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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-981

Filed 1 October 2024

North Carolina Industrial Commission, No. Y22434

VINCENT MASTANDUNO, Employee, Plaintiff,

v.

NATIONAL FREIGHT INDUSTRIES, Employer, and AMERICAN ZURICH INSURANCE CO., Carrier, Defendants.

Appeal by Plaintiff from award filed 17 March 2023 by the North Carolina Industrial Commission. Heard in the Court of Appeals 17 April 2024.

John M. Kirby for plaintiff-appellant.

Teague, Campbell, Dennis & Gorham, LLP, by S. Scott Farwell and Clark R. Drummond, for defendants-appellees.

PER CURIAM.

Plaintiff Vincent Mastanduno (“Plaintiff”) appeals from a final Opinion and Award made by the North Carolina Industrial Commission (“NCIC”) suspending his disability benefits. We affirm.

I. Background

Plaintiff filed a workers compensation claim on 14 September 2012. Within

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his claim, Plaintiff alleged he slipped and fell on a wet floor while pulling a heavy pallet from a trailer while at work on 29 May 2012. Defendant-Employer National Freight Industries (“Defendant”) accepted Plaintiff’s claim and began compensating him on 30 June 2012. Plaintiff began seeing an orthopedic surgeon, Dr. Mark Dumonski, at Guilford County Orthopedic and Sports Medicine Center. Dr. Dumonski diagnosed Plaintiff with an L5-S1 disc herniation on 27 July 2012.

In early 2013, Plaintiff underwent a microdiscectomy surgery to remove a large disc fragment “causing obvious and significant compression of the traversing S1 nerve.” Approximately six months after surgery, Dr. Dumonski assessed Plaintiff to be at maximum medical improvement (“MMI”) and assigned a permanent partial impairment (“PPI”) rating of 10% to Plaintiff’s back. Dr. Dumonski provided Plaintiff with a permanent work note indicating his present capability to “lift 30 pounds occasionally.” Plaintiff’s MMI was reconfirmed through an independent medical examination (“IME”) with Dr. Max Cohen on 31 October 2014.

Additionally, Plaintiff presented to Dr. Wright-Etter on 25 June 2014 for a psychiatric IME. Plaintiff’s chief complaints were depression and sleep problems, which he described as stemming from his work-related injury in 2012. Dr. Wright-Etter opined that Plaintiff “has no evidence of depression or really any major psychiatric diagnosis at the time of this evaluation.” Plaintiff sought a second psychiatric assessment from Dr. Moira Artigues on 8 March 2018. Dr. Artigues could not render an opinion as to Plaintiff’s psychiatric state because he was uncooperative

during the assessment.

On 12 April 2019, Defendant filed a Form 24 *Application to Terminate or Suspend Payment of Compensation* ([N.C.G.S.] § 97-18.1) seeking to suspend Plaintiff's indemnity benefits due to his failure to cooperate with the IME performed by Dr. Artigues. Then-presiding Special Deputy Commissioner Lucy Austin issued an Administrative Decision & Order approving Defendant's Form 24 request on 9 May 2019. On 12 July 2021, Plaintiff returned to Dr. Artigues for another assessment. Dr. Artigues opined Plaintiff's psychological issues were not related to his back injury, and there was no reason Plaintiff should not be able to return to work.

Plaintiff filed a Form 33 *Request That Claim Be Assigned for Hearing* requesting indemnity compensation be reinstated on 15 March 2021. A hearing was held before Deputy Commissioner Celeste Harris on 17 August 2021. In her opinion and award filed 1 March 2022, Deputy Commissioner Harris found Plaintiff did not produce the evidence required to prove he was incapable of work in any employment, and payment for his disability by the Defendant should be terminated. Plaintiff thereafter submitted an *Application for Review* and a brief to the Full Commission on 9 May 2022. To the Full Commission, Plaintiff argued Deputy Commissioner Harris erred in denying the reinstatement of his disability benefits and the reimbursement of his out-of-pocket medical and psychiatric care.

In Finding of Fact 36, the Full Commission found Defendant had only ever

accepted Plaintiff's lower back injury as compensable, but at no point ever accepted a mental health condition or lower extremity condition relating to the 29 May 2012 injury at work. In light of the evidence presented by Plaintiff, the Full Commission found Plaintiff did require a "medium physical demand" work restriction due to his workplace injury. Further, however, the Full Commission found Plaintiff *was* capable of looking for employment but failed to present any evidence indicating any effort on his part to find such work prior or subsequent to his indemnity compensation suspension on 9 May 2019.

In accordance with the opinions of both Dr. Artigues and Dr. Keshavpal Reddy, a doctor at the Triad Psychiatric and Counseling Center, the Full Commission found Plaintiff's mental health conditions were not attributed to his lower back injury and did not qualify for reimbursement by the Defendant.

The Full Commission concluded Plaintiff did not present sufficient evidence to show he was incapable of work in any employment and therefore could not prove a compensable disability. As such, in its Opinion and Award filed 17 March 2023, the Full Commission affirmed the suspension of Plaintiff's disability compensation. Plaintiff appealed this Opinion and Award of the Full Commission to this Court on 17 April 2023.

II. Analysis

"Appellate review of an opinion and award from the Industrial Commission is generally limited to determining: '(1) whether the findings of fact are supported by

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competent evidence, and (2) whether the conclusions of law are justified by the findings of fact.” *Hassell v. Onslow Cty. Bd. of Educ.*, 362 N.C. 299, 305 (2008) (quoting *Clark v. Wal-Mart*, 360 N.C. 41, 43 (2005)). “The findings of the Commission are conclusive on appeal when such competent evidence exists, even if there is plenary evidence for contrary findings.” *Hardin v. Motor Panels, Inc.*, 136 N.C. App. 351, 353, *disc. rev. denied*, 351 N.C. 473 (2000). The Commission’s conclusions of law, however, are reviewed *de novo*. See *McRae v. Toastmaster Inc.*, 358 N.C. 488, 496 (2004) (citations omitted).

Plaintiff argues the Commission erred in: (1) denying his claim for compensation for his back injuries; (2) denying his claim for compensation for his psychological injuries; (3) concluding Plaintiff was not disabled; and (4) failing to make “sufficient findings” as to whether Plaintiff complied with the IME.

“In a worker’s compensation claim, the employee ‘has the burden of proving that his claim is compensable.” *Holley v. ACTS, Inc.*, 357 N.C. 228, 231 (2003) (citing *Henry v. A.C. Lawrence Leather Co.*, 231 N.C. 477, 479 (1950)). In *Russell*, this Court identified four methods by which a plaintiff could prove their disability. These methods include:

- (1) [T]he production of medical evidence that he is physically or mentally[] . . . incapable of work in any environment;
- (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 unemployment;
- (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 he earned prior to the injury.

Russell v. Lowes Prod. Distribution, 108 N.C. App. 762, 765 (1993) (internal citations omitted).

Here, we agree with the Commission in its conclusion that Plaintiff failed to provide sufficient evidence tending to prove his disability under any of the *Russell* methods. In making its conclusions, the Commission considered competent evidence tending to show Plaintiff was placed at MMI by Dr. Dumonski in 2013 and could reasonably return to work thereafter with some light restrictions. Additionally, the psychological IME performed by Dr. Artigues tended to show Plaintiff did not have any mental disabilities or psychological hindrances preventing him from returning to work. Finally, the evidence of his being uncooperative in July 2021 with Dr. Artigues was supported by competent evidence and in turn supports the Commission's conclusions.

III. Conclusion

Plaintiff has failed to prove he possesses any disability preventing him from returning to work. The Full Commission considered competent evidence in making its findings, and such findings support its conclusions of law. We affirm the Commission's termination of disability compensation.

AFFIRMED.

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Panel consisting of Judges MURPHY, ARROWOOD, and THOMPSON.

Report per Rule 30(e).