NO. COA03-1080

NORTH CAROLINA COURT OF APPEALS

Filed: 1 June 2004

SHEILA M. ARNOLD,
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 840798

WAL-MART STORES, INC.,
Employer,

and

INSURANCE COMPANY OF THE STATE
OF PENNSYLVANIA,
Carrier,
Defendants.

Appeal by plaintiff from opinion and award entered 29 May 2003 by the North Carolina Industrial Commission. Heard in the Court of Appeals 29 April 2004.

Law Offices of Kathleen G. Sumner, by Kathleen G. Sumner for plaintiff-appellant.

Young Moore and Henderson P.A., by J.D. Prather, Michael W. Ballance and Zachary C. Bolen, for defendant-appellees.

LEVINSON, Judge.

Plaintiff (Sheila Arnold) appeals from an Opinion and Award of the North Carolina Industrial Commission. We affirm.

The relevant facts are not in dispute: Plaintiff was employed by defendant Wal-Mart in 1995. On 4 May 1998 plaintiff suffered a compensable injury by accident, resulting both in

temporary permanent disability and also a 10 percent permanent partial disability rating to her back. On 13 July 1998 plaintiff was released to return to work with certain restrictions. Defendant did not provide employment within these restrictions and plaintiff did not return to work for defendant. On 13 May 1999 plaintiff returned to work for a new employer, at a salary at least as high as she earned before the accident.

Plaintiff filed for workers' compensation benefits and on 5 December 2001 the Industrial Commission awarded plaintiff medical benefits, temporary total disability benefits, and permanent partial disability benefits. Defendants appealed from the Commission's Opinion and Award. On 3 December 2002 this Court issued an opinion affirming in part, and reversing and remanding in part, the Commission's Opinion and Award. *See Arnold v. Wal-Mart Stores, Inc.*, 154 N.C. App. 482, 571 S.E.2d 888 (2002) ("*Arnold I*"). The opinion first reviewed the statutes governing disability benefits. The Court noted that an "injured employee . . . generally has two options" for receiving workers' compensation benefits. *Id*. at 484, 571 S.E.2d at 891. If a compensable injury results in a partial or total loss of wage-earning capacity, the employee is considered "disabled" in the meaning of the workers' compensation statutes, and may receive disability compensation. N.C.G.S. §97-2(9) (2003). Compensation for loss of wage earning capacity is governed by N.C.G.S. §97-29 (2003) (total disability), and N.C.G.S. §97-30 (2003) (partial disability). The Court also discussed the second option available to an employee if the employee "has a specific physical impairment that falls under the schedule set forth in N.C. Gen. Stat. §97-31 [(2003)], regardless of whether the employee has, in fact, suffered a loss of wage-earning capacity." *Arnold*, 154 N.C. App. at 484, 571 S.E.2d at 891 (quoting *Knight v. Wal-Mart Stores, Inc.*, 149 N.C. App. 1, 11, 562 S.E.2d 434, 442, *disc. review denied*, 355 N.C. 749, 565 S.E.2d 667 (2002) and *aff'd*, 357 N.C. 44, 577 S.E.2d 620 (2003)). The Court further noted that

an injured employee may not "recover from both methods simultaneously." *Arnold*, 154 N.C. App. at 484, 571 S.E.2d at 891. Regarding the determination of when a claimant's "healing period" ends, *Arnold I* held:

> The ending of the healing period under N.C. Gen. Stat. §97-31 is "when the injury has stabilized, referred to as the point of 'maximum medical improvement' (or . . . "MMI"). The Commission must find the date on which the employee reached MMI with regard to the specific scheduled injury before awarding compensation from that date based on the statutory number of weeks set forth in N.C. Gen. Stat. §97-31.

Arnold, 154 N.C. App. at 485, 571 S.E.2d at 891. *Arnold I* then addressed deficiencies in the Commission's Award:

> Here, the Commission did not specify under which section of the Act it awarded compensation. . . . The Commission found that employee had a 10 percent permanent impairment rating and awarded benefits for the scheduled statutory injury starting on 13 May 1999, the date employee returned to employment. However, under N.C. Gen. Stat. §97-31 , the date of returning to employment and the employee's wage-earning capacity are irrelevant. What is relevant is the end of employee's "healing period" or the date employee reached MMI. The Commission failed to find the date the "healing period" ended or the date employee reached MMI. Without such a finding, the Commission could not award benefits under N.C. Gen. Stat. §97-31. We vacate the award of the Commission and remand for further findings of fact regarding the date employee reached MMI.

Arnold, 154 N.C. App. at 485, 571 S.E.2d at 891-92.

In reviewing a decision of the Industrial Commission, this Court is mindful that "(1) the full Commission is the sole judge of the weight and credibility of the evidence, and (2) appellate courts reviewing Commission decisions are limited to reviewing 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). Further, "the findings of fact of the Industrial Commission are conclusive on appeal when supported by competent evidence, even though there be evidence that would support findings to the contrary." *Jones v. Desk Co*., 264 N.C. 401, 402, 141 S.E.2d 632, 633 (1965) (*per curiam*). In the instant case, "[b]ecause [plaintiff] do[es] not assign as error any of the Industrial Commission's findings of fact, they are 'conclusively established on appeal.'" *McGrady v. Olsten Corp*., 159 N.C. App. 643, 648, 583 S.E.2d 371, 375 (2003) (quoting *Johnson v. Herbie's Place*, 157 N.C. App. 168, 180, 579 S.E.2d 110, 118, *disc. review denied*, 357 N.C. 460, 585 S.E.2d 760 (2003)).

Plaintiff argues first that the Industrial Commission erred by equating the date that she reached MMI with the end of her "healing period." Relying on *Walker v. Lake Rim Lawn & Garden*, 155 N.C.App. 709, 575 S.E.2d 764, *disc. review denied*, 357 N.C. 67, 579 S.E.2d 577 (2003), plaintiff contends the healing period does not necessarily end when the claimant reaches MMI but must, instead, take into account one's vocational recovery. However, the holding of *Arnold I* remained the "law of the case" for purposes of remand to the Industrial Commission and the present appeal:

> "As a general rule, when an appellate court passes on questions and remands the case for further proceedings to the trial court, the questions therein actually presented and necessarily involved in determining the case, and the decision on those questions become the law of the case[.]" Under the law of the case doctrine, an appellate court ruling on a question governs the resolution of that question both in subsequent proceedings in the trial court and on a subsequent appeal, provided the same facts and the same questions, which were determined in the previous appeal, are involved in the second appeal.

Creech v. Melnik, 147 N.C. App. 471, 473-74, 556 S.E.2d 587, 589 (2001) (quoting *Tennessee-Carolina Transp. Inc. v. Strick Corp*., 286 N.C. 235, 239, 210 S.E.2d 181, 183 (1974))

(additional citations omitted). Accordingly, "this Court's prior ruling that plaintiff is not entitled to temporary total disability after reaching maximum medical improvement is now the law of the case, and we do not address this issue[.]" *Demery v. Converse, Inc*., 138 N.C. App. 243, 252, 530 S.E.2d 871, 877 (2000). This assignment of error is overruled.

Plaintiff's other two arguments essentially reiterate the same issue. Plaintiff contends that several of the Commission's legal conclusions about her award were erroneously based on the assumption that the end of the healing period was the same as the date plaintiff reached MMI. Again, in *Arnold I*, this Court clearly held that the Commission should employ the date of MMI as the end of the healing period. This ruling became the law of the case and is binding on this Court in our review of this case.

Finally, plaintiff argues that the evidence fails to support the Commission's finding of fact that she reached MMI on 21 August 1998. However, as discussed above, plaintiff failed to assign error to any of the Commission's findings of fact, which are therefore conclusively established on appeal. Plaintiff failed to preserve for appellate review the issue of the adequacy of the evidence to support the Commission's findings of fact.

For the reasons discussed above, the Opinion and Award of the Industrial Commission is Affirmed.

Judges McCULLOUGH and HUDSON concur.

Report per Rule 30(e).