NO. COA04-745

NORTH CAROLINA COURT OF APPEALS

Filed: 07 June 2005

MICHAEL HINSON,
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 927717

HARRIS STEEL ERECTORS, INC.,
Employer,

AMERICAN INTERSTATE
INSURANCE COMPANY,
Carrier,
Defendants.

Appeal by defendants from an opinion and award entered 06 November 2003 by the North Carolina Industrial Commission. Heard in the Court of Appeals 26 January 2005.

The McGougan Law Firm, by Dennis T. Worley and Paul J. Ekster for plaintiff-appellee.

Young Moore and Henderson, P.A., by J. Aldean Webster III, for defendants-appellants.

ELMORE, Judge.

Michael Hinson (plaintiff) fell a sizable distance from the roof of a building to the ground on 11 April 1999 while working on a construction site. Plaintiff's injuries were severe, including twenty-nine broken bones, damage to his right eye socket, and multiple lacerations. At the time of the fall, plaintiff was employed by Harris Steel (defendant) for approximately three weeks. Before working with defendant, plaintiff had spent his previous thirty years in heavy

construction, mainly working with steel. Plaintiff, approximately fifty-two years old, has an eighth grade education and does not have a driver's license.

This appeal arises from the Full Commission's determination that plaintiff is permanently and totally disabled and that defendants shall continue to pay compensation and medical costs associated with the fall until his condition changes. Defendants do not challenge the Commission's conclusion that plaintiff's fall was indeed a work-related injury. Rather, their main challenges to the Commission's opinion and award are that 1) plaintiff has refused available work and vocational rehabilitation should not be ceased, and 2) that the wages calculated by the Commission were erroneous and unfair. Defendants raise forty-four convoluted assignments of error and, despite the vast majority of these assignments of error referencing the exact same findings of fact and conclusions of law, we can adequately tell the findings and conclusions being challenged.

Our review of an opinion and award from the Full Commission is well documented. We 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). This Court "does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998)(quoting *Anderson v. Construction Co*., 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999). If there is any evidence at all, taken in the light most favorable to the plaintiff, the finding of fact stands, even if there is substantial evidence to the contrary. *Id*. The plaintiff is entitled to the benefit of every reasonable inference

in his or her favor, whether or not he or she prevailed before the Commission. *See Poole v. Tammy Lynn Ctr.*, 151 N.C. App. 668, 672, 566 S.E.2d 839, 841 (2002). The Full Commission is the "sole judge of the weight and credibility of the evidence," and this Court may not second-guess those determinations. *Deese*, 352 N.C. at 116, 530 S.E.2d at 553.

Defendants challenged the evidence supporting findings that:

> 2. Plaintiff has no additional certification or training that would enable him to obtain employment in other areas. Plaintiff does not have any computer, telephone, telemarketing, or sales skills.
>
> 3. Plaintiff is a hard working individual and has always been placed in physically demanding positions. His personality could be characterized as gruff.

But there was competent evidence supporting these findings. The deposition testimony of Lewis Drumm, plaintiff's vocational rehabilitation case manager, supports a determination that plaintiff's work experience outside of steel is sparse and that he had no formal training. Drumm also described plaintiff as "gruff," but likable, characterizing him as someone who has spent his life in construction. Drumm's deposition testimony also supports the following findings, disputed by defendants:

> 12. Three vocational rehabilitation counselors have been working with plaintiff over a period of years. Plaintiff has used good faith efforts to work with the vocational rehabilitation counselors, and has submitted applications and pursued job opportunities as directed.
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> 13. In spite of these efforts, plaintiff has been unable to obtain employment through vocational rehabilitation because of his compensable injuries.
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> 14. Plaintiff's vocational rehabilitation counselor for the longest period of time has been Lewis Drumm. Mr. Drumm has indicated there are four items that appeared to make it difficult to locate suitable employment for plaintiff. These items are (1) education through only the eighth grade; (2) lack of a driver's

> license; (3) restrictions limiting plaintiff's work to a light physical demand category; and (4) all his work experience having been heavy labor in the steel field. The Full Commission also finds that the required daily use of narcotics is a job-limiting factor.

Finding of fact 14 was directly based on Drumm's testimony and, in the light most favorable to plaintiff, the evidence supports findings 12 and 13. Plaintiff submitted applications or inquired about over one hundred jobs as directed by his counselor. Drumm also testified that in his opinion plaintiff cooperated fully with vocational rehabilitation counselors. The evidence that plaintiff was unable to obtain employment with any company subsequent to the accident is undisputed.

Medical testimony by Dr. James Hundley, an orthopedic surgeon who treated plaintiff's bone fractures, joints, and muscle tears for approximately a year, and Dr. Essam Eskander, a general practitioner who treated plaintiff for pain management as well as high blood pressure, emphysema, and other ailments, provides competent evidence for many of the Commission's findings regarding plaintiff's injuries, treatment, pain management, and restrictions that were challenged by defendants.

> 4. [P]laintiff sustained 29 broken bones, including a shattered left shoulder, a laceration of his spleen, injury to his right eye socket, and two broken wrists. Additionally, plaintiff suffers from arthritis caused by the fractures sustained in the accident on the job. Consequently, daily narcotic pain medication is necessary to deal with this condition and plaintiff should not drive because of this necessary narcotic pain medication. Due to plaintiff's pain, he is unable to perform prior activities, such as working around his house and yard.
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> 8. Dr. Hundley released plaintiff with a thirty (30%) permanent partial disability rating to his left upper extremity and a ten (10%) permanent partial disability to his left wrist. Dr. Hundley indicated that plaintiff has permanent restrictions, which include no climbing or repetitive work with his upper extremities. Plaintiff has a permanent lifting restriction of no more than 30 pounds.

> 9. Plaintiff has experienced chronic pain in his shoulder and wrists since the time of his injury. He has been informed by his treating physicians that most likely this pain will not subside and is something he will have to become accustomed to for the rest of his life. It is necessary for plaintiff to take narcotics on a daily basis to deal with the pain caused by his compensable injuries and resulting arthritis.
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> 11. The totality of plaintiff's extensive medical records indicated plaintiff is extremely restricted regarding his physical abilities to pursue employment.

Both doctors agreed that plaintiff's pain was severe and would increase with time and age. Both agreed that plaintiff's arthritis would be accelerated because of the fractures suffered in the fall. Most importantly, both doctors agreed that the level of narcotic pain medication plaintiff was taking on a daily basis would impair his mental functioning and ease his suffering only if he did not over exert himself.

One job that plaintiff interviewed for and was rejected from was a telemarketing position. The Commission made two findings addressing the suitability of that position.

> 15. Mr. Drumm has indicated plaintiff was sent to a telemarketing job that paid $6.00 an hour. . . . The Full Commission finds that telemarketing is not a suitable job for plaintiff considering his educational background, work experience and temperament.
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> 18. Having fully reviewed plaintiff's educational background and work experiences, the Full Commission finds that plaintiff does not have the necessary skills or aptitude to be a successful telemarketer.

Again, viewed in the light most favorable to plaintiff, there was competent evidence in the record to support these findings. Testimony from two women at the telemarketing business revealed that eighty-five percent of the employees were female; no one with a background in the iron industry had ever worked there; the standard pay was about $6.00 an hour; and while $16.00 an hour or

greater was attainable, only about 5 percent of all employees achieved that hourly rate based upon salary and commissions.

Defendant argues that plaintiff was suitable for the telemarketing job, but was not offered employment because he cursed in the interview and maintained a bad attitude throughout the time he was there. The Commission addressed defendants' concerns, finding that plaintiff's language during the interview was "reflective of the circumstances and not of plaintiff's lack of good faith efforts to comply with vocational rehabilitation." As indicated, there was evidence in the record to support this finding, despite existing evidence to the contrary.

Having reviewed the evidence, we hold that there was competent evidence in the record to support the Commission's findings of fact and will now review its conclusions of law. Defendant argues that the Commission erred in ending vocational rehabilitation and calculating plaintiff's average weekly wage. We will review each in turn.

The Full Commission, based on its findings, concluded that "plaintiff's physical conditions resulting from his compensable injuries (including required daily use of narcotics), educational background and work experiences" make him "permanently and totally disabled." We see no error in this determination and hold that plaintiff has met his burden of showing a disability. *See Knight v. Wal-Mart Stores, Inc.*, 149 N.C. App. 1, 7-8, 562 S.E.2d 434, 439-40 (2002), *aff'd. per curiam*, 357 N.C. 44, 577 S.E.2d 620 (2003); *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 765-66, 425 S.E.2d 454, 457 (1993). As discussed above, plaintiff has no driver's license and only an eighth grade education. He has worked with steel all his life. He has not operated a computer, had any sales experience, or even worked with people who were not in construction. His experience and education are very limited. Plaintiff's pain, as testified to by two physicians, is very real and debilitating. *See Knight*, 149 N.C. App. at 7-8, 562

S.E.2d at 439-40 (plaintiff's pain can be considered in determining extent of disability); *Webb v. Power Circuit, Inc.*, 141 N.C. App. 507, 512-13, 540 S.E.2d 790, 793-94 (2000) (extensive debilitating pain may support total disability). The high dosage of narcotics he is currently on allow him relief, but only to the extent that he is not physically active. The side effects of the medication impair his ability to drive and his ability to think and react quickly. We see no reason to disagree with the Commission that plaintiff has met his burden of showing disability, indeed a total disability. *See Webb*, 141 N.C. App. at 512-13, 540 S.E.2d at 793-94; *Burwell v. Winn-Dixie Raleigh*, 114 N.C. App. 69, 73, 441 S.E.2d 145, 149 (1994) ("A claimant who asserts that he is entitled to compensation under N.C. Gen. Stat. §97-29 has the burden of proving that he is, as a result of the injury arising out of and in the course of his employment, totally unable to 'earn wages which . . . [he] was receiving at the time [of injury] in the same or any other employment.'") (internal quotation omitted).

Thus, the burden shifts to defendants to show that the Commission erred in determining that plaintiff would be unsuitable for employment at a rate equal to his pre-injury wages due to his health conditions, educational background, and work experience. *See id*. at 513, 540 S.E.2d at 794 (citing *Franklin v. Broyhill Furniture Industries*, 123 N.C. App. 200, 206, 472 S.E.2d 382, 386 (1996)); *Burwell*, 114 N.C. App. at 73, 441 S.E.2d at 149 (defendant must show plaintiff is capable of achieving a suitable job: "one the claimant is capable of performing considering his age, education, physical limitations, vocational skills, and experience."). Defendants' arguments imply that the telemarketing job was suitable employment available to plaintiff if he had diligently sought the job. *See Webb*, 141 N.C. App. at 513, 540 S.E.2d at 794.

Yet, based on the findings of the Commission, which were supported by competent evidence, the Commission did not err in concluding that the telemarketing job was unsuitable.

Findings 2, 9, 11, 12, 14, 15, and 18 all support the Commission's conclusion that the telemarketing job was unsuitable. Granted, the Commission did not give much weight to the testimony of the telemarketing manager, who said plaintiff was not hired because of his attitude and cursing, but credibility is the sole province of the Commission. *Deese*, 352 N.C. at 116, 530 S.E.2d at 553. Further, to the extent that Dr. Hundley testified the telemarketing job was within plaintiff's *orthopedic* limitations, he and Dr. Eskander both agreed that plaintiff's heavy dependance on pain medication was problematic for working at any job. Also, both doctors testified that plaintiff's pain would increase with time and age, thus further limiting his ability to work. Finally, plaintiff's vocational rehabilitation case manager, Lewis Drumm, testified that plaintiff had been cooperative and attempted everything asked of him. Accordingly, we conclude defendants failed to meet their burden of showing that suitable employment was available.

Defendants next argue that the Commission erred in calculating the average weekly wage of plaintiff. We disagree. The Commission found that the first method of calculating plaintiff's average weekly wage in N.C. Gen. Stat. §97-2(5), that of dividing pre-injury earnings over 52 weeks, was inapplicable because plaintiff had only worked 12 days for defendant-employer. Alternatively, the Commission found that the second method was accurate since plaintiff had recorded earnings for the one and five-sevenths weeks worked. *See* N.C. Gen. Stat. §97-2(5) (2003) (wages of employees who have worked fewer than 52 weeks are divided by the number of weeks and parts thereof to arrive at an average weekly wage). Further, the Commission found that the second method was fair to both parties.

In so doing, the Commission relied upon the wages stated on Form 22, which was $1,640.00 over the twelve day period. Dividing that amount by one and five-sevenths weeks yields an average weekly wage of approximately $956.00, and sixty-six and two-thirds percent

of that, as required by N.C. Gen. Stat. §97-29, exceeds the statutory maximum of compensation in place in 1999 when the injury occurred. Therefore, plaintiff's weekly compensation was capped at the maximum of $560.00 per week. This rate was consistent with what defendants had paid since 19 April 1999. The Commission's findings support its conclusions with regard to applying the second method of N.C. Gen. Stat. §97-2(5) to calculate plaintiff's average weekly wage. Accordingly, we find no error.

Having reviewed the remaining assignments of error and evidence presented, we affirm the opinion and award of the Industrial Commission.

Affirmed.

Judges McCULLOUGH and LEVINSON concur.

Report per Rule 30(e).