NO. COA01-200

NORTH CAROLINA COURT OF APPEALS

Filed: 5 February 2002

SUSAN KAY ADAMS,
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 628007

BARCALOUNGER,
Employer,

WAUSAU INSURANCE COMPANY,
Carrier,
Defendants.

Appeal by plaintiff from opinion and award of the North Carolina Industrial Commission filed 18 October 2000 and from order filed 11 December 2000. Heard in the Court of Appeals 8 January 2002.

Anderson & Anderson, by Michael J. Anderson, for plaintiff- appellant.

Hedrick, Eatman, Gardner & Kincheloe, LLP, by Jeffrey A. Doyle, for defendant-appellees.

GREENE, Judge.

Susan Kay Adams (Plaintiff) appeals the opinion and award of the Full Commission (the Commission) of the North Carolina Industrial Commission filed 18 October 2000 denying payment of medical expenses for the treatment of Plaintiff's carpal tunnel syndrome, and the Commission's order filed 11 December 2000 denying Plaintiff's motion for a new hearing.**[Note**

1] On 17 June 1997, a deputy commissioner of the Industrial Commission filed an opinion and award in which he determined Plaintiff, during the course and scope of her employment with Barcalounger, had sustained a compensable injury by accident on 18 October 1995, resulting in a herniated cervical disk that caused Plaintiff arm pain. The deputy commissioner found Plaintiff to be totally disabled from 31 October 1995 until 27 May 1996, at which time Plaintiff reached maximum medical improvement and was assigned a ten-percent permanent partial disability rating for her back/neck injury. The deputy commissioner's award was not appealed to the Commission. On 3 October 1997, Plaintiff filed a Form 33 for change of condition, and the matter came before the Commission on 22 March 2000.

Deposition testimony taken for the first and second hearing revealed that Dr. Lucas J. Martinez (Martinez) had released Plaintiff to work with a thirty-pound lifting restriction on 27 May 1996. Between May 1996 and early 1997, Plaintiff's pain in her arms and shoulders worsened. On 6 February 1997, Plaintiff returned to Martinez, who requested a nerve conduction study from Dr. William Deans (Deans). The nerve conduction study, performed on 6 March 1997, led Martinez to conclude Plaintiff had a residual radiculopathy from her disk injury. As a result of these findings, Martinez changed Plaintiff's lifting limitations from thirty pounds to twenty pounds. Martinez testified the reduction in Plaintiff's lifting restrictions was not due to a change in Plaintiff's condition, but due to a change in his knowledge of Plaintiff's condition as it had existed since her accident. He continued to treat Plaintiff until September 1997. During the course of Plaintiff's treatment, Martinez did not believe carpal tunnel syndrome was the cause of Plaintiff's pain. The pain Plaintiff complained of was consistent with her neck injury, although some of the complaints were also of the type a person with mild carpal tunnel syndrome might express.

On 2 October 1997, Plaintiff began treatment with Dr. Scott S. Sanitate (Sanitate). Sanitate believed Plaintiff's problems more likely stemmed from her neck than from any distal extremity. On 7 January 1998, Plaintiff sought treatment from Dr. David E. Tomaszek (Tomaszek), who diagnosed her with severe carpal tunnel syndrome and performed left carpal tunnel release surgery on Plaintiff. Tomaszek determined that part of Plaintiff's problem derived from her neck injury. He also believed Plaintiff's carpal tunnel syndrome was related to Plaintiff's compensable 1995 injury. Tomaszek explained his opinion as follows:

> I am deferring to [Deans'] opinion that [Plaintiff] had carpal tunnel [syndrome] back in 1995. I do not know what Deans thought about [Plaintiff's] clinical condition in 1997. Hypothetical number one, Deans still feels [Plaintiff has] a carpal tunnel despite normal EMGs. If that's the case, then I believe that [Plaintiff's] carpal tunnel has progressed but was caused by her injury.
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> . . . .
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> But there is no question, being fair to everybody here, that a normal EMG and then a grossly abnormal EMG three years later [taken by Tomaszek] is hard to explain on the basis of an injury from 1995. So I need either some clinical input from 1997, which I don't have, or in the absence of that, I have created a scenario which is plausible . . . but which can be challenged by an individual who actually saw and examined [Plaintiff] at the time the second EMG was done.

Tomaszek concluded:

> The big hole in the evidence is that Deans had a clinical impression in 1995 that [Plaintiff] had carpal tunnel despite normal EMG. If Deans had a clinical impression in 1997 that [Plaintiff] still had signs and symptoms consistent with carpal tunnel and despite a normal EMG, then the comments I have given . . . hold true.

In its opinion and award entered 18 October 2000, the Commission found in pertinent part:

4. Plaintiff had returned to [Martinez] in February 1997, with complaints of pain in both arms. [Martinez] ordered x-rays and a myelogram, the results of which led him to conclude that [P]laintiff was suffering from residual radiculopathy from the previous disk surgery. Nerve conduction studies performed by [Deans] in March 1997 revealed normal results. In May 1997, [Martinez] changed [P]laintiff's lifting restriction [from thirty] to twenty pounds due to a revision in his understanding of [P]laintiff's limitations. [Martinez] continued treating [P]laintiff through September 1997 but never diagnosed her with carpal tunnel syndrome.

5. On 2 October 1997, [P]laintiff sought treatment with [Sanitate], a specialist in physical medicine and rehabilitation. At this time, [P]laintiff had continued complaints of extremity pain and neck pain. [Sanitate] assigned [P]laintiff a ten[-]percent permanent partial disability to the spine and thought [P]laintiff's problems stemmed more from her neck rather than from any distal extremity. [Sanitate] did not recommend surgical intervention for [P]laintiff's problems.

6. [Tomaszek], a neurosurgeon, began treating [P]laintiff on 7 January 1998. [P]laintiff had complaints of neck pain, with radiation to the left arm and hand, radiation of pain behind her shoulder blades and into her lower back. EMG studies revealed severe left carpal tunnel syndrome, with no evidence of active nerve root injury coming from the neck. [Tomaszek] ultimately concluded that [P]laintiff's pain was not coming from her neck because the cervical disk surgery, nerve blocks, or a combination of the two had improved that condition. [Tomaszek] recommended that [P]laintiff undergo carpal tunnel release surgery. On 20 July 1998, [Tomaszek] performed left carpal tunnel release surgery on [P]laintiff. [Tomaszek] opined that [P]laintiff's carpal tunnel syndrome was related to her original injury by accident of 18 October 1995 and had progressed since that time. He acknowledged, however, that there was a "hole" in the medical evidence tracing the carpal tunnel in 1998 to [P]laintiff's injury in 1995.

. . . .

8. Plaintiff's severe carpal tunnel syndrome, first diagnosed and confirmed by EMG studies in 1998, was unrelated to [P]laintiff's employment with [Barcalounger] three years earlier. Any symptoms of carpal tunnel syndrome which [P]laintiff had in connection with her employment in 1995 had resolved.

> 9. The greater weight of the evidence fails to prove that [P]laintiff's carpal tunnel syndrome was caused by her 18 October 1995 injury by accident or by her employment with [Barcalounger].

The Commission concluded that "Plaintiff's carpal tunnel syndrome was not caused or aggravated by an injury by accident on 18 October 1995" and Plaintiff was therefore not entitled to payment of medical expenses for the treatment of her carpal tunnel syndrome. On 7 November 2000, Plaintiff filed a motion for a new hearing pursuant to Rule 59 of the North Carolina Rules of Civil Procedure and Rule 702 of the Workers' Compensation Rules of the North Carolina Industrial Commission. The Commission denied this motion on 11 December 2000. Plaintiff subsequently filed a notice of appeal to this Court on 5 January 2000.**[Note 2]**

The dispositive issue is whether the Commission erred in rejecting Tomaszek's opinion that Plaintiff's carpal tunnel syndrome was caused by her 1995 injury.

Appellate review of an opinion and award of the Commission "is limited to a determination of (1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are supported by the findings." *Barham v. Food World*, 300 N.C. 329, 331, 266 S.E.2d 676, 678, *reh'g denied*, 300 N.C. 562, 270 S.E.2d 105 (1980). The Commission is "the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Melton v. City of Rocky Mount*, 118 N.C. App. 249, 255, 454 S.E.2d 704, 708 (citation omitted), *disc. review denied*, 340N.C. 568, 460 S.E.2d 319 (1995).

In this case, Tomaszek testified Plaintiff's carpal tunnel syndrome was caused by her 18 October 1995 injury. His opinion was based on a "[h]ypothetical" and thus a "hole" exists because it "can be challenged by an individual who actually saw and examined [Plaintiff] at the

time the second EMG was done." Tomaszek proffered that in order for his theory to hold up, he would need to know if Deans had a clinical impression that Plaintiff suffered from carpal tunnel syndrome in 1997 "despite a normal EMG." No such evidence was introduced. Thus, the Commission, which is to judge credibility, was well within its authority in rejecting Tomaszek's opinion testimony based on a "'hole' in the medical evidence tracing the carpal tunnel [syndrome] in 1998 to [P]laintiff's injury in 1995." As Plaintiff presented no other evidence on the issue of causation, she failed in her burden of proof, leaving the Commission no choice but to find that "[t]he greater weight of the evidence fails to prove that [P]laintiff's carpal tunnel syndrome [as diagnosed in 1998] was caused by her 18 October 1995 injury." If there is no evidence of causation between the injury and the current condition, there can be no change of condition. *Blair v. Am. Television & Communications Corp.*, 124 N.C. App. 420, 423, 477 S.E.2d 190, 192 (1996) (where an employee seeks to establish a change in condition, the burden is on the employee to prove the causal relationship between the new condition and the injury that is the basis of the award the employee seeks to modify). Accordingly, Plaintiff's additional argument that the Commission erred by failing to address the issue whether Plaintiff's carpal tunnel syndrome was a substantial change of condition under N.C. Gen. Stat. §97-47 also fails.

Plaintiff finally argues that, regardless of whether her carpal tunnel syndrome was related to her 1995 injury, Martinez' reduction of Plaintiff's lifting restrictions from thirty to twenty pounds indicates a change in Plaintiff's condition because the change in her restrictions decreased her earning capacity. There is no evidence this issue was even raised before the Industrial Commission as both the deputy commissioner and the Commission only addressed Plaintiff's carpal tunnel syndrome as the basis of a change in condition. In addition, Plaintiff's assignments of error do not specifically address Plaintiff's lifting restrictions in respect to a

change in condition. *See* N.C.R. App. P. 10(c)(1) ("An assignment of error is sufficient if it directs the attention of the appellate court to the particular error about which the question is made."). In any event, the Commission found, based on competent evidence, that the reduction in Plaintiff's lifting restrictions was "due to a revision in [Martinez'] understanding of [P]laintiff's limitations," not due to a change in her condition. The changed restrictions thus do not constitute evidence of a change in condition under section 97-47. *See McLean v. Roadway Express*, 307 N.C. 99, 103-04, 296 S.E.2d 456, 459 (1982) ("'a continued incapacity of the same kind and character and for the same injury is not a change of condition . . . [,] the change must be actual, and not a mere change of opinion with respect to a pre-existing condition'") (citation omitted).

Affirmed.

Judges HUNTER and TYSON concur.

Report per Rule 30(e).

NOTES

1. Plaintiff did not assign error to the Commission's denial of the motion for a new hearing. We therefore do not address the Commission's 11 December 2000 order. See N.C.R. App. P. 10(a) ("review on appeal is confined to a consideration of those assignments of error set out in the record on appeal").

2. Plaintiff filed her motion for a new hearing approximately twenty days after the Commission had entered its opinion and award. Because the motion was not timely, see N.C.G.S. §1A-1, Rule 59 (1999) (must file motion for a new trial or to amend the judgment "not later than ten days after entry of the judgment"), the thirty-day period in which to file a notice of appeal was not tolled, and Plaintiff's notice of appeal to this Court was therefore untimely, see N.C.R. App. P. 3(c)(3) (if a timely motion is made for relief under N.C. Gen. Stat. §1A-1, Rule 59, "the 30-day period for taking appeal is tolled"); Workers' Comp. R. N.C. Indus. Comm'n 702(1), 1999 Ann. R. N.C. 772 ("The running of the time for filing and serving a notice of appeal is tolled . . . by a timely motion . . . to amend, to make additional findings, or to reconsider the decision."). We nevertheless exercise our discretion and grant certiorari in order to decide this case on the merits. See N.C.R. App. P. 21(a)(1).