NO. COA10-160

NORTH CAROLINA COURT OF APPEALS

Filed: 16 November 2010

SANDRA BASILE,
Employee,
Plaintiff,

v.

North Carolina
Industrial Commission
I.C. No. 677965

CHRIS'S OPEN HEARTH STEAK HOUSE,
Employer,

KEY RISK INSURANCE COMPANY,
Carrier,
Defendants.

Appeal by plaintiff from opinion and award entered 28 October 2009 by the North Carolina Industrial Commission. Heard in the Court of Appeals 31 August 2010.

Oxner, Thomas & Permar, PLLC, by John R. Landry, for plaintiff-appellant.

Brooks, Stevens & Pope, P.A., by Joy H. Brewer and Ginny P. Lanier, for defendants-appellants.

HUNTER, Robert C., Judge.

Plaintiff Sandra Basile appeals from the Industrial Commission's opinion and award. After careful review, we affirm.

Facts

Plaintiff, who has significant work history as a restaurant server, began working as a server for defendant-employer Chris's Open Hearth Steak House on 2 June 2006. Servers with defendant-

employer, including plaintiff, derive most of their income from tips, with defendant-employer paying a nominal $2.13 hourly wage. On paydays, plaintiff normally received a check with a "zero amount" from defendant-employer due to the amount of plaintiff's withholdings. Defendant-employer required its servers to sign on paydays a salary logbook, which functioned as a record of the servers' reported tip income. The logbook did not reflect plaintiff's entire tip income, only that amount that defendant-employer reported to the IRS. Plaintiff did not report her full tip income to the IRS.

On 7 October 2006, plaintiff injured her back at work when she slipped and fell while carrying a tray. Plaintiff returned to work the next day at reduced hours, but was subsequently excused from all work by her treating physician, Dr. Zane T. Walsh, Jr. On 30 November 2006, defendants filed a Form 60, accepting plaintiff's back injury as compensable and paying temporary total disability compensation based on an average weekly wage of $233.65 and a weekly compensation rate of $155.77.

On 7 May 2007, plaintiff served defendants with her first set of discovery requests, seeking information regarding, among other things, her tip income. Although defendants objected to the discovery request on the grounds that it was irrelevant and unduly burdensome, they produced some of plaintiff's wage records and filed a Form 22. In response, plaintiff filed a motion to overrule defendants' objections, as well as a Form 33 alleging that defendants would not produce plaintiff's employment file or wage

and hour documentation. The Commission's Executive Secretary denied plaintiff's motion to overrule defendants' objections.

On 3 July 2007, Dr. Walsh released plaintiff to return to work with a permanent lifting restriction of 25 pounds. Dr. Walsh also concluded that plaintiff had reached maximum medical improvement and assigned a 5% permanent impairment rating to plaintiff's back. Defendant-employer offered plaintiff a job as a hostess in July 2007. Plaintiff refused the offer, believing that the position paid less than defendant-employer's server position and required lifting beyond her work restrictions. After Dr. Walsh approved the job description of the hostess position on 25 September 2007, defendant-employer offered plaintiff the position again. Plaintiff, again, refused the job.

On 15 October 2007, defendants filed a Form 24, seeking to suspend plaintiff's temporary total disability compensation on the ground that "[p]laintiff ha[d] unjustifiably refused suitable employment." Defendants' application was disapproved by a special deputy commissioner on 3 December 2007.

Prior to the evidentiary hearing before the deputy commissioner, plaintiff filed a motion requesting that the hearing be continued or limited to the issue of plaintiff's entitlement to additional discovery regarding the calculation of her average weekly wage. The deputy commissioner continued the matter and ordered the parties to "resolve the issues delaying the hearing, including the discovery issues." On 28 April 2008, defendants produced a list of plaintiff's credit card sales, tips, and time

cards. At the evidentiary hearing before the deputy commissioner, which was held on 25 June 2008, plaintiff moved to compel defendants to produce actual credit card receipts and documentation regarding her cash tips. On 30 June 2008, the deputy commissioner entered an order denying plaintiff's motion. In an opinion and award entered 8 October 2008, the deputy commissioner calculated plaintiff's average weekly wage to be $233.65, yielding a weekly compensation rate of $155.77. The deputy commissioner also concluded that plaintiff had unjustifiably refused the hostess position with defendant-employer. Plaintiff appealed the deputy commissioner's decision to the Full Commission, which, in an opinion and award entered 28 October 2009, affirmed the deputy commissioner's decision with minor modifications. Plaintiff timely appealed to this Court.

Standard of Review

Appellate review of a decision by the Industrial Commission 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). The Commission's findings of fact are conclusive on appeal when supported by competent evidence, despite evidence in the record that would support contrary findings. *Jones v. Myrtle Desk Co.*, 264 N.C. 401, 402, 141 S.E.2d 632, 633 (1965) (per curiam). The Commission's conclusions of law, however, are reviewed de novo.

McRae v. Toastmaster, Inc., 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004).

I

Plaintiff first contends that "the Full Commission erred in refusing to reconsider the evidence, to receive further evidence or to rehear the parties or their representatives following receipt of additional evidence submitted by Defendants after oral argument before the Full Commission." The record on appeal indicates, however, that plaintiff failed to preserve this issue for appellate review.

After appealing the deputy commissioner's decision to the Full Commission, plaintiff requested that defendants produce a daily accounting of all of plaintiff's credit card and cash sales. In an order entered 18 June 2009, the Commission "re-opened [the matter] in order to receive additional evidence concerning Plaintiff's average weekly wage . . . ." On 8 July 2009, defendants produced a "Daily Accounting of Plaintiff's Credit Card Sales" in her position with defendant-employer and a "Daily Accounting of Defendant-Employer's Gross Daily Sales" for the days worked by plaintiff. In its 28 October 2009 opinion and award, the Commission "admitted [defendants' documentation] into the evidentiary record" and affirmed, with minor modifications, the decision of the deputy commissioner.

Although plaintiff contends that the Commission erred in "refusing" to reconsider the evidence, to admit additional evidence, or to rehear the matter after admitting defendants'

documentation after oral arguments before the Commission, the record indicates that plaintiff never made such a request. Rule 10 of the Rules of Appellate Procedure provides that, "[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make . . . ." N.C. R. App. P. 10(a)(1). Where a party fails to raise an issue before the Industrial Commission and subsequently "raises th[e] issue for the first time . . . on appeal[,] . . . . [that] failure to raise the issue below result[s] in a waiver of the issue." *Carey v. Norment Sec. Industries*, 194 N.C. App. 97, 107, 669 S.E.2d 1, 7 (2008). Here, plaintiff's failure to request that the Commission reconsider the evidence, admit additional evidence, or rehear the matter constitutes waiver of the issue on appeal. We, therefore, decline to address plaintiff's argument. *See Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co., Inc.*, 362 N.C. 191, 195-96, 657 S.E.2d 361, 364 (2008) ("[A] party's failure to properly preserve an issue for appellate review ordinarily justifies the appellate court's refusal to consider the issue on appeal.").

II

Plaintiff next challenges the Commission's calculation of her average weekly wage. An employee's "average weekly wage is determined by calculating 'the amount which the injured employee would be earning were it not for the injury.'" *Loch v. Enter. Partners*, 148 N.C. App. 106, 111, 557 S.E.2d 182, 185 (2001)

(quoting *Derebery v. Pitt County Fire Marshall*, 318 N.C. 192, 197, 347 S.E.2d 814, 817 (1986)). "The calculation of an injured employee's average weekly wages is governed by N.C.G.S. § 97-2(5)[,]" which sets out "in priority sequence five methods by which an injured employee's average weekly wages are to be computed . . . ." *McAninch v. Buncombe County Schools*, 347 N.C. 126, 129, 489 S.E.2d 375, 377 (1997). Here, the Commission computed plaintiff's average weekly wage under the statute's third method, which provides:

> 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.

N.C. Gen. Stat. § 97-2(5) (2009).

Plaintiff argues that there is insufficient evidence to support the Commission's findings detailing its calculation of plaintiff's average weekly wage:

> 8. . . . . [T]he Full Commission finds that defendant-employer correctly calculated plaintiff's income from tips using the amount of $3,106.00 that she claimed as actual tips and correctly calculated plaintiff's wages for the hours worked at the base pay of $2.13. Based on the greater weight of the evidence presented, the Full Commission finds that plaintiff's average weekly wage was $233.65.
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> . . . .
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> 19. The Full Commission has considered the methods for calculating average weekly wages set forth in N.C. Gen. Stat. §97-2(5) and finds the third method to be appropriate in this case. . . . The third method applies to employees who worked less than fifty-two (52),

> [sic] weeks, and calculates the average weekly wage by dividing the actual total earnings by the number of weeks worked, provided the results are fair and just to both parties. This method generates an average weekly wage for plaintiff of $233.65, which yields a weekly compensation rate of $155.77. Given the circumstances of this case, this result is fair and just to both parties and this method of computation is appropriate. . . .

Plaintiff contends that "[t]here is no competent evidence to support the Full Commission's finding that 'defendant-employer correctly calculated plaintiff's income from tips using the amount of $3,106.00." Contrary to plaintiff's argument, the Commission's finding is supported by the testimony of defendant-employer's manager, Ms. Lori Ann Skinner, who stated that $3,106.00 was the amount of tips plaintiff "actually claim[ed] during the course of her employment." Ms. Skinner also explained that plaintiff was required to review the amount of tips declared in defendant-employer's logbook and had the "opportunity to claim more tips if appropriate[.]" According to Ms. Skinner, plaintiff signed the logbook at the end of each pay period and never requested to claim more tips. This testimony is sufficient to support the Commission's finding that plaintiff's tip income totaled $3,106.00. *See Munford v. West Const. Co.*, 203 N.C. 247, 250, 165 S.E. 696, 697 (1932) (holding that Commission's findings regarding computation of employee's average weekly wage is binding on appeal where supported by competent evidence).

Plaintiff nevertheless points to her testimony that "she could specifically recall situations where the tip ledger, as well as the tally presented by Defendants, was inaccurate." As the finder of

fact, however, the Commission was free to accord greater weight to Ms. Skinner's testimony than to plaintiff's. *Anderson v. Lincoln Const. Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965) ("The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony.").

III

Plaintiff's final argument is that the Commission erred in determining that she unjustifiably refused the hostess position offered by defendant-employer. "N.C. Gen. Stat. § 97-32 provides that an injured employee shall not be entitled to compensation if he unjustifiably 'refuses employment procured for him suitable to his capacity.'" *Munns v. Precision Franchising, Inc.*, 196 N.C. App. 315, 317, 674 S.E.2d 430, 433 (2009) (quoting N.C. Gen. Stat. § 97-32 (2007)); N.C. Gen. Stat. § 97-32 (2009). "Suitable employment" is defined as "any job that a claimant 'is capable of performing considering his age, education, physical limitations, vocational skills, and experience.'" *Shah v. Howard Johnson*, 140 N.C. App. 58, 68, 535 S.E.2d 577, 583 (2000) (quoting *Burwell v. Winn-Dixie Raleigh*, 114 N.C. App. 69, 73, 441 S.E.2d 145, 149 (1994)).

With respect to plaintiff's refusals of the hostess position, the Commission found:

> 9. Defendants offered plaintiff a job as a hostess in July and October of 2007. Plaintiff declined these positions and testified that she was unable to perform the hostess duties because the associated lifting requirements were beyond her physical restrictions. In declining these hostess job offers, plaintiff relied upon her experience

and knowledge of what the duties of a hostess for defendant-employer were. Plaintiff also relied upon her knowledge that hostesses for defendant-employer earned substantially less than defendant-employer's servers.

10. There is conflicting testimony regarding the physical requirements of the hostess position. Plaintiff testified that the physical demands of the position were beyond her twenty-five (25) pound lifting restriction. However, Ms. Sylvia Morris, a hostess for defendant-employer, testified that the position did not require lifting more than twenty-five (25) pounds and she had never lifted anything heavier than twenty-five (25) pounds during the course of her employment with defendant-employment as a hostess.

11. After plaintiff went out of work, defendant-employer began a new salary system for hostesses and began paying hostesses a "tip out." Pursuant to this policy, a hostess's tip-out would be based upon the number of customers served during their shift. This policy, which allowed hostesses to earn wages in addition to their base salary, was not in effect when plaintiff worked for defendant-employer. However, the date that this new policy took effect is unclear from the evidence.

12. When plaintiff worked for defendant-employer prior to her injury, hostesses earned $7.00 to $7.50 per hour, compared to approximately $10.00 per hour earned by servers. The evidence indicates that currently defendant-employer's hostesses earn wages substantially similar to those of servers, a wage level higher than what was earned by hostesses when plaintiff worked for defendant-employer.

13. Considering the change in defendant-employer's hostess pay policy subsequent to plaintiff's injury, plaintiff may not have been aware of the new policy at the time of her refusals and her refusals of the hostess position were therefore justified at the time.

14. In a medical note dated 3 July 2007, plaintiff was released by Dr. Walsh to return

> to work with a permanent lifting restriction of twenty-five (25) pounds. . . .
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> . . . .
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> 16. On 25 September 2007, Dr. Walsh approved the job description of the hostess positions offered by defendant-employer to plaintiff.
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> 17. The evidence establishes that up to the time of the filing of Deputy Commissioner Gillen's Opinion and Award on 8 October 2008, the hostess position remained available to plaintiff and defendant-employer would have hired plaintiff in that job. The Full Commission finds as fact that Deputy Commissioner Gillen correctly determined in his Opinion and Award of 8 October 2008, that plaintiff's continued refusal to return to work for defendant-employer in the hostess position was unjustified.

Based on these findings, the Commission concluded that, "[g]iven plaintiff's reasonable misapprehension regarding the wages paid to hostesses and the physical requirements of the position, plaintiff's refusals of that position were justified through the date of the filing of Deputy Commissioner Gillen's Opinion and Award on 8 October 2008[,]" but that "[g]iven that the new wage policy for hostesses was made known to plaintiff in Deputy Commissioner Gillen's Opinion and Award, as of the date of its filing on October 8, 2009, plaintiff's refusal to return to work for defendant-employer in the hostess position was unjustified."

With respect to the Commission's findings regarding plaintiff's refusals of the hostess position, plaintiff only challenges finding of fact 17, contending that it is not supported

by competent evidence.[1] Contrary to plaintiff's contention, the Commission's finding is based on the testimony of defendant-employer's manager, Ms. Skinner, who stated that the hostess position was "still available" at the restaurant at the time of the 25 June 2008 hearing and that she would "employ Ms. Basile today as a hostess if she agreed to return to work[.]" This testimony is sufficient to support the Commission's finding.

Plaintiff nonetheless contends that "there is no competent evidence to support the Full Commission's finding of fact that the hostess position Defendant-Employer offered to Plaintiff was available up to the time of the filing of Deputy Commissioner Gillen's Opinion and Award on 8 October 2008" because "[t]here is no evidence that the hostess position . . . was available following the date of the hearing in this matter on 25 June 2008" before the deputy commissioner. In essence, plaintiff asserts that a job offering existing at the time of a hearing before the Commission ceases to exist at the time of the closing of the evidentiary record. Plaintiff fails to cite any authority — and we have found none — supportive of this proposition. Adopting plaintiff's argument would put employers in the impractical and illogical position of having to present evidence of the continued viability of a job offering after the evidentiary record has been closed. We decline to adopt such a requirement.

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[1]The remaining findings are, consequently, binding on appeal. *See Johnson v. Herbie's Place*, 157 N.C. App. 168, 180, 579 S.E.2d 110, 118 (2003) (holding that Industrial Commission's unchallenged findings of fact are binding on appeal).

Plaintiff also argues that the wages for the hostess position are not suitable, and, therefore, her refusals of the position were justified. Plaintiff is correct that "[t]he disparity between pre-injury and post-injury wages is one factor which may be considered in determining the suitability of post-injury employment." *Foster v. U.S. Airways, Inc.*, 149 N.C. App. 913, 921, 563 S.E.2d 235, 241 (2002). In this case, however, in an unchallenged finding, the Commission determined that "[t]he evidence indicates that currently defendant-employer's hostesses earn wages substantially similar to those of servers . . . ." As plaintiff would have been earning "substantially similar" wages working as a hostess as she had been earning in her prior position as a server, the Commission properly concluded that the hostess position offered by defendant-employer constituted suitable employment under N.C. Gen. Stat. § 97-32 and that plaintiff was not justified in refusing the position after learning of the substantial similarity in wages from the deputy commissioner's decision. Accordingly, the Commission's opinion and award is affirmed.

Affirmed.

Judges Robert N. HUNTER, Jr. and LEWIS concur.

Report per Rule 30(e).