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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-727

Filed: 21 February 2017

North Carolina Industrial Commission, I.C. NO. 14-000917

DENNIS KENNEDY, Employee, Plaintiff,

v.

HARRIS TEETER, Employer, HARTFORD CASUALTY INSURANCE COMPANY, Carrier (GALLAGHER BASSETT SERVICES, Third-Party Administrator), Defendants.

Appeal by plaintiff from Opinion and Award of the North Carolina Industrial Commission entered 3 March 2016 by Commissioner Linda Cheatham. Heard in the Court of Appeals 1 December 2016.

Daggett Shuler, Attorneys at Law, by Griffis C. Shuler, for employee, plaintiff-appellant.

Hedrick Gardner Kincheloe & Garofalo, LLP, by M. Duane Jones, Jennifer V. Ruiz, and Elias W. Admassu, for employer and carrier, defendant-appellees.

McCULLOUGH, Judge.

Dennis Kennedy (“plaintiff”) appeals from an opinion and award of the North Carolina Industrial Commission denying his request to reverse Harris Teeter (“defendant employer”) and Hartford Casualty Insurance Company’s (“carrier”), through Gallagher Basset Services (“third-party administrator”) (collectively “defendants”), Form 24 approval, his claim for resumption of temporary total

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disability compensation, and his request for a change of authorized treating physician. For the reasons stated herein, we affirm.

I. Background

Plaintiff served as a switcher for defendant employer in Greensboro, North Carolina. As a switcher, plaintiff drove a truck around defendant employer's distribution center, moving trailers to various warehouses. Plaintiff's tasks included checking the truck prior to driving, hooking his truck's lines up to a trailer, shutting trailer doors, lifting a dolly weighing approximately eighty pounds not more than twice a week, climbing up and down the back of a trailer, and opening and closing trailer doors. On average, plaintiff moved forty to fifty trailers daily, requiring plaintiff to get in and out of his truck 160 to 200 times a day.

On 4 January 2014, plaintiff lost his balance and fell from the back of a container, sustaining a contusion to his left hip, left shoulder, and lower back. By a Form 60, entitled "Employer's Admission of Employee's Right to Compensation (G.S. § 97-18(b))" and completed 16 January 2014, defendants admitted liability and compensability of plaintiff's injuries to his left hip, left shoulder, and lower back.

On 16 May 2014, plaintiff filed a Form 18, entitled "Notice of Accident to Employer and Claim of Employee, Representative, or Dependent (G.S. 97-22 Through 24)."

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On 5 August 2014, defendants filed a Form 24, entitled “Application to Terminate or Suspend Payment of Compensation (G.S. 97-18.1).” Defendants were applying to terminate compensation to plaintiff on the grounds that “Plaintiff has been released to return to work without restrictions by his authorized treating physician. Therefore, Plaintiff is no no [sic] longer disabled under the North Carolina Workers’ Compensation Act.”

Plaintiff received ongoing total disability compensation based upon the average weekly wage of \$917.44 and the weekly compensation rate of \$611.65 from the date of disability on 5 January 2014 until a 16 September 2014 Administrative Decision and Order by Special Deputy Commissioner Michael R. Kelly was entered, approving defendants’ Form 24 application to terminate total disability benefits effective 5 August 2014.

Thereafter, plaintiff then filed a Form 33, entitled “Request that Claim be Assigned for Hearing,” on 23 September 2014. Defendants filed a Form 33R, entitled “Response to Request that Claim Be Assigned for Hearing.”

On 9 December 2014, a hearing was held before Deputy Commissioner Phillip A. Holmes (“Deputy Commissioner Holmes”). On 26 March 2015, Deputy Commissioner Holmes entered an opinion and award denying plaintiff’s request to reverse the Form 24 approval, denying plaintiff’s request for resumption of temporary total disability compensation, and denying plaintiff’s request for a change of

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authorized physicians from Dr. Keith Lennon (“Dr. Lennon”) to Dr. Dahari Brooks (“Dr. Brooks”). Plaintiff appealed Deputy Commissioner Holmes’ opinion and award to the Full Commission (the “Commission”).

On 3 March 2016, the Commission entered an opinion and award affirming Deputy Commissioner Holmes’ opinion and award, with modifications. On 25 March 2016, plaintiff entered notice of appeal from the Commission’s opinion and award.

II. Standard of Review

Our review of a decision of the Industrial Commission “is limited to determining whether there is any competent evidence to support the findings of fact, and whether the findings of fact justify the conclusions of law.” “The findings of the Commission are conclusive on appeal when such competent evidence exists, even if there is plenary evidence for contrary findings.” This Court reviews the Commission's conclusions of law *de novo*.

Hunt v. N.C. State Univ., 194 N.C. App. 662, 664, 670 S.E.2d 309, 311 (2009) (citation omitted).

III. Discussion

Plaintiff presents three issues on appeal. First, plaintiff argues that the Commission erred by concluding that plaintiff had returned to his pre-injury baseline and was at maximum medical improvement. Second, plaintiff argues that the Commission erred by failing to award plaintiff disability compensation. Third, plaintiff argues that the Commission erred by failing to authorize and approve

plaintiff's request to change his treating physician. We address each argument in turn.

A. The Parsons Presumption

Plaintiff argues that the Commission erred by concluding that plaintiff had returned to his pre-injury baseline condition, was at maximum medical improvement, and thus, was released to full duty without restrictions. Specifically, plaintiff contends that the Commission erred by concluding that defendants had successfully rebutted the presumption set out in *Parsons v. Pantry, Inc.*, 126 N.C. App. 540, 485 S.E.2d 867 (1997), through the expert medical testimony of Dr. Lennon. We disagree.

In *Parsons*, “this Court held after a workers’ compensation claimant meets the initial burden of proving the compensability of an injury, there arises a presumption that further medical treatment is directly related to the compensable injury.” *Patillo v. Goodyear Tire & Rubber Co.*, __ N.C. App. __, __, __ S.E.2d __, __, (2016). The defendants then have the “responsibility to prove the original finding of compensable injury is unrelated to [the claimant’s] present discomfort.” *Parsons*, 126 N.C. App. at 542, 485 S.E.2d at 869. The *Parsons* Court reasoned that “[t]o require plaintiff to re-prove causation each time she seeks treatment for the very injury that the Commission has previously determined to be the result of a compensable accident is unjust and violates our duty to interpret the [Workers’ Compensation] Act in favor of injured employees.” *Id.*

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In the present case, defendants do not contest the compensability of plaintiff's 4 January 2014 injury. Therefore, defendants bore the burden of demonstrating that plaintiff's current claims regarding his left shoulder and low back pain were not related to his original compensable injury.

The Commission found that Dr. Lennon was an orthopedist and had treated plaintiff since at least 2006. Prior to his work injury, plaintiff had a history of low back pain that radiated bilaterally to his legs and left shoulder pain. The Commission also found that on 27 April 2007, plaintiff had presented to Dr. Lennon, complaining of low back pain. Dr. Lennon noted that plaintiff had longstanding low back pain and scoliosis.

On 7 October 2011, during a follow-up visit with Dr. Lennon, plaintiff indicated on a medical questionnaire that he had back pain radiating into his legs bilaterally. On 17 August 2012, plaintiff again presented to Dr. Lennon, complaining of back pain radiating in both of his legs. After his work injury on 4 January 2014, plaintiff was treated in the emergency room of Moses Cone Hospital in Greensboro, North Carolina. Plaintiff's diagnoses were hip contusions and back strain.

The Commission further found that on 7 January 2014, plaintiff treated with Dr. Victor Korang ("Dr. Korang") with US HealthWorks Medical Group in Greensboro, North Carolina, for complaints of pain in the left hip, back, and left shoulder. Plaintiff indicated that he had pre-existing conditions of scoliosis, severe

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degenerative joint disease in the spine, and right knee arthroscopy. Plaintiff's diagnoses were contusion of the left hip, sprain of the back, and muscle spasms. At the direction of Dr. Korang, plaintiff underwent an MRI of the lumbar spine on 23 January 2014.

The Commission found that on 4 March 2014, plaintiff presented to Dr. Lennon and stated he sustained a work injury on 4 January 2014. Dr. Lennon noted that he had previously treated plaintiff for the left shoulder and that plaintiff felt that this was aggravated with the injury as well as to the back and left hip. Dr. Lennon indicated in his note that "Plaintiff's back problems were compounded by an acute exacerbation of his chronic condition." Dr. Lennon recommended light-duty restrictions with thirty pounds lifting and no climbing. During a follow-up visit on 5 May 2014, Dr. Lennon noted that plaintiff seemed to be improving and that plaintiff's left shoulder complaints appeared to be another acute exacerbation of his chronic condition. On 3 June 2014, Dr. Lennon directed plaintiff to remain on restrictions of no lifting over thirty pounds and no climbing. On 8 July 2014, Dr. Lennon gave plaintiff work restrictions of no lifting over thirty pounds for the next two weeks. Dr. Lennon testified that as of 8 July 2014, plaintiff was at maximum medical improvement and that plaintiff was back at baseline for both his lumbar spine and left shoulder conditions, which included his scoliosis and radiation into the

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legs. After two weeks, which would have been 23 July 2014, plaintiff was to move to full duty without restrictions for his work injury.

The Commission found that on 15 September 2014, plaintiff presented to Dr. Brooks for a second opinion, stating that he was unable to return to work as he had “horrific pain.” Dr. Brooks opined that plaintiff was not at maximum medical improvement and recommended pain management for possible injection therapy and self-directed exercises. Dr. Brooks did not assign restrictions on this date. On 19 January 2015, plaintiff returned to Dr. Brooks who noted that plaintiff continued to report significant back and buttock pain, decreased activity tolerance, and fatigue. Dr. Brooks opined that plaintiff had longstanding scoliosis and degenerative disc disease, that plaintiff was active prior to the work injury, and was now unable to drive and had a poorer quality of life with increased pain as a result of the work injury. Dr. Brooks recommended against reconstructive surgery and thought plaintiff could perform medium-duty work with lifting of approximately twenty-five pounds and limitations on bending, stooping, and squatting.

The Commission assigned greater weight to the opinions of Dr. Lennon than those of Dr. Brooks with regard to plaintiff’s left shoulder and low back conditions because Dr. Lennon had treated plaintiff since at least 2006 and was more familiar with plaintiff’s chronic conditions, occasional flare-ups, and baseline condition. The Commission also assigned greater weight to the opinions of Dr. Lennon as to the

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appropriate restrictions for plaintiff's workers' compensation injuries. The Commission found that as of 8 July 2014, plaintiff had returned to his pre-injury baseline condition and was at maximum medical improvement from the acute exacerbation of aggravation of his preexisting chronic conditions.

Thereafter, the Commission made the following pertinent conclusion of law:

6. The Form 60 filed in this case entitles Plaintiff to a rebuttable presumption that his current left shoulder and low back conditions are causally related to his January 4, 2014 work event. *Perez v. American Airlines/AMR Corp.*, 174 N.C. App. 128, 135-36, 620 S.E.2d 288, 292-93 (2005); *disc. rev. improvidently allowed*, 360 N.C. 587, 634 S.E.2d 887 (2006); *Parsons v. Pantry, Inc.*, 126 N.C. App. 540, 485 S.E.2d 867 (1997). Based upon a preponderance of the evidence in view of the entire record, the Commission concludes that Defendants successfully rebutted the *Parsons* presumption through the expert medical opinion of Dr. Lennon, who opined that Plaintiff had reached MMI and that Plaintiff had returned to his pre-injury baseline for both his lumbar spine and left shoulder conditions. If a Defendant rebuts the *Parsons* presumption, the burden of proof shifts back to Plaintiff. *See McCoy v. Oxford Janitorial Service Co.*, 122 N.C. App. 730, 733, 471 S.E.2d 662, 664 (1996). Plaintiff has failed to meet this shifting burden, therefore, Plaintiff is not entitled to a reversal of the Form 24 approval, nor is he entitled to resumption of his temporary total disability compensation. *Id.*; *Perez*, 174 N.C. App. at 135-36, 620 S.E.2d at 292-93.

On appeal, plaintiff asserts that defendants did not successfully rebut the *Parsons* presumption through the medical opinion of Dr. Lennon. He argues that the Commission's findings do not support the conclusions of law because: Dr. Lennon is

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a general orthopedic surgeon with no fellowship training; Dr. Lennon's testimony supports that plaintiff's work injury aggravated his underlying back condition and caused his present disability; plaintiff was not suffering significant back problems immediately prior to the work injury on 4 January 2014; Dr. Brooks' expert opinion was that plaintiff had not reached maximum medical improvement and this directly contradicted the opinion of Dr. Lennon.

Although plaintiff seeks to argue that the findings were not supported by the evidence and the findings failed to support the conclusions of law, the essence of plaintiff's argument is a challenge to the Commission assigning greater weight to the opinions of Dr. Lennon. Plaintiff is asking our Court to re-weigh the evidence. On appeal, it is not this Court's duty to second guess the Commission's determinations of the witnesses' credibility or to reweigh the evidence. We decline to do so here. *Gregory v. W.A. Brown & Sons*, 212 N.C. App. 287, 295, 713 S.E.2d 68, 74 (2011).

Our review establishes that there is competent evidence in the record, namely Dr. Lennon's deposition testimony, to support the Commission's finding that as of 8 July 2014, plaintiff had returned to his pre-injury baseline condition and was at maximum medical improvement. In addition, as of 23 July 2014, plaintiff was to move to full duty without restrictions for his work injury. These findings support the Commission's conclusion of law that defendants successfully rebutted the *Parsons*

presumption and that because plaintiff failed to meet this shifting burden, plaintiff was not entitled to a reversal of the Form 24 approval.

B. Disability Benefits

Next, we address plaintiff's argument that he is entitled to an award of disability and that the Commission erred by concluding that he had failed to prove ongoing disability.

"The term 'disability' means 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) (2015). "[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).

The claimant has "the burden of proving the existence of his disability and its extent." *Johnson v. Southern Tire Sales & Serv.*, 358 N.C. 701, 706, 599 S.E.2d 508, 512 (2004) (citation omitted). A claimant may meet his burden of establishing the existence of a "disability" in one of four ways:

- (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related

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injury, incapable of work in any employment;

- (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment;
- (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment; or
- (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

Russell v. Lowes Prod. Distrib., 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993)

(internal citations omitted).

On appeal, plaintiff contends that he is incapable of earning wages in suitable employment, presently not working, and continues to suffer a complete loss of his wage earning capacity because of the work injury. Plaintiff supports his argument by relying on the testimony of Dr. Brooks and his medical records which indicate that plaintiff has not reached maximum medical improvement and has work restrictions that relate directly to his employment.

It is well established that the Commission “is the sole judge of the credibility of the witnesses and the weight to be given to their testimony. The Commission may accept or reject the testimony of a witness solely on the basis of whether it believes the witness or not.” *Hilliard*, 305 N.C. at 595, 290 S.E.2d at 683-84. As previously

discussed, the Commission assigned greater weight to the opinions of Dr. Lennon and accordingly, found that plaintiff had returned to his pre-injury baseline condition as of 8 July 2014 and that plaintiff was released to return to full duty work without restrictions as of 23 July 2014. The Commission concluded that because plaintiff was not disabled as of 23 July 2014, the Form 24 was properly approved. Because the Commission is the sole judge of the credibility of the witnesses and has assigned greater weight to the opinions of Dr. Lennon, we will not second-guess the Commission's credibility determination. We hold that the Commission did not err in concluding that as of 23 July 2014, plaintiff was not disabled and that plaintiff failed to prove ongoing disability.

C. Plaintiff's Request for a Change of Treating Physician

In his last argument on appeal, plaintiff contends that the Full Commission erred by denying his request for a change of authorized treating physician from Dr. Lennon to Dr. Brooks because Dr. Brooks is in the best position to effect a cure, provide relief, and lessen the period of disability.

N.C. Gen. Stat. § 97-25(c) provides as follows:

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.

N.C. Gen. Stat. § 97-25(c) (2015).

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The language of N.C. Gen. Stat. § 97-25 “leaves the approval of a physician within the discretion of the Commission and the Commission’s determination may only be reversed upon a finding of a manifest abuse of discretion.” *Franklin v. Broyhill Furniture Indus.*, 123 N.C. App. 200, 207, 472 S.E.2d 382, 387 (1996). Plaintiff has not alleged a manifest abuse of discretion, nor do we not find any.

IV. Conclusion

The 3 March 2016 Opinion and Award of the Commission is affirmed.

AFFIRMED.

Judges DILLON and TYSON concur.

Report per Rule 30(e).