequences.” He further testified that “loss of bowel and bladder control and weakness are sort of the hallmarks of the cauda equina syndrome.” Cauda equina syndrome is viewed as a medically urgent situation and can potentially lead to paraplegia.

34. The evaluations and treatment [Sparrow] received during the period from July 13, 2015 through August 17, 2015 from Dr. Randall Crumpler, Dr. Jerome Parnell and Dr. Dennis Bullard to determine whether [Sparrow’s] urinary incontinence was caused by his compensable back condition was reasonably related to his compensable injury and Defendants are obligated to pay for this treatment. Defendants are also obligated to pay for the August 15, 2015 MR1 which was necessary to determine if [Sparrow’s] incontinence was caused by cauda equina compression related to his injury.

35. [Sparrow] testified that he wishes to undergo the surgery recommended by Dr. Bullard. Given the preponderance of the evidence in view of the entire record, the Full Commission finds that Dr. Bullard is in the best position to direct [Sparrow’s] medical care.

36. Based upon a preponderance of the evidence in view of the entire record, the Full Commission finds that [Sparrow] has failed to provide sufficient evidence to establish that urinary incontinence and [DVT] conditions are causally related to his December 31, 2014 compensable work injury.

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Based upon these factual findings, the Commission concluded as a matter of law that (1) Tyco must reimburse Sparrow for the appointments and testing he underwent between 13 July and 17 August 2015 in an effort to determine the cause of his urinary incontinence; (2) Sparrow's current back condition is causally related to his compensable injury; (3) the back surgery recommended by Dr. Bullard is reasonably required to effect a cure, provide relief, or lessen Sparrow's disability; (4) Sparrow is entitled to have Dr. Bullard named as his new treating physician; (5) there is insufficient evidence to show a causal relationship between the compensable injury and Sparrow's urinary incontinence and DVT; and, accordingly, (6) Sparrow was not entitled to any medical compensation for his incontinence or DVT. Tyco appealed from the Commission's opinion and award.

Discussion

On appeal, Tyco argues that: (1) the Commission erred in finding as fact and concluding as law that the surgery recommended by Dr. Bullard was necessary such as to support a change of treating physician, (2) no competent evidence supports the Commission's award of treatment for Sparrow's urological and bowel conditions between 13 July and 17 August 2015, and (3) it has overcome the *Parsons* presumption. We affirm.

Standard of Review

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In reviewing an opinion and award of the Industrial Commission, this Court is limited to two questions of law: (1) whether there was any competent evidence before the Commission to support its findings of fact; and (2) whether the findings of fact of the Commission justify its legal conclusions and decisions. The Commission is the sole judge of the credibility of the witnesses and the weight given to their testimony, and may assign more credibility and weight to certain testimony than other testimony. Moreover, the determination of the Commission is conclusive upon appeal even though the evidence may support . . . contrary findings.

The Commission's findings of fact may be set aside on appeal only when there is a complete lack of competent evidence to support them. If the totality of the evidence, viewed in the light most favorable to the complainant, tends directly or by reasonable inference to support the Commission's findings, these findings are conclusive on appeal even though there may be plenary evidence to support findings to the contrary.

Forrest v. Pitt Cty. Bd. of Educ., 100 N.C. App. 119, 123, 394 S.E.2d 659, 661 (1990) (citations, internal quotation marks, brackets, and one ellipsis omitted), *affirmed per curiam*, 328 N.C. 327, 401 S.E.2d 366 (1991).

I. Change of treating physician & surgery

Tyco first argues that “insufficient evidence exists to prove that the surgery recommended by Dr. Bullard and the change of treating physician is necessary to effect a cure, provide relief, or lessen [Sparrow’s] period of disability.” Specifically, Tyco contends that the “Commission erred in relying on Dr. Bullard’s testimony” because the evidence did not support findings of fact 31 and 35. We disagree.

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As an initial matter, we observe that, on appeal, our task is not to consider whether “sufficient” evidence “proves” the necessity of making Dr. Bullard Sparrow’s new treating physician or approving the recommended surgery. Rather, the question for this Court is whether the Commission’s conclusions of law regarding the necessity of a new treating physician and the recommended surgical procedure are supported by the relevant findings of fact and whether those findings of fact are supported by *any* competent evidence. In its argument on appeal, Tyco asserts that the testimony and opinions of Drs. Lacin and Musante—that surgery was not the best course of treatment for Sparrow—should have been given more weight than Dr. Bullard’s testimony and opinion that Sparrow was a surgical candidate. Such credibility determinations are solely the province of the Commission, and this Court may not second-guess them. *See id.* at 123, 394 S.E.2d at 661. As for Tyco’s observation that, based upon the findings of fact, the Commission apparently found Dr. Bullard’s opinion the most credible regarding surgery, but found Dr. Lacin’s testimony more credible regarding the link between the compensable injury and Sparrow’s incontinence, “the Commission may reject all or any part of any witness’[s] testimony.” *Franklin v. Broyhill Furniture Indus.*, 123 N.C. App. 200, 204, 472 S.E.2d 382, 385 (citation omitted), *cert. denied*, 344 N.C. 629, 477 S.E.2d 39 (1996). In sum, the Commission’s findings of fact regarding the credibility of the three expert medical witnesses are supported by competent evidence and, accordingly, are conclusive on

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appeal. *See Forrest*, 100 N.C. App. at 123, 394 S.E.2d at 661. To argue otherwise, based on our longstanding and well-settled standard of review, strikes us as incomprehensible.

We must next consider whether the Commission's findings of fact support its conclusions of law regarding the need for a change in Sparrow's treating physician. "Generally, an employer has the right to direct the medical treatment for a compensable work injury." *Craven v. VF Corp.*, 167 N.C. App. 612, 616, 606 S.E.2d 160, 163 (2004) (citation omitted), *disc. review denied*, 359 N.C. 320, 611 S.E.2d 172 (2005).

Provided, however, if he so desires, an injured employee may select a physician of his own choosing subject to the approval of the Industrial Commission.

The unambiguous language of this statute, thus, leaves the approval of a physician within the discretion of the Commission and the Commission's determination may only be reversed upon a finding of a manifest abuse of discretion.

Franklin, 123 N.C. App. at 207, 472 S.E.2d at 387 (citations, internal quotation marks, and ellipses omitted); *see* N.C. Gen. Stat. § 97-25(c) (2015) ("In order for the Commission to grant an employee's request to change treatment or health care provider, the employee must show by a preponderance of the evidence that the change is reasonably necessary to effect a cure, provide relief, or lessen the period of disability."). "An abuse of discretion results only where a decision is manifestly

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unsupported by reason or . . . so arbitrary that it could not have been the result of a reasoned decision.” *Goforth v. K-Mart Corp.*, 167 N.C. App. 618, 624, 605 S.E.2d 709, 713 (2004) (citations, internal quotation marks, and ellipsis omitted).

Tyco does not cite or acknowledge the abuse of discretion standard, instead relying entirely on its above-summarized contentions regarding credibility determinations. In light of the Commission’s factual findings that Dr. Bullard’s testimony and opinion regarding the necessity of surgery are the most credible, which we concluded, *supra*, are supported by competent evidence, in conjunction with the Commission’s findings of fact acknowledging that Dr. Musante did not agree with the surgical treatment plan, we cannot say that the Commission’s decision that a change in treating physician from Dr. Musante and Triangle to Dr. Bullard was “so arbitrary that it could not have been the result of a reasoned decision.” *Id.* (citations and internal quotation marks omitted). This argument lacks merit and is overruled.

II. Award for emergency diagnostic studies & treatment

Tyco next argues that no competent evidence supports the Commission’s award of treatment for Sparrow’s urological and bowel conditions between 13 July 2015 and 17 August 2015. Specifically, Tyco suggests that no competent evidence supports the Commission’s findings of fact regarding Sparrow’s urgent need to seek medical care for his urinary and bowel issues following the start of his work conditioning. We disagree.

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The Act provides that, “[i]f in an emergency on account of the employer’s failure to provide medical compensation, a physician other than provided by the employer is called to treat the injured employee, the reasonable cost of such service shall be paid by the employer if so ordered by the Industrial Commission.” N.C. Gen. Stat. § 97-25(e). However, the statute “does not define an emergency. What may be an emergency under one set of circumstances may not qualify as such under another.” *Schofield v. Great Atl. & Pac. Tea Co.*, 43 N.C. App. 567, 571, 259 S.E.2d 338, 341 (1979), *vacated on other grounds*, 299 N.C. 582, 264 S.E.2d 56 (1980).

Tyco contends that Sparrow’s urinary incontinence and bowel issues were not an emergency matter. We are not persuaded. Once Sparrow experienced incontinence during his work conditioning, Dr. Crumpler, his primary physician, suggested follow-up with Triangle and Dr. Musante, but, when Sparrow took that advice, he was told that Dr. Musante would not see him at that point. Tyco cites no case law, or, indeed, any authority that supports its assertion that Sparrow’s circumstances, to wit, a disabled employee who (1) experiences a sudden onset of incontinence which prevents him from continuing his work conditioning, (2) is directed by his primary care physician to get follow-up care, (3) seeks but is denied follow-up care from his current treating physician, and then (4) seeks but is denied a second opinion from his employer, did not constitute an emergency. As noted by the Commission in finding of fact 33, Dr. Bullard testified that the medical evaluations

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in question were necessary to determine whether Sparrow's incontinence was caused by cauda equina compression, "a medically urgent situation" that can have "severe consequences" and "potentially lead to paraplegia." This finding of fact fully supports the Commission's award to Sparrow of compensation and reimbursement for the costs of the medical evaluations required to determine whether his incontinence was related to his compensable back injury. Tyco's argument to the contrary is wholly lacking in merit and is overruled.

III. Parsons presumption

Tyco also argues that it has "overcome the rebuttable *Parsons* presumption." Specifically, Tyco contends that it has rebutted "the presumption as to whether the surgery recommended by Dr. Bullard is necessary to effect a cure, provide relief, and/or lessen the period of disability." We disagree.

Once an injured employee meets his initial burden of proving the compensability of a workplace injury, there arises a presumption that any further medical treatment the employee requires is causally related to the compensable injury. *Parsons v. Pantry, Inc.*, 126 N.C. App. 540, 542, 485 S.E.2d 867, 869 (1997). However, "[t]he employer may rebut the presumption with evidence that the medical treatment is not directly related to the compensable injury." *Miller v. Mission Hosp., Inc.*, 234 N.C. App. 514, 519, 760 S.E.2d 31, 35 (2014) (citation and internal quotation marks omitted).

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Tyco accepted Sparrow's low back injury as compensable; testimony from Sparrow, as well as his medical records, show that Sparrow continued to experience low back pain since the injury, and the surgery suggested by Dr. Bullard is to address Sparrow's ongoing low back pain. Thus, the surgery in question is intended to treat pain caused by "the very injury [accepted] to be the result of a compensable accident" *See Parsons*, 126 N.C. App. at 542, 485 S.E.2d at 869. Tyco's actual argument appears to be that the Commission erred in finding more credible Dr. Bullard's treatment approach—surgery—rather than a continuation of the approach favored by Drs. Lacin and Musante—a more conservative, non-surgical approach. Relying on its first two arguments, Tyco asserts, correctly, that both of the latter doctors opined that surgery was not an appropriate treatment for Sparrow's back condition. However, Dr. Bullard testified that Sparrow was a good candidate for surgery. As discussed in section I, *supra*, the Commission then exercised its role as finder of fact in making credibility determinations, weighing the conflicting evidence, and, ultimately, determining that Dr. Bullard was the most credible medical witness on the question of the surgery. It is not the role of this Court to second guess the Commission in such circumstances. *See Forrest*, 100 N.C. App. at 123, 394 S.E.2d at 661.

Conclusion

For these reasons, the opinion and award of the Commission is

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AFFIRMED.

Judges BRYANT and CALABRIA concur.

Report per Rule 30(e).