NO. COA10-1069
NORTH CAROLINA COURT OF APPEALS

Filed: 4 October 2011

HELEN C. McCALL,
Employee,
Plaintiff,

v.

P.H. GLATFELTER CO.,
Employer,
Defendant.

North Carolina
Industrial Commission
I.C. No. 005263

Appeal by defendant from Opinion and Award entered 11 May 2010 by the North Carolina Industrial Commission. Heard in the Court of Appeals on 26 January 2011.

Law Offices of Lee & Smith, P.A., by Michael R. Lee, for plaintiff-appellee.

Prather Law Firm, by J.D. Prather, for defendant-appellant.

STROUD, Judge.

Defendant P.H. Glatfelter Company ("defendant") appeals from an Opinion and Award entered by the North Carolina Industrial Commission on 11 May 2010 concluding that: (1) Helen McCall ("plaintiff") suffered a compensable injury by accident arising out of and in the course of her employment with

defendant; (2) plaintiff's post-injury employment was not suitable employment and therefore not representative of plaintiff's post-injury earning capacity; and (3) plaintiff was entitled to temporary total disability compensation of $470.42 per week from 16 August 2002 until further order of the Full Commission, along with medical and attorney fees, subject to certain credits already paid by defendant. For the following reasons, we reverse.

I. Background

Plaintiff suffered a compensable injury on 5 January 1999, and then returned to her regular job on 30 November 1999, where she continued to work at this job until defendant's plant closed on 15 August 2002. On 8 August 2008, plaintiff filed a Form 33 requesting hearing on her claim for payment of compensation from 16 August 2002 to present and continuing. On 14 October 2009, Deputy Commissioner J. Brad Donovan issued an Opinion and Award denying plaintiff's claim for permanent or temporary total disability compensation and awarded permanent partial disability for her injured thumb.

On 26 October 2009, plaintiff appealed the deputy commissioner's opinion and award to the Full Commission ("the Commission"). On 11 May 2010, the Commission filed an Opinion

and Award, reversing the deputy commissioner's Opinion and Award of 14 October 2009 and awarding plaintiff temporary total disability. The Full Commission made the following findings of fact:

> 1. At the time of the hearing before the Deputy Commissioner, Plaintiff was 59 years old. She is a high school graduate with one semester of college. Plaintiff worked for Defendant, its predecessors and successor for 28 years. She worked in the Quality Control Department as a lab technician on the date of her compensable injury.
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> 2. On January 5, 1999, Plaintiff was retrieving pulp samples from a warehouse when she slipped on oil or grease and fell, sustaining an injury to her left hand. Plaintiff is right hand dominant. She was treated at the plant medical facilities by Dr. Tyson and thereafter received treatment from Dr. Mark Hazel and Dr. Bruce Minkin.
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> 3. After the injury Plaintiff continued to work in her regular job with Defendant as a lab tech. On November 19, 1999, Plaintiff underwent a left carpometacarpal joint reconstruction with trapeziectomy, APL tendon transfer, and palmaris longus tendon graft and pinning of metarsophalangeal joint, performed by Dr. Minkin.
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> 4. Plaintiff returned to work on November 30, 1999. She initially entered data on a computer until her stitches were removed, and then she returned to her lab tech duties. Ultimately, Plaintiff resumed performing all duties as a lab tech with the exception of carrying five gallon buckets containing wet pulp samples to the lab. Defendant assigned a helper to assist with

the caring and lifting of the buckets. The helper was not hired strictly for that purpose but held a different position at the plant as well.

5. On November 3, 2000, Dr. Minkin found Plaintiff to be at maximum medical improvement, although he noted that Plaintiff still had some limitations to strength and range of movement of the thumb and some laxity of the MP joint. On November 8, 2000, Dr. Minkin gave Plaintiff a permanent partial disability rating of 12% to the left hand, based on lack of range of motion, decreased pinch and grip strength. He did not assign any work restrictions based upon Plaintiff's claim that she was not having any problems at work and did not require any note of restrictions. Dr. Minkin opined that Plaintiff should not have had any problems with carrying the five gallon buckets as the task is usually done by hooking the fingers and does not place pressure on the carrier's thumb. Plaintiff was released to return on a per need basis. She did not return to Dr. Minkin.

6. Plaintiff worked continuously thereafter as a lab tech at her pre-injury wages until the plant closed under different ownership on August 15, 2002. Plaintiff was able to perform all aspects of her job as a lab tech for the entire time after Dr. Minkin released her until the plant closed more than two and half years later. There is nothing in the record indicating that Plaintiff's return to work following surgery was a "trial return to work."

7. On August 28, 2001, Plaintiff presented to Dr. Carol A. Koostra for a second opinion on her rating. Dr. Koostra noted that Plaintiff complained of "daily constant pain which is aching and traveling into her thumb

area with a sensation of burning and coldness." She also noted that Plaintiff had difficulty lifting weights greater than 20-40 pounds, although this is not attributed to her thumb problems in Dr. Koostra's notes. She recognized that Plaintiff was having trouble doing household chores and was unable to obtain a second job, but does not identify to what job she was referring. Dr. Koostra rated Plaintiff with a 30% permanent partial impairment to the left thumb, based upon the North Carolina Guides to the Evaluation of Physical Impairment.

8. Other than obtaining this second opinion, there is no evidence of record that Plaintiff sought any medical attention for her thumb condition since being released by Dr. Minkin.

9. Subsequent to the plant closing, Plaintiff applied for and received unemployment benefits with the Employment Security Commission. She certified in her application that she was "willing and able" to work, and performed a job search during the time she was receiving benefits. Plaintiff was unable to obtain documentation from the ESC as to the exact amount she received, but estimated that she received approximately six months of benefits at approximately $350.00 per week.

10. In June and July 2005, Plaintiff worked with Nutro Dog Food as a product demonstrator at area pet stores such as Pet Smart. She discontinued working with Nutro because the driving often required 90 mile round-trips to Asheville and also because carrying the 40 pound bags of dog food to the cash register was too difficult for her. She worked a total of 67 hours during these two months at the rate of $11 per hour.

11. Plaintiff next worked with Whitmire Grading as a part-time receptionist from February 2006 to February 2007. During the 12 month period she worked a total of 127 hours at the rate of $8.50 per hour. Plaintiff discontinued working in this job because the owner passed away and she was no longer needed.

12. On February 14, 2007, Plaintiff contracted a case of shingles and was in bed for approximately six weeks. She did not look for work during this time. About the time Plaintiff recovered, her husband was undergoing surgery of his own that kept him out of work until July and Plaintiff stayed home to care for him. Plaintiff experienced a recurrence of shingles in October or November. As a result of these problems, Plaintiff did not look for work at all for the entire calendar year of 2007, with the exception of applications filed with Lowes and Home Depot on 30 July 2007.

13. Plaintiff introduced credible evidence into the record concerning her job search activities after Defendant's plant closed on August 15, 2002. Her job search log covered the time period from September 3, 2002, through August 2008. Plaintiff testified that during that time period she searched for jobs on a regular basis and performed limited work for two employers. Although there were some periods of time when Plaintiff could not perform job searches due to personal or family illnesses, Plaintiff has established that she engaged in substantial and meaningful job search efforts after she lost her job with Defendant.

14. Both parties had Plaintiff's case evaluated by vocational experts, Gregory

Henderson for Defendant, and Jack Dainty for Plaintiff. Having reviewed both reports, the undersigned find [sic] that Mr. Dainty's evaluation is based on perceived restrictions that have never been assigned to Plaintiff by a medical provider and so result in inaccurate conclusions as to the types of positions Plaintiff is capable of obtaining. Mr. Henderson's evaluation contains recommended positions that pay relatively low wages compared to Plaintiff's pre-injury wages and so call into question their suitability under the Act. In his deposition testimony, Mr. Henderson stated that it is reasonable to assume Plaintiff's starting salary for potential jobs is about $11.00 per hour for the occupations he identified, and possibly $8.00 per hour. Mr. Henderson's opinion that Plaintiff could expect a starting salary of about $11.00 per hour establishes that the occupations he identified are not suitable employment for Plaintiff. Based on Plaintiff's stipulated average weekly wage of $705.60, her pre-injury hourly wage was $17.64. Accordingly, the evidentiary record establishes that no suitable employment exists in the local economy which Plaintiff can perform. Plaintiff's inability to find suitable employment is not related to current economic conditions because Plaintiff has been unable to find suitable employment since August 15, 2002, despite reasonable job search efforts.

15. The undersigned finds as fact that the greater weight of the evidence shows that Plaintiff has not been consistently employable since the plant closing on August 15, 2002, and that her thumb condition has been problematic, and has rendered her disabled from employment. As the result of her January 5, 1999, injury by accident, Plaintiff has been unable to earn the wages

> which she was receiving at the time of her injury in the same or any other employment from August 15, 2002, through the present and continuing.

Based upon these findings, the Commission concluded, in pertinent part, as follows:

> 1. Plaintiff sustained an injury by accident arising out of and in the course of the employment on January 5, 1999, for which she is entitled temporary total compensation in the amount of $470.42 per week from August 16, 2002, to the present and continuing. N.C. Gen. Stat. §§ 97-2(6), -2(9), -29.
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> 2. Plaintiff's two post-injury employments and all jobs available to Plaintiff within her physical and vocational capacities are not suitable employment and thus are not representative of Plaintiff's post-injury earning capacity. . . .

Commissioner Dianne C. Sellers dissented without an opinion. Defendant appeals.

II. Discussion

On appeal, defendant has set forth eight assignments of error[1], all of which point to the issue of whether the Commission's findings of fact support its conclusion that that

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[1] We note that assignments of error are no *longer* required pursuant to North Carolina Rule of Appellate Procedure Rule 10(a). However, defendant has properly presented its arguments in its brief pursuant to N.C.R. App. P. 28(a) (stating that "[t]he scope of review on appeal is limited to issues so presented in the several briefs. Issues not presented and discussed in a party's brief are deemed abandoned.").

the plaintiff was "disabled," within the meaning of the Workers' Compensation Act, as a result of her compensable injury. We find that it did so err. In an appeal from the Commission, the jurisdiction of the appellate courts is limited. When it comes to questions of fact, "the findings of fact made by the Commission are conclusive on appeal when supported by competent evidence . . . even though there is evidence to support a contrary finding of fact." *Morrison v. Burlington Indus.*, 304 N.C. 1, 6, 282 S.E.2d 458, 463 (1981). As for conclusions of law entered by the Commission, the Court determines whether or not "the findings of fact justify the conclusions of law." *Ramsey v. Southern Indus. Constructors, Inc.*, 178 N.C. App. 25, 29, 630 S.E.2d 681, 685, *disc. review denied*, 361 N.C. 168, 639 S.E.2d 652 (2006).

Central to the outcome of this case is the Workers' Compensation Act's definition of disability. According to N.C. Gen Stat. § 97-2(9) (2009), "[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." (emphasis added).

In order to support a conclusion of disability, the Commission must find three things:

> (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.

Hilliard v. Apex Cabinet Co., 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). The employee bears the burden of proving these elements.[2] *Gilberto v. Wake Forest Univ.*, 152 N.C. App. 112, 116, 566 S.E.2d 788, 792 (2002).

An employee may meet this burden in 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.

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[2] This Court has held that a presumption of disability arises only by a previous Commission's award of continuing disability or by producing a Form 21 or Form 26 settlement approved by the Commission. *Cialino v. Wal-Mart Stores*, 156 N.C. App. 463, 470-71, 577 S.E.2d 345, 350-51 (2003). Neither circumstance applies in this case.

Russell v. Lowes Produc. Distributions, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (citations and quotation marks omitted).

Plaintiff argues that the findings of fact and evidence support a finding of disability under the second, third, and fourth prongs of *Russell*. Plaintiff's main contention is that the evidence supports the findings of fact; however, even if there is sufficient evidence to support the key findings of fact, the stated findings of fact do not logically support the conclusion of law that plaintiff has been totally disabled since 16 August 2002.

Plaintiff argues that she proved that she was "incapable after [her] injury of earning the same wages [s]he had earned before h[er] injury in the same employment[,]" but neither the evidence nor findings support this argument. In fact, the Commission's findings of fact 4, 5, and 6 completely contradict that plaintiff was unable to earn the same wages as she had prior to her compensable injury. In these findings, the Commission found that plaintiff did indeed return to work in her same pre-injury job, where she performed all the same duties and earned the same wage, with the only exception being that another lab technician carried five-gallon buckets for her. The

Commission also found that plaintiff should have been able to carry the buckets despite her injury; in fact, Dr. Minkin did not assign any work restrictions once plaintiff reached her maximum medical improvement on 3 November 2000. Finally, the Commission went so far as to say in finding of fact Number 6 that, "[p]laintiff was able to perform all aspects of her job as a lab tech for the entire time after Dr. Minkin released her until the plant closed more than two and a half years later." Her job ended due to the plant closure on 16 August 2002, the same date the Commission concluded was the date upon which plaintiff's period of temporary total disability began. There is no finding as to any change whatsoever in plaintiff's medical condition or her ability to work as of 16 August 2002. Thus, the reason she stopped working in the same job was completely unrelated to her injury.

Plaintiff relies heavily on her unsuccessful job search to support her argument as to disability. In fact, the Commission found that "[p]laintiff's inability to find suitable employment is not related to current economic conditions because Plaintiff has been unable to find suitable employment since August 15, 2002, despite reasonable job search efforts." This finding is illogical and is not supported by the other findings of fact.

Essentially, the Commission found that because she made a reasonable job search, her inability to find a job cannot be related to economic conditions, so it must be because of her compensable injury. Yet the Commission also found that plaintiff received unemployment benefits for about 6 months; that she worked for Nutro Dog Food in 2005 for two months; that she worked part-time for Whitmire Grading from February 2006 through February 2007; and that she did not look for work in 2007 due to her and her husband's medical problems. The Commission did not make any findings that plaintiff made any efforts to find a job from February 2007 up to the date of hearing before the deputy commissioner in April 2009. Instead, the findings indicate that after working for two and half years at her pre-injury job and wage, plaintiff did in fact obtain and perform other jobs, both of which ended for reasons other than plaintiff's injury. Although finding of fact 14 states that "no suitable employment exists in the local economy which Plaintiff can perform[,]" the Commission did not find that plaintiff's injury had anything to do with her inability to find suitable employment. She has no work restrictions; she performed her pre-injury job for 2 ½ years before stopping only because her job terminated for reasons entirely unrelated to her injury.

The Commission made no finding that plaintiff's medical condition had changed at all from November 1999 when she returned to work until the date of hearing before the deputy commissioner. The Commission even found that plaintiff saw Dr. Koostra "for a second opinion" a year before her job ended. Plaintiff told Dr. Koostra that she "was having trouble doing household chores and was unable to obtain a second job," but Dr. Koostra did not assign any restrictions on plaintiff's work and plaintiff's job did not change after this visit.

While plaintiff's experienced reduction in wages may be evidence of plaintiff's reduced ability to earn wages, it is not conclusive. *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 190-91, 345 S.E.2d 374, 381 (1986). Since the Commission did not make any findings of fact which indicate that plaintiff's work difficulties after she returned to work which defendant on 30 November 1999 were caused by her compensable injury, as a matter of law, plaintiff suffered no disability under the *Hilliard* test. The Workers' Compensation Act is concerned with capacity and ability to work due to the compensable injury, not employability, which may involve extraneous factors such as

economic conditions and the employee's health.[3] Therefore, the Commission's conclusion of law 1 is erroneous in finding plaintiff disabled "from August 16, 2002, to the present and continuing" as it is not supported by the findings of fact.

Since the Commission's findings of fact do not logically support the conclusion that plaintiff is disabled, the Commission erred in awarding plaintiff compensation for temporary total disability under N.C. Gen. Stat. § 97-29 (2009). As Deputy Commissioner Donovan concluded, plaintiff is entitled to receive compensation for permanent partial disability pursuant to N.C. Gen. Stat. § 97-31 (2009), but no more, since "[d]isability compensation under N.C. Gen. Stat. § 97-31 is awarded for physical impairment irrespective of ability to work or loss of wage earning ability and is *in lieu of all other compensation*." *Farley v. N.C. Dept. of Labor*, 146 N.C. App. 584, 587, 553 S.E.2d 231, 233 (2001) (citation omitted).

REVERSED.

Judges CALABRIA and HUNTER, JR., Robert N. concur.

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[3] Vocational experts for both the plaintiff and defendant opined that the economy affected plaintiff's employability, and the Commission found that plaintiff could not work because she suffered from shingles during 2007 in Finding of Fact Number 12. These are both factors that affect employability but not capacity to earn wages as caused by the compensable injury.

Report per Rule 30(e).