NO. COA04-535

NORTH CAROLINA COURT OF APPEALS

Filed: 5 April 2005

LUCIA F. ROMERO (CASTRO),
Plaintiff-employee

v.

North Carolina Industrial Commission
I.C. File No. 962662

STAFFMARK,
Defendant-employer

SELF INSURED, CRAWFORD & COMPANY, THIRD PARTY ADMINISTRATOR,
Defendant-carrier

Appeal by plaintiff from opinion and award filed 13 January 2004 by North Carolina Industrial Commission. Heard in the Court of Appeals 17 February 2005.

Brumbaugh, Mu & King, P.A., by Leah L. King, for plaintiff.

McAngus, Goudelock & Courie, P.L.L.C., by Trula R. Mitchell, for defendants.

BRYANT, Judge.

Lucia F. Romero (Castro) (plaintiff) appeals an opinion and award filed 13 January 2004, denying plaintiff further workers' compensation benefits effective 23 December 1999.

Plaintiff, an undocumented worker, was born in Mexico and moved to California in 1990. In 1996, plaintiff moved to North Carolina and in April 1999 went to work for Staffmark (defendant-employer). Staffmark is a temporary placement company that contracted with Allen

Canning to provide human resource positions. Plaintiff was employed as a label operator with Allen Canning through placement with Staffmark.

As a label operator, plaintiff was required to stock labels on the assembly line, and ensure that the cans moved along the assembly belt to the next processing machine. Sometimes, the cans would get stuck on the assembly line and plaintiff would be responsible for unsticking those cans. The position also required the occasional lifting of boxes of labels that weighed between fifteen and thirty pounds, and walking approximately six feet along the assembly line.

On 11 June 1999, plaintiff sustained a compensable injury by accident. Specifically, plaintiff's hair was caught in a pulley device on the assembly line, resulting in an extensive laceration to her scalp. Plaintiff's claim for workers' compensation benefits was accepted by defendant, and plaintiff was provided temporary total disability benefits.

Following the accident, plaintiff was transported to Sampson Memorial Hospital on 12 June 1999. She was diagnosed with a scalp laceration; however, there were no other injuries except for an abrasion on her left hand, and a "superficial left periorbital laceration." Plaintiff was admitted, and spent three days in the hospital due to the scalp laceration.

Plaintiff's injury was repaired by Dr. John F. McPhail of Sampson Regional Medical Center, who referred plaintiff to plastic surgeon Dr. Jeffrey S. Church of Wilmington Plastic Surgery Specialists, P.A. Plaintiff was first seen by Dr. Church on 30 June1999. Dr. Church noted that plaintiff had developed a significant necrosis of a large portion of her scalp and would require surgery. On 16 July 1999, plaintiff underwent debridement of her scalp and skin grafting, with skin being taken from her right thigh, and was discharged on 17 July 1999. Over the next several months, plaintiff underwent additional surgical procedures intended to expand the scalp tissue.

Plaintiff's surgeries were successful, however, plaintiff complained of headaches, dizziness, and left eye pain. Dr. Church indicated plaintiff may have had "post conclusive syndrome" and recommended that plaintiff consult with a neurologist. In July 1999, plaintiff was seen by neurologists Drs. Barry E. White**[Note 1]** and Sampath V. Chayra of Cape Fear Neurology Associates, P.A. Drs. White and Chayra diagnosed plaintiff with post traumatic headaches and released plaintiff to return to work on 2 September 1999, but restricted plaintiff's work duties to sedentary work not within close proximity to machinery.

Plaintiff returned to work for Allen Canning through Staffmark in November 1999 at pre-injury wages. Plaintiff's job duties included standing and inspecting cans to ensure all the cans were labeled. On 23 December 1999, Staffmark employees were notified that Staffmark's contract with Allen Canning had terminated and, further, the Staffmark office would be closing. The employees were notified they would either be hired by Allen Canning or have their employment with Staffmark terminated. Plaintiff's employment with Staffmark was terminated and she was not hired by Allen Canning because of her status as an undocumented worker (illegal alien).

Following plaintiff's termination from employment, Dr. Church released plaintiff from his care, indicating plaintiff suffered no permanent impairment as result of the injury or surgeries, and any work restrictions would need to be determined by her neurologists. Plaintiff remained under treatment with Drs. White and Chayra as plaintiff continued to have dizziness, pain on the side of her face, and headaches. Dr. White recommended releasing plaintiff to engage in sedentary work, avoid machinery, and return to work with lifting restrictions. Dr. Chayra, however, expressed concern regarding the inspector position plaintiff performed with Allen Canning, submitting that the position would be difficult for plaintiff to perform and would

exacerbate her symptoms. Dr. Chayra, unlike Dr. White, was not provided a copy of plaintiff's job description at the time he made his recommendation.

This matter came for hearing before Deputy Commissioner W. Bain Jones, Jr. on 25 September 2002. By opinion and award filed 28 June 2003, the deputy commissioner determined that plaintiff was not entitled to any further compensation after November 1999. Plaintiff appealed to the Full Commission. This matter came before the Full Commission on 8 December 2003, and by opinion and award filed 13 January 2004, the Full Commission determined plaintiff was not entitled to any further compensation after 23 December 1999. Plaintiff gave timely notice of appeal.

Standard of Review

Opinions and awards of the Commission are reviewed to determine whether competent evidence exists to support the Commission's findings of fact, and whether the findings of fact support the Commission's conclusions of law. *See Deese v. Champion Int'l Corp.*, 352 N.C. 109, 114, 530 S.E.2d 549, 552 (2000). If supported by competent evidence, the Commission's findings are binding on appeal even when there exists evidence to support findings to the contrary. *Allen v. Roberts Elec. Contr'rs*, 143 N.C. App. 55, 60, 546 S.E.2d 133, 137 (2001). The Commission's conclusions of law are reviewed *de novo*. *Allen*, 143 N.C. App. at 63, 546 S.E.2d at 139.

The dispositive issue on appeal is whether the Full Commission erred by finding as fact and concluding as law that but for plaintiff's status as an illegal alien, she would have been able to obtain employment with Allen Canning in December 1999.

When a plaintiff establishes she has suffered a compensable injury, "there is a presumption that disability lasts until the employee returns to work and likewise a presumption that disability ends when the employee returns to work at wages equal to those [s]he was receiving at the time [her] injury occurred." *Watkins v. Central Motor Lines*, 279 N.C. 132, 137, 181 S.E.2d 588, 592 (1971). Once disability is established, "the employer has the burden of producing evidence to rebut the claimant's evidence. This requires the employer to 'come forward with evidence to show not only that suitable jobs are available, but also that the plaintiff is capable of getting one, taking into account both physical and vocational limitations.'" *Burwell v. Winn-Dixie Raleigh*, 114 N.C. App. 69, 73, 441 S.E.2d 145, 149 (1994) (quoting *Kennedy v. Duke Univ. Med. Center*, 101 N.C. App. 24, 33, 398 S.E.2d 677, 682 (1990).

"[Although] employers may not rehire illegal aliens to the same pre-injury job or any other suitable job, federal law does not prevent looking into the surrounding community to locate other suitable jobs the plaintiff might be able to obtain but for the plaintiff's illegal alien status." *Gayton v. Gage Carolina Metals, Inc.*, 149 N.C. App. 346, 351, 560 S.E.2d 870, 873-74 (2002). "Furthermore, it is not required that the employer produce a specific job that has already been offered to the employee in order to terminate workers' compensation benefits." *Id.*

> An employee is "capable of getting" a job if "there exists a reasonable likelihood . . . that he would be hired if he diligently sought the job." It is not necessary . . . that the employer show that some employer has specifically offered plaintiff a job. If the employer produces evidence that there are suitable jobs available which the claimant is capable of getting, the claimant has the burden of producing evidence that either contests the availability of other jobs or his suitability for those jobs, or establishes that he has unsuccessfully sought the employment opportunities located by his employer.

Burwell, 114 N.C. App. at 73-74, 441 S.E.2d at 149 (quoting *Trans-State Dredging v. Benefits Review Bd.*, 731 F.2d 199, 201 (4th Cir. 1984)).

Here, defendants identified a specific job for which plaintiff would have been able to accept but for her status as an illegal alien. Specifically, plaintiff would have been able to accept a label inspector position with Allen Canning (the same position in which she was employed until December 1999) had she been able to work legally. Plaintiff's treating physician in 1999, Dr. White, reviewed the job description and recommended releasing plaintiff to return to work as a label inspector. Plaintiff returned to work as a label inspector in November 1999 and remained in that position until her termination in December 1999. Plaintiff performed the duties of this position at pre-injury wages, without any reported complications. Further, Dr. Chayra testified at his deposition that there was no evidence that plaintiff was incapable of working while under his care.

The Commission did not err in its finding of fact and conclusion of law that but for plaintiff's status as an illegal alien, she would have been able to obtain employment with Allen Canning.

Affirmed.

Judges TIMMONS-GOODSON and LEVINSON concur.

Report per Rule 30(e).

NOTE

1. Although the opinion and award of the Full Commission stated that plaintiff was treated by neurologist Dr. Kenneth S. White, the medical records indicate the neurologist's name is actually Dr. Barry E. White.