NO. COA08-1077

NORTH CAROLINA COURT OF APPEALS

Filed: 7 July 2009

CAROLYN JEAN "C.J." GESEL,
Employee,
Plaintiff,

v.

From the North Carolina
Industrial Commission
I.C. File No. 263168

MILLER ORTHOPAEDIC CLINIC,
INC.,
Employer,

and

SELECTIVE INSURANCE COMPANY,
Carrier,
Defendants.

Appeal by defendants from Opinion and Award entered 22 May 2008 by the Full Commission. Heard in the Court of Appeals 11 February 2009.

Rudisill, White & Kaplan, P.L.L.C., by Bradley H. Smith, for defendants.

The Sumwalt Law Firm, by Vernon Sumwalt and Mark T. Sumwalt, for plaintiff.

ELMORE, Judge.

On 22 May 2002, C.J. Gesel (plaintiff) sustained an admittedly compensable injury while employed by Miller Orthopaedic Clinic (defendant Clinic; together with its insurer Selective Insurance Company, defendants). While lifting a paraplegic patient onto an

x-ray table in her position as an x-ray technician for defendant Clinic, plaintiff sustained an injury to her back. As an x-ray technician, plaintiff earned an average weekly wage of $832.21. After her injury, she did not work again until 16 December 2002, when she returned to work for defendant Clinic as a coding specialist, earning $670.39 per week.

On 10 April 2003, plaintiff was terminated as a coding specialist after several doctors left defendant Clinic to start a new practice. Plaintiff eventually found new work as an insurance coordinator at Pathology Associates, where she began work on 7 August 2003 and earned a weekly wage of $452.03. The requirements of her new job required plaintiff to frequently "bend, squat, and stoop" in order to pick up boxes of documents, which caused plaintiff back and leg pain. She frequently had to enlist other employees to help her lift boxes and open filing cabinets. Plaintiff was working approximately thirty-two hours per week for Pathology Associates despite continued back pain, leg pain, and intolerance to over twenty different medications prescribed to treat the pain.

In 2004, plaintiff and defendants mediated portions of plaintiff's request for temporary partial disability payments from defendants. On 27 January 2005, a deputy commissioner issued an Opinion and Award settling the remaining disputes between plaintiff and defendants. The Opinion held, *inter alia*, that defendants' measurement of disability payments to plaintiff would be determined by plaintiff's wages as a coding specialist, rather than her lower

wages as an insurance coordinator. Neither plaintiff nor defendants appealed this determination.

On 10 November 2005, Dr. Kern Carlton forbade plaintiff from working on account of plaintiff's worsening pain. Dr. Carlton suggested numerous treatment options, including lumbar fusion surgery, epidural steroid injections, aquatic therapy, a spinal cord stimulator implant, and a four-week comprehensive functional restoration program. However, Dr. Hunter Dyer and Dr. John Welshofer recommended against the lumbar fusion surgery because plaintiff's pain was neurogenic, not orthopedic, in origin. The epidural steroid injections caused pressure on plaintiff's nerve, resulting in her being bed-ridden for a week in January 2006. The aquatic therapy was equally inefficacious because it only relieved pain during the time that plaintiff was in the pool. As for the spinal cord stimulator implant, Dr. Carlton indicated that he could not find "any patients that had had success with it[,]" and plaintiff ultimately decided against that option. Plaintiff attempted to participate in the four-week restoration program, but after just two days, Dr. Carlton "excused [plaintiff] from the program because it did not appear that she would make the improvement that was expected."

On 16 May 2006, Dr. Carlton allowed plaintiff to seek employment but only on the stipulation that she not work more than two hours per day, five days per week, with the hope that she might eventually be able to work longer hours. That same day, plaintiff contacted Kim Bradley, her previous supervisor at Pathology

Associates, about returning to work on a part-time basis. Bradley agreed to allow plaintiff to return to work on 22 May 2006 at reduced hours; however, plaintiff called Bradley three days later and informed her that she would not be taking the position after all. Plaintiff claimed that Bradley wanted her to return to full-time work within two weeks and that plaintiff was afraid that she would not be able to progress physically so as to meet that timeline and that she would just end up being terminated. Bradley testified that, while Pathology Associates would eventually have needed plaintiff to work full-time, she had not imposed any kind of timeline on plaintiff. Since then, plaintiff said that she has not worked any jobs because

> physically [I] have reached the end of my rope. I'm not – I'm not scared of trying anything, doing anything. If there was a treatment out there, I would – I would do it. I worked years in pain. I have fought with the doctors to let me work. And it's just to a point now where I cannot tolerate it anymore. And I worry – I worry that – when I look back four years ago, and I could brush my teeth without any problem, and recently it's becoming a problem, now I worry what it's going to be like in a year, two years. I'm not old and – I'm sorry. I'm scared.

On 9 October 2006, defendants filed a hearing request with the Commission contending that, as a result of plaintiff's failure to accept the ten-hour-per-week job at Pathology Associates in May 2006, the temporary disability benefits that defendants had been paying to plaintiff since the 27 January 2005 Opinion and Award should be suspended or terminated. On 30 May 2007, Deputy Commissioner Philip A. Baddour, III, issued his Opinion and Award

indicating that the job offered to plaintiff in May 2006 was not suitable employment and, therefore, plaintiff had been entitled to reject it and to continue receiving total disability compensation. Defendants then appealed to the Full Commission, which affirmed the deputy commissioner's Opinion and Award on 22 May 2008. Pursuant to N.C. Gen. Stat. § 97-86, this final decision of the Full Commission has been appealed by defendants to this Court.

ARGUMENTS

I.

Defendants contend that the Full Commission misapprehended the law within the context of N.C. Gen. Stat. § 97-32 by concluding that plaintiff was at maximum medical improvement without also considering whether she was at maximum vocational recovery. We disagree.

The point at which an injury stabilizes is called the maximum medical improvement (MMI). *Horne v. Universal Leaf Tobacco Processors*, 119 N.C. App. 682, 688, 459 S.E.2d 797, 801 (1995). This is also considered the end of the "healing period." *Neal v. Carolina Mgmt.*, 350 N.C. 63, 510 S.E.2d 375 (1999) (adopting per curiam the dissenting opinion of Timmons-Goodson, J., at 130 N.C. App. 228, 235, 502 S.E.2d 424, 429 (1998)). "The [MMI] finding is solely the prerequisite to determination of the amount of any permanent disability for purposes of G.S. 97-31." *Watson v. Winston-Salem Transit Auth.*, 92 N.C. App. 473, 476, 374 S.E.2d 483, 485 (1988) (citation omitted). N.C. Gen. Stat. § 97-31's purpose

is to outline periods and rates of compensation for on-the-job injuries. N.C. Gen. Stat. § 97-31 (2007).

Defendants characterize the Full Commission's finding of whether plaintiff had reached MMI as a question of law. However, this Court has expressly held that "the question of whether an employee has reached [MMI] is an issue of fact." *Collins v. Speedway Motor Sports Corp.*, 165 N.C. App. 113, 116, 598 S.E.2d 185, 188 (2004). Therefore, this Court will affirm the Commission's finding of MMI so long as there is "any competent evidence" supporting it. *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000).

Defendants urge this Court to interpret MMI as including the dictum in *Walker v. Lake Rim Lawn and Garden* that states "until he has reached maximum vocational recovery, this plaintiff's healing period is not yet at an end." 155 N.C. App. 709, 718, 575 S.E.2d 764, 770 (2003). However, this Court expressly "decline[d] to adopt the *obitur dictum* contained in *Walker*, and h[e]ld that a finding of MMI . . . does not require the injured worker to have reached 'maximum vocational recovery.'" *Collins*, 165 N.C. App. at 122, 598 S.E.2d at 192.

Therefore, determining plaintiff's level of vocational recovery is not necessary in determining whether plaintiff had reached MMI. As such, the sole question in this argument is whether there is any competent evidence supporting the Full Commission's finding that plaintiff's injury had stabilized – or, put another way, that her period of healing had ended – before she

was offered the two-hour-per-day job with Pathology Associates in May 2006. Such evidence includes: (1) that Dr. Carlton stated that he had concluded on 11 December 2003 that plaintiff had reached MMI, (2) that Dr. Dyer likewise concluded on 14 January 2004 that plaintiff had reached MMI, and (3) that plaintiff testified that she had tried almost two dozen medications and numerous other treatment options, with no improvement in her pain. Given the testimony of two medical doctors indicating that plaintiff had reached MMI, as well as plaintiff's own testimony, there is more than enough competent evidence to uphold the Full Commission's finding that plaintiff had reached MMI well before she was offered the job at Pathology Associates in May 2006.

Therefore, the Full Commission did not err by determining that plaintiff had reached MMI, and defendants' argument fails.

II.

Defendants next argue that the Full Commission's failure to conclude that plaintiff had suffered a change of condition for the worse under N.C. Gen. Stat. § 97-47 and was no longer at maximum vocational recovery was not supported by the facts and the parties' stipulations.

N.C. Gen. Stat. § 97-47 states that

> [u]pon its own motion or upon the application of any party in interest on the grounds of a change in condition, the Industrial Commission may review any award, and on such review may make an award ending, diminishing, or increasing the compensation previously awarded, subject to the maximum or minimum provided in this Article, and shall immediately send to the parties a copy of the award.

N.C. Gen. Stat. § 97-47 (2007). The language of the statute specifically provides that the appeal should be made to the Industrial Commission itself. However, in the present case, defendants have raised this argument for the first time on appeal to this Court, which explains why the Full Commission failed to make a conclusion regarding whether plaintiff had suffered a change of condition. Neither defendants' Request for Hearing nor defendants' Application for Review by the Full Commission mentioned a "change of condition" argument under N.C. Gen. Stat. § 97-47.

On appeal from an order by the Full Commission, a reviewing court may "neither find facts nor adjudicate matters within the jurisdiction of the Industrial Commission." *Byers v. North Carolina State Highway Comm.*, 275 N.C. 229, 233, 166 S.E.2d 649, 652 (1969); *see also State ex rel. Employment Sec. Comm. v. Paul's Young Men's Shop, Inc.*, 32 N.C. App. 23, 29, 231 S.E.2d 157, 160-61 (1977). As such, this Court cannot consider defendants' argument concerning whether plaintiff had a change in condition, such argument not first being made to the Industrial Commission.

III.

Defendants' final argument is that the Full Commission misapprehended the law within the context of N.C. Gen. Stat. § 97-32 when it determined that the two-hour-per-day job with Pathology Associates was not suitable employment.

The statute provides in whole that "[i]f an injured employee refuses employment procured for him suitable to his capacity he 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 (2007).

Defendants argue that the Full Commission erred by not analyzing the present case under the principles of *Seagraves v. Austin Company of Greensboro*, 123 N.C. App. 228, 472 S.E.2d 397 (1996). *Seagraves* deals, in part, with workers who have not reached MMI and, therefore, focuses its analysis on the question of "whether the employee's failure to perform is due to an *inability* to perform or an *unwillingness* to perform." *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 494, 597 S.E.2d 695, 700 (2004). Since defendants' argument in Section I, *supra*, was that plaintiff was not at MMI, then defendants contend that plaintiff's behavior should be analyzed under *Seagraves* as an unwillingness to take the May 2006 job at Pathology Associates, and, therefore, the Full Commission's choice of analysis on this matter should be reviewed as a question of law.

However, in Section I, *supra*, we determined that plaintiff had, in fact, reached MMI prior to May 2006; therefore, the Full Commission properly failed to use *Seagraves*'s principles relating to non-MMI workers. As such, this argument is not one of law, but rather one of fact, where this Court will affirm the Full Commission's decision that plaintiff was justified in refusing to take the May 2006 job so long as there is "any competent evidence" to support the decision. *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000).

The Industrial Commission's Rules Regarding Rehabilitation Professionals defines "suitable employment" as

> employment in the local labor market or self-employment which is reasonably attainable and which offers an opportunity to restore the worker as soon as possible and as nearly as practicable to pre-injury wage, while giving due consideration to the worker's qualifications (age, education, work experience, physical and mental capacities), impairment, vocational interests, and aptitudes.

Collins, 165 N.C. App. at 122, 598 S.E.2d at 191-92 (quoting N.C. Indus. Comm'n Rules for Rehabilitation Professionals III(G), 2004 Ann. R. (N.C.) 1017, 1018-19).

Competent evidence supporting the Full Commission's finding that the job was unsuitable exists under two different parts of this definition: (1) the job's wage was substantially below plaintiff's pre-injury wage, and (2) the job's requirements did not fit plaintiff's qualifications – specifically, her physical capacity and impairment.

First, plaintiff's wage at the Pathology Associates job would have been $142.50 per week, which is an 82.9 percent reduction in wages from plaintiff's pre-injury wages of $832.21 – by any standard, an enormous pay cut. Additionally, the definition calls for a job to "restore the worker as soon as possible and as nearly as practicable to pre-injury wage." *Id.* Given that Pathology Associates apparently wanted plaintiff to resume full time work after only a few weeks at reduced hours, that job did not offer a practicable time schedule for plaintiff to return to her pre-injury hours and wage.

Second, when plaintiff had previously worked for Pathology Associates, she was only able to accomplish her work with the help of other employees, who lifted boxes and opened filing cabinets for her. In *Peoples v. Cone Mills Corporation*, our Supreme Court noted that where other employees "help [an injured worker] to hold his job by doing much of his work for him, or if he manages to continue only by delegating his more onerous tasks to a helper," then the job "does not accurately reflect the person's ability to compete with others for wages." 316 N.C. 426, 437, 342 S.E.2d 798, 806 (1986) (citations omitted). Further, plaintiff stated that she "didn't feel that [she] could do it five days a week, two hours a day based on [the pain] I feel." Plaintiff's supervisor confirmed that the job would require plaintiff to "bend, squat, and stoop" in order to reach files. This Court has previously defined competent evidence to include a plaintiff's own testimony that he was in pain and unable to work, despite evidence to the contrary that he could return to work full-time. *Byrd v. Ecofibers, Inc.*, 182 N.C. App. 728, 731, 645 S.E.2d 80, 82 (2007).

Plaintiff presented competent evidence to support the Full Commission's findings of fact that the May 2006 job was at a substantially reduced wage from her pre-injury wage and that she could not return to work for even ten hours per week without incurring further back and leg pain. As such, defendant's argument unquestionably fails.

Given that there is a considerable amount of competent evidence supporting the Full Commission's findings that plaintiff had reached MMI and that the proffered job at Pathology Associates was not a suitable position for plaintiff, then plaintiff was within her rights to reject the job offer without risk of losing her disability payments from defendants. If defendants wish to argue for a change in condition, the proper avenue for that appeal will begin with the Commission, not this Court. Therefore, we overrule all of defendants' arguments and affirm the Full Commission's findings.

No error.

Judges CALABRIA and STROUD concur.

Report per Rule 30(e).