

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA11-552
NORTH CAROLINA COURT OF APPEALS

Filed: 3 July 2012

STELLA SMITH,
Employee, Plaintiff-
Appellant, Cross-Appellee

v.

North Carolina Industrial
Commission
I.C. File No. 799904

BAXTER INTERNATIONAL, INC.,
Employer,

BROADSPIRE,
Servicing Agent, Defendant-
Appellees, Cross-Appellants

Appeal by plaintiff and cross-appeal by defendants from
Opinion and Award entered 28 December 2010 by the North Carolina
Industrial Commission. Heard in the Court of Appeals 17
November 2011.

*The Law Offices of David Gantt, by David Gantt, for
plaintiff-appellant/cross-appellee.*

*Martineau King, PLLC, by L. Kristin King, for defendant-
appellee/cross-appellant.*

ERVIN, Judge.

Plaintiff Stella Smith appeals from a Commission order
determining, among other things, that she was not disabled after
31 January 2008 as the result of her 15 August 2007 work-related

injury and that the difficulties that she experienced with her right knee were not caused or aggravated by her injury and Defendants Baxter International, Inc., and Broadspire appeal from the same order to the extent that the Commission determined that Plaintiff's left knee, hip, and back conditions were compensable. In essence, both parties contend that the challenged portions of the Commission's decision were not supported by the competent evidence contained in the record and the Commission's factual findings. After careful consideration of the parties' challenges to the Commission's order in light of the record and the applicable law, we conclude that the Commission's order should be affirmed.

I. Factual Background

A. Substantive Facts

On 15 August 2007, Plaintiff, a fifty-five year old high school graduate with an associate's degree in business administration, was injured when an automated guided vehicle pinned her left leg to a conveyor belt while she worked at Defendant Baxter's plant. After this incident, Plaintiff was taken to Gloria Biddix Hall, an occupational nurse and the manager of Defendant Baxter's medical department, who observed that Plaintiff had sustained a six centimeter laceration to her left thigh. Later that day, Plaintiff was taken to Dr. Peter

Mangone, who diagnosed an internal degloving injury to Plaintiff's left thigh.

On 16 August 2007, Dr. Mangone performed a debridement of Plaintiff's left thigh, during which he extensively irrigated Plaintiff's wound and closed the laceration. After the completion of this procedure, Plaintiff was told that she could return to sedentary work with Defendant Baxter.

During the ensuing week, Plaintiff reported to Defendant Baxter's medical department, where she would sleep long enough to be counted as present for that workday. By doing that, Plaintiff became entitled to receive her full pay and obviated the necessity for Defendant Baxter to treat Plaintiff's injury as a "lost-time accident." Subsequently, Plaintiff was assigned to sedentary duty until 31 August 2007, when she retired consistently with plans that antedated the 15 August 2007 accident.

After her retirement, Plaintiff continued to experience pain in the area in which she had been injured. On 1 November 2007, Dr. Laurence Ian Arnold, a plastic surgeon, determined that Plaintiff's wound was "nonhealing" and noted that Plaintiff was experiencing arthritis-related ambulation difficulties. On 2 November 2007, Dr. Arnold performed a surgical debridement of Plaintiff's wound. In December 2007, Plaintiff reported to Dr.

Arnold and her nurse care manager that she was experiencing left back and hip pain. On 4 January 2008, Dr. Arnold performed a skin graft on the area affected by Plaintiff's left thigh injury, a procedure which resulted in Plaintiff's hospitalization through 8 January 2008. After her release from the hospital, Plaintiff saw Dr. Arnold on two additional occasions, did not make any complaints of pain during those appointments, and described her pain as zero on a zero to ten scale. On 31 January 2008, Dr. Arnold released Plaintiff from his care with instructions to return on an as-needed basis and without making Plaintiff subject to any permanent work restrictions.

After being released by Dr. Arnold, Plaintiff made complaints concerning left hip pain to another nurse case manager, who arranged for Plaintiff to be evaluated by Dr. James Christopher Karegeannes, an orthopedist. On 19 February 2008, Plaintiff told Dr. Karegeannes that she was experiencing lower back and left buttock pain. At that time, Dr. Karegeannes determined that Plaintiff had a full, pain-free range of motion in her left hip. Dr. Karegeannes believed that an alteration in Plaintiff's gait stemming from her work-related injury had aggravated her preexisting lumbar spine arthritis. In light of

Dr. Karegeannes' findings, Defendants declined to authorize further treatment for Plaintiff's back or hip.

On 14 March 2008, Plaintiff was examined by her primary care physician, Dr. Joseph Taylor Turnbull, who interpreted x-rays as revealing the presence of degenerative osteoarthritic changes in both of Plaintiff's knees. As a result, Dr. Turnbull diagnosed Plaintiff as suffering from osteoarthritis and prescribed medication for that condition. However, Plaintiff's medical records indicated that she had been taking arthritis medication for over a year and half prior to the date upon which her work-related injury occurred and that Plaintiff had received treatment from Dr. Turnbull for bilateral knee pain prior to the date of her injury.

On 20 March 2008, Plaintiff returned to Dr. Turnbull. At that time, Plaintiff complained of left hip pain and walked with a noticeable limp. At six office visits with Dr. Turnbull after 20 March 2008, Plaintiff complained of lower left leg pain, right arm and shoulder pain, and popping and cracking in her right knee. However, Plaintiff's medical records do not reflect that she complained of hip or back pain on those occasions. An examination of Plaintiff's back did not reveal the presence of any abnormalities.

On 10 September 2009, Plaintiff was examined by Dr. Dennis Hoogerman, a clinical psychologist, at the request of her attorney. Dr. Hoogerman administered a series of tests which measured Plaintiff's memory, concentration, and attention abilities, with Plaintiff scoring in the eighty-seventh percentile. After completing a Social Security Administration questionnaire addressing a variety of employment-related limitations, Dr. Hoogerman rated Plaintiff's limitations on a scale of "no limitation" to "severely limited" and concluded that Plaintiff should not be rated as "severely limited" in any category. Dr. Hoogerman determined that Plaintiff suffered from depression due to several childhood traumas and that Plaintiff coped with these pre-existing traumas through working, including the work that she performed at Defendant's plant and at home. Once Plaintiff could no longer work or remain consistently active, she became depressed and unable to cope with her feelings. For that reason, Dr. Hoogerman concluded that Plaintiff's work-related injury was a "significant factor" and had "exacerbated" her underlying depression. Based upon the standardized testing that was administered to Plaintiff, Dr. Hoogerman further opined that Plaintiff's psychological limitations would impair her ability to return to work and maintain employment.

On 17 September 2009, also at the request of her attorney, Plaintiff was evaluated by A. Bentley Hankins, a certified rehabilitation counselor and certified vocational evaluation specialist. During that evaluation, Plaintiff completed several standardized tests, including an intelligence test, a wide-range achievement test, a memory recall test, and a clerical skills examination. Plaintiff scored in the average to high-average percentile range on all tests except for the one evaluating her clerical skills. Based upon Plaintiff's performance on these standardized tests, the evaluation performed by Dr. Hoogerman, and other factors, such as Plaintiff's age, Plaintiff's education, Plaintiff's work experience, and local labor market conditions, Mr. Hankins concluded that Plaintiff was not a realistic candidate for employment in the local labor market or in the national economy.

At the request of Defendants, George R. Lentz, a certified rehabilitation specialist and licensed professional counselor, reviewed Mr. Hankins' report and Dr. Hoogerman's evaluation. Although Mr. Lentz concluded that Mr. Hankins' standardized testing had been appropriate, he disagreed with Mr. Hankins' conclusions because they ignored Plaintiff's transferable skills and other positive factors reflected in the vocational testing. Mr. Lentz performed a labor market search based upon the same

pre-injury occupation classification upon which Mr. Hankins relied; performed a transferable skills analysis using a United States Department of Transportation software program; and found that Plaintiff possessed a number of transferable skills that translated into alternative employment opportunities. As a result, Mr. Lentz opined that, based upon her education, experience, and transferable skills, Plaintiff was not permanently and totally disabled and that "there [were] certainly alternative type[s] of work existing in . . . national counseling and hopefully in the local economy that she could perform."

B. Procedural History

On 30 October 2007, Defendants submitted a Form 19 providing notice of Plaintiff's injury. Although Defendants did not file a Form 60 admitting liability for Plaintiff's injury to her left thigh, they did pay to have that injury treated and subsequently stipulated that Plaintiff's left thigh injury was compensable. On 17 March 2008, Plaintiff filed a Form 33 requesting that her claim be assigned for hearing on the grounds that Defendants had failed to provide necessary medical treatment, temporary total disability benefits, and permanent total disability benefits. In response, Defendants filed a Form 33R admitting that Plaintiff should receive workers'

compensation benefits for her left thigh injury while denying that Plaintiff's back, hip, and knee complaints stemmed from the 15 August 2007 accident and that Plaintiff was disabled. On 22 April 2008, Defendants filed a Form 61 denying that Plaintiff sustained an injury to her back as a result of the 15 August 2007 accident.

On 22 June 2010, Deputy Commissioner George R. Hall, III, entered an Opinion and Award concluding that, while Plaintiff had sustained a compensable injury to her left thigh, she had failed to demonstrate by the greater weight of the evidence that her alleged hip, knee, and back injuries were causally related to her thigh injury. As a result, Deputy Commissioner Hall denied Plaintiff's request for additional medical benefits and disability compensation. Plaintiff noted an appeal to the Commission from Deputy Commissioner Hall's order.

On 28 December 2010, the Commission, by means of an Opinion and Award issued by Commissioner Bernadine S. Ballance with the concurrence of Commissioners Staci T. Meyer and Christopher Scott, concluded that Plaintiff had sustained a compensable injury by accident to her left thigh and, as a direct and natural consequence of that injury, had experienced significant aggravation and exacerbation of her pre-existing left knee, hip and back conditions. As a result, the Commission awarded

Plaintiff medical benefits relating to her left thigh, knee, hip and back conditions; temporary total disability benefits from 31 August 2007 through 31 January 2008; and attorney's fees. The Commission further concluded that Plaintiff had failed to prove that her work-related injury caused or contributed to her right knee complaints. Plaintiff and Defendants noted appeals to this Court from the Commission's order.

II. Legal Analysis

A. Standard of Review

In reviewing an appeal from a Commission order, this Court is "limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law," *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000), with the Commission serving as the sole judge of the weight and credibility of the evidence. *Id.* (citation omitted). In an order addressing a claim for workers' compensation benefits, the Commission "must make specific findings of fact as to each material fact upon which the rights of the parties in a case involving a claim for compensation depend," including "find[ing] those facts which are necessary to support its conclusions of law." *Johnson v. Herbie's Place*, 157 N.C. App. 168, 172, 579 S.E.2d 110, 113 (citations and quotation marks

omitted), *disc. review denied*, 357 N.C. 460, 585 S.E.2d 760 (2003). “The court’s duty goes no further than to determine whether the record contains any evidence tending to support the [challenged] finding[s].” *Johnson v. Lowe’s Cos., Inc.*, 143 N.C. App. 348, 350, 546 S.E.2d 616, 618 (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)), *aff’d*, 354 N.C. 358, 554 S.E.2d 336 (2001). Unchallenged findings of fact are binding on this Court. *Ferreyra v. Cumberland Cty.*, 175 N.C. App. 581, 583, 623 S.E.2d 825, 826-27 (2006). We review the Commission’s conclusions of law on a *de novo* basis. *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004).

B. Plaintiff’s Appeal

1. Date Upon Which Disability Ended

In her first challenge to the Commission’s order, Plaintiff contends that the Commission erred by determining that her disability ended on 31 January 2008. In support of this contention, Plaintiff asserts that, although she last visited Dr. Arnold on that date, “the [r]ecord contains no medical indication that [Plaintiff’s] back, hip, [or] knee pain had resolved or lessened by that date to support a return to earning capacity.” According to Plaintiff, a number of the Commission’s findings of fact relating to this issue lack adequate record

support and do not, for that reason, support the Commission's conclusions of law. Plaintiff's argument lacks merit.

In its order, the Commission found as a fact that:

16. On March 20, 2008, Plaintiff returned to Dr. Turnbull with complaints of bi-lateral knee and now left hip pain, and was walking with a limp. Dr. Turnbull saw Plaintiff on six occasions between March 20, 2008 and August 6, 2009. There are no recorded complaints of hip or back pain after the March 20, 2008 office visit through August 6, 2009, and Dr. Turnbull's medical records indicate a "normal inspection" of the back upon physical examination.

.

20. The Full Commission gives greater weight to the opinion testimony of Dr. Turnbull over any contrary testimony of Dr. Karegeannes on the causal relationship between Plaintiff['s] work injury and the worsening of symptoms in her left knee, hip and back. The evidence presented is insufficient to prove a causal relationship between Plaintiff's August 15, 2007 work injury and her right knee complaints.

.

24. At Dr. Hoogerman's deposition, he acknowledged that he was unaware at the time of his September 10, 2009 evaluation that Plaintiff accompanies her husband on a weekly basis to a public trade lot where she assists with customer sales transactions, that Plaintiff provides babysitting services for her daughter's twin grandchildren[,] who are toddlers, between the hours of 7:00 a.m. and approximately 4:00 p.m. one day a week[;] and that subsequent to Plaintiff's August 15, 2007 work injury, she went on

several family camping trips and other vacations with family and family friends.

25. On September 17, 2009, Mr. Adrian Bentley Hankins, a certified rehabilitation counselor, performed a vocational assessment evaluation of Plaintiff at the request of Plaintiff's counsel. Mr. Hankins administered several standardized tests, including an intelligence test, a wide-range achievement test, a clerical examination; and a memory recall test. Plaintiff scored in the average to high-average percentile ranges on all of the standardized tests except for the clerical test. According to Mr. Hankins, the clerical test measures the test-taker's results against bank employees of all ages. Mr. Hankins further explained that the clerical test does not account for today's reliance on computers, and would not be indicative of Plaintiff's performance in all types of office work.

26. Based upon the standardized testing administered to Plaintiff by both Mr. Hankins and Dr. Hoogerman, as well as other vocationally relevant factors such as age, education, and work experience, Mr. Hankins concluded that Plaintiff is no longer a realistic candidate for employment in her local labor market. In particular, Mr. Hankins based his opinions upon the psychological limitations that Dr. Hoogerman opined Plaintiff has. Mr. Hankins agreed that if the evidence failed to prove that Plaintiff had these psychological limitations, then Plaintiff's ability to return to work would not be limited, as Plaintiff would be intellectually and physically capable of performing most, if not all, of her former job duties with Defendant.

. . . .

31. Plaintiff continues to perform household cooking and cleaning duties in her home, and is able to go to the grocery store and run errands. She attends church on a weekly basis and continues to garden. Plaintiff does not use her cane around the house or when walking on level surfaces.

. . . .

35. The Full Commission gives greater weight to the opinion testimony of Mr. Lentz over any contrary opinions of Mr. Hankins regarding Plaintiff's ability to compete for suitable employment within her work restrictions in the competitive labor market.

. . . .

39. Plaintiff has not proven disability after January 31, 2008. Dr. Karegeannes was of the opinion that she "potentially could go back [to work] with limited duty . . . with precautions directed toward . . . the source of pain in the spine," depending upon the degree of pain she was having and what type of work she was doing. Dr. Turnbull's testimony concerning estimated periods of time he believed Plaintiff would have been unable to work following her surgeries is speculative and not supported by any competent evidence. Additionally, the Full Commission has found the vocational opinions of Mr. Lentz to be more persuasive than that of Mr. Hankins.

40. Following January 31, 2008 Plaintiff did not make reasonable efforts to find suitable employment.

Based upon these findings of fact, the Commission concluded as a matter of law that:

7. As a result of her injury, Plaintiff was medically unable to perform "real work" from August 15, 2007 through August 31, 2007. Since Plaintiff received her full salary during this period, no temporary total disability compensation is owed. From August 31, 2007 through January 31, 2008, when Dr. Laurence Ian Arnold released Plaintiff from his care, it would have been futile for Plaintiff to seek suitable employment, considering her medical and physical limitations as a result of the failure of her left thigh to heal after the August 15, 2007 work injury. Therefore, Plaintiff is entitled to temporary total disability compensation in the amount of \$523.13 per week from August 31, 2007 through January 31, 2008.

Thus, the Commission concluded that Plaintiff was disabled from the date of her injury until 31 January 2008.

In seeking to persuade us that the Commission erred by determining that Plaintiff was not disabled after 31 January 2008, Plaintiff argues that the Commission incorrectly interpreted and evaluated the testimony of Dr. Karegeannes and Mr. Lentz while impermissibly "discounting" the testimony of Dr. Turnbull and, to a lesser extent, Dr. Hoogerman. More specifically, Plaintiff contends that (1) "[a] complete reading of Dr. Karegeannes' testimony[] and . . . Finding of Fact [No.] 39 . . . does not support the contrary Conclusion of Law [No.] 7 limiting disability to the January 31, 2008 date[;]" (2) the record contained no evidence that Dr. Hoogerman's findings and conclusions rested upon deficient knowledge about Plaintiff's

activities; (3) Mr. Lentz's conclusions were largely subjective and dismissive of the objective tests performed by Dr. Hoogerman; (4) Mr. Lentz did not produce evidence of actual job opportunities, as required by *Burwell v. Winn-Dixie Raleigh*, 114 N.C. App. 69, 441 S.E.2d 145 (1994), and, instead, provided a vague, theoretical description of potential employment opportunities that he believed to be available to Plaintiff based upon information provided by a computer software program; and (5) while the medical, psychological, and vocational testimony established that Plaintiff had satisfied her initial burden of proving disability under either the first or third prongs set out in *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993), Defendant failed to rebut this showing by establishing that satisfactory jobs were, in fact, available to Plaintiff. We do not find this series of arguments persuasive.

"An employee injured in the course of his employment is disabled under the Act if the injury results in an 'incapacity . . . to earn the wages which the employee was receiving at the time of injury in the same or any other employment.'" *Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457 (quoting N.C. Gen. Stat. § 97-2(9)). "Accordingly, disability as defined in the Act is the impairment of the injured employee's earning capacity rather

than physical disablement." *Id.* (citation omitted). "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." *Id.* (citation omitted).

The employee can prove disability by:

(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.

Id. at 765, 425 S.E.2d at 457 (citations omitted). If the employee makes such a showing, "the employer has the burden of producing evidence to rebut the claimant's evidence," effectively requiring "the employer to 'come forward with evidence to show not only that suitable jobs are available, but also that the plaintiff is capable of getting one, taking into account both physical and vocational limitations.'" *Burwell*, 114 N.C. App. at 73, 441 S.E.2d at 149 (emphasis omitted) (quoting *Kennedy v. Duke Univ. Medical Ctr.*, 101 N.C. App. 24, 33, 398 S.E.2d 677, 682 (1990)).

According to Plaintiff, she met her burden of proving disability beyond 31 January 2008 given the existence of medical, psychological, and vocational testimony tending to show that she was "physically or mentally, as a consequence of the work related injury, incapable of work in any employment" and that, although she was "capable of some work, . . . it would be futile because of preexisting conditions." *Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457. However, the record contains ample evidence upon which the Commission could base a determination that Plaintiff did not make the showing required by either the first or the third prongs of the *Russell* test.

a. Medically-Based Disability

In unchallenged findings of fact, the Commission found that Plaintiff had a high school diploma and an associate's degree in business administration and had taken college-level computer and accounting courses. As is also reflected in the Commission's unchallenged findings of fact, Plaintiff saw Dr. Arnold twice following her skin graft surgery, at which time she reported no complaints of pain and said her level of pain was "zero on a zero to ten pain scale." For that reason, Dr. Arnold released Plaintiff on 31 January 2008 without making her subject to any permanent work restrictions. Needless to say, this medical

evidence tends to support the Commission's disability date determination as well.

When asked if there was "anything in [his] exam or findings from [19 February 2008] that would have caused [him] to put [Plaintiff] completely out of work[,]" Dr. Karegeannes testified that, depending upon the degree of pain that she was experiencing and the type of work that she was performing, Plaintiff "potentially could go back with limited duty as she did after the injury with precautions directed toward . . . the source of pain in the spine." In addition, Dr. Karegeannes opined that it "would be very difficult" to assign any periods of time during which Plaintiff could not work given his observation of her medical condition. Similarly, Dr. Turnbull opined that Plaintiff's work-related injury would have caused her to miss work due to the performance of surgical procedures and her lower back problems and that, without being sure of the applicable dates, there was "probably at least a two- or three-month period of time . . . where [Plaintiff would not] have been able to carry on with her usual job." However, Dr. Turnbull also testified that he "[did not] know . . . about her training, [and] whether [Plaintiff could have] been in a less active type of job . . . given her age and previous experiences." Finally, Dr. Turnbull testified that he lacked familiarity with

Plaintiff's educational background and that his opinions concerning Plaintiff's ability to work assumed that she would return to the same job that she had held with Defendant prior to the accident. As a result, the Commission's disability date determination is supported by other medical evidence as well.

Similarly, Dr. Hoogerman determined that Plaintiff scored in the eighty-seventh percentile on standardized tests measuring her memory, concentration, and attention abilities and was not rated as "severely limited" in any area. Although Dr. Hoogerman believed that Plaintiff's psychological limitations would impair her ability to work, he admitted that he did not know that, (1) on a weekly basis, Plaintiff accompanied her husband to a trade lot to assist in making sales, (2) provided babysitting services for her daughter's children one day each week, and (3) went on several family camping trips and vacations following her work-related injury.

Similarly, although Mr. Hankins believed that, "based on the psychological limitations recommended by Dr. Hoogerman . . . [Plaintiff was] no longer capable of performing any of the jobs for which she had access prior to her work-related injury," he also acknowledged that, "in the absence of . . . Dr. Hoogerman's [psychological] restrictions, [he] would not have any post[-]injury restrictions . . . and . . . [his] opinion would then

be, at least at [that] time, that [Plaintiff] could perform most, if not all, of her prior work." Although Mr. Lentz found Mr. Hankins' standardized testing appropriate, he disagreed with Mr. Hankins' conclusions because Mr. Hankins ignored Plaintiff's transferable skills and the other positive vocational aptitudes disclosed by the testing. According to unchallenged Finding of Fact No. 28, Mr. Lentz performed a labor market search using the same pre-injury occupation classification upon which Mr. Hankins based his opinion, performed a transferable skills analysis using accepted United States Department of Transportation software, and found that Plaintiff possessed a number of transferable skills that created alternative employment opportunities. Mr. Lentz believed that, in light of her education, experience, and transferable skills, Plaintiff was not permanently and totally disabled and that "there [were] certainly alternative type[s] of work existing in . . . national counseling and hopefully in the local economy that she could perform." The Commission gave "[g]reater weight . . . to the opinions of Mr. Lentz on Plaintiff's ability to work over any contrary opinions of Mr. Hankins and Dr. Hoogerman." Thus, the record contains ample support for a determination that Plaintiff was not psychologically disabled from working either.

As a result, we conclude that the Commission's findings of fact have either not been challenged on appeal or have adequate record support and that the Commission's findings adequately support its conclusion that Plaintiff had failed to produce credible evidence that she was disabled for medical reasons after 31 January 2008. Simply put, the fact that Plaintiff was released from Dr. Arnold's care on 31 January 2008 without being subject to any work-related restrictions, the fact that Dr. Karegeannes' disability-related testimony assumed that she would return to her job at Defendant Baxter, the fact that Dr. Turnbull lacked knowledge concerning Plaintiff's educational history and background and assumed that Plaintiff would return to her employment with Defendant Baxter, and the fact that Mr. Lentz concluded that Plaintiff was not permanently and totally disabled for psychological and other reasons all support the Commission's determination that Plaintiff was not disabled after 31 January 2008 for purposes of the first *Russell* prong.

In seeking to persuade us to reach a contrary conclusion, Plaintiff argues that Dr. Turnbull's "long term and comprehensive medical care for Plaintiff was the only ongoing treatment she received after Dr. Arnold's release" and that his "years of handling Plaintiff's health problems . . . [gave] him a unique and powerful view of the origins and relationship of

her ongoing ailments and complications [resulting from her work-related injury]." In addition, Plaintiff contends that the record did not support a determination that Dr. Hoogerman's opinions hinged upon the nature and extent of the activities in which Plaintiff engaged after her work-related injury and that Defendant did not present competent psychological evidence that contradicted Dr. Hoogerman's testimony. Finally, Plaintiff argues that the conclusions reached by Mr. Lentz are largely subjective and improperly dismiss the objective testing results upon which Dr. Hoogerman relied. We do not believe that these arguments, which essentially amount to a challenge to the Commission's determination concerning the weight and credulity to be afforded to portions of the record evidence, justify a decision to overturn the Commission's order.

Although the Commission is not entitled to inappropriately discount testimony, a reviewing court "[does] not have the right to weigh the evidence and decide the issue on the basis of its weight." *Hassell v. Onslow Cty. Bd. Of Educ.*, 362 N.C. 299, 305, 661 S.E.2d 709, 714 (2008) (citation and quotation marks omitted). The Commission improperly discounts competent evidence by failing to mention it, *Sheehan v. Perry M. Alexander Constr. Co.*, 150 N.C. App. 506, 515, 563 S.E.2d 300, 306 (2002), or by expressly "disregard[ing] it, . . . treat[ing] it as

though it had never existed, [or] . . . omit[ting] it from consideration." *Harrell v. Stevens & Co.*, 45 N.C. App. 197, 205, 262 S.E.2d 830, 835, *disc. review denied*, 300 N.C. 196, 269 S.E.2d 623 (1980). In weighing evidence, the Commission "may reject entirely the testimony of a witness if warranted by disbelief of the witness." *Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457 (citation omitted). The Commission's determinations concerning weight and credibility issues are simply not reviewable on appeal. *Deese*, 352 N.C. at 116-17, 530 S.E.2d at 553 (recognizing that the Commission is the sole judge of the weight and credibility to be afforded to the record evidence, that the Commission need not explain its credibility determinations, and that reviewing courts lack the authority to review the Commission's weight and credibility determinations). As a result, given that the Commission's order reflects consideration of the evidence provided by Dr. Turnbull, Dr. Hoogerman, Mr., Hankins, and Mr. Lentz, this Court lacks the authority to overturn the weight and credulity determinations that the Commission made with respect to the evidence provided by these witnesses. *Mauldin v. A.C. Corp.*, __ N.C. App. __, __, 719 S.E.2d 110, 116 (2011) (stating that, where the relevant expert testimony conflicts, "[i]t is the responsibility of the Commission to decide the credibility and weight to be afforded

to the testimony of the various expert witnesses"). A review of the Commission's order demonstrates that it did, in fact, "consider all of the competent evidence, make definitive findings, draw its conclusions of law from these findings, and enter the appropriate award." *Harrell*, 45 N.C. App. at 205, 262 S.E.2d at 835 (emphasis omitted). As a result, we lack the authority to overturn the Commission's decision for the weight and credibility-related reasons advanced by Plaintiff.

b. Futility-Based Disability

In addition, Plaintiff asserts that the "medical, psychological, and vocational testimony [satisfies] the futility element of the third . . . prong of *Russell*." In support of this contention, Plaintiff argues that her age and the fact that Dr. Hoogerman diagnosed her as suffering from "significant depression" constitute pre-existing conditions which would render it "futile . . . to seek other employment[.]" *Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457. Once again, we conclude that Plaintiff's argument lacks merit.

A careful review of the record discloses the presence of ample evidence, a portion of which has been summarized above, tending to show that a job search by Defendant would not have been an exercise in futility. As we have previously discussed, unchallenged findings in the Commission's order establish that

Mr. Lentz based his labor market search upon the same pre-injury classification criteria that were used by Mr. Hankins. In addition, the record contains evidence tending to show that Mr. Lentz determined that Plaintiff possessed a number of transferable skills that would permit her to take advantage of alternative employment opportunities and that Mr. Lentz believed that there were available jobs that Plaintiff could perform. Finally, Mr. Hankins agreed that, if Plaintiff did not have the psychological limitations described by Dr. Hoogerman, she would be intellectually and physically capable of performing most, if not all, of her former job duties with Defendant. After analyzing the record evidence, the Commission assigned greater weight to the testimony of Mr. Lentz than that of Mr. Hankins and found the vocational opinions expressed by Mr. Lentz more persuasive than those advanced by Mr. Hankins. As we have previously stated, this Court has no authority to revisit the Commission's weight and credibility determinations. *Maudlin*, __ N.C. App. at __, 719 S.E.2d at 116. Thus, we conclude that the Commission's factual findings related to the "futility" prong of the *Russell* test are supported by competent evidence and that those findings support the Commission's determination that Plaintiff had not produced credible evidence that she was

disabled beyond 31 January 2008 under *Russell's* "futility" prong.

In seeking to persuade us that the necessary showing of disability had been made under the "futility" prong, Plaintiff cites *Gayton v. Gage Carolina Metals Inc.*, in which we recognized that an employee is capable of getting a job if "there exists a reasonable likelihood . . . that he would be hired if he diligently sought the job." 149 N.C. App. 346, 350, 560 S.E.2d 870, 873 (2002) (quoting *Burwell*, 114 N.C. App. at 73-74, 441 S.E.2d at 149 (citation and quotation marks omitted)). However, our decision in *Gayton* focused upon the employer's burden under *Burwell* to rebut an employee's showing of disability through the presentation of evidence tending to establish that suitable jobs were available and that the employee was capable of obtaining them given his or her physical and vocational limitations. *Id.* at 349-51, 560 S.E.2d at 872-74. In this case, however, we have concluded that the Commission did not err by concluding that Plaintiff had failed to produce evidence establishing disability after 31 January 2008 under either the first or the third *Russell* prong. For that reason, we need not consider whether Defendant provided substantial rebuttal evidence relating to either prong of the

"Russell" test as required by *Burwell*.¹ Thus, for all of these reasons, we conclude that the Commission did not err by concluding that Plaintiff was not disabled after 31 January 2008.

2. Plaintiff's Right Knee Condition

Secondly, Plaintiff contends that the Commission erred by determining that her right knee condition had not been aggravated by and was not a natural consequence of the August 2007 accident. Once again, we conclude that Plaintiff's argument lacks merit.

In addressing this issue, the Commission made the following finding of fact:

20. The Full Commission gives greater weight to the opinion testimony of Dr. Turnbull over any contrary testimony of Dr. Karegeannes on the causal relationship between Plaintiff['s] work injury and the worsening of symptoms in her left knee, hip and back. The evidence presented is insufficient to prove a causal relationship between Plaintiff's August 15, 2007 work injury and her right knee complaints.

¹Although Plaintiff suggests that her retirement on 31 August 2007 played a role in the Commission's conclusion that she was not disabled after 31 January 2008 in violation of the basic principal "that a claimant's [right] to a workers' compensation disability award is unrelated to the claimant's eligibility to retire or his decision to retire," *Troutman v. White & Simpson, Inc.*, 121 N.C. App. 48, 52, 464 S.E.2d 481, 484 (1995), *disc. review denied*, 343 N.C. 516, 472 S.E.2d 26 (1996), the record provides no indication that Plaintiff's retirement had any impact on the Commission's disability determination.

Based upon this finding of fact, the Commission concluded as a matter of law that:

3. Plaintiff failed to prove that her August 15, 2007 work injury caused or contributed to her right knee complaints.

The record contains ample justification for the Commission's decision with respect to this issue.

In unchallenged findings of fact, the Commission found that, on 14 March 2008, Dr. Turnbull reviewed x-rays which revealed degenerative osteoarthritic changes in Plaintiff's left and right knees. In addition, a physical examination that Dr. Turnbull performed revealed that Plaintiff's knees were crepitus and enlarged. Although Dr. Turnbull diagnosed Plaintiff as suffering from osteoarthritis and prescribed medication for the purpose of treating her condition, the record also reflects that Plaintiff had been taking arthritis medication consistently for over a year and half prior to her 15 August 2007 injury. In addition, the record reflects that Plaintiff had pre-existing bilateral knee pain for which she had received treatment from Dr. Turnbull.

Admittedly, Dr. Turnbull stated that Plaintiff's work-related injury aggravated her pre-existing knee condition. According to Dr. Turnbull, Plaintiff first complained of "popping and cracking" in her right knee in April of 2009. Dr.

Turnbull believed that Plaintiff had degenerative joint disease in her right knee and testified that "preferentially using one leg to go up a step or down a step, leading with it due to pain . . . tends to make it cause more symptoms." However, Dr. Turnbull also stated that Plaintiff's excessive weight "causes things to bother things more, too, [and] causes an increased amount of wear and tear on the joints." Ultimately, Dr. Turnbull concluded that Plaintiff's right leg and knee pain was exacerbated by alteration in her body mechanics stemming from her left leg injury and that Plaintiff might possibly have the same back, hip, and knee complaints if the 15 August 2007 injury had never occurred.

On the other hand, Dr. Karegeannes testified that any opinion he might have concerning the extent, if any, to which Plaintiff's work-related injury caused, aggravated, accelerated, or significantly contributed to any right leg or right knee problems would constitute "speculation." As a result of the fact that Plaintiff did not report any prior problems with her knees at the time that he examined her, Dr. Karegeannes did not address Plaintiff's right knee complaints. Thus, Dr. Karegeannes' testimony casts doubt on the extent to which there was a causal connection between the 15 August 2007 accident and Defendant's right knee condition.

"[T]he employee 'has the burden of proving that his claim is compensable.'" *Holley v. ACTS, Inc.*, 357 N.C. 228, 231, 581 S.E.2d 750, 752 (2003) (quoting *Henry v. A.C. Lawrence Leather Co.*, 231 N.C. 477, 479, 57 S.E.2d 760, 761 (1950)). "Although the employment-related accident need not be the sole causative force to render an injury compensable, the plaintiff must prove that the accident was a causal factor by a preponderance of the evidence." *Id.* at 231-32, 581 S.E.2d at 752 (citations and quotation marks 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 [an] injury.'" *Id.* at 232, 581 S.E.2d at 753 (quoting *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980)). "'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.'" *Id.* (quoting *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 915 (2000)). "'[T]he 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.* (quoting *Gilmore v. Hoke Cty. Bd. of Educ.*, 222 N.C. 358, 365,

23 S.E.2d 292, 296 (1942)). "It is the responsibility of the Commission to decide the credibility and weight to be afforded to the testimony of the various expert witnesses." *Maudlin*, __ N.C. App. at __, 719 S.E.2d at 116.

The record contains ample support for the Commission's determination that Plaintiff failed to prove a causal relationship between her right knee complaints and her work-related injury. Based upon his observations of Plaintiff's gait, Dr. Turnbull opined that Plaintiff's right leg and knee pain was exacerbated by a change in body mechanics stemming from her work-related injury. However, Dr. Turnbull also testified that Plaintiff had a degenerative joint condition in her right knee, that her excessive weight had caused her to have joint problems, and that Plaintiff might be having the same knee-related complaints even if the 15 August 2007 injury had never occurred. Given that Plaintiff never made any complaints concerning her knees and did not tell him that she had a pre-existing knee condition, Dr. Karegeannes testified that any attempt to establish a causal relationship between the 15 August 2007 accident and Plaintiff's right knee complaints would involve speculation. Moreover, the Commission's unchallenged findings of fact establish that Plaintiff had a pre-existing degenerative arthritic condition in both knees. Although

Plaintiff asserts that, "since no medical opinion was rendered denying the relationship [between Plaintiff's work-related injury and right knee condition,] the [Commission] may accept or reject both Dr. Turnbull's opinion and Dr. Karegeannes' tentative testimony," we believe the Commission's order clearly indicates that it considered Dr. Turnbull's opinion concerning the origin of Plaintiff's right knee condition and elected not to accept it. When considered in its entirety, the record evidence amply supports the Commission's decision to find that Plaintiff had failed to establish a causal link between Plaintiff's work-related injury and the pain that she was experiencing in her right knee. As a result, the Commission did not err by concluding that Plaintiff had failed to prove that the condition of her right knee was caused by the 15 August 2007 accident.

C. Defendants' Appeal

In their sole challenge to the Commission's order, Defendants contend that the Commission erroneously concluded that Plaintiff met her burden of proving that the 15 August 2007 injury "contributed to, and/or aggravated her left knee, hip and back conditions" and that Plaintiff "failed to prove . . . that her pre-existing osteoarthritis conditions of the back, knees and hip were somehow aggravated or contributed to by her work-

related thigh laceration injury." We do not find Defendants' contention persuasive.

In its order, the Commission found as a fact that:

17. Upon being presented with a questionnaire soliciting an opinion as to whether Plaintiff's August 15, 2007, work injury caused, contributed to, exacerbated, or aggravated Plaintiff's back and hip complaints, Dr. Turnbull responded that the work injury significantly exacerbated or aggravated Plaintiff's pre-existing back and hip problems. In addition, Dr. Turnbull opined that Plaintiff's August 15, 2007 work injury aggravated her pre-existing knee condition.

18. At Dr. Turnbull's deposition, he opined that Plaintiff's August 15, 2007 work injury exacerbated and/or aggravated her left knee condition due to the significant injury and loss of flesh to the soft tissue of the left leg which caused increased stress and strain, based upon his understanding of how the injury occurred. He also opined that Plaintiff's work injury [] either caused or contributed to her hip and back complaints, considering the amount of injury that she sustained, and that the age-related degeneration seen in Plaintiff's most recent lumbar MRI and x-rays from October 2009 would not account for her hip and back complaints following the August 15, 2007 work injury.

19. With respect to Plaintiff's back, Dr. Karegeannes was of the opinion that the degenerative findings present in Plaintiff's spine would be exacerbated by her obesity, and that Plaintiff's pre-existing osteoarthritis would be expected to affect her ambulation, which in turn would exacerbate any arthritis in the back. After being presented with a hypothetical posed by

Plaintiff's counsel and being provided with information regarding Plaintiff's prior medical history, Dr. Karegeannes opined that it was "quite possible" that Plaintiff's August 15, 2007 work injury aggravated her back pain due to "the timing of the onset of symptoms following the injury," and that the hip pain was actually referred back pain, thereby making it aggravated by the work injury. He felt that it was "also possible that she [Plaintiff] aggravated her preexisting lumbar spine arthritis from an alteration in her gait secondary to the injury to the left leg," and that this "would be I think the best way to link the two processes." Additionally, Dr. Karegeannes testified that "injury to the muscles in the [left] leg, perhaps from scarring from the surgeries . . . could lead to a change in how she [Plaintiff] carries the leg and how she ambulates which would then throw off her back."

20. The Full Commission gives greater weight to the opinion testimony of Dr. Turnbull over any contrary testimony of Dr. Karegeannes on the causal relationship between Plaintiff['s] work injury and the worsening of symptoms in her left knee, hip and back. . . .

Based upon these findings of fact, the Commission concluded as a matter of law that:

2. Plaintiff's August 15, 2007 work injury caused a laceration-type injury to her left thigh, and significantly aggravated and exacerbated her pre-existing left knee, hip, and back conditions. *Cannon v. Goodyear Tire and Rubber Co.*, 171 N.C. App. 254, 614 S.E.2d 440 [*disc. review denied*, 360 N.C. 61, 621 S.E.2d 177] (2005). The significant aggravation and exacerbation of Plaintiff's pre-existing left knee, hip, and back conditions was a direct and natural

consequence of her August 15, 2007 work injury. *Roper v. J.P. Stevens & Co.*, 65 N.C. App. 69, 308 S.E.2d 485 (1983).

In challenging the Commission's order, Defendant argues that the opinions upon which the Commission relied in determining that Plaintiff's left hip, knee, and back conditions were exacerbated by the 17 August 2007 injury, rested on "speculation or possibility [and are] not competent to establish medical causation."

A careful examination of the record reveals ample support for the Commission's decision with respect to this issue. According to Dr. Turnbull, Plaintiff's left knee condition was "probably . . . exacerbated and aggravated by the on-the-job injury." Dr. Turnbull believed that, since Plaintiff had "a significant injury to the leg," "it [was] very reasonable that [Plaintiff's left knee condition] was . . . related to that injury, with the increased stress and strain." Dr. Turnbull testified that the 15 August 2007 accident had "obviously [caused] a pretty significant injury to the soft tissue;" that Plaintiff "had a problem with wound infection and . . . a pretty good loss of flesh [in her left leg;]" and that this set of facts explained Plaintiff's left leg pain. In addition, Dr. Turnbull indicated that Plaintiff's work-related injury significantly contributed to her hip and back problems given the

seriousness of that injury. After examining Plaintiff for the purpose of addressing her complaints of left leg, hip, and back pain on 6 August 2009 and ordering that x-rays of Plaintiff's low back be taken and an MRI be performed, Dr. Turnbull determined, based on a review of these studies, that, although Plaintiff had "degenerative-type changes" in her lower back, he saw no sign of any deformity that would explain Plaintiff's hip and left leg pain. As a result, in response to questions posed by Plaintiff's counsel, Dr. Turnbull opined that the Plaintiff's left knee, left leg, back and hip complaints, were "contributing to and exacerbated by [her work-related] injury."

As we previously recognized, the Commission is the sole judge of the weight and credibility to be given a witness' testimony. *Deese*, 352 N.C. at 116, 530 S.E.2d at 553. Although an employment-related accident need not be the sole cause of a plaintiff's problem in order for a particular injury to be compensable, "the plaintiff must prove that the accident was a causal factor by a preponderance of the evidence." *Holley*, 357 N.C. at 232, 581 S.E.2d at 752 (citation and quotation marks omitted). "All natural consequences that result from a work-related injury are compensable under the Workers' Compensation Act." *Cannon v. Goodyear Tire & Rubber Co.*, 171 N.C. App. 254, 260, 614 S.E.2d 440, 444 (citation omitted), *disc. review*

denied, 360 N.C. 61, 621 S.E.2d 177 (2005). As we have previously noted, expert testimony addressing causation-related issues “‘based merely upon speculation and conjecture, . . . is not sufficiently reliable to qualify as competent evidence on issues of medical causation.’” *Holley*, 357 N.C. at 232, 581 S.E.2d at 753 (quoting *Young*, 353 N.C. at 230, 538 S.E.2d at 915). For that reason, while “expert testimony as to the *possible* cause of a medical condition is admissible if helpful to the jury,” such testimony “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.’” *Id.* at 233, 581 S.E.2d at 753 (citation omitted and quoting *Young*, 353 N.C. at 233, 538 S.E.2d at 916). “Although medical certainty is not required, an expert’s ‘speculation’ is insufficient to establish causation.” *Id.* at 234, 581 S.E.2d at 754. As a result, while evidence that “an accident ‘could or might’ have caused an injury, or ‘possibly’ caused it is not generally enough alone to prove medical causation[,]” testimony that a particular event “‘more than likely’ caused an injury or that the witness is satisfied to a ‘reasonable degree of medical certainty’ has been considered sufficient.” *Carr v. Dept. of Health and Human Services*, ___ N.C. App. ___, ___, 720 S.E.2d 869, 873 (2012).

In seeking to persuade us that the Commission erroneously found that the injuries that Plaintiff sustained in the 15 August 2007 accident aggravated and exacerbated Plaintiff's pre-existing left knee, hip, and back conditions, Defendants argue that the Commission (1) ignored Dr. Turnbull's testimony that Plaintiff could possibly have experienced the same difficulties with her left knee, hip, and back even if the 15 August 2007 injury had not occurred; (2) did not explain which of Dr. Turnbull's various theories of causation the Commission found to be persuasive; and (3) improperly buttressed Dr. Turnbull's medical causation opinions with selected excerpts from Dr. Karegeannes' testimony. We do not find these arguments persuasive.

Although Dr. Turnbull did testify that it was "possible" that Plaintiff might have had her existing back, hip and knee problems even if she had not been injured on 15 August 2007; that Plaintiff's obesity put additional stress on her knees, hips and back; and that he did not specialize in orthopedics, the fact that Dr. Turnbull made these admissions does not establish that his testimony concerning the relationship between the 15 August 2007 accident and Plaintiff's left knee, hip, and back condition constituted "mere speculation." *Carr*, ___ N.C. App. at ___, 720 S.E.2d at 873 (recognizing that a doctor's

admission that "herniated discs can be spontaneous in nature" and that they constitute an ongoing condition stemming from spinal deterioration did not render his testimony that the plaintiff's cervical spine problems were caused, exacerbated, or aggravated by her left hand injury "mere speculation"). Similarly, although Defendant objects to the fact that the Commission relied upon a response that Dr. Turnbull provided to a medical questionnaire provided by Plaintiff's counsel, Dr. Turnbull adequately explained the basis for the opinions that he expressed in responding to that questionnaire during his testimony. As the record clearly established, Dr. Turnbull's opinion concerning the causation issue rested upon his examination of Plaintiff, his understanding of her pre-existing osteoarthritic conditions, his understanding of her work-related injury, and his review of the x-rays and MRI study of Plaintiff's lower back.

In light of the substantial record evidence describing the basis for Dr. Turnbull's opinion, we believe that his testimony did, in fact, constitute competent evidence upon which the Commission was entitled to base its decision rather than "mere speculation" and that the Commission's failure to specifically adopt one of the explanations for this result that Dr. Turnbull advanced during his testimony does not in any way invalidate the

Commission's decision. Reduced to its essence, Defendants' challenge to the Commission's decision concerning the extent to which Plaintiff's pre-existing left hip, knee, and back problems were exacerbated or aggravated by the 15 August 2007 accident hinges on a challenge to the Commission's decision concerning the credibility of and weight to be given to Dr. Turnbull's testimony, which is not a basis upon which we are entitled to award appellate relief. *Deese*, 352 N.C. at 116, 530 S.E.2d at 553. Thus, we conclude that the record contains sufficient competent evidence to support the relevant findings of fact and that these findings, in turn, support the Commission's conclusion that Plaintiff's pre-existing left knee, hip, and back conditions were significantly aggravated and exacerbated by her work-related injury, so that Defendants have established no justification for overturning the Commission's decision with respect to this issue.

III. Conclusion

Thus, for the reasons set forth above, we conclude that both Plaintiff and Defendants have failed to demonstrate that the Commission committed any error of law by concluding that Plaintiff did not remain disabled after 31 January 2008, that Plaintiff's work-related injury did not cause or contribute to her right knee pain, and that Plaintiff's work-related injury

exacerbated or aggravated her left knee, hip, and back conditions. As a result, the Commission's order should be, and hereby is, affirmed.

AFFIRMED.

Judges BEASLEY AND THIGPEN concur.

Report per Rule 30(e).