NO. COA06-1078

NORTH CAROLINA COURT OF APPEALS

Filed: 7 August 2007

NORMAN HOOD,
Employee
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 273087

THE MANGUM GROUP,
Employer,

and

ZURICH,
Carrier,
Defendants.

Appeal by defendants from opinion and award entered 24 May 2006 by Commissioner Christopher Scott for the North Carolina Industrial Commission. Heard in the Court of Appeals 15 March 2007.

Lewis & Roberts, P.L.L.C., by Jeffrey A. Misenheimer and Timothy S. Riordan, for defendants-appellants.

Younce & Vtipil, P.A., by Robert C. Younce, Jr., for plaintiff-appellee.

ELMORE, Judge.

A full panel of the North Carolina Industrial Commission (Full Commission) awarded Norman W. Wood (plaintiff) workers' compensation payments for disability and medical

expenses on 24 May 2006. It is from this opinion and award that the Mangum Group, Inc. (defendant-employer) and Zurich US (defendant-carrier, together, defendants) appeal.

Plaintiff, born 11 February 1946, started work for defendant-employer on 6 August 1990 as a service technician who maintained heavy equipment such as earth movers, bulldozers, backhoes, pavers, and dump trucks. He earned $15.50 an hour and an average weekly wage of $813.26. Plaintiff changed oil and air filters and replaced cutting blades on bulldozers and teeth on backhoes. Carrying out the duties required plaintiff to crawl, stretch, reach overhead, and bend to access various parts of machinery. These tasks included carrying blades that weighed between forty and one hundred pounds and reached four feet in length.

Plaintiff was servicing a JCB rubber tire backhoe on 8 March 2002 when the backhoe's driver accidentally struck him with the bucket. The blow struck plaintiff in the right chest area, throwing him against the air compressor of a nearby truck before he ultimately landed under the truck's drive shaft. Plaintiff injured his left shoulder in the fall. Plaintiff reported his injury to defendant-employer, but at the time did not seek medical attention or miss time from work.

Following the incident, plaintiff experienced increased pain in his left shoulder, and on 11 June 2002, defendant-employer sent him to Concentra Medical Centers for treatment. Doctors diagnosed plaintiff with a left shoulder contusion and shoulder impingement. Plaintiff had surgery on 27 January 2003 to repair his left rotator cuff. Defendant-employer paid for the surgery and for plaintiff's temporary total disability until plaintiff returned to his job as a service technician on 17 March 2003.

Upon his return, plaintiff was unable to perform all of his previous duties because of doctor-ordered light work restrictions. He could not bend, crawl, squat, stoop, perform overhead work, lift more than twenty pounds, or climb above a standing height of six feet. The limitations

prevented plaintiff from performing about half of his former job-related tasks and also slowed down his work pace by about fifty percent. Plaintiff testified that he would sit in his truck for about three or four hours of an eight-hour shift and that supervisor Phil Strain told him, "It's kind of hard to find something for you to do with these restrictions," and that human resources vice president Kathy Vaught said, "Well, come in and do what you can." Defendant-employer offered plaintiff a job as a parts runner, but he declined to take it.

Dr. William Lestini (Lestini) ordered plaintiff to stop working on 16 June 2004. Lestini diagnosed plaintiff with cervical spondylosis, lumbar canal stenosis, shoulder rotator cuff pathology, and ulnar neuropathy. Lestini testified that plaintiff's conditions "probably" resulted from a degenerative spine that was aggravated by the trauma of his work-related injury.

On 22 December 2004, defendant-employer laid off plaintiff, who received unemployment compensation but no workers' compensation during this time. Plaintiff began working part-time for defendant-employer on 5 March 2005.

Defendant-employer accepted plaintiff's claim for a compensable injury. Plaintiff filed a request for a hearing on suitable employment. Based on depositions from vocational evaluation experts Dr. Tina Bryant (Bryant) and Dr. Stephen Carpenter (Carpenter), the Industrial Commission found on 10 November 2005 that defendant-employer did not have suitable employment for plaintiff and plaintiff's refusal to accept the proposed position was not grounds for suspension of disability benefits. It awarded plaintiff temporary total disability benefits from the last date he worked for defendant-employer until he finds further employment. The Industrial Commission also awarded plaintiff temporary partial disability benefits from the time that he returned to part-time work on 5 March 2005 and continuing for a maximum of 300 weeks.

Defendants appealed the opinion and award to the Full Commission, which on 24 May 2006 affirmed the Industrial Commission's opinion and award.

I. Suitable Employment

Defendants first argue that plaintiff refused "suitable employment," negating their requirement to pay compensation. We disagree.

Upon review by this Court, the Full Commission's findings of fact and conclusions of law must be backed by competent evidence. *Ard v. Owens-Illinois*, __ N.C. App. __, __, 642 S.E.2d ___, ___ (2007). As 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." *Id*. at __, 642 S.E.2d at ___ (quotation and citation omitted).

An injured employee who refuses work suitable to his limited capacities is not entitled to compensation unless the Commission finds the refusal justified. N.C. Gen. Stat. §97-32 (2005). Suitability encompasses physical and mental abilities, pre- and post-injury salaries, and potential for advancement and income growth, among other factors. *Dixon v. City of Durham*, 128 N.C. App. 501, 504, 495 S.E.2d 380, 383 (1998). "Proffered employment would not accurately reflect earning capacity if other employers would not hire the employee with the employee's limitations at a comparable wage level" because an employee without the ability to earn wages competitively would be left without income if his job were terminated. *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 438, 342 S.E.2d 798, 806 (1986). Work so modified to meet the employee's limitations due to injury does not constitute a proper measure of the employee's ability to earn the same wages in a competitive job market if other employers would not offer a

similar job at a comparable wage. *Saums v. Raleigh Community Hospital*, 346 N.C. 760, 765, 487 S.E.2d 746, 750 (1997).

Plaintiff presented competent evidence that the work defendant-employer offered was unsuitable. Upon returning to his job as a service technician, plaintiff's physical restrictions caused him to work at a much slower pace than before and limited the tasks he could perform. Plaintiff's supervisors acknowledged that it was difficult to find work for him. Still, plaintiff continued to collect his wage, even earning overtime in busy periods. However, plaintiff spent time sitting in his truck as other technicians worked. Given plaintiff's restrictions and inability to perform at the same level as others with his job title, it appears unlikely that another employer would hire plaintiff for a similar position. *See Saums*, 346 N.C. at 765, 487 S.E.2d at 750. This modified work did not accurately reflect plaintiff's ability to earn wages in a competitive environment. *Peoples*, 316 N.C. at 438, 342 S.E.2d at 806.

Defendant-employer also offered plaintiff a job as a parts runner. This position proved unsuitable because driving for long periods of time aggravated plaintiff's back pain. Most general parts runner positions require lifting objects that exceed plaintiff's weight restrictions, hindering his ability to perform those duties. Finally, parts running jobs generally start at $8.00 per hour with the potential to earn up to $10.00 or $12.00 per hour. These factors make the parts runner position unsuitable.

II. Disability

Defendants next argue that the Full Commission erred in awarding plaintiff disability benefits, both temporary total benefits and temporary partial benefits. Defendants allege that plaintiff was capable of performing all of his duties upon returning to work after surgery. We disagree.

Defendant-employer will pay a plaintiff totally incapable of employment 66 . percent of his average weekly wages. N.C. Gen. Stat. §97-29 (2005). Defendant-employer will pay a plaintiff partially incapable of employment 66 . percent of the difference between his average weekly wages before the injury and the average weekly wages he is able to earn after the injury. N.C. Gen. Stat. §97-30 (2005). The compensation period for partial disability continues for a maximum of 300 weeks. *Id*. Total disability benefits may not run concurrently with temporary partial benefits. *See* N.C. Gen. Stat. §97-29 (2005) ("In case the partial disability begins after a period of total disability, the latter shall be deducted from the maximum period allowed for partial disability.").

Disability is defined by statute as "incapacity because of injury to earn the wages which the employee was receiving at the time at the time of injury in the same or any other employment." N.C. Gen. Stat. §97-2(9) (2005). In a workers' compensation claim, the plaintiff bears the burden of proving his incapacity to earn the same wages he had earned before the injury. *Harris v. North American Products*, 125 N.C. App. 349, 354, 481 S.E.2d 321, 324 (1997). The plaintiff may prove his disability by any of four methods: (1) producing medical evidence that, because of a work-related injury, he is physically incapable of work in any employment; (2) producing evidence that he is capable of some work, but after a reasonable effort, is unable to find employment; (3) producing evidence that he is capable of some work, but pre-existing conditions such as age, lack of education, or inexperience render that option futile; or (4) producing evidence that he has obtained employment at a wage less than he earned prior to the injury. *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 765-66, 425 S.E.2d 454, 457 (1993) (citation omitted). A plaintiff who can work and earn some wages, but less than he earned before the injury, is partially disabled. *Harris*, 125 N.C. App. at 354, 481 S.E.2d at 324.

Plaintiff produced competent evidence at trial to prove his disability under three of the four methods established by *Russell*. *Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457. Vocational tests show plaintiff reads at a seventh-grade level, spells at a sixth-grade level, and performs arithmetic at a fifth-grade level. These proficiency levels disqualify plaintiff from many clerical, administrative, or office positions. Plaintiff's advanced age, demonstrated deficiencies on memory, concentration and attention tests, and inexperience in work outside of manual labor will make re-training for a new type of vocation difficult. These pre-existing conditions prevent plaintiff from finding other employment and make futile his attempts to secure other employment. This evidence satisfies plaintiff's proof of disability under the third *Russell* method. *Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457.

Plaintiff's only significant work experience has come from manual labor, and dexterity tests show that his post-injury condition prohibits him from fast-paced repetitive work and work that requires him to grip and handle objects with his dominant right hand. Though plaintiff's physical limitations do not allow him to perform heavy labor, he is capable of light or sedentary work. However, this type of employment generally pays $6.00 per hour. This figure falls below the $15.50 per hour plaintiff earned prior to the injury. If plaintiff were to gain employment in this field, his post-injury salary would be lower than his pre-injury salary, satisfying a claim for disability under the fourth *Russell* method. *Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457.

Lestini permanently restricted plaintiff to lifting no more than twenty pounds, performing light bench work, climbing no higher than standing height, and abstaining from overhead work. Lestini said he thought plaintiff "should be released . . . with permanent total disability." Based on these restrictions, vocational evaluation experts Bryant and Carpenter**[Note 1]** testified that plaintiff could no longer perform his regular duties as a service technician. Based on these

opinions, plaintiff was not physically capable of working as a service technician because of his work-related injury. This evidence satisfies plaintiff's proof that he is not capable of any work, satisfying the first *Russell* method.

Once plaintiff began part-time work for defendant-employer on 5 March 2005, he no longer qualified for total disability under N.C. Gen. Stat. §97-29. *See Tucker v. Lowdermilk*, 233 N.C. 185, 189, 63 S.E.2d 109, 112 (1951) ("[I]f an award is made, payable during disability, and there is a presumption that disability lasts until the employee returns to work, there is likewise a presumption that disability ended when the employee returned to work."). However, plaintiff may recover partial disability compensation under *Harris* and N.C. Gen. Stat. §97-30 because his part-time wages did not meet or exceed his weekly wage of $813.26 at the time of his injury.

Affirmed.

Judges McGEE and STEPHENS concur.

Report per 30(e).

NOTE

1. Defendants challenge Carpenter's opinions as suspect based on his previous experience testifying primarily for plaintiffs in other workers' compensation claims. However, this Court has held that the competency of an expert witness "is a question addressed primarily to the sound discretion of the trial court" and that "[t]he fact that the witness is . . . a consultant specially retained by a party to the litigation [] does not disqualify him as an expert. The effect of this circumstance upon the weight to be given his opinion is for the trial body to determine." *Credit Co. v. Concrete Co.*, 31 N.C. App. 450, 459-60, 229 S.E.2d 814, 820-21 (1976).