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NO. COA02-369

NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2002

DEBRA HOWELL,
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 567655

WAL-MART STORES, INC.,
Employer,

and

INSURANCE COMPANY OF STATE
OF PENNSYLVANIA,
Carrier,
Defendants.

Appeal by plaintiff from opinion and award entered 15 October 2001 by the North Carolina Industrial Commission. Heard in the Court of Appeals 12 November 2002.

Ralph T. Bryant, Jr. for plaintiff-appellant.

Young Moore and Henderson, P.A., by Dawn Dillon Raynor and Zachary C. Bolen, for defendant-appellees.

EAGLES, Chief Judge.

Debra Howell (“plaintiff”) appeals from the Full Industrial Commission’s opinion awarding her permanent partial disability benefits.

The evidence tends to show the following. Plaintiff was hired by Wal-Mart Stores, Inc. (“defendant”) as a stocker in Fayetteville, North Carolina in 1988. In 1993, plaintiff was

transferred to defendant's store in Morehead City, where she was manager of the pet department. On 22 August 1995, plaintiff injured her back while stocking shelves at defendant's store. Plaintiff's lower back and leg pain became steadily worse over the next few days. Plaintiff saw Dr. C.C. Goodno on 24 August 1995. Dr. Goodno referred plaintiff to Dr. Harold Vandersea, an orthopedic surgeon, who in turn referred plaintiff to Dr. Mark Held, a neurosurgeon. Dr. Held suggested that plaintiff undergo surgery to correct her back problems. On 20 February 1996, Dr. Held performed surgery on plaintiff in order to decompress the nerves in plaintiff's back.

Plaintiff returned to work for defendant on 6 June 1996. Plaintiff worked as a part-time fitting room attendant. After one week of working as a fitting room attendant, plaintiff complained to Dr. Held of significant pain. Dr. Held took plaintiff out of work and ordered her to complete a work hardening program. Once plaintiff completed the hardening program, Dr. Held released plaintiff to work again with restrictions in October 1997.

Dr. Held referred plaintiff to Dr. Christopher Delaney on 7 October 1996. Dr. Delaney is a physiatrist, or a doctor who specializes in physical therapy. Dr. Delaney performed a number of tests on plaintiff to determine the extent of her injuries. He found plaintiff's reflexes to be decreased on both sides, but noted there were several inconsistencies in plaintiff's interview and examination. Dr. Delaney ordered a functional capacity evaluation on 11 November 1996. Plaintiff was found to be "capable of performing sedentary work, including the fitting room position, and it was recommended that her hours be gradually increased until she was working full time."

On 10 December 1996, plaintiff reported to Dr. Held that she did not think she could work any longer because her back pain was increasing. Dr. Held gave her a return to work note, but limited plaintiff to four hours of work per day on Monday, Wednesday, and Friday. Plaintiff

told Dr. Held she suffered less pain from the reduced work schedule. Dr. Held testified that plaintiff had reached maximum medical improvement on 16 January 1997.

Plaintiff continued to work as a fitting room attendant until May 1997. Defendant moved plaintiff to an office job in May 1997 because of her persistent pain complaints. On 20 May 1997, plaintiff saw Dr. Ira Wentz for a second opinion. Dr. Wentz diagnosed plaintiff with chronic lumbar radiculitis. Dr. Wentz's only change to plaintiff's treatment plan was to suggest that she be allowed to move around more often. Dr. Wentz also recommended that plaintiff undergo pain management therapy.

Plaintiff saw Dr. Delaney again on 15 July 1997. He found several non-physiologic indicators of pain and concluded that plaintiff was significantly exaggerating her symptoms. Dr. Delaney testified that plaintiff was capable of full-time work and had reached maximum medical improvement.

Plaintiff stopped reporting for work in August 1997. In September 1997, plaintiff returned to Dr. Held, who sent her to an anesthesiologist, Dr. George Baylor. Dr. Held also ordered an MRI on plaintiff, which revealed extensive scarring in her lower back. Dr. Baylor began a series of nerve root block injections on 17 December 1997. After plaintiff's second injection on 2 February 1998, she reported relief from pain for several days. A nerve block administered on 24 February 1998 relieved plaintiff's pain as well.

On 5 and 6 February 1998, plaintiff was observed performing vigorous yard work that included "digging, pulling, climbing, bending, lifting, and stooping." A surveillance videotape recorded plaintiff's yard work on those two days. Throughout this activity, plaintiff did not appear to be in discomfort or pain. Plaintiff stated that the nerve root block injection she received on 2 February allowed her to perform these activities without pain.

Dr. Delaney examined plaintiff on 16 March 1998. He found no significant change in her condition. He found some evidence of nerve damage, but also found that plaintiff continued exaggerating her symptoms. As a result, Dr. Delaney did not recommend any further surgical treatment, but instead referred plaintiff to a pain management program. Dr. Held also suggested that plaintiff join a pain management program, and did not change plaintiff's work restrictions.

Defendant admitted liability for benefits under the Workers' Compensation Act. Defendant paid plaintiff compensation from 24 August 1995 until the case was heard before a Deputy Commissioner. At that time, defendant requested that it be allowed to stop paying plaintiff disability payments.

The Full Industrial Commission found that plaintiff had reached maximum medical improvement on 15 July 1997 despite a ten percent permanent partial impairment to her back. The Commission found that defendant had work available for plaintiff that fit her lifting restrictions, so plaintiff was capable of earning pre-injury wages. The Full Commission found that plaintiff was entitled to compensation of \$232.01 per week for thirty weeks beginning on 16 July 1997 for her ten percent permanent partial disability. However, the Commission found that defendant had paid plaintiff benefits in excess of that amount and defendant was entitled to offset future payments against the amount already paid to plaintiff. From this opinion and award, plaintiff appeals.

As a preliminary matter, we note that the brief for plaintiff does not comply with the North Carolina Rules of Appellate Procedure. The Rules state that:

Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or **authority cited, will be taken as abandoned**. The body of the argument **shall contain citations of the authorities** upon which the appellant relies.

N.C. R. App. P. 28(b)(5)(emphasis added). In violation of this rule, plaintiff has failed to cite any statutory or case authority for support of any of the assignments of error argued in her brief. According to the Rules of Appellate Procedure we could deem these assignments of error abandoned by plaintiff. Instead we choose to exercise our discretion to suspend the Rules of Appellate Procedure in order to consider plaintiff's appeal on its merits.

Plaintiff contends that the Industrial Commission erred in finding as a fact that plaintiff was capable of earning pre-injury wages on 15 July 1997 by working as a fitting room attendant for defendant. We disagree.

On appeal of an opinion of the Full Commission, this Court is "limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000).

Here, plaintiff takes exception to the Commission's finding of fact #12, specifically to the portion that states: "The fitting room attendant position provided by defendant was suitable to her capacity and was an actual job within the store that was available on a full-time or part-time basis. Plaintiff has been capable of performing that job throughout the time in question."

Plaintiff argues that the Commission's findings are incorrect because the fitting room attendant position was never offered to plaintiff. Plaintiff's evidence tended to show that she was not capable of performing the job because the fitting room attendant position was not within her work restrictions and would require her to perform tasks not approved by her doctor. In contradiction, defendant offered evidence that the fitting room attendant position was available through the testimony of Ms. Susan Vail, the personnel manager of defendant's store where plaintiff worked before the accident. Although plaintiff is correct when she argues that no

evidence supports the finding that the fitting room attendant job was offered to plaintiff, the offer of a job was not part of finding of fact #12. Further, defendant offered evidence that the fitting room position was within the plaintiff's work restrictions through the testimony of Ms. Vail, in addition to the deposition testimony of Dr. Held and Dr. Delaney.

Plaintiff also excepts to the Commission's finding of fact #14: "Plaintiff . . . had exaggerated her symptoms on examination to the extent that she misrepresented her condition to her physicians. . . . Plaintiff was capable of working on a full-time basis by the time she reached maximum medical improvement."

Plaintiff offers a deposition by Dr. Baylor that states he did not think plaintiff ever exaggerated her symptoms. However, defendant presented conflicting evidence from Dr. Delaney, who stated specifically that on 15 July 1997 he found the following:

I also noted that I felt the patient may well have some residual degree of discomfort, but that it was difficult to assess because there is unquestionably significant symptom exaggeration. As [plaintiff] was not unstable from a musculoskeletal neurologic standpoint, I saw no medical contraindications to her continuing to work. I described her as at maximum medical improvement, and therefore, recommended no further evaluation or treatment interventions.

Despite plaintiff's presentation of evidence that contradicted the Commission's findings of fact #12 and #14, there was competent evidence presented by defendant to support findings of fact #12 and #14. Accordingly, plaintiff's first assignment of error is overruled.

Next plaintiff contends that the Full Commission erred by finding as a fact that her level of activity captured on a videotape undermined her credibility as a witness. We disagree.

Plaintiff disagrees with the Commission's finding of fact #13, which states, in pertinent part:

[O]n 5 February 1998 and 6 February 1998, plaintiff was observed engaging in activities which were quite inconsistent with her reported symptoms. A surveillance videotape shows plaintiff engaged in labor intensive activities,

including digging, pulling, climbing, bending, lifting, and stooping. Plaintiff was in no obvious discomfort during and after these activities. Plaintiff explained her activities by stating that she had recently received a nerve root block, which had helped her considerably. However, the level of activity which plaintiff performed undermines the credibility of her complaints of pain so significant that she cannot return to suitable employment. Plaintiff's explanations to the contrary are not credible.

Plaintiff argues that the Commission improperly disregarded all of the medical evidence presented and relied solely upon the videotape in making this finding of fact. Plaintiff contends that this videotape was not evidence of her ability to work or proof of her lack of pain. Plaintiff testified that she received a nerve root block injection several days before the events recorded in the videotape, and that the injection enabled her to carry on these activities with no pain. Plaintiff also contends that the Commission erred by relying on the testimony of Dr. Delaney regarding her symptom exaggeration in making finding of fact #13.

The Full Commission acts as "the sole judge of the weight and credibility of the evidence." *Deese*, 352 N.C. at 116, 530 S.E.2d at 553. Here, the Commission specifically stated that it did not find plaintiff's explanation of her strenuous activity on 5 and 6 February 1998 to be credible. Plaintiff's presentation of medical evidence to support her contention that the nerve block injection allowed her to perform yard work could also be disregarded by the Commission if the Commission did not consider it credible. In addition, Dr. Delaney testified that plaintiff had exaggerated her symptoms of pain when he examined her on several occasions. Dr. Delaney found indications that plaintiff was exaggerating her pain when he examined her on 7 October 1996 and 15 July 1997, well over a year before she began receiving nerve root block injections. Dr. Delaney also opined that plaintiff was exaggerating her pain when he saw her on 16 March 1998, after she had been given several nerve root injections. Contradicting testimony by other expert witnesses does not render Delaney's opinion incompetent. Since the Commission's

finding of fact was supported by competent evidence, this Court will not disturb the Commission's finding. Accordingly, this assignment of error is overruled.

Plaintiff further contends that the Commission erred because its conclusions of law are not supported by the findings of fact. We disagree.

The Commission determined that plaintiff had reached maximum medical improvement on 15 July 1997. Plaintiff argues that this conclusion is unsupported by the evidence presented because plaintiff still had work restrictions in place forbidding her from working. However, the Commission found as a fact that plaintiff had exaggerated the amount of pain she was suffering. In addition, the Commission found as a fact that plaintiff had reached maximum medical improvement on 15 July 1997 based upon Dr. Delaney's testimony. Because the Commission's conclusions of law are supported by its findings of fact, this Court will not overturn the conclusions of law. We overrule this assignment of error.

For the reasons stated, the opinion and award of the Full Commission is affirmed.

Affirmed.

Judges GREENE and MARTIN concur.

Report per Rule 30(e).