NO. COA06-1648

NORTH CAROLINA COURT OF APPEALS

Filed: 16 October 2007

SANDRA S. MCLESKEY,
Employee,
Plaintiff

v.

North Carolina Industrial Commission
I.C. File No. 305698

CAROLINA SCCS,
Employer,

LIBERTY MUTUAL INSURANCE COMPANY,
Carrier,
Defendants.

Appeal by employee from Opinion and Award entered 18 August 2006 by the North Carolina Industrial Commission. Heard in the Court of Appeals 10 September 2007.

Brumbaugh, Mu & King, P.A., by Leah L. King, for plaintiff-appellant.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Erica B. Lewis and Benjamin D. Williams, for defendants-appellees.

MARTIN, Chief Judge.

Sandra McLeskey ("plaintiff") appeals from an order of the North Carolina Industrial Commission denying her claim for ongoing total disability compensation. The record reflects that plaintiff sustained an injury to her right ankle by stepping in a pothole on 25 October 2002. On 6 November 2002, defendant-employer filed an IC Form 60 admitting compensability of plaintiff's right ankle injury. Plaintiff later filed an IC Form 18, dated 23 April 2003, alleging

that she sustained injury to her right ankle, right shoulder, and left wrist as a result of the 25 October 2002 incident. On 7 May 2003, defendants filed an IC Form 24 seeking termination of plaintiff's workers' compensation benefits. The case was heard before a deputy commissioner on 18 November 2004. On 13 September 2005, plaintiff was awarded compensation for ongoing total disability benefits. Defendants appealed to the full Industrial Commission ("the Commission"). The Commission found that plaintiff's condition was unrelated to her compensable injury and denied her additional benefits. Plaintiff appealed to this Court. We affirm.

The Commission made the following findings: At the time of the alleged incident, plaintiff was fifty-four years old. In 1997, plaintiff was involved in a serious car accident which caused shoulder pain and hand and finger numbness, and prior to her employment with defendant-employer, she was receiving Social Security disability benefits for chronic fatigue syndrome, fibromyalgia, and congestive heart failure. Plaintiff began working part-time for defendant-employer in September 2002, and her job duties involved assisting a special-needs child and supervising the child throughout the day. Plaintiff began performing her duties full-time on 24 October 2002. Her part-time and full-time rate of pay was eleven dollars per hour.

On 25 October 2002, plaintiff was attending to her assigned special-needs child on a playground when the child began to run away from plaintiff's line of sight. As plaintiff chased the child she stepped in a pothole, causing her right ankle to turn and "pop." Other teachers helped plaintiff to her feet, and plaintiff worked the remainder of the day. At the end of the day an office assistant took plaintiff to Whiteville Urgent Care.

Records from Whiteville Urgent Care show that plaintiff complained of pain in her right foot. Plaintiff's right ankle was x-rayed, and she was diagnosed with a fractured distal fibula. She

was given painkillers, and her ankle was wrapped in an Ace bandage. She was also referred to Dr. Stephen Candela ("Dr. Candela"), an orthopedic surgeon. On 28 October 2002, plaintiff was examined by Jim Oles ("Oles"), Dr. Candela's physician assistant. Oles diagnosed plaintiff with a fracture of the lateral malleolus in her right ankle. Plaintiff's ankle was placed in a CAM walker, and she was medically excused from work. On 18 November 2002, plaintiff returned to Dr. Candela's office and had more x-rays taken. Dr. Candela interpreted the x-rays to show that the fracture was healing. Plaintiff continued to receive treatment from Dr. Candela over the next few months, including physical therapy and different methods of bracing the ankle. On 26 March 2003, an x-ray revealed that plaintiff's ankle was fully healed, and Dr. Candela released plaintiff from his care. He authorized her to return to work with no restrictions.

Plaintiff took her return-to-work note to defendant-employer and was informed that the child with whom she had been working had been assigned to another mentor. Plaintiff believed she was no longer employed by defendant-employer, and she filed a complaint with the North Carolina Department of Labor. In May 2003, after the complaint was filed, defendant-employer contacted plaintiff and offered her a part-time, twenty hour per week position paying eight dollars per hour. Plaintiff refused this position. In June 2003, a full-time position became available and was offered to plaintiff. This position was essentially the same as plaintiff's previous position, with the same rate of pay. Plaintiff refused this position and did not return to work with defendant-employer.

On 21 February 2003, plaintiff was shopping at a Big Lots store when she was struck by falling pictures. Plaintiff fell backwards, landed on her left hip, twisted her back, and hit her left hand. Plaintiff was taken to the emergency room where she reported experiencing left hip pain,

right ankle pain, and back pain. Plaintiff was diagnosed with a left hip contusion, and she was given medication and released.

Plaintiff continued to experience pain and sought treatment from her family physician, Dr. Richard Berry ("Dr. Berry"). On 7 April 2003, Dr. Berry requested an MRI of plaintiff's right ankle and left knee, and referred her to Dr. Brian Altman ("Dr. Altman"), an orthopedic specialist. Dr. Altman examined plaintiff on 21 April 2003 and diagnosed her with laxity of the right ankle and a torn medial meniscus of the left knee. On 29 June 2003, Dr. Altman performed a left medial meniscectomy and chondroplasty on plaintiff's knee. On 8 October 2003, plaintiff returned to Dr. Altman, complaining of increased pain and numbness in her right ankle. Dr. Altman diagnosed her with chronic lateral laxity of the right ankle and prescribed an air cast.

In January 2004, plaintiff returned to Dr. Altman, complaining of weakness in her right ankle despite the use of the air cast. Dr. Altman referred plaintiff to physical therapy. Plaintiff saw Dr. Altman again on 11 February 2004 and complained of increased pain in her left knee. An April 2004 MRI of plaintiff's ankle revealed a deficit with the medial malleolus. On 10 November 2004, Dr. Altman diagnosed plaintiff with severe arthritis of the left knee and recommended a total joint replacement.

The Commission found that plaintiff's left knee, right ankle, and bilateral hand problems were not causally related to the 25 October 2002 incident. The Commission also found that the part-time and full-time positions offered to plaintiff were suitable and that her refusal of them was unjustified. Finally, the Commission found that a just approximation of plaintiff's average weekly wage at the time of her admittedly compensable injury was $220. The Commission ordered that plaintiff receive workers' compensation benefits only for the period of 28 October 2002 through 26 March 2003.

"The standard of review for an appeal from an opinion and award of the Industrial 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). This Court may not weigh the evidence or make determinations regarding the credibility of the witnesses. *Adams v. AVX Corp*.,349 N.C. 676, 681, 509 S.E.2d 411, 413-14 (1998). "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).

Plaintiff first argues the Commission erred in determining that her left knee, right ankle, and bilateral hand problems were not causally related to her compensable injury. We disagree. This Court may only review the record to determine if the Commission's findings of fact are supported by competent evidence and if these findings support its conclusions of law. *Hedrick v. PPG Indus.*, 126 N.C. App. 354, 357, 484 S.E.2d 853, 856 (1997). Further, "[t]o show that the prior compensable injury caused the subsequent injury, the evidence must be such as to take the case out of the realm of conjecture and remote possibility, that is, there must be sufficient competent evidence tending to show a proximate causal relation." *Cooper v. Cooper Enters., Inc.*, 168 N.C. App. 562, 564, 608 S.E.2d 104, 106 (2005) (internal quotation marks omitted). Turning first to the Commission's determination that plaintiff's left knee problems were not causally related to the compensable injury, a handwritten description of the 25 October 2002 incident that plaintiff filled out at Dr. Candela's office describes only her ankle injury and contains no mention of a knee injury or knee pain. Dr. Candela testified that his records

contained no indication that plaintiff complained of pain or injury in any part of her body other than her ankle. Dr. Altman testified that plaintiff told him that her left knee problems began three weeks prior to her 21 April 2003 visit to him. Dr. Altman also testified that he could not offer an opinion on causation, that he could only speculate as to the cause of plaintiff's knee injury, and that the fall at Big Lots could have caused a problem with the meniscus. This testimony on causation amounts to mere conjecture. The record thus contains sufficient competent evidence supporting the Commission's finding that plaintiff's knee problems were unrelated to her compensable injury. This evidence supports the Commission's conclusion that plaintiff's knee problems are not compensable.

Turning to plaintiff's right ankle problems, Dr. Candela determined that plaintiff's ankle was healed on 26 March 2003 and returned her to work with no restrictions. Dr. Altman testified that when he examined plaintiff after her fall at Big Lots he observed a fracture of the medial malleolus, and he acknowledged that this was a different area of the ankle than the area treated by Dr. Candela. Dr. Altman also testified that he could not give an opinion as to whether the 25 October incident or the fall at Big Lots caused the ankle problem, and that to give such an opinion would only be speculation. The medical testimony on the cause of plaintiff's current ankle problem was thus mere conjecture. This is sufficient competent evidence supporting the Commission's finding that plaintiff's right ankle problems were unrelated to her compensable injury. This evidence supports the Commission's conclusion that plaintiff's right ankle problem is not compensable.

Turning finally to plaintiff's bilateral hand complaints, neither Dr. Altman or Dr. Candela recall plaintiff complaining about any problems with her hands and neither of them treated her for any such problems. This is sufficient competent evidence to support the Commission's

finding that plaintiff's bilateral hand problems were not casually related to the compensable injury. This evidence supports the Commission's conclusion that plaintiff's bilateral hand problems are not compensable.

Next, plaintiff argues that the Commission erred in finding that plaintiff unjustifiably refused suitable job offers made to her by defendant-employer. "If an injured employee refuses employment procured for him suitable to his capacity he shall not be entitled to any compensation at any time during the continuance of such refusal, unless in the opinion of the Industrial Commission such refusal was justified." N.C. Gen. Stat. §97-32 (2005). Factors to consider in determining suitability include the worker's physical capacity, age, education, work experience, vocational interests, and aptitudes; no one factor shall be determinative. *Collins v. Speedway Motor Sports Corp.*, 165 N.C. App. 113, 122, 598 S.E.2d 185, 191-92 (2004).

In the present case, Dr. Candela released plaintiff to full-duty work with no restrictions on 26 March 2003. This is competent evidence that the two positions offered to plaintiff were physically suitable. Catherine Bastian ("Bastian"), defendant-employer's human resources manager, testified that the only difference between the part-time position offered to plaintiff and plaintiff's previous part-time position was the rate of pay. Bastian also testified that the full-time position offered to plaintiff in June 2003 was essentially the same job plaintiff had been performing on the day of her injury, with the same rate of pay. This is competent evidence that the two positions were suitable to plaintiff's age, education, work experience, vocational interests, and aptitudes. The fact that the first position offered to plaintiff was part-time does not render it unsuitable; plaintiff had agreed to "try" full time work when the child she was supervising required full-time mentoring, and plaintiff had only been working the full-time position for one day when she was injured. The part-time position's deficit in pay is also not

determinative; the position was otherwise suitable to plaintiff's work experience, vocational interests, age, and education, as it was essentially the same job she had performed prior to her injury. This is sufficient competent evidence to support the Commission's finding that both jobs offered to plaintiff were suitable and that plaintiff's refusal of the positions was unjustified. This evidence in turn supports the Commission's conclusion that plaintiff should not receive benefits for the period of time when she refused the positions.

Next, plaintiff argues that the Commission erred in its calculation of plaintiff's average weekly wage. N.C.G.S. §97-2(5) sets forth in priority sequence five methods by which an injured employee's average weekly wages are to be computed. The third method of calculation set out in the statute applies in the present case:

> Where the employment *prior* to the injury extended over a period of *fewer than 52 weeks,* the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed; provided, results fair and just to both parties will be thereby obtained.

N.C. Gen. Stat. §97-2(5) (2005) (emphasis added). Because plaintiff had been working for defendant-employer less than 52 weeks prior to her injury, the Commission computed plaintiff's weekly wages based on her part-time rate of pay from the time she began working for defendant-employer in September 2002. The Commission found that this method of calculation was fair to both parties.

Plaintiff argues that the Commission should have computed plaintiff's average weekly wage based on her full-time hours, using the last method described in the statute: "But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the

injury." N.C. Gen. Stat. §97-2(5) (2005). Our Supreme Court has stated that this last method "may not be used unless there has been a finding that unjust results would occur by using the previously enumerated methods." *McAninch v. Buncombe County Sch.*, 347 N.C. 126, 130, 489 S.E.2d 375, 378 (1997). In the present case, recalculation of plaintiff's average weekly wages through our application of the fifth computation method would "constitute[] an improper contravention of the Commission[']s] fact-finding authority, and specifically its finding of fairness in this case." *Id.* at 131, 489 S.E.2d at 378. The Commission's findings of fact and conclusions of law on the issue of average weekly wages are amply supported by the evidence in the record.

Affirmed.

Judges STROUD and ARROWOOD concur.

Report per Rule 30(e).