NO. COA04-693

NORTH CAROLINA COURT OF APPEALS

Filed: 6 September 2005

JOSE GUADELUPE MELENDEZ TORRES,
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 164967

JEFFREY J. SMITH,
Employer,

and

JAMES C. GREENE COMPANY,
Carrier,
Defendants.

Appeal by defendants from opinion and award entered by the North Carolina Industrial Commission on 12 February 2004. Heard in the Court of Appeals 1 February 2005.

The Bricio Law Firm, P.L.L.C., by Francisco J. Bricio, and North Carolina Legal Aid, by Lori J. Elmer, for plaintiff-appellee.

Young Moore and Henderson, P.A., by Zachary C. Bolen, for defendant-appellants.

HUDSON, Judge.

Plaintiff sustained an admittedly work-related injury on 14 October 2000. After a hearing on 13 December 2002, Deputy Commissioner Lorrie Dollar awarded plaintiff a limited period of temporary total disability compensation and ongoing partial disability benefits pursuant to N.C . Gen. Stat. §97-30 (2000). Defendants appealed to the Full Commission, which affirmed the

Deputy Commissioner's decision on 4 February 2004. The Commission also awarded plaintiff a ten percent (10%) penalty due to defendants' late payment, as well as attorneys' fees as a "sanction for [defendants'] failure to comply with the statutory requirements in terminating indemnity payments and due to their bad faith in the handling of this claim" pursuant to N.C . Gen. Stat. §97-88 (2000) and I.C. Rule 802 (2000). Defendants appeal.

The evidence tends to show that plaintiff began working for Jeffrey Smith Farm, and the North Carolina Grower's Association, as a seasonal laborer from Mexico under the H2A program in July 2000. The H2A program provides employment to immigrant laborers in North Carolina pursuant to a visa that allows them to work during the agricultural growing season. On 14 October 2000, plaintiff sustained a compensable injury to a finger on his left hand. Dr. Marvin Vice provided most of the medical care to plaintiff for this injury. Dr. Vice examined plaintiff on 31 October 2000 and found a displaced fracture of the finger. Plaintiff underwent surgery to repair the fracture on 9 November 2000, and Dr. Vice provided follow-up care for approximately twelve weeks. On 4 January 2001, Dr. Vice operated on plaintiff to remove pins and wires from his left hand. Dr. Vice last saw plaintiff on 31 January 2001, at which time he noted that plaintiff still had "a lot of restriction of motion" of the affected finger. Dr. Vice advised plaintiff to work on stretching the injured finger, to improve the range of motion. Following this appointment, plaintiff returned to Mexico.

Before returning to Mexico, plaintiff worked for one day, on 26 January 2001, at Jeffrey Smith Farm, cutting and peeling pumpkins. On 29 January 2001, defendants filed a Form 60 and a Form 28. Defendants paid plaintiff temporary total disability from 23 October 2000 to 25 January 2001, but have paid nothing further.

This Court reviews decisions of the Industrial Commission to determine "whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.,* 352 N.C. 109, 116, 530 SE.2d 549, 553 (2000) (citing *Adams v. AVX Corp.,* 349 N.C. 676, 509 S.E.2d 411 (1998). We may not "weigh the evidence and decide the issue on the basis of its weight," but must only determine whether the record contains "any evidence tending to support the finding." *Adams,* 349 N.C. at 681, 509 S.E.2d at 414 (internal citation and quotation marks omitted). However, the Commission's conclusions of law are reviewed *de novo*. *Grantham v. R.G. Barry Corp.*, 127 N.C. App. 529, 534, 491 S.E.2d 678, 681 (1997), *disc. review denied*, 347 N.C. 671, 500 S.E.2d 86 (1998).

Defendants argue that the Commission's findings of fact do not support its conclusion that plaintiff is entitled to compensation for total disability from 27 January 2001 to 29 April 2001; that there was insufficient evidence of record to support a finding that plaintiff was disabled from 24 January 2001 to 29 April 2001; and that the Commission erred, as a matter of law, in concluding that plaintiff is entitled to temporary partial disability since 30 April 2001. We conclude that the Commission's findings are supported by competent evidence and the findings do support its conclusions in each respect. Accordingly, we overrule these assignments of error.

Defendants stipulated that plaintiff did not work between 27 January and 30 April 2001, and that since that time, "he has been earning $6251 per week with his current employer." Additional findings include that after 31 January 2001, plaintiff's doctor did not return him to work without restrictions, and that "plaintiff was temporarily totally disabled from earning wages due to the compensable injury from 22 October 2000 to 25 January 2001 and again from 27

January 2001 until 29 April 2001." Medical records, also stipulated by the parties into evidence, show that on 12 December 2002, plaintiff's physician concluded that "the restrictions right now . . . would be any persistent grasping with pushing or pulling because of the inability to make a full fist with the hand, writing with the hand would be somewhat limited, however, he does mostly farmwork and I think anything where he has to grasp or push or pull would be very difficult for him to do."

Defendant contends that the Commission erroneously afforded plaintiff a presumption of disability. Assuming *arguendo*, that filing a Form 60 does not create a presumption of ongoing disability, *Sims v. Charmes/Arby's Roast Beef*, 142 N.C. App. 154, 159-60, 542 S.E.2d 277, 281-82 (2001), these findings, as discussed above, show that plaintiff's evidence established both the existence and degree of disability. *See Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). In addition, the Commission found and concluded, and defendant has not challenged on appeal, the following:

> 6. Defendants unilaterally terminated plaintiff's temporary total disability benefits as of 25 January 2001.
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> 8. Defendants did not file either an I.C. Form 28T or an I.C. Form 24 prior to unilaterally terminating payment of temporary total disability benefits to plaintiff.
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> 2. In addition to sums already paid pursuant to the I.C. Form 60, plaintiff is entitled to temporary total disability for the period from 27 January 2001 through 29 April 2001 at the rate of $265.83 per week. N.C. Gen. Stat. §97-29. Plaintiff is entitled to have defendants pay a penalty of an additional ten per centum (10%), pursuant to N.C. Gen. Stat. §97-18(g) for failure to timely pay benefits due.

> 3. Plaintiff is entitled to temporary partial disability compensation at the rate of two-thirds of the difference between the pre-injury and post-injury wage for the period from 30 April 2002 and continuing in accordance with the provisions of N.C. Gen. Stat. §97-30. Plaintiff is entitled to have defendants pay a penalty of an additional ten per centum (10%), pursuant to N.C. Gen. Stat. §97-18(g) for failure to timely pay benefits due.
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> 6. Plaintiff is entitled to have defendants pay his reasonable attorney's fees for bringing this claim as a sanction for [defendants'] failure to comply with the statutory requirements in terminating indemnity payments and due to their bad faith in the handling of this claim, which arose from the same. N.C . Gen. Stat. §97-88.1, Commission Rule 802.

N.C. Gen. Stat. §97-18.1(b) (2000) instructs employers that they may terminate compensation if the employee attempts a trial return to work, subject to N.C. Gen. Stat. §97-32.1 . Where an employee purportedly returns to work, the Commission requires the carrier to complete a Form 28T. I.C. Rule 404A (1) (2000). The "employer shall promptly notify the Commission and the employee, on a form prescribed by the Commission, of the termination of compensation and the availability of trial return to work and additional compensation due the employee for any partial disability." N.C. Gen. Stat. §97-18.1(b) . This Court has held that the use of the word "shall" in the Workers' Compensation Act indicates that the use of an Industrial Commission form is mandatory. *Bailey v. Western Staff Servs.*, 151 N.C. App 356, 360, 566 S.E.2d 509, 512 (2002) . N.C. Gen. Stat. 97-32.1 (2000), entitled "Trial return to work," requires that "[i]f the trial return to work is unsuccessful, the employee's right to continuing compensation under G.S. 97-29 shall be unimpaired unless terminated or suspended there after pursuant to the provisions of this Article." *Id.*

Here, defendants filed a Form 28, but never filed a Form 28T. While defendants contend that this makes no difference, neither Rule 404A nor any other rule of the Commission permits the use of a Form 28 to terminate compensation. Indeed, the two forms differ significantly.

> A primary purpose of a Form 28T, 'Notice of Termination of Compensation,' is to give notice to the Industrial Commission of the termination; but more importantly, it is a notice to the employee of that employee's current status and rights available to that employee.

Burchette v. East Coast Millwork Distributors, Inc., 149 N.C. App. 802, 809-10, 562 S.E.2d 459, 464 (2002). In contrast, a Form 28 does not conform with the statutory requirement and purpose of advising the employee of "the availability of trial return to work and additional compensation due the employee for any partial disability." N.C. Gen. Stat. §97-18.1(b).

Here, defendants paid plaintiff for his compensable injury and admitted compensability when they filed a Form 60. Then, during plaintiff's recuperation from his surgery, defendants suggested plaintiff return to work, which he did for one afternoon. In lieu of completing or filing a Form 28T, as required, defendants unilaterally terminated compensation to plaintiff, without following prescribed procedures, in violation of N.C. Gen. Stat. §§97-18.1(b) and 97-32.1, and I.C. Rule 404A.

Here, it is undisputed that defendants commenced payment of total disability compensation and that they never filed a Form 28T, or other appropriate procedures(such as filing a Form 24), before terminating plaintiff's compensation. To terminate benefits, defendants ordinarily must file a Form 24, pursuant to which the Commission must conduct an informal hearing and issue a decision within 30 days after the filing of a Form 24. I.C. Rule 404(2) (2000). Where defendants provide no grounds for termination and fail to file a Form 24, the Commission may award continuing total disability without considering such grounds. *Lewis v. Sonoco*

Products Co., 137 N.C. App. 61, 68, 526 S.E.2d 671, 675 (2000). This Court has also held that where a carrier fails to comply with the proper procedure for terminating benefits, the Commission may order the carrier to pay all unpaid installments and to resume payment of compensation. *Hieb v. Howell's Child Care Center,* 123 N.C. App. 61, 68, 472 S.E.2d 208, 213 (1996). Thus, although the Commission could have awarded plaintiff compensation on this basis alone, here we conclude its award was based on more. As defendants have not challenged the 10% penalty and award of attorneys' fees pursuant to N.C. Gen. Stat. §97-88.1 and I.C. Rule 802, we leave these sanctions undisturbed as addressing these procedural violations.

In their final argument, defendants contend that the Commission erred, as a matter of law, in its calculation of plaintiff's average weekly wage, as it failed to take into account that plaintiff was a seasonal worker. N.C. Gen. Stat. §97-2(5)(2000) defines "average weekly wages" and delineates five methods for calculating average weekly wages. Here, the Commission used the third method under N.C. Gen. Stat. §97-2(5), which provides that:

> [w]here the employment prior to the injury extended over a period of less 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.

Defendants complain that the Commission did not make any findings of fact regarding why this method is fair to the parties. Plaintiff responds that all of the evidence, including the Form 22 (wage chart) prepared by the defendants, the adjuster's testimony, as well as the Forms 19 and 60, both prepared by defendants, show the plaintiff's average weekly wage as $398.72. The Commission then found as fact that the defendants paid benefits to plaintiff based on an average weekly wage of $398.72, and concluded that this wage based on "the third method" is "fair and equitable." Thus, the Commission's finding that this was plaintiff's wage, and the Commission's

conclusion of law that this method of calculating average weekly wages was "fair and equitable" to the parties, are supported by the evidence, which supports the pertinent findings.

Defendants assert that the Commission should have used the fifth method listed under N.C. Gen. Stat. §97-2(5):

> [b]ut 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.

However, our Courts have ruled that the Commission's determination of which method to use is binding on appeal. In *McAninch v. Buncombe County Schools*, the Supreme Court held that "the recalculation of plaintiff's average weekly wages by the Court of Appeals through application of the fifth computation method constituted an improper contravention of the Commission's fact-finding authority." 347 N.C. 126, 131, 489 S.E.2d 375, 378 (1997). Accordingly, as we have upheld the findings of fact as to plaintiff's wage, we decline to overrule the Commission's conclusion, applying the third method of calculating average weekly wages.

Affirmed.

Judges WYNN and STEELMAN concur.

Report per Rule 30 (e).