Bolch - affirmed

Ballance

Mavretic

NO. COA99-900

NORTH CAROLINA COURT OF APPEALS

Filed: 7 March 2000

DEWEY R. FAILE, JR., Employee,
Plaintiff-Appellee

v.

GENERAL TIRE & RUBBER CO.,
Employer, SELF-INSURED (Frank
Gates Service Company, Servicing
Agent),
Defendant-Appellant

North Carolina
Industrial Commission
I.C. File No. 453286

Appeal by defendant from opinion and award filed 26 February 1999 by the North Carolina Industrial Commission. Heard in the Court of Appeals 28 February 2000.

The Roberts Law Firm, P.A., by Joseph B. Roberts, III, for plaintiff-appellee.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Mel J. Garofalo and William B. Wallace, for defendant-appellant.

WALKER, Judge.

Defendant appeals from an opinion and award of the Industrial Commission (Commission) ordering defendant to continue to pay plaintiff compensation for temporary total disability and to pay for psychiatric or psychological treatment of plaintiff.

While working in defendant-employer's facility, plaintiff injured his knee on 27 June 1994 when a piece of conduit pipe fell from the ceiling and struck his knee. Defendant accepted the injury as compensable, and the parties executed and filed a Form 21, "Agreement for Compensation for Disability," which the

Commission approved. Plaintiff subsequently filed a request for a hearing, contending he needed ongoing psychiatric treatment. Defendant responded to the request for a hearing by asserting that plaintiff is able to return to gainful employment and thus is no longer totally disabled. The request for a hearing and response therefore presented two issues for the Commission to decide: (1) whether defendant should be required to pay for psychiatric treatment of plaintiff and (2) whether plaintiff is able to return to work.

When a Form 21 agreement is executed by the parties and approved by the Commission, the employee is entitled to a presumption that he is disabled. *Saums v. Raleigh Community Hospital*, 346 N.C. 760, 487 S.E.2d 746 (1997). This presumption may be overcome by the presentation of evidence by the employer showing "not only that suitable jobs are available, but also that the plaintiff is capable of getting one, taking into account both physical and vocational limitations." *Kennedy v. Duke Univ. Med. Center*, 101 N.C. App. 24, 33, 398 S.E.2d 677, 682 (1990). If the employer produces such evidence, the employee "has the burden of producing evidence that either contests the availability of other jobs or his suitability for such jobs, or establishes that he has unsuccessfully sought the employment opportunities located by his employer." *Burwell v. Winn-Dixie Raleigh*, 114 N.C. App. 69, 74, 441 S.E.2d 145, 149 (1994).

During the hearing before the deputy commissioner, plaintiff testified first. His testimony tends to show that he was born on

13 November 1952. He has a high school and some trade school education. After completion of high school and prior to his employment by defendant, he worked in physically demanding jobs. He then began working at defendant's tire manufacturing plant in Charlotte in jobs that required him to be active and on his feet. Following surgery on his injured knee, he returned to work at General Tire for approximately three weeks performing clerical work four hours per day. While performing this temporary job, he experienced pain and discomfort in his knee, hips and back. After being told that defendant did not have a job available for him, he worked with defendant's vocational counselor, Dorothy Hunt, to apply for jobs elsewhere. He interviewed for a job at a "film place" but he could not guarantee the prospective employer how long he would be able to work there. He also met with Ms. Hunt and a jewelry company operator about working as a bench jewelry trainee "but nothing ever came from it." He would have accepted the job had it been offered to him.

Dorothy Hunt testified for defendant that she received a physical capacity report from Dr. Roy A. Majors, plaintiff's treating physician, which indicated plaintiff could stand and walk up to two hours and sit six to eight hours per day. He could drive thirty to sixty minutes at a time, and he could lift not more than ten to twenty pounds regularly or thirty pounds occasionally. He could not squat, kneel, or crawl. He could occasionally bend or climb. With these physical limitations in mind, she attempted to find plaintiff a job. Initially, plaintiff told her that he wished

to return to work for defendant and that he would not apply for jobs that were not near his pre-injury wage. She could find few jobs within plaintiff's physical limitations that paid as much as plaintiff was earning in his employment with defendant. After plaintiff subsequently indicated he would consider other lower-paying jobs, she provided him with job leads but plaintiff applied for only half of them. Plaintiff indicated that he did not like the wage potential of the jobs and that he did not feel he was physically able to perform an eight-hour job.

Notwithstanding, plaintiff did interview for a job as a film processor. The prospective employer informed Ms. Hunt that plaintiff was not hired because plaintiff indicated he was in pain and unable to stand, lift or sit for any duration of time. Ms. Hunt then submitted the job description for this job to Dr. Majors, who reviewed it and stated plaintiff was able to perform the job. She believed that if plaintiff had not indicated he was unable to perform the job, plaintiff would have been hired.

Ms. Hunt also arranged an interview for a job as a bench jeweler trainee. She accompanied plaintiff to this interview. The employer indicated that he would consider training plaintiff for the job if plaintiff wanted it. Defendant also offered to continue plaintiff's benefits while in training. Ms. Hunt communicated this information to plaintiff, who indicated he preferred not to do that type of work; however, he did not definitely rule out accepting the job.

After reviewing the evidence, the Commission concluded that defendant failed to overcome the presumption of disability engendered by the Form 21. It found that the jobs as bench jewelry apprentice or photo finisher were neither suitable nor obtainable by plaintiff.

Defendant contends that the Commission erred in finding that defendant did not overcome the presumption of disability. It argues that the evidence shows that plaintiff is able to return to gainful employment and that such employment is available to plaintiff.

Appellate review of an opinion and award of the Commission is limited to determining (1) whether there is competent evidence in the record to support the Commission's findings of fact, and (2) whether the Commission's findings of fact support its conclusions of law and award. *Barham v. Food World*, 300 N.C. 329, 266 S.E.2d 676, *rehearing denied*, 300 N.C. 562, 270 S.E.2d 105 (1980). If there is any competent evidence in the record to support the Commission's findings, the appellate court is bound by them. *Adams v. AVX Corp.*, 349 N.C. 676, 509 S.E.2d 411 (1998), *rehearing denied*, 350 N.C. 108, ___ S.E.2d ____ (1999).

We find evidence in the record to support the Commission's determination. Ms. Hunt acknowledged that the owner of the jewelry store told her that initially he "would not be able to pay [plaintiff] anything until we determine whether or not he was good at the job." The prospective employer also told her that "after about two months he could probably start paying him on a piecework

basis, and also that it would take maybe a year or two for him to work up to full potential." She also acknowledged that the job was contingent upon the opening of a new store. She was not aware whether the store had ever opened.

Ms. Hunt also acknowledged that plaintiff was not offered the job as a photo finisher because of the prospective employer's concern that plaintiff may not be able to perform the job due to pain he was experiencing. The medical evidence confirms that plaintiff suffers from chronic pain in the knee that will become progressively worse as he ages or until he undergoes knee replacement surgery. Dr. Majors acknowledged that plaintiff's pain becomes greater with increased activity.

The Commission did find that "Plaintiff was less than enthusiastic about participating in the job search, particularly for jobs that paid substantially less than his income at General Tire." However, the defendants never filed for a Form 24 order to compel plaintiff to cooperate with vocational rehabilitation.

Defendant also contends that the Commission erred in finding that plaintiff has a psychological condition causally related to his workplace injury. Defendant argues the finding is not supported by evidence.

Plaintiff was seen by Dr. John W. Long, a clinical psychologist, who testified that he examined plaintiff and diagnosed him as suffering from depression. He further testified that, in his opinion, plaintiff's depression was caused by his chronic pain and by frustration and loss of self-esteem arising out

of his inability to engage in activities and work he enjoyed prior to sustaining the injury. There was competent evidence to support the Commission's findings and conclusions.

For the foregoing reasons, the opinion and award is

Affirmed.

Chief Judge EAGLES and Judge SMITH concur.

Report per Rule 30(e).