NO. COA01-588

NORTH CAROLINA COURT OF APPEALS

Filed: 5 March 2002

ROBERT C. LOGAN,
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 819188

ROGER'S CONCRETE COMPANY,
Employer,

MONTGOMERY MUTUAL INSURANCE COMPANY,
Carrier,
Defendants.

Appeal by defendants from opinion and award filed 7 March 2001 by the North Carolina Industrial Commission. Heard in the Court of Appeals 4 February 2002.

Law Offices of Mark T. Sumwalt, P.A., by Mark T. Sumwalt and Vernon Sumwalt, and Price, Smith, Hargett, Petho & Anderson, by Richard A. Anderson, for plaintiff appellee.

Teague, Campbell, Dennis & Gorham, L.L.P., by Dayle A. Flammia, for defendant appellants.

TIMMONS-GOODSON, Judge.

On 12 March 1998, Robert C. Logan ("plaintiff") suffered a compensable injury while employed by Roger's Concrete Company ("defendant") as a concrete finisher. Plaintiff had been employed by defendant for more than fifty-two weeks preceding the injury. On 17 March 1998, plaintiff filed a claim with the Industrial Commission, which matter was heard by Deputy

Commissioner Pamela T. Young on 22 September 1999. Defendant's bookkeeper, Glenda Rogers ("Rogers"), testified that plaintiff was retired and received Social Security benefits in 1997 and 1998. Rogers stated that plaintiff did not want to earn "more than what Social Security wages" allowed per year in order to avoid "them taking anything out." Rogers testified that "most years [plaintiff] made around $7,000." Specifically, plaintiff earned $6,164.00 in 1996, $7,096.00 in 1997, and $740.00 before his injury in 1998, with an hourly wage of $8.00 during the entire time period. Rogers conceded that the Form 22 Wage Charts did not accurately reflect the days plaintiff worked in August, November and December of 1997.

The deputy commissioner found that plaintiff earned $6,384.00 from 3 March 1997 through 12 March 1998. After excluding all periods in which plaintiff missed more than seven consecutive days, the deputy commissioner determined plaintiff's average weekly wage to be $199.50, yielding a corresponding compensation rate of $133.00. The deputy commissioner filed her opinion and award on 13 December 1999, and defendants gave notice of appeal to the Full Commission on 21 December 1999.

In its opinion and award filed on 7 March 2001, the Full Commission modified in part and affirmed in part the deputy commissioner's prior opinion and award. The Full Commission found that plaintiff earned $6,009.42 from 12 March 1997 through 12 March 1998. Because plaintiff missed seven or more consecutive days on one or more occasions, the Full Commission concluded that the second method under North Carolina General Statutes section 97-2(5)was the appropriate method for calculating plaintiff's average weekly wage. It also determined that the second "method [was] mandatory under the statute and [would] bring about a result that is fair and just to all parties. . . . [and that] [t]here are no extraordinary circumstance[s] relating to plaintiff's average weekly wage upon which the Full Commission could use the fifth method of

calculation under G.S. §97-2(5).” The Full Commission further found that “the reasonable inference is that plaintiff attempted to earn only as much wages as he could up to $7,000 so that he would not trigger the Social Security offset provisions” and that “plaintiff was not an intermittent employee.” After excluding all periods in which plaintiff missed more than seven consecutive days, the Full Commission determined plaintiff’s average weekly wage to be $204.19, yielding a compensation rate of $136.19. Defendants now appeal to this Court.

Defendants argue that the Industrial Commission incorrectly calculated plaintiff’s weekly wage. For the reasons set forth herein, we affirm the Opinion and Award of the Industrial Commission.

Defendants contend the Full Commission “completely ignored the intent of the provisions of the Workers’ Compensation Act in determining the average weekly wage, which requires results which are fair and just to both the employer and the employee.” They argue the Full Commission “effectively shifted plaintiff’s part- time, or even intermittent part-time job into a full-time or continuous job.” Defendants assert that the Full Commission’s finding of an average weekly wage of $204.19 ($10,617.88 annually) ignored plaintiff’s previous work history and his expressed desire not to earn more than $7,200.00 per year. They contend the Full Commission should have utilized the fifth method found in section 97-2(5) of the North Carolina General Statutes for calculating plaintiff’s average weekly wage. We disagree.

In reviewing an award of the Industrial Commission, this Court’s inquiry is strictly limited “to two questions of law, namely: (1) [w]hether or not there was any competent evidence before the Commission to support its findings of fact; and (2) whether or not the findings of fact of the Commission justify its legal conclusions and decision.” *Henry v. Leather Co.*, 231 N.C.

477, 479, 57 S.E.2d 760, 762 (1950). The five methods of computing average weekly wage are set forth under section 97-2(5) of our General Statutes, which establishes "a clear order of preference" for the method to be used. *Hensley v. Caswell Action Committee*, 296 N.C. 527, 533, 251 S.E.2d 399, 402 (1979).

"Average weekly wages" are defined in the first two methods as:

> [1] 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 . . . divided by 52; [2] but if the injured employee lost more than seven consecutive calendar days at one or more times during such period, although not in the same week, then the earnings for the remainder of such 52 weeks shall be divided by the number of weeks remaining after the time so lost has been deducted.

N.C. Gen. Stat. §97-2(5) (1999). Because plaintiff missed seven or more consecutive days during the fifty-two weeks prior to his injury, the first method of calculating his average weekly wage was inapplicable. The Full Commission thus utilized the second method to find plaintiff's average weekly wage to be $204.19, and concluded that such a result was "fair and just to all parties." Plaintiff's corresponding weekly compensation rate was $136.19 ($7081.88 annually). *See* N.C. Gen. Stat. §97-29 (1999) (establishing sixty-six and two-thirds percent of average weekly wage as the correct calculation).

The fifth method contained in section 97-2(5), which defendants argue is applicable in the present case, states that "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). This Court has previously stated, however, that "[t]he final, or fifth method, as set forth in N.C. Gen. Stat. §97-2(5), may not be used unless there has been a finding that unjust results would occur by using the previously

enumerated methods." *Bond v. Foster Masonry, Inc.*, 139 N.C. App. 123, 128, 532 S.E.2d 583, 586 (2000). Here, the Full Commission explicitly found "[t]here are no extraordinary circumstance[s] relating to plaintiff's average weekly wage upon which the Full Commission could use the fifth method of calculation under G.S. §97-2(5)."

"Ultimately, the primary intent of this statute [N.C. Gen. Stat. §97-2(5)] 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 v. Buncombe County Schools*, 347 N.C. 126, 130, 489 S.E.2d 375, 378 (1997) (citation omitted)(quoting *Liles v. Electric Co.*, 244 N.C. 653, 660, 94 S.E.2d 790, 796 (1956)). Our review of the record reveals competent evidence that supports the Full Commission's pertinent findings of fact, which in turn support its conclusions of law as to the results obtained and the absence of extraordinary circumstances. As a result, the Full Commission properly concluded "the fifth method of calculating a claimant's average weekly wage cannot, under the law[,] be used" and utilized the second method. We therefore affirm the Full Commission's opinion and award.

Affirmed.

Chief Judge EAGLES and Judge McCULLOUGH concur.

Report per Rule 30(e).