NO. COA11-509
NORTH CAROLINA COURT OF APPEALS

Filed: 15 November 2011

CHARLES EDWARDS,
Employee, Plaintiff,

v. North Carolina Industrial Commission
I.C. No. 650613

SOUTHERN MAINTENANCE OF HAYWOOD COUNTY,
Employer,

PENNSYLVANIA NATIONAL INSURANCE COMPANY,
Carrier, Defendants.

Appeal by defendants from Opinion and Award entered 20 January 2011 by the North Carolina Industrial Commission. Heard in the Court of Appeals 10 October 2011.

Law Offices of David Gantt, by David Gantt, for plaintiff-appellee.

Cranfill Sumner & Hartzog LLP, by Rebecca L. Thomas and Ashley Baker White, for defendants-appellants.

MARTIN, Chief Judge.

Defendant-employer Southern Maintenance of Haywood County and defendant-carrier Pennsylvania National Insurance Company

(collectively "defendants") appeal from an Opinion and Award by the North Carolina Industrial Commission ("the Commission") awarding temporary total disability compensation to plaintiff Charles Edwards. We affirm.

The parties agree that on 7 August 2006, plaintiff, who was then sixty-three years old, sustained an injury by accident during the course of his employment with defendant-employer, a general contractor, when plaintiff fell approximately ten to twelve feet from a ladder onto a concrete floor. At the time of his accident, plaintiff had been employed by defendant-employer as a "working supervisor" for approximately twenty-six years. Plaintiff's job was "physically demanding," requiring "very heavy lifting of over 100 pounds at times," and included such duties as "running backhoes, laying pipe, concrete work, shoveling, and weed-eating." As a result of the accident, plaintiff "was diagnosed with a closed traumatic brain injury with a basilar skull fracture and rib fractures." Defendants accepted the claim as compensable and plaintiff stayed out of work due to his injuries from 8 August 2006 through 12 November 2006, and then again from 30 March 2007 through 22 May 2007. When plaintiff returned to work, he was restricted to lifting no more than 50 pounds and was not to work on any tasks that were above shoulder level or required neck extension. Although there

is evidence in the record that plaintiff continued to work at least 40 hours per week for more than fourteen months after he returned to work following his injury, the Commission found that, after his fall, plaintiff "lost his balance often on the job," was "unable to lift as much as before," and "appeared to have less stamina, tiring after working only two or three hours." Plaintiff was assigned "a combined 25% permanent partial disability rating based on his traumatic brain injury, cervical spine injury, and cranial nerve I neuropathy." Plaintiff retired on 21 August 2008, one week before his sixty-sixth birthday.

The parties were unable to agree as to whether plaintiff was entitled to ongoing temporary total disability payments after his retirement; defendants contended plaintiff was only entitled to permanent partial disability benefits under N.C.G.S. § 97-31. The matter was assigned to a deputy commissioner for hearing; the deputy commissioner issued an Opinion and Award ordering defendants to pay total disability compensation to plaintiff from 22 August 2008 until further order of the Commission. Defendants appealed to the Full Commission, which entered its Opinion and Award in which it concluded that, while plaintiff "may be able to perform some work," due to the "extent and nature of [his] injuries, his permanent work restrictions,

his educational background, his work experience in the construction trade, the vocational assessments obtained, and his age," it would be "futile" for plaintiff to seek employment, and ordered defendants to pay temporary total disability compensation beginning 22 August 2008 and continuing until further order of the Commission. Defendants appeal to this Court.

The scope of our review of an Opinion and Award of the Industrial Commission is well-established. "Under our Workers' Compensation Act, 'the Commission is the fact finding body.'" *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998) (quoting *Brewer v. Powers Trucking Co.*, 256 N.C. 175, 182, 123 S.E.2d 608, 613 (1962)), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999). "'The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony.'" *Id.* (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433–34, 144 S.E.2d 272, 274 (1965)). "[O]n appeal, this Court 'does not have the right to weigh the evidence and decide the issue on the basis of its weight. The [C]ourt's duty goes no further than to determine whether the record contains any evidence tending to support the finding.'" *Id.* at 681, 509 S.E.2d at 414 (quoting *Anderson*, 265 N.C. at

434, 144 S.E.2d at 274). "'[T]he findings of fact of the Industrial Commission are conclusive on appeal when supported by competent evidence, even though there be evidence that would support findings to the contrary.'" *Id.* (quoting *Jones v. Myrtle Desk Co.*, 264 N.C. 401, 402, 141 S.E.2d 632, 633 (1965) (per curiam)). "The evidence tending to support plaintiff's claim is to be viewed in the light most favorable to plaintiff, and plaintiff is entitled to the benefit of every reasonable inference to be drawn from the evidence." *Id.* (citing *Doggett v. S. Atl. Warehouse Co.*, 212 N.C. 599, 601, 194 S.E. 111, 113 (1937)).

When used within the North Carolina 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) (2009); *see also Hall v. Thomason Chevrolet, Inc.*, 263 N.C. 569, 574, 139 S.E.2d 857, 861 (1965) ("[*D*]*isability* refers not to physical infirmity but to a diminished capacity to earn money."). In order to support a conclusion of disability, the plaintiff has the burden of showing, and the Commission must find,

> (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that 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 plaintiff's injury.

Hilliard v. Apex Cabinet Co., 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). The employee may meet his burden of establishing that he was incapable of earning the same wages after his work-related injury in either the same or any other employment in one of four ways:

> (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;
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> (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;
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> (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.

Russell v. Lowes Prod. Distrib'n, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (citations omitted).

The Commission found, *inter alia*:

> 16. Plaintiff continued to work for

> approximately one year following his return to Defendant-Employer. However, the heavy manual labor of the job aggravated his neck pain. Plaintiff testified before the Deputy Commissioner that the grip strength in his hands was weakened, which made it difficult for him to grip the wheelbarrow and roll heavy loads. He could not work above his shoulders and was limited in his lifting. He did not do tasks requiring climbing anymore because his balance was not good. He often required assistance from other workers [to] perform his work. Plaintiff stated that he wanted to continue working two to three days per week but "the way I am right now, I can't do it."
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> . . . .
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> 23. The Full Commission finds that although Plaintiff returned to work for Defendant-Employer, he was unable to perform his pre-injury job fully and required regular assistance from his co-workers.

Defendants argue that neither of these findings is supported by competent evidence because they are contrary to testimony offered by two of defendants' witnesses, and because plaintiff "did not complain about his physical limitations to his co-workers or his supervisor." Nevertheless, our courts have long held, as is true in the present case, "'*even though* there be evidence that would support findings to the contrary,'" *see Adams*, 349 N.C. at 681, 509 S.E.2d at 414 (emphasis added) (quoting *Jones*, 264 N.C. at 402, 141 S.E.2d at 633), a

plaintiff's own testimony is competent evidence to support the Commission's findings that he was unable to fully perform the functions of his work. *See, e.g.*, *Niple v. Seawell Realty & Ins. Co.*, 88 N.C. App. 136, 139, 362 S.E.2d 572, 574 (1987) ("[P]laintiff's own testimony regarding her limited ability to engage in any activity and the effect that physical exertion has upon her is competent evidence as to her ability to work."), *disc. review denied*, 321 N.C. 744, 365 S.E.2d 903 (1988). Additionally, in this case, the Commission also found, based on the testimony of plaintiff's son who worked with his father before and after the injury, that plaintiff "lost his balance often on the job and was unable to lift as much as before. He also appeared to have less stamina, tiring after working only two or three hours." Defendants have not challenged this finding. Thus, when viewed in the light most favorable to plaintiff, we conclude that there is competent evidence to support Findings of Fact 16 and 23.

Defendants next argue that the Commission erred by apparently giving greater weight to the testimony of Bentley Hankins, a vocational rehabilitation specialist who testified for plaintiff, than it gave to the testimony of defendants' witness, Jack Dainty, a certified disability management specialist, and by concluding that plaintiff established that he

is capable of some work but that it would be futile for him to seek other employment. *See Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457. The Commission found, based on Mr. Hankins' opinion, that "[p]laintiff's work restrictions in combination with other relevant vocational factors such as age, prior educational attainment, and lack of any other skills in any trade other than construction, significantly reduced [p]laintiff's ability to obtain suitable employment." Mr. Dainty, on the other hand, was of the opinion that plaintiff did possess skills which were "transferable" to other jobs, and that jobs within his capability existed within the local labor market. Mr. Hankins' testimony supports the Commission's findings, and, because it is solely within the Commission's purview to determine the weight and credibility of competing testimony, *see Adams*, 349 N.C. at 680, 509 S.E.2d at 413, we decline defendants' invitation to re-weigh that testimony against that of Mr. Dainty.

Defendants next argue that, even if these findings *are* supported by competent evidence, the Commission could not properly conclude that plaintiff was disabled because there was evidence in the record that plaintiff continued to work an average of over 40 hours per week at his regular hourly rate during the fourteen months he worked following his injury until

he retired in August 2008. However, the evidence also showed that, in the fourteen months after his injury and prior to his retirement, even though plaintiff was paid for working about 40 hours a week, plaintiff actually worked an average of thirty to forty hours per month *less* than he had worked prior to his injury in mid-2006. Moreover, "[t]he statement . . . that there is no disability if the employee is receiving the same wages in the same or other employment is correct only so long as the employment reflects the employee's ability to earn wages in the competitive market." *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 440, 342 S.E.2d 798, 807 (1986); *see id.* at 437, 342 S.E.2d at 805–06 ("If post-injury earnings do not reflect this ability to compete with others for wages, they are not a proper measure of earning capacity."). Since we have already concluded that there was competent evidence to support the Commission's findings that plaintiff was "unable to perform his pre-injury job fully" without assistance from other workers, that plaintiff was incapable of continuing to work in the "physically demanding" position of working supervisor, and that, although plaintiff was capable of "some work," it would be futile for him to seek other employment, when viewing the evidence in the light most favorable to plaintiff, we must conclude this argument is without merit.

Finally, defendants contend the Commission could not have properly found that plaintiff established the first *Hilliard* factor——that plaintiff was incapable of earning the same wages in the same employment after his injury——because plaintiff "went out of work *by choice*" when he retired just before his sixty-sixth birthday. (Emphasis added.) Nevertheless, as defendants concede, "[b]ecause disability measures an employee's present *ability* to earn wages, and is unrelated to a decision to withdraw from the labor force by retirement, the Commission may not deny disability benefits because the claimant retired where there is evidence of diminished earning capacity caused by an occupational disease." *Heffner v. Cone Mills Corp.*, 83 N.C. App. 84, 88, 349 S.E.2d 70, 74 (1986) (citation omitted). Since we have already determined that the Commission made findings based on competent evidence presented by plaintiff in support of the Commission's conclusion that plaintiff is disabled in accordance with the third prong of *Russell*, *see White v. Weyerhaeuser Co.*, 167 N.C. App. 658, 672 n.3, 606 S.E.2d 389, 399 n.3 (2005), we conclude defendants' contentions with respect to this issue are also without merit.

We decline to consider the remaining assertions raised in defendants' brief for which defendants failed to present supporting legal authority. *See* N.C.R. App. P. 28(b)(6).

Affirmed.

Judges GEER and STROUD concur.

Report per Rule 30(e).