IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-1377

Filed: 6 December 2016

North Carolina Industrial Commission, No. X74819

JOHN MCLEAN, Plaintiff,

v.

BAKER SAND AND GRAVEL, Employer, and NC FARM BUREAU MUTUAL INSURANCE, Carrier, Defendants.

Appeal by plaintiff from opinion and award entered 23 September 2015 by the North Carolina Industrial Commission. Heard in the Court of Appeals 10 May 2016.

Hardison & Cochran P.L.L.C., by Benjamin T. Cochran, for plaintiff-appellant.

Young Moore and Henderson, P.A., by Zachary C. Bolen, for defendant-appellees.

BRYANT, Judge.

Where this Court received notice of a Rule 60(b) motion that might impact the appeal pending before this Court, we remand to the Industrial Commission to hold a hearing and indicate how it might be inclined to rule on the motion were this appeal not pending.

We briefly state the facts underlying the appeal in this case. Plaintiff John McLean, a fifty-seven-year-old male, began employment with Baker Sand & Gravel, defendant-employer, as a truck driver around 1980 and was so employed for

approximately thirty years. On 22 September 2011, plaintiff injured his left shoulder while attempting to adjust the tarp on the top of his dump truck. Defendants accepted liability for plaintiff's claim on 9 January 2012 via a Form 60.

Plaintiff saw orthopaedic surgeon Dr. Daniel McBrayer, who ultimately recommended surgery after approximately three months of conservative treatments showed no improvement. After surgery, plaintiff participated in physical therapy. During one of his sessions, plaintiff suffered a tear of his right rotator cuff, which necessitated further surgery, also performed by Dr. McBrayer.

Plaintiff continued with physical therapy per Dr. McBrayer's recommendation but suffered a meniscus tear during a session around June of 2013. Dr. McBrayer performed surgery to repair the meniscus tear. During his deposition, Dr. McBrayer testified to a reasonable degree of medical certainty that all the ensuing medical treatment to date stemmed from the original compensable injury that occurred on 22 September 2011. In December 2013, Dr. McBrayer performed a Functional Capacity Evaluation ("FCE") and the only permanent restriction assigned was for plaintiff to avoid overhead lifting of greater than fifty pounds.

Meanwhile, Barbara Readling, a senior vocational case manager with Carolina Case Management, conducted a "Digital Job Analysis" to assess whether plaintiff's former truck driver position's duties were within his restrictions. Readling gathered information about plaintiff, his physical restrictions, and his work and educational

backgrounds in an attempt to identify transferable skills. In July 2014, Readling performed a labor market survey to "determine [plaintiff's] ability to obtain suitable employment in the current labor market given his marketable transferable skills, current physical abilities and education level." Readling identified three full-time positions—traffic controller, poultry worker, and bus driver—that plaintiff could perform given his transferable skills and permanent lifting restriction.

Defendants commenced this action on 9 May 2014 by filing a Form 24 application to terminate or suspend payment of compensation on the grounds that plaintiff is no longer disabled and, therefore, is capable of performing his pre-injury work. Plaintiff responded, denying that he had been released to "full duty" and stating he remained disabled.

This matter was heard before former Deputy Commissioner Victoria M. Homick on 20 August 2014. Thereafter, the parties were allowed time to take additional testimony as necessary. After receipt of the parties' contentions and proposed opinion and awards, the record was closed on 24 November 2014. Later, on 2 February 2015, jurisdiction of the claim was transferred to Deputy Commissioner Myra L. Griffin. Deputy Commissioner Griffin rendered an opinion and award on 6 March 2015, concluding that plaintiff had failed to meet his burden of proving ongoing disability. Plaintiff appealed to the Full Commission and, on 23 September

2015, the Full Commission filed an opinion and award affirming the decision of Deputy Commissioner Griffin. Plaintiff filed notice of appeal to this Court.

On 6 September 2016, this Court filed its opinion. However, on 22 September 2016, we granted defendants' motion to withdraw the opinion. Meanwhile, on 17 October 2016, plaintiff filed a Rule 60(b) motion for relief from judgment in the Industrial Commission, challenging the propriety of the Commission's ruling in light of this court's recent opinion in *Bentley v. Jonathan Piner Constr.,* ___ N.C. App. ___, 790 S.E.2d 379 (2016), where it determined that N.C. Gen. Stat. § 97-84 of the Workers' Compensation Act does not permit one deputy commission to hear the evidence and another to render the opinion in the same matter. Thereafter, plaintiff filed with this Court a motion for limited remand requesting this matter be remanded to the Industrial Commission so it might indicate how the Commission might be inclined to rule were this appeal not pending. For the reasons which follow, we grant plaintiff's limited motion to remand.

On appeal, plaintiff argues the Full Commission erred by concluding that (I) plaintiff failed to meet his burden of proving disability beyond 9 May 2014; (II) plaintiff is not entitled to any temporary total disability benefits beyond 9 May 2014; and (III) plaintiff failed to meet his burden of proof and establish that he is entitled to vocational rehabilitation services. However, because we allow plaintiff's motion for

a limited remand to the Full Commission, we do not address the merits of plaintiff's appeal. Plaintiff's motion before this Court to which plaintiff appends his Rule 60(b) motion filed in the Industrial Commission, requests relief from judgment based on recent case law interpreting N.C. Gen. Stat. § 97-84, which "requires a single deputy commissioner to both hear the evidence and render an opinion and award[.]" *Bentley*, ___ N.C. App. at ___ n.1, 790 S.E.2d at 380 n.1.

N.C. Gen. Stat. § 97-84, provides as follows:

> The Commission or any of its members shall hear the parties at issue and their representatives and witnesses, and shall determine the dispute in a summary manner. The Commission shall decide the case and issue findings of fact based upon the preponderance of the evidence in view of the entire record. The award, together with a statement of the findings of fact, rulings of law, and other matters pertinent to the questions at issue shall be filed with the record of the proceedings, within 180 days of the close of the hearing record unless time is extended for good cause by the Commission, and a copy of the award shall immediately be sent to the parties in dispute. The parties may be heard by a deputy, in which event the hearing shall be conducted in the same way and manner prescribed for hearings which are conducted by a member of the Industrial Commission, *and said deputy shall proceed to a complete determination of the matters in dispute, file his written opinion within 180 days of the close of the hearing record* unless time is extended for good cause by the Commission, and *the deputy* shall cause to be issued an award pursuant to such determination.

N.C.G.S. § 97-84 (2015) (emphasis added).

In *Bentley*, the plaintiff-employee argued on appeal that "the Commission erred in basing its decision on an opinion and award of a deputy commissioner who did not hear the evidence." ___ N.C. App. at ___, 790 S.E.2d at 380. In other words, one deputy, Deputy Vilas, "presided over the hearing, issued a preliminary order bifurcating the jurisdictional and merits issues, and closed the record" on one issue, while a second deputy, Deputy Shipley, "issued the opinion and order finding that the Commission had no jurisdiction . . . ." ___ N.C. App. at ___, 790 S.E.2d at 382.

Considering the plain language of the statute, this Court agreed with the plaintiff in *Bentley*, holding that N.C.G.S. § 97-84 "unambiguously dictate[s] that when 'a deputy' commissioner presides over a dispute, 'said deputy' "—meaning *the same deputy*—shall be the one to issue the opinion and award in order to satisfy the statutory mandate that "*said deputy* shall proceed *to a complete determination of the matters in dispute* . . . ." ___ N.C. App. at ___, 790 S.E.2d at 382 (quoting N.C.G.S. § 97-84). In so holding, this Court reasoned that "the context in which 'a deputy,' 'said deputy,' and 'the deputy' are used [in the statute] requires that the entire process be handled by a single deputy commissioner, and that a contrary interpretation would contravene the manifest intent of the General Assembly." *Id.* at ___, 790 S.E.2d at 381 (citations omitted).

Thus, because "[n]either Deputy Vilas nor Deputy Shipley 'proceed[ed] to a complete determination of the matters in dispute,' 'file[d] [a] written opinion,' *and*

'cause[d] to be issued an award pursuant to such determination[,]' . . . the proceedings before Deputy Vilas resulting in an opinion and order by Deputy Shipley violated N.C.G.S. § 97-84." *Id.* at ___, 790 S.E.2d at 382 (alterations in original) (quoting N.C.G.S. § 97-84). Accordingly, this Court vacated the Commission's opinion and award which was based on an order issued in violation of N.C.G.S. § 97-84 and remanded the case for a new hearing. *Id.*

In the instant case, the record and briefs which the parties filed before this Court did not address the issue which the plaintiff presented in *Bentley*, namely, whether one deputy commissioner may hear the evidence while another deputy enters the opinion and award. *See id.* at ___, 790 S.E.2d at 380. However, because there is no developed record on this issue and we cannot discern whether the facts in the instant case are different from those in *Bentley*, we remand this case for hearing before the Full Commission so it may determine how it is inclined to rule on a 60(b) motion regarding whether or to what extent the opinion and award entered by Deputy Commissioner Griffin was in violation of N.C. Gen. Stat. § 97-84 based on this Court's recent interpretation of that statute in *Bentley v. Jonathan Piner Constr.*, ___ N.C. App. ___ 790 S.E.2d 379 (2016). *See Bell v. Martin*, 43 N.C. App. 134, 142, 258 S.E.2d 403, 409 (1979) ("[T]he better practice is to allow the trial court to consider a Rule 60(b) motion filed while the appeal is pending for the limited purpose of indicating, by a proper entry in the record, how it would be inclined to rule on the motion were

the appeal not pending."), *rev'd on other grounds by* 299 N.C. 715, 264 S.E.2d 101 (1980); *see also Hall v. Cohen*, 177 N.C. App. 456, 458, 628 S.E.2d 469, 471 (2006) ("[T]he trial court retains limited jurisdiction to indicate how it is inclined to rule on a Rule 60(b) motion." (citing *Bell*, 43 N.C. App. at 140–42, 258 S.E.2d at 408–09)). Plaintiff's motion for limited remand to the Full Commission is granted.

REMANDED.

Judges STROUD and DIETZ concur.

Report per Rule 30(e).