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NO. COA08-804

NORTH CAROLINA COURT OF APPEALS

Filed: 7 April 2009

WYATT WOMBLE,
Employee,
Plaintiff

v.

North Carolina Industrial Commission
I.C. File Nos. 456073 & 528358

G & D TRANSPORTATION,
Employer,

ZURICH INSURANCE COMPANY,
Carrier,
Defendants.

Appeal by plaintiff and defendants from opinion and award entered 13 February 2008 by the North Carolina Industrial Commission. Heard in the Court of Appeals 11 December 2008.

Mast, Schulz, Mast, Johnson & Wells, P.A., by Charles D. Mast, for plaintiff.

Allen, Kopet & Associates, PLLC, by Stephen F. Dimmick, for defendants.

STROUD, Judge.

The Full Commission awarded plaintiff worker's compensation benefits due to his injuries and ordered defendants to pay costs to "be deducted from the funds due to plaintiff." All parties appeal. For the following reasons, we affirm.

I. Background

On or about 17 June 2003, defendants agreed to pay plaintiff worker's compensation benefits due to an injury to plaintiff's *left* shoulder. On 7 July 2003, plaintiff returned to work for

light duty. On or about 25 April 2005, defendant-employer reported a work-related injury to plaintiff's *right* shoulder to the Industrial Commission.

On or about 16 September 2005, a "NOTICE OF TERMINATION OF COMPENSATION BY REASON OF TRIAL RETURN TO WORK" ("Form 28T") was filed. Form 28T noted that plaintiff was injured on 17 June 2003 and that his disability began the next day. The form also noted plaintiff's temporary total disability compensation terminated on 7 September 2005 and that plaintiff had returned to work on 8 September 2005 "at reduced wages[.]" On or about 16 September 2005, defendant-employer admitted plaintiff's right to compensation for the two separate injuries, one to plaintiff's left shoulder on 17 June 2003 and the other to plaintiff's right shoulder on 19 April 2005. Defendant-employer further admitted that as to plaintiff's left shoulder, plaintiff was entitled to $489.68 per week based on an average weekly wage of $734.48 and as to plaintiff's right shoulder, he was entitled to $381.39 a week based on an average weekly wage of $572.06. The admissions also noted that as to plaintiff's left shoulder his compensation was "Other" because "[plaintiff was] released to modified duty [on] 9/8/05 and was taken off work [on] 9/12/05 for other inju[ry.]"

On or about 24 January 2006, plaintiff filed a motion with the Industrial Commission to reinstate his benefits at the rate of $489.68 per week. Plaintiff claimed that defendants had "no reasonable ground" for reducing his benefits and requested the $489.68 payment be reinstated "from September 13, 2005 continuing so long as the Employee continues to be disabled." Plaintiff also requested defendants be sanctioned for their lack of "reasonable grounds" in reducing plaintiff's benefits by having to pay plaintiff's attorney's fees in the amount of $2,173.75.

On or about 8 February 2006, defendants' responded to plaintiff's motion to reinstate his benefits and for attorney fees, requesting that the motion be denied and "referred for hearing on the issue of the appropriate weekly wage for the April 19, 2005 right shoulder claim." On or about 15 February 2006, plaintiff responded to defendants' response arguing that

> [d]uring the entire 52 weeks prior to this second injury, the temporary partial disability would have been two-thirds of the difference between the average weekly wage for . . . [plaintiff's] first injury and the reduced wages he was earning. The amount of temporary partial disability cannot be used to compute average weekly wage, since it is, by definition, two-thirds of that amount. As a result, the average weekly wage for the second injury should be the same as the first injury.

On or about 6 April 2006, Executive Secretary Tracey H. Weaver filed an administrative order noting that an evidentiary hearing was needed, and therefore plaintiff's motion was denied.

On or about 9 June 2006, plaintiff requested "that compensation be reinstated after [an] unsuccessful trial return to work[.]" On or about 18 September 2006, the parties entered into a pre-trial agreement stipulating to plaintiff's injuries and amounts of compensation which had already been paid. On or about 26 April 2007, Deputy Commissioner Philip A. Baddour, III issued an opinion and award. On or about 14 June 2007, a return to work report was completed noting plaintiff had returned to work on 6June 2007. On or about 10 July 2007, plaintiff requested "that compensation be reinstated after [an] unsuccessful trial return to work[.]" On or about 6 September 2007, defendants filed Form 44, requesting review of the Deputy Commissioner's opinion and award.

On 13 February 2008, the Full Commission filed an opinion and award which ordered that:

> 1. Defendants shall pay disability compensation to plaintiff as follows:

(a) An additional $59.28 per week for all the weeks identified in stipulated paragraph six that plaintiff was paid what defendants identified as TTD;

(b) Two-thirds of the difference between $823.40 per week and the wages earned by plaintiff for all the weeks identified in stipulated paragraph six and nine that plaintiff was paid what defendants identified as TPD, less a credit for such benefits previously paid;

(c) An additional $167.57 per week from September 13, 2005 through the date of the Award by the deputy commissioner;

(d) $548.96 per week from the date of the Award by the deputy commissioner until plaintiff returns to suitable employment or until further Order of the Industrial Commission.

2. Defendants shall pay to plaintiff's counsel as a reasonable attorney's fee an amount equal to twenty-five percent (25%) of the net past compensation owing to plaintiff and twenty-five percent (25%) of the future compensation owing to plaintiff. Said attorney's fee shall be deducted from the funds due to plaintiff.

3. Defendants shall pay the costs due the Commission.

On or about 25 February 2008, plaintiff filed a motion for reconsideration of the Commission's opinion and award. On or about17 March 2008, defendants filed a notice of appeal. On or about March 2008, defendants responded to plaintiff's motion for reconsideration and requested that it be denied. On 22 April 2008, plaintiff's motion for reconsideration was denied. On 7 May 2008, plaintiff filed a notice of appeal.

On appeal, defendants argue that the Commission erred in making findings of fact 1-4 and 24 and conclusion of law 1, thus challenging the Commission's calculation of plaintiff's average weekly wage. Plaintiff does not appeal as to the calculation of his average weekly wage or weekly benefits, but argues the Commission erred by its failure to award attorney's fees in

addition to his workers compensation benefits, based upon its determination that defendants had reasonable grounds to reduce plaintiff's benefits. For the following reasons, we affirm.

II. Defendants' Appeal

Defendants contest several findings of fact and one conclusion of law as either unsupported by competent evidence or as an abuse of discretion. Though most of defendants' contentions are extremely fact specific, defendants contend these alleged errors resulted in the Commission wrongly calculating plaintiff's award. For the following reasons, we disagree.

> Our review of a decision of the Industrial Commission is limited to determining whether there is any competent evidence to support the findings of fact, and whether the findings of fact justify the conclusions of law. The findings of the Commission are conclusive on appeal when such competent evidence exists, even if there is plenary evidence for contrary findings. This Court reviews the Commission's conclusions of law *de novo*.

Ramsey v. Southern Indus. Constructors, Inc., 178 N.C. App. 25, 29-30, 630 S.E.2d 681, 685 (citations and quotation marks omitted), *disc. rev. denied*, 361 N.C. 168, 639 S.E.2d 652 (2006).

> The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony. Thus, on appeal, appellate courts do 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.

Gore v. Myrtle/Mueller, 362 N.C. 27, 40-41, 653 S.E.2d 400, 409 (2007) (citations and quotation marks omitted).

A. Finding of Fact 1

In finding of fact 1, the Industrial Commission found, "Plaintiff began working for defendant-employer as a truck driver on or about September 19, 2002. He was hired for a ninety (90) day probationary period. During his probationary employment, plaintiff drove trucks, but performed mostly 'yard moves' and short runs." Defendants first contend that the Commission

erred in finding that plaintiff "performed mostly 'yard moves' and short runs" during his probationary employment. Defendants argue "plaintiff was, at all times following his initial training period, a local truck driver, and that there is no competent evidence to support the assertion that plaintiff was hired for a 90 day probationary period." Before the Industrial Commission plaintiff was asked, "And what did you do during this *probationary period* for G&D?" Plaintiff responded, "I made *local runs* to Clayton, Sanford, did *yard moves*, and I think I went to South Carolina once." (Emphasis added). Plaintiff's testimony is competent evidence upon which the Commission could make finding of fact 1, and thus defendants' argument is overruled.

B. Finding of Fact 2

In finding of fact 2 the Commission found, "Plaintiff's probationary employment ended on or about December 18, 2002, and he was retained as a permanent employee. Shortly after his probationary period expired, plaintiff's job duties changed from the 'yard moves' and short runs to a trucking run from Apex, North Carolina to Sanford, North Carolina." Defendant next argues "there is no competent evidence to base Finding of Fact 2 that [plaintiff's] duties changed from 'short runs' to 'trucking runs'. Likewise there is no competent evidence that plaintiff changed jobs as his probationary employment ended or was otherwise hired for a new job consisting of this route to Apex." Before the Industrial Commission plaintiff testified:

> Q. I assume G&D hired you as a permanent employee after the probationary period was over?
>
> A. True.
>
> Q. And once the probationary period was over, did G&D move you to a different job?
>
> A. They offered me a run that took me to Apex of a morning [sic], and I would leave Apex and go back and forth to

> Sanford all day. The last run in the evening I would bring back to Clayton the caterpillar there, and then come back to G&D in Smithfield and get off.
>
> Q. Did you take that job?
>
> A. Yes, I took the move.
>
> Q. Excuse me?
>
> A. Yes, sir, I took the move.
>
> Q. And about when did that start?
>
> A. Probably in November of 2002.
>
> Q. You said three months' probation. Would it be--- You started in September. Would it be___
>
> A. It might have been December when I went to that.
>
> Q. If three months from September the 19th, October, November, December 19th, so would it be some time after December 19th?
>
> A. Yeah, I think so.

Plaintiff's testimony was competent evidence upon which the Commission could make finding of fact number 2. This argument is overruled.

C. Finding of Fact 3

In finding of fact 3 the Commission found that

> [d]efendants provided wage documentation for plaintiff but did not provide a Form 22 from which to determine any periods of seven or more consecutive days that plaintiff was out of work. Based upon Stipulated Exhibit 3 and Plaintiff's Exhibit 2, following the Christmas and New Year's holiday's plaintiff earned $18,114.75 as a permanent employee during the twenty-two (22) week period from January 5, 2003 through June 8, 2003. Defendants did not provide any wage documentation for the pay period beginning on June 9, 2003 through the date of plaintiff's injury on June 17, 2003.

“Defendant contends that there is no competent evidence that plaintiff’s earnings during this twenty-two week period were ‘as a permanent employee’, and that at all times between September 19, 2002 and June 17, 2003 plaintiff was an at-will employee of Defendant-Employer and was never a party to an employment contract or otherwise a ‘permanent employee’.” Defendant further argues that “[t]o not count all of these earned wages in the determination of the plaintiff’s average weekly wage due to the plaintiff’s arbitrary designation as a ‘probationary’ employee is manifestly unsupported by reason, and constitutes an abuse of discretion by the Full Commission.” Based on plaintiff’s testimony stating he was hired as a permanent employee after his probationary period, we again conclude there is competent evidence to support finding of fact 3, and we discern no abuse of discretion in calculating plaintiff’s wages solely as a permanent employee. *See Clark* at 84, 623 S.E.2d at 299; *see also* N.C. Gen. Stat. §97-2(5) (2005). This argument is overruled.

D. Finding of Fact 4

The Commission determined in finding of fact 4 that

> [p]laintiff’s average weekly earnings were $823.40 for the pay period of January 5, 2003 through June 8, 2003. Based upon the available information, the undersigned find that this amount most nearly approximates the amount that plaintiff would be earning were it not for his left shoulder injury.

Defendant argues N.C. Gen. Stat. §97-2(5) “sets forth five methods, in order of preference, by which an injured employee’s average weekly wages are to be computed.” Defendant contends the Commission should have employed method 2, “Where the employment prior to the injury extended over a period of fewer than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed; provided, results fair and just to both parties will be thereby

obtained[,]" rather than method 4, "But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury." *See* N.C. Gen. Stat. §97-2(5).

However, method 2 of N.C. Gen. Stat. §97-2(5) specifically provides it is only to be used if "results fair and just to both parties will be thereby obtained." N.C. Gen. Stat. §97-2(5). Clearly, the Commission did not deem it fair to calculate plaintiff's compensation according to the wages he earned as a probationary employee. The Commission found its method to be the fairest method because (1) "plaintiff's earnings as a permanent employee most nearly approximate the amount he would be earning were it not for the injury[,]" (2) "it is fair to begin the calculation after the holiday season because defendants did not provide a Form 22 from which to determine any periods of seven or more consecutive days that plaintiff was out of work during the holiday season[,]" and (3) "defendants did not provide any wage documentation for the pay period beginning on June 9, 2003 through the date of plaintiff's injury on June 17, 2003[.]" We do not find the Commission's determination as to the "fairest" method of calculations based on the competent evidence to be an abuse of discretion. *See Clark* at 84, 623 S.E.2d at 299. This argument is overruled.

E. Finding of Fact 24

In finding of fact 24 the Commission found that

> [d]efendants assert that the change in average weekly wage was proper because the disability plaintiff incurred subsequent to September 12, 2005 is due to his being taken out of work by Dr. Cruzan for the right shoulder injury. Defendants apparently assert that plaintiff's two days of work in the hurricane relief trailer demonstrate sufficient earning capacity that, upon the expiration of the temporary two-day job, plaintiff was not entitled to a reinstatement of total disability compensation for his left shoulder

> condition. The undersigned do not find defendants' position persuasive for the following reasons: At the time plaintiff worked for two days in the hurricane relief trailer in September 2005, he had been receiving ongoing total disability compensation based upon his left shoulder injury since going out of work in April 2005 for left shoulder surgery. In September 2005, plaintiff remained under significant work restrictions for his left shoulder which prevented him from working more than 4-6 hours per day, and which prevented him from doing any lifting, among other numerous restrictions. The hurricane relief trailer job was clearly a two day temporary position and cannot be asserted as the basis for determining that plaintiff was no longer disabled due to his left shoulder injury.

"Defendants contend that there is no competent evidence that this work[, hurricane relief trailer job,] cannot be asserted as the basis for determining that plaintiff was no longer disabled due to his left shoulder injury[.]" We conclude that defendants' position on this issue is without any merit. "If an award is made by the Industrial Commission, payable during disability, there is a presumption that disability lasts until the employee returns to work and likewise a presumption that disability ends when the employee returns to work at wages equal to those he was receiving at the time his injury occurred." *Watkins v. Motor Lines*, 279 N.C. 132, 137, 181 S.E.2d 588, 592 (1971) (citation omitted).

We find it absurd that defendants contend that plaintiff's two day stint in a hurricane relief trailer effectively rebuts the presumption that plaintiff was still disabled in his left shoulder. *See id.* The competent evidence shows that plaintiff was hired and thereafter worked as a truck driver; manning a hurricane relief trailer over the course of 48 hours does not qualify as "return[ing] to work" for purposes of overruling the presumption that plaintiff's disability is still present. *See id.* There is no evidence that hurricane relief work is a regular part of the employer's business or that this type of work would ever be offered to employees except in the event of an

emergency, such as a hurricane, which is by definition not the normal state of affairs. This argument is overruled.

F. Conclusion of Law 1

The Commission concluded that

> as plaintiff worked less than fifty-two (52) weeks prior to his left shoulder injury, plaintiff's average weekly wage for this injury should be computed using a method that is fair both to plaintiffs and defendants. Based upon the wage documentation that is available, the fairest method of computing plaintiff's average weekly wage is to add together his earnings for the twenty-two (22) week period that he worked as a permanent employee after the holiday season and prior to his left shoulder injury (January 5, 2003through January 8, 2003) and divide that sum by twenty-two (22). Because plaintiff's earnings as a permanent employee most nearly approximate the amount he would be earning were it not for the injury, plaintiff's earnings while a temporary employee should not be included in the calculation. Although plaintiff became a permanent employee on or about December 18, 2002, it is fair to begin the calculation after the holiday season because defendants did not provide a Form 22 from which to determine any periods of seven or more consecutive days that plaintiff was out of work during the holiday season. Additionally, defendants did not provide any wage documentation for the pay period beginning on June 9, 2003 through the date of plaintiff's injury on June 17, 2003; therefore, this period of time cannot be included in the calculation. Based upon the foregoing, plaintiff has an average weekly wage for his left shoulder injury of $823.40, yielding a compensation rate of $548.96. N.C. Gen. Stat. §97-2(5).

Defendants argues "conclusion of law number 1 is not supported by competent evidence of the findings of fact and results in the computed average weekly wage being manifestly unfair to defendants." We conclude that all of defendant's arguments as to conclusion of law 1 were effectively addressed *supra*, specifically regarding finding of fact 4. Therefore, this argument is overruled.

III. Plaintiff's Appeal

Plaintiff argues that because the Commission erred in concluding that defendants' reduction and argument for reduction of plaintiff's compensation was based upon reasonable grounds, plaintiff was not awarded attorney's fees in addition to his benefits. We first note that except for the standard of review, plaintiff failed to cite any case law or relevant legal analysis to this Court regarding "reasonable grounds."

> Whether a defendant had reasonable ground to bring a hearing is a matter reviewable by this Court *de novo*. The reviewing court must look to the evidence introduced at the hearing in order to determine whether a hearing has been defended without reasonable ground. The test is not whether the defense prevails, but whether it is based in reason rather than in stubborn, unfounded litigiousness.
>
> Pursuant to North Carolina General Statutes section 97-88.1, if the Industrial Commission shall determine that any hearing has been defended without reasonable ground, it may assess the whole cost of the proceedings including reasonable fees for plaintiff's attorney upon the party who has defended them. The purpose of North Carolina General Statutes section 97-88.1 is to deter unfounded litigiousness.
>
> The policy underlying the Worker's Compensation Act is to provide a swift and certain remedy to an injured worker and to ensure a limited and determinate liability for employers. The Worker's Compensation Act is to be construed liberally, and benefits are not to be denied upon technical, narrow, or strict interpretation of its provisions.

Ruggery v. N.C. Dep't. of Correction, 135 N.C. App. 270, 273-74, 520 S.E.2d 77, 80-81 (1999) (citations, quotation marks, ellipses, and brackets omitted); *see* N.C. Gen. Stat. §97-88.1 ("If the Industrial Commission shall determine that any hearing has been brought, prosecuted, or defended without reasonable ground, it may assess the whole cost of the proceedings including reasonable fees for defendant's attorney or plaintiff's attorney upon the party who has brought or defended them.")

In *Troutman v. White & Simpson, Inc.*, 121 N.C. App. 48, 50-55, 464 S.E.2d 481, 484-86 (1995), *disc. review denied*, 343 N.C. 516,472 S.E.2d 26 (1996), this Court concluded that defendants defended on unreasonable grounds because they

> contended at oral argument before this Court that since they were unaware of the holding in *Heffner*, they should be excused for having advanced their position at the hearing below. That is absurd. Defendant's ignorance of a 1986 North Carolina case directly on point provides no support for their contention that grounds for requesting a hearing in 1991 were reasonable. Such a construction would encourage incompetence and thwart the legislative purpose of N.C.G.S. §97-88.1. We affirm the Commission's conclusion that defendant brought the subject hearing without a reasonable ground.

Id. at 52, 464 S.E.2d at 484-85. Here, unlike in *Troutman*, there was a genuine basis for defendant's contention. *See id.* Plaintiff and defendants disagreed as to the proper calculation of plaintiff's wages and compensation, specifically considering whether plaintiff had a probationary period and how such a period should be treated as plaintiff had worked with defendant-employer for less than 52 weeks. *See* N.C. Gen. Stat. §97-2(5) (2005). While defendants' argument as to plaintiff's return to work during the two days in the hurricane relief trailer may border on "unfounded litigiousness," *Ruggery* at 274, 520 S.E.2d at 80, defendants did have other arguments. Defendants did not deny plaintiff's right to compensation, but instead, based upon a reasonable interpretation of N.C. Gen. Stat. §97-2(5), disagreed with plaintiff about the fairest manner of calculating plaintiff's compensation. *See* N.C. Gen. Stat. §97-2(5). Although the Commission found in plaintiff's favor on the calculation of compensation, and we agree with the Commission, defendants did have a good faith argument as to their proposed method of calculation. We therefore must conclude that defendants' defense was "based in reason rather than in stubborn, unfounded litigiousness." *Ruggery* at 274, 520 S.E.2d at 80. As such, we conclude that defendants defended upon reasonable grounds.

Lastly, plaintiff requests "this Court to award additional reasonable attorney's fees" pursuant to N.C. Gen. Stat. §97-88 where attorney's fees "may" be awarded in cases such as this. *See* N.C. Gen. Stat. §97-88 (2005). "The standard of review for an award of attorneys' fees by the Full Commission is abuse of discretion." *Clawson v. Phil Cline Trucking, Inc.*, 168 N.C. App. 108, 116, 606 S.E.2d 715, 720 (2005) (citation omitted). "An abuse of discretion results only where a decision is manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision." *Clark v. Sanger Clinic*, 175 N.C. App. 76, 84, 623 S.E.2d 293, 299 (2005) (citation, quotation marks, and ellipses omitted). We discern no abuse of discretion in the Industrial Commission's decision to award attorney's fees from plaintiff's benefits as N.C. Gen. Stat. §97-88 is not mandatory in nature, but only allows the Commission to award attorney's fees in its discretion. *See* N.C. Gen. Stat. §97-88. This argument is overruled.

IV. Conclusion

For the foregoing reasons, we affirm.

AFFIRMED.

Judges CALABRIA and STEELMAN concur.

Report per Rule 30(e).