NO. COA11-51
NORTH CAROLINA COURT OF APPEALS

Filed: 16 August 2011

MICHAEL E. CURTIS,
Employee,
Plaintiff,

v.

North Carolina
Industrial Commission
I.C. No. 792425

GAINES MOTOR LINES, INC.,
Employer/Defendant,

and

THE HARTFORD,
Carrier/Defendant.

Appeal by defendants from opinion and award entered 6 August 2010 by the North Carolina Industrial Commission. Heard in the Court of Appeals 25 May 2011.

*Richard B. Harper for plaintiff-appellee.*

*Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Neil P. Andrews and M. Duane Jones, for defendants-appellants.*

HUNTER, Robert C., Judge.

Gaines Motor Lines, Inc. and The Harford ("defendants") appeal from the North Carolina Industrial Commission's opinion and award in which the Commission awarded Michael E. Curtis

("plaintiff") continuing temporary total disability compensation and payment of medical expenses. After careful review, we affirm.

## Background

Plaintiff began work as a long-distance truck driver for defendant-employer in July 2005. Plaintiff earned $.36 per mile for an average weekly wage of $1,009.80. On 5 September 2007, plaintiff slipped on diesel fuel and fell backwards, suffering a compensable injury by accident to his back. On 18 September 2007, defendants accepted the compensability of plaintiff's work injury via a Form 63. Plaintiff was initially treated by his family physician, Dr. Don Hoover, who referred him to Dr. Jeffrey Knapp, an orthopedic surgeon. Dr. Knapp examined plaintiff on 10 October 2007 and recommended an MRI which revealed an annular bulge and tear at the L5-S1 level of the spine. Plaintiff received epidural steroid injections and began physical therapy. Plaintiff was unable to work from 7 September 2007 through 12 November 2007.

On 13 November 2007, plaintiff began a trial return to work on light duty. In January 2008, plaintiff returned to full duty as a long-distance truck driver; however, he experienced a recurrence of his back pain, and, on 22 February 2008, Dr.

Hoover and Dr. Knapp took him out of work. On 29 April 2008, plaintiff filed a Form 28U giving notice that his trial return to work was unsuccessful.

In March 2008, plaintiff reported that his back pain was worse, and Dr. Knapp recommended a discography, which showed pain generating from both the L4-L5 and L5-S1 levels of the spine. In May 2008 Dr. Knapp recommended surgery for fusion at L4-L5 and L5-S1. Plaintiff was reluctant to undergo surgery, and, in September 2008, he received a second opinion from Dr. Theodore Belanger, an orthopedist. Dr. Belanger advised plaintiff not to undergo surgery and recommended a cognitive behavioral and functional restoration program. On 7 October 2008, Dr. Knapp released plaintiff to return to work in a light-duty capacity with work restrictions, including no repetitive bending, no lifting more than five pounds, and alternating between sitting and standing as needed.

On 21 November 2008, defendants authorized plaintiff's participation in the functional restoration program. Plaintiff underwent the functional restoration program with Dr. Thomas Kern Carlton from 11 December 2008 to 21 January 2009. The program also involved psychological counseling with Dr. John Riley.

On 21 January 2009, Dr. Carlton released plaintiff at maximum medical improvement for his back injury and assigned a 10% permanent partial disability rating to his back. Dr. Carlton issued permanent work restrictions for plaintiff of light to medium duty, frequent position changes during the day, and no lifting over 40 pounds. Dr. Knapp also released plaintiff with a 3% permanent partial disability rating to his back, and assigned permanent work restrictions of no repetitive bending and no lifting over 25 pounds. Dr. Knapp testified that plaintiff's condition might worsen with age and that he might need fusion surgery in the future.

On 13 October 2008, Ricky Tompkins, safety director and human resources officer for defendant-employer, offered plaintiff a guard shack position at defendant-employer's terminal in Hickory. The guard shack position required monitoring drivers as they entered and left the premises. It did not require any lifting and allowed sitting and standing as needed. The guard shack position paid $11.22 per hour for 40 hours of work per week, or between $440.00 and $450.00 per week. Mr. Tompkins testified that the guard shack position was available to the general public, but had never been advertised and had always been filled internally. Plaintiff refused the

guard shack position, and, on 31 October 2008, defendant-employer terminated plaintiff's employment because he failed to report to work for the guard shack position.

At the beginning of February 2009, after completing the functional restoration program, plaintiff called Roger Short, the terminal manager and plaintiff's former supervisor, to discuss returning to work, specifically asking about the guard shack position. Mr. Short told plaintiff that the guard shack position was not a real job, and, if it were a real job, he would have offered it to one of his drivers who had been laid off. On 6 March 2009 defendants' counsel again offered plaintiff the guard shack position. Plaintiff again refused the guard shack position based on his belief that it was not a real job, as indicated to him by Mr. Short, and on advice of his counsel that it was not suitable employment.

On 17 November 2008, defendants filed a Form 24 application, seeking to terminate plaintiff's benefits due to his refusal of the guard shack position. The application was denied on 29 January 2009 by Special Deputy Commissioner Christopher B. Rawls. Defendants appealed, and, on 8 January 2010, Deputy Commissioner J. Brad Donovan issued an opinion and award concluding that plaintiff reached maximum medical

improvement on 21 January 2009, that the guard shack position was suitable, and that plaintiff unjustifiably refused suitable employment as of 1 February 2009. Plaintiff appealed to the Full Commission.

The Commission's opinion and award issued on 6 August 2010, found as fact that plaintiff's refusal of the guard shack position on 13 October 2008 was justifiable. The Commission found that plaintiff was at maximum medical improvement as of 21 January 2009, that plaintiff had a 10% permanent partial disability rating to his back, and that he required further medical treatment and psychological therapy. The Commission found that plaintiff's refusal of the guard shack position when it was offered to him again on 6 March 2009 was justifiable because it was not a real job and was not suitable employment for him.

In its conclusions of law, the Commission concluded that plaintiff was incapable of any work from 5 September 2007 to 13 November 2007, when he began a trial return to work. On 22 February 2008 plaintiff again became medically disabled from any employment. Although plaintiff was released to work in a light-duty capacity on 7 October 2008, his pain level "was severe enough to justify pain management treatment in an intensive

functional restoration program and [he] was awaiting authorization for such treatment. Therefore, any attempt to work during that period would have been futile." Plaintiff was again unable to work while enrolled in the functional restoration program. After plaintiff reached maximum medical improvement on 21 January 2009, he was capable of some work, but he was incapable of returning to his pre-injury employment. Plaintiff made reasonable but unsuccessful attempts to find suitable employment on his own, and his refusal of the unsuitable guard shack position was justifiable. Therefore, plaintiff proved continuing disability from 21 January 2009 and continuing. As a result, the Commission's opinion and award ordered defendants to pay temporary total disability compensation to plaintiff at the rate of $673.23 per week from 5 September 2007 and continuing until further order of the Commission.

Plaintiff's Motion to Dismiss Case as Interlocutory

As a preliminary matter, plaintiff asserts that defendants' appeal is interlocutory, does not affect a substantial right, and should, therefore, be dismissed. We disagree.

"A decision of the Industrial Commission that determines one but not all of the issues in a case is interlocutory, as is

a decision which on its face contemplates further proceedings or 'does not fully dispose of the pending stage of the litigation.'" *Berardi v. Craven Cty. Schools*, __ N.C. App. __, __, 688 S.E.2d 115, 116 (quoting *Cash v. Lincare Holdings*, 181 N.C. App. 259, 263, 639 S.E.2d 9, 13 (2007)), *disc. review denied*, 364 N.C. 239, 698 S.E.2d 74 (2010). For example, "[a]n opinion and award that settles preliminary questions of compensability but leaves unresolved the amount of compensation to which the plaintiff is entitled and *expressly reserves final disposition* of the matter pending receipt of further evidence is interlocutory." *Riggins v. Elkay Southern Corp.*, 132 N.C. App. 232, 233, 510 S.E.2d 674, 675 (1999) (emphasis added).

This Court has recently addressed this matter and reasserted that a workers' compensation case is interlocutory where issues remain for further resolution. *See, e.g., Evans v. Hendrick Automotive Group*, __ N.C. App. __, __, 708 S.E.2d 99, 103 (2011) (holding that appeal was interlocutory where the Commission contemplated entry of a future order "to resolve the amount of plaintiff's wage loss benefits"); *Thomas v. Contract Core Drilling & Sawing*, __ N.C. App. __, __, 703 S.E.2d 862, 865 (2011) (holding that appeal was interlocutory where "the Commission reserved both the issue of the extent of

[plaintiff's] temporary disability, if any, after [a certain date] and the issue of his permanent partial disability for future resolution"). We find these cases to be distinguishable.

Here, the central issue to be decided was whether plaintiff had justifiably turned down the guard shack position offered by defendant-employer. The Commission determined that plaintiff was justified in turning down the position and that plaintiff was entitled to ongoing temporary total disability benefits and payment of medical expenses. While there is always a possibility that the Commission may have to resolve another dispute between the parties, there was no issue left for resolution by the Commission at the time the opinion and award was entered. While it appears that plaintiff had received a permanent partial disability rating by two different physicians, the matter of compensation for that rating was not an issue before the Commission. The Commission also concluded that plaintiff requires future medical treatment and that defendants are obligated to pay for such treatment. Defendants do not appeal the issues of future medical treatment or their obligation to pay for such treatment; therefore, those issues are not left for resolution by the Commission, nor are they presently before this Court. In sum, because there were no

issues left for resolution by the Commission, we hold that defendants' appeal is not interlocutory, and, consequently, we will review the merits of defendants' claims.

Standard of Review

The standard of appellate review of an opinion and award of the Industrial Commission in a workers' compensation case is 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). As the "Commission is the sole judge of the credibility of the witnesses and the weight of the evidence[,]" *Hassell v. Onslow Cty. Bd. of Educ.*, 362 N.C. 299, 305, 661 S.E.2d 709, 714 (2008), its findings are conclusive and binding on appeal "so long as there is some 'evidence of substance which directly or by reasonable inference tends to support the findings . . . .'" *Shah v. Howard Johnson*, 140 N.C. App. 58, 61-62, 535 S.E.2d 577, 580 (2000) (quoting *Porterfield v. RPC Corp.*, 47 N.C. App. 140, 144, 266 S.E.2d 760, 762 (1980)), *disc. review denied*, 353 N.C. 381, 547 S.E.2d 17 (2001). The Commission's findings may be set aside on appeal only "when there is a complete lack of competent evidence to support them[.]" *Young v. Hickory Bus. Furn.*, 353

N.C. 227, 230, 538 S.E.2d 912, 914 (2000). The Commission's conclusions of law are reviewed *de novo* on appeal. *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004).

Discussion

Defendants argue that: (1) there is no competent evidence to support the Commission's findings and conclusions that plaintiff was at maximum medical improvement; (2) since plaintiff was not at maximum medical improvement, the Commission applied an incorrect standard in finding the guard shack position unsuitable, or, in the alternative, even if plaintiff was at maximum medical improvement, the Commission erred in finding the guard shack position unsuitable; and (3) there is no competent evidence to support the Commission's findings and conclusions that plaintiff is totally disabled and entitled to ongoing benefits.

I.

Defendants argue that the Commission's finding of fact that plaintiff was at maximum medical improvement as of 21 January 2009 was not supported by the evidence because he may undergo lumbar fusion in the future and because he still suffers from depression. We disagree.

The term "maximum medical improvement" is not defined by statute. N.C. Gen. Stat. § 97-31 (2009) provides compensation for temporary disability during the "healing period."

> The "healing period" of the injury "is the time when the claimant is unable to work because of his injury, is submitting to treatment, which may include an operation or operations, or is convalescing." "This period of temporary total disability contemplates that eventually there will be either complete recovery, or an impaired bodily condition which is stabilized." The "healing period" ends when, "after a course of treatment and observation, the injury is discovered to be permanent and that fact is duly established."

*Carpenter v. Industrial Piping Co.*, 73 N.C. App. 309, 311, 326 S.E.2d 328, 329-30 (1985) (quoting *Crawley v. Southern Devices, Inc.*, 31 N.C. App. 284, 288-89, 229 S.E.2d 325, 328-29 (1976), *disc. review denied*, 292 N.C. 467, 234 S.E.2d 2 (1977)). The point at which the injury has stabilized is often called "maximum medical improvement." *Johnson v. City of Winston-Salem*, 188 N.C. App. 383, 397, 656 S.E.2d 608, 618, *aff'd per curiam*, 362 N.C. 676, 669 S.E.2d 319 (2008). "[T]he question of whether an employee has reached 'maximum medical improvement' or 'MMI' is an issue of fact." *Collins v. Speedway Motor Sports Corp.*, 165 N.C. App. 113, 116, 598 S.E.2d 185, 188 (2004).

Defendants argue that plaintiff is still in the "healing period," recovering from his injury. Defendants do not dispute,

however, that on 21 January 2009, Dr. Carlton, who administered the functional restoration program attended by plaintiff, determined that plaintiff was at maximum medical improvement and had a permanent partial disability rating of 10%. Dr. Carlton stated that plaintiff will never be able to return to work as a long-distance truck driver, and Dr. Carlton issued permanent work restrictions, including weight lifting limitations. Dr. Knapp also saw plaintiff in January 2009, at which point he assigned a permanent partial disability rating of 3% and provided permanent work restrictions for plaintiff. Dr. Riley testified, however, that as of March 2009, plaintiff was still in need of psychological therapy as he suffered from depression due to his chronic pain. The Commission considered Dr. Riley's testimony regarding plaintiff's depression, but found that Dr. Carlton "was aware of Plaintiff's depression when he released him from the functional restoration program on January 21, 2009, found him at maximum medical improvement, and gave him work restrictions." The Commission ultimately found:

> [B]ased upon the greater weight of the evidence, that Plaintiff was at maximum medical improvement with respect to his September 5, 2007 work injury to his lower back as of January 21, 2009, that Plaintiff has a 10 percent permanent partial disability rating to his back, and that he requires further medical treatment and

psychological therapy.

The evidence discussed *supra* supports this finding by the Commission. Dr. Carlton testified that plaintiff was at maximum medical improvement, and both Dr. Carlton and Dr. Knapp gave plaintiff a permanent disability rating to his back and permanent work restrictions, indicating that plaintiff's "injury [was] discovered to be permanent." *Carpenter*, 73 N.C. App. at 311, 326 S.E.2d at 330. We hold that there is competent evidence in the record to support the Commission's finding that plaintiff's back injury is at maximum medical improvement.

While the Commission also found that "it is possible that Plaintiff will need fusion surgery in the future[,]" plaintiff has already declined surgery once and may never undergo surgery. In addition, the Commission found that plaintiff suffered from chronic lower back pain requiring continued pain management and from depression that "was at least, in part, related to the chronic lower back pain resulting from his September 5, 2007 work injury." Plaintiff's need for ongoing medical treatment to manage his chronic pain and associated depression is not inconsistent with the Commission's finding that plaintiff's back injury is at maximum medical improvement.

II.

Defendants next argue that the Commission erred in finding that the guard shack position was unsuitable and that plaintiff's refusal of the position was justified. We disagree.

As a preliminary matter, defendants claim that, because plaintiff was not at maximum medical improvement, the Commission used the wrong standard for determining whether an injured worker may turn down employment. Defendants claim that if a worker is *not* at maximum medical improvement, then the worker must accept *any* position offered to him so long as it complies with the work restrictions imposed by his physician. We need not reach the merits of this argument because we have held *supra* that there was competent evidence to support the Commission's finding of fact that plaintiff was at maximum medical improvement as of 21 January 2009.[1]

Defendants then argue, in the alternative, that, even if plaintiff was at maximum medical improvement, the Commission erred in finding that the guard shack position was unsuitable. Pursuant to our State's Workers' Compensation Act: "If an

[1] We do, however, note that defendants' only support for their argument that a different standard applies is found in an unpublished case by this Court, *Russo v. Food Lion*, 187 N.C. App. 509, 653 S.E.2d 255 (2007) (unpublished), which pertained to constructive refusal of suitable employment where the employee turned down a light duty position offered by her employer and refused to look for any other suitable employment.

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 (2009). The burden is on the employer to show that plaintiff refused suitable employment. *Gordon v. City of Durham*, 153 N.C. App. 782, 787, 571 S.E.2d 48, 51 (2002). "[W]hen an employer attempts to show an employee is no longer entitled to compensation for disability based upon the proffer of a job specially created for the employee, the employer must come forward with evidence that others would hire the employee 'to do a similar job at a comparable wage.'" *Smith v. Sealed Air Corp.*, 127 N.C. App. 359, 362, 489 S.E.2d 445, 447 (1997) (quoting *Saums v. Raleigh Community Hospital*, 346 N.C. 760, 765, 487 S.E.2d 746, 750 (1997)).

The Commission first made a finding of fact that the guard shack position was not a real job:

> 27. Based on the greater weight of the evidence, the Full Commission finds as fact that the evidence is insufficient to establish that the guard shack position was a "real job" that Defendant-Employer made available to the general public, or even to its own laid-off employees. Mr. Short, who held a higher managerial position than Mr. Tompkins, told Plaintiff the guard shack position was not a "real job." Also, the

> Full Commission is not persuaded by the testimony of Mr. Tompkins that he never advertised the guard shack position because there were always enough employees needing work to keep the position filled, considering the evidence presented through Mr. Tompkins that Defendant-Employer held the position for seven months unfilled, pending Plaintiff's acceptance of it in October 2008, that the position was open in March 2009, despite the company lay-offs, and that as of the date of the hearing before the Deputy Commissioner, the former, unnamed warehouse employee who purportedly worked in this position only worked Monday and Tuesday nights. The Full Commission does not find Mr. Tompkins' testimony concerning the guard shack position to be credible.

Defendants argue that "the Guard Shack position is a real, legitimate, suitable position[,]" based on the testimony of Mr. Tompkins. The Commission, however, "[was] not persuaded by [his] testimony " and "[did] not find [his] testimony concerning the guard shack position to be credible." The Commission based its finding that the guard shack position was not a real job on the following evidence: (1) plaintiff's testimony that Mr. Short told him that the position was not a real job; (2) that the position was not advertised or made available to the general public; (3) that the position was not available for laid-off employees; (4) that the position was created in March 2008 and held open for plaintiff for seven months; (5) that the position

was open in March 2009, despite the company lay-offs; (6) that the employee who purportedly worked this position only worked two nights a week. Similarly, in *Moore v. Concrete Supply Co.*, 149 N.C. App. 381, 390, 561 S.E.2d 315, 320 (2002), the fact that "the position was never advertised to the public, had never previously existed and was never subsequently filled after being refused by [the employee] . . . support[ed] the finding that the offered position was make-work, and thus [the employee] was justified in refusing the . . . position." In *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 444, 342 S.E.2d 798, 810 (1986), our Supreme Court held that employers may not "avoid paying compensation merely by creating for their injured employees makeshift positions not ordinarily available in the market[.]" The Commission concluded that the guard shack position was such a "makeshift position." We hold that there is competent evidence to support the Commission's finding that the guard shack position was not a real job and that the Commission's conclusion that defendants failed to prove that the guard shack position was a real job is justified by the Commission's findings of fact.

The Commission then made a finding of fact that "the guard shack position does not constitute suitable employment for Plaintiff":

> 28. Based upon the greater weight of the evidence, the Full Commission further finds as fact that the guard shack position does not constitute suitable employment for Plaintiff. The guard shack position would have paid approximately $450.00 per week, which was less than half of Plaintiff's pre-injury average weekly wage of $1,009.80 and is not indicative of any wage-earning capacity Plaintiff may have. Defendant-Employer did not advertise the guard shack position and the evidence is insufficient to prove that Defendant-Employer offered it to the general public or filled the position after Plaintiff declined it, despite any testimony by Mr. Tompkins to the contrary. Also, Defendants failed to produce sufficient evidence to show that employers other than Defendant-Employer would hire Plaintiff to do a similar job at a comparable wage or that the guard shack position afforded Plaintiff any potential for advancement or income growth. The evidence further indicates that Defendants offered the guard shack position to Plaintiff to help him out and the company out because the company was already paying Plaintiff (apparently, workers compensation). Consequently, the guard shack position would not be a measure of Plaintiff's ability to attain employment in the competitive employment market or his capacity to earn wages in the competitive marketplace.

Defendants argue that the guard shack position is indicative of plaintiff's earning capacity, and that a lower

wage does not automatically mean the position is unsuitable. The Commission, however, considered additional evidence in determining the suitability of the guard shack position. First, the job paid less than half of plaintiff's pre-injury average weekly wage. *Foster v. U.S. Airways, Inc.*, 149 N.C. App. 913, 921, 563 S.E.2d 235, 241 (2002) ("The disparity between pre-injury and post-injury wages is one factor which may be considered in determining the suitability of post-injury employment."). Second, it was unlikely that other employers would hire plaintiff for a similar position at a comparable wage. *Peoples* 316 N.C. at 438, 342 S.E.2d at 806 ("Proffered employment would not accurately reflect earning capacity if other employers would not hire the employee with the employee's limitations at a comparable wage level."). Third, the position was not made available in the open and competitive job market and was not advertised. *Id.* (stating that proffered employment would not accurately reflect earning capacity "if the proffered employment is so modified because of the employee's limitations that it is not ordinarily available in the competitive job market"). Fourth, the guard shack position did not afford plaintiff any potential for advancement or income growth. *Dixon v. City of Durham*, 128 N.C. App. 501, 504, 495 S.E.2d 380, 383

(1998) ("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."). Based on the foregoing, we hold that there was competent evidence to support the Commission's ultimate finding that the guard shack position did not constitute suitable employment and that this finding supports the Commission's conclusion that plaintiff was justified in turning down the guard shack position.

III.

Defendants further argue that there is no competent evidence to support the Commission's findings of fact and conclusion of law that plaintiff is totally disabled and entitled to benefits. We disagree.

> The burden is on the employee to show that he is unable to earn the same wages he had earned before the injury, either in the same employment or in other employment. The employee may meet this burden in one of four ways: (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 v. Lowes Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (internal citations omitted).

The Commission addressed plaintiff's disability beginning with the date of his work-related injury. The Commission concluded that plaintiff was physically incapable of work in any employment from 5 September 2007 through 13 November 2007, when he began a trial return to work. Plaintiff thereby satisfied the first prong of the *Russell* test during that time period. *Id.* The Commission concluded that Plaintiff again became incapable of any employment from 22 February 2008 through 7 October 2008, again satisfying the first prong of the *Russell* test during that time period. *Id.* Dr. Knapp released plaintiff for work in a light-duty capacity on 7 October 2008, but the Commission concluded that plaintiff was still in severe pain and was waiting for authorization to enter a functional restoration program until December 2008 when he entered the program. Therefore, any attempt to work during that period would have been futile. Plaintiff thereby satisfied the third prong of the

*Russell* test during that period. *Id.* The Commission further concluded that plaintiff was unable to work from December 2008 until 21 January 2009 while he was enrolled in the program. Plaintiff thereby satisfied the third *Russell* test during that period. *Id.* Defendants do not dispute the Commission's conclusions relating to these earlier time periods.

Defendants argue, however, that plaintiff has not met his burden of proving an ongoing total disability after 21 January 2009, the date when Dr. Carlton discharged plaintiff from the program with permanent work restrictions and found him to be at maximum medical improvement. Defendants argue that plaintiff does not satisfy any of the first three prongs of the *Russell* test, most pertinently, the second prong. Defendants argue that plaintiff "failed to provide any evidence that he ha[d] been unsuccessful in obtaining employment." Defendants suggests that the guard shack position offered to plaintiff by defendant-employer is evidence of plaintiff's employability, as well as plaintiff's participation in the North Carolina Vocational Rehabilitation Work Program. The Commission found, however, that plaintiff had made reasonable efforts to find suitable employment, but had been unsuccessful. The Commission found that the guard shack position was not suitable employment. The

Commission also found that, in addition to plaintiff's participation in vocational rehabilitation, plaintiff had applied for work at companies in the area where he lives, had looked for employment through the Employment Security Commission, and was working on his GED at a community college.

We hold that the Commission's findings of fact are supported by competent evidence. We further hold that the Commission's findings of fact support the Commission's conclusion of law that plaintiff was disabled and continues to be disabled under the second prong of *Russell* after 21 January 2009.

## Conclusion

We hold that defendants' appeal is properly before us; that the Commission's determination that plaintiff was at maximum medical improvement is supported by competent evidence; that the Commission's findings support its conclusion that plaintiff was justified in refusing the guard shack position as unsuitable; and that the Commission's determination that plaintiff is disabled and entitled to ongoing benefits is supported by competent evidence. Consequently, we affirm the Commission's opinion and award.

Affirmed.

Judges STROUD and Robert N. HUNTER, Jr. concur.

Report per Rule 30(e).