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NO. COA07-616

NORTH CAROLINA COURT OF APPEALS

Filed: 15 April 2008

SARA LOUISE MOORE,
Employee, Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 352436

FIRST CITIZENS BANK,
Employer,

THE PMA INSURANCE GROUP,
Carrier,
Defendants.

Appeal by defendants from Opinion and Award entered 2 February 2007 by the Industrial Commission of North Carolina. Heard in the Court of Appeals 28 November 2007.

Lennon and Camak, P.L.L.C., by George W. Lennon and Michael W. Bertics, for plaintiff-appellee.

Ward and Smith, P.A., by William Joseph Austin, Jr., for defendant-appellants.

STROUD, Judge.

Defendants First Citizens Bank and Trust Company and The PMA Insurance Group appeal from the Opinion and Award of the Industrial Commission filed 2 February 2007, which awarded temporary total disability compensation and medical expenses to plaintiff for depression and carpal tunnel syndrome. We affirm.

I. Factual Background

Plaintiff began working for defendant-employer in the Trust Department in 1995. She suffered from depression, and began treating with Dr. Margaret Dorfman, a psychiatrist, in 1995. In 2001 she was transferred to the Item Processing Department (IPD) of defendant-employer. Her job duties in the IPD included locating and removing metal such as paper clips and staples from batches of checks and computer keying of data. She was diagnosed with carpal tunnel syndrome in 2003. The pain from her carpal tunnel syndrome aggravated her depression. She underwent carpal tunnel release surgery on 13 August 2004 and 11 October 2004. She made several attempts to return to work after the surgery, but was not successful, because her bilateral hand and arm pain increased with activity.

II. Procedural History

On 6 August 2003, plaintiff filed Form 18 with the Industrial Commission seeking benefits for an occupational disease, carpal tunnel syndrome, resulting from her job of processing checks for defendant-employer. Defendants denied that plaintiff was entitled to benefits, contending that plaintiff was not disabled, and alternatively, that any disability was not causally related to her employment with defendant-employer. Plaintiff's claim was amended 15 July 2004 to include psychiatric illness.

The claim was initially heard before Deputy Commissioner John B. DeLuca on 23 March 2005. By an Opinion and Award filed on 21 April 2006, the deputy commissioner concluded that plaintiff was permanently and totally disabled, and awarded benefits accordingly. Defendants appealed the Opinion and Award to the Full Commission. The Full Commission reviewed plaintiff's claim on 12 October 2006. On 2 February 2007, the Commission filed an Opinion and Award, concluding that plaintiff's carpal tunnel syndrome was a compensable occupational disease, which had aggravated her pre-existing depression, rendering her temporarily totally

disabled. Accordingly, the Commission awarded medical expenses, plus compensation amounting to two-thirds of her weekly wage until further order of the Commission. Defendants appeal.

III. Standard of Review

In order to prevail on a disability claim for workers' compensation, the plaintiff bears the burden of proving by a preponderance of the evidence the existence and extent of his disability, *Fletcher v. Dana Corporation*, 119 N.C. App. 491, 494, 459 S.E.2d 31, 34, *disc. review denied*, 342 N.C. 191, 463 S.E.2d 235 (1995), and that the disability was caused by a disease or injury reasonably related to his employment. *Holley v. ACTS, Inc.*, 357 N.C. 228, 231-32, 581 S.E.2d 750, 752 (2003).

A plaintiff may prove the existence of a disability by

- (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment;
- (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment;
- (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment; or
- (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

Russell v. Lowes Product Distribution, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (citations omitted).

If a plaintiff seeks compensation for a disease not specifically enumerated in The Workers' Compensation Act, in addition to causation he must also prove that the disease is: "(1) characteristic of persons engaged in the particular trade or occupation in which the claimant is engaged; [and] (2) not an ordinary disease of life to which the public generally is equally

exposed with those engaged in that particular trade or occupation[.]” *Rutledge v. Tultex Corp.*, 308 N.C. 85, 93, 301 S.E.2d 359, 365 (1983); N.C. Gen. Stat. §97-53(13) (2003).

In determining whether the plaintiff has met her burden of proof, the Industrial Commission must consider all competent evidence presented, *Weaver v. American National Can Corp.*, 123 N.C. App. 507, 510, 473 S.E.2d 10, 12 (1996), and make specific findings of fact to support its conclusions for all “crucial questions.” *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 596, 290 S.E.2d 682, 684 (1982). Once the Industrial Commission has found the facts, “the Commission’s findings of fact may be set aside on appeal only when there is a complete lack of competent evidence to support them.” *Estate of Gainey v. Southern Flooring*, ___ N.C. App. ___, ___, 646 S.E.2d 604, 607 (2007) (citations and quotation marks omitted). However, “[t]he Commission’s legal conclusions are reviewable by the appellate courts *de novo*.” *Id.* at ___, 646 S.E.2d at 608.

IV. Findings of Fact

Defendants contend that (1) plaintiff’s carpal tunnel syndrome was not related to her employment with defendant-employer; (2) even if plaintiff’s carpal tunnel syndrome was related to her employment, it did not result in total disability. Specifically, defendants contend that the following findings of the Commission are erroneous:

12. Dr. Krakauer opined that plaintiff’s symptoms were due to causes and conditions characteristic of and peculiar to her employment with defendant-employer. He further stated that plaintiff’s symptoms were not an ordinary disease of life to which the general public is equally exposed. Dr. Krakauer testified to a reasonable degree of medical certainty that plaintiff’s job duties, more likely than not, caused her carpal tunnel syndrome.

....

14. . . . The Full Commission gives greater weight to Dr. Krakauer's opinion than to the opinions of the other doctors who testified regarding her carpal tunnel syndrome.

15. Plaintiff has treated with Dr. Margaret Dorfman, a psychiatrist[,] since 1995. Dr. Dorfman opined to a reasonable degree of medical certainty that plaintiff's preexisting depression was substantially aggravated by the onset of her bilateral hand and arm pain. Dr. Dorfman also testified that but for plaintiff's hand and arm pain, plaintiff would not have become disabled at the time that she did. In her medical opinion, plaintiff is permanently and totally disabled from all competitive employment. Dr. Dorfman determined plaintiff totally disabled in the spring of 2005.

. . . .

18. The Full Commission gives greater weight to Dr. Dorfman's opinion than [the opinion of a psychologist who examined plaintiff on behalf of defendants].

19. The Full Commission finds that plaintiff's depression was aggravated by her compensable occupational disease.

Finding number 14 concerning the weight to be given to Dr. Krakauer's testimony was the "exclusive province" of the Commission as it considered his testimony; it is not reviewable. *Lucas v. Thomas Built Buses*, 88 N.C. App. 587, 589, 364 S.E.2d 147, 149 (1988). As to finding number 12, defendants contend that the Commission erred when it decided to give greater weight to the testimony of Dr. Krakauer than to the testimony of Dr. Kolkin, another orthopedic surgeon who examined plaintiff. However, it is well-established that this Court does not re-weigh evidence examined by the Commission; if the Commission's findings are supported by any competent evidence they are binding on appeal. *Estate of Gainey*, ___ N.C. App. at ___, 646 S.E.2d at 607. After review of the record, we determine that finding number 12 is supported by the sworn deposition testimony of Dr. Krakauer. Dr. Krakauer's testimony was competent evidence, therefore this finding will not be disturbed on appeal.

Finding number 18 concerning the weight to be given to Dr. Dorfman's testimony was the "exclusive province" of the Commission as it considered her testimony; it is not reviewable. *Lucas*, 88 N.C. App. at 589, 364 S.E.2d at 149. As to findings numbered 15 and 19, the thrust of defendants' argument is that Dr. Dorfman and plaintiff were not credible witnesses. However, it is well-established that "[t]his Court does not . . . assess [the] credibility of witnesses" on appeal from an award of the Industrial Commission. *Sharpe v. Rex Healthcare*, 179 N.C. App. 365, 370, 633 S.E.2d 702, 705 (2006). If the Commission's findings are supported by any competent evidence, even if the evidence could support a contrary finding, they are binding on appeal. *Id.* at 370-71, 633 S.E.2d at 705. After review of the record, we determine that findings number 15 and 19 are supported by the sworn deposition testimony and medical records of Dr. Dorfman. That testimony and medical records were competent evidence, therefore these finding will not be disturbed on appeal. Plaintiff's remaining assignments of error to the Commission's findings of fact which were not brought forward and argued in the brief are not reviewable. N.C.R. App. P. 28(b)(6).

V. Conclusions of Law

The Commission concluded plaintiff's bilateral carpal tunnel syndrome was a compensable occupational disease, and that her carpal tunnel syndrome had aggravated her preexisting depression, rendering her temporarily totally disabled. These conclusions were supported by the Commission's findings as set forth above. Accordingly, we affirm the 02 February 2007 Opinion and Award of the Industrial Commission.

Affirmed.

Judges HUNTER and CALABRIA concur.

Report per Rule 30(e).