NO. COA99-1414

NORTH CAROLINA COURT OF APPEALS

Filed: 29 December 2000

SANDRA GREENE,
Employee/Plaintiff;

v.

From the North Carolina
Industrial Commission
No. I.C. No. 254230

ABSORBA OSHKOSH,
Employer/Insured;

LIBERTY MUTUAL INSURANCE COMPANY,
Carrier,
Defendants.

Appeal by defendants from Opinion and Award entered 3 August 1999 by the North Carolina Industrial Commission. Heard in the Court of Appeals 10 October 2000.

Scott M. Anderson, P.A., by Scott M. Anderson, for plaintiff-appellee.

Roberts & Stevens, P.A., by Steven W. Sizemore, for defendant-appellants.

EDMUNDS, Judge.

Defendants appeal an opinion and award of the North Carolina Industrial Commission (the Commission) granting plaintiff benefits for permanent and total disability. We affirm.

On 17 May 1991, plaintiff Sandra Greene was injured in the course of her employment with defendant Absorba/Oshkosh, Inc. when she slipped and fell on a lubricant which had leaked from a spray can and created a slick spot on the floor. Plaintiff suffered from bruising, swelling, and pain on her right side. Plaintiff returned

to work the day after the accident, and her injuries gradually improved. However, on 4 July 1991, she was reassigned to a sewing position which required her to use a new sewing machine and chair. As she worked in this new position, she began to experience pain in her shoulder, arm and wrist. On 23 September 1991, plaintiff was treated at the emergency room, and her treating physician advised her to stop work temporarily.

Plaintiff began treatment on 30 September 1991 with Dr. Hobart Rogers, an orthopedic surgeon, who excused her from work through 11 November 1991. Dr. Rogers determined that plaintiff had a neck injury and that she suffered from decreased sensation in her right forearm and shoulder, muscle spasms, tenderness, minimal posterior lateral unseen process, and minimal root compression. An MRI revealed a small amount of hard disk at two places on plaintiff's spine. Dr. Rogers was of the opinion that plaintiff's injuries were caused by her work-related fall.

As a result of these injuries, plaintiff was disabled from work from 23 September 1991 through 11 November 1991. Although she returned to work on 12 November 1991, she stopped again on 7 December 1991 because pain prevented her from performing her duties. She has not returned to work since that date.

On 13 August 1992, plaintiff filed a Form 18, Notice of Accident to Employer, and defendants thereafter denied liability for plaintiff's injuries and subsequent disability. Plaintiff's case was heard on 21 September 1993, and on 20 July 1994, a Deputy Commissioner filed an interlocutory order and award finding that

plaintiff sustained an injury during the course of her employment and was temporarily and totally disabled from 23 September 1991 through 11 November 1991. The Deputy Commissioner also determined that plaintiff had been out of work since 7 December 1991, but had not presented sufficient evidence to permit a determination of whether plaintiff was entitled to any compensation for the time period following 7 December 1991. Accordingly, the Deputy Commissioner ordered plaintiff to submit to further testing and evaluation regarding her disability after 7 December 1991 and the extent of her permanent impairment, if any. The record remained open until 30 May 1996 for receipt of additional and vocational evidence.

On 3 February 1998, after receipt of additional evidence from Dr. Rogers, neurologist Dr. Leonel Perez-Limonte, rehabilitation consultant expert Dr. Benson Hecker, and rehabilitation counselor Maria King, the Deputy Commissioner filed an opinion and award finding that plaintiff was permanently and totally disabled and awarded her compensation for total disability at the rate of $244.35 per week from 23 September 1991 to 11 November 1991 and from 7 December 1991 to the date of the hearing and continuing until further order of the Commission. Defendants appealed to the Commission, and on 3 August 1999, the Commission modified and affirmed the holding of the Deputy Commissioner and ordered defendants to pay plaintiff temporary total disability compensation at the rate of $244.46 per week from 23 September 1991 through 11 November 1991 and permanent and total disability compensation at

the rate of $244.46 per week from 7 December 1991 through the present and continuing until plaintiff returns to work or until further order of the Commission. Defendants appeal.

We note as a preliminary matter that while defendants briefed seven assignments of error, they presented authority for only four of them. Our appellate rules state that "[a]ssignments of error . . . in support of which no reason or argument is stated or authority cited, will be taken as abandoned. The body of the argument shall contain citations of the authorities upon which the appellant relies." N.C. R. App. P. 28(b)(5). In addition, the arguments in defendants' brief are presented without reference to the assignments of error pertinent to the arguments by number and location in the record on appeal, in violation of N.C. R. App. P. 28(b)(5). These rules are mandatory and failure to follow them will subject an appeal to dismissal. *See Steingress v. Steingress*, 350 N.C. 64, 511 S.E.2d 298 (1999). Nonetheless, we elect to exercise the discretion accorded us by N.C. R. App. P. 2 and consider this appeal on its merits.

I.

Defendants first assign as error the Commission's finding of fact eighteen. This finding states, "Dr. Hobart Rogers, a board-certified orthopaedist, examined the plaintiff again on 23 August 1994. Dr. Rogers initially examined and treated the plaintiff on 30 September 1991. During the 23 August 1994 visit, Dr. Rogers noted that plaintiff was still unable to work and was still complaining of pain."

> On appeal from an opinion and award of the Industrial Commission, the reviewing court's task is to determine (1) whether there is any competent evidence of record to support the Commission's factual findings and (2) whether those findings, in turn, provide support for the Commission's conclusions of law. To that end, the findings by the Commission are binding on the reviewing court if the record contains any competent evidence in their support. This is true, even when the record offers evidence that would support findings to the contrary. The Commission's legal conclusions, however, are subject to this Court's *de novo* review.

Young v. Hickory Bus. Furn., 137 N.C. App. 51, 54, 527 S.E.2d 344, 347 (2000) (internal citations omitted).

Our review of the record reveals competent evidence to support this factual finding. Typed medical notes of Dr. Rogers, plaintiff's treating physician, taken after plaintiff's 23 August 1994 examination provide that:

> This patient is seen for re-evaluation at the request of the Industrial Commission. Her past history is the same as when I last examined her one and a half years ago or at least 19 months ago on January 14, 1993. Interim history since that time shows that the patient continues to be unable to work.

In addition, the deposition testimony of Dr. Rogers indicates that plaintiff was still unable to work at the time of her appointment on 23 August 1994. Pertinent portions of his testimony include:

> Q: All right. Then just to clarify the question. From when you saw her in January of '93 up until the time you saw her in August of '94, would Ms. Greene be capable of working?
>
> . . . .
>
> A: She was not capable of doing her previous job.

. . . .

Q: All right. So your -- would it not be more accurate to say that as of January 14, 1993, she wasn't capable of performing her prior employment; and as of August 23, 1994, she wasn't capable of performing her prior employment?

A: 1994, that is correct.

. . . .

Q: Have her complaints to you been consistent with your clinical findings?

A: Yes.

Q: Is it your opinion that she still suffers from some degree of nerve root irritation in her cervical spine?

A: As of 12-5-95.

Q: And that is the last time you saw her?

A: That is correct.

Q: It is your opinion that that condition is likely to be permanent?

A: Yes.

Also, plaintiff testified at the 21 September 1993 hearing that she left work on 7 December 1991 because of pain that prevented her from performing her duties. At the hearing she stated:

Q: When did you return to work?

A: It was in November.

Q: And did you work for a period of time after you returned?

A: Yeah.

Q: All right. And what was that like?

A: Well, it was, you know, the stinging and the burning. It just - you know, it just kept getting worse and worse.

Q: All right. Now did you subsequently leave your job?

A: Yeah.

Q: And why was that?

A: Because of my husband and my family.

Q: Now explain what you mean there.

A: Well, I'd come home from work and I'd be in a lot of pain, and it was like I got on their nerves from crying, and my husband couldn't sleep with me because I'd cry myself to sleep at night. And the kids, you know, they had to take on the jobs that I couldn't do anymore, and it just - you know, it was just - became too much for them and me.

Q: Well, were you physically able to do your job when you left?

A: Well, I did what I could. I couldn't do production.

Q: What have you done since you left work December 7th of 1991?

A: I haven't done anything.

Q: Are you physically able now to return to a job like what you were doing at Absorba in the sewing department?

A: I don't think so.

Q: And why is that?

A: Because the pain's still there. The problem's still there.

The Commission found plaintiff's testimony on this issue credible, noting that:

> Plaintiff again attempted to return to work on 12 November 1991. However, she was again

> forced to stop working on 7 December 1991 because the level of pain she was experiencing prevented her from performing her job duties. Plaintiff's testimony on this issue is credible. Plaintiff's conduct after the injury demonstrated a willingness to work in that she continued to work after the initial injury even though parts of her body were bruised and swollen and she was in pain. Plaintiff continued to work even after her pain recurred in July 1991 and did not stop working until her pain became so unbearable that she had to seek medical attention and was taken out of work by her doctor.

Although defendants contend that plaintiff is malingering and has magnified her symptoms, neither Dr. Hecker, who interviewed plaintiff on 28 March 1996, nor Dr. Perez-Limonte, who treated plaintiff on 20 September 1994, was of the opinion that plaintiff was malingering or untruthful. Defendants also point to the fact that plaintiff voluntarily terminated her employment on 7 December 1991 and did not seek medical treatment until 14 January 1993. However, the Commission found that "[s]ubsequent to her leaving work because of her ongoing pain, plaintiff was seen by Dr. Hobart Rogers only once because she could not afford further medical treatment. Defendants denied liability for her injuries and her subsequent disability."

The record contains competent evidence to support the Commission's factual finding that plaintiff was still unable to work at the time of her 23 August 1994 visit with Dr. Rogers. Because findings of fact "are binding on appeal if any competent evidence exists to support them," *Deese* v. *Champion Int'l Corp.*, 133 N.C. App. 278, 282, 515 S.E.2d 239, 242 (1999), *rev'd on other*

grounds, 352 N.C. 109, 530 S.E.2d 549 (2000), this assignment of error is overruled.

II.

Defendants next assign as error the Commission's finding of fact twenty-one, which states,

> [o]n 5 May 1996, Maria King, a rehabilitation counselor, began working with the plaintiff. After working with the plaintiff, Ms. King opined that there were some sedentary jobs that were available for the plaintiff within her restrictions. However, these positions were entry level jobs and were not suitable for plaintiff. Therefore, plaintiff was justified in refusing these positions.

In reviewing this finding, we must consider factors including the employee's age, education and work experience. Indeed,

> if other preexisting conditions such as the employee's age, education and work experience are such that an injury causes him a greater degree of incapacity for work than the same injury would cause some other person, the employee must be compensated for the actual incapacity he or she suffers, and not for the degree of disability which would be suffered by someone with superior education or work experience.

Little v. Food Service, 295 N.C. 527, 532, 246 S.E.2d 743, 746 (1978). "The similarity of the wages or salary of the pre-injury employment and the post-injury job offer also is among the factors considered." *Dixon v. City of Durham*, 128 N.C. App. 501, 504, 495 S.E.2d 380, 383 (1998).

In the case at bar, there is competent evidence to support the Commission's finding of fact that plaintiff was justified in refusing employment positions suggested by Maria King. Dr. Hecker testified in his deposition that plaintiff was incapable of earning

a wage in the competitive job market. Although he indicated that she was capable of doing work involving light to sedentary duties, he determined that she was not physically capable of lifting weights up to ten pounds. Dr. Hecker also testified that due to plaintiff's age, physical abilities, educational level, and work history "[t]here may be a very limited and extremely limited number of jobs that she might" be able to perform.

Although Maria King identified five employment positions for plaintiff, she did not rely on the most recent functional capacity evaluation in formulating her opinion. In addition, Ms. King did not consider plaintiff's lack of a driver's license in her evaluation, nor did she identify anyone who could transport plaintiff to work. Ms. King did not visit any job sites and agreed that plaintiff had minimal transferable skills from her prior employment. The jobs identified by Ms. King paid less than plaintiff's earnings at her previous employment, and two of the five positions identified did not have current openings. Ms. King also did not discuss plaintiff's precise physical limitations with any of the potential employers, nor did she confer with any of the physicians that had examined plaintiff.

The Commission's findings of fact are binding on appeal if supported by competent evidence, even if evidence exists to support a contrary finding. *See Carroll v. Burlington Industries*, 81 N.C. App. 384, 344 S.E.2d 287 (1986), *aff'd*, 319 N.C. 395, 354 S.E.2d 237 (1987). The Commission was able to evaluate the testimony of all witnesses as to plaintiff's justification in refusing various

vocational alternatives suggested to her, and, as detailed below, the Commission had the authority to give less weight to Ms. King's testimony than to the testimony of Dr. Hecker. Because there is competent evidence to support the Commission's finding of fact, this assignment of error is overruled.

III.

Defendants also assign as error the Commission's finding of fact twenty-two, which states, "[a]fter giving careful consideration to the testimony of the experts and doctors in this matter, greater weight is given to the opinions of Dr. Rogers as the treating physician, and to the opinions of Dr. Hecker a rehabilitation consultant vocational expert." Defendants argue that the testimony of Maria King and Dr. Perez-Limonte was supported by more substantial evidence and therefore should have been accorded the greater weight by the Commission.

> In passing upon issues of fact, the Industrial Commission is the sole judge of the credibility of the witnesses and the weight to be given to their testimony. The Commission may accept or reject the testimony of a witness solely on the basis of whether it believes the witness or not.

Hilliard v. Apex Cabinet Co., 305 N.C. 593, 595, 290 S.E.2d 682, 683-84 (1982) (citation omitted). Indeed, "the Commission may assign more weight and credibility to certain testimony than others. Moreover, if the evidence before the Commission is capable of supporting two contrary findings, the determination of the Commission is conclusive on appeal." *Rivera v. Trapp*, 135 N.C. App. 296, 304, 519 S.E.2d 777, 782 (1999) (citation omitted).

Accordingly, it was well within the Commission's authority to assign greater weight to the testimony of Dr. Rogers and Dr. Hecker. This assignment of error is overruled.

IV.

Defendants next assign as error the Commission's findings of fact twenty-three and twenty-four and conclusion of law four, which find and conclude that plaintiff met her burden of proving total disability and created a rebuttable presumption of disability.

A "[p]laintiff has the initial burden of proving he was rendered disabled as a result of a work related injury." *Harrington v. Adams-Robinson Enterprises*, 128 N.C. App. 496, 498, 495 S.E.2d 377, 379 (citation omitted), *rev'd on other grounds*, 349 N.C. 218, 504 S.E.2d 786 (1998). An employee who is injured during the course of his employment is disabled under the Workers' Compensation Act if the injury results in an "incapacity . . . to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C. Gen. Stat. § 97-2(9) (1999). In other words, "disability as defined in the Act is the impairment of the injured employee's earning capacity rather than physical disablement." *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (citation omitted). The employee may meet his initial burden of proving disability by showing:

> (1) that [he] was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that [he] was incapable after his injury of earning the same wages he had earned before his injury

> in any other employment, and (3) that [his] incapacity to earn was caused by [his] injury.

Hilliard, 305 N.C. at 595, 290 S.E.2d at 683 (citation omitted). "To prove disability, the employee need not prove [he] unsuccessfully sought employment if the employee proves that, because of [his] age, work experience, training, education, or any other factor, seeking employment at pre-injury wages would be futile." *Coppley v. PPG Indus., Inc.*, 133 N.C. App. 631, 635, 516 S.E.2d 184, 187 (1999) (citation omitted). If the employee proves disability, "there is a presumption that disability lasts until the employee returns to work and likewise a presumption that disability ends when the employee returns to work at wages equal to those he was receiving at the time his injury occurred." *Watkins v. Motor Lines*, 279 N.C. 132, 137, 181 S.E.2d 588, 592 (1971) (citation omitted).

"Once the employee has met [his] initial burden of proving 'disability,' the burden then shifts to the employer to produce evidence that suitable jobs are available for the employee and that the employee is capable of obtaining a job at pre-injury wages." *Coppley*, 133 N.C. App. at 634-35, 516 S.E.2d at 187 (citation omitted). "A job is 'suitable' if the employee is able to perform the job, given [his] 'age, education, physical limitations, vocational skills, and experience.'" *Harrington*, 128 N.C. App. at 498-99, 495 S.E.2d at 379 (citations omitted). "A finding of maximum medical improvement is not the equivalent of a finding that the employee is able to earn the same wage earned prior to injury and does not satisfy the defendant's burden." *Brown v. S & N*

Communications, Inc., 124 N.C. App. 320, 330, 477 S.E.2d 197, 203 (1996).

In the case at bar, there is competent evidence in the record to support the Commission's findings of fact and conclusion of law. Defendants do not contest the Commission's finding that plaintiff's inability to earn was caused by her injury. Nor is there any dispute as to whether plaintiff was incapable after her injury of earning the same wages that she had earned before her injury in the same employment. Therefore, the only issue is whether plaintiff was incapable after her injury of earning the same wages she had earned before the injury in *any other employment*, and the evidence demonstrates that she was not. Because the five jobs identified by Maria King all paid considerably less than the amount plaintiff had earned with defendant prior to her injury, the Commission did not err in finding that plaintiff is entitled to a presumption of disability. As set out in section II above, defendants did not meet their burden of producing evidence that suitable jobs were available to plaintiff and that plaintiff was capable of obtaining a job at pre-injury wages. Accordingly, this assignment of error is overruled.

V.

Finally, defendants assign as error the Commission's conclusion of law six, which provides,

> [a]s the result of her 17 May 1991 injury by accident, plaintiff is entitled to be paid by defendants ongoing permanent and total disability compensation at the rate of $244.46 per week from 7 December 1991 through the present and continuing until such time as she

> returns to work or until further order of the Commission.

Our review of the record indicates that this conclusion of law is supported the Commission's findings of fact. Accordingly, this assignment of error is overruled.

VI.

As a final matter, plaintiff submits that should this Court affirm the decision of the Commission, she is entitled to costs and attorneys' fees under N.C. Gen. Stat. § 97-88 (1999) and interest on unpaid benefits pursuant to N.C. Gen. Stat. § 97-86.2 (1999). We agree.

Section 97-88 of the North Carolina General Statutes, entitled Expenses of Appeals Brought by Insurers, provides:

> If the Industrial Commission at a hearing on review or any court before which any proceedings are brought on appeal under this Article, shall find that such hearing or proceedings were brought by the insurer and the Commission or court by its decision orders the insurer to make, or to continue payments of benefits, including compensation for medical expenses, to the injured employee, the Commission or court may further order that the cost to the injured employee of such hearing or proceedings including therein reasonable attorney's fee to be determined by the Commission shall be paid by the insurer as a part of the bill of costs.

N.C. Gen. Stat. § 97-88. We have interpreted this provision to mean that the Commission "may order that the costs to the injured employee of appeals to this Court, including reasonable attorney's fees, be paid by the insurer if: (1) the insurer brings the appeal; and (2) this Court orders the insurer to make or continue to make payments of benefits or medical expenses." *Matthews* v.

Petroleum Tank Service, Inc., 108 N.C. App. 259, 267, 423 S.E.2d 532, 537 (1992) (citation omitted).

In the case at bar, both elements have been met. The defendants-insurers instituted the appeal, and we have affirmed the order and award of the Commission ordering defendants to continue to make payments for plaintiff's total and permanent disability. Accordingly, an award of attorney's fees is appropriate. The case is remanded to the Commission for a determination of attorney's fees and costs incurred by plaintiff in defending the appeal to this Court.

In addition, section 97-86.2 of the North Carolina General Statutes, which governs interest on unpaid benefits, provides:

> In any workers' compensation case in which an order is issued either granting or denying an award to the employee and where there is a[n] appeal resulting in a[n] ultimate award to the employee, the insurance carrier or employer shall pay interest on the final award or unpaid portion thereof from the date of the initial hearing on the claim, until paid at the legal rate of interest provided in G.S. 24-1. If interest is paid it shall not be a part of, or in any way increase attorneys' fees, but shall be paid in full to the claimant.

N.C. Gen. Stat. § 97-86.2. In accordance with this statute, this case is remanded for a determination of interest on plaintiff's unpaid benefits. *See Strickland v. Carolina Classics Catfish, Inc.*, 127 N.C. App. 615, 492 S.E.2d 362 (1997); *Childress v. Trion, Inc.*, 125 N.C. App. 588, 592, 481 S.E.2d 697, 699 (1997).

Affirmed.

Judges GREENE and MARTIN concur.

Report per Rule 30(e).