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NO. COA02-1475

NORTH CAROLINA COURT OF APPEALS

Filed: 21 October 2003

MARY HAILEY,
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 848677

[TYSON FOODS],
Employer,

SELF-INSURED ([TYNET, Servicing Agent]),
Defendant.

Appeal by defendants from opinion and award entered 9 July 2002 by the North Carolina Industrial Commission. Heard in the Court of Appeals 8 September 2003.

Tania L. Leon for plaintiff appellee.

Orbock Bowden Ruark & Dillard, PC, by Maureen T. Orbock and Devin F. Thomas, for defendant appellants.

McCULLOUGH, Judge.

Mary Hailey was employed by Tyson Foods between 1992 and 1998. On 21 November 1996, plaintiff reported to her employer that she injured her hands and shoulder. At that time, she had been performing the wingette cutter job for approximately three years. This position required feeding wingettes into a Star Wheel Machine. The machine contained slots and revolved in front of the employee. On average, the employee would feed between 50 and 60 pieces per minute and up to 28,800 pieces per day.

Defendants arranged for plaintiff to be seen on 20 November 1996 by doctors at Carolina Bone and Joint. Dr. John Millon diagnosed plaintiff with moderate right shoulder impingement syndrome and left sided carpal tunnel syndrome. On 18 December 1996, Dr. Millon indicated that plaintiff could return to work after plaintiff had reported long lasting relief. However, on 22 January 1997, plaintiff returned to Dr. Millon and complained about swelling in her right hand after using scissors at work. The doctor diagnosed plaintiff as having recurring bilateral carpal tunnel syndrome and released her to work in rotating jobs but without the use of scissors.

In March of 1997, Dr. Millon restricted plaintiff from packing for six weeks after plaintiff mentioned that it exacerbated her pain. In December, plaintiff saw Dr. Joseph King, a colleague of Dr. Millon. Dr. King reported that plaintiff continued to have trouble with her hands and it appeared to be a "long term problem." A Nerve Conduction Study was performed on 19 January 1998 and determined that the problem was bilateral carpal tunnel syndrome. Based on these results, Dr. King recommended surgery. On 29 January 1998, defendants approved the study under workers' compensation.

On 30 January 1998, plaintiff had bilateral carpal tunnel release surgery. Plaintiff was unable to work from 13 January 1998 to 9 March 1998 and from 31 March 1998 to 12 May 1998. She took a leave of absence and received employer-funded short term disability benefits during these time periods. Defendants admit that the bilateral carpal tunnel syndrome was a result of plaintiff's employment and have agreed to pay plaintiff the difference between what she would have received as temporary total disability benefits and what she received as short term disability benefits paid to her. As of 13 January 1998, plaintiff made $7.90 per hour or $316.00 per week which yields a compensation rate of $210.67 per week.

Plaintiff attempted to return to work on 13 May 1998, but she only lasted two hours. Her hands ached, and she became dizzy, sweaty, and sick to her stomach. Plaintiff reported to defendant's medical department and was informed by Elaine Edwards that there was no job that plaintiff could do. Edwards also told plaintiff that she should file for disability and return when she felt better. At this point, defendants were not treating plaintiff's claim as a workers' compensation claim and did not provide continuing medical care directed at returning plaintiff to work.

Plaintiff received treatment for right shoulder pain in November of 1998 and did not seek medical treatment again until 19 February 1999. On that day, plaintiff told Dr. King that mopping had caused left shoulder and left hand pain. About four months later, plaintiff told Dr. King that working at her church increased her hand symptoms. Dr. King opined that plaintiff did not need further treatment. He indicated that plaintiff had reached maximum medical improvement, but had a five percent permanent partial disability rating to her hand.

Plaintiff went to Dr. Lois Osier to get a second opinion on 15 July 1999. Dr. Osier concluded that plaintiff could return to work as long as it did not involve moderate or heavy lifting or gripping. On 8 December 1999, plaintiff returned to Dr. King after injuring her wrist while lifting a gallon of milk. Plaintiff did not seek any medical treatment for more than one and a half years, and she did not return to see Dr. King until 1 June 2001.

On 16 November 2001, Deputy Commissioner Phillip A. Holmes awarded temporary total disability benefits for bilateral carpal tunnel syndrome from 13 January 1998 through 9 March 1998 and from 31 March 1998 through 13 May 1998 subject to a credit for short term disability payments. He found that plaintiff had not proved that she was disabled after 13 May 1998 due to an intervening cause. Plaintiff appealed to the Full Commission.

The Full Commission filed its opinion and award on 9 July 2002 and modified the Deputy Commissioner's opinion and award. It awarded the plaintiff the following:

> 1. Defendant shall pay to Plaintiff temporary total disability compensation of $210.67 per week from January 13, 1998 through March 9, 1998, from March 31, 1998, through May 12, 1998, and from May 14, 1998 until plaintiff returns to work or further order from the Commission, less credit owed to the Defendants for payment of short-term disability benefits paid to Plaintiff. Those benefits which have accrued shall be paid to Plaintiff in a lump sum subject to an attorney fee, awarded below. Continuing benefits shall be paid weekly, subject to the attorney's fees awarded, below.
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> 2. Plaintiff's counsel is entitled to a 25% attorney's fee on the lump sum payment for past benefits owed to Plaintiff after credit is given to the Defendants for short term disability benefits that were paid. Defendant shall withhold this sum from the amount payable to plaintiff in Paragraph 1, above, and pay this sum directly to plaintiff's counsel. Defendant shall pay every fourth continuing weekly benefit to plaintiff's counsel.
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> 3. Defendants shall pay for all medical treatment for Plaintiff's admitted carpal tunnel syndrome.
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> 4. Defendants shall pay the costs.

Defendants appeal.

On appeal, defendants argue the Full Commission erred by finding that (I) plaintiff has continued to be disabled since 14 May 1998 and (II) plaintiff's complaints after 13 May 1998 are related to her admitted, work-related bilateral carpal tunnel syndrome. For the reasons stated here, we disagree with defendants' arguments and affirm the opinion and award of the Full Commission.

The standard of review in this case is limited to "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). The Full Commission is the "sole judge of the weight and credibility of the evidence[.]" *Id.* at 116, 530 S.E.2d at 553. An appellate court reviewing a workers' compensation claim "does not have the right to weigh the evidence and decide the issue on the basis of its weight." *Anderson v. Construction Co.,* 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965). "The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Id.* at 434, 144 S.E.2d at 274. If there is any evidence at all, taken in the light most favorable to the plaintiff to support it, the finding of fact stands, even if there is substantial evidence going the other way. *Adams v. AVX Corp.,* 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998). With these principles in mind, we consider the case before us.

Defendants have assigned error to the following findings of fact of the Full Commission:

> 17. Plaintiff attempted to return to work on May 13, 1998, however, only lasted two hours before her hands ached to the point where plaintiff felt dizzy, was sweaty, and sick to her stomach. Plaintiff reported to defendant's medical department and was informed by Ms. Edwards that there was no job with defendant that plaintiff could do, that plaintiff should file for Social Security disability, and to return when she felt better. Plaintiff did not feel better and did not return to defendant. Defendant was not treating plaintiff's claim as a workers' compensation claim and did not provide continuing medical care directed at returning plaintiff to work.
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> 18. Plaintiff returned to work on May 13, 1998, however, plaintiff was not able to physically perform the work available with defendant. The greater weight of the credible evidence is that defendant did not offer suitable employment to plaintiff and thereby plaintiff did not refuse suitable employment.
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> * * * *
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> 25. Based on the greater weight of the competent evidence, plaintiff's compensable bilateral carpal tunnel syndrome continued after she left work on May 13, 1998, and is continuing. Although plaintiff has sustained aggravations to her carpal tunnel condition, the reported incidents are natural consequences of the

> compensable injury and are not an independent, intervening event attributable to plaintiff's intentional conduct.
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> * * * *
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> 28. Plaintiff has sustained a compensable injury consisting of bilateral carpal tunnel syndrome. Defendant has accepted the compensability of plaintiff's bilateral carpal tunnel syndrome. Plaintiff was disabled and not able to return to employment with defendant and continued to be disabled as of the date of her unsuccessful attempt to return to work on May 13, 1998. Defendant has not presented evidence to establish that plaintiff's disability is not or has not been continuing. The limited medical care provided to plaintiff after May 13, 1998, is related to defendant's failure to acknowledge plaintiff's condition as a workers' compensation claim and to provide medical care as required by the Act.

I. Finding of Fact 17

Defendants argue that there is no competent evidence in the record to support finding of fact 17 which determined that plaintiff had hand pain on May 13, 1998, as a result of her job. We disagree.

Plaintiff's own testimony indicates that she experienced hand pain while doing her job on the date in question.

> Q. And you stayed out of work for a period of time until May the 13th, 1998?
>
> A. Yes.
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> * * * *
>
> Q. Do you know how long you lasted there that day?
>
> A. About two hours.
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> Q. And why did you leave after two hours?
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> A. Because the meat was too cold and my hands was aching. And I was having irregular heartbeats. Well, that's what she said it was when I asked Elaine how my heart was.

* * * *

Q. What did you say to her? I mean, how did you explain it to her?

A. I went to her and I told her that I was packing and my hands was real cold and they was aching real bad. And I started sweating and I was sick on my stomach. My shoulders was aching.

This evidence validates the Full Commission's finding of fact on this issue. Therefore, we find no error.

II. Finding of Fact 18

Defendants contend that finding of fact 18 is not based on competent, credible evidence. They argue that plaintiff refused employment by walking away from her job on 13 May 1998 without explanation and never returning. The Full Commission rejected this argument.

In her testimony, plaintiff recounted a conversation she had with Elaine Edwards, the nursing supervisor at Tyson Foods. According to plaintiff, Edwards gave her permission to leave work on 13 May 1998 and told her to come back when she was feeling better. Because there is competent evidence that plaintiff left with permission and did not refuse employment, we find no error in the Full Commission's finding of fact 18.

III. Finding of Fact 25

Defendants assert that finding of fact 25 was erroneous because there is no competent evidence in the record that plaintiff's reported hand pain after 13 May 1998 was related to her job or her previously diagnosed carpal tunnel syndrome. We disagree.

Evidence in the record suggests that plaintiff's bilateral carpal tunnel syndrome continued after she left work. Plaintiff indicated that her pain was so severe that she could not return to her job: "Well, Elaine told me to come back when I get better and I ain't got better. My hands are

still bothering me." Medical records also indicate that plaintiff's symptoms of hand pain continued after May of 1998. Dr. Lois K. Osier gave a second opinion about plaintiff's work-related injury on 15 July 1999. Dr. Osier explained:

> In discussing Ms. Hailey's present findings she continues to have achiness in the left palm of the hand as well as numbness in the right index finger. She finds that the right index and long fingers continue to ache quite a bit. She does not get any further numbness in the left hand. . . . She continues to note weakness of the right hand and difficulty when performing activities such as a handshake.

Similarly, Dr. Osier's report from 16 March 2000 mentions "a nerve conduction study" that was conducted to address plaintiff's "*ongoing complaints* of bilateral carpal tunnel syndrome." (Emphasis added.) Dr. Osier further explains that "[i]t is possible that she has re-accumulated scar tissue now causing recurrence of her symptoms." These records reveal that plaintiff's bilateral carpal tunnel syndrome never really subsided. She continued to experience and complain about pain in 1999 and 2000. Accordingly, defendants' assertion that plaintiff had no symptoms of bilateral carpal tunnel syndrome is without merit.

Defendants also claim that finding of fact 25 was improper because plaintiff's symptoms after 13 May 1998 were caused by subsequent intervening events. In particular, they suggest that plaintiff's lifting a gallon of milk, providing volunteer work at church, mopping, and falling on her wrist caused her hand pain.

"The aggravation of an injury is compensable if the primary injury arose out of and in the course of employment, and the subsequent aggravation of that injury is a natural consequence that flows from the primary injury." *Horne v. Universal Leaf Tobacco Processors,* 119 N.C. App. 682, 685, 459 S.E.2d 797, 799, *disc. review denied*, 342 N.C. 192, 463 S.E.2d 237 (1995).

Here, plaintiff's original injury resulted from her employment with Tyson Foods. In fact, Tyson acknowledged that plaintiff's claim for bilateral carpal tunnel syndrome was compensable. Similarly, the subsequent aggravation of that injury is a natural consequence that flows from the primary injury. While lifting a gallon of milk, volunteering at church, mopping, and falling may have resulted in an increase in symptoms, they are not intervening events. Dr. King agreed that in each instance, the subsequent event did not materially change plaintiff's underlying medical condition resulting from her occupational injuries. Therefore, the Full Commission's finding of fact 25 was not erroneous.

IV. Finding of Fact 28

Defendant argues that finding of fact 28 was erroneous in determining that plaintiff was disabled and could not return to work for defendant. We disagree.

"An injured employee seeking to be compensated for a disability under the Workers' Compensation Act must initially establish both the existence and the extent of the disability." *Flores v. Stacy Penny Masonry Co.,* 134 N.C. App. 452, 455, 518 S.E.2d 200, 203 (1999). Disability is defined as "incapacity . . . 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) (2001). A plaintiff may show such incapacity by "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 . . . ." *Russell v. Lowes Product Distribution,* 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993). "In determining if plaintiff has met this burden, the Commission must consider not only the plaintiff's physical limitations, but also his testimony as to his pain in determining the extent of incapacity to work and earn wages such pain might cause." *Webb v. Power Circuit, Inc.,* 141

N.C. App. 507, 512, 540 S.E.2d 790, 793 (2000), *cert. denied*, 353 N.C. 398, 548 S.E.2d 159 (2001).

In the case at bar, plaintiff reported having hand pain from working for defendant as a wingette cutter. Doctors diagnosed plaintiff with recurring bilateral carpal tunnel syndrome, and plaintiff's treating physician, Dr. King, indicated that the hand pain seemed to be a "long term problem." Plaintiff underwent bilateral carpal release surgery on 19 January 1998 and was unsuccessful in her attempt to return to work on 13 May 1998. At this point, plaintiff was disabled, and defendants accepted the compensability of plaintiff's condition. Furthermore, plaintiff's hand condition has not improved since that time. She testified that she continues to experience severe swelling and aching in her hands and that she gets pains from doing the most basic of life's chores such as combing her hair, cooking, and driving. Once again, we reiterate our limited standard of review: "'The findings of fact by the Industrial Commission are conclusive on appeal if supported by any competent evidence.'" *Id.* at 511-12, 540 S.E.2d at 793 (quoting *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 115, 530 S.E.2d 549, 552 (2000)). We find that there was competent evidence to support the Commission's findings that plaintiff met her burden of proving a disability.

When a disability has been established, the employer has the burden of showing that suitable jobs are available for the employee and that the employee is capable of getting one, taking the employee's physical and vocational limitations into account. *Franklin v. Broyhill Furniture Industries,* 123 N.C. App. 200, 206, 472 S.E.2d 382, 386, *cert. denied*, 344 N.C. 629, 477 S.E.2d 39 (1996). "A job is suitable if the employee is capable of performing the job, given her 'age, education, *physical limitations,* vocational skills, and experience.'" *Id.* at 206, 472

S.E.2d at 386 (citation omitted) (emphasis added). An employee is capable of getting a job if there is a reasonable likelihood that she would be hired if she diligently sought the job. *Id.*

The defendant has not met its burden of proving that plaintiff was employable. An employee for Tyson, Jonathan Edwards, explained that the company did employ people to do "light-duty" jobs. Edwards also testified that these positions were available to the *general public*. However, defendants did not establish that plaintiff was reasonably likely to be hired by Tyson or anyone else. Furthermore, given plaintiff's physical limitations, we are not persuaded that light-duty jobs would be suitable for her. Plaintiff has had a long history of carpal tunnel syndrome, and her symptoms continue to debilitate her. A woman whose hand problems inhibit her from doing life's simplest tasks may not be employable, even in light-duty jobs. While there is some evidence going the other way, we find no error in the Commission's finding that plaintiff is not employable because of her continuing disability.

After careful consideration of the record and the arguments presented by the parties, we conclude that the Full Commission acted properly in all respects. Accordingly, the opinion and award of the Full Commission is affirmed.

Affirmed.

Chief Judge EAGLES and Judge STEELMAN concur.

Report Per Rule 30(e).