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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-672

Filed: 1 September 2020

North Carolina Industrial Commission, I.C. No. 14-028212

RANDOLPH GILBERT, Employee, Plaintiff,

v.

BRANDCO, INC. & BRANDCO PRODUCTS, INC., Employer, ERIE INSURANCE EXCHANGE, Carrier, Defendants.

Appeal by plaintiff from opinion and award entered 12 March 2019 by the North Carolina Industrial Commission. Heard in the Court of Appeals 4 February 2020.

*Mast, Johnson, Trimyer, Wright, Booker & Van Patten, PA, by Charles D. Mast, for plaintiff-appellant.*

*McAngus, Goudelock & Courie, P.L.L.C., by Of Counsel Stephanie O. Gearhart, for defendants-appellee.*

BRYANT, Judge.

Where the findings of fact are supported by competent evidence, which support the conclusions of law, we affirm the opinion and award of the Industrial Commission (“the Commission”) denying plaintiff’s claim for additional compensation.

Plaintiff Randolph Gilbert had been employed by defendant-employer Brandco & Brandco Products, Inc. (hereinafter “Brandco”) as a fireplace technician.

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Defendant Erie Insurance Exchange is the carrier for defendant-employer Brandco (hereinafter defendants).

Plaintiff's work duties included servicing gas log fireplaces. Plaintiff did so using hand tools. On 15 January 2014, plaintiff was working on a fireplace when he used his left hand to stabilize himself and caused an injury to his left wrist. Plaintiff was sitting on a raised hearth about a foot off the ground with his legs crossed. Plaintiff turned his body to the left and placed his left hand on the floor while he reached with his right hand to retrieve a tool from his bag. In doing so, plaintiff fell backwards and felt a crack in his left hand. The next day, on 16 January 2014, plaintiff reported his injury to Brandco and was directed to go to the hospital for medical care. Plaintiff was diagnosed with a left wrist contusion, provided a splint to wear, and placed on light duty work through 30 January 2014. Brandco filed a Form 19 notice of plaintiff's injury. Plaintiff returned to the hospital on 30 January 2014 for a follow up appointment where the doctor noted that "[p]laintiff's wrist pain had resolved[, that p]laintiff had reached maximum medical improvement (MMI) for his left wrist injury, and [that] he could return to work at full duty." Plaintiff was discharged from treatment and continued to work for Brandco until May 2014.

On 26 May 2014, plaintiff sustained another injury to his left hand and wrist while attending a company picnic for Brandco. Plaintiff was sent back to the hospital on 28 May 2014, where he was instructed to stay out of work and referred to an

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orthopedic doctor. Brandco filed another Form 19 notice of plaintiff's injury on 28 May 2014 and began paying temporary total disability compensation to plaintiff in the amount of \$321.87 per week. Despite paying plaintiff's medical and indemnity compensation, defendants did not file any forms reflecting the nature of the injury being accepted and the compensation being paid as required by N.C. Gen. Stat. § 97-18. However, by the time of the hearing, defendants had stipulated that plaintiff sustained a compensable injury to his left wrist on 15 January 2014 arising out of his employment with Brandco.

On 30 June 2014, plaintiff began treatment with the referred orthopedic doctor for his wrist pain. After a few months of treatment, plaintiff was restricted to light duty work and referred to a physical therapist for strengthening. On 17 November 2014, plaintiff was released from his treatment plan with the orthopedic doctor. The orthopedic doctor found that plaintiff had reached "maximum medical improvement" with 10% permanent partial disability to his left wrist. The orthopedic doctor removed plaintiff's work restrictions and released plaintiff to return to work at full duty following the completion of his physical therapy. Plaintiff completed his physical therapy on 18 November 2014. Following his release, plaintiff did not return to work for Brandco. Thereafter, Brandco ceased paying disability compensation to plaintiff.

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In November 2014, plaintiff went to truck driving school and obtained his commercial driver's license. After obtaining a job working for a trucking company in January 2015, plaintiff experienced aggravation to his left wrist and stopped driving three days later. On 23 May 2015, plaintiff sought treatment for his left wrist at urgent care. Plaintiff was diagnosed with a left wrist sprain and followed up with another orthopedic hand specialist. After an MRI revealed that plaintiff had severe arthritis, the orthopedist recommended surgery as the proper treatment for plaintiff's wrist condition.

On 15 October 2015, plaintiff made two filings: a Form 18M for additional medical compensation; and a notice of change of condition. On 16 December 2015, the Commission filed an administrative order denying plaintiff's Form 18M and ordered defendants to file "all necessary Commission forms to reflect payment of disability compensation" within 10 days. Defendants did not timely comply with the order.

On 23 February 2016, defendants filed a Form 61 denying plaintiff's claim for additional compensation, alleging that plaintiff sustained a "non-work related incident on [26 May 2014], which caused additional pain and [aggravated] his pre-existing medical condition. That incident was not work related and was not compensable."

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This matter was heard before a deputy commissioner who issued an opinion and award on 14 May 2018 finding that “[p]laintiff’s current left hand/wrist condition [was] not causally related to his compensable injury” and denying his claim for additional medical compensation. Plaintiff appealed to the Full Commission.

On review, the Full Commission upheld the opinion and award of the deputy commissioner affirming the denial of plaintiff’s claim for additional compensation. Plaintiff appeals to this Court.

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On appeal, plaintiff argues the Commission erred by I) failing to determine whether the doctrine of equitable estoppel prevented defendants from contesting the compensability of plaintiff’s condition, II) finding that defendants were not responsible for his current wrist condition and concluding that defendants rebutted the *Parsons* presumption, and III) failing to awarding temporary total disability benefits for plaintiff to obtain medical treatment and complete his recommended surgery after November 2014.

This Court’s review of decisions by 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). All findings of fact shall be conclusive and binding upon review of the Commission if there is any

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evidence to support the finding. *Hawley v. Wayne Dale Const.*, 146 N.C. App. 423, 427, 552 S.E.2d 269, 272 (2001). “Before making findings of fact, the Industrial Commission must consider all of the evidence. The Industrial Commission may not discount or disregard any evidence, but may choose not to believe the evidence *after* considering it.” *Weaver v. Am. Nat. Can Corp.*, 123 N.C. App. 507, 510, 473 S.E.2d 10, 12 (1996). “Accordingly, this Court does not have the right to weigh the evidence and decide the issue on the basis of its weight.” *Johnson v. Lowe’s Cos., Inc.*, 143 N.C. App. 348, 350, 546 S.E.2d 616, 618 (2001) (citation and quotation marks omitted).

*I*

Plaintiff first argues the Commission erred by failing to determine that the doctrine of equitable estoppel prevented defendants from contesting compensability for his wrist condition. However, defendants contend that issue is waived on appeal. We agree.

Rule 701 of the Workers’ Compensation Rules of the North Carolina Industrial Commission, which governs appeals taken to the Full Commission, provides the following:

[t]he appellant shall submit a Form 44 Application for Review stating with particularity all assignments of error and grounds for review, including, where applicable, the pages in the transcript or the record on which the alleged errors shall be recorded. *Grounds for review and assignments of error not set forth in the Form 44 Application for Review are deemed abandoned*, and

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argument thereon shall not be heard before the Full Commission.

(emphasis added). “Such notice is required for the appellee to prepare a response to an appeal to the Full Commission.” *Wade v. Carolina Brush Mfg. Co.*, 187 N.C. App. 245, 252, 652 S.E.2d 713, 717 (2007). “Thus, the penalty for non-compliance with the particularity requirement is waiver of the grounds, and, where no grounds are stated, the appeal is abandoned.” *Id.* at 249, 652 S.E.2d at 715.

Rule 701 clearly states that a plaintiff must state with particularity the grounds on which a defendant could have proper notice. Plaintiff presented several arguments for the Commission to review in his Form 44 application—none of which referenced the issue of estoppel to bar defendants from contesting compensability. Plaintiff has thereby waived all review on this issue.

*II*

Plaintiff next argues the Commission erred by finding that defendants were not responsible for the current arthritic condition to his left wrist because defendants had provided compensation for his initial injury in January 2014. Specifically, plaintiff contends that it was erroneous to conclude that defendants had successfully rebutted the *Parsons* presumption in proving that his current wrist condition was not related to a compensable injury. We disagree.

A claimant seeking additional medical compensation must establish that the treatment is directly related to the compensable injury. *Perez v. Am. Airlines/AMR*

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*Corp.*, 174 N.C. App. 128, 136, 620 S.E.2d 288, 293 (2005). “Where a plaintiff’s injury has been proven to be compensable, there is a presumption that the additional medical treatment is directly related to the compensable injury.” *Id.* at 135, 620 S.E.2d at 292. “The employer may rebut the presumption with evidence that the medical treatment is not directly related to the compensable injury.” *Id.* Generally, “[t]he employer’s filing of a Form 60 is an admission of compensability.” *Id.* at 135, 620 S.E.2d at 293.

In the instant case, plaintiff sustained his initial injury—a left wrist contusion—on 15 January 2014. Defendants accepted compensability and paid for plaintiff’s treatment until he was discharged. Four months later, plaintiff reinjured his left hand and wrist. While defendants never filed a Form 60 admitting plaintiff’s right to compensation, defendants never contested compensability and further stipulated that plaintiff was paid compensation from the date of his reinjury until the completion of his treatment in November 2014. Two months later, after plaintiff experienced aggravation in his left wrist, surgery was recommended.

The Commission made the following conclusions of law as to plaintiff’s current wrist condition:

2. Plaintiff [was] entitled to a presumption that his ongoing need for medical treatment for his left hand/wrist condition [was] related to his compensable January 15, 2014 injury. *Parsons v. Pantry*, 126 N.C. App. 540, 485 S.E.2d 867 (1997). However, the Full Commission concludes that [d]efendants have successfully rebutted the



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*Parsons* presumption with the competent expert medical opinion testimony of [plaintiff's treating physicians] that [p]laintiff's current left hand wrist condition [was] not related to his compensable January 15, 2014 injury by accident. *Id.*; *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980).

3. The Full Commission further concludes that, based upon the preponderance of the evidence in view of the entire record, [p]laintiff's current left hand wrist condition [was] not causally related to his compensable injury. Rather, based upon the preponderance of the evidence in view of the entire record, the Full Commission concludes that [p]laintiff suffered a temporary aggravation of his pre-existing condition with the January 15, 2014 incident, in the form of an acute flare-up of his STT arthritis that resolved by November 2014, and that [p]laintiff's current left hand/wrist condition and need for treatment [was] related to his chronic gouty arthropathy in that joint. N.C. Gen. Stat. §§ 97-2(6); 97-25; *English v. J.P. Stevens & Co.*, 98 N.C. App. 466, 471, 391 S.E.2d 499, 502 (1990).

Because defendants stipulated that plaintiff's injury to his left hand and wrist was compensable, we agree with the Commission that plaintiff was entitled to a rebuttable presumption under *Parsons* that his aggravated left wrist injury was directly related to the original compensable injury.

However, the record supports the Commission's conclusion that defendants successfully rebutted the presumption by testimony from plaintiff's treating physicians and evidence of an intervening act to prove that plaintiff's treatment for his aggravated left wrist injury was not directly related to the 15 January 2014 incident.

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One of plaintiff's treating physicians testified that during plaintiff's last doctor's visit in November 2014, plaintiff's wrist condition had "mostly resolved to the point that he had reached his maximum medical improvement" because his x-rays did not show any structural damage excluding the arthritis to his wrist. The physician stated that plaintiff had an existing gouty arthritis condition prior to his work-related injury and opined that the occasional flare-ups in his wrist resulted from plaintiff's gout. Defendants had also presented testimony from plaintiff's last treating physician, who evaluated plaintiff after the hearing before the deputy commissioner, and his testimony was equivocal in that plaintiff's aggravated left wrist injury did not stem from the 15 January 2014 incident so as to be compensable.

Given that it is the Commission, not this Court, who ultimately determines the weight and credibility of testimony, *see Adams v. AVX Corp.*, 349 N.C. 676, 680–81, 509 S.E.2d 411, 413 (1998), we believe on this record that defendants have sufficiently rebutted the presumption by establishing that plaintiff's current condition was not related to the compensable injury. As such, the Commission did not err in concluding that plaintiff was not entitled to additional medical treatment.

*III*

Lastly, plaintiff argues the Commission erred by concluding that he was not entitled to reasonable medical treatment for his current wrist condition, and thus, it was erroneous to deny temporary total disability benefits. We disagree.

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“The burden of proving the existence and extent of a disability is generally carried by the claimant.” *Medlin v. Weaver Cooke Const., LLC*, 367 N.C. 414, 420, 760 S.E.2d 732, 736 (2014).

[T]o 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).

Here, the Commission made the following findings of fact:

12. Plaintiff [went] to . . . an orthopedic hand specialist, on June 30, 2014, and [this physician] became [p]laintiff’s authorized treating physician in this claim. . . . [The physician] diagnosed [p]laintiff with STT arthrosis of his left wrist and put him in a cast up to his left elbow to immobilize the joint pending follow-up. . . .

13. On July 28, 2014, [the physician] noted [p]laintiff’s symptoms seemed to have resolved with the cast treatment, and [the physician] felt no further treatment was warranted at that time. [The physician] removed the cast and restricted [p]laintiff to light duty work for the following week, anticipating that [p]laintiff could return to full duty when his strength returned in about a week.

14. On August 4, 2014, [p]laintiff returned to [the physician] and complained of increased pain in his left hand after the cast removal. . . . Based on his review of x-rays, [the physician] believed there was no structural damage and he referred [p]laintiff for physical therapy for strengthening.

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15. Plaintiff began physical therapy on August 15, 2014, and thereafter went for twenty-six visits through November 18, 2014.

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17. Plaintiff last saw [his physician] on November 17, 2014, at which time [his physician] noted [p]laintiff was able to do most of his activities in physical therapy without difficulty. [The physician] concluded [p]laintiff had reached MMI and assigned him a ten percent permanent partial impairment rating. [The physician] released [p]laintiff to return to work at full duty with no restrictions as of November 24, 2014, following his completion of physical therapy.

18. On November 18, 2014, [p]laintiff had his last physical therapy visit. That day, he reported that his functional status with his left hand and wrist was at the following levels: “100 percent for light household chores, 90 percent for heavy household chores, 90 percent for gardening/yard work, and 75 percent for work activities.” Plaintiff also reported, at best, his pain in his left hand/wrist was at the 0/10 level and that, at worst, the pain was at the 2/10 level, which was “rare.”

19. Upon [the physician’s] release of [p]laintiff, [p]laintiff did not return to work with [Brandco] and [d]efendants stopped paying TTD compensation to [p]laintiff.

The Commission further concluded that “[p]laintiff [was] not entitled to further medical and/or TTD compensation in this claim.”

Based on these findings, plaintiff has not demonstrated that he is entitled to disability compensation. Following his release from treatment, plaintiff did not produce any evidence to rebut the contention that he was incapable of resuming his work duties at full capacity. In fact, the findings support that it was unlikely any

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limitation caused by his current wrist condition was the direct result of his work-related injury. Thus, the Commission properly concluded, based on the evidence presented, that plaintiff was not entitled to additional compensation to cover his medical treatment. Plaintiff's argument is overruled.

For the reasons stated herein, the Commission's opinion and award is  
**AFFIRMED.**

Judges DILLON and DIETZ concur.

Report per Rule 30(e).