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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-774

Filed: 18 February 2020

North Carolina Industrial Commission, I.C. No. 16-011190

CATHY B. WHISNANT, Employee, Plaintiff,

v.

ABERNATHY LAURELS, Employer, UNITED HEARTLAND, Carrier, Defendants.

Appeal by plaintiff from opinion and award entered 30 April 2019 by the North Carolina Industrial Commission. Heard in the Court of Appeals 5 February 2020.

Lyndon R. Helton and The Bollinger Law Firm, PC, by Bobby L. Bollinger, Jr. and Nicholas J.A. Stark, for plaintiff-appellant.

Eller Tonnsen Bach, LLC, by Cameron S. Wesley and Kurt C. Widenhouse, for defendant-appellees.

TYSON, Judge.

Cathy Whisnant ("Plaintiff") appeals from an opinion and award filed 30 April 2019 by the North Carolina Industrial Commission ("Commission") denying compensation for her claim. We affirm.

I. Background

Plaintiff is a licensed practical nurse and a nationally certified surgical technician. She had worked as a surgical technician in a hospital for five years, an occupational health nurse at a furniture company for seventeen years, a practical nurse with a residential nursing care facility for ten years, and as a private duty nurse for seven months, until July 2015.

Plaintiff stepped on a piece of paper on the hardwood floor in her home in July 2015. She slipped on the paper, "slid and basically did the split." Plaintiff self-diagnosed a quadricep tear in her right thigh, but she did not seek medical treatment until she presented at an urgent care facility on 9 September 2015.

Plaintiff suffered pain and muscle spasms throughout 2015. She took anti-inflammatory medications and muscle relaxers. She did not maintain health insurance at the time of the fall.

Abernathy Laurels ("Defendant-Employer") offered Plaintiff a position as a licensed practical nurse and completed a pre-placement, post-offer physical function observation of her on 24 September 2015. Plaintiff met the physical criteria for the position Defendant-Employer had offered her. Defendant-Employer hired Plaintiff as a part-time employee on 29 September 2015 and promoted her to a full-time position effective 15 October 2015. Plaintiff received health insurance coverage from Defendant-Employer three months after being hired.

Plaintiff saw Dr. Justin Jones at Carolina Orthopaedic Specialists on 4 December 2015. Dr. Jones suspected Plaintiff had a right quadricep strain rather than a tear. Dr. Jones recommended she get radiographs, an MRI, and physical therapy. Plaintiff declined to undergo and pay for the tests and recommended treatment, as she did not yet have medical insurance.

Plaintiff returned to Dr. Jones on 2 February 2016 with pain in her right hip and an audible popping sensation. Plaintiff was now insured and obtained radiographs of her hip, which revealed the appearance of avascular necrosis with collapse, a bullet-shaped femoral head, shortening of the length of her right leg, and a complete loss of joint space.

Dr. Jones recommended a total hip replacement as "the treatment of choice" for her condition, but Plaintiff requested they "try to manage this conservatively" until she became eligible for leave under the Family and Medical Leave Act.

Dr. Jones prescribed Plaintiff with an anti-inflammatory medication until she underwent surgery and referred her to pain management specialists. Plaintiff visited Dr. J. Barry Sanderlin on 5 February 2016 for a steroid injection to her right hip. She reported a 50% reduction in pain immediately following the injection.

Plaintiff was working in a patient's room on 1 March 2016 when her feet became tangled up in oxygen tubing. She tripped and fell onto her left side. Plaintiff presented to Catawba Valley Medical Center that afternoon, where a physician's

assistant, Phillip Killian, examined her hips. Killian determined her right hip was abnormal, "most likely a combination of femoral head avascular necrosis with subchondral collapse and osteoarthritis" with "no residual joint space." He also found the condition of her left hip joint was "unremarkable." Killian prescribed a muscle relaxer and pain medication. He restricted Plaintiff to sit-down work with "no stooping, squatting[,] prolonged standing, walking[,] prolonged bending, twisting," and "no lifting more than 10 pounds."

Defendant-Employer acknowledged these restrictions and accommodated Plaintiff by transitioning her schedule to include more shifts of a shorter duration. Plaintiff returned to a follow up visit with Killian on 7 March 2016. Plaintiff reported she "had to do a lot of walking down the halls to the point that her hip was hurting so bad she left [work] early." Killian referred Plaintiff to an orthopedist and kept her out of work for one week.

Plaintiff returned to Dr. Jones on 11 March 2016. Plaintiff reported to Dr. Jones she suffered intermittent "achiness" and pain in her "groin, as she previously had, just worse, as well as in [her] thigh." Dr. Jones recommended holding Plaintiff "out of work for a week or two, get her started on a course of physical therapy with the goal of getting her back to her baseline function prior to this fall, which again is not 100%, but she was reasonably functional." Dr. Jones added: "I would not expect Workman's Compensation to cover her hip replacement as her avascular necrosis

preceded the most recent injury, but lets [sic] see if we can at least get her back to her baseline level."

Plaintiff began physical therapy on 17 March 2016. She continued to see Dr. Jones every two weeks, and he continued to excuse her from work for physical therapy. Dr. Jones referred to Plaintiff's fall on 1 March as "a secondary work-related injury . . . that has exacerbated her symptoms." Defendant-Employer and United Heartland (collectively, "Defendants") completed a Form 63, Section 1 and began indemnity benefits without prejudice on 18 March 2016.

Plaintiff reported to Dr. Jones on 26 April 2016 that she had been having a "giving-way type sensation" in her thigh and "thigh weakness." She requested an MRI and expressed hope that she could return to work "if she can get rid of the thigh pain or the muscle pain in her thigh." Plaintiff obtained the MRI on 4 May 2016, which revealed a significant chronic tear of a tendon with significant retraction into the right thigh and atrophy of the muscle.

Defendants filed a Form 61 on 18 May 2016, denying Plaintiff's worker's compensation claim on the grounds that Plaintiff's work-related injury was "not the primary cause of the need for treatment." Defendant-Employer terminated Plaintiff's employment pursuant to their absence from work and leave policy on 29 May 2016.

Plaintiff presented to Dr. H. David Homesley, an orthopedist on 8 July 2016 for evaluation. Dr. Homesley determined Plaintiff was an appropriate candidate for

a total right hip replacement because she had "exhausted conservative measures." Dr. Homesley performed Plaintiff's total right hip replacement on 31 October 2016.

The Commission filed its Opinion and Award denying Plaintiff's claim on 30 April 2019. One commissioner dissented. In its conclusion of law number 3, the Commission determined:

> On 1 March 2016, Plaintiff was acting within the course and scope of her employment with Defendant-Employer when she fell after her feet became entangled in oxygen tubing and a phone cord. Based upon a greater weight of the competent evidence, Plaintiff has failed to prove by a preponderance of the evidence that the 1 March 2016 work-related fall aggravated her pre-existing right hip condition and was a causal factor in the necessity for a total right hip arthroplasty.

Plaintiff filed her notice of appeal with this Court on 23 May 2019.

II. Jurisdiction

This Court possesses jurisdiction from an appeal of an Opinion and Award of the Industrial Commission pursuant to N.C. Gen. Stat. §§ 7A-29(a) and 97-86 (2019).

III. Issue

Plaintiff argues the Full Commission erred in relying upon the "legal opinion" of a medical expert in reaching the conclusion that her work-related fall did not aggravate or exacerbate her pre-existing right hip condition, despite medical records and testimony to the contrary.

IV. Standard of Review

> The standard of review for an opinion and award of the North Carolina Industrial Commission is (1) whether any competent evidence in the record supports the Commission's findings of fact, and (2) whether such findings of fact support the Commission's conclusions of law. The Commission's findings of fact are conclusive on appeal if supported by competent evidence, notwithstanding evidence that might support a contrary finding. In determining the facts of a particular case, the Commission is the sole judge of the credibility of the witnesses and the weight accorded to their testimony. This Court reviews the Commission's conclusions of law *de novo*.

Booker-Douglas v. J & S Truck Serv., Inc., 178 N.C. App. 174, 176-77, 630 S.E.2d 726, 729 (2006) (citations and internal quotation marks omitted).

V. Analysis

Plaintiff's index in its brief contains a single issue, which is the subject of the argument made in the brief, but the "Issues Presented" contains four other purported "issues." Defendants argue Plaintiff is attempting to raise five distinct "issues" and has abandoned each by not clearly addressing them in her brief. *See* N.C. R. App. P. 28(b)(6).

To the extent Plaintiff's "Issues Presented" asserts arguments not addressed in her brief, we agree. However, Plaintiff's index and argument centers around a single common issue: whether the Full Commission relied too heavily upon the "legal opinion" of a medical expert. Although unartfully written, Plaintiff's brief does not abandon that central issue under Rule 28(b)(6).

Plaintiff challenges the Full Commission's findings of fact numbers 14, 15, 17, 19, 22, 23, 26, 28, and 30; its conclusion of law number 3; and, the award. Plaintiff argues the Full Commission relied too heavily upon a "legal opinion" Dr. Jones purportedly expressed in his reports. Plaintiff cites his report following the 11 March 2016 office visit, in which he wrote: "I would not expect Workman's Compensation to cover her hip replacement as her avascular necrosis preceded the most recent injury."

In a criminal case context, our Supreme Court stated, "an expert may not testify that . . . a particular legal conclusion or standard has or has not been met . . . where the standard is a legal term of art which carries a specific legal meaning not readily apparent to the witness." *State v. Smith*, 315 N.C. 76, 100, 337 S.E.2d 833, 849 (1985). Plaintiff then asserts as error, "it is clear that Dr. Jones held a legal opinion that the existence of a pre-existing condition was a bar to recovery under the [Workers' Compensation] Act even in the event of a subsequent aggravating injury." The Full Commission cited Dr. Jones' statement of his "legal opinion" in its finding of fact number number 14.

Defendants argue the unchallenged findings of fact numbers 4-10, 16, 24, 25, and 29 are based on competent evidence to support the Full Commission's conclusion of law number 3. "Unchallenged findings of fact are presumed correct and are binding on appeal." *In re Schiphof*, 192 N.C. App. 696, 700, 666 S.E.2d 497, 500 (2008).

The unchallenged findings of fact Defendant cites to support the Commission's conclusion of law number 3 are:

> 4. Prior to the 1 March 2016 fall, Plaintiff had pre-existing severe arthritis of her right hip and her orthopaedic physician had recommended she have a right total hip replacement. In July 2015, Plaintiff slipped and fell at home. Sometime later, Plaintiff stepped in a hole, which worsened her pain. Plaintiff sought medical treatment for her right hip pain on 9 September 2015 at Frye Urgent Care. Plaintiff was diagnosed with a strain of the right hip and thigh. Plaintiff was unable to obtain the recommended x-rays as she was unemployed and did not have health insurance.
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> 5. Plaintiff was initially hired by Defendant-Employer on a part-time basis on 29 September 2015 and became full-time on 15 October 2015, at which time she was eligible for numerous employee benefits, including health insurance coverage to be effective after ninety days of full-time employment. Plaintiff would also become eligible for protection afforded by the Family and Medical Leave Act following twelve months of employment.
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> 6. Sheila Mathis is an LPN for Defendant-Employer and worked with Plaintiff in the same unit. Prior to the 1 March 2016 fall, Plaintiff had complained "quite a bit" to Ms. Mathis about her hip pain and discussed how she needed to have surgery but was waiting until she had insurance. Ms. Mathis also observed Plaintiff walking a limp.
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> 7. Bethel Smith was Plaintiff's supervisor from September to December 2015. During this time, Ms. Smith observed Plaintiff walking with a limp, favoring her right side. Plaintiff also told Ms. Smith that she had come to work with Defendant-Employer so she could get insurance.

8. In 2015, Plaintiff took anti-inflammatories and muscle relaxers to reduce the muscle spasms and pain in her right hip. Plaintiff walked with a limp and wore an elastic support band over her right thigh to provide support. However, Plaintiff's pain worsened and she ultimately sought treatment with an orthopedist at the end of 2015 despite a lack of health insurance.

9. On 4 December 2015, Plaintiff presented to Dr. Justin Jones of Carolina Orthopaedic Specialists for "constant sharp (8/10) pain" since the July fall. Plaintiff complained of right thigh pain and, on examination, Dr. Jones noted an antalgic gait on the right and "palpable fullness on the proximal lateral aspect of the right thigh," with tenderness to palpation. Dr. Jones diagnosed a right thigh strain and recommended radiographs and an MRI to rule out a quadriceps muscle tear. Dr. Jones also recommended physical therapy, but Plaintiff declined all recommended treatment because she did not have health insurance with Defendant-Employer.

10. Plaintiff, having obtained health insurance through Defendant-Employer in January, returned to Dr. Jones on 2 February 2016 and reported developing constant pain in the right hip, with an audible popping sensation. On examination, Dr. Jones noted an antalgic gait on the right, and "markedly limited range of motion of the right hip with crepitus throughout." Dr. Jones was able to take radiographs of Plaintiff's hips and interpreted the x-rays as revealing avascular necrosis with collapse, a "bullet shaped" femoral head, shortening of the overall length of the leg, and a complete loss of joint space. These findings indicated Plaintiff had advanced avascular necrosis and had end-stage arthrosis of the right hip. Dr. Jones recommended a right total hip arthroplasty but noted that because Plaintiff "is not eligible for FMLA leave until 1 year, and she would like to try to manage this conservatively until that time."

Dr. Jones relayed his belief that such a delay would be a challenge and referred her to pain management to "get her through a year of symptom relief."

. . .

16. Plaintiff continued to treat with Dr. Jones in March and April 2016. On 26 April 2016, Dr. Jones noted that Plaintiffs right hip pain pre-dated the 1 March 2016 fall and that Plaintiff has pain and a give-way sensation in the right thigh since the fall. Plaintiff requested an MRI of her right thigh, and Dr. Jones agreed to order it. Dr. Jones again noted Plaintiff had severe degenerative changes of the right hip that would benefit from a total hip arthroplasty, but which is unrelated to the work-related injury.

. . .

24. The parties deposed Mr. Killian, the physician assistant that evaluated Plaintiff immediately after the 1 March 2016 fall. Mr. Killian was tendered as an expert in occupational medicine. Mr. Killian testified that the necessity for a total right hip replacement was not caused by Plaintiff's 1 March 2016 fall.

25. Dr. Jones is an orthopedist specializing in total joint replacement. Dr. Jones is the only physician who treated Plaintiff that evaluated and treated Plaintiff's right hip condition before and after the 1 March 2016 fall and his opinions are given greater weight than those of Dr. Homesley and Dr. Sloand. When Dr. Jones evaluated Plaintiff on 2 February 2016, Plaintiff had end-stage arthrosis of the right hip, a condition which would not improve over time. Based upon his examination and the radiographs, he recommended a total hip arthroplasty.

. . .

> 29. The Full Commission assigns less weight to Dr. Sloand's opinions as they are based upon speculation and upon facts that the Full Commission does not find credible. The Full Commission assigns less weight to Dr. Homesley's opinions as compared to Dr. Jones's opinions because Dr. Jones was in a better position to render an opinion on any material aggravation of her hip condition as he treated Plaintiff both before and after the 1 March 2016 fall.

These findings of fact are unchallenged by Plaintiff, are supported by competent evidence, and are binding upon appeal. *See id.* These findings support the Commission's challenged conclusion of law number 3: "Based upon a greater weight of the competent evidence, Plaintiff has failed to prove by a preponderance of the evidence that the 1 March 2016 work-related fall aggravated her pre-existing right hip condition and was a causal factor in the necessity for a total right hip arthroplasty."

Even were we to agree that the findings of fact Plaintiff challenged are not supported by competent evidence, other unchallenged and sufficient findings of fact support the Commission's conclusion of law number 3 and its Award. *See Booker-Douglas*, 178 N.C. App. at 176, 630 S.E.2d at 729. Plaintiff's argument is overruled.

VI. Conclusion

As noted, Plaintiff's brief sufficiently sets forth an issue and argument to overcome Defendant's argument, asserting it is waived on appeal. *See* N.C. R. App. P. 28(a). The Commission's unchallenged findings are binding on appeal. *See Schiphof*, 192 N.C. App. at 700, 666 S.E.2d at 500. These unchallenged findings are

based upon competent evidence and support the Commission's challenged conclusion of law and its Award. *See Booker-Douglas*, 178 N.C. App. at 176, 630 S.E.2d at 729.

Plaintiff has failed to show any error in the Commission's conclusion of law number 3 and Award to reverse and remand. The Commission's Opinion and Award is affirmed. *It is so ordered.*

AFFIRMED.

Judges HAMPSON and BROOK concur.

Report per Rule 30(e).