NO. COA01-1458

NORTH CAROLINA COURT OF APPEALS

Filed: 5 November 2002

MARY TURNER BROWN,
Employee,
Plaintiff-Appellant

v.

North Carolina
Industrial Commission
I.C. File No. 427648

HIGH POINT REGIONAL HOSPITAL,
Employer-Defendant

and

ALEXSIS, INC.,
Servicing Agent,
Appellees

Appeal by plaintiff from an opinion and award of the North Carolina Industrial Commission filed 13 September 2001. Heard in the Court of Appeals 18 September 2002.

Law Offices of Kathleen G. Sumner, by Kathleen G. Sumner and Linda J. Hartwell, for plaintiff-appellant.

Smith Moore LLP, by Carolina H. Lock and Shannon J. Adcock, for defendant-appellee.

WALKER, Judge.

The following summarizes the findings of the Industrial Commission (Commission): On 3 September 1994, Mary Turner Brown (plaintiff) suffered an injury while working as a housekeeper for defendant, High Point Regional Hospital (Hospital). Defendant accepted the claim pursuant to a Form 21 agreement. Without first

obtaining her employer's approval, plaintiff sought initial treatment from Dr. Dalldorf, an orthopedic surgeon. Defendant later instructed plaintiff to go to the Occupational Health Clinic at the Hospital, where she was referred to another orthopedic surgeon, Dr. Warburton. Dr. Warburton's tests indicated that plaintiff had a small paracentral herniated disk at L4-5, which led him to refer plaintiff to Dr. Saul Schwarz, a neurosurgeon, for additional evaluation.

On 17 October 1994, Dr. Schwarz examined plaintiff. She complained of pain and numbness in each part of her body about which Dr. Schwarz inquired. Dr. Schwarz noted inconsistencies in plaintiff's movements in the examining room and in the hallway. Dr. Schwarz concluded that plaintiff would not require surgery and recommended physical therapy and an epidural steroid injection. Plaintiff declined the injection but accepted the physical therapy treatment.

Dr. Schwarz again noted inconsistencies in plaintiff's behavior when he saw her on 31 October 1994, and plaintiff's physical therapist reported that she exhibited "non-organic signs and non-physiological behaviors and had completed an inappropriate pain drawing." Although Dr. Schwarz recommended that plaintiff continue physical therapy, the physical therapist advised that plaintiff was not making a consistent and reliable effort at the therapy. Subsequently, on 14 November 1994, Dr. Schwarz released plaintiff from his care, leaving the remaining treatment decisions to plaintiff's psychiatrist, Dr. Reddy. In a 4 December 1994

letter, Dr. Schwarz explained that plaintiff had no disability associated with her back condition that limited her working ability, although her mental condition could be job-limiting. Plaintiff continued seeing Dr. Reddy for her pre-existing mental condition, and he released her to return to work in December 1994.

Upon her release to return to work, plaintiff's supervisors at the Hospital contacted her almost every day requesting that she return to work. Plaintiff failed to return to work, and her employment was terminated in March 1995.

In the interim, defendant filed with the Commission in December 1994 a Form 24 request to stop payment of benefits. The Commission approved the request over plaintiff's objections in a 27 January 1995 order.

Thereafter, between February 1995 and May 1999, plaintiff was again seen by Drs. Reddy, Schwarz and Warburton and was examined by two additional physicians, Dr. Paul, an orthopedic surgeon, and Dr. Wilson, a neurosurgeon. According to the record, Dr. Wilson was the last physician to examine plaintiff in 1999; however, he did not recommend surgery or other medical treatment for plaintiff nor did he restrict her work activities.

The Full Commission's findings further include the following:

> 13. Defendant paid compensation to plaintiff for temporary total disability until December 4, 1994 pursuant to the Form 21 agreement approved in this case. The Industrial Commission allowed defendant to stop payment of compensation effective December 5, 1994. Plaintiff filed a motion to reconsider the Administrative Decision and Order that had been filed on January 27, 1995. The motion was denied by Order filed February 28, 1995.

> Consequently, defendant paid no further compensation to plaintiff in the case.
>
> 14. As of December 5, 1994 plaintiff was capable of performing her regular job as a housekeeper for defendant without restrictions. Defendant, however, offered to provide work [for] her that was less strenuous than normal. Plaintiff refused to return to work without justification for three months. Defendant then terminated her employment for good cause. She thereafter made no effort to find work.
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> 17. Plaintiff reached maximum medical improvement with respect to her back injury by December 1994 with no permanent disability.
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> 18. During the two years following the last payment of compensation, plaintiff did not sustain a material change for the worse in her condition. She remained able to perform her regular job duties and her medical condition did not change.
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> 19. The psychiatric illnesses for which plaintiff was treated by Dr. Reddy were not causally related to her injury at work. Rather, they preexisted the injury.

After a hearing, the deputy commissioner overruled plaintiff's objections to the deposition testimony of Drs. Schwarz and Warburton. The Commission affirmed the deputy commissioner and considered the testimony of Drs. Schwarz and Warburton.

Plaintiff first argues that *ex parte* communications with plaintiff's treating physicians require the "prophylactic exclusion" of the testimony of Drs. Schwarz and Warburton under this Court's holding in *Salaam v. N.C. Dept. of Transportation,* 122 N.C. App. 83, 468 S.E.2d 536, *disc. review allowed,* 343 N.C. 514, 472 S.E.2d 20 (1996), *disc. review improvidently allowed,* 345 N.C.

494, 480 S.E.2d 51 (1997). In support of this argument, plaintiff contends that a communication by Alexsis, Inc. (Alexsis), defendant's servicing agent, with Dr. Schwarz and a communication by defendant with Dr. Warburton constitute non-consensual *ex parte* communications which require their testimony not be considered by the Commission under the *Salaam* rule.

In *Salaam*, the plaintiff requested a hearing for additional benefits. *Salaam*, 122 N.C. App. at 85, 468 S.E.2d at 537. During the course of discovery for the hearing, both parties deposed plaintiff's physician. *Id.* Prior to the deposition, defendant's counsel engaged in an *ex parte* conversation with his physician. *Id.* Plaintiff subsequently objected based on the inappropriate nature of the *ex parte* conversation. *Id.* Citing our Supreme Court's decision in *Crist v. Moffatt*, 326 N.C. 326, 389 S.E.2d 41 (1990), this Court held that the Commission erred in admitting the physician's testimony in light of the non-consensual *ex parte* contact between defendant's counsel and plaintiff's physician. *Id.* at 88, 468 S.E.2d at 539.

This case is distinguishable. The record does not reveal the extent or scope of any communications by Alexsis and defendant with Drs. Schwarz and Warburton. In any event, we do not construe *Salaam* to exclude all communications that may be in the nature of a request for records or medical updates regarding a patient-claimant. Therefore, we cannot conclude that the purported communications with Drs. Schwarz and Warburton violated the

prohibition set forth in *Salaam* so as to require the exclusion of their testimony from the Commission's consideration.

Plaintiff further contends that defendant failed to rebut the presumption of disability that attaches to an approved Form 21 agreement and that plaintiff did not reach maximum medical improvement where she continued to require treatment. "[W]hen considering an appeal from the Commission, our Court is limited to two questions: (1) whether competent evidence exists to support the Commission's findings of fact, and (2) whether the Commission's findings of fact justify its conclusions of law and decision." *Simmons v. N.C. Dept. of Transportation*, 128 N.C. App. 402, 405-06, 496 S.E.2d 790, 793 (1998). The Commission's findings of fact are conclusive on appeal if they are supported by any competent evidence, even if there is some evidence to the contrary. *Allen v. Roberts Elec. Contr'rs,* 143 N.C. App. 55, 60, 546 S.E.2d 133, 137 (2001) (citations omitted). We find substantial competent evidence in the record to support the Commission's findings which, in turn, justify the Commission's conclusions that the Form 21 presumption was rebutted and plaintiff had reached maximum medical improvement.

We have carefully reviewed plaintiff's remaining assignments of error and find them to be without merit.

Affirmed.

Judges McGEE and HUNTER concur.

Report per Rule 30(e).