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NO. COA10-1142

NORTH CAROLINA COURT OF APPEALS

Filed: 16 August 2011

KELVIN D. THOMPSON,
Employee,
Plaintiff,

v.

North Carolina
Industrial Commission
I.C. No. 105742

CAROLINA CABINET COMPANY,
Employer,

ISURITY, INC.,
Carrier,
Defendants.

Appeal by defendants from Opinion and Award entered on 14 June 2010 by the North Carolina Industrial Commission. Heard in the Court of Appeals 9 February 2011.

Keel O'Malley Tunstall, PLLC, by Joseph P. Tunstall, III, for plaintiff-appellee.

Orbock Ruark & Dillard, PA, by Barbara E. Ruark, for defendant-appellants.

STROUD, Judge.

Carolina Cabinet Company and Isurity, Inc., (collectively referred to as "defendants") appeal from an opinion and award by the Full Commission awarding to Kelvin D. Thompson ("plaintiff") temporary total disability compensation, past and future medical expenses as the result of his compensable injury, attorney's fees, and costs. For the following reasons, we remand to the Full Commission for clarification of its conclusion of law.

I. Background

On 26 November 2008, plaintiff filed a claim for workers' compensation benefits, requesting the claim be assigned for a hearing. Plaintiff's claim was heard before a deputy commissioner, who issued an opinion and award on 4 June 2009, finding that plaintiff had suffered a compensable back injury and awarding plaintiff temporary total disability benefits, payment of past and future medical expenses, and attorney's fees. Defendants appealed the deputy commissioner's opinion and award to the Full Commission. The Full Commission in its 14 June 2010 opinion and award adopted the deputy commissioner's opinion and award, with minor modifications, and awarded plaintiff temporary total disability compensation, payment of past and future medical expenses, attorney's fees, and costs.

On 9 July 2010, defendants filed notice of appeal from the Full Commission's 14 June 2010 opinion and award.

Defendants contend that the Full Commission erroneously found that plaintiff met his burden of proving disability in his workers' compensation claim.

This Court has previously stated that

review of a decision of the Industrial Commission is limited to determining whether there is any competent evidence to support the findings of fact, and whether the findings of fact justify the conclusions of law. The findings of the Commission are conclusive on appeal when such competent evidence exists, even if there is plenary evidence for contrary findings. This Court reviews the Commission's conclusions of law *de novo*.

McLaughlin v. Staffing Solutions, ___ N.C. App. ___, ___, 696 S.E.2d 839, 844 (2010) (citation omitted). Here, defendants argue that the Full Commission's findings 1, 3, 8, 13, and 15, are not supported by competent evidence in the record; the Full Commission's conclusions of law 4 and 5 are not supported by the findings; and, therefore, the Full Commission's awards 1 and 3 are not supported by the findings or the conclusions of law. Even before considering defendants challenges to the Full Commission's findings of fact, the appeal before us presents a

preliminary matter as to the Full Commission's conclusions of law.

II. Preliminary Matters

Defendants contend that "the Industrial Commission committed reversible error in concluding that plaintiff met his burden of proof under Russell v. Lowes Product Distrib., 108 N.C. App. 762, 425 S.E.2d 454 (1993)[.]" N.C. Gen. Stat. § 97-2(9) (2009) states that the 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." Therefore, "[u]nder the Workmen's [sic] Compensation Act disability refers not to physical infirmity but to a diminished capacity to earn money." *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 434-35, 342 S.E.2d 798, 804 (1986) (citation and quotation marks omitted). In order to support a conclusion of disability, the Commission must find three things:

- (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment,
- (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and
- (3) that this individual's incapacity to earn was caused by plaintiff's injury.

Hilliard v. Apex Cabinet Co., 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). The employee can meet his burden to show that "he is unable to earn the same wages he had earned before the injury, either in the same employment or in other employment[,] 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 108 N.C. App. at 765, 425 S.E.2d at 457 (citations and quotation marks omitted). Accordingly, the Full Commission made the following conclusion of law applying *Russell* to determine whether plaintiff presented sufficient evidence to prove his disability:

5. According to *Russell*, plaintiff can prove disability 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 pre-existing 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. Lowe's Product Distribution*, 108 N.C. App. 762, 425 S.E.2d 454 (1993). *In the present case the evidence shows that, given plaintiff's current physical and vocational limitations, plaintiff is incapable of work in any employment.*

(Emphasis added.) The Full Commission made no further conclusions as to *Russell* regarding whether plaintiff proved his disability.

Defendants note that "the Commission did not specifically state whether it used the first or third prong of *Russell* to determine that Plaintiff had met his burden of proof[,] but go on to argue that the findings of fact do not support a conclusion as to disability under any of the four prongs of *Russell*. In contrast plaintiff argues that the findings of fact support a conclusion that plaintiff was disabled pursuant to the third prong of *Russell*, concluding that "[t]he third prong of *Russell* was written for [plaintiff]." As the Full Commission used language from prongs one and three of *Russell* in its

conclusion, we agree with defendants that the Full Commission's conclusion is not clear. The first prong of *Russell* states that plaintiff can prove his disability by "(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[,]*" and the third prong by "(3) the production of evidence that he is capable of some work but that it would be futile because of pre-existing conditions, i.e., age, inexperience, lack of education, to seek other employment[.]" See *id.* (Emphasis added.) The Full Commission's conclusion incorporates the "any employment" language of the first prong and "plaintiff's current physical . . . limitations" which could be referring to "medical evidence that he is physically . . . incapable of work[.]" as the first prong requires. The Full Commission's conclusion also relies on plaintiff's "vocational limitations[.]" which could be referring to "pre-existing conditions, i.e., age, inexperience, lack of education" in prong three but makes no mention as to whether plaintiff "is capable of some work but that it would be futile" because of these "vocational limitations" for plaintiff "to seek other employment" as prong three requires. With such disparities, we cannot determine from the Full Commission's conclusion of law

whether it is based on either prong one or three of *Russell*, both or neither. Thus, without even addressing defendants' challenges to the Full Commission's findings of fact, we cannot determine "whether the findings of fact justify the conclusions of law[,]” *McLaughlin*, ___ N.C. App. at ___, 696 S.E.2d at 844, as it is unclear what the Full Commission's conclusion of law was in this instance. Accordingly, we remand back to the Full Commission for clarification of this conclusion of law which is crucial to the determination of the parties' arguments.

REMANDED.

Judges CALABRIA and HUNTER, JR., Robert N. concur.

Report per Rule 30(e).