IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1009

Filed: 5 November 2019

N.C. Industrial Commission, I.C. No. 609188

MARY BENTLEY, Employee, Plaintiff

v.

REVLON, Employer, CNA INSURANCE COMPANY, Carrier, Defendants

Appeal by Plaintiff from Opinion and Award entered 21 June 2018 by the North Carolina Industrial Commission. Heard in the Court of Appeals 22 May 2019.

Lennon, Camak & Bertics, PLLC, by George W. Lennon and Michael W. Bertics, for plaintiff-appellant.

Teague Campbell Dennis & Gorham, LLP, by Heather T. Baker, Bruce A. Hamilton, and Elizabeth P. Ligon, for defendants-appellees.

HAMPSON, Judge.

Factual and Procedural Background

Mary Bentley (Plaintiff) appeals from an Opinion and Award of the Full Commission of the North Carolina Industrial Commission (Commission), denying her claims for additional indemnity compensation and medical compensation for a compensable right shoulder injury. Specifically, the Commission concluded Revlon

and CNA Insurance Company (Defendants) rebutted the *Parsons* presumption and Plaintiff failed to prove her current treatment for her shoulder was related to a 1995 injury or that she sustained a change in condition. Relevant to this appeal, the Record tends to show the following:

Plaintiff was employed by Revlon, or its corporate predecessors, from 1983 to 2011. On 28 December 1995, Plaintiff sustained serious injuries to her face, nasal passage, head, neck, right shoulder, and right arm when a pressurized air hose struck her in the face and right side multiple times. Plaintiff sought numerous treatments from various doctors over the past two decades for her injuries, and the parties litigated her claims on multiple occasions before the Commission to determine issues of compensability and compensation.

In an Opinion and Award entered on 17 March 2003 (2003 Opinion and Award), the Commission concluded Plaintiff's injuries to her "face, nasal passage, head, neck, right shoulder and arm" were compensable injuries under the North Carolina Workers' Compensation Act (the Act) and ordered that Defendants pay all medical compensation necessitated by the 1995 injury. *See* N.C. Gen. Stat. § 97-2(6) (2017) (defining compensable injury for purposes of the Act). The 2003 Opinion and Award expressly left open the "issue of what, if any, permanent partial disability compensation shall be payable to [P]laintiff . . . until such time as [P]laintiff reaches

maximum medical improvement." Neither party appealed the 2003 Opinion and Award.

In the 2003 Opinion and Award, the Commission found in January of 1996, Dr. Michael Soo (Dr. Soo), a neurologist at Durham Clinic, P.A., "examined [P]laintiff . . . for complaints of . . . shooting pain and numbness down her right arm" and that "[b]y March 1996, [P]laintiff was improving but continued to have pain in the . . . right shoulder[.]" In March of 1997, Plaintiff obtained a second opinion from Dr. Robert E. Price, Jr. (Dr. Price) "regarding her facial pain, right shoulder pain and right arm pain and numbness." After performing an electromyography (EMG) of Plaintiff's right arm, Dr. Price concluded there was no nerve damage. With Plaintiff still continuing to have "numbness in the right side of her face, pain in her right shoulder and numbness in the right arm and hand[,] Defendants sent her to a chiropractor . . . for an evaluation." After receiving three treatments, "[D]efendant-carrier refused to pay for the treatments[, and] Plaintiff was forced to discontinue her treatment." Thereafter, Defendants referred Plaintiff for a second opinion to Dr. Barrie J. Hurwitz (Dr. Hurwitz), who recommended "it would be reasonable to repeat the EMG and NCV due to [P]laintiff's complaints of worsening symptoms over the past month." However, "Defendants denied authorization for these studies, stating that [P]laintiff's injuries were to her face and neck, and not to her arm." The Commission further found: "On May 24, 2000, [D]efendants accepted liability for

[P]laintiff's arm condition . . . . Thus, [P]laintiff's arm condition is causally related to the December 28, 1995 injury by accident."

In January of 2011, Plaintiff filed an occupational disease claim, citing upper extremity conditions caused by the repetitive nature of her job duties, and on 28 August 2011, Plaintiff filed a Form 33 requesting payment of various compensation benefits related to the 1995 injury. After conducting a hearing, the Commission issued an Opinion and Award on 13 March 2013 (2013 Opinion and Award). In its 2013 Opinion and Award, the Commission, *inter alia*, denied Plaintiff's request for additional temporary partial or temporary total disability benefits relating to her 1995 injury and denied Plaintiff's occupational disease claim, concluding Plaintiff "failed to establish that she suffers from a compensable occupational disease within the meaning of N.C. Gen. Stat. § 97-53." Plaintiff appealed this 2013 Opinion and Award to our Court, which affirmed the Commission's decision. *See Bentley v. Revlon, Inc.*, 233 N.C. App. 598, 758 S.E.2d 903 (15 April 2014) (unpublished).

On 16 May 2016, Plaintiff filed a Form 33 requesting her claim be assigned for hearing, alleging a change of condition, and seeking payment for additional medical treatments and expenses and for permanent partial and total disability. On 2 August 2016, Dr. Kevin P. Speer (Dr. Speer), an orthopedic surgeon, evaluated Plaintiff for ongoing right shoulder pain that was increasing over time. Dr. Speer ordered an MRI of her shoulder, which revealed "significant degenerative changes and a small full

thickness tear of the supraspinatus tendon of the rotator cuff." On 10 November 2016, Dr. Matthew Boes (Dr. Boes) conducted an Independent Medical Examination of Plaintiff's right shoulder. Dr. Boes agreed with Dr. Speer's assessment of a partial thickness rotator cuff tear but did not recommend surgery. Both Drs. Speer and Boes were deposed in this case. In his deposition, Dr. Speer testified the Commission's prior finding that the shoulder injury was related to the 1995 injury was consistent with his own findings on examination. He further testified any attempt to relate any portion of Plaintiff's shoulder injury to a non-work injury "would be entirely speculative[.]"

On the other hand, Dr. Boes opined to a reasonable degree of medical certainty that Plaintiff's current shoulder injury was not related to the 1995 injury. Dr. Boes based his opinion on his understanding:

> [T]he injury had occurred twenty-one years prior. She had not complained based on the records that I had of any pain between then and I believe August of 2016. And we had documentation of a note from 1992 I believe it was that showed her complaining of neck and shoulder pain at that point.

However, Dr. Boes also testified he was provided and reviewed only thirty-nine pages of Plaintiff's medical records and had not seen records from 1996, 1997, and 2009 related to Plaintiff's right arm or shoulder. He was also not provided with either the 2003 Opinion and Award or the 2013 Opinion and Award for review.

On 21 June 2018, the Commission issued its Opinion and Award denying Plaintiff's claims for additional indemnity compensation and medical compensation for her current right shoulder injury. In reaching this decision, the Commission made the following relevant Findings of Fact:

> 11. . . . . [T]he [2013 Opinion and Award] did not specifically address the compensability of Plaintiff's right shoulder condition. The decision did not find that Plaintiff reached maximum medical improvement of her right shoulder condition, and there is no evidence in the prior decisions indicating Plaintiff had been found by a medical provider to be at maximum medical improvement or given a permanent partial disability rating for her compensable right shoulder condition. There has been no final adjudication on the merits of Plaintiff's right shoulder condition.
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> 22. Dr. Boes opined to a reasonable degree of medical certainty that Plaintiff's current right shoulder condition is not causally related to her compensable accident on December 28, 1995. In formulating his opinion, Dr. Boes relied on the fact that Plaintiff had not reported right shoulder symptoms from the date of her December 28, 1995 accident until she first sought treatment on August 2, 2016 with Dr. Speer.
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> 23. The Full Commission has reviewed and carefully weighed all the evidence and the testimony of the medical experts and gives greater weight to the opinion testimony of Dr. Boes. The Full Commission finds as fact, based upon a preponderance of the evidence, that Plaintiff's current right shoulder condition is not a consequence of her admittedly compensable injury of December 28, 1995.
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> 24. With regards to Plaintiff's application for additional indemnity compensation on the grounds of a change in condition, the Full Commission finds that Plaintiff has not suffered a change in her earning capacity, a change in her degree of disability, or a

> substantial change in her physical conditions that impact her earning capacity. In the alternative, the Full Commission finds based upon a preponderance of the evidence in view of the entire record that Plaintiff has failed to otherwise prove that she is disabled due to her December 28, 1995 work-related injury.

Based on its Findings of Fact, the Commission made the following relevant Conclusions of Law:

> 2. Plaintiff's right shoulder was deemed a compensable injury by the Full Commission in their 2003 decision. The [2013 Opinion and Award] did not specifically address the compensability of Plaintiff's right shoulder condition and was not a final judgment. The decision did not find that Plaintiff reached maximum medical improvement of her right shoulder condition, and there is no evidence in the prior decisions indicating Plaintiff had been found by a medical provider to be at maximum medical improvement or given a permanent partial disability rating for her compensable right shoulder condition. There has been no final adjudication on the merits of Plaintiff's right shoulder condition. Thus, the Full Commission concludes the doctrine of *res judicata* does not preclude Plaintiff's current claim for additional medical treatment for her right shoulder condition. [(citation omitted)].
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> 3. In *Parsons v. Pantry, Inc.*[,] 126 N.C. App. 540, 485 S.E.2d 867 (1997), the North Carolina Court of Appeals held that where a Plaintiff's injury has been proven to be compensable, there is a presumption that the additional medical treatment is directly related to the compensable injury. *Id.* On March 17, 2003, the Full Commission determined that Plaintiff sustained compensable injuries to her face, nasal passage, head, neck, right shoulder, and right arm. Defendants did not appeal this Award. Applying the rebuttable *Parsons* presumption to Plaintiff's current right shoulder condition, the Full Commission concludes, through the presentation of evidence in this case, specifically through the testimony of Dr. Boes, Defendants have rebutted the *Parsons* presumption regarding Plaintiff's current right shoulder condition. [(citation omitted)].

> 4. The *Parsons* presumption having been rebutted, the burden is with Plaintiff to prove the compensability of her current right shoulder condition. . . . Given Plaintiff's medical records and the medical testimony on the subject of the cause of Plaintiff's current right shoulder condition, the greater weight of the competent evidence does not establish that Plaintiff's current right shoulder condition was caused by the December 28, 1995 compensable accident incident. [(citations omitted)]. Therefore, Plaintiff is not entitled to additional medical treatment for her right shoulder condition.
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> 5. Plaintiff has asserted she sustained a change of condition, resulting in a change in her earning capacity since May 16, 2014, the date the last payment of compensation was made. . . . Based upon the preponderance of the evidence in view of the entire record, Plaintiff has failed to prove she sustained a substantial change in her physical capacity to earn wages and that any such change was causally related to the December 28, 1995 injury by accident. [(citation omitted)].
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> 6. For the purposes of workers' compensation, "disability" refers to diminished capacity to earn wages rather than physical infirmity. [(citation omitted)]. In order to prove ongoing total disability, Plaintiff must prove (1) the incapacity of earning pre-injury wages in the same employment, (2) the incapacity of earning pre-injury wages in any other employment, and (3) that this incapacity to earn wages is caused by the injury. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). . . . In addition, Plaintiff must also satisfy the third element in *Hilliard* by proving that his inability to obtain employment is because of his work-related injury. *Id.* Based upon the preponderance of the evidence in view of the entire record, the Full Commission concludes that Plaintiff has failed to prove she is disabled due to her December 28, 1995 work-related injury. *Id.*

On 10 July 2018, Plaintiff filed timely Notice of Appeal from this Opinion and Award.

See N.C. Gen. Stat. § 97-86 (2017).

Issues

The dispositive issues on appeal are (I) whether the Commission erred by finding Defendants met their burden of proving Plaintiff's current right shoulder condition was not related to her compensable injury; (II) whether the Commission erred by finding Plaintiff failed to prove a change of condition; and (III) whether the Commission erred by finding Plaintiff failed to prove she is disabled as a result of the 1995 injury.

Standard of Review

Review of an opinion and award of the Industrial Commission "is limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law. [The appellate] court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (citations and quotation marks omitted). Thus, "[t]he Commission's findings of fact may be set aside on appeal only where there is a complete lack of competent evidence to support them." *Jones v. Candler Mobile Village*, 118 N.C. App. 719, 721, 457 S.E.2d 315, 317 (1995) (citation omitted). Unchallenged findings of fact are presumed to be supported by competent evidence and are therefore binding on appeal. *Johnson v. Herbie's Place*, 157 N.C. App. 168, 180, 579 S.E.2d 110, 118 (2003) (citations omitted). In addition,

"[t]he Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Anderson v. Construction Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965). But, "[w]hen the Commission acts under a misapprehension of the law, the award must be set aside and the case remanded for a new determination using the correct legal standard." *Ballenger v. ITT Grinnell Industrial Piping*, 320 N.C. 155, 158, 357 S.E.2d 683, 685 (1987) (citations omitted). The Commission's conclusions of law, however, are subject to de novo review. *Wilkes v. City of Greenville*, 243 N.C. App. 491, 494, 777 S.E.2d 282, 285 (2015) (citation omitted), *aff'd as modified*, 369 N.C. 730, 799 S.E.2d 838 (2017).

Analysis

I. *Parsons* Presumption

It is well settled "[t]he claimant has the burden of proving that his claim is compensable under the [North Carolina Workmen's Compensation] Act." *Henry v. Leather Co.*, 231 N.C. 477, 479, 57 S.E.2d 760, 761 (1950) (citations omitted). In order to meet this burden, the claimant must prove a causal relationship exists between the injury suffered and the work-related accident. *Hedges v. Wake Cnty. Pub. Sch. Sys.*, 206 N.C. App. 732, 734, 699 S.E.2d 124, 126 (2010) (citation omitted). However, in *Parsons v. Pantry, Inc.*, this Court held where the Commission had previously determined a claimant has suffered a compensable injury, a rebuttable presumption arises that additional medical treatment is causally related to the original injury.

126 N.C. App. 540, 542, 485 S.E.2d 867, 869 (1997). "The presumption of compensability applies to future symptoms allegedly related to the original compensable injury." *Perez v. American Airlines/AMR Corp.*, 174 N.C. App. 128, 136-37 n.1, 620 S.E.2d 288, 293 n.1 (2005). Under this framework, the burden of proof is shifted from the employee to the employer "to prove the original finding of compensable injury is unrelated to [the employee's] present discomfort." *Parsons*, 126 N.C. App. at 542, 485 S.E.2d at 869; *see Reinninger v. Prestige Fabricators, Inc.*, 136 N.C. App. 255, 259, 523 S.E.2d 720, 723 (1999) (holding, in this context, the employer must produce "evidence showing the [current] treatment is not directly related to the compensable injury." (citation omitted)). If, however, the employer "rebuts the *Parsons* presumption, the burden of proof shifts back to the [employee]." *Miller v. Mission Hosp., Inc.*, 234 N.C. App. 514, 519, 760 S.E.2d 31, 35 (2014) (citation omitted).

"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." *Holley v. ACTS, Inc.*, 357 N.C. 228, 232, 581 S.E.2d 750, 753 (2003) (citation and quotation marks omitted). "In order to be sufficient to support a finding that a stated cause produced a stated result, evidence on causation must indicate a reasonable scientific probability that the stated cause produced the stated result." *Johnson v. Piggly Wiggly of Pinetops, Inc.*, 156

N.C. App. 42, 49, 575 S.E.2d 797, 802 (2003) (alteration, citation, quotation marks omitted). "Expert testimony as to the possible cause of a medical condition is admissible if helpful but is insufficient to prove causation, particularly when there is additional evidence or testimony showing the expert's opinion to be a guess or mere speculation." *Seay v. Wal-Mart Stores, Inc.*, 180 N.C. App. 432, 436, 637 S.E.2d 299, 302 (2006) (citation and quotation marks omitted). "Ultimately, expert opinion testimony based on speculation and conjecture lacks the reliability to qualify as competent evidence on issues of medical causation." *Id.* at 436-37, 637 S.E.2d at 302-03 (citation omitted) (concluding the plaintiff's expert testimony was too speculative where he based his opinion on a "medical assumption" based on a hypothetical question). "An expert's opinion that was solicited through the assumption of facts unsupported by the record is entirely based on conjecture." *Id.* at 437, 637 S.E.2d at 303 (citation omitted).

Here, Plaintiff asserts Dr. Boes's testimony is not competent, thereby rendering Finding of Fact 22 erroneous. Specifically, Plaintiff takes issue with the following portion of Finding 22: "In formulating his opinion, Dr. Boes relied on the fact that Plaintiff had not reported right shoulder symptoms from the date of her December 28, 1995 accident until she first sought treatment on August 2, 2016 with Dr. Speer." Finding 22 is based on Dr. Boes's testimony during his deposition that he based his medical opinion on the fact Plaintiff "had not complained based on the

records that I had of any pain between [the 1995 injury] and I believe August of 2016." The Record, however, reflects Dr. Boes had reviewed only a relatively small portion of Plaintiff's medical records and had not been provided the Commission's two prior decisions.

Dr. Boes's testimony amounts to mere "speculation and conjecture" because he assumed Plaintiff had not complained of right shoulder problems since her accident, which the Record, the 2003 Opinion and Award, and 2013 Opinion and Award plainly and repeatedly contradict. *Id.* at 436-37, 637 S.E.2d at 302-03 (citation omitted). For instance, the 2003 Opinion and Award, which was not appealed by either party, found that as early as 1996 Plaintiff sought treatment from Dr. Soo for "shooting pain and numbness down her right arm" and that by March of 1996, Plaintiff "continued to have pain in the . . . right shoulder[.]" In March of 1997, Plaintiff sought and obtained a second opinion from Dr. Price "regarding her . . . right shoulder pain and right arm pain and numbness." After obtaining a third opinion from Dr. Hurwitz—who agreed Plaintiff needed additional tests after complaints of worsening pain in her right shoulder—the Commission in 2003 expressly found that Plaintiff's "arm condition is causally related" to the 1995 injury.

Thus, Dr. Boes's opinion on medical causation is "entirely based on conjecture" because it was "solicited through the assumption of facts unsupported by the record[,]" rendering his opinion incompetent. *Id.* ("Ultimately, expert opinion

testimony based on speculation and conjecture lacks the reliability to qualify as competent evidence on issues of medical causation." (citations omitted)). Therefore, the Commission's Finding 22 is not supported by competent evidence and must be reversed. Because the Commission relied on Dr. Boes's testimony in finding that Plaintiff's current right shoulder condition is not a result of her 1995 injury, the Commission's Finding 23 must also be reversed. These two Findings also erroneously informed the Commission's Conclusion of Law 3 concluding Defendants rebutted the *Parsons* presumption "through the testimony of Dr. Boes[.]" Consequently, we conclude Defendants failed to rebut the *Parsons* presumption through the testimony of Dr. Boes and to show Plaintiff's current right shoulder condition is not causally related to the 1995 injury. *See Parsons*, 126 N.C. App. at 542, 485 S.E.2d at 869. Accordingly, we reverse the Commission's conclusion on this issue.

II. Change of Condition

Plaintiff next argues the Commission erred in its Conclusion of Law 5 finding Plaintiff failed to prove a change of condition under N.C. Gen. Stat. § 97-47. Section 97-47 provides in relevant part:

> [U]pon the application of any party in interest on the grounds of a change in condition, the Industrial Commission may review any award, and on such review may make an award ending, diminishing, or increasing the compensation previously awarded . . . . [N]o such review shall be made after two years from the date of the last payment of compensation pursuant to an award under this Article[.]

N.C. Gen. Stat. § 97-47 (2017). This Court has explained that Section 97-47 was enacted to "establish[] conditions under which otherwise final disability evaluations can be reviewed and revised when changes occur; it does not establish either a procedure or a limitations period for processing unresolved claims for permanent disability." *Beard v. Blumenthal Jewish Home*, 87 N.C. App. 58, 63, 359 S.E.2d 261, 264 (1987). Importantly, however, this Section only applies where there has been a final award of workers' compensation benefits. *See id.* at 60, 359 S.E.2d at 262 (citations omitted).

Here, the 2003 Opinion and Award found Plaintiff's right shoulder injury compensable but left open the issue of what permanent partial disability compensation shall be payable to Plaintiff "until such time as [P]laintiff reaches maximum medical improvement." Defendants, however, contend the 2013 Opinion and Award constituted a final award of Permanent Partial Disability as to all of Plaintiff's conditions arising from the 1995 injury, including Plaintiff's shoulder injury. Defendants, however, ignore the Commission's Finding 11 in the present case. In Finding of Fact 11[1], the Commission found:

> [T]he [2013 Opinion and Award] did not specifically address the compensability of Plaintiff's right shoulder condition. The decision did not find that Plaintiff reached maximum medical improvement of her right shoulder condition, and there is no evidence in the prior decisions indicating Plaintiff had been found by a medical provider to be at maximum medical improvement or

[1] On appeal, Defendants do not challenge this Finding as an issue depriving them of an alternative basis in law supporting the Commission's Opinion and Award. N.C.R. App. P. 18(e), 28(c).

> given a permanent partial disability rating for her compensable right shoulder condition. *There has been no final adjudication on the merits of Plaintiff's right shoulder condition*. (emphasis added).

Because the Commission correctly found "[t]here has been no final adjudication on the merits of Plaintiff's right shoulder condition[,]" the Commission erred in Conclusion of Law 5 by applying the change-of-condition analysis in Section 97-47.[2] *See id.*

III. Plaintiff's Disability

Lastly, Plaintiff challenges the Commission's Finding of Fact 24 and Conclusion of Law 6, which determined Plaintiff "failed to prove she is disabled due to her December 28, 1995 work-related injury." Under the Act, "a claimant seeking disability must establish that his inability to find work was 'because of' his work-related injury." *Medlin v. Weaver Cooke Constr., LLC*, 367 N.C. 414, 419, 760 S.E.2d 732, 736 (2014) (citation omitted). In order to establish a disability, our Supreme Court has provided the following guidance:

> We are of the opinion that in order to support a conclusion of disability, the Commission must find: (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.

[2] We acknowledge this issue was before the Commission because Plaintiff alleged a change of condition in her Form 33. However, we view this allegation as more in the nature of pleading an alternative basis for recovery.

Hilliard v. Apex Cabinet Co., 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982) (citation omitted).

Here, in Conclusion of Law 6, the Commission concluded Plaintiff failed to establish the third *Hilliard* element. In reaching this conclusion, the Commission relied, in part, on Finding 24, which found: "In the alternative, the Full Commission finds based upon a preponderance of the evidence in view of the entire record that Plaintiff has failed to otherwise prove that she is disabled due to her December 28, 1995 work-related injury." However, this Finding 24 builds upon the Commission's erroneous Findings 22 and 23 that Plaintiff's current right shoulder condition is not a result of the 1995 injury. Because these erroneous Findings informed the Commission's disability analysis, we reverse Conclusion of Law 6 and remand for a determination of whether Plaintiff is disabled due to her current right shoulder injury. *See Ballenger*, 320 N.C. at 158, 357 S.E.2d at 685 ("When the Commission acts under a misapprehension of the law, the award must be set aside and the case remanded for a new determination using the correct legal standard." (citations omitted)).

Conclusion

Accordingly, for the foregoing reasons, we reverse the Commission's Opinion and Award and remand this matter for a determination of whether Plaintiff is entitled to disability compensation for her current right shoulder injury.[3]

REVERSED AND REMANDED.

Judges STROUD and BROOK concur.

Report per Rule 30(e).

[3] In its Opinion and Award, the Commission awarded Plaintiff additional compensation for her permanent injuries to her head and sinuses. Neither party appeals this portion of the Opinion and Award; therefore, we do not disturb this award on appeal. *See* N.C. Gen. Stat. § 97-86.