IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-333

Filed: 7 April 2015

North Carolina Industrial Commission, I.C. Nos. 886537 & W06274

RITA HAILEAB, Employee, Plaintiff,

v.

JOHN Q. HAMMONS HOTELS d/b/a EMBASSY SUITES, Employer, PHOENIX INSURANCE CO., Carrier, Defendants.

Appeal by defendants and cross-appeal by plaintiff from opinion and award entered 20 December 2013 by the North Carolina Industrial Commission. Heard in the Court of Appeals 9 September 2014.

The Sumwalt Law Firm, by Vernon Sumwalt, for plaintiff-appellant, cross-appellee.

Hedrick Gardner Kincheloe & Garofalo, LLP, by R. Jeremy Sugg and M. Duane Jones, for defendant-appellees, cross-appellants.

BRYANT, Judge.

Where there was sufficient evidence to support the Full Commission's findings of fact as to a causal connection between plaintiff's admittedly compensable injury and subsequent injuries to plaintiff's knees and lower back, we affirm the Commission's award of compensation for those subsequent injuries. Where the Commission was within its authority to hear arguments concerning the suspension

of plaintiff's disability benefits and to award defendants a credit against future payments for the amount of compensation paid in excess of payments due to plaintiff, again, we affirm.

On 25 February 2008, John Hammons Hotels, Inc., filed a Form 19 reporting to the Industrial Commission that employee Rita Haileab sustained an injury in the course of performing her employment duties on 7 December 2007. Haileab filed a Form 18 with her employer giving notice of the 7 December 2007 injury. John Hammons Hotels, Inc., filed with the Industrial Commission a Form 60 "Employer's admission of employee's right to compensation." On the Form 60, a description of the accident indicated that "[Haileab] was struck by an ice cart . . . causing injury to both feet."

On 6 November 2009, Haileab filed a second Form 18 with her employer giving notice of an injury to her right thigh sustained on 31 January 2008 when she was hit with a table during the course of her employment.

On 21 September 2011, Haileab (hereinafter "plaintiff") filed with the Industrial Commission a request that her claim be assigned for hearing. Plaintiff contended that employer John Q. Hammons Hotels, Inc., and insurance carrier Phoenix Insurance Company (hereinafter "defendants") had not paid for or authorized medical compensation for all healthcare providers who have provided treatment for plaintiff's injuries in relation to the injury sustained 7 December 2007.

Defendants responded that they had authorized and paid for all medical treatment provided by plaintiff's authorized treating physicians but plaintiff's current medical treatment was not authorized and not related to her work injury sustained 7 December 2007. The matter was heard before Deputy Commissioner Chrystal Redding Stanback on 24 April 2012.

In an opinion and award filed 2 May 2013 and amended on 3 May 2013, Deputy Commissioner Stanback concluded that plaintiff had sustained a compensable injury to both feet and ankles on 7 December 2007 and sustained another compensable injury to her right thigh on 31 January 2008. As a consequence of her compensable injuries plaintiff had developed an antalgic gait, an aggravation of arthritis in her left knee, an aggravation of arthritis in her right knee, and lower back pain. Deputy Commissioner Stanback also concluded that as a consequence of her antalgic gait, plaintiff suffered a fall on 12 January 2010 resulting in injury to her right shoulder. The Deputy Commissioner concluded that plaintiff's compensable injuries were the proximate cause of her development of bilateral knee pain, right shoulder pain, and lower back pain. Deputy Commissioner Stanback ordered defendants to pay all medical expenses incurred or to be incurred by plaintiff as a result of her compensable injuries suffered on 7 December 2007 and 31 January 2008, including treatment rendered for plaintiff's bilateral knee condition, right shoulder condition, and back condition. Defendants appealed the deputy commissioner's opinion and award to the

Full Commission (hereinafter "the Commission"). Prior to a hearing before the Commission, defendants filed a motion to allow new evidence, specifically, evidence regarding whether plaintiff was entitled to ongoing indemnity compensation predicated on her ability to work. On 20 December 2013, the Commission entered its opinion and award affirming in part and modifying in part the opinion and award of the Deputy Commissioner. In its opinion and award, the Commission found that defendant hired plaintiff as a banquet server on 24 September 2007. On 7 December 2007, plaintiff sustained an injury by accident at work, when an ice cart struck her injuring both feet and ankles, including her Achilles tendon. On 10 December 2007, plaintiff presented to Piedmont Healthcare Urgent Care and reported a history of bilateral posterior heel pain and difficulty walking. Plaintiff returned to Piedmont Healthcare Urgent Care on 24 January 2008 with complaints of continued pain in the lower back side of both legs. On 14 February 2008, plaintiff was seen by her family physician, Dr. Jane Ren, and thereafter plaintiff received treatment for her complaints of neck and shoulder discomfort. Meanwhile, the Commission found that plaintiff had sustained a second compensable injury at work on 31 January 2008 when a co-worker ran into her with a table, injuring her right thigh.

With regard to pain in her right thigh and left heel, plaintiff received treatment from The Piedmont Healthcare Urgent Care and, from OrthoCarolina. Plaintiff also received evaluation and management of her ongoing foot and ankle pain from Dr.

Kern Carlton, a physical medicine and rehabilitation and pain management physician.

On 4 September 2008, Dr. Carroll Jones—an orthopedic surgeon with OrthoCarolina specializing in foot and ankle conditions—performed surgery on plaintiff's left Achilles tendon "consisting of a left gastrocnemius release, a left distal Achilles reconstruction without tendon transfer and excision of a Haglund deformity and calcific spur of the left calcaneous." Following the surgery, Dr. Jones noted that plaintiff developed an antalgic gait on the left.

On 21 May 2009, plaintiff sought treatment for right knee pain at CMC-Meyers Park Clinic. She was diagnosed with patellofemoral degenerative joint disease. On 5 August 2009, during a follow-up appointment at CMC-Meyers Park Clinic, plaintiff reported suffering from intermittent back pain which started after injury to her Achilles. Plaintiff was diagnosed with low back pain "probably made worse by the use of crutches" following surgery on her Achilles tendon.

On 5 June 2009 plaintiff filed with the Industrial Commission a motion for Specific Medical Treatment requesting that defendants authorize an independent medical evaluation to determine whether plaintiff "reached maximum medical improvement and/or it identify additional treatment options that may be reasonably necessary to effect a cure and/or lessen the period of disability. Plaintiff was evaluated by Dr. Christopher Nagy, an orthopedic surgeon at Salisbury Orthopaedic.

> [Dr. Nagy opined that] because Plaintiff did not have a functioning limb in her left lower extremity after her left Achilles tendon surgery, she was forced to alter her gait. [Dr. Nagy] diagnosed Plaintiff with continuing left ankle pain following Achilles tendon repair with patellofemoral chondromalacia, or wear and tear of the cartilage on the underside of the knee, and low back pain secondary to alteration in gait. Dr. Nagy recommended a course of physical therapy, but Defendants denied authorization.

On 27 January 2011, plaintiff was seen at CMC-Meyers Park Clinic with complaints of left knee pain for which she also received subsequent treatment. On 12 January 2012, while in front of CMC-Meyers Park Clinic, plaintiff fell. Plaintiff attributed the fall to her antalgic gait and left knee collapsing. Plaintiff later testified that she injured her right side as a result of the fall.

A divided Commission found that the condition of plaintiff's right and left knees was causally related to her forced altered gait and limp resulting from her 7 December 2007 injury by accident and resulting left Achilles tendon injury and surgery, causing the need for medical treatment. With regard to plaintiff's lower back, the Commission found that the condition was also proximately caused by or was contributed to by her antalgic gait. However, with regard to plaintiff's right shoulder condition, the Commission found that although the shoulder condition was causally related to her 12 January 2012 fall, the shoulder condition was not compensable as plaintiff failed to establish that the fall was related to her compensable injury. The Commission found that it was reasonable for plaintiff to seek treatment from other

providers for her bilateral knee and lower back conditions: plaintiff sought authorization for specific medical treatment to determine any additional medical treatment related to her 7 December 2007 injury by accident reasonably necessary to effect a cure, provide relief and/or lessen her period of disability. The Commission further found that treatment for plaintiff's bilateral knee and lower back conditions was causally related to her 7 December 2007 injury by accident and that "[p]laintiff timely sought authorization from the Industrial Commission for medical treatment of her bilateral knees and back[,]" and such treatment was authorized.

As to plaintiff's disability compensation, the Commission noted that plaintiff was receiving temporary total disability compensation and that defendants disputed whether plaintiff was due compensation after 22 September 2010—the date following Dr. Jones' release of plaintiff from his care with permanent work restrictions of no standing and walking more than fifteen minutes per hour. The Commission found that following her release from Dr. Jones' medical care, plaintiff did not search for work on her own until she began participating with defendants' vocational rehabilitation services on 23 December 2010. The Commission found that from 22 September 2010 until 23 December 2010, plaintiff was capable of some work, but did not show that she made a reasonable effort to find suitable employment during this period. The Commission concluded that plaintiff was not entitled to temporary total disability benefits from 22 September 2010 through 23 December 2010, and that

defendants were entitled to a credit for compensation paid to plaintiff during that period. From 23 December 2010 and continuing until further order of the Commission, plaintiff was entitled to an award of temporary total disability benefits. In its award, the Commission ordered defendants to pay all medical expenses incurred or to be incurred by plaintiff as a result of her compensable injuries on 7 December 2007 and 31 January 2008, "this shall also include all treatment rendered or to be rendered for Plaintiff's bilateral knee and back conditions." But, defendants "[were to] receive a credit for compensation paid to Plaintiff for the period from September 22, 2010 through December 23, 2010 . . . ."

Defendants appeal. Plaintiff cross-appeals.

On appeal, defendants raise the following issues: the Commission erred by (I) awarding compensation for injury to plaintiff's left knee; and (II) finding defendants liable for past unauthorized medical treatment.

On cross-appeal, plaintiff raises the following issues: (III) defendants failed to exhaust their administrative remedies; (IV) the Commission erred by awarding defendants a credit; and (V) the Commission erred by retroactively suspending plaintiff's compensation.

"Under the North Carolina Workers' Compensation Act, an employee seeking benefits bears the burden of proving every element of compensability. *Rogers v.*

Smoky Mount. Petrol. Co., 172 N.C. App. 521, 524, 617 S.E.2d 292, 295 (2005) (citation and quotations omitted).

> Appellate review of an award from the Commission is generally limited to two issues: (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. Under our Workers' Compensation Act, the Commission is the fact finding body. The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony. Thus, on appeal, appellate courts do not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding. Reviewing courts do not function as appellate fact finders.

Gore v. Myrtle/Mueller, 362 N.C. 27, 40—41, 653 S.E.2d 400, 409 (2007) (citations and quotations omitted).

I

Defendants argue that the Commission erred by awarding compensation for plaintiff's left knee. More specifically, defendants contend that there was no competent evidence to establish a causal connection between plaintiff's 7 December 2007 compensable injury and plaintiff's injury to her left knee. Defendants assert that the Commission predicated its disability award for plaintiff's left knee injury upon testimony that amounted to only conjecture as to the causal relationship between plaintiff's compensable injuries and the subsequent injury to plaintiff's left

knee. As such, defendants argue that the Commission's award should be reversed. We disagree.

"To show that the prior compensable injury caused the subsequent injury, the evidence must be such as to take the case out of the realm of conjecture and remote possibility, that is, there must be sufficient competent evidence tending to show a proximate causal relation." *Cooper v. Cooper Enters., Inc.*, 168 N.C. App. 562, 564, 608 S.E.2d 104, 106 (2005) (citation and quotation omitted).

> The quantum and quality of the evidence required to establish prima facie the causal relationship will of course vary with the complexity of the injury itself. There will be many instances in which the facts in evidence are such that any layman of average intelligence and experience would know what caused the injuries complained of.
>
> However, in cases presenting 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.

Hodgin v. Hodgin, 159 N.C. App. 635, 639—40, 583 S.E.2d 362, 365 (2003) (citations and quotations omitted); *see e.g. Whitfield v. Lab. Corp. of Am.*, 158 N.C. App. 341, 350-51, 581 S.E.2d 778, 785 (2003) ("[The treating physician] was of the opinion and the Full Commission finds that the types of problems he diagnosed for [the] plaintiff were *likely* to have arisen from such a twisting fall. This finding, if supported by the evidence, is sufficient to support the Commission's conclusion that [the] plaintiff had shown a causal relationship between [the] plaintiff's symptoms and the compensable

accident . . . . Such a finding takes the causal relationship out of the 'realm of conjecture and remote possibility' as required." (emphasis added) (citation omitted)).

Defendant argues that the Commission's finding of a causal connection between plaintiff's compensable injury and the subsequent injury to her left knee cannot be supported solely by medical records. In support of its argument, defendant points out that the author of the medical records underscoring the Commission's findings of a causal connection, Dr. Elliot Robinson, was not deposed or qualified as an expert.

In *Gore*, 362 N.C. 27, 653 S.E.2d 400, our Supreme Court considered whether there existed competent evidence to support the Commission's finding of fact that a causal connection existed between work place incidents occurring on 12 January 2000 and 31 March 2000 and a subsequent diagnosis of back injury. *Id.* at 29, 653 S.E.2d at 402—03. On 12 January 2000, while trying to aid another employee, the plaintiff slipped on ice in the parking lot of the defendant's premises. *Id.* at 28, 653 S.E.2d at 402. On 31 March 2000, the plaintiff was pulling a desk when she felt a catch in her back. *Id.* at 29, 653 S.E.2d at 402. The plaintiff saw her primary care physician for complaints of back pain. The physician diagnosed plaintiff with severe back pain and underlying severe osteoarthritis. On 2 May 2000, the physician diagnosed the plaintiff with back pain due to degenerative disc disease and spondylolisthesis. *Id.* at 29, 653 S.E.2d at 403. On 12 July 2000, the plaintiff sought a second opinion from

another physician who diagnosed the plaintiff with low back pain syndrome and trochanteric bursitis. *Id.* On 20 June 2002, the plaintiff sought a third physician's opinion who determined that the plaintiff suffered from degenerative arthritis of her neck and back, myofascial pain, and Grade IV spondylolisthesis of her lumbar spine. *Id.* The Commission held the plaintiff sustained a compensable injury by accident arising out of and as a direct result of her employment with defendant on 12 January 2000 and 31 March 2000. Further, the plaintiff's workplace injuries on 12 January 2000 and 31 March 2000 aggravated a preexisting, nondisabling condition. *Id.* at 32, 653 S.E.2d at 404. In overruling the opinion of this Court, our Supreme Court found support for the Commission's findings of fact in stipulated medical records.

> The Court of Appeals' concerns were premised entirely on its assessments of the deposition testimonies of the doctors involved. Its opinion states: "Upon review of the record, the deposition testimonies of [the physicians] were based merely upon speculation and conjecture, and were not sufficiently reliable to qualify as competent evidence on issues of medical causation."

Id. at 41, 653 S.E.2d at 409 (citation omitted). However, "[t]he Commission's findings of fact may only be set aside in the complete absence of competent evidence to support them." *Id.* at 42, 653 S.E.2d at 410 (citation omitted).

> [O]ur review of the evidence in the record reveals that it contains considerable medical records in addition to the testimony referenced by the Court of Appeals. These records were stipulated into evidence by the parties. As such, they represent competent evidence to support the Commission's findings of fact determining that there was a

> causal connection between [the] plaintiff's injuries and her work.

Id. at 41, 653 S.E.2d at 409. The Court held that the medical records "constitute competent evidence to support the Commission's findings that [the] plaintiff 'sustained a compensable injury by accident arising out of and as a direct result of her employment with [the] defendant in that she suffered specific traumatic incidents' and that her workplace injuries 'aggravated a preexisting, nondisabling condition.'" *Id.* at 42, 653 S.E.2d 410; *see also Shockley v. Cairn Studios Ltd.*, No. COA03-1210, at *4 (N.C. App. July 6, 2004) (finding competent evidence in support of the Commission's findings of fact based on stipulated medical records); *Whitfield*, 158 N.C. App. at 349, 581 S.E.2d at 784 ("We note that the statement by the Commission that [the physicians who treated the plaintiff] were 'not deposed; and that only their treatment records were in evidence' is somewhat contradictory to North Carolina Workers' Compensation Rule 612.[1] This rule encourages parties to stipulate medical records into evidence, as opposed to taking multiple depositions, by allowing assessment of the costs of a deposition of a medical witness, including attorney's fees, against the party who refuses to stipulate to medical records." (citation omitted)).

[1] "In cases where a party, or an attorney for either party, refuses to stipulate medical reports and the case must be reset or depositions ordered for testimony of medical witnesses, a Commissioner or Deputy Commissioner may in his discretion assess the cost of such hearing or depositions, including reasonable attorney fees, against the party who refused the stipulation." Workers' Comp. R. of N.C. Indus. Comm'n 612(a) (2012).

Here, the parties stipulated to the admission of plaintiff's medical records into evidence as exhibits. Included was a medical record from Dr. Robinson, with CMC-Meyer's Park Clinic, which states the following:

> HISTORY OF PRESENT ILLNESS: This is a 52-year-old female complaining of left knee pain. Her history is notable for a left Achilles rupture on the job in 2008. . . .
>
> . . .
>
> PHYSICAL EXAMINATION:
>
> . . . She walks with an antalgic gait on the left side. . . .
>
> IMPRESSION:
> 1. I firmly believe that this knee pain and feeling of instability comes from her Achilles contracture. I do not feel that there is any intrinsic pathology in the knee. The patient's complaints of back pain are also likely secondary to this gait abnormality. . . .

After noting that plaintiff presented for treatment on her knee and lower extremities relating to the compensable injury Nurse Holzinger was asked whether plaintiff's gait alteration due to surgery on her Achilles tendon would cause rapid development of arthritis or aggravate pre-existing arthritis.

> Q . . . If it sort of makes sense that it might be related, can you say not a hundred percent certainty but to a degree of more likely than not, I mean, greater than 50 percent given [plaintiff]'s history that that's where at least the symptoms from that condition came from?
>
> A Probably more likely than not. I mean, that is what I would think as a practitioner.

The Commission made the following finding of fact:

> 71. The Full Commission gives greater weight to the medical opinions of Dr. Robinson and Nurse Practitioner Holzinger over any contrary opinions . . . with regard to Plaintiff's left knee condition and further finds that Plaintiff's left knee condition is causually related to her December 7, 2007 Achilles tendon injury, surgery and resulting gait alteration.

As plaintiff's stipulated medical records provide competent evidence that elevates the finding of a causal connection between plaintiff's compensable injuries and the subsequent injury to her left knee out of the realm of conjecture, we must hold that the Commission's finding of fact reflecting the causal connection is supported by competent evidence in the record. *See Gore*, 362 N.C. at 41—42, 653 S.E.2d at 409—10. Accordingly, to the extent that defendants contends that the Commission lacked competent evidence to support its finding of fact regarding a causal relationship between plaintiff's compensable injuries by accident and plaintiff's subsequent left knee injury, such argument is overruled.

II

Defendants argue that the Commission erred by finding defendants liable for past medical treatment plaintiff received in regard to her knees and lower back. Defendants contend that plaintiff sought unauthorized treatment for pain in her knees and lower back, failed to notify defendants that she was seeking treatment until well after she began such treatment but now argues that defendants are liable

for these medical expenses. Defendants further contend that plaintiff's motion for Specific Medical Treatment filed with the Industrial Commission on 5 June 2009 failed to provide reasonable notice to defendants or the Commission that plaintiff was seeking treatment for specific injuries other than those compensable injuries occurring 7 December 2007 and 31 January 2008. Defendants argue that this failure to request approval for additional treatment warrants the reversal of the Commission's award of payment for past medical expenses. We disagree.

"Generally, an employer has the right to direct the medical treatment for a compensable work injury. However, an employer's right to direct medical treatment (including the right to select the treating physician) attaches only once the employer accepts the claim as compensable." *Craven v. VF Corp.*, 167 N.C. App. 612, 616-17, 606 S.E.2d 160, 163 (2004) (citations and quotations omitted). The Workers' Compensation Act is codified within Chapter 97 of out General Statutes. Pursuant to section 97-25, "if the employee so desires, an injured employee may select a health care provider of the employee's own choosing to attend, prescribe, and assume the care and charge of the employee's case subject to the approval of the Industrial Commission." N.C. Gen. Stat. § 97-25(c) (2013). "G.S. 97-25 imposes no requirement of notice or approval *prior* to an employee's procurement of his own physician." *Schofield v. Tea Co.*, 299 N.C. 582, 592, 264 S.E.2d 56, 63 (1980), superceded by statute on other grounds 1991 N.C. Sess. Laws ch. 703, § 703, *as recognized in*

Franklin v. Broyhill Furniture Indus., 123 N.C. App. 200, 207—08, 472 S.E.2d 382, 387 (1996). However, our Supreme Court has held that an interpretation of the statute as imposing no time limits on providing notice or seeking approval by an employee who changes physicians "is inconceivable." *Id.* at 592, 264 S.E.2d at 63. Because, construing the statute in such a way "would work a burden and an injustice on all parties involved." *Id.* "We therefore construe the statute to require an employee to obtain approval of the Commission within a reasonable time after he has selected a physician of his own choosing to assume treatment." *Id.* at 593, 264 S.E.2d at 63.

In *Whitfield*, 158 N.C. App. 341, 581 S.E.2d 778, the plaintiff suffered a compensable work injury to her back, notified her supervisor, and sought medical attention in the following days. The plaintiff saw a physician who took the plaintiff out of work and referred her to a physical therapist. The physical therapy sessions were terminated because the plaintiff complained of pain. *Id.* at 344—45, 581 S.E.2d at 781. Because of her pain, the plaintiff was barely able to walk. *Id.* at 345, 581 S.E.2d at 782. The plaintiff was terminated. Despite the termination, the plaintiff kept an appointment with a physician the defendant employer had previously arranged. That physician indicated to the plaintiff that he thought the plaintiff's problems would resolve themselves with no surgical intervention and with minimal treatment. *Id.* at 346, 581 S.E.2d at 782. Following this visit, the plaintiff's employer

failed to provide her with any type of medical treatment. *Id.* Three months later, in October 1998, the plaintiff sought treatment from Dr. Huh, a board certified anesthesiologist and board eligible pain management specialist, at the Duke Hospital Pain Clinic. *Id.* On appeal, the defendant-employer argued that the Commission erred in concluding the defendant-employer was responsible for medical bills the plaintiff incurred for treatment with Dr. Huh, where the treatment was not approved by the defendant-employer. *Id.* at 355—56, 581 S.E.2d at 788. The defendant-employer argued that "[the] plaintiff [was] not entitled to simply shop around for a physician . . . ." *Id.* at 356, 581 S.E.2d at 788. This Court noted that "N.C.G.S. § 97-25 allows 'an injured employee to select a physician of his own choosing to attend, prescribe and assume the care and charge of his case, subject to the approval of the Industrial Commission.'" *Id.* at 357, 581 S.E.2d at 788 (quotations omitted). The record reflected the Commission's approval of Dr. Huh as the plaintiff's primary treating physician for the problems arising from the plaintiff's 5 June 1998 injury by accident, and the *Whitfield* Court held the Commission did not err in approving Dr. Huh. However, the Court did note that as to past medical expenses, "there [was] no finding by the Commission that the Commission approved the treatment by Dr. Huh prior to the issuance of the Commission's order and award, or that [the] plaintiff sought such approval from the Commission." *Id.* at 357, 581 S.E.2d at 788. The Court cited *Larramore v. Richardson Sports Ltd. Partners*, 141 N.C. App. 250, 258, 540

S.E.2d 768, 772—73 (2000), *aff'd per curiam*, 353 N.C. 520, 546 S.E.2d 87 (2001), for the proposition that "[the] request need not be made before treatment is received, only within a reasonable time thereafter[.]" *Whitfield*, 158 N.C. App. at 357, 581 S.E.2d at 788—89. Noting that the Commission's opinion and award reflected no request on the part of the plaintiff for Dr. Huh's approval, the *Whitfield* Court held as follows:

> [W]ithout any evidence of a request in the record, the issue of the timeliness of the request is not before us. We therefore vacate [that] portion of [the] conclusion . . . of the Commission's opinion and award granting past medical benefits for treatment by Dr. Huh and remand this issue to the Commission to make proper findings as to whether [the] plaintiff actually requested approval from the Commission for treatment by Dr. Huh.

Id. at 357, 581 S.E.2d at 789.

Distinguishing *Whitfield*, this Court observed in *Fontenot v. Ammons Springmoor Assoc.*, 176 N.C. App. 93, 625 S.E.2d 862 (2006), that "Whitfield's Form 33 [filed with the Industrial Commission to request additional medical treatment] did not include a request for approval of alternative medical treatment." *Id.* at 99, 625 S.E.2d at 866.

> [In distinction,] Fontenot's Form 33 contains a specific allusion to section 97-25 of the General Statutes, which authorizes the Commission to approve an employee's request for medical treatment of her own choosing. This reference provided a basis for the Commission's determination that Fontenot sought approval for her additional medical treatment. As this determination is

> supported by the record, it must be affirmed.

Id. at 99, 625 S.E.2d at 866. The *Fontenot* Court went on to consider the timeliness of the plaintiff's request for alternative medical treatment, given the prior start of such treatment. Citing *O'Brien v. Plumides*, 79 N.C. App. 159, 162, 339 S.E.2d 54, 55 (1986) (noting that the reasonable value of a service must be decided based upon the circumstances of a particular case), and *Hardee's Food Systems, Inc. v. Hicks*, 5 N.C. App. 595, 599, 169 S.E.2d 70, 73 (1969) (discussing a reasonable amount of time under a contract and stating that "if different inferences may be drawn, such that a definite legal rule cannot be applied, then the matter should be submitted to the [trier of fact]" (citation omitted)), the *Fontenot* Court reasoned that "what is reasonable is a question of fact to be determined in the light of the circumstances of each case." *Id.* at 99, 625 S.E.2d at 867. On the Commission's findings of fact, the *Fontenot* Court noted the following:

> Fontenot visited an emergency room and saw three physicians of her choosing between November of 2000 and February of 2001. On 23 January 2001, Fontenot filed a request to have defendants pay the costs of this treatment. . . . [D]efendants formally refused Fontenot's request for authorization in writing on 21 September 2001. Only five months later, in March of 2002, Fontenot sought to have the Commission approve the course of treatment which defendants had declined to authorize.

Id. at 100, 625 S.E.2d at 867. The *Fontenot* Court held that the Commission's conclusion that Fontenot requested approval of additional medical treatment within

a reasonable amount of time after seeking treatment was supported by the record. *Id.* at 100, 625 S.E.2d at 867.

Here, the record reflects that plaintiff suffered from two compensable injuries by accident on 7 December 2007 and 31 January 2008. Following the 7 December 2007 injury, Plaintiff presented to Piedmont Healthcare Urgent Care for treatment on 10 December 2007, reporting a history of bilateral posterior heel pain and difficulty walking since she was struck with an ice cart at work. Following the second injury occurring on 31 January 2008 which resulted in a contusion to plaintiff's right thigh, plaintiff continued to receive conservative treatment at Piedmont Healthcare Urgent Care addressing "persistent right thigh and left heel pain." On 19 March 2008, plaintiff presented to Dr. Jones, an orthopedic surgeon specializing in foot and ankle conditions, with OrthoCarolina. Plaintiff received treatment at OrthoCarolina, and subsequently The Rehab Center, Inc., for injury to her Achilles tendon in the form of physical therapy, surgery, and rehabilitation, until she was released from Dr. Jones' care on 22 September 2010.

On 21 September 2011, plaintiff filed a Form 33 "Request that Claim be Assigned for Hearing" asserting that "[the] parties have failed to reach an agreement in regard to compensation . . . . We have been unable to agree because . . . defendants have not paid for or authorized medical compensation from all healthcare providers who have provided treatment for Plaintiff's injuries[.]" Defendants responded that

they had authorized and paid for all authorized medical treatment, and that plaintiff's current medical treatment was unauthorized and unrelated to her compensable injury occurring on 7 December 2007.

Defendants argue on appeal that plaintiff provided no notice or request for additional medical treatment she received at CMC-Meyer Park Clinic for pain plaintiff suffered in her lower back and her knees.

The Commission's findings of fact reflect that on 6 May 2009, plaintiff presented herself to Dr. Jones at OrthoCarolina with reports of bilateral lower leg swelling.

> 36. Dr. Jones noted that he did not believe her bilateral lower leg swelling was related to her Achilles tendon injury and informed Plaintiff that he was only treating her for the Achilles tendon injury. A physical exam revealed an antalgic gait on the left and tenderness at the insertion of the Achilles.
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> 37. On May 21, 2009, Plaintiff was seen by Dr. Nosheen Qureshi at CMC-Meyers Park Clinic with complaints of right knee pain. A physical examination revealed tenderness at the right knee with palpation secondary to pain. . . . A May 22, 2009 x-ray of the right knee revealed patellofemoral degenerative joint disease.
>
> . . .
>
> 39. On June 5, 2009, Plaintiff filed a Motion for Specific Medical Treatment with the Industrial Commission requesting that Defendants authorize an Independent Medical Evaluation . . . to determine 'whether [plaintiff] has reached maximum medical improvement and/or identify additional treatment options that may be

> necessary to effect a cure and/or lessen the period of disability.

On 19 June 2009, a special deputy commissioner granted plaintiff's motion for Specific Medical Treatment and ordered defendants to authorize an independent medical evaluation.

> Dr. Christopher Nagy, an orthopedic surgeon at Salisbury Orthopaedic, performed an independent medical examination on Plaintiff on August 12, 2009. Plaintiff reported increasing trouble with her right knee and lower back following ankle surgery. Dr. Nagy opined and the Full Commission finds [as] fact, that because Plaintiff did not have a functioning limb in her left lower extremity after her left Achilles tendon surgery, she was forced to alter her gait. He diagnosed Plaintiff with continuing left ankle pain following Achilles tendon repair with patellofemoral chondromalacia, or wear and tear of the cartilage on the underside of the knee, and low back pain secondary to alteration in gait. Dr. Nagy recommended a course of physical therapy, but Defendants denied authorization.

Plaintiff continued to seek treatment at the CMC-Meyer Park Clinic for medical treatment addressing pain in her knees and lower back.

The Commission's findings of fact reflects that Dr. Nagy examined plaintiff on 12 August 2009 and recommended a course of physical therapy, but defendants denied the authorization. The Commission's findings do not disclose when

defendants denied the authorization but plaintiff filed her Form 33 "Request that Claim be Assigned for Hearing" on 21 September 2011.[2]

We view plaintiff's 5 June 2009 Motion for Specific Medical Treatment with the Industrial Commission requesting that defendants authorize an Independent Medical Evaluation as well as the ensuing request for physical therapy to address plaintiff's continuing left ankle pain following her Achilles tendon repair with patellofemoral chondromalacia, or wear and tear of the cartilage on the underside of the knee, and low back pain secondary to alteration in gait as a request for medical treatment made within a reasonable time of plaintiff seeking treatment for her knee and lower back pain at CMC-Meyer Park Clinic. *See Fontenot*, 176 N.C. App. at 99—100, 625 S.E.2d at 867. Accordingly, we overrule defendants' argument.

III, VI, & *V*

On cross-appeal, plaintiff argues (III) that defendants failed to exhaust their administrative remedies for a suspension of compensation, (IV) that the Commission

[2] The record reflects that defendants set up a 2 October 2009 appointment for plaintiff to begin rehabilitation which plaintiff failed to attend. Defendants filed a motion to compel plaintiff's compliance with medical treatment which the Commission granted by order entered 5 January 2010. On 30 April 2010, defendants submitted an application to terminate or suspend payment of compensation. In response, plaintiff submitted a memorandum contending that a mediation was held on 29 March 2010 to address the Commission's 5 January 2010 compliance order. During the mediation, plaintiff had stated that she would be willing to enter a rehabilitation program, but defendants failed to subsequently schedule the pain management appointments and notify plaintiff's counsel.

On 14 March 2011, defendants denied plaintiff's workers' compensation claim stating that "[r]ight shoulder has been denied as part of this claim." On 21 September 2011, plaintiff filed a Form 33, "Request that Claim be Assigned for Hearing" stating "defendants have not paid for or authorized medical compensation from all healthcare providers who have [provided] treatment for Plaintiff's injuries[.]"

was without authority to award a credit for temporary total disability payments made where defendants failed to exhaust their administrative remedies, and (V) that the Commission violated due process guarantees by retroactively suspending plaintiff's compensation. More specifically, in concluding that plaintiff failed to establish a basis for the disability benefits paid to her for the period from 22 September 2010 until 23 December 2010, suspending plaintiff's benefits retroactively, and awarding defendants a credit for the benefits paid against future benefit payments, plaintiff contends that the Commission acted beyond the scope of its authority and in violation of plaintiff's due process rights. We disagree.

We first consider whether the issue of suspending plaintiff's disability compensation was properly before the Commission.

Plaintiff contends that defendants failed to comply with General Statutes section 97-18.1 "Termination or suspension of compensation benefits." Pursuant to section 97-18.1,

> An employer seeking to terminate or suspend compensation being paid pursuant to G.S. 97-29 for a reason other than those specified in subsection (b) of this section shall notify the employee and the employee's attorney of record in writing of its intent to do so on a form prescribed by the Commission.

N.C. Gen. Stat. § 97-18.1(c) (2013). Plaintiff argues that by failing to notify her that defendants sought to terminate or suspend her disability compensation benefits on

the form prescribed by the Commission—Form 24[3], defendants failed to comply with section 97-18.1. Plaintiff further asserts that by failing to file a Form 24, "Application to Stop Payment of Compensation," defendants have failed to exhaust the administrative remedy prescribed for seeking to suspend or terminate disability benefits and violated plaintiff's due process rights. However, plaintiff fails to direct our attention to any case in which this Court has vacated an order entered by the Commission *solely* on the ground that a party failed to file a Form 24, and we find none. Moreover, pursuant to Workers' Compensation Rules, Rule 404, "retroactive termination or suspension of compensation to a date preceding the filing of a Form 24 may be ordered as a result of a formal hearing. Additionally, *nothing shall impair an employer's right to seek a credit pursuant to N.C. Gen. Stat. § 97-42*." Workers' Comp. R. of N.C. Indus. Comm'n, Rule 404(8) (2012) (emphasis added). Thus, as to this point, plaintiff's argument is overruled.

Per the arguments presented to this Court in the parties' respective briefs, defendants' notification that they sought to terminate or suspend plaintiff's disability benefits first occurred in defendant's motion to allow new evidence regarding whether plaintiff was entitled to enjoy compensation due to her ability to earn. Further

[3] Pursuant to Workers' Compensation Rules, Rule 404 ("Termination of Compensation"), "[w]hen an employer or carrier/administrator seeks to terminate or suspend compensation being paid pursuant to N.C. Gen. Stat. § 97-29 for a reason other than those specified in N.C. Gen. Stat. § 97-18(d) . . ., or N.C. Gen. Stat. § 97-18.1(b) . . ., the employer or carrier/administrator should notify the employee and the employee's attorney of record, if any, on Form 24, "Application to Stop Payment of Compensation." N.C. Workers' Comp. Rules, Rule 404(2) (2012).

defendants sought termination of benefits in their brief to the Commission in support of defendants' appeal of Deputy Commissioner Stanback's Amended Opinion and Award. In their brief to the Commission, defendants presented the following issue statement accompanied by written argument: "PLAINTIFF'S INDEMNITY COMPENSATION SHOULD BE TERMINATED AS SHE HAS FAILED TO PROVE SHE IS 'DISABLED' AS A RESULT OF THE COMPENSABLE ANKLE INJURY." Defendants went on to contend the following:

> Plaintiff was released by her authorized treating physician with light-duty restrictions as to injury on September 22, 2010. Thus, in terms of accepted injury, Plaintiff is capable of working. . . . Plaintiff's ongoing indemnity benefits should be terminated, and Defendants should be awarded a credit for indemnity compensation paid since Plaintiff was released to light-duty employment on September 22, 2010.

We overrule plaintiff's contention that defendants' failure to file a Form 24 prior to seeking a credit for disability compensation paid, exceeding the amount owed violates plaintiff's due process rights and precludes the Commission from hearing the issue as defendants gave notice of this issue in both their motion and brief to the Commission. *See generally Hieb v. Howell's Child Care Ctr., Inc.*, 123 N.C. App. 61, 68, 472 S.E.2d 208, 212 (1996) ("The Industrial Commission has continuing jurisdiction over all proceedings begun before it for compensation in accordance with its terms. In other words, it is clothed with such implied power as is necessary to perform the duties required of it by the law which it administers." (citations and

quotations omitted)); *see also Peace v. Employment Sec. Comm'n*, 349 N.C. 315, 322, 507 S.E.2d 272, 278 (1998) ("The fundamental premise of procedural due process protection is notice and the opportunity to be heard."); *compare Cooper v. BHT Enterprises*, 195 N.C. App. 363, 369, 672 S.E.2d 748, 753—54 (2009) (recognizing the discretion of the Commission to waive the Form 44 requirements "where the appealing party has stated its grounds for appeal with particularity in a brief or other document filed with the Full Commission"). While the requirements of filing a Form 44 versus a Form 24 are distinct, from a procedural due process standpoint, we can discern no meaningful difference where appellee has received notice and opportunity to be heard.

Plaintiff further argues that the Commission lacked authority to suspend her disability benefits and award defendants a credit for payments defendants already paid. Plaintiff contends that her disability benefits, paid in accordance with defendants' admission of her right to compensation as indicated by defendants' filing of a Form 60—"Employer's Admission of Employee's Right to Compensation"—were "due and payable" and, thus, not subject to deduction. Plaintiff cites N.C. Gen. Stat. § 97-42.

"The [Workers' Compensation] Act is . . . designed to provide payments based upon the actual loss of wages. Compensation must be keyed to the loss of ability to

earn." *Foster v. W.-Elec. Co.*, 320 N.C. 113, 117, 357 S.E.2d 670, 673 (1987) (citation omitted).

Pursuant to North Carolina General Statutes, section 97-42,

> Payments made by the employer to the injured employee during the period of his disability, or to his dependents, which by the terms of this Article were not due and payable when made, may, subject to the approval of the Commission be deducted from the amount to be paid as compensation.

N.C. Gen. Stat. § 97-42 (2013).

> This Court has held that "due and payable" refers only to whether an employer has accepted an employee's injuries as compensable when payments for which credit is sought are made. However, even where these payments were "due and payable," and thus, no credit is allowed, an employee may not receive more in wage supplements than he is entitled to receive under the Workers' Compensation Act. Thus, where an employer makes payments to an employee under a wage-replacement program, that employer is not required to make duplicative payments but is entitled to an offset against the workers' compensation benefits.

Rice v. City of Winston-Salem, 154 N.C. App. 680, 683—84, 572 S.E.2d 794, 797 (2002) (citations omitted); *see also Moretz v. Richards & Assocs.*, 316 N.C. 539, 542, 342 S.E.2d 844, 846 (1986) ("Because defendants accepted plaintiff's injury as compensable, then initiated the payment of benefits, those payments were due and payable and were not deductible under the provisions of section 97-42, *so long as* the payments did not exceed the amount determined by statute or by the Commission to compensate plaintiff for his injuries." (original emphasis)).

Here, defendants accepted plaintiff's 7 December 2007 workplace injury by accident as compensable by filing a Form 60—"Employer's Admission of Employee's Right to Compensation (G.S. 97-18(b))." *See Sims v. Charmes/Arby's Roast Beef*, 142 N.C. App. 154, 159—60, 542 S.E.2d 277, 281—82 (2001) ("[A]dmitting compensability and liability, whether through notification of the Commission by the use of a Form 60 or through paying benefits beyond the statutory period provided for in G.S. § 97-18(d), *does not create a presumption of continuing disability* . . . ." (emphasis added)). The Commission found, and plaintiff does not dispute, that plaintiff was examined by Dr. Carroll Jones on 22 September 2010 and released from his care with maximum medical improvement for her left Achilles tendon injury and a fifteen percent partial improvement rating to her left foot with permanent work restrictions of no standing and walking more than fifteen minutes per hour along with other restrictions "per FCE." On 23 December 2010, defendants provided plaintiff with vocational rehabilitation services with a vocational rehabilitation specialist with whom plaintiff has "reasonably cooperated." The Commission concluded that "from September 22, 2010 until December 23, 2010, plaintiff was capable of some work, but has not shown that she made a reasonable effort to find suitable employment and has not otherwise proven that she was disabled during this time period."[4] In its award, the Commission

[4] "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

ordered that "Defendants shall continue to pay temporary total disability compensation to Plaintiff . . . until further Order of the Industrial Commission." However, the Commission further ordered that "Defendants shall receive a credit for compensation paid to Plaintiff for the period from September 22, 2010 through December 23, 2010, to be deducted as set forth in N.C. Gen. Stat. § 97-42."

As the Commission concluded that the disability benefits defendants paid plaintiff exceeded the amount required to compensate plaintiff for her disability, such payments were not "due and payable" within the meaning of General Statutes, section 97-42 and, thus, were properly deductible from the amount defendants were to pay as compensation. Therefore, the Commission acted within its authority to suspend plaintiff's disability payments for the period 22 September 2010 through 23 December 2010 and grant defendants a credit against future disability benefits for disability benefit compensation paid to plaintiff. *See* N.C.G.S. § 97-42; Workers' Comp. R. of N.C. Indus. Comm'n 404(8); *Moretz*, 316 N.C. at 542, 342 S.E.2d at 846.

AFFIRMED.

Chief Judge McGEE and Judge Stroud concur.

Report per Rule 30(e).

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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. In workers' compensation cases, a claimant ordinarily has the burden of proving both the existence of his disability and its degree." *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982) (citations omitted).