NO. COA06-828

NORTH CAROLINA COURT OF APPEALS

Filed: 20 March 2007

QILAN SHEN,
Employee,
Plaintiff

v.

North Carolina Industrial Commission
I.C. File No. 026382

CHARLOTTE UNIVERSITY
HILTON HOTEL,
Employer

N.C. INSURANCE GUARANTY
ASSOCIATION,
Carrier,
Defendants

Appeal by plaintiff from Opinion and Award entered 12 January 2006 by the North Carolina Industrial Commission. Heard in the Court of Appeals 12 March 2007.

Ken Harris for plaintiff-appellant.

Oxner, Thomas and Permar, P.L.L.C., by Devin F. Thomas, for defendant-appellees.

HUNTER, Judge.

Qilan Shen ("plaintiff") appeals from an Opinion and Award entered by the North Carolina Industrial Commission concluding that she unjustifiably refused employment within her restrictions and that she is therefore not entitled to additional benefits. For the foregoing reasons, we affirm.

Plaintiff worked as a banquet waitress for defendant-employer Charlotte University Hilton Hotel until 25 January 2000, when she lost her balance and fell while lifting a glass rack onto a shelf, injuring her lower back and left arm. Defendants accepted plaintiff's injury as compensable and paid temporary total disability compensation pursuant to a Form 60, Employer's Admission of Employee's Right to Compensation, dated 17 February 2000.

Dr. Joseph Zuhosky treated plaintiff for her injuries. In 2000, Dr. Zuhosky opined that plaintiff had reached maximum medical improvement, and in 2002, assigned plaintiff a lifting restriction of fifteen pounds and released her to work within her lifting restrictions. Defendants offered plaintiff a waitress/server position with a ten pound lifting restriction and instructed plaintiff to return to work on 30 June 2003. Plaintiff, however, did not report for work.

Defendants filed a Form 24 on 9 July 2003 to terminate payment of compensation on the grounds that plaintiff, who had been released to return to work with restrictions, had refused to accept a suitable job by defendant-employer. By an administrative order of the Commission, defendants' Form 24 was approved based on plaintiff's unjustifiable refusal to accept the job which plaintiff's treating physician had approved to be within plaintiff's current restrictions. Plaintiff subsequently requested a hearing on her compensation.

After conducting a hearing, Deputy Commissioner J. Brad Donovan issued an Opinion and Award holding that defendants had failed to show that the employment offered to plaintiff constituted "suitable" employment and rescinded the 6 August 2003 order suspending compensation. Defendants appealed to the Full Commission. The Full Commission subsequently allowed defendants the opportunity to submit an affidavit and required plaintiff to undergo an Independent Medical Examination.

On 12 January 2006, the Full Commission issued an Opinion and Award, in which it found the following pertinent findings of fact:

> 3. Plaintiff initially presented to Dr. Joseph Zuhosky, who is a specialist in physical medicine rehabilitation, pain medicine and electrodiagnostic medicine. Dr. Zuhosky treated plaintiff for a subacute lumbar strain, left lateral epicondylitis and left elbow pain. On May 30, 2000, Dr. Zuhosky released plaintiff with a 0% permanent partial disability rating to her back. Dr. Zuhosky also assigned a permanent lifting restriction of 15 pounds to plaintiff.
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> 4. On September 26, 2000, Dr. Zuhosky opined that plaintiff had reached maximum medical improvement and he released her to work within her previous restrictions. He further recommended that plaintiff proceed with a functional capacity evaluation ("FCE").
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> 5. On October 12, 2000, an FCE was performed and on October 17, 2000, Dr. Zuhosky summarized the results indicating that plaintiff essentially had a 15-pound permanent lifting restriction. Dr. Zuhosky opined that he believed plaintiff had reached maximum medical improvement. He assigned a permanent partial impairment rating of three percent (3%) to plaintiff's elbow.
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> 6. On February 1, 2001, plaintiff presented to Dr. David DuPuy, an orthopedic specialist, for an independent medical examination. Dr. DuPuy opined that plaintiff was essentially at maximum medical improvement. However, he also opined that "in view of the negative exam for her back except for [plaintiff's] description of pain and given the inconsistent FCE findings and the symptom magnification on today's exam, I question why Dr. Zuhosky put her on a 15-poundlifting restriction for the rest of her life." Dr. DuPuy further opined, "I think it could be a pretty simple task for her to be able to go back at light duty and ramp up over the next month or two and I expect she would be able to do her job without restrictions."
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> 7. On December 11, 2001, plaintiff returned to Dr. Zuhosky with continuing complaints of low back pain. An MRI performed on January 18, 2002, revealed annular tears at L4-5 and L5-S1.

8. On April 2, 2002, Dr. Zuhosky recommended that plaintiff undergo an EMG and nerve conduction study because of her ongoing complaints. These studies were performed on April 18, 2002, and Dr. Zuhosky interpreted them as normal and as showing no electrodiagnostic evidence of lumbosacral radiculopathy, myopathy or generalized neuropathy.

9. Following conservative treatment, Dr. Zuhosky released plaintiff on May 2, 2002, to return only as needed if there were a substantial change in her condition. He continued the 15-pound lifting restriction and assigned plaintiff a three percent (3%) permanent partial disability rating to her back.

10. Vocational rehabilitation case manager, Lee Anzaldi, was assigned to plaintiff's case to provide job development and coordinate medical treatment. On May 28, 2003, Mr. Anzaldi informed plaintiff by letter that defendant-employer "has agreed to present you with a re-employment opportunity as a waitress/server. This is the same position that you worked prior to your workers' compensation injury." As of June 4, 2003, Mr. Anzaldi was aware that defendants had reduced plaintiff's work restriction from 15 to 10 pounds, even though other responsibilities remained similar.

11. On or about June 6, 2003, Mr. Anzaldi presented a job description for the waitress position to Dr. Zuhosky. The job description did not offer a specific description of the actual duties of a waitress, but stated that the employee, "Provides guests in the Catering Department with the highest standard of food and beverage service on all functions. In so doing, it is expected that all efforts be directed toward guest satisfaction, the achievement/maintenance at division standards and profit maximization."

12. The job description also provided "General Responsibilities," instructing the employee to perform all activities in a cordial manner, to maintain a commitment to guest satisfaction and a cooperative, team-like attitude with supervisors and fellow employees and to keep a positive attitude. At the bottom of the description written in long hand is the notation "Restrict lifting to 10 lbs."

13. Although the Industrial Commission ordered the record to be reopened to allow, among other things, defendants to present an affidavit, which would more specifically describe

plaintiff's job responsibilities, defendants failed to present any further documentation.

14. On June 6, 2003, plaintiff wrote a letter to Dr. Zuhosky in which she expressed her strong concerns and objections to defendants' offer of the waitress position. Plaintiff also explained to Dr. Zuhosky that the position, which defendants were offering was, according to her, the same position that she was performing at the time of her accident. Plaintiff also described what the job entailed.

15. In a June 10, 2003, letter, Dr. Zuhosky acknowledged receipt of plaintiff's letter but nonetheless approved the position. Dr. Zuhosky confirmed, "For some time now [plaintiff] has been released with permanent restrictions of a 15-pound lifting restriction related to previous functional capacity assessment."

16. Dr. Zuhosky further opined that the 15-pound lifting restriction is quite appropriate and that plaintiff is at maximum medical improvement. He stated that if defendant had a position that would require less than 15 pounds of lifting, he saw no medical reason why plaintiff could not perform it.

17. On June 11, 2003, Lee Anzaldi, plaintiff's vocational rehabilitation case manager, wrote to Dr. Zuhosky confirming that defendant-employer was willing to offer plaintiff a job within her assigned work restrictions and accordingly, did not complete a detailed job analysis. Mr. Anzaldi confirmed that the job would not require lifting over 10 pounds, which was within Dr. Zuhosky's restriction. Mr. Anzaldi also sent a copy of the job description to Dr. Zuhosky and a physician review form, which he requested that Dr. Zuhosky complete and return.

18. On June 18, 2003, Dr. Zuhosky completed the physician review form indicating that he had reviewed the job description and believed that plaintiff was capable of performing the physical demands of the waitress position. However, plaintiff never returned to work to attempt the job duties.

19. By letter dated June 23, 2003, defendants offered plaintiff the position and instructed plaintiff to return to work on June 30, 2003. Plaintiff refused the position, as she believed it to be the same position she had held prior to her injury and she did not believe she could perform the job. Plaintiff did not report for work on June 30, 2003, or on any subsequent date. She has never

attempted to perform the job responsibilities that were approved by Dr. Zuhosky and within her restrictions.

20. On June 30, 2003, defendants filed a Form 24 Application to suspend compensation based upon plaintiff's refusal to accept suitable employment. By Order of the Executive Secretary on August 6, 2003, defendants were permitted to suspend compensation.

21. On June 14, 2005, plaintiff presented to Dr. Michael D. Getter, an orthopedic specialist, for an independent medical examination by Order of the Full Commission. Dr. Getter opined that the 15-pound lifting restriction was well within keeping of plaintiff's functional capacity. Dr. Getter also opined that plaintiff should not do any repetitive bending, stooping or squatting.

22. On July 19, 2005, defendants deposed Dr. Zuhosky. Although plaintiff's counsel was given timely notice of the deposition, he did not attend.

23. Having considered the results of plaintiff's FCE, job description, plaintiff's comments and her own description of the position as well as the medical evidence, Dr. Zuhosky testified, "we do not have any medical reason to state that [plaintiff] cannot perform the function, the basic tasks as outlined in the official job description. We would further comment that it is a clear disconnect, as noted on her past assessment, between [plaintiff's] estimation of her impairment and what we see objectively."

24. The Full Commission gives greater weight to the opinion of Dr. Zuhosky, who is plaintiff's treating physician.

25. The Full Commission finds that the job defendants offered to plaintiff was suitable employment and plaintiff's refusal of the position was unjustified. In reaching this finding, the Full Commission, as did Dr. Zuhosky, relies on the March 25, 2003, job description that defendants provided.

Based on these findings, the Commission concluded that by her failure to report to work, plaintiff unjustifiably refused employment within her restrictions and was not entitled to further compensation after 9 July 2003, the date of defendant's Form 24, "for as long as she continues to refuse the suitable work defendants have offered her." The Commission also concluded that

plaintiff was entitled to permanent partial disability compensation for nine weeks for her back and 7.2 weeks for her left arm subject to a credit to defendants for any overpayment of temporary total disability benefits paid to plaintiff after 9 July 2003. Plaintiff appeals.

"The standard of review for an appeal from an opinion and award of the Industrial Commission is limited to a determination of (1) whether the Commission's findings of fact are supported by any competent evidence in the record; and (2) whether the Commission's findings justify its conclusions of law." *Goff v. Foster Forbes Glass Div.*, 140 N.C. App. 130, 132-33, 535 S.E.2d 602, 604 (2000). If there is competent evidence to support the findings, they are conclusive on appeal even though there is evidence to support contrary findings. *Hedrick v. PPG Industries*, 126 N.C. App. 354, 357, 484 S.E.2d 853, 856, *disc. review denied*, 346 N.C. 546, 488 S.E.2d 801 (1997). Furthermore, the evidence tending to support plaintiff's claim must be taken "in the light most favorable to plaintiff, and plaintiff is entitled to the benefit of every reasonable inference to be drawn from the evidence." *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998), *rehearing denied*, 350 N.C. 108, 532 S.E.2d 522 (1999). However, "findings of fact by the Commission may be set aside on appeal when there is a complete lack of competent evidence to support them[.]" *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 914 (2000).

Plaintiff challenges the Commission's findings and conclusions concerning the waitress position offered by defendant. Plaintiff contends that the Commission erred in finding that the waitress position was suitable employment for her and that plaintiff's refusal of employment was not justified. N.C. Gen. Stat. §97-32 (2005) provides: "If an injured employee refuses employment procured for him suitable to his capacity he shall not be entitled to any compensation at any time during the continuance of such refusal, unless in the opinion of the

Industrial Commission such refusal was justified." *Id*. "The plain language of this statute requires that the proffered employment be suitable to the employee's capacity. If not, it cannot be used to bar compensation for which an employee is otherwise entitled." *McLean v. Eaton Corp*., 125 N.C. App. 391, 393, 481 S.E.2d 289, 290 (1997). "The burden is on the employer to show that plaintiff refused suitable employment." *Gordon v. City of Durham*, 153 N.C. App. 782, 787, 571 S.E.2d 48, 51 (2002). We have defined "suitable employment," in the context of N.C. Gen. Stat. §97-32, as "any job that a claimant 'is capable of performing considering his age, education, physical limitations, vocational skills and experience.'" *Shah v. Howard Johnson*, 140 N.C. App. 58, 68, 535 S.E.2d 577, 583 (2000) (citation omitted), *disc. review denied*, 353 N.C. 381, 547 S.E.2d 17 (2001). Once the employer shows, to the satisfaction of the Commission, that the employee was offered suitable work, the burden shifts to the employee to show that his refusal was justified. *See, e.g., Moore v. Concrete Supply Co*., 149 N.C. App. 381, 389-90, 561 S.E.2d 315, 320 (2002).

Plaintiff asserts her refusal to report to work was justified because of her physical condition at the time. However, the evidence established that defendant-employer, with the assistance of vocational rehabilitation case manager Lee Anzaldi, identified a waitress position as being within plaintiff's physical restrictions. Dr. Zuhosky, who released plaintiff with a work restriction of no lifting of more than fifteen pounds, approved the waitress position as a job plaintiff would be capable of performing. According to his interrogatory, Dr. Zuhosky stated, "Ms. Shen had minimal objective findings. Given this and her FCE, I felt the restriction on lifting was appropriate." Dr. Zuhosky testified in his deposition that based on his review, the job description, and plaintiff's functional capacity evaluation, the job offered was "quite appropriate" and that plaintiff "could perform the physical demands of the waitress position as

outlined." This evidence supports the Commission's finding and its conclusion that plaintiff was not justified in refusing to report to work in a position medically approved for her restrictions. *See Shah*, 140 N.C. App. at 68, 535 S.E.2d at 583 (upholding Commission's conclusion that plaintiff unjustifiably refused employment based on evidence that plaintiff's doctor believed plaintiff capable of performing job offered by defendant-employer).

Plaintiff argues the Commission erred by not finding that the waitress position required pushing or pulling of up to fifty pounds and that the Commission ignored evidence of Dr. Michael Getter that plaintiff had limitations of pushing or pulling more than five pounds. Plaintiff, however, does not point to any evidence, other than her own testimony and her 6 June 2003 letter sent to Dr. Zuhosky, to show that the waitress position offered to her by defendant required pushing and pulling of up to fifty pounds. Furthermore, the Commission did consider Dr. Getter's testimony; it simply determined that it would accord Dr. Zuhosky's opinion more weight as he was plaintiff's treating physician. The weight and credibility to be accorded the testimony of any witness is within the exclusive province of the Commission. *Adams*, 349 N.C. at 681, 509 S.E.2d at 413.

Furthermore, contrary to plaintiff's assertion, the waitress job was not unsuitable because it was an accommodation or "make work." In *Moore*, this Court held that the plaintiff was justified in refusing the position even though the work was suitable in light of his physical limitations and restrictions. *Moore*, 149 N.C. App. at 390, 561 S.E.2d at 320. This Court determined the position offered to plaintiff constituted "'make work'" specifically created for plaintiff because the position did not exist in the ordinary marketplace, was never advertised to the public, had never previously existed and was never subsequently filled after being refused by plaintiff. *Id.*

Here, however, John Howard, General Manager for defendant, testified that the job offered to plaintiff was the "coffee break server" position, which other employees had worked in before and after 2003. He further testified that the "coffee break server" position paid the same rate as plaintiff's pre-injury position. Thus, the waitress position offered to plaintiff here was not specially created for plaintiff, but was a real job which plaintiff unjustifiably refused.

Based on all of the medical evidence, the Commission was entitled to find that plaintiff's refusal to perform her employment in the waitress position was unjustified as the position was suitable for her. Therefore, we hold that the Commission's conclusion that plaintiff unjustifiably refused the job offer of a suitable waitress position with the defendant-employer is supported by the findings of fact, which are in turn supported by competent evidence of record.

For the foregoing reasons, the Opinion and Award of the Industrial Commission is affirmed.

Affirmed.

Chief Judge MARTIN and Judge McGEE concur.

Report per Rule 30(e).