NO. COA01-650

NORTH CAROLINA COURT OF APPEALS

Filed: 17 September 2002

MARY TATE LEE,
Plaintiff-Employee,

v.

North Carolina Industrial Commission
I.C. File No. 202149

BRIAN CENTER,
Defendant-Employer,

and

SELF-INSURED/KEY RISK
MANAGEMENT SERVICES,
Defendant-Servicing agent.

Appeal by plaintiff from Opinion and Award filed 11 December 2000 by the Full Commission in the Industrial Commission. Heard in the Court of Appeals 20 February 2002.

Waymon L. Morris, PA, by Waymon L. Morris, for plaintiff-appellant.

Young, Moore and Henderson, PA, by J. D. Prather and Tina Lloyd Hlabse, for defendant-appellee Brian Center.

BRYANT, Judge.

Plaintiff appeals from the Full Commission's Opinion and Award allowing the defendant employer to suspend temporary disability benefits until plaintiff complies with the Full Commission's Order to attend a medical examination set up by her employer.

Plaintiff, a certified nursing assistant, suffered a compensable back injury on 2 November 1991 while employed at the Brian Center [defendant]. Plaintiff felt a "pop and a pulling sensation" in her back when the patient she was assisting lost his balance. Plaintiff was diagnosed with a lumbosacral and right sacroiliac sprain. Magnetic Resonance Imagery [MRI] later revealed that plaintiff had a small herniated disc, and she underwent surgery on 27 December 1991 to correct the problem. The Industrial Commission approved a Form 21 Agreement for Compensation on 15 May 1992.

Plaintiff's symptoms persisted, and she was referred to Dr. Todd Chapman for post-operative back pain. Dr. Chapman was plaintiff's treating physician from June 1992 until he retired due to medical reasons in December 1996. During that period, Dr. Chapman performed several spinal operations on plaintiff at the Miller Orthopaedic Clinic [Miller Clinic] in Charlotte. He allowed plaintiff to return to light-duty work in July 1993. The first job defendant offered to plaintiff involved some duties as a certified nursing assistant, but plaintiff was unable to perform the job because of pain. Defendant created a telephone receptionist position for plaintiff, but the job exacerbated plaintiff's other medical problems. When a conflict arose with the receptionist position, defendant re-assigned plaintiff to a job in the laundry folding clothes. The job was not approved by Dr. Chapman. Plaintiff continued to experience pain and on 27 August 1993 she had to leave work and go to the emergency room.

On 30 August 1993, plaintiff saw Dr. Chapman, who did not return plaintiff to work. Dr. Chapman referred plaintiff back to her family physician, Dr. Steven Crane, who examined plaintiff on 3 September 1993. Dr. Chapman recommended a Computed Tomography[CT] scan on 9 December 1996, but Key Risk, defendant's insurer, declined to pay for the test because the adjustor for Key Risk mistakenly claimed that plaintiff could only receive benefits for her

permanent disability rating. On 3 February 1997, Key Risk sent a letter to the Miller Clinic denying a bill for treatment on 9 December 1996, the same date the CT scan was requested. It is unclear whether the CT scan was ever performed.

The deputy commissioner issued an Opinion and Award on 10 April 1997 denying plaintiff benefits. On 21 January 1998, the Full Commission rejected the deputy commissioner's findings and awarded plaintiff temporary total disability compensation. The Full Commission also ordered defendant to pay all plaintiff's medical expenses incurred as a result of her injury.

On 11 March 1998, defendant scheduled a 23 March 1998 appointment for plaintiff with Dr. Mark Hartman, an orthopaedist, also at the Miller Clinic. On 16 March 1998, plaintiff was examined by Dr. David Mackel, an orthopaedic surgeon in her home town of Hendersonville, at Dr. Crane's request. A week later, plaintiff missed her appointment with Dr. Hartman. Plaintiff does not drive and she thought defendant had arranged transportation to Charlotte. Plaintiff acquired her X-rays in advance of her appointment and stayed at home all day waiting for transportation. On 23 May 1998, plaintiff filed a motion with the Industrial Commission to change her treating physician to Dr. Mackel. A few days later in an order filed 27 May 1998, the Executive Secretary directed plaintiff to submit to an examination by Dr. Hartman. The Order stated:

> IT IS HEREBY ORDERED that plaintiff shall submit to a medical evaluation at a reasonable time and place when scheduled by the defendant pursuant to N.C. Gen. Stat. §97-27(a).
>
> *If* plaintiff presents documentation or reasonable grounds for her need for transportation, *the undersigned will consider ordering that transportation to [sic] be provided by the defendant* due to the distance involved. *Otherwise, the parties may be able to resolve the issue between themselves* through contact and discussion with each other.

(Emphases added.).

A few days later, plaintiff requested that defendant pay for Dr. Mackel's services. The parties attempted to mediate the issue, but reached an impasse. The parties dispute that plaintiff was told that transportation would not be provided for a second appointment with Dr. Hartman that was scheduled by defendant. Defendant scheduled a second appointment for 22 June 1998. Plaintiff repeatedly attempted to contact defendant about her need for transportation, but her medical case manager never returned her calls. Plaintiff missed the 22 June 1998 appointment because she did not have transportation.

On 2 July 1998, defendant filed a Form 24 application to suspend or terminate payment of compensation until plaintiff complied with the Executive Secretary's order to submit to an examination by Dr. Hartman. Plaintiff requested a hearing. In response to defendant's Form 24, plaintiff filed a statement indicating that she notified defendants that she needed transportation from her hometown of Hendersonville, North Carolina, to Charlotte, where Dr. Hartman worked at the Miller Clinic. Plaintiff also indicated in the statement that she waited for transportation, but none arrived, and that she was willing to go to Charlotte if defendant would provide transportation.

In its 22 June 1999 Opinion and Award, the deputy commissioner, without determining that the time and place of the appointment were reasonable, suspended plaintiff's right to temporary total disability from 22 June 1998, the date she missed the second appointment, until she complied with the Executive Secretary's Order. Plaintiff appealed to the Full Commission. According to the Full Commission, the issues for determination were: 1) whether to terminate plaintiff's compensation for failure to comply with an order by the Executive Secretary to submit to a medical evaluation; and 2) whether plaintiff was authorized to change her treating physician. The Full Commission in an Opinion and Award filed 11 December 2000 concluded that: 1)

defendant was entitled to suspend plaintiff's benefits until she complied with the order to submit to an independent medical examination; and 2) plaintiff was not entitled to change her treating physician. Accordingly, the Full Commission adopted and affirmed the holding of the deputy commissioner. Plaintiff appealed.

Plaintiff raises three issues, arguing that the Full Commission erred: 1) in interpreting and applying the provisions of N.C.G.S. §97-27 by requiring plaintiff to pay for travel to and from doctors' appointments arranged by the employer; 2) in not approving the physician of plaintiff's choice when the sole basis of disapproval was that the employer objected to plaintiff's choice of treating physicians; and 3) by ordering an independent medical examination by a physician selected by the employer and suspending her benefits in the absence of findings of fact that the time and place of the appointment was reasonable.

The Workers' Compensation Act is to be liberally construed to achieve its purpose, namely, to provide compensation to employees injured during the course and within the scope of their employment. *Lynch v. M. B. Kahn Constr. Co.*, 41 N.C. App. 127, 130, 254 S.E.2d 236, 238 (1979). When reviewing decisions by the Industrial Commission, this Court is limited to determining whether there is *any* competent evidence to support the Full Commission's findings, and whether the findings support the Full Commission's legal conclusions. *Watson v. Winston-Salem Transit Auth.*, 92 N.C. App. 473, 374 S.E.2d 483 (1988). Findings of fact are conclusive on appeal when supported by competent evidence. *Keel v. H & V Inc.*, 107 N.C. App. 536, 421 S.E.2d 362 (1992). The Full Commission's conclusions of law are fully reviewable. *Lanning v. Fieldcrest-Cannon, Inc.*, 352 N.C. 98, 530 S.E.2d 54 (2000).

I.

Plaintiff argues that the Full Commission erred in interpreting and applying the provisions of N.C.G.S. §97-27 by requiring plaintiff to pay for travel to and from doctors' appointments arranged by the employer. We disagree with plaintiff's interpretation of the Full Commission's Opinion and Award. The Full Commission found that plaintiff failed to file information about her transportation difficulties pursuant to the May 27 Order; therefore, her "refusal" to attend the medical examination was unjustified. Although perhaps implicit in the Opinion and Award of the Full Commission, because there was no explicit finding or conclusion, we decline to reach the issue of whether N.C.G.S. §97-27 requires an employer who requests that an employee submit to a medical examination to pay for transportation costs.

We do, however, address the dispositive issue of whether the Full Commission's findings of fact regarding plaintiff's transportation problems and missed appointment were supported by competent evidence, and whether the Commission's conclusion of law that defendant was entitled to suspend plaintiff's benefits because she refused to submit to or somehow obstructed an examination was supported by the findings of fact. We hold that the Full Commission's findings of fact do not support its conclusions of law, and that the suspension of plaintiff's benefits was unjustified as a matter of law.

We first examine whether there is any competent evidence to support the Full Commission's findings of fact that plaintiff refused to attend an appointment with Dr. Hartman, and that the refusal was unjustified. The Full Commission made the following pertinent findings of fact:

> 5. Ms. Johnson [(plaintiff's medical case manager)] scheduled plaintiff to be evaluated by Dr. Hartman on March 23, 1998 at Miller Clinic in Charlotte. Plaintiff failed to attend this appointment, telling Ms. Johnson that she was unable to attend the appointment due to transportation problems.
>
> . . . .

> 7. Defendant filed a motion with the Commission seeking an order to compel plaintiff's attendance at an evaluation by Dr. Hartman . . . . By Order filed May 27, 1998, the Commission directed the plaintiff to attend a subsequent examination by Dr. Hartman and *directed the plaintiff to submit information* to the Commission regarding any transportation difficulties . . . .
>
> 8. Plaintiff did not file any information with the Commission pursuant to the May 27, 1998 Order to indicate or explain any transportation difficulties.
>
> 9. Ms. Johnson rescheduled plaintiff to see Dr. Hartman on June 22, 1998. Nevertheless, plaintiff again failed to attend this appointment.
>
> 10. Plaintiff's *refusal* to attend the medical examination of June 22, 1998, as Ordered by the Commission was *unjustified*.

(Emphases added.). This led the Full Commission to conclude:

> Defendant is entitled to suspend payment of temporary disability benefits from June 22, 1998 until plaintiff complies with the Commission's Order to attend an examination by Dr. Hartman. If the employee refuses to submit herself to or in any way obstructs an examination requested by and provided by the employer, her right to compensation and her right to take or prosecute any proceeding under this article shall be suspended until such refusal or objection ceases, and no compensation shall at any time be payable for the period of obstruction, unless in the opinion of the Industrial Commission, the circumstances justify the refusal or obstruction. In plaintiff's case, the *circumstances do not justify her obstruction* of defendant's efforts to obtain current medical information. Therefore, her benefits are suspended until such time as she complies with the outstanding Order of May 27, 1998.

(Emphasis added.).

Refusal to accept treatment under N.C.G.S. §97-25 "connotes a willful or intentional act." *Johnson v. Jones Group, Inc.*, 123 N.C. App. 219, 222, 472 S.E.2d 587, 589 (1996). Upon careful examination of the record, we conclude that there is no competent evidence in support of the Full Commission's finding of fact that plaintiff's "refusal to attend the medical examination of June 22, 1998, as Ordered by the Commission was unjustified."

First, the evidence of record before this Court does not show that plaintiff refused to attend the 22 June medical examination. Joanne Johnson, plaintiff's medical case manager, scheduled the appointment after the Executive Secretary's order that plaintiff submit to a medical examination. While it is true that plaintiff missed this appointment due to transportation problems, the record reveals that on 15 June 1998, plaintiff notified Key Risk that she needed transportation to her appointment with Dr. Hartman in Charlotte. Plaintiff also attempted to contact Johnson four times about her need for transportation, but Johnson never returned her calls. Plaintiff does not have a driver's license and does not own a car. For almost five years, plaintiff traveled from her home in Hendersonville to Charlotte for medical appointments, including several surgeries. Plaintiff had previously relied on her husband or other relatives to drive her to appointments. However, plaintiff's husband could not take her to the appointments she missed because of his full-time job and health problems. The record contains no evidence contradicting plaintiff's testimony that she attempted to communicate with Johnson and Lynn Key, a senior claims representative, about her need for transportation.

Second, the record indicates that plaintiff has always been willing to be examined by doctors of defendant's choosing, despite her transportation difficulties. When defendant filed a Form 24 application to terminate plaintiff's benefits, plaintiff submitted the following statement in response:

> Because I live in Hendersonville, North Carolina the Defendants and their agents had been informed that I was and still am without means of transportation to and from Charlotte, North Carolina. The Defendants nevertheless made an appointment with a doctor in Charlotte. I waited for transportation arrangements to and from Charlotte, but as far as I know the Defendants have made no arrangements. I was then, and still am, ready and willing to go to Charlotte, but I am unable to do so without help from the Defendants.

Further, plaintiff testified that she was willing to go to Charlotte for an appointment with a doctor of defendant's choosing if transportation were provided. The record indicates that defendant, through Lynn Key, was informed as early as 1997 that transportation would be an issue. Further, plaintiff's deposition testimony indicates that she was told by Ms. Dale Poplin of Concentra Managed Care that transportation would be provided. According to plaintiff, she never received notice from defendant that transportation would not be provided, even though a letter denying transportation was sent to her attorney.

We see nothing in the record in support of the Full Commission's finding that plaintiff refused to attend the medical examination arranged by defendant and that the refusal was unjustified. On the contrary, plaintiff made more than reasonable efforts to comply.

We next examine whether the findings support the Full Commission's legal conclusions. The Full Commission's conclusion that defendant is entitled to suspend payment was based on its finding that plaintiff refused to submit to an examination or somehow obstructed the examination. As stated above, the record is devoid of any competent evidence in support of this finding. Rather, the Full Commission's finding in this regard was based on the Executive Secretary stating in part that

> If plaintiff presents documentation or reasonable grounds for her need for transportation, the undersigned will consider ordering that transportation to be provided by the defendant due to the distance involved. Otherwise, the parties may be able to resolve the issue between themselves through contact and discussion with each other.

Plaintiff's failure to provide documentation regarding her transportation problems under these circumstances hardly justifies suspension or termination of her benefits. Here, it is undisputed that plaintiff suffered a compensable injury. Defendant was therefore required to provide medical compensation. The Full Commission's finding that plaintiff refused to submit to

treatment was manifestly unsupported by competent evidence. Likewise, the Full Commission's conclusion that defendant was entitled to suspend plaintiff's benefits was unsupported by the findings of fact. Accordingly, we hold that the Full Commission erred in concluding that defendant was entitled to suspend or terminate plaintiff's benefits.

II.

Plaintiff also argues that the Full Commission erred in not approving the physician of plaintiff's choice when the sole basis of disapproval was that the employer objected to plaintiff's choice of treating physicians. We agree that the Full Commission erred, but for reasons different than those stated by plaintiff.

Plaintiff's assessment that the Full Commission's sole basis of disapproval of plaintiff's request to change treating physicians was that defendant objected to plaintiff's choice of treating physicians appears to be incorrect based on the record. Lynn Key testified that she did not object to Dr. Mackel as plaintiff's treating physician, so long as plaintiff was first evaluated by a doctor at the Miller Clinic. Therefore, it would appear that the Commission based its ruling that defendant was entitled to suspend plaintiff's benefits on plaintiff's failure to submit to the examination.

Although we disagree with plaintiff's assessment of the Full Commission's reasons for denying plaintiff's request to change treating physicians, we nevertheless find error with the Full Commission's findings of fact and conclusions of law regarding this issue. The Workers' Compensation Act provides that the employer must provide medical compensation to an employee who has suffered a compensable injury. N.C.G.S. §97-25 (2001). "[A]s a general rule, an employer has the right to select a physician to care for an injured employee and an employee may not procure his own medical treatment at the employer's expense without the employer's

knowledge and consent." *Ruggery v. N.C. Dep't of Corrections*, 135 N.C. App. 270, 275, 520 S.E.2d 77, 81 (1999) (citing *Schofield v. Great Atl. & Pac. Tea Co.*, 299 N.C. 582, 586-87, 264 S.E.2d 56, 60 (1980)). "[A]n employer's right to direct medical treatment (including the right to select the treating physician) attaches once the employer accepts the claim as compensable." *Kanipe v. Lane Upholstery*, 141 N.C. App. 620, 624, 540 S.E.2d 785, 788 (2000), *appeal after remand*, ___ N.C. App. ___, 566 S.E.2d 167 (2002).

The employee, however, is not without some input as to her own treatment. N.C.G.S. §97-25 also provides that "an injured employee may select a physician of his own choosing to attend, prescribe and assume the care and charge of his case, subject to the approval of the Industrial Commission." N.C.G.S. §97-25; *see Forrest v. Pitt County Bd. of Educ.*, 100 N.C. App. 119, 394 S.E.2d 659 (1990), *aff'd*, 328 N.C. 327, 401 S.E.2d 366 (1991). The employee may choose his own physician even in the absence of an emergency. *Ruggery*, 135 N.C. App. at 276, 520 S.E.2d at 82. If the employee so chooses, the Industrial Commission must approve the physician's services within a reasonable time after the employee selects the physician. *Id.*

In the case *sub judice*, plaintiff filed a motion with the Industrial Commission on 25 May 1998 to change her treating physician to Dr. Mackel, an orthopaedic surgeon in Hendersonville, because Dr. Chapman retired. Plaintiff first saw Dr. Mackel on 16 March 1998, more than two months before filing her motion to change treating physicians. Rather than specifically ruling on plaintiff's motion, the Executive Secretary ruled on *defendant's* motion to compel plaintiff to comply with medical treatment and vocational rehabilitation, and directed plaintiff to submit to an examination by Dr. Hartman. Defendant was to schedule the appointment at a reasonable time and place.

As we stated earlier, if an employee chooses his own physician, the employee must seek the approval of the Industrial Commission within a reasonable time after selecting the physician. *Ruggery*, 135 N.C. App. at 276, 520 S.E.2d at 82. "Where an employee seeks retroactive authorization of a new treating physician, the Commission 'must make findings relative to whether such approval was sought . . . within a reasonable time.'" *Jenkins v. Pub. Serv. Co. of N.C.*, 134 N.C. App. 405, 411, 518 S.E.2d 6, 10 (1999) (alteration in original) (quoting *Schofield v. Great Atlantic & Pac. Tea Co.*, 299 N.C. 582, 594, 264 S.E.2d 56, 64 (1980)). In this case, the record does not indicate that the deputy commissioner ruled on plaintiff's motion to change treating physicians in the 22 June 1999 Opinion and Award or the 7 July 1999 Amended Opinion and Award. Further, the Full Commission's findings of fact in its 11 December 2000 Opinion and Award merely indicate that the Executive Secretary ordered an examination by Dr. Hartman, "but did not rule on [plaintiff's] motion separately." Failing to rule on a motion effectively amounts to a denial of the motion. *See State v. Partin*, 48 N.C. App. 274, 269 S.E.2d 250 (1980). The Executive Secretary, deputy commissioner and Full Commission failed to make findings of fact in support of the denial and timeliness of plaintiff's motion to change treating physician. Absent such findings of fact, we cannot determine whether the Full Commission appropriately exercised its discretion.

In *Clark v. Sanger Clinic, P.A.*, 142 N.C. App. 350, 542 S.E.2d 668, *review denied*, ___ N.C. ___, 548 S.E.2d 524 (2001), a registered nurse suffered an admittedly compensable injury to her back while pushing a cart loaded with equipment. After her treating physician recommended a weight-loss program to take pressure off her back, she requested additional medical providers to treat complications from her stomach reduction surgery. The Full Commission denied her request without stating a reason. This Court reversed and remanded,

stating that "[a]bsent findings of fact or some other clear indication of the basis upon which the Commission denied the request, we cannot determine whether the decision was an appropriate exercise of the Commission's discretion." *Clark*, 142 N.C. App. at 360, 542 S.E.2d at 675. Therefore, based on our holding in *Clark*, in the case *sub judice* we must reverse and remand to the Full Commission for a clear ruling on plaintiff's motion to change treating physicians, with findings of fact as to the timeliness of plaintiff's request. *See Jenkins*, 134 N.C. App. at 411, 518 S.E.2d at 10.

III.

In light of our rulings as to the first two arguments it is unnecessary to address plaintiff's third argument.

Conclusion

Based on the foregoing, we hold that the Full Commission erred in finding that plaintiff unjustifiably refused to submit to an examination and in concluding that defendant was therefore entitled to suspend plaintiff's benefits. We further hold that the Full Commission erred in failing to rule on plaintiff's motion to change treating physicians, in effect denying plaintiff's motion without making appropriate findings of fact as to the reasonableness of the motion. "Absent findings of fact or some other clear indication of the basis upon which the Commission denied the request, we cannot determine whether the decision was an appropriate exercise of the Commission's discretion." *Clark*, 142 N.C. App. at 360, 542 S.E.2d at 675. We therefore reverse and remand to the Full Commission to enter findings of fact and conclusions of law in accordance with this opinion.

REVERSED AND REMANDED.

Judge HUNTER concurs.

Judge WALKER concurs in the result with a separate opinion.

Report per 30(e).

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WALKER, Judge, concurring in the result.

The distinction between the provisions of N.C. Gen. Stat. §§97-25 and 97-27 should be emphasized. Upon a proper finding, the Commission could allow Dr. Mackel to be plaintiff's treating physician under N.C. Gen. Stat. 95-25. However, the Commission, upon proper finding, may require plaintiff to be examined by a physician pursuant to defendant's request under N.C. Gen. Stat. §97-27.

The Commission has created a mechanism for plaintiff to show that she should be entitled to transportation costs provided by defendant. The findings of the Commission should reflect whether she is entitled to these costs.

I urge the parties and the Commission to take the appropriate action to bring this matter to a resolution since plaintiff's benefits remain in suspension until these issues are resolved.