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NO. COA08-1412

NORTH CAROLINA COURT OF APPEALS

Filed: 1 September 2009

RAYMOND CARROLL, Employee,  
Plaintiff-Appellant

v.

North Carolina  
Industrial Commission  
I.C. No. 501839

TRIANGLE GRADING, Employer  
and THE HARTFORD, Carrier,  
Defendants-Appellees

Appeal by plaintiff from Opinion and Award entered 10 June 2008 by the North Carolina Industrial Commission. Heard in the Court of Appeals 21 May 2009.

*Rothrock Law Firm, P.A., by Kenneth Price Rothrock, for plaintiff-appellant.*

*Cranfill, Sumner & Hartzog, by J. Michael Ricci & Ashley Baker White, for defendants-appellees.*

CALABRIA, Judge.

Raymond Carroll ("plaintiff") appeals from an Opinion and Award entered by the North Carolina Industrial Commission ("the Commission") denying plaintiff's claim for ongoing temporary total disability. We affirm the Commission's decision regarding disability, but remand for further findings of fact and conclusions of law regarding plaintiff's average weekly wage and entitlement to payment for certain medical care.

Plaintiff was employed as a foreman by Triangle Grading ("defendants"). Plaintiff suffered an admittedly compensable injury to his back when he fell while running a piece of equipment on 15 December 2004. Defendants began paying workers' compensation benefits to plaintiff based on an average weekly wage of \$800.00. Plaintiff continued to work after his injury, but his pain increased. On 3 January 2005 he sought medical attention at the Alamance Regional Medical Center emergency room. Plaintiff was unable to return to work after that date.

On 11 January 2005, plaintiff saw Dr. James Califf ("Dr. Califf") at the Kernodle Clinic for his injury. Dr. Califf diagnosed plaintiff with persistent back pain and possible radiculopathy and recommended an MRI of the lumbar spine and other conservative treatment measures. Dr. Califf cleared plaintiff for light duty work under restrictions that limited plaintiff to desk work only. Defendants had no desk work available for plaintiff at that time. Plaintiff did not attempt to find sedentary work elsewhere, but rather remained out of work.

Following another appointment on 4 February 2005, Dr. Califf continued plaintiff's light duty work restrictions, but plaintiff still did not seek employment within those restrictions. Plaintiff later completed a functional capacity evaluation ("FCE"), which placed him in the light category for lifting above the waist and the heavy category for lifting below the waist. After reviewing the result of the FCE on 14 April 2005, Dr. Califf referred plaintiff to a pain clinic for epidural steroid injections

and continued plaintiff's light duty work restrictions. Plaintiff remained out of work and continued to not seek employment within his restrictions.

Plaintiff underwent another MRI of his lumbar spine on 25 August 2005. The results were compared to the 14 January 2005 MRI and revealed no significant change. Dr. Califf recommended a discogram for plaintiff. The purpose of a discogram is to identify a particular disc as the source of a patient's pain and helps doctors determine whether surgical intervention is necessary. Although plaintiff's discogram was initially denied by defendants, it was eventually approved and completed.

On 4 January 2006, plaintiff saw Dr. Califf again and complained of lower back pain radiating into his lower extremity. Dr. Califf reviewed the discogram, which revealed evidence of bilateral L5 radiculopathy, but did not reproduce plaintiff's alleged pain at the abnormal levels plaintiff reported. Dr. Califf recommended surgical intervention to correct what he diagnosed as lateral stenosis L4-5 and degenerative disc disease.

Plaintiff underwent decompression and fusion surgery on 6 February 2006 at Alamance Regional Medical Center. Plaintiff continued to see Dr. Califf for post-operative treatment, including physical therapy. During the time immediately following his surgery, plaintiff was unable to work. On 29 June 2006, Dr. Califf again cleared plaintiff for light duty work, but plaintiff still made no effort to find any employment.

Plaintiff next saw Dr. Califf on 7 August 2006, reporting right calf pain possibly related to a blood clot. When plaintiff returned on 19 September 2006, still complaining of persistent back and leg pain, Dr. Califf diagnosed him with persistent pain complaints and recommended ongoing conservative treatment. Although nerve conduction studies performed prior to that date revealed normal results, Dr. Califf also recommended plaintiff undergo a myelogram/CT scan. The myelogram/CT scan was completed on 8 December 2006 and revealed no evidence of neural compromise. Plaintiff's light duty work restrictions were continued by Dr. Califf on 31 October 2006 and 18 December 2006.

On 27 September 2005, plaintiff filed a request for hearing with the North Carolina Industrial Commission. On 23 October 2007, an Opinion and Award was filed by Deputy Commissioner Adrian Phillips, which concluded that plaintiff was entitled to total disability compensation, back pay of benefits accrued because of an originally incorrect average weekly wage, and payment of all medical care. On appeal, the Full Commission denied plaintiff's claim for ongoing temporary total disability and awarded plaintiff payment of all medical care "which may reasonably be required to effect a cure, provide relief, or lessen plaintiff's period of disability." Plaintiff appeals.

#### I. Standard of Review

When reviewing a decision of the Commission, this Court is limited "to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact

support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). The Commission is the "sole judge of the weight and credibility of the evidence." *Id.* at 116, 530 S.E.2d at 553. The Commission's findings of fact "are conclusive on appeal when supported by competent evidence even though" evidence exists that would support a contrary finding. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 684 (1982). The evidence must be viewed "in the light most favorable to plaintiff, and plaintiff is entitled to the benefit of every reasonable inference to be drawn from the evidence." *Deese* at 115, 530 S.E.2d at 553.

The Commission "is not required . . . to find facts as to all credible evidence. That requirement would place an unreasonable burden on the Commission." *Peagler v. Tyson Foods, Inc.*, 138 N.C. App. 593, 602, 532 S.E.2d 207, 213 (2000) (internal quotation marks omitted) (alteration in original). The Commission is only required to make findings of fact which are necessary to support its conclusions of law. *Id.* "[W]hen the findings are insufficient to determine the rights of the parties, the court may remand to the Industrial Commission for additional findings." *Hilliard*, 305 N.C. at 595, 290 S.E.2d at 684 (citing *Byers v. Highway Comm.*, 275 N.C. 229, 233, 166 S.E.2d 649, 651 (1969); *Brice v. Salvage Co.*, 249 N.C. 74, 83, 105 S.E.2d 439, 446 (1958)).

## II. Disability

Plaintiff argues that the Commission erred by concluding that plaintiff was no longer disabled as a result of the injury on 15

December 2004. Plaintiff assigns error to the Commission's Finding of Fact 1 and Finding of Fact 11. The remaining, unchallenged findings of fact are conclusive on appeal. *First Union Nat'l Bank v. Bob Dunn Ford, Inc.*, 118 N.C. App. 444, 446, 455 S.E.2d 453, 454 (1995).

To prove disability, an employee must show that he is incapable of earning the same wages he earned prior to the injury, at the same or other employment. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). The employee can prove disability through one of four methods:

(1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) 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; (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) (internal citations omitted).

A. Finding of Fact 1

Plaintiff argues that Finding of Fact 1, that plaintiff has a high school education, is error because plaintiff actually has a G.E.D. We disagree. Plaintiff testified during the hearing before the deputy commissioner that he had a high school education and later specifically stated that he had a G.E.D. Moreover, there is

no vocational difference between a G.E.D. and a high school education. Plaintiff has failed to show that there was no competent evidence in the record to support the Commission's finding.

B. Finding of Fact 11

Plaintiff next argues that Finding of Fact 11, which states that plaintiff was capable of sedentary or light duty work during certain periods of time, is error. We disagree. Plaintiff argues that this finding is contrary to plaintiff's testimony that he is unable to work. This finding is amply supported by additional evidence in the record. For example, Dr. Califf testified that he cleared plaintiff for light duty work repeatedly during his treatment. Dr. Califf's testimony is fully supported by plaintiff's medical records.

Plaintiff also argues that Finding of Fact 11 is a conclusion of law rather than a finding of fact, but this contention is without merit. Finding of Fact 11 is clearly a factual statement based on medical testimony offered by Dr. Califf.

C. Application of *Russell* Test

Plaintiff argues that the Commission failed to consider evidence of plaintiff's age, inexperience, and lack of education, in determining whether he was capable of obtaining other employment. See *Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457 (internal citations omitted). We disagree. The Commission considered all of these factors in Finding of Fact 1, which states:

At the time of the hearing before the deputy commissioner, plaintiff was thirty-eight years

old with a high school education. Plaintiff began working for defendant in 2002. In 2004, plaintiff became a foreman of a work crew with defendant. As a foreman, plaintiff's job duties were to supervise workers at job sites and to make sure jobs were completed. Prior to working for defendant, plaintiff worked as a boom truck driver and helped his wife manage a nightclub.

The Commission made specific findings regarding plaintiff's age, inexperience, and lack of education.

Plaintiff also contends that the Commission failed to consider his current health and pain level. However, the Commission's findings detail plaintiff's medical history since his injury was sustained on 15 December 2004. These findings of fact specifically mention plaintiff's complaints of pain as well as Dr. Califf's diagnoses. Thus, the Commission considered all necessary factors in reaching its conclusion. Plaintiff's first assignment of error is overruled.

### III. Average Weekly Wage

Plaintiff argues that the Commission erred by not making findings of fact and conclusions of law regarding plaintiff's correct average weekly wage. We agree.

The Commission is not required to make specific findings of fact as to every issue, but "it is required to make specific findings with respect to crucial facts upon which the question of plaintiff's right to compensation depends." *Perry v. CKE Rests., Inc.*, 187 N.C. App. 759, 763, 654 S.E.2d 33, 36 (2007) (citing *Gaines v. 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) (citing *Hansel v. Sherman Textiles*, 304 N.C. 44, 59, 283 S.E.2d 101, 109-10 (1981)).

Plaintiff argued at the initial hearing that the compensation rate being paid by defendants was based on an incorrect average weekly wage and that he was thus entitled to a higher compensation rate and back pay. Plaintiff testified that in addition to his salary of \$800.00 per week, his employer also paid him an extra \$150.00 in cash. This income was not reported on plaintiff's tax return, but plaintiff testified that he received a letter from the IRS regarding the unreported income. Plaintiff moved to supplement the record with evidence regarding his average weekly wage, but the record had already closed and thus plaintiff's motion was denied.

Defendants argue that the Commission specifically rejected the deputy commissioner's findings of fact as to the average weekly wage issue when it stated, "[h]aving reviewed the competent evidence of record, the Full Commission rejects the findings of fact in the Opinion and Award of Deputy Commissioner Phillips and enters the following Opinion and Award." That statement, however, is neither a finding of fact nor a conclusion of law; it is merely an introduction to the Commission's Opinion and Award and thus cannot be considered part of the Opinion and Award.

Defendants argue that specific findings of fact regarding the average weekly wage were not required because any increase in

plaintiff's average weekly wage would be offset by defendants' overpayment of benefits to plaintiff. The Commission concluded that plaintiff was not entitled to disability benefits during the time periods he was released to light duty work, but defendants paid temporary total disability to plaintiff during those time periods and continued to pay benefits until the Commission issued its Opinion and Award.

Setting the appropriate average weekly wage will ensure that both plaintiff and defendants receive all monies to which they are entitled. See N.C. Gen. Stat. § 97-29 (2007) ("where the incapacity for work resulting from the injury is total, the employer shall pay or cause to be paid. . . weekly compensation equal to sixty-six and two-thirds percent of his average weekly wages."). An exact accounting is preferable to the rough generalization that the overpayment of benefits will "offset" any increase in plaintiff's average weekly wage. Accordingly, we remand to the Industrial Commission to make findings of fact and conclusions of law regarding plaintiff's average weekly wage.

#### IV. Medical care

Plaintiff argues that the Commission erred by failing to make findings of fact and conclusions of law regarding plaintiff's right to payment for the following medical care recommended by Dr. Califf: (1) myelogram; (2) discogram; (3) CT scan; (4) nicotine patch; and (5) Coumadin prescription. We agree.

Plaintiff specifically assigns error to Conclusion of Law 7, which states that plaintiff is entitled to payment of medical care

suggested by Dr. Califf that may reasonably be required to effect a cure, provide relief, or lessen plaintiff's period of disability. N.C. Gen. Stat. § 97-2(19) (2007).

Plaintiff argues Conclusion of Law 7 is inadequate because the purpose of the hearing was to settle the controversy and allow the medical care to go immediately forward. By awarding plaintiff payment of medical care which "may reasonably be required to effect [sic] a cure, provide relief, or lessen plaintiff's period of disability," the Commission left open for further dispute what particular medical care meets this standard.

N.C. Gen. Stat. § 97-25 requires an employer to provide "medical compensation" to an injured employee, which is defined as services "as may reasonably be required to effect a cure or give relief and for such additional time as, in the judgment of the Commission, will tend to lessen the period of disability." N.C. Gen. Stat. §§ 97-2(19), 97-25 (2007). The Commission used the correct statutory language in its Opinion and Award; however, an exact finding as to what medical treatments meet this standard is necessary to fully determine the rights of the parties. See *Lawton v. County of Durham*, 85 N.C. App. 589, 592, 355 S.E.2d 158, 160 (1987) (citing *Hansel v. Sherman Textiles*, 304 N.C. 44, 59, 283 S.E.2d 101, 109-10 (1981)).

Accordingly, we remand to the Commission for further findings of fact regarding plaintiff's right to medical care. Specifically, it must be determined what medical treatments have not been paid

and what further payments for medical care defendants are required to provide.

V. Conclusion

Plaintiff has failed to bring forth any arguments regarding his remaining assignments of error. As such, we deem these assignments of error abandoned pursuant to N.C.R. App. P. 28(b)(6) (2008).

We affirm that portion of the Commission's Opinion and Award which holds that plaintiff failed to prove he is entitled to ongoing temporary total disability benefits. We remand for further findings of fact regarding plaintiff's correct average weekly wage and plaintiff's entitlement to certain medical treatments, specifically what medical treatments have already been paid by defendants and what, if any, additional medical treatments defendants are required to pay.

Affirmed in part, remanded in part.

Judges BRYANT and ELMORE concur.

Report per Rule 30(e).