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NO. COA03-672

NORTH CAROLINA COURT OF APPEALS

Filed: 4 May 2004

HAROLD NORMAN,
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File Nos. 811206, 814965, & 849719

R.J. REYNOLDS TOBACCO CO.,
Employer,

KEMPER INSURANCE COMPANY,
Carrier,
Defendants.

Appeal by defendants from opinion and award entered 16 October 2002 by the North Carolina Industrial Commission. Heard in the Court of Appeals 1 March 2004.

Walden & Walden, by Daniel S. Walden, for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Clayton M. Custer and Philip J. Mohr, for defendant-appellants.

LEVINSON, Judge.

Defendants (R.J.R. Tobacco Co. and Kemper Insurance) appeal from an Opinion and Award of the North Carolina Industrial Commission awarding plaintiff (Harold Norman) workers' compensation disability and medical benefits. Plaintiff cross-appeals from the denial of his motion to amend certain findings and conclusions. We affirm in part and reverse in part.

The relevant facts are summarized as follows: Plaintiff left school after the eighth grade but obtained a GED degree in 1991. At the time of the hearing, plaintiff was fifty nine years old. For twenty one years beginning in 1975, plaintiff was employed by defendant as a general laborer or plant attendant. His tasks included general cleaning, maintenance, and forklift operation. In March 1991, plaintiff suffered an undisputed compensable injury by accident when he sustained a right rotator cuff tear. Plaintiff required surgery and was out of work for several months. Upon his return in November, 1991, plaintiff had a 15% permanent partial disability rating and was under medical restrictions not to lift heavy weights or to work above his waist level.

In March 1996, plaintiff suffered a second workplace injury in which he sustained a torn left biceps. He was out of work for several months, but returned to work without further restrictions. At the hearing before the Commission, plaintiff testified that in December 1996 his duties were changed to include a lot of overhead work with an air hose that repeatedly “jerked” plaintiff’s arms up and over his head, causing pain and weakness to his arms and shoulders. On 7 May 1997 plaintiff told his supervisor he could no longer perform his job duties; he was seen by medical personnel in defendant’s medical facility and released from work on account of the pain and weakness in his arms and shoulders. On 14 May 1997 plaintiff was diagnosed with a recurrent right rotator cuff tear, for which he required a second surgery in September, 1997. In May 1998 plaintiff was diagnosed with bilateral rotator cuff tendonitis by his treating physician.

In January 1998 plaintiff filed claims for workers’ compensation disability and medical benefits for both his 1996 left biceps tear and the occupational disease of recurrent right rotator cuff tear. His claim was amended in July 1998 to add a claim for benefits for the occupational disease of bilateral rotator cuff tendonitis. In October 2000, following several hearings, a deputy

commissioner concluded that plaintiff's left biceps tear was a compensable injury but denied plaintiff's occupational disease claims. Both parties sought review by the Full Commission, which issued its opinion and award on 16 October 2002. The Commission ruled that plaintiff's left biceps tear was a compensable injury and that plaintiff suffered from the occupational diseases of recurrent right rotator cuff tear and bilateral rotator cuff tendonitis. The Commission awarded plaintiff medical and disability benefits. Defendants appeal from this opinion and award. Plaintiff cross-appeals from the denial of his motion to amend the Commission's opinion and award.

Defendants' Appeal

Preliminarily, we observe that defendants' appeal is in violation of several of the North Carolina Rules of Appellate Procedure. Defendants did not file the Appeal Information Statement required by N.C.R. App. P. 41. Defendants also failed to comply with N.C.R. App. P. 28(b)(5), which requires briefs to include a "full and complete statement of the facts[,] . . . a non-argumentative summary of all material facts . . . supported by references to pages in the transcript of proceedings, the record on appeal, or exhibits[.]"

Under N.C.G.S. §97-86 (2003), appeal from an opinion and award of the Industrial Commission is taken "under the same terms and conditions as govern appeals . . . in ordinary civil actions [and the] procedure for the appeal shall be as provided by the rules of appellate procedure." "The Rules of Appellate Procedure are designed to facilitate effective appellate review; they are mandatory and a failure to follow the Rules subjects an appeal to dismissal. N.C.R. App. P. 25(b). In the exercise of the discretion granted us by N.C.R. App. P. 2, however, we will suspend the requirements of these rules in the present case and consider the merits of

defendant's arguments." *State v. Castor*, 150 N.C. App. 17, 23, 562 S.E.2d 574, 579 (2002), *cert. denied*, 357 N.C. 508, 587 S.E.2d 885 (2003).

Standard of Review

“Appellate review of opinions and awards of the Industrial Commission is strictly limited to the discovery and correction of legal errors.” *McAninch v. Buncombe County Schools*, 347 N.C. 126, 131, 489 S.E.2d 375, 378 (1997) (quoting *Godley v. County of Pitt*, 306 N.C. 357, 359-60, 293 S.E.2d 167, 169 (1982)). Thus:

[j]urisdiction of appellate courts on appeal from an award of the Industrial Commission is limited to the questions (1) whether there was competent evidence before the Commission to support its findings and (2) whether such findings support its legal conclusions. . . . [F]indings of fact made by the Commission are conclusive on appeal when supported by competent evidence . . . even though there is evidence to support a contrary finding of fact.

McLean v. Roadway Express, 307 N.C. 99, 102, 296 S.E.2d 456, 458 (1982) (citation omitted).

Defendants argue first that the Industrial Commission erred in its determination that plaintiff suffered from the occupational diseases of recurrent right rotator cuff tear and bilateral rotator cuff tendonitis, on the grounds that the Commission's findings were “based upon improper assumptions” and were “not supported by any competent evidence.” We disagree.

Pursuant to N.C.R. App. P. 28(b)(6), defendants reference their “Assignment of Error Number One” immediately following the argument heading. However, this assignment of error alleges only the broad generalization that the Commission erred by awarding benefits to plaintiff on the grounds that “the evidence did not support the findings of fact; and the findings of fact did

not support the conclusion of law.” Defendant has not assigned error to any specific findings of fact, but relies instead on this “broadside” attack on “the findings of fact” in general.

“A single assignment [of error] generally challenging the sufficiency of the evidence to support numerous findings of fact, as here, is broadside and ineffective’ under N.C.R. App. P. 10. Because [defendant] has not properly assigned error to any specific findings of fact, those findings are binding on this Court.” *Dreyer v. Smith*, ___ N.C. App. ___, ___, 592 S.E.2d 594, 595 (2004) (quoting *Wade v. Wade*, 72 N.C. App. 372, 375-76, 325 S.E.2d 260, 266 (1985)). Therefore, our review “is limited to the question of whether the [Industrial Commission’s] findings of fact, which are presumed to be supported by competent evidence, support its conclusions of law and judgment.” *Okwara v. Dillard Dep’t Stores, Inc.*, 136 N.C. App. 587, 591-92, 525 S.E.2d 481, 484 (2000).

We turn next to consideration of whether the Commission’s findings of fact support its conclusions of law. The findings include, in pertinent part, the following:

1. . . . In March 1991, plaintiff was injured in a compensable accident . . . that resulted in a torn right rotator cuff requiring surgical repair. Plaintiff was given a 15% PPD rating to the right shoulder. . . . Plaintiff returned to work in . . . a position where he could limit his lifting to below the waist level[.]
2. Beginning in 1995, . . . [p]laintiff’s . . . job tasks [were] . . . performed on non-continuous basis . . . and could be done by using either hand. . . .
3. Beginning in December, 1996, plaintiff was instructed to clean . . . areas above his head. Plaintiff repetitively had to use an air hose to complete this task.
4. Plaintiff suffered a recurrent right rotator cuff tear caused by this overhead work.
5. Plaintiff’s work in reaching with an air hose repetitively to clean his work area put him at an increased risk as

compared to the general public to suffer from recurrent right rotator cuff tear and bilateral rotator cuff tendonitis.

6. On 4 March 1996, plaintiff had to push tobacco cans weighing about 500 pounds out of his way in order to get to his work area. This was not part of his normal and usual work activity. As plaintiff was pushing one can out of the way, it accidentally hit another can and jerked plaintiff's left arm, causing severe pain, and a bulge or knot to form in his upper arm or biceps tendon area. This accident caused plaintiff to suffer a rupture . . . of the biceps tendon.

7. Later on 4 March 1996, . . . he mentioned to his supervisor, . . . [that he] hurt his left arm moving a can[.] . . . [She] sent plaintiff to the RJR Medical Department[.] . . . Plaintiff was diagnosed with a ruptured left bicep[.]

8. As a result of the 4 March 1996 compensable accident, plaintiff was unable to earn wages in the same or in any other employment during the period 4 March 1996 through 29 May 1996. His average weekly wage as of 4 March 1996 was \$645.38, yielding a compensation rate of \$430.27.

9. WSHC treated plaintiff conservatively and referred him to Dr. Tomberlin, an orthopedic surgeon, for a second opinion. Dr. Tomberlin felt that surgical repair would not likely be satisfactory, but recommended that plaintiff build the brahalsis muscle in his left arm to substitute for the strength and gave him instructions as how to do that.

10. Plaintiff was out of work from 6 March 1996 to 29 May 1996 due to the left arm injury. During that time period, he was compensated one hundred percent of his usual salary through a salary continuation ("SC") benefit provided by his employer. Plaintiff was not given a PPD rating or work restrictions from the injury. Plaintiff returned to work at his same job as General Plant Attendant at the PRO Facility.

11. On 7 May 1997, plaintiff . . . told [his supervisor] that he felt that he was unable to do his job as General Plant Attendant. . . . Plaintiff was sent to RJR Medical Department for an examination and released from work by Jesse Holmes based on his reports of shoulder pain.

12. Plaintiff then began treatment with Dr. O'Keeffe for his shoulder pain. He was initially diagnosed with shoulder

tendonitis on 19 May 1997, by Dr. O’Keeffe’s Physician’s Assistant (“PA”), Suzonne Stratton . . . [and] was written out of work[.] . . . On 14 August 1997, Dr. O’Keeffe diagnosed him with a torn right rotator cuff and surgery was recommended. Plaintiff had a surgical repair of the torn right rotator cuff on 10 September 1997. Although plaintiff recovered well after the surgery, he continued to have discomfort about both shoulders and, consequently, was diagnosed with “diffuse rotator cuff tendonitis” by Dr. O’Keeffe on 18 May 1998. Plaintiff was unable to work due to this condition beginning 19 May 1998 and continuing.

13. Plaintiff continued to treat with Dr. O’Keeffe until 13 November 1998 when Dr. O’Keeffe concluded plaintiff was at MMI and gave him a “15% permanent partial impairment of the right shoulder secondary to the rotator cuff tear and a 5% permanent partial impairment of the left shoulder secondary to chronic rotator cuff tendonitis.” . . .

14. Dr. Bonfili certified . . . that plaintiff was eligible for long term disability benefits for the two to three months that it would take to recover from shoulder surgery. Plaintiff never returned to work.

15. Defendant is entitled to a credit for the payments it made to plaintiff for plaintiff’s 4 March 1996 compensable injury in the stipulated amount of \$6,966.00 pursuant to its salary continuation plan.

Based on its findings of fact, the Industrial Commission made conclusions of law, including the following:

1. Plaintiff’s acquisition and aggravation of his recurrent right rotator cuff tear and bilateral rotator cuff tendonitis was due to causes and conditions characteristic of and peculiar to his employment with defendant-employer, is not an ordinary disease of life to which the general public not so employed is equally exposed, and is, therefore, an occupational disease. N.C. Gen. Stat. §97-53(13).

2. On 4 March 1996 . . . plaintiff sustained an injury by accident to his left biceps arising out of and in the course of his employment[.] . . . N.C. Gen. Stat. §97-2(6).

3. As a result of his compensable injury by accident on March 4, 1996, plaintiff is entitled to compensation for total

disability from 4 March 1996 through 29 May 1996 at the rate of \$430.27 per week. N.C. Gen. Stat. §97-29.

4. As a result of his recurrent right rotator cuff tear and bilateral rotator cuff tendonitis, plaintiff is entitled to compensation for total disability at the rate of \$430.27 per week from 19 May 1997 and continuing until plaintiff returns to work or until further order of the Commission. N.C. Gen. Stat. §97-29.

5. The plaintiff is entitled to have the defendant pay for medical expenses . . . as a result of the compensable injury of 4 March 1996 and as a result of the recurrent right rotator cuff tear and bilateral rotator cuff tendonitis. . . . N.C. Gen. Stat. §97-25.

6. Defendant is entitled to a credit for the payments it made to plaintiff for plaintiff's 4 March 1996 compensable injury in the stipulated amount of \$6966.00 pursuant to its salary continuation plan. N.C. Gen. Stat. §97-42.1.

N.C.G.S. §97-53 (2003) lists a number of compensable occupational diseases, but does not include recurrent right rotator cuff tear or bilateral rotator cuff tendonitis among these. However, under N.C.G.S. §97-53(13) (2003), a disease or condition not listed in the statute may nonetheless be a compensable occupational disease if the plaintiff shows that:

(1) [the disease is] characteristic of persons engaged in the particular trade or occupation in which the claimant is engaged; (2) [the disease is] not an ordinary disease of life to which the public generally is equally exposed with those engaged in that particular trade or occupation; and (3) there must be "a causal connection between the disease and the [claimant's] employment."

Rutledge v. Tultex Corp., 308 N.C. 85, 93, 301 S.E.2d 359, 365 (1983) (quoting *Hansel v. Sherman Textiles*, 304 N.C. 44, 52, 283 S.E.2d 101, 105-06 (1981)). "The first two elements of the *Rutledge* test are satisfied where the claimant can show that 'the employment exposed the worker to a greater risk of contracting the disease than the public generally.'" *Robbins v. Wake Cty. Bd. of Educ.*, 151 N.C. App. 518, 521, 566 S.E.2d 139, 142 (2002) (quoting *Rutledge*, 308 N.C. at 94, 301 S.E.2d at 365). "The third element of the test is satisfied if the employment

‘significantly contributed to, or was a significant causal factor in, the disease’s development.’“
Hardin v. Motor Panels, Inc., 136 N.C. App. 351, 354, 524 S.E.2d 368, 371 (2000) (quoting
Rutledge, 308 N.C. at 101, 301 S.E.2d at 369-70).

Defendants do not challenge the Commission’s conclusion that plaintiff’s March 1996 left biceps tear was a compensable injury by accident. With respect to the Commission’s conclusion that plaintiff’s recurrent right rotator cuff tear was an occupational disease, this conclusion is supported by the Commission’s findings of fact. Regarding the Commission’s conclusion that plaintiff’s bilateral rotator cuff tendonitis was an occupational disease, defendants “acknowledge that the Full Commission found that as a result of plaintiff’s right rotator cuff tear he developed bilateral rotator cuff tendonitis,” and “concede . . . that [if] the plaintiff’s right rotator cuff tear is a compensable occupational disease, then competent evidence exists to support the determination that plaintiff’s bilateral rotator cuff tendonitis is compensable.” We have concluded that the Industrial Commission did not err in its conclusion that plaintiff’s recurrent right rotator cuff tear was compensable. Accordingly, we further conclude that the Industrial Commission’s findings of fact support its conclusion that plaintiff’s bilateral rotator cuff tendonitis was a compensable occupational disease. This assignment of error is overruled.

Defendants argue next that the Commission erred by awarding plaintiff disability benefits, on the basis that plaintiff “failed to prove a resulting disability” caused by his occupational disease. Under N.C.R. App. P. 28(b)(6):

Immediately following each question shall be a reference to the assignments of error pertinent to the question, identified by their numbers and by the pages at which they appear in the printed record on appeal. Assignments of error not set out in the appellant’s brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.

Defendants violated this rule by failing to cite to either of their assignments of error, either in their “questions presented” or in their argument headings. Moreover, although one of defendants’ two assignments of error is addressed to the Commission’s award of disability benefits, neither assignment of error challenges any of the Commission’s individual findings of fact. Thus, both are generalized “broadside” assignments of error that, as discussed above, fail to preserve for appellate review the evidentiary basis for any specific finding of fact. For these reasons, defendants’ assignment of error is dismissed.

Plaintiff’s Appeal

Plaintiff appeals from the Commission’s denial of his motion to amend the Opinion and Award issued by the Industrial Commission. Plaintiff argues first that the Industrial Commission erred in reaching its “Conclusion Four” and its “Award One and Two.” Specifically, plaintiff asserts that the Commission erroneously stated the amount of the effective compensation rate for plaintiff’s recurrent right rotator cuff tear. The Commission stated that the rate was \$645.00, based on plaintiff’s pay rate as of March, 1996. Plaintiff, however, contends that the proper compensation rate is \$666.00, based on plaintiff’s pay rate in May, 1997. Defendants agree that the Commission erred in this regard. The parties are correct; plaintiff is entitled to a compensation rate based on his May, 1997 average weekly wage of \$666.00. Accordingly, the Commission’s Conclusion Four and Award One and Two must be reversed and remanded for entry of the correct amount of plaintiff’s May, 1997 compensation rate.

Plaintiff argues next that the Commission erred in its characterization of the salary and disability payments that defendants made to plaintiff before the hearing. Plaintiff contends that the portions of the Commission’s opinion and award that address this issue “are not clear, but would appear to allow” defendants to claim a credit to which they are not entitled.

“A justiciable controversy is a prerequisite to a court’s obtaining jurisdiction.” *Town of Ayden v. Town of Winterville*, 143 N.C. App. 136, 140, 544 S.E.2d 821, 824 (2001). “[T]o satisfy the jurisdictional requirement of an actual controversy, it is necessary that litigation appear unavoidable[.]” *Sharpe v. Park Newspapers of Lumberton*, 317 N.C. 579, 589, 347 S.E.2d 25, 32 (1986) (quoting *Gaston Bd. Of Realtors v. Harrison*, 311 N.C. 230, 234, 316 S.E.2d 59, 61 (1984)). In the instant case, plaintiff does not allege that defendants have in fact attempted to claim any illegal credit, and the parties do not disagree about the dollar amounts at issue. We conclude that there is no justiciable case or controversy regarding this issue. This assignment of error is overruled.

Finally, plaintiff argues that one of the Commission’s findings of fact should be revised to provide additional clarity regarding the Commission’s conclusion that plaintiff’s bilateral rotator cuff tendonitis was an occupational disease. As we have upheld the Commission’s conclusion in this regard, we have no need to address this issue. This assignment of error is overruled.

For the reasons discussed above, we conclude that the Industrial Commission’s “Conclusion Four” and “Award One and Two” must be reversed and remanded for correction of the amount of plaintiff’s May, 1997 compensation. We further conclude that the Commission did not err in the remainder of the Commission’s Opinion and Award. Accordingly, the Opinion and Award in this case is

Affirmed in part, reversed and remanded in part.

Judges TIMMONS-GOODSON and HUNTER concur.

Report per Rule 30(e).