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NO. COA02-1397

NORTH CAROLINA COURT OF APPEALS

Filed: 5 August 2003

ALBERT HARGROVE,  
Employee,  
Plaintiff

v.

North Carolina Industrial Commission  
I.C. File No. 065431

BATTS TEMPORARY SERVICE  
d/b/a LABOR WORKS,  
Employer,

and

CLARENDON NATIONAL INSURANCE  
COMPANY c/o MIDWESTERN  
INSURANCE ALLIANCE, INC.,  
Carrier,  
Defendants

Appeal by plaintiff from an Opinion and Award entered 10 July 2002 by the North Carolina Industrial Commission. Heard in the Court of Appeals 11 June 2003.

*Albert M. Hargrove, plaintiff-appellant, pro se.*

*Henson & Henson, L.L.P., by Amanda M. Willis, for defendant-appellees.*

HUNTER, Judge.

Albert Hargrove (“plaintiff”) appeals an Opinion and Award of the North Carolina Industrial Commission (“Commission”) denying his claim for additional workers’ compensation benefits. We affirm.

On 16 August 2000, plaintiff was working as a temporary laborer employed by Batts Temporary Service/Labor Works (“Labor Works”) on a construction site in Cary, North Carolina, when he fell into a hole and the wheelbarrow he was pushing fell on his leg. Plaintiff sought medical treatment for his injuries on 24 August 2000 from Dr. Samia, who diagnosed his condition as a strain of the left leg. Dr. Samia released plaintiff to perform light-duty work, which Labor Works was apparently unable to offer him. Nevertheless, Labor Works paid plaintiff disability benefits during that time, as well as paid all costs associated with his treatment. Dr. Samia eventually released plaintiff on 11 September 2000 to return to full-duty employment with no restrictions. Upon returning to full-duty employment however, plaintiff was not given a temporary job assignment by Labor Works.

Plaintiff filed a workers’ compensation claim against Labor Works and its insurance carrier, Clarendon National Insurance Company, administered through Midwestern Insurance Alliance, Inc. (collectively “defendants”), for additional compensation. Following the denial of his claim, plaintiff requested a hearing to determine if his entitlement to “damages due to injury and hardship circumstances that [L]abor [W]orks[‘] local office forced [him] into.” Plaintiff essentially sought compensation for work days missed from 11 September 2000 through 1 December 2000 and for several days in August of 2000 because he was allegedly (1) still injured when he was released and returned to full-duty employment, and (2) unable to obtain employment with Labor Works or elsewhere until 1 December 2000.

Plaintiff’s matter was heard on 23 July 2001, before Deputy Commissioner George T. Glenn, II (“Deputy Commissioner Glenn”). Deputy Commissioner Glenn found that Plaintiff had “not sought or received any medical treatment for the injury he sustained since being released to return to work in September 2000[.]” and that “his inability to obtain employment was not related

to any disability he sustained as a result of his injury by accident.” Thus, he concluded plaintiff had failed to prove by the greater weight of the evidence that plaintiff (1) had “suffer[ed] from any current conditions related or caused by the injury by accident” and (2) was not “entitled to recover any additional workers’ compensation benefits in this matter.” Plaintiff gave notice of appeal of the Opinion and Award to the Commission.

The Commission reviewed the matter on 11 February 2002. After reviewing the prior Opinion and Award of Deputy Commissioner Glenn, the Commission determined that plaintiff had “not shown good grounds to reconsider the evidence; receive further evidence; rehear the parties or their representatives; or amend the Opinion and Award.” Therefore, the Commission reiterated the findings and conclusions of Deputy Commissioner Glenn and ordered that plaintiff’s claim for additional workers’ compensation benefits be denied. Plaintiff appeals.

Initially, we note that plaintiff, appearing *pro se*, brings forth several assignments of error that fail to comply with the North Carolina Rules of Appellate Procedure (“Appellate Rules”). Specifically, Appellate Rule 28 provides, in pertinent part, that “[a]ssignments of error not set out in the appellant’s brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.” N.C.R. App. P. 28(6). Plaintiff’s failure to comply with this rule results in the abandonment of his “Findings of Fact/Assignment of Errors” I, II, IV, and VIII; “Conclusions of Law/Assignment of Error” II; and “Additional Questions Presented” III and IV(c). Moreover, Appellate Rule 10 provides, in pertinent part, that “[e]ach assignment of error shall, so far as practicable, be confined to a single issue of law; and shall state plainly, concisely and without argumentation the legal basis upon which error is assigned.” N.C.R. App. P. 10(c)(1). Most of plaintiff’s assignments of error fail to comply with this rule as well. Thus,

we shall only address plaintiff's arguments that are meritorious and are supported by clear reasoning and authority.

Plaintiff's remaining arguments question the Commission's denial of his claim for additional workers' compensation benefits. Appellate review of "an opinion and award of the Industrial Commission is limited to a determination of (1) whether the Commission's findings of fact are supported by any competent evidence in the record; and (2) whether the Commission's findings justify its conclusions of law." *Goff v. Foster Forbes Glass Div.*, 140 N.C. App. 130, 132-33, 535 S.E.2d 602, 604 (2000). "If there is competent evidence to support the findings, they are conclusive on appeal even though there is evidence to support contrary findings." *Boles v. U.S. Air, Inc.*, 148 N.C. App. 493, 498, 560 S.E.2d 809, 812 (2002).

#### I.

Plaintiff argues the Commission failed to determine the extent of his disability. Plaintiff further argues the Commission erred in failing to determine his earning capacity and whether there were any restrictions on that capacity. Addressing both arguments simultaneously, we conclude the Commission did not err.

Under the Workers' Compensation Act ("the Act"), "[t]he term 'disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C. Gen. Stat. §97-2(9) (2001). In order to obtain workers' compensation benefits for a disability, the employee has the burden of proving the existence of that disability and its extent. *Saums v. Raleigh Community Hospital*, 346 N.C. 760, 763, 487 S.E.2d 746, 749 (1997). The burden may be met in one of four ways:

- (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment;
- (2) the production of evidence that he is capable of some work, but that he has, after a

reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment[;] or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

*Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993)  
(citations omitted).

In the instant case, plaintiff failed to meet his burden of establishing the existence of a disability after 11 September 2000, much less the extent of that alleged disability. Plaintiff produced no evidence, medical or otherwise, that following his release, he still suffered from a disability that prevented him from obtaining employment elsewhere. Furthermore, plaintiff failed to produce evidence that any loss of earning capacity was caused by the existence of that disability after his return to full-duty employment with no restrictions.

Additionally, plaintiff's testimony from the hearing before Deputy Commissioner Glenn provided the Commission with competent evidence to support its findings and justify its conclusion that plaintiff was not entitled to additional benefits. Plaintiff testified, *inter alia*:

Q. [Deputy Commissioner Glenn] Okay. Now, are you contending that you have not been able to go back to work as a result of the injury that you're alleging you sustained on August the 16th, 2000?

A. [Plaintiff] No, sir.

....

Q. . . . are you claiming that there is something from this alleged injury that prevented you from returning back to work?

A. Since this alleged injury, I have not been able to acquire a job.

Q. That's not my question. Listen to my question.

A. Okay.

Q. Since September 11th of 2000, are you claiming that you have been unable to work as a result of the injury that you claim that you sustained on August the 16th of 2000.

A. I would have to say yes because it's a contributing factor.

Q. What contributing factor is it?

A. Because if not for the injury, I would have kept on being employed. I would have still been employed. I would have had a job somewhere if I hadn't have suffered that injury.

Q. Was there a medical provider that told you that you are incapable of working because of the injury that you claim you sustained on August 16th, 2000?

....

A. No doctor has said that to me.

With respect to this testimony, our Court has held that “in order to prove disability, an injured employee must prove he is unable to work [due to a work-related injury] and not merely that he unsuccessfully sought work.” *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 443-44, 342 S.E.2d 798, 809 (1986). Plaintiff has admittedly failed to offer such proof.

Accordingly, considering the lack of evidence and plaintiff's own testimony, the Commission could not have determined the extent of plaintiff's now “non-existent” disability and its effects on his earning capacity after 11 September 2000.

## II.

Plaintiff also assigns error to the Commission's findings of fact and conclusions of law because they failed to establish that he had suffered a substantial change of condition within the guidelines of the Act. We disagree.

Pursuant to Section 97-47 of our statutes, “[u]pon its own motion or upon the application of any party in interest on the grounds of a change in condition, the Industrial Commission may review any award, and on such review may make an award ending, diminishing, or increasing the compensation previously awarded[.]” N.C. Gen. Stat. §97-47 (2001). Here, the record does not include and plaintiff did not present evidence that a previous workers’ compensation award existed. Our Supreme Court has interpreted Section 97-47 as stating that the existence of a change of condition is relevant only if there has been a previous award of compensation by the Commission. *Weaver v. Swedish Imports Maintenance, Inc.*, 319 N.C. 243, 247, 354 S.E.2d 477, 480 (1987). Further, plaintiff failed to present evidence that he suffered from any condition related to his work-related injury that required him to seek additional medical attention after being released by Dr. Samia. Thus, there was no evidence of a change in his condition following his 11 September 2000 release to full-duty employment.

### III.

Plaintiff’s final argument asserts that defendants’ failure to comply with the Act entitles him to damages in a tort action for unfair and deceptive trade practices. However, our Supreme Court’s holding in *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991), clearly established that unless an employee’s work-related injury (and/or death) was the result of an intentional tort committed by the employer, benefits under the Act are the only recourse granted to that employee. Defendant makes no such allegation.

For the aforementioned reasons, we conclude the Commission did not err in denying plaintiff’s claim for additional workers’ compensation benefits.

Affirmed.

Judges TIMMONS-GOODSON and ELMORE concur.

Report per Rule 30(e).