IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-890

Filed: 7 April 2015

North Carolina Industrial Commission, I.C. No. W63959

TOM BIRCKHEAD, Employee, Plaintiff,

v.

NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, Employer, Defendant,

and

CORVEL CORPORATION, Third-Party Administrator.

Appeal by plaintiff from opinion and award entered 10 April 2014 by the North Carolina Industrial Commission. Heard in the Court of Appeals 21 January 2015.

The Deuterman Law Group, P.A., by C. Michael Broome, for plaintiff-appellant.

Attorney General Roy Cooper, by Assistant Attorney General Ryan C. Zellar, for defendant-appellee.

DIETZ, Judge.

Plaintiff Tom Birckhead appeals from the North Carolina Industrial Commission's decision to reduce his workers' compensation award by the amount his employer previously paid in short-term disability payments following his injury.

Birckhead challenges the Industrial Commission's decision on two main grounds. First, he argues that the Commission erred in finding that his short-term

disability plan was a fully employer-funded plan. Second, he contends that the Commission erred by taking up this issue after a final opinion and award already had been entered and the time for appeal had expired.

For the reasons discussed below, we reject Birckhead's arguments. We must affirm the Industrial Commission's findings of fact if there is *any* competent record evidence supporting those findings. Here, a witness testified under oath that Birckhead's short-term disability benefits were fully employer-funded, and that testimony is sufficient to uphold the Commission's finding. With respect to the Commission's amendment to the final opinion and award, this Court has held that the Industrial Commission has inherent authority to amend its decisions in the interest of justice. The Commission's decision to do so in this case, to avoid an unjust double recovery, is consistent with our precedent on this issue. Accordingly, we affirm.

Facts and Procedural History

Plaintiff Tom Birckhead was employed as an HVAC supervisor by Defendant North Carolina Department of Public Safety ("DPS"). On 28 December 2009, Birckhead injured his left knee while assisting with a repair at one of DPS's facilities. The following day, Birckhead reported the injury to his supervisor and filed a workers' compensation claim. DPS denied Birckhead's claim on 11 February 2010. Birckhead then requested a hearing on his claim before the Industrial Commission.

Deputy Commissioner Vilas held a hearing on 10 September 2010 to determine whether Birckhead's injury was compensable. On 9 November 2010, Birckhead applied for short-term disability benefits under a separate disability plan offered as part of Birckhead's state employee benefits. DPS began paying short-term disability benefits under this plan in November 2010. Birckhead received a total of $35,215.61 in short-term disability payments.

On 18 July 2011, Deputy Commissioner Vilas filed an opinion and award finding that Birckhead's injury was compensable and ordering DPS to pay Birckhead temporary total disability benefits of $629.37 per week from 29 December 2009 until Birckhead returns to work. The 18 July 2011 opinion and award also ordered DPS to pay accrued compensation in a lump sum. DPS did not appeal this opinion and award.

Shortly after entry of the opinion and award, and before the time for appeal had expired, Birckhead's counsel communicated with DPS's counsel via email regarding payment of the lump sum of Birckhead's accrued temporary total disability benefits. Birckhead's counsel wrote that "Mr. Birckhead is okay with the credit/repay of STD [short-term disability]," acknowledged that DPS would be "taking a credit for STD payments," and included a proposed calculation for the amount of temporary total disability benefits minus a credit for the short-term disability payments. DPS's counsel replied, "I'm sure we'll be able to work this out."

Lisa Milam, an adjuster with CorVel Corporation who handled Birckhead's workers' compensation claim, later testified that DPS allowed the time to appeal the 18 July 2011 opinion and award to expire because DPS believed it had an agreement with Birckhead's counsel to deduct the short-term disability payments from the lump sum workers' compensation award.

After a dispute arose between the parties over whether DPS was entitled to a 100% credit for the short-term disability payments, DPS filed a motion with the Industrial Commission on 7 September 2011 requesting an order that DPS is entitled to deduct the $35,215.61 in short-term disability payments from the amounts it owed Birckhead under the 18 July 2011 opinion and award. Birckhead filed a motion to show cause on 8 September 2011, asserting that DPS was not entitled to a credit and requesting that a 10% late penalty be assessed against the agency.

On 6 October 2011, DPS issued the first payment under the 18 July 2011 opinion and award, which included the lump sum payment covering the previous two years. DPS deducted the short-term disability payments from that lump sum payment.

The Commission denied DPS's motion for a credit by order filed 24 October 2011. DPS then requested a hearing on the issue. Deputy Commissioner Goodwin held a hearing on 23 October 2012. On 6 August 2013, Deputy Commissioner Goodwin issued an opinion and award denying DPS's request for a credit. Deputy

Commissioner Goodwin reasoned that DPS was barred from seeking a credit due to their failure to appeal the 18 July 2011 opinion and award. DPS appealed that order to the Full Commission.

The Full Commission filed an opinion and award on 10 April 2014, rejecting the Deputy Commissioner's reasoning and awarding DPS a $35,215.61 credit for short-term disability payments. The Full Commission found that DPS paid Birckhead $35,215.61 in short-term disability benefits and that the agency was entitled to deduct those payments from the workers' compensation award under N.C. Gen. Stat. § 97-42 to prevent an unjust double recovery. Birckhead timely appealed the Full Commission's opinion and award.

Analysis

I. Credit Awarded Under N.C. Gen. Stat. § 97-42

Birckhead first argues that the Industrial Commission erred in awarding DPS a credit for the short-term disability payments it made while it litigated the compensability of Birckhead's workers' compensation claim. For the reasons discussed below, we affirm the Industrial Commission's decision.

The Workers' Compensation Act contains a provision designed to encourage employers to pay injured workers under a separate wage-replacement plan—such as a short-term disability plan—while the compensability of a workers' compensation claim is litigated. *See* N.C. Gen. Stat. § 97-42 (2013). As our Supreme Court has

explained, "[p]ayment by the employer under a private disability plan accomplishes sound policy objectives by providing immediate financial assistance to the disabled worker *while* she is disabled." *Foster v. Western-Elec. Co.*, 320 N.C. 113, 116-17, 357 S.E.2d 670, 673 (1987). The Court also observed that an employer "who has paid an employee wage-replacement benefits at the time of that employee's greatest need[ ] should not be penalized by being denied full credit for the amount paid as against the amount which was subsequently determined to be due the employee under workers' compensation." *Id.* at 117, 357 S.E.2d at 673. "To do so would inevitably cause employers to be less generous and the result would be that the employee would lose his full salary at the very moment he needs it most." *Id.*

The Workers' Compensation Act accomplishes the policy goals described in *Foster* by providing that "[p]ayments made by the employer to the injured employee during the period of his disability, or to his dependents, which by the terms of this Article were not due and payable when made, may, subject to the approval of the Commission be deducted from the amount to be paid as compensation." N.C. Gen. Stat. § 97-42.

Disability benefits are "due and payable" when either (1) the employer has accepted the injury as compensable or (2) the Industrial Commission has determined the injury is compensable. *See Foster*, 320 N.C. at 115, 357 S.E.2d at 672. In *Foster*, as in this case, the employer disputed the compensability of the injury under the

Workers' Compensation Act but began paying benefits to the injured worker under the company's short-term disability plan. *Id.* at 114, 357 S.E.2d at 671. The Supreme Court held those payments were deductible under § 97-42 because "defendant had *not* accepted plaintiff's injury as compensable under workers' compensation at the time the payments were made, nor had there been a determination of compensability by the Industrial Commission." *Id.* at 115-16, 357 S.E.2d at 672.

Foster involved a short-term disability plan that was fully funded by the employer. The decision expressly left open the question of whether a deduction would be available if the plan were partially funded by contributions from the employee. *Id.* at 117 n.1, 357 S.E.2d at 673 n.1. The crux of Birckhead's argument is that the statutory description of DPS's short-term disability plan suggests that some portion of state employees' contributions to the retirement system might be used to fund some portion of the disability benefits. Thus, Birckhead argues, DPS's short-term disability payments were not from a fully employer-funded plan and fall outside the scope of § 97-42.

We are compelled to reject this argument under the strict standard of review applicable to decisions of the Industrial Commission. We review findings of fact by the Industrial Commission under the competent evidence standard. Under that standard, "[w]e determine only whether there is *any* evidence of substance in the record to support the Commission's findings." *Carroll v. Burlington Indus.*, 81 N.C.

App. 384, 387-88, 344 S.E.2d 287, 289 (1986), *aff'd*, 319 N.C. 395, 354 S.E.2d 237 (1987). "[I]f there is, we are bound by the findings," even if the record contains contradictory evidence. *Id.* at 388, 344 S.E.2d at 289.

Here, the Commission found "Employer-Defendant's disability plan to be employer-funded based on the credible testimony of Ms. Milam." Lisa Milam is an adjuster for CorVel Corporation and was responsible for processing Birckhead's workers' compensation plan for DPS. She testified under oath that DPS's short-term disability plan was fully employer-funded:

> DEFENDANT'S COUNSEL: Okay. And the – the short-term disability is paid – is a hundred percent employer funded, is it not?
>
> MS. MILAM: That is correct. That's what I've been told.
>
> DEFENDANT'S COUNSEL: And that would be an important component as far as complying with § 97-42, would it not?
>
> MS. MILAM: Uh-huh, that is correct.
>
> DEFENDANT'S COUNSEL: Okay. And so – so no portion – or is it your understanding that no portion of plaintiff's salary goes to pay for or secure short-term disability benefits?
>
> MS. MILAM: That is correct.

This unchallenged testimony is sufficient to establish at least some competent record evidence to support the Commission's finding that the short-term disability

plan was fully employer-funded. *See Carroll*, 81 N.C. App. at 387-88, 344 S.E.2d at 289.

Birckhead also argues that his short-term disability payments already had been "earned" in much the same way as sick leave and vacation benefits, and thus were "due and payable" under the statute. Birckhead supports this argument by citing this Court's decision in *Estes v. N.C. State Univ.*, 89 N.C. App. 55, 61, 365 S.E.2d 160, 163 (1988). But our decision is *Estes* did not address this issue, instead remanding to the Industrial Commission for further consideration in light of *Foster*. *Id.* From this record, we cannot discern any meaningful difference between the short-term disability plan in this case and those at issue in *Foster* and its progeny. *See generally Foster*, 320 N.C. 113, 357 S.E.2d 670; *Evans v. AT&T Techs., Inc.*, 332 N.C. 78, 418 S.E.2d 503 (1992); *Strickland v. Martin Marietta Materials*, 193 N.C. App. 718, 668 S.E.2d 633 (2008). We thus reject this argument and affirm the Industrial Commission's decision to deduct the short-term disability payments from Birckhead's compensation award.

II. Failure to Timely Appeal

Birckhead next argues that DPS did not timely appeal the Industrial Commission's initial opinion and award (which did not provide a credit for the short-term disability payments) and thus that decision became unreviewable under the doctrine of *res judicata*. We disagree.

Under the Workers' Compensation Act, parties have a period of "15 days from the date when notice of the award shall have been given" to apply for review of the award by the Full Commission. N.C. Gen. Stat. § 97-85(a) (2013). "[T]he application for review to the Commission within fifteen days of the deputy commissioner's order prevents the deputy commissioner's order from becoming final." *Lewis v. N.C. Dep't of Corr.*, 138 N.C. App. 526, 528, 531 S.E.2d 468, 470 (2000). Ordinarily, "[t]he doctrine of *res judicata* precludes relitigation of final orders of the Full Commission and orders of a deputy commissioner which have not been appealed to the Full Commission." *Bryant v. Weyerhaeuser Co.*, 130 N.C. App. 135, 138, 502 S.E.2d 58, 61 (1998).

Birckhead argues that, because DPS did not appeal the 18 July 2011 opinion and award within 15 days, that opinion and award became a final order and triggered the application of the doctrine of *res judicata*, thus precluding the Industrial Commission from considering DPS's credit request at a later date. However, in *Ammons v. Goodyear Tire & Rubber Co.*, this Court recognized that the Industrial Commission "has inherent power, analogous to that conferred on courts by [North Carolina Civil Procedure] Rule 60(b)(6), in the exercise of supervision over its own judgments to set aside a former judgment when the paramount interest in achieving a just and proper determination of a claim requires it." 209 N.C. App. 741, 744, 708 S.E.2d 127, 128 (2011) (internal quotation marks omitted). In *Ammons*, this Court

held that the Industrial Commission was acting within its "expansive power to set aside its own judgments" where "[b]ased on our review of the record, the Industrial Commission's amendment to the January award was not an attempt to provide Goodyear relief from an erroneous judgment" or "a substitute for Goodyear's failure to timely appeal," "but was instead necessary supervision of its own judgments to do justice under the circumstances." *Id.* at 744, 708 S.E.2d at 129. This Court recognized that amendment of the Commission's award was justified because "double recovery is not contemplated by [the Workers' Compensation Act]." *Id.* at 745, 708 S.E.2d at 129 (internal quotation marks omitted).

As in *Ammons*, the Industrial Commission in this case acted to do justice under the circumstances and to avoid an unjust double recovery. Here, DPS did not appeal the 18 July 2011 opinion and award because the agency believed it already had an agreement with Birckhead to deduct the short-term disability payments from the Commission's award. Ms. Milam, who negotiated with Birckhead's counsel on behalf of DPS, testified that "[i]t was my understanding that – that it was his agreement that they would take the credit for the $35,000 that was paid in short-term disability benefits" and "[o]ffset the amount of TTD that was due by the $35,000."

Ms. Milam's testimony is corroborated by a 25 July 2011 email contained in the record in which Birckhead's counsel wrote that "Mr. Birckhead is okay with the

credit/repay of STD" and acknowledged that DPS would be "taking a credit for STD payments."

In light of this record evidence, we hold that the Industrial Commission properly exercised its inherent authority to amend a previously entered opinion and award to avoid an unjust double recovery. *See Ammons*, 209 N.C. App. at 744, 708 S.E.2d at 129. Accordingly, we reject Birckhead's argument and affirm the Commission's decision to permit DPS to deduct its short-term disability payments from the compensation award.

Conclusion

For the reasons set forth above, we affirm the Industrial Commission's opinion and award.

AFFIRMED.

Judges STEELMAN and INMAN concur.

Report per Rule 30(e).