NO. COA01-790

NORTH CAROLINA COURT OF APPEALS

Filed: 20 August 2002

JACKIE BIVINS

v.

North Carolina Industrial Commission
I.C. File No. 178062

KOCH INDUSTRIES, INC.,
Employer; CIGNA PROPERTY
AND CASUALTY COMPANY,
Carrier.

Appeal by defendants from judgment entered 6 February 2001 by Commissioner Christopher Scott of the N.C. Industrial Commission. Heard in the Court of Appeals 18 April 2002.

Melinda H. Crouch for plaintiff-appellee.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Thomas W. Page and Lynette K. Neel for defendants-appellants.

THOMAS, Judge.

Defendants, Koch Industries, Inc. (Koch) and Cigna Property and Casualty Company, appeal from an opinion and award of the Industrial Commission ordering them to pay plaintiff, Jackie Bivins, ongoing total disability compensation in the amount of $388.25 per week, as well as medical expenses. Defendants set forth two assignments of error. For the reasons herein, we affirm.

The facts are as follows: Bivins worked as a chemical operator and insulator for Koch until 1 November 1991, when he sat in a chair and its back came off. He fell backwards, with his lower back striking a metal prong before he hit the floor. Bivins sustained a pneumothorax, collapsed lung, three fractured ribs, and injuries to his head, neck, and back. The parties entered into a Form 21 Agreement, later approved by the Commission, that provided for total disability compensation for "necessary weeks."

In August 1996, Charles Jones became the plant manager at Koch. Purportedly as part of Jones's reorganization efforts, Bivins was offered the newly created full-time position of Production Manager Assistant. His job would be to monitor shipments to insure that loading and delivery schedules were on time, enter production data into a computer spreadsheet program, and forward the information to management.

Koch maintains that while it was prepared to be flexible concerning accommodations for the person filling the new position, the job was not created especially for Bivins. The position was offered to Bivins at the rate of $10.40 per hour, an amount less than his pre-injury wage level. It included the company's full benefit package with eligibility for pay raises.

Bivins did not accept the offer, although the record is unclear regarding the date Koch officially offered the job to Bivins. The position was never advertised. On 9 December 1997, defendants filed a Form 33 request for hearing alleging Bivins was no longer disabled and a position with Koch was available for him.

On 8 April 1999, Deputy Commissioner Theresa B. Stephenson entered an opinion and award finding that Bivins unjustly refused suitable employment provided by defendants. She reserved ruling on the issue of permanent partial disability but ordered that Bivins's claim for permanent and total disability be denied. Bivins appealed to the Full Commission and then

returned to work for Koch on 3 May 1999 as the Production Manager Assistant. Although he contended that his physical condition prevented his being able to do the work, Bivins said he felt forced to return in order to not lose his health insurance and because he needed to support his family.

Bivins's primary duty, entering data on spreadsheets, took little time, sometimes a mere thirty minutes. As a result, Bivins had more idle time during the day than other employees at Koch, who complained that he was getting a "free ride." Due to Bivins's job and forty-five minute to an hour commute, the problems and symptoms associated with his back condition increased in frequency, resulting in a number of missed work days.

A month after returning to Koch, Bivins consulted his family physician, Dr. Najib Muradi, who referred him to Dr. Stephen Grubb, an orthopaedic surgeon. Grubb's diagnosis was that Bivins suffered from a cervical and lumbar degenerative disc disease with possible spinal chord compression. Grubb found Bivins's complaints and symptoms to be consistent with his own findings.

Grubb examined Bivins again approximately two months later. Bivins continued to experience back and neck pain, and had also started suffering from hip pain. Grubb said that if Bivins continued his routine of work and commuting, the stress on his spine would be significantly increased and the symptoms would only worsen. Additionally, Grubb determined that Bivins was incapable of gainful employment. Bivins quit his job at Koch on 6 January2000.

On 6 February 2001, the Commission entered its order and found that the position at Koch was not suitable for Bivins due to his physical condition and was, in fact, a "make work" position. The Commission further found that there was a lack of evidence that the Production Manager Assistant position is a job readily available in the competitive job market. It also found

Bivins's initial refusal to take the job reasonable and justified, and that the wages earned by Bivins in an unsuitable job are not indicative of his wage earning capacity. Finally, further vocational rehabilitation efforts were found to be futile. Defendants appeal.

On appeal from an award of the Commission, the appellate court is limited to determining whether there was competent evidence before the Commission 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). The findings of fact are conclusive on appeal even when there is evidence to support contrary findings. *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 186, 345 S.E.2d 374, 379 (1986). "The evidence tending to support plaintiff's claim is to be viewed 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), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999). The Commission's conclusions of law, however, are reviewable *de novo. Grantham v. R. G. Barry Corp.*, 127 N.C. App. 529, 534, 491 S.E.2d 678, 681(1997), *disc. review denied*, 347 N.C. 671, 500 S.E.2d 86 (1998).

By their first assignment of error, defendants contend that they offered Bivins a suitable job that successfully rebutted the Form 21 presumption of continuing total disability. We disagree.

An employee is entitled to a presumption of continuing total disability after a properly executed Form 21 is filed and approved by the Commission. *See Franklin v. Broyhill Furniture Industries*, 123 N.C. App. 200, 205, 472 S.E.2d 382, 386, *cert. denied*, 344 N.C. 629, 477 S.E.2d 39 (1996). An employer may rebut the presumption by producing evidence that suitable jobs are available for the employee in the competitive job market and that he is capable of getting one,

given his physical and vocational limitations. *Id*. (*quoting Burwell v. Wynn-Dixie Raleigh*, 114 N.C. App. 69, 73, 441 S.E.2d 145, 149 (1994)). Moreover, the employer may establish that the employee is no longer entitled to benefits because of the latter's unjustified refusal to accept a specific offer of suitable employment. *Franklin*, 123 N.C. App. at 206, 472 S.E.2d at 386.

A job is suitable if the employee is capable of performing the job, taking into account his age, education, physical limitations, vocational skills, and experience. *Id*. An employee is capable of obtaining a job if it is reasonably likely that he would be hired if he diligently sought the job. *Id*.

Defendants contend that the position of Production Manager Assistant is a suitable job that Bivins could obtain in the competitive marketplace. Grubb, however, stated that, "bas[ed] [on] my examination and . . . opinion regarding [Bivins's] age, medical condition, the multi-level, multi-centric cervical, lumbar and degenerative disc disease, his educational level and his job skills," he is permanently and totally disabled. Therefore, there is competent evidence supporting the Commission's conclusion that the job offered by defendants is not suitable given his physical condition and restrictions.

Moreover, there is competent evidence supporting the Commission's conclusion that "this newly created job was a make[-] work position for which there is a lack of evidence of its availability in the competitive job market." *See Peoples v. Cone Mills Corp.*, 316 N.C. 426, 439, 342 S.E.2d 798, 806 (1986) ("The Workers' Compensation Act does not permit [the employer] to avoid its duty to pay compensation by offering an injured employee employment which the employee under normally prevailing market conditions could find nowhere else[.]").

The position was not advertised to the general public and was still vacant when Deputy Commissioner Stephenson's opinion and award was filed. Its duties could be fulfilled in only a

few hours each day. Other employees actually became disgruntled because of the work disparity. The only evidence offered by defendants of the job's availability in the competitive marketplace is the testimony of Koch's plant manager. He claimed that a similar position, called "area support coordinator," exists at a competitor of Koch. The plant manager, however, did not know what physical activities were part of the job and further said the pay rate was $16.00 to $17.00 per hour because the area support coordinator is considered that chemical plant's top operator. Accordingly, there was competent evidence before the Commission to support the conclusion that the "position offered to [Bivins] by defendants was not suitable given his physical condition and restrictions."

Defendants also maintain that there is competent and credible medical evidence showing that Bivins is capable of performing the job. Defendants base their contention on the opinion of Torres, who said that Bivins could perform the job. However, the Commission specifically rejected Torres's opinion. Defendants further argue that the testimony of Grubb is neither competent nor credible. Grubb, however, is a well-established orthopaedic surgeon who evaluated Bivins extensively after Bivins began his new position at Koch. He also met with Bivins and his staff vocational counselor.

Finally, defendants argue that Bivins unjustifiably refused gainful employment and, therefore, is not entitled to further benefits effective from the date of the offer of employment in October of 1997. Section 97-32 of our General Statutes 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.

N.C. Gen. Stat. §97-32 (2001).

Reviewing the evidence in the light most favorable to Bivins, we cannot say the Commission erred in finding that Bivins's initial refusal of the job was reasonable and justified. There was competent evidence supporting the Commision's finding that the job was not suitable given Bivins's physical limitations. The Commission's findings, in turn, support its conclusion that defendants failed to rebut the presumption of continuing total disability pursuant to the Form 21 Agreement. We thus reject defendants' first assignment of error.

By their second assignment of error, defendants contend that Bivins presented no competent and credible evidence that vocational rehabilitation would be futile. Defendants again argue that the testimony of Grubb is not credible and competent medical evidence of Bivins's ability to work in any capacity because Grubb: (1) failed to obtain a Labor Market Survey or onsite review of the Product Assistant position; (2) reviewed only the medical history of Bivins that Bivins provided; and (3) failed to qualify as a vocational expert. We disagree.

Defendants have the burden of producing evidence to show that the presumption of disability does not continue. In fact, it was Bivins who presented substantial evidence that his disability remains. Here, Grubb testified that he had practiced medicine in North Carolina since 1975, had been on faculty at the University of North Carolina at Chapel Hill prior to private practice, and had been involved with worker's compensation cases for twenty years. His job as an orthopaedic surgeon is to "return people to functional status." He evaluated Bivins three times. The competent evidence presented by Bivins supports the Commission's conclusion that vocational rehabilitation efforts would be futile. Thus, the findings are conclusive even though defendants presented some evidence that might support findings to the contrary. *See Hendrix*, 317 N.C. at 186, 345 S.E.2d at 379. The Commission's opinion and award are affirmed.

AFFIRMED.

Judges MARTIN and TYSON concur.

Report per Rule 30(e).