NO. COA01-568

NORTH CAROLINA COURT OF APPEALS

Filed: 6 August 2002

DAVID WARD,
Employee,
Plaintiff,

v. North Carolina Industrial Commission
I.C. File No. 816964

FLOORS PERFECT,
Employer;

PENN NATIONAL INSURANCE,
Carrier,
Defendants.

Appeal by plaintiff from opinion and award filed 8 February 2001 by the North Carolina Industrial Commission. Heard in the Court of Appeals 18 February 2002.

Law Offices of George W. Lennon, by George W. Lennon and Michael W. Ballance, for plaintiff appellant.

Young Moore and Henderson, P.A., by Dawn Dillon Raynor and Zachary C. Bolen for defendant appellees.

McCULLOUGH, Judge.

This case arises out of a workers' compensation claim filed by plaintiff David J. Ward. On appeal, plaintiff seeks review of the Industrial Commission's opinion and award ordering defendants Floors Perfect (the employer) and Penn National Insurance (the insurance carrier) to pay plaintiff reasonable medical expenses and partial compensation. The relevant facts are as follows: In 1997, plaintiff was self-employed and operated Floors Perfect, a floor covering

business. Plaintiff did much of the actual installation himself, working eight hours a day, six hours of which he spent on his knees. On 27 August 1997, plaintiff filed a workers' compensation claim alleging that, over time, he developed bilateral patellofemoral pain (damage to the knees) as a result of his occupation. Plaintiff's Form 33, dated 3 February 1998, requested compensation at a rate of $532.00 per week for the days of work he missed, beginning 13 January 1997; payment of all medical expenses and treatment; payment for permanent partial disability as required by law; and payment for training in a new occupation. The Form 33 also requested a hearing before a Deputy Commissioner of the North Carolina Industrial Commission.

On 5 February 1998, Mr. Joe Griggs, a claims representative for the insurance carrier filed a Form 61 denying plaintiff's claim. Mr. Griggs' letter stated that, "Upon investigation, your claim does not meet the statutory requirements for accidental injury under General Statute 97-2. Medical expenses to this date will be paid." On 14 April 1998, defendants Floors Perfect and Penn National Insurance filed a Form 33R in response to plaintiff's request for a hearing. Defendants maintained that "[o]ur investigation reveals that plaintiff did not sustain an injury by accident as defined by the Act and his injuries are not the result of an occupational disease."

On 26 June 1998, plaintiff's case was heard by Deputy Commissioner Kim L. Cramer in Raleigh, North Carolina. Deputy Commissioner Cramer found that plaintiff was 41 years old and was attending community college in hopes of transferring to a four-year university and going on to law school. Since 1994, plaintiff owned and operated Floors Perfect, a business installing carpet, vinyl tile, and linoleum. Plaintiff did the floor installation himself and spent approximately six hours per day on his knees. Plaintiff had ten to fifteen years' experience in

flooring work prior to opening Floors Perfect. When plaintiff suffered an unrelated back injury in September 1997, he stayed out of work until February 1998 and contracted out all his labor.

According to Deputy Commissioner Cramer, plaintiff did not sustain a specific injury on 27 August 1997; instead, he had been experiencing trouble with both his knees for several weeks prior to that date. On 27 August, plaintiff went to Wake Med's emergency room and told the staff he worked as a flooring installer and had experienced knee pain for about two months. He was advised to consult an orthopedic specialist. On 13 January 1998, plaintiff saw orthopedic surgeon Dr. George Callaway. Plaintiff related that he had experienced increasing knee pain for the past one to two years. Dr. Callaway took X-rays, which showed full range of motion on both knees, stable planes, and no effusion. Other tests ruled out any cartilage or ligament tears, though Dr. Callaway did notice "crepitus," a crunching noise behind the kneecaps. After diagnosing plaintiff with bilateral patellofemoral pain (anterior knee pain), Dr. Callaway gave plaintiff a prescription for an anti-inflammatory drug, Daypro, and sent plaintiff to physical therapy.

Plaintiff did not take the Daypro, nor did he participate in physical therapy. Plaintiff went to his first physical therapy session and informed the therapist he did heavy lifting at work and was not interested in doing further exercise. Despite plaintiff's references to work, however, he was actually out of work during January and February 1998 due to his unrelated back injury. On 24 February 1998, plaintiff saw Dr. Callaway and told him he had taken Daypro before and it was not helpful. Upon examination, Dr. Callaway again found full range of motion, stable planes and no effusion. He advised plaintiff to continue physical therapy and cleared plaintiff to return to work, with the restriction of no kneeling. Until he was deposed, Dr. Callaway believed plaintiff was following through with the physical therapy recommendations.

Plaintiff sought no further medical treatment for his knees until he visited Dr. Callaway nearly a year later, on 18 February 1999. On that date, Dr. Callaway recommended an MRI. The MRI showed the cartilage on the back of the plaintiff's kneecap was defective and there was a small cartilage tear on the lateral tibial plateau (permanent damages Dr. Callaway believed were caused by plaintiff's work), as well as a small medial meniscus tear (which Dr. Callaway believed was unrelated to plaintiff's work). Dr. Callaway advised plaintiff that the only other possible treatment was arthroscopy of the right knee and an MRI of the left knee. Otherwise, Dr. Callaway noted, as of plaintiff's last visit on 27 July 1999, he was at maximum medical improvement, with a 5% permanent impairment to his right knee and a 2½% permanent impairment to his left knee.

Plaintiff continued working but did not resume installation of flooring after September 1997. Despite this fact, plaintiff's knee condition remained the same. On 29 April 1998, a physical capacity evaluation revealed plaintiff could frequently lift and carry up to fifty pounds, could bend at the waist, and handle materials with his upper extremities; his only permanent restriction was no kneeling. By the summer of 1998, plaintiff stopped working and entered community college. Upon making her findings of fact, Deputy Commissioner Cramer made the following conclusions of law:

> 1. As a result of his employment, Plaintiff has developed bilateral patellofemoral pain, a condition which is due to causes and conditions peculiar to his employment, and which is not a condition to which the general public is equally exposed and which is therefore compensable as an occupational disease pursuant to N.C. Gen. Stat. §97-53(13).
>
> 2. Defendants are responsible for payment of all medical expenses incurred for Plaintiff's treatment of his bilateral patellofemoral pain. N.C. Gen. Stat. §97-2(19), 97-25.

> 3. The Plaintiff has not suffered any loss of his wage earning capacity as a result of his bilateral patellofemoral pain. As Plaintiff voluntarily removed himself from the labor market to pursue his education, the evidence fails to establish any periods of time for which he would be entitled to benefits for either partial or total disability. N.C. Gen. Stat. §97-29.
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> 4. Plaintiff has reached maximum medical improvement from his bilateral patellofemoral pain and has sustained a five percent permanent impairment to his right leg and a two and one-half percent permanent impairment to his left leg for which he is entitled to compensation pursuant to N.C. Gen. Stat. §97-31(15).

Defendants were ordered to pay plaintiff's medical expenses, as well as $512.00 per week for fifteen weeks, beginning 27 July 1999, as compensation for the permanent impairment ratings of his knees. Deputy Commissioner Cramer determined a reasonable attorney's fee of twenty-five percent of the compensation due plaintiff was approved for his counsel, and defendants were also required to pay the costs of the action. Plaintiff appealed to the Full Commission.

By opinion and award filed 8 February 2001, the Full Commission concluded plaintiff did not show good grounds for reconsidering the evidence or receiving further evidence. The Full Commission entered its own findings of fact and conclusions of law affirming Deputy Commissioner Cramer's decision. Plaintiff again appealed.

On appeal, plaintiff argues the Full Commission erred by (I) misapplying the burden of proof and failing to find he was temporarily totally disabled; (II) reaching an unsupported conclusion of law that he had reached maximum medical improvement; (III) failing to make findings of fact regarding his actual wage earning capacity; (IV) failing to award him retraining and failing to award disability payments during retraining; and (V) failing to properly address plaintiff's motion for sanctions. For the reasons set forth herein, we disagree with plaintiff's contentions and affirm the decision of the Full Commission.

Burden of Proof

By his first assignment of error, plaintiff argues the Full Commission misapplied the burden of proof and incorrectly concluded he failed to prove he was disabled and voluntarily removed himself from the job market to attend school full time. We do not agree.

In reviewing an award of the Industrial Commission, "[t]he reviewing court's inquiry is limited to two issues: whether the Commission's findings of fact are supported by competent evidence and whether the Commission's conclusions of law are justified by its findings of fact." *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 186, 345 S.E.2d 374, 379 (1986). "In order to obtain compensation under the Workers' Compensation Act, the claimant has the burden of proving the existence of his disability and its extent." *Id.* at 185, 345 S.E.2d at 378. The Workers' Compensation Act defines a "disability" as

> incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.

N.C. Gen. Stat. §97-2(9) (2001). "The term 'disability' as used under the Workers' Compensation Act refers to the diminished capacity to earn wages and not to physical infirmity." *Priddy v. Cone Mills Corp.*, 58 N.C. App. 720, 721, 294 S.E.2d 743, 744 (1982).

> [I]n order to support a conclusion of disability, the Commission must find: (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) that this individual's incapacity to earn was caused by plaintiff's injury.

Hilliard v. Apex Cabinet Co., 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). An employee may meet the burden in one of the following 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[;] (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[;] (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[;] or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

Russell v. Lowes Product Distribution, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (citations omitted). Once the employee presents substantial evidence of his incapacity to earn wages, the employer "must come forward with evidence to show not only that suitable jobs are available, but also that the plaintiff is capable of getting one, taking into account both physical and vocational limitations." *Kennedy v. Duke Univ. Med. Center*, 101 N.C. App. 24, 33, 398 S.E.2d 677, 682 (1990); *Barber v. Going West Transp., Inc.*, 134 N.C. App. 428, 435, 517 S.E.2d 914, 920 (1999). With these principles in mind, we turn to the case at hand.

Plaintiff contends he met his burden of proving disability. He points to the testimony of Dr. Callaway, who stated plaintiff was totally disabled from work as a flooring installer and was permanently restricted from this type of work in the future. Plaintiff also contends he showed he was incapable after his injury of earning the same wages he had earned before his injury in the same employment, because of his age and lack of education. *See Hilliard*, 305 N.C. 593, 290 S.E.2d 682; and *Russell*, 108 N.C. App. 762, 425 S.E.2d 454. Plaintiff also believes he successfully conveyed the futility of his search for employment--and his need for further schooling--because someone with a high school equivalency degree could not earn the same money in another field, and he maintains he was unable to work in flooring anymore, per Dr. Callaway's instructions. Plaintiff stated he made over $50,000.00 in 1997 before his injury. He also testified that "[t]here's no way that I could find a job without some type of education, in my own belief, that would allow me to make a comparable salary as to what I was doing before."

Plaintiff argues the burden should have then shifted to defendants to demonstrate the existence of a suitable job plaintiff could have obtained, considering his limitations. *See Kennedy*, 101 N.C. App. at 33, 398 S.E.2d at 682. Plaintiff notes defendants did not present any evidence before the Full Commission, and believes they could not meet their burden of showing that plaintiff retained his pre-injury wage-earning capacity because there was no evidence of suitable employment for him. Plaintiff argues defendants should have looked for suitable jobs for him, taking into account his aptitudes, capabilities, and vocational future. Moreover, plaintiff contends the Full Commission erred in concluding that he voluntarily removed himself from the job market to pursue his educational aspirations. Plaintiff states he went to school because he could not earn pre-injury wages. He compares his situation to a voluntary retirement and notes this Court has held that the Full Commission cannot deny benefits to an injured worker when the worker chooses to attend school rather than take an unsuitable job offered by the employer. *See Dixon v. City of Durham*, 128 N.C. App. 501, 495 S.E.2d 380, *disc. review denied*, 348 N.C. 496, 510 S.E.2d 381 (1998).

Plaintiff's arguments hinge on his belief that he met his burden of showing disability so that the burden shifted to defendants to demonstrate the existence of a suitable job that plaintiff could have obtained, given his particular situation. Plaintiff relies heavily on *Russell* to argue that the Full Commission applied an incomplete legal standard in determining whether plaintiff met his burden of proving disability. We do not find these arguments persuasive.

Defendants argue, and we agree, that plaintiff never met his burden of showing disability and the burden did not shift to defendants to prove the availability of suitable jobs for which plaintiff was qualified. The Full Commission found that:

> 15. Plaintiff has failed to prove by the greater weight that he is incapable of work in any employment or that he is

> capable of some work but has been unsuccessful after making reasonable efforts to locate employment. In fact, plaintiff, without reasonable efforts to locate employment, voluntarily removed himself from the job market and chose to enter community college in the summer of 1998. Plaintiff has not demonstrated that he is incapable of earning wages due to his knee condition.

This finding of fact was well supported by the evidence of record. None of plaintiff's doctors opined that plaintiff could not work, and plaintiff presented no medical evidence that he was unable to work due to his knee injury. Despite this fact, plaintiff admitted he had not sought any employment. Though Dr. Callaway took plaintiff out of work for two weeks in January 1998, he subsequently released plaintiff to work with only a no kneeling restriction. Plaintiff was still able to lift and carry objects weighing up to 50 pounds using his upper extremities, to climb, and to work at unrestricted heights. Despite plaintiff's intelligence, experience in numerous fields, and years of successfully operating his floor installation business, he characterized a job search as futile. The Full Commission rejected plaintiff's position, and concluded plaintiff failed to show a loss of wage-earning capacity.

"The facts found by the Commission are conclusive upon appeal to this Court when they are supported by competent evidence, even when there is evidence to support contrary findings." *Pittman v. International Paper Co.*, 132 N.C. App. 151, 156, 510 S.E.2d 705, 709, *aff'd*, 351 N.C. 42, 519 S.E.2d 524 (1999). Upon review, we conclude the evidence supported the Commission's findings of fact, which in turn supported the conclusions of law. The Full Commission concluded plaintiff developed a compensable occupational disease, but also concluded plaintiff had not suffered a loss in wage-earning capacity since he failed to prove by the greater weight of the evidence that he was unable to work or was unsuccessful in seeking work. The evidence that plaintiff voluntarily left work to attend school full time obviated the need for defendants to show that suitable jobs were available to plaintiff.

Plaintiff's first assignment of error is overruled.

Maximum Medical Improvement

By his second assignment of error, plaintiff contends the Full Commission erred in concluding he reached maximum medical improvement because there was no evidence to support that conclusion. We disagree.

The Full Commission found that "as of plaintiff's last visit on July 27, 1999 with Dr. Callaway, plaintiff was at maximum medical improvement[.]" This finding of fact was supported by competent evidence in the form of Dr. Callaway's deposition testimony. During the deposition, Dr. Callaway was asked whether plaintiff had reached maximum medical improvement. Dr. Callaway responded, "I think that if he chooses to go without an arthroscopy of the knee, then he'll likely, in the near future, be at maximum medical improvement." The record indicates plaintiff decided to forego the arthroscopy; thus, according to Dr. Callaway, plaintiff achieved maximum medical improvement on 27 July 1999.

Dr. Callaway's assignment of permanent disability ratings to plaintiff's knees further supports the Full Commission's finding that plaintiff reached maximum medical improvement. "A finding of maximum medical improvement is simply the prerequisite to a determination of the amount of any permanent disability under N.C. Gen. Stat. §97-31." *Silver v. Roberts Welding Contractors*, 117 N.C. App. 707, 711, 453 S.E.2d 216, 219 (1995). Dr. Callaway first had to conclude plaintiff reached maximum medical improvement before he could assign permanent disability ratings to plaintiff's knees. Based on our review, we conclude the Full Commission's finding that plaintiff had reached maximum medical improvement was supported by competent evidence of record. Plaintiff's second assignment of error is overruled.

Wage-Earning Capacity

By his third assignment of error, plaintiff contends the Full Commission erred by not making any findings of fact regarding his actual wage-earning capacity. We do not agree.

> In order to secure an award under G.S. 97-30, the claimant has the burden of proving (1) that the injury resulted from accident arising out of and in the course of his employment; (2) that there resulted from that injury a loss of earning capacity (disability); and (3) that he must prove the extent of that disability.

Gaddy v. Kern, 17 N.C. App. 680, 683, 195 S.E.2d 141, 143, *cert. denied*, 283 N.C. 585, 197 S.E.2d 873 (1973). In cases involving determinations of disability, the Full Commission is required to make specific findings of fact as to a plaintiff's wage-earning capacity. *McLean v. Eaton Corp.*, 125 N.C. App. 391, 394, 481 S.E.2d 289, 291 (1997). Plaintiff argues the Full Commission's failure to make such findings amounted to a *de facto* deprivation of his right to choose a wage loss claim under N.C. Gen. Stat. §97-30(2001). Plaintiff maintains that, under §97-30, he could have chosen to receive payments based on the difference in his wage-earning capacity, or to receive a simple payment for his permanent partial disability rating (here, $512.00 per week for 15 weeks). *See Gupton v. Builders Transport*, 320 N.C. 38, 43, 357 S.E.2d 674, 678 (1987). Defendants contend, and we agree, that there has been no *de facto* deprivation of plaintiff's right to choose a wage loss claim under §97-30 because he did not prove there was any change in his ability to earn wages as a result of his knee injury. "Without such proof there is no authority upon which to make an award even though permanent physical injury may have been suffered." *Gaddy*, 17 N.C. App. at 683, 195 S.E.2d at 143. Plaintiff's third assignment of error is overruled.

Retraining Expenses and Disability Benefits

By his fourth assignment of error, plaintiff contends defendants should have paid his retraining expenses and provided disability benefits during the period of retraining. We disagree.

N.C. Gen. Stat. §97-2(19) explains that rehabilitative services are meant "to lessen the period of disability[.]" Plaintiff contends retraining expenses fall within the scope of such rehabilitative services. *See Sanhueza v. Liberty Steel Erectors*, 122 N.C. App. 603, 607, 471 S.E.2d 92, 95 (1996), *disc. review denied*, 345 N.C. 347, 483 S.E.2d 177 (1997). Plaintiff maintains the Industrial Commission's Rehabilitation Rules also allow retraining expenses to be payable to him.

In the present case, the Full Commission concluded plaintiff failed to prove he was disabled. Since there was no period of disability, defendants maintain they should not be required to pay for plaintiff's education. Plaintiff testified he went back to school to qualify for a job that would compensate him at his pre-injury wage. However, we note plaintiff did not present testimony from any vocational professional stating that retraining was necessary in his situation. Instead, the record indicates that Dr. Callaway released plaintiff to go back to work with only a no kneeling restriction, that plaintiff was experienced in various fields of work, that plaintiff was intelligent and articulate, and that plaintiff made no efforts to find a job.

> Q. Since September 9, 1997, have you sought employment in any other position?
>
> A. No, I have not. . . .
>
> Q. Mr. Ward, you're an intelligent man. You're very articulate. You obviously have some business acumen. You ran your own business. Isn't it true that you could walk out the door right now and go look for a job and probably find something within the week?
>
> A. Sure. Anybody can [go] down at (unintelligible) and get a job at $5.00 an hour.
>
> Q. But in this job economy, isn't it true that you could find something significantly better than that?
>
> A. No, it's not.

Q. No, it's not? But you haven't tried; have you?

A. No.

As we have already upheld the Full Commission's conclusion that plaintiff failed to prove he was disabled (and likewise failed to prove a corresponding period of disability), the issue of whether defendants should be required to pay for retraining is moot. Plaintiff's argument fails, and his fourth assignment of error is overruled.

Sanctions

By his final assignment of error, plaintiff asserts the Full Commission erred in failing to address his motion for sanctions, which was raised in his Form 44 Application for Review. In support of this assignment of error, plaintiff contends defendants failed to properly investigate his claim and erred again by denying his claim. Plaintiff contends these actions were unreasonable under N.C. Gen. Stat. §§97-88.1 and 58-63-15(11) (2001) and warrant sanctions. We disagree.

The Full Commission has a duty "to make specific findings of fact and conclusions of law with respect to each issue raised by the evidence, and upon which plaintiff's right to compensation depends." *Slatton v. Metro Air Conditioning*, 117 N.C. App. 226, 231, 450 S.E.2d 550, 553 (1994). Plaintiff correctly points out that "[w]hether a defendant had reasonable ground to bring a hearing is a matter reviewable by this Court *de novo*." *Ruggery v. N.C. Dep't of Correction*, 135 N.C. App. 270, 273-74, 520 S.E.2d 77, 80 (1999). Thus, we turn to the statutory provisions cited by plaintiff.

N.C. Gen. Stat. §97-88.1 states:

> 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. §58-63-15(11) defines unfair claim settlement practices as follows:

> d. Refusing to pay claims without conducting a reasonable investigation based upon all available information;
>
> * * * *
>
> f. Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear[.]

Plaintiff argues defendants violated these provisions of the General Statutes by continually stonewalling and requesting incorrect, unreasonable applications of the law, and should be punished accordingly. Plaintiff also points out that defendants presented no lay witnesses, medical opinions, or vocational expert evidence that plaintiff was capable of earning the same wage as he did prior to his knee injury.

Defendants, on the other hand, correctly point out that, when determining whether attorney's fees should be awarded under N.C. Gen. Stat. §97-88.1, "[t]he test is not whether the defense prevails, but whether it is based in reason rather than in stubborn, unfounded litigiousness." *Sparks v. Mountain Breeze Restaurant*, 55 N.C. App. 663, 665, 286 S.E.2d 575, 576 (1982). Defendants' position was sustained by the Full Commission, and it was plaintiff who appealed the opinions and awards of Deputy Commissioner Cramer and the Full Commission. After reviewing the record below, it appears defendants were simply defending against plaintiff's claim and did not act in a stubborn or unfounded manner; rather, defendants' attorneys acted as zealous advocates for their clients. As for plaintiff's contention that the Full Commission failed to make required findings of fact, we note that, in order for the Full Commission to award attorney's fees, it would have had to make findings of fact that defendants' decision to defend

the lawsuit was based on stubborn, unfounded litigiousness. The evidence does not support such findings of fact. Accordingly, plaintiff's final assignment of error is overruled.

After careful examination of the record and the arguments presented by the parties, the decision of the Full Commission denying plaintiff's claim is

Affirmed.

Chief Judge EAGLES and Judge BIGGS concur.

Report per Rule 30(e).