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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-396

No. COA21-454

Filed 7 June 2022

North Carolina Industrial Commission, I.C. No. 16-021823

DONALD RAINEY, Employee, Plaintiff,

v.

GOODYEAR TIRE AND RUBBER CO., Employer, LIBERTY MUTUAL, Carrier, Defendants.

Appeal by Defendants from opinion and award entered 12 April 2021 by the Full Commission of the North Carolina Industrial Commission. Heard in the Court of Appeals 25 January 2022.

Parker and Frey Attorneys at Law, PLLC, by Robert A. Frey, for Plaintiff-Appellee.

Hedrick Gardner Kincheloe &Garofalo LLP, by M. Duane Jones & Matthew J. Ledwith, for Defendant-Appellants.

INMAN, Judge.

¶ 1 Defendants Goodyear Tire & Rubber Company ("Goodyear") and Liberty Mutual Insurance Company appeal an amended opinion and award from the Industrial Commission allowing Plaintiff Donald W. Rainey's ("Mr. Rainey") claim for temporary partial disability benefits under the Workers' Compensation Act.

¶ 2 Goodyear argues the Full Commission erred in awarding a 26 percent permanent partial impairment rating for Mr. Rainey's hand and in its ultimate award of temporary partial disability benefits.

¶ 3 For the reasons explained below, we affirm the Commission's opinion and award.

I. FACTS AND PROCEDURAL BACKGROUND

¶ 4 Mr. Rainey is an employee of Goodyear. On 8 May 2018, Mr. Rainey filed a claim against Goodyear with the North Carolina Industrial Commission ("the Commission") seeking disability compensation for an injury sustained to his right hand while working for Goodyear three years earlier. The Deputy Commissioner issued an opinion and award on 4 January 2019 in Mr. Rainey's favor. Goodyear timely appealed to the Full Commission, which issued an opinion and award on 30 December 2020. The Full Commission affirmed the Deputy Commissioner's decision that Mr. Rainey's right hand was compensable, and that Mr. Rainey was temporarily partially disabled from 4 August 2017 until 9 February 2018. The Commission determined that Mr. Rainey suffered 26 percent permanent partial disability to his right hand as a result of the workplace injury.

¶ 5 Goodyear requested reconsideration, and on 12 April 2021, the Full Commission issued an amended opinion and award again affirming the Deputy

Commissioner, with slight modifications. Goodyear now appeals that order to this Court.

¶ 6 Mr. Rainey has been employed with Goodyear for 41 years and spent ten of those years working in drum maintenance repair. Mr. Rainey regularly worked 42 hours per week. Prior to his injury, he worked an additional average of 22.9 overtime hours per week, averaging a total of 64.9 hours worked each week.

¶ 7 The record evidence tends to show the following:

¶ 8 On 29 May 2015, Mr. Rainey sustained an injury to his right hand when his Allen wrench broke while he was applying pressure to loosen segments of a drum. The pain was concentrated at the base of the right thumb. Mr. Rainey visited Dr. Barrie at Fayetteville Orthopedics on 28 August 2015 where an X-ray and examination revealed right thumb carpometacarpal (CMC) joint osteoarthritis aggravated by a twisting injury. Dr. Barrie administered a cortisone injection into the thumb CMC joint and provided Mr. Rainey a soft brace. She restricted Mr. Rainey to lifting no more than ten pounds. Mr. Rainey continued working his regular position and regular hours from 9 September 2015 through 7 May 2016.

¶ 9 On 8 May 2016, Mr. Rainey sustained lacerations to his right hand on the ring and little finger. On 21 September 2016, Mr. Rainey went to see Dr. George Edwards, Jr., ("Dr. Edwards") at Raleigh Hand Center following a referral for a workers' compensation evaluation. In addition to the lacerations, Dr. Edwards noted that Mr.

Rainey complained of continued pain at the base of his right thumb CMC joint since 29 May 2015. Dr. Edwards treated Mr. Rainey by administering an injection into his right ring finger. Dr. Edwards did not impose any work restrictions on Mr. Rainey at the time.

¶ 10 On 17 October 2016, Mr. Rainey returned to Dr. Edwards for treatment of pain at the base of his right thumb. Dr. Edwards administered a CMC joint injection and provided Mr. Rainey with an orthotic to immobilize his right thumb CMC and metatarsophalangeal joints (MP) but did not impose any work restrictions.

¶ 11 On 7 February 2017, Dr. Edwards performed a fascial arthroplasty of Mr. Rainey's thumb CMC joint because of continued pain and wrote Mr. Rainey out of work. Goodyear provided Mr. Rainey with temporary total disability compensation through 3 August 2017.

¶ 12 On 4 August 2017, Mr. Rainey returned to work on a trial basis. Mr. Rainey worked a light-duty position, which included "sweeping and painting." Mr. Rainey testified that he was not able to work any overtime hours during this period. However, according to his work records, Mr. Rainey worked an average of approximately 3.13 overtime hours per week during the 22-week light-work period, compared to his pre-injury overtime average of 22.9 hours per week.

¶ 13 On 11 October 2017, Mr. Rainey returned to Dr. Edwards, who diagnosed him with synovitis and tenosynovitis of the right hand, post-traumatic osteoarthritis of

the right hand, trigger finger of the right ring finger, and trigger thumb of the right thumb. Dr. Edwards determined Mr. Rainey had reached his maximum medical improvement, resulting in permanent partial disability of the right hand of 26 percent.

¶ 14 At deposition, Goodyear's counsel requested Dr. Edwards parse out the 26-percent computation that he assigned to Mr. Rainey's whole right hand. Dr. Edwards testified that he would say "[p]robably around" 15 percent to the thumb joint, 3.5 percent to each the fourth and third fingers, and 4 percent to the wrist.

¶ 15 On 9 February 2018, Dr. Edwards removed Mr. Rainey's work restrictions subject to a permanent restriction of lifting no more than twenty pounds with the right hand. Mr. Rainey then returned to his normal position of drum maintenance repair and overtime hours.

¶ 16 Following a hearing, Deputy Commissioner Lori A. Gaines concluded Mr. Rainey satisfied his burden of proof that he was partially disabled and entitled to temporary partial disability benefits for the period between 5 August 2017 and 9 February 2018. Goodyear appealed the Deputy Commissioner's ruling to the Full Commission, which affirmed the Deputy's award in an amended opinion and award on 12 April 2021. Goodyear timely appealed.

II. ANALYSIS

¶ 17 Goodyear first argues the Commission erred in awarding a 26 percent permanent partial impairment rating to Mr. Rainey's right hand and in concluding that Mr. Rainey's diminished earnings following his return to work were related to his work injury. We disagree and affirm.

A. Standard of Review

¶ 18 Our review of an award from the Industrial Commission is limited to "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). "Unchallenged findings of fact by the Commission are binding on appeal." *Davis v. Hospice & Palliative Care of Winston-Salem*, 202 N.C. App. 660, 670, 692 S.E.2d 631, 638 (2010) (citation omitted). We do not have the right "to weigh the evidence and decide the issue on the basis of its weight." *Deese*, 352 N.C. at 115, 530 S.E.2d at 552. We cannot disturb findings if *any* competent evidence supports them. *Id.* at 552-53. "The Court's duty goes no further than to determine whether the record contains any evidence tending to support the finding[s]." *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998).

¶ 19 Since the Act provides the claimant's exclusive remedy, benefits "will not be denied by narrow, technical or strict construction." *Stevenson v. City of Durham*, 281 N.C. 300, 303, 188 S.E.2d 281, 283 (1972).

B. 26 Percent Permanent Partial Impairment Rating of the Hand

¶ 20

Goodyear first challenges Findings of Fact 17 and 18 of the Commission's order. Finding of Fact 17 describes Dr. Edwards' evaluation of Mr. Rainey at maximum medical improvement; Dr. Edwards' assignment of 26 percent permanent partial impairment rating to the right hand; permanent work restrictions; and the calculations for the 26 percent rating. This finding is supported by Mr. Rainey's medical records and Dr. Edwards' "competent medical testimony." While Goodyear contends Mr. Rainey only "should have been awarded a 4% rating to the hand," Goodyear concedes that "Fact No. 17 accurately states the totality of the evidence." We hold that finding of Fact 17 is supported by competent evidence.

¶ 21

Finding of Fact 18 adopted Dr. Edwards' 26 percent hand rating and awarded the combined value of the 26 percent rating for the period in question, totaling $48,176.00. Goodyear argues the Full Commission's rating for the whole hand is inconsistent with the Industrial Commission Rating Guide (ICRG), which Dr. Edwards used to explain the assignments of individual injury to each of Mr. Rainey's fingers, thumb joint, and wrist, resulting in the 26 percent hand calculation. In light of Dr. Edwards' clarification as to percentage breakdown, Goodyear contends Mr. Rainey should only have been entitled to compensation for a 4 percent rating of the hand, the percentage Dr. Edwards assigned to the wrist. We disagree.

¶ 22 Finding of Fact 18 is a conclusion of law in that it includes the Commission's application of Finding 17 to N.C. Gen. Stat. § 97-31 (2021). *See State ex rel. Utils. Comm'n v. Eddleman*, 320 N.C. 344, 352, 358 S.E.2d 339, 346 (1987). We therefore review it *de novo*. *State v. Malone*, 373 N.C. 134, 145, 833 S.E.2d 779, 786 (2019).

¶ 23 Section 31 of the Worker's Compensation Act contains a schedule of injuries and respective rates and periods of compensation based on a percentage disability assigned to a particular body part. *See* N.C. Gen. Stat. § 97-31 (2021). Injuries contained in this schedule are compensated during the healing period, as well as for the periods specified in the section. *See id*. For the loss of a hand, a claimant shall receive 66.66% of his average weekly wages for 200 weeks. *See id.* § 97-31(12) (2021).

¶ 24 The North Carolina Industrial Commission Rating Guide provides the following framework for hand ratings:

> The individual member is to be rated. If damage is limited to the digits distal to the metacarpophalangeal joint, then the digit itself should be rated. If there is anatomical damage proximal to the metacarpophalangeal joint, a rating for the hand should be given, including any consideration for the digit as a percentage of the hand.[1]

¶ 25 Because Mr. Rainey's injury in fact included some injury to the hand and was not limited solely to his fingers, the Rating Guide supports a rating for the whole

[1] N.C. Industrial Commission Rating Guide p. 4, § 2 (Upper Extremities), available at ic.nc.gov/ncic/pages/ratinggd.htm.

hand. This includes those percentages which would otherwise be attributed to the fingers but for the accompanying hand injury. In addition, Goodyear concedes in its appellate brief: "The rating to the wrist, *or hand*, is 4%." (Emphasis added). This rating is sufficient to affirm the Commission's order under the plane text of the Rating Guide.

¶ 26 Moreover, this Court has determined the hand "refers to the fingers and thumb, the hand proper and the wrist." *Thompson v. Frank IX & Sons*, 33 N.C. App. 350, 355, 235 S.E.2d 250, 253 (1977). We also note Dr. Edwards testified to other conditions present in Mr. Rainey's hand, including pain and weakness assessments, all of which support the Commission's conclusion. *See* N.C. Industrial Commission Rating Guide p. 4, § 2 ("[I]n many cases there are intangible factors which cannot be stereotyped but must be considered. Among these factors are pain, weakness, and dexterity. . . . The final rating of impairment should be entirely the examining doctor's independent opinion, based on his own knowledge, experience and clinical examination.").

¶ 27 Here, Dr. Edwards diagnosed Mr. Rainey as having synovitis and tenosynovitis of the right hand, post-traumatic osteoarthritis of the right hand, trigger finger of the right ring finger, and trigger thumb of the right thumb. Based on his diagnosis, Dr. Edwards assigned a rating to the right hand of 26 percent. This rating aligns with our Court's definition of the hand in *Thompson*, 33 N.C. App. at 355, 235 S.E.2d at

253, and the ICRG's explicit purpose as a guide for medical experts. Considering the statute and our precedent, the Commission correctly awarded compensation for Mr. Rainey's right hand, including the fingers in that calculation.

¶ 28 For all these reasons, we conclude the Commission did not err in calculating Mr. Rainey's injury.

C. Award of Temporary Partial Disability Benefits

¶ 29 Goodyear also challenges Finding 16. Finding 16 discusses the period between 4 August 2017 and 9 February 2018, during which time Mr. Rainey "worked a light-duty position . . . sweeping and painting and earned wages less than his pre-injury 2015 average weekly wage . . . ." (Internal quotation marks omitted). The Commission concluded Mr. Rainey "earned less performing the restricted duty position" in that it "did not provide him with the same opportunities to service and perform drum repair or work overtime."

¶ 30 Goodyear argues no evidence supported the Commission's conclusion that the reason Mr. Rainey could not work overtime was his work injury. According to Goodyear, "[t]he mere fact that he did not work as much overtime as before does not correlate to a finding that he did not work because of his work injury." We disagree.

¶ 31 The Workers' Compensation Act defines disability 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) (2021). To support a

conclusion of disability, the burden is on the employee to demonstrate: (1) that the employee was incapable after his injury of earning the same wages he had earned before his injury in the same employment; (2) that the employee 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 the employee's injury. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). "The disability of an employee because of an injury is to be measured by his capacity or incapacity to earn the wages he was receiving at the time of the injury." *Dail v. Kellex Corp.*, 233 N.C. 446, 448, 64 S.E.2d 438, 440 (1951). "Compensation must be based upon loss of wage-earning power rather than the amount actually received." *Hill v. Du Bose*, 234 N.C. 446, 447, 67 S.E.2d 371, 372 (1951).

¶ 32 We conclude the Commission's award is supported by competent evidence. Mr. Rainey testified about his inability to perform his pre-injury duties because of his injury. Mr. Rainey explained he could not do the job tasks required for overtime "because his hand was hurting." We will not reassess the weight and credibility of Mr. Rainey's testimony on appeal. *Phelps v. Phelps*, 337 N.C. 344, 357-58, 446 S.E.2d 17, 25 (1994) (holding the weight or credibility of the testimony was ultimately within the discretion of the trial court). Mr. Rainey's 41 years of service and pre-injury

overtime average of 22.9 hours per week rebut Goodyear's theory that Mr. Rainey was capable but not desirous of earning overtime during this time.

¶ 33 Goodyear also argues that even if Mr. Rainey is awarded temporary partial disability benefits, those benefits should be limited to wages earned from the 22.9 average overtime hours that Mr. Rainey could no longer work, not the difference between his pre-injury average weekly wage and his post-injury average weekly wage. We reject this argument.

¶ 34 Section 97-30 states that for temporary partial disability, the employer shall pay weekly compensation equal to 66.66 percent "of the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter . . . ." N.C. Gen. Stat. § 97-30 (2021). There is no distinction in either Section 97-2(5) or 97-30 between regular wages and overtime wages. Absent a distinction, we read the statute to include wages generally, not specifically regular or overtime wages. *See Stevenson*, 281 N.C. at 303, 188 S.E.2d at 283 (concluding the Workers' Compensation Act, as an employee's sole remedy, should not be denied by a technical, narrow, or strict construction, but in favor of the employee).

¶ 35 The Commission reasonably concluded that the limited availability of light duty jobs, combined with the payroll evidence, demonstrated Mr. Rainey's reduced wage-earning power. In addition, because Mr. Rainey worked fewer hours and less overtime following his restricted duty, the Commission correctly calculated his

temporary partial disability benefits according to his post-injury average weekly wage.

¶ 36 In sum, we hold that the Commission's findings of fact are supported by at least some competent evidence in the record and that those findings, in turn, support the Commission's conclusions of law. We therefore affirm the Commission's opinion and award.

III. CONCLUSION

¶ 37 For the foregoing reasons, we affirm the order of the Commission.

AFFIRMED.

Judge DIETZ and Judge HAMPSON concur.

Report per Rule 30(e).