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NO. COA12-868  
NORTH CAROLINA COURT OF APPEALS

Filed: 5 February 2013

NANCY HOLLOWAY,  
Employee, Plaintiff,

v.

North Carolina  
Industrial Commission  
I.C. No. 574777

CV INDUSTRIES, INC.,  
Employer,

AEGIS ADMINISTRATIVE SERVICES,  
TPA,  
Carrier, Defendants.

Appeal by defendants from opinion and award filed 17 May 2012 by the North Carolina Industrial Commission. Heard in the Court of Appeals 12 December 2012.

*Charles G. Monnett III & Associates, by Lauren O. Newton, for plaintiff appellee.*

*Rudisill White & Kaplan, P.L.L.C., by Stephen Kushner, for defendant appellants.*

McCULLOUGH, Judge.

CV Industries ("defendant employer") and Aegis Administrative Services ("defendant carrier," collectively, "defendants"), appeal from an opinion and award of the North

Carolina Industrial Commission ("the Commission") ordering defendants to continue payment of temporary total disability benefits to Nancy Holloway ("plaintiff") and to compensate plaintiff for past and future attendant care services. We affirm in part and remand in part.

### I. Background

Plaintiff is a sixty-two-year-old woman with a date of birth of 21 May 1950. Plaintiff worked in the textile industry for approximately thirty years and worked for defendant employer from the late 1990's until 2005.

On 16 November 2005, plaintiff sustained an injury by accident arising out of and in the course of her employment with defendant employer when she was struck by a forklift-type vehicle and was dragged approximately twenty feet. As a result of this incident, plaintiff sustained a traumatic brain injury and multiple orthopedic injuries to other body parts, including her left ankle, left hand, left leg and knee, right foot, and back. On 17 November 2005, Dr. Karen Rives ("Dr. Rives") diagnosed plaintiff with a left ankle fracture, a meniscus tear to the left knee, metatarsal fractures in the right foot, and a ligament tear in the area of the third metacarpal phalangeal joint in the left hand.

Defendants admitted plaintiff's right to compensation by filing a North Carolina Industrial Commission Form 60 dated 6 July 2006 and commenced paying temporary total disability benefits to plaintiff beginning 17 November 2005. Plaintiff was still receiving weekly temporary total disability benefits at the time of the hearing in the present matter.

Following her injury, plaintiff continued to treat with Dr. Rives for a number of orthopedic complaints, including left knee pain, left ankle pain, and back pain. On 29 March 2007, Dr. Rives opined that plaintiff was at maximum medical improvement from an orthopedic standpoint and released her to sedentary work, sitting six hours per day during an eight-hour shift and lifting no more than ten pounds.

As a result of her traumatic brain injury, plaintiff suffered significant, permanent cognitive and psychological problems, including depression, anxiety, difficulty with concentration and short-term memory impairment, for which she received extensive treatment from Dr. David Deas ("Dr. Deas"), Dr. Alexander Manning ("Dr. Manning"), Dr. Gary Indenbaum ("Dr. Indenbaum"), and cognitive therapist Pat Benfield ("Benfield"). Defendants accepted the compensability of plaintiff's head injury and related cognitive deficits and psychological problems

and provided plaintiff with ongoing medical treatment for those impairments.

In December 2005, plaintiff hired a family friend, Sylvia Keyes ("Keyes"), to provide twenty-four-hour attendant care at a daily rate of \$100.00. Keyes cooked and cleaned for plaintiff and assisted plaintiff in taking baths, getting in and out of bed, and using the bathroom. Keyes also transported plaintiff to and from various medical appointments and handled plaintiff's finances.

Beginning 2 August 2007, plaintiff returned to Dr. Mark McGinnis ("Dr. McGinnis") with new complaints of diffuse pain throughout her left hand. On 10 August 2009, plaintiff also began treating with Dr. Herman Gore ("Dr. Gore") for complaints of neck and low back pain radiating into her upper and lower extremities. Plaintiff sought additional compensation for this treatment.

On 9 March 2009, plaintiff filed North Carolina Industrial Commission Form 33, Request that Claim be Assigned for Hearing, contending that defendants refused to accept her left hand injury as a compensable injury. Defendants responded by denying compensability for plaintiff's left hand injury and contending that defendants had paid all benefits owed to plaintiff relating

to her 16 November 2005 compensable injury. Defendants also requested a determination as to plaintiff's disability, contending that plaintiff had reached maximum medical improvement.

On 12 May 2010, Deputy Commissioner George R. Hall, III ("Deputy Commissioner Hall") entered an opinion and award addressing compensation to plaintiff for her head, back, and left hand injuries, as well as reimbursement for attendant care services that had been provided to plaintiff by Keyes. Deputy Commissioner Hall denied plaintiff's claim for further medical compensation, having concluded that plaintiff's ongoing orthopedic complaints were not causally related to her compensable injury. In addition, Deputy Commissioner Hall denied plaintiff's claim for attendant care benefits, having concluded that plaintiff had not proved she was in need of attendant care services or that she was entitled to reimbursement for past attendant care services. Plaintiff appealed Deputy Commissioner Hall's opinion and award to the Full Commission on 27 May 2010.

On 10 December 2010, plaintiff moved the Commission to supplement the record with additional vocational and medical reports, to which defendants objected. On 23 February 2011, the

Commission ordered plaintiff to undergo a comprehensive neuropsychological evaluation by Dr. Manning and assigned a nurse from the Industrial Commission Nurses' Section to assess plaintiff's current living and home care arrangements. In addition, the Commission reopened the record for the receipt of additional evidence from either party, including "additional medical records, vocational reports and depositions, if needed[.]"

Meanwhile, on 31 May 2011, plaintiff presented to Dr. Peter F. Giallanza complaining that she suffered from possible pelvic floor dysfunction, which she believed was causally related to her 16 November 2005 injury by accident. Nerve conduction testing and an EMG revealed the presence of a bilateral sacral nerve injury.

On 28 June 2011, plaintiff submitted additional medical evidence for inclusion in the record. On 28 October 2011, the Commission allowed the parties sixty days to take additional depositions, during which the parties took the depositions of Dr. Manning, Dr. John Edmiston, and Dr. Giallanza. These depositions, in addition to the depositions of Dr. Deas, Dr. Gore, Dr. McGinnis, Dr. Indenbaum, Benfield, and Dr. Cornelius

Okonkwo, plaintiff's family physician, were received into evidence by the Commission.

On 17 May 2012, the Commission entered an opinion and award reversing in part the opinion and award of Deputy Commissioner Hall. The Commission denied plaintiff's claim for further medical compensation for her ongoing left hand, back, and sacral nerve injury/pelvic floor dysfunction complaints, having concluded that those complaints were not causally related to her compensable injury. However, the Commission concluded that plaintiff had proved that since her 16 November 2005 injury, she has needed attendant care services and that she will continue to need attendant care services in the future. The Commission ordered that the past attendant care provided by Keyes and paid for by plaintiff be reimbursed by defendants and that defendants provide for future attendant care services for plaintiff. The Commission further ordered defendants to continue to pay plaintiff temporary total disability benefits in addition to certain medical treatment specified by the Commission. On 23 May 2012, defendants gave timely notice of appeal from the Commission's opinion and award to this Court.

## II. Standard of Review

Our review of an opinion and award of the Industrial Commission "is limited to consideration of whether competent

evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law." *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008). In reviewing the Commission's findings of fact, "[t]his 'court's duty goes no further than to determine whether the record contains any evidence tending to support the finding.'" *Id.* (quoting *Anderson v. Construction Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)). In weighing the evidence, "[t]he Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Anderson*, 265 N.C. at 433-34, 144 S.E.2d at 274. However, we review the Commission's conclusions and other issues of law *de novo*. *Boney v. Winn-Dixie, Inc.*, 163 N.C. App. 330, 331-32, 593 S.E.2d 93, 95 (2004).

### III. Discussion

Defendants present four arguments on appeal for this Court's review. First, defendants argue the Commission exceeded its statutory authority to determine the issues between the parties when the Commission made findings of fact and conclusions of law addressing issues that defendants allege were outside the scope of the hearing. Specifically, defendants contend the Commission erred in addressing (1) defendants' obligation to provide medical treatment for conditions which defendants had previously admitted were compensable and for which defendants are voluntarily paying,



(2) defendants' authorization and payment for prescriptions, and (3) defendants' obligation to continue to pay to plaintiff temporary total disability benefits. Second, defendants argue the Commission failed to consider the testimony of and documentary evidence submitted by Darrell Latham ("Latham"), a private investigator hired by defendants. Defendants contend that, although the Commission retains the discretion to determine the credibility of the witnesses, the Commission cannot wholly exclude this evidence from the record. Third, defendants argue the Commission's findings of fact addressing defendants' obligation to pay plaintiff for attendant care services are internally inconsistent, are not supported by competent evidence in the record, and do not support the Commission's conclusions of law. Finally, defendants argue that if the Commission was statutorily authorized to determine plaintiff's disability, the Commission failed to make a final determination of plaintiff's disability that is consistent with the Commission's findings of fact. We address each of defendants' arguments in turn.

*A. Statutory Authority of Commission to Determine Issues Presented*

As to this issue, defendants have not specifically identified which findings of fact and conclusions of law they are challenging on appeal. Based on defendants' arguments, we have determined that defendants appear to challenge the following:

[Finding of Fact] 50. Plaintiff needs ongoing medical treatment for her compensable injuries to her brain/head, left knee, left ankle and causally related conditions. Defendants are obligated to continue to pay for such treatment.

. . . .

[Conclusion of Law] 2. Defendants are obligated to provide such medical treatment as is reasonably required to effect a cure, provide relief or lessen Plaintiff's period of disability for all of her compensable conditions, including any medically prescribed YWCA membership. The treatment and evaluations provided to Plaintiff from Dr. David Deas, Dr. Alexander Manning, Dr. Gary Indenbaum, and cognitive therapist Pat Benfield was reasonably required to either effect a cure, provide relief or lessen Plaintiff's disability and Defendants are obligated to pay for this treatment.

[Conclusion of Law] 3. Dr. Deas and Dr. Okwonko are authorized as Plaintiff's treating physicians. Defendants shall not require authorization for medical prescriptions prescribed for Plaintiff's compensable injuries by her authorized treating physicians, except for the initial approval of a new prescription and a decision on approval of a new prescription shall be given within three business days.

(Citations omitted.) Defendants contend that these issues were not in dispute and that the Commission exceeded its statutory authority in ruling on these matters.

Pursuant to section 97-84 of the Workers' Compensation Act:

The Commission or any of its members shall hear the parties at issue and their

representatives and witnesses, and shall determine the dispute in a summary manner. The Commission shall decide the case and issue findings of fact based upon the preponderance of the evidence in view of the entire record.

N.C. Gen. Stat. § 97-84 (2011). "It is the duty and responsibility of the full Commission to make detailed findings of fact and conclusions of law with respect to every aspect of the case before it." *Reaves v. Industrial Pump Serv.*, 195 N.C. App. 31, 35, 671 S.E.2d 14, 18 (2009) (quoting *Joyner v. Rocky Mount Mills*, 92 N.C. App. 478, 482, 374 S.E.2d 610, 613 (1988)). "The Commission must 'decide all of the matters in controversy between the parties.'" *Id.* (quoting *Vieregge v. N.C. State Univ.*, 105 N.C. App. 633, 638, 414 S.E.2d 771, 774 (1992)).

Here, although defendants admitted compensability as to plaintiff's left knee and ankle injuries and had been paying temporary total disability benefits and related medical compensation to plaintiff, the record reveals that in response to plaintiff's request for a hearing addressing the compensability of her left hand injury, defendants requested a determination by the Commission as to plaintiff's continuing disability. Indeed, Deputy Commissioner Hall's opinion and award indicated that whether plaintiff is disabled under the Workers' Compensation Act and the extent of benefits that plaintiff may be entitled to thereunder were issues presented for hearing by defendants. Accordingly, those

findings of fact and conclusions of law addressing plaintiff's continuing disability and defendants' liability for compensation to plaintiff therefor were properly addressed by the Commission in its opinion and award.

In addition, pursuant to section 97-25 of the Workers' Compensation Act, "[m]edical compensation shall be provided by the employer." N.C. Gen. Stat. § 97-25 (2011). Medical compensation is defined to include medical care and medicines that "may reasonably be required to effect a cure or give relief[.]" N.C. Gen. Stat. § 97-2(19) (2011). According to this subsection, "[i]f the Industrial Commission determines that continuing medical treatment is necessary, it may, in its discretion, order such treatment and require the employer to pay for it." *Cooke v. P.H. Glatfelter/Ecusta*, 130 N.C. App. 220, 224, 502 S.E.2d 419, 422 (1998).

Here, the record reveals certain physicians and others involved in plaintiff's treatment expressed difficulty obtaining authorization for medicines prescribed to plaintiff. Specifically, Benfield testified that refills of a certain cognitive medication prescribed for treatment of plaintiff's brain injury were not authorized by defendants, and Dr. Deas likewise testified as to issues plaintiff had encountered in obtaining authorization for certain medications he had prescribed to treat plaintiff's

cognitive impairments as a result of her brain injury. Dr. Deas testified that if a patient is "suddenly withdrawn from those type[s] of medications[,] . . . [the patient is] going to feel a whole lot worse real quickly." Thus, we discern no abuse of discretion by the Commission in awarding plaintiff compensation by defendants for her medical prescriptions and imposing a time limitation for approvals of new medicines in light of the evidence presented to the Commission in this case.

*B. Final Determination of Plaintiff's Disability*

In light of our conclusion that the Commission properly addressed the extent of plaintiff's disability and her entitlement to compensation therefor, we next address defendants' contention that the Commission erred in failing to make a final determination that plaintiff is permanently and totally disabled consistent with its findings of fact. Regarding the extent of plaintiff's disability, the Commission made the following findings of fact and conclusions of law:

[Finding of Fact] 30. As a direct result of her November 16, 2005 accident, Plaintiff has suffered significant, permanent cognitive and psychological problems, including depression, anxiety, difficulty with concentration and short-term memory [impairment], for which she has received extensive treatment from Dr. David Deas, Dr. Alexander Manning, Dr. Gary Indenbaum, and cognitive therapist Pat Benfield. . . .

. . . .

[Finding of Fact] 34. As a result of the February 23, 2011 Order of the Full Commission, Plaintiff underwent a comprehensive neuropsychological evaluation by Dr. Manning on May 31, 2011. Dr. Manning opined that Plaintiff's condition had deteriorated since his 2006 evaluation and that, although her overall intelligence quotient remained almost identical to the 2006 results, she showed a decrease in verbal IQ and in her ability to concentrate or pay attention to memory-related tasks. . . . Dr. Manning recommended that Plaintiff undergo an MRI of her brain to determine the structural integrity of the brain.

. . . .

[Finding of Fact] 51. With respect to Plaintiff's disability, Dr. Deas opined that he did not think Plaintiff was capable of working or maintaining full-time competitive employment because of her continued memory deficits. Dr. Manning agreed with Dr. Deas and opined that Plaintiff's memory deficits prevented her from engaging in most forms of gainful employment.

[Finding of Fact] 52. Vocational rehabilitation efforts to date have been unsuccessful due to Plaintiff's physical and mental limitations. Reports by the vocational rehabilitation case manager indicate that while Plaintiff is at maximum medical improvement from an orthopedic standpoint, her causally related cognitive and emotional impairments have hindered her efforts to return to work. . . .

[Finding of Fact] 53. Based upon the competent medical and vocational evidence of

record, the Full Commission finds that as a result of her physical limitations and psychological and cognitive conditions resulting from her November 16, 2005 injury by accident, Plaintiff is medically incapable of earning wages in any employment and it would also be futile for Plaintiff to seek employment.

. . . .

[Conclusion of Law] 14. In the instant case, Plaintiff has proven through expert medical and vocational evidence that due to her psychological and cognitive problems and her physical limitations resulting from her compensable injury, she is medically unable to return to her pre-injury job or to any other employment and that it would be futile for her to seek employment.

. . . .

[Conclusion of Law] 16. Plaintiff is entitled to ongoing temporary total disability benefits at the weekly rate of \$500.03 until further Order of the Full Commission.

(Citations omitted.)

The Workers' Compensation Act provides compensation for disability dependent as to amount upon whether the plaintiff's disability produces a permanent total, a permanent partial, a temporary total, or a temporary partial incapacity. *Branham v. Panel Co.*, 223 N.C. 233, 235, 25 S.E.2d 865, 867 (1943). Pursuant to section 97-29 of the Workers' Compensation Act, an injured employee may qualify for permanent total disability if the

employee has a "[s]evere brain or closed head injury as evidenced by severe and permanent: a. Sensory or motor disturbances; b. Communication disturbances; c. Complex integrated disturbances of cerebral functioning; or d. Neurological disorders." N.C. Gen. Stat. § 97-29(d)(3) (2011). "Duration is a critical finding necessary to support a compensation award under G.S. 97-29 and 30[.]" *Gamble v. Borden, Inc.*, 45 N.C. App. 506, 508, 263 S.E.2d 280, 281 (1980). Furthermore, this Court has previously held that "'either party can seek a determination of permanent loss of wage-earning capacity.'" *Pait v. Southeastern General Hosp.*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 724 S.E.2d 618, 625 (quoting *Effingham v. Kroger Co.*, 149 N.C. App. 105, 114, 561 S.E.2d 287, 294 (2002)), *disc. review denied*, \_\_\_ N.C. \_\_\_, 726 S.E.2d 831 (2012).

Here, the Commission's findings of fact do not support an award of temporary total disability benefits. Moreover, the Commission wholly failed to make a finding of fact specifically addressing the duration of plaintiff's disability. Examining the evidence before the Commission on the issue of the duration of plaintiff's disability, the record appears amply developed for the Commission to find and conclude that plaintiff's disability is permanent. Dr. Manning testified that plaintiff was believed to have suffered a mild traumatic brain injury from her accident and opined that plaintiff suffers from an amnesic disorder. Dr.



Manning testified that, following plaintiff's accident, upon testing her cognitive functioning in 2006, he found severe impairment in plaintiff's delayed recall memory and that her immediate recall memory was mildly deficient. Dr. Manning testified that upon further testing of plaintiff in 2011, he found plaintiff's cognitive problems were worse than they had been in 2006 following her accident. Dr. Manning testified that her cognitive impairments are consistent with her inability to perform daily activities and that her deficient memory functioning will likely prevent her from engaging in most forms of gainful employment.

In addition, Dr. Deas testified as to his opinion that plaintiff's brain injuries included dementia and anxiety and depressive disorders. Dr. Deas testified that these injuries are permanent and cannot be cured. Dr. Deas further testified that because of plaintiff's memory deficits, she is not capable of maintaining full-time competitive employment. Benfield likewise testified as to her opinion that she does not foresee plaintiff going back to work.

The Commission's findings of fact, as detailed above, similarly indicate that plaintiff's disability is permanent. Indeed, the Commission's findings of fact concerning plaintiff's short-term memory loss, her loss of verbal IQ, and her other

cognitive impairments resulting from her traumatic brain injury appear to implicate all subdivisions of N.C. Gen. Stat. § 97-29(d)(3). Nonetheless, the Commission failed to make any specific findings of fact or conclusions of law as to the duration of plaintiff's disability. "[S]pecific findings by the Commission with respect to the crucial facts, upon which the question of plaintiff's right to compensation depends, are required.'" *Gamble*, 45 N.C. App. at 508, 263 S.E.2d at 281-82 (quoting *Morgan v. Furniture Industries, Inc.*, 2 N.C. App. 126, 128, 162 S.E.2d 619, 620 (1968)). Accordingly, we must remand so that the Commission may make findings of fact and conclusions of law regarding whether plaintiff's total disability continues to be temporary or has become permanent under the criteria of N.C. Gen. Stat. § 96-29(d)(3) in light of the evidence presented.

*C. Commission's Consideration of All Competent Evidence*

"The Commission may not wholly disregard competent evidence; however, as the sole judge of witness credibility and the weight to be given to witness testimony, the Commission may believe all or a part or none of any witness's testimony. The Commission is not required to accept the testimony of a witness, even if the testimony is uncontradicted. Nor is the Commission required to offer reasons for its credibility determinations."

*Biggerstaff v. Petsmart, Inc.*, 196 N.C. App. 261, 265, 674 S.E.2d 757, 761 (2009) (quoting *Hassell v. Onslow County Bd. of Educ.*, 362

N.C. 299, 306-07, 661 S.E.2d 709, 715 (2008) (internal quotation marks and citations omitted)). "[B]efore finding the facts, the Industrial Commission must consider and evaluate all of the evidence. Although the Commission may choose not to believe the evidence after considering it, it may not wholly disregard or ignore competent evidence." *Lineback v. Wake County Board of Commissioners*, 126 N.C. App. 678, 680, 486 S.E.2d 252, 254 (1997). Here, defendants argue that the record reveals the Commission wholly disregarded the testimony of and documentary evidence submitted by Darrell Latham, a private investigator hired by defendants to monitor plaintiff's activities during her disability. There appears to be no dispute between the parties that defendants did, in fact, submit this evidence to the Commission for consideration.

Defendants are correct that, according to the opinion and award of the Commission, defendants' evidence from Latham was not received into evidence, and there is no indication by the Commission that it considered this evidence in any way, although all other depositions and medical evidence were received into evidence per the Commission's opinion and award.

The Commission's findings of fact and receipt of evidence likewise make no definitive indication that the Commission considered or weighed Latham's evidence in making its determination

as to plaintiff's need for attendant care services, the issue to which Latham's evidence was relevant. Thus, we must conclude the Commission impermissibly disregarded that evidence and committed error in doing so. *Lineback*, 126 N.C. App. at 681, 486 S.E.2d at 254; *see also Jenkins v. Easco Aluminum Corp.*, 142 N.C. App. 71, 79, 541 S.E.2d 510, 515 (2001). Accordingly, we must remand to the Commission for consideration of defendants' evidence and the entry of appropriate findings of fact and conclusions of law after consideration of such evidence. *Weaver v. American National Can Corp.*, 123 N.C. App. 507, 511, 473 S.E.2d 10, 12 (1996); *Lineback*, 126 N.C. App. at 683, 486 S.E.2d at 255.

*D. Attendant Care Services*

From the record, it appears that the Commission's decision to award compensation for past attendant care services provided by Keyes to plaintiff was largely dependent on testimony given by plaintiff and Keyes. Because the Commission's credibility determinations may differ in light of its consideration of Latham's evidence on remand, we need not address defendants' remaining argument on appeal concerning the Commission's findings of fact, conclusions of law, and award regarding reimbursement to plaintiff for past attendant care services.

IV. Conclusion

We hold plaintiff's ongoing disability, including her entitlement to disability benefits under the Workers' Compensation Act, and defendants' liability to compensate plaintiff for her disability, including authorization for prescription medicines, was properly before the Commission, and the Commission had statutory authority to make those determinations. However, despite the Commission's findings of fact indicating that plaintiff's disability is permanent and total, the Commission wholly failed to specifically address the duration of plaintiff's disability and summarily awarded plaintiff ongoing temporary total disability benefits. Therefore, we remand to the Commission for entry of findings of fact based on the record evidence and conclusions of law addressing the duration of plaintiff's disability.

In addition, the record reveals the Commission failed to consider defendants' evidence consisting of deposition testimony and supporting documents from Latham, and the Commission erred in disregarding this evidence. Therefore, we likewise remand to the Commission for consideration of defendants' evidence and the entry of appropriate findings of fact and conclusions of law after consideration of all the record evidence.

Affirmed in part, remanded in part.

Judges STEELMAN and STEPHENS concur.

Report per Rule 30(e).