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NO. COA06-520

NORTH CAROLINA COURT OF APPEALS

Filed: 04 December 2007

ELEANER RUSSO,
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 950433

FOOD LION
Employer,
Defendant,

and

SELF INSURED RISK MANAGEMENT
SERVICES, INC. SERVICING AGENT,
Carrier,
Defendant.

Appeals by employee-plaintiff and employer-defendant from an opinion and award entered 12 December 2005 by the North Carolina Industrial Commission. Heard in the Court of Appeals 9 January 2007.

Brumbaugh, Mu & King, P.A., by Kenneth W. King, Nicole D. Wray, and Maggie S. Bennington, for employee-plaintiff.

Hedrick Eatman Gardner & Kincheloe, L.L.P., by Shelley W. Coleman, Tracie H. Brisson, and M. Duane Jones, for employer-defendant and carrier-defendant.

STEELMAN, Judge.

Eleanor Russo's ("plaintiff") benefits were properly suspended when plaintiff, despite advice from multiple physicians that a return to light-duty work would be therapeutic, refused

Food Lion's ("defendant" and with Risk Management Services, "defendants") offer of employment suitable to her condition. Plaintiff made no effort to obtain suitable employment on her own. The Industrial Commission did not err in suspending, rather than terminating, plaintiff's compensation benefits based upon her refusal of suitable employment.

The relevant undisputed facts, as found by the Industrial Commission, are as follows. Plaintiff began working for defendant on 20 November 1994. On 1 July 1999 while working in her duties as Customer Service Manager, plaintiff slipped on some grapes and grabbed a conveyor belt near the cash register in order to break her fall. Upon grabbing the conveyor belt she heard a loud noise in her right arm and experienced immediate pain. The same day, plaintiff was examined by Dr. Patricia Miller, who diagnosed a sprain of plaintiff's neck and upper right arm. Dr. Miller took plaintiff out of work until 5 September 1999 when plaintiff resumed light-duty work with defendant. On 7 September 1999, defendant filed an Industrial Commission form 60, "Employer's Admission of Employee's Right to Compensation," admitting plaintiff's disability, and paid temporary disability benefits to plaintiff from 1 July 1999 through 4 September 1999 and partial disability benefits from 5 September 1999 through 11 September 1999. On 7 September 1999 plaintiff was examined by Dr. Neil Conti upon referral from Dr. Miller. Dr. Conti diagnosed right carpal tunnel syndrome, right trapezial strain, and right shoulder tendinitis. Plaintiff elected not to proceed with an EMG recommended by Dr. Conti, and Dr. Conti released plaintiff to full duty work as of 12 September 1999. Plaintiff resumed her regular work duties and did not have any absences from work or seek medical treatment until 22 February 2000 when she returned to Dr. Conti and complained of right arm pain, including a burning sensation with swelling and redness. Dr. Conti again recommended an EMG and nerve condition study and removed plaintiff from work until 5 April 2000. The EMG and nerve

condition studies were conducted on 4 April 2000, and revealed carpal tunnel syndrome in plaintiff's left arm, but not in her right arm. Dr. Conti diagnosed plaintiff with complex regional pain syndrome ("CRPS") to the right extremity. On 25 April 2000, Dr. Conti examined plaintiff again, and while she still exhibited symptoms of CRPS, Dr. Conti released plaintiff to light-duty work because of the therapeutic benefits of using the CRPS-affected extremity. Dr. Conti also recommended physical and occupational therapy and pain clinic consultation, which plaintiff refused. Plaintiff was seen by Dr. Thomas Kern Carlton, III, on 22 June 2000. Dr. Carlton found no symptoms of CRPS. He concluded that plaintiff was capable, at a minimum, of left-handed work. On 18 July 2000, Dr. Conti reaffirmed his recommendation that plaintiff perform light-duty work with her left hand and referred plaintiff to a hand specialist for treatment of her right hand. Dr. Conti informed plaintiff that light-duty work would be therapeutic for the symptoms in her right hand.

Defendant offered for plaintiff to participate in a Temporary Alternative Duty ("TAD") program for injured workers on 27 July 2000. TAD is a program which tailors work duties to accommodate workers who have been injured until they are able to return to full-duty work. Wages for TAD are at the minimum wage. However, employees continue to be eligible for workers' compensation benefits while participating in the program. On 27 July 2000, defendant wrote to plaintiff explaining the TAD program and requesting that she return to work on 3 August 2000 to perform work within her medical restrictions. Defendant's letter stated that a failure to report for duty would be interpreted as "a lack of desire on your part to continue employment with our company." Plaintiff did not report for work.

On 11 August 2000, Dr. James Post examined plaintiff upon Dr. Conti's referral. Dr. Post's examination revealed no signs of CRPS whatsoever, and in fact, Dr. Post noted that

plaintiff's complaints might very well be "fictitious." Dr. Post recommended that plaintiff return to at least light-duty work with her left hand. On 29 August 2000, plaintiff underwent a cervical MRI at the request of Drs. Carlton and Post. The MRI results showed that any cervical abnormalities were not the cause of any right extremity condition plaintiff might have. On 26 September 2000, defendant filed an Industrial Commission Form 24, an application to terminate or suspend payment of compensation. Defendant sought to terminate plaintiff's benefits. The case summary attached to the form explained that the application was being made due to plaintiff's refusal to return to suitable employment.

On 3 October 2000, Dr. Zane Walsh examined plaintiff and reported that plaintiff's range of motion appeared to improve with distraction and that her reports of pain were out of proportion to his objective findings. Dr. Walsh's diagnosis was chronic pain, and he recommended that plaintiff return to work using her left hand, limiting her right hand use to non-repetitive motions, and avoiding lifting of that arm. On 25 October 2000, and upon referral by plaintiff's family physician, plaintiff was examined by Dr. Kenneth Oswalt, a pain medicine specialist. Dr. Oswalt diagnosed plaintiff with CRPS and excused her from work for one month while she participated in pain management therapies.

None of plaintiff's treating doctors causally related plaintiff's ongoing right extremity pain after 18 July 2000 to her injury of 1 July 1999. Plaintiff filed an Industrial Commission form 33 requesting a hearing upon defendant's failure to pay workers' compensation benefits.

On 11 December 2000, plaintiff was again examined by Dr. Oswalt who manipulated her right shoulder under sedation and determined that her limited range of movement was not due to a mechanical problem. He recommended plaintiff undergo a stellate ganglion block procedure as a further diagnostic procedure. Plaintiff refused to undergo the procedure, and Dr. Oswalt

subsequently prescribed a Catepres patch for pain. On 16 February 2001, plaintiff reported to Dr. Oswalt that the Catepres patch was improving her symptoms. Dr. Oswalt continued this course of treatment in addition to physical therapy and also recommended a consultation with a pain psychologist. During a visit with Dr. Oswalt on 1 March 2001, plaintiff complained of increased pain and minimal discoloration and mottling of the right hand. The symptoms resolved prior to the end of the visit, and Dr. Oswalt spoke to plaintiff for five to ten minutes concerning the importance of using her right hand as much as possible to minimize the secondary complications of disuse.

On 6 April 2001, plaintiff visited Dr. Thomas Kern for a psychological examination. Dr. Kern diagnosed plaintiff with adjustment disorder with depressed mood and chronic pain disorder associated with plaintiff's general medical condition and life struggles.

A hearing was held before a deputy commissioner on 5 April 2001. Dr. Oswalt reevaluated plaintiff on 8 May and 16 May 2001, continuing use of the Catepres patch, and renewing his recommendation of the stellate ganglion block. Plaintiff was again encouraged to use the right hand as much as possible. On 5 June 2001, plaintiff informed Dr. Oswalt that she was not going to undergo the recommended stellate ganglion block procedure until her depression was under control.

On 16 July 2002, Deputy Commissioner Gheen ordered defendant to pay total disability payments to plaintiff from 22 February 2000 until further order of the Commission. Both plaintiff and defendant appealed to the Full Commission. The Commission filed an opinion and award on 12 December 2005, reversing the opinion and award of the deputy commissioner. The Commission held that in light of plaintiff's refusal to take the proffered TAD light-duty position offered by defendant, along with her refusal to look for any other suitable employment, plaintiff

had “constructively refused suitable employment and forfeited her right to benefits during the time of such refusal pursuant to N.C.G.S. §97-32.” Defendant’s Form 24 application was granted, effective with the date of filing, 27 September 2000. The Commission did not terminate plaintiff’s benefits as requested by defendant. Rather, it suspended benefits until such time as plaintiff ceased refusing suitable employment. The Commission further held that defendant was entitled to a credit for all benefits paid after 3 August 2000 against any further benefits that may be awarded to plaintiff. Both plaintiff and defendants appealed the Commission’s opinion and award.

Standard of Review

”The standard of review on appeal to this Court from an award by the Commission is whether there is any competent evidence in the record to support the Commission’s findings and whether those findings support the Commission’s conclusions of law.” *Oliver v. Lane Co.*, 143 N.C. App. 167, 170, 544 S.E.2d 606, 608 (2001) (citations omitted). “Therefore, if there is competent evidence to support the findings, they are conclusive on appeal even though there is plenary evidence to support contrary findings.” *Id.* “The Full Commission is the sole judge of the weight and credibility of the evidence.” *Trivette v. Mid-South Mgmt., Inc.*, 154 N.C. App. 140, 144, 571 S.E.2d 692, 695 (2002) (citation and internal quotes omitted). “This Court reviews the Commission’s conclusions of law *de novo*.” *Ramsey v. Southern Indus. Constructors, Inc.*, 178 N.C.App. 25, 30, 630 S.E.2d 681, 685 (2006) (internal citations omitted).

Plaintiff’s Appeal

We first note that plaintiff has made a general exception to 14 findings of fact in two assignments of error. “It is well-established that ‘[a] single assignment generally challenging the sufficiency of the evidence to support numerous findings of fact, as here, is broadside and

ineffective.”“ *State v. Sutton*, 167 N.C. App. 242, 244-45, 605 S.E.2d 483, 485 (2004) (citations omitted). The findings of fact made by the Commission are therefore binding on appeal. *Id.* at 245, 605 S.E.2d at 485. Further, plaintiff makes no argument in her brief contesting any specific finding of fact, which serves as a further ground to declare them abandoned and binding on appeal. *See* N.C. R. App. P. 28(a) (2007); *Summers v. City of Charlotte*, 149 N.C. App. 509, 517, 562 S.E.2d 18, 24 (2002). Plaintiff’s single assignment of error contesting 16 conclusions of law is broadside and violates N.C. R. App. P. 10(c)(1) in that it is not “confined to a single issue of law” and “does not [state] plainly. . . the [legal] basis upon which error is assigned.” *Lumsden v. Lawing*, 107 N.C. App. 493, 498-99, 421 S.E.2d 594, 597 (1992). We therefore “only consider whether the findings of fact support the conclusions of law and the conclusions support the judgment.” *Id.* at 499, 421 S.E.2d at 598 (citation omitted).

Plaintiff argues that defendant’s TAD program was “make work” under the rationale of *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 342 S.E.2d 798 (1986), and *Saums v. Raleigh Community Hosp.*, 346 N.C. 760, 487 S.E.2d 746 (1997). These cases deal with situations in which the employee had reached maximum medical improvement, which is not the case here. We hold that the Industrial Commission properly applied the test set forth in *Seagraves v. Austin Co.*, 123 N.C. App. 228, 472 S.E.2d 397 (1996), to the instant case.

The Commission suspended plaintiff’s temporary total disability benefits based upon her refusal of suitable employment. N.C. Gen. Stat. §97-32 (2005). The Commission concluded plaintiff’s refusal of the TAD position, along with her unwillingness to seek any other employment, constituted constructive refusal of suitable employment. *See* *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 597 S.E.2d 695 (2004); *Cf. Allen v. Roberts Elec. Contractors*, 143 N.C. App. 55, 546 S.E.2d 133 (2001); *Seagraves*, 123 N.C. App. 228, 472 S.E.2d 397.

Particularly relevant was the fact that all her physicians advised plaintiff that appropriate employment would be therapeutic for her affected right arm.

[T]he test is whether the employee's loss of, or diminution in, wages is attributable to the wrongful act resulting in loss of employment, in which case benefits will be barred, or whether such loss or diminution in earning capacity is due to the employee's work-related disability, in which case the employee will be entitled to benefits for such disability. Therefore, in such cases the employer must first show that the employee was terminated for misconduct or fault, unrelated to the compensable injury, for which a nondisabled employee would ordinarily have been terminated. If the employer makes such a showing, the employee's misconduct will be deemed to constitute a constructive refusal to perform the work provided and consequent forfeiture of benefits for lost earnings, unless the employee is then able to show that his or her inability to find or hold other employment of any kind, or other employment at a wage comparable to that earned prior to the injury, is due to the work-related disability.

Seagraves at 234, 472 S.E.2d at 401 (test adopted by *McRae*, 358 N.C. at 495, 597 S.E.2d at 700). "In disputes like the one at bar, the critical area of inquiry into the circumstances of an injured employee's termination is to determine from the evidence whether the employee's failure to perform is due to an *inability* to perform or an *unwillingness* to perform." *McRae* at 494, 597 S.E.2d at 700 (emphasis in original).

The *Seagraves* test first requires that plaintiff's termination from Food Lion have a basis independent from her compensable injury. The Commission's findings of fact, which are binding in this appeal, clearly state that plaintiff was offered suitable employment by Food Lion, and that plaintiff never responded to this offer of employment. Multiple physicians testified the offered position would likely be therapeutic for plaintiff's condition. Further findings state that plaintiff made no attempt whatsoever to obtain any form of suitable employment. The Commission determined that plaintiff was removed from the Food Lion payroll due to her misconduct in failing to respond in any manner to the offer of employment in the TAD program. The

Commission found that plaintiff was only removed from the active payroll after 12 months without earning a paycheck, and that any non-disabled employee would have been removed from the active payroll in those same circumstances. The Commission's findings support its conclusion that defendants met their burden for the first prong of the *Seagraves* test.

Defendants having met their burden in the *Seagraves* test, plaintiff was required to show that her inability to find suitable employment of any kind was due to her work-related disability. Because the Commission found as fact that plaintiff was capable of work (and in fact that work would be therapeutic for plaintiff's condition), that plaintiff made *no attempt whatsoever* to find suitable employment, and that she refused the TAD employment offered by Food Lion, plaintiff has clearly failed to carry her burden. We hold that the Commission's findings of fact support its conclusions of law that plaintiff constructively refused suitable employment in violation of N.C. Gen. Stat. §97-32. The suspension of plaintiff's benefits was supported by the findings of fact and conclusions of law, and is therefore justified. Plaintiff's appeal is without merit.

Defendants' Appeal

Defendants contend that the full Industrial Commission erred in suspending, rather than terminating, plaintiff's benefits. We disagree.

Defendants argue that the Commission erred in its conclusion of law number five, which stated that because plaintiff had "failed to meet her ongoing burden of proving that her upper extremities conditions are actually related to the July 1, 1999 injury, defendants are entitled to suspend plaintiff's workers' compensation benefits. . . ." Defendants contend that because the Commission determined plaintiff had failed to show any ongoing disability related to her 1 July 1999 accident, her benefits should have been terminated, not suspended.

We first note that defendants' appeal is not properly before us. Subsequent to plaintiff's 1 July 1999 accident, defendant Food Lion filed a Form 60 in this matter, admitting plaintiff's right to compensation pursuant to N.C. Gen. Stat. §97-18(b) (2005). Defendant Food Lion paid plaintiff's compensation benefits without protest until she returned to work, and then reinstated her benefits when she was once again removed from work pursuant to Dr. Conti's recommendation. This action was initiated by defendant's filing of a Form 24 "Application to Terminate or Suspend Payment of Compensation Pursuant to N.C. Gen. Stat. §97-18.1." In the form, defendant requested termination of benefits. In section A(6), which requests the grounds supporting defendant's request for termination, defendant wrote "See attached case summary." The attached case summary stated that defendant sought to terminate plaintiff's benefits because she had been released to work by her physicians, yet refused the offered TAD position. Nowhere in defendant's Form 24 do they contend benefits should be terminated based upon an absence of disability associated with plaintiff's 1 July 1999 accident. In the Pretrial agreement, defendants did propose as an issue whether plaintiff has been disabled at any time after 3 August 2000. However, at the 5 April 2001 hearing before Deputy Commissioner Gheen, defendants' attorney stated that there was a single issue to be addressed.

To put it in its most simple terms, if I can, Your Honor, the issue is that the defendants contend that the plaintiff was released to light-duty work and was offered a position in - I represent Food Lion - in Food Lion's light-duty program and that she should have participated in that program. The plaintiff contends that she rightfully refused to participate in that program, and I think we're down to that. I suppose to the extent that there could be medical issues about causes of her problems, that could be a tangential issue, but it would only be that, tangential to the main issue.

Plaintiff's attorney agreed that this correctly stated the single contested issue. Therefore, the contested issue was limited to whether plaintiff justifiably or unjustifiably refused employment,

and the medical issues were relevant only insofar as they shed light on plaintiff's ability to work, and the appropriateness of her refusal of the TAD position.

In the depositions of the physicians, though there was occasional questioning relevant to plaintiff's disability and its relation to the compensable injury by accident of 1 July 1999, the vast majority of the questioning concerned plaintiff's ability to return to work following 3 August 2000, with no particular focus on whether plaintiff was disabled as defined by our worker's compensation law, and no particular focus on whether any disability was causally related to the 1 July 1999 injury. We note that all of these depositions followed the hearing of 5 April 2001, where the attorneys limited the contested issue to plaintiff's refusal of the proffered TAD position.

Further, though the Commission made findings of fact and conclusions of law concerning evidence of plaintiff's disability, it is apparent that the focus of its opinion and award was plaintiff's refusal of suitable employment. The first section of the award states that "Defendant's Form 24 Application is hereby granted. . . ." Defendant's form 24 application was solely based upon plaintiff's refusal of suitable employment. Further, the second section of the award states: "Plaintiff's workers' compensation benefits shall remain suspended until such time as her refusal of suitable employment ceases." This result is authorized by N.C. Gen. Stat. §97-32. Nowhere in the award does it suggest the award was based upon any failure by plaintiff to prove continuing disability. Defendants' appeal is dismissed.

AFFIRMED.

Judges WYNN and HUNTER concur.

Report per Rule 30(e).