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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-78

No. COA20-443

Filed 16 March 2021

I.C. No. 16-760689

DARRELL NICHOLS, Employee, Plaintiff,

v.

UNITED PAINTING SERVICES, INC., Employer, and LIBERTY MUTUAL INSURANCE COMPANY, Carrier, Defendants.

Appeal by defendants from Opinion and Award entered 6 January 2020 by the North Carolina Industrial Commission. Heard in the Court of Appeals 9 February 2021.

Wallace Childers PLLC, by C.J. Childers, for plaintiff-appellee.

Cranfill Sumner & Hartzog LLP, by Steven A. Bader and Matthew Covington, for defendants-appellants.

ARROWOOD, Judge.

¶ 1

United Painting Services, Inc., and Liberty Mutual Insurance Company (“defendants”) appeal the North Carolina Industrial Commission’s Opinion and Award filed 6 January 2020. For the following reasons, we affirm the Full Commission’s decision.

I. Background

¶ 2 Darrell Nichols (“plaintiff”) sustained injury by accident on 9 September 2016 while employed as a painter for defendant United Painting Services, Inc. Plaintiff filed a workers’ compensation claim seeking benefits for left- and right-shoulder injuries and a back injury. Defendants accepted liability only for the compensable left-shoulder injury and filed a Form 60 (“Employer’s Admission of Employee’s Right to Compensation”) on 25 April 2017.

¶ 3 On 26 October 2016, plaintiff’s authorized treating physician, Dr. James Romanowski (“Dr. Romanowski”), diagnosed a full thickness left rotator cuff tear on plaintiff’s left shoulder. Plaintiff underwent surgery to repair the tear on 13 April 2017.

¶ 4 Immediately following the accident, defendant provided light-duty work for plaintiff, which involved quality control responsibilities (*e.g.*, taking pictures and recording damaged products). Plaintiff performed light-duty work for defendant United Painting Services, Inc., from 10 September 2016 through 18 November 2016.

¶ 5 On 16 November 2016, the owner of defendant United Painting Services, Inc., offered plaintiff a light-duty position in Charleston, South Carolina. The offer was made via text message. Defendant United Painting Services, Inc., also offered a “third shift job” on 21 November 2016 through text message. Both offers lacked job

descriptions and explanations of duties, and the jobs had not been pre-approved by plaintiff's authorized treating physician. Plaintiff declined these opportunities.

¶ 6 Post-surgery, plaintiff participated in physical therapy through 24 August 2017. Following the completion of physical therapy, defendant United Painting Services, Inc., supposedly offered plaintiff two separate light-duty positions. The first position labeled "Light duty-Desk work" ("Desk Work Position") was described on a form dated 10 August 2017. Dr. Romanowski initially indicated that plaintiff was not capable to perform this job as a result of his injury; however, on or about 8 September 2017, Dr. Romanowski reversed his prior opinion and indicated on a workers' compensation medical status questionnaire that plaintiff was able to perform the Desk Work Position.

¶ 7 The second position was presented on a form signed by agents of defendant United Painting Services, Inc., on 20 September 2017 and 21 September 2017, after the hearing before the deputy commissioner. The job description was titled "Light duty-Security escort" ("Security Escort Position"). On or about 29 September 2017, Dr. Romanowski reviewed the workers' compensation medical status questionnaire associated with this position and opined that plaintiff could perform the Security Escort Position "under the restriction of light duty with no lifting with his left shoulder."

¶ 8 The case appeared for a hearing before Deputy Commissioner Jesse M. Tillman, III (“Deputy Commissioner Tillman”) on 13 September 2017. The main issues raised by the parties were as follows: (1) whether plaintiff is entitled to workers’ compensation benefits for injury to his back and right shoulder as a result of the accident on 9 September 2016; (2) whether plaintiff refused suitable employment offered by defendants; and (3) whether plaintiff is entitled to temporary total indemnity benefits for the period of time between the accident and his left-shoulder surgery on 13 April 2017. Deputy Commissioner Tillman issued an opinion and award on 11 July 2018. Deputy Commissioner Tillman denied plaintiff’s claim for workers’ compensation benefits for injury to his right shoulder and back, but ruled in favor of plaintiff on all suitable employment issues, specifically that defendants had not extended suitable employment to plaintiff as of the date of the hearing. Deputy Commissioner Tillman concluded that “[p]laintiff continues to be totally disabled from his compensable injuries [*i.e.*, left-shoulder injury] by accident of September 9, 2016.”

¶ 9 Following the hearing, on 12 January 2018, defendants moved to introduce new evidence regarding Dr. Romanowski’s approval of the Security Escort Position; plaintiff’s refusal to accept that position; and e-mail correspondence between the parties’ counsel on 17 October 2017. In the October 2017 e-mail correspondence, defense counsel stated that he had “previously forwarded you the security escort

position approved by Dr. Romanowski. According to the Employer the position was offered and refused.” Plaintiff’s counsel replied that plaintiff has not “abandoned any position or job. He showed up daily at the office when he was offered day shift work and he completed it as best he could given his capacity to do paperwork and computer work.” Plaintiff’s counsel also stated, with respect to the Security Escort Position, that plaintiff cannot work the position on the third shift “because he has to be at home with his father-in-law who has dementia.” Defense counsel replied that plaintiff’s refusal of the Security Escort Position is “unrelated to disability or his injury I will take your response as an indication that [plaintiff] is refusing the offer recently given for the [S]ecurity [E]scort [P]osition unless otherwise corrected.” Deputy Commissioner Tillman granted defendants’ motion to admit new evidence in his opinion and award dated 11 July 2018.

¶ 10 Plaintiff appealed the right shoulder and back determination to the Full Commission on 24 July 2018. Two days later, on 26 July 2018, defendants appealed the suitable employment issues to the Full Commission. The Full Commission issued its Opinion and Award on 6 January 2020. The Full Commission found that plaintiff’s accident on 9 September 2016 did not cause the injuries to plaintiff’s right shoulder and back. The Full Commission also found that plaintiff did not refuse suitable employment. The Full Commission found that because the Desk Work Position and the Security Escort Position “were not approved by the authorized

treating physician, Dr. Romanowski, until after the evidentiary hearing before the Deputy Commissioner, the Full Commission does not address the issue of whether Defendants have suitable employment available for Plaintiff as of October 17, 2017.” The Commission further found because the positions offered to plaintiff via text in November 2016 did include “job descriptions or explanations of duties and had not been approved by Plaintiff’s authorized treating physician . . . Plaintiff’s refusal of both jobs was justified. Plaintiff is therefore entitled to temporary total disability compensation for the period of November 19, 2016 to April 13, 2017.”¹ The Full Commission noted in its findings of fact that since it “does not address the issue of whether Defendants have suitable employment available for Plaintiff as of October 17, 2017, Defendants are not entitled to suspend Plaintiff’s ongoing disability compensation after October 17, 2017.” Defendants appealed the suitable employment determinations to this Court on 4 February 2020.

¶ 11 This appeal is properly before this Court pursuant to N.C. Gen. Stat. § 7A-29(a) (2019).

II. Discussion

¶ 12 Defendants maintain on appeal that the Full Commission erred when it found that plaintiff had not been offered suitable employment as of 17 October 2017 as the

¹ Whether these positions constituted “suitable employment” is not at issue on appeal.

evidence showed that plaintiff's authorized physician approved him for at least two light-duty positions prior to this date. The crux of defendants' argument is that the Full Commission's decision erroneously implies that a claimant's authorized treating physician must approve a position before an evidentiary hearing in order for the position to constitute "suitable employment." Defendants ask this Court to remand this matter to the Full Commission "with a direction to vacate and amend the findings of fact that lack competent evidence, and an instruction that 'suitable employment' is not limited to positions approved prior to an evidentiary hearing before a Deputy Commissioner."

¶ 13 "In reviewing a decision of the Commission, our review is limited to two issues: (1) whether any competent evidence in the record supports the Commission's findings of fact, and (2) whether such findings of fact support the Commission's conclusions of law." *Creel v. Town of Dover*, 126 N.C. App. 547, 552, 486 S.E.2d 478, 480 (1997) (citation omitted). "The findings of the Commission are conclusive on appeal when such competent evidence exists, even if there is plenary evidence for contrary findings." *Hardin v. Motor Panels, Inc.*, 136 N.C. App. 351, 353, 524 S.E.2d 368, 371 (2000) (citation omitted). In other words, given the deferential standard of review afforded to decisions of the Full Commission, this Court must affirm if "there is 'any competent evidence' supporting its findings of fact, even if there is evidence supporting a contrary finding." *Tedder v. A & K Enterprises*, 238 N.C. App. 169, 178,

767 S.E.2d 98, 104-105 (2014) (citing *Davis v. Harrah's Cherokee Casino*, 362 N.C. 133, 137, 655 S.E.2d 392, 394-95 (2008)). We review the Commission's conclusions of law *de novo*. *Ramsey v. S. Indus. Constructors Inc.*, 178 N.C. App. 25, 30, 630 S.E.2d 681, 685 (2006) (citation omitted).

¶ 14 Section 97-32 of the North Carolina General Statutes provides, in pertinent portion, the following: "If an injured employee refuses suitable employment as defined by G.S. 97-2(22), the employee 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." N.C. Gen. Stat. § 97-32 (2019). "Suitable employment" is defined as "employment available to the employee that (i) prior to reaching maximum medical improvement is within the employee's work restrictions, including rehabilitative or other noncompetitive employment with the employer of injury approved by the employee's authorized health care provider" N.C. Gen. Stat. § 97-2(22) (2019).

¶ 15 "The burden is on the employer to show that plaintiff refused suitable employment." *Lowery v. Duke Univ.*, 167 N.C. App. 714, 718, 609 S.E.2d 780, 783 (2005) (quoting *Gordon v. City of Durham*, 153 N.C. App. 782, 787, 571 S.E.2d 48, 51 (2002)). "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.” *Id.* (citing *Moore v. Concrete Supply Co.*, 149 N.C. App. 381, 390, 561 S.E.2d 315, 320 (2002)).

¶ 16 In this case, the Full Commission’s finding (implicit as it may be) that defendants failed to meet their burden of showing that plaintiff refused suitable employment is supported by competent evidence. The Full Commission found that because the Desk Work Position was not approved by Dr. Romanowski until after the evidentiary hearing, the Full Commission “does not address the issue of whether Defendants have suitable employment available for Plaintiff as of October 17, 2017.” There is competent evidence to support this finding. For example, on 17 October 2017, plaintiff’s counsel advised attorneys for defendants that plaintiff “has not abandoned any position or job. He showed up daily at the office when he was offered day shift work and he completed it as best he could given his capacity to do paperwork and computer work.” While there may be contrary evidence suggesting that Dr. Romanowski approved the Desk Work Position before the hearing, there is competent evidence from which the Full Commission could have reasonably found that plaintiff never refused this position and, therefore, that defendants failed to meet their burden of showing the refusal of suitable employment. We thus affirm the Full Commission’s finding with respect to the Desk Work Position.²

² We therefore do not address whether the Desk Work Position (or Security Escort Position) constitute “suitable employment.”

¶ 17 In the same vein, the Full Commission’s finding that defendants failed to show that the Security Escort Position was approved by plaintiff’s authorized treating physician before the hearing is likewise supported by competent evidence. In fact, defendants concede that Dr. Romanowski did not approve the Security Escort Position until 29 September 2017 (sixteen days after the hearing). While Deputy Commissioner Tillman granted defendants’ post-hearing motion to introduce new evidence of plaintiff’s supposed refusal of this position, “the Commission must concern itself with the claimant’s level of disability as it exists prior to and at the time of hearing.” *Carothers v. Ti-Caro*, 83 N.C. App. 301, 306, 350 S.E.2d 95, 98 (1986). The Full Commission is not permitted to make anticipatory findings. *Id.* (citation omitted). As such, the Full Commission’s disinclination to decide whether the Security Escort Position was available as of 17 October 2017 was warranted.

¶ 18 To be clear, we do not hold that a claimant’s authorized treating physician must approve a position before an evidentiary hearing in order for the position to constitute “suitable employment.” Rather we conclude that under the particular facts of this case—which indicate that defendants made no effort to introduce evidence at the 13 September 2017 hearing reflecting their purported offer of the Security Escort Position (or plaintiff’s purported refusal of the same) nor provided any reason or justification to the Full Commission for not doing so—the Full Commission acted within its sound discretion by electing to disregard new evidence pertaining to the

Security Escort Position. *See McSwain v. Indus. Commercial Sales & Serv., LLC*, __ N.C. App. __, __, 841 S.E.2d 345, 350 (2020). Because there was competent evidence from which the Full Commission could find that the Security Escort Position was not authorized by Dr. Romanowski until after the evidentiary hearing—which nullifies the suitability of the employment opportunity—we affirm the Full Commission’s finding with respect to the Security Escort Position.

¶ 19 Because the Full Commission’s findings of fact were supported by competent evidence, we affirm the conclusions and award set out in the Full Commission’s decision. *See Tedder*, 238 N.C. App. at 178, 767 S.E.2d at 105.

III. Conclusion

¶ 20 For the foregoing reason, we affirm the North Carolina Industrial Commission’s Opinion and Award filed 6 January 2020.

AFFIRMED.

Judges DILLON and MURPHY concur.

Report per Rule 30(e).