

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA04-1098

NORTH CAROLINA COURT OF APPEALS

Filed: 18 October 2005

JOHN PHILLIPS,
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 107286

HERTZ CORPORATION,
Employer,

CAMBRIDGE INTEGRATED SERVICES
GROUP, INC.,
Carrier,
Defendants.

Appeal by defendants from Opinion and Award filed 5 May 2004 by the North Carolina Industrial Commission. Heard in the Court of Appeals 24 March 2005.

Fink & Hayes, P.L.L.C., by Steven B. Hayes, for plaintiff-appellee.

Morris, York, Williams, Surlis & Barringer, L.L.P., by C. Michelle Sain, for defendants-appellants.

GEER, Judge.

Defendants Hertz Corporation and Cambridge Integrated Services Group, Inc. appeal from the Industrial Commission's opinion and award granting plaintiff John Phillips temporary total disability benefits. Because we hold that the Full Commission's conclusion of law that Phillips is entitled to temporary total disability payments dating from his accident on 8 June 2000

is not supported by sufficient findings of fact, we reverse and remand to the Full Commission for further findings.

Facts

Phillips became employed with Hertz in December 1999 as a lot shuttler/coordinator. He was responsible for inspecting all cars to make sure they were clean, in the correct space, and that the mileage was correct. He also retrieved and parked cars and filled cars with gas. Because the car lot was approximately the size of six football fields, Phillips' job required a significant amount of walking.

On 8 June 2000, Phillips sustained an admittedly compensable injury. As he was exiting a car in the Hertz lot, he stepped into a hole and twisted his right knee. Beginning on 28 June 2000, Phillips was treated conservatively by First Family Physicians. When he did not improve, he was referred to Dr. William L. Griffin at Charlotte Orthopaedic Specialists. Phillips first saw Dr. Griffin on 10 July 2000 and was diagnosed as suffering osteoarthritis of the right knee as aggravated by a work-related injury. Dr. Griffin also treated Phillips conservatively and released him to return to work with the following restrictions: no lifting over 10 pounds, sedentary work, and no standing or walking exceeding 15 minutes per hour.

Following Phillips' visit with Dr. Griffin, Hertz placed him in a light duty clerical position that was within his restrictions. In this position, Phillips helped existing office employees with paperwork, lost and found, and other clerical tasks. The Commission found that (1) "[t]his modified light duty job was tailored by the defendant-employer to compensate for plaintiff's physical restrictions," and (2) "[t]his job is not a reflection of plaintiff's wage-earning capacity."

Phillips' knee condition failed to improve. On 25 August 2000, Dr. Griffin recommended arthroscopy in order to obtain a better idea as to what was leading to Phillips' pain. He estimated that Phillips might expect a 50% success rate in relieving the pain for approximately two years. When the defendant-carrier did not approve the surgery, Dr. Griffin continued Phillips' work restrictions.

In early October 2000, Hertz placed Phillips in another modified light duty position: Mobile III driver. In this job, Phillips drove a shuttle that picked up and dropped off Hertz employees. Phillips continued in this position through the termination of his employment by Hertz in September 2001.

At an 11 November 2000 visit, Dr. Griffin again continued Phillips' work restrictions. From 11 November 2000 until 10 May 2002, defendants did not authorize Phillips to return to Dr. Griffin for treatment. Phillips, however, sought treatment from Dr. Taub, another orthopedist, in April 2001, and Dr. Oweida in September 2001.

On approximately 12 September 2001, Phillips' employment with Hertz was terminated related to the decrease in business following the terrorist bombings on 11 September 2001. After 12 September 2001, Phillips did not return to work for Hertz or any other employer, although he did some free-lance interior design consulting for which he earned approximately \$3,000.00.

When Phillips returned to Dr. Griffin on 10 May 2002, he complained of pain in his right knee, a progressive knock knee deformity, daily pain, and intermittent swelling of the knee, especially with activity. An x-ray revealed that bone was rubbing against bone in Phillips' knee. Dr. Griffin concluded that an arthroscopy would no longer be of benefit to Phillips, but rather that he needed a total knee replacement. Dr. Griffin also believed that Phillips had not reached maximum medical improvement and retained the same restrictions that he had in November

2001. While Dr. Griffin anticipated that Phillips would continue in the future to have restrictions, he felt that following the knee replacement, the restrictions might be slightly less. Dr. Griffin expressed the opinion that the necessity for a knee replacement was caused by Phillips' compensable injury by accident on 8 June 2000.

On 25 October 2001, Phillips filed a Form 33, requesting a hearing on his claims for payment of medical expenses and attorneys' fees. Defendants' response stated that "[d]efendants contend Employee-Plaintiff is not entitled to additional medical treatment as a result of any workers' compensation injury." The parties' pre-trial agreement included as additional issues to be decided: (1) whether Phillips suffered a compensable injury and (2) the nature of the benefits to which Phillips was entitled.

At the hearing before Deputy Commissioner Wanda Blanche Taylor on 30 July 2002, defendants acknowledged that Phillips had suffered a compensable injury on 8 June 2000. The parties then entered into the following stipulation as described by the Deputy Commissioner: So we have a stipulation that plaintiff suffered a compensable injury to his right knee, that medical treatment is, shall we say, as of today authorized by Dr. Griffin, and that once he has an appointment with Dr. Griffin, whatever Dr. Griffin says about temporary total or whatever, is going to be treated as compensable as well[.]

The parties also confirmed that the only issues to be resolved in the hearing were accrued temporary partial disability and temporary total disability.

On 22 November 2002, prior to a decision being rendered, Phillips moved to compel payment of temporary total disability and for sanctions. The motion asserted that Phillips underwent a full knee replacement on 29 October 2002, but that defendants had, contrary to the stipulation, refused to pay temporary total disability following the surgery. The motion sought a

10% penalty and \$500.00 in attorneys' fees. On 13 December 2002, the Deputy Commissioner entered an order finding that defendants had in bad faith refused to pay temporary total disability benefits, that Phillips was entitled to accrued unpaid benefits in the amount of \$1,960.62 for the period 29 October 2002 through 12 December 2002 and continuing, and that Phillips was entitled to receive a 10% penalty in the amount of \$196.06 and attorneys' fees in the amount of \$500.00. The order further directed that defendants "immediately pay" to Phillips all accrued and unpaid benefits to date. Defendants forwarded a letter to the Commission dated 23 December 2002 stating that it was a "Notice of Exception" to the 13 December 2002 order.

On 26 December 2002, Phillips moved to compel compliance with the 13 December 2002 order, asserting that as of 26 December 2002, defendants had failed to make any payments to Phillips. On 13 January 2003, the Deputy Commissioner found that Phillips received a check for \$2,240.10 for temporary total disability compensation on 31 December 2002, but that defendants had failed to pay the compensation owed in a timely manner, making the amount subject to a 10% penalty. The order also provided that "[d]efendants shall pay plaintiff attorney's fees in the amount of \$600.00 for defendants' unreasonable litigiousness." On 13 January 2003, defendants submitted a "Notice of Exception" to that order.

On 15 April 2003, the Deputy Commissioner entered an opinion and award, concluding that Phillips was not entitled to temporary partial disability benefits from 28 June 2000 through 11 September 2001 because any diminution in his wages was not a compensable consequence of his compensable injury. With respect to the period beginning 12 September 2001, the Deputy Commissioner declined to award temporary total disability benefits because of Phillips' failure to engage in an active job search. The Deputy Commissioner denied the claim for sanctions for failure to provide medical treatment, but ordered defendants to pay all future medical

compensation to the extent it was reasonably designed to provide relief, lessen the period of disability, or effect a cure. Phillips filed a notice of appeal to the Full Commission.

On 5 May 2004, the Full Commission entered its opinion and award modifying the Deputy Commissioner's decision. The Full Commission agreed with the Deputy Commissioner that Phillips' wages were not decreased from 8 June 2000 through 12 September 2001 and that any diminution in earnings was due to a lack of overtime and was not causally related to the compensable right knee injury. Contrary to the Deputy Commissioner, however, the Full Commission concluded that "[a]s a result of the 8 June 2000 injury, the plaintiff remains disabled and is entitled to be paid by the defendant ongoing total disability . . . from 8 June 2000 and continuing until further order of the Commission." The Commission also held that defendants were entitled to a credit for the wages paid for the modified light-duty positions and for the interior design work. Defendants have timely appealed from the Full Commission's opinion and award.

Discussion

As our Supreme Court has held, "appellate review of an award from the 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." *Johnson v. Southern Tire Sales & Serv.*, 358 N.C. 701, 705, 599 S.E.2d 508, 512 (2004). With respect to the findings of fact, they "are conclusive on appeal when supported by competent evidence even though evidence exists that would support a contrary finding." *Id.* (internal quotation marks omitted). When the findings of fact "are insufficient to determine the rights of the parties, the court may remand to the Industrial Commission for additional findings." *Id.* (quoting *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 684 (1982)).

Defendants first argue that the evidence did not support the Commission's finding that the light-duty clerical position and the Mobile III shuttle driver position were "make-work" positions that did not evidence plaintiff's wage earning capacity.

It is well-established that "the fact that an employee is capable of performing employment tendered by the employer is not, as a matter of law, an indication of plaintiff's ability to earn wages." *Saums v. Raleigh Cmty. Hosp.*, 346 N.C. 760, 764, 487 S.E.2d 746, 750 (1997). As our Supreme Court first explained in *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 438, 342 S.E.2d 798, 806 (1986):

If the proffered employment does not accurately reflect the person's ability to compete with others for wages, it cannot be considered evidence of earning capacity. Proffered employment would not accurately reflect earning capacity if other employers would not hire the employee with the employee's limitations at a comparable wage level. The same is true if the proffered employment is so modified because of the employee's limitations that it is not ordinarily available in the competitive job market. The rationale behind the competitive measure of earning capacity is apparent. If an employee has no ability to earn wages competitively, the employee will be left with no income should the employee's job be terminated.

The Supreme Court concluded: "The Workers' Compensation Act does not permit [a defendant] to avoid its duty to pay compensation by offering an injured employee employment which the employee under normally prevailing market conditions could find nowhere else and which [defendant] could terminate at will or . . . for reasons beyond its control." *Id.* at 439, 342 S.E.2d at 806.

In this case, the Full Commission found: "From 28 June 2000 through 12 September 2001, plaintiff worked modified light duty jobs tailored by the defendant-employer to compensate for plaintiff's physical restrictions. These jobs are not a reflection of plaintiff's

wage-earning capacity.” When Dominique Colombo, Hertz’ manager, was asked about the two jobs, he testified: “[B]oth jobs were in essence made available to [Phillips], were not necessarily jobs that were there.” He agreed with counsel that the jobs were “made available” because Phillips had physical restrictions and that Hertz did not have a need to replace Phillips after he was laid off. Further, the record contains no evidence that other employers apart from Hertz would hire plaintiff to perform the light-duty work.

Our Supreme Court has consistently held that such evidence is sufficient to support a finding that a position is a “make-work” job not reflecting a plaintiff’s ability to earn wages in the competitive job market. *See Saums*, 346 N.C. at 764, 487 S.E.2d at 750 (holding that a job newly created for the plaintiff’s return to work was not an accurate measure of the plaintiff’s ability to earn wages in the competitive job market when the record contained no evidence that employers other than the defendant would hire the plaintiff to do a similar job at a comparable wage); *Peoples*, 316 N.C. at 438, 342 S.E.2d at 806 (holding that a position did not accurately reflect the plaintiff’s earning capacity when the employer modified the job because of the plaintiff’s condition, the employer did not intend to hire anyone to replace the plaintiff in that position, and the record contained no evidence that other employers would hire the plaintiff for that position at that wage). Accordingly, we hold that competent evidence supports the Commission’s finding of fact that the clerical and Mobile III shuttle driver positions did not establish plaintiff’s wage earning capacity.

II

Defendants next contend that the record lacks “credible and competent evidence” to support the Full Commission’s conclusion that Phillips is entitled to temporary total disability benefits beginning 8 June 2000. The determination that an employee is disabled is a conclusion

of law that must be based upon findings of fact supported by competent evidence. *Hilliard*, 305 N.C. at 594-95, 290 S.E.2d at 683.[**Note 1**]

In order to support a conclusion of disability, the Commission must find:

(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.

Id. at 595, 290 S.E.2d at 683. Under this test, "[t]he burden is on the employee 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." *Russell v. Lowes Prod. Distrib.*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993).

Plaintiff may meet his burden of proving disability through one of the following methods:

(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.

Id. (internal citations omitted).

In this case, there is no dispute that Phillips cannot return to his pre-injury employment. Defendants have argued instead that the light duty positions establish that Phillips was not disabled. As discussed above, the Commission's findings of fact otherwise, pursuant to *Peoples* and *Saums*, are supported by competent evidence and, therefore, are binding on appeal. After, however, finding that the light duty positions did not accurately reflect Phillips' wage-earning

capacity, the Commission did not make any findings of fact regarding Phillips' actual wage earning capacity. As a result, the opinion and award contains no findings of fact to support the conclusion that Phillips was totally disabled from the date of the injury on 8 June 2000 through the termination of his employment on 12 September 2001. *See Peoples*, 316 N.C. at 440, 342 S.E.2d at 807 (holding that although the defendant's offer of employment was irrelevant, "an issue remains as to whether the Industrial Commission erred in awarding plaintiff compensation for total and permanent disability").

With respect to the period following Phillips' termination, the Full Commission adopted, with only slight modification, the findings of fact of the Deputy Commissioner:

20. During the period of time following plaintiff's termination from defendant-employer he was released to return to work within his restrictions but admittedly did not engage in any active job search as he was "waiting for litigation that was pending to be resolved." Plaintiff did earn some wages, which he estimated to be approximately \$3,000.00 for interior design work. Plaintiff did not engage in further job search other than his interior design work due to the fact that his litigation was pending, that he had limited transportation and that his apartment was not "bus-friendly."

....

27. Following plaintiff's termination he was released to return to work and did not engage in any active job search because it would not have made sense to do so in his opinion because he was waiting for the results of his workers' compensation litigation.**[Note 2]**

Although the Full Commission then reached the opposite conclusion from the Deputy Commissioner regarding disability, it made no additional findings of fact to support its conclusion that Phillips continued to be totally disabled after the termination of his employment.

Thus, the sole findings of fact relating to the extent of Phillips' disability do not establish that Phillips was totally disabled. Those findings _ not challenged by Phillips on appeal _ also

cannot, standing alone, support a conclusion that Phillips was not totally disabled. Nor do they resolve whether Phillips might have been partially disabled. The findings do no more than assert that Phillips failed to engage in an active job search. In *Peoples*, our Supreme Court held that the failure to conduct a job search is not sufficient, without more, to establish a lack of disability: “In order to prove disability, the employee need not prove he unsuccessfully sought employment if the employee proves he is unable to obtain employment.” *Peoples*, 316 N.C. at 444, 342 S.E.2d at 809. Instead, when “an employee’s effort to obtain employment would be futile because of age, inexperience, lack of education or other preexisting factors, the employee should not be precluded from compensation for failing to engage in the meaningless exercise of seeking a job which does not exist.” *Id.* The Full Commission’s opinion and award contains no findings of fact relating to the issue of futility even though Phillips offered evidence relating to the futility of a job search prior to his knee replacement surgery.

The Supreme Court stressed in *Johnson* the need for specific findings of fact on the dispositive issues: “While the Commission is not required to make findings as to each fact presented by the evidence, it must find those crucial and specific facts upon which the right to compensation depends so that a reviewing court can determine on appeal whether an adequate basis exists for the Commission’s award.” *Johnson*, 358 N.C. at 705, 599 S.E.2d at 511. When the Commission fails to do so, we must “remand to the Commission for the purpose of making adequate findings of fact.” *Id.* at 708, 599 S.E.2d at 513. Accordingly, because the Commission has failed to make the necessary findings of fact regarding the extent of Phillips’ disability from 8 June 2000 through the date of the hearing before the Deputy Commissioner, we must remand for further findings of fact both as to the period from 8 June 2000 through 12 September 2001 and the period following the termination of Phillips’ employment on 12 September 2001.

III

Finally, defendants assign error to the Full Commission's failure to address defendants' exceptions to the Deputy Commissioner's 13 December 2002 and 13 January 2003 orders assessing defendants a 10% penalty and awarding Phillips' attorneys' fees. We hold that defendants did not properly appeal those orders to the Full Commission and, therefore, decline to address this assignment of error.

Following each of the Deputy Commissioner's orders, defendants filed a "Notice of Exception" with the Industrial Commission. Upon receipt, the Commission, in a letter to the parties from the Docket Director, stated that the "Exception has been noted for the record." Once the Deputy Commissioner entered her opinion and award denying Phillips disability compensation, Phillips filed a notice of appeal and a Form 44 application for review. Defendants, however, did not file a notice of appeal from the Deputy Commissioner's orders or file their own Form 44 application for review regarding the sanctions and attorneys' fees.

N.C. Gen. Stat. §97-85 (2003) provides for review by the Full Commission "[i]f application is made to the Commission within 15 days from the date when notice of the award shall have been given." Defendants' "Notice of Exception" filed prior to the opinion and award is not a substitute for a notice of appeal to the Full Commission. An exception is simply a formal objection; it is not an appeal. *See* N.C.R. Civ. P. 46 (discussing objections and exceptions); *Wilson v. Utah Constr. Co.*, 243 N.C. 96, 98, 89 S.E.2d 864, 866 (1955) (distinguishing between a notice of appeal and a bill of exceptions).

Defendants were obligated to file a separate notice of appeal if they wished the Full Commission to review the Deputy Commissioner's orders requiring payment of the 10% penalty and attorneys' fees. These orders cannot be deemed encompassed by Phillips' appeal of the

Deputy Commissioner's opinion and award since the orders are irrelevant to any of the issues raised by that opinion and award. Without a notice of appeal, the Full Commission had no indication that defendants wished to pursue review of those orders, especially since defendants also did not file a Form 44 application for review.

The North Carolina Workers' Compensation Rules provide that a party wishing to appeal a decision of the Deputy Commissioner to the Full Commission must file a Form 44 "stat[ing] with particularity" the grounds for the appeal, "including the specific errors allegedly committed by the Commissioner or Deputy Commissioner." Workers' Comp. R. of N.C. Indus. Comm'n 701(2), 2005 Ann. R. (N.C.) 943. "Failure to state with particularity the grounds for appeal shall result in abandonment of such grounds." *Id.*

Since defendants filed no notice of appeal and no Form 44 raising the issue of the propriety of the Deputy Commissioner's orders, the Commission had no notice that the issue was before it and, therefore, did not err in failing to address the question. *See Joyner v. Rocky Mount Mills*, 85 N.C. App. 606, 608, 355 S.E.2d 161, 162 (1987) ("The *record* must in some way reflect that the matter was before the full Commission."). We may not re-examine that issue now. Defendants' third assignment of error is, therefore, overruled.

Reversed and remanded.

Judges TIMMONS-GOODSON and CALABRIA concur.

Report per Rule 30(e).

NOTES

1. We note that the credibility of the evidence is not an issue properly raised on appeal. As our Supreme Court has held, "[t]he Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965)).

2. The only alteration made by the Full Commission to the Deputy Commissioner's findings on this subject was omission of the following sentence: "Plaintiff did not engage in any job search activities."