NO. COA09-716

NORTH CAROLINA COURT OF APPEALS

Filed: 4 May 2010

JOSEPH E. DIXON,
Employee/Plaintiff,

v. N.C. Industrial Commission
I.C. No. 385467

SEARS ROEBUCK & COMPANY,
Employer,

and

LIBERTY MUTUAL INSURANCE COMPANY,
Carrier/Defendants.

Appeal by Defendants from an Opinion and Award entered 11 March 2009 by the Full Commission of the North Carolina Industrial Commission. Heard in the Court of Appeals 5 November 2009.

R. Steve Bowden & Associates, by Jarvis T. Harris, for Plaintiff-Appellee.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Jeremy T. Canipe, for Defendant-Appellants.

BEASLEY, Judge.

Sears Roebuck & Company and Liberty Mutual Insurance Company (collectively "Defendants") appeal from an Opinion and Award made

by the North Carolina Industrial Commission (Commission) concluding that Joseph Dixon (Plaintiff) was entitled to have his medical expenses and "other out of pocket expenses reasonably related to [his] claim, incurred or to be incurred by [P]laintiff as a result of his compensable injury" to be paid by Defendants. For the reasons stated below, we affirm.

On 7 November 2003, Plaintiff was an employee of Sears Roebuck located in Greensboro, North Carolina when he suffered compensable injuries to his left wrist, left shoulder, left ankle, and back. The injury occurred when a dryer he was holding fell apart in his hands. Sears Roebuck filled out a Form 60, titled "Employer's Admission of Employee's Right to Compensation (G.S. 97-18(b))." The form stated that, "[Plaintiff's] employer admits [Plaintiff's] right to compensation for an injury by accident on 11/7/2003. . . . The description of the injury by accident or occupational disease is: CUT ON LT WRIST, INJURED LEFT SHOULDER AND LEFT ANKLE."

In September 2006, Defendants filed a Form 33, titled "Request That Claim Be Assigned For Hearing," contending that Plaintiff was not disabled within the meaning of the Workers' Compensation Act. Defendants sought "reimbursement for overpayment of TTD benefits subject to the time that [Plaintiff] was no longer disabled under the North Carolina Workers' Compensation Act[,]" claiming that

"Plaintiff's disability [was] unrelated to the compensable injuries sustained in the incident giving rise to this claim."

In July 2008, Deputy Commissioner Robert W. Rideout, Jr. of the North Carolina Industrial Commission issued an Opinion and Award concluding, in pertinent part, that: (1) Plaintiff had suffered "a compensable injury by accident of the work assigned in the course and scope of his employment on November 7, 2003"; (2) Plaintiff was entitled to benefits under the North Carolina Workers' Compensation Act; and (3) Plaintiff's injuries to his shoulder and left ankle were a direct and natural result of his November 7, 2003 injury, requiring surgical intervention and physical therapy. The Opinion and Award ordered, among other things, that Defendant pay temporary total disability benefits to Plaintiff, that Defendants pay for all medical expenses "incurred or to be incurred by Plaintiff as a result of his compensable injury", and that Defendant "pay for any future necessary medical compensation that is reasonably related to this claim." From this Opinion and Award, Defendants appealed.

In January 2009, Defendants' appeal came before the Full Commission. In March 2009, Commissioner Laura Kranifeld Mavretic entered an Opinion and Award concluding the following, in pertinent part: (1) Plaintiff "sustained a compensable injury by accident arising out of and in the course of his employment with

[Defendants;]" (2) Plaintiff's diagnosis of Deep Vein Thrombosis (DVT) and left knee condition are "direct and natural consequences that flow from his compensable November 7, 2003 injury[;]" (3) Plaintiff met his burden of continuing disability "by showing through medical evidence that he is physically, because of the work-related injury, incapable of work in any employment[;]" (4) Plaintiff is entitled to ongoing temporary total disability compensation; and (5) Plaintiff is entitled to have Defendants pay for all related medical expenses "incurred or to be incurred necessary to provide relief, lessen disability or shorten the healing period[.]" From this Opinion and Award, Defendants appeal.

Defendants first argue that the Commission erred when it concluded that Plaintiff's "left knee meniscal tear was the natural consequence of the compensable left ankle and left shoulder injury." Defendants contend that the record failed to contain competent evidence or medical testimony to support the Commission's finding that Plaintiff's injury was the "natural consequence of either his compensable November 7, 2003 injury by accident or the related, post-operative physical therapy." We disagree.

The "'Workers' Compensation Act should be liberally construed to effectuate its purpose to provide compensation for injured employees . . . and its benefits should not be denied by a

technical, narrow, and strict construction.'" *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998) (quoting *Hollman v. City of Raleigh*, 273 N.C. 240, 252, 159 S.E.2d 874, 882 (1968)). "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." *Johnson v. Herbie's Place*, 157 N.C. App. 168, 171, 579 S.E.2d 110, 113 (2003) (internal quotations omitted). "[O]n appeal, the 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*, 349 N.C. at 681, 509 S.E.2d at 414 (emphasis added and internal quotations omitted).

Defendants argue that the "torn left meniscus would be compensable only if it was caused by an 'aggravation of the original injury or a new and distinct injury, which was the direct and natural result of a prior compensable injury.'" We agree with this contention. Defendants also contend that the Full Commission erroneously relied on the testimony of Dr. Paul A. Bednarz in determining that "a causal connection [existed] between Plaintiff's torn left meniscus and his injury by accident or subsequent

physical therapy." Based on the evidence in the record, we conclude that there was competent evidence to support the Commission's findings of fact and that the findings of fact support the conclusions of law.

"[I]f the evidence before the Commission is capable of supporting two contrary findings, the determination of the Commissioner is conclusive on appeal." *Vandiford v. Stewart Equipment Co.*, 98 N.C. App. 458, 462, 391 S.E.2d 193, 195 (1990). Defendants argue that Dr. Bednarz "only testified regarding a causal connection between the 2004 physical therapy incident and the 2004 left knee symptoms." However, in Dr. Bednarz's deposition, Plaintiff's counsel and Dr. Bednarz had the following exchange:

> [PLAINTIFF COUNSEL]: Now, Dr. Bednarz, kind of moving away a little bit from the ankle but going back to the knee, which is also kind of one of the issues here today, you testified earlier that you - - that the MRI from 2004 showed a displaced patella or a tilted patella. If the Industrial Commission were to find that [Plaintiff] was participating in physical therapy for his ankle and had an injury - - or suffered an injury on a - using a compression machine or extension machine, which led to the clicking and popping in his knee, would you have an opinion within a reasonable degree of medical certainty and satisfactory unto yourself as an expert in orthopedic surgery whether or not that particular incident was *causally related to the clicking and popping in his knee* that you

> examined him for, and, if so, what is that opinion?
> . . . .
>
> [DR. BENDARZ]: Well, he didn't have the knee pain before that and had it after, so it's *likely the cause*. (emphasis added).

Dr. Bednarz also testified that the meniscal tear that "showed up in 2007 but wasn't there in 2004 . . . could have degenerated over two years[.]"

From this deposition, the Commission found that "Dr. Bednarz further testified that the clicking and popping in plaintiff's knee was not present prior to the physical therapy incident. . . Dr. Bednarz further stated his belief that physical therapy likely caused plaintiff's clicking . . . in his knee[.]" Defendants argue that Dr. Bednarz's testimony merely supports the finding that the physical therapy caused the left knee symptoms and not the injury itself. We disagree. We hold that the Commission's finding is conclusive on appeal and that Dr. Bednarz's deposition serves as competent evidence to support the Commission's finding of fact. *Vandiford*, 98 N.C. App. at 462, 391 S.E.2d at 195. The Commission's conclusion that "plaintiffs DVT and left knee condition [were the] direct and natural consequences that flow[ed] from his compensable November 7, 2003 injury" was supported by their findings of fact. Because Dr. Bednarz testified that the

physical therapy likely caused Plaintiff's clicking and popping and the physical therapy Plaintiff underwent was due to his November 7, 2003 injury, we conclude that the Commission did not err in making this conclusion. This assignment of error is overruled.

Defendants also argue that the Commission erred when it concluded that Plaintiff was entitled to additional benefits because there was no competent evidence to support Plaintiff's disability after Plaintiff reached maximum medical improvement. Defendants contend that Plaintiff "has failed to put forth competent evidence proving the existence and extent of his alleged disability subsequent to being rated and released on February 7, 2007." We disagree.

Under the North Carolina Workers' Compensation Act, "[t]he term 'disability' means 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) (2009). "The burden is on the employee to show that he is unable to earn the same wages he had earned before the injury, either in the same employment or in the other employment." *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (citation omitted). Plaintiff can meet his 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 preexisting 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. (citations omitted). "Once an employee meets [his] initial burden of production [of showing a disability], the burden of production shifts to the employer to show that suitable jobs are available and that the employee is capable of obtaining a suitable job taking into account both physical and vocational limitations." *Demery v. Perdue Farms, Inc.*, 143 N.C. App. 259, 265, 545 S.E.2d 485, 490 (2001) (internal quotations omitted).

Our review is limited to whether there is competent evidence to support the Commission's findings of fact and whether those findings of fact support the conclusions of law. *Johnson,* 157 N.C. App. at 171, 579 S.E.2d at 113. Among its numerous findings, the Commission found that "Plaintiff [had] not been released to full duty by any of his doctors, and defendant-employer has not offered plaintiff any job that would accommodate his restriction." The Commission also found that, "[t]he medical evidence of record shows

that plaintiff was taken out of work by Dr. Allen on September 17, 2007 and that he has not been released to return to work . . . . [T]he record shows that prior to being taken out of work, plaintiff attempted unsuccessfully to return to work with other employers."

The evidence establishes that none of Plaintiff's doctors released Plaintiff to full duty. In their depositions, neither doctors Norris, Poehling, Dainty, nor Bednarz testified that Plaintiff should be "released to full duty[,]" but listed numerous restrictions as conditions if Plaintiff were to return to employment. The evidence also shows that Plaintiff was taken completely out of work by Dr. Allen on 17 September 2007. Plaintiff testified that he had applied for several jobs, but that he was unsuccessful in obtaining employment. If there is any evidence to support the Commission's finding, it is conclusive on appeal. *Adams*, 349 N.C. at 681, 509 S.E.2d at 414. Even though there was evidence that Plaintiff had been offered employment but chose not to accept it, the Commission found, based on competent contrary evidence, that "[P]laintiff attempted unsuccessfully to return to work with other employers." This determination is conclusive on appeal. *Vandiford*, 98 N.C. App. at 461, 391 S.E.2d at 195.

The Commission concluded that "[Plaintiff had] met his burden by showing through medical evidence that he [was] physically,

because of the work-related injury, incapable of work in any employment." We conclude that the Commission's conclusion of law regarding Plaintiff's inability to work in any employment is supported by the findings of fact stated above. Plaintiff has met his burden of showing that, as a result of his work-related injury, he is incapable of work in any employment and that he is disabled under the meaning of the North Carolina Workers' Compensation Act. This assignment of error is overruled.

For the foregoing reasons, we affirm.

Affirmed.

Judges STEPHENS and STROUD concur.

Report per Rule 30(e).