IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-1082

Filed: 21 April 2015

From the North Carolina Industrial Commission, I.C. No. 570867

HERMAN SIMMONS, JR., Employee, Plaintiff-Appellee,

v.

WILLIAM E. SMITH TRUCKING, INC., Employer,

and

AMERICAN INTERSTATE INSURANCE COMPANY, Carrier, Defendant-Appellants.

Appeal by Defendants from opinion and award entered 26 June 2014 by the North Carolina Industrial Commission. Heard in the Court of Appeals 3 February 2015.

Hall & Green, L.L.P., by John F. Green, II, for plaintiff-appellee.

Brooks, Stevens, & Pope, P.A., by Heather A. Haney and Kate Gorman, for defendant-appellants.

HUNTER, JR., Robert N., Judge.

William E. Smith Trucking, Inc. ("Defendant-Employer") and American Interstate Insurance Company (collectively, "Defendants") appeal from an opinion

and award of the North Carolina Industrial Commission ("Full Commission" or "Commission"). We affirm.

I. Factual & Procedural History

On 26 October 2005, Herman Simmons, Jr. ("Plaintiff") suffered an admittedly compensable work-related injury while riding as a passenger in Defendant-Employer's tractor-trailer when it overturned on an interstate and rolled down a mountain in New Mexico. Plaintiff was sleeping in the berth of the tractor-trailer. Plaintiff awoke to being smashed around the inside of the truck, suffering multiple rib fractures and a ruptured spleen. Once the tractor-trailer slid to a stop at the bottom of the mountain, Plaintiff scrambled out and "just about as soon as [his] feet hit the pavement[,] the truck caught fire" and burned.

Plaintiff was transported to Rehoboth McKinley Christian Hospital in New Mexico, where he underwent an emergency splenectomy to remove his ruptured spleen. Approximately one week later, Plaintiff was released from the hospital. Being unable to ride in a truck, Defendants made arrangements to fly Plaintiff back to North Carolina. Once he returned home to Burgaw, Plaintiff followed up with his primary care physician and surgeon, Dr. Nasrallah.

Dr. Nasrallah testified that when Plaintiff presented on 11 November 2005, he had an open surgical incision over one foot long that ran from his sternum to his

pelvic bone from the emergency splenectomy, as well as a persistent infection on the incision which ultimately required a skin graft. Dr. Nasrallah testified that at that time Plaintiff "ha[d] a wide area open still and apparently the - - from the infection[] . . . the closure separated." Dr. Nasrallah instructed Plaintiff to wear an abdominal binder all day and continued to follow him and treat his infection. Plaintiff visited Dr. Nasrallah on 15, 22, and 25 November, as well as on 6 December 2005. On 7 December 2005, once the infection had cleared, Dr. Nasrallah put a skin graft to the surgical incision to cover the skin and protect against further infection. Dr. Nasrallah testified that although he placed a skin graft over the incision, Plaintiff "still had the hernia."

On 12 January 2006, Dr. Nasrallah's handwritten medical notes indicate Plaintiff's hernia was related to the 26 October 2005 splenectomy and resulting incision infection; his notes of 26 January 2006 indicate that Plaintiff's "incisional hernia need[s] repair." Dr. Nasrallah testified that although his medical notes at times identify Plaintiff's hernia as either an "incisional hernia" or a "ventral hernia," he was always referring to same hernia he diagnosed in 2006. Dr. Nasrallah explained it "[wa]s an incisional hernia to start with, because it [wa]s a result of incision [sic] didn't heal. . . . And after a while we call it 'ventral' because it start bulging out . . . as a continuation of it." On 17 February 2006, Dr. Nasrallah released Plaintiff to return to light duty work.

A letter dated 2 March 2006 reveals that Defendant-Employer and Plaintiff spoke on the telephone on 1 March 2006. Plaintiff indicated that he would not return to work unless he could perform single-driver runs to California, as he no longer felt safe driving with a partner. The letter indicates that Defendant-Employer did not have solo runs to California but stated they could have "one solo trip delivery on the East Coast weekly." William Smith, Defendant-Employer's owner, later testified that he did not have any single-driver East Coast runs and that he did not actually offer Plaintiff any position following his light-duty release. Plaintiff never returned to work for Defendant-Employer but received workers' compensation benefits from 27 October 2005 through 13 April 2006.

On 1 March 2006, Plaintiff found a new job with North Carolina State University Horticulture Department ("NC State") as a maintenance mechanic at its research farm in Castle Hayne. Plaintiff testified that he never lifted anything heavier than about two gallons of water at this new job. Throughout this time, Plaintiff continued to treat with Dr. Nasrallah, who repeatedly noted in his medical notes from these visits the need for hernia repair.

On 11 September 2006, Dr. Nasrallah implanted mesh on the hernia in an attempt to repair it. Plaintiff was taken out of work from 11 September to 17 October 2006, when he was released to return to light-duty work with a restriction of no lifting greater than twenty-five pounds. On 14 November 2006, Dr. Nasrallah released

Plaintiff as far as his mesh hernia procedure was concerned. Defendants paid for Plaintiff's treatment with Dr. Nasrallah, including the 11 September surgery, through the 14 November 2006 appointment. Dr. Nasrallah assigned permanent work restrictions of no lifting over fifty pounds and noted that Plaintiff was to continue wearing a binder while working.

On 7 September 2007, Plaintiff was evaluated by Dr. Ellis Tinsley of Wilmington Surgical Associates ("Dr. Tinsley") for a second opinion on his hernia condition. Dr. Tinsley assessed a recurrent incisional hernia and noted Plaintiff could consider complex reconstruction surgery. He recommended Plaintiff get an evaluation and opinion from Dr. Jeffrey Church, a local plastic surgeon.

In September 2007 and March 2009, Plaintiff sought authorization from Defendant-Carrier for further medical treatment, but it was denied.

On 7 March 2011, Dr. Nasrallah referred Plaintiff to Duke University Medical Center. On 23 March 2011, Plaintiff visited Dr. Dan G. Blazer, III, of Duke University Medical Center ("Dr. Blazer") for a one-time evaluation of his hernia condition. Dr. Blazer opined that Plaintiff's hernia was related to the splenectomy that arose from his 2005 injury and resulting incision infection. Dr. Blazer recommended that Plaintiff undergo a repeat hernia repair, which related to the injuries Plaintiff sustained in the truck wreck.

On 6 April 2011, Plaintiff was seen by Dr. Jeffrey Church, a plastic surgeon in Wilmington, for evaluation of his hernia condition. Dr. Church noted that he could feel what felt like loose mesh in the area of the hernia. He assessed Plaintiff with a "recurrent ventral hernia." Dr. Church testified that the earlier hernia repair by Dr. Nasrallah in September 2006 had failed because the mesh did not hold and that an incisional infection makes the recurrence of a hernia more likely and subsequent repair more difficult.

On 16 January 2012, Plaintiff underwent another surgery to repair the incisional hernia at the direction of Dr. Church. Dr. Church assessed Plaintiff as having "essentially healed" and gave Plaintiff permanent restrictions of no pushing, pulling, or lifting over fifteen pounds.

On 15 March 2012, Defendants filed a Form 33, Request for Hearing, disputing the compensability of Plaintiff's ongoing medical treatment, including the 2012 surgery, as it related to his 2005 injury.

On 25 October 2012, the matter was heard before a deputy commissioner. By opinion and award filed 16 July 2013, the deputy commissioner found, relying on this Court's decision in *Bondurant v. Estes Express Lanes, Inc.*, 167 N.C. App. 259, 606 S.E.2d 345 (2004), that Plaintiff was not entitled to further compensation for his continuing hernia condition, because his claim for compensation failed to meet the unique statutory requirements of N.C. Gen. Stat. § 97-2(18) (2013). Furthermore, the

deputy commissioner concluded that Plaintiff was precluded from further compensation because this right expired on 21 February 2010, two years after the last medical compensation was paid, as indicated by Defendant-Employer's Form 28B. Plaintiff appealed to the Full Commission.

On 3 February 2014, the Full Commission reviewed this matter. By opinion and award filed 27 March 2014, the Full Commission, with Chairman Andrew T. Heath dissenting in part, reversed the deputy commissioner's opinion and award, concluding that Plaintiff's hernia condition was compensable and that his claim was not barred because Defendant-Employers had not paid all compensation, including for the loss of Plaintiff's spleen, at the time the Form 28B was filed. The Full Commission reopened the matter for receipt of additional evidence on the issue of Plaintiff's loss of an important organ and to determine the amount of compensation pursuant to N.C. Gen. Stat. § 97-31(24) (2013).

On 26 June 2014, the Full Commission issued an amended opinion and award, this time unanimous, wherein it concluded again that Plaintiff's hernia condition was compensable and that he was entitled to further indemnity benefits. Defendants appeal.

II. Analysis

Defendants contend that the Commission erred in (1) finding and concluding that Plaintiff's recurrent hernia is compensable under the Workers' Compensation Act, and (2) awarding further indemnity benefits to Plaintiff. We disagree and affirm.

This Court's review of an opinion and award of the Industrial Commission is "limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). The Commission is the "sole judge of the weight and credibility of the evidence[.]" *Id.* at 116, 530 S.E.2d at 553. Therefore, "[t]he Commission's findings of fact are conclusive on appeal if supported by competent evidence 'notwithstanding evidence that might support a contrary finding.' " *Reaves v. Indus. Pump Serv.*, 195 N.C. App. 31, 34, 671 S.E.2d 14, 17 (2009) (quoting *Hobbs v. Clean Control Corp.*, 154 N.C. App. 433, 435, 571 S.E.2d 860, 862 (2002)). "Unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal." *Allred v. Exceptional Landscapes, Inc.*, __ N.C. App. __, __, 743 S.E.2d 48, 51 (2013). However, "[t]he Commission's conclusions of law are reviewed *de novo*[,]" *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004), wherein this Court "considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citations and quotation marks omitted).

A. Recurrent Hernia Compensability

The crux of Defendants' twelve assignments of error is that the Commission erred by concluding Plaintiff's continuing hernia condition is compensable. We are not persuaded.

1. Findings of Fact Regarding Plaintiff's Recurrent Hernia

Defendants contend the Commission's Findings of Fact # 17, # 21, # 24, # 32, # 36, and # 39 are not supported by competent evidence. We disagree.

As to Finding of Fact # 17, Defendants challenge that "Dr. Nasrallah assigned permanent restrictions of no lifting over fifty pounds and wearing an abdominal binder while working as a result of the 11 September 2006 surgical repair of the initial hernia." The record shows that on 25 April 2007, Dr. Nasrallah wrote a letter wherein he stated: "MR. SIMMONS WAS ADVISED TO LIMIT LIFTING ITEMS TO 50 LBS. AND TO WEAR AN ABDOMINAL BINDER WHILE WORKING." Plaintiff testified that Dr. Nasrallah instructed him he could lift only "[u]p to fifty pounds[.]" Furthermore, Plaintiff confirmed that Dr. Nasrallah gave him the binder and "told [him he] had to wear it for a lifetime." While Dr. Nasrallah's handwritten medical notes do not provide an exact restriction, nor did Dr. Nasrallah recall the specific restrictions given during his deposition, Dr. Nasrallah stated "I don't think I said no

restriction[,]" "my standard is no lifting until a year or two years after." Therefore, we dismiss Defendants' challenge.

As to Findings of Fact # 21 and 24, Defendants challenge Dr. Nasrallah's testimony that Plaintiff's recurrent hernia "was the same hernia as the one he had operated on in September 2006." Dr. Nasrallah's medical records indicate that Plaintiff presented with an "old large ventral hernia." When asked if this was the same hernia as the hernia he repaired in 2006, Dr. Nasrallah responded: "The same. Oh yeah, it's the same one." Dr. Nasrallah testified that he referred Plaintiff to Duke Hospital because "the hernia came back and he had problems with it." Therefore, we dismiss Defendants' challenge.

Defendants challenge Finding of Fact # 32, specifically the portion wherein the Commission found that the hernia Dr. Nasrallah "originally diagnosed and treated in 2006 and the hernia repair surgery that Plaintiff underwent in 2012 was the same hernia and not two separate hernias." Dr. Nasrallah, in his deposition, confirmed "[i]t's the same, yes." When asked "did you refer Mr. Simmons to Doctors Tinsley and Church for the same incisional hernia of October - -" Dr. Nasrallah responded: "The same." Therefore, competent evidence exists in the record to support this finding.

Defendants next challenge Finding of Fact # 36, specifically the portion of the finding that Dr. Church testified that the hernia he repaired in 2012 was not a new hernia but the same hernia Plaintiff was diagnosed with in 2006. When asked if the

2012 hernia was related to the original incisional hernia that occurred following the 2005 injury, Dr. Church opined: "I think they are directly related." Furthermore, when asked if the hernia Dr. Church repaired in 2012 was a new hernia, Dr. Church responded: "No, it is the same hernia." Therefore, Defendants' challenge is meritless.

As to Finding of Fact # 39, Defendants challenge the portion in which the Commission "finds [P]laintiff's recurrent hernia was a 'continuing hernia condition' and the direct and natural result of the October 2005 injury." We conclude that, in light of the above, plenary competent evidence exists in the record to support the Commission's finding that Plaintiff's recurrent hernia was a direct and natural result of the October 2005 injury. We hold that, when viewed in the light most favorable to Plaintiff, Drs. Nasrallah and Church's testimony provided sufficient evidence to support the Commission's findings of fact that Plaintiff's hernias were the direct and natural result of his original injury. We next turn to Defendants challenge that Plaintiff's recurrent hernia is not compensable under the Workers' Compensation Act.

2. Compensability of Plaintiff's Hernia Condition

Defendants contend the Commission's Conclusions of Law # 2, # 3, # 4, # 5, # 7, and # 11 are erroneous. Specifically, Defendants challenge the Commission's conclusion that Plaintiff's hernia condition is a direct and natural result of his original injury and, therefore, is compensable pursuant to this Court's analysis in

Heatherly v. Montgomery Components, Inc., 71 N.C. App. 377, 379, 323 S.E.2d 29, 30 (1984). Defendants cite to this Court's decision in *Bondurant* for their contention that Plaintiff's hernia condition is not compensable, as it fails to meet the statutory standard for the compensability of hernias under the Workers' Compensation Act, as set forth in N.C. Gen. Stat. § 97-2(18). We agree that Plaintiff's hernia condition fails to meet the statutory requirement but conclude that it is of no consequence, for *Bondurant* is distinguishable and *Heatherly* controls the instant case.

Under the Workers' Compensation Act, N.C. Gen. Stat. § 97-2(18) provides in pertinent part:

> In all claims for compensation for hernia or rupture, resulting from injury by accident arising out of and in the course of the employee's employment, it must be definitely proven to the satisfaction of the Industrial Commission:
>
> > a. That there was an injury resulting in hernia or rupture.
> >
> > b. That the hernia or rupture appeared suddenly.
> >
> > c. Repealed by S.L. 1987-729, § 2.
> >
> > d. That the hernia or rupture immediately followed an accident. Provided, however, a hernia shall be compensable under this Article if it arises out of and in the course of the employment and is the direct result of a specific traumatic incident of the work assigned.
> >
> > e. That the hernia or rupture did not exist prior to the accident for which compensation is claimed. . . .

N.C. Gen. Stat. § 97-2(18) (2013). However, "[o]ur courts have consistently held that workers injured in compensable accidents are entitled to be compensated for all disability caused by and resulting from the compensable injury." *Heatherly*, 71 N.C. App. at 379, 323 S.E.2d at 30 (citations omitted). Therefore, even failing the statutory requirements for hernia compensability above, "[a] subsequent injury to an employee, whether an aggravation of the original injury or a new and distinct injury, is compensable . . . if it is the direct and natural result of a prior compensable injury." *Vandiford v. Stewart Equip. Co.*, 98 N.C. App. 458, 461, 391 S.E.2d 193, 195 (1990) (citation omitted). "When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury arises out of the employment, unless it is the result of an independent intervening cause attributable to the claimant's own intentional conduct." *Heatherly*, 71 N.C. App. at 379-80, 323 S.E.2d at 30 (quotation marks, brackets, and citation omitted).

While claimants seeking compensation for a hernia arising out of a work-related injury typically must prove all four elements enumerated above or their claim must be denied, see *Bondurant*, 167 N.C. App. at 265, 606 S.E.2d at 349, the issue of compensability in the instant case falls outside of these statutory requirements and lands into *Heatherly*'s control. Plaintiff's hernia condition did not result from an injury by accident "arising out of and in the course of the employee's employment." Rather, Plaintiff's hernia condition arose as a direct and natural consequence of

Plaintiff's emergency splenectomy that came about due to the admittedly compensable injury by accident on 26 October 2005. The evidence is clear that the 2005 surgical incision failed to heal properly and caused an infection, which resulted in an incisional hernia that progressively worsened without any identifiable inciting events and required two surgeries to repair. Therefore, the direct and natural analysis under *Heatherly* controls the instant case.

In *Heatherly*, the plaintiff suffered an admittedly compensable compound fracture of his right middle distal tibia on 24 October 1980. 71 N.C. App. at 378, 323 S.E.2d at 29. On 4 July 1981, the plaintiff suffered a compound refracture of his tibia and a fracture of his right fibula when his left foot slipped from under him. *Id.* The Commission held that the 4 July 1981 fractures were the direct and natural result of the compensable 24 October 1980 fracture. *Id.* at 381, 323 S.E.2d at 31. The defendants appealed.

The plaintiff's attending physician for the second fracture opined that he was aware of the first fracture and that the refracture of the plaintiff's tibia, in his opinion, was along the same fracture line. *Id.* at 380, 323 S.E.2d at 31. The physician also stated that the plaintiff's first tibia fracture was healing but was not "rock-solid" when the refracture occurred. *Id.* This Court held that the physician's testimony was sufficient to support the Commission's conclusion that the plaintiff's second

fracture was the direct and natural result of his original injury. *Id.* at 381, 323 S.E.2d at 31.

Here, Plaintiff suffered a compensable injury that resulted in his spleen rupturing on 26 October 2005. In performing the emergency splenectomy, Plaintiff's abdominal wall was incised and his abdominal muscles were separated to retrieve and remove his ruptured spleen. The surgical incision did not heal properly, causing an infection and opening of the surgical incision site that resulted in an incisional hernia. While Dr. Nasrallah covered the large incisional site with a skin graft once the infection cleared, the hernia remained and required a repair. Plaintiff consequently underwent surgery on 11 September 2006. However, this hernia repair did not hold, and Plaintiff needed to undergo a second hernia repair on 16 January 2012. All three medical experts testified that Plaintiff's continuing hernia condition is directly related to, and arose due to, the admittedly compensable work-related injury suffered in 2005. Therefore, we conclude that Plaintiff's continuing hernia condition, including the 11 September 2006 and 16 January 2012 hernia surgeries, are the direct and natural result of the admittedly compensable work-related injury which caused his ruptured spleen and required a splenectomy. Accordingly, Plaintiff's hernia condition is compensable.

Defendants cite to *Bondurant* for their proposition that "hernias are subject to the requirements set forth in N.C. Gen. Stat. § 97-2(18) with regard to

compensability." However, *Bondurant* is easily distinguishable from the instant case. In *Bondurant*, the plaintiff suffered an admittedly compensable umbilical hernia in 1995. 167 N.C. App. at 260, 606 S.E.2d at 346. In 1996, the plaintiff suffered another umbilical hernia, which the employer denied, but the Commission concluded was compensable and a "new" hernia. *Id.* at 261, 606 S.E.2d at 346-47. In 1999, the plaintiff began working for another employer and suffered a third hernia of unknown origin. *Id.* at 261, 606 S.E.2d at 347. The plaintiff underwent a hernia repair surgery in December 1999. *Id.* In January 2000, the plaintiff's surgeon determined that he no longer had a hernia and released him without restrictions in February 2000. *Id.*

In the summer of 2000, the plaintiff was at the beach when a wave struck him and he felt a burning sensation in his stomach. *Bondurant*, 167 N.C. App. at 262, 606 S.E.2d at 347. In January 2001, the plaintiff returned to his surgeon complaining of another hernia. *Id.* His surgeon again repaired the hernia and, in March 2001, determined that the plaintiff no longer had a hernia and released him to return to work without restrictions as of 12 April 2001. *Id.* In the summer of 2001, the plaintiff was lifting and carrying a door when he felt the symptoms of a hernia. He presented to his surgeon who concluded that the plaintiff had two hernias and recommended a fifth surgical repair. *Id.* At this time, the plaintiff filed a claim seeking compensation for his hernia condition, which was denied. *Id.* at 260, 606 S.E.2d at 346. A deputy commissioner determined that at least three of plaintiff's hernias, which occurred in

the summers of 1999 and 2000, as well as in January 2001 and the summer of 2001, were compensable. *Id.* The Commission reversed and concluded these three subsequent hernias were not compensable. The plaintiff appealed to this Court, which affirmed the Commission.

In reaching its decision, this Court concluded *Heatherly* was inapplicable because, among other things, "plaintiff [could not] show that the subsequent hernias were the natural and direct result of the earlier hernias." *Id.* at 266, 606 S.E.2d at 350. To the contrary, the "[p]laintiff testified that the third hernia occurred due to being hit by a wave at the beach, and the last two hernias occurred while carrying a door down a set of steps at his home." *Id.* at 267, 606 S.E.2d at 350. Additionally, the plaintiff's surgeon testified, after both the 1999 and January 2001 hernia repairs, the plaintiff no longer had a hernia and released him both times to return to work without restrictions. *Id.* at 261-62, 606 S.E.2d at 347.

In the instant case, no evidence in the record suggests that Plaintiff experienced any other incident or injury that caused a new hernia or any event that caused his incisional hernia to become worse. Indeed, Defendants failed to assign as error Finding of Fact # 31, which states in pertinent part: "[T]here have not been any incidents or event(s) that have caused [Plaintiff's] hernia condition to worsen. Plaintiff's hernia condition has just progressively worsened." Additionally, three medical experts testified that Plaintiff's continuing hernia condition, including his 11

September 2006 and 16 January 2012 hernia repairs, were related to the original incisional hernia that arose from an infection caused by the emergency splenectomy, which was required from the admittedly compensable work-related injury on 26 October 2005. Moreover, unlike in *Bondurant*, no doctor testified that Plaintiff "no longer had a hernia." To the contrary, Dr. Nasrallah testified that after he repaired the hernia with mesh in September 2006, the mesh held until it could hold no longer, and that the hernia "came back" because it tore through the mesh repair. Dr. Church testified that the earlier hernia repair by Dr. Nasrallah had failed because the mesh did not hold.

Furthermore, Plaintiff in the instant case was never released without restrictions by any doctor following his hernia repairs; after the 11 September 2006 mesh implant, Dr. Nasrallah assigned permanent work restrictions of no lifting over fifty pounds and wearing an abdominal binder. After the 16 January 2012 surgery repair, Dr. Church assigned permanent restrictions of no lifting, pushing, or pulling greater than fifteen pounds. When asked if the 2012 hernia was related to the original incisional hernia suffered by Plaintiff as a result of his original injury in 2005, Dr. Church opined: "I think they are directly related." Moreover, when asked if the hernia Dr. Church repaired in 2012 was a new hernia, Dr. Church responded: "No, it is the same hernia." Accordingly, we conclude that *Bondurant* is readily distinguishable from the instant case.

The Commission conducted the proper analysis when it determined *Bondurant* does not apply and *Heatherly* controls. Thus Defendants' argument is dismissed.

B. Indemnity Benefits Award

Defendants' final contention is that the Commission erred in awarding further indemnity benefits to Plaintiff. We are not persuaded.

Defendants first challenge Conclusions of Law # 6, # 8, # 9, # 10, and # 11, but fail to make any specific challenges to these conclusions (except # 10, as will be discussed below) and instead contends "The Full Commission's Award fails to take into consideration the law regarding disability under the Workers' Compensation Act, as well as the inequity of plaintiff's request to amend his compensation rate on the date of hearing, 25 October 2012, seven years after the last payment of compensation in this matter." Although these conclusions concern the computation of average weekly wage, an issue this Court reviews *de novo*, see *Tedder v. A & K Enter.*, __ N.C. App. __, __, 767 S.E.2d 98, 102 (2014), Defendants assert only that (1) the Commission erred in awarding compensation following Plaintiff's refusal of suitable employment, and (2) Plaintiff is not entitled to amendment of his weekly compensation rate. Therefore, our review is so limited. *See* N.C. R. App. P. 28(1) (2013) ("The scope of

review on appeal is limited to issues so presented in the several briefs. Issues not presented and discussed in a party's brief are deemed abandoned.").

1. Refusal of Suitable Employment

Defendants contend the Commission erred in awarding Plaintiff compensation following his refusal of suitable employment. Specifically, Defendants challenge the competency of evidence underlying the Commission's Findings of Fact # 12, # 13, # 44, and # 45, "to the extent they find plaintiff had a fear of driving, and experienced disability after March 2006." We disagree.

Plenary evidence exists in the record to support these findings. Plaintiff testified that before the accident, "[he] could drive with anybody." However, after the accident, Defendant confirmed that he did not want to drive with a partner, and testified that "I could not be in the truck. I could not even be in a passenger seat of a vehicle right now to drive or to . . . ride." Plaintiff further testified, concerning riding as a passenger, that "I got – have had panic attacks because of it." Specifically, Plaintiff testified that in the early part of 2006 he tried to ride with his son, who is also a transfer truck driver, but "[he] had panic attacks." After about ten miles, the two had to turn around and come back. Plaintiff's son confirmed this by his own testimony, in which he stated that when Plaintiff attempted to ride with him in his transfer truck, "I thought he was going to pass out because he was shaking and – he was just real nervous."

Furthermore, a review of Dr. Nasrallah's deposition testimony confirms that the doctor stated "after the accident he start getting some scary feeling of driving," and that "he may have the reasonable fear[.]" Dr. Nasrallah also wrote a letter dated 9 November 2010 wherein he stated: "BECAUSE OF THE MVA, MR. SIMMONS HAS A REASONABLE FEAR OF SLEEPING IN AN OVER THE ROAD TRUCK OR VEHICLE." Therefore, competent evidence exists in the record to support the Commission's finding that Plaintiff had a reasonable fear of driving, and we dismiss Defendants' challenges to these findings.

Defendants point this Court to N.C. Gen. Stat. § 97-32, applicable at the time of the incident, which provided: "If an injured employee refuses employment procured for him suitable to his capacity he 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." N.C. Gen. Stat. § 97-32 (2010). The thrust of Defendants' argument is that Plaintiff is not entitled to compensation due to his refusal of suitable employment offered by Employer-Defendant. We disagree.

In *Bowden v. The Boiling Co.*, 110 N.C. App. 226, 233, 429 S.E.2d 394, 398 (1993), this Court held that "if a person's fear of returning to work renders the job unsafe for his performance then it is illogical to say that a suitable position has been offered." The same reasoning applies in the instant case. Determining as we have that the evidence is sufficient to support the finding that Plaintiff had a reasonable

fear of driving as a passenger in a transfer truck, we conclude that any positions offered other than solo drives were not suitable employment. Defendant-Employer's letter provided that they "could" have "one solo trip delivery on the East Coast weekly[;]" however, Defendant-Employer later testified that he did not actually offer Plaintiff any position following his light-duty release. Because Defendants failed to assign as error Finding of Fact # 11, which provided in pertinent part: "Defendant-Employer's owner, William Smith, testified that . . . Defendant-Employer did not actually offer Plaintiff any position following his light duty release[,]" we are bound by that finding. Plaintiff cannot be said to have refused suitable employment when Defendant-Employer admitted that employment suitable to Plaintiff's capacity was never actually offered. We therefore dismiss Defendants' challenge on this issue.

2. Entitlement to Amended Compensation Rate

Defendants' last contention is that Plaintiff is not entitled to amendment of his average weekly wage compensation rate, as the Commission determined in its Conclusion of Law # 10. Defendants' argument relies on this Court's decision in *Miller v. Carolinas Medical Center-Northeast*, __ N.C. App. __, 756 S.E.2d 54 (2014), for the proposition that "the Full Commission's modification of plaintiff's compensation rate is a rescission of the Form 60 agreement for the payment of compensation, which is impermissible. The calculation of plaintiff's average weekly wage is a mistake of law, and thus not subject to rescission." Failing this, Defendants

contend that Plaintiff waited an unreasonable amount of time to address the proper average weekly wage issue. We are not persuaded.

Miller is readily distinguishable from the instant case. *Miller* concerned the reformation an average weekly wage amount agreed upon by the parties pursuant to a Form 21, a type of workers' compensation settlement agreement. Here, there was never any agreement between the parties as to the average weekly wage amount. Contrarily, the record shows that Plaintiff sought clarification of his compensation amount. Indeed, correspondence dated 12 March 2009 from Plaintiff's counsel to Defendants' counsel addressing Defendants' failure to authorize Plaintiff's future medical care, reads, *inter alia*: "At this point, we have three options. We could discuss the wage issue and the payment for the additional treatment[.]" Therefore, the issue of average weekly wage was still under dispute and had not been agreed upon. Therefore, we dismiss Defendants' challenge on this issue.

In the instant case, a Form 60 dated 31 October 2005 indicates Plaintiff's average weekly wage was $639.24, which calculates to a weekly compensation rate of $426.18. A Form 28B dated 1 May 2008 indicates that Plaintiff was paid this compensation rate from 27 October 2005 through 13 April 2006. The Form 28B also indicates that Plaintiff's last medical compensation was paid on 21 February 2008. Because the amount of medical and indemnity compensation was still under dispute as late as 12 March 2009, and it had never been decided upon by the Commission, we

conclude that Plaintiff was entitled to address the proper average weekly wage at the October 2012 hearing. We therefore conclude that Plaintiff was entitled to additional compensation as determined by the Commission. Defendants' last argument is dismissed.

III. Conclusion

For the foregoing reasons, we affirm the judgment of the Full Commission.

AFFIRMED.

Judge BRYANT and Judge STROUD concur.

Report per Rule 30(e).