Sellers
Riggsbee
Scott (separate concurring opinion)

NO. COA99-1345

NORTH CAROLINA COURT OF APPEALS

Filed: 1 August 2000

DIANE STIMSON,
Employee,
Plaintiff

v.

FOUST TEXTILES,
Employer;
CINCINNATI INSURANCE COMPANY,
Carrier,
Defendants

From the North Carolina Industrial Commission
I.C. No. 542561

Appeal by plaintiff from an opinion and award entered 23 March 1999 by the North Carolina Industrial Commission. Heard in the Court of Appeals 24 July 2000.

Bridges & Gilbert, P.A., by Ralph L. Gilbert, III, by plaintiff-appellant.

Stiles Byrum & Horne, L.L.P., by Terry D. Horne, for defendant-appellees.

HUNTER, Judge.

Diane Stimson ("plaintiff") was employed by Foust Textiles ("defendant-employer") as a quilting kit assembler and packer. On 17 March 1995, plaintiff sustained a compensable injury by accident to her back while helping to move a table. On 26 October 1995, the parties entered into a Form 21 agreement, which was approved by the Industrial Commission, under the terms of which plaintiff was paid temporary total disability compensation at a weekly compensation

rate of $164.00. On 27 March 1996, plaintiff's physician, Dr. Mark Hartman, determined that plaintiff had reached maximum medical improvement and assigned plaintiff a permanent partial impairment rating of fifteen percent. During plaintiff's 27 March 1996 visit, Elizabeth Smith, a rehabilitation nurse retained by defendants, presented Dr. Hartman with a written job analysis and video tape depicting the job duties of a position plaintiff was being offered by defendant-employer. Dr. Hartman reviewed the items and concluded that plaintiff could be released to attempt to work for defendant-employer in the job described. Dr. Hartman had concerns about the likely success of plaintiff returning to work, but determined that she should at least make an effort to return to work. Plaintiff was notified that she should report to work on 29 March 1996. Plaintiff never reported to work, nor did she attempt to return to work in any other position or for any other employer.

On 17 April 1996, defendant-employer and Cincinnati Insurance Company (collectively "defendants") filed a Form 24 application to suspend payment of further compensation to plaintiff. A telephonic hearing was held on 12 June 1996. On 1 July 1996, a special deputy commissioner approved the application. Plaintiff appealed. On 29 May 1998, Deputy Commissioner Mary Moore Hoag entered an opinion and award finding there was no evidence to support plaintiff's contentions that she is unable to work and is permanently and totally disabled. Accordingly, the deputy commissioner concluded that plaintiff had unjustifiably refused to return to work and denied her claim for permanent and total disability compensation.

On 23 March 1999, the Full Commission entered an opinion and award affirming the deputy commissioner's decision. Plaintiff appeals.

We first consider whether the Commission erred by finding that plaintiff was not permanently and totally disabled. Plaintiff testified that she did not return to work because of continued pain associated with the injury. Plaintiff notes Dr. Hartman's testimony that she probably aggravated a preexisting condition, that he thought that plaintiff would risk being injured during the job, and that he was never happy with plaintiff's post-operative course. Plaintiff argues that "[e]ven though Dr. Hartman never expressly states that Ms. Stimson is permanently impaired all of this testimony points in that direction and should have been taken as such by the Full Commission."

Defendants argue that the there is competent evidence in the record to support the Commission's findings. Defendants state that by virtue of the Form 21 agreement between the parties, plaintiff was entitled to a presumption of continuing disability. However, defendants assert that the burden of proof shifted to plaintiff once defendants were able to produce evidence that suitable jobs were available to plaintiff. Here, defendants contend the evidence showed that defendant-employer actually offered plaintiff a job which Dr. Hartman had deemed suitable. Thus, defendants assert that plaintiff had the burden of proof to show that the job was not suitable for her. Defendants argue that plaintiff presented no such evidence. Furthermore, defendants assert there was no evidence to support plaintiff's claim that she was unable to work

due to her disability. Defendants further contend that plaintiff's own physician testified that plaintiff could and should return to work. Accordingly, defendants argue that the Commission did not err when it found that plaintiff was not totally and permanently disabled. We agree.

A Form 21 agreement, approved by the Commission, entitles an employee to a presumption of continuing disability. *Davis v. Embree-Reed, Inc.*, 135 N.C. App. 80, 84, 519 S.E.2d 763, 765, *disc. review denied*, 357 N.C. 102, ___ S.E.2d ___ (1999). However, an employer may rebut this presumption by showing that suitable jobs are available to the employee and that the employee is capable of getting one, taking into account the employee's age, education, physical limitations, vocational skills, and experience. *Id.* Here, there was an approved Form 21 agreement between the parties. Defendants rebutted the presumption of continuing disability by presenting evidence that defendant-employer actually offered plaintiff a position, a position which plaintiff's own physician deemed suitable. Accordingly, we find there was competent evidence in the record to support the Commission's conclusion that plaintiff was not totally and permanently disabled as of 27 March 1996.

We next consider whether the Commission erred in denying plaintiff's claim for further benefits because she had unjustifiably refused suitable employment. Plaintiff argues that the Commission also erred in finding that defendants had overcome the presumption of plaintiff's continuing disability, that plaintiff's refusal to take the job was not justified, and in

finding that the job offered was suitable to plaintiff's work capacity. Plaintiff contends that medical evidence does not support the Commission's findings. Plaintiff asserts that Dr. Hartman testified that he did not think the job offered by defendant-employer was a sedentary job, nor did he think plaintiff would have a successful return to work. Plaintiff asserts that she is unable to work in any job, and is permanently and totally disabled.

Defendants argue that plaintiff's failure to accept the position offered by defendant-employer was unjustified and a sufficient basis for suspending further benefits. Defendants assert that the position was reviewed by Dr. Hartman and deemed suitable considering plaintiff's physical limitations. Defendants further argue that there is no evidence that the position was a "make-work" position. Accordingly, defendants argue that plaintiff's claim for further benefits was properly denied.

After careful review of the record, briefs and contentions of the parties, we affirm. The findings of fact made by the Industrial Commission 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). The Court's review is limited to determining "whether there was competent evidence before the Commission to support its findings and . . . whether such findings support its legal conclusions." *McLean v. Roadway Express*, 307 N.C. 99, 102, 296 S.E.2d 456, 458 (1982). Here, the evidence of

record shows that Dr. Hartman released plaintiff for light duty work. Dr. Hartman reviewed a video tape and a description of a job being offered to plaintiff by defendant-employer and found that the job did not look "that strenuous." Accordingly, Dr. Hartman determined that plaintiff should attempt to return to work in the position offered. However, plaintiff never attempted to return to work. Thus, we find there was competent evidence in the record to support the Commission's finding that plaintiff unjustifiably refused to return to work and its conclusion that she was not entitled to further benefits.

Affirmed.

Judges McGEE and TIMMONS-GOODSON concur.

Report per Rule 30(e).