

Mavretic: Affirmed
Concurring: Scott
Ballance

NO. COA99-1435

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NORTH CAROLINA COURT OF APPEALS

DEC 19 2000

Filed: 19 December 2000

IN THE OFFICE OF
CLERK COURT OF APPEALS
OF NORTH CAROLINA

MICHAEL BATTS,
Employee,
Plaintiff;

v.

North Carolina
Industrial Commission
I.C. No. 583105

SUNSHARES,
Employer;

SELF/NARM/RISCORP OF NC,
Servicing Agent;
Defendants.

Appeal by defendants from judgment entered 2 July 1999 by Commissioner Laura K. Mavretic of the North Carolina Industrial Commission. Heard in the Court of Appeals 11 October 2000.

Daniel F. Read for plaintiff-appellee.

Cranfill, Sumner & Hartzog, L.L.P., by Scott J. Lasso, for defendants-appellants.

WYNN, Judge.

On 15 September 1995, the plaintiff Michael Batts injured his back while working for his employer Sunshares. He filed a claim for workers' compensation and medical coverage. On 20 May 1997, Deputy Commissioner William L. Haigh concluded that as a result of his injury, Mr. Batts was temporarily totally disabled from 18 September 1995 to 18 March 1996, and was entitled to benefits in the amount of \$266.68 per week for that period of time. Deputy Commissioner Haigh also ordered a medical examination of Mr. Batts

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to determine whether he had healed from the injury. Dr. William J. Mallon examined Mr. Batts in June and July 1997 and concluded that he had not reached maximum medical improvement. Dr. Mallon could not project a return to work date for Mr. Batts and did not think he could perform any manual labor.

In the meantime, Mr. Batts made three attempts to return to work between spring 1996 and summer 1997, but had to quit each job after only a few weeks because of the pain in his back. Mr. Batts began a fourth job on 18 August 1997, doing street maintenance for the City of Durham. His back continued to cause him pain. The City of Durham released Mr. Batts from this position in November 1997 due to a lack of available work.

On 18 November 1997, Deputy Commissioner Pamela T. Young granted Mr. Batts continuing medical benefits but denied his claim for temporary total disability. The Full Commission reviewed Deputy Commissioner Young's opinion and award, affirmed the continuation of his medical benefits, awarded him temporary total disability compensation after finding that he was unsuccessful in returning to work, and deducted amounts Mr. Batts earned while working for the City of Durham.

The defendants appealed to this Court, arguing that there was no competent evidence upon which the Commission could have found that Mr. Batts was temporarily totally disabled. Mr. Batts assigned as error the Commission's failure to address whether his ongoing medical treatment entitled him to temporary total disability benefits, and whether that status lasted until he could

return to work at the same wages he was earning when he was injured.

In reviewing an appeal from the Industrial Commission, we must first determine whether competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law. See *Guy v. Burlington Indus.*, 74 N.C. App. 685, 689, 329 S.E.2d 685, 687 (1985). If there is any competent evidence to support a finding of fact, that finding is conclusive on appeal even if other evidence would support a contrary finding. See *Cummings v. Burroughs Wellcome Co.*, 130 N.C. App. 88, 90, 502 S.E.2d 26, 28, review denied, 349 N.C. 355, 517 S.E.2d 890 (1998). The Commission's conclusions of law are fully reviewable. See *id.*

The defendants argue that finding of fact number 14 is not supported by competent evidence and cannot be reconciled with other findings of fact. Specifically, the defendants assert that the Commission's finding that Mr. Batts did not successfully return to work is at odds with its finding that he lost his job with the City of Durham due to a lack of work and not because of his injury. However, when applying the appropriate standard as to what constitutes a successful return to work, it is clear that the Commission's finding was supported by competent evidence.

Initially, an injured employee has the burden of establishing the existence and extent of his disability. *Smith v. Sealed Air Corp.*, 127 N.C. App. 359, 361, 489 S.E.2d 445, 446 (1997). In the case at bar, the defendants do not dispute that Mr. Batts was

injured while working for Sunshares; rather, they assert that he is no longer disabled.

"Disability" is defined as the "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. Gen. Stat. § 97-2(9) (Cum. Supp. 1997); *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). The inability to earn a pre-injury wage can be shown in one of four ways: (1) the employee is unable to work; (2) the employee cannot find work; (3) the employee cannot work because of a pre-existing condition; or (4) the employee has obtained other employment, but at lower wages than what he earned prior to his injury. See *Russell v. Lowes Product Distrib.*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993). Once disability has been established, the employee is presumed to still be disabled, and the burden is on the employer to rebut that presumption. See *Saums v. Raleigh Community Hosp.*, 346 N.C. 760, 763, 487 S.E.2d 746, 750 (1997). The employer may rebut the presumption of continuing disability through medical and other evidence, see *In re Stone v. G & G Builders*, 346 N.C. 154, 157, 484 S.E.2d 365, 368 (1997), including evidence that jobs are available to the employee and that he is capable of getting one. See *Smith*, 127 N.C. App. at 361, 489 S.E.2d at 447. But mere proof of a return to work is insufficient to rebut the presumption because "capacity to earn is the benchmark test of disability. . . ." See *Kisiah v. W.R. Kisiah Plumbing, Inc.*, 124 N.C. App. 72, 81, 476 S.E.2d 434, 439 (1996), *disc. review denied*, 345 N.C. 343, 483

S.E.2d 169 (1997).

In the case at bar, the record contains evidence showing that Mr. Batts' injury prevented him from working for more than a few months at a time and forced him to resign from three of his four post-injury jobs. The defendants do not dispute that Mr. Batts left his first three positions because of his injury. This alone indicates that his first three post-injury attempts at working were unsuccessful.

Although Mr. Batts lost his job with the City of Durham due to lack of work, this fact is irrelevant in determining whether he was "disabled" under N.C. Gen. Stat. § 97-2(9) because he earned wages that were lower than the wages he earned before his injury--\$288.20 each week versus \$400.00 each week. The lower wage renders Mr. Batts "disabled" under *Russell, supra* and *Kiziah, supra*.

Other evidence supports the trial court's findings of fact and conclusions of law that Mr. Batts continues to be disabled. The Commission considered the evidence of Dr. Mallon, who opined in July 1997 that Mr. Batts had not fully recovered and could not project a return to work date.¹ The Commission also considered the testimony and work record of Mr. Batts. Mr. Batts testified that he still suffered pain from his injury and this pain kept him from doing manual labor. Further, Mr. Batts' history of continually

¹ The defendants argue that Dr. Mallon's evidence should not have persuaded the Full Commission to find that Mr. Batts was still injured. However, it is not the job of this Court to weigh the evidence. Our duty goes no further than to determine whether the record contains any evidence tending to support the findings of fact. See *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998).

looking for work strongly indicated a desire to be employed that was thwarted by his injury. All of these factors are competent evidence upon which the Commission could have based its findings of fact that supported its conclusion of law that Mr. Batts was still disabled. We find no error in the Commission's award of temporary total disability compensation for Mr. Batts.

Next, the defendants argue that if Mr. Batts is entitled to receive disability benefits, he should receive only temporary partial disability benefits instead of temporary total disability benefits. The defendants did not raise this argument before the Industrial Commission, and did not list this argument in their assignments of error. We therefore decline to address the merits of this argument. See N.C.R. App. R. 10(a).

Lastly, Mr. Batts argues that the Commission erred in not finding that he was entitled to temporary total disability benefits based on the fact that he had not yet reached maximum medical improvement. See *Crawley v. Southern Devices, Inc.*, 31 N.C. App. 284, 229 S.E.2d 325 (1976), -review denied, 292 N.C. 467, 234 S.E.2d 2 (1977). Since we have already determined that the Commission properly found that Mr. Batts was still disabled and entitled to temporary total disability compensation, we decline to address this assignment of error.

The Industrial Commission's findings of fact are supported by competent evidence. The findings of fact, in turn, support the Commission's conclusion of law that Mr. Batts is still disabled. We affirm the Commission's award of temporary total disability

compensation.

Affirmed.

Judges LEWIS and HUNTER concur.

Report per Rule 30(e).