IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-910-2

Filed: 1 August 2017

North Carolina Industrial Commission, I.C. No. X43019

CAPEN TRUCER CARL ANDERS, II, Employee, Plaintiff,

v.

UNIVERSAL LEAF NORTH AMERICA, Employer, and ESIS, Carrier, Defendants.

Appeal by plaintiff from opinion and award entered 5 July 2016 by the North Carolina Industrial Commission. Heard in the Court of Appeals 8 February 2017. Opinion filed 2 May 2017. Petition for rehearing granted 26 June 2017. The following opinion supersedes and replaces the opinion filed 2 May 2017.

Kellum Law Firm, by J. Kevin Jones, for plaintiff-appellant.

Wilson & Ratledge, PLLC, by James E. R. Ratledge and Scott J. Lasso, for defendants-appellees.

ZACHARY, Judge.

Plaintiff-employee Capen Trucer Carl Anders, II (Anders) appeals from an Opinion and Award of the Industrial Commission denying his claims for additional medical and indemnity benefits related to recurring bilateral hernias allegedly caused by an earlier, compensable hernia injury that plaintiff suffered while

employed by defendant-employer Universal Leaf North America (Universal Leaf). Anders' primary argument on appeal is that the Commission erred in concluding that the subsequent bilateral hernias that he suffered after Universal Leaf terminated his employment were not causally related to his prior compensable hernia injury. In a related argument, Anders contends that the Commission's causation analysis was erroneous because it failed to apply the evidentiary presumption enunciated in *Parsons v. Pantry, Inc.*, 126 N.C. App. 540, 485 S.E.2d 867 (1997), which provides that once an employee meets the initial burden of demonstrating a causal relationship between an injury and a work-related accident, the employee is entitled to a rebuttable presumption that further medical treatment is directly related to the compensable injury (the *Parsons* presumption). Anders further contends that because the Commission erred on the issue of causation, it improperly denied him temporary total disability benefits. Finally, Anders challenges the Commission's conclusion that his claim for additional medical treatment related to the subsequent bilateral hernias was time-barred by N.C. Gen. Stat. § 97-25.1.

For the reasons that follow, we conclude that Anders' right to additional medical compensation is time-barred, but agree that the Commission erred by not applying the *Parsons* presumption to its causation analysis. The issue of causation has a direct bearing on whether Anders can receive disability benefits. As a result, we remand this matter to the Commission so that it may apply the *Parsons*

presumption in making a new determination as to whether there was a causal relation between Anders' original compensable injury and his subsequent recurring hernias.

I. Background

This case arises out of an admittedly compensable bilateral inguinal hernia injury that Anders suffered while employed as a seasonal employee by Universal Leaf, a tobacco company. At the time of the work-related accident, which occurred on 20 November 2010, Anders was working on the "blending line" removing wires from bales of tobacco. After a tobacco-bale wire became stuck, Anders "yanked on the wire and felt a pain in his groin." On 22 November 2010, Universal Leaf sent Anders to Carolina Quick Care, where he was diagnosed with an inguinal hernia and referred to a surgeon. However, defendants refused to authorize a surgeon's visit at that time. Anders worked under light-duty restrictions for several days.

On 28 November 2010, Anders sought treatment for his hernia in the emergency department at Halifax Regional Medical Center, where he was again diagnosed with an inguinal hernia and referred to a surgeon. When Anders returned to work on 29 November 2010, he learned that he had been fired for violating Universal Leaf's attendance policy. The record reveals that a specific absentee policy applied to Anders' position and that Universal Leaf had an established process for handling workers' compensation claims. According to Universal Leaf's absentee

policy, a seasonal worker could be terminated for accruing six "occurrences"— i.e., "a day out of work, an early leave, or a late entry into work"—in a twelve-month period. Anders had accumulated at least six occurrences between 17 September 2010 and 29 October 2010. When Anders sought medical treatment on 28 November 2010, his absence from work counted as an occurrence because Anders did not contact Universal Leaf's first aid office and receive prior authorization for the hospital visit.

Shortly after Universal Leaf terminated Anders, he found work at a local Waffle House restaurant. On 22 March 2011, Dr. Robert Vire performed a bilateral inguinal repair surgery on Anders. That same day, Anders was discharged from the hospital with the temporary restriction that he not lift more than 10 pounds. Although Anders returned to Dr. Vire on 7 April 2011 with "soreness" at the incision site, Dr. Vire found no evidence of any hernia. Dr. Vire released Anders to full-duty work and instructed him to report for further treatment as needed. Anders then returned to his position at Waffle House.

In late May 2011, Anders experienced ongoing pain in his right groin and he returned to Dr. Vire, who ordered that Anders undergo an ultrasound and CT scan of the abdomen, pelvis, and chest. The ultrasound was performed on 8 June 2011 and Anders underwent CT scans on 20 June 2011 and 7 July 2011. Dr. Vire found no evidence of a recurring hernia, but the ultrasound revealed that Anders suffered from

a "small right hydrocele with superficial edema around the right scrotum." It does not appear that the CT scans revealed any further concerns.

Anders' original claim for workers' compensation benefits related to the work-related hernia injury was accepted by defendants' filing a Form 60 on 13 May 2011. That same day, defendants also filed a Form 28 Return to Work report, which indicated that Anders was released to work on 15 April 2011,[1] and a Form 28B, which reported that Anders had received medical compensation and 2.2 weeks of temporary total disability benefits for the period from 29 March 2011 until 14 April 2011. The Form 28B established that Anders received his last disability payment on 8 April 2011. Anders received his last medical compensation payment on 19 January 2012; that payment covered the ultrasound and the CT scans ordered by Dr. Vire.

Based on the results from the June 2011 ultrasound, Dr. Vire referred Anders to Dr. Fred Williams, a surgeon at ECU Physicians. Dr. Williams examined Anders on 11 August 2011 and found no recurrent hernias, but Dr. Williams did "appreciate[] a small hydrocele, with tenderness in the . . . ilioinguinal nerve." As a result, Anders was prescribed the medication Neurontin for nerve pain. Anders began working for Hardee's in August 2011.

[1] Although the Form 28 indicated that Anders returned to work for Universal Leaf on 15 April 2011, it is clear that Anders returned to work at Waffle House, as Anders was terminated from his employment with Universal Leaf in November 2010.

When Anders sought treatment for bilateral groin pain in May 2013, he was referred to general surgeon Dr. James Ketoff, who diagnosed a small, recurrent right inguinal hernia. Dr. Ketoff surgically repaired this hernia on 6 June 2013, and he ordered Anders out work until 9 July 2013. Between July 2013 and August 2014, Anders sporadically sought medical treatment for groin pain.

On 27 January 2014, Anders initiated the present action by filing a Form 33 request for hearing, seeking medical and indemnity compensation for his recurring hernias. Following defendants' Form 33R response, which asserted that Anders had received all benefits to which he was entitled, the matter was heard before Deputy Commissioner Theresa Stephenson on 10 September 2014. On 9 April 2015, Deputy Commissioner Stephenson filed an Opinion and Award that, *inter alia*, concluded that Anders' subsequent recurring hernias were not related to his November 2010 work-related injury and denied indemnity compensation and medical compensation for the recurring hernias.

Anders reported to Dr. Ketoff, who diagnosed a left-sided, recurrent hernia on 21 August 2014. Dr. Ketoff surgically repaired Anders' left-sided hernia on 24 September 2014. Dr. Ketoff ordered Anders out of work from the date of the surgery until 9 December 2014, when Anders was released to work and instructed to ease into full activity.

Anders appealed Deputy Commissioner Stephenson's decision to the Full Commission. After hearing the matter in September 2015, the Commission entered an Opinion and Award on 5 July 2016 and found, *inter alia*, that Anders' work-related hernia had "fully healed" after it was repaired on 22 March 2011; that defendants' last payments of indemnity and medical payments occurred on 8 April 2011 and 19 January 2012, respectively; that Anders did not request additional medical compensation until 27 January 2014; that Anders had not suffered any permanent damage to any organs or body parts as a result of the work-related injury; and that Anders failed to produce evidence of his earnings from the work he performed after Universal Leaf terminated him, which included positions at Waffle House, Hardee's, and landscaping and construction work.

Based on these findings, the Commission concluded that Anders had failed to prove that his November 2010 work-related injury was causally related to his subsequent recurring hernias, and that Anders' request for additional medical compensation was time-barred by N.C. Gen. Stat. § 97-25.1. Because Anders had failed to prove that he was "disabled" as defined by the Workers' Compensation Act during the period following his termination, the Commission further concluded that Anders was not entitled to additional indemnity compensation for his subsequent recurrent hernias. Consequently, Anders' claims for additional compensation were denied. Anders now appeals the Commission's Opinion and Award.

II. Standard of Review

"Appellate review of an award from the Industrial 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." *Clark v. Wal-Mart*, 360 N.C. 41, 43, 619 S.E.2d 491, 492 (2005). The " 'Commission is the sole judge of the credibility of the witnesses and the [evidentiary] weight to be given their testimony.' " *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965)). "Thus, if the totality of the evidence, viewed in the light most favorable to the complainant, tends directly or by reasonable inference to support the Commission's findings, these findings are conclusive on appeal even though there may be plenary evidence to support findings to the contrary." *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 166, 265 S.E.2d 389, 390 (1980). The Commission's conclusions of law are subject to *de novo* review. *Wilkes v. City of Greenville*, __ N.C. App. __, __, 777 S.E.2d 282, 285 (2015), *review allowed*, *writ allowed*, __ N.C. __, 784 S.E.2d 468 (2016), *and aff'd as modified*, __ N.C. __, __ S.E.2d __, No. 368PA15, 2017 WL 2492779 (June 9, 2017).

III. Discussion

On appeal, Anders' primary argument is that the Commission improperly decided the causation issue, that is, whether Anders' "subsequent bilateral hernias

[were] compensable as natural and direct results of the earlier compensable bilateral hernias" he suffered while employed by Universal Leaf. However, the Commission's Opinion and Award also contains a conclusion of law that presents a separate and distinct bar—which is unaffected by the causation issue—to Anders' claim for additional medical benefits. Accordingly, we begin by addressing the Commission's conclusion that Anders' claim for medical benefits was time-barred. We will then address the Commission's conclusion that Anders' claim for indemnity benefits should be denied because he failed to prove that he was "disabled" as defined by the Workers' Compensation Act during the period following his termination from employment by Universal Leaf. Finally, we will address the issue of causation.

A. Overview

In 1929, the legislature created our Workers' Compensation Act, "[t]he underlying purpose of [which] is to provide compensation for work[ers] who suffer disability by accident arising out of and in the course of their employment." *Henry v. A.C. Lawrence Leather Co.*, 234 N.C. 126, 127, 66 S.E.2d 693, 694 (1951). As the plan is designed, "[a]n award under the Act has two distinct components: (1) payment of '*medical compensation*' pursuant to G.S. § 97-25 for expenses incurred as a direct result of the work-related injury, and (2) payment of *general* '*compensation*' pursuant to G.S. §§ 97-29 through 97-31 for financial loss suffered as a direct result of the work-related injury." *Collins v. Speedway Motor Sports Corp.*, 165 N.C. App. 113, 118, 598

S.E.2d 185, 189 (2004) (emphasis added and citations omitted); *see Cash v. Lincare Holdings*, 181 N.C. App. 259, 264, 639 S.E.2d 9, 14 (2007) (recognizing that "the legislature always has provided for, and continues to provide for, [these] two distinct components of an award under the Workers' Compensation Act") (citation and internal quotation marks omitted).

The term medical compensation is defined as

> medical, surgical, hospital, nursing, and rehabilitative services, including, but not limited to, attendant care services prescribed by a health care provider authorized by the employer or subsequently by the Commission, vocational rehabilitation, and medicines, sick travel, and other treatment, including medical and surgical supplies, as may reasonably be required to effect a cure or give relief and for such additional time as, in the judgment of the Commission, will tend to lessen the period of disability; and any original artificial members as may reasonably be necessary at the end of the healing period and the replacement of such artificial members when reasonably necessitated by ordinary use or medical circumstances.

N.C. Gen. Stat. § 97-2(19) (2015). In contrast, indemnity benefits (general compensation) may be awarded to address "financial loss other than medical expenses." *Hyler v. GTE Prod. Co.*, 333 N.C. 258, 267, 425 S.E.2d 698, 704 (1993), *superseded in part on other grounds by statute as recognized by Lunsford v. Mills*, 367 N.C. 618, 623, 766 S.E.2d 297, 301 (2014). Because "the Commission's determination that an employer must pay an injured employee medical compensation pursuant to N.C.G.S. § 97-25 is a separate determination from whether an employer owes

[general] compensation as a result of an employee's disability[,] . . . [n]either determination is a necessary prerequisite for the other." *Cash*, 181 N.C. App. at 264, 639 S.E.2d at 14.

With this statutory scheme in mind, we turn to Anders' claim for additional medical compensation.

B. Limitations Period on Anders' Claim for Medical Compensation

As noted above, the Commission concluded that Anders' claim for additional medical compensation for treatment related to his subsequent recurrent hernias was time-barred pursuant to the provisions of N.C. Gen. Stat. § 97-25.1. The Commission's conclusion cited this Court's decisions in *Busque v. Mid-Am. Apartment Communities*, 209 N.C. App. 696, 707 S.E.2d 692 (2011) and *Harrison v. Gemma Power Systems, LLC*, 234 N.C. App. 664, 763 S.E.2d 17, 2014 WL 2993853 (2014) (unpublished), and was based on the following findings:

> 15. A Form 28B, *Report of Employer or Carrier/Administrator of Compensation and Medical Compensation Paid and Notice of Right to Additional Medical Compensation*, was filed by Defendants on May 16, 2011, reflecting indemnity compensation payments from March 29, 2011 through April 14, 2011, with the last compensation check forwarded on April 8, 2011.
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> 16. The Form 28B further reflected that the last payment of medical compensation was paid on May 5, 2011. However, Defendants' claims payment history reflects that the actual last payment by Defendants of medical compensation was made on January 19, 2012, for the ultrasound and CT scans performed in June and July 2011.

> . . .
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> 19. . . . [T]he last payment of medical compensation made by Defendants was January 19, 2012.
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> 20. Plaintiff did not seek any medical treatment from March 15, 2012 until May 18, 2013. There is no evidence Plaintiff sought authorization for medical treatment from Defendants during this time period. Plaintiff did not file a request to the Commission for additional medical compensation until January 27, 2014, when he filed a Form 33, *Request that Claim be Assigned for Hearing*. This request was made more than two years following the last payment of indemnity and medical compensation.

Section 97-25.1 imposes a limitations period upon an injured employee's right to seek medical compensation:

> The right to medical compensation shall terminate two years after the employer's last payment of medical or indemnity compensation unless, prior to the expiration of this period, either: (i) the employee files with the Commission an application for additional medical compensation which is thereafter approved by the Commission, or (ii) the Commission on its own motion orders additional medical compensation.

In *Busque*, this Court applied section 97-25.1 in a "straight-forward" manner, holding that the plaintiff's right to medical compensation for an ankle injury was barred because her 2007 application for additional medical treatment was filed more than two years after the defendants' last payment of medical compensation in 2003. 209 N.C. App. at 707, 707 S.E.2d at 700.

Here, the Commission's unchallenged findings establish that Anders' 27 January 2014 request for additional medical compensation was filed more than two years after defendants' last payments of indemnity and medical compensation, which occurred, respectively, on 8 April 2011 and 19 January 2012. Accordingly, the Commission properly concluded that section 97-25.1 stands as a bar to Anders' claims for additional medical treatment.

Nevertheless, Anders argues that if the "Commission [had] properly considered the evidence and the law controlling that evidence, there would have been, at minimum, an indemnity award for [the period during which defendant was allegedly disabled], which would in turn render defendants' [section] 97-25.1 defense inapplicable as the indemnity benefits would restart the clock on said statute's limitations period." This argument utilizes the notion of a "hypothetical" indemnity award to prevent section 97-25.1 from barring Anders' claim for additional medical treatment. However, this Court recently rejected a similar contention in *Harrison*.

The *Harrison* Court relied on *Busque* and held that "because the last payment of medical compensation made by [the d]efendant was more than two years prior to [the p]laintiff's current Form 33 filing, . . . [the p]laintiff's right to additional medical compensation [was] time-barred pursuant to N.C. Gen. Stat. § 97-25.1." *Harrison*, 2014 WL 2993853, at *4. Even so, the *Harrison* Court addressed the plaintiff's argument that " 'the last payment of compensation in the claim has not yet taken

place' because '[the p]laintiff is still owed payment for temporary total disability and/or permanent partial impairment.' " *Id.* "Stated differently," the Court explained, "[the p]laintiff argues that the two-year statute of limitations period found in N.C. Gen. Stat. § 97-25.1 has not yet begun and will not begin until [the p]laintiff receives a payment from [the d]efendant for indemnity benefits." *Id.* In rejecting this argument, the Court explained:

> First, [the p]laintiff's argument ignores the plain language of the statute. "The right to medical compensation shall terminate two years after the employer's *last* payment of medical or indemnity compensation. . . ." N.C. Gen. Stat. § 97-25.1 (emphasis added). In context, the word "last" does not refer to a *hypothetical future payment* that [the p]laintiff may be entitled to receive after presenting a claim to the Industrial Commission. On its face, the "last" payment refers to the most recent payment of medical or indemnity benefits that has actually been paid. Second, [the p]laintiff's argument assumes the certainty of a future indemnity payment before the right to such payment has been decided by the Industrial Commission. Third, accepting Plaintiff's interpretation of the statute would allow claimants seeking additional medical compensation to obviate the statute of limitations in any case by asserting a valid claim for indemnity benefits alongside a claim for additional medical compensation. Such an expansive interpretation ignores the clear intent of our legislature to limit claims for additional medical compensation to a specified time period.

Id. (emphasis added). Although clearly not controlling, we find *Harrison*'s reasoning persuasive and apply it to the instant case.

In our view, the *Harrison* Court correctly determined that the "last" payment referred to in section 97-25.1 denotes the most recent, "actual" payment of medical or indemnity benefits, not hypothetical payments the Commission *might* award in the future. *Harrison*, 2014 WL 2993853, at *4; *c.f. Lewis v. Transit Mgmt. of Charlotte*, __ N.C. App. __, __, 792 S.E.2d 890, 895-96 (2016), *review withdrawn*, __ N.C. __, 799 S.E.2d 623 (2017) (finding the reasoning in *Harrison* persuasive and holding that, where the last payment of medical or indemnity compensation was made on 22 April 2010, the employee's request for additional medical compensation on 5 May 2014 was barred by section 97-25.1, even though the employer made a corrective payment for the underpayment of indemnity compensation on 7 December 2015; the "corrective payment had not been made at the time of the Commission's decision and, therefore, could not have been the 'last payment' under a straight-forward application of N.C. Gen. Stat. § 97-25.1"). At the time when the Commission issued its Opinion and Award in the present case, the last *actual* payment of indemnity compensation was made on 8 April 2011. Anders received his last *actual* payment of medical compensation on 19 January 2012. It is undisputed that defendants had not made any indemnity or medical payments within two years of Anders' request for additional medical compensation, which occurred when Anders filed the Form 33 on 27 January 2014. The evidence, therefore, supports the Commission's findings and the findings

support the Commission's conclusion that section 97-25.1 bars Anders' request for additional medical compensation.

C. Indemnity Compensation

Separate from Anders' claim for medical compensation is his claim for indemnity benefits for periods of temporary total disability allegedly caused by his original compensable hernia injury. "An employee seeking indemnity benefits pursuant to the Workers' Compensation Act has, at the outset, two very general options." *Knight v. Wal-Mart Stores, Inc.*, 149 N.C. App. 1, 10, 562 S.E.2d 434, 441 (2002), *aff'd*, 357 N.C. 44, 577 S.E.2d 620 (2003). First, an injured employee may seek indemnity benefits by showing either a total disability pursuant to N.C. Gen. Stat. § 97-29 (2015) or a partial disability pursuant to N.C. Gen. Stat. § 97-30 (2015). "[D]isability is defined by a diminished capacity to earn wages, not by physical infirmity." *Saums v. Raleigh Community Hospital*, 346 N.C. 760, 764, 487 S.E.2d 746, 750 (1997); N.C. Gen. Stat. § 97-2(9) (2015) ("The term 'disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment."). "The second option available to an employee seeking indemnity benefits is to show that the employee has a specific physical impairment that falls under the schedule set forth in N.C. Gen. Stat. § 97-31 [(2015)], regardless of whether the employee has, in fact, suffered" a

partial or total disability. *Knight*, 149 N.C. App. at 11, 562 S.E.2d at 442.[2] Particularly relevant here, an employee is entitled to compensation under N.C. Gen. Stat. § 97-31(24) if "he [produces] . . . medical evidence that he has loss of or permanent injury to an important external or internal organ or part of his body for which no compensation is payable under any other subdivision of [N.C. Gen. Stat. §] 97-31." *Porterfield v. RPC Corp.*, 47 N.C. App. 140, 142-43, 266 S.E.2d 760, 762 (1980).

1. *Indemnity Compensation Pursuant to N.C. Gen. Stat. § 97-31(24)*

As to Anders' right to indemnity compensation pursuant to section 97-31(24), the Commission found:

> 28. . . . Dr. Williams testified he treated Plaintiff for nerve-type pain in his right groin and Plaintiff got better. Further, Dr. Williams could not provide the opinion that Plaintiff suffered an injury to a nerve.
> . . .
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> 30. Dr. Ketoff indicated there was no permanent damage to the muscles making up Plaintiff's abdominal muscular floor or to Plaintiff's spermatic blood vessels or cord. Dr. Ketoff opined that the right-sided numbness Plaintiff is experiencing is from the inguinal nerve and is probably permanent. As to the left side, Dr. Ketoff could not provide an opinion on whether Plaintiff would have permanent numbness. Dr. Ketoff did not provide evidence or testimony of the importance of the inguinal nerve to the body's general health and well-being.

[2] If an employee is either partially or totally disabled and also has a specific physical impairment that falls under N.C. Gen. Stat. § 97-31, the employee may pursue benefits under the statutory section that affords the most favorable remedy. *Whitley v. Columbia Lumber Mfg. Co.*, 318 N.C. 89, 90, 348 S.E.2d 336, 340 (1986).

These unchallenged findings support the Commission's conclusion that because Anders "failed to establish through competent medical evidence that he suffered loss or permanent damage to any important organs or body parts[,]" it would be "[im]proper to issue an award under N.C. Gen. Stat. § 97-31(24)."

2. *Disability Benefits Pursuant to N.C. Gen. Stat. § 97-29*

As to Anders' right to temporary total disability benefits under section 97-29 following his termination, Universal Leaf was required to demonstrate initially that: (1) Anders was terminated for misconduct or other fault; (2) a nondisabled employee would have been terminated for the same misconduct or fault; and (3) the termination was unrelated to Anders' compensable injury. *Seagraves v. Austin Co. of Greensboro*, 123 N.C. App. 228, 234, 472 S.E.2d 397, 401 (1996). "[T]he court in *Seagraves* adopted a test that measures whether the employee's loss of earning capacity is attributable to the wrongful act that caused the employee's termination from employment, in which case benefits would be barred, or whether such loss of earning capacity is due to the employee's work-related disability, in which case the employee would be entitled to benefits intended for such disability." *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 493, 597 S.E.2d 695, 699 (2004) (citation omitted).

The Commission addressed the circumstances of Anders' termination in the following unchallenged findings of fact:

6. When Plaintiff began working for Defendant-Employer

> in 2010, he was provided an employee handbook and underwent an orientation process. Plaintiff was instructed on how workers' compensation claims would be handled and was instructed on the absentee policy for seasonal employees. Plaintiff was aware of the absentee policy and that, as a seasonal employee, he could be terminated if he accrued six occurrences within a 12-month period.
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> 7. From September 17, 2010 through October 29, 2010, Plaintiff had missed six work shifts. For three of those shifts, Plaintiff failed to report to work or notify the employer. Plaintiff missed one shift for personal business and the remaining shifts were missed due to illness and occurred prior to his November 20, 2010 incident. Plaintiff received warnings from his supervisor as he accumulated occurrences.
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> 34. Based upon a preponderance of the competent, credible evidence, Defendant terminated Plaintiff for misconduct and the reason for Plaintiff's termination was a reason for which a non-disabled employee would be terminated. While Plaintiff's last absence which led to his termination was due to medical treatment he sought for his hernia condition, Plaintiff did not obtain proper authorization for his absence, despite knowledge of the attendance policy, knowledge of the proper procedure for requesting medical treatment and time off for his work-related injury, and knowledge that he had accumulated occurrences and was on warning for his excessive absences.

These unchallenged findings support the Commission's conclusion that defendants met their initial burden of showing that the first three elements of the *Seagraves* test were satisfied.

"An employer's successful demonstration of . . . evidence [that satisfies the initial part of the *Seagraves* test] is 'deemed to constitute a constructive refusal' by

the employee to perform suitable work, a circumstance that would bar benefits for lost earnings, '*unless* the employee is then able to show that his or her inability to find or hold other employment . . . at a wage comparable to that earned prior to the injury[ ] is due to the work-related disability.' " *Id.* at 493-94, 597 S.E.2d at 699 (quoting *Seagraves*, 123 N.C. App. at 234, 472 S.E.2d at 401). In other words, "the burden shift[ed] to [Anders] to re-establish that he suffer[ed] from a disability" during the time periods in question. *Williams v. Pee Dee Electric Membership Corp.*, 130 N.C. App. 298, 303, 502 S.E.2d 645, 648 (1998). An employee must prove all three of the following factual elements in order to support a conclusion of disability:

> (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). Therefore, "[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 Prod. Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (citation omitted). The first two elements announced in *Hilliard* may be proven in one of several ways, including:

> (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury,

> incapable of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

Id. at 765, 425 S.E.2d at 457 (internal citations omitted). As recognized by our Supreme Court in *Medlin v. Weaver Cooke Constr., LLC*, an employee "may prove the first two elements [under *Hilliard*] through any of the four methods articulated in *Russell*, but these methods are neither statutory nor exhaustive." 367 N.C. 414, 422, 760 S.E.2d 732, 737 (2014). "[A] claimant must also satisfy the third element, as articulated in *Hilliard*, by proving that his inability to obtain equally well-paying work is because of his work-related injury." *Id.*

The Commission found the following facts that were relevant to whether Anders had satisfied any of *Russell*'s prongs:

> 35. Except for the short period of time following his surgeries, Plaintiff has failed to produce evidence that he was unable to work due to his injuries, that he conducted a reasonable job search, or that it would have been futile for him to look for work, after November 28, 2010. While Plaintiff returned to work at Waffle House, earning a lower hourly rate than that earned with Defendant-Employer, Plaintiff has failed to produce competent evidence that he earned less than his average weekly wage at any point during his employment with Waffle House or Hardee's. Plaintiff also failed to produce evidence that any partial

incapacity to work or any decrease in earnings was a result of his November 20, 2010 injuries and any subsequent physical impairments.

36. Plaintiff was out of work due to his first bilateral hernia surgery repair from March 22, 2011 through April 7, 2011 and Defendant paid indemnity compensation. Plaintiff was written out of work by Dr. Ketoff for his right recurrent hernia surgery from June 6, 201[3] through July 9, 2013. Plaintiff was written out of work by Dr. Ketoff for his left recurrent hernia surgery from September 24, 2014 through October 21, 2014.

37. Plaintiff quit his job at Hardee's in October 2011 due to lack of hours. From approximately October 2011 through May 2013, Plaintiff mainly performed landscaping and construction work in the form of framing houses and was paid in cash. Plaintiff did not present evidence of his earnings from his work performed with Waffle House or Hardee's, or his jobs in landscaping and construction.

38. According to his sworn discovery answers served on July 21, 2014, since the date of his injury, Plaintiff sought work at Coca-Cola, Lowe's, Smithfield Genetics, and Georgia Pacific. Plaintiff indicated he also sought work through the Employment Security Commission but did not provide any further details as to the number or types of positions for which he applied.

39. At the evidentiary hearing held on September 10, 2014, Plaintiff presented a one-page job search log detailing contact with various employers from August 2014 through September 2014. Given the manner in which it was completed and Plaintiff's failure to explain the unusual format, it is likely that Plaintiff constructed this sheet at one time rather than over the period of one month as alleged. The timing of this job search documentation is suspect since the calendar for setting the hearing in this matter would have been sent out the first of August, 2014. Plaintiff testified, and there is no evidence to the contrary,

> that he is physically able to perform all the positions to which he applied.
>
> 40. Plaintiff has not conducted a reasonable job search. The records do not reflect the types of positions for which Plaintiff applied and whether he met any necessary qualifications for the positions. Furthermore, the evidence reveals Plaintiff contacted approximately 12 employers total over a three-year period in an effort to obtain suitable employment.

These unchallenged findings establish that Anders failed to meet his burden of production under the second, third, and fourth prongs of *Russell*.

In contrast, certain findings indicate that Anders satisfied the portion of *Russell*'s first prong requiring the production of medical evidence that the employee was physical or mentally incapable of work in any employment due to the work-related injury. *Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457. Finding 36 specifically states that Dr. Ketoff wrote Anders out of work "from June 6, 201[3] through July 9, 2013" and "from September 24, 2014 through October 21, 2014" following his recurrent hernia surgeries. Finding 35 states that "*[e]xcept for the short period of time following his surgeries*, Plaintiff has failed to produce evidence that he was unable to work due to his injuries, that he conducted a reasonable job search, or that it would have been futile for him to look for work, after November 28, 2010." (Emphasis added). We conclude that these findings, which are supported by Dr. Kettoff's deposition testimony and medical notes, establish that Anders produced

medical evidence that he was physically incapable of any work for the periods that followed both of his recurrent hernia surgeries.

However, *Russell*'s first prong could only be fully satisfied if Anders' inability to work was "a consequence of the work related injury[.]" *Id.* To that end, the last sentence in finding 35 states that Anders failed to prove "any partial incapacity to work or any decrease in earnings was a result of his November 20, 2010 injuries and any subsequent physical impairments." In conclusion of law 8, the Commission made the following determination:

> The burden is on Plaintiff to prove ongoing disability. In order to meet the burden of proving disability, Plaintiff must prove that he was incapable of earning pre-injury wages in either the same or in any other employment and that the incapacity to earn pre-injury wages was caused by his injury. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 290 S.E.2d 682 (1982). Plaintiff must demonstrate the required "link between wage loss and the work-related injury.["] *Fletcher v. Dana Corp.*, 119 N.C. App. 491, 494-99, 459 S.E.2d 31, 34-36 (1995); *see also Medlin v. Weaver Cooke Constr., LLC*, 367 N.C. 414, 760 S.E.2d 732 (2014) (holding that Plaintiff must satisfy *Hilliard* by proving that his inability to obtain equally well-paying work is because of his work-related injury). Following his termination on November 29, 2010, Plaintiff failed to produce evidence that he was disabled as defined by the Act, except for a period from March 22, 2011 through April 7, 2011.

Read in context, this conclusion was based on a determination that Anders failed to show a causal connection between his original hernia injury and subsequent wage

loss during the two periods of alleged temporary total disability (6 June 2013 to 9 July 2013 and 24 September 2014 to 21 October 2014).

When findings 35 and 36 are considered in conjunction with conclusion of law 8, the implication is that while Anders may have presented evidence concerning a *portion of Russell*'s first prong, Anders failed to establish that any wage loss he suffered due to the recovery periods associated with his recurrent hernia surgeries was causally related to the original, work-related hernia injury. As explained below, because Anders was not given the benefit of the rebuttable presumption enunciated in *Parsons*, we remand to the Commission for a new determination of causation. The causation issue will be dispositive on remand. If it is determined that a causal connection existed between Anders' compensable hernia injury and one or both of his subsequent recurring hernias, Anders will have established that he suffered one or two periods of temporary total disability under *Russell*'s first prong, and he will have proven all three of *Hilliard*'s elements. *See Medlin*, 367 N.C. at 422, 760 S.E.2d at 737 (recognizing that the first two elements of *Hilliard* may be proven by satisfying any one of *Russell*'s prongs, and that the third element in *Hilliard* requires proof that any wage loss was because of the work-related injury).

D. The Commission's Causation Analysis and the *Parsons* Presumption

We now turn to the issue of causation. Anders' primary arguments are that the facts of *Bondurant v. Estes Express Lines, Inc.*, 167 N.C. App. 259, 606 S.E.2d 345

(2004)[3] are distinguishable from this case, and that the Commission erred in relying on *Bondurant* to support its conclusion that Anders' subsequent bilateral hernias were not compensable because they were not the direct and natural result of the compensable hernia injury that he sustained while employed by Universal Leaf. Anders supplements these arguments with his assertion that the Commission erroneously placed on him the burden of proving that his subsequent recurrent hernias were causally related to his compensable 20 November 2010 injury. According to Anders, the Commission failed to give him the benefit of the evidentiary presumption enunciated in *Parsons*.

The Commission found that Dr. Vire "determined that Plaintiff's bilateral hernias caused by the November 22, 2010 [compensable] injury would have been fully

[3] In *Bondurant*, the plaintiff suffered two compensable hernias, both of which were surgically repaired. 167 N.C. App. at 261, 606 S.E.2d at 346-47. The plaintiff later suffered three additional hernias while he was no longer in the employ of the defendant. *Id.* at 261-62, 606 S.E.2d at 347. On appeal to this Court, the plaintiff challenged the Commission's conclusion that his three subsequent hernias were governed by and failed the statutory test for the compensability of hernias, and that the subsequent hernias were not natural and direct results of the earlier compensable hernias. *Id.* at 265, 606 S.E.2d at 349; s*ee* N.C. Gen. Stat. § 97-2(18) (requiring, *inter alia*, that a hernia appear suddenly and be the immediate and direct result of a work-related accident or specific traumatic incident of work assigned by the defendant-employer). This Court rejected the plaintiff's argument that the Commission erred by applying the test set out in section 97-2(18) instead of applying the rule recognized in *Heatherly v. Montgomery Components, Inc.*, 71 N.C. App. 377, 379-80, 323 S.E.2d 29, 30 (1984) (citations omitted): "[W]hen the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury arises out of the employment, unless it is the result of an independent intervening cause attributable to claimant's own intentional conduct." The *Bondurant* Court reasoned that "[e]ven if [we] . . . were to conclude that *Heatherly* controls, plaintiff's argument nevertheless fails as [expert medical testimony established] that just because a person has undergone a hernia repair, it does not necessarily follow that the person will have another hernia." *Bondurant*, 167 N.C. App. at 266, 606 S.E.2d at 350.

healed by May 18, 2013[,]" and that "Dr. Ketoff agreed that the medical records from Dr. Vire and Dr. Williams indicated that Plaintiff had recovered from his March 22, 2011 hernia repairs." Based on these and other findings, and applying "the reasoning in *Bondurant*" and "the statutory test enumerated in [section] 97-2(18)[,]" the Commission concluded that because "[t]he competent, credible evidence establishes that Plaintiff had fully healed from his initial hernia surgery with Dr. Vire [on] March 22, 2011 when he subsequently sustained acute injuries to his bilateral groin in 2013 and 2014," Anders' recurrent hernias were not compensable.

It is well established that an employee who seeks workers' compensation benefits must prove that a causal relationship exists between the injury suffered and the work-related accident. *Hedges v. Wake Cty. Pub. Sch. Sys.*, 206 N.C. App. 732, 734, 699 S.E.2d 124, 126 (2010), *disc. review denied*, 365 N.C. 77, 705 S.E.2d 746 (2011). But in *Parsons*, this Court held that where the Commission has determined that an employee has suffered a compensable injury, a rebuttable presumption arises that additional medical treatment is causally related to the original injury. 126 N.C. App. at 542, 485 S.E.2d at 869. "The presumption of compensability applies to future symptoms allegedly related to the original compensable injury." *Perez v. Am. Airlines/AMR Corp.*, 174 N.C. App. 128, 136 n.1, 620 S.E.2d 288, 293 n.1 (2005). In this context, the burden of proof is shifted from the employee to the employer "to prove the original finding of compensable injury is unrelated to [the employee's]

present discomfort." *Parsons*, 126 N.C. App. at 542, 485 S.E.2d at 869. Put another way, the employer must produce "evidence showing the [current] treatment is not directly related to the compensable injury." *Reinninger v. Prestige Fabricators, Inc.*, 136 N.C. App. 255, 259, 523 S.E.2d 720, 723 (1999) (citation omitted). If the employer, however, "rebuts the *Parsons* presumption, the burden of proof shifts back to the [the employee]." *Miller v. Mission Hosp., Inc.*, 234 N.C. App. 514, 519, 760 S.E.2d 31, 35 (2014) (citation omitted).

In the present case, Anders sought additional medical treatment for recurring hernias allegedly caused by his 2010 work-related injury. By filing a Form 60, defendants admitted the compensability of the 2010 injury. *Perez*, 174 N.C. App. at 136, 620 S.E.2d at 293 (holding that the *Parsons* presumption applies when an employer has admitted compensability of the original injury by filing a Form 60). As a result, defendants bore the burden on the issue of whether Anders was entitled to additional medical compensation. Deputy Commissioner Stephenson correctly applied the *Parsons* presumption in her Opinion and Award before concluding that defendants had "successfully rebutted Plaintiff's presumption that the recurrent hernias are related to the original compensable hernias." The Full Commission, however, clearly failed to give Anders the benefit of the *Parsons* presumption. Instead, the burden of proving causation was placed on Anders, despite defendants' prior admission of compensability through the filing of a Form 60. Accordingly, we

conclude that the Commission's conclusions concerning causation must be vacated, and that this matter must be remanded to the Commission so that it can apply the *Parsons* presumption and make a new determination as to whether Anders' recurrent hernias were causally related to his November 2010, work-related injury. *See Wilkes*, __ N.C. at __, __ S.E.2d at __, 2017 WL 2492779, at *8 (affirming the Court of Appeals' decision to vacate the portion of an opinion and award that determined the employee's psychological symptoms were not related to his original compensable injury, and to remand so that the Commission could apply the *Parsons* presumption to that issue); *Reinninger*, 136 N.C. App. at 260, 523 S.E.2d at 724 ("[T]he Commission['s findings indicate that it] failed to give Plaintiff the benefit of the presumption that his medical treatment now sought was causally related to his 1995 compensable injury. . . . Because Plaintiff was entitled to such a presumption [under *Parsons*], we remand this case to the Commission for a new determination of causation.").

This case is unique in that Anders' medical claims are barred by section 97-25.1 and the *Parsons* presumption "arises in the context of medical compensation." *Wilkes*, __ N.C. at __, __ S.E.2d at __, 2017 WL 2492779 at *5. We also recognize that "[e]stablishing disability is a separate question from establishing the compensability of an injury[,]" *Gonzalez v. Tidy Maids, Inc.*, 239 N.C. App. 469, 478, 768 S.E.2d 886, 894 (2015), and that the *Parsons* presumption relates to the latter. *Wilkes*, __ N.C. at __, __ S.E.2d at __, 2017 WL 2492779 at *5 ("This presumption that additional

medical treatment is directly related to the compensable injury has since become known as the '*Parsons* presumption.' ") (citation omitted). Here, section 97-25.1 presents an independent bar to Anders' medical claims. But on remand, Anders should still be given the presumption that there was a causal connection between the medical treatment he sought for his recurrent hernias and the hernia injury that he suffered while employed by Universal Leaf. As we have already held, a determination of whether Anders has proven that his incapacity to earn wages after his recurrent hernia surgeries was causally related to his original compensable hernia injury *will determine* whether he can receive any temporary total disability benefits. *See Medlin*, 367 N.C. at 422, 760 S.E.2d at 737 (specifying that a claimant must satisfy *Hillard*'s third element "by proving that his inability to obtain equally well-paying work is because of his work-related injury"). Accordingly, we conclude that on remand Anders is entitled to the rebuttable presumption that his recurring hernias and the surgeries undertaken to correct them were directly related to his original compensable injury. If defendants rebut the *Parsons* presumption, the burden of proof as to causation will shift back to Anders. *Miller*, 234 N.C. App. at 519, 760 S.E.2d at 35.

IV. Conclusion

Anders' claim for additional medical compensation is barred by the provisions of section 97-25.1. The Commission also properly concluded that Anders was not

entitled to permanent partial impairment benefits under section 97-31. However, because the Commission failed to give Anders the benefit of the *Parsons* presumption, we vacate the portion of the Opinion and Award concerning causation and we remand this matter so that the presumption may be applied. As explained above, if Anders partially or wholly prevails on the causation issue, he will be entitled to temporary total disability indemnity benefits for either one or both of the short periods that followed his recurrent hernia surgeries. The remainder of the Commission's Opinion and Award is affirmed.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

Judges ELMORE and DILLON concur.

Report per Rule 30(e).