An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA06-778

NORTH CAROLINA COURT OF APPEALS

Filed: 15 May 2007

CHARLES HARVEY,
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 279504

EPES TRANSPORT SYSTEMS,
Employer,

PROTECTIVE INSURANCE COMPANY,
Carrier,
Defendants.

Appeal by defendants from opinion and award entered 30 March 2006 by the North Carolina Industrial Commission. Heard in the Court of Appeals 25 January 2007.

Law Offices of Michael A. DeMayo, LLP, by Susan E. Rhodes, for plaintiff-appellee.

Morris York Williams Surles & Barringer, LLP, by Stephen Kushner, for defendants-appellants.

GEER, Judge.

Defendants Epes Transport Systems and Protective Insurance Company appeal from an opinion and award of the North Carolina Industrial Commission authorizing back surgery and other medical treatment for plaintiff Charles Harvey. On appeal, defendants argue that the Commission improperly shifted the burden of proof by requiring defendants to establish that the surgery sought by plaintiff was not reasonably calculated to effect a cure, provide relief, or

lessen Harvey's period of disability. Based upon a review of the entire opinion and award, we believe that the Commission properly allocated the burden of proof.

Defendants further contend that compliance with the Commission's authorization of treatment "as recommended" by two separate treating physicians is impossible since each physician recommended a different type of surgery. The opinion and award and the record indicate that the doctors _ one who was treating Harvey's pain and one who was the orthopedic surgeon _ were each responsible for different aspects of Harvey's care and, in any event, will be able to coordinate with respect to Harvey's treatment. Therefore, the Commission did not abuse its discretion when approving further treatment "as recommended" by the two physicians.

Facts

Harvey was born in 1956, attended high school through the eleventh grade, and worked most of his adult life as a truck driver. In April 2000, while working as a driver for U.S. Express, Harvey sustained a back injury and later underwent fusion surgery at the L5-S1 level. This surgery was performed by orthopedic surgeon Dr. Paul Broadstone, who released Harvey to return to work as a truck driver in May 2001.

In August 2001, Harvey became employed with defendant Epes Transportation Services, Inc. as a truck driver. While working for Epes, Harvey experienced no significant back-related problems until his admittedly compensable injury by accident on 11 January 2003, when the seat of a truck he was driving "suddenly lost compression" and dropped him to the floor of the cab. Harvey began experiencing "piercing pain" in his back, and on 11 March 2003, the parties filed a Form 21 agreeing that Harvey's injury was compensable.

When Harvey's back pain failed to remit, he was again referred to Dr. Broadstone, who diagnosed Harvey with myofascial pain, degenerative disk disease, and discogenic pain that was

confirmed by a positive discogram at L2-L3, L3-L4, and L4-L5. Although Dr. Broadstone recommended physical therapy, this treatment was discontinued after two visits when Harvey experienced significant pain. After Harvey failed to respond to additional conservative treatment, Dr. Broadstone recommended an inner-body fusion at L4-L5.

On 21 April 2003, Dr. Broadstone referred Harvey to Dr. Roger W. Catlin, a pain medicine specialist at the Chattanooga Center for Pain Management. Dr. Catlin performed another discogram, from which he concluded that several of Harvey's discs had degenerated and were "leaky." Dr. Catlin treated Harvey with psychological support, various medications, and injections. Dr. Catlin expressed the opinion that the surgery recommended by Dr. Broadstone was "necessary to reduce Mr. Harvey's pain to the point he can return to a functional lifestyle . . . ." With respect to the type of fusion surgery to be performed, Dr. Catlin testified: "I think he needs fusion surgery, whether it's one level or three levels. You know, I will leave it up to the orthopedist who is going to take the responsibility for that surgery and for its outcome." In addition to the surgery, Dr. Catlin recommended that Harvey be referred for a psychological evaluation and treatment, a back brace, smoking cessation patches, bone growth stimulator, and blood work (necessary because of the medications taken by Harvey for many months).

On 13 January 2004, Harvey was examined by Dr. S. Craig Humphreys, in an independent medical examination requested by defendants. Dr. Humphreys recommended a three-level fusion, rather than the single-level advised by Dr. Broadstone, although he expressed the view that "what Dr. Broadstone is recommending is certainly within the bounds of, you know, normal practice." He agreed with Dr. Broadstone and Dr. Catlin that surgery _ whether a three-level fusion or a one-level fusion _ was reasonably required to effect a cure, provide relief,

or lessen Harvey's period of disability. Dr. Humphreys also agreed with the additional treatment recommended by Dr. Catlin.

Defendants retained Dr. J. Paul Kern, a specialist in physical medicine and rehabilitation, to review Harvey's medical records. Based upon that review, Dr. Kern, who does not perform surgery and did not physically examine plaintiff, disagreed with the other physicians' opinion that the fusion would be likely to effect a cure, provide relief, or lessen Harvey's period of disability. Dr. Kern did agree with Dr. Catlin's referral of Harvey to a psychologist, for a liver blood profile, and for smoking cessation patches.

Defendants refused to pay for the surgery and treatment recommended by Drs. Broadstone and Catlin, contending that Harvey's symptoms were related to his prior back injury in April 2001. The deputy commissioner entered an opinion and award in favor of Harvey and requiring, among other things, that defendants authorize and pay for ongoing medical treatment "as may be recommended by Dr. Broadstone and/or Dr. Catlin." Following defendants' appeal, the Full Commission affirmed the decision of the deputy commissioner with modifications, concluding that Harvey's "admittedly compensable injury aggravated his pre-existing disc disease" and that "plaintiff's request for additional medical treatment, as recommended by his treating physicians, is reasonable and appropriate." The Commission, therefore, ordered defendants to "authorize and pay for ongoing medical treatment for the plaintiff to help control or improve his pain, including surgery (whether a one-level or three-level fusion); smoking cessation patches; blood work/liver[;] Aspen Quick Draw Brace; bone growth stimulator; and psychological evaluation and treatment[;] and other treatment as may be recommended by Dr. Broadstone and/or Dr. Catlin." Defendants timely appealed to this Court.

I

Defendants first argue that the Commission improperly shifted the burden of proof by requiring defendants to show that the treatment Harvey sought was not reasonably calculated to effect a cure, provide relief, or lessen Harvey's period of disability. We disagree.

N.C. Gen. Stat. §97-25 (2005) provides that "[m]edical compensation shall be provided by the employer." Medical compensation is defined as "medical, surgical, hospital, nursing, and rehabilitative services, and medicines, sick travel, and other treatment, including medical and surgical supplies, as may reasonably be required to effect a cure or give relief and for such additional time as, in the judgment of the Commission, will tend to lessen the period of disability . . . ." N.C. Gen. Stat. §97-2(19) (2005). "In case of a controversy arising between the employer and employee relative to the continuance of medical, surgical, hospital, or other treatment, the Industrial Commission may order such further treatments as may in the discretion of the Commission be necessary." N.C. Gen. Stat. §97-25.

In arguing that the Commission improperly required them to bear the burden of proving that fusion surgery was "required to effect a cure or give relief" or "lessen the period of disability," defendants point to a single sentence in the middle of Finding of Fact 39, in which the Commission found that "defendants' refusal to authorize and pay for additional medical treatment . . . is not supported by the greater weight of the evidence." Although we agree this portion of Finding of Fact 39 would benefit from better wording, review of the entire opinion and award reveals that the Commission properly allocated the burden of proof. *See Reavis v. Reavis*, 82 N.C. App. 77, 80, 345 S.E.2d 460, 462 (1986) ("Judgments must be interpreted like other written documents, not by focusing on isolated parts, but as a whole.").

Finding of Fact 39 states in its entirety:

> 39. The Full Commission finds that the surgery (whether a one-level or three-level fusion); smoking cessation

> patches; blood work/liver profile[;] Aspen Quick Draw Brace; bone growth stimulator[;] and psychological evaluation, are reasonably required to provide the plaintiff relief or to lessen his period of disability. The defendants' refusal to authorize and pay for additional medical treatment, to include: surgery (whether a one-level or three-level fusion); smoking cessation patches; blood work/liver profile[;] Aspen Quick Draw Brace; bone growth stimulator; and psychological evaluation and treatment is not supported by the greater weight of the evidence. *In reaching these conclusions*, the Full Commission notes that three of the four doctors who were deposed recommended surgery of some kind. Greater weight is given to the testimony of Dr. Broadstone, the surgeon most familiar with the plaintiff's medical history and within whom both Dr. Caitlin [sic] and Dr. Humphreys expressed great confidence, as opposed to Dr. Kerns [sic], who did not examine the plaintiff or speak with any doctor that treated the plaintiff.

(Emphasis added.) As the Commission's reference to "these conclusions" indicates, the first and second sentences of this finding of fact represent two separate factual determinations.

The first sentence of the finding of fact _ addressing Harvey's entitlement to further treatment _ suggests a proper allocation of the burden of proof. This allocation is further supported by the Commission's first conclusion of law, in which the Commission concluded that "[*t]he plaintiff's request* for additional medical treatment, as *recommended* by his treating physicians, is reasonable and appropriate." (Emphasis added.)

When the entire opinion and award is reviewed, it is apparent that the second sentence addresses Harvey's request for attorneys' fees under N.C. Gen. Stat. §97-88.1 (2005), which provides: "If the Industrial Commission shall determine that any hearing has been . . . defended without reasonable ground, it may assess the whole cost of the proceedings including reasonable fees . . . upon the party who has . . . defended them." After explaining that defendants' litigation position was not supported by the greater weight of the evidence, the Commission then made Finding of Fact 40, which determined that defendants nonetheless "reasonably defended this

matter" because their position was supported by some of the evidence. In short, the Commission's reference to defendants' refusal not being supported by the weight of the evidence was related to its determination that it was supported by some evidence and, therefore, did not warrant an award of fees under §97-88.1. *See Simmons v. Columbus County Bd. of Educ.*, 171 N.C. App. 725, 732, 615 S.E.2d 69, 75 (2005) (interpreting disputed finding of fact and concluding Commission did not misapply the burden of proof). We, therefore, overrule this assignment of error.

II

Defendants next argue that the Commission's requirement that defendants authorize and pay for "treatment as may be recommended by Dr. Broadstone and/or Dr. Catlin" is "impossible" because these two doctors "contradicted one another." In their brief, defendants "concede that sufficient evidence existed for the Commission to simply enter an Order approving the one-level fusion recommended by Dr. Broadstone." Defendants thus apparently do not dispute that the Commission could have ordered them to pay compensation pursuant to Dr. Broadstone's recommendations, and, instead, argue only that compliance with the recommendations of both doctors is impossible.

Defendants have, however, overlooked the fact that this appeal involved a dispute not only over the fusion surgery (recommended initially by Dr. Broadstone), but also over whether Harvey was entitled to the various types of further treatment recommended by Dr. Catlin. Harvey had two separate treating physicians, each of whom was responsible for different aspects of his treatment. Dr. Broadstone was the surgeon, while Dr. Catlin was responsible for pain management. Dr. Catlin determined that Harvey needed to receive a psychological evaluation and treatment, a back brace, smoking cessation patches, bone growth stimulator, and blood work.

After finding that fusion surgery and these other forms of treatment _ recommended by the two treating physicians _ were reasonably required to provide Harvey relief or to lessen his period of disability, the Commission properly concluded, pursuant to N.C. Gen. Stat. §97-25, that "[t]he plaintiff's request for additional medical treatment, as recommended by his treating physicians, is reasonable and appropriate."

In light of the various types of treatment at issue and the differing responsibilities of the two treating physicians, it is reasonable that the Commission stated in its award that defendants were required to pay for "ongoing medical treatment for the plaintiff to help control or improve his pain, surgery (whether a one-level or three-level fusion); smoking cessation patches; blood work/liver[;] Aspen Quick Draw Brace; bone growth stimulator; and psychological evaluation and treatment[;] *and other treatment as may be recommended by Dr. Broadstone and/or Dr. Catlin*." (Emphasis added.) As Harvey's treating physicians, both doctors would likely be involved in any medical determinations as to what other treatment might be appropriate to help improve Harvey's pain. Certainly, the Commission did not err in allowing Harvey to have more than one treating physician. *See, e.g.*, *Lakey v. U.S. Airways, Inc.*, 155 N.C. App. 169, 174, 573 S.E.2d 703, 707 (2002) (upholding opinion and award that approved treatment by several physicians), *disc. review denied*, 357 N.C. 251, 582 S.E.2d 271 (2003); *Radica v. Carolina Mills*, 113 N.C. App. 440, 451, 439 S.E.2d 185, 192 (1994) (remanding to Commission for reconsideration of whether plaintiff was entitled to medical compensation, not only for services provided by defendant's physician, but also for services provided by four other physicians treating plaintiff).

Defendants' concern that the opinion and award does not specify whether the surgery should be a one-level or three-level fusion is misplaced. The Commission is not qualified to

make a medical determination regarding which of two types of surgeries would be best for a claimant without any expert testimony stating that one of the types would be inappropriate. That decision must be made by the approved treating physician or physicians in conjunction with the patient. After determining that fusion surgery was necessary under N.C. Gen. Stat. §97-25, the Commission properly left the task of determining precisely what type of fusion surgery was best to Drs. Broadstone and Catlin.

Moreover, the Commission's findings and the record indicate that Drs. Broadstone and Catlin should be able to effectively collaborate in making that decision. Dr. Catlin testified that he not only agreed with Dr. Broadstone that Harvey needed surgery, but that Dr. Catlin would also defer to Dr. Broadstone's recommendations with respect to Harvey's specific surgical needs. Further, defendants do not dispute the Commission's finding that Dr. Catlin "expressed great confidence" in Dr. Broadstone's opinions.

Accordingly, we see no reason to conclude that the Commission's approval of the treatment sought by Harvey amounted to an abuse of discretion. *See* N.C. Gen. Stat. §97-25 ("In case of a controversy arising between the employer and employee relative to the continuance of medical, surgical, hospital, or other treatment, the Industrial Commission may order such further treatments as may in the discretion of the Commission be necessary."). We, therefore, affirm the opinion and award of the Commission.

Affirmed.

Judges CALABRIA and JACKSON concur.

Report per Rule 30(e).