NO. COA09-430

NORTH CAROLINA COURT OF APPEALS

Filed: 15 June 2010

PAUL RAGSDALE,
Employee,
Plaintiff

v.

North Carolina Industrial Commission
I.C. Nos. 222918, 532240

LAMAR OUTDOOR ADVERTISING,
Employer,

CNA CLAIMS PLUS,
Carrier,
Defendants

Appeal by plaintiff from opinion and award entered 23 October 2008 by the North Carolina Industrial Commission. Heard in the Court of Appeals 14 October 2009.

Cox and Gage, PLLC, by Robert H. Gage, for plaintiff-appellant.

McAngus Goudelock and Courie, by Sally B. Moran and Daniel L. McCullough, for defendants-appellees.

CALABRIA, Judge.

Paul W. Ragsdale ("plaintiff") appeals from the Full Commission of the North Carolina Industrial Commission's ("the Commission") Opinion and Award denying plaintiff's claim to set aside a Form 21 agreement approving payment of a permanent partial disability ("PPD") rating for plaintiff's admittedly compensable back injury. We remand for further findings.

I. BACKGROUND

Plaintiff was employed as a billboard climber for Lamar OCI South Corporation, d/b/a Lamar Outdoor Advertising ("defendant-employer"). On 10 May 2001, plaintiff fell and sustained injuries to his cervical spine when the scaffold on which he was working collapsed. On 3 March 2003,[1] defendant-employer and its insurance carrier, CNA Claims Plus ("defendant-carrier") (collectively "defendants") admitted plaintiff's right to compensation for his injury.

Beginning in July 2001, Dr. Ralph Maxy ("Dr. Maxy"), an orthopaedic surgeon, treated plaintiff for his injury. Following a course of treatment, Dr. Maxy determined plaintiff reached maximum medical improvement ("MMI") on 7 March 2002. Dr. Maxy also assigned a two per cent (2%) permanent partial impairment to plaintiff's neck. On 30 April 2002, defendant-carrier prepared a Form 21 agreement ("Form 21"), but it was not signed because plaintiff's neck did not improve. Plaintiff's symptoms worsened, and on 6 December 2002, plaintiff underwent a three-level cervical discectomy and fusion surgery. On 27 February 2003, plaintiff was released to light duty and he returned to work on 3 March 2003. On 27 March 2003, Dr. Maxy concluded that plaintiff reached MMI, released him to return to full work duty, and plaintiff returned to full work duty. On 9 June 2003, Dr. Maxy assigned a 5% whole body

[1]Many filing dates in this opinion are approximate, due to the fact that the Commission lost its electronic files in a computer system crash in December 2006.

disability rating, equating to a 9% PPD of plaintiff's back. On 16 June 2003, a Form 21 was prepared but never signed by either party. On 11 September 2003, Dr. Maxy released plaintiff to return to work with no restrictions. On 17 October 2003, another Form 21 was prepared but never signed.

On 17 November 2003, while on the job, plaintiff claimed he experienced symptoms of a heart attack, including shortness of breath. He also claimed he had tightness in his chest and difficulty breathing while riding back to the office with two coworkers. However, plaintiff appeared normal to the coworkers, did not complain to them about his health, and did not report any symptoms to his supervisor. On 18 November 2003, plaintiff was required to appear in court regarding a domestic matter related to an alleged assault. After court that day, plaintiff complained of chest pain and weakness and returned to Dr. Anthony Maglione ("Dr. Maglione"). Dr. Maglione, a cardiologist, who had treated plaintiff since November 2000, had performed plaintiff's heart catheterization procedure on 18 March 2001. On 18 November 2003, plaintiff was admitted to Caldwell Memorial Hospital for treatment of acute coronary syndrome ("ACS"). Plaintiff subsequently underwent open heart surgery and never returned to work.

On 19 February 2004, plaintiff returned to Dr. Maxy seeking treatment for his back injury. Plaintiff previously contacted Dr. Maxy during the months preceding his heart surgery regarding increased pain from wearing a harness and a hard hat at work. Plaintiff asked Dr. Maxy to change "no restrictions" to

restrictions on wearing the harness and hard hat. Dr. Maxy issued a permanent work restriction prohibiting plaintiff from wearing the harness and hard hat while at work. On 19 February 2004, Dr. Maxy sent a letter to notify defendant-carrier of plaintiff's work restrictions. Dr. Maxy also completed a Form 18M, indicating that in his opinion, there was a substantial risk that plaintiff would need "[p]ossible continued/periodic treatment for pain."

On 5 August 2004, plaintiff returned to Dr. Maxy seeking treatment for neck and shoulder pain. Medical tests indicated that plaintiff suffered from effacement of the spinal cord and impingement on the thecal sac at three cervical levels. Dr. Maxy prescribed pain medication for plaintiff.

On 29 October 2004, plaintiff signed a Form 21 whereby defendants agreed to pay plaintiff for the PPD to his back. The proposed payment was for "5% whole body = 9% to the back. 27 wks = $8,790.66." On the Form 21, line 7 indicated that payments to plaintiff would begin on 6 December 2002 and continue for twenty-seven weeks, while line 8 stated that plaintiff returned to work on 3 March 2003. Defendant-employer did not sign the form.

The Commission returned the Form 21 to plaintiff, with a note dated 30 November 2004, stating, "We are returning herewith Form 21 for the reason(s) checked below:

> Full and complete medical records (Note 25R/rating should be first pages)
>
> Submit Form 25A (signed and dated by all parties)
>
> Comments - PPD cannot begin prior to [return to work] @ full wage; correct date line 7."

On 17 December 2004, plaintiff signed Form 25A, "Certification of Complete Medical Records," certifying that "all medical records related to the injury which are known to exist have been filed" with the Commission.

On or about 23 December 2004, defendant-carrier submitted another Form 21 to the Commission. This form included the Commission's "Received" stamp dated 19 November 2004. On line 7 of this Form 21, the date "12/6/2002" was crossed out and in its place the date "3/3/03" was written. The final Form 21 stated that defendants agreed to pay plaintiff $8,790.66 for a 9% PPD to plaintiff's back. Medical records along with the Form 21 were sent to the Commission.

On 24 February 2005, in a memorandum, the Commission noted that it had lost the final Form 21 at least twice. The memo stated, "Originals misplaced 1/3/05," and "This was given to Steve on 1-8-05 and we never got it back." A note added to the bottom of the memo stated, "carrier has resubmitted doc. again."

On 25 February 2005, Chief Deputy Commissioner Stephen T. Gheen ("Gheen") approved the Form 21 signed by the parties. However, Gheen "had no independent recollection of what [he] was looking at" when approving the Form 21. Plaintiff subsequently cashed a check from defendants in the amount of $8,790.66.

Some time between December 2004 and 28 April 2005, plaintiff mailed an undated letter to the Commission along with a copy of Dr. Maxy's letter dated 19 February 2004. Dr. Maxy's letter issued a permanent work restriction prohibiting plaintiff from wearing the

harness and hard hat while at work. Plaintiff's letter informed the Commission that wearing the harness caused him pain, and that he requested additional compensation for his back injury, his heart attack, the resulting medical treatment and loss of wages. On 28 April 2005, based on the information in plaintiff's letter to the Commission, Gheen declined to approve the Form 21.

On 14 July 2005, plaintiff requested a hearing before the Commission. Plaintiff requested that the Commission set aside the Form 21, award him temporary total disability benefits, award him medical and vocational compensation for his back injury, and award him indemnity and medical compensation for his heart attack. The hearing was not scheduled until 4 March 2008. Following the hearing, Deputy Commissioner Phillip A. Baddour filed an Opinion and Award upholding the original amount approved in the Form 21 and denying plaintiff's claim for compensation for his heart attack. Plaintiff appealed to the Full Commission. On 23 October 2008, the Commission issued an Opinion and Award refusing to set aside the Form 21 and denying plaintiff's claim for additional compensation for his heart attack. Plaintiff appeals.

II. STANDARD OF REVIEW

In reviewing a decision of the Commission, we examine "(1) whether any competent evidence in the record supports the Commission's findings of fact, and (2) whether such findings of fact support the Commission's conclusions of law." *Creel v. Town of Dover*, 126 N.C. App. 547, 552, 486 S.E.2d 478, 480 (1997). "The Commission's findings of fact are conclusive on appeal if supported

by competent evidence, notwithstanding evidence that might support a contrary finding." *Hobbs v. Clean Control Corp.*, 154 N.C. App. 433, 435, 571 S.E.2d 860, 862 (2002). "This Court reviews the Commission's conclusions of law *de novo*." *Deseth v. Lenscrafters, Inc.*, 160 N.C. App. 180, 184, 585 S.E.2d 264, 267 (2003). "[W]hen the findings are insufficient to determine the rights of the parties, the court may remand to the Industrial Commission for additional findings." *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 684 (1982).

III. FULL AND COMPLETE MEDICAL REPORT

Plaintiff argues that the Commission erred in denying his claim to set aside the Form 21 because the record did not show the Commission approved the Form 21 after review of a "full and complete medical report." We agree.

"The North Carolina Workers' Compensation Act, N.C. Gen. Stat. §§ 97-1 *et seq.*, 'does not prevent settlements made by and between the employee and employer so long as the amount of compensation and the time and manner of payment are in accordance with the provisions of this Article.'" *Atkins v. Kelly Springfield Tire Co.*, 154 N.C. App. 512, 513, 571 S.E.2d 865, 866 (2002) (quoting N.C. Gen. Stat. § 97-17). "If the employer and the injured employee reach an agreement regarding compensation, such agreement, 'accompanied by a full and complete medical report, shall be filed with and approved by the Commission; otherwise such agreement shall be voidable by the employee or his dependents.'" *Id.* (quoting N.C.

Gen. Stat. § 97-82(a)).[2] The requirement that an agreement be accompanied by a full and complete medical report is a "statutory mandate." *Id.*

> N.C. Industrial Comm. R. 501(3) states "no agreement will be approved until all relevant medical, vocational and nursing rehabilitation reports known to exist in the case have been filed with the Industrial Commission." While Rule 503(3) does not define the term "relevant medical reports", reading 501(3) in light of N.C. Gen. Stat. § 97-82(a) leads us to conclude that relevant records include the full and complete medical records related to the work-related injury.

Id. at 513-14, 571 S.E.2d at 866. Furthermore:

> Every compensation and compromise agreement between an employer and an injured employee must be determined by the Commission to be fair and just prior to its approval. The conclusion the agreement is fair and just must be indicated in the approval order of the Commission and must come after a full review of the medical records filed with the agreement submitted to the Commission.

Lewis v. Craven Reg'l Med. Ctr., 134 N.C. App. 438, 441, 518 S.E.2d 1, 3 (1999) (internal citation omitted). We have held that the Commission's review of a compromise agreement with less than the full and complete medical report is "statutorily impermissible." *Atkins*, 154 N.C. App. at 514, 571 S.E.2d at 867. If the Commission approves an agreement without conducting the required review of the full and complete medical report, then "'the agreement is subject to being set aside.'" *Id.* (quoting *Lewis*, 134 N.C. App. at 441, 518 S.E.2d at 3).

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[2]The language of this statute was changed in 2005, replacing "full and complete medical report" with "the material medical and vocational records." 2005 N.C. Sess. Laws ch. 448, § 7.

In the instant case, the Commission made no finding that the Form 21 was accompanied by a full and complete medical report. It found only that "Gheen testified that the Form 21 would not have been approved if medical records were not submitted with the agreement; however, due to computer failure at the Industrial Commission, it is impossible to ascertain whether particular medical records were submitted with the Form 21." Therefore, the fact that some medical records were submitted with the agreement does not establish that a full and complete medical report was attached to the Form 21.

The record shows that, initially, no medical records were attached to the 29 October 2004 Form 21 filed with the Commission. On 30 November 2004, the Commission returned the Form 21 noting the need for a correction to the date, "[f]ull and complete medical records," and a Form 25A signed and dated by the parties. A Form 25A signed by plaintiff on 17 December 2004 "certifie[d] that all medical reports related to the injury which are known to exist have been filed with the Industrial Commission for consideration pursuant to G.S. 97-82(a) and Industrial Commission Rule 501(3)."

In its opinion and award, the Commission noted that plaintiff testified "that he was not provided with any medical records with the Form 21 Agreement," but apparently discounted this testimony based on its determination that "plaintiff executed the Form 25A certifying that *he had received a copy of his medical records* at the time he executed the forms." (emphasis added). This finding of fact is not supported by the evidence. Plaintiff did not

certify on the Form 25A that he ever received a copy of his medical records. Plaintiff did certify on the Form 25A that "all medical reports related to the injury which are known to exist have been filed with *the Industrial Commission* . . . ." (emphasis added).

The Form 21 with the unidentified medical records was apparently submitted to Gheen in early January 2005. A 24 February 2005 checklist for approval of the Form 21 indicated, "[o]riginals misplaced 1/3/05," but also stated that the Form 21 was given to Gheen "on 1-8-05 and we never got it back." On the face of the checklist, it is unclear precisely which records Gheen received on 8 January 2005 since the originals were reportedly misplaced on 3 January 2005. Although the February checklist indicated that "[c]arrier has resubmitted doc. again," it does not specify whether the resubmitted document included both the Form 21 and the medical records. In any event, there is nothing in the record clearly indicating which medical records were received by the Commission or reviewed by Gheen in approving the Form 21.

In *Smythe v. Waffle House*, the plaintiff filed a Form 33 requesting that the Commission set aside previously approved settlement agreements. 170 N.C. App. 361, 362, 612 S.E.2d 345, 347 (2005). The Commission concluded that there was insufficient evidence to justify setting aside the settlement agreements. *Id.* at 365, 612 S.E.2d at 349. On appeal, this Court, relying on *Atkins*, first observed that "it was 'statutorily impermissible' for the Commission to determine that the [settlement] agreement was

'fair and just' without a review of the full medical records." *Id.* at 365, 612 S.E.2d at 348-49. The Court then stated:

> We are unable to determine, which, if any, medical records were before the Commission when the agreement was approved, or during the subsequent litigation to set it aside, since no medical evidence at all appears in the record. As such, we see no evidence from which the Commission could have determined the fairness of the agreement.

Id. at 365, 612 S.E.2d at 349. The Court concluded that the Commission's determination that the record lacked sufficient evidence to justify setting aside the agreement was "not supported by competent evidence or necessary findings" and that the Commission erred in not setting aside its order of approval. *Id.* at 365-66, 612 S.E.2d at 349.

In the instant case, plaintiff certified that all medical records known to exist had been filed with the Commission. While some medical records were filed with the Commission, plaintiff did not receive a copy of the medical records required for review in the course of the litigation to set aside the form 21 and plaintiff's request for benefits from a heart attack. The presence of some medical records rather than none does not distinguish this case from *Smythe*. *Smythe* addressed two issues: (1) whether the Commission possessed sufficient information upon which to base a determination of fairness, and (2) whether the agreements were fair and just. *Smythe*, 170 N.C. App. at 364-66, 612 S.E.2d at 348-49. The lack of evidence regarding precisely which records were submitted to the Commission with the settlement agreements relates to the first question. The lack of medical records in the

subsequent litigation to set aside the approval relates to the second inquiry and the Commission's determination that the agreements were fair and just.

In the instant case, the question is whether Gheen had a full and complete medical report at the time he approved the Form 21. The Commission specifically found that "it is impossible to ascertain whether particular medical records were submitted with the Form 21." This finding is not challenged by defendants and a review of the record shows that this finding is accurate. While Gheen testified that he would not have received the Form 21 for approval unless medical records were attached, his testimony is not sufficient to establish that the attached medical records were a full and complete medical report. Since the Commission did not find that a full and complete medical report was submitted — and indeed determined that it could not make that finding on the record — the Commission's conclusion that the evidence was insufficient to justify setting aside the Form 21 is unsupported by the findings of fact or the evidence. *See also Clawson v. Phil Cline Trucking, Inc.*, 168 N.C. App. 108, 114, 606 S.E.2d 715, 719 (2005) ("Without regard to which party submitted the Form 26 Agreement to the Full Commission, the fact remains that the necessary and relevant medical records were not submitted with the Agreement. A full and complete medical report is essential for the deputy commissioner to accurately assess the proposed settlement agreement. Because the parties failed to file a full and complete medical report, we

conclude that the Full Commission properly invalidated the Form 26 Agreement.").

Defendants argue that the Commission is presumed to have had a full and complete medical report and that plaintiff bears the burden of rebutting that presumption. That argument cannot be reconciled with *Smythe*. If such a presumption exists, then the lack of any evidence regarding which medical records were before the Commission upon approval of the settlement would be immaterial. Under defendants' approach, the plaintiff in *Smythe* would have had the burden of showing that an incomplete medical record was submitted. Instead, we held that the lack of evidence of what was before the Commission required setting aside the order of approval. *Smythe*, 170 N.C. App. at 366, 612 S.E.2d at 349.

Defendants have not cited any cases supporting the existence of a presumption. Defendants point to *Caudill v. Manufacturing Co.*, 258 N.C. 99, 106, 128 S.E.2d 128, 133 (1962), in which our Supreme Court held that "[t]he presumption is that the Industrial Commission approves compromises only after a full investigation and a determination that the settlement is fair and just." While *Caudill* does not address the requirement of a full and complete medical report, we do not believe that this reference to a "presumption" was intended to be used in the manner urged by defendants.

Our Supreme Court noted the *Caudill* presumption language in *Vernon v. Steven L. Mabe Builders*, 336 N.C. 425, 431, 444 S.E.2d 191, 194 (1994), while discussing the history of the Court's case

law regarding approval of voluntary settlement agreements. The Court characterized this language as supporting the view that "'[t]he law thus undertakes to protect the rights of the employee in contracting with respect to his injuries.'" *Id.* (quoting *Caudill*, 258 N.C. at 106, 128 S.E.2d at 133). If the "presumption" language in *Caudill* was intended to have the effect urged by defendants, it is difficult to see how that language leads to the conclusion that the law is protecting the rights of employees when entering into compromise agreements.

Indeed, the Court in *Vernon* appears to impose a mandatory duty on the Commission to conduct a full investigation that is inconsistent with our simply assuming that such an investigation was done:

> We hold, therefore, that the statute requires, on the part of the Commission, a full investigation and a determination that a Form 26 compensation agreement is fair and just, in order to assure that the settlement is in accord with the intent and purpose of the Act that an injured employee receive the disability benefits to which he is entitled, and, particularly, that an employee qualifying for disability compensation under both sections 97-29 and -31 have the benefit of the more favorable remedy.

Id. at 432-33, 444 S.E.2d at 195. This Court has also applied *Vernon* to impose a duty on the Commission that cannot be squared with defendants' presumption argument. *See Kyle v. Holston Grp.*, 188 N.C. App. 686, 698, 656 S.E.2d 667, 674, *disc. review denied*, 362 N.C. 359, 662 S.E.2d 905 (2008) ("While it is not incumbent upon an insurance adjuster to explain the law to an unwitting claimant, the Industrial Commission must stand by to assure fair

dealing in any voluntary settlement. Thus, in this case, a full investigation to determine that the Agreement was fair and just required [the deputy commissioner] to determine, rather than assume, that Plaintiff was aware of his remedies under the law.") (internal citation omitted).

Defendants also cite *McAninch v. Buncombe County Schools*, 347 N.C. 126, 489 S.E.2d 375 (1997), in support of their claim that plaintiff bore the burden of proving the negative: that the Commission did not have the full and complete medical report. Nothing in *McAninch*, however, addresses that issue. Instead, the Supreme Court considered whether the plaintiff was bound by the stipulation regarding her average weekly wage in a compromise agreement found to be fair and equitable by the Commission. *Id.* at 131-32, 489 S.E.2d at 378-79. *McAninch* held only that the plaintiff was bound by the stipulation unless the plaintiff showed a basis for setting it aside, such as by showing fraud, misrepresentation, undue influence, or mutual mistake. *Id.* at 132, 489 S.E.2d at 379. The issue was not whether the Commission had conducted a proper investigation and properly found the agreement just and fair. *McAninch* does not, therefore, support the Commission's decision in this case.

Moreover, defendants' argument is analogous to the one made unsuccessfully by the defendants in *Clawson*. In *Clawson*, 168 N.C. App. at 109, 606 S.E.2d at 716, this Court reviewed an opinion and award invalidating a settlement agreement for lack of medical documentation. The Commission concluded that the deputy

commissioner did not have all the relevant medical records necessary to approve the agreement. *Id.* at 111, 606 S.E.2d at 717. On appeal, the defendants argued that the agreement should not have been set aside because the plaintiff had the responsibility to submit proper medical documentation in support of the agreement. *Id.* at 114, 606 S.E.2d at 719. This Court disagreed, holding that "it is the responsibility of the employer or its insurance carrier to submit the Form 26 Agreement and all attendant medical documentation to the Full Commission." *Id.*

If the burden of submitting the records rested on defendants, then defendants are the parties in the best position to know what documents were in fact submitted, if we consider the loss of files at the Commission. It is not unreasonable to place the burden on defendants to show that all medical records were in fact submitted. Defendants could have easily resolved the issue below by filing an affidavit attaching the medical records that were twice forwarded to the Commission. There is no such affidavit in the record before us.

Plaintiff also argues that the Commission erred in failing to make a determination that the Form 21 was fair and just. We agree.

"Under *Lewis*, this Court recognized that the N.C. Gen. Stat. § 97-82(a) requires the Commission to indicate in its approval order that the agreement is fair and just . . . ." *Atkins*, 154 N.C. at 514, 571 S.E.2d at 867. "At the hearing on a motion to set aside the agreement, the Commission must determine the fairness and justness of the agreement from the medical evidence filed with the

agreement at the time it was originally submitted to the Commission for approval." *Lewis*, 134 N.C. App. at 441, 518 S.E.2d at 3. "If the Commission approves an agreement without conducting the required inquiry and concluding the agreement is fair and just, the agreement is subject to being set aside." *Id.*

In the instant case, in its Opinion and Award, the Commission never indicated that the agreement was fair and just. Further, since the Commission never determined the nature of the medical evidence submitted, it could not make this determination. *See also id.* at 442, 518 S.E.2d at 4 ("In reviewing the fairness of the Form 26 Agreement pursuant to Plaintiff's motion [to set it aside], the Commission appears to have appropriately limited its consideration to the medical records present in the Commission file at the time the Form 26 was approved . . . .").

IV. CONCLUSION

We remand the Opinion and Award to the Commission to determine which records were submitted to the Commission with the Form 21. If a full and complete medical report was not before the Chief Deputy Commissioner, then, in accordance with *Atkins*, defendants must ensure that the Commission has a full and complete set of the medical records in existence as of the date the Form 21 was submitted for approval. The Commission is then required to determine whether the Form 21 is fair and just based on a review of all medical records "existing at the time the Form 21 agreement was submitted for original approval." *Atkins*, 154 N.C. App. at 515, 571 S.E.2d at 867.

Remanded.

Judges HUNTER, Robert C. and GEER concur.

Report per Rule 30(e).