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NO. COA02-685

NORTH CAROLINA COURT OF APPEALS

Filed: 5 August 2003

RODERICK L. KING,
Employee,
Plaintiff-Appellant,

v.

North Carolina Industrial Commission
I.C. File No. 538736

KELLY SPRINGFIELD TIRE CO.,
Employer,

and

TRAVELERS INSURANCE COMPANY,
Carrier,
Defendants-Appellees.

Appeal by plaintiff from an opinion and award entered 18 February 2002 by the North Carolina Industrial Commission. Heard in the Court of Appeals 13 March 2003.

Brent Adams & Associates, by Brenton D. Adams, for plaintiff-appellant.

Cranfill, Sumner & Hartzog, L.L.P., by Samuel H. Poole, Jr., for defendants-appellees.

McGEE, Judge.

Roderick L. King (plaintiff) sustained a compensable injury at his place of employment on 25 January 1995 when his right arm was pulled into a tire machine. Kelly Springfield Tire Co. (employer) filed a Form 60 Admission of Employee's Right to Compensation dated 12 June 1995. On the date of plaintiff's injury, plaintiff was examined in a hospital emergency room and was diagnosed with an abrasion to his right shoulder and spiral fractures of the fourth finger on

his right hand. Plaintiff was subsequently treated by Dr. Louis Clark, who referred plaintiff to Dr. Lucas Van Tran for nerve conduction studies in order to rule out a brachial plexus injury. Dr. Van Tran testified that nerve conduction velocity studies and electro diagnostic tests performed on 13 February 1995 showed that the nerves and muscles in plaintiff's right arm, shoulder and hand were normal. Plaintiff continued to receive follow-up treatment, primarily for pain in his shoulder and arm. Dr. Clark suspected plaintiff was suffering from a rotator cuff tear and referred plaintiff to Dr. Stanley Gilbert, who performed surgery on 11 July 1995.

Plaintiff still continued to complain of difficulties associated with his right arm. However, repeat nerve studies on 19 September 1995, conducted by Dr. Van Tran were normal for all functions, including brachial plexus functions. Dr. Van Tran testified that in September of 1995 there was no evidence of nerve injury to plaintiff's arm.

Plaintiff was referred to a work hardening program by Dr. Gilbert, which plaintiff completed on 1 November 1995. However, a 1 November 1995 report indicated that while plaintiff had completed the work hardening program, he had not put forth maximum effort. Dr. Gilbert noted on 1 November 1995 that plaintiff had full range of motion in his shoulder, did not have any complaints of pain, and the muscle strength in plaintiff's shoulder and arm appeared satisfactory. Therefore, Dr. Gilbert felt that plaintiff had reached maximum medical improvement, releasing him with a permanent partial disability rating of twenty percent to the right arm and a twenty pound weight restriction, based primarily on the subjective complaints of plaintiff.

Plaintiff obtained a second opinion from Dr. Frank Rowan, who diagnosed plaintiff with persistent right shoulder impingement syndrome post/arthroscopic decompression with a residual spur. Dr. Rowan testified that the spur was a pre-existing condition that plaintiff had most likely

developed over his lifetime. Dr. Rowan performed an arthroscopic procedure to remove the spur from plaintiff's shoulder on 22 January 1996. However, plaintiff continued to complain of pain and progressed slowly in physical therapy following his surgery. During an examination of plaintiff by Dr. Rowan on 21 February 1996, plaintiff complained of pain in his right shoulder despite injections to treat the pain.

Plaintiff was involved in a motor vehicle accident in which his vehicle was rear-ended and demolished by another vehicle on 7 March 1996. Following this accident, plaintiff complained of pain and stiffness in his lower back, neck, and shoulder.

Plaintiff saw Dr. Rowan on 12 March 1996. Dr. Rowan found a significant psychological overlay to plaintiff's complaints and could find no medical reason for plaintiff's complaints of pain. During a 2 April 1996 visit, Dr. Rowan again found no objective sign for plaintiff's pain; he placed a lifting restriction on plaintiff of forty pounds and explained to plaintiff that he was physically healed. Dr. Rowan increased plaintiff's lifting restriction to seventy pounds in July 1996, allowing plaintiff to hold a position as a forklift operator; Dr. Rowan indicated that plaintiff had reached maximum medical improvement and assigned a fifteen percent permanent partial disability rating for plaintiff's right upper extremity. Following this July 1996 appointment, plaintiff continued to go to Dr. Rowan's office for follow-up visits until he did not show up for two scheduled appointments on 15 October and 5 November 1996. Plaintiff contends his employer did not allow him to return to Dr. Rowan after employer terminated his employment. However, a 30 April 1998 letter indicates that upon request for further medical treatment, employer authorized plaintiff to return to Dr. Rowan, Dr. Gilbert, or Dr. Van Tran.

Employer paid temporary total workers' compensation benefits to plaintiff until 9 July 1996, when plaintiff returned to work for employer. Plaintiff argues that even though he returned

to work in July 1996, he did not begin operating a forklift for at least one and a half months. Plaintiff further claimed that he sat in an office doing "make work" from July 1996 until approximately October 1996. However, Dr. Rowan stated in his clinic notes on 23 July 1996 that plaintiff's "employer has been kind enough to give him a job operating a forklift with all hydraulic controls and he seems to like this [job] and is doing well." Plaintiff's supervisor, Bernard Armstrong (Armstrong), also testified that plaintiff returned to work as a forklift operator in the summer of 1996. The forklift operator position required plaintiff to sit on the forklift and use the steering wheel and hydraulic controls to control the vehicle. Plaintiff claimed that he was only able to use one arm to operate the forklift. However, Armstrong testified that while it is possible, it would be very awkward to operate a forklift with one hand, and that he never recalled any complaints with plaintiff's operating a forklift. Claimant was never required to lift more than forty pounds when he returned to work for employer.

Plaintiff continued to work as a forklift operator for employer without incident until 28 October 1996 when he was investigated for soliciting money from his co-workers under false pretenses. Armstrong received a report that plaintiff had told associates that a fellow employee's brother had been killed in an automobile accident and that plaintiff had attempted to collect money for the family. After at first denying he had done so, plaintiff admitted to supervisory personnel that he had solicited money from several associates on the basis of a co-worker's brother having been killed in a car accident. Complaints against plaintiff were investigated by employer and employer concluded plaintiff had fabricated the story about a co-worker's brother. Employer fired plaintiff on 4 November 1996.

Supervisory personnel from employer testified that plaintiff was a good employee who performed his job well, and that, but for the false solicitation of funds, plaintiff would not have

been terminated from his job as a forklift operator. Plaintiff's termination report of 4 November 1996 stated that "the Company cannot tolerate the practice of allowing an associate to solicit money from other associates under false pretense, which is clearly fraud and theft."

Plaintiff continued to complain of heaviness and numbness in his entire upper extremity and was treated periodically by Dr. Gilbert for these symptoms. Dr. Gilbert again referred plaintiff to Dr. Van Tran for further nerve studies, which were conducted on 28 July 1997. Dr. Van Tran found no evidence of any injury in plaintiff's wrist, forearm, arm, armpit, or neck. Dr. Van Tran testified that plaintiff's compound muscle and sensory nerve action tests were normal and that there was no evidence of a brachial plexus injury or any other nerve injury.

A Form 26 Agreement was approved by the N.C. Industrial Commission (the Commission) on 16 December 1997, which included a compromise of 17.5 percent permanent partial disability rating for plaintiff's shoulder.

Dr. Collins, a neurologist, saw plaintiff on 25 February 1998 on referral from plaintiff's family physician, Dr. Livingston. Dr. Gilbert also gave plaintiff a referral to Dr. Collins on 20 May 1998. Dr. Collins performed an EMG and nerve conduction studies on plaintiff on 10 March 1998. The results of these tests were abnormal and consistent with a brachial plexus injury. Initially, Dr. Collins was of the opinion that such an injury could have resulted from the injury plaintiff sustained on 25 January 1995. However, when Dr. Collins was presented with the normal nerve studies conducted by Dr. Van Tran, Dr. Collins changed his opinion, stating that if plaintiff's injuries were caused by his accident at work, plaintiff's September 1995 and July 1997 nerve studies would have been abnormal; therefore, the 25 January 1995 accident could not have caused the brachial plexus injury.

Plaintiff was further evaluated by an orthopedist, Dr. Kevin Speer, on 21 June 1999. Dr. Speer noted no atrophy of the right shoulder and, based on plaintiff's subjective symptoms, Dr. Speer diagnosed shoulder osteoarthritis with a potential mild brachial plexapathy. Dr. Speer also noted a significant psychogenic component to all symptoms, with an inconsistent distribution of pain patterns. Dr. Speer felt that proper treatment of plaintiff's condition would include shoulder arthroplasty or prosthetic joint replacement. Dr. Speer testified in his deposition that the type of injury plaintiff suffered "would be consistent with one that would cause a shoulder arthritis to develop." Dr. Speer further testified that he believed the shoulder arthritis was caused by the January 1995 accident. Dr. Speer said that the shoulder arthritis had progressed from that which had existed at the time of plaintiff's prior surgeries and that the osteoarthritis condition would likely worsen in the future.

Dr. Speer stated that plaintiff could be treated by performing total shoulder arthroplasty, which would involve prosthetic replacement of the shoulder socket joint and humeral head. However, Dr. Speer noted that the prosthetic shoulder would likely need to be replaced in ten to fifteen years. Dr. Speer did not believe that plaintiff was malingering or engaging in symptom magnification.

Plaintiff filed three motions with the Commission on 7 October1999: (1) a motion to strike and set aside the Form 26 Agreement approved by the Commission on 16 December 1997, (2) a motion for review of award and for increase of benefits pursuant to N.C. Gen. Stat. §97-47, and (3) a motion to compel payment of temporary total disability benefits. In an order dated 26 October 1999, these motions were denied and a finding that the issues raised by the motions required findings of fact that "may only be addressed in a full evidentiary hearing before a Deputy Commissioner upon the filing of a Form 33 Request for Hearing." Plaintiff filed a Form

33 request for hearing on 29 October 1999. The parties entered into a pre-trial agreement stipulating, *inter alia*, that a compensable injury to plaintiff resulted from the 25 January 1995 accident, that plaintiff's average weekly wage at the time of the accident was $978.43. The pre-trial agreement also identified the possible witnesses for the hearing and the issues for determination. A deputy commissioner entered an order on 30 March 2001, finding that plaintiff had constructively refused suitable employment by way of his fraudulent conduct at work and concluded that plaintiff had failed to show any additional disability or change of condition. The deputy commissioner denied plaintiff's request for additional workers' compensation benefits. Plaintiff appealed this decision to the Commission. The Commission entered an opinion and award on 18 February 2002 affirming the opinion of the deputy commissioner with minor modifications. Plaintiff appeals from the opinion and award.

Plaintiff has not submitted an argument in support of assignment of error number four, and that assignment of error is, therefore, deemed abandoned. N.C.R. App. P. 28(b)(6).

I.

Plaintiff argues that the Commission erred in finding as fact that plaintiff solicited money from his co-workers under false pretenses when there was no competent evidence to support that finding; and the Commission therefore erred in concluding that plaintiff was discharged for misconduct unrelated to his compensable injury and thus constructively refused employment. In reviewing an opinion and award from the Commission, our review "'is limited to a determination of (1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are supported by the findings.'" *Guy v. Burlington Industries*, 74 N.C. App. 685, 689, 329 S.E.2d 685, 687-88 (1985) (quoting *Barham v. Food World*, 300 N.C. 329, 331, 266 S.E.2d 676, 678 (1980)).

As to plaintiff's first argument, we note that he has not assigned error to finding of fact number sixteen. Findings of fact not assigned as error are deemed supported by competent evidence and are conclusive on appeal. *Taylor v. Bridgestone/Firestone, Inc.*, ___ N.C. App. ___, ____, 579 S.E.2d 413, 414 n.1 (2003). Finding of fact number sixteen states:

> Mr. Malone testified, and the Full Commission accepts as fact, that plaintiff-employee was terminated from his employment for soliciting funds from co-workers under false pretenses in violation of company policy and that other employees would have been terminated for similar reason. Mr. Malone testified that plaintiff initially denied this conduct in the course of defendant-employer's investigation, however, that plaintiff subsequently admitted that he had made false statements to co-employees for the purpose of receiving money. Plaintiff, therefore, was discharged for reasons unrelated to his compensable workers' compensation injury. All evidence is that plaintiff could have continued in employment and would not have sustained any disability absent his termination for misconduct.

Although plaintiff challenges finding of fact number twelve, we need not address that argument because, as noted below, finding of fact number sixteen fully supports the Commission's conclusion of law that "[p]laintiff, by soliciting money from his co-workers under false pretenses and causing his termination, [for conduct for which a non-disabled employee would be terminated], constructively refused employment." However, even though this would not automatically bar plaintiff from benefits if he continued to suffer a diminution in wage-earning capacity as a result of his work-related injury, in this case the Commission found and concluded that plaintiff had not proved a continuing loss of wages due to his injury. *See Seagroves v. Austin Co. of Greensboro*, 123 N.C. App. 228, 233-34, 472 S.E.2d 397, 401 (1996) ("the test is whether the employee's loss of, or diminution in, wages is attributable to the wrongful act . . . or whether such loss . . . is due to the employee's work-related disability, in which case the employee will be entitled to benefits . . . ."). Plaintiff's first argument is therefore overruled.

II.

Plaintiff also argues that the Commission erred in admitting into evidence hearsay statements contained in defendant's exhibit number three. Exhibit number three is the disciplinary action record of plaintiff concerning plaintiff's discharge from employment. Exhibit number three is a record written by Mr. Malone, who testified at the hearing before the deputy commissioner. Despite plaintiff's arguments to the contrary, the record contains no statements by co-workers as to whether plaintiff solicited them for money, such as the statements contained in excluded exhibits numbers one and two. The only statements referenced in the record are the statements of plaintiff himself, admissible under N.C. Gen. Stat. §8C-1, Rule 804(b)(3). Plaintiff's second argument is overruled.

III.

Plaintiff next argues that the Commission erred in concluding that plaintiff was entitled to no further benefits under the Workers' Compensation Act because he constructively refused suitable employment. As discussed above, plaintiff did not take exception to finding of fact number sixteen and therefore the finding of fact is presumed to be supported by competent evidence and conclusive on appeal. *See Taylor*, ___ N.C. App. at ___, 579 S.E.2d at 414 n.1. On appeal we must determine whether the findings of fact support the conclusions of law. *Guy*, 74 N.C. App. at 689, 329 S.E.2d at 687. Finding of fact number sixteen supports the conclusion that plaintiff constructively refused suitable employment. *See Seagroves*, 123 N.C. App. at 234, 472 S.E.2d at 401. Thus, the burden shifts to plaintiff to establish disability by making a showing that he cannot find and retain a suitable job with another employer that enables him to earn wages at pre-injury levels. *Id.* Finding of fact number thirteen states: "At the hearing, Plaintiff testified that as of the date of the hearing in the matter, he had made no independent efforts to locate

suitable employment in an effort to return to work." Plaintiff's testimony supports this finding that he had not made an attempt to look for work in the last two years. Plaintiff failed to meet his burden. Therefore, the Commission's conclusions that plaintiff was not entitled to additional benefits and that plaintiff constructively refused employment are supported by the Commission's findings of fact. This argument is overruled.

IV.

Plaintiff argues that the Commission erred in finding that the plaintiff's current symptoms are not causally related to his 1995 work injury because the record is devoid of any evidence to support such a finding. Plaintiff challenges several findings of fact in this argument. Our review of this issue is to determine whether there is any competent evidence to support the findings of fact made by the Commission and whether those findings of fact support the Commission's conclusions of law. *Lineback v. Wake County Board of Commissioners*, 126 N.C. App. 678, 680, 486 S.E.2d 252, 254 (1997). The Commission is the sole judge of credibility of testimony. *Rackley v. Coastal Painting*, 153 N.C. App. 469, 472, 570 S.E.2d 121, 124 (2002) (citation omitted). On appeal, we do not reweigh the evidence. *Whitfield v. Laboratory Corp. of America*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___ (2003). A conflict in medical testimony need not be resolved in favor of the plaintiff. *Rooks v. Cement Co.*, 9 N.C. App. 57, 58, 175 S.E.2d 324, 325 (1970). If there is any competent evidence to support the Commission's findings, they are conclusive on appeal, "even [if] there is evidence to support a contrary finding." *Morrison v. Burlington Industries*, 304 N.C. 1, 6, 282 S.E.2d 458, 463 (1981).

Plaintiff challenges the portion of finding of fact number three that states, "There was no evidence of injury in plaintiff's wrist, forearm, armpit or neck." While in isolation this statement appears erroneous, when taken in context with the entire finding of fact number three, it relates

only to the results of the nerve studies conducted on plaintiff by Dr. Van Tran. There is evidence in the record that Dr. Van Tran was qualified to conduct such studies and interpret them. There is also competent testimony in the record by Dr. Van Tran that the nerve studies he conducted revealed no nerve injury to plaintiff's wrist, forearm, armpit, or neck. This finding of fact is thus deemed conclusive on appeal.

Plaintiff challenges finding of fact number four which states:

> Plaintiff's symptoms did not resolve and he was referred to Dr. Collins, neurologist, for more studies, which were performed on March 10, 1998. This time the results were consistent with a brachial plexus injury, but Dr. Collins opined that given the normal results obtained by Dr. Van Tran in 1996 and 1997, the compensable injury plaintiff sustained in 1995 could not have been the cause of the brachial plexus injury.

We first note that in plaintiff's assignment of error for this finding, as well as for findings of fact six, eight and nine, he claims that this finding is contrary to the weight of the evidence. As frequently stated by this Court, that is not the correct basis for our review. We will not overturn a finding of fact merely because it is against the weight of the evidence; it must be completely devoid of support by any competent evidence. *See Whitfield*, ___ N.C. App. at ___, ___ S.E.2d at ___. This finding of fact is supported by the testimony of Dr. Collins, who was qualified to give such testimony. This finding is conclusive on appeal.

Plaintiff challenges finding of fact number six which states:

> Plaintiff continued to complain of pain, which puzzled Dr. Rowan, who believed plaintiff should have experienced relief from his treatment. Drs. Rowan and Collins opined that there is no medical explanation for plaintiff's continued complaints of pain and noted a psychological component to plaintiff's symptoms. Furthermore, in his physical therapy sessions, plaintiff was observed engaging in full use of his arm when he thought no one was watching him.

There is competent testimony by both Dr. Rowan and Dr. Collins to support this finding of fact. There is a stipulation that Dr. Rowan was qualified to give such testimony; and there is evidence to show Dr. Collins was qualified to give such testimony. This finding is also conclusive on appeal.

Plaintiff challenges finding of fact number nine which states:

> On July 23, 1996, plaintiff reported to Dr. Rowan that he was enjoying his job as forklift operator. Dr. Collins opined that plaintiff was capable of performing this job. Plaintiff never reported any difficulties performing his job, but plaintiff testified at the hearing that he could only perform the job with one hand.

There is competent evidence in the record of plaintiff's statement to Dr. Rowan. There is also competent testimony by Dr. Collins that plaintiff was capable of performing his job. There is also competent testimony in the depositions and at the hearing that plaintiff never reported any difficulties in performing his job. Further, plaintiff testified that he could only do the job with one hand. This finding of fact is supported by competent evidence and thus conclusive on appeal.

Plaintiff challenges finding of fact number eight in so far as it indicates that driving a forklift was a suitable job for plaintiff. We note that there is competent evidence in the record, including statements by plaintiff to Dr. Rowan, testimony by both plaintiff's direct supervisor and the former business manager that plaintiff could perform the job of operating a forklift, as well as medical testimony that plaintiff was capable of performing such work. This finding of fact is deemed conclusive.

Plaintiff challenges finding of fact number eleven to the extent that it states that Dr. Collins found that plaintiff's brachial plexus injury was not related to his 1995 injury. As discussed in our review of finding of fact number four, such a finding is supported by competent evidence in the record, and therefore is deemed conclusive on appeal.

The Commission stated in finding of fact number fourteen:

> The Full Commission gives greater weight to the testimony of Drs. Van Tran, Rowan, Collins and Gilbert over that of Dr. Speer regarding whether there is a causal relationship between plaintiff's current symptoms and his original injury of 1995because Dr. Speer only evaluated plaintiff once while the others collectively and individually treated plaintiff over a period of time offering specific treatment plans.

Plaintiff also claims this finding is not supported by competent evidence in the record. However, the record reveals that plaintiff was treated by Drs. Van Tran, Rowan, Collins and Gilbert over a significant period of time, while plaintiff was treated by Dr. Speer on only one occasion. This is a valid basis for the Commission to find the testimony of Drs. Van Tran, Rowan, Collins and Gilbert more credible than the testimony of Dr. Speer. *See Whitfield*, ___ N.C. App. at ___, ___ S.E.2d at ___. Accordingly, finding of fact number fourteen is deemed conclusive on appeal.

Plaintiff argues that finding of fact number seventeen is not supported by competent evidence in the record. Finding of fact number seventeen states:

> The competent evidence in the record establishes that plaintiff's current symptoms are not causally related to his 1995 work-related injury and thus plaintiff is not entitled to further benefits beyond November 4, 1996 when plaintiff was discharged for actions unrelated to his original compensable injury.

As discussed above, the Commission properly found the testimony of Drs. Van Tran, Rowan, Collins and Gilbert more credible than that of Dr. Speer. We also note that plaintiff does not challenge finding of fact number fifteen, in which the Commission stated that the testimony by defendants' witnesses was entitled to greater weight than the testimony of plaintiff's witnesses. Upon review of the record we find competent evidence in the record to support the Commission's finding of fact number seventeen. Dr. Rowan testified that there was no medical explanation for plaintiff's continued complaints of pain and noted that prior to plaintiff's release,

plaintiff was observed engaging in full use of his arm when he thought no one was watching. Dr. Gilbert testified that he could not find a cause for plaintiff's pain symptoms. He further testified that plaintiff suffered from cervical cord syrinx, but that there was no relationship between that condition and his 1995 injury. Dr. Van Tran testified that plaintiff's compound muscle and sensory nerve action tests were normal. When plaintiff was referred in 1998 to Dr. Collins, a neurologist, Dr. Collins conducted nerve studies and compared them to the nerve studies done by Dr. Van Tran over the previous two years. While Dr. Collins testified that the 1998 test results were consistent with a brachial plexus injury, he also testified that due to the normal tests conducted by Dr. Van Tran in 1996 and 1997, the 1995 injury could not have caused the brachial plexus injury. Our discussion of the previous findings of fact excepted to by plaintiff supports our conclusion that this finding is supported by competent evidence in the record. While there is testimony in the record by Dr. Speer that plaintiff's current symptoms were the result of the 1995 injury, it is not our duty to reweigh the evidence. *Whitfield*, ___ N.C. App. at ___, ___ S.E.2d at ___. We hold there is competent evidence sufficient to support the Commission's finding of fact number seventeen, that plaintiff's current symptoms are not causally related to his 1995 work-related injury. Therefore, it is deemed conclusive on appeal. *See Morrison*, 304 N.C. at 6, 282 S.E.2d at 463.

We note that, although plaintiff cites the Commission's conclusions of law as error under this argument in his brief, he puts forth no argument on that basis here; therefore, we will not address that claim under this argument. As all of the findings of fact excepted to by plaintiff are supported by competent evidence in the record, plaintiff's argument is overruled.

V.

Plaintiff argues that the Commission erred in failing to order additional medical benefits for plaintiff. Plaintiff cites three assignments of error in making this argument, one of which deals with the Commission's conclusion that plaintiff is not entitled to any additional benefits generally. In plaintiff's assignments of error, he does not specifically cite error to the Commission's findings and conclusions as they relate to continuing medical benefits under N.C. Gen. Stat. §97-25. However, plaintiff did make a request in his original motion for review of award for the Commission to order defendant "to pay all medical expenses for care and treatment of injuries sustained in the compensable accident of January 25, 1995, including injury to his right shoulder, right arm, right hand and fingers, neck, both knees, chest, back, depression, anxiety and post traumatic stress disorder."

Plaintiff also filed a Form 18M seeking additional medical compensation on 1 April 1998. In the pre-trial agreement entered by the parties, plaintiff identifies as one of the issues for resolution: "Whether the claimant is entitled to further medical care and treatment . . . as the result of his compensable injury by accident . . . ." We note that plaintiff did not raise this issue before the Commission when appealing from the deputy commissioner's decision, except in so far as the broad exception that the deputy commissioner erred in concluding that plaintiff was not entitled to any additional benefits. However, given the references by plaintiff to his request for further medical compensation, the issue was before the deputy commissioner, who concluded that plaintiff is entitled to no further benefits. The Commission affirmed the deputy commissioner's conclusion, adopting it verbatim as its own conclusion of law.

As stated above, our Court reviews whether conclusions of law are supported by the findings of fact in an opinion and award. *Lineback*, 126 N.C. App. at 680, 486 S.E.2d at 254. Plaintiff has put forth no argument in support of his contention that the trial court erred in

concluding that plaintiff had not shown a change in conditions to satisfy N.C. Gen. Stat. §97-47; therefore, we deem that assignment or error to be abandoned. N.C.R. App. P. 28(b)(6). However, in seeking a request for further medical treatment under N.C.G.S. §97-25, there is no requirement that plaintiff show a "change of condition" as required by N.C. Gen. Stat. §97-47 (2001). *Hyler v. GTE Products Co.*, 333 N.C. 258, 262-63, 425 S.E.2d 698, 701 (1993).

> In an action for additional compensation for medical treatment, the medical treatment sought must be "directly related to the original compensable injury." *Pittman v. Thomas & Howard*, 122 N.C. App. 124, 130, 468 S.E.2d 283, 286, *disc. review denied*, 343 N.C. 513, 472 S.E.2d 18 (1996). 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. *Id.*

Reinninger v. Prestige Fabricators, Inc., 136 N.C. App. 255, 259, 523 S.E.2d 720, 723 (1999).

In the present case, plaintiff sought additional medical treatment allegedly related to his 1995 injury. Therefore, the burden is on defendant to show this treatment is not directly related to the compensable injury. *Id.* While the Commission made numerous findings of fact that plaintiff's current symptoms are not related to the 1995 injury and that the evidence establishes that plaintiff's current symptoms are not causally related to the 1995 injury, that analysis appears to be done under the rubric of whether the plaintiff has met his burden of establishing causation in order to be entitled to compensation benefits. In making a determination of whether additional medical benefits are required, the burden has shifted to defendant. *See id.* We cannot determine that a finding based on that standard of proof has been made by the Commission and thus remand to the Commission for a finding, without taking additional evidence, of whether defendant has met its "burden of producing evidence showing the treatment is not directly related to the compensable injury." *Id.* We note that while much of the evidence in the record may relate

to both the question of causation, where the burden is on the employee, and entitlement to additional medical compensation, where the burden is on the employer to show the additional treatment was not related to the compensable injury, the Commission must make separate findings as to each, given the differing burdens of proof.

Affirmed in part; remanded in part.

Judges HUDSON and STEELMAN concur.

Report per Rule 30(e).