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NO. COA08-1226

NORTH CAROLINA COURT OF APPEALS

Filed: 19 May 2009

AKHTAR MASOOD,
Employee-Plaintiff,

v.

North Carolina
Industrial Commission
I.C. File No. 013942

ERWIN OIL COMPANY,
Employer-Defendant,

and **Court of Appeals**

EMC INSURANCE COMPANIES,
Carrier-Defendant.

Appeal by plaintiff from Opinion and Award entered 10 June 2008 by the North Carolina Industrial Commission. Heard in the Court of Appeals 11 March 2009.

Slip Opinion

Patterson Harkavy LLP, by Leto Copeley and Narendra K. Ghosh, for plaintiff-appellant.

Patterson Dilthey, LLP, by Phillip J. Anthony, for defendant-appellee.

STEELMAN, Judge.

Where the Industrial Commission did not make findings of fact as to whether plaintiff was disadvantaged by an inability to pay for necessary medical care, we cannot determine whether plaintiff was entitled to an award of interest on his outstanding medical expenses, and this matter is remanded for further findings by the Industrial Commission.

I. Procedural Background

This matter is before this Court for a second time. The underlying facts of this case are set forth in *Masood v. Erwin Oil Co.*, 181 N.C. App. 424, 639 S.E.2d 118 (2007) and are not repeated. The Commission initially denied plaintiff's claim for workers' compensation benefits. A majority of this Court reversed the Commission's decision holding that Erwin Oil was the statutory employer of plaintiff pursuant to N.C. Gen. Stat. § 97-19, and remanded the matter to the Commission for additional findings on plaintiff's injuries and defendant's liability. Defendants appealed to the Supreme Court as a matter of right based on the dissent. The Supreme Court was equally divided on the result of this appeal, and the majority opinion of this Court was left undisturbed, without precedential value. See *Masood v. Erwin Oil Co.*, 361 N.C. 579, 650 S.E.2d 595 (2007).

On 27 March 2008, the Commission entered an Opinion and Award awarding plaintiff temporary total disability benefits in the amount of \$237.69 per week for the time period from 6 August 1999 through 2 June 2000, together with interest at eight percent per annum since 10 September 2003 when this action was first heard by the Deputy Commissioner, permanent partial disability benefits in the amount of \$105,000.00, past and future medical expenses, attorney's fees, and costs. On 11 April 2008, plaintiff filed a motion for reconsideration requesting the Commission amend its Opinion and Award to order defendants to pay interest on the permanent partial disability benefits and plaintiff's medical

expenses. On 10 June 2008, the Commission modified its Opinion and Award and directed defendants to pay interest on the permanent partial disability benefits, but denied plaintiff's request for the payment of interest as to his medical expenses on the basis that "[t]he payment of said interest in the instant case would constitute an unjustified benefit to plaintiff and would be far removed from the goals of the Workers' Compensation Act." The Commission further concluded "[i]f anyone should receive interest for the unpaid, outstanding medical expenses, it should be the health care provider who has provided the treatment to plaintiff and has failed to receive payment from any source in almost nine years." Plaintiff appeals.

II. Standard of Review

"The standard of review on appeal to this Court from an award by the Commission is whether there is any competent evidence in the record to support the Commission's findings and whether those findings support the Commission's conclusions of law." *Oliver v. Lane Co.*, 143 N.C. App. 167, 170, 544 S.E.2d 606, 609 (2001) (citation omitted). The Commission's conclusions of law are subject to *de novo* review. *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004).

III. Analysis

In his sole argument on appeal, plaintiff contends the Commission erred by concluding he was not entitled to interest on the award of medical expenses pursuant to N.C. Gen. Stat. § 97-86.2.

N.C. Gen. Stat. § 97-86.2 (2007) provides:

In any workers' compensation case in which an order is issued either granting or denying an award to the employee and where there is an appeal resulting in an ultimate award to the employee, the insurance carrier or employer shall pay interest on the final award or unpaid portion thereof from the date of the initial hearing on the claim, until paid at the legal rate of interest provided in G.S. 24-1. If interest is paid it shall not be a part of, or in any way increase attorneys' fees, but shall be paid in full to the claimant.

This Court first considered whether the General Assembly's use of the term "award" in N.C. Gen. Stat. § 97-86.2 encompassed the payment of a plaintiff's outstanding medical expenses in *Childress v. Trion, Inc.*, 125 N.C. App. 588, 481 S.E.2d 697, *disc. review denied*, 346 N.C. 276, 487 S.E.2d 541 (1997). This Court concluded that, based on the plain language of the statute, there was nothing to indicate that an "award" did not include medical expenses.

[I]n contested cases, workers' compensation plaintiffs incur the liability for all medical expenses if they lose; that plaintiffs often pay significant out-of-pocket medical expenses for prescription drugs, travel, deductibles, or actual payment of medical expenses when there is no other way plaintiffs can obtain treatment; and that because the factual scenarios in determining whether plaintiffs in workers' compensation cases have incurred out-of-pocket expenses are so numerous, the only reasonable construction is that any award of medical compensation for the plaintiff's benefit is covered by G.S. 97-86.2.

Id. at 591, 481 S.E.2d 699. This Court further noted that the Workers' Compensation Act is to be construed liberally in favor of the injured worker and set forth the goals of awarding interest as follows: "(a) [T]o compensate a plaintiff for loss of the use

value of a damage award or compensation for delay in payment; (b) to prevent unjust enrichment to a defendant for the use value of the money; and (c) to promote settlement." *Id.* at 592, 481 S.E.2d at 699 (alteration in original) (quoting *Powe v. Odell*, 312 N.C. 410, 413, 322 S.E.2d 762, 764 (1984)). In *Childress*, all of these goals were met, and we held that the Commission properly awarded interest on the plaintiff's medical expenses. *Id.*

More recently, this Court revisited this issue in *Sprinkle v. Lilly Indus.*, ___ N.C. App. ___, 668 S.E.2d 378 (2008), *disc. review denied*, ___ N.C. ___, 673 S.E.2d 363 (2009). In *Sprinkle*, it was undisputed that interest should be paid on the amount of medical compensation reimbursed to the plaintiff for his out-of-pocket expenses. At issue was whether the plaintiff should receive interest on the amounts of the award which were reimbursed to a third-party health insurer. *Id.* at ___, 668 S.E.2d at 381.

Sprinkle focused on the purposes of awarding interest to plaintiffs in workers' compensation cases. "The first purpose . . . seeks to provide compensation to an employee where that employee has suffered some loss or disadvantage by the employer or carrier's failure to pay the award." *Id.* Because the plaintiff had health insurance, which contractually shifted the risk of loss to the health insurer, the plaintiff "did not experience a loss of use of his money nor was he disadvantaged by an inability to pay for care." *Id.* In the absence of a compensatory purpose, awarding interest would only serve as a penalty to the employer/carrier and would create a windfall for the employee. *Id.* at ___, 668 S.E.2d

at 381-82. We noted that construing the interest statute so as to operate as a penalty would ignore the overall purpose of the Workers' Compensation Act. *Id.* at ____, 668 S.E.2d at 382. We also stressed that our appellate courts have repeatedly held that the Act was not intended to create a windfall of recovery for the employee. *Id.* *Sprinkle* concluded that N.C. Gen. Stat. § 97-86.2 "must not include amounts of medical compensation for which plaintiff was indemnified by his health insurer and which were reimbursable to the third-party health insurer." *Id.* at ____, 668 S.E.2d at 383.

In the instant case, the issue before us is whether interest should be awarded on outstanding medical expenses that have not been paid by either plaintiff or a third-party health insurer. We must determine whether plaintiff "experience[d] a loss of use of his money [or] was . . . disadvantaged by an inability to pay for care." *Id.* at ____, 668 S.E.2d at 381. Plaintiff argues that "[b]ecause he had no health insurance and would have been liable for the outstanding medical expenses had he lost on appeal, and because he did not receive needed follow-up care, plaintiff suffered disadvantages while waiting for the disposition of this case."

We hold that the first portion of plaintiff's argument is without merit. Plaintiff's contention that interest should be awarded based upon the fact that he *would have been liable* for the medical expenses had he lost his appeal suggests that interest should be awarded to every uninsured plaintiff that comes before

the Commission. This is clearly not what is contemplated in our decisions in *Childress* and *Sprinkle*, and would result in an impermissible windfall to plaintiff that serves no compensatory purpose under the statute.

However, we do believe that the second part of plaintiff's argument has merit. The decision of the Commission is devoid of any findings of fact as to whether plaintiff was disadvantaged by any inability to pay for care, the second part of the test set forth in *Sprinkle*. It is not the role of the appellate courts to make findings of fact in Industrial Commission cases. See *Carroll v. Burlington Industries*, 81 N.C. App. 384, 387, 344 S.E.2d 287, 289 (1986) (providing that this Court has a limited role on appeal from a final order of the Industrial Commission and does not weigh the evidence), *per curiam aff'd*, 319 N.C. 395, 354 S.E.2d 237 (1987). This role is reserved solely for the Industrial Commission. *Armstrong v. W.R. Grace & Co.*, 175 N.C. App. 528, 533, 623 S.E.2d 820, 824 ("Under our Workers' Compensation Act, the Commission is the factfinding body. The Commission is the sole judge of the credibility of witnesses and the ultimate factfinder whether it is conducting a hearing or reviewing a cold record." (citations omitted)), *disc. review denied*, 360 N.C. 531, 633 S.E.2d 672 (2006). Without findings on this question, we cannot evaluate whether there was evidence to support the findings and whether the findings support the conclusions of law. We therefore remand this matter to the Commission for entry of findings of fact as to

whether plaintiff was disadvantaged by any inability to pay for necessary medical treatment.

In entering these findings, the Commission should consider whether there was medically necessary treatment that plaintiff was unable to procure, and whether plaintiff had the ability to pay for this treatment during the time period that it was medically necessary.

REVERSED AND REMANDED.

Judges BRYANT and ELMORE concur.

Report per Rule 30(e).