

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA10-1434
NORTH CAROLINA COURT OF APPEALS

Filed: 7 June 2011

AMANDA MINOR

Employee/Plaintiff,

v.

N.C. Industrial Commission
IC. No. 765713

UNITED HEALTH SERVICES, INC.,
Employer,

TRAVELERS INSURANCE COMPANY OF
ILLINOIS,
Carrier/Defendants.

Appeal by Defendants from Opinion and Award entered 6 July 2010 by the North Carolina Industrial Commission. Heard in the Court of Appeals 26 April 2011.

Ricci Law Firm, P.A., by Brian M. Ricci for Plaintiff-Appellee.

Hedrick, Gardner, Kincheloe & Garofalo, by Erin T. Collins and Tracie H. Brisson for Defendant-Appellants.

Beasley, Judge.

Defendants appeal from an Opinion and Award of the Full Industrial Commission. For the reasons stated herein, we reverse and remand.

On 22 April 2007, Amanda Minor ("Plaintiff") sustained an injury to her lower back while employed as a certified nursing assistant for the Two Rivers Healthcare facility ("Defendant-Employer"). Defendant-Employer accepted Plaintiff's claim for a lower back injury by a Form 60 filed 29 May 2007. Shortly after the incident, Plaintiff sought treatment with Dr. John P. Mahaney, Jr. ("Dr. Mahaney") at the New Bern Family Practice Center. After conducting a medical evaluation of Plaintiff, Dr. Mahaney wrote Plaintiff out of work and prescribed several medications for Plaintiff's back pain. Dr. Mahaney also referred Plaintiff to Coastal Physical Medicine & Rehabilitation Services for further treatment. On 19 July 2007, Plaintiff was evaluated by Dr. Alan Russakov ("Dr. Russakov") at Coastal Physical Medicine & Rehabilitation Services. Dr. Russakov determined that Plaintiff suffered from lower back pain that was only secondary to her work injury. Dr. Russakov was unable to offer additional treatment options to help alleviate Plaintiff's back pain.

Plaintiff continued to receive treatment from Dr. Mahaney and participated in physical therapy. On 8 October 2007 Plaintiff underwent a functional capacity evaluation. "Based upon the [evaluation], Plaintiff was deemed capable of working

at the light to medium physical demand level." Several months later, Dr. Mahaney assigned a twenty percent permanent partial disability rating to Plaintiff's spine, and determined that Plaintiff "had likely reached maximum medical improvement."

On 7 March 2008, Plaintiff returned to work at the Defendant-Employer's premises. However, due to the work restrictions assigned by Dr. Mahaney, Plaintiff was unable to resume her position as a certified nursing assistant. "Plaintiff continued in this position until terminated by the Employer on or about November 26, 2008." Plaintiff's position was terminated when Defendant failed to contact Defendant-Employer's human resources department to locate suitable permanent employment. During the course of her employment, Plaintiff's wages were reduced to an amount below that which she received before her injury. Also, there is no evidence that Plaintiff received any temporary partial disability benefits during the course of her employment with Defendant-Employer.

On 10 February 2009, Plaintiff again presented to Coastal Physical Medicine & Rehabilitation Services for treatment. During her second visit, Plaintiff was evaluated by Dr. Christopher Delaney ("Dr. Delaney"). Following his evaluation of Plaintiff, Dr. Delaney opined that Plaintiff suffered a back

sprain or strain on 22 April 2007. However, he believed it was unlikely that the pain could be attributed to her compensable work injury.

On 9 March 2009, this matter was heard by the Deputy Industrial Commissioner. On 4 December 2009, the Deputy Industrial Commissioner issued an Opinion and Award in which she concluded that Plaintiff's termination was directly related to her inability to return to her prior position as a certified nursing assistant, and that Plaintiff established that she was incapable of earning wages in the same or any other employment. Both parties appealed the decision of the Deputy Industrial Commissioner. After a hearing, the Full Commission issued an Opinion and Award affirming the relevant conclusions of the Deputy Commissioner and awarded Plaintiff temporary total disability benefits. Defendant appeals from the Opinion and Award of the Full Commission.

Standard of Review

"The standard of review on appeal to this Court of an award by the Industrial Commission is whether there is any competent evidence in the record to support the Commission's findings of fact and whether these findings support the Commission's conclusions of law." *Hedrick v. PPG Industries*, 126 N.C. App.

354, 357, 484 S.E.2d 853, 856 (1997). The findings of the commission that are supported by competent evidence are conclusive on appeal. *Id.* "This is true even when there is evidence that would support contrary findings." *Goff v. Foster Forbes Glass Div.*, 140 N.C. App. 130, 133, 535 S.E.2d 602, 604 (2000). "The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony. The courts may set aside findings of fact only upon the ground they lack evidentiary support." *Anderson v. Lincoln Const. Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965).

I.

Defendant raises a number of arguments on appeal. Notably, Defendant argues that the Commission made insufficient findings of fact to support its conclusion that Plaintiff is entitled to receive ongoing disability benefits. After a review of the record and relevant North Carolina authority, we agree with Defendant's contention.

"The term 'disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C. Gen. Stat. § 97-2(9) (2009). Our Supreme Court has held that:

[I]n order to support a conclusion of disability, the Commission must find: (1)

that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) that this individual's incapacity to earn was caused by plaintiff's injury.

Hilliard v. Apex Cabinet Co., 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). Ordinarily, the worker's compensation claimant bears the burden of proving the existence of a disability and its degree. *Id.* "Where the compensability of a claimant's claim is admitted via Form 60, no presumption of disability attaches;" therefore, the burden to prove the existence of a disability remains with the claimant. See *Everett v. Well Care & Nursing Services*, 180 N.C. App. 314, 320, 636 S.E.2d 824, 828 (2006).

In this case, Plaintiff was specifically tasked with proving the existence of a disability. Though the Full Commission concluded that Plaintiff established that she was entitled to on-going disability benefits, the Full Commission's conclusion is not supported by competent record evidence. The Full Commission's findings of fact do not support its conclusion that Plaintiff satisfied this burden. "[T]o ensure effective appellate review, the Commission's findings must sufficiently

reflect that plaintiff produced evidence to prove all three *Hilliard* factors." *Coppley v. PPG Industries, Inc.*, 133 N.C. App. 631, 635, 516 S.E.2d 184, 187 (1999). If on review, this Court determines that the Commission's findings are insufficient to determine the rights of the parties upon the matters in controversy, we must remand to the commission for proper findings of fact. *Id.* (citing *Hansel v. Sherman Textiles*, 304 N.C. 44, 59, 283 S.E.2d 101, 109-10 (1981)).

In its Opinion and Award the Full Commission made the following findings of fact:

23. Dr. Delaney testified, and the undersigned find as fact, that he is a physician, board certified in physical medicine and rehabilitation with [a] subspecialty in the fields of the care of children and adults with physical and cognitive disabilities. He is also board certified in the sub-specialties of spinal cord injury medicine and pediatric rehabilitation medicine. There are only approximately 500 spinal cord injury specialists in the United States. Dr. Delaney is also a certified disability analyst, a certified wound specialist and a certified brain injury specialist.

24. Dr. Delaney is licensed to practice medicine in New Jersey, Pennsylvania, and North Carolina. He practices in the field of physical medicine and rehabilitation, which uses non-invasive techniques to treat disability and pain, and also helps patients develop compensatory strategies for temporary and permanent physical and

cognitive disabilities. Dr. Delaney is a competent medical expert in the fields of physical medicine and rehabilitation.

25. Dr. Delaney examined Plaintiff on February 10, 2009, using "a variety of well recognized and scientifically validated techniques to look for non-organic indicators of pain," and that Plaintiff "was positive for virtually all of those." Dr. Delaney found signs of secondary gain issues leading to Plaintiff's symptom exaggeration.

26. Per Dr. Delaney, his physical examination of Plaintiff was essentially unremarkable for objective findings. Her neurologic exam was normal. He noted the MRI of Plaintiff's lumbar spine revealed non-traumatic degeneration of the spine, which was "probably related to a combination of aging and her morbid obesity."

27. Dr. Delaney's assessment was that Plaintiff sustained a back strain or back sprain on April 22, 2007, which is a self-limited minor musculoskeletal injury. He concluded that while Plaintiff may have low back pain, there is no evidence that the pain is traumatically related. Dr. Delaney testified, and the undersigned find as fact, that Plaintiff "had virtually the same complaints, by her report, for years, in spite of living a very sedentary lifestyle," and it is unlikely that her pain is related to an acute injury such as a sprain/strain syndrome.

. . . .

30. In weighing the medical evidence, the undersigned find that Dr. Delaney is an expert in physical medicine and that, as such, he has special training that allows him to identify inorganic pain behaviors.

Dr. Mahaney testified that he would defer to the assessment of Dr. Delaney in this regard. Dr. Delaney is more qualified [to] make assessments of pain and disability than Dr. Mahaney who practices solely in the field of family medicine. Therefore the testimony of Dr. Delaney is given greater weight than that of Dr. Mahaney, and in particular regard to the assessment of Plaintiff's pain and permanent impairment.

Based on these findings the Full Commission concluded that:

8. Although there are some credibility issues with Plaintiff, the greater weight of the evidence shows that has engaged in reasonable efforts to secure employment, at least up to the hearing date before the Deputy Commissioner. Plaintiff has established that due to her age, education, and her restrictions, she has been unable to find suitable employment. Plaintiff has established that due to her injury by accident, she has been incapable of earning wages in the same or any other employment, such that she is entitled to receive ongoing total disability benefits. N.C. Gen. Stat. § 97-29; *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 425 S.E.2d 454 (1993).

The Full Commission's findings of fact do not sufficiently support its conclusion that the third *Hilliard* factor was satisfied. In its order, the Full Commission tended to place more credibility with the testimony of Dr. Delaney. After conducting an examination of Plaintiff, Dr. Delaney opined that Plaintiff's continuing back pain is likely attributed to factors

that were unrelated to her back injury, such as her obesity and age. Despite making this finding of fact, the Full Commission concluded that Plaintiff was entitled to disability compensation. Based on the Full Commission's findings of fact, the facts do not support a conclusion that Plaintiff's inability to obtain employment was caused by her work injury. Though Dr. Mahaney came to contradictory conclusions, the Full Commission determined that the testimony of Dr. Delaney was more credible. Accordingly, we reverse and remand.

Reversed and Remanded.

Judges MCGEE and STROUD concur.

Report per Rule 30(e).