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NO. COA04-96

NORTH CAROLINA COURT OF APPEALS

Filed: 21 December 2004

ESTATE OF JOHNNY ANDERSON,
Deceased Employee,
Plaintiff

v.

From the North Carolina
Industrial Commission
I.C. No. 016368

DANA CORPORATION,
Employer

SELF-INSURED (HARTFORD
SPECIALTY RISK SERVICES,
Servicing Agent),
Defendants

Appeal by plaintiff from an opinion and award entered 25 September 2003 by the North Carolina Industrial Commission. Heard in the Court of Appeals 19 October 2004.

Cox, Gage and Sasser, by Charles McB. Sasser, for plaintiff-appellant.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Paul C. Lawrence and Adam E. Whitten, for defendant-appellees.

HUNTER, Judge.

The Estate of Johnny Anderson ("plaintiff") appeals an Opinion and Award of the Full Commission of the North Carolina Industrial Commission filed 25 September 2003, denying temporary and total disability benefits. Plaintiff contends the Commission erred in placing the burden of proof of disability on plaintiff after

reversing the deputy commissioner's Order and in concluding there was no disability after plaintiff's termination. As we find no error in the Commission's order, we affirm.

The evidence before the Commission tends to show that plaintiff was employed by Dana Corporation ("defendant") and injured his back while on the job on 3 October 1998. Plaintiff reported to Pro-Med medical offices at defendant's direction on 5 October 1998 for evaluation of back pain and a drug test. Plaintiff tested positive for cocaine, but denied using illicit substances to defendant.

Plaintiff was evaluated for his back injury on 7 October 1998, and written out of work for two weeks. He was reevaluated in late October and given an MRI for further diagnosis. Defendant accepted liability for plaintiff's 3 October injury and filed a North Carolina Industrial Commission Form 60 on 17 November 1998. Plaintiff's medical treatment was transferred to Dr. David Dupuy ("Dr. DuPuy"), and plaintiff was released for work with some limitations on 10 December 1998. Defendant had no work available within the medical restrictions. Plaintiff returned for his final evaluation on 29 December 1998 and was released for full duty work with a three percent (3%) permanent partial disability.

Defendant instructed plaintiff to return to work on 5 January 1999, rather than 30 December 1998. When plaintiff reported to work, he was immediately asked to meet with his supervisor, where he was terminated for failing the drug test on 5 October 1998.

Plaintiff was examined by Dr. Ade Akande ("Dr. Akande") on 23 February 1999. Dr. Akande recommended treatments for plaintiff's back pain, but did not issue any work restrictions. Plaintiff did not complete any treatments. Plaintiff was also reexamined on 27 May 1999 by Dr. Alfred Rhyne, III ("Dr. Rhyne"), who had seen plaintiff in October after the original injury. Dr. Rhyne also prescribed pain medication for plaintiff's back pain, but did not restrict plaintiff's work capacity.

Plaintiff filed a Form 33 with the Industrial Commission on 2 June 2000 and a hearing was held on 18 September 2001. The deputy commissioner found that plaintiff was terminated for misconduct unrelated to his compensable injury and had therefore constructively refused employment and was not entitled to additional compensation. Plaintiff appealed this ruling to the Full Commission.

On 25 September 2003, the Full Commission entered an Opinion and Award reversing in part and affirming in part the Opinion and Award of the deputy commissioner. The Commission held that defendant failed to show plaintiff was discharged for misconduct and therefore entitled to total disability benefits through the day he returned to work and to partial disability benefits for nine weeks for the three percent disability rating to his back. The Commission found, however, that plaintiff failed to prove he was incapable of earning his pre-injury wages after the date of termination and did not award temporary total disability benefits after 5 January 1999. Plaintiff died from causes unrelated to his

injury on 27 December 2001 and plaintiff's estate appeals from this order.

Plaintiff contends that the Industrial Commission erred as a matter of law in: (1) shifting the burden to plaintiff to prove disability after finding plaintiff had not constructively refused employment, or in the alternative, in concluding plaintiff was not disabled when terminated, and (2) failing to award plaintiff total and temporary disability benefits. The standard of review for decisions of the Industrial Commission is well established. "In reviewing an opinion and award from the Industrial Commission, the appellate courts are bound by the Commission's findings of fact when supported by any competent evidence; but the Commission's legal conclusions are fully reviewable." *Lanning v. Fieldcrest-Cannon, Inc.*, 352 N.C. 98, 106, 530 S.E.2d 54, 60 (2000).

I.

Plaintiff first contends the Industrial Commission erred as a matter of law in finding the burden of proof shifted to plaintiff to prove his disability after concluding defendant improperly terminated plaintiff's benefits. We disagree.

The Full Commission reversed the deputy commissioner's finding and determined that plaintiff had not constructively refused employment. Defendant does not cross-assign error to this conclusion and we therefore do not review this issue. See N.C.R. App. P. 10(a); *White v. N.C. Dept. of E.H.N.R.*, 117 N.C. App. 545, 548, 451 S.E.2d 376, 379 (1995).

Such a finding does not, however, preclude the Commission's conclusion that the burden then shifted to plaintiff to establish his disability, and that he failed to do so. A disability is defined as an "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.'" *Sims v. Charmes/Arby's Roast Beef*, 142 N.C. App. 154, 160, 542 S.E.2d 277, 282 (2001) (quoting N.C. Gen. Stat. § 97-2(9)). "In workers' compensation cases, a claimant ordinarily has the burden of proving both the existence of his disability and its degree." *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982).

Defendant filed a Form 60 in November 1998 admitting plaintiff's right to compensation. Although the filing of a Form 60 establishes an employer's admission of liability for compensation, it does not create a presumption of continuing disability. See *Sims*, 142 N.C. App. at 159-60, 542 S.E.2d at 281-82 (holding that use of a Form 60 does not create a presumption of continuing disability as does a Form 21 agreement entered into between the employer and the employee). The Industrial Commission therefore properly concluded that plaintiff bore the burden of showing continued disability in order to receive benefits.

Plaintiff argues in the alternative that the Commission erred as a matter of law in concluding plaintiff was not disabled when terminated. We disagree.

A plaintiff may prove his disability for a worker's compensation claim 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; (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."

Knight v. Wal-Mart Stores, Inc., 149 N.C. App. 1, 7, 562 S.E.2d 434, 439 (2002) (quoting *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993)). "[T]he Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Johnson v. Southern Tire Sales & Serv.*, 358 N.C. 701, 711, 599 S.E.2d 508, 515 (2004) (citations omitted).

Plaintiff here presented medical evidence and gave personal testimony as to his physical incapacity to work as a consequence of the work-related injury. The Industrial Commission found that plaintiff was released to work on 29 December 1998, and that no other competent medical evidence of a continuing disability was presented. The Commission noted in its findings the medical examinations of plaintiff conducted by Dr. DuPuy, Dr. Akande, and Dr. Rhyne. Further, the Commission found that none of the medical examinations had resulted in plaintiff's being taken out of work after Dr. DuPuy released plaintiff to return to work. Plaintiff's only proof of continuing disability was his own testimony, which

the Commission found lacked credibility. The Commission's conclusion that plaintiff failed to establish he was incapable of work as a result of the compensable injury after 5 January 1999 is therefore affirmed.

II.

Plaintiff next contends the Industrial Commission erred as a matter of law in failing to award plaintiff temporary total disability from 5 January 1999 to 31 May 2000 and temporary partial disability benefits from 1 June 2000 until plaintiff's death. We disagree.

Defendant cites *Brown v. S & N Communications, Inc.*, 124 N.C. App. 320, 477 S.E.2d 197 (1996) for the proposition that once a disability is proven, "there is a presumption that it continues until the employee returns to work at wages equal to those he was receiving at the time his injury occurred." *Brown*, 124 N.C. App. at 329, 477 S.E.2d at 202 (citations omitted).

Here however, as discussed *supra*, the Commission concluded:

In the instant case no doctor took decedent out of work after his release to full-duty work without restrictions on December 29, 1998. Decedent failed to establish by the greater weight of the medical evidence that as a result of the compensable injury by accident he was incapable of work in any employment after January 5, 1999.

As the Commission found no incapacity for work resulting from the injury after 5 January 1999, and therefore no disability, no presumption was created and the Commission properly concluded that plaintiff was not eligible for continued partial or total benefits under the Workers' Compensation Act. See *Brown*, 124 N.C. App. at

329, 477 S.E.2d at 202 (holding that in order to receive disability compensation under the Act, the injury must have impaired the worker's earning capacity).

For the reasons stated herein, the opinion and award of the Full Commission is affirmed.

Affirmed.

Judges WYNN and THORNBURG concur.

Report per Rule 30(e).