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NO. COA11-1000
NORTH CAROLINA COURT OF APPEALS

Filed: 17 July 2012

WALTER STEVENS,
Employee,
Plaintiff,

v.

From the North Carolina
Industrial Commission
IC No. 661260

UNITED STATES COLD STORAGE, INC.,
Employer/Defendant,
and N.C. INSURANCE GUARANTY
ASSOCIATION,
Carrier/Defendant.

Appeal by plaintiff from the Opinion and Award entered 2
May 2011 by the North Carolina Industrial Commission. Heard in
the Court of Appeals 11 January 2012.

*Smith, James, Rowlett & Cohen, L.L.P. by Margaret Rowlett
for plaintiff-appellant.*

*McAngus, Goudelock & Courie, P.L.L.C. by Laura Carter and
Layla T. Santa Rosa for defendant-appellee.*

STEELMAN, Judge.

The Commission erred in awarding temporary total disability
compensation under N.C. Gen. Stat. § 97-29 without assessing
whether N.C. Gen. Stat. § 97-31 would provide plaintiff with a

more munificent remedy. We affirm the denial of plaintiff's claim for attorney's fees. Plaintiff cannot show that the failure to address his motion for production of a privilege log and in-camera review was highly prejudicial.

I. Factual and Procedural History

On 18 March 1996, Walter Stevens (plaintiff) suffered an injury at work while pulling a tarp over his truck. In the 15 years since his work-related injury, he has returned to work for approximately two months. Plaintiff experiences daily back pain which radiates into his legs. Plaintiff has also been diagnosed with depression and dyspepsia. His symptoms have "persisted despite five years of psychotropic medication trials and intermittent counseling."

On 27 March 2009, defendants filed a Form 33 Request for Hearing. On 2 May 2011, the Full Commission entered an Opinion and Award, finding that plaintiff is permanently and totally disabled and awarding temporary total disability compensation for plaintiff's lifetime.

Plaintiff appeals.

II. Whether the Commission Erred in Failing to Allow Plaintiff a More Munificent Remedy

In his first argument, plaintiff contends that the Commission erred in failing to allow plaintiff to elect a more

munificent remedy, pursuant to *Hill v. Hanes Corp.*, 319 N.C. 167, 353 S.E.2d 392 (1987). We agree.

A. Standard of Review

"Appellate review of an order and award of the Industrial Commission is limited to a determination of whether the findings of the Commission are supported by the evidence and whether the findings in turn support the legal conclusions of the Commission." *Radica v. Carolina Mills*, 113 N.C. App. 440, 445-46, 439 S.E.2d 185, 189 (1994). "The Industrial Commission's findings of fact are conclusive on appeal when supported by competent evidence . . . even [if] there is evidence to support a contrary finding[,] and may be set aside on appeal [only] when there is a complete lack of competent evidence to support them[.]" *Johnson v. Herbie's Place*, 157 N.C. App. 168, 171, 579 S.E.2d 110, 113 (2003) (alteration in original) (internal quotation marks and citation omitted). The Industrial Commission's conclusions of law are reviewable *de novo*. *Id.*

B. Analysis

Plaintiff argues that the Commission erred in failing to allow plaintiff to elect compensation for both total incapacity under N.C. Gen. Stat. § 97-29¹ and scheduled injury under N.C.

¹ The General Assembly amended N.C. Gen. Stat. § 97-29 in 2011.

Gen. Stat. § 97-31.

N.C. Gen. Stat. §§ 97-29 and 97-31 "have been interpreted as offering alternative avenues of recovery to an employee whose scheduled injuries leave him or her totally incapacitated." *Dishmond v. Int'l Paper Co.*, 132 N.C. App. 576, 577, 512 S.E.2d 771, 772 (1999). "Section 97-29 provides compensation for total disability, while section 97-31 furnishes a menu of specific harms and corresponding compensations." *Id.*

"The general rule is that stacking of benefits covering the same injury for the same time period is prohibited." *Id.* (internal quotation marks omitted). However, our Supreme Court has held that recovery under both N.C. Gen. Stat. §§ 97-29 and 97-31 is available under certain circumstances. An employee may be compensated for both a scheduled compensable injury under N.C. Gen. Stat. § 97-31 and total incapacity for work under N.C. Gen. Stat. § 97-29 "when the total incapacity is caused by a psychiatric disorder brought on by the scheduled injury." *Hill*, 319 N.C. at 174, 353 S.E.2d at 397.

The reason for this exception is that psychological injuries are not covered by the schedule in N.C. Gen. Stat.

The amendments apply to claims arising on or after 24 June 2011. 2011 N.C. Sess. Laws, ch. 287 § 10. Because the claim arose in 1996, the amendments do not apply to this case.

§ 97-31 and therefore are compensable, if at all, under N.C. Gen. Stat. § 97-29 or N.C. Gen. Stat. § 97-30. *McLean v. Eaton Corp.*, 125 N.C. App. 391, 395, 481 S.E.2d 289, 291 (1997).

In *McLean*, the plaintiff suffered hand injuries, major depressive disorder, and post-traumatic stress disorder. *McLean*, 125 N.C. App. at 392, 481 S.E.2d at 290. The Commission awarded compensation under N.C. Gen. Stat. § 97-31. *McLean*, 125 N.C. App. at 394, 481 S.E.2d at 291. This Court held that the Commission denied benefits to which the plaintiff may be entitled. "[A] claimant who is entitled to benefits under either G.S. section 97-31 or G.S. section 97-30 may select the more munificent remedy. A similar election is available as between G.S. sections 97-31 and 97-29." *McLean*, 125 N.C. App. at 394, 481 S.E.2d at 291 (alteration in original) (citation omitted).

The Court remanded for the Commission to make findings and conclusions regarding the plaintiff's wage-earning capacity and to assess whether N.C. Gen. Stat. § 97-29 or N.C. Gen. Stat. § 97-30 would provide the plaintiff with "a more munificent remedy." *McLean*, 125 N.C. App. at 394-95, 481 S.E.2d at 291. "When the Commission again considers the issue of plaintiff's permanent disability, he should be given the opportunity to elect the section or sections which provides him with the best

monetary remedy." *McLean*, 125 N.C. App. at 395, 481 S.E.2d at 291. "Any recovery [the plaintiff] obtains under G.S. 97-29 or G.S. 97-30 may be in addition to any recovery he elects to receive under G.S. 97-31 for the scheduled injury[.]" *Id.* "The 'in lieu of' clause in G.S. 97-31 does not bar recovery under other statutory sections in regard to injuries not covered by the schedule." *Id.*

In the instant case, plaintiff suffered a back injury, which was rated at 30% permanent impairment. This injury is listed in the schedule. See N.C. Gen. Stat. § 97-31(23) (2011). Plaintiff's psychological injuries are not covered by N.C. Gen. Stat. § 97-31. Dr. Barkenbus diagnosed plaintiff with depression and dyspepsia and noted that plaintiff's depression and anxiety symptoms "persisted despite five years of psychotropic medication trials and intermittent counseling." Due to plaintiff's psychological condition, plaintiff would have difficulty with vocational training.

The Commission concluded that due to plaintiff's "back injury and ongoing pain and the psychological impact of the same, . . . Plaintiff has sustained a permanent and complete loss of wage earning capacity[.]" The Commission concluded that plaintiff "is permanently and totally disabled pursuant to N.C.

Gen. Stat. § 97-29" and awarded temporary total disability compensation.

We remand this matter for the Commission to make findings and conclusions as to whether N.C. Gen. Stat. § 97-29 or N.C. Gen. Stat. § 97-31 provides plaintiff with a more munificent remedy, in accordance with our holding in *McLean*.

III. Whether the Commission Erred in Allowing Defendants to Litigate Plaintiff's Permanent Disability

Plaintiff next argues that the Commission erred in allowing defendants to litigate the issue of plaintiff's permanent disability for the purpose of triggering the statute of limitations in N.C. Gen. Stat. § 97-38. We disagree.

"Whether the defendant had a reasonable ground to bring a hearing is reviewable by this Court *de novo*." *Troutman v. White & Simpson, Inc.*, 121 N.C. App. 48, 50, 464 S.E.2d 481, 484 (1995). To determine whether a defendant had reasonable ground to bring a hearing, we must consider evidence introduced at the hearing. *Meares v. Dana Corp.*, 193 N.C. App. 86, 93, 666 S.E.2d 819, 825 (2008). "The determination of reasonable grounds is not whether the party prevails in its claim, but whether the claim is based on reason rather than stubborn, unfounded litigiousness." *Id.* (internal quotation marks omitted). "The decision of whether to make such an award, and the amount of the

award, is in the discretion of the Commission, and its award or denial of an award will not be disturbed absent an abuse of discretion." *Troutman*, 121 N.C. App. at 54, 464 S.E.2d at 486.

Plaintiff cites *Meares* in support of its argument. In that case, the Commission awarded attorney's fees under N.C. Gen. Stat. § 97-88.1. *Meares*, 193 N.C. App. at 93, 666 S.E.2d at 825. The Court held that the defendants lacked reasonable ground because the "defendants did not introduce any evidence which would prove the existence of a change in condition[.]" *Meares*, 193 N.C. App. at 94, 666 S.E.2d at 825.

In the instant case, the Commission concluded that "[d]efendants did not defend this claim without reasonable grounds, and as such, the assessment of attorney's fees under N.C. Gen. Stat. § 97-88.1 is neither proper nor justified." The Commission made no findings to support a contrary conclusion.

We affirm the portion of the Commission's Opinion and Award denying plaintiff's claim for attorney's fees.

IV. Whether the Commission Erred in Failing to Rule on Plaintiff's Motion

In his final argument, plaintiff contends that the Commission erred in failing to rule on plaintiff's motion for production of a privilege log and in-camera review. We disagree.

"It is well established that it is the duty of the Commission to consider every aspect of plaintiff's claim whether before a hearing officer or on appeal to the full Commission." *Heflin v. G.R. Hammonds Roofing, Inc.*, ___ N.C. App. ___, ___, 689 S.E.2d 388, 392 (2009), *disc. rev. denied*, 363 N.C. 854, 694 S.E.2d 202 (2010) (internal quotation marks omitted).

In *Heflin*, the plaintiff filed a motion for a stay. *Heflin*, ___ N.C. App. at ___, 689 S.E.2d at 392. The Court held that "the Commission failed to rule on a substantive motion pending before it and, therefore, failed to discharge its duty to consider every aspect of plaintiff's claim." *Heflin*, ___ N.C. App. at ___, 689 S.E.2d at 392 (internal quotation marks omitted). "[T]he failure of the Commission to address [the plaintiff's] motion for a stay was highly prejudicial to her since it jeopardized her ability to obtain relief in the wrongful death action pending in Florida." *Heflin*, ___ N.C. App. at ___, 689 S.E.2d at 392.

In the instant case, the Commission failed to rule on plaintiff's motion for production of a privilege log and in-camera review.

Plaintiff argues that "[b]ecause the motion was not granted, plaintiff was not allowed to develop his evidence with

respect to the issue of defendants' improper motivations." However, in the previous section, we held that the Commission did not err in denying attorney's fees on the basis that defendant lacked reasonable ground to bring the hearing. Therefore, plaintiff cannot show that the failure of the Commission to address the motion was highly prejudicial.

AFFIRMED IN PART and REVERSED AND REMANDED IN PART.

Judges GEER and HUNTER, JR., ROBERT N. concur.

Report per Rule 30(e).