

Scott - affirm  
Bolch  
Sellers - dissent

NO. COA99-26

NORTH CAROLINA COURT OF APPEALS

Filed: 15 February 2000

BECKY ANN WILLIAMS,  
Employee-Plaintiff

v.

North Carolina  
Industrial Commission  
I.C. File No. 471881

MAIDENFORM, INC.,  
Employer-Defendant,

and

ATLANTIC MUTUAL INSURANCE CO.,  
Carrier-Defendant

Appeal by defendants from judgment entered 27 August 1998 by the North Carolina Industrial Commission (Commission). Heard in the Court of Appeals 19 October 1999.

*Brenton D. Adams for plaintiff-appellee.*

*Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Jeffrey A. Doyle and Robert T. Lewis, for defendants-appellants.*

WALKER, Judge.

On 25 July 1994, plaintiff suffered a compensable back injury. Plaintiff and defendants entered into a Form 21 agreement which was approved by the Commission on 11 October 1994. After plaintiff failed to return to work on 19 October 1995, defendants filed a Form 24 application to terminate benefits. Maidenform (employer) then mailed plaintiff a letter dated 1 March 1996, which informed plaintiff that her employment had been terminated as of that date. On 28 March 1996, Deputy Commissioner Lowrance filed an

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OF THE STATE OF NORTH CAROLINA

Administrative Order, approving the suspension of benefits effective as of 19 October 1995 until plaintiff cooperates with defendant-employer's return to work efforts. After a hearing on 5 December 1996, Deputy Commissioner Stephenson found that plaintiff was not entitled to further temporary total disability compensation effective 19 October 1995. Plaintiff appealed to the Full Commission (Commission) which reversed the holding of the deputy commissioner and concluded that the employer should have reinstated plaintiff's benefits as of 2 April 1996.

The Commission's findings include the following:

2. On 25 July 1994 plaintiff sustained a compensable injury by accident arising out of and in the course of her employment with defendant-employer when she was lifting boxes overhead.

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4. The parties entered into a Form 21 Agreement on 14 September 1994, which was approved by the Commission 11 October 1994. According to the terms of this agreement, plaintiff was to be paid temporary total disability compensation from 27 July 1994 and continuing for an 'unknown' period of weeks.

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6. On 18 May 1995, plaintiff attempted to return to work in her former position. Upon her attempted return to work, plaintiff earned the same amount of wages that she had prior to her injury.

7. On 30 May 1995, plaintiff sought treatment from Dr. Neville after aggravating her prior injury on 29 May 1995 while pushing a Z-truck. Dr. Neville placed plaintiff on light-duty until her return appointment on 6 June 1995.

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14. Eventually, after continued treatment, Dr. Neville approved plaintiff's return to work on 7 August 1995 with the restriction of fifty percent (50%) production. At plaintiff's request, Dr. Neville changed plaintiff's restrictions to light work on 28 August 1995.

15. Plaintiff did not return to work on 27 September 1995 due to a sick child. When plaintiff returned to work on 2 October 1995, she developed an effusion in her knee. An MRI of the knee revealed degenerative changes but no evidence of any tear or on-the-job injury due to squatting.

16. Due to plaintiff's knee condition, Dr. Neville kept plaintiff out of work from 3 October 1995 until he released her on 19 October 1995.

17. As a result of her work related injury on 25 July 1994, Dr. Neville rated plaintiff with a five percent (5%) permanent partial impairment of the back.

18. Plaintiff did not return to work for defendant-employer on 19 October 1995. As of that date, defendant-employer had two (2) positions available for plaintiff. These positions were suitable to plaintiff's restrictions as imposed by Dr. Neville.

19. Defendants continued to pay plaintiff temporary total disability following plaintiff's refusal to return to work on 19 October 1995.

20. Based upon plaintiff's failure to return to work on 19 October 1995, defendant filed an Industrial Commission Form 24 Application to Terminate Benefits. On 28 March 1996, Special Deputy Commissioner Martha Lowrance filed an Administrative Order, in which she approved the suspension of benefits effective as of 19 October 1995. According to this Order, defendants were entitled to suspend benefits until such time as plaintiff cooperated with defendants' return to work efforts.

21. After filing the Form 24, but prior to the entry of the 28 March 1996 Administrative

Order, defendants terminated plaintiff's employment. Ms. Pat Fitzgerald, defendant-employer's human resource manager, testified that a letter was sent to plaintiff on 1 March 1996 informing her that her employment had been terminated as of that date. According to this letter, defendants' termination of plaintiff was based in part on a note from Dr. Eddie Powell, in which he opined that plaintiff was unable to return to work.

22. At the time of plaintiff's termination, Dr. Neville was plaintiff's approved treating physician, not Dr. Powell. Despite this fact, plaintiff's termination was triggered by defendant-employer's acceptance of Dr. Powell's opinion. However, to date, defendants have not authorized any treatments provided by Dr. Powell and have consistently argued that they should not be responsible for medical expenses related to his treatments. Defendants have produced no convincing evidence to explain the contradictory manner in which they have approached Dr. Powell's treatments and his opinions.

23. Defendants' actions regarding plaintiff's termination were inconsistent with their actions regarding their Form 24, which was filed on 13 February 1996. In support of their application to terminate plaintiff's benefits, defendants contended that she had unjustifiably refused to return to work. Following the filing of their Form 24, defendants continued paying temporary total disability benefits pending the Administrative Order. Then, on 1 March 1996, defendants terminated plaintiff's employment based on the note from Dr. Powell and their contention that plaintiff had used all of her leave time.

24. Plaintiff's termination occurred while the issue of whether her benefits should be terminated was pending before the Commission. Furthermore, defendants' decision to terminate plaintiff was in part based upon their estimation of her physical condition and her ability to return to work, issues still pending at that time before the Commission. Therefore, despite their efforts to justify her termination, defendants have failed to produce sufficient evidence upon which to find

that plaintiff's termination was unrelated to her 25 July 1994 injury by accident. This is true despite defendants' ultimate success in suspending plaintiff's benefits.

25. On 2 April 1996, plaintiff presented to defendant-employer with [sic] a letter indicating that she was prepared to cooperate with defendants' return to work efforts and that she was prepared to follow the employer's instructions in this regard. Plaintiff gave this note to Ms. Fitzgerald, who informed her that the employer did not have anything for her to do.

26. The next week, on 8 April 1996, plaintiff again returned to defendant-employer with an identical letter which she presented to Ms. Fitzgerald and to Mr. Robert Gates, defendant-employer's plant manager.

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28. Plaintiff repeated this procedure each week until 17 June 1996, when she was instructed not to bring the employer any more letters....

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31. As of 2 April 1996, plaintiff attempted to fully cooperate with the return to work efforts of defendants. Therefore, plaintiff had complied with the 28 March 1996 Administrative Order as of that date.

Defendants argue that the Commission erred in failing to find that plaintiff was no longer disabled as of 19 October 1995 and in reinstating plaintiff's temporary total disability compensation as of 2 April 1996. Plaintiff contends that since the 28 March 1996 Administrative Order suspended rather than terminated her compensation payments, the issue of plaintiff's continuing disability was never raised before the Commission and therefore plaintiff was entitled to have compensation reinstated on 2 April

1996, the date she attempted to fully cooperate with the return to work efforts of the employer.

When considering an appeal from the Commission, this Court is limited to two questions: (1) whether competent evidence exists to support the Commission's findings, and (2) whether the Commission's findings justify its conclusions and decision. *Simmons v. N.C. Dept. of Transportation*, 128 N.C. App. 402, 496 S.E.2d 790 (1998). Findings of fact by the Commission, if supported by competent evidence, are conclusive on appeal even though there is evidence which would support a contrary finding. *Bullman v. Highway Comm.*, 18 N.C. App. 94, 195 S.E.2d 803 (1973).

On 28 March 1996, Deputy Commissioner Lowrance filed an Administrative Order, approving the suspension of benefits effective as of 19 October 1995 until plaintiff cooperates with defendant-employer's return to work efforts. Then, after a hearing on 5 December 1996, Deputy Commissioner Stephenson found that plaintiff was not entitled to further temporary total disability compensation effective 19 October 1995. However, the Commission found that Deputy Commissioner Stephenson's opinion "did not address [plaintiff's] testimony regarding her attempts to cooperate with defendants' return to work efforts on and after 2 April 1996" and that "pursuant to that Order, upon plaintiff's cooperation with defendants' return to work efforts, the suspension of her benefits was to end."

Although we recognize that the burden shifts to the plaintiff once the defendant meets its burden of showing the plaintiff is

released to return to work and suitable work is available, the employer cannot terminate or suspend compensation unless its application is approved. See N.C. Gen. Stat. § 97-18.1(d) (1999). Here, pursuant to the 28 March 1996 order of Deputy Commissioner Lowrance, defendants were only approved to "suspend payment of compensation ... until plaintiff cooperates with return to work efforts provided by defendant" and were not approved to terminate plaintiff's benefits. Therefore, since there is competent evidence in the record to support the Commission's finding that plaintiff attempted to fully cooperate with the return to work efforts of defendant-employer as of 2 April 1996, we affirm the Commission's order.

Affirmed.

Judges GREENE and HUNTER concur.

Report per Rule 30(e).