IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-1045

Filed: 16 August 2016

North Carolina Industrial Commission, I.C. No. Y18976

ADRIANNE DENISE DUTCH, Employee, Plaintiff,

v.

LAUREL HEALTH CARE HOLDINGS, INC., Employer, THE PHOENIX INSURANCE COMPANY, Carrier, Defendants.

Appeal by Defendants from Opinion and Award entered 22 May 2015 by the North Carolina Industrial Commission. Heard in the Court of Appeals 11 February 2016.

Wallace and Graham, P.A., by Whitney V. Wallace, for Plaintiff-Appellee.

Northup McConnell and Sizemore, PLLC, by Steven W. Sizemore, for Defendant-Appellants.

INMAN, Judge.

Laurel Healthcare Holdings ("Defendant-Employer") and The Phoenix Insurance Co. ("Defendant-Insurer") (together, "Defendants") appeal from an Opinion and Award of the Full Commission of the North Carolina Industrial Commission ("the Commission") granting Adrianne Denise Dutch ("Plaintiff") indemnity benefits. Defendants contend that the Commission's findings of fact were not sufficient to

support its conclusion that Plaintiff is entitled to these benefits. After careful review, we affirm the Commission's Opinion and Award.

Factual and Procedural History

Plaintiff worked as a licensed practical nurse ("LPN") from 1994 until August 2012, when she was injured while working for Defendant-Employer, giving rise to this action.

Defendant-Employer is a home-healthcare facility that provides long-term care, rehabilitation, and nursing assistance to elderly residents at the Laurels of Salisbury in Rowan County. Plaintiff's job duties included assessing and treating wounds and sores, prescribing and administering medicines, lifting and transporting patients, filing patient reports, and other miscellaneous activities. Plaintiff had a history of back pain, including surgery, but had never experienced difficulty performing her duties with Defendant-Employer due to back pain or radiating leg pain.

Plaintiff was lifting a patient who weighed between 180 and 200 pounds from a Geri-chair on Friday, 10 August 2012, when she felt an immediate onset of pain in her lower back that radiated down her left leg. Within minutes, Plaintiff reported the injury to the Director of Nursing, who requested that Plaintiff continue working for the rest of the day.

After leaving work that same day, Plaintiff sought medical care at Rowan Urgent Care. Dr. Wenn, the first doctor Plaintiff saw, noted that she presented with

pain at her L3-L4-L5 vertebrae that worsened with movement and radiated down her left leg. Dr. Wenn diagnosed acute low back pain with leg sciatica. Dr. Wenn instructed Plaintiff to rest over the weekend and cleared her to return to work, but with restrictions. Six days later, Plaintiff returned to work. A week after Plaintiff returned to work, the restrictions were discontinued, but Plaintiff's pain continued when she attempted to resume lifting patients, so she ceased performing that task. Plaintiff returned to Rowan Urgent Care because of her continued pain. On 29 August 2012—the day before she learned she was fired—Plaintiff's work restrictions were reinstated without a specified end date.

On 28 August 2012, Defendant-Employer decided to terminate Plaintiff's employment following two incidents that day in which Plaintiff allegedly failed to provide adequate care to residents and failed to document their care. Plaintiff was informed of her termination two days later, on 30 August 2012.

The Commission found that Defendants failed to meet their burden to show that Plaintiff was terminated for misconduct, that such misconduct would have resulted in the termination of a nondisabled employee, and that the termination was unrelated to Plaintiff's compensable injury. Defendants did not appeal any of these findings, and as such they are binding on appeal. *See Davis v. Hospice & Palliative Care of Winston-Salem*, 202 N.C. App. 660, 670, 692 S.E.2d 631, 638 (2010) ("Unchallenged findings of fact by the Commission are binding on appeal.").

As is authorized for an employer whose employee claims disability benefits, Defendant-Employer chose Dr. Hans Hansen, a pain specialist, to evaluate and treat Plaintiff. A year later, in August 2013, Dr. Hansen determined that Plaintiff had reached maximum medical improvement, "at a benchmark that I do not think is going to change over [one] year." Dr. Hansen opined that Plaintiff's condition had "improved somewhat," by twenty to fifty percent.

From the termination of her employment with Defendant-Employer until March 2014, Plaintiff maintained a "job log" in conformity with the requirements for unemployment benefits. During that time, Plaintiff applied for at least two jobs per week, but was unsuccessful in obtaining employment. Plaintiff testified that potential employers explained that she was not being hired due to her restrictions. The Commission found that Plaintiff's testimony about her job search and the relationship between her injury and her difficulty finding employment was credible.

Dr. Wenn's findings in the course of treating Plaintiff were consistent with her complaints. He recommended that Plaintiff get adequate rest and avoid tasks that caused pain, as "any activity that aggravates an injury will either make it worse or prolong the injury and prevent it from resolving." Dr. Hansen found Plaintiff's symptoms and reports of pain to be true and credible. Plaintiff, Dr. Wenn, and Dr. Hansen all expressed concern that Plaintiff would not be able to obtain and/or fully perform employment as an LPN. While most of the jobs that Plaintiff applied for required an LPN, she also applied to various employers for "anything available."

Six months after she was injured, Plaintiff filed a request for a hearing before the Commission seeking, *inter alia,* temporary total disability benefits and other benefits referred to collectively as "indemnity benefits." Defendants responded to Plaintiff's request and filed with the Commission a form documenting payment of temporary total disability benefits to Plaintiff. In total, Plaintiff collected unemployment benefits from 18 November 2012 until 22 June 2013 and temporary total disability benefits from 24 May 2013 until 9 July 2014.

Defendants applied with the Commission to terminate Plaintiff's disability benefits in August 2013, a year after she was injured, based upon new information that Dr. Hansen had not removed her from work following a surgical procedure. The Commission disapproved that application.

After a hearing on Plaintiff's claim for benefits, Deputy Commissioner J. Brad Donovan filed an Opinion and Award on 9 July 2014 denying her claim for indemnity benefits. Plaintiff appealed to the Full Commission. After reviewing the deputy commissioner's opinion and hearing oral arguments by the parties, the Commission filed an Opinion and Award on 22 May 2015 awarding indemnity benefits to Plaintiff subject to credits for any unemployment benefits she received. Defendants appeal.

Analysis

A. Standard of Review

The Commission's Opinion and Award is a final judgment from an administrative agency and appeal thereof lies to this Court pursuant to N.C. Gen. Stat. §§ 7A-29(a) and 97-86 (2015).

"Appellate review of an award from the Industrial Commission is generally limited to two issues: (1) whether the findings of facts are supported by competent evidence, and (2) whether the conclusions of law are justified by the findings of fact." *Clark v. Wal-Mart*, 360 N.C. 41, 43, 619 S.E.2d 491, 492 (2005). If any competent evidence which supports the Commission's findings exists at all, the Commission's findings of fact are conclusive on appeal. *Hardin v. Motor Panels, Inc.*, 136 N.C. App. 351, 353, 524 S.E.2d 369 (2000).

"The Commission's conclusions of law are reviewed *de novo*." *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004). If a factual finding by the Commission states the legal basis for its foundation, it may be considered a conclusion of law and therefore reviewed *de novo*. *Long v. Morganton Dyeing & Fishing Co.*, 321 N.C. 82, 86, 361 S.E.2d 575, 577 (1987).

B. Conclusion of Law 4

Defendants argue that the Commission erred in deciding that Plaintiff had proven she was entitled to indemnity benefits under the Workers' Compensation Act as a result of her work-related injury.

The Industrial Commission must "make specific findings with respect to crucial facts upon which the . . . right to compensation depends[,]" *Gaines v. L.D.*

Swain & Son, Inc., 33 N.C. App. 575, 579, 235 S.E.2d 856, 859 (1977), "must find those facts which are necessary to support its conclusions of law," *Peagler v. Tyson Foods, Inc.*, 138 N.C. App. 593, 602, 532 S.E.2d 207, 213 (2000), and must "resolv[e] . . . conflicting testimony" without "mere[ly] summariz[ing] or recit[ing] . . . the evidence . . . ." *Lane v. Am. Nat'l Can Co.*, 181 N.C. App. 527, 531, 640 S.E.2d 732, 735 (2007) (citation omitted); *see also Cauble v. Macke Co.*, 78 N.C. App. 793, 795, 338 S.E.2d 320, 321-22 (1986). On appeal, "[f]indings not supported by competent evidence are not conclusive and will be set aside," *Penland v. Bird Coal Co.*, 246 N.C. 26, 30, 97 S.E.2d 432, 436 (1957), and "[w]ithout competent evidence, the Commission's conclusions are likewise unsupported and the opinion and award must be reversed." *Gutierrez v. GDX Auto.*, 169 N.C. App. 173, 178, 609 S.E.2d 445, 449 (2005).

To qualify for indemnity benefits, it is a claimant's burden to prove the existence and extent of his or her disability. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 684 (1982); *Simmons v. Kroger Co.*, 117 N.C. App. 440, 442, 451 S.E.2d 12, 13 (1994). Disability, in this context, refers to one's "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) (emphasis added); *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 432, 342 S.E.2d 798, 802 (1986).

> The employee may meet [her] burden in one of four ways: (1) the production of medical evidence that [she] is physically or mentally, as a consequence of the work

> related injury, incapable of work in any employment; (2) the production of evidence that [she] is capable of some work, but that [she] has, after a reasonable effort on [her] part, been unsuccessful in [her] effort to obtain employment; (3) the production of evidence that [she] 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 [she] has obtained other employment at a wage less than that earned prior to the injury.

Russell v. Lowes Product Distribution, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (internal citations omitted).

Defendants challenge the Commission's Conclusion of Law 4 which determined the following:

> Plaintiff has proven disability under prong two of *Russell* by showing that while she was capable of some work, she[,] after a reasonable effort on her part, has been unsuccessful in her efforts to obtain employment. As a result of her physical limitations[,] Plaintiff cannot return to work as [an] LPN. She has searched for work pursuant to the job search requirements to receive unemployment benefits from the North Carolina Division of Employment Security. Plaintiff was informed by some potential employers that her physical limitations prevented her from being hired. Thus, Plaintiff has met her burden of proving that she is temporarily totally disabled.

(Internal citations omitted.)

Defendants first contend that the Commission erred in concluding that Plaintiff's job search was reasonable. Defendants next contend that the Commission erred in concluding that Plaintiff was unable to find work due to her work-related injuries. We disagree with each of Defendants' contentions.

Defendants contend that the Commission's findings of fact were too broad and conclusory to satisfy the requirements for factual findings by the Commission. Defendants argue that this case is similar to *Salomon v. Oaks of Carolina*, 217 N.C. App. 146, 153, 718 S.E.2d 204, 209 (2011), in which this Court held that the Commission's findings were insufficient to support the conclusion that the claimant had made reasonable efforts to find a job but was unsuccessful because of her on-the-job injury. In *Salomon*, the plaintiff was awarded temporary total disability benefits following findings by the Commission that she had conducted a reasonable job search to find suitable employment and that her inability to earn wages equal to or greater than her previous pay was due to a work-related injury. *Id.* at 152-53, 718 S.E.2d at 209. This Court reversed in part and remanded the case back to the Commission for further proceedings. *Id.* at 153, 718 S.E.2d at 209. This Court held that the "conclusory findings [made by the Commission] [were] insufficient to support the Commission's conclusion that Plaintiff has established her disability by showing her job search was 'reasonable' but unsuccessful." *Id.* (citing *Johnson v. Southern Tire Sales & Serv.*, 358 N.C. 701, 710, 599 S.E.2d 508, 515 (2004)).

Salomon is not similar to this case. In *Salomon*, the Commission made only two findings of fact: first, "that plaintiff made a reasonable job search in an effort to find possible suitable employment but has been unsuccessful in her efforts[;]" and second, "that as a result of the compensable injury by accident, plaintiff has been

unable to earn the same or greater wages as she was earning in the same or any other employment . . . ." *Id.* at 152-53, 718 S.E.2d at 209.

In this case, by contrast, the Commission made more than ten findings of fact, including the manner in which Plaintiff submitted her employment applications, the characteristics of Plaintiff's job search logs, the number and nature of the positions for which Plaintiff applied, Plaintiff's experiences with potential employers, and the likely effects that Plaintiff's injuries have had on her ability to obtain suitable employment, among other such information. The Commission's multiple findings of fact, each discussing the evidence, distinguish this case from *Salomon*. These findings support the Commission's conclusion that Plaintiff conducted a reasonable job search.

While not binding on the Commission as elements of the reasonableness of a job search, the North Carolina Employment Security Commission's (the "NCESC") job search requirements to receive unemployment benefits are instructive and beneficial to this Court's evaluations. *See White v. Weyerhaeuser Co.*, 167 N.C. App. 658, 668-69, 672, 606 S.E.2d 389, 395, 399 (2005). To receive unemployment benefits, an applicant must: (1) be actively seeking employment; (2) make at least two job contacts per week; (3) keep a record of all job search-related activities; and (4) be able

to work.[1] Plaintiff's evidence showed as follows: She applied for two jobs each week she received unemployment benefits. She submitted resumes, often in person, to a variety of employers, not simply those employing LPNs, and she often applied to work as "anything available." Plaintiff recorded all of her attempts in a job search log, which she provided to the Commission. Plaintiff was capable of working in many jobs less physically intensive than an LPN. This evidence provided ample support for the Commission's findings of fact, and these findings of fact supported its conclusion that Plaintiff's physical limitations caused by her on-the-job injury prevented her from obtaining employment.

C. Hearsay

Defendants also argue that Findings of Fact 32-34 are based solely upon inadmissible hearsay testimony objected to by defense counsel at trial.

At trial, Plaintiff testified as follows:

> Whenever people have called me and they ask me why I was – left my previous job, when I would tell them, and

[1] These standards are promulgated by the NCESC, and can be found on the organization's website. *North Carolina Job Search Requirements*, Unemployment Handbook (July 18 2016), http://unemploymenthandbook.com/state-unemployment-directory/72-north-carolina/994-north-carolina-unemployment-job-search-requirements. Additionally, the NCESC has provided guidance as to the meaning of "actively seeking" employment:

> "Actively seeking work" is defined as doing those things that an unemployed person who wants to work would normally do. . . . [A] prima facie showing of "actively seeking work" has been established when: During the week for which a claim for regular unemployment insurance benefits has been filed, the claimant sought work on at least two (2) different days and made a total of at least two (2) in person job contacts.

N.C. Employment Security Regulation § 10.25(A)(1), (2) (2009).

> then I said and I'm still under the care of a doctor, they just don't want to hire me; no one does.
>
> . . . .
>
> [T]hey don't want to hire someone that's already under restrictions, so if I'm under a doctor's care, no one wants to hire me.

Defendants allege that this testimony contained inadmissible hearsay, providing an inappropriate foundation for the Commission's findings and conclusions that Plaintiff is entitled to receive indemnity benefits. We disagree, in part because other evidence supported the Commission's findings and conclusions.

The Industrial Commission is not strictly bound by the Rules of Evidence. The North Carolina Supreme Court has held that "[w]here hearsay evidence has been admitted, an award will not be reversed where competent evidence on the same issue has been received. . . ." *Maley v. Thomasville Furniture Co.*, 214 N.C. 589, 594, 200 S.E. 438, 441 (1939).

Evidence other than the hearsay statements challenged by Defendants supports the Commission's findings and conclusions. Dr. Wenn testified that work activity could exacerbate Plaintiff's condition and expressed concern as to whether Plaintiff could return to a similar field of work. Dr. Hansen testified that restrictions on a patient's abilities make reemployment more difficult. He also testified that the typical work required of an LPN could exceed medium level work to which Plaintiff should be restricted. The totality of evidence presented to the Commission, hearsay

or otherwise, shows that, even though Plaintiff was capable of some work, Plaintiff's injuries hampered her ability to find suitable employment.

Conclusion

For the foregoing reasons, we affirm the Opinion and Award of the Commission granting Plaintiff indemnity benefits.

AFFIRMED.

Judges STEPHENS and HUNTER, JR. concur.

Report per Rule 30(e).