NO. COA10-878
NORTH CAROLINA COURT OF APPEALS

Filed: 16 August 2011

EUNICE POLSTON,
Employee,
Plaintiff,

v.

North Carolina
Industrial Commission
I.C. No. 725935

INGLES MARKETS,
Employer,
SELF-INSURED
(BROADSPIRE, Servicing Agent),
Defendant.

Appeal by defendant from opinion and award entered 30 March 2010 by the North Carolina Industrial Commission. Heard in the Court of Appeals 10 February 2011.

David Gantt for plaintiff-appellee.

Northup McConnell & Sizemore, PLLC, by Steven W. Sizemore, for defendant-appellant.

GEER, Judge.

Plaintiff Eunice Polston was injured at work when she caught a 30-pound container of cheese as it slipped off a shelf. Defendant Ingles Markets appeals from the 30 March 2010 Industrial Commission opinion and award that awarded plaintiff

temporary total disability. Defendant primarily challenges the Commission's conclusion that a position defendant made available to plaintiff was not suitable employment and that plaintiff's employment in that position constituted a failed return to work. We hold that the Commission's conclusions on these issues were supported by proper findings of fact that were in turn supported by competent evidence. We believe, however, that the Commission's conclusion that plaintiff's "back conditions" are compensable conditions is not supported by sufficient findings of fact distinguishing between cervical and thoracic spine conditions and a separate lumbar condition. Accordingly, we affirm in part and reverse and remand in part for further findings of fact.

Facts

Plaintiff, who was 63 years old at the time of the hearing before the deputy commissioner, began working for Ingles Markets on 26 November 1996. Over time, she was promoted and became manager of the deli department, making $12.50 per hour. On 31 October 2006, plaintiff was attempting to put a 30-pound container of cheese on a shelf in the market. The container slipped off the shelf, and she caught it, injuring her neck.

Plaintiff saw her family physician, Dr. Laurence So, on 1 November 2006 complaining of mid-upper back pain, mostly on her

left side. On 21 November 2006, plaintiff saw Dr. Wesley Fowler, a neurosurgeon, and reported experiencing pain from her neck through the length of her left arm into her left hand. Dr. Fowler recommended immediate surgical intervention and performed two surgeries on her cervical spine on 28 November 2006 and 19 December 2006. Dr. Fowler observed that after the surgeries, plaintiff's pain symptoms waxed and waned but never completely resolved. He believed that plaintiff's left-side numbness would be permanent.

Plaintiff began a multi-disciplinary work-hardening program at the Center for Occupational Rehabilitation ("COR") on 24 January 2007. As part of this program, Dr. Richard Broadhurst oversaw plaintiff's pain medication management. Dr. Broadhurst diagnosed plaintiff with post-laminectomy syndrome, left-sided C6 radiculopathy, cervical degenerative joint disease, degenerative disc disease, and overall deconditioning. He prescribed Lyrica for plaintiff's pain and started her in the physical therapy portion of the work conditioning program.

On 22 February 2007, plaintiff filed a Form 18 stating that she injured her neck "when lifting a thirty (30) pound box of cheese onto a shelf." On 1 March 2007, defendant filed a Form 60 admitting plaintiff's right to compensation as a result of the accident.

On 17 May 2007, COR evaluated plaintiff's work capacity and concluded that she could perform light to light-medium range work. Dr. Broadhurst approved work restrictions of lifting up to 15 pounds and overhead lifting up to six pounds, occasional overhead reaching, and avoidance of ladder climbing, crawling, and kneeling. Frequent walking and standing were, however, allowed.

On 31 May 2007, Dr. Broadhurst determined that plaintiff had reached maximum medical improvement ("MMI") for her compensable neck injury and assigned a 10% permanent partial impairment ("PPI") rating. That same day, Dr. Broadhurst reviewed and approved a job description for a U-Scan position at Ingles as being physically suitable for plaintiff. Dr. Fowler agreed to allow plaintiff to try this position although he was uncertain whether she would be able to continue in the position long-term.

The U-Scan position involved plaintiff's acting as an attendant at the automated checkout in Ingles Market. The customers performed the actual scanning and bagging. The position was essentially sedentary in nature, could be performed while sitting or standing, and involved occasional reaching and lifting up to ten pounds. The only routine keying was inputting the codes for produce. Plaintiff's compensation for the U-Scan

position would begin at her pre-injury average weekly wage ("AWW") of $12.50 per hour, but would likely be reduced after a three-month period to $11.00 per hour if she remained in the position.

On 9 June 2007, while driving to visit her son in Florida, plaintiff suffered a grand mal seizure when sitting in traffic. As a result of this seizure, plaintiff sustained fractures in her lumbar spine. After she was released from the hospital on 17 June 2007, plaintiff lived with her son in Florida for approximately two and one half months.

At some point between 29 May 2007 and 19 June 2007, defendant fired plaintiff for exceeding the company's leave policy. At plaintiff's request, on 13 July 2007, Dr. Fowler released her to light duty work based on the 17 May 2007 COR examination.

Plaintiff saw Dr. So on 30 August 2007 and 10 September 2007, complaining of lower back pain related to the seizure incident. Dr. So continued to treat plaintiff for several months due to her complaints of lower back pain.

Dr. Fowler saw plaintiff again on 24 September 2007. Plaintiff declined further diagnostic studies of her neck condition because she did not believe her symptoms were severe enough to warrant them. Dr. Fowler released plaintiff from

treatment and directed her to return as needed. At that time, Dr. Fowler believed plaintiff probably had a chronic pain issue in her left upper extremity secondary to an intrinsic nerve dysfunction. Dr. Fowler also did not believe plaintiff's seizure and lumbar spine fractures significantly changed plaintiff's neck condition or her pain.

On 9 October 2007, plaintiff returned to work for defendant performing the U-Scan position. She worked in that position through 15 October 2007 at which point the pain levels in her left arm and fingers became extremely high and uncomfortable. On 16 October 2007, Dr. So wrote plaintiff out of work for "back pain." He believed plaintiff was unable to work at this time due to increasing neck and upper extremity pain. On 19 October 2007, however, defendant filed a Form 28T indicating that plaintiff had made a successful and ongoing return to work effective 10 October 2007.

On 14 January 2008, plaintiff returned to Dr. Fowler with complaints of lower back and left hip pain. On 30 January 2008, plaintiff again visited Dr. Fowler complaining of neck pain, left arm numbness, and headaches. Dr. Fowler considered these symptoms similar to those that plaintiff had continued to experience following the 2006 surgeries.

Dr. So last examined plaintiff for lower back pain on 14 May 2008 and referred her to an orthopedic surgeon. On 28 October 2008, over one year after plaintiff left the U-Scan position, Dr. So executed a Form 28U that stated plaintiff suffered from "increased neck and upper extremity pain and numbness."

On 3 November 2008, plaintiff returned to Dr. Fowler complaining of neck pain, left arm pain, and headaches. Plaintiff told him that she wanted the further diagnostic studies he had previously suggested. Dr. Fowler declined her request to give her a rating for her neck condition without current imaging, and plaintiff left his office and never returned.

Plaintiff has unsuccessfully looked for work at other retailers near her home since leaving defendant employer in October 2007. Plaintiff's family has noticed a significant negative change in her ability to perform activities of daily living since her 31 October 2006 incident at work.

This claim was heard by the deputy commissioner on 12 November 2008. On 21 August 2009, the deputy commissioner filed an opinion and award that denied plaintiff disability benefits. Plaintiff appealed this opinion and award to the Full Commission.

On 30 March 2010, the Full Commission filed an opinion and award that reversed the opinion and award of the deputy commissioner. The Commission concluded that plaintiff had suffered compensable injuries to her neck, left shoulder, left arm, left hand, and back. The Commission further determined that plaintiff "ha[d] not reached MMI at this time since she has not received the comprehensive pain management, diagnostic testing, examination, and FCE suggested by Dr. Fowler." With respect to disability, the Commission concluded that the U-Scan position was not suitable employment, that plaintiff's work in the U-Scan position was a failed return to work, and that plaintiff was entitled to temporary total disability. The Commission awarded plaintiff compensation of $331.19 per week from 16 October 2007 until it ordered otherwise. The Commission also ordered defendant to pay for treatment to plaintiff's compensable neck, left shoulder, left arm, left hand, and back conditions. Defendant timely appealed to this Court.

Discussion

When this Court reviews decisions by the Commission, we "are limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d

549, 553 (2000). When supported by competent evidence, the Commission's findings of fact are conclusive on appeal, even if there is evidence supporting contrary findings. *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 700 (2004). However, "[t]he Commission's conclusions of law are reviewed *de novo*." *Garner v. Capital Area Transit*, ___ N.C. App. ___, ___, 702 S.E.2d 319, 322 (2010).[1]

I

Defendant contends that the Commission erred in the following facts by identifying plaintiff's compensable injuries as being to plaintiff's arm, shoulder, hand, and back, as well as to her neck:

> 26. On October 16, 2007, Dr. So wrote Plaintiff out of work for "back pain." Plaintiff took this note to the store manager. Dr. So felt that Plaintiff was unable to work at this time due to increasing neck and upper extremity pain.
>
> . . . .
>
> 41. The medical treatment that Plaintiff has received for her compensable

[1]We note that defendant has failed to comply with the current version of the Rules of Appellate Procedure. Effective for appeals on or after 1 October 2009, the record on appeal no longer includes assignments of error, but rather an appellant must include proposed issues on appeal. *See* N.C.R. App. P. 18(c)(10). The elimination of assignments of error also results in changes to the appellant's brief. *See* N.C.R. App. P. 28(b). The notice of appeal in this case was filed 30 April 2010, and therefore the amendments to the Rules of Appellate Procedure are applicable. We urge counsel to review the revised rules.

> neck, arm, shoulder, hand, and back conditions has been reasonably required to effect a cure, provide relief and/or lessen her period of disability related to said condition. Further medical treatment is reasonably required to effect a cure and/or provide relief for her compensable neck, arm, shoulder, hand, and back conditions.

Defendant notes that the parties stipulated only that plaintiff had suffered a compensable injury to her neck.

Throughout the Commission's Opinion and Award, and the evidence supporting the Commission's findings, the Commission and the physicians noted that, as a result of the accident with the cheese, plaintiff experienced severe pain in her neck "radiating down into her left arm and hand." Dr. So, Dr. Fowler, and Dr. Broadhurst all noted the pain radiating down plaintiff's left arm from her cervical spine condition -- the neck condition that the parties stipulated was compensable. Dr. Fowler, in addition, found that, following his surgery, the left arm pain improved, but plaintiff still had residual numbness in her left hand. The Commission and all of the doctors related the pain in the left shoulder, arm, and hand to the admittedly compensable cervical spine injury. Defendant has pointed to no evidence to the contrary. We, therefore, hold that the Commission did not err in concluding that plaintiff's left shoulder, arm, and hand conditions were compensable. We note that the Commission should clarify in its opinion and award that

it is finding compensable the *left* arm, shoulder, and hand conditions.

With respect to the back, the Commission generally concluded that plaintiff's "back conditions" were compensable without explaining to which back conditions it was referring. In addition to "mid back pain" and plaintiff's cervical spine issues, however, plaintiff suffered an injury to her lumbar spine as a result of a seizure. There is no dispute that the lumbar spine condition is not compensable. Plaintiff, Dr. So, and Dr. Fowler all testified that plaintiff's lower back pain was attributable to the lumbar fractures resulting from the seizure, and they did not relate the pain to the compensable injury. Dr. Fowler did not, however, believe that the seizure or lumbar fractures significantly affected plaintiff's neck condition or the ongoing pain resulting from that condition.

Accordingly, to the extent that the Commission is including the lumbar condition as one of plaintiff's "back conditions" referenced in the opinion and award, the evidence does not support a determination that the lumbar condition is compensable. The Commission may, however, have been referring to the mid back pain and cervical spine conditions. Since the Commission's findings do not clarify which back conditions it

intended to deem compensable, we must remand for further findings of fact on that issue.

II

Defendant next challenges as unsupported by the evidence the Commission's finding of fact number 38 that "[p]laintiff has not reached MMI at this time since she has not received the comprehensive pain management, diagnostic testing, examination, and FCE suggested by Dr. Fowler." This finding of fact was the basis for the Commission's conclusion of law that "[b]ecause a question remains, pending further evaluation, as to whether Plaintiff has reached MMI for her compensable neck condition, an award for [permanent partial disability ("PPD")] is not authorized at this time." The conclusion of law thus clarified that the Commission had in fact decided that a determination regarding whether plaintiff had reached MMI could not be made without further evaluation.

Defendant points to the Commission's finding of fact 19 as being inconsistent with finding of fact 38:

> 19. On May 31, 2007, Dr. Broadhurst deemed Plaintiff to have reached maximum medical improvement (MMI) for her compensable neck injury and assigned a ten percent (10%) permanent partial impairment (PPI) rating.

The Commission, however, also found:

> 36. Dr. Fowler confirmed that Plaintiff was medically unable to work until he released her to light duty on July 13, 2007. As to her work status beyond that date, he declined to comment without further diagnostic testing, examination and a possible functional capacity evaluation (FCE).
>
> 37. Dr. Fowler also could not say, without further evaluation, whether Plaintiff has reached maximum medical improvement (MMI) for her compensable neck condition.

The Commission was not bound by Dr. Broadhurst's opinion that plaintiff reached MMI. The Commission apparently determined that Dr. Fowler's testimony and opinion was more credible and entitled to greater weight than Dr. Broadhurst's, as was its prerogative. *See Scarboro v. Emery Worldwide Freight Corp.*, 192 N.C. App. 488, 493, 665 S.E.2d 781, 786 (2008) ("This Court may not weigh the evidence or evaluate the credibility of witnesses, as '[t]he Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony.'" (quoting *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998))).

Dr. Fowler's evidence and the findings of fact regarding that evidence amply support the Commission's conclusion that the question whether plaintiff had reached MMI could not be decided until further evaluation had been completed. The Commission was

not, therefore, required at this point to decide whether plaintiff was permanently disabled and could enter an award of temporary disability.

III

Defendant further contends that the Industrial Commission committed reversible error when it concluded that the U-Scan position was not suitable employment and when it concluded that plaintiff's October 2007 employment in that position constituted a failed trial return to work. We disagree.

On these issues, the Commission found that "[t]he U-Scan position was not a 'suitable' employment job since the job would pay less money than the Deli Department Manager job she worked at when injured in her October 31, 2006, accident." The Commission then concluded:

> 2. Plaintiff was unable to perform the U-Scan position offered by Defendant Employer due to her compensable injuries suffered in the October 31, 2006, injury by accident. Plaintiff did not unreasonably refuse a suitable job as a U-Scan worker since she was unable to physically endure the position due to pain caused by compensable injuries from her October 31, 2006, injury by accident. Plaintiff did not unreasonable [sic] refuse a suitable job as a U-Scan worker as the position offered was not suitable employment based on the job's earning potential. . . .
>
> 3. Plaintiff's work in the U-Scan position in October 2007 constituted a failed trial return to work per N.C. Gen.

> Stat. §97-32.1. The U-Scan job attempt was an unsuccessful work attempt that should have prompted reinstatement of her temporary total disability (TTD) benefits as of October 16, 2006.

With respect to the suitability of the U-Scan position, N.C. Gen. Stat. § 97-32 (2009) provides: "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." The employer "bears the burden of showing that an employee refused suitable employment." *Nobles v. Coastal Power & Elec., Inc.*, ___ N.C. App. ___, ___, 701 S.E.2d 316, 319 (2010). If "the employer makes this showing, the burden shifts to the employee to show that the refusal was justified." *Id.*

"A 'suitable' job is one the claimant is capable of performing considering his age, education, physical limitations, vocational skills, and experience." *Burwell v. Winn-Dixie Raleigh, Inc.*, 114 N.C. App. 69, 73, 441 S.E.2d 145, 149 (1994). "The disparity between pre-injury and post-injury wages is one factor which may be considered in determining the suitability of post-injury employment." *Foster v. U.S. Airways, Inc.*, 149 N.C. App. 913, 921, 563 S.E.2d 235, 241 (affirming Commission's determination that job leads and reservationist job available to

plaintiff were unsuitable due to "disparity in plaintiff's pre-injury wages and her post-injury wages"), *disc. review denied*, 356 N.C. 299, 570 S.E.2d 505 (2002).

In *Dixon v. City of Durham*, 128 N.C. App. 501, 495 S.E.2d 380, *disc. review denied*, 348 N.C. 496, 510 S.E.2d 381 (1998), the plaintiff, who had been a police officer, was no longer safely able to perform her duties because of a compensable injury. *Id.* at 501-02, 495 S.E.2d at 381. The City offered the plaintiff a position as a water meter-reader trainee and assured her that she would be paid the same salary she made as a police officer. *Id.* at 502, 495 S.E.2d at 381. The plaintiff rejected this offer and sought [PPD] compensation. *Id.* The Commission found the plaintiff's refusal to accept the position was unjustified and the plaintiff appealed to this Court. *Id.*

This Court concluded that "a job (water meter-reader trainee) with no potential for income growth for plaintiff is not sufficiently similar to a job (police officer II) with income-growth potential of approximately $8,000." *Id.* at 504, 495 S.E.2d at 383. This Court reversed the Commission and remanded, holding that "[t]he post-injury job offered by defendant is not 'suitable' to plaintiff's capacity pursuant to G.S. § 97-32 and related statutes and case law. Plaintiff was justified in rejecting it." *Id.* at 506, 495 S.E.2d at 384.

Similarly, here, plaintiff would start out earning the same wage as in her position as deli manager, but she would eventually earn a lower wage if she stayed in the position. Under *Dixon*, the Commission could properly conclude that the U-Scan position was not suitable employment.

While defendant acknowledges that a disparity in wages may be a factor in determining suitability, the defendant claims that the Industrial Commission provided no basis for its finding that the U-Scan position would pay less than plaintiff's prior position managing the deli department. In support of this argument, defendant cites *Munns v. Precision Franchising, Inc.*, 196 N.C. App. 315, 319, 674 S.E.2d 430, 434 (2009), in which this Court held that "[w]ithout such comparison, the Commission could not determine the suitability of the employment offered by employer."

In *Munns*, the Commission did not make a finding of fact as to the wages the plaintiff would have earned in the position offered by the employer and, therefore, could not have compared the wages earned in the original job and in the proposed employment. Here, however, the Commission found in finding of fact 4 that plaintiff made $12.50 per hour as deli manager and in finding of fact 17 found that in the U-Scan position, she "would start off at her pre-injury average weekly wage (AWW),

but would likely be reduced to $11/hr after a three (3) month period if she remained in that position." These findings of fact as to plaintiff's prior wages and the wages she would be paid in the U-Scan position properly supported the Commission's conclusion of law that the position was not suitable under *Dixon* as it did not have the same earning potential.

We turn next to defendant's claim that the Commission erred when it concluded that plaintiff's October 2007 return to work was a failed return to work. Pursuant to N.C. Gen. Stat. § 97-32.1 (2009), "[i]f the trial return to work is unsuccessful, the employee's right to continuing compensation under G.S. 97-29 shall be unimpaired unless terminated or suspended thereafter pursuant to the provisions of this Article."

On this issue, the Commission made the following findings of fact:

> 25. On October 9, 2007, Plaintiff returned to work for Defendant Employer in the U-Scan position at the Robbinsville store. She continued to work in this position through October 15, 2007, when the pain levels in her left arm and fingers became extremely high and uncomfortable.
>
> 26. On October 16, 2007, Dr. So wrote Plaintiff out of work for "back pain." Plaintiff took this note to the store manager. Dr. So felt that Plaintiff was unable to work at this time due to increasing neck and upper extremity pain.

Defendant contends that finding of fact 26 is not supported by competent evidence because Dr. So was asked during cross-examination, "So there's no real support for her increased neck and upper extremity pain and numbness in your records, is there?" Dr. So answered "No." Nevertheless, earlier in his deposition, Dr. So was asked if the reason plaintiff was unable to return to work "was due to increasing neck and upper extremity pain," and he responded in the affirmative. He also testified that "[i]f [plaintiff] continues to have pain in her neck as well as the numbness as well as weakness of the arm, then that would preclude her from using the arm or being able to work due to the neck pain as well."

The absence of any reference in Dr. So's records to increased pain and numbness went to the credibility and weight to be afforded Dr. So's opinion as expressed in his deposition, which are issues for the Commission. As this Court has previously noted, "the Commission's findings may be set aside on appeal only 'when there is a complete lack of competent evidence to support them[.]'" *Gray v. RDU Airport Auth.*, ___ N.C. App. ___, ___, 692 S.E.2d 170, 174 (2010) (quoting *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 914 (2000)).

Defendant contends that finding of fact 25, even if supported by evidence, is not sufficient because it does not

specifically "find the lack of comfort due to pain was such that Plaintiff was unable to continue in her position as a U-Scan clerk." While the finding may not explicitly state that the pain prevented her from working in the U-Scan position, we believe that the Commission effectively made that finding when it stated that plaintiff worked in that position until her pain became "extremely high and uncomfortable," and, as finding of fact 26 states, her doctor wrote her out of work because of the pain.

In short, findings of fact 25 and 26 state that plaintiff attempted to work in the U-Scan position, but she was forced to stop due to her pain from her compensable injury. These findings are sufficient to support the Commission's conclusion that plaintiff's work was a failed trial return to work and, as a result, she was entitled to reinstatement of TTD benefits. *See Burchette v. East Coast Millwork Distribs., Inc.*, 149 N.C. App. 802, 807, 562 S.E.2d 459, 462 (2002) (upholding Commission's finding that plaintiff had a failed return to work where he was unable to perform light duty jobs with defendant-employer due to "'increased lower back pain and increased right leg pain and weakness from the prolonged sitting or standing required by the job'").

Affirmed in part; reversed and remanded in part.

Judges STEPHENS and McCULLOUGH concur.

Report per Rule 30(e).