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NO. COA03-1023

NORTH CAROLINA COURT OF APPEALS

Filed: 18 May 2004

MITCHELL SELLERS,
Employee-Plaintiff

v.

North Carolina Industrial Commission
I.C. File No. 833513

LIBBEY OWENS FORD COMPANY,
Employer

SELF-INSURED,
Defendant

and

ITT SPECIALTY RISK
SERVICES, INC.,
Third-Party Administrator

Appeal by defendants and plaintiff from an opinion and award entered 24 March 2003 by the North Carolina Industrial Commission. Heard in the Court of Appeals 27 April 2004.

Heidi G. Chapman, P.L.L.C., by Heidi G. Chapman, for plaintiff-appellant and plaintiff-appellee.

Teague, Campbell, Dennis & Gorham, L.L.P., by George H. Pender, for defendants-appellants and defendants-appellees.

CALABRIA, Judge.

Libbey Owens Ford Company (“Ford”) and ITT Specialty Risk Services, Inc. (“ITT”) (collectively “defendants”) appeal an opinion and award issued by the North Carolina Industrial Commission (the “Commission”), asserting the Commission erred in awarding Mitchell Sellers

(“plaintiff”) compensation benefits under the Workers’ Compensation Act (the “Act”). Plaintiff appeals the Commission’s failure to award sanctions, including attorney fees and costs. We affirm.

The Commission made uncontested findings of fact detailing, *inter alia*, the following. On 15 December 1997, plaintiff, a forty-seven-year-old man and twenty-four-year employee of Ford, was employed as a shipping technician when his feet became tangled in metal shipping bands, causing him to fall on the floor. Plaintiff reported the accident, and an accident report was prepared. Ford referred plaintiff to Dr. David Williams for treatment.

Plaintiff was diagnosed with back strain and a low back contusion. Plaintiff was treated with pain medications and permitted to return to work with restrictions of limited bending and stooping for one week. Because of continued pain, plaintiff was excused from work on 16 and 17 December 1997 and was later referred to Scotland Memorial Hospital’s Occupational Health Clinic for evaluation, where he saw Drs. McCaskill and Baniewicz. Plaintiff was again diagnosed with back strain. Plaintiff remained out of work until 4 January 1998, and his pain improved. Plaintiff returned to work with restrictions that were subsequently lifted on 13 January 1998.

Despite plaintiff’s release to return to full duty, he continued to experience increasing back pain, which he attempted to alleviate by scheduling his accumulated vacation time to avoid the busiest shifts. By March 1998, however, plaintiff had depleted his vacation time and started calling in sick on the days when his pain prevented him from working. On 6 April 1998, after plaintiff wrote a letter concerning his back pain, Ford’s nurse agreed to arrange an evaluation by Dr. Holzknecht for 30 April 1998 at Scotland Orthopaedic. In the interim, plaintiff was unable to work due to his back pain. Ford informed plaintiff by letter that his pay had been stopped due to

unauthorized absences from work as of 17 April 1998. Dr. Holzkecht's examination revealed plaintiff had some degenerative disc disease, tenderness and numbness, and a large Schmorl's node. Dr. Holzkecht approved only light duty work and placed plaintiff on sedentary work restrictions.

In May 1998, plaintiff returned to work and performed clerical work within his restrictions. He was later moved, with Dr. Holzkecht's approval, to work on a buggy; however, Dr. Holzkecht had not approved a position requiring plaintiff to get up and down several times. Ford assigned someone to assist plaintiff, but that person was moved to another job after only thirty minutes. After being informed that further unauthorized absences would result in disciplinary action, plaintiff completed an eight-hour shift despite severe back and testicular pain. The following days, 18 May to 22 May 1998, plaintiff was unable to work because of continuing pain. Ford terminated plaintiff on 28 May 1998 for failing to report to work or have an excuse.

Following his termination, defendants provided plaintiff with some medical care, including epidural injections. Plaintiff never received any workers' compensation benefits. In November 1998, Dr. Holzkecht released plaintiff from his care, assigning a 5% permanent partial disability rating. The Commission found, however, that plaintiff had not reached maximum medical improvement. After further examinations, plaintiff was diagnosed with a "disc herniation/extrusion" and a 20% permanent partial impairment rating; however, the doctors did not recommend surgery. Plaintiff was also diagnosed with major depressive and pain disorders, which the Commission found was caused or aggravated by the compensable injury. The Commission further found that, as of the date of the award, plaintiff had not reached maximum medical improvement.

On 10 April 1998, plaintiff's claim for workers' compensation benefits was denied on the grounds that there was "no evidence to support his current condition [was] related to his original injury." After a hearing, Deputy Commissioner Stephenson awarded plaintiff temporary total disability compensation and medical expenses as a result of his compensable injury on 15 December 1997 but denied imposing sanctions, costs, or attorney fees on defendants. Plaintiff and defendants appealed, and the Commission, in all material aspects, affirmed the deputy commissioner's opinion and award. Both parties appealed to this Court.

I. Award of Compensation

Defendants assert on appeal that the Commission erred in awarding compensation benefits because plaintiff failed to carry his burden of proving entitlement to such benefits. We note initially that defendants have not challenged any findings of fact made by the Commission; therefore, the findings of fact made by the Commission in this case are deemed "conclusively established on appeal" and do not warrant further review. *Johnson v. Herbie's Place*, 157 N.C. App. 168, 180, 579 S.E.2d 110, 118, *disc. rev. denied*, 357 N.C. 460, 585 S.E.2d 760 (2003). Defendants have assigned and brought forward as error the Commission's conclusion of law that plaintiff's compensable injury entitles him to temporary total disability compensation and the award of that compensation. Thus, our review is limited to 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).

To obtain workers' compensation benefits, a claimant bears the burden of proving both the existence and the extent of disability. *Saums v. Raleigh Community Hospital*, 346 N.C. 760, 763, 487 S.E.2d 746, 749 (1997). Where, as here, there is no Form 21 or other admission of liability for compensation, the employee bears the burden of proving he is incapable of earning

the wages he earned prior to the injury in either the same or other employment. *Demery v. Converse, Inc.*, 138 N.C. App. 243, 249-50, 530 S.E.2d 871, 876 (2000). This burden can be met in one of 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) (internal citations omitted).

In the instant case, the Commission found as fact that “[t]he greater weight of the evidence is that except for a few weeks on limited duty in early 1998, plaintiff had essentially been unable to work or earn wages since the 15 December 1997 compensable injury.” This finding by the Commission denotes plaintiff carried his burden under the first prong set out in *Russell* and supports the Commission’s conclusion that plaintiff was entitled to temporary total disability compensation resulting from the injury sustained on 15 December 1997.

Nonetheless, defendants argue a number of facts in the record are undisputed and “clearly establish that plaintiff is capable of some work, that he is currently unemployed, and that it is not futile for plaintiff to look for employment based on some pre-existing condition.” To the extent these facts involve the deposition testimony of experts or plaintiff’s testimony at the hearing, defendants are asking this Court to determine whether the record evidence conflicts with a finding of fact to which defendants have not assigned error. This we will not do. Defendants also assert the Commission’s findings of fact include that “[d]efendant-employer did not provide

plaintiff a job within his work restrictions.” While we are unable to find this finding of fact in the opinion and award of the Commission, we note it has no bearing on the issue of whether plaintiff has carried his burden under the first prong set out in *Russell*. The same is true of defendants’ reliance on the Commission’s finding of fact that plaintiff “had not sought employment following his termination from defendant-employer in 1998.” Plaintiff argues that this finding was not supported by the evidence, which actually reveals that plaintiff had applied for forty to fifty jobs. However, whether plaintiff sought employment is irrelevant because a plaintiff does not have to show reasonable effort to obtain employment when he can show a physical or mental inability to work in any employment, as plaintiff did here. *Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457.

Defendants also direct the attention of this Court to the Commission’s finding of fact 32, which provides as follows:

Plaintiff desires to work and performs very limited duties at his sisters’ business, Bobby Clarks Wrecker, Garage and Salvage. Plaintiff also handles some of his mother’s business affairs regarding the management of rental property. However, plaintiff performs these functions on a limited, irregular basis, according to his physical and mental condition at the time.

Defendants contend this finding indicates plaintiff’s current ability to work in employment. We disagree. The Commission found plaintiff desired to work, and that desire was exemplified by his efforts as detailed in finding of fact 32. Nonetheless, while that finding shows some level of involvement by plaintiff in the various family businesses, his involvement is limited by his mental and physical condition, resulting in sporadic contribution and performance. Defendants’ contention regarding finding of fact 32, if accepted, would bring it into direct conflict with the Commission’s finding that plaintiff was “essentially unable to work” since his injury. Moreover, nothing in finding of fact 32 indicates plaintiff’s “positions,” such as they were, in the family

businesses were normally available in the competitive job market or indicative of wage-earning capacity. *See Saums*, 346 N.C. at 765, 487 S.E.2d at 750; *Bostick v. Kinston-Neuse Corp.*, 145 N.C. App. 102, 107, 549 S.E.2d 558, 561 (2001). Rather, the Commission's order, read as a whole, indicates plaintiff's mental and physical limitations resulting from his injury prevented him from working, and, while his desire to work prompted him to become involved with the family businesses at some level, it did not show that plaintiff was able to earn wages. Indeed, plaintiff did not receive any income for the limited and sporadic duties he performed for the family businesses. The findings of fact made by the Commission are not in conflict and support the conclusions of law and award regarding plaintiff's entitlement to compensation. This assignment of error is overruled.

II. Sanctions

In his appeal, plaintiff asserts defendants ignored the mandatory provisions of the Act and engaged in stubborn and unfounded litigiousness in a manner that justifies the imposition of sanctions under N.C. Gen. Stat. §97-88.1 (2003). In its opinion and award, the Commission found a hearing was required to determine the issues of the case in light of the numerous depositions and expert opinions required. While noting that Ford's conduct in handling the case may have contributed to plaintiff's stress, the Commission found sanctions were not justified. Based on that finding, the Commission concluded "[p]laintiff [was] not entitled to attorney fees or costs [and] defendants [were] not subject to sanctions" under N.C. Gen. Stat. §§97-18 and 97-88.1.

North Carolina General Statutes §97-88.1 provides, in pertinent part, "[i]f the Industrial Commission shall determine that any hearing has been . . . defended without reasonable ground, it may assess the whole cost of the proceedings including reasonable fees for . . . plaintiff's

attorney upon the party who has . . . defended them.” The statute is not intended to operate whenever the defense is unsuccessful in defending a claim, *see Sparks v. Mountain Breeze Restaurant*, 55 N.C. App. 663, 665, 286 S.E.2d 575, 576 (1982), but rather its purpose is “to prevent ‘stubborn, unfounded litigiousness’ which is inharmonious with the primary purpose of the Workers’ Compensation Act to provide compensation to injured employees.” *Beam v. Floyd’s Creek Baptist Church*, 99 N.C. App. 767, 768, 394 S.E.2d 191, 192 (1990) (citation omitted). Our review of a decision of the Commission to award or deny attorney fees is limited to determining whether the Commission abused its discretion. *Whitfield v. Laboratory Corp. of Am.*, 158 N.C. App. 341, 358, 581 S.E.2d 778, 789 (2003) (citing *Troutman v. White & Simpson, Inc.*, 121 N.C. App. 48, 54-55, 464 S.E.2d 481, 486 (1995)).

We note both the deputy commissioner and the Commission declined to award plaintiff attorney fees as a sanction pursuant to N.C. Gen. Stat. §97-88.1. Our review of the record fails to disclose an abuse of discretion by the Commission. Rather, defendants’ actions in the instant case simply amount to a vigorous opposition to plaintiff’s claim. To the extent plaintiff has argued the Commission’s findings of fact “did not fully and accurately present the evidence regarding defendants’ unreasonable defense in this case,” the Commission 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. The Commission was required to examine the expert testimony of no less than ten doctors in order to resolve the issues pending before it, and we cannot say the Commission abused its discretion in denying attorney fees based on unfounded or stubborn litigiousness.

Affirmed.

Judges WYNN and STEELMAN concur.

Report per Rule 30(e).