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NO. COA07-772

NORTH CAROLINA COURT OF APPEALS

Filed: 5 February 2008

BARBARA SHUFORD,
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File Nos. 441413 & 488251

REGAL MANUFACTURING COMPANY
- WORLDTEX, INC.,
Employer,

CRUM & FOSTER,
Carrier,

WAUSAU INSURANCE,
Carrier,
Defendants.

Appeal by defendants from an opinion and award entered 12 April 2007 by the Full Commission. Heard in the Court of Appeals 8 January 2008.

Randy D. Duncan for plaintiff-appellee.

Jones, Hewson, & Woolard, by Lawrence J. Goldman, for defendant-appellants.

BRYANT, Judge.

Worldtex, Inc. and Crum & Foster (defendants) appeal from an Opinion and Award of the North Carolina Industrial Commission (the Commission) entered 12 April 2007 awarding Barbara Shuford (plaintiff) workers' compensation benefits under N.C. Gen. Stat. §97-25 and §97-29. For the reasons below, we affirm the Order and Award of the Commission.

Facts

Based on the unchallenged findings of fact made by the Commission, plaintiff was employed by defendant-employer as a working supervisor through 16 July 2004. On 30 December 2002, plaintiff sustained an admittedly compensable injury when she struck the inside of her left knee against the corner of a desk. Plaintiff missed no work as a result of the injury on 30 December 2002. Plaintiff began receiving care for the injury, diagnosed as a left knee contusion, at Hart Industrial Clinics on 8 January 2003 and continued receiving care through 5 August 2003. A note from the Hart Industrial Clinic, dated 22 July 2003, indicated plaintiff reported an improvement in her left knee.

On 14 August 2003, plaintiff was referred to Carolina Orthopaedic Specialists and was examined by Dr. Stephen J. Sladicka and Dr. Donald A. Campbell because she continued to experience pain in her left knee. Both doctors were unable to identify the cause of plaintiff's ongoing left knee pain and found no medical evidence of a medial meniscal tear, plaintiff's subsequent diagnosis. Both doctors doubted the likelihood that plaintiff's 30 December 2002 incident would cause a torn meniscus.

Plaintiff received treatment for continued complications with her left knee from Dr. H. Grey Winfield of the Hickory Orthopaedic Center beginning on 21 June 2004 and continuing through 7 July 2004. Dr. Winfield's notes first mentioned plaintiff experiencing pain in her right knee. During his deposition testimony, Dr. Winfield indicated he did not believe plaintiff's torn meniscus was the cause of the left knee pain he treated, nor did he believe plaintiff's right knee pain was directly related to the incident on 30 December 2002.

On 12 July 2004, plaintiff suffered another injury, this time to her left elbow. Plaintiff was released to regular duty work the following day. The compensability of plaintiff's 12 July

2004 injury is not at issue in this appeal. Three days after plaintiff returned to regular work duty, on 16 July 2004, defendant-employer's plant closed and plaintiff was terminated. After defendant-employer's plant closed, plaintiff attempted to find new employment, contacting over 100 potential employers. However, plaintiff's search was unsuccessful.

On 27 September 2004 and 31 December 2004, plaintiff was seen by Dr. Jerry L. Barron. Dr. Barron ordered an MRI of plaintiff's left knee. The MRI, conducted on 17 November 2004, showed "posterior horn medial meniscal tear with displaced flap and adjacent chondromalacia." Dr. Alan D. Massengill interpreted the MRI noting that the MRI indicated the meniscal tear may have been present but not detected during a prior MRI conducted on 24 February 2003. Based on the findings, Dr. Barron recommended plaintiff undergo left knee surgery and an MRI of her right knee.

On 15 November 2005, plaintiff's claim for disability benefits was heard by Deputy Commissioner John B. Deluca, who ruled plaintiff was entitled to temporary total disability compensation and payment of medical expenses. Defendants appealed the decision to the Full Commission. In an Opinion and Award entered 12 April 2007, the Full Commission affirmed the Deputy Commissioner with minor modifications. Defendants appeal.

Defendants raise the issues of whether the Commission erred by: (I) awarding temporary total disability benefits from the date defendant-employer's plant closed; (II) finding and concluding the plaintiff's ongoing left knee problems were the result of her work injury; and (III) finding the plaintiff's right knee problems were the direct and natural result of the work injury. For the reasons stated below, we affirm the Opinion and Award of the Commission.

Standard of Review

“Our review of the Commission’s opinion and award is limited to determining whether competent evidence of record supports the findings of fact and whether the findings of fact, in turn, support the conclusions of law.” *Rose v. City of Rocky Mount*, 180 N.C. App. 392, 395, 637 S.E.2d 251, 254 (2006), *review denied*, 361 N.C. 356, 644 S.E.2d 232 (2007). The Commission’s findings “are conclusive on appeal when supported by competent evidence, even though there is evidence that would have supported findings to the contrary.” *Hollman v. City of Raleigh*, 273 N.C. 240, 245, 159 S.E.2d 874, 877 (1968).

I

Defendants argue the Commission erred by awarding temporary total disability benefits from the date plaintiff’s employment was terminated because there was no evidence plaintiff’s lost earnings were the result of her injury on 30 December 2002. We disagree.

“A claimant seeking to recover under the Workers’ Compensation Act . . . bears the burden of proving both the existence and extent of disability.” *Fletcher v. Dana Corporation*, 119 N.C. App. 491, 494, 459 S.E.2d 31, 34 (1995). An employee is “disabled” when he is incapable “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) (2007). An employee may meet the burden of proving an inability to earn the same wages as before the injury by producing 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.” *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (citation omitted).

In *Fletcher*, the employee suffered a work-related injury to his arm. 119 N.C. App. at 492, 459 S.E.2d at 32. The employee, after re-injuring his arm, was placed on work restrictions. *Id.* However, due to the restrictions, the employee was unable to perform his job or any other

available position and was released from duty. *Id.* This Court affirmed the Commission's award of temporary total disability benefits to the employee when, after diligent efforts, he was unable to obtain employment. Relying on *Russell and Bridges v. Linn-Corriher Corp.*, 90 N.C. App. 397, 368 S.E.2d 388 (1988), this Court held: "an employee who suffers a work-related injury is not precluded from workers' compensation benefits when that employee, while employable within limitations in certain kinds of work, cannot after reasonable efforts obtain employment due to unavailability of jobs." *Fletcher*, 119 N.C. App. at 500, 459 S.E.2d at 37.

In *Britt v. Gator Wood, Inc.*, ___ N.C. App. ___, 648 S.E.2d 917 (2007), a case similar to the instant case, the plaintiff, after suffering a work-related injury, was laid off because the defendant-employer was forced to downsize. *Id.* at ___, 648 S.E.2d at 919. Although this Court ultimately remanded the case in order for the Commission to make additional findings, the Court addressed the defendants' argument that the plaintiff's loss of wage earning capacity was due to the lay-off. This Court reasoned "[although] the immediate cause of the loss of plaintiff's wages . . . may have been the lay-off, that fact does not preclude a finding of disability." *Id.* at ___, 648 S.E.2d at 921.

Here, plaintiff met her burden to prove disability under the second prong of *Russell*. The findings show that plaintiff, although limited in the work she can perform, is capable of performing some work and that "after a reasonable effort on [her] part, [she has] been unsuccessful in [her] effort to obtain employment." *Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457. The Commission specifically found that "plaintiff continued to have pain in both knees and had difficulty standing more than 1.5 to 2 hours, or sitting more than 1.5 to 2 hours." The Commission also found that "[p]laintiff has unsuccessfully sought employment at more than 100 places . . . [and] plaintiff's efforts in seeking employment constitute a reasonable job search."

Like the employee in *Fletcher*, plaintiff established she was incapable of earning pre-injury wages by reasonably, although unsuccessfully, attempting to obtain employment. Accordingly, this assignment of error is overruled.

II & III

Defendants next argue the Commission erred by finding plaintiff's ongoing left knee problems were the result of the work injury and by finding plaintiff's right knee problems were the result of the work injury. We disagree.

The Commission made the following relevant findings:

14. In his deposition, Dr. Barron opined that plaintiff's compensable injury of December 30, 2002, caused plaintiff's ongoing left knee pain and indirectly caused her right knee pain due to additional pressure on plaintiff's right knee. Dr. Barron testified that plaintiff's knee problems have restricted her from prolonged standing and she should be allowed to sit as needed. Dr. Barron's testimony corroborates the testimony of plaintiff, who testified that she felt the left knee injury was forcing her to place additional stress on her right knee.

15. On January 27, 2005, plaintiff returned to Dr. Sladicka reporting bilateral knee pain. Upon examination, Dr. Sladicka did not give any work restrictions at that visit. Regarding plaintiff's right knee pain, Dr. Sladicka testified that it is common for patients to develop problems with an uninjured leg from favoring the injured leg.

...

19. The Full Commission finds that, based upon the testimony of Dr. Barron, plaintiff's persistent left knee pain was causally related to her compensable injury of December 30, 2002. Additionally, based upon the testimony of Dr. Barron, the Full Commission finds that plaintiff's right knee pain developed as a natural consequence of plaintiff's left knee injury and is, thus, proximately related to the December 30, 2002 work-related incident. Although Dr. Winfield and Dr. Campbell both were of the opinion that plaintiff's right knee problems were not related to the compensable left knee injury, the Full Commission gives greater weight to the testimony of Dr. Barron. Dr. Barron's opinion

that plaintiff's right knee pain is proximately related to the compensable left knee injury is supported by the testimony of Dr. Sladicka, who testified that it is common for patients to develop problems with an uninjured leg from favoring the injured leg. Moreover, Dr. Barron's opinion is supported by plaintiff's own testimony, in which she stated that she felt the left knee injury was forcing her to place additional stress on her right knee.

It is well established that "[t]he Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998). Although there may be some evidence in the record to support a contrary holding, "in a Workers' Compensation case the findings of fact by the Industrial Commission . . . are conclusive on appeal when supported by competent evidence, even though there is evidence that would have supported findings to the contrary." *Hollman*, 273 N.C. at 245, 159 S.E.2d at 877. "[O]n appeal, 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*, 349 N.C. at 681, 509 S.E.2d at 414.

Although the evidence was conflicting, there is competent evidence to support the Commission's findings of fact and, in turn, its conclusions of law. Dr. Massengill testified that the discrepancies in the first and second MRIs conducted on plaintiff's left knee may have been a result of the manner in which the MRIs were conducted. He also testified that, in his opinion, the meniscus tear was present, although undetected, in the first MRI. Additionally, Dr. Barron testified that plaintiff's 30 December 2002 injury was the direct cause of her ongoing left knee pain and indirect cause of plaintiff's right knee pain. Dr. Barron also testified that injury to one knee can result in problems with the other knee. Furthermore, defendants' contention that Dr. Barron's testimony was based upon a hypothetical question and thus incompetent is without

merit. *Haponski v. Constructor's Inc.*, 87 N.C. App. 95, 100, 360 S.E.2d 109, 112 (“interrogator may form his hypothetical question on any theory which can be deduced from the evidence and may select as a predicate such facts as the evidence reasonably tends to prove”). Based upon the evidence before us, we hold there is sufficient competent evidence to support these findings. Accordingly, this assignment of error is overruled.

Affirmed.

Judges WYNN and ELMORE concur.

Report per Rule 30(e).