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NO. COA12-320
NORTH CAROLINA COURT OF APPEALS

Filed: 5 February 2013

CLARENCE BURTON, Employee,
Plaintiff,

v.

Industrial Commission
I.C. No. 797214

ARVINMERITOR, INC, Employer,
SELF-INSURED (THE FRANK GATES SERVICE COMPANY [AVIZENT RISK], Third-Party Administrator),
Defendant.

Appeal by defendant from opinion and award entered 7 November 2011 by the North Carolina Industrial Commission. Heard in the Court of Appeals 12 September 2012.

Gary A. Dodd for plaintiff-appellee.

Dickie, McCamey & Chilcote, PC, by Susan H. Briggs, for defendant-appellants.

BRYANT, Judge.

Where there was sufficient evidence presented to support the Commission's findings of fact that plaintiff's deep vein thrombosis was a consequence of his 23 February 2007 work accident and that the position of maintenance planner/scheduler

was not suitable to plaintiff's capacity and did not reflect plaintiff's capacity to earn wages in the general economy, we affirm the Commission.

Plaintiff Clarence Burton was first employed as a service worker with Rockwell International, now Arvin Meritor (hereinafter "the employer"), on 12 May 1986. On 27 January 2006, prior to the injury that is the subject of this claim, plaintiff underwent joint replacement surgery on his left knee. After completing physical therapy, plaintiff was released to return to work but soon sought medical attention for deep vein thrombosis (DVT). Plaintiff was prescribed an aspirin therapy and was cleared to return to full duty work on 6 October 2006.

On 23 February 2007, in the course of his employment, plaintiff fell and sustained a compensable injury to his left knee. Plaintiff sought medical attention that same day and was diagnosed with suffering from a contusion to his left knee and osteoarthrosis. Plaintiff's physician prescribed physical therapy but released plaintiff to return to work with limited bending, twisting, kneeling, and squatting, as well as, limited use of stairs and ladders. The employer accommodated plaintiff's physical restrictions, and plaintiff continued to work; however, plaintiff's left knee became "increasingly symptomatic."

On 19 November 2007, plaintiff was examined by an orthopedic specialist. Dr. Bryan Springer recommended a surgical revision of the left knee arthroplasty. Plaintiff underwent a pre-operative consultation where he tested negative for any hereditary disorders relating to DVT and surgery was recommended. Dr. Springer performed a revision on plaintiff's left knee on 9 July 2008.

Following surgery on his left knee, plaintiff developed a blood clot in the femoral vein of his right leg and suffered complications which led to swelling in both legs. Dr. Springer recommended that plaintiff exercise his knee but opined that plaintiff would be permanently limited in his ability to use his left knee - unable to crawl, bend, or perform any stooping or lifting from ground to waist level.

Later, plaintiff reported to his family physician that he was experiencing nausea, lower back pain, and radicular foot pain in his left foot. Plaintiff underwent an MRI revealing a herniated disc at L4-5 "while participating in work hardening for treatment of the [23 February 2007] compensable injury." Plaintiff was released to return to work pending physical restrictions; however, a dispute arose as to whether a new position made available to plaintiff, that of maintenance scheduler/planner, was suitable employment.

On 17 October 2007, prior to plaintiff's surgical revision of his left knee, plaintiff filed a Form 18 notice of accident and claim to the employer. On 5 November 2007, the employer filed a Form 60 admission of employee's right to compensation. However, subsequently, the employer denied plaintiff's claim for workers' compensation benefits stemming from plaintiff's herniated disc and blood clots, contending those issues were unrelated to plaintiff's workers' compensation claim.

On 5 February 2009, plaintiff filed a request that his claim be assigned a hearing before the North Carolina Industrial Commission. The parties stipulated that the employer paid plaintiff temporary total disability benefits as a result of his compensable injuries.

The case was heard before Deputy Commissioner Victoria M. Homick on 22 September 2010. In an opinion and award filed 27 April 2011, Deputy Commissioner Homick concluded that on 23 February 2007, plaintiff sustained a compensable left knee injury. As a direct result, he was unable to earn the same or greater wages in any employment and, thus, was entitled to temporary total disability payments, though at a higher rate than the employer had paid him. Further, the deputy commissioner concluded that "plaintiff [was] entitled to all medical expenses incurred or to be incurred for his left knee injury so long as such examinations, evaluations and treatments

may reasonably be required to affect a cure, give relief or lessen plaintiff's period of disability." Plaintiff appealed to the Full Commission (the Commission).

On appeal, the Commission sought to address, among other questions, whether plaintiff's DVT was causally related to his 23 February 2007 injury; whether plaintiff was entitled to further medical compensation for treatment of his DVT and lower back injury; and whether the position of maintenance planner/scheduler – offered by the employer to plaintiff after his release to return to light-duty work following his 9 July 2008 surgical revision to his left knee – was suitable employment.

On 7 November 2011, the Commission filed its opinion and award reversing the opinion and award of the deputy commissioner. The Commission concluded that plaintiff's 23 February 2007 injury to his left knee was compensable; that plaintiff suffered a right lower extremity DVT, an aggravation of a pre-existing left lower extremity DVT; and a herniated disc at L4-5. As a result, the employer was "responsible for all disability and medical treatment related to those conditions, as well as that related to the treatment of his left knee . . . ." The Commission also concluded that regardless of whether plaintiff could perform the duties of a maintenance planner/scheduler, the position did not evidence plaintiff's

earning capacity; therefore, the employer was ordered to continue paying plaintiff temporary total disability until he returns to work or is further ordered by the Commission. The employer appeals to this Court.

On appeal, the employer argues: the Commission erred in finding (I) that plaintiff's DVT condition was a consequence of his 23 February 2007 work accident; and (II) that the maintenance planner/scheduler position was not suitable to plaintiff's capacity and did not reflect plaintiff's capacity to earn wages in the general economy.

Standard of Review

Appellate review of an opinion and award of the Industrial Commission "is limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law. This 'court's duty goes no further than to determine whether the record contains any evidence tending to support the finding.'" *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (citations omitted) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)). "The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Anderson*, 265 N.C. at 433-34, 144 S.E.2d at 274.

I

The employer argues the Commission erred in finding, based on competent evidence in the record, that plaintiff's DVT condition was a consequence of his 23 February 2007 work accident as plaintiff has not presented legally sufficient expert medical opinion testimony to establish a causal relationship between his work accident and his chronic DVT condition. We disagree.

"The 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, [he] is entitled to compensation." *Hoyle v. Carolina Associated Mills*, 122 N.C. App. 462, 465-66, 470 S.E.2d 357, 359 (1996) (citations and internal quotations omitted). "When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to claimant's own intentional conduct." *Starr v. Charlotte Paper Co.*, 8 N.C. App. 604, 611, 175 S.E.2d 342, 347 (1970) (citing *Larson's Workmen's Compensation Law*, § 13.00). Furthermore, the aggravation of a pre-existing medical condition which results in loss of wage earning capacity is compensable.

See Ruffin v. Compass Group USA, 150 N.C. App. 480, 481, 563 S.E.2d 633, 635 (2002).

Based on its findings, the Commission concluded that "[a]s a direct and natural result of his February 23, 2007 injury by accident, Plaintiff suffered a right lower extremity DVT and an aggravation of his preexisting left lower extremity DVT . . . ."

The Commission found that following a 2006 surgery to perform a total left knee arthroplasty, plaintiff's recovery was complicated by a large DVT in his left leg, which plaintiff's family physician, Dr. Kevin Burke Treakle, opined was a consequence of the surgery. Plaintiff received treatment for DVT and, on 6 October 2006, was able to work without restriction. On 23 February 2007, plaintiff sustained an injury which his employer has acknowledged is compensable. On 20 March 2007, Dr. Treakle examined plaintiff and found no evidence of recurrent clots; however, plaintiff's knee became increasingly symptomatic. Plaintiff was ultimately referred to orthopedic surgeon Dr. Springer. In February 2008, Dr. Springer recommended revision surgery to plaintiff's left knee.

> 17. . . . Because of Plaintiff's history of DVT, Dr. Springer recommended that Plaintiff undergo a pre-operative evaluation by a vascular surgeon for consideration of insertion of a clot filter.

On 9 July 2008, Dr. Springer performed a left knee revision.

> 19. Postoperatively Plaintiff developed a right leg femoral vein blood clot below the [clot] filter that had been placed [two days before his revision surgery]. . . . Plaintiff continues to experience pain and swelling in both legs with pooling of blood around his ankles, and finds it necessary to lie down throughout the day to elevate his legs.

Addressing the employer's challenge to whether plaintiff provided legally sufficient expert medical opinion testimony to support a finding of a causal relationship between his 23 February 2007 work accident and his chronic DVT condition, we first note the testimony of Dr. Springer who testified as an expert in the field of orthopedic surgery with joint replacement subspecialty.

> A. [A]fter [plaintiff and I] discussed our options at the last time, he felt like he had debilitated enough at that time, with the current status of his knee, that we were going ahead and proceed to revision surgery. We talked about all the options for revision. We talked about how to manage his history of blood clots. We elected at that point, because of his risk, to put what we call an IVC filter in him.
>
> Q. And what is an IVC filter?
>
> A. . . . It's a device that is used in patients that are at high risk for blood clots . . . .
>
> . . .
>
> Q. Did he have any complications postoperatively with respect to the right

> leg and the installation of the filter?
>
> A. He did develop a clot in his femoral vein on the right side, postoperatively.

Dr. Treakle, who testified as an expert in the field of family medicine, gave the following testimony:

> Well, certainly, his right lower extremity DVT was a complication of the second surgery. . . The problem in the right lower extremity seemed to have been a complication of preparation for the left total knee… yes, the right lower extremity problems and that cascade of events that occurred were related to it.

The aforementioned testimony supports the Commission's finding of fact that as "a direct and natural result of his February 23, 2007 injury by accident, Plaintiff suffered a right lower extremity DVT and an aggravation of his preexisting left lower extremity DVT . . . ." Accordingly, we overrule the employer's argument.

II

Next, the employer argues that the Commission erred in finding the maintenance planner/scheduler position was not suitable to plaintiff's capacity and did not reflect plaintiff's capacity to earn wages in the general economy. Specifically, the employer argues that the opinions of Dr. Treakle and Charlie Edwards – who testified as a vocational expert – which expressed concern over plaintiff's ability to meet the physical

requirements of the maintenance schedule/planner lacked foundation. We disagree.

"In deciding an appeal from an award of the Industrial Commission, appellate courts may set aside a finding of fact only if it lacks evidentiary support." *Holley v. ACTS, Inc.*, 357 N.C. 228, 231, 581 S.E.2d 750, 752 (2003) (citations omitted).

Suitable employment has been defined as "any job that a claimant is capable of performing considering his age, education, physical limitations, vocational skills, and experience." *Shah v. Howard Johnson*, 140 N.C. App. 58, 68, 535 S.E.2d 577, 583 (2000) (citation and quotations omitted). "The earning capacity of an injured employee must be evaluated by the employee's own ability to compete in the labor market. If post-injury earnings do not reflect this ability to compete with others for wages, they are not a proper measure of earning capacity." *Lanning v. Fieldcrest-Cannon, Inc.*, 352 N.C. 98, 105, 530 S.E.2d 54, 60 (2000) (citation and quotations omitted).

Though it acknowledged "[that the position of] Maintenance Planner/Scheduler [] with Defendant-Employer [] would pay Plaintiff the same wages he was earning at the time of the injury," the Commission made the following findings of fact:

> 45. Based upon the preponderance of the evidence in view of the entire record, the Maintenance Planner/Scheduler job

> was not suitable to Plaintiff's capacity, nor did it reflect Plaintiff's capacity to earn wages in the general economy.
>
> 46. Based upon the preponderance of the evidence in view of the entire record, Plaintiff is physically unable, as a result of the injury he sustained on February 23, 2007 and the conditions he later developed as a result of that injury, to earn any wages in any employment as a result of the February 23, 2007 injury.

With regard to the testimony of plaintiff's physicians, the Commission found that "Dr. Treakle later opined that Plaintiff likely couldn't work more than 20 hours per week, given his problems with chronic pain and swelling in his lower extremities."

In support of this finding of fact, we note the following testimony given by Dr. Treakle during his deposition:

> Q. Okay. And do you have an opinion satisfactory to yourself, based upon a reasonable degree of medical certainty, based upon your findings in [plaintiff's] case, as to whether or not [plaintiff] could perform the job duties listed in [the Physical Demands Analysis form] for an eight-hour day, five days a week over a sustained period of time?
>
> . . .
>
> [Dr. Treakle]: Well, my feeling is that from conversations I've had with [plaintiff] and from my examination and especially just in this calendar year, that he could not sit for three or four hours .

. . .

So when I look at sitting, I doubt that he could consistently sit three to four hours per work shift every working day.

Likewise walking, he says he has trouble walking more than 50 or a hundred feet without having to stop, so I doubt that he could walk for one to two hours per shift.

In terms of carrying or lifting 20 pounds, he might be able to do this intermittently but not up to a third of the time. It might be it would be more like ten percent of the time. And I'm not sure – I'm not sure that he could really do this 20 percent of the time day in and day out. I'm just uncertain of that.

Also, the last checked box is about his overtime required on a routine basis. The fact that I believe it's checked at the bottom, I don't think he could work 40 hours, much less do overtime.

So I have great reservations as to suggesting that he could walk for one or two hours every day or sit for three or four hours every day at work.

. . .

Q. All right, sir. So let me ask you in conclusion, do you have an opinion satisfactory to yourself, based upon a reasonable degree of medical certainty, as to whether or not he could perform the job of maintenance PS as described on Plaintiff's [Physical Demands Analysis form], given the condition of his legs?

. . .

[Dr. Treakle]: I don't think he can do the duties outlined on this form in any job

> description . . . at this time.

The Commission also noted the testimony of Charlie Edwards who was retained to provide "expert vocational evidence." Edwards testified that "it would be difficult for Plaintiff to transfer into the Maintenance Planner/Scheduler position without specific training, which could take a year or more." And, in addition, "given the work restrictions assigned by Dr. Treakle and Dr. Springer[,]" plaintiff lacked the ability to do "the Maintenance Planner/Scheduler job or to do other sedentary work as defined by the Dictionary of Occupational Titles for a full eight-hour workday[.]"

> 40. . . . Mr. Edwards testified that there are no jobs in the competitive labor market that permit an employee to elevate his legs above heart level at his discretion. Moreover, given Plaintiff's restrictions, there are no jobs in the regional economy (western North Carolina) that Plaintiff could perform without special considerations being offered to accommodate his restrictions. While Mr. Edwards testified that it would not be futile for Plaintiff to seek employment, he did not think Plaintiff would find work, particularly work paying him wages comparable to that he was earning at the time of his injury.
>
> 41. Mr. Edwards testified that even if Plaintiff could physically perform the Maintenance Planner/Scheduler position that was made available to him at Defendant-Employer, it would not be a job that he would be able to obtain from any other employer.

We note that the Commission's findings of fact were premised on Edwards' testimony comparing plaintiff's physical restrictions, as stated by Drs. Springer and Treakle during their individual depositions, as well as the standards for the job categories toolmaker and Maintenance Planner Scheduler as set out in the Dictionary of Occupational Titles.

> Q. Is [the Dictionary of Occupational Titles] a document that's regularly used by vocational experts to determine the types of requirements that certain types of listed jobs have in the workplace? That is physical, mental, educational, etcetera, qualifications?
>
> A. Yes. That is the so-called bible.

As the Commission's findings of fact were supported by the evidence presented in the depositions of Dr. Treakle and Edwards, we hold that the Commission did not err in finding that the position of the maintenance planner/scheduler was not suitable to plaintiff's capacity and did not reflect plaintiff's capacity to earn wages in the general economy. *See Richardson*, 362 N.C. at 660, 669 S.E.2d at 584 ("This court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." (citation and quotations omitted)). Accordingly, the employer's argument is overruled.

Affirmed.

Judges HUNTER, Robert C., and STEELMAN concur.

Report per Rule 30(e).