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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-55

Filed 20 August 2024

North Carolina Industrial Commission, I.C. No. 18-732798

TYRONE BAILEY, Employee, Plaintiff,

v.

SOUTHERN LITHOPLATE, INC., Employer, ALLIANZ GLOBAL CORPORATE & SPECIALTY (FIREMAN'S FUND), Carrier, (GALLAGHER BASSETT SERVICES, INC., Third-Party Administrator), Defendants.

Appeal by plaintiff from opinion and award entered 27 September 2023 by the North Carolina Industrial Commission. Heard in the Court of Appeals 15 May 2024.

Lennon, Camak & Bertics, PLLC, by Michael W. Bertics, for plaintiff-appellant.

McAngus, Goudelock & Courie, PLLC, by Jeffrey B. Kuykendal and Stephanie Gearhart, for defendants-appellees.

ZACHARY, Judge.

Plaintiff Tyrone Bailey appeals from the opinion and award entered by the North Carolina Industrial Commission (the “Full Commission”) awarding him medical treatment compensation but denying him partial disability compensation. After careful review, we remand for the entry of additional findings of fact.

I. Background

Plaintiff worked for Defendant-Employer Southern Lithoplate, Inc., from November 1996 through 24 February 2018. Defendant-Employer manufactures aluminum lithographic printing plates, which are used in the printing of newspapers, magazines, and glossy advertisements. Plaintiff worked on Defendant-Employer's production floor, where he "was exposed to airborne chemical mists, vapors, and fumes of acids and bases, as well as industrial solvents over the course of his 22-year working career with Defendant-Employer without respiratory protection."

In 2017, his last full calendar year of work for Defendant-Employer, Plaintiff earned an average weekly wage of \$1,183.92. Plaintiff left his position with Defendant-Employer in 2018 as a result of "long[-]term breathing issues." Plaintiff was diagnosed with a combination of various lung conditions, including bronchitic asthma.

On 28 June 2018, Plaintiff filed a Form 18, claiming an occupational disease relating to his "lungs / respiratory system" as a result of "prolonged exposure to chemicals and fumes used on the job[.]" On 8 March 2019, Defendants filed a Form 61, denying Plaintiff's claim. The matter was heard from 12 to 14 May 2021 before Deputy Commissioner Ashley M. Moore. After the hearing, the Deputy Commissioner received the transcripts of several depositions, including those of the parties' respective vocational experts.

On 10 November 2022, the Deputy Commissioner filed an opinion and award. The Deputy Commissioner first concluded that "Plaintiff has proven he suffers from

an occupational disease” and that “Defendants are responsible for paying for reasonable and necessary medical treatment causally related to Plaintiff’s compensable condition.” The Deputy Commissioner also concluded that “Plaintiff conducted a reasonable job search and received unemployment benefits and, thus, has proven his entitlement to temporary total disability for the period of July 29, 2018 through October 29, 2018.” Finally, the Deputy Commissioner concluded that “Plaintiff is entitled to receive sixty-six and two thirds percent (66 2/3%) of the difference between his pre-injury average weekly wage of \$1,183.92 and his post-injury earning capacity of \$270.00 per week, namely \$609.31 per week[.]”

Defendants filed timely notice of appeal to the Full Commission. The matter came on for hearing before the Full Commission on 19 April 2023.

On 27 September 2023, the Full Commission filed its opinion and award. The Full Commission agreed with the Deputy Commissioner that “Plaintiff has established that he sustained a compensable occupational disease” and that “Plaintiff is entitled to payment by Defendants of medical expenses incurred, or to be incurred, as a result of his compensable lung conditions as may reasonably be required to effect a cure, provide relief, or lessen the period of disability.” However, the Full Commission rejected Plaintiff’s disability claim, concluding:

[T]here is insufficient evidence of record to find that Plaintiff has suffered disability as a result of his compensable occupational disease. There is no evidence showing that Plaintiff is incapable of work in any employment. Although there is evidence that Plaintiff may

be capable of some work, there is no evidence that Plaintiff conducted a job search, or it would otherwise be futile for him to seek other employment. The mere fact that Plaintiff received unemployment benefits is not enough to establish disability under the Workers' Compensation Act. *See Hooker v. Stokes Reynolds Hosp./N. Carolina Baptist Hosp., Inc.*, 161 N.C. App. 111, 117, 587 S.E.2d 440, 445 (2003) (finding that the Commission's holding that Plaintiff was eligible for disability compensation was correct when Plaintiff testified to complying with requirements to receive unemployment and described additional efforts in seeking employment within her work restrictions). Here, although Plaintiff received unemployment benefits, there is no evidence of record that Plaintiff applied for work while receiving said benefits.

Accordingly, the Full Commission ordered that (1) Defendants "pay for all medical treatment incurred or to be incurred for Plaintiff's compensable lung conditions for so long as such treatment is reasonably necessary to either effect a cure, provide relief, or lessen any period of disability[.]" but that (2) Plaintiff "is not entitled to any disability compensation under the Workers' Compensation Act at this time."

Both parties filed timely notice of appeal to this Court. However, after settling the record on appeal, Defendants did not timely file an appellant's brief in their cross-appeal. Instead, on 22 February 2024, Defendants filed a motion with this Court pursuant to N.C.R. App. P. 2 seeking permission to raise their cross-appeal arguments in their appellee's brief in Plaintiff's appeal, which this Court denied that same day. The following day, Plaintiff filed a motion to dismiss Defendants' cross-appeal, which this Court allowed on 20 August 2024. *See* N.C.R. App. P. 13(c) ("If an

appellant fails to file and serve a brief within the time allowed, the appeal may be dismissed on motion of an appellee . . .”). Consequently, only Plaintiff’s appeal from the Full Commission’s opinion and award is before us.

II. Discussion

Plaintiff argues that the Full Commission’s opinion and award should be remanded for several reasons, among them that the Full Commission failed to make adequate findings of fact regarding his wage-earning capacity when denying his disability claim. We agree that additional findings are required.

A. Standard of Review

“The [Full] Commission is the sole judge of the credibility of witnesses and may accept or reject any of a claimant’s evidence. However, the Commission is required to make specific findings as to the facts upon which a compensation claim is based, including the extent of a claimant’s disability.” *Grant v. Burlington Indus., Inc.*, 77 N.C. App. 241, 247, 335 S.E.2d 327, 332 (1985). “Although the [Full] Commission’s findings are conclusive on appeal if supported by competent evidence, its legal conclusions are reviewable by our appellate courts. Particularly, when the factual findings are insufficient to determine the rights of the parties, the [appellate] court may remand to the [Full] Commission for additional findings.” *Id.* (citation omitted).

B. Analysis

Under the Workers’ Compensation Act, “[t]he term ‘disability’ means 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) (2023). “It is well[]settled that in this context, ‘disability’ does not refer to physical infirmity, but to a diminished capacity to earn wages.” *Grant*, 77 N.C. App. at 247, 335 S.E.2d at 332. To support a conclusion of disability, the Full Commission must find:

(1) that [the] 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 this individual’s incapacity to earn was caused by [the] plaintiff’s injury.

Hilliard v. Apex Cabinet Co., 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982).

An employee may meet this burden in one of several ways, four of which were enumerated by this Court in *Russell v. Lowes Prod. Distrib’n*:

(1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (citations omitted).

“Our Supreme Court has held that the determination whether a disability

exists is a conclusion of law, and, as such, must be based upon findings of fact supported by competent evidence.” *Grant*, 77 N.C. App. at 247, 335 S.E.2d at 332; accord *Hilliard*, 305 N.C. at 594–95, 290 S.E.2d at 683. “Therefore, to enable a proper review of a conclusion concerning disability, the [Full] Commission is required to make specific findings of fact as to a plaintiff’s earning capacity.” *Grant*, 77 N.C. App. at 247, 335 S.E.2d at 332; see also *Johnson v. S. Tire Sales & Serv.*, 358 N.C. 701, 707, 599 S.E.2d 508, 512–13 (2004) (“Because the burden remained on [the] plaintiff to prove his disability, the [Full] Commission was obligated to make specific findings regarding the existence and extent of any disability suffered by [the] plaintiff.”).

In this case, the Full Commission concluded that “there is insufficient evidence of record to find that Plaintiff has suffered disability as a result of his compensable occupational disease.” To support this conclusion, the Full Commission made findings of fact reciting the competing testimonies of the parties’ vocational experts, as well as these relevant findings:

43. Following the termination of Plaintiff’s employment with Defendant-Employer, Plaintiff sought and received unemployment benefits. There is no evidence of record that Plaintiff returned to work for another employer or, indeed, in any way sought employment even though no doctor has completely taken him out of work.

. . . .

48. Based upon the preponderance of the evidence in view of the entire record, including the opinions of the vocational experts, the Full Commission finds that there is insufficient evidence of record to find that Plaintiff has

suffered disability as a result of his compensable occupational disease. There is no evidence showing that Plaintiff is incapable of work in any employment. Although there is evidence that Plaintiff may be capable of some work, there is no evidence that Plaintiff conducted a job search, or it would otherwise be futile for him to seek other employment. The mere fact that Plaintiff received unemployment benefits is not enough to establish disability under the Workers' Compensation Act.

As an initial matter, we observe that, even though the Full Commission made findings of fact summarizing the testimonies of the parties' respective vocational experts, the above-quoted findings of fact "fail to resolve [the resulting] evidentiary conflicts" regarding Plaintiff's wage-earning capacity. *Grant*, 77 N.C. App. at 249, 335 S.E.2d at 333.

For example, the Full Commission recited that Plaintiff's vocational expert "testified that Plaintiff has a reduced earning capacity compared to his preinjury status and agreed that Plaintiff was not unemployable[.]" while Defendants' vocational expert "opined that Plaintiff does have wage-earning capacity, is employable, and that it would not be futile for Plaintiff to search for employment." Moreover, Plaintiffs' vocational expert "testified [that] Plaintiff had the ability to command \$9.00 to \$12.00 per hour, and thus he could make \$180.00 per week at 20 hours per week and \$360.00 per week at 30 hours per week in the current labor market[.]" while Defendants' vocational expert opined that "Plaintiff could earn between \$520.00 and \$640.00 per week based on her belief that he could be hired for \$13 to \$16 an hour for 40 hours per week."

In light of the stipulated fact that Plaintiff's pre-injury wage was \$1,183.92 per week, these findings of fact by the Full Commission indicate that the issue it needed to resolve was not *whether* Plaintiff's wage-earning capacity decreased but rather *how much* it decreased. "Although the [Full] Commission entered no findings regarding [P]laintiff's current earning capacity[,] there was sufficient testimony and exhibits in the record "upon which the [Full] Commission could have based a finding of partial incapacity and an award of benefits under [N.C. Gen. Stat.] § 97-30." *Gupton v. Builders Transp.*, 320 N.C. 38, 43, 357 S.E.2d 674, 678 (1987). Yet the Full Commission did not resolve the evidentiary conflict regarding Plaintiff's current wage-earning capacity, frustrating our appellate review of the merits of the Full Commission's denial of Plaintiff's disability claim.

Rather, it is apparent that the Full Commission did not make these required findings of fact because it determined, instead, that Plaintiff failed to establish *any* disability, even partial. The Full Commission's findings relate to the second of the four *Russell* factors—"the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment"—which this Court has long used to determine whether an employee can "show that he is unable to earn the same wages he had earned before the injury, either in the same employment or in other employment." *Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457.

However, as the Full Commission itself stated, our Supreme Court has

repeatedly disclaimed that the *Russell* factors “are neither statutory nor exhaustive.” *Medlin v. Weaver Cooke Const., LLC*, 367 N.C. 414, 422, 760 S.E.2d 732, 737 (2014); *see also Wilkes v. City of Greenville*, 369 N.C. 730, 745, 799 S.E.2d 838, 849 (2017), *superseded by statute on other grounds as stated in Pine v. Wal-Mart Assocs.*, 371 N.C. 707, 712, 821 S.E.2d 155, 158 (2018). As he did before the Full Commission, Plaintiff cites *Lewis v. Craven Regional Medical Center* to note that this Court has previously rejected the argument that partial disability benefits “may be awarded only when the employee has returned to some type of employment at which he or she earns wages after the injury.” 174 N.C. App. 561, 565, 621 S.E.2d 259, 262 (2005), *disc. review denied*, 360 N.C. 364, 629 S.E.2d 853 (2006). In rejecting this argument, the Court in *Lewis* recognized that, under § 97-30, “a calculation of compensation for partial incapacity is based on the difference in a claimant’s average weekly wages before the injury and the average weekly wages which he *is able to earn* thereafter.” *Id.* (cleaned up); *accord* N.C. Gen. Stat. § 97-30. “By focusing the calculation on post-injury wage-earning capacity and *not actual post-injury wages*, [N.C. Gen. Stat. § 97-30] accords with the overall structure of the Workers’ Compensation Act.” *Lewis*, 174 N.C. App. at 565, 621 S.E.2d at 262 (emphasis added); *see also Hill v. DuBose*, 234 N.C. 446, 447–48, 67 S.E.2d 371, 372 (1951) (“Compensation must be based upon loss of wage-earning power rather than the amount [of wages] actually received. It was intended by the statute to provide compensation only for loss of earning capacity.”).

In this case, the Full Commission distinguished *Lewis* by looking to the case’s

procedural posture as it concerned an appellant's election of the most munificent remedy available to him as between §§ 97-30 and -31 on remand from two previous appeals to this Court. However, in that *Lewis* is consonant "with the overall structure of the Workers' Compensation Act[.]" we see no reason why the particular procedural posture of *Lewis* renders inapplicable its holding that the Full Commission may "consider an employee's post-injury capacity to earn wages in calculating benefits for partial incapacity under N.C. Gen. Stat. § 97-30 where the employee does not actually return to work." 174 N.C. App. at 565, 621 S.E.2d at 262.

Ultimately, on the findings of fact in the Full Commission's opinion and award, we are unable to properly review the merits of Plaintiff's argument that he has shown disability under the Workers' Compensation Act. "In short, the factual findings in this case are insufficient to determine the rights of the parties on the issue of disability." *Grant*, 77 N.C. App. at 249, 335 S.E.2d at 333. Accordingly, we remand to the Full Commission for additional findings as suggested by this decision. *See id.* at 247, 335 S.E.2d at 332.

III. Conclusion

In the absence of sufficient findings of fact to review the Full Commission's determination on Plaintiff's claim for disability benefits, we make no further comment on the potential merits, if any, of Plaintiff's claim. We remand to the Full Commission to make additional findings of fact consistent with this opinion.

REMANDED.

BAILEY V. S. LITHOPLATE, INC.

Opinion of the Court

Chief Judge DILLON and Judge ARROWOOD concur.

Report per Rule 30(e).