NO. COA03-116

NORTH CAROLINA COURT OF APPEALS

Filed: 17 August 2004

LINDA E. SHOFFNER,
Employee,
Plaintiff-Appellant,

v.

North Carolina Industrial Commission
I.C. File No. 619730

WAL-MART STORES, INC.,
Employer,

and

INSURANCE COMPANY OF THE
STATE OF PENNSYLVANIA,
Carrier,
Defendants-Appellees.

Appeal by plaintiff from opinion and award entered 26 November 2002 by the North Carolina Industrial Commission. Heard in the Court of Appeals 30 October 2003.

Kathleen G. Sumner, for plaintiff-appellant.

Young Moore and Henderson P.A., by Jeffrey T. Linder and Zachary C. Bolen, for defendants-appellees.

McGEE, Judge.

Linda E. Shoffner (plaintiff) appeals from an opinion and award of the North Carolina Industrial Commission (the Commission) entered 26 November 2002 granting plaintiff permanent partial disability benefits for injury to her right arm but denying benefits for her myofascial pain syndrome.

The evidence before the Commission tended to show that plaintiff was working for Wal-Mart Stores, Inc. (employer) as a customer service manager on 26 February 1996. Plaintiff was injured when she was struck by a shopping cart that was pushed by a child. The cart hit plaintiff on her left side, causing her to fall into other carts before falling to the floor on her right side. After the accident, employer assigned plaintiff to a slow register for the afternoon where she could work using her left hand. As she attempted to lift a bag of dog food, she felt something "pull in [her] chest." Due to the pain, plaintiff finished the remainder of the workday by doing work-related computer programs.

Plaintiff went to the emergency room the following morning and was given muscle relaxants and a pain reliever. Plaintiff stayed home from work for the next "two or three days." When plaintiff returned to work, Wal-Mart personnel sent her to PrimeCare where she was treated with heating pads and cold packs. Plaintiff had multiple appointments with PrimeCare from 5 March 1996 until 9 April 1996. PrimeCare diagnosed plaintiff as having injuries consisting of chest wall muscle strain, chest wall neuralgia, pectoral strain, and chest myofascial pain.

PrimeCare referred plaintiff to Dr. W. Dan Caffrey (Dr. Caffrey). However, plaintiff's treatment by PrimeCare did not cease at this point. Rather, plaintiff returned to PrimeCare on 21 December 1998 and continued treatment there until 28 April 2000. Dr. Caffrey saw plaintiff on 11 April 1996 and several more times through 17 October 1996. Dr. Caffrey initially diagnosed plaintiff as having "[a]rm and shoulder and thoracic strain." In subsequent visits, Dr. Caffrey described plaintiff's condition as "more of a fibromyalgia type complaint" and a "fibrous tissue type pain."

Dr. Caffrey referred plaintiff to a neurologist, Dr. Jeffrey J. Schmidt (Dr. Schmidt). Dr. Schmidt treated plaintiff from 24 September 1996 until 5 November 1998. Dr. Schmidt's initial impression was that plaintiff suffered from "musculoskeletal pain involving her right anterior chest and posterior shoulder region." Dr. Schmidt found "no definite evidence of a neuropathic problem[.]" In March 1997, Dr. Schmidt first noted that plaintiff's symptoms had a "strong myofascial component." Dr. Schmidt determined on 13 September 1998 that plaintiff had an eight percent impairment of her right arm but noted he was not familiar with the North Carolina Workers' Compensation Permanent Partial Disability Schedule Numbers.

Throughout this process, plaintiff underwent three Independent Medical Examinations (IMEs). Plaintiff was seen by Dr. Mark C. Yates (Dr. Yates), an orthopedist, for the first IME on 24 February 1998. Dr. Yates determined plaintiff had "persistent complaints of chest wall pain with normal diagnostic studies" and that he could not assign her a disability rating. Dr. Michael Gwinn (Dr. Gwinn) conducted another IME on 15 July 1999. Dr. Gwinn concluded that he could not "definitively relate [plaintiff's] current symptoms to the 2/26/96 injury" and "that myofascial pain syndrome cannot be objectively demonstrated." The third IME was conducted by Dr. Ethan Wiesler (Dr. Wiesler) on 8 November 2000. Dr. Wiesler focused primarily on the wrist pain but noted plaintiff "suffered from [r]ight upper extremity pain of unknown etiology."

A deputy commissioner entered an opinion and award on 16 October 2001 denying plaintiff's claims for compensation for both a wrist/hand injury and for myofascial pain syndrome. Plaintiff appealed to the Commission. The Commission reversed a portion of the deputy commissioner's award and concluded that the wrist/hand injury was compensable. However, the Commission found that plaintiff's myofascial pain syndrome was not a direct and natural result of, or causally related to, her 26 February 1996 injury by accident. Therefore, the

Commission concluded plaintiff was not entitled to medical treatment or permanent partial disability compensation for the myofascial pain syndrome. Plaintiff appeals.

Plaintiff argues in assignment of error number nine that the Commission committed reversible error when it failed to prophylactically exclude the tainted testimony of Dr. Schmidt due to *ex parte* communications. Plaintiff states in her brief that "defendants sent ex parte letters to the treating physicians, either questioning their medical judgment, denying their ordered medical treatment, or called and spoke with the treating physician to further limit medical treatment." We note that plaintiff failed to pinpoint any specific documents or testimony in the record to support her assertions. However, after examining the record, we found three potential documents which could form the basis of plaintiff's argument.

The first two documents are letters which were sent to Dr. Schmidt from the claims specialist handling plaintiff's workers' compensation claim. The letters were dated 26 March 1998 and 21 August 1998 and both asked Dr. Schmidt whether plaintiff had reached "maximum medical improvement," whether plaintiff needed additional treatment to maintain maximum improvement, whether plaintiff sustained permanent disability, and whether plaintiff had returned to work. In response to the March letter, Dr. Schmidt indicated that plaintiff had not yet reached maximum improvement. However, he indicated in response to the August letter that plaintiff had in fact reached maximum improvement and had an estimated eight percent impairment rating. The third document is a 10 February 2000 letter from the same claims specialist asking Dr. Schmidt for an explanation of how he arrived at the estimated impairment rating for plaintiff.

Plaintiff cites *Porter v. Fieldcrest Cannon, Inc.*, 133 N.C. App. 23, 514 S.E.2d 517 (1999) and *Salaam v. N.C. Dept. of Transportation*, 122 N.C. App. 83, 468 S.E.2d 536 (1996) as

support for her argument that Dr. Schmidt's testimony should have been excluded. In *Salaam*, the plaintiff had injured his back and requested a hearing for additional benefits. *Salaam*, 122 N.C. App. at 84-85, 468 S.E.2d at 537. Before the parties deposed the plaintiff's surgeon, the defendant's counsel engaged in an *ex parte* conversation with the surgeon. *Salaam*, 122 N.C. App. at 85, 468 S.E.2d at 537. The plaintiff's counsel objected to the surgeon's deposition based on this alleged inappropriate contact. *Id*. However, the deputy commissioner and the Commission both admitted the deposition testimony. *Id*. On appeal, our Court concluded that it was error to admit the surgeon's deposition testimony due to the non-consensual *ex parte* contact. *Id*. at 88, 468 S.E.2d at 539. The decision was based on the rule in *Crist v. Moffatt*, 326 N.C. 326, 389 S.E.2d 41 (1990) which "precludes non-consensual *ex parte* communications during adversarial proceedings." *Salaam*, 122 N.C. App. at 88, 468 S.E.2d at 539. The *Salaam* court noted its recognition that "'the Commission is not required to strictly apply the rules of evidence applicable to a court of law[.]'" *Id*. (quoting *Tucker v. City of Clinton*, 120 N.C. App. 776, 780, 463 S.E.2d 806, 810 (1995)). Nonetheless, this Court stated

> after careful review of the bases for the *Crist* holding _ patient privacy, the confidential relationship between doctor and patient, and the adequacy of formal discovery devices _ we cannot discern why these policy considerations would not be equally applicable to adversarial proceedings before the Commission.

Salaam, 122 N.C. App. at 88, 468 S.E.2d at 539. Accordingly, the *Salaam* court concluded that the contact was inappropriate and remanded to the Commission with instructions to strike the deposition testimony of the doctor involved in the *ex parte* contact and reconsider the plaintiff's request for additional benefits. *Id*.

Crist was a case concerning a medical malpractice claim. In *Crist*, the defendant's attorney met privately with two of the plaintiff's treating physicians. *Crist*, 326 N.C. at 328, 389

S.E.2d at 43. The plaintiff filed a motion to compel disclosure of these private conversations and requested that the trial court disallow the use of such information at trial. *Id*. at 329, 389S.E.2d at 43. The trial court entered an order concluding these contacts were improper, ordering disclosure, and prohibiting contact between the defendant's counsel and the plaintiff's treating physicians without the knowledge and consent of the plaintiff's attorney or a court order. *Id*. at 329-30, 389 S.E.2d at 43. In affirming this order, our Court concluded

> that considerations of patient privacy, the confidential relationship between doctor and patient, the adequacy of formal discovery devices, and the untenable position in which *ex parte* contacts place the nonparty treating physician supersede defendant's interest in a less expensive and more convenient method of discovery. We thus hold that defense counsel may not interview plaintiff's nonparty treating physicians privately without plaintiff's express consent.

Id. at 336, 389 S.E.2d at 47.

Plaintiff also cites *Porter*, a case in which counsel for the defendant sent a letter *ex parte* to the plaintiff's treating physician inquiring about his opinion regarding the plaintiff's condition. *Porter*, 133 N.C. App. at 30, 514 S.E.2d at 523. The physician "responded to the letter, giving brief opinions, in his own handwriting, as to the causation of plaintiff's condition and continuing problems." *Id*. Based on this inappropriate contact, our Court remanded "to the Commission to review the deposition testimony and exclude from consideration only those portions tainted by the *ex parte* communication." *Id*. at 31, 514 S.E.2d at 523.

Terry v. PPG Indus., Inc., 156 N.C. App. 512, 577 S.E.2d 326, *disc. review denied*, 357 N.C. 256, 583 S.E.2d 290 (2003) is also instructive on the issue of *ex parte* contacts. *Terry* involved a plaintiff who was awarded temporary total disability compensation by the Commission for a work-related injury. *Terry*, 156 N.C. App. at 514 , 577 S.E.2d at 329. The defendants appealed and argued that the "Commission erred in striking the testimony and

stipulated medical records of Dr. Strader based upon his *ex parte* communication with the employer." *Id*. at 515, 577 S.E.2d at 329. The defendants asserted that *Salaam* was not applicable because "Dr. Strader was not a nonparty treating physician" and "the conversation was not with defendant's attorney and [the conversation] did not involve plaintiff's treatment." *Id*. at 515, 577 S.E.2d at 330.

This Court found that although Dr. Strader merely treated the plaintiff through visits he made to the defendant's plant, his role was "that of a treating physician." *Id*. at 516, 577 S.E.2d at 330. The alleged *ex parte* contact occurred between Dr. Strader and one of the defendant's employees, the manager of safety and plant protection. *Id*. The employee showed Dr. Strader a surveillance videotape of the plaintiff, and they had a brief conversation about the video. *Id*. at 516-17, 577 S.E.2d at 330-31. Our Court stated that this contact was improper because it implicated the "'considerations of protecting patient privacy, the confidential relationship between physician and patient and "the untenable position in which *ex parte* contacts place the nonparty treating physician,"' *Pittman*, 132 N.C. App. at 155, 510 S.E.2d at 708 (citation omitted), which *Salaam* protects." *Terry*, 156 N.C. App. at 517-18, 577 S.E.2d at 331. Accordingly, this Court overruled the defendants' assignment of error.

In light of the cases cited above and the policy reasons cited therein, we conclude that the *ex parte* contact between defendant's counsel and Dr. Schmidt was inappropriate. Accordingly, we reverse the opinion and award filed 26 November 2002 and remand this case to the Commission with directions to review Dr. Schmidt's deposition testimony and exclude from consideration those portions tainted by the *ex parte* communication and then reconsider plaintiff's request for compensation for her alleged myofascial pain syndrome.

In light of our holding on this issue, we do not reach the other arguments brought forth by plaintiff.

Reversed and remanded.

Judges HUDSON and CALABRIA concur.

Report per Rule 30(e).