NO. COA04-1296

NORTH CAROLINA COURT OF APPEALS

Filed: 2 August 2005

PATSY WAITE,
Employee-Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 955034

HEILIG MEYERS,
Employer-Defendant,

KEMPER INSURANCE COMPANIES
Carrier-Defendant.

Appeal by defendant from Opinion and Award entered 8 April 2004 by the North Carolina Industrial Commission. Heard in the Court of Appeals 7 June 2005.

Hoyle & Stroud, L.L.P., by William S. Hoyle, for plaintiff-appellee.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Thomas M. Morrow and Bettina Mumme for defendants-appellants.

LEVINSON, Judge.

Defendants (Heilig Meyers and Kemper Insurance Companies) appeal from an Opinion and Award of the North Carolina Industrial Commission awarding plaintiff (Patsy Waite) disability and medical workers' compensation benefits. We affirm.

The pertinent facts are undisputed and may be summarized as follows: Plaintiff was employed as a salesperson by defendant Value House Furniture (a division of Heilig Meyers), a two-story furniture store in Nashville, North Carolina. Her duties included tidying the store,

straightening and vacuuming furniture, waiting on customers, and running errands. The plaintiff's errands sometimes included trips to the bank to make deposits or get cash. Plaintiff remained on the clock while running these errands. She frequently worked through her lunch break because company policy required that at least two employees remain in the store at all times.

On 23 July 1999 plaintiff and a store manager both worked through lunch. They ordered lunch by delivery from a nearby restaurant, and paid with twenty dollars borrowed from the cash register. The manager attested to the routine nature of this practice: "[W]e did this very often_-borrow[ed.] . . . [T]hey would have to pay it back at the end of the day so we could make the drawer right[.]" As the store prepared to close, the manager "told [plaintiff] she needed the money to put back in the till[.]" Plaintiff left the store and began walking to a nearby bank to withdraw money for the store register and for her personal use. While walking through the store's parking lot, plaintiff tripped on a cable wire and suffered serious injuries to her hip and knee requiring medical treatment and surgery.

On 24 July 1999 plaintiff filed a claim for workers' compensation benefits, which defendants denied on the basis that "[plaintiff was] not injured by accident in the course and scope of [her] employ[ment]." In December 2002, plaintiff's workers' compensation claim was heard before Deputy Commissioner Adrian A. Phillips, who entered an opinion and award granting medical and disability workers' compensation benefits to plaintiff for her left hip injury. Defendant appealed to the Full Commission, which adopted and affirmed, with some modification, the Deputy Commissioner's holding, and entered an opinion and award granting medical and disability workers' compensation benefits to plaintiff.

On 6 May 2004 defendant filed notice of appeal from this Opinion and Award.

Standard of Review

"The standard of appellate review of an opinion and award of the Industrial Commission is well established. Our review 'is limited to a determination of (1) whether the Commission's findings of fact are supported by any competent evidence in the record; and (2) whether the Commission's findings justify its legal conclusions.'" *Aaron v. New Fortis Homes*, Inc., 127 N.C. App. 711, 714, 493 S.E.2d 305, 306 (1997) (quoting *Counts v. Black & Decker Corp.*, 121 N.C. App. 387, 389, 465 S.E.2d 343, 345 (1996)) (citation omitted). "The findings of fact made by the Commission are conclusive upon appeal when supported by competent evidence, even when there is evidence to support a finding to the contrary." *Plummer v. Henderson Storage Co.*, 118 N.C. App. 727, 730, 456 S.E.2d 886, 888 (1995) (citation omitted). "[T]his Court is 'not at liberty to reweigh the evidence and to set aside the findings . . . simply because other . . . conclusions might have been reached.'" *Baker v. City of Sanford*, 120 N.C. App. 783, 787, 463 S.E.2d 559, 562 (1995) (quoting *Rewis v. Insurance Co.*, 226 N.C. 325, 330, 38 S.E.2d 97, 100 (1946)). Moreover, "[i]n weighing the evidence the Commission is the sole judge of the credibility of the witnesses and the weight to be given to their testimony[.]" *Plummer*, 118 N.C. App. at 730-31, 456 S.E.2d at 888 (citation omitted).

An injury is compensable under the Worker's Compensation Act only if the injury is an "accident . . . arising out of and in the course of the employment." N.C.G.S. §97-2(6) (2003). "The determination of whether an accident arises out of and in the course of employment is a mixed question of law and fact, and this Court may review the record to determine if the Industrial Commission's findings and conclusions are supported by sufficient evidence." *Royster v. Culp, Inc.*, 343 N.C. 279, 281, 470 S.E.2d 30, 31 (1996) (citation omitted).

Defendants argue first that the Commission erred by concluding that plaintiff's accident was a compensable injury arising out of and in the course of her employment, on the grounds that this conclusion is not justified by findings of fact that are supported by competent evidence. We disagree.

Generally, "where any reasonable relationship to the employment exists, or employment is a contributory cause, the court is justified in upholding the award as 'arising out of employment.'" *Smallwood v. Eason*, 123 N.C. App. 661, 665-66, 474 S.E.2d 411, 414 (1996) (quoting *Harless v. Flynn*, 1 N.C. App. 448, 455, 162 S.E.2d 47, 52 (1968)), *rev'd on other grounds*, 346 N.C. 171, 484 S.E.2d 526 (1997) (internal quotations omitted). Further, "a conclusion that the injury occurred in the course of employment is required where there is evidence that it occurred during the hours of employment and at the place of employment while the claimant was actually in the performance of the duties of the employment." *Harless*, 1 N.C. App. at 455-56, 162 S.E.2d at 52 (citation omitted).

In the instant case, the Commission's findings of fact included, in pertinent part, the following:

> 4. At approximately 5:40 p.m. on 23 July 1999, at the direction and authorization of the assistant store manager, plaintiff departed from the store premises to go to a nearby bank automatic teller machine to obtain money to repay the store cash box for borrowed lunch money and to obtain funds for personal use.
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> 21. . . . [The injury] occurred within the course and scope of the plaintiff's employment. The store manager and delivery person were out of the store that day delivering furniture, leaving only the plaintiff and the credit manager to wait on customers and handle all store business. Because of her job duties and the fact that only two workers were on duty, the plaintiff had to work through her lunch hour, with lunch being delivered to the store and paid for using cash-register money. Later that afternoon,

> the plaintiff's supervisor then directed the plaintiff to travel quickly to an ATM machine to withdraw funds in order to reimburse the lunch money so the day's accounts could be balanced in a timely way. Plaintiff was not on a personal errand when injured. Her actions working through her lunch hour and going on a supervisor-directed trip to the ATM provided a direct benefit to defendant-employer.

Upon these and other findings of fact, the Commission concluded in relevant part that:

> 1. Plaintiff's fall . . . arose out of her employment and occurred during the course and scope of her employment and the injuries she suffered as a result of the accidental fall are compensable under the Workers[']' Compensation Act.

Defendants argue that these findings are not supported by competent evidence, and thus, that the Commission erroneously concluded that plaintiff's injury arose out of and in the course of her employment. We disagree.

The undisputed evidence showed that company policy required that two employees be present at all times, and on the day of the accident only two employees were at the store during lunch. Consequently, plaintiff could not go out for lunch because she had to work at the store during her lunch hour. Plaintiff borrowed money from the register to pay for lunch delivery. Her supervisor testified that borrowing money from the cash register was an accepted practice, but the managers required that the register be balanced before the end of each day. Plaintiff's supervisor also testified that before the store closed that day, plaintiff went to the bank in order to withdraw money to balance the register and for personal use. Plaintiff was "on the clock" and she went to the ATM with the permission and at the direction of her supervisor to withdraw money to balance the cash register; it was at this time that plaintiff fell and injured her hip. At the hearing, plaintiff's supervisor explained plaintiff's obligation to her employer:

> Q: … Specifically, did she go to the bank for the store occasionally?

A: Yes, sir.

Q: Okay. Now, was that part of her job duty?

A: Yes, sir.

Q: All right. If she had refused to do that when asked, what would have happened?

A: She probably would have got a recommend - probably would have sat down in the office and wanted to know why she refused to do what I asked her to do.

. . . .

Q: Would you consider it to be official store business to go to the ATM to get money for a tanning bed and to pay back petty cash for money that you borrowed from lunch?

A: . . . [T]o get the money, yeah, because she had to get the money to pay it back.

Q: Okay. And how is that_?

A: … [S]he was told to leave, ma'am, to go get the money. She had permission to do that.

Q: Right. But how is that - my question is, how is that official store business[.] . . .

A: Because it's official business. She borrowed the money, she had to pay it back before the end of the day.

In sum, the record shows that the injury resulted from a series of events, beginning with the company-imposed policy requiring that she work through lunch, and concluding with the obligation that she balance the register before the day's end. The Commission's conclusion, that plaintiff suffered a compensable injury, is supported by findings of fact which are, in turn, supported by competent evidence.

Defendants, however, argue that because plaintiff also planned to withdraw cash for personal use in addition to getting money needed to balance the register, her injury did not arise

out of and in the course of her employment. This argument in unpersuasive. Whether plaintiff planned to withdraw personal cash is not dispositive because company policy required that plaintiff balance the register.

Defendants also argue that there was no evidence that "the employee was acting for the benefit of [her] employer 'to any appreciable extent' when the accident occurred." *Hoffman v. Truck Lines, Inc.*, 306 N.C. 502, 506, 293 S.E.2d 807, 810 (1982) (quoting *Guest v. Iron & Metal Co.*, 241 N.C. 448, 452, 85 S.E.2d 596, 600 (1955)) (emphasis added). However, the Commission found that plaintiff "departed from the store premises to go to a nearby bank . . . to obtain money to repay the store cash box for borrowed lunch money[.]" This finding supports the Commission's conclusion that plaintiff's injury "arose out of her employment and occurred during the course and scope of her employment."

The Industrial Commission did not err by concluding that plaintiff's injury was compensable. The associated assignments of error are overruled.

Defendants next argue that the Commission erred by concluding that plaintiff was totally disabled, on the grounds that this conclusion is not justified by findings of fact supported by competent evidence. We do not agree.

Disability is defined as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C.G.S. . 97-2(9) (2003). The "[p]laintiff bears the burden of showing that she can no longer earn her pre-injury wages in the same or any other employment, and that the diminished earning capacity is a result of the compensable injury." *Gilberto v. Wake Forest Univ.*, 152 N.C. App. 112, 116, 566 S.E.2d 788, 792 (2002) (citation omitted). The general rule follows:

> The employee may meet this burden in one of four ways: (1) 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; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

Knight v. Wal-Mart Stores, Inc., 149 N.C. App. 1, 7, 562 S.E.2d 434, 439 (2002) (quoting *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993)). "[A]ny claim [by employer] 'that there is no disability if the employee is receiving the same wages in the same or other employment is correct only so long as the employment reflects the employee's ability to earn wages in the competitive market.'" *White v. Weyerhaeuser Co.*, __ N.C. App. __, __, 606 S.E.2d 389, 399 (2005) (quoting *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 440, 342 S.E.2d 798, 807 (1986)). Further, "'if other employers would not hire the employee with the employee's limitations at a comparable wage level . . . [or] if the proffered employment is so modified because of the employee's limitations that it is not ordinarily available in the competitive job market,' the job is 'make work' and is not competitive." *Jenkins v. Easco Aluminum*, 165 N.C. App. 86, 95, 598 S.E.2d 252, 258 (2004) (quoting *Peoples*, 316 N.C. at 438, 342 S.E.2d at 806). "An unsuccessful attempt to obtain employment is, certainly, evidence of disability." *Peoples*, 316 N.C. at 444, 342 S.E.2d at 809.

In the instant case, the Commission's conclusions of law included, in relevant part, the following:

> 4. Plaintiff returned to modified work at Value House Furniture on November 15, 1999, work that was not available in the general economy and was not indicative of her ability to earn wages in the general economy.

> 5. Plaintiff has been totally disabled from any gainful employment since May, 2001, when the Defendant-Employer closed its place of business. Plaintiff thereafter made a concerted effort to return to work, but was unable to do so because of her compensable injury and has been totally disabled since that time.

The Commission's conclusions of law were justified by the following findings:

> 9. Upon plaintiff's return to work . . . [she] was provided with special accommodations and assistance from Defendant-Employer to an extent greater than would have been provided to an applicant for the position of sales person in the general market place for uninjured workers. Plaintiff continued to receive special assistance and accommodations from 15 November 1999 until the Defendant-Employer closed Value House Furniture in May, 2001. If plaintiff had applied for work as a new employee at Value House Furniture with the physical limitations and restrictions she had following her injuries, she would not have been hired.
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> 15. The injury to plaintiff's left hip is permanent and would make it difficult for her to perform any work that requires her to sit or stand for extended periods of time during an eight-hour workday and/or to walk and/or drive a motor vehicle.
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> 18. After Defendant-Employer closed its Value House Furniture Store in May, 2001, Plaintiff has applied for but has been unable to find any other employment.
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> 20. Plaintiff is unable to return to her prior work as a furniture sales person as a result of the left hip fracture injury diagnosed by Dr. Shepherd F. Rosenblum[.]

Defendants argue that sufficient competent evidence does not support the following: "[Plaintiff] made a concerted effort to return to work, but was unable to do so because of her compensable injury." We disagree, and conclude that plaintiff met her burden of proving

disability under the second method of *Knight*, by "[producing] evidence that [she] is capable of some work, but that [she] has, after a reasonable effort on [her] part, been unsuccessful in [her] effort to obtain employment." *Knight*, 149 N.C. App. at 7, 562 S.E.2d at 439.

"[T]his Court has approved methods of proof other than medical evidence to show that an employee has lost wage earning capacity, and is therefore, entitled to total disability benefits." *Bridwell v. Golden Corral Steak House*, 149 N.C. App. 338, 343, 561 S.E.2d 298, 302 (2002). "The so-called work search test is merely the evidentiary vehicle by which employability, or lack of it, is proven[.] . . . [T]here are a number of criteria by which wage-earning capacity must be measured, and no single factor is conclusive." *Fletcher v. Dana Corporation,* 119 N.C. App. 491, 495, 459 S.E.2d 31, 34 (1995) (quoting *Anderson v. S & S Diversified, Inc.,* 477 So. 2d 591, 594 (Fla. 1st DCA 1985)) (internal quotations omitted). "In determining whether plaintiff is incapable of earning the same wages at other employment, the Commission is required to focus not on 'whether all or some persons with plaintiff's degree of injury are capable of working and earning wages, but whether plaintiff [her]self has such capacity.'" *Bridwell,* 149 N.C. App. at 344-45, 561 S.E.2d at 303 (quoting *Little v. Food Service*, 295 N.C. 527, 531, 246 S.E.2d 743, 746 (1978)). "[T]he Commission must decide the disability issue based on the particular characteristics of the individual employee. This necessitates a consideration of the employee's age, work experience, training, education, and any other factors which might affect his ability to earn wages." *Heffner v. Cone Mills Corp.*, 83 N.C. App. 84, 89, 349 S.E.2d 70, 74-75 (1986) (citations omitted).

In the instant case, plaintiff presented the following undisputed evidence to substantiate her claim that she had undergone a reasonable but unsuccessful job search: Plaintiff was 55 years old when she was injured and had been in the furniture business for approximately twenty years.

She had completed one year of post-high school education at Vance-Granville Community College. Plaintiff walked with a cane, and could only perform light physical tasks due to her hip injury. Moreover, plaintiff experienced chronic pain. Plaintiff's job search included the following: (1) applying in person for sales positions in at least four furniture stores; (2) calling and sending resumes to various other employers who advertised jobs in newspaper classifieds, including other furniture companies; and (3) extending her job search to areas outside of Nashville, including one city located 50 miles away. She testified that, when the employers saw that she walked with a cane, they specifically asked if she could perform the job duties. Plaintiff explained to the interviewers that she could not "do all of the heavy duty things that is required of a salesperson," but that she had decades of experience in furniture sales. Of the numerous employers to which plaintiff applied, only one furniture store accepted her application. Even her supervisor at Value House Furniture, who highly regarded her sales expertise, admitted that he would not have hired plaintiff if she had first applied after her injury.

We conclude that sufficient competent evidence exists in the record to support the following: Plaintiff "made a concerted effort to return to work, but was unable to do so because of her compensable injury." The Commission's findings justify the Commission's conclusion that plaintiff is totally disabled.

Defendants also argue that plaintiff's return to work at Value House after her injury contradicts the second prong of *Knight*, because plaintiff was not "unsuccessful in [her] effort to obtain employment." *Knight*, 149 N.C. App. at 7, 562 S.E.2d at 439. This argument is not persuasive.

The claim by defendants "'that there is no disability if the employee is receiving the same wages in the same or other employment is correct only so long as the employment reflects the

employee's ability to earn wages in the competitive market.'" *White*, __ N.C. App. at __, 606 S.E.2d at 399 (quoting *Peoples*, 316 N.C. at 440, 342 S.E.2d at 807). In the instant case, the Commission made the following finding: "[P]laintiff was provided with special accommodations and assistance . . . to an extent greater than would have been provided to an applicant for the position of sales person in the general market place." There is competent evidence in the record to support this finding.

First, plaintiff's supervisor testified that plaintiff was unable to perform the duties of her job without special accommodations, but they nonetheless provided her with employment because of her sales expertise:

> She wasn't able to do any lifting[.] . . . she couldn't walk the steps[.] . . . she couldn't stand for a certain amount of time. She would have to sit down. . . . The problem was that as a salesperson, as far as going upstairs, she couldn't fulfill her duties, but she was a good salesperson, and I talked to my supervisor and we worked it out where . . . we could keep her[.]

Secondly, plaintiff's primary care physician, Dr. Rosenblum, testified that plaintiff needed special accommodations to continue working at any employment: "I believe she is permanently unable . . . to perform any sort of job activity where she has to sit or stand for prolonged periods of time and do any sort of significant driving activities. . . . I do believe it's a permanent injury to her hip. . . . [S]he will have permanent restrictions with regards to the hip and knee, which would preclude her from doing prolonged standing, walking, squatting, or lifting type of work." Dr. Rosenblum continued, stating that "she may have trouble with an eight-hour day no matter what she's doing. But I think she could probably return to some limited type work."

Thirdly, plaintiff testified that she could not perform the duties of her job after her accident. Plaintiff testified that she is "constantly in pain[,]" and limited to walking with a cane.

Plaintiff said she could not stand for long periods of time; nor could she bend, lift heavy objects or climb the stairs. Plaintiff testified that "the customers . . . helped me a lot[.]" In fact, due to the plaintiff's partial immobility, the customers sometimes walked up the steps to retrieve furniture tags for her. She further explained: "I could not vacuum. . . . I [asked] the delivery guy to do the vacuuming for me. I couldn't sweep. . . . I just couldn't do the duties that I did before."

Based on the testimony of the plaintiff, her supervisor and her primary care physician, we conclude that, even though plaintiff temporarily returned to Value House, the Commission did not err in its finding that "plaintiff was provided with special accommodations and assistance . . . to an extent greater than would have been provided to an applicant for the position of sales person in the general market place." This finding is related to whether her temporary return to Value House was competitive and, therefore, helps establish her disability.

Our review of the record shows that there is competent evidence to support the findings of fact of the Commission, and they are therefore conclusive on appeal. *Plummer*, 118 N.C. App. at 730, 456 S.E.2d at 888. The Commission's findings justify its conclusion that plaintiff was totally disabled. The associated assignments of error are overruled.

Finally, defendants argue that the Commission erred in its calculation of plaintiff's average weekly wage. The defendants contend that finding number 19, that plaintiff's average weekly wage is $673.01, is contrary to the parties' stipulation that "[t]he plaintiff's pertinent average weekly wage is $667.32."

Generally, a "[s]tipulation to a particular fact has the effect of 'eliminat[ing] the necessity of submitting that issue of fact to the [fact-finder].' 'Where facts are stipulated, they are deemed established as fully as if determined by the verdict of a jury.'" *Smith v. N.C. Dep't of Transp.*,

156 N.C. App. 92, 103, 576 S.E.2d 345, 353 (2003) (quoting *Blackmon v. Bumgardner*, 135 N.C. App. 125, 134, 519 S.E.2d 335, 341 (1999)).

Here, the Full Commission stated in the "Stipulations" section of its order that "plaintiff's pertinent average weekly wage is $667.32." On appeal, the parties disagree about whether there was, indeed, such a stipulation. The parties direct this Court only to the following record evidence: the "Pretrial Stipulations" document submitted to the Commission. This document provided, in pertinent part, the following: "The employee's average weekly wage is $667.32 (or may be determined from an I.C. Form 22 Wage Chart to be provided by employer/carrier prior to the time of the hearing). . . . Contested[.]" This cannot constitute a stipulation, as it was specifically reserved for the Commission as a "contested" issue. Moreover, even if there was a stipulation in the record to the weekly wage of $667.32, this conflicts with the weekly wage utilized by the Commission in its award, $673.01. This latter weekly wage is supported by competent evidence in the record. Nonetheless, because the order is internally inconsistent in that the "Stipulations" section provides that the average weekly wage is $667.32, while the Commission made a finding that $673.01 was the applicable weekly wage and utilized the same in its order and award, we must remand for the Commission to examine this issue.

Affirmed in part, reversed and remanded in part.

Judges McGEE and HUNTER concur.

Report per Rule 30(e).