NO. COA03-975

NORTH CAROLINA COURT OF APPEALS

Filed: 03 August 2004

SUSAN OWENS
Plaintiff-Employee

v.

North Carolina Industrial Commission
I.C. File Nos. Nos. 002275 & 003420

WAL-MART STORES, INC.
Defendant-Employer

and

AMERICAN HOME ASSURANCE CO.
Defendant-Carrier

Appeal by defendant-appellants from opinion and award entered 20 February 2003 by the North Carolina Industrial Commission. Heard in the Court of Appeals 27 April 2004.

Brumbaugh, Mu & King, P.A., by Kenneth W. King, Jr. for plaintiff-appellee.

Young, Moore and Henderson, P.A., by J. Aldean Webster III for defendant-appellants.

STEELMAN, Judge.

Susan Owens (plaintiff) worked for Sam's Club, a division of Wal-Mart Stores, Inc. (defendant-employer) until 19 July 2000. On 25 October 1999 plaintiff sustained injuries to her neck, back, and right shoulder while operating a floor machine at work. On 12 December 1999 plaintiff sustained further injuries to her neck, back and right ankle when she tripped over a dustpan on the job. Plaintiff was diagnosed with lumbosacral sprain, contusion of the pelvis, and rotator cuff tendonitis. After her spine injury was diagnosed as chronic, plaintiff was placed on

light duty work with restricted lifting, standing and walking. Plaintiff worked as a "greeter," a telemarketer, and did other light duty work that allowed her to sit. On 19 July 2000, defendant-employer told plaintiff she could no longer sit while working as a "greeter." Plaintiff ceased working for defendant-employer at that time. Defendant-employer offered plaintiff a job as a cashier by letter received in April of 2001. This letter did not indicate that plaintiff would be allowed to sit at her work (cashiers do not normally sit at Sam's Club). The letter also informed plaintiff that if she did not accept this offer of position she would be terminated. Plaintiff did not accept this position. Plaintiff applied for jobs with other employers, but without success. She has not earned wages since 19 July 2000.

On 29 November 2000, an opinion and award was entered by Deputy Commissioner W. Bain Jones, Jr. which found plaintiff's injuries of 25 October 1999 and 12 December 1999 to be compensable, and also found that the sitting greeter position was not a regular position that defendant-employer hires workers to perform. Defendant-employer did not appeal from this opinion and award. Deputy Commissioner Jones did not make a determination of temporary total disability at that time, but directed that plaintiff be evaluated to determine any permanent partial disability.

Following another hearing before a Deputy Commissioner, this matter was heard by the Industrial Commission on the issue of plaintiff's eligibility for temporary total disability compensation. The opinion and award of the Industrial Commission ordered the following:

> 1. Payment of total disability compensation from 19 July 2000 until plaintiff returns to work or until further order of the Commission;
>
> 2. Payment of plaintiff's medical expenses;
>
> 3. Reimbursement to plaintiff of personal/sick time taken by plaintiff for her compensable injuries;

4. Payment of attorneys fees from the lump sum award to plaintiff.

Defendants appeal the award of total disability compensation.

On appeal of an opinion and award by the Industrial Commission, this Court is "limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). If there is any evidence in the record to support a finding of fact by the Commission it is conclusive on appeal, even if there is substantial evidence to the contrary. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999). This 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." *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965). Moreover, the Commission is the sole judge of the credibility of witnesses and the weight to be given the evidence. *Russell v. Lowes Prod. Distr.*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993).

In their first assignment of error defendants argue that the Commission erred in awarding plaintiff temporary total disability benefits because plaintiff failed to prove she was disabled. We disagree.

"The determination of whether a disability exists is a conclusion of law that must be based upon findings of fact supported by competent evidence." *Lanning v. Fieldcrest-Cannon, Inc.*, 352 N.C. 98, 108, 530 S.E.2d 54, 61 (2000). An employee is "disabled" under the North Carolina Workers Compensation Act if she "because of injury" is unable "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 (2004); *Tyndall v. Walter Kidde Co.*, 102 N.C. App. 726, 730, 403 S.E.2d 548, 550, *disc. review denied*, 329 N.C. 505, 407 S.E.2d 553 (1991).

> The employee may meet this burden in one of four ways: (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment, (2) *the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment*, (3) the production of evidence that he 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 he has obtained other employment at a wage less than that earned prior to the injury.

Russell v. Lowes Prod. Distribution, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993)(emphasis added)(citations omitted). It is "plaintiff's burden to persuade the Commission not only that [she] had obtained no other employment but that [she] was unable to obtain other employment." *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 684 (1982).

> Upon a showing of disability by the employee, ... the employer may produce evidence that suitable jobs are available for the employee and "that the [employee] is capable of getting one," taking the employee's physical and vocational limitations into account. A job is "suitable" if the employee is capable of performing the job, given her "age, education, physical limitations, vocational skills, and experience." An employee is "capable of getting" a job if there is "a reasonable likelihood . . . that [she] would be hired if [she] diligently sought the job."

Franklin v. Broyhill Furniture Indus., 123 N.C. App. 200, 206, 472 S.E.2d 382, 386 (1996)(citations omitted). "An unsuccessful attempt to obtain employment is, certainly, evidence of disability." *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 444, 342 S.E.2d 798, 809 (1986).

The Commission found the following: At the time of the hearing plaintiff was 55 years old; that her job prior to the injury was gathering trash and cleaning the floors and bathrooms;

that plaintiff was injured while working for defendant-employer, and as a result of these injuries she was placed on light duty with restrictions on lifting, standing and walking; that plaintiff willingly accepted light duty work as a greeter offered by defendant-employer, but was forced to stop when defendant-employer informed her she could not sit down while working as a greeter; that defendant-employer offered plaintiff a job as a cashier, but plaintiff was justified in refusing the job because defendant-employer did not indicate the job would comply with the medical restrictions required due to plaintiff's injury; that defendant-employer did not have any jobs that would meet with plaintiff's requirements (unless specifically modified for plaintiff); that defendant-employer has not offered plaintiff suitable employment, nor has it assisted her in locating any suitable job elsewhere; that plaintiff "applied for various jobs on her own and has yet to find employment due to her disability and related work restrictions." We interpret "disability" to mean injury, as the determination that plaintiff is "disabled" under N.C. Gen. Stat. §97-29 is a conclusion of law, not a finding of fact.

Our review of the record shows that there is competent evidence to support the findings of fact of the Commission, and thus they are conclusive on appeal. *Adams*, 349 N.C. at 681, 509 S.E.2d at 414. Based on these facts, the Commission made the following conclusions of law: The cashier job offered to plaintiff by defendant-employer was not suitable employment and plaintiff was justified in refusing it; plaintiff met her burden of proving she is disabled because she was unable to find other employment due to the injuries she sustained while working for defendant-employer; plaintiff is entitled to temporary total disability payments until plaintiff returns to work or further order by the Industrial Commission; and defendants are responsible for all plaintiff's reasonable medical expenses.

We hold that the findings of fact in the instant case are sufficient to support the legal conclusions of the Commission. Plaintiff met her burden of proving disability through her inability to find employment, and defendants failed to prove in rebuttal that suitable jobs were available and that plaintiff was capable of obtaining employment, taking into account her age, injury, education, skills and experience. *Burwell v. Winn-Dixie Raleigh,* 114 N.C. App. 69, 73, 441 S.E.2d 145, 149 (1994). This assignment of error is without merit.

In their second assignment of error defendants argue that plaintiff was limited to the payments provided by N.C. Gen. Stat. §97-31, and cannot claim total disability benefits under N.C. Gen. Stat. §97-29. We disagree.

> G.S. §97-29 and G.S. §97-31 are alternative avenues of recovery for an employee whose scheduled injuries leave him or her totally disabled. G.S. §97-29 provides compensation for total disability, while G.S. §97-31 furnishes a list of specific injuries and corresponding compensations. This statutory scheme exists to prevent double recovery, not to dictate an exclusive remedy. Our Supreme Court has stated, "even if all injuries are covered under the scheduled injury section an employee may nevertheless elect to claim under G.S. §97-29 if this section is more favorable; but he may not recover under both sections."

Rivera v. Trapp, 135 N.C. App. 296, 302, 519 S.E.2d 777, 781 (1999)(*citing inter alia Hill v. Hanes Corp.*, 319 N.C. 167, 175-76, 353 S.E.2d 392, 397 (1987); *Dishmond v. International Paper Co.*,132 N.C. App. 576, 512 S.E.2d 771, 772, (1999), *Gupton v. Builders Transport*, 320 N.C. 38, 43, 357 S.E.2d 674, 678 (1987)). We find this assignment of error to be without merit.

In defendants' third assignment of error they argue plaintiff is not entitled to temporary total disability benefits because plaintiff failed to prove that plaintiff's disability was caused by the relevant injuries. We disagree.

In order to receive disability benefits under N.C. Gen. Stat. §97-29 plaintiff must prove that her disability was caused by the injuries she sustained on the job. *Hilliard v. Apex Cabinet*

Co., 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). When there is no evidence of a causal relationship between the accident and the compensable disability the claim 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, 434, 144 S.E.2d 272, 275 (1965)(citation omitted). The Commission found as a fact that plaintiff was twice injured while working for defendant-employer; as a result of her injuries, plaintiff was sent to seek medical attention; plaintiff was diagnosed with chronic acute injury of the cervical spine; this injury was compensable; as a result of her injury work restrictions and limitations were placed upon plaintiff; and as a result of these injuries and related work restrictions plaintiff was unable to find work though she had sought employment. Based on these findings of fact, the Commission concluded that plaintiff was entitled to total disability benefits.

These findings of fact are supported by competent evidence and binding on appeal. The opinion and award of the Commission makes sufficient causal connection between the injuries plaintiff sustained working for defendant-employer and its award of total disability benefits. This assignment of error is without merit.

Because defendants have not argued their other assignments of error in their brief, they are deemed abandoned. N.C. R. App. P. Rule 28(b)(6) (2003).

AFFIRMED.

Judges WYNN and CALABRIA concur.

Report per Rule 30(e).