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NO. COA06-445

NORTH CAROLINA COURT OF APPEALS

Filed: 3 April 2007

LINDA DILLINGHAM,

Plaintiff/Employee

v.

From the Industrial Commission  
I.C. No. 978835

WESTERN CAROLINA CENTER,

Defendant/Employer,

KEY RISK MANAGEMENT SERVICES,

Third-Party Administrator.

Appeal by defendant from Opinion and Award for the Full Commission entered 1 February 2006 by Commissioner Laura Kranfield Mavretic. Heard in the Court of Appeals 13 December 2006.

*Attorney General Roy Cooper, by Assistant Attorney General Vanessa N. Totten, for defendant.*

*Richard B. Harper, for plaintiff.*

ELMORE, Judge.

Linda Dillingham (plaintiff) was injured by accident while employed as a Trainer III by Western Carolina Center (defendant). She filed a claim, and the case was heard by Deputy Commissioner Wanda Blanche Taylor on 8 April 2004. Deputy Commissioner Taylor filed an opinion and award on 22 April 2005 denying "plaintiff's claim for temporary total disability benefits, temporary partial

disability benefits, and/or medical treatment," and awarding her permanent partial disability benefits of \$311.31 a week for ten weeks. Plaintiff appealed to the Full Commission, which heard her appeal on 6 October 2005. On 1 February 2006, the Full Commission filed an opinion and award granting plaintiff, in addition to the partial disability benefits awarded her in Deputy Commissioner Taylor's opinion, "partial disability compensation at the rate of two-thirds of the difference between her average weekly wage and any wages earned beginning January 16, 2001 and continuing for 300 weeks from the April 14, 1999 date of injury or until she returns to work earning her pre-injury wages." Further, the Full Commission awarded plaintiff payment "for any medical treatment related to plaintiff's compensable injury by accident . . . not including treatment for plaintiff's hypertension or heel, hip or low back pain." It is from the Full Commission's 1 February 2006 opinion and award that defendant now appeals. After a thorough review of the record, we affirm the Full Commission's opinion and award.

Defendant first argues that the Full Commission erred in its finding of fact No. 18 and conclusion of law No. 2. The standard of review in this case is well established:

In considering an appeal from a decision of the North Carolina Industrial Commission, this Court is limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law. A finding of fact is conclusive on appeal if supported by competent evidence, even where there is evidence to contradict the finding. This Court may not weigh the evidence or evaluate the

credibility of witnesses, as the Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony.

*Bowen v. ABF Freight Systems, Inc.*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 633 S.E.2d 854, 857 (2006) (internal quotations and citations omitted). Because there was ample competent evidence to support finding of fact No. 18, and because conclusion of law No. 2 was supported by the findings of fact, we hold that defendant's assignment of error is without merit.

As a preliminary matter, we note that defendant assigned error only to finding of fact No. 18. Defendant did not assign error to any of the Full Commission's other findings of fact. "Thus, the findings are 'presumed to be supported by competent evidence and are binding on appeal.'" *State ex rel. City of Salisbury v. Campbell*, 169 N.C. App. 829, 831, 610 S.E.2d 799, 800 (2005) (quoting *Anderson Chevrolet/Olds v. Higgins*, 57 N.C. App. 650, 653, 292 S.E.2d 159, 161 (1982)).

There was competent evidence to support the Full Commission's finding of fact 18. Finding of fact No. 18 reads in its entirety: "As the result of the compensable injury by accident, plaintiff was partially disabled from employment and earned reduced wages after her resignation on January 16, 2001. Her diminished ability to earn wages is due to her disability resulting from her compensable injury by accident." The Full Commission was presented with evidence from two medical doctors, both of whom assigned a five percent disability rating to plaintiff's knee. The Full Commission received testimony from plaintiff that she was not able to continue

her employment with defendant due to the physical demands of the job, and that she was subsequently unable to find equally remunerative employment. This evidence is sufficient as the basis for the Full Commission's finding of fact No. 18.

Moreover, the Full Commission's conclusion of law No. 2 was adequately supported by the extensive findings of fact, which defendant has not challenged. Conclusion of law No. 2 reads:

As the result of her compensable injury by accident, plaintiff was partially disabled and was entitled to receive partial disability compensation at the rate of two-thirds of the difference between her average weekly wage and any wages earned beginning January 16, 2001 and continuing for 300 weeks from the April 14, 1999 date of injury or until plaintiff returns to work earning wages equal to her pre-injury wages. N.C. Gen. Stat. §97-30; *Larramore v. Richardson Sports Ltd. Partners*, 141 N.C. App. 250, 540 S.E.2d 768 (2000), *aff'd per curiam*, 353 N.C. 520, 546 S.E.2d 87 (2001).

The Full Commission found as fact that plaintiff suffered a compensable injury to her knee; that she was treated conservatively and her job was modified as a result of the injury; that she was advised by a physician to seek less physically demanding work; that her application for a less physically demanding position with defendant was denied; that she underwent surgery for the knee; and that she felt unable to perform her job duties. These findings of fact are sufficient to support the Full Commission's conclusion of law No. 2.

The Full Commission based its finding of fact No. 18 on competent evidence, and its conclusion of law No. 2 was supported

by its findings of fact. Accordingly, defendant's first assignment of error is without merit.

Defendant next argues that the Full Commission applied a presumption that plaintiff was entitled to partial disability payments, and that such a presumption was inconsistent with the facts as found by the Full Commission. Because we find that the Full Commission did not apply any such presumption, this assignment of error must fail.

In its conclusion of law No. 2, the Full Commission cited *Larramore v. Richardson Sports, Ltd. Partners*, 141 N.C. App. 250, 540 S.E.2d 768 (2000), *aff'd per curiam*, 353 N.C. 520, 546 S.E.2d 87 (2001). Defendant asserts that the Full Commission relied on *Larramore* for the purpose of creating a "presumption." Defendant's brief is unclear as to what, exactly, is to be presumed. Defendant correctly notes that evidence of a plaintiff working for lower wages after an injury, "while not dispositive of disability, shifts the burden to the employer to establish that the employee could have obtained higher earnings." *Larramore*, 141 N.C. App. at 259-60, 540 S.E.2d at 773 (citations omitted). Such burden shifting does not constitute a presumption of anything; it simply forces a defendant to present contrary evidence. Moreover, even assuming that *Larramore* does create a presumption of disability, defendant fails to show any consequence in this case. Instead, defendant argues extensively on the facts, claiming that there was evidence sufficient to overcome such a burden. "But it is not this Court's role to make new findings of fact based upon the evidence; our

review of a finding of fact entered by the Commission is to determine whether it is supported by competent evidence." *Bowen*, \_\_\_ N.C. App. at \_\_\_, 633 S.E.2d at 859 (citing *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998)). Accordingly, we find no merit in defendant's assignment of error.

There was competent evidence to support the Full Commission's findings of fact, and the conclusions of law were supported by the findings of fact.

Affirmed.

Judges MCGEE and BRYANT concur.

Report per Rule 30(e).