Page 377

495 S.E.2d 377
128 N.C.App. 496
In re Perry HARRINGTON, Employee, Plaintiff-Appellant,
v.
ADAMS-ROBINSON ENTERPRISES, Employer, Wausau Insurance Company, Carrier, Defendant-Appellees.
No. COA97-452.
Court of Appeals of North Carolina.
Feb. 3, 1998.

[128 N.C.App. 498] Brenton D. Adams, Dunn, for plaintiff-appellant.

Teague, Campbell, Dennis & Gorham, L.L.P. by Gregory M. Willis, Raleigh, for defendant-appellees.

EAGLES, Judge.

We first consider whether plaintiff's benefits should have been terminated

Page 379

after 18 January 1994. Plaintiff has the initial burden of proving he was rendered disabled as a result of a work related injury. Watson v. Winston-Salem Transit Authority, 92 N.C.App. 473, 475, 374 S.E.2d 483, 485 (1988). The term "disability" means "incapacity because of injury to earn the wages which the employee was receiving at the time of the injury in the same or any other employment." G.S. 97-2(9). Accordingly, in Hilliard v. Apex Cabinet Co., our Supreme Court ruled that in order to find a worker disabled under the Act the Commission must find:

(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.

305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). However, once a Form 21 agreement is signed the employee is presumed totally disabled. Franklin v. Broyhill Furniture Indus., 123 N.C.App. 200, 205, 472 S.E.2d 382, 386 (1996), cert. denied, 344 N.C. 629, 477 S.E.2d 39 (1996). Once the disability is shown or stipulated by entry of a Form 21 agreement, there is a presumption that it continues until the employee returns to work at wages equal to those he was receiving at the time his injury occurred. Watkins v. Central Motor Lines, Inc., 279 N.C. 132, 137, 181 S.E.2d 588, 592 (1971); Tucker v. Lowdermilk, 233 N.C. 185, 189, 63 S.E.2d 109, 112 (1951). Likewise there is a presumption that a disability ends when the employee returns to work at the same wages. Id.

Upon a showing of disability by the employee, the employer must produce evidence that suitable jobs are available for the employee and that the employee is capable of getting a job. Burwell v. Winn-Dixie Raleigh, Inc., 114 N.C.App. 69, 73, 441 S.E.2d 145, 149 (1994); Kennedy v. Duke Univ. Medical Ctr., 101 N.C.App. 24, 33, 398 S.E.2d 677, 682 (1990). A job is "suitable" if the employee is able to perform [128 N.C.App. 499] the job, given her "age, education, physical limitations, vocational skills, and experience." Franklin, 123 N.C.App. at 206, 472 S.E.2d at 386 (quoting Burwell, 114 N.C.App. at 73, 441 S.E.2d at 149). A finding of a maximum medical improvement is not the equivalent of finding that the employee is able to earn the same wage and does not satisfy the defendant's burden of disproving an employee's disability. Watson, 92 N.C.App. at 476, 374 S.E.2d at 485.

Plaintiff argues that the Industrial Commission erred by failing to apply the

presumption that the plaintiff's temporary total disability continues until he or she returns to work at the same wage earned prior to the injury. We agree.

Here, plaintiff has carried his initial burden of showing that he was disabled. The defendants have admitted liability by entering into the Form 21 agreement. Plaintiff began to receive benefits for his temporary total disability on 28 August 1993 and continuing for "necessary weeks." By January 1994, three doctors had released plaintiff to return to work. However, "[a]n employee's release to return to work is not the equivalent of a finding that the employee is able to earn the same wage earned prior to the injury, nor does it automatically deprive an employee of the benefit of the Watkins v. Motor Lines presumption." Radica v. Carolina Mills, 113 N.C.App. 440, 447, 439 S.E.2d 185, 190 (1994). As in Radica, there is no evidence to support a finding that the plaintiff retained any earning capacity after he was released by his doctors. The defendant-employer has not met its burden of proving that the plaintiff-employee was capable of earning the same wages. A release from a doctor is not enough to rebut the presumption of a disability. Accordingly, the Full Commission erred when it terminated plaintiff's benefits after 18 January 1994.

Reversed.

WYNN, J., concurs.

WALKER, J., dissents.

WALKER, Judge, dissenting.

I respectfully dissent from the majority opinion holding that the North Carolina Industrial

Page 380

Commission (the Commission) erred when it terminated plaintiff's benefits after 18 January 1994.

[128 N.C.App. 500] Included in the Commission's findings were the following:

8. On 17 January 1994 Dr. Gwinn opined that plaintiff had reached maximum medical improvement and released plaintiff from his care to return to work on 18 January 1994....

9. ... [P]laintiff has remained capable of returning to unrestricted work, including his regular carpenter's job, since 18 January 1994.

10. Although he has been released to return to unrestricted work plaintiff has not applied for work because he contends that he is no longer capable of the heavy work required by the type of carpenter job he had when he was injured. He also contends that the light work he admits to being capable of performing would pay substantially less than the $10.00 an hour he was earning as a carpenter and would not be appropriate for someone of his education.

...

13. On 20 July 1994 defendants filed a Form 24 Application of Employer or Insurance Carrier to Stop Payment of Compensation, which was approved by the Commission on 4 August 1994....

Further, the deputy commissioner had found plaintiff's testimony as to continuing pain was not credible.

In the recent case of In re Stone v. G & G Builders, 346 N.C. 154, 157, 484 S.E.2d 365, 367 (1997), our Supreme Court, in reversing this Court and reinstating the opinion and award of the Industrial Commission stated:

In order to qualify for compensation under the Workers' Compensation Act, a claimant

must prove both the existence and the extent of disability. In the context of a claim for workers' compensation, disability refers to the impairment of the injured employee's earning capacity. "If an award is made by the Industrial Commission, payable during disability, there is a presumption that disability lasts until the employee returns to work...." However, as stated in Rule 404(1) of the Workers' Compensation Rules of the North Carolina Industrial Commission, this presumption of continuing disability is rebuttable. In the instant case the parties entered into a Form 21 Agreement which was approved by the Commission on 24 April [128 N.C.App. 501] 1992. On 13 November 1992 defendants' Form 24 application to stop payment was approved by the Commission. Any presumptions existing in favor of the employee were rebutted by defendants in this case through medical and other evidence.

(Citations omitted).

Here, the Commission's findings adequately established that the presumption existing in favor of the plaintiff was rebutted by the defendant through medical and other evidence.

I would affirm the opinion and award of the Industrial Commission.