NO. COA10-1238
NORTH CAROLINA COURT OF APPEALS

Filed: 16 August 2011

DOUGLAS FULLER,
Employee, Plaintiff,

v.

BEST SERVICES GROUP, INC., Employer, NATIONAL INTERSTATE INSURANCE CARRIER, Defendants.

From the North Carolina Industrial Commission
I.C. No. 793010

Appeal by plaintiff from opinion and award entered 8 April 2010 by the North Carolina Industrial Commission. Heard in the Court of Appeals 25 May 2011.

The Atkinson Law Firm, P.L.L.C., by Mark T. Atkinson, for plaintiff-appellant.

Teague Campbell Dennis & Gorham, L.L.P., by J. Matthew Little and Brian M. Love, for defendant-appellees.

BRYANT, Judge.

Because the unchallenged findings of fact support the Commission's conclusion that plaintiff failed to meet his burden of proof that he was unable to obtain employment after a reasonable effort or that it was futile for him to seek

employment because of other factors after 8 January 2009, we affirm the Commission. Because the Commission's award to plaintiff granting defendants a credit for the cost of the proceedings was not manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision, we affirm.

Facts

In May 2004, plaintiff was diagnosed as having Type I diabetes mellitus.

On 11 May 2005, plaintiff applied for a job as a truck driver with Best Cartage, a sub-company of defendant Best Services. Plaintiff was offered the job contingent upon passing a commercial driver fitness examination and receiving a commercial driver's license. The questionnaire for the commercial driver fitness examination requested that plaintiff provide a medical history and specifically provided a check box indicating whether plaintiff suffered from diabetes. On 14 June 2005, plaintiff underwent an examination, and on his medical history form, the box checked regarding diabetes indicated that this was not a condition from which he suffered.

On 5 May 2006, plaintiff signed an employment application for Best Dedicated, another sub-company of defendant-employer.

On 8 May 2006, plaintiff, again, submitted to a medical exam for commercial driver fitness determination. Again, plaintiff's medical history report indicated that he did not suffer from diabetes or elevated blood sugar.

On 13 August 2007, in the course of plaintiff's employment as a truck driver, plaintiff attempted to catch and keep a 400 pound dresser from falling when he felt a sudden pain in his back. Plaintiff reported the injury to his defendant-employer. On 30 August 2007, plaintiff was diagnosed with having low back sciatica and assigned work restrictions such as medium work with only occasional pushing, pulling, climbing, lifting, bending, stooping, squatting, and kneeling. Plaintiff returned to light duty work until 10 September 2007, when his restrictions could no longer be accommodated.

Defendants filed a Form 60, Employer's Admission of Employee's Right to Compensation, accepted plaintiff's claim and provided plaintiff with treatment from authorized physicians Dr. Jeffrey Beane and Dr. Richard Ramos of the Greensboro Orthopaedic Center. Plaintiff underwent an MRI on 19 October 2007. The physicians diagnosed plaintiff with Grade 1 spondylolisthesis at L5-S1 with severe biforaminal stenosis. On 15 April 2008, after undergoing conservative treatment, such as

physical therapy and steroid injections, plaintiff was referred to Dr. Max Cohen at the Greensboro Spine & Scoliosis Clinic. Dr. Cohen diagnosed plaintiff as having "unstable L5-S1 spondylolisthesis with severe biforaminal narrowing and bilateral lower extremity radiculopathy left greater and right[.]" Dr. Cohen recommended surgery.

On 25 June 2008, Dr. Cohen performed an A-LIF laminectomy and fusion at L5-S1. On 8 January 2009, Dr. Cohen reported that plaintiff had reached maximum medical improvement. Plaintiff was given a twenty-percent permanent partial impairment rating to the back, and Dr. Cohen "opined that plaintiff was able to return to work full duty."

On 11 June 2008, defendants Best Services Group, Inc., and National Interstate Insurance Carrier, filed a Form 33, Request that Claim Be Assigned for Hearing, asserting that plaintiff committed fraud and/or fraud in the inducement by lying and/or making material misrepresentations in his application for employment and post-application physical examinations.

On 12 November 2008, the matter was heard before Deputy Commissioner J. Brad Donovan. In an Opinion and Award filed 27 August 2009, the deputy commissioner ordered that defendants shall continue to pay temporary total disability compensation to

plaintiff until further ordered. Defendants appealed to the Full Commission (the Commission).

The matter was heard before the Commission on 2 February 2010. In an Opinion and Award filed 8 April 2010, the Commission concluded that defendants were to continue to pay plaintiff temporary total disability compensation beginning on the date of the injury and continuing until 8 January 2009, and defendants were to pay plaintiff permanent partial disability of twenty-percent to his back for sixty weeks, subject to a credit for all temporary total disability benefits paid after plaintiff reached maximum medical improvement on 8 January 2009. The Commission further asserted that "the amounts awarded to plaintiff . . . are subject to a credit for the costs of the proceedings in this matter including reasonable attorney fees . . . ." Plaintiff appeals.

On appeal, plaintiff raises the following issues: Did the Commission err in concluding that (I and II) plaintiff failed to meet his burden of proving disability; and (III & IV) defendants were entitled to a credit against any benefits owed to plaintiff.

Standard of Review

"The standard of review on appeal to this Court of a workers' compensation case is whether there is any competent evidence in the record to support the Commission's findings of fact, and whether these findings support the conclusions of the Commission." *Russell v. Lowes Food Prod. Distrib.*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993).

> It is the role of the Commission, not this Court, to weigh the evidence in a workers' compensation case. *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 166, 265 S.E.2d 389, 390 (1980). "In weighing the evidence, the Commission is the sole judge of the credibility of witnesses and the weight to be given their testimony, and may reject entirely the testimony of a witness if warranted by disbelief of the witness." *Russell v. Lowes Prod. Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993). Moreover, "'the evidence tending to support plaintiff's claim is to be viewed in the light most favorable to plaintiff, and plaintiff is entitled to the benefit of every reasonable inference to be drawn from the evidence.'" *Lewis v. Orkand Corp.*, 147 N.C. App. 742, 744, 556 S.E.2d 685, 687-88 (2001) (quoting *Adams*, 349 N.C. at 681, 509 S.E.2d at 414).

Lewis v. N.C. Dep't of Corr., 167 N.C. App. 560, 564, 606 S.E.2d 199, 202 (2004).

> [F]ailure to [challenge] the Commission's findings of fact renders them binding on appellate review. *Cornell v. Western & S. Life Ins. Co.*, 162 N.C. App. 106, 110-11, 590 S.E.2d 294, 297 (2004). Likewise, the Commission's findings of fact are binding on

> appeal if they are supported by competent evidence, even if there is evidence to support a contrary finding. ***Morrison v. Burlington Industries***, 304 N.C. 1, 6, 282 S.E.2d 458, 463 (1981). Put another way, the Commission's findings of fact may be set aside on appeal only "when there is a complete lack of competent evidence to support them." ***Young v. Hickory Bus. Furn.***, 353 N.C. 227, 230, 538 S.E.2d 912, 914 (2000) (citation omitted).

Estate of Gainey v. S. Flooring & Accoustical Co., 184 N.C. App. 497, 501, 646 S.E.2d 604, 607 (2007).

I and *II*

Plaintiff argues that the Commission erred in concluding that he had not met his burden of proof that he was unable to obtain employment after a reasonable effort after 8 January 2009. We disagree.

> 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. ***Hilliard v. Apex Cabinet Co.***, 305 N.C. 593, 595, 290 S.E.2d 682, 684 (1982). 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, ***Peoples***, 316 N.C. at 443, 342 S.E.2d at 809; (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, id. at 444, 442 S.E.2d at 809; 1C Arthur Larson, ***The Law of***

> *Workmen's Compensation* § 57.61(d) (1992); (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, *Peoples*, 316 N.C. at 444, 342 S.E.2d at 809; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury. *Tyndall v. Walter Kidde Co.*, 102 N.C. App. 726, 730, 403 S.E.2d 548, 550, *disc. rev. denied*, 329 N.C. 505, 407 S.E.2d 553 (1991).

Lowe's Food Prod. Distrib., 108 N.C. App. at 765-66, 425 S.E.2d at 457. Plaintiff argues that he presented competent medical evidence from his authorized treating physician, Dr. Cohen, showing that he was physically unable to earn wages as a result of the injuries he sustained. Plaintiff does not argue that he was capable of some work but was unsuccessful in obtaining employment after a reasonable effort; that it would be futile because of pre-existing conditions; or that he obtained employment at a wage less than that earned prior to the injury. *See id.*

The Commission made the following pertinent unchallenged findings of fact. As these findings are unchallenged, they are binding on appeal. *Estate of Gainey*, 184 N.C. App. at 501, 646 S.E.2d at 607.

> 12. On 8 January 2009, Dr. Cohen reported that plaintiff had reached maximum medical

> improvement. Dr. Cohen provided plaintiff with a 20% permanent partial impairment rating to the back and opined that plaintiff was able to return to work full duty.
>
> 13. On 20 May 2009, Dr. Cohen revised plaintiff's work restrictions based solely on plaintiff's complaints of pain and not any anatomical, medical or surgical reason. Dr. Cohen noted that plaintiff could return to work light duty with permanent restrictions of no sitting, standing, or walking more than two hours without a 15-minute break.

The Commission drew the following conclusion:

> 3. In the present case, plaintiff was at maximum medical improvement on 8 January 2009, and was released to return to work full duty. Although, plaintiff was later assigned light duty restrictions on 20 May 2009 based solely upon plaintiff's subjective complaints, plaintiff has not met his burden of proving that he was unable to obtain employment after a reasonable effort or that it was futile for him to seek employment because of other factors after January 8, 2009.

Clearly, the Commission placed more weight on Dr. Cohen's determination that plaintiff "was able to return to work full duty" following plaintiff's 8 January 2009 medical evaluation than plaintiff's revised work restrictions made 20 May 2009 following plaintiff's complaints to Dr. Cohen. In addition, the fact that plaintiff may have had restrictions does not establish that plaintiff would be incapable of working in any employment.

As the Commission is the sole judge of the weight to be given the evidence presented and the Commission's conclusion is supported by the findings of fact, plaintiff's argument is overruled.

III and *IV*

Plaintiff argues that the Commission erred in concluding that plaintiff's "unreasonable prosecution" of his claim entitles defendants to a credit against any benefits owed for the costs of the proceedings including reasonable attorney fees. We disagree.

> 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.

N.C. Gen. Stat. § 97-88.1 (2009). "[A]n award under section 97-88.1 is in the sound discretion of the Commission and we may not overturn such a decision unless it is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Bryson v. Phil Cline Trucking*, 150 N.C. App. 653, 659, 564 S.E.2d 585, 589 (2002) (citation and internal quotations omitted).

On 12 June 2008, defendants filed a Form 33, Request that

Claim be Assigned for Hearing, asserting that "plaintiff committed fraud and/or fraud in the inducement by lying and/or making material misrepresentations in his application for employment and post-application physical examinations." Defendants relied on *Freeman v. Rothrock*, 189 N.C. App. 31, 657 S.E.2d 389 (2008) (Wynn, J., dissenting), *rev'd*, 363 N.C. 249, 676 S.E.2d 46 (2009) (per curiam) (for the reasons stated in the dissenting opinion), holding that "an employee may be barred from recovering workers' compensation benefits as a result of a false statement at the time of hiring . . . ." *Id.* at 36, 657 S.E.2d at 392-93. As exhibits attached to their Form 33 – Request that Claim be Assigned for Hearing – defendants provided plaintiff's application for employment with Best Cartage, signed 11 June 2005, and Best Dedicated, signed 5 May 2006. Both applications indicate plaintiff was hired on the day of or days before submitting to a medical examination. On reports entitled Medical Examination Report for Commercial Driver Fitness Determination, signed 14 June 2005 and 8 May 2006, in the health history section, the response listed indicates that plaintiff did not suffer from "diabetes or elevated blood sugar controlled by: diet[,] pills[,] [or] insulin[.]" Based on these reports medical examiners indicated that plaintiff "[m]eets standards in

49 CFR 391.41; qualifies for 2 year certificate[.]" The Code of Federal Regulations, Title 49, Transportation, section 391.41 – physical qualifications for drivers – states "[a] person subject to this part must not operate a commercial motor vehicle unless he or she is medically certified as physically qualified to do so . . . ." 49 C.F.R. § 391.41 (a)(1)(i) (2011). "A person is physically qualified to drive a commercial motor vehicle if that person . . . (3) [h]as no established medical history or clinical diagnosis of diabetes mellitus currently requiring insulin for control . . . ." 49 C.F.R. § 391.41(b)(3).

In his Form 33R, Response to Request that Claim be Assigned for Hearing, plaintiff asserted that "[he] ha[d] not committed fraud; any misrepresentations by plaintiff were not material; any misrepresentations by plaintiff were not made knowingly and willfully; any misrepresentations by plaintiff were not relied upon as a substantial hiring factor by employer-defendant . . . ." In his testimony, on 12 November 2008, before Special Deputy Commissioner Brad Donovan, plaintiff testified that he did not check off that he did not suffer from diabetes, but "left that box [referencing diabetes] intentionally blank so that [he] could discuss it with his doctor." Plaintiff further testified that, on 11 May 2004, after receiving medical treatment for

cramps, nausea, fatigue, malaise and losing nearly forty pounds, an endocreinologist diagnosed him as a Type I diabetic who required insulin.

Defendants took depositions from the medical examiners who made plaintiff's commercial driver fitness determination: Lee A. Gray, a physician's assistant who examined plaintiff at PrimeCare Kernersville, on 14 June 2005, as well as his supervising physician, Dr. Thomas O'Meara. Both Gray and Dr. O'Meara testified in substance that they had no knowledge prior to plaintiff's testimony that he suffered from diabetes and would not have checked the box regarding diabetes with "no" on plaintiff's behalf. Further, Roger Melton, a nurse practitioner who worked at PrimeCare and conducted plaintiff's medical exam on 8 May 2006, testified during his deposition that he was unaware plaintiff was a diabetic at the time he was examined and that he was "absolutely confident" that plaintiff told him plaintiff was not a diabetic. Melton, further testified, that had plaintiff left the box next to diabetes unchecked as to both "yes" and "no," he would have asked plaintiff why he left it blank and waited for a response.

Meanwhile, on 1 May 2009, our Supreme Court reversed ***Freeman*** for the reasons stated in the dissenting opinion which

reasoned that under the test pertinent to the facts of that case a denial of benefits under the Workers' Compensation Act could not be premised on a claim of fraud. *Freeman*, 189 N.C. App. 31, 657 S.E.2d 389 (Wynn, J., dissenting), *rev'd*, 363 N.C. 249, 676 S.E.2d 46 (for the reasons stated in the dissenting opinion). The Opinion and Award entered by the deputy commissioner noted that the Supreme Court had overturned the ruling in *Freeman* upon which defendants had relied. In awarding continuing total disability compensation the deputy commissioner concluded that "plaintiff's claim is not barred on the basis of his failure to inform defendant-employer of his diabetes on his job application."

On appeal, the Full Commission reversed the Opinion and Award of the deputy commissioner and awarded compensation to plaintiff from the date of injury (13 August 2007) to 8 January 2009, and concluded that "[b]ased upon plaintiff's unreasonable prosecution of this claim, defendants are entitled to a credit against any benefits owed to plaintiff for the costs of the proceedings including reasonable attorney fees . . . ." Because the Commission's decision to assess the cost of the proceedings upon plaintiff who, the Commission concluded, has defended this action without reasonable grounds and such a decision is not

manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision, we affirm. *See* N.C.G.S. § 97-88.1; *Bryson*, 150 N.C. App. 653, 564 S.E.2d 585.

Affirmed.

Judges GEER and BEASLEY concur.

Report per Rule 30(e).