NO. COA11-168
NORTH CAROLINA COURT OF APPEALS

Filed: 19 July 2011

HYMAN SPRUILL LEGGETT, Employee,
Plaintiff,

v.

North Carolina
Industrial Commission
I.C. No. 600560

AAA COOPER TRANSPORTATION, Self-Insured Employer (CRAWFORD & COMPANY, Third-Party Administrator),
Defendant.

Appeal by plaintiff from opinion and award entered 3 November 2010 by the North Carolina Industrial Commission. Heard in the Court of Appeals 7 June 2011.

Keel O'Malley Tunstall, PLLC, by Joseph P. Tunstall, III, for plaintiff appellant.

Dickie, McCamey & Chilcote, PC, by Susan H. Briggs, for defendant appellees.

McCULLOUGH, Judge.

Hyman "Buddy" Spruill Leggett ("plaintiff") appeals from an opinion and award of the North Carolina Industrial Commission ("the Commission") finding that plaintiff unjustifiably refused an offer of suitable employment, thereby negating plaintiff's

entitlement to any disability compensation during the period of 20 December 2006 through 31 December 2007. We affirm.

I. Background

Since a detailed summary of the facts giving rise to this appeal is set forth in our previous opinion, *Leggett v. AAA Cooper Transportation*, No. COA09-944 (N.C. Ct. App. 20 July 2010), only a brief synopsis of the pertinent facts is required to provide context for the issues to be considered.

On 24 July 2005, plaintiff was involved in a serious motor vehicle accident while in the course and scope of his employment as a full-time truck driver for defendant AAA Cooper Transportation ("AAA"). As a result of the accident, plaintiff suffered extensive injuries, including severe burns to plaintiff's lower extremities and chest and injuries to plaintiff's back, right shoulder, and ribs. Plaintiff was treated by Dr. David C. Miller ("Dr. Miller") for his back, Nurse Susan Everette ("Nurse Everette") for his burns, Dr. Robert Martin ("Dr. Martin") for his right shoulder, and Dr. Gilbert Alligood ("Dr. Alligood"), his family physician, for his broken ribs. On 24 July 2005, AAA filed Industrial Commission Form 19 employer's report of plaintiff's injury, and on 25

October 2005, AAA accepted plaintiff's claim for workers' compensation benefits by means of Industrial Commission Form 60.

On 14 December 2005, plaintiff was released by Dr. Miller to return to light duty work with restrictions to lifting a maximum of 25 pounds. On 15 December 2005, Nurse Everette released plaintiff to return to his pre-injury job as a truck driver without restrictions from the standpoint of his burns. On 11 January 2006, plaintiff informed Dr. Miller that plaintiff was "relatively pain free" and that he was able to do his regular job. Dr. Miller opined that plaintiff had reached maximum medical improvement and released plaintiff to regular duty work. Following these releases, plaintiff returned to work for AAA at his pre-injury job.

On 30 January 2006, plaintiff was seen by Dr. Alligood for a follow-up, at which Dr. Alligood recommended that plaintiff continue to avoid heavy lifting at that time. On 28 February 2006, plaintiff was again seen by Dr. Alligood for pain in plaintiff's right shoulder. Dr. Alligood referred plaintiff to Dr. Martin. On 23 March 2006, Dr. Martin placed plaintiff on the following work restrictions: (1) no lifting more than 25 pounds and (2) no overhead use of the right arm. On 23 May 2006, plaintiff underwent surgery on his right shoulder.

Shortly thereafter, on 5 June 2006, plaintiff was terminated by AAA pursuant to company policy for exceeding his 12-week medical leave allowance under the Family Medical Leave Act.

On 20 June 2006, Nurse Everette opined that plaintiff's scars were maturing well and that he had no recurrent inflammation, but that he should avoid direct sun exposure. Nurse Everette stated that plaintiff's clothing would be sufficient to protect his burns from direct sun exposure. On 28 July 2006, plaintiff was seen by Dr. Alligood for a follow-up examination, at which Dr. Alligood noted that plaintiff's shoulder was "pretty much back to full speed" and that he only needed to see plaintiff on an as-needed basis. Dr. Alligood did not state any work restrictions for plaintiff. On 21 September 2006, plaintiff was seen for a follow-up examination with Dr. Martin and was released to return to normal work with no restrictions.

Subsequently, AAA filed Industrial Commission Form 24 application to terminate or suspend payment of compensation on the basis that plaintiff "ha[d] received full duty release from [all treating physicians]." Plaintiff failed to object to the application, and on 29 November 2006, AAA's Form 24 application was approved. On 12 December 2006, plaintiff presented to

Tarboro Clinic for a commercial drivers' physical exam. Plaintiff was physically cleared to work as a truck driver by the examining physician and completed all required Department of Transportation forms. On 20 December 2006, plaintiff was again seen by Dr. Martin. Plaintiff had no pain, full range of motion, and normal strength in his right shoulder. Dr. Martin's medical report indicates that plaintiff was released to "normal work activities" with no restrictions from the standpoint of his shoulder.

Following his release to normal work duty by his doctors, AAA offered plaintiff a job as a dock worker/driver at a pay rate of $18.00 to $19.00 per hour for sixty hours per week. The position required lifting of possibly 50 pounds if not done with a forklift. Plaintiff was told by Lydia Gurganus ("Gurganus"), terminal manager of AAA's Washington, North Carolina, office, that after a few weeks working at this position, plaintiff would be assisted with petitioning the owner of AAA to reinstate his seniority and that plaintiff might be able to return to his previous truck driver position, although this was not guaranteed. Plaintiff refused this employment and did not further contact AAA for any position of employment.

During the period of December 2006 through May 2007, plaintiff applied for employment as a truck driver at over thirty locations without success. On 27 May 2007, plaintiff accepted a position with East Carolina Outfitters ("ECO"), a hunting guide service, earning $10.00 per hour. His duties included transporting the hunters to and from the stands and loading and skinning the deer. Additionally, plaintiff assisted with checking and painting the 250 stands and helped with feeding the deer, a task that involved shoveling and pushing corn out of a "mule" tractor cart. Plaintiff's tasks at ECO were very light duty and involved little physical labor. However, by 1 January 2008, plaintiff suffered back pain, numbness and irritation from his burn scars, and thereafter did not return to work at ECO. On 20 February 2008, plaintiff returned to Dr. Miller complaining of back pain, buttock pain, and numbness in both feet. Dr. Miller then wrote plaintiff out of work.

In its initial opinion and award entered 27 May 2009, the Commission found that plaintiff was entitled to temporary total disability benefits during the period 20 December 2006 through 26 May 2007 and temporary partial disability benefits during the period 27 May 2007 through 31 December 2007. AAA and

Broadspire, a Crawford Company (collectively, "defendants") appealed the Commission's opinion and award to this Court. On 20 July 2010, this Court remanded the case to the Commission on the issue of whether plaintiff had unjustifiably refused an offer of suitable employment, finding the Commission had made insufficient findings of fact on that issue. *Leggett v. AAA Cooper Transportation*, No. COA09-944 (N.C. Ct. App. 20 July 2010).

On 3 November 2010, the Commission issued its opinion and award finding that AAA's offer of employment in the dock worker/driver position was suitable employment for plaintiff and that plaintiff had unjustifiably refused the offer of suitable employment. Accordingly, the Commission concluded that plaintiff was not entitled to any compensation during the continuance of such refusal, which encompassed the period between 20 December 2006 and 31 December 2007. Plaintiff appeals.

II. Standard of Review

"The applicable standard of appellate review in workers' compensation cases is well established." *Hassell v. Onslow Cty. Bd. of Educ.*, 362 N.C. 299, 305, 661 S.E.2d 709, 714 (2008). "Appellate review of an opinion and award from the Industrial Commission is generally limited to determining: '(1) whether the

findings of fact are supported by competent evidence, and (2) whether the conclusions of law are justified by the findings of fact.'" *Id.* (quoting *Clark v. Wal-Mart*, 360 N.C. 41, 43, 619 S.E.2d 491, 492 (2005)). "Where there is competent evidence to support the Commission's findings, they are binding on appeal even in light of evidence to support contrary findings." *Starr v. Gaston Cty. Bd. of Educ.*, 191 N.C. App. 301, 304-05, 663 S.E.2d 322, 325 (2008). Our Courts, in addition to the Workers' Compensation Act, have consistently stated that the Commission "is the sole judge of the credibility of the witnesses and the weight of the evidence." *Hassell*, 362 N.C. at 305, 661 S.E.2d at 714. Consequently, this Court's duty "goes no further than to determine whether the record contains any evidence tending to support the finding." *Chavis v. TLC Home Health Care*, 172 N.C. App. 366, 369, 616 S.E.2d 403, 408 (2005) (internal quotation marks and citation omitted). "Moreover, findings of fact which are left unchallenged by the parties on appeal are presumed to be supported by competent evidence and are, thus conclusively established on appeal." *Chaisson v. Simpson*, 195 N.C. App. 463, 470, 673 S.E.2d 149, 156 (2009) (internal quotation marks and citation omitted). We review the Commission's conclusions of

law *de novo*. *Griggs v. Eastern Omni Constructors*, 158 N.C. App. 480, 483, 581 S.E.2d 138, 141 (2003).

III. Unjustifiable refusal of suitable employment

In its initial award in the present case, the Commission determined that plaintiff had met his burden of proving disability for the period 20 December 2006 through 31 December 2007. Defendants appealed, and this Court remanded the case for additional findings of fact as to whether plaintiff justifiably refused suitable employment offered by his former employer during that time period. *Leggett v. AAA Cooper Transportation*, No. COA09-944 (N.C. Ct. App. 20 July 2010). On remand, the Commission determined that plaintiff had unjustifiably refused suitable employment and had been released to return to normal work without restrictions, thereby negating the Commission's original determination of disability. Therefore, we first address plaintiff's argument that the Commission erred in concluding that plaintiff had unjustifiably refused suitable employment.

Pursuant to N.C. Gen. Stat. § 97-2(9) (2009), "[t]he term 'disability' means 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." *Id*. "Accordingly, disability

as defined in the Act is the impairment of the injured employee's earning capacity rather than physical disablement." *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993).

"'In order to obtain compensation under the Workers' Compensation Act, the [employee] has the burden of proving the existence of his disability and its extent.'" *Myers v. BBF Printing Solutions*, 184 N.C. App. 192, 198, 645 S.E.2d 873, 877 (2007) (quoting *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 185, 345 S.E.2d 374, 378 (1986)). This Court has established four ways in which an employee may meet his burden:

> (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

Russell, 108 N.C. App. at 765, 425 S.E.2d at 457 (citations omitted).

At any time, the employer may also establish that the employee is not entitled to either total or partial disability benefits because the employee has unjustifiably refused suitable employment. *Franklin v. Broyhill Furniture Industries*, 123 N.C. App. 200, 206, 472 S.E.2d 382, 386 (1996); *McCoy v. Oxford Janitorial Service Co.*, 122 N.C. App. 730, 733, 471 S.E.2d 662, 665 (1996)). "If an employer meets its burden of showing that a plaintiff unjustifiably refused suitable employment, then the employee is not entitled to any further benefits [for either total or partial disability]." *Whitfield v. Laboratory Corp. of Am.*, 158 N.C. App. 341, 354-55, 581 S.E.2d 778, 787 (2003); *see also* N.C. Gen. Stat. § 97-32 (2009) ("If an injured employee refuses employment procured for him suitable to his capacity he shall not be entitled to any compensation at any time during the continuance of such refusal, unless in the opinion of the Industrial Commission such refusal was justified.").

"'Suitable employment' is defined as 'any job that a claimant is capable of performing considering his age, education, physical limitations, vocational skills and experience.'" *Munns v. Precision Franchising, Inc.*, 196 N.C. App. 315, 317-18, 674 S.E.2d 430, 433 (2009) (quoting *Shah v. Howard Johnson*, 140 N.C. App. 58, 68, 535 S.E.2d 577, 583

(2000)). In determining the suitability of a particular job, the Commission may consider multiple factors, including plaintiff's physical and psychological suitability for the position, as well as the "similarity of the wages or salary of the pre-injury employment and the post-injury job offer." *Dixon v. City of Durham*, 128 N.C. App. 501, 504, 495 S.E.2d 380, 383 (1998). "In considering the wages or salary of a pre-injury job and a post-injury job offer, common sense and fairness dictate examination not only of the actual dollar amount paid at a given time, but also of the potential for advancement or, in other words, capacity for income growth." *Id.*

Plaintiff challenges the following conclusions of law in the Commission's order:

> 5. In this case, defendant offered plaintiff the dock worker/driver position which was suitable employment for plaintiff. Plaintiff had been released to return to full-duty work with no restrictions. Defendant offered plaintiff employment that paid slightly lower wages than his pre-injury job, but higher wages than plaintiff earned at Eastern Carolina Outfitters.
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> 7. Plaintiff unjustifiably refused defendant's offer of suitable employment in December 2006. Thereafter, plaintiff is not entitled to any compensation during the continuance of such refusal.

(Citations omitted.) Specifically, plaintiff argues that the findings of fact on which these two conclusions of law are based are not supported by competent evidence in the record. In particular, plaintiff challenges the following finding of fact in the Commission's order:

> 22. The Full Commission finds based on the greater weight of the evidence that the dock worker/driver position offered to plaintiff was suitable employment. Plaintiff had been released to return to work with no restrictions by his doctors, the wages for this position were only slightly lower than his pre-injury wages, and there was the possibility that plaintiff could return to his truck driver position and prior seniority after he had worked a short time in the dock worker position. Plaintiff unjustifiably refused this offer of suitable employment.

Plaintiff argues the Commission's determinations that the position was suitable, that plaintiff was without restrictions, and that the wages were similar are not supported by competent evidence in the record. We disagree.

First, this Court has already noted the evidence showed that "during the period of December 2006 through May 2007, plaintiff had been given a full release to normal work duty with no work restrictions by each of his physicians." *Leggett*, No. COA09-944, slip op. at 16. In addition, the Commission made the following findings of fact:

> 10. On December 15, 2005, [Nurse] Everette released plaintiff to return to his pre-injury job as a truck driver without restrictions from the standpoint of his burns.
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> 16. On July 28, 2006, plaintiff returned to Dr. Alligood for a follow-up. Dr. Alligood noted that plaintiff's shoulder was "pretty much back to full speed." . . . Dr. Alligood indicated he only needed to see plaintiff on an as needed basis. Dr. Alligood did not mention the previous lifting restrictions indicated during plaintiff's January 30, 2006 visit.
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> 18. On October 3, 2006, defendant filed a Form 24 Application to Terminate Payment of Compensation. . . . Plaintiff did not contest the Form 24 Application or submit any contradictory documentation.
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> 20. On December 20, 2006, plaintiff returned to Dr. Martin. Plaintiff had no pain and had returned to normal activities. . . . Dr. Martin reiterated that plaintiff could return to full-duty work.

The above findings of fact are not challenged by plaintiff on appeal, and therefore are binding on this Court. *Chaisson*, 195 N.C. App. at 470, 673 S.E.2d at 156. The above findings of fact show that plaintiff had no work restrictions from Nurse Everette or Drs. Alligood and Martin as of 20 December 2006.

Furthermore, the Commission found as a fact that "by the end of July 2006, [plaintiff] was released to return to work by the physicians treating his burns, shoulder, back and chest injuries." The record evidence shows that on 11 January 2006, plaintiff was released by Dr. Miller to regular work duty. Nurse Everette testified that on 15 December 2005, she released plaintiff to return to work with no restrictions regarding plaintiff's ability to work as a truck driver or in any other typical employment. On 20 June 2006, Nurse Everette recommended only that plaintiff should avoid direct sun exposure, stating that plaintiff's clothing would be sufficient to protect his burns from any direct sun exposure. The record evidence also shows that on 28 July 2006, Dr. Alligood did not state any work restrictions for plaintiff, despite his previous restrictions on lifting weight. Moreover, plaintiff testified that he had no work restrictions from a medical doctor in 2006. In addition, plaintiff does not argue, nor is there evidence in the record to show, that plaintiff was placed on any work restrictions by any of his physicians in 2007. Therefore, we find the Commission properly found as a fact that plaintiff had been released to return to work with no restrictions by his doctors during the period of 20 December 2006 through 31 December 2007.

Next, regarding whether the wages for the position offered by defendants were comparable to plaintiff's pre-injury wages, the Commission found as a fact that the dock worker/driver position "was for 60 hours per week and paid $18.00-$19.00 per hour, which was the top of the pay range for that position." This finding is supported by Gurganus' testimony. Accordingly, the wages for the position offered by defendants would yield $1,080-$1,140 per week. Plaintiff stipulated that his average weekly wage prior to his injury was $1,248.50 per week. Comparing the actual dollar amounts, we conclude that the Commission properly found that the wages for the dock worker/driver position are only slightly lower than plaintiff's pre-injury wages.

Plaintiff argues that prior to his injury, plaintiff only worked 40 hours per week in earning his weekly pre-injury wage, and that requiring plaintiff to work an additional 20 hours per week to make "similar" wages is unreasonable and should be against public policy. However, the Industrial Commission Form 19 filed by AAA reporting plaintiff's injury reflects that plaintiff worked ten hours per day for five days per week, totaling 50 hours per week in his pre-injury position. Plaintiff stipulated to all Industrial Commission forms. In

addition, Gurganus testified that the hourly wage offered plaintiff in the dock worker/driver position was a "guaranteed salary," whereas plaintiff's pre-injury position was paid only by the mile. Therefore, we find the Commission's finding of fact that the wages for the dock worker/driver position offered to plaintiff by defendants were only slightly lower than his pre-injury wages is supported by competent evidence in the record, and plaintiff's public policy argument under the circumstances of this case must fail.

Third, regarding plaintiff's potential for advancement, the Commission found as fact that "Ms. Gurganus stated that after plaintiff returned to work for eight weeks, he could request the owner of defendant-employer to reinstate plaintiff's seniority. Reinstatement of plaintiff's seniority and higher pay, however, was not guaranteed." This finding is also supported by Gurganus' testimony. In turn, such competent evidence supports the Commission's finding of fact that there was a possibility that plaintiff could return to his truck driver position and prior seniority after he had worked a short time in the dock worker/driver position.

Accordingly, competent evidence in the record supports the Commission's finding of fact that the dock worker/driver

position was suitable employment for plaintiff. In making this determination, the Commission properly considered plaintiff's physical disability, the similarity of wages, and the potential for advancement. *Dixon*, 128 N.C. App. at 504, 495 S.E.2d at 383. Because the Commission properly found that the dock worker/driver position offered by defendants was suitable employment for plaintiff, the Commission also properly found as a fact that plaintiff unjustifiably refused such offer, in particular by "throwing his keys at Ms. Gurganus and stating that he was not willing to start at the bottom again." This finding of fact is likewise supported by Gurganus' testimony. Thus, we find the Commission's findings of fact are supported by competent evidence in the record, and the Commission's findings of fact support its conclusions of law that the dock worker/driver position offered by defendants was suitable employment for plaintiff and that plaintiff unjustifiably refused such offer of employment. We therefore affirm the Commission's 3 November 2010 opinion and award. Because we affirm the Commission's conclusion that plaintiff unjustifiably refused suitable employment during the period 20 December 2006 through 31 December 2007, we need not address plaintiff's remaining arguments regarding his disability.

IV. Conclusion

We hold there is competent evidence in the record to support the Commission's findings of fact, which in turn support the Commission's conclusion of law that plaintiff unjustifiably refused defendants' offer of suitable employment, thereby negating plaintiff's entitlement to any disability compensation during the period of 20 December 2006 through 31 December 2007. The Commission's 3 November 2010 opinion and award is therefore affirmed.

Affirmed.

Judges McGEE and ERVIN concur.

Report per Rule 30(e).