IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-259

Filed: 6 March 2018

North Carolina Industrial Commission, I.C. No. Y14644

RUSSELL OXENDINE, Employee, Plaintiff,

v.

BRISKEL LOCKLEAR, Employer, RIVERPORT INSURANCE COMPANY, Carrier (BERKLEY ASSIGNED RISK SERVICES, Administrator), Defendants.

Appeal by plaintiff from opinion and award entered 3 November 2016 by the North Carolina Industrial Commission. Heard in the Court of Appeals 18 October 2017.

Hester, Grady & Hester, PLLC, by H. Clifton Hester, for plaintiff-appellant.

Brewer Defense Group, by Joy H. Brewer and Kenneth E. Menzel, for defendant-appellees.

ELMORE, Judge.

Russell Oxendine ("plaintiff") appeals from an opinion and award of the North Carolina Industrial Commission ("the Commission") denying his claim for further workers' compensation benefits and granting his employer, Briskel Locklear ("defendant"), a credit for the overpayment of benefits to date. On appeal, plaintiff

contends the Commission erred in concluding that he failed to prove ongoing disability as defined by N.C. Gen. Stat. § 97-2(9), and in concluding that the fifth method of calculating average weekly wage under N.C. Gen. Stat. § 97-2(5) should apply in plaintiff's case.

While plaintiff focuses on evidence in the record tending to support his arguments, there is at least some competent evidence supporting the Commission's findings of fact, which in turn support its conclusions of law. Thus, under the narrow standard of review applicable to this appeal, we affirm the Commission's opinion and award.

I.

As of the 2015 hearing on this matter, plaintiff was 55 years old and resided in Maxton. The majority of plaintiff's work experience had been as a drywall finisher, which is the job he was performing for defendant at the time of his work-related injury. Plaintiff's job as a drywall finisher required him to use both hands and to lift heavy objects up to approximately 65 pounds.

At an unspecified time in 2010 or 2011, plaintiff performed a job for defendant that lasted three to four months. When that job was completed, plaintiff did not work another job for defendant until March 2012. Plaintiff's work in 2012 included approximately two weeks at a jobsite in Lansing, Michigan, and a few days at a jobsite in Detroit, Michigan. Plaintiff was not paid for any work he performed at these

jobsites due to pay disputes between defendant and the entities that had retained his crew for the two Michigan projects.

After leaving Detroit, plaintiff and the rest of defendant's crew drove to Danville, Pennsylvania, to begin working on a project that would eventually be completed on 22 July 2012. Unfortunately, on 8 May 2012—after working in Pennsylvania for less than two months—plaintiff fractured his left wrist and elbow when his scaffolding collapsed, causing him to fall 20 feet to the ground. Plaintiff underwent surgery and spent several days recovering at a hospital in Pennsylvania before returning home to Maxton on or about 12 May 2012.

On 12 June 2012, plaintiff began seeing Dr. Mark Brenner at Pinehurst Surgical Clinic for follow-up treatment for his injury. Plaintiff's treatment with Dr. Brenner included pain management, physical therapy, a minor procedure to remove a leftover surgical suture, and fittings for a variety of arm braces and splints.

After one year of monthly visits, Dr. Brenner released plaintiff at maximum medical improvement (MMI) on 17 June 2013. At that time, plaintiff's left elbow had a 30 percent permanent partial impairment rating, and his left wrist had a 25 percent permanent partial impairment rating. Dr. Brenner assigned physical restrictions for plaintiff's left upper extremity to include no vigorous pushing, pulling, pinching, gripping, or fingering; no repetitive use of his left arm; and no lifting over a certain weight limit, the exact amount of which remains in dispute.

From 17 June 2013 to 28 July 2015, plaintiff did not receive any additional medical treatment for his injury. Plaintiff was unable to return to his previous work as a drywall finisher due to his physical restrictions, and he did not attempt to obtain employment in any capacity after 8 May 2012. In the meantime, defendant had accepted plaintiff's workers' compensation claim on 20 November 2012 and had been paying plaintiff both indemnity and medical benefits as a result of his admittedly compensable injury. As of the hearing date, defendant had been paying indemnity compensation to plaintiff at a weekly compensation rate of $333.35, which had been calculated based on an average weekly wage of $500.00. However, defendant was never able to verify the accuracy of this wage calculation, which was complicated by the fact that defendant had always paid plaintiff in cash and had never provided plaintiff with a W-2.

The parties ultimately failed to reach an agreement as to the correct calculation of plaintiff's wage. As a result, on 14 May 2014, plaintiff filed a request for hearing before the Commission to determine his average weekly wage under N.C. Gen. Stat. § 97-2(5). Defendant filed a response alleging that plaintiff had received and/or was currently receiving all benefits to which he was entitled to receive, and that no additional benefits were owed to plaintiff.

On 18 February 2015, a hearing was held before Deputy Commissioner George T. Glenn II in which plaintiff testified regarding the work he had performed for

defendant and the wages defendant had paid to him. Plaintiff also testified to having a number of health conditions prior to his injury that defendant had accommodated by limiting his job duties. According to plaintiff, the new restrictions caused by his work-related injury—in conjunction with his pre-existing conditions—now prevented him from working in any capacity, even with accommodations. Whether plaintiff in fact had any work restrictions related to his pre-existing conditions remains in dispute.

At the conclusion of the hearing, Deputy Commissioner Glenn ordered that plaintiff have a functional capacity evaluation (FCE) performed to determine the extent of his physical limitations, including those attributable to plaintiff's pre-existing conditions. Unfortunately, on 9 March 2015, plaintiff suffered a non-work-related stroke. As a result of health complications associated with his stroke, plaintiff was unable to have an FCE performed.

On 28 July 2015, plaintiff returned to Dr. Brenner for the first time since his June 2013 release. Dr. Brenner performed an updated assessment of plaintiff's physical limitations and again recommended that plaintiff avoid stressful, forceful, or repetitive use of the left arm, but he did not issue a specific lifting restriction. Dr. Brenner's deposition was obtained on 11 August 2015 and made a part of the record.

As to the issue of plaintiff's ongoing disability, defendant retained Mr. Gregory Henderson, a vocational expert, to conduct economic and labor market surveys in this

matter. The purpose of the surveys was to assist in establishing the wage scale for drywall finishers and in determining if there were any potential jobs in the area that plaintiff had the ability to perform. Notably, all of the potential jobs proposed by Mr. Henderson were light-work jobs that required the occasional lifting of up to 25 pounds and the frequent lifting of up to 10 pounds. Mr. Henderson's deposition was obtained on 12 August 2015 and made a part of the record.

On 13 January 2016, Deputy Commissioner Glenn entered an opinion and award in which he concluded (1) that plaintiff had remained totally disabled from performing any work from the time of his injury through the hearing date, (2) that plaintiff's average weekly wage at the time of his injury was $1120.00, which yielded a compensation rate of $746.70 per week, and (3) that, given the health complications associated with plaintiff's stroke, it was too early to determine plaintiff's future restrictions and ability to earn income. Based on these conclusions, the deputy commissioner ordered defendant to pay indemnity compensation to plaintiff at a rate of $746.70 per week, continuing until further order of the Commission or until plaintiff obtained employment. Defendant timely appealed Deputy Commissioner Glenn's decision to the full commission.

On 3 November 2016, the full commission entered an opinion and award in which it reversed the decision of the deputy commissioner. The full commission found, *inter alia*, that Dr. Brenner had assigned plaintiff a lifting restriction of 25

pounds, and that the evidence did not support a finding that plaintiff had any work restrictions related to his pre-existing health conditions. The full commission concluded as a matter of law (1) that plaintiff had sustained a compensable injury by accident and was entitled to receive reasonably necessary medical benefits, (2) that, as to indemnity compensation, plaintiff's average weekly wage at the time of his injury was $409.23, which yielded a compensation rate of $272.83 per week, and (3) that plaintiff had failed to establish disability entitling him to indemnity compensation at any time subsequent to his 2013 release from Dr. Brenner's care. Based on these conclusions, the full commission denied plaintiff's claim for additional workers' compensation benefits, and it granted defendant a credit for the overpayment of benefits to date. Plaintiff entered timely notice of appeal.

II.

On appeal, plaintiff argues that the Commission erred in finding that Dr. Brenner assigned him a 25-pound lifting restriction, and in finding that plaintiff did not have any work restrictions due to his pre-existing health conditions. Plaintiff contends that these findings were not supported by competent evidence and, therefore, should not have been used to support the Commission's conclusion that plaintiff failed to prove ongoing disability as defined by N.C. Gen. Stat. § 97-2(9).

Plaintiff also argues that the Commission erred in utilizing the fifth method under N.C. Gen. Stat. § 97-2(5) to calculate his average weekly wage. He contends

that the Commission's decision to use the fifth method rather than the fourth method was based upon its finding that plaintiff did not have any work restrictions due to his pre-existing health conditions, which plaintiff specifically challenges on appeal.

Our review of an opinion and award of the Commission 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); N.C. Gen. Stat. § 97-86 (2015). "Thus, on appeal, this Court 'does not have the right to weigh the evidence and decide the issue on the basis of its weight. The [C]ourt'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. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)). If the record does contain such evidence, the Commission's findings are conclusive on appeal, even if there is also evidence that would support contrary findings. *Id.* (citing *Jones v. Myrtle Desk Co.*, 264 N.C. 401, 402, 141 S.E.2d 632, 633 (1965)). However, the plaintiff is entitled to the benefit of every reasonable inference in his favor. *Id.* (citation omitted).

A. Finding of Fact No. 11: Dr. Brenner's Lifting Restriction

The Commission found that

> To the extent Plaintiff argues that Dr. Brenner permanently restricted Plaintiff from lifting over 10

> pounds as a result of his left upper extremity injury, the preponderance of the competent, credible evidence tends to show that Dr. Brenner never altered his June 17, 2013 assignment of restrictions of no lifting over 25 pounds. . . .

On appeal, plaintiff maintains his argument that Dr. Brenner permanently restricted him from lifting over 10 pounds. He contends that the Commission erred in finding that Dr. Brenner assigned plaintiff a 25-pound lifting restriction because that finding is not supported by competent evidence. We disagree.

The remainder of the challenged finding plainly sets forth the Commission's reasons for rejecting plaintiff's argument as to the lifting restriction:

> . . . During his deposition, Plaintiff asked Dr. Brenner, "the 10 pound lifting restriction with the left upper extremity, is that, in your opinion, a permanent condition . . . ?" Dr. Brenner stated "[y]es, sir." However, there are no medical records from Dr. Brenner in which Plaintiff's lifting restrictions were altered after June 17, 2013. Further, on cross-examination, Dr. Brenner testified Plaintiff's left upper extremity restrictions were the same in June 2013 and in July 2015; that the restrictions he provided on July 28, 2015 were neither more nor less limiting than those assigned on June 17, 2013.

The restrictions Dr. Brenner assigned upon releasing plaintiff on 17 June 2013 are memorialized in a medical record from Pinehurst Surgical Clinic executed on that same date. The record lists "Mark Brenner, MD" as plaintiff's provider and includes the following notation: "Permanent Restrictions: No lifting greater than 25 lbs." Plaintiff contends that this record does not constitute competent evidence because the document appears to be an unsigned and incomplete template only, and because

Dr. Brenner later contradicted the 25-pound lifting restriction in his deposition testimony.

While the medical record relied upon by the Commission does appear to be in a different format than the majority of records from Dr. Brenner's office, this particular record was issued on plaintiff's final day of treatment. Thus, it is reasonable for the record to vary in appearance from earlier records that indicate ongoing care and future treatment plans. Further, the record includes plaintiff's name, date of birth, and the additional restrictions to his left upper extremity, none of which are in dispute. Dr. Brenner's name also appears in electronic form in the "provider" section at the bottom of the record, much like the electronic signatures that appear on the majority of his office records. As to plaintiff's assertion that Dr. Brenner contradicted the record in his deposition, such an assertion goes to the weight of the evidence, which is outside the scope of our narrow appellate review.

Because the Commission's finding that Dr. Brenner assigned plaintiff a 25-pound lifting restriction is supported by at least some competent evidence, we reject plaintiff's argument that the finding was made in error.

B. Finding of Fact No. 12: Impact of Pre-Existing Conditions

The Commission also found that

> In 1992 or 1993, Plaintiff cut off two toes on his left foot. Prior to May 8, 2012, Plaintiff also suffered a hernia, and he described his knees as "deteriorating." There is no medical evidence documenting any work restrictions

> related to these pre-existing conditions. Plaintiff's testimony that he was not able to perform the full range of duties associated with being a drywall finisher prior to May 8, 2012 because of these pre[-]existing conditions is not accepted as credible.

On appeal, plaintiff contends his testimony that pre-existing conditions had prevented him from performing the full range of duties as a drywall finisher even before his injury was admitted by both parties. Plaintiff argues that, because his pre-existing conditions were noted in the hospital records from his work-related injury and were never in dispute, the Commission erred in finding that his testimony was not credible. We disagree.

Here, plaintiff's argument again goes to the weight of the evidence. As to the existence of hospital records noting plaintiff's pre-existing conditions, the Commission found that there were no medical records documenting any *work restrictions* related to those conditions; it did not deny the existence of the conditions themselves. On appeal, plaintiff has not identified a single medical record that specifically documents any work restrictions attributable to his pre-existing conditions and has, therefore, failed to refute the Commission's finding.

In weighing the evidence, the Commission apparently determined that the lack of medical records was more persuasive than plaintiff's testimony. Because the Commission's finding is supported by competent evidence, we reject plaintiff's argument that the finding was made in error.

C. Conclusion of Law No. 4: Failure to Prove Ongoing Disability

Based on its findings of fact, the Commission concluded that plaintiff "failed to meet his burden of proving ongoing disability" and, therefore, "is no longer entitled to ongoing indemnity compensation."

Disability is defined 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(9) (2015). In *Hilliard v. Apex Cabinet Co.*, our Supreme Court held that

> in 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 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.

305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). Under the three-pronged *Hilliard* test, the burden is on the employee to show that he is incapable of earning the same wages he had earned before the injury. *Id.*

> 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 pre[-]existing 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. Distrib., 108 N.C. App. 762, 765–66, 425 S.E.2d 454, 457 (1993) (citations omitted). If he is able to meet this initial burden, the employee must then demonstrate the required link between wage loss and the work-related injury. *See Fletcher v. Dana Corp.*, 119 N.C. App. 491, 494–99, 459 S.E.2d 31, 34–36 (1995).

Plaintiff contends the undisputed evidence shows that Dr. Brenner assigned him a 10-pound lifting restriction, and that his pre-existing conditions prevented him from performing the full range of duties as a drywall finisher. He relies on these two assertions in arguing that he has satisfied the first two prongs of the *Hillard* test under the third method set forth above. Plaintiff ultimately contends that, given his permanent 10-pound lifting restriction and his inability to perform his previous work as a drywall finisher, he has proven disability under the *Hilliard* test. We disagree.

The Commission made a total of seventeen findings of fact to support its four conclusions of law. As discussed herein, the Commission's findings as to plaintiff's lifting restriction and his pre-existing conditions are supported by competent evidence. At issue then is whether these two factual findings, in addition to the Commission's fifteen unchallenged findings, support the conclusion that plaintiff failed to meet his burden of proving ongoing disability.

Notably, the Commission made the following two unchallenged findings regarding plaintiff's employment capabilities during each relevant time period since the date of his injury:

> 13. For the period from May 8, 2012 to June 16, 2013, Plaintiff was incapable of working in any capacity because of physical restrictions caused by the May 8, 2012 injury by accident.
>
> Beginning June 17, 2013, and continuing until he suffered his non-work-related stroke, Plaintiff was capable of some employment within the restrictions assigned by Dr. Brenner. . . .
>
> 14. For the period from June 17, 2013 (the date Dr. Brenner released Plaintiff to return to work with restrictions) to May 15, 2015 (the date of Plaintiff's stroke)[1], Plaintiff failed to show that he was physically incapable of work in any capacity, that he made a reasonable effort to find other employment, or that it would have been futile for him to look for work because of pre-existing conditions.
>
> For the period from May 16, 2015[2] to the present, Plaintiff's inability to earn the same wages he was earning at the time of the injury in the same or any other employment has been causally related to his stroke. . . .

Based on this timeline, the Commission concluded that plaintiff sustained a compensable injury on 8 May 2012, but that he failed to meet his burden of proving disability subsequent to 17 June 2013. We agree.

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[1] As the Commission correctly noted in an earlier finding, the actual date of plaintiff's stroke was 9 March 2015. This typographical error is immaterial.

[2] Here, the Commission is attempting to refer to the day after plaintiff's stroke. The correct date is 10 March 2015. This typographical error is immaterial.

Plaintiff maintains that he has been incapable of any employment at all times since 8 May 2012. He argues that a 10-pound lifting restriction limits him to sedentary work only, while a 25-pound restriction suggests an ability to perform light-work jobs. This difference is significant because the labor market survey presented by Mr. Henderson showed the availability of light-work jobs only. Plaintiff contends that the " 'under 10 pound lifting restriction' given to him by Dr. Brenner[,] together with his pre-existing conditions, precluded all work regardless of his right-side stroke disability." Thus, plaintiff's argument as to ongoing disability caused by his work-related injury relies entirely on a 10-pound lifting restriction and a finding of work restrictions related to his pre-existing conditions.

Because the Commission properly found a 25-pound lifting restriction and no work restrictions related to plaintiff's pre-existing conditions, we reject plaintiff's argument that the Commission erred in concluding that he failed to meet his burden of proving ongoing disability.

D. Conclusions of Law Nos. 2 and 3: Calculation of Average Weekly Wage

The Commission also concluded that "the fifth method of calculating the average weekly wage under N.C. Gen. Stat. § 97-2(5) should be applied as it will provide an average weekly wage that will most nearly approximate the amount which Plaintiff would be earning were it not for his injury."

"In North Carolina, the calculation of an injured employee's average weekly wages is governed by N.C. Gen. Stat. § 97-2(5)." *Conyers v. New Hanover Cty. Sch.*, 188 N.C. App. 253, 255, 654 S.E.2d 745, 748 (2008). "The statute sets forth five methods, in order of preference, by which an injured employee's average weekly wages are to be computed." *Id.* (citation omitted). In relevant part, the statute specifically provides:

> [Method 5]: But where for exceptional reasons the foregoing [four methods] would be unfair, either to the employer or the employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

N.C. Gen. Stat. § 97-2(5) (2015).

Plaintiff argues that the Commission erred in concluding that the fifth method was the only method that would produce fair and just results to both parties. He asserts that the Commission rejected the first four methods because it assumed, without any evidence, that plaintiff would not have worked the remaining 22 weeks left in the year after his contract with defendant ended. We disagree.

The Commission found that prior to his 8 May 2012 injury, plaintiff was not consistently employed by defendant or any other employer. In determining which method of calculating average weekly wage should be applied under such circumstances, the Commission made the following extensive findings as to the first four methods under N.C. Gen. Stat. § 97-2(5):

15. . . . The first method is inappropriate as Plaintiff did not work for Defendant-Employer continuously for the 52 weeks preceding his injury. The second method is inappropriate as it applies to an employee who has worked 52 weeks for a Defendant-Employer but missed more than 7 consecutive days during that period, which is not the factual situation presented by this case. The third method applies to employees whose employment extends over a period of fewer than 52 weeks by calculating their average weekly wage by dividing the actual earnings by the number of weeks worked, *provided the results are fair and just to both parties*. This method would not produce fair and just results to both parties given the very sporadic nature of Plaintiff's employment. Plaintiff has failed to demonstrate that he worked more than a few months for any employer during either 2010 or 2011, and in 2012, the job on which Plaintiff was working was only expected to last for a few more months after Plaintiff's injury. Therefore, the weekly compensation rate which would result from using the third method would mean that Plaintiff would receive much more in workers' compensation on an annual basis than what he was earning before he was injured.

16. Defendants contend that Plaintiff's average weekly wage should be calculated using the fourth method and applying wage and earnings data compiled by their vocational expert, Mr. Gregory Henderson. . . . Defendants contend that in the absence of any documentation regarding Plaintiff's hourly earnings, the Commission should find that Plaintiff was paid the low-end wage rate because of the pre-existing conditions Plaintiff contended impaired his ability to perform all aspects of the drywall finisher job. However, the Commission rejected Plaintiff's testimony in that regard as not credible. In addition, the Commission finds that to calculate Plaintiff's average weekly wage using a high-end or low-end hourly rate for 52 weeks a year produces a result that is not fair and just to both parties, given Plaintiff's sporadic employment history. These methods would result in a calculation of the average weekly wage that would not be fair to both parties.

(Emphasis added.) Because the first four methods were either inapplicable or would produce results which would not be fair and just to both parties, the Commission concluded that the fifth method under N.C. Gen. Stat. § 97-2(5) should apply in plaintiff's case. We agree.

In *Joyner v. A. J. Carey Oil Co.*, our Supreme Court noted that the intent of N.C. Gen. Stat. § 97-2(5) is to obtain results that are fair and just to both employer and employee. 266 N.C. 519, 522, 146 S.E.2d 447, 449 (1966). Fair and just results "consist of such average weekly wages as will most nearly approximate the amount which the injured employee *would be earning* were it not for the injury, in the employment in which he was working at the time of his injury." *Id.* (citation and quotation marks omitted).

The Commission here noted that, as was the case in *Joyner*, plaintiff's employment cannot be treated as if it were a continuous job with regular wages because the evidence does not establish that plaintiff would have worked every week, or even every month. This is a factor in determining what is fair and just to both parties because "[t]he compensation which he collects, however,—whatever the amount—will be paid every week." *Id.* As a result, the Court in *Joyner* calculated the plaintiff's average weekly wage by dividing his earnings by 52 weeks, rather than by the number of weeks he would have worked but for his injury.

Here, the Commission determined—based on the completion of the

Pennsylvania project in July 2012—that had plaintiff not been injured on 8 May 2012, he would have earned $1120.00 per week for a period of 19 weeks, or $21,280.00. However, in order to produce results fair and just to both parties pursuant to *Joyner*, the Commission then divided plaintiff's projected total gross earnings by 52, not 19. The Commission's calculation produced an average weekly wage of $409.23, which yielded a compensation rate of $272.83 per week. Because defendant had been paying indemnity compensation at a rate $333.35 per week, the Commission concluded that defendant was entitled to a credit for the overpayment of $60.52 per week.

Plaintiff maintains his argument that his pre-existing conditions prevented him from performing the full range of duties as a drywall finisher even before his injury, and that the Commission erred in failing to conclude that the fourth method of calculating average weekly wage should be applied due to those conditions. Because the Commission properly found no work restrictions related to plaintiff's pre-existing conditions, this argument is without merit.

Plaintiff also asserts that, in determining what is fair and just to the parties, the Commission failed to consider the two-and-a-half weeks that plaintiff worked for defendant without pay in early 2012. This assertion is based on plaintiff's personal views of fairness and is irrelevant to the calculation of what plaintiff would have earned but for his injury. As noted by the Commission, "[t]he failure of both parties to report and keep records of earnings and wages paid and dates worked makes it

impossible to calculate the average weekly wage with greater precision."

Because the Commission considered each method under N.C. Gen. Stat. § 97-5(2) and determined, based on the available evidence, that the first four methods would not produce fair and just results to both parties, the Commission did not err in concluding that the fifth method of calculating average weekly wage should apply in plaintiff's case.

III.

Because there was competent evidence to support its findings of fact, and because those factual findings in turn support its conclusions of law, the opinion and award of the Commission is hereby:

AFFIRMED.

Judges DIETZ and INMAN concur.

Report per Rule 30(e).