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NO. COA 04-129

NORTH CAROLINA COURT OF APPEALS

Filed: 15 March 2005

SHEILA ASHFORD,
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 970639

WAL-MART STORES,
Employer,

and

AMERICAN HOME ASSURANCE,
Carrier,
Defendants.

Appeal by plaintiff from opinion and award entered by the North Carolina Industrial Commission on 29 September 2003. Heard in the Court of Appeals 2 November 2004.

Brumbaugh, Mu & King, P.A., by Nicole D. Wray, for plaintiff-appellant.

Young, Moore and Henderson P.A., by J.D. Prather and Michael W. Ballance, for defendant-appellees.

HUDSON, Judge.

On or about 19 August 1999, plaintiff sustained an admittedly compensable leg injury. Disputes arose over plaintiff's entitlement to ongoing benefits and the case was heard on 30 August 2001. On 16 January 2003, Deputy Commissioner Theresa B. Stephenson awarded plaintiff ongoing temporary total disability benefits from her compensable accident on 19 August

1999. Defendants appealed to the Full Commission, which reversed the Commissioner's opinion and award on 29 September 2003. Plaintiff appeals. For the reasons discussed below, we affirm.

The following is a summary of the Full Commission's findings. Plaintiff worked as a "slotter" at a Wal-Mart Distribution Center in Hope Mills. Her position required continuous standing and lifting to count and sort merchandise. On 19 August 1999, a forklift ran into two pallets, pushing plaintiff's work cart into her right lower shin, which knocked her back and caused her to twist her body to keep from falling into the main aisle where forklifts were traveling. On 2 September 1999, plaintiff went to Occupational Health and was diagnosed with a contusion to her lower right leg and told not to stand for more than two hours. Plaintiff followed up with Occupational Health on 9 September and 23 September 1999, and although her leg improved, she continued to experience tingling and pain in her foot. Defendants filed a Form 60 on 23 September 1999, admitting the compensability of the leg injury.

On 20 October 1999, plaintiff saw Dr. John Smid, an orthopaedist, who diagnosed a possible Grade I strain of the medial collateral ligament with unresolved discomfort, possible early bursitis, and a contusion to the right lower extremity. Dr. Smid recommended physical therapy and instructed plaintiff to limit her work to sedentary duties. During a follow-up visit on 17 November 1999, plaintiff reported improvement in her leg. Also, for the first time since the 19 August 1999 injury, she reported back pain, which she said had begun in the previous week. Dr. Smid recommended continued physical therapy and when plaintiff continued to have knee pain, he ordered an MRI, which revealed small joint effusion. On 29 December 1999, Dr. Smid suggested arthroscopy of the knee. Plaintiff returned to Dr. Smid on 10 May 2000 and reported continued medial joint line pain and paresthesias in her right knee and lower leg. She also reported lower back pain radiating into her right lower leg. Dr. Smid again recommended knee

arthroscopy but instructed plaintiff that her back pain needed to improve first. After examining plaintiff on 7 June 2000, Dr. Smid stated in his notes that her primary complaint was lower back pain rather than leg or knee problems. By 8 December 2000, the last time Dr. Smid treated plaintiff, he opined that even without arthroscopy, plaintiff had reached maximum medical improvement (MMI) for her knee condition.

Plaintiff's family physician, Dr. Carl Foulks, also treated her during this period, for high blood pressure, as well as her leg and back injuries. When plaintiff moved to Roseboro, Dr. Eddie Powell became her family physician. She saw Dr. Powell on 19 April 2001 and reported back pain and numbness in her right leg. Dr. Powell recommended an MRI which revealed a herniated disc. On 14 August 2001, Dr. Powell imposed work restrictions on plaintiff, including no lifting, bending, crawling, twisting, running, jumping, climbing, prolonged sitting, prolonged standing, or prolonged walking.

Prior to addressing plaintiff's substantive arguments, we note that her brief violates appellate Rule 28(b)(6). N.C. R. App. P. 28(b)(6) (2004). Plaintiff has not made reference in her brief to the assignments of error pertinent to each question discussed, as required by this rule. *Id.* "The Rules of Appellate Procedure, are mandatory and failure to follow these rules will subject an appeal to dismissal." *Steingress v. Steingress*, 350 N.C. 64, 65, 511 S.E.2d 298, 299 (1999) (internal citations omitted). "[W]hen the appellant's brief does not . . . properly set[] forth exceptions and assignments of error with reference to the transcript . . . it is difficult if not impossible to properly determine the appeal." *Id.* at 66, 511 S.E.2d at 299 (internal citations omitted). However, this Court may reach the merits of an appeal despite rules violations by exercising its discretion to "suspend or vary the requirements or provisions of any of these rules in a case pending before it." N.C.R. App. P. 2 (2004). While we choose to apply Rule 2 and

address plaintiff's appeal, we conclude that because of these violations of the rules, she has not properly presented any issues for review.

Plaintiff argues first that the Industrial Commission's determination that her back condition is not causally related to her compensable leg injury is not supported by competent evidence or reasonable inferences therefrom. A causal relationship between the injury and the employment must be established for there to be a compensable worker's compensation claim. *Booker v. Duke Medical Center*, 297 N.C. 458, 475, 256 S.E.2d 189, 200 (1979). But this Court's review of an Industrial Commission decision is limited:

(1) the full Commission is the sole judge of the weight and credibility of the evidence, and (2) appellate courts reviewing Commission decisions are limited to reviewing 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) (citing *Adams v. AVX Corp.*, 349 N.C. 676, 509 S.E.2d 411 (1998)). Because plaintiff failed to bring forward assignments of error to specific findings of fact or conclusions of law, she has not sufficiently identified which portions of the opinion and award she contests. The Commission's findings of facts are conclusive if the record contains "any evidence tending to support the finding." *Adams*, 349 N.C. at 681, 509 S.E.2d at 414. Thus, the findings are conclusive, N.C. Gen. Stat. §97-86 (1999), and her assignments of error to those findings are deemed abandoned. N.C.R. App. P. 28 (b)(6).

Dr. Smid documented in his records that he did not believe the plaintiff's back condition was related to her injury at work, and the Commission so found. Plaintiff argues that during his deposition, Dr. Smid said he was unaware that plaintiff twisted to avoid falling when she injured her leg and that such twisting *could* cause back pain. However, even if review of the findings

were properly before us, the evidence supports the Commission's findings of fact. Likewise, plaintiff argues that Dr. Powell also testified that her injury was *possibly* caused by the accident. But he also testified, and the Commission found, that Dr. Powell had no opinion on causation. Given this testimony, the Commission acted within its authority to conclude, as it did, that plaintiff failed "to show that [her] back condition is causally related to her compensable knee injury." Here, we accept the Commission's findings as conclusive, and they in turn support its conclusions of law.

In her other argument, plaintiff contends that the Commission's determination that she failed to prove disability after 8 December 2000 as a result of her compensable injury by accident is not supported by competent evidence or inferences therefrom. Again, this issue is not properly before us. But even if it were, the evidence supports the Commission's findings of fact, which support its conclusions of law.

A plaintiff must establish one of the following to prove disability: 1) she is medically unable to return to work in any employment; 2) she is physically able to return to work but it would be futile for her to attempt to do so in light of her vocational limitations; 3) she is physically able to return to work but has been unable to do so in spite of reasonable efforts to find work; or 4) she has returned to work earning reduced wages. *Russell v. Lowes Prod. Dist.*, 108 N.C. App. 762, 425 S.E.2d 454 (1993). To award benefits for disability, the Commission must find and conclude that the plaintiff's incapacity to earn was caused by the compensable injury. *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 186, 345 S.E.2d 374, 379 (1986). Here, the Commission found no causal connection between plaintiff's work accident and her back problems. The Commission also found that most of the restrictions on her activities were due to her back condition and that she, "had not looked for work with any employer and does not know

whether there are jobs currently available that are consistent with her prior work history and within her current [leg] restriction.” These findings support the Commission’s conclusion that plaintiff did not sufficiently prove that she remained disabled after 8 December 2000 as a result of her compensable injury, and thus, that she was not entitled to receive any further workers’ compensation benefits.

Affirmed.

Judges WYNN and ELMORE concur.

Report per Rule 30(e).