

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA11-1185
NORTH CAROLINA COURT OF APPEALS

Filed: 5 June 2012

THOMAS McFALLS, Employee,
Plaintiff

v.

North Carolina Industrial
Commission
I.C. No. 890142

INGLES MARKETS, INC.,
Employer, SELF-INSURED,
Defendant

Appeal by defendant from opinion and award entered 7
February 2011 by the North Carolina Industrial Commission.
Heard in the Court of Appeals 22 February 2012.

*Law Office of Gary A. Dodd, by Gary A. Dodd, for plaintiff-
appellee.*

*Northup McConnell & Sizemore, PLLC, by Steven W. Sizemore,
for defendant-appellant.*

CALABRIA, Judge.

Ingles Markets, Inc. ("defendant") appeals from an opinion
and award by the Full Commission of the North Carolina
Industrial Commission ("the Commission") which reinstated total
temporary disability payments to Thomas McFalls ("plaintiff").
We affirm.

I. Background

Plaintiff was an employee at one of defendant's food warehouses ("the warehouse"). Plaintiff's employment entailed picking up boxes of product, loading them onto a battery operated pallet jack, and driving the loaded pallet jack to the outgoing loading dock. Plaintiff was also responsible for lifting boxes weighing up to approximately seventy pounds without assistance.

Plaintiff had been employed at the warehouse by defendant's predecessor and then by defendant beginning in 1987. Since 1989, plaintiff experienced periods of lower back pain. According to plaintiff's primary care physician, this pain was caused by lumbar degenerative disc disease and arthritis. However, plaintiff's conditions did not significantly impact plaintiff's job attendance or performance.

On 21 January 2008, plaintiff suffered an injury at the warehouse when he had an onset of severe lower back pain while lifting boxes weighing between fifty and seventy pounds ("the warehouse injury"). By the time plaintiff returned home at the end of his shift, he could barely walk up the steps to his home. Defendant accepted this injury as compensable.

After the warehouse injury, plaintiff sought treatment from

several physicians for his back pain. On 31 March 2008, plaintiff visited Dr. Stephen David ("Dr. David"), an orthopedic spine surgeon. In Dr. David's opinion, the warehouse injury had caused an exacerbation of his underlying conditions and had potentially worsened a herniated disc in plaintiff's lower back. Typically, Dr. David would have treated plaintiff's conditions with surgery. However, Dr. David did not believe that surgery was appropriate for plaintiff due to plaintiff's unrelated medical conditions. Instead, Dr. David recommended injections for pain management and did not permit plaintiff to return to work.

On 11 July 2008, plaintiff returned to Dr. David and continued to complain about severe pain in his lower back. Dr. David again recommended pain management rather than surgery and continued plaintiff's out-of-work status. Dr. David believed plaintiff's condition to be permanent.

On 10 September 2008, plaintiff visited Dr. Richard Broadhurst ("Dr. Broadhurst"), an occupational medicine physician, at the direction of defendant. Dr. Broadhurst diagnosed plaintiff with pre-existing lumbar degenerative disc disease and arthritis. He did not believe that plaintiff's condition had been exacerbated by the warehouse injury. Dr.

Broadhurst recommended that plaintiff enroll in a "work hardening" program, which would allow him to return to useful employment. Plaintiff initially enrolled in the program, but was discharged after he missed several sessions due to his concerns about the program's effect on his other health problems.

On 12 May 2009, plaintiff was examined by physiatrist Dr. Daniel Hankley ("Dr. Hankley"). At this visit, plaintiff reported to Dr. Hankley that he felt he was "almost back to baseline." Dr. Hankley determined that plaintiff had suffered a lumbar strain on 21 January 2008. Dr. Hankley determined that plaintiff had reached maximum medical improvement, assigned plaintiff a one percent permanent partial impairment rating to his back, and told plaintiff to resume normal activities.

Based upon Dr. Hankley's evaluation, defendant filed an application to terminate plaintiff's workers' compensation, which was approved by Special Deputy Commissioner Jennifer S. Boyer on 8 July 2009. Plaintiff's compensation was terminated as of 8 June 2009. Plaintiff appealed this order.

On 17 March 2010, a hearing on plaintiff's appeal was conducted by Deputy Commissioner Robert J. Harris ("Harris"). On 9 December 2010, Harris filed an opinion and award setting

aside the decision to terminate plaintiff's benefits and reinstating plaintiff's compensation. Defendant appealed to the Full Commission.

On 7 July 2011, the Full Commission issued an opinion and award which affirmed Harris's award, with modifications. The Full Commission concluded that Dr. David's diagnosis was to be given more weight than those of Drs. Broadhurst and Hankley. As a result, the Full Commission ordered defendant to continue plaintiff's temporary total disability compensation. Defendant appeals.

II. Standard of Review

The standard of review for an opinion and award of the Commission is well established:

This Court reviews an award from the Commission to determine: (1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are justified by the findings of fact. Where there is competent evidence to support the Commission's findings, they are binding on appeal even in light of evidence to support contrary findings. Moreover, findings of fact which are left unchallenged by the parties on appeal are presumed to be supported by competent evidence and are, thus conclusively established on appeal. The Commission's conclusions of law are reviewed *de novo*.

Kee v. Caromont Health, Inc., ___ N.C. App. ___, ___, 706 S.E.2d

781, 782-83 (2011) (internal quotations and citations omitted).

III. Continuing Disability

Defendant's sole argument on appeal is that the Full Commission erred in concluding that plaintiff was entitled to temporary total disability benefits on and after 8 June 2009. Specifically, defendant contends that plaintiff provided no competent evidence that he was still disabled at that time. We disagree.

The employee seeking compensation under the Act bears the burden of proving the existence of [his] disability and its extent. 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.

Campos-Brizuela v. Rocha Masonry, L.L.C., ____ N.C. App. ____, ____, 716 S.E.2d 427, 436-37 (2011) (internal quotations and citations omitted).

In the instant case, the Commission concluded that

"Plaintiff has shown that he remains totally disabled, in that he is physically unable to work in any employment consistent with Dr. David's order." In reaching this conclusion, the Commission relied upon its finding that "The Full Commission gives greater weight to the medical opinions of Dr. David than to those of Dr. Hankley and Dr. Broadhurst. Dr. David is a spine specialist, and the Full Commission finds that he has greater expertise in low back issues than does Dr. Hankley, a physiatrist, or Dr. Broadhurst, an occupational medicine physician."

Defendant does not challenge the Commission's finding. Rather, defendant contends that any findings regarding Dr. David were insufficient to support a conclusion that plaintiff was disabled on and after 8 June 2009. To support its contention, defendant notes that Dr. David last saw plaintiff on 11 July 2008, and argues that he could not have made a determination regarding plaintiff's disability on 8 June 2009 at that time. Defendant contends that the only competent evidence of plaintiff's condition at that time was the testimony of Dr. Hankley, who treated plaintiff on 12 May 2009 and determined that plaintiff could return to work.

Defendant's argument does not take into account the

totality of Dr. David's testimony. Dr. David testified in his deposition as follows:

Q: Do you have an opinion satisfactory to yourself, based upon a reasonable degree of medical certainty and based upon your findings, as to whether or not [plaintiff] would be limited with respect to the use of his back to any degree, as a result of the exacerbation or worsening of that back condition?

A: Yes. When I last saw him, he was not able to participate in gainful occupation and I wrote him out of work.

Q: And do you have an opinion satisfactory to yourself, based upon a reasonable degree of medical certainty, as to whether or not the findings you made . . . with respect to [plaintiff]'s back, *are permanent in the event that no surgery is performed in the future?*

A: Yes, unless there is some type of compelling data to change my mind since I last saw him and documented this note.

(Emphasis added). Thus, Dr. David believed that, without surgery, plaintiff's condition was permanent and would continue to render plaintiff unable to return to work. In the remainder of the deposition, defendant did not present Dr. David with any "compelling data" that showed that plaintiff's condition had changed since his last visit. Consequently, since plaintiff never underwent surgery, Dr. David's opinion from 11 July 2008 was still applicable to plaintiff's condition on 8 June 2009 and

after that date. The Commission found that this diagnosis was more credible than the diagnosis provided by Dr. Hankley. Since this finding was supported by Dr. David's testimony, it is conclusive on appeal. See *Johnson v. Southern Tire Sales & Serv.*, 358 N.C. 701, 705, 599 S.E.2d 508, 512 (2004) ("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." (internal quotations and citation omitted)). The Commission's findings regarding Dr. David's testimony fully support its conclusion that plaintiff remained totally disabled on and after 8 June 2009. This argument is overruled.

IV. Conclusion

The Commission's findings of fact regarding Dr. David's testimony were supported by competent evidence. These findings supported the Commission's conclusion that plaintiff remained totally disabled on and after 8 June 2009. The Commission's opinion and award is affirmed.

Affirmed.

Judges ERVIN and THIGPEN concur.

Report per Rule 30(e).