NO. COA11-571
NORTH CAROLINA COURT OF APPEALS

Filed: 17 January 2011

SABRINA SOLOMON,
Employee,
Plaintiff,

v. NORTH CAROLINA INDUSTRIAL COMMISSION
I.C. No. 930794

NC STATE VETERANS NURSING HOME-FAYETTEVILLE,
Employer,

and

THE PHOENIX INSURANCE COMPANY,
Carrier,
Defendants.

Appeal by defendants from opinion and award entered 3 January 2011 by the North Carolina Industrial Commission. Heard in the Court of Appeals 27 October 2011.

Kathleen G. Sumner for plaintiff-appellee.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Dalton B. Green and Tracie H. Brisson, for defendants-appellants.

THIGPEN, Judge.

On 3 January 2011, the Full Commission of the North Carolina Industrial Commission ("the Commission") awarded ongoing total disability benefits to Sabrina Solomon ("Plaintiff") for a compensable injury to her head, neck, back, and right arm that she sustained while working for NC State Veterans' Nursing Home ("Employer"). Employer and The Phoenix Insurance Company (collectively, "Defendants") appeal the Commission's Opinion and Award arguing the Commission erred by concluding: (I) the dietary aide position offered by Employer was not suitable employment; (II) Plaintiff is entitled to ongoing total disability benefits; and (III) Plaintiff is entitled to further medical treatment, including neurosurgical treatment by Dr. David Jones. We affirm on issues (I) and (III), but we remand for additional findings of fact regarding whether Plaintiff is disabled.

On 29 April 2008, Plaintiff was working for Employer as a certified nurse assistant ("CNA") when she was walking into a patient's room and slipped on water on the floor. Plaintiff worked eight hours per day, five to six days per week on the third shift and was paid $10.00 per hour, plus an additional $1.50 per hour shift differential. Plaintiff reported her injury to Employer the same day and was sent for treatment at

MedEx Urgent Care where she was diagnosed with a right elbow contusion, a closed head injury, neck pain, and low back pain. Plaintiff was prescribed physical therapy and pain medication, and she was released to return to light duty work with restrictions on lifting and alternation of sitting and standing. On 10 June 2008, Employer filed a Form 60, admitting Plaintiff's right to compensation for the "injury by accident on 4/29/2008" in which Plaintiff "slipped on water and fell injuring her head, low back, neck and right elbow[.]"

Plaintiff was referred to Dr. Krishna Bhat, a physical medicine and rehabilitation specialist. Dr. Bhat first examined Plaintiff on 11 August 2008 and diagnosed her with upper trapezius/cervical myofascial pain, lumbar degenerative disc disease, and cervicogenic headaches. Dr. Bhat recommended physical therapy, prescription medication, and continued Plaintiff on light duty restrictions of no lifting over twenty pounds, alternation of sitting and standing, and limited overhead work and repetitive side bending/rotation. Dr. Bhat continued to treat Plaintiff through 11 February 2009, at which point he determined Plaintiff was at maximum medical improvement and assigned permanent work restrictions of no pushing, pulling, or lifting over 50 pounds, 20 to 50 pounds occasionally, and 20

pounds frequently; occasional repetitive rotating, side bending, stooping, and squatting; and brief rest breaks if standing more than one hour at a time. Dr. Bhat also assigned a 2% permanent partial disability to Plaintiff's back.

As a result of Plaintiff's 29 April 2008 injury, she initially returned to work as a light duty CNA on the third shift. Around 1 October 2008, Plaintiff was transferred to the position of laundry aide, with an accommodation by Employer to allow Plaintiff to work on the third shift. The laundry aide position paid $7.50 per hour, and Plaintiff was paid temporary partial disability benefits to account for her wage reduction. After working as a laundry aide for a few weeks, Plaintiff complained that pulling wet laundry out of washers increased her pain; therefore, Employer instructed Plaintiff to just fold the laundry. Subsequently, Plaintiff returned to work as a light duty CNA.

Once an employee reaches maximum medical improvement and their physical restrictions become permanent, Employer's policy is to attempt to place the employee in permanent suitable employment that is not modified to accommodate the employee's physical restrictions. After Plaintiff reached maximum medical improvement and her physical restrictions became permanent, she

was offered the position of dietary aide on the first shift on 24 February 2009, as there were no suitable permanent positions on the third shift. The dietary aide position paid a starting wage of $7.50 per hour. Dr. Bhat did not review or approve the dietary aide position as a permanent position for Plaintiff. Plaintiff refused the dietary aide job offer and informed Employer she could not work the first shift due to child care issues. Employer then considered Plaintiff to have resigned her employment.

On 5 March 2009, Plaintiff filed a Request That Claim Be Assigned for Hearing. The Deputy Commissioner heard the case on 30 November 2009, and filed an Opinion and Award awarding ongoing total disability benefits to Plaintiff on 17 June 2010. Defendants appealed to the Commission, which filed an Opinion and Award affirming the Deputy Commissioner on 3 January 2011. The Commission made the following relevant conclusions: (1) "the dietary aide position was not suitable employment given that it was never approved by plaintiff's primary treating physician Dr. Bhat, and is not sufficiently similar in salary to plaintiff's work for defendant-employer as a full-duty CNA"; (2) "plaintiff is entitled to ongoing total disability compensation at the rate of $301.84 per week for the period of February 23,

2009, through the present and continuing until such a time as she returns to suitable employment"; and (3) "plaintiff is entitled to have defendants pay for all related medical treatment incurred or to be incurred . . . including treatment recommended and provided by Dr. David Jones[,]" a board certified neurosurgeon. Defendants appeal the Opinion and Award of the Commission.

"[O]n appeal from an award of the Industrial Commission, review is limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law." *Richardson v. Maxim Healthcare/Allegis Group*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (citation omitted), *rehearing denied*, 363 N.C. 260, 676 S.E.2d 472 (2009). "[T]he Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Id.* (quotation omitted). "[T]he Commission's findings of fact are conclusive on appeal when supported by any competent evidence, even though there be evidence that would support findings to the contrary and may be set aside only when there is a complete lack of competent evidence to support them." *Nobles v. Coastal Power & Elec., Inc.*, __ N.C. App. __, __, 701 S.E.2d 316, 319 (2010) (citations

and quotation marks omitted). "However, the Commission's conclusions of law are reviewed de novo." *Id.* (citation omitted).

I. Dietary Aide as Suitable Employment

Defendants first argue the Commission erred by concluding the dietary aide position offered to Plaintiff by Employer was not suitable employment. We disagree.

The Workers' Compensation Act provides that an injured employee is not entitled to compensation if he "refuses employment procured for him suitable to his capacity . . . unless in the opinion of the Industrial Commission such refusal was justified." N.C. Gen. Stat. § 97-32 (2009). "A 'suitable' job is one the claimant is capable of performing considering his age, education, physical limitations, vocational skills, and experience." *Burwell v. Winn-Dixie Raleigh, Inc.*, 114 N.C. App. 69, 73, 441 S.E.2d 145, 149 (1994) (citation omitted). In determining suitability under N.C. Gen. Stat. § 97-32, "[t]he similarity of the wages or salary of the pre-injury employment and the post-injury job offer . . . is among the factors considered." *Dixon v. City of Durham*, 128 N.C. App. 501, 504, 495 S.E.2d 380, 383, *disc. review denied*, 348 N.C. 496, 510 S.E.2d 381 (1998). "In considering the wages or salary of a

pre-injury job and a post-injury job offer, common sense and fairness dictate examination not only of the actual dollar amount paid at a given time, but also of the potential for advancement or, in other words, capacity for income growth." *Id*. "The employer bears the burden of showing that an employee refused suitable employment. Once the employer makes this showing, the burden shifts to the employee to show that the refusal was justified." *Nobles*, __ N.C. App. at __, 701 S.E.2d at 319 (citations omitted).

In this case, Plaintiff earned a total of $11.50 per hour as a CNA, including a $1.50 per hour shift differential for working the third shift. Employer's Human Resources/Payroll Manager, Kimberly Weston Moore, testified that Plaintiff's starting wage as a dietary aide would have been $7.50 per hour. Ms. Moore also presented a list of wage rates for Employer's dietary aide employees which indicated that dietary aides earn wages up to $10.54 per hour. Additionally, Ms. Moore stated that the dietary aide position had "the same room for opportunity" as the CNA position, that Plaintiff could increase her pay based on her yearly performance evaluations, and that she could eventually reach the same hourly wage as a CNA.

Although Ms. Moore stated the CNA and dietary aide positions have a similar capacity for income growth, the actual dollar amount of Plaintiff's pre-injury employment wages and the post-injury job offer are not sufficiently similar. Specifically, there is a $4.00 per hour discrepancy between Plaintiff's pre-injury wage and the post-injury job offer. Furthermore, Plaintiff would have had to start near the beginning of the wage scale for dietary aides, and, based on the wage rates for Employer's other dietary aides, Plaintiff would never obtain wages equal to that of her CNA position. Thus, we hold the dietary aide position offered by Employer is not "suitable" to Plaintiff's earning capacity pursuant to N.C. Gen. Stat. § 97-32, and the Commission did not err by concluding the dietary aide position was not suitable employment. *See Foster v. U.S. Airways, Inc.*, 149 N.C. App. 913, 927-28, 563 S.E.2d 235, 244 (upholding the Commission's determination that a reservationist position was unsuitable because although the reservationist job had a similar wage scale to the plaintiff's previous job, she would have had to start at the lower end of that wage scale as contrasted to the high end of the flight attendant wage scale and would never obtain wages and benefits

equal to her old job), *disc. review denied*, 356 N.C. 299, 570 S.E.2d 505 (2002).[1]

II. Disability Benefits

Defendants next argue the Commission erred by concluding Plaintiff is entitled to "ongoing total disability compensation." We remand for additional findings of fact on the issue of whether Plaintiff is disabled.

Under our Workers' Compensation Act, disability is defined as "the impairment of the injured employee's earning capacity rather than physical disablement[,] . . . [and] [t]he 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." *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (citations omitted). An employee may meet this burden in one of four ways:

> (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a

[1]Defendants also challenge the Commission's conclusion that "the dietary aide position was not suitable employment given that it was never approved by plaintiff's primary physician Dr. Bhat[.]" We do not address this argument, however, because we conclude the dietary aide position was not suitable employment because it was not sufficiently similar in salary to Plaintiff's pre-injury employment as a CNA.

> 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. (citations omitted).

"[T]he Industrial 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. Thus, the Commission must find 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 (quotations and quotation marks omitted), *disc. review denied*, 357 N.C. 460, 585 S.E.2d 760 (2003).

Defendants contend the Commission erred by awarding Plaintiff ongoing total disability benefits because Plaintiff failed to prove she is disabled under any of the four methods outlined in *Russell*. In support of its conclusion that plaintiff is entitled to ongoing total disability compensation, the Commission made the following pertinent findings of fact:

> 7. Plaintiff first sought medical attention on April 29, 2008, at MedEx Urgent Care upon the referral of defendant-employer.

Plaintiff was diagnosed as having sustained a right elbow contusion, a closed head injury, as well as low back and neck pain, for which she was prescribed medication and physical therapy. Additionally, plaintiff was released to return to light-duty work with restrictions[.] . . .

. . .

14. On December 15, 2008, plaintiff underwent a functional capacity evaluation hereinafter referred to as "FCE," which demonstrated that she was capable of performing a job requiring a medium level of activity for eight (8) hours a day, forty (40) hours per week. . . .

15. On February 11, 2009, Dr. Bhat opined that plaintiff had reached maximum medical improvement and assigned permanent work restrictions of no pushing, pulling, lifting, or carrying more than fifty (50) pounds, occasional pushing, pulling, lifting, or carrying of twenty (20) pounds. Plaintiff's restrictions remained unchanged regarding occasional repetitive rotating, side bending, stooping, and squatting, and she was to take rest breaks after standing for more than one hour. In addition, Dr. Bhat assigned a two percent (2%) permanent partial disability rating to plaintiff's back.

16. Dr. Bhat opined that as of February 11, 2009, the CNA duties plaintiff was performing for defendant-employer were within her permanent work restrictions. Additionally, Dr. Bhat testified that plaintiff would have been able to continue working in that capacity subsequent to February 11, 2009.

. . .

> 34. Based upon the totality of the credible vocational and medical evidence of record, and as a result of her admittedly compensable April 29, 2008, injury by accident, plaintiff has been unable to earn any wages in her former position with defendant-employer or in any other employment for the period of February 23, 2009, through the present and continuing.[2]

We conclude Plaintiff has not met the requirements of the first method of proof under *Russell* since she presented no medical evidence that she was "physically or mentally . . . incapable of work in any employment[.]" *Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457. In fact, as the Commission's findings of fact demonstrate, Plaintiff was released to return to light-duty work the same day she was injured, she completed a FCE which demonstrated she was capable of performing "a job requiring a medium level of activity for eight (8) hours a day, forty (40) hours per week[,]" and she was assigned permanent work restrictions by Dr. Bhat.

"The absence of medical proof of total disability, however, does not preclude a finding of disability under one of the other three *Russell* tests." *Britt v. Gator Wood, Inc.*, 185 N.C. App.

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[2]Defendant challenges only finding of fact number 34 as unsupported by evidence. The unchallenged findings of fact are binding on appeal. *See Davis v. Hospice & Palliative Care of Winston-Salem*, __ N.C. App.)__, __, 692 S.E.2d 631, 638 (2010).

677, 684, 648 S.E.2d 917, 922 (2007) (quotation and quotation marks omitted). "Where . . . the findings show that plaintiff, although limited in the work he can perform, is capable of performing some work, and there is evidence that plaintiff may have satisfied *Russell* methods two or three, the Commission must make findings addressing those two methods of proof." *Id.* (quotation and quotation marks omitted) (remanding to the Commission to make findings regarding the plaintiff's disability under *Russell* methods two and three).

Here, Plaintiff testified about her work experience and unsuccessful efforts to obtain other employment, evidence that is relevant to the second and third prongs of *Russell*. However, the Commission made no findings of fact related to that evidence. We must, therefore, remand to the Commission to make findings of fact addressing whether Plaintiff is disabled under *Russell* methods two and three. *See id.*

III. Additional Medical Treatment

Defendants lastly argue the Commission erred by concluding Plaintiff is entitled to have Defendants pay for further medical treatment, including neurosurgical treatment recommended by Dr. David Jones. Defendants also contend finding of fact number 31

is erroneous because it was a misapplication of law to apply the *Parsons'* presumption to the present case. We disagree.

Under the *Parsons'* presumption, "[w]here a plaintiff's injury has been proven to be compensable, there is a presumption that the additional medical treatment is directly related to the compensable injury. The employer may rebut the presumption with evidence that the medical treatment is not directly related to the compensable injury." *Perez v. American Airlines/AMR Corp.*, 174 N.C. App. 128, 135, 620 S.E.2d 288, 292 (2005) (citations omitted), *rehearing denied*, 360 N.C. 655, 638 S.E.2d 469 (2006). This Court has held the Parsons' presumption applies when an employer files a Form 60 admitting compensability of an employee's injury. *Id.* at 136, 620 S.E.2d at 293.[3]

Defendants contend the *Parsons'* presumption is inapplicable in this case because Defendants are not attempting to prove Plaintiff has an ongoing neurological condition that is unrelated to her injury; rather, Defendants argue "there is no medical evidence whatsoever that Plaintiff has a neurological condition." The Commission, however, made the following

[3]We note that Employer filed a Form 60 on 10 June 2008 admitting the compensability of Plaintiff's "head, low back, neck and right elbow" injury.

pertinent unchallenged findings of fact regarding Plaintiff's injuries and neurological condition:

> 6. Defendants accepted plaintiff's claim as compensable through the filing of an Industrial Commission Form 60, which lists injuries to her head, low back, neck, and right elbow.
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> 7. Plaintiff first sought medical attention on April 29, 2008, at MedEx Urgent Care upon the referral of defendant-employer. Plaintiff was diagnosed as having sustained a right elbow contusion, a closed head injury, as well as low back and neck pain, for which she was prescribed medication and physical therapy. . . .
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> . . .
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> 11. Prior to her appointment with Dr. Bhat, plaintiff was examined by Dr. Luca Van Tran, a neurologist, on July 23, 2008. Dr. Van Tran diagnosed plaintiff as having sustained soft tissue injuries to the head and neck. Dr. Van Tran was of the opinion that plaintiff did not have any pertinent neurological problems that required further neurological treatment and instead recommended that plaintiff continue conservative treatment with MedEx.
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> 12. On August 11, 2008, plaintiff was first examined by Dr. Bhat, a specialist in physical medicine and rehabilitation. On that date, Dr. Bhat diagnosed plaintiff as having myofascial pain, or muscular pain, in her upper back and lower neck, lumbar degenerative disc disease, and cervicogenic headaches. . . .
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> . . .

> 17. Dr. Bhat has opined to a reasonable degree of medical certainty that plaintiff's ongoing symptoms were caused by her admittedly compensable injury by accident of April 29, 2008.
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> 33. Even assuming *arguendo* that the *Parsons'* presumption had been rebutted, there is sufficient medical evidence of record upon which to independently find that plaintiff's ongoing neurological condition for which she seeks treatment is the direct and natural result of, and causally related to, her April 29, 2008, admittedly compensable injury by accident.
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> 37. Plaintiff has requested that she be allowed to treat with Dr. David Jones, a board certified neurosurgeon. Based upon the totality of the credible evidence of record, said request is reasonable, medically and otherwise.

Defendants do not challenge any of the above findings of fact; thus, they are binding on appeal. *See Davis*, __ N.C. App. at __, 692 S.E.2d at 638 ("Unchallenged findings of fact by the Commission are binding on appeal.") (citation omitted).

Although the Commission found as fact that Dr. Van Tran believed Plaintiff "did not have any pertinent neurological problems that required further neurological treatment[,]" it also found Plaintiff suffered injuries to her head, was diagnosed with numerous conditions, including "cervicogenic

headaches[,]" and has "ongoing symptoms" and an "ongoing neurological condition for which she seeks treatment[.]" Furthermore, the Commission found Plaintiff's request to treat with Dr. Jones reasonable. In light of the unchallenged findings of fact, we are not persuaded by Defendants' argument that there is no medical evidence that Plaintiff has a neurological condition. We therefore hold the Commission did not err by concluding Plaintiff is entitled to have Defendants pay for further medical treatment, including neurosurgical treatment recommended by Dr. Jones.

In sum, we hold the Commission did not err by concluding that the dietary aide position was not suitable employment and that Plaintiff is entitled to further medical treatment, including neurosurgical treatment by Dr. Jones. Thus, we affirm on those issues. However, we remand for additional findings of fact regarding whether Plaintiff is disabled under the second and third methods for establishing disability set forth in *Russell*.

AFFIRMED IN PART, REMANDED IN PART.

Judges HUNTER, JR., and McCULLOUGH concur.

Report per Rule 30(e).