NO. COA02-458

NORTH CAROLINA COURT OF APPEALS

Filed: 18 March 2003

TERESA ABSHER,
Employee-Plaintiff,
v.
North Carolina Industrial Commission
I.C. File No. 870745

THOMAS BUILT BUSES, Inc.,
Employer,

and

CONTINENTAL CASUALTY COMPANY,
Carrier,
Defendants.

Appeal by defendants from opinion and award entered 28 November 2001 by the North Carolina Industrial Commission. Heard in the Court of Appeals 22 January 2003.

Robert D. Davidson, Jr., for plaintiff-appellee.

Womble Carlyle Sandridge & Rice, by Clayton Custer and Christopher Howard, for defendant-appellants.

LEVINSON, Judge.

Defendants appeal from an opinion and award of the Industrial Commission, awarding plaintiff (Teresa Absher) compensation for temporary total disability. For the reasons discussed below, we affirm in part, and reverse and remand in part.

Plaintiff was employed by Thomas Built Buses (defendant) in 1995. In 1996, she sought medical treatment for neck and shoulder pain and in August, 1996, she underwent fusion surgery

at two sites on her vertebrae. She recovered from this surgery, and returned to work for defendant on 17 October 1996. In May 1997, while at work, plaintiff was struck by a forklift operated by a co-worker. She sought medical treatment for pain and bruises the same day, and received an x-ray. Although plaintiff continued to work for defendant during the following year, she experienced increasing pain, for which she sought medical treatment from several physicians. On 30 June 1998, plaintiff's family physician, Dr. Kruger, restricted her to work that did not require her to lift more than ten pounds, or to bend, stoop, or be on her feet. Defendant had no positions available meeting these restrictions, so plaintiff has not worked for defendant since 3 July 1998. Plaintiff subsequently obtained a tomogram, which revealed that her earlier fusion surgery had fractured. When conservative measures failed to relieve the problem, plaintiff underwent a refusion surgery on 17 February 1999. The refusion was performed by Dr. Admundson, the physician who performed the initial fusion surgery.

Following the refusion surgery, plaintiff "underwent an interdisciplinary" course of rehabilitation for six months, and on 12 August 1999, was "released to the care of her primary treating physician for ongoing treatment and medication." Plaintiff was restricted to sedentary work that did not require lifting more than ten pounds, did not require reaching overhead, and allowed for frequent changes of position and alternation of arms. Defendant had no positions meeting these restrictions, so plaintiff was unable to return to work for defendant.

On 4 February 1999, shortly before plaintiff's refusion surgery, she filed an Industrial Commission Form 33, seeking a contested case hearing. Defendant responded in an Industrial Commission Form 33R, denying plaintiff's right to disability compensation. A hearing was held on 25 October 1999, about two months after plaintiff completed her post-surgical rehabilitation program. On 10 August 2000, a deputy commissioner issued an opinion and award, awarding

plaintiff benefits for temporary total disability. Defendants appealed to the Full Commission, which conducted a review on 20 April 2001, and issued its opinion and award on 28 November 2001. The Commission affirmed the deputy commissioner, with minor modifications. From the award and opinion of the Full Commission, defendants appeal.

Standard of Review

On an appeal from an opinion and award of the Industrial Commission, the standard of review by this Court "is limited to a determination of (1) whether the Commission's findings of fact are supported by any competent evidence in the record; and (2) whether the Commission's findings justify its conclusions of law." *Goff v. Foster Forbes Glass Div*., 140 N.C. App. 130, 132-33, 535 S.E.2d 602, 604 (2000). The Industrial Commission's findings of fact are binding on appeal if supported by any competent evidence, even if the record also contains evidence that would support findings to the contrary. *Adams v. AVX Corp*., 349 N.C. 676, 509 S.E.2d 411 (1998). Thus, "the Court of Appeals is bound by the Commission's findings of fact when they are supported by direct evidence or by reasonable inferences drawn from the record." *Kennedy v. Duke Univ. Med. Center*, 101 N.C. App. 24, 30, 398 S.E.2d 677, 680 (1990). The Industrial Commission's conclusions of law, however, are reviewable *de novo. Lewis v. Craven Regional Medical Center*, 122 N.C. App. 143, 468 S.E.2d 269 (1996).

I.

Defendants argue on appeal that the Industrial Commission erred by awarding plaintiff benefits for temporary total disability, and also by concluding that plaintiff's disability (if any) after July 3, 1998, was caused by her injury on 28 May 1997.

Under N.C.G.S. §97-2(9) (2001), disability is defined as the "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." "[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).

"[I]n worker's compensation cases the initial burden has always been on the plaintiff to produce competent evidence of all three *Hilliard* factors before the burden shifts to defendant to rebut plaintiff's evidence." *Coppley v. PPG Indus., Inc.*, (*Coppley I*), 133 N.C. App. 631, 635, 516 S.E.2d 184, 187 (1999)). There are several alternative ways a plaintiff may establish her inability to earn the same wages in any employment:

> The employee may meet this burden 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) (citing *Peoples v. Cone Mills Corp*., 316 N.C. 426, 443-444, 342 S.E.2d 798, 809 (1986), and *Tyndall v. Walter Kidde Co*., 102 N.C. App. 726, 730, 403 S.E.2d 548, 550, *disc. review denied*, 329 N.C. 505, 407 S.E.2d 553 (1991)). In the present case, plaintiff did not present evidence of the kind required under the second, third, or fourth avenues discussed in *Russell*. Therefore, plaintiff was required to present "medical evidence that he is physically or mentally, as a

consequence of the work related injury, incapable of work in any employment." *Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457.

"Furthermore, to ensure effective appellate review, the Commission's findings must sufficiently reflect that plaintiff produced evidence to prove all three *Hilliard* factors." *Coppley*, 133 N.C. App. at 635, 516 S.E.2d at 187. We review, therefore, to determine whether the Industrial Commission fulfilled its duty to make adequate findings of fact, and whether these are supported by competent evidence. In the case *sub judice*, the Industrial Commission's findings of fact include, in relevant part, the following:

> 2. . . . In late July 1996 plaintiff sought medical treatment for severe neck pain[.] . . . Plaintiff therefore underwent fusion surgery. . . and was out of work approximately three months as a result. Plaintiff was released and returned to work . . . on or about October 17, 1996. Dr. Admundson, a neurosurgeon, performed the surgery and treated plaintiff for this injury.
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> 3. After the fusion surgery and her return to work, plaintiff continued under Dr. Admundson's care for several months[.] . . . On April 17, 1997 . . . Dr. Admundson released plaintiff from his care, and noted that there was a very solid fusion and no instability at the surgical sites.
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> 5. On May 28, 1997, while in the course and scope of her employment with defendant-employer plaintiff was struck by a tow motor [forklift.] As a result . . . plaintiff suffered numerous abrasions and bruises, [and] experienced immediate pain[.] . . .
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> 6. Plaintiff sought treatment that same day . . . [and] reported that her neck was "feel[ing] funny." . . . In July 1997 plaintiff [went to] her family physician, Dr. Kruger, an internist, with complaints of neck pain. Plaintiff [saw] Dr. Kruger for several months . . . with Dr. Kruger increasing the strength of [pain] medication . . . as plaintiff's complaints of pain intensified.
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> 7. Plaintiff's complaints continued to increase . . . [and] Dr. Kruger ordered a repeat MRI in June 1998 . . . [and] referred plaintiff to Dr. Notricia at the Pain Management Clinic . . .

[where] [p]laintiff underwent several epidural steroid injections. . . .

8. On June 30, 1998, Dr. Kruger assigned work restrictions of light duty and indicated that plaintiff was unable to lift greater than ten pounds, and was not to bend, stoop, or be on her feet. Because defendant-employer did not have suitable employment within these restrictions, plaintiff went out of work altogether. . . .

9. Plaintiff [went] to Dr. Admundson on September 21, 1998 with neck pain. . . .

10. A tomogram . . . confirmed that . . . the fusion . . . was not fully solid. . . . On November 13, 1998 a repeat tomogram again showed an incomplete fusion . . . [and] Dr. Admundson recommended a surgical approach.

11. On February 17, 1999 Dr. Admundson performed a refusion. . . . While in surgery, Dr. Admundson discovered a very clear fracture line . . . confirming his initial suspicion. . . . Based upon plaintiff's history that she successfully returned to work after her initial surgery, was later hit by a tow motor at work . . . and her symptoms worsened after this incident, Dr. Admundson was of the opinion, and the Full Commission so finds, that the fracture . . . was caused by plaintiff being hit by the tow motor. . . . [T]his accident on May 28, 1997 materially aggravated plaintiff's preexisting condition and caused the condition to become disabling. . . . .

13. Plaintiff underwent . . . physical therapy and psychological counseling . . . through mid-August, 1999. . . . As a result of the evaluations and treatment . . . it was determined that plaintiff was unable to return to work in her former employment as a hose assembler. Plaintiff was given sedentary work restrictions with no lifting greater than ten pounds, no significant overhead work, and with frequent positional changes as well as alternating the use of her arms. Upon completion of this program, plaintiff was released to the care of her primary treating physician for ongoing treatment and medication.

14. Plaintiff last worked for defendant-employer on July 3, 1998. Defendant-employer, through its own admission, does not have a position that is suitable for plaintiff's physical capacity. As of the date of the hearing . . . plaintiff had made no independent efforts to locate suitable employment; neither have

> defendants assisted plaintiff in locating suitable employment through vocational rehabilitation. Additionally, plaintiff was not at MMI as of the date of the hearing . . . and was unable because of her compensable injury to earn wages.
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> 16. As a result of the compensable material aggravation of her preexisting condition, plaintiff has been totally disabled since July 3, 1998. However, given her age, education, and employment background, and the fact that she has been released to work within restrictions . . . the Full Commission cannot find and hold by the greater weight of the evidence at this time that plaintiff is permanently totally disabled. Plaintiff is capable of working in some capacity; however, there is no evidence in th[e] record showing that there are jobs available in the competitive job market that are suitable for plaintiff's physical capacity that she is capable of obtaining and performing.
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> 17. Because Dr. Admundson was the physician who operated on plaintiff twice . . . and because he actually treated plaintiff while Dr. Timothy B. Garner . . . merely reviewed the medical records . . . Dr. Admundson's evidence is given greater weight.

On the basis of its findings of fact, the Industrial Commission made conclusions of law including, in pertinent part the following:

> 1. On May 28, 1997 plaintiff sustained a compensable injury by accident arising out of and in the course of her employment . . . when a tow motor [forklift] hit her. N.C.G.S. §97-2(6). This injury by accident materially aggravated her underlying, preexisting condition by fracturing the surgically-fused disc, and contributed in some reasonable degree to plaintiff's ongoing disability. . . .
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> 2. As a result of her compensable injury by accident that materially aggravated an underlying, preexisting condition, plaintiff has been unable to earn wages since July 3, 1998, and is entitled to benefits as a result. N.C.G.S. §97-29.
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> 5. Plaintiff was totally unable to earn any wages for periods of time as a result of her compensable injury and, although

> some of her physicians say she can return to work with restrictions, there is no evidence in this record of what her earning capability might be. Additionally, she has not reached the end of the healing period. Accordingly, plaintiff is entitled to continuing disability until further order of the Industrial Commission.

Defendants have argued that the Industrial Commission erred by finding that plaintiff's disability after July 3, 1998 was caused by the accident in May, 1997. We disagree.

"It is the duty of the Commission, not this Court, to weigh the evidence and to assess its credibility, and when conflicting evidence is presented, the Commission's finding of causal connection between the accident and the disability is conclusive." *Pomeroy v. Tanner Masonry*, 151 N.C. App. 171, 181, 565 S.E.2d 209, 216 (2002) (citing *Anderson v. Lincoln Construction Co*., 265 N.C. 431, 434, 144 S.E.2d 272, 275 (1965)). Further, "[i]t is well-established that even if decedent's injury at work aggravated a pre-existing condition, the resulting disability is nonetheless compensable." *Skillin v. Magna Corp.*, 152 N.C. App. 41, 50, 566 S.E.2d 717, 723 (2002).

In the present case, the Commission found that plaintiff had suffered a compensable injury when she was struck by a forklift, which injury caused her fused vertebrae to fracture. The Commission concluded that the accident "materially aggravated plaintiff's preexisting condition and caused the condition to become disabling." We conclude these findings were amply supported by competent record evidence. We further conclude that the Industrial Commission's findings of causation support its conclusion of law that plaintiff suffered a compensable injury, which caused her disability. Accordingly, these findings and conclusion are affirmed, and this assignment of error is overruled.

We next consider the Industrial Commission's findings and conclusions regarding the extent of plaintiff's disability. The Commission found that even after surgery and rehabilitation,

plaintiff was subject to certain work restrictions, and that defendant did not have any positions meeting these restrictions. We conclude that the Industrial Commission's findings sufficiently support the conclusion that plaintiff was incapable of earning wages in the *same employment*, notwithstanding the Industrial Commission's failure to make an express finding to that effect. *See Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 187, 345 S.E.2d 374, 379 (1986) (holding Commission's finding that claimant was "unable to obtain employment in the cotton textile industry due to his inability to pass the breathing test . . . amounted to a finding that the plaintiff was incapable of earning the same wages he had earned before his injury in the same employment" despite fact that "neither the deputy commissioner nor the Commission specifically so stated"); *Skillin*, 152 N.C. App. at 51, 566 S.E.2d at 724 (evidence that employer had no positions available meeting claimant's work restrictions sufficient to support conclusion that plaintiff was disabled). The Industrial Commission's conclusion that plaintiff was totally disabled is affirmed as regards her inability to earn her pre-injury wages in the same employment.

Finally, we consider the Industrial Commission's findings and conclusions as they pertain to plaintiff's ability to earn the same wages *in any employment*. We conclude that the Industrial Commission's findings of fact on this issue are incomplete and inconsistent.

The Industrial Commission concluded that "plaintiff has been unable to earn wages since July 3, 1998[,]" and was therefore entitled to benefits for temporary total disability, pursuant to G.S. §97-29. The Industrial Commission's findings of fact support its award of benefits for temporary total disability for the period 3 July 1998, until 12 August 1999, when she completed the rehabilitation from her second surgery and was released to work within certain restrictions. However, the Commission failed to make a finding that plaintiff remained unable to earn the

same wages in any employment; moreover, its findings pertaining to this issue are contradictory. In finding of fact number 14, the Commission states that plaintiff "was unable because of her compensable injury to earn wages[,]" and, in finding of fact number 16, that "plaintiff has been totally disabled since July 3, 1998." However, the Commission also states in finding of fact number 16 that plaintiff "has been released to work within restrictions" and "is capable of working in some capacity[.]"

"[A]lthough the Commission 'is not required . . . to find facts as to all credible evidence . . . the Commission must find those facts which are necessary to support its conclusions of law[.]'" *Pomeroy*, 151 N.C. App. at 178, 565 S.E.2d at 214 (quoting *Peagler v. Tyson Foods, Inc.*, 138 N.C. App. 593, 602, 532 S.E.2d 207, 213 (2000)). Thus, the Industrial Commission is "required to make specific findings with respect to crucial facts upon which the question of plaintiff's right to compensation depends." *Gaines v. Swain & Son, Inc.*, 33 N.C. App. 575, 579, 235 S.E.2d 856, 859 (1977) (citations omitted). Further, if the findings of fact "are insufficient to enable the court to determine the rights of the parties upon the matters in controversy, the proceeding must be remanded to the commission for proper findings of fact." *Id.* See *Thomason v. Cab Co.*, 235 N.C. 602, 605-6, 70 S.E.2d 706, 709 (1952):

> The findings of fact of the Industrial Commission . . . must be sufficiently positive and specific to enable the court on appeal to determine whether they are supported by the evidence and whether the law has been properly applied to them. . . . [T]he court cannot decide whether the conclusions of law and the decision of the Industrial Commission rightly recognize and effectively enforce the rights of the parties upon the matters in controversy if the Industrial Commission fails to make specific findings as to each material fact upon which those rights depend.

"If the findings of the Commission are insufficient to determine the rights of the parties, the appellate court may remand to the Industrial Commission for additional findings." *Lanning v.*

Fieldcrest-Cannon, Inc., 352 N.C. 98, 106, 530 S.E.2d 54, 60 (2000). *See also Harrell v. Harriet & Henderson Yarns*, 314 N.C. 566, 575, 336 S.E.2d 47, 52 (1985) (where Commission makes "inconsistent fact findings, . . . the proper course is to remand the case to the Commission"); *Neal v. Leslie Fay, Inc.*, 78 N.C. App. 117, 119, 336 S.E.2d 628, 630 (1985) ("[t]hough this appeal raises [certain] questions they cannot be determined because the Commission's findings of fact and conclusions of law are inconsistent and contradictory, some of which support and some of which undermine the decision made").

We conclude that the Industrial Commission's findings of fact support its conclusion that plaintiff suffered a compensable injury resulting in temporary total disability from 3 July 1998, until at least 12 August 1999, when she was released to return to work within restrictions. However, the Commission's findings of fact are incomplete and inconsistent with regards to the period after 12 August 1999. Accordingly, we affirm the Industrial Commission's award of benefits for temporary total disability from 3 July 1998, until 12 August 1999, and reverse and remand for determination of plaintiff's eligibility after that date.

Affirmed in part, reversed and remanded in part.

Judges TIMMONS-GOODSON and TYSON concur.

Report per Rule 30(e).