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NO. COA00-1240-2

NORTH CAROLINA COURT OF APPEALS

Filed: 5 March 2002

JOAN FINN,  
Employee,  
Plaintiff,

v.

North Carolina  
Industrial Commission  
I.C. No. 840232

FRANKLIN COUNTY,  
Employer/Self-Insured  
SEDGWICK OF THE CAROLINAS, INC.,  
Third Party Administrator  
Defendant.

Appeal by defendant from opinion and award entered 23 August 2000 by the North Carolina Industrial Commission. Originally heard in the Court of Appeals 13 September 2001. On 30 January 2002, the defendants filed a petition for re-hearing. This Court allowed the petition but stipulated that the case would be reconsidered without the filing of additional briefs and without oral argument. The following opinion supersedes and replaces the unpublished opinion filed 28 December 2001.

*Charles R. Hassell, Jr., for plaintiff-appellee.*

*Teague, Campbell, Dennis & Gorham, L.L.P., by Gregory M. Willis, for defendant-appellant.*

BIGGS, Judge.

This appeals arises from proceedings before the Industrial Commission in which plaintiff Joan Finn alleged that she suffered

a compensable injury arising out of, and in the course of, her employment with defendant Franklin County. The record shows that on Saturday, 11 January 1997, plaintiff, a home health nurse, was employed by the Franklin County Health Department (an agency of defendant Franklin County) when, during and in the course of her employment, she slipped on ice in the Health Department's parking lot. Plaintiff fell hard on her left side. She immediately felt pain in her left side; and her left hip, clavicle, back, and elbow were bruised. On the following Monday, 13 January 1997, when plaintiff returned to work, she completed and turned in a written report of the incident - a Form 19 Report of Injury. Plaintiff's initial bruises and soreness from the fall abated over the next several weeks, and she continued to perform her job duties. Several months later, however, plaintiff began to experience pain in her upper back, the left side of her neck, and in her shoulder. She also began to experience tingling in her arm and headaches. She took a few days sick leave, complaining to her supervisor of neck pain and headaches.

On 2 January 1998, plaintiff was seen by Dr. C.J. Perry, her family physician, and complained of persistent neck and shoulder pain, and weakness in her left arm, hand, and leg. Plaintiff told Dr. Perry that her upper back pain began as early as 25 April 1997. When her symptoms worsened, Dr. Perry ordered an MRI, which revealed evidence of cervical disk disease. Dr. Perry then referred plaintiff to Dr. Timothy B. Garner, a neurosurgeon.

Dr. Garner first saw plaintiff on 23 February 1998. After

examining plaintiff, the doctor diagnosed plaintiff with spondylosis (degenerative disk disease) and severe spinal stenosis (narrowing of the spinal canal) at levels C5-6 and C6-7, and recommended surgery. During that first visit, plaintiff informed Dr. Garner of her 11 January 1997 accident, and of her consequent bruising and soreness. Plaintiff told Dr. Garner that the original bruising and soreness had abated, only to be replaced by neck pain and headaches.

In March 1998, plaintiff underwent a decompressive cervical laminectomy, during which Dr. Garner observed certain degenerative changes in plaintiff's cervical spine. Dr. Garner also observed that plaintiff had developed a pseudoarthrosis - described by the doctor as an attempted healing of an old fracture to the boney *pars interarticularis*. After plaintiff's surgery, Dr. Garner informed her that she had "cracked" a bone in her neck. Plaintiff informed her supervisor of this fact when the supervisor visited her in the hospital after surgery.

Dr. Garner opined that plaintiff's fall likely aggravated her pre-existing degenerative disease. He stated during deposition, "I think you guys in the legal profession talk about exacerbation of a preexisting disease - that's kind of the classic example." In addition, Dr. Garner stated that the improperly healed fracture of the *pars interarticularis* bone in plaintiff's spine resulted in scarring (pseudoarthrosis), which in turn caused additional stenosis and resulting compression on the associated nerve roots in plaintiff's spine. In Dr. Garner's opinion, this improperly healed

fracture explained the pattern of plaintiff's pain, which initially abated following the fall, then reappeared when scar tissue formed around the healing fracture.

After recuperating from spinal surgery, plaintiff was released and returned to work on 29 June 1998. However, on her first day back, plaintiff developed severe neck pain while doing paperwork and reviewing charts, so Dr. Perry extended her medical leave through 13 July 1998.

On 10 July 1998, plaintiff was terminated by defendant-employer for unauthorized absences. Plaintiff made two unsuccessful attempts to return to work in her field, but has been unable to find suitable employment in her field. She was last seen by Dr. Garner on 7 June 1999, just two weeks prior to the 24 June 1999 hearing before the deputy commissioner. At that time, the doctor noted that, despite some post-surgery improvement, plaintiff was still experiencing persistent neck pain, numbness in her extremities, and headache. At the time of hearing before the deputy commissioner, plaintiff was taking prescription medication for pain, and remained in Dr. Garner's care. During deposition, Dr. Garner testified that when his patients' symptoms recur following surgery it is usually "because they've stirred up something related to the surgery or something that was related to their original problem." Dr. Garner recommended that plaintiff not return to work pending further evaluation, to determine why she was still hurting and had developed symptoms on her right side post-surgery.

After defendant denied the compensability of plaintiff's injury, plaintiff sought a hearing on her claim. This matter was heard by Deputy Commissioner Douglas E. Berger on 24 June 1999. By opinion and award filed 3 January 2000, Deputy Commissioner Berger awarded plaintiff temporary total disability and medical treatment compensation for her 11 January 1997 work-related injury. Defendant appealed, and the Full Commission reviewed the matter. The Full Commission affirmed the deputy commissioner's opinion and award, with amendment to include compensation for plaintiff's complaints involving her right side, "if Dr. Garner finds after further evaluation that they are related to plaintiff's January 11, 1997 injury by accident." Defendant appeals.

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Defendant contests the propriety of the Full Commission's findings and conclusions as to the compensability of defendant's right and left-side complaints. As discussed below, these arguments are unpersuasive, and we affirm the opinion and award of the Full Commission.

This Court's review on appeal from an opinion and award of the Industrial Commission is limited to "whether the Commission's findings of fact are supported by any competent evidence of record and whether those findings, in turn, support the Commission's conclusions of law." *Deskins v. Ithaca Industries, Inc.*, 131 N.C. App. 826, 830, 509 S.E.2d 232, 234-235 (1998). The findings of the Commission are binding upon this Court if supported by any competent evidence, although there also may be evidence to support

a contrary finding. *Id.* "Thus, on appeal, this Court 'does not have the right to weigh the evidence and decide the issue on the basis of its weight.'" *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965)). The Court does, however, have the authority and duty to review the Commission's conclusions of law *de novo*. *Hansen v. Crystal Ford-Mercury, Inc.*, 138 N.C. App. 369, 531 S.E.2d 867, *disc. review denied*, 353 N.C. 263, 546 S.E.2d 96 (2000).

In the case *sub judice*, defendant first argues that the plaintiff failed to prove that her right and left-side complaints of neck pain were causally related to her 11 January 1997 work-related accident. We disagree.

The Full Commission made detailed findings of fact which include, in pertinent part:

4. Following January 11, 1997, plaintiff experienced soreness on her left side for a few days. This pain abated; however, plaintiff began to experience periodic problems with pain in her neck during the time period following January 11, 1997.

5. On January 13, 1997, plaintiff reported to her supervisor that she had sustained injuries as a result of a fall over the weekend. A Form 19 prepared by defendant-employer reveals that plaintiff described pain in the left clavicle region.

. . . .

7. On April 25, 1997, plaintiff reported problems with upper back pain to Dr. Perry.

8. On January 2, 1998, plaintiff reported to Dr. Perry that she was continuing to experience pain in her upper back and tingling

in her left leg. Plaintiff described her pain as emanating from her left posterior cervical and left shoulder areas for several months. This report of pain is consistent with plaintiff's original report to her supervisor on January 13, 1997 that she had sustained an injury to her left clavicle region.

9. A January 1998 MRI revealed that plaintiff had significant disk disease and spinal stenosis at the C5-6 and C6-7 levels in her neck. Based upon a review of this MRI, Dr. Perry referred the plaintiff to be examined by Dr. Garner.

10. On February 23, 1998, plaintiff began a course of treatment for her neck problems under the direction of Dr. Garner. Plaintiff reported to Dr. Garner that her neck problems had started following her fall on ice the previous year. . . .

11. On March 19, 1998, Dr. Garner performed decompression surgery on plaintiff's neck. During the surgery, Dr. Garner discovered a poorly healed hairline fracture in a piece of bone that ran between a facet joint from one level in plaintiff's neck to a facet joint into another level in plaintiff's neck. Dr. Garner removed a pseudoarthrosis that had formed over the hairline fracture. . . .

12. As a result of the work-related January 11, 1997 slip and fall, plaintiff sustained a fracture in her neck.

13. As a result of the work-related January 11, 1997 slip and fall, plaintiff sustained an exacerbation of pre-existing cervical spondylosis and spinal stenosis.

14. As a result of the work-related January 11, 1997 slip and fall, plaintiff was physically unable to earn any wages for the time period beginning March 18, 1998 to June 29, 1998 and from June 20, 1998 to July 13, 1998.

The record is replete with evidence which supports the Commission's findings of facts. Plaintiff testified about her 11 January 1997

slip and fall on the ice in defendant-employer's parking lot, and the resulting pain and discomfort – first, on the left side of her neck and then, after surgery, on the right side. Moreover, Dr. Perry's testimony was consistent with plaintiff's testimony regarding the slip and fall incident and her initial complaint. Finally, Dr. Garner, the neurologist who initially diagnosed plaintiff with a degenerative disk disease and who performed surgery on her back, stated that during surgery, he found the reason for plaintiff's "pattern of pain" – a pseudoarthrosis (an improperly healed fracture in her neck). Dr. Garner testified that plaintiff's delayed onset of neck problems was symptomatic of her slip and fall injury, which exacerbated her pre-existing disk disease and resulted in a improperly healed fracture in her neck. During deposition, when asked about the development of plaintiff's right side symptoms, Dr. Garner noted his concern about plaintiff's continued post-surgery pain, and stated that more testing would be required to evaluate her condition. He specified that his current restrictions applied to plaintiff's right-side arm and neck pain. Dr. Garner explained that when patients experience recurrent symptoms following surgery, it is usually "because they've stirred up something related to the surgery or something that was related to their original problem."

Contrary to defendant's arguments, the evidence more than adequately supports the Commission's findings in regard to plaintiff's left – and right – side complaints. To that end, these findings support the Commission's conclusion of law that a causal



nexus existed between plaintiff's 11 January 1997 work-related injury and her subsequent left side complaints. That conclusion of law being legally correct, it is, therefore, upheld by this Court. With respect to plaintiff's right side complaints, the Commission concluded that "in the event causation is medically established with further evaluation and testimony by Dr. Garner," that its award is to include expenses related to that injury as well. Defendant offers no support for its position that such a conclusion by the Commission is error and we do not find error.

We next consider defendant's final argument that the plaintiff failed to prove that she was disabled as a result of the incident on 11 January 1997. Again, we disagree.

Generally, an employee who seeks disability compensation bears the burden of establishing "the existence and extent of her disability." *Franklin v. Broyhill Furniture Industries*, 123 N.C. App. 200, 205, 472 S.E.2d 382, 386, cert. denied, 344 N.C. 629, 477 S.E.2d 39 (1996). She may do so by showing "(1) that [she] was incapable after [her] injury of earning the same wages [she] had earned before [her] injury with the same employment; (2) that [she] was incapable after [her] injury of earning the same wages [she] had earned before [her] injury in any other employment, and (3) that [her] incapacity to earn was caused by [her] injury." *Hillard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982).

Temporary total disability is payable only during the healing period, which ends when the employee reaches "maximum medical improvement." *Franklin*, 123 N.C. App. at 204-05, 472 S.E.2d at

385. "Maximum medical improvement' occurs when the employee has either completely recovered from her injuries or her injuries have stabilized." *Anderson v. Gulistan Carpet, Inc.*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 550 S.E.2d 237, 244 (2001).

The Full Commission made the following pertinent findings regarding the issue of the existence and extent of plaintiff's disability:

14. As a result of the work-related January 11, 1997 slip and fall, plaintiff was physically unable to earn any wages for the time period beginning March 18, 1998 to June 29, 1998 and from June 30, 1998 to July 13, 1998.

15. Dr. Garner released the plaintiff to return to work on June 29, 1998. Plaintiff attempted a trial return to work for one day, and then returned to Dr. Perry seeking medical authorization to remain out of work due to the severity of neck pain she was experiencing. Dr. Perry provided the plaintiff medical authorization to remain out of work for an additional period up to July 13, 1998.

16. On July 10, 1998, the director of the Health Department, Keith Patton, met with the plaintiff for a pre-dismissal conference. Plaintiff presented to Mr. Patton a medical note from Dr. Perry authorizing her to remain out of work until July 13, 1998. Despite the presentation of this note, Mr. Patton terminated the plaintiff. Plaintiff expressed some reservations about her ability to return to work on July 13, 1998 as directed by Dr. Perry, but she did not tell Mr. Patton that she would not return to work on that day.

17. . . . Plaintiff was terminated by Mr. Patton because plaintiff did not have any more leave time under the Family Medical Leave Act for [her absences on June 6, 1998 to June 29, 1998 and from June 30, 1998 to July 10, 1998] and her workers' compensation claim had been denied by the adjusting agent.

18. After her termination on July 10, 1998, plaintiff conducted a reasonable, but unsuccessful effort in attempting to secure employment. In a letter dated August 3, 1998, plaintiff's counsel sent a letter to Mr. Patton requesting that he reconsider the termination and allow the plaintiff to return to work. Plaintiff returned to work on November 6, 1998 at a job with Maria Parham Hospital. She worked there from November 6, 1998 to November 12, 1998, but had to end her employment because of the severity of her neck pain resulting from her January 11, 1997 work-related accident. On June 2, 1999, she obtained a job at a nursing home in Warren County. She attempted to do this job for the time period beginning June 2, 1999 to June 22, 1999, but had to end her employment because of the severity of the neck pain resulting from her January 11, 1997 work-related accident. In addition, plaintiff has been suffering from right-sided complaints since June of 1999, which also inhibit her ability to work. At this time it is unclear whether these complaints are related to her January 11, 1997 injury by accident.

19. As a result of the January 11, 1997 work[-]related incident and related termination, plaintiff has been unable to earn any wages for the time period beginning July 13, 1998 to November 6, 1998, from November 12, 1998 to June 2, 1999 and from June [22], 1999 to the present and continuing.

In arguing that plaintiff has failed to meet her burden of showing her inability to return to work due to her 11 January 1997 work-related injury, defendant completely ignores the testimony of plaintiff and her physician. The evidence tends to show that plaintiff made several efforts to return to work, only to be hindered by pain. Further, the uncontroverted testimony of Dr. Garner, plaintiff's neurosurgeon, was that as late as 7 June 1999, plaintiff continued to have neck pain, headaches, and recurrent arm pain. Dr. Garner, therefore, recommended that plaintiff remain out

of work and take the pain medications that he had prescribed, and that he continue to follow plaintiff to determine whether her symptoms represented something new or were related to her original injury. As the evidence is only probative as to "temporary disability," we need not belabor the point.

We conclude that the Commission's findings on the issue of plaintiff's temporary total disability are wholly supported by the evidence of record. In turn, these findings support the Commission's conclusions of law, particularly the conclusion that "plaintiff is entitled to receive temporary total disability compensation in the amount of \$409.95 per week for the time period beginning March 19, 1998 to November 6, 1998, from November 12, 1998 to June 2, 1999 and from June 22, 1999 to the present and continuing[.]" The Full Commission's conclusions of law being legally correct, they are upheld on appeal.

Having so concluded, the opinion and award of the Full Commission is affirmed.

Affirmed.

Judges MARTIN and MCCULLOUGH concur.

Report per Rule 30(e).