NO. COA09-1671

NORTH CAROLINA COURT OF APPEALS

Filed: 4 January 2011.

BURL E. BRINN, JR.,

Employee,
Plaintiff,

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

WEYERHAEUSER COMPANY,

Employer,
(Self-Insured),
Defendant,

Appeal by plaintiff from order of the Full Commission of the North Carolina Industrial Commission entered 22 June 2009 by Commissioner Laura Kranifeld Mavretic. Heard in the Court of Appeals 10 June 2010.

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

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

JACKSON, Judge.

Burl E. Brinn, Jr. ("plaintiff") appeals the 22 June 2009 order from the Full Commission of the North Carolina Industrial Commission ("Commission") order stating that, were it not divested of jurisdiction pending plaintiff's prior appeal to this Court, it

would be inclined to deny plaintiff's motion for relief from judgment. For the reasons stated herein, we affirm.

On 11 March 1998, plaintiff, who was working for Weyerhaeuser Company ("defendant"), suffered a compensable back injury. Over the next six years, numerous physicians and other healthcare providers saw plaintiff for his injuries. At some point, defendant became concerned that plaintiff was not cooperating with attempts to rehabilitate him. Plaintiff and defendant entered into a consent order on 15 November 2002. The consent order required, *inter alia*, that plaintiff cooperate with vocational rehabilitation efforts and follow the work restrictions recommended by one of the physicians whom plaintiff had seen previously. On or about 17 March 2004, a deputy commissioner ordered plaintiff to undergo a functional capacity evaluation ("FCE") and to discontinue vocational rehabilitation; defendant was to continue to pay disability benefits.

On 22 April 2004, plaintiff attempted to complete an FCE. He completed tasks one through nine without experiencing any major problems. However, at the completion of a sitting tolerance exam that lasted five minutes, plaintiff began to complain of severe pain and lightheadedness. After receiving a glass of water, plaintiff began to cry uncontrollably. Plaintiff then went to Pitt County Memorial Hospital via ambulance. Once he arrived in the emergency room, plaintiff created a scene by banging on doors, yelling, screaming, and lying on the floor. When hospital staff administered an IV that contained saline solution, plaintiff

stated, "I can feel that morphine[;] my whole body is feeling better."

On 26 February 2008, a deputy commissioner issued an opinion and award finding in favor of plaintiff. Defendant then filed a notice of appeal to the Commission on or about 4 March 2008. On 18 November 2008, the Commission reversed the deputy commissioner on the merits of the case and suspended plaintiff's disability benefits. Plaintiff appealed the Commission's opinion and award to this Court.

While that case was pending, Dr. Moira Artigues conducted an interview and psychiatric evaluation of plaintiff on 25 February 2009. Dr. Artigues assessed plaintiff with several disorders, the most relevant of which is conversion disorder. According to Dr. Artigues, "[t]he symptoms [experienced by a person with conversion disorder] are not intentionally produced or feigned. The symptoms are not fully explained by a neurological or other general medical condition, by the direct effects of a substance, or as a culturally sanctioned behavior or experience." In Dr. Artigues's opinion, plaintiff "expresses his psychological distress through physical manifestations, which may be more culturally acceptable to him. However, this 'conversion' occurs on an unconscious level."

Plaintiff also attempted another FCE on 6 March 2009. When he arrived for the FCE, plaintiff reported that he was nervous. During pre-test monitoring, plaintiff's heart rate and blood pressure remained elevated for sixty minutes. Plaintiff's heart rate and blood pressure "exceed[ed] guidelines for safe

administration of the . . . FCE." Therefore, the FCE was not administered. The FCE therapist commented that he would need clearance from plaintiff's treating physician prior to another FCE "with clear direction as to the acceptable level of [blood pressure] and [heart rate]." The therapist further recommended that plaintiff use an anti-anxiety medication prior to attempting an FCE again.

On or about 28 April 2009, plaintiff filed a motion for relief from judgment based upon the "new evidence" of the 25 February 2009 psychiatric evaluation and the FCE that was attempted on 6 March 2009. According to plaintiff, "[t]he newly discovered evidence, which was obtained pursuant to the Commission's Order of November 18, 2008, clearly demonstrates that the [p]laintiff was not a malingerer or willfully failing to comply with any order." On 22 June 2009, the Commission indicated that, were it not divested of jurisdiction based upon plaintiff's prior appeal to this Court, it would deny plaintiff's motion for relief. In support of its conclusion, the Commission found that

> [t]he grounds for plaintiff's motion are records from an FCE and psychiatric examination of plaintiff, both of which were done in 2009 after issuance of the Full Commission Opinion and Award. These records do not constitute newly discovered evidence pursuant to N.C. Gen. Stat. §1A-1, Rule 60(b)(2). Additionally, plaintiff fails to submit sufficient reasons to justify relief from operation of the decision pursuant to N.C. Gen. Stat. §1A-1, Rule 60(b)(6).

Plaintiff appeals.[1]

Plaintiff first argues that the Commission erred in denying his motion for relief because it improperly disregarded new evidence. We disagree.

Our review of a decision of the Commission normally is limited to "(1) whether the Commission's findings of fact are supported by any competent evidence in the record; and (2) whether the Commission's findings of fact justify its legal conclusions." *Moore v. Davis Auto Service*, 118 N.C. App. 624, 627, 456 S.E.2d 847, 850 (1995) (citing *Watkins v. City of Asheville*, 99 N.C. App. 302, 303, 392 S.E.2d 754, 756, *disc. rev. denied*, 327 N.C. 488, 397 S.E.2d 238 (1990)). However, when we review the Commission's decision — which is analogous to a trial court's decision pursuant to North Carolina General Statutes, section 1A-1, Rule 60(b) — we employ an abuse of discretion analysis. *See Hogan v. Cone Mills Corp.*, 94 N.C. App. 640, 647, 381 S.E.2d 151, 154 (1989) (applying an abuse of discretion standard to a review of the Industrial Commission's determination, which is analogous to a trial court's Rule 60(b) determination), *rev'd on other grounds*, 326 N.C. 476, 390 S.E.2d 136 (1990).

North Carolina General Statutes, section 1A-1, Rule 60(b) provides:

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[1] On 18 May 2010, we filed our unpublished decision, affirming the Commission's 18 November 2008 opinion and award. *See Brinn v. Weyerhaeuser Co.*, ___ N.C. App. ___, 694 S.E.2d 522, 2010 N.C. App. LEXIS 833 (unpublished). We held, in relevant part, "that the Commission did not err in concluding that plaintiff unjustifiably had failed to comply with its orders nor in suspending plaintiff's benefits." *Id.* at *13.

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
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> . . . .
>
> (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
>
> . . . .
>
> (6) Any other reason justifying relief from the operation of the judgment.
>
> . . . This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. . . .

N.C. Gen. Stat. § 1A-1, Rule 60(b) (2007).

The party requesting relief from judgment bears the burden to rebut the presumption that the initial order was correct. *Brown v. Sheets*, 197 N.C. 268, 273, 148 S.E. 233, 236 (1929) (quoting *Johnson v. R.R.*, 163 N.C. 431, 453, 79 S.E. 690, 699 (1913)). That party must show:

> "(1) [t]hat the witness will give the newly discovered evidence; (2) that it is probably true; (3) that it is competent, material and relevant; (4) that due diligence has been used and the means employed, or that there has been no laches, in procuring the testimony at the trial; (5) that it is not merely cumulative; (6) that it does not tend only to contradict a former witness or to impeach or discredit him; (7) that it is of such a nature as to show that on another trial a different result will probably be reached and that the right will prevail[.]"

Id. at 273-74, 148 S.E. at 236 (quoting *Johnson v. R.R.*, 163 N.C. 431, 453, 79 S.E. 690, 699 (1913)).

Evidence is considered to be newly discovered only if it is "'such that it could not have been obtained in time for the original proceeding through the exercise of due diligence.'" *Parks v. Green*, 153 N.C. App. 405, 412, 571 S.E.2d 14, 19 (2002) (quoting *Waldrop v. Young*, 104 N.C. App. 294, 297, 408 S.E.2d 883, 884 (1991)). In addition, it "must have been in existence at the time of the trial." *Id.* (citing *Grupen v. Furniture Industries*, 28 N.C. App. 119, 121, 220 S.E.2d 201, 202 (1975), *disc. rev. denied*, 289 N.C. 297, 222 S.E.2d 696 (1976)). "'This limitation on newly discovered evidence has been justified on the firm policy ground that, if the situation were otherwise, litigation would never come to an end.'" *Id.* (quoting *Cole v. Cole*, 90 N.C. App. 724, 728, 370 S.E.2d 272, 274, *disc. rev. denied*, 323 N.C. 475, 373 S.E.2d 862 (1988)).

We have held that an additional medical evaluation does not constitute newly discovered evidence in a workers' compensation case. *See, e.g.*, *Grupen v. Furniture Industries*, 28 N.C. App. 119, 121, 220 S.E.2d 201, 202 (1975) (A doctor evaluated plaintiff almost two years after the workers' compensation hearing and submitted an affidavit containing his opinion that plaintiff's compensable injury was permanent. We held that this evaluation did not constitute newly discovered evidence based upon several prior cases that came to similar conclusions.), *disc. rev. denied*, 289 N.C. 297, 222 S.E.2d 696 (1976).

In the case *sub judice*, the 25 February 2009 psychiatric evaluation and 6 March 2009 FCE were not in existence when the

Commission entered its 18 November 2008 opinion and award. Furthermore, plaintiff could have requested another FCE at any time between his first attempt on 22 April 2004 and the hearings that took place in late 2007 and early 2008. He also could have undergone a psychiatric evaluation at any point prior to the hearings. Therefore, although plaintiff contends that these evaluations are newly discovered evidence, they could have been discovered by due diligence prior to the initial opinion and award. We hold that the Commission did not abuse its discretion by denying plaintiff's motion for relief, because plaintiff's evidence does not constitute newly discovered evidence.

Second, plaintiff contends that the Commission erred in denying his motion for relief because it failed to make proper findings of fact and conclusions of law. We disagree.

"To enable the appellate courts to perform their duty of determining whether the Commission's legal conclusions are justified, the Commission must support its conclusions with sufficient findings of fact." *Gregory v. W.A. Brown & Sons*, 363 N.C. 750, 761, 688 S.E.2d 431, 439 (2010) (citing *Pardue v. Tire Co.*, 260 N.C. 413, 415–16, 132 S.E.2d 747, 748–49 (1963)).

When an appeal is pending, a trial court's ruling as to a Rule 60(b) motion is advisory. *See Bell v. Martin*, 43 N.C. App. 134, 142, 258 S.E.2d 403, 409 (1979) ("[T]he trial court [should] consider a Rule 60(b) motion filed while the appeal is pending for the limited purpose of indicating, by a proper entry in the record, how it would be inclined to rule on the motion were the appeal not

pending."), *rev'd on other grounds*, 299 N.C. 715, 264 S.E.2d 101 (1980).

Furthermore, in other contexts, we have held that "[a]lthough a better practice would be to make findings of fact when ruling on a Rule 60(b) motion, the trial court is not required to do so." *McLean v. Mechanic*, 116 N.C. App. 271, 276, 447 S.E.2d 459, 462 (1994) (citing *Nations v. Nations*, 111 N.C. App. 211, 214, 431 S.E.2d 852, 855 (1993)), *disc. rev. denied*, 339 N.C. 738, 454 S.E.2d 653 (1995).

Here, although the Commission did not label specific sentences as either "findings of fact" or "conclusions of law" within its order, the order was sufficient to allow us to review the Commission's reasoning. The Commission found that "[t]he grounds for plaintiff's motion are records from an FCE and psychiatric examination of plaintiff, both of which were done in 2009 after issuance of the Full Commission Opinion and Award." It then concluded that "[t]hese records do not constitute newly discovered evidence pursuant to N.C. Gen. Stat. §1A-1, Rule 60(b)(2). Additionally, plaintiff fails to submit sufficient reasons to justify relief from operation of the decision pursuant to N.C. Gen. Stat. §1A-1, Rule 60(b)(6)." Considering both that the Commission's order was advisory and that it included sufficient detail for us to be able to conduct an adequate review, we hold that the Commission did not err in failing to enumerate specific findings and conclusions within its 22 June 2009 order.

Plaintiff next argues that the Commission erred in denying his motion for relief because its holding that plaintiff failed to submit sufficient reasons to justify relief was erroneous. We disagree.

As discussed *supra*, we review the Commission's decision pursuant to an abuse of discretion standard, *see Hogan*, 94 N.C. App. at 647, 381 S.E.2d at 154, and the party requesting relief from judgment bears the burden to rebut the presumption that the initial order was correct, *Brown*, 197 N.C. at 273, 148 S.E. at 236 (citation omitted).

According to North Carolina General Statutes, section 1A-1, Rule 60(b), a motion for relief may be granted for, *inter alia*, "[a]ny other reason justifying relief from the operation of the judgment." N.C. Gen. Stat. § 1A-1, Rule 60(b)(6) (2007). We have held that "Rule 60(b)(6) is not a catch-all rule although it has been described as a 'grand reservoir of equitable power to do justice in a particular case.'" *Goodwin v. Cashwell*, 102 N.C. App. 275, 278, 401 S.E.2d 840, 842 (1991) (quoting *Vaglio v. Town and Campus Int., Inc.*, 71 N.C. App. 250, 255, 322 S.E.2d 3, 7 (1984)). In addition, "[i]n order to be entitled to relief under Rule 60(b)(6) the movant must show that (1) extraordinary circumstances exist and that (2) 'justice demands' such relief." *Id.* (citing *Vaglio v. Town and Campus Int., Inc.*, 71 N.C. App. 250, 255, 322 S.E.2d 3, 7 (1984)).

In the instant case, plaintiff argues that "the [6 March 2009 FCE] testing done pursuant to Commission orders proved that the

Commission wrongfully terminated benefits" and that the 25 February 2009 psychiatric exam "clearly raise[s] questions about the [initial order] . . . ." However, he has not shown the existence of any extraordinary circumstances nor that justice demands the relief he seeks.

Moreover, although plaintiff did not initiate the cessation of the 6 March 2009 FCE, that fact does not constitute "indisputable proof that [he] is not being uncooperative[,]" as argued by plaintiff. The FCE therapist suggested in his report "that [plaintiff's] treating physician consider an anti[-]anxiety medication prior to attempting a[n] FCE in the future." That report does not support plaintiff's contention that "[t]here is now indisputable proof that [he] is physically impaired and unable to complete the FCE." Accordingly, plaintiff has not carried his burden to rebut the presumption that the initial order — which was a discretionary ruling by the Commission — was correct. Therefore, we cannot say that the Commission abused its discretion by denying plaintiff's motion for relief.

Plaintiff's final contention is that the Commission erred in denying his motion for relief because its orders "create an impossible and unconstitutional situation" for plaintiff. We disagree.

Here, plaintiff argues that "[h]e is required by the November 18, 2008 order to complete an FCE. However, due to his physical and mental issues, he cannot complete an FCE. . . . In essence, he has been ordered to do something that he cannot do." As discussed

supra, plaintiff has not shown that he is incapable of performing an FCE. Plaintiff was cleared for light-duty work, which would include tasks more strenuous than those required by the FCE. Also, the FCE therapist suggested that plaintiff take anti-anxiety medication prior to his next FCE.

In addition, Rule 60(b) specifically provides that it "does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court." N.C. Gen. Stat. § 1A-1, Rule 60(b) (2007). Defendant also points out that plaintiff could have requested a new evidentiary hearing as to his conversion disorder. Therefore, we do not think that the Commission's denial of plaintiff's motion for relief "create[s] an impossible and unconstitutional situation" for plaintiff.

We hold that the Commission did not abuse its discretion in denying plaintiff's motion for relief from its 18 November 2008 opinion and award, because plaintiff's 25 February 2009 psychiatric evaluation and 6 March 2009 FCE do not constitute newly discovered evidence, the Commission's order adequately supported its decision, plaintiff did not submit sufficient reasons to justify relief, and the order does not "create an impossible and unconstitutional situation" for plaintiff.

Affirmed.

Judges GEER and BEASLEY concur.

Report per Rule 30(e).

Judge JACKSON concurred prior to December 31, 2010.