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NO. COA05-1378

NORTH CAROLINA COURT OF APPEALS

Filed: 7 November 2006

THOMAS E. WRIGHT,  
Employee,  
Plaintiff,

v.

North Carolina Industrial Commission  
I.C. File No. 069799

SIMPSON'S EGGS, INC.,  
Employer,

and

NORTH CAROLINA FARM BUREAU  
MUTUAL INSURANCE COMPANY,  
Carrier,  
Defendants.

Appeal by plaintiff from opinion and award entered 20 July 2005 by the North Carolina Industrial Commission. Heard in the Court of Appeals 6 June 2006.

*Poisson, Poisson & Bower, PLLC, by E. Stewart Poisson and Fred D. Poisson, Jr., for plaintiff-appellant.*

*Young, Moore & Henderson, P.A., by Zachary C. Bolen, for defendant-appellee.*

GEER, Judge.

Plaintiff Thomas E. Wright appeals from an opinion and award of the North Carolina Industrial Commission concluding Wright was not entitled to workers' compensation benefits because his claims were barred by the statute of limitations found in N.C. Gen. Stat. §97-47 (2005). *Perez v. Am. Airlines/AMR Corp.*, 174 N.C. App. 128, 132, 620 S.E.2d 288, 291 (2005),

*disc. review improvidently allowed*, \_\_\_ N.C. \_\_\_, 634 S.E.2d 887 (2006), controls the issues in this case and requires that we reverse.

### Facts

In July 2000, Wright, a high school graduate then in his mid-forties, began working as a delivery driver for defendant Simpson's Eggs, Inc. Wright's duties included palletizing cartons of eggs according to store orders, loading the pallets onto a truck, driving to the stores, and unloading the eggs.

On 4 September 2000, while making a delivery, Wright slipped, fell from a loading dock, caught himself on a hand railing with his left hand, but ultimately tumbled to the pavement, landing on his buttocks. Wright saw a physician's assistant for his resulting back injury on 7 September 2000, was treated with medication and heat, and was taken out of work.

Wright's symptoms persisted, and he saw orthopedic surgeon Dr. Jeffrey Daily on 13 September 2000. Dr. Daily changed Wright's medication and ordered physical therapy. Wright later returned to work on 26 September 2000 with restrictions. On 3 October 2000, defendants filed a Form 60, admitting Wright's right to compensation for the 4 September 2000 accident. On the same date, defendants also filed a Form 28B, stating that Wright had returned to work and the last compensation check was forwarded to him on 3 October 2000. The form noted, however, that "final medical" had not been paid.

Wright's pain continued, and Dr. Daily referred Wright to psychiatrist Dr. John Welshofer. Dr. Welshofer ordered an MRI, which showed mild spinal stenosis at L2-3 and L3-4 and a slight disc bulge at L5-S1 with a possible annular tear. On 23 November 2000, Dr. Welshofer released Wright with a 0% permanent partial impairment rating and authorized him to return to work

without restrictions. On 15 March 2001, defendants filed a second Form 28B, stating that the last medical compensation was paid on 20 February 2001.

Wright's employment with Simpson's Eggs was terminated in June 2001 after he became depressed and stopped reporting to work. Wright subsequently worked as a driver for several other companies from January to July of 2002. Wright had additional back pain problems, however, including an incident in Florida requiring an ambulance to take him to a local hospital.

On 14 February 2003, after receiving additional treatment from other practitioners, Wright filed a motion to reopen his claim based upon a worsening of his condition. Following a hearing in February 2004, Deputy Commissioner Morgan S. Chapman concluded that Wright had failed to establish causation between his current condition and his original compensable injury and that, in any event, Wright's claims were time-barred under N.C. Gen. Stat. §97-47.

Wright appealed to the Full Commission. The Commission affirmed the deputy's opinion and award solely on the ground that Wright's failure to file a claim within two years of the last indemnity payment made pursuant to the Form 60 rendered his claims time-barred under N.C. Gen. Stat. §97-47. Wright timely appealed to this Court.

## I

Wright first argues that the Commission erred in applying the two-year statute of limitations found in N.C. Gen. Stat. §97-47. Section 97-47, in pertinent part, provides that:

Upon . . . the application of any party in interest on the grounds of a change in condition, the Industrial Commission may review any award . . . . No such review shall . . . be made after two years from the date of the last payment of compensation *pursuant to an award* under this Article . . . .

(Emphasis added.)

This provision is “a statute of limitations which requires an employee to apply for additional compensation on the grounds of a change in condition within two years of the date on which the last compensation was paid.” *Apple v. Guilford County*, 321 N.C. 98, 100-01, 361 S.E.2d 588, 590 (1987). This Court has clarified, however, that “the ‘award’ referred to in this statute, which the Industrial Commission may not review after two years from the date of the last payment of compensation thereunder, is a final award and . . . the statute does not apply to an interlocutory award.” *Beard v. Blumenthal Jewish Home*, 87 N.C. App. 58, 60, 359 S.E.2d 261, 262 (1987) (internal citations omitted), *disc. review denied*, 321 N.C. 471, 364 S.E.2d 918 (1988).

In *Perez*, this Court addressed the applicability of N.C. Gen. Stat. §97-47 in cases involving a Form 60 and held: “[W]e reject defendant’s argument that an employer’s Form 60 payments constitute a *final* award within the meaning of N.C. Gen. Stat. §97-47.” 174 N.C. App. at 131, 620 S.E.2d at 290. After noting that *Beard* held that N.C. Gen. Stat. §97-47 does not apply to an award that determines some aspects of an employee’s claim, but does not resolve permanent disability, *id.* at 131-32, 620 S.E.2d at 290, the Court explained with respect to a Form 60:

[T]he Form 60 filed by defendant does not resolve the extent of plaintiff’s permanent disability. Indeed, like the Form 21 agreement at issue in *Beard*, the Form 60 does not mention permanent disability. At most, the Form 60 payments were an interlocutory award resolving the issue of compensability but not the nature and extent of any disability. The Form 60 payments of temporary total disability compensation did not constitute a final award contemplated by N.C. Gen. Stat. §97-47. Thus, the Commission did not err in concluding that N.C. Gen. Stat. §97-47 did not apply to bar plaintiff’s claim for further indemnity compensation.

*Id.* at 132, 620 S.E.2d at 291 (internal citations omitted). *See also Watts v. Hemlock Homes of the Highlands, Inc.*, 141 N.C. App. 725, 729, 544 S.E.2d 1, 3 (“By executing a Form 60 and paying compensation pursuant thereto, a defendant admits only the compensability of the employee’s injury.”), *disc. review denied*, 353 N.C. 398, 547 S.E.2d 431 (2001).

Defendants attempt to distinguish *Perez*. First, defendants argue that the issue of permanent disability was resolved by Dr. Welshofer’s 0% permanent partial disability rating, pointing to the Commission’s finding of fact describing Dr. Welshofer’s treatment. Defendants’ argument overlooks the fact that the Commission simply recited Dr. Welshofer’s opinion; the Commission itself never made any finding regarding Wright’s permanent disability. In any event, defendants never explain how a finding regarding permanent disability in 2005 could transform a Form 60 filed more than four years earlier into a final award. Nor does the record contain any indication that Wright ever agreed to this rating. Thus, as in *Perez*, this case contains no final resolution of Wright’s permanent disability, whether through a finding of the Commission or agreement by Wright. Dr. Welschofer’s opinion cannot transform defendants’ otherwise interlocutory Form 60 into a final award. *Compare Wall v. N.C. Dep’t of Human Res.: Div. of Youth Servs.*, 99 N.C. App. 330, 331, 393 S.E.2d 109, 110 (1990) (noting that since the parties’ “agreement was in settlement of plaintiff’s claim for permanent disability under the Workers’ Compensation Act and was approved by the Industrial Commission, it was a final award or judgment of the Commission”), *disc. review denied*, 328 N.C. 98, 402 S.E.2d 430 (1991).

Defendants also suggest that their Form 28B renders *Perez* inapplicable. Defendants do not, however, address the fact that the defendant in *Perez* also filed a Form 28B stating the date of the plaintiff’s last indemnity compensation and last medical compensation. 174 N.C. App. at

129-30, 620 S.E.2d at 289. We therefore hold that *Perez* controls and reverse the Commission's decision concluding that Wright's claims for indemnity compensation were barred by N.C. Gen. Stat. §97-47.

## II

Wright also argues that, in any event, the Commission erred by failing to consider whether he was entitled to additional medical compensation under N.C. Gen. Stat. §97-25.1 (2005). "The right to medical compensation shall terminate two years after the employer's last payment of medical or indemnity compensation unless, prior to the expiration of this period, . . . the employee files with the Commission an application for additional medical compensation which is thereafter approved by the Commission . . . ." N.C. Gen. Stat. §97-25.1. *See McAllister v. Wellman, Inc.*, 162 N.C. App. 146, 149, 590 S.E.2d 311, 313 (2004) (noting that N.C. Gen. Stat. §97-25.1 imposes "a two-year statute of limitations on reopening claims for medical compensation" (quoting John Richard Owen, *The North Carolina Workers' Compensation Act of 1994: A Step in the Direction of Restoring Balance*, 73 N.C. L. Rev. 2502, 2510 (1995))).

Here, Wright received his last medical compensation payment on 20 February 2001 and filed his motion to reopen on 14 February 2003. Thus, Wright came within the two-year statute of limitations provided in N.C. Gen. Stat. §97-25.1, and the Commission erred by failing to address his claims for additional medical compensation.

Defendants do not dispute the timeliness of Wright's claim for additional medical compensation, but instead argue that we should affirm the Full Commission's decision based on a lack of causation. Defendants acknowledge that the Full Commission did not address causation, but assert that the Commission's "intent to affirm the deputy commissioner's decision

[that Wright failed to establish causation between his current condition and his original compensable injury] is clear in the record.”

This Court does not, however, speculate as to what the Full Commission might have ruled had it decided to address an issue. We review the Commission’s actual opinion and award. “[T]he North Carolina Industrial Commission is not an appellate court.” *Vierregge v. N.C. State Univ.*, 105 N.C. App. 633, 639, 414 S.E.2d 771, 775 (1992). Consequently, the Commission may not merely affirm or adopt the opinion and award of the deputy commissioner, but, rather, must formulate its own opinion and award. *See id.* at 640, 414 S.E.2d at 775; *Joyner v. Rocky Mount Mills*, 92 N.C. App. 478, 482, 374 S.E.2d 610, 613 (1988). The Full Commission is “the ultimate fact-finder” and, therefore, in the absence of any findings or conclusions on the issue of causation by the Full Commission, we may not affirm the decision of the deputy commissioner. *Adams v. M.A. Hanna Co.*, 166 N.C. App. 619, 624, 603 S.E.2d 402, 406 (2004). Accordingly, we remand to the Commission so that it may address the question of causation and any other issues relating to the merits of Wright’s claims.

Reversed and remanded.

Judges WYNN and STEPHENS concur.

Report per Rule 30(e).