

Burns - affirmed
Beckham
Maurice

NO. COA99-816

NORTH CAROLINA COURT OF APPEALS

Filed: 16 May 2000

COA99-816
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NORTH CAROLINA
COURT OF APPEALS

RAYVON EAST,
Employee,
Plaintiff;

v.

NORTH CAROLINA STATE UNIVERSITY,
Employer;

SELF-INSURED (Key Risk Management
Services, Inc.),
Defendant.

From the North Carolina
Industrial Commission
I.C. NO. 448691

Appeal by defendant from opinion and award filed 9 April 1999
by the North Carolina Industrial Commission. Heard in the Court of
Appeals 18 April 2000.

*Charles Peed and Associates, by Janet H. Clary, for plaintiff-
appellee.*

*Attorney General Michael F. Easley, by Assistant Attorney
General Don Wright, for defendant-appellant.*

GREENE, Judge.

North Carolina State University (Employer) appeals an opinion
and award of the Full Commission of the North Carolina Industrial
Commission (Full Commission) filed on 9 April 1999.

The evidence shows that on 30 May 1994, Rayvon East (East) was
working as a general maintenance man at Camp Sertoma, a camp
administered by Employer. On that day, East sustained a
compensable injury when a horse he was attempting to mount reared
up and landed on top of him. The accident caused injury to East's

left arm and right leg. East and Employer subsequently entered into a Form 21 Settlement Agreement which was approved by the North Carolina Industrial Commission on 2 September 1994. Pursuant to the Form 21 Settlement Agreement, East was paid temporary total disability compensation until 20 February 1995. On 20 February 1995, East returned to work with Employer. At that time, Richard M. O'Keefe, Jr., M.D. (Dr. O'Keefe), East's treating physician for his compensable injury, placed East on work restrictions, including that East walk and stand only on level surfaces, restrict his lifting to under twenty-five pounds, and avoid using ladders.

East testified at a 3 February 1998 hearing before the Deputy Commissioner of the North Carolina Industrial Commission that from 20 February 1995 to 6 February 1997 he was able to perform his job duties without any physical problems. During this time period, East's job consisted of supervising maintenance. On 6 February 1997, Carol Blackard (Blackard), East's daughter who also worked for Employer, left her employment with Employer. East testified that after Blackard left her employment, his job description and duties changed. East's new duties included performing cleaning tasks such as mopping and sweeping, and these duties caused East pain in his back and leg.

East testified that in the fall of 1996 he was diagnosed with heart and lung problems which are unrelated to his compensable injury. As a result of his heart and lung problems, East began receiving treatment from several doctors and was occasionally absent from work. East notified his supervisor, Charles Michael

Bowman (Bowman), of his medical appointments when those appointments required him to be absent from work, and Bowman told East he did not need to obtain notes from these doctors confirming the appointments. Sometime after 6 February 1997, however, Bowman asked East to obtain paperwork from his doctors confirming his medical appointments for the days he had been absent from work in 1996 and 1997. When Bowman did not receive the requested medical excuses within thirty days of his request, East received a written warning regarding the request. The warning stated East had been absent from work twenty-three days since 27 October 1996 and had not furnished Bowman with medical excuses for those absences. East also received a written warning on 5 March 1997 stating he had "effected [sic] staff morale . . . by making negative remarks pertaining to work habitat."

On 19 March 1997, East injured his ankle while working in the camp swimming pool. East testified the work he performed in the swimming pool required him to use a ladder and to work on a sloped surface in violation of his work restrictions. As a result of the injury to East's ankle, Dr. O'Keefe reduced East's weight restriction from twenty-five pounds to ten pounds. Approximately one week after imposition of the new medical restrictions, Bowman assigned East to work in the camp kitchen. After working in the kitchen for one or two days, East told Bowman he was unable perform the kitchen duties because the work was causing him pain in his back and leg. On 3 April 1997, after Bowman failed to take action to change East's job duties, East stopped reporting for work.

Employer presented evidence at the 3 February 1998 hearing that on 3 February 1997, Bowman gave East a written notice requesting medical excuses for East's absences from work. Bowman testified he requested the excuses because East had been paid for these absences as a result of Bowman's belief they were related to East's 30 May 1994 compensable injury. Bowman later discovered several of the appointments had been with East's heart and lung physicians, and East was not entitled to receive paid leave for these absences.

Bowman testified that in the spring of 1997 East received new medical restrictions from Dr. O'Keefe. The new restrictions included a ten-pound lifting restriction and, as a result of this restriction, Bowman assigned East to perform cleaning tasks in the camp recreation hall. After East complained that sweeping in the recreation hall caused him back pain, Bowman changed East's duties to performing cleaning tasks in the kitchen. At the end of his first day of working in the kitchen, East told Bowman the work was "tiring" and he did not get along with a woman who also worked in the kitchen. After that day, East did not return to work, and he was terminated on 8 April 1997 for failure to report to work. Bowman testified he would have terminated any other employee who failed to report for work.

On 1 August 1997, East requested a hearing before the North Carolina Industrial Commission regarding whether he "should receive temporary total disability." In a response to East's request for a hearing, which was dated 27 September 1997, Employer stated:

"[East] WAS TERMINATED FROM EMPLOYMENT FOR NON-WORKERS' COMPENSATION RELATED REASONS AND, BUT FOR TERMINATION, WORK WOULD BE AVAILABLE."

The parties stipulated that as a result of East's 30 May 1994 accident that arose out of the course and scope of his employment with Employer, he suffered the following permanent disabilities: 5% of his left arm; 15% of his right leg; and 10% of his back.

Following the hearing, the Deputy Commissioner awarded East, in pertinent part, permanent partial disability compensation benefits, and Employer appealed the award. In an opinion and award filed 9 April 1999, the Full Commission made the following pertinent findings of fact:

7. . . . [E]mployer knew the cause of . . . East's absences [from work in 1996 and 1997] . . . [and] Bowman did not make any critical remarks regarding [East's] numerous absences during the period when he was out to attend to the newly discovered heart and lung problems.

. . . .

9. . . . From early February [of 1997] forward, for unexplained reasons, . . . [E]mployer no longer accommodated [East's] permanent restrictions and proceeded to alter [East's] work duties.

. . . .

14. . . . [T]he competent, credible, and convincing evidence of record fails to convincingly establish that [East] was actually terminated for misconduct or fault, unrelated to the compensable injury, for which a non-disabled employee would ordinarily have been terminated. [Employer] has failed to sufficiently meet its burden of proof in this regard and the reasons given by [Employer] for the dismissal are not credible and convincing.

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16. [Employer] has not to date offered [East] his job back with the same medical restrictions at which he had been previously working without difficulty.

The Full Commission then made the following pertinent conclusion of law:

3. [Employer] did not convincingly establish [East's] misconduct. Thus, [East's] termination was not a valid result of any misconduct and does not fall within the first prong of the *Seagraves* test, which would have to be met in order to shift the burden onto [East] to prove his ongoing disability. *Seagraves v. Austin Co. of Greensboro*, 123 N.C. App. 228, 472 S.E.2d 397 (1996).

The Full Commission then awarded East "continuing total disability benefits in the amount of \$153.21 per week, beginning April 3, 1997, and continuing until further order of the Commission."

The issue is whether the record contains competent evidence to support the Full Commission's finding of fact Employer failed to show East was "terminated for misconduct or fault, unrelated to the compensable injury, for which a non-disabled employee would ordinarily have been terminated."

Employer contends East's termination was a constructive refusal to accept suitable employment under N.C. Gen. Stat. § 97-32, and the record does not contain competent evidence to support the Full Commission's contrary finding.¹ We disagree.

¹Although Employer assigns error to the Full Commission's finding of fact "Employer has not . . . offered [East] his job back," Employer does not argue in his brief to this Court that

North Carolina General Statute section 97-32 provides:

"If an injured employee refuses employment procured for him suitable to his capacity he shall not be entitled to any compensation at any time during the continuance of such refusal, unless in the opinion of the Industrial Commission such refusal was justified."

N.C.G.S. § 97-32 (1999). An employer has the burden under section 97-32 of showing an employee has refused suitable employment. *Flores v. Stacy Penny Masonry Co.*, 134 N.C. App. 452, 456, 518 S.E.2d 200, 203 (1999). An employer may meet this burden by showing an employee actually refused suitable employment, or by showing an employee constructively refused suitable employment. *Williams v. Pee Dee Electric Membership Corp.*, 130 N.C. App. 298, 301, 502 S.E.2d 645, 647 (1998). Constructive refusal can be shown by evidence an employee was terminated "for misconduct or fault, unrelated to the compensable injury, for which a non-disabled employee would ordinarily have been terminated." *Seagroves v. Austin of Greensboro*, 123 N.C. App. 228, 234, 472 S.E.2d 397, 401 (1996). Once an employer makes this showing, the employee's misconduct or fault is presumed to constitute a constructive refusal to perform the work provided by the employer "unless the

East's refusal to accept Employer's alleged offer was an actual refusal of suitable employment under section 97-32. We, nevertheless, note the record contains competent evidence to support the Full Commission's finding of fact "Employer has not . . . offered [East] his job back," and we are, therefore, bound by this finding. See *Hemric v. Manufacturing Co.*, 54 N.C. App. 314, 316, 283 S.E.2d 436, 437-38 (1981) (appellate review of Commission's findings of fact limited to whether the record contains competent evidence to support those findings), *disc. review denied*, 304 N.C. 726, 288 S.E.2d 806 (1982).

employee is then able to show that his or her inability to find or hold other employment of any kind, or other employment at a wage comparable to that earned prior to the injury, is due to the work-related disability." *Id.*

In this case, the parties stipulated that as a result of East's 30 May 1994 accident that arose during the course and scope of his employment, East suffered permanent disabilities to his arm, leg, and back. Employer, however, argued before the Full Commission that East was nonetheless not entitled to disability benefits under *Seagraves* because East was terminated for misconduct unrelated to his compensable injury. The Full Commission did not find Employer's evidence credible, and found as fact Employer failed to show East was "terminated for misconduct or fault, unrelated to the compensable injury, for which a non-disabled employee would ordinarily have been terminated." This finding that East's termination was related to his compensable injury is supported by evidence Bowman altered East's job duties on 6 February 1997, and East's new job duties caused pain to his leg and back; Bowman initially told East he did not need to obtain medical excuses for absences, and Bowman did not request medical excuses until after East's job duties had been changed; East was injured in March of 1997 while performing a job assignment that violated work restrictions placed on East as a result of his 30 May 1994 compensable injury; East notified Bowman his job assignment in the camp kitchen caused him pain in his back and leg and Bowman did not take action to address this problem; East did not stop reporting to

work until Bowman altered East's job duties to include duties which caused him pain in his back and leg; and Bowman testified he terminated East for failing to report to work. Because the Full Commission's finding of fact is supported by competent evidence, we are bound by this finding. See *Hemric v. Manufacturing Co.*, 54 N.C. App. 314, 316, 283 S.E.2d 436, 437-38 (1981) (appellate review of decision of Commission limited to whether the record contains competent evidence to support the Commission's findings of fact and whether these findings of fact support the Commission's conclusions of law), *disc. review denied*, 304 N.C. 726, 288 S.E.2d 806 (1982). Additionally, this finding of fact supports the Full Commission's conclusion of law "[East's] termination . . . does not fall within the first prong of the Seagraves test, which would have to be met in order to shift the burden onto [East] to prove his ongoing disability."² See *id.* Accordingly, because the parties stipulated East received permanent disabilities as a result of the 30 May 1994 accident that arose during the scope and course of his employment with Employer and Employer has not shown a refusal to accept suitable employment, the opinion and award of the Full Commission is affirmed.

Affirmed.

Judges MCGEE and EDMUNDS concur.

Report per rule 30(e).

²Because the Full Commission properly concluded East's termination "does not fall within the first prong of the Seagraves test," we need not address Employer's additional assignment of error.