NO. COA08-267

NORTH CAROLINA COURT OF APPEALS

Filed: 2 December 2008

DONALD WATTS,
Employee,
Plaintiff-Appellee,

v.

North Carolina Industrial Commission
I.C. File No. 401888

E.I. DUPONT DE NEMOURS,
Employer,
and
KEMPER INSURANCE COMPANY,
Carrier,
Defendants-Appellants,

Appeal by defendants from opinion and award of the Full Commission of the North Carolina Industrial Commission entered 29 November 2007 by Commissioner Christopher Scott. Heard in the Court of Appeals 10 September 2008.

Hardison & Cochran P.L.L.C., by Benjamin T. Cochran and J. Jackson Hardison, for plaintiff-appellee.

Lewis & Roberts, PLLC, by John D. Elvers and Sarah C. Blair, for defendants-appellants.

JACKSON, Judge.

E.I. DuPont De Nemours ("defendant") appeals from an opinion and award of the Full Commission of the North Carolina Industrial Commission ("Full Commission") entered 29 November 2007. For the following reasons, we affirm.

On 23 September 1993, Donald Watts ("plaintiff") developed bilateral carpal tunnel syndrome as a result of his employment with defendant. At that time, plaintiff was employed by defendant as a plastics technician. Defendant and Kemper Insurance Company ("Insurance Company"), defendant's insurance carrier (collectively, "defendants"), accepted plaintiff's claim pursuant to a Form 21 agreement for compensation.

On 29 August 1994, Dr. Mark Brenner ("Dr. Brenner") of Pinehurst Surgical Clinic performed a left cubital tunnel release and a left carpal tunnel release on plaintiff. On 10 October 1994, Dr. Brenner performed a right cubital tunnel release and a right carpal tunnel release on plaintiff.

On 12 July 1995, plaintiff presented to Dr. James A. Nunley ("Dr. Nunley") of Duke University Medical Center who concluded that plaintiff had reached maximum medical improvement. Dr. Nunley assigned a five percent permanent partial disability rating to each hand and released plaintiff to return to work.

On 24 January 1996, plaintiff returned to Dr. Brenner who assigned an eight percent permanent partial disability rating to each hand and released plaintiff to return to work.

On 12 January 1999, Dr. Barry White ("Dr. White") of Cape Fear Neurology Associates performed an independent medical evaluation on plaintiff. Dr. White assigned a five percent permanent partial disability rating to each hand and released plaintiff to return to work with restrictions.

Defendants made numerous attempts to provide vocational rehabilitation to plaintiff, but plaintiff consistently refused to cooperate with defendants' efforts. As a result, on 28 April 1999, Special Deputy Commissioner Gina E. Cammarano ("Special Deputy Commissioner

Cammarano") issued an order directing plaintiff to comply with reasonable vocational rehabilitation services provided by defendants.

Plaintiff, however, continued to refuse to cooperate with vocational rehabilitation. On 28 June 1999, defendants filed a Form 24 application to terminate or suspend compensation. On 16 August 1999, Special Deputy Commissioner Cammarano conducted an informal hearing, and by order entered 23 August 1999, approved defendants' Form 24 application and allowed defendants to suspend payment of compensation from 2 June 1999 until plaintiff ceased his refusal to cooperate with vocational rehabilitation services as previously ordered by Special Deputy Commissioner Cammarano.

On 21 September 1999, plaintiff filed a Form 33 request for hearing appealing Special Deputy Commissioner Cammarano's approval of defendants' Form 24 application.

On 25 October 2000, at a hearing before Deputy Commissioner Theresa B. Stephenson ("Deputy Commissioner Stephenson"), plaintiff testified that he would participate in vocational rehabilitation. Linda DeBaer ("DeBaer"), a vocational rehabilitation counselor, testified that during the months she had worked with plaintiff, plaintiff had refused to consider any positions which did not pay him $20.00 per hour or more, required him to drive more than eighteen miles, or were temporary. Plaintiff also refused to work overtime. Plaintiff informed DeBaer that he would not be willing to work for any employer other than defendant.

On 20 November 2000, Deputy Commissioner Stephenson and counsel for both parties participated in a conference call. Deputy Commissioner Stephenson agreed to suspend disposition of the case and allow defendants to resume vocational rehabilitation, and the parties agreed that plaintiff was required to cooperate with vocational rehabilitation for a reasonable

period of time to prove that he had good faith intentions of cooperating with these rehabilitation efforts.

On 11 January 2001, however, plaintiff failed to cooperate with vocational rehabilitation when he refused to meet with a vocational rehabilitation counselor at plaintiff's former attorney's office. On 15 January 2001, then counsel for plaintiff requested that she be allowed to withdraw as counsel of record in this case.

On 12 February 2001, Deputy Commissioner Stephenson filed an opinion and award finding that plaintiff unjustifiably had refused to cooperate with reasonable vocational rehabilitation efforts since 2 June 1999. She concluded that Special Deputy Commissioner Cammarano properly approved defendants' Form 24 application to suspend plaintiff's disability benefits. Deputy Commissioner Stephenson also awarded defendants a credit for any compensation benefits paid after 2 June 1999.

On 5 March 2001 , plaintiff, proceeding *pro se*, appealed from Deputy Commissioner Stephenson's opinion and award to the Full Commission.

On 11 January 2002, the Full Commission entered an opinion and award affirming Deputy Commissioner Stephenson's opinion and award in all respects. Plaintiff subsequently appealed the Full Commission's opinion and award to this Court and filed two motions with the Full Commission to reconsider its 11 January 2002 opinion and award.

On 25 February 2002 and 2 March 2002, the Full Commission entered orders denying each of plaintiff's motions for reconsideration. However, in its 2 March 2002 order, the Full Commission provided that "plaintiff's benefits would be reinstated upon notification to the Executive Secretary of the Industrial Commission that he stands willing to comply with the

assigned vocational rehabilitation." On 10 May 2002, the Full Commission dismissed plaintiff's appeal to this Court for failure to file a proposed record on appeal.

On 5 June 2002, plaintiff moved the Full Commission for reinstatement of compensation based on a change of condition. On 8 October 2002, the Full Commission denied plaintiff's motion.

On 24 October 2002, the matter came on for hearing before Deputy Commissioner Nancy W. Gregory ("Deputy Commissioner Gregory"). Plaintiff testified that (1) he had not participated in vocational rehabilitation since his 11 January 2001 scheduled meeting with DeBaer; (2) Dr. Brenner had indicated that plaintiff should not return to vocational rehabilitation; and (3) plaintiff had done the best he could to cooperate with vocational rehabilitation.

Following the 24 October 2002 hearing, the parties deposed Dr. Brenner. Contrary to plaintiff's testimony, Dr. Brenner testified at his deposition that vocational rehabilitation would have a much greater chance of success if plaintiff was willing to cooperate with a vocational counselor, to perform the activities that he or she requested, and to forego the limitations plaintiff previously had indicated to DeBaer. Furthermore, Dr. Brenner had no independent recollection of receiving any information about plaintiff's vocational rehabilitation efforts from anyone other than plaintiff, and noted that plaintiff did not mention anything to him regarding DeBaer's efforts to provide vocational rehabilitation or plaintiff's failure to comply with DeBaer's efforts.

On 30 January 2003, Deputy Commissioner Gregory found that plaintiff failed to prove that he was willing to cease his refusal to cooperate with vocational rehabilitation for the purpose of reinstating benefits. Deputy Commissioner Gregory denied plaintiff's claim for additional benefits, and allowed defendants to continue their suspension of plaintiff's disability benefits.

On 16 August 2004, Executive Secretary Tracey H. Weaver ("Executive Secretary Weaver") responded by letter to plaintiff's correspondence of 16 July 2004 and indicated that there was no further action to be taken by the Full Commission following Deputy Commissioner Gregory's opinion and award on 30 January 2003. Plaintiff subsequently filed a motion to reinstate benefits pursuant to North Carolina General Statutes, section 97-18.1. On 9 February 2005, Executive Secretary Weaver denied plaintiff's motion. On 14 February 2005 , plaintiff appealed Executive Secretary Weaver's denial of plaintiff's motion.

On 18 May 2005, Deputy Commissioner Adrian A. Phillips ("Deputy Commissioner Phillips") heard the matter. At the hearing, plaintiff testified that he has searched for employment since 5 November 2004 in an effort to have vocational rehabilitation and disability benefits reinstated. Plaintiff also provided job search logs that he had maintained since 5 November 2004. Plaintiff's job search logs include the date of search, name of the company, name of the manager, hiring status, and phone number of the potential employer. Plaintiff testified that he has been in contact with each employer listed in his job search logs, but admitted, however, that every job log listing he provided states that the prospective employer is not hiring or requires experience that plaintiff does not possess. Plaintiff further testified that, prior to November 2004, he did not look for a job on a day-to-day basis, but that since November 2004, he goes out and inquires whether employers are hiring or taking applications, and he goes to the "Employment Office" once a week. Finally, plaintiff testified that he had not received any workers' compensation benefits since 1999.

On 16 August 2005, upon defendants' request, the parties agreed to have a vocational rehabilitation expert, George Page("Page"), follow up with plaintiff's prospective employers to determine the extent of plaintiff's job search.

On 31 August 2005, Deputy Commissioner Phillips entered an opinion and award from the 18 May 2005 hearing that denied plaintiff's claim and allowed defendants to suspend plaintiff's workers' compensation benefits permanently . On 7 September 2005, plaintiff appealed Deputy Commissioner Phillips' opinion and award to the Full Commission.

On 9 October 2007, the Full Commission reviewed Deputy Commissioner Phillips' opinion and award. On 29 November 2007, the Full Commission entered an opinion and award reversing Deputy Commissioner Phillips' opinion and award from 31 August 2007 . From the Full Commission's opinion and award, defendants appeal.

On appeal, defendants first argue that there is no competent evidence to support a finding that plaintiff has demonstrated a willingness to comply with vocational rehabilitation, and, therefore, plaintiff's workers' compensation benefits should be suspended pursuant to North Carolina General Statutes, section 97-25. We disagree.

In pertinent part, section 97-25 provides that

> [t]he refusal of the employee to accept any medical, hospital, surgical or other treatment or rehabilitative procedure when ordered by the Industrial Commission shall bar said employee from further compensation until such refusal ceases, and no compensation shall at any time be paid for the period of suspension unless in the opinion of the Industrial Commission the circumstances justified the refusal . . . .

N.C. Gen. Stat. §97-25 (2007).

"Appellate review of an award from the Industrial Commission is generally limited to two issues: (1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are justified by the findings of fact." *Clark v. Wal-Mart*, 360 N.C. 41, 43, 619 S.E.2d 491, 492 (2005) (citing *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 186, 345 S.E.2d 374, 379 (1986)). "Under the first inquiry, the findings of fact are conclusive on

appeal so long as they are supported by *any* competent evidence, even if other evidence would support contrary findings." *Calloway v. Memorial Mission Hosp.*, 137 N.C. App. 480, 484, 528 S.E.2d 397, 400 (2000) (emphasis in original) (citing *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998)). "'The [Full] Commission is the sole judge of the credibility of the witnesses and the [evidentiary] weight to be given their testimony.'" *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998) (quoting *Anderson v. Construction Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965)), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999). Findings of fact by the Full Commission may be set aside on appeal only in the complete absence of competent evidence to support them. *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 914 (2000) (citing *Saunders v. Edenton OB/GYN Ctr.*, 352 N.C. 136, 140, 530 S.E.2d 62, 65 (2000)). "'This Court reviews the [Full] Commission's conclusions of law *de novo*.'" *Raper v. Mansfield Sys., Inc.*, __ N.C. App. __, __, 657 S.E.2d 899, 904 (2008) (quoting *Britt v. Gator Wood, Inc.*, 185 N.C. App. 677, 681, 648 S.E.2d 917, 920 (2007)). "If the conclusions of the[Full] Commission are based upon a deficiency of evidence or misapprehension of the law, the case should be remanded so 'that the evidence [may] be considered in its true legal light.'" *Clark*, 360 N.C. at 43, 619 S.E.2d at 492 (second brackets in original) (quoting *McGill v. Lumberton*, 215 N.C. 752, 754, 3 S.E.2d 324, 326 (1939)).

Defendants argue that the competent evidence of record establishes plaintiff's consistent refusal to comply with vocational rehabilitation offered by defendants and ordered by Special Deputy Commissioner Cammarano. Defendants assign error to and offer argument against the Full Commission's findings of fact numbered 22 and 23 as well as the Full Commission's conclusion of law number 2. *See* N.C. R. App. P. 28(b)(6) (2007).

The Full Commission found as follows:

> 22. In performing his assignment, Mr. Page contacted forty-three of the prospective employers listed in Plaintiff's job logs. Of the forty-three employers, Mr. Page visited thirty-six employers directly and contacted six employers *via* telephone. Out of the thirty-four employers that Mr. Page actually spoke with, twenty-five of the employers remembered Plaintiff inquiring about a position. Mr. Page was of the opinion that the majority of the places [plaintiff] visited would have been inappropriate employment options for him due to his restrictions and lack of skills; *however, the fact remains that plaintiff made a sincere effort to find employment with a large number of employers with businesses spanning a variety of industries*.
>
> 23. Based on the totality of the evidence of record, including Plaintiff's testimony and his submitted job logs, *the Full Commission finds that Plaintiff has shown that he has made a significant effort to obtain employment and, thus, has shown a willingness to comply with vocational rehabilitation*. The Full Commission further finds that plaintiff has shown continuing disability through 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.

(Emphasis added).

The Full Commission's conclusion of law number 2 states that

> [b]ecause plaintiff has shown continuing disability and a willingness to comply with vocational rehabilitation as ordered by the Commission, plaintiff is entitled to the reinstatement of his temporary and total disability compensation at the weekly rate of $442.00 from November 5, 2004, the date Plaintiff began his job search, and continuing until further order of the Commission. N.C. Gen. Stat. §97-29.

In an effort to illustrate competent evidence contrary to the Full Commission's findings of fact numbered 22 and 23, defendants note that several of plaintiff's prospective employers require skills that plaintiff does not possess, such as the ability to speak Spanish. Defendants also attempt to demonstrate plaintiff's lack of sincerity by relying upon Page's report which states that Page

> spoke with Peggy DeLeon [at The Thrift Shop]. Ms. DeLeon indicated that [plaintiff] had been by three to four times. She noted he generally sticks his head in the door and asks whether or not they are hiring. She states she always tell[s] him that they never hire, that they are a husband and wife store. She notes that he always just sticks his head in the door and acts as if he's in a hurry. She notes that he wears his hand splints and he is generally in and out very quick[ly]. Her impression is that he's really not looking for a job. She also indicated [that plaintiff] told her that if someone asked, she did not have to tell that they weren't hiring, just that he was looking.

Defendants, however, misapprehend our standard of review. "[S]o long as there is some 'evidence of substance which directly or by reasonable inference tends to support the findings, this Court is bound by such evidence, even though there is evidence that would have supported a finding to the contrary.'" *Shah v. Howard Johnson*, 140 N.C. App. 58, 61-62, 535 S.E.2d 577, 580 (2000) (quoting *Porterfield v. RPC Corp.*, 47 N.C. App. 140, 144, 266 S.E.2d 760, 762 (1980)), *disc. rev. denied*, 353 N.C. 381, 547 S.E.2d 17 (2001).

In the case *sub judice*, the evidence before the Full Commission included plaintiff's testimony that he was willing to comply with vocational rehabilitation efforts in order to reinstate his workers' compensation benefits as well as plaintiff's job search logs dating back to November 2004. Despite contradictory evidence, it is within the exclusive province of the Full Commission to determine the credibility of and the weight to be given to the evidence. *Adams*, 349 N.C. at 680, 509 S.E.2d at 413. Accordingly, we hold that the Full Commission's findings of fact numbered 22 and 23 are supported by competent evidence.

We next inquire whether the Full Commission's conclusion of law number 2 is justified by the findings of fact. *Clark*, 360 N.C. at 43, 619 S.E.2d at 492. Upon review of the record, we hold that it is. The parties' stipulation that plaintiff's compensation rate is $442.00 in conjunction

with the Full Commission's findings of fact support the Full Commission's conclusion of law number 2. Accordingly, defendants' first argument is without merit.

Next, defendants argue that the Full Commission erred in concluding that permanent suspension of plaintiff's workers' compensation benefits is not warranted. We disagree.

In pertinent part, the Commission concluded as follows:

> 2. Because plaintiff has shown continuing disability and a willingness to comply with vocational rehabilitation as ordered by the Commission, plaintiff is entitled to the reinstatement of his temporary total disability compensation . . . .
>
> 3. Plaintiff is entitled to have the Defendants provide vocational rehabilitation services to him, and Plaintiff is directed to comply with such services. N.C. Gen. Stat. §97-25.

As noted *supra*, North Carolina General Statutes, section 97-25 provides that

> [t]he refusal of the employee to accept any medical, hospital, surgical or other treatment or rehabilitative procedure when ordered by the Industrial Commission shall bar said employee from further compensation *until such refusal ceases*, and no compensation shall at any time be paid for the period of suspension unless in the opinion of the Industrial Commission the circumstances justified the refusal . . . .

N.C. Gen. Stat. §97-25 (2007) (emphasis added).

Defendants argue that the Full Commission strictly construed North Carolina General Statutes, section 97-25 to prohibit a permanent suspension of benefits and effectively allow plaintiff to seek reinstatement of workers' compensation benefits indefinitely, despite prior findings of Special Deputy Commissioner Cammarano, Deputy Commissioner Stephenson, Deputy Commissioner Gregory, and Deputy Commissioner Phillips.

We are not persuaded by defendants' argument. We previously have held that section "97-25 is clear in its mandate that a claimant who refuses to cooperate with a rehabilitative procedure is only barred from receiving further compensation 'until such refusal ceases . . . .'"

Sanhueza v. Liberty Steel Erectors, 122 N.C. App. 603, 608, 471 S.E.2d 92, 95 (1996) (quoting N.C. Gen. Stat. §97-25) (reversing the opinion and award of the Full Commission because it "effectively terminat[ed] plaintiff's right to receive future disability benefits rather than merely suspending that right for the period of plaintiff's unjustified refusal to cooperate with defendants' vocational rehabilative efforts"). Accordingly, we hold the Full Commission's conclusions of law are justified and correct in view of established precedent. *See Clark*, 360 N.C. at 43, 619 S.E.2d at 492; *Sanhueza*, 122 N.C. App. at 608, 471 S.E.2d at 95. Defendants' second argument is without merit.

For the foregoing reasons, we affirm the Full Commission's opinion and award entered on 29 November 2007.

Affirmed.

Judges BRYANT and ARROWOOD concur.

Report per Rule 30(e).