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NO. COA05-1431

NORTH CAROLINA COURT OF APPEALS

Filed: 18 July 2006

RICHARD LUCAS, Employee,
Plaintiff,

v.

LL BUILDING PRODUCTS, Employer,
and
CRAWFORD & COMPANY, Servicing Agent,
Defendants.

North Carolina
Industrial Commission
I.C. File No. 235306

Appeal by defendants from opinion and award filed 13 July 2005 by the North Carolina Industrial Commission. Heard in the Court of Appeals 11 May 2006.

Brannon Strickland, PLLC, by Anthony M. Brannon, for plaintiff appellee.

McAngus, Goudelock & Courie, PLLC, by Trula R. Mitchell, for defendant appellants.

McCULLOUGH, Judge.

Defendants appeal from an opinion and award of the North Carolina Industrial Commission ("the Commission") awarding temporary total disability payment to plaintiff Richard Lucas ("Mr. Lucas"). We affirm.

Plaintiff, Mr. Lucas, was employed by LL Building Products as a lead maintenance man on 26 March 2002 when he was injured on the job. While working with a machine, Mr. Lucas sustained an injury

by accident in which he severely lacerated his right index and long fingers. After an investigation of the incident, Mr. Lucas was terminated for failure to follow established safety procedures. Immediately following the accident, Mr. Lucas was taken to the hospital where he was referred to a specialist in the field of orthopedic surgery with a specific concentration on hands, Dr. Bahner.

Due to the severity of the injury, Dr. Bahner determined that Mr. Lucas would be out of work for an extended period of time and needed multiple surgeries, the first of which was performed in April 2002. Due to problems with the wound, tendons, and nerves in Mr. Lucas's hand, he underwent several subsequent surgeries and debridements in an attempt to repair his hand. Even after the multiple surgeries, Mr. Lucas continued to have extensive pain resulting in a surgery in November 2002 which was an attempt to increase motion in his hand and to eliminate pain and stiffness. Throughout the period when Mr. Lucas was undergoing these surgeries, he was also participating in occupational therapy for his hand.

On 24 June 2003, Dr. Bahner performed a functional capacity evaluation in an attempt to quantify Mr. Lucas's impairments and disability. Dr. Bahner determined at that time that, due to loss of motion and sensation, he had the following impairment ratings: long finger, 64 percent; index finger, 27 percent; ring finger, 25 percent; and small finger, 33 percent impairment. Based on the evaluation and impairment rating, Dr. Bahner recommended that Mr.

Lucas be careful with sharp objects due to difficulty with sensation and use a glove or other protective handwear with any work. At that time, no restrictions were made on grip or lifting. In June 2003, Mr. Lucas also received an evaluation from his therapist finding that Mr. Lucas was capable of sustaining medium level work for an eight-hour day and further that his grip strength was approximately a quarter compared to his left side. Dr. Bahner stated that based on the therapist's evaluation, he could conclude that Mr. Lucas had lost some of his grip strength from the injury.

Karen Davis, a vocational specialist with Crawford and Company, defendant-carrier, began working with Mr. Lucas after the accident in an attempt to find alternate employment. Mr. Lucas was initially advised to enroll in computer training classes in order to apply for a job with Dell Labs. Mr. Lucas attended computer training classes and applied for a job at Dell Labs, but was never offered a position. Mr. Lucas also applied for a job at a nursing home which was recommended to him but again was not offered a position. Karen Davis recommended other alternate employment for Mr. Lucas; however, he determined that they were too far away from his home to be feasible options for employment.

Initially, Mr. Lucas's claim was accepted as compensable pursuant to Form 60. Subsequently defendants filed a Form 24 application to suspend or terminate payment of compensation which was granted by a special deputy commissioner pursuant to evidence that Mr. Lucas had wage-earning capacity based on surveillance video which showed Mr. Lucas operating a tow truck. The matter was

appealed to Deputy Commissioner Phillip Holmes who filed an opinion and award holding that Mr. Lucas had sustained a compensable injury but that he was no longer entitled to temporary total disability where he had wage earning capacity. Mr. Lucas then appealed the opinion and award of the Deputy Commissioner to the Commission.

In support of defendants' application to terminate Mr. Lucas's compensation, they presented evidence that Mr. Lucas was capable of gainful employment in the form of driving a tow truck and further that there were numerous jobs at LL Building Products that would be available to Mr. Lucas but for his termination for violation of safety regulations. There was further evidence at trial of available opportunities for alternate employment that were not pursued by Mr. Lucas.

Mr. Lucas admitted that he attempted to drive a tow truck in order to determine whether it was an occupation which he had the ability to hold after he sustained his injury. He further explained that after several failed attempts to secure a vehicle onto the tow truck he realized that he was unable to pursue this as an occupation. It was also adduced at trial that none of the positions testified to as appropriate for Mr. Lucas within LL Building Products had ever been offered to him nor were any available at the time of the hearing. The Commission entered an opinion and award finding that Mr. Lucas was entitled to ongoing benefits and that the application to terminate compensation was improvidently allowed.

Defendants now appeal.

Defendants contend on appeal that there is no competent evidence in the record to support a finding of disability and award of indemnity compensation. We disagree.

In reviewing a decision of the Commission, our review is limited to two issues: (1) whether any competent evidence in the record supports the Commission's findings of fact, and (2) whether such findings of fact support the Commission's conclusions of law. *Moore v. Davis Auto Service*, 118 N.C. App. 624, 627, 456 S.E.2d 847, 850 (1995).

An employee injured in the course of his employment is disabled under the Act if the injury results in an "incapacity . . . 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) (2005). "The burden is on the employee to show that he is unable to earn the same wages he had earned before the injury, either in the same employment or in other employment." *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993). An 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.

Id. (citations omitted).

Defendants argue that Mr. Lucas did not meet this burden. The record clearly establishes that Mr. Lucas is capable of doing some work, is not currently employed, and that Mr. Lucas does not have a pre-existing condition. The main argument on appeal appears to be the contention by defendants that there is not competent evidence in the record that Mr. Lucas made reasonable efforts to obtain employment. In its opinion and award, the Commission made the following findings of fact:

7. While continuing his hand treatment, in December of 2002 and January of 2003 the plaintiff attempted on his own to learn how to operate a tow truck. Plaintiff was contemplating buying a towing business to own and run himself if he could perform the physical tasks required in that trade. The owners of AOK Towing were trying to sell their business, and attempted to teach plaintiff to execute the tasks required in the towing business. The plaintiff rode in the truck in order to learn the physical as well as the business aspects of AOK Towing. To that end the plaintiff often went inside to see clients and handle the paperwork involved with tows. The plaintiff never received any wages whatsoever from AOK Towing.

8. The plaintiff lacked the hand strength to secure cars to a tow truck. A car plaintiff attempted to secure became loose and fell off the truck as he was towing it. Plaintiff abandoned the idea of owning and running a towing business due to his inability to perform the necessary physical tasks with his right hand. The defendants submitted no evidence that plaintiff earned any wages from AOK Towing.

Defendants attempted to present evidence that Mr. Lucas was capable of work, through testimony and a video presentation, showing Mr. Lucas operating a tow truck. Defendants asserted that where he was capable of work, he was therefore not entitled to disability benefits. However, the Commission declined to accept this evidence as credible evidence and this Court will not re-weigh that evidence. *Anderson v. Motor Co.*, 233 N.C. 372, 376, 64 S.E.2d 265, 268 (1951) (In weighing the evidence, the Commission is the sole judge of the credibility of witnesses and the weight to be given their testimony, and may reject entirely the testimony of a witness if warranted by disbelief of the witness.). The Commission instead accepted the testimony of Mr. Lucas that the video evidence of him operating a tow truck was one of the many instances in which he unsuccessfully attempted to find alternate employment after his injury.

Defendants attempted to offer further evidence showing that Mr. Lucas failed to make reasonable efforts to obtain employment, and moreover that there would be positions available for Mr. Lucas at LL Building Products, considering his restrictions, but for his termination. However, the Commission also found this evidence to not be credible and made the following findings of fact:

10. Defendant started vocational services on 30 August 2003, but these services proved not to be fruitful. The defendants closed the vocational file on plaintiff on 16 January 2004. The vocational professional wrote in the 13 January 2004 report that the plaintiff completed a keyboarding class, had a strong work ethic, was motivated to return to work,

and followed up on all job leads. Plaintiff was unable to find suitable employment.

11. The defendants named several jobs that plaintiff could possibly perform for defendant-employer. However, Mr. Redwine, the employer's safety coordinator, testified on cross-examination that none of these jobs were ever offered to plaintiff and that none were available at the time of the hearing before the Deputy Commissioner.

These findings of fact are merely another indication that there was conflicting evidence which the Commission weighed and subsequently determined the evidence of Mr. Lucas to be more credible and competent.

Mr. Lucas testified that he sought work with a towing company on his own volition and that he worked with a vocational specialist in attempting to obtain employment by enrolling in a computer class and applying for numerous jobs. Mr. Lucas testified that he was physically unable to complete the tasks associated with a towing job and further that he completed several job applications and was refused employment in each instance. The report of the vocational specialist was further admitted into evidence showing that Mr. Lucas was motivated to work, had followed up on all job leads, but was unable to find suitable work. Because the Commission is the sole judge of the credibility of the witnesses and has rejected as not credible defendants' evidence that Mr. Lucas failed to make a reasonable effort to obtain other employment, Mr. Lucas met his burden of showing the existence of a disability.

Accordingly, the decision of the Commission is

Affirmed.

Judges HUDSON and TYSON concur.

Report per Rule 30(e).