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NO. COA03-1273

NORTH CAROLINA COURT OF APPEALS

Filed: 17 August 2004

FREDERICK C. CLARK,
Plaintiff-Employee

v.

North Carolina
Industrial Commission
I.C. File No. 475939

CITY OF WINSTON-SALEM,
Employer, and

SELF-INSURED,
Defendant

Appeal by defendant from an opinion and award entered 28 July 2003 by the North Carolina Industrial Commission. Heard in the Court of Appeals 15 June 2004.

J. Kevin Morton, for plaintiff-appellee.

Wilson & Iseman, L.L.P., by S. Ranchor Harris, III, for defendant-appellant.

CALABRIA, Judge.

The City of Winston-Salem ("Winston-Salem") appeals an opinion and award issued by the North Carolina Industrial Commission (the "Commission"), asserting that the Commission erred in awarding Frederick C. Clark ("plaintiff") compensation benefits under the Workers' Compensation Act. We affirm.

The Commission made uncontested findings of fact detailing, *inter alia*, the following. In September of 1979, plaintiff commenced employment with Winston-Salem as a sanitation engineer. During his employment, plaintiff injured his back on two different occasions. Winston-Salem accepted compensability for plaintiff's second injury by filing a Form 21 Agreement for Compensation for Disability. The Commission approved the Form 21, which provided (1) plaintiff sustained "an injury by accident arising out of and in the course of said employment" and (2) temporary total disability compensation in the amount of \$309.99 per week "and continuing for necessary weeks."

After treatment, plaintiff's treating physician released him to return to work with the following permanent restrictions: no bending, crawling, twisting, no overhead work, no lifting greater than ten pounds, limited standing and sitting without breaks for one hour, and no driving. Winston-Salem subsequently selected plaintiff to participate in a new "Employee Training and Placement Program" ("Job Link program"). Winston-Salem informed plaintiff that if he agreed to participate in the program, he would receive his full salary and benefits. On the other hand, if he declined to participate, he would be deemed to be refusing suitable employment and steps would be taken to terminate his disability compensation.

In response, plaintiff requested a job description, that the first meeting with the vocational rehabilitation professional be scheduled at his attorney's office, and that clarification be sent as to whether Winston-Salem's program constituted a job offer or

vocational rehabilitation. Winston-Salem responded, characterizing the program as an offer of a light duty job. When plaintiff did not enter the program, Winston-Salem filed a Form 24 Application to Terminate Benefits with the Commission. Special Deputy Commissioner James C. Gillen found that Winston-Salem's program was vocational rehabilitation, not competitive employment, and denied Winston-Salem's application to terminate benefits. Nonetheless, the order found plaintiff was "obligated to comply reasonably with vocational rehabilitation provided by" Winston-Salem.

Plaintiff started the Job Link program after Winston-Salem again demanded participation for purposes of vocational rehabilitation in accordance with the deputy commissioner's order and received his full salary and benefits. In the program, plaintiff had no job duties and spent his time exclusively searching for employment. Plaintiff's job skills were never assessed, and he was not assigned a rehabilitation professional nor given the North Carolina Industrial Commission Rules for Utilization of Rehabilitation Professionals in Workers' Compensation Claims. Plaintiff was never given appropriate job skills retraining to help him secure employment, job referrals by Job Link personnel, or a personal development plan. Plaintiff had minimal daily contact with the supervisor of the Job Link program but such contact consisted mostly of the supervisor asking, "Mr. Clark, are you going to find a job today?" No periodic reports on referrals and services provided to plaintiff were kept. Most of plaintiff's time at the Job Link program was spent sitting in the

break room with other men. While plaintiff received aid in developing a resume and was referred to Employment Security Commission personnel, the Employment Security Commission routinely told plaintiff that they had no positions within plaintiff's work restrictions and did not understand why he continued to seek positions through them.

Plaintiff's supervisor eventually recommended his termination from the Job Link program. Her recommendation was based on the following: (1) plaintiff was frequently tardy to the program, (2) he wrote down the time that he was supposed to arrive to the program rather than when he actually arrived despite warnings, (3) he falsified two documents concerning interviews with potential employers, and (4) he failed to follow up with at least three Employment Security Commission recommendations. Winston-Salem terminated plaintiff from the Job Link program on 22 August 2000 and did not reinstate plaintiff's temporary total disability compensation.

Thereafter, plaintiff's counsel sent a Form 33 to the Commission and requested that the matter be assigned for hearing. Deputy Commissioner Wanda Blanche Taylor heard the matter on 13 March 2002. On 23 September 2002, Deputy Commissioner Taylor issued an opinion and award in favor of plaintiff. Winston-Salem appealed the opinion and award, and the Full Commission also found in favor of plaintiff, concluding that plaintiff was not placed in a qualifying vocational rehabilitation program and was not offered suitable employment. Accordingly, the Commission found that

Winston-Salem could not suspend compensation benefits for any failure to cooperate with the Job Link program. The Commission awarded the plaintiff "total disability compensation" from the date of his termination from the Job Link program, a ten percent (10%) late penalty on the past due total disability compensation, and payment of all medical expenses resulting from his compensable injury.

I. Award of Total Disability

Winston-Salem asserts on appeal that the Commission erred in concluding as a matter of law that plaintiff is entitled to permanent total disability. Winston-Salem contends that permanent total disability should not have been addressed because it was not an issue presented to the Commission for decision. Because the Commission did not award permanent total disability in its opinion and award, we find Winston-Salem's assertion to be without merit.

In its order, the Commission concluded "[p]laintiff is entitled to total disability compensation from August 22, 2000 and continuing until further Order of the Commission." The Commission cited N.C. Gen. Stat. § 97-29, which covers both permanent and temporary total disability, as authority for its conclusion. Nothing in this conclusion or in the order by the Commission indicates an award of permanent total disability. To the contrary, in conclusion of law number six, the Commission determined a ten percent late penalty on disability compensation was owed by Winston-Salem for its unjustifiable termination of "plaintiff's temporary total disability compensation." Moreover, in conclusion

of law number two the Commission said: "[p]laintiff has an ongoing presumption of disability based upon the Form 21 Agreement approved by the Commission on October 25, 1994." Neither party disputes the Form 21 agreement awarded temporary total disability as opposed to permanent total disability. We, therefore, hold the order at issue entitled plaintiff to continued temporary total disability compensation. This assignment of error is overruled.

II. Award of Ten Percent Late Penalty

Winston-Salem next argues that the Commission "abused [its] discretion in awarding a ten percent late penalty based on past total disability." Specifically, Winston-Salem argues that the Commission "disregard[ed] evidence of the plaintiff's termination and unjustifiable refusal to participate in vocational rehabilitation" in awarding the ten percent late penalty. We disagree.

Winston-Salem failed to assign error to any findings of fact made by the Commission. Accordingly, the Commission's findings of fact are "conclusively established on appeal[,] see *Johnson v. Herbie's Place*, 157 N.C. App. 168, 180, 579 S.E.2d 110, 118, *disc. rev. denied*, 357 N.C. 460, 585 S.E.2d 760 (2003), and our review is limited to 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). Moreover, Winston-Salem's emphatic and repeated arguments concerning the Commission's failure to defer to or adopt the deputy commissioner's findings cannot be sustained. See *Keel v. H & V Inc.*, 107 N.C. App. 536, 542, 421

S.E.2d 362, 367 (1992) (internal citations omitted) (observing "[t]he deputy commissioner's findings of fact are not conclusive; only the Full Commission's findings of fact are conclusive. The Commission may 'weigh the evidence [presented to the deputy commissioner] and make its own determination as to the weight and credibility of the evidence.' The Commission may strike the deputy commissioner's findings of fact even if no exception was taken to the findings.").

North Carolina General Statutes § 97-18(g) governs penalties for late compensation payments and provides, in pertinent part, as follows:

[i]f any installment of compensation is not paid within 14 days after it becomes due, there shall be added to such unpaid installment an amount equal to ten per centum (10%) thereof . . . unless such nonpayment is excused by the Commission after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

The statute imposes a mandatory requirement. *Bostick v. Kinston-Neuse Corp.*, 145 N.C. App. 102, 110, 549 S.E.2d 558, 563 (2001). While the Commission is empowered under N.C. Gen. Stat. § 97-18(g) to excuse nonpayment, Winston-Salem made no showing "that owing to conditions over which [it] had no control such installment could not be paid within the period prescribed for the payment." *Id.* Indeed, nothing in the order, record, or Winston-Salem's arguments on appeal indicates an inability on the part of Winston-Salem to pay the compensation installments as they came due. Accordingly, this assignment of error is overruled.

III. Rules for Utilization of Rehabilitation Professionals

Lastly, Winston-Salem argues that the Commission erred by concluding as a matter of law (1) that the vocational rehabilitation efforts offered by Job Link did not comply with the North Carolina Industrial Commission Rules for Utilization of Rehabilitation Professionals in workers' compensation claims and (2) that Winston-Salem has shown that plaintiff failed to comply with reasonable vocational efforts. These arguments are rejected.

Conclusion of law number four states:

The vocational rehabilitation efforts offered by Job Link did not comply with the North Carolina Industrial Commission Rules for Utilization of Rehabilitation Professionals in Workers' Compensation Claims and defendant has not shown that plaintiff failed to comply with reasonable vocational rehabilitation efforts.

In support of this conclusion of law, the Commission made the following uncontested finding of fact:

27. The vocational rehabilitation which plaintiff received did not comply with the North Carolina Industrial Commission Rules for Utilization of Rehabilitation Professionals in that no individualized plan was completed; a rehabilitation professional was not assigned; plaintiff was never given the Rehabilitation Rules; a rehabilitation professional did not meet with the plaintiff at his attorney's office for the first meeting; a rehabilitation professional did not coordinate plaintiff's activities with plaintiff's counsel; no periodic reports on referrals and services provided plaintiff was kept; plaintiff was not referred only toward opportunities for suitable employment which had been evaluated against his restrictions; plaintiff was not provided job descriptions; and a qualified professional did not coordinate job search efforts for plaintiff.

For purposes of our review, finding of fact twenty-seven is conclusively established, and it adequately supports conclusion of law number four. This assignment of error is overruled.

Affirmed.

Judges WYNN and LEVINSON concur.

Report per Rule 30(e).