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NO. COA06-681

NORTH CAROLINA COURT OF APPEALS

Filed: 6 March 2007

WANDIRA MARTIN,

Employee,
Plaintiff-Appellant,

v.

N.C. Industrial Commission
I.C. No. 181508

ADECCO FRANCHISEE,

Employer,

and

CONSTITUTION STATE
SERVICE COMPANY,

Carrier,
Defendant-Appellees,

Appeal by plaintiff from opinion and award of the North Carolina Industrial Full Commission entered 2 March 2006 by Commissioner Bernadine S. Ballance. Heard in the Court of Appeals 14 December 2006.

Douglas S. Harris, for plaintiff-appellant.

Cranfill, Sumner & Hartzog, L.L.P., by James B. Black, IV, for defendant-appellees.

JACKSON, Judge.

Wandira Martin ("plaintiff") was injured on 21 September 2001, when a wagon which was being pulled by a forklift struck her in her right foot, causing her to fall onto a cement floor, and then ran

over her right leg. At the time, plaintiff was employed by Adecco Franchisee ("defendant"), and was performing heavy labor, including the loading and unloading of trucks at a K-Mart Distribution Center.

A Form 18 Notice of Accident to Employer was filed 17 December 2001. Plaintiff was granted temporary total disability as a result of the compensable injury to her right leg and ankle which arose out of and in the course of her employment with defendant. She received benefits from 21 September 2001 through 26 December 2001, and again from 2 January 2002 through the date of her hearing before the Full Commission on 16 August 2005.

Following the accident, plaintiff sought treatment for an injury to her right leg and ankle from Dr. James Aplington ("Aplington"), a board certified orthopedist. Aplington diagnosed plaintiff with a contusion to her right leg and excused plaintiff from working. He also recommended that plaintiff participate in physical therapy, which she did for approximately two weeks. During his treatment of plaintiff, Aplington noted that she was expressing an over-dramatization of her symptoms. He testified that she continually held her right ankle in an abnormal position, and complained that she was unable to move it; however, when she was distracted, her ankle would assume a normal position. Aplington performed tests to determine if plaintiff was suffering from any back problems, the results of which were negative. Aplington referred plaintiff for a Functional Capacity Evaluation

("FCE") so that they would be able to determine exactly what type of activities plaintiff was capable of participating in.

Plaintiff's FCE was performed on 30 January 2002. Dr. William T. Griffin ("Griffin"), who performed the FCE, testified that plaintiff declined to perform some of the testing procedures, and that based upon her declining to participate, the fact that her heart rate changed very little during the tests, and her lack of effort, it was impossible for him to make any recommendations about her ability to return to work at that time. In fact, plaintiff declined to perform specific lifting exercises and tasks which should have had no effect on her physical complaints. The various physical-effort tests revealed that plaintiff put forth a less than maximal effort, and therefore the evaluation and test results were invalid. Aplington concluded his treatment of plaintiff in February 2002, at which time he felt as though plaintiff had no permanent impairment. He believed that plaintiff was capable of returning to work, however she should not return to her former employment involving heavy lifting. He also stated that plaintiff's complaints were not consistent with her testing results or his observations of her.

On 8 May 2003, plaintiff was examined by Dr. J. Craig Derian ("Derian"), a board certified orthopedic surgeon, based upon complaints of problems with her back. Derian was of the opinion that plaintiff suffered from a possible L5-S1 lumbar disc herniation with right L5 radiculopathy. He believed that her current back problems were manifested by her leg problems, but were

likely caused by a ruptured disc. Derian testified that plaintiff's complaints were consistent with her symptoms and that in his opinion, she did not demonstrate any indication of symptom magnification. He testified that her current back condition was directly related to her compensable injury on 21 September 2001. Derian's deposition testimony, and his initial diagnosis, were done prior to his observation of an MRI that was later done on plaintiff's back. Following a review of the MRI of plaintiff's back, Derian diagnosed plaintiff with symptomatic lumbar degenerative disc disease.

Plaintiff subsequently was examined on 14 October 2003 by Dr. Robert Elkins ("Elkins"), a board certified orthopedic surgeon and independent medical evaluator. Elkins found plaintiff's walking and physical condition to be consistent with a person who has ankle problems, however he stated that plaintiff exhibited symptom magnification and seemed to be motivated by secondary gain issues. He testified that during one test in which he very lightly touched plaintiff's back, she expressed back tenderness and pain which was out of proportion for the light amount of pressure he had applied. Elkins found plaintiff's range of motion in her ankle and leg to be within normal ranges. He stated that plaintiff did not show any signs of having a pinched nerve in her back, or a ruptured disc or radiculopathy. After reviewing an MRI of plaintiff's right ankle, Elkins stated that as of 25 November 2003, plaintiff had reached maximum medical improvement for her injury to her right ankle, and

she was therefore capable of returning to full duty work, without restrictions.

On 17 June 2003, defendant filed a Form 33 Request that a Claim Be Assigned for Hearing, based upon plaintiff's complaint that she was now suffering serious back problems for which defendant would not authorize treatment. The matter came before Deputy Commissioner Nancy W. Gregory on 23 March 2004, and in an Opinion and Award by Deputy Commissioner Bradley W. Houser, filed 10 February 2005, plaintiff's claim for additional workers' compensation benefits related to her back condition was denied. Plaintiff appealed to the Full Commission.

In an Opinion and Award of the Full Commission, filed 2 March 2006, plaintiff's claim for additional benefits related to her back condition was again denied. The Commission held that plaintiff's back condition was not causally related to her 21 September 2001 injury by accident. Plaintiff appeals from the denial of her claim for additional workers' compensation benefits for her current back condition.

"The [F]ull Commission, upon reviewing an award by the hearing commissioner, is not bound by findings of fact supported by the evidence, but may reconsider evidence and adopt or reject findings and conclusions of the hearing commissioner." *Robinson v. J. P. Stevens*, 57 N.C. App. 619, 627, 292 S.E.2d 144, 149 (1982) (citing *Watkins v. City of Wilmington*, 290 N.C. 276, 280, 225 S.E.2d 577, 580 (1976)). On appeal, the review of a decision of the Full Commission is limited to a consideration of whether there is any

competent evidence to support 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). The Commission's findings of fact are deemed conclusive on appeal when they are supported by competent evidence, even when there is evidence which would support contrary findings. *Pittman v. International Paper Co.*, 132 N.C. App. 151, 156, 510 S.E.2d 705, 709, *aff'd*, 351 N.C. 42, 519 S.E.2d 524 (1999). "[T]he [F]ull Commission is the sole judge of the weight and credibility of the evidence." *Deese*, 352 N.C. at 116, 530 S.E.2d at 553 (citing *Adams v. AVX Corp.*, 349 N.C. 676, 509 S.E.2d 411 (1998)). This Court "does not have the right to weigh the evidence and decide the issue on the basis of its weight." *Anderson v. Construction Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965). Our review "goes no further than to determine whether the record contains any evidence tending to support the finding." *Id.*

Plaintiff first contends the Commission erred in stating, in finding of fact number eleven, that "Dr. Aplington opined that plaintiff's complaints of pain in her back were not related to her injury by accident on 21 September 2001." Plaintiff argues that this finding contradicts Aplington's deposition testimony, and as such, the Commission attributes an opinion to Aplington that does not appear in the record.

In addition to the sentence referenced above, finding of fact number eleven states that Aplington noted that he did not believe

plaintiff should return to the heavy work which she previously performed, regardless of the outcome of the functional capacity evaluation. The finding continues, stating that Aplington did not believe plaintiff had any permanent impairment.

During his deposition, Aplington testified that at the time he treated plaintiff in November 2001, he noted that while her condition had improved significantly, he did not believe she needed to return to work doing the heavy lifting type of work that she previously had done. This opinion was based upon not only plaintiff's initial injury to her right ankle and leg, but also her age and physical condition. When Aplington treated plaintiff in early 2002, he noted that she continued to have pain and swelling in her ankle and leg. He testified that four to six weeks usually was long enough for someone to recover from the type of injury plaintiff suffered, and that her course of treatment was unusually long for the injuries she had sustained. Aplington did state that he can not say for sure that her current back problems are related to her original compensable injury. He stated that when she was treated by Derian, she presented with different symptoms and Derian had different findings for tests which Aplington also had performed. In addition, Aplington did not know what had happened to plaintiff over the course of the one and a half years since he treated her last. Aplington testified that it was possible that plaintiff had an evolving disc problem when he initially saw her. However based upon his observation and treatment of plaintiff in 2001 and 2002 following her initial injury, he felt as though her

injury was one from which she should have recovered, and that her complaints and continued unusual presentations were something that may have been manufactured by her.

Although Aplington's testimony may not have risen to the level of definitively stating that plaintiff's back problems were not directly related to her compensable injury, his deposition testimony and his treatment records demonstrate that he did not believe there to be a causal connection between her initial injury and her current back problems. This finding of fact does not wholly disregard Aplington's deposition testimony, as plaintiff contends. Therefore, we hold there was sufficient evidence before the Commission to support this finding of fact, and plaintiff's assignment of error is overruled.

Plaintiff next argues the Commission erred in stating, in finding of fact twelve, "Therefore, some of [Dr. Derian's] testimony concerning what his physical examination indicated was speculative, unless corroborated by MRI or other diagnostic testing." Plaintiff contends that in making this finding, the Commission held Derian to a different medical standard from that to which Doctors Aplington and Elkins were held. Plaintiff argues that neither Aplington nor Elkins had the benefit of reviewing plaintiff's lumbar spine MRI at the time of their deposition testimony, and as such, to state that Derian's testimony alone, and not that of Aplington or Elkins, was speculative until corroborated by the MRI was in violation of our state constitution's equal protection clause.

Plaintiff's argument is without merit. Derian was the only doctor to testify concerning plaintiff's back problems for which she sought treatment for one and a half years after her compensable injury. Doctors Aplington and Elkins' testimony centered around their treatment of plaintiff's injury to her right leg and ankle, her ability or lack thereof to return to work, and her possible symptom magnification and refusal to participate fully in their evaluations of her. In fact, Derian himself testified that based upon the way plaintiff presented to him, he felt as though she did suffer from back problems, including some nerve damage; however, he qualified his opinion by stating that depending upon what the MRI showed, plaintiff may or may not have a problem for which he would be able to provide medical treatment.

Based upon the testimony of the three doctors, and Derian's specific testimony regarding plaintiff's recent complaints and symptoms, we hold the Commission did not hold the doctors to different medical standards. Plaintiff's assignment of error is overruled.

Plaintiff next contends the Commission erred in finding that "the Full Commission gives greater weight to the opinions of Dr. Aplington and Dr. Elkins over those of Dr. Derian." Plaintiff argues that in giving greater weight to the opinions of Aplington and Elkins, the Commission disregarded their prior opinion that plaintiff not was capable of returning to a job requiring heavy work.

As stated previously, the Full Commission is the sole judge of the weight which is to be given to the testimony and evidence before it, and this Court may not re-weigh the evidence. *Deese*, 352 N.C. at 115, 530 S.E.2d at 552. Again, we find plaintiff's argument to be misplaced. The Commission was fully within its right to give greater weight to the testimony of Aplington and Elkins, and on appeal, plaintiff has presented no argument that Aplington and Elkins' opinions were not competent or should otherwise be discounted.

In finding of fact eight, not assigned as error by plaintiff, the Commission specifically stated that "On 23 November 2001, Dr. Aplington indicated that plaintiff could return to work on 26 November 2001, but he did not believe she should return to her previous heavy-duty position with defendant-employer due to her age and the 'deconditioned' state of her body." Thus, the Commission had the authority to consider the opinions of Aplington and Elkins over that of Derian, and there is no indication that the Commission ignored any portions of Aplington's or Elkins' testimony in making its findings. Plaintiff's assignment of error is overruled.

Plaintiff next contends the Commission erred in making finding of fact nineteen. Plaintiff argues that the finding wholly disregards the opinion of Aplington and favors the opinion of Elkins, which contradicts finding eighteen in which the Commission purportedly gave Aplington's opinion as much or greater weight than that of Elkins.

Finding of fact nineteen provides that "Plaintiff reached maximum medical improvement from her compensable right lower extremity injury by 25 November 2003 and was capable at that time of returning to full duty work, without restrictions." The Commission based this finding directly upon Elkins' deposition testimony and his treatment records for plaintiff. Elkins' statements were based upon his thorough evaluation of plaintiff, along with his review of an MRI done on plaintiff's right ankle which showed no problems other than fluid in the joint of her ankle. Elkins treated plaintiff in October 2003, more than a year and a half after Aplington last saw plaintiff. His opinion regarding plaintiff's ability to return to work related solely to her initial compensable injury. His examination and report show no indication that plaintiff complained of problems with her back, or that he observed any abnormalities or problems with plaintiff's back.

We hold the Commission did not err in basing this finding upon Elkins' testimony and evidence, as he observed plaintiff after Derian initially examined plaintiff in May of 2003 and after Aplington ceased treatment of plaintiff in February of 2002. We hold the Commission's finding is supported by competent evidence, and as such plaintiff's assignment of error is overruled.

Finally, plaintiff argues the Commission erred in making finding of fact twenty and conclusion of law two, in that they each wholly disregard the opinions of Derian and Aplington. Finding of fact twenty provides, "Plaintiff's current back condition as

diagnosed by Dr. Derian is not causally related to her 21 September 2001 injury by accident." Conclusion of law number two provides "Because plaintiff's current back condition as diagnosed by Dr. Derian is not causally related to her 21 September 2001 injury by accident, she is not entitled to indemnity or medical compensation for her back." Plaintiff contends these statements ignore not only Aplington's prior opinion that plaintiff could not return to heavy duty work, but also the statements by Aplington, Elkins, and Derian in which they each said that an accident such as plaintiff's could cause a back injury. We disagree.

Our courts long have held that the employee bears the burden of establishing the compensability of a workers' compensation claim. *Holley v. ACTS, Inc.*, 357 N.C. 228, 231, 581 S.E.2d 750, 752 (2003); *Henry v. Leather Co.*, 231 N.C. 477, 479, 57 S.E.2d 760, 761 (1950); *Cooper v. Cooper Enters., Inc.*, 168 N.C. App. 562, 564, 608 S.E.2d 104, 105 (2005). "'A subsequent injury to an employee, whether an aggravation of the original injury or a new and distinct injury, is compensable only if it is the direct and natural result of a prior compensable injury.'" *Cooper*, 168 N.C. App. at 564, 608 S.E.2d at 106 (quoting *Vandiford v. Equipment Co.*, 98 N.C. App. 458, 461, 391 S.E.2d 193, 195 (1990)). To establish that a separate and distinct injury is compensable, the "evidence must be such as to take the case out of the realm of conjecture and remote possibility, that is, there must be sufficient competent evidence tending to show a proximate causal relation.'" *Holley*, 357 N.C. at 232, 581 S.E.2d at 753 (quoting *Gilmore v. Hoke Board of Education*,

222 N.C. 358, 365, 23 S.E.2d 292, 296 (1942)). "Although expert testimony as to the *possible* cause of a medical condition is admissible . . . , it is insufficient to prove causation, particularly 'when there is additional evidence or testimony showing the expert's opinion to be a guess or mere speculation.'" *Id.* at 233, 581 S.E.2d at 753 (citations omitted).

Here, the record indicates that Aplington and Elkins both felt as though plaintiff was continually magnifying her symptoms. Neither Aplington nor Elkins, along with Griffin who performed plaintiff's FCE, found anything to indicate that plaintiff suffered from any type of injury to her back as a result of her workplace accident. Plaintiff did not complain of or seek treatment for her alleged back problems until a year and a half after her accident. Derian, who was the only physician to testify that plaintiff's back condition was remotely related to her workplace injury, testified that based upon plaintiff's report that she had not worked or done anything strenuous since her accident, and "if the MRI scan confirms actual structural abnormality," then he "think[s] that the patient's findings [are] directly related to her injury" on 21 September 2001. Because there was no MRI scan done, at this stage, Derian's testimony constituted speculation that plaintiff's back condition was related to her compensable injury, and as such, this opinion is not competent evidence.

Aplington and Elkins testified that plaintiff's current back problems may be related to her workplace accident, however they had nothing concrete to connect the two. At the time they treated and

observed plaintiff, she did not complain of pain and problems in her back, and she presented herself in such a way that her physicians and others observing her believed that she was magnifying her symptoms, purposefully holding her foot in an abnormal way, and not participating in testing to her maximum ability. Based upon the record before us, we hold the Commission properly determined that plaintiff failed to establish that her current back condition was a direct and natural result of her compensable injury, and as such, did not err in finding and concluding that her back condition was not causally related to her compensable injury by accident. Plaintiff's assignment of error is overruled.

Affirmed.

Judges CALABRIA and GEER concur.

Report per Rule 30(e).