NO. COA07-436

NORTH CAROLINA COURT OF APPEALS

Filed: 19 February 2008

HORACE PATTERSON,
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 415880

SANDERS UTILITY CONSTRUCTION,
Employer, and CNA CLAIMS PLUS,
Carrier,
Defendants.

Appeal by Plaintiff from Opinion and Award entered 17 November 2006 by the North Carolina Industrial Commission. Heard in the Court of Appeals 31 October 2007.

Robert M. Talford for Plaintiff-Appellant.

McAngus, Goudelock & Courie, PLLC, by Sally G. Boswell and Shaun C. Blake, for Defendants-Appellees.

STEPHENS, Judge.

Horace Patterson ("Plaintiff") appeals from an Opinion and Award of the North Carolina Industrial Commission which denied his claim for workers' compensation benefits. We affirm.

FACTS AND PROCEDURE

The evidence before the Industrial Commission tended to show that on 22 January 2004, Plaintiff was sixty-one years old and had been employed by Defendant Sanders Utility Construction ("Sanders") for almost twenty years as a truck driver. In the course of his

employment that day, Plaintiff suffered an admittedly compensable injury to his right ankle when he stepped into a hole on a jobsite. On 23 January 2004, a physician "totally restricted [Plaintiff] from any and all employment" through 25 January 2004. After missing some days due to inclement weather, Plaintiff returned to work on the morning of 29 January 2004. He saw Dr. Pressly Gilbert, an orthopedist, that afternoon.

Dr. Gilbert diagnosed a sprained right foot and posterior tibial tendinitis, and returned Plaintiff to work with restrictions. Plaintiff was instructed to wear a walker boot at all times and not to drive. After working a full schedule over the next two weeks, Plaintiff next saw Dr. Gilbert on 13 February 2004. Dr. Gilbert returned Plaintiff to work on 16 February 2004, again with the restriction that he wear the boot at all times, and scheduled Plaintiff for an MRI scan. Dr. Gilbert met with Plaintiff on 1 March 2004 after the MRI scan was performed. In a medical note written that day, Dr. Gilbert wrote: "I am not sure that I can explain his tenderness and pain, based on this [MRI] scan. I am going to take the films to the hospital and have the musculoskeletal radiologist review them there." Dr. Gilbert placed Plaintiff out of work for one week. On 8 March 2004, Dr. Gilbert "discussed [his] findings with [Plaintiff] with regard to the [MRI] [s]can[,]" injected medicine into Plaintiff's ankle, and again placed him out of work for one week. On 16 March 2004, Dr. Gilbert determined that Plaintiff could return to work on 22 March 2004 "with the boot." Plaintiff returned to work 29 March 2004 and began receiving physical therapy on his ankle.**[Note 1]** On 8 April 2004, Plaintiff again saw Dr. Gilbert. Dr. Gilbert noted that Plaintiff was still complaining of pain and that Plaintiff's physical therapy notes indicated he had made no progress. Dr. Gilbert discharged Plaintiff at maximum medical improvement and assigned a five percent permanent partial disability rating. Dr. Gilbert returned Plaintiff to work without restrictions.

Plaintiff continued working for Sanders in his pre-injury position until June 2004. As discussed below, there is some dispute as to why Plaintiff stopped working for Sanders at that time. On 26 October 2004, Plaintiff again saw Dr. Gilbert, complaining of severe pain in his ankle. Dr. Gilbert did not have an explanation for Plaintiff's pain and noted that the "MRI scan simply did not demonstrate anything other than the . . . sprain[.]" Dr. Gilbert referred Plaintiff to Dr. James Sebold for a second opinion.

Dr. Sebold reviewed the MRI, diagnosed an ankle sprain, and stated that Plaintiff could work without restrictions. Plaintiff met with Dr. Sebold again on 23 December 2004 continuing to complain of pain. Dr. Sebold advised Plaintiff that the only other treatment option was a diagnostic ankle arthroscopy. He returned Plaintiff to work without restrictions. After performing an arthroscopy on 24 January 2005, Dr. Sebold concluded that Plaintiff "just had some synovitis" and there was no "significant cartilage damage." Although Plaintiff continued to complain of ankle pain, Dr. Sebold returned him to work on 7 February 2005 without restrictions.

On or about 22 February 2005, Plaintiff filed a Form 33 Request for Hearing, seeking, *inter alia*, temporary total disability compensation. Deputy Commissioner Myra L. Griffin filed an opinion and award denying Plaintiff's claim on 7 March 2006, and Plaintiff appealed to the Full Commission. The Full Commission filed its Opinion and Award 17 November 2006, finding that Plaintiff failed to prove he was disabled and concluding that he was not entitled to further temporary total disability benefits.

"[W]hen 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) (quoting *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000)). "The Commission's findings of fact are conclusive on appeal when supported by such competent evidence, 'even though there [is] evidence that would support findings to the contrary.'" *Id.* (quoting *Jones v. Myrtle Desk Co.*, 264 N.C. 401, 402, 141 S.E.2d 632, 633 (1965)). "However, evidence tending to support a plaintiff's claim is to be viewed in the light most favorable to the plaintiff, and 'plaintiff is entitled to the benefit of every reasonable inference to be drawn from the evidence.'" *Id.* at 496, 597 S.E.2d at 700-01 (quoting *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998)) (citation omitted). "The Commission's conclusions of law are reviewed *de novo*." *Id.* at 496, 597 S.E.2d at 701 (citing *Grantham v. R. G. Barry Corp.*, 127 N.C. App. 529, 534, 491 S.E.2d 678, 681 (1997), *disc. review denied*, 347 N.C. 671, 500 S.E.2d 86 (1998)).

By his first assignment of error, Plaintiff argues that the following italicized portion of the Commission's third finding of fact is not supported by competent evidence:

> 3. On January 29, 2004, Dr. Pressly Gilbert with Charlotte Orthopaedic Specialist[s] evaluated [Plaintiff's] right ankle injury. Dr. Gilbert diagnosed [Plaintiff] with a deltoid sprain of the right ankle. Plaintiff returned to Dr. Gilbert on March 1, 2004[,] to discuss the results of the MRI scan. *After reviewing the MRI scan, Dr. Gilbert could not explain [Plaintiff's] tenderness and pain.* Dr. Gilbert wrote [Plaintiff] out of work until March 8, 2004. During this period, Dr. Gilbert had the MRI films reviewed for a second opinion by a musculoskeletal radiologist.

Plaintiff contends the challenged portion of this finding of fact "is an inaccurate statement of Dr. Gilbert's opinion." Our review of this issue, however, is limited to an examination of whether any competent evidence supports the challenged finding. *McRae*, 358 N.C. 488, 597 S.E.2d 695. We find such evidence in Dr. Gilbert's 1 March 2004 medical note in which he wrote: "I am not

sure that I can explain [Plaintiff's] tenderness and pain, based on this [MRI] scan." This evidence is competent and supports the challenged portion of the Commission's finding. Plaintiff's first assignment of error is overruled.

By his second assignment of error, Plaintiff argues that the following italicized portions of the Commission's thirteenth and fourteenth findings of fact are not supported by competent evidence:

> 13. *Since he voluntarily left his employment with [Sanders],* [Plaintiff] has earned some income from the sale of firewood by his son.
>
> 14. Plaintiff was released to return to full-duty unrestricted work by all of his treating physicians. Plaintiff returned to work in his pre-injury position as a truck driver and *then voluntarily retired from the position as previously planned. Plaintiff has failed to prove that he is currently disabled within the meaning of the North Carolina Workers' Compensation Act.*

Plaintiff contends that the evidence shows he left his employment with Sanders because he was in pain from the injury and that, thus, his "failure to return to work as a result of pain cannot be found to be voluntary." We agree with Plaintiff that there is some evidence he stopped working for Sanders because his "feet were bothering [him]." Nevertheless, as stated above, our review of the Commission's findings is limited to a determination of whether the findings are supported by *any* competent evidence. *McRae,* 358 N.C. 488, 597 S.E.2d 695. Plaintiff testified as follows:

> Q. Isn't it true, Mr. Patterson, that you expressed to individuals [with] Sanders Utility that you were going to retire when you turned 62?
>
> A. Yes.
>
> Q. And you turned 62 on June 16th of 2004, isn't that correct?

A. Right.

Q. And, in fact, you did retire in June of 2004, didn't you?

A. Right.

. . . .

Q. Now . . . you had talked about retiring. When you left [Sanders], was it your intent never to work again?

A. That's right.

One of Sanders' payroll employees testified that Plaintiff stopped working around the end of June 2004 because "[h]e was retiring." Finally, Sanders' project president and project manager testified that Plaintiff "retired" in June 2004. All of this testimony constitutes competent evidence which supports the Commission's findings that Plaintiff "voluntarily" left his employment with Sanders and retired.**[Note 2]** Plaintiff's argument to the contrary is without merit.

Additionally, Plaintiff contends that he met his burden of proving disability because he was in genuine, severe, and "disabling" pain. An employee seeking compensation under the North Carolina Workers' Compensation Act bears the burden of proving, by the greater weight of the evidence, the existence and extent of a disability. *Clark v. Wal-Mart*, 360 N.C. 41, 619 S.E.2d 491 (2005); *Phillips v. U.S. Air, Inc.*, 120 N.C. App. 538, 463 S.E.2d 259 (1995), *aff'd per curiam*, 343 N.C. 302, 469 S.E.2d 552 (1996). "The 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) (2005). An employee may satisfy the burden of proving disability by: (1) producing medical evidence that, as a consequence of the work-related injury, the employee is physically or mentally incapable of work in any

employment; (2) producing evidence that the employee is capable of some work, but that the employee, after a reasonable effort, has been unable to obtain employment; (3) producing evidence that the employee is capable of some work but that it would be futile to seek other employment because of preexisting conditions, *i.e.*, age, inexperience, or lack of education; or (4) producing evidence that the employee has obtained other employment at a wage less than that earned prior to injury. *Russell v. Lowes Prod. Distrib'n*, 108 N.C. App. 762, 425 S.E.2d 454 (1993). Plaintiff did not meet his burden of proof under any of the *Russell* methods.

First, Plaintiff presented no medical evidence that, as a consequence of the injury, he was physically or mentally incapable of work in any employment. On the contrary, all of the evidence suggests that Plaintiff's subjective reports of pain did not affect his ability to work, and both of Plaintiff's doctors returned him to work "without restrictions." Second, after testifying that he had not tried to get a job since he left Sanders, Plaintiff testified he had been on one job site "to get a backhoe job[,]" but that he did not get the job because he was wearing the boot. Third, Plaintiff produced no evidence of the futility of seeking other work because of preexisting conditions. In his brief, Plaintiff suggests "it is reasonable to infer" that because he had a 10th grade education, any effort by him to seek other work would be futile. We do not think such an inference is inherently reasonable. Finally, Plaintiff presented no evidence that he had obtained other employment at a wage less than that earned prior to injury. We reiterate the *unrefuted* medical evidence that Plaintiff was released to and capable of *unrestricted* work, *i.e.*, that despite his injury, he was able to perform his pre-injury job and thus earn the same wages he was earning at the time of his injury. This Plaintiff continued to do until he reached his sixty-second birthday at which time, as he had planned, he retired with no intention of working again. When

he retired, he remained capable of performing his pre-injury job without restrictions, and such job remained available for him.

Accordingly, the evidence supports the Commission's finding that Plaintiff failed to prove the existence of a disability. Plaintiff's second assignment of error is overruled.

By his final assignment of error, Plaintiff asserts that the following conclusions of law are not supported by the Commission's findings of fact:

> 1. Plaintiff has the burden of establishing continuing disability. Plaintiff has failed to prove by the greater weight of the evidence that he is currently disabled within the meaning of the North Carolina Workers' Compensation Act. . . .
>
> 2. Plaintiff is not entitled to any further temporary total disability compensation. . . .

The Commission's fourteenth finding of fact, being a near verbatim restatement of the Commission's first conclusion of law, supports the Commission's first conclusion. Moreover, the Commission's findings that (1) Plaintiff was released to full-duty, unrestricted work by all his doctors, (2) Plaintiff returned to his pre-injury job until he voluntarily retired as previously planned, (3) Plaintiff's retirement was unrelated to his ability to perform his job, and (4) Plaintiff failed to prove disability, support its conclusion that Plaintiff is not entitled to temporary total disability compensation. N.C. Gen. Stat. §97-29 (2005). Plaintiff's third assignment of error is overruled, and the Opinion and Award of the Industrial Commission is

AFFIRMED.

Judges CALABRIA and ARROWOOD concur.

Report per Rule 30(e).

NOTES

1. Defendants paid Plaintiff temporary total disability benefits from 1 March 2004 through 28 March 2004.

2. We note Plaintiff's failure to assign error to or present argument challenging the Commission's seventh finding of fact, which states:

> 7. Prior to his injury on January 22, 2004, [Plaintiff] advised representatives of [Sanders] of his intention to retire on his 62nd birthday on June 16, 2004. After returning to his regular full-duty position as a truck driver with [Sanders], [Plaintiff] voluntarily left his employment. Plaintiff did not report to [Defendants] that he was unable to perform his job duties because of his ankle injury. It was [Defendants'] understanding that [Plaintiff] had retired as planned. [Sanders' president] testified that a truck driver position was available at the time [Plaintiff] retired in June 2004.