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NO. COA11-950  
NORTH CAROLINA COURT OF APPEALS

Filed: 1 May 2012

DONNA ELLISON,  
Employee,  
Plaintiff,

v.

North Carolina  
Industrial Commission  
I.C. No. 488865

DANA CORPORATION,  
Employer,  
SPECIALTY RISK SERVICES,  
Carrier,  
Defendants.

Appeal by plaintiff from opinion and award entered 27 January 2011 and order entered 5 April 2011 by the North Carolina Industrial Commission. Heard in the Court of Appeals 14 December 2011.

*Donna Ellison, pro se, plaintiff-appellant.*

*Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Brandon M. Williams and M. Duane Jones, for defendants-appellees.*

GEER, Judge.

Plaintiff Donna Ellison appeals from an opinion and award and order denying her claim for a change of condition. On appeal, Ms. Ellison focuses only on the evidence supporting her claim. Under our standard of review, the Full Commission had

the paramount fact-finding role, and we may not set aside a decision supported by evidence, even if the record contains contrary evidence. We, therefore, affirm the Commission's determination that plaintiff failed to establish a change of condition.

#### Facts

Ms. Ellison suffered a compensable back injury on 30 July 2004. The Commission entered an opinion and award in April 2007 granting Ms. Ellison benefits only from 30 July 2004 through 5 August 2004. The Commission found that plaintiff's condition subsequent to 5 August 2004 was caused by a pre-existing condition and was not a work-related injury. This Court affirmed the Commission's opinion and award unanimously. See *Ellison v. Dana Corp.*, 189 N.C. App. 209, 657 S.E.2d 445, 2008 N.C. App. LEXIS 358, 2008 WL 565491 (Mar. 4, 2008) (unpublished). Ms. Ellison did not file a petition for discretionary review in the Supreme Court, although she points to that omission as misconduct by her attorney.

After this Court's decision, it appears Ms. Ellison fired her attorney, Bobby L. Bollinger, Jr., on 19 March 2008. Ms. Ellison then filed a pro se Form 33 on 2 April 2008. On the Form 33, Ms. Ellison indicated: "I have ongoing & continuous

medical problems and treatments since my injury on the job 7/30/04 related to my worker's compensation injury."

Ms. Ellison filed an amended Form 33 on 12 May 2008, alleging a "Change of Condition" under N.C. Gen. Stat. § 97-47. She stated "I have a change in condition related to my on the job injury on July 30, 2004 where my condition changed on Aug 2, 2004 as described in N.C.G.S. § 97-47." Ms. Ellison requested payment of compensation for the period from 5 August 2004 through 12 May 2008 and continuing, payment of medical expenses and treatment, payment for permanent partial disability, and payment for permanent and total disability.

On 11 June 2008, Ms. Ellison returned to Dr. Domagoj Coric, a neurosurgeon who had performed back surgery on her, for further treatment and reported that she had some neck and back pain but that she had improved from her preoperative state. Ms. Ellison complained most of low back pain. On 11 August 2008, she was evaluated by Dr. Mark Williamson for back pain. Dr. Williamson recommended pain management.

Ms. Ellison then went to Dr. David Spivey for pain management on 29 September 2008. Dr. Spivey gave her epidural steroid injections on 30 September and 21 October 2008. During this time, Dr. Richard Bey performed nerve conduction studies on

Ms. Ellison's lower and upper extremities, and the results were normal.

In late 2008, Ms. Ellison filed a grievance with the North Carolina State Bar against her former attorney. After the investigation, the matter was dismissed when the Grievance Committee did not find probable cause that Mr. Bollinger had violated the Rules of Professional Conduct in representing Ms. Ellison.

A hearing was conducted before Deputy Commissioner Victoria M. Homick on 20 April 2009. Ms. Ellison was the only witness to testify at the hearing. Deputy Commissioner Homick repeatedly reminded Ms. Ellison that the only issue before the Commission was whether she had suffered a change in condition, as alleged in her Form 33. When Ms. Ellison continued to try to offer evidence related to other issues and to complain of fraudulent practices, Deputy Commissioner Homick referred her to the Industrial Commission's Investigations Unit.

During her testimony, Ms. Ellison stated that she could not put a date on when her condition changed. She testified that it was just "a gradual progression." Written interrogatories were served on Ms. Ellison's doctors on 14 October 2009.

Dr. Ronald Adams treated Ms. Ellison for cervical and lumbar complaints from February 2003 to August 2004, and

responded that he did not have an opinion on her ability to work. Dr. Coric treated Ms. Ellison from 19 January 2005 to 16 July 2008 for cervical radiculopathy and cervical stenosis, but he did not know how long these conditions had existed. He reported that a traumatic injury could cause an aggravation or a change of condition. Dr. Coric believed Ms. Ellison was capable of sedentary work while he was treating her and at present.

Dr. Dale K. Rader treated Ms. Ellison for degenerative disc disease and lumber degenerative disc disease from 15 February 2008 to 23 June 2008. He found abnormalities in Ms. Ellison's spine, but he could not say how long they had existed. He explained, however, that a traumatic injury could worsen or cause a change of condition.

Dr. Leo Young stated that he treated Ms. Ellison for degenerative disc disease and bulging discs from 29 July 2008 to 21 August 2009. Dr. Young reported that Ms. Ellison's condition during that time was consistent with her condition on 6 August 2004. He believed that Ms. Ellison could not work.

Dr. Trishwant Garcha, a clinical neurophysiologist, treated Ms. Ellison from 25 November 2008 through 30 March 2009. He declined to express any opinion whether Ms. Ellison had experienced a change of condition or whether her condition was causally related to the 30 July 2004 work incident.

Deputy Commissioner Homick filed an opinion and award on 13 July 2010, finding Ms. Ellison's claim barred by *res judicata*. Deputy Commissioner Homick further found that, even if *res judicata* did not apply, Ms. Ellison had presented insufficient evidence of a change of condition.

Ms. Ellison appealed to the Full Commission on 21 November 2010. In her Form 44, Ms. Ellison waived oral argument. Defendants requested oral argument, and the Full Industrial Commission heard the appeal on 6 December 2010. Based on the record, Ms. Ellison apparently attended the hearing. The Full Commission filed a decision on 27 January 2011, affirming the opinion and award. The decision was written by Commissioner Linda Cheatham and concurred in by Commissioners Christopher Scott and Laura Kranifeld Mavretic.

The Commission first noted that Ms. Ellison sustained a compensable injury on 30 July 2004 when she felt an onset of pain and numbness in her cervical spine while taping axles at work. The Commission then concluded that "[i]n the present matter, the issue of plaintiff's entitlement to further workers' compensation benefits for her cervical spine is the same as the issue decided by the Court of Appeals on March 4, 2008. In its decision, the Court of Appeals found that plaintiff failed to show that her condition or disability after August 5, 2004

resulted from the July 30, 2004 incident. As such, plaintiff's claim for a change of condition claim [sic] has already been addressed." The Commission further concluded that even if Ms. Ellison's claim were not barred by *res judicata*, "the evidence of record is insufficient to find that plaintiff experienced a change of condition pursuant to N.C. Gen. Stat. §97-47" because Ms. Ellison "failed to show that her present conditions are causally related to her compensable injury of July 30, 2004."

On 15 February 2011, Ms. Ellison filed motions to recuse Commissioners Cheatham, Scott, and Mavretic for being biased against her, for participating in fraud with her former attorney, and for withholding discovery documents. Ms. Ellison stated that she "believes that the Full Commission had a duty to report and investigate this fraud upon the Court before making a ruling in her case since she had documented proof of this fraud."

Ms. Ellison also filed a document that the Full Commission deemed a motion for reconsideration on 15 February 2011. The Commission denied the three motions for recusal and denied her motion for reconsideration in a decision filed on 5 April 2011. Ms. Ellison timely appealed to this Court.

As an initial matter, we address Ms. Ellison's contentions regarding the record filed in this Court. Ms. Ellison first contends that she was wrongfully denied a transcript of the Full Commission oral argument held on 6 December 2010. Ms. Ellison argues that she inquired repeatedly about the transcript, saying that she "did not waive her rights," although she was informed that the oral argument was not recorded and, therefore, no transcript could be ordered.

The Workers' Compensation Rules of the North Carolina Industrial Commission make provisions for transcripts to be provided of the hearing before the deputy commissioner when an appeal is made to the Full Commission. See Workers' Comp. R. of N.C. Indus. Comm'n 701, 2012 Ann. R. N.C. 1087 (requiring Form 44 to be filed "within 25 days of appellant's receipt of the transcript or receipt of notice that there will be no transcript"). The proceedings before the Full Commission include only oral argument and, just as in this Court, are not ordinarily recorded or transcribed. The Commission was not required to provide Ms. Ellison with a transcript of the oral argument.

Ms. Ellison next argues that the record on appeal was improperly settled. She contends that Commissioner Cheatham did not have jurisdiction to settle the record as "she was a party



to plaintiff's appeal." Ms. Ellison appears to have misunderstood the distinction between a party and someone alleged to have erred. While Ms. Ellison alleges that Commissioner Cheatham participated in fraud, as discussed below, that does not make her a party to this appeal. The duty to settle the record was delegated to Commissioner Cheatham pursuant to N.C. Gen. Stat. § 97-77 (2009), and we find no error in her doing so.

## II

We next address Ms. Ellison's contention that the Commission erred in denying her claim for a change of condition. Our review of a decision of the Industrial Commission "is limited to determining whether there is any competent evidence to support the findings of fact, and whether the findings of fact justify the conclusions of law." *Cross v. Blue Cross/Blue Shield*, 104 N.C. App. 284, 285-86, 409 S.E.2d 103, 104 (1991).

"The findings of the Commission are conclusive on appeal when such competent evidence exists, even if there is plenary evidence for contrary findings." *Hardin v. Motor Panels, Inc.*, 136 N.C. App. 351, 353, 524 S.E.2d 368, 371 (2000). As the fact-finding body, "[t]he Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 115,

530 S.E.2d 549, 552 (2000) (quoting *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998)).

We start by noting that the Commission already decided, and this Court affirmed, that Ms. Ellison's neck and back conditions were not caused by the work-related incident on 30 July 2004. *Res judicata* applies to opinions and awards of the Industrial Commission. See, e.g., *Lewis v. N.C. Dep't of Corr.*, 138 N.C. App. 526, 528, 531 S.E.2d 468, 470 (2000). Any issue that was previously addressed in the opinion and award in this case upheld on appeal could not be revisited by the Commission and may not be revisited by this Court. Therefore, the sole issue before the Commission was whether Ms. Ellison had proven that she suffered a change of condition from 5 August 2004, entitling her to additional compensation beyond the five days already awarded.

"A change of condition for purposes of N.C. Gen. Stat. § 97-47, is a substantial change in physical capacity to earn wages, occurring after a final award of compensation, that is different from that existing when the award was made." *Bailey v. Sears Roebuck & Co.*, 131 N.C. App. 649, 654, 508 S.E.2d 831, 835 (1998). To recover compensation for a change of condition, a "plaintiff must prove by the greater weight of the evidence that her change in condition was a natural consequence" of the

original injury. *Id.* Therefore, to have a change of condition, Ms. Ellison would need to prove by the greater weight of the evidence that her physical capacity to earn wages is different from when the original award was entered and that this change was due to her original compensable injury.

The Commission, as affirmed by this Court, previously determined that Ms. Ellison's spinal condition following 5 August 2004 was due to a pre-existing condition and not her compensable work-related injury. Ms. Ellison, therefore, was required to show that she is now suffering from a new condition -- different from the one considered by the Commission previously -- that is causally related to the 30 July 2004 specific traumatic incident.

Based upon our review of the record, we hold that the Commission's determination that the record contains insufficient evidence of a new condition or that Ms. Ellison's current condition is causally connected to the 30 July 2004 work-related specific traumatic incident is supported by competent evidence. While Ms. Ellison points us to evidence that might support a different conclusion and argues that the Commission should have given greater weight to the testimony of some experts over others, the Commission has sole responsibility for determining the weight and credibility of the evidence. As the record

contains evidence that Ms. Ellison's condition had not changed since 6 August 2004 due to her compensable injury, we must affirm.

III

Ms. Ellison also makes a number of arguments alleging fraud by her former attorney and the Commission. However, the majority of the issues raised by Ms. Ellison concern events that occurred before this Court's 4 March 2008 decision upholding the Commission's opinion and award and, therefore, cannot be raised again. The only issue properly before us is whether the Commission erred in denying the motions to recuse Commissioners Cheatham, Scott, and Mavretic.

"The burden is on the party moving for recusal to demonstrate objectively that grounds for disqualification actually exist." *Harrington v. Wall*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 710 S.E.2d 364, 367 (2011) (quoting *State v. Kennedy*, 110 N.C. App. 302, 305, 429 S.E.2d 449, 451 (1993)). "Such a showing must consist of substantial evidence that there exists such a personal bias, prejudice or interest on the part of the judge that he would be unable to rule impartially." *State v. Scott*, 343 N.C. 313, 325, 471 S.E.2d 605, 612 (1996) (quoting *State v. Fie*, 320 N.C. 626, 627, 359 S.E.2d 774, 775 (1987)).

We thus review Ms. Ellison's "motions to recuse and disqualify" to determine if they objectively demonstrate substantial evidence that grounds for recusal actually exist. Ms. Ellison's reasons set out in the motion for recusal allege withholding of discovery, a "deal" between her former attorney and the Industrial Commission, and bias against her. After a thorough review of the record, we can find no evidence to support Ms. Ellison's allegations of bias, a "deal," or the withholding of discovery.

Ms. Ellison next contends that the Commissioners should have recused themselves because they were reviewing their own filed award in violation of N.C. Gen. Stat. § 97-84 (2011). The Commissioners were not, however, reviewing their own award -- this Court had already upheld that opinion and award. In the opinion and award currently on appeal, the Commission simply summarized its prior binding opinion and award.

Ms. Ellison also contends that the "replacement" of Commissioners selected to hear her claim constitutes evidence of this fraud. While the calendar submitted by Ms. Ellison shows that her appeal to the Full Commission was originally assigned to Commissioners Ballance, Meyer, and Cheatham, there is nothing in the record to indicate why Commissioners Ballance and Meyer were replaced with Commissioners Scott and Mavretic. Without

more, we cannot say Ms. Ellison has presented substantial objective evidence that grounds for recusal exist. We note, however, that Commissioners Scott and Mavretic heard the original appeal (along with Commissioner Sellers), and, therefore, it would be logical for them to participate in the second appeal as well.

In her brief arguing that denial of her motions to recuse was error, Ms. Ellison points us to two findings of fact she characterizes as "suspicious." However, the only information in these findings that changed between the original opinion and award in 2007 and the one filed in 2011 was the fact that Ms. Ellison continues to have neck and back pain -- a fact to which Ms. Ellison testified -- and that she had not presented evidence of a change of condition, a determination that we have already upheld. Therefore, we do not find substantial evidence that grounds for recusal actually exist.

Ms. Ellison also contends the Full Commission improperly withheld from her the Industrial Commission Guide for Pro Se Appellants. According to Ms. Ellison's brief, a guide should have been sent with the copy of the opinion and award filed 27 January 2011, and, instead, she had to request one, which she received on 23 April 2011.

While Ms. Ellison cites a public records act case as authority, *State Emps. Ass'n of N.C., Inc. v. N.C. Dep't of State Treasurer*, 364 N.C. 205, 695 S.E.2d 91 (2010), that decision does not support her claim that the delay in her receiving the guide was reversible error. Even assuming, without deciding, that error occurred, Ms. Ellison has not shown any prejudice from the delay.

IV

Ms. Ellison lastly contends that "[d]efendants breached their fiduciary duty pursuant to the ERISA Act of 1974." It is, however, well established that "'[t]he Industrial Commission is not a court of general jurisdiction. It has no jurisdiction except that conferred upon it by statute.'" *Hartsell v. Pickett Cotton Mills, Inc.*, 4 N.C. App. 67, 71, 165 S.E.2d 792, 795 (1969) (quoting *Bryant v. Dougherty*, 267 N.C. 545, 548, 148 S.E.2d 548, 551 (1966)). The Industrial Commission's jurisdiction "may not be enlarged or extended by act or consent of parties, nor may jurisdiction be conferred by agreement or waiver." *Letterlough v. Atkins*, 258 N.C. 166, 168, 128 S.E.2d 215, 217 (1962).

An ERISA action is not one within the Industrial Commission's jurisdiction. See 29 U.S.C. § 1132(e)(1) (2006) (granting "[s]tate courts of competent jurisdiction and district

courts of the United States . . . concurrent jurisdiction"); N.C. Gen. Stat. § 97-10.1 (2011) ("the rights and remedies herein granted to the employee . . . shall exclude all other rights and remedies of the employee . . . as against the employer at common law or otherwise on account of such injury or death"); *Trull v. Dayco Prods., LLC*, 214 F.R.D. 394, 403 (W.D.N.C. 2003) (finding asbestos claims pending before the North Carolina Industrial Commission "not duplicative" as they "address entirely different legal and factual matters" than the ERISA claims before the court).

In any event, Ms. Ellison's argument seems to be that defendants and Mr. Bollinger did not provide her with certain materials. However, those materials were in fact available to her attorney during the pendency of her first claim, even if unbeknownst to her. A strategic decision was made not to use those specific documents. Any challenge to that decision is not properly before this Court.

Conclusion

We have carefully reviewed Ms. Ellison's arguments on appeal and the record. We find no basis for overturning the Commission's decision and, therefore, affirm.

Affirmed.

Judges ROBERT C. HUNTER and ROBERT N. HUNTER, JR. concur.



Report per Rule 30(e).