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NO. COA06-1179

NORTH CAROLINA COURT OF APPEALS

Filed: 1 May 2007

DORIS SIMMONS,
Employee/Plaintiff-Appellant

v.

North Carolina Industrial Commission
I.C. File No. 255772

MELON HR SOLUTIONS,
Employer,

THE TRAVELERS INSURANCE,
Carrier,
Defendant-Appellee

Appeal by employee from opinion and award of the North Carolina Industrial Commission entered 25 January 2006. Heard in the Court of Appeals 27 March 2007.

Perry, Perry & Perry, P.A., by Robert T. Perry, for plaintiff-appellant.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Jeffrey A. Doyle, Erika D. Jones, and Susan J. Vanderweert, for defendant-appellee.

MARTIN, Chief Judge.

Doris Simmons, (“plaintiff”), a former employee of Melon HR Solutions, insured by Travelers Insurance (collectively “defendants”), appeals from an order of the North Carolina Industrial Commission (“Commission”) denying her additional benefits. We affirm.

The facts before the Commission tended to show that plaintiff sustained an admittedly compensable injury by accident resulting in problems to her neck, back and shoulder when she fell at work. As a result of her fall, she also sustained multiple fractures of her teeth, was

rendered unconscious and suffered a concussion. She was taken by EMS to Western Wake emergency services where she was treated and released to the care of her primary physician, Dr. Douglas Hammer.

After her treatment, plaintiff continued to have problems with her right knee, headaches, and left neck pain. After an MRI, plaintiff was referred to the Raleigh Orthopaedic Clinic for her right knee. On 8 July 2002, Dr. Boone of the clinic diagnosed plaintiff with degenerative disease in her right knee as well as a partial tear of the anterior cruciate ligament. Dr. Boone also referred plaintiff to Dr. Cara Siegel, who determined that plaintiff suffered from significant degenerative changes in her cervical and lumbosacral spine. Concerned that the plaintiff was suffering from a pinching of the spinal cord in her neck, Dr. Siegel further referred plaintiff to Dr. Albright, an orthopedic surgeon. Dr. Albright determined that plaintiff had severe spinal cord problems. Since plaintiff complained of regularly falling and losing her balance, Dr. Albright recommended surgery.

After surgery, plaintiff's condition deteriorated further. She left a rehabilitation facility in June 2003 and moved into an apartment where she had a contact guard for standby assistance, and an aide to occasionally assist with cooking and cleaning. Her physicians determined that plaintiff was totally and permanently disabled from any job. Dr. Hammer was of the opinion that plaintiff's compensable fall caused her back pain as well as the resulting weakness and numbness in her legs and left arm, increasing weakness of the right arm, and acute and chronic pain and depression. In addition to Lexapro, Wellbutrin, Vicodin, Neurotin and Motrin, plaintiff was prescribed Diavon HCT, a blood pressure medication. She was also taking Pepcid for reflux and a constipation medication, conditions that Dr. Hammer testified were common to people who

were wheelchair bound. In Dr. Hammer's opinion, these conditions were caused, or significantly contributed to, by plaintiff's compensable injury.

Dr. Hammer also stated that plaintiff was in constant pain 24 hours a day. She could not perform the usual household chores to the point that she could not tie her shoe. Easily fatigued and wheelchair bound, plaintiff was not capable of shopping or cleaning. In his opinion, plaintiff would need constant medical monitoring and assistance for the rest of her life. Defendants conceded that plaintiff was permanently and totally disabled, and ceased to contest the matter.

The Commission awarded plaintiff benefits for permanent and total disability compensation for the rest of her life. The Commission found that plaintiff was unable to transport herself for shopping or perform general household cleaning. The Commission ordered defendant to provide transportation services for general life and medical needs, as well as a motorized wheelchair, and all medical expenses incurred, or to be incurred, as a result of her compensable injury. However, the Commission found that plaintiff had failed to prove by the greater weight of the evidence that her high blood pressure, acid reflux, or indigestion were causally related to the compensable injury. Therefore, defendants were not required to pay for the prescriptions for these conditions. The Commission further found that plaintiff was not entitled to further household maid service. Plaintiff appeals.

Plaintiff argues that the Commission erred in its determination that she is not entitled to further maid services. We cannot agree. Plaintiff cites our decision in *Timmons v. North Carolina Dept. of Transp.*, 123 N.C. App. 456, 462, 473 S.E.2d 356, 359 (1996) to argue that the "other treatment" language of N.C.G.S. §97-25 encompasses her request for a maid. N.C. Gen. Stat. §97-25 (2005). We find the comparison misplaced. In *Timmons*, we directed the employer to pay for the difference between ordinary housing and the special handicap-accessible housing

necessitated by the employee's injuries. *Id.* ("Such extraordinary and unusual expenses are, in our view, properly embraced in the 'other treatment' language of G.S. §97-25, while the basic cost of acquisition or construction of the housing is not."). However, we specifically declined to require the employer to pay for the entire cost of the housing, noting that "the expense of housing is an ordinary necessity of life, to be paid from the statutory substitute for wages provided by the Workers' Compensation Act." *Id.* at 461-62, 473 S.E.2d at 359.

Our research has yielded several North Carolina cases upholding awards for attendant care, including: *Godwin v. Swift & Co.*, 270 N.C. 690, 155 S.E.2d 157 (1967) ; *Palmer v. Jackson*, 161N.C. App. 642, 590 S.E.2d 275 (2003); *Levens v. Guilford Cty. Schools*, 152 N.C. App. 390, 567 S.E.2d 767 (2002); *Ruiz v. Belk Masonry Co.*, 148 N.C. App. 675, 559 S.E.2d 249, *disc. review denied*, 356 N.C. 166, 568 S.E.2d 610 (2002); *London v. Snak Time Catering, Inc.*, 136 N.C. App. 473, 525 S.E.2d 203 (2000). In each of those cases, the question considered by the Court was simply whether the Commission's findings of fact were supported by competent evidence and whether the conclusions of law were supported by the findings. *Godwin*, 270 N.C. at 693-95, 155 S.E.2d at 159-61 ; *Palmer*, 161 N.C. App. at 646-49, 590 S.E.2d at 277-79; *Levens*, 152 N.C. App. at 394-400, 567 S.E.2d at 770-73; *Ruiz*, 148 N.C. App. at 679-82, 559 S.E.2d at 252-54; *London*, 136 N.C. App. at 474-80, 525 S.E.2d at 204-08. We employ the same test here.

The evidence shows that plaintiff already receives assistance in cleaning, meal preparation and detail services from her family, and from individuals she pays on her own. In addition, she is capable of performing some light work on her own. Plaintiff has directed us to no medical testimony or other evidence suggesting attendant care as part of her rehabilitation program. Given these factors, we cannot say there was no competent evidence supporting the

Commission's determination that plaintiff was no longer entitled to maid service. This argument is therefore overruled.

Next, plaintiff argues that the Commission erred in its determination that the plaintiff's high blood pressure, acid reflux and indigestion were not causally related to her compensable injury. "We stress that this Court does not function as an appellate fact finder; it is the Commission that performs the 'ultimate fact-finding' function under our Worker's Compensation Act." *Rose v. City of Rocky Mount*, ___ N.C. App. ___, ___, 637 S.E.2d 251, 256 (2006). If the Commission's findings are supported by competent evidence, they are conclusive on appeal, *Hedrick v. PPG Indus.*, 126 N.C. App. 354, 357, 484 S.E.2d 853, 856, *disc. review denied*, 346 N.C. 546, 488 S.E.2d 801-02 (1997), and this Court "may set aside a finding of fact only if it lacks evidentiary support." *Holley v. ACTS, Inc.*, 357 N.C. 228, 231, 581 S.E.2d 750, 752 (2003). In particular, this Court may not weigh the evidence or evaluate the credibility of witnesses, as "the Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998). A finding of fact is conclusive on appeal if supported by competent evidence, even where there is evidence to contradict the finding. *Id.* at 681, 509 S.E.2d at 414.

Therefore, we review the record to see if the Commission's findings are supported by competent evidence. Turning first to the Commission's determination that the blood pressure was not related to the compensable work injury, we note that Dr. Hammer testified that it was "possible" that the blood pressure was related or unrelated to the injury, and could not say that it was more likely than not that it was. Similarly, with regard to the acid reflux, Dr. Hammer testified that he did not know if her reflux medication "was related to her accident or not." Concerning her indigestion, Dr. Hammer stated that indigestion was "not an uncommon

problem” and conceded that he had not conducted any investigation into the cause of her indigestion or reflux. Since plaintiff’s argument relies entirely on Dr. Hammer’s testimony, the statements above constitute sufficient competent evidence to support the Commission’s determination that the blood pressure, acid reflux, and indigestion were not related to the work injury. Therefore, this argument is overruled.

Affirmed.

Judges WYNN and GEER concur.

Report per Rule 30(e).