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NO. COA01-714

NORTH CAROLINA COURT OF APPEALS

Filed: 16 July 2002

FELIX OLIVARES-JUAREZ,
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 558811

SHOWELL FARMS,
Employer,

LIBERTY MUTUAL INS. CO.,
Carrier,
Defendants.

Appeal by plaintiff from opinion and award of the North Carolina Industrial Commission filed 16 March 2001. Heard in the Court of Appeals 16 April 2002.

Law Offices of Robert J. Willis, by Robert J. Willis, for plaintiff appellant.

Haynsworth Baldwin Johnson & Greaves, L.L.C., by Brian M. Freedman, for defendant appellees.

TIMMONS-GOODSON, Judge.

Felix Olivares-Juarez (“plaintiff”) appeals from an opinion and award by the North Carolina Industrial Commission (“the Commission”) awarding plaintiff temporary total and permanent partial disability compensation benefits. The case arose over injuries plaintiff sustained while operating a pressure hose in the course of his employment as a sanitation worker at Showell Farms (“defendant-employer”). In its opinion and award, the Commission concluded,

inter alia, that plaintiff had failed to prove that he sustained a wage loss or was disabled after 28 January 1996 as a result of his work-related injury. For the reasons stated herein, we reverse the opinion and award of the Commission.

This is the second time that this Court has addressed plaintiff's case. The following summary of the pertinent factual and procedural history appears in our decision in *Olivares-Juarez v. Showell Farms*, 138 N.C. App. 663, 532 S.E.2d 198 (2000): Plaintiff is Guatemalan and, at all times relevant to these proceedings, did not have the necessary documentation to qualify as a legal immigrant or to hold employment in the United States. Nevertheless, on or about 4 June 1995, plaintiff obtained employment with defendant-employer using documentation belonging to his brother, Felipe Olivares-Juarez, who was a legal immigrant. Defendant-employer was unaware of the misrepresentation by plaintiff.

On 1 August 1995, plaintiff fractured the ulna and radius of his left arm and lacerated his left hand while working for defendant-employer. Defendant-carrier initiated disability payments and filed a Form 63 Notice to "Felipe Olivares Juarez" (plaintiff's brother) of Payment of Compensation Without Prejudice. Plaintiff filed a Form 18 Notice of Accident using his brother's name, and the parties attempted to execute a Form 21 Agreement with plaintiff signing his brother's name. The Commission refused to approve the Form 21 Agreement, however, because "the name listed for the employee was admittedly fictitious."

On 4 August 1995, plaintiff underwent surgery to repair his left arm fractures, followed thereafter by physical therapy for several months. Plaintiff was unable to return to his former position with defendant-employer as a result of the injury. On 7 December 1995, plaintiff's physician approved his return to a modified, "one-handed," clean-up position offered by defendant-employer. Before plaintiff could accept the position, however, defendant-employer

withdrew its offer to re-employ plaintiff, informing him that his status as an illegal alien prohibited his further employment with the company. On 2 January 1996, defendant-carrier terminated plaintiff's disability payments.

Plaintiff's physician conducted a final examination of plaintiff's condition on 8 February 1996 and assigned him a five-percent permanent partial disability rating to his left arm. He also imposed a three-month restriction upon plaintiff of lifting more than twenty-five pounds, operating a vibrating instrument, or working in cold temperatures. He otherwise permitted plaintiff to return to normal activities. On 29 January 1996, plaintiff obtained employment inspecting finished parts at Quality Molded Products, where he continued to experience pain in his hand and arm due to the 1 August 1995 injury. Plaintiff ultimately resigned from this position on 19 May 1996 due to complaints of pain and discomfort in his left thumb and forearm. On 3 August 1996, plaintiff began employment with Glendale Hosiery Company earning a lesser wage than he received with defendant-employer.

On 8 May 1996, plaintiff visited an orthopaedic surgeon, Dr. Gary Kuzma, for an independent medical evaluation. In Dr. Kuzma's opinion, plaintiff had reached maximum medical improvement and had sustained a ten-percent permanent partial disability to his left hand and arm.

Plaintiff's case was heard on 24 February 1997 before a deputy commissioner, who concluded that plaintiff's unemployment subsequent to 7 December 1995 was caused by his illegal immigration status and lack of documentation permitting his employment in the United States. On appeal, the Full Commission reversed the deputy commissioner's denial of benefits after 7 December 1995, determining that, irrespective of plaintiff's illegal immigration status, the light duty position offered to him by defendant-employer did not demonstrate that plaintiff was

capable of returning to suitable employment at pre-injury wages. The Commission therefore awarded plaintiff temporary partial disability compensation benefits.

Defendants appealed to this Court, which reversed the opinion and award on the grounds that the Commission had made no findings to support its conclusion that plaintiff's earning capacity was diminished as a result of his 1 August 1995 injury. *See Olivares-Juarez*, 138 N.C. App. at 667, 532 S.E.2d at 202. We therefore remanded plaintiff's case for further proceedings.

On remand, the Commission again reviewed plaintiff's medical and wage loss evidence and entered an opinion and award that is the subject of the instant appeal. Characterizing the evidence concerning plaintiff's wage records from Quality Molded Products as "incomplete," the Commission found that "[t]he evidence, including the medical evidence, fails to show that plaintiff sustained a wage loss or was disabled after 28 January 1996 as a result of his 1 August 1995 injury." Accordingly, the Commission limited its award of temporary total disability compensation benefits to plaintiff to the period of 1 August 1995 through 28 January 1996. The Commission also awarded plaintiff permanent partial compensation for twenty-four weeks and reasonable attorneys' fees, and ordered defendants to pay all reasonable medical expenses incurred by plaintiff as a result of the 1 August 1995 injury. From this opinion and award, plaintiff appeals.

Plaintiff argues that the Commission erred in concluding that he failed to prove that he sustained a compensable wage loss after 28 January 1996 as a result of the 1 August 1995 injury, and that the Commission's findings regarding plaintiff's loss of wage-earning capacity are unsupported by competent evidence. For the reasons stated herein, we reverse the opinion and award of the Commission.

On review of an opinion and award by the Commission, our role is limited to determining whether there is competent evidence to support the Commission's findings of fact, and whether those findings in turn support the Commission's conclusions of law. *See Flores v. Stacy Penny Masonry Co.*, 134 N.C. App. 452, 455, 518 S.E.2d 200, 203 (1999). We are bound by the Commission's findings if they are sustained by any competent evidence of record, regardless of whether such other evidence exists that would support contrary findings. *See id.* The Commission's conclusions of law are nevertheless fully reviewable on appeal. *See 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).

Plaintiff contends there is no competent evidence to support the Commission's findings that plaintiff failed to prove that he sustained a wage loss or was disabled after 28 January 1996 as a result of his 1 August 1995 injury. Under the Workers' Compensation Act, "disability" is defined as "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) (2001). The initial burden of proving disability is on the injured employee. *See Snead v. Carolina Pre-Cast Concrete, Inc.*, 129 N.C. App. 331, 335, 499 S.E.2d 470, 473, *cert. denied*, 348 N.C. 501, 510 S.E.2d 656 (1998). To prove disability, an employee must demonstrate that he is unable to earn pre-injury wages in the same employment or in any other employment, and that the inability to earn such wages is due to his work-related injury. *See Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). An employee may make such a showing in one of the following ways:

- (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 Product Distribution, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (citations omitted). Once an employee has met his initial burden of proof, the burden shifts to the employer to rebut such evidence of a disability by showing not only that there were suitable alternative jobs available to the employee, but that the employee was capable of obtaining one of these jobs. *See Shaw v. United Parcel Service*, 116 N.C. App. 598, 601, 449 S.E.2d 50, 52-53 (1994), *affirmed*, 342 N.C. 189, 463 S.E.2d 78 (1995).

In the instant case, the Commission made the following findings in support of its conclusion that plaintiff had failed to prove that he sustained a wage loss after 28 January 1996 as a result of the 1 August 1995 injury:

11. On 29 January 1996, plaintiff obtained a position with Quality Molded Products, where he inspected finished parts. During his employment with Quality Molded Products, plaintiff continued to experience some hand and arm pain due to his 1 August 1995 injury. Having re-reviewed plaintiff's evidence as to wage loss, however, in particular the incomplete wage records from Quality Molded Products, the Commission finds that plaintiff has failed to prove that he sustained a wage loss after 28 January 1996 as a result of his 1 August 1995 injury.

. . . .

15. The evidence, including the medical evidence, fails to show that plaintiff sustained a wage loss or was disabled after 28 January 1996 as a result of his 1 August 1995 injury.

Plaintiff argues that the above-stated findings are unsupported by the competent evidence of record, and that he presented sufficient evidence of disability to sustain his initial burden of proof. Plaintiff asserts that he met his burden of proving an impairment of his earning capacity

by supplying evidence that he obtained other employment at a lesser wage than the wage earned prior to his injury. Specifically, plaintiff points to his wage records from Quality Molded Products, Inc. (“QMP”), where he began working on 29 January 1996, as proof of the impairment of his wage-earning capacity. These records are in the form of five bi-weekly earnings statements showing the numbers of hours plaintiff worked at QMP, his hourly wage, and his total gross earnings with QMP. The first earnings statement is for the pay period ending on 11 February 1996, and the last earnings statement is for the pay period ending 19 May 1996, at which time plaintiff left his employment with QMP. There is a gap in plaintiff’s QMP wage records for the time period from 11 March 1996 to 21 April 1996. The wage records show that plaintiff began working for QMP at a wage of \$5.00 per hour, which was eventually increased to \$5.20 per hour. Although the records indicate that plaintiff worked full-time and overtime hours in January and February of 1996, plaintiff’s earnings statements from March and May of 1996 reveal that plaintiff’s hours were reduced to part-time, and plaintiff received no overtime wage. At the time of his injury with defendant-employer, plaintiff was working eight hours per day, five days per week, at an hourly wage of \$6.40 per hour.

We conclude that plaintiff met the initial burden of proving disability by demonstrating that he obtained other employment at a wage less than the wage earned prior to his injury. Plaintiff’s earnings statements reveal that his hourly wage at QMP was substantially lower than the hourly wage he earned with defendant-employer, and that his work hours were significantly shorter. Plaintiff presented competent evidence that he obtained employment at a lesser wage than the wage earned prior to his injury, but the Commission failed to make any findings concerning such evidence, other than to characterize it as “incomplete.” This one-word finding is insufficient to support the Commission’s conclusion that plaintiff failed to meet his initial burden

of proving disability. The remaining “findings” by the Commission regarding plaintiff’s failure to prove disability are, in fact, not factual findings at all, but rather legal conclusions. Because plaintiff met the initial burden of proving disability, the burden then shifted to defendant-employer to rebut the existence of such disability by showing that there were suitable alternative jobs available to plaintiff, and that plaintiff was capable of obtaining one of these positions. *See Shaw*, 116 N.C. App. at 601, 449 S.E.2d at 52-53. We therefore reverse the opinion and award and remand this case to the Commission for further proceedings consistent with this opinion.

Defendants present two further arguments originating from the first appeal of this case. Defendants contend that these arguments have been properly preserved for the instant appeal, by virtue of the fact that these issues were raised but never addressed by this Court during the first appeal. We disagree. Defendants’ assignments of error do not appear in the present record on appeal, and thus these issues are not properly before this Court. *See* N.C.R. App. P. 9(a)(1)(k) (2002); *Williams v. Williams*, 31 N.C. App. 747, 747, 230 S.E.2d 428, 428 (1976); *Johnson v. Hooks*, 27 N.C. App. 584, 585, 219 S.E.2d 664, 665 (1975), *disc. review denied*, 289 N.C. 298, 222 S.E.2d 697 (1976). We therefore do not address these arguments by defendants.

We conclude that plaintiff met the initial burden of proving disability by demonstrating that he obtained other employment at a wage less than the wage earned prior to his injury. We therefore reverse and remand this case to the Industrial Commission.

Reversed and remanded.

Judges GREENE and HUNTER concur.

Report per Rule 30(e).