IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-567

Filed: 4 August 2020

North Carolina Industrial Commission, I.C. No. 16-055077

KEITH WILKINS, Employee, Plaintiff,

v.

BRIAN BUCKNER, Employer, ERIE INSURANCE GROUP, Carrier, Defendants.

Appeal by plaintiff from opinion and award filed 11 February 2019 by the North Carolina Industrial Commission. Heard in the Court of Appeals 5 December 2019.

Mast, Johnson, Trimyer, Wright, Booker & Van Patten, PA, by Charles D. Mast, for plaintiff-appellant.

McAngus, Goudelock & Courie, P.L.L.C., by Stephanie O. Gearhart, for defendant-appellees.

TYSON, Judge.

Keith Wilkins ("Plaintiff") appeals from an opinion and award by the North Carolina Industrial Commission ("Commission"). We affirm.

I. Background

Plaintiff sustained an injury by accident to his left eye while installing hardwood flooring for Brian Buckner ("Defendant-Employer") on 4 November 2016.

A nail ricocheted off of shoe molding and pierced his eye. Plaintiff lost his vision in that eye from the injury.

Plaintiff filed a Form 18 Notice of Accident and Claim with Defendant-Employer on 6 December 2016. Defendants filed a Form 61 denying the claim on 28 December 2016. Plaintiff filed a Form 33 Request for Hearing on 28 February 2017.

This matter came before the deputy commissioner on 12 September 2017. Following this hearing, the parties agreed to and filed a consent order, stipulating that Plaintiff had suffered a compensable injury and Defendants would pay for some of his medical treatment. All the remaining issues before the deputy commissioner were included in the computation of Plaintiff's average weekly wage.

The deputy commissioner entered an opinion and award on 12 March 2018. The deputy commissioner determined, *inter alia*, Plaintiff's average weekly wage at the time of his injury was $260.64, yielding a weekly compensation rate of $173.77. Both parties appealed portions of this opinion and award to the Full Commission.

The Full Commission heard the matter on 29 August 2018 and issued its opinion and award on 11 February 2019. The Commission also found, *inter alia*, Plaintiff's average weekly wage at the time of injury was $260.64, with a compensation rate of $173.77. Plaintiff timely filed his notice of appeal.

II. Jurisdiction

An appeal lies with this Court pursuant to N.C. Gen. Stat. §§ 7A-29(a) and 97-86 (2019).

III. Issue

Plaintiff's sole argument on appeal is the Full Commission erred in its calculation of his average weekly wage and compensation rate.

IV. Standard of Review

Our review of a decision of the Commission "is limited to determining whether there is any competent evidence to support the finding of fact, and whether the findings of fact justify the conclusions of law." *Cross v. Blue Cross/BlueShield*, 104 N.C. App. 284, 285-86, 409 S.E.2d 103, 104 (1991).

The Commission's findings of fact "are conclusive on appeal when supported by competent evidence even though evidence exists that would support a contrary finding." *Johnson v. S. Tire Sales and Serv.*, 358 N.C. 701, 705, 599 S.E.2d 508, 512 (2004) (citation omitted). Our Court reviews the Commission's conclusions of law *de novo*. *Conyers v. New Hanover Cty. Sch.*, 188 N.C. App. 253, 255, 654 S.E.2d 745, 748 (2008).

V. Analysis

Plaintiff proposed seven issues on appeal. Plaintiff's brief only addressed the Commission's computation of his average weekly wage. Plaintiff's remaining issues

are abandoned. N.C. R. App. P. 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned.").

Plaintiff did not challenge any findings of fact. When a party fails to contest the Commission's findings of fact on appeal, "the findings are presumed to be correct." *Smith v. Richardson Sports Ltd. Partners.*, 172 N.C. App. 200, 204 n.2, 616 S.E.2d 245, 249 n. 2 (2005).

A. Average Weekly Wage

This Court has held: "The determination of the [P]laintiff's average weekly wages requires application of the definition set forth in the Workers' Compensation Act, and the case law construing that statute[,] and thus raises an issue of law, not fact." *Boney v. Winn Dixie, Inc.*, 163 N.C. App. 330, 331-32, 593 S.E.2d 93, 95 (2004) (citation and internal quotation marks omitted); *see* N.C. Gen. Stat. § 97-2(5) (2019). We review the Commission's calculation of Plaintiff's average weekly wage *de novo*. *Boney*, 163 N.C. App. at 331-32, 593 S.E.2d at 95.

B. Five Methods of Computation

N.C. Gen. Stat. § 97-2(5) sets out five distinct methods for calculating an injured employee's average weekly wages:

> [Method 1] "Average weekly wages" shall mean the earnings of the injured employee in the employment in which the employee was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury, . . . divided by 52 . . . .

> . . . .
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> [Method 3] Where the employment prior to the injury extended over a period of fewer than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed; provided, results fair and just to both parties will be thereby obtained.
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> . . . .
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> [Method 5] But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

N.C. Gen. Stat. § 97-2(5).

Our Court has held: "The five methods are ranked in order of preference, and each subsequent method can be applied only if the previous methods are inappropriate." *Tedder v. A&K Enters.*, 238 N.C. App. 169, 174, 767 S.E.2d 98, 102 (2014).

C. Method 3

Method 3 is to be applied when the employee has worked on the job for a period of fewer than fifty-two weeks. *Id.* at 175, 767 S.E.2d at 102. Under this method, the average weekly wages are calculated by dividing the total earnings on the job by the number of weeks or portion of weeks the employee worked. *Id.* Under Method 3, Plaintiff's average weekly wage was calculated to be $260.64. This amount was

calculated by dividing Plaintiff's total unchallenged earnings, $7,000.00, by the total number of weeks he worked, 26.857 weeks. Plaintiff's weekly workers' compensation rate was $173.77. N.C. Gen. Stat. § 97-29 (a) (2019) ("When an employee qualifies for total disability, the employer shall pay or cause to be paid, as hereinafter provided by subsections (b) through (d) of this section, to the injured employee a weekly compensation equal to sixty-six and two-thirds percent ($66^{2}/_{3}\%$) of his average weekly wages, but not more than the amount established annually to be effective January 1 as provided herein, nor less than thirty dollars ($30.00) per week.").

Plaintiff did not provide any evidence other than his testimony to substantiate the amounts Defendant-Employer had paid him. N.C. Gen. Stat. § 97-2(5) does "not allow the inclusion of wages or income earned in employment or work other than that in which the employee was injured." *McAninch v. Buncombe Cty. Sch.*, 347 N.C. 126, 134, 489 S.E.2d 375, 380 (1997). The amounts Plaintiff earned while working for another flooring company are not eligible for inclusion in the calculation of his average weekly wages. *Id.*

D. Method 5

Plaintiff began full time work with Defendant-Employer in September 2016. Plaintiff argues the Commission's utilizing Method 3 is not "fair and just to both parties" because in September 2016 Plaintiff's work hours and responsibilities for

Defendant-Employer changed significantly when Plaintiff worked full time with Defendant-Employer.

Plaintiff argues the Commission should have applied Method 5 from the beginning of the September 2016 date when Plaintiff went full time. Plaintiff asserts this Method provides a better approximation. In support, Plaintiff cites *Hendricks v. Hill Realty Grp., Inc.*, 131 N.C. App. 859, 509 S.E.2d 801 (1998), where the employee increased their workload fifteen weeks prior to a fatal accident. This Court affirmed the opinion and award, holding the Commission's findings were supported by the competent evidence in the record. *Id.* at 862-63, 509 S.E.2d at 803. In *Hendricks*, no evidence or testimony showed a limited temporal nature of this increased employment or fluctuations in pay. *Id.*

Here, the Commission's findings calculating Plaintiff's average weekly wage are supported by competent evidence in the record. Method 3 provides a "fair and just result" for both parties. As Plaintiff admits, there was no way to identify how long Defendant-Employer's "bunch of work coming" in would last. Plaintiff's witness testified the flooring business provided work "mostly five days a week, sometimes six or seven" in the summer, with "good weeks" before Christmas. The Commission properly found Plaintiff would work "whenever he was needed" and could not find how long this work was going to last. The unchallenged findings made by the Commission support its conclusion of law.

Our Supreme Court has long held: "Fairness to the employer requires that we take into account consideration both peak and slack periods." *Joyner v. A.J. Carey Oil Co.*, 266 N.C. 519, 522, 146 S.E.2d 447, 450 (1966). Plaintiff's seeks a calculation based only upon a busy "peak" period.

Plaintiff also cites *Conyers*, wherein this Court held Method 5 best approximated the plaintiff's work schedule with a school system being seasonal to the ten months school was in session. *Conyers*, 188 N.C. App. at 261, 654 S.E.2d at 751. This Court held it was unfair to apply a method dividing by fifty-two weeks for this instance to calculate the average weekly wage. *Id.* The plaintiff, in *Conyers*, had worked longer than a year in the job. *Id.*

Here, *Conyers* is not on point. Plaintiff worked twenty-six weeks. The provisions for Method 3 apply "fair[ly] and just[ly]" to calculate his average weekly wage. N.C. Gen. Stat. § 97-2(5). Plaintiff's argument is overruled.

VI. Conclusion

Method 3 of N.C. Gen. Stat. § 97-2(5) provides a "fair and just" calculation for both parties. The Commission's unchallenged finding and conclusion that Method 3 provides the best method for calculating Plaintiff's average weekly wage is affirmed. *It is so ordered.*

AFFIRMED.

Judges Murphy and Young concur.

Report per Rule 30(e).