NO. COA04-1457

NORTH CAROLINA COURT OF APPEALS

Filed: 21 March 2006

ROBERT FARISS,
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 149131

STROH COMPANIES, INC.,
Employer,

AMERICAN MOTORISTS INSURANCE COMPANY,
Carrier,
Defendants.

Appeal by defendants from Opinion and Award entered 9 June 2004 by the North Carolina Industrial Commission. Heard in the Court of Appeals 1 November 2005.

Walden & Walden, by Daniel S. Walden, for plaintiff-appellee.

Womble, Carlyle, Sandridge & Rice, P.L.L.C., by Craig D. Cannon, for defendants-appellants.

GEER, Judge.

Defendants Stroh Companies, Inc. and American Motorists Insurance Company appeal from an opinion and award of the Industrial Commission that (1) denied disability compensation to plaintiff Robert Fariss from 6 August 1999 until the date Fariss first underwent shoulder surgery on 9 October 2002, and (2) granted total disability compensation from 9 October 2002 until further order of the Commission. Since, on appeal, defendants only challenge findings of

fact immaterial to the Commission's ultimate decision or improperly ask this Court to revisit the Commission's credibility determinations, we affirm.

In reviewing a decision by the Commission, this Court's role "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." *Cross v. Blue Cross/Blue Shield*, 104 N.C. App. 284, 285-86, 409 S.E.2d 103, 104 (1991). The Commission's findings of fact are conclusive on appeal if supported by competent evidence, even if there is evidence to support a contrary finding. *Morrison v. Burlington Indus.*, 304 N.C. 1, 6, 282 S.E.2d 458, 463 (1981). Findings of fact may be set aside on appeal only "when there is a complete lack of competent evidence to support them." *Young v. Hickory Bus. Furniture*, 353 N.C. 227, 230, 538 S.E.2d 912, 914 (2000).

In this case, the Commission made the following findings of fact. At the time of the hearing before the Deputy Commissioner, Fariss was 57 years old and had earned a GED at Forsyth Technical Community College in 1976. From 1964 through 1970, Fariss worked as a laborer in a variety of jobs. In 1970, he began working for Schlitz Brewery at a plant that ultimately became owned by Stroh Companies, Inc. in 1986. Fariss continued to work as a brewer or laborer until 6 August 1999 when the Winston-Salem brewery was closed and the employees laid off.

Fariss' job duties at the brewery involved demanding physical labor, including using his hands and arms to lift up to 75 pounds. Among his other tasks, Fariss spent about three hours per day removing, changing, and replacing heavy brass elbows in the brewery's pipe system. In order to loosen and tighten the elbows, Fariss had to raise an eight-pound weight above his head and then bring it down with great force to hammer at the fittings that joined each elbow to the

pipe. Fariss' job also required him to lift heavy hoses to a height above his chest and drag them for attachment to the necessary pipes.

In early 1998, Fariss began to experience bilateral shoulder pain, with the pain becoming significant in early 1999. Despite the pain, however, he continued to perform his work duties. After he was laid off in August 1999, the pain in his shoulders continued to worsen. He found that the pain was aggravated by any arm activity, particularly movements of his arms away from his body. Fariss did not, however, seek medical treatment until 2 February 2001, when he reported his symptoms to Dr. John B. Thomas, his family physician. Dr. Thomas referred him to Dr. Michael King, an orthopaedist who evaluated him on 5 March 2001. Dr. King diagnosed Fariss with bilateral rotator cuff tears, right worse than left, that he concluded were probably caused by his job duties at Stroh. Dr. King recommended arthroscopic surgery to address the problem.

On 18 March 2002, Fariss sought treatment from Dr. Gary G. Poehling of the Winston-Salem Orthopaedic Group. Dr. Poehling diagnosed bilateral shoulder impingement syndrome, right worse than left, which he also believed was caused by Fariss' work duties. Like Dr. King, Dr. Poehling recommended arthroscopic surgery on both shoulders.

In August 2002, Fariss applied for a position as an armored service technician with Loomis Fargo. He was offered the position, but decided to turn it down after he realized that the job would require lifting, carrying, and the ability to use a .38 revolver. The Commission found that Fariss justifiably did not accept the job offer.

On 9 October 2002, Dr. Poehling operated on Fariss' right shoulder. The surgery, accompanied by eight weeks of follow-up physical therapy, provided Fariss with some relief, but he continued to experience moderate amounts of pain in his right shoulder. On 21 May 2003, Dr.

Poehling also operated on Fariss' left shoulder. In a deposition taken soon after these surgeries, Dr. Poehling testified that Fariss had reached maximum medical improvement with respect to his right arm and shoulder, but not with respect to his left. He expressed the opinion that Fariss was incapable of returning to any employment.

On 14 April 2003, a vocational consultant, Gary L. Sigmon, evaluated Fariss. Because of Fariss' physical limitations, coupled with his inability to concentrate on tasks due to his pain, Mr. Sigmon concluded that Fariss' injuries would prevent him from seeking most types of work and that it was highly unlikely Fariss would be able to procure suitable employment.

The Full Commission concluded that both of Fariss' shoulder conditions were compensable occupational diseases. It determined, however, that Fariss had failed to prove he was disabled between the time he was laid off by Stroh and the time of his first surgery with Dr. Poehling on 9 October 2002. The Commission based this conclusion on the fact that during this period of time, "no doctor took plaintiff out of work, plaintiff was capable of some work but did not make a reasonable effort to look for work, and there is insufficient evidence of record that it would be futile for plaintiff to seek employment." According to the Commission, Fariss' total disability began as of the date of his first shoulder surgery, 9 October 2002. He was entitled, therefore, to receive total disability compensation at the rate of $560.00 per week beginning 9 October 2002 and continuing until further order of the Commission. Defendants have appealed that opinion and award.

Defendants' first argument is that the Full Commission erred in determining that Fariss justifiably refused the offer of employment with Loomis Fargo in August 2002. To warrant reversal, the Industrial Commission's error must be material and prejudicial; a reviewing court will not reverse for harmless error. *Vaughn v. N.C. Dep't of Human Res.*, 37 N.C. App. 86, 90,

245 S.E.2d 892, 894 (1978), *aff'd on other grounds*, 296 N.C. 683, 252 S.E.2d 792 (1979). Even though the Commission found Fariss' refusal of the job justifiable, the Commission still concluded that "the greater weight of the evidence of record fails to show that plaintiff was disabled during the period from the date he was laid off, August 6, 1999, until his first surgery on October 9, 2002." Defendants have made no argument explaining how the Commission's finding regarding Fariss' rejection of the Loomis Fargo job is material in light of the Commission's ultimate conclusion that Fariss did not become disabled until after his surgery in October 2002, which was two months after his rejection of the job. This assignment of error is, therefore, overruled.

Defendants next argue that there was no competent evidence to support the Full Commission's finding of fact that Fariss was totally disabled starting 9 October 2002. While they acknowledge that the Commission's determination is supported by the testimony of Gary Sigmon, they nonetheless argue that "Mr. Sigmon's testimony is simply not credible." It is well-established that "'[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)). This Court may not review the Commission's credibility determinations. *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116-17, 530 S.E.2d 549, 553 (2000).

Here, Sigmon concluded -- based on Fariss' physical limitations and inability to concentrate on tasks due to his pain, coupled with his age, education, and work history -- that "it is highly unlikely that suitable competitive employment opportunities exist in which Mr. Fariss could be successful. . . . [H]is ability to find and maintain employment is . . . impaired to the point that I don't believe an occupation could be found that could meet that criteria." Fariss'

surgeon, Dr. Poehling, also expressed doubts about Fariss' ability to return to any employment, opining that "if you go as an unemployed person to ask if you'll employ me, and they ask you do you have any medical problems -- yeah, I'm being treated for a rotator cuff tear, most employers will not accept you as an employee." This evidence and the Commission's findings based on that evidence are sufficient to support the conclusion that Fariss was totally disabled as of 9 October 2002. *See Russell v. Lowes Prod. Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (holding that an employee may meet his burden of proving disability by, among other methods, showing 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 that "he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment").

Finally, defendants argue that "[e]ven if the Court finds Mr. Sigmon's testimony to be credible, the Full Commission still erred in awarding the plaintiff disability benefits from October 16, 2002 until April 13, 2003 . . . ." Defendants argue that Mr. Sigmon's opinion cannot be a basis for a conclusion of disability between the date of Fariss' recovery from the first surgery (a week after the surgery) and 13 April 2003, because he did not meet with Fariss until 14 April 2003.

We note that, even if we were to disregard Sigmon's opinions as a basis for a conclusion of disability for any time period before 14 April 2003, defendants have not addressed Dr. Poehling's testimony, which also supports the finding of disability. Further, defendants refer us to no authority, and we know of none, that would bar the Commission from relying upon the opinions expressed by Sigmon regarding Fariss' capacity to earn wages based on Sigmon's understanding of Farris' physical limitations during the relevant time frame and the pertinent

vocational considerations. The fact that Sigmon first evaluated Fariss on 14 April 2003 goes to the weight and not the admissibility of Fariss' evidence. As we have noted above, this Court "'does not have the right to weigh the evidence and decide the issue on the basis of its weight. The [C]ourt's duty goes no further than to determine whether the record contains any evidence tending to support the finding.'" *Deese*, 352 N.C. at 115, 530 S.E.2d at 552 (quoting *Adams*, 349 N.C. at 681, 509 S.E.2d at 414). Defendants' final assignment of error is, therefore, overruled.

Fariss has filed a motion in this Court, pursuant to Rule 34 of the North Carolina Rules of Appellate Procedure, seeking attorneys' fees on appeal. "N.C.G.S. §97-88 allows an injured employee to move that its attorney's fees be paid whenever an insurer appeals to the Full Commission, or to a court of the appellate division, and the insurer is required to make payments to the injured employee." *Troutman v. White & Simpson, Inc.*, 121 N.C. App. 48, 53, 464 S.E.2d 481, 485 (1995), *disc. review denied*, 343 N.C. 516, 472 S.E.2d 26 (1996). We find that Fariss has satisfied the requirements of N.C. Gen. Stat. §97-88 (2005) and that this appeal is an appropriate case in which to exercise our discretion and grant Fariss' motion for attorneys' fees. We remand to the Commission to determine the amount of reasonable attorneys' fees incurred by Fariss on this appeal.

Affirmed and remanded.

Judges WYNN and McGEE concur.

Report per Rule 30(e).