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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 15-1205

Filed: 19 April 2016

North Carolina Industrial Commission, I.C. No. Y01087

CHRISTOPHER L. BARKER, Plaintiff,

v.

HATTERAS ISLAND COTTAGE REPAIR, Employer, and NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, Carrier, Defendants.

Appeal by plaintiff from Opinion and Award entered 13 August 2015 by the North Carolina Industrial Commission. Heard in the Court of Appeals 7 March 2016.

*King Law Firm, by Kenneth W. King, Jr., for plaintiff-appellant.*

*Young Moore and Henderson, P.A., by Angela Farag Craddock, for defendants-appellees.*

ZACHARY, Judge.

Christopher Barker (plaintiff) appeals from an Industrial Commission Opinion and Award that denied plaintiff's request to reinstate disability payments that had been suspended for failure to cooperate with vocational rehabilitation efforts, and held that plaintiff had failed to establish that he was disabled. On appeal, plaintiff argues that the Commission erred by finding that plaintiff had failed to comply with the vocational rehabilitation plan, and by finding that plaintiff had failed to demonstrate that his inability to obtain employment was caused by his workplace

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injury. We conclude that the Industrial Commission did not err and that its Opinion and Award should be upheld.

#### I. Background

In May 2012, plaintiff worked for Hatteras Island Cottage Repair (defendant, with insurance carrier North Carolina Farm Bureau, defendants), performing construction and maintenance on rental properties. On 3 May 2012, plaintiff sustained an injury to his back and ribs when a bundle of roofing shingles fell off a roof and struck him. On 18 May 2012, defendants filed an Industrial Commission Form 60 admitting the compensability of plaintiff's injury by accident, and began paying plaintiff disability and medical compensation benefits. Plaintiff was treated for low back pain by Dr. David Goss at The Spine Center of the Chesapeake. On 2 January 2013, Dr. Goss performed an anterior lumbar interbody fusion at the L5-S1 location on plaintiff's spine. Following surgery, plaintiff missed fourteen of thirty-five scheduled sessions of physical therapy and on 24 May 2013, Special Deputy Commissioner Emily M. Baucom filed an order compelling plaintiff to cooperate with medical treatment.

In May 2013, defendants retained the services of a vocational rehabilitation firm to assist plaintiff with identification of employment opportunities and the development of marketable skills. Phillip Lawson, a certified rehabilitation provider, was assigned as plaintiff's vocational rehabilitation counselor. In April 2014,

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defendants filed an Industrial Commission Form 24 application to suspend plaintiff's disability compensation on the grounds that plaintiff had failed to comply with the vocational rehabilitation plan. Commissioner Baucom filed an order on 28 May 2014 suspending plaintiff's disability compensation and ordering that:

To have benefits reinstated, Plaintiff must demonstrate compliance with vocational rehabilitation for a period of four weeks by attending all meetings dressed in appropriate attire, arriving on time to all meetings, providing job logs as requested, and otherwise following the directions of the vocational rehabilitation professional. After plaintiff has demonstrated compliance in this matter, defendants SHALL reinstate benefits within five days. (emphasis in original).

On 6 May 2014, plaintiff filed an Industrial Commission Form 33 requesting a hearing on the issue of whether he was entitled to psychological treatment and treatment of pain in his left knee, conditions that plaintiff asserted were causally related to his workplace injury. On 5 June 2014, plaintiff filed an amended Form 33, adding to the issues identified in his first Form 33 an appeal from Commissioner Baucom's order suspending his disability compensation. The matter was heard by Deputy Commissioner George R. Hall, III, on 16 July 2014. Commissioner Hall filed an Opinion and Award on 12 December 2014, concluding that (1) plaintiff had complied with vocational rehabilitation efforts, but had been unable to obtain suitable employment due to the lifting restrictions resulting from his injury, and (2) plaintiff was not entitled to further psychological treatment or to treatment for his left knee, as these were not causally related to his injury. Commissioner Hall ordered plaintiff's

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disability compensation reinstated. Plaintiff appealed from Commissioner Hall's conclusion that he was not entitled to psychological treatment or to treatment for his left knee; defendants appealed from the order to reinstate plaintiff's disability compensation.

The matter was heard before the Full Commission on 6 May 2015, and on 13 August 2015 the Commission issued its Opinion and Award. The Commission upheld Commissioner Hall's conclusion that plaintiff was not entitled to medical compensation for his psychological issues or left knee condition, but reversed Commissioner Hall's award of disability benefits to plaintiff. The Commission found that plaintiff had "failed to take advantage of available employment opportunities," and had failed to prove that "his inability to find work earning the same wages he [] earned before his injury is because of his work-related injury." The Commission ordered that "[f]or so long as plaintiff fails to meet his burden of proving ongoing disability, plaintiff is not entitled to ongoing indemnity compensation. Therefore, plaintiff's request for a reinstatement of his indemnity compensation is denied." Plaintiff has appealed to this Court.

II. Standard of Review

The standard of review in workers' compensation cases has been firmly established by the General Assembly and by numerous decisions of this Court. Under the Workers' Compensation Act, "[t]he Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." Therefore, on appeal from an award of the

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Industrial Commission, review is limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law. This "court's duty goes no further than to determine whether the record contains any evidence tending to support the finding."

*Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (quoting *Anderson v. Construction Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965)). "Because the Industrial Commission is the 'sole judge of the credibility of the witnesses and the weight of the evidence[,] [w]e have repeatedly held that the Commission's findings of fact are conclusive on appeal when supported by competent evidence, even though there be evidence that would support findings to the contrary.'" *Medlin v. Weaver Cooke Constr., LLC*, 367 N.C. 414, 423, 760 S.E.2d 732, 738 (2014) (quoting *Davis v. Harrah's Cherokee Casino*, 362 N.C. 133, 137, 655 S.E.2d 392, 394-95 (2008)). Findings that are not challenged on appeal are "presumed to be supported by competent evidence" and are "conclusively established on appeal." *Johnson v. Herbie's Place*, 157 N.C. App. 168, 180, 579 S.E.2d 110, 118, *disc. review denied*, 357 N.C. 460, 585 S.E.2d 760 (2003). The "Commission's conclusions of law are reviewed *de novo*." *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004) (citation omitted).

### III. Scope of Appeal

Preliminarily, we clarify the scope of plaintiff's appeal. In his appellate brief, plaintiff does not present any arguments challenging the Commission's conclusion

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that plaintiff failed to prove that his psychological condition or his left knee pain were causally related to his workplace injury. Nor does plaintiff argue that he is entitled to medical benefits for these conditions. Therefore, we need not address the Commission's findings and conclusions on these issues.

In addition, although plaintiff makes a conclusory assertion that the Commission "committed reversible error by making findings of fact and conclusions of law that are not supported by evidence," plaintiff has failed to identify any specific finding by the Commission that plaintiff contends is not supported by the evidence. "In his brief, Plaintiff fails to argue that any specific findings of fact made by the Full Commission were not based upon sufficient evidence in the record. The findings of the Full Commission are thus binding on appeal." *Treat v. Mecklenburg Cty.*, 194 N.C. App. 545, 548-49, 669 S.E.2d 800, 803 (2008) (citing *Bass v. Morganite, Inc.*, 166 N.C. App. 605, 609, 603 S.E.2d 384, 386-87 (2004)). "Therefore, it is presumed that all findings of fact are supported by competent evidence, and they are conclusive on appeal. We are thus limited to the question whether such findings support the Industrial Commission's conclusion[s] of law[.]" *McLean v. Roadway Express*, 307 N.C. 99, 103, 296 S.E.2d 456, 459 (1982) (citations omitted).

III. Failure to Comply with Vocational Rehabilitation

In his first argument, plaintiff contends that the Commission erred by "finding that the plaintiff failed to comply with vocational rehabilitation efforts and thereby

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giving cause to terminate his temporary total disability benefits.” However, contrary to plaintiff’s contention, the Commission did not make a finding that plaintiff had “failed to comply with vocational rehabilitation efforts,” although it did make findings addressing the subject of his compliance. In addition, as discussed above, plaintiff does not challenge the evidentiary support for any specific findings. We also note that plaintiff’s benefits were not “terminated” as a result of the Commission’s Opinion: rather, the Commission denied plaintiff’s request to reverse Commissioner Baucom’s order suspending plaintiff’s benefits.

Plaintiff’s appellate argument is not entirely clear, but appears to be based on plaintiff’s contention that his disability payments were suspended based entirely upon his refusal of employment as a pizza delivery driver, a job which plaintiff contends was not suitable. Our review of the Commission’s Opinion reveals that the Commission made a number of other findings pertaining to plaintiff’s cooperation with the vocational rehabilitation program, in addition to the Commission’s findings concerning the pizza delivery job. These findings include the following:

36. Defendants retained the services of a vocational rehabilitation firm in May 2013 to assist plaintiff with identification of employment opportunities and the development of marketable skills. Phillip Lawson, a certified rehabilitation provider, was assigned as plaintiff’s vocational rehabilitation counselor. At their initial meeting, Mr. Lawson went over plaintiff’s current medical status, his restrictions, educational background, and prior work history. Based on their discussions, Mr. Lawson outlined a vocational rehabilitation plan. Based upon his

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experience in the job market in the Outer Banks, where Plaintiff resided, and Plaintiff's work restrictions, Mr. Lawson identified several vocational options for Plaintiff to explore including measure technician, building supply coordinator, prosthetics technician apprentice, dental lab technician apprentice; home appraiser apprentice, utility locator, meter reader, cabinetmaker, installer, dispatcher, courier, delivery driver, and food service worker.

37. Following their initial meeting, Mr. Lawson began having problems getting plaintiff to comply with his vocational rehabilitation efforts. Plaintiff was a "no show" for his scheduled weekly meetings on May 28, July 10, September 10, and October 15, 2013. Defendants filed a Motion to Compel Cooperation with Vocational Rehabilitation on October 13, 2013. On November 1, 2013, Special Deputy Commissioner Michael R. Kelly issued an Order compelling plaintiff to fully cooperate with all rehabilitation efforts directed by Mr. Lawson.

38. Subsequent to Special Deputy Commissioner Kelly's Order, plaintiff continued his failure to comply with vocational rehabilitation. Defendants filed a Form 24 Application to terminate plaintiff's benefits on April 25, 2014 due to his failure to comply. In their Form 24 Application, defendants showed that plaintiff failed to bring required job logs to eight different weekly meetings with Mr. Lawson; failed to arrive promptly to several meetings; missed weekly meetings due to being sick, but failed to produce [a] doctor's note for those dates as requested; and despite being advised by Mr. Lawson repeatedly to wear appropriate attire and be well groomed for meetings and interviews, plaintiff presented on five different occasions to meetings in sweat suits and unshaven.

39. Prior to the Form 24 hearing, defendants submitted additional documentation in support of their Form 24 Application and contended that plaintiff had unjustifiably refused a suitable position identified by Mr. Lawson.



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Special Deputy Commissioner Baucom issued an Order suspending Plaintiff's benefits on May 28, 2014.

40. The position identified by Mr. Lawson was for a pizza delivery driver with Maxximuss Pizza. Mr. Lawson secured an interview with the pizzeria on April 10, 2014 and the owner expressed an interest in hiring plaintiff to begin working as soon as possible. Plaintiff would work 36 hours per week and earn \$6.00 per hour, plus tips. Mr. Lawson obtained a job description and Dr. Goss approved the job description. By letter dated May 20, 2014, Mr. Lawson advised plaintiff that he should report to work on Monday, May 26, 2014, at noon. When plaintiff arrived, the business was closed. Plaintiff was subsequently instructed to report to work on May 30, 2014, but did not do so.

...

42. Between May 2013 and April 2014, Mr. Lawson identified at least 53 different job openings consistent with plaintiff's vocational profile in the area in which plaintiff lives. Plaintiff did not present any competent evidence that he is incapable of work in any employment. Plaintiff has failed to prove he has made reasonable attempts to find work as he failed to take advantage of available employment opportunities by repeatedly missing weekly vocational meetings, failing to apply for jobs as instructed by Mr. Lawson, failing to keep regular job logs documenting where he had applied, and often presenting to meetings with Mr. Lawson and prospective employers sloppily dressed and unshaven. Further, plaintiff did not offer medical or vocational expert testimony to demonstrate that it would be futile for him to look for work due to pre-existing conditions.

We conclude that these findings support the Commission's decision to deny plaintiff's request to reinstate disability benefits. Plaintiff directs our attention to other evidence that he contends would have supported a different result, and urges

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that the Commission's interpretation of the evidence relied too heavily on Mr. Lawson's testimony and failed to give sufficient consideration to the challenges plaintiff has faced since his injury. It is axiomatic that "[u]nder the Workers' Compensation Act, '[t]he Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony.'" *Richardson*, 362 N.C. at 660, 669 S.E.2d 584 (quoting *Anderson*, 265 N.C. at 433-34, 144 S.E.2d at 274). "On appeal, this Court may not reweigh the evidence or assess credibility." *Kelly v. Duke Univ.*, 190 N.C. App. 733, 738-39, 661 S.E.2d 745, 748 (2008) (citing *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998)) *disc. review denied*, 363 N.C. 128, 675 S.E.2d 367 (2009). We conclude that plaintiff is not entitled to relief on the basis of this argument.

IV. Proof of Disability

In his second argument, plaintiff asserts that the Commission erred by finding and concluding that plaintiff failed to prove that he was disabled. This argument lacks merit.

"The term 'disability' means 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(9) (2014). It is well-established that

[I]n order to support a conclusion of disability, the Commission must find: (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that plaintiff

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

*Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). “[A] claimant seeking to establish that he is legally disabled must prove all three statutory elements as explained in *Hilliard*.” *Medlin*, 367 N.C. at 422, 760 S.E.2d at 737.

The burden is on the employee to show that he is unable to earn the same wages he had earned before the injury, either in the same employment or in other employment. 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.

*Russell v. Lowe's Product Distribution*. 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993). In the present case, plaintiff asserts that he “proved his disability by the first method -- the production of medical evidence that he is physically incapable of accepting full duty work in any employment.” Plaintiff fails to identify the “medical evidence” upon which this contention is based. Moreover, plaintiff does not dispute the accuracy of the Commission's Finding No. 32, which stated that on 6 January 2014 “Dr. Goss released plaintiff” at maximum medical improvement, assigned

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permanent restrictions of no lifting over 35 pounds, and assigned a 30% permanent partial impairment rating to the back.” We conclude that plaintiff’s argument that “medical evidence” establishes his inability to work full time “in any employment” is without merit.

For the reasons discussed above, we conclude that the Commission did not err and that its Opinion and Award should be

**AFFIRMED.**

Chief Judge McGEE and Judge STROUD concur.

Report per Rule 30(e).