NO. COA11-1503
NORTH CAROLINA COURT OF APPEALS

Filed: 4 September 2012

WANDA G. THORNTON, Employee,
Plaintiff

v.

North Carolina Industrial Commission
I.C. No. 216738

CITY OF RALEIGH, Employer,
SELF-INSURED (N.C. LEAGUE OF MUNICIPALITIES, Third-Party Administrator),
Defendant

Appeal by plaintiff from opinion and award entered 19 September 2011 by the North Carolina Industrial Commission. Heard in the Court of Appeals 25 April 2012.

Lennon, Camak & Bertics, PLLC, by George W. Lennon, for plaintiff-appellant.

Teague, Campbell, Dennis & Gorham, L.L.P., by Brad G. Inman, for defendant-appellee.

CALABRIA, Judge.

Wanda G. Thornton ("plaintiff") appeals from an opinion and award by the Full Commission of the North Carolina Industrial Commission ("the Commission") which upheld the suspension of plaintiff's temporary total disability benefits due to

plaintiff's unjustified refusal to accept suitable employment. We affirm in part and remand for additional findings of fact in part.

I. Background

In March 1990, plaintiff began working for the City of Raleigh, North Carolina ("defendant") as a water meter mechanic. On 6 February 2002, plaintiff sustained an injury to her right shoulder while working on a water meter. At the time plaintiff sustained the injury, she was suffering from various unrelated medical conditions, including arthritis and fibromyalgia.

Defendant accepted plaintiff's injury as compensable, and plaintiff began receiving weekly worker's compensation benefits of $375.84 on 7 February 2002. Plaintiff was initially evaluated by Dr. Kevin Speer ("Dr. Speer"). Dr. Speer found no evidence of a rotator cuff tear, but did find that plaintiff suffered from "[m]arked degenerative change within the acromioclavicular joint, which narrows the supraspinatus outlet." Dr. Speer recommended that plaintiff undergo shoulder surgery.

After initially agreeing to the surgery, plaintiff changed her mind and elected not to undergo the procedure. As a result, Dr. Speer determined that plaintiff had reached maximum medical

improvement and assigned a five percent permanent partial disability rating to her right arm. Plaintiff was restricted from lifting more than twenty pounds and from engaging in repetitive overhead activity. Plaintiff continued to receive temporary total disability compensation benefits from defendant.

In April 2006, plaintiff came under the care of Dr. J. Th. Bloem ("Dr. Bloem"). Dr. Bloem also recommended that plaintiff undergo surgery. Plaintiff agreed and Dr. Bloem performed the procedure on 31 May 2007. Dr. Bloem later released plaintiff to light duty work, with restrictions of not lifting more than twenty-five pounds and refraining from any overhead work.

On 1 July 2009, defendant offered plaintiff employment as a security booth attendant ("the security booth position" or "the position"). Defendant had previously employed a private security firm to staff this position. However, due to budgetary limitations, defendant decided to begin staffing the position with current employees. The position required plaintiff to monitor and log vehicle ingress throughout the day. Defendant planned to pay plaintiff the same salary and benefits she received at her pre-injury position.

Plaintiff's pain management physician, Dr. Kirk Edward Harum ("Dr. Harum"), determined that plaintiff would be able to

perform the work duties associated with the position. However, plaintiff's psychiatrist, Dr. James Smith ("Dr. Smith"), determined that aspects of the position would aggravate plaintiff's anxiety and claustrophobia and that, as a result, the position was inappropriate for plaintiff.

Plaintiff failed to report to work at the position when requested by defendant. Consequently, on 11 August 2009, defendant filed a Form 24 with the Commission, seeking to suspend disability payments. On 16 September 2009, the Form 24 was approved and all total temporary disability payments to plaintiff were suspended as of 12 August 2009. The suspension of payments was to continue so long as plaintiff continued to refuse to accept suitable employment. Plaintiff's employment with defendant was subsequently terminated for reasons unrelated to her injury.

On 4 March 2010, plaintiff filed a Form 33 request for hearing alleging that defendant's Form 24 was improvidently approved and requesting that reinstatement of plaintiff's benefits. The hearing was conducted on 4 August 2010. On 25 March 2011, Deputy Commissioner James C. Gillen ("Deputy Commissioner Gillen") entered an opinion and award upholding the

suspension of plaintiff's benefits until her refusal to accept the position ceased.

Plaintiff appealed to the Full Commission. While the matter was pending on appeal, plaintiff attempted to accept the position, but defendant refused to re-offer her the job. As a result, on 17 June 2011, plaintiff filed a "Motion to Compel Reinstatement of Benefits," ("motion to compel") alleging that her refusal to accept the position had ceased. On 19 September 2011, the Full Commission filed an opinion and award affirming the suspension of plaintiff's disability benefits on the basis of plaintiff's unjustified refusal to accept suitable employment. In addition, the Commission denied plaintiff's motion to compel. Plaintiff appeals.

II. Standard of Review

Appellate review of an opinion and award of the Commission "is limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law. This 'court's duty goes no further than to determine whether the record contains any evidence tending to support the finding.'" *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008)(internal quotations and citations

omitted). "The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Anderson v. Constr. Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965). This Court reviews the Commission's conclusions of law *de novo*. *Deseth v. LensCrafters, Inc.*, 160 N.C. App. 180, 184, 585 S.E.2d 264, 267 (2003).

III. Suitability

Plaintiff argues that the Commission erred in concluding that her refusal to accept the position offered by defendant was unjustified because the position was unsuitable as a matter of law. We disagree.

> "Suitable employment" is defined as any job that a claimant is capable of performing considering his age, education, physical limitations, vocational skills and experience. The burden is on the employer to show that an employee refused suitable employment. Once the employer makes this showing, the burden shifts to the employee to show that the refusal was justified.

Munns v. Precision Franchising, Inc., 196 N.C. App. 315, 317-18, 674 S.E.2d 430, 433 (2009)(internal quotations and citations omitted).

A. Physical Limitations

Plaintiff first contends that the Commission failed to make sufficient findings regarding her mental health and urinary

urgency conditions. However, the Commission found as fact that "[t]he greater weight of the credible evidence establishes that the physical requirements of the booth attendant position offered to Plaintiff by Defendant-Employer are within Plaintiff's physical restrictions." This finding, which is supported by competent evidence, is sufficiently broad to address plaintiff's conditions. This argument is overruled.

B. Availability of the Position

Plaintiff next contends that the Commission's findings do not address the fact that the security booth position was only made available to light duty workers. Plaintiff argues that this demonstrates that the position only constituted unsuitable "make work" and that the Commission should have made findings specifically addressing this aspect of the security booth position.

Our Supreme Court has stated that "[t]he Workers' Compensation Act does not permit [an 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 . . . ." *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 439, 342 S.E.2d 798, 806 (1986). "'[I]f the proffered employment is so modified because of the employee's

limitations that it is not ordinarily available in the competitive job market,' the job is 'make work' and is not competitive." ***Jenkins v. Easco Aluminum***, 165 N.C. App. 86, 95, 598 S.E.2d 252, 258 (2004)(quoting ***Peoples***, 316 N.C. at 438, 342 S.E.2d at 806).

In the instant case, the Commission's findings reflect that the security booth position should not be characterized as "make work." The Commission specifically found that the position "exists in the competitive job market in Raleigh[,]" and that the requirements of the position "w[ere] not modified when it was brought in-house[.]" These findings, which were supported by competent evidence, adequately demonstrate that the security booth position was not impermissible "make work." Accordingly, the fact that the position was only available to plaintiff's light duty employees was immaterial to the Commission's determination and the Commission was not required to make specific findings regarding this aspect of the position. This argument is overruled.

C. Wages

Plaintiff additionally argues that the security booth position was unsuitable as a matter of law because the position was not available at a comparable rate of pay in the competitive

marketplace. "[A]n employer cannot avoid its duty to pay compensation by offering the employee a position that could not be found elsewhere under normally prevailing market conditions." *Moore v. Concrete Supply Co.*, 149 N.C. App. 381, 389-90, 561 S.E.2d 315, 320 (2002).

> The plain language of G.S. § 97-32 states that a post-injury job offered by an employer to the injured employee must be "suitable to his capacity." In determining what is "suitable," our courts consider similarity of the wages or salary of the pre-injury employment and the post-injury job offer. And *Peoples* requires that earning capacity be measured by whether other employers would hire the employee in the proffered job at a comparable wage level.

Dixon v. City of Durham, 128 N.C. App. 501, 506, 495 S.E.2d 380, 384 (1998).

In the instant case, the Commission found as fact that the position offered to plaintiff "is readily available in Raleigh's competitive labor market at a salary similar to Plaintiff's pre-injury wage." Plaintiff challenges this finding as unsupported by competent evidence.

The relevant testimony on this issue was provided by vocational consultant Ann Neulicht, Ph.D. ("Neulicht"). She testified that the base pay of the security booth position was between eight and eleven dollars per hour, and that the ranged

of the median salary was a few to five dollars above this rate. Since there was no evidence presented at the hearing which would indicate that plaintiff had any previous experience as an unarmed guard, plaintiff could expect to receive the entry-level salary of eight to eleven dollars per hour in the general labor market. Defendant intended to pay plaintiff her pre-injury wage to work in the position. The parties stipulated that this wage was $563.73 per week, which would constitute an hourly wage of $14.09. Consequently, Neulicht's testimony establishes that plaintiff would receive up to seventy-eight percent of the wages she would receive from defendant to perform the same job for another employer.

A starting wage at seventy-eight percent of pre-injury wages may be reasonably and rationally found to be a comparable wage. Thus, the Commission's finding of fact was supported by Neulicht's testimony and further supported the Commission's conclusion that the security booth position was suitable employment. This argument is overruled.

D. Plaintiff's Age, Education, Medical Limitations Vocational Skills, and Experience

Finally, plaintiff argues that the Commission's opinion and award did not contain sufficient findings to satisfy the requirements of this Court's opinion in ***Munns***. In ***Munns***, the

Court remanded the Commission's opinion and award on the issue of the physical suitability of the employment offered to the plaintiff because "[t]he Opinion and Award contain[ed] no findings addressing employee's ability to perform the [offered employment] considering his age, education, physical limitations, vocational skills and experience." 196 N.C. App. at 321, 674 S.E.2d at 435 (internal quotations and citation omitted).

In contrast to the opinion and award in *Munns*, which contained no findings on physical suitability, the Commission, in the instant case, made a specific finding that the requirements of the security booth position were within plaintiff's physical restrictions. While the Commission did not make detailed findings regarding the effect of plaintiff's age, education, physical limitations, vocational skills, and experience on her ability to perform the position, there is nothing in *Munns* which suggests that separate findings are required for each of these attributes.

The testimony which supports the Commission's finding demonstrates that all of the evidence required by *Munns* before it was before the Commission when it made its finding on physical suitability. Neulicht was specifically asked if the

security booth position "was suitable for [plaintiff] from the perspective of her age, her education, her physical limitations, her vocational skills and her work experience," and she answered that it was. Neulicht stated that "[i]t certainly is within physical restrictions and would require less education -- actually the same reasoning, math and language levels that her job as a meter--water meter installer required." This testimony fully supports a finding that the security booth position was physically suitable for plaintiff, and such a finding complies with the requirements of *Munns*. This argument is overruled.

IV. Refusal to Accept Employment

Plaintiff argues that the Commission erred in finding that her refusal to accept the security booth position was unjustified. We disagree.

Under N.C. Gen. Stat. § 97-32, "[i]f an injured employee refuses suitable employment, . . . 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 (2011). Plaintiff claims that her refusal to accept the position was justified due to her medical conditions.

Plaintiff relies upon the testimony of her psychiatrist, Dr. Smith, in support of her claim.

However, the findings of the Commission indicate that it considered and then disregarded Dr. Smith's opinion on the suitability of the position, which it was free to do as the finder of fact. *See Hassell v. Onslow Cty. Bd. of Educ.*, 362 N.C. 299, 306, 661 S.E.2d 709, 715 (2008)("[A]s the sole judge of witness credibility and the weight to be given to witness testimony, the Commission may believe all or a part or none of any witness's testimony." (internal quotations and citations omitted)). The Commission found that Dr. Smith did not know the details of the security booth position and may have recommended that plaintiff attempt the position if he knew its true requirements. These findings are supported by Dr. Smith's testimony. The remainder of the Commission's findings, which included findings that some of plaintiff's other physicians found the position to be suitable, support the Commission's determination that plaintiff had unjustifiably refused to attempt the security booth position. This argument is overruled.

V. Motion to Compel Reinstatement of Benefits

Plaintiff argues that the Commission erred in failing to grant her motion to compel reinstatement of benefits. We remand this issue for further findings of fact.

An employee who refuses suitable employment "shall not be entitled to any compensation at any time during the continuance of such refusal[.]" *Id.* In her motion to compel, plaintiff contended that she agreed to accept the security booth position after Deputy Commissioner Gillen's decision, while the case was on appeal to the Full Commission, but that defendant refused to allow plaintiff to accept the position since she was no longer a city employee.

We are unable to determine whether the Commission properly denied plaintiff's motion to reinstate benefits because the Commission's opinion and award contains no findings regarding the contentions in plaintiff's motion. While the Commission repeatedly asserts in its opinion and award that plaintiff was not entitled to compensation until her refusal to accept suitable employment ceased, there are simply no findings which address whether plaintiff's willingness to attempt the security booth position was a legitimate cessation of her refusal.

Defendant relies upon *Alphin v. Tart L.P. Gas Co.*, 192 N.C. App. 576, 666 S.E.2d 160 (2008), to support its assertion that

plaintiff's representation that she would accept the position was not credible. However, in *Alphin*, the Commission made a specific finding of fact that the plaintiff's willingness to cooperate was not credible before denying his motion to reinstate benefits. *Id.* at 592, 666 S.E.2d at 170. In contrast, the Commission, in the instant case, made no findings regarding the credibility of plaintiff's willingness to cooperate. Without such findings, the Commission could not determine whether or not plaintiff's refusal to accept the security booth position had ceased. Therefore, we must remand the case for further findings of fact which specifically address the claims raised in plaintiff's motion to compel.

VI. Conclusion

The Commission's findings of fact are supported by competent evidence and fully support its determination that the security booth position was suitable employment and that plaintiff unjustifiably refused to attempt that position. That portion of the Commission's opinion and award is affirmed. However, the Commission failed to make any findings which address the claims raised in plaintiff's motion to compel. As a result, we remand the case for additional findings of fact on that issue.

Affirmed in part and remanded in part.

Judges STEELMAN and BEASLEY concur.

Report per Rule 30(e).