IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-1094

Filed: 21 April 2015

North Carolina Industrial Commission, IC No. Y16731

PAUL FIELDS, Employee, Plaintiff,

v.

H&E EQUIPMENT SERVICES, LLC, Employer, TRAVELERS, Carrier, Defendants.

Appeal by Defendants from Opinion and Award entered 21 May 2014 by the North Carolina Industrial Commission. Heard in the Court of Appeals on 18 February 2015.

Hutchens Law Firm, by William L. Senter and Maggie S. Bennington, for the plaintiff-appellee.

Hedrick Gardner Kincheloe & Garofalo LLP, by M. Duane Jones and Ryan W. Keevan, for the defendant-appellants.

HUNTER, JR. Robert N., Judge.

Paul Fields ("Plaintiff") was injured at his place of employment on 24 May 2012. This injury resulted in significant pain and loss of physical capability. The Full Industrial Commission awarded Plaintiff total temporary disability ("TTD") compensation. H&E Equipment Services, LLC and Travelers ("Defendants") appeal, arguing that Plaintiff did not meet his burden to show that he is entitled to TTD compensation. Because Plaintiff failed to provide competent evidence through expert

testimony of his inability to find any other work as a result of his work-related injury, we reverse the Opinion and Award.

I. Factual & Procedural History

Plaintiff was employed as a mechanic for Defendant H&E Equipment Services for over eleven years. He is a sixty-five year old man with a tenth-grade education and some computer skills. Plaintiff's job as a mechanic involved physical activities such as changing batteries, tires, brakes, and other types of equipment. He was regularly required to stoop and lift, sometimes in excess of forty pounds. Beginning in 2006, Plaintiff saw Dr. James E. Rice ("Dr. Rice") for pain in his back. These visits escalated in 2011, when Plaintiff saw Dr. Rice three times for back and leg pain, at which time Dr. Rice placed Plaintiff on a home exercise program and gave him prescriptions for pain medicine and muscle relaxers. In addition to the prescriptions and exercise regimen, Dr. Rice also placed Plaintiff under a work restriction of lifting no more than twenty-five pounds. Dr. Rice also acknowledged that Plaintiff's condition, likely a degenerative disc disease, was expected to worsen over time without regard to work-related activities.

On 24 May 2012, Plaintiff sustained a back injury at his place of employment while removing a forty-three-pound battery from a vehicle, in violation of Defendant's and Dr. Rice's lifting restrictions. Plaintiff felt a "sting" in his back after lifting the battery, resulting in steadily increasing back and leg pain over the next few days.

The following Tuesday, 29 May 2012, Plaintiff went to the emergency room for his pain. Plaintiff subsequently notified his employer of his accident and inability to work. Plaintiff's co-worker, Jeff Zima, took Plaintiff to U.S. Healthworks multiple times, for which Defendants covered the cost. After the second visit, U.S. Healthworks discharged Plaintiff, but Plaintiff sought continued help and treatment from Dr. Rice.

Dr. Rice noted Plaintiff's condition had worsened, with extremely limited ability to bend his back and legs. Additionally, Plaintiff's ranges of motion were limited and his spine and back muscles demonstrated increased tenderness, lumbar strain, lumbar degenerative disc disease, and sciatica. An MRI revealed significant changes in the lower three levels of his back. Dr. Rice then recommended that Plaintiff not return to his regular work and placed him on prescription pain medications and muscle relaxers. Plaintiff returned to Dr. Rice over the next few months with consistent back pain radiating through his legs, some numbness, and limited range of spinal and leg mobility. Dr. Rice testified it was more likely than not within a reasonable degree of medical certainty that Plaintiff had a pre-existing condition that had been aggravated by his work-related injury. Additionally, should Plaintiff's condition not improve, Dr. Rice stated he would recommend Plaintiff undergo surgery.

On 2 August 2012, Plaintiff filed a Form 18 (Notice of Accident to Employer and Claim of Employee, Representative, or Dependent) and a Form 33 (Request that Claim be Assigned for Hearing), alleging a compensable injury to his back. On 1 October 2012, Defendant completed a Form 19 (Employer's Report of Employee's Injury or Occupational Disease), and a Form 61, denying the compensability of Plaintiff's back claim on the grounds that he did not sustain a specific traumatic incident.

On 19 April 2013, Plaintiff's case was heard by Deputy Commissioner Robert J. Harris. On 30 October 2013, Deputy Commissioner Harris issued an opinion finding that Plaintiff had established ongoing disability as of 24 May 2012 and was entitled to TTD benefits from 25 May 2012 through the present and ongoing. Plaintiff's employer was ordered to pay Plaintiff's TTD benefits at the rate of $506.69 per week from 25 May 2012 onward, as well as payment for Plaintiff's medical treatments beginning 24 May 2012. Defendants gave proper Notice of Appeal to the Full Commission on 30 October 2013.

On 21 May 2014, the Full Commission issued an Opinion and Award affirming the Deputy Commissioner's decision. Defendants then filed a notice of appeal of the order of the Full Commission to this Court on 24 June 2014.

II. Jurisdiction

This Court has jurisdiction over appeals from the Industrial Commission pursuant to N.C. Gen. Stat. § 7A-29(a) (2014).

III. Standard of Review

"'Appellate review of an order and award of the Industrial Commission is limited to a determination of whether the findings of the Commission are supported by the evidence and whether the findings in turn support the legal conclusions of the Commission.'" *Allred v. Exceptional Landscapes, Inc.*, ___ N.C. App. ___, ___, 743 S.E.2d 48, 51 (2013) (quoting *Simon v. Triangle Materials, Inc.,* 106 N.C. App. 39, 41, 415 S.E.2d 105, 106 (1992)). The Industrial Commission "is the sole judge of the credibility of the witnesses and the weight of the evidence[,]" *Hassell v. Onslow Cnty. Bd. of Educ.*, 362 N.C. 299, 305, 661 S.E.2d 709, 714 (2008), and therefore "[t]he Commission's findings of fact are conclusive on appeal if supported by competent evidence 'notwithstanding evidence that might support a contrary finding.'" *Reaves v. Indus. Pump Serv.*, 195 N.C. App. 31, 34, 671 S.E.2d 14, 17 (2009) (quoting *Hobbs v. Clean Control Corp.*, 154 N.C. App. 433, 435, 571 S.E.2d 860, 862 (2002)). "Unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal." *Allred*, ___ N.C. App. at ___, 743 S.E.2d at 51. "The Commission's conclusions of law are reviewable *de novo*." *Id.* "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment

for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (quotations omitted).

IV. Analysis

The issue on appeal is whether the Full Commission erred in awarding Plaintiff disability benefits: specifically, whether Plaintiff failed to meet his burden of showing that he is disabled as a result of a work injury. Defendants argue that the Full Commission's Finding of Fact No. 37 is not supported by competent evidence in the record. Finding of Fact No. 37 states that, based on the evidence, it would be futile for Plaintiff to seek competitive employment that conforms with the work restrictions placed on Plaintiff by his doctor. **[R. at 39]** Defendants also challenge the Commission's Conclusion of Law No. 4, based on Finding of Fact No. 37. Conclusion of Law No. 4 states:

> Plaintiff has met his burden of proving disability under prong three (3) of *Russell* by demonstrating that he has been and continues to be disabled as a result of his compensable 24 May 2012 injury in that it has been and continues to be futile for him to seek competitive employment that comports with the work restrictions that Dr. Rice has placed on him related to his 24 May 2012 injury. As such, plaintiff is entitled to temporary total disability compensation from 25 May 2012 through the present and continuing until plaintiff returns to work or further Order of the Commission.

The Workers' Compensation Act requires an employee seeking compensation to prove the existence of his disability and its extent. *Newnam v. New Hanover Reg'l*

Med. Ctr., 212 N.C. App. 271, 282, 711 S.E.2d 194, 202 (2011). In order to prove compensable disability, our Supreme Court requires a plaintiff to prove three things:

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

Hilliard v. Apex Cabinet Co., 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). A plaintiff must establish all three of the *Hilliard* elements in order to prove that he is legally disabled. *Medlin v. Weaver Cooke Constr., LLC*, 367 N.C. 414, 421, 760 S.E.2d 732, 737 (2014).

A plaintiff may satisfy the first two elements of *Hilliard* by producing one of the following: (1) medical evidence that he is mentally or physically incapable of working in any capacity; (2) evidence that he is capable of some work, but has not been able to find any; (3) evidence that he is capable of some work, but that it would be futile to attempt to find any based on his age, experience, or lack of education; or (4) evidence that he has obtained employment at a lower wage than his previous employment. *See Russell v. Lowes Prod. Distrib.*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993). These are known as the *Russell* factors, and a plaintiff need only produce evidence of one *Russell* factor to satisfy the first two prongs of *Hilliard*. *See id*.

When an employee's attempts to obtain employment "would be futile because of age, inexperience, lack of education or other preexisting factors, the employee should not be precluded from compensation for failing to engage in the meaningless exercise of seeking a job which does not exist." *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 444, 342 S.E.2d 798, 809 (1986). In *Peoples* and a similar case, *Roset-Eredia v. F.W. Dillinger, Inc.*, medical and vocational expert testimony was offered to demonstrate futility of effort based on extreme injury, pain, and lack of transferable skill in a competitive market. *See Peoples*, 316 N.C. at 442-43, 342 S.E.2d at 809; *Roset-Eredia*, 190 N.C. App. 520, 525, 660 S.E.2d 592, 596-97 (2008).

In this case, Defendants argue that Plaintiff did not sufficiently demonstrate futility under the third prong of *Russell*. We agree.

Here, Plaintiff failed to meet prongs one, two, or four of *Russell* because he did not present any evidence of an attempt to gain employment as required by prongs two and four, nor that he is incapacitated so severely that he is incapable of working in *any* capacity as required by prong one. *See Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457. Plaintiff's only remaining option to satisfy *Russell*, and thus, *Hilliard*, is prong three, which requires a showing of evidence that it would be futile for Plaintiff to attempt to find any work because of his age, experience, or lack of education. *See id.*

Plaintiff offered no testimony from a vocational expert that his pre-existing condition made it futile to seek any other employment opportunities in his job market. There was no evidence presented of any labor market statistics stating that his pre-existing condition made him incapable of re-entering the labor market. Plaintiff's medical expert did not state that his pre-existing condition or medical injury would make it impossible for him to work, only that he should not continue in his current role. Without any expert testimony establishing that Plaintiff's job with Defendant is the only job obtainable, or any evidence demonstrating that no other man of his age, education, experience, and physical capabilities is currently working anywhere, Plaintiff did not meet his burden of proof of disability under *Russell* prong three. Therefore, he failed to meet the first two requirements of *Hilliard*. *See Peoples*, 316 N.C. at 442-43, 342 S.E.2d at 809; *Roset-Eredia*, 190 N.C. App. at 525, 660 S.E.2d at 596-97 (concerning the need for vocational or medical expert testimony concerning futility of job search).

Defendants also argue that Plaintiff failed to present evidence to fulfill the third prong of *Hilliard*: "that . . . [the plaintiff's] incapacity to earn was caused by [his] . . . injury." *Hilliard*, 305 N.C. at 595, 290 S.E.2d at 683. We reject this argument. Based on the testimony of Dr. Rice, an expert in orthopedics and spinal injuries, Plaintiff established that his ongoing pain and disability is a result of his work-related injury from 24 May 2012. Dr. Rice testified that the injury was an

aggravation of a pre-existing condition caused by the work-related incident. He also noted that Plaintiff's condition is significantly worse than his condition prior to the injury on 24 May 2012. Dr. Rice further recommended after the injury on 24 May 2012 that Plaintiff not resume his previous work activities. This expert testimony is sufficient to meet the requirement of the third prong of *Hilliard*.

Nevertheless, because Plaintiff failed to meet his burden of proof by failing to produce competent evidence that it is futile for him to seek any other employment, he has not satisfied the first two prongs of *Hilliard*. The Commission's Finding of Fact No. 37 is not supported by competent evidence. Thus, the Commission erred in making Conclusion of Law No. 4. We reverse the Commission's Opinion and Award.

REVERSED.

Judge STEPHENS and Judge TYSON concur.