NO. COA04-1324

NORTH CAROLINA COURT OF APPEALS

Filed: 18 October 2005

RAY BARRETT,
Employee,
Plaintiff

v.

North Carolina Industrial Commission
I.C. File No. 187444

MORGAN CORPORATION/WAL-MART,
Employer,

and

LIBERTY MUTUAL
Carrier,
Defendants.

Appeal by defendants and cross-appeal by plaintiff from opinion and award entered 29 July 2004 by the North Carolina Industrial Commission. Heard in the Court of Appeals 18 May 2005.

Cranfill, Sumner & Hartzog, L.L.P., by Jeffery A. Howle and Meredith T. Black, for defendants-appellants.

Bollinger & Piemonte, P.C., by Bobby L. Bollinger, Jr., for plaintiff-appellee.

ELMORE, Judge.

This case arises out of a work-related injury that occurred on 12 October 2001, one day after Ray Barrett (plaintiff) began work for Morgan Construction (defendant). Plaintiff operated a pan, a large piece of construction equipment on which he had received some limited training,

but was nonetheless injured during his first hour of solo operation. Plaintiff was operating the pan when he came across an unexpected mound of dirt that bumped the pan and caused the seat to bounce violently. Plaintiff immediately felt pain in his lower back, had to be helped out of the pan, and was taken to a local hospital.

Defendant challenged the nature of plaintiff's injuries during the proceedings below, but does not now challenge the Commission's conclusion that plaintiff's injury was work-related. Rather, defendant's contention is that the Commission erred in ordering disability and medical payments until otherwise ordered. Defendant agrees with the dissenting opinion of the Commission that would have ceased payments as of the date plaintiff was released from jail, a point at which the dissent concludes no evidence was introduced that would support a continued award.

Our review of an opinion and award from the Full Commission is well-documented. We are "limited to reviewing 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 S.E.2d 549, 553 (2000). This Court "does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (quoting *Anderson v. Construction Co*., 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999). If there is any evidence at all, taken in the light most favorable to the plaintiff, the finding of fact stands, even if there is substantial evidence to the contrary. *Id*. The plaintiff is entitled to the benefit of every reasonable inference in his or her favor. *See Poole v. Tammy Lynn Ctr*., 151 N.C. App. 668, 672, 566 S.E.2d 839, 841 (2002). The

full Commission is the "sole judge of the weight and credibility of the evidence," and this Court may not second-guess those determinations. *Deese*, 352 N.C. at 116, 530 S.E.2d at 553.

Defendant challenges the evidence supporting the Commission's findings that:

> 12. Dr. Hartman treated plaintiff conservatively with a "turtle shell" brace that plaintiff was required to wear for approximately six (6) months. Plaintiff was unable to work from 12 October 2001 and continuing through the present. Dr. Hartman opined plaintiff retains an eighteen percent (18%) permanent partial disability as a result of his work-related incident on 12 October 2001. The greater weight of the evidence is that plaintiff has not reached maximum medical improvement and is in need of further medical evaluation. Plaintiff missed the last couple of appointments with Dr. Hartman due to defendant's denial of the claim and plaintiff's lack of insurance.
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> 14. As of the date of the hearing before the Deputy Commissioner, plaintiff has not returned to suitable employment and his symptoms were such that he could only withstand about two (2) hours of activity and then he would have to sit or lie to rest. As of the date of the hearing before the Deputy Commissioner, plaintiff was still suffering from a considerable amount of residual pain from the injury and that hampered his work activities. Plaintiff had searched for a job at every painting contractor in the Shelby area but had been unable to find any work.
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> 15. The Full Commission finds that in light of plaintiff's physical condition and job skills, plaintiff had performed a reasonable but unsuccessful job search.

These findings are supported by competent evidence in the record, or are otherwise credibility determinations that we will not second-guess.

Dr. Mark Hartman, plaintiff's orthopedic physician, testified that because plaintiff's L-1 burst fracture was not severe, surgery was not required and a non-invasive brace was used instead. He testified that people suffering from plaintiff's condition usually return to work within nine months, but he also stated that "some [people] couldn't" and plaintiff "may not be able to"—the determination hinging on the amount of plaintiff's pain. Dr. Hartman also testified that,

despite not having seen plaintiff in nearly two years, plaintiff had reached maximum medical improvement and had a partial permanent disability rating of eighteen percent. Plaintiff, however, provided evidence that he was still in great amounts of pain due to his injury.

> PLAINTIFF: I still have a lot of pain. I can't - when I sit down, I can't - I just can't get straightened back up. Takes a little while to get straightened back up. I'm worth about two hours - I'm - walk around about two hours and I'm - about as long as I can go.
>
> COUNSEL: Well, after about two hours, what do have to do?
>
> PLAINTIFF: Have to get back and lay down or get some, you know, chairs - somewhere where I can rest.
>
> . . .
>
> COUNSEL: Are you still taking pain medication because of your back?
>
> PLAINTIFF: Well, sometimes, when I can afford it.

Plaintiff's testimony regarding his pain, his continued need of care, and what he could do provide some evidence to support the Commission's findings. Even though plaintiff's testimony conflicted with Dr. Hartman's testimony, which was based on hundreds of cases similar to plaintiff's, the Commission was persuaded by plaintiff's testimony and we will not second-guess its determination. *See Deese*, 352 N.C. at 116, 530 S.E.2d at 553.

Plaintiff also testified about his job search, and his testimony supports the Commission's findings in that regard. He testified that he looked for painting jobs in Shelby and Charlotte. He also sought out jobs in meat-cutting and bartending, but was unable to find any jobs that he could maintain due to his back pain, which required him to sit or lie down every two hours. Plaintiff has little education and marginal experience in jobs that he may be able to do in his condition. Further, plaintiff said he would likely not be capable of performing any heavy construction

work—defendant's type of work. Thus, each of the Commission's contested findings were grounded in competent evidence and will not be overturned.

Accordingly then, we now review the Commission's conclusions of law. The Commission, in part, concluded that:

> 3. As a result of plaintiff's compensable injury, he is entitled to temporary total disability at his compensable rate of $383.35 per week from 12 October 2001 to 1 April 2002 and from 5 November 2002 and continuing until further Order of the Commission. N.C. Gen. Stat. §97-29.
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> 4. Plaintiff is entitled to have defendants pay all medical expenses incurred by plaintiff as a result of his compensable injury for so long as such examinations, evaluations and treatments may reasonably be required to effect a cure, give relief or lessen plaintiff's period of disability. N.C. Gen. Stat. §97-25.

In order to recover disability payments, plaintiff has the burden "to show that he is unable to earn the same wages he had earned before the injury, either in the same employment or in other employment." *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (citing *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 684 (1982)). Plaintiff may meet this burden in one of four ways:

> (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment[;] . . . (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment[;] . . . (3) the production of evidence that he is capable of some work but that it would be futile because of pre-existing conditions, i.e, age, inexperience, lack of education, to seek other employment[;] . . . or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

Id. (internal citations omitted). Plaintiff and defendant dispute which of the four methods the Commission relied on in reaching its conclusion that plaintiff was disabled. Defendant argues

that there was no medical evidence of plaintiff's incapacity, and therefore the award should be reversed, but plaintiff argues that the Commission relied on the second ground under *Russell*. *See id.*

It is evident from the facts, evidence, and opinion that the Commission relied either upon the second or third grounds for finding plaintiff was disabled. As discussed above, the Commission found that plaintiff had performed a reasonable job search. He had contacted all the painting companies in his home area, but due to his debilitating pain, no one could offer him limited work. According to his testimony, plaintiff's pain also interfered with his ability to find work in the meat-cutting or bartending areas, his only two previous skill sets. Plaintiff's lack of education, limited skill sets, and debilitating pain all combined to make his job search unsuccessful. Thus, the Commission's conclusion that plaintiff was disabled is supported by its findings. *See Russell*, 108 N.C. App. at 766, 425 S.E.2d at 457 (weight and credibility given to plaintiff's testimony regarding his search will not be overturned); *see also Fletcher v. Dana Corporation*, 119 N.C. App. 491, 459 S.E.2d 31 (1995) (discussing "work search" test). Defendant's argument to the contrary is misplaced. *See White v. Weyerhaeuser Co.*, 167 N.C. App. 658, 672, 606 S.E.2d 389, 399 (2005) (the absence of medical evidence would be fatal to a plaintiff relying on the first method of proving disability, but its absence "does not preclude a finding of disability under one of the other three tests.") (citing *Bridwell v. Golden Corral Steak House*, 149 N.C. App. 338, 342, 561 S.E.2d 298, 302, *disc. review denied*, 355 N.C. 747, 565 S.E.2d 193 (2002)).

Although we affirm the Commission's conclusions of law in the case *sub judice*, the Commission's conclusions do not support its actual award. Following up on conclusion of law three, the Commission ordered that: "[s]ubject to a reasonable attorney's fee herein approved

defendants shall pay temporary total disability to plaintiff at the rate of $383.35 per week from 12 October 2001 to 1 April 2002, and from 5 November 2002 and continuing through 1 April 2003. Those amounts that have accrued shall be paid in a lump sum." Ordering that payments cease as of 1 April 2003 is contrary to the Commission's conclusion that payments should continue until further order. We agree with plaintiff that this inconsistency was a clerical error.

After the opinion and award was filed, plaintiff's counsel asked the Commission to amend its opinion and award to bring paragraph one of the award in line with conclusion of law three. The Commission did so in an amended opinion and award filed on 18 November 2004. However, on or about 26 August 2004, defendant filed a notice of appeal. This filing divested the Commission of any jurisdiction to enter the amended opinion and award, thus we cannot review or affirm it. *See RPR & Assocs. v. University of N.C.-Chapel Hill*, 153 N.C. App. 342, 346-47, 570 S.E.2d 510, 513 (2002) (citing *Bowen v. Motor Co.*, 292 N.C. 633, 635, 234 S.E.2d 748, 749 (1977)). Nonetheless, if the Commission intended for defendant to cease disability payments on 1 April 2003 and not have them ongoing, then its second sentence stating "[t]hose amounts that have accrued shall be paid in a lump sum ," would be superfluous. The Commission did not review the matter until 18 March 2004 and the opinion and award was not filed until 29 July2004, thus making *all* payments lump sum if no payment was to continue beyond the order. Further, the Commission stated it was affirming the award of the deputy commissioner, who did in fact order that payments continue until further notified. Moreover, this date has no discernable significance; despite stating that we must affirm it, defendant cannot find any support for the date of 1 April 2003. Accordingly, we remand the matter to the Commission for the limited purpose of amending paragraph one of the award to represent its conclusions of law stated earlier.

We have also reviewed plaintiff's contention that the trial court abused its discretion in denying attorney's fees pursuant to N.C. Gen. Stat. §97-88.1. We find this contention to be without merit. In sum, we affirm the Commission's conclusions of law in its opinion and award, and we remand the matter to the Commission to amend its opinion and award to represent those conclusions.

Affirmed in part, remanded in part.

Judges McGEE and CALABRIA concur.

Report per Rule 30(e).