IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-231

Filed: 17 November 2015

The North Carolina Industrial Commission, I.C. No. 414302

JOHN MILLIGAN, Employee, Plaintiff,

v.

WINSTON-SALEM/FORSYTH COUNTY SCHOOLS, N.C. DEPARTMENT OF PUBLIC INSTRUCTION, Employer, SELF-INSURED (CORVEL, Third-Party Administrator), Defendants.

Appeal by Plaintiff from an Opinion and Award entered 20 October 2014 by the Full Commission of the North Carolina Industrial Commission. Heard in the Court of Appeals 9 September 2015.

Gray & Johnson, LLP, by Mark V.L. Gray and Nekia J. Pridgen, for Plaintiff-Appellant.

Attorney General Roy Cooper, by Assistant Attorney General Lora C. Cubbage, for Defendant-Appellee.

INMAN, Judge.

Plaintiff John Milligan ("Plaintiff") appeals the Opinion and Award from the Full Commission concluding that he is not entitled to payment for attendant care services provided by his wife and refusing to award Plaintiff attorney's fees related to Defendant's failure to comply with an earlier Opinion and Award.

After careful review, we affirm the Full Commission's Opinion and Award.

Factual and Procedural Background

On 8 March 2004, Plaintiff suffered a lower back injury while working as a janitor for the North Carolina Department of Public Instruction ("Defendant") in Winston-Salem. Defendant filed a Form 60, admitting Plaintiff's right to compensation. Defendant began paying Plaintiff temporary total disability benefits on 15 March 2004.

In addition to his back injury, Plaintiff has several other health conditions unrelated to his back, including a heart condition, prostate cancer, blood clots, sleep apnea, memory loss, left hand weakness, and right knee problems

Plaintiff's wife, Beverly Milligan ("Mrs. Milligan"), a certified nursing assistant for over 20 years, now operates a catering business from their home in order to help care for Plaintiff. Mrs. Milligan testified before the Industrial Commission that she is Plaintiff's primary caregiver in the home, assisting Plaintiff by helping him shower, use the toilet, dress, prepare meals, clean, do yard work, and run errands. She also testified that Plaintiff did not need any assistance in these activities prior to his work-related back injury.

Dr. John Birkedal, an orthopedic specialist, has been Plaintiff's treating physician since 2005. Plaintiff underwent two surgeries in 2010 and 2011 to treat his back injury and related back conditions. Dr. Birkedal testified at deposition that he believes the 2011 surgery was successful and that Plaintiff is at maximum medical

improvement for his lower back. Dr. Birkedal opined that Plaintiff's other medical conditions, specifically issues related to his knee replacements and arm weakness, have a greater impact on Plaintiff's ability to get around than his lower back injury. While Dr. Birkedal believes that Plaintiff may need assistance with "heavier lifting, heavier duties with regard to taking care of a house, living independently[,]" he would not need assistance with other activities such as "buttoning his shirt and things like that" based on his back injury.

As part of Plaintiff's post-operative treatment plan, Dr. Birkedal recommended that Plaintiff receive home medical equipment. On 20 January 2011, Defendant paid for a home assessment, which was conducted by Sandra Frost ("Ms. Frost"). Ms. Frost evaluated Plaintiff's house and recommended a raised toilet seat, one to two fixed and hinged grab bars next to the toilet, a bath seat, a grab bar on the side of the tub, a "smart-rail" to help Plaintiff get in and out of the bed, and a dressing stick to help him get dressed.

On 6 February 2013, Deputy Commissioner Mary C. Vilas issued an Opinion and Award concluding that "it is medically reasonable and necessary for Plaintiff to have some accommodations made in his home." Deputy Commissioner Vilas ordered Defendant to pay for a chair lift for the stairs inside the home, a hospital bed, lifted toilet seats, grab bars in the bathrooms, a folding tub seat, grab bars for the tub, and a dress stick/shoehorn.

The home modifications ordered by Deputy Commissioner Vilas were not completed until June 2013. Cathy Carmichael, the workers' compensation adjuster assigned to Plaintiff's claim, ("Ms. Carmichael") testified that she "inherited" Plaintiff's file from a predecessor. When she realized that the home accommodations had not been installed, she immediately took steps to correct the oversight and had the recommended modifications completed the week before the June 2013 hearing before the Commission.

The matter came up again to the Industrial Commission on 25 June 2013 based on Plaintiff's request for past and future attendant care services and Defendant's failure to "follow doctor's recommendations regarding handicap accommodations." In his 18 February 2014 Opinion and Award, Deputy Commissioner Phillip A. Holmes concluded that the delay in the installation of the home modification devices did not result in prejudice to Plaintiff and denied him attorney's fees based on Defendant's failure to comply with Deputy Commissioner Vilas's order. Deputy Commissioner Holmes concluded that Plaintiff was not entitled to attendant care services or benefits because:

> 2. Expenses for housecleaning, cooking, and personal grooming are ordinary expenses of life and not medical compensation. *Id.*; *Scarboro v. Emery Worldwide Freight Corp.*, __ N.C. App. at __, 665 S.E.2d 781 (2008).
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> 3. There is insufficient evidence of record upon which to conclude that providing cleaning and cooking assistance to plaintiff, dispensing medications, personal hygiene

> assistance is related to his compensable injury with Defendant. N.C. Gen. Stat. §97-25. N.C. Gen. Stat. § 97-2(19); *See, e.g., Foster v. USAirways, Inc.*, 149 N.C. App. 913, 563 S.E.2d 235, cert. denied, 356 N.C. 299, 570 S.E.2d 505 (2002); *McDonald v. Brunswick Elec. Membership Coq.*, 77 N.C. App. 753, 756,336 S.E.2d 407, 409 (1985); *Timmons v. N. C Dept. of Transportation*, (Timmons 1), 123 N.C. App. 456, 473 S.E.2d 356 (1996).

Plaintiff appealed Deputy Commissioner Holmes's Opinion and Award to the Full Commission.

The matter came on for hearing before the Full Commission on 30 July 2014. The Full Commission made the following pertinent findings of fact:

> 11. Following Plaintiff's 13 June 2011 back surgery, he was placed at maximum medical improvement and Dr. Birkedal released Plaintiff to do light duty work in relation to his compensable injury. Dr. Birkedal testified that while Plaintiff's back problems are a substantial contributing factor in his ability to work, his compensable back condition is not the major reason he has mobility restrictions in everyday life.
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> 12. On 10 August 2012, Plaintiff took a letter drafted by his attorney to an appointment with Dr. Birkedal asking "is it your opinion that Mr. Milligan's work-related injury and current medical condition necessitate attendant care from the date of injury and will do so for the foreseeable future?" In response to this, Dr. Birkedal wrote "Yes" and placed his initials on the letter.
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> 15. On 22 November 2013, Dr. Birkedal testified that he stood by his prior statement that Plaintiff's compensable back condition was not the major reason for his mobility restrictions. Dr. Birkedal felt that, more likely than not,

> Plaintiff's other medical conditions placed more significant limitations on his mobility than his compensable injury. Dr. Birkedal further explained his opinion expressed in the 10 August 2012 letter. Dr. Birkedal clarified that when asked about ordering attendant care, he "was unaware of the specifics with regard to someone specifically being paid for - a certain individual, or specific individual being paid for a certain function." Dr. Birkedal testified it was not his intention to order an hourly rate for Mr. Milligan's wife back to the date of injury. Moreover, he testified that Plaintiff could lift up to twenty pounds and was able to return to work due to his compensable back injury in a light duty capacity. Dr. Birkedal believed that Plaintiff would need help with some housekeeping tasks around the house like heavy lifting and vacuuming, but did not address any further specific limitations and deferred that to an occupational therapist.
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> 17. Based upon the preponderance of the evidence in view of the entire record, the Full Commission finds as fact that Plaintiffs non-work related conditions have more significantly contributed to Plaintiff's immobility than his compensable back injury, and therefore Plaintiff's request for attendant care services is not causally related and medically necessary to his admittedly compensable back condition.
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> 18. Based upon the preponderance of the evidence in view of the entire record, the Full Commission finds as fact that Defendant complied with the home modifications ordered by Deputy Commissioner Vilas' 6 February 2013 Opinion and Award, and any delay in compliance did not result in any prejudice to Plaintiff and did not require any additional time or cost to Plaintiff's Counsel.

Based on these findings, the Full Commission concluded that

> 3. Medical compensation is defined as "medical, surgical,

> hospital, nursing, and rehabilitative services, and medicines, sick travel, and other treatment, including medical and surgical supplies, as may reasonably be required to effect a cure or give relief and for such additional time as, in the judgment of the Commission, will tend to lessen the period of disability." *Scarboro*, 192 N.C. App. at 491-92, 665 S.E.2d at 784. Ordinary expenses of life are not considered medical compensation. *Id*. at 488, 665 S.E.2d at 781. The Full Commission concludes that what Plaintiff is referring to as attendant care is no more than assistance with housecleaning, cooking, and personal hygiene. These services are not medical treatment, but are instead ordinary expenses of life that Defendant should not be required to pay pursuant to N.C. Gen. Stat. §§ 97-2(19) and 97-25. *Scarboro*, 192 N.C. App. at 488, 665 S.E.2d at 781.
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> 4. Moreover, although Dr. Birkedal testified at three separate depositions, Plaintiff has failed to present sufficient evidence that his request for attendant care services in the form of assistance with cooking, cleaning and maintaining his hygiene is necessary, as a result of his compensable back injury, to effect a cure, provide relief, or lessen the period of disability. N.C. Gen. Stat. §§ 97-2(19); 97-25. Conversely, the medical testimony provided by Dr. Birkedal reflects that Plaintiff's requests are more substantially related to his non-work related conditions than his compensable back injury and that, as it pertains to Plaintiffs compensable back injury, he is able to return to work in a light duty capacity.
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> 5. Plaintiff is not entitled to sanctions or attorney fees related to the Defendants' compliance with Deputy Commissioner Vilas' Opinion and Award as it did not result in any prejudice to Plaintiff and did not require any additional time or cost to Plaintiff's Counsel. N.C. Gen. Stat. § 97-88.1; *Sparks v. Mountain Breeze Restaurant and Fish House, Inc.*, 55 N.C. App. 663, 286 S.E.2d 575 (1982).

Plaintiff timely appeals.

Analysis

Plaintiff argues that the Industrial Commission erred in refusing to award payment for attendant care services provided to Plaintiff by Mrs. Milligan. Specifically, Plaintiff contends that "the evidence shows that Plaintiff receives assistance in cleaning, meal preparation, and detail services," all of which constitute "attendant care services," which are compensable as "medical compensation under N.C. Gen. Stat. 97-2(19) and 97-25, not "ordinary expenses of life," which are not.[1]

"Our review of an appeal from a decision of the North Carolina Industrial Commission is limited to the following: (1) whether there was any competent evidence to support the Full Commission's findings of fact and (2) whether these findings of fact support the conclusions of law." *Scarboro v. Emery Worldwide Freight Corp.*, 192 N.C. App. 488, 490, 665 S.E.2d 781, 784 (2008). We review conclusions of law *de novo*. *Id*. at 491, 665 S.E.2d at 784.

Employers are required to provide medical compensation to injured employees. N.C. Gen. Stat. 97-25. "Medical compensation" includes "attendant care services prescribed by a health care provider[.]" N.C. Gen. Stat. 97-2(19). However, "medical compensation" does not include assistance with "ordinary expense[s] of life," *i.e.*,

[1] In support of his argument, Plaintiff cites the 6 February 2013 Opinion and Award of Deputy Commissioner Vilas which, according to Plaintiff, "establish[ed] Plaintiff's need for attendant care services[.]" However, there are no findings or conclusions in Deputy Commissioner Vilas's Opinion and Award with regard to attendant care services. The only relevant findings and conclusions in this earlier Opinion and Award are the ones addressing Defendant's obligations to pay for the expenses incurred in making the home accommodations recommended by Ms. Frost.

those things that an employee normally has to pay before his injury, such as rent. *Espinosa v. Tradesource, Inc.*, __ N.C. App. __, __, 752 S.E.2d 153, 161 (2013).

This Court in *Scarboro*, 192 N.C. App. at 493-94, 665 S.E.2d at 786, distinguished between "ordinary expenses of life," which do not qualify as medical compensation an employee is entitled to be reimbursed for, and the compensable "extraordinary or unusual expenses" that are "reasonably required to effect a cure[,] give relief[,] . . . [or] lessen the period of disability" under N.C. Gen. Stat. § 97-2(19). In *Scarboro*, the plaintiff appealed the Industrial Commission's conclusion that lawn care services were not "extraordinary and unusual expenses that [the] plaintiff has incurred as a result of his work-related injury" but were, instead, an "ordinary expense of life" the employer would not be obligated to pay for. *Id.* at 491, 665 S.E.2d at 786. The plaintiff contended that he was unable to take care of his lawn due to his compensable injury and that lawn care services were necessary to comply with his neighborhood's restrictive covenants. *Id.* at 494, 665 S.E.2d at 786.

On appeal, this Court affirmed the Industrial Commission's conclusion despite the evidence establishing that lawn care services were recommended in the plaintiff's life care plan and qualified as "medically necessary" by several of the plaintiff's treating physicians. *Id.* at 494, 665 S.E.2d at 785-86. Noting that "[t]he determination of what treatment is appropriate for a particular employee is a matter within the exclusive jurisdiction of the [Full] Commission[,]" this Court, relying on

the defendants' evidence that the lawn care services were "an ordinary expense," concluded that:

> [w]e understand and appreciate plaintiff's efforts to keep his yard in compliance with the rules of his homeowners' association. However, providing plaintiff with the resources to comply with this restrictive covenant does not rise to the level of "other treatment[.]" These factual findings support the conclusion that the lawn care services are an ordinary expense of life, which is not included in medical compensation, pursuant to N.C. Gen. Stat. § 97-2(19) and N.C. Gen. Stat. § 97-25.

Id. at 493-94, 665 S.E.2d at 786-86 (second alteration in original).

This Court, again, explained the difference between "ordinary expense[s] of life" and compensable expenses that qualify as "medical compensation" in *Espinosa*, __ N.C. App. at __, 752 S.E.2d at 161. The *Espinosa* Court affirmed the Industrial Commission's determination that the defendants should pay the *pro rata* difference between the rent required for the plaintiff's new, handicapped-accessible home that would "meet his needs" due to his injury and the rent the plaintiff paid prior to his injury. *Id*. In so holding, the Court noted that, "[t]he Commission sensibly reasoned that living arrangements constitute an ordinary expense of life and, thus, should be paid by the employee. The Commission also recognized, however, that a change in such an expense, which is necessitated by a compensable injury, should be compensated for by the employer." *Id*.

Here, the Full Commission determined that Plaintiff's request for assistance with housekeeping, cooking, and personal hygiene were "ordinary expenses of life" and that Defendant would not be obligated to pay these expenses as part of Plaintiff's "medical compensation." We agree with regard to the tasks of housekeeping and cooking. Clearly, these types of activities are ordinary tasks and responsibilities that Mrs. Milligan or Plaintiff would have to perform regardless of Plaintiff's injury. The fact that Plaintiff may not be able to help as much as he had prior to his injury does not necessarily transform these tasks into ones that are compensable as "medical compensation" pursuant to N.C. Gen. Stat. § 97-2(19). Furthermore, Dr. Birkedal testified during his 2013 deposition that he did not recommend that Plaintiff's wife be compensated for attendant care services because he believed Plaintiff was capable of performing most of these tasks without assistance and had even released him to light duty work. Dr. Birkedal clarified that when he initialed the August 2012 letter brought to him by Plaintiff stating that it was Dr. Birkedal's opinion that Plaintiff will need attendant care for the foreseeable future, it was not his intention to recommend Mrs. Milligan be paid an hourly rate for care; instead, he stated that "my intent was to speak as far as a functional basis" and note his agreement that Plaintiff might need help with some activities. Therefore, because Plaintiff's requests for assistance with yard work and cooking do not qualify as "medical compensation" and in the absence of any recommendation by a treating physician for attendant care, we

affirm the Full Commission's conclusion that Plaintiff is not entitled to attendant care services with regard to these activities.

Further, even *assuming arguendo* that we agree with Plaintiff that his request for assistance with "personal hygiene" does not constitute an "ordinary expense of life," we agree with the Full Commission that these expenses are not compensable because they are not related to Plaintiff's compensable back injury. As noted by *Espinosa*, __ N.C. App. at __, 752 S.E.2d at 161, to be compensable as "medical compensation," the expenses an employee is seeking must be "necessitated by a compensable injury[.]" Here, Dr. Birkedal testified that Plaintiff's other medical conditions have a much greater impact on his mobility issues than his back injury, and the Industrial Commission adopted Dr. Birkedal's testimony in its findings of fact. Dr. Birkedal opined that Plaintiff's back injury was still improving and that any assistance he needs with most ordinary tasks, other than those that require heavy lifting, is based on these other medical problems. Thus, because Plaintiff's need for assistance with regard to "personal hygiene" is not causally related to nor "necessitated" by his compensable back injury, *id.*, we affirm the Full Commission's determination that Mrs. Milligan is not entitled to compensation for attendant care services with regard to personal hygiene.

Plaintiff next argues that the Full Commission erred by refusing to award Plaintiff reasonable attorney's fees pursuant to N.C. Gen. Stat. 97-88.1 for

Defendant's failure to comply with the home modifications ordered in Deputy Commissioner Vilas's 6 February 2013 Opinion and Award. We disagree.

A decision whether to award attorney's fees under N.C. Gen. Stat. § 97-88.1 is reviewed for an abuse of discretion. *Burnham v. McGee Bros. Co.*, 221 N.C. App. 341, 346, 727 S.E.2d 724, 728 (2012). "[A]n abuse of discretion occurs when a determination is so arbitrary that it could not have been the result of a reasoned decision." *Bishop v. Ingles Markets, Inc.*, __ N.C. App. __, __, 756 S.E.2d 115, 121 (2014) (internal quotation marks omitted).

It is undisputed that the home modifications Deputy Commissioner Vilas ordered in her February 2013 Opinion and Award were not completed by Defendant until June 2013, approximately four months later. However, the Full Commission concluded that Plaintiff was not prejudiced by this delay and that Plaintiff's counsel did not spend any additional time on the issue or incur any additional cost as a result of this delay. Plaintiff concedes that "[t]here is no evidence in the record that speaks to Plaintiff's prejudice or exacerbation of his condition due to his physical limitations in the home." Furthermore, Ms. Carmichael testified that Defendant's failure to comply with Deputy Commissioner Vilas's Opinion and Award was an unintentional oversight that was rectified as soon as she realized those ordered accommodations had not been completed. Consequently, we are unable to say on appeal that the Full

Commission's decision to deny Plaintiff's N.C. Gen. Stat. § 97-88.1 request for attorney's fees was manifestly unsupported by reason.

Conclusion

Based on our review of the record of evidence and relevant caselaw, we affirm the Full Commission's Opinion and Award.

AFFIRMED.

Judges CALABRIA and STROUD concur.

Report per Rule 30(e).