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NO. COA99-855

NORTH CAROLINA COURT OF APPEALS

Filed: 4 April 2000

ROBERT LEONHARDT, EMPLOYEE,
Plaintiff-Appellee

v.

CAROLINA FREIGHT CARRIERS CORPORATION,
EMPLOYER, SELF-INSURED,
Defendant-Appellant

North Carolina
Industrial Commission
I.C. No. 455250

Appeal by employer from opinion and award entered 19 February 1999 by the North Carolina Industrial Commission. Heard in the Court of Appeals 27 March 2000.

Donaldson & Black, P.A., by Jay A. Gervasi, Jr., for claimant employee.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Paul C. Lawrence, for employer appellant.

SMITH, Judge.

Employer appeals from a decision of the North Carolina Industrial Commission (the Commission), awarding claimant temporary partial disability benefits under the wage differential formula of N.C. Gen. Stat. § 97-30 (1999). We affirm.

Evidence of record tends to show the following facts. Plaintiff worked for employer as Director of Outside Maintenance and Fuel Administration, a position requiring him to drive 40,000 to 50,000 miles per year. He sustained a work-related back injury on 3 December 1992. At the time of the injury, plaintiff had

already planned to take early retirement at the end of the year. Plaintiff retired as scheduled on 31 December 1992. Although plaintiff missed no work due to his injury, he reported the accident to his employer and sought chiropractic treatment in late December, 1992.

Plaintiff received periodic chiropractic and medical treatment for his back during 1993 and 1994. He experienced increased back pain after lifting a box at home in 1993 and following an automobile accident on 28 September 1994. Chiropractor Dr. Derrick Denman opined that plaintiff's condition was caused by his work-related fall rather than by lifting the box. Dr. Denman believed the automobile accident caused only a temporary worsening of plaintiff's underlying condition. Dr. Denman concluded that plaintiff's work-related injury limited him to a maximum of four hours of driving per day.

Plaintiff received additional treatment from neurosurgeon Dr. Mark Roy from 1994 through July, 1996. Dr. Roy diagnosed ruptured discs at L3-4 and L4-5 attributable to the 1994 automobile accident, and degenerative changes at L5-S1 attributable to the 1992 fall at work. Dr. Roy assigned a disability rating of 15% to the L5-S1 injury and a rating of 21% for the combined injuries.

Concerning plaintiff's ability to drive, Dr. Roy stated that, "I wouldn't have [plaintiff in a] job that drives." When pressed for a number of hours and miles plaintiff could drive daily, Dr. Roy opined, "I would say two hours max, maybe an hour one way and an hour back, and that's it. That's what I would limit it to."

Plaintiff intended to work after retirement as a truck locator, identifying used vehicles for purchase by trucking companies. Based on his experience while working for employer, plaintiff expected to earn as much through commissions as he had earned prior to retirement. Because this work required even more driving than his previous job, plaintiff's ability to earn income as a truck locator was substantially reduced by his back injury. Plaintiff stated he could drive only 100 miles per day and could not drive every day. Plaintiff's tax forms for 1993 to 1995 showed mileage of 15,000 to 20,000 per year.

In 1993, plaintiff earned a net of $515 from locating trucks. Plaintiff also performed consulting work for two other truck companies and received deferred wages from employer, bringing his total earnings for 1993 to $11,888. Plaintiff spoke with Moss Trucking Company in 1993 about accepting a job similar to his previous job with employer. He declined that job because he could not perform the driving required.

In 1994, plaintiff suffered a business loss of $650 but earned $669.30 in consulting fees, netting $19.30. In 1995, plaintiff suffered a net loss of $850.

In 1996, plaintiff formed a business with Hugh Watts, allowing plaintiff to perform office work while Watts did the driving and "leg work" required to find trucks. The business acted as a broker, purchasing used trucks for re-sale. Plaintiff earned $16,000 in 1996.

Plaintiff filed a personal injury suit in 1994, arising from

an accident in which he lost a finger. As part of his damages, plaintiff had sought lost wages of $400,000 for the several months in 1994 when he was unable to work due to the finger. In a deposition taken during the course of the suit, plaintiff based this estimate on lost commissions he would have earned on a lease contract. In the instant proceedings, plaintiff disavowed this earlier claim of lost income, stating he would have been unable to obtain the contract due to "politics in the company."

Based on findings of fact consistent with events described above, the Commission concluded plaintiff's 1992 injury left him "unable to earn the amount of wages he had earned prior to his injury." The parties stipulated to plaintiff's average weekly wage was $1,041.19 at the time of his injury. In calculating the wage differential under N.C. Gen. Stat. § 97-30, the Commission relied on plaintiff's actual wages for 1993 to 1996 as representing his wage earning capacity. Using this data, it was determined that plaintiff was entitled to the maximum compensation rate of $426 per week for up to 300 weeks.

On appeal, employer argues the Commission erred in ignoring the evidence of defendant's claimed ability to earn $400,000 in 1994, occasioned by the loss of his finger. Employer asserts plaintiff's diminished earnings after retirement were caused by a personal choice of self-employment. Because the Commission ignored these factors in calculating plaintiff's post-retirement earning capacity, employer claims the Commission misinterpreted *Stroud v. Caswell*, 124 N.C. App. 653, 478 S.E.2d 234 (1996).

Employer also challenges the Commission's finding of partial disability, insisting the medical evidence establishes plaintiff's continued ability to drive, albeit with discomfort. Finally, employer cites "fundamental fairness," accusing plaintiff of dishonesty so severe as to disqualify him from benefits.

Our review of workers' compensation awards is limited. The Commission's determination of a claimant's partial disability is a conclusion of law which must be based on findings of fact supported by competent evidence. If supported by proper findings, however, the Commission's determination of disability is binding. *See Calloway v. Shuford Mills*, 78 N.C. App. 702, 707, 338 S.E.2d 548, 552 (1986).

In order to recover benefits for temporary partial disability under N.C. Gen. Stat. 97-30, a claimant must show he is incapable of earning the same wages as he earned prior to his injury. He may meet this burden by showing "he has obtained other employment at a wage less than that earned prior to the injury." *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993). Plaintiff must also prove his incapacity was caused by a covered accidental injury. See *id.* A claimant's voluntary retirement does not preclude or reduce his entitlement to benefits, if his pre-retirement injury diminished his post-retirement capacity to earn wages in the market. *See Stroud*, 124 N.C. App. at 656, 478 S.E.2d at 236.

Competent evidence of record supports the Commission's finding that plaintiff's wage earning capacity was impaired as a result of

his 1992 accident. Drs. Denman and Roy attributed plaintiff's back condition to his fall at work in 1992. The restrictions recommended by Drs. Denman and Roy barred plaintiff from driving the distances required by his job with employer. Evidence also supports the finding that these same driving restrictions substantially impaired plaintiff's ability to earn income as a truck locator after retirement and prevented him from accepting a job at Moss Trucking Company. Thus, the record supports the finding that plaintiff's wages in 1993 to 1996 were substantially below those earned prior to retirement, as a result of his 1992 back injury.

The Commission's finding of the amount of plaintiff's lost earning capacity is likewise supported by competent evidence of record. Employer stipulated to plaintiff's pre-retirement wage. The Commission treated plaintiff's actual wages in 1993 to 1996 as his wage earning capacity. Although a claimant's actual earnings does not necessarily reflect his ability to earn wages in the market, they are "strong evidence" thereof, creating a presumption of actual wage earning capacity which must be rebutted by a showing of unreliability. *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 436, 342 S.E.2d 798, 805 (1986); *see Harris v. North American Products*, 125 N.C. App. 349, 355, 481 S.E.2d 321, 324-25 (1997). In addition, income earned through self-employment may reflect a claimant's earning capacity if he is "actively involved" in the business, using skills that are "marketable in the labor market." *McGee v. Estes Express Lines*, 125 N.C. App. 298, 300, 480 S.E.2d

416, 418 (1997).

The Commission made no explicit finding of fact equating plaintiff's actual wages with his wage earning capacity. However, the Commission's decision refers to plaintiff's "earning capacity" and identifies "whether [plaintiff] has, in fact, sustained a loss of wage earning capacity" as the question under consideration. The Commission made detailed findings of plaintiff's various attempts to earn wages, including his work as a truck locator, his consulting work, an unsuccessful attempt to obtain work from Moss Trucking Company, and his venture with Watts. In light of these factors, we believe the Commission's decision contains an "implicit" finding that "the wages actually earned [by plaintiff] . . . were the wages he was capable of earning." *Calloway*, 78 N.C. App. at 708, 338 S.E.2d at 553.

Employer asserts the Commission ignored its evidence of plaintiff's prior assertion of an earning capacity of $400,000 in 1994. More likely, the Commission deemed plaintiff's prior assertion to be wholly speculative. The Commission was empowered to discredit plaintiff's testimony in an unrelated lawsuit or to credit his repudiation of that testimony in the instant action. *See Anderson v. Motor Co.*, 233 N.C. 372, 64 S.E.2d 265 (1951). In making its findings of fact, the Commission is not required to allude to every piece of contradictory evidence contained in the record. *See Bryant v. Weyerhaeuser Co.*, 130 N.C. App. 135, 139, 502 S.E.2d 58, 62, *disc. review denied*, 349 N.C. 352, 515 S.E.2d 700 (1998). Based on our own review of the record and the

Commission's decision, we find the Commission adequately weighed and considered the entire record. *See id.*

Employer also challenges plaintiff's testimony that his back injury limited his driving to 100 miles per day and prevented him from driving every day. Employer believes this proffer is directly contradicted by plaintiff's tax records which show he drove 15,000 to 20,000 miles per year in 1993 through 1995. Unlike employer, however, we find no obvious discrepancy. A calculation of 100 miles per day driven three days a week for fifty weeks yields annual mileage of 15,000. Thus, plaintiff's testimony is sufficiently consistent with his tax records to support the Commission's findings. We note employer cites no authority for its "fundamental fairness" argument, *see* N.C.R. App. P. 28(b)(5). We are thus unpersuaded by employer's accusations of a "pattern of deception" by plaintiff in the instant proceedings.

Employer does not address its remaining assignments of error. By rule, they are deemed abandoned.

For the reasons discussed above, we affirm the decision of the Commission.

Affirmed.

Chief Judge EAGLES and Judge WALKER concur.

Report per Rule 30(e).