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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-881

Filed: 7 August 2018

North Carolina Industrial Commission, I.C. Nos. X27940 & X68504

CATHERINE LASSITER, Employee, Plaintiff,

v.

KEYSTONE FREIGHT CORP., Employer, SEDGWICK CMS, Carrier, Defendants.

Appeal by Plaintiff from Opinion and Award entered 2 June 2017 by the Full Commission of the North Carolina Industrial Commission. Heard in the Court of Appeals 11 January 2018.

The Deuterman Law Group, P.A., by Daniel L. Deuterman, Jack P. Waissen, and Zachary B. Marquand, for Plaintiff-Appellant.

Dickie, McCamey & Chilcote, P.C., by Susan H. Briggs and Michele Friedlander Eagle, for Defendants-Appellees.

INMAN, Judge.

Catherine Lassiter ("Plaintiff") appeals from an Opinion and Award of the Full North Carolina Industrial Commission (the "Commission") in favor of Keystone Freight Corporation ("Keystone") and Sedgwick CMS ("Sedgwick") (collectively "Defendants"). The Commission concluded that: (1) Plaintiff failed to show disability

as result of her injuries as of 17 August 2014; (2) Defendants were entitled to terminate her indemnity benefits as of that date; and (3) Plaintiff is not entitled to further compensation. Plaintiff argues that several of the Commission's Findings of Fact are not supported by competent evidence. Plaintiff further contends that the Commission committed errors of law in concluding she failed to show ongoing disability as a result of her workplace injuries as of 17 August 2014. After careful review, we affirm the Commission.

I. FACTUAL AND PROCEDURAL HISTORY

Plaintiff began working for Keystone in 2010 as a truck driver. Plaintiff sustained two sets of injuries from two different accidents during her employment: one to her right eye and forehead, and the other to her right shoulder and neck.

A. Injury to Right Eye and Forehead

On 29 December 2010, while Plaintiff was winding down the landing gear on a trailer, a handle kicked back and struck her in the right eye and forehead. Plaintiff visited the hospital, reporting eye pain, head pain, and nausea. She was diagnosed with a face contusion, a minor head injury, and an eye injury, and referred to an ophthalmologist.

A few days later, Plaintiff reported headaches and blurred vision to the ophthalmologist. She was referred for a neurological evaluation to Dr. Eliot Lewit, a board-certified neurologist specializing in headaches, who diagnosed Plaintiff with a

mild head injury and post-traumatic headaches. Dr. Lewit restricted Plaintiff from all work. Keystone accepted the compensability of Plaintiff's injury on 17 February 2011 by filing a Form 60, acknowledging that Plaintiff had sustained a "right eye orbital hematoma."

In March 2011, Dr. Lewit noted that Plaintiff's cognitive difficulties were improving and released Plaintiff to fulltime office work, but still restricted Plaintiff from driving a truck. By April 2011, Plaintiff's headaches, eye inflammation, and dizziness had resolved, but she was experiencing tinnitus. Dr. Lewit released her to return to driving without any restrictions and advised her to follow up with an ophthalmologist. Plaintiff continued to report headaches, tinnitus, and blurry vision to Dr. Lewit, and she was restricted and released from work at different points throughout 2011. An MRI performed during this period appeared normal, and Dr. Lewit ascribed the headache and tinnitus to the accident and related stress; he did not know what caused Plaintiff's vision issues.

Plaintiff last worked for Keystone on 22 January 2012, but she continued seeing Dr. Lewit. On 17 February 2012, Dr. Lewit noted that Plaintiff was at maximum medical improvement ("MMI") for her post-concussive headaches and assigned a three percent permanent partial impairment rating for Plaintiff's head due to persistent headaches. He released Plaintiff to office work only.

Even though she had already been released at MMI, Plaintiff returned to Dr. Lewit in April 2012. Dr. Lewit diagnosed her with chronic post-traumatic headaches, ringing of the ears, right eye deficit, right shoulder pain, and episodes of shakiness. He recommended a psychiatric evaluation and restricted her to no driving or working at heights.

On 30 May 2012, Plaintiff saw Dr. Andreas Runheim, a board-certified neurologist and Plaintiff's current treating physician, for similar head and neck symptoms. Tests showed evidence of a pinched nerve, which Dr. Runheim believed was caused by the accident. He diagnosed Plaintiff with a closed head injury and post-concussive syndrome with continued headaches. Plaintiff returned with headache complaints again that August, resulting in further work restrictions, and Dr. Runheim added neck pain and nerve damage conditions to Plaintiff's diagnosis. Dr. Runheim tried four different solutions to treat Plaintiff's headaches and cervical pain, all of which Plaintiff reported as ineffective and causing side effects.

Dr. Runheim ordered an additional study to evaluate Plaintiff's continued headaches and neck pain, which revealed wrist injuries consistent with carpal tunnel syndrome and a pinched nerve. Dr. Runheim restricted Plaintiff from work and continued these restrictions over various time periods, eventually declaring that Plaintiff had reached MMI in October 2013. He assigned a fourteen percent permanent partial impairment for her post-concussive headaches and a twelve

percent permanent partial impairment rating for Plaintiff's pinched nerve, but he did not release her for work. More than three years after the accident, on 1 April 2014, Plaintiff returned to Dr. Runheim complaining of the same symptoms, and an MRI revealed minimal white matter disease in the brain. Dr. Runheim stated that, as of the last time he saw Plaintiff in July 2014, she was incapable of work in any capacity.

B. Injury to Right Shoulder and Neck

Several months after the accident injuring her eye and forehead, on 8 September 2011, Plaintiff slipped and fell while walking across a wet catwalk between her cab and trailer. Plaintiff went to the hospital complaining of moderate shoulder pain and was diagnosed with right shoulder bruising. Plaintiff later returned, complaining of worsening pain, and she was written out of work until she could be seen by an orthopedist.

On 12 October 2011, Defendants filed a Form 60, accepting the compensability of Plaintiff's injury to her right shoulder from the accident. After an MRI the following month, Plaintiff was released by an orthopedist on 15 November 2011 at MMI with a zero percent permanent partial impairment rating and no restrictions.

In June 2012, Plaintiff saw Dr. Robert Sypher, an orthopedic surgeon, for continuing shoulder issues. Dr. Sypher diagnosed Plaintiff with: (1) chronic right shoulder pain and stiffness, along with evidence of post-traumatic arthritis; (2) probable neuropathic pain syndrome, a condition of shooting pains, consistent with

the shoulder injury and evidence of a pinched nerve; (3) likely pre-existing mild carpal tunnel syndrome; and (4) prolonged work impairment. After several procedures over the following months, Dr. Sypher noticed arthritis in Plaintiff's shoulder and that the biceps tendon was completely ruptured and not present in the shoulder, despite the MRI report showing otherwise. He also observed adhesions and "found multiple reasons why she would have pain." By the end of November 2012, Dr. Sypher had terminated physical therapy due to Plaintiff's pain complaints and restricted Plaintiff from work for six weeks.

Plaintiff next saw an anesthesiologist and pain medicine physician, Dr. Mark Phillips, in December 2012, who diagnosed Plaintiff with shoulder enthesopathy and shoulder osteoarthritis. Plaintiff returned in January 2013 to report continued worsening pain, and Dr. Phillips wrote Plaintiff completely out of work.

In May 2013, Dr. Mark Dumonski, a board-certified orthopedic surgeon, diagnosed Plaintiff with axial neck pain with evidence of minimal degenerative disk disease and facet arthritis, with the latter potentially exacerbated by her work-related injury. Plaintiff was given injections for the pain based on Dr. Dumonski's recommendations but complained that the injections worsened her pain. Physical therapy did not improve Plaintiff's condition. In July 2013, Dr. Dumonski noted that Plaintiff was at MMI and assigned her light work restrictions with a five percent permanent partial impairment rating to the spine.

In September 2013, Dr. Sypher found Plaintiff to be at MMI from an orthopedic standpoint. He gave a 20 percent impairment rating to her right arm based on its degree of arthritis. He observed "clear evidence" that Plaintiff had a cartilage injury that contributed to her pain and to the resulting problems in her shoulder. He then restricted Plaintiff to lifting no more than 20 pounds up to chest level and no overhead lifting. Dr. Sypher believed that Plaintiff could drive a truck but felt that she would have difficulties with responsibilities that required physical exertion.

In April 2014, Dr. Phillips placed Plaintiff at MMI from a pain management standpoint, though Plaintiff continued to visit him for treatment. Dr. Phillips continued to write Plaintiff completely out of work through 2015.

On 31 July 2014, Defendants directed Plaintiff to attend an Independent Medical Evaluation performed by Dr. Manish Fozdar, a certified psychiatrist and specialist in neuropsychiatry and behavioral neurology, and Dr. Thomas Bundick, a clinical neuropsychologist. During Dr. Fozdar's exam, Plaintiff moved her right hand with ease, but her overall effort was poor. Even though she could move her eyes in all directions without issue, she did not cooperate with eye movement testing and reported that she was dizzy. Plaintiff resisted when Dr. Fozdar tried to test Plaintiff's left arm. Dr. Fozdar concluded that Plaintiff's symptoms could not be attributed to her two accidents. He noted that Plaintiff provided false information during the exam, no objective evidence supported her complaints, and that her presentation

during the physical exam conflicted with surveillance videos and Dr. Fozdar's own informal observations during the visit. Dr. Fozdar diagnosed Plaintiff with somatoform disorder—a psychological disorder—and frank malingering, or the conscious exaggeration of symptoms. Dr. Fozdar also concluded that Plaintiff was not disabled.

During the neurophysiological exam with Dr. Bundick, Plaintiff took an unusually long time to complete the tests and shook dramatically when asked to stand. Dr. Bundick concluded that Plaintiff's low neurocognitive test results were invalid because of multiple indicators of non-credible performance and performance lower than what is expected for Alzheimer's patients. Dr. Bundick diagnosed Plaintiff with probable malingered neurocognitive impairment and concluded that she did not sustain a traumatic brain injury. Both Drs. Fozdar and Dr. Bundick believed that Plaintiff's behavior during the exams was consistent with conscious exaggeration of symptoms for the purpose of primary gain.

C. Procedural History

Plaintiff filed a hearing request on 14 April 2014 seeking a determination that she is permanently and totally disabled under N.C. Gen. Stat. § 97-29. Following responses from the parties, a Deputy Commissioner filed an Opinion and Award in favor of Plaintiff. Defendants appealed, and the Commission reversed the decision. The Commission's Opinion and Award concluded that Plaintiff failed to show that

she remained incapable of work in any capacity as a result of her prior compensable injuries and terminated all indemnity benefits and temporary total disability and medical compensation payable to Plaintiff as of 17 August 2014. The Opinion and Award further allowed credit for any disability compensation paid to Plaintiff after that date. Plaintiff timely appealed.

II. ANALYSIS

A. Standard of Review

Our review of an award of the Commission is "limited to reviewing 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). This Court "only need[s] to find some evidence in the record that supports the Full Commission's findings of fact[,]" *Bishop v. Ingles Mkts., Inc.,* 233 N.C. App. 431, 438, 756 S.E.2d 115, 120-21 (2014), and we "may set aside a finding of fact only if it lacks evidentiary support." *Holley v. ACTS, Inc.,* 357 N.C. 228, 231, 581 S.E.2d 750, 752 (2003) (citations omitted). Unchallenged findings of fact are presumed to be supported by competent evidence and are therefore conclusively established. *Chaisson v. Simpson,* 195 N.C. App. 463, 470, 673 S.E.2d 149, 156 (2009). The Commission is the sole judge of the credibility of witnesses and the weight given to their testimony. *Miller v. Mission Hosp., Inc.,* 234 N.C. App. 514, 516-17, 760 S.E.2d 31, 34 (2014). "The Commission's

conclusions of law are reviewable *de novo*." *Allred v. Exceptional Landscapes, Inc.,* 227 N.C. App. 229, 232, 743 S.E.2d 48, 51 (2013) (citation omitted).

B. Challenged Findings of Fact

Plaintiff first challenges Finding of Fact 62, which recounts Dr. Sypher's testimony that if the Commission deemed Plaintiff not credible, he would not causally relate her disability to her September 2011 accident. Plaintiff's challenge is without merit.

In his deposition. Dr. Sypher testified that based on "the assumption that Ms. Lassiter's history is entirely correct and verifiable, there's no reason to dispute that she had an aggravation with her fall." When Dr. Sypher was asked, "[i]f Ms. Lassiter is deemed by the Industrial Commission to not be credible, would this change your opinions?" Dr. Sypher responded "[y]es[,]" and explained that "[i]f it is found that there are some challenges to her veracity, it is very inappropriate to place all the blame for her current disability on that fall. That stated, the concept of aggravation is a fair consideration." However, when asked if Plaintiff's reports of pain would serve as the basis for any conclusions as to aggravation, Dr. Sypher testified that "[e]ssentially, that is true." He went on to testify that he would be unable to ascribe an apportionment of aggravation to the September 2011 accident with any medical degree of certainty, and ventured only that "in general if you have another injury, it certainly doesn't help things, but I can't state exactly how much it made it worse." Anything more definite, per Dr. Sypher's testimony, "would be a conjecture." Reading

them in their totality, Dr. Sypher's statements serve as competent evidence that support the Commission's finding that if Plaintiff was deemed not credible by the Commission, then Dr. Sypher would not causally relate her disability to her injury from 2011.

Next, Plaintiff challenges Finding of Fact 68, which states that "Dr. Fozdar concluded that Plaintiff's symptoms could not be attributed to her December 29, 2010 and September 8, 2011 accidents." Plaintiff argues that the finding overstates Dr. Fozdar's opinion. Dr. Fozdar's written opinion, however, stated that the pain and neurocognitive symptoms complained of "simply cannot be attributed to her accidents in question. . . . There [is] no objective data so far to support her multiple complaints." While Dr. Fozdar did limit his opinion at deposition to his practice area, his practice includes the treatment of chronic pain. Given the content of the written opinion and oral testimony, the Commission's finding that Dr. Fozdar determined Plaintiff's *symptoms*—as opposed to a physical injury—were not caused by the accidents is supported by the evidence.

Plaintiff next challenges Findings of Fact 84, 85, and 86 as unsupported by competent evidence, but only insofar as they rely on the testimony of Drs. Bundick and Fozdar. Specifically, Plaintiff contends that because the two doctors were not qualified to diagnose, treat, or opine as to her physical shoulder and neck injuries, the Commission erred in relying upon their testimony. Plaintiff, however, again

conflates two separate issues: the nature, scope, and source of her physical injuries versus the nature, scope, and source of her disabling pain and neurocognitive symptoms for which she seeks continuing treatment and compensation. Dr. Bundick practices in the fields of neuropsychology and psychotherapy, while Dr. Fozdar specializes in neuropsychiatry and behavioral neurology. Plaintiff does not argue on appeal that they are not qualified experts in those fields. Dr. Bundick, therefore, was competent to evaluate and opine as to whether Plaintiff's pain and neurocognitive impairment were psychological in nature, while Dr. Fozdar was competent to evaluate and opine as to any psychiatric or neurologic basis for the same. Both doctors' written reports reflect that Plaintiff's pain and neurocognitive impairment were the result of diagnosable mental conditions: either frank malingering—a conscious exaggeration of symptoms—or somatoform disorder—the manifestation of physical symptoms stemming from an underlying psychological condition. So the Commission properly relied on the opinions of Drs. Bundick and Fozdar in determining whether Plaintiff's ongoing symptoms were the result of other impairments distinct from her compensable injuries.

Plaintiff also argues that the Commission erred in relying on Defendants' experts in evaluating Plaintiff's credibility in Findings 84, 85, and 86. However, the Commission engaged in its own, independent assessment of Plaintiff's credibility. In unchallenged Finding of Fact 79, the Commission noted that Plaintiff was able to

testify from "uninhibited memory and recollection" during direct examination by her own attorney, yet she "exhibited poor recall and denied knowledge of many of the same facts she testified to on direct examination" during Defendants' counsel's questioning. In the next unchallenged finding, Finding of Fact 80, the Commission found "Plaintiff's testimony regarding her complaints of pain and current symptoms . . . not credible." Because the Commission formed its own determination as to Plaintiff's credibility independent of the testimony by Drs. Bundick and Fozdar, and because the Commission's findings in that regard are unchallenged, Plaintiff's argument is overruled.

In short, the Commission could rely on Defendants' experts to find that Plaintiff's symptoms of pain and neurocognitive disability were the result of diagnosable mental conditions and, in light of Plaintiff's apparent lack of credibility, consider that evidence more probative than the testimony of other witnesses whose opinions were predicated on Plaintiff's truthfulness. "[T]his Court does not have the right to weigh the evidence and decide the issue on the basis of its weight[,]" and our "duty goes no further than to determine whether the record contains any evidence tending to support the [Commission's] finding[s]." *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (quotations and citations omitted). In keeping with that duty, we reject Plaintiff's challenges to Findings of Fact 84, 85, and 86.

In arguing that the Commission's findings of fact were erroneous, Plaintiff further posits that the Commission erred in failing to make certain findings of fact and conclusions of law that would continue compensation for treatment of ongoing pain relating to Plaintiff's neck and shoulder injuries under the presumption established by *Parsons v. Pantry, Inc.*, 126 N.C. App. 540, 485 S.E.2d 867 (1997). As for the conclusions actually contained in the Opinion and Award, the Commission: (1) gave Plaintiff the benefit of the presumption; (2) concluded Defendants had rebutted the presumption, shifting the burden of proof back to Plaintiff; and (3) concluded Plaintiff failed to satisfy that burden.

As acknowledged by Plaintiff, rebuttal of the presumption is accomplished through the introduction of "expert testimony or affirmative medical evidence tending to show that the treatment [Plaintiff now seeks] is not directly related to the compensable injury[.]" *Perez v. Am. Airlines/AMR Corp.*, 174 N.C. App. 128, 137, 620 S.E.2d 288, 293 (2005). Defendants' experts provided testimony and medical evidence in the form of a physical examination and neuropsychological test tending to show that Plaintiff's continued pain and cognitive impairment reflected frank malingering or somatoform disorder, as opposed to a prior compensable neck and shoulder injury. Dr. Phillips, who treated Plaintiff for pain and opined that her symptoms were related to her prior compensable injuries, acknowledged that Dr. Fozdar's opinion provided an alternative theory of causation, stating "he appears to

have a different opinion than I do of the presentation. It appears that he believes that there may be more of a somatoform disorder occurring. . . . It's a possible explanation."

We have previously upheld the Commission's conclusion that the *Parsons* presumption has been rebutted on similar evidence. *See, e.g., Edwards v. PCC Airfoils*, COA16-951, 799 S.E.2d 286, 2017 WL 2118716 (N.C. Ct. App. 2017) (unpublished) (holding the *Parsons* presumption was rebutted on testimony from Dr. Fozdar that an employee's symptoms were malingering and therefore not related to an earlier compensable injury). And, while the Commission could have determined that the *Parsons* presumption had not been rebutted upon weighing the testimony of the parties' experts, *McLeod v. Wal-Mart Stores, Inc.*, 208 N.C. App. 555, 703 S.E.2d 471 (2010), the Commission weighed the testimony and reached the opposite conclusion. We are bound by the unchallenged and supported findings of the Commission "even if there is plenary evidence for contrary findings." *Hardin v. Motor Panels, Inc.*, 136 N.C. App. 351, 353, 524 S.E.2d 368, 371 (2000).

C. Challenges to the Commission's Conclusions of Law

Plaintiff asserts three principal errors in the Commission's conclusions of law, first arguing that several critical conclusions are based on challenged Findings of Fact 84, 85, and 86. Having held *supra* that those findings were not made in error, we reject Plaintiff's challenge to the correlating conclusions. Plaintiff's second

argument is essentially a restatement of her evidentiary challenges to the Commission's findings of fact, asserting that Defendants presented insufficient evidence to support the Commission's conclusions concerning Plaintiff's injuries and ongoing condition. Again, having upheld the Commission's relevant findings of fact as either unchallenged or supported by the evidence, we reject this restatement of Plaintiff's earlier argument.

In her sole non-evidentiary challenge to the Commission's conclusions, Plaintiff contends that the Commission misapplied the law in concluding that Plaintiff: (1) does not require further medical treatment for her shoulder and neck injuries; (2) is not incapable of work in any capacity as a result of her injuries as of 17 August 2014; and (3) is no longer entitled to temporary total disability. Specifically, Plaintiff asserts that the Commission erred in its application of *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 290 S.E.2d 682 (1982), *Russell v. Lowes Prods. Distrib.*, 108 N.C. App. 762, 425 S.E.2d 454 (1993), and *Medlin v. Weaver Cooke Constr., LLC*, 367 N.C. 414, 760 S.E.2d 732 (2014), in reaching those conclusions.

In *Hilliard*, our Supreme Court established three factual elements an employee must show to prove disability:

> (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 capacity to earn was caused by plaintiff's

> injury.

305 N.C. at 595, 290 S.E.2d at 683. This Court supplied a non-exhaustive list of methods by which those factual elements could be shown in *Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457, and that decision's applicability was, in turn, limited by the Supreme Court's more recent holdings in *Medlin*, 367 N.C. at 422, 760 S.E.2d at 737 (limiting *Russell*'s applicability to the first two *Hilliard* factors), and *Wilkes v. City of Greenville*, 369 N.C. 730, 745, 799 S.E.2d 838, 849 (2017) (noting that our Supreme Court "has not adopted *Russell*" and holding it inapposite on the issues presented).

Plaintiff argues that she provided sufficient evidence, consistent with *Russell* and *Hilliard*, to support a conclusion by the Commission that she suffers from an ongoing disability caused by the December 2010 and September 2011 accidents. Reading the Opinion and Award's conclusions of law, however, it is apparent that the Commission simply did not believe that the evidence Plaintiff presented on the third *Hilliard* factor was credible, and that the Commission believed the testimony of Drs. Bundick and Fozdar carried greater weight on the issue:

> 8. Based upon a preponderance of the evidence in view of the entire record, the Full Commission concludes that Plaintiff has reached maximum medical improvement for the neck and shoulder injuries she sustained on September 8, 2011 and her current complaints of neck and shoulder pain are not credible. Specifically, Plaintiff's testimony that she continues to suffer severe ongoing neck and right shoulder pain is not credible. Dr. Fozdar and Dr. Bundick provided expert medical testimony that Plaintiff is exaggerating her current symptoms and Plaintiff's current

> pain complaints are not related to the September 8, 2011 injury. . . . Any further medical treatment that was recommended for her neck and shoulder conditions was based upon her subjective and non-credible complaints of ongoing pain.
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> . . .
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> 9. . . . Based upon a preponderance of the evidence in view of the entire record, the Full Commission concludes that Plaintiff has failed to show as of August 17, 2014 she remained incapable of work in any capacity *as a result of* her compensable December 29, 2010 and September 8, 2011 injur[ies] by accident[] and resulting injuries.

(emphasis added). Again, the Commission, and not this Court, is empowered to weigh and determine the facts from the evidence, *Adams*, 349 N.C. at 681, 509 S.E.2d at 414, and we are required to accept supported findings "even if there is plenary evidence for contrary findings." *Hardin*, 136 N.C. App. at 353, 524 S.E.2d at 371 (2000). As we have already upheld the findings that support the conclusion that Plaintiff has failed to satisfy the third *Hilliard* factor, we reject Plaintiff's argument on this point and hold that the Commission did not err in concluding Plaintiff failed to show disability as of 17 August 2014 as a result of her December 2010 and September 2011 injuries.

III. CONCLUSION

We hold that the Commission's Findings of Fact are supported by competent evidence and that its Conclusions of Law are supported by competent Findings of Fact. For the foregoing reasons, we affirm the Commission's Opinion and Award.

AFFIRMED.

Judges STROUD and DILLON concur.

Report per Rule 30(e).