NO. COA10-1587
NORTH CAROLINA COURT OF APPEALS

Filed: 18 October 2011

CAREY DENNING, Employee,
Plaintiff,

v.

North Carolina
Industrial Commission
IC No. 799667

N.C. DEPARTMENT OF AGRICULTURE,
Employer,
SELF-INSURED (CORVEL CORPORATION,
Third-Party Administrator),
Defendant.

Appeal by defendant from opinion and award entered 1 October 2010 by the Full Commission. Heard in the Court of Appeals 26 May 2011.

Law Offices of D. Hardison Wood, by Adam A. Smith, for plaintiff.

Attorney General Roy Cooper, by Assistant Attorney General Vanessa N. Totten, for defendant.

ELMORE, Judge.

The Department of Agriculture (defendant) appeals from an opinion and award entered by the Full Commission in favor of Carey Denning (plaintiff). The Full Commission awarded plaintiff a temporary total disability compensation rate of

$420.30 per week, which defendant disputes on appeal. Defendant argues that the Full Commission used the wrong method to calculate plaintiff's compensation rate. We disagree and affirm.

Beginning in 2002, defendant employed plaintiff as a part-time, temporary employee at the North Carolina State Fair. Plaintiff was otherwise employed full time as a deputy with the Wake County Sheriff's Office, and he provided security for defendant at the State Fair while wearing his Sheriff's Office uniform and carrying his Sheriff's Office sidearm. There was some kind of relationship or understanding between defendant and the Wake County Sheriff's Office concerning use of deputy sheriffs to provide security at the State Fair, but defendant did not produce enough evidence to determine the exact nature of this relationship or understanding. As to plaintiff specifically, it appears that his State Fair employment was arranged through his captain. His captain scheduled him to work for a total of thirty-six hours, or three shifts, for $25.00 per hour. However, neither party produced a schedule showing which shifts plaintiff was assigned to work during the ten-day fair. On 15 October 2007, during plaintiff's first shift, he fell and fractured his left wrist while pursuing a suspect at the State

Fair. This was a compensable work injury, and the parties filed a Form 21 agreeing to compensate plaintiff for a ten percent partial permanent disability rating to plaintiff's left hand. On the Form 21, plaintiff's average weekly wage was $5.89.

When the Full Commission reviewed plaintiff's case, it used a different method to calculate plaintiff's average weekly wage, concluding that it was $630.00, which resulted in a temporary total disability compensation rate of $420.30 per week. The Full Commission ordered defendant to pay this rate from 16 October 2007 through 14 January 2008, or until plaintiff returned to work at his regular position at the Wake County Sheriff's Office.

On appeal, defendant argues that the Full Commission erred by finding as fact and concluding as a matter of law that plaintiff had an average weekly wage of $630.00 and, thus, a weekly compensation rate of $420.30. Specifically, defendant challenges findings of fact 12 through 14 as well as conclusion of law 4.

> 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). "The Commission's findings of fact may only be set aside in the complete absence of competent evidence to support them." *Gore v. Myrtle/Mueller*, 362 N.C. 27, 42, 653 S.E.2d 400, 410 (2007) (citation omitted). "Thus, on appeal, appellate courts do 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 record contains any evidence tending to support the finding." *Id.* at 41, 653 S.E.2d at 409 (quotations and citation omitted).

The statute at issue here is N.C. Gen. Stat. § 97-2(5), which sets out the five methods by which the Industrial Commission can calculate average weekly wages, listing them in order of preference. *McAninch v. Buncombe County Schools*, 347 N.C. 126, 129, 489 S.E.2d 375, 377 (1997). These methods are: (1) divide by fifty-two "the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury"; (2) "if the injured employee lost more than seven

consecutive calendar days . . . during such period, although not in the same week, then" divide "the earnings for the remainder of such 52 weeks" by "the number of weeks remaining after the time so lost has been deducted"; (3) if the employment preceding the injury lasted fewer than fifty-two weeks, divide "the earnings during that period by the number of weeks and parts thereof during which the employee earned wages," provided that the result is "fair and just to both parties"; (4) if it is impractical to compute the average weekly wage using one of the previous methods because "of a shortness of time during which the employee has been in the employment of his employer or the casual nature or terms of his employment," the Industrial Commission should look "to the average weekly amount which during the 52 weeks previous to the injury was being earned by a person of the same grade and character employed in the same class of employment in the same locality or community"; and (5) "where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury." N.C. Gen. Stat. § 97-2(5) (2009).

> The final method, as set forth in the last sentence, clearly may not be used unless there has been a finding that unjust results would occur by using the previously enumerated methods. Ultimately, the primary intent of this statute is that results are reached which are fair and just to both parties. Ordinarily, whether such results will be obtained . . . is a question of fact; and in such case a finding of fact by the Commission controls decision.

McAninch, 347 N.C. at 130, 489 S.E.2d at 378 (quotations and citations omitted; alteration in original).

Here, the Full Commission used that final method, and defendant contends that the Full Commission erred in so doing. We disagree. As the Full Commission found, the first two methods were not appropriate because plaintiff had not worked for defendant during the fifty-two weeks preceding his accident. Defendant asserts that the parties stipulated that plaintiff had earned $595.88 "during" the fifty-two weeks preceding the accident, that is, during the previous State Fair in 2006. However, methods one and two clearly anticipate that the employee's employment with the employer was ongoing for fifty-two weeks, not that the employee had, at some point in the previous fifty-two weeks, worked for the employer.

The Full Commission found that the third method was not appropriate because it would not be fair and just to the parties. Plaintiff was paid $306.25 for 12.25 hours of work.

Assuming a forty-hour work week, 12.25 hours translates to approximately three-tenths of a work week. Using the third method, that would result in an average weekly wage of $1,020.83, which is significantly more than the $630.00 per week that the Full Commission found. This supports the Full Commission's finding that the third method would not be fair and just to the parties.

The Full Commission rejected the fourth method because the record contained no evidence upon which to compare plaintiff's wages with similar employees' wages. Both the Full Commission and the Special Deputy Commissioner requested such comparables, but, the Full Commission found, "the parties took the position that there were no employees similar enough to Plaintiff in order to undertake a proper wage determination." Defendant does not challenge this finding of fact, and therefore it is binding on appeal. It also supports the Full Commission's finding that the fourth method would not be fair and just to the parties.

The Full Commission used the fifth method, after specifically finding as fact that "it would not be fair and just to the parties to use any of the first four methods under section 97-2(5) . . . to determine Plaintiff's average weekly wage[.]" Defendant asserts that this was not fair because it

resulted in a windfall for plaintiff by creating an artificially high average weekly wage. However, defendant's real problem with plaintiff's award is that plaintiff was entitled to receive compensation for a period of weeks longer than the period of weeks that he would have worked for defendant. Such is the nature of temporary work, and defendant provides no support to show that the Full Commission improperly applied the statutory method for determining temporary total disability compensation. Defendant cites two cases to support its contention that the opinion and award created a windfall for plaintiff, but both cases support the Full Commission's application of section 97-2(5). *See Boney v. Winn Dixie, Inc.*, 163 N.C. App. 330, 334, 593 S.E.2d 93, 97 (2004) (endorsing the fifth method to calculate average weekly wages for a part-time or intermittent employee); *Wallace v. Music Shop*, 11 N.C. App. 328, 332, 181 S.E.2d 237, 240 (1971) ("By computing the plaintiff's average weekly wage from his earnings from *the employment in which he was injured*, the employer's liability is in direct proportion to his payroll and the insurance premiums based thereon. This, we believe, is fair and just.") (emphasis added).

Accordingly, we hold that the Full Commission's challenged findings of fact are supported by competent evidence and the

challenged conclusion of law is supported by the findings of fact.

Affirmed.

Judges CALABRIA and STEELMAN concur.

Report per Rule 30(e).