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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 16-26

Filed: 2 August 2016

North Carolina Industrial Commission, No. X64352

DONALD HALE, Employee, Plaintiff,

v.

BARNES DISTRIBUTION, Employer, and INDEMNITY COMPANY OF NORTH AMERICA (TRISTAR RISK MANAGEMENT, Third Party Administrator), Carrier, Defendants.

Appeal by plaintiff from opinion and award entered 14 September 2015 by the North Carolina Industrial Commission. Heard in the Court of Appeals 25 May 2016.

O'Malley Tunstall, PLLC, by Joseph P. Tunstall, III, for employee plaintiff-appellant.

Lewis Brisbois Bisgaard & Smith, LLP, by Scott J. Lasso, for employer and carrier defendants-appellees.

DIETZ, Judge.

Plaintiff Donald Hale appeals from the Industrial Commission's denial of his request for continuing total disability benefits. Our review in this appeal is constrained by the narrow standard of review applicable to determinations by the Commission. Relying on testimony from several experts on vocational rehabilitation, the Commission found that Hale had not shown that he satisfied any of the criteria

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to establish an ongoing disability. Because this portion of Commission's award is supported by at least some competent evidence, we must affirm.

Hale also challenges the Commission's determination that Defendants properly ceased paying temporary total disability payments after Hale's treating physician released him for light duty work with some restrictions. But as the Commission found, the parties entered into a mediated settlement agreement, approved by the Commission, stating that Defendants would cease temporary disability payments once Hale's treating physician released him to return to work, with or without restrictions. The Commission did not err in concluding that Defendants complied with the terms of the mediated settlement agreement. Accordingly, we reject Hale's arguments and affirm the Commission's opinion and award.

Facts and Procedural History

Plaintiff Donald Hale tripped on a rock in a parking lot and injured his left knee while working as an Account Representative for Defendant Barnes Distribution. Following the injury, Hale filed a workers' compensation claim in the Industrial Commission.

In May 2012, the parties participated in a Commission-ordered mediated settlement conference. As a result of the meditation, Defendants agreed to immediately pay for total knee replacement surgery for Hale and to pay temporary

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total disability payments until Hale was released by his treating physician to return to work with or without restrictions. The agreement also permitted Hale to petition for the resumption of disability benefits after his physician released him, if appropriate.

Hale underwent the knee replacement surgery in August 2012. Roughly a year later, in September 2013, Hale was released for light duty work for an eight-hour day.

Defendants submitted a Form 28 Return to Work Report in October 2013 and ended Hale's disability payments as set out in the mediated settlement agreement. In response to that filing, Hale filed a Form 33 requesting a hearing on his claim for continuing total disability payments. Following a hearing, the deputy commissioner entered an opinion and award denying Hale's claim for continuing total disability compensation. The Full Commission affirmed that opinion and award, and Hale timely appealed.

Analysis

Hale first argues that the Industrial Commission erred in determining that he had not proven an ongoing disability and therefore was not entitled to further disability payments. "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." *Kee v. Caromont Health, Inc.*, 209 N.C. App. 193, 195, 706 S.E.2d 781, 782 (2011). If the

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Commission's factual findings are supported by any competent evidence in the record, those findings are binding on appeal. *Adams v. Frit Car, Inc.*, 185 N.C. App. 714, 717, 649 S.E.2d 651, 653 (2007). We review the Commission's conclusions of law *de novo*. *Id.*

In a workers' compensation case, the plaintiff bears the burden of proving the existence and extent of any disability. *Clark v. Wal-Mart*, 360 N.C. 41, 43, 619 S.E.2d 491, 493 (2005). As defined by the North Carolina Workers' Compensation Act, "disability" is the "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." N.C. Gen. Stat. § 97-2(9). An employee can establish disability 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 Prod. Distribution, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (citations omitted).

Here, the Commission found that Hale had not satisfied any of the *Russell* factors. Specifically, the Commission found that Hale "has failed to show that he is disabled as a consequence of his injury by accident" because Hale "is not restricted

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from work in all employment but rather has been released to return to work with restrictions,” that Hale “has not conducted a reasonable job search for suitable employment within his work restrictions,” and that Hale “has failed to show that it would be futile for him to seek employment considering his work restrictions, employment history, education and age.”

These findings are supported by competent evidence in the record, which is discussed in detail in the Commission’s evidentiary findings. For example, Vickie Hyman, an expert in vocational rehabilitation, testified that after assessing Hale, she determined that he is employable and that his most notable limitation was not his age, but his “temperament.” Dr. Steven Sligar, an associate professor in the Department of Addictions and Rehabilitation Studies at East Carolina University and an expert in the field of vocational rehabilitation and evaluation, testified that after evaluating Hale, he determined that Hale possessed transferable employment skills. Dr. Sligar testified that Hale’s limitations on employment were largely due to “internal factors,” such as Hale’s “self-perception . . . that he is retired” and hence is not actively seeking employment. Dr. Sligar also identified specific categories of jobs to which Hale’s skills would be immediately transferable and that are substantially similar to his current position, including “merchandise distributor, stock control clerk, or general sales representative.” Hale did not present any evidence that he conducted a reasonable job search for those types of employment.

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Because the Commission’s findings are supported by at least some competent evidence, those findings are binding on appeal. *Adams*, 185 N.C. App. at 717, 649 S.E.2d at 653. In light of those findings, the Commission properly concluded that Hale “failed to meet his burden of proving the existence and extent of any compensable disability that resulted from a work-related condition” under *Russell*. Accordingly, we reject Hale’s argument.

Hale next argues that the Commission erred in determining that Defendants could “unilaterally” terminate his temporary total disability benefits. Hale argues that benefits cannot be terminated without approval following a hearing. But here, the parties entered into a mediated settlement agreement, approved by the Industrial Commission, which provided that Defendants would pay temporary total disability benefits only until Hale’s treating physician released him.

Parties are permitted to mediate their workers’ compensation disputes and enter into settlement agreements approved by the Commission. *See* N.C. Gen. Stat. §§ 97–17, 97–80(c). The Commission, relying on the parties’ mediated settlement agreement, and the fact that Hale’s treating physician released him to return to work in September 2013, found that “Defendants did not unilaterally terminate payment of temporary total disability compensation in this matter, but rather such compensation was terminated in accordance with the terms of an agreement of the

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parties.” That finding is supported by competent evidence in the record. Accordingly, we affirm this portion of the opinion and award.

Conclusion

We affirm the opinion and award of the Industrial Commission.

AFFIRMED.

Judges ELMORE and DAVIS concur.

Report per Rule 30(e).