

ARKANSAS COURT OF APPEALS

DIVISIONS I & II

No. CA09-109

STEVEN DIDDLE

APPELLANT

Opinion Delivered January 20, 2010

V.

WESTWOOD HEALTH &
REHABILITATION, INC. and CCMSI,
CARRIER

APPELLEES

APPEAL FROM THE ARKANSAS
WORKERS' COMPENSATION
COMMISSION
[NO. F700988]

REVERSED AND REMANDED

JOSEPHINE LINKER HART, Judge

On July 19, 2006, while employed by appellee Westwood Health & Rehabilitation, Inc., appellant, Steven Diddle, who is a licensed practical nurse, suffered an admittedly compensable injury to his back when lifting a patient. In an opinion adopted by the Commission, the administrative law judge found that appellant's requested temporary total disability benefits and additional medical benefits were not necessitated by or connected with his admittedly compensable injury. However, because of erroneous fact finding expressly relied on by the ALJ and hence the Commission in reaching this decision, we remand this case for the Commission to fully examine the evidence presented.

The day after appellant's July 19, 2006 compensable injury, appellant was seen by a physician, and an ordered x-ray showed "no acute abnormalities." He was returned to work but restricted to "[n]o lifting more than 10 pounds." He was seen again on July 28, 2006, and

was returned to work with the “same” restrictions.

Appellant continued to work for appellee until September 1, 2006, when he left his employment and worked for a second nursing facility from October to November of 2006 and a third nursing facility from December 2006 until January 2007. He also was briefly employed in January 2007 by the second nursing facility.

Appellant next sought medical treatment at an emergency room on December 27, 2006. He complained of back pain and numbness in his left leg. Records noted back pain for six weeks that was the result of a recent injury while lifting a patient. An x-ray showed an “[u]nremarkable lumbar spine.” Clinical notes indicated an “Acute Herniated Disc at L4-5.” He was again seen at an emergency room on January 27, 2007, giving a history of a July 2006 back injury with an onset of symptoms six months earlier. He was also seen at the emergency room on February 13, 2007. A nursing record from that date indicated chronic lower-back pain with a recent injury on December 27, 2006, and an initial history of a back injury in July 2006 from assisting a patient who had slipped. On April 12, 2007, appellant was seen by a physician for back and left-leg pain. Appellant noted an onset of back pain in July 2006 while transferring a patient to a chair. An x-ray showed significant disc space settling at L4-5, and the physician suspected a significant bulging disc at L4-5. Appellant was also seen in the emergency room on May 25, June 22, July 15, August 8, and August 31, 2007.

An MRI of August 27, 2007, showed at L4-5 disc dessication with a small left paracentral herniation, a mild narrowing of the left neural foramen, associated spondylosis, and

mild bilateral facet hypertrophy. At L5-S1, there was mild bilateral facet hypertrophy and disc dessication with a mild generalized bulging annulus and spondylosis. On October 3, 2007, a physician noted that the MRI showed a significant disc bulge at L4-5. An x-ray report of that date showed significant disc-space collapse at L4-5. An MRI performed on February 28, 2008, demonstrated early multilevel spondylosis, most pronounced at L4-5, with a left parasagittal broad-based disc protrusion adjacent to the descending left L5 nerve root, which was slightly displaced. Further, it showed mild L4-5 and L5-S1 neural foraminal narrowing.

In denying benefits, the ALJ wrote that appellant was injured July 19, 2006, and treated on July 20, 2006, when an x-ray showed no abnormalities. The ALJ further wrote that appellant was released on July 28, 2006, with no work restrictions. The ALJ also wrote that appellant left employment with appellee Westwood and was employed by two other nursing facilities and did not again seek medical treatment until December 27, 2006. Further, the ALJ noted that it was not until April 2007 that an abnormality was found, and appellant had returned to employment with a nursing facility in January 2007.

The ALJ did not find credible appellant's explanation that he did not seek medical treatment until December 2006 because he was given the "run around" by appellees. The ALJ observed that appellant was a nurse who appeared to understand medical procedure and terminology, and if he suffered pain from July to December, he would have sought treatment at an emergency room, as he did on multiple occasions beginning in December 2006. The ALJ further noted that appellant's employment at the other nursing facilities also required him

to exert physical force that could have caused his current back difficulties. Moreover, the ALJ noted that his employment with the two employers was closer in time than his employment with appellee Westwood. The ALJ thought it more probable that his current problems were related to some incident that occurred during his employment with the other nursing facilities, or could also have stemmed from some routine activity unrelated to work. The ALJ found that appellant failed to prove that his current need for additional medical treatment was necessitated by or connected with the July 19, 2006 injury and concluded that appellant was therefore not entitled to additional medical treatment or temporary total disability benefits. The Commission adopted the ALJ's findings.

Appellant challenges on appeal the Commission's findings. We note, however, that the ALJ's analysis was based on erroneous fact finding. In the adjudication portion of the ALJ's opinion, the ALJ found that "the medical records reflect that [appellant] was released on July 28, 2006, with no work restrictions." This finding also appears in the medical-history portion of the opinion. This factual finding, however, is incorrect, as the medical record of July 28, 2006, indicates appellant was still under the "same" restriction—no lifting more than ten pounds—that he was under on July 20, 2006, the date he was first seen by the physician. The medical record also was corroborated by appellant's testimony that he was placed on light duty.

Thus, in denying benefits, the ALJ's analysis proceeded under the false conclusion that appellant continued to work for appellee Westwood and others while free of lifting

restrictions. This erroneous fact finding, on which the Commission expressly relied, led the ALJ to its conclusion that appellant's back pain after his visit to a physician on July 28, 2006, could have resulted from some subsequent event.

This court does not review decisions of the Commission de novo on the record. *Roberts v. Whirlpool*, 102 Ark. App. 284, 284 S.W.3d 100 (2008). The Commission failed to make a proper de novo review of the record, which resulted in it making an erroneous factual finding upon which it expressly relied in reaching its decision, thus leaving this court to speculate concerning what evidence the Commission intended to rely on when making its decision. See *Vaughan v. APS Services, LLC*, 99 Ark. App. 267, 259 S.W.3d 470 (2007). The Commission's erroneous fact finding requires that we reverse and remand the Commission's decision for it to fully examine the evidence presented. *Id.* While we point out only this erroneous finding, we note there are other errant statements and inconsistencies in the opinion.¹ On remand, the Commission should reexamine all of the evidence to resolve these misstatements.

Reversed and remanded.

ROBBINS, KINARD, and BAKER, JJ., agree.

VAUGHT, C.J., and PITTMAN, J., dissent.

VAUGHT, C.J., dissenting. While I agree that the Commission made an erroneous

¹These include misstatements about appellant's employment dates and a quote in the medical-history portion of the opinion that is at best a paraphrase.

factual finding in its opinion, I dissent because that factual finding was not relevant to the Commission's decision and is not relevant to the issues on appeal.

The Commission found that Diddle was released to return to work on July 28, 2006, "with no work restrictions." This is incorrect. A ten-pound lifting restriction was included in the work release. But this erroneous finding has no bearing on the issues presented in this appeal. Diddle is seeking additional temporary-total-disability benefits beginning August 25, 2007, and medical treatment that was recommended in December 2007.

The Commission, in denying benefits, did not rely upon its erroneous factual finding. Rather, the Commission relied upon the following findings: (1) after being released to work in July 2006, Diddle worked for approximately six months at three nursing facilities (Westwood and two other facilities) as a treatment nurse; (2) while working at the other two nursing facilities, he had to exert physical force that could have caused his current back difficulties; (3) from July 28, 2006, until December 27, 2006, Diddle did not seek or receive medical treatment for his compensable injury; (4) Diddle's testimony that he tried to get treatment prior to December 2006, but his employer "gave him the runaround," was incredible; (5) the temporal relationship of his pain complaints to medical providers was much closer to his employment with the other two nursing facilities than with Westwood. Based on these findings—not the incorrect finding that Diddle was returned to full-duty work in July 2006—the Commission found that Diddle failed to prove that additional TTD and medical benefits arose from and were reasonably related to the July 19, 2006 compensable injury. As such, the Commission's factual mistake has no relevance. Therefore, I would affirm, holding that the above-listed findings made

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by the Commission support its decision.

I am authorized to state that Judge Pittman joins in this dissent.