IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-324

Filed 05 July 2023

North Carolina Industrial Commission, I.C. No. X59367

MARY BETTS, Employee, Plaintiff,

v.

NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES – CHERRY HOSPITAL, Employer, SELF-INSURED (CCMSI, Third-Party Administrator), Defendants.

Appeal by plaintiff from opinion and award entered 1 February 2022 by Commissioner Wanda Blanche Taylor for the North Carolina Industrial Commission.

Heard in the Court of Appeals 10 May 2023.

The Sumwalt Group, by Vernon Sumwalt, and Lucas Denning & Ellerbe, P.A., by Sarah E. Ellerbe and Robert Lucas, for plaintiff-appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General Heather Haney, for appellee North Carolina Department of Health and Human Services – Cherry Hospital, et al.

Lennon Camak & Bertics, PLLC, by Michael W. Bertics, and The Harper Law Firm, PLLC, by Richard B. Harper and Joshua O. Harper, for Amicus Curae North Carolina Advocates for Justice.

Brewer Defense Group, by Joy H. Brewer and Ginny P. Lanier, for Amicus Curae North Carolina Association for Defense Attorneys, et al.

GORE, Judge.

Plaintiff Mary Betts appeals the Full Commission's denial of her claim for extended disability benefits. We consider two issues on appeal: (i) whether the Commission misapprehended the law in denying plaintiff's claim for extended compensation under N.C. Gen. Stat. section 97-29(c); and (ii) whether the Commission appropriately determined that plaintiff's right shoulder injury is not the proximate and compensable consequence of her original ankle injury. Upon review, we remand in part and affirm in part.

I.

On 12 August 2011, plaintiff sustained an admittedly compensable injury by accident resulting in injury to her right ankle, arising out of and in the course of her employment as a Heath Care Technician at Cherry Hospital. Plaintiff was injured during a confrontation with a combative patient.

Defendants admitted liability and compensability for plaintiff's right ankle injury. Defendants paid plaintiff temporary total disability benefits beginning 13 August 2011, plaintiff's first date of disability.

On 18 December 2019, plaintiff filed a Form 33 Request for Hearing, seeking payment of extended compensation under N.C. Gen. Stat. section 97-29(c). On 12 March 2021, a deputy commissioner filed an Opinion and Award, approving the claim for extended compensation.

On 15 March 2021, defendants appealed to the Full Commission. Defendants filed their Form 44 Application for Review on 18 May 2021. On 1 February 2022, the

Full Commission reversed the deputy commissioner and denied plaintiff's claim for extended compensation.

On 23 February 2022, plaintiff appealed to this Court. North Carolina General Statutes section 97-86 enables this Court to review final awards of the Industrial Commission.

II.

In this case, the Full Commission concluded as a matter of law that:

> N.C. Gen. Stat. § 97-29(c) does not invoke "disability" as defined by N.C. Gen. Stat. § 97-2(9), nor does it require the employee to prove that she is unable to obtain competitive employment. Indeed, to qualify for benefits extending beyond 500 weeks, the statute on its face requires the employee to prove "by a preponderance of the evidence that the employee has sustained a total loss of wage-earning capacity."

The Full Commission subsequently engaged in statutory construction—resorting to a collegiate dictionary to ascertain the plain, ordinary, and literal meaning of the words "total," "loss," and "capacity." The Full Commission construed section 97-29(c):

> as requiring Plaintiff to prove by a preponderance of the evidence that she has sustained *a complete destruction of the ability to earn wages*. Here, Plaintiff has satisfied the time prerequisites to qualify for extended compensation as set out in N.C. Gen. Stat. § 97-29(c). However, the Full Commission concludes that Plaintiff has the capacity to earn some wages, and thus, has failed to prove by the preponderance of the evidence that she has sustained a "total loss of wage-earning capacity" due to her compensable right ankle injury. As such, Defendants are

> entitled to terminate compensation as of [13 March 2021] (the last day of the 500-week period following Plaintiff's date of first disability).

Plaintiff asserts the Full Commission misapprehended the law in denying her claim for extended compensation under section 97-29(c). Specifically, plaintiff argues the Full Commission: (i) erred by resorting to a collegiate dictionary, rather than decades of appellate precedent, to define the term of art "total loss of wage-earning capacity;" and (ii) erred by concluding that plaintiff was not entitled to extended compensation on grounds that she has the capacity to earn some wages. We agree.

A.

We review the Full Commission's conclusions of law de novo. *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004). However, we must refrain from an exercise in statutory construction in the instant case. We are guided by our recent decision in *Sturdivant v. State Dep't of Pub. Safety*, wherein we addressed the proper interpretation of section 97-29(c) as "an issue of first impression." ___ N.C. App. ___, ___, ___ S.E.2d ___, ___ (2023), *disc. rev. pending*, 130-P-23-1. Our Supreme Court has instructed this Court, "[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In re Appeal from Civil Penalty Assessed for Violations of*

Sedimentation Pollution Control Act etc., 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).[1]

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[1] We note that only portions A and B of our analysis in *Sturdivant* constitute binding precedent as Chief Judge Stroud concurred in result only and Judge Hampson filed a separate opinion concurring in part and dissenting in part:

> I am in full agreement with Part II, Subpart A of the Opinion of the Court that the Full Commission erred in the standard it applied to determine whether Plaintiff had suffered a total loss of wage-earning capacity for purposes of determining whether Plaintiff was entitled to receive extended temporary total disability benefits under N.C. Gen. Stat. § 97-29(c). I also agree with Part II, Subpart B of the Opinion of the Court that in meeting his burden of proof to qualify for extended benefits, Plaintiff is not entitled to the Watkins presumption of continuing temporary total disability.
>
> Rather, my dissenting view is limited to Part II, Subpart C of the Opinion of the Court and more so on the appropriate mandate of this Court.

Sturdivant, ___ N.C. App. at ___, ___ S.E.2d at ___; *see also Thigpen v. Ngo*, 143 N.C. App. 209, 213, 545 S.E.2d 477, 479-80 (2001), *rev'd in part*, 355 N.C. 198, 558 S.E.2d 162 (2002) ("In *Keith v. Northern Hosp. Dist. of Surry County*, 129 N.C.App. 402, 499 S.E.2d 200, *disc. review denied*, 348 N.C. 693, 511 S.E.2d 646 (1998), the judge writing the opinion for the panel concluded that the inclusion of 'shall be dismissed' in Rule 9(j) acted to prevent a plaintiff from subsequently amending a complaint under Rule 15 to add the requisite Rule 9(j) certification. However, another judge on the panel disagreed with that reasoning and concluded that the language of Rule 9(j), when read *in pari materia* with Rule 15, allowed correction through amendment. That second judge concurred in the result only, on the basis of the trial court's discretion to deny an amendment under Rule 15. Because the third judge on the *Keith* panel also concurred in the result only, on the basis of discretion under Rule 15, the precedential authority of *Keith* is limited to its holding that the trial court did not abuse its discretion under Rule 15. *See, e.g., State v. Bryant*, 334 N.C. 333, 341, 432 S.E.2d 291, 296 (1993), *vacated on other grounds*, 511 U.S. 1001, 114 S.Ct. 1365, 128 L. Ed. 2d 42 (1994). Although portions of the principal opinion in *Keith* were subsequently quoted by and thus incorporated into *Allen v. Carolina Permanente Med. Grp., P.A.*, 139 N.C. App. 342, 533 S.E.2d 812 (2000), *Allen* did not address the application of Rule 15 to Rule 9(j) and therefore holds no precedential value applicable to the case before us."); *Hoag v. Cnty. of Pitt,* 270 N.C. App. 820, 839 S.E.2d 875 (2020) ("Plaintiffs argue that their complaint adequately alleges special damages, because it generally follows the language employed by the plaintiff in *Cherry Community Organization v. City of Charlotte*, 257 N.C. App. 579, 809 S.E.2d 397 (2018). In that case, the authoring judge of this Court quoted the plaintiff's complaint and stated that 'it is clear that [the plaintiff] met the minimum pleading requirements of standing to survive a motion to dismiss in accordance with Rule 12(b)(6) . . . in generally alleging special damages.' *Id*. at 584, 809 S.E.2d at 401. *Cherry Community* is of limited precedential and persuasive value because the opinion failed to garner a clear majority; one judge concurred in the result only, while the other member of the panel concurred by separate opinion and wrote 'separately to concur in the result only.' *Id*. at 587, 809 S.E.2d at 403. *Cherry Community* is inapposite because it reviewed the trial court's entry of a summary judgment

B.

"[I]n 2011, our General Assembly reinstated a cap on eligibility for temporary, total disability benefits of 500 weeks 'unless the employee qualifies for extended compensation under subsection (c)[.]'" *Sturdivant*, ___ N.C. App. at ___, ___ S.E.2d at ___ (quoting N.C. Gen. Stat. § 97-29(b)). "An employee qualifies for extended temporary, total disability benefits, beyond the 500-week cap, if 'pursuant to the provisions of G.S. 97-84, . . . the employee shall prove by a preponderance of the evidence that the employee has sustained a *total loss of wage-earning capacity*.'" *Id.* (quoting N.C. Gen. Stat. § 97-29(c)).

In *Sturdivant*, we held that the Full Commission erred by "conclud[ing] that an employee who has some work capabilities but cannot find a compatible job, though 'totally disabled', has not suffered a 'total loss of wage-earning capacity' to qualify for extended benefits under Section 97-29(c)." *Id.* at ___, ___ S.E.2d at ___. In reaching this holding, we reasoned "that '*total* disability' (under Section 97-29(b)) and '*total* loss of wage-earning capacity' (under Section 97-29(c)) are synonymous." *Id.* at ___, ___ S.E.2d at ___. In other words, as Judge Dillon observed, plaintiff's "burden of showing a 'total loss of wage-earning capacity' under Section 97-29(c) is the same as his burden of showing a 'total disability' to receive benefits under Section 97-29(b). For instance, one who can perform some work may still qualify for extended benefits

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order, not a motion to dismiss. The Court's analysis that the complaint would have survived a motion to dismiss is non-binding *dicta*.").

if no one would hire him." *Id.* at ___, ___ S.E.2d at ___ (Opinion of Dillon, J.).

Consistent with our holding in *Sturdivant*, in this case, the Full Commission erroneously concluded that "N.C. Gen. Stat. § 97-29(c) does not invoke 'disability' as defined by N.C. Gen. Stat. § 97-2(9)," and erred by determining that plaintiff failed to meet her burden to prove "a total loss of wage-earning capacity" based exclusively upon a finding that "plaintiff has the capacity to earn some wages."

C.

However, our inquiry does not end here. In *Sturdivant*, Judge Dillon ultimately upheld the Full Commission's Decision and Order because, "in other parts of its order, the Commission seem[ed] to apply the correct analysis and d[id] make findings of fact which support[ed] its ultimate decision based on our interpretation of Section 97-29(c)." *Id.* at ___, ___ S.E.2d at ___ (Opinion of Dillon, J.). Here, the Commission's Opinion and Award is distinguishable from the written order under review in *Sturdivant*.

"The burden is on the employee to show that he is unable to earn the same wages he had earned before the injury, either in the same employment or in other employment." *Russell v. Lowe's Prod. Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (citation omitted). An employee meets this burden of showing a total-loss of wage-earning capacity in one of four ways:

> (1) by showing he is incapable of performing any work;
>
> (2) by showing that he is capable of work *but that* "after a

> reasonable effort on his part, been unsuccessful" in finding employment;
>
> (3) by showing that he is capable of work *but that* "it would be futile" to seek other employment "because of preexisting conditions; i.e., age, inexperience, lack of education";
>
> (4) by showing he has obtained employment, but at a lower wage than he was earning before the accident.

Sturdivant, ___ N.C. App. at ___, ___ S.E.2d at ___ (citing *Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457) (Opinion of Dillon, J.). "Only the first three ways are relevant here, as the fourth concerns *partial* loss wage-earning capacity." *Id.*

Unlike in *Sturdivant*, the Commission in this case failed to make findings demonstrating it considered these factors. Instead, the Commission based its denial of extended compensation upon its erroneous application of section 97-29(c), which it interpreted as "requiring [p]laintiff to prove by a preponderance of the evidence that she has sustained *a complete destruction* of the ability to earn wages." The Full Commission concluded as a matter of law "that Plaintiff has the capacity to earn some wages, and thus, has failed to prove by a preponderance of the evidence that she has sustained a "total loss of wage-earning capacity" due to her compensable right ankle injury.

"To enable the appellate courts to perform their duty of determining whether the Commission's legal conclusions are justified, the Commission must support its conclusions with sufficient findings of fact." *Gregory v. W.A. Brown & Sons*, 363 N.C. 750, 761, 688 S.E.2d 431, 439 (2010) (citation omitted). If the findings of fact of the

Commission are insufficient to enable the Court to determine the rights of the parties upon the matters in controversy, the proceeding must be remanded to the end that the Commission make proper findings." *Id.* (citation omitted). Accordingly, we remand to the Full Commission with instructions to consider the appropriate factors in determining whether plaintiff met her burden in showing she qualified for extended benefits under section 97-29(c).

III.

Next, plaintiff argues the Commission erred by ignoring competent record evidence that plaintiff's right shoulder condition is a proximate and compensable consequence of her original ankle injury. We disagree.

Here, plaintiff does not challenge specific findings of fact. Plaintiff merely asserts the Commission disregarded competent record evidence in reaching its determination.

The Commission's unchallenged finding of fact 32 states:

> [b]ased upon the preponderance of the evidence in view of the entire record, the Full Commission finds that there is insufficient competent evidence of record to establish a causal connection between Plaintiff's compensable [12 August 2011] right ankle injury and her subsequent [25 June 2020] fall and right shoulder injury. The fact that Plaintiff thinks her right ankle caused the fall, or that a fused ankle *could* make one more susceptible to a fall, is not sufficient to establish causation by a preponderance of the evidence.

In considering this finding, it is well established that:

> [t]he Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony. The courts may set aside findings of fact only upon the ground they lack evidentiary support. Th[is] [C]ourt does not have the right to weigh the evidence and decide the issue on the basis of its weight. Th[is] [C]ourt's duty goes no further than to determine whether the record contains any evidence tending to support the finding. Of course, where there is no evidence of causal relationship between the accident and injury the claim must be denied. Or, if the disability is due to pre-existing physical injuries, it must be denied. But where the evidence is conflicting, the Commission's finding of causal connection between the accident and the disability is conclusive.

Anderson v. Lincoln Constr. Co., 265 N.C. 431, 433-34, 144 S.E.2d 272, 274-75 (1965) (citations omitted).

Here, the Commission concluded that plaintiff failed to show her right arm injury is causally related to the present claim. The Commission's unchallenged findings support this conclusion. Thus, we affirm this portion of the Commission's Opinion and Award.

IV.

The Full Commission misconstrued the term of art "total loss of wage-earning capacity," and based its denial of plaintiff's claim for extended compensation upon this erroneous interpretation of section 97-29(c). We remand for further proceedings consistent with this opinion. Additionally, plaintiff failed to meet her burden to show compensability for her right shoulder injury. We affirm this portion of the Commission's Opinion and Award.

REMANDED IN PART AND AFFIRMED IN PART.

Judges MURPHY and FLOOD concur.

Report per Rule 30(e).