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NO. COA04-1354

NORTH CAROLINA COURT OF APPEALS

Filed: 2 August 2005

DENISE J. PARKER,
Employee-Plaintiff

v.

North Carolina Industrial Commission
I.C. File No. 210741

THE WACKENHUT CORP.,
Employer-Defendant

and

CAMBRIDGE INTEGRATED SERVICES,
Servicing Agent-Defendant

Appeal by defendants from opinion and award entered 8 July 2004 by the North Carolina Industrial Commission. Heard in the Court of Appeals 18 July 2005.

No brief filed for plaintiff-appellee.

Teague, Campbell, Dennis & Gorham, L.L.P., by Jan N. Pittman and Jacob H. Wellman, for defendants-appellees.

MARTIN, Chief Judge.

Defendant-employer appeals from an opinion and award of the North Carolina Industrial Commission (“the Commission”) awarding temporary total and permanent partial disability benefits to plaintiff-employee for an injury to her left knee. We affirm.

Competent evidence of record tends to show that plaintiff began working for The Wackenhut Corporation (“defendant”) on 2 February 2001, as a food service supervisor at Rivers

Correctional Institution in Winton, North Carolina. While at work on the morning of 22 August 2001, plaintiff slipped and fell on a wet floor in the prison's kitchen, landing on her right hip with her left leg splayed to the side. Plaintiff did not require medical attention on 22 August 2001, but sought treatment at the emergency room of Roanoke-Chowan Hospital on 27 August 2001, where she complained primarily of pain in her right hip but "let them know that it was some [left] knee pain, also." Plaintiff was diagnosed with a bruised hip and missed work for two days. Plaintiff returned to work on 3 September 2001, but continued to experience "knee pain and hip pain," which she alleviated by "taking breaks and sitting down." On 31 October 2001, plaintiff had to leave work in a wheelchair due to the pain and swelling in her left knee. The next day, 1 November 2001, she went to see her orthopedist, Dr. Lawrence Norman Larabee, Jr., who had previously performed an anterior cruciate ligament (ACL) reconstruction on her left knee in 1999. Based on his examination of plaintiff on 1 November 2001, Dr. Larabee took plaintiff out of work. A subsequent MRI of the knee revealed a degenerative meniscal tear and "tenuated fibers" of the reconstructed ACL. When more conservative treatment proved unsuccessful, Dr. Larabee performed arthroscopic surgery on plaintiff's knee on 8 April 2002. In addition to the meniscal tear revealed by the MRI, arthroscopy confirmed that plaintiff's reconstructed ACL was torn and stretched. Based upon his findings, Dr. Larabee performed a "partial medial and lateral meniscectomy, [a]nterior cruciate ligament debridement of the patello femoral joint and chondroplasty" on plaintiff's knee.

Following defendant's denial of her workers' compensation claim, plaintiff filed a Form 33 requesting a hearing before a deputy commissioner. Deputy Commissioner Wanda Blanche Taylor conducted the hearing on 13 May 2002, and determined that additional medical evidence was required to resolve plaintiff's claim. On 7 October 2002, the deputy commissioner submitted

written questions to Dr. Larabee with instructions to “answer all opinion questions to a reasonable degree of medical certainty, that is what is probable, but not merely possible.” For purposes of his responses, Dr. Larabee was asked to assume the following facts, which are consistent with the subsequent findings of the Commission:

Plaintiff was initially referred to you in August 1999 for complaints of the left knee. Plaintiff was employed with defendant-employer as a food service supervisor On August 22, 2001, plaintiff slipped on the cement floor landing on her buttocks in an awkward position. Her right leg was out to the front of her and her left leg was out to the side. Plaintiff did not receive medical treatment that day and finished work. By August 27, 2001, plaintiff continued to be in pain and was treated at the Roanoke Chowan Hospital emergency room where she was diagnosed with a bruised hip but also complained of left knee pain. . . . On September 3, 2001, plaintiff returned to her job performing her regular duties. On October 31, 2001, plaintiff’s pain became so bad that she had to be wheeled out of her employment in a wheelchair. . . . [O]n November 1, 2001 plaintiff presented to you complaining of left knee pain. . . . [F]ollowing conservative treatment on April 8, 2002, plaintiff underwent a partial medial and lateral meniscectomy, interior cruciate ligament debridement of the patellofemoral joint and chondroplasty.

He responded to the questions as follows:

Please identify the nature of the condition or conditions for which you treated [plaintiff] beginning on November 1, 2001.

Left knee pain[.] Statically intact knees with mild to moderate degenerative changes.

Was the condition or injury . . . caused, aggravated or accelerated by the incident on August 22, 2001 in the assumed facts as noted above?

Yes.

Based upon the foregoing facts, your evaluation and treatment of [plaintiff] and your clinical experience, do you have an opinion satisfactory to yourself and to a reasonable degree of medical certainty, what, if any, injury she sustained to her knee as a result of the August 22, 2001 fall?

Yes.

Was the condition which plaintiff originally presented to you in August 1999 one from which plaintiff retained any permanent impairment . . . ?

No.

If plaintiff's November 1, 2001 injury was caused, aggravated or accelerated by the August 22, 2001 [incident] described above, did plaintiff sustain any permanent impairment as a result of the injury or injuries and if so what percentage of permanent impairment and to what portion of the body did plaintiff sustain such impairment?

10% (ten) due to the decreased range of motion and persistent pain. Left knee[.]

(Italics added to denote responses). In light of Dr. Larabee's responses, the deputy commissioner awarded plaintiff temporary total and permanent partial disability benefits to plaintiff on 29 July 2003, finding that she sustained a compensable injury to her knee on 22 August 2001.

Defendant appealed to the Full Commission. On 13 February 2004, the Full Commission entered an order remanding the matter to allow defendant to depose Dr. Larabee. Dr. Larabee's deposition was taken on 27 April 2004, and the transcript was transmitted to the Full Commission as part of the record.

In affirming the deputy commissioner's award with modifications, the Full Commission found, in pertinent part, as follows:

3. In 1999, plaintiff was treated by Dr. Lawrence N. Larabee Jr. for complaints of left knee pain. Plaintiff . . . was diagnosed with degenerative changes of her left knee as well as an ACL tear. Plaintiff underwent an ACL reconstruction on November 24, 1999, which was performed by Dr. Larabee. Plaintiff healed successfully and was able to return to work at regular duty.

. . . .

6. On August 22, 2001, while performing her regular duties with defendant-employer, plaintiff slipped on the cement

floor and landed on her buttocks in an awkward position. Her right leg was out in front of her and her left leg was out to the side. This constituted a compensable injury by accident.

7. By August 27, 2001, plaintiff continued to be in pain and was treated at the Roanoke Chowan Hospital emergency room, where she was diagnosed with a bruised hip but also complained of left knee pain. Plaintiff was taken out of work for two days.

....

9. Plaintiff continued to experience left knee pain, and on October 31, 2001, plaintiff's pain became so bad that she had to be wheeled out of her employment in a wheelchair.

10. On November 1, 2001, plaintiff presented to Dr. Larabee complaining of knee pain with decreased motion of her left knee. . . . On that date, plaintiff indicated that she had sustained an injury at work. The Full Commission finds this injury to be compensable under the Workers' Compensation Act.

11. Dr. Larabee suspected a re-tear of the cartilage in plaintiff's left knee. An MRI confirmed a meniscal tear. . . .

....

15. Plaintiff, on April 8, 2002, underwent a partial medial and lateral meniscectomy, [a]nterior cruciate ligament debridement of the patellofemoral joint and chondroplasty of the left leg, which was performed by Dr. Larabee.

....

20. Dr. Larabee was of the opinion, and the Full Commission finds as fact, that plaintiff's injuries were consistent with a meniscal injury that occurred from a slip and fall that likely happened as plaintiff described on August 2[2], 2001. Dr. Larabee was further of the opinion, and the Full Commission finds as fact, that plaintiff has been reasonable and truthful and has no reason to suspect that plaintiff was not telling the truth regarding the August 2[2], 2001, injury of her left knee.

21. The Deputy Commissioner found, and the Full Commission equally finds, plaintiff's testimony to be deemed

credible in consideration of plaintiff's demeanor, her testimony, and all the other evidence of record.

22. On August 22, 2001, plaintiff sustained an injury to her left knee that is compensable under the NC Workers' Compensation Act.

The Commission awarded plaintiff temporary total disability compensation of \$288.54 per week for the periods of 1 November through 27 December 2001, and 8 April through 29 May 2002, and permanent partial disability compensation of \$288.54 per week for 20 weeks based upon the 10% permanent impairment of her left leg.

On appeal, defendant claims that the evidence before the Commission did not support a "finding that plaintiff sustained an injury to her left knee as the result of the incident occurring on or about August 22, 2001." We disagree.

Under the familiar standard of review in workers' compensation cases, the Commission's findings of fact are deemed binding and conclusive on appeal if supported by any competent evidence of record. *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 700 (2004). Here, Dr. Larabee's responses to the deputy commissioner's written questions are competent evidence that plaintiff's disabling knee injury was "caused, aggravated or accelerated" by her accidental fall at work on 22 August 2001. Moreover, when asked at his 27 April 2004 deposition whether his opinion had changed since making these responses, Dr. Larabee replied, "No, ma'am." He explained that the tear to plaintiff's ACL was indicative of a traumatic injury, rather than degenerative changes, and was consistent with the history reported by plaintiff of a slip and fall on 22 August 2001, and subsequent onset of knee pain. While conceding he had no "independent knowledge of how [plaintiff] hurt her knee, other than what she's told [me,]" Dr. Larabee further noted, "but that's how I always find out about a patient's injuries and . . . what's happened to them is by their history."

Defendant points to the absence of any reference to knee pain in the records from plaintiff's visit to the emergency room on 27 August 2001. However, plaintiff testified that she presented at the hospital with both hip and knee pain, although she complained primarily of the contusion to her hip. As finder of fact, the Commission was entitled to credit plaintiff's testimony on this issue. *See generally Anderson v. Construction Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965).

Defendant also notes Dr. Larabee's response to a hypothetical scenario posed by defendant's counsel, in which he was asked to assume the following:

That when [plaintiff] fell in August of 2001 she did not sustain any injury to her left knee, that she had . . . a bruise to her right hip for which she sought medical treatment at Roanoke-Chowan Hospital on August 27 of 2001. . . . And on October 31, 2001 she began experiencing left knee pain. And then she returned to see you on November 1, 2001 and at that time reported to you a one-day history of knee pain.

(Emphasis added). "Based on that information alone and no other information," Dr. Larabee agreed that he would be "unable to state to a reasonable degree of medical certainty that the condition for which [plaintiff was] treated . . . on November 1, 2001 was related to a fall she sustained in August, 2001." Inasmuch as the material facts of defendant's hypothetical are contrary to those found by the Commission, however, any opinion based thereon is incompetent on the issue of causation. *See Thacker v. City of Winston-Salem*, 125 N.C. App. 671, 675, 482 S.E.2d 20, 23, *disc. review denied*, 346 N.C. 289, 487 S.E.2d 571 (1997).

In a second, alternative argument, defendant excepts to the Commission's finding "that it had no reason to suspect that plaintiff was not telling the truth." We conclude that this assignment of error does not provide a cognizable ground for relief on appeal. It is well established that "[t]he Commission is the sole judge of the credibility of the witnesses and the

weight to be given their testimony.” *Anderson*, 265 N.C. at 433-34, 144 S.E.2d at 274. Moreover, “the Commission does not have to explain its findings of fact by attempting to distinguish which evidence or witnesses it finds credible. . . . The Commission’s credibility determinations . . . cannot be the basis for reversing the Commission’s order absent other error.” *Deese v. Champion Int’l Corp.*, 352 N.C. 109, 116-17, 530 S.E.2d 549, 553 (2000).

The record on appeal contains additional assignments of error not addressed by defendant in its brief to this Court. Pursuant to N.C.R. App. P. 28(b)(6), we deem them abandoned.

Affirmed

Judges HUNTER and STEELMAN concur.

Report per Rule 30(e).