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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA20-121

Filed: 6 October 2020

North Carolina Industrial Commission, I.C. No. 17-000435

HELEN LYNETTE GIBBS, Widow of DAVID W. GIBBS, Deceased Employee,
Plaintiff,

v.

ROCA'S WELDING, LLC, Employer, BUILDER'S MUTUAL INSURANCE
COMPANY, Carrier, Defendants.

Appeal by plaintiff from opinion and award entered 31 October 2019 by the
North Carolina Industrial Commission. Heard in the Court of Appeals 22 September
2020.

Daggett Shuler, by Griffis C. Shuler, for plaintiff-appellant.

Anders Newton PLLC, by J. William Crone, for defendant-appellees.

TYSON, Judge.

Helen Lynette Gibbs ("Plaintiff") appeals from an opinion and award filed 31
October 2019 by the North Carolina Industrial Commission ("Commission"). We
affirm.

I. Background

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Plaintiff's husband, David W. Gibbs was employed as a pipe fitter foreman with Roca's Welding, LLC ("Employer") from 11 December 2016 until 17 December 2016. Gibbs' foot caught the edge of a roof and he fell fourteen feet onto the ground below. Gibbs suffered injuries to his back, left foot, ankle, leg, pelvis, and ribs.

Gibbs was admitted to Sampson Regional Medical Center and treated for four days. A CT scan and an x-ray were performed which revealed a T3 compression fracture and a left ankle sprain. Gibbs was discharged from inpatient care and ordered to follow up with an orthopedist.

On 29 December 2016, Gibbs met with Dr. Frank Rowan at Guilford Orthopedic and Sports Medicine and presented with thoracic back pain, severe pain in the left ankle and heel, severe left buttock contusion and hematoma, and left sided rib pain. Dr. Rowan ordered an x-ray of Gibbs' thoracic spine which showed the same T3 compression fracture as was observed in the scans and x-ray performed at Sampson Regional Medical Center.

Dr. Rowan also ordered a CT scan of Gibbs' pelvis, which revealed a non-displaced hairline fracture of the left iliac, narrowing associated with edema, and a probable hemorrhage of the left iliac muscle. Finally, Dr. Rowan ordered an MRI of Gibbs' left ankle, which showed a moderate to severe contusion/impaction fracture along the lateral margin of the left calcaneus with diffuse, circumferential moderate to severe subcutaneous edema.

On 11 January 2017, Dr. Rowan placed Gibbs' left foot and ankle in a fracture boot and told him to continue using his walker to ambulate. At this visit, Gibbs complained of back and rib pain and he was referred for physical therapy.

Gibbs began attending physical therapy. On 14 March 2017, Gibbs returned to Dr. Rowan and reported ongoing back pain. Dr. Rowan advised Gibbs that it would likely require several additional months of therapy for his condition to improve. Dr. Rowan prescribed pain medication for the back pain and released Gibbs to return to sedentary work.

Gibbs returned to Dr. Rowan on 11 April 2017 and reported slow progress after attending thirty-one sessions of physical therapy. Dr. Rowan ordered CT scans of the pelvis and left foot and an MRI of the thoracic spine, which showed "a resolution of [Gibbs'] multiple injuries" but revealed mild spondylosis, degenerative disc disease, and a disc protrusion at T7-T8.

Dr. Rowan concluded Gibbs' had "plateaued in physical therapy" and ordered a functional capacity evaluation ("FCE") on 2 May 2017. The results showed Gibbs was functionally limited to leg lifts of forty pounds; shoulder and overhead lifts of thirty pounds; and, to carrying, pushing, and pulling up to forty pounds. Gibbs was restricted from squatting, kneeling, ladder climbing, and crawling with occasional bending and stair climbing. Gibbs did not demonstrate the functional capabilities required to return to his pre-injury job.

Following the FCE, Dr. Rowan noted Gibbs had “[c]linically healed fractures of the calcaneus, the left iliac wing, and T3 vertebral body.” Dr. Rowan concluded Gibbs was at maximum medical improvement and completed a Form 25R on 26 July 2017. Dr. Rowan graded and concluded Gibbs with a 5% permanent partial impairment rating to his left foot for the calcaneus fracture, a 5% permanent partial impairment to the left leg for the left iliac wing fracture, and a 5% permanent partial impairment rating for the vertebral fracture to his back. Gibbs was released with permanent work restrictions, including no lifting, pushing, or pulling greater than forty pounds. Gibbs continued to complain of low back pain and walked with a limp.

Gibbs was authorized to return to visit Dr. Rowan and was assigned to vocational rehabilitation. Dr. Rowan did not recommend or order pain management treatment for Gibbs. In February 2018, Gibbs began attending vocational rehabilitation services to identify suitable employment within his permanent work restrictions. On 23 April 2018, Gibbs filed a Form 33 Request for Hearing seeking the Commission to terminate vocational rehabilitation services based upon futility to find suitable employment.

Gibbs died on 23 May 2018 from causes unrelated to his 17 December 2016 work injury. At the time of his death, Gibbs was receiving temporary total disability payments. For the first eleven weeks of disability, Gibbs received an overpayment of

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\$1,319.89. Gibbs' weekly compensation rate was \$713.38. From 26 July 2017 through 2 June 2018, Gibbs received benefits totaling \$31,796.37.

Plaintiff testified that Gibbs continued to complain of ongoing pain in his back, left ankle, heel, and upper left leg/pelvis up until his death. If Gibbs stood for any length of time his foot would swell and he continued to walk with a limp. Dr. Rowan testified of his opinion to a reasonable degree of medical certainty that Gibbs had reached maximum medical improvement ("MMI") by 26 July 2017.

Dr. Vincent Paul, an orthopedic surgeon, testified, at Plaintiff's request, before the Commission. Dr. Paul concluded Gibbs may not have been at maximum medical improvement on 26 July 2017 because he still had complaints, namely he "felt like there were some things that still can be causing low back pain which have never been worked up." Dr. Paul concluded Gibbs had a 19% permanent partial impairment rating of his spine, and an 8% permanent partial rating impairment to the left foot.

The deputy commissioner issued an opinion and award denying Plaintiff's claim for additional workers' compensation benefits, concluding Gibbs had received all of the benefits to which he was entitled prior to his death and was not entitled to additional permanent partial disability or other benefits. The Full Commission affirmed the deputy commissioner's opinion and award. Plaintiff appeals.

II. Jurisdiction

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An appeal lies with this Court from the Industrial Commission pursuant to N.C. Gen. Stat. §§ 7A-29(a) and 97-86 (2019).

III. Issue

Plaintiff’s sole argument on appeal asserts the Commission erred in its conclusion Plaintiff is not owed additional compensation.

IV. Plaintiff’s Challenges to Findings of Facts and Conclusions of Law

A. Standard of Review

Review of an opinion and award of the Commission “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 [C]ourt’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) (citations and internal quotations omitted). Our Court reviews the Commission’s conclusions of law *de novo*. *Conyers v. New Hanover Cty. Sch.*, 188 N.C. App. 253, 255, 654 S.E.2d 745, 748 (2008).

B. Challenged Findings of Fact

Plaintiff challenges the findings of fact in the Commission’s opinion and award that led the Commission to conclude Gibbs had reached MMI on 26 July 2017. After review of the competent evidence in the entire record and the Commission’s findings thereon, competent evidence exists “that a reasonable mind might accept as

adequate” for each of the contested findings of fact. *Andrews v. Fulcher Tire Sales and Service*, 120 N.C. App. 602, 605, 463 S.E.2d 425, 427 (1995). We are bound on appeal by the supported evidentiary findings of the Commission. *Id.* Plaintiff's challenges to the Commission's findings of fact are overruled.

C. Challenged Conclusions of Law

Plaintiff challenges the Commission's Conclusion of Law 4, which provides: “[Gibbs] reached maximum medical improvement on July 26, 2017. *See Collins v. Speedway Motor Sports Corp.*, 165 N.C. App. 113, 118, 598 S.E.2d 185, 189 (2004).” Plaintiff argues the evidence shows Gibbs' lower back and left foot deteriorated after 26 July 2017.

Plaintiff provides no case, citation, or other authority to support the assertion Gibbs was not at MMI on 26 July 2017, nor can this Court locate any such authority. The Commission weighed the expert testimony of both Dr. Paul and Dr. Rowan and held Gibbs had reached MMI on 26 July 2017. Dr. Rowan treated Gibbs from 29 December 2016 until 26 July 2017. Supported evidentiary findings of the Commission support the contested conclusion. *See Andrews*, 120 N.C. App. at 605, 463 S.E.2d at 427.

Plaintiff cites *Whitley v. Columbia Lumber Mfg. Co.*, 318 N.C. 89, 348 S.E.2d 336 (1986) and further argues an injured employee who is permanently and totally disabled as a result of the work injuries can elect to receive total disability

compensation under N.C. Gen. Stat. § 97-29 in lieu of receiving compensation under the scheduled benefits under N.C. Gen. Stat. § 97-31. We review these statutes.

N.C. Gen. Stat. § 97-29 provides, *inter alia*:

(a) When an employee qualifies for total disability, the employer shall pay or cause to be paid . . . to the injured employee a weekly compensation equal to sixty-six and two-thirds percent (66 2/3%) of his average weekly wages, but not more than the amount established annually to be effective January 1 as provided herein, nor less than thirty dollars (\$30.00) per week.

. . . .

(f) Where an employee can show entitlement to compensation pursuant to this section or G.S. 97-30 and a specific physical impairment pursuant to G.S. 97-31, *the employee shall not collect benefits concurrently* pursuant to both this section or G.S. 97-30 and G.S. 97-31, but rather *is entitled to select the statutory compensation which provides the more favorable remedy*.

N.C. Gen. Stat. § 97-29 (a), (f) (2019) (emphasis supplied).

N.C. Gen. Stat. § 97-31 provides, *inter alia*:

In cases included by the following schedule the compensation in each case shall be paid for disability during the healing period and in addition the disability shall be deemed to continue for the period specified, and shall be in lieu of all other compensation, including disfigurement, to wit:

. . . .

(22) In case of serious bodily disfigurement for which no compensation is payable under any other subdivision of this section, but excluding the disfigurement resulting

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from permanent loss or permanent partial loss of use of any member of the body for which compensation is fixed in the schedule contained in this section, the Industrial Commission may award proper and equitable compensation not to exceed ten thousand dollars (\$ 10,000).

(23) For the total loss of use of the back, sixty-six and two-thirds percent (66 2/3%) of the average weekly wages during 300 weeks. The compensation for partial loss of use of the back shall be such proportion of the periods of payment herein provided for total loss as such partial loss bears to total loss, except that in cases where there is seventy-five per centum (75%) or more loss of use of the back, in which event the injured employee shall be deemed to have suffered "total industrial disability" and compensated as for total loss of use of the back.

(24) In case of the loss of or permanent injury to any important external or internal organ or part of the body for which no compensation is payable under any other subdivision of this section, the Industrial Commission may award proper and equitable compensation not to exceed twenty thousand dollars (\$ 20,000).

N.C. Gen. Stat. § 97-31 (2019).

Plaintiff's reliance on *Whitley* to support a different result is misplaced. The 5% impairment ratings Dr. Rowan assigned equates to 32.2 weeks of disability benefits under N.C. Gen. Stat. § 97-31. From 26 July 2017 until 2 June 2018, Gibbs received 44.47 weeks of temporary total disability benefits. The Commission properly concluded Gibbs was compensated more favorably after reaching MMI on 26 July 2017.

In *Kelly v. Duke University*, 190 N.C. App. 733, 742, 661 S.E.2d 745, 750 (2008),

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this Court held “the in lieu of clause of § 97-31 is a bar to double recovery, decedent is not entitled to recover once under § 97-29 and then again under § 97-31.” (internal quotation marks omitted). Gibbs is not entitled to additional compensation under N.C. Gen. Stat. § 97-31. Plaintiff’s argument is overruled.

V. Healing Period

Plaintiff argues the Commission erred in denying additional benefits by determining the “healing period” of N.C. Gen. Stat. § 97-31 concluded on 26 July 2017 with Gibbs reaching MMI.

A. Standard of Review

Our Court reviews the Commission’s conclusions of law *de novo*. *Conyers*, 188 N.C. App. at 255, 654 S.E.2d at 748.

B. Analysis

Our appellate courts have consistently held: “the healing period ends when an employee reaches maximum medical improvement.” *Franklin v. Broyhill Furniture Indus.*, 123 N.C. App. 200, 204-05, 472 S.E.2d 382, 385 (1996) (citations and internal quotation marks omitted); *see also Neal v. Carolina Mgmt.*, 350 N.C. 63, 510 S.E.2d 375 (1999). We previously concluded the Commission’s conclusion of Gibbs’ MMI is supported by competent evidence and findings of fact. Our Supreme Court and prior panels of this Court have held “the healing period ends when an employee reaches

maximum medical improvement.” *Franklin*, 123 N.C. App. at 204-05, 472 S.E.2d at 385.

Both the Supreme Court of North Carolina and this Court have recognized “[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.” *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). “We are without authority to overturn the ruling of a prior panel of this Court on the same issue.” *Poindexter v. Everhart*, __ N.C. App. __, __, 840 S.E.2d 844, 849 (2020) (citation omitted). Plaintiff’s argument is overruled.

VI. Conclusion

The Commission did not err by concluding Plaintiff was not entitled to additional compensation under N.C. Gen. Stat. § 97-31. Competent evidence in the whole record supports the Commission’s findings of fact and those findings in turn support the Commission’s conclusions of law.

Plaintiff has not demonstrated additional compensation is due, beyond what has already been disbursed. The opinion and award of the Commission is affirmed. *It is so ordered.*

AFFIRMED.

Judges DIETZ and MURPHY concur.

Report per Rule 30(e).