NO. COA03-795

NORTH CAROLINA COURT OF APPEALS

Filed: 20 April 2004

MARSHALL WILLIAMS,
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 947549

SPRAY COTTON MILL/MT. HOLLY SPINNING MILLS,
Employer,

SELF-INSURED (KEY RISK MANAGEMENT SERVICES,
Servicing Agent),
Defendant.

Appeal by plaintiff from opinion and award filed 25 March 2003 by the North Carolina Industrial Commission. Heard in the Court of Appeals 3 March 2004.

The Roberts Law Firm, P.A., by Scott W. Roberts, for plaintiff-appellant.

Alala Mullen Holland & Cooper P.A., by J. Reid McGraw, Jr. and John H. Russell, Jr., for defendant-appellee.

BRYANT, Judge.

Marshall Williams (plaintiff) appeals an opinion and award of the Full Commission filed 25 March 2003 that concluded plaintiff failed to establish proof of disability after reaching maximum medical improvement (MMI), and therefore, was not entitled to temporary total disability benefits. For the following reasons, we remand for reconsideration in light of *Knight v.*

Wal-Mart Stores, Inc., 149 N.C. App. 1, 562 S.E.2d 434 (2002), *aff'd per curiam*, 357 N.C. 44, 577 S.E.2d 620 (2003); *see also Bennett v. Progressive Furniture Co.*, 160 N.C. App. 250, 584 S.E.2d 108 (2003) (unpublished opinion).

Plaintiff suffered a compensable back injury on 23 June 1999 while employed as a shop mechanic at Mount Holly Spinning Mills (defendant). Defendant entered a Form 60 agreement and paid temporary total disability benefits to plaintiff from 1 July 1999 until 5 April 2000, when plaintiff returned to light duty work with defendant. Upon his return to work, plaintiff was paid temporary partial disability benefits based upon the rate of two-thirds of the difference between plaintiff's pre-injury average weekly wage and his return to work wage. Plaintiff continued to work for defendant until his position was eliminated on 20 July 2000 as part of a companywide layoff. Plaintiff continued to receive temporary partial disability benefits after the layoff.

On 3 October 2000, plaintiff was found to have reached MMI and was issued a fifteen percent permanent partial disability rating. Plaintiff voluntarily participated in vocational rehabilitation offered by defendant in December 2000.

This matter came for hearing before a deputy commissioner on 24 January 2001. By opinion and award filed 3 May 2001, the deputy commissioner concluded plaintiff continued to be partially incapacitated since his layoff and was entitled to continued receipt of temporary partial payments after reaching MMI. Both plaintiff and defendant appealed the 3 May 2001 opinion and award.

On 17 May 2001, plaintiff discontinued his participation in vocational rehabilitation after starting the application process to receive Social Security benefits. On 18 June 2001, defendant filed a motion to suspend payment of plaintiff's temporary partial disability benefits pursuant to

N.C. Gen. Stat. §97-25 for failure to continue participation with vocational efforts. These matters came for hearing before the Full Commission on 4 December 2001.

By opinion and award filed 25 March 2003, the Full Commission concluded plaintiff was temporarily and totally disabled from the time of his layoff until he reached MMI but failed to meet his burden of presenting evidence to establish disability after reaching MMI. Additionally, the Full Commission concluded plaintiff unilaterally withdrew from vocational rehabilitation and did not establish disability after the date of withdrawal. The Full Commission awarded plaintiff total disability compensation pursuant to N.C. Gen. Stat. §97-31 for the period covering the date of his layoff until the date he reached MMI.

Plaintiff gave notice of appeal on 28 April 2003.

This Court reviews conclusions of law of the Full Commission by applying the *de novo* standard. *Allen v. Roberts Elec. Contr'rs*, 143 N.C. App. 55, 63, 546 S.E.2d 133, 139 (2001). In the case *sub judice*, a number of the Commission's conclusions of law at issue appear to be in direct contradiction to case law as decided by this Court and recently affirmed by the North Carolina Supreme Court. More specifically, the Commission did not consider the holding in *Knight v. Wal-Mart Stores, Inc.* in rendering its decision. Accordingly, we remand to the Full Commission for reconsideration.

In *Knight*, this Court articulated that

> the primary significance of the concept of MMI is to delineate a crucial point in time only within the context of a claim for scheduled benefits under N.C. Gen. Stat. §97-31, and that the concept of MMI does not have any direct bearing upon an employee's right to continue to receive temporary disability benefits once the employee has established a loss of wage-earning capacity pursuant to N.C. Gen. Stat. §97-29 or §97-30.

Knight, at 13-14, 562 S.E.2d at 443; *see also Bennett*, 160 N.C. App. 250, 584 S.E.2d 108 ("Since the only issues before the Commission were [the plaintiff's] entitlement to ongoing disability benefits under N.C. Gen. Stat. §97-29 and future medical expenses, whether or not [the plaintiff] has reached MMI is irrelevant at this stage in the proceedings.").

In the instant case, the Full Commission specifically concluded that plaintiff failed to establish disability after reaching MMI. This conclusion completely ignores the significance of MMI as articulated in *Knight*.

Moreover, it appears the Full Commission erred in concluding plaintiff failed to meet his burden to establish disability after ceasing vocational rehabilitation. Defendant sought to suspend payment of plaintiff's temporary partial disability benefits pursuant to N.C. Gen. Stat. §97-25 for failure to continue participation with vocational efforts. N.C. Gen. Stat. §97-25 reads in pertinent part:

> 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.G.S. §97-25 (2003) (emphasis added).

Here, the record is void of any evidence that the Commission ever ordered plaintiff to participate in vocational rehabilitation. Absent such evidence, plaintiff's withdrawal from participation cannot serve as grounds for suspension of benefits pursuant to N.C. Gen. Stat. §97-25. *See Deskins v. Ithaca Industries, Inc.*, 131 N.C. App. 826, 832, 509 S.E.2d 232, 236 (1998) ("The language of this statute is quite specific, and the bar to compensation does not apply unless the employee 'refuses . . . to accept any . . . rehabilitative procedure when ordered by the

Commission.' There is absolutely no evidence in the record that plaintiff refused any rehabilitative procedure ordered by the Commission.") (citation omitted); *Maynor v. Sayles Biltmore Bleacheries*, 116 N.C. App. 485, 488, 448 S.E.2d 382, 384 (1994) ("The record does not indicate that defendant ever requested the Industrial Commission to order surgery for plaintiff, or that the Industrial Commission made any such order. Plaintiff could not disobey an order plaintiff never received. Without any evidence of an order, defendant's argument must fail.").

Finally, we note that the Full Commission cites *Gupton v. Builders Transport*, 320 N.C. 38, 357 S.E.2d 674 (1987) for its conclusion that "[p]laintiff is entitled to receive the greater of benefits under Sections 97-29, 97-30, or 97-31, and . . . he is presumed to elect benefits under Section 97-31." In *Gupton*, the Supreme Court held "'[w]here an employee can show that the physical injury from which he is suffering causes appreciable employment disability, the employee *is allowed* to recover under which provisions affords [*sic*] him greater compensation.'" *Gupton*, 320 N.C. at 42-43, 357 S.E.2d at 678 (emphasis added) (citation omitted). *Gupton* therefore did not create a presumption that the employee will elect to receive benefits pursuant to the section that provides greater compensation - only that the plaintiff has the option of selecting between the applicable provisions.

Remanded for reconsideration.**[Note 1]**

Judges McCULLOUGH and ELMORE concur.

Report per Rule 30(e).

NOTE

1. "A proceeding determined under a misapprehension of the applicable principles of law must be remanded to the Commission for consideration and adjudication of all the employee's compensable injuries and disabilities." *Gupton*, 320 N.C. at 43, 357 S.E.2d at 678.