NO. COA 02-1381

NORTH CAROLINA COURT OF APPEALS

Filed: 2 March 2004

SAM E. PRUETT,
Employee,
Plaintiff-Appellee,

v.

North Carolina Industrial Commission
I.C. File No. 557214

PRUETT FLOOR COVERINGS,
Employer,

and

THE TRAVELERS INSURANCE COMPANY,
Carrier,
Defendants-Appellants.

Appeal by defendants from opinion and award entered 15 July 2002 by the North Carolina Industrial Commission. Heard in the Court of Appeals 21 August 2003.

Tania L. Leon, P.A., by Tania L. Leon, for plaintiff-appellee.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Hatcher Kincheloe and Shannon P. Herndon, for defendants-appellants.

McGEE, Judge.

Sam Pruett (plaintiff), a vinyl floor installer and sole proprietor, slid in the mud at a jobsite which resulted in an injury to his lower back on 3 December 1994. As a result of the accident, plaintiff experienced back pain for which he sought treatment with a chiropractor. Plaintiff continued to work, although he did not perform installations for a period of time

following the accident. As a vinyl floor installer, plaintiff regularly carried heavy rolls of vinyl and necessary equipment.

In 1995, plaintiff's pain continued despite his visits to a chiropractor and plaintiff then sought treatment from Dr. Raymond Sweet (Dr. Sweet), a neurosurgeon. After completing an MRI and a physical examination, Dr. Sweet diagnosed plaintiff as suffering from a herniated disc at L5-S1 and from stenosis at L4 and L5-S1. In accordance with Dr. Sweet's recommendation, plaintiff underwent a laminectomy at L4 and L5-S1 and diskectomy at L5-S1 on 20 April 1995. Because the surgery prevented plaintiff from working, the parties entered into a Form 21 agreement (the agreement) on 3 May 1995. The agreement was approved by the Industrial Commission on 16 April 1996. Under the agreement, defendant-carrier agreed to pay plaintiff temporary total disability benefits at a rate of $466.00 per week, the maximum compensation rate for 1994, based on an average weekly wage of $1,076.20 as reported in the agreement. Plaintiff stipulated in the agreement that, "pay roll for my salary is far above the listed amount. Twice the amount or more." According to the printed language of Industrial Commission Form 21, the average weekly wage was "subject to verification" unless otherwise agreed upon. Plaintiff received payments pursuant to the agreement from 20 April 1995 through 12 October 1995.

Plaintiff completed a return to work report and resumed employment on 21 August 1995. Dr. Sweet determined that plaintiff had reached maximum medical improvement on 20 June 1996 and sustained a twelve and one-half percent permanent partial impairment to his back as a result of the fall on 3 December 1994.Dr. Sweet provided plaintiff with a list of permanent restrictions on 6 September 1996. Since his return to work on 21 August 1996, plaintiff has performed repair work, completed small vinyl flooring installations, and managed operations. Plaintiff is now dependant on others for assistance in completing installation work. He also

avoids concrete floors if possible. Plaintiff's wife, Faye Pruett (Mrs. Pruett), with whom he has worked for over a decade, assumed a greater amount of the installation work after her husband's accident.

Plaintiff filed a Form 33 on 16 April 1999 with the North Carolina Industrial Commission (Commission) requesting approval for disability benefits based on a permanent partial wage loss. A deputy commissioner entered an opinion and award on 29 August 2000 finding that plaintiff had failed to show, by the greater weight of the evidence, that he sustained a partial wage loss as a result of his compensable injury. The deputy commissioner relied on a finding that plaintiff's adjusted income, based on the income derived from the business, had not declined. However, the deputy commissioner found that for the twelve and one-half percent permanent partial disability to plaintiff's back, plaintiff was entitled to thirty-seven and one-half weeks of disability compensation at a rate of $466 per week, to be paid in a lump sum amount, subject to plaintiff's attorney fees.

Plaintiff filed notice of appeal to the Industrial Commission on 6 September 2000. The Commission reviewed the case and on 2 May 2001, remanded the case to a deputy commissioner for an evidentiary hearing to allow the parties to introduce evidence into the record, including oral testimony, on the issue of whether plaintiff had suffered a partial wage loss since his return to work on 22 August 1995.

A deputy commissioner conducted an evidentiary hearing and entered an order on 4 October 2001 transferring the matter back to the Commission. The Commission filed its opinion and award on 15 July 2002 ordering defendants to pay plaintiff partial disability benefits pursuant to N.C. Gen. Stat. §97-30 for plaintiff's partial wage loss. The Commission found that in 1994, at the time of the accident, plaintiff was able to perform labor to generate seventy

percent of his business's net profit, but only forty percent from 1996 through 1999 due to his injury. The Commission held that plaintiff's average weekly wage at the time of injury was $1,241.67 and his post-injury earning capacity was $779.13. This resulted in a loss of $462.54 per week, for which the Commission determined plaintiff was entitled to receive compensation at a rate of $308.36 per week for his partial wage loss beginning 21 August 1995 and ending 2 September 2000. The award was subject to a deduction for the total disability compensation already paid to plaintiff. Defendants appeal.

When reviewing an opinion and award of the Commission, an appellate 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" and "the Commission does not have to explain its findings of fact by attempting to distinguish which evidence or witnesses it finds credible." *Id*.

In assignment of error number six, defendants contend the Commission erred in finding that plaintiff's pre-injury average weekly wage was seventy percent of the business' net profit. Defendants argue that the determination was both arbitrary and capricious.

Under the relevant standard of review, "[i]f there is any evidence of substance which directly or by reasonable inference tends to support the [Commission's] findings, this Court is bound by such evidence, even though there is evidence that would have supported a finding to the contrary." *Porterfield v. RPC Corp.*, 47 N.C. App. 140, 144, 266 S.E.2d 760, 762 (1980); *see Adams v. AVX Corp.*, 349 N.C. 676, 680-81, 509 S.E.2d 411, 413-14 (1998). In the case before us, plaintiff testified that he performed "at least seventy to seventy-five percent of the [business's] intake" prior to his injury. The Commission is in the best position to determine the

weight and credibility of witness testimony. Accordingly, we find that there was competent evidence to support the Commission's determination that plaintiff's pre-injury wage amounted to seventy percent of the business' net profit.

Defendants further argue that the Commission erred in giving weight to the work performed by Mrs. Pruett in calculating that plaintiff's pre-injury work contributed to only seventy percent of the business' net profit. Defendants, in making their argument, rely on the United States Tax Code which dictates that a sole proprietor is solely responsible for all income and liabilities of a business. Defendants thus conclude that plaintiff is entitled to one hundred percent of all profits of the business and therefore, it is irrelevant what percent of the profit is attributable to the efforts of Mrs. Pruett.

Specifically addressing the issue of sole proprietorships in the context of workers' compensation, N.C. Gen. Stat. §97-2(2) (2003) provides that:

> Any sole proprietor . . . of a business may elect to be included as an employee under the workers' compensation coverage of such business if he is actively engaged in the operation of the business and if the insurer is notified of his election to be so included. Any such sole proprietor . . . shall, upon such election, be entitled to employee benefits and be subject to employee responsibilities prescribed in this Article.

This Court held in *McAnelly v. Wilson Pallet and Crate Co.*, 120 N.C. App. 127, 460 S.E.2d 894, *disc. review denied*, 342 N.C. 193, 463 S.E.2d 239 (1995), that the Commission erred when it relied on whether the employer enjoyed a net profit as the basis for determining the amount to award the sole proprietor, who had elected for workers' compensation coverage. "'[T]he profit or loss of [a] business may not necessarily reflect the value of the plaintiff's services to it.'" *Id*. at 136, 460 S.E.2d at 899 (quoting *York v. Unionville Volunteer Fire Dept*., 58 N.C. App. 591, 593, 293 S.E.2d 812, 814 (1982)). A sole proprietor who elects to be deemed an employee in

accordance with N.C.G.S. §97-2(2) is "entitled to have his average weekly wages determined like any other employee." *McAnelly*, 120 N.C. App. at 133, 460 S.E.2d at 897. Therefore, because the workers' compensation statute explicitly provides coverage for sole proprietors, in light of our holding in *McAnelly*, we find defendants' argument that plaintiff's wage is conclusively dictated by the net profit of his business to be without merit. The Commission did not err in determining what percentage of the business's net income was attributable to plaintiff's efforts. Defendants' assignment of error number six is without merit.

In defendants' assignments of error seven through ten, defendants contend the Commission acted arbitrarily in finding that by the greater weight of the evidence plaintiff, post-injury, was able to perform labor to generate forty percent of the net profit of defendant-employer from 1996 to 1999. In reaching this percentage rate, the Commission accepted the testimony of plaintiff and Mrs. Pruett as to plaintiff's work capacity after his post-injury return to work. Again, we note that sole proprietors may purchase workers' compensation coverage and that a sole proprietor's average weekly wage is not simply the equivalent of the net profit of the business. *See McAnelly*, 120 N.C. App. 127, 460 S.E.2d 894. We find there was competent evidence before the Commission from which it could conclude that plaintiff contributed only forty percent of the net profit of the business from 1996 to 1999. It is irrelevant to our review whether there was some evidence that could have proven otherwise.

Defendants note that an employee is only entitled to partial disability benefits if the employee earns lower wages after a compensable injury than he earned before the injury. N.C. Gen. Stat. §97-30 (2003). In its findings, the Commission noted that plaintiff and Mrs. Pruett presented confusing and conflicting testimony as to how much work plaintiff was performing. Nonetheless, the Commission made extensive findings that the greater weight of the evidence

supported a determination that plaintiff earned seventy percent of the pre-injury net profit and only forty percent of the post-injury net profit. Even though there may be evidence to the contrary, this Court must uphold the Commission's findings of fact if there is any competent evidence supporting the findings.

It is apparent from the opinion and award that the Commission thoughtfully and thoroughly examined the record in concluding plaintiff earned a lesser amount upon his return to work. We find there was competent evidence supporting the Commission's finding that plaintiff, upon his return to work, was no longer capable of receiving wages as he did prior to his injury. Those findings support the Commission's conclusion of law that plaintiff was entitled to compensation for his partial wage loss based on two-thirds of the difference between his average weekly wage at the time of the accident and the wage he was able to earn after the accident. *See* N.C.G.S. §97-30 (2003). Defendants' assignments of error seven through ten are overruled.

Defendants' assignments of error three through eleven collectively argue the Commission erred in finding that the "average weekly wage" listed on the agreement was not conclusive in assessing plaintiff's average weekly wage for purposes of calculating the workers' compensation award due. Defendants emphasize that in plaintiff's Form 44 application for review by the Commission, plaintiff did not set forth the issue of average weekly wage, yet the Commission remanded the case to a deputy commissioner for an evidentiary hearing on the matter of plaintiff's partial wage loss.

The Workers' Compensation Rules of North Carolina proscribe that "[p]articular grounds for appeal not set forth in the application for review shall be deemed abandoned, and argument thereon shall not be heard before the Full Commission." Workers' Comp. R. of N.C. Indus. Comm'n 701, 2004 Ann. R. (N.C.) 924. However, "the question of whether to reopen a case for

the taking of additional evidence rests in the sound discretion of the Industrial Commission, and its decision will not be disturbed on appeal in the absence of an abuse of discretion." *Porter v. Fieldcrest Cannon, Inc.*, 133 N.C. App. 23, 29, 514 S.E.2d 517, 522 (1999) (quoting *Schofield v. Tea Co.*, 299 N.C. 582, 596, 264 S.E.2d 56, 65 (1980), *superseded by statute as stated in*, *Franklin v. Broyhill Furniture Industries*, 123 N.C. App. 200, 472 S.E.2d 382, *cert. denied*, 344 N.C. 629, 477 S.E.2d 39 (1996)). The Commission possesses plenary powers which enable it upon a showing of good grounds to receive additional evidence, reconsider the evidence, rehear the parties, and if just, amend the award. *Lynch v. Construction Co.*, 41 N.C. App. 127, 130, 254 S.E.2d 236, 238, *disc. review denied*, 298 N.C. 298, 259 S.E.2d 914 (1979); *also see* N.C. Gen. Stat. §97-85 (2003). The Commission may, on its own motion, set a hearing for the taking of additional evidence on the issue of plaintiff's wage loss. This Court recognizes

> that the [F]ull Commission has the authority to determine the case from the written transcript of the hearing before the deputy commissioner or hearing officer, but when that transcript is insufficient to resolve all the issues, the [F]ull Commission must conduct its own hearing or remand the matter for further hearing.

Joyner v. Rocky Mount Mills, 92 N.C. App. 478, 482, 374 S.E.2d 610, 613 (1988).

After careful consideration in its effort to determine plaintiff's wage loss, the Commission disregarded as erroneous the average weekly wage figure presented in the agreement. Contrary to defendants' assertion, the Commission did not rescind the Form 21; instead, the Commission explicitly reviewed the average weekly wage as listed and determined it was not accurate. According to the wording of Form 21, the listed average weekly wage was "subject to verification." Furthermore, plaintiff handwrote on the form that "[p]ayroll for my salary is far above the listed amount. Twice the amount or more."

As a result of changes to Form 21 in the mid-1990s, the term "subject to verification" was added to Form 21. Prior to the changes, the average weekly wage as reported on the printed language of Form 21 and then approved by the Commission, was regarded as conclusive evidence of the average weekly wage and could only be rescinded on the basis of fraud, misrepresentation, undue influence, or abuse of confidential relationship. *Swain v. C & N Evans Trucking Co.*, 126 N.C. App. 332, 484 S.E.2d 845 (1997) (determination of plaintiff's average weekly wage raises an issue of law, not fact, so mutual mistake of fact is insufficient basis for recision of a Form 21 agreement). However, following the Industrial Commission's modification of Form 21, *Swain* is no longer dispositive and defendants' reliance on the decision is in error. The present printed Form 21 explicitly states that the listed wage is subject to verification. Furthermore, N.C. Gen. Stat. §97-17(a) (2003) provides that no party to a settlement agreement, such as an approved Form 21,

> for compensation approved by the Commission shall deny the truth of the matters contained in the settlement agreement, unless the party is able to show to the satisfaction of the Commission that there has been error due to . . . mutual mistake, in which event the Commission may set aside the agreement.

We note that in a letter to plaintiff from defendant-carrier dated 30 May 2001, defendant-carrier admitted that the average weekly wage listed in the agreement was in error.

The Commission's determination that the average weekly wage listed in the agreement was inaccurate was a step in the process of verifying what the correct pre-injury wage was in order to determine any wage loss due to plaintiff's disability. Since there had not been a verification completed at the time the Commission received plaintiff's appeal, the Commission did not err in electing to do so at that time. The actions of the Commission do not amount to a rescission of the agreement, but instead the Commission is modifying the agreement due to the

mutual mistake as to plaintiff's average weekly wage. The Commission may review and reconsider evidence in order to make a record comply with the law even though no exception was taken as to the finding or conclusion. *Nash v. Conrad Industries*, 62 N.C. App. 612, 617, 303 S.E.2d 373, 376, *aff'd*, 309 N.C. 629, 308 S.E.2d 334 (1983) (Commission has authority to strike findings of fact and conclusions made by deputy commissioner regardless of whether an exception is taken by a party).

The Commission heard extensive testimony as to the confusing means of payroll accounting employed by the business. Competent evidence was presented to support the finding that the best means of calculating plaintiff's pre-injury average weekly wage was to use the business' 1994 tax return to deduce the net profit, providing for the percentage of labor supplied by plaintiff. Likewise, there was competent evidence presented that the 1996 through 1999 tax returns for the business were the best source for determining plaintiff's post-injury earnings. These findings support the Commission's conclusion of law that plaintiff suffered a partial wage loss due to his disability. We find no error in the Commission's opinion and award.

Finally, we have considered defendants' remaining assignments of error and find them to be without merit.

Affirmed.

Judges BRYANT and GEER concur.

Report per Rule 30(e).