

NO. COA99-1074

NORTH CAROLINA COURT OF APPEALS

Filed: 29 August 2000

BRENDA HANKINS,
Employee-Plaintiff,

v.

MERCY HOSPITAL
Employer,

SELF-INSURED (KEY RISK MANAGEMENT
SERVICES, Servicing Agent)
Defendants

Industrial Commission
I.C. File No. 301332

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COURT OF APPEALS
OF NORTH CAROLINA

Appeal by plaintiff from opinion and award entered 5 May 1999
by the North Carolina Industrial Commission. Heard in the Court of
Appeals 7 June 2000.

*The Law Office of Robin Hudson, by Faith Herndon, for
plaintiff-appellant.*

*Morris York Williams Surles & Barringer, LLP, by G. Lee Martin
and Lisa F. Schwanz, for defendant-appellees.*

McGEE, Judge.

Brenda Hankins (plaintiff) appeals from the 5 May 1999 opinion
and award of the North Carolina Industrial Commission (Commission).
The Commission awarded plaintiff temporary partial disability
payments, total disability payments, past and future medical
expenses, and a reasonable attorney's fee, and directed defendants
Mercy Hospital (Mercy) and Key Risk Management Services (Key Risk)
to pay the costs.

Plaintiff, a fifty-year old woman, began working as an
executive secretary for Mercy beginning in December 1990.

*Sellers
Bunn
Maurotic (Concerning impact,
presenting in part)*

Plaintiff was diagnosed with carpal tunnel syndrome on 10 August 1992 while she was employed by Mercy. Plaintiff had surgery on her right hand on 25 November 1992. However, she developed extreme pain in her right hand and was diagnosed with reflex sympathetic dystrophy (RSD) five weeks after surgery. As a result of her hand problem, plaintiff did not return to her prior employment with Mercy.

The parties executed a Form 21, Agreement for Compensation for Disability, on 30 December 1992, which stipulated that plaintiff suffered from "pain in hands and wrists" and further provided weekly compensation of \$230.68 beginning 23 November 1992 and continuing for "necessary" weeks. The Commission approved the Form 21 agreement on 26 January 1993.

Plaintiff made several unsuccessful attempts to return to work with Mercy beginning on 31 March 1993. Plaintiff worked as a dispatcher in the security department, a cashier in the gift shop, and a heart monitor technician. She left each job due to increased pain in her hands.

The parties executed a Form 26, Supplemental Memorandum of Agreement as to Payment of Compensation. The Commission approved the Form 26 on 6 May 1993, in which defendants agreed to pay compensation from 31 March 1993 for the "necessary" weeks due to "temporary partial" disability. The record shows a Form 28B, Insurance Carrier's Report of Compensation and Medical Paid, dated 4 October 1993, was filed showing defendants paid plaintiff \$20,782.18, including temporary total disability compensation from

23 November 1992 until 30 March 1993, temporary partial disability from 31 March 1993 until 7 September 1993, and medical expenses.

Plaintiff visited Dr. Stephen J. Naso for the first time on 11 January 1993. Dr. Naso submitted a Form 25, Evaluation for Permanent Disability, to the Commission on 16 September 1993, rating plaintiff with fifteen percent permanent impairment to her right hand. Dr. Naso also conducted a functional capacity evaluation and determined that plaintiff should not have continued or extended use of her hands in her employment, such as typing or writing, and should have frequent breaks. In addition, Dr. Naso stated that she should not perform any jobs involving repetitive use of her hands, heavy lifting, or cold temperatures.

Plaintiff began working for Host Marriott in a Starbucks coffee shop at the Charlotte-Mecklenburg airport on 3 May 1994. No job description was available to her, but during training sessions, plaintiff realized that her job involved handling heavy coffee pots and dishes. On the first work day, plaintiff had difficulty performing the job because of pain in her hands, and plaintiff's supervisor reassigned her to the gift shop.

For the remainder of her employment with Host Marriott, plaintiff's job duties in the gift shop primarily involved operating the cash register. In that capacity, plaintiff experienced pain in her right hand. In June 1994, plaintiff's supervisor reduced her work hours from forty hours per week to thirty-two hours per week. About three weeks later, plaintiff's hours were reduced to about twenty-four hours per week. In order

to alleviate plaintiff's hand pain, her employer gradually reduced her hours until plaintiff stopped working on 4 January 1995 because of her hand problems.

Plaintiff began working for a telemarketer in February 1995, calling business customers from her home. Her employment required plaintiff to work three or four hours a week at a rate of six dollars per hour. However, plaintiff was never paid for the work.

In December 1994, plaintiff began to visit Dr. Sunil Dogra, Clinical Assistant Professor in the Department of Anesthesiology at the University of North Carolina at Chapel Hill. Dr. Dogra excused plaintiff from work for the months of March and April 1995. Dr. Dogra provided plaintiff a letter in May 1995, which stated that plaintiff "should refrain from any repetitive motion involving her wrists and hands such as typing or working a calculator and or cash register."

Dr. Dogra recommended vocational rehabilitation for plaintiff on 23 August 1995. Subsequently, according to hospital records, plaintiff again sought employment. In October 1995, plaintiff was "trying to work some as a typist." By December 1995 she was working fifteen hours per week as a receptionist. However, she lost her job by 15 January 1996 because "she couldn't do enough work to make it worth their while." According to plaintiff's June 1996 medical records, she was working ten hours a week. Her July 1996 medical record indicates that plaintiff "got a job which will be temporary for the next 6-8 weeks" beginning 15 July 1996. The job involved secretarial work, which plaintiff "says . . . is rough

. . . because of repetitive motion."

Plaintiff filed a Form 33 on 22 July 1994, requesting that her claim be assigned for hearing. Defendants filed a response to plaintiff's request for a hearing on 12 August 1994. Specifically, defendants argued, "Employee-Plaintiff's diagnosis of trigger finger of the right hand is not causally related to her original compensable injury sustained on August 10, 1992. In addition, Employee-Plaintiff was last injuriously exposed to the risk of her present condition while employed with a subsequent employer, Host Mariott." A deputy commissioner heard plaintiff's case on 11 August 1995 and entered an opinion and award on 25 March 1998 awarding plaintiff "disability benefits for any and all periods of temporary total and temporary partial disability due to plaintiff's compensable bilateral carpal tunnel syndrome and/or right RSD for all such periods beginning 4 May 1994 and continuing through the date of the hearing." Defendants timely appealed to the Commission, which heard the appeal on 16 October 1998.

The Commission found as fact in its opinion and award entered 5 May 1999 that:

On 7 September 1993, Dr. Naso found plaintiff to be at maximum medical improvement and rated her with a 15% permanent impairment to the right hand.

The Commission concluded as a matter of law that:

3. Because the parties executed a Form 21 in this case, plaintiff was entitled to a presumption that she continued to be disabled until defendant met its burden to show that the plaintiff became employable. [citation omitted] Defendants have met their burden by showing that plaintiff was actually employable

in her job with defendant Host Marriot [sic], making the same or lesser wages than before her injury. [citation omitted] Thereafter, the burden shifted back to plaintiff to show that she continued to remain disabled. [citation omitted] Plaintiff has failed to meet this burden.

4. As a result of her RSD and bilateral carpal tunnel syndrome, plaintiff is entitled to temporary partial disability compensation based upon the difference between her pre-injury wages and the wages earned at Starbucks. As of 5 January 1995 when plaintiff left the employ of Starbucks, defendant is not responsible for continuing, with the exception of the two month period in March and April 1995 during which she was written out of work by Dr. Dogra.

The Commission awarded plaintiff the following:

Defendants Mercy Hospital and Key Risk are directed to pay temporary partial disability benefits for the period of time during which plaintiff was employed by Starbucks. Defendants are further required to pay temporary total disability payments for March and April 1995 during which time plaintiff was written out of work by Dr. Dogra. Any amount under this paragraph which remains owing by defendants shall have deducted from it any temporary partial disability payments made by defendants between 5 January 1995 and the present.

Plaintiff appeals.

I.

Plaintiff argues that defendants have failed to rebut the Form 21 presumption of plaintiff's disability, and therefore plaintiff is entitled to temporary total disability benefits under N.C. Gen. Stat. § 97-30 from 5 January 1995 to 28 February 1998. We disagree.

Our Court discussed the relationship between the finding of

maximum medical improvement and temporary total disability in *Franklin v. Broyhill Furniture Industries*, 123 N.C. App. 200, 204-05, 472 S.E.2d 382, 385, cert. denied, 344 N.C. 629, 477 S.E.2d 39 (1996):

Temporary total disability is payable only "during the healing period." The "healing period" ends when an employee reaches "maximum medical improvement." Only when an employee has reached "maximum medical improvement" does the question of her entitlement to permanent disability arise.

(Citations omitted). Our Court further held that "plaintiff is not entitled to temporary total disability after reaching maximum medical improvement" in *Demery v. Converse Incorporated*, ___ N.C. App. ___, ___, ___ S.E.2d. ___, ___ (2000) (emphasis added). Therefore, temporary total disability benefits may not be awarded after an employee reaches maximum medical improvement.

In the case before us, the Commission found as fact, and the plaintiff did not dispute that:

On 7 September 1993, Dr. Naso found plaintiff to be at maximum medical improvement and rated her with a 15% permanent impairment to the right hand.

See *Franklin*, 123 N.C. App. at 206, 472 S.E.2d at 386 (holding that the plaintiff should not be awarded temporary total disability after Commission determined, and the plaintiff did not dispute, that the plaintiff reached maximum medical improvement). Therefore, plaintiff's argument that she should receive temporary total disability from 5 January 1995 to 28 February 1995 is without merit.

Plaintiff also argues the Commission erred by not awarding her

temporary total disability benefits beginning May 1995. As previously discussed, once an employee has reached maximum medical improvement, the employee is not entitled to temporary total disability after that date. This argument by plaintiff is without merit.

Furthermore, although neither party argues this issue on appeal, we note that the Commission erred in awarding plaintiff temporary total disability compensation from March to April 1995, after the date of maximum medical improvement. Therefore, we find that the Commission's award of temporary total benefits for March and April 1995 is error, and we reverse. Nonetheless, we also note the Commission found that plaintiff had a fifteen percent permanent impairment to the right hand, and therefore plaintiff may be entitled to permanent partial disability. See N.C. Gen. Stat. § 97-29 (1991).

II.

Plaintiff contends that she is entitled to temporary partial disability benefits from 5 January 1995 to 28 February 1995 and from May 1995 and thereafter.

Although the Commission properly determined plaintiff's temporary partial disability benefits during her employment with Host Marriott, the Commission failed to make any findings as to plaintiff's employment from 5 January to 28 February 1995 and May 1995 and afterward, in its opinion and award. "While the Industrial Commission is not required to make specific findings of fact on every issue raised by the evidence, it is required to make

findings on crucial facts upon which the right to compensation depends." *Lawton v. County of Durham*, 85 N.C. App. 589, 592, 355 S.E.2d 158, 160 (1987). As the specific nature and earnings of plaintiff's employment from 5 January 1995 to 28 February 1995 and May 1995 and thereafter is crucial in determining temporary partial disability, and the Commission failed to make any findings on this issue, this matter must be remanded for findings of fact. *See id.*

In sum, we affirm the Commission's award of temporary partial disability for plaintiff's employment with Host Marriott from 3 May 1994 to 4 January 1995. However, because (1) the Commission failed to make findings as to plaintiff's employment from 5 January 1995 to 28 February 1995 and May 1995 and thereafter, and (2) the Commission erred in awarding plaintiff temporary total disability benefits for April and May 1995 after she had reached maximum medical improvement, we reverse and remand to the Commission for entry of findings and an opinion and award consistent with this opinion.

Affirmed in part; reversed and remanded in part.

Judges WYNN and MARTIN concur.

Report per Rule 30(e).