NO. COA10-548
NORTH CAROLINA COURT OF APPEALS

Filed: 7 June 2011

GREGORY W. TINCHER,
Employee,
Plaintiff,

v. Industrial Commission
I.C. No. 712483

ADECCO (formerly known as OLSTEN STAFFING),
Employer,

BROADSPIRE,
Third-Party Administrator/
Carrier,
Defendants.

Appeal by Plaintiff and Defendants from opinion and award entered 22 February 2010 by the North Carolina Industrial Commission. Heard in the Court of Appeals 15 November 2010.

Law Office of Gary A. Dodd, by Gary A. Dodd, for Plaintiff.

Wilson & Ratledge, PLLC, by Kristine L. Prati, for Defendants.

McGEE, Judge.

Gregory W. Tincher (Plaintiff) filed a Form 18 with the North Carolina Industrial Commission against Employer Adecco (Adecco) and Insurer Broadspire (collectively Defendants), on 19 February 2007. Plaintiff filed a request that his claim be assigned for hearing, and the matter was heard by a deputy commissioner on 11 August 2009. Defendants appealed the deputy commissioner's opinion and award, and the matter was heard by the Commission on 13 January 2010.

The Commission made the following relevant findings of fact: Adecco was a temporary staffing agency. Adecco placed Plaintiff with Borg-Warner in a position as a lathe operator on 11 October 2006. As part of his employment, Plaintiff was required to apply a chemical coolant, Quakercool 3750, to a lathe machine. At some date subsequent to the start of Plaintiff's use of Quakercool 3750, Plaintiff began to experience a rash on his fingers and on the palms of his hands. Plaintiff could not identify the date he was exposed to Quakercool 3750, or when he developed the rash. Skin irritation and dermatitis were known potential hazards of contact with Quakercool 3750. Plaintiff reported the rash to his supervisor, who provided Plaintiff with a "barrier cream" and instructed Plaintiff to "use [the cream] along with his gloves." Plaintiff continued to work until Adecco's holiday break, which began on

21 December 2006. The condition of Plaintiff's hands worsened during the holiday break, and Plaintiff did not return to work on 2 January 2007, which was the end of the holiday break.

Plaintiff went to the Sisters of Mercy Urgent Care facility on 2 February 2007, where Dr. Ellen T. Lawson (Dr. Lawson) diagnosed Plaintiff with contact dermatitis. Dr. Lawson prescribed a treatment and released Plaintiff to return to work. Plaintiff returned to Sisters of Mercy Urgent Care twice more in February 2007, and was referred for a dermatological evaluation on 13 February 2007. Plaintiff's symptoms did not improve and he presented to the emergency room at Mission Hospital on 3 June 2007. Plaintiff was treated by Dr. Stace E. Horine (Dr. Horine). Dr. Horine noted that Plaintiff's right hand was in significantly worse condition than Plaintiff's left hand. Dr. Horine diagnosed Plaintiff with "possible fungal infection, possible atopic dermatitis . . . possibly secondary to a dyshidrotic eczematous process[,]" and prescribed a short course of steroids.

Plaintiff presented to Advanced Dermatology and Skin Surgery on 14 June 2009. Plaintiff was examined by Physican's Assistant Della Sue Reynolds (Ms. Reynolds). Plaintiff was treated by Ms. Reynolds for an "aggressive case of dyshidrotic eczema secondary to contact with a coolant at work." Plaintiff

presented to Dr. Timothy Highley (Dr. Highley), a dermatologist and family physician, on 29 January 2009. Dr. Highley diagnosed Plaintiff with hand eczema. Both Dr. Highley and Ms. Reynolds opined to a reasonable degree of medical certainty that Plaintiff's exposure to Quakercool 3750 could have been the cause of Plaintiff's hand eczema.

Based on these facts, the Commission found that Plaintiff's "work-related exposure to the [Quakercool 3750] either caused or significantly contributed to [Plaintiff's] chronic dermatitis on both hands beginning approximately on November 1, 2007." The Commission concluded "[P]laintiff's contraction of contact dermatitis on his hands was due to causes and conditions characteristic of and peculiar to [P]laintiff's employment, . . . and [was], therefore, a compensable occupational disease" as defined in N.C. Gen. Stat 97-53(13). Based on that conclusion, the Commission awarded Plaintiff "all related medical expenses incurred or to be incurred . . . as the result of his compensable occupational disease of contact dermatitis on both hands[.]" The Commission ordered that Defendants pay all those costs. However, the Commission also concluded that Plaintiff did not prove by the greater weight of the evidence that he was disabled and, therefore, pursuant to N.C. Gen. Stat. § 97-2(9) and § 97-54, Plaintiff was not

entitled to disability compensation under the North Carolina Workers' Compensation Act (the Act). Because Plaintiff's injury did not qualify as a disability, the Commission denied Plaintiff's claim for disability compensation. Both Plaintiff and Defendants appeal.

As a preliminary matter, Plaintiff argues that Defendants (1) waived their rights to contest the compensability of, and their liability for, Plaintiff's claim by failing to comply with the requirements of N.C. Gen. Stat. § 97-18(d), and (2) that Defendants should be equitably estopped from denying the compensability of Plaintiff's injury in light of Defendants' conduct following Plaintiff's injury. We dismiss these arguments because they are not properly before us.

The record is devoid of any evidence that Plaintiff made these arguments to the Commission. Plaintiff's Form 44 appealing the opinion and award of the deputy commissioner does not include either of these arguments as assignments of error to be considered by the Commission. In ***Floyd v. Executive Personnel Grp.***, the "[p]laintiff . . . raises these arguments for the first time on appeal. The 'law does not permit parties to swap horses between courts in order to get a better mount' on appeal. . . . [B]ecause these arguments were not raised before the Full Commission, we will not address them on appeal." ***Floyd***

v. Executive Personnel Grp., 194 N.C. App. 322, 329, 669 S.E.2d 822, 828 (2008) (citation omitted); *see also Soder v. Corvel Corp.*, __ N.C. App. __, 690 S.E.2d 30 (2010); *Lewis v. Beachwood Exxon Service*, 2008 N.C. App. LEXIS 523 (unpublished opinion) (our Court affirmed opinion and award of the Industrial Commission concluding the employee had failed to preserve issue for consideration because employee did not include the issue in Form 44). Because Plaintiff failed to preserve these arguments for appeal, they are dismissed.

Defendants' Appeal

Defendants argue that the Commission erred in determining that Plaintiff suffered a compensable occupational disease and in requiring Defendants to pay for Plaintiff's related medical expenses. We disagree.

> "The standard of review on appeal . . . from an award by the Commission is whether there is any competent evidence in the record to support the Commission's findings and whether those findings support the Commission's conclusions of law." The Commission's findings of fact are conclusive on appeal if supported by any competent evidence. "Thus, on appeal, this Court does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the records contain any evidence tending to support the finding."

Evans v. Conwood LLC, 199 N.C. App. 480, 483, 681 S.E.2d 833, 836 (2009) (citations omitted).

Defendants specifically argue that Plaintiff failed, through expert testimony, to prove that his condition was causally related to his employment, as is required by N.C. Gen. Stat. § 97-53. Defendants argue that the competent evidence in the record does not support the Commission's findings of fact and conclusions of law.

N.C. Gen. Stat. § 97-53(13) defines an occupational disease as:

> "Any disease, other than hearing loss covered in another subdivision of this section, which is proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment."
>
> Our Supreme Court has interpreted N.C. Gen. Stat. § 97-53(13) to require that plaintiff establish three elements to demonstrate an occupational disease:
>
> > (1) the disease must be characteristic of and peculiar to the claimant's particular trade, occupation or employment;
> >
> > (2) the disease must not be an ordinary disease of life to which the public is equally exposed outside of the employment; and

> (3) there must be proof of causation (proof of a causal connection between the disease and the employment).

Evans, 199 N.C. App. at 484, 681 S.E.2d at 836 (citations omitted). Relying on the testimony of Dr. Highly and Ms. Reynolds, the Commission found:

> 17. Based on the sudden onset of [P]laintiff's rash after he commenced work on the older lathe in November 2007, the location of the rash in the area where [P]laintiff's skin was exposed to [Quakercool 3750], the prompt reporting of the rash to a supervisor . . ., [P]laintiff's consultation with a medical care provider on February 2, 2007 regarding his symptoms, the lack of any evidence that the rash was fungal or that [P]laintiff suffered from similar symptoms prior to his exposure to [Quakercool 3750] . . ., the general opinions of Dr. Highley and Ms. Reynolds, the fact that [other doctors] restricted [P]laintiff from working with the "offending substance," and Dr. Lawson's opinion that [P]laintiff's dermatitis was "probably related to [Quakercool 3750]," the undersigned finds that [P]laintiff's work-related exposure to the industrial coolant either caused or significantly contributed to his chronic dermatitis on both hands beginning approximately on November 1, 2007.

The Commission, citing N.C.G.S. § 97-53(13), concluded as a matter of law that "[P]laintiff's contraction of contact dermatitis on his hands was due to causes and conditions characteristic of and peculiar to [P]laintiff's employment, [was] not an ordinary disease of life to which the general

public not so employed [was] equally exposed, and [was], therefore, a compensable occupational disease."

"The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony. The courts may set aside findings of fact only upon the ground they lack evidentiary support." *Anderson v. Construction Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965) (citations omitted). The Commission weighed reports and testimony of five different doctors and a physician's assistant as to the causal relationship between Plaintiff's condition and his employment, and assessed the credibility of this evidence. It is not the province of our Court to reweigh the evidence. *Evans*, 199 N.C. App. at 488, 681 S.E.2d at 838. "'The findings of fact of the Industrial Commission are conclusive on appeal when supported by competent evidence, even though there be evidence that would support findings to the contrary.'" *Id.* (citation omitted). We hold that the Commission's findings of fact regarding this issue are supported by competent evidence, and that the findings of fact in turn support the Commission's conclusions of law and award. Because we hold that the Commission did not err in concluding that Plaintiff suffered a compensable occupational disease while working for Adecco, we further hold that the Commission did not err in ordering Defendants to pay for

Plaintiff's medical costs related to that occupational disease. Defendants' appeal is without merit.

Plaintiff's Appeal

Plaintiff's first argument is that Defendants waived their rights to contest the compensability of, and Defendants' liability for, Plaintiff's occupational disease, or, in the alternative, that Defendants should be equitably estopped from doing so. We have already dismissed this argument above.

Plaintiff next argues that "the greater weight of the competent evidence in this case establishes that [Plaintiff] contracted a compensable occupational disease" which rendered Plaintiff "physically incapable of work in any employment and temporarily and totally disabled until 7 April 2007." Plaintiff further argues that this injury "substantially diminished" Plaintiff's earning capacity and, therefore, the trial court erred in denying Plaintiff workers' compensation benefits for his injury.

We hold that the findings and conclusions of the Commission are insufficient for appellate review. In order for Plaintiff to meet his burden to show he is entitled to an award of compensation for his occupational disease, he must prove that he is disabled as defined in the Act. N.C. Gen. Stat. § 97-52 (2009).

> In order to support a conclusion of 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 employment, and (3) that this individual's incapacity to earn was caused by plaintiff's injury." Under this test, "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."

White v. Weyerhaeuser Co., 167 N.C. App. 658, 670-71, 606 S.E.2d 389, 398 (2005) (citations omitted).

> In *Russell* [*v. Lowes Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993),] this Court held that an employee may meet his burden of proving 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."

White, 167 N.C. App. at 671, 606 S.E.2d at 399. "After the claimant meets this initial burden, the burden shifts to the employer to show that not only were suitable alternative jobs available to the plaintiff, but that the plaintiff was capable of obtaining one of these jobs." *Shaw v. United Parcel Service*, 116 N.C. App. 598, 601, 449 S.E.2d 50, 52-53 (1994) (citations omitted).

> When . . . a worker presents evidence that satisfies the fourth prong of *Russell* – "that he has obtained other employment at a wage less than that earned prior to the injury," – "[s]uch evidence, while not dispositive of disability, shifts the burden to the employer to establish that the employee could have obtained higher earnings."

Britt v. Gator Wood, Inc., 185 N.C. App. 677, 684, 648 S.E.2d 917, 922 (2007) (citations omitted).

In the case before us, the Commission made findings of fact that Plaintiff did obtain some employment after contracting the contact dermatitis. Plaintiff worked as a truck driver from April 2007 to February 2008, and worked for his sister stocking vending machines from approximately February 2008 until September 2008. Therefore, the Commission's findings establish that Plaintiff "obtained other employment" following Plaintiff's injury. The Commission's findings are insufficient, however, for our Court to make a determination considering whether this

employment was at a "wage less than that earned prior to the injury."

First, there are no findings stating what Plaintiff's wages were when he was working for Adecco. Second, the findings concerning Plaintiff's jobs as a truck driver and vending machine stocker also lack information necessary to calculate Plaintiff's hourly wages. For example, the Commission found that Plaintiff worked for approximately ten months as a truck driver, and that Plaintiff earned $10,981.89 during that period. However, there is no information concerning the number of hours Plaintiff worked, or whether his earnings included overtime or other special rates of compensation. The Commission did not make any specific findings or conclusions indicating whether it determined that Plaintiff had satisfied the fourth *Russell* method. The findings the Commission did make, however, suggest that Plaintiff *may* have done so. We therefore remand to the Commission for additional findings and conclusions regarding the fourth method sufficient for our Court to review.

In addition, when "the findings show that 'plaintiff, although limited in the work he can perform, is capable of performing some work,' and there is evidence that plaintiff may have satisfied *Russell* methods two or three, the Commission must make findings addressing those two methods of proof." *Britt*,

185 N.C. App. at 684, 648 S.E.2d at 922 (citation omitted). The Commission has not indicated in any of its findings or conclusions which *Russell* methods it considered. It seems apparent from the language used in some of its findings of fact and one of its conclusions that the Commission considered method two, and determined that Plaintiff failed to prove a disability by that method. There are no findings addressing the second prong of method three. This may be because the Commission determined that Plaintiff presented no evidence of any preexisting conditions. If this is the case, the better practice is for the Commission to address all the *Russell* methods and include a determination for each in its opinions and awards.

If, upon remand, the Commission determines that Plaintiff has satisfied his burden pursuant to one or more of the *Russell* methods, the burden shifts to Defendants to prove Plaintiff was not disabled under the Act. If the burden shifts to Defendants, the Commission must then make the appropriate findings and conclusions concerning whether Defendants met their burden in showing not only that there "were suitable alternative jobs available to . . . [P]laintiff, but that . . . [P]laintiff was capable of obtaining one of th[o]se jobs." *Shaw*, 116 N.C. App. at 601, 449 S.E.2d at 52-53. If Plaintiff has presented

evidence that he obtained employment at wages less than those he was receiving at the time of his injury, the burden then shifts to Defendants to establish that Plaintiff "'could have obtained higher earnings,'" *Britt*, 185 N.C. App. at 684, 648 S.E.2d at 922 (citations omitted).

The Commission did include findings of fact relevant to a determination of Plaintiff's ability to obtain other suitable employment, but it is unclear to this Court if the Commission made any conclusion concerning this issue. The Commission's relevant conclusion of law concerning proof of disability was stated as follows:

> Although [P]laintiff contracted a compensable occupational disease, the greater weight of the evidence fails to show that he sustained any disability as a result of the contact dermatitis on his hands. No physician took [P]laintiff out of work and there is no medical evidence of record that [P]laintiff was unable to work due to his occupational disease. Plaintiff failed to make reasonable efforts to seek employment after he left his assignment with [D]efendant-[E]mployer at Borg-Warner. Plaintiff failed to prove by the greater weight of the evidence that he is disabled and therefore he is not entitled to disability compensation[.]

This conclusion seems to indicate that the Commission determined Plaintiff failed to prove disability pursuant to *Russell* methods one and two. This conclusion gives us little guidance

concerning methods three and four, even though Plaintiff presented evidence relevant to method four. It appears that, through this conclusion, the Commission was attempting to state that it determined Plaintiff had failed to meet his burden as defined in *Russell*. If Plaintiff did, in fact, fail to meet his burden for all four *Russell* methods, there would be no need for the Commission to make any conclusions regarding whether suitable alternative jobs were available to Plaintiff and whether Plaintiff was capable of obtaining one of those jobs; or whether, if Plaintiff had obtained another job, he earned at least as much in that job as he was earning in his job at the time of his injury.

If Plaintiff did present competent evidence sufficient to support one or more of the *Russell* methods of proof, the Commission was required to make the appropriate findings and conclusions regarding any evidence presented by Defendants relating to alternative available jobs, wages for those jobs, and Plaintiff's likelihood of obtaining one of those jobs. *Britt*, 185 N.C. App. at 684, 648 S.E.2d at 922; *Shaw*, 116 N.C. App. at 601, 449 S.E.2d at 52-53. The conclusions in the opinion and award before us do not address this issue. We therefore reverse and remand to the Commission that portion of

its opinion and award denying compensation for Plaintiff's injury.

Upon remand, the Commission shall make all conclusions necessary for our Court to fully understand the basis for the Commission's decision, and make the findings of fact necessary to support its conclusions.

Dismissed in part; affirmed in part; reversed and remanded in part.

Chief Judge MARTIN and Judge ERVIN concur.

Report per Rule 30(e).