NO. COA05-498

NORTH CAROLINA COURT OF APPEALS

Filed: 7 March 2006

MARY McLAMB, Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 986526

CARROLL'S FOODS, INC., Employer,
SELF-INSURED (HEWITT, COLEMAN & ASSOCIATES, Servicing Agent),
Defendant.

Appeal by plaintiff from an opinion and award filed 3 February 2005 by the North Carolina Industrial Commission. Heard in the Court of Appeals 30 November 2005.

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

Lewis & Roberts, P.L.L.C., by Timothy S. Riordan and Jeffrey A. Misenheimer, for defendant appellee.

McCULLOUGH, Judge.

Plaintiff Mary McLamb appeals from an opinion and award of the North Carolina Industrial Commission partially denying her workers' compensation claim. We affirm the challenged opinion and award.

FACTS

On 20 October 1999, plaintiff Mary McLamb was working as a truck driver for defendant Carroll's Foods when, while placing a tarp over some cargo, she felt a pain in her neck, back, and shoulders. She subsequently filed a claim for workers' compensation in which she alleged

that she suffered injuries to her neck, shoulder and lower back as a result of the tarp-pulling incident.

The evidence presented at the hearing before the Industrial Commission tended to show the following: McLamb sought treatment from Dr. Albert Verrilli on 26 October 1999 for pain in her neck and upper back which she related to her accident at work six days earlier. Dr. Verrilli diagnosed McLamb with a trapezius muscle strain, but only prescribed Extra-Strength Tylenol for her pain because she was pregnant. Dr. Verrilli recommended physical therapy and instructed McLamb to return to work in a light-duty capacity. In November of 1999 Dr. Verrilli advised McLamb to miss work. She remained out of work pursuant to Dr. Verrilli's recommendations until approximately January 2000, at which point the doctor recommended light-duty work that did not involve driving long distances or pushing, pulling, or lifting heavy items.

Pursuant to a referral from Dr. Verrilli, McLamb was seen by Dr. Alexander Huff at Southeast Orthopaedics and Sports Medicine on 10 January 2000. Dr. Huff diagnosed McLamb with unresolved cervical strain and right shoulder subacromial impingement. He recommended additional physical therapy and instructed McLamb to continue with light duty work.

Based on Dr. Huff's recommendation, McLamb was assigned light-duty work as an attendant in the scale house at Carroll's Foods beginning on 10 January 2000. Her duties in this position included weighing trucks, taking samples, entering data into a computer, completing log sheets, and carrying samples weighing approximately one pound to the company lab.

Two months after the 17 March 2000 delivery of her child, McLamb returned to Dr. Verrilli with complaints of persistent neck pain. Dr. Verrilli diagnosed her with suspected myofascial pain syndrome. Dr. Verrilli ordered further testing and again referred her to Dr. Huff.

McLamb returned to Dr. Huff on 5 June 2000 and was diagnosed with unresolved cervical strain. Dr. Huff recommended physical therapy and restricted McLamb to light-duty work which precluded her from lifting objects heavier than ten pounds or driving trucks. On 16 August 2000 Dr. Huff performed a right shoulder subacromial injection and recommended physical therapy for aggressive strengthening of McLamb's right shoulder. Dr. Huff restricted McLamb to work which did not involve reaching over her head, and he continued to advise her that she should not lift objects heavier than ten pounds. On 2 November 2000, Dr. Huff recommended a neurosurgical evaluation.

Pursuant to Dr. Huff's recommendation, McLamb was seen by Dr. Robert Allen of Raleigh Neurosurgical Clinic, Inc., on 27 November 2000. Dr. Allen believed McLamb's neck pain was "muscular ligamentous" and did not recommend surgery.

Following Dr. Allen's evaluation, McLamb returned to Dr. Huff on 14 December 2000. Dr. Huff recommended right shoulder open subacromial decompression, and possible rotator cuff repair. Dr. Huff recommended continued avoidance of overhead activities and limited use of her right arm. McLamb remained out of work from 3November 2000 until 23 April 2001 and received temporary total disability benefits during this time.

In May of 2001, McLamb was seen by Dr. Max Kasselt at Kasselt Bone and Joint Center for back pain, weak legs, neck pain, numbness in her right hand, and pain in her left and right shoulders. Dr. Kasselt believed that McLamb was engaging in symptom amplification behavior and suspected that psychological factors were affecting her physical condition. Based on this opinion, Dr. Kasselt referred McLamb to Dr. Gregory Gridley for a psychological evaluation.

Dr. Gridley evaluated McLamb on 17 May 2001, and opined that McLamb was malingering. Immediately following this evaluation, McLamb returned to Dr. Kasselt, who concurred in Dr. Gridley's assessment of malingering and released McLamb from his care.

McLamb returned to Dr. Huff on 3 December 2001 for back pain and right shoulder pain. Dr. Huff could not identify objective reasons for McLamb's continued pain on this date. Dr. Huff released McLamb to return to full duty work without restrictions.

McLamb sought treatment for lower back pain from Dr. Carolyn Sampson on 25 April 2001. Dr. Sampson diagnosed McLamb with chronic back pain, and instructed McLamb to remain out of work for two days. On 2 May 2001 Dr. Sampson recommended that McLamb's hours be reduced to thirty to thirty-five hours per week due to her back pain.

Dr. Sampson referred McLamb for a neurological evaluation, and she was seen by Dr. Rangasamy Ramachandran of Cape Fear Neurology Associates on 29 April 2002. Dr. Ramachandran diagnosed McLamb with musculoskeletal pains in the cervical and lumbar regions and

possible cervical radiculopathy and lumbosacral radiculopathy, and he advised her not to push, pull or lift any object heavier than ten pounds.

In August of 2001, McLamb presented her supervisor at Carroll's Foods with a note from Dr. Sampson regarding her light-duty restrictions. The testimony concerning the supervisor's reaction is in dispute. McLamb testified that she was instructed at this time that unless she could go back to work full time driving a truck, there was no work available for her. Her supervisor testified that no such conversation occurred and that light-duty work remained available for McLamb. McLamb has remained out of work since August 2001. She testified that she is willing to return to work in a light-duty capacity but that no light-duty position is available to her.

Based on the foregoing evidence, the Full Commission ("the Commission") ruled that McLamb had suffered a compensable injury to her neck and right shoulder but that her lower back injury was not related to the 20 October 1999 tarp-pulling incident and was not compensable. The Commission determined that McLamb had already been provided all necessary medical benefits and that she was not entitled to further disability compensation because she had refused suitable employment offered by her employer.

McLamb now appeals.

I.

In her first argument on appeal, McLamb contends that the Commission's determination that her lower back injury was not compensable is not supported by competent evidence in the record. This argument lacks merit.

For an injury to be compensable, it must be an "injury by accident arising out of and in the course of employment . . . ." N.C. Gen. Stat. §97-2(6) (2005). This Court must affirm the Commission's factual determinations concerning compensability if they are supported by " **any** competent evidence in the record." *Creel v. Town of Dover*, 126 N.C. App. 547, 552, 486 S.E.2d 478, 480 (1997) (emphasis added). Such determinations are conclusive on appeal "notwithstanding evidence that might support a contrary finding." *Hobbs v. Clean Control Corp.*, 154 N.C. App. 433, 435, 571 S.E.2d 860, 862 (2002).

In the instant case, Dr. Verrilli testified that he did not remember McLamb complaining of lower back pain when she initially sought medical treatment following the 20 October 1999 tarp-pulling incident, and his records indicated that McLamb only mentioned lower back pain once in the twelve times that he examined her between October 1999 and May 2000. Dr. Verrilli opined that, given the timing of McLamb's complaints of lower back pain and the scarcity with

which she mentioned it in her visits with him, the lower back injury was probably not related to the 20 October 1999 tarp-pulling incident. Dr. Huff testified that McLamb did not report lower back pain to him until eight-and-one-half months after the 20 October 1999 tarp-pulling incident, and he opined that the lower back injury probably was not related to the incident at work because McLamb did not consistently mention lower back pain to Dr. Verrilli. This medical testimony supports the Commission's finding that McLamb's lower back pain was not causally related to the incident at work and was not compensable.

II.

McLamb next contends that the Commission's determination that she does not require any future medical treatment for her neck and shoulder injuries is not supported by competent evidence in the record. This contention also lacks merit.

As already indicated, the Commission's factual determinations must be affirmed if there is competent evidence to support them, even if there is evidence which would support a contrary finding. *Ante*, slip op. at 6. In the instant case, Dr. Huff assigned a zero percent permanent partial disability rating to McLamb's neck and shoulder, and Drs. Huff, Allen, and Kasselt offered opinions that McLamb did not require additional medical treatment for her neck and shoulder injuries. This evidence supports the Commission's determination that no future treatment is needed for McLamb's neck and shoulder injuries.

III.

In her final argument on appeal, McLamb asserts that the Commission's determination that she is not entitled to any future disability benefits because she refused suitable employment is not supported by competent record evidence. This contention also lacks merit.

Under the North Carolina Workers' Compensation Act, a disability is defined as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C. Gen. Stat. §97-2(9) (2005). Thus, the term "disability" refers to diminished earning capacity. *See id*. Accordingly, "[i]f an injured employee refuses employment procured for him suitable to his capacity he shall not be entitled to any compensation at any time during the continuance of such refusal, unless in the opinion of the Industrial Commission such refusal was justified." N.C. Gen. Stat. §97-32 (2005). The Commission's findings in this regard must be affirmed if supported by any competent evidence in the record. *Ante*, slip op. at 6.

In the instant case, McLamb's supervisor testified that Carroll's Foods permitted McLamb to work as a scale house attendant. This position entailed recording weights for incoming and outgoing trucks, directing trucks to an unloading area, and occasionally carrying samples to a company lab. These duties required McLamb to be able to pick up a pencil and clipboard, to do paperwork, to stand, sit, and walk, and to lift samples weighing less than one pound. Accordingly, the requirements of the scale house attendant position complied with McLamb's doctor-imposed work restrictions. The supervisor testified that the light-duty position was available for the duration of McLamb's compensable injury and that, although she remains an employee of Carroll's Foods, McLamb has not worked since July or August of 2001.

Though McLamb provided testimony from which the Commission could find that the light-duty position was not made available to her for the duration of her compensable injury, there was evidence from which the Commission could find and conclude that McLamb refused suitable employment made available to her and that she therefore was not entitled to any additional disability benefits.

McLamb’s assignments of error are overruled. The Commission’s opinion and award is Affirmed.

Judges HUNTER and GEER concur.

Report per Rule 30(e).