NO. COA06-339

NORTH CAROLINA COURT OF APPEALS

Filed: 5 December 2006

LISA BERRY POST,
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 736574

KVAERNER CONSTRUCTIONS, INC.,
Employer,

SELF-INSURED (GALLAGHER BASSETT SERVICES, INC., Third-Party Administrator),
Defendant.

Appeal by plaintiff from opinion and award entered 1 November 2005 by Commissioner Laura Kranifeld Mavretic for the North Carolina Industrial Commission. Heard in the Court of Appeals 13 November 2006.

Law Offices of George W. Lennon, by George W. Lennon, for plaintiff-appellant.

McAngus, Goudelock & Courie, P.L.L.C., by Louis A. Waple and Andrew N. Bernardini, for defendant-appellee.

TYSON, Judge.

Lisa Berry Post ("plaintiff") appeals from the opinion and award entered by the Full Commission of the North Carolina Industrial Commission ("the Commission") requiring Kvaerner Constructions, Inc. ("defendant") to pay temporary total disability compensation to plaintiff from 26 August 1997 through 25 April 2000. We affirm.

I. Background

In May 1997, plaintiff was employed by defendant as a sheet rock installer on a job site at Wake Medical Center. On 15 May 1997, plaintiff sustained a compensable injury when she jumped through a windowsill to enter a bathroom. Plaintiff's head struck a wooden stub protruding from the wall, and she sustained a laceration to her scalp. Plaintiff fell backwards and hit her head against the tile floor losing consciousness for a few seconds. Plaintiff obtained medical attention at Wake Medical Center where her head wound was cleaned and sutured.

On 17 July 1997, plaintiff presented to Wake Medical Center and complained of blurred vision and headaches. Plaintiff was assessed with post-traumatic headaches and given prescription medication.

On 21 July 1997, plaintiff presented to Dr. Lilley and complained of headaches, blurred vision and nausea brought on by bright lights and noise. Dr. Lilley noted a normal neurological exam and CT scan results. Dr. Lilley referred plaintiff to Dr. Jozewicz.

On 24 July 1997, plaintiff presented to neurologist, Dr. Jozewicz. Dr. Jozewicz noted plaintiff had a normal neurological exam and assessed plaintiff with persistent migraine or vascular headaches and post-head injury. Dr. Jozewicz prescribed medication and released plaintiff for part-time work for two to three days per week at five hours per day.

On or about 7 August 1997, defendant terminated plaintiff from her job. On 12 August 1997, Dr. Jozewicz noted plaintiff's headaches had "improved approximately 40%." On 8 September 1997, Dr. Jozewicz noted plaintiff's headaches had improved and that she was currently unemployed. On 6 November 1997, Dr. Jozewicz opined plaintiff had reached maximum medical improvement and released her to return to work without restrictions. Dr.

Jozewicz testified to a reasonable degree of medical certainty that plaintiff's headaches were caused by her 15 May 1997 accident.

On 3 February 1998, plaintiff was involved in a non-work related altercation at the "Pure Gold" club where she sustained multiple blows to her head. On 4 March 1998, plaintiff sought treatment from neurologist, Dr. Kapil Rawal, for severe headaches, double vision, problems focusing, and ringing in both ears. Dr. Rawal assessed plaintiff with post-traumatic muscle contraction headaches with a vascular component. On 25 April 2000, Dr. Rawal concluded plaintiff had reached maximum medical improvement from a neurological standpoint. Dr. Rawal advised plaintiff she could return to work without restrictions.

Plaintiff's counsel referred plaintiff to neuropsychologist Dr. Robert Condor. On 24 October 2000, Dr. Condor diagnosed plaintiff with a concussion, depression, and a pain disorder with conversion features. Dr. Condor found that while it was difficult to differentiate between the May 1997 work injury and the February 1998 assault, "[t]he 1998 assault clearly exacerbated [plaintiff]'s headache situation." He stated plaintiff was at maximum medical improvement from a neuropsychological perspective, and that she could not return to her previous employment in heavy construction. Dr. Condor stated plaintiff's future work would require modifications, such as lighting for photosensitivity, low stress environments, and flexible attendance requirements due to headaches.

Defendant accepted plaintiff's 15 May 1997 injury as compensable. Defendant paid plaintiff ongoing benefits beginning on 26 August 1997. After 25 April 2000, plaintiff was capable of work, but failed to make a reasonable effort to find employment.

On 22 December 2004, a Deputy Commissioner of the Commission entered an opinion and award that denied plaintiff's claim for: (1) additional benefits for ongoing psychological

treatment; (2) ongoing medical treatment for alleged headaches; and (3) ongoing benefits for wage loss. The Deputy Commissioner also required plaintiff to pay costs, including expert witness fees.

Plaintiff appealed to the Full Commission. On 1 November 2005, the Commission filed an opinion and award that concluded: (1) plaintiff was entitled to temporary total disability from 26 August 1997 through 25 April 2000; (2) defendant shall pay medical expenses incurred as a result of the compensable injury; (3) plaintiff's counsel was entitled to receive twenty-five percent of sums due to plaintiff; and (4) defendant shall pay costs. Plaintiff appeals.

II. Issues

Plaintiff argues the Commission erred because it: (1) entered a finding of fact and conclusion of law that she was released to return to work without restrictions which are unsupported by competent evidence; (2) failed to shift the burden of proof to defendant to prove she was unable to obtain employment after 25 April 2000; (3) failed to conclude plaintiff met her burden of proving she was disabled after 25 April 2000; (4) entered findings of fact that are insufficient as a matter of law; and (5) failed to award sanctions against defendant.

III. Standard of Review

"The standard of review on appeal to this Court 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." *Oliver v. Lane Co.*, 143 N.C. App. 167, 170, 544 S.E.2d 606, 608 (2001) (citation omitted). This Court neither re-weighs evidence nor assesses credibility of witnesses. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998). "[I]f there is competent evidence to support the findings, they are conclusive on appeal even though there is plenary evidence to support contrary findings." *Oliver*,

143 N.C. App. at 170, 544 S.E.2d at 608 (citation omitted). "The Commission may weigh the evidence and believe all, none or some of the evidence." *Hawley v. Wayne Dale Constr.*, 146 N.C. App. 423, 428, 552 S.E.2d 269, 272, *disc. rev. denied*, 355 N.C. 211, 558 S.E.2d 868 (2001). "The Commission's conclusions of law are reviewable *de novo*." *Arnold v. Wal-Mart Stores, Inc.*, 154 N.C. App. 482, 484, 571 S.E.2d 888, 891 (2002).

IV. Plaintiff's Release to Work

Plaintiff argues the Commission erred when it entered a finding of fact and conclusion of law releasing her to return to work without restrictions and asserts these findings are unsupported by competent evidence. We disagree.

The Commission entered the following findings of fact:

> 8. On November 6, 1997, Dr. Jozewicz again noted improvement in plaintiff's headaches, but that the headaches still occurred with stress. Dr. Jozewicz determined that *plaintiff had reached maximum medical improvement and released her to return to work with no restrictions*. In her deposition, Dr. Jozewicz testified to a reasonable degree of medical certainty that plaintiff's headaches were caused by her injury by accident at work on May 15, 1997. Dr. Jozewicz also noted that plaintiff would benefit from vocational rehabilitation to assist her in a new job placement.
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> 13. As of April 25, 2000, Dr. Rawal felt *plaintiff had reached maximum medical improvement* from a neurological standpoint. At that visit, Dr. Rawal advised plaintiff that she could return to work without restrictions.

(Emphasis supplied).

Unchallenged findings of fact are binding on appeal. *See In re Moore*, 306 N.C. 394, 404, 293 S.E.2d 127, 133 (1982) ("Since respondent did not except to any of the findings, they are presumed to be correct and supported by evidence."); *see also State v. Watkins*, 337 N.C. 437, 438, 446 S.E.2d 67, 68 (1994) (findings of fact which are not excepted to are binding on appeal).

The Commission's findings of fact are conclusive and binding upon appeal if supported by competent evidence, even if competent evidence supports a contrary finding. *Hedrick v. PPG Industries*, 126 N.C. App. 354, 357, 484 S.E.2d 853, 856, *disc. rev. denied*, 346 N.C. 546, 488 S.E.2d 801 (1997); *see Lumbee River Electric Corp. v. City of Fayetteville*, 309 N.C. 726, 741, 309 S.E.2d 209, 219 (1983) (findings of fact are conclusive on appeal if supported by competent evidence, even if there is evidence to the contrary); *see also Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) (where no exception is taken to a finding of fact, the finding is presumed to be supported by competent evidence and is binding on appeal).

Plaintiff failed to assign error to findings of fact numbered 8 and 13. These findings of fact are presumed to be supported by competent evidence and they are binding on appeal. *Moore*, 306 N.C. at 404, 293 S.E.2d at 133. The Commission's finding and conclusion that plaintiff was released to return to work without restrictions is presumed to be supported by competent evidence.

Even though the Commission's findings of fact are binding on appeal and presumed to be supported by competent evidence, competent evidence in the record also supports findings of fact numbered 8 and 13. Dr. Rawal provided regular treatment for plaintiff's headaches from 4 March 1998 though 8 September 1999. He provided further treatment in April 2000 and September 2000. Dr. Rawal's diagnostic tests included an MRI of plaintiff's brain, an EEG, and a CT scan. All tests failed to reveal any evidence of abnormality. Competent evidence supports Dr. Rawal's testimony that plaintiff reached maximum medical improvement on 25 April 2000. This assignment of error is overruled.

V. Plaintiff's Burden of Proof

Plaintiff argues the Commission erred by failing to shift the burden of proof to defendant to prove she was unable to find employment after 25 April 2000. We disagree.

"'In order to obtain compensation under the Workers' Compensation Act, the claimant has the burden of proving the existence of his disability and its extent.'" *Saums v. Raleigh Community Hospital*, 346 N.C. 760, 763, 487 S.E.2d 746, 749 (1997) (quoting *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 185, 345 S.E.2d 374, 378 (1986)). "[T]he 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." *Shaw v. United Parcel Service*, 116 N.C. App. 598, 601, 449 S.E.2d 50, 52 (1994), *aff'd per curiam*, 342 N.C. 189, 463 S.E.2d 78 (1995). An employee may establish 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) (citations omitted). "If an employee presents substantial evidence he or she is incapable of earning wages, the employer must then come forward with evidence to show not only that suitable jobs are available, but also that the plaintiff is capable of getting one, taking into account both physical and vocational limitations." *Barber v. Going West Transp. Inc.*, 134 N.C. App. 428, 435, 517 S.E.2d 914, 920 (1999).

The Commission concluded:

> 6. [P]laintiff met her initial burden to show that she is disabled. On April 25, 2000, however, plaintiff reached maximum medical improvement for the injuries sustained in the injury by accident and she was released to return to work. Plaintiff did not meet her burden to prove that after August 25, 2000, she was unable to obtain employment after a reasonable effort or that it was futile for her to seek employment because of other factors. Plaintiff was capable of some work and no doctor took her completely out of work.

The Commission did not shift the burden of proof to defendant because it never concluded plaintiff satisfied her burden of proving she was disabled and re-employment efforts were futile. Plaintiff is not entitled to a continuing presumption of disability. *Sims v. Charmes/Arby's Roast Beef,* 142 N.C. App. 154, 159-60, 542 S.E.2d 277, 281, *disc. rev. denied,* 353 N.C. 729, 550 S.E.2d 782 (2001). Plaintiff's assignment of error is overruled.

VI. Proof of Disability

Plaintiff argues that even if the Commission failed to shift the burden of proof, she met her burden of proving she was disabled after 25 April 2000. We disagree.

The Commission found as fact:

> 8. Dr. Jozewicz determined that plaintiff had reached maximum medical improvement and released her to work with no restrictions.
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> 13. As of April 25, 2000, Dr. Rawal felt plaintiff had reached maximum medical improvement from a neurological standpoint. At that visit, Dr. Rawal advised plaintiff that she could return to work without restrictions.
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> 16. Dr. Condor stated that he would expect that any future work would require some modifications, such as lighting for photosensitivity, low stress environments, and flexible attendance requirements due to headaches.

. . . .

> 21. After April 25, 2000, plaintiff was capable of some work but failed to make a reasonable effort to find employment.

The Commission concluded:

> 6. Plaintiff was capable of some work and no doctor took her completely out of work.

Plaintiff failed to assign error to any of these findings of fact. Unchallenged findings of fact are binding on appeal. *In re Moore*, 306 N.C. at 404, 293 S.E.2d at 133. The Commission's findings of fact support its conclusion of law that "plaintiff was capable of some work and no doctor took her completely out of work." This assignment of error is overruled.

VII. Findings of Fact

Plaintiff argues the Commission's findings of fact are insufficient as a matter of law. We disagree.

Plaintiff argues the Commission failed to make required findings of fact concerning her medical condition and the physician's testimony sufficient for appellate review. Recitations of the testimony of witnesses will be accepted as findings of fact and upheld on appeal as long as there is sufficient competent evidence in the record to support each finding. *Bailey v. Sears Roebuck & Co.*, 131 N.C. App. 649, 653-54, 508 S.E.2d 831, 835 (1998). The Commission is not obligated to explain its findings of fact by attempting to distinguish which evidence or witnesses it finds credible. *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116-17, 530 S.E.2d 549, 552 (2000).

Unchallenged findings of fact numbered 8 and 13 state plaintiff reached maximum medical improvement on or before 25 April 2000. These findings of fact state plaintiff was released to return to work without restrictions on or before 25 April 2000. Findings of fact

numbered 8 and 13 are not insufficient as a matter of law and support the Commission's conclusions of law. This assignment of error is overruled.

VIII. Sanctions

Plaintiff argues the Commission erred when it failed to award sanctions against defendant. We disagree.

N.C. Gen. Stat. §97-88.1 (2005) states, "If the Industrial Commission shall determine that any hearing has been brought, prosecuted, or defended without reasonable ground, it may assess the whole cost of the proceedings including reasonable fees for defendant's attorney or plaintiff's attorney upon the party who has brought or defended them." "The purpose of [N.C. Gen. Stat. §97-88.1] is to prevent 'stubborn, unfounded litigiousness' which is inharmonious with the primary purpose of the Workers' Compensation Act to provide compensation to injured employees." *Beam v. Floyd's Creek Baptist Church*, 99 N.C. App. 767, 768, 394 S.E.2d 191, 192 (1990) (quoting *Sparks v. Mountain Breeze Restaurant & Fish House, Inc.*, 55 N.C. App. 663, 664, 286 S.E.2d 575, 576 (1982)).

Plaintiff, not defendant, appealed from the Deputy Commissioner's decision to the Commission. Defendant's arguments are based upon reasonable grounds because unchallenged findings of fact numbered 8 and 13 show plaintiff reached maximum medical improvement on or before 25 April 2000 and was released to return to work without restrictions. The Commission's findings support its conclusions of law. This assignment of error is overruled.

IX. Conclusion

The Commission did not err when it entered findings of fact and conclusions of law that plaintiff was released to work without any restrictions and was capable of some work. The Commission did not shift the burden of proof to defendant after it found plaintiff had failed to

prove she was disabled after 25 April 2000. The Commission's findings of fact are not insufficient as a matter of law. The Commission did not err by failing to award sanctions against defendant.

The Commission's conclusions of law are supported by its findings of fact. These findings of facts are supported by competent evidence in the record. The Commission's opinion and award is affirmed.

Affirmed.

Chief Judge MARTIN and Judge CALABRIA concur.

Report per Rule 30(e).