NO. COA05-1628

NORTH CAROLINA COURT OF APPEALS

Filed: 17 October 2006

VICTOR EVERHART,
Employee,
Plaintiff-Appellant,

v. N.C. Industrial Commission
I.C. No. 234937

WALGREEN'S,
Employer,

AMERICAN MANUFACTURERS
MUTUAL INSURANCE COMPANY,
Carrier,
Defendants-Appellees.

Appeal by Plaintiff from opinion and award entered 1 September 2005 by the North Carolina Industrial Commission. Heard in the Court of Appeals 13 September 2006.

Oxner Thomas + Permar, pllc, by Devin F. Thomas, for Plaintiff-Appellant.

Brotherton Ford Yeoman & Worley, PLLC, by Joseph F. Brotherton and Steven P. Weaver, for Defendants-Appellees.

McGEE, Judge.

Victor Everhart (Plaintiff) filed a motion for attendant care with the North Carolina Industrial Commission (the Commission) on 23 July 2003, seeking compensation from Defendants for routine house and yard work that he was no longer able to perform as a result of a compensable injury. Defendants filed a letter in opposition to Plaintiff's motion on 28 July 2003. Special Deputy

Commissioner Robert J. Harris denied Plaintiff's motion in an order entered 11 August 2003.

Plaintiff later filed a Form 33 and Defendants filed a Form 33R. The parties waived a hearing and stipulated to the facts by letter dated 7 January 2004. Deputy Commissioner Wanda Blanche Taylor entered an opinion and award on 8 February 2005, denying Plaintiff's claim for attendant care. Plaintiff appealed to the Commission, which denied Plaintiff's claim for attendant care in a 1 September 2005 opinion and award.

In its opinion and award, the Commission made the following uncontested findings of fact. Plaintiff suffered a compensable injury to his shoulder and neck on 22 April 2002. Defendants accepted Plaintiff's claim and have provided medical care and indemnity benefits to Plaintiff since that time. Dr. Kevin M. Supple (Dr. Supple) treated Plaintiff and kept Plaintiff out of work until 12 June 2002, at which time Dr. Supple opined that Plaintiff could work "one-handed." Dr. Supple took Plaintiff out of work again on 17 July 2002, pending repair to Plaintiff's rotator cuff. It was Dr. Supple's opinion that Plaintiff had a twenty percent permanent partial disability rating to his shoulder and Dr. Supple restricted Plaintiff to lifting no more than ten pounds on 4 August 2002. Dr. Supple also restricted Plaintiff from using his left arm for overhead lifting. Plaintiff remained out of work until 7 October 2002, at which time Dr. Supple again determined that Plaintiff could work "one-handed."

Dr. Supple referred Plaintiff to Dr. Max Cohen (Dr. Cohen) in

December 2002. Dr. Cohen restricted Plaintiff on 13 December 2002 to lifting no more than five pounds, to no overhead activities and to no pushing or pulling. Dr. Cohen performed a multi-level cervical fusion of C5-6, C6-7, and C7-T1 on Plaintiff on 21 February 2003, and took Plaintiff out of work.

In a letter from Plaintiff's counsel to Dr. Cohen on 11 June 2003, Plaintiff's counsel asked Dr. Cohen if he believed Plaintiff "would benefit from having some assistance with his yard and house work[.]" Dr. Cohen responded to Plaintiff's counsel in a letter dated 23 June 2003 that he was "in agreement that [Plaintiff] require[d] some level of assistance at home both with his yardwork as well as routine household cleaning jobs." Dr. Cohen also wrote as follows: "I would be happy to assist [Plaintiff] in any way that I can in gaining the necessary assistance. [Plaintiff] can stop by [my] office for a prescription or drop off any forms that he may have that require completion." At the time of Dr. Cohen's response, Dr. Cohen had restricted Plaintiff to lifting no more than five pounds, to no bending, twisting or stooping, and to no prolonged standing. Dr. Cohen placed these restrictions on Plaintiff on 19 June 2003.

A few weeks later on 1 August 2003, Dr. Cohen imposed the following, less restrictive limitations on Plaintiff: "(a) No overhead lifting over ten pounds; (b) No repetitive bending, twisting, or crouching; and (c) No pushing or pulling greater than 30 pounds."

Plaintiff also contests the Commission's following finding of

fact:

> Dr. Cohen's statement that [P]laintiff requires "some level of assistance" and other evidence presented are insufficient to meet [P]laintiff's burden of establishing that assistance with yard work and housecleaning is a reasonably required "medical, surgical, hospital or other treatment" covered under N.C. Gen. Stat. § 97-25, considering [P]laintiff's permanent physical restrictions. Plaintiff's restrictions do not appear to prevent him from doing routine housecleaning or routine yardwork.

Plaintiff further challenges the Commission's conclusion of law:

> The benefits sought by Plaintiff in this proceeding are for assistance at home with his yard work as well as routine house cleaning jobs. Plaintiff has not proven by the greater weight of the evidence that assistance with yard work and household cleaning is a reasonably required medical or "other treatment" covered under N.C. Gen. Stat. § 97-25 under the facts of this case.

Based upon its findings of fact and conclusion of law, the Commission denied Plaintiff's claim for attendant care. Plaintiff appeals.

Plaintiff argues the Commission erred by denying Plaintiff's motion for attendant care. Plaintiff contends he is entitled to payment from Defendants for routine house and yard work that he is no longer able to perform as a result of his compensable injury. We disagree.

First, Plaintiff misconstrues the cases he relies upon. Second, Plaintiff was never prescribed attendant care by his treating physician. Finally, because of Dr. Cohen's relaxed restrictions on Plaintiff's activities, Plaintiff did not require

assistance with routine house and yard work, and the Commission's findings to that effect are supported by competent evidence.

Our Court reviews decisions of the Commission to determine "whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000) (citing *Adams v. AVX Corp.*, 349 N.C. 676, 509 S.E.2d 411 (1998), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999)). The Commission's findings of fact are conclusive on appeal if supported by competent evidence, even when there is evidence to support contrary findings. *Id.* at 115, 530 S.E.2d at 552-53. The Commission's conclusions of law are reviewed *de novo* by our Court. *Grantham v. R.G. Barry Corp.*, 127 N.C. App. 529, 534, 491 S.E.2d 678, 681 (1997), *disc. review denied*, 347 N.C. 671, 500 S.E.2d 86 (1998).

The North Carolina Workers' Compensation Act provides that "[m]edical compensation shall be provided by the employer." N.C. Gen. Stat. § 97-25 (2005). The Act also provides that "[t]he Commission may at any time upon the request of an employee order a change of treatment and designate other treatment suggested by the injured employee subject to the approval of the Commission[.]" *Id.* The Act defines "medical compensation" as

> medical, surgical, hospital, nursing, and rehabilitative services, and medicines, sick travel, and other treatment, including medical and surgical supplies, as may reasonably be required to effect a cure or give relief and for such additional time as, in the judgment of the Commission, will tend to lessen the period of disability[.]

N.C. Gen. Stat. § 97-2(19) (2005).

In support of his argument, Plaintiff cites several cases in which our appellate courts have upheld awards for attendant care, including: *Palmer v. Jackson*, 161 N.C. App. 642, 590 S.E.2d 275 (2003); *Levens v. Guilford Cty. Schools*, 152 N.C. App. 390, 567 S.E.2d 767 (2002); *Ruiz v. Belk Masonry Co.*, 148 N.C. App. 675, 559 S.E.2d 249, *disc. review denied*, 356 N.C. 166, 568 S.E.2d 610 (2002); *London v. Snak Time Catering, Inc.*, 136 N.C. App. 473, 525 S.E.2d 203 (2000); *Godwin v. Swift & Co.*, 270 N.C. 690, 155 S.E.2d 157 (1967). Plaintiff argues that "[i]n each case [our appellate Courts] have looked to determine whether the claimant was capable of performing the tasks on his own. If not, because of the work injury, and if prescribed by the treating doctor, attendant care was inevitably awarded." However, this was not the test employed by our Court and the Supreme Court in reviewing these cases. Rather, in each case, our appellate courts simply determined whether the Commission's findings of fact were supported by competent evidence and whether the conclusions of law were supported by the findings. *Palmer*, 161 N.C. App. at 646-49, 590 S.E.2d at 277-79; *Levens*, 152 N.C. App. at 394-400, 567 S.E.2d at 770-73; *Ruiz*, 148 N.C. App. at 679-82, 559 S.E.2d at 252-54; *London*, 136 N.C. App. at 474-80, 525 S.E.2d at 204-08; *Godwin*, 270 N.C. at 693-95, 155 S.E.2d at 159-61. We employ the same test here.

In the present case, although Plaintiff argues that Dr. Cohen prescribed home assistance for Plaintiff, the record does not

support that argument. In his letter to Plaintiff's counsel, Dr. Cohen stated that he agreed that Plaintiff required some level of assistance with house and yard work. Also in the letter, Dr. Cohen stated that Plaintiff "can stop by [my] office for a prescription or drop off any forms that he may have that require completion." However, the record does not show that Plaintiff ever sought a prescription for home assistance or that Dr. Cohen ever prescribed home assistance for Plaintiff.

Moreover, in the present case, the permanent restrictions placed on Plaintiff by Dr. Cohen do not appear to prevent Plaintiff from performing routine house and yard work. The parties stipulated to the following facts. Although Dr. Cohen suggested that Plaintiff required some assistance with routine house and yard work, he did so at a time when he had restricted Plaintiff to lifting no more than five pounds, to no bending, twisting or stooping, and to no prolonged standing. However, within two months of imposing those restrictions, and after suggesting that Plaintiff required some assistance, Dr. Cohen eased the restrictions on Plaintiff's activities. Dr. Cohen restricted Plaintiff to no overhead lifting of more than ten pounds, to no repetitive bending, twisting, or crouching, and to no pushing or pulling of more than thirty pounds on 1 August 2003. These permanent restrictions seem to have eliminated any need Plaintiff might have had for assistance with routine house and yard work. Therefore, the Commission's finding, that "Plaintiff's restrictions do not appear to prevent him from doing routine housecleaning or routine yardwork[,]" is

supported by competent evidence. We also hold that this finding of fact supports the Commission's conclusion that under the facts of this case, assistance with routine house and yard work is not "other treatment" covered under N.C.G.S. § 97-25.

For the reasons stated above, we overrule Plaintiff's assignments of error grouped under this argument. We hold the Commission did not err in denying Plaintiff's claim for attendant care.

Affirmed.

Judges BRYANT and ELMORE concur.

Report per Rule 30(e).