An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA05-462

NORTH CAROLINA COURT OF APPEALS

Filed: 18 July 2006

DEVENDRA PATEL,
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 876636

THE STANLEY WORKS CUSTOMER SUPPORT,
Employer,

CONSTITUTION STATE SERVICE COMPANY,
Carrier,
Defendants.

Appeal by defendant from Opinion and Award filed 21 December 2004 by the North Carolina Industrial Commission. Heard in the Court of Appeals 7 December 2005.

Charles G. Monnett III & Associates, by Charles G. Monnett, III, for plaintiff-appellee.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by M. Duane Jones, for defendant-appellant.

GEER, Judge.

Defendants appeal from the Industrial Commission's opinion and award granting plaintiff Deventra Patel total disability benefits. The sole dispute on appeal is the amount of Mr. Patel's average weekly wage. Although the Commission, in making its determination of the average weekly wage, relied on various forms filed by defendants, defendants contend that the

Commission nevertheless miscalculated that figure. Because the Full Commission's findings of fact as to Mr. Patel's average weekly wage are supported by competent evidence, however, our standard of review requires that we affirm.

Facts

Mr. Patel was employed by defendant Stanley Works Customer Support in the order processing department of its facility in Concord, North Carolina. On 10 June 1997, Mr. Patel injured his lower back while lifting a heavy box over his head. Less than two weeks later, defendants filed an Industrial Commission Form 19 stating that Mr. Patel earned $9.21 per hour and worked 12 hours per day, seven days a week. In the Form 19, defendants specified that Mr. Patel had an average weekly wage of $773.64.

From the date of his injury through December 1998, Mr. Patel was able to continue working for Stanley Works while receiving conservative treatment for his ongoing pain. Mr. Patel's condition, however, gradually deteriorated until he was unable to continue working and doctors recommended surgery. On 15 December 1998, Mr. Patel underwent a microdiscectomy.

On 29 December 1998, defendants filed a Form 60 admitting Mr. Patel's right to compensation. Like the Form 19, the Form 60 indicated that Mr. Patel's average weekly wage was $773.64 with a weekly compensation rate of $512.00.

As a result of the surgery and post-operative recovery, Mr. Patel was medically excused from work through 14 June 1999. On 10 June 1999, he was released to return to work with a permanent lifting restriction of no more than 30 pounds and a permanent partial disability rating of 12% to his lumbar spine. Mr. Patel's temporary total disability benefits were terminated pursuant to an Industrial Commission Form 28T.

After his return to work, Mr. Patel's symptoms worsened, and he was again removed from work on 31 July 1999. Defendants thereafter filed a Form 62 noting that ongoing total disability benefits would be reinstated effective 31 July 1999. Mr. Patel has not since returned to any gainful employment and has undergone numerous additional medical procedures.

Defendants ultimately paid Mr. Patel total disability compensation at the rate of $512.00 per week for the periods of 15 December 1998 until 13 June 1999 and 31 July 1999 through 29 January 2003. In late 2002, however, defendants filed with the Commission an incomplete Form 22. The Form 22 contained no information regarding the days Mr. Patel had actually worked, but rather listed the total amounts earned by Mr. Patel each month. The form included no explanation as to why the amounts listed for five of the twelve months varied.

On 29 January 2003, defendants notified Mr. Patel that they believed they had miscalculated his average weekly wage and that he had been overpaid. As of 1 February 2003, defendants unilaterally reduced the amount of weekly benefits paid to Mr. Patel by $305.60 per week, so that Mr. Patel received only $206.40 per week.

Following a hearing, the deputy commissioner entered an opinion and award on 24 February 2004, finding with respect to the average weekly wage issue that:

> The aforementioned Form 22 was not prepared or filed until 29 December 2002, five years and six months . . . after [Mr. Patel's] injury by accident. Over that period, [Stanley Works] had ample time and opportunity to investigate all issues, including [Mr. Patel's] average weekly wage. Because [Stanley Works] offered no explanation for the delay in raising issues related to [Mr. Patel's] average weekly wage, the undersigned finds their delay to be unreasonable. Additionally, prejudice would result, and has with [Stanley Works'] unilateral actions, from a sizeable reduction in the benefits that [Mr. Patel] has been receiving.

The deputy commissioner awarded Mr. Patel ongoing total disability benefits at the rate of $512.00 per week and directed defendants to pay the difference accruing since they had unilaterally reduced his benefits.

Defendants appealed to the Full Commission, which, on 21 December 2004, filed an opinion and award substantially affirming the decision of the deputy commissioner. Defendants timely appealed to this Court.

Discussion

On appeal, defendants argue that the Full Commission's finding that Mr. Patel had an average weekly wage of $773.64 is not supported by competent evidence. In reviewing a decision by the Full Commission, this Court's role "is limited to determining whether there is any competent evidence to support the findings of fact, and whether the findings of fact justify the conclusions of law." *Cross v. Blue Cross/Blue Shield*, 104 N.C. App. 284, 285-86, 409 S.E.2d 103, 104 (1991). The Commission's findings of fact "are conclusive on appeal when supported by competent evidence even though evidence exists that would support a contrary finding." *Johnson v. Southern Tire Sales & Serv.*, 358 N.C. 701, 705, 599 S.E.2d 508, 512 (2004) (internal quotation marks omitted).

The Commission, in making its determination regarding Mr. Patel's average weekly wage, relied upon defendants' representations in their Form 19 and Form 60 and upon defendants' actual payments to Mr. Patel over a period of years. In particular, the Full Commission found that the Form 19 stated that for more than two years prior to his injury, Mr. Patel had "earned $9.21 per hour and worked 12 hours per day, seven days per week," for an average weekly wage, including overtime, of $773.64 per week. Further, the Full Commission found that defendants' Form 60 agreed to pay total disability benefits of $512.00 per week _ a

rate based on an average weekly wage of $773.64. Finally, the Commission found that "[d]efendants paid total disability compensation to plaintiff at the rate of $512.00 per week for the periods of December 15, 1998 through June 13, 1999, and from July 31, 1999 to January 29, 2003."

While statements by an employer in a Form 60 and a Form 19 may not conclusively determine the nature and extent of an employee's disabilities, such representations by the employer to the Commission remain competent _ although not conclusive _ evidence of an employee's average weekly wage. *See, e.g.*, *Harris v. Asheville Contracting Co.*, 240 N.C. 715, 718, 83 S.E.2d 802, 804 (1954) (stating that "we know of no reason why the information contained in [a Form 19], with respect to wages paid by the employer, should not be admitted as evidence when a claim for compensation is filed and a hearing is held pursuant thereto"); *Haley v. ABB, Inc.*, ___ N.C. App. ___, ___, 621 S.E.2d 180, 186 (2005) (affirming Commission's decision regarding an employee's average weekly wage when, among other things, the evidence before the Commission included a Form 60 in which the employer had stated the amount contested on appeal). The Commission's decision is, therefore, supported by competent evidence.

Defendants point to their Form 22, filed more than four years after defendants first paid Mr. Patel total disability compensation. With respect to the Form 22, the Commission found:

> 34. On December 19, 2002 defendants filed a Form 22. The instructions of the Form 22 require an employer to:
>
> > "[P]lace an X in the proper squares to indicate days paid in full. Days the employee is on paid vacation leave and/or paid sick leave should be marked with an X. Leave blank squares to indicate days not paid in full for any reason. Total earnings for each pay period should be placed in the proper column. If the employee's job or pay rate was changed during the

> reported period, this should be noted, with an indication as to the nature of the change."
>
> Rather than complying with the specific instructions, defendants prepared the Form 22 which has no information on the days plaintiff worked and merely shows the total amounts earned each month. The amounts listed for five of the twelve months listed are different and no information is listed to explain variations in pay.
>
> 35. Plaintiff's 1996, 1997 and 1998 tax returns are a part of the evidence of record, as are plaintiff's daily attendance records for 1997. Plaintiff's daily attendance records for 1997 show different numbers of absences per month ranging from one to six days. However, plaintiff's pay per month in 1997 remained the same each month according to the Form 22.
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> 36. Because defendants failed to submit a properly completed Form 22, the Form 22 does not constitute competent evidence of plaintiff's average weekly wage and the Form 22 is not sufficient evidence from which to compute an average weekly wage. Defendants have not presented competent evidence that the average weekly wage paid plaintiff for over five years was incorrect. Therefore, the Full Commission finds as fact that plaintiff's average weekly wage is $773.64, which yields the maximum compensation rate for 1997 of $512.00.

In short, the Commission chose to give greater weight to the Forms 19 and 60 than the improperly-completed and belatedly-filed Form 22. As this Court has previously observed, "[b]efore making findings of fact, the Industrial Commission must consider *all* of the evidence. The Industrial Commission may not discount or disregard any evidence, *but may choose not to believe the evidence after considering it.*" *Weaver v. Am. Nat'l Can Corp.*, 123 N.C. App. 507, 510, 473 S.E.2d 10, 12 (1996) (second emphasis added).

Defendants also point to Mr. Patel's tax records and daily attendance records, arguing that the Full Commission erred by "fail[ing] to make specific findings of fact which indicated that they had considered this evidence." Finding of Fact 35, however, specifically referenced those pieces of evidence and relied upon them in connection with the Commission's

determination that the Form 22 was flawed. The Commission was not required to be any more specific regarding that evidence since, as our Supreme Court has stressed, the Commission "is not required to make findings as to each fact presented by the evidence." *Johnson*, 358 N.C. at 705, 599 S.E.2d at 511. Rather, it need only "find those crucial and specific facts upon which the right to compensation depends so that a reviewing court can determine on appeal whether an adequate basis exists for the Commission's award." *Id.* The findings made by the Commission in this case provide an adequate basis upon which to review the award.

Although defendants have pointed to evidence to support their calculation of the average weekly wage, it is well-settled that "'[t]his Court is not at liberty to reweigh the evidence and to set aside the findings . . . simply because other . . . conclusions might have been reached.'" *Brown v. Family Dollar Distrib. Ctr.*, 129 N.C. App. 361, 363, 499 S.E.2d 197, 198 (1998) (quoting *Baker v. City of Sanford*, 120 N.C. App. 783, 787, 463 S.E.2d 559, 562 (1995) (internal quotation marks and citations omitted), *disc. review denied*, 342 N.C. 651, 467 S.E.2d 703 (1996)). Since the Commission's calculation is supported by defendants' own representations to the Commission in the Forms 19 and 60, as well as their years of payments to Mr. Patel, we must uphold that determination. Given our disposition of this appeal, we need not address defendants' remaining assignments of error.

Affirmed.

Judges HUNTER and McCULLOUGH concur.

Report per Rule 30(e).