NO. COA10-294

NORTH CAROLINA COURT OF APPEALS

Filed: 19 October 2010

JULIAN S. ROLLINS, Employee,
Plaintiff,

v.

From the North Carolina Industrial Commission
I.C. File No. 547454

TYCO ELECTRONICS, Self-Insured Employer (SEDGWICK CMS, Servicing Agent),
Defendant.

Appeal by plaintiff-employee from opinion and award entered 23 October 2009 by the North Carolina Industrial Commission. Heard in the Court of Appeals 15 September 2010.

Kenneth M. Johnson, P.A., by Kenneth M. Johnson, for plaintiff-employee.

Wilson & Ratledge, by James E.R. Ratledge, for defendant.

BRYANT, Judge.

Where an employee fails to comply with reasonable medical treatment and rehabilitation, his benefits are properly subject to suspension. Further, where conclusive findings of fact support the conclusion that an employee is no longer totally disabled from any employment, he is not entitled to further payment of total disability compensation

Facts

Because plaintiff-employee Julian S. Rollins does not challenge any of the Full Commission's findings of fact, they are conclusive on appeal. These findings present the factual and procedural history of this case:

> 1. At the time of the hearing before the Deputy Commissioner, plaintiff was 36 years old and [had] obtained his GED. Plaintiff began working for defendant-employer in approximately 2002 or 2003 as a fork lift operator. On February 2, 2005, plaintiff sustained injuries when a lift he was riding fell several feet. The claim was accepted and plaintiff has received benefits from defendant since the accident.
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> 2. Plaintiff first received treatment for his injuries on February 2, 2005 and on February 5, 2005, at U.S. Healthworks. He was diagnosed with a lumbar sprain/strain and placed on modified work restrictions of no lifting over 15 pounds, no forceful pushing or pulling, and no bending, stooping, kneeling or squatting.
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> 3. On February 15, 2005, plaintiff presented to Dr. Richard Ramos with complaints of an aching, burning sensation across his lower back with no radiation into his legs. A physical exam revealed no obvious distress, and Dr. Ramos noted that plaintiff ambulated without an antalgic gait. Plaintiff had good range of motion of the lumbar spine with no tenderness. Strength was noted to be 5 out of 5 and plaintiff could toe/heel walk and had negative straight leg raising. Dr. Ramos did not think that plaintiff had suffered a ruptured disc and recommended outpatient physical therapy, light-duty work with no lifting over 20 pounds, and a return in three weeks.
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> 4. On April 12,2005, plaintiff returned to Dr. Ramos and reported increased pain with physical therapy. Plaintiff also reported that he was unable to take the prescribed medication secondary to nausea and headaches. Dr. Ramos recommended that plaintiff undergo an MRI scan of the lumbar spine. Dr. Ramos

also allowed plaintiff to return to work with restrictions of no lifting over 20 pounds and no repetitive bending, stooping or squatting.

5. The MRI was scheduled for May 6, 2005. However, when plaintiff arrived he refused to go through with the MRI scan, claiming he was claustrophobic. Plaintiff was rescheduled for an open MRI on May 15, 2005, and was given medications to calm him. Plaintiff stated he took the pills on the wrong day and refused to undergo the MRI in the open unit. Plaintiff demanded that he be put to sleep. Dr. Ramos recommended that plaintiff attempt the open MRI scan with the prescribed medications, and the test was rescheduled for June 14, 2005. Once again, plaintiff refused to complete the test. Dr. Ramos ordered a CT scan, scheduled for June 23, 2005. Because plaintiff was "worried" and "afraid" of the CT scan, it was rescheduled for June 29, 2005; however, plaintiff continued to refuse to undergo the CT scan without first being put to sleep.

6. On July 28,2005, plaintiff returned to Dr. Ramos and reported he had stopped physical therapy because of the pain and that he was terminated from his job in February because he did not give a urine sample. On physical exam, plaintiff complained of low back pain, but was not in significant distress and no lower extremity swelling was noted. Dr. Ramos opined in his note "I am not saying that he is taking advantage of the system, but it certainly could appear that way." Dr. Ramos recommended an FCE. In the meantime, he released plaintiff to return to work on July 28, 2005, performing light-duty with no lifting over ten pounds. On July 29, 2005, Dr. Ramos discharged plaintiff from his care.

7. On November 1, 2005, the Executive Secretary's Office ordered plaintiff to comply with all reasonable and prescribed treatment as provided by defendant and noted that the refusal to comply "shall bar plaintiff from further compensation."

8. Plaintiff next presented to Dr. John L. Graves who informed plaintiff that he would only treat plaintiff if he underwent an MRI and that he would only schedule the MRI once.

Plaintiff complied and underwent the MRI. The December 5, 2005, review of the test showed that the MRI was normal with no evidence of herniation, bulging, or disc dissection. Dr. Graves recommended that plaintiff undergo an FCE and return to work consistent with the results. On January 5, 2006, Dr. Graves stated that plaintiff was capable of performing sedentary/light work based upon plaintiff's FCE and that he did not believe that plaintiff would have any permanent functional impairment. Dr. Graves further recommended that plaintiff begin a work conditioning program.

9. On January 19, 2006, Dr. Graves recommended that plaintiff immediately go back to work at the sedentary level so that he could regain confidence and eventually be engaged in gainful employment. Dr. Graves opined that plaintiff had reached maximum medical improvement and that plaintiffs back pain would eventually resolve. Dr. Graves released plaintiff for sedentary work with a 0% rating to the back. Dr. Graves also recommended that plaintiff undergo comprehensive pain management to include a psychological evaluation which defendant authorized and arranged.

10. On May 16, 2006, plaintiff was seen at The Rehab Center in Charlotte which found him at maximum medical improvement and recommended that he be seen by a psychologist for a "brief" course of counseling for his chronic pain and depression.

11. Plaintiff was referred to Dr. Michael F. Zelson of Moses Cone Outpatient Rehabilitation Center in Greensboro, North Carolina. On September 11, 2006, plaintiff was 20 minutes late for his initial evaluation and thereafter cancelled his first actual appointment. At plaintiff's second appointment, Dr. Zelson noted defiance on plaintiff's part and resistance to the treatment offered. After canceling the next two sessions, plaintiff finally presented for a third visit but terminated it ten minutes into the session stating, "It isn't working out with you. I want a female therapist to talk to. I can't open up to you.' Dr. Zelson discharged

plaintiff and noted plaintiffs history of alienating and dismissing medical caregivers.

12. From August 16, 2007 through September 10, 2007, plaintiff treated with Paula Katz, a female licensed professional therapist and counselor. On November 14, 2007, Ms. Katz wrote a letter documenting her refusal to continue treatment of plaintiff due to plaintiff's questioning her integrity, ethics and professionalism. She also stated that the appointments had not been productive.

13. On January 16, 2007, defendant initiated vocational rehabilitation to assist plaintiff with a return to gainful employment. Julianne Romano was assigned to the case and determined that plaintiff needed to undergo a vocational assessment to determine his capabilities. Sylvia Henry was assigned to perform the testing and assessment. The assessment was first scheduled at plaintiffs attorney's office for February 23, 2007, but was canceled due to plaintiffs complaints of pain. The assessment was rescheduled for March 12, 2007, at plaintiffs home, as plaintiff had recently terminated his attorney. Only one hour of testing was completed because plaintiff complained of pain. The testing was re-scheduled for March 21, 2007.

14. On March 21, 2007, plaintiff again failed to complete the testing, stating that he was having too much pain and could not focus. The appointment was then re-scheduled for March 29, 2007. Plaintiff later called Ms. Henry and informed her that he could not complete the testing on March 29, 2007, as he had a dental appointment on March 28,2007 to have a tooth pulled. He also informed Ms. Henry that he did not know when he could meet with her to finish testing. On March 29, 2007, Ms. Henry contacted plaintiff to inquire about his medical status and when he could complete the testing. Plaintiff informed her that he did not go to the dentist. After Ms. Henry was later advised by her superiors to not return to plaintiffs home due to plaintiffs violent actions and temper, she recommended that a male perform the vocational evaluation. Defendant authorized an evaluation by Charles Hook.

15. On May 14, 2007 defendant filed a Form 24 application to suspend or terminate plaintiffs benefits pursuant to N.C. Gen. Stat. §97-25 for plaintiffs refusal to comply with medical and vocational rehabilitation. On July 17, 2007, the Executive Secretary's Office ordered that defendant was authorized to suspend plaintiffs benefits as of May 14, 2007, but that defendant was to automatically reinstate benefits when plaintiff completed the evaluation with Mr. Hook. Defendant complied with this Order.

16. On August 10 and 17, 2007, Mr. Hook performed a vocational evaluation of plaintiff and prepared a report dated September 4, 2007. Mr. Hook believed that plaintiff made little or no effort in the evaluation. Mr. Hook questioned the validity of his testing, which produced results indicating that plaintiff was functioning at second grade and fourth grade levels. Mr. Hook found plaintiff to be belligerent, and plaintiff made statements such as, "Well, I don't want to be here." Mr. Hook recommended that plaintiff undergo some pain management treatment that would permit him to be re-evaluated for vocational possibilities.

17. On November 28, 2007, Dr. Thomas Gaultieri performed a neuro-psychiatric evaluation of plaintiff. Dr. Gaultieri determined that the evaluation was not indicative of clinical depression, traumatic brain injury, or post-traumatic stress disorder. Dr. Gaultieri stated that the evaluation clearly indicated exaggeration and fabrication by plaintiff. Dr. Gaultieri further opined that plaintiff was not disabled due to any neuro-psychiatric condition and did not need psychiatric treatment. Plaintiff was noted to be at maximum medical improvement for any problems from the accident in February 2005, with no continuing disability.

18. Plaintiff maintains that he currently suffers from leg, back, balance, high blood pressure, migraine, rapid heart beat, and anxiety and depression issues. He did not have any of these problems before the accident. Plaintiff contends that he can not do anything since the accident, other than sit

around and watch his children or watch television. However, he is able to drive to his mother's house which is 45 minutes from his home. His main problem is his right leg that feels like it is going to sleep with pins sticking in it. Plaintiff experiences numbness in the leg whenever he sits for a long period of time. Bending causes problems to plaintiff's lower back.

19. The greater weight of the evidence of record shows that since November 1, 2005, plaintiff has willfully and intentionally refused medical treatment and vocational rehabilitation efforts. The record does not reveal any reasonable basis for plaintiffs refusal to cooperate, and plaintiff does not have any psychological or medical condition that affects his ability to reasonably comply with treatment. Plaintiff has not proven that his pain prevented him from participating in vocational rehabilitation efforts or independent job search efforts. Plaintiff is physically able to seek suitable employment, but has not looked for work.

20. The greater weight of the evidence shows that plaintiff intentionally did not make a valid effort during the vocational testing by Mr. Hook and therefore the Commission gives little weight to the vocational assessment. The Commission finds that by his failure to cooperate with the vocational testing, plaintiff did not comply with vocational rehabilitation efforts and therefore total disability compensation should not have been reinstated in August 2007.

21. Drs. Ramos, Graves and Gualtieri have released plaintiff to return to work with restrictions but no permanent functional impairment. Since January 16, 2007 defendant has attempted to provide vocational rehabilitation to assist plaintiff in a return to gainful employment. Due to plaintiff's unreasonable refusal to cooperate with vocational rehabilitation, defendant has been unable to determine plaintiff's vocational capabilities in order to locate employment suitable to his capacity.

> 22. The greater weight of the evidence shows that plaintiff is medically capable of performing sedentary work or at the very least, attempting sedentary work. Since plaintiff has not sought suitable employment or shown that seeking suitable employment would be futile, plaintiff has not proven that he is totally disabled.

The Commission concluded that employee had sustained an injury by accident on 2 February 2005 which entitled him to medical compensation; however, because of employee's failure to comply with medical efforts to return him to work, his benefits were subject to suspension. Further, the Commission concluded that employee had failed to show that he continued to be disabled from any employment. Employee appeals.

Employee proposes two issues for appeal which he brings forward in his brief to this Court: that the Full Commission erred in concluding that (I) employee's total disability compensation was properly suspended for a failure to comply with the Commission's 1 November 2005 order concerning medical treatment and rehabilitation; and (II) employee was no longer totally disabled from any employment and was therefore not entitled to further payment of total disability compensation.

Standard of Review

Our review of an opinion and award from the Industrial Commission is limited to determining whether competent evidence supports the Commission's findings of fact and whether those findings support the conclusions of law. *Calloway v. Mem'l Mission Hosp.*, 137 N.C. App. 480, 484, 528 S.E.2d 397, 400 (2000) (citation

omitted). Findings supported by competent evidence are conclusive on appeal even if the evidence could support contrary findings. *Id.* (citing *Adams v. AVX Corp.*, 349 N.C. 676, 509 S.E.2d 414 (1998), *reh'ing denied*, 350 N.C. 108, 532 S.E.2d 522 (1999)). We review conclusions of law de novo. *Goodson v. P.H. Glatfelter Co.*, 171 N.C. App. 596, 605, 615 S.E.2d 350, 357, *disc. review denied*, 360 N.C. 63, 623 S.E.2d 582 (2005). Further, "[t]he full Commission, upon reviewing an award by the hearing commissioner, is not bound by findings of fact supported by the evidence, but may reconsider evidence and adopt or reject findings and conclusions of the hearing commissioner." *Robinson v. J.P. Stevens & Co.*, 57 N.C. App. 619, 627, 292 S.E.2d 144, 149 (1982). "Whether the full Commission conducts a hearing or reviews a cold record, N.C.G.S. § 97-85 places the ultimate fact-finding function with the Commission–not the hearing officer. It is the Commission that ultimately determines credibility, whether from a cold record or from live testimony." *Adams*, 349 N.C. at 681, 509 S.E.2d at 413.

I

Employee first argues that the Commission erred in concluding that his total disability compensation was properly suspended for a failure to comply with the Commission's 1 November 2005 order concerning medical treatment and rehabilitation. We disagree.

Under the Worker's Compensation Act:

> The refusal of the employee to accept any medical, hospital, surgical or other treatment or rehabilitative procedure when ordered by the Industrial Commission shall bar said employee from further compensation until such refusal ceases, and no compensation shall at

> any time be paid for the period of suspension unless in the opinion of the Industrial Commission the circumstances justified the refusal, in which case, the Industrial Commission may order a change in the medical or hospital service.

N.C. Gen. Stat. § 97-25 (2009).

We note that employee misstates the applicable standard of review in his brief:

> If a finding of fact by the Full Commission is clearly contradictory with it's [sic] Conclusion of law, then such contradiction should in all cases be held in the light most favorable to the plaintiff, or to do otherwise would subject the plaintiff to a standard impossible to achieve for inability to measure what standard the Full Commission has based it's [sic] conclusion on. [sic] does not go on to fully explain the basis for such contradiction.

We are unable to determine exactly what employee means by this statement. Employee then states: "Further [sic] if uncontradicted evidence is set out as findings in the deputy's ruling but given no consideration at all then reversible error has occurred." Employee then appears to argue that the Full Commission erred in not adopting certain findings and/or conclusions of the deputy commissioner. As noted above, the Full Commission is not bound by any of the findings or conclusions of the deputy commissioners, nor is it bound by the deputy commissioner's credibility determinations. *See Adams*, 349 N.C. at 681, 509 S.E.2d at 413 ("Whether the full Commission conducts a hearing or reviews a cold record, N.C.G.S. § 97-85 places the ultimate fact-finding function with the Commission--not the hearing officer. It is the Commission that ultimately determines credibility, whether from a cold record

or from live testimony."); *Robinson*, 57 N.C. App. at 627, 292 S.E.2d at 149 ("The full Commission, upon reviewing an award by the hearing commissioner, is not bound by findings of fact supported by the evidence, but may reconsider evidence and adopt or reject findings and conclusions of the hearing commissioner."). Thus, employee's arguments on this point are misplaced. Employee did not challenge any of the Commission's findings and his brief does not argue that the conclusions made by the Commission are not supported by its findings of fact. Thus, employee does not bring forward any issue for our review. However, even had employee made an argument that the Commission's findings did not support its conclusion that his total disability compensation was properly suspended for a failure to comply with the Commission's 1 November 2005 order, he would not prevail.

Here, by order dated 1 November 2005, employee was ordered to comply with all reasonable and prescribed treatment as provided by employer. The order also cautioned employee that failure to comply would bar him from further compensation. The Commission's finding 9 notes that employee's treating physician recommended that employee undergo a comprehensive pain management program including a psychological evaluation. Findings 11 and 12 document employee's refusal to cooperate with two therapists assigned to work with him. Findings 13-14 document employee's refusal to schedule and complete a vocational assessment despite multiple attempts by vocational rehabilitation staff to do so during February and March 2007. Finding 14 also notes employee's "violent reactions and temper" in

his interactions with a member of the vocational rehabilitation staff trying to reschedule the assessment. Finding 15 notes that the Commission authorized suspension of employee's compensation from 14 May 2007 until such time as he completed the assessment. Finding 16 states that employee finally completed the assessment in August 2007 but that he had made little or no effort during the assessment and was belligerent. Finding 17 states that employee underwent a neuro-psychiatric evaluation in November 2007 at which the examining physician noted "exaggeration and fabrication by" employee. These findings support the Commission's finding and conclusion that employee willfully and intentionally refused to comply with reasonable treatment and rehabilitation efforts and that as a result, pursuant to N.C.G.S. § 97-25, his benefits were subject to suspension. Employee's arguments on this issue are overruled.

II

Employee next argues that the Full Commission erred in concluding that he was no longer totally disabled from any employment and was therefore not entitled to further payment of total disability compensation. We disagree.

Again, employee misstates our standard of review on appeal from the Industrial Commission. He acknowledges that in finding 17, which is conclusive on appeal, the Commission states that, following a neuro-psychiatric evaluation, Dr. Thomas Gaultieri determined that employee had no continuing disability as of 28 November 2007. He further acknowledges that this finding supports

the Commission's conclusion that he was no longer disabled. However, employee complains that in reaching this conclusion, the Commission failed to give greater weight to contradictory evidence and failed to judge the credibility of witnesses. This the Commission was free to do. The Industrial Commission is the finder of fact, and this Court does not reweigh evidence or make credibility determinations. *Adams*, 349 N.C. at 681, 509 S.E.2d at 413. Even where there is evidence to support contrary findings of fact, on appeal we will not disturb the Commission's findings if any competent evidence supports them. *Calloway*, 137 N.C. App. at 484, 528 S.E.2d at 400. Instead, our review of an opinion and award from the Commission is limited to determining whether competent evidence supports the Commission's findings of fact and whether those findings support the conclusions of law. *Id.*

A large portion of employee's second argument in his brief returns to discussion of the deputy commissioner's opinion and award, which, as noted above, is not before us as employee's appeal is from the opinion and award of the Full Commission. This argument is overruled.

Affirmed.

Judges STEELMAN and BEASLEY concur.

Report per Rule 30(e).