NO. COA05-1667

NORTH CAROLINA COURT OF APPEALS

Filed: 7 November 2006

JACKSON ALEXANDRE,
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 322446

TESORO CORPORATION,
Employer,

THE TRAVELERS,
Carrier,
Defendants.

Appeal by plaintiff from opinion and award entered 4 August 2005 by the North Carolina Industrial Commission. Heard in the Court of Appeals 16 August 2006.

Kellum Law Firm, by John T. Briggs, for plaintiff-appellant.

Orbock, Ruark & Dillard, by Brook M. Webster, for defendants-appellees.

GEER, Judge.

Plaintiff Jackson Alexandre appeals from an opinion and award of the Industrial Commission, awarding him temporary total disability benefits for the period of 14 March 2003 through 30 June 2003, but holding that he failed to prove that he was disabled following that date. Because the record contains competent evidence to support the Commission's finding that plaintiff's disability ended on 30 June 2003, we affirm the opinion and award of the Industrial Commission.

Under N.C.R. App. P. 10(a), the appellate court's review is limited to those findings of fact and conclusions of law properly assigned as error. When a finding of fact is not assigned as error, the finding is presumed to be supported by competent evidence and is binding on appeal. *Dreyer v. Smith*, 163 N.C. App. 155, 156-57, 592 S.E.2d 594, 595 (2004). In this appeal, plaintiff has only assigned error to the Commission's finding of fact relating to the date his disability ended. Therefore, the remaining findings of the Industrial Commission are binding on this Court.

Facts

At the time of the Deputy Commissioner's hearing on 9 February 2004, plaintiff Jackson Alexandre was 43 years old and had been employed as a construction worker and general laborer with defendant Tesoro Corporation from 22 November 2002 through 26 March 2003. On 14 February 2003, plaintiff was working on a construction project at Camp Lejeune breaking up pieces of scrap sheetrock for disposal by kicking the sheetrock with his foot. In the process, plaintiff lost his balance, felt a pop in his back, and fell forward onto his knees.

Plaintiff reported the incident to his supervisor Dennis Boone, who drove plaintiff to Onslow Doctor's Care. There, he was diagnosed as having sustained an acute lumbar spine sprain, given medication, and was released to sedentary work. On 17 and 20 February 2003, plaintiff returned to the clinic, reporting continued low back pain. Each time, the clinic released him to return to light-duty work with specific work restrictions. On the recommendation of the clinic, plaintiff underwent four physical therapy sessions from 4 through 11 March 2003. Because of increased pain, he was discharged from the physical therapy program and told to return to a doctor for a possible referral to an orthopedist.

According to plaintiff, he telephoned his supervisor on Friday, 14 March 2003, and told him that he would not be able to work because of his pain. From 13 through 20 March 2003,

plaintiff's wife unsuccessfully sought to obtain defendants' approval for an orthopedic appointment. Because of defendants' failure to authorize the appointment, plaintiff went to the emergency room on 20 March 2003, as a result of which he was medically excused from work through 24 March 2003. Plaintiff's wife testified that she communicated to Tesoro by telephone the fact that defendant had been excused from work. Nevertheless, on 26 March 2003, Tesoro terminated plaintiff's employment in a letter stating that plaintiff was being terminated for being absent from work without notification between 18 and 21 March 2003 and from 24 through 26 March 2003.**[Note 1]**

On 3 June 2003, plaintiff was examined by Dr. George Huffmon, a neurosurgeon. Dr. Huffmon concluded, after reviewing an MRI, that plaintiff had a tear in the annulus or the outside of the disc, as well as degenerative disc disease. Dr. Huffmon testified that the work-place incident on 14 February 2003 was the cause of plaintiff's disc tear and his resulting pain. He recommended sending plaintiff to a pain clinic and to physical therapy. Dr. Huffmon expected that plaintiff would be able to return to work after four weeks of physical therapy or 30 June 2003. He indicated that if physical therapy did not help, then plaintiff should see an orthopedic surgeon.

As of the date of the Deputy Commissioner's hearing, plaintiff had not received any additional medical treatment other than an emergency room visit while he was residing in Florida. Plaintiff also has not worked in any employment since he stopped working at Tesoro on 13 March 2003.

This claim was initially heard by Deputy Commissioner Bradley W. Houser, who entered an opinion and award on 9 July 2004, awarding plaintiff total disability benefits beginning 14 March 2003 and continuing until plaintiff returned to work or until further order of the

Commission. On appeal, the Full Commission, in an opinion and award filed 4 August 2005, concluded that plaintiff had suffered an injury by accident that caused a tear in the annulus of a disc at the L5-S1 level, that plaintiff's termination by Tesoro was not a constructive refusal of suitable employment, and that plaintiff met his burden of showing that he was disabled from employment for the period 14 March through 30 June 2003. The Commission, however, further found: "After June 30, 2003, plaintiff received no medical treatment and no doctor took him out of work. As of June 30, 2003, plaintiff was capable of some work, but made no effort to find suitable employment." Accordingly, the Full Commission awarded plaintiff temporary total disability only for the period 14 March through 30 June 2003. Plaintiff timely appealed to this Court.

Discussion

Plaintiff's sole argument on appeal is that the Commission erred in concluding that he failed to satisfy his burden of proving disability after 30 June 2003. Disability is defined as an "incapacity because of injury 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) (2005). An injured employee has the burden of proving the existence and degree of the disability. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982).

In order to meet his burden, plaintiff was required to prove that "[he] can no longer earn [his] pre-injury wages in the same or any other employment, and that the diminished earning capacity is a result of the compensable injury." *Gilberto v. Wake Forest Univ.*, 152 N.C. App. 112, 116, 566 S.E.2d 788, 792 (2002). An employee may satisfy the burden of proving disability 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 preexisitng 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.

Russell v. Lowes Prod. Distribution, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (internal citations omitted).

In this case, plaintiff argues that he was not required to prove disability under *Russell* because he is entitled to an ongoing presumption of disability. Our courts have applied a presumption of disability only when (1) there has been an executed Form 21 or Form 26 or (2) there has been a prior disability award from the Industrial Commission. *Clark v. Wal-Mart*, 360 N.C. 41, 44, 619 S.E.2d 491, 493 (2005). In the absence of those two circumstances, the burden of proving continued disability remains with plaintiff. *See Cialino v. Wal-Mart Stores*, 156 N.C. App. 463, 470, 577 S.E.2d 345, 350 (2003) (holding that no presumption of disability arose where plaintiff was injured at work, there was no prior award by the Industrial Commission, and no Form 21 or Form 26 Agreement was executed by the parties).

In this case, the parties did not execute a Form 21 or Form 26 Agreement, nor is there a prior award of continuing disability from the Industrial Commission. The presumption of ongoing disability does not, therefore, apply, and plaintiff was required to introduce evidence to satisfy one of the *Russell* methods of proving disability. *Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457.

With regard to the first *Russell* method, plaintiff only provided medical evidence to support a finding of disability through 30 June 2003. Dr. Huffmon testified that after four weeks of physical therapy, or 30 June 2003, plaintiff should be able to return to work. Plaintiff did not

return to work after that date, and he presented no evidence to show that Dr. Huffmon or any other health care provider believed he was unable to work as of 30 June 2003.

Plaintiff, however, argues that Dr. Huffmon's medical opinion stating that plaintiff could return to work after 30 June 2003 is "purely speculative" and that the Commission erred by relying on it to conclude that plaintiff's disability ended after that date. This argument, however, overlooks the fact that the burden of proof was on plaintiff. Disregarding Dr. Huffmon's opinion as to the likely ending date of plaintiff's disability does not undermine the Commission's decision, since plaintiff provided no other medical evidence to support his assertion that his disability continued past 30 June 2003.

Plaintiff also failed to offer evidence to satisfy any of the other three *Russell* methods. He provided no evidence that he attempted to obtain employment elsewhere, no evidence to indicate that seeking employment would be futile, and no evidence that he has obtained other employment at a wage less than that earned prior to his injury. Therefore, the Commission did not err in concluding that plaintiff failed to meet his burden of proving disability after 30 June 2003. Accordingly, we affirm.

Affirmed.

Judges CALABRIA and JACKSON concur.

Report per Rule 30(e).

NOTE

1. Defendants further contended that they had no knowledge of any illness or injury that would prevent plaintiff from reporting to work. The Full Commission found, however, that "[g]iven the totality of the credible evidence of record," that contention "is not given any weight by the Full Commission