NO. COA08-26

NORTH CAROLINA COURT OF APPEALS

Filed: 19 August 2008

LARRY CAGLE,
Employee-Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 121196

P.H. GLATFELTER/ECUSTA DIVISION,
SELF-INSURED,
Employer-Defendant,

and

PMA Insurance Group, Third Party
Administrator.

Appeal by Defendant from Opinion and Award entered 7 September 2007 by the North Carolina Industrial Commission. Heard in the Court of Appeals 22 May 2008.

Neill S. Fuleihan, Attorney at Law, by Neill S. Fuleihan, for Plaintiff-Appellee.

Prather Law Firm, by J. D. Prather, for Defendant-Appellant.

STEPHENS, Judge.

Defendant P.H. Glatfelter/Ecusta Division ("Glatfelter") appeals an adverse Opinion and Award of the North Carolina Industrial Commission. On the evidence before it, the Commission found the following pertinent facts:

In February 2001, Plaintiff was fifty-seven years old and had worked in Glatfelter's paper mill for approximately twenty-eight years. For the previous twenty years, Plaintiff worked in the

mill's refining department. Plaintiff had a high school education and a significant hearing loss. On 19 February 2001, Plaintiff sustained an admittedly compensable injury to his back while working in the mill. Dr. Richard Weiss performed surgery on Plaintiff's back on 30 March 2001, and Plaintiff subsequently underwent physical therapy. Plaintiff returned to work on 9 September 2001. From 10 March 2001 through 9 September 2001, Plaintiff received temporary total disability compensation of $493.98 per week. Based on his pre-injury wages, Plaintiff should have received $611.88 per week.

On 24 August 2001, Glatfelter sold the paper mill to RFS Ecusta, Inc. ("RFS"). As part of the transaction, Glatfelter purported to transfer its workers' compensation liabilities to RFS. In *Goodson v. P.H. Glatfelter Co.*, 171 N.C. App. 596, 615 S.E.2d 350, *disc. review denied*, 360 N.C. 63, 623 S.E.2d 582 (2005), this Court held that the purported transfer was void *ab initio* and that Glatfelter remained liable for its workers' compensation liabilities.

Upon Plaintiff's return to the mill on 9 September 2001, RFS assigned Plaintiff to work in the "Gatehouse" and paid Plaintiff his pre-injury wages. In the Gatehouse, Plaintiff answered phones, weighed trucks, and checked employee and visitor identifications. RFS used the Gatehouse position to provide return-to-work opportunities and vocational rehabilitation for injured employees. The position was not available to other mill workers, nor was it available to outside job applicants. On 17 September 2001, Plaintiff underwent a functional capacity evaluation and was released to work with the following restrictions: no lifting greater than twenty pounds and no repetitious bending or lifting. Plaintiff worked in the Gatehouse until 7 October 2001 when he was taken out of work due to back pain. The pain prevented him from performing any of his Gatehouse duties. From 7 October 2001 through 8 April 2002, Plaintiff again received $493.98 per week in temporary total disability compensation.

On 8 April 2002, Plaintiff returned to work at the mill in the "Core Room." As with the Gatehouse, this position was limited to workers released to work with restrictions and was not available to other mill workers or outside applicants. Although Plaintiff received his pre-injury wages in this position, Plaintiff was not required to perform any of the position's duties. On 21 June 2002, while Plaintiff was still employed in the Core Room, Dr. Margaret Burke assigned Plaintiff a ten percent permanent partial impairment rating. Plaintiff remained in the Core Room until 15 August 2002, on which day the paper mill shut down.

From 15 August 2002 through 4 May 2003, Plaintiff received unemployment compensation at the rate of $408.00 per week. RFS stopped providing Plaintiff medical benefits on 2 October 2002. Plaintiff unsuccessfully looked for at least two jobs per week throughout the time he received unemployment compensation. Plaintiff ended his job search on 4 May 2003 because of chronic low back pain.

On these findings, the Industrial Commission concluded that Plaintiff was entitled to: (1) the amount of temporary total disability compensation which was underpaid from 10 March 2001 to9 September 2001 and from 7 October 2001 to 8 April 2002; (2) an additional payment equal to ten percent of the amount he was underpaid as a penalty to Glatfelter; (3) continuing temporary total disability compensation dating from 15 August 2002, the date on which the mill shut down; and (4) medical expenses incurred or to be incurred as a result of the injury. Additionally, the Commission concluded that Glatfelter was estopped from asserting defenses which should have been asserted during the period of time Glatfelter contested its liability in the *Goodson* litigation. Glatfelter timely appealed.

"On appeal from an order of the Industrial Commission, '[t]he reviewing court's inquiry is limited to two issues: whether the Commission's findings of fact are supported by competent

evidence and whether the Commission's conclusions of law are justified by its findings of fact.'" *Stone v. G & G Builders*, 346 N.C. 154, 157, 484 S.E.2d 365, 367 (1997) (quoting *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 186, 345 S.E.2d 374, 379 (1986)). In particular, the reviewing court "'does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding[s].'" *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999). The court reviews the Commission's conclusions of law *de novo*. *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 597 S.E.2d 695 (2004).

In order to obtain compensation under the Workers' Compensation Act, an employee has the burden of proving both the existence and the extent of a disability. *Hendrix*, 317 N.C. 179, 345 S.E.2d 374. The Act defines "disability" as the "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) (2007). An employee may meet the burden of proving disability 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 Prod. Distrib'n, 108 N.C. App. 762, 765-66, 425 S.E.2d 454, 457 (1993) (citations omitted). Once the employee presents substantial evidence that he or she is incapable

of earning wages, "the employer has the burden of producing evidence to rebut the [employee's] evidence." *Burwell v. Winn-Dixie Raleigh*, 114 N.C. App. 69, 73, 441 S.E.2d 145, 149 (1994).

Glatfelter first challenges the Industrial Commission's determination that Plaintiff satisfied his burden of proving disability and was, therefore, entitled to workers' compensation benefits after the mill shut down on 15 August 2002. The Commission found and concluded:

> Plaintiff's burden of proof on total loss of earning capacity is met with medical evidence of a 10% permanent partial impairment of the back with permanent work restrictions and resulting chronic low back pain; with vocational evidence of an unsuccessful job search throughout the period of receipt of unemployment benefits; and with evidence of futility when the above evidence is combined with [Glatfelter's] deliberate refusal to pay medical and indemnity compensation since October, 2002, while legally liable therefor.

Glatfelter contends that the evidence and findings do not support the Commission's conclusion that Plaintiff satisfied his burden of proving disability. We disagree.

The findings of fact support the conclusion that Plaintiff met his burden of proof by producing 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. The Commission found that, for a period of almost nine months, Plaintiff looked for at least two jobs per week, but was unsuccessful in obtaining employment. Glatfelter does not contend that this finding is not supported by the evidence. Accordingly, on appeal, the finding is binding. *See Pollock v. Reeves Bros., Inc.*, 313 N.C. 287, 294, 328 S.E.2d 282, 286 (1985) ("Defendants did not except to this finding of fact, therefore it is deemed to be supported by competent evidence and it is binding upon appeal.") (citation omitted). We hold that such a search constitutes a reasonable effort on Plaintiff's part to obtain work within his restrictions. This finding thus supports the Commission's conclusion that Plaintiff proved disability.

Additionally, we disagree with Glatfelter's contention that there is no evidence Plaintiff was unable to find work *because of* the injury. Upon returning to work at the mill in April 2002, RFS placed Plaintiff in a position which was not an accurate reflection of Plaintiff's ability to earn wages in a competitive market. *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 342 S.E.2d 798 (1986). Plaintiff's permanent work restrictions prevented him from performing the job duties he had performed for the last twenty years. His nine-month job search for work he could perform produced no job offer. The conclusion that Plaintiff was unable to find work because of his injury is inescapable.

Moreover, the findings of fact support the Commission's conclusion that Plaintiff met his burden of producing evidence that he is capable of some work but that it would be futile because of preexisting conditions to seek other employment. Plaintiff had a high school education and worked at the mill for almost thirty years. It is uncontested that, due to his injury, Plaintiff was unable to perform the duties of the job he had held at the mill for the past twenty years. Plaintiff was fifty-nine years old when he ended his job search. The combination of his injury, for which Glatfelter was not providing medical benefits, and the preexisting conditions support the Commission's determination that it was futile for Plaintiff to seek other employment. Although the evidence and the findings do not support the Commission's conclusion that Plaintiff presented medical evidence that he was incapable of work in any employment, on the facts of this case, Plaintiff met his burden of proof on two of the four *Russell* methods. Accordingly, Glatfelter's argument is rejected.

Next, Glatfelter argues that the Commission erred in concluding that Glatfelter was estopped by this Court's decision in *Goodson*, 171 N.C. App. 596, 615 S.E.2d 350, from raising any defenses to Plaintiff's claim. Glatfelter first points out that it "asserted *no* 'defenses'"

(emphasis added), but then states that the Commission's conclusion affected its right "to present evidence of wage-earning capacity in defense of [P]laintiff's claim for disability compensation." Glatfelter's argument lacks merit.

In the challenged conclusion of law, the Commission determined that Glatfelter was barred from re-litigating jurisdictional, procedural, and statutory issues decided by *Goodson*. In *Goodson*, this Court held that Glatfelter's purported transfer of its workers' compensation liability to RFS as part of the sale of the paper mill was void and of no effect. In the case at bar, the Commission properly concluded that Glatfelter could not again assert this same position. *See Thomas M. McInnis & Assocs., Inc. v. Hall*, 318 N.C. 421, 349 S.E.2d 552 (1986) (discussing the doctrine of collateral estoppel).

Moreover and furthermore, the record contains no evidence that the Industrial Commission estopped Glatfelter from doing anything. The record demonstrates not one instance where the Commission estopped Glatfelter from adducing evidence or advancing its positions. Even though the Commission concluded that Glatfelter was precluded from asserting defenses to liability in the instant claim, the record nevertheless is devoid of a single instance in which Glatfelter was actually estopped from re-litigating any jurisdictional, procedural, or statutory issues previously decided by this Court in *Goodson*. Glatfelter's argument is rejected.

Finally, Glatfelter argues that the Commission erred in imposing a penalty upon Glatfelter for underpaying temporary total disability compensation to Plaintiff for the periods of time between 10 March 2001 and 9 September 2001 and 7 October 2001 and 8 April 2002. The Commission found that "Plaintiff was underpaid temporary total disability from [those periods] in the amount of $117.90 per week." The Commission concluded that Plaintiff was entitled to the amount of underpaid compensation and, pursuant to N.C. Gen. Stat. §97-18(g), the Commission

also concluded that Plaintiff was entitled to ten percent of the total amount underpaid as a penalty. We affirm the Commission's conclusion.

Section 97-18 of the Workers' Compensation Act provides:

> (b) When the employer or insurer admits the employee's right to compensation, the first installment of compensation payable by the employer shall become due on the fourteenth day after the employer has written or actual notice of the injury or death, on which date all compensation then due shall be paid. . . .
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> . . . .
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> (g) If any installment of compensation is not paid within 14 days after it becomes due, there shall be added to such unpaid installment an amount equal to ten per centum (10%) thereof, which shall be paid at the same time as, but in addition to, such installment . . . .

N.C. Gen. Stat. §97-18 (2007).

First, the Commission's finding is fully supported by the evidence. Specifically, the record on appeal contains an executed pre-trial agreement which states, in part:

> 3. On [19 February 2001], Plaintiff's average weekly wage was $917.77, resulting in a compensation rate of $611.88 per week as manifested by a Form 22 dated June 28, 2002.
>
> 4. As a result of his compensable injury, Plaintiff received $493.98 per week in temporary total disability compensation from March 10, 2001 to September 9, [2001] and from October 7, 2001 to April 8, 2002, as manifested by [Industrial Commission] Forms 60 dated June 16, 2001, 28U dated October 7, 2001, and F62 dated November 7, 2001.

Second, we conclude that the Commission's finding supports its conclusion that Plaintiff is entitled to the ten percent penalty. By filing the Form 60, Glatfelter admitted that Plaintiff suffered a compensable injury, *Perez v. Am. Airlines/AMR Corp.*, 174 N.C. App. 128, 620 S.E.2d 288 (2005), *disc. review improvidently allowed*, 360 N.C. 587, 634 S.E.2d 887 (per curiam), *reh'g denied*, 360 N.C. 655, 638 S.E.2d 469 (2006), and Glatfelter stipulated that Plaintiff

received $117.90 less per week than he was entitled to during the periods he received compensation. By the plain language of the statute, Plaintiff is entitled to the ten percent penalty. N.C. Gen. Stat. §97-18.

AFFIRMED.

Judges McCULLOUGH and BRYANT concur.

Report per Rule 30(e).