NO. COA05-687

NORTH CAROLINA COURT OF APPEALS

Filed: 4 April 2006

LORI M. JONES,
Employee/Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 187952

NEW HANOVER COUNTY SCHOOLS,
Employer,

and

KEY RISK INSURANCE COMPANY,
Carrier/Defendants.

Appeal by defendant from Opinion and Award entered 7 February 2005 by the North Carolina Industrial Commission. Heard in the Court of Appeals 25 January 2006.

Law Offices of Kathleen G. Sumner, by Kathleen G. Sumner, for plaintiff-appellee.

Attorney General Roy Cooper, by Assistant Attorney General Patrick S. Wooten, for defendant-appellant.

LEVINSON, Judge.

Defendant (New Hanover County Schools) appeals an Opinion and Award of the North Carolina Industrial Commission, awarding certain benefits to plaintiff Lori Jones. We affirm in part and reverse in part.

The relevant facts are summarized as follows: In September 1998 defendant hired plaintiff as a teacher's assistant in a special education classroom, a position that plaintiff continued to hold during the 2001-2002 school year. On 11 October 2001 plaintiff suffered a compensable injury as a result of the violent behavior of a student in the class. In November 2001, plaintiff filed a claim for workers' compensation benefits, and a request for a hearing before the Industrial Commission. Defendant accepted plaintiff's claim as compensable on a "medical only" basis, but asserted that plaintiff was not entitled to disability benefits. Following a hearing, Deputy Commissioner Brad Donovan issued an opinion and award on 30 January 2004. The commissioner ruled that: (1) plaintiff failed to demonstrate entitlement to disability benefits; (2) plaintiff was entitled to benefits under N.C. Gen. Stat. §115C-338, for injury to a school employee as a result of violence; (3) plaintiff was entitled to medical benefits; and (4) plaintiff was not entitled to disability benefits for time lost from employment other than with defendant.

Plaintiff appealed to the Full Commission, which issued an Opinion and Award on 7 February 2005, awarding plaintiff medical benefits, attorney's fees, and benefits under N.C. Gen. Stat. §115C-338. The Commission also awarded plaintiff temporary total disability benefits as compensation for her lost summer earnings in a family commercial fishing business; plaintiff had testified that, as a result of her compensable injury, she had been unable to work in the fishing industry during the summer of 2002. Commissioner Buck Lattimore dissented from this part of the award, arguing that plaintiff was not entitled to disability benefits from a job other than her employment with defendant. From this order, defendant timely appealed.

Scope of Review

N.C. Gen. Stat. §97-86 (2005) provides that appeal from an opinion and award of the Industrial Commission is governed by "the same terms and conditions as govern appeals from the superior court to the Court of Appeals in ordinary civil actions" and that "procedure for the appeal shall be as provided by the rules of appellate procedure." Under N.C.R. App. P. 10:

> (a) . . . [T]he scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal in accordance with this Rule 10. . . .
>
> . . . .
>
> (c) (1) . . . Each assignment of error shall, so far as practicable, be confined to a single issue of law; and shall state plainly, concisely and without argumentation the legal basis upon which error is assigned. . . .

N.C.R. App. P. 10(a) and (c)(1). Thus, the "scope of appellate review is limited to the issues presented by assignments of error set out in the record on appeal; where the issue presented in the appellant's brief does not correspond to a proper assignment of error, the matter is not properly considered by the appellate court." *Bustle v. Rice*, 116 N.C. App. 658, 659, 449 S.E.2d 10, 11 (1994) (citation omitted). Assignments of error that are "'broad, vague, and unspecific . . . do not comply with the North Carolina Rules of Appellate Procedure[.]'" *Walker v. Walker*, __ N.C. App. __, __, 624 S.E.2d 639, 641 (2005) (quoting *In re Appeal of Lane Co.*, 153 N.C. App. 119, 123, 571 S.E.2d 224, 226-27 (2002)).

Defendant herein made two assignments of error:

> 1. Whether Industrial Commission erred in ordering the payment of temporary total disability benefits pursuant to N.C. Gen. Stat. §97-29 under a misapprehension of law.
>
> 2. Whether Industrial Commission erred in ordering the payment of temporary total disability benefits pursuant to N.C. Gen. Stat. §97-29 for alleged time lost from a second job, unrelated to plaintiff's employment with Defendant-Employer.

We conclude that defendant's first assignment of error, that the Commission's award of disability benefits was made "under a misapprehension of law," is so vague as to be meaningless, and failed to preserve any issue for appellate review:

> Defendant's assertion that a given . . . ruling was erroneous as a matter of law completely fails to identify the issues actually briefed on appeal. . . . Defendant's series of generic assertions that the trial court's findings and conclusions were erroneous as a matter of law essentially amount to no more than an allegation that the court erred because its ruling was erroneous.

Walker, __ N.C. App. at __, 624 S.E.2d at 642 (internal quotation marks omitted).

Regarding defendant's second assignment of error, we conclude it adequately preserves for appellate review the issue of whether the Industrial Commission erred by awarding plaintiff disability benefits for a summer job for an employer other than defendant.

Standard of Review

"The standard of appellate review of an opinion and award of the Industrial Commission in a workers' compensation case is whether there is any competent evidence in the record to support the Commission's findings of fact and whether these findings support the Commission's conclusions of law." *Lineback v. Wake County Board of Commissioners*, 126 N.C. App. 678, 680, 486 S.E.2d 252, 254 (1997). "In the instant case, defendant[] failed to assign error to any of the Commission's findings of fact. . . . Thus, these findings are conclusively established on appeal." *Johnson v. Herbie's Place*, 157 N.C. App. 168, 180, 579 S.E.2d 110, 118 (2003) (citing *Okwara v. Dillard Dep't Stores, Inc*., 136 N.C. App. 587, 591, 525 S.E.2d 481, 484 (2000)). "Therefore, our review 'is limited to the question of whether the [Industrial Commission's] findings of fact, which are presumed to be supported by competent evidence, support its conclusions of law and judgment." *Herbie's Place*, 157 N.C. App. at 180, 579 S.E.2d at 118 (quoting *Okwara,* 136 N.C. App. at 591-92, 525 S.E.2d at 484).

Defendant challenges the Commission's award of disability compensation to plaintiff for her summer job. "As this issue concerns statutory interpretation of the Act, it is a question of law we review *de novo*." *Goodson v. P.H. Glatfelter Co.*, __ N.C. App. __, __, 615 S.E.2d 350, 357, *disc. review denied*, __ N.C. __, 623 S.E.2d 582 (2005).

"When an employee who holds two separate jobs is injured in one of them, his compensation is based only upon his average weekly wages earned in the employment producing the injury." *Joyner v. Oil Co.*, 266 N.C. 519, 521, 146 S.E.2d 447, 449 (1966). Thus, an "employee who unfortunately breaks his leg while working at a weekly Saturday-only job has his compensation calculated upon his average weekly wage from that job, not his regular forty-hour-a-week employment." *Richardson v. N.C. Dept. of Correction*, 345 N.C. 128, 136, 478 S.E.2d 501, 506 (1996) (citation omitted).

In *McAninch v. Buncombe County Schools*, 347 N.C. 126, 489 S.E.2d 375 (1997), the Supreme Court of North Carolina addressed a situation similar to the instant case. The plaintiff in *McAninch* was a school employee who suffered a compensable injury during the school year. This Court upheld a calculation of plaintiff's average weekly wage that included income earned at various jobs during the school's summer break. The Supreme Court of North Carolina reversed:

> In defining average weekly wages, N.C.G.S. §97-2(5) [(2005)] explicitly provides that average weekly wages shall mean the earnings of the injured employee in the employment in which he was working at the time of the injury. . . .
>
> Accordingly, we hold that the definition of average weekly wages and the range of alternatives set forth in the five methods of computing such wages, as specified in the first two paragraphs of N.C.G.S. §97-2(5), do not allow the inclusion of wages or income

> earned in employment or work other than that in which the employee was injured.

Id. at 132-34, 489 S.E.2d at 379-80 (emphasis added) (internal quotation marks omitted). We find *McAninch* indistinguishable from the instant case, and conclude that the Industrial Commission erred by including plaintiff's summer earnings from a commercial fishing business.

The Opinion and Award of the Industrial Commission is affirmed, except for the award of disability benefits for plaintiff's summer employment. We reverse that part of the Opinion, and remand for proceedings not inconsistent with this opinion.

Affirm in part, reverse in part, and remanded.

Judges McCULLOUGH and ELMORE concur.

Report per Rule 30(e).