NO. COA09-944

NORTH CAROLINA COURT OF APPEALS

Filed: 20 July 2010

HYMAN SPRUILL LEGGETT,
Employee-Plaintiff,

v. North Carolina Industrial Commission I.C. No. 600560

AAA COOPER TRANSPORTATION,
Employer-Defendant,

and

CRAWFORD & COMPANY,
Third-Party Administrator-Defendant.

Appeal by defendants from Opinion and Award entered 27 May 2009 by the North Carolina Industrial Commission. Heard in the Court of Appeals 2 December 2009.

Keel O'Malley Tunstall, LLP, by Joseph P. Tunstall, III, for plaintiff-appellee.

Hedrick, Gardner, Kincheloe & Garofalo, LLP, by Kelli A. Burns and Margaret M. Kingston, for defendant-appellants.

STEELMAN, Judge.

Where expert testimony demonstrated that plaintiff's need for back surgery in 2008 was directly related to his 2005 compensable injury, the Commission properly concluded that defendants had failed to overcome the *Parsons* presumption. Where there are insufficient findings of fact to determine whether the Commission properly found that plaintiff had justifiably refused defendant's

offer of employment, this issue is remanded to the Commission for proper findings of fact as to whether plaintiff was entitled to disability benefits from 20 December 2006 through 31 December 2007. Where the evidence demonstrated that as of 1 January 2008 plaintiff was incapable of work in any employment because of the pain in his back, numbness in his feet, and irritation from the burn scars, plaintiff was entitled to temporary total disability benefits from 1 January 2008 until further order of the Commission. Defendants are entitled to receive a credit for any amount paid pursuant to N.C. Gen. Stat. §§ 97-29 and -30 against what is owed for plaintiff's permanent disability ratings pursuant to N.C. Gen. Stat. § 97-31. The award is subject to the limitations of N.C. Gen. Stat. § 97-25.1 should the conditions arise under which the limitations operate.

I. Factual and Procedural Background

Hyman "Buddy" Spruill Leggett (plaintiff) was employed as a full-time truck driver for AAA Cooper Transportation (AAA) for thirteen years. On 24 July 2005, plaintiff was involved in a serious motor vehicle accident while in the course and scope of his employment. Additional facts concerning this accident can be found in our opinion in *Leggett v. AAA Cooper Transp., Inc.*, ___ N.C. App. ___, 678 S.E.2d 757 (2009)[1]. Plaintiff suffered extensive

[1]The issue resolved in the prior opinion was whether the trial court properly reduced the amount of the workers' compensation lien in the context of a settlement with a third-party tortfeasor pursuant to N.C. Gen. Stat. § 97-10.2(j).

injuries, including burns to his lower extremities, and injuries to his back, right shoulder, and ribs.

On 17 October 2005, plaintiff presented to Dr. David C. Miller (Dr. Miller) with complaints of lower back pain and numbness in his legs and feet. Dr. Miller diagnosed plaintiff with lower back pain and bilateral foot numbness. He prescribed a steroid and anti-inflammatory medication, and recommended physical therapy. On 25 October 2005, AAA accepted plaintiff's claim for workers' compensation benefits via Industrial Commission Form 60.

On 17 November 2005, an MRI of plaintiff's lumbar spine revealed that at "L3-L4 and L4-L5, [plaintiff] ha[d] a broad-based disc bulge with facet arthrosis causing mild-to-moderate spinal stenosis." The spinal stenosis was a pre-existing degenerative condition that was aggravated by the accident. A second test, an EMG nerve conduction study, showed findings consistent with peripheral neuropathy and minimal lumbar radiculopathy, both of which could have been causing the numbness in plaintiff's feet.[2] On 14 December 2005, plaintiff was released to return to light duty work, but was restricted to lifting a maximum of twenty-five pounds. On 19 December 2005, plaintiff returned to work for defendant. On 11 January 2006, plaintiff stated that he was "relatively pain free" and that he was able to do his regular job.

---

[2]Peripheral neuropathy is nerve disease in the extra-spinal area. Dr. Miller could not opine whether the peripheral neuropathy was caused by the accident because plaintiff had significant burns on his lower extremities. Dr. Miller stated that only plaintiff's burn specialist could answer that question. Lumbar radiculopathy was caused by the spinal stenosis.

Plaintiff continued to have numbness in both feet. Dr. Miller opined that plaintiff had reached medical maximum improvement and he was released to regular work duty.

On 28 February 2006, plaintiff presented to Dr. Gilbert Alligood complaining of pain in his right shoulder. An MRI was ordered and plaintiff was referred to Dr. Robert Martin (Dr. Martin). The MRI revealed a partial thickness rotator cuff tear. Dr. Martin placed plaintiff on the following work restrictions: (1) lifting a maximum of twenty-five pounds and (2) no overhead use of the right arm. On 23 May 2006, plaintiff underwent an arthroscopic debridement and subacromial decompression of the right shoulder. AAA accepted plaintiff's claim for his right shoulder injury and reinstated temporary total disability benefits. Several days later, plaintiff was terminated from his employment with AAA because his twelve weeks of leave under the Family Medical Leave Act had expired.

On 21 September 2006, plaintiff was seen for a follow-up examination with Dr. Martin and was released to return to work with no restrictions. AAA subsequently filed Industrial Commission Form 24 application to terminate or suspend payment of compensation on the basis that plaintiff "ha[d] received full duty release from the treating doctor." Plaintiff failed to object to this application. On 29 November 2006, AAA's Form 24 application was approved. Plaintiff presented to Dr. Martin again on 20 December 2006 and had no pain, full range of motion, and normal strength in his shoulder.

Dr. Martin's medical report indicates that plaintiff was released to "normal work activities and MMI with no PPI for his shoulder."[3]

After plaintiff was released to normal work duty, AAA offered him a job as a dock worker and driver at a pay rate of $18.00 to $19.00 per hour. Plaintiff refused this employment. From December 2006 until May 2007, plaintiff received unemployment benefits. During this time, plaintiff applied for employment as a truck driver at over thirty locations without success. On 21 May 2007, plaintiff filed Industrial Commission Form 33 requesting his claim be assigned for hearing, and asserted that: (1) AAA's Form 24 application violated public policy because an adjuster filed the application; and (2) he was still entitled to temporary total disability benefits. From early June 2007 until 1 January 2008, plaintiff worked for East Carolina Outfitters, a hunting guide service, and earned $10.00 an hour.

On 20 February 2008, plaintiff presented to Dr. Miller and complained of recurring back pain, buttock pain, and numbness in both feet. Plaintiff also complained of groin pain. An MRI was ordered with results "fairly similar" to the 2005 MRI. The MRI did reveal "enlarged joints at the L3-4 and L4-5 level[s], [and] subarticular stenosis, meaning the narrowing of the nerve root passageways." Dr. Miller discussed additional treatment with

---

[3]In his deposition, Dr. Martin stated that based upon the North Carolina Industrial Commission Rating Guide, he found that it would be appropriate to award plaintiff a permanent partial impairment rating of five percent for his shoulder under section 4.c. entitled Resection end of clavicle (distal to coranoid and trapezoid ligaments).

plaintiff, including surgical intervention. Plaintiff stated that he desired to undergo lumbar laminectomy at the L3-L4 and L4-L5 levels. At the time of the hearing before the Commission, plaintiff had not undergone surgery.

On 27 May 2009, the Commission entered an Opinion and Award and concluded that: (1) on 24 July 2005, plaintiff sustained a compensable injury by accident to his back, right shoulder, and ribs, as well as severe burns, arising out of and in the course of his employment with defendant; (2) the *Parsons* presumption was applicable and established that plaintiff's back condition in 2008 was directly and causally related to his 24 July 2005 injury, and that AAA had failed to rebut this presumption; and (3) plaintiff had established that his refusal to accept employment with defendant as a dock worker was justified. Plaintiff was awarded temporary total disability benefits from 20 December 2006 until 26 May 2007; temporary partial disability benefits from 27 May 2007 until 31 December 2007; and temporary total disability benefits from 1 January 2008 until further order of the Commission. Plaintiff was entitled to payment for all future medical expenses, and a 5% permanent partial disability rating to his shoulder, a 20% rating for the scarring on his legs from the burns, and "any additional rating received for his abdominal area." Plaintiff did not present an argument in favor of entitlement to compensation as a result of disfigurement. AAA and Crawford & Company (collectively, defendants) appeal.

II. Standard of Review

> The applicable standard of appellate review in workers' compensation cases is well established. Appellate review of an opinion and award from the Industrial Commission is generally limited to determining: "(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) (citing *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 186, 345 S.E.2d 374, 379 (1986)).

Hassell v. Onslow Cty. Bd. of Educ., 362 N.C. 299, 305, 661 S.E.2d 709, 714 (2008). The Commission is the sole judge of the credibility of the witnesses and the weight to be given to the evidence before it. *Id.* North Carolina appellate courts do not "have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Id.* (quotation omitted). We review the Commission's conclusions of law *de novo*. *McRae v. Toastmaster*, Inc., 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004).

III. Causation and the *Parsons* Presumption

In their first argument, defendants contend the Commission erred by concluding that defendants had failed to rebut the presumption that the necessary treatment for plaintiff's back condition in 2008 was causally related to the 24 July 2005 compensable injury. We disagree.

Defendants stipulated in a pre-trial agreement that plaintiff sustained a compensable injury by accident on 24 July 2005. "Subsequent to the establishment of a compensable injury under the North Carolina Workers' Compensation Act, an employee may seek

compensation under N.C. Gen. Stat. § 97-25 for additional medical treatment when such treatment 'lessens the period of disability, effects a cure or gives relief.'" *Reinninger v. Prestige Fabricators, Inc.*, 136 N.C. App. 255, 259, 523 S.E.2d 720, 723 (1999) (quoting *Parsons v. Pantry, Inc.*, 126 N.C. App. 540, 541–42, 485 S.E.2d 867, 869 (1997)).

> In an action for additional compensation for medical treatment, the medical treatment sought must be "directly related to the original compensable injury." If additional medical treatment is required, there arises a rebuttable presumption that the treatment is directly related to the original compensable injury and the employer has the burden of producing evidence showing the treatment is not directly related to the compensable injury.

Id. (quotation and citation omitted). To require a plaintiff to re-prove causation each time he seeks treatment for an injury that has previously been determined to be the result of a compensable accident would be "unjust and violates our duty to interpret the Act in favor of injured employees." *Parsons*, 126 N.C. App. at 542, 485 S.E.2d at 869.

Defendants challenge the findings of fact and conclusion of law made regarding this issue:

> 24. On March 5, 2008, plaintiff presented to Dr. David Miller at Carolina Regional Orthopaedics after having a lumber MRI. The MRI showed disc disease at L1-L2 with narrowing disc space and degenerative changes, facet arthropathy at L4-L5 bilaterally with foraminal stenosis, and facet hypertrophy at L3-L4 with possible stenosis. Dr. Miller testified that the results of this MRI were fairly similar to plaintiff's previous MRI. Plaintiff indicated a desire to pursue a bilateral laminectomy at L3-L4. Dr. Miller

> opined that a lumbar laminectomy could help plaintiff's back and buttock pain and would hopefully improve plaintiff's numbness by 50%.
>
> 25. When asked whether plaintiff's symptoms on February 20 and March 5, 2008 were consistent with plaintiff's original injury to his back in July 2005, Dr. Miller testified, "The symptoms were very, very, very, similar; pretty much the same." Regarding whether plaintiff's need for a laminectomy is related to the July 24, 2005 accident, Dr. Miller stated, "It's not the – it's not the only reason, but it is one of the reasons." When Dr. Miller was asked whether plaintiff's continued problems were related to his injury on July 24, 2005, he responded, "That's one I can't answer, to be honest with you. I don't know . . . his numbness never went away. . . . So, I would say in regards to that, that probably is still related, and since there seems to be a sort of continuum there." Because plaintiff's back pain got better and there was a span of almost two years between plaintiff's visits to him, Dr. Miller felt that the causation issue regarding plaintiff's low back pain was more difficult to answer. Dr. Miller also testified that as of March 5, 2008, he took plaintiff out of work, in preparation for surgery. If plaintiff did not have surgery, Dr. Miller planned to discuss plaintiff's work status with him and plaintiff would be out of work for an indefinite time.
>
> 26. Plaintiff also testified at the Deputy Commissioner's hearing that his back initially felt better in December 2005, but that the numbness never went away and the low back pain slowly increased to where it had been after the accident. Based on the greater weight of the medical evidence, the Commission[] finds that plaintiff's 2008 back condition and numbness are related to his July 24, 2005 injury by accident.

Based upon these findings, the Commission concluded that "the *Parsons* presumption applies and establishes that plaintiff's back condition in 2008 is directly and causally related to his injury by accident on July 24, 2005. Defendants failed to rebut the

presumption that the medical treatment is directly related to the compensable injury."

As to findings of fact 24 and 25, defendants argue that the Commission erred by reciting Dr. Miller's testimony in lieu of making findings about his testimony. It is well-established that "the Industrial Commission had a duty to make findings of fact which were more than a mere summarization or recitation of the evidence, and which resolved any conflicting testimony." *Munns v. Precision Franchising, Inc.*, ___ N.C. App. ___, ___, 674 S.E.2d 430, 434 (2009) (quotation omitted). While it is true that findings of fact 24 and 25 merely recite Dr. Miller's deposition testimony, the Commission did make a finding on the "crucial facts upon which the right to compensation depends" in finding of fact 26, which resolved the issue of whether plaintiff's current back condition was related to his original compensable injury based upon the testimony reflected in findings 24 and 25. *Id.*

As to finding of fact 26, defendants argue that Dr. Miller's expert testimony is not sufficient to establish a casual link between the original injury and plaintiff's back condition and numbness in 2008 because his testimony does not satisfy the requirements of *Holley v. ACTS, Inc.*, 357 N.C. 228, 581 S.E.2d 750 (2003). In *Holley*, our Supreme Court stated:

> In cases involving complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury. However, when such expert opinion testimony is based merely upon speculation and conjecture, . . . it is not sufficiently reliable to qualify as competent

> evidence on issues of medical causation. The evidence must be such as to take the case out of the realm of conjecture and remote possibility, that is, there must be sufficient competent evidence tending to show a proximate causal relation.

Id. at 232, 581 S.E.2d at 753 (internal quotations and alteration omitted). Medical certainty is not required, *Id.* at 234, 581 S.E.2d at 754, and goes only to the weight of the expert's testimony, *Adams v. Metals USA*, 168 N.C. App. 469, 483, 608 S.E.2d 357, 365, *aff'd per curiam*, 360 N.C. 54, 619 S.E.2d 495 (2005). Our appellate courts differentiate between "mere possibility" and "probability" when establishing causation. *See Whitfield v. Laboratory Corp. of Am.*, 158 N.C. App. 341, 351, 581 S.E.2d 778, 785 (2003) ("[T]he 'mere possibility of causation,' as opposed to the 'probability' of causation, is insufficient to support a finding of compensability." (citation omitted)).

Dr. Miller testified that when plaintiff presented in February 2008, the symptoms he was experiencing were "pretty much the same" as those he experienced in July 2005, and that the MRI ordered in 2008 had results that were "fairly similar" to the 2005 MRI. When asked if he had an opinion to a reasonable degree of medical certainty whether plaintiff's continued problems were related to his injury on 24 July 2005, Dr. Miller responded:

> That's one I can't answer, to be honest with you. I don't know. You know, we have documentation in the chart that he got better in regard -- you know, his numbness never went away. . . . *So, I would say in regards to that, that probably is still related, and since there seems to be sort of a continuum there.* His back pain did get better, and that -- that to me would be the only issue in my

> mind that's sort of hard to answer, because, you know, people can have back pain, it goes away, back pain can come back. That's a span of two years, almost, between those two visits that we're referencing here. And again, the symptoms are pretty much exactly the same. You know, whether the accident -- you know, I'm sure that the accident caused the initial problem that we saw him for, and then it resolved except for the numbness. I can't say, you know, with a reasonable degree of certainty . . . that after his pain, back pain, resolved but his numbness continued, that he might not have gotten back pain again at a later time for unknown reasons, because of the two-year span.

(Emphasis added).

Dr. Miller further testified that the 24 July 2005 injury was "a reason" for his need for back surgery at that time based upon the fact that the numbness in plaintiff's feet had never resolved. *See Hansel v. Sherman Textiles*, 304 N.C. 44, 52, 283 S.E.2d 101, 106 (1981) ("In workers' compensation actions the rule of causation is that where the right to recover is based on injury by accident, the employment need not be the sole causative force to render an injury compensable."). Dr. Miller specifically opined that the surgery would "probably" improve plaintiff's numbness in his feet by fifty percent.

The Commission's finding of fact 26 is supported by competent evidence and this finding supports the Commission's conclusion that defendants failed to rebut the presumption that the necessary treatment for plaintiff's back condition in 2008 was directly related to the 24 July 2005 injury. This argument is overruled.

III. Disability Benefits

In their second argument, defendants contend the Commission erred by concluding plaintiff was entitled to disability benefits. We remand for additional findings in part and disagree in part.

"The term 'disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C. Gen. Stat. § 97-2(9) (2007). "Accordingly, disability as defined in the Act is the impairment of the injured employee's earning capacity rather than physical disablement." *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993). The burden is on the employee to show:

> (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) that this individual's incapacity to earn was caused by plaintiff's injury.

Hilliard v. Apex Cabinet Co., 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982) (citation omitted). In *Russell*, *supra*, this Court set forth four ways in which an employee may meet this burden:

> (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

Russell, 108 N.C. App. at 765, 425 S.E.2d at 457 (internal citations omitted). The employer may also establish at any time that the employee is not entitled to disability benefits because of the latter's unjustified refusal to accept an offer of suitable employment. *Franklin v. Broyhill Furniture Industries*, 123 N.C. App. 200, 206, 472 S.E.2d 382, 386, *cert. denied*, 344 N.C. 629, 477 S.E.2d 39 (1996). "Suitable employment is defined as any job that a claimant is capable of performing considering his age, education, physical limitations, vocational skills and experience." *Munns*, ___ N.C. App. at ___, 674 S.E.2d at 433 (quotation omitted).

The Commission found that plaintiff was entitled to disability benefits for three distinct time periods for three distinct reasons.

20 December 2006 through 26 May 2007

The Commission awarded plaintiff temporary total disability benefits during this time frame based upon the second prong of *Russell*. In support of this award, the Commission made the following findings and conclusions which are challenged by defendants:

Findings of Fact

> 19. In December 2006, Lydia Gurganus, manager for defendant-employer, offered plaintiff employment as a dock worker and driver, which was the only job she had available at that time. The dock worker/driver position paid $17.00 per hour, which was the top of the pay range for that position, but it was less than half of what plaintiff made prior to his injury by accident. Ms. Gurganus testified that as a dock worker, plaintiff would be expected to lift at least 50 pounds and if he

was not driving a forklift, plaintiff would be on his feet for the entire shift. She explained that it was a very physical job, with significantly higher lifting requirements than plaintiff's truck driving job. Ms. Gurganus stated that after plaintiff returned to work for eight weeks, he could petition the owner of defendant-employer to reinstate plaintiff's seniority. Reinstatement of plaintiff's seniority and higher pay, however, was not guaranteed. Plaintiff refused the offer of employment. Plaintiff has not contacted defendant-employer since that time to see if any other positions became available.

20. Plaintiff applied for and received unemployment compensation in the amount of $378.00 per week for 26 weeks, ending on May 27, 2007. Plaintiff testified that between December 2006 and May 2007, he was looking for work and applied for over 30 different jobs as a driver.

. . . .

Conclusions of Law

4. In *Dixon v. Durham*, 128 N.C. App. 501, 495 S.E.2d 380 (1998), the Court held,

> In considering the wages or salary of a pre-injury job and a post-injury job offer, common sense and fairness dictate examination not only of the actual dollar amount paid at a given time, but also of the potential for advancement or, in other words, capacity for income growth.

In the case at bar, the dock worker/driver position paid wages that were less than half of what plaintiff made in his pre-injury position. Additionally, the lifting requirements were much higher than that of a driver and it was uncertain whether plaintiff would ever regain his seniority or former pay. The greater weight of the evidence showed that the dock worker/driver job offered by defendants was not suitable employment and therefore the Commission finds that

> plaintiff's refusal to accept this employment was justified. . . .
>
> 5. From December 20, 2006 until May 27, 2007, plaintiff met his burden to prove that he was capable of some work but after a reasonable effort was unable to obtain employment. . . .

Defendants contend that plaintiff unjustifiably refused suitable employment and argue that the Commission erroneously took into consideration that the dock worker/driver position had significantly higher lifting requirements and that it was a physical job. We agree. The Commission specifically found that Lydia Gurganus (Gurganus), defendant's manager, testified that as a dock worker, plaintiff would be expected to lift 50 pounds and, if he was not driving a forklift, plaintiff would be on his feet for the entire shift. Gurganus explained that the dock worker/driver position was a very physical job, with significantly higher lifting requirements than plaintiff's truck driving job. The Commission clearly considered the higher lifting requirements in its determination of whether plaintiff justifiably refused suitable employment. However, during the period of December 2006 through May 2007, plaintiff had been given a full release to normal work duty with no work restrictions by each of his physicians. Therefore, any additional lifting requirements were improperly considered by the Commission in its determination.

We also note that the Commission made a miscalculation in the comparison of plaintiff's pre-injury salary and post-injury salary offer by finding the dock worker/driver position paid wages that were "less than half" of what plaintiff made in his pre-injury

position. Gurganus testified that the post-injury dock worker/driver position paid "$18.00 or $19.00" an hour not $17.00. Further, there was no evidence before the Commission that indicated this amount was "less than half of what plaintiff made in his pre-injury position."

"[I]t is not this Court's role to make new findings of fact based upon the evidence[.]" *Bowen v. ABF Freight Sys.*, 179 N.C. App. 323, 330–31, 633 S.E.2d 854, 859 (2006). We are unable to determine whether the Commission correctly found that plaintiff had justifiably refused suitable employment during this time period based upon the findings of the Commission. "While the Commission is not required to make findings on each detail of the evidence or each inference which can be drawn from the evidence, its findings of fact must be sufficient to resolve all of the issues the evidence raises." *Heffner v. Cone Mills Corp.*, 83 N.C. App. 84, 86, 349 S.E.2d 70, 73 (1986). This issue must be remanded to the Commission. *See Watts v. Borg Warner Auto., Inc.*, 171 N.C. App. 1, 5, 613 S.E.2d 715, 719 ("Where the findings are insufficient to enable the court to determine the rights of the parties, the case must be remanded to the Commission for proper findings of fact." (quotation omitted)), *aff'd per curiam*, 360 N.C. 169, 622 S.E.2d 492 (2005).

27 May 2007 through 31 December 2007

The Commission awarded plaintiff temporary partial disability benefits during this time frame based upon the fourth prong of *Russell*. Plaintiff worked at Eastern Carolina Outfitters at a wage

of $10.00 an hour during this time period. The Commission concluded that this position paid less than half of plaintiff's pre-injury wages, and "was also not suitable and not indicative of plaintiff's wage earning capacity."

In order to establish disability under the fourth prong of *Russell*, plaintiff must produce evidence that he has obtained other employment at a wage less than that earned prior to the injury. *Larramore v. Richardson Sports Ltd. Partners*, 141 N.C. App. 250, 259, 540 S.E.2d 768, 773 (2000), *aff'd per curiam*, 353 N.C. 520, 546 S.E.2d 87 (2001). "When, however, a worker presents evidence that satisfies the fourth prong of *Russell* . . . such evidence, while not dispositive of disability, shifts the burden to the employer to establish that the employee could have obtained higher earnings." *Britt v. Gator Wood, Inc.*, 185 N.C. App. 677, 684, 648 S.E.2d 917, 922 (2007). The evidence before the Commission was that defendant had offered plaintiff employment that paid higher wages than Eastern Carolina Outfitters. The dispositive issue again becomes whether plaintiff justifiably refused this employment. This issue is also remanded to the Commission.

1 January 2008 until Further Order of the Commission

The Commission found that plaintiff was incapable of work in any employment during this time period pursuant to the first prong in *Russell*. Defendants rely heavily on their first argument that plaintiff's back condition in 2008 was not causally related to his compensable injury in 2005. As stated above, this argument is overruled.

Further, in determining whether plaintiff has met the burden of proving loss of wage earning capacity under the first prong of *Russell*, "the Commission must consider not only the plaintiff's physical limitations, but also his testimony as to his pain in determining the extent of incapacity to work and earn wages such pain might cause." *Webb v. Power Circuit, Inc.*, 141 N.C. App. 507, 512, 540 S.E.2d 790, 793 (2000), *cert denied*, 353 N.C. 398, 548 S.E.2d 159 (2001). Plaintiff testified that by 1 January 2008, he was having back pain, numbness in his feet, and irritation from the burn scars. Dr. Miller testified that plaintiff was taken out of work on 20 February 2008 and that the "out-of-work recommendation" was indefinite at that time. Plaintiff is entitled to total temporary disability benefits from 1 January 2008 until further order of the Commission.

IV. Credit

In their third argument, defendants contend the Commission erred by determining that plaintiff was entitled to compensation under N.C. Gen. Stat. § 97-31 for a specific physical impairment and at the same time awarding disability benefits under N.C. Gen. Stat. §§ 97-29 and -30. We agree.

In *Collins v. Speedway Motor Sports Corp.*, 165 N.C. App. 113, 598 S.E.2d 185 (2004), this Court held that "[w]here an employee can show *both* a disability pursuant to G.S. §§ 97-29 or 97-30 and a specific physical impairment pursuant to G.S. § 97-31, he may not collect benefits pursuant to both schemes, but rather is entitled to select the statutory compensation scheme which provides the more

favorable remedy." *Id.* at 119, 598 S.E.2d at 190. Plaintiff concedes this question and we agree that defendants should receive a credit for any amount paid pursuant to N.C. Gen. Stat. §§ 97-29 and -30 against what is owed for his permanent ratings pursuant to N.C. Gen. Stat. § 97-31.[4]

V. N.C. Gen. Stat. § 97-25.1

In their fourth argument, defendants contend the Commission erred by ordering defendant to pay "all related medical expenses incurred or to be incurred by plaintiff as the result of his injury by accident, for so long as such examinations, evaluations and treatments may reasonably be required to effect a cure, give relief or tend to lessen plaintiff's period of disability . . . ." Defendants specifically argue that pursuant to N.C. Gen. Stat. § 97-25.1, medical treatment cannot be requested two years after defendants' last payment of medical or indemnity compensation.

In *Guerrero v. Brodie Contrs., Inc.*, 158 N.C. App. 678, 582 S.E.2d 346 (2003), this Court addressed virtually the same argument and held:

> The award does not appear to override the provisions of G.S. § 97-25.1 and the record does not indicate that the issue of whether the two-year statute of limitations had begun to run was before the Commission. Therefore, we hold that the award is not overly broad and would be subject to the limitations of G.S. § 97-25.1, should the conditions arise under which the limitations operate.

---

[4]The Commission found that plaintiff was entitled to compensation for the 5% permanent partial disability rating to his shoulder, the 20% rating to his legs, and any additional rating received for his abdomen. The Commission has yet to award plaintiff this compensation.

Id. at 685, 582 S.E.2d 351. In the instant case, it does not appear that the issue of whether the two-year statute of limitations had begun to run was before the Commission. Based upon our holding in *Guerrero*, the Commission's award is subject to the limitations of N.C. Gen. Stat. § 97-25.1, "should the conditions arise under which the limitations operate." *Id.*

AFFIRMED IN PART; REMANDED IN PART.

Judges MCGEE and STEPHENS concur.

Report per Rule 30(e).