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NO. COA09-1555

NORTH CAROLINA COURT OF APPEALS

Filed: 6 July 2010

LISA SHUPE,
Employee-Plaintiff,

v.

CITY OF CHARLOTTE,
Employer, Self-Insured,
Defendant.

NORTH CAROLINA
INDUSTRIAL COMMISSION
No. 388253

Appeal by defendant from Opinion and Award filed 3 September 2009 by the North Carolina Industrial Commission. Heard in the Court of Appeals 27 April 2010.

DeVore Acton & Stafford, P.A., by William D. Acton, Jr., for employee-plaintiff.

Jones, Hewson & Woolard, by Lawrence J. Goldman, for employer-self-insured-defendant.

STEELMAN, Judge.

Plaintiff's evidence established that her non-work-related cancer aggravated and conjoined with her admittedly compensable right knee injury to preclude surgical repair of the knee. Plaintiff is entitled to compensation for total permanent disability. Apportionment of plaintiff's award for temporary total disability is not proper when no evidence was presented attributing any portion of plaintiff's disability solely to her compensable work-related injury. The record supports the Commission's finding

that plaintiff's temporary, light-duty assignment was not suitable employment. The doctrine of estoppel is applicable only if there has been an earlier adjudication of an issue of fact or law.

I. Factual and Procedural Background

On 7 August 2003, Lisa Shupe (plaintiff) sustained a compensable right knee injury in the course of her employment as a police officer for the City of Charlotte (defendant). On 3 December 2003, defendant accepted the claim pursuant to Industrial Commission (Commission) Form 60 and paid total disability benefits to plaintiff during the time she was out of work. On 4 December 2003, Dr. Roy Majors (Dr. Majors), an orthopaedic surgeon, operated on plaintiff's right knee. Following surgery, Dr. Majors restricted plaintiff to "sit-down work", with no repetitive bending, stooping or squatting." Plaintiff returned to work at her pre-injury wage in a light-duty, administrative job in the Crime Report Writing Unit as a Police Investigation Tech, which was "a non-sworn police position that Defendant provides to sworn police officers under light-duty restrictions from their treating physician."

On 26 July 2004, Dr. Majors released plaintiff from his care and assigned a 10% permanent partial disability rating to her right knee.

On 24 May 2004, plaintiff sought a second medical opinion from Dr. Jerry Barron (Dr. Barron), another orthopaedic surgeon, because her right knee "was not responding well to months of physical therapy." Plaintiff could not straighten her right knee and

complained of severe pain. Following an MRI examination, Dr. Barron recommended additional corrective surgery.

On 17 February 2005, plaintiff filed a motion with the Commission styled as "Plaintiff's Motion to Authorize Medical Treatment by New Treating Physician," requesting that Dr. Barron be authorized as her treating physician. On 28 March 2005, plaintiff returned to Dr. Barron who recommended that plaintiff proceed with corrective surgery. On 14 November 2005, Deputy Commissioner Chrystal Redding Stanback filed an Opinion and Award approving the additional surgery. About that time, plaintiff was diagnosed with cancer in her pancreas and liver.

Plaintiff's oncologist, Dr. David Eagle (Dr. Eagle), recommended that plaintiff not have surgery on her right knee because it would require her to discontinue chemotherapy and immunotherapy, which would pose risks in controlling her cancer. On 5 February 2006, plaintiff went on retirement disability because of illness caused by her chemotherapy.

On 1 March 2006, Dr. Barron recommended that plaintiff not have surgery until she completed cancer treatments, and assigned a 25% permanent partial disability rating to her right knee. On 27 July 2007, plaintiff filed a Form 33 with the Commission, requesting a hearing because the parties disagreed on the permanent partial disability rating. On 11 March 2008, plaintiff filed a motion to withdraw her request for hearing because "Dr. Eagle testified that it is possible that plaintiff's condition will improve and she could have the surgery in the future, we are not

sure whether plaintiff is yet at maximum medical improvement." On 18 March 2008, the Commission granted plaintiff's motion.

On 19 July 2008, plaintiff filed another Form 33, requesting a hearing on whether she was "entitled to total disability compensation." On 3 September 2009, the Commission filed an Opinion and Award, concluding that plaintiff's disability after 4 February 2006 was caused by a combination of the compensable right knee injury, her subsequent inability to obtain corrective surgery because of her cancer, and the effects of her cancer treatments. Plaintiff was awarded temporary total disability benefits from 5 February 2006, continuing until further orders of the Commission. Past, present, and future medical expenses related to plaintiff's right knee injury were also awarded.

Defendant appeals.

II. Standard of Review

"The standard of review on appeal to this Court from an award by the Commission is whether there is any competent evidence in the record to support the Commission's findings and whether those findings support the Commission's conclusions of law." *Oliver v. Lane Co.*, 143 N.C. App. 167, 170, 544 S.E.2d 606, 608 (2001) (citing *Lowe v. BE&K Construction Co.*, 121 N.C. App. 570, 573, 468 S.E.2d 396, 397 (1996)). The Commission's findings of fact are conclusive on appeal if supported by any competent evidence. This is true even if there is evidence to support a contrary finding. *Morrison v. Burlington Industries*, 304 N.C. 1, 6, 282 S.E.2d 458, 463 (1981). "Thus, on appeal, this Court does not have the right

to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (citations and quotations omitted). "This Court reviews the Commission's conclusions of law *de novo*." *Ramsey v. Southern Indus. Constructors, Inc.*, 178 N.C. App. 25, 30, 630 S.E.2d 681, 685 (2006) (citation omitted).

III. Award of Temporary Total Disability Benefits

In its first argument, defendant contends that plaintiff failed to establish that she was totally disabled because her inability to work was caused solely by her cancer and not by her compensable right knee injury. We disagree.

Pursuant to the Worker's Compensation Act, an employee who suffers a compensable injury is disabled if the injury results in an "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) (2009). A determination of disability "focuses on the injured employee's diminished capacity to earn wages, rather than upon his physical impairment." *Johnson v. City of Winston-Salem*, 188 N.C. App. 383, 388, 656 S.E.2d 608, 613 (citation omitted), *aff'd*, 362 N.C. 676, 669 S.E.2d 319 (2008). Plaintiff bears the burden of proving the existence and extent of her disability. *Id.* at 388-89, 656 S.E.2d at 613.

The Commission concluded that plaintiff met her burden by establishing that her diminished earning capacity was the result of her compensable injury:

4. Plaintiff has proven by the greater weight of the medical evidence that her non-work related cancer aggravated and conjoined with her admittedly compensable knee injury precluding surgical repair of the knee at this time. . . .

5. Plaintiff has proven by the medical evidence supported by her testimony of physical incapacity that she is temporarily totally disabled. N.C. Gen. Stat. § 97-29.

Defendant argues that the Commission's findings of fact do not support these conclusions because the Commission mischaracterized Dr. Eagles' testimony in finding of fact 14, which states:

14. Dr. Eagle opines that Plaintiff has been unable to return to her regular job as a police officer since February 4, 2006 due to her admittedly compensable right knee injury and her cancer. Dr. Eagles has further opined that it is possible that Plaintiff's tumors will regress, and given that event she could undergo the knee surgery recommended by Dr. Barron in the future.

The Commission also made the following unchallenged findings of fact:

12. Since being diagnosed with cancer, Plaintiff has not undergone the previously recommended right knee surgery, and consequently, has remained unable to return to her regular duty job as a sworn police officer due to her admittedly compensable right knee injury.

. . . .

16. Based upon the totality of the medical evidence of record, Plaintiff has not reached maximum medical improvement with regards to her admittedly compensable right knee injury.

17. The compelling weight of the medical evidence established that Plaintiff's non-work related cancer has conjoined with and aggravated Plaintiff's work related knee injury to preclude surgical repair of her knee at this time, both conditions combining to preclude Plaintiff's employment in even light-duty positions.

Because defendant has failed to present any argument regarding these findings in its brief, they are presumed to be supported by competent evidence and are binding on appeal. *Estate of Gainey v. Southern Flooring and Acoustical Co.*, 184 N.C. App. 497, 501, 646 S.E.2d 604, 607 (2007) (citation omitted); see also N.C.R. App. P. 28(b)(6).

These findings establish that plaintiff's non-work-related injury combined with her compensable work-related injury to prevent surgery. This has precluded plaintiff from employment, even in light-duty positions. We further note that the parties stipulated before the Commission that "Plaintiff has not been able to return to her job as a sworn police officer, initially due to her right knee injury, and later due to her right knee injury and her cancer." These findings and stipulation support the Commission's conclusion that plaintiff is entitled to compensation for total permanent disability. "Our courts have held that where a claimant is rendered totally unable to earn wages, partially as a result of a compensable injury and partially as a result of a non-work-related medical condition, the claimant is entitled to an award for total disability under G.S. § 97-29." *Counts v. Black & Decker Corp.*, 121 N.C. App. 387, 390, 465 S.E.2d 343, 345, *disc. review denied*, 343 N.C. 305, 471 S.E.2d 68 (1996) (citations omitted).

Because we determine that the unchallenged findings of fact are sufficient to support conclusion of law 4, we need not address defendant's argument concerning finding of fact 14. *Lynn v. Lynn*, ___ N.C. App. ___, ___, 689 S.E.2d 198, 208 (2010).

In the alternative, defendant seeks apportionment of plaintiff's award of compensation for temporary total disability. Apportionment has been allowed when only a portion of an employee's total disability is caused by the compensable injury and another portion is caused by a non-work-related injury. *Weaver v. Swedish Imports Maintenance, Inc.*, 319 N.C. 243, 253-54, 354 S.E.2d 477, 483-84 (1987); *Errante v. Cumberland County Solid Waste Management*, 106 N.C. App. 114, 119-20, 415 S.E.2d 583, 586-87 (1992). However, apportionment is not proper when the evidence before the Commission renders an attempt at apportionment speculative, or when there is no evidence attributing percentages to the employee's total incapacity of her compensable injury and to her non-compensable injury. *Errante*, 106 N.C. App. at 120, 415 S.E.2d at 587 (citations omitted). In the instant case, no evidence was presented before the Commission attributing any percentage of plaintiff's total incapacity solely to her compensable work-related injury. Though Dr. Majors assigned plaintiff a 10% permanent partial disability rating and Dr. Barron assigned plaintiff a 25% permanent partial disability rating, these ratings do not address the question of what percentage of plaintiff's total disability to earn wages was attributable to her compensable work-related injury and what percentage was attributable to her non-work-related

injury. Apportionment would be speculative, and plaintiff is entitled to full compensation for her temporary total disability.

This argument is without merit.

IV. Suitable Employment

In its second argument, defendant contends that the Commission erred by determining that plaintiff's temporary, light-duty assignment was not suitable employment. We disagree.

"'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.*, ___ N.C. App. ___, ___, 674 S.E.2d 430, 433 (2009) (citation and internal quotations omitted). Defendant argues that the administrative job performed by plaintiff while on light duty was an actual position, ordinarily available in the competitive job market, and was not "make work."

In *Peoples v. Cone Mills Corp.*, our Supreme Court held that employers may not "avoid paying compensation merely by creating for their injured employees makeshift positions not ordinarily available in the market[.]" 316 N.C. 426, 444, 342 S.E.2d 798, 810 (1986). "[I]f other employers would not hire the employee with the employee's limitations at a comparable wage level . . . [or] if the proffered employment is so modified because of the employee's limitations that it is not ordinarily available in the competitive job market, the job is 'make work' and is not competitive." *Jenkins v. Easco Aluminum*, 165 N.C. App. 86, 95, 598 S.E.2d 252, 258 (2004) (citation and internal quotation omitted).

The Commission made three findings of fact regarding suitable employment:

7. For injured police officers who could not perform their essential job duties and were on workers' compensation, Defendant had a light-duty policy pursuant to which the injured officers were placed in temporary, light-duty jobs until able to return to full-duty work. Pursuant to this policy, Plaintiff was assigned a temporary, light-duty job at her regular salary level of \$52,500.00. Plaintiff worked in this capacity from January 4, 2004 to February 5, 2006. Specifically, Plaintiff's assignment was very similar to a job performed by non-sworn police investigative technicians, who were hired at a starting salary of \$29,000 as of 2008.

8. Based upon the credible evidence of record, the temporary, light-duty job to which Plaintiff was paid her regular salary level was not a job that is ordinarily available in the local competitive job market. As such, the light-duty job was not suitable and not truly indicative of any wage earning capacity Plaintiff may have had.

9. Although the temporary, light-duty job Plaintiff performed during the period of January 4, 2004 through February 4, 2006 was not indicative of her wage earning capacity, Plaintiff sustained no diminution in her wages during this period.

Defendant presents an argument regarding only finding of fact 8 in its brief, thus findings of fact 7 and 9 are binding on appeal. *Estate of Gainey*, 184 N.C. App. at 501, 646 S.E.2d at 607; see also N.C.R. App. P. 28(b)(6). After careful review of the record, we hold that there is competent evidence to support finding of fact 8.

Stephanie Whitesides (Whitesides), human resources manager for the Charlotte-Mecklenburg Police Department, testified that the administrative position was a temporary assignment for plaintiff

until she could go back to work as a sworn police officer. The position was just a temporary assignment while plaintiff was injured, it was never meant to be a permanent job. Whitesides further testified that if plaintiff was permanently hired in the temporary assignment position, she most likely "would not be making the same rate of pay."

As the Commission found in finding of fact 7, the difference in pay between what plaintiff was earning as a sworn police officer and what she would earn if she was permanently hired in the light-duty job was about \$23,000. This is a significant difference and is not a comparable wage, thus it is not truly indicative of any wage earning capacity plaintiff may have had. "The disparity between pre-injury and post-injury wages is one factor which may be considered in determining the suitability of post-injury employment." *Foster v. U.S. Airways, Inc.*, 149 N.C. App. 913, 921, 563 S.E.2d 235, 241 (citing *Dixon v. City of Durham*, 128 N.C. App. 501, 504, 495 S.E.2d 380, 383, *disc. review denied*, 348 N.C. 496, 510 S.E.2d 381 (1998)), *disc. review denied*, 356 N.C. 299, 570 S.E.2d 505 (2002). "The rationale behind the competitive measure of earning capacity is apparent. If an employee has no ability to earn wages competitively, the employee will be left with no income should the employee's job be terminated." *Peoples*, 316 N.C. at 438, 342 S.E.2d at 806.

We hold finding of fact 8, that the light-duty assignment was not suitable employment, is supported by competent evidence. This finding, in addition to findings of fact 7 and 9, supports the

Commission's conclusion that plaintiff's temporary, light-duty assignment was not indicative of her wage earning capacity.

This argument is without merit.

V. Estoppel

In its third argument, defendant contends that the Commission erred in not finding that plaintiff was estopped from pursuing a claim for temporary total disability benefits by her prior request for a hearing on permanent partial disability benefits. We disagree.

The Commission concluded:

2. Defendant's contention that Plaintiff's filing of a Form 33, Request that Claim be Assigned for Hearing, requesting that permanent partial disability benefits be established [sic] operated as an election of benefits precluding Plaintiff's subsequent request for determination of temporary total disability benefits is not well supported. There [is] no credible evidence of record upon which to find that Plaintiff is estopped from pursuing a claim for total disability compensation. [*Daugherty*] v. *Cherry Hospital*, ___ N.C. App. ___, ___ S.E.2d ___ (2009).

In *Daugherty*, this Court held that the equitable doctrines of estoppel and laches are applicable in workers' compensation cases.

___ N.C. App. ___, 670 S.E.2d 915.

Defendant cites *In re Will of Lamanski*, 149 N.C. App. 647, 561 S.E.2d 537 (2002) for its proposition that "where a party has an election between several inconsistent courses of action, she will be confined to that which she first adopts and is estopped to assert another." In *Lamanski*, a claimant was estopped from alleging that a will was invalid in a will caveat proceeding after

the claimant had earlier relied on the validity of the will to receive property. We find *Lamanski* to be inapposite because the case stands for the proposition that one who accepts benefits under a will is estopped from later contesting the will's validity.

In the instant case, plaintiff withdrew her request for a hearing on permanent partial disability *before* the Commission considered the matter or made a determination on that issue. The doctrine of estoppel is only applicable if there has been an earlier adjudication of an issue of fact or law. *Isler v. Harrison*, 71 N.C. 64, 65 (1874).

This argument is without merit.

Defendant has failed to argue the remaining assignments of error in its brief, and they are deemed abandoned pursuant to Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure.

AFFIRMED.

Judges WYNN and CALABRIA concur.

Report per Rule 30(e).