NO. COA10-901
NORTH CAROLINA COURT OF APPEALS

Filed: 3 May 2011

EDDIE L. HOLDEN, Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. No. 595281

BRICKEY ACOUSTICAL, INC., Employer, STATE FARM FIRE AND CASUALTY COMPANY, Carrier,
Defendants.

Appeal by plaintiff from opinion and award entered 10 March 2010 by the North Carolina Industrial Commission. Heard in the Court of Appeals 10 January 2011.

Law Offices of Jeffrey G. Scott, PLLC, by Jeffrey G. Scott, and Fox Appeals, a Professional Association Incorporated as Fox Law, P.A., by Angela Bullard Fox, for plaintiff-appellant.

Brooks, Stevens & Pope, P.A., by Michael C. Sigmon, for defendants-appellees.

MARTIN, Chief Judge.

On 19 January 2006, Eddie L. Holden (plaintiff) suffered an injury by accident while performing drywall finishing for defendant Brickey Acoustical, Inc. As plaintiff was standing on

an extension ladder about ten feet in the air, it slid and caused him to "ride the ladder" down to the concrete floor. Plaintiff was injured as a result of his right knee-area striking a rung on the ladder as the ladder hit the floor. At the time of plaintiff's injury, defendant Brickey Acoustical, Inc. had a policy of insurance with defendant State Farm Fire and Casualty Company (collectively "defendants") that provided workers' compensation coverage for plaintiff's injury. Defendants accepted compensability under our Workers' Compensation Act for multiple fractures to plaintiff's right femur arising from the accident.

After accepting the compensability of plaintiff's injury, on 27 February 2006, defendants filed a Form 22. The Form 22 indicates that plaintiff worked for defendant Brickey Acoustical, Inc. a total of 136 days[1] and that his total compensation during that time was $13,933. On 20 June 2007, plaintiff filed a Form 18. Following that, in a Form 18M dated 3 October 2007, pursuant to N.C.G.S. § 97-25.1, plaintiff moved for additional medical compensation. On 14 February 2008,

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[1] We note that, although the Form 22 indicates that plaintiff worked a total of 136 days for defendant Brickey Acoustical, Inc., 85 boxes on the Form 22 wage chart contain an "X" and one box, which appears to represent the date of plaintiff's compensable injury, contains a notation. The wage chart therefore indicates that plaintiff may have worked only 86 days.

plaintiff's motion was approved by an administrative order. Defendants appealed the order and requested that the claim be assigned for a hearing.

Plaintiff also filed a motion to receive medical treatment around that time, pursuant to N.C.G.S. § 97-25. His motion requested an order for "a return orthopedic evaluation with Dr. Peter Dalldorf" for determination of "whether his current low back pain is related to his altered gait resulting from his fractured knee following his January 19, 2006 on-the-job injury." In response to plaintiff's motion, defendants submitted a letter stating "Plaintiff did not injure his back and no back injury or condition has been accepted as compensable by Defendants" and requested that "plaintiff's request for medical treatment for the unrelated back condition" be denied. On 4 April 2008, plaintiff's motion was denied by an administrative order. Plaintiff appealed the order and requested that his claim be assigned for a hearing.

Thereafter, on 16 April 2008, plaintiff filed an amended Form 18 alleging that he had injured his "right femur/leg ***and back***." (Emphasis added.) In a Form 61 dated 6 May 2008, defendants "denyi[ed] that Plaintiff sustained any back injury in the January 19, 2006 accident" stated that the "[i]nitial Form 18 received on June 29, 2007 completed by Plaintiff[']s

attorney did not note any back injury," and noted that plaintiff's "supplemental Form 18 was submitted more than 2 years after the day of injury."

During the hearing before the deputy commissioner, defendants contended that plaintiff was not an "employee," but was instead a "subcontractor." As such, defendants contended that the Form 22 submitted by defendant Brickey Acoustical, Inc., which included all amounts paid to plaintiff before his compensable injury, included not only payments to plaintiff, but also payments to other employees of plaintiff, and, therefore, overstated plaintiff's earnings. The issue of whether plaintiff had an ongoing disability was also addressed during the hearing.

On 5 August 2009, the deputy commissioner filed an opinion and award in which she awarded, *inter alia*,

> 2. Plaintiff's Form 18M Employee's Application for Additional Medical Compensation is APPROVED. Defendants shall pay for the treatment when said treatment [is] recommended to [be] necessary by competent medical authority.
>
> 3. Defendants shall pay to plaintiff temporary total disability compensation at the rate of $478.08 per week beginning on January 19, 2006 and continuing until further Order of the Commission. For the period from January 19, 2006 to the present, defendants shall immediately make a lump sum payment to plaintiff equal to the difference between the previous compensation rate and the one determined herein.

Defendants filed a Form 44 Application for Review of the opinion and award, and plaintiff filed a Motion for Change of Medical Treatment pursuant to N.C.G.S. § 97-25, requesting to change his physician from Dr. Hans Hansen to Dr. James M. North, and a Motion for an Examination, pursuant to N.C.G.S. § 97-27(b), requesting an examination by a surgeon.

On 10 March 2010, the Full Commission entered an opinion and award denying plaintiff's motions and reversing the deputy commissioner's opinion and award. Plaintiff appeals the Commission's opinion and award. The Commission's findings and conclusions will be discussed where they are relevant to the issues plaintiff brings forward on appeal.

Plaintiff first contends the Commission erred by concluding that he failed to establish he is entitled to ongoing disability benefits. We disagree.

Under our Workers' Compensation Act, an employee injured in the course of his employment is disabled if the injury results in an "incapacity . . . 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) (2009).

> [T]o support a conclusion of disability, the Commission must find: (1) that plaintiff was

> incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) that this [plaintiff's] incapacity to earn was caused by [his] injury.

Johnson v. S. Tire Sales & Serv., 358 N.C. 701, 706, 599 S.E.2d 508, 512 (2004) (alterations in original) (internal quotation marks omitted). "The burden is on the employee to show that he is unable to earn the same wages he had earned before the injury, either in the same employment or in other employment." *Russell v. Lowes Prod. Distrib'n*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993). The employee may meet this burden by showing one of the following:

> (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.

Id. (citations omitted). Our review of the Commission's opinion and award 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).

In the present case, plaintiff contends the following findings of the Commission are unsupported by competent evidence:

> 34. Plaintiff began a job search in 2007. However, *plaintiff focused his search on locating construction jobs that were not within his restrictions and positions that paid $15.00 or more per hour and at his preferred pay of $24.00 per hour which are greater than his pre-injury wages*. Based upon these unreasonable job searches, plaintiff limited his ability to find suitable employment.
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> 35. The Full Commission finds based upon the greater weight of the evidence that plaintiff has failed to conduct a reasonable job search.
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> 36. Plaintiff has failed to prove that he has not been able to obtain employment since August 7, 2009 in the same or other employment or that it would be futile for him to do so.

(Emphasis added.) Plaintiff contends the evidence and findings fail to support the following conclusions of law:

> 5. . . . [A]s of August 7, 2009, plaintiff has been capable of some work but has failed to make a reasonable effort to find suitable employment within his restrictions and has failed to prove that it

> would be futile for him to do so. Therefore, plaintiff has failed to establish that he is entitled to ongoing disability benefits pursuant to N.C. Gen. Stat. § 97-29.
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> 6. Plaintiff is entitled to temporary total disability benefits at the rate of $279.31 per week from January 19, 2006 through August 7, 2009. N.C. Gen. Stat. § 97-29.

Specifically, plaintiff contends no competent evidence supports a finding that "he limited his job search to jobs he was physically unable to perform" or that it was unreasonable for him to search for jobs paying $24 per hour.

"The findings of fact by the Industrial Commission are conclusive on appeal if supported by any competent evidence." *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (internal quotation marks omitted), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999). Further, findings supported by competent evidence are conclusive "even though [other] evidence . . . would support findings to the contrary." *Id.* (internal quotation marks omitted). "Thus, on appeal, this Court does not have the right to weigh the evidence and decide the issue on the basis of its weight." *Id.* (internal quotation marks omitted). "The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Id.* (internal quotation marks omitted).

Anthony Enoch, who provided vocational services to plaintiff beginning in July 2008, testified that there was a discrepancy between plaintiff's interests and what plaintiff's functional capacity would allow. Mr. Enoch testified that plaintiff's interest in working outdoors is an impediment to his ability to find employment: plaintiff "is interested in an area of work he physically cannot do, based on the [functional capacity evaluation]." Mr. Enoch also testified that, assuming that plaintiff has a GED, some computer skills, experience in construction, including forty years' experience in drywall-finishing trades, and a preinjury wage of $14 per hour in the drywall field, plaintiff is capable of earning wages in his local geographic area. Furthermore, during the hearing before the deputy commissioner, plaintiff testified that he searches for jobs "in construction basically," that "the majority of what [he] look[s] for" are construction jobs, and that he tries to find jobs in "a line of work similar to what [he has] done." This evidence supports the Commission's finding that plaintiff "focused his search on locating construction jobs that were not within his restrictions."

Plaintiff also contends no evidence supports the Commission's finding that it was unreasonable for him to look for jobs paying $24 per hour. Plaintiff describes circumstances

he contends support the reasonableness of his belief that his hourly wage while working for defendant Brickey Acoustical, Inc. was $24, including the deputy commissioner's findings and conclusions regarding his wages, and also points out that he fully cooperated with Mr. Enoch's recommendations for his job search.

However, because we are "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*, 352 N.C. at 116, 530 S.E.2d at 553, we are not permitted to determine on appeal whether plaintiff's belief that his hourly wage was $24 was reasonable or to consider "other indicia of [the] reasonableness" of plaintiff's job search as plaintiff requests.

The Commission found that plaintiff's hourly wage while working for defendant Brickey Acoustical, Inc. was $14. That finding is supported by the testimony of Terrence Wyatt, a field superintendent with defendant Brickey Acoustical, Inc. Furthermore, Mr. Enoch testified that, given plaintiff's physical restrictions, it would not surprise him that plaintiff would have difficulty finding a job that would pay $24 per hour. Mr. Enoch testified that the pay range in plaintiff's local labor market was from $10 to about $18 per hour, that more jobs

would be available in plaintiff's local geographic area if plaintiff were looking for jobs paying between $10 and $14 per hour rather than for jobs paying between $16 and $24 per hour, and that, had plaintiff looked in the $10 to $14 per hour range, his job search would have been more successful. This evidence supports the Commission's finding that plaintiff engaged in an "unreasonable job search[]" by searching for jobs "that paid $15 or more per hour and at his preferred pay of $24 per hour."

Plaintiff next contends the Commission erred by concluding that his hip and back problems are not a direct and natural consequence of his 19 January 2006 compensable injury.

Although plaintiff contends that "obvious results of [his] compensable femur fractures and knee injuries were his altered gait and necessary dependence on devices such as crutches, canes, and walkers," describes the onset of his back and hip pain, notes the references to his back and hip pain in his medical records, and notes the testimony of Drs. Supple and Dalldorf regarding the causal relationship between his knee and femur injuries and his subsequent back and hip pain, plaintiff fails to challenge any of the Commission's findings as unsupported by competent evidence. Our review of an opinion and award of the Commission does not permit us to weigh the evidence before the Commission. *See Adams*, 349 N.C. at 681, 509 S.E.2d

at 414. Thus, we decline to consider whether the other evidence to which plaintiff refers would support alternative findings related to the compensability of his hip and back problems.

Plaintiff also asserts that the Commission's findings of fact fail to support its conclusion of law on this issue because the Commission failed to make a finding concerning "the lack of [a] causal nexus between Plaintiff's original injury and the subsequent hip and back pain/conditions" and failed to "identify evidence or determine itself that Plaintiff intentionally altered his gait" or "was faking the back and hip conditions." We disagree, and hold that the Commission's findings support its conclusion that

> 3. . . . plaintiff has failed to establish that his right hip and back problems are a direct and natural consequence of his January 19, 2006 compensable injury by accident, plaintiff is not entitled to receive medical treatment for these conditions.

The Commission's relevant findings include that

> 26. On October 31, 2007, plaintiff was examined by Dr. Peter G. Dalldorf . . . . Dr. Dalldorf did not find problems or complaints of hip or back pain.
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> 27. On May 9, 2008, plaintiff complained to Dr. Dalldorf that he was worse and now had popping in his right knee, hip, and ankle. Dr. Dalldorf noted that plaintiff walked with an altered gait using a cane . . . . Dr. Dalldorf also noted that

> plaintiff had a good range of motion in his hip which seemed painless . . . .
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> 28. On July 30, 2008, plaintiff returned to Dr. Dalldorf . . . . [Dr. Dalldorf] opined that plaintiff's back pain is probably related to the altered gait which Dr. Dalldorf related to his right knee injury.
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> 29. On August 15, 2008, Dr. Dalldorf noted plaintiff's exam was basically normal . . . . Dr. Dalldorf did not understand why plaintiff had so much difficulty or why plaintiff needed to walk with a cane.
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> . . . .
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> 32. Following a[functional capacity evaluation] on August 10, 2009 in which plaintiff engaged in self-limiting behavior, Dr. Hansen opined . . . that plaintiff could return to work at light/medium job level.
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> 33. . . . Mr. Enoch met with plaintiff on several occasions and never witnessed plaintiff walk with assistance of or carry a cane.
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> . . . .
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> 38. Plaintiff has failed to present sufficient evidence that his right hip and back pain are a direct and natural consequence of his original compensable leg injury arising out of his employment with the defendant-employer.

The Commission must make "definitive findings to determine the critical issues raised by the evidence." *Bryant v. Weyerhaeuser Co.*, 130 N.C. App. 135, 139, 502 S.E.2d 58, 61, *disc. review denied*, 349 N.C. 228, 515 S.E.2d 700 (1998) (internal quotation

marks omitted). "'[N]egative' findings are not required." *Id.* In this case, the Commission made sufficient findings to support its conclusion that "plaintiff has failed to establish that his right hip and back problems are a direct and natural consequence of his January 19, 2006 compensable injury."

Plaintiff's remaining arguments concern the calculation of his average weekly wages under N.C.G.S. § 97-2(5). He argues that remand is necessary because the Commission failed to identify the method it used under N.C.G.S. § 97-2(5) to determine his average weekly wages and failed to properly calculate his average weekly wages. We agree and, for the following reasons, remand this issue to the Commission for recalculation of plaintiff's average weekly wages.

N.C.G.S. § 97-2(5) provides five methods for computing an injured employee's average weekly wages:

> [1] "Average weekly wages" shall mean the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury . . . divided by 52; [2] but if the injured employee lost more than seven consecutive calendar days at one or more times during such period, although not in the same week, then the earnings for the remainder of such 52 weeks shall be divided by the number of weeks remaining after the time so lost has been deducted. [3] ***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.* [4] Where, by reason of a shortness of time during which the employee has been in the employment of his employer or the casual nature or terms of his employment, it is impractical to compute the average weekly wages as above defined, regard shall be had to the average weekly amount which during the 52 weeks previous to the injury was being earned by a person of the same grade and character employed in the same class of employment in the same locality or community.
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> [5] 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.

N.C. Gen. Stat. § 97-2(5) (emphasis added). "[T]his statute establishes an order of preference for the calculation method to be used." *McAninch v. Buncombe Cty. Sch.*, 347 N.C. 126, 129, 489 S.E.2d 375, 377 (1997). "[T]he primary method . . . is to calculate the total wages of the employee for the fifty-two weeks of the year prior to the date of injury and to divide that sum by fifty-two" and "[t]he final method . . . clearly may not be used unless there has been a finding that unjust results would occur by using the previously enumerated methods." *Id.* at 129-30, 489 S.E.2d at 377-78.

The Commission made the following relevant findings:

> 4. . . . Plaintiff was paid $14.00 per hour and plaintiff's wife earned $10.00 per hour. Therefore, defendant-employer paid to them in one paycheck $24 per hour for the work they performed together.
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> 5. Defendant-employer filed with the Industrial Commission a completed Form 22 wage chart showing wages paid to plaintiff totaling $13,933.00 . . . .
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> 6. However, the [Form 22] wage chart was completed based upon the rate of earnings by both plaintiff and his wife, not just plaintiff's earnings. Based upon the calculations from the wage chart and the greater weight of the credible evidence, plaintiff worked approximately 580.54 hours at $14.00 per hour with total earnings for himself of $8,127.56.
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> 7. *As plaintiff's employment with defendant-employer prior to his injury was for a period of time less than 52 weeks, plaintiff's average weekly wage should be determined by dividing the earnings during his period of employment by the number of weeks and parts thereof for which he earned wages with defendant-employer. The Form 22 indicates that plaintiff worked a total of 136 days or 19.4 weeks for defendant-employer thereby resulting in an average weekly wage of $418.95 with a corresponding compensation rate of $279.31.*

(Emphasis added.) The Commission then made the following conclusion:

> 2. *As plaintiff's employment with defendant-employer prior to his injury was for a period of time less than 52 weeks, plaintiff's average weekly wage should be*

> *determined by dividing the earnings during his period of employment by the number of weeks and parts thereof for which he earned wages with defendant-employer. Plaintiff worked a total of 19.4 weeks for defendant-employer with total earnings of $8,127.56 resulting in an average weekly wage of $418.95 with a corresponding compensation rate of $279.31.* N.C. Gen. Stat. § 97-2(5).

(Emphasis added.)

Although Finding of Fact 7 and Conclusion of Law 2, as defendants point out, nearly quote verbatim the language of method three under N.C.G.S. § 97-2(5), we disagree with defendants that remand in this case is unnecessary because, even assuming the Commission's quoting the method it employed was sufficient to indicate the method it used, the Commission failed to compute plaintiff's average weekly wages in accordance with that method.

It appears from the calculations in the Commission's Finding of Fact 7 that it determined plaintiff worked 19.4 weeks for defendant Brickey Acoustical, Inc. by dividing the 136 days plaintiff worked, as stated on the Form 22, by seven. Then, Commission's findings indicate that it divided $8127.56, the amount it computed plaintiff's total earnings to be, by 19.4 weeks. By doing so, it appears the Commission did not divide plaintiff's total earnings by "the number of weeks and parts thereof during which the [plaintiff] earned wages" as provided

by method three, but instead, divided plaintiff's total earnings by the number of weeks and parts thereof plaintiff would have earned wages had the individual jobs he completed been consolidated so that he worked consecutive seven-day work weeks. Just as the second method of N.C.G.S. § 97-2(5) "does not authorize using a 'daily wage rate' and multiplying it by seven in calculating an average weekly wage," *see Bond v. Foster Masonry, Inc.*, 139 N.C. App. 123, 130, 532 S.E.2d 583, 587 (2000) (noting additionally that "no evidence indicates that plaintiff worked seven days a week" and that "'average weekly wages of the employee in the employment in which he was working at the time of the injury must be related to *his earnings* rather than to his earning capacity'" (quoting *Liles v. Faulkner Neon & Elec. Co.*, 244 N.C. 653, 657, 94 S.E.2d 790, 794 (1956)), neither does the third method authorize the calculation the Commission used in the present case.

Furthermore, had the Commission intended to use method five, that is, to calculate plaintiff's average weekly wages by using "such other method of computing average weekly wages . . . as will most nearly approximate the amount which the injured employee would be earning were it not for the injury," N.C. Gen. Stat. § 97-2(5), it would have been required to have made "a finding that unjust results would occur by using the previously

enumerated methods." *See McAninch*, 347 N.C. at 130, 489 S.E.2d at 378. The Commission failed to do so in this case. Moreover, we emphasize that, on remand, if the Commission makes a finding that the other methods would produce unjust results and therefore chooses to employ method five, the Commission's determination of plaintiff's average weekly wages "must [nevertheless] be related to *his earnings* rather than to his earning capacity." *See Liles*, 244 N.C. at 657, 94 S.E.2d at 794.

Accordingly, we remand this issue to the Commission for recalculation of plaintiff's average weekly wages and entry of findings and conclusions to support the recalculation. *See Boney v. Winn Dixie, Inc.*, 163 N.C. App. 330, 334-35, 593 S.E.2d 93, 97 (2004). Because we remand this issue, we do not reach plaintiff's final issue concerning the Commission's findings related to his average weekly wages.

Affirmed in part, reversed and remanded in part.

Judges HUNTER and THIGPEN concur.

Report per Rule 30(e).