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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-256

No. COA21-2

Filed 5 April 2022

North Carolina Industrial Commission, I.C. No. 17-013615

FERNANDO VALDIVIEZ, Employee, Plaintiff,

v.

SUPREME MAINTENANCE ORGANIZATION, Employer, ACCIDENT FUND INSURANCE CO. OF AMERICA, Carrier, Defendants.

Appeal by plaintiff from Opinion and Award entered 22 September 2020 by the North Carolina Industrial Commission. Heard in the Court of Appeals 5 October 2021.

Diener Law, P.A., by Russell W. Johnson, for plaintiff-appellant.

Cranfill Sumner LLP, by Steven A. Bader and James B. Black, IV, for defendant-appellees.

STROUD, Chief Judge.

¶ 1 Plaintiff appeals an Opinion and Award of the North Carolina Industrial Commission which determined plaintiff's current back pain was not related to his prior compensable injuries. We affirm.

I. Background

¶ 2 Because plaintiff contests only one finding of fact and one conclusion of law we begin by noting that "[e]xcept for jurisdictional questions, failure to assign error to the Commission's findings of fact renders them binding on appellate review." *Estate of Gainey v. S. Flooring and Acoustical Co., Inc.*, 184 N.C. App. 497, 501, 646 S.E.2d 604, 607 (2007). The parties stipulated that "[p]laintiff sustained a compensable injury to the left knee and lumbar strain on or about October 9, 2016" and "was paid temporary total disability (TTD) benefits and temporary partial disability (TPD) benefits until his return to full duty work on August 21, 2017." The binding findings of fact establish, *see id.*, that plaintiff was a 55-year-old man who "mainly performed manual labor-type work, including landscaping, construction, and working on factory lines" for defendant-employer Supreme Maintenance Organization.

¶ 3 "On September 15, 2017, [after 'his return to full duty work,'] plaintiff returned to [his knee doctor] who noted that plaintiff had reached MMI for his compensable left knee condition and released him from treatment to follow up as needed." After his September appointment, "plaintiff did not request any further medical treatment" until 25 March 2019.

¶ 4 On 15 March 2019, plaintiff resigned, noting "he felt he could physically no longer do the work." Throughout March and April of 2019, plaintiff sought medical care for lower back pain, including calling an ambulance and being treated in the emergency room "because he felt like his legs had fallen asleep, and was unable to

get up." "Plaintiff underwent a lumbar MRI, which revealed a disc bulge and a small central disc extrusion that was slightly inferiorly migrated, right neuroforaminal stenosis at L3-4, and disc bulge and mild bilateral neuroforaminal stenosis at L4-5. Plaintiff was assessed with lumbar pain and lumbar radiculopathy." Plaintiff returned to the emergency room again in April.

¶ 5 In August of 2019, Dr. Smoot, plaintiff's authorized treating low back physician and "an expert in physical medicine and rehabilitation," was deposed and stated he did not believe plaintiff's current low back symptoms were related to his 9 October 2016 accident. "Dr. Smoot further testified the disc herniation seen on the April 16, 2019 MRI was a new finding, compared to the June 9, 2017 MRI. Dr. Smoot explained that when he evaluated Plaintiff several times in 2017, he did not present with, or exhibit, radicular symptoms." "Dr. Smoot believed there had been a 'new event' that had brought on plaintiff's symptoms in April 2019." The Commission ultimately found "that plaintiff's current low back symptoms are not related to his compensable injuries that occurred on October 9, 2016." Plaintiff appeals.

II. Standard of Review

> [T]he Commission's findings of fact are binding on appeal if they are supported by competent evidence, even if there is evidence to support a contrary finding. Put another way, the Commission's findings of fact may be set aside on appeal only when there is a complete lack of competent evidence to support them. Further, on appeal of an award of the Industrial Commission, the evidence tending to

> support plaintiff's claim is to be viewed in the light most favorable to plaintiff, and plaintiff is entitled to the benefit of every reasonable inference to be drawn from the evidence.

Id. at 501, 646 S.E.2d at 607 (citations and quotation marks omitted). "Unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal." *Allred v. Exceptional Landscapes, Inc.*, 227 N.C. App. 229, 232, 743 S.E.2d 48, 51 (2013).

III. Findings of Fact

¶ 6 Plaintiff contests only one finding of fact contending that "the Industrial Commission's finding of fact 23 is not supported by competent evidence[.]" (Capitalization altered.) Finding of fact 23 provides,

> 23. A review of plaintiff's medical records reveals no documentation that plaintiff complained of any significant leg pain or radicular symptoms until April 2019, approximately 30 months after the date of injury of this claim. Most often when asked by providers about leg pain, numbness, or weakness before April 2019, plaintiff denied these symptoms.

¶ 7 Plaintiff contends that finding of fact 23 is contradicted by finding of fact 17 because it states there was "no documentation" of complaints prior to April 2019:

> 17. On March 26, 2019, plaintiff presented to his primary care provider, Dr. Rajendra L. Nigalye, reporting lower back pain that radiated into his buttocks, with an onset date of 'yesterday.' The pain was characterized as moderate, and severe at times. Plaintiff denied leg pain, numbness or weakness.

¶ 8 Plaintiff also directs us to medical records not specifically mentioned in the Opinion and Award, noting he had reported low back pain as early as December of 2016. But finding of fact 23 does not state plaintiff had absolutely no symptoms until April 2019. Finding of fact 23 states plaintiff had not "complained of any *significant* leg pain or radicular symptoms" and that "[m]ost *often* when asked" about these symptoms until April 2019, he denied them. (Emphasis added.) This is consistent with finding of fact 17, which addresses one report of symptoms in March 2019; otherwise, "most often," at other visits to physicians before April 2019, he had not reported these symptoms. Defendants note that "[i]f the phrase 'no documentation' is meant to be absolute, then at best, [plaintiff] identified one record – the 21 December 2016 record – that refers to radicular symptoms prior to April 2019." But defendants further contend, "[i]f the 'no documentation' finding is an error, the mistake is not material or prejudicial."

¶ 9 Finding of fact 23 is supported by the record and is not contradicted by finding of fact 17. In addition, the uncontested findings establish, *see Allred*, 227 N.C. App. at 232, 743 S.E.2d at 51, plaintiff's authorized treating low back physician, Dr. Smoot, did not believe plaintiff's current low back symptoms were related to his 9 October 2016 accident. "Dr. Smoot further testified the disc herniation seen on the April 16, 2019 MRI was a new finding, compared to the June 9, 2017 MRI. Dr. Smoot explained

that when he evaluated Plaintiff several times in 2017, he did not present with, or exhibit, radicular symptoms." "Dr. Smoot believed there had been a 'new event' that had brought on plaintiff's symptoms in April 2019." The Commission heavily relied upon the opinion of Dr. Smoot in making its determination as is noted in finding of fact 26, "The Full Commission accords greater weigh to the expert opinion of Dr. Smoot, as plaintiff's authorized treating physician, over the expert opinion of Dr. Kundukalam." This argument is overruled.

IV. *Parsons* Presumption

¶ 10 Plaintiff's only other argument on appeal is that "the Industrial Commission erred in concluding defendants rebutted the *Parsons* presumption." (Capitalization altered.) The *Parsons* presumption "provides that a plaintiff is entitled to a presumption that her current discomfort and related medical treatment are directly related to her compensable injuries[.]" *Gonzalez v. Tidy Maids, Inc.*, 239 N.C. App. 469, 470, 768 S.E.2d 886, 888–89 (2015) (citing *Parsons v. Pantry, Inc.*, 126 N.C. App. 540, 485 S.E.2d 867 (1997)). "Once the *Parsons* presumption applies, the burden rests on the Defendants to rebut the presumption. The employer may rebut the presumption with evidence that the medical treatment is not directly related to the compensable injury." *Patillo v. Goodyear Tire and Rubber Company*, 251 N.C. App. 228, 244, 794 S.E.2d 906, 917 (2016) (citation and quotation marks omitted).

¶ 11 Plaintiff directs us to Dr. Smoot's deposition wherein he states it would be

possible, if plaintiff had significant gait change from his October 2016 injury, that plaintiff could develop a herniated disc and thus other low back issues, from the gait change. Plaintiff argues in his reply brief, "Dr. Smoot's equivocation on this central point renders his opinion insufficient to rebut the *Parsons* presumption[.]" Plaintiff also directs us to unpublished case law to support his point on "equivocation," but "citation of unpublished opinions is disfavored," particularly, here, where a large body of published case law on the *Parsons* presumption exists. *Evans v. Conwood, LLC*, 199 N.C. App. 480, 490, 681 S.E.2d 833, 840 (2009); *see, e.g., Patillo*, 251 N.C. App. 228, 794 S.E.2d 906; *Gonzalez*, 239 N.C. App. 469, 768 S.E.2d 886. Further, per plaintiff's own description, Dr. Smoot did not equivocate when he stated "it's possible," "if"; in other words, Dr. Smoot was plainly speaking in hypotheticals to answer the question posed to him. When asked to determine what he believed what had actually occurred, Dr. Smoot stated a "new event" caused plaintiff's back pain, as noted in the unchallenged findings of fact.

¶ 12 Here, defendants rebutted plaintiff's presumption with the deposition of Dr. Smoot, plaintiff's authorized treating physician for his low back and "an expert in physical medicine and rehabilitation," which indicated he believed the 2019 MRI revealed an issue caused by a "new event[.]" *See generally Patillo*, 251 N.C. App. at 244, 794 S.E.2d at 917 ("Once the *Parsons* presumption applies, the burden rests on the Defendants to rebut the presumption. The employer may rebut the presumption

with evidence that the medical treatment is not directly related to the compensable injury." (citation and quotation marks omitted)). In this case, the Commission concluded, "In order to rebut this presumption, Defendants have the burden of producing evidence showing Plaintiff's non-mechanical back pain and his need for medical treatment for his non-mechanical back pain are unrelated to the compensable injury. *Defendants must present expert testimony or affirmative medical evidence tending to show that the treatment Plaintiff seeks for his current low back condition is not directly related to his admittedly compensable back injury*." *Id.* (emphasis added). This argument is overruled.

V. Conclusion

¶ 13 For the foregoing reasons, we affirm.

AFFIRMED.

Judges TYSON and INMAN concur.

Report per Rule 30(e).