IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-987

Filed: 26 March 2019

N.C. Industrial Commission, I.C. No. X62826

DONNA CLIFTON, Employee, Plaintiff,

v.

THE GOODYEAR TIRE & RUBBER COMPANY, Employer,

LIBERTY MUTUAL INSURANCE COMPANY, Carrier, Defendants.

Appeal by Plaintiff from opinion and award entered 4 June 2018 by the North Carolina Industrial Commission. Heard in the Court of Appeals 26 February 2019.

Hardison & Cochran P.L.L.C., by J. Adam Bridwell, for Plaintiff-Appellant.

Hedrick Gardner Kincheloe & Garofalo LLP, by Linda Stephens, M. Duane Jones, and Matthew J. Ledwith, for Defendants-Appellees.

McGEE, Chief Judge.

Donna Clifton ("Plaintiff") appeals from opinion and award of the North Carolina Industrial Commission (the "Commission"). Plaintiff contends the Commission erred in concluding: (1) Defendants did not engage in improper *ex parte* communication with Dr. Barnes; (2) Plaintiff was not entitled to additional medical

treatment or further benefits from her left knee injury; and (3) Plaintiff refused suitable employment offered by Defendants. Moreover, Plaintiff argues the Commission erred in upholding Defendants' motion to consolidate. We affirm the Commission's opinion and award.

I. Factual and Procedural Background

Plaintiff started working in 1997 for the Goodyear Tire & Rubber Company ("Defendant-Employer"), that was insured by Liberty Mutual Insurance Company ("Defendant-Carrier") (together, "Defendants"). Plaintiff worked as a gantry operator at Defendant-Employer's Fayetteville plant (the "plant"). Plaintiff injured her left knee and right shoulder when she slipped on a ladder at work on 5 August 2011. Plaintiff had previously also sustained a work-related left knee injury in 2008 and, as a result, had undergone surgery that removed seventy-five percent of the medial meniscus in her left knee.

In response to Plaintiff's 5 August 2011 injury, Defendants filed a Form 60 *Employer's Admission of Employee's Right to Compensation* on 21 November 2011 that identified Plaintiff's injured body part as her "left leg – left knee." Defendants stipulated in a pre-trial agreement to the compensability of Plaintiff's left knee injury. Defendants have never admitted to the compensability of Plaintiff's right shoulder injury.

Defendants authorized medical treatment for Plaintiff's left knee and right shoulder with Dr. Christopher J. Barnes ("Dr. Barnes") of Fayetteville Orthopedics and Sports Medicine. Dr. Barnes evaluated Plaintiff on 26 October 2011. Defendants began paying Plaintiff indemnity compensation of $698.63 per week on 4 November 2011. Dr. Barnes performed an arthroscopic reconstruction of Plaintiff's anterior cruciate ligament and a medial femoral condyle chondroplasty on Plaintiff's left knee on 8 November 2011. Plaintiff received physical therapy and, on 21 March 2012, reported ongoing pain requiring the use of Percocet and Naprosyn. Dr. Barnes recommended Plaintiff continue physical therapy and pain control.

Dr. Barnes also recommended Plaintiff participate in a functional capacity evaluation ("FCE") with Frank Murray ("Murray"), a physical therapist and owner of Industrial Motions, Inc., which contracts with corporations, including Defendant-Employer, to provide occupational medicine services that include job matches and FCEs. Murray conducted an FCE on Plaintiff on 26 Aril 2012.

Plaintiff experienced "popping sensations" and pain in her left knee and, as a result, returned to Dr. Barnes on 2 May 2012. Dr. Barnes evaluated Plaintiff and noted that, given Plaintiff's pre-existing left knee contracture, it would be "unlikely" that she "would see dramatic improvement in her symptoms." Dr. Barnes recommended Plaintiff return to a position in compliance with her FCE, placed Plaintiff at maximum medical improvement in regard to her left knee injury, and

assigned Plaintiff a permanent partial impairment rating of fifteen percent to her left lower extremity on 2 May 2012. Dr. Barnes referred Plaintiff for further pain management.

Murray conducted a job match for Plaintiff on 6 February 2014 and, at that time, Defendant-Employer had eliminated the position of gantry operator. A job match consists of the following: (1) Defendant-Employer's medical department reviews an injured employee's medical restrictions and FCE and determines whether the employee can perform the employee's regular job duties; (2) if Defendant-Employer determines the employee is unable to perform the employee's regular job duties, it sends Murray a list of open positions within the plant that fall within the employee's physical restrictions; (3) Murray reviews the job descriptions and determines, taking into account the employee's physical restrictions, whether there is an appropriate open position for that employee; (4) if Murray finds an appropriate position, he sends Defendant-Employer a report and provides guidance on specific training to facilitate that employee in that position; and (5) Defendant-Employer prepares a written job offer to the employee. After conducting a job match for Plaintiff, Murray determined Plaintiff was suited for the duties of "Job Number 700-500 Production Service Truck Carcasses" (the "carcass truck driver position").

Murray completed his job match report on 6 February 2014 and addressed it "[t]o whom it may concern[.]" In the report, Murray stated that, "in response to

request from the Goodyear Tire and Rubber company, I have performed a Job Match for Plaintiff." Murray explained that the training provided to Plaintiff would be adjusted to allow her to utilize "the least physically demanding methods available."

Defendant-Employer reviewed Murray's job match report and sent Plaintiff a job offer for the carcass truck driver position on 27 February 2014. Plaintiff rejected the position, stating she was entitled to an FCE on her right shoulder before she made a decision regarding the suitability of the carcass truck driver position.

Defendants sent Dr. Barnes, and copied Plaintiff, the job description for the carcass truck driver position on 7 March 2014. Dr. Barnes reviewed the job description, Plaintiff's FCE, and the job match report, and determined Plaintiff was physically able to work in the carcass truck driver position. As a result, Defendant-Employer sent Plaintiff another formal job offer for the position on 16 April 2014. Plaintiff again declined to accept the position. In response, Defendants filed a Form 24 *Application to Terminate or Suspend Payment of Compensation* on 21 April 2014.

Plaintiff returned to Dr. Barnes on 21 May 2014, reporting pain and expressing concern that, upon returning to work, she would have to walk from the parking lot to the plant. Dr. Barnes recommended ongoing pain treatment, a knee brace, a parking spot for Plaintiff close to the plant, and "an ergonomic assessment of Plaintiff's work environment by Mr. Murray[.]" Special Deputy Commissioner Michelle D. Denning

denied Defendants' Form 24 application on 3 June 2014. Defendants then filed a Form 33 *Request that Claim Be Assigned For Hearing* on 5 June 2014.

Defendant-Employer sent Plaintiff a third formal offer for the carcass truck driver position on 9 September 2014. That letter specifically addressed Dr. Barnes' recommendations, stating that Plaintiff would be provided a handicapped parking placard "to minimize walking" and Murray would visit the plant to ensure there were no issues with the new position. Former Deputy Commissioner Chrystal Redding Stanback ("Deputy Commissioner Stanback") heard evidence in a hearing regarding Defendants' Form 33 on 28 October 2014.

Plaintiff underwent a job function test on 27 July 2015, in which she exhibited the ability to perform the duties of a carcass truck driver. Plaintiff returned to work with Defendant-Employer on 28 July 2015. On the same day, Defendants filed a Form 28T *Notice of Termination of Compensation by Reason of Trial Return to Work*, and ceased paying Plaintiff indemnity compensation. Plaintiff filed a motion to compel Defendants to authorize additional medical treatments with Dr. Barnes that was subsequently granted by Deputy Commissioner Stanback on 24 August 2015.

Plaintiff saw Dr. Barnes on 14 September 2015 and reported that she was "unable to tolerate" her return to work. Dr. Barnes evaluated Plaintiff and noted that her pain and the progression of her left knee degenerative arthritis were "more likely than not related to her prior meniscectomy by Dr. Broussard back in 2008." As

a result of Dr. Barnes' evaluation (the "14 September 2015 medical record"), Defendants filed a Form 61 *Denial of Workers' Compensation Claim* on 21 September 2015. In response, Plaintiff filed a Form 33 on 23 October 2015.

Defendants filed a motion to consolidate the issues in Plaintiff's Form 33 with the issues heard on 28 October 2014 before Deputy Commissioner Stanback on 19 November 2015. Defendants subsequently moved to enter the 14 September 2015 medical record into evidence; Plaintiff objected to Defendants' request and moved to re-depose Dr. Barnes. Deputy Commissioner Stanback entered an order on 24 November 2015, admitting the 14 September 2015 medical record and allowing Plaintiff's request to re-depose Dr. Barnes. Dr. Barnes was re-deposed on 11 December 2015. Deputy Commissioner Stanback discussed Defendants' motion to consolidate with counsel for both parties during a phone conference on 7 March 2016.

In an opinion and award dated 4 April 2016, Deputy Commissioner Tyler Younts ("Deputy Commissioner Younts")[1] granted Defendants' motion to consolidate and denied Plaintiff's claim for medical and indemnity benefits relating to her left knee injury. Both parties appealed to the Commission. The Commission entered its opinion and award on 4 June 2018. The Commission denied Plaintiff's claim for additional medical treatment for her left knee, denied Plaintiff's claim for temporary

[1] Deputy Commissioner Stanback departed from the Commission and, as a result, on 5 February 2016, former Chief Deputy Commissioner Christopher C. Loutit (now Commissioner Loutit) entered an order transferring jurisdiction of this matter to Deputy Commissioner Younts.

total disability benefits after 7 October 2013, and ordered that Defendants were entitled to a credit for all indemnity compensation paid to Plaintiff after that date.

II. Analysis

Plaintiff argues the Commission erred by concluding: (1) Defendants did not engage in impermissible *ex parte* communication with Dr. Barnes and in denying Plaintiff's request that the Commission exclude Dr. Barnes' opinion; (2) Plaintiff was not entitled to additional medical treatment or further benefits for her left knee; and (3) Defendants had shown that suitable employment was available to Plaintiff and, as such, awarded Defendants a credit for the indemnity compensation paid from 7 October 2013. Plaintiff also contends the Commission erred in upholding Defendants' motion to consolidate.

A. *Standard of Review*

"The standard of review for an opinion and award of the North Carolina Industrial Commission is (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." *Cox v. City of Winston-Salem*, 171 N.C. App. 112, 114, 613 S.E.2d 746, 747 (2005) (internal quotation marks and citation omitted). "Except for jurisdictional questions, failure to assign error to the Commission's findings of fact renders them binding on appellate review." *Estate of Gainey v. S. Flooring & Acoustical Co.*, 184 N.C. App. 497, 501, 646 S.E.2d 604, 607 (2007)

(citation omitted). Moreover, "[i]t is the duty of the Commission to decide the matters in controversy and not the role of this Court to re-weigh the evidence." *Starr v. Gaston Cty. Bd. of Educ.*, 191 N.C. App. 301, 305, 663 S.E.2d 322, 325 (2008).

B. *Ex Parte Communication*

Plaintiff argues the Commission erred in concluding that Defendants did not engage in impermissible *ex parte* communication with Dr. Barnes by means of Murray's 6 February 2014 letter.

Plaintiff challenges the portion of Conclusion of Law No. 4 that states: "Defendants did not engage in impermissible *ex parte* communications with Dr. Barnes and Plaintiff's request that the opinions of Dr. Barnes be excluded for consideration by the Commission is denied." The Commission found as fact:

> 24. Plaintiff asserts Defendants improperly engaged in *ex parte* communications with Dr. Barnes by providing Dr. Barnes the February 6, 2014 job match report completed by Mr. Murray and, as such, the Commission is obligated to disregard the opinions of Dr. Barnes.
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> 25. Dr. Barnes and Mr. Murray have a professional working relationship. When treating a patient that works for Defendant-Employer, Dr. Barnes may communicate with Mr. Murray about the position being presented for his approval because Mr. Murray has more familiarity with the many jobs at Defendant-Employer's Fayetteville plant and their physical requirements. Dr. Barnes said of Mr. Murray, he is "the one I trust to be independent. He's not employed by Goodyear. He's like me, the guy trying to do what's best for the patient, get them back [to work] and safe." Dr. Barnes acknowledged that he spoke to Mr. Murray about the carcass truck driver position and

> Plaintiff's ability to perform the job as reflected in his May 21, 2014 medical record.
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> 26. Based upon his experience over the years of collaborating with Dr. Barnes, Mr. Murray testified that Dr. Barnes treats many patients that work at Defendant-Employer's Fayetteville plant, that he is familiar with the job match process, and that it is not uncommon for Dr. Barnes to request a copy of a job match report if he is reviewing a job description to determine its suitability. Mr. Murray could not recall specifically sending the job match report to Dr. Barnes. However, given the timing of Defendants' March 7, 2014 letter requesting Dr. Barnes approve the carcass truck driver position, Mr. Murray testified that it would be reasonable to conclude that Dr. Barnes contacted him and requested the job match report after receiving Defendants' request to approve the position.
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> 27. Mr. Murray has never been an employee of Defendant-Employer. Mr. Murray testified that neither Defendant-Employer nor Defendant-Carrier, at any point in time, directed Mr. Murray to contact Dr. Barnes or communicate with him. Plaintiff has not presented credible evidence that Defendants provided the job match report to Dr. Barnes. Further, Plaintiff has not presented credible evidence that Defendants directed Mr. Murray to provide the job match report to Dr. Barnes. The Full Commission finds there was no *ex parte* communication between Defendant[s] and Dr. Barnes.

These findings of fact are unchallenged by Plaintiff and, thus, are binding on appeal. *See Allred v. Exceptional Landscapes, Inc.*, 227 N.C. App. 229, 232, 743 S.E.2d 48, 51 (2013) ("Unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal."). Moreover, these findings support

the Commission's conclusion that "Defendants did not engage in impermissible *ex parte* communications with Dr. Barnes[.]"

Plaintiff quotes excerpts of Murray's testimony and contends that the Commission's conclusion that Defendants did not engage in impermissible *ex parte* communication with Dr. Barnes was contrary to said testimony. However, "'[t]he Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony.'" *Deese v. Champion Int'l Corp*., 352 N.C. 109, 115, 530 S.E.2d 549, 552 (2000) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965)). In the present case, the Commission found that Plaintiff had not presented credible evidence that Defendants (1) provided Dr. Barnes the job match report or (2) directed Murray to provide the job match report to Dr. Barnes. Therefore, the Commission – the sole judge of credibility – found that Plaintiff had not provided credible evidence that Defendants engaged in improper *ex parte* communication with Dr. Barnes. *See Deese*, 352 N.C. at 115, 530 S.E.2d at 552. We hold that the Commission's findings of fact, that are binding on appeal, support the Commission's conclusion of law.

C. *Additional Medical Treatment*

Plaintiff argues the Commission erred in concluding that Plaintiff is not entitled to additional medical treatment or further benefits from her left knee injury. Specifically, Plaintiff contends the Commission erred in concluding that Defendants

rebutted the *Parsons* presumption. In the alternative, Plaintiff argues that she has met her burden of showing that her left knee injury was compensable.

Once a workers' compensation claim is proven compensable, a presumption arises that any additional medical treatment that the employee later undertakes is directly related to that initial compensable injury (the "*Parsons* presumption"). *Parsons v. Pantry, Inc.*, 126 N.C. App. 540, 542, 485 S.E.2d 867, 869 (1997). However, an employer can rebut the *Parsons* presumption by providing evidence that the employee's current symptoms are not "directly related to the compensable injury." *Perez v. Am. Airlines/AMR Corp.*, 174 N.C. App. 128, 135, 620 S.E.2d 288, 292 (2005). In the present case, because Defendants accepted Plaintiff's left knee injury as a compensable injury – via a Form 60 and by stipulation in a pre-trial agreement – the *Parsons* presumption attached. *See id.* at 135, 620 S.E.2d at 293 ("The employer's filing of a Form 60 is an admission of compensability.").

The Commission concluded that, "[b]ased on the preponderance of the competent evidence and testimony, Defendants rebutted the presumption that the medical treatment Plaintiff seeks for her left knee is directly related to her compensable injuries." The Commission found as fact:

> 36. Following an Order filed by former Deputy Commissioner Stanback on August 24, 2015, granting Plaintiff's motion to compel Defendants to authorize additional medical treatment, Dr. Barnes evaluated Plaintiff on September 14, 2015. Plaintiff reported that she attempted to return to work but was unable to tolerate it.

On physical examination, Dr. Barnes noted tenderness to palpation along the medial aspect of the proximal tibia and adjoining joint line. X-rays revealed degenerative changes in the medial joint compartment. Dr. Barnes then noted the following:

> [Plaintiff] likely has pain and dysfunction in the knee as a result of the posttraumatic degenerative changes she has in the medial joint compartment. These are more likely than not related to her prior meniscectomy by Dr. Broussard back in 2008. Indeed, we did note degenerative changes in the medial joint compartment at the time of her ACL reconstruction, which was done to address her subjective instability that was at the time alleged to be related to a work-related injury (though a careful review of the 2008 operative report reveals that she did have an ACL tear at the time of her index (sic) surgery by Dr. Broussard).

Dr. Barnes noted there were several treatment options, including injections, physical therapy, and a unicompartmental arthroplasty, to treat the degenerative knee joint pain.

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38. The parties re-deposed Dr. Barnes on December 11, 2015. Based upon his competent, credible testimony, the Full Commission finds that Plaintiff suffered deficiencies in her left knee, from a medial meniscal tear and a tear of the anterior cruciate ligament, prior to her surgery with Dr. Broussard in 2008. These deficiencies led to Plaintiff's development of degenerative joint disease, or arthritis, in her left knee. At the time of the November 8, 2011 operation, Dr. Barnes noted subtle/early degenerative changes in the medial aspect of Plaintiff's knee joint. However, based upon the September 14, 2015 x-rays, he

> stated, "there is nothing subtle" about the current degree of degeneration in the joint.
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> 39. Plaintiff's pain complaints and findings on physical examination at the September 14, 2015 evaluation with Dr. Barnes were due to the progression of her left knee degenerative joint disease and his recommended treatment options were to treat this condition. Plaintiff's current left knee degenerative disease is, more likely than not, the result of Plaintiff's left knee condition in or prior to 2008, when Dr. Broussard removed her medial meniscus. The November 8, 2011 surgery performed to repair the anterior cruciate ligament did not accelerate Plaintiff's progressive degenerative joint disease and Plaintiff's current need for treatment is not related to the August 25, 2011 left knee injury and the medical treatment provided by Dr. Barnes for said injury.
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> 41. Plaintiff's current left knee condition for which Dr. Barnes has recommended additional medical treatment, including any ongoing pain management, is not causally related to her August 5, 2011 injury by accident.

The Commission's findings regarding Dr. Barnes' opinion that Plaintiff's current left knee degenerative disease was likely a result of her previous knee injury and was not accelerated by her 8 November 2011 surgery support its conclusion that Defendants rebutted the *Parsons* presumption. Plaintiff, again, fails to challenge any of the Commission's findings of fact, rendering them binding on appeal. *See Allred*, 227 N.C. App. at 232, 743 S.E.2d at 51.

Plaintiff quotes excerpts of Dr. Barnes' testimony and argues that it compels a conclusion contrary to the one reached by the Commission. However, this Court does

not re-weigh evidence but, instead, is limited to reviewing whether the Commission's findings of fact support its conclusions of law. *See Starr*, 191 N.C. App. at 305, 663 S.E.2d at 325. We hold that the Commission's findings of fact support its conclusion that Defendants rebutted the *Parsons* presumption, and that Plaintiff is not entitled to additional medical treatment or further benefits for her left knee injury.

D. *Available Suitable Employment*

Plaintiff argues the Commission erred in concluding that she is not entitled to additional medical treatment or further benefits from her left knee injury because Defendants had suitable employment available to Plaintiff. As a result, Plaintiff argues the Commission erred in awarding Defendants a credit for the indemnity compensation paid since 7 October 2013.

The Commission concluded as a matter of law:

> 5. . . . . The carcass truck driver position offered to Plaintiff by Defendant-Employer was suitable employment. Further, as of April 16, 2014, Plaintiff's refusal of the position was not justified and she is not entitled to any indemnity compensation during the continuance of her refusal of the position. . . . Defendants have shown that suitable employment is available to Plaintiff and Plaintiff was capable of obtaining said employment by accepting the position offered to her by Defendant-Employer. . . . .

Regarding the suitability of the carcass truck driver position, the Commission found as fact:

> 16. Job number 700-500, also called carcass truck driver, is

a full-time position, working in twelve-hour shifts, three to four days per week. During each shift, the employee is provided four ten-minute breaks and a twenty-minute lunch. Driving a truck referred to as a tow motor, the carcass truck driver transports carcass racks to and from tire builders and storage areas. A carcass rack is a trailer with four rungs seventy-five inches high that holds tire carcasses. The driver attaches an empty carcass rack to the tow motor. A tire builder then stacks tire carcasses onto the carcass rack. The driver then drives the carcasses to a designated tire building machine or storage area, where another tire builder unloads the tires from the carcass up and place it either on the bed of the carcass rack. If a tire carcass falls off the rack, which is a rare occurrence, the driver will have to pick it up and place it either on the bed of the carcass rack trailer or back onto the rack. The weight of a tire carcass ranges between ten and forty pounds. The driver is also responsible for changing the battery in the tow motor. The driver may also choose to manually move a carcass rack, which requires pushing or pulling up to ninety pounds, to attach it to the tow motor or, alternatively, the driver can maneuver the tow motor to align with the carcass rack.

17. In his February 6, 2014 job match report addressed "To whom it may concern," Mr. Murray wrote, "[i]n response to request from the Goodyear Tire and Rubber company, I have performed a Job Match for [Plaintiff]." Mr. Murray concluded that the most appropriate available job for Plaintiff was the truck carcass driver position. He further noted that there would be adjustments in the training provided to Plaintiff to allow her to perform the job using the least physically demanding methods available. This would include training on how to perform all pushing and pulling tasks using her tow motor, thus, eliminating the possibility that Plaintiff would have to manually push or pull the carcass rack.

18. Based upon the job match report, on February 27, 2014, Defendant-Employer sent a formal job offer to Plaintiff,

offering her the full-time position as a carcass truck driver. The next day, Plaintiff refused the position, contending she was entitled to a functional capacity evaluation regarding her right shoulder before determining if the offered position was suitable.

19. On March 7, 2014, Defendants sent correspondence to Dr. Barnes, including a copy of the job description for the carcass truck driver position. Plaintiff was copied on the correspondence. On April 14, 2014, Dr. Barnes wrote that, after reviewing the job description of the carcass truck driver position, Plaintiff's April 26, 2012 functional capacity evaluation, and the February 6, 2014 job match report, Plaintiff was physically able to perform the job duties required of the position.

20. On April 16, 2014, Defendant-Employer sent a formal job offer to Plaintiff, again offering her the full-time position of carcass truck driver. Plaintiff again refused the position.

21. On May 21, 2014, Plaintiff presented for a return evaluation with Dr. Barnes and expressed concerns with returning to work due to ongoing medial knee pain and having to walk several hundred yards from the parking lot to the plant to report for work. Dr. Barnes recommended ongoing pain management with Dr. Walsh and a medial unloader brace "to help offload the arthritic area of her knee." Dr. Barnes noted he felt Plaintiff should be able to tolerate the carcass truck driver position based upon her prior functional capacity evaluation results, the recommended adjustments identified by Mr. Murray in the job match report, and a personal conversation he had with Mr. Murray that very day. Dr. Barnes recommended Plaintiff be assigned a parking spot closer to the plant and an ergonomic assessment of Plaintiff's work environment by Mr. Murray to ensure Plaintiff is "as comfortable as possible during her work duties."

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> 30. During his May 19, 2015 deposition, Dr. Barnes reviewed the videos depicting portions of the job duties performed by the carcass truck driver, was able to view how the driver sits and moves while operating the tow motor, and opined Plaintiff would have sufficient positional variety such that her left knee would not remain in a fixed, flexed position. Dr. Barnes confirmed his previously noted opinions that the carcass truck driver position was within Plaintiff's physical abilities and it would be reasonable for Plaintiff to try to return to work and perform the job.
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> 32. The Full Commission finds that the carcass truck driver position offered to Plaintiff by Defendant-Employer was suitable employment. Plaintiff's refusal of the position after April 16, 2014, the second time Defendant-Employer offered the position and following Dr. Barnes's determination that Plaintiff was physically able to perform the job, was unjustified.

These findings address Defendant-Employer's job match process, the duties of the carcass truck driver position, Murray's specific job match for Plaintiff, two occasions in which Dr. Barnes opined that Plaintiff was physically able to work in the carcass truck driver position, and the multiple job offers that Defendant-Employer made to Plaintiff. Plaintiff has failed to challenge any of the Commission's findings of fact and, therefore, they are binding on appeal. *See Allred*, 227 N.C. App. at 232, 743 S.E.2d at 51. The Commission's ample findings support its conclusion that the carcass truck driver position was suitable employment and, therefore, Plaintiff's refusal of the position was unjustified.

Moreover, Plaintiff challenges the Commission's award to Defendants of a credit for all indemnity compensation paid since 7 October 2013. The Commission concluded as a matter of law:

> 10. Any indemnity compensation paid by Defendants after October 7, 2013 was not due and payable at the time it was made as Plaintiff failed to prove she was disabled under the Act. Thus, Defendants are entitled to a credit against any future claim for indemnity compensation for any indemnity compensation paid after October 7, 2013. N.C. Gen. Stat. § 97-42 (2017).

Regarding indemnity compensation, the Commission found as fact:

> 45. Since October 7, 2013, Plaintiff has been capable of performing some work and has failed to demonstrate she sustained a loss of wage-earning capacity. There is no evidence that, because of her age, education, prior work experience, or the existence of any pre-existing or co-existing conditions, Plaintiff has maintained a loss of wage-earning capacity after October 7, 2013. Plaintiff has failed to prove that, as of October 7, 2013, a job search would be futile because of preexisting conditions, such as age, inexperience, or lack of education. Plaintiff did not present any evidence that she conducted a job search or took any other course of action to find suitable work until she presented at Defendant-Employer's Fayetteville plant on July 28, 2015 to accept the offered position of carcass truck [driver]. Plaintiff did not make reasonable efforts to search for work within her restrictions.

The Commission's finding regarding the credit awarded to Defendants for all indemnity compensation paid since 7 October 2013 is binding on appeal, as it is unchallenged by Plaintiff and is supported by the evidence, and supports the conclusion that Defendants were entitled to such an award.

E. *Motion to Consolidate*

Plaintiff contends the Commission erred in upholding Defendants' 19 November 2015 motion to consolidate.

The procedural posture surrounding Defendants' motion to consolidate is as follows: Defendants filed a Form 33 on 6 June 2014, and the matter was heard before Deputy Commissioner Stanback on 28 October 2014. Prior to that hearing, the parties entered a pretrial agreement, in which Defendants raised the issues of whether Plaintiff required any additional medical treatment and whether Plaintiff was, at that time, disabled. Following the 28 October 2014 hearing, proceedings on the matter progressed and, on 24 August 2015, Deputy Commissioner Stanback granted Plaintiff's motion to compel Defendants to authorize additional medical treatments with Dr. Barnes. Dr. Barnes evaluated Plaintiff on 14 September 2015 and determined that, "more likely than not," her pain and left knee degenerative arthritis were related to her 2008 meniscectomy. In light of Dr. Barnes' opinion, Defendants filed a Form 61, denying liability for Plaintiff's current medical conditions, physical limitations, and need for medical treatment. In response, Plaintiff filed a Form 33.

Defendants filed, on 19 November 2015, a motion to consolidate the issues raised in Plaintiff's Form 33 with the issues already pending with Deputy Commissioner Stanback following the 28 October 2014 hearing. Deputy

Commissioner Younts granted Defendants' motion to consolidate on 4 April 2016, concluding that "the issues raised in Plaintiff's November 4, 2015 Form 33 are included within the issues identified in the Pre-Trial Agreement associated with the Form 24 appeal and the issues raised at the October 28, 2014 full evidentiary hearing."

Plaintiff contends the Commission erred in upholding Defendants' motion to consolidate because both she and her representatives "were unable to be heard regarding her issues pertaining to her Form 33 Request for Hearing," in violation of N.C. Gen. Stat. § 97-84 (2017). N.C.G.S. § 97-84 provides that "the Commission or any of its members or deputies shall hear the parties at issue and their representatives and witnesses, and shall determine the dispute in a summary manner." However, Plaintiff has failed to preserve this argument for appellate review.

Plaintiff's Form 33 was prompted by Defendants' Form 61. In Defendants' Form 61, they "den[ied] that Plaintiff's current medical condition and any resulting physical limitations [were] causally related to the August 5, 2011 incident." Thus, the only new issue addressed in Defendants' Form 61 was the causation between Plaintiff's pre-existing left knee injury and Plaintiff's 5 August 2011 left knee injury. The evidence regarding this causation issue consisted of: (1) the 14 September 2015

medical report and (2) Dr. Barnes' testimony from his second deposition on 11 December 2015.

There is no indication in the record that, prior to Deputy Commissioner Yount's opinion and award allowing Defendants' motion to consolidate, or prior to the Commission's opinion and award that upheld granting Defendants' motion to consolidate, Plaintiff identified any new evidence she sought to enter that would have been relevant to the causation issue. Moreover, Plaintiff failed to make an offer of proof of any other evidence related to her Form 33 that was not already before the Commission, but that she believed should have been considered. *See State v. Ginyard*, 122 N.C. App. 25, 33, 468 S.E.2d 525, 531 (1996) ("In order to preserve an argument on appeal which relates to the exclusion of evidence, including evidence solicited on cross-examination, the defendant must make an offer of proof so that the substance and significance of the excluded evidence is in the record."). Therefore, we hold Plaintiff did not preserve this issue and, as this Court cannot conduct meaningful appellate review on an issue not raised at an earlier tribunal, we reject Plaintiff's argument in regard to Defendants' motion to consolidate.

III. Conclusion

For the reasons stated above, we affirm the Commission's opinion and award.

AFFIRMED.

Judges DAVIS and DIETZ concur.

Report per Rule 30(e).

Judge Davis concurred in this opinion prior to 25 March 2019.