NO. COA13-19

NORTH CAROLINA COURT OF APPEALS

Filed: 4 June 2013

JOSEPH H. WILHITE, Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. No. 143496

PIKE ELECTRIC, INC., Employer;
LIBERTY INSURANCE CORPORATION,[1]
Carrier,
Defendants.

Appeal by Plaintiff from opinion and award entered 28 September 2012 by the North Carolina Industrial Commission.

Heard in the Court of Appeals 7 May 2013.

Franklin Smith for Plaintiff.

McAngus, Goudelock & Courie, P.L.L.C., by Raymond J. Williams, III, for Defendants.

STEPHENS, Judge.

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[1]Defendants' brief to this Court identifies the Carrier as "Liberty Mutual Insurance Company," but following our customary practice, we style the parties in the caption of this opinion exactly as they are listed in the opinion and award from which this appeal is taken.

Procedural History

On 25 September 2008, Plaintiff-employee Joseph H. Wilhite ("Plaintiff") sustained injuries while employed by Defendant-employer Pike Electric, Inc. Defendants accepted Plaintiff's claim as compensable. Plaintiff did not miss any time off work as a result of his injury, and his treating physician did not order any work restrictions due to the compensable injury until February 2009. In December 2009, Plaintiff and several co-workers were laid off due to economic conditions. As a result of the restrictions and partial permanent impairment ratings assigned to Plaintiff's arm and cervical spine in February 2009, the parties entered into an agreement for payment of compensation pursuant to Form 26A. The Form 26A was approved by a deputy commissioner on 27 August 2009, and Plaintiff received a payment of $11,848.00.

On 6 August 2010, Plaintiff filed an amended Form 18, stating that he had been completely unable to work since 7 December 2009. A subsequent mediated settlement conference resulted in an impasse, and the case was assigned for hearing on the issue of whether Plaintiff was entitled to a modification of the Commission's 27 August 2009 award. By opinion and award

filed 1 March 2012, the deputy commissioner denied Plaintiff's request to modify the 27 August 2009 award. Plaintiff appealed to the Full Commission which, by an opinion and award entered 28 September 2012, likewise denied Plaintiff's request to modify. This appeal followed.

Standard of Review

> The standard of review in workers' compensation cases has been firmly established by the General Assembly and by numerous decisions of this Court. Under the Workers' Compensation Act, the Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony. Therefore, on appeal from an award of the Industrial Commission, review is limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law. This [C]ourt's duty goes no further than to determine whether the record contains any evidence tending to support the finding. Findings of fact which are left unchallenged by the parties on appeal are presumed to be supported by competent evidence and are, thus conclusively established on appeal. The Commission's conclusions of law are reviewed *de novo*.

Spivey v. Wright's Roofing, __ N.C. App. __, __, 737 S.E.2d 745, 748-49 (2013) (citations, quotation marks, brackets, and ellipsis omitted; italics added).

On appeal, Plaintiff presents a single argument: That the Commission erred in concluding that Plaintiff did not prove by a

preponderance of the evidence that he experienced a substantial change in condition since the Commission's 27 August 2009 approval of the Form 26A.[2] Specifically, Plaintiff contends he is now completely disabled. We disagree.

Section 97-47 of the Workers' Compensation Act provides that, "[u]pon its own motion or upon the application of any party in interest on the grounds of a change in condition, the Industrial Commission may review any award, and on such review may make an award ending, diminishing, or increasing the compensation previously awarded[.]" N.C. Gen. Stat. § 97-47 (2011).

> A change of condition refers to conditions different from those in existence when an award was originally made and a continued incapacity of the same kind and character and for the same injury is not a change in condition. To merit an increase or decrease in disability compensation, the change must be a substantial change of physical capacity to earn.

Lewis, 122 N.C. App. at 149, 468 S.E.2d at 274 (citations, quotation marks, and ellipsis omitted).

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[2]While the Commission's opinion and award contains both a finding of fact and a conclusion of law to this effect, such a determination is a conclusion of law. *See Lewis v. Craven Reg'l Medical Ctr.*, 122 N.C. App. 143, 149, 468 S.E.2d 269, 274 (1996) ("Whether the facts amount to a change of condition pursuant to N.C. Gen. Stat. § 97-47 is a question of law, and reviewable *de novo* by this Court.") (citation and quotation marks omitted).

> This change in condition can consist of either a change in the claimant's physical condition that impacts his earning capacity, a change in the claimant's earning capacity even though claimant's physical condition remains unchanged, or a change in the degree of disability even though claimant's physical condition remains unchanged. In all instances the burden is on the party seeking the modification to prove the existence of the new condition and that it is causally related to the injury that is the basis of the award the party seeks to modify.

Blair v. Am. Television & Commc'ns Corp., 124 N.C. App. 420, 423, 477 S.E.2d 190, 192 (1996) (citations and quotation marks omitted).

Here, Plaintiff does not challenge any of the Commission's findings of fact, which are thus conclusive on appeal. *See Spivey*, __ N.C. App. at __, 737 S.E.2d at 749. The Commission found, *inter alia*, the following facts pertinent to this appeal: On 27 August 2009, the Commission approved a Form 26A, Employer's Admission of Employee's Right to Permanent Partial Disability ("the PPD form"). The PPD form provided for payment based upon a 2.5% partial impairment rating to Plaintiff's arm and a 5% partial impairment rating to his back. Beginning on 11 December 2008, Plaintiff was treated in connection for the underlying injury in this matter by Dr. Mark Lyerly, a neurosurgeon who had treated Plaintiff since 2005 for an

unrelated low back injury. In connection with a February 2009 visit, Lyerly had assigned the permanent partial impairment ratings covered by the PPD form. In the same workers' compensation medical status questionnaire which contained those ratings, Lyerly also indicated a lifting restriction of 25 pounds and a push/pull restriction of 40 pounds. Plaintiff continued to see Lyerly about every six months until 18 March 2011. Lyerly testified that, at the March 2011 appointment, he changed Plaintiff's regularly scheduled follow-up visits from six months to one year. Lyerly also testified that Plaintiff's lifting and push/pull restrictions remained unchanged during his treatment of Plaintiff. The Commission also found that Lyerly, who had substantial experience in diagnosing and treating a condition known as complex regional pain syndrome ("CRPS"), testified that Plaintiff "did not present with the necessary symptomatology and objective findings to diagnose CRPS[.]"

The Commission further found that, on 21 January 2011, Plaintiff received a one-time evaluation by Dr. Gary Poehling. Poehling diagnosed Plaintiff with CRPS. Poehling further testified that, because he had seen Plaintiff only once, he would defer to Plaintiff's treating physician on the question of how his condition had changed over time. However, Poehling

agreed that, since the date of his injury, Plaintiff's condition had "stayed the same or gotten somewhat better." In addition, Poehling gave Plaintiff a restriction of lifting "up to 35 or 40 pounds, so long as he was not on a ladder." This restriction permitted Plaintiff to lift a greater weight than allowed by the 25-pound lifting restriction kept in place by Lyerly at Plaintiff's March 2011 appointment. In weighing the credibility and weight to be given to the testimony, the Commission found that Lyerly's opinion should be accorded more weight than Poehling's opinion, noting Lyerly's extensive experience in treating Plaintiff over more than five years and eleven visits.

Plaintiff draws our attention to the following exchange between Lyerly and Plaintiff's counsel which Plaintiff contends shows a change in his condition to "100% disability" by March 2010:

> [Lyerly]: Yes. Next visit 3-19-10. That would be the first visit after having been released from Pike. His back still bothered him but perhaps a little less at that point. ***The improvement in neck and right arm and headaches with oral steroids*** had allowed him to avoid getting an epidural block. He still took two Lortab per day.
>
> The ***strength in his right grip was better than it was on the preceding visit***. He was somewhat more tender in his right shoulder, and at this visit I thought he might have some primary shoulder pathology.

> [Plaintiff's counsel]: Did you think he had any disability at the time that Pike released him?
>
> [Lyerly]: Yes.
>
> [Plaintiff's counsel]: What's your opinion?
>
> [Lyerly]: Considering his cervical abnormality, lumbar abnormality, and peripheral nerve, I supported him for applying for disability.
>
> [Plaintiff's counsel]: Would that opinion be 100 percent?
>
> [Lyerly]: In the light of skill set and educational background, I did not view him as employable.

(Emphasis added). Lyerly also agreed that, following his final examination of Plaintiff on 18 March 2011, his opinion of Plaintiff's disability was "the same still now [as] after the last visit[.]" However, we note that while Lyerly agreed with counsel's assertion that Plaintiff was "100 percent" disabled, Lyerly's opinion on this point was not based solely upon Plaintiff's medical condition or Lyerly's medical expertise. Rather, Lyerly agreed with counsel's assessment based upon Lyerly's consideration of Plaintiff's "skill set and educational background[.]"[3] As the emphasized portions of the exchange make

[3]As revealed in the deposition excerpt quoted above, in making

clear, Lyerly noted Plaintiff's medical improvement in several respects, and as a result, did not alter Plaintiff's work restrictions or impairment ratings.

Thus, Lyerly continued to hold the opinion that Plaintiff was capable of working with the same restrictions assigned in February 2009, and under which Plaintiff had worked for ten months before being laid off for reasons wholly unrelated to his compensable injury. Moreover, as with any evidence in a workers' compensation case, "the Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Id.* at __, 737 S.E.2d at 748. Just as the Commission was entitled to judge Lyerly's testimony regarding CRPS more credible than Poehling's testimony, the Commission was also entitled to find Lyerly's testimony about Plaintiff's *medical* condition credible, while rejecting his opinion about Plaintiff's employability in light of Plaintiff's "skill set and educational background[.]" This is particularly so because the record contains no evidence that Lyerly possessed the credentials to assess employability based on "skill set and educational background[.]"

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his assessment of Plaintiff's employability, Lyerly also considered Plaintiff's low back condition which predated Plaintiff's compensable injury.

In sum, the Commission's unchallenged findings of fact fully support its conclusion that Plaintiff failed to show a change in his earning capacity after 27 August 2009. Accordingly, the opinion and award of the Commission is

AFFIRMED.

Judges MCGEE and HUNTER, JR., ROBERT N., concur.

Report per Rule 30(e).