NO. COA09-403

NORTH CAROLINA COURT OF APPEALS

Filed: 18 May 2010

BURL E. BRINN, JR.,

Employee,
Plaintiff-Appellant,

v. N.C. Industrial Commission
I.C. No. 821807

WEYERHAEUSER COMPANY,

Self-Insured Employer,
Defendant-Appellee,

Appeal by plaintiff from opinion and award of the Full Commission of the North Carolina Industrial Commission entered 18 November 2008 by Commissioner Laura Kranifeld Mavretic. Heard in the Court of Appeals 26 October 2009.

Wallace and Graham, P.A., by Edward L. Pauley, for plaintiff-appellant.

Teague Campbell Dennis & Gorham, L.L.P., by J. Matthew Little and Tamara R. Nance, for defendant-appellee.

JACKSON, Judge.

Burl E. Brinn, Jr. ("plaintiff") appeals the 18 November 2008 opinion and award for the Full Commission of the North Carolina Industrial Commission ("Commission") that suspended his disability benefits. For the reasons stated below, we affirm.

On 11 March 1998, plaintiff suffered a compensable back injury while working for Weyerhaeuser Company ("defendant"). Following

his injury until early 2004, plaintiff saw numerous physicians and other healthcare providers for his injuries. Defendant became concerned that plaintiff was not cooperating with attempts to rehabilitate him. On 15 November 2002, plaintiff and defendant entered into a consent order, which required, in part, that plaintiff cooperate with vocational rehabilitation efforts and follow the work restrictions recommended by Dr. Lestini, a physician whom plaintiff had seen previously. On 17 March 2004, the deputy commissioner ordered plaintiff to undergo a functional capacity evaluation (FCE) and to discontinue vocational rehabilitation; defendant was to continue to pay disability benefits. Defendant and plaintiff attempted to negotiate an end to their dispute by entering a settlement agreement, according to defendant, or a tentative settlement agreement, according to plaintiff. On 30 October 2007, the parties appeared before the deputy commissioner, and on 26 February 2008, an opinion and award was issued, finding in favor of plaintiff. Defendant filed a notice of appeal on 4 March 2008. The Commission entered its opinion and award on 18 November 2008, reversing the deputy commissioner on the merits of the case, suspending plaintiff's disability benefits, and declining to rule as to whether a settlement agreement existed. Plaintiff appeals.

Plaintiff first argues that the Commission erred in holding that he unjustifiably had failed to comply with the Commission's orders because the evidence is insufficient to support that finding. Second, plaintiff contends that the Commission erred in

suspending his benefits. We will address these two arguments together, as plaintiff did in his brief. We disagree with both contentions.

Our review of the Commission's decision "is limited to determining whether competent evidence of record supports the findings of fact and whether the findings of fact, in turn, support the conclusions of law." *Rose v. City of Rocky Mount*, 180 N.C. App. 392, 395, 637 S.E.2d 251, 254 (2006) (citing *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000)). "If there is any competent evidence supporting the Commission's findings of fact, those findings will not be disturbed on appeal despite evidence to the contrary." *Id.* (citing *Jones v. Desk Co.*, 264 N.C. 401, 402, 141 S.E.2d 632, 633 (1965)). "Because the Commission is the sole judge of the credibility of the witnesses and the weight given to their testimony, the Commission may assign more credibility and weight to certain testimony than other testimony." *Watkins v. City of Asheville*, 99 N.C. App. 302, 303, 392 S.E.2d 754, 756 (1990).

North Carolina General Statutes, section 97-25 provides that "[t]he refusal of the employee to accept any medical, hospital, surgical or other treatment or rehabilitative procedure when ordered by the Industrial Commission shall bar said employee from further compensation . . . unless in the opinion of the Industrial Commission the circumstances justified the refusal[.]" N.C. Gen. Stat. § 97-25 (1997). Because an employee's unjustifiable refusal to accept the treatment ordered *shall* bar compensation, the only

question before us is whether the evidence presented to the Commission supports its findings and whether those findings support a conclusion that plaintiff unjustifiably refused to comply with the Commission's prior orders.

In the case *sub judice*, the Commission found as fact that, *inter alia*:

> 3. Plaintiff was initially treated by orthopedist Dr. William Lestini, who found plaintiff at maximum medical improvement on January 6, 2000. Dr. Lestini released plaintiff to return to light duty work with restrictions of lifting no more than 20 pounds and no repetitive twisting or bending. . . .
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> 5. On October 11, 2000 plaintiff was evaluated by Dr. Scott Sanitate, a physiatrist. During plaintiff's examination he reported back pain when Dr. Sanitate moved his big toe, with axial compression, and with parallel rotation of the hips and shoulders. Dr. Sanitate stated that such movements cannot physiologically replicate back pain. Based upon his concerns about plaintiff's high degree of self-limiting behavior and exaggerated symptoms, Dr. Sanitate refused to take plaintiff as a patient. Dr. Sanitate believed that the medications plaintiff was taking had a minimal impact on his level of functioning. According to Dr. Sanitate, it would be reasonable for plaintiff to have a psychiatric evaluation to ascertain whether he has any psychiatric overlay relative to his pain.
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> 6. . . . During an examination on March 28, 2002, Dr. Bryant noted that plaintiff exhibited disproportionate guarding with light touch and exaggerated pain behavior which was inconsistent with his back injury. . . . According to nurse case manager Cynthia Whitaker, when Dr. Bryant raised the issue of vocational rehabilitation, plaintiff stated, "they can forget about that." . . . As of March 28, 2002 Dr. Bryant stated that

plaintiff was at maximum medical improvement and could perform sedentary or light duty work. Dr. Bryant also stated his opinion that plaintiff was able to drive a car.

7. In early 2000 defendant initiated vocational rehabilitation efforts through the services of Phil Lawson and Gregory Henderson of VocMed. Plaintiff lives in Belhaven, North Carolina, and refused to drive a reasonable distance to Washington, North Carolina, to pursue job leads identified by the vocational consultants. Plaintiff's refusal to drive to the neighboring towns of Washington or Plymouth significantly limited the number of potential jobs available. Plaintiff drove himself to meetings with the vocational rehabilitation counselors. According to the vocational rehabilitation counselors, light duty jobs are available for plaintiff in surrounding counties.

8. . . . the parties entered into a Consent Order of Cooperation that was approved by [the deputy commissioner] on November 15, 2002. The Order required plaintiff to cooperate with vocational rehabilitation efforts, which included driving reasonable distances to apply for suitable employment, and adopted the work restrictions imposed by Dr. Lestini.

9. In spring 2003 plaintiff participated in a basic computer class at Beaufort County Community College. He refused to take a computer-aided drafting (CAD) class recommended by VocMed in January 2004. This course involved sitting and using a computer to draft mechanical parts and machines and would have assisted plaintiff in the vocational rehabilitation process. Plaintiff's refusal to participate in the CAD class constituted non-compliance with the Consent Order of Cooperation of November 15, 2002.

10. On March 17, 2004, [the deputy commissioner] entered an Order that required plaintiff to undergo a functional capacity evaluation (FCE) and also set a schedule for the taking of depositions in this case.

> 11. On April 22, 2004, plaintiff underwent an FCE and completed the first nine tasks with no significant problems. After a five-minute sitting tolerance test, plaintiff stated that he began experiencing severe pain and was feeling light headed. He was given a glass of water and began to sob dramatically. The employees at the facility administering the FCE called an ambulance and plaintiff was taken to Pitt County Memorial Hospital. Upon arrival at the emergency room, plaintiff banged on the doors, yelled and screamed, and lay on the floor. When plaintiff was given an IV of normal saline solution, he claimed that, "I can feel that morphine, my whole body is feeling better." Plaintiff was uncooperative during the physical examination by Dr. William Meggs. Dr. Meggs discharged plaintiff from the hospital with no additional pain medications.
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> 12. Plaintiff has not scheduled or completed another FCE since April 2004, in violation of the Order by [the deputy commissioner] issued March 17, 2004.
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> 15. The Full Commission gives greater weight to the opinions of Drs. Bryant, Sanitate, Meggs and Lestini, as well as Ms. Whitaker, Ms. Dentel, Mr. Henderson, and Mr. Lawson, concerning plaintiff's ability to drive a car, attend classes and complete an FCE, than to the opinions of Dr. Jones and Mr. Carpenter.
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> 16. By unjustifiably refusing to travel reasonable distances to apply for suitable jobs, by refusing to take the recommended computer courses, and by failing to complete an FCE[,] plaintiff has not complied with the November 15, 2002 and March 17, 2004 Commission Orders.

Plaintiff does not assign error to either Finding of Fact 8 or Finding of Fact 10, and therefore, they are both binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) ("Where no exception is taken to a finding of fact by the trial

court, the finding is presumed to be supported by competent evidence and is binding on appeal.") (citations omitted). These two findings establish the existence and contents of the 15 November 2002 and 17 March 2004 orders.

Similarly, challenges to Findings of Fact 3, 5, 6, 7, 9, 11, and 12 are not attached to any arguments in plaintiff's brief and therefore, are considered abandoned. N.C. R. App. P. 28(b)(6) (2007) ("Immediately following each question shall be a reference to the assignments of error pertinent to the question[.] . . . Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned."). Even if plaintiff had not abandoned these assignments of error, the record contains ample evidence — through medical records, testimony, and depositions — to support each of the findings made by the Commission. Accordingly, these findings of fact are supported by competent evidence.

In its 18 November 2008 opinion and award, the Commission made the legal conclusion that "[p]laintiff has unjustifiably failed to comply with the Commission Orders of November 15, 2002 and March 17, 2004 and to cooperate with defendant's rehabilitation efforts and should therefore be barred from further compensation until such refusal ceases." The findings of fact, enumerated above, demonstrate that numerous physicians found plaintiff physically able to perform certain tasks that would aid in his physical and vocational rehabilitation. Despite these physicians'

recommendations, plaintiff nonetheless failed to complete an FCE or to seek available, suitable employment. Clearly, the Commission's conclusion that "[p]laintiff has unjustifiably failed to comply with the Commission's Orders . . ." is supported by the findings of fact. Even though other witnesses provided contrary testimony about plaintiff's symptoms and abilities to comply with the Commission's orders, the Commission had before it competent evidence upon which it could base its findings. Therefore, the Commission did not err in concluding that plaintiff unjustifiably had refused to follow its prior orders, as such conclusion was based upon sufficient findings of fact, which were all supported by competent evidence.

Plaintiff next argues that the Commission erred in suspending his benefits for the time period when he was in compliance with its orders. His fourth argument is that the Commission violated his constitutional rights by suspending his benefits for the time period in which he was in compliance with its orders. Again, we address these issues together, as did plaintiff, and again, we disagree with them both.

As set forth above, North Carolina General Statutes, section 97-25 provides that "[t]he refusal of the employee to accept any medical, hospital, surgical or other treatment or rehabilitative procedure when ordered by the Industrial Commission *shall bar* said employee from further compensation . . . unless in the opinion of the Industrial Commission the circumstances justified the refusal[.]" N.C. Gen. Stat. § 97-25 (emphasis added).

As defendant points out, and as is set forth *supra*, plaintiff did not adhere to the 15 November 2002 consent order, which required him to cooperate with the vocational rehabilitation firm and search for a job within the restrictions imposed by Dr. Lestini. Plaintiff ignored recommendations made by VocMed, such as taking a computer-aided drafting class. Therefore, irrespective of plaintiff's argument that the 17 March 2004 order changed the requirements imposed on him by the Commission, the Commission properly concluded that he had failed unjustifiably to follow the Commission's orders, and accordingly, did not violate plaintiff's rights of due process.

Plaintiff's final argument is that the Commission erred by failing to address all outstanding issues in the claim, specifically the purported settlement agreement between the parties. Because plaintiff effectively has waived this contention, we do not address it.

Our Rules of Appellate Procedure provide:

> In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make . . . . It is also necessary for the complaining party to obtain a ruling upon the party's request, objection or motion.

N.C. R. App. P. 10(b)(1) (2007). Rule 701(3) of the Rules of the Industrial Commission also provides that "[p]articular grounds for appeal not set forth in the application for review shall be deemed abandoned[.]"

Here, defendant moved to enforce the purported settlement agreement on 8 December 2006. Plaintiff responded to defendant's motion by arguing, *inter alia*, that "[p]laintiff has opted not to settle the matter[.]" Furthermore, the deputy commissioner found in his 26 February 2008 opinion and award that "there was no agreement to be enforced . . . ." Defendant appealed the deputy commissioner's order to the Full Commission, but plaintiff did not cross-appeal any findings or conclusions as required by Rule 701(3). Plaintiff, therefore, has waived any objection to the deputy commissioner's finding that no enforceable settlement agreement existed.

We hold that the Commission did not err in concluding that plaintiff unjustifiably had failed to comply with its orders nor in suspending plaintiff's benefits. We also hold that the Commission did not violate plaintiff's constitutional rights. Finally, plaintiff's argument as to the Commission's failure to address all outstanding issues was not preserved for our review.

Affirmed.

Chief Judge MARTIN and Judge ERVIN concur.

Report per Rule 30(e).