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NO. COA03-1186

NORTH CAROLINA COURT OF APPEALS

Filed: 3 August 2004

RAIFORD D. THREATT,
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 083426

SOUTHERN PIPE, INC.,
Employer,

and

W.R. BERKLEY CORP.,
Carrier,
Defendants.

Appeal by plaintiff from an opinion and award entered 28 February 2003 by the North Carolina Industrial Commission. Heard in the Court of Appeals 20 May 2004.

Law Offices of Joel G. Bowden, by Joel G. Bowden for plaintiff.

Cranfill, Sumner & Hartzog, L.L.P., by Jeffrey A. Howle, for defendants.

LEVINSON, Judge.

Plaintiff (Raiford D. Threatt) appeals from an opinion and award of the North Carolina Industrial Commission (the Commission) terminating his benefits as of 21 May 2001. We reverse-in-part and remand.

On 4 November 2000, plaintiff was working as a line operator with Southern Pipe, Incorporated (Southern Pipe), when his hand and arm were caught in a machine that he was

cleaning. Plaintiff filed a claim under the Workers' Compensation Act seeking compensation and medical benefits for injuries resulting from this incident. The Commission made findings, to which no party has assigned error, that plaintiff suffered compensable wrist and shoulder injuries as a result of this incident.

Subsequently, on 19 December 2000, Southern Pipe terminated plaintiff's employment on the grounds that plaintiff had been present at the plant during non-working hours and had been intoxicated during his visit to the plant during non-working hours. The Commission made findings and conclusions, which are challenged on appeal, that the conduct resulting in plaintiff's discharge constituted a constructive refusal by plaintiff to accept employment.

Prior to the hearing before the Commission, plaintiff's treating physician, Dr. Gregg A. Ferrero, examined plaintiff and determined that, as of 21 May 2001, plaintiff was at maximum medical improvement with respect to his wrist injury; from that date hence, Dr. Ferrero has not assigned work restrictions regarding plaintiff's wrist injury. However, in testimony offered to the Commission, Dr. Ferrero testified that, as of 21 May 2001, plaintiff could not have returned to the workforce without restrictions based upon his shoulder condition.

Following a hearing, the Full Commission, with one Commissioner dissenting, filed an opinion and award in which it found and concluded that plaintiff was capable of "at least attempting" to return to work as of 21 May 2001, that the conduct for which plaintiff was discharged constituted a constructive refusal to accept employment, and that, therefore, plaintiff should be barred from receiving benefits under N.C.G.S. §97-32. From this opinion and award, plaintiff appeals, contending the Commission erred by, *inter alia*, (1) finding that plaintiff was no longer disabled as a result of his compensable shoulder injury as of 21 May 2001, and (2) concluding that plaintiff is not entitled to continuing weekly temporary total disability benefits.

Our review of the Commission's opinion and award "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) (citation omitted). "The facts found by the Commission are conclusive upon appeal to this Court when they are supported by competent evidence, even when there is evidence to support contrary findings." *Carroll v. Town of Ayden*, 160 N.C. App. 637, 641, 586 S.E.2d 822, 825-26 (2003) (citation omitted). This Court reviews the Commission's conclusions of law *de novo*. *Id.*

The present case requires analysis under the legal principles established by N.C.G.S. §97-32 (2003), and *Seagraves v. Austin Co. of Greensboro*, 123 N.C. App. 228, 234, 472 S.E.2d 397, 401 (1996). G.S. §97-32 limits recovery of compensation where disability, as the term is defined by the Act, is caused by an employee's conduct as opposed to the employee's compensable injury: "[i]f 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." *Seagraves*, which was recently adopted by our Supreme Court in *McRae v. Toastmaster, Inc.*, ___ N.C. ___, ___, ___ S.E.2d ___, ___ (filed 25 June 2003), makes G.S. §97-32 applicable where an employee is deemed to constructively refuse suitable employment. *Seagraves*, 123 N.C. App. at 234, 472 S.E.2d at 401.

We note that, because *McRae* and *Seagraves* make G.S. §97-32 operational in circumstances where a constructive refusal occurs, the provisions of the statute govern the effect of the refusal. The following two principles codified in G.S. §97-32 are, therefore, significant to our disposition of the instant case: First, whether the refusal to accept employment is actual or

constructive, G.S. §97-32 explicitly requires that the employment offered to the employee be “suitable to his capacity.” Thus, where proffered employment is not suitable to the employee’s capacity, “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) (citation omitted). “In fact, before the Commission determines, in general, that a plaintiff is employable and can earn wages, it must determine that he can obtain a job taking into account his specific disabilities.” *Id.* (citation and internal quotation marks omitted). Second, G.S. §97-32 provides only for the suspension of benefits “during the continuance of [the] refusal” to accept suitable employment.

In the instant case, plaintiff asserts that the Commission erred by finding that he was no longer disabled as a result of his compensable shoulder injury. We conclude that for benefits to be suspended, the Commission must first make findings that the employment was offered to plaintiff **and** was “suitable to his capacity” and, if so, that plaintiff’s inability to earn wages has been caused by his constructive refusal to accept such employment and not by his compensable injury. Pursuant to G.S. §97-32, findings that an employer procured employment for the employee and that the procured employment was suitable are prerequisites to a finding of actual or constructive refusal to accept employment. The Commission’s opinion and award acknowledges that Dr. Ferrero opined that plaintiff could not return to the workforce without restrictions due to his shoulder injury and posits only that “plaintiff was capable of at least attempting to return to work.” We note also that, although Southern Pipe’s production manager testified that there would have been a job available for plaintiff once he was able to return to work, she also indicated that there would be no light-duty work made available for plaintiff. However, there are no findings in the Commission’s opinion and award that indicate that the

employment which plaintiff is said to have constructively refused was, in fact, offered to him or was suitable “taking into account [plaintiff]’s specific [shoulder] disabilities.” See *McLean*, 125 N.C. App. at 393, 481 S.E.2d at 290. On remand, the Commission must make adequate findings of fact addressing whether employment at Southern Pipe was, in fact, offered to plaintiff and, if so, whether the employment was suitable.

Plaintiff also contends that the Commission erred in concluding that he was not entitled to continuing disability benefits. We note that, if the Commission finds that suitable employment was actually offered to plaintiff and that plaintiff constructively refused such employment, G.S. §97-32 provides for a **suspension** of benefits during the pendency of an employee’s refusal to accept suitable employment as opposed to a permanent disqualification from benefits. See *Sanhueza v. Liberty Steel Erectors*, 122 N.C. App. 603, 608, 471 S.E.2d 92, 95 (1996) (“The Commission’s opinion and award must reflect the fact that plaintiff may again be entitled to weekly compensation benefits upon a proper showing by plaintiff . . .”). Thus, if it is determined on remand that benefits are to be withheld, then the Commission should order that benefits be suspended.

Reversed-in-part and remanded.

Judges McCULLOUGH and HUDSON concur.

Report per Rule 30(e).