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NO. COA05-922

NORTH CAROLINA COURT OF APPEALS

Filed: 21 March 2006

GLENN CREDLE,
Plaintiff

v.

North Carolina Industrial Commission
I.C. File No. 200785

INJECTION TECHNOLOGY,
Defendant-Employer

and

FEDERATED MUTUAL INSURANCE
CO.,
Defendant-Carrier

Appeal by defendants from order of the North Carolina Industrial Commission entered 30 March 2005 by Commissioners Laura K. Mavretic, Christopher Scott, and Pamela T. Young. Heard in the Court of Appeals 21 February 2006.

David Gantt for plaintiff-appellee.

Hedrick, Eatman, Gardner, & Kincheloe, L.L.P., by Sharon E. Dent for defendants-appellants.

CALABRIA, Judge.

Injection Technology Corporation (“Injection Technology”) and Federated Mutual Insurance Company (“Federal Mutual”), collectively (“defendants”), appeal from an Opinion and Award of the Industrial Commission that awarded Glenn Credle (“plaintiff”) temporary total disability compensation, medical expenses, and attorney fees. We affirm.

The Industrial Commission made the following findings of fact:

1. At the time of the hearing before the Deputy Commissioner, plaintiff was 61 years old. . . .

2. Plaintiff's work experience was in manufacturing jobs requiring production. She worked for defendants as a plastic mold machine operator for five years. Her job required her to remove, inspect, and package custom-made plastic items from metal molds.

3. Plaintiff has a medical history of right carpal tunnel release surgery in 1993. After the surgery she was assigned a 15% permanent partial disability rating to her right hand. Plaintiff has also had high blood pressure since 1993. In 1998 she had a stroke which caused some generalized right-sided weakness.

4. On August 14, 2001, plaintiff was removing plastic parts from a metal mold. When a part stuck in the mold, plaintiff tried to forcefully remove the part from the mold. As plaintiff reached into the machine to pull the part off, her right hand flew back, she almost lost her balance, and her hand hit the metal mold. After she struck her hand, plaintiff experienced pain in her arm and neck, numbness in her arm, swelling and numbness in her hand, and tingling in her fingers.

5. Defendants accepted the claim as medical only and initially provided medical treatment to plaintiff.

6. Plaintiff continued working for the employer on August 14, 2001 and for approximately three additional weeks before seeking any medical treatment.

7. On September 8, 2001, plaintiff presented to the Emergency Department at Memorial Mission Hospital complaining of right wrist and hand pain. X-rays were taken of plaintiff's right wrist that revealed degenerative changes but no acute pathology. Plaintiff was instructed to wear a splint and referred for follow-up to Carolina Hand Center. Plaintiff was not written out of work.

8. On September 10, 2001, plaintiff presented to Dr. Lacy E. Thornburg of Carolina Hand Surgery Associates in Asheville. Dr. Thornburg diagnosed plaintiff with right cubital tunnel syndrome and possible left carpal tunnel syndrome,

prescribed a right wrist splint, and ordered nerve conduction studies.

9. Dr. Thornburg restricted plaintiff to light duty, which the employer provided.

10. On October 8, 2001, plaintiff presented to Dr. Cecil Durham of Mountain Neurological Center in Asheville. Dr. Durham performed nerve conduction studies that revealed the possibility of mild medial nerve dysfunction at the right wrist.

11. On October 22, 2001, plaintiff returned to Dr. Thornburg. After reviewing the results of the nerve conduction studies, Dr. Thornburg noted that plaintiff's symptoms did not seem to correlate with nerve compression.

12. Dr. Thornburg further noted that plaintiff was working and wearing her wrist splint at work and recommended that she continue to wear her wrist splint as needed to work.

13. On December 19, 2001, plaintiff presented to Dr. Thornburg complaining for the first time of lateral elbow pain. Dr. Thornburg diagnosed plaintiff with right lateral epicondylitis and possible mild carpal tunnel syndrome and recommended physical therapy. Thereafter, defendants filed a Form 61 indicating that while the blow to plaintiff's right hand was accepted as compensable, further medical treatment was denied as unrelated to the trauma to plaintiff's right hand.

14. Dr. Thornburg testified that it was unlikely that the injury on August 14, 2001 caused, aggravated, accelerated, exacerbated, or contributed to the elbow problems for which he treated plaintiff. Dr. Thornburg explained that plaintiff did not complain of elbow pain until December of 2001 and that if plaintiff's elbow problem had been caused by an acute injury, he would have expected the elbow to hurt right away. Under further questioning by plaintiff's counsel, Dr. Thornburg admitted that it was possible that the type of trauma plaintiff sustained when she hit the metal mold could have caused an injury to her elbow.

15. Although plaintiff continued working, she was unable to meet production after her hand injury and neck aggravation. On March 14, 2002, plaintiff quit the employment after a confrontation with her supervisor about her productivity level. The following day she returned to the employer to explain that she was working in pain and had delayed having surgery while

trying to work the best that she was able. Plaintiff asked the owner of the employer to re-hire her but he told her that he did not hire workers who quit.

16. On March 18, 2002, after having quit the employment, plaintiff returned to Dr. Thornburg complaining of lateral elbow pain. Dr. Thornburg decided to proceed with a right lateral epicondyle debridement and radial tunnel release. On March 28, 2002, plaintiff underwent the recommended surgery.

17. From March 28, 2002 through May 7, 2002, plaintiff was restricted to left-handed work using the right hand only as an assist. On May 8, 2002, plaintiff was released to return to work at light duty for a period of three weeks. Thereafter, in June 2002 plaintiff was released to return to work at full duty.

18. On August 12, 2002, Dr. Thornburg released plaintiff to return to work with no restrictions.

...

20. On February 26, 2003, plaintiff presented to Dr. Thornburg with complaints of neck and posterior shoulder pain down to her elbow in her right upper extremity. Dr. Thornburg's office visit notes do not document any prior complaint of neck and shoulder pain. Dr. Thornburg did not recommend any further surgical treatment and suggested that plaintiff follow-up with her primary care physician.

21. On April 14, 2003, plaintiff was evaluated by Dr. Stephen K. Westly, a board-certified orthopedist in Asheville whose specialty is hand surgery. In his report, Dr. Westly noted four causes of plaintiff's current upper extremity complaints: (1) cervical spondylosis with radiculopathy; (2) probable mild residual paresis secondary to the stroke she suffered in 1998; (3) possible slight residual or recurrent dysfunction of the median nerve across the right carpal canal; and (4) possible mild dysfunction of the posterior interosseous nerve in the right forearm.

22. Dr. Westly felt plaintiff's injury by accident aggravated the pre-existing cervical condition, as well as the pain and dysfunction in her right arm. In view of the significant sensory abnormalities and motor weakness, Dr. Westly felt plaintiff had an overall impairment in the right upper extremity in the range of 65-85% and was not capable of performing any significant productive work with the right upper extremity.

23. Dr. Westly agreed that no further surgical treatment to the right upper extremity was warranted, but left open the possibility that cervical spine surgery might be indicated and recommended that plaintiff be referred to a spine specialist for further evaluation.

24. Dr. Westly felt that plaintiff's overall condition and her significant symptomatology and apparent abnormalities on physical examination were due to multiple factors, many of them potentially fairly severe. One of these factors was plaintiff's injury on August 14, 2001.

25. Dr. Thomas Gaffney, a physician who is a clinical volunteer with the Buncombe County Health Department and who has treated plaintiff, noted a number of medical conditions from which plaintiff suffered including, but not limited to, hypertension, angina, a prior stroke, and what he characterized as continuing tobacco abuse. Plaintiff first complained of neck pain at the visit to Dr. Gaffney on December 18, 2002.

26. When plaintiff continued to complain of neck pain to Dr. Gaffney on March 10, 2003, Dr. Gaffney ordered an MRI examination of plaintiff's cervical spine and right shoulder that was performed on March 11, 2003. The MRI showed plaintiff had rotator cuff tendonopathy, bursitis, degenerative cysts of the humerus and acromioclavicular osteoarthritis. Dr. Gaffney believed plaintiff needed an evaluation by an orthopedist, but defendants refused to pay for this treatment. Dr. Gaffney felt that plaintiff was unable to work because of the discomfort and disability in her shoulder.

27. Dr. Gaffney felt that it was possible that the abrupt motion when plaintiff hit the back of her hand aggravated or accelerated the problems shown on the MRI. At his deposition he stated that "any hyperextension or injury to the arm or the shoulder could conceivably aggravate . . . any one or all of those conditions."

28. Vocational rehabilitation expert Randy Adams evaluated plaintiff and found after testing that she had an eighth grade reading level, fourth grade spelling level, and sixth grade math skills. Based upon the various tests he administered, Mr. Adams expressed his vocational opinion that plaintiff was not capable of obtaining or maintaining any substantial gainful employment.

29. The Full Commission gives greater weight to the expert medical opinions of Dr. Westly and Dr. Gaffney than to the opinions of Dr. Thornburg.

30. The Full Commission finds based upon the greater weight of the credible evidence that the injury by accident on August 14, 2001 aggravated plaintiff's pre-existing elbow, neck and shoulder conditions.

31. As of the Deputy Commissioner hearing, plaintiff had not returned to work for another employer and had filed a disability claim under the Social Security Act.

32. As the result of the compensable injury by accident which aggravated her underlying conditions, plaintiff was disabled from any employment as of the surgery on March 28, 2002 until released to return to work with no restrictions on August 12, 2002. The evidence of record does not show that any doctor removed plaintiff from work or that plaintiff made reasonable efforts to find employment from August 12, 2002 until December 18, 2002 when plaintiff was treated by Dr. Gaffney for her neck and shoulder conditions. Since December 18, 2002 plaintiff has continued to be unable to earn wages in any employment due to her compensable injury by accident.

Based upon these findings, the Industrial Commission concluded: (1) "plaintiff sustained an injury by accident while in the course and scope of her employment with defendants, which resulted in injury to her right hand, right arm and shoulder, and neck"; (2) "plaintiff is not entitled to any compensation from [March 14, 2002] until her surgery on March 28, 2002 [because she refused suitable employment]"; (3) "As a result of the compensable injury by accident, plaintiff was temporarily totally disabled and entitled to temporary total disability compensation . . . ; and (4) "Plaintiff is entitled to receive medical treatment for her injury by accident which has been necessary to effect a cure, lessen her period of disability, or relieve her pain." From the Opinion and Award of the Industrial Commission, defendants appeal.

On appeal, defendants initially argue that “the Full Commission erred in concluding plaintiff met her burden of proving she sustained injury to her cervical spine and right upper extremity on [14 August 2001] and in awarding additional medical compensation.” Specifically, defendants contend “there is no competent evidence of record[] establishing a causal relationship between [p]laintiff’s elbow, shoulder, and neck problems and the injury of August 14, 2001[.]”

On review from an Opinion and Award of the Full Commission, this Court 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). This Court “does not have the right to weigh the evidence and decide the issue on the basis of its weight.” *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (quotations omitted). Rather, this Court’s duty “goes no further than to determine whether the record contains any evidence tending to support the finding” when the evidence is viewed in the light most favorable to the plaintiff. *Id.* Unchallenged findings of fact are binding on this Court. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) (“[w]here no exception is taken to a finding of fact . . . , the finding is presumed to be supported by competent evidence and is binding on appeal”) (citations omitted).

We initially address the challenged findings that relate to defendants’ first argument. Insofar as defendants assign error to finding of fact number 4, *supra*, as not supported by competent evidence, plaintiff’s testimony supports this finding. Plaintiff testified:

I know my hand flew back . . . because I almost lost my balance, and my hand hit the mold. I thought that I had cut my hand. So I was looking at that as my hand fell down inside the mold. The pain was all the way up my neck. My whole arm was numb. . . . I was trying to work my fingers trying to get some feeling back in it to

see if I'd broke[n] anything. . . . [My hand had] swollen up, so I soaked it to get the swelling down.

Defendants additionally challenge the findings that “[t]he Full Commission gives greater weight to the expert medical opinions of Dr. Westly and Dr. Gaffney than to the opinions of Dr. Thornburg” and that “[t]he Full Commission finds based upon the greater weight of the credible evidence that the injury by accident . . . aggravated plaintiff’s pre-existing elbow, neck and shoulder conditions.” After reviewing the depositions, the record, and the Commission’s Opinion and Award, we hold that these challenged findings are supported by competent evidence. Finally, defendants’ assignment of error 3 has been abandoned since their brief states no argument on the issue of why finding of fact 26 “omits salient facts.” N.C. R. App. P. 28(b)(6) (2005). Accordingly, defendants’ assignments of error relating to challenged findings are without merit.

Defendants also attempt to raise an assignment of error challenging the Full Commission’s conclusion that “plaintiff sustained an injury by accident while in the course and scope of her employment with defendants, which resulted in injury to her right hand, right arm and shoulder, and neck.” However, defendants fail to argue why this conclusion of law is unsupported by the findings; rather, they argue that the challenged findings are not supported by competent evidence. Accordingly, we hold that this assignment of error is without merit because, as explained *supra*, the challenged findings are supported by competent evidence.

Defendants’ second set of arguments state that “the Full Commission erred in concluding that plaintiff is disabled as a result of the injury of [14 August 2001] and in awarding wage compensation.” Defendants argue, “As Plaintiff’s termination was voluntary, the Defendants contend that the Employer met its burden of showing that Plaintiff unjustifiably refused suitable employment.” Defendants also argue, “Plaintiff was not disabled within the meaning of the North Carolina Workers’ Compensation Act at the time she voluntarily quit her employment

with the employer as she was continuing to work for the employer at wages equal or greater than what she earned prior to the injury.” Lastly, defendants argue “there is no competent evidence to support a conclusion that Plaintiff currently retains any disability as a result of the bump to her right hand on [14 August 2001].”

Regarding defendants’ assignments of error relating to conclusions of law numbers 2 and 3, we decline to address portions of these assignments of error because of violations of the North Carolina Rules of Appellate Procedure. Defendants’ assignments of error 8 and 9 state,

8. The Industrial Commission’s Conclusion of Law No. 2 on the grounds that the Findings of Fact on which the Conclusion of Law is based are erroneous, are not supported by the competent evidence or evidence of Record, and are contrary to the competent evidence, and on the grounds that said Conclusion of Law is contrary to law. 9. The Industrial Commission’s Conclusion of Law No. 3, in its entirety, on the grounds that the Findings of Fact on which the Conclusion of Law is based are erroneous, are not supported by the competent evidence or evidence of Record, and are contrary to the competent evidence, and on the grounds that said Conclusion of Law is contrary to law.

Insofar as these assignments of error state the conclusions of law are “contrary to law,” they fail to provide notice of the issues on appeal. *May v. Down East Homes of Beulaville, Inc.*, __ N.C. App. __, __, 623 S.E.2d 345, 346 (2006). *See also Wetchin v. Ocean Side Corp.*, 167 N.C. App. 756, 759, 606 S.E.2d 407, 409 (2005) (“Such an assignment of error is designed to allow counsel to argue anything and everything they desire in their brief on appeal. ‘This assignment--like a hoopskirt--covers everything and touches nothing’“ (citations omitted)).

However, we address the assignments of error insofar as they state that the findings on which the conclusions are “based are erroneous, are not supported by the competent evidence or evidence of Record, and are contrary to the competent evidence.” Defendants must specifically assign error to each finding of fact that they intend to challenge on appeal. *See Davis v.*

Columbus County Schools, __ N.C. App. __, __, 622 S.E.2d 671, 674 (2005) (holding that an appellant’s assignment of error was “too general to preserve for review objections to specific findings of fact” when it stated “[t]he Full Commission’s findings and conclusions are not supported by competent evidence”). The only findings that relate to arguments set forth in defendants’ second set of arguments on appeal and separately assigned as error are findings of fact 15 and 32. Defendants fail to state an argument supporting their assignment of error that relates to finding of fact 15, and we deem it abandoned pursuant to N.C. R. App. P. 28(b)(6). Moreover, finding of fact 32 is supported, as to those arguments made in defendants’ brief, by the unchallenged findings 17, 18, 19, 26[**Note 1**], and 28. Accordingly, we reject defendants’ assignments of error that the conclusions are based on incompetent findings.

Defendants have failed to raise their remaining assignments of error on appeal, and we deem them abandoned pursuant to N.C. R. App. P. 28(b)(6).

Affirmed.

Judges McGEE and GEER concur.

Report per Rule 30(e).

NOTE

1. As stated *supra*, although finding of fact 26 is assigned as error insofar as it “omits salient facts,” defendants have failed to raise any argument on this matter in their brief such that the finding is conclusively established.