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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-1077

Filed: 20 September 2016

N.C. Industrial Commission, No. Y02943

TORREY S. YOUNG, Employee, Plaintiff

v.

LOWES HOME CENTER, INC., Employer; SELF-INSURED (SEDGWICK CMS, Third-Party Administrator), Defendant

Appeal by plaintiff and cross-appeal by defendant from opinion and award entered 27 May 2015 by the Full Commission of the North Carolina Industrial Commission. Heard in the Court of Appeals 30 March 2016.

*Law Offices of James Scott Farrin, by Matthew D. Harbin, for plaintiff-appellant.*

*Cranfill, Sumner, and Hartzog, LLP, by Jaye E. Bingham-Hinch, Amy L. Pfeiffer, and Meredith T. Berard, for defendant-appellee and defendant-appellant.*

CALABRIA, Judge.

Torrey S. Young (“plaintiff”) and Lowe’s Home Centers, Inc. and Sedgwick CMS (“defendant”) appeal from an opinion and award of the Full Commission of the North Carolina Industrial Commission (“Commission”). We affirm.

***I. Background***

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Young, thirty-six years old, had been employed by Lowe's for fourteen years as a product service associate. His job involved moving metal shelves and putting up and taking down displays. On 8 November 2011, plaintiff was "pulling a range to place on a pallet for transport" and felt a pinch in his left shoulder. On 27 March 2012, defendant filed a Form 60 with the Industrial Commission, admitting liability and accepting compensability for plaintiff's "sprains and strains on [his] left shoulder and upper arm."

On 28 November 2011, plaintiff was treated by Dr. Matthew T. Boes ("Dr. Boes") of Raleigh Orthopaedic Clinic for his left shoulder injury. Dr. Boes diagnosed plaintiff with left shoulder impingement syndrome bursitis with likely AC joint arthritis, possible bicep tendonitis versus superior labral tear. After reviewing plaintiff's left shoulder MRI arthrogram ("MRI with contrast"), Dr. Boes referred plaintiff to physical therapy, but physical therapy was unsuccessful. Dr. Boes recommended that plaintiff undergo a left shoulder arthroscopy with subacromial decompression as well as open versus arthroscopic distal clavicle excision, which Dr. Boes performed on 14 March 2012. After surgery and additional physical therapy, plaintiff's condition improved, and, on 6 August 2012, he was released to work without restrictions.

On 13 August 2012, plaintiff returned to Dr. Boes complaining of pain with full-duty work. Dr. Boes injected his shoulder with cortisone and sent him for a four-

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week conditioning program. By 1 October 2012, Dr. Boes determined plaintiff was at maximum medical improvement, assigned him a 7% partial-impairment rating to his left upper extremity, and released him to return to full-duty work without restrictions.

Although plaintiff was released from Dr. Boes' care and returned to work, he continued to experience pain in his upper extremity and had difficulty lifting, reaching, pushing, and pulling. On 7 November 2012, plaintiff sent a request to defendant to approve an independent medical evaluation pursuant to N.C. Gen. Stat. § 97-25. On 7 January 2013, plaintiff filed a motion to compel authorization for an independent medical evaluation, which he subsequently withdrew.

On 18 April 2013, plaintiff sought a second opinion from Dr. Kevin Speer ("Dr. Speer") of Southeastern Sports Medicine and Shoulder Center, PA. Dr. Speer noted plaintiff's decreased range of motion and tenderness around the AC interval at the surgical incision. Dr. Speer opined that plaintiff had bursitis, with possible adhesions in his shoulder, and recommended avoiding repetitive overhead use of the shoulder. Dr. Speer gave plaintiff a 15% disability rating, based on his ongoing symptoms.

In July 2014, defendant authorized an evaluation with Dr. Raymond Carroll ("Dr. Carroll") of the Cary Orthopaedics Center. After Dr. Carroll examined plaintiff on 30 July 2014, he noted a tenderness along the proximal biceps and discomfort with

internal rotation and injected plaintiff's left bicep area with cortisone for pain relief. Dr. Carroll diagnosed plaintiff with proximal biceps tendinitis.

On 27 August 2014, plaintiff reported to Dr. Carroll that the cortisone shot only relieved his pain for approximately five days. Dr. Carroll noted that plaintiff suffered a continued tenderness along his left proximal biceps and discomfort with internal rotation of his shoulder. Dr. Carroll recommended that plaintiff undergo a left shoulder arthroscopy with debridement and an open biceps tenodesis surgical procedure.

On 22 September 2014, plaintiff requested that defendant authorize Dr. Carroll's recommended surgery, which was denied. On 16 January 2015, plaintiff filed an expedited motion to compel medical treatment with the Industrial Commission, requesting authorization for ongoing medical treatment and surgery with Dr. Carroll.

On 13 March 2015, Dr. Boes was deposed and gave his opinion that he would recommend an MRI without contrast to better visualize the bicep area before recommending surgery. On 9 March 2015, Dr. Carroll was deposed and gave his opinion that an MRI with contrast was the only diagnostic test that he could administer to better visualize the bicep area and attempt to confirm his diagnosis of plaintiff's injury before proceeding with surgery, but stated that he would recommend arthroscopic surgery regardless of the results.

After a hearing, Deputy Commissioner Melanie Wade Goodwin entered an opinion and award on 26 March 2015 granting plaintiff's expedited medical motion seeking left upper extremity surgery and plaintiff's motion to change his authorized treating physician to Dr. Carroll. Defendant subsequently appealed Deputy Commissioner Goodwin's opinion and award and filed a motion to stay its effects. After a hearing, the Full Commission reversed Deputy Commissioner Goodwin's opinion and award and entered an opinion and award on 27 May 2015 that (1) denied plaintiff's expedited medical motion seeking left upper extremity surgery; (2) denied plaintiff's motion to change his authorized treating physician to Dr. Carroll; and (3) ordered defendant to authorize and pay for plaintiff to undergo a left shoulder MRI with contrast as recommended by Dr. Carroll and an MRI without contrast as recommended by Dr. Boes and then to authorize a physician other than Drs. Boes, Speer, or Carroll to review plaintiff's prior medical records and MRI results and to provide appropriate treatment. Plaintiff and defendant appeal.

## ***II. Analysis***

### **A. Standard of Review**

“Appellate review of an opinion and award from the Industrial Commission is generally limited to determining: ‘(1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are justified by the findings of fact.’” *Hassell v. Onslow Cty. Bd. of Educ.*, 362 N.C. 299, 305, 661 S.E.2d

709, 714 (2008) (quoting *Clark v. Wal-Mart*, 360 N.C. 41, 43, 619 S.E.2d 491, 492 (2005)).

## B. Defendant's Appeal

Defendant contends that the Commission erred by ordering them to authorize medical compensation for plaintiff to undergo an MRI with contrast and an MRI without contrast. Defendant challenges the Commission's findings of fact ("FOF") nos. 15 and 17 as not supported by competent evidence, as well as its conclusion of law ("COL") no. 4 as not supported by the Commission's findings of fact. We disagree.

The challenged portion of FOF no. 15 provides in pertinent part:

15. . . . Dr. Boes also testified that he would recommend an MRI without contrast to visualize any problems in the biceps area before recommending surgery.

The challenged portion of FOF no. 17 provides in pertinent part:

17. Dr. Carroll testified that the only diagnostic test that he could administer to attempt to confirm whether plaintiff was suffering from biceps tendinitis would be an MRI arthrogram [with contrast], where dye is injected into the shoulder to expand it. It was his opinion that this test would give a better visualization of the biceps and labrum than a regular MRI. However, Dr. Carroll also testified that regardless of the results of the MRI he would continue to recommend arthroscopic surgery based upon plaintiff's presentation of symptoms.

"This Court has long held that findings of fact must be more than a mere summarization or recitation of the evidence and the Commission must resolve the conflicting testimony." *Lane v. American Nat'l Can Co.*, 181 N.C. App. 527, 531, 640

S.E.2d 732, 735 (2007) (citations omitted). “ [R]ecitations of the testimony of each witness *do not* constitute *findings of fact* by the trial judge, because they do not reflect a conscious choice between the conflicting versions of the incident in question which emerged from all the evidence presented.’” *Winders v. Edgecombe Cnty. Home Health Care*, 187 N.C. App. 668, 673, 653 S.E.2d 575, 579 (2007) (quoting *In re Green*, 67 N.C. App. 501, 505 n.1, 313 S.E.2d 193, 195 n.1 (1984)). Nonetheless, “ [w]here there are sufficient findings of fact based on competent evidence to support the [Commission’s] conclusions of law, the [award] will not be disturbed because of other erroneous findings which do not affect the conclusions.’” *Hunt v. N.C. State Univ.*, 194 N.C. App. 662, 664, 670 S.E.2d 309, 311 (2009) (quoting *Meares v. Dana Corp.*, 193 N.C. App. 86, 90, 666 S.E.2d 819, 823 (2008)). Additionally, the labels “findings of fact” and “conclusions of law” do not dictate our standard of review. *See Peters v. Pennington*, 210 N.C. App. 1, 27, 707 S.E.2d 724, 735 (2011) (reviewing what was labeled a “conclusion of law” as a finding of fact).

Defendant also challenges the Commission’s COL no. 4, which states:

Under N.C. Gen. Stat. § 97-25, defendant is obligated to provide medical compensation. The Full Commission concludes that it would be appropriate for plaintiff to undergo a left shoulder MRI arthrogram as recommended by Dr. Carroll and a left shoulder MRI without contrast as recommended by Dr. Boes.

This “conclusion of law” contains two critical findings of fact: (1) Dr. Carroll recommended plaintiff undergo a left shoulder MRI with contrast, and (2) Dr. Boes

recommended plaintiff undergo a left shoulder MRI without contrast. Our review is whether these findings are supported by any competent evidence in the record.

As to the first finding, Dr. Boes was asked during his deposition about Dr. Carroll's recommendation that plaintiff undergo a left upper extremity arthroscopy. Regarding this recommendation, Dr. Boes was asked: "If Dr. Carroll performed an MRI arthrogram with dye, would that give him a better visualization of the bicep and labrum?" In response, Dr. Boes opined that although an MRI with contrast would provide a better visualization of the labrum, "[he would] probably do an MRI without . . . the contrast, to look for problems around the biceps, specifically[.]" Therefore, this finding is supported by the competent medical testimony of Dr. Boes.

As to the second finding, Dr. Carroll opined during his deposition that plaintiff's bicep was generating his ongoing shoulder pain and recommended plaintiff undergo an upper extremity arthroscopy. When Dr. Carroll was asked if "there [were] a diagnostic test [Dr. Carroll] could take prior to performing surgery that would confirm or deny that[.]" he responded, "the only test that you could get that could give you more information would be an MRI [with contrast], where you inject the shoulder with dye to expand it." Dr. Carroll continued: "It gives you a better visualization of the biceps and labrum, which a regular MRI does not." Dr. Carroll subsequently stated that because an MRI might not show the injury, he would recommend arthroscopic surgery regardless of the MRI results. Therefore, this finding is



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supported by the competent medical testimony of Dr. Carroll. Because there is competent evidence to support these findings, we are bound by them on appeal. *See Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000).

Defendant does not dispute that portion of COL no. 3 determining that it is obligated pursuant to N.C. Gen. Stat. § 97-25 to provide medical compensation to plaintiff. Rather, defendant contends the Commission erred by determining “it would be appropriate for plaintiff to undergo a left shoulder MRI [with contrast] as recommended by Dr. Carroll and a left shoulder MRI without contrast as recommended by Dr. Boes” and ordering defendant to authorize and pay for these procedures. We disagree.

The North Carolina Workers’ Compensation Act (“Act”) defines “medical compensation” in pertinent part as “medical . . . services, including, but not limited to, attendant care services prescribed by a health care provider authorized by the employer *or subsequently by the Commission* . . . and other treatment . . . as may reasonably be required to effect a cure or give relief . . . or lessen plaintiff’s period of disability.” N.C. Gen. Stat. § 97–2(19) (emphasis added). Additionally, the Act provides that “in case of a controversy arising between the employer and the employee, *the Industrial Commission may order necessary treatment.*” N.C. Gen. Stat. § 97-25(c) (emphasis added). It is within the Commission’s discretion to authorize supplemental medical treatment that it deems necessary. *See* N.C. Gen.

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Stat. § 97-25(c); *see also Silva v. Lowes Home Improvement*, \_\_ N.C. App. \_\_, \_\_, 768 S.E.2d 180, 184 (2015) (reviewing for abuse of discretion the Commission’s decision to deny a medical compensation request on the basis that “the Commission has discretion in determining whether a rehabilitative service will effect a cure, give relief, or will lessen a claimant’s period of disability”) (quoting *Foster v. U.S. Airways Inc.*, 149 N.C. App. 913, 923, 563 S.E.2d 235, 242 (2002)).

In the instant case, although neither doctor actually prescribed an MRI, the findings established that when asked which diagnostic test would provide the best visualization of plaintiff’s injury prior to surgery, both doctors recommended these tests. It was certainly reasonable for the Commission to order the diagnostic testing recommended by plaintiff’s treating physicians, if those results might affect the decision to proceed with surgery. Although Dr. Carroll testified he would recommend proceeding with shoulder arthroscopy regardless of the MRI, the Commission ordered another physician to treat plaintiff. We hold that the Commission did not abuse its discretion in determining that, based on the differing medical opinions of Drs. Boes and Carroll, plaintiff should undergo both diagnostic tests in order to provide a better visualization of his injury prior to proceeding with surgery.

Accordingly, we hold that the Commission’s challenged findings were supported by competent evidence, that its challenged conclusions were supported by

its findings, and that the Commission did not abuse its discretion by ordering defendant to authorize and pay for plaintiff to undergo both MRIs.

We have reviewed defendant's remaining argument that the Commission's failure to find or conclude that "these MRIs would effect a cure, give relief, or tend to lessen [sic] the period of disability" was reversible error and conclude it is without merit.

### **C. Plaintiff's Appeal**

Plaintiff contends "[t]he Commission incorrectly concluded plaintiff did not prove by a preponderance of the evidence that he was entitled to a change of physician pursuant to N.C. Gen. Stat. § 97-25(c)." Additionally, plaintiff contends that the Commission "erred in concluding plaintiff was entitled to ongoing treatment with a physician of defendant's choosing." We disagree.

It is well established that when an employer accepts a claim as compensable, "an employer has the right to direct the medical treatment for a compensable work injury." *Craven v. VF Corp.*, 167 N.C. App. 612, 616, 606 S.E.2d 160, 163 (2004). This right includes the right to select the treating physician. *Id.* at 617, 606 S.E.2d at 163. An employee is allowed to request a change in physician pursuant to N.C. Gen. Stat. § 97-25(c), which provides in pertinent part:

In order for the Commission to grant an employee's request to change treatment or health care provider, the employee must show by a preponderance of the evidence that the change is reasonably necessary to effect a cure, provide

relief, or lessen the period of disability. . . .

However, the first sentence of N.C. Gen. Stat. § 97-25(c) (emphasis added) provides that “an injured employee may select a health care provider of the employee’s own choosing to attend, prescribe, and assume the care and charge of the employee’s case *subject to the approval of the Industrial Commission.*” Regardless of whether an employee meets his evidentiary burden under N.C. Gen. Stat. § 97-25(c), the decision is still subject to the Commission’s sound discretion.

“Under this provision, [a]pproval of an employee-selected physician is left to the sound discretion of the Commission.’ ” *Yingling v. Bank of Am.*, 225 N.C. App. 820, 838, 741 S.E.2d 395, 407–08 (2013) (interpreting the “2011 changes to N.C. Gen. Stat. § 97–25[,]” which apply to this case) (quoting *Kanipe v. Lane Upholstery*, 141 N.C. App. 620, 626, 540 S.E.2d 785, 789 (2000)). “The test for abuse of discretion is whether a decision is manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision.” *Little v. Penn Ventilator Co.*, 317 N.C. 206, 218, 345 S.E.2d 204, 212 (1986) (citations and quotation marks omitted).

In the instant case, Dr. Carroll testified that he would proceed with surgery regardless of the MRI results, while Dr. Boes stated that he would wait to proceed with surgery until after interpreting the MRI results. One apparent reason for denying plaintiff’s request to change his physician to Dr. Carroll is that Dr. Carroll testified he would proceed with surgery regardless of the results of any diagnostic

testing. Plaintiff has failed to show that the Commission's disapproval of Dr. Carroll as his treating physician was unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision. Therefore, the Commission's decision was not an abuse of discretion. Additionally, because defendant has admitted compensability for this claim, the Commission was well within its authority to order that defendant choose plaintiff's physician.

***III. Conclusion***

The Commission's challenged COL was supported by its FOFs. The Commission did not abuse its discretion by ordering defendant to authorize and pay for plaintiff to undergo both MRIs, by denying plaintiff's request to authorize Dr. Carroll as his new treating physician, or by ordering that defendant select another physician.

AFFIRMED.

Judges DILLON and DIETZ concur.

Report per Rule 30(e).