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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-522

Filed: 5 April 2016

North Carolina Industrial Commission, I.C. No. X52597

KIMBERLY LEDFORD, Plaintiff,

v.

INGLES MARKETS, INC., Employer, SELF-INSURED, Defendant.

Appeal by plaintiff from opinion and award entered 17 December 2014 by the North Carolina Industrial Commission. Heard in the Court of Appeals 17 December 2015.

Law Office of Gary A. Dodd, by Gary A. Dodd, for plaintiff.

Northup, McConnell & Sizemore, PLLC, by Charles E. McGee, for defendant.

DIETZ, Judge.

Kimberly Ledford hurt her back while working as a scanning coordinator at Ingles Markets. In that role, she checked inventory and changed prices on products by scanning bar codes.

After several months of total disability, Ledford's doctors concluded that she could return to light-duty work. Her doctors reviewed a job description for a "U-Scan Clerk," a position that assisted customers using self-checkout machines. They specifically approved Ledford's return to work in that position, which did not require

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bending, stooping or lifting, and permitted her to alternate between seated and standing positions. The U-Scan Clerk position also paid the same as Ledford's previous position.

Ledford refused to return to work, and Ingles applied to terminate her workers' compensation benefits. The Industrial Commission approved that request.

On appeal, Ledford challenges a number of findings of fact and conclusions of law from the Industrial Commission's opinion and award. As explained below, under the narrow standard of review applicable here, we hold that the Commission's findings were supported by competent evidence and that its conclusions of law are supported by its findings. Accordingly, we affirm the Industrial Commission's opinion and award.

Facts and Procedural History

On 17 June 2011, Kimberly Ledford suffered a compensable injury to her lower back when she slipped and fell while working as a scanning coordinator at Ingles Markets. Her job duties in that role included checking inventory and changing prices by scanning bar codes. The position required bending, stooping, climbing, and lifting items weighing up to 50 pounds.

After she fell, Ledford saw a series of physicians to obtain treatment for her injury and the resulting pain and discomfort. Ultimately, on 15 February 2012, Dr. Alfred Geissele performed back surgery.

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After the surgery, Ledford continued to experience pain. On 25 May 2012, Dr. Geissele concluded that he did not have a clear explanation for Ledford's symptoms and suggested she obtain an MRI. The MRI revealed no anatomic explanation for Ledford's pain complaints.

On 10 August 2012, still unable to identify the source of Ledford's pain, Dr. Geissele recommended a CT myelogram. The results of the CT myelogram did not identify the source of Ledford's pain. Dr. Geissele also noted at the time that Ledford expressed significantly amplified and disproportionate pain complaints on examination.

Dr. Geissele concluded that Ledford did not have an operative condition and had reached maximum medical improvement. He released Ledford back to work with restrictions on bending, twisting, and lifting over twenty pounds and instructions to permit changes from sitting to standing positions as needed.

On 23 October 2012, Dr. Christopher Ray Martin, a pain specialist, concluded that Ledford had reached maximum medical improvement, and recommended a Functional Capacity Evaluation ("FCE") to determine her capabilities. The FCE revealed varying levels of effort and multiple clinical inconsistencies which prevented the administrator from determining Ledford's capabilities. Dr. Martin reviewed the FCE results, which revealed that Ledford was "at least capable of secretarial type work."

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Ingles reviewed the positions available at the company and determined that Ledford could fill the U-Scan Clerk position with her current medical restrictions. U-Scan Clerks assist customers with self-checkout. The company produced a U-Scan Clerk job analysis document that detailed the job responsibilities. After reviewing those duties, Dr. Geissele authored a letter stating he had reviewed Ledford's FCE results and the job duties of a U-Scan Clerk and concluded that she could engage in the U-Scan Clerk position without any accommodations.

On 17 January 2013, Ingles offered Ledford an opportunity to return to work as a U-Scan Clerk. When Ledford declined the position, Ingles applied to terminate Ledford's benefits.

The Industrial Commission granted that application, a Deputy Industrial Commissioner affirmed that decision following a hearing, and the Full Commission affirmed the Deputy Commissioner in its own opinion and award. Ledford timely appealed.

Analysis

Ledford challenges a number of the Industrial Commission's findings of fact and conclusions of law. "This Court reviews an award from the Commission to determine: (1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are justified by the findings of fact." *Kee v. Caromont Health, Inc.*, 209 N.C. App. 193, 195, 706 S.E.2d 781, 782 (2011). If the

Commission's factual findings are supported by any competent evidence in the record, those findings are binding on appeal. *Starr v. Gaston Cty. Bd. of Educ.*, 191 N.C. App. 301, 304, 663 S.E.2d 322, 325 (2008). With this standard in mind, we address each of Ledford's arguments in turn.

I. Factual Findings

Ledford challenges Findings of Fact 22, 35, 36, and 37. As explained below, each of these findings is supported by at least some competent evidence in the record and therefore are binding on appeal.

First, Ledford challenges Finding of Fact 22, which quotes portions of the Functional Capacity Evaluation indicating that “[d]ue to variable levels of effort and because of questionable reliability of pain and disability a return to work status cannot be determined at this time” and that “considerable question [sic] should be drawn to the reliability and accuracy of [Ledford's] reports of pain and disability.”

Ledford argues this finding of fact was not based on “objective medical indicators of effort in the report” and is “contrary to all of the medical records as well as the FCE itself.” Ledford argues that “the Full Commission did not give any consideration to the medical evidence of record” when it adopted this finding. But all Finding of Fact 22 does is quote portions of the FCE report. Those quotes are accurate, as indicated by the report itself, which is a part of the record on appeal. Thus, Finding of Fact 22 is supported by competent evidence.

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Ledford next argues that Finding of Fact 35 is not supported by competent evidence. Finding of Fact 35 reads:

Although the “U-Scan Clerk” position fell under defendant’s general classification as a “cashier,” the position offered plaintiff would, given her significant experience, appropriately pay her \$12.50 per hour. Furthermore, it would not require the same physical tasks as a regular cashier position.

Ledford contends that the hearing testimony did not support Finding of Fact 35 because Mr. Puett, Ingles Store Manager, testified that he did not expressly offer to pay Ledford \$12.50 per hour (the wage she earned before her injury) and some cashier positions at Ingles make only \$7.25 per hour.

But in Finding of Fact 24, which is unchallenged on appeal, the Commission found that Ingles “formally offered plaintiff the U-Scan Clerk position by letter” and that the U-Scan Clerk position is “light duty in that the clerk can sit or stand as needed and there is little to no lifting required.” Mr. Puett also testified that Ledford was to make \$12.50 per hour at the U-Scan position and that he told Ledford she would be permitted to use a stool as needed when he offered her the position. This is sufficient competent evidence to support Finding of Fact 35.

Ledford next challenges Finding of Fact 36, which states:

The U-Scan clerk position is not a modified or make-work position. It is a genuine position available to regular applicants in the normal course of business in the local competitive market.

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Ledford argues that “U-Scan Clerk” positions are not genuine because they are not listed on Ingles’s website and are not available to regular applicants. But there is ample evidence in the record, including the U-Scan Clerk job analysis document, establishing that, although the position is housed under the general heading of “cashier,” the U-Scan Clerk position, which involves managing multiple self-checkout stations, is a distinct, genuine position within the company available to regular applicants. Accordingly, this finding is supported by competent evidence.

Ledford next challenges Finding of Fact 37, which states:

The preponderance of the credible evidence establishes that the physical requirements of the U-Scan Clerk position offered plaintiff by defendant are within plaintiff’s physical restrictions.

Ledford contends that she needed to be able to sit and stand as needed, that the U-Scan Clerk position would not permit her to do that, and that the position requires clerks to help customers with heavy items, which Ledford could not do.

Again, record evidence contradicts Ledford’s position and supports the Commission’s findings. Mr. Puett testified that a U-Scan Clerk could use a chair or stool as needed in the position. He also testified that the position required “very little” bending and twisting—only once or twice a day—and that the only required lifting was paper towels and glass cleaner weighing less than two pounds total. This testimony also is supported by the U-Scan Clerk job analysis document. Finally, Dr. Geissele reviewed the U-Scan Clerk job analysis document and approved Ledford to

return to work in that position without modification to the recommended work restrictions. This competent evidence supports the Commission's finding.

II. Conclusions of Law

Ledford next challenges two of the Commission's Conclusions of Law: First, that she refused a position of suitable employment, and second, that she is no longer totally disabled. We address these arguments in turn.

Ledford first challenges Conclusion of Law 3, which states that the U-Scan Clerk position "is suitable employment in that it is within plaintiff's physical restrictions, is not a modified or make-work position, and would pay plaintiff at a rate significantly similar to her pre-injury wages" and that Ledford's "refusal of this position was therefore not justified." As explained below, the Commission's conclusion is supported by its findings of fact.

The former version of N.C. Gen. Stat. § 97–32, applicable to Ledford's claim, provides that an injured employee shall not be entitled to compensation if she unjustifiably "refuses employment procured for him suitable to his capacity." N.C. Gen. Stat. § 97–32 (pre-2011 amendment). "Suitable employment" is defined as "any job that a claimant is capable of performing considering his age, education, physical limitations, vocational skills, and experience." *Shah v. Howard Johnson*, 140 N.C. App. 58, 68, 535 S.E.2d 577, 583 (2000) (defining "suitable employment" under former version of N.C. Gen. Stat. § 97-32).

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Ledford's arguments challenging Conclusion of Law 3, in essence, rehash her arguments challenging the Commission's findings of fact. She contends that the U-Scan Clerk position is a "make work" position and that she was not even assured she would be paid \$12.50 per hour in the position. As explained above, the Commission found precisely the opposite in its findings of fact, and those findings are supported by competent evidence. Those findings, in turn, support Conclusion of Law 3. Accordingly, we reject Ledford's challenge to Conclusion of Law 3.

Ledford also challenges Conclusion of Law 4, which states that Ledford was "temporarily totally disabled . . . for the period from 10 February 2012 through 31 January 2013." Ledford argues that the Commission failed to make any findings of fact establishing that she was not totally disabled after 31 January 2013 and that the medical evidence supports her claim that she remains totally disabled. We disagree.

The Commission's unchallenged findings of fact establish that, on 12 October 2012, Dr. Geissele concluded that Ledford had reached maximum medical improvement with a 5% permanent partial disability to her back. On 23 October 2012, Dr. Martin reached the same conclusion and recommended that Ledford undergo a Functional Capacity Evaluation to determine her physical capabilities. On 6 December 2012, Dr. Geissele concluded that, after reviewing Ledford's FCE results, "[i]t is my opinion . . . that she is eligible to engage in a position of U-Scan clerk and, as best I can tell, she would not require any accommodations for same." These

unchallenged findings support the Commission's conclusion that Ledford no longer was totally disabled after 31 January 2013.

III. Procedural Due Process

Finally, Ledford contends that the process used by the Commission to terminate her benefits was "substantially flawed and in violation on the Constitution of North Carolina and the United States." Ledford cites several U.S. Supreme Court decisions addressing due process violations, but she does not provide any argument for why the Industrial Commission's process in this case rises to the level of a due process violation. Indeed, Ledford does not even identify what part of the process she believes violated her constitutional rights. Accordingly, we decline to address this argument. *See* N.C. R. App. P. 28(b)(6).

Conclusion

We affirm the Industrial Commission's opinion and award.

AFFIRMED.

Judges STROUD and TYSON concur.

Report per Rule 30(e).