NO. COA07-470

NORTH CAROLINA COURT OF APPEALS

Filed: 19 February 2008

MARK D. SHULENBERGER,
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 170550

HBD Industries, Inc.,
Employer,
Defendant,

SENTRY INSURANCE,
Carrier,
Defendant.

Appeal by plaintiff from Opinion and Award entered 20 December 2006 by the North Carolina Industrial Commission. Heard in the Court of Appeals 1 November 2007.

Wallace and Graham, P.A., by Edward L. Pauley, for plaintiff-appellant.

Cranfill Sumner & Hartzog LLP, by Robin H. Terry and Jaye E. Bingham, for defendant-appellees.

BRYANT, Judge.

Mark D. Shulenberger (plaintiff) appeals from an Opinion and Award entered 20 December 2006 by the North Carolina Industrial Commission (the Commission) awarding plaintiff attendant care for eighteen hours per day, seven days per week at the rate of $14.50 per hour and denying plaintiff's request for attorney's fees. We affirm.

Facts

Plaintiff was injured during a work related incident on 6 August 2001 wherein he sustained an admittedly compensable injury resulting in severe pelvic and genitourinary injuries as well as cervical injuries. Defendants immediately accepted compensability of plaintiff's injuries and began paying benefits and medical expenses. Defendants agreed to pay plaintiff's sister-in-law, Toni Shulenberger (Toni), four hours per day for attendant care services. Defendants also agreed to pay plaintiff's mother, Mrs. Shirley McCall Shulenberger (Mrs. Shulenberger) for transporting defendant to and from medical appointments. Defendants continued to compensate Mrs. Shulenberger and Toni over the next several years. Defendants did not deny payment to the Shulenbergers until they requested a van and a house.

Plaintiff filed a Form 33 Request to have his claim assigned for a hearing on 17 March 2005 and requested, among other things, additional attendant care benefits. On 31 March 2006, Deputy Commissioner John B. Deluca awarded plaintiff 14 hours of attendant care per day, seven days per week at the rate of $14.50 per hour. Plaintiff appealed to the Commission. The Commission affirmed the opinion of Deputy Commissioner Deluca with modifications increased the number of attendant care hours to eighteen hours per day, among other things. Plaintiff appeals.

Plaintiff raises the issues of whether the Commission erred in: (I) awarding plaintiff only eighteen hours of paid attendant care; (II) awarding plaintiff only $14.50 per hour in attendant care compensation; (III) failing to award plaintiff retroactive compensation for attendant care; (IV) failing to award overtime compensation pursuant to state and federal wage and hour laws; and (V) failing to make findings of fact regarding plaintiff's claim for relief under N.C. Gen. Stat. §97-88.1.

Standard of Review

Review by this Court of a decision by the North Carolina Industrial Commission is limited to the determination of whether any competent evidence supports the Commission's findings of fact and whether those findings support the Commission's conclusions of law. *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). The Commission's findings of fact are conclusive on appeal even where there is contrary evidence, and such findings may only be set aside where there is a "complete lack of competent evidence to support them." *Johnson v. Herbie's Place*, 157 N.C. App. 168, 171, 579 S.E.2d 110, 113 (2003) (citation and quotations omitted); *see also Adams v. AVX Corp.*, 349 N.C. 676, 509 S.E.2d 411 (1998). Our review "goes no further than to determine whether the record contains any evidence tending to support the finding." *Adams*, 349 N.C. at 681, 509 S.E.2d at 414 (citation omitted). "[E]vidence tending to support plaintiff's claim is to be viewed in the light most favorable to plaintiff, and plaintiff is entitled to the benefit of every reasonable inference to be drawn from the evidence." *Id.* (citation omitted); *see also Hollman v. City of Raleigh*, 273 N.C. 240, 252, 159 S.E.2d 874, 882 (1968) ("[O]ur Workmen's Compensation Act should be liberally construed to effectuate its purpose to provide compensation for injured employees . . ., and its benefits should not be denied by a technical, narrow, and strict construction."). However, the Commission's conclusions of law are reviewed *de novo*. *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004).

I

Plaintiff argues the Commission erred by finding and concluding plaintiff required attendant care for only eighteen hours per day because the evidence showed plaintiff requires twenty-four hours of attendant care. We disagree.

Plaintiff challenges the following findings as unsupported by the evidence:

> 15. Ms. Groce testified that at the present time, attendant care was more focused on "standby assistance," for prompting and possible safety issues as plaintiff could do his own bathing and dressing. Ms. Groce also testified that no doctor had ever recommended that anyone be paid more than four hours per day, five days per week. . . . Ms. Groce also indicated that she would defer to other professionals on whether round-the-clock care was necessary. She further testified that the competitive rate for personal care services in the area was $14.50 per hour.
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> 16. Based upon the competent evidence of record including the testimony of lay witnesses and medical expert testimony, and as agreed upon by defendants, the undersigned hereby find as fact it is necessary and reasonable for plaintiff to have attendant care for eighteen (18) hours per day, seven days per week, by a family member or agency at the rate of $14.50 per hour.

Although plaintiff also assigned error to finding of fact number 8, plaintiff failed to address this assignment of error in his brief. Therefore, this assignment of error is deemed abandoned pursuant to N.C.R. App. P. 28(b)(6) (2007).

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*, 349 N.C. at 680, 509 S.E.2d at 413 (citation omitted). Although there may be some evidence in the record to support a contrary holding, in a Workers' Compensation case the findings of fact by the Commission are conclusive on appeal when supported by competent evidence, even though there is evidence that would have supported findings to the contrary. *Hollman*, 273 N.C. at 245, 159 S.E.2d at 877.

The Commission's findings in the instant case are supported by competent evidence in the record. Dr. Lyerly testified that plaintiff could be left alone for a few hours per day, but that he could not be left alone for eighteen hours. Plaintiff's mother, Mrs. Shulenberger testified that she usually provided twelve hours of assistance per day to plaintiff. Other members of plaintiff's family testified to providing between two and four hours of assistance per day to plaintiff.

Further, the Commission found that Dr. Lyerly testified "he did not think it made sense to pay for home care for 24 hours per day" and "he believed it was reasonable that plaintiff's family should be paid for at least 14 hours per day of care[.]" Plaintiff failed to assign error to this finding, therefore it is binding on appeal. N.C.R. App. P.28(b)(6) (2007). The witnesses' testimonies as well as the finding regarding Dr. Lyerly's opinion support the Commission's findings of fact and conclusions of law. Accordingly, this assignment of error is overruled.

II

Plaintiff argues the Commission erred by awarding attendant care fees at the rate of $14.50 per hour. We disagree.

Plaintiff challenges the Commission's finding that the competitive rate for personal care services in the area was $14.50 per hour. Plaintiff also challenges the Commission's finding that it was "necessary and reasonable for plaintiff to have attendant care . . . by a family member or agency at the rate of $14.50 per hour." Plaintiff also challenges the Commission's conclusion of law that "[a]ttendant care provided to plaintiff for eighteen hours per day, seven days per week at the rate of $14.50 per hour is appropriate under N.C. Gen. Stat. §97-25."

After review of the record, we find the Commission's findings were supported by competent evidence. Ms. Groce testified that the competitive companion services rate was $14.50 per hour. She also testified that companion services included "sitting with a person, taking them to physicians' appointments, doing personal errands[.]" As to the services actually provided by plaintiff's family, Ms. Groce testified that Mrs. Shulenberger and Toni "provided personal care assistance" which included "bathing, cleaning after [plaintiff], cooking, dressing him, [and] assisting him," essentially many of the tasks associated with companion services. Although Ms. Groce testified that Certified Nursing Assistants (CNA) receive $16.50-$17.00 per

hour, neither Mrs. Shulenberger nor Toni are CNAs. We hold the Commission's findings were supported by competent evidence in the record and those findings supported its conclusion of law. Accordingly, this assignment of error is overruled.

III.

Plaintiff next argues the Commission erred by failing to award retroactive attendant care benefits. We disagree.

Whether an employee is entitled to attendant care benefits is a conclusion of law and reviewable *de novo*. *See Ruiz v. Belk Masonry Co.*, 148 N.C. App. 675, 679, 559 S.E.2d 249, 252 (2002); *Bond v. Foster Masonry, Inc.*, 139 N.C. App. 123, 127, 532 S.E.2d 583, 585 (2000). Plaintiff argues the Commission made an incorrect statement of law when it concluded no motion was ever made to the Commission and no order was ever filed by the Commission ordering defendants to pay attendant care benefits as required by N.C. Gen. Stat. §97-26(a), the Industrial Commission's rules and fee schedules, and *Hatchett v. Hitchcock Corporation*. *Hatchett*, 240 N.C. 591, 83 S.E.2d 539 (1954). We disagree.

In *Hatchett*, the employee's mother provided attendant care to him after he sustained a work-related injury. *Id.* at 592, 83 S.E.2d at 540. After the employee recovered from his injury and was able to care for himself, he filed a claim for attendant care benefits to be paid to his mother. *Id.* The Industrial Commission awarded retroactive benefits to the employee's mother and the employer appealed. *Id.* at 592-93, 83 S.E.2d at 541. Our Supreme Court held the Industrial Commission's award of attendant care benefits to the employee's mother was in error because there was "no evidence in the Record that claimant requested the Industrial Commission to order his mother to render services to him or that the Commission ordered such services to be rendered." *Id.* at 594, 83 S.E.2d at 542. Our Supreme Court reached its holding by applying the

Industrial Commission's rules and regulations requiring that "[f]ees for practical nursing service by a member of claimants family or any one else will not be honored unless written authority has been obtained in advance." *Id.* at 593, 83 S.E.2d at 541.

The rule in *Hatchett* is substantially similar to the fee schedule enacted by the Commission through its authority under N.C. Gen. Stat. §97-26(a). The Commission's rule states:

> Except in unusual cases where the treating physician certifies it is required, fees for practical nursing services by members of the immediate family of the injured will not be approved unless written authority for the rendition of such services for pay is first obtained from the Industrial Commission.

N.C. Indus. Comm'n, The North Carolina Worker's Compensation Medical Fee Schedule , Hospital Fee Schedule 3 (1995). In the instant case, plaintiff's treating physician prescribed four hours of attendant care per day, five days per week. Defendants, through an agreement with the Shulenbergers, compensated Toni for the attendant care she provided to plaintiff for the prescribed amount of time. Plaintiff did not request the Commission's approval for any additional attendant care hours per day or during the weekend prior to receiving such care. Therefore, the Commission did not err by relying on *Hatchett* and the Worker's Compensation Medical Fee Schedule when it denied plaintiff's request for retroactive attendant care benefits.

IV.

Plaintiff contends the Commission erred by failing to award overtime compensation. We disagree.

An issue similar to the one in the instant case was raised in *Palmer v. Jackson*, 161 N.C. App. 642, 590 S.E.2d 275 (2003). In *Palmer*, the plaintiff requested overtime compensation for attendant care provided by his father and sister. *Id.* at 643, 590 S.E.2d at 276. This Court

affirmed the Commission's order awarding the plaintiff attendant care compensation but not awarding overtime compensation. *Id.* at 649, 590 S.E.2d at 279. This Court reasoned that the Commission "implicitly rejected plaintiff's request for additional overtime compensation" when it determined that $7.00 per hour was an appropriate rate of compensation. *Id.*

As in *Palmer*, the Commission in the instant case relied on competent evidence in the record to determine that $14.50 per hour was an appropriate rate of compensation for attendant care. By doing so, the Commission implicitly rejected plaintiff's request for overtime compensation. Accordingly, this assignment of error is overruled.

V.

Finally, plaintiff contends the Commission erred by failing to make findings of fact regarding plaintiff's claim for relief under N.C. Gen. Stat. §97-88.1 (2007). We disagree.

Under N.C.G.S. §97-88.1:

> If the Industrial Commission shall determine that any hearing has been brought, prosecuted, or defended without reasonable ground, it may assess the whole cost of the proceedings including reasonable fees for defendant's attorney or plaintiff's attorney upon the party who has brought or defended them.

Id. "The decision of whether to make such an award, and the amount of the award, is in the discretion of the Commission, and its award or denial of an award will not be disturbed absent an abuse of discretion." *Clark v. Sanger Clinic*, 175 N.C. App. 76, 84, 623 S.E.2d 293, 299 (2005) (citation omitted). "An abuse of discretion results only where a decision is manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision." *Id.* (citation omitted).

The Commission determined that defendant "had not engaged in stubborn, unfounded litigiousness during the course of defending this claim." Although plaintiff assigned error to this

finding, he failed to argue this assignment of error in his brief. Therefore, the Commission's finding is binding on appeal. N.C. R. App. P. 28 (b)(6). Furthermore, the Commission's finding is supported by competent evidence in the record including the fact that defendant immediately accepted plaintiff's claim as compensable, paid Mrs. Shulenberger to transport plaintiff to and from doctors visits, and paid Toni to care for plaintiff four hours per day, five days per week. It was only after plaintiff requested additional compensation and resources that defendant denied plaintiff's request. Based on the evidence in the record, the Commission's finding that defendant had not engaged in stubborn, unfounded litigiousness was supported by competent evidence, and its conclusion that defendant was not responsible for paying plaintiff's attorney's fees was supported by its findings of fact. Accordingly, this assignment of error is overruled.

Affirmed.

Judges McGEE and HUNTER concur.

Report per Rule 30(e).