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NO. COA05-705

NORTH CAROLINA COURT OF APPEALS

Filed: 7 February 2006

MARTHA FALLS CLARK  
Plaintiff-Employee

v.

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

THE SANGER CLINIC, P.A.,  
Defendant-Employer

and

ITT HARTFORD INSURANCE CO., INC.,  
Defendant-Carrier.

Appeal by plaintiff from an Opinion and Award filed 15 February 2005 by the North Carolina Industrial Commission. Heard in the Court of Appeals 11 January 2006.

*Seth M. Bernanke for plaintiff-appellant.*

*Morris, York, Williams, Surles & Barringer, L.L.P., by Susan H. Briggs and Keith B. Nichols, for defendant-appellees.*

BRYANT, Judge.

Martha Falls Clark (plaintiff) appeals from an Opinion and Award of the Industrial Commission filed 15 February 2005 denying any additional plaintiff's attorney's fees.

Plaintiff was initially injured on 16 April 1993[**Note 1**] while pushing a cart transporting 600 to 800 pounds of equipment into an elevator while employed by The Sanger Clinic, P.A. (defendant). The wheel of the cart became wedged in the threshold of the elevator, and in her

attempt to dislodge the wheel, plaintiff suffered an admittedly compensable injury to her back. On 4 October 1999, the Full Commission awarded plaintiff temporary total disability and permanent total disability benefits, and, in part, ordered defendants to provide all medical treatment arising from her injury by accident, including subsequent falls resulting from her back injury causing dental problems and a knee injury.

During the period from 1 August to 30 October 2002, plaintiff fell several times, sustaining severe injuries, as a result of a significant reduction in the range of motion of her right hip. On 1 November 2002, Dr. Mokris, a specialist in hip surgery, evaluated plaintiff and concluded plaintiff needed hip surgery. This matter was initiated on 10 December 2002 when plaintiff filed a Form 33 Request that Claim be Assigned for Hearing for defendant's refusal to authorize hip surgery for plaintiff. Defendants filed a Form 33R Response to plaintiff. The claim came before Deputy Commissioner George T. Glenn, II, on 18 February 2003. Deputy Commissioner Glenn filed an Opinion and Award on 17 September 2003 awarding plaintiff disability benefits and attorney's fees, from which defendants appealed on 26 September 2003. On 15 February 2005, the Full Commission filed its Opinion and Award in this matter affirming the Deputy Commissioner's ruling, except reversing the award of plaintiff's attorney's fees. Plaintiff appeals.

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Plaintiff argues the Full Commission erred by failing to award plaintiff attorney's fees pursuant to Section 97-88.1 of the North Carolina General Statutes. We disagree.

Review by this Court of a decision by the North Carolina Industrial Commission is limited to the determination of "whether any competent evidence supports the Commission's findings of fact and whether [those] findings . . . support the Commission's conclusions of law."

*Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). The Commission's findings of fact are conclusive on appeal even where there is contrary evidence, and such findings may only be set aside where there is a "complete lack of competent evidence to support them." *Johnson v. Herbie's Place*, 157 N.C. App. 168, 171, 579 S.E.2d 110, 113 (2003) (citations omitted). Our review "goes no further than to determine whether the record contains any evidence tending to support the finding." *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965). However, the Commission's conclusions of law are reviewed *de novo*. *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004).

Under Section 97-88.1 the Industrial Commission may assess "the whole cost of the proceedings including reasonable [attorney's fees]" if the Commission determines "any hearing has been brought, prosecuted or defended without reasonable ground." N.C. Gen. Stat. §97-88.1 (2003). "The decision of whether to make such an award, and the amount of the award, is in the discretion of the Commission, and its award or denial of an award will not be disturbed absent an abuse of discretion." *Troutman v. White & Simpson, Inc.*, 121 N.C. App. 48, 54-55, 464 S.E.2d 481, 486 (1995). "An abuse of discretion results only where a decision is manifestly unsupported by reason or . . . so arbitrary that it could not have been the result of a reasoned decision." *Goforth v. K-Mart Corp.*, 167 N.C. App. 618, 624, 605 S.E.2d 709, 713 (2004) (internal quotations omitted). "In determining whether a hearing has been defended without reasonable ground, the Commission (and a reviewing court) must look to the evidence introduced at the hearing. "The test is not whether the defense prevails, but whether it is based in reason rather than in stubborn, unfounded litigiousness." " *Cooke v. P.H. Glatfelter/Ecusta*, 130 N.C. App. 220, 225, 502 S.E.2d 419, 422-23 (1998) (quoting *Sparks v. Mountain Breeze Rest.*, 55 N.C. App. 663, 665, 286 S.E.2d 575, 576 (1982)); *but compare Cialino v. Wal-Mart Stores*, 156 N.C. App.

463, 474, 577 S.E.2d 345, 353 (2003) (where plaintiff argued the defendant denied her claim without reasonable investigation and failed to accept the claim when liability became reasonably clear, the Full Commission's failure to address whether plaintiff was entitled to attorney's fees in its findings of fact and conclusions of law was error).

Generally, plaintiff contends the Commission's findings of fact fail to support its conclusion of law. Plaintiff challenges finding of fact eighteen - "defendants did not defend this claim without just cause" - and conclusion of law eight - "the defense of this claim was reasonable and not stubborn, unfounded litigiousness and, therefore, plaintiff is not entitled to attorney's fees pursuant to N.C. Gen. Stat. §97-88.1." Plaintiff argues however, that defendant's defense of this matter was without reasonable grounds and based on stubborn litigiousness. We disagree.

The record before us supports that plaintiff has suffered from many injuries, some of which were not compensable. In the present case, medical opinion testimony varied on the issue of causation of plaintiff's right hip pain. Dr. Ken Carlton, plaintiff's treating physician, testified plaintiff's hip pain could be due to arthritic changes or traumas related to having fallen. Dr. Morkis, an orthopaedic surgeon, testified plaintiff's obesity may have exacerbated plaintiff's pre-existing arthritis. Because one of plaintiff's falls occurred while she was at home, in her garage, defendants wanted to examine the condition of plaintiff's garage. The Commission denied the request and went on to make findings of fact and conclusions of law on the issues before it. We find nothing to indicate the Commission abused its discretion in finding and concluding defendants' grounds were reasonable, as opposed to stubborn or litigious, in contesting and defending plaintiff's claim for a hip replacement. Therefore, we affirm the Commission's decision not to award plaintiff additional attorney's fees.

Affirmed.

Judges CALABRIA and SMITH concur.

Report per Rule 30(e).

**NOTE**

1. See *Clark v. Sanger Clinic, P.A.*, 142 N.C. App. 350, 542 S.E.2d 668, *disc. rev. denied*, 353 N.C. 450, 548 S.E.2d 524 (2001); *Clark v. Sanger Clinic, P.A.*, 157 N.C. App. 572, 579 S.E.2d 520 (2003); *Clark v. Sanger Clinic, P.A.*, COA05-477, 2005 N.C. App. LEXIS 2742 (December 20, 2005).