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NO. COA07-852

NORTH CAROLINA COURT OF APPEALS

Filed: 17 February 2009

LINDA S. ALLEN,
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 162649

CARE FOCUS - DURHAM,
Employer,

and

CONSTITUTION STATE
SERVICE CO,
Carrier,
Defendants.

and

LINDA S. ALLEN,
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 355745

HEALTH MANAGEMENT
ASSOCIATES,
Employer,

and

LIBERTY MUTUAL INSURANCE
CO.,
Carrier,
Defendants.

Appeal by defendants from the opinion and award of the Full Commission of the North Carolina Industrial Commission entered 9 April 2007 by Commissioner Laura K. Mavretic. Heard in the Court of Appeals 20 February 2008.

Younce & Vtipil, P.A., by Robert C. Younce, Jr., for plaintiff-appellee.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Susan J. Vanderweert, for Health Management Associates and Liberty Mutual, defendants-appellants.

Cranfill Sumner & Hartzog LLP, by J. Michael Ricci and Ashley Baker White, for Care Focus - Durham and Constitution State Service Co., defendants-appellees.

JACKSON, Judge.

Health Management Associates (“HMA”) and Liberty Mutual Insurance Company (collectively “defendants”) appeal the 9 April 2007 award of workers’ compensation benefits to Linda S. Allen (“plaintiff”), attributing her partial disability to an injury incurred while employed by HMA rather than to an injury incurred while employed with Care Focus - Durham (“Care Focus”). For the reasons stated below, we affirm.

When plaintiff began working as a nurse manager for Care Focus in November 1999, she already had obtained a fifteen percent impairment rating to her spine. On 18 June 2001, plaintiff suffered a compensable injury to her left knee and back while employed with Care Focus. On 13 March 2002, plaintiff underwent an interdiscal electrothermal (“IDET”) surgical procedure for which she was taken out of work and never returned to Care Focus. As a result, Care Focus paid temporary total disability compensation to plaintiff. At her 24 April 2002 follow-up doctor’s visit, she indicated that she wanted to return to a nursing job. On 23 May 2002, her physician released her to return to full-time work with restrictions, and recommended that she return in four to six weeks for reevaluation.

On 10 June 2002, plaintiff began working for HMA as a home health nurse. Care Focus ceased temporary total disability compensation on 24 June 2002 due to plaintiff's return to work. However, it continued to pay medical compensation for lumbar spine treatments, including chiropractic care.

On 30 January 2003, while working for HMA, plaintiff experienced another work-related injury. Plaintiff reported to HMA that she had injured her knees and back. HMA admitted compensability of the left knee injury, but denied payment for any back condition, due to plaintiff's pre-existing workers' compensation claim with Care Focus.

Plaintiff sought a hearing with respect to both Care Focus and HMA to determine, *inter alia*, which employer was responsible for compensating her for the 30 January 2003 injury to her back. The matter was heard before a deputy commissioner of the Industrial Commission on 24 August 2004. In her 28 November 2005 opinion and award, the deputy commissioner determined that defendants were responsible for plaintiff's compensation, because the 30 January 2003 injury was a "substantial and material aggravation of her previous low back and left knee injuries."

Defendants appealed to the Full Industrial Commission on 7 December 2005. The Full Commission reviewed the matter on 16 May 2006 and filed its opinion and award on 9 April 2007 affirming the award of benefits payable by defendants. Defendants appeal.

Initially, neither plaintiff nor Care Focus filed a brief in this matter. On 8 February 2008, prior to our hearing this appeal, defendants filed a motion to hold the appeal in abeyance. Through mediation, the parties had reached a tentative settlement agreement, contingent upon receiving approval of a Medicare Set-Aside Allocation. This Court granted the motion on 12 February 2008, holding the appeal in abeyance for ninety days.

On 12 May 2008, defendants received notification that the Medicare Set-Aside Allocation had been approved. Although defendants had prepared a Compromise Settlement Agreement, plaintiff refused to sign it, claiming that she had not been competent to enter into the tentative settlement agreement. On 11 July 2008, defendants requested a hearing with the Industrial Commission, seeking to enforce the tentative settlement agreement. On 31 July 2008, defendants filed a second motion to hold the appeal in abeyance for an additional ninety days. The second motion was granted on 8 August 2008. The Court declined to grant any further extensions of time.

Having failed to reach final agreement, Care Focus filed its appellee's brief on 6 November 2008. Plaintiff filed her appellee's brief on 1 December 2008.

This Court's review of an award from the Industrial Commission is limited to two issues: "(1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are justified by the findings of fact." *Clark v. Wal-Mart*, 360 N.C. 41, 43, 619 S.E.2d 491, 492 (2005) (citing *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 186, 345 S.E.2d 374, 379 (1986)). The Industrial Commission is the sole judge of witness credibility and the evidentiary weight to be given to testimony; its findings of fact may be set aside on appeal only when there is a complete lack of competent evidence to support them. *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 914 (2000) (citations omitted). The Commission's conclusions of law are reviewed *de novo*. *Griggs v. Eastern Omni Constructors*, 158 N.C. App. 480, 483, 581 S.E.2d 138, 141 (2003).

Defendants first argue that the Full Commission erred by using the wrong burden of proof to conclude that plaintiff materially aggravated her prior low back injury on 30 January 2003. We disagree.

Defendants contend that because Care Focus admitted the compensability of plaintiff's 18 June 2001 back injury, pursuant to *Parsons v. Pantry, Inc.*, 126 N.C. App. 540, 485 S.E.2d 867 (1997), there is a presumption that any additional treatment is directly related to the compensable injury. Therefore, the burden was on Care Focus to show that plaintiff's continuing back problems were not related to her 18 June 2001 injury. *Parsons* is inapposite to the case *sub judice*.

In *Parsons*, the issue was whether the plaintiff was required, having proved already her injury was compensable, to prove that later treatment also was compensable. *Parsons* held that once the plaintiff proved causation, the burden was on the employer to prove that the compensable injury was unrelated to her present discomfort. "To require plaintiff to re-prove causation each time she seeks treatment for the very injury that the Commission has previously determined to be the result of a compensable accident is unjust and violates our duty to interpret the Act in favor of injured employees." *Id.* at 542, 485 S.E.2d at 869. Here, the Full Commission was correct in not placing the burden on plaintiff as to her claim against Care Focus.

As to her claim against defendants, "aggravation of a pre-existing condition which results in loss of wage earning capacity is compensable under the workers' compensation laws in our state." *Smith v. Champion Int'l.*, 134 N.C. App. 180, 182, 517 S.E.2d 164, 166 (1999). The Full Commission concluded as a matter of law that plaintiff suffered a work-related injury on 30 January 2003 which was a "substantial and material aggravation of her previous low back and left knee injuries." This conclusion of law was supported by the following findings of fact:

6. Following the IDET procedure, plaintiff experienced significant improvement in her back pain. . . .

* * * *

9. [Plaintiff's chiropractor] first saw plaintiff on August 29, 2002. On that date, plaintiff was suffering with left knee, right groin, mid and low back pain from 76-100 percent of the day. [He] diagnosed a facet syndrome, lumbosacral subluxation, muscle spasm, muscle stiffness, and subluxation complex. [His] chiropractic treatment was successful

* * * *

11. On January 30, 2003, while working for Health Management Services in a patient's home, plaintiff missed a step in a poorly lit hallway. She injured both knees, the left more than the right, and aggravated her low back such that the pain was worse by the next day. Plaintiff reported the injury to her supervisor, Lydia Moose, and went to the emergency room at Franklin Regional Hospital. Although the medical records from that visit mention only knee pain, the Full Commission finds that, based upon the credible evidence of record, plaintiff also experienced back pain as a result of this accident of January 30, 2003.

12. Plaintiff saw [her chiropractor] for an unscheduled appointment on January 31, 2003, and she reported to him that she had re-injured her back on the previous day. [He] confirmed that her back was different on examination than it had been the prior visit. Plaintiff required more frequent visits with [him] following her fall on January 30, 2003. Plaintiff's back pain was so severe on some days that [he] could not perform adjustments but could only do soft tissue and physical therapy modalities.

13. It was [the chiropractor's] opinion, and the Full Commission finds as fact, that the compensable accident of January 30, 2003, materially aggravated plaintiff's back condition. The aggravation of plaintiff's low back pain caused by the January 30, 2003, fall lasted at least as long as [his] period of treatment, which ended May 2, 2003.

14. Plaintiff's back pain continued to worsen following her January 30, 2003, accident. Her job duties for Health Management Services also increased her low back and knee pain because she was required to ride in her car and twist in and out of her car to see patients.

* * * *

19. . . . Plaintiff . . . reported [to her family physician] the January 30, 2003, accident which she said had made her back pain worse. [Her family physician] stated at his deposition that the fall on January 30, 2003, aggravated plaintiff's preexisting back pain.

Although there may be evidence in the record which would support contrary findings of fact, the findings made by the Full Commission are supported by competent evidence in the record and are therefore binding on appeal. On appeal, this Court "does not have the right to weigh the evidence and decide the issue on the basis of its weight." *Anderson v. Construction Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965).

Because the Full Commission's conclusion of law was supported by appropriate findings of fact, which in turn were supported by competent evidence of record, these assignments of error are without merit.

Next, defendants argue that the Full Commission erred in finding and concluding that plaintiff's psychological condition is the natural result of her 30 January 2003 injury. We disagree.

In its opinion and award, the Full Commission concluded as a matter of law that "[a]s the natural result of the pain from the January 30, 2003 injury by accident, plaintiff also sustained . . . psychological problems, including depression and anxiety." This conclusion is supported by the following findings of fact:

16. On or near April 2003, plaintiff began to suffer from depression and stress. In a meeting with her supervisor in March, 2003, plaintiff was informed that she would be terminated on June 10, 2003. Although plaintiff had been putting forth her best effort, as a result of her severe chronic pain, she was getting further behind in her work. The pain was coming from both her knee and her back. She had been taking an increasing amount of pain medications, and the pain was also causing sleep deprivation, which in turn affected plaintiff's job performance.

17. Although plaintiff had other stressors in her life, the biggest source of her stress was the threat of losing her job and being unable, because of her pain and injuries, to obtain other employment. Plaintiff was a single mother and was not receiving child support from the child's father at the time.

18. On April 28, 2003, plaintiff went to [her family physician] regarding back pain and situational anxiety that had to do with the loss of her job. . . .

19. At the April 28, 2003, visit . . . plaintiff was experiencing anxiety, change in sleep pattern, depression, loss of appetite, headaches, poor memory, inability to concentrate, and high blood pressure. Each of these symptoms was related to plaintiff's situational anxiety and depression. . . .

20. On May 6, 2003, [plaintiff's family physician] wrote plaintiff out of work for her back pain and depression because plaintiff was not able to function in her job. [He] found plaintiff's depression to be so serious that he referred her to Holly Hill, an inpatient mental health facility, for evaluation.

21. According to [her doctor], stress can amplify body pain, and body pain can worsen symptoms of anxiety, stress, and depression. Plaintiff's back and knee pain and her worry about losing her job were significant causative factors in the development of her depression and situational anxiety. If plaintiff's depression pre-existed either of the two injuries at issue in this case, plaintiff's bodily pain and worry about her job loss aggravated that depression to a reasonable degree. Both anxiety and depression are aggravated by chronic pain and financial stress. . . . Plaintiff's . . . psychological problems, including depression and anxiety, are the natural result of the aggravated back and knee pain resulting from her January 30, 2003, injury by accident.

22. On May 8, 2003, [plaintiff's back specialist] took plaintiff out of work completely for her increasing back pain as well as for her stress and depression issues relating to the inability to do her job. At that point, plaintiff's pain, in conjunction with her stress and depression, caused her to be totally disabled from work.

23. [He] referred plaintiff to . . . a certified pain psychologist. [The psychologist] examined plaintiff for one visit, on June 5, 2003, at which time plaintiff acknowledged distress and anxiety as well as being discouraged by her future, inability to take pleasure in life, indecision, decreased self-esteem, decreased

energy, sleep disturbance, appetite disturbance, decreased concentration, ease of fatigue, and decreased libido.

24. Plaintiff had been on anti-depressant medications. The termination of her job was an additional source of stress, and her stress and depression were a significant impairment of her functional capacity. The Oswestry Disability Index placed plaintiff in the “severe” range of self-perceived disability, secondary to pain. Plaintiff was pessimistic about her ability to return to her previous position as a home health nurse. [The psychologist] stated that plaintiff had a high level of psychophysiological reactivity as evidenced by her irritable bowel syndrome and other symptoms.

25. It was [the psychologist’s] opinion, and the Full Commission finds as fact, that plaintiff’s psychological status was contributing significantly to her disability and that plaintiff’s pain was a significant causative factor of her depression. Plaintiff was a good candidate for psychological intervention, and she suffered from pain disorder associated with both psychological factors and a general medical condition, and adjustment disorder with depressed mood. Plaintiff’s conditions were caused by her “current psychosocial stressors having to do with occupational problems, pain and associated impairment of functioning.” The body pain associated with this impairment of functioning included plaintiff’s neck, back, mid-thoracic, and knee pain.

26. The psychological treatment [the psychologist] recommended for plaintiff was cognitive behavioral treatment to change her pain related beliefs. Plaintiff would also have received benefit from a psychiatric consultation.

Each of these findings of fact is supported by competent evidence of record, including plaintiff’s hearing testimony, the deposition testimony of her family physician and psychologist, and medical records. As with the previous argument, these assignments of error are without merit.

Finally, defendants argue that the Full Commission erred in finding and concluding that plaintiff’s high blood pressure is the natural result of her 30 January 2003 injury. We disagree.

In addition to the findings of fact stated above, the Full Commission made the following findings of fact in its opinion and award to support its conclusion of law that “[a]s the natural

result of the pain from the January 30, 2003 injury by accident, plaintiff also sustained high blood pressure”

19. At the April 28, 2003, visit with [her family physician], plaintiff was experiencing . . . high blood pressure . . . related to plaintiff’s situational anxiety and depression. . . .

* * * *

21. . . . [Plaintiff’s family physician] also treated plaintiff for high blood pressure resulting from the January 30, 2003, injury by accident. Plaintiff’s high blood pressure [is] the natural result of the aggravated back and knee pain resulting from her January 30, 2003, injury by accident.

Pursuant to the North Carolina Rules of Appellate Procedure, an appellant shall reference the pertinent assignments of error immediately following each question presented in her brief, “identified by their numbers and by the pages at which they appear in the printed record on appeal. Assignments of error not set out in the appellant’s brief, . . . will be taken as abandoned.” N.C. R. App. P 28(b)(6) (2007).

Although defendants assigned error to these findings of fact in the record on appeal, they did not raise those assignments of error with respect to this question presented. Having failed to set out these assignments of error in her brief, they are deemed abandoned. *Id.* The assignments of error having been abandoned, these findings of fact are binding on appeal. *See Willen v. Hewson*, 174 N.C. App. 714, 718, 622 S.E.2d 187, 190 (2005) (“[D]efendant assigned error to numerous findings of fact by the trial court, but has failed to argue any of these assignments of error in her brief on appeal. Such assignments of error are therefore abandoned, and the trial court’s findings are binding on appeal.”), *disc. rev. denied*, 360 N.C. 491, 631 S.E.2d 520 (2006).

Because these findings of fact are binding on appeal, and support the challenged conclusion of law, we cannot say that the Full Commission erred in attributing plaintiff's high blood pressure to the 30 January 2003 incident.

Having determined that the findings of fact are supported by competent evidence in the record and that these findings of fact support the Full Commission's conclusions of law, the award thereupon is without error.

Affirmed.

Judges HUNTER and ELMORE concur.

Report per Rule 30(e).