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NO. COA02-805

NORTH CAROLINA COURT OF APPEALS

Filed: 6 May 2003

MARTHA FALLS CLARK,
Employee,
Plaintiff

v.

North Carolina Industrial Commission
I.C. File No. 333197

THE SANGER CLINIC, P.A.,
Employer

and

ITT HARTFORD INSURANCE COMPANY,
Carrier,
Defendants.

Appeal by plaintiff from Opinion and Award of the North Carolina Industrial Commission filed 6 February 2002. Heard in the Court of Appeals 15 April 2003.

Seth M. Bernanke for plaintiff-appellant.

Morris, York, Williams, Surlles & Barringer, L.L.P., by John F. Morris and Marc S. Gentile, for defendants-appellees.

TYSON, Judge.

Martha Falls Clark (“plaintiff”) appeals from the North Carolina Industrial Commission’s (“Commission”) denial of plaintiff’s request for authorization for additional medical providers. We affirm the Commission’s order.

I. Background

On 16 April 1993, plaintiff was employed by The Sanger Clinic, P.A. and suffered a compensable back injury while pushing a metal cart weighing approximately 600 to 800 pounds over the threshold of an elevator. On 4 October 1999, the Commission awarded plaintiff temporary total disability and permanent total disability benefits, but denied authorization for additional medical providers “who were involved in plaintiff’s stomach reduction surgery and resulting complications.” Plaintiff appealed to this Court. We affirmed the Commission’s opinion and award in part, and remanded the denial of the authorization for additional medical providers to the Commission for further findings of fact and conclusions of law. *Clark v. Sanger Clinic, P.A.*, 142 N.C. App. 350, 542 S.E.2d 668 (2001) (“*Clark I*”).

Upon remand, plaintiff moved to recuse Commissioner Dianne Sellers (“Sellers”) citing conflicts between Sellers and plaintiff’s attorney which had appeared in a newspaper article. In a separate case, the Commission heard arguments on the motion to recuse Sellers from cases involving plaintiff’s attorney. All Commission members signed an order denying plaintiff’s motion in that case and “any other cases in which [plaintiff’s attorney] is counsel of record.”

On remand, the Commission entered a new opinion and award which “contain[ed] an additional finding of fact (Number 35), a modification of a conclusion of law (Number 4) and an additional order (Number 5).” The Commission denied plaintiff’s request for authorization of medical benefits on the ground that defendants were prejudiced by plaintiff’s failure to provide reasonable notice of the procedure. Plaintiff appeals.

II. Issues

Plaintiff claims that the Commission erred in (1) not recusing Sellers and (2) denying authorization of plaintiff’s medical providers.

III. Recusal of Commissioner Sellers

Plaintiff contends the Commission erred in failing to recuse Sellers as a commissioner in the present case.

On 31 July 2001, plaintiff moved to recuse Sellers on the grounds that Sellers knew that plaintiff's attorney was significantly involved in a campaign to discourage the governor from re-appointing Sellers to the Industrial Commission. Plaintiff's attorney made a similar motion in *Miller v. Frito Lay, Inc.* which was also pending before the Commission. In that case, the Commission entered an order, signed by seven commissioners, which stated:

Pursuant to Rule 615 of the North Carolina Industrial Commission Rules, Commissioner Sellers as well as the other members of the Full Commission have considered plaintiff's motion. As determined by the Full Commission, plaintiff's motion is hereby Denied with regard to this case and any other cases in which Mr. Bernanke is counsel of record.

Presuming error in all seven commissioners entering one order in one case when the same motion was pending in multiple cases, any error was harmless. Two other commissioners concurred in the opinion and award.

Plaintiff does not object to the other two commissioners who served on the panel and voted unanimously to deny plaintiff's request for authorization of medical expenses. An opinion and award are valid when a majority of the three commissioners agree to the opinion and award. N.C. Gen. Stat. §97-85 (2001). *See e.g., Tew v. E.B. Davis Elec. Co.*, 142 N.C. App. 120, 541 S.E.2d 764 (2001); *Pearson v. C.P. Buckner Steel Erection*, 139 N.C. App. 394, 400, 533 S.E.2d 532, 535 (2000), *disc. rev. denied*, 353 N.C. 379, 547 S.E.2d 434 (2001); *Estes v. N.C. State University*, 117 N.C. App. 126, 128, 449 S.E.2d 762, 764 (1994). This assignment of error is overruled.

IV. Authorization of Medical Providers

Plaintiff assigns error to the denial of her motion for authorization of additional medical providers, expenses for stomach reduction surgery, and treatment for resulting complications. Plaintiff asserts (1) the finding of fact is not supported by competent evidence and (2) the Commission abused its discretion. We disagree.

The Commission's findings are conclusive on appeal if supported by competent evidence. N.C. Gen. Stat. §97-25 provides, "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." (emphasis supplied). This Court has previously held:

Whether to authorize supplemental medical treatment under section 97-25 is a matter firmly within the Commission's discretion. *Franklin v. Broyhill Furniture Industries*, 123 N.C. App. 200, 207, 472 S.E.2d 382, 387 (1996). A discretionary ruling will be upheld on appeal, provided that the decision was reasonable and was not whimsical or ill-considered. *Carrier v. Starnes*, 120 N.C. App. 513, 520, 463 S.E.2d 393, 397 (1995).

Clark I, 142 N.C. App. at 360, 542 S.E.2d at 675.

In *Clark I*, this Court held "[a]bsent findings of fact or some other clear indication of the basis upon which the Commission denied the request, we cannot determine whether the decision was an appropriate exercise of the Commission's discretion." *Id.* We remanded the case to the Commission to make further findings of fact and conclusions of law.

On remand, the Commission found:

35. Plaintiff's back condition would benefit from a reasonable weight loss program as recommended by her treating physician Dr. Petty. However, plaintiff's gastric bypass surgery was not authorized and the request for authorization was not reasonable or timely. Dr. Petty referred plaintiff to the Caswell Weight Loss Clinic and never recommended gastric bypass surgery. Furthermore, Dr. Petty did not recall referring plaintiff to Dr. Smith and speculated that plaintiff may have decided to treat

with Dr. Smith and requested a referral. The string of referrals beginning with Dr. Smith in November 1997 and the resulting weight loss surgery of January 15, 1998 performed by Dr. Fischer and the subsequent treatment for complications were unauthorized and authorization was not timely sought. In fact, plaintiff did not make a motion for authorization until June 24, 1998, 5 months after the gastric bypass surgery had been performed. Furthermore, there is nothing in plaintiff's motion to indicate that the medical treatment sought included an invasive surgical procedure which had already been performed. In fact, plaintiff did not undergo the treatment in question until after the October 20, 1997 hearing before Deputy Commissioner Taylor. Consequently, defendants did not have a reasonable opportunity to direct medical treatment in this compensable claim, review the medical records, seek additional medical opinions or properly depose necessary expert witnesses. As defendants were not provided reasonable notice to explore other treatment options or prepare a defense, they were prejudiced by plaintiff's unauthorized treatment including the surgery.

Whether a request for authorization is filed within a reasonable time is a question of fact. *Braswell v. Pitt County Mem. Hosp.*, 106 N.C. App. 1, 5, 415 S.E.2d 86, 88 (1992). Competent evidence in the record supports the Commission's finding that plaintiff did not request authorization for the gastric bypass surgery within a reasonable time. The Commission made findings of fact upon competent evidence and entered conclusions of law that enables us to "determine whether the decision was an appropriate exercise of the Commission's discretion." *Clark I*, 142 N.C. App. at 360, 542 S.E.2d at 675. We hold that the Commission did not abuse its discretion in denying plaintiff authorization for additional medical providers.

V. Conclusion

Competent evidence in the record supports the Commission's findings of fact, which support the conclusions of law. The Commission did not abuse its discretion in denying plaintiff's request for authorization for medical providers for her gastric bypass surgery and resulting complications. Any error in denying plaintiff's recusal motion was harmless.

Affirmed.

Judges WYNN and STEELMAN concur.

Report per Rule 30(e).