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NO. COA11-1332
NORTH CAROLINA COURT OF APPEALS

Filed: 5 June 2012

CHARLOTTE HARRELL,
Employee,
Plaintiff,

v.

North Carolina
Industrial Commission
I.C. No. 298817

EDGECOMBE COUNTY PUBLIC SCHOOLS/
SELF-INSURED,
Employer,

CORVEL CORPORATION,
Third-party administrator,
Defendant.

Appeal by plaintiff from opinion and award entered 25 July 2011 by the North Carolina Industrial Commission. Heard in the Court of Appeals 20 March 2012.

Keel O'Malley Tunstall, PLLC, by Joseph P. Tunstall, III, for plaintiff appellant.

Attorney General Roy Cooper, by Assistant Attorney General Patrick S. Wooten, for defendant appellees.

McCULLOUGH, Judge.

Charlotte Harrell ("plaintiff") appeals from the Industrial Commission's ("Commission") opinion and award finding that she failed to prove a continuing disability and in turn denying her

claim for additional disability compensation. Furthermore, the Commission lowered plaintiff's average weekly wage and resulting compensation rate. For the following reasons, we affirm the decision of the Commission.

I. Background

Plaintiff began working as a bus driver for Edgecombe County Public Schools (collectively "defendants" with Corvel Corporation) in 1985 and continued in the same position for twenty years, excluding two years in which she maintained a different job. In 1994, plaintiff began working in the school cafeteria as a cashier/assistant, while maintaining her position as a bus driver. Plaintiff would work approximately three hours a day as a bus driver and four hours a day in the cafeteria, constituting a full-time schedule. At the time of her hearing she was 57 years old, having been born on 12 June 1954. She had graduated from high school, and had experience as a Certified Nurse's Assistant ("CNA") and as an employee at Kentucky Fried Chicken.

On 24 September 2002, plaintiff picked up a box of ketchup while setting up the cafeteria when she immediately felt a catch in her back with associated lower back pain. She initially went to Heritage Hospital, but ultimately saw Dr. Robert Martin at

Carolina Regional Orthopedic, who restricted her to light duty with no lifting of more than fifteen pounds and no bus driving for about three weeks. She was also prescribed strong pain medications, but told not to take them during work. Plaintiff subsequently filed a Form 18 Notice of Accident to Employer and Claim of Employee, Representative, or Dependent on 8 October 2002. Defendants admitted plaintiff's injury pursuant to a Form 60 Employer's Admission of Employee's Right to Compensation Pursuant to N.C. Gen. Stat. § 97-18(b), on 1 November 2002. Claims Representative Bryant Ramirez filed the Form 60 in which plaintiff was allotted an average weekly wage of $320.81, with a corresponding compensation rate of $213.88, pursuant to the third prong of N.C. Gen. Stat. § 97-2(5). Plaintiff was to be paid her temporary partial disability ("TPD") for the period that she could not drive a bus, up to three hundred weeks from the date of injury.

In February 2003, plaintiff returned to full duty with no restrictions. However, in June 2004, she complained of continued back pain and Dr. Martin referred her to his coworker, Dr. David Miller, a back specialist. She received an MRI on 27 July 2004, which indicated a herniated disc at the L4-5 level. Dr. Miller tried a series of injections on plaintiff in the beginning of

2005, with little success. On 27 January 2005, Dr. Miller permanently restricted plaintiff from working as a school bus driver due to the vibrations. He prescribed more pain medications and they considered back surgery.

On 26 September 2005, plaintiff received a total disc replacement and was removed from work for a period of time. Subsequently, on 25 January 2006, Dr. Miller released plaintiff to return to work at the school as a cashier, as well as in her secondary position as a CNA. Plaintiff received temporary total disability while out of work until 22 February 2006, when she returned to her cashier position, but the bus driving restriction remained. Plaintiff continued working until 8 May 2006, when she returned to Dr. Miller, complaining of continued pain and only being capable of working four hours a day. Dr. Miller again restricted her lifting with no repetitive bending, impact, or vibrational activities. On 17 July 2006, Dr. Miller indicated that plaintiff had reached her maximum medical improvement and had a permanent partial disability ("PPD") of fifteen percent, with the same light duty restrictions. She received forty-five weeks of compensation for her fifteen percent PPD. Plaintiff returned to Dr. Miller in March 2007, at

which point he again removed her from work, but he allowed her to return to work in May of that year.

Plaintiff continued seeing Dr. Miller until April 2009, at which point Dr. Miller referred her to Dr. Divya Patel, the pain management specialist within his practice. Since April 2009, Dr. Patel has treated plaintiff almost every month. He has prescribed her numerous pain medications, as well as a cane to prevent falling and to reduce pain. On 14 March 2006, defendants filed a Form 62 Reinstatement or Modification of Compensation indicating that plaintiff had returned to less than full wages. Ultimately, on 2 September 2009, plaintiff filed a Form 33 Request that Claim be Assigned for Hearing, alleging that her work was unstable "make-work" and that she continued to be disabled. Defendants responded with a Form 33R, denying plaintiff's claims and alleging that plaintiff had received TPD for the entire three hundred weeks, as well as returning to a position adhering to all her restrictions.

On 24 May 2010, Deputy Commissioner John B. Deluca heard plaintiff's case in Nashville, North Carolina. Plaintiff testified and defendants presented Jane Reynolds and Bryant Ramirez on their behalf. Jane Reynolds is the cafeteria manager and plaintiff's supervisor, who testified that plaintiff's

restrictions had not affected her job. Mr. Ramirez testified to the preparation of the Form 60 in which he determined plaintiff's average weekly wage using a Form 22 and based it on her ten-month work schedule. He admitted at the hearing that her wage was higher than it should have been due to a change in the law that required her wage computation to be based on a 52-week schedule. The parties also presented the depositions of Drs. Patel and Miller. On 19 November 2010, Deputy Commissioner Deluca filed an opinion and award finding that plaintiff failed to meet her burden of proving a continuing disability. At the same time, he lowered plaintiff's average weekly wage based on the discrepancy mentioned above. Plaintiff filed a notice of appeal to the Full Commission on 29 November 2010 and the Full Commission subsequently affirmed the Deputy Commissioner's decision in its own opinion and award dated 25 July 2011. Plaintiff filed her notice of appeal to our Court on 9 August 2011.

II. Analysis

A. Disability

Plaintiff raises a two-part argument on appeal with her first issue being whether or not the Commission used the incorrect legal standard in finding plaintiff to not be totally

disabled. Plaintiff contends that she presented sufficient evidence to prove that she is disabled and enough evidence to shift the burden to defendants to show that her current employment is not unacceptable "make-work." We disagree.

"Appellate review of an award from the Industrial Commission is generally limited to two issues: (1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are justified by the findings of fact." *Clark v. Wal-Mart*, 360 N.C. 41, 43, 619 S.E.2d 491, 492 (2005). Moreover, findings of fact "not supported by competent evidence are not conclusive and will be set aside on appeal." *Penland v. Coal Co.*, 246 N.C. 26, 30, 97 S.E.2d 432, 436 (1957). Ultimately, the conclusions of law are reviewed *de novo*. *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004).

Plaintiff contends that there is a two-step legal analysis used to determine disability and an employee's ability to return to work where the employer has admitted that the employee's injury was causally related to the employment. First, the plaintiff must prove that he or she suffers from a disability. Secondly, the defendant must prove that the job returned to by the plaintiff is suitable.

An injury is compensable when it is "by accident arising out of and in the course of the employment," N.C. Gen. Stat. § 97-2(6) (2011), and furthermore an injury to the back is compensable when it is "the direct result of a specific traumatic incident of the work assigned[.]" *Id*. Plaintiff cites to *Parsons v. Pantry, Inc.*, 126 N.C. App. 540, 485 S.E.2d 867 (1997), for her contention that once the Commission has found a claim to be compensable, a rebuttable presumption arises that the treatment is directly related to the original compensable injury. At this point, the burden would shift to defendants to prove the medical treatment is not directly related to the compensable injury. However, here defendants have admitted that plaintiff's back injury was compensable and, in addition, Dr. Miller testified that his treatment of plaintiff's injury was causally related to her on-the-job injury. Thus, we must move to the issue of disability.

A disability as defined under the Workers' Compensation Act is an "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). An employee may prove a disability by:

> (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, *Peoples*, 316 N.C. at 443, 342 S.E.2d at 809; (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, *id.* at 444, 442 S.E.2d at 809; 1C Arthur Larson, *The Law of Workmen's Compensation* § 57.61(d) (1992); (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, *Peoples*, 316 N.C. at 444, 342 S.E.2d at 809; 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 Product Distribution, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993). In the case at hand, plaintiff contends that she has proven her disability and has thus shifted the burden of proof to defendant. She notes that the Commission's Finding of Fact 7 explains how she was restricted from returning to work as a bus driver. She has been allowed to return to work in the cafeteria and as a CNA, but can no longer be a bus driver and as a result does not receive those wages. Consequently, plaintiff contends that she has *de facto* and *de jure* proven a disability under the fourth prong of the *Russell* test, as provided above, in that she has obtained other work at a wage less than that earned prior to her injury.

Defendants, on the other hand, argue that plaintiff misses a crucial step in her analysis in that she has only proven a partial disability under N.C. Gen. Stat. § 97-30 (2011), and not a total disability under N.C. Gen. Stat. § 97-29 (2011). Furthermore, she has received her maximum benefits of three hundred weeks of compensation pursuant to N.C. Gen. Stat. § 97-30.[1] Plaintiff retains the burden of proving that she is disabled and the extent of her alleged disability. *Johnson v. Southern Tire Sales & Serv.*, 358 N.C. 701, 706, 599 S.E.2d 508, 512 (2004). Even further, the burden remains that of the plaintiff where the defendants admit compensability of an injury and provide disability benefits. *Clark*, 360 N.C. at 44, 619 S.E.2d at 493. There is no presumption of a continuing disability in the case at hand even though the case was accepted on a Form 60. *See Sims v. Charmes/Arby's Roast Beef*, 142 N.C. App. 154, 159-60, 542 S.E.2d 277, 281-82 (2001). As a result, plaintiff's reliance on *Parsons* is misplaced, as the issue of medical treatment was never a contested issue before the Commission, and the case does not raise a presumption of disability.

[1] We recognize that the term of benefits in N.C. Gen. Stat. 97-30 has changed from 300 weeks to 500 weeks, but plaintiff's case was initiated prior to this legislative change.

The mere fact that plaintiff suffered a work-related injury with some resulting physical impairment does not entitle her to receive permanent disability benefits because there must be an accompanying impairment to her earning capacity. *See Brown v. S & N Communications, Inc.*, 124 N.C. App. 320, 329, 477 S.E.2d 197, 202 (1996). Plaintiff must prove that "'(1) [she] was incapable of earning pre-injury wages in the same employment, (2) she was incapable of earning pre-injury wages in any other employment, and (3) the incapacity to earn pre-injury wages in either the same or other employment was caused by [her] injury.'" *Parker v. Wal-Mart Stores, Inc.*, 156 N.C. App. 209, 212, 576 S.E.2d 112, 114 (2003) (quoting *Coppley v. PPG Indus., Inc.*, 133 N.C. App. 631, 634, 516 S.E.2d 184, 186 (1999)). Defendants acknowledge that the Commission correctly found plaintiff to be disabled under the fourth prong of *Russell*. *See Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457. However,

> "[t]he burden is on the employee to show that [she] is unable to earn the same wages [she] had earned before the injury, either in the same employment or in other employment." We noted that the employee may meet this burden in one of four ways, one of which is "the production of evidence that [she] has obtained other employment at a wage less than that earned prior to the injury." *Id.* After the claimant meets this initial burden, the burden shifts to the employer to show that not only were suitable

> alternative jobs available to the plaintiff, but that the plaintiff was capable of obtaining one of these jobs. *Tyndall v. Walter Kidd[e] Co.*, 102 N.C. App. 726, 403 S.E.2d 548, *disc. review denied*, 329 N.C. 505, 407 S.E.2d 553 (1991).

Shaw v. United Parcel Service, 116 N.C. App. 598, 601, 449 S.E.2d 50, 52-53 (1994). Plaintiff did return to "'employment at a wage less than that earned prior to the injury,'" however, she failed to prove that she was incapable of making up the difference in wages in a different job. *Id.* (quoting *Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457). Defendants noted that she was allowed to return to her secondary position as a CNA, which could potentially make up any difference. Moreover, we must focus on plaintiff's earning capacity and not her physical impairment. *Segovia v. J.L. Powell & Co.*, 167 N.C. App. 354, 357, 608 S.E.2d 557, 559 (2004). She is not totally and permanently disabled, but merely partially disabled, so she could certainly find other suitable employment. Defendants cite to a similar case of *Renfro v. Richardson Sports Ltd. Partners*, 172 N.C. App. 176, 616 S.E.2d 317 (2005), where a professional football player was injured and not able to return to playing football, but was able to return to reduced wages as a real estate broker. Our Court held that the plaintiff was entitled to three hundred weeks of TPD under N.C. Gen. Stat. § 97-30, even

though he returned to diminished wages in an entirely different profession. *Id*. Thus, in the case at bar, plaintiff failed to prove that she suffered from a permanent disability. Additionally, she received her three hundred weeks of TPD and defendants proved that she could obtain other work.

B. "Make-work" Position

Plaintiff next argues that, because she has proven that she suffers from a disability, defendants have the burden to prove the suitability of plaintiff's job in returning her to pre-injury wages. *Dixon v. City of Durham*, 128 N.C. App. 501, 504-06, 495 S.E.2d 380, 382-84 (1998). Plaintiff contends that she did not return to her pre-injury wages due to her inability to work as a bus driver and, as a result, defendants have failed to show that she has the capability of earning her pre-injury wages. We disagree.

In reviewing the suitability of an employee's post-injury employment we must consider the similarity of wages in the pre-injury position to those of the post-injury position, along with any potential for advancement. *Id*.

> If an employee presents substantial evidence he or she is incapable of earning wages, the employer must then
>
> > "come forward with evidence to show not only that suitable jobs are available,

> but also that the plaintiff is capable of getting one, taking into account both physical and vocational limitations."

Barber v. Going West Transp., Inc., 134 N.C. App. 428, 435, 517 S.E.2d 914, 920 (1999) (quoting *Kennedy v. Duke Univ. Med. Center*, 101 N.C. App. 24, 33, 398 S.E.2d 677, 682 (1990)). Plaintiff argues that her doctors have put her on a number of restrictions, keeping her from being a bus driver, and defendants have failed to offer any increase in hours in the cafeteria or hourly wage to make up for the ones lost from not being a bus driver. Worth noting is that "the degree of pain experienced must be considered by the Commission in determining the extent of the employee's incapacity to work and earn wages." *Matthews v. Petroleum Tank Service, Inc.*, 108 N.C. App. 259, 265, 423 S.E.2d 532, 535 (1992). Furthermore, plaintiff contends that her ability to do some work and defendants' ability to modify a job enough to let her work does not accurately reflect her earning capacity. *See Peoples*, 316 N.C. 426, 342 S.E.2d 798; *Saums v. Raleigh Community Hospital*, 346 N.C. 760, 487 S.E.2d 746 (1997). Nonetheless, once a plaintiff has met its initial burden of proving disability, mere proof of a return to work is insufficient to rebut a presumption of continuing disability because the plaintiff's "*capacity to earn* is the benchmark test

of disability." *Kisiah v. W.R. Kisiah Plumbing*, 124 N.C. App. 72, 81, 476 S.E.2d 434, 439 (1996).

Defendants, alternatively, contend that plaintiff's return to her pre-existing position as a cafeteria worker is suitable and not "make-work." Defendants acknowledge that the burden does shift to them to prove that plaintiff's position is suitable after her showing of a disability. However, they contend that the Commission correctly determined that plaintiff's cashier position was suitable employment. The issue is not just whether "'suitable jobs are available, *but also that the plaintiff is capable of getting one*[.]'" *Burwell v. Winn-Dixie Raleigh*, 114 N.C. App. 69, 73, 441 S.E.2d 145, 149 (1994) (quoting *Kennedy v. Duke Univ. Medical Ctr.*, 101 N.C. App. 24, 33, 398 S.E.2d 677, 682 (1990)). A "suitable job" is "one that is available to the employee and that the employee is capable of performing considering, among other things, [her] physical limitations." *Johnson*, 358 N.C. at 708, 599 S.E.2d at 514.

As the Commission noted, plaintiff's cashier position fell within the restrictions applied by her doctors and her duties remained substantially the same from pre-injury to post-injury. *See Peoples*, 316 N.C. 426, 342 S.E.2d 798; *Saums*, 346 N.C. 760, 487 S.E.2d 746. Her position is one that is available in the

competitive job market and defendants employ other able-bodied cashiers and part-time workers. Cashier positions are fairly standard in the job market and do not require overly specific qualifications, which would limit plaintiff's ability to find other suitable employment. Furthermore, plaintiff's doctors opined that plaintiff could return to her secondary position as a CNA, which could make up for some of her loss in wages. Thus, the Commission did not err in finding that plaintiff's light-duty cashier position was suitable under N.C. Gen. Stat. § 97-32.1 (2011), and not "make-work."

III. Conclusion

The Commission did not err in finding that plaintiff was not totally disabled and had not returned to "make-work." Rather, the Commission correctly found that plaintiff was partially disabled and had already been awarded her suitable TPD benefits, as well as returned to suitable post-injury employment with the ability to find other reasonable employment. Consequently, we affirm the opinion and award of the Commission.

Affirmed.

Judge McGEE concurs.

Judge GEER concurs in the result only with a separate opinion.

Report per Rule 30(e).

NO. COA11-1332

NORTH CAROLINA COURT OF APPEALS

Filed: 5 June 2012

CHARLOTTE HARRELL,
Employee,
Plaintiff,

v.

North Carolina
Industrial Commission
I.C. No. 298817

EDGECOMBE COUNTY SCHOOLS,
SELF-INSURED, Employer, (CORVEL
CORPORATION, Third-Party
Administrator),
Defendant.

GEER, Judge concurring in the result only.

I agree with the majority opinion that the opinion and award of the Full Commission should be affirmed. I write separately because my analysis is slightly different.

Although plaintiff's brief is not entirely clear, plaintiff appears to be arguing, as an initial matter, that she was entitled to a presumption of continuing disability, citing *Parsons v. Pantry, Inc.*, 126 N.C. App. 540, 485 S.E.2d 867 (1997). As the majority opinion points out, however, *Parsons* does not address disability, but rather relates only to the burden of proving causation for additional medical treatment for a compensable injury. *Id.* at 542, 485 S.E.2d at 869 ("[T]he Industrial Commission ruled that [plaintiff's] headaches were

causally related to the compensable accident. Logically, defendants now have the responsibility to prove the original finding of compensable injury is unrelated to her present discomfort. To require plaintiff to re-prove causation each time she seeks treatment for the very injury that the Commission has previously determined to be the result of a compensable accident is unjust and violates our duty to interpret the Act in favor of injured employees."). Because there is no dispute over the compensability of plaintiff's medical treatment, *Parsons* is irrelevant.

Plaintiff also seems to contend that she falls within the scope of the presumption of continuing disability described in *Kisiah v. W.R. Kisiah Plumbing, Inc.*, 124 N.C. App. 72, 476 S.E.2d 434 (1996), because, as she argues, plaintiff "met her initial burden of proving disability . . . ." Our Supreme Court has, however, held "that a presumption of disability in favor of an employee arises only in limited circumstances." *Johnson v. S. Tire Sales & Serv.*, 358 N.C. 701, 706, 599 S.E.2d 508, 512 (2004). "Those limited circumstances are (1) when there has been an executed Form 21, 'AGREEMENT FOR COMPENSATION FOR DISABILITY'; (2) when there has been an executed Form 26, 'SUPPLEMENTAL AGREEMENT AS TO PAYMENT OF COMPENSATION'; or (3) when there has been a prior disability award from the Industrial

Commission." *Clark v. Wal-Mart*, 360 N.C. 41, 44, 619 S.E.2d 491, 493 (2005).

Here, defendant paid compensation pursuant to a Form 60 and not pursuant to a Form 21 or Form 26 agreement. Further, there was no prior disability award from the Commission. Consequently, plaintiff was not entitled to invoke the presumption of continuing disability. As a result, plaintiff had "the burden of proving the existence of [her] disability and its extent." *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 185, 345 S.E.2d 374, 378 (1986).

Plaintiff claims that the Commission erred in concluding that she was not disabled when she met her burden under the fourth prong of the test in *Russell v. Lowes Prod. Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993), by producing "evidence that [she] ha[d] obtained other employment at a wage less than that earned prior to the injury." Plaintiff overlooks the fact that the Commission *did find* her disabled -- it simply found her partially rather than totally disabled.

Under *Hendrix*, plaintiff bore the burden of showing not only that she was disabled, but also that she was totally disabled. As this Court held in *Tyndall v. Walter Kidde Co.*, 102 N.C. App. 726, 731, 403 S.E.2d 548, 551 (1991) (emphasis added), the case cited as the basis for *Russell*'s fourth prong,

plaintiff's proof that her post-injury earnings were less than her pre-injury earnings "was proof of *a reduction* in [plaintiff's] earning capacity." It did not prove that plaintiff had no earning capacity and was entitled to total disability compensation.

Once plaintiff presented her evidence that she had a reduced earning capacity, the burden shifted to defendant to offer evidence "that other jobs were available which [plaintiff] was capable of getting and which paid wages equivalent to her 'pre-injury' wages . . . ." *Id.* at 732, 403 S.E.2d at 551. In this case, however, defendant chose to pay partial disability benefits rather than dispute plaintiff's claim of partial disability.

The burden, therefore, remained on plaintiff to prove that she was in fact totally disabled and not just partially disabled. The Commission found that "[t]he competent evidence shows that Plaintiff has failed to produce sufficient medical evidence showing that she is incapable of work in any employment as a result of her September 24, 2002 incident." The Commission further found that "[t]he competent evidence of record shows Plaintiff is capable of earning a partial amount of her pre-injury wages with Defendant-Employer in the cafeteria cashier position." With respect to the cafeteria cashier position, the

Commission found that while the position was light duty, it "was not a make-work position, as it existed before Plaintiff's injury." Although this last finding is characterized as a conclusion of law, it is actually a finding of fact.

On appeal, plaintiff argues that the cashier position in fact was a make-work position and did not establish that she has a capacity to earn wages in the competitive marketplace. She cites *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 437, 342 S.E.2d 798, 805-06 (1986), in which our Supreme Court held that "an injured employee's earning capacity must be measured not by the largesse of a particular employer, but rather by the employee's own ability to compete in the labor market. If post-injury earnings do not reflect this ability to compete with others for wages, they are not a proper measure of earning capacity."

The Court explained that "[p]roffered employment would not accurately reflect earning capacity if other employers would not hire the employee with the employee's limitations at a comparable wage level. The same is true if the proffered employment is so modified because of the employee's limitations that it is not ordinarily available in the competitive job market." *Id.* at 438, 342 S.E.2d at 806. In sum, an employer "may not avoid liability under the Act by offering an injured employee a job at his old wage within his ability to perform . .

. if the proffered job is not available generally in the market. *If the proffered job is generally available in the market, the wages earned in it may well be strong, if not conclusive, evidence of the employee's earning capacity*." *Id.* at 440, 342 S.E.2d at 807 (emphasis added).

In determining whether plaintiff's cashier position was not an accurate reflection of her earning capacity, the focus is on whether the cashier's position, as performed by plaintiff, is a position generally available in the market. Plaintiff argues that defendant bore the burden of proof on this issue, citing *Saums v. Raleigh Cmty. Hosp.*, 346 N.C. 760, 487 S.E.2d 746 (1997). *Saums*, however, involved a Form 21 agreement -- the defendant in that case bore the burden of rebutting the presumption of continuing disability and, therefore, had the burden of showing that the position it offered plaintiff accurately reflected the employee's wage earning capacity in the competitive marketplace. *Id.* at 764, 487 S.E.2d at 750.

Since this case does not involve the presumption and since plaintiff bore the burden of showing that she was totally disabled, she also bore the burden of showing that the cashier position was not a position generally available in the marketplace. Plaintiff has not specifically addressed this

issue or challenged the Commission's finding that her position existed before her injury.

Instead, plaintiff summarizes her argument by stating that the Commission "unfortunately applied the wrong legal test, did not find disability pursuant to Russell [sic] (4) and failed to shift the burden to the Defendants to demonstrate that Plaintiff's position was a 'real' job. Plaintiff is entitled to Temporary Total Disability from her initial return to work following her surgery as the position as a cashier is unsuitable and will not lead to the ability to return to pre-injury wages."

Plaintiff appears to misunderstand the "suitable work" concept. Her argument that her cashier position is "unsuitable" because of the difference in wages earned solely as a cashier versus those earned as a cashier/bus driver relies on ***Dixon v. City of Durham***, 128 N.C. App. 501, 503-04, 495 S.E.2d 380, 382 (1998), a case in which the defendant was arguing that the partially disabled plaintiff should be barred from receiving any compensation under N.C. Gen. Stat. § 97-32. N.C. Gen. Stat. § 97-32 (2011) currently provides: "If an injured employee refuses suitable employment as defined by G.S. 97-2(22), the employee shall not be entitled to any compensation at any time during the continuance of such refusal, unless in the opinion of the Industrial Commission such refusal was justified." Here,

plaintiff did not refuse the cashier position, so *Dixon* and N.C. Gen. Stat. § 97-32's concept of suitable work are inapplicable.

Contrary to plaintiff's position, I would hold that the Commission properly applied *Johnson* by holding that plaintiff had the burden of proving the existence and extent of her disability. Further, the Commission properly applied *Russell* and found plaintiff partially disabled under prong four of the *Russell* test. Because plaintiff did not meet her burden of showing total disability and defendant did not contest partial disability, the Commission properly declined to shift the burden to defendant of showing that plaintiff's cashier position was available in the competitive marketplace. Further, plaintiff has not demonstrated that the Commission erred in finding that her cashier position was not make-work. I, therefore, agree with the majority opinion that the Commission's opinion and award should be affirmed.