IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-627

Filed: 5 September 2017

North Carolina Industrial Commission, I.C. No. W69306

LEONARD CARTER, Employee, Plaintiff,

v.

BARNES TRANSPORTATION, Employer, NATIONAL INTERSTATE INSURANCE, Carrier, Defendants.

Appeal by Defendants from Opinion and Award entered 28 January 2016 by the North Carolina Industrial Commission. Heard in the Court of Appeals 15 November 2016.

Mast, Mast, Johnson, Wells, & Trimyer, PA, by Charles D. Mast, for Plaintiff-Appellee.

Teague, Campbell, Dennis & Gorham, L.L.P., by S. Scott Farwell, for Defendants-Appellants.

INMAN, Judge.

When a medical expert's deposition testimony delineates permanent work restrictions, on the one hand, and anticipated limitations on an employee's future work attendance and performance, on the other hand, the Commission did not err in relying on all of the expert's testimony and related documents, even if the

Commission mischaracterized evidence regarding anticipated limitations as evidence of permanent work restrictions. The Commission's Opinion and Award was supported by competent evidence, sufficient findings of fact, and sufficient conclusions of law.

Barnes Transportation ("Defendant Employer") and National Interstate Insurance (together, "Defendants") appeal from an Opinion and Award of the Full North Carolina Industrial Commission (the "Commission"), awarding workers' compensation benefits and medical expenses to employee Leonard Carter ("Plaintiff"). Defendants argue that specific findings of fact made by the Commission were supported only by expert opinion testimony that was disavowed by the medical provider espousing it, rendering that evidence incompetent, and in turn rendering those findings of fact, and any derivative findings of fact and conclusions of law erroneous. After careful review, we affirm the Commission.

Factual & Procedural History

The evidence before the Commission tended to show the following:

Plaintiff worked as a long distance truck driver for Defendant Employer. On 12 February 2010, Plaintiff exited the cab of his eighteen-wheel truck, stepped in a hole, and fell to the ground on the his side. He felt immediate pain in his left knee and ankle.

Two days after the accident, Plaintiff presented to Wilson Immediate Care. Dr. Dean Maynard examined Plaintiff and ordered an x-ray which revealed a non-displaced left ankle fracture.

Four days later, Plaintiff presented to Dr. Gregory Nelson, an orthopaedic surgeon at Rocky Mount Orthopaedics. Dr. Nelson placed Plaintiff in a 3-D walking cast and restricted him to desk work. Approximately one month later, Dr. Nelson saw Plaintiff again, replaced his walking cast with an air cast, and continued his desk restriction. Dr. Nelson informed Plaintiff that he could return to regular work duty the following month.

In late April 2010, Plaintiff returned to work as a long distance truck driver. The pain in his left leg persisted and he developed a burning pain in his back. On 12 May 2010, Plaintiff sent Dr. Nelson an email reporting that "not keeping my leg elevated is killing me. It's very distracting and I'm not sleeping well at all at night. . . . I'm scared to keep doing this. Truck drivers need to be focused and alert." Dr. Nelson did not respond to Plaintiff's email, and Plaintiff continued to drive.

In July of 2010, Defendants directed Plaintiff to Raleigh Orthopaedic Clinic, where he was seen by Dr. Kevin Logel. Plaintiff presented with left leg and ankle pain and "aching and pins and needles-type pain" in his lower back, extending down his left leg. Dr. Logel ordered a left leg MRI, which revealed "a healed distal fibular fracture with no evidence of displacement." Dr. Logel noted that Plaintiff had not

reached maximum medical improvement and, in August, noted that Plaintiff's " 'pain is real[.]' " The next month, Plaintiff was prescribed Gabapentin for his pain.

Defendants then directed Plaintiff to Dr. Benjamin Thomas at Wilson Neurology. Dr. Thomas diagnosed causalgia/reflex sympathetic dystrophy ("RSD")/complex regional pain syndrome ("CRPS"), type II.[1] Dr. Thomas continued Plaintiff's Gabapentin dosage and added a prescription for Nortriptyline as a sleep aid. Plaintiff testified that the Nortriptyline caused him to be drowsy in the morning and, over time, the Gabapentin became less effective. However, Plaintiff continued working as a full time truck driver.

In February of 2012, two years after the accident, Dr. Thomas refilled Plaintiff's prescriptions but determined that Plaintiff's pain could only be relieved through treatment with a pain specialist. In June 2012, Plaintiff filed a motion for approval of pain management and, in July 2012, a special deputy commissioner issued an administrative order granting Plaintiff's motion. Plaintiff was evaluated by pain management provider Dr. Scott Sanitate of Cary Orthopaedic Spine Specialists, who noted that "[P]laintiff's lumbar complaints could certainly be related to the described twisting fall which occurred in February of 2010."

Defendants then authorized Plaintiff's care with pain management specialist Dr. Dina Eisinger ("Dr. Eisinger") at Triangle Orthopaedic Associates. In February

[1] In the Opinion and Award, the Commission noted that Plaintiff's treating providers refer to RSD and CRPS interchangeably in their medical records and deposition testimony and, therefore, the Commission uses the terms interchangeably throughout its Opinion and Award.

2013, Plaintiff met with Dr. Eisinger, complaining of back, left lower extremity, and left ankle pain. Dr. Eisinger's initial impression was: "[c]omplex pain problem with some combination of lumbar radicular pain, post fracture pain local to the left ankle, and CRPS." She also noted:

> I agree that it is probably disadvantageous at this point for this gentleman to be working as a truck driver. First of all the prolonged sitting and prolonged vibrational stress are difficult for people with back pain. Secondly I'm concerned about his sedating medications particularly the high dose Neurontin in a setting of truck driving.

Plaintiff continued driving after his initial meeting with Dr. Eisinger, because he "had to make a living and was not going to quit driving until he was told that he could not drive." In March of 2013, while driving a truck for Defendant Employer, Plaintiff was issued a warning ticket for improper lane use. In May 2013, Plaintiff returned to Dr. Eisinger and received a lumbar epidural steroid injection. The following month, Dr. Eisinger reiterated her concerns about Plaintiff driving while on pain medications. Dr. Eisinger issued Plaintiff work restrictions for four weeks, including no driving. However, Plaintiff continued to drive.

On 4 July 2013, Plaintiff was en route to Texas when Defendant Employer notified him that he was being "shut down"—removed from the road—as a result of his continued use of prescribed medications. Plaintiff was instructed to park his truck, and was told that another driver would pick him up and drive him home. At that time, Defendants stopped paying Plaintiff disability compensation.

Upon Plaintiff's return to North Carolina, Defendant Employer called Plaintiff's residence and left a message with his girlfriend. Defendant Employer reported that it had "modified duty" for Plaintiff in Wilson, North Carolina. In response to the message, in July 2013, Plaintiff's counsel sent defense counsel an email explaining that round trip, Plaintiff's drive to Wilson was 174 miles. Plaintiff's counsel requested that defense counsel speak with Defendant Employer in regard to the manner in which Plaintiff was expected to get to work, as well as a description of the work he was to complete.

Michael Ward, a supervisor employed by Defendant Employer, testified that he never personally received any communication about Plaintiff attempting to return to work in the modified position. Ward also testified that Defendant Employer terminated Plaintiff as a result of Plaintiff's failure to respond to the modified position offer. Plaintiff was notified of his termination a year later in October of 2014 during a deposition.

On 11 September 2013, Plaintiff filed a Form 33 Request that Claim Be Assigned for Hearing, seeking benefits for injuries to his left ankle, left leg, and lumbar radiculopathy. The matter was heard before a deputy commissioner, who issued an opinion and award granting Plaintiff medical and disability benefits. Defendants appealed to the Full Commission. On 28 January 2016, the Commission entered an Opinion and Award affirming the decision of the deputy commissioner and awarding Plaintiff medical and disability benefits. Defendants timely appealed.

Analysis

I. Standard of Review

In deciding an appeal from an award of the Commission, our review is "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 "only need[s] to find some evidence in the record that supports the Full Commission's findings of fact[,]" *Bishop v. Ingles Mkts., Inc.*, 233 N.C. App. 431, 438, 756 S.E.2d 115, 120-21 (2014), and we "may set aside a finding of fact only if it lacks evidentiary support." *Holley v. ACTS, Inc.*, 357 N.C. 228, 231, 581 S.E.2d 750, 752 (2003). "The Commission's conclusions of law are reviewable *de novo*." *Allred v. Exceptional Landscapes, Inc.*, 227 N.C. App. 229, 232, 743 S.E.2d 48, 51 (2013) (citation omitted).

II. Work Restrictions

Defendants challenge the Commission's findings of fact regarding work restrictions issued by Dr. Eisinger. The challenged findings are as follows:

> 45. Dr. Eisinger testified that, from July 4, 2013, through the time she gave deposition testimony in October 2014, she could not see [P]laintiff being able to perform any job on a full-time basis. She testified that [P]laintiff's pain would affect his ability to maintain attention and concentration between one-third and two-thirds of the time; that [P]laintiff would miss 'way more than two days per month' of work; and even if [P]laintiff were able to do some work, he would need at least one, 20-minute rest

> period per hour. Dr. Eisinger testified that she would consider these work limitations to be permanent.
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> 46. Regarding Dr. Eisinger's opinion as to how much time from work [P]laintiff would miss because of his injury-related conditions, Dr. Eisinger testified: 'I mean, we have to distinguish if he's fearful for his livelihood and is going to work when he shouldn't versus if he's not. If he were listening to what he should be doing, health wise, then he would be missing work more than not.'
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> . . .
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> 51. The preponderance of the evidence in view of the entire record establishes that [P]laintiff is unable to earn his pre-injury wages in his pre-injury employment and, given his permanent restrictions imposed by Dr. Eisinger of no driving, missing more than two days of work per month, and taking a 20-minute rest break each hour, combined with the testimony of Ms. Vieceli, it would be futile for [P]laintiff to look for work in any other employment.

Defendants acknowledge that evidence exists in the record—forms signed by Dr. Eisinger—to support the Commission's Findings of Fact 45, 46, and 51. These forms include Workers' Compensation Medical Evaluations (31 July 2013 and 18 December 2013), a Social Security Disability Form (31 July 2013), a Pain Questionnaire (15 April 2014), and a Rest Questionnaire (15 April 2014). Defendants also acknowledge that Dr. Eisinger's deposition testimony, in some respects, supports Findings of Fact 45, 46, and 51, but argue that the testimony referred only to the forms she completed. Defendants contend that the forms and related testimony are

erroneous and were specifically disavowed by Dr. Eisinger later in her deposition testimony.

The evidence Defendants argue was disavowed by Dr. Eisinger includes work restrictions noted in the Social Security Disability Form, the Pain Questionnaire, and the Rest Questionnaire. We are unpersuaded.

On 31 July 2013, Dr. Eisinger completed two forms: a Social Security Disability Form and a Workers' Compensation Medical Evaluation. On the Social Security Disability Form, Dr. Eisinger indicated that Plaintiff's work restrictions were no lifting over ten pounds, no standing, no walking, and no driving. On the Workers' Compensation Medical Evaluation, Dr. Eisinger indicated Plaintiff's work restrictions were no driving, minimal walk/stand, and no lifting over thirty pounds.[2] In another Workers' Compensation Evaluation completed on 18 December 2013, Dr. Eisinger reaffirmed Plaintiff's work restrictions were no driving, minimize stand/walk, and no lifting over thirty pounds.

On 15 April 2014, Dr. Eisinger filled out two questionnaires: a Pain Questionnaire and a Rest Questionnaire. On the Pain Questionnaire, in response to the question asking "[o]n average, how often do you anticipate that the individual's impairment(s) or treatment would cause him/her to be absent from work[,]" Dr. Eisinger checked the box stating "[m]ore than two days a month." In response to the

[2] In her deposition, when asked about her discrepant lifting restrictions, Dr. Eisinger responded "typo, human error on the [ten]."

question "[t]o what extent does pain interfere with the patient's ability to maintain attention and concentration to sufficiently complete tasks in a timely matter[,]" Dr. Eisinger checked the box stating "frequently (34-66% of the time)[.]" On the Rest Questionnaire, in response to the question "[b]ased upon your diagnosis and findings, and assuming that the patient were to return to repetitive work activity allowing for a sit/stand option, which (if any) of the following would be the minimum rest periods required in addition to a 30 minute lunch and two 15 minute breaks[,]" Dr. Eisinger checked the box stating "[o]ne 20 minute rest period per hour."

In her deposition, Dr. Eisinger reiterated Plaintiff's permanent work restrictions—that he minimize standing and walking, not lift over thirty pounds, and not drive a commercial vehicle—consistent with her Workers' Compensation Medical Evaluations. Also in her deposition, Dr. Eisinger distinguished her opinions noted in the Pain Questionnaire and Rest Questionnaire. She testified that those questionnaires reflected her opinions regarding limitations she could foresee Plaintiff facing if he returned to work.

Defendants argue that "when asked to which documents or records she deferred as it relates to [Plaintiff's] actual and applicable permanent restrictions within the workers' compensation context/claim, Dr. Eisinger openly disavowed the documents from which the Full Commissions' Findings of Fact 45, 46 and 51 are drawn, and, instead, confirmed deference to her workers' compensation evaluation records." We disagree.

Dr. Eisinger did not disavow any of her opinions. She simply clarified that some opinions referred not to formal work restrictions, but rather to her expectations of Plaintiff's future limitations resulting from his medical condition. The Commission, charged with determining the credibility and weight of testimony, did not find that Dr. Eisinger had disavowed her statements on these forms.

We acknowledge that in Findings of Fact 45 and 51 the Commission labeled the opinions of Dr. Eisinger regarding the limitations she anticipated Plaintiff facing if he returned to work as "permanent" limitations and/or restrictions, muddling the distinction that Dr. Eisinger explained in her testimony. However, regardless of the Commission's designation, it did not find that Dr. Eisinger disavowed her opinions regarding limitations she could foresee Plaintiff facing if he returned to work–upon which the Commission based its Findings of Fact 45, 46, and 51.[3] Further, Defendants have cited no authority, and we are aware of none, that precludes the Commission from relying on evidence of anticipated limitations as opposed to permanent work restrictions. Accordingly, we hold that that Findings of Fact 45, 46, and 51 are supported by competent evidence.

[3] Defendants also argue that Dr. Eisinger's testimony is insufficient and incompetent under the reliability test established in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 125 L.E.2d 469 (1993). Defendants argue that: (1) Dr. Eisinger's testimony was based on insufficient facts or data, *i.e.,* disavowed evidence, and (2) Dr. Eisinger failed to apply her own standards of analysis. However, "[i]t is the role of the Commission to consider the reliability and credibility of witnesses. It is not the role of this Court to make *de novo* determinations concerning the credibility to be given to testimony, or the weight to be given to testimony." *Wise v. Alcoa, Inc.*, 231 N.C. App. 159, 164, 752 S.E.2d 172, 175 (2013). Because we hold that Dr. Eisinger's testimony was based on competent evidence in the record, we reject Defendants' argument that it was based on disavowed and/or incompetent evidence.

III. Vocational Expert

Defendants also challenge the Commission's finding regarding the testimony of vocational expert Gina Vieceli. Finding of Fact 50 states:

> When asked what sort of job [P]laintiff could obtain earning his pre-injury wage and based upon his age, education, and work experience, Ms. Vieceli testified that consideration of the wage factor would not matter because she was not aware of any employer that would have a job opportunity for an individual who would miss more than two days of work per month and need to take a 20-minute rest period per hour.

Defendants acknowledge that "testimony of this nature is present in the record[;]" however, they argue that Dr. Vieceli's testimony is derived from Dr. Eisinger's disavowed opinions and is, itself, incompetent." Because, as stated *supra*, we hold that Dr. Eisinger did not disavow her opinions regarding limitations she could foresee Plaintiff facing if he were to return to work, we reject Defendants' challenge to Dr. Vieceli's testimony.

In a deposition, after identifying Dr. Eisinger's opinions regarding limitations she could foresee Plaintiff facing—missing two or more days a month and requiring one 20-minute rest period per hour—Defendants' counsel asked Dr. Vieceli "[w]hat sort of reasonable effort would you expect from [Plaintiff] to find employment with these restrictions I've identified to you, and with his age, education, and work experience?" Dr. Vieceli responded, "I don't know of any employers that have this opportunity that would match these restrictions." Dr. Vieceli further testified that

"[b]ased on those restrictions, I'm not sure the wage matters." Defendants' counsel, in questioning Dr. Vieceli, conflated anticipated limitations with restrictions. Dr. Vieceli responded using the same misnomer in answering. But because Defendants have cited no authority differentiating between the legal consequence of restrictions and anticipated limitations, and because Dr. Eisinger's testimony was based on competent evidence, so too was Dr. Vieceli's. We hold that Finding of Fact 50 is supported by competent evidence.

Defendants also argue that the evidence the Commission should have cited in making a finding regarding Dr. Vieceli's expert opinion "supports a completely alternative view." However, this Court " 'does not have the right to weigh the evidence and decide the issue on the basis of its weight.' " *Adams v. AVX Corp.,* 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)). As this Court's " 'duty goes no further than to determine whether the record contains any evidence tending to support the finding[,]' " *id.* at 681, 509 S.E.2d at 414, and we hold that Finding of Fact 50 is supported by competent evidence, we reject Defendants' argument.

IV. Disability

Defendants next challenge the Commission's conclusion regarding Plaintiff's disability. Conclusion of Law 6 states:

> Given his medical restriction against driving due to his pain management protocol, [P]laintiff has not worked for [D]efendant-[E]mployer, or any employer, since July 4,

> 2013. In addition to no driving, Dr. Eisinger has testified to permanent restrictions of lifting no more than 30 pounds[,] missing at least two days of work per month, and needing at least one, 20-minute rest period each hour. When Ms. Vieceli conducted labor market research for potential job opportunities for [P]laintiff in 2014, she did so based only on perceived permanent restrictions of no driving and lifting no more than 30 pounds. When confronted with [P]laintiff's restrictions requiring a 20-minute rest break each hour and missing at least two days of work per month, Ms. Vieceli testified that [P]laintiff could try looking for work, but she was unaware of any employer that would hire someone with those restrictions. Based on the vocational expert testimony presented by Ms. Vieceli, in combination with [P]laintiff's 25-year work history as a truck driver and permanent work restrictions, which include[] no driving, the Commission concludes that a job search by [P]laintiff would be futile. Accordingly, the Commission concludes that [P]laintiff has successfully established disability as of July 4, 2013.

The Workers' Compensation Act defines disability as "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." N.C. Gen. Stat. § 97-2 (2015). The burden is on the employee to prove the existence of his disability. *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 185, 345 S.E.2d 374, 378 (1986). Once the employee establishes disability, the burden shifts to the employer "to show not only that suitable jobs are available, but also that the plaintiff is capable of getting one, taking into account both

physical and vocational limitations." *Wilkes v. City of Greenville*, __ N.C. __, __, 799 S.E.2d 838, 849 (2017) (quotation marks and citation omitted).[4]

To support a conclusion of disability, the employee must prove three factual elements:

> (1) that [the employee] was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that [the employee] was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) that this [employee's] incapacity to earn was caused by [the employee's] injury.

Hilliard v. Apex Cabinet Co., 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982).

In *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 425 S.E.2d 454 (1993), this Court provided four methods by which an employee can prove the first two factual elements established in *Hilliard*:

> (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.

[4] The General Assembly abrogated the Supreme Court's decision in *Wilkes* by amending N.C. Gen. Stat. § 97-82. 2017 N.C. Sess. Laws 2017-124. However, the holding in *Wilkes* abrogated by the amended statute is not at issue in this case.

Id. at 765-66, 425 S.E.2d at 457 (internal citation omitted).[5]

Here, the Commission determined, applying the third prong of *Russell*, that it would be futile for Plaintiff to conduct a job search and that Plaintiff "successfully established disability as of July 4, 2013." Defendants argue that Plaintiff failed to meet his burden of showing that a return to work effort would be futile. We disagree.

"[I]n determining loss of wage-earning capacity, the Commission must take into account age, education, and prior work experience as well as other preexisting and coexisting conditions." *Wilkes*, __ N.C. at __,799 S.E.2d at 849 (citation omitted). The Supreme Court recently noted in *Wilkes* that it has "never held, and decline to do so now, that an employee is required to produce expert testimony in order to demonstrate his inability to earn wages." *Id.* at __, 99 S.E.2d at 849.

Here, we hold that the Commission's findings are sufficient to support its conclusion that Plaintiff met his burden of showing that a return to work effort would be futile. Most material among these findings are the uncomplicated facts that Plaintiff was fifty-six years old, had worked as a long distance truck driver for approximately twenty-five years, and was assigned the formal work restriction of no commercial driving. The driving restriction eliminated the possibility that Plaintiff could continue doing the only job he had worked in for virtually all of his adult life,

[5] We note that recently, in *Wilkes*, __ N.C. at __, 799 S.E.2d at 849, the North Carolina Supreme Court "emphasize[d] that [it] has not adopted *Russell*, and that the approaches taken therein are not the only means of proving disability."

as well as any similar job, because driving was central to all of his vocational skills and experience.

Additionally, the Commission's findings regarding Plaintiff's chronic and debilitating pain further support its finding that an effort to return to work would be futile. The Commission found that: (1) in May of 2010, Plaintiff reported that "not keeping my leg elevated is killing me. It's very distracting and I'm not sleeping well at all at night. . . . I'm scared to keep doing this. Truck drivers need to be focused and alert[;]" (2) six months after the accident, a physician selected by Defendants noted that Plaintiff's "pain is real[;]" and (3) two years after the accident, another physician selected by Defendants opined that Plaintiff's pain could only be relieved through treatment with a pain specialist.

Finally, the Commission found that Dr. Eisinger—the last physician selected by Defendants to treat Plaintiff—opined that if Plaintiff were to return to work, he would need a twenty minute break each hour and would miss two or more days a month from work. As explained *supra*, the Commission's mislabeling this opinion as a permanent restriction rather than as an expected limitation is not material.

In sum, the Commission's findings reflect that it considered Plaintiff's age, prior work experience, pain, assigned work restrictions, and limitations foreseen by the medical expert in concluding that a job search by Plaintiff would be futile. Defendants argue that expert testimony in the record supports the contrary conclusion that Plaintiff can return to work. However, an alternative possible

conclusion is not a basis to reverse the Commission. *Thompson v. Carolina Cabinet Co.*, 223 N.C. App. 352, 359, 734 S.E.2d 125, 129 (2012) ("Although the Commission was not required to reach this conclusion given the evidence, its decision is sufficiently supported under our standard of review.").

Conclusion

We hold that Dr. Eisinger did not disavow her opinion testimony or other evidence upon which the Commission based its findings of fact, and thus hold that the Commission's findings of fact are supported by competent evidence. We also hold that the Commission's conclusions of law are supported by its factual findings. As such, we affirm the Commission's Opinion and Award.

AFFIRMED.

Judges DILLON and ZACHARY concur.

Report per Rule 30(e).