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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1322

Filed: 15 January 2019

North Carolina Industrial Commission, I.C. No. Y27414

JOHN WALTER ROLLS, Employee, Plaintiff,

v.

JUST STUMPS, INC., Employer, and ERIE INSURANCE GROUP, Carrier,
Defendants.

Appeal by Plaintiff from an Opinion and Award filed 23 August 2017 by the Full North Carolina Industrial Commission. Heard in the Court of Appeals 19 April 2018.

The Richardson Firm, P.L.L.C., by Keischa M. Lovelace, for plaintiff-appellant.

McAngus, Goudelock & Courie, PLLC, by Stephanie O. Gearhart, for defendants-appellees.

MURPHY, Judge.

When a plaintiff fails to prove that a lack of income was caused by his work-related injury, the Industrial Commission (“Commission”) is correct in denying a request for temporary total disability. Further, our duty is only to determine whether the record contains any evidence tending to support a challenged finding. Where

there is competent evidence to support the Commission's findings related to whether Plaintiff is entitled to additional treatment, we must affirm the Commission's Opinion and Award.

BACKGROUND

John Walter Rolls ("Plaintiff") is the owner of a stump grinding business, Just Stumps, Inc. Plaintiff fell and was injured while working on 10 October 2012. Just Stumps had workers' compensation insurance with Defendant, Erie Insurance Group. Plaintiff was transported by ambulance to the Emergency Room at WakeMed and subsequently referred to Dr. Jonathan Chappell ("Dr. Chappell") at Wake Orthopedics. Dr. Chappell diagnosed Plaintiff with a quadriceps tendon rupture and performed quadriceps tendon repair surgery on 18 October 2012. Plaintiff suffered a second rupture of his quadriceps tendon in February 2013. After a second surgery on Plaintiff's quadriceps tendon, Dr. Chappell recommended Plaintiff continue with physical therapy.

Dr. Chappell determined that Plaintiff reached "Maximum Medical Improvement" on 18 February 2014 and assigned Plaintiff a 15% permanent partial disability rating for his left knee. Dr. Gilbert Whitmer gave Plaintiff a second opinion and assigned him a 20% permanent partial disability rating for his left knee. Dr. Lyman Smith ("Dr. Smith") performed an independent medical examination of Plaintiff in 2014. Dr. Smith reviewed Plaintiff's MRIs and Dr. Chappell's operative

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notes and stated that Plaintiff could continue to work in his current role with Just Stumps. Plaintiff also saw Dr. Shepherd Hurwitz (“Dr. Hurwitz”) on 14 January 2015 for his Achilles tendon. Plaintiff had not mentioned any Achilles tendon issues in either of his interactions with Doctors Smith or Chappell. Dr. Hurwitz stated:

I have the highest degree of medical certainty that his Achilles injury occurred and his symptoms in the area of the insertion of the Achilles are due to the injury of 2012 [sic], October 2012.

Plaintiff appeared before Deputy Commissioner Sumit Gupta on 8 April 2016. Deputy Commissioner Gupta determined Plaintiff’s Achilles tendon injury was related to his 10 October 2012 injury and designated Dr. Hurwitz as his treating physician. Defendant, Erie Insurance Group, was ordered to pay Plaintiff the 15% permanent partial disability he sustained to his left leg as a result of the 10 October 2012 injury. All other claims were denied. Both parties appealed to the Full Commission. The Full Commission denied Plaintiff’s claim related to his Achilles tendon injury, but otherwise upheld Deputy Commissioner Gupta’s award. Plaintiff timely appealed to this Court.

ANALYSIS

Review of an Opinion and Award of the Commission “is limited to consideration of whether competent evidence supports the Commission’s findings of fact and whether the findings support the Commission’s conclusions of law. This ‘court’s duty goes no further than to determine whether the record contains any evidence tending

to support the finding.” *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (citation omitted). “We have repeatedly held that the Commission's findings of fact ‘are conclusive on appeal when supported by competent evidence, even though there be evidence that would support findings to the contrary.’” *Davis v. Harrah's Cherokee Casino*, 362 N.C. 133, 137, 655 S.E.2d 392, 394 (2008). In addition, “[t]he Industrial Commission ‘is the sole judge of the credibility of the witness and the weight to be given its testimony[.]’” *Weaver v. Am. Nat. Can Corp.*, 123 N.C. App. 507, 510, 473 S.E.2d 10, 12 (1996) (citation omitted).

Plaintiff argues that he was entitled to temporary total disability compensation as a result of his work-related injury. In addition, Plaintiff argues that he is entitled to additional treatment for his Achilles tendon and patella tendon. We disagree. While we recognize that the evidence could support contrary findings, because our “duty goes no further than to determine whether the record contains any evidence tending to support the finding[.]” we affirm the Commission’s Opinion and Award. *Richardson*, 362 N.C. at 660, 669 S.E.2d at 584.

A. Temporary Total Disability Compensation

“The term ‘disability’ means 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.G.S. § 97-2(9) (2017). “[I]n order to support a conclusion of disability, the Commission must find: (1) that plaintiff was incapable after his injury

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of earning the same wages he had earned before his injury in the same employment, (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) that this individual's incapacity to earn was caused by plaintiff's injury." *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). The burden is on the Plaintiff "to persuade the Commission not only that he had obtained no other employment but that he was unable to obtain other employment." *Id.* at 595, 290 S.E.2d at 684.

"[T]he test for determining whether the self-employed injured employee has [retained] wage-earning capacity is that the employee (i) be actively involved in the day to day operation of the business and (ii) utilize skills which would enable the employee to be employable in the competitive market place notwithstanding the employee's physical limitations, age, education and experience." *Lanning v. Fieldcrest-Cannon, Inc.*, 352 N.C. 98, 107, 530 S.E.2d 54, 61 (2000).

The Commission found that Plaintiff failed to prove that his wage-earning capacity was diminished as a result of his injury. It made the following relevant findings of fact that Plaintiff now contests:

10. Plaintiff testified that in July 2013 he was able to return to work monitoring, bidding for work, operating a stump grinder and hiring subcontractors. Plaintiff testified that he has done less physical work and hired more subcontractors since his injury.

11. Even on the day of Plaintiff's surgery, the business was still in operation. Plaintiff hired a subcontractor to

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complete the work needed when he was in surgery. After the surgery, Plaintiff went to jobsites while on crutches and drove his pick-up truck. Plaintiff testified that after the injury he began to rent out Just Stumps, Inc. equipment to generate income. In January 2016, Plaintiff testified that he got a job removing snow in a parking lot, and that he drove a snow plow for that job.

12. At the hearing before the Deputy Commissioner, Plaintiff's counsel asked Plaintiff if he had turned down any work due to this injury and Plaintiff did not provide a direct or clear answer. Plaintiff testified that he did not look for any different types of work. When asked whether Plaintiff was looking for work in 2013, he testified that he couldn't remember. Plaintiff further testified that if there were no debits or withdrawals during portions of 2013 it was because there was nothing going on in the business. There were no debit or withdrawal transactions reflected in the bank records for Just Stumps, Inc. during that period.

13. Plaintiff continues to operate his stump grinder with a remote control from a seated position. Plaintiff continues to work with customers to evaluate potential jobs and bids for jobs. Just Stumps, Inc. has a regular contract with the City of Raleigh. It has had the contract since before Plaintiff's injury. Plaintiff can monitor the work his subcontractors perform by traveling to their location. Plaintiff can sometimes walk around to monitor the work and other times he sits in his vehicle and oversees the work.

With respect to Findings of Fact 10-12, we conclude that these findings of fact are supported by the transcript of Plaintiff's testimony and by other competent evidence. Plaintiff's own testimony established that he used subcontractors after his injury and that this use became more frequent after the injury. Indeed, Plaintiff

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testified that he organized a subcontractor to perform a job from his hospital bed. Plaintiff also testified that he would go to the job sites on his crutches and that he would rent out his equipment. Plaintiff also did not establish that the lack of “debits or withdrawals” were a result of his disability. It was Plaintiff’s burden to establish that the lack of income was caused by his injury. His failure to do so was fatal to his claim for temporary total disability compensation. We, therefore, conclude that the findings support the Commission’s conclusions of law.

Plaintiff claims that Finding of Fact 13 is not supported by the evidence because it “fails to make a temporal connection to any of Plaintiff’s work activities,” noting that Plaintiff did not purchase the remote control stump grinder until 2014 and that Plaintiff did not “begin using subcontractors or monitoring work from his vehicle until after 1 July 2013.”¹ The Commission’s failure to make this “temporal connection” regarding the remote control stump grinder did not render Finding of Fact 13 unsupported by evidence. Plaintiff failed to establish when he purchased the remote control stump grinder, testifying that he purchased it “[m]aybe a year and a half ago . . . I don’t remember the date.” Finding of Fact 13 was supported by the evidence and Plaintiff’s own testimony. *See Hunt v. N.C. St. U.*, 194 N.C. App. 662,

¹ Appellee contends, and we agree, that Plaintiff sought temporary total disability before the Full Commission for the period of October 10, 2012 until February 18, 2014. Now on appeal, Plaintiff contends he is entitled to temporary total disability from October 10, 2012 until July 1, 2013 and claims any findings after July 1, 2013 are erroneous as they are not “temporally connected.” We, therefore, review whether the Full Commission’s findings of fact are supported by competent evidence based on the time period that Plaintiff presented below.

664, 670 S.E.2d 309, 311 (2009) (“Where there are sufficient findings of fact based on competent evidence to support the Commission’s conclusions of law, the award will not be disturbed because of other erroneous findings which do not affect the conclusions.”) (citation and alteration omitted). Plaintiff testified that he would go to job sites to monitor his subcontractors from his vehicle and while on crutches. As mentioned, Plaintiff also operated his business and coordinated bids from his hospital bed. He also confirmed that his contract with the City of Raleigh was continuously in place. This finding of fact, supported by competent evidence, justifies the Commission’s conclusion that Plaintiff “was consistently active in the day to day operations of the business and utilized many skills in project management that would make him employable in the competitive marketplace.”

The Commission’s challenged findings of fact on this issue are supported by competent evidence and the findings support the Commission’s conclusion of law that Plaintiff was not entitled to temporary total disability compensation.

B. Achilles Tendon Injury

Plaintiff argues that his Achilles tendon injury is directly related to his 10 October 2012 workplace injury and that he is entitled to additional treatment for his Achilles tendon.

The North Carolina Workers’ Compensation Act requires employers to provide medical compensation for the treatment of compensable injuries, including additional medical compensation directly related to the compensable

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injury that is designed to effectuate a cure, provide relief, or lessen the period of disability. It is well established that an employee seeking compensation for an injury bears the burden of demonstrating that the injury suffered is causally related to the work-related accident.

Pine v. Wal-Mart Associates, Inc., ___ N.C. App. ___, ___, 804 S.E.2d 769, 773 (2017) (citations quotations and alterations omitted), *appeal dismissed, review allowed sub nom.*, *Pine v. Wal-Mart Associates, Inc.*, 370 N.C. 578, 809 S.E.2d 588 (2018). “Although the Commission may choose not to believe the evidence after considering it, it may not wholly disregard or ignore competent evidence.” *Lineback v. Wake Cty. Bd. of Comm’rs*, 126 N.C. App. 678, 680, 486 S.E.2d 252, 254 (1997).

Plaintiff specifically challenges Finding of Fact 31, which states:

The Full Commission finds that Plaintiff’s left Achilles injury is not related to his incident of October 10, 2012.

However, Plaintiff’s brief does not specifically challenge Finding of Fact 38, which states:

The Full Commission finds by a preponderance of the competent and credible evidence of record, that Plaintiff’s injury to his left Achilles is not causally related to the October 10, 2012 incident.

“Unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal.” *Allred v. Exceptional Landscapes, Inc.*, 227 N.C. App. 229, 232, 743 S.E.2d 48, 51 (2013). While Plaintiff’s proposed issues on appeal list Finding of Fact 38 as not supported by the evidentiary record under “Issue 6”,

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proposed issues on appeal not argued in a plaintiff's brief are deemed abandoned. N.C. R. App. P. 28; *Garlock*, 211 N.C. App. at 215, 712 S.E.2d at 169 (2011) ("Under Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure, the brief is to include the contentions of the appellant 'with respect to each issue presented. Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.'"). Accordingly, because Plaintiff's brief does not specifically challenge Finding of Fact 38 and only references "Issues on Appeal 1, 5, 6, 7," we presume that Finding of Fact 38 is supported by competent evidence and is binding on appeal. Moreover, because Finding of Fact 38 is presumed to be supported by competent evidence and is binding on appeal, we find that the conclusion of law based on this finding of fact is justified.

Even if this argument were properly preserved, it is evident from the Opinion and Award that the Commission did not "wholly disregard or ignore competent evidence," *Lineback*, 126 N.C. App. at 680, 486 S.E.2d at 254, and the Commission properly considered the relevant testimony regarding Plaintiff's Achilles tendon injury. There is competent evidence to support the Commission's findings of fact regarding Plaintiff's Achilles tendon injury, and these findings support the Commission's conclusions of law.

C. Additional Treatment

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Additional treatment must be “reasonably necessary to effect a cure, provide relief, or lessen the period of disability.” N.C.G.S. § 97-25(c). Plaintiff argues that he is entitled to additional treatment for his patella tendon and challenges the Commission’s Findings of Fact 24, 25, and 37:

24. The parties deposed Dr. Jonathan Chappell of Wake Orthopaedics. Dr. Chappell testified he continued to hold the opinion that Plaintiff was at maximum medical improvement and that this opinion was to a reasonable degree of medical certainty. Dr. Chappell further testified to a reasonable degree of medical certainty that Plaintiff does not require additional surgery or any additional medical treatment. Dr. Chappell testified that Plaintiff could continue to perform his job duties with Just Stumps, Inc. without limitations.

25. Dr. Lyman Smith performed a second opinion evaluation of Plaintiff following his injury. Dr. Smith testified that it was his opinion that Plaintiff could continue to work in his current position with Just Stumps, Inc.

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37. The Full Commission finds by a preponderance of the competent and credible evidence of record, that Plaintiff is not entitled to any additional medical treatment related to the October 10, 2012 or the February 2013 injuries. There is no evidence that any additional treatment would effect a cure or provide Plaintiff relief. The Full Commission further finds that Plaintiff has failed to present evidence that an appointment of an authorized treating physician is reasonably necessary to effect a cure or provide Plaintiff relief.

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Plaintiff further argues that the Commission's Conclusions of Law 12 and 13 are erroneous:

12. A claimant is only entitled to medical treatment that is directly related and reasonably necessary to effect a cure, provide relief, or lessen the period of disability. N.C. Gen. Stat. § 97-2(19); *Pomeroy v. Tanner*, 151 N.C. App. 171, 182, 565 S.E.2d 209, 216 (2002). Plaintiff has failed to prove that any additional treatment is necessary to effect a cure, provide relief, or lessen any period of disability related to Plaintiff's October 10, 2012 or February 2013 injuries. N.C. Gen. Stat. § 97-2(19).

13. Plaintiff has not shown that an appointment of an authorized treating physician is reasonably necessary to effect a cure, provide relief, or lessen any period of disability. N.C. Gen. Stat. § 97-25.

Dr. Chappell testified that plaintiff was at maximum medical improvement relating to his quadriceps injury as of 18 February 2014. Dr. Chappell further testified that Plaintiff does not require additional surgery. Dr. Chappell made these opinions to a high degree of reasonable certainty based on his physical examination and treatment of Plaintiff and his expertise as an orthopedic surgeon. In regards to Plaintiff's patella tendon, Dr. Chappell stated that any "central third patellar tendon rupture is a clinically insignificant finding." Dr. Chappell explained that "you can live a perfectly functional normal life without a central third patellar tendon. So again, in my opinion it's not clinically relevant." It is clear that the Commission considered Dr. Chappell's testimony and also that of Dr. Smith, who performed an independent evaluation of Plaintiff, and concluded that Plaintiff did not "show by a

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preponderance of the evidence that the change is reasonably necessary to effect a cure, provide relief, or lessen the period of disability.” N.C.G.S. § 97-25(c) The record contains evidence tending to support the challenged findings, and the findings in turn support the challenged conclusions of law.

CONCLUSION

Plaintiff failed to prove that his lack of income was caused by his work-related injury. Accordingly, the Commission was correct to deny Plaintiff’s request for temporary total disability. Further, we conclude the record contains evidence tending to support the challenged findings related to causation and additional treatment.

AFFIRMED.

Judge DAVIS concurs.

Judge INMAN concurs in result only.

Report per Rule 30(e).