NO. COA02-1021

NORTH CAROLINA COURT OF APPEALS

Filed: 19 August 2003

FRED VINCENT BENNETT, JR.,
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 861644

PROGRESSIVE FURNITURE COMPANY,
Employer,

and

TRAVELERS INSURANCE COMPANIES,
Carrier,
Defendants.

Appeal by defendants from Opinion and Award entered 22 April 2002 by the North Carolina Industrial Commission. Heard in the Court of Appeals 16 April 2003.

Randy D. Duncan for plaintiff-appellee.

Hedrick, Eatman, Gardner & Kincheloe, LLP, by Sharon E. Dent, for defendants-appellants.

GEER, Judge.

In this appeal from an opinion and award of the North Carolina Industrial Commission, defendants object to the manner in which the Commission weighed the evidence and to the Commission's decision to authorize medical treatment by physicians not selected by defendants.

Since this Court may not re-weigh evidence and since the Commission's findings of fact are supported by competent evidence, we affirm.

Facts

Plaintiff, Fred Bennett, began working as a truck driver for defendant Progressive Furniture Company ("Progressive") in approximately 1990. His duties required that he drive a furniture delivery truck and lift dressers, chests of drawers, and entertainment centers weighing as much as 100 pounds.

On 2 April 1998, Mr. Bennett's truck was "rear-ended" by another truck, causing his truck to collide with the rear of a camper. During the collision, Mr. Bennett's head struck and broke the rear window of his truck. Defendants filed a Form 60 acknowledging the compensability of the accident.

Mr. Bennett sought medical treatment on the same day of the accident at the emergency room of Catawba Memorial Hospital where he was diagnosed with a head contusion and abrasion. Mr. Bennett was later treated by Dr. John dePerczel, an orthopedist, who diagnosed plaintiff as suffering contusions; neck, shoulder, and back strain; and right sciatica. Dr. dePerczel authorized Mr. Bennett to return to work on 27 April 1998. Dr. dePerczel believed that Mr. Bennett had reached maximum medical improvement by 18 August 1998 and that he retained no permanent impairment.

On 5 April 1999, defendants referred Mr. Bennett to Dr. Alfred Rhyne, a board certified orthopedist, for a second opinion evaluation. Dr. Rhyne recommended a functional capacity evaluation ("FCE"). After an initial FCE indicated that Mr. Bennett had not cooperated and had failed to complete the test, Dr. Rhyne counseled him on the importance of the FCE. After a second FCE, Dr. Rhyne found Mr. Bennett capable of performing medium level work, with

permanent work restrictions of occasionally lifting seventy-five pounds, frequently lifting thirty-five pounds, and constantly lifting fifteen pounds. On 9 August 1999, Dr. Rhyne found that Mr. Bennett had reached maximum medical improvement and retained a two percent permanent partial impairment to his lumbar spine as a result of the compensable injury.

Progressive did not have a truck driver job available that fell within the work restrictions set by Dr. Rhyne. On 24 August 1999, Progressive offered Mr. Bennett a shipping job, requiring him to lift between forty and seventy-five pounds and to bend and stoop frequently. Although Mr. Bennett was able to perform some of his duties, the bending and stooping caused back pain and forced him to take pain medication on the job. Mr. Bennett's supervisor told him that he could "stand around" if he needed to because of the pain.

In August and September 1999, Mr. Bennett and his wife made nine or ten calls to Dr. Rhyne's office in unsuccessful attempts to schedule an appointment or obtain prescription refills. Because Dr. Rhyne believed he was only a second-opinion physician and had not been advised by the carrier that he was Mr. Bennett's treating physician, Dr. Rhyne's staff notified the Bennetts that defendants had not authorized a follow-up appointment.

Plaintiff's counsel wrote the carrier on several occasions reporting Mr. Bennett's inability to obtain treatment. On 20 September 1999, the carrier allowed Mr. Bennett to return to Dr. Rhyne.

Prior to obtaining an appointment with Dr. Rhyne, Mr. Bennett had scheduled an appointment with Dr. Peter Miller, a neurosurgeon. After ordering a lumbar discogram and epidural injections, Dr. Miller concluded that the accident either caused or accelerated Mr. Bennett's back pain. Dr. Miller provided Mr. Bennett with out-of-work notes for the period from

21 October 1999 until 15 December 1999 because he believed Mr. Bennett was physically unable to perform the frequent bending and heavy lifting required by his job.

On 25 October 1999, Progressive notified Mr. Bennett that defendants would not authorize treatment by any doctor other than Dr. Rhyne. Because Progressive refused to honor Dr. Miller's out-of-work notes, the company fired Mr. Bennett on 15 November 1999 for being out of work without authorization.

Dr. Miller referred Mr. Bennett to Dr. Thomas Herfurth, an anesthesiologist, for pain management. Dr. Herfurth treated Mr. Bennett from 15 December 1999 through 17 August 2000 for hip and back pain. Dr. Herfurth restricted Mr. Bennett to lifting no more than twenty pounds and concluded that Mr. Bennett would benefit from continued pain management treatment.

Following the termination of his employment, Mr. Bennett sought work through a temporary service agency and by contacting North Carolina Vocational Rehabilitation. He has, however, been unsuccessful in finding employment.

Mr. Bennett's claim was initially heard by Deputy Commissioner Lorrie L. Dollar who awarded plaintiff temporary total disability compensation for a period commencing 21 October 1999 and continuing until further order of the Commission. She also granted plaintiff's request that Drs. Peter Miller and Thomas Herfurth be approved as plaintiff's treating physicians and ordered defendants to pay for vocational rehabilitative services. Defendants appealed to the Full Commission. In an opinion and award filed on 22 April 2002, the Full Commission adopted the deputy commissioner's findings of fact with some modifications and awarded ongoing total disability "until further Order of the Commission," authorized plaintiff to have Drs. Miller and Herfurth as his treating physicians, ordered payment of past and future medical expenses, and

ordered defendants to provide vocational rehabilitative services. Defendants appealed to this Court.

Standard of Review

In reviewing a decision by the Commission, this Court's role "is limited to determining whether there is any competent evidence to support the findings of fact, and whether the findings of fact justify the conclusions of law." *Cross v. Blue Cross/Blue Shield*, 104 N.C. App. 284, 285-86, 409 S.E.2d 103, 104 (1991). The Commission's findings of fact are conclusive upon appeal if supported by competent evidence, even if there is evidence to support a contrary finding. *Morrison v. Burlington Industries*, 304 N.C. 1, 6, 282 S.E.2d 458, 463 (1981). Findings of fact may be set aside on appeal only "when there is a complete lack of competent evidence to support them." *Young v. Hickory Bus. Furniture*, 353 N.C. 227, 230, 538 S.E.2d 912, 914 (2000).

I

Defendants first argue that the Commission erred in finding that plaintiff met his initial burden of showing that he is disabled. An employee may meet this burden by showing: (1) medical evidence that he is physically or mentally, as a result of the work-related injury, incapable of work in any employment; (2) evidence that he is capable of some work, but after a reasonable effort, has been unsuccessful in his efforts to obtain employment; (3) evidence that he is capable of some work, but that it would be futile because of preexisting conditions, such as age, inexperience, or lack of education, to seek employment; or (4) evidence that he has obtained other employment at wages less than his pre-injury wages. *Russell v. Lowes Prod. Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993).

The Commission's conclusion that Mr. Bennett met this initial burden is supported by competent evidence. The record contains evidence that Mr. Bennett was unable to return to his

truck-driving job; that Mr. Bennett was unable to perform the shipping job due to pain; that Dr. Miller removed him from the shipping job; and, according to Drs. Miller and Herfurth, that the shipping job exceeded his physical restrictions. In addition, the Commission found that, following Progressive's termination of Mr. Bennett's employment, "[d]espite plaintiff's reasonable efforts, he has been unsuccessful finding employment." This finding was supported by testimony from Mr. Bennett and from Henry Steele of North Carolina Vocational Rehabilitation. The evidence offered by plaintiff shows that he may be capable of some work, but he has been unsuccessful in obtaining employment despite reasonable efforts.

In support of their contention that plaintiff did not meet his burden, defendants argue that "[t]he Full Commission erred in giving greater weight to the opinions of Drs. Miller and Herfurth than to Dr. Rhyne and the FCE results." Defendants mistake the role of the appellate court. On appeal, this Court may not re-weigh the evidence or assess credibility. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998). We hold, therefore, that the Commission's conclusion that Mr. Bennett met his initial burden is supported by competent evidence.

Defendants acknowledge that once the Commission finds that a plaintiff has met the initial burden of proving disability, then the burden shifts to defendants to produce evidence that suitable jobs are available for the employee and that the employee is capable of obtaining a suitable job, taking into account both physical and vocational limitations. *Demery v. Perdue Farms, Inc.*, 143 N.C. App. 259, 265, 545 S.E.2d 485, 490, *aff'd per curiam*, 354 N.C. 355, 554 S.E.2d 337 (2001). Defendants point to Progressive's shipping job and contend that the Commission erred in concluding that they failed to meet their burden.

Again, the record contains competent evidence to support the Commission's determination that the shipping job did not meet defendants' burden, including the testimony of

Drs. Miller and Herfurth and Mr. Bennett and his wife (who had also performed the job). In addition, Dr. Rhyne testified that if the shipping job required frequent lifting in the forty to seventy-five pound range _ as Mr. Bennett and his wife claimed _ then that job exceeded the restrictions that he set for Mr. Bennett.

Under the standard of review applicable in workers' compensation cases, we affirm the Commission's determination that Mr. Bennett is entitled to total disability compensation beginning 21 October 1999 and continuing until further order of the Commission.

II

Defendants also argue that the Full Commission erred in authorizing plaintiff to have Drs. Miller and Herfurth as his treating physicians and requiring defendants to pay "for all treatment provided by the physicians or ordered by these physicians which are causally related." We disagree.

We review the Commission's approval or non-approval of an employee's request for a change of physician under an abuse of discretion standard. *Kanipe v. Lane Upholstery*, 141 N.C. App. 620, 626, 540 S.E.2d 785, 789 (2000). Defendants have failed to establish that the Commission abused its discretion in authorizing Drs. Miller and Herfurth to assume Mr. Bennett's care.

Defendants contend first that the evidence does not support any finding that plaintiff sought care from Drs. Miller and Herfurth only after being unable to obtain additional treatment from the carrier's selected physician. Although defendants implicitly acknowledge that the testimony of plaintiff and his wife supports the Commission's decision, they complain that the testimony was "self-serving" and inconsistent with other evidence. That contention addresses

only the credibility and weight of the evidence, an argument for the Commission and not this Court.

Moreover, an employee is not required to show that the employer or carrier has failed to provide medical care before seeking treatment by another physician. N.C. Gen. Stat. § 97-25 (2001) provides: "[I]f he so desires, an injured employee may select a physician of his own choosing to attend, prescribe and assume the care and charge of his case, subject to the approval of the Industrial Commission." Under this provision, an injured employee may, even if defendant is providing medical care, choose his own physician so long as he obtains the approval of the Commission "within a reasonable time after he has selected a physician of his own choosing to assume treatment." *Schofield v. Great Atl. & Pac. Tea Co.*, 299 N.C. 582, 593, 264 S.E.2d 56, 63 (1980). There is no contention in this case that plaintiff failed to act within a reasonable time.

Alternatively, defendant argues that the Commission could not order payment of additional medical expenses because plaintiff had reached maximum medical improvement. Defendants appear to be suggesting that they cannot be liable for medical expenses unless the medical treatment is necessary to lessen the employee's disability or to provide a cure. The law has long been otherwise.

Under N.C. Gen. Stat. § 97-25, "[m]edical compensation shall be provided by the employer." "Medical compensation" is defined to include treatment "as may reasonably be required to effect a cure *or give relief* . . . ." N.C. Gen. Stat. § 97-2(19) (2001) (emphasis added).

In *Little v. Penn Ventilator Co.*, 317 N.C. 206, 211-12, 345S.E.2d 204, 208 (1986), the Supreme Court, construing this language, expressly rejected an attempt to limit the scope of compensable medical treatment. The Court noted that the legislature has provided alternate grounds for awarding expenses for future medical treatments: "Awards for such treatments are

appropriate, therefore, even if those treatments will not lessen the period of disability as long as they are required to 'effect a cure' *or 'give relief.*'" *Id.* at 213, 345 S.E.2d at 209 (emphasis added).

The Commission in this case found that "[p]laintiff would benefit from continued pain management treatment" and that finding is supported by Dr. Herfurth's testimony. This Court has already held that "relief from pain is a legitimate aspect of the 'relief' anticipated by future medical treatment under N.C. Gen. Stat. § 97-25 . . . ." *Simon v. Triangle Materials, Inc.*, 106 N.C. App. 39, 44, 415 S.E.2d 105, 108, *disc. review denied*, 332 N.C. 347, 421 S.E.2d 154 (1992). The Commission was, therefore, entitled to order payment for future medical treatment necessary to address Mr. Bennett's pain.

Defendant also objects to the statement in the Commission's award that plaintiff has not "reached maximum medical improvement." We need not address this issue since whether plaintiff has reached maximum medical improvement ("MMI") was immaterial to the issues before the Commission. The Supreme Court recently adopted the majority opinion in *Knight v. Wal-Mart Stores, Inc.*, 149 N.C. App. 1, 13-14, 562 S.E.2d 434, 443 (2002) (emphasis original), *aff'd per curiam*, 357 N.C. 44, 577 S.E.2d 620 (2003), which explained the role that MMI plays in a workers' compensation case:

> We have concluded that the primary significance of the concept of MMI is to delineate a crucial point in time *only within the context of a claim for scheduled benefits under N.C. Gen. Stat. § 97-31*, and that the concept of MMI does not have any direct bearing upon an employee's right to continue to receive temporary disability benefits once the employee has established a loss of wage-earning capacity pursuant to N.C. Gen. Stat. § 97-29 or § 97-30.

Since the only issues before the Commission were Mr. Bennett's entitlement to ongoing disability benefits under N.C. Gen. Stat. § 97-29 and future medical expenses, whether or not

Mr. Bennett has reached MMI is irrelevant at this stage in the proceedings. We note that the Commission expressly stated that either party may request a hearing to address plaintiff's permanent functional impairment, an issue to which MMI is relevant.

AFFIRMED.

Judges TIMMONS-GOODSON and BRYANT concur.

Report per Rule 30(e).