NO. COA05-587

NORTH CAROLINA COURT OF APPEALS

Filed: 3 January 2006

RUTILA RAMIREZ,
Plaintiff

v.

North Carolina Industrial Commission
I.C. File No. 919517

GOLDEN CORRAL,
Employer

and

ROYAL INSURANCE CO.,
Carrier

Appeal by plaintiff from Opinion and Award of the Industrial Commission entered 15 February 2005 by Commissioners Dianne C. Sellers, Pamela T. Young, and Christopher Scott. Heard in the Court of Appeals 30 November 2005.

Robert J. Willis for plaintiff-appellant.

Brooks, Stevens & Pope, P.A., by Robert S. Welch and Kimberley A. D'Arruda, for defendants-appellees.

CALABRIA, Judge.

Rutila Ramirez ("plaintiff") appeals from an Opinion and Award of the Industrial Commission, denying plaintiff's claim for additional medical treatment and indemnity compensation. We affirm.

I. Facts

The North Carolina Industrial Commission ("the Commission") made the following findings of fact:

> 1. On May 1, 1998, while employed as a baker with [Golden Corral ("defendant")], plaintiff slipped and fell on grease on the floor and sustained a compensable injury to her right knee arising out of and in the course of her employment.
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> 2. Plaintiff ultimately underwent arthroscopic surgery on her right knee on February 10, 1999, performed by Dr. Obremskey. Specifically, plaintiff underwent diagnostic arthroscopy with debridement of the posterior medical meniscus and chondroplasty of the medial femoral condyle. According to Dr. Obremskey's February 1999 operative note, the arthroscopic surgery revealed that plaintiff had a medial meniscus tear, meaning the tear was located on the medial or inside portion of the knee.
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> 3. Following her surgery on April 5, 1999, Dr. Obremskey released plaintiff to return to work full duty without restrictions. In reviewing a case for a release to return to work, it is Dr. Obremskey's usual practice to ask the patient what she does in her day-to-day job and whether she thinks she can perform her day-to-day job with her current conditions. Dr. Obremskey followed this protocol through an interpreter before determining to release plaintiff to work. Dr. Obremskey did not assign a permanent partial disability rating to plaintiff's right lower extremity. Plaintiff reached maximum medical improvement as of April 5, 1999.
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> 4. After her release to full duty, plaintiff returned to work at her regular job as a baker for defendants at her pre-injury wages on April 8, 1999. There was no reduction in the work force. She continued to work for defendants until she voluntarily resigned in July 2000. While she worked with defendants from April 8, 1999 until July 2000, no physician assigned any restrictions to plaintiff. Plaintiff, who speaks primarily Spanish, described all the difficulties she was having with her job to her doctor through her daughter who is fluent in both English and Spanish. Nevertheless, plaintiff's doctor continued to release her to work full duty while she was employed with defendants.
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> 5. Even though plaintiff's daughter was present to translate, contemporaneous medical notes reflect that plaintiff never complained to her physician about increased job duties. Plaintiff[] claim[s] that her job duties significantly increased after

her return to work in April 1999, but there was no evidence of a reduction in the work force and plaintiff's job duties with defendants did not substantially change after April 1999. When plaintiff voluntarily resigned her job with defendants, she constructively refused suitable employment.

6. Following her voluntary resignation with defendants, plaintiff began working for Laurels of Forest Glenn, a senior citizens' home, in July 2000 and worked there until November 5, 2000, when she voluntarily resigned. This job required her to load about 20 trays on a cart and wheel the cart to the nurses so that the nurses could serve the residents their meals. Plaintiff also bussed tables. Plaintiff worked at this job for approximately four hours per day. Plaintiff claims her duties at the senior citizens' home caused her knee condition to worsen.

7. On October 26, 2000, during the time that plaintiff was working at the senior citizens' home, Dr. Burroughs, an orthopaedic surgeon, diagnosed plaintiff with a "possible recurrent meniscus tear, right knee." Dr. Burroughs used the word "recurrent" to mean that plaintiff had a new meniscus tear after her first injury. He also found she had severe flexion contracture during this time. Subsequent1y, on January 16, 2001, an MRI scan of plaintiff's right knee was obtained, which revealed a lateral meniscus tear, meaning that the tear was located on the outside portion of the knee. Dr. Obremskey's February 1999 operative note indicated that the tear was on the medial or inside portion of plaintiff's knee while the 2001 MRI revealed a lateral meniscus tear, meaning that the tear was located on the outside portion of the knee.

8. Based on the testimony of Dr. Burroughs and Dr. Obremskey, the Full Commission finds that plaintiff had degenerative problems in the knee prior to her injury. In addition, x-rays of plaintiff's right knee from January 21, 1999, February 2, 2001, and October 23, 2001 showed that the arthritis in her knee had increasingly worsened. Based on Dr. Burroughs' testimony, and the x-ray reports from these dates, more change had occurred between February 2001 and October 2001 rather than between January 1999 and February 2001.

9. Based on Dr. Obremsky's testimony, traumatic arthritis usually occurs in a joint after significant trauma. It is most commonly seen following a fracture in the joint, requiring internal fixation. In this case, there was no fracture of the bone or internal fixation. Plaintiff's height was approximately 5'2" to 5'4" and her

weight was approximately 150 to 180 pounds. During the time that Dr. Obremskey's treated plaintiff, she was 57 to 60 years old. Based on Dr. Obremskey's opinion, to a reasonable degree of medical certainty, and other evidence of record including the fact that plaintiff's arthritis continued to get worse between February 2001 and October 2001 after she stopped work altogether, the fact that there was no evidence of a flexion contracture until October 2001 after she stopped working altogether, the fact that there was no evidence of a flexion contracture until October 2000 well after she left defendants and the fact that there was no evidence of a new lateral meniscus tear until January 2001 well after she left defendants, the Full Commission finds that it was probable that plaintiff's age and weight contributed to or were the primary reasons for the development of the symptomatic osteoarthritis.

10. The Full Commission finds by a preponderance of the evidence that p1aintiff's right knee condition worsened as a result of her work subsequent to leaving defendant's employment, either by way of a new and different meniscus tear on the outside of the right knee or by way of advancing osteoarthitis, or as a result of age and increased natural wear and tear due to obesity, and is not related to her compensable injury by accident.

11. Since plaintiff's current right knee problems are not related to her compensable injury and because there is no credible medical testimony in support thereof, plaintiffs back and hip conditions are not related to her compensable right knee injury.

12. Based on Dr. Speer's testimony that plaintiff was not complaining of hip and back pain when he saw her and based on Dr. Obremskey's testimony that a limp caused by an impaired knee cannot cause arthritis in one's other knee and back, and further based on Dr. Speer's testimony that he was aware of no peer review or epidemiological studies supporting the proposition that walking on an impaired knee caused problems with other body joints, plaintiff's hip and back complaints are unrelated to her compensable injury.

13. Dr. Obremsky did not assign plaintiff an impairment rating. Dr. Burroughs' medical notes indicate a 10% impairment rating to plaintiff's right knee and Dr. Speer, who saw plaintiff only one time on November 28, 2001 at the request of plaintiff, found plaintiff to have a 25% impairment rating to her right knee.

> 14. Plaintiff's average weekly wage based on the Form 22 is $295.40, yielding a compensation rate of $196.94.
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> 15. Plaintiff was paid temporary total disability compensation at a compensation rate of $173.34 according to the Form 60 filed in this matter. Plaintiff is entitled to be paid for the difference between her compensation rate and the rate she was paid pursuant to the Form 60.

Based on these findings, the Commission concluded, *inter alia*: (1) "[p]laintiff has failed to prove that her current medical condition is causally related to her compensable injury by accident of May 1, 1998"; (2) "[p]laintiff has failed to establish that she suffers from an occupational disease[]"; and (3)[p]laintiff is entitled to no additional medical treatment under the provisions of the North Carolina Workers' Compensation Act." In its award, the Commission denied plaintiff's claim for additional medical treatment and indemnity compensation. Plaintiff appeals.

II. Adequacy of Findings of Fact

We initially address plaintiff's argument that findings of fact 3, 4, 5, 10, and 11 are not supported by competent evidence. On appeal from an Opinion and Award of the Commission, our review is limited to considering "whether any competent evidence supports the Commission's findings of fact and 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). If any competent evidence supports a finding, viewed in the light most favorable to the plaintiff, it is conclusively established, even if the evidence would support a contrary finding. *Id.*, 352 N.C. at 115, 530 S.E.2d at 553. Moreover, a plaintiff is entitled to every inference in her favor. *Poole v. Tammy Lynn Center*, 151 N.C. App. 668, 672, 566 S.E.2d 839, 841 (2002).

Plaintiff assigns error to finding of fact 3 as not supported by any evidence insofar as it states that "it is Dr. Obremskey's usual practice to ask the patient . . . whether she thinks she can

perform her day-to-day job with her current conditions." Dr. Obremskey testified in his deposition that it is his normal practice when reviewing cases for a release to return to work to ask the patient, "What do you do in your day-to-day job? And do you think that you could perform your day-to-day job with the current way your extremity, or whatever is injured, is able to function?". Dr. Obremskey's deposition testimony supports finding 3, and we reject plaintiff's assignment of error.

Plaintiff next assigns error to the trial court's finding of fact 4 that "Plaintiff's doctor continued to release her to work full duty while she was employed with the Defendants" and that "[w]hile she worked with defendants from April 8, 1999 until July 2000, no physician assigned any restriction to the Plaintiff." This finding is supported by the plaintiff's testimony that a month after her return to work, she saw Dr. Obremskey and he again released her to work without restrictions. Our review of the transcripts, record, exhibits, and briefs further confirms that no work restrictions were assigned by any physician from 8 April 1999 to July 2000. We, therefore, reject this assignment of error.

Plaintiff additionally assigns error to findings of fact 4 and 5 "that the plaintiff's job duties at Golden Corral did not significantly increase after her return to work in April 1999, and that 'contemporaneous medical notes reflect that the Plaintiff never complained to her physician about increased job duties.'" At trial, plaintiff was asked, "And the pushing and pulling you're talking about, the cleaning, the kneeling and crawling, were you -- what, if any, change was that -- was there in that work during the time you were working for GC?" Plaintiff responded, "It didn't change." Plaintiff also testified that there were five (5) employees in her section throughout her employment at Golden Corral. The record, transcripts, exhibits, and briefs likewise reveal no contemporaneous medical notes that indicate plaintiff complained about

increased job duties. Accordingly, the Commission's findings are supported by competent evidence, and we reject this assignment of error.

Plaintiff also argues that "no competent evidence supports the Commission's finding[s] . . . that the plaintiff voluntarily resigned her job with [Golden Corral] in circumstances that constitute a constructive refusal of suitable employment." These findings are supported by evidence adduced at trial that plaintiff was released to work without restrictions but that plaintiff, nonetheless, resigned from the same position that she had prior to her injury, which paid the same wages she earned pre-injury. We, therefore, reject this assignment of error.

Plaintiff further challenges finding 10 that "plaintiff's right knee condition[] worsened as a result of her work subsequent to leaving defendant's employment by way of a new and different meniscus tear on the outside of the right knee or by way of advancing osteoarthritis, or as a result of age and increased natural wear and tear due to obesity[.]" Plaintiff also challenges finding 9 "that it was probable that plaintiff's age and weight contributed to or were the primary reasons for the development of the symptomatic osteoarthritis." Additionally, plaintiff challenges both findings 10 and 11 insofar as they state plaintiff's current knee problems are unrelated to her compensable injury. Specifically, plaintiff assigns error to these findings as "based upon an erroneous application and interpretation of law with respect to the issue of causation."

Plaintiff cites *Gutierrez v. GDX Automotive* for the proposition that "[o]ur Supreme Court specifically rejected 'could or might' testimony to prove causation." 169 N.C. App. 173, 178, 609 S.E.2d 445, 449 (2005). Indeed, our Supreme Court has held, "[d]octors are trained not to rule out medical possibilities no matter how remote; however, mere possibility has never been legally competent to prove causation. Although medical certainty is not required, an expert's 'speculation' is insufficient to establish causation." *Holley v. ACTS, Inc*, 357 N.C. 228, 234, 581

S.E.2d 750, 753 (2003) (citations omitted). In his deposition, Dr. Obremskey testified that plaintiff's worsened knee condition *could* have resulted from, *inter alia,* arthritis, plaintiff's age and weight, or osteoarthritis. Dr. Burroughs testified that plaintiff's weight, arthritis, or a displaced meniscal tear *could* have aggravated her knee condition. Later in his testimony, Burroughs testified that if plaintiff did fall, "it certainly, most[] likely, aggravated her arthritis." In regard to the possible recurrent meniscus tear, Dr. Burroughs testified that plaintiff "*might* have a meniscus tear," and "it *could* be an extension of [the] original tear[;] it *could* be a new tear[;] or it *could* be something else." Dr. Burroughs also testified that the initial meniscus tear and the subsequent meniscus tear were on "different side[s]" of the knee. Dr. Burroughs further testified that plaintiff's current knee problems *could have* resulted from her work subsequent to leaving defendant's employ. Because our review of the testimony of the medical experts on which the Commission relied, other than Burroughs's statement that plaintiff's fall "certainly, most likely" was an aggravating factor in her arthritis, never went beyond "could or might" testimony, the Commission erroneously determined causation of plaintiff's injury based on this testimony. This is true even though the Commission couched its causation determination in terms of "reasonable degree of medical certainty" and used the word "probable." It is the medical expert's responsibility to express his or her opinion in terms of probabilities or reasonable degrees of medical certainty, not for the Commission to derive such a determination from its assessment of the medical expert's could or might testimony.

However, even though the Commission's findings are erroneous, plaintiff still has the burden of coming forward with evidence of causation. In finding 11 the Commission found, "Since plaintiff's current right knee problems are not related to her compensable injury and because there is no credible medical testimony in support thereof, plaintiff's back and hip

conditions are not related to her compensable right knee injury." Our review of the transcripts, records, and briefs supports this finding, and it is, therefore, conclusively established. Likewise, this finding supports the Commission's conclusion that "[p]laintiff has failed to prove that her current medical condition is causally related to her compensable injury." Because plaintiff has failed to meet her burden regarding causation, we hold that the Commission's erroneous findings amount to harmless error, and we reject the applicable assignments of error.

III. Failure to Make Certain Findings of Fact

Plaintiff next argues that "the Industrial Commission failed to make pivotal findings of fact that are essential for the Court to effectively review the Commission's conclusions of law." However, this Court has held that the Commission "is not required to make specific findings of fact on every issue raised by the evidence." *Watts v. Borg Warner Auto., Inc.*, __ N.C. App. __, __,613 S.E.2d 715, 719 (2005). Rather, the Commission need only find facts that are "necessary to support its conclusions of law." *Peagler v. Tyson Foods, Inc.*, 138 N.C. App. 593, 602, 532 S.E.2d 207, 213 (2000). Moreover, "[t]he Commission is not required to receive evidence from every physician who had treated plaintiff, but is required to enter findings of fact regarding material evidence properly presented to and considered by the Commission." *Gutierrez*, 169 N.C. App. at 177, 609 S.E.2d at 448. After reviewing the Commission's findings, we hold that the findings are adequate to support its conclusions of law. We, therefore, reject all plaintiff's assignments of error relating to the Commission's failure to make certain findings.

IV. Maximum Medical Improvement

Plaintiff next argues that the Commission erred in finding that she "reached maximum medical improvement as of [5 April 1999]" because it erroneously interpreted applicable law as to the meaning of the term "maximum medical improvement." Specifically, plaintiff argues that

she did not reach maximum medical improvement by 5 April 1999 because she attended physical therapy subsequent to that date. In reviewing a Commission's finding that plaintiff reached maximum medical improvement, we consider whether there is any competent evidence in the record to support the Commission's finding. *Collins v. Speedway Motor Sports Corp.*, 165 N.C. App. 113, 116, 598 S.E.2d 185, 188 (2004). "Maximum medical improvement, by definition, means that the employee's healing period has ended." *Knight v. Wal-Mart Stores, Inc.*, 149 N.C. App.1, 14, n. 4, 562 S.E.2d 434, 443, n. 4 (2002), *aff'd*, 357 N.C. 44, 577 S.E.2d 620 (2003) (internal quotation omitted). Maximum medical improvement is:

> [a] treatment plateau (static or well-stabilized) in which no fundamental, functional or physiological change can be anticipated within reasonable probability despite further medical or rehabilitative procedures. A claimant may need supportive care to maintain this level of function despite the fact that she has reached maximum medical improvement.

See Collins, 165 N.C. App. at 117, 598 S.E.2d at 189. Moreover, our courts have specifically recognized that maximum medical improvement can be reached despite the need for supportive care. *See, e.g., Collins*, 165 N.C. App. at 123, 598 S.E.2d at 191 (holding that the need for vocation rehabilitation supported, not contradicted, that a plaintiff reached maximum medical improvement).

Pursuant to this standard, we hold that the Commission did not err in finding plaintiff reached maximum medical improvement as of 5 April 1999. There was competent evidence before the Commission that plaintiff's healing period had ended on 5 April 1999, when Dr. Obremskey released her to return to full work duties, despite her need for ongoing supportive care. Accordingly, we reject this assignment of error.

V. Burden of Proof

Plaintiff next argues that the Commission's findings 10 and 11 show that "it failed to properly ascertain and allocate the burden of proof between the parties[.]" Plaintiff argues that under *Parsons v. Pantry, Inc.*, 126 N.C. App. 540, 542, 485 S.E.2d 867, 869 (1997), the burden is on defendants to show that plaintiff's "pain, flexion, and extension problems in her right knee after 20 May 2000 were unrelated to the compensable injury to that same knee." *Parsons*, however, is distinguishable. In *Parsons*, a plaintiff met her initial burden of establishing her injury resulted from her work-related accident. The Commission then ordered a defendant to pay the plaintiff's medical expenses and "such future medical treatment which tends to effect a cure, give relief, or lessen the plaintiff's period of disability." At the time of the initial hearing, the main injury of which the plaintiff complained was headaches. The defendant subsequently failed to pay medical expenses related to plaintiff's headaches, and plaintiff brought suit. The issue presented was whether the Commission erred in placing the burden on the plaintiff to prove a causal relationship between her prior compensable injury and her current headaches. We held, "Plaintiff met her causation burden; the Industrial Commission ruled that her headaches were causally related to the compensable accident. Logically, defendants now have the responsibility to prove the original finding of compensable injury is unrelated to her present discomfort." *Id.*

In the case *sub judice*, however, plaintiff reached maximum medical improvement from her compensable injury and returned to pre-injury employment at pre-injury wages. Plaintiff continued to work for the defendant for over a year and then went to work for another employer for several months. Plaintiff never met her burden of proving her current injuries were causally related to her compensable accident, and the Commission never awarded plaintiff ongoing future medical treatment. Accordingly, we decline to extend *Parsons* to these facts and hold that the

Commission did not err in placing the burden on the plaintiff to show the compensability of her subsequent right knee injuries and pain.

VI. Challenged Conclusions of Law

Plaintiff in her brief argues, "the conclusions of law [1-5] of the Commission's Award are based upon the Commission's failure to correctly apply the legal standards applicable to a fact situation such as the one involved here[.]" Plaintiff then cites to other portions of her brief and cases involving arguments we have previously addressed involving the Commission's failure to make findings, and the Commission's maximum medical improvement determination. We have considered, and reject, plaintiff's assignments of error regarding the Commission's conclusions of law. VII. Motion to Compel and Motion for Rehearing

Plaintiff's final argument is that the Commission "abused its discretion by failing to grant the plaintiff's motion to compel and by failing to grant the plaintiff's request for rehearing to submit new evidence based upon the information obtained from that motion to compel." Plaintiff sought a motion to compel defendants' response to interrogatory 4, regarding her job duties while employed with Golden Corral, and she subsequently requested a rehearing.

This Court reviews the Commission's denial of a motion to compel under an abuse of discretion standard. *Williams v. State Farm Mut. Auto. Ins. Co.*, 67 N.C. App. 271, 273, 312 S.E.2d 905, 907 (1984). When considering a plaintiff's request for rehearing, the following standard applies:

> [W]hen an appeal of an opinion and award is taken, the Full Commission is granted the authority to review the award, and if good ground be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives, and, if proper, amend the award. Whether good ground be shown therefore in any particular case is a matter within the sound discretion of the Commission, and the Commission's

> determination in that regard will not be reviewed on appeal absent a showing of manifest abuse of discretion.

Brown v. Kroger Co., 169 N.C. App. 312, 320-21, 610 S.E.2d 447, 453 (2005) (quotations omitted). *See also* N.C. Gen. Stat. §97-85 (2003).

There is no manifest abuse of discretion on these facts regarding the Commission's denial of either the motion to compel or the motion for rehearing, particularly given that plaintiff specifically testified regarding her job duties.

For all the foregoing reasons, we affirm the Commission's Opinion and Award.

Affirmed.

Judges TYSON and BRYANT concur.

Report per Rule 30(e).