NO. COA05-787

NORTH CAROLINA COURT OF APPEALS

Filed: 5 July 2006

GRACE DAVIS,
Plaintiff

v.

North Carolina Industrial Commission
I.C. File No. 811985

CONTINENTAL TIRE,
Employer

Appeal by employer from Opinion and Award of the North Carolina Industrial Commission entered 14 February 2005 by Commissioner Thomas J. Bolch, Commissioner Bernadine S. Ballance, and Chairman Buck Lattimore. Heard in the Court of Appeals 22 March 2006.

No brief filed for plaintiff-appellee.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Joel Turner, for defendant-appellant.

CALABRIA, Judge.

Continental Tire North America ("defendant") appeals from an Opinion and Award of the Industrial Commission, awarding Grace Davis ("plaintiff") compensation for permanent damage to her teeth and permanent partial disabilities for back and left arm injuries. We affirm.

Plaintiff was a high school graduate who had worked for defendant as a tire builder since December 1989. On 31 January1998, the date of the accident at issue in this case, plaintiff was forty-eight years old and still employed as a tire builder for defendant. On that date, a co-worker

discovered plaintiff lying unconscious on the floor under her machine, and plaintiff was bleeding from her mouth. Based on this evidence, the Industrial Commission made the finding, "Apparently, plaintiff's arm had become caught in the machine and her head was pulled against it. As a result of the accident, plaintiff fractured her jaw, knocked out a tooth, loosened other teeth, injured her neck, left arm, and low back, and sustained burns to her chest and left arm."

In its Opinion and Award, the Industrial Commission made the following additional findings of fact:

> 1. . . . [Plaintiff] was taken to the emergency room where she was evaluated by Dr. Carlisle, an oral surgeon. Dr. Carlisle diagnosed plaintiff with a mobile left mandibular-aveolar ridge fracture involving three teeth, and he performed surgery to repair the fracture and to stitch a small laceration to her lip. An arch bar or splint was placed in her mouth during the operation. Dr. Carlisle removed the splint on February 28, 1998.
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> 2. Dr. Kleitches, a dentist, cleaned plaintiff's teeth while the splint was in place and then treated her for the damage she sustained to her teeth. He crowned three teeth and placed a bridge over a tooth, which was knocked out in the accident. Dr. Kleitches subsequently performed root canals to six teeth.
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> 3. Some of plaintiff's medical records were not submitted by the parties, including most of those arising from her initial treatment. Plaintiff was apparently treated by a Dr. Leslie for neck and arm pain, and for headaches. However, in April 1998, Dr. Singer, an orthopedic surgeon, began treating plaintiff for those symptoms. Dr. Singer also referred plaintiff to Dr. Hawes, a neurologist, for evaluation and treatment. Plaintiff was treated conservatively with medication, physical therapy, trigger point injections, and limitations on her activities. Her symptoms very slowly improved. On October 19, 1999, plaintiff returned to work on a part-time basis in her former position. However, the job was so physically demanding that it aggravated her symptoms. Consequently, Dr. Hawes subsequently recommended that she not work at that machine.
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> 4. In July 2000, defendant offered plaintiff a position as a stylistic machine operator, which involved lighter work duties. At Dr. Hawes's recommendation, she started working in the new

position on a part-time basis with instructions to gradually increase her working hours. A normal work shift at the plant was twelve hours, and plaintiff was not able to work that many hours at one time until December 25, 2000. However, she was thereafter able to continue working on a full time basis in her new job and she remained so employed as of the date of hearing before the Deputy Commissioner.

5. Plaintiff requested a hearing in order to receive compensation for permanent partial disability. Defendant paid her compensation for temporary total disability until she returned to work, and then paid compensation to her for temporary partial disability through December 24, 2000, while she was working on a part-time basis. Defendant has claimed that plaintiff reached maximum medical improvement when Dr. Singer rated her and that she received as much compensation for her actual wage-loss after that date as she would have received for her ratings. The evidence of record does not disclose specifically how much compensation defendant paid to plaintiff after July 13, 2000, when Dr. Singer gave plaintiff her final rating. In any event, it was apparent from the evidence that plaintiff had not reached maximum medical improvement at that time. On July 13, 2000, she was able to only work limited hours in her new position on the stylistic machine. Plaintiff remained physically incapable of working twelve hours per day due to the residual symptoms from her injury. Her left arm would swell with heavy use, and would be sore and tingle with normal use. Plaintiff also had some persistent neck and shoulder pain. Her condition continued to gradually improve after that date until December 25, 2000, when she was able to resume a full time work schedule.

6. Plaintiff reached maximum medical improvement with respect to her injury at work no sooner than December 25, 2000. She sustained a four percent (4%) permanent partial disability to her cervical back and a twelve percent (12%) permanent partial disability to her left arm as a result of the injury. Plaintiff also lost tooth number 10 and had to have crowns placed on teeth number 8,9, and 11, which are all important parts of the body.

Based on these findings of fact, the Industrial Commission concluded:

1. Plaintiff is entitled to compensation at the rate of $532.00 per week for twelve weeks for a four percent (4%) permanent partial disability to her cervical back, which she

> sustained as a result of the work-related injury by accident. N.C. Gen. Stat. §97-31 (23).
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> 2. Plaintiff is entitled to compensation at the rate of $532.00 per week for 28.8 weeks for a twelve percent (12%) permanent partial disability, which she sustained to her left arm as a result of the work-related injury by accident. N.C. Gen. Stat. §97-31 (13).
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> 3. Plaintiff is entitled to compensation in the amount of $420.00 for the loss of tooth number 10, and $210.00 each for the permanent damage to teeth numbers 8,9 and 11. Plaintiff's teeth are important parts of the body. N.C. Gen. Stat. §97-31(24); and the Industrial Commission Rating Guide.
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> 4. Plaintiff is entitled to have defendant provide all medical compensation arising from this injury by accident. N.C. Gen. Stat. §97-2(19), and 97-25.

The Industrial Commission then issued an award in accordance with its conclusions. From this Opinion and Award, defendant appeals.

On appeal, defendant initially argues that "the Industrial Commission erred in finding that [plaintiff] reached maximum medical improvement for her back and left arm injuries no sooner than December 25, 2000, as that finding is not supported by any competent . . . evidence." When reviewing an Opinion and Award of the Industrial Commission, this Court is limited to determining "whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). We do not weigh the evidence and decide the issue on the basis of its weight; rather, our duty goes no further than to determine whether the record contains any evidence tending to support the finding. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998). If a challenged finding is supported by any competent evidence, viewed in the light most favorable to the plaintiff, it is conclusive on appeal. *Poole v. Tammy Lynn Center*, 151 N.C. App. 668, 672, 566 S.E.2d 839, 841 (2002). Likewise,

unchallenged findings are binding on appeal. *Johnson v. Herbie's Place*, 157 N.C. App. 168, 180, 579 S.E.2d 110, 118 (2003).

In a relatively recent decision, this Court clarified the significance of maximum medical improvement ("MMI"):

> [B]efore an employee may receive scheduled benefits pursuant to N.C. Gen. Stat. §97-31, it must be established that the employee has reached the point of MMI with regard to the employee's specific physical impairment and, therefore, that the healing period has ended and the employee's physical impairment has become permanent. Once this is established, an employee may receive benefits for the specific physical impairment for the statutory period set forth in N.C. Gen. Stat. §97-31 that corresponds to that impairment.

Knight v. Wal-Mart Stores, Inc., 149 N.C. App. 1, 13, 562 S.E.2d 434, 443 (2002), *aff'd per curiam*, 357 N.C. 44, 577 S.E.2d 620 (2003). The Court explained further that "the healing period in N.C. Gen. Stat. §97-31 ends at the point when the injury has stabilized, referred to as the point of 'maximum medical improvement' (or 'maximum improvement' or 'maximum recovery')." *Id.*, 149 N.C. App. at 12, 562 S.E.2d at 442.

MMI connotes that:

> a claimant is only temporarily totally disabled and his body healing when his condition is steadily improving, and/or he is receiving medical treatment. Yet, recovery from injuries often entails a healing period of alternating improvement and deterioration. In these cases, the healing period is over when the impaired bodily condition is stabilized, or determined to be permanent, and not at one of the temporary high points. *Moreover, in many cases the body is able to heal itself, and during convalescence doctors refrain from active treatment with surgery or drugs. Thus, the absence of such medical treatment does not mean that the injury has completely improved or that the impaired bodily condition has stabilized.*

Carpenter v. Indus. Piping Co., 73 N.C. App. 309, 311, 326 S.E.2d 328, 330 (1985) (emphasis added).

In this case, it is unclear when plaintiff reached MMI. None of the doctors testified regarding plaintiff's date of MMI or documented it in plaintiff's medical records. In May 2000, Dr. Hawes noted that plaintiff was experiencing recurrent pain and swelling with repetitive motion and recommended that plaintiff be assigned to a less demanding job. Based on that recommendation, plaintiff was placed in a stylistic machine operator position in July 2000 on a part-time basis. On 13 July 2000, Dr. Singer observed that plaintiff still had soreness in her arm. Although he released plaintiff from his care on that date, he specifically noted that plaintiff was still under the care of Dr. Hawes. The evidence is undisputed that, subsequently, plaintiff did not assume full-time hours until Christmas 2000.

Based on this evidence, the Commission specifically found:

> 4. In July 2000, defendant offered plaintiff a position as a stylistic machine operator, which involved lighter work duties. At Dr. Hawes's recommendation, she started working in the new position on a part-time basis with instructions to gradually increase her working hours. A normal work shift at the plant was twelve hours, and plaintiff was not able to work that many hours at one time until December 25, 2000. However, she was thereafter able to continue working on a full time basis in her new job and she remained so employed as of the date of hearing before the Deputy Commissioner.

Since defendant did not specifically assign error to this finding of fact, it is binding on appeal.**[Note 1]** *Johnson*, 157 N.C. App. at 180, 579 S.E.2d at 118. This finding of fact establishes that plaintiff's gradual increase in hours was at Dr. Hawes's recommendation. The finding is also consistent with the medical evidence, which indicates that plaintiff's doctors consistently recommended that plaintiff only gradually increase her hours because of pain and swelling in her arm.

In sum, the unchallenged finding establishes that plaintiff still had pain in her injured arm and was under the care of a doctor in July 2000, the latest date at which defendant contends

plaintiff reached MMI. From July 2000 until December 2000, plaintiff--on the recommendation of her doctor--worked at a lighter duty job and gradually increased her hours. Plaintiff's condition was not fully stabilized or her physical condition fully improved until December 2000, at which point plaintiff was able to work full-time. To use the terminology in *Knight*, she did not reach maximum recovery or maximum improvement until Christmas 2000. This evidence is sufficient to support the Commission's determination that plaintiff reached MMI on 25 December 2000. Therefore, the related assignments of error are without merit.

Defendant next argues, "The Industrial Commission erred in awarding N.C. Gen. Stat. §97-31 permanent partial disability benefits for [plaintiff's] back and left arm injuries, as [plaintiff] continued to receive N.C. Gen. Stat. §97-29 and N.C. Gen. Stat. §97-30 benefits after the point in time when defendant contends she reached maximum medical improvement." Because this argument is based on defendant's first argument that we have previously rejected, we likewise hold that this second argument is without merit.

Defendant's remaining assignments of error are either insufficient in that they either point to no specific finding of fact in violation of N.C. R. App. P. 10 (2006) or are abandoned pursuant to N.C. R. App. P. 28(b)(6) (2006).

Affirmed.

Judges McGEE and GEER concur.

Report per Rule 30(e).

NOTE

1. While defendant did include an assignment of error that asserted generally that the findings of fact were not supported by competent evidence, such a "broadside" assignment of error is insufficient. *White v. Weyerhaeuser Co.*, 167 N.C. App. 658, 661, 606 S.E.2d 389, 392 (2005).