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NO. COA04-1676

NORTH CAROLINA COURT OF APPEALS

Filed: 4 October 2005

JOYCE JOHNSON,  
Employee,  
Plaintiff,

v.

North Carolina Industrial Commission  
I.C. File No. 162623

MAGNETTI-MARELLI USA, INC.,  
Employer,

and

ATLANTIC MUTUAL  
INSURANCE COMPANY,  
Carrier,  
Defendants.

Appeal by Defendants from Opinion and Award entered 3 August 2004 by the North Carolina Industrial Commission. Heard in the Court of Appeals 13 September 2005.

*Jeanette T. Peace, for plaintiff-appellee.*

*Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Jeffrey A. Doyle and Stacy M. Race, for defendant-appellants.*

WYNN, Judge.

Section 97-2(9) of the North Carolina General Statutes defines “disability” 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) (2004). In this case, there was competent evidence to support the full Commission’s findings of fact and its findings of fact

supported its conclusions of law that Plaintiff was disabled as a result of her compensable injury after 27 March 2001. Accordingly, we affirm the full Commission's order.

The record on appeal shows that on 24 November 1999, Plaintiff Joyce Johnson injured her right ankle when she stepped off a curb and fell on Defendant Magnetti-Marelli USA, Inc.'s property. Before 24 November 1999, Ms. Johnson suffered from osteoarthritis of the knees, hypertension, gross obesity, and respiratory problems, including asthma. On 9 December 1999, Samuel David Ciliberto, M.D., a specialist in orthopaedic surgery, performed surgery to repair Ms. Johnson's right ankle. He continued treating her up until the time of the hearing.

Ms. Johnson asked to return to work at Magnetti-Marelli with the aid of the walker. Celestina Nicholas, a human resources benefit clerk, informed Ms. Johnson that she could not work with the walker in the plant because of safety issues. Thereafter, Ms. Johnson brought this claim for workers compensation benefits.

This case came for hearing before Deputy Commissioner Amy L. Pfeiffer who awarded Ms. Johnson temporary total disability benefits from 25 November 1999 to 27 March 2001, 14.4 weeks of permanent partial disability benefits, medical expenses, and attorney's fees. On 3 August 2004, the full Commission filed an Opinion and Award awarding Ms. Johnson temporary total disability benefits from 25 November 1999 until she becomes able to return to work and medical expenses. Defendants -- Magnetti-Marelli and its insurance carrier Atlantic Mutual Insurance Company -- appealed.

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On appeal, Defendants argue that the full Commission erred by making findings of fact and conclusions of law that Ms. Johnson's disability from her right ankle injury continued beyond 27 March 2001. We disagree.

The standard of review for this Court in reviewing an appeal from the full Commission is limited to determining “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). Our review “‘goes no further than to determine whether the record contains any evidence tending to support the finding.’” *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (citation omitted). The full Commission’s findings of fact “are conclusive on appeal when supported by competent evidence[,]” even if there is evidence to support a contrary finding, *Morrison v. Burlington Indus.*, 304 N.C. 1, 6, 282 S.E.2d 458, 463 (1981), and may be set aside on appeal only “when there is a complete lack of competent evidence to support them[.]” *Young v. Hickory Bus. Furniture*, 353 N.C. 227, 230, 538 S.E.2d 912, 914 (2000). It is not the job of this Court to re-weigh the evidence. *Adams*, 349 N.C. at 681, 509 S.E.2d at 414. Further, all evidence must be taken in the light most favorable to the plaintiff, and the plaintiff “is entitled to the benefit of every reasonable inference to be drawn from the evidence.” *Id.*

Defendants argue that Ms. Johnson failed to prove that her right ankle injury prevented her from returning to her prior employment after 27 March 2001.

To receive compensation under section 97-29 of the North Carolina General Statutes, a claimant has the burden of proving the existence of a disability as well as its extent. N.C. Gen. Stat. §97-29 (2004). Section 97-2(9) of the North Carolina General Statutes defines “disability” 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). Thus, the claimant’s burden is to show that *because of injury* his earning capacity is impaired. *Russell v. Lowes Prod. Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993).

In this case, Ms. Johnson had the burden to show that, because of her right ankle injury, she is unable to earn the same wages she had earned before the injury, either in the same employment or in other employment. *See Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982).

Defendants assign error to the following findings of fact:

13. Plaintiff uses a walker because she can only bear a little weight on her ankle. At home, she uses a little stool to avoid standing on her feet when she washes dishes. Since the fall, she does not do a lot of cooking and her daughters help her with cleaning and housework. Although she thought that she could sit down and do her job duties at Magnetti Marelli, she would have problems getting to her work station and moving around within the plant. She would not be able to carry anything (because of her need to use the walker), and she would have a difficult time “getting around to the bathroom and the break room”.

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15. Plaintiff suffered from several pre-existing health conditions prior to her compensable injury. She suffered from advanced osteoarthritis of both knees, hypertension, and obesity. When Dr. David Ciliberto was deposed, he testified that in his opinion, the claimant was not employable when she is considered as a composite person. He specifically testified that he did not believe that she was employable because “She has difficulty walking because of her advanced osteoarthritis of knees and her morbid obesity.” He also noted her continued need for an assistive device (walker) for walking and her continued problems with swelling and pain in her ankle (that was fractured as a result of the compensable injury).

16. Given plaintiff’s age, education, pre-existing health problems, and ongoing problems with walking, plaintiff has met her burden of proving that although she may be capable of some work, it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, inability to be trained, to seek other employment. There was no evidence that plaintiff was capable of doing anything other than the work she had done for the past 20 plus years.

There is competent evidence to support finding of fact number thirteen. Ms. Johnson testified that she uses a stool when washing dishes and her daughters help her with most of the housework. Also, Ms. Nicholas testified that Ms. Johnson would be unable to return to her previous job while using the walker because of safety issues. Additionally, Ms. Johnson testified that she “can bear a little weight on [her] ankle.” She further testified that when she is walking somewhere she uses her walker. Dr. Ciliberto testified that Ms. Johnson needs the walker due to her right ankle injury “to some extent.” Therefore, there is competent evidence to support finding of fact thirteen.

There is competent evidence to support finding of fact number fifteen. Dr. Ciliberto testified that prior to 24 November 1999, Ms. Johnson suffered from osteoarthritis of the knees, hypertension, gross obesity, and respiratory problems, including asthma. Dr. Ciliberto further testified that:

Q: The -- the question that I'm asking is as a whole composite person, could she return to --

A: I do not believe that she is employable.

Q: And what is the basis of that opinion?

A: She has difficulty in walking because of her advanced osteoarthritis of knees and her morbid obesity.

Finding of fact number sixteen is supported by Ms. Johnson's testimony that: she was fifty-seven-years-old, did not have a high school diploma, and her only job experience consisted of working in plants and cooking in a restaurant.

Defendants also assign error to the following conclusion of law:

4. As a result of her compensable right foot injury, plaintiff was temporarily totally disabled from November 25, 1999, through March 27, 2001, the date by which she was at maximum medical improvement as a result of her compensable foot injury.

N.C. Gen. Stat. §97-29. Her disability continues inasmuch as the employer would not return her to her old job and inasmuch as her age, education, skill set, and infirmities make it futile for plaintiff to seek work elsewhere in the competitive market. *Russell v. Lowes Prod. Distrib.*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993).

The record on appeal shows that this conclusion of law is supported by the full Commission's findings of fact, including the fact that Ms. Johnson needed to use the walker as a result of her right ankle injury. See *Deese*, 352 N.C. at 116, 530 S.E.2d at 553. The full Commission concluded that "[h]er disability continues inasmuch as the employer would not return her to her old job . . . ." *Deese*, 352 N.C. at 116, 530 S.E.2d at 553. Moreover, under finding of fact number fourteen, the Commission found that Magenetti-Marelli would not allow Ms. Johnson to return to her old job while she needed the use of her walker, due to safety issues. As Ms. Johnson's need for the walker was related to her compensable right ankle injury, she proved that *because of her compensable injury* her earning capacity was impaired. N.C. Gen. Stat. §97-2(9). Therefore, the findings of fact support the full Commission's conclusion that Ms. Johnson's disability continued past 27 March 2001.

Affirmed.

Judges CALABRIA and LEVINSON concur.

Report per Rule 30(e).