IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-391

Filed: 6 December 2016

North Carolina Industrial Commission, I.C. No. X27737

SHENITA McKNIGHT, Employee, Plaintiff,

v.

LOWE'S HOME CENTERS, LLC, Employer, SELF-INSURED (SEDGEWICK CMS, Third-Party Administrator), Defendant.

Appeal by plaintiff from opinion and award entered 29 January 2016. Heard in the Court of Appeals 5 October 2016.

Younce & Vtipil, PA, by Robert C. Younce, Jr., for plaintiff-appellant.

Cranfill Sumner & Hartzog LLP, by Jaye E. Bingham-Hinch and Amy L. Pfeiffer, for defendant-appellee.

DAVIS, Judge.

Shenita McKnight ("Plaintiff") appeals from an opinion and award of the North Carolina Industrial Commission suspending the temporary total disability benefits that her employer, Lowe's Home Centers, LLC ("Defendant"), had been paying to her after she was injured on the job. On appeal, Plaintiff argues that the Commission erred in determining that she unjustifiably refused suitable employment offered by Defendant. Because we believe the Commission did not make sufficient findings of

fact on this issue, we vacate its opinion and award and remand for further proceedings.

Factual Background

Plaintiff, who was born in 1978 and has a high school diploma, obtained employment with Defendant in 2001 at one of its Raleigh, North Carolina stores and worked as a cashier there for approximately two and a half years. She then worked as a specialist in the store's home décor department and as a manager-in-training in its hardware and tools department before becoming the manager of its paint and home décor department in 2005.

While working in that capacity, Plaintiff suffered compensable injuries to her neck and right shoulder on 16 November 2009. Plaintiff continued to serve as the paint and home décor department manager until 13 July 2010 when she stopped working because she felt that she was unable to continue performing her job without exceeding the 10-pound lifting restriction imposed by her physician.

On 30 July 2010, Defendant filed a Form 60 "Employer's Admission of Employee's Right to Compensation," which reflected that it was making temporary total disability payments to Plaintiff.[1] Plaintiff filed a Form 18 "Notice of Accident to Employer" on 9 February 2011 regarding the work-related injuries she had suffered on 16 November 2009.

[1] Defendant also filed an amended Form 60 on 11 October 2013, which slightly adjusted the amount of each disability payment.

A Functional Capacity Evaluation ("FCE") was performed on Plaintiff on 17 October 2011, which determined that she could (1) occasionally lift up to 17.5 pounds from floor to waist; (2) lift 15 pounds from waist to shoulder; (3) carry up to 15 pounds; (4) push with 52.5 pounds of force; and (5) pull with 50 pounds of force. On 31 October 2011, Plaintiff's treating physician, Dr. Dwayne E. Patterson, determined that Plaintiff had reached maximum medical improvement ("MMI") with a three percent disability rating for her neck and upper back, and he released her back to work with "permanent restrictions based on her FCE which puts her at a light work level with lifting in a 15-pound range."

On 16 October 2012, Defendant initiated vocational rehabilitation services for Plaintiff that were provided by Anthony Enoch. Over the next year and a half, Plaintiff participated in numerous meetings with Enoch, obtained community college certifications in the subjects of basic computers and office applications, and applied unsuccessfully for a number of jobs with other employers.

After Plaintiff applied for a customer service job with Defendant, Defendant sent her a letter on 5 August 2013 requesting that she fill out an enclosed Americans with Disabilities Act ("ADA") Accommodation Request Form and have her physician complete a Functional Capabilities Assessment Form and return both to Defendant by 16 August 2013. Plaintiff received this request but did not return the documents based on her belief that "there's no possible job. There's – there's nothing they could

accommodate – accommodate me with."

As a result of Plaintiff's failure to return the completed forms, on 27 September 2013 Defendant filed a Motion to Compel Compliance with Vocation Rehabilitation requesting that the Commission require Plaintiff to submit these forms. After the motion was summarily denied by Special Deputy Commissioner Michael R. Kelly on 23 October 2013, Defendant filed a Form 33 "Request that Claim be Assigned for Hearing" on 1 November 2013 in order to have the motion to compel heard before a deputy commissioner.

On 26 February 2014, Enoch conducted a job analysis of a full-time, modified cashier position with Defendant to determine whether the position would be appropriate for Plaintiff. As stated in this document, the "Outline of Duties" for the position was to "operate cash register for customer purchases." The physical classification of the job was "Light Work – 20 lbs. of force occasionally, and/or 10-25 lbs. of force frequently, and/or up to 10 lbs. of force constantly." The physical demands section stated that the position did not require more than 10 pounds of lifting and required only occasional pushing and pulling. Under "job modifications," the document stated, "Will be able to use scanner for items." The document contained the signature of Kim Madden, the human resources manager for Defendant's store, under the "Verification of Above Information by Personnel Contact/Employer" section. Enoch forwarded the job analysis to Dr. Patterson on 10 March 2014 and

asked him to "please determine if [Plaintiff] can perform the duties listed."

On 26 March 2014, Deputy Commissioner Chrystal Redding Stanback held a hearing on the Motion to Compel Compliance with Vocational Rehabilitation. At the hearing, Plaintiff testified she was aware that Enoch had completed a job analysis of a cashier position with Defendant. Counsel for Defendant informed Plaintiff that the job analysis was pending Dr. Patterson's review as of the date of the hearing and asked her: "[I]f the job is acceptable by Dr. Patterson, would you try – would you be willing to try the job?" Plaintiff answered: "I really don't know." She then explained that she was "afraid of going back, getting hurt all over again" and stated that she was applying for "secretarial work, something light."

Plaintiff also testified that the duties of a cashier for Defendant included loading merchandise into cars, bringing in empty shopping carts from the parking lot, and lifting heavy items — such as five-gallon paint buckets, blinds, fans, generators, and lumber — when checking customers out. She stated that Defendant employs loaders who sometimes help cashiers with lifting items but that they are not always available and that customers do not want to wait the extra time necessary for cashiers to receive such assistance.

In addition, Plaintiff stated that during checkout customers do not always place purchased items so that the UPC barcode faces upward such that the cashier can easily access it. She also noted that it would be harder during the summer

months — when the pace of business increases — for Defendant to accommodate her physical restrictions. For these reasons, she claimed, there was no way she could work in the cashier position without being required to lift more than 10 pounds.

Plaintiff also testified that, despite its assurances to her at the time, Defendant had failed to accommodate her physical restrictions when she continued to work as a paint and décor department manager following her injury. She stated that she had been routinely required to lift five-gallon paint buckets because "you get promised help[,]" but "[t]here's no help. You have to do it." She also testified that it is not realistic for an employee to tell a customer to "wait ten or fifteen or even five minutes for another employee to come lift a gallon or a five gallon bucket so they can get some paint mixed."

During cross examination, Plaintiff was asked: "[H]ow do you know that Lowe's cannot accommodate you if you don't [submit the ADA Accommodation Request Form] and see if there is anything that [Defendant] can accommodate?" She responded: "I – I really don't know." She then stated that she would return to work with Defendant if Defendant "could identify a job that would be within [her] restrictions[.]"

After Dr. Patterson approved Enoch's job analysis for the modified cashier position, Defendant sent Plaintiff a letter on 28 April 2014 offering her that position at the rate of $11.33 per hour (or $453.20 per week), informing her of Dr. Patterson's

approval of that position, and asking her to return to work on 5 May 2014. At the time of her injury, Plaintiff had been earning an average of $612.73 per week as a department manager. Plaintiff received the letter on 29 April 2014 but did not return to work for Defendant.

Based upon Plaintiff's failure to return to work, Defendant filed a Form 24, "Application to Terminate or Suspend Payment of Compensation," on 19 May 2014. The parties agreed to submit in writing their respective contentions regarding the Form 24 issues to Deputy Commissioner Stanb ack without the need for a new hearing.

Deputy Commissioner Stanback filed an opinion and award on 9 September 2014 in which she determined, *inter alia*, that (1) Defendant had not established a reasonable necessity for Plaintiff to complete the ADA Accommodation Request Form or the Functional Capabilities Assessment; (2) Defendant did not meet its burden of showing that the modified cashier job was suitable employment because there was "no evidence in the record that the modified cashier[ ] job allegedly offered to Plaintiff exists in the competitive job market, or that the job description in the Form 24 Application exhibits is accurate"; (3) Plaintiff's refusal of the modified cashier position was justifiable because it was not suitable employment; and (4) Plaintiff was entitled to continued total disability compensation until Plaintiff returned to work absent further order of the Commission.

Defendant appealed the deputy commissioner's opinion and award to the Full Commission on 24 September 2014. The Commission issued an Opinion and Award on 29 January 2016 in which it determined, *inter alia*, that: (1) the Commission lacked jurisdiction over issues relating to the completion of ADA forms; (2) Defendant had established that Plaintiff unjustifiably refused suitable employment; and (3) Defendant was therefore entitled to suspend her temporary total disability benefits.

Commissioner Bernadine S. Ballance filed a dissent in which she voiced several disagreements with the Commission's determinations, including its failure to analyze the issue of whether Defendant had shown that the cashier's position — as modified by Defendant — existed in the competitive labor market. Commissioner Ballance's dissent also observed that "[t]here is no job description of record listing the actual job requirements of a cashier's position with Defendant, without modifications, in order to determine whether the position as modified constituted a real job in the competitive marketplace."

Plaintiff filed a timely appeal from the Commission's 29 January 2016 Opinion and Award.

Analysis

Plaintiff argues on appeal that the Commission erred in determining that she unjustifiably refused suitable employment when she rejected the modified cashier

position offered to her by Defendant. Because we conclude that the Commission failed to make findings necessary to the determination of this issue, we remand.

Appellate review of an opinion and award of the Industrial Commission is "limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law." *Philbeck v. Univ. of Mich.*, 235 N.C. App. 124, 127, 761 S.E.2d 668, 671 (2014) (citation and quotation marks omitted). The Commission's conclusions of law are reviewed *de novo*. *Id.*

In the workers' compensation context, "[t]he term 'disability' means 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. Gen. Stat. § 97-2(9) (2015). "[I]n order to support a conclusion of disability, the Commission must find: (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) that this individual's incapacity to earn was caused by plaintiff's injury." *Medlin v. Weaver Cooke Constr., LLC*, 367 N.C. 414, 420, 760 S.E.2d 732, 736 (2014) (citation omitted).

However, "[i]f an injured employee refuses suitable employment as defined by G.S. 97-2(22), the employee shall not be entitled to any compensation at any time

during the continuance of such refusal, unless in the opinion of the Industrial Commission such refusal was justified." N.C. Gen. Stat. § 97-32 (2015). " 'Suitable employment' is defined as any job that a claimant is capable of performing considering his age, education, physical limitations, vocational skills and experience." *Munns v. Precision Franchising, Inc*., 196 N.C. App. 315, 317-18, 674 S.E.2d 430, 433 (2009) (citation and quotation marks omitted). "The burden is on the employer to show that an employee refused suitable employment. Once the employer makes this showing, the burden shifts to the employee to show that the refusal was justified." *Id.* at 318, 674 S.E.2d at 433.

"A 'suitable' position must both accurately reflect the claimant's ability to earn wages in the open market and not constitute 'make-work[.]' " *Wynn v. United Health Servs./Two Rivers Health-Trent Campus*, 214 N.C. App. 69, 75, 716 S.E.2d 373, 380 (2011), *disc. review denied*, 365 N.C. 545, 720 S.E.2d 685 (2012). This is so because the "Workers' Compensation Act does not permit defendants to avoid their duty to pay compensation by offering an injured employee employment which the employee under normally prevailing market conditions could find nowhere else and which defendants could terminate at will or for reasons beyond their control." *Stamey v. N.C. Self-Ins. Guar. Ass'n*, 131 N.C. App. 662, 666, 507 S.E.2d 596, 599 (1998) (citation, quotation marks, brackets, and ellipses omitted).

> Proffered employment would not accurately reflect earning capacity if other employers would not hire the employee

> with the employee's limitations at a comparable wage level. The same is true if the *proffered employment is so modified because of the employee's limitations that it is not ordinarily available in the competitive job market*.

Peoples v. Cone Mills Corp., 316 N.C. 426, 438, 342 S.E.2d 798, 806 (1986) (emphasis added).

In *Stamey*, the defendant-employer offered the plaintiff a "modified roller picker" position that allowed her to only use her left arm and to obtain assistance to perform tasks outside of her restrictions. After finding that the modified roller picker position was "a real position which exists in the marketplace," the Commission concluded that the plaintiff had unjustifiably refused the position. *Stamey*, 131 N.C. App. at 665, 507 S.E.2d at 599. We reversed, holding that "although the evidence showed that [the defendant] offered [the plaintiff] a position as a modified roller picker, the record is devoid of any evidence which would support the Commission's finding of fact that the modified roller picker position is a real position which exists in the marketplace and is not made work." *Id.* at 667, 507 S.E.2d at 600 (citation and quotation marks omitted).

In the present case, the Commission failed to make *any* findings on the issue of whether Defendant had demonstrated that the modified cashier position was a position that actually existed in the labor market and did not constitute "make work." We note that this issue was addressed by the deputy commissioner, who specifically found that "[t]here is no evidence in the record that other employers would hire the

Plaintiff to do a similar job at a comparable wage[,]" and "[t]here is no evidence in the record that the modified cashiers job allegedly offered to Plaintiff exists in the competitive job market . . . ." The parties then briefed this issue before the Commission. Although the Commission's Opinion and Award specifically noted that "the cashier position would be *modified* such that the cashier would use the scanner to scan items, rather than lifting items to be scanned[,]" it never made findings as to the significance of that modification. (Emphasis added.)

Defendant argues that because the cashier position was not *substantially* modified, there was no need for the Commission to make findings on this issue. However, in making this argument, Defendant is merely asserting its own characterization as to the significance of the modification. It was the duty of the *Commission* to make findings on this subject.

The cases cited by Defendant in its brief on this issue are inapposite. In those cases, the Commission explicitly made the type of findings that are lacking here. *See, e.g.*, *Nobles v. Coastal Power & Elec., Inc.*, 207 N.C. App. 683, 686, 689, 701 S.E.2d 316, 320, 322 (2010) (Commission's opinion and award contained finding that "[t]he position is a legitimate position with [the defendant], which even though it has been intermittently filled in the past, has become necessary on a regular basis due to the growth of [the defendant]'s business," and this Court determined that "competent evidence regarding the need for a fleet manager's assistant and the nature of the

position demonstrate[d] that the job was neither created nor modified for Plaintiff");[2] *Shah v. Howard Johnson*, 140 N.C. App. 58, 67, 535 S.E.2d 577, 583 (2000) (opinion of Commission included finding that job offered by defendant-employer "was not so modified to be considered make-work"), *disc. review denied*, 353 N.C. 381, 547 S.E.2d 17 (2001).

As this Court has previously explained, "while the Industrial Commission is not required to make specific findings of fact on every issue raised by the evidence, it is required to make findings on crucial facts upon which the right to compensation depends." *Munns*, 196 N.C. App. at 319, 674 S.E.2d at 434 (citation, quotation marks, brackets, and ellipses omitted). Here, the evidence — which showed that the cashier position had been modified for Plaintiff — directly raised the issue of whether the modified position "accurately reflect[ed Plaintiff]'s ability to earn wages in the open market and [did] not constitute 'make-work[.]' " *Wynn*, 214 N.C. App. at 75, 716 S.E.2d at 380. Because the Commission failed to make sufficient findings on this issue, we must remand this matter to the Commission. *See Munns*, 196 N.C. App. at 319, 674 S.E.2d at 434 (remanding case to Commission based on its failure to make necessary findings in its opinion and award).

Conclusion

[2] Moreover, unlike in *Nobles*, the Commission here expressly acknowledged that the cashier position offered to Plaintiff had, in fact, been modified.

For the reasons stated above, we vacate the Commission's 29 January 2016 Opinion and Award and remand for further proceedings not inconsistent with this opinion.

VACATED AND REMANDED.

Judges INMAN and ENOCHS concur.

Report per Rule 30(e).