IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-645

Filed: 3 July 2018

North Carolina Industrial Commission

DAVID S. FIFE, Employee, Plaintiff,

v.

ETERNAL WOODWORKS, LLC., Employer, and ERIE INSURANCE, Carrier, Defendants.

Appeal by Plaintiff from Opinion and Award entered 24 February 2017 by the Full Commission of the North Carolina Industrial Commission. Heard in the Court of Appeals 14 December 2017.

Ramsay Law Firm, P.A., by Martha L. Ramsay, for Plaintiff-Appellant.

Hedrick Gardner Kincheloe & Garofalo, LLP, by M. Duane Jones, Lindsay N. Wikle, and Linda Stephens, for Defendants-Appellants.

INMAN, Judge.

As the finder of fact, the North Carolina Industrial Commission has sole authority to determine the weight and credibility of evidence. This Court will not review a finding that one piece of evidence was more or less credible than another piece, so long as the Commission's findings are supported by competent evidence.

David S. Fife ("Plaintiff" or "Mr. Fife") appeals from an Opinion and Award of the Full Commission of the North Carolina Industrial Commission (the "Commission") awarding Plaintiff workers' compensation benefits in the amount of $301.02 per week from Eternal Woodworks, LLC, ("Defendant-Employer" or "Eternal Woodworks") and Erie Insurance ("Defendant-Carrier") (collectively "Defendants"). Plaintiff contends the Commission erred in calculating his average weekly wage under N.C. Gen. Stat. § 97-2(5). After careful review, we affirm the Commission's Opinion and Award.

Factual and Procedural History

Mr. Fife has been a woodworker for over twenty years, and is right-hand dominant. Throughout his career, he worked primarily as an employee rather than as an independent contractor.

In October 2014, Mr. Fife began working for Eternal Woodworks as the shop manager. His duties included setting up the shop and building custom woodwork items. He typically worked eight to nine hours per day.

Jon Robinson, the owner of Eternal Woodworks, paid Mr. Fife $20.00 per hour on a weekly basis, which he later increased to $23.00 an hour. Mr. Robinson paid Mr. Fife most Fridays, except for times when he asked Mr. Fife to delay payment until he received payment from a customer. Mr. Fife received payment in multiple ways, either by check from Eternal Woodworks, bank funds transfer from Mr. Robinson, or

sometimes directly from a customer if so arranged by Mr. Robinson. Mr. Fife normally reported his hours to Mr. Robinson through text message or telephone calls, except during a brief period when he was required to keep a daily record of his hours. Mr. Robinson did not give Mr. Fife a 1099 or W-2 form during his employment, did not deduct any tax or benefits withholding from his pay, and did not use paper accounting or a computer program to keep track of his company's payments to Mr. Fife.

On 1 July 2015, while using a table saw to construct a bench, Mr. Fife slipped on the floor and threw out his arms to regain his balance. As he came down, his right hand landed on the blade of the table saw, severing his index finger and mangling his hand. Mr. Fife suffered an amputated right index finger to the middle knuckle; an open fracture and dislocation of the proximal interphalangeal joint of the right middle finger, which also sustained a de-gloving injury and significant bone damage; a tuft fracture and complex tip laceration of the right ring finger, and a complex tip laceration of the right small finger. Mr. Fife's injury required multiple surgeries and treatments, and caused persistent damage in his grip and motor function.

Mr. Fife filed a workers' compensation claim with Defendants, but they denied his claim on the ground that no employer-employee relationship existed between the parties. Mr. Fife filed a request for a hearing, which proceeded on 12 November 2015. A Deputy Commissioner entered an Opinion and Award on 13 May 2016, concluding

that Mr. Fife was an employee of Eternal Woodworks, had an average weekly wage of $816.40, and was entitled to a weekly compensation rate of $544.29. Defendants appealed to the Full Commission.

The Commission entered an Opinion and Award adopting the Deputy Commissioner's decision in part but recalculating Mr. Fife's average weekly wage. The Commission made the following findings of fact:

> 35. The documentation of payments made by Mr. Robinson to [Mr. Fife] for the work [Mr. Fife] performed for Eternal Woodworks totals $11,212.00. Each of the payments that comprise this total is also accounted for in the documentation of payments received and itemized by [Mr. Fife].
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> 36. Text Messages between [Mr. Fife] and Mr. Robinson further confirm [Mr. Fife's] receipt of wages totaling $5,105.50 for work [Mr. Fife] performed on behalf of Eternal Woodworks that was not captured in the documentation provided by Mr. Robinson. The majority of these payments were made to [Mr. Fife] via electronic funds transfer or check from Mr. Robinson; however, two of these payments [Mr. Fife] received directly from one of Eternal Woodworks' clients. The dates and times of these text message exchanges correspond with deposits made in [Mr. Fife's] checking account . . . .
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> 37. The preponderance of evidence in view of the entire record shows [Mr. Fife] received total wages for the work he performed for Eternal Woodworks in the amount of $16,317.50.

Based on these findings, the Commission concluded:

> 9. The third statutory method of calculating average weekly wage provides that, where the employment prior to

> the injury extended over a period of less than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed, so long as such a calculation produces results fair and just to both parties. *Tedder*, 238 N.C. App. at 175, 767 S.E.2d at 102. In the instant claim, [Mr. Fife] worked 36.14 weeks for Eternal Woodworks, from October 21, 2014 until his date of injury on July 1, 2015. Plaintiff earned $16,317.50 over this period, which comports to an average weekly wage of $451.51, yielding a compensation rate of $301.02. The Commission concludes that calculation of [Mr. Fife's] average weekly wage using this third method is fair and just to both [Mr. Fife] and defendants, as it most nearly approximates the wages [Mr. Fife] would be earning but for his compensable injury.

Mr. Fife timely appealed to this Court.[1]

Analysis

Plaintiff argues that the Commission's findings of fact regarding his compensation rate were unsupported by the evidence and that the Commission erred as a matter of law in its application of the appropriate method for determining Plaintiff's average weekly wage. We disagree.

A. Standard of Review

Our review of an opinion and award by the North Carolina Industrial Commission is limited to determining "(i) whether the findings of fact are supported by competent evidence, and (ii) whether the conclusions of law are justified by the

[1] Defendants have not cross-appealed the issue of whether or not Plaintiff qualifies as an employee for the purposes of compensation. This issue is therefore abandoned and we need not address it.

findings of fact." *Chambers v. Transit Mgmt.*, 360 N.C. 609, 611, 636 S.E.2d 553, 555 (2006) (citations omitted). "This Court has no authority to re-weigh the evidence or to substitute its view of the facts for those found by the Commission." *Weaver v. Dedmon*, __ N.C. App. __, __, 801 S.E.2d 131, 136 (2017). Unchallenged findings of fact are binding on appeal, *Allred v. Exceptional Landscapes, Inc.*, 227 N.C. App. 229, 233, 743 S.E.2d 48, 52 (2013), and we must accept as conclusive any challenged findings supported by competent evidence "even though there is evidence which would support a finding to the contrary." *Hansel v. Sherman Textiles,* 304 N.C. 44, 49, 283 S.E.2d 101, 104 (1981).

The Commission's conclusions of law are reviewable *de novo*. *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004) (citation omitted). If the Commission's conclusions are based on insufficient evidence or a misapprehension of the law, "the case should be remanded so 'that the evidence [may] be considered in its true legal light.' " *Thompson v. STS Holdings, Inc.*, 213 N.C. App. 26, 30, 711 S.E.2d 827, 829 (2011) (citing *Chambers*, 360 N.C. at 611, 636 S.E.2d at 555).

B. Average Weekly Wage

The North Carolina Workers' Compensation Act establishes five methods, in order of preference, by which to calculate an injured employee's average weekly wage.

Hensley v. Caswell Action Comm., Inc., 296 N.C. 527, 533, 251 S.E.2d 399, 402 (1979). The relevant portion of the statute provides that "average weekly wages" shall mean:

> [1] the earnings of the injured employee in the employment in which the employee was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury, including the subsistence allowance paid to veteran trainees by the United States government, provided the amount of said allowance shall be reported monthly by said trainee to the trainee's employer, divided by 52; [2] but if the injured employee lost more than seven consecutive calendar days at one or more times during such period, although not in the same week, then the earnings for the remainder of such 52 weeks shall be divided by the number of weeks remaining after the time so lost has been deducted. [3] Where the employment prior to the injury extended over a period of less than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed; provided, results fair and just to both parties will be thereby obtained. . . .

N.C. Gen. Stat. § 97-2(5) (2015). Our case law has emphasized that the primary intent of this statute is "to obtain results that are fair and just to both employer and employee." *Conyers v. New Hanover Cty. Sch.*, 188 N.C. App. 253, 256, 654 S.E.2d 745, 748 (2008). Fair and just results are those that "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." *Liles v. Faulkner Neon & Elec. Co.*, 244 N.C. 653, 660, 94 S.E.2d 790, 795 (1956) (emphasis in original).

The Commission used the third statutory method in this case. Plaintiff does not dispute the Commission's choice of that method but challenges the Commission's weighing of the evidence in calculating his wages.

C. The Commission's Weighing of Evidence

Plaintiff first argues that the Commission primarily relied on incomplete and unreliable evidence to determine his gross earnings, and it thus erred in calculating the average weekly wage. Plaintiff contends that instead of using the Defendants' documentation of earnings as its baseline, the Commission should have relied on Plaintiff's self-created itemization of wages paid, as well as text messages between the parties concerning work and payment. Plaintiff argues that the evidence he presented is more reliable and essentially asks this Court to re-weigh the evidence. This we cannot do. *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 115, 530 S.E.2d 549, 552 (2000). Credibility and weight of evidence are solely within the province of the Commission, and this Court will not disturb the Commission's findings unless unsupported by competent evidence. *Id.* at 115, 530 S.E.2d at 552.

The Industrial Commission has a duty to consider all of the evidence presented to it, and "may not discount or disregard any evidence, but may choose not to believe the evidence *after* considering it." *Weaver v. Am. Nat'l Can Corp.*, 123 N.C. App. 507, 510, 473 S.E.2d 10, 12 (1996). There is no indication in the record that the Commission failed to consider Plaintiff's evidence; on the contrary, the Commission's

Opinion and Award used the parts of Plaintiff's evidence it deemed most reliable as the basis for its calculations. Even if it had chosen not to rely on Plaintiff's evidence, nowhere in our case law have we held that the Commission is required to believe certain evidence. *See, e.g., Lineback v. Wake Cty. Bd. of Comm'rs*, 126 N.C. App. 678, 680, 486 S.E.2d 252, 254 (1997) (holding the Commission "may reject a witness' testimony entirely if warranted by disbelief of that witness").

We hold that the Commission's Finding of Fact Number 37 that Plaintiff's gross earnings during his total period of employment immediately prior to his injury were $16,317.50 is supported by competent evidence. The Commission considered all of the evidence presented to it, including the testimony of both parties; the bank statements, checks, and itemization of wages provided by the Plaintiff; the bank statements provided by Defendants; and the record of text messages between Mr. Fife and Mr. Robinson. The Commission chose not to rely on Plaintiff's itemization of his wages, a calculation not corroborated by other evidence. It also chose not to rely solely on bank statements provided by Mr. Robinson, which it found to be an incomplete record of payments. Instead, it gave the most weight to evidence that could be corroborated by other pieces of evidence.

Ultimately, the Commission based its calculations on the deposits into Mr. Fife's account that were corroborated by either Mr. Robinson's bank statement or text messages between Mr. Fife and Mr. Robinson explicitly mentioning payment. As

"sole judge of [] credibility[,]" the Commission was well within its authority in deciding not to accept Plaintiff's itemization of wages as completely accurate. *Deese*, 352 N.C. at 115, 530 S.E.2d at 552. It was also not required to make the inferential leaps required by some of the text message evidence that did not directly mention payment. Although Plaintiff contends that his evidence supports a finding of higher gross wages than those found by the Commission, this Court must accept challenged findings as conclusive when supported by any competent evidence. *Hansel*, 304 N.C. at 49, 283 S.E.2d at 104. Such is the case here; accordingly, we reject Plaintiff's argument.

D. Calculation of Average Weekly Wage

Plaintiff next challenges the Commission's calculation of his average weekly wage. Plaintiff argues that the Commission incorrectly presumed that he worked every day of the total employment period without subtracting days Plaintiff missed work. We disagree.

As Plaintiff concedes was correct, the Commission used the third statutory method to calculate his average weekly wage because Plaintiff was employed by Defendant for less than a year. N.C. Gen. Stat. § 97-2(5). The third method requires the Commission to "divid[e] the earnings during that period by the number of weeks and parts thereof during which the employee earned wages," provided the results are "fair and just to both parties." *Id*.

This Court has interpreted the statute to require that when the Commission applies the third method, "average weekly wages are calculated in the same manner as method two, with the distinction that the results must be 'fair and just to both parties.' " *Frank v. Charlotte Symphony*, __ N.C. App. __, __, 804 S.E.2d 619, 624 (2017). The second method, which applies when the employee "lost more than seven consecutive calendar days at one or more times" in the 52 weeks preceding his injury, provides that "the earnings for the remainder of such 52 weeks shall be divided by the number of weeks remaining after the time so lost has been deducted." N.C. Gen. Stat. § 97-2(5).

Thus, the Commission was required first to determine the total number of weeks Plaintiff was employed by Defendant, deducting from that number any consecutive seven-day period which Plaintiff was absent from work. The Commission was next required to divide Plaintiff's gross wages from Defendant by the total number of weeks worked.

In its Opinion and Award, the Commission found that Plaintiff "worked a total of 36.14 weeks for Eternal Woodworks from October 21, 2014 until his date of injury on July 1, 2015." Implicit in the finding of the number of weeks Plaintiff worked is the determination of whether he lost more than seven consecutive days of work during the total period of employment, requiring a deduction from the number of weeks worked. We therefore reject Plaintiff's argument that the Commission's failure

to make an explicit finding as to the number of weeks Plaintiff may not have worked is an improper application of the third method.

Mr. Robinson's poor record-keeping practices rendered the record unclear regarding when exactly Plaintiff did and did not work. However, evidence including text messages between the parties and payments documented by Plaintiff himself indicate that Plaintiff worked consistently throughout his employment period. While the Commission did not explicitly make a finding that Plaintiff did not miss more than seven consecutive days of work prior to his injury, it explicitly found how many weeks Plaintiff did in fact work. *See, e.g.*, *Frank*, __ N.C. App. at __, 804 S.E.2d at 624. Although Plaintiff testified that he missed more than seven consecutive days during his employment, it is not the job of this Court to re-weigh the evidence. *Deese*, 352 N.C. at 115, 530 S.E.2d at 552.

The Commission then divided Plaintiff's total earnings by the number of weeks he worked to calculate Plaintiff's average weekly wage in its Conclusion of Law Number 9. Although the calculation of average weekly wage is a conclusion of law and thus reviewed *de novo*, the Commission's determination of the number of weeks Plaintiff worked is a finding of fact, and so we must accept that finding if supported by any competent evidence. *Hansel*, 304 N.C. at 49, 283 S.E.2d at 104. We hold that the Commission properly determined the number of weeks that Plaintiff worked and that it did not err in calculating Plaintiff's average weekly wage.

We also reject Plaintiff's argument that the average weekly wage of $451.51 is not fair and just. Method three specifically requires that the calculated wage be fair and just, meaning that it must "most nearly approximate the amount which the injured employee *would be earning* were it not for the injury[.]" *Liles*, 244 N.C. at 660, 94 S.E.2d at 795 (emphasis in original). The Commission found that Plaintiff's gross earnings over his period of employment at Eternal Woodworks totaled $16,317.50. It then divided the gross earnings by 36.14, the number of weeks that Plaintiff worked, which yielded an average weekly wage of $451.51. We agree with the Commission that this number was a fair and just result, as it most nearly approximates the amount Plaintiff would be earning but for his injury.

Plaintiff argues that this number is not fair and just because it implies that he only worked an average of 19-23 hours per week; he asserts that he worked at least 40 hours per week. While the evidence included weeks when Plaintiff worked 40 hours or more, the evidence also reflected weeks when Plaintiff worked fewer hours, resulting in the calculated average over the total period of employment. The average weekly wage of $451.51 accounts for the reality of Plaintiff's work schedule. "The purpose of our Workers' Compensation Act is not to put the employee in a better position and the employer in a worse position than they occupied before the injury." *Conyers*, 188 N.C. App. at 259, 654 S.E.2d at 750. To adopt the Plaintiff's position would be to put him in a better position than he occupied before by giving him an

average weekly wage of at least $800—higher than what the evidence shows he actually earned—and would thus be unjust and unfair. For these reasons, we hold the Commission's calculation of $451.51 is fair and just to both Plaintiff and Defendant-Employer.

Conclusion

The Commission's findings as to Mr. Fife's gross wages and the number of weeks that he worked are supported by competent evidence. These findings also support the Commission's conclusions of law that Plaintiff's average weekly wage amounts to $451.51, and is a fair and just result. Plaintiff has failed to show any error in the Commission's Opinion and Award. We therefore affirm.

AFFIRMED.

Judges HUNTER and BERGER concur.

Report per Rule 30(e).