IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-78

Filed: 18 August 2015

North Carolina Industrial Commission, I.C. No. W14258

MARGIE ELLIS, Employee, Plaintiff,

v.

KEY CITY FURNITURE INC., Employer, and STONEWOOD INSURANCE COMPANY, Carrier, Defendants.

Appeal by plaintiff from an opinion and award entered 22 October 2014 by the North Carolina Industrial Commission. Heard in the Court of Appeals 5 June 2015.

The Law Offices of Timothy D. Welborn, P.A., by Timothy D. Welborn, for plaintiff-appellant.

Brooks Stevens & Pope, by Matthew P. Blake, for defendant-appellee.

INMAN, Judge.

Where a disability claimant seeking compensation after she was laid off from her job due to economic conditions offered no evidence regarding her inability to earn the same wages as she had earned prior to being laid off, the Industrial Commission did not err in concluding that she failed to meet her burden of proving disability. Where the claimant obtained statutory authorization for a physician to assess only the percentage of her permanent disability, the Industrial Commission did not err by

disregarding or giving diminished weight to that physician's opinions and recommendations beyond the scope of the evaluation authorized by the statute.

Plaintiff Margie Ellis ("plaintiff") appeals the opinion and award by the Full Commission of the North Carolina Industrial Commission (the "Full Commission") awarding her permanent partial disability compensation based on a five percent permanent partial impairment rating to her back and medical treatment in the form of pain medication and annual evaluations, but denying her ongoing total disability claims. Plaintiff contends the Full Commission erred by: (1) failing to conclude that she was disabled after she was laid off from her job; (2) disregarding testimony by Dr. William Bell, who was authorized to perform a medical examination under N.C. Gen. Stat. § 97-27(b); and (3) failing to order additional diagnostic testing as recommended by Dr. Bell.

After careful review, we affirm the Full Commission's opinion and award.

Background

Plaintiff worked at Key City Furniture ("Key City") for approximately 35 years as a coordinator responsible for assembling pieces of furniture. Plaintiff's job required standing, frequent lifting, bending, twisting, and reaching overhead. On 16 December 2008, plaintiff was injured when she tripped over a cushion on the workroom floor. On 21 April 2009, Key City and its insurance carrier Stonewood Insurance Company (collectively known as "defendants") filed a "Notice to Employee of Payment of Medical Only Without Prejudice to Later Deny the Claim," referred to

as Form 63, agreeing to pay plaintiff's medical bills but not providing disability compensation and not admitting that plaintiff was entitled to disability compensation.

On 20 October 2009, plaintiff saw Dr. Alden Milam ("Dr. Milam"), an orthopedic surgeon, for her ongoing claims of leg pain. After reviewing plaintiff's CT scan, Dr. Milam diagnosed her with disc herniation and lateral recess stenosis but, at a later appointment on 30 March 2010, determined that she had reached maximum medical improvement ("MMI"), so that no further interventions were needed. Dr. Milam assigned a five percent permanent partial impairment rating to plaintiff for her back injury. Plaintiff continued to work full-time.

On 13 April 2010, plaintiff was again injured at work when she slipped on strings on the floor and pulled her back. Following this new injury, Dr. Milam saw plaintiff again on 11 May 2010 and recommended an MRI of the lumbar spine "to rule out a new issue." In a progress note dated 28 September 2010, Dr. Milam opined that surgery was not a good option for plaintiff, declined to change her impairment rating, and released her to full-duty work. Dr. Milam referred plaintiff to Dr. Peterson Giallianza ("Dr. Giallanza"), a neurologist, for a second opinion and defendants authorized that consultation.

Dr. Giallanza examined plaintiff on 4 November 2010 and diagnosed a left lumbar radiculopathy, ordered other diagnostic tests, recommended additional physical therapy, and prescribed plaintiff pain medication. Plaintiff saw Dr.

Giallanza several more times until 24 January 2012. During her last appointment, plaintiff reported that the pain medication had "greatly improved" her back and leg pain and requested that he release her from care. Dr. Giallanza noted she was stable and recommended plaintiff follow-up with another physician on an annual basis.

Plaintiff continued to work full-time following her second injury, but she lost her job as a result of company-wide layoffs on or around 12 January 2012. Key City ceased operations altogether in August 2013.

On 15 August 2012, defendants authorized plaintiff to see Dr. Henry Elsner ("Dr. Elsner"), a neurosurgeon. Dr. Elsner, like Dr. Milam, determined that plaintiff had reached MMI and assigned her a five percent permanent disability rating. He did not recommend any further treatment for plaintiff other than pain management.

Displeased with the recommendations and evaluations by her physicians, plaintiff called an adjuster for defendant-carrier on 3 October 2012 and requested an additional evaluation. The adjustor advised plaintiff she could receive a second opinion on her permanent partial impairment rating. After being provided a list of three physicians, plaintiff chose Dr. William Bell ("Dr. Bell"), a neurosurgeon, for the second opinion on her permanent partial impairment rating. The adjustor wrote Dr. Bell on 3 October 2012 to advise that, because the evaluation was authorized under N.C. Gen. Stat. § 97-27, "this appointment is authorized for a second opinion on the rating only."

Dr. Bell saw plaintiff on 17 December 2012 and determined he did "not think this patient is at [MMI]" and did "not think that she should be assigned a rating." Dr. Bell recommended further diagnostic tests, including a lumbar myelogram and CT scan, to determine whether plaintiff had any neural compression.

On 1 February 2013, plaintiff requested authorization for the additional testing recommended by Dr. Bell. Defendants denied plaintiff's request, noting that Dr. Bell had exceeded the scope of the authorized examination pursuant to 97-27(b), and that, accordingly, "[h]is opinions are not due the same weight of the authorized treating physician."

On 18 January 2012, defendants filed a Form 33 "Request for Hearing" noting that: "[p]laintiff has been released at [MMI] and assigned a permanent partial impairment rating; however, plaintiff will not accept payment of her permanent partial impairment rating. Plaintiff has also been released without restrictions and is not currently disabled." Plaintiff filed a Form 33R "Response" on 13 August 2013 contending that she "is unable to return to work and is entitled to continue receiving medical treatment until a complete recovery is made."

The matter came on for hearing before Deputy Commissioner Phillip A. Holmes on 9 September 2013. Deputy Commissioner Holmes entered an opinion and award on 21 January 2014 ordering defendants pay for the additional diagnostic testing recommended by Dr. Bell but denying plaintiff's claim for ongoing disability

compensation. Both plaintiff and defendants appealed Deputy Commissioner Holmes's opinion to the Full Commission.

The matter came on before the Full Commission on 28 May 2014. Based on the evidence before it, the Full Commission made the following pertinent findings of fact:

> 27. From the time of plaintiff's injury on 16 December 2008 until the time defendant-employer's plant closed on 12 January 2012, plaintiff did not miss any time from work due to her injury, other than to attend medical appointments. Plaintiff was able to perform her regular duties and was part of an economic layoff.
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> 32. Dr. Bell opined to a reasonable degree of medical certainty that he did not think plaintiff could return to work "in the state that [he] saw her." The Full Commission disregards this opinion in light of the fact that Dr. Bell saw plaintiff on one occasion for a second opinion on her permanent partial impairment rating.
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> 35. The Full Commission finds that plaintiff has reached maximum medical improvement for her 16 December 2008 injury by accident. Drs. Milam and Elsner determined that plaintiff had reached maximum medical improvement and both assigned a five percent (5%) permanent partial impairment rating. Dr. Giallanza opined during his deposition that, assuming plaintiff would not consider surgical intervention, which he noted she had been adamantly opposed to, she was at maximum medical improvement and could work with lifting and bending restrictions. Dr. Giallanza noted that plaintiff could "possibly" improve with surgery but that this would be difficult to determine. The Full Commission gives less weight to Dr. Bell's opinion that plaintiff had not reached

> maximum medical improvement as he saw her on only one occasion for a second opinion on her permanent partial impairment rating.

The Full Commission entered the following conclusions of law pertinent to the issues before this Court:

> 1. Plaintiff sustained a compensable injury by accident to her low back arising out of and in the course and scope of her employment with defendant-employer on 16 December 2008. N.C. Gen. Stat. §§ 97-2(6), 97-29.
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> 2. Plaintiff has failed to meet her burden of proving disability, through the production of evidence that she was incapable of earning pre-injury wages in either the same or in any other employment and that the incapacity to earn pre-injury wages was caused by plaintiff's injury. *Hillard v. Apex Cabinet Co.*, 305 N.C. 593, 290 S.E.2d 682 (1982).
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> 4. Pursuant to N.C. Gen. Stat. § 97-27(b), the Full Commission is required to either disregard or give less weight to the opinions of Dr. Bell on issues outside the scope of the second opinion on plaintiff's permanent partial impairment rating. Having done so, the Full Commission concludes that additional imaging studies, including a CT scan, myelogram and repeat MRI, would not tend to effect a cure or provide plaintiff with relief at this time. Accordingly, plaintiff is not entitled to have defendants authorize and pay for the same at this time. *Id.*
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> 5. Plaintiff has reached maximum medical improvement from her 16 December 2008 work injury and is entitled to payment of the 5% permanent partial impairment rating to her back. N.C. Gen. Stat. § 97-31(23).

Plaintiff timely appealed the Full Commission's opinion and award.

Standard of Review

"Appellate review of an order and award of the Industrial Commission is limited to a determination of whether the findings of the commission are supported by the evidence and whether the findings in turn support the legal conclusions of the commission." *Simon v. Triangle Materials, Inc.*, 106 N.C. App. 39, 41, 415 S.E.2d 105, 106 (1992).

Analysis

I. Disability Determination

Plaintiff first argues that because she "produced medical evidence of her ongoing impairment and inability to work," the Full Commission erred in not concluding that she has been disabled since 12 January 2012, the date she was laid off. Specifically, plaintiff contends that the Full Commission ignored credible evidence showing her ongoing disability, citing her own testimony and that of Dr. Bell. We disagree because evidence of plaintiff's medical condition, without more, does not suffice to establish that she is disabled.

"An employee seeking compensation under the Workers' Compensation Act for an injury arising out of and in the course of employment bears the burden of proving the existence of his disability and its extent." *Johnson v. S. Tire Sales & Serv.*, 358 N.C. 701, 706, 599 S.E.2d 508, 512 (2004) (internal quotation marks omitted). Although a presumption of disability arises in limited situations, it does not arise when, as here, an employer filed a Form 63 reserving the right to deny the employee's claim. *Id.* Pursuant to N.C. Gen. Stat. § 97-2(9) (2013), disability, for purposes of

workers' compensation, is defined as an "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." In determining whether an employee has met her burden of showing disability, the Commission may consider the employee's "testimony as to [her] pain in determining the extent of incapacity to work and earn wages such pain might cause." *Webb v. Power Circuit, Inc.*, 141 N.C. App. 507, 512, 540 S.E.2d 790, 793 (2000). However, disability "specifically relates to the incapacity to earn wages, rather than only to physical infirmity." *Medlin v. Weaver Cooke Const., LLC*, 367 N.C. 414, 420, 760 S.E.2d 732, 736 (2014).

> [I]n order to support a conclusion of disability, the Commission must find: (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) that this individual's incapacity to earn was caused by plaintiff's injury.

Hilliard v. Apex Cabinet Co., 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982).

On appeal, plaintiff challenges only the Full Commission's failure to conclude she was disabled during the time period after she was laid off from Key City, 12 January 2012. Plaintiff, however, has offered no evidence as to her earning capacity after the layoff; nor did the Full Commission make any findings regarding her diminished wage earning capacity. Without evidence of incapacity, the Industrial Commission could not conclude that plaintiff was disabled. As our Supreme Court has noted,

> Because the focus is on earning capacity, broad economic conditions, as well as the circumstances of particular markets and occupations, are undoubtedly relevant to whether a claimant's inability to find equally lucrative work was because of a work-related injury. Whether in a boom or bust economy, a claimant's inability to find equally lucrative work is a function of both economic conditions and his specific limitations. Both factors necessarily determine whether a specific claimant is able to obtain employment that pays as well as his previous position; the Commission makes this determination based on the evidence in the individual case.

Medlin v. Weaver Cooke Const., LLC, 367 N.C. 414, 422-23, 760 S.E.2d 732, 737-38 (2014). As noted above, this burden regarding her earning capacity is on plaintiff. *See Johnson*, 358 N.C. at 706, 599 S.E.2d at 512.

Plaintiff testified that following her layoff, she worked part-time as a CNA until February 2013, but she had to stop because it hurt her back. However, plaintiff presented no evidence that she was unable to find "equally lucrative work" after the layoff due to her injury, nor did she offer any evidence of her post-layoff wages. In fact, the only evidence offered as to plaintiff's earnings after 12 January 2012, the date she was laid off, was that plaintiff was approved for social security disability retroactive to that date. Moreover, plaintiff offered no evidence that limitations from her injury affected her ability to find work, especially considering that she had been released to work without restriction by three physicians who examined her. Thus, we hold that, despite her ongoing physical symptoms, plaintiff failed to meet her burden of proving disability after she was laid off, and we affirm the Full Commission's conclusion that plaintiff was not disabled after January 2012.

II. Testimony by Dr. Bell

Plaintiff next argues that the Full Commission erred by disregarding Dr. Bell's testimony that plaintiff was not at MMI. We disagree, because the statute authorizing Dr. Bell's evaluation of plaintiff expressly directs the Industrial Commission to disregard or give diminished weight to such testimony .

Dr. Bell's examination of plaintiff and his evaluation were authorized under, and limited by, N.C. Gen. Stat. § 97-27(b) which states, in pertinent part, that:

> (b) In any case arising under this Article in which the employee is dissatisfied with the percentage of permanent disability as provided by G.S. §97-31 and determined by the authorized health care provider, the employee is entitled to have another examination *solely on the percentage of permanent disability* provided by a duly qualified physician of the employee's choosing [.]

N.C. Gen. Stat. § 97-27(b) (2013) (emphasis added). This scope of examination is narrower than the scope of examination by Drs. Milam, Giallanza, and Elsner, who were authorized by defendants to provide comprehensive second opinion evaluations under N.C. Gen. Stat. § 97-27(a).

Section 97-27(b) specifies that any medical opinion beyond its limited scope must be disregarded entirely or given less weight than the opinions of a qualified physician who examined a claimant for broader purposes:

> The Industrial Commission must either disregard or give less weight to the opinions of the duly qualified physician chosen by the employee pursuant to this subsection on issues outside the scope of the G.S. §97-27(b) examination.

Id.

When interpreting statutes concerning workers' compensation, this Court has noted that "[i]f the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning." *Purcell v. Friday Staffing*, __ N.C. App. __, __, 761 S.E.2d 694, 698 (2014). Here, the statute is clear and unambiguous with regard to the scope of an evaluation allowed by a physician providing a second opinion as to an injured employee's permanent disability rating. Dr. Bell was selected by plaintiff and authorized by defendants to provide a second opinion on the degree of her permanent disability rating, which had been determined to be five percent by Dr. Elsner and Dr. Milam. Dr. Bell offered no opinion on plaintiff's permanent disability rating. He instead opined that plaintiff had not reached MMI and recommended additional diagnostic testing—both opinions outside the scope of the evaluation authorized by section 97-27(b). Thus, the plain language of the statute required the Full Commission to disregard or give less weight to Dr. Bell's opinions. We hold, therefore, that the Full Commission did not err in disregarding Dr. Bell's opinions that fell outside the scope of the N.C. Gen. Stat. 97-27(b) evaluation, or in placing more weight on the medical opinions offered by Drs. Milam, Giallanza, and Elsner.

Finally, plaintiff argues that the Full Commission erred by not ordering the additional testing recommended by Dr. Bell. We disagree, because Dr. Bell's recommendations were beyond the scope of his evaluation authorized by section 97-27(b).

The Full Commission acknowledged Dr. Bell's recommendations that plaintiff undergo a CT scan and myelogram, but it gave them less weight than the testimony by Dr. Elsner and Dr. Giallianza, who each of opined that these additional tests would not make any relevant findings or provide any benefit to plaintiff. As noted above, Dr. Bell's recommendations were outside the scope of evaluation he was authorized to perform. Thus, we hold that the Full Commission's decision to assign Dr. Bell's recommendations less weight was required by the statute. We therefore affirm the Full Commission's determination rejecting plaintiff's demand for further testing.

Conclusion

For the reasons stated above and based on our review of the evidence and the applicable law, we affirm the Full Commission's opinion and award.

AFFIRMED.

Judges STROUD and MCCULLOUGH concur.

Report per Rule 30(e).