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NO. COA99-890

NORTH CAROLINA COURT OF APPEALS

Filed: 29 August 2000

JERRY LOWERY,
Employee/Plaintiff,

v.

N.C. Industrial Commission
I.C. No. 859350

C&J TRANSPORTATION CO.,
Employer/Defendant,

and

NORTH CAROLINA FARM BUREAU
MUTUAL INSURANCE COMPANY,
Carrier/Defendant.

Appeal by defendants from Opinion and Award of the North Carolina Industrial Commission filed 18 February 1999. Heard in the Court of Appeals 20 April 2000.

Ganly, Ramer, Strom and Fuleihan, by Thomas F. Ramer, for plaintiff-appellee.

Young, Moore and Henderson, P.A., by J.D. Prather, for defendant-appellants.

SMITH, Judge.

Defendants appeal an Opinion and Award of the North Carolina Industrial Commission (the Commission) reinstating plaintiff's disability compensation. We affirm. Pertinent facts and procedural information include the following: On 7 September 1988, plaintiff suffered a compensable injury by accident arising out of and in the course of his employment with defendant-employer. Plaintiff presented to Dr. Keith M. Maxwell (Dr. Maxwell), who diagnosed and treated plaintiff for facet arthropathy and extreme

pain behavior. Dr. Maxwell determined plaintiff had reached maximum medical improvement as of 6 March 1989 with a 5% permanent impairment of the spine. Pursuant to a Form 21 Agreement for Compensation for Disability approved by the Commission, defendants paid plaintiff temporary total disability benefits from 10 September 1988 through 5 March 1989. Defendants also agreed in a Form 26 Agreement to pay plaintiff compensation for the 5% permanent partial impairment to his back.

Plaintiff returned to work as a truck driver in August 1989, but left such employment 15 September 1989 due to an increase in pain. In an Opinion and Award filed 2 April 1992, Deputy Commissioner William L. Haigh (Deputy Commissioner Haigh), concluded that plaintiff had sustained a change of condition on 15 September 1989 due to increased pain in his back, legs, hips, and shoulder, which rendered him totally disabled as of such date. Deputy Commissioner Haigh ordered defendants to pay plaintiff compensation for as long as plaintiff remained disabled, but made such payments contingent upon plaintiff's cooperation with rehabilitative efforts. This order was affirmed by the Full Commission 28 January 1993 and by this Court on 2 November 1993. See *Lowery v. C&J Transp. Inc.*, No. 9310IC460 (N.C. App. Nov. 2, 1993) [hereinafter *Lowery I*].

On 26 November 1990, at defendant's request, plaintiff again presented to Dr. Maxwell for examination and evaluation. Dr. Maxwell determined plaintiff had suffered no physical change in condition, imposed work restrictions of "no lifting [over] 50

[pounds] repetitively[,] limited bending or stooping." Plaintiff was then referred to the Work Recovery Center (Recovery Center) for pain management. On 6 May 1991, plaintiff entered an in-patient rehabilitation program at the Recovery Center and came under the care of Dr. Andrea A. Stutesman (Dr. Stutesman). Philip Holder (Holder), a vocational specialist, met with plaintiff during the Recovery Center program to assist him in returning to work within his work restrictions. Holder scheduled plaintiff to attend an adult basic education class beginning in August 1991 and a job-seeking skills class starting September 1991. Plaintiff initially participated in the programs but eventually stopped attending. Holder then scheduled plaintiff to begin a rehabilitative program with Webster Enterprises, a vocational workshop, in February 1992, but plaintiff refused to participate in the program.

In February 1992, defendants ceased payment of compensation, alleging plaintiff had failed to cooperate with vocational efforts. In an Opinion and Award filed 4 January 1994, Deputy Commissioner Haigh concluded plaintiff had failed to make a good faith, reasonable effort to locate employment, failed to participate in rehabilitative efforts as of 5 August 1991, and was thus "not entitled to workers' compensation benefits on or after August 5, 1991." This order was affirmed by the Full Commission 24 August 1994.

On or about 16 February 1994, plaintiff voluntarily contacted the North Carolina Department of Vocational Rehabilitation (Department of Vocational Rehabilitation), which referred him to

Foothills Industries (Foothills), a workshop similar to the Webster Enterprises program in which defendant previously had refused to participate. Plaintiff underwent a work assessment at Foothills 25 February 1994 through 14 March 1994 and was reported as having "severe to marked limitations" of functional abilities due to pain. Keith Carswell (Carswell), a Foothills vocational evaluator, reported plaintiff "seemed very motivated" to perform in the program, but that he "d[id] not have the potential for competitive employment at [that] time." Plaintiff was discharged from the Foothills program 14 March 1994 due to functional limitations and increased pain. Thereafter, on 7 September 1994, plaintiff returned to work as a truck driver, but left the position 8 December 1994 due to increased pain.

This matter subsequently came on for hearing again before Deputy Commissioner Haigh, who filed an Opinion and Award 30 January 1998 reinstating plaintiff's temporary total disability benefits. Deputy Commissioner Haigh held that the 24 August 1994 order was "not a final award of the Commission within the perview [sic] of the provisions of N.C. Gen. Stat. § 97-47," but rather, under the provisions of N.C. Gen. Stat. § 97-25 (1991) (amended 1997, 1999), "constituted only a suspension of plaintiff's right to further workers' compensation benefits because of his failure to comply" with the 2 April 1992 order. The Full Commission affirmed Deputy Commissioner Haigh's order on 18 February 1999 and awarded plaintiff compensation "from February 16, 1994 to September 9, 1994

and from December 9, 1994 and continuing thereafter for so long as he remains totally disabled." Defendants appeal.

I.

Defendants contend the Commission erred in reinstating plaintiff's disability compensation without a showing of changed condition. We disagree.

Appellate review of an award by the Industrial Commission is limited to a determination of "whether there is any competent evidence in the record to support the Commission's findings of fact and whether these findings support the Commission's conclusions of law." *Hedrick v. PPG Industries*, 126 N.C. App. 354, 357, 484 S.E.2d 853, 856 (1997) (citation omitted). "The Commission's findings of fact are conclusive on appeal if supported by competent evidence," *Hoyle v. Carolina Associated Mills*, 122 N.C. App. 462, 463, 470 S.E.2d 357, 358 (1996) (citation omitted), notwithstanding the existence of evidence to support contrary findings, see *Matthews v. Petroleum Tank Service, Inc.*, 108 N.C. App. 259, 264, 423 S.E.2d 532, 535 (1992). In addition, "the Commission is the sole judge of the credibility of the witnesses and the weight to be given to their testimony." *Hedrick*, 126 N.C. App. at 357, 484 S.E.2d at 856 (citation omitted).

In his 2 April 1992 Opinion and Award, Deputy Commissioner Haigh concluded plaintiff had suffered a change in condition as of 15 September 1989, which rendered him totally disabled. Citing section 97-25, Deputy Commissioner Haigh granted plaintiff compensation "for as long as he remain[ed] totally disabled,

provided, however, that he fully cooperate[] with rehabilitation efforts offered by defendants." Thereafter, in a 4 January 1994 Opinion and Award, affirmed by the Full Commission 24 August 1994, Deputy Commissioner Haigh concluded plaintiff had "frustrated the vocational rehabilitation efforts of defendants to locate employment suitable to his capacity," and therefore was "not entitled to workers' compensation benefits on or after August 5, 1991." Defendants argue the 4 January 1994 order effectively terminated plaintiff's right to compensation rather than merely suspending his right pending cooperation with rehabilitative efforts, and thus plaintiff is required to prove a change in condition for further compensation. Based upon Deputy Commissioner Haigh's subsequent 30 January 1998 Opinion and Award, which was affirmed by the Commission 18 February 1999, we disagree with defendants' contention.

In his January 1998 Opinion and Award, Deputy Commissioner Haigh held:

1. The Opinion and Award filed by the Full Commission on August 24, 1994 was not a final award . . . within the purview [sic] of the provisions of N.C. Gen. Stat. § 97-47. Rather, under the provisions of N.C. Gen. Stat. § 97-25, the Opinion and Award constituted only a suspension of plaintiff's right to further workers' compensation benefits because of his failure to comply with the Order contained in the Opinion and Award filed by the undersigned on April 2, 1992 (which was later affirmed by both the Full Commission and the Court of Appeals), which expressly cited and relied upon N.C. Gen. Stat. § 97-25 and which required plaintiff to cooperate with vocational rehabilitation efforts offered by defendants. Under the provisions of N.C. Gen. Stat. § 97-25, once

plaintiff again complied with that Order and so long as he remained disabled, both of which occurred herein, his right to further workers' compensation benefits arose and the suspension thereof terminated. He, however, is not entitled to any benefits during the period of his unjustifiable refusal, that being from August 5, 1991 to February 16, 1994. [However, when] plaintiff sought the vocational rehabilitation services of the North Carolina Department of Vocational Rehabilitation and Foothills Industries and he thereafter on his own sought and obtained employment instead of initially requesting defendants to again offer vocational rehabilitation services, he thereby substantially complied with the Order and it's [sic] underlying purpose.

(Emphasis added.) The foregoing establishes that Deputy Commissioner Haigh, pursuant to section 97-25, suspended plaintiff's right to compensation 4 January 1994, pending his compliance with the 2 April 1992 Opinion and Award, requiring him to cooperate with defendants' rehabilitative efforts.

In pertinent part, section 97-25 provided:

Medical Compensation shall be provided by the employer. In case of a controversy arising between the employer and employee relative to the continuance of medical, surgical, hospital, or other treatments, the Industrial Commission may order such further treatment as may in the discretion of the Commission be necessary.

. . . .

The refusal of the employee to accept any medical, hospital, surgical or other treatment or rehabilitative procedure when ordered by the Industrial Commission shall bar said employee from further compensation until such refusal ceases, and no compensation shall at any time be paid for the period of suspension unless in the opinion of the Industrial Commission the circumstances justified the refusal, in which case, the Industrial

Commission may order a change in the medical or hospital service.

N.C. Gen. Stat. § 97-25. Although section 97-25 permitted suspension of disability benefits upon the "refusal of the employee to accept any . . . rehabilitative procedure," *id.*, "an employee's refusal to cooperate only bars h[im] from receiving compensation until h[is] refusal ceases," *Scurlock v. Durham County General Hosp.*, --- N.C. App. ---, ---, 523 S.E.2d 439, 441 (1999) (citation omitted). An employee is entitled to resumption of benefits "upon a proper showing . . . that he is willing to cooperate with . . . rehabilitative efforts." *Sanhueza v. Liberty Steel Erectors*, 122 N.C. App. 603, 608, 471 S.E.2d 92, 95 (1996). Accordingly, the Commission's suspension of plaintiff's benefits does not require a showing of change in condition as defendants assert, but rather requires only a showing of compliance with vocational placement. *See id.* (Section 97-25 is "clear in its mandate that a claimant who refuses to cooperate with a rehabilitative procedure is only barred from receiving further compensation 'until such refusal ceases.'").

Sub judice, regarding plaintiff's compliance with rehabilitative efforts, the Full Commission, in its 18 February 1999 Opinion and Award, adopted the following pertinent findings of fact from Deputy Commissioner Haigh's 30 January 1998 Opinion and Award:

10. Following issuance of [] Deputy Commissioner[] [Haigh's] Opinion and Award on January 4, 1994, plaintiff voluntarily on his own motion sought the services of the McDowell County office of the North Carolina Department of Vocational Rehabilitation after which he was referred to a work evaluation at Foothills

Industries, a workshop which is similar to Webster Enterprises, that being the one to which plaintiff had been referred in February 1992 by Philip Holder, a vocational specialist retained by defendants, but which plaintiff had refused to attend.

11. Plaintiff underwent a work assessment at Foothills Industries during the period of February 16, 1994 through March 14, 1994, which included an initial vocational assessment, a situational assessment, work stamina testing, and a work assessment consisting of performing manual labor activities. During the work assessment portion of the program plaintiff performed various manual tasks

12. Plaintiff's physical capacities were observed by the Foothill's staff, which, together with plaintiff's testimony, establishes that plaintiff had severe, marked limitations of his functional abilities due to pain

. . . .

14. Plaintiff's physical symptoms progressively worsened during the increased physical activities of the daily work. Due to his continuing and deteriorating condition . . . , plaintiff was discharged from the Foothills work assessment program on March 14, 1994.

. . . .

17. Subsequent to his discharge from Foothills, plaintiff . . . again voluntarily sought vocational opportunities and located a job driving a truck . . . from September 7 through December 8, 1994 As a result of his increasing back pain, leg pain and hives, plaintiff voluntarily terminated his employment on December 8, 1994.

18. As a result of his compensable injury . . . , plaintiff has been unable to earn any wages in any employment since September 15, 1989 and continuing through the November 5, 1996 hearing, except for the

period from September 7, 1994 through December 8, 1994. . . .

19. As of February 16, 1994, plaintiff engaged in a good faith and reasonable vocational efforts [sic] to locate employment when he began the work assessment at Foothills Industries upon a referral from the North Carolina Department of Vocational Rehabilitation. He has thereafter continued to engage in good faith and reasonable vocational efforts by seeking and obtaining employment but was unable to maintain said employment. After terminating that employment, he undertook to obtain employment but was unsuccessful.

Our review of the record reveals plenary competent evidence to support the Commission's findings regarding plaintiff's participation in vocational rehabilitation. Plaintiff testified he contacted the Department of Vocational Rehabilitation in February 1994, approximately one month after Deputy Commissioner Haigh's 4 January 1994 suspension of benefits, to request assistance in locating employment suitable to his work restrictions. The Department of Vocational Rehabilitation referred plaintiff to Foothills for a work assessment. Plaintiff was evaluated to determine whether he could return to work. Plaintiff was placed in various job situations involving physical activity commensurate with his work restrictions. Carswell, a vocational specialist at Foothills, observed plaintiff's job performance and testified he was at a 30% productivity level, and "seemed to have a lot of problems that prevented him from working," including pain "from the back and the hips and the leg." Notwithstanding such pain, Carswell related plaintiff "would want to continue as long as he could," and "tried his best but he was unable to tolerate even the

simplest work." Throughout plaintiff's two week work simulations, Foothills staff reported plaintiff "seemed to be very motivated to work" and "tried his best." However, on 14 March 1994 plaintiff was discharged from the program upon the staff's determination that he "would not be able to find competitive employment" and would be "unable to tolerate even a part-time placement" due to "pain in his legs and back, and . . . his shoulders." The staff cited plaintiff's age, sixth-grade education, life-long work experience as a manual laborer and truck driver, and his employment restrictions, in concluding plaintiff would have "extreme[] difficult[y]" in finding and maintaining sustained competitive employment, and that additional vocational efforts would be futile because "he would probably not be able to go to work." After leaving the Foothills program, plaintiff sought employment and voluntarily assumed a truck-driving position on 7 September 1994, but unilaterally terminated such employment 8 December 1994 due to increasing back and leg pain.

We hold the foregoing competent evidence supports the Commission's factual findings relating to plaintiff's voluntary participation in a vocational rehabilitation program and the fact that it would be futile for him to engage in further vocational efforts. Additionally, we hold the Commission's findings of fact provide adequate support for its conclusions of law.

II.

Defendants also contend the Commission erred in finding that plaintiff is disabled as a result of his 7 September 1988 compensable injury. Again, we disagree.

In its 18 February 1999 Opinion and Award, the Commission held:

By Opinion and Award filed April 2, 1992, Deputy Commissioner Haigh found and concluded that pursuant to the provisions of N.C.G.S. § 97-47 plaintiff had sustained a change of condition by September 15, 1989 which by reason of increased pain in his back, legs, hips, and shoulder as well as swelling of his legs and his pain developing into a chronic pain condition . . . rendered him totally disabled beginning September 15, 1989 and defendants were ordered to pay compensation continuing thereafter for so long as plaintiff remained totally disabled, provided that plaintiff fully cooperate with rehabilitation efforts offered by defendants which plaintiff was thereby ordered to do.

On 28 January 1993, the Commission affirmed Deputy Commissioner Haigh's reinstatement of plaintiff's total disability compensation upon determining he had suffered a substantial change of condition rendering him totally disabled, and such decision was also affirmed by this Court on 2 November 1993. See *Lowery I*, No. 9310IC460. Thereafter, the Commission affirmed Deputy Commissioner Haigh's 4 January 1994 Opinion and Award suspending plaintiff's compensation benefits upon finding that plaintiff had failed to cooperate with rehabilitative efforts. Subsequently, in its 18 February 1999 Opinion and Award, the Commission, citing Deputy Commissioner Haigh's 30 January 1998 Opinion and Award, determined that plaintiff's benefits were to be reinstated because he had

voluntarily participated in a rehabilitation program. The Commissioner further determined that based upon plaintiff's age and mental and physical functional limitations, it would be futile for him to continue rehabilitation efforts and encouraged plaintiff to seek further medical treatment.

Evidence showed that after plaintiff was discharged from Foothills he voluntarily attempted to return to work on 7 September 1994 driving a truck. However, he quit that position 8 December 1994 due to increasing pain in his back and legs as a result of his compensable injury. Based upon prior orders of the Commission and evidence offered by plaintiff, including Carswell's testimony, the Commission found in its 18 February 1999 Opinion and Award:

21. In view of plaintiff's continuing and increased pain resulting from the injury by accident giving rise hereto, it is reasonably medically necessary that he be examined and evaluated by an orthopedist and if so recommended by said physician, he should undergo treatment designed to effect a cure, give relief, or lessen his period of wage earning incapacity due to the injury by accident giving rise hereto.

It then concluded:

2. As a result of the injury by accident giving rise hereto, plaintiff has remained totally disabled since September 15, 1989 and continuing through November 5, 1996, the date of the last hearing . . . in this case, except for the period that he worked from September 7, 1994 through December 8, 1994. However, he is not entitled to any workers' compensation benefits for the period of his unjustifiable refusal to abide by the Order to cooperate with vocational rehabilitation efforts from August 5, 1991 to February 16, 1994. As of February 16, 1994 and continuing thereafter until it became fruitless and futile to continue, he engaged

in good faith vocational rehabilitation efforts and job searches. He, accordingly, is entitled to compensation at the rate of \$327.01 per week for the period from February 16, 1994 to September 7, 1994 and from December 9, 1994 through November 5, 1996 and continuing thereafter for so long as he remains totally disabled, subject, however, to a credit in the amount of and for the period determined herein below.

We hold there is competent evidence of record to support the Commission's determination that plaintiff, while capable of some work, "has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment," and "it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment." *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (citations omitted). Although defendants contend plaintiff's and Carswell's testimonies did not provide sufficient evidence of continued disability, we note the Commission is the sole judge of the credibility of the witnesses and their evidence, and we give deference to its credibility determination regarding testimony of whether suitable jobs are currently available within plaintiff's physical and mental limitations, age, educational background, and prior work experience. See *Burwell v. Winn-Dixie Raleigh*, 114 N.C. App. 69, 73, 441 S.E.2d 145, 149 (1994) (employer may produce evidence that suitable jobs, which the employee is capable of performing given his "age, education, physical limitations, vocational skills, and experience," are available and the employee is "'capable of getting one'"). As these findings are supported by competent evidence they are conclusive on appeal,

notwithstanding the existence of evidence that may support contrary findings. Based on the foregoing, we affirm the Commission.

Affirmed.

Judges WYNN and HORTON concur.

Report per Rule 30(e).