

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA10-792
NORTH CAROLINA COURT OF APPEALS

Filed: 3 May 2011

HERMAN LEE COLVIN,
Employee,
Plaintiff,

v.

Industrial Commission
I.C. No. 696584

WAKE COUNTY,
Employer,
and
KEY RISK MANAGEMENT SERVICES,
Third-Party Administrator,
Defendants.

Appeal by defendants from opinion and award entered 29 March 2010 by Commissioner Dianne C. Sellers for the Full Commission. Heard in the Court of Appeals 15 December 2010.

Younce & Vtipil, P.A., Robert C. Younce, Jr., for plaintiff.

Wilson & Ratledge, PLLC, by Paul F. Toland, for defendants.

ELMORE, Judge.

Wake County (defendant-employer), which is self-insured through Key Risk Management Services, Inc. (defendant-administrator; together, defendants), appeals an opinion and

award entered by the Full Commission, which awarded temporary total disability (TTD) compensation and medical expenses to Herman Lee Colvin (plaintiff). After careful consideration, we affirm.

I. Background

The following facts are undisputed and based on the Full Commission's findings in its opinion and award. At the time of his original injury, plaintiff worked for defendant as a crime scene investigator. As part of his job, plaintiff "was often required to lift and carry dead bodies away from crime scenes." On 1 January 2007, plaintiff injured his lower back while lifting a body bag at a crime scene. Defendants admitted that this injury was a compensable injury and "accepted th[e] work injury by way of a Form 60, which set forth an average weekly wage of \$947.27, and a corresponding weekly compensation rate of \$631.52."

Defendants authorized plaintiff to see Dr. Mark Mikles, a board certified orthopedic surgeon. Eight months earlier, Dr. Mikles had performed spinal surgery at L4-5 on plaintiff after plaintiff had sustained a lumbar disc herniation that was apparently not related to his employment with defendant-employer. That surgery had gone "well," and plaintiff did not experience complications. After plaintiff returned to Dr.

Mikles following the 1 January 2007 back injury, "Dr. Mikles opined that Plaintiff had sustained a 'new work-related injury' and kept Plaintiff out of work for a period of three weeks, during which Plaintiff received TTD benefits pursuant to the Form 60."

Plaintiff returned to work at the end of February 2007, but Dr. Mikles restricted his work to light-duty status. Plaintiff continued to complain of pain his lower back and buttocks while working on light-duty status. On 1 March 2007, Dr. Mikles ordered an MRI, which revealed a ten by eight millimeter recurrent disc extrusion at L4-5. Dr. Mikles interpreted the scan as showing a "small recurrent lateral disc herniation at L4-5 with significant disc degeneration at L4-5 and L5-S1 without significant nerve root compression." He ordered physical therapy, work conditioning, and a functional capacity evaluation. He kept plaintiff on light duty at work, with time restrictions. Plaintiff's functional capacity evaluation concluded that plaintiff "could occasionally lift 120 pounds and carry 100 pounds."

At the end of May 2007, plaintiff again saw Dr. Mikles, still complaining of back and buttock pain, with occasional right buttock and leg pain. Dr. Mikles released plaintiff "from treatment under his functional capacity evaluation restrictions with a permanent partial impairment rating of 5%[.]" Dr. Mikles

cleared plaintiff to return to his regular-duty work as a crime scene investigator, but advised plaintiff that an epidural steroid injection or additional physical therapy were options if plaintiff's low back or leg pain increased.

Plaintiff resigned from his position on 26 July 2007 because he "did not believe that he would [be] able to continue to safely work as a crime scene investigator . . . over the long term in light of his low back condition." On 28 July 2007, plaintiff began work as a fraud investigator for the Industrial Commission. This job was not as strenuous as his job as a crime scene investigator. He also began work as an adjunct professor of Criminal Justice at St. Augustine's College. "Plaintiff did not suffer a new injury to his low back while working at the Industrial Commission or at St. Augustine's College." Plaintiff's employment at the Industrial Commission was short lived; his employment was terminated on 18 September 2007 for reasons unrelated to this workers' compensation claim.

On 26 September 2007, plaintiff again saw Dr. Mikles, reporting "increased low back pain over the course of the preceding month which radiated into his right buttock, thigh and leg." Dr. Mikles "attributed this pain to an aggravation or exacerbation of" plaintiff's original compensable 1 January 2007 back injury, and he "prescribed a steroid dose-pack, physical therapy, Ultram and Flexeril, and ordered a new MRI." When

plaintiff saw Dr. Mikles on 5 October 2007, plaintiff was in a wheelchair because of his pain. The MRI showed that plaintiff's herniated disc had "progressed and become larger." Dr. Mikles recommended a revision L4-L5 microdiscectomy, which he performed on 9 October 2007. The surgery successfully alleviated plaintiff's right leg pain, but he continued "to experience significant pain and stiffness in his low back for which he continues to be prescribed" medication. "Plaintiff is also limited in the amount of weight he can lift and how long he can walk or remain seated or standing." He "will likely need fusion surgery in the future."

On May 22, 2008, Dr. Mikles completed a form indicating that the January 1, 2007[,] incident described by plaintiff had more likely than not aggravated, accelerated or activated improvement and that he was not capable of any work at that time. On June 3, 2008, plaintiff was declared to be at maximum medical improvement with a 15% permanent partial impairment rating specifically for the January 1, 2007[,] injury by accident. On July 9, 2008, Dr. Mikles wrote again that plaintiff was to remain out of work.

The Full Commission made two other findings of fact, to which defendants object:

20. The October 9, 2007[,] revision microdiscectomy was related to Plaintiff's January 1, 2007[,] work injury.
24. Plaintiff continues to be unable to work in any job as the result of his January 1, 2007[,] work injury.

Based on the preceding facts, the Full Commission concluded that plaintiff had met his initial burden of proving disability by presenting sufficient medical evidence to prove that his original compensable injury caused his inability to work in any employment from 5 October 2007 until the date of the hearing. The Full Commission concluded that plaintiff was entitled to temporary total disability compensation and payment of his medical expenses incurred or to be incurred as a result of his 1 January 2007 injury. Defendants now appeal.

II. Arguments

A. Section 97-47 does not apply to plaintiff's case.

Defendants first argue that the Full Commission should have applied N.C. Gen. Stat. § 97-47, which applies only to final awards, to plaintiff's appeal because plaintiff received the "functional equivalent of a 'final award' within the meaning of N.C.G.S. § 97-47." Defendants offer no legal authority or cogent reasoning to support such an interpretation of § 97-47, and none is apparent to us.

"N.C. Gen. Stat. § 97-47 applies only where there has been a final award of workers' compensation benefits." *Perez v. American Airlines/AMR Corp.*, 174 N.C. App. 128, 131, 620 S.E.2d 288, 290 (2005) (citations omitted). In *Perez*, we stated that "an employer's payment of compensation pursuant to a Form 60

filed with the Commission is an enforceable award on the compensability of the employee's injury[,]” but we rejected the notion that “an employer's Form 60 payments constitute a *final* award within the meaning of N.C. Gen. Stat. § 97-47.” *Id.* (citations omitted). Here, plaintiff received Form 60 payments, but the Industrial Commission never issued a final opinion and award. Accordingly, we do not apply § 97-47, and the Full Commission properly declined to apply it as well.

B. The challenged findings of fact are supported by competent evidence.

This Court's review is limited to a consideration of whether there was any competent evidence to support the Full Commission's findings of fact and whether these findings of fact support the Commission's conclusions of law. This Court has stated that so long as there is some evidence of substance which directly or by reasonable inference tends to support the findings, this Court is bound by such evidence, even though there is evidence that would have supported a finding to the contrary.

Ard v. Owens-Illinois, 182 N.C. App. 493, 496, 642 S.E.2d 257, 259-60 (2007) (quotations, citations, and emphasis omitted)

To receive compensation pursuant to the Workers' Compensation Act, these three conditions must be met: “(1) the claimant suffered a personal injury by accident; (2) such injury arose in the course of the employment; and (3) such injury arose

out of the employment." *Id.* at 496, 642 S.E.2d at 260 (quotations and citations omitted).

With respect to back injuries, however, where injury to the back arises out of and in the course of the employment and is the direct result of a specific traumatic incident of the work assigned, "injury by accident" shall be construed to include any disabling physical injury to the back arising out of and causally related to such incident.

N.C. Gen. Stat. § 97-2(6) (2009).

On appeal, defendant challenges findings of fact 20 and 24. The thrust of defendant's factual argument is that we could reach different factual conclusions about plaintiff's disability based on the evidence. That may be the case, but that is not our role. As noted above, we must affirm the Full Commission's findings of fact if there is competent evidence to support them, even if the evidence could support a contrary finding.

There is competent evidence to support the findings of fact that plaintiff's revision microdiscectomy was related to his 1 January 2007 work injury and that he was unable to work at any job as a result of his 1 January 2007 injury. During his deposition, Dr. Mikles testified that plaintiff's 9 October 2007 back surgery was "more likely than not related to [plaintiff's] January 1, 2007, work-related injury." Dr. Mikles also stated multiple times that defendant was "not capable of any kind of work" as a result of his back injury. Dr. Mikles provided bases

for both opinions. Accordingly, we hold that the challenged findings of fact were supported by competent evidence.

C. The findings of fact support the conclusion that plaintiff has a continuing disability.

Defendants also argue that plaintiff has not proven any ongoing disability and so is not entitled to ongoing TTD benefits. Defendants contend that plaintiff must "undertake a reasonable job search beyond his prior employer in order to prove a continuing disability after the date of the Evidentiary Hearing before the Deputy Commissioner." Defendants rely on our opinion in *Singletary v. N.C. Baptist Hosp.*, 174 N.C. App. 147, 619 S.E.2d 888 (2005), to support this proposition. However, defendants do not direct our attention to any particular language in *Singletary* -- nor even any page in the opinion¹ -- to support this assertion, and none is apparent to us.²

[T]o support a conclusion of compensable disability, the Commission must find: (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other

¹ It is good practice to use a pinpoint citation to indicate "[t]he page on which a quotation or relevant passage appears[.]" *Black's Law Dictionary* 260 (8th ed. 2004).

² In *Singletary*, the employee offered no evidence that she was under a disability beyond 2 May 2002, and the Full Commission rightly concluded "that she had failed to prove that she was under a disability after 2 May 2002." 174 N.C. App. at 150-51, 619 S.E.2d at 891. Here, plaintiff offered medical evidence that his disability was ongoing.

employment, and (3) that this individual's incapacity to earn was caused by plaintiff's injury.

Britt v. Gator Wood, Inc., 185 N.C. App. 677, 681-82, 648 S.E.2d 917, 920 (2007) (citing *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982)). "There are four methods by which a plaintiff may prove disability[,]” including “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[.]” *Id.* at 682, 648 S.E.2d at 920 (quotations and citation omitted). Here, plaintiff produced medical evidence that, as a consequence of his 1 January 2007 work injury, he was physically unable to work in any employment. The Full Commission made findings of fact about that medical evidence, and those findings of fact support the Full Commission's conclusion that plaintiff met his burden of proving disability.

Accordingly, we find no merit in defendants' appeal, and we affirm the opinion and award of the Full Commission.

Affirmed.

Judges HUNTER, Robert C., and CALABRIA concur.

Report per Rule 30(e).