NO. COA11-1248
NORTH CAROLINA COURT OF APPEALS

Filed: 5 June 2012

KEITH KENNEDY,
Employee,
Plaintiff,

v.

N.C. Industrial Commission
I.C. Nos. 673731, W04978

MINUTEMAN POWERBOSS,
Employer,

THE HARTFORD and CNA,
Carriers,
Defendants.

Appeal by defendants Minuteman Powerboss and CNA from opinion and award entered 20 June 2011 by the Full Commission.

Heard in the Court of Appeals 22 March 2012.

Scudder & Hedrick, PLLC, by Samuel A. Scudder, for plaintiff-appellee.

Teague Campbell Dennis & Gorham, L.L.P., by J. Matthew Little and Tara D. Muller, for defendant-appellants Minuteman and CNA.

Cranfill Sumner & Hartzog LLP, by Charles "Trey" Collier, III, and Ashley Baker White, for defendant-appellee The Hartford.

ELMORE, Judge.

Minuteman Powerboss (Minuteman) and CNA (together, defendants) appeal from an opinion and award ordering them to pay for Keith Kennedy's medical treatment as well as the attorney fees generated by Kennedy and The Hartford. We affirm.

I. Background

Kennedy worked as a team leader for Minuteman on 23 June 1999, when he began treatment with Dr. James Rice for a back condition that was unrelated to his employment. In August 1999, Dr. Rice performed a discectomy on L3-L5. After the surgery, Kennedy returned to work while continuing treatment with Dr. Rice. On 20 October 2006, Kennedy hurt his back while lifting a piece of equipment at work. Minuteman's insurer, The Hartford, accepted Kennedy's claim and paid for his medical treatment. The next year, on 7 August 2007, Kennedy was involved in a car accident that was unrelated to his employment with Minuteman. Minuteman and The Hartford agreed to compensate Kennedy for the two weeks of work that he missed following the accident as well as to pay Kennedy's remaining medical bills and reimburse his out-of-pocket medical expenses.

On 30 January 2009, Kennedy suffered a new injury to his back, which underlies the present appeal. During the course of

his employment, Kennedy was using a forklift to load a pallet when the forklift hit a desk on the loading dock; Kennedy climbed out of the forklift and attempted to move the desk himself, which resulted in a new injury to his lower back at L4-L5. Dr. Rice opined that this new injury was different from his previous back injuries. He also opined that, before the 2009 injury, Kennedy's back was responding to conservative, non-surgical treatment; however, the 2009 injury made Kennedy's back "worse," requiring surgical intervention.

By January 2009, Minuteman's insurance carrier had changed to CNA. On 6 February 2009, CNA filed a Form 60, admitting that Kennedy's 30 January 2009 injury was compensable. But on 15 April 2009, defendants requested that Kennedy's claim be assigned for a hearing for the following reason:

> At the time the defendant-carrier accepted the compensability of plaintiff's claim it was not aware that plaintiff was taking various prescription medications for an active back injury and/or condition. Defendants therefore request a hearing seeking a determination by the Industrial Commission on what, if any, injury plaintiff suffered as a result of his alleged January 30, 2009 specific traumatic incident. In the alternative, defendants seek a determination of whether plaintiff suffered a specific, traumatic back injury and, if not, defendants seek an Order of the Industrial Commission allowing them to

> withdraw their Form 60 on the grounds of mutual mistake of fact or fraud.

Defendants then amended this request for hearing on 21 September 2009 as follows:

> At the time the defendant-carrier accepted the compensability of plaintiff's claim it was not aware that plaintiff was taking various prescription medications for an active back injury and/or condition. Further, defendant-carrier was not aware that plaintiff's treating surgeon, Dr. James Rice of Sandhills Orthopaedics, had recommended surgery on multiple occasions in the three month period prior to plaintiff's alleged injury. Defendants therefore request a hearing seeking a determination by the Industrial Commission on what, if any, injury plaintiff suffered as a result of his alleged January 30, 2009 specific traumatic incident. In the alternative, defendants seek a determination of whether plaintiff suffered a specific, traumatic back injury and, if not, defendants seek an Order of the Industrial Commission allowing them to withdraw their Form 60 on the grounds of mutual mistake of fact. Defendants expressly withdraw the fraud allegation made in their original Form 33 as, based upon reasonable investigation, sufficient evidence of fraud has not been discovered.

The Deputy Commissioner found that Kennedy had suffered a new injury to his lower back on 30 January 2009 and that he "has a substantial risk" of necessary future medical treatment, including a second back surgery, an ongoing prescription medicine regimen, a comprehensive pain management treatment program, and narcotic addiction treatment. The Deputy

Commissioner concluded that Kennedy's pre-existing, non-disabling back condition was aggravated by the 2009 injury, and therefore Minuteman and CNA were responsible for compensating Kennedy "for the entire resulting disability." The Deputy Commissioner also sanctioned defendants for "stubborn, unfounded litigiousness in regards to their attempt at setting aside the Form 60 filed in this matter" by ordering them to pay the reasonable attorney fees generated by Kennedy and The Hartford.

Defendants appealed to the Full Commission, which issued an opinion and award affirming the Deputy Commissioner's opinion and award and ordering defendants to pay for all of Kennedy's medical care as well as his and The Hartford's attorney fees. The opinion and award includes the following findings of fact central to this appeal:

> 22. The Full Commission finds as fact, based upon the subjective complaints of pain and deposition testimony of Dr. Rice, that Plaintiff's back condition was improving prior to the January 30, 2009 incident. The Full Commission further finds [that,] although surgery was an elective option prior to January 30, 2009, the necessity for surgical intervention at this date is directly related to Plaintiff's compensable event or specific traumatic incident occurring on January 30, 2009.
>
> * * *
>
> 25. Defendant-Employer and Defendant-CNA have continued to prosecute their motion to

> set aside the Form 60 and have continued to litigate the compensability of the claim that they accepted as compensable. Defendant-Employer and Defendant-CNA have failed to offer any credible evidence, legal authority, or competent argument that they are entitled to the relief they seek. The Full Commission finds by the greater weight of the evidence that Defendant-Employer and Defendant-CNA have engaged in stubborn, unfounded litigiousness.
>
> 26. In this claim it is conceded by all parties that the employee's claim is a compensable one; therefore the only issue is which carrier or carriers are liable. Defendant-Employer and Defendant-CNA admitted compensability of the claim via filing of their Form 60, and Defendant-Employer and Defendant-The Hartford joined in Plaintiff's Motion in Opposition to Setting Aside the Form 60.

Defendants now appeal the Full Commission's opinion and award and raise the following arguments: (1) Finding of fact 22 is not supported by competent evidence. (2) The Full Commission applied the wrong legal standard when it determined that CNA was the only carrier responsible for Kennedy's compensation. (3) The Full Commission improperly sanctioned defendants because there were reasonable grounds for defending Kennedy's claim. As to all three arguments, we disagree.

II. Arguments

A. Finding of Fact 22

We first address defendants' contention that the Full Commission improperly found that the 30 January 2009 injury was "directly related to" the necessity of Kennedy's recommended surgery.

> This Court's review is limited to a consideration of whether there was any competent evidence to support the Full Commission's findings of fact and whether these findings of fact support the Commission's conclusions of law. This Court has stated that so long as there is some evidence of substance which directly or by reasonable inference tends to support the findings, this Court is bound by such evidence, even though there is evidence that would have supported a finding to the contrary.

Ard v. Owens-Illinois, 182 N.C. App. 493, 496, 642 S.E.2d 257, 259-60 (2007) (quotations, citations, and emphasis omitted). "The Commission's findings of fact may only be set aside in the complete absence of competent evidence to support them." *Gore v. Myrtle/Mueller*, 362 N.C. 27, 42, 653 S.E.2d 400, 410 (2007) (citation omitted). "Thus, on appeal, appellate courts do not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Id.* at 41, 653 S.E.2d at 409 (quotations and citation omitted).

Here, there is competent evidence to support the challenged finding. Defendants are correct that Dr. Rice equivocated during his deposition, stating at one point that it was equally possible that Kennedy's back injury was caused by the 30 January 2009 incident or that it was caused by the natural progression of his pre-existing back condition. However, Dr. Rice also testified to the following, which, if taken together, support the inference that Kennedy's 30 January 2009 injury was "directly related to" the necessity of his recommended surgery: (1) The herniated disc was a new finding, separate from his previous back injuries. (2) "[I]f the patient says I did some activity recently, as recently as the day before, hour before, minutes before and as a result of that, my back is killing me now, to me that would indicate that *more likely than not* that activity had an effect to cause it." (Emphasis added.) (3) Kennedy's back condition had a history of worsening as the result of certain specific activities. (4) Kennedy's experience of moving the heavy desk and then having excruciating back pain 18 hours later lends "more credence to the way" Kennedy interpreted the injury, which was that moving the desk aggravated his back. (5) After the 30 January 2009 event, Kennedy stated that his back pain was worse than before the

event. (6) Kennedy's back pain was responding to conservative treatment and improving in the months immediately before the 30 January 2009 event. (7) "But for" the 30 January 2009 event, Kennedy could have continued to treat his back pain conservatively, without surgical intervention. (8) A patient who "maintain[s] a very high level of pain despite increasing pain medications . . . probably really need[s] to consider surgical intervention." (9) Following the 30 January 2009 event, Kennedy's pain levels were very high, despite an increase in pain medications.

Taken together, Dr. Rice's deposition testimony is competent evidence to support the challenged finding of fact.

B. CNA is solely responsible for Kennedy's medical treatment.

Defendants argue that the Full Commission should have concluded, as a matter of law, that responsibility for Kennedy's compensation be shared between CNA (Minuteman's insurer on 30 January 2009) and The Hartford (Minuteman's insurer when Kennedy injured his back in 2006 and 2007). Defendants assert that the Full Commission misapplied *Morrison v. Burlington Industries*, 304 N.C. 1, 282 S.E.2d 458 (1981), and instead should have apportioned the medical award pursuant to *Newcomb v. Greensboro*

Pipe Co., 196 N.C. App. 675, 677 S.E.2d 167 (2009). We disagree.

We review the Full Commission's award for an abuse of discretion. *See Newcomb*, 196 N.C. App. at 679, 677 S.E.2d at 169 ("[O]ur Supreme Court has dictated that the Full Commission award 'proper and equitable compensation' and 'has no discretion to make an improper or inequitable award. What constitutes a "proper and equitable award" calls for the exercise of judgment and balancing.'") (quoting *Little v. Penn Ventilator Co.*, 317 N.C. 206, 218, 345 S.E.2d 204, 212 (1986)).

> The abuse of discretion standard of review is applied to those decisions which necessarily require the exercise of judgment. The test for abuse of discretion is whether a decision is manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision. The intended operation of the test may be seen in light of the purpose of the reviewing court. Because the reviewing court does not in the first instance make the judgment, the purpose of the reviewing court is not to substitute its judgment in place of the decision maker. Rather, the reviewing court sits only to insure that the decision could, in light of the factual context in which it is made, be the product of reason.

Id. (quotations and citation omitted).

In *Morrison*, our Supreme Court neatly summarized the relevant portion of its analysis as follows:

> (1) [A]n employer takes the employee as he finds her with all her pre-existing infirmities and weaknesses. (2) When a pre-existing, *nondisabling, non-job-related* condition is aggravated or accelerated by an accidental injury arising out of and in the course of employment or by an occupational disease so that disability results, then the employer must compensate the employee for the entire resulting disability even though it would not have disabled a normal person to that extent. (3) On the other hand, when a pre-existing, nondisabling, non-job-related disease or infirmity eventually causes an incapacity for work without any aggravation or acceleration of it by a compensable accident or by an occupational disease, the resulting incapacity so caused is not compensable. (4) When a claimant becomes incapacitated for work and part of that incapacity is caused, accelerated or aggravated by an occupational disease and the remainder of that incapacity for work is not caused, accelerated or aggravated by an occupational disease, the Workers' Compensation Act of North Carolina requires compensation only for that portion of the disability caused, accelerated or aggravated by the occupational disease.

Morrison, 304 N.C. at 18, 282 S.E.2d at 470. Kennedy's case meets the conditions set out in (2) above: His back pain originated in 1999 and was not job-related; although his back pain worsened over the years and following both work- and non-work-related events, the back pain was never disabling; and the condition was aggravated by an accidental injury arising during the course of his employment so that disability resulted. These

conditions having been met, Minuteman was required to compensate Kennedy for the entire resulting disability.

Newcomb is easily distinguishable, and the Full Commission did not abuse its discretion by declining to apply it. In that case, the Full Commission found that the plaintiff's surgery "was due to a combination of the [two] accidents that he sustained" while working for two different employers. *Newcomb*, 196 N.C. App. at 677, 677 S.E.2d at 168. As a result, the Full Commission concluded that both employers' insurance carriers were responsible for the plaintiff's compensation. *Id.* at 682, 677 S.E.2d at 171. Here, the Full Commission did not find that Kennedy's surgery was the result of Kennedy's two job-related accidents; instead, it found that the surgery was the result of the 30 January 2009 accident. As we explained above, there was competent evidence to support this finding. Accordingly, we can find no abuse of discretion in the Full Commission's decision to order only CNA to pay Kennedy's medical compensation.

C. Sanctions for Unfounded, Stubborn Litigiousness

Defendants argue that the Full Commission improperly sanctioned defendants for stubborn, unfounded litigiousness. The Full Commission based its sanction on defendants' continued

prosecution of their motion to set aside the Form 60, litigating the compensability of a claim that they had already accepted as compensable. At the Industrial Commission, defendants argued that they were entitled to have the Form 60 set aside because of mutual mistake. On appeal to this Court, defendants argue that they would not have admitted compensability had they known that Kennedy had a pre-existing back injury or that Kennedy's 30 January 2009 accident involved moving a desk rather than "a machine," as they stated on Forms 19 and 60.

We review the Full Commission's decision to award attorney's fees as a sanction for stubborn, unfound litigiousness using the abuse of discretion standard. *Bradley v. Mission St. Joseph's Health Sys.*, 180 N.C. App. 592, 596–97, 638 S.E.2d 254, 258 (2006). Here, we find no abuse of discretion.

First, the Full Commission properly concluded, as a matter of law, that a Form 60 cannot be set aside based upon mutual mistake. *Higgins v. Michael Powell Builders*, 132 N.C. App. 720, 726–27, 515 S.E.2d 17, 21–22 (1999). Second, "an employer who files a Form 60 pursuant to N.C. Gen. Stat. § 97-18(b)," as Minuteman and CNA did here, "will be deemed to have admitted liability and compensability." *Barbour v. Regis Corp.*, 167 N.C.

App. 449, 453, 606 S.E.2d 119, 123 (2004) (footnote omitted). Defendants' argument in favor of withdrawing their admission of compensability boils down to defendants' alleged failure to investigate Kennedy's accident and medical history before filing the Form 60. Kennedy's medical history was known to his co-workers and was obviously known to Minuteman, given Kennedy's previous job-related back injury and various absences from work due to back pain, beginning in 1999. Had defendants wished to investigate either the incident or Kennedy's medical history, they could have filed a Form 63, pursuant to N.C. Gen. Stat. § 97-18(d), which would have allowed them to investigate the compensability of Kennedy's accident. We cannot conclude that the Full Commission abused its discretion by sanctioning defendants for unfounded, stubborn litigiousness when defendants, after admitting compensability via a Form 60, continued to challenge that admitted compensability based upon (1) a legally impossible basis and (2) their own lack of due diligence.

III. Conclusion

We affirm the opinion and award of the Full Commission.

Affirmed.

Judges STEELMAN and STROUD concur.

Report per Rule 30(e).