

NO. COA99-817

NORTH CAROLINA COURT OF APPEALS

Filed: 15 August 2000

PERRY WELCH,
Employee,
Plaintiff-Appellee,

v.

Industrial Commission
No. 431525

LOWE'S FOODS STORES,
Employer,

and

KEMPER INSURANCE COMPANY,
Carrier,
Defendant-Appellants.

Appeal by defendants from opinion and award of the North Carolina Industrial Commission entered 26 February 1999. Heard in the Court of Appeals 18 April 2000.

Robert D. Davidson, Jr. for plaintiff-appellee.

Orbock Bowden Ruark & Dillard, PC, by Barbara E. Ruark, for defendant-appellants.

McGEE, Judge.

This case arises from a worker's compensation claim of plaintiff Perry Welch for a disabling back injury he suffered while lifting during his part-time employment with defendant Lowe's Foods Stores (Lowe's).

An opinion and award was entered by a deputy commissioner on 5 February 1998 granting plaintiff's claim for an injury sustained in a workplace accident on 28 March 1994. Defendants appealed to the Full Commission, which made the following findings of fact.

B.164

Scott

Riggsbee dissenting

Plaintiff was a part-time employee of Lowe's at the time of his injury. His job included stocking shelves, unloading trucks, breaking down pallets, and shelving groceries. Plaintiff also worked full-time at Spencer Parlier, Inc. (Spencer) as a small appliance salesman. Plaintiff worked at least forty hours a week at Spencer and averaged twenty to twenty-eight hours per week at Lowe's.

The Commission found that "plaintiff was lifting a wooden pallet when he felt a severe pain in his back" around 28 March 1994. An MRI showed he had suffered a ruptured disc. Dr. Michael B. Hussey provided medical treatment to plaintiff and performed surgery to remove the ruptured disc around 19 April 1994. Plaintiff returned to work but began experiencing pain and numbness in his left leg and his back, which eventually required additional surgery on 28 December 1994. Dr. Hussey released plaintiff to return to his job with Lowe's around 14 February 1995. He released plaintiff to return to both his full-time and part-time jobs with a twenty pound lifting restriction around 7 March 1995. Dr. Hussey removed the lifting restriction on 18 April 1995 and released plaintiff from his care around 13 June 1995, with a fifteen percent permanent partial disability rating to his back.

The Commission further found plaintiff worked at both his full-time and part-time jobs until August 1995 when he began experiencing medical problems and sought medical treatment from Dr. Craig Derian. Dr. Derian instructed plaintiff (1) not to lift more than ten to fifteen pounds, (2) not to engage in prolonged

repetitive bending, lifting or stooping, and (3) to frequently change positions from sitting to standing to walking. Plaintiff informed Jeff Beane (Beane), his supervisor at Lowe's, of these restrictions. Beane told plaintiff he had no work for him within those restrictions. Plaintiff quit his job with Lowe's on 3 October 1995. Having suffered a heart attack in May 1995, plaintiff underwent heart surgery on 14 December 1995 and was released to return to work from this procedure on 29 January 1996.

The Commission further found that plaintiff thereafter began seeing Dr. James E. Nitka for his back problems. Plaintiff returned to work at Lowe's while working at Spencer in November 1996 but worked fewer hours each successive week due to the pain he experienced before quitting on 21 December 1996. Dr. Nitka instructed plaintiff to undergo a functional capacity evaluation and determined plaintiff could not work in both his full-time and part-time positions. Dr. Nitka recommended that plaintiff limit his lifting to items weighing no more than fifteen pounds, refrain from squatting and kneeling, and work at a job that allowed him to frequently alter his body position during the course of a day.

The Commission further found that plaintiff could not do repetitive bending, lifting, or stooping and should not regularly lift more than twenty to twenty-five pounds. It also found that plaintiff was working at the time of the hearing but concluded that he could not work more than forty hours per week. The Commission found that plaintiff could perform his full-time job, but that he had been unable to work both his full-time and part-time jobs since

3 October 1995 because of his injury.

The Commission found that prior to plaintiff's injury, his average full-time wages were \$400 per week at Spencer and his average part-time wages were \$139.65 at Lowe's. The Commission determined plaintiff sustained a decrease in his wage-earning ability as a direct result of his 28 March 1994 injury and awarded him compensation of \$93.10 per week. Defendants appeal.

Defendants contend on appeal that the Commission erred by: (I) finding plaintiff suffered an injury while working his part-time job at Lowe's, (II) finding that plaintiff is disabled as a result of this injury, and (III) awarding plaintiff disability benefits. We disagree.

The standard of review of our Court of an opinion and award of the Commission is limited to two questions:

(1) whether there is any competent evidence in the record to support the Commission's findings of fact; and (2) whether those findings of fact support the Commission's conclusions of law. Thus, if there is competent evidence to support the findings, those findings are conclusive on appeal even though there is plenary evidence to support contrary findings.

Locklear v. Stedman Corp., 131 N.C. App. 389, 393, 508 S.E.2d 795, 797 (1998) (citations omitted).

I.

Defendants argue the Commission erred in finding that plaintiff suffered an injury at his part-time job with Lowe's. Plaintiff's testimony provides sufficient evidence to determine the time and place of his injury. Plaintiff stated in his deposition,

"I bent over to lift [up a pallet]. When I did, it was a pop and a sensation of burning in my lower back." He also stated that he re-injured his back on 2 October 1995 while unloading a truck. There was sufficient evidence before the Commission to conclude that plaintiff's injury occurred at his part-time job at Lowe's.

II.

Defendants next argue that plaintiff is not currently disabled because he can still work at Lowe's and earn the wages he earned prior to his injury. The evidence before the Commission includes Dr. Nitka's deposition in which he stated that plaintiff is unable to perform the physical tasks his Lowe's job required. Dr. Nitka testified that, "[s]o I feel as though the patient is able to carry on his job as a salesperson without much trouble; but the second job, I think, is beyond his capacity to perform work." Dr. Nitka's medical records and plaintiff's functional capacity evaluation provide additional evidence of plaintiff's inability to perform his prior work at Lowe's.

Plaintiff testified that he could not perform the part-time job at Lowe's since he was already working full-time earlier in the week. Plaintiff also testified that he could not perform his work at Lowe's in November 1996 because "[i]t was just aggravating my injury more. The pain was getting too intense--the burning, the numbness. I was just--couldn't even hardly feel my legs sometimes." Plaintiff further testified that he would be unable to perform the Lowe's job even if he were not working full-time, because he was incapable of doing "any manual labor work."

Beane, plaintiff's supervisor at Lowe's, testified at the hearing that:

Mr. Welch brought the papers that were referred to earlier about his restrictions and gave them to me. And I read them and I told him, being his immediate supervisor over grocery, I did not have nothing [sic] in that department; he would need to see Rick Hudson, the store manager, who's over the whole store if there was anything else in the store that he could possibly do.

Richard Hudson, the Lowe's store manager, testified that plaintiff had stated he did not believe he could perform the job offered by Lowe's. The testimony at the hearing, and Dr. Nitka's deposition and medical records, provided sufficient evidence for the Commission to find plaintiff could not work both his full-time and part-time jobs or perform his previous responsibilities at Lowe's.

III.

Defendants argue that plaintiff is not disabled within the meaning of N.C. Gen Stat. § 97-2(9), and that the Commission's findings of fact on the issue of disability do not support its conclusions of law. "Disability" is statutorily defined as the "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) (1991). "[T]he term 'disability' signifies an impairment of wage-earning capacity rather than a physical impairment." *Anderson v. Northwestern Motor Co.*, 233 N.C. 372, 374, 64 S.E.2d 265, 266 (1951). A "[c]laimant's post-injury earning capacity is the determinative factor in assessing disability." *Tyndall v. Walter Kidde Co.*, 102 N.C. App.

726, 730, 403 S.E.2d 548, 550, *disc. review denied*, 329 N.C. 505, 407 S.E.2d 553 (1991). However, the compensation an employee can receive "must be based only upon his wages from the employment in which he was injured." *Barnhardt v. Cab Co.*, 266 N.C. 419, 429, 146 S.E.2d 479, 486 (1966) (quoting *Quinn v. Pate*, 124 Vt. 121, 127, 197 A.2d 795, 799 (1964)).

To support a conclusion of disability, the Commission must find facts that the employee is: (1) incapable of earning pre-injury wages in the same employment, (2) incapable of earning pre-injury wages in any other employment, and (3) the incapacity to earn pre-injury wages in the same or other employment was caused by plaintiff's injury. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). When an employee establishes his disability, the burden shifts to the employer to produce evidence that suitable jobs exist that would compensate the employee at the employee's pre-injury wage level. *Coppley v. PPG Indus., Inc.*, 133 N.C. App. 631, 634-35, 516 S.E.2d 184, 187 (1999).

In the case before us, the findings of fact support the Commission's conclusions of law and the temporary total disability award of \$93.10 per week to plaintiff. In reaching its conclusions of law, the Commission examined the lost earning capacity suffered by plaintiff as the result of his injury at Lowe's and his disability. The Commission found that plaintiff could no longer earn the wages from his part-time job while working his regular, full-time job.

Defendants argue that plaintiff is not precluded from working

at Lowe's since he could reduce his hours at Spencer, thereby allowing him to work his previous hours at Lowe's in the same or a different capacity. If plaintiff worked his customary pre-injury hours at Lowe's, defendants could argue that plaintiff is capable of earning his pre-injury wages from Lowe's and thus be relieved of their responsibility to compensate plaintiff for his injury. However, such a shift in plaintiff's work schedule would only allow plaintiff to work the maximum number of hours doctors say he is capable of working each week, which is forty. This change would still deprive plaintiff of his part-time earning capacity, while relieving Lowe's of its responsibility to compensate plaintiff for his injury. While an employee cannot recover lost wages in a second job from injuries suffered in the first, neither should a second employer mitigate its responsibility by compelling plaintiff to shift hours away from another employer for the purpose of earning his pre-injury wages in the same or different employment. Plaintiff's ability to reduce his hours at Spencer to work at Lowe's does not negate plaintiff's disability. Plaintiff would still suffer a decrease in his overall earning capacity, which is the determining factor in assessing disability.

Defendants also argue that plaintiff failed to seek additional employment and that Lowe's had met its burden by showing that a Lowe's job existed within plaintiff's restrictions. As previously discussed, plaintiff is limited to working forty hours per week. Plaintiff uses this time to work in the full-time job he had at Spencer before his disabling injury. While Lowe's may have

demonstrated that a job exists within plaintiff's physical restrictions, performing that job would require plaintiff to work in excess of his forty hour week limit. Plaintiff is incapable of performing the part-time work at Lowe's in addition to his full-time job, thus making any Lowe's part-time employment not a feasible alternative until plaintiff is capable of resuming both work schedules.

Defendants also contend plaintiff should only be entitled to limited wage loss benefits under N.C. Gen. Stat. § 97-30. However, defendants cite no case law in support of their argument nor do they develop this argument. The Commission's findings of fact support its conclusion of temporary total disability. We overrule this assignment of error.

Finally, defendants argue that (1) plaintiff quit his Lowe's job in October 1995 because of a heart condition, (2) plaintiff could have used his real estate license to recover his lost earning capacity, and (3) plaintiff did not file a 28 U form. However, defendants failed to assign error to findings of fact numbers nine, eleven, eighteen, and twenty-two, which deal with these arguments. Accordingly, pursuant to N.C.R. App. P. 10(a), we do not review these arguments.

We have reviewed defendants' remaining assignments of error and find them to be without merit.

Affirmed.

Judges GREENE and EDMUNDS concur.

Report per Rule 30(e).