NO. COA11-716
NORTH CAROLINA COURT OF APPEALS

Filed: 17 January 2012

DEBRA KNOWLES,
Employee,
Plaintiff,

v.

North Carolina
Industrial Commission
I.C. No. 029574

WACKENHUT CORPORATION,
Employer,

GALLAGHER BASSETT SERVICES, INC.,
Carrier,
Defendants.

Appeal by defendants from opinion and award entered 28 March 2011 by the North Carolina Industrial Commission. Heard in the Court of Appeals 10 November 2011.

Greg Jones & Associates, P.A., by Cameron D. Simmons, for plaintiff appellee.

Cranfill Sumner & Hartzog, LLP, by Brian J. Kromke and Sara B. Warf, for defendant appellants.

McCULLOUGH, Judge.

Wackenhut Corporation and Gallagher Bassett Services, Inc. (collectively "defendants") appeal from the Full Commission's 28 March 2011 Opinion and Award granting continued temporary total

disability compensation, medical expenses, and attorney's fees to Debra Knowles ("plaintiff"). For the following reasons, we affirm in part, and reverse and remand in part.

I. Background

On 26 July 2008, plaintiff was sitting at her post as a security guard for defendant Wackenhut. She had been with Wackenhut for fifty-three days at the time. While sitting at her post, she sat up to scoot further back in her chair and as she did so, the chair lowered several inches unexpectedly, causing her to sit down harder than intended. She said she heard a "pop" in her back and reported pain in her back and right foot. Following the accident, she has been unable to work and has sought treatment from several doctors due to her pain.

Plaintiff first visited Atlantic Orthopedics and saw Dr. Francis S. Pecoraro, who is a pain management specialist. He conducted numerous tests, but could not find an objective injury causing her pain. Dr. Pecoraro put plaintiff on several pain medication regimens, but none solved her pain problem. In April 2009, Dr. Pecoraro referred plaintiff to another doctor for a second opinion due to his belief that he may not be treating her properly. Plaintiff subsequently saw Dr. Alan Tamadon in June 2009, and he had a similar opinion as Dr. Pecoraro, in that he could not find an organic basis for plaintiff's pain. He also

opined that plaintiff had reached her maximum medical improvement. Plaintiff also met with Dr. Patrick T. Boylan, another pain management specialist, in March 2010 and he gave a similar prognosis as Dr. Tamadon. Plaintiff finally saw Dr. Kimberly S. Adams, a licensed clinical psychologist, who concluded that plaintiff was suffering from depression and anxiety. Dr. Pecoraro continues to treat plaintiff, and his last recommendation has been that she be treated with a spinal cord stimulator.

Following the accident, defendant Wackenhut filed a Form 60 Employer's Admission of Employee's Right to Compensation. Defendant Wackenhut then sent plaintiff, via certified mail, a Form 90 Report of Earnings, which plaintiff never returned. On 26 June 2009, defendant Wackenhut filed a Form 24 Application to Terminate or Suspend Payment of Compensation due to one of plaintiff's doctors assigning her a 4% permanent partial disability rating and stating that she was at maximum medical improvement. In July, plaintiff requested that the Form 24 be denied and soon thereafter filed a Form 22 Statement of Days Worked and Earnings of Injured Employee. Later in July, she sent another letter contesting the Form 24 and also finally produced a completed Form 90. On 5 August 2009, plaintiff filed a Form 18 Notice of Accident to Employer with the Industrial Commission.

Subsequently, on 7 August 2009, the Industrial Commission entered an order denying defendant Wackenhut's Form 24 request. That same day defendants filed a Form 33 Request that Claim be Assigned for Hearing. On 16 September 2009, Special Deputy Commissioner Christopher B. Rawls filed an order requiring defendants to provide plaintiff with a one-time psychological evaluation. Defendants filed another Form 33 to review this order. Deputy Commissioner Myra L. Griffin then entered an order on 1 October 2009, referring the matter to the Director of the Medical Rehabilitation Nurses Section for the psychological evaluation. Then, on 27 April 2010, Deputy Commissioner George R. Hall, III, granted plaintiff's motion to compel continued treatment with Dr. Pecoraro and to see Dr. Boylan for EMG studies.

Finally, on 29 September 2010, Deputy Commissioner Hall filed an Opinion and Award ordering defendants to pay medical compensation, temporary total disability benefits, plaintiff's attorney's fees, and court costs. In response, defendants filed a Form 44 Application for Review to Full Commission. The Full Commission entered its Opinion and Award on 28 March 2011, affirming Deputy Commissioner Hall's Opinion and Award with minor modifications. Defendants filed their Notice of Appeal on 19 April 2011.

II. Analysis

A. Standard of Review

"Appellate review of an award from the Industrial Commission is generally limited to two issues: (1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are justified by the findings of fact." *Clark v. Wal-Mart*, 360 N.C. 41, 43, 619 S.E.2d 491, 492 (2005). "The Commission's conclusions of law are reviewed *de novo*." *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004). Furthermore, "[t]he Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Anderson v. Construction Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965).

B. Competency of the Evidence

Defendants raise two issues on appeal. First, defendants contend the Full Commission's findings of fact and conclusions of law that plaintiff continues to be disabled and entitled to ongoing disability benefits and medical treatment are not supported by competent evidence. We disagree.

Defendants first argue that the competent record evidence shows that no objective basis exists for plaintiff's reported symptoms. Defendants contend the Full Commission erred in giving Dr. Pecoraro's opinion greater weight than the opinions of Drs.

Tamadon and Boylan, who both were unable to find an objective basis for plaintiff's pain and believe she has reached her maximum medical improvement. More specifically, defendants argue Dr. Pecoraro's opinion was the same as Drs. Tamadon and Boylan in every manner except the final evaluation of whether plaintiff could return to work; and therefore, the Full Commission inappropriately gave more weight to Dr. Pecoraro's final determination rather than the three doctors' overall assessment. Unfortunately, as stated above, issues regarding the credibility and weight to be given testimony are solely left to the determination of the Full Commission. *Anderson*, 265 N.C. at 433-34, 144 S.E.2d at 274. The Full Commission heard the testimony of the three doctors and decided to give more weight to plaintiff's continuous physician, Dr. Pecoraro. Consequently, this issue lacks merit and must be dismissed.

Defendants also take issue with the Full Commission's findings of fact and conclusions of law regarding plaintiff's ability to return to work. Defendants argue plaintiff's post-injury earnings of nearly $12,000.00 from being a real estate broker show that she can return to work and, as a result, should be considered in awarding her weekly wage. The Full Commission, in reviewing plaintiff's additional income from being a real estate broker, determined that the income came from two real

estate closings after plaintiff's injury, but that the closings were the result of work done prior to her injury and through the helping of a friend who had already found her desired property. The Full Commission concluded that this was not an enlargement of plaintiff's concurrent employment and not indicative of her wage-earning capacity. Again, as discussed above, this is an issue regarding the weight and credibility of the evidence, which is left to the discretion of the Full Commission. *Id*. The Full Commission properly weighed the evidence in determining whether plaintiff continued to act as a real estate broker and earn additional wages following her injury. Therefore, this argument is also without merit.

C. Plaintiff's Average Weekly Wage

Defendants' second argument is that the Full Commission erred in calculating plaintiff's average weekly wage by including her overtime pay. Defendants claim the overtime earned in plaintiff's 53 days of employment should not be fully considered in determining her average weekly wage because a majority of it was due to a staff shortage. We agree.

In calculating the average weekly wage of an injured employee, one must look to N.C. Gen. Stat. § 97-2(5) (2009). "The statute sets forth five methods, in order of preference, by which an injured employee's average weekly wages are to be

computed." *Conyers v. New Hanover Cty. Schools*, 188 N.C. App. 253, 255, 654 S.E.2d 745, 748 (2008). The statute, as applicable to the case at hand, provides:

> [First method] "Average weekly wages" shall mean the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury, . . . divided by 52 . . . .
>
> [Third method] Where the employment prior to the injury extended over a period of fewer than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed; provided, results fair and just to both parties will be thereby obtained.
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> [Fourth method] Where, by reason of a shortness of time during which the employee has been in the employment of his employer or the casual nature or terms of his employment, it is impractical to compute the average weekly wages as above defined, regard shall be had to the average weekly amount which during the 52 weeks previous to the injury was being earned by a person of the same grade and character employed in the same class of employment in the same locality or community.
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> [Fifth method] But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

N.C. Gen. Stat. § 97-2(5).

> The dominant intent of this statute is to obtain results that are fair and just to both employer and employee. *Joyner v. A.J. Carey Oil Co.*, 266 N.C. 519, 146 S.E.2d 447 (1966). Results fair and just within the meaning of the statute "consist of such 'average weekly wages' as will most nearly approximate the amount which the injured employee would be earning were it not for the injury, in the employment in which he was working at the time of his injury." *Liles v. Faulkner Neon & Elec. Co.*, 244 N.C. 653, 660, 94 S.E.2d 790, 795-96 (1956).

Conyers, 188 N.C. App. at 256, 654 S.E.2d at 748.

Defendants claim the Full Commission erred in using the third method of N.C. Gen. Stat. § 97-2(5) in calculating plaintiff's average weekly wage. Defendants specifically argue the Full Commission erred in making the following findings of fact:

> 24. . . . Defendants contend that it would be unfair to consider the overtime earnings of Plaintiff in the weeks preceding her July 26, 2008 work injury; however, Defendants' witness, Ms. Basil, testified that overtime work is available and that it is up to individual employees as to whether and how much overtime they would like to work.
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> . . . .
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> 26. The Full Commission finds that it would be fair and just to both parties to calculate Plaintiff's average weekly wage by using method three under §97-2(5) of the North Carolina General Statutes, whereby the earnings from less than 52 weeks of

> employment in the year preceding Plaintiff's July 26, 2008 work injury are divided by the number of weeks, and parts thereof, during which Plaintiff earned wages. Since overtime was readily available and depends upon the employee's desire to work overtime to earn more money, it is fair to both parties to include overtime in Plaintiff's average weekly wage calculation.
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> 27. Therefore, the Full Commission finds as fact that Plaintiff worked a total of 53 days and earned a total of $5,481.24 prior to her July 26, 2008 work injury, and that dividing the amount earned by the number of days worked yields an average weekly wage of $723.94, and a compensation rate of $482.62.

Defendants also take issue with the Full Commission's seventh Conclusion of Law which states, in relevant in part, "[i]n fairness to both parties, Plaintiff's average weekly wage should be based on her wages earned during her employment with Defendant-Employer prior to her July 26, 2008 work injury, particularly in light of the fact that overtime was available to employees and the amount of overtime worked during this period of time depended upon an individual employee's desire to work overtime to earn more money."

Defendants contend the Full Commission should have used the fourth method of N.C. Gen. Stat. § 97-2(5) instead of the third method. Defendants argue the fourth method would be fairer than the third method because using the fourth method considers

plaintiff's pre-injury overtime. Defendants claim the Full Commission overlooked the testimony of Nicole L. Basil, defendant Wackenhut's Human Resource Manager, in that during plaintiff's term of employment, excessive overtime was available due to a staff shortage in the security guard position. During Ms. Basil's deposition the following colloquy occurred:

> [KROMKE] Okay. Do you think [plaintiff] would've continued with all of the overtime if she would've remained working for a full year?
>
> [BASIL] There would've been some overtime, just not as much due to hiring these other officers on, but there's always opportunities for overtime.
>
> [KROMKE] So, she would've worked some overtime –
>
> [BASIL] Yes.
>
> [KROMKE] Because Wackenhut hired a bunch of people to fix their staffing shortage?
>
> [BASIL] Right.

The Full Commission appears to have believed that large amounts of overtime were consistently available to plaintiff; however, we believe this conclusion is not supported by competent evidence. On the other hand, the evidence tends to show that during plaintiff's brief employment of 53 days, excessive amounts of overtime were readily available due to a staff shortage in the security guard position, which has since

been remedied. Our Court addressed a similar issue in ***Derosier v. WNA, Inc./Imperial Fire Hose Co.***, 149 N.C. App. 597, 602, 562 S.E.2d 41, 45, ***aff'd***, 356 N.C. 431, 571 S.E.2d 585 (2002), where an employee had an inflated pre-injury earning capacity due to excessive overtime; and our Court determined that the employee's earning capacity should be what an equal, healthy employee would earn in the same position after the injured employee's accident. ***Id.*** In ***Derosier***, the employee earned inflated pre-injury wages due to excessive overtime during a period of economic stability, but post-injury the employer suffered from an economic downturn resulting in a reduction of overtime hours. ***Id.*** Consequently, our Court reasoned that "the proper comparison should be between the amount of overtime ***available***, not ***worked***." ***Id.***

As in ***Derosier***, the "circumstances surrounding [plaintiff's] pre-injury position have changed." ***Id.*** While Ms. Basil did state in her deposition that employees determined the amount of overtime worked, the evidence shows that excessive amounts were available during plaintiff's employment due to a staff shortage. Defendants contend we should apply the fourth method of N.C. Gen. Stat. § 97-2(5) to determine plaintiff's average weekly wage, but we believe a better formula would be under the fifth method. Our Supreme Court has held that the fifth method "'clearly may not be used unless there has been a

finding that unjust results would occur by using the previously enumerated methods.'" *Thompson v. STS Holdings, Inc.*, ___ N.C. App. ___, ___, 711 S.E.2d 827, 830 (2011) (quoting *McAninch v. Buncombe County Schools*, 347 N.C. 126, 130, 489 S.E.2d 375, 378 (1997)). The Commission already found the first and second methods to be unjust and we are holding the third method to not be supported by the competent evidence, which leaves the Commission with either the fourth or fifth method.

The fourth method is similar to the third method which we found is not supported by competent evidence. While the fourth method is available, it would require the Commission to ignore testimony regarding the staff shortage which was cured shortly after plaintiff's accident. The fifth method, on the other hand, may be fairer because under it the Commission could utilize similarly situated employees in a 52-week-period following plaintiff's injury, which would be after defendant Wackenhut addressed its staffing issue. Ms. Basil testified in her deposition regarding the weekly wages of six employees in similar positions and hired around the same time as plaintiff. These six employees had average weekly wages of $520.61, $556.50, $525.00, $501.21, $499.68, and $535.71, with an average between the six of $523.12. This amount appears more reasonable and fair than the average weekly wage awarded of $723.94, with

coinciding compensation rate of $482.62. Finally, in applying the sixty-six and two-thirds percent (66-2/3%) requirement of N.C. Gen. Stat. § 97-29 (2009), plaintiff's resulting weekly compensation rate for temporary total disability under this calculation would be $348.74. Nonetheless, we reverse the Commission's use of the third method and remand for further findings regarding use of the fourth and fifth methods.

D. Plaintiff's Request for Attorney's Fees

Plaintiff makes a request in her brief that we reward her attorney's fees for the cost of her defense on appeal. Due to our decision to review defendants' appeal and to reverse and remand in part, we deny plaintiff's request for attorney's fees.

III. Conclusion

The Full Commission did not err in awarding plaintiff benefits for temporary total disability based on the evidence presented. However, the Full Commission did err in its calculation of plaintiff's average weekly wage, and we now reverse and remand for the Full Commission to recalculate plaintiff's average weekly wage.

Affirmed in part; reversed and remanded in part.

Judges HUNTER, JR., and THIGPEN concur.

Report per Rule 30(e).