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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-526

Filed 2 July 2024

N.C. Industrial Commission, No. 19-029132

MICHAEL PIERSON, Plaintiff,

v.

SOUTHWEST AIRLINES, Employer, SELF-INSURED (SEDGWICK CMS, Third-Party Administrator), Defendants.

Appeal by plaintiff from opinion and award entered 26 April 2023 by the North Carolina Industrial Commission. Heard in the Court of Appeals 31 October 2023.

*Younce, Vtipil, Baznik & Banks, PA, by Robert C. Younce, Jr., for plaintiff-appellant.*

*Midkiff, Muncie & Ross, P.C., by Brian C. Groesser, for defendants-appellees.*

STROUD, Judge.

Plaintiff appeals from an opinion and award entered by the North Carolina Industrial Commission which: (1) denied “Plaintiff’s claim for additional medical treatment for his left knee arthritis and chondromalacia[;]” (2) denied “Plaintiff’s claim for compensation for his mental health issues[;]” and (3) allowed Defendants “to cease paying temporary total disability benefits[.]” As the Industrial

Commission’s findings of fact are supported by competent evidence and the findings support the conclusions of law, we affirm the opinion and award.

## **I. Background**

Plaintiff was employed by Defendant Southwest Airlines (“Southwest”) from 2000 until he sustained an on-the-job injury on 28 June 2019. In Plaintiff’s job as a “ramp agent,” he “sorted, stacked, loaded, and unloaded passengers’ bags; helped clean and resupply aircraft; and assisted in repositioning aircraft.” During Plaintiff’s employment with Southwest, he sustained multiple injuries to his back, neck, and right knee and required “two back surgeries in 2003 and 2004.” Plaintiff also suffered injury to his cervical spine in 2009; “tore his right knee medial meniscus and lateral meniscus, requiring surgery in 2018[;]” and reinjured his back in 2018.

The 28 June 2019 injury to Plaintiff’s left knee is the basis of this appeal, and on 30 October 2019 “Defendant filed a Form 60 *Employer’s Admission of Employee’s Right to Compensation* admitting the compensability of a ‘left knee strain’ and indicating that disability compensation began on 30 June 2019.” (Emphasis in original.) Plaintiff was receiving “temporary total disability compensation at the rate of \$672.57” since 29 June 2019. In addition to Plaintiff’s physical injuries, he had suffered from anxiety and depression which manifested physical symptoms such as stomach pain and trouble sleeping, resulting in Plaintiff being “treated with medication and therapy prior to his 28 June 2019 injury.”

Plaintiff first received medical treatment for his left knee injury from Dr. Dave

Shilpa, M.D., who diagnosed Plaintiff with “a soft tissue injury or strain, for which he ordered physical therapy and an MRI.” Dr. Shilpa “restricted Plaintiff to sedentary work” and “Plaintiff began physical therapy on 1 July 2019.” Eventually, Dr. Shilpa “released Plaintiff from care” due to Plaintiff’s confrontational attitude towards him and his staff. Plaintiff eventually sought treatment from Raleigh Orthopaedic Clinic and had an MRI, which showed “a possible medial meniscus tear[.]” Mr. Eagle, the physician assistant who first treated Plaintiff at Raleigh Orthopaedic Clinic, ordered Plaintiff to continue physical therapy and scheduled a follow-up appointment with Dr. Albright, who had treated Plaintiff for previous injuries. On 6 August 2019, Dr. Albright “noted that Plaintiff’s right knee showed mild-moderate arthritis and that the left knee – the subject of this claim – looked ‘fine.’” Dr. Albright recommended “conservative treatment” which included “low-impact weight loss exercises” and further “provided Plaintiff with sedentary work restrictions.” On 18 October 2019, Dr. Albright “performed a left knee arthroscopy” to address ongoing pain and “indicated that he believed the partial tear [to Plaintiff’s knee] was not the source of Plaintiff’s pain, but instead degenerative joint disease” was the cause and he was “unsure whether the surgery would improve Plaintiff’s symptoms.” Dr. Albright conducted the surgery without complication.

Plaintiff believed “something bad had happened” during this surgery, but his medical providers told him “everything went fine,” upsetting Plaintiff, but there was no evidence of any complications during the surgery. During a 24 October 2019

follow-up appointment, a physician assistant “noted that Plaintiff’s left knee seemed to be healing and recommended that Plaintiff continue walking as tolerated[,]” and “wrote Plaintiff out of work until his next visit, scheduled for one month later.”

Plaintiff resigned from his employment with Southwest on 31 October 2019. Plaintiff testified he resigned because he felt like he could not “continue to perform his job.” On 5 December 2019, Plaintiff “reported that he was doing well and that his preoperative left knee pain was gone” and Dr. Albright noted “Plaintiff had adequate left knee range of motion and gait and that the surgical site was healing well” and “ordered physical therapy and work conditioning as well as releasing him to light duty work[.]” While Plaintiff saw Dr. Albright again on 3 March 2020 and reported surgery “only helped some[,]” Dr. Albright noted Plaintiff’s left knee was “benign and pain free with adequate motion in flexion and extension” and had “normal alignment when standing, no deformity, no weakness, and no suggestion for any obvious knee issue.” Dr. Albright ordered “work conditioning and recommended a functional capacity evaluation (“FCE”) to set any permanent restrictions.”

Plaintiff underwent the FCE on 17 July 2020, where Plaintiff “put forward inconsistent effort in some tests, was inconsistent in his pain reports, and was noted to have ‘inappropriate illness behaviors.’” The FCE was “equivocal” and noted Plaintiff could work “in a medium physical demand job.” The FCE “indicated Plaintiff could not squat, could rarely climb steps, kneel, or crawl; and could occasionally lift up to forty pounds, frequently lift up to twenty pounds, and constantly lift up to eight

pounds.” On 30 July 2020, Dr. Albright “noted that Plaintiff had reached maximum medical improvement” and ordered another MRI. After Dr. Albright’s review of the MRI, he indicated the ongoing pain was from “degenerative joint disease” for which “surgery was unlikely to provide relief.” Plaintiff was released with “instructions to lose weight, stop smoking, exercise three times a week, and return to work.”

Plaintiff moved out of North Carolina to Indiana in September 2020. After moving to Indiana, Plaintiff retained a specialist “to provide vocational case management services[,]” created a resume, “contacted several potential employers a week, applied to many jobs, and obtained several interviews” but “stopped a placement with Cook Medical Inc., when they requested his social security number” which Plaintiff stated made him feel “confused and harassed.” The Industrial Commission noted Plaintiff also “applied for jobs outside of his skill set[;]” “limited his job search and applications to positions in Bloomington[;]” and “against [the vocational specialist’s] advice, asked employers to disclose their starting salaries and COVID-19 protocols in his initial communications.” Plaintiff eventually told the vocational specialist he “did not want to pursue any position that may require social interaction with a stranger.” Plaintiff eventually stopped searching for employment in October 2021.

Plaintiff saw several psychological providers for his anxiety and depression and was diagnosed with post-traumatic stress disorder (“PTSD”) according to a 9 September 2021 note, although the provider did not mention the divorce or child

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*Opinion of the Court*

custody issues in Plaintiff's life. Plaintiff sought additional medical treatment on 30 November 2021 for his knee, which Plaintiff reported as having swelling and worsened pain. He was given a corticosteroid injection but saw no improvement and was ordered to have another MRI, which showed "mild cartilage degeneration, a nondisplaced tear of the posterior horn of the lateral meniscus, and abnormal signal at the posterior horn of the medial meniscus."

Depositions were taken from Dr. Albright, "an expert in orthopedic surgery involving the spine, hip, and knee[;]" Dr. Niehaus, an "expert in family and sports medicine[;]" Dr. Singleton, "an expert in psychiatry[;]" and Mr. Conway, "an expert in vocational rehabilitation[.]" Dr. Albright testified Plaintiff's knee surgery went without complication and Plaintiff was a "pleasant patient" but after he saw "the contents of Plaintiff's 2021 left knee appointments" he acknowledged Plaintiff's condition appeared worse than it had during Dr. Albright's care. Dr. Albright believed "the compensable injury resulted in a temporary aggravation of Plaintiff's chondromalacia" and "Plaintiff's need for additional treatment related to his meniscus tears was related to the compensable injury, but that additional treatment for Plaintiff's chondromalacia and arthritis were unrelated to the compensable injury."

Dr. Niehaus testified about his interaction with Plaintiff, who had requested that Dr. Niehaus remove from his medical notes that Plaintiff suffered from "a long history of chronic anxiety" and only include a "history of anxiety;" he considered this

request suspicious as he had never before received such a request. Dr. Niehaus testified that the restrictions he gave Plaintiff on 1 and 2 June 2021, that Plaintiff be employed in jobs without face-to-face customer interaction, were not necessary but “he assigned them because he thought they may help Plaintiff narrow in on jobs he was applying for[.]”

Dr. Singleton testified “Plaintiff developed PTSD as a result of cumulative trauma from multiple injuries” including a “‘bad surgery’ on 18 October 2019 acting as the ‘straw that broke the camel’s back.’” Although there was no evidence there were any complications from Plaintiff’s 18 October 2019 surgery, Dr. Singleton testified “it could still trigger PTSD, as individuals with PTSD can have altered or disoriented memories.” Further, Dr. Singleton admitted he was unaware of the previous “stressors” Plaintiff had, such as problems with his marriage, divorce, and a child custody dispute. The Industrial Commission noted Dr. Singleton “admitted that the medical records for Plaintiff’s left knee treatment provided no indication that his left knee injury, or its related surgery, was a source of any of Plaintiff’s stress or anxiety while Plaintiff was undergoing treatment for his left knee.” Finally, Mr. Conway testified that he at first had no issues working with Plaintiff, but Plaintiff eventually “began to restrict the positions he would consider[.]” indicated “Plaintiff’s independent job search involved applying to positions for which Plaintiff was not qualified[.]” and ultimately concluded Plaintiff “had not conducted a reasonable job search.”

A hearing was conducted on 9 May 2022 in the North Carolina Industrial Commission by Deputy Commissioner Wes Saunders, who awarded Plaintiff “additional medical compensation for the meniscus in his left knee at the direction and expense of Defendants[.]” denied Plaintiff’s “claim for additional medical compensation for the chondromalacia and arthritis in his left knee” and those “related to his psychological conditions[.]” and granted Defendants’ “request to stop paying temporary total disability benefits[.]” Defendants appealed to the Full Commission.

The matter was heard by the Full Commission on 20 October 2022 and the Full Commission entered its opinion and award on 26 April 2023. The Full Commission concluded

Defendant failed to present any evidence that Plaintiff’s need for additional treatment for his left knee meniscus issues is not directly related to the 28 June 2019 compensable injury, and, therefore, Defendant failed to rebut the *Parsons* presumption in regards to said meniscus issues. However, Defendant has presented competent and credible medical evidence through Dr. Albright that the 28 June 2019 left knee injury caused a temporary aggravation of Plaintiff’s pre-existing arthritis and chondromalacia which resolved by 5 December 2019 and that any future treatment for said conditions was unrelated to the 28 June 2019 compensable injury.

The Full Commission also concluded Plaintiff did not present competent evidence that the 28 June 2019 injury “caused or aggravated his mental health issues[.]”

Therefore, the Full Commission ordered that “Defendant[s] shall pay for all medical expenses incurred, or to be incurred, as a result of Plaintiff’s compensable



left knee meniscus issues[;]” denied Plaintiff’s claims for additional medical treatment for the arthritis and chondromalacia and mental health issues; and allowed Defendants to “cease paying temporary total disability benefits as of 5 October 2021.” Plaintiff appeals to this Court.

## **II. Analysis**

Plaintiff argues: (1) the Industrial Commission erred “in concluding that Plaintiff was not entitled to temporary total disability compensation after 5 October 2021[;]” (2) the Industrial Commission erred in concluding that Defendants had met their burden to rebut the presumption that “all of Plaintiff’s left knee conditions remain compensable[;]” and (3) Plaintiff is “entitled to a duly qualified physician in the Bloomington, Indiana area to attend, prescribe, and assume the care and charge of all problems involving [Plaintiff’s] left knee[.]” We will first discuss whether the Industrial Commission properly concluded that Defendants rebutted the presumption Plaintiff’s injury remains compensable, and then we will discuss whether Plaintiff is entitled to temporary total disability.

### **A. Standard of Review**

On appeal from the Commission in a workers’ compensation claim, our standard of review requires us to consider: whether there is any competent evidence in the record to support the Commission’s findings of fact and whether these findings support the Commission’s conclusions of law. The findings of fact made by the Commission are conclusive upon appeal when supported by competent evidence, even when there is evidence to support a finding to the contrary. In weighing the evidence

the Commission is the sole judge of the credibility of the witnesses and the weight to be given to their testimony and may reject a witness' testimony entirely if warranted by disbelief of that witness. Where no exception is taken to a finding of fact, the finding is presumed to be supported by competent evidence and is binding on appeal.

*Workman v. Rutherford Elec. Membership Corp.*, 170 N.C. App. 481, 485-86, 613 S.E.2d 243, 247 (2005) (citations and ellipsis omitted).

**B. *Parsons* Presumption**

Plaintiff's primary brief argues finding 72 is not supported by competent evidence and thus conclusion of law 2 should be set aside; while Deputy Commissioner Saunder's opinion had 79 findings, the opinion and award entered by the Full Commission, on appeal here, has only 54 findings. Plaintiff first only identifies the challenged finding by record page citation, but Plaintiff again argues "[s]omehow from all that flip flopping the Full Commission came up with Finding of Fact 72[.]" In Plaintiff's reply brief, he corrects the multiple errors citing to the incorrect opinion and award entered by Deputy Commissioner Saunders and instead challenges findings 44 and 51 in the Full Commission's opinion and award. While this Court has consistently stated "a reply brief does not serve as a way to correct deficiencies in the principal brief[.]" *Larsen v. Black Diamond French Truffles, Inc.*, 241 N.C. App. 74, 78, 772 S.E.2d 93, 96 (2015) (citations, quotation marks, and brackets omitted), this error does not require dismissal as the *substance* of Plaintiff's argument challenging findings 44 and 51 remains the same in his principal brief and

reply brief. In other words, Plaintiff raises no new issues in his reply brief, but rather simply corrects the numbers of the findings he is challenging. We now turn to Plaintiff's challenge to these findings and then address the Industrial Commission's conclusion.

***1. Findings 44 and 51***

Plaintiff challenges findings 44 and 51 from the opinion and award of the Full Commission. Findings 44 and 51 state:

44. After being presented with the contents of Plaintiff's 2021 left knee appointments, Dr. Albright testified that Plaintiff's current condition appeared to be worse than when he was released from care in August 2020. When asked about whether Plaintiff's conditions were related to the 28 June 2019 injury, Dr. Albright opined that the compensable injury resulted in a temporary aggravation of Plaintiff's chondromalacia, which resolved by the 5 December 2019 follow up appointment, and damage to Plaintiff's meniscus. As a result, Dr. Albright opined that Plaintiff's need for additional treatment related to his meniscus tears was related to the compensable injury, but that additional treatment for Plaintiff's chondromalacia and arthritis were unrelated to the compensable injury.

....

51. Based upon the preponderance of evidence in view of the entire record, the Full Commission finds that Plaintiff's need for ongoing treatment related to his left knee arthritis and chondromalacia is unrelated to his 28 June 2019 compensable injury. The Full Commission finds competent and credible the opinion of Dr. Albright that Plaintiff experienced a temporary aggravation of Plaintiff's left knee arthritis and chondromalacia, for which Plaintiff returned to baseline on 5 December 2019, when Plaintiff reported that his pre-injury left knee pain had resolved. Further, Dr.

Albright specifically opined that any further treatment for Plaintiff's left knee arthritis and chondromalacia was unrelated to the 28 June 2019 compensable injury.

Essentially, Plaintiff contends these findings are not supported by competent evidence since Dr. Albright “flip-flopped at least eight times” in his testimony. Plaintiff is correct in noting “an expert is not competent to testify as to the issue of causal relation founded upon mere speculation or possibility.” *Ballenger v. Burris Indus., Inc.*, 66 N.C. App. 556, 567, 311 S.E.2d 881, 887 (1984). This Court in *Ballenger* also noted “the number of times that the word ‘guess’ appears throughout Dr. Hurwitz’s testimony is striking.” *Id.* However, it is also well-established that

[t]he findings of fact made by the Commission are conclusive upon appeal when supported by competent evidence, even when there is evidence to support a finding to the contrary. In weighing the evidence the Commission is the sole judge of the credibility of the witnesses and the weight to be given to their testimony and may reject a witness’ testimony entirely if warranted by disbelief of that witness.

*Workman*, 170 N.C. App. at 485-86, 613 S.E.2d at 247 (citations omitted).

Plaintiff contends “flip flopping eight times is the definition of contradictory evidence. ‘I don’t know’ is the definition of speculative evidence.” Plaintiff first contends

[a]fter testifying on direct examination that plaintiffs compensable left knee injury only temporarily aggravated plaintiff’s chondromalacia, he then testified that plaintiff’s ongoing knee pain that was being treated by the physician’s assistant in Bloomington was related to the original injury and surgery. (Flip flop # 1) Dr. Albright then

backed off of his prior testimony saying that plaintiff's preexisting chondromalacia was aggravated by his work injury, although he was not sure if it was a temporary or permanent aggravation. (Flip flop # 2)[.]

Dr. Albright testified as follows:

Q. The presumption that his ongoing left knee problems that he's reporting to the orthopedic here in Indiana as recently as December of 2021, is there anything based off of everything we've talked about today that would suggest that the presumption that the issues that he's having here in December is related to the work injury for which you treated, is there anything in your mind that would rebut that in your opinion?

....

[A.] . . . I'm not sure - - ongoing knee pain can be related to the original injury and surgery, yes.

Q. And is that because of twofold: One, it's possible that the meniscus either re-tore or is having issues with scarring and then, two, you mentioned this underlying chondromalacia that you said preexisted this work injury, I think is what you said, but was that underlying condition, in your opinion, materially aggravated by this work injury?

A. Answering the latter, yes, it could have been. That's a vague answer. Was his preexisting chondromalacia aggravated by his work injury? Yes. Was that a temporary aggravation or permanent? I don't know. Typically it's temporary aggravation of chondromalacia. Chondromalacia is a long-term degenerative arthritis decline not related to trauma. So the original work injury, did it temporarily aggravate the chondromalacia? Yes. I think the first part of your question was having to do with could he have developed another meniscus tear problem. Yes.

Dr. Albright then went on to testify that during a 5 December 2019 postop visit,

Plaintiff's preop pain was gone which "[w]ould be an indication . . . that the underlying condition had a temporary exacerbation that was back to baseline as of December 5th, 2019[.]"

Plaintiff then contends Dr. Albright "flip flopped" again, stating "a few pages later, Dr. Albright flipped back again testifying that plaintiff's left knee pain was related to getting hurt on the job[.]" but this is a mischaracterization of the testimony:

Q. Again, we're after his surgery and - - you said this previously in other places, but I wanted to - - I don't know if we've actually gone over this before. You said, "His knee pain is related to getting hurt on the job *and chondromalacia and early knee arthritis/pre-arthritis*," correct?

A. Yes.

Q. Is that still your opinion?

A. Yes.

(Emphasis added.) Dr. Albright stated the injury on the job and the chondromalacia and arthritis contributed to Plaintiff's knee pain, not that the injury on the job was the sole cause of the knee pain. This testimony is consistent with Dr. Albright's previous testimony that the chondromalacia was temporarily aggravated by the work injury. Next, Plaintiff again claims Dr. Albright "flip flopped" and said he did not know whether the compensable injury aggravated the knee pain temporarily or permanently; Dr. Albright testified as follows:

Q. Did you completely change your mind after the surgery that [the knee pain] was not work related?

A. That's a good question, because we don't really know. I know that the injury did not cause chondromalacia. I know that. Injury exacerbated the preexisting condition. Was it a temporary or permanent exacerbation? I don't really know. I would think temporary. His injury definitely could have caused a meniscus tear. That can be a traumatic event. So, yes, the meniscus tear is easily attributable to an injury at work.

Dr. Albright clarified his testimony after this exchange, where he directly addressed the inconsistencies:

Q. . . . And so when I asked you that question on that December 5th, 2019 note where it says preop pain is gone, you previously testified that that's when he went back to baseline as it related to the chondromalacia, and then you testified that you couldn't say that to a reasonable degree of medical certainty - -

A. Right.

Q. - - that his current symptoms, if it is related to chondromalacia and not the meniscal tear that you were talking about, was related to the original work injury.

Is that still - - based off of that line of questioning, is that still your opinion?

A. No. And you're right, my previous response, final response to the other attorney, . . . , may have been flawed. I had forgotten for the moment the December 5th, 2019 note where he said his preop pain is gone, he was doing well. He was recovering. This is December 5th, after his October 18th surgery of the same year. So that suggests he recovered from the acute injury.

Q. Is your previous testimony regarding causation as to his current symptoms related to the underlying chondromalacia - - do you still stand by what you testified to on direct examination as it related to causation after reviewing that note.

A. To be blunt, I don't mean to have conflicting answers. My gestalt general medical opinion would be his current pain is a result of worsening degenerative joint disease and chondromalacia, which was not created by his work injury, yeah.

Finally, Plaintiff points us to multiple exchanges during re-cross examination that Plaintiff contends Dr. Albright said he did not know whether the left knee pain Plaintiff continued having resulted from the work injury and whether the 5 December visit was a "honeymoon period" after surgery where Plaintiff would not have felt pain. Plaintiff's counsel asked multiple general questions about whether it was "possible" there was a honeymoon period where Plaintiff would not have pain after surgery but Plaintiff's subsequent pain was still caused by the work injury. In response to Plaintiff's counsel's questions about various possibilities, Dr. Albright testified those possibilities did exist, but testifying a result is possible is not the same as stating what happened in the current case.

Overall, Plaintiff seeks to characterize Dr. Albright's testimony about changes in Plaintiff's condition over time and his inability to answer some of counsel's questions with one hundred percent certainty as a "flip-flop," but this characterization is not accurate. As Dr. Albright summarized his opinion, his "gestalt general medical opinion would be his current pain is a result of worsening degenerative joint disease and chondromalacia, which was not created by his work injury." Dr. Albright did not state, as Plaintiff contends, "the December 5, 2019 note without documentation of left knee pain must have been a honeymoon period right



after the surgery.” Plaintiff also argues Dr. Albright’s final statements “top all the flip flops like a cherry, as the last thing he said in the deposition . . . [was] ‘My summary comment is I don’t know. That’s my summary comment. That’s my summary comment.’” But this short quote leaves out necessary context, as Dr. Albright’s full answer was, “My summary comment is I don’t know. That’s my summary comment. *If we exclude the December 5th visit, which the opposing [Defendant’s] attorney would like me to do, then I believe his current condition is related to his work injury.*” (Emphasis added.) However, neither Dr. Albright nor the Industrial Commission was required to disregard the December 5th note, where Plaintiff stated the preop pain was gone and which supported Dr. Albright’s ultimate conclusion that the ongoing pain was not related to the injury, as Plaintiff would like. *See Workman*, 170 N.C. App. at 485-86, 613 S.E.2d at 247. The note and Dr. Albright’s testimony support the Industrial Commission’s findings of fact 44 and 51.

Dr. Albright testified both the chondromalacia and the injury contributed to the knee pain, and after being shown his 5 December notes said Plaintiff recovered from the injury based upon his examination and Plaintiff’s own report the pain was gone after the surgery, suggesting the aggravation of his chondromalacia was temporary. Even to the extent Dr. Albright had inconsistent testimony, this case is not similar to *Ballenger* where the testimony was based off of “guesses” and the expert stated, “I could not state that the fracture was the direct cause of the diffuse weakness that he showed in both legs and in the arms” and many answers where the expert

only stated “I would think so.” *Ballenger*, 66 N.C. App. at 566-67, 311 S.E.2d at 887. Further, the expert in *Ballenger* agreed with the statement that the plaintiff’s disease progression and the relationship to the work injury “would be only a speculation.” *Id.* at 567, 311 S.E.2d at 888. Here, Dr. Albright testified to a reasonable degree of certainty that Plaintiff’s aggravation and pain from the work injury had ended by 5 December 2019 as indicated by his medical note based upon his examination and Plaintiff’s own statements. In complete contrast to *Ballenger*, Dr. Albright was ultimately clear, despite Plaintiff’s counsel’s ambiguous questions, that the 5 December 2019 note supported his conclusion that the aggravation of Plaintiff’s chondromalacia was temporary. *See id.* Plaintiff’s challenges to these findings are overruled. *See Perez v. American Airlines/AMR Corp.*, 174 N.C. App. 128, 134, 620 S.E.2d 288, 291-92 (2005) (“[I]t is not the role of this Court to comb through the testimony and view it in the light most favorable to the defendant. Although by doing so, it is possible to find a few excerpts that might be speculative, this Court’s role is not to engage in such a weighing of the evidence.” (citations and quotation marks omitted)).

## ***2. Conclusion the Parsons Presumption Was Rebutted***

As we conclude the challenged findings are supported by competent evidence, we will briefly address whether such findings are sufficient to rebut the *Parsons* presumption that Plaintiff’s ongoing knee pain was not caused by the work injury. *See Parsons v. Pantry, Inc.*, 126 N.C. App. 540, 542, 485 S.E.2d 867, 869 (1997) (“We

hold that the Industrial Commission erred in this matter by placing the burden of causation on plaintiff instead of defendants.”). The Industrial Commission’s conclusion found:

4. . . . Defendant failed to present any evidence that Plaintiff’s need for additional treatment for his left knee meniscus issues is not directly related to the 28 June 2019 compensable injury, and, therefore, Defendant failed to rebut the *Parsons* presumption in regards to said meniscus issues. However, Defendant has presented competent and credible medical evidence through Dr. Albright that the 28 June 2019 left knee injury caused a temporary aggravation of Plaintiff’s pre-existing arthritis and chondromalacia which resolved by 5 December 2019 and that any future treatment for said conditions was unrelated to the 28 June 2019 compensable injury.

We first note the Industrial Commission properly placed the burden to prove the “28 June 2019 left knee injury caused a temporary aggravation of Plaintiff’s pre-existing arthritis and chondromalacia which resolved by 5 December 2019 and that any future treatment for said conditions was unrelated to the 28 June 2019 compensable injury” on Defendants. *See id.* Plaintiff’s argument as to the conclusion of law assumes error in the findings of fact, and as we have concluded the findings are supported by competent evidence, we also conclude the Commission’s conclusion is supported by sufficient findings of fact. *See Perez*, 174 N.C. App. at 134, 620 S.E.2d at 292 (“As there is competent evidence to support the Commission’s findings of the causal relationship between the treatment in 2002 and the injury in 1998, we are bound by them. The Commission’s corresponding conclusion of law that plaintiff’s

herniated disc was causally related to the compensable injury of 1998 is supported by its findings.”). Finally, Plaintiff’s argument he is “entitled to a duly qualified physician in . . . Bloomington, Indiana” is overruled as it is based on the same challenge to the findings of fact and conclusions of law as above.

**C. Temporary Total Disability**

Finally, Plaintiff argues the Industrial Commission erred by “concluding that Plaintiff was not entitled to temporary total disability compensation after 5 October 2021[.]” (Capitalization altered.) Plaintiff does not challenge any findings of fact as unsupported in this argument but argues “while [P]laintiff’s unrelated psychiatric condition may or may not be the single most important factor in his disability since October 4, 2021, it is certainly not the only factor. Plaintiff has severe bilateral knee pain as well as severe low back pain.”

The Industrial Commission concluded “Plaintiff bears the burden to establish that the 28 June 2019 compensable injury caused or aggravated his mental health conditions” and

Plaintiff has failed to provide competent and credible medical evidence to establish that the 28 June 2019 compensable injury caused or aggravated his mental health issue, as due to Dr. Singleton’s lack of familiarity with Plaintiff’s mental health condition and treatment prior to – or even during – the time Plaintiff sought treatment for his compensable left knee injury, Dr. Singleton did not have sufficient information to provide a reliable, competent, and credible opinion on whether Plaintiff’s mental health issues were caused or aggravated by the compensable injury.

The Industrial Commission also concluded that “between 29 June 2019 and 4 October 2021, Plaintiff was disabled either under the first prong of *Russell* while he was written out of work or under the second prong of *Russell* while he made a reasonable job search[.]” However, the Industrial Commission also concluded “as of 5 October 2021, Plaintiff was written entirely out of work by Dr. Singleton for mental health issues unrelated to the 28 June 2019 compensable injury.”

Under North Carolina General Statute Section 97-2(9), a disability means “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) (2023). As is well-established by this Court, “[t]he burden is on the employee to show that he is unable to earn the same wages he had earned before the injury, either in the same employment or other employment.” *Russell v. Lowes Prod. Distrib.*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (citation omitted).

The employee may meet this burden in one of four ways: (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.* (citations omitted).

Plaintiff seems to contend that he was unable to work after 5 October 2021 due to his knee pain, not any mental health issues. The Industrial Commission concluded prong 1 and 2 of *Russell* applied, so our analysis will be limited to those two prongs. The Industrial Commission identified Plaintiff being “completely written out of work” by Dr. Singleton, a psychiatrist, for an unrelated injury – his mental health issues – as a basis for denying any further temporary total disability. According to finding of fact 54 in the Industrial Commission’s opinion and award, which was unchallenged and thus binding on appeal, *see Workman*, 170 N.C. App. at 485-86, 613 S.E.2d at 247, “[t]he restrictions [regarding Plaintiff’s ability to work] imposed by Dr. Singleton prohibited Plaintiff from returning to work in, or even participating in vocational rehabilitation services to identify[] positions that were within his physical restrictions for his 28 June 2019 compensable injury and his pre-existing and co-existing conditions[.]” The argument the Industrial Commission did not consider Plaintiff’s knee injury as of 5 October 2021 cannot stand as finding 54 establishes Plaintiff’s mental health issues caused his inability to return to work or even look for positions that “were within his physical restrictions” from his knee injury.

Finally, Plaintiff argues his mental health issues were caused by his work-related injury, but there is more than sufficient evidence in the record this is not the case. As early as 16 November 2018, before the compensable injury, Plaintiff “sought mental health treatment” due to “stressful times” which manifested in physical symptoms such as “stomach pain, trouble sleeping, and several panic attacks a week

with shortness of breath and heart palpitations.” Plaintiff testified “his stressors as of November 2018 included issues with his ex-wife as well as pain in his right knee and back from prior injuries.” Plaintiff also testified that in May 2019, “his ex-wife began preventing him from seeing his children” and he was “unable to see his children until January 2020.” In February 2020, Plaintiff again “continued to report stress from his ‘very toxic split with a lot of arguing over finances’” and reported similar symptoms as before his compensable injury, such as panic attacks several times a week. “On 1 June 2021, at Plaintiff’s request, Dr. Niehaus issued a note stating that due to Plaintiff’s ‘long history of chronic anxiety it would be best that he ideally has employment that does not involve direct facing with customers.’” Plaintiff then asked Dr. Niehaus to change his note to read only “anxiety” instead of the previous “long history of anxiety[.]” and Dr. Niehaus changed the note to read only “history of anxiety[.]” All of these facts taken together indicate that Plaintiff suffered from anxiety, depression, and panic attacks before his compensable work injury. While we sympathize with Plaintiff, Plaintiff “has not proved that his inability to find equally lucrative work is *because of* his work-related injury.” *Medlin v. Weaver Cooke Const., LLC*, 367 N.C. 414, 424, 760 S.E.2d 732, 738 (2014) (emphasis in original) (citation omitted). This argument is overruled.

### **III. Conclusion**

As the Industrial Commission’s challenged findings are supported by competent evidence, and the findings support the conclusions that Plaintiff’s

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aggravated knee injury was temporary and he was written out of work due to injuries unrelated to the compensable injury, we affirm the Industrial Commission's opinion and award.

AFFIRMED.

Judges HAMPSON and GORE concur.

Report per Rule 30(e).