

Riggsbee - Affirmed  
Mavretic - Concurring  
Sellers - Concurring

NO. COA00-121

NORTH CAROLINA COURT OF APPEALS

Filed: 5 December 2000

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IN THE OFFICE OF  
THE CLERK OF  
THE COURT OF APPEALS  
OF NORTH CAROLINA

LOU NELL SHAVER,  
Employee,  
Plaintiff,

v.

HUNT MANUFACTURING CO.,  
Employer,

LIBERTY MUTUAL INSURANCE  
CO.,

Carrier,  
Defendants.

From the North Carolina  
Industrial Commission  
I.C. No. 515285

Appeal by plaintiff from opinion and award filed 17 September 1999 by the North Carolina Industrial Commission. Heard in the Court of Appeals 21 November 2000.

*Pope McMillan Kutteh Simon & Privette, P.A., by William H. McMillan and Ryan D. Bolick, for plaintiff-appellant.*

*Morris York William Surles & Barringer, LLP, by G. Lee Martin and Kelly F. Miller, for defendant-appellees.*

GREENE, Judge

Lou Nell Shaver (Plaintiff) appeals an opinion and award of the Full Commission of the North Carolina Industrial Commission (the Commission) filed 17 September 1999, in favor of Hunt Manufacturing Co. (Employer) and Liberty Mutual Insurance Co. (collectively, Defendants).

The evidence shows that in 1992, Plaintiff was employed by Employer, a manufacturer of arts and crafts supplies. In March of

1992, Plaintiff worked for sixteen hours on a paint line, performing assembly line work, packing boxes, and performing other various duties. The next morning, Plaintiff had pain in her back and she was unable to get out of bed. Plaintiff called the plant nurse, and she was referred to an orthopaedic surgeon. Plaintiff underwent an MRI and was diagnosed with a "minimal" disk bulge. As a result of the injury, Plaintiff was unable to work for ten days.

On 30 January 1995, Plaintiff suffered another injury while working for Employer. Plaintiff was treated by Robert Saltzman, M.D. (Dr. Saltzman) at Statesville Orthopaedic Clinic. Dr. Saltzman diagnosed Plaintiff with "arthritis in the facet joints," prescribed physical therapy, and ordered Plaintiff to remain out of work pending treatment. On 21 February 1995, Plaintiff returned to work on a light-duty basis at the same wages she was earning prior to her injury. At that time, Plaintiff and Employer entered into a Form 21 agreement and Plaintiff was paid total disability compensation for the period covering 16 February 1995 to 21 February 1995.

On 30 May 1996, Plaintiff returned to Dr. Saltzman with complaints of back pain. The back pain began after she slipped in her bathtub during the previous week. Dr. Saltzman ordered Plaintiff to remain out of work and he prescribed physical therapy. Plaintiff continued to have pain despite physical therapy, and on 24 June 1996, Dr. Saltzman requested Plaintiff undergo a CT scan. Plaintiff underwent a CT scan on 26 June 1996, and on 28 June 1996, Dr. Saltzman diagnosed Plaintiff with a herniated disk and

secondary central spinal stenosis. Plaintiff returned to see Dr. Saltzman on 23 December 1996 with complaints of pain in her back, thighs, and calves due to worsening of her spinal stenosis. Because of Plaintiff's weight and age, Dr. Saltzman determined Plaintiff was not a good candidate for surgery. Dr. Saltzman also determined Plaintiff could return to work for a four-hour day of sedentary work. Plaintiff, however, never returned to work.

On 30 December 1996, Plaintiff filed a Form 33 request that her claim be assigned for a hearing with the Industrial Commission. Plaintiff's claim was heard on 29 January 1998, and Plaintiff presented medical evidence in the form of deposition testimony of Dr. Saltzman. Dr. Saltzman testified, when asked whether Plaintiff's injuries in December of 1996 could have been related to her 1992 injury by accident, that "[he'd] be speculating." Dr. Saltzman also testified that the medical condition suffered by Plaintiff "usually" results from "normal wear and tear." He did not testify that to a reasonable medical certainty Plaintiff's injuries in 1996 were related to a previous injury by accident.

On 17 September 1999, the Commission filed an opinion and award containing the following pertinent findings of fact:

7. On 21 February 1995, [P]laintiff returned to work for [Employer] earning the same wages she had earned prior to her 30 January 1995 injury by accident.

. . . .

14. The greater weight of the evidence, in particular the medical evidence, fails to establish that [P]laintiff's back complaints and medical treatment after 30 May 1996 or her incapacity to earn wages after that date were

caused by the injury by accident on 30 January 1995 or by an earlier injury by accident in March [of] 1992.

The Commission, therefore, denied Plaintiff's claim.

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The issues are whether: (I) Plaintiff was entitled to a presumption of disability based on the Form 21 agreement for compensation entered into by the parties subsequent to Plaintiff's 30 January 1995 injury by accident; and (II) the record contains competent evidence to support the Commission's finding of fact that the evidence "fails to establish that [P]laintiff's back complaints and medical treatment after 30 May 1996 or her incapacity to earn wages after that date were caused by the injury by accident on 30 January 1995 or by an earlier injury by accident in March [of] 1992."

I

Plaintiff argues she was entitled to the benefit of a presumption of disability based on the Form 21 agreement entered into by the parties, and the Commission, therefore, erred by placing the burden on Plaintiff to prove the existence of a disability. We disagree.

The North Carolina Workers' Compensation Act defines disability as "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.G.S. § 97-2(9) (1999). An employee is disabled when the Commission finds:

- (1) that [the employee] was incapable after her injury of earning the same wages she

earned before her injury in the same employment, (2) that she was incapable after her injury of earning the same wages she earned before her injury in any other employment, and (3) that her incapacity to earn was caused by her injury.

*Hoyle v. Carolina Associated Mills*, 122 N.C. App. 462, 464, 470 S.E.2d 357, 358 (1996). Generally, an employee has the burden of showing the existence of a disability. *Simmons v. Kroger Co.*, 117 N.C. App. 440, 442, 451 S.E.2d 12, 14 (1994). When an employee and employer enter into a Form 21 agreement for compensation, however, a presumption of disability attaches in favor of the employee. *Kisiah v. W.R. Kisiah Plumbing*, 124 N.C. App. 72, 77, 476 S.E.2d 434, 436 (1996), *disc. review denied*, 345 N.C. 343, 483 S.E.2d 169 (1997). The presumption of disability continues until the employee "return[s] to work at wages equal to those [she] was receiving . . . at the time of [her] injury." *Snead v. Carolina Pre-Cast Concrete, Inc.*, 129 N.C. App. 331, 336, 499 S.E.2d 470, 473, *cert. denied*, 348 N.C. 501, 510 S.E.2d 656 (1998). Once an employee "returns to work at wages equal to those [she] was receiving at the time [her] injury occurred," the employer is entitled to a presumption that the employee's disability has ended. *Watkins v. Motor Lines*, 279 N.C. 132, 137, 181 S.E. 588, 592 (1971).

In this case, Plaintiff entered into a Form 21 agreement for compensation with Employer subsequent to her 30 January 1995 injury by accident. Plaintiff returned to work with Employer on 21 February 1995, at which time she began receiving the same wages she was receiving at the time of her injury by accident. On 30 December 1996, when Plaintiff requested a hearing before the

Commission for additional compensation benefits, she was, therefore, no longer entitled to a presumption of disability. Rather, Plaintiff had the burden of showing the existence of her disability. Accordingly, the Commission did not err by placing the burden on Plaintiff to prove her incapacity to earn was caused by her 30 January 1995 injury.

II

Plaintiff argues the record does not contain competent evidence to support the Commission's finding of fact that the evidence "fails to establish that [P]laintiff's back complaints and medical treatment after 30 May 1996 or her incapacity to earn wages after that date were caused by the injury by accident on 30 January 1995 or by an earlier accident in March [of] 1992." We disagree.

The Commission's findings of fact are conclusive on appeal if supported by any competent evidence. *Watkins v. City of Asheville*, 99 N.C. App. 302, 303, 392 S.E.2d 754, 756, *disc. review denied*, 327 N.C. 488, 397 S.E.2d 238 (1990).

In this case, Dr. Saltzman, who offered the only expert medical opinion with regard to causation, did not testify that to a reasonable scientific probability Plaintiff's injuries in 1996 were related to a previous injury by accident. See *Phillips v. U.S. Air, Inc.*, 120 N.C. App. 538, 542, 463 S.E.2d 259, 262 (1995) ("evidence on causation 'must indicate a reasonable scientific probability that the stated cause produced the stated result'" and "[e]vidence is insufficient on causation if it 'raises a mere conjecture, surmise, and speculation'" (quoting *Hinson v. National*

*Starch & Chemical Corp.*, 99 N.C. App. 198, 202, 392 S.E.2d 657, 659 (1990))), *aff'd per curiam*, 343 N.C. 302, 469 S.E.2d 552 (1996). Indeed, Dr. Saltzman testified that the medical condition suffered by Plaintiff was "usually" the result of "normal wear and tear." When asked if Plaintiff's injuries could have been related to her 1992 injury by accident, Dr. Saltzman replied "I'd be speculating." This medical testimony is competent evidence to support the Commission's finding of fact that Plaintiff has not shown her "back complaints and medical treatment after 30 May 1996 or her incapacity to earn wages after that date were caused by the injury by accident on 30 January 1995 or by an earlier accident in March [of] 1992." Plaintiff, therefore, has not met her burden of showing the existence of a disability under the North Carolina Workers' Compensation Act. Accordingly, the Commission's opinion and award denying Plaintiff's claim for compensation is affirmed.

Affirmed.

Judges WALKER and FULLER concur.

Report per Rule 30(e).