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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-41

No. COA20-585

Filed 18 January 2022

North Carolina Industrial Commission, I.C. No. 15-769318

ROBIN ENOCH, Employee, Plaintiff,

v.

MONARCH, Employer, AMERICAN BUILDERS INSURANCE COMPANY, Carrier
(SYNERGY COVERAGE SOLUTIONS, Third-Party Administrator), Defendants.

Appeal by defendants from opinion and award entered 6 January 2020 by the
North Carolina Industrial Commission. Heard in the Court of Appeals 8 September
2021.

Poisson, Poisson & Bower, PLLC, by E. Stewart Poisson, for plaintiff-appellee.

*McAngus Goudelock & Courie, LLC, by John F. Morris, for defendants-
appellants.*

DIETZ, Judge.

¶ 1 Plaintiff Robin Enoch suffered a compensable injury to her spine while working at a group home for people with disabilities. After Defendants—her employer and the workers’ compensation insurer—declined to authorize a second round of facet joint injections recommended by her treating physician, the Industrial Commission entered an opinion and award that, among other things, assessed costs and attorneys’

fees on Defendants under N.C. Gen. Stat. § 97-88.1.

¶ 2 Defendants challenge that portion of the Commission’s opinion and award on appeal. As explained below, we hold that the record supports the Commission’s legal determination that the assessment of costs and attorneys’ fees was permissible, and further hold that the Commission’s decision to assess those fees and costs was within the Commission’s sound discretion. We therefore affirm the opinion and award.

Facts and Procedural History

¶ 3 In 2015, Plaintiff Robin Enoch was a developmental specialist for Defendant Monarch, a health services company, in a group home for people with disabilities. Enoch suffered a compensable back injury at work after a struggle with a resident of the group home. Monarch and its workers’ compensation insurer referred Enoch for occupational health treatment at Stanly Regional Medical Center. Enoch’s initial appointment was on 20 October 2015. On examination, Enoch had limited range of motion throughout the thoracic and lumbar spine with moderate muscle spasms and tightness.

¶ 4 By 1 December 2015, Enoch had pain down the right leg to her ankle with numbness in her right foot intermittently and pain in her left leg to her knee with no numbness. Enoch’s care providers referred her to an orthopedist. Enoch met with that orthopedist, Dr. Segebarth, at OrthoCarolina on 15 December 2015. Dr. Segebarth noted forward flexion, extension, lateral bending and rotation “near” normal but also

noted that Enoch had left buttock pain that he thought may be radicular. He recommended an MRI scan.

¶ 5 Dr. Segebarth saw Enoch again on 16 February 2016 and reviewed the MRI scan results. He found no disc herniation or neural impingement on the MRI. Based on his review of the MRI results, he believed the injury likely was a hamstring or gluteus type tendinopathy. He assigned no permanent work restrictions. By that point, Enoch had completed physical therapy and four months of conservative therapy.

¶ 6 Enoch's pain did not resolve, so Enoch requested a second opinion. Defendants consented. Enoch consulted with Dr. Welshofer, a non-surgical spinal care physician specializing in physical medicine and rehabilitation, on 30 November 2016. Dr. Welshofer noted that Enoch complained of left-sided low back pain. He performed a physical exam and noted that Enoch had decreased range of motion and moderate restriction on extension.

¶ 7 Dr. Welshofer believed Enoch's earlier MRI scan was of very poor quality, but he could still see that there appeared to be some moderate facet disease and disc bulging. He recommended a CT scan and a SPECT scan of the lumbar spine for further investigation. He felt that Enoch may be a candidate for facet joint injections, depending on the results of the testing.

¶ 8 After Enoch requested authorization of the scan recommended by Dr.

Welshofer, Defendants filed a Form 33 Request for Hearing, arguing that Enoch was not entitled to any additional medical treatment. Defendants then advised Enoch that they wanted her to present to an independent examination with Dr. VanDerNoord, who, like Dr. Welshofer, is a non-surgical spinal care physician certified in physical medicine, rehabilitation, and pain medicine.

¶ 9 Dr. VanDerNoord fully agreed with Dr. Welshofer in all respects. Enoch then requested that Defendants agree to transfer her treatment to either Dr. Welshofer or Dr. VanDerNoord. Enoch did not receive a “definitive response” from Defendants to that request and then filed a motion to transfer care to Dr. Welshofer. Defendants later agreed to transfer care to Dr. VanDerNoord in exchange for Enoch withdrawing her motion to transfer care to Dr. Welshofer.

¶ 10 Dr. VanDerNoord determined that Enoch should receive a series of two facet joint injections as part of her treatment protocol. Enoch received the first injection on 11 December 2017. Dr. VanDerNoord found that, in response to the first injection, Enoch had a “clearly diagnostic response with some partial therapeutic relief.” He thus advised Enoch to complete the treatment protocol with a second set of injections.

¶ 11 Later, Enoch received a call from Dr. VanDerNoord’s staff cancelling the second injection because it had not been approved by Defendants. The matter then reached the Industrial Commission on Defendant’s Form 33 Request for Hearing.

¶ 12 After the hearing, the deputy commissioner filed an opinion and award on 5

July 2018. The deputy commissioner found that the recommended injection treatment was necessary and related to the compensable injury, and further found that Defendants had been unfoundedly litigious in denying that treatment. As a result, the deputy commissioner assessed costs and attorneys’ fees against Defendants. Defendants timely appealed to the Full Commission.

¶ 13 The Full Commission issued its opinion and award on 6 January 2020 and affirmed the deputy commissioner in all respects. Defendants then appealed to this Court. After this appeal commenced, Enoch passed away from causes unrelated to this workers’ compensation claim. Enoch’s counsel moved to intervene as the real party in interest with respect to this appeal. A panel of this Court allowed that motion on 6 November 2020.

Analysis

¶ 14 Defendants argue that the Commission erred in finding and concluding that Defendants had no reasonable grounds for cancelling the second set of injections by Dr. VanDerNoord and that the Commission abused its discretion by assessing costs and attorneys’ fees as a result.

¶ 15 By statute, “[i]f the Industrial Commission shall determine that any hearing has been . . . defended without reasonable ground, it may assess the whole cost of the proceedings including reasonable fees for . . . plaintiff’s attorney upon the party who has . . . defended them.” N.C. Gen. Stat. § 97-88.1. The purpose of Section 97-

88.1 is “to deter unfounded litigiousness.” *Matthews v. Charlotte-Mecklenburg Hosp. Auth.*, 132 N.C. App. 11, 21, 510 S.E.2d 388, 395 (1999). “[T]he Worker’s Compensation Act is to be construed liberally, and benefits are not to be denied upon technical, narrow, or strict interpretation of its provisions.” *Id.* at 16, 510 S.E.2d at 392.

¶ 16 Our precedent requires us to review an award for unfounded litigiousness under Section 97-88.1 using a two-part test. First, whether a defendant “had a reasonable ground to bring a hearing is reviewable by this Court de novo.” *Troutman v. White & Simpson, Inc.*, 121 N.C. App. 48, 50, 464 S.E.2d 481, 484 (1995). “The test is not whether the defense prevails, but whether it is based in reason rather than in stubborn, unfounded litigiousness.” *Silva v. Lowes Home Improvement*, 239 N.C. App. 175, 182, 768 S.E.2d 180, 186 (2015). Second, the decision “whether to award or deny attorney’s fees rests within the sound discretion of the Commission and will not be overturned absent a showing that the decision was manifestly unsupported by reason.” *Thompson v. Fed. Express Ground*, 175 N.C. App. 564, 570, 623 S.E.2d 811, 815 (2006).

¶ 17 Defendants argue on appeal that their decision not to authorize the second set of facet injections was “reasonable and factually supported in light of the following: 1) a questionable response to the injections; 2) Dr. Segebarth’s previous release with no rating, restrictions or recommendation for further treatment; and 3) an upcoming

mediation of the claim.”

¶ 18 With respect to Enoch’s “questionable response” to the first injection, Dr. VanDerNoord testified that the standard protocol for a facet joint injury is two sets of diagnostic injections. Because Dr. VanDerNoord determined that the first injection resulted in a “clearly diagnostic response with some partial therapeutic relief” for Enoch, Dr. VanDerNoord determined that Enoch should proceed to the second injection. The Commission described this evidence in its findings of fact. The Commission also found, based on undisputed evidence in the record, that although Enoch’s insurance adjuster, Dana Gillenwalters, believed “reports that came in did not show that [Enoch] had much relief from the first” injection, Gillenwalters “admitted that she did not know the significance of the relief experienced” by Enoch and had not discussed the results of the first injection with Dr. VanDerNoord, Enoch’s treating physician.

¶ 19 Simply put, on the record before this Court, we cannot agree that there was evidence of a “questionable response” to the first injection. The evidence indicates that Enoch experienced sufficient relief from the first injection to warrant the second injection under the applicable medical protocol and the medical assessment of her treating physician.

¶ 20 With respect to Dr. Segebarth’s previous release with “no rating, restrictions or recommendation for further treatment,” this argument is undermined by the fact

that Enoch sought a second opinion from Dr. Welshofer, who specialized in non-surgical spine treatment and recommended the injection protocol to afford relief from Enoch’s condition; that Defendants then requested a further second opinion from Dr. VanDerNoord, who likewise specialized in non-surgical spine treatment and again recommended the injection protocol; that Defendants consented to transfer Enoch’s care from Dr. Segebarth to Dr. VanDerNoord; and that Defendants authorized Enoch to begin the injection protocol, with results that her treating physician found to yield a “clearly diagnostic response” and “partial therapeutic relief.”

¶ 21 Finally, with respect to the approaching mediation, the record indicates that Defendants did not cancel the authorization of the second injection because they believed the parties could address that issue in the mediation. In correspondence between the parties concerning the mediation, Enoch’s counsel asked if Defendants were going to authorize the “injection and return visits” and Defendants’ counsel responded, “No they are not. They believe her problems relate to her weight.” Nothing in the record indicates that Defendants chose not to authorize the second injection because they expected to negotiate or resolve that issue in the upcoming mediation.

¶ 22 In sum, none of Defendants’ justifications on appeal are sufficient to overcome the Commission’s findings that Defendants authorized Enoch’s care to be transferred to Dr. VanDerNoord, a physician that Defendants requested in lieu of Enoch’s preferred treating physician, that Dr. VanDerNoord recommended Enoch receive a

two-part treatment protocol involving two sets of facet joint injections, that Defendants authorized the first set of facet joint injections, and that Defendants then declined to authorize the second set of facet injections despite a positive response to the first set and no other change in circumstances in the interim. We thus hold that the Commission properly determined that it could assess costs and attorneys’ fees against Defendants under N.C. Gen. Stat. § 97-88.1 for refusing to authorize the second set of facet injections, which were the second portion of a two-part treatment protocol recommended by Enoch’s treating physician, until being forced to do so by ruling of the Commission.

¶ 23 Having determined that the award was permissible under N.C. Gen. Stat. § 97-88.1, we likewise conclude that the Commission acted within its sound discretion in assessing those costs and attorneys’ fees. This Court cannot set aside this discretionary decision “absent a showing that the decision was manifestly unsupported by reason.” *Thompson*, 175 N.C. App. at 570, 623 S.E.2d at 815. The Commission’s order demonstrates that the Commission engaged in a thorough, reasoned analysis of this issue. Thus, under the narrow standard of review this Court must apply, we uphold the Commission’s decision.

Conclusion

¶ 24 We affirm the Industrial Commission’s opinion and award.

AFFIRMED.

ENOCH V. MONARCH

2022-NCCOA-41

Opinion of the Court

Judges GORE and GRIFFIN concur.

Report per Rule 30(e).