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NO. COA07-976

NORTH CAROLINA COURT OF APPEALS

Filed: 4 March 2008

SAMUEL Robinson,
Employee/Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 406538

ALTRIA GROUP, INC.,
Employer,

and

INDEMNITY COMPANY OF NORTH
AMERICA/ACE USA,
Carrier/Defendants.

Appeal by Defendants from opinion and award entered 28 March 2007 by the North Carolina Industrial Commission. Heard in the Court of Appeals 6 February 2008.

Sellers, Hinshaw, Ayers, Dortch & Lyons, P.A., by John F. Ayers, III, for Plaintiff-Appellee.

Hunton & Williams LLP, by Brent A. Rosser, for Defendant-Appellants.

ARROWOOD, Judge.

Altria Group, Inc., and Ace USA Insurance Co. (collectively Defendants) appeal from an Opinion and Award of the Industrial Commission granting a request by Samuel Robinson (Plaintiff) to change his authorized treating physician. We affirm.

Plaintiff has worked for more than twenty years for Defendant, a cigarette manufacturer. Plaintiff's job requires him to lift, carry, stack, and move various items associated with cigarette

manufacture. On 28 February 2004 Plaintiff slipped on ice in Defendant's parking lot and broke his left wrist. Defendants accepted Plaintiff's injury as compensable, and provided wage and medical compensation benefits. Plaintiff was treated by Dr. Loftus and Dr. Skahen, both of Northeast Orthopedics, P.A. In May 2004 Dr. Loftus released Plaintiff to return to work with no restrictions. Plaintiff went back to work, but continued to experience significant pain in his left wrist. Dr. Lupus then referred Plaintiff to Dr. Skahen, an orthopedic surgeon with expertise in hand surgery.

In August 2004 Dr. Skahen diagnosed Plaintiff with "a congenital coalition between the lunate and triquetral bones" in his hand. Dr. Skahen defined this condition, which occurs in approximately ten percent (10%) of African-American males, as a partial fusion of two bones in the hand that normally separate before birth. Dr. Skahen's testified that Plaintiff's wrist fracture separated these bones that previously were about fifty percent (50%) fused, causing Plaintiff to experience pain when he moved his wrist:

DR. SKAHEN: My diagnosis, that he had basically injured his lunotriquetral coalition and had basically fractured through this abnormal bony union, and as a result developed what's called a nonunion of that portion, and as a result he had abnormal motion there for him and that was producing his pain.

COUNSEL: And so do you have an opinion as to whether, given the fact that his [wrist] fracture had apparently healed . . . whether or not his pain that continued to be rather significant . . . was related to that traumatic nonunion of the lunotriquetral that you diagnosed?

DR. SKAHEN: By the time I saw him, that's where his pain was coming from.

In September 2004 Dr. Skahen performed a surgical procedure to reestablish the partial fusion of the two bones. Dr. Skahen intentionally left an unfused cleft of one to two millimeters between the bones. In January 2005 Dr. Skahen released Plaintiff to return to work, and assigned

him a ten percent (10%) permanent partial impairment rating to his left hand. Plaintiff continued to experience pain and soreness in his left wrist. In March 2005 Dr. Skahen told Plaintiff he had no further treatment to offer, and suggested that Plaintiff obtain a second opinion.

On 28 April 2005 Plaintiff was examined by Dr. Alan Ward, a board-certified orthopedic surgeon who has performed an average of 500 hand surgeries a year for more than twenty years. Dr. Ward examined Plaintiff, reviewed medical records of his treatment, and noted that Plaintiff was experiencing significant pain in his wrist, which Plaintiff described as “seven to eight out of ten.” Dr. Ward took x-rays of Plaintiff’s hand, and observed “a gap that was remaining between the lunate and the triquetral bones that measured between 1 and 2 millimeters.” Dr. Ward disagreed with Dr. Skahen about the medical wisdom of Dr. Skalen’s decision to leave an intentional gap:

COUNSEL: . . . If Dr. Skahen testified that the 1 to 2 millimeter cleft that you mentioned in your note was intentional on his part . . . what would you think about that testimony?

DR. WARD: I’m not sure I understand what he would be saying.

COUNSEL: I think the testimony was in his deposition that the 1 to 2 millimeters that you noticed on the x-ray would still be there based on his opinion. But that it was natural and normal for it to be there and he did not intend to form any grafting or any fusion at that location.

DR. WARD: I’m not sure medically I understand that. Either he’s fused or he’s not. If you’re seeing a cleft on x-ray, then he’s not fused. I’m not sure I understand that statement.

COUNSEL: So if he did, in fact, testify to that, then I guess you’re not aware of any medical literature or theory of medical science that says that in this particular case you ought to leave part of the bone unfused to avoid the formation of arthritis or some other negative impact with respect to the bones or anything of that nature?

DR. WARD: No, I’m not aware of that.

. . .

COUNSEL: . . . Can you think of any reason why you would treat this nonunion differently than any other nonunion that you have treated in the past?

DR. WARD: No, not really.

Dr. Ward proposed several possible treatments for Plaintiff, including the use of a bone stimulator to “accelerate bone healing non-operatively”; an arthroscopic synovectomy in which “inflamed tissue is taken out of a joint to reduce pain”; or “re-exploration of the fusion mass” in order to “clean out any areas that were not healed by bone” and “add new bone graft to try to stimulate those areas to bridge and heal.” He testified that any of these treatments might provide Plaintiff with relief from his continuing pain and discomfort, and that there was no difference in the treatment of congenital or traumatic non-union of bones in the hand. Regardless of the cause, the recommended treatment is to facilitate fusion of the bones.

After meeting with Dr. Ward, Plaintiff filed a motion to be allowed to change his treating physician. Defendants opposed his request, and a hearing was conducted in March 2006. In June 2006 a Deputy Commissioner issued an Opinion denying Plaintiff’s request to change treating physicians. Plaintiff appealed to the Full Commission, and on 28 March 2007 the Commission issued an Opinion reversing the Deputy Commissioner and granting Plaintiff’s request for treatment with Dr. Ward. From this Opinion Defendants appeal.

Standard of Review

Preliminarily, we note that Defendants are in violation of N.C.R. App. P. 28(b)(6), for failing to state “the applicable standard(s) of review for each question presented, which shall appear either at the beginning of the discussion of each question presented or under a separate heading placed before the beginning of the discussion of all the questions presented.” We also

note that Defendants have moved to amend the record to add an assignment of error challenging the Commission's finding of fact thirteen (13), and its conclusions of law one through three (1 - 3). In the exercise of our discretion, we will grant Defendants' motion, and overlook their violation of appellate rules.

This Court's "review in a workers' compensation case 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. Where the Commission's findings are supported by competent evidence, those findings are conclusive even if there is evidence to support a contrary finding." *Cash v. Lincare Holdings*, 181 N.C. App. 259, 265, 639 S.E.2d 9, 14 (2007) (citations omitted). Further, where Defendants fail to assign error to certain findings "these findings are conclusively established on appeal." *Johnson v. Herbie's Place*, 157 N.C. App. 168, 180, 579 S.E.2d 110, 118 (2003) (citation omitted). In the instant case, Defendants assigned error only to finding of fact number thirteen (13).

"Generally speaking, the employer has the right to direct the medical treatment for a compensable injury. This includes the right to select the treating physician." *Kanipe v. Lane Upholstery*, 141 N.C. App. 620, 623-24, 540 S.E.2d 785, 788 (2000) (citing *Schofield v. Tea Co.*, 299 N.C. 582, 586, 264 S.E.2d 56, 60 (1980)). However, N.C. Gen. Stat. §97-25 (2007), provides in pertinent part that:

The Commission may at any time upon the request of an employee order a change of treatment and designate other treatment suggested by the injured employee subject to the approval of the Commission[.] . . .

[I]f he so desires, an injured employee may select a physician of his own choosing to attend, prescribe and assume the care and charge of his case, subject to the approval of the Industrial Commission.

Accordingly, under N.C. Gen. Stat. §97-25 “even in the absence of an emergency or the employer’s failure to direct timely and adequate treatment, an employee still may select his or her own physician if such selection is approved by the Commission.” *Kanipe*, 141 N.C. App. at 626, 540 S.E.2d at 789. “Approval of an employee-selected physician is left to the sound discretion of the Commission.” *Id.* (citing *Franklin v. Broyhill Furniture Industries*, 123 N.C. App. 200, 207, 472 S.E.2d 382, 387 (1996)). “This Court will disturb the Commission’s determination on this issue only upon a finding of manifest abuse of discretion.” *Lakey v. U.S. Airways, Inc.*, 155 N.C. App. 169, 174, 573 S.E.2d 703, 707 (2002) (citations omitted).

Defendants first argue that the Commission “erred in accepting the testimony” of Dr. Ward, on the grounds that his testimony “was not supported by competent evidence.” Despite this generalized assertion, Defendants’ argument only challenges the sufficiency of evidence supporting the following excerpt from finding of fact number thirteen (13):

. . . Dr. Ward testified that, and the Full Commission finds as fact, that the work-related fracture of plaintiff’s lunate and triquetral [wrist] bones has caused plaintiff to experience pain [in his wrist] at the congenital disunion of the bones, which appears as a one to two millimeter cleft.

Defendants contend that Dr. Ward’s expert opinion on the cause of Plaintiff’s wrist pain was “based entirely upon conjecture and speculation” and, therefore, that there was “no competent evidence” that Plaintiff’s “current pain is causally related to his February 2004 work injury.” Defendants thus treat the “causative nature of Plaintiff’s pain” as a disputed issue that cannot be resolved without expert medical testimony. We disagree for several reasons.

First, Defendants failed to raise this issue before the Industrial Commission. Defendants did not challenge the causal relationship between Plaintiff’s wrist pain and his compensable

injury in their response to Plaintiff's motion for a hearing, their brief to the Commission, or in the pretrial agreement setting out the issues to be resolved by the Industrial Commission. Under N.C.R. App. P. 10(b)(1), "to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context."

Secondly, it is uncontradicted that (1) after Plaintiff fractured his wrist, he experienced persistent wrist pain; (2) both Dr. Skalen and Dr. Ward diagnosed a nonunion of the lunate and the triquetral bones; (3) Dr. Skalen tried to relieve Plaintiff's wrist pain by performing a surgical procedure on the nonunion of the lunate and the triquetral bones; and (4) Dr. Ward proposed further treatment of the same anatomical feature to further alleviate Plaintiff's pain. Thus, the evidence suggests there was no real dispute over the fact that Plaintiff's wrist pain was caused by complications arising from his compensable wrist fracture, one such complication being the traumatic disunion of his lunate and the triquetral bones.

Defendants also fail to support their underlying premise, that the causal issue in this case must be established by expert medical testimony. Cases cited by Defendants discuss the need for expert medical testimony to prove causation in complex medical situations beyond the diagnostic ability of a layperson. However, evidence in the present case suggests a fairly straightforward cause and effect relationship, namely that complications of Plaintiff's fractured wrist caused Plaintiff to experience persistent pain in his wrist. This Court has held:

"There are many instances in which the facts in evidence are such that any layman of average intelligence and experience would know what caused the injuries complained of." We think the case now before us falls in the latter category, and that plaintiff introduced evidence from which the trier of the facts might draw a

reasonable inference that the particular injury of which he complained was the proximate result of the accident.

Tickle v. Insulating Co., 8 N.C. App. 5, 8, 173 S.E.2d 491, 494 (1970) (quoting *Gillikin v. Burbage*, 263 N.C. 317, 325, 139 S.E.2d 753, 760 (1965)). The causal link between Plaintiff's fractured wrist and continued pain in the area of the wrist fracture is a likely to be within Plaintiff's ability.

To summarize, (1) Defendants failed to preserve the issue of the causation of Plaintiff's wrist pain; (2) the causal connection between Plaintiff's compensable broken wrist and later pain in his wrist does not appear to be disputed; and (3) Plaintiff is probably qualified to determine the causal relationship between a fractured wrist and wrist pain.

However, assuming, *arguendo*, that a causal link between Plaintiff's compensable wrist fracture and his continued wrist pain in the area of the cleft in his lunate and the triquetral bones was a contested issue requiring expert medical testimony, we conclude that the evidence was more than adequate to support the challenged finding of fact and the Commission's conclusions of law. As discussed above, Dr. Ward testified (1) that Plaintiff had a disunion of two wrist bones and (2) that treatment of the non-union might alleviate his pain. This sufficiently supports the Commission's finding, based on Dr. Ward's opinion, that Plaintiff's wrist pain was caused by the cleft between the bones resulting from his compensable wrist injury. We reject Defendants' arguments to the contrary.

Defendants argue that Dr. Ward testified that he did not know why Plaintiff's wrist was painful. This is inaccurate. Defendants direct our attention to testimony that, three months after Dr. Ward found that Plaintiff had a cleft between the lunate and the triquetral bones of his hand, Dr. Skahen reported a "solidly healed" fusion. On the basis of the assumption that Dr. Skahen had found Plaintiff's wrist bones to be solidly fused, Dr. Ward testified that further testing would

be needed to determine the source of Plaintiff's wrist pain. Defendants construe this as an admission by Dr. Ward that Plaintiff's wrist bones were fully fused and that Dr. Ward had no idea what caused Plaintiff's sore wrist. However, the evidence unequivocally shows that Dr. Skahen's definition of a "solid fusion" includes the same cleft that Dr. Ward observed:

COUNSEL: . . . If a radiograph showed . . . a persistent cleft between the lunate and the triquetrum [bones] of, say, one to two millimeters, would that give you any indication as to what was going on there at the fusion site?

DR. SKAHEN: You're missing a point that I stressed when we went over the surgical portion of this testimony here. . . . I told you when we took the nonunion site out of the fibrous union site down, we only took it down 50 percent. We left the other 50 percent of the cleft open[.]

COUNSEL: Right

DR. SKAHEN: They were united 50 percent. Okay. We basically put that 50 percent back, right where he was. . . . You have to leave that cleft there[.]

COUNSEL: So in this situation you're saying that there is a persistent cleft that is in that area of the fusion mass?

DR. SKAHEN: Correct, his normal cleft. That is normal for him.

Thus, Dr. Skahen and Dr. Ward agreed there was a cleft between Plaintiff's lunate and the triquetral bones. Because Dr. Ward expressed uncertainty about the cause of Plaintiff's wrist pain only in response to the erroneous hypotheses that the lunate and the triquetral bones in Plaintiff's wrist were totally fused, this testimony was properly disregarded by the Commission.

We have concluded that competent evidence supports the challenged finding of fact. Moreover, even without considering finding of fact thirteen (13), the remaining, unchallenged, findings of fact would support the Commission's conclusion regarding the cause of Plaintiff's wrist pain. These include, in pertinent part, the following:

8. Plaintiff was seen by Dr. Ward on April 28, 2005. Dr. Ward performed a physical examination, including x-rays. The x-ray indicated a “persistent cleft between lunate and triquetrum measuring one to two millimeters.” Based on his findings, Dr. Ward diagnosed plaintiff with persistent left wrist pain, status post limited arthrodesis attempt of left lunotriquetral interval possibly related to delayed union versus persisted fibrous union and suggested several forms of possible treatment. . . . Dr. Ward was specifically concerned with the persistent cleft between the lunate and triquetrum, and believed an attempt to fuse this cleft would provide relief to plaintiff from ongoing wrist pain.

. . . .

14. Plaintiff sustained an injury by accident on February 28, 2004, which caused a fracture of plaintiff’s lunate and the triquetral bones that required surgery, and thereby caused plaintiff to experience pain at the congenital disunion of the lunate and the triquetral bones, which appears as a one to two millimeter cleft.

We conclude that there was competent evidence to support the Commission’s finding that, based on Dr. Ward’s testimony, the pain in Plaintiff’s wrist was caused by the cleft between the lunate and the triquetral bones that resulted from his compensable injury. This assignment of error is overruled.

Defendants next assert that the Commission erred by allowing Plaintiff to be treated by Dr. Ward, because there was no evidence that Dr. Ward’s treatment was “reasonably likely to effect a cure, provide relief or lessen the period of Plaintiff’s disability.” We disagree.

It bears repeating that the Commission’s decision is reviewed for abuse of discretion. Dr. Ward testified as follows regarding the possible benefit of these treatments:

COUNSEL: So in your experience, then, is the bone stimulator something that’s useful to someone who is in the same position as Mr. Robinson?

DR. WARD: I think so.

COUNSEL: And it could perhaps affect a cure to his continuing discomfort and pain?

DR. WARD: It could.

....

COUNSEL: And then second, you said that you would consider an arthroscopic synovectomy. What is a synovectomy?

DR. WARD: That's where the inflamed tissue is taken out of a joint to reduce pain.

....

COUNSEL: Then the third procedure you suggested for his possible treatment was the re-exploration of the fusion mass. . . . And is it possible if you were able to accomplish that procedure that that could improve his condition or lessen his pain or affect a cure?

DR. WARD: It is.

We conclude that this testimony supports the Commission's finding number thirteen (13) which states that the treatment proposed by Dr. Ward "could potentially effect a cure or give relief to plaintiff." Further, the unchallenged findings of fact include in pertinent part the following:

4. . . . Dr. Skahen diagnosed Plaintiff with a nonunion through a congenital fusion of the lunate and triquetral bones. To treat this condition, Dr. Skahen performed surgery to reestablish the fusion between the lunate and triquetral bones[.] . . . Dr Skahen put the 50% union back in Plaintiff's wrist[.]

5. . . . [P]laintiff followed-up with Dr. Skahen, who noted that plaintiff still had aching and discomfort in his wrist. . . .

6. . . . [Plaintiff] continued to complain of soreness in the dorsal ulnar wrist[.] . . .

7. On March 2, 2005, Plaintiff complained again to Dr. Skahen of pain and soreness on the dorsal aspect of his wrist[.]

. . . Dr. Skahen stated he could offer nothing further to help the Plaintiff[.] . . .

8. Plaintiff was seen by Dr. Ward on April 28, 2005. Dr. Ward performed a physical examination, including x-rays. The x-ray indicated a “persistent cleft between lunate and triquetrum, measuring one to two millimeters.” Based on his findings, Dr. Ward diagnosed plaintiff with persistent left wrist pain, status post limited arthrodesis attempt of left lunotriquetral interval possibly related to delayed union versus persisted fibrous union, and suggested several forms of possible treatment. Dr. Ward indicated that one option would be the use of a bone growth stimulator in attempts to accelerate bone healing. A second option would be to consider arthroscopic synovectomy of the wrist and re-exploration of the fusion mass with an attempt at refusion with new hardware. Dr. Ward was specifically concerned with the persistent cleft between the lunate and triquetrum, and believed an attempt to fuse this cleft would provide relief to plaintiff from ongoing wrist pain.

. . . .

15. Based on the evidence of record, including the testimony of Dr. Ward, the Full Commission finds that plaintiff has shown that he would benefit from further treatment with Dr. Ward for his left hand and wrist condition including, but not limited to, a bone growth stimulator in attempts to accelerate bone healing, or a possible arthroscopic synovectomy of the wrist and re-exploration of the fusion mass with an attempt at refusion with new hardware. Given that plaintiff’s treating physician has offered no further treatment to plaintiff, despite plaintiff’s complaints of continued pain and difficulty in performing his job duties, while Dr. Ward has provided specific options for continued treatment that could potentially effect a cure or give relief, the Full Commission deems it appropriate for plaintiff to undergo a change of treatment with Dr. [Ward].

These findings easily support the Commission’s conclusion that Plaintiff was entitled to seek treatment from Dr. Ward. This assignment of error is overruled.

Finally, Defendants argue that the Commission erred by “failing to properly consider” the testimony of Dr. Skahen. This argument is based solely on their contention that “Dr. Ward’s

testimony as to causation is not supported by competent evidence[.]” We have concluded that Dr. Ward’s testimony was adequately supported. This assignment of error is overruled.

For the reasons discussed above, we conclude that the Industrial Commission did not err and that its Opinion and Award should be

Affirmed.

Judges McCULLOUGH and ELMORE concur.

Report per Rule 30(e).