IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-918

Filed: 26 March 2019

North Carolina Industrial Commission, I.C. Nos. X48418 and X92876

ELIZABETH BALL, Employee, Plaintiff

v.

BAYADA HOME HEALTH CARE, Employer, ARCH INSURANCE GROUP, INC., Carrier (GALLAGHER BASSETT SERVICES, INC., Third-Party Administrator), Defendants.

Appeal by defendants from opinion and award entered 25 June 2018 by the North Carolina Industrial Commission. Heard in the Court of Appeals 26 February 2019.

Ganly & Ramer PLLC, by Thomas F. Ramer, for plaintiff-appellee.

Brewer Defense Group, by Joy H. Brewer, for defendants-appellants.

DAVIS, Judge.

Bayada Home Health Care ("Bayada") and its insurance carrier Arch Insurance Group (collectively "Defendants") appeal from the 25 June 2018 opinion and award of the North Carolina Industrial Commission awarding Elizabeth Ball ("Plaintiff") workers' compensation benefits for an injury sustained during the course

of her employment at Bayada. After a thorough review of the record and applicable law, we affirm.

Factual and Procedural Background

This dispute between the parties is before us for the second time. The facts giving rise to this appeal are set out in full in our previous opinion.

> Plaintiff began her employment as a certified nurse's assistant with [Bayada] on 26 May 2010. Plaintiff worked on a part-time basis for Bayada from 26 May 2010 until 30 November 2010, when she began to work a full-time schedule. During this time in her employment, Plaintiff earned $8.00 per hour. In February 2011, Plaintiff was transferred from Bayada's Asheville office to its Hendersonville office, where she began working with a single, specific client ("the client"). As a result of this change, Plaintiff began working an increased number of hours, and at an increased wage — $10.00 per hour. On Plaintiff's first day of work with the client at the higher hourly rate, 10 February 2011, Plaintiff was injured when the client, who suffered from Alzheimer's, pushed Plaintiff down several stairs.
>
> Plaintiff sought medical treatment for her injuries that same day and was released to limited duty work. Three days later, Plaintiff requested a release for full work duty and was granted such by her medical care provider. Despite her 10 February 2011 injury, Plaintiff continued to work for the client, with the attendant increase in hours and rate of pay, through 18 May 2011. On that date, Plaintiff alleged, she suffered a second injury while working with the client.
>
> Plaintiff filed a Form 18 on 20 March 2012 informing [Defendants] of her 10 February 2011 incident. In the Form 18, Plaintiff claimed injuries to her left hand, both knees, and right hip from the 10 February 2011 incident.

Plaintiff filed a second Form 18 on the same day, informing Defendants of the alleged 18 May 2011 incident, and claimed injuries in that incident to both of her knees. Defendants admitted the compensability of Plaintiff's 10 February 2011 injury to her right leg, but denied the compensability of the injuries to her hips and hands. Defendants also denied compensability of all injuries stemming from the 18 May 2011 incident. Despite denying the compensability of Plaintiff's alleged 18 May 2011 injuries, Defendants filed a Form 60 on 10 June 2011, admitting Plaintiff's disability resulting from the injuries began on 19 May 2011.

Plaintiff filed a Form 33 on 31 May 2012, requesting that her disability claim be assigned for hearing, and a hearing was held before a deputy commissioner on 26 May 2015. Following that hearing, the deputy commissioner filed an opinion 16 August 2012 concluding as a matter of law that Plaintiff suffered compensable injuries on both 10 February 2011 and 18 May 2011. The deputy commissioner also determined that the appropriate method to determine Plaintiff's average weekly wage was Method 5, as listed in N.C.G.S. § 97-2(5), which resulted in an average weekly wage of $510.33 and a corresponding weekly compensation rate of $340.24 for Plaintiff's temporary total disability payments. Defendants appealed to the Commission.

Upon its *de novo* review, the Commission concluded as a matter of law that, *inter alia*: (1) Plaintiff had suffered a compensable injury on 10 February 2011; (2) there was not sufficient, competent evidence of Plaintiff's being injured on 18 May 2011; (3) Plaintiff's disability began on 19 May 2011; and (4) Plaintiff had ongoing medical treatment needs. The Commission concluded as a matter of law that Methods 1, 2, and 4, as listed in N.C.G.S. § 97-2(5), were inapplicable to the facts of the present case, and as such that utilization of Method 3 for calculation of average weekly wage applied to Plaintiff's claim.

> The Commission determined that, applying Method 3, Plaintiff was entitled to an average weekly wage of $284.79 with a compensation rate of $189.87. The Commission further found that calculation of Plaintiff's average weekly wage using Method 3 was fair and just to both Plaintiff and Defendants. Plaintiff appeals.

Ball v. Bayada Home Health Care, __ N.C. App. __, __, 803 S.E.2d 692, 693-94 (2017) (quotation marks and brackets omitted) (hereinafter "*Ball I*").

In an opinion filed on 15 August 2017, this Court reversed the Commission's opinion and award, holding that the Commission "erred in utilizing Method 3 in N.C. Gen. Stat. § 97-2(5) because use of that method is not fair and just to [Plaintiff], as required by that statute." *Id.* at __, 803 S.E.2d at 694 (quotation marks omitted). We remanded the case "for a determination of Plaintiff's average weekly wages utilizing Method 5, and appropriately considering Plaintiff's post-injury work." *Id.* at __, 803 S.E.2d at 696.

On 25 June 2018, the Commission filed an amended opinion and award. The opinion and award contained the following pertinent finding of fact with regard to the calculation of Plaintiff's average weekly wage according to the fifth method set out in N.C. Gen. Stat. § 97-2(5):

> 52. The fifth statutory method allows for calculation of average weekly wage by using "such other method" that will "most nearly approximate the amount which the injured employee would be earning were it not for the injury." The average weekly wage which most nearly approximates the amount which plaintiff would be earning were it not for her injuries in her employment with

> defendant-employer is represented by all wages plaintiff earned before and after her first injury, while working part-time, full-time, and at both $8.00 per hour and $10.00 per hour. The Form 22 *Statement of Days Worked and Earnings of Injured Employee* stipulated into evidence by the parties shows plaintiff earned gross wages in the amount of $10,286.88 over a period of 176 days (or 25.14 weeks) while working for defendant-employer from May 26, 2010 through May 18, 2011. This results in an average weekly wage of $409.18 with a corresponding compensation rate of $272.80. The Full Commission finds that calculation of plaintiff's average weekly wage using this fifth statutory method is fair and just to both plaintiff and defendants and the most appropriate method to utilize in this matter.

Based upon its findings of fact, the Commission concluded that "plaintiff's average weekly wage utilizing the fifth statutory method and considering all wages earned, both before and after her first injury, is $409.18 with a corresponding compensation rate of $272.80." On 20 July 2018, Defendants filed a timely notice of appeal.

Analysis

Defendants' sole argument on appeal is that the Commission erred in its calculation of Plaintiff's average weekly wage pursuant to the fifth statutory method set out in N.C. Gen. Stat. § 97-2(5). Specifically, they contend that the Commission's calculation "assigns inappropriate weight to plaintiff's post-injury earnings . . . and does not closely approximate the amount plaintiff would have earned but for her injury[.]" We disagree.

Appellate review of an opinion and award of the Industrial Commission is typically "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." *Philbeck v. Univ. of Mich.*, 235 N.C. App. 124, 127, 761 S.E.2d 668, 671 (2014) (citation and quotation marks omitted). "The findings of fact made by the Commission are conclusive on appeal if supported by competent evidence even if there is also evidence that would support a contrary finding. The Commission's conclusions of law, however, are reviewed *de novo*." *Morgan v. Morgan Motor Co. of Albemarle*, 231 N.C. App. 377, 380, 752 S.E.2d 677, 680 (2013) (internal citation omitted), *aff'd per curiam*, 368 N.C. 69, 772 S.E.2d 238 (2015).

"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 in priority sequence five methods by which an injured employee's average weekly wages are to be computed." *Shaw v. U.S. Airways, Inc.,* 362 N.C. 457, 459, 665 S.E.2d 449, 451 (2008) (citation and quotation marks omitted).

N.C. Gen. Stat. § 97-2(5) provides, in pertinent part, as follows:

> [Method 3]: Where the employment prior to the injury extended over a period of fewer 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.

> . . . .
>
> [Method 5]: But where for exceptional reasons the foregoing would be unfair, either to the employer or 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) (2017).

This Court has stated that the "dominant intent" of N.C. Gen. Stat. § 97-2(5) "is to obtain results that are fair and just to both employer and employee." *Conyers*, 188 N.C. App. at 256, 654 S.E.2d at 748 (citation omitted).

> The words "fair and just" may not be considered generalities, variable according to the predilections of the individuals who from time to time compose the Commission. These words must be related to the standard set up by the statute. Results fair and just, within the meaning of N.C.G.S. § 97-2(5), 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.

Ball I, __ N.C. App. at __, 803 S.E.2d at 694 (citation, quotation marks, and brackets omitted).

In evaluating Defendants' argument, we find instructive cases in which our appellate courts have determined that the application of Method 5 produced a more equitable result than Method 3 for purposes of calculating an employee's average weekly wage. In *Joyner v. A. J. Carey Oil Co., Inc.*, 266 N.C. 519, 146 S.E.2d 447

(1966), the plaintiff worked part-time as a truck driver on an as-needed basis. *Id.* at 519, 146 S.E.2d at 448. Our Supreme Court noted that the nature of the employee's work was "inherently part-time and intermittent. It does not provide work in each of the 52 weeks of the year; some weeks the job is nonexistent." *Id.* at 522, 146 S.E.2d at 450. Consequently, the Court concluded that the application of Method 5 was appropriate because "[f]airness to the employer requires that we take into consideration both peak and slack periods." *Id.*

This Court reached a similar conclusion in *Conyers*. That case involved an injury suffered by a school bus driver who worked only ten months during the previous year. *Conyers*, 188 N.C. App. at 254, 654 S.E.2d at 747. We determined that the Commission's utilization of Method 3 was inappropriate because "[the employer] would be unduly burdened while [the employee] would receive a windfall." *Id.* at 259, 654 S.E.2d at 750. Noting that "Plaintiff's employment had peak times where she worked full time, and slack periods where she did not work at all[,]" this Court reversed and remanded the case to the Commission with instructions to calculate the driver's average weekly wage using Method 5 because that method "most nearly approximates the amount Plaintiff would be earning were it not for her injury." *Id.* at 260, 261, 654 S.E.2d at 751 (quotation marks omitted).

In *Ball I*, we determined that the application of Method 3 was unfair to Plaintiff and remanded to the Commission with instructions to instead utilize Method

5 in calculating her average weekly wage. *Ball I*, __ N.C. App. at __, 803 S.E.2d at 696.

> We hold that only taking into account Plaintiff's pre-injury compensation, through use of Method 3, is unfair to Plaintiff, as it ignores the months of increased hours and pay Plaintiff worked after her 10 February 2011 injury, and would effectively treat Plaintiff as if she had never worked increased hours at a higher rate of pay. We must reject the use of Method 3 on the facts of the present case, as use of that method squarely conflicts with the statute's unambiguous command to use a methodology that will most nearly approximate the amount which the injured employee would be earning were it not for the injury. Defendants admitted that Plaintiff was disabled as a result of her 10 February 2011 injury. In order to most nearly approximate what Plaintiff would be earning if she had not been injured, we believe that Plaintiff's post-injury work must be taken into account.

Id. at __, 803 S.E.2d at 695 (internal citations and quotation marks omitted).

On remand, as directed by this Court, the Commission utilized Method 5 in calculating Plaintiff's average weekly wage. In so doing, the Commission determined that the "average weekly wage which most nearly approximates the amount which plaintiff would be earning were it not for her injuries . . . is represented by all wages plaintiff earned before and after her first injury, while working part-time, full-time, and at both $8.00 per hour and $10.00 per hour." Accordingly, the Commission divided Plaintiff's gross wages ($10,286.88) by the total number of days on which she actually worked (176 days or 25.14 weeks) to calculate her average weekly wage ($409.18).

We are satisfied that the Commission's calculation of Plaintiff's average weekly wage in this manner "most nearly approximate[s] the amount which [Plaintiff] would be earning were it not for the injury." N.C. Gen. Stat. § 97-2(5). Furthermore, by dividing Plaintiff's gross wages by the total number of days on which she worked, the Commission's method of calculation was also fair to Defendants in that it "[took] into consideration both peak and slack periods." *Joyner*, 266 N.C. at 522, 146 S.E.2d at 450. Therefore, we hold that the Commission did not err in its calculation of Plaintiff's average weekly wage.

Conclusion

For the reasons stated above, we affirm the Commission's 25 June 2018 opinion and award.

AFFIRMED.

Chief Judge McGEE and Judge DIETZ concur.

This opinion was authored by Judge Davis prior to 25 March 2019.

Report per Rule 30(e).