NO. COA04-217

NORTH CAROLINA COURT OF APPEALS

Filed: 5 April 2005

HOAT PIPER,
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 081100

AMP, INCORPORATED,
Employer,

THE TRAVELERS,
Carrier,
Defendants.

Appeal by plaintiff from Opinion and Award filed 6 August 2003 by the North Carolina Industrial Commission. Heard in the Court of Appeals 20 October 2004.

Law Offices of George W. Lennon, by George W. Lennon and W. Bain Jones, Jr., for plaintiff-appellant.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Erin D. Eveson and Barry C. Jennings, for defendants-appellees.

GEER, Judge.

Plaintiff Hoat Piper appeals from the Industrial Commission's opinion and award granting her medical compensation, but denying her partial disability benefits after she voluntarily resigned from her position at defendant to take a lesser-paying job. Because we have determined that competent evidence supports the Commission's finding that plaintiff's decreased

wages were not due to her compensable injury, we affirm the Commission's conclusion that plaintiff is not entitled to partial disability compensation based on wage loss.

Facts

During the years 1978-1987 and 1994-1999, plaintiff worked for defendant AMP, Inc. as a die repair machine mechanic. On 23 December 1998, she slipped on ice in her employer's parking lot and injured her lower back and tailbone. Plaintiff did not miss any work since she was on vacation from 23 December 1998 through 4 January 1999 and, thereafter, returned to work in a light-duty capacity.

After an initial visit with her family physician, plaintiff was referred to Dr. Jeffrey Beane at Greensboro Orthopaedic Clinic for treatment at defendants' expense. On 18 May 1999, after treating plaintiff from 7 January 1999 throughout the spring, Dr. Beane concluded: "Continue light duties with no lifting over 25 pounds. No repetitive bending for the next two weeks. On 6/1/99, she can return to her work on full duties as tolerated full time. I anticipate maximum medical improvement at that point in time with no permanent partial impairment." Plaintiff did not visit Dr. Beane again while she was working for AMP.

Defendants offered evidence that plaintiff's supervisors gave her the opportunity to move to another similar job in the same department with the same pay that would better accommodate her work restrictions, but that plaintiff "expressed a desire to stay on her same job on the extruders . . . but with some assistance." Her supervisors "arranged for someone to be back there with her anytime she needed to do all of her lifting." Plaintiff's immediate supervisor Kerry Smith testified that plaintiff told him that "[s]he felt like it was going great with the help that they were providing and everything was working out real good." Plaintiff testified, however, that her job duties aggravated her back condition and increased her pain.

Plaintiff tendered her resignation to AMP in August 1999 and moved from Greensboro to Raleigh where she began working for a new employer, Cree Research, Inc., at a decrease in pay. AMP had paid plaintiff $16.00 per hour, while her new job at Cree paid $12.00 per hour. The evidence before the Industrial Commission conflicted as to plaintiff's reason for changing jobs. Plaintiff claimed that it was because of her difficulty in performing her job, while defendants offered evidence that it was because of a desire to take another job closer to her family.

In November 1999, three months after leaving her job at AMP, plaintiff returned to Dr. Beane's office for another visit. According to Dr. Beane, plaintiff

> indicated that - in October - that she was having continued symptoms and requested I see her back for a follow-up visit, which I did on the 9th of November. She indicated at that point in time that she had a recurrence of her back pain in the new job - a new job that she was now working in Raleigh. Apparently, it required a fair amount of sitting which she was having a problem with longer than the half hour at a time. She indicated that after I had seen her in May, she nearly had a complete resolution of her symptoms. It was not until she started her new job with the increased sitting demands that her pain increased. As a result of this visit, Dr. Beane prescribed pain medication and a seat cushion, and stated, "[s]he is to limit her sitting whenever possible. I think she can return to work on full duties as tolerated and see me as needed. No changes in her impairment at this point in time."

On 22 January 2001, plaintiff filed a Form 33, requesting a hearing on her claim for partial disability benefits and payment for medical treatment. Following a hearing on 28 August 2001, Deputy Commissioner George T. Glenn, II filed an opinion and award on 3 June 2002, concluding that plaintiff had been partially disabled since 23 December 1998. Defendant appealed to the Full Commission, and on 6 August 2003, the Full Commission entered an opinion and award by Commissioner Christopher Scott with a dissent by Commissioner Bernadine S. Ballance, awarding plaintiff medical compensation, but concluding that plaintiff was not entitled to disability compensation.

Discussion

In reviewing a decision by the Full Commission, this Court's role "is limited to determining whether there is any competent evidence to support the findings of fact, and whether the findings of fact justify the conclusions of law." *Cross v. Blue Cross/Blue Shield*, 104 N.C. App. 284, 285-86, 409 S.E.2d 103, 104 (1991). An appellate court's duty in this regard is to determine whether the record contains any evidence tending to support the findings. *Lanning v. Fieldcrest-Cannon, Inc.*, 352 N.C. 98, 106, 530 S.E.2d 54, 60 (2000). With respect to issues of fact, "the Industrial Commission is the sole judge of the credibility of the witnesses and the weight to be given to their testimony. The Commission may accept or reject the testimony of a witness solely on the basis of whether it believes the witness or not." *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 594, 290 S.E.2d 682, 683-84 (1982).

There is no dispute that plaintiff suffered a compensable injury. The issue before the Commission was whether plaintiff was disabled as a result of that compensable injury. Disability is defined under the Workers' Compensation Act as "incapacity because of injury 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(9) (2003). The determination that an employee is disabled is a conclusion of law that must be based upon findings of fact supported by competent evidence. *Hilliard*, 305 N.C. at 594-95, 290 S.E.2d at 683.

In order to support a conclusion of compensable disability, the Commission must find:

> (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) that this individual's incapacity to earn was caused by plaintiff's injury.

Id. at 595, 290 S.E.2d at 683. Under this test, the employee "bears the burden of showing that she can no longer earn her pre-injury wages in the same or any other employment, *and that the diminished earning capacity is a result of the compensable injury*." *Gilberto v. Wake Forest Univ.*, 152 N.C. App. 112, 116, 566 S.E.2d 788, 792 (2002) (emphasis added).

An employee may meet her burden of proving disability 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) (internal citations omitted). The *Russell* test, however, provides only a means by which an employee may show "that he is unable to earn the same wages he had earned before the injury, either in the same employment [*Hilliard* prong one] or in other employment [*Hilliard* prong two]." *Id. Russell* evidence does not, however, establish the third prong of *Hilliard*: that the employee's incapacity to earn wages was caused by the employee's compensable injury.

In this case, plaintiff relied upon the fourth method of *Russell* to prove her partial capacity to earn wages. She offered evidence that she was working at Cree Research for a lower wage than she was earning at AMP. Under *Hilliard*, however, the Commission was required to determine whether the wage loss was due to plaintiff's compensable injury or whether it was due to some other cause. The Commission made the following findings pertinent to this question:

> 7. The plaintiff returned to her full duty position with defendant-employer as of 1 June 1999 at her preinjury wage and

> worked at this position through the months of June and July, 1999 without complaint and without seeking medical treatment.
>
> 8. The plaintiff tendered her resignation from defendant-employer on 9 August 1999. In her exit questionnaire, the plaintiff indicated that she has resigned voluntarily to take other employment. The plaintiff indicated verbally to one of her supervisors that she was taking employment in Raleigh to be closer to her family.
>
> 9. There is insufficient evidence of record from which to prove that as a result of the compensable injury by accident that the plaintiff retained any disability beyond 1 June 1999.
>
> 10. The plaintiff resigned her employment with defendant-employer on 9 August 1999 for reasons unrelated to the injury by accident.

While the opinion and award is quite circumscribed, we believe that these findings indicate that the Commission was denying plaintiff's claim based on her failure to prove that her decreased capacity to earn wages was due to her injury as opposed to her desire to move nearer to her family. Our review of the evidence reveals that these findings of fact are supported by competent evidence.

Although plaintiff maintains that she was forced to change jobs because the functions she was required to perform at AMP were causing her too much pain, she stated on her exit questionnaire that she was resigning voluntarily and had another job. In completing the questionnaire, she did not mention anything about problems with pain. AMP human resources advisor Deborah Ann Miller testified that during plaintiff's exit interview, plaintiff stated simply, consistent with the questionnaire, that she was leaving to take another job. In addition, plaintiff's supervisor Kerry Smith testified that he understood plaintiff was quitting her job in Greensboro and moving to Raleigh because "she was going back to an area where she had previously lived and had friends and family there." Dr. Beane's testimony further supported the Commission's

findings: "She indicated that after I had seen her in May, she nearly had a complete resolution of her symptoms. It was not until she started her new job with the increased sitting demands that her pain increased."

This evidence is sufficient to support the Commission's determination that any wage loss was the result of plaintiff's desire to move and not her work-related injury. In turn, that determination supports the Commission's conclusion that plaintiff is not entitled to disability compensation based on wage loss.**[Note 1]** *See Seagraves v. Austin Co. of Greensboro*, 123 N.C. App. 228, 234, 472 S.E.2d 397, 401 (1996) (holding that, in the context of an involuntary termination, "the test is whether the employee's loss of, or diminution in, wages is attributable to the wrongful act resulting in loss of employment, in which case benefits will be barred, or whether such loss or diminution in earning capacity is due to the employee's work-related disability, in which case the employee will be entitled to benefits for such disability"). Accordingly, under the applicable standard of review, we affirm.

Affirmed.

Judges HUNTER and STEELMAN concur.

Report per Rule 30(e).

NOTE

1. Although the Commission referred to N.C. Gen. Stat. §97-29 (2003) (providing compensation for total incapacity), we assume that the Commission intended to refer to N.C. Gen. Stat. §97-30 (2003), the provision governing partial incapacity. This apparent clerical error should be corrected.