NO. COA09-1243

NORTH CAROLINA COURT OF APPEALS

Filed: 20 July 2010

GUILFORD A. MOORE,
Employee,
Plaintiff,

v.

North Carolina
Industrial Commission
I.C. No. 675766

SLEEPY CREEK FARMS/GOLDSBORO MILLING COMPANY,
Employer,

SELF-INSURED (HEWITT COLEMAN RISK MANAGEMENT SERVICES,
Third-Party Administrator),
Defendant.

Appeal by defendants from Opinion and Award entered 5 May 2009 by the North Carolina Industrial Commission. Heard in the Court of Appeals 11 March 2010.

Martin & Jones, PLLC, by Matthew S. Healey, for plaintiff-appellee.

Cranfill Sumner & Hartzog LLP, by P. Collins Barwick, III, for defendant-appellants.

STROUD, Judge.

Defendants appealed opinion and award of the Full Commission awarding total disability compensation to plaintiff. As we conclude that plaintiff's medical procedures were casually related to his compensable injury and that plaintiff is disabled, we affirm.

I. Background

On 5 May 2009, the Full Commission ("Commission") entered an opinion and award awarding plaintiff "total disability compensation at the rate of $236.73 per week beginning October 12, 2006, [the date plaintiff had a total right knee replacement,] and continuing until plaintiff returns to work or until further Order of the Commission." The parties had previously stipulated that

> 2. On all relevant dates, an employee-employer relationship existed between plaintiff and defendant-employer.
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> 4. On February 16, 2006, plaintiff sustained a compensable injury by accident to his right knee when a stack of plastic boxes fell and struck his leg. Defendant accepted the claim on an Industrial Commission Form 60 dated May 30, 2006.
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> 5. As a direct result of the compensable injury, on May 22, 2006, plaintiff underwent a right knee arthroscopy with medial and lateral meniscectomies. Defendant paid plaintiff temporary total disability compensation from May 25, 2006 to May 31, 2006.
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> 6. On October 12, 2006, plaintiff underwent a total right knee replacement. Plaintiff has not worked since the knee replacement surgery. Defendant denies that the knee replacement surgery is causally related to the knee injury plaintiff sustained on February 16, 2006.
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> 7. On all relevant dates, plaintiff's average weekly wage was $355.10, which yields a compensation rate of $236.73 per week.

Defendant appeals the opinion and award of the Commission. Defendant argues that the "Commission erred in concluding that plaintiff's right total knee replacement and manipulation were

casually related to his compensable injury" and "that plaintiff was disabled as a result of his work injury." (Original in all caps.)

II. Standard of Review

> On appeal from an opinion and award of the North Carolina Industrial Commission, the standard of review 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. The Industrial Commission's findings of fact are conclusive on appeal if supported by competent evidence even though there is evidence to support a contrary finding. The full Commission is the sole judge of the weight and credibility of the evidence. This Court is not at liberty to reweigh the evidence and to set aside the findings simply because other conclusions might have been reached. This Court reviews the Commission's conclusions of law *de novo*.

Roberts v. Century Contr'rs, Inc., 162 N.C. App. 688, 690-91, 592 S.E.2d 215, 218 (2004) (citations, quotation marks, brackets, and ellipses omitted).

III. Casually Related

Defendants argue that the "Commission erred in concluding that plaintiff's right total knee replacement and manipulation were causally related to his compensable injury." (Original in all caps.) Defendants contend that the evidence presented demonstrates that plaintiff's compensable work injury, requiring a right knee arthroscopy with medial and lateral meniscectomies, was not attributable to or directly related to plaintiff's need for a total knee replacement or a knee manipulation ("additional medical treatments"). Defendants specifically argue that the trial court erred in the following findings of fact:

> 5. Prior to February 16, 2006, plaintiff had not experienced any pain, stiffness, or swelling in his right knee.
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> . . . .
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> 20. Although as of May 2, 2006, it was Dr. de Araujo's opinion that plaintiff's potential need for a knee replacement would not be attributable to his injury by accident, at his deposition, Dr. de Araujo testified to a reasonable degree of medical probability that the knee replacement procedure he performed was casually related to plaintiff's February 16, 2006 right knee injury. . . .
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> 21. Dr. de Araujo explained that although plaintiff's arthritis and osteonecrosis conditions were chronic and predated the knee injury, the injury aggravated and accelerated these conditions and caused plaintiff's severe pain and that the total knee replacement was performed because of this ongoing severe pain. Dr. de Araujo felt this casual relationship was true even though plaintiff might have needed a knee replacement surgery some time in the future.
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> 22. The greater weight of the evidence shows and the Commission finds that plaintiff's February 16, 2006 injury by accident materially aggravated and accelerated his pre-existing right knee arthritis and osteonecrosis. This aggravation resulted in medically necessary right knee replacement surgery on October 12, 2006, which directly caused the need for the February 8, 2008 right knee manipulation.

Defendants argue that these findings led the Commission to erroneously conclude that plaintiff's additional medical treatments were directly related to plaintiff's compensable injury and to award plaintiff medical expenses incurred due to the additional medical treatments.

In *Perez v. Am. Airlines/AMR Corp.* this Court stated,

> A party seeking additional medical compensation pursuant to N.C. Gen. Stat. § 97-25 must establish that the treatment is directly related to the compensable injury. Where a plaintiff's injury has been proven to be compensable, there is a presumption that the additional medical treatment is directly related to the compensable injury [("*Parsons* presumption")]. The employer may rebut the presumption with evidence that the medical treatment is not directly related to the compensable injury.
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> The employer's filing of a Form 60 is an admission of compensability. Thereafter, the employer's payment of compensation pursuant to the Form 60 is an award of the Commission on the issue of compensability of the injury. As the payment of compensation pursuant to a Form 60 amounts to a determination of compensability, we conclude that the Parsons presumption applies in this context.

174 N.C. App. 128, 135-36, 620 S.E.2d 288, 292-93 (2005) (citations and quotation marks omitted), *disc. review allowed*, 360 N.C. 364, 630 S.E.2d 186, *disc. review improvidently allowed per curiam*, 360 N.C. 587, 634 S.E.2d 887 (2006).

Here, defendants filed a Form 60 and thus the *Parsons* presumption applies. *See id.* In other words, because defendants filed a Form 60 admitting the compensability of the injury requiring the right knee arthroscopy with medial and lateral meniscectomies, the burden is now on defendants to show that plaintiff's additional medical treatments, including total knee replacement and a knee manipulation, were "*not* directly related to the compensable injury." *Id.* at 135, 620 S.E.2d at 292 (emphasis added).

Defendant directs our attention to Dr. William de Araujo, plaintiff's treating physician. While portions of Dr. de Araujo's

testimony do indicate that plaintiff's additional medical treatment was "not directly related to the compensable injury[,]" *id.*, other portions state the opposite. Even if there were contradictions in Dr. de Araujo's testimony, "[t]he full Commission is the sole judge of the weight and credibility of the evidence. This Court is not at liberty to reweigh the evidence and to set aside the findings simply because other conclusions might have been reached." *Roberts* at 691, 592 S.E.2d at 218 (citations, quotation marks, ellipses, and brackets omitted). In addition, the fact that plaintiff's knee replacement and manipulation may have been attributable, at least in part, to a pre-existing condition does not preclude plaintiff from recovery. *See Hoyle v. Carolina Associated Mills*, 122 N.C. App. 462, 465-66, 470 S.E.2d 357, 359 (1996). This Court has noted that

> [t]he work-related injury need not be the sole cause of the problems to render an injury compensable. If the work-related accident contributed in some reasonable degree to plaintiff's disability, she is entitled to compensation. When a pre-existing, non-disabling, non-job-related condition is aggravated or accelerated by an accidental injury arising out of and in the course of employment 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.

Id. (citations, quotation marks, and ellipses omitted).

Dr. de Araujo testified in his deposition as follows:

> Q Doctor, Mr. Moore testified at his deposition that he was not having any trouble with his knee prior to the February 2006 accident; do you have any information that would contradict that testimony?

A I do not.

. . . .

Q So why in your opinion was the total knee replacement necessary?

A Because of his pain.

Q And Doctor, we've discussed earlier in the deposition that Mr. Moore did have the osteoarthritis before his accident?

A Correct.

Q And we also talked about his testimony that he did not have knee pain before the February 2006 accident?

A Not according to my records, correct.

Q Do you have an opinion to a reasonable degree of medical probability as to what caused Mr. Moore's knee pain?

A I believe it was his injury that occurred on February the 16th of 2006.

. . . .

Q If he had presented to you before his injury with an MRI showing the osteoarthritis but he didn't have the pain symptoms, would you have recommended a total knee replacement?

A No.

. . . .

Q What is a manipulation?

A A manipulation is when the patient is put under an anesthetic and then the knee is forcibly moved through its range of motion that we previously were able to see in the operating room during the knee replacement and it's -- the function of it is to break up the scar tissue that has developed after the knee replacement.

Q And was the problem with Mr. Moore's range of motion following the total knee replacement, was that due to the formulation of scar tissue?

A Yes.

. . . .

Q But you've testify [sic] today that the pain, which you say was caused by the accident, led and required the total knee replacement?

A Well, that's a great question and I don't know if we'll ever know the answer to it, but I believe his accident caused his meniscal injuries. He had arthroscopy to treat those meniscal injuries, but he never returned to his pre-injury activity level. So then I believe that the injury accelerated his arthritis, which ultimately led to his knee replacement. So the injury did not cause his arthritis, but the injury indirectly let [sic] to him needing a knee replacement and it's probably some sort of a compilation of all those things.

. . . .

Q And based on that record and your findings of the MRI in April of 2006 and the degree of arthritic findings at that moment in April of '06, is it more probable than not that he would've needed a knee replacement?

A I believe at some point in his future, he was heading towards a knee replacement, even if he didn't injure the knee on the 16th. Whether that would've been six months later or six years later, I don't know.

Q And would it be possible that it could've occurred during that same time period; I mean, you never know exactly when it's going to happen, right?

A It's possible. I think his -- he was heading on a train towards a knee replacement. I think the injury put him on a faster track. That's probably the best way I could explain it.

Turning to findings of fact 5, 20, 21, and 22, we conclude that "competent evidence," *see Roberts* at 690, 592 S.E.2d at 218, supports these findings as Dr. de Araujo testified that plaintiff was not in pain before his injury at work; the right knee replacement was necessary because of plaintiff's pain after the work injury; and the right knee replacement and knee manipulation were casually related to plaintiff's work injury as it accelerated plaintiff's pre-existing arthritis. We further conclude that the findings of fact support the conclusions of law which ultimately awarded plaintiff medical expenses incurred due to his need for additional medical treatments. Defendant has not effectively rebutted the *Parsons* presumption that plaintiff's knee replacement and manipulation were directly related to his compensable injury, as there was competent evidence that plaintiff's additional medical treatment was attributable and directly related to his compensable work injury. Even if plaintiff would have eventually needed a knee replacement even without the compensable injury, the competent evidence established that plaintiff's work injury put him on the "faster track" for additional medical treatments. *See Hoyle* at 466, 470 S.E.2d at 359 ("When a pre-existing, non-disabling, non-job-related condition is aggravated or accelerated by an accidental injury arising out of and in the course of employment so that disability results, then the employer must compensate the employee for the entire resulting disability . . . ." (citations, quotation marks, and ellipses omitted)).

Defendants also briefly suggest that Dr. de Araujo's testimony is insufficient as it is "speculation and conjecture[.]" However, we find this argument without merit as Dr. de Araujo has been plaintiff's treating physician since twelve days after the accident. Furthermore, defendants' brief heavily relies on the medical opinions of Dr. de Araujo. In conclusion, we overrule defendants' arguments regarding the causal relationship between plaintiff's work injury and additional medical treatment.

IV. Disability

Defendants next contend that the "Commission erred in concluding that plaintiff was disabled as a result of his work injury." (Original in all caps.) Defendants argue the Commission erred in making the following findings of fact:

> 13. Following his initial right knee surgery, plaintiff returned to a transitional, light-duty position constructing cardboard boxes. When performing this job, plaintiff placed the broken down boxes and dividers on a table approximately five feet long. A chair was available for plaintiff to sit as needed so he could get a box, fold it, make the box, set it to the side, and repeat the job. This light duty position is not a permanent, full-time job at defendant-employer's facility. Defendant-employer does not hire employees to only construct boxes and does not advertise such a position. Plaintiff remained in this position until October 11, 2006, the day prior to his knee replacement surgery.
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> . . . .
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> 18. Dr. de Araujo stated that plaintiff reached maximum medical improvement on February 28, 2008. Plaintiff's total permanent partial disability rating was be [sic] between 35% and 40% of which 15% was for his acute injury, in addition to his chronic conditions.

. . . .

23. Following plaintiff's October 16, 2006, total right knee replacement, defendant-employer offered plaintiff the transitional light duty job he previously performed constructing boxes. Dr. de Araujo opined that from a physical standpoint, plaintiff could perform this job.

24. The Commission finds that the light duty box construction job offered to plaintiff was not a job that is ordinarily available in the competitive job market and was therefore not suitable employment. Thus, plaintiff's refusal of the light duty box construction job after October 12, 2006 was justified.

25. On January 15, 2008, prior to plaintiff's deposition testimony, counsel for plaintiff wrote to defendant-employer informing them of plaintiff's decision to retire and that this decision was based on the fact that he was unable to perform his regular job as a maintenance worker.

26. After Dr. de Araujo was deposed and prior to the close of the evidentiary record before the Deputy Commissioner, on July 14, 2008, defendant-employer offered plaintiff the poult room position. According to the job analysis performed by rehabilitation counselor Kim Deal, the poult room position required lifting 23-25 pound poult boxes. Although the carrying requirement was an essential part of the job duties according to manager James Campbell, defendant-employer modified the position so that plaintiff was not required to transfer the boxes.

27. The Commission finds that the poult room position offered to plaintiff was so modified to accommodate plaintiff's restrictions that it would not be available in the competitive labor market and there is no evidence that defendant-employer or any other employer would hire plaintiff for this position. Therefore, plaintiff's refusal of the modified poult room position after July 14, 2008 was justified.

> 28. Although plaintiff completed the eighth grade, vocational assessment and transferrable skills analysis tests administered on February 1, 2008 by Ms. Deal indicate that plaintiff functions at a second grade level for reading, a first grade level for spelling, and a third grade level for arithmetic. Due to a lack of writing skills, plaintiff could not complete a sample employment application for Ms. Deal. Based upon her evaluation, Ms. Deal recommended that plaintiff complete a situational work assessment, which provides more detailed information when working with someone functioning at a lower level. Ms. Deal also recommended a work adjustment program or structured workshop.
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> 29. Vocational tests administered by Kim Engler, vocational expert, indicate that plaintiff has memory and concentration difficulties and, therefore, has difficulty learning and carrying out simple instructions. Ms. Engler opined that based upon his age, education, work history, need to walk with an assistive device, and cognitive difficulties, plaintiff is unable to perform even unskilled, sedentary work and has lost access to the labor market.
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> 30. Although there is some evidence that plaintiff is capable of sedentary employment, the Commission finds that it would be futile for plaintiff to look for work because of his age, his limited education in that he is functionally illiterate, his work experience primarily in medium level work, and his physical limitations. Based upon the credible vocational and medical evidence of record, and as a result of his February 16, 2006 injury by accident, the Commission further finds that plaintiff has been unable to earn any wages in his former position with defendant-employer or in any other employment for the period October 12, 2006 through the present and continuing.

Defendant argues that these findings led the Commission to erroneously conclude that defendant had proven disability.

In *Russell v. Lowes Prod. Distribution*, this Court stated,

> An employee injured in the course of his employment is disabled under the Act if the injury results in an incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment. Accordingly, disability as defined in the Act is the impairment of the injured employee's earning capacity rather than physical disablement.
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> The burden is on the employee to show that he is unable to earn the same wages he had earned before the injury, either in the same employment or in other employment. The employee may meet this burden in one of four ways: (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment, (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment, (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment, or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (citations, quotation marks, and ellipses omitted). The Commission found disability based upon the third method, "the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment[.]" *Id.*

Kimberly Ann Engler, a vocational rehabilitation expert, testified that plaintiff

> is 64 years old, which is essentially advanced age in the world of work. The limited testing that I did would indicate that he would have -- or for the test, he had difficulty with memory and concentration and, most likely,

> would have difficultly learning and carrying out even simple instructions.
>
> He has a work history of unskilled, medium -- actually, I believe he's worked up to very heavy as a construction worker, too. . . . But he has an unskilled, at least medium, elemental work history.
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> As per his treating physician, he is limited to modified, sedentary work. Sedentary work, normally, is work that is performed in a seated position, normally at a desk, lifting less than 10 pounds occasionally, 5 pounds frequently.
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> He's performed unskilled work in the past, which would indicate these jobs take less than 30 days to learn, and would not offer him any transferable skills.
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> The next section indicates that the treating physician further limited him to below the full range of sedentary exertional category. I indicated he would need to sit, stand, and walk around at intervals at his own discretion throughout the day, and occasionally elevate his leg, as well.
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> *Based on his advanced age, what we call a limited education, and possibly even illiterate status, past unskilled work experience, need to walk with an assistive device, has cognitive difficulties, he would be unable to perform even unskilled, even sedentary work, and has lost access to the labor market, in my opinion.*

(Emphasis added.)

From Ms. Engler's testimony it is clear that evidence was presented before the Commission that "it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment[.]" *Id.* Though other contradictory evidence may have been presented, "the Industrial Commission's findings of fact are conclusive on appeal if supported by competent evidence even though there is evidence to support a contrary finding." *Roberts* at 691, 592 S.E.2d at 218 (citation and quotation marks omitted). We need not review each and every one

of defendant's contested findings of fact because the findings of fact that are supported by competent evidence support the conclusion of law that plaintiff is disabled. *See generally State v. Blackwell*, 246 N.C. 642, 644, 99 S.E.2d 867, 869 (1957) ("The rule is that a correct decision of a lower court will not be disturbed because a wrong or insufficient or superfluous reason is assigned." (citation omitted)).

V. Conclusion

In conclusion, we affirm the opinion and award of the Commission awarding total disability compensation to plaintiff.

AFFIRMED.

Judges ELMORE and JACKSON concur.

Report per Rule 30(e).