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NO. COA12-700
NORTH CAROLINA COURT OF APPEALS

Filed: 6 November 2012

MARTY L. SELLERS,
Employee,
Plaintiff,

v.

From the North Carolina
Industrial Commission
IC No. 677611

McARTHUR SUPPLY,
Employer/Defendant,
and PENN NATIONAL CLAIMS,
Carrier/Defendants

Appeal by defendant from the Opinion and Award entered 7 March 2012 by the North Carolina Industrial Commission. Heard in the Court of Appeals 22 October 2012.

Greg Jones & Associates, P.A. by Cameron D. Simmons for plaintiff-appellee.

Cranfill Sumner & Hartzog LLP by Brian J. Kromke and Sara B. Warf for defendant-appellants.

STEELMAN, Judge.

There was competent evidence in the record supporting the findings of the Industrial Commission that plaintiff was disabled as a result of his work-related injury.

I. Factual and Procedural History

Marty L. Sellers (plaintiff) began working as a sales associate for McArthur Supply (defendant) in 1993. On 12 June 2006, plaintiff suffered an "admittedly compensable injury" to his right arm while at work. On 9 July 2008, defendant filed a Form 60, admitting plaintiff's right to temporary total compensation of \$433.13 per week. On 28 August 2008, plaintiff was released by his treating physician to return to work with a minimal restriction. Plaintiff's condition worsened, and he was out of work on an intermittent basis until he suffered a heart attack on 26 October 2009. On 13 April 2010, the treating physician assigned permanent restrictions to plaintiff's right arm of "no pushing, pulling, gripping, or grasping greater than 10 pounds." On 30 August 2010, plaintiff filed a request for hearing, alleging that defendants had failed to pay compensation.

On 7 March 2012, the Industrial Commission entered an Opinion and Award that contained the following rulings: (1) an award of temporary partial disability compensation of two-thirds of the difference between plaintiff's pre-injury and post-injury earnings from the date of injury through 13 April 2010; (2) an award of temporary total disability for the periods that

plaintiff was completely out of work from the date of injury through 26 October 2009; (3) an award of temporary total disability compensation from 13 April 2010 until further order of the Commission; (4) a credit to employer for unemployment benefits paid to plaintiff for periods when plaintiff was entitled to disability benefits; (5) an award of medical expenses; and (6) the right of plaintiff to elect to receive permanent partial disability benefits instead of temporary total disability benefits.

Defendants appeal.

II. Disability Determination by Industrial Commission

Defendants contend that the Commission erred in finding and concluding that plaintiff was disabled as a result of his compensable injury. We disagree.

A. Standard of Review

"Appellate review of an award from the Industrial Commission is generally limited to two issues: (1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are justified by the findings of fact." *Clark v. Wal-Mart*, 360 N.C. 41, 43, 619 S.E.2d 491, 492 (2005).

"In reviewing a workers' compensation claim, our Court does

not have the right to weigh the evidence and decide the issue on the basis of weight." *Adams v. Metals USA*, 168 N.C. App. 469, 474-75, 608 S.E.2d 357, 361, *aff'd*, 360 N.C. 54, 619 S.E.2d 495 (2005) (per curiam) (internal quotation marks omitted). "If supported by competent evidence, the Commission's findings are binding on appeal even when there exists evidence to support findings to the contrary." *Adams*, 168 N.C. App. at 475, 608 S.E.2d at 361.

B. Analysis

Defendants make two closely related arguments challenging the Commission's findings of fact regarding plaintiff's disability. First, defendants argue that plaintiff was disabled due to his heart attack, rather than his work-related injury. Second, defendants contend that the Commission erred in finding that plaintiff could not find suitable employment because the job with defendant was suitable.

"In worker's compensation cases, plaintiff has the initial burden of proving that he suffers from a disability as a result of a work-related injury." *Brice v. Sheraton Inn*, 137 N.C. App. 131, 136, 527 S.E.2d 323, 327 (2000). "The term 'disability' means 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) (2011).¹

An employee may meet the burden of establishing disability in one of four 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) (internal citations omitted). In the instant case, plaintiff produced evidence that satisfies the second criterion outlined above.

Defendant McArthur Supply is a building materials business. Plaintiff had worked there since November 1993. The job required plaintiff to lift and carry construction materials and to help unload the 12 trucks that arrived at the business on a weekly basis. Following his work-related injury in June 2006, plaintiff

¹ The General Assembly amended this statute twice in 2011. Subsection (9) remains unchanged.

was unable to perform the lifting required of a person in that position without assistance from other employees or without violating the work restrictions imposed by his treating physician. The Commission found that plaintiff's pre-injury job was not suitable employment since the job requirements exceeded plaintiff's permanent restrictions. The Commission further found that, although plaintiff was capable of light duty work, after a reasonable job search plaintiff had been unable to obtain suitable employment as a result of his compensable injury. Plaintiff thus met the requirements of the second prong of the *Russell* test.

The Commission made the following finding:

24. The Full Commission finds that after Plaintiff's compensable injury, Plaintiff's sales person job became a modified duty position that was not appropriate because it sometimes required him to work outside of his restrictions and because it was not a job that was available in the competitive labor market. Other employers would not have hired Plaintiff for a sales associate position in a supply warehouse with his light duty restrictions. The fact that said job was made available, on an extended basis, to Plaintiff by Defendant-Employer does not indicate that the modified position was suitable employment.

Competent evidence in the record supports these findings. Prior to his heart attack, plaintiff could not perform his

duties within the scope of the work restrictions imposed by his treating physician. Charles William McArthur, owner of McArthur Supply, testified that defendant accommodated plaintiff's restrictions by providing another person to do the lifting. Plaintiff testified that another person was not always available to assist. Because competent evidence supports the Commission's findings, they are binding on appeal. *Adams*, 168 N.C. App. at 475, 608 S.E.2d at 361.

While there was contrary evidence presented to the Commission by defendants, it is not the role of the appellate courts to determine the credibility and weight of the evidence. That role has been assigned to the Industrial Commission. Where there is competent evidence in the record, supporting the findings of the Industrial Commission, we are bound by the findings. *Id.*

AFFIRMED.

Chief Judge MARTIN and Judge ERVIN concur.

Report per Rule 30(e).