An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-551

Filed: 6 December 2016

North Carolina Industrial Commission, No. 808512

SHANNON GOODWIN, Employee, Plaintiff,

v.

CITY OF CHARLOTTE, Employer, SELF-INSURED (ALLIED CLAIMS ADMINISTRATION, Third-Party Administrator), Defendants.

Appeal by Defendants from opinion and award entered 11 March 2016 by the North Carolina Industrial Commission. Heard in the Court of Appeals 2 November 2016.

DeVore, Acton & Stafford, P.A., by William D. Acton, Jr., for plaintiff-appellee.

Jones, Hewson & Woolard, by Lawrence J. Goldman, for defendants-appellants.

ENOCHS, Judge.

The City of Charlotte and its workers' compensation administrator, Allied Claims Administration, ("Defendants"), appeal from the opinion and award of the North Carolina Industrial Commission ("the Commission") denying their motion to compel Shannon Goodwin ("Plaintiff") to cooperate with vocational rehabilitation.

Specifically, Defendants argue that the Commission erred by (1) finding that a written rehabilitation plan for Plaintiff was necessary under N.C. Gen. Stat. § 97-32.2 (2015); and (2) failing to find that volunteer work should have been required as mandatory vocational rehabilitation for Plaintiff towards the goal of enabling her to attain suitable employment. After careful review, we affirm.

Factual Background

On 9 August 2007, Plaintiff sustained a compensable work-related injury in an automobile accident while working as a patrol officer for the City of Charlotte. Defendants filed an Industrial Commission Form 60 admitting the claim and began paying Plaintiff $682.99 per week in compensation. Defendants have continued to pay Plaintiff at this rate since the date of her injury. Additionally, Defendants have paid all medical benefits owed to her.

On 8 June 2010, Dr. Alden Milam examined Plaintiff and prescribed the permanent restrictions that she (1) no longer work as a patrol officer; and (2) limit her sitting to thirty minutes per hour and alternate sitting and standing twice per hour. Following her examination by Dr. Milam, Plaintiff entered into disability retirement and moved to Buffalo, New York, where she has since conducted extensive job searches. Two vocational rehabilitation consultants were assigned by Defendants to assist Plaintiff in obtaining suitable alternative employment and returning to

work. One of these consultants was Brian Bernas ("Bernas"), a vocational rehabilitation counselor at Voc Med.

After Bernas began working with Plaintiff, a dispute arose when Bernas requested Plaintiff apply for a volunteer position with the American Red Cross on 11 September 2014. Bernas requested that Plaintiff apply for the volunteer position in order to "fill the void in [her] work history, and provide recent work history for future employers to reference." On 16 September 2014, Plaintiff's counsel responded to Bernas' letter in an email asking that he refrain from instructing Plaintiff to apply for volunteer work because it did not constitute suitable employment under the North Carolina Industrial Commission Rules for Utilization of Rehabilitation Professionals in Workers' Compensation Claims (the "Rules").

Bernas addressed Plaintiff's counsel's concerns in an 18 September 2014 response letter, stating that volunteer work was authorized by the Rules as "vocational exploration and work adjustment counseling." After additional correspondence between Bernas and Plaintiff's counsel in which no agreement on this point could be reached, Defendants filed a Motion to Compel Cooperation with Vocational Rehabilitation with the Industrial Commission on 25 September 2014. In response to Defendants' motion, Plaintiff filed a Motion to Compel Voc Med to comply with the Rules and cease instructing her to pursue volunteer work, or, in the alternative, deny Defendants' motion.

On 5 November 2014, Commission Executive Secretary Meredith Henderson issued an order providing that Plaintiff cooperate with vocational rehabilitation — including volunteer work — or be subject to the possibility of suspension of her workers' compensation benefits. Executive Secretary Henderson also ordered Bernas to comply with the Rules in directing Plaintiff towards volunteer work. Plaintiff appealed this order by filing a Form 33 Request for Hearing on 12 November 2014.

Following his review of stipulated documents and the contentions of the parties, Deputy Commissioner Bradley Houser entered an opinion and award on 21 May 2015 ordering Plaintiff to "comply with defendants' vocational rehabilitation services, including recommendations and directions regarding volunteer positions." Plaintiff appealed Deputy Commissioner Houser's opinion and award to the Commission on 22 May 2015.

On 11 March 2016, the Commission issued an opinion and award. The Commission concluded that "Defendant[s] failed to present evidence that Mr. Bernas conducted a vocational assessment or developed a plan tailored to Plaintiff's vocational history and goals, and that such plan included performing volunteer work and how such work would help Plaintiff ultimately secure suitable employment." The Commission further concluded that the reasons Bernas had offered for Plaintiff needing to pursue volunteer work, "i.e., to fill gaps in her employment history, make her look active and motivated, and provide a current reference," were "simply not

sufficient." The Commission additionally determined that "[b]ecause Defendant has failed to show that it is reasonable and necessary that Plaintiff perform volunteer work to lessen her period of disability, or that performing the volunteer work is likely to lead to her securing suitable employment, Defendant's [sic] Motion to Compel Plaintiff to cooperate with vocational rehabilitation must be denied." Defendants filed a timely notice of appeal of the Industrial Commission's opinion and award.

Analysis

"Our review of the Commission's opinion and award is limited to determining whether competent evidence of record supports the findings of fact and whether the findings of fact, in turn, support the conclusions of law." *Rose v. City of Rocky Mount*, 180 N.C. App. 392, 395, 637 S.E.2d 251, 254 (2006). "This court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Rawls v. Yellow Roadway Corp.*, 219 N.C. App. 191, 195, 723 S.E.2d 573, 576, (2012) (citation and quotation marks omitted). "If there is any competent evidence supporting the Commission's findings of fact, those findings will not be disturbed on appeal despite evidence to the contrary." *Rose*, 180 N.C. App. at 395, 637 S.E.2d at 254. "Unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal." *Allred v. Exceptional Landscapes, Inc.*, 227 N.C. App. 229, 232, 743 S.E.2d 48, 51 (2013). "However, '[T]he Commission's conclusions of law are reviewed *de novo*.' " *Rose*, 180 N.C. App. at 395, 637 S.E.2d at

254 (quoting *Ward v. Long Beach Vol. Rescue Squad*, 151 N.C. App. 717, 720, 568 S.E.2d 626, 628 (2002)).

Defendants first contend that the Commission erred by determining that an individualized written rehabilitation plan for Plaintiff was required pursuant to N.C. Gen. Stat. § 97-32.2(c) (2015) which provides, in pertinent part, that "[v]ocational rehabilitation services shall include a vocational assessment and the formulation of an individualized written rehabilitation plan with the goal of substantially increasing the employee's wage-earning capacity[.]" Specifically, they assert that § 97-32.2 only applies to workers' compensation claims arising after 24 June 2011 and that Plaintiff's claim arose on 9 August 2007.

The flaw with Defendants' argument on this issue, however, is that the opinion and award of the Commission expressly states in Conclusion of Law 1 that "N.C. Gen. Stat. § 97-32.2 regarding vocational rehabilitation, [is] only applicable to claims arising on or after June 24, 2011." Therefore, the Commission did not, as Defendants contend, apply § 97-32.2 in the present case in finding that Defendants' vocational rehabilitation consultant was required to have formulated an individualized plan for Plaintiff based upon a vocational assessment.

Instead, the Commission relied upon Rule III(E) of the Rules, which states that vocational rehabilitation is defined as the "delivery and coordination of services under an individualized *plan*." N.C. Indus. Comm'n Rules for Rehabilitation Professionals

III(E), 2001 Ann. R. N.C. 810. Indeed, in correspondence with Plaintiff's counsel, Bernas stated that "vocational rehabilitation refers to the delivery and coordination of services under an individualized plan." The first step in the creation of such a plan is a vocational assessment, which is a report based upon "the [rehabilitation professionals'] evaluation of the worker's social, medical, and vocational standing, along with other information significant to [the workers'] employment potential." N.C. Indus. Comm'n Rules for Rehabilitation Professionals III(E)(2), 2001 Ann. R. N.C. 810.

Here, the Commission denied Defendants' motion to compel, in part, because Defendants failed to present evidence that Bernas had conducted the required vocational assessment or had developed a plan tailored to Plaintiff's vocational history and goals. The Commission stated in Finding of Fact 6 that "[t]he records which the parties stipulated in this case do not include a vocational assessment or a plan individually tailored to Plaintiff with recommendations for vocational services. Therefore, there is no evidence that performing volunteer work was an integral part of Mr. Bernas' overall strategy or plan to help Plaintiff achieve her vocational goals." Because this finding is unchallenged by Defendants, it is binding on appeal.

Defendants nevertheless attempt to argue that Bernas' written correspondence with Plaintiff and her counsel should constitute such an assessment or plan. However, Defendants concede in their brief that there was already an

Individualized Written Rehabilitation Plan in existence and prepared by Bernas prior to the present dispute. Defendants did not include this plan in the record before the Commission because they did not deem it to be relevant. Therefore, we find the argument that the correspondence between Plaintiff's counsel and Bernas somehow supplanted this pre-existing formalized vocational plan — without stating any intention to do so or even purporting to be a separate and independent plan by its own terms — meritless. In any event, we cannot find error in the Commission's opinion and award denying Defendants' motion to compel where they failed to introduce this individualized plan in the record for review.

We further note that the Commission made findings of fact — again unchallenged and, thus, binding on appeal — that "Defendants have failed to produce any evidence tending to show that the volunteer positions would enable Plaintiff to learn specific skills or obtain training which would likely lead to suitable work" and that "Defendants failed to show that the volunteer positions . . . were reasonable and necessary to lessen her period of disability or were likely to advance a rehabilitation plan designed to restore [p]laintiff 'as soon as possible and as nearly as practicable to [her] pre-injury wage.' "

These findings of fact support the Commission's conclusion of law that "[b]ecause Defendant has failed to show that it is reasonable and necessary that Plaintiff perform volunteer work to lessen her period of disability, or that performing

volunteer work is likely to lead to her securing suitable employment, Defendant's Motion to Compel . . . must be denied." Therefore, in sum, we hold that the Commission denied Defendants' motion not due to a misapprehension or misapplication of the law, as Defendants argue, but because Defendants did not present sufficient evidence to support their motion.[1]

Conclusion

In conclusion, for the reasons stated above, we find that the Commission did not err in denying Defendants' motion to compel. As a result, the opinion and award of the Commission is affirmed.

AFFIRMED.

Judges DAVIS and INMAN concur.

Report per Rule 30(e).

[1] Defendants also make a brief argument on appeal that asks this Court to find that Plaintiff's counsel's statements that vocational rehabilitation refrain from utilizing volunteer services were indicative of a failure to cooperate with vocational rehabilitation. Pursuant to Rule 107(j) of the Rules for Utilization of Rehabilitation Professionals, the rehabilitation professional determines compliance or non-compliance of the injured worker with their rehabilitation services. Bernas, Plaintiff's rehabilitation professional, never made any determination of non-compliance and so this argument is without merit.