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NO. COA07-784

NO. COA07-836

NORTH CAROLINA COURT OF APPEALS

Filed: 20 May 2008

STEVEN LAPIDUS,
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File Nos. 162240 & 836986

SIEMENS POWER TRANSMISSION,
Employer,

TRAVELERS INSURANCE COMPANY,
Carrier,
Defendants.

Appeal by Plaintiff from opinion and award entered 2 February 2007 by the North Carolina Industrial Commission. Appeal by Defendants from opinion and award entered 10 March 2004 and from opinion and award entered 2 February 2007 by the North Carolina Industrial Commission. Heard in the Court of Appeals 5 February 2008. As the issues presented in these appeals involve common questions of law, we have consolidated the appeals pursuant to Rule 40 of the North Carolina Rules of Appellate Procedure. N.C.R. App. P. 40.

Steven LaPidus, Plaintiff, pro se.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Thomas M. Morrow and Susan J. Vanderweert, for Defendants.

McGEE, Judge.

The records in these two cases demonstrate that Steven LaPibus (Plaintiff) began working for Siemens Power Transmission (Defendant Siemens) in 1996. Plaintiff was injured on 11 February 1998 when he was involved in a motor vehicle collision while on a business trip. Plaintiff was transported to Wake Medical Center in Raleigh, North Carolina. Doctors diagnosed Plaintiff with cervical spine muscle spasm, but x-rays of Plaintiff's ankle, spine, and chest were normal. Plaintiff was given prescriptions for pain relievers and muscle relaxants. He was discharged from the hospital and returned to work shortly thereafter.

Plaintiff subsequently filed a claim under Industrial Commission file number 836986 (file 836986) for workers' compensation benefits for "soft tissue injuries to [his] neck and back." Defendant Siemens and Travelers Insurance Company (together, Defendants) accepted the compensability of Plaintiff's injury and began to pay for Plaintiff's medical expenses.

Over the following months, Plaintiff sought medical care from a number of different physicians. Dr. Delores Peterson (Dr. Peterson), Plaintiff's family physician, diagnosed Plaintiff with severe musculoskeletal strain. An MRI of Plaintiff's brain on 24 March 1998 was normal, and a CT scan of Plaintiff's cervical spine revealed a bulging disc but no herniation. Dr. Bruce Lipsius (Dr. Lipsius) performed a neurological evaluation of Plaintiff in May 1998 and diagnosed Plaintiff with post-traumatic cervical sprain and post-traumatic headaches. Another scan of Plaintiff's brain in July 1998 was normal. Though Plaintiff continued to complain of neck pain, Dr. Lipsius again determined in September 1998 that Plaintiff's neurological exam was normal. Plaintiff received trigger-point injections and underwent physical therapy.

Plaintiff returned to Dr. Peterson in December 1998 complaining of new symptoms, including headaches, numbness, spine pain, bowel and bladder urgency, extremely cold hands and feet, insomnia, and knee pain. Doctor Nathaniel Evans (Dr. Evans) performed an

independent medical examination (IME) of Plaintiff on 28 July 1999. Dr. Evans' examination revealed no objective findings to explain Plaintiff's symptoms. Dr. Evans determined that Plaintiff's cervical muscle strain had resolved, and that Plaintiff's other complaints were unrelated to the motor vehicle accident. Therefore, Dr. Evans determined that Plaintiff had reached maximum medical improvement (MMI) with regard to his injuries from the motor vehicle accident and required no further treatment. Defendants thereafter filed a Form 28B in February 2000 indicating that they had paid \$20,310.41 in medical expenses, and that Plaintiff had received his final compensation in December 1999.

Plaintiff continued to seek treatment for his headaches, bowel and bladder urgency, and neurological symptoms. Dr. Arun Kachroo (Dr. Kachroo) diagnosed Plaintiff with systemic neuropathy in February 2000 and treated Plaintiff for pain and depression. Dr. Peterson examined Plaintiff again in June 2000 and determined that Plaintiff had reached MMI with regard to his injuries from the motor vehicle accident. Dr. Peterson concluded that Plaintiff's bladder and bowel dysfunction was unrelated to the motor vehicle accident.

While on a business trip in Germany in September 2000, Plaintiff lost his balance on a flight of stairs. Plaintiff sustained tendon injuries and fractured the fourth metatarsal bone in his foot. Plaintiff filed a claim under Industrial Commission file number 162240 (file 162240) for workers' compensation benefits related to his foot injuries. Defendants filed a Form 28B in November 2001 indicating that they had paid Plaintiff a total of \$6,495.46 in medical expenses related to this claim, and that Plaintiff had received his final compensation in June 2001.

Meanwhile, Plaintiff continued to seek medical attention for chronic pain, migraines, bowel and bladder dysfunction, and cognitive impairment. Dr. Steven Scherer (Dr. Scherer) examined Plaintiff in January 2001 and determined that Plaintiff's headaches were unrelated to

the motor vehicle accident. Dr. Paul Marcotte (Dr. Marcotte) examined Plaintiff in February 2001 and determined that Plaintiff's symptoms were unrelated to his bulging cervical disc. Dr. John Yang (Dr. Yang) performed an IME on Plaintiff in June 2001. Dr. Yang found no objective neurological abnormality to explain Plaintiff's symptoms, and he determined that Plaintiff had reached MMI with regard to his injuries from the motor vehicle accident. Plaintiff then treated with Dr. Brenda Ivker (Dr. Ivker) in December 2001 for his physical symptoms as well as memory deficit, diminished attention span, difficulty with mathematics, and irritability. Dr. Ivker determined that Plaintiff's symptoms might have been caused by emotional issues, rather than by injuries from his motor vehicle accident. Finally, Dr. Jeanne Doherty (Dr. Doherty) examined Plaintiff in January 2002 and determined that no objective findings could account for Plaintiff's symptoms.

Plaintiff filed an application for additional compensation in file 836986 on 2 December 2001. Plaintiff sought additional medical benefits as well as disability benefits. Deputy Commissioner Edward Garner, Jr. (Deputy Commissioner Garner) heard Plaintiff's request for additional medical benefits on 22 March 2002. Deputy Garner issued an opinion and award on 22 May 2003 denying Plaintiff's claim on the ground that Plaintiff had not proven that his symptoms were directly related to the motor vehicle accident. Plaintiff appealed Deputy Commissioner Garner's decision to the North Carolina Industrial Commission (the Commission). The Commission issued an opinion and award on 10 March 2004 reversing Deputy Commissioner Garner's order. The Commission concluded that Plaintiff was entitled to additional medical benefits and ordered Defendants to pay Plaintiff's medical expenses. The Commission then remanded the case for a hearing on Plaintiff's claim for disability compensation.

While Plaintiff's claim for disability benefits in file 836986 was pending on remand, Plaintiff filed a claim on 5 October 2004 seeking additional medical benefits and disability benefits in file 162240. All of Plaintiff's pending claims were heard on 14 March 2005 before Deputy Commissioner George T. Glenn, II (Deputy Commissioner Glenn). Deputy Commissioner Glenn issued an opinion and award on 4 October 2005 denying Plaintiff's claims, and Plaintiff appealed to the Commission. The Commission issued an opinion and award on 2 February 2007 denying Plaintiff's claims for medical and disability compensation in file 162240, and for disability compensation in file 836986. However, the Commission's opinion instructed Defendants to continue to pay Plaintiff's medical expenses in file 836986, as previously ordered in the Commission's 10 March 2004 opinion and award. Both parties appeal.

I.

Plaintiff appeals the Commission's 2 February 2007 opinion and award denying his claims for additional medical benefits and disability benefits in file 162240, and denying his claim for disability benefits in file 836986. "The standard of appellate review of an opinion and award of the Industrial Commission in a workers' compensation case is whether there is any competent evidence in the record to support the Commission's findings of fact and whether these findings support the Commission's conclusions of law." *Lineback v. Wake County Board of Commissioners*, 126 N.C. App. 678, 680, 486 S.E.2d 252, 254 (1997).

A.

Plaintiff first argues that the Commission erred by denying his claim for additional medical benefits and disability benefits in file 162240. The record indicates that Plaintiff received his final medical compensation payment from Defendants in file 162240 on 8 June 2001. The Workers' Compensation Act provides:

The [employee's] right to medical compensation shall terminate two years after the employer's last payment of medical or indemnity compensation unless, prior to the expiration of this period . . . the employee files with the Commission an application for additional medical compensation which is thereafter approved by the Commission[.]

N.C. Gen. Stat. §97-25.1 (2007). Plaintiff did not file a claim for additional compensation in file 162240 until 5 October 2004. The Commission found that Plaintiff's claim was filed more than two years after his last compensation payment and therefore concluded that Plaintiff's claim was barred.

Plaintiff does not deny the untimeliness of his claim. Rather, Plaintiff argues that he was unaware that he needed to file a claim for additional benefits. Plaintiff cites *Jones v. Lowe's Companies*, 103 N.C. App. 73, 404 S.E.2d 165 (1991) for the proposition that the statutory violation should be excused because Plaintiff did not "reasonably know of the nature, seriousness, or probable compensable character of his injury and delay[ed] notification only until he reasonably kn[ew]" of the need to file a claim. *Id.* at 75, 404 S.E.2d at 166 (quoting *Lawton v. County of Durham*, 85 N.C. App. 589, 592, 355 S.E.2d 158, 160 (1987)).

Plaintiff's reliance on *Jones* is misplaced. In *Jones*, the injured employee failed to provide notice to his employer within thirty days of his injury, in violation of the Workers' Compensation Act. Our Court excused this violation because the employee had a reasonable excuse for providing late notice. *Id.* at 76, 404 S.E.2d at 167. However, the statutory provision at issue in *Jones* specifically excuses late notice if "reasonable excuse is made [by the employee] to the satisfaction of the Industrial Commission for not giving such notice and the Commission is satisfied that the employer has not been prejudiced thereby." N.C. Gen. Stat. §97-22 (2007). In contrast, N.C.G.S. §97-25.1 does not similarly excuse certain violations of its two-year filing

requirement. Therefore, Plaintiff cannot argue that his late filing error is excusable under the rule discussed in *Jones*.

Plaintiff also argues that Defendants have waived their right to contest the compensability of Plaintiff's claim by their own procedural delays. However, the question on appeal is not whether Plaintiff's claim is compensable, but rather whether Plaintiff's right to compensation has expired under N.C.G.S. §97-25.1. Plaintiff's arguments are therefore without merit. We hold that the Commission's findings are supported by competent evidence, and that the Commission's findings support its conclusions. The Commission did not err by denying Plaintiff's claims for additional medical compensation and disability benefits in file 162240.

B.

Plaintiff next argues that the Commission erred by denying his claim for disability benefits in file 836986. As part of his argument, Plaintiff challenges numerous findings of fact contained in the Commission's 10 March 2004 opinion and award. Plaintiff has not appealed from that decision and, therefore, is unable to challenge findings contained therein. We limit our review to the findings of fact and conclusions of law contained in the Commission's 2 February 2007 opinion and award from which Plaintiff appeals.

The Workers' Compensation Act defines "disability" 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) (2007). To conclude that an employee is disabled, the Commission must first find:

- (1) that [the] plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment,
- (2) that [the] plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and
- (3) that this individual's incapacity to earn was caused by [the] plaintiff's injury.

Hilliard v. Apex Cabinet Co., 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). The employee may meet his burden of showing that his earning capacity has decreased in one of four ways, including:

(1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

Russell v. Lowes Product Distribution, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (internal citations omitted).

Plaintiff's evidence regarding his alleged disability tended to show that Plaintiff was out of work for ten days following the motor vehicle accident. Plaintiff testified before Deputy Commissioner Glenn that in the three years following the accident, he gradually lost wages and benefits from Defendant Siemens until he was fired in June 2002, after which time he worked for various other companies. However, Plaintiff also testified regarding his annual income between 1998 and 2004. According to Plaintiff, he earned: \$72,648 in 1998, the year of his motor vehicle accident; \$61,970 in 1999; \$88,257 in 2000; \$68,043 in 2001; \$87,242 in 2002; \$38,807 in 2003; and approximately \$60,000 for ten months of work in 2004. Plaintiff testified that since the motor vehicle accident, the longest amount of time he had been out of work with no compensation was eight weeks. Plaintiff argued that while he had basically worked full-time since the motor vehicle accident and continued to draw a salary comparable to his 1998 salary, he was not earning up to his full capacity. Plaintiff also introduced an 18 March 2002 letter from

Dr. Peterson regarding Plaintiff's ability to work. Dr. Peterson wrote that Plaintiff was able to work up to forty or sixty hours per week, with accommodations. However, Dr. Peterson also stated that Plaintiff's "cognitive deficits . . . would make it difficult for [Plaintiff] to obtain comparable employment; I would also expect these cognitive deficits to hurt his future earning capabilities."

In its 2 February 2007 opinion and award, the Commission found:

[P]laintiff has failed to show . . . that he was disabled or suffered any loss in wage earning capacity as a result of the injuries associated with this claim. Plaintiff continued to work full time until just before the date of [the] hearing before . . . Deputy Commissioner [Glenn], and failed to show that any of his treating physicians have taken him out of work for symptoms related to the injury by accident. Thus, the Full Commission finds that [P]laintiff has failed to show that he is unable to earn the same wages that he earned before the injury, either in the same employment or in other employment.

The Commission therefore concluded that Plaintiff was not entitled to disability benefits in file 836986.

Based on the record before us, we hold that the Commission's findings were supported by competent evidence. Plaintiff's evidence does not demonstrate that he is incapable of work in any employment, nor does it show that he has been unable to obtain employment. *See Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457. Further, while Plaintiff's annual income has fluctuated since his injury, his reported earnings do not suggest that he is unable to earn a salary comparable to his 1998 salary. *See id.* In fact, Plaintiff's earnings in 2000 and 2002 substantially exceeded his 1998 earnings. While Plaintiff did introduce evidence suggesting that his injuries caused a decrease in his future earning potential, we nonetheless hold that there was competent evidence to support the Commission's findings. We further hold that the Commission's findings

supported its conclusions. The Commission therefore did not err by denying Plaintiff's claim for disability benefits in file 836986.

Plaintiff has not set out or argued his remaining assignments of error and therefore they are deemed abandoned. N.C.R. App. P. 28(b)(6).

II.

Defendants appeal the Commission's 10 March 2004 and 2 February 2007 opinions and awards granting Plaintiff's claim for additional medical benefits in file 836986.

Following a compensable injury, an employer must provide medical compensation to the injured employee "as may reasonably be required to effect a cure or give relief and for such additional time as . . . will tend to lessen the period of disability[.]" N.C. Gen. Stat. §97-2(19) (2007). When an employer and employee disagree regarding the continuance of medical care, "the Industrial Commission may order such further treatments as may in the discretion of the Commission be necessary." N.C. Gen. Stat. §97-25 (2007). Our Court has previously held that "[l]ogically implicit in the authority accorded the Commission to order . . . further medical treatment under [N.C.]G.S. §97-25 is the requirement that the supplemental compensation and future treatment be directly related to the original compensable injury." *Pittman v. Thomas & Howard*, 122 N.C. App. 124, 130, 468 S.E.2d 283, 286, *disc. review denied*, 343 N.C. 513, 472 S.E.2d 18 (1996). A plaintiff must prove causation by a preponderance of the evidence. *See, e.g., Phillips v. U.S. Air, Inc.*, 120 N.C. App. 538, 541-42, 463 S.E.2d 259, 261 (1995), *aff'd per curiam*, 343 N.C. 302, 469 S.E.2d 552 (1996).

After considering Plaintiff's medical evidence, including statements and depositions from his treating physicians, the Commission issued finding of fact number thirty-one:

31. [I]t is clear . . . that [P]laintiff continues to suffer from multiple problems of unknown or undiagnosed

etiology. . . . [I]t is unclear whether [P]laintiff's complaints are from a head injury or a behavior-related illness; however, it is clear that the litany of medical problems that afflict [P]laintiff appear to begin with the admittedly compensable accident on February 11, 1998. Thus, the Full Commission finds there to be sufficient evidence, including [P]laintiff's own testimony in regard to his ongoing pain, that [P]laintiff is in need of continuing medical treatment despite the fact that he has reached maximum medical improvement with respect to his injuries.

Based on this finding, the Commission concluded that "there is sufficient evidence of record to support [P]laintiff's need for continuing medical compensation to effect a cure, give relief, or lessen the period of disability."

Defendants contend that the Commission's finding and conclusion are based on an erroneous legal premise. We agree. In *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 538 S.E.2d 912 (2000), the employee suffered back strain and received medical compensation from her employer. *Id.* at 228, 538 S.E.2d at 913-14. Three years later, the employee was diagnosed with fibromyalgia, and her treating physician believed that her condition was related to her earlier work injury. The employee sought additional medical benefits, but the employer claimed that there was no medical evidence to demonstrate that the employee's fibromyalgia was related to her work injury. *Id.* at 229, 538 S.E.2d at 914. The employee's physician stated in his deposition: "I think [the employee] does have fibromyalgia and I relate it to the accident primarily because . . . it was not there before and she developed it afterwards. And that's the only piece of information that relates the two." *Id.* at 232, 538 S.E.2d at 916. The Commission awarded the employee disability compensation. *Id.* at 229, 538S.E.2d at 914.

Our Supreme Court reversed the Commission's decision, finding that the physician's opinion on causation "was based entirely upon conjecture and speculation." *Id.* at 231, 538 S.E.2d at 915. The Court instructed:

The maxim “*post hoc, ergo propter hoc* [after this, therefore because of this],” denotes “the fallacy of . . . confusing sequence with consequence,” and assumes a false connection between causation and temporal sequence. As such, this Court has treated the maxim as inconclusive as to proximate cause. This Court has also held that “[i]t is a settled principle that the law looks to the immediate and not the remote cause of damage[.] . . . In a case where the threshold question is the cause of a controversial medical condition, the maxim of “*post hoc, ergo propter hoc*,” is not competent evidence of causation.

Id. at 232, 538 S.E.2d at 916 (quoting Black’s Law Dictionary 1186 (7th ed. 1999); *Johnson v. Telegraph Co.*, 177 N.C. 31, 33, 97 S.E. 757, 758 (1919)) (internal citations omitted). The Court therefore held that the physician’s testimony, which was “the sole evidence as to causation, was incompetent and insufficient to support the Industrial Commission’s findings of fact.” *Id.* at 233, 538 S.E.2d at 917.

We hold that the Commission’s finding of causation in the present case was likewise improperly based on the maxim “*post hoc, ergo propter hoc*.” The Commission found that the cause of Plaintiff’s symptoms was unclear, but nonetheless found that the motor vehicle accident caused those symptoms because they “appear to begin with the admittedly compensable accident[.]” Such a finding cannot support the Commission’s conclusion that Plaintiff was entitled to continuing medical compensation. We therefore remand case number COA07-784 to the Commission to issue definitive findings and proper conclusions therefrom, applying the proper legal standard of causation.

In Plaintiff’s appeal we affirm.

In Defendants’ appeal we remand.

Judges WYNN and CALABRIA concur.

Report per Rule 30(e).