IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-631

Filed 6 February 2024

North Carolina Industrial Commission, I.C. No. 17-034676

VANESSA PORTER, Employee, Plaintiff,

v.

GOODYEAR TIRE AND RUBBER COMPANY, Employer, LIBERTY MUTUAL INSURANCE CO., Carrier, Defendants.

Appeal by defendants from opinion and award entered 14 March 2023 by the North Carolina Industrial Commission. Heard in the Court of Appeals 10 January 2024.

Lennon, Camak & Bertics, PLLC, by Michael W. Bertics, for plaintiff-appellee.

Hedrick Gardner Kincheloe & Garofalo LLP, by M. Duane Jones, Linda Stephens, and Matthew J. Ledwith, for defendant-appellants.

THOMPSON, Judge.

In this workers' compensation case, defendant-employer Goodyear Tire & Rubber Company and its workers' compensation carrier Liberty Insurance Company appeal from the opinion and award entered on 14 March 2023 by the North Carolina Industrial Commission. In that opinion and award, the Commission determined that

plaintiff Vanessa Porter sustained an admittedly compensable work injury on 8 August 2017 and awarded her "temporary partial disability compensation from October 12, 2019 through and continuing until such time as [p]laintiff's post-injury earning capacity increases, subject to the limitations set forth in N.C. Gen. Stat. § 97-30." Defendants first contend that the Commission erred in awarding plaintiff any temporary partial disability benefits, and alternatively, argue that even if such an award was appropriate, the Commission erred in failing to determine plaintiff's earning capacity and thus failed to correctly calculate her temporary partial disability payments. After careful consideration, we affirm the Commission's opinion and award as to the award of temporary partial disability benefits, but remand for additional findings of fact regarding plaintiff's post-injury earning capacity and for recalculation of the amount of compensation to which plaintiff is entitled.

I. Factual Background and Procedural History

This matter was initially heard on 10 July 2020 via Webex by a Deputy Commissioner at the North Carolina Industrial Commission.[1] When the case came on for hearing, the evidence presented tended to show the following: On 8 August 2017, plaintiff was employed at the defendant's Fayetteville location as a VMI Process Technician earning a Grade 1 pay rate of $28.69 per hour. Plaintiff's duties in this

[1] We note that the case was initially heard by Deputy Commissioner Sumit Gupta, but following Gupta's departure from the Commission, jurisdiction was transferred to Deputy Commissioner Tiffany Mack Smith, who filed an opinion and award on 5 April 2021.

position included "building both sides of a tire, feeding the machine, watching the machine, watching the process, and making sure measurements and everything else [we]re correct." In the course of performing her duties, plaintiff was attempting to pull ply stock out of a wheel in which the ply stock had become stuck, and plaintiff testified that she felt her shoulder pop and was subsequently unable to raise her arm.

Plaintiff was placed on light duty following her injury and was under the care of certified orthopedic surgeon Dr. Christopher Barnes, whose specializations are shoulder surgery and sports medicine. In November 2017, Dr. Barnes performed surgery to repair the rotator cuff in plaintiff's right shoulder. When plaintiff returned to work after her surgery, she was unable to perform the duties associated with her VMI Process Technician position and opted to "go through the job match process." Dr. Barnes ordered that plaintiff undergo a Functional Capacity Evaluation (FCE) with Frank Murray, a licensed physical therapist who works part-time onsite at defendant's Fayetteville location where plaintiff is employed. Murray is also licensed to use a system called DSI Work Solutions which develops functional job descriptions and FCEs and assists with performing FCEs. Plaintiff's FCE determined that she was no longer able to perform the duties required by the VMI position, so Murray began the job match process for plaintiff. On 3 October 2018, Dr. Barnes issued permanent work restrictions for plaintiff based on the findings of the FCE.

Plaintiff has been a member of the Local No. 959 United Steelworkers Union (Union) since 1997. The Union has a Collective Bargaining Agreement (CBA) with

defendant company which, *inter alia*, sets forth the process for job matching, job bidding, and disqualification. Pursuant to the requirements of the CBA, the job match process begins by looking at the "currently open positions" in the company. Murray reviews the open positions to determine if there is a job that is "a match between the worker's physical abilities and the physical demands of an open position . . . ." The employee has no input into the job that is offered to him or her. Plaintiff was offered the only position with which there was a job match—a Re-Roll and Repair Liners position. The Re-Roll position is a pay grade 6, the lowest pay grade in the company; plaintiff's original VMI position, as a pay grade 1, is the highest pay grade. Pursuant to the CBA, plaintiff was entitled to receive her pre-injury pay for the first twelve months of her transfer, after which she would begin receiving the pay grade 6 wages commensurate with the Re-Roll and Repair Liners position. The CBA further provided that plaintiff could not bid on any other jobs in the company during the initial twelve months of the transfer period. Plaintiff's wage rate decreased in October 2019, at which time she became eligible to bid on open jobs posted within the company. The positions of Laydown Stock and Roller Die Operator—jobs that were both a pay grade 4 and offered higher wages than plaintiff was making in the Re-Roll and Repair Liners position—were posted in December 2019, January 2020, and February 2020. Plaintiff did not apply for either of these jobs but did apply for a management select position which she was not offered because the duties were outside of plaintiff's permanent restrictions.

When plaintiff attempted to move out of the Re-Roll and Repair Liners position at the end of the twelve-month transfer period, she sought help from Murray in determining what her restrictions were as well as the process for bidding on open jobs so she could obtain a position that allowed her to make higher wages. Plaintiff testified that she had trouble getting in touch with Murray, that others from whom she sought assistance only directed her back to Murray, and that she did not want to bid on a job that was outside her permanent restrictions because company policy would require plaintiff to accept any job which she placed a bid on and was then awarded.

Defendants contended that the Laydown Stock and Roller Die Operator positions were both within plaintiff's restrictions and offered a pay grade higher than plaintiff's position in Re-Roll and Repair Liners, but plaintiff did not apply for those jobs, choosing instead to apply only for the management select position which she was not awarded. Defendants further argued that plaintiff had the ability to increase her wages by working overtime in her department. Plaintiff asserted that the Laydown Stock and Roller Die Operator positions were outside of her restrictions and Murray's opinions that there was a possibility plaintiff could have performed the duties required by those jobs were offered only after the positions had already been filled. Additionally, plaintiff alleged that there was no overtime available when she started in the Re-Roll and Repair Liners department, and no overtime became available while she was employed in that position. Finally, as plaintiff notes and the Commission

found, the Laydown Stock and Roller Die Operator positions were never offered to plaintiff, and defendants only identified those jobs when they were preparing for the hearing before the Commission, many months after the application period for those jobs had closed.

The Full Commission awarded plaintiff temporary partial disability benefits effective 12 October 2019 and continuing through the present, finding, *inter alia*, that plaintiff returned to work earning less than she did in her pre-injury employment as a VMI Process Technician and that plaintiff's efforts to find a position with defendant after her return to work were reasonable. Defendants timely appealed.

II. Analysis

On appeal, defendants present two arguments: first, that the Commission erred in awarding plaintiff temporary partial disability benefits, and second, in the event that this Court concludes that an award of those benefits was proper, that the Commission erred in failing to determine plaintiff's earning capacity and thus failed to correctly calculate her temporary partial disability. While we affirm the decision of the Commission to award plaintiff temporary partial disability benefits, we conclude that the matter must be remanded to the Commission on findings of fact to support the amount of that award as discussed below.

A. Standard of review

The standard of review in workers' compensation appeals is well established and has recently been summarized and re-affirmed by our Supreme Court:

> The North Carolina Industrial Commission is the fact-finding body under the Workers' Compensation Act. As the finder of fact, the Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony. An appellate court does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding. In this regard, the state appellate courts are limited when reviewing opinions and awards issued by the Commission to determinations of: (1) whether the Commission's findings of fact are supported by competent evidence, and (2) whether the Commission's conclusions of law are justified by its findings of fact. Finally, the evidence tending to support plaintiff's claim is to be viewed in the light most favorable to plaintiff, and plaintiff is entitled to the benefit of every reasonable inference to be drawn from the evidence.

Sprouse v. Mary B. Turner Trucking Co., 384 N.C. 635, 642–43, 887 S.E.2d 699, 706 (2023) (citations, quotation marks, ellipses, and brackets omitted). Findings of fact not challenged on appeal are deemed conclusive and binding upon review on appeal. *Johnson v. Herbie's Place*, 157 N.C. App. 168, 180, 579 S.E.2d 110, 118, *disc. review denied*, 357 N.C. 460, 585 S.E.2d 760 (2003).

B. Award of temporary partial disability benefits

Defendants first contend that the Commission erred in awarding temporary partial disability benefits to plaintiff, specifically arguing "[t]he *preponderance of the competent evidence in view of the entire* [*r*]*ecord* does not support . . . Findings of Fact 15, 16, 18, 26, and 27 and, in turn, . . . Conclusions of Law 5, 6, and 7 are not supported by [the] Findings of Fact." In our view, these contentions lack merit in light of the

appropriate standard of review.

We first emphasize that, on appeal, we review factual findings made by the Commission only to determine whether they are supported "*by competent evidence*[, . . .] *viewed in the light most favorable to plaintiff* [with] the benefit of every reasonable inference to be drawn from the evidence." *Sprouse*, 384 N.C. at 643, 887 S.E.2d at 706. *See also Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) ("The Court's duty goes no further than to determine whether the record contains *any* evidence tending to support the finding[s]." (emphasis added)). Thus, defendants' repeated reference to a "preponderance of evidence in view of the entire record" as relevant in this appeal is erroneous and inapposite.

Relatedly, we next observe that, beyond the bare assertion that the above-noted findings of fact were unsupported, defendants in their appellate brief do not actually argue, much less demonstrate that *no* competent evidence supports the challenged findings of fact. Rather, defendants instead draw our attention to certain evidence which they contend could have supported different or additional findings, particularly citing certain testimony from Murray and Barnes and inferences which could have arisen therefrom. As but one example of this misunderstanding and / or unfounded reliance on inapposite case law, defendants cite *Perkins v. U.S. Airways*, 177 N.C. App. 205, 628 S.E.2d 402 (2006), *disc. review denied*, 361 N.C. 356, 644 S.E.2d 231 (2007), in representing that the Commission erred in finding that plaintiff engaged in a reasonable job search. However, in *Perkins*, this Court *upheld and*

affirmed the Commission's finding on that point. *See id.* at 214, 628 S.E.2d at 408. Such a result, reached in light of this Court's deference to the Commission on factual findings, does not benefit defendants here where evidence before the Commission supports the findings of fact that defendants now wish this Court to overrule.

We express no opinion about any testimony which might have sustained hypothetical additional or alternative findings of fact, as this Court does not reweigh the evidence, second-guess the Commission's assessment of the credibility of any witness or testimony, or review the record to locate evidence which might sustain different findings of fact. *See, e.g.*, *Alexander v. Wal-Mart Stores, Inc.*, 166 N.C. App. 563, 573, 603 S.E.2d 552, 558 (2004) (Hudson, J., dissenting) (stating that it is not "the role of this Court to comb through the testimony and view it in the light most favorable to the defendant, when the Supreme Court has clearly instructed us to do the opposite. . . . [because] this Court's role is not to engage in such a weighing of the evidence"), *reversed for the reasons stated in the dissent*, 359 N.C. 403, 610 S.E.2d 374 (2005) (per curiam). Defendants' argument on this issue is overruled.

C. Earning capacity and calculation of temporary partial disability benefits

Defendants' second appellate argument is that the Commission erred in failing to determine plaintiff's earning capacity, and, as a result, erred in its calculation of temporary partial disability benefits. Defendants specifically contend that "Conclusion of Law 3 is not supported by sufficient Findings of Fact, is erroneous in

its apparent calculation of temporary partial disability and, therefore, does not support the Commission's award of temporary partial disability benefits." We hold that the Commission did not err and thus we affirm the opinion and award as to its calculation and award of temporary partial disability.

Initially, we observe that we have already rejected defendants' assertion that "the erroneous . . . findings of fact discussed in Argument I," led the Commission to conclude "that [p]laintiff met her burden of proof 'by showing that her wages were reduced due to her the [sic] restrictions from her compensable work injury beginning on October 12, 2019 when she began receiving wages at the Grade 6 pay rate applicable to the Re-Roll position.' "

However, we agree that, despite directing defendants to pay temporary partial disability benefits, as provided in the Worker's Compensation Act,[2] "from October 12, 2019 through and continuing until such time as [p]laintiff's *post-injury earning capacity* increases," the opinion and award does not include any findings of fact or conclusions of law determining plaintiff's post-injury earning capacity. "Compensation must be based upon loss of wage-earning power *rather than the amount actually received*" as payment for work. *Hill v. Du Bose*, 234 N.C. 446, 447,

[2] "[W]here the incapacity for work resulting from the injury is partial, the employer shall pay, or cause to be paid, as hereinafter provided, to the injured employee during such disability, a weekly compensation equal to sixty-six and two-thirds percent (66⅔%) of the difference between his average weekly wages before the injury and the average weekly wages *which he is able to earn* thereafter [with certain limitations]." N.C. Gen. Stat. § 97-30 (2021) (emphasis added).

67 S.E.2d 371, 372 (1951) (remanding for pertinent findings of fact regarding loss of earning *capacity* where actual wages earned were used to determine disability payments); *see also Lipscomb v. Mayflower Vehicle Sys.*, 213 N.C. App. 440, 448, 716 S.E.2d 345, 351 (2011) (affirming the determination of the employee's post-injury earning capacity at a different amount than the employee's actual post-injury earnings); *Thomas v. Hanes Printables*, 91 N.C. App. 45, 48, 370 S.E.2d 419, 421 (1988) (citing *Hill* for the proposition that "the practice of comparing earnings before and after an injury is not the proper method to exhibit diminished earning capacity"); *Preslar v. Cannon Mills Co.*, 80 N.C. App. 610, 619, 343 S.E.2d 209, 215 (1986) (citing *Hill* for the proposition that "actual wages earned do[ ] not necessarily prove wage-earning capacity"). Accordingly, we must send this case back to the Commission for its determination of plaintiff's post-injury earning capacity.

III. Conclusion

We affirm the opinion and award as to plaintiff's entitlement to temporary partial disability benefits but vacate the opinion and award regarding the amount of the payments and remand the matter to the Commission for the entry of findings of fact and / or conclusions of law concerning plaintiff's post-injury earning capacity and for a re-calculation of plaintiff's temporary partial disability weekly payments.

AFFIRMED IN PART; VACATED IN PART; AND REMANDED.

Judges COLLINS and HAMPSON concur.

Report per Rule 30(e).