NO. COA05-895

NORTH CAROLINA COURT OF APPEALS

Filed: 6 June 2006

MARVIN SILVERS,
Plaintiff-Employee

v.

North Carolina Industrial Commission
I.C. File No. 204944

MASTERCRAFT FABRICS, L.L.C.
Defendant-Employer

and

HEWITT, COLEMAN & ASSOCIATES, INC.,
Defendant-Carrier.

Appeal by employer from an Opinion and Award filed 7 February 2005 by the Full Commission. Heard in the Court of Appeals 8 February 2006.

The Sumwalt Law Firm, by Mark T. Sumwalt and Vernon Sumwalt, for plaintiff-employee-appellee.

Ogletree, Deakins, Nash, Smoak & Stewart, P.C., by H. Bernard Tisdale, III, for defendant-employer-appellant.

BRYANT, Judge.

Mastercraft Fabrics, L.L.C. (defendant) appeals from an Opinion and Award filed 7 February 2005 awarding Marvin Silvers (plaintiff) temporary partial disability from 11 December 2001 through 31 December 2001; temporary partial disability from 8 January 2002 through 31 December 2002; temporary partial disability for the period of 1 January 2003 through

18 February 2003; total disability compensation for 5 January 2002 though 7 January 2002 and 19 February 2003 through the present and continuing until further order of the Commission; all medical expenses as a result of plaintiff's 11 December 2001 injury by accident; and attorney's fees.

Plaintiff, age forty-four, worked for defendant for eight years before his injury occurred. On 11 December 2001, plaintiff injured his left knee when he stepped off a loom. Defendants admitted the compensability of plaintiff's injury as well as their liability for the injury by filing a Form 60 under N.C. Gen. Stat. §97-18(b). On 13 December 2001, plaintiff was referred to Dr. John Davis, an orthopedic surgeon. Dr. Davis performed arthroscopic surgery on plaintiff on 4 January 2002. Defendant's employment supervisor and human resources manager, Becky Stevens, attended plaintiff's appointments and examinations with Dr. Davis and discussed plaintiff's return to work without plaintiff's consent.

Between 11 December 2001 and 4 January 2002, Dr. Davis imposed work restrictions of "light duty" on plaintiff. The "light duty" restrictions were not defined, however, and it was left up to defendant to interpret and implement them. Plaintiff's work during this time involved special accommodations that were not a part of his ordinary work routine. He usually worked in the office doing odd jobs when he was able to work.

On 4 January 2002, Dr. Davis performed a medial retinacular repair on plaintiff's left knee. Even on the day of his surgery, plaintiff was required to perform work for defendant under his "light duty" restrictions for two hours before the surgery so defendant would not have to report a lost-time accident. On 8 January 2002, plaintiff returned to work with defendant for as long as he could tolerate the post-surgical pain in his left knee. Dr. Davis encouraged plaintiff to continue working full-time because Dr. Davis wanted to avoid having to write plaintiff out of

work, even though plaintiff had to leave work early or miss work entirely because of left knee pain. When plaintiff missed work, defendant marked plaintiff's attendance record as if plaintiff had called in "sick" for that particular day.

Despite plaintiff's ongoing knee pain, Dr. Davis told plaintiff he had no other medical treatment to offer. Plaintiff was transferred to Dr. Jay Jansen, who performed a second surgery on his left knee on 28 August 2002. Upon arthroscopic examination, Dr. Jansen found cartilage wear ("chondromalacia") on the back of plaintiff's kneecap as well as on the medial femoral condyle, which is the weight-bearing part of the knee. Dr. Davis' first surgery did not address the weight-bearing part of the knee. Plaintiff continued to work with defendant through 28 August 2002, the date of the second surgery. The second surgery helped the pain, swelling, and popping in plaintiff's left knee to some degree, however plaintiff continued to have the same problems post-surgery.

On 4 September 2002, plaintiff returned to work with defendant on a graduated return-to-work schedule. On 9 December 2002, Dr. Jansen released plaintiff to return to work without any work restrictions from his August 2002 surgery. Dr. Jansen did so even though he had not reviewed a functional capacity evaluation, and even though plaintiff's knee problems had persisted after two surgeries. Defendants paid temporary partial disability to plaintiff during this period; however they discontinued payments of temporary partial disability benefits on 16 November 2002, under the assumption that plaintiff had no work restrictions. On 18 February 2003, defendant terminated plaintiff for excessive absences from work. Since 18 February 2003, plaintiff has attempted to find other employment, including conducting a job search through the Employment Security Commission after filing for unemployment. Many of the employers with whom plaintiff applied for employment were not hiring. In addition, defendant considered the

possibility of jobs at two of its other plants for plaintiff, but these jobs were either three hours from plaintiff's residence or different from the job plaintiff had always performed. Defendant presented no evidence as to the functional requirements of these jobs, their physical demands, and they never offered these jobs to plaintiff.

On 19 August 2003, plaintiff underwent an independent medical evaluation with Dr. Jerry Barron of Perry & Barron Orthopedics in Charlotte, North Carolina. Dr. Barron is a board certified orthopedic surgeon in Charlotte specializing in the treatment of knees and shoulders. In addition to the diagnoses provided by Dr. Davis and Dr. Jansen, Dr. Barron opined that plaintiff's intraoperative photographs from the second surgery, which Dr. Jansen had performed on 28 August 2002, indicated at least a partial tear to his anterior cruciate ligament (ACL) with avulsion of the ligament from the femoral condyle. The symptoms from ACL tears resemble and often mimic symptoms from plaintiff's other diagnoses. Dr. Barron recommended surgery to evaluate and repair the ACL tear, but he also stated a functional capacity evaluation (FCE) would help to determine plaintiff's work activities if he should decide not to have surgery.

On 26 September 2003, plaintiff underwent the FCE, which indicated he could not climb ladders or stairs, crawl, or kneel. The FCE also indicated plaintiff could walk only minimally, and that he must alternate periods of sitting and standing as needed. In accordance with the FCE results, Dr. Barron assigned permanent restrictions to plaintiff as follows: (1) lifting no more than 20 pounds occasionally from the waist up and no lifting from the waist down; (2) no climbing ladders, kneeling, or squatting; and (3) climbing stairs no more than occasionally. Dr. Barron also stated these restrictions related back to 28 August 2002, when plaintiff had his second surgery. On 10 June 2004, the Deputy Commission issued an Opinion and Award, awarding plaintiff disability benefits. On 7 February 2005, the Full Commission affirmed the

Deputy Commission's Opinion and Award, with some modifications, and awarded plaintiff: temporary partial disability from 11 December 2001 through 31 December 2001; temporary partial disability at a rate of $117.22 per week from 8 January 2002 through 31 December 2002 (a lump sum of $6,095.44); temporary partial disability at a rate of $3.31 per week for the period of 1 January 2003 through 18 February 2003 (a lump sum of $23.17); total disability compensation at a rate of $360.47 per week from 5 January 2002 though 7 January 2002 and 19 February 2003 through the present and continuing until further order of the Commission; all medical expenses as a result of plaintiff's 11 December 2001 injury by accident; and attorney's fees. From this Opinion and Award, defendant appeals.

On appeal, defendant argues the Commission erred by: (I) concluding plaintiff has been totally disabled since 19 February 2003 and continuing; (II) concluding plaintiff was temporarily and partially disabled between 1 January 2003 and 18 February 2003; (III) discounting Dr. Davis' testimony; (IV) concluding plaintiff was entitled to ongoing compensation for his ACL tear.

This Court's review of a workers' compensation appeal is limited to:

> the questions of law (1) whether there was competent evidence before the Commission to support its findings of fact and (2) whether such findings justify the legal conclusions and decision of the Commission. . . . This Court may, however, remand a case to the Commission for further findings of fact, where [the Court] determine[s] that the findings are insufficient to permit a full and fair adjudication of all matters in controversy.

Smith v. American & Efird Mills, 51 N.C. App. 480, 486, 277 S.E.2d 83, 87 (1981); *see also* N.C. Gen. Stat. §97-86 (2005). In addition, "[t]he Industrial Commission possesses the powers of a court[,]" and in exercising those powers, exercises discretion. *Porter v. Fieldcrest Cannon*,

Inc., 133 N.C. App. 23, 26, 514 S.E.2d 517, 520 (1999). "An abuse of discretion results only where a decision is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Bryson v. Phil Cline Trucking*, 150 N.C. App. 653, 656, 564 S.E.2d 585, 587 (2002) (citations omitted) (internal quotation marks omitted).

I

Defendant first argues the Commission erred in determining plaintiff was totally disabled since 19 February 2003 and continuing to the present time. We disagree.

"Disability" under the Workers' Compensation Act 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). Plaintiff has the burden of proving disability and can 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.

Russell v. Lowes Prod. Distr., 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993).

In the instant case, the Commission made the following findings of fact:

> 18. On February 18, 2003, plaintiff was terminated by [defendant], with the stated reason being excessive absences. [Defendant] had an attendance policy under which it could terminate any employee who missed more than ninety-six (96) hours in a given year. Plaintiff's attendance log indicates that he missed the following dates after "calling in sick"; May 25, 2002; May 26, 2002; September 30, 2002; October 1, 2002; November 11, 2002; February 10, 2003; February 12, 2003; February 13, 2003; and February 18, 2003. These dates account for the majority

> of the ninety-six (96) hours plaintiff could miss before [defendant] could terminate his employment.
>
> 19. The credible evidence of record supports the finding that many of plaintiff's absences that lead (sic.) to his termination were directly related to his admittedly compensable injury by accident. Accordingly, although [defendant's] policy was a general one, defendant failed to prove that plaintiff's termination was for misconduct or fault for which a non-disabled employee would also have been terminated. Therefore, plaintiff's termination did not constitute a constructive refusal of suitable employment.

Plaintiff has had medical limitations that prevented him from performing work since 19 February 2003. A functional capacity evaluation (FCE) confirmed plaintiff had permanent restrictions from his knee injury, but that he was capable of working within those restrictions. Dr. Barron testified that these restrictions related back to at least 28 August 2002, well before the onset of plaintiff's total disability on 19 February 2003. The Commission gave greater weight to the testimony of Dr. Barron than to the testimony of the other doctors who treated plaintiff, including Dr. Jansen who failed to diagnose the partial ACL tear from plaintiff's injury, even though the ACL tear appeared on the intraoperative photographs from 28 August 2002. It was Dr. Barron who correctly diagnosed plaintiff with an ACL tear, referred him out for an FCE, and assigned permanent work restrictions based on the objective results of the FCE. Dr. Jansen, on the other hand, did not have the benefit of the FCE results, but later endorsed them as an appropriate measure of plaintiff's restrictions. This Court cannot reconsider the credibility and evidentiary weight that the Commission gave to Dr. Barron's opinions in light of the competent evidence that supports the Commission's findings. *See Jenkins v. Easco Aluminum Corp.*, 165 N.C. App. 86, 96, 598 S.E.2d 252, 258 (2004) ("[T]his Court does not have the authority to weigh the evidence and decide an issue on the basis of its weight."). Plaintiff has therefore shown he was "capable of some work" under the second prong of *Russell* as of 19 February

2003. *See*, *Hooker v. Stokes-Reynolds Hosp./N.C. Baptist Hosp., Inc.*, 161 N.C. App. 111, 117, 587 S.E.2d 440, 445 (2003); *Zimmerman v. Eagle Elec. Mfg.*, 147 N.C. App. 748, 752, 556 S.E.2d 678, 680 (2001). This competent evidence supports these findings, which in turn support the Commission's conclusion that plaintiff has been disabled since 19 February 2003. *Lanning v. Fieldcrest Cannon, Inc.*, 352 N.C. 98, 108, 530 S.E.2d 54, 61 (2000). The Commission further concluded:

> 4. Based upon the credible evidence of record, defendant failed to prove that plaintiff's termination was for misconduct or fault for which a non-disabled employee would also have been terminated. . . . Accordingly, plaintiff's termination did not constitute a constructive refusal of suitable employment[.]

Plaintiff complied with the job search requirements in his claim for unemployment compensation and thus, made a "reasonable effort" to become employed under the second prong of *Russell*. Plaintiff's efforts included applying for at least fifty-two other jobs beginning the week of 23 February 2003 through the Employment Security Commission, which requires "at least two in-person contacts with different employers on different days each week." *Hooker*, 161 N.C. App. at 117, 587 S.E.2d at 445 (citing North Carolina Employment Security Commission Regulation §10.25). Plaintiff's compliance with this obligation constituted "reasonable efforts" as required to prove disability under *Russell*. *See id.* Competent evidence supports the Commission's determination that plaintiff has been "disabled" since 19 February 2003. *See id.* Defendant suggests that a "sluggish economy," and not plaintiff's injury, is the real reason plaintiff cannot work. Construing the second prong under *Russell*, this Court has previously remarked in *Fletcher v. Dana Corporation* that "whether the nonavailability of jobs due to economic conditions is a factor to be considered or ignored in determining the after-injury wages an employee is 'able to earn,' is not immediately apparent from a literal reading of the statute

itself." *Fletcher v. Dana Corp.*, 119 N.C. App. 491, 496-497, 459 S.E.2d 31, 35 (1995). Therefore, we reject defendant's argument. This assignment of error is overruled.

II

Defendants next argue the Commission erred in finding and concluding plaintiff was temporarily and partially disabled between 1 January 2003 and 18 February 2003. We disagree.

N.C. Gen. Stat. §97-30 provides an allowance for "where the incapacity for work resulting from [an] injury is partial[.]" *Shaw v. United Parcel Serv.*, 116 N.C. App. 598, 600, 449 S.E.2d 50, 52 (1994), *aff'd*, 342 N.C. 189, 463 S.E.2d 78 (1995). "The compensation is to be computed upon the basis of the difference in the average weekly earnings before the injury and the average weekly wages he is able to earn thereafter." *Gupton v. Builders Transp.*, 320 N.C. 38, 42-43, 357 S.E.2d 674, 678 (1987).

Defendant complains the Commission should not have awarded a total of $23.17 in temporary partial disability between 1 January 2003 and 18 February 2003.**[Note 1]** Defendants assert plaintiff was capable of working "at full duty and without restriction" during this period. However, the standard of review allows the Commission to give greater weight to Dr. Barron's opinion such that plaintiff had permanent work restrictions starting in August 2002, as demonstrated by the FCE. Plaintiff's temporary partial disability resulted from the work restrictions caused by his compensable knee injury. He is entitled to $23.17 in temporary partial disability between 1 January 2003 and 18 February 2003. This assignment of error is overruled.

III

Defendant next argues the Commission erred by discounting the testimony of Dr. Davis. Specifically defendant argues the opinion testimony based on conversations between Dr. Davis and defendant's representatives should not have been stricken, contending there was no

confidential physician-patient relationship between Dr. Davis and plaintiff, and further contending there was no *ex parte* communication. We disagree.

Our standard of review is whether the Commission abused its discretion. *Adams v. AVX Corp.*, 349 N.C. 676, 509 S.E.2d 411 (1998). "In reviewing th[ese] issue[s] for an abuse of the Commission's discretion, we note that this Court does not have the right to weigh the evidence and decide the issue on the basis of its weight. . . . Rather, we can only determine whether the record contains sufficient evidence to support the Commission's findings." *Lakey v. U.S. Airways, Inc.*, 155 N.C. App. 169, 175, 573 S.E.2d 703, 707-708 (2002) (internal citations omitted). Consequently, on appeal, "so long as there is any competent evidence to support the facts found by the Commission, they are binding on appeal[.]" *Adams*, 349 N.C. at 681, 509 S.E.2d at 414.

The Commission made the following finding of fact:

> 27. Ms. Becky Stevens is [defendant's] employment supervisor and human resources manager. Ms. Stevens is not a rehabilitation nurse case manager. The credible evidence of record supports a finding that Ms. Stevens attended many of plaintiff's appointments with Dr. Davis, including being present for actual physical examinations. Ms. Stevens was present in this manner without having obtained plaintiff's consent. Additionally, Ms. Stevens discussed plaintiff's return to work with Dr. Davis outside of plaintiff's presence. These communications by Ms. Stevens with Dr. Davis were non-consensual *ex parte* communications. Given these factors, Dr. Davis' testimony should be stricken from the record.

The Commission concluded:

> 1. Ms. Steven's non-consensual *ex parte* communications with Dr. [Davis] regarding plaintiff's injury and return to work warrants the striking of Dr. Davis' deposition testimony from the record. *Salaam v. N.C. Dept. Of Transportation*, 122 N.C. App. 83, 468 S.E.2d 536, *disc. review improvidently allowed*, 345 N.C. 494, 450 S.E.2d 51 (1997).

The competent evidence of record shows that Becky Stevens testified she attended plaintiff's examinations with Dr. Davis without plaintiff's consent. The record evidence further shows that Dawn Steadman, the claims adjuster for defendant-carrier, also testified she spoke to Dr. Davis without plaintiff's consent.

Some of Ms. Steadman's testimony is as follows:

> Q. And the-the interrogatories say that "Dawn Steadman spoke with Dr. Davis' office in August, 2002 regarding whether plaintiff was restricted from driving . . . ," [A]re you aware of that?
>
> A. Yes
>
> Q. Okay. You didn't have my consent to do that, nor [plaintiff's] consent, did you?
>
> A. That's correct.
>
> Q. Okay. But you called the doctor's office up and talked to them about a substantive matter?
>
> A. I did not speak to Dr. Davis. I spoke with a member of his staff.
>
> Q. Okay. But you talked to Dr. Davis' office about a substantive matter in this claim?
>
> [Defendant' s counsel]: Objection. Asked and answered.
>
> THE COURT: I believe she has answered that question.

Dr. Davis also testified about communicating with defendant's representatives outside of plaintiff's presence, which conversations resulted in Dr. Davis ordering plaintiff to work "light duty," which in turn allowed defendant to require plaintiff to appear at least two hours a day, including the day of his knee surgery, so that defendant would not have to report a "lost-time" accident. Competent evidence therefore supports the Commission's findings that defendant's representatives had *ex parte* communication with Dr. Davis' office regarding plaintiff's medical

limitations and return-to-work issues. "While a conversation outside the plaintiff's presence, standing alone, does not require disregarding that physician's opinion, the weight given to his testimony is for the Industrial Commission to decide." *Burchette v. East Coast Millwork Distrib.*, 149 N.C. App. 802, 810, 562 S.E.2d 459, 464 (2002). Admission of testimony given after this type of *ex parte* contact is reversible error in spite of any opportunities the plaintiff's attorney had to cure the resulting prejudice. *Evans v. Young-Hinkle Corp.*, 123 N.C. App. 693, 696, 474 S.E.2d 152, 154 (1996). This is because the "gravaman of the issue [of allowing *ex parte* contacts] is not whether evidence of plaintiff's medical condition is subject to discovery, but by what methods the evidence may be discovered[.]" *Crist v. Moffatt*, 326 N.C. 326, 336, 389 S.E.2d 41, 47 (1990). Such contact can place a doctor in an "untenable position", one which supports the possibility of undue influence upon the doctor. Therefore, "[a]s long as there [is] any competent evidence to support the possibility of undue influence upon [the treating physician], the Commission's findings on this basis are conclusive on appeal." *Jenkins v. Public Serv. Co.*, 134 N.C. App. 405, 417, 518 S.E.2d 6, 13 (1999) (J. Wynn, dissenting), *rev'd based on dissent*, 351 N.C. 341, 524 S.E.2d 805 (2000). The Commission's exclusion of the testimony of Dr. Davis was supported by the evidence.

Defendant argues there was never any confidential physician-patient relationship between Dr. Davis and plaintiff because plaintiff never asserted the physician-patient privilege. Defendant further argues that because plaintiff could have done so but failed to object to the presence of a third party during his medical treatment, he in essence waived any physician-patient privilege. However, our Supreme Court has observed that "[q]uestions relating to the [physician-patient] privilege have been discussed and decided often by this Court. . . . In all of our decisions except *Yow v. Pittman* [241 N.C. 69, 84 S.E.2d 297 (1954)], the questions presented related to rulings

made during the progress of the trial by the presiding superior court judge." *Lockwood v. McCaskill*, 261 N.C. 754, 757, 136 S.E.2d 67, 69 (1964). Thus, it appears a "patient may expressly or impliedly waive his physician-patient privilege during discovery and at trial," *Adams v. Lovette*, 105 N.C. App. 23, 28-29, 411 S.E.2d 620, 624 (1992), but not before litigation commences, as defendant is trying to assert here. "The statutory physician-patient privilege is [] distinct from the rule prohibiting unauthorized *ex parte* contacts in several respects." *Crist*, 326 N.C. at 332-34, 389 S.E.2d at 45-46. In express language, the North Carolina Workers' Compensation Act acknowledges the difference and interdependence between the two prohibitions. *See* N.C. Gen. Stat. §97-25.6 ("Notwithstanding the provisions of G.S. 8-53, any law relating to the privacy of medical records or information, and the prohibition against *ex parte* communications at common law . . .the Commission shall protect the employee's right to a confidential physician-patient relationship while facilitating the release of information necessary to the administration of the employee's claim."). Defendant admitted they did not obtain plaintiff's consent. Thus, defendant has violated the physician-patient privilege of N.C. Gen. Stat. §8-53. Notwithstanding defendant's inaccurate assertions that plaintiff was required to object to defendant's presence at medical visits, because most of the communications at issue here between defendant and Dr. Davis' were *ex parte*, plaintiff was unable to make a contemporaneous objection since he did not know the communications had taken place until after they had occurred. *See, e.g., Terry v. PPG Indus., Inc.*, 156 N.C. App. 512, 515, 577 S.E.2d 326, 330 (2003) (*ex parte* communications between employer's manager of safety and plant protection and employee's treating physician were excluded from testimony); *Porter*, 133 N.C. App. at 30, 514 S.E.2d at 523 (holding Commission must exclude portions of deposition testimony tainted by *ex parte* communication between treating physician and defense counsel);

Salaam v. North Carolina Dept. of Transp., 122 N.C. App. 83, 87, 468 S.E.2d 536, 538 (1996) (Commission erred by admitting the treating physician's deposition testimony in light of physician's non-consensual *ex parte* contact with defendant).

Because competent evidence supports the Commission's findings of fact that defendant's non-consensual, *ex parte* communications required Dr. Davis's testimony to be stricken from the record, the Commission did not err in striking the testimony. *See Mayfield v. Parker Hannifin*, ___ N.C. App. ___, 621 S.E.2d 243 (2005) (upholding the exclusion of non-consensual, *ex parte* communication between employer and employee's treating physicians as to employee's ability to work). This assignment of error is overruled.

IV

Defendant argues the Commission erred in finding and concluding plaintiff is entitled to ongoing medical compensation for his Anterior Cruciate Ligament (ACL) tear. We disagree.

Defendant challenges the Commission's finding that plaintiff's "partially torn ACL in his left knee was the direct and natural result of and causally related to his December 11, 2001, injury by accident." "The determination of the proximate cause of claimant's injuries is a question for the finder of fact." *Rorie v. Holly Farms Poultry Co.*, 306 N.C. 706, 712, 295 S.E.2d 458, 462 (1982). If "[t]here is competent evidence in the record to support these findings and [this Court] is bound by them." *Fuller v. Motel 6*, 136 N.C. App. 727, 734, 526 S.E.2d 480, 484 (2000).

Defendant first asserts that plaintiff failed to prove a causal link between his employment and ACL tear because Dr. Barron did not "testify" about this link. However, defendant accepted plaintiff's "left knee" injury as being compensable. *See* N.C. Gen. Stat. §§97-18(b), 97-82(b). In an action for additional compensation for medical treatment, the medical treatment sought must

be "'directly related to the original compensable injury' . . . . If additional medical treatment is required, there arises a rebuttable presumption that the treatment is directly related to the original compensable injury and the employer has the burden of producing evidence showing the treatment is not directly related to the compensable injury." *Reinninger v. Prestige Fabricators, Inc.*, 136 N.C. App. 255, 259, 523 S.E.2d 720, 723 (1999). This is the *Parsons* presumption. *Parsons v. The Pantry, Inc.*, 126 N.C. App. 540, 541-42, 485 S.E.2d 867, 869 (1997).

With respect to defendant's burden of proof under the *Parsons* presumption in the present case, the Commission gave more weight to Dr. Barron's testimony than to the remaining medical evidence. Consequently, in order to prevail defendant must show there is no competent evidence from Dr. Barron that links plaintiff's ACL tear to his compensable left knee injury.

On 19 August 2003, Dr. Barron examined plaintiff specifically regarding the work-related injury to his left knee. After ordering a functional capacity evaluation that indicated significant work restrictions, Dr. Barron concluded "[b]ased upon [plaintiff's] history of injury, surgical treatment, FCE and today's exam, it is my opinion that [plaintiff] has a 15% permanent partial disability of his knee. This does take into account the fact that he has a partial ACL tear." Dr. Barron's written opinion is clear: plaintiff's ACL tear was a part of his compensable injury and contributed to the disability related to that injury. *See Childress v. Fluor Daniel, Inc.*, 162 N.C. App. 524, 526, 590 S.E.2d 893, 896 (2004) (plaintiff entitled to every reasonable inference from evidence). Dr. Barron testified from his physical examination of plaintiff that his "knee had some laxity but an endpoint which would suggest that the ACL was not completely torn" and that there had been "some type of injury to the ACL . . . not completely disrupting the ACL but partially destructing the ACL." Dr. Barron's deposition testimony confirmed that neither the first

nor second surgeries involved repairing plaintiff's ACL. In fact, Dr. Barron testified plaintiff's compensable knee injury was the most likely cause of the ACL tear:

> My impression was that he, from the record and the history exam, was that he had most likely an acute patella dislocation that required open surgery followed by arthroscopic surgery, that he had the chondromalacia findings that were noted and that he had a partial ACL tear.

From this medical testimony, the Commission found:

> 25. Based upon the credible evidence of record, plaintiff's partially torn ACL in his left was the direct and natural result of and causally related to his December 11, 2001 injury by accident. This injury was not addressed in his prior two surgical procedures. As of the date of the hearing, plaintiff continued to experience problems with his knee, particularly with going up and down steps and with sitting for prolonged periods. Given these factors, Dr. Barron's opinions regarding plaintiff's partially torn ACL are given more weight than the opinions of Dr. Davis and Dr. Jansen.

Competent evidence supports the Commission's findings. *See Adams*, 349 N.C. at 676, 509 S.E.2d at 411.

Finally, defendant asserts that Dr. Davis was "in a much better position to testify concerning [plaintiff's] knee." However, the findings of the Commission are conclusive on appeal when such competent evidence exists, even if there is plenary evidence for such contrary findings. *Jarrett v. McCreary Modern, Inc.*, 167 N.C. App. 234, 238, 605 S.E.2d 197, 200 (2004). The Commission's "finding is supported [by competent evidence], and . . . we should affirm the opinion and award." *Alexander v. Wal-Mart Stores, Inc.*, 166 N.C. App. 563, 573-74, 603 S.E.2d 552, 558 (J. Hudson, dissenting), *rev'd based on dissent*, 359 N.C. 403, 610 S.E.2d 374 (2005). This assignment of error is overruled.

Affirmed.

Chief Judge MARTIN and Judge CALABRIA concur.

Report per Rule 30(e).

NOTE

1. $3.17 per week for approximately seven weeks temporary partial disability equals $23.17.