NO. COA07-692

NORTH CAROLINA COURT OF APPEALS

Filed: 18 March 2008

LEONOR R. BRAMMER,
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 342769

FREEDOM COMMUNICATIONS,
Employer,

KEY RISK MANAGEMENT SERVICES,
Carrier,
Defendants.

Appeal by plaintiff from Opinion and Award of the North Carolina Industrial Commission entered 20 March 2007. Heard in the Court of Appeals 8 January 2008.

Brumbaugh, Mu & King, P.A., by Nicole D. Wray, for plaintiff-appellant.

Prather Law Firm, by J.D. Prather, for defendants-appellees.

WYNN, Judge.

To prove disability under the Workers' Compensation Act, a plaintiff must produce medical evidence that she is incapable of work due to her compensable injury, evidence that she is capable of some work but cannot secure employment, or evidence that she has obtained employment at a lower wage than that earned prior to the injury.**[Note 1]** Here, because the plaintiff failed to prove disability through any of these means, we affirm the Full Commission's denialof her claim for temporary total disability benefits.

On 13 June 2002, Plaintiff Leonor Brammer was employed in two jobs: one during the day as a food sanitation specialist with Moore's Cafeteria, and the other at night with Daily News, owned by Defendant-Employer Freedom Communications, where she inserted advertisements and magazines into daily newspapers. While at her Daily News job on the evening of 13 June, Ms. Brammer slipped and fell on a newspaper, landing on her buttocks on the cement floor. She immediately informed her supervisor of the incident and requested medical attention. The next day, Ms. Brammer was diagnosed with acute lumbar sacral strain; she was instructed to put heat on the affected area and released with light-duty work restrictions to return to work on 14 June 2002.

Over the next several weeks, Ms. Brammer complained of continuing pain in her lower back and had X-rays performed that showed advance facet arthritis at two vertebra and a large degenerative spur at another. She was referred to physical therapy, which she completed on 13 August 2002, after noting improvement with the treatment. Nevertheless, Ms. Brammer still had back pain and sought a return appointment to the doctor, which she later stated was denied by the defendant carrier. Ms. Brammer was then in a motor vehicle accident in November 2002, following which she received extensive chiropractic treatment, including to her lower back. However, Ms. Brammer did not tell Dr. Brett Whitekettle, the chiropractor who treated her, about her accident at work.

In May 2003, Ms. Brammer was diagnosed with lumbar pain with mild radiculopathy and mild osteoarthritic spurring of the lumbar spine; she then had an MRI performed that showed diffuse disc bulging and mild stenosis at two vertebra. Dr. Patrick Curlee evaluated Ms. Brammer on 7 July 2003 and found that she had lumbar stenosis with exacerbation of symptoms

secondary to her fall at work. Ms. Brammer had not informed Dr. Curlee of her September 2002 car accident. He recommended she have epidural steroid injections to treat her back.

Ms. Brammer was in another car accident in September 2003 and returned to her chiropractor for treatment. She was referred to an orthopedic surgeon in December 2003. After the epidural steroid injections, additional physical therapy, and a TENS unit failed to improve Ms. Brammer's pain, a CT Myelogram showed that she had disc protusion, disc bulge, degenerative joint disease, and hypertrophy at several vertebra. Further attempts at different therapies and treatments likewise did not provide Ms. Brammer relief from her ongoing pain, so her treating physician recommended a discogram to identify the specific source of her pain and perhaps to discuss surgery.

Ms. Brammer left her job at Daily News in April 2003, stating that her decision to leave was based on her pain in attempting to lift and carry the bundles of newspapers and inserts. Prior to leaving that job, Ms. Brammer also missed work due to her pain; however, she did not have any doctor's notes for these absences. She has maintained her employment with Moore's Cafeteria.

Deputy Commissioner Phillip A. Holmes heard Ms. Brammer's workers' compensation claim on 24 February 2005 and issued an Opinion and Award on 10 January 2006, awarding her medical expenses, temporary total disability compensation, and some attorney's fees. After Freedom Communications appealed, the Full Commission heard the case; in its 20 March 2007 Opinion and Award, it affirmed the award of medical expenses for treatment incurred as a result of Ms. Brammer's 13 June 2002 accident at work, concluding that the fall "materially exacerbated her pre-existing back condition." However, the Full Commission reversed the award of temporary total disability benefits to Ms. Brammer.

Ms. Brammer now appeals, assigning error only to the Full Commission's finding and conclusion that "there is no evidence of record that any physician has ever taken [Ms. Brammer] out of work," such that she is not entitled to temporary total disability benefits. Ms. Brammer essentially contends that her treating physicians did not consider her job description because her claim was initially treated as being for medical expenses only, but that her testimony that she left the Daily News job due to pain is sufficient to qualify for disability benefits. We find this argument to be without merit.

Our review of an Opinion and Award of the Full Commission 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). Inparticular, this Court "does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999). 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).

Under the Workers' Compensation Act, "disability" is defined as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C. Gen. Stat. §97-2(9) (2005). Thus, disability is the " impairment of [the injured employee's] earning capacity rather than physical disablement." *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 434, 342 S.E.2d 798, 804 (1986). A plaintiff has the burden of

proving disability, *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 684 (1982) , and can meet this burden in one of four 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. Lowe's Prod. Distribution, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (internal citations omitted).

In the instant case, Ms. Brammer has offered no evidence to establish her disability under any of these four means. Indeed, several of her treating physicians explicitly stated in their depositions that they did not restrict her from work, either at her Daily News job or otherwise. Moreover, Ms. Brammer maintained her employment with Moore's Cafeteria and presented no testimony or documentation that she was unable to secure additional employment, either after reasonable efforts or for some other reason, or that she had gotten a second job that paid less. Perhaps Ms. Brammer did leave her position with Daily News due to pain; nevertheless, competent evidence in the record supports the Full Commission's finding and conclusion that "there is no evidence of record that any physician has ever taken [Ms. Brammer] out of work ." Accordingly, these assignments of error are overruled.

Affirmed.

Judges BRYANT and ELMORE concur.

Report per Rule 30(e).

NOTE

1. *Russell v. Lowe's Prod. Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993).