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NO. COA07-734

NORTH CAROLINA COURT OF APPEALS

Filed: 04 March 2008

WILLIE J. BROWN

Employee-Appellant

v.

North Carolina Industrial Commission
I.C. File No. 282656

BLACK AND DECKER CORPORATION and
SPECIALTY RISK SERVICES,

Employer-Insurer-Appellee

Appeal by employee-plaintiff from an Opinion and Award entered 2 February 2007 by the North Carolina Industrial Commission. Heard in the Court of Appeals 12 December 2007.

Robert M. Talford for the employee-appellant.

Rudisill, White, & Kaplan, P.L.L.C., by Garth H. White and John R. Blythe, for employer-insurer-appellee.

STEELMAN, Judge.

Findings of fact of the Industrial Commission that are supported by competent evidence in the record or are unchallenged on appeal are binding on appellate courts. When these findings support the Commission's conclusions of law, its award must be affirmed.

Factual and Procedural Background

On 2 July 2002, Willie J. Brown (plaintiff) sustained a compensable injury arising out of his employment with Black and Decker Corporation (employer) to the first and second toes of his right foot. On 15 July 2002, plaintiff returned to work on light-duty, and on 6 September

2002, plaintiff was released by his treating physician to return to regular duty, with no permanent restrictions. Plaintiff's physician assigned a one-percent (1%) permanent partial disability rating to plaintiff's right foot. The Commission approved a Form 21 Agreement on 12 March 2003.

On 28 July 2003, plaintiff was terminated by employer for unsatisfactory job performance. Two days after his termination, plaintiff returned to his treating physician complaining of cramps and numbness in his toes and also pain in his right leg and back.

On 13 April 2005, plaintiff sought modification of his compensation award based upon a change of condition. The Commission found that plaintiff's physician opined "that plaintiff's leg and back problems were likely not related to his foot injury or to any aspect of his employment with defendant-employer" and denied plaintiff's claim for additional compensation. Plaintiff appeals.

Standard of Review

"The standard of review on appeal to this Court from an award by the Commission is whether there is any competent evidence in the record to support the Commission's findings and whether those findings support the Commission's conclusions of law." *Oliver v. Lane Co.* 143 N.C. App. 167, 170, 544 S.E.2d 606, 608 (2001) (citations omitted).

Analysis

In his first argument, plaintiff contends that the Commission's finding of fact 8 is not supported by competent evidence. We disagree.

The Commission found that plaintiff's job with employer was changed after his return to work, but that the two positions "were fundamentally the same." Plaintiff argues that the two positions were not the same. We hold that there is competent evidence in the record to support the Commission's finding. Further, we hold that even if the jobs were different, this finding

would be irrelevant to whether plaintiff demonstrated a change in his medical condition supporting a modification in his award under N.C. Gen. Stat. §97-47 (2005). This argument is without merit.

In his second argument, plaintiff contends that the Commission's finding of fact 10 is not supported by competent evidence. We disagree.

The Commission found that plaintiff was counseled about his job performance on several occasions after returning to work and prior to termination, and that he had also been counseled concerning the same problems prior to his injury. We hold that there is competent evidence in the record to support this finding. Further we hold that even if the finding was not supported by competent evidence, it would be irrelevant to whether plaintiff demonstrated a change in his medical condition supporting a modification in his award under N.C. Gen. Stat. §97-47 (2005). This argument is without merit.

In his third argument, plaintiff contends that the Commission's finding of fact 15 is not supported by competent evidence. We disagree.

This finding reads as follows:

Based upon the credible medical and lay evidence of record, plaintiff has not undergone a change of condition and has failed to prove that any reduction in his earning capacity is related to his 2 July 2002 right foot injury.

Plaintiff first argues that this is really a conclusion of law and is reviewable *de novo*. We hold that this finding is an ultimate finding of fact rather than an evidentiary finding of fact, *see Woodard v. Mordecai*, 234 N.C. 463, 470, 67 S.E.2d 639, 644 (1951), and is reviewed to determine whether it is supported by competent evidence in the record.

Plaintiff's argument is two-fold. First, since he is the only person who knows about his pain, and he testified to debilitating pain, then all of the evidence shows that he is in pain.

Second, his treating physician's testimony that there is not a connection between his compensable injury and his current physical complaints is "based in speculation" and, as such, is lay testimony rather than expert testimony.

We note that plaintiff does not assign error to findings of fact 12-14, which are evidentiary in nature:

12. On 30 July 2003, two days after his termination, plaintiff returned to see Dr. Sebold and reported experiencing cramps and numbness in his toes as well as right-sided leg and back pain. Dr. Sebold testified that plaintiff's complaints on 30 July 2003 were new and different than those for which he previously provided treatment. Additionally, Dr. Sebold opined that plaintiff's leg and back problems were likely not related to his foot injury or to any aspect of his employment with defendant-employer.

13. Following his termination, plaintiff held a variety [of] jobs with several employers including Consolidated Cable, Budd's Security and Mid-American Metal. In these positions, plaintiff earned from \$200.00 to \$930.00 per week. As of the hearing date, plaintiff worked for a landscaping service.

14. At the hearing before the Deputy Commissioner, plaintiff testified that he experiences pain in his right foot and lower back and that at times he experiences a sensation in his right foot which he described as feeling as though he is walking on rocks. The Full Commission gives little weight to plaintiff's testimony in this regard due to his failure to report symptoms of this nature to defendant-employer, and the fact that he sought no medical treatment following his release by Dr. Sebold on 6 September 2002 until 30 July 2003.

Where an appellant fails to assign error to findings of fact, those findings are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). Findings of fact 12, 13, and 14 clearly support the Commission's finding of fact 15. This argument is without merit.

In his fourth argument, plaintiff contends that the Commission erred in entering Conclusion of Law 3 because all credible evidence in the record supports a change of condition resulting from debilitating pain. We disagree.

In Conclusion of Law 3, the Commission held:

There is insufficient credible evidence of record upon which to conclude that plaintiff sustained a change in condition following the approval of the Form 21 Agreement on 12 March 2003 or that any reduction in his earning capacity following his termination is related to his 2 July 2002 admittedly compensable injury. N.C. Gen. Stat. §97-47.

Once again, plaintiff asserts that his subjective complaints of pain, which the Commission found not to be credible, establish that he has a reduced earning capacity. Findings of fact 12, 13, and 14, unchallenged by plaintiff, clearly support Conclusion of Law 3. This argument is without merit.

AFFIRMED.

Judges McCULLOUGH and GEER concur.

Report per Rule 30(e).