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NO. COA05-83

NORTH CAROLINA COURT OF APPEALS

Filed: 3 January 2006

DEBORAH PERRY,
Employee,
Plaintiff

v.

North Carolina Industrial Commission
I.C. File No. 752385

U.S. ASSEMBLIES, RTP,
Employer

CNA INSURANCE COMPANY,
Carrier,
Defendants

Appeal by plaintiff from an opinion and award entered 1 September 2004 by the North Carolina Industrial Commission. Heard in the Court of Appeals 14 September 2005.

Law Offices of George W. Lennon, by George W. Lennon, for plaintiff-appellant.

Teague, Campbell, Dennis & Gorham, L.L.P., by Jan N. Pittman and Jacob H. Wellman, for defendant-appellees.

HUNTER, Judge.

Deborah Perry (“plaintiff”) appeals from an opinion and award of the North Carolina Industrial Commission (“Commission”) entered 1 September 2004. For the reasons stated herein, we affirm the Commission’s opinion and award.

Plaintiff was employed by U.S. Assemblies in August of 1997, and sustained a back injury on 3 September 1997 while lifting boxes. Plaintiff was treated for a mechanical lower

back injury and muscular injury to the lower abdomen, and provided with light-duty work in accordance with the treating physician's orders. Plaintiff left U.S. Assemblies's employment for personal reasons on 7 October 1997, but continued to complain of severe back pain and sought further treatment.

In plaintiff's initial claim to the Commission in 1998, the deputy commissioner found that plaintiff had sustained a compensable back injury, that suitable light work had been offered to plaintiff, and that plaintiff had refused such work without justification by her termination of employment. The deputy commissioner further found that plaintiff reached maximum medical improvement by July 1998 and sustained no permanent partial disability as a result of the injury, and found plaintiff's claim of chronic pain lacked credibility. The deputy commissioner concluded that plaintiff was entitled to medical compensation arising from the injury only, and was not entitled to temporary total or permanent partial disability.

Plaintiff appealed to the Full Commission, which affirmed the deputy commissioner's holding with some minor amendments, including a conclusion that plaintiff was not entitled to have defendants provide for either a psychological evaluation or psychological care. Plaintiff did not appeal the Full Commission's order.

In November 2001, plaintiff filed a Form 33 request for a hearing, alleging a claim for change of condition due to a psychological condition and chronic disabling pain, as well as additional medical expenses. Defendants moved to dismiss plaintiff's claim related to her psychological condition on the ground of *res judicata*, and the motion was granted. The deputy commissioner found the evidence showed plaintiff did not develop a somatoform pain disorder or depression as a result of the September 1997 injury, and that plaintiff's chronic pain was not related to the injury. The deputy commissioner denied plaintiff's claim.

Plaintiff appealed to the Full Commission. The Full Commission found that plaintiff's claim regarding her psychological condition was not properly dismissed on the ground of *res judicata*, as no final judgment had been made on the merits. However, the Full Commission determined, on the basis of the evidence of record regarding plaintiff's psychological condition, that "plaintiff's disability, if any, is due to the psychological conditions and not to the compensable injury. The psychological conditions are not causally related to the September 1997 low back strain." The Full Commission denied plaintiff's claim. Plaintiff appeals.

I.

We first note the appropriate standard of review for appeals from the Industrial Commission. The standard of review is narrow in worker's compensation cases, "limited to the consideration of two issues: (1) whether the Commission's findings of fact are supported by competent evidence; and (2) whether the conclusions of law are supported by the findings of fact." *Cannon v. Goodyear Tire & Rubber Co.*, ___ N.C. App. ___, ___, 614 S.E.2d 440, 444, *disc. review denied*, ___ N.C. ___, 621 S.E.2d 177 (2005). "In Workers' Compensation cases, the Industrial Commission's findings of fact are conclusive on appeal if there is any competent evidence to support them, even if there is conflicting evidence." *Brown v. Family Dollar Distrib. Ctr.*, 129 N.C. App. 361, 363, 499 S.E.2d 197, 198 (1998) (citation omitted). "[T]his Court is "not at liberty to reweigh the evidence and to set aside the findings . . . simply because other . . . conclusions might have been reached." "This is so, notwithstanding [that] the evidence upon the entire record might support a contrary finding." *Id.* (citations omitted). We now address plaintiff's assignments of error.

II.

Plaintiff first contends the Commission erred as a matter of law in failing to decide all matters in controversy. Plaintiff contends that the failure of an expert to answer cross-examination questions relating to records not in evidence created a matter of controversy between the parties which was not addressed by the Industrial Commission. We disagree.

Plaintiff cites as authority the case of *Bank v. Motor Co.*, 216 N.C. 432, 5 S.E.2d 318 (1939). In *Bank*, the Industrial Commission found a death to be in the course of employment when a salesman for Reid Motor Co. was shot. *Id.* at 433, 5 S.E.2d at 319. The finding was based on the testimony of Jack Freeze (“Freeze”), the individual who shot the salesman. *Id.* at 435, 5 S.E.2d at 321. At the hearing before the Commission, Freeze answered some of claimant’s questions, then refused to answer further. *Id.* at 433, 5 S.E.2d at 320. On cross-examination, Freeze again answered some questions, then refused to answer additional questions of consequence. *Id.* The Supreme Court stated that, “where a witness refuses to answer pertinent questions on cross-examination, his testimony on direct examination should be stricken out.” *Id.* at 434, 5 S.E.2d at 320. ““This doctrine rests on the common law rule that no evidence should be admitted but what was or might be under the examination of both parties and that *ex parte* statements are too uncertain and unreliable to be considered in the investigation of controverted facts.”” *Id.* (citation omitted). As a result, the Court determined the findings based on Freeze’s testimony were founded upon incompetent evidence and not conclusive, and therefore ordered them set aside. *Id.* at 435, 5 S.E.2d at 321.

Here, plaintiff was examined by Dr. Siegel, an independent medical examiner, in November 2002. During Dr. Siegel’s deposition, defendants instructed him to not answer plaintiff’s questions concerning reports by Dr. Rollins, a psychiatrist who had previously examined plaintiff, as evidence concerning plaintiff’s psychological condition, including Dr.

Rollins's reports, had not yet been admitted pending a ruling by the deputy commissioner. Dr. Siegel did not answer the questions.

Plaintiff was afforded the opportunity to cross-examine Dr. Siegel as to all pertinent issues other than the reports related to plaintiff's psychological condition. Plaintiff's cross-examination questions as to Dr. Rollins's reports, which defendants had not questioned plaintiff regarding, related to items not in evidence pending a specific ruling by the Commission as to whether matters pertaining to plaintiff's psychological condition could be considered in the claim. As such, they were not "pertinent questions" to issues "under the examination of both parties" at the time of the deposition. *Bank*, 216 N.C. at 434, 5 S.E.2d at 320 (citation omitted). We find no evidence in the record to indicate that plaintiff sought an opportunity to further depose the witness as to the issue of plaintiff's psychiatric condition after such evidence was admitted by the deputy commissioner. The deposition testimony therefore need not be stricken from the record.

Further, assuming *arguendo* that Dr. Siegel's failure to answer such questions would require his testimony to be stricken, we note that the Commission's finding that plaintiff's psychological condition was not related to the work-related injury incurred in September 1997 is supported by competent evidence from plaintiff's own witnesses, as addressed *infra* in Section IV. We therefore find no merit to plaintiff's assignment of error.

III.

Plaintiff next contends the Industrial Commission erred as a matter of law in failing to recognize that the burden of proof shifted to defendants as to plaintiff's claims for additional medical compensation. We disagree.

In claims for “additional compensation for medical treatment, the medical treatment sought must be ‘directly related to the original compensable injury.’” *Reininger v. Prestige Fabricators, Inc.*, 136 N.C. App. 255, 259, 523 S.E.2d 720, 723 (1999) (citation omitted). In the case of *Parsons v. Pantry, Inc.*, 126 N.C. App. 540, 485 S.E.2d 867 (1997), this Court held that once an employee has established a compensable injury, the employer bears the burden of proof as to causation in a claim for additional medical compensation which “lessens the period of disability, effects a cure or gives relief” under N.C. Gen. Stat. §97-25 (2003). *Id.* at 541-42, 485 S.E.2d at 869. In *Parsons*, the plaintiff had established causation between the workplace injury and headaches, and had been awarded future medical treatment. *Id.* at 542, 485 S.E.2d at 869. The Court found that in a claim for additional medical compensation for treatment of continued headaches, the defendant bore the burden of producing evidence showing that the plaintiff’s headaches were not related to the original injury. *Id.*

Here, in the prior unappealed order of 6 July 2000, the Full Commission determined that plaintiff had suffered a lumbar strain from the September 1997 injury and had reached full maximum medical improvement as of July 1998. The Commission further held that plaintiff lacked credibility as to claims of chronic pain and did not injure her cervical spine as a result of the September 1997 incident. The order limited compensation to medical compensation arising from the injury by accident and specifically found that plaintiff was not entitled to treatment for unrelated conditions and psychological care. Plaintiff’s claims for additional medical compensation relate to care for chronic pain and a psychological condition, conditions specifically excluded from the finding of plaintiff’s original compensable injury, a lumbar strain. As plaintiff had not established causation for these medical conditions in the initial order, we

find that the Commission did not improperly shift the burden of proof in determining plaintiff's claim.

IV.

Plaintiff next contends the Industrial Commission erred as a matter of law in the findings and conclusions, specifically in its findings and conclusions that plaintiff's psychological condition and resulting disability were not causally related to plaintiff's compensable injury, and that plaintiff had failed to prove a change of condition. We disagree.

As discussed *supra*, this Court's review of a Commission order is limited to the consideration of two issues: "(1) whether the Commission's findings of fact are supported by competent evidence; and (2) whether the conclusions of law are supported by the findings of fact." *Cannon*, ___ N.C. App. at ___, 614 S.E.2d at 444. "The 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 Commission's findings of fact may be set aside on appeal only where there is a complete lack of competent evidence to support them." *Jones v. Candler Mobile Village*, 118 N.C. App. 719, 721, 457 S.E.2d 315, 317 (1995) (citations omitted).

When seeking a modification of a final order on the basis of a change of condition, "[t]he burden is on the party seeking the modification to prove the existence of the new condition and that it is causally related to the injury that is the basis of the award the party seeks to modify." *Grantham v. R. G. Barry Corp.*, 127 N.C. App. 529, 534, 491 S.E.2d 678, 681 (1997) (citation omitted). "An employee satisfies this burden by producing medical evidence showing 'he is physically or mentally, *as a consequence of the work related injury*, incapable of work in any employment.'" *Id.* (emphasis added) (citation omitted).

Here, a review of the record shows that the Commission made numerous findings that supported the conclusion that plaintiff's claims were not caused by the original compensable injury, and that plaintiff failed to carry her burden to show that a change of condition had occurred. The Commission found that plaintiff was diagnosed with a somatoform pain disorder and that her chronic pain was psychologically based. The Commission also found that Dr. Blau, one of plaintiff's treating physicians, was unable to state whether plaintiff's injury or somatoform disorder originated first, and that Dr. Rollins, a psychiatrist who examined plaintiff, was unable to provide an opinion as to whether the somatoform disorder was related to plaintiff's compensable injury, and further opined that plaintiff's psychological problems were very long standing, going back to childhood. The Commission found that Dr. Siegel, the independent medical examiner, opined that plaintiff's compensable injury did not cause chronic pain syndrome, that plaintiff was not credible, and that there was no pathological basis for plaintiff's pain. Finally, the Commission found that Dr. Hernandez, a treating psychologist, opined that plaintiff's psychological conditions were caused by plaintiff's compensable injury, but gave little weight to that testimony, as Dr. Hernandez's opinion was based solely on the fact that plaintiff had not had the disabling psychological condition prior to September 1997. We note that "[t]he Commission is the sole judge of the credibility of a witness and the weight to be given to his testimony." *Jones*, 118 N.C. App. at 722, 457 S.E.2d at 318. Our review of the record reveals that these findings are supported by competent evidence. As these findings of fact support the Commission's conclusion of law that plaintiff failed to prove causation in order to establish a change of condition, we find this assignment of error to be without merit.

Plaintiff next contends the Industrial Commission erred as a matter of law in disregarding competent evidence. We disagree.

As discussed *supra*, the Commission's "'findings of fact are conclusive on appeal if there is any competent evidence to support them, even if there is conflicting evidence' . . . [which] "'might support a contrary finding.'" *Brown*, 129 N.C. App. at 363, 499 S.E.2d at 198 (citations omitted). "In making its findings of fact . . . it is the duty of the Commission to consider, weigh, and evaluate all of the competent evidence before it." *Ward v. Beaunit Corp.*, 56 N.C. App. 128, 134, 287 S.E.2d 464, 467 (1982). "In making its findings of fact, the Commission may not ignore, discount, disregard or fail to properly weigh and evaluate any of the competent evidence before it." *Id.*

Here, plaintiff contends the Commission failed to consider all competent evidence presented by plaintiff as to causation and disability, in particular the testimony of Drs. Craig, Blau, Hernandez, and Rollins. A review of the record indicates that the Commission made specific findings as to the evidence given by Drs. Craig, Blau, Hernandez and Rollins, all of the expert witnesses, and does not indicate that the Commission failed to properly weigh and evaluate the evidence before it. Further, competent evidence supports the findings made by the Commission as to the testimony of these doctors. Although the Commission gave little weight to Dr. Hernandez's opinions, the Commission specifically noted that such opinion was disregarded because it was based on the assumption that a temporal connection was sufficient to establish medical causation. "'[T]he Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony.'" "Thus, the Commission may assign more weight and credibility to certain testimony than other.'" *Renfro v. Richardson Sports Ltd.*, ___ N.C. App. ___, ___, 616 S.E.2d 317, 329 (2005) (citation omitted).

As the record indicates the Commission properly considered, weighed, and evaluated all of the competent evidence before it, we find no merit to plaintiff's argument that the Commission failed to consider all evidence as to causation.

VI.

Plaintiff finally contends the Industrial Commission erred in finding the defense of the claim was reasonable. We disagree.

"If the Industrial Commission shall determine that any hearing has been brought, prosecuted, or defended without reasonable ground, it may assess the whole cost of the proceedings including reasonable fees for defendant's attorney or plaintiff's attorney upon the party who has brought or defended them." N.C. Gen. Stat. §97-88.1 (2003). "The decision of whether to take such action is consigned to the discretion of the Commission, and will be left undisturbed absent an abuse of discretion." *Singletary v. North Carolina Baptist Hosp.*, ___ N.C. App. ___, ___, 619 S.E.2d 888, 892 (2005).

Here, under the facts and circumstances of the case, we find plaintiff's arguments unpersuasive that defendants' defense of the claim was unreasonable. Although the Full Commission determined on review that the issue of plaintiff's claim for a change of condition for a psychological condition was not barred by *res judicata*, defendants' arguments and evidence regarding plaintiff's claim were reasonable and successful and we find no evidence of abuse of discretion by the Commission.

As the findings of fact and conclusions of law support the order of the Commission denying plaintiff's claim, and as we find no abuse of discretion on the part of the Commission, we affirm the order for the foregoing reasons.

Affirmed.

Judges TYSON and STEELMAN concur.

Report per Rule 30(e).