NO. COA07-346

NORTH CAROLINA COURT OF APPEALS

Filed: 15 January 2008

STEPHEN W. MCCARVER,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 397085

HUNTER MOTORS, INC.,
Employer,

BRENTWOOD SERVICES,
Servicing Agent,
Defendants.

Appeal by defendants from Opinion and Award filed 4 January 2007 by the Industrial Commission. Heard in the Court of Appeals 17 October 2007.

The Sumwalt Law Firm, by Mark T. Sumwalt and Vernon Sumwalt, for plaintiff-appellee.

Teague, Campbell, Dennis & Gorham, L.L.P., by Tara D. Muller, for defendant-appellants.

BRYANT, Judge.

Hunter Motors, Inc. and Brentwood Services (defendants) appeal from a 4 January 2007 Opinion and Award awarding Stephen W. McCarver (plaintiff) temporary total disability benefits of $430.85 per week from 13 April 2004 to 18 July 2005; temporary partial disability benefits of two-thirds the difference between plaintiff's pre-injury average weekly wage and his wages upon returning to work beginning on 18 July 2005; reasonable attorney's fees; and all

related medical expenses. For the reasons stated herein, we affirm the Industrial Commission's Opinion and Award. In 1993, plaintiff began working with defendant in the shipping and receiving department. In 1996, he transferred to the sales division, where he worked until April 2005. In the sales job, plaintiff received orders for parts either from customers who walked in, customers who placed orders over the phone, or technicians who worked for defendant and who needed parts while repairing cars. Plaintiff worked in a two-story building and a separate warehouse. He retrieved parts approximately 120 times on an average day, and seventy-five percent of the time, he had to retrieve them from the ground-level floor where his counter was located. For twenty percent of the time, he had to walk up eighteen to twenty stairs to retrieve the parts from the upstairs level. Otherwise, plaintiff walked to retrieve the parts from a warehouse, located across the street from his building. On 19 January 2004, plaintiff injured his right knee by catching his leg on the wheel of a hand truck. Defendants admitted their liability for plaintiff's injury through a Form 60 Admission dated 19 April 2004.**[Note 1]**

Dr. Ronald Singer treated plaintiff on 25 February 2004. On 13 April 2004, Dr. Singer performed a third surgery on plaintiff's right knee. On 7 July 2004, Dr. Singer allowed plaintiff to return to sedentary work for defendant.

On plaintiff's first day back at work, despite receiving a copy of Dr. Singer's sedentary work restrictions, the parts manager, Mr. Ed Mills, informed plaintiff he would be performing his normal pre-injury sales job "at your desk on the front counter." On 13 July 2004, plaintiff called Dr. Singer's office and complained of increased pain from getting up to retrieve parts more than fifty-two times in a three-hour period. Consequently, Dr. Singer imposed additional restrictions, permitting plaintiff to get up only four times per hour and against retrieving parts that weighed more than ten pounds, consistent with his sedentary work restrictions.

On 2 August 2004, plaintiff called Dr. Singer's office to report he was getting up to retrieve parts between forty to fifty times per shift. Dr. Singer removed plaintiff from work altogether until he could reevaluate plaintiff's knee. On 20 August 2004, Dr. Singer reevaluated plaintiff's knee and restricted plaintiff against (1) getting up to retrieve parts more than four times per hour; (2) lifting, pushing, or pulling greater than ten pounds; (3) bending, kneeling, stooping, squatting, or twisting; and (4) stair or ladder climbing. On 23 August 2004, plaintiff returned to work under these restrictions. Plaintiff reported receiving help with his job from co-workers twenty-five percent of the time and the remainder of the time, plaintiff performed his job in the same way he had pre-injury. In addition, plaintiff reported getting up during an eight-hour period from fifty times to more than one hundred and nineteen times.

On 1 October, 17 November, and 20 December 2004, Dr. Singer saw plaintiff, who each time complained of defendant's unwillingness to comply with Dr. Singer's restrictions. On 19 January 2005, Dr. Singer imposed permanent restrictions which included (1) getting up no more than four times per hour; (2) no lifting greater than thirty pounds; (3) only occasional stair climbing with no squatting, stooping, kneeling, or repetitive bending; and (4) standing no more than thirty minutes at a time.

In March 2005, plaintiff began to experience numbness in his left arm and, on 15 March 2005, was seen at the Miller Orthopaedic Clinic. A physician's assistant took plaintiff out of work for two weeks and scheduled a CT scan. On 18 March 2005, plaintiff spoke to Mr. Mills regarding his condition, upcoming CT scan and follow-up appointment on 6 April 2005. At the 6 April 2005 appointment, Dr. Craig Brigham authorized plaintiff to return to work on 21 April 2005. The clinic informed plaintiff that they would fax Dr. Brigham's return-to-work note to Mr. Mills, who acknowledged receipt of such fax. In addition, plaintiff called Mr. Mills on 8 April

2005; however, when he could not be located, plaintiff informed Mr. Ray Kimbrell that plaintiff had been written out of work for an additional two weeks and asked Mr. Kimbrell to relay this information to Mr. Mills. On 14 April 2005, Mr. Millsleft plaintiff a voicemail indicating that because defendant had not heard from plaintiff since 18 March 2005, plaintiff had been terminated from employment effective 8 April 2005. Plaintiff did not return to work for defendant and began working for Nourse Auto Mall on 18 July 2005.

On 10 August 2005, Deputy Commissioner J. Brad Donovan heard the case. After the hearing, the parties deposed Dr. Singer; Dr. Jerry L. Barron, M.D.; and Veronica Pressley, CRC, MSRC. On 13 April 2006, Deputy Commissioner Donovan filed an Opinion and Award, granting plaintiff total disability compensation from 13 April 2004 through 18 July 2005 (less amounts paid as wages for work with defendant during that period), and temporary partial disability from 18 July 2005, and continuing throughout the relevant 300-week period in N.C. Gen. Stat. §97-30. Defendants appealed to the Full Commission, which affirmed the deputy commissioner's decision with slight modifications in an Opinion and Award filed on 4 January 2007. Defendants appeal.

Defendants appeal whether the Commission erred by finding and concluding plaintiff's post-injury employment was outside his physical restrictions and that plaintiff is entitled to disability benefits. Defendants argue the Commission erred by determining plaintiff never returned to suitable employment. We disagree.

> While the issue of whether plaintiff failed to perform [his] duties is a question of fact, the determination of whether plaintiff's failings constituted a constructive refusal to accept suitable employment is a question of law. The distinction is significant, as an appellate court's standard of review of the Commission's findings of fact is

> markedly different from its standard for reviewing the Commission's conclusions of law.

McRae v. Toastmaster, 358 N.C. 488, 500 n.3, 597 S.E.2d 695, 703 n.3 (2004). We review whether competent evidence supports the findings made by the Commission, and whether these findings in turn support the Commission's conclusions of law. *Adams v. AVX*, 349 N.C. 676, 509 S.E.2d 411 (1998).

Defendants are required to show plaintiff's work with defendant was "suitable" before defendants are relieved from their duty to pay disability compensation. *See* N.C. Gen. Stat. §97-32 (2005).

> "Suitable employment" means employment in the local labor market or self-employment which is reasonably attainable and which offers an opportunity to restore the worker as soon as possible and as nearly as practicable to pre-injury wage, while giving due consideration to the worker's qualifications (age, education, work experience, physical and mental capacities), impairment, vocational interests, and aptitudes. No one factor shall be considered solely in determining suitable employment.

Collins v. Speedway Motor Corp., 165 N.C. App. 113, 122, 598 S.E.2d 185, 191-192 (2004) (emphasis omitted). Under this definition, work that exceeds the physical limitations imposed by an injured employee's treating doctor is not "suitable" as a matter of law. *Lowery v. Duke Univ.*, 167 N.C. App. 714, 719-21, 609 S.E.2d 780, 784-85 (2005) ("the Commission did not err when it determined that plaintiff did not constructively refuse suitable employment. . . .[T]he work plaintiff was instructed to do did not fall within [the doctor's] restrictions"). "The Full Commission is the 'sole judge of the weight and credibility of the evidence,' and this Court may not second-guess those determinations." *Alexander v. Wal-Mart Stores, Inc.*, 166 N.C. App. 563, 573, 603 S.E.2d 552, 558 (J. Hudson, dissenting), *rev'd and dissent adopted*, 359 N.C. 403, 610 S.E.2d 374 (2005) (per curiam).

The Commission made the following findings:

> 13. Following plaintiff's complaints about the job duties and at the request of defendant, on September 9, 2004, Veronica Pressley, vocational case manager, observed plaintiff for one and a half hours while he performed the parts sales clerk job. Ms. Pressley prepared a written job analysis based on her observations. The analysis and her testimony revealed that plaintiff was required to stand up to perform work-related duties three times during the one and a half hour observation period. Plaintiff voluntarily stood up one other time to retrieve a snack, but this action was not related to or required by the position of employment.
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> 14. Plaintiff alleges that Ms. Pressley's observation occurred during a period of unusually slow business at defendant-employer and that one and one half hours does not suffice to gain an accurate impression of the physical demands of the job. Ms. Pressley testified that based on her training and education, she determined when the best observation period would be to represent the usual work routine. Ms. Pressley concluded that due to the repetitive nature of the job, her observation period was sufficient to gain an accurate impression of the physical demands of the parts sales clerk position.
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> 1[5]. The Commission gives greater weight to plaintiff's testimony and the job description prepared by Mr. Mills, based upon his more than 20 years experience as a parts supervisor, that stated that the parts sales clerk job required an employee to pick parts 10 to 15 times per hour, over the estimate provided by Ms. Pressley. In addition, based upon the greater weight of the evidence, the Commission finds that the job of parts sales clerk provided by defendant-employer was not reasonably within plaintiff's return to work restrictions and did not constitute suitable employment.

Plaintiff's job with defendant between 7 July 2004 and 14 April 2005 required him to exceed Dr. Singer's physical restrictions. Defendant had no job available within those restrictions before that time, and even after plaintiff had returned to work, Mr. Mills assigned plaintiff to his old job "at your desk at the front counter. . . pulling parts, waiting on walk-in technicians, telephones." Dr. Singer's medical records confirm defendant's failure to comply

with his restrictions, indicating that plaintiff was required to retrieve parts in excess of the number of times that Dr. Singer allowed plaintiff to perform per work shift. The written job description prepared by Mr. Mills, upon which the Commission relied specifically in finding of fact number fifteen (incorrectly numbered as finding "thirteen"), indicates plaintiff's job required him to exceed the frequency plaintiff was medically permitted to retrieve parts. The Commission's findings that plaintiff never returned to "suitable" employment where defendants did not accommodate plaintiff's job duties to fall within Dr. Singer's physical restrictions are supported by competent evidence. *See Lowery*, 167 N.C. App. at 719-21, 609 S.E.2d at 784-85. Accordingly, the Commission properly determined plaintiff did not constructively refuse employment where the post-injury employment was not suitable for plaintiff. *Id.* at 718, 609 S.E.2d at 784.

Further, defendants claim the Commission "failed to make any findings whatsoever regarding any . . . testimony" by Ms. Lisa Howell, who was "plaintiff's co-worker who sat next to plaintiff 'every day, all day.'" However, the Commission properly entered findings of fact thirteen through fifteen, which, although they do not cite Ms. Howell by name, reflect the combined testimony of Ms. Howell and Ms. Veronica Pressley, plaintiff's vocational case manager. *See Gutierrez v. GDX Automotive*, 169 N.C. App. 173, 176, 609 S.E.2d 445, 448 (2005)(the Commission "must consider and evaluate all the evidence before it is rejected"). Competent evidence supports the Commission's findings that plaintiff (1) was temporarily and totally disabled between 13 April 2004 through 18 July 2005, and (2) has been temporarily and partially disabled from 18 July 2005 through the present time and continuing throughout the remainder of the 300-week period in N.C. Gen. Stat. §97-30. While "[t]he determination of whether a disability exists is a conclusion of law," *Lanning v. Fieldcrest-Cannon, Inc.*, 352 N.C.

98, 108, 530 S.E.2d 54, 61 (1986), the Commission's finding regarding the extent of disability is "binding on appeal if there is any competent evidence in the record to support" it. *Foster v. Carolina Marble & Tile Co.*, 132 N.C. App. 505, 509, 513 S.E.2d 75, 78 (1999).

The Commission found plaintiff was totally disabled between 13 April 2004 and 18 July 2005. Plaintiff may prove disability 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. Lowes Prod. Distr., 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993).

In the present case, plaintiff established his total disability during the period between 13 April 2004 and 18 July 2005. Defendants' admission that plaintiff satisfied his initial burden of proving disability, supports the Commission's finding plaintiff suffered from a disability until he returned to work on 7 July 2004. *Troutman v. White & Simpson, Inc.*, 121 N.C. App. 48, 52, 464 S.E.2d 481, 484 (1995). After 7 July 2004 and through 18 July 2005, plaintiff proved his disability by "showing [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." *Fletcher v. Dana Corp.*, 119 N.C. App. 491, 494, 459 S.E.2d 31, 34 (1995) (internal citations and quotations omitted). Plaintiff was capable of "some" work, and finding of fact number six describes Dr. Singer's restrictions allowing plaintiff to return to some but not all work, after 13 April 2004. *See Workman v. Rutherford Elec. Membership Corp.*, 170 N.C. App. 481, 490, 613 S.E.2d 243, 250(holding that work restrictions denote the capability to perform "some" work). A successful

return to "work" signifies a return only to work that is "suitable," and not to work that is unsuitable. *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 437-38, 342 S.E.2d 798, 806 (1986). Here, plaintiff made a reasonable effort to return to work with defendant, but was unsuccessful in securing suitable employment because his job duties exceeded his medical restrictions.

The Commission's determination plaintiff was totally disabled between 7 July 2004 and 18 July 2005 is substantiated by competent evidence. The Commission found:

> 22. Following his termination by defendant-employer, plaintiff looked for work but remained out of work until July 18, 2005, when he obtained a job with Nourse Auto Mall. Plaintiff earned a total of $2,730.33 with this new employer through the pay period ending September 27, 2005.

This finding reflects plaintiff made a reasonable but unsuccessful job search before 18 July 2005.

> [A]n injured employee's earning capacity must be measured . . . by the employee's own ability to compete in the labor market. If post-injury earnings do not reflect this ability to compete with others for wages, they are not a proper measure of earning capacity. The ultimate objective of the disability test is . . . to determine the wage that would have been paid in the open market under normal employment conditions to claimant as injured. . . . Wages paid an injured employee out of sympathy, or in consideration of his long service with the employer, clearly do not reflect his actual earning capacity, and for purposes of determining permanent disability are to be discounted accordingly. The same is true if the injured man's friends help him to hold his job by doing much of his work for him, or if he manages to continue only by delegating his more onerous tasks to a helper, or if the work for which claimant is paid is made work or sheltered work.

Id. at 437, 342 S.E.2d at 805-06 (citations and internal quotations omitted). Accordingly, where plaintiff's job with defendant after 7 July 2004 required him to exceed his physician's restrictions post-injury, as well as get help from his coworkers to perform unsuitable employment, the Commission's conclusion of law number three is consistent with *Peoples*.

Finally, plaintiff has been temporarily, partially disabled since 18 July 2005. "North Carolina General Statutes §97-30 provides allowance for 'where the incapacity for work resulting from [an] injury is partial[.]'" *Shaw v. United Parcel Serv.*, 116 N.C. App. 598, 600, 449 S.E.2d 50, 52 (l994), *aff'd*, 342 N.C. 189, 463 S.E.2d 78 (1995). Temporary and partial disability occurs when an employee returns to work with a post-injury earning capacity that is less than his pre-injury earnings. *See* N.C. Gen. Stat. §97-30 (2005); *Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457 (disability exists where "the production of evidence that [the employee] has obtained other employment at a wage less than that earned prior to the injury"). Plaintiff returned to work earning less than his pre-injury average weekly wage after 18 July 2005. Accordingly, the Commission concluded:

> 4. Plaintiff is entitled to temporary partial disability compensation equal to two-thirds of the difference between his pre-injury average weekly wage and his wages upon returning to work for Nourse Auto Mall beginning on July 18, 2005 and continuing for a maximum of 300weeks from January 19, 2004. N.C. Gen. Stat. §97-30.

Defendants failed to present any evidence that plaintiff's earning capacity after 18 July 2005, exceeded his actual earnings at Nourse Auto Mall. *See Tyndall v. Walter Kidde Co.*, 102 N.C. App. 726, 731-32, 403 S.E.2d 548, 551 (1991) (These actual earnings create "a presumption. . . that [plaintiff's] earning capacity was consistent with those earnings. . . . In that [his] 'post-injury' earnings were less than [his] 'pre-injury' earnings, there was a proof of a reduction in [plaintiff's] earning capacity."). Competent evidence supports the Commission's determination that plaintiff has been temporarily and partially disabled since 18 July 2005, and the Commission's findings of fact support such conclusion of law. These assignments of error are overruled.

Affirmed.

Judges MCGEE and HUNTER concur.

Report per Rule 30(e).

NOTE

1. Prior to his compensable injury on 19 January 2004, plaintiff had sustained another work-related injury to his right leg on 11 September 1998. Dr. Ronald Singer, M.D. treated plaintiff for this 1998 injury by performing two arthroscopic surgeries; one on 29 October 1998 and another on 16 October 1999. After the surgeries, Dr. Singer assigned a 20% permanent partial disability to plaintiff's right knee on 1 March 2000. Plaintiff's 1 March 2000 appointment was the last time he saw Dr. Singer with respect to the 1998 injury, after which time he returned to his sales job with defendant. On 8 March 2002, the Industrial Commission approved a Form 21 Agreement that the parties entered into for the 20% permanent partial disability rating. Plaintiff continued working in his sales job after the Form 21 Agreement and until the 19 January 2004 injury occurred.