NO. COA05-587

NORTH CAROLINA COURT OF APPEALS

Filed: 21 February 2006

RUTILA RAMIREZ,
Employee
Plaintiff

v.

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

GOLDEN CORRAL,
Employer

and

ROYAL INSURANCE CO.,
Carrier
Defendants

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 in part and remand in part.

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 medial 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 primarily speaks 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, 2001showed that the arthritis in her knee had increasingly worsened. Based on Dr. Burroughs' testimony, and the x-ray reports from these three dates, more change had occurred between February 2001 and October 2001 rather than between January 1999 and February 2001.

9. Based on Dr. Obremskey'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 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 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. Obremsk[e]y 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. Burden of Proof

Plaintiff argues that several of the Commission's findings and conclusions of law show that "it failed to properly ascertain and allocate the burden of proof between the parties[.]" Specifically, 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." We agree.

In *Perez v. American Airlines*, __ N.C. App. __, __, 620 S.E.2d 288, 293 (2005), this Court held that "[a]s the payment of compensation pursuant to a Form 60 amounts to a determination of compensability, we conclude that the *Parsons* presumption applies in this context." Defendant admitted the compensability of plaintiff's right knee injury in this case via a Form 60. Pursuant to our holding in *Perez*, the Form 60 established compensability and created a

presumption in favor of plaintiff that additional medical treatment for her right knee problems was related to her previous compensable injury to her right knee. *Perez*, __ N.C. App. at __, 620 S.E.2d at 292. As such, the burden shifted to defendants to come forward with evidence showing that the medical treatment for plaintiff's right knee is unrelated to her compensable injury. *Id.* The Commission's findings and the applicable conclusions of law establish that it failed to grant plaintiff this presumption in regard to the additional medical treatment of her right knee. Accordingly, we remand this matter to the Commission for appropriate findings and conclusions in light of this presumption. *See Clark v. Wal-Mart*, 360 N.C. 41, 43, 619 S.E.2d 491, 492 (2005) ("[i]f the conclusions of the Commission are based upon a deficiency of evidence or misapprehension of the law, the case should be remanded so that the evidence may be considered in its true legal light" (citation and quotations omitted)).

The *Parsons* presumption, however, applies only to subsequent injuries to plaintiff's right knee, and plaintiff still has the burden of establishing compensability for her back and hip conditions. *Cooper v. Cooper Enterprises, Inc.*, 168 N.C. App. 562, 564, 608 S.E.2d 104, 105-06 (2005). The Commission's finding 12, which is supported by competent evidence, supports the Commission's conclusion that "[p]laintiff has failed to prove that her current medical condition is causally related to her compensable injury by accident of May 1, 1998" insofar as that conclusion relates to plaintiff's back and hip conditions. Accordingly, we affirm the Commission's determination that plaintiff's back and hip conditions were non-compensable.

III. Motion to Compel and Motion for Rehearing

Plaintiff next argues 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 four, regarding her job duties while employed with defendant, 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 (2005). Pursuant to this standard, we hold 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.

Having remanded for new findings and conclusions based on the proper burden of proof, we need not address plaintiff's other assignments of error.

For the foregoing reasons, we affirm in part and remand in part the Industrial Commission's Opinion and Award for further proceedings consistent with this opinion.

Affirmed in part and remanded in part.

Judges TYSON and BRYANT concur.

Report per Rule 30(e).