NO. COA10-770
NORTH CAROLINA COURT OF APPEALS

Filed: 19 July 2011

WILLIE B. JOHNSON,
Employee,
Plaintiff,

v. N.C. Industrial Commission
I.C. No. 689047

SOUTHERN TIRE SALES and SERVICE, INC.,
Employer,

and

NORTH CAROLINA INSURANCE GUARANTY ASSOCIATION,
Defendants.

Appeal by Plaintiff and Defendants from opinion and award entered by the North Carolina Industrial Commission 9 March 2010. Heard in the Court of Appeals 25 January 2011.

Oxner, Thomas + Permar, by John R. Landry, for Plaintiff.

Young Moore and Henderson, P.A., by Joe E. Austin, Jr., for Defendants.

McGEE, Judge.

This Court and the North Carolina Supreme Court have addressed in great detail the underlying facts of this case in prior opinions. *See Johnson v. Southern Tire Sales & Serv.*, 152 N.C. App. 323, 567 S.E.2d 773 (2002) (*Johnson I*), *rev'd*, 358 N.C. 701, 599 S.E.2d 508 (2004) (*Johnson II*). Willie B. Johnson (Plaintiff) was employed by Southern Tire Sales and Service, Inc., (Southern Tire), which was insured by Casualty Reciprocal Exchange at the time. Southern Tire is now insured by North Carolina Insurance Guaranty Association (with Southern Tire, Defendants). Plaintiff sustained a work-related back injury on 24 October 1996. Defendants filed a Form 63 and paid Plaintiff medical and indemnity compensation. Defendants later accepted liability for Plaintiff's injury "by failing to contest the compensability of [P]laintiff's claim or their liability therefor within the statutory period." *See Johnson II*, 358 N.C. at 702, 599 S.E.2d at 510.

Plaintiff's treating physician authorized Plaintiff to return to work, but with restrictions. However, Southern Tire "did not have work available within those restrictions." Defendants provided vocational rehabilitative services to aid Plaintiff in obtaining suitable employment, but Plaintiff disagreed with Defendants regarding his treatment and rehabilitation regimens. A consent order entered 17 August 1998

directed Defendants to provide certain medical treatment and ordered Plaintiff to comply with rehabilitation efforts.

Defendants filed a Form 24 requesting that, because of Plaintiff's failure to cooperate with rehabilitation efforts, they be allowed to suspend payment of Plaintiff's indemnity compensation. The matter was heard by a deputy commissioner on 5 May 1999. An opinion and award was entered on 27 April 2000, directing Defendants to suspend payment effective 9 February 1999 based on Plaintiff's "unjustifiabl[e] refus[al] to cooperate with [D]efendant's rehabilitative efforts." The deputy commissioner allowed Defendants a credit for benefits paid to Plaintiff after 9 February 1999.

Both Plaintiff and Defendants appealed to the Commission. The Commission entered an opinion and award reversing the deputy commissioner's decision on 6 February 2001, and ordered Defendants to pay ongoing weekly disability compensation from 27 January 1997, when Plaintiff was medically removed from work, and continuing until Plaintiff returned to work. From that opinion and award, Defendants appealed to our Court. A divided panel of this Court filed an opinion on 20 August 2002, *Johnson I*, affirming the Commission's opinion and award. Defendants then appealed to the North Carolina Supreme Court. Our Supreme Court filed an opinion on 13 August 2004, *Johnson II*, reversing

Johnson I and remanding to our Court for further remand to the Commission with instructions to make additional specific findings of fact.

In January 2010, the Commission discovered that an opinion and award had not issued following remand of *Johnson I*, and the Commission requested that the parties submit briefs and a proposed opinion and award. The Commission, in response to the *Johnson II*, filed a revised opinion and award on 9 March 2010. Plaintiff and Defendants appeal.

We note the record does not show what circumstances gave rise to the almost six-year delay between our Supreme Court's remand and the Commission's filing of its revised opinion and award. The record does not contain any motion or petition filed by either party in this action following the Supreme Court's remand order, other than a motion for a protective order filed by Plaintiff, which we discuss below, and a motion to withdraw as counsel, filed by one of Plaintiff's attorneys and dated 8 December 2009. The record contains an order granting Plaintiff's counsel's motion to withdraw, but the order does not bear a file stamp indicating a date. The record does contain copies of several letters addressed to the Commission during that time period that contain requests for action.

I. Standard of Review

When reviewing an opinion and award from the Commission, our Court must determine whether the findings of fact are supported by competent evidence and whether the findings support the conclusions of law. *Chaisson v. Simpson*, 195 N.C. App. 463, 470, 673 S.E.2d 149, 156 (2009). Findings of fact which are supported by any competent evidence, as well as those that are unchallenged on appeal, are binding on this Court. *Id.* We review conclusions of law *de novo*. *Id.*

The Commission is required to make "specific findings with respect to the crucial facts upon which the question of [the] plaintiff's right to compensation depends." *Perry v. CKE Rests., Inc.*, 187 N.C. App. 759, 763, 654 S.E.2d 33, 36 (2007) (citation omitted). "Where the findings are insufficient to enable the court to determine the rights of the parties, the case must be remanded to the Commission for proper findings of fact." *Lawton v. County of Durham*, 85 N.C. App. 589, 592, 355 S.E.2d 158, 160 (1987) (citation omitted).

II. Plaintiff's Appeal

A. Suitable Employment

Plaintiff first argues that the Commission erred by "failing to address whether or not the vocational rehabilitation efforts at issue in this matter were likely to result in placement of [Plaintiff] in suitable employment[.]" Plaintiff

also argues that the Commission erred in determining what constituted suitable employment in this case.

N.C. Gen. Stat. § 97-32 (2009) provides in pertinent part: "If an injured employee refuses employment procured for him suitable to his capacity he shall not be entitled to any compensation at any time during the continuance of such refusal, unless in the opinion of the Industrial Commission such refusal was justified." In the present case, the Commission found that "[Plaintiff] unjustifiably refused to cooperate with [Defendants'] vocational rehabilitative efforts[.]" The Commission then concluded that, as a result, Defendants were entitled to suspend payment of compensation to Plaintiff from 9 February 1999.

However, citing *Moore v. Concrete Supply Co.*, 149 N.C. App. 381, 561 S.E.2d 315 (2002), Plaintiff argues that "if the employment is not suitable for the injured employee, the employee's refusal thereof cannot be used to bar compensation to which the employee is otherwise entitled." Plaintiff contends that "in regards [to] the Commission's decision to suspend Plaintiff's receipt of temporary total disability compensation pursuant to N.C. Gen. Stat. § 97-32, . . . it is not sufficient for the Commission to simply find that there was work within Plaintiff's physical limitation." Plaintiff further argues that

"a decision whether or not he justifiably refused to cooperate with Defendants' vocational rehabilitation efforts must include a determination of whether or not the vocational efforts were directed toward prospective employers offering possible opportunities for suitable employment." Plaintiff cites no authority in support of his argument.

We note that in *Johnson II*, the Supreme Court remanded to our Court with instructions to remand to the Commission for further findings. The portion of *Johnson II* addressing this issue concludes with the following:

> On the other hand, the Commission made findings regarding plaintiff's efforts to find employment. The Commission found that "plaintiff located a job lead on his own" and that "[p]laintiff has made a reasonable effort to locate suitable employment." Although relevant, these findings alone are insufficient to support the Commission's conclusions of law and do not cure the error resulting from the *lack of findings concerning the suitability of alternative employment. Accordingly, we remand with instructions that the Commission make necessary findings of fact on which the rights of the parties can be determined.*

Johnson II, 358 N.C. at 710, 599 S.E.2d at 515 (emphasis added).

> The Workers' Compensation Act provides that an injured employee is not entitled to compensation if he unjustifiably "refuses employment procured for him suitable to his capacity." "Clearly, if the proffered employment is not suitable for the injured employee, the employee's refusal thereof cannot be used to bar compensation to which

> the employee is otherwise entitled."

Nobles v. Coastal Power & Elec., Inc., ___ N.C. App. ___, ___, 701 S.E.2d 316, 319 (2010) (citations omitted). "'Suitable employment' is defined as 'any job that a claimant is capable of performing considering his age, education, physical limitations, vocational skills, and experience.'" *Id.* (citation omitted).

Our Court addressed a similar situation in *Sanhueza v. Liberty Steel Erectors*, 122 N.C. App. 603, 471 S.E.2d 92 (1996):

> Here, the Industrial Commission found that defendants secured vocational rehabilitation services for the plaintiff "in order to assist [plaintiff] in obtaining the type of suitable alternate light/sedentary work required by his permanent back injury. . . ." In this context, we hold that an attempt to secure suitable employment for plaintiff is an appropriate attempt to "lessen the period of disability." We conclude therefore that G.S. 97-25 is controlling and that defendants here have met their burden of showing that plaintiff has unjustifiably refused to cooperate with defendants' rehabilitation efforts. Accordingly, we conclude that the portion of the Industrial Commission's opinion and award that suspends plaintiff's benefits pursuant to G.S. 97-25 should be affirmed.

Id. at 607-08, 471 S.E.2d at 95.

In the present case, the Commission's opinion and award contains the following findings of fact:

> 28. In late 1998 and early 1999 Mr. Alford [Plaintiff's rehabilitation counselor] suggested Johnston County Industries for

> [P]laintiff. This program would have allowed [P]laintiff to participate in vocational training in an accommodated setting. Plaintiff would be able to work part-time if needed and could sit, stand, walk or lay down as needed. The work itself was rated light sedentary to light work and included packaging and assembling. The second part of the program is called America Works. This program transitions a person from Johnston County Industries into a permanent suitable job. Mr. Alford registered [P]laintiff for the program to begin 9 February 1999 and . . . [D]efendants paid the fee. However[,] right before he was to start, [P]laintiff informed Mr. Alford he would not participate in the program. . . . [D]efendants lost the money they had paid for [P]laintiff's participation.
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> 29. . . . [P]laintiff failed to cooperate with vocational rehabilitative efforts in February 1999 when he refused to participate in Johnston County Industries without reasonable excuse. Plaintiff would have been paid by the hour for the hours he worked and work he was capable of doing. If necessary, Johnston County Industries would have provided transportation for [P]laintiff. . . . This program would have been beneficial for . . . [P]laintiff.

Thus, the Commission's findings do address the suitability of employment to which the vocational rehabilitation efforts were directed. In light of *Sanhueza* and the requirements noted in *Nobles*, we hold that the Commission's findings were sufficient to comply with our Supreme Court's mandate that the Commission "make necessary findings of fact on which the rights of the

parties can be determined." *Johnson II*, 358 N.C. at 710, 599 S.E.2d at 515.

B. Length of Delay, Additional Evidence

Plaintiff next argues that the Commission erred in: (1) failing to rule on this matter from 13 August 2004 until 9 March 2010 following remand from our Supreme Court; (2) entering an opinion and award on 9 March 2010 without receiving additional evidence after its "initial hearing on 5 May 1999 and oral arguments before the full commission on 5 October 2000;" and (3) "failing to address Plaintiff's proof of and entitlement to ongoing disability following 9 February 1999[.]" We first note that, while Plaintiff recites the argument concerning his "proof of and entitlement to" disability in his argument caption, he fails to actually argue the issue in his brief. In support of his argument that the Commission failed to timely rule on this matter following remand from the Supreme Court in 2004, Plaintiff cites the due process clause of the United States Constitution, the law of the land clause of the North Carolina Constitution, and various case law that stands for the proposition that parties in a workers' compensation case must be given the right to testify, present evidence, and be heard before the Commission makes its decision. Plaintiff, however, presents no case law in support of his argument that the

Commission is required to receive additional evidence upon remand from the Supreme Court for additional findings.

The record in this case is an oddity. There are copies of several letters written by counsel for the parties, addressed to the Commission and various representatives thereof. These letters contain references to various filings and occasionally contain requests to the Commission such as "I would appreciate a ruling in this case." However, there is nothing in the record nor in the briefs that informs this Court as to why the Commission delayed from 2004 until 2010 in making the additional findings ordered by the Supreme Court. The record also contains nothing showing that Plaintiff filed any motion or petition seeking relief or attempting to compel the Commission to act. Moreover, while the record does contain a letter in which Plaintiff's attorney states that he would "provid[e] whatever materials the Commission may require to assist its determination[,]" there is nothing in the record that Plaintiff requested a hearing or an opportunity to present additional evidence.

The record also contains a motion filed by Plaintiff, dated 13 June 2007, for a protective order seeking to quash certain interrogatories filed by Defendants. Defendants' interrogatories, dated 16 May 2007, contained eleven questions,

many of which were specifically directed at the nature and extent of Plaintiff's injuries and condition, as well as his efforts at obtaining employment and medical treatment. In his motion for a protective order, Plaintiff asserted that: "Defendants have not requested a hearing and have shown no need to take further discovery at this juncture in the case." Contrary to Plaintiff's argument, the Commission did not "fail to allow" Plaintiff to present evidence; rather, in at least one instance, Plaintiff actively sought to avoid the presentation of additional evidence. Thus, not only did Plaintiff fail to request an opportunity to present evidence, the record shows he actively sought to prevent the development of further evidence on the part of Defendants.

In *Silva v. Lowe's Home Improvement*, 197 N.C. App. 142, 676 S.E.2d 604 (2009), our Court noted that, on appeal from a deputy commissioner, the Commission may receive additional evidence on appeal

> "[i]f application is made to the Commission within 15 days from the date when notice of the award shall have been given, the full Commission shall review the award, and, if good ground be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives, and, if proper, amend the award[.]"

Id. at 149, 676 S.E.2d at 610 (quoting N.C. Gen. Stat. § 97-85). "Although N.C.G.S. § 97–85 has ordinarily been applied to cases

before the Full Commission on appeal from the opinion and award of a deputy commissioner, we have held that the Full Commission has plenary power to receive additional evidence, and may do so at its sound discretion." *Id.* (citation omitted).

> Furthermore, "[w]hether such good ground [to receive further evidence] has been shown is discretionary and 'will not be reviewed on appeal absent a showing of manifest abuse of discretion.'" The Full Commission, when reviewing an award by a deputy commissioner, may receive additional evidence, even if it was not newly discovered evidence.

Id. (citations omitted).

Thus, in the absence of a specific mandate from the appellate court, it is within the discretion of the Commission whether to receive additional evidence. "An abuse of discretion will be found only when the decision is manifestly unsupported by reason or is so arbitrary that it could not have been the product of a reasoned decision." *Chavis v. Thetford Prop. Mgmt., Inc.*, 155 N.C. App. 769, 771, 573 S.E.2d 920, 921 (2003). Though the caption for this issue in Plaintiff's brief contains a statement that the Commission abused its discretion, Plaintiff does not argue abuse of discretion, and he fails to argue that the Commission's ruling was "manifestly unsupported by reason" or "so arbitrary that it could not have been the product of a reasoned decision." *Id.* Given Plaintiff's failure to request a hearing before the Commission to present additional evidence and

his failure to properly argue the issue before this Court, we find no abuse of discretion in the Commission not receiving additional evidence.

C. Cooperation

Plaintiff next argues that the Commission erred by ruling that "Plaintiff's refusal to cooperate with vocational rehabilitation efforts entitle[d] Defendants to suspend payment of compensation from 9 February 1999 to 9 March 2010[.]" Plaintiff further contends the Commission erred in reaching its decision regarding his cooperation because "such a decision [was] inappropriate pending the Commission's receipt of additional evidence for the period from the original hearing date until 9 March 2010 regarding Plaintiff's willingness to cooperate with Defendants' vocational rehabilitative efforts." In support of this contention, Plaintiff asserts that suspension of disability compensation must end upon a showing of a plaintiff's willingness to cooperate with a defendant's vocational rehabilitative efforts. While it appears that Plaintiff is preparing the groundwork for an argument that, at some point after remand from the Supreme Court, he became willing to cooperate with Defendants' rehabilitative efforts, Plaintiff does not actually make this argument. We again note that Plaintiff did not request a hearing in order to present

additional evidence. Further, Plaintiff does not actually argue now, nor does the record reflect that he argued before the Commission, that he was willing to cooperate with Defendants' rehabilitation plan at any point between 2004 and 2010. As we have determined that the Commission did not err by issuing an opinion and award without receipt of additional evidence, we likewise find no error in this ruling of the Commission.

D. Credit

Plaintiff next argues that the Commission erred by "addressing Defendants' entitlement to a credit for compensation Plaintiff received following 9 February 1999[.]" Again, Plaintiff cites no authority in support of this argument. Plaintiff asserts that the Commission's determination on Defendants' entitlement to a credit was "not appropriate, pending the Commission's receipt of additional evidence regarding Plaintiff's entitlement" to compensation. As we have held the Commission was not required to receive additional evidence, this argument is overruled.

E. Unauthorized Treatment

Plaintiff contends the Commission erred in "failing to specifically address . . . Plaintiff's entitlement to reimbursement and/or payment for past unauthorized medical treatment . . . provided to effect a cure, give relief or lessen

the period of disability[.]" Attached to the record on appeal is a pre-hearing agreement entered into by the parties prior to the 1999 hearing on the evidence. In Plaintiff's list of proposed issues in the pre-hearing agreement, his sole issue was "[w]hether the Plaintiff is totally and permanently disabled[.]" Likewise, in the 2010 opinion and award, the Commission listed the following stipulated issues: "The issues to be determined by this hearing are whether [P]laintiff's benefits should be suspended, are [D]efendants entitled to any credit, what is the extent of [P]laintiff's disability and who is the treating physician." The record contains an email to the parties from a Commission law clerk, dated 5 January 2010, informing the parties that the Commission intended to rule on these issues and requesting briefs from the parties and a proposed opinion and award. However, the record does not include briefs submitted by the parties, nor any proposed opinion and award. There is only an "excerpt from Defendants' new brief to the Full Commission[,]" which is not relevant to Plaintiff's argument here.

Thus, the record contains no evidence that Plaintiff ever submitted the issue of unauthorized past medical expenses to the Commission. When a party fails to present an issue to the Commission and "thus . . . raises this issue for the first time

here on appeal[,] . . . [that] failure to raise the issue below result[s] in a waiver of the issue." *Carey v. Norment Sec. Indus.*, 194 N.C. App. 97, 107, 669 S.E.2d 1, 7 (2008). We therefore overrule Plaintiff's argument for unauthorized medical compensation.

III. Defendants' Appeal

A. Extent of Disability

Defendants argue that the Commission "erred by failing to follow the Supreme Court's instructions to make specific comprehensive findings as to the existence and extent of disability[.]" Our Supreme Court remanded *Johnson II* because it concluded that the Commission erred in shifting the burden of proving the absence of disability to Defendants on the grounds of a supposed presumption arising after the filing of a Form 63. Defendants quote the following portion of the Supreme Court's decision in *Johnson II*:

> Because the Commission improperly allocated the burden of proof as to the issue of disability and because, as a result of this misallocation, the Commission failed to make specific comprehensive findings as to the existence and extent of plaintiff's injury, its conclusion of law that plaintiff was totally disabled as a result of his work-related injury is unsupported by sufficient evidence.

Johnson II, 358 N.C. at 708, 599 S.E.2d at 513.

Defendants argue that, "despite the Supreme Court's specific instruction, the Commission failed to resolve issues pertaining to the existence and extent of any disability." Specifically, Defendants contend that certain findings of fact are inconsistent with the Commission's ultimate conclusion of law regarding disability in which it found that "[P]laintiff is able to work within [certain] restrictions[;]" and "that had [P]laintiff put forth a diligent effort to find work . . . there was a reasonable likelihood that he would have succeeded[.]" Defendants argue that, because these finding are "flatly inconsistent with any determination that [P]laintiff has been disabled[,]" the Commission "has failed to clearly resolve that issue, in spite of the Supreme Court's specific instructions to do so."

However:

> 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. The employee may meet this burden 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) (citations omitted). "Once an employee meets his initial burden of production, the burden shifts to the employer to show 'that suitable jobs are available' and that the employee is capable of obtaining a suitable job 'taking into account both physical and vocational limitations.'" *Bridwell v. Golden Corral Steak House*, 149 N.C. App. 338, 342, 561 S.E.2d 298, 302 (2002) (citation omitted). "An employee is 'capable of getting' a job if 'there exists a reasonable likelihood . . . that he would be hired if he diligently sought the job.'" *Burwell v. Winn-Dixie Raleigh, Inc.*, 114 N.C. App. 69, 73-74, 441 S.E.2d 145, 149 (1994) (citation omitted).

In the present case, the findings indicate that Plaintiff sought work but was unable to obtain employment due to his physical limitations. The first finding to address the suitability of the work available to Plaintiff states that in "late 1998 and early 1999" Plaintiff's vocational rehabilitation specialist recommended that he become involved with America Works, a program designed to "transition[] a person . . . into a

permanent suitable job." The Commission also found that Plaintiff was registered for this program to begin 9 February 1999, but that Plaintiff did not participate. Finally, after finding that Plaintiff failed to cooperate with Defendants' rehabilitative efforts, the Commission made the following finding:

> [Plaintiff's vocational rehabilitation specialist] testified, and the Full Commission finds, that had [P]laintiff put forth a diligent effort to find work within his physical and vocational limitations, there was a reasonable likelihood that he would have succeeded in doing so.

Therefore, the Commission's findings suggest that, prior to 9 February 1999, Plaintiff was capable of some work and perhaps could have found work had he put forth a diligent effort; however, the findings do not address the "suitability" of the available work until 9 February 1999. After the finding on suitability of work, the Commission found that Plaintiff could have found work had he put forth a diligent effort to do so. Further, the Commission states in its ultimate finding that

> Plaintiff is able to work within the restrictions provided . . . . Based on the totality of the evidence of record, the Full Commission finds that [P]laintiff made reasonable, though unsuccessful, efforts to find employment during the period beginning with his release to return to work by [his physician] on 23 April 1997 through 9 February 1999, when he unjustifiably refused to cooperate with vocational rehabilitative

efforts[.]

Reading the opinion and award in its entirety, we find no inconsistency in the Commission's findings on disability. We overrule Defendants' argument.

B. Discovery Motions

Defendants next argue that the Commission erred "by failing to rule on the parties' discovery motions." Defendants state that, "while the claim was pending on remand from the Supreme Court, [D]efendants served [P]laintiff with 11 interrogatories that principally inquired as to facts pertaining to [P]laintiff's capacity for work and medical treatment." However, as with several of Plaintiff's arguments, the record is insufficient to allow our Court to rule on this issue.

Plaintiff filed a motion for a protective order dated 13 June 2007, requesting that the Commission quash Defendants' interrogatories. In response to Plaintiff's motion for a protective order, Defendants wrote a letter to the Commission dated 11 July 2007, requesting that the Commission order Plaintiff to respond to the interrogatories, but did not include a copy of the proposed order in the record. Defendants wrote letters to the Commission on 13 September 2007, 28 August 2008, and 21 May 2009, seeking a ruling as to a motion to compel discovery, which Defendants assert was filed 11 July 2007;

however, the record does not contain a copy of any such motion to compel discovery. The record contains no ruling by the Commission as to Defendants' motion to compel discovery. Thus, the record contains only a copy of Plaintiff's motion for a protective order and several letters that reference Defendants' motion to compel, which is the subject of Defendants' argument.

"'It is the appellant's duty and responsibility to see that the record is in proper form and complete.'" *McKyer v. McKyer*, 182 N.C. App. 456, 463, 642 S.E.2d 527, 532 (2007) (citation omitted). "'An appellate court is not required to, and should not, assume error by the trial judge when none appears on the record before the appellate court.'" *Id.* (citation omitted). Based on the record submitted to our Court, we are unable to conclude that the Commission erred. *See id.*

Finding no merit in the arguments of either Plaintiff's appeal or Defendants' appeal, we affirm the opinion and award entered by the Commission.

Affirmed.

Judges BRYANT and BEASLEY concur.

Report per Rule 30(e).