Bunn - Vacated and remanded
Mavretic
Bolch

NO. COA99-557

NORTH CAROLINA COURT OF APPEALS

Filed: 6 June 2000

PEGGY S. FRANKLIN,
Employee

v.

BROYHILL FURNITURE INDUSTRIES,
(SELF-INSURED),
Employer

and

TRIGON ADMINISTRATORS
(ADMINISTERING AGENT),
Carrier

North Carolina
Industrial Commission
I.C. File No: 213523

Appeal by employee from revised opinion and award entered 8 December 1998 by the North Carolina Industrial Commission. Heard in the Court of Appeals 27 March 2000.

LeCroy Ayers & Willcox, by M. Alan LeCroy, for employee-appellant.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Erica B. Lewis and Lynette K. Neel, for employer-appellee.

TIMMONS-GOODSON, Judge.

Peggy S. Franklin ("employee") worked for Broyhill Furniture Industries ("employer") as a rough end worker from September 1989 until 19 February 1992. While working for employer on 15 January 1992, employee tripped and fell, landing on both knees. On 28 February 1992, the parties executed a Form 21 Agreement ("Form 21") for disability compensation, which stipulated that employee suffered an accidental injury to her left knee which arose out of and in the course of her employment. Employer paid temporary total

disability to employee pursuant to the Form 21.

Dr. Stephen G. Fleming treated employee for left knee pain. On 26 March 1992, Dr. Fleming excised a loose body and fibrotic pad from employee's left knee and ordered physical therapy. Following the operation, employee received treatment from Doctors H. Grey Winfield, III, J. Alfred Moretz, III, Walton Curl, and Andrea Stutesman. Dr. Curl rated employee's permanent impairment at 20% loss in each knee.

Employee submitted a claim for permanent total disability, which employer denied. Following a hearing, Deputy Commissioner Lorrie L. Dollar submitted an opinion and award on 18 November 1994, denying employee's claim for permanent total disability benefits. Employee appealed to the North Carolina Industrial Commission ("the Commission"). The Commission entered an opinion and award on 17 May 1995 granting employee retroactive and ongoing temporary total disability benefits, but denying employee's claim for permanent total disability benefits.

Employee appealed to the North Carolina Court of Appeals. On 16 July 1996, this Court issued its opinion reversing the decision of the Commission and remanding the case for a decision consistent with its opinion. On 8 December 1998, the Commission issued a revised opinion and award.

Based on the evidence presented at the hearing, the Commission made the following pertinent findings of fact in its revised opinion and award:

> 14. Dr. Fleming, Dr. Stutesman, and Dr. Curl have opined that [employee] is capable of

performing some range of sedentary work with restrictions, which include a four (4) hour per day restriction, recommended self-pacing, no bending, no stooping, no climbing, and no kneeling. . . .

15. Dave Toney, a vocational counselor retained by [employer], attempted to identify work available within [employee's] restrictions. These jobs included two telemarketing jobs, a movie cinema, Domino's Pizza, Pizza Hut, and McDonald's. [Employee] was offered a job at Domino's, which, according to worked up job description was to be four hours. However, the record is devoid of any convincing evidence as to its actual hours/terms. [Employee] failed to follow up on the interviews for the other jobs.

16. [Employee] was terminated from Domino's after her first day on February 3, 1994. The undersigned, however, are unable to determine from the record at hand the specific reason for her termination. The only statement present was the hearsay, second hand account through Dave Toney, which cannot be accepted as either credible or convincing by the undersigned. Neither [employee] nor the potential employers at Domino's testified as to what transpired.

17. Randy Adams, a vocational counselor hired by [employee], testified that [employee] would be disadvantaged in competing against non-disabled applicants for work. However, there is no credible or convincing medical evidence in the record to establish that [employee] is permanently and totally disabled. As Mr. Adams' opinion is based upon the presumption that [employee] is permanently and totally disabled, his opinions are not accepted as credible or convincing.

18. Dr. Curl has opined that [employee] had reached maximum medical improvement as of January 4, 1993 and that she retains a 20% permanent impairment to her left leg. Dr. Curl's rating to [employee's] right leg is not accepted or credible or convincing for reasons stated herein above.

Based upon its findings of fact, the Commission made the

following relevant conclusions of law:

> 1. As a result of the compensable injury, [employee] retains a 20% permanent partial disability to her left leg, for which she is entitled to 40 weeks of compensation should she choose to elect to receive this benefit. N.C.G.S. § 97-31(15).
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> . . . .
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> 4. This case contains an approved Form 21 agreement, and therefore the presumption of [employee's] continuing total disability arises and continues unless [employer] meets its burden of successfully rebutting the presumption. Kisiah v. W.R. Kisiah Plumbing, Inc., 124 N.C. App. 72, 476 S.E.2d 434 (1996), disc rev. den'd, 345 N.C. 343 (1997).
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> 5. In the case at hand, [employer] has successfully rebutted the presumption of total disability to the extent that the competent, credible, and convincing evidence of record is that [employee] is not permanently and totally disabled and retains some earning capacity. N.C.G.S. § 97-29. However, the presumption [sic] continued partial disability to the extent that [employee's] wage-earning capacity has been reduced has not [sic] successfully rebutted by [employer] in that it has not been able to successfully show by the competent, credible, or convincing evidence that a job, even at reduced earnings actually exists within [employee's] permanent restrictions and that [employee] is capable of obtaining such a job. N.C.G.S. § 97-30, Kisiah, Id. However, it must be noted that [employee], for the period of time noted above, impeded [employer's] ability to rebut the presumption in that all of the competent and convincing medical evidence establishes that [employee] has exaggerated complaints, has refused treatment, and has refused to cooperate with functional evaluations even after being ordered to comply on two occasions by then Chief Deputy Commissioner Sellers.

Based upon its conclusions of law, the Commission made the following award:

> 1. [Employer] shall pay [employee], at her election, either for her 20% permanent partial disability rating to her left leg or for her partial disability pursuant to N.C.G.S. § 97-30, whichever is the more favorable remedy. . . .

From the revised opinion and award of the Commission, employee appeals.

By her only assignment of error, employee argues that the Commission erred in determining that she is not entitled to an award of permanent and total disability benefits because the Commission's findings of fact and conclusions of law are in conflict. We agree.

Appellate review is limited to a determination of whether the findings of fact are supported by competent evidence, and whether the conclusions of law are supported by the findings. *Henry v. Leather Co.*, 231 N.C. 477, 479, 57 S.E.2d 760, 762 (1950). The findings of fact of the Commission are binding on appeal if they are supported by competent evidence, even though evidence exists to support a contrary finding. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 684 (1982). However, the Commission's conclusions of law are reviewable on appeal. *Id.*

As a general rule, the employee bears the initial burden of establishing the existence and extent of her disability. *Radica v. Carolina Mills*, 113 N.C. App. 440, 447, 439 S.E.2d 185, 190 (1994). Disability is defined as "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) (1999).

However, the employee is relieved of her burden in a case containing a Form 21, which represents "an admission of liability by the employer for disability compensation pursuant to the Workers' Compensation Act." *Kisiah v. W.R. Kisiah Plumbing*, 124 N.C. App. 72, 77, 476 S.E.2d 434, 436 (1996), *disc. review denied*, 345 N.C. 343, 483 S.E.2d 169 (1997). Once a Form 21 is approved by the Commission, a presumption of total disability arises and extends until the employer successfully rebuts the presumption. *Franklin v. Broyhill Furniture Industries*, 123 N.C. App. 200, 205, 472 S.E.2d 382, 386, *cert. denied*, 344 N.C. 629, 477 S.E.2d 39 (1996). To meet its burden, the employer must "come forward with evidence to show not only that suitable jobs are available, but also that the [employee] is capable of getting one, taking into account both physical and vocational limitations." *Kennedy v. Duke Univ. Med. Center*, 101 N.C. App. 24, 33, 398 S.E.2d 677, 682 (1990).

In the present case, the parties signed a Form 21, giving rise to the presumption that employee was totally disabled. The Commission concluded that employer "has not been able to successfully show by the competent, credible, or convincing evidence that a job, even at reduced earnings actually exists within [employee's] permanent restrictions and that [employee] is capable of obtaining such a job." The Commission further concluded that "[employer] has successfully rebutted the presumption of total disability . . . ."

We hold that the two conclusions of the Commission are

contradictory and cannot be reconciled. *See Neal v. Leslie Fay, Inc.*, 78 N.C. App. 117, 336 S.E.2d 628 (1985). In concluding that employer failed to show that a suitable job was available and that employee was capable of obtaining one, the Commission established that employer did not meet its burden in order to rebut the presumption of continuing total disability. Yet, the Commission concluded that employer had succeeded in rebutting the presumption. As the conclusions are inconsistent, the opinion and award of the Commission must be vacated and the case is remanded for appropriate findings of fact and conclusions of law made in accordance with this opinion.

For the reasons stated herein, we find that the revised opinion and award of the Commission must be vacated and remanded.

Vacated and remanded.

Chief Judge EAGLES and Judge HUNTER concur.

Report per Rule 30(e).