NO. COA06-1277

NORTH CAROLINA COURT OF APPEALS

Filed: 17 July 2007

SHELLIE HALLOWAY,
Administratrix of the
Estate of HAROLD
HALLOWAY, Deceased,
Employee,
Plaintiff

v.

North Carolina Industrial Commission
I.C. File No. 221263

CMS HOLDINGS COMPANY,
Employer

LEGION INSURANCE COMPANY,
(c/o COMPFIRST, Third-Party
Administrator),
Carrier

and/or

N.C. INSURANCE GUARANTY
ASSOCIATION,
Statutory Insurer,
Defendants

Appeal by plaintiff from an opinion and award entered 12 June 2006 by the North Carolina Industrial Commission. Heard in the Court of Appeals 25 April 2007.

Crumley & Associates, P.C., by J. William Snyder, Jr. and Kathleen Quinn DuBois, for plaintiff-appellant.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Matthew D. Glidewell and M. Duane Jones, for defendant-appellees.

HUNTER, Judge.

Harold Halloway**[Note 1]** "plaintiff" or "employee") appeals an opinion and award by the Full Industrial Commission ("Commission") in which it granted him benefits from 9 January 2002 through 14 January 2002 but denied benefits thereafter. After careful consideration, we affirm.

Plaintiff was a thirty-eight year old who was employed as an exterior door builder for CMS Holdings Company**[Note 2]** ("defendant" or "employer"). His primary duties consisted of assembling and fabricating exterior doors, and his immediate supervisor was Gary Patrick ("Patrick"). At the time of the injury, plaintiff reported an approximate average weekly wage of $320.00. During the course of this litigation, plaintiff died due to causes unrelated to the disposition of this case.**[Note 3]**

Plaintiff alleged that his injury occurred on or about 9 January 2002 while performing responsibilities related to his job. According to plaintiff, as he was lifting a door he felt something in his back "pop[]" and felt immediate pain in his lower back and right leg. Plaintiff states that he attempted to report the injury to various people but did not report it to Patrick. Plaintiff left defendant's workshop without clocking out but the time card for the day indicates a hand-written entry showing that he left the workshop at 9:00 a.m.

The following day, on 10 January 2002, plaintiff went to the emergency department of the North Wilkes Regional Medical Center. There, plaintiff received injections to his back and was provided with prescription pain medications. Plaintiff was to follow up with Dr. McMahon, an internist. Plaintiff alleges that he was instructed to stay out of work until the following week.

Defendant's response to interrogatories indicate that plaintiff worked on 9 January 2002, 14-15 January 2002, and 17-18 January 2002. Plaintiff, however, testified that he did not work at

all after the date of his injury. Dr. Louis Yancich ("Dr. Yancich"), plaintiff's primary care physician, provided plaintiff with a copy of a note to give to Patrick which indicated that plaintiff could perform light duty type work. Patrick, according to plaintiff, fired plaintiff after receiving the note. Defendant claims that plaintiff was terminated based on multiple unexcused absences during the month of January 2002. The termination became effective on 24 January 2002.

On 7 February 2002, plaintiff saw Dr. David L. Kelly, Jr. ("Dr. Kelly"), for evaluation of his back and for pain that had developed in his left leg. After a physical exam and an MRI, Dr. Kelly diagnosed plaintiff with a herniated disk at L4-L5 with an extruded fragment, and he advised plaintiff that he would need surgery to remove the disk. On 13 February 2002, Dr. Kelly performed a lumbar laminectomy at the L4-L5 level on plaintiff to remove the disk.

During the deposition, Dr. Kelly was asked to assume that plaintiff had no clinically significant back problems before 8 January 2002, and that on that date he and a co-worker were lifting a door weighing over 100 pounds, when plaintiff felt a pop in his back. Assuming those facts, Dr. Kelly testified that it "'sound[s] like that injury could have caused his disc to rupture.'" On cross-examination, Dr. Kelly testified that he was unsure as to how reliable plaintiff's medical history was and that it was not consistent with his own notes nor the emergency room records from 10 January 2002. Defense counsel asked Dr. Kelly the following:

> "Given all of what we've talked about here today and the evidence that's been put in front of you including Mr. Snyder's hypothetical, can you actually say that more likely than not the symptoms with which you _ or for which you treated . . . [plaintiff] were related probably, more likely than not, to an incident that happened on January 9th, 2002; or are you more comfortable opining that you just don't know or you can't give it?"

Dr. Kelly responded, "'I can't answer the question.'"

According to plaintiff, he was unable to obtain employment because of residual back and leg pain after the surgery. Plaintiff died on 29 July 2003 due to injuries sustained during a car accident unrelated to this case.

A deputy commissioner filed an opinion and award approving employee's claim as compensable and awarding benefits due up until the death of plaintiff. Defendant appealed this award to the Full Commission (the "Commission") which affirmed the deputy's decision that plaintiff suffered a compensable injury and was entitled to benefits from 9 January 2002 to 14 January 2002 but reversed the deputy's decision to provide benefits to plaintiff after 14 January 2002. Plaintiff appeals from this order.

Plaintiff presents the following issues for review by this Court: (1) whether the Commission erred by placing the burden of proof upon plaintiff to prove that his medical condition after 14 January 2002 was caused by a work related injury on 9 January 2002; and (2) whether the Commission erred in concluding that plaintiff was not disabled for longer than the seven-day waiting period following the alleged injury.

Our review of an opinion and award of the Commission is limited to a determination of: "(1) whether the Commission's findings of fact are supported by any competent evidence in the record; and (2) whether the Commission's findings justify its conclusions of law." *Goff v. Foster Forbes Glass Div.*, 140 N.C. App. 130, 132-33, 535 S.E.2d 602, 604 (2000). If supported by competent evidence, the Commission's findings are binding on appeal even when there exists evidence to support findings to the contrary. *Allen v. Roberts Elec. Contr'rs*, 143 N.C. App. 55, 60, 546 S.E.2d 133, 137 (2001).

The Commission's conclusions of law are reviewed *de novo*. *Id.* at 63, 546 S.E.2d at 139. Accordingly, "[w]hen the Commission acts under a misapprehension of the law, the award must

be set aside and the case remanded for a new determination using the correct legal standard." *Ballenger v. ITT Grinnell Industrial Piping*, 320 N.C. 155, 158, 357 S.E.2d 683, 685 (1987).

In this case, plaintiff argues that the Commission erred in not following two of this Court's opinions. They do not, however, challenge the actual findings of fact or whether those findings were based on competent evidence. Accordingly, we limit our discussion to whether the Commission failed to follow precedent.

I.

Plaintiff argues that the Commission erred in placing the burden of proof on him to establish a causal relationship between the 9 January 2002 injury and his medical conditions occurring after 14 January 2002. We disagree. It is well settled that "[t]he claimant has the burden of proving that his claim is compensable under the [Workers Compensation] Act" ("Act"). *Henry v. Leather Co*., 231 N.C. 477, 479, 57 S.E.2d 760, 761 (1950). Similarly, "the claimant has the burden of proving the existence of his disability and its extent." *Hendrix v. Linn-Corriher Corp*., 317 N.C. 179, 185, 345 S.E.2d 374, 378 (1986).

Plaintiff points out, however, that under the "*Parsons*[] presumption," when a claimant has proven the condition of a particular body part causally related to a compensable incident, a presumption arises that any future medical condition afflicting that body part is causally related to the original compensable claim and therefore also compensable. *Parsons v. Pantry, Inc*., 126 N.C. App. 540, 542, 485 S.E.2d 867, 869 (1997). This presumption, of course, can be rebutted by competent medical evidence that the new condition is not causally related to the original compensable claim. *Id*.

We do not find this Court's holding in *Parsons* applicable to the facts of this case. In *Parsons*, this Court noted that, "[a]t the initial hearing . . . it was [employee's] burden to prove

the causal relationship between [the] . . . accident and her [injuries].” *Id*. The claimant in that case carried her burden at the initial hearing and later sought further payments from the employer. *Id*. It was only after the claimant carried her initial burden during prior litigation between the parties did this Court hold the claimant would be entitled to a presumption of causal relationship should the parties litigate over medical expenses again. *Id*.**[Note 4]**

The facts of the instant case do not include any prior litigation over compensability or disability or a previous award by the Commission and therefore do not require the application of the presumption created to address the issue presented in *Parsons*. In short, the *Parsons* presumption only applies in subsequent litigation between the parties after a claimant has carried his burden during the initial hearing. Those are not the facts of this case and we reject plaintiff’s assignments of error as to this issue.

We similarly reject plaintiff’s reliance on *Perez v. American Airlines/AMR Corp*., 174 N.C. App. 128, 620 S.E.2d 288, (2005), *reh’g denied*, 360 N.C. 655, 638 S.E.2d 469 (2006). Plaintiff contends that *Perez* requires this Court to apply “a presumption of compensability” to the case at bar. The facts of that case, however, are readily distinguishable from those in the instant case. Defendants in *Perez* filed a Form 60 accepting the compensability of the claim. *Id*. at 136, 620 S.E.2d at 293. Payments made pursuant to a Form 60 are “equivalent of an employee’s proof that the injury is compensable.” *Id*. Thus, this Court applied the *Parsons* presumption because the Form 60 payment operated as though the claimant had carried his burden of proof at an initial hearing. *Id*. In this case, defendant filed a Form 61 denying compensability of this claim. Accordingly, it cannot be said that defendant in this case in any way admitted compensability and, as such, the *Parsons* presumption is not appropriate in this case.

II.

Plaintiff's final argument is that the Commission erred in not following this Court's holding in *Seagroves v. Austin Co. of Greensboro*, 123 N.C. App. 228, 472 S.E.2d 397 (1996). We disagree. The issue in *Seagroves* was

> whether an employee, who is disabled as a result of a compensable injury and is provided with light duty employment by the employer, constructively refuses the light duty work and forfeits workers' compensation benefits for such disability pursuant to the statute upon termination of the employment for fault or misconduct unrelated to the compensable injury.

Id. at 230, 472 S.E.2d at 399. In that case we held that "the employer must first show that the employee was terminated for misconduct or fault, unrelated to the compensable injury, for which a nondisabled employee would ordinarily have been terminated." *Id*. at 234, 472 S.E.2d at 401. If that showing is made then "the employee's misconduct will be deemed to constitute a constructive refusal to perform the work provided and consequent forfeiture of benefits" unless the employee is then able to show that his loss of earnings is due to the work-related injury. *Id*.

This case, however, does not involve an employee who was terminated after constructively refusing light duty work. Specifically, the Commission made the following conclusion of law:

> 2. As a result of the injury by accident, decedent was unable to work and earn wages from January 9, 2002 until January 14, 2002. However, as decedent was not disabled from work for more than seven days, he is not entitled to any compensation. N.C. Gen. Stat. §97-28. Decedent's disability, if any, to earn wages after January 19, 2002 was not causally related to the January 9, 2002 injury by accident.

The Commission also made the following finding of fact:

> 6. On January 14 and 15, 2002, decedent returned to work for defendant-employer. On January 16, 2002, decedent had an unexcused absence from work, and on January 17, 2002,

> decedent worked a full day. On January 18, 2002, decedent worked a half-day, and thereafter, did not ever return to work for defendant-employer. There is no evidence in the record that any doctor took decedent out of work on January 16, 21, or 22, 2002,and, thus, defendant-employer terminated plaintiff for unexcused absences in accordance with their attendance policy.

In other words, plaintiff, according to the Commission, was no longer disabled as of 14 January 2002. This was the same date in which plaintiff returned to work at full duty status -- that is, was no longer engaging in light duty work -- and plaintiff was not terminated until ten days later. Thus, plaintiff was no longer performing light duty work in connection with his compensable 9 January 2002 injury. Accordingly, it could not be said that plaintiff was terminated for constructive failure to perform light duty work.

We also note that the Commission has made adequate findings of fact to support this conclusion of law. Specifically, the Commission found that Dr. Kelly could not say whether plaintiff's injuries were caused by the 9 January 2002 incident, and that after 19 January 2002 any disability was not causally related to the 9 January 2002 incident. These findings of fact are supported by competent evidence -- the transcript from Dr. Kelly's deposition.

Furthermore, plaintiff concedes in his brief that if the *Parson*'s presumption does not apply, as we have concluded it does not, then the *Seagroves* analysis is not appropriate. Accordingly, we reject plaintiff's assignments of error as to this issue.

III.

In summary, plaintiff is not entitled to the *Parsons* presumption as he did not carry his burden of proof at an initial hearing between the parties. We also hold that the Commission did not err in failing to apply this Court's holding in *Seagroves*. Thus, we affirm the opinion and award of the Commission.

Affirmed.

Judges ELMORE and GEER concur.

Report per Rule 30(e).

NOTES

1. The correct spelling of the injured worker's name, according to plaintiff's appellate brief, is actually "Holloway." The correct spelling, however, was not determined until litigation had already commenced. Both parties address the plaintiff as "Halloway" and so will we.

2. Legion Insurance Company is also a defendant in this action. For simplicity, however, we refer only to plaintiff's immediate employer, CMS Holdings Company, as defendant in this opinion.

3. Sherrie Halloway is plaintiff's widow and the administratrix of his estate. She is also the substituted plaintiff in this matter.

4. A presumption of disability could also arise where there has been an executed Form 21 or where there has been an executed Form 26. *Clark v. Wal-Mart*, 360 N.C. 41, 44, 619 S.E.2d 491, 493 (2005). Neither a Form 21 nor a Form 26 were executed in this case.