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NO. COA06-448

NORTH CAROLINA COURT OF APPEALS

Filed: 6 February 2007

CECIL MCDANIEL,
Employee
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 398514

CONTINENTAL TIRE, SELF-INSURED
(Gallagher Bassett Services,
Inc., Servicing Agent), EMPLOYER
Defendant.

Appeal by defendant from Opinion and Award dated 16 December 2005 by the Full Commission. Heard in the Court of Appeals 13 December 2006.

No brief filed for plaintiff-appellee.

Hedrick, Eatman, Gardner & Kincheloe, by Joel K. Turner, for defendant-appellant.

BRYANT, Judge.

Continental Tire (defendant-employer) appeals from an Opinion and Award dated 16 December 2005 by the Full Commission awarding Cecil McDaniel (plaintiff-employee) payment of temporary total disability benefits at a rate of \$533.80 weekly from 10 February 2004 and ongoing . Plaintiff was also awarded attorneys fees. In addition, the Full Commission concluded defendants are “entitled to an appropriate credit for the short-term benefits that have been paid to plaintiff” at a rate of 75% of the short-term benefits paid each week on a “week-by-week rather than on a dollar-for-dollar basis.”

Plaintiff worked for defendant for nearly twenty-six years in various positions.

On 18 January 2004, plaintiff was working as a palletizer which duties included strapping down tires by using black rubber straps to hold the tires onto pallets, securing the pallets to the inner portion of the tires at four different points on each pallet. On that date, plaintiff reported to his supervisor, Jim Daniels , that he had injured his back. On 2 February 2004 plaintiff's right arm went completely numb after experiencing severe pain while performing his job duties. At that time, plaintiff and his supervisor agreed that plaintiff should report to the Plant Nurse, Deborah Crawford, because of the intensity of the pain plaintiff had felt in the back of his neck radiating down into his right shoulder, arm, and hand. Ms. Crawford sent plaintiff to OccMed for further evaluation by Dr. Keith Baugh. Dr. Baugh gave plaintiff work restrictions of "no strapping down tires." Plaintiff worked light duty from 2 February 2004, until 11 February 2004. At that time, defendant requested that plaintiff go out of work on short-term disability because he was unable to perform his regular job duties. Defendant paid plaintiff \$385.00 per week in short-term disability benefits . On 10 February 2004, plaintiff was seen by Dr. Daniel Murrey, at Charlotte Orthopedic Specialists, and was diagnosed with new onset right upper extremity radiculopathy. Plaintiff was given restrictions of no lifting greater than thirty pounds, no prolonged reaching overhead or extreme neck positions, and no awkward lifting.

On 25 March 2004, due to plaintiff's continuing neck pain, Dr. Murrey recommended facet blocks[**Note 1**]. On 29 April 2004 Dr. Murrey stated that he had little additional treatment to offer plaintiff. Thereafter, plaintiff began treatment with Dr. Ronald Vandernoord, who performed the recommended facet block injections. During a follow-up visit on 18 August 2004, Dr. Vandernoord stated that the injections were not improving plaintiff's symptoms. During his deposition, Dr. Vandernoord stated that Dr. Murrey's previous restrictions of "no lifting greater

than thirty pounds, no prolonged reaching overhead[] or extreme neck positions, and no awkward lifting or rotation” were appropriate at that time.

On 14 October 2004, plaintiff began treatment with Dr. William Lehman at Carolina Orthopaedic Surgery Associates. Dr. Lehman diagnosed plaintiff with chronic cervical pain, for which he stated surgical intervention did not appear to be a reasonable approach, but that pain management may be an option. Further, Dr. Lehman testified that he thought plaintiff was capable of working some type of sedentary employment, but not in plaintiff’s present job with defendant. Dr. Lehman testified that based on his physical examination, his review of plaintiff’s medical records, and plaintiff’s statements as to his own capabilities, plaintiff was capable of light duty work, lifting up to twenty pounds with frequent lifting and/or carrying up to ten pounds. He testified that he agreed with Drs. Vandernoord and Murrey’s opinions that plaintiff was employable. Dr. Lehman also stated during the same deposition that plaintiff appeared to be unemployable due to a lack of transferable skills.

Plaintiff’s claim was heard by Deputy Commissioner Phillip A. Holmes on 26 October 2004. At the 26 October 2004 hearing, plaintiff testified that since he last worked for defendant on 11 February 2004, he has not looked for work as he did not believe he was physically capable of working, despite the medical opinions of his physicians to the contrary. On 9 February 2005, Deputy Commissioner Holmes issued an Opinion and Award, which found that plaintiff had sustained an injury by specific traumatic incident to his back as defined under N.C. Gen. Stat. §97-2(6). Further, plaintiff was awarded ongoing disability and medical benefits, but defendant was granted a full credit for short-term disability benefits previously paid, pursuant to N.C. Gen. Stat. §97-42.

Subsequently, defendant appealed to the Industrial Commission on 21 February 2005. Defendant argued that there was no competent or credible evidence that plaintiff sustained a compensable specific traumatic incident on or about 18 January 2004, and, further, even if plaintiff did sustain a compensable injury, he had not met his burden of proving disability and was not entitled to ongoing disability benefits pursuant to N.C. Gen. Stat. §97-29. On 16 December 2005, the Full Commission issued an Opinion and Award essentially affirming Deputy Commissioner Holmes' previous Opinion and Award with several changes including a reduced credit for short-term disability benefits. A dissent was issued by Commissioner Buck Lattimore. Defendant appeals.

Defendant raises two issues on appeal whether the Full Commission erred in: (I) concluding that plaintiff is disabled and entitled to ongoing disability benefits and (II) failing to award defendant a full credit for employer-funded short-term disability benefits.

I

Defendant argues the Full Commission erred in concluding that plaintiff is disabled and entitled to ongoing disability benefits. Defendant is appealing the Full Commission's Conclusion of Law number two, which states, "[p]laintiff is entitled to temporary total disability compensation at the rate of \$533.80 per week from February 10, 2004, through the present and until such time as he returns to gainful employment at the same or greater wages, as a result of this injury by accident. N.C. Gen. Stat. §97-29." For the reasons stated below, we reverse and remand to the Commission for additional findings of fact.

"When reviewing Industrial Commission decisions, appellate courts must examine whether any competent evidence supports the Commission's findings of fact and whether [those]

findings . . . support the Commission’s conclusions of law.” *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 700 (2004) (citation and internal quotation marks omitted). “While the Industrial Commission is not required to make specific findings of fact on every issue raised by the evidence, it is required to make findings on crucial facts upon which the right to compensation depends.” *Gaines v. L. D. Swain & Son, Inc.*, 33 N.C. App. 575, 579, 235 S.E.2d 856, 859 (1977). “Where the findings are insufficient to enable the court to determine the rights of the parties, the case must be remanded to the Commission for proper findings of fact.” *Lawton v. County of Durham*, 85 N.C. App. 589, 592, 355 S.E.2d 158, 160 (1987).

Disability under the Workers’ Compensation Act is defined as “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). Plaintiff may meet his burden of showing 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 working in any employment;
- (2) the production of evidence that he is capable of some kind of work but that he has, after 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.

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

“Medical evidence that the plaintiff suffers from pain as a result of physical injury, combined with the plaintiff’s own testimony that he is in pain has been held to be sufficient to support a conclusion of total disability.” *Weatherford v. Am. Nat’l Can Co.*, 168 N.C. App. 377, 380-81, 607 S.E.2d 348, 351 (2005) (citation omitted). “The work-related injury need not be the sole

cause of the problems to render an injury compensable. If the work-related accident contributed in some reasonable degree to plaintiff's disability, [he] is entitled to compensation." *Smith v. Champion Int'l*, 134 N.C. App. 180, 182, 517 S.E.2d 164, 166 (1999) (citations omitted).

Defendant challenges whether competent evidence of record supports several of the Commission's factual findings with respect to the Commission's conclusion that plaintiff has an ongoing disability as a result of his 18 January 2004 work-related injury. Dr. Lehman, who testified as an orthopedic surgeon and who specializes in the treatment of spinal injuries, indicated that plaintiff is

not able to go back to . . . work at General Tire. They don't have any alternative job activity. Basically Mr. McDaniel does not have any transferrable skills. He can't go into heating and air conditioning, carpentry or anything else. So basically it would appear at this point that he is unemployable.

Further, plaintiff testified to the fact that he is not certain as to what type of continuing treatment he will need. Plaintiff also testified:

There's nothing I can do. I mean - I mean my neck hurts all the time. There's no lifting I can do, sitting bothers me, standing bothers me. I mean you know, it's just - arm - if I do - do a lot of lifting or moving or anything like that, it just - I get a tingling sensation down my arms. I mean there's nothing I can do.

Here, the Commission made no findings regarding the nature of plaintiff's disability or its extent. The Commission found that "at this time plaintiff is unemployable until such time as he receives a functional capacity evaluation and/or vocational rehabilitation" but that he "has not reached MMI and remains temporarily disabled" and that although plaintiff "continues to be unemployed as a result of the work related injury of January 18, 2004[, he] has not looked for other employment." However, the Commission made no detailed findings as to plaintiff's pain, including his physical injuries and limitations, or as to any of the *Russell* factors. Because the

Commission's findings on crucial facts upon which the right to compensation depends are insufficient to enable us "to determine the rights of the parties, the case must be remanded to the Commission for proper findings of fact." *Lawton* at 592, 355 S.E.2d at 160.

Reversed and remanded.

Judges MCGEE and ELMORE concur.

Report per Rule 30(e).

NOTE

1. Facet blocks are injections of cortisone in the back used to alleviate tightness at the vertebrae above and below the plaintiff's spinal fusions that resulted from a previous injury to plaintiff's neck.