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NO. COA07-577

NORTH CAROLINA COURT OF APPEALS

Filed: 15 April 2008

STEVEN IRVIN FLIPPEN, SR.  
Employee,  
Plaintiff-Appellee

v.

North Carolina Industrial Commission  
I.C. File No. 244728

AMERICRAFT CARTONS, INC.,  
Employer,

SENTRY INSURANCE COMPANY,  
Carrier,  
Defendants-Appellants.

Appeal by defendants from opinion and award entered 2 February 2007 by the Full Commission. Heard in the Court of Appeals 27 November 2007.

*Walden & Walden, by Daniel S. Walden, for plaintiff.*

*Cranfill, Sumner & Hartzog, L.L.P., by J. Michael Ricci and Meredith Taylor Berard, for defendants.*

ELMORE, Judge.

On 19 November 2003, Deputy Commissioner George T. Glenn II filed an opinion and award determining that Steven I. Flippen (plaintiff) sustained a compensable injury to his left shoulder and awarding compensation for ongoing temporary disability. The employer, Americraft Cartons, Inc., and its carrier, Sentry Insurance Company (together, defendants), filed a Form 33 Request for Hearing on 6 December 2004, alleging that plaintiff was no longer

disabled. Following a hearing on 8 August 2005, Deputy Commissioner Morgan S. Chapman filed an opinion and award on 14 July 2006, in which he concluded that plaintiff was not only capable of work, but had in fact been working since 30 September 2004. Accordingly, the Deputy Commissioner stated that defendants were entitled to stop payment and to a credit for compensation paid since 30 September 2004.

On appeal, the Full Commission reversed the Deputy Commissioner's decision. In an opinion and award entered 2 February 2007, the Full Commission found that plaintiff remained disabled, was entitled to reinstatement of temporary total disability compensation, including retroactive payments, and was also entitled to ongoing medical treatment, including a spinal cord stimulator trial. Defendants now appeal.

Defendants' first contention on appeal is that the Full Commission applied an incorrect standard as to the burden of proof required of defendants in rebutting the presumption of disability. We disagree.

As a preliminary matter, we note that

[t]his Court's review is limited to a consideration of whether there was any competent evidence to support the Full Commission's findings of fact and whether these findings of fact support the Commission's conclusions of law. This Court has stated that so long as there is some evidence of substance which directly or by reasonable inference tends to support the findings, this Court is bound by such evidence, even though there is evidence that would have supported a finding to the contrary.

*Ard v. Owens-Illinois*, 182 N.C. App. 493, 496, 642 S.E.2d 257, 259-60 (2007) (quotations, citations, and emphasis omitted).

The burden of proof regarding disability under our Workers' Compensation statutes is well established:

[O]nce [a] disability is proven, there is a presumption that it continues until the employee returns to work at wages equal to those he was receiving at the time his injury occurred. That presumption of disability continues until the defendant offers evidence to rebut the presumption. . . . An employer may rebut the continuing presumption of total disability either by showing the employee's capacity to earn the same wages as before the injury or by showing the employee's capacity to earn lesser wages than before the injury. To rebut the presumption of continuing disability, the employer must produce evidence that:

- (1) suitable jobs are available for the employee;
- (2) that the employee is capable of getting said job taking into account the employee's physical and vocational limitations;
- (3) and that the job would enable the employee to earn some wages.

*Barbour v. Regis Corp.*, 167 N.C. App. 449, 457-58, 606 S.E.2d 119, 125-26 (2004) (quotations and citations omitted).

Defendants contend that their evidence showed that plaintiff not only had the capacity to earn wages, but was actually earning wages. Based on their claim that this evidence was uncontroverted, defendants argue that the Full Commission erred in focusing its inquiry not on plaintiff's capacity, but rather on whether plaintiff did in fact earn wages. We disagree, however, with the premise of defendants' argument. Because it does not appear to this Court, in our review of the record on appeal, that the evidence of plaintiff's capacity was uncontroverted, we find defendants' argument meritless.

Defendants rely heavily on evidence that they presented to the Full Commission tending to show that plaintiff was employed as a funeral attendant with Spencer's Funeral Home. This evidence included videotaped surveillance footage of defendant performing duties normally associated with such a position, including loading a gurney with a corpse into a hearse, driving

the vehicle to a different funeral home, unloading the gurney, reloading the gurney without the accompanying body, and returning to Spencer's Funeral Home. This evidence was bolstered by testimony from Eddie Spencer, the owner of Spencer's Funeral Home, who testified as to the existence of the funeral attendant position, the duties thereof, and the fact that he gave plaintiff money in exchange for his work.

However, the Full Commission found as fact that plaintiff's activities did not constitute employment. Though the Full Commission clearly considered the videotape evidence, it expressly found that plaintiff's "activities [were] consistent with plaintiff's limited ability to use his left upper extremity as an assist to his right upper extremity." The Full Commission also considered evidence that plaintiff had a long history of helping out, without pay, at the funeral home, based on his close personal relationship with the Spencers. Based in part on this evidence, the Full Commission also found as fact that the payments made were gratuitous in nature.

Defendants argue at length that the issue before the Full Commission was not whether plaintiff actually was employed, but whether he had the capacity for gainful employment. Defendants are correct. However, the Full Commission explicitly stated that "the payments made to plaintiff by the Spencers are not an indication of plaintiff's earning capacity," and that based on plaintiff's testimony, his physician's testimony, and the medical evidence, plaintiff continued to be totally disabled. "As long as there is competent evidence in support of the Commission's decision, it does not matter that there is evidence supporting a contrary finding. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Webb v. N.C. Dep't of Transp.*, 180 N.C. App. 466, 467, 637 S.E.2d 304, 305 (2006). Accordingly, we find defendants' arguments to be without merit.

Defendants also claim, in a separate but related argument, that the Full Commission erred in its conclusion of law that “plaintiff remains disabled and entitled to ongoing compensation and medical treatment.” Defendants attempt to support this argument by attacking the Full Commission’s findings of fact on the issue. Defendants aver that the Full Commission completely ignored the contrary evidence indicating that plaintiff did, in fact, receive wages from the Spencers. As we noted above, however, this is simply not the case. The Full Commission clearly considered all of the evidence, weighed it, and expressly found “plaintiff’s testimony to be credible.” Likewise, the Full Commission gave more than sufficient attention to the videotape evidence, explicitly noting that the so-called “job duties” that plaintiff performed were done largely without the use of his left hand. The Full Commission’s findings of fact were supported by the evidence, and they in turn supported the Full Commission’s conclusions of law. Defendants’ arguments therefore fail.

Finally, we note plaintiff’s asserted cross-assignment of error. Because we hold in plaintiff’s favor, any cross-assignment of error is moot.[**Note 1**] Having conducted a thorough review of the briefs and record on appeal, we affirm the Full Commission’s opinion and award.

Affirmed.

Judges WYNN & BRYANT concur.

Report per Rule 30(e).

#### **NOTE**

1. We note for the sake of clarity that plaintiff’s asserted cross-assignment of error would fail in any case, as it did not constitute “an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken.” *Joyce v. Joyce*, 180 N.C. App. 647, 653, 637 S.E.2d 908, 912 (2006) (quoting N.C.R. App. P. 10(d) (2006)).