IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-1156

Filed: 21 April 2015

North Carolina Industrial Commission, I.C. Nos. 100731, X50759

VERNE CHENETTE, Plaintiff,

v.

METOKOTE CORPORATION, Employer, INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, Carrier, and GALLAGHER BASSETT SERVICES, Third Party Administrator, Defendants.

Appeal by plaintiff from opinion and award entered 17 July 2014 by the North Carolina Industrial Commission. Heard in the Court of Appeals 18 March 2015.

Mast, Mast, Johnson, Wells & Trimyer, P.A., by Charles D. Mast, for plaintiff-appellant.

McAngus, Goudelock & Courie, PLLC, by Layla T. Santa Rosa, for defendant-appellant.

TYSON, Judge.

Verne Chenette ("Plaintiff") appeals from the Opinion and Award of the North Carolina Industrial Commission ("the Commission") awarding him temporary total disability compensation. We affirm.

I. Factual Background

Plaintiff was employed by Metokote Corporation ("Defendant") as a lead powder coater on 24 September 2007. A spill occurred in the wastewater area.

Plaintiff used a squeegee to clean the spill. When he gave the squeegee a "good push," the top part of his body twisted while the bottom half remained stationary. Plaintiff stated he felt a sharp pain in his lower back, which subsequently radiated down his left leg. Plaintiff presented to his doctor the following day.

Plaintiff received ongoing medical treatment from October 2007 through June 2010. From 8 December 2008 through 12 May 2011, Plaintiff continued to work for Defendant, with permanent lifting restrictions.

On 20 December 2010, Plaintiff squatted to lift a drain hose and felt a sharp pain in his lower back and left leg.

A. Plaintiff's Medical Treatment

Plaintiff sought treatment from Dr. Shepherd Rosenblum ("Dr. Rosenblum") at Triangle Orthopaedic Associates on 9 October 2007. Dr. Rosenblum diagnosed Plaintiff as having lumbar radiculopathy of the left lower extremity with a history of disc problems and chronic pain. Dr. Rosenblum recommended a steroid dose pack and assigned work restrictions, including no pushing, pulling, or lifting more than twenty-five pounds.

On 23 October 2007, Plaintiff sought treatment with Dr. Andrew Lynch ("Dr. Lynch") at Triangle Orthopaedic Associates. Dr. Lynch believed Plaintiff exhibited "lumbar degenerative disc disease at L4-L5 and L5-S1, left lower extremity neuritis, and possible foraminal stenosis."

On 7 April 2008, Plaintiff sought a surgical consultation and was examined by Dr. David Musante ("Dr. Musante") at Triangle Orthopaedic Associates. Plaintiff reported experiencing low back pain, left leg pain, and left foot tingling. Dr. Musante ordered a lumbar X-ray and MRI. Dr. Musante diagnosed Plaintiff with "persistently symptomatic left L4-5 and L5-S1 disc protrusions with underlying degenerative disc disease."

Dr. Musante recommended a left L4-5 and L5-S1 hemilaminotomy and discectomy for decompression. Dr. Musante indicated this surgery was primarily designed to decrease Plaintiff's leg-related symptoms. He further noted the proposed surgery was not intended to relieve all of Plaintiff's back-related problems. On 8 October 2008, Plaintiff underwent a left L4-L5 and L5-S1 hemilaminotomy and discectomy and lateral recess stenosis decompression procedure. Plaintiff returned to work on 8 December 2008. He reported he continued to experience low back and left leg pain.

On 4 February 2009, Plaintiff sought treatment with Dr. Scott Sanitate ("Dr. Sanitate") at Cary Orthopaedic and Spine for his continued lower back and left leg pain. Dr. Sanitate noted Plaintiff's chief complaint was "chronic low back pain with left lower extremity radiation." Dr. Sanitate diagnosed Plaintiff with chronic low back pain, and prescribed Lidoderm patches. It was also noted that Plaintiff had

been performing work outside of his lifting restrictions. Dr. Sanitate instructed Plaintiff to continue the work restriction of not lifting more than twenty-five pounds.

Plaintiff returned to Dr. Sanitate eight more times between 4 February 2009 and 20 May 2009. At each visit, Plaintiff complained of the same pain and of difficulty physically tolerating his work. On 20 May 2009, Dr. Sanitate released Plaintiff from his treatment and opined Plaintiff had reached the maximum level of medical improvement with regards to his 24 September 2007 injury. Dr. Sanitate also assigned permanent restrictions, which included avoiding repetitive lumbar flexion and extension and repetitive bending into the tanks.

On 4 June 2009, Plaintiff returned to Dr. Musante, and reported no benefit from pain management and no improvement in his pain. Dr. Musante diagnosed Plaintiff with "persistently symptomatic back and left leg pain, despite [the] prior decompression" surgical procedure performed. Dr. Musante also assigned permanent restrictions of lifting, pushing, and pulling no more than thirty-five pounds.

Plaintiff continued to experience problems with his lower back at work, and asked to return to Dr. Sanitate. On 30 June 2010, Plaintiff was evaluated by Dr. Sanitate once again. Dr. Sanitate noted Plaintiff had previously complained of significant physical symptoms of left distal lower extremity weakness, along with sensory deficits not apparent on the current physical examination. Dr. Sanitate also noted Plaintiff's current condition had improved from September 2009.

After Plaintiff's 20 December 2010 injury, Defendant sent him to Dr. Nicole Bullock ("Dr. Bullock") at Cary Orthopaedic, who examined Plaintiff on 13 January 2011. Dr. Bullock noted Plaintiff's previous history of lower back and left leg pain. Plaintiff reported he had not experienced back or leg pain prior to the 20 December injury.

On 12 May 2011, Plaintiff returned to Dr. Bullock. He reported experiencing an increase in overall pain and having to work outside of his restrictions. Dr. Bullock removed Plaintiff from work for two weeks in order to properly re-assess his condition.

Plaintiff presented several more times at Cary Orthopaedic. On 26 May 2011, Dr. Bullock assigned light-duty restrictions, including: (1) no lifting more than fifteen pounds; (2) being able to sit and stand intermittently; and (3) occasional bending, squatting, and climbing.

The parties stipulated Plaintiff has not been able to work for Defendant or any other employer since 12 May 2011.

B. Plaintiff's Claims Related to the 24 September 2007 Incident

On 9 October 2007, Defendant filed a Form 19 "Employer's Report of Employee's Injury or Occupational Disease to the Industrial Commission." This form indicated Plaintiff had sustained a strain to his lower back area while cleaning water on the floor at work.

Plaintiff filed a Form 18 "Notice of Accident to Employer and Claim of Employee" on 15 October 2008. On 17 December 2008, Metokote Corporation, the Insurance Company of the State of Pennsylvania, and Gallagher Bassett Services, Inc. (collectively, "Defendants") responded by submitting a Form 60 "Employer's Admission of Employee's Right to Compensation." Plaintiff received indemnity compensation at the rate of $540.80 per week from 8 October 2008 through 8 December 2008, at which point he returned to work.

C. Plaintiff's Claims Related to the 20 December 2010 Incident

Plaintiff reported the 20 December 2010 incident to his supervisor, Marty Holland ("Mr. Holland"). Mr. Holland completed a Form 19 "Employer's Report of Employee's Injury or Occupational Disease to the Industrial Commission" on 6 January 2011.

On 24 June 2011, Defendants filed a Form 60 "Employer's Admission of Employee's Right to Compensation," acknowledging Plaintiff had sustained a compensable injury on 20 December 2010. Defendants filed a second Form 60 on 4 November 2011, which reduced Plaintiff's compensation rate to $432.13. This compensation rate was based upon Plaintiff's average weekly wage of $648.19 during the fifty-two weeks prior to the 20 December 2010 incident. Plaintiff began receiving indemnity compensation after Dr. Bullock removed him from work on 12 May 2011.

This matter was heard before Deputy Commissioner Mary C. Vilas ("Deputy Commissioner Vilas") on 15 May 2013. Deputy Commissioner Vilas filed an opinion and award on 9 December 2013, in which she found Plaintiff's symptoms subsequent to 20 December 2010 were "the direct and natural result of and causally related to his injury on that date." She ordered Defendants to continue paying Plaintiff temporary total disability compensation at the rate of $432.13 per week.

Plaintiff appealed to the Full Commission. On 17 July 2014, the Commission issued an Opinion and Award affirming Deputy Commissioner Vilas' opinion and award. The Commission's Opinion and Award concluded, in pertinent part:

> Based upon a preponderance of the evidence the Full Commission finds that, although the symptoms Plaintiff had subsequent to the December 20, 2010 incident were similar to and in similar areas as he experienced after his September 24, 2007 injury by accident, Plaintiff's condition subsequent to December 20, 2010 was causally related to his December 20, 2010 injury by accident. Therefore, Plaintiff's average weekly wage in this case . . . should be based upon his earnings with Defendant-Employer in the 52 weeks prior to his December 20, 2010 injury.

The Commission determined Plaintiff earned $31,690.26 in the year prior to his 20 December 2010 injury, and his average weekly wage was $646.74. Based on these amounts, the Commission determined Plaintiff was entitled to, and ordered Defendants to pay to Plaintiff, a weekly compensation rate of $431.18. Plaintiff appealed.

II. Issues

Plaintiff argues the Commission erred by reducing his temporary total disability compensation rate to $431.18 per week for all periods of disability subsequent to 20 December 2010.

A. Standard of Review

On appeal, the standard of review of a workers' compensation case "is whether there is any competent evidence in the record to support the Commission's findings and whether those findings support the Commission's conclusions of law." *Oliver v. Lane Co., Inc.*, 143 N.C. App. 167, 170, 544 S.E.2d 606, 608 (2001). This Court's "duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (citation and internal quotation marks omitted), *rehr'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999).

The Commission's findings of fact are conclusive on appeal if supported by competent evidence, even if there is evidence to support contrary findings. *Pittman v. Int'l Paper Co.*, 132 N.C. App. 151, 156, 510 S.E.2d 705, 709, *aff'd*, 351 N.C. 42, 519 S.E.2d 524 (1999). "[T]he Commission is the sole judge of the credibility of witnesses and may believe all or a part or none of any witness's testimony." *Harrell v. J. P. Stevens & Co., Inc.*, 45 N.C. App. 197, 205, 262 S.E.2d 830, 835 (citation omitted), *disc. review denied*, 300 N.C. 196, 269 S.E.2d 623 (1980).

If a party fails to assign error to the Commission's findings of fact, those findings are presumed to be supported by competent evidence on appeal. *Cooper v. BHT Enterprises*, 195 N.C. App. 363, 364-65, 672 S.E.2d 748, 751 (2009).

The Commission's conclusions of law are reviewed *de novo*. *Gregory v. W.A. Brown & Sons*, 212 N.C. App. 287, 295, 713 S.E.2d 68, 74, *disc. review denied*, __ N.C. __, 719 S.E.2d 26 (2011).

B. Analysis

1. Plaintiff's Compensable Injuries

N.C. Gen. Stat. § 97-2(6) ("the Workers' Compensation Act") defines a compensable work-related injury as an "accident arising out of and in the course of the employment." N.C. Gen. Stat. § 97-2(6) (2013).

With respect to back injuries, the Workers' Compensation Act provides

> where injury to the back arises out of and in the course of the employment and is the direct result of a specific traumatic incident of the work assigned, "injury by accident" shall be construed to include any disabling physical injury to the back arising out of and causally related to such incident.

Id.

Plaintiff argues the Commission erred by reducing his temporary total disability compensation rate. Plaintiff contends the Commission failed to place the burden of proof on Defendants to prove Plaintiff's back pain subsequent to 20

December 2010 was unrelated to his 24 September 2007 compensable injury. We disagree.

In its Opinion and Award, the Commission made the following pertinent findings of fact:

> 2. On September 24, 2007, one of Defendant-Employer's waste water tanks overflowed. As part of the clean-up effort, Plaintiff was in the waste treatment area and had to remove water that had overflowed onto the floor using a squeegee. . . . [A]s Plaintiff was pushing the squeegee with force, it hydroplaned, causing the top half of Plaintiff's body to twist due to the lack of resistance, while the bottom half of his body remained stationary. When this incident occurred, Plaintiff experienced the onset of a strong, sharp pain in his lower back that subsequently radiated down his left leg.
>
> . . . .
>
> 8. Defendant-Employer prepared a Form 22 Wage Chart dated October 13, 2008, which reflected that Plaintiff's average weekly wage for the fifty two [sic] weeks prior to September 24, 2007 was $811.16, yielding a compensation rate of $540.80. Defendants later filed a Form 60 dated December 17, 2008, which reflected that Defendants had paid Plaintiff temporary total disability compensation at the rate of $540.80 per week from October 8, 2008 to December 8, 2008, when Plaintiff returned to his pre-injury job with Defendant-Employer with a lifting restriction.
>
> 9. Following Plaintiff's return to work on December 8, 2008, he continued to experience low back and left leg pain that was aggravated by certain activities at work.
>
> . . . .

> 16. On December 20, 2010, *Plaintiff sustained another injury to his back* arising out of and in the course of his employment as a direct result of the work assigned to him by Defendant-Employer. Plaintiff squatted down at work to pick up and shake a clogged hose and experienced a sharp pain in his lower back and left leg.
>
> . . . .
>
> 29. . . . On November 4, 2011 Defendants filed a second Form 60 accepting compensability of Plaintiff's December 20, 2010 injury, but stating Plaintiff's average weekly wage was $648.19 and his compensation rate is $432.13.
>
> . . . .
>
> 31. Based upon a preponderance of the evidence the Full Commission finds that, *although the symptoms Plaintiff had subsequent to the December 20, 2010 incident were similar to and in similar areas as he experienced after his September 24, 2007 injury by accident, Plaintiff's condition subsequent to December 20, 2010 was causally related to his December 20, 2010 injury by accident.* Therefore, Plaintiff's average weekly wage in this case . . . should be based upon his earnings with Defendant-Employer in the 52 weeks prior to his December 20, 2010 injury.

(emphasis supplied).

Based on these findings of fact, the Commission made the following conclusions of law:

> 1. On September 24, 2007, Plaintiff sustained a compensable injury by accident arising out of and in the course of and scope of his employment with Defendant-Employer involving his back and causally related left leg symptoms. N.C. Gen. Stat. § 97-2(6).

> 2. On December 20, 2010, Plaintiff sustained a compensable injury by accident arising out of and in the course of and scope of his employment with Defendant-Employer involving his back and causally related left leg symptoms. N.C. Gen. Stat. § 97-2(6).
>
> . . . .
>
> 4. Although the symptoms Plaintiff had subsequent to December 20, 2010 were similar to and in similar areas as he experienced after his September 24, 2007 injury by accident, the Full Commission concludes that Plaintiff's condition subsequent to December 20, 2010 was causally related to his injury by accident on December 20, 2010. N.C. Gen. Stat. § 97-2(6); *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 265 S.E.2d 389 (1980); *Holley v. ACTS, Inc.*, 357 N.C. 228, 581 S.E.2d 750 (2003); *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 538 S.E.2d 912 (2000).
>
> 5. The Full Commission further concludes that Plaintiff's average weekly wage in this case . . . should be based upon his earnings with Defendant-Employer in the 52 weeks prior to his December 20, 2010 injury.

Plaintiff did not challenge any of the Commission's findings of fact on appeal. The Commission's findings are presumed to be supported by competent evidence and are, thus, conclusively established on appeal. *Cooper*, 195 N.C. App. at 364, 672 S.E.2d at 751; *Johnson v. Herbie's Place*, 157 N.C. App. 168, 180, 579 S.E.2d 110, 118 (2003) (holding Commission's findings of fact were conclusively established on appeal where defendants failed to assign error to any of the findings). The record contains competent evidence to support the Commission's conclusion that Plaintiff's condition subsequent to 20 December 2010 was causally related to his injury on that date.

Plaintiff argues our decision in *Perez v. American Airlines/AMR Corp.* stands for the principle that once defendants admit compensability of an injury on a Form 60, the burden shifts to defendants to show future symptoms for that body part for which medical compensation is sought are not related to the compensable injury. 174 N.C. App. 128, 620 S.E.2d 288 (2005), *disc. review improvidently allowed*, 360 N.C. 587, 634 S.E.2d 887 (2006).

Plaintiff asserts under *Perez*, he is entitled to a presumption of ongoing disability because Defendants filed a Form 60 admitting Plaintiff sustained a compensable injury on 24 September 2007. Plaintiff contends the burden was on Defendants to prove Plaintiff's disability beginning 13 May 2011 was not related to his 24 September 2007 injury. *Id.* Plaintiff's asserted application of our holding in *Perez* is misplaced.

In *Perez*, the plaintiff sustained a compensable injury to her back under the Workers' Compensation Act. The defendants filed a Form 60, and began payment of medical and indemnity compensation. The plaintiff's lower back pain subsequently intensified, and she was diagnosed with having a herniated disc. The defendants denied the plaintiff any compensation toward her additional medical treatment. They argued she was not entitled to a presumption that her additional medical treatment was directly related to the compensable injury. *Perez*, 174 N.C. App. at 135-36, 620 S.E.2d at 292-93.

This Court first noted "[w]here a plaintiff's injury has been proven to be compensable, there is a presumption that the additional medical treatment is directly related to the compensable injury." *Perez*, 174 N.C. App. at 135, 620 S.E.2d at 292 (citations omitted). This Court concluded the defendants' act of filing a Form 60 was an admission of compensability. The defendants' payment pursuant to a Form 60 amounted to a determination of compensability. Therefore, the plaintiff was entitled to a presumption that additional medical treatment was directly related to the original compensable injury. Once compensability had been determined by the defendants' Form 60 payments, the burden shifted to the defendants to rebut the presumption and show the medical treatment was not directly related to the original compensable injury. *Id*.

Here, Defendants filed a Form 60 admitting liability for the 24 September 2007 injury and Plaintiff's right to compensation. Although this filing is an admission of compensability of Plaintiff's injury, this Court has held filing a Form 60 does not resolve any disputes regarding the *amount* of compensation due. *Watts v. Hemlock Homes of the Highlands, Inc.*, 141 N.C. App. 725, 729, 544 S.E.2d 1, 3, *disc. review denied*, 353 N.C. 398, 547 S.E.2d 431 (2001) (holding when a defendant "execut[es] a Form 60 and pay[s] compensation pursuant thereto, a defendant admits only the compensability of the employee's injury"). Filing a Form 60 also does not create a presumption of ongoing disability. *Sims v. Charmes/Arby's Roast Beef*, 142 N.C. App.

154, 159-60, 542 S.E.2d 277, 281, *disc. review denied*, 353 N.C. 729, 550 S.E.2d 782 (2001). Plaintiff maintained the burden to prove his disability beginning 13 May 2011 was related to his 24 September 2007 injury.

The parties stipulated Defendants filed a new Form 60 in response to Plaintiff's 20 December 2010 injury by accident. The Commission considered the similarity in the symptoms arising from both injuries. It found, by a preponderance of the evidence, Plaintiff's condition after 20 December 2010 "was causally related to his December 20, 2010 injury by accident."

The Commission also found Plaintiff was able to return to work after the 24 September 2007 injury. The Commission further found, after the 20 December 2010 injury, Plaintiff has been unable to work for Defendant or any other employer as of 13 May 2011. Plaintiff did not challenge any of these findings of fact on appeal. These findings are binding on appeal. *Cooper*, 195 N.C. at 364, 672 S.E.2d at 751; *Johnson*, 157 N.C. App. at 180, 579 S.E.2d at 118.

The Commission concluded the appropriate calculation of Plaintiff's temporary total disability compensation award was based on his earnings during the fifty-two weeks prior to his 20 December injury. Competent evidence in the record supports the Commission's findings of fact. These findings support the Commission's conclusions of law. This argument is overruled.

2. Method of Calculation

Plaintiff argues, in the alternative, the Commission erred by using the second method of calculation to determine his average weekly wages for purposes of his temporary total disability compensation. We disagree.

Pursuant to N.C. Gen. Stat. § 97-2(5), the second method of calculating an employee's average weekly wages is used "if the injured employee lost more than seven consecutive calendar days at one or more times during [the 52 weeks immediately preceding the date of the injury]." N.C. Gen. Stat. § 97-2(5) (2013). Under the second method, "the earnings for the remainder of such 52 weeks shall be divided by the number of weeks remaining after the time so lost has been deducted." *Id*.

Plaintiff argues the proper method of calculation of his average weekly wage is the fifth method enumerated in the statute. The fifth method provides:

> 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) (2013). This method may not be used unless there has been a finding that unjust results would occur by using one of the other four methods of calculating average weekly wages. *Loch v. Entertainment Partners*, 148 N.C. App. 106, 112, 557 S.E.2d 182, 186 (2001); *Wallace v. Music Shop, II, Inc.*, 11 N.C. App. 328, 331, 181 S.E.2d 237, 239 (1971).

The Commission found method two under N.C. Gen. Stat. § 97-2(5) was the appropriate method of calculation after determining "method one is not appropriate to calculate Plaintiff's average weekly wage because Plaintiff lost more than seven consecutive calendar days at one or more times during the fifty-two weeks preceding his December 20, 2010 injury by accident." The Commission did not make any findings of fact that utilizing method two would yield unjust results.

Defendant urges this Court to disregard the Commission's findings of fact and conclusions of law and conclude the average weekly wages for Plaintiff's 24 September 2007 injury would more closely approximate the amount he would be earning if not for his injury.

Plaintiff's average weekly wages for his 24 September 2007 injury were significantly higher than his earnings for the fifty-two weeks prior to his 20 December 2010 injury. The Commission's conclusion that Plaintiff's average weekly wages should be calculated under the second method in N.C. Gen. Stat. § 97-2(5) is supported by competent evidence in the record and the Commission's findings of fact. This argument is overruled.

IV. Conclusion

Plaintiff failed to challenge the Commission's findings of fact, which are binding on appeal. These findings of fact support the Commission's conclusions of law. The Opinion and Award of the Industrial Commission is affirmed.

AFFIRMED.

Judge STEPHENS and HUNTER, JR. concur.

Report per Rule 30(e).