NO. COA07-898

NORTH CAROLINA COURT OF APPEALS

Filed: 4 March 2008

LOLA MORRISON,
Employee/Plaintiff,

v.

North Carolina Industrial Commission
I.C. File Nos. 248201 & 281383

OUTBACK STEAKHOUSE,
Employer,

TRAVELERS INSURANCE COMPANY,
Carrier/Defendants.

Appeal by Plaintiff and Defendants from order entered 1 May 2007, by the North Carolina Industrial Commission. Heard in the Court of Appeals 16 January 2008.

*Brumbaugh, Mu & King, P.A., by Angela D. Vandivier-Stanley for Plaintiff.*

*Marshall, Williams & Gorham, L.L.P., by Ronald H. Woodruff, for Defendants.*

ARROWOOD, Judge.

Lola Morrison (Plaintiff), together with Outback Steakhouse and Travelers Insurance Company (Defendants), appeal from an Opinion and Award of the North Carolina Industrial Commission (Commission). We affirm.

The findings of fact of the Deputy Commissioner and the Commission recite the relevant details of Plaintiff's injuries sustained on 14 December 2002 and 30 January 2003. The Commission found, in pertinent part, that in July 2002, Plaintiff was employed as a server for Outback Steakhouse, and on 14 December 2002, "the floor at Outback "was wet and greasy[.]"

"[Plaintiff] slipped and fell[,] and "[Plaintiff] landed on both knees and wrists [when exiting the office.]" Plaintiff required the aid of her manager to help her from the floor. Plaintiff testified that she sought medical treatment the next morning at Urgent Care, "carried" there by her son. Plaintiff testified that "[t]he left arm was the worst [injury.]" Plaintiff "literally couldn't move [her left arm,]" and Plaintiff "could not dress [her]self [for] three weeks[.]" Both of Plaintiff's "knees [were] bruised and sw[ollen]."

On 30 January 2003, Plaintiff sustained a second injury at Outback Steakhouse, again slipping on the floor. As Plaintiff slipped, she "gripped the ice box[,]" and "[Plaintiff together with] the ice cream box[,] rolled." Plaintiff stated that she "slid" during this incident and sustained "pulled muscle" injuries in her back. Plaintiff stated that after the second injury, "I honestly could not even brush my hair . . . I was in so much pain[.]" For her injuries, Plaintiff received injections in her knees, back and shoulder for pain. Plaintiff also had MRIs of her knees.

Plaintiff and Defendants appeal from the Opinion and Award of the Commission, which concluded that Plaintiff sustained a compensable injury arising out of and in the course of her employment on 14 December 2002 and 30 January 2003, and awarding Plaintiff temporary total disability compensation at a rate of $144.00 per week from 15 December 2002 through 17 January 2003, from 4 March 2004 through 8 March 2004, and from 7 March 2004through 27 April 2004. The Commission also awarded Plaintiff all medical expenses incurred as a result of her 14 December 2002 and 30 January 2003 injuries. The Commission, however, concluded that Plaintiff did not carry the burden of proof to establish that her 14 December 2002 and 30 January 2003 injuries caused her conditions of weakness and diffuse body pain, and therefore, the

Commission did not award Plaintiff medical expenses related thereto. We affirm the Opinion and Award of the Commission.

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"[A]ppellate review of an award from the Commission is generally limited to two issues: (1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are justified by the findings of fact." *Johnson v. Southern Tire Sales & Serv.*, 358 N.C. 701, 705, 599 S.E.2d 508, 512 (2004). The Commission's conclusions of law are reviewable *de novo*. *Whitfield v. Laboratory Corp. of Am.*, 158 N.C. App. 341, 581 S.E.2d 778 (2003).

"In weighing the evidence, the Commission is the sole judge of the credibility of the witnesses and the weight to be given to their testimony, and the Commission may reject entirely any testimony which it disbelieves." *Hedrick v. PPG Industries*, 126 N.C. App. 354, 357, 484 S.E.2d 853, 856 (1997). The Commission's findings "'are conclusive on appeal . . . even though there be evidence that would support findings to the contrary.'" *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (quoting *Jones v. Myrtle Desk Co.*, 264 N.C. 401, 402, 141 S.E.2d 632, 633(1965)). This Court's "duty goes no further than to determine whether the record contains any evidence tending to support the finding[s].'" *Adams*, 349 N.C. at 681, 509 S.E.2d at 414 (quoting

*Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)). "This Court does not weigh the evidence; if there is any competent evidence which supports the Commission's findings, we are bound by their findings even though there may be evidence to the contrary." *Peagler v. Tyson Foods, Inc.*, 138 N.C. App. 593, 597, 532 S.E.2d 207, 210 (2000) (citation omitted).

"The Commission is not required . . . to find facts as to all credible evidence. That requirement would place an unreasonable burden on the Commission. Instead, the Commission must find those facts which are necessary to support its conclusions of law." *London v. Snak Time Catering, Inc.*, 136 N.C. App. 473, 476, 525 S.E.2d 203, 205 (2000) (citation omitted).

Temporary Total Disability Benefits

In her first argument, Plaintiff argues that the Commission erred in concluding that she was not entitled to ongoing temporary total disability benefits. We disagree.

The Workers' Compensation Act defines "disability" as the "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C. Gen. Stat. §97-2(9) (2007). The employee initially bears the burden of proving the extent of his disability. *See Ramsey v. Southern Indus. Constructors, Inc.*, 178 N.C. App. 25, 41, 630 S.E.2d 681, 692, *disc. review denied*, 361 N.C. 168, 639S.E.2d 652 (2006) (citation omitted). "[A] presumption of disability arises only '(1) by a previous Industrial Commission award of continuing disability, or (2) by producing a Form 21 or Form 26 settlement agreement approved by the Industrial Commission.'" *Id.* at 41-42, 630 S.E.2d at 692 (quoting *Cialino v. Wal-Mart Stores*, 156 N.C. App. 463, 470, 577 S.E.2d 345, 350 (2003)). Once the employee has established the presumption of disability, the burden shifts to the employer to produce sufficient evidence to rebut the continuing presumption of disability. *Burchette v. East Coast Millwork Distribs., Inc.*, 149 N.C. App. 802, 806, 562 S.E.2d 459, 461 (2002).

Plaintiff specifically argues that the Commission erred by failing to award her ongoing temporary total disability benefits, because Defendant failed to provide evidence to rebut the

presumption of ongoing disability. Plaintiff specifically challenges the following findings of fact, numbers 27 and 28, which state the following:

> 27. After plaintiff's minor injuries by accident on December 14, 2002 and January 30, 2003, plaintiff returned to work for defendant-employer in February 2003 and continued to work until March 4, 2004. It was not until one year later that plaintiff stated she was unable to return to work for defendant-employer due to her conditions of weakness and diffuse body pain. Plaintiff has not returned to work for defendant-employer since March 4, 2004 and there is no evidence to indicate that she has sought suitable employment.
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> 28. The competent medical evidence of record fails to establish by the greater weight that plaintiff's contusion to her left elbow, joint line pain in her knees, lumbar sprain and a left hand bruise resulting from her work-related accidents on December 14, 2002 and January 30, 2003 caused her current conditions of weakness and diffuse body pain.

Plaintiff also assigns error to the Commission's conclusions and award, which limit Plaintiff's disability compensation to 15 December 2002 through 17 January 2003, 4 March 2004 through 8 March 2004, and 17 March 2004 through 27 April 2004.

On 10 March 2006, Deputy Commissioner Theresa B. Stephenson awarded Plaintiff "temporary total disability benefits . . . from March 4, 2004 until further order of the Industrial Commission." This was sufficient to create the presumption of continuing disability and shift the burden of proof to the employer. On 24 April 2007, pursuant to N.C. Gen. Stat. §97-29 (2007), the Full Commission awarded Plaintiff "payment of temporary total disability compensation . . . from December 15, 2002 through January 17, 2003, March 4, 2004 through March 8, 2004 and March 17, 2004 through April 27, 2004."

The Commission made the following findings of fact, to which Plaintiff does not assign error:

> 22. On March 3, 2004, plaintiff presented to Dr. Mark E. Brenner, an orthopedic surgeon who treated her conservatively with cortisone shots to her shoulder and knees, muscle relaxants and home exercise. Dr. Brenner removed plaintiff from work until March 8, 2004. Thereafter, plaintiff was to return to light duty and if it were unavailable, she was to remain out of work.
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> 23. When plaintiff presented to Dr. Brenner on March 17, 2004, she was experiencing persistent knee pain. Dr. Brenner released plaintiff from work for four weeks. On April 2, 2004, Dr. Brenner extended plaintiff's release from work until April 27, 2004. Dr. Brenner testified that as of this date, he would have allowed plaintiff to return to work with restrictions of no heavy lifting, pushing or pulling. . . .

"Where an appellant fails to assign error to the trial court's findings of fact, the findings are 'presumed to be correct.'" *Okwara v. Dillard Dep't Stores, Inc.*, 136 N.C. App. 587, 591, 525 S.E.2d 481, 484 (2000) (internal quotation marks omitted).

A review of the record also reveals that the Commission based their conclusion to limit Plaintiff's disability compensation on the following evidence: On 20 May 2004, Dr. Bruce S. Solomon's examination of Plaintiff showed "normal muscle strength, normal sensation and normal reflexes." At that time, "[f]rom a neurological standpoint," Dr. Brenner "did not assign any work restrictions." Plaintiff, however, "continued to be treated conservatively . . . with muscle relaxants and pain medication" for her weakness and diffuse body pain.

Based on the foregoing evidence, we conclude that the Commission's findings of fact regarding the scope of Plaintiff's disability compensation are supported by competent evidence, and the Commission's conclusions that Plaintiff was entitled to temporary total disability compensation for the specified dates was supported by the findings of fact. Defendants met their burden of rebutting the presumption of Plaintiff's disability with evidence in the form of the deposition testimony of the physicians, Dr. Solomon and Dr. Brenner. The associated assignments of error are overruled.

Compensable Injury

In her second argument, Plaintiff contends that the Full Commission erred by concluding that her medical conditions of "weakness and diffuse body pain" were not caused by her injuries sustained on 14 December 2002 and 30 January 2003. We disagree.

The worker must prove causation if he or she is to recover based on the occurrence of an injury by accident: "An injury is compensable as employment-related if any reasonable relationship to employment exists. Although the employment-related accident need not be the sole causative force to render an injury compensable, the plaintiff must prove that the accident was a causal factor by a preponderance of the evidence." *Holley v. ACTS, Inc.*, 357 N.C. 228, 231-32, 581 S.E.2d 750, 752 (2003) (internal quotation marks and citations omitted). "To establish the necessary causal relationship for compensation under the Act, 'the evidence must be such as to take the case out of the realm of conjecture and remote possibility.'" *Chambers v. Transit Mgmt.*, 360 N.C. 609, 616, 636 S.E.2d 553, 557 (2006) (quoting *Gilmore v. Hoke Cty. Bd. of Educ.*, 222 N.C. 358, 365, 23 S.E.2d 292, 296 (1942)).

In the instant case, the following competent evidence supports the Commission's finding that the 14 December 2002 and 30 January 2003 injuries did not cause Plaintiff's weakness and diffuse body pain: Dr. Brenner stated that "I can't explain her symptoms [regarding weakness and diffuse body pain] as a basis of a single traumatic event. . . . The symptoms are too diffuse, nonspecific, multifocused, and geographically variable." Brenner continued, "I could certainly relate a focused anatomical part to an injury[,] . . . But there's no way I could causally relate elbow pain, neck pain, back pain, foot pain, hand pain, wrist pain, headaches, blurred vision, et cetera, to a fall." Then, Dr. Brenner added, "Unless she, perhaps . . . fell from . . . a six-story

building[.]" Then, Dr. Brenner qualified that he could "causally relate [the pain in her knees] to her fall[.]" Dr. David P. Fedder also stated the following:

> I would say it's normally unusual for one or two isolated falls to elicit a widespread chronic pain syndrome. It certainly could aggravate someone that is predisposed to that syndrome. Certainly could aggravate a situation like that. In other words, I - I've never seen somebody fall and develop fibromyalgia from an isolated fall.

The foregoing evidence supported the Commissions finding regarding the lack of a causal link between Plaintiff's injuries sustained at Outback Steakhouse on 14 December 2002 and 30 January 2003 and her conditions of weakness and diffuse body pain. According to Dr. Brenner and Dr. Fedder, the evidence is not such as to take the causal connection in the instant case "out of the realm of conjecture and remote possibility." *Chambers*, 360 N.C. at 616, 636 S.E.2d at 557. The finding, in turn, supports the Commissions conclusion that Plaintiff was not entitled to compensation or medical expenses for her conditions of weakness and diffuse body pain. The associated assignments of error are overruled.

Temporary Total Disability Benefits

Defendants contend on appeal that because Plaintiff failed to prove causation between the injuries sustained on 14 December 2002and 30 January 2003 and Plaintiff's weakness and diffuse body pain, the Commission erred in concluding that Plaintiff was entitled to temporary total disability benefits for 4 March 2004 through 8 March 2004 and 17 March 2004 through 27 April 2004. We disagree.

Specifically, Defendants challenge the Commission's conclusion of law, number 2, and award, number 1:

> As a result of her compensable injuries by accident, plaintiff is entitled to payment of temporary total disability compensation, payable at the rate of $144.00 per week from December 15, 2002 through January 17, 2003, March 4, 2004

> through March 8, 2004 and March 17, 2004 through April 27, 2004. . . .
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> Subject to attorney's fees approved herein, defendants shall pay to plaintiff temporary total disability compensation at the rate of $144.00 per week from December 15, 2002 through January 17, 2003, March 4, 2004 through March 8, 2004 and from March 17, 2004 through April 27, 2004. Compensation due which has accrued shall be paid to plaintiff in a lump sum, subject to attorney's fees hereinafter approved.

Defendants, however, notably fail to assign error to the finding of fact, numbers 22 and 23, which state:

> 22. On March 3, 2004, plaintiff presented to Dr. Mark E. Brenner, an orthopedic surgeon who treated her conservatively with cortisone shots to her shoulder and knees, muscle relaxants and home exercise. Dr. Brenner removed plaintiff from work until March 8, 2004. Thereafter, plaintiff was to return to light duty and if it were unavailable, she was to remain out of work.
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> 23. When plaintiff presented to Dr. Brenner on March 17, 2004, she was experiencing persistent knee pain. Dr. Brenner released plaintiff from work for four weeks. On April 2, 2004, Dr. Brenner extended plaintiff's release from work until April 27, 2004. Dr. Brenner testified that as of this date, he would have allowed plaintiff to return to work with restrictions of no heavy lifting, pushing or pulling. . . .

Because Defendants failed to assign error to these findings, we presume the findings to be correct. *Okwara*, 136 N.C. App. at 591, 525 S.E.2d at 484. Dr. Brenner stated that the pain Plaintiff suffered in her knees - "a focused anatomical part" - could be causally related "to her fall[s][.]" The Commission concluded that Plaintiff's injuries sustained on 14 December 2002 and 30 January 2003 arose out of Plaintiff's employment and were compensable. The Commission therefore provided compensation for Plaintiff's persistent knee pain from 4 March 2004 through 8 March 2004 and 17 March 2004 through 27 April 2004, during which times, Dr. Brenner restricted Plaintiff's work obligations at Outback Steakhouse. The Commission did not,

as Defendants suggest, award Plaintiff compensation during the foregoing dates, for "conditions of weakness and diffuse body pain," which the Commission explicitly concluded were not caused by Plaintiffs compensable injuries sustained on 14 December 2002 and 30 January 2003.

Because there is competent evidence to support the Commission's findings regarding Plaintiff's persistent knee pain on 4 March 2004 and 17 March 2004, and the causal connection of Plaintiff's knee pain to her compensable injuries sustained on 14 December 2002 and 30 January 2003, we conclude that the Commission did not err in awarding Plaintiff temporary total disability benefits for 4 March 2004 through 8 March 2004 and 17 March 2004 through 27 April 2004. *See Peagler v. Tyson Foods, Inc.*, 138 N.C.App. 593, 597, 532 S.E.2d 207, 210 (2000) (stating that "if there is any competent evidence which supports the Commission's findings, we are bound by their findings even though there may be evidence to the contrary"). The associated assignments of error are overruled.

For the foregoing reasons, we affirm the Opinion and Award of the Commission.

Affirmed.

Judges MCCULLOUGH and ELMORE concur.

Report per Rule 30(e).