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NO. COA08-1552

NORTH CAROLINA COURT OF APPEALS

Filed: 15 September 2009

HARRY TANNER,
Employee,
Plaintiff

v.

N. C. Industrial Commission
I.C. No. 277961

COLUMBUS MCKINNON
CORPORATION,
Employer,

and

LIBERTY MUTUAL INSURANCE
COMPANY,
Carrier,
Defendants.

Appeal by defendants from Opinion and Award of the North Carolina Industrial Commission entered 11 September 2008. Heard in the Court of Appeals 9 June 2009.

McAngus, Goudelock, & Courie, P.L.L.C., by H. George Kurani and Eloise O. Morgan, for defendants-appellants.

Poisson, Poisson & Bower, PLLC, by Fred D. Poisson, Jr. and E. Stewart Poisson, for employee-appellee.

WYNN, Judge.

In 1966, Plaintiff Harry Tanner began working for Defendant Columbus McKinnon Corporation, which obtained workers' compensation insurance coverage from Defendant Liberty Mutual Insurance Company ("Defendants"). In 1980, he started working in the tool room; in 1985, he was promoted to the position of tool and die operator.

On 26 June 2002, Tanner tripped and fell over pallets into a storage room ladder, and injured his right shoulder. His claim was accepted as compensable and he received temporary total disability benefits from 27 February 2003 until 3 August 2003 when he returned to work for Columbus McKinnon Corporation.

On 9 January 2003, Dr. Jeffrey Daily of OrthoCarolina evaluated Tanner's right shoulder and right arm. Tanner reported that he had been experiencing pain for about a month, and that he had a long history of shoulder bursitis. Initially, Dr. Daily recommended rotator cuff strengthening and a change in medication but, on 27 February 2003, Tanner underwent shoulder surgery "to repair a massive right rotator cuff tear."

At a 23 July 2003 visit with Dr. Daily, Tanner complained of "a lack of significant progress, poor motion and some subacromial popping." Dr. Daily recommended that he resume work with "no lifting greater than twenty pounds, no pushing or pulling greater than twenty pounds and no overhead work." He returned to work with these restrictions on 3 August 2003.

On 1 December 2003, Tanner reported that "he had been functioning pretty well at his job." Dr. Daily released him at maximum medical improvement, and assigned a twenty-five percent (25%) permanent partial impairment to Tanner's right arm. Dr. Daily also assigned "permanent work restrictions of no overhead work" and discussed other restrictions orally, including "no lifting greater than 10 to 15 pounds on a regular basis and no lifting above chest level or overhead." Dr. Daily stated that he

did not assign all of the restrictions in writing "because if he had, per his testimony, [Tanner] would not have been able to work."

Tanner returned to visit Dr. Daily on 15 April 2004. Dr. Daily reported that Tanner had "a poorly functioning rotator cuff and that he would have significant long-term restrictions on overhead work and lifting with the right arm." When Tanner returned again on 3 February 2005, he had some improvement, but continued to have symptoms in his shoulder. Dr. Daily continued Tanner on his work restrictions, noting, "Significant activity is going to cause him difficulty." Dr. Daily planned to see Tanner "only as needed" as he did not anticipate any changes to Tanner's rating or work restrictions.

Unable to reach an agreement regarding compensation, Defendants requested that this matter be assigned for hearing. Following a hearing, Deputy Commissioner Kim Ledford filed an Opinion and Award concluding Tanner should be awarded compensation under N.C. Gen. Stat. § 97-31(13) (2007) "for his twenty-five percent permanent partial disability rating (25% PPD) to his right arm[,] that he is "entitled to ongoing medical treatment for his right shoulder[,] and that he failed to show that his current job was considered "make work" or that he was unable to earn a competitive wage such that he is totally disabled.

Tanner appealed to the Full Commission. On 11 September 2008, the Commission filed an Opinion and Award which reversed Commissioner Ledford's decision. The Commission made the following conclusions of law:

1. Plaintiff sustained an admittedly compensable injury by accident to his right arm on June 26, 2002.

2. Plaintiff is entitled to his most munificent remedy under the Workers' Compensation Act. In order for the Commission to determine Plaintiff's most munificent remedy, the Commission must first determine Plaintiff's wage-earning capacity.

3. If employment is so modified because of the employee's limitations that it is not ordinarily available in the competitive job market, then it is not indicative of a claimant's wage-earning capacity. Based on the totality of the evidence of record, the Full Commission concludes that Plaintiff's current job is so modified because of his physical limitations related to his compensable injury that it is not indicative of his wage earning [sic] capacity. Therefore, the Full Commission concludes there to be insufficient evidence upon which to determine Plaintiff's wage-earning capacity.

. . .

5. While Plaintiff may be entitled to compensation under Sections 97-29 and 97-31 of the North Carolina General Statutes, the Full Commission concludes that he is not required to make an election of remedies at this point in time. Plaintiff has the exclusive right to determine the timing of his making the election of his most munificent remedy.

(internal citations omitted).

Defendants appeal, arguing that the Commission's conclusion that Tanner's current job is overly modified and not indicative of his earning capacity is not supported by adequate findings of fact; the Commission's conclusion that if Tanner determines he can no longer perform his current job, it would not constitute a refusal of suitable employment is not supported by adequate findings of fact; and the Commission's conclusion that Tanner presently is not

required to elect a compensation remedy is not supported by adequate findings of fact.

Preliminarily, we note that on review of an Opinion and Award from the Commission, this Court is "limited to reviewing 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). Findings may be set aside on appeal only "when there is a complete lack of competent evidence to support them[.]" *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 914 (2000) (citing *Saunders v. Edenton OB/GYN Ctr.*, 352 N.C. 136, 140, 530 S.E.2d 62, 65 (2000)). However, we review the Commission's conclusions of law *de novo*. *Griggs v. Eastern Omni Constructors*, 158 N.C. App. 480, 483, 581 S.E.2d 138, 141 (2003).

"[T]o permit meaningful appellate review of the Commission's decision, the findings of fact must adequately reflect that plaintiff produced sufficient evidence to meet his burden of proving disability." *Olivares-Juarez v. Showell Farms*, 138 N.C. App. 663, 667, 532 S.E.2d 198, 201 (2000) (citing *Coppley v. PPG Indus., Inc.*, 133 N.C. App. 631, 635, 516 S.E.2d 184, 187 (1999)). A presumption of disability in favor of an employee arises where the claimant and employer have executed a Form 21, Agreement for Compensation for Disability, or a Form 26, Supplemental Agreement as to Payment of Compensation, provided that the forms stipulate to a continuing disability and are later approved by the Commission.

Johnson v. Southern Tire Sales & Serv., 358 N.C. 701, 706, 599 S.E.2d 508, 512 (2004).

Absent these limited circumstances, the claimant may discharge his burden of proving disability in one of the following ways:

(1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

Russell v. Lowes Product Distribution, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (internal citations omitted). Only after the claimant has met his initial burden of proving his disability will the burden then shift to the employer to demonstrate that the employee is capable of earning wages. See *Kennedy v. Duke Univ. Med. Center*, 101 N.C. App. 24, 32-33, 398 S.E.2d 677, 682 (1990).

In the present case, the record indicates that neither a Form 21 nor a Form 26 had been filed and approved by the Commission. A Form 21 Agreement was executed by the parties, but the Commission was unable to approve the Agreement without the submission of additional evidence. Prior to the hearing and at the request of Tanner, the Form 21 was withdrawn by an order of Deputy Commissioner Theresa B. Stephenson on 6 December 2005. Accordingly, no presumption of disability favoring Tanner arose,

and the burden remained with Tanner to come forward with evidence of a diminished earning capacity as a result of his job-related injury. N.C. Gen. Stat. § 97-2(9) (2007).

Here, the findings of fact do not reveal that he made any such showing. Regarding Tanner's ability to perform his current position with Defendant, the Commission found:

24. Based on the totality of the evidence of record, including the testimony of Plaintiff, his co-workers, and Dr. Daily, the Full Commission finds that Plaintiff's job has been modified substantially to accommodate his restrictions and, thus, would not be considered a real job in the competitive labor market.

However, finding that Tanner's current position is overly modified and not indicative of his wage-earning capacity was premature and not sufficient to sustain his burden of proving disability. *Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457. Further, the Commission's determination that there was "insufficient evidence upon which to determine Plaintiff's wage-earning capacity" suggests that Tanner actually failed to discharge his burden of establishing a loss of wage-earning capacity, and therefore was not disabled under section 97-2.

Moreover, the Commission's conclusion that "Plaintiff *may be* entitled to compensation under Sections 97-29 and 97-31 of the North Carolina General Statutes" is not supported by the Commission's findings (emphasis added). Compensability under section 97-29 requires an employee to establish that his or her injury caused an impairment of wage-earning capacity. Absent a finding of such impairment, Tanner would not be entitled to

compensation under section 97-29, and would likely only be entitled to an election of compensability under section 97-31(13), which allows compensation for specified injuries without regard to loss of wage-earning power.

Accordingly, the Commission's decision must be set aside, and remanded for additional findings of fact regarding Tanner's disability status. Furthermore, we need not address Defendants' remaining arguments.

Reversed and Remanded.

Judges STROUD and BEASLEY concur.

Report per Rule 30(e).