NO. COA12-1009
NORTH CAROLINA COURT OF APPEALS

Filed: 5 March 2013

JAMES A. BELL,
Employee, Plaintiff

v. North Carolina Industrial Commission
I.C. No. W28869

THE GOODYEAR TIRE & RUBBER COMPANY, Employer, and LIBERTY MUTUAL INSURANCE COMPANY, Carrier,
Defendants.

Appeal by plaintiff from opinion and award entered 17 May 2012 by the North Carolina Industrial Commission. Heard in the Court of Appeals 10 January 2013.

Law Offices of Kathleen G. Sumner, by Kathleen G. Sumner, for Plaintiff-Appellant.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Matthew J. Ledwith and M. Duane Jones, for Defendant-Appellees.

HUNTER, JR., Robert N., Judge.

James A. Bell ("Plaintiff") appeals from the 17 May 2012 opinion and award of the Full Commission of the North Carolina Industrial Commission (the "Commission") denying Plaintiff's requests. Plaintiff argues that the Commission erred by (1) failing to approve his Form 18M for medical treatment, (2)

failing to make an award for injury to an important organ, and (3) failing to order a Functional Capacity Evaluation. We affirm the Commission's opinion and award.

I. Factual Background

Plaintiff began working for Goodyear Tire & Rubber Company ("Defendant") in 1997. On 10 May 2009, Plaintiff was building tires at Defendant's tire plant in Fayetteville when he experienced a burning sensation in the lower part of his stomach. He told his area manager about the injury that day. Plaintiff visited Defendant's dispensary on 12 May 2009. From there, Plaintiff went to the emergency room, where he was diagnosed with a hernia. At an already scheduled checkup appointment, Plaintiff's doctor, Dr. Sandip Patel, also determined that Plaintiff had a hernia.

On 17 June 2009, Plaintiff visited Dr. Michael Bryant, a general surgeon. On 9 July 2009, Dr. Bryant performed an umbilical herniorrhaphy with mesh repair at the Fayetteville Ambulatory Surgery Center. Plaintiff visited Dr. Bryant on 20 July 2009, 10 August 2009, and 24 August 2009 before returning to work on 16 September 2009. Defendant paid Plaintiff for his time out of work and all of his medical bills up to that point.

On 26 March 2010, Plaintiff visited Dr. Patel complaining of pain in his chest and of nausea. Plaintiff was diagnosed with acid reflux. Dr. Patel excused Plaintiff from work on 26 March 2010 through 29 March 2010. On 29 March 2010, Plaintiff stated to Dr. Patel that he was feeling much better.

Also on 29 March 2010, at a visit with Dr. Bryant, Plaintiff complained of "[p]ain with lifting in [his] right lateral [abdomen]" but said there was no pain at the repair site. Dr. Bryant's assessment was non-specific pain not related to surgery. Dr. Bryant found him to be at maximum medical improvement at that visit.

A CT scan performed at Dr. Patel's request revealed no evidence of a hernia. Plaintiff visited Dr. Patel on 11 June 2010 and 29 July 2010 regarding bumps on the back of his head and pain in his left foot, but did not complain at those visits of pain from the hernia surgery.

On 8 September 2010, Plaintiff visited Dr. Bryant for the last time complaining of pain below his navel when he did heavy work. Dr. Bryant did not feel any recurrence of Plaintiff's hernia.

On 8 December 2010, based on a referral from his attorney, Plaintiff visited Dr. Charles Hultman for an evaluation of his

abdominal pain. Dr. Hultman was not able to specifically identify what was causing Plaintiff's chronic pain. He said that Plaintiff was likely to have chronic pain in the future, but listed other possible complications as having less than a 50% chance of developing. The only treatment Dr. Hultman recommended was over-the-counter nonsteroidal anti-inflammatory drugs such as Aleve or Advil.

At the time of his hearing on 10 November 2011, Plaintiff had no medical restrictions as a result of the hernia. He testified that his pain was less than when he first returned to work after the surgery. When building tires, he testified that his pain was a five on a scale of one to ten, with ten being the worst pain.

II. Procedural History

On 8 July 2009, Defendant filled out a Form 60 admitting Plaintiff's right to compensation. On 14 July 2009, Plaintiff filed a Form 18 notice of accident and claim. On 27 May 2009, Defendant filled out a Form 19 employer's report. On 18 May 2010, Plaintiff filed an amended Form 18.

On 10 June 2010, Plaintiff filed a Form 18M seeking additional medical compensation for "[r]ecurrent problems with [the] hernia site." On 15 July 2010, Plaintiff completed a Form

33 requesting that his claim be assigned for a hearing. On 20 July 2010, Defendant filled out a Form 33R response claiming that

> Employee-Plaintiff has received all compensation and medical benefits to which he is entitled under the North Carolina Workers' Compensation Act. Employee-Plaintiff's Form 18M was properly denied as there has been no showing that there is a substantial risk for future medical treatment regarding Employee-Plaintiff's hernia repair. Employee-Plaintiff has been released to return to work full duty and not assigned a PPD rating.

On 6 October 2011, Deputy Commissioner Myra L. Griffin filed an opinion and award denying Plaintiff's claims on his Form 18M as well as his request for compensation for injury to an important organ. Plaintiff appealed, and on 17 May 2012, the Full Commission filed an opinion and award denying Plaintiff's claims. Plaintiff filed timely notice of appeal.

III. Jurisdiction & Standard of Review

An opinion and award of the Industrial Commission is a final judgment entered upon review of a decision of an administrative agency, and appeal lies to this Court pursuant to N.C. Gen. Stat. § 97-86 (2011).

Review of an opinion and award of the Industrial Commission "is limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support

the Commission's conclusions of law. This 'court's duty goes no further than to determine whether the record contains any evidence tending to support the finding.'" *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (citation omitted) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)).

"The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Anderson*, 265 N.C. at 433-34, 144 S.E.2d at 274.

IV. Analysis

Plaintiff argues that the Full Commission erred by (1) failing to approve his Form 18M for medical treatment, (2) failing to make an award for injury to an important organ, and (3) failing to order a Functional Capacity Evaluation. For the following reasons, we disagree.

We note preliminarily that for all arguments, Plaintiff has said that "there is no factual dispute. The dispute is based upon the Commission's conclusions of law . . . ." "Unchallenged findings of fact by the Commission are binding on appeal." *Davis v. Hospice & Palliative Care of Winston-Salem*, 202 N.C. App. 660, 670, 692 S.E.2d 631, 638 (2010). "The Commission's conclusions of law are reviewed *de novo*." *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004).

1. Form 18M

Plaintiff first argues that the Full Commission erred in failing to approve his Form 18M requesting additional medical compensation.

"After an employee has established a compensable injury under the Workers' Compensation Act, he may seek compensation for additional medical treatment when such treatment lessens the period of disability, effects a cure or gives relief. . . . . [T]he Commission must determine that there is a substantial risk of the necessity of future medical compensation to order such payment." ***Adams v. Frit Car, Inc.***, 185 N.C. App. 714, 720, 649 S.E.2d 651, 655 (2007) (quotation marks and internal citations omitted).

In the present case, the Commission made the following findings of fact:

> [10.] On March 26, 2010, plaintiff presented to Dr. Patel for follow-up from a hospital admission for pain in the chest and epigastric area. Plaintiff reported burning pain with some nausea. His diagnosis from his hospital admission was acid reflux. He reported some improvement with the pain and discomfort. Plaintiff did not report any complaints related to his hernia at this visit . . . .
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> 11. On March 29, 2010, plaintiff returned to Dr. Bryant with complaints of pain in his right side when performing heavy lifting at

work. Upon examination, Dr. Bryant did not feel plaintiff's pain was related to a recurrence of his hernia.

12. On September 8, 2010, plaintiff reported pain just below his navel when he was doing heavy work. Dr. Bryant determined plaintiff did not have a recurrence of his hernia . . . . Dr. Bryant did not feel any surgical intervention was warranted.

. . . .

[14.] Upon examination, Dr. Hultman diagnosed plaintiff with post-operative pain. He determined there were no specific problems which could be addressed by surgery. Dr. Hultman recommended plaintiff take an over-the-counter non-steroidal pain reliever, such as Aleve and Advil, when he experienced pain.

15. Dr. Hultman opined plaintiff is at risk for developing repeat hernia, a bowel obstruction or infection. However, the chances of plaintiff developing any of the conditions were less than 50%. He did opine that plaintiff had a greater than 50% chance of developing chronic abdominal pain. However, Dr. Hultman felt that currently plaintiff's pain could be controlled with the use of an over-the-counter non-steroidal pain reliever such as Aleve or Advil. As of the date of Dr. Hultman's examination, he did not feel plaintiff's pain warranted a referral to a pain management specialist. Further, Dr. Patel indicated that none of the treatment he had provided to plaintiff following plaintiff's 2009 surgery was related to plaintiff's umbilical hernia "repair surgery."

16. Plaintiff continues to work in his pre-injury position with defendant-employer

> since being released to return to work by Dr. Bryant. While building tires, he rates his pain a 5 on a scale of 1 to 10 with 10 be[ing] the highest level of pain. He admits his pain is improving with time.

The Commission then found that "[b]ased upon the preponderance of the evidence in view of the entire record, plaintiff does not have a substantial risk for needing future medical treatment." This led to its conclusion of law that "Plaintiff has not proven that he is at 'substantial risk' of needing future medical treatment."

"[T]he Commission must first determine whether there is a substantial risk of the necessity of future medical compensation." *Taylor v. Bridgestone/Firestone, Inc.*, 157 N.C. App. 453, 460, 579 S.E.2d 413, 417 (Hunter, Robert C., J., dissenting), *rev'd for reasons stated in dissent*, 357 N.C. 565, 598 S.E.2d 379 (2003). "If the Commission concludes that the plaintiff has shown such substantial risk . . . then a rebuttable presumption arises that the treatment is directly related to the original compensable injury and the employer has the burden of producing evidence showing the treatment is not directly related to the compensable injury." *Id.* (quotation marks and citation omitted). "However, if the Commission concludes that the plaintiff has failed to satisfy his initial

burden of proving that there is a substantial risk of future medical treatment, then it is unnecessary for the Commission to even reach the second stage of the inquiry." *Id.* at 460, 579 S.E.2d at 418.

Only Dr. Hultman testified that Plaintiff may be at risk for further conditions related to his hernia. Of the conditions Dr. Hultman mentioned, the only one with a greater than 50% chance of development was chronic abdominal pain. Dr. Hultman felt Plaintiff's pain was manageable using nonsteroidal pain relievers, did not warrant a referral to a pain management specialist, and should not be addressed by surgery. These findings of fact support the Commission's conclusion that Plaintiff did not meet his initial burden of proving there was a "substantial risk" of needing future medical treatment.

We note that Plaintiff argues in his brief that the Commission "ignore[s]" facts favorable to Plaintiff. In making its decisions, "the Commission may not wholly disregard or ignore the competent evidence before it." *Peagler v. Tyson Foods, Inc.*, 138 N.C. App. 593, 601, 532 S.E.2d 207, 212 (2000). However, there is no requirement that the Commission "find facts as to all credible evidence. That requirement would place an unreasonable burden on the Commission. Instead, the Commission

must find those facts which are necessary to support its conclusions of law." *Id.* at 602, 532 S.E.2d at 213 (quotation marks and citation omitted).

There is nothing in the record to suggest that the Commission wholly disregarded or ignored competent evidence. The Commission referenced and summarized the depositions of all three physicians in the case, as well as Plaintiff's testimony. The Commission considered all of the evidence and its findings of fact support its conclusion of law that Plaintiff did not show a "substantial risk" of future medical treatment.

2. Injury to an Important Organ

Plaintiff next argues that Commission erred in failing to award compensation for "loss of or permanent injury to any important external or internal organ" under N.C. Gen. Stat. § 97-31(24) (2011).

The Commission made the following findings of fact:

> [6.] On July 9, 2009, plaintiff underwent an umbilical hernia repair with mesh without complication performed by Dr. Bryant.
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> . . . .
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> 11. On March 29, 2010, plaintiff returned to Dr. Bryant with complaints of pain in his right side when performing heavy lifting at work. Upon examination, Dr. Bryant did not feel plaintiff's pain was related to a recurrence of his hernia.

> 12. On September 8, 2010, plaintiff reported pain just below his navel when he was doing heavy work. Dr. Bryant determined plaintiff did not have a recurrence of his hernia. Dr. Bryant opined the pain could be secondary to scar tissue from the hernia repair or muscle strain. Dr. Bryant did not feel any surgical intervention was warranted.
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> 13. Dr. Bryant found plaintiff reached maximum medical improvement on March 29, 2010 . . . .
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> [16.] While building tires, [Plaintiff] rates his pain a 5 on a scale of 1 to 10 with 10 be[ing] the highest level of pain. He admits his pain is improving with time.

From these facts, the Commission found that "[b]ased upon the preponderance of the evidence in view of the entire record, there is no evidence that plaintiff has sustained any loss of or permanent injury to any important external or internal organ or part of the body."

"In order for plaintiff to be entitled to compensation pursuant to [N.C. Gen. Stat. §] 97-31(24), he must show from medical evidence that he has loss of or permanent injury to an *important* external or internal organ or part of his body for which no compensation is payable under any other subdivision of [N.C. Gen. Stat. §] 97-31." *Porterfield v. RPC Corp.*, 47 N.C. App. 140, 142-43, 266 S.E.2d 760, 762 (1980).

Plaintiff suffered a hernia which was repaired by a surgery using mesh without complication. Since then, although he complains of pain, Plaintiff admits that his pain is improving. There is no evidence that Plaintiff has suffered the loss of an important organ. Likewise, there is no evidence that Plaintiff has suffered any permanent injury to an important organ. *See Id.* at 143-44, 266 S.E.2d at 762 (affirming the Commission's decision that a hernia repaired using mesh was not compensable under N.C. Gen. Stat. § 97-31(24)).

3. Functional Capacity Evaluation

Plaintiff lastly argues that the Commission erred by failing to order a functional capacity evaluation ("FCE") to determine whether Plaintiff returned to suitable employment.

An FCE is obtained to determine what level an employee can work in his current condition. It measures things such as the amount of weight the employee can lift, push, and pull, and how many hours an employee can work per day or week. The Commission made the following findings of fact:

> 8. Following the surgery, plaintiff was written out of work for several weeks. On September 11, 2009, plaintiff was released to return to work without restrictions.
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> 9. On September 16, 2009, plaintiff returned to work with defendant-employer. He was permitted to work off-standard so

> that he could build up his tolerance to meet his full duty requirements.
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> . . . .
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> 13. Dr. Bryant found plaintiff reached maximum medical improvement on March 29, 2010. He prescribed a waistband to provide extra support while plaintiff was performing heavy work. Dr. Bryant did not assign a permanent partial disability rating because he does not assign ratings as part of his practice.
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> . . . .
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> 16. Plaintiff continues to work in his pre-injury position with defendant-employer since being released to work by Dr. Bryant. While building tires, he rates his pain a 5 on a scale of 1 to 10 with 10 be[ing] the highest level of pain. He admits his pain is improving with time.
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> . . . .
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> [18.] The Full Commission finds that plaintiff does not need an FCE as: plaintiff has been found to be at maximum medical improvement; has been released to return to work without restrictions; has returned to work in his pre-injury position; has continued to work in that position through the date of hearing before the Deputy Commissioner and has acknowledged that any pain he does have has been improving over time.

Since Plaintiff is at maximum medical improvement and has returned to work without restrictions, the Commission's findings of fact support their conclusion that Plaintiff does not need a

functional capacity evaluation. We find no error in their failure to grant Plaintiff's request for a functional capacity evaluation.

V. Conclusion

For the foregoing reasons, the decision of the Commission is

AFFIRMED.

Judges STROUD and DAVIS concur.

Report per Rule 30(e).