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NO. COA04-1603

NORTH CAROLINA COURT OF APPEALS

Filed: 18 October 2005

BARBARA DINKINS,
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 654108

PENN VENTILATOR CO., INC.,
Employer,

and

THE HARTFORD,
Carrier,
Defendants.

Appeal by plaintiff from opinion and award entered 12 August 2004 by the North Carolina Industrial Commission. Heard in the Court of Appeals 15 June 2005.

The McGougan Law Firm, by Paul J. Ekster and Kevin J. Bullard, for plaintiff-appellant.

Cranfill, Sumner & Hartzog, L.L.P., by David A. Rhoades and Jaye E. Bingham, for defendants-appellees.

ELMORE, Judge.

This case arises out of an incident that occurred on 3 August 1996. Barbara Dinkins (plaintiff) was working in the damper department of Penn Ventilator (defendant), assembling parts for ventilators. Her tasks required her to operate four stations and machines. While twisting to pick up another part, plaintiff felt a pull and a sharp pain in her left leg and hip. She reported

the pain to her supervisor and began receiving treatment. On 14 August 2000, nearly four years after the incident, defendant filed a Form 61 denying plaintiff's claim. During this interim time period, plaintiff had been receiving care from several physicians and had been advised she would need hip replacement surgery for her premature degenerative arthritis. Plaintiff argues that her surgery is compensable. After review of the issues raised on appeal, we find the full Commission failed to address an issue material to the controversy, and since resolution of that issue could be dispositive to plaintiff's claim, we remand the matter to the full Commission for appropriate findings and conclusions.

After defendant filed a Form 61 denying plaintiff's claim, a hearing was held before the deputy commissioner. The deputy commissioner found that plaintiff had failed to prove a compensable occupational disease and denied her claim. Plaintiff appealed the denial of her claim to the full Commission. She was granted an extension to file her Form 44 and brief. Plaintiff's Form 44, stating her assignments of error, listed: "1. The Deputy Commissioner erred in allowing the Defendants to proceed in denying the Plaintiffs claim when more than four years had transpired between the Plaintiff's injury and the Defendant's filing of a Form 61." The opinion and award of the full Commission failed to address this assignment of error, and the Commission affirmed the deputy commissioner's denial with a few modifications. Plaintiff argues that the full Commission's failure to address this material issue before them requires us to remand the matter to their attention. We agree.

The full Commission is charged with a duty "to make detailed findings of fact and conclusions of law with respect to every aspect of the case before it." *Joyner v. Rocky Mount Mills*, 92 N.C. App. 478, 482, 374 S.E.2d 610, 613 (1988). In *Vieregge v. N.C. State University*, 105 N.C. App. 633, 639, 414 S.E.2d 771, 774-75 (1992), we stated that pursuant to N.C. Gen.

Stat. §97-85, a party requesting review before the full Commission and filing a Form 44 “is entitled to have the full Commission respond to the questions directly raised by his appeal.” The question of waiver or estoppel raised by defendant making payments and then four years after the incident denying the claim, was not addressed at all by the deputy commissioner or the full Commission. It stands to reason that fully addressing this issue may alter the outcome of plaintiff’s claim.

Claims paid pursuant to section 97-18(d) of our General Statutes are paid without prejudice and allow the employer up to ninety days plus extensions in which to investigate the claim. *See* N.C. Gen. Stat. §97-18(d) (2003). However, an employer’s failure to contest the claim within the ninety days (plus any extensions) of its notice of the incident acts as a waiver of the right to contest compensability or liability for the claim. *See id.*; *see also Higgins v. Michael Powell Builders*, 132 N.C. App. 720, 515 S.E.2d 17 (1999). If payments made to plaintiff were in fact made pursuant to N.C. Gen. Stat. §97-18, then defendants may be barred from contesting compensability at this point. However, there are no findings by the Commission addressing whether payments made to plaintiff were made pursuant to N.C. Gen. Stat. §97-18(d), pursuant to section 97-18(b), or pursuant to some other agreement. Further, there are no findings or conclusions addressing whether after making payments to plaintiff for approximately four years, defendant can still now deny plaintiff’s claim. These determinations are crucial to an overall determination of whether the Commission erred in denying plaintiff’s claim.

If the Commission had addressed plaintiff’s material assignment of error and determined whether defendant could contest liability and compensability as it should have, we would be in the proper position to then determine whether its findings and conclusions that plaintiff failed to prove a compensable occupational injury were erroneous or not. However, as it stands, we must

remand this case to the Commission to address the waiver issues raised by plaintiff in her Form 44.

Vacated and Remanded.

Judges CALABRIA and GEER concur.

Report per Rule 30(e).