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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1243

Filed: 3 September 2019

North Carolina Industrial Commission, No. 14-038782

TIMOTHY SHIPMAN, Employee, Plaintiff,

v.

MURPHY BROWN, LLC, Employer, and ACE/ESIS, Carrier, Defendants.

Appeal by Defendants from opinion and award entered 12 September 2018 by the North Carolina Industrial Commission. Heard in the Court of Appeals 24 April 2019.

The McGougan Law Firm, by Kevin J. Bullard, for the Plaintiff-Appellee.

Midkiff, Muncie & Ross, P.C., by Brian C. Groesser, for Defendants-Appellants.

COLLINS, Judge.

Defendants Murphy Brown and ACE/ESIS appeal from opinion and award of the Industrial Commission awarding Plaintiff Timothy Shipman workers' compensation benefits. Defendants contend that the Commission erred in (1) making certain findings of fact and (2) concluding that Plaintiff met his burden of proving an

ongoing disability and thus awarding ongoing temporary total disability benefits to Plaintiff. We affirm.

I. Background and Procedural History

On 15 December 2013, Plaintiff Timothy Shipman sustained an injury to his right arm and elbow after a slip and fall incident at work. Plaintiff began medical treatment for his injury, which was paid for by Smithfield Foods[1] (Employer) and its insurance carrier, ESIS (Carrier). Defendants admitted to the compensability of Plaintiff's workplace injury.

On 25 April 2014, Plaintiff initiated medical treatment with an orthopedic physician, Dr. Craig Lippe. This treatment was directed and paid for by Carrier. Lippe diagnosed Plaintiff with lateral epicondylitis, and prescribed conservative treatment measures of anti-inflammatory injections. Instead of improving, Plaintiff's injury deteriorated, and Plaintiff underwent an MRI scan. The scan showed that Plaintiff's elbow injury had worsened, and Lippe updated Plaintiff's diagnosis to include medial epicondylitis. Lippe instructed Plaintiff to begin GPS injections, where a platelet-rich solution is injected into the damaged tissue, and Plaintiff complied.

[1] Murphy Brown, LLC, is a subsidiary of the Smithfield Foods conglomerate. We note that while the opinion and award refers to the company as "Murphy Brown," the company's proper name is Murphy-Brown. For consistency, we will use Murphy Brown throughout this opinion.

By January 2015, Plaintiff's condition had not improved, but Lippe maintained Plaintiff's diagnosis of lateral and medial epicondylitis. Lippe then determined that Plaintiff needed surgical intervention.

On 17 February 2015, Lippe performed surgery on Plaintiff, where he excised portions of Plaintiff's damaged tendon, drilled into the bone to stimulate bleeding, and reattached the healthy portions of tendon to the bone. Lippe estimated that Plaintiff would need approximately 12 weeks to recover. On 1 June 2015, Plaintiff returned to Lippe for a follow-up appointment, and indicated that he still had medial epicondylitis pain.

On 3 August 2015, Lippe ordered a Functional Capacity Exam ("FCE") and estimated that Plaintiff would need another 8 weeks until he was cleared to work on "full release." Lippe noted that Plaintiff still complained of pain but placed Plaintiff at Maximum Medical Improvement with certain work restrictions.

On 21 September 2015, Lippe met with Plaintiff to discuss the FCE results. Lippe ordered permanent work restrictions of lifting 20-50 pounds occasionally, 10-25 pounds frequently, and 10 pounds constantly.

On 13 October 2015, Plaintiff met with his primary care physician, Dr. David Martin. Plaintiff visited Martin to discuss his elbow pain and the surgery performed by Lippe.

In February 2016, Plaintiff returned to Lippe complaining of elbow and wrist pain in his right arm. Lippe assigned a 4% permanent partial disability rating to Plaintiff's right arm.

On 7 March 2016, Plaintiff returned to Lippe complaining of the same elbow and wrist pain. Plaintiff explained to Lippe that Employer had returned him to full-time truck driving and that the position was exacerbating his elbow injury. Lippe explained that the repetitive motions of shifting gears on a commercial truck can commonly aggravate epicondylitis injuries, and modified Plaintiff's permanent work restrictions to prohibit repetitive motion.

On 13 May 2016, Plaintiff's counsel notified Carrier that Plaintiff's truck-driving position was outside of the permanent work restrictions assigned by Lippe. Angie Romaine, a human resources manager for Employer, determined that Plaintiff should no longer perform the truck driving position based on Lippe's restrictions.

On 2 June 2016, Plaintiff received a letter from Employer stating that it had a position of "Loading Crew Loader" available within Plaintiff's restrictions. Romaine determined that Plaintiff was capable of working as a Loading Crew Loader, and assured Plaintiff that the position was within his permanent work restrictions. However, the Loading Crew Loader job description stated that an employee must be able to lift 50 pounds occasionally, provide hand/wrist work, and continuously grasp, reach, and lift 10 pounds repetitively. Moreover, the position required Plaintiff to lift and pull up hog gates constantly throughout the day, with each gate weighing

between 25 and 35 pounds. These duties did not comply with Plaintiff's work restrictions. Regardless, Plaintiff attempted to do the job, but quickly began experiencing pain in his right wrist and arm.

On 19 July 2016, Plaintiff returned to Dr. Martin and reported pain in his right elbow. Martin advised Plaintiff to remain out of work for two weeks because of the "repetitive movement" of opening and closing the hog gates.

On 15 August 2016, Employer notified Plaintiff that, because he had missed work due to his workers' compensation incident, he was eligible for Family Medical Leave Act leave and that it would run concurrent with his workers' compensation temporary total disability benefits and short-term disability payments. However, Defendants did not reinstate Plaintiff's workers' compensation temporary total disability benefits. Employer did initiate Plaintiff's short-term disability payments.

On 24 August 2016, Plaintiff's counsel filed a motion to reinstate Plaintiff's workers' compensation temporary total disability benefits and requested a return appointment with Lippe. However, Lippe refused to see Plaintiff.

On 25 August 2016, at Defendants' direction, Plaintiff met with Dr. Richard Moore to obtain a second opinion evaluation. Moore agreed with Lippe's course of treatment, and also agreed with Lippe's assignment of a 4% permanent partial disability rating to Plaintiff's right arm.

On 30 August 2016, Plaintiff's counsel sent Moore a letter, requesting that Moore review the Loading Crew Loader job description, and informing Moore that

Plaintiff had attempted to perform the job duties until he was removed from work by Martin. Moore responded that the Loading Crew Loader job description denoted functional demands outside of Plaintiff's permanent work restrictions and was therefore not appropriate unless the demands were excluded from the position. Moore specifically testified that the indication that Plaintiff would have to lift 50 pounds occasionally was outside of Plaintiff's permanent work restrictions.

Defendants then modified the Loading Crew Loader position into a "sorter" position. This newly-created sorter position included restrictions of lifting no greater than 20 pounds and no repetitive motions.

On 3 October 2016, Defendants filed a response to Plaintiff's motion to reinstate the workers' compensation temporary total disability benefits.

On 4 October 2016, Martin took Plaintiff out of work indefinitely due to his elbow pain, and Plaintiff informed Employer that he had been taken out of work.

On 10 October 2016, Special Deputy Commissioner Michael Kelly denied Plaintiff's motion to reinstate the workers' compensation temporary total disability benefits. On 21 November 2016, Plaintiff filed a Form 33 request for hearing.

On 26 February 2018, Deputy Commissioner Lori A. Gaines issued an opinion and award in favor of Plaintiff. Gaines concluded that Plaintiff had not constructively or unjustifiably refused suitable employment; that Defendants had not provided any description of a job within Plaintiff's restrictions for which Plaintiff would have been eligible; that Plaintiff's testimony was credible and established that Plaintiff was

physically unable to work; that Defendants failed to provide suitable employment from 15 August 2016 and ongoing; and that Defendants failed to show that other employers would hire Plaintiff to do a similar job at a comparable wage. Defendants appealed to the Full Commission.

On 11 July 2018, the Commission heard the case. The Commission determined that Defendants did not offer Plaintiff suitable employment, that Plaintiff was not capable of performing the duties of Loading Crew Loader, and that Plaintiff was entitled to ongoing benefits. The Commission awarded Plaintiff temporary total disability compensation at the rate of $512.44 per week from 15 August 2016 until Plaintiff returns to suitable employment. The Commission further ordered Defendants to pay Plaintiff's temporary partial disability compensation, medical treatment, and attorney's fees. From entry of the Commission's opinion and award, Defendants appeal.

II. Discussion

Defendants argue that the Commission erred in (1) its findings of fact 36, 37, and 40 and (2) concluding that Plaintiff met his burden of proving an ongoing disability and thus awarding Plaintiff temporary total disability benefits.

A. Standard of Review

Appellate review of the Commission's opinion and award is "limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law."

Deese v. Champion Int'l Corp., 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). "[T]his [C]ourt does not . . . weigh the evidence and decide the issue on the basis of its weight. The [C]ourt'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) (internal quotation marks and citation omitted). If the record contains such evidence, the Commission's findings are conclusive on appeal, even if there is evidence that would support contrary findings. *Id.* Unchallenged findings of fact are binding on appeal. *Medlin v. Weaver Cooke Constr., LLC*, 367 N.C. 414, 423, 760 S.E.2d 732, 738 (2014). This Court reviews the Commission's conclusions of law *de novo*. *Deseth v. LensCrafters, Inc.*, 160 N.C. App. 180, 184, 585 S.E.2d 264, 267 (2003).

B. Supporting Evidence for Findings 36, 37, and 40

Defendants argue that the Commissions' findings 36, 37, and 40 are unsupported by the evidentiary record.

Finding 36 states in relevant part, "On October 4, 2016, Plaintiff returned to his primary care physician, Dr. Martin, and was taken out of work indefinitely due to chronic elbow pain." Defendants claim that finding 36 is "misleading and inaccurate" because Martin's testimony proves he took Plaintiff out of work only from the sorter position and not from other positions. However, the transcript shows that Martin did, in fact, take Plaintiff out of work indefinitely:

> Q: When was the next visit after the August, 2016?

> A: The next visit was October 4th, 2016.
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> . . . .
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> Q: And what decision was made in regards to work during that October visit?
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> A: At that point, you know, he did not feel that he was any better and that he was not able to return to work, whether it was the original job or the new job he had. And at that point, he just did not feel that he could go back. So we decided to take him out of work indefinitely at that point.
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> . . . .
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> Q: So, at this point, in December of 2016, it's your opinion that you've at least taken [Plaintiff] completely out of work in regards to any physical labor at Smithfield?
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> A: That's correct. And at that point, we were just doing notes that were from point A to point B, just to keep him out of work and, you know, fulfill his obligations at work with disability requirements and making the guidelines of paperwork and stuff that needed to be filled out was being filled out.
>
> Q: And it -- it does look like, in regards to some of the stipulated exhibit as well, that you were -- you completed, through his employer, some short-term disability forms, saying that he was not able -- capable of working at that time?
>
> A: That's correct.

During cross-examination, Martin further testified that he removed Plaintiff from work completely and that he did not feel as if there was anything that Plaintiff could do:

> Q: And as far as the restrictions, I'm curious -- he was removed from work completely. It wasn't --
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> A: That's correct.
>
> Q: Why -- why was -- why were the restrictions not limited to the right arm that he was treating for?

> A: The main reason is that, when we tried to adjust his work, we tried to address -- adjust his work environment so that he could work at that particular facility, but there, you know, I did not feel that there was anything he could really do. He was not a great candidate for an office job, administration or anything like that. So the jobs that they were asking him to do were revolving around him working around a truck or loading stuff or doing labor-intensive jobs, and it would require his dominant hand, which is his right arm. So I just did not feel there was anything else that could be done there. They've already tried to set him up with an alternative job and it didn't work.

As this is competent testimonial evidence to support finding 36, it is conclusive on appeal. *Adams*, 349 N.C. at 681, 509 S.E.2d at 414.

Defendants next argue that finding 37, and one portion of finding 40, are not supported by record evidence. Defendants claim that these findings are "not found in the evidentiary record and not true at the time of the hearing."[2]

Finding 37 states:

> At the time of hearing before the Full Commission, Plaintiff was still employed by Defendant-Employer, but had not returned to work in the sorter position. Defendant-Employer had not offered Plaintiff any other position. Defendants did not reinstate Plaintiff's temporary total disability benefits when he was unable to perform the duties of the sorter position.

The challenged portion of finding 40 states:

[2] Defendants also make a cursory argument that finding 40 is "erroneously and improperly drafted as a conclusion of law," but provide no argument, authorities, or discussion in support of their position. Thus, pursuant N.C. R. App. P. 28(a) (2018), this issue is deemed abandoned.

> Plaintiff remains employed with Defendant-Employer, but to date, has not been offered suitable employment by Defendant-Employer.

Plaintiff's testimony supports these findings. Plaintiff was asked, "You are currently employed with Smithfield Foods, is that correct?" Plaintiff responded, "Yes." Because this record evidence supports findings 37 and 40, the findings are conclusive on appeal. *Adams*, 349 N.C. at 681, 509 S.E.2d at 414.

The Commission also made the following relevant findings of fact, which Defendants do not challenge on appeal:

> 7. Upon Plaintiff's removal from work, Defendants filed a Form 60 and agreed to pay ongoing indemnity benefits based on an average weekly wage of $753.62 and a compensation rate of $502.44 for the right elbow injury.
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> . . . .
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> 22. In light of his complaints about utilizing the crank, the claims adjuster scheduled plaintiff for a return visit with Dr. Lippe, the authorized treating physician. Dr. Lippe opined that the truck driving job was too repetitious and was not within the permanent work restrictions provided to Plaintiff.
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> . . . .
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> 27. Plaintiff attempted to do the job of sorter and began experiencing pain and discomfort in his wrist and right arm. Plaintiff explained that the gates he was required to lift as part of his duties as a sorter were approximately twenty-five pounds, which exceeded his permanent restrictions. During the time that Plaintiff worked in the sorter position, he did not earn the same wages as his pre-injury wage. In Defendants' contentions, Defendants conceded Plaintiff is entitled to temporary partial disability benefits for the period in which he earned less per week in the sorter position.

. . . .

31. On July 19, 2016, Plaintiff returned to Dr. Martin and reported right elbow joint pain. Dr. Martin advised Plaintiff to remain out of work for two weeks because of "repetitive movement." Dr. Martin did not have the job description to review. Dr. Martin recalled Plaintiff telling him that it was the opening and closing of the gates that bothered his arm. Defendants were provided a copy of this medical treatment and note to remain out of work.

32. On August 15, 2016, Plaintiff again presented to Dr. Martin and reported unchanged symptoms despite not returning to work. Dr. Martin assessed chronic right elbow pain with reflex or sympathetic dystrophy (hereinafter "RSD") and an inability to do any type of repetitive motion or labor involving the right arm. He advised Plaintiff to remain out of work for five weeks to find a non-labor job.

33. Defendant-Employer notified Plaintiff by letter that he had missed work and that it was due to his workers' compensation incident. Dr. Martin completed Family Medical Leave Act paperwork indicating that Plaintiff had a permanent nerve injury in his right arm based on a RSD diagnosis and would be unable to perform repetitive arm motions for an indefinite duration as of August 15, 2016. Plaintiff began receiving short-term disability benefits on August 15, 2016 and received a total of $7,196.70 through January 16, 2017.

. . . .

38. The Full Commission finds, based upon the preponderance of the evidence in view of the entire record, that the sorter position offered to Plaintiff by Defendant-Employer in June 2016 was not suitable because it was not a job that would be offered by Defendant-Employer to applicants in the competitive marketplace and was not shown by Defendants to be a job available on the open labor market as modified for Plaintiff's restrictions. The sorter position was a make-work job that was not shown to accurately reflect Plaintiff's ability to earn wages in the open labor market. Moreover, even if the position had not been make-work, Plaintiff was unable to perform the sorter

> position because the essential duties exceeded his permanent work restrictions. In particular, he was experiencing pain and discomfort from lifting the twenty-five to thirty-pound gate for the transfers.
>
> 39. The preponderance of the evidence in view of the entire record establishes that Defendants transferred Plaintiff from a truck driving position that was not within Plaintiff's restrictions to a loading crew loader position that was not within Plaintiff's restrictions.

As Defendants do not contest the above findings of fact, they are binding on appeal. *Medlin*, 367 N.C. at 423, 760 S.E.2d at 738. Accordingly, the Commission's 40 findings of fact are binding on this Court.

C. Proof of Disability and Award of Benefits

Defendants next argue that the Commission erred in concluding that Plaintiff met his burden of proving an ongoing disability and thus awarding Plaintiff temporary total disability benefits.

"Disability" within the context of a workers' compensation claim refers to the injured employee's "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) (2018). The plaintiff has the burden of proving the existence of his disability and its degree. *Hall v. Thomason Chevrolet Inc.*, 263 N.C. 569, 575, 139 S.E.2d 857, 861 (1965). In order to support a conclusion of disability, "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." *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). A plaintiff may satisfy the first two *Hilliard* elements by proving one of the four factors laid out in *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 425 S.E.2d 454 (1993). These factors are:

> (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. at 765, 425 S.E.2d at 457 (internal citations omitted). Once an injured employee establishes a compensable injury, the burden shifts to the employer to rebut the employee's evidence. *Johnson v. S. Tire Sales & Service*, 358 N.C. 701, 708, 599 S.E.2d 508, 513 (2004). The burden lies with the employer to provide evidence to show that suitable jobs are available and that Plaintiff is capable of getting one. *Id.*

A suitable position must both accurately reflect the claimant's ability to earn wages in the open market and not constitute "make-work." *See Munn v. Precision Franchising, Inc.*, 196 N.C. App 315, 319, 674 S.E.2d 430, 434 (2009) (determining that 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 not competitive). The burden is on the employer to show that the job offered meets the definition of suitable employment. *Id.* at 318, 674 S.E.2d at 433.

Defendants argue that the Commission erred in its Conclusion of Law 6 because the conclusion is not supported by findings of fact.[3] It states:

> Defendants admitted the compensability of Plaintiff's injury by accident on December 15, 2013 by filing a Form 60 on January 15, 2015. However, the Form 60 does not create a presumption of continuing disability and therefore the burden of proving disability remains with Plaintiff. *Sims v. Charmes/Arby's Roast Beef*, 142 N.C. App. 154, 542 S.E.2d 277 (2001).
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> . . . .
>
> In the present case, Plaintiff has shown that he was temporarily totally disabled from employment. Plaintiff is not able to return to his pre-injury position based on his permanent work restrictions assigned by Dr. Lippe. The sorter position Defendant-Employer offered Plaintiff is not suitable employment and Defendants have not shown that any other suitable job was available with Defendant-Employer. Plaintiff's modified job when attempting to return to work for Defendant-Employer did not demonstrate he has wage earning capacity in the competitive job market. Plaintiff remains employed with Defendant-Employer, but to date, has not been offered suitable employment by Defendant-Employer. Based upon the preponderance of the evidence in view of the entire record, the Full Commission concludes Plaintiff is entitled to weekly temporary total disability compensation from August 15, 2016 and continuing until Plaintiff returns to work or further order of the Commission.

[3] We note that the Commission included two "Conclusion of Law No. 6." On appeal, Defendants challenge only the first-listed Conclusion of Law No. 6 and not the second.

The Commission's findings support its conclusion that Plaintiff provided sufficient proof of disability as outlined in *Hilliard*. Finding 22 supports that Plaintiff was incapable after his injury of earning the same wages he earned before his injury in the same employment, as it shows that Plaintiff could not return to his original job driving a commercial truck, which paid a higher wage, because the job was not within Plaintiff's permanent work restrictions. Moreover, finding 27 shows that Defendants conceded that Plaintiff did not earn the same wages as his pre-injury wage and was entitled to temporary partial disability benefits for the period in which he earned less per week in the sorter position. These findings show that Plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment. *Hilliard*, 305 N.C. at 595, 290 S.E.2d at 683.

Findings 29, 30, 37, 38, and 39 support that Plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment. These findings show that: Plaintiff was still employed by Employer; Plaintiff diligently worked with human resources to find a position that complied with his permanent work restrictions; Plaintiff attempted to work in the two positions offered to him by Employer which did not comply with his permanent work restrictions; and Employer did not offer Plaintiff any other position within the company that complied with Plaintiff's permanent work restrictions. The findings also show that the Commission determined that the sorter position offered to Plaintiff was "make-work" and not a position that would be offered to applicants in the

competitive marketplace. Finding 40 further supports that Plaintiff was incapable of earning the same wages he had earned before his injury in any other employment, as it shows that Plaintiff's job duties in the "make-work" sorter position did not demonstrate that he had wage earning capacity in the competitive job market and that Employer had not offered him suitable employment. These findings show that Plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment. *Id.*

And finding 7 shows that Plaintiff's incapacity to earn was caused by his injury, as it shows that Defendants filed a Form 60 in which they admitted the compensability of Plaintiff's injury. *Id.*

The Commission's findings of fact provide the requisite support for the Commission's conclusion that Plaintiff was temporarily totally disabled from employment. As this Court does not weigh the evidence and decide the issue, Defendants' argument that the Commission erred in concluding that Plaintiff met his burden of proving an ongoing disability and thus awarding Plaintiff temporary total disability benefits fails. *Deese*, 352 N.C. at 116, 530 S.E.2d at 553.

III. Conclusion

As competent evidence supports the Commission's findings, and the findings support the conclusion that Plaintiff was temporarily totally disabled from employment, the Commission did not err in awarding Plaintiff workers' compensation benefits. The Commission's opinion and award is affirmed.

AFFIRMED.

Judges BRYANT and STROUD concur.