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NO. COA04-1055
NORTH CAROLINA COURT OF APPEALS
Filed: 6 September 2005

LINDA BAKER,
Employee-Plaintiff

v.

North Carolina Industrial Commission
I.C. File Nos. 846590 & 940150

WAL-MART STORES, INC.,
Employer

and

INSURANCE COMPANY FOR THE
STATE OF PENNSYLVANIA and
AMERICAN HOME ASSURANCE,
Carrier-Defendants

Appeal by defendants from an opinion and award entered 30 April 2003 by the North Carolina Industrial Commission. Heard in the Court of Appeals 24 March 2005.

Lucas, Bryant, Denning & Ellerbe, P.A., by Sarah Ellerbe, for plaintiff.

Young, Moore, and Henderson, P.A., by Michael W. Ballance, for defendants.

CALABRIA, Judge.

Wal-Mart Stores, Inc. (“employer”), Insurance Company of the State of Pennsylvania, and American Home Assurance (collectively, “defendants”) appeal an opinion and award of the Industrial Commission (“Commission”) requiring defendants to pay total disability compensation. We affirm.

Linda Baker (“plaintiff”) started working for employer in 1996 as a third-shift coordinator in the shoe department. During plaintiff’s employment, she suffered two

compensable injuries by accident. The first accident occurred on 24 April 1998 when plaintiff fell off of a step stool and herniated a vertebral disc. On 8 June 1998, Dr. Koeleveld, a neurosurgeon, performed a L5-S1 laminectomy and removed the herniated disc. Plaintiff was assigned a permanent partial disability rating to her back and subsequently returned to work. The second accident occurred on 20 May 1999 when plaintiff slipped on some hairspray and exacerbated her chronic radiculitis symptoms in the lumbar spine. She was additionally diagnosed with a lumbar sprain. Plaintiff was released to work with restrictions and subsequently reached maximum medical improvement on 30 September 1999. Despite returning to work, plaintiff continued to suffer chronic and radiating back pain and informed her primary care provider and physician's assistant, Theresa Kubicki ("Kubicki") of her continuing pain. A subsequent independent medical examination by Dr. Derian, an orthopedic surgeon, in 2000 indicated that, without further surgical intervention such as a spine fusion, plaintiff had a fifteen percent permanent partial disability rating to her back and a twenty percent permanent partial disability rating to her leg. The examination revealed plaintiff still suffered from a large posterior annular tear uncorrected by the surgical intervention already undertaken.

In late 1999, plaintiff underwent a chest evaluation and catheterization by Dr. Nutt, a cardiologist, which showed non-focal plaquing of the coronary arteries and normal pumping capacity of the heart. Plaintiff, a smoker, also had high blood pressure, high cholesterol, and other cardiac risk factors. On 10 January 2001, plaintiff returned for medical treatment, complaining of non-exertional chest pain. On 30 January 2001, plaintiff returned to Kubicki for high blood pressure and chronic pain. Based on Kubicki's instructions, plaintiff continued to work for employer but gave a two-week notice before taking a leave of absence. On the last day of the two-week period, plaintiff experienced difficulties, including shortness of breath and chest

pain, and was taken to the Johnston Memorial Hospital emergency room. A second catheterization showed significant blockage of three coronary arteries, and plaintiff underwent triple bypass surgery. Dr. Nutt released plaintiff to full-time work from a cardiac standpoint on 18 June 2001. Due to continuing back pain, however, plaintiff did not return to work at any time after the time she took a leave of absence.

For each of plaintiff's compensable injuries, defendants admitted plaintiff's right to compensation and paid compensation until plaintiff's return to work. In April 2001, plaintiff submitted a request that her claim be assigned for hearing to have her declared totally and permanently disabled. Prior to the hearing, Deputy Commissioner W. Bain Jones excluded the testimony of Kubicki and entered an opinion and award that plaintiff was not entitled to additional compensation after 1 February 2001. On appeal, the Commission received the testimony of Kubicki and reversed the deputy commissioner's ruling. Defendants appeal.

I. Admissibility of Kubicki's Testimony

We first consider defendants' assignment of error concerning the Commission's admission of and reliance on Kubicki's expert testimony for purposes of establishing medical causation. "[T]he opinion testimony of an expert witness is competent if there is evidence to show that, through study or experience, or both, the witness has acquired such skill that he is better qualified than the jury to form an opinion on the particular subject of his testimony. *Maloney v. Wake Hosp. Sys.*, 45 N.C. App. 172, 177, 262 S.E.2d 680, 683 (1980).

Kubicki, as a physician's assistant, was required to be supervised by Dr. Kolar. Other than this supervision requirement, Dr. Kolar testified Kubicki was entitled "to practice medicine in an entire full scope, in terms of what . . . problems she can manage, what tests she can order, consultations she can order, as well as what medications she wishes to prescribe, including

controlled substances.” Dr. Kolar further noted that Kubicki was “very experienced” with “very good clinical judgment, a deep knowledge base of pathophysiology of _ just across the board, and she had good clinical instincts as well.” Kubicki’s own testimony reveals she possessed a degree for physical therapy and being a physician’s assistant and was a licensed physician’s assistant in North Carolina. Accordingly, Kubicki was clearly qualified to render expert medical testimony, including that of causation.

Defendants, nonetheless, argue Kubicki’s medical testimony regarding causation should be excluded on the grounds that it was not corroborated by her supervising doctor or any other medical doctor. However, the record indicates Dr. Kolar reviewed all of Kubicki’s notes for internal consistency and appropriateness in medical care. Moreover, Dr. Kolar expressly stated his medical opinion that Kubicki’s recommendations regarding plaintiff’s work status was that her recommendations were “[n]ot only reasonable, but . . . reflected . . . a good medical judgment, based on her assessment of _ on the immediate situation, and probably the intangibles that made her figure that at this point, the problem was deteriorating enough to suggest leaving work.” Defendants argue that Dr. Kolar subsequently limited that testimony to plaintiff’s blood pressure problem; however, we note Dr. Kolar’s answer, while referencing plaintiff’s blood pressure problem, went on to note that “the other thing is, is Ms. Kubicki having worked with [plaintiff] since at least 1993, was probably familiar with the patient . . . would have been in the best position of anyone to decide wh[at] the patient was like compared to her past years of experience.” Dr. Kolar went on to “absolutely” agree with the recommendations Kubicki made. In addition, while Dr. Kolar generally spoke of deferring to other doctors treating plaintiff’s back problem, he unequivocally stated Kubicki “would have the most thorough medical picture of [plaintiff at] the beginning of the year 2001.” Most importantly, an uncontested finding of fact by

the Commission notes that Dr. Kolar felt “Kubicki was in the best position to *evaluate plaintiff* because of her thorough knowledge of plaintiff’s medical condition.” Based on this uncontested finding of fact and after reviewing the evidence, we cannot agree with defendants that Dr. Kolar did not corroborate Kubicki’s testimony. The Commission could properly admit into evidence and rely upon Kubicki’s expert medical opinion, including any testimony concerning causation. This assignment of error is overruled.

II. Medical Causation

In their final assignment of error, defendants assert the Commission erred by concluding plaintiff’s disability was caused by her compensable injuries at work rather than her unrelated heart condition. Initially, we note that defendants have not assigned error to any of the Commission’s findings of fact in support of this argument; accordingly, the findings of fact are “conclusively established on appeal[.]” *Johnson v. Herbie’s Place*, 157 N.C. App. 168, 180, 579 S.E.2d 110, 118, *disc. rev. denied*, 357 N.C. 460, 585 S.E.2d 760 (2003), and our review is limited to whether “the findings of fact support the Commission’s conclusions of law.” *Deese v. Champion Int’l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000).

A claimant bears the burden of proving both the existence and the extent of disability. *Saums v. Raleigh Community Hospital*, 346 N.C. 760, 763, 487 S.E.2d 746, 749 (1997). Disability denotes an “incapacity because of injury to earn the wages which the employee was receiving at the time of injury” N.C. Gen. Stat. §97-2(9) (2003). Defendants point out that plaintiff returned to work following her two compensable injuries and assert her subsequent inability to work on and following 1 February 2001 was due to her unrelated heart condition. Defendants further assert plaintiff failed to prove any disability after 1 February 2001 was due to

her compensable injuries. However, the Commission made the following uncontested findings of fact:

25. Ms. Kubicki testified that plaintiff was unable to continue to work because of the amount of pain she was having and that this pain resulted from the compensable injuries by accident. Ms. Kubicki indicated plaintiff should be out of work for the month of February 2001 as a result of [*inter alia*] . . . chronic back pain

36. [T]he greater weight of the evidence [shows] that after February 1, 2001 plaintiff was disabled from *any employment* as a result of her compensable injuries.

Kubicki, in fact, testified to a reasonable degree of medical certainty that plaintiff's accidents at work were "a proximate cause of the pain that she was experiencing in January of 2001 which caused her to come out of work[.]" In light of these uncontested findings of fact, defendants' arguments cannot be sustained. These findings support the conclusion that plaintiff proved by the greater weight of the evidence that, "as a result of the compensable injuries[,] [plaintiff] is physically incapable of work in any employment due to her chronic back pain." This conclusion, in turn, supports the Commission's opinion and award of on-going total disability compensation.

Affirmed.

Judges TIMMONS-GOODSON and GEER concur.

Report per Rule 30(e).