NO. COA10-1334
NORTH CAROLINA COURT OF APPEALS

Filed: 6 September 2011

JAMES ALLEN FRANKLIN,
Plaintiff

v. From the N.C. Industrial Commission
I.C. No. 992243

BROYHILL FURNITURE INDUSTRIES,
INC., a Subsidiary of
FURNITURE BRANDS,
INTERNATIONAL, INC.
Defendant

Appeal by defendant from Opinion and Award entered 9 July 2010 by the North Carolina Industrial Commission. Heard in the Court of Appeals 22 March 2011.

Randy D. Duncan for Plaintiff-appellee.

Law Offices of Gary A. Scarzafava, by Gary A. Scarzafava, for Defendant-appellant.

ERVIN, Judge.

Defendant Broyhill Furniture Industries, Inc., appeals from an Opinion and Award entered by the Industrial Commission awarding workers' compensation disability and medical benefits to Plaintiff James Franklin. On appeal, Defendant argues that the Commission erred by awarding Plaintiff temporary total

disability, finding that Plaintiff is unable to work as a truck driver, and ordering that Dr. Stephen David periodically monitor Plaintiff's spinal condition. After careful consideration of Defendant's challenges to the Commission's order in light of the record and the applicable law, we conclude that, except for its determination that Plaintiff was disabled, which is not supported by sufficient factual findings and which must be reversed and the subject of further proceedings on remand, the Commission's order should be affirmed.

I. Factual Background

A. Substantive Facts

Plaintiff was born on 22 March 1944, left school after the tenth grade, and never obtained a general equivalency diploma. As of the date of the hearing held before the deputy commissioner in this case, Plaintiff was 65 years old and had worked as a truck driver for approximately forty years. In October 1983, Plaintiff began working for Defendant as a long distance truck driver, a position that required him to lift furniture.

On 4 October 2007, Plaintiff was making a delivery near Dallas, Texas, when he "just fell out of the trailer" and suffered an admittedly compensable back injury. Although Plaintiff immediately experienced back and hip pain, he

completed the delivery job. However, Plaintiff was in pain throughout the remainder of the trip.

Upon returning from Texas, Plaintiff sought medical treatment for his injury. Between 8 October 2007 and 28 March 2008, Plaintiff was treated by Dr. David Abernathy, an internist, who diagnosed Plaintiff with lower back pain, prescribed pain medications, and released Plaintiff to return to work as a truck driver on 8 October 2007, subject to the restriction that he not load or unload trucks. Plaintiff's back pain did not, however, abate.

On 28 March 2008, Dr. Abernathy referred Plaintiff for an evaluation by Dr. James Stanislaw, an orthopedic surgeon, who diagnosed Plaintiff with degenerative disk disease, back pain, and right leg radiculitis. Dr. Stanislaw continued the medications previously prescribed by Dr. Abernathy, ordered an MRI, and released Plaintiff to return to work as a truck driver on the condition that he not do any lifting.

After the MRI was performed on 26 Apri1 2008, Dr. Stanislaw reported that it "revealed encroachment on the existing nerve root at L5-S1 predominantly by bony degenerative change and some disk desiccation as well as degenerative changes encroaching on the left neural exit foramen at L4-5 with multi-level degenerative disk disease." As a result, Dr. Stanislaw

recommended that Plaintiff be treated with lumbar epidural steroid injections for pain management, continued Plaintiff's existing work restrictions in effect, and allowed Plaintiff to work as a long distance truck driver as long as he could do so safely while taking Tramadol, the narcotic-like pain reliever that had been prescribed for Plaintiff.

After having worked for Defendant for more than twenty-five years, Plaintiff was terminated from his employment on 29 May 2008 for failing to immediately report an accident, having had three accidents in eighteen months, allegedly tampering with the truck's speed governor, and leaving his truck in a disorderly condition. After his termination, Plaintiff continued to seek medical treatment for his back condition.

On 2 July 2008, Plaintiff was seen by Dr. Hans Hansen, a pain management specialist, who diagnosed Plaintiff as having degenerative disease of the lumbar spine accompanied by facet syndrome and recommended both a lumbar epidural and the use of hydrocodone and other pain relievers. On 23 July 2008, Dr. Hansen recommended that two devices, an RS-4i stimulator and an RS-LB Low Back Conductive Garment, be made available for Plaintiff's daily home therapy use; this recommendation was ultimately approved and implemented. In addition, Dr. Hansen administered three lumbar epidural steroid injections, which

provided Plaintiff with some limited relief. Penny Mitchell, a nurse practitioner supervised by Dr. Hansen, ultimately concluded that "Plaintiff had [experienced] no significant improvement with conservative treatment" and referred him to Dr. Stanislaw. On 3 November 2008, Plaintiff was evaluated by Dr. Stanislaw, who recommended that an EMG and nerve conduction study be performed and released Plaintiff to return to work as long as he did not lift more than 40 pounds.

On 21 October 2008, Plaintiff received authorization to obtain a second opinion from Dr. Stephen David, an orthopedic surgeon with training in treating spinal disorders. On 20 January 2009, Dr. David determined that Plaintiff was a suitable candidate for L4/5 and L5/S1 decompression and stabilization surgery. However, Dr. David recommended a preliminary course of physical therapy followed by a spinal fusion if Plaintiff failed to improve. Dr. David did not believe that Plaintiff was able to perform his duties as a long distance truck driver, even subject to a "no loading" restriction, because he could not remain in a seated position for the required length of time. In Dr. David's opinion, Plaintiff's 4 October 2007 fall significantly exacerbated his underlying back condition. Subsequently, Dr. Stanislaw agreed to transfer Plaintiff's care to Dr. David.

On 30 March 2009, Plaintiff saw Dr. Laura Fleck, a neurologist, who diagnosed Plaintiff as having "lumbar radiculagia on the right side and potentially facet-mediated lumbar pain." According to Dr. Fleck, Plaintiff's symptoms stemmed from his 4 October 2007 injury. Dr. Fleck prescribed the RS-4i stimulator that had been recommended by Dr. Hansen and indicated that Plaintiff would need to use this stimulator for the remainder of his life. Dr. Fleck did not, however, recommend that Plaintiff undergo back surgery. On 29 June 2009, Dr. Fleck concluded that Plaintiff had reached maximum medical improvement. In addition:

> . . . Dr. Fleck opined that Plaintiff is permanently restricted to light duty, which would include occasional lifting of up to twenty (20) pounds, frequent lifting of under eight (8) pounds, the ability to alternate sitting and standing every fifteen (15) to twenty (20) minutes, and no operation of heavy equipment. Dr. Fleck opined that Plaintiff would not be able to load or unload a tractor-trailer, due to the lifting restrictions. In addition, due to the requirement that Plaintiff alternate between sitting and standing every fifteen (15) to twenty (20) minutes, Dr. Fleck did not think it was realistic for Defendant to expect Plaintiff to be able to perform his duties as a long distance truck driver.

Plaintiff agreed that he would be unable to perform his job duties for Defendant without violating the restrictions to which he was subject.

After Plaintiff was terminated by Defendant, he sought other employment as a truck driver. At the hearing held before the deputy commissioner, Plaintiff produced a job search log indicating that he had contacted various companies on a weekly basis. However, Plaintiff stated that he had been unable to obtain suitable employment given his physical limitations.

B. Procedural History

On 30 May 2008, Plaintiff filed a Form 18 seeking workers' compensation benefits. On 17 September 2008, Defendant filed a Form 63 in which it accepted Plaintiff's claim for medical benefits without prejudice to its ability to deny the compensability of Plaintiff's claim at a later time. On 22 September 2008, Plaintiff filed a Form 33 in which he requested a hearing on his disability benefits claim. In response, Defendant filed a Form 33R in which it alleged that Plaintiff was not entitled to receive disability benefits because he had constructively refused suitable employment by violating company and federal regulations.

On 23 April 2009, a hearing was held concerning Plaintiff's claim before Deputy Commissioner Victoria M. Homick. On 14 December 2009, Deputy Commissioner Homick issued an order awarding Plaintiff temporary total disability compensation from 29 May 2008 until further order of the Commission, medical

benefits, and attorneys' fees. Defendant noted an appeal from Deputy Commissioner Homick's order to the Commission. On 9 July 2010, the Commission filed an Opinion and Award by Commissioner Danny Lee McDonald, with the concurrence of Commissioner Staci T. Meyer and Chair Pamela T. Young, affirming Deputy Commissioner Homick's order. Defendant noted an appeal to this Court from the Commission's order.

II. Legal Analysis

A. Standard of Review

"The standard of review in workers' compensation cases has been firmly established by the General Assembly and by numerous decisions of this Court. . . . Under the Workers' Compensation Act, '[t]he Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony.' Therefore, on 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. This 'court's duty goes no further than to determine whether the record contains any evidence tending to support the finding.'" *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (citing *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 115, 530 S.E.2d 549, 552 (2000), and *Adams*

v. AVX Corp., 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998), and quoting *Anderson v. Construction Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965)). We will now utilize this standard of review in order to evaluate Defendant's challenges to the Commission's order.

B. Substantive Legal Issues

1. Award of Temporary Total Disability

On appeal, Defendant argues that the Commission erred by awarding Plaintiff temporary total disability benefits on the grounds that the Commission failed to make required findings of fact and that the Commission's award lacks adequate evidentiary support. We agree with Defendant's contention in part and disagree with Defendant's contention in part.

a. Basic Principles of Disability Determinations

"An employee injured in the course of his employment is disabled . . . if the injury results in an 'incapacity . . . to earn the wages which the employee was receiving at the time of the injury in the same or any other employment.'" *Russell v. Lowe's Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (quoting N.C. Gen. Stat. § 97-2(9) (1991)). "Therefore, 'disability' as defined in the Workers' Compensation Act is the impairment of the injured employee's earning capacity and not physical disablement." *Peoples v. Cone Mills Corp.*, 316

N.C. 426, 434-35, 342 S.E.2d 798, 804 (1986) (internal citation omitted). "[I]n order to support a conclusion of disability, the Commission must find: (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) that this individual's incapacity to earn was caused by plaintiff's injury." *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). "The employee seeking compensation under the Act bears 'the burden of proving the existence of [his] disability and its extent.'" *Clark v. Wal-Mart*, 360 N.C. 41, 43, 619 S.E.2d 491, 493 (2005) (quoting *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 185, 345 S.E.2d 374, 378 (1986)). "The employee may meet this burden in one of four ways: (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, *i.e.*, age, inexperience, lack of education, to seek

other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury." *Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457 (internal citations omitted). Thus, the four prong test outlined in *Russell* sets out the alternative ways in which a claimant is entitled to make the showing required in *Hilliard*.

As a result of the fact that Plaintiff was terminated from his employment after suffering a compensable injury, we must also consider the effect of that development on the validity of the Commission's order. According to N.C. Gen. Stat. § 97-32, "[i]f an injured employee refuses employment procured for him suitable to his capacity he shall not be entitled to any compensation at any time during the continuance of such refusal, unless in the opinion of the Industrial Commission such refusal was justified." In *Seagraves v. Austin Co. of Greensboro*, 123 N.C. App. 228, 233-34, 472 S.E.2d 397, 401 (1996), we held that a claimant's termination for the sort of misconduct which would lead to the termination of a nondisabled employee constituted a constructive refusal to work. However,

> in such cases the employer must first show that the employee was terminated for misconduct or fault, unrelated to the compensable injury, for which a nondisabled employee would ordinarily have been terminated. If the employer makes such a showing, the employee's misconduct will be deemed to constitute a constructive refusal

> to perform the work provided and consequent forfeiture of benefits for lost earnings, unless the employee is then able to show that his or her inability to find or hold other employment of any kind, or other employment at a wage comparable to that earned prior to the injury, is due to the work-related disability.

Id.

b. Sufficiency of Commission's Disability-Related Findings

In light of the principles outlined above, the Commission was required to address three different issues in order to allow Plaintiff's claim for disability benefits. First, the Commission must find that the claimant is unable to earn the wages he previously earned in the same or any other employment as a result of his work-related injury. *Hilliard*, 305 N.C. at 595, 290 S.E.2d at 683. In this case, the Commission concluded that, "[a]s a direct and proximate result of Plaintiff's compensable injury by accident on October 4, 2007, Plaintiff has been unable to earn the same or greater wages as he was earning in the same or any other employment." Secondly, the Commission's disability determination must be supported by findings establishing that the claimant has met his "burden in one of the ways outlined in" *Russell*. In this case, the Commission found "that[,] after his termination on May 29, 2008, Plaintiff was capable of some work and made a reasonable, but unsuccessful, effort to find other employment." This portion of

the Commission's order closely tracks the language in which the second prong of the *Russell* test is couched. Finally, the Commission, after citing *Seagraves*, specifically found that Plaintiff's inability to find work following his termination was "a direct and proximate result of Plaintiff's compensable injury." As a result, the Commission clearly made the legal conclusions necessary to support an award of disability, a fact which requires us to examine the extent, if any, to which the Commission's findings of fact do or do not support these conclusions.

In its order, the Commission found that:

> 1. At the time of the hearing before the Deputy Commissioner, Plaintiff was 65 years old. Plaintiff completed the tenth grade of high school and has not obtained a high school equivalency certificate by passing the General Educational Development Test (GED). Plaintiff holds a Class A Commercial Driver[`]s License and has worked as a long distance truck driver for Defendant for approximately 25 years from October 1983 until May 29, 2008. His duties included operating a tractor trailer throughout the United States for furniture delivery.
>
> . . . .
>
> 29. At the hearing before the Deputy Commissioner, Plaintiff testified that he has attempted to obtain employment as a truck driver since his termination with Defendant. Plaintiff's job search log was introduced into evidence and indicated that since his termination on May 29, 2008,

> Plaintiff made weekly contacts to various companies that employ truck drivers. Plaintiff testified that any available positions were not within his physical restrictions. The undersigned finds by the greater weight of the evidence that Plaintiff has conducted a reasonable job search without success and that Plaintiff's inability to find or hold other employment is related to his work injury.

In addition, the undisputed record evidence shows that Plaintiff worked as a long-distance truck driver for fifteen years prior to obtaining employment with Defendant. Finally, the Commission made numerous findings describing Plaintiff's unsuccessful attempts to achieve relief from the pain caused by his compensable injury.

According to well-established North Carolina law, "the 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 (quoting *Hansel v. Sherman Textiles*, 304 N.C. 44, 59, 283 S.E.2d 101, 109 (1981) (internal citation omitted), and *Peagler v. Tyson Foods, Inc.*, 138 N.C. App. 593, 602, 532 S.E.2d 207, 213 (2000)), *disc. review denied*, 357 N.C. 460, 585 S.E.2d 760 (2003). However, "[j]ust as the Commission is not required to make specific findings on the

credibility of evidence, 'the Commission is not required . . . to find facts as to all credible evidence. That requirement would place an unreasonable burden on the Commission.'" *Rogers v. Smoky Mountain Petroleum Co.*, 172 N.C. App. 521, 529-30, 617 S.E.2d 292, 298 (2005) (quoting *Peagler*, 138 N.C. App. at 602, 532 S.E.2d at 212). As a result, "[w]hile the Commission is not required to make findings as to each fact presented by the evidence, it is required to make specific findings with respect to crucial facts upon which the question of plaintiff's right to compensation depends." *Gaines v. Swain & Son, Inc.*, 33 N.C. App. 575, 579, 235 S.E.2d 856, 859 (1977).

In challenging the lawfulness of the Commission's order, Defendant argues, in reliance upon various references in our appellate jurisprudence to a claimant's ability to earn wages in the same or other employment, that a claimant must produce evidence and the Commission must find that he unsuccessfully searched for employment in fields other than the one in which he was employed at the time he was injured. As a result, Defendant contends that the Commission's disability determination rests upon an error of law because the Commission "made no findings concerning Plaintiff's search for non-truck driving positions" and because the record would not have supported such findings had they been made.

The proper resolution of the issue of the extent to which the Commission made adequate findings of fact concerning the disability issue in this case is controlled by our recent decision in *Freeman v. Rothrock*, __ N.C. App __, 689 S.E.2d 569 (2010), in which the claimant, like Plaintiff, worked as a truck driver prior to suffering a compensable injury. The *Freeman* claimant lacked experience performing office work and did not know how to use a computer or an office telephone system, leading him to search for employment as a truck driver. In its order concluding that the *Freeman* claimant was disabled, the Commission specifically found that:

> 15. Despite the likely futility of a job search, plaintiff has been searching for jobs within the areas in which he has experience, to wit, truck driving. Plaintiff's search so far has been unsuccessful.
>
> 16. Defendants assert that plaintiff's job search has been unreasonable. However, while plaintiff suspected that he might be unable to perform the trucking jobs he was seeking, he was not certain, and he was willing to try. In fact, such an attitude following plaintiff's prior back problems led to nearly two years of successful employment with defendant-employer, until plaintiff's unrelated March 2002 injury. Furthermore, the reason that plaintiff focused his job search on trucking jobs was that those were the only ones in which he had any experience or qualifications. Plaintiff has sought employment in fields in which he does have the skills and has been unable to obtain a job because of his compensable injury. Rather than rendering plaintiff's job search

> "unreasonable," plaintiff's actions instead demonstrate his ongoing disability.

Freeman, __ N.C. App at __, 689 S.E.2d at 573. Based upon these findings, the Commission concluded, in pertinent part, that the plaintiff "has been unsuccessful in his efforts to obtain employment in the areas in which he has work skills and experience, to wit, truck driving." In addition, the Commission also found that the plaintiff had produced evidence that a search for employment would likely be futile and that the claimant "focused his job search on trucking jobs" because "those were the only ones in which he had any experience of qualifications." On appeal, we "affirmed the Full Commission's conclusion that plaintiff established his disability pursuant to the second and third tests set forth in *Russell* and that defendant failed to rebut the presumption of disability." *Freeman*, __ N.C. App. at __, 689 S.E.2d at 574.

In light of the reasoning set forth in *Freeman* and our own review of the relevant statutory provisions and legal authorities, we conclude that the Commission's finding that Plaintiff had conducted a reasonable search for employment was not supported by sufficient factual findings. Unlike the situation in *Freeman*, the Commission order before us in this case contains no explanation for the Commission's belief that Plaintiff acted in an appropriate fashion by focusing his job

search solely on other truck driving positions instead of expanding his search for employment into other areas of endeavor. Although we did not, contrary to the argument advanced by Defendant in this case, require findings that the claimant searched outside his usual field of endeavor as a precondition for sustaining the Commission's disability finding in ***Freeman***, we did require that the Commission explain the basis for its determination of "reasonableness." As a result, given that the Commission's disability-related findings rest solely on an unsupported, conclusory determination of "reasonableness" instead of the more detailed findings deemed appropriate in ***Freeman*** and given that Plaintiff's ability to establish his disability in the absence of a search for employment outside his usual field hinges upon the extent, if any, to which such a limitation on his job search was reasonable, we conclude that the Commission was required to make findings of fact explaining the reason that it deemed Plaintiff's job search to be "reasonable" and that its failure to make such findings constituted an error of law requiring us to reverse this portion of the Commission's order and remand this case to the Commission for further proceedings not inconsistent with this opinion, including the making of adequate findings of fact addressing the extent to which Plaintiff is disabled.

c. Other Disability-Related Issues

In addition, we have reviewed Defendant's remaining challenges to the Commission's disability determination and, to the extent that they are not adequately addressed in our discussion of the inadequacy of the Commission's disability-related findings, conclude that they lack merit. For example, Defendant argues that the Commission erroneously found a causal connection between Plaintiff's inability to obtain employment and his injury, noting other possible causes of Plaintiff's failure to find work, such as the poor economy. However, since "[t]he Commission's findings of fact 'are conclusive on appeal when supported by competent evidence even though' evidence exists that would support a contrary finding," *Johnson v. Southern Tire Sales & Serv.*, 358 N.C. 701, 705, 599 S.E.2d 508, 512 (2004) (quoting *Hilliard*, 305 N.C. at 595, 290 S.E.2d at 684), we conclude that this challenge to the Commission's order lacks merit.

Similarly, Defendant argues that none of the physicians from whom Plaintiff received treatment for his back injury instructed him not to do any work. Although "[m]edical evidence may be dispositive of only the first *Russell* test," "the absence of [such] evidence does not preclude a finding of disability under one of the other three tests." *White v. Weyerhaeuser Co.*,

167 N.C. App. 658, 672, 606 S.E.2d 389, 399 (2005) (quoting *Russell* at 765, 425 S.E.2d at 457, and citing ***Bridwell v. Golden Corral Steak House***, 149 N.C. App. 338, 342, 561 S.E.2d 298, 302, ***disc. review denied***, 355 N.C. 747, 565 S.E.2d 193 (2002)). The Commission clearly did not attempt to find Plaintiff disabled on the basis of the first *Russell* test. Thus, Defendant is not entitled to relief on the basis of this argument either.

Finally, Defendant contends that the Commission failed to make findings addressing (1) the fact that Plaintiff's unsuccessful search for employment did not automatically establish his disability; (2) whether Plaintiff's unsuccessful job search was related to the general state of the economy; (3) the extent to which Plaintiff was able to perform his job duties in the aftermath of his injury until he was terminated by Defendant; or (4) the possibility that Plaintiff's inability to find suitable employment stemmed from his termination for misconduct. Defendant's insistence that the Commission was required to making factual findings addressing these issues is, in essence, a request that this Court reweigh the evidence, focus on those components of the record that support Defendant's position and reach a different result than that deemed appropriate by the Commission. It is, however, well-established that:

> "The Industrial Commission and the appellate courts have distinct responsibilities when reviewing workers' compensation claims." The Industrial Commission is "the fact finding body," and is "the sole judge of the credibility of the witnesses and the weight to be given their testimony." "This being true, [the Commission] may accept or reject the testimony of a witness, either in whole or in part, depending solely upon whether it believes or disbelieves the same." This Court, on the other hand, "does not have the right to weigh the evidence and decide the issue on the basis of its weight."

Cooper v. BHT Enters., 195 N.C. App. 363, 369, 672 S.E.2d 748, 754 (2009) (quoting *Billings v. General Parts, Inc.*, 187 N.C. App. 580, 584, 654 S.E.2d 254, 257 (2007), *disc. review denied*, 362 N.C. 233, 659 S.E.2d 435 (2008), *Adams*, 349 N.C. at 680-81, 509 S.E.2d at 413-14 (citations omitted), and *Anderson v. Motor Co.*, 233 N.C. 372, 376, 64 S.E.2d 265, 268 (1951)). We conclude, with the exception noted above, that the facts found by the Commission sufficiently addressed the issues necessary to adequately determine Plaintiff's eligibility for disability benefits. As a result, none of Defendant's remaining challenges to the Commission's disability determination have merit.

2. Plaintiff's Ability to Work as a Truck Driver

Secondly, Defendant contends that the Commission erred by finding that Plaintiff could no longer work as a long distance truck driver. More specifically, Defendant argues that:

> [T]he full Commission found that Dr. Fleck, Dr. David, and Ms. Mitchell would not have released Plaintiff to work as a truck driver. These findings are not based on competent evidence and fail to consider the full testimony of Dr. Fleck, Dr. David, and Ms. Mitchell, and in particular, these findings totally ignore the examination of these witnesses by counsel for Defendant-Appellant.

Once again, we conclude that Defendant's argument lacks merit.

The Commission found, in pertinent part, that:

> 2. On October 4, 2007, Plaintiff was injured while delivering furniture in Texas . . . [when he] fell approximately four feet from the truck onto concrete. Plaintiff testified that he experienced pain in his back and hip as well as his entire right side.
>
> . . . .
>
> 6. . . . [O]n October 8, 2007, [Plaintiff] presented to Dr. David Abernathy, an internist, . . . [who] diagnosed Plaintiff with lower back pain and prescribed Tramadol. Dr. Abernathy released Plaintiff to return to work as a truck driver with restrictions of no loading or unloading from his first appointment on October 8, 2007, through March 28, 2008.
>
> . . . .
>
> 9. On April 11, 2008, Plaintiff presented to Dr. James Stanislaw, an orthopedic surgeon [who] . . . diagnosed degenerative disk disease, back pain, and right leg radiculitis. Dr. Stanislaw continued the same medications as Dr. Abernathy, ordered an MRI, and released Plaintiff to return to work as a truck driver within the no lifting restriction.

10. The MRI was performed on Apri1 26, 2008, and . . . revealed encroachment on the existing nerve root at L5-S1 predominantly by bony degenerative change and some disk desiccation as well as degenerative changes encroaching on the left neural exit foramen at L4-5 with multi-level degenerative disk disease. Dr. Stanislaw recommended . . . pain management with lumbar epidural steroid injections. Dr. Stanislaw continued Plaintiff's work restriction of no lifting and allowed Plaintiff to continue to work as a long distance truck driver as long as Plaintiff was able to do so safely while taking the . . . narcotic-like pain reliever that was prescribed for his work injury.

. . . .

13. . . . . On July 2, 2008, Plaintiff presented to Dr. Hansen, a pain management specialist[, who] . . . diagnosed Plaintiff with degenerative spinal disease of the lumbar spine with facet syndrome. Dr. Hansen recommended a lumbar epidural, a trial of Hydrocodone, and prescribed Lyrica for myofascial mechanical pain.

14. On July 23, 2008, Dr. Hansen recommended an RS-4i stimulator and the RS-LB Low Back Conductive Garment for daily home therapy for Plaintiff. . . .

. . . .

16. Penny Mitchell, a family nurse practitioner under Dr. Hansen's supervision, first treated Plaintiff on July 23, 2008, and continued until his last visit in March 2009. Ms. Mitchell reported that Plaintiff had no significant improvement with conservative treatment and referred him back to his surgeon. . . .

. . . .

19. On January 20, 2009, Plaintiff presented to Dr. David, who determined that Plaintiff is a suitable candidate for L4/5 and L5/S1 decompression and stabilization surgery because of his work injury. . . . Dr. David opined that Plaintiff is unable to perform his duties as a long distance truck driver, even if he did not do any loading, as Plaintiff is unable to remain in a seated position for the number of hours required. Dr. David opined to a reasonable degree of medical certainty that Plaintiff's fall on October 4, 2007, significantly exacerbated his underlying back condition.

. . . .

21. On March 30, 2009, Plaintiff presented to Dr. Laura Fleck, an Asheville neurologist, who opined that Plaintiff suffered from "lumbar radiculagia on the right side and potentially facet-mediated lumbar pain." Dr. Fleck testified to a reasonable degree of medical certainty that Plaintiff's symptoms were the result of his October 4, 2007, work injury. Dr. Fleck prescribed the same RS-4i stimulator that Dr. Hansen had and opined that Plaintiff will need it the remainder of his life.

. . . .

24. With regard to Plaintiff's ability to perform his work duties, Dr. Fleck opined that Plaintiff is permanently restricted to light duty, which would include occasional lifting of up to twenty (20) pounds, frequent lifting of under eight (8) pounds, the ability to alternate sitting and standing every fifteen (15) to twenty (20) minutes, and no operation of heavy equipment. Dr. Fleck opined that Plaintiff would not be able to load or unload a tractor-trailer, due to the lifting restrictions. In addition, due to the

> requirement that Plaintiff alternate between sitting and standing every fifteen (15) to twenty (20) minutes, Dr. Fleck did not think it was realistic for Defendant to expect Plaintiff to be able to perform his duties as a long distance truck driver. . . .
>
> 25. Dr. Fleck opined that although Plaintiff continued to perform his job duties for approximately thirty-four weeks after his October 4, 2007, injury, she would not have recommended that he return to that position since it exceeded what she believed Plaintiff was capable of performing and may be the reason Plaintiff is still symptomatic.
>
> 26. Dr. Fleck opined that she had no reason to believe that Plaintiff had been anything other than truthful and forthright with her.
>
> 27. At his deposition, Dr. David testified that Plaintiff was unable to perform his duties as a long distance truck driver, as he would be unable to remain in a seated position for the number of hours required. Dr. David opined that he would be concerned if Plaintiff returned to his position as a truck driver while he was still symptomatic.
>
> 28. Ms. Mitchell, [a] family nurse practitioner . . . testified that . . . she was concerned that the pain medication, which Plaintiff had been prescribed and was taking for his October 4, 2007, work injury, would have interfered with his ability to safely operate his vehicle. . . .

We conclude that these findings are supported by competent evidence and provide sufficient support for the Commission's

conclusion that Plaintiff was no longer able to work as a long-distance truck driver.

In its brief, however, Defendant points to various alleged contradictions between the opinions of these medical providers and other evidence, cites evidence tending to support a conclusion contrary to that reached by the Commission, and directs our attention to aspects of Defendant's cross-examination of these witnesses that, in Defendant's view, weakened or undercut their testimony. However, as we have previously discussed, issues arising from contradictions in the evidence, like other credibility-related issues, and the weight to be given to witness testimony are matters for which the Commission, rather than this Court, has responsibility. We have carefully reviewed the record in light of Defendant's arguments and conclude that Defendant's argument is, at bottom, merely an attempt to reargue factual issues that the Commission decided in favor of Plaintiff. As a result, we hold that Defendant is not entitled to relief based on this contention.

3. Future Examination by Dr. David

Finally, Defendant asserts that the Commission erred by directing "that Dr. David should periodically monitor Plaintiff's spinal condition." According to Defendant, there is a "conflict" between the testimony of Dr. David and Dr. Fleck

concerning the extent to which Plaintiff would or would not need surgery in the future that the Commission failed to resolve. Once again, we conclude that Defendant's argument lacks merit.

Dr. David was accepted without objection as an expert in orthopaedic surgery. The Commission found, among other things, that Dr. David considered Plaintiff to be a "suitable candidate for L4/5 and L5/S1 decompression and stabilization surgery," but that he recommended that Plaintiff undergo an initial course of more conservative physical therapy first. More specifically, Dr. David recommended "a trial of physical therapy and then, if Plaintiff failed to improve, he would recommend a spinal fusion." Dr. Fleck, on the other hand, testified as an expert in neurology. Her practice consisted of "solely conservative, meaning non-surgical management of spine-related problems." According to the Commission, Dr. Fleck believed that "Plaintiff did not meet surgical criteria and therefore she would not recommend back surgery for Plaintiff or referral for treatment to a back surgeon."

In its order, the Commission found that:

> 33. As Plaintiff's health care providers have testified that Plaintiff will need lifelong medications, an RS-4i stimulator, and possibly an L4/5 and L5/S1 fusion, there is a substantial risk of the necessity of future medical compensation.

> 34. Plaintiff would benefit from further treatment for his compensable injury with Dr. Laura Fleck, a pain management specialist and occasional monitoring by Dr. Stephen David, to determine if surgery becomes necessary.

As a result, the Commission determined that:

> . . . Plaintiff is entitled to all medical expenses incurred or to be incurred for his lumbar spine injury, including but not limited to periodic evaluations with Dr. Fleck and Dr. Stephen David to monitor Plaintiff's spinal condition, the RS-4i stimulator, and possibly an L4/5 and L5/S1 fusion, for so long as such examinations, evaluations, and treatments may reasonably be required to effect a cure, give relief or tend to lessen Plaintiff's period of disability.

After carefully reviewing the testimony of the medical care providers who treated Plaintiff, the Commission's order, and the arguments advanced in Defendant's brief, we conclude that the Commission's order reflects proper consideration of the testimony of each witness, that the Commission's decision reflects a permissible choice among competing medical alternatives that has adequate evidentiary support, and that the Commission did not err by allowing Plaintiff to receive periodic evaluations by Dr. David.

III. Conclusion

Thus, for the reasons discussed above, we conclude that, with the exception of its challenge to the sufficiency of the

Commission's factual findings relating to the disability issue, none of Defendant's challenges to the Commission's order have merit. As a result, the Commission's order should be, and hereby is, affirmed in part and reversed in part, with this case remanded to the Commission for further proceedings not inconsistent with this opinion, including the making of adequate findings of fact concerning the extent, if any, to which Plaintiff has proven that he is "disabled."

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Judges ROBERT C. HUNTER and STEPHENS concur.

Report per Rule 30(e).