IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-1301

Filed: 3 November 2015

North Carolina Industrial Commission, I.C. No. Y11706

MICHAEL VOGEL, Employee, Plaintiff,

v.

FOOD LION, LLC/DELHAIZE AMERICA, INC., Employer, SELF-INSURED (RISK MANAGEMENT SERVICES, INC., Third-Party Administrator), Defendants.

Appeal by plaintiff and defendants from opinion and award entered 1 August 2014 by the North Carolina Industrial Commission. Heard in the Court of Appeals 7 April 2015.

Laura S. Jenkins, PC, by Laura S. Jenkins, for plaintiff.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Brooke A. Mulenex and M. Duane Jones, for defendants.

GEER, Judge.

Both plaintiff Michael Vogel and defendants Food Lion, LLC/Delhaize America, Inc., and Risk Management Services, Inc. appeal from an opinion and award of the Industrial Commission awarding plaintiff temporary total disability compensation from 10 June 2012 until 29 November 2012 for an injury to his lower back. On appeal, plaintiff primarily argues that the Commission erred in finding,

pursuant to the test articulated in *Seagraves v. Austin Co. of Greensboro*, 123 N.C. App. 228, 472 S.E.2d 397 (1996), that plaintiff's employment with defendant-employer was terminated for reasons unrelated to his compensable injury. However, this finding is supported by competent evidence in the record and is, therefore, binding on appeal.

Defendants primarily argue that the Commission erred in awarding temporary total disability benefits after plaintiff was terminated on 7 September 2012, despite its finding that the termination was unrelated to his injury. We agree. Once the Commission determined that plaintiff's termination was unrelated to his workers' compensation claim and that his conduct would have resulted in termination of a non-disabled employee, plaintiff was only entitled to continued disability benefits if he could show that his inability to find employment was due to his compensable injury. The Commission failed to make a finding whether plaintiff met this burden, and, therefore, its findings are insufficient to support its conclusion that plaintiff was entitled to disability benefits after 7 September 2012. We reverse and remand for a determination whether plaintiff met his burden of showing that his failure to find employment from 7 September 2012 until 29 November 2012 was due to his back injury.

Facts

At the time of the hearing, plaintiff was 53 years old. He has a bachelor's and a master's degree in business administration. He began working for defendant-employer on 12 May 2003 as a store manager and was eventually promoted to a district manager.

Plaintiff initially received satisfactory performance evaluations from defendant-employer, but later began to receive reviews that indicated a need for improvement. In an annual appraisal completed on 18 March 2011, plaintiff's supervisor found that plaintiff met the requirements of his job, but noted that his team "[did] not feel valued and trusted" and felt that plaintiff was "not approachable and open to discuss their needs." On 19 December 2011, plaintiff received a Report of Verbal Counseling from his supervisor, Tracey Herrmann, for his failure to complete an actionable development plan. Ms. Herrmann completed plaintiff's annual appraisal on 10 February 2012 and determined that overall plaintiff did not meet expectations.

On 6 June 2012, Ms. Herrmann completed a Performance Counseling Form that indicated that plaintiff would be discharged from his position as district manager due to his continued inability to create fellowship. Ms. Herrmann scheduled a meeting with plaintiff for 11 June 2012 to discuss his performance issues and the Report of Verbal Counseling.

On 10 June 2012, while plaintiff was demonstrating cleaning techniques to an employee, he experienced a sharp pain in his lower back. He presented to CHC Urgent Care and was diagnosed with acute low back pain with sciatica. He was released from work from 10 June 2012 until 7 August 2012. Because of this, the 11 June 2012 meeting with Ms. Herrmann did not take place.

On 12 June 2012, plaintiff was seen at Pro Med Salisbury and was diagnosed with sciatica. He was referred for physical therapy and assigned sedentary restrictions with limited walking and standing, and no driving. On 3 July 2012, plaintiff had an appointment with Todd Kennedy, a physician's assistant at Carolina Spine & Hand Center working under the supervision of Dr. Jeffrey Baker, an orthopedic surgeon. Mr. Kennedy diagnosed plaintiff with lumbosacral disc degeneration and referred him for an EMG and injections at L3-4 and L4-5 for diagnostic and therapeutic purposes.

Defendants accepted the compensability of the injury by filing a Form 60 on 16 July 2012. On 6 August 2012, defendant-employer offered plaintiff temporary employment in a light duty position with plaintiff performing sedentary work. On 7 August 2012, Mr. Kennedy assigned plaintiff sedentary light duty restrictions.

On 9 August 2012, plaintiff presented to Dr. Michael Meighen, a physical medicine and rehabilitation specialist at OrthoCarolina, upon referral of Dr. Baker. Dr. Meighen performed an EMG study that he concluded was normal and without

any evidence of radiculopathy. Plaintiff presented to Dr. Meighen again on 15 August 2012 with complaints of continued back and right-side pain. Dr. Meighen believed that plaintiff's main problem was likely either muscular or mechanical in origin and that there was nothing acutely abnormal. He diagnosed plaintiff with low back pain, referred him for physical therapy, and assigned restrictions of no lifting over 25 pounds with limited twisting, turning, bending, and rotating.

Plaintiff worked in the light duty position from 7 August 2012 until 6 September 2012, at which time he was allowed to return to work with restrictions of no lifting greater than 25 pounds. On 7 September 2012, plaintiff met with Ms. Herrmann to discuss the Report of Verbal Counseling. Plaintiff was terminated from his job as district manager and given 30 days to locate a new position with defendant-employer. Plaintiff was unable to find another position with defendant-employer and on 15 November 2012, plaintiff entered into a severance agreement with defendant-employer under which he was paid 10 weeks of severance pay.

Plaintiff returned to Dr. Meighen on 1 October 2012. Dr. Meighen noted that plaintiff was progressing slowly and recommended an aggressive home exercise program, encouraged plaintiff to increase his activity level, and continued his restrictions of no lifting over 25 pounds. He scheduled a reevaluation for four weeks later, at which point he anticipated releasing plaintiff from his care and to full duty work without restrictions. Plaintiff missed the scheduled appointment with Dr.

Meighen on 1 November 2012. At an appointment on 29 November 2012, Dr. Meighen noted that an MRI did not reveal any evidence of acute abnormalities and plaintiff's nerve studies were normal. Dr. Meighen believed that plaintiff had reached maximum medical improvement and retained a 0% permanent partial disability rating. He released plaintiff to full duty work without restrictions.

On 1 May 2013, plaintiff presented to Dr. John Welshofer, a physical medicine and rehabilitation specialist at Carolina Neurosurgery & Spine, for a second opinion evaluation. Dr. Welshofer confirmed that the treatment plaintiff had previously received was appropriate and diagnosed him with sciatica and L3-4 and L4-5 degenerative disc disease. Dr. Welshofer recommended a flexion-estension CT myelogram and a repeat EMG, and pain management. He assigned plaintiff a 5% permanent partial impairment rating and sedentary restrictions of no lifting greater than 10 pounds until the testing could be completed. The CT scan and myelogram of plaintiff's lumbar spine were performed on 18 July 2013 and revealed mild to moderate stenosis at L3 through L5, and the fusion at L4-5 was without significant stenosis.

A hearing was held before the deputy commissioner on 16 April 2013, and an opinion and award was entered 16 January 2014 awarding plaintiff temporary total disability compensation from 10 June 2012 through 29 November 2012. Both parties appealed, and the Full Commission affirmed with minor modifications in an opinion

and award entered 1 August 2014. The Commission found that plaintiff was terminated on 7 September 2012 for reasons unrelated to his workers' compensation claim and that plaintiff was capable of performing his regular job duties as of 29 November 2012. Based upon these findings, the Commission awarded plaintiff temporary total disability compensation at a rate of $862.00 per week from 10 June 2012 through 29 November 2012. Both parties timely appealed to this Court.

Discussion

Review of an opinion and award of the Industrial Commission "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) (internal citation omitted) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)).

On appeal, defendants concede that plaintiff was totally disabled from 10 June 2012 until 6 August 2012, and plaintiff does not challenge the Commission's finding that he was no longer disabled after 29 November 2012 when he was released to work without restrictions. The parties disagree as to whether the Commission properly

found that defendant was entitled to total disability compensation from 7 August 2012 until 29 November 2012.

Disability is "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." N.C. Gen. Stat. § 97-2(9) (2013). " 'Under the Workmen's Compensation Act disability refers not to physical infirmity but to a diminished capacity to earn money.' " *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 434-35, 342 S.E.2d 798, 804 (1986) (quoting *Ashley v. Rent-A-Car Co.*, 271 N.C. 76, 84, 155 S.E.2d 755, 761 (1967)).

Defendants first argue that the findings are insufficient to show that plaintiff was totally disabled from 8 August 2012 until 6 September 2012 because plaintiff returned to work for defendant-employer in a temporary light duty position and earned his pre-injury wages during this timeframe. However, "the fact that an employee is capable of performing employment tendered by the employer is not, as a matter of law, an indication of plaintiff's ability to earn wages." *Saums v. Raleigh Cmty. Hosp.*, 346 N.C. 760, 764, 487 S.E.2d 746, 750 (1997).

As explained in *Peoples*, 316 N.C. at 438, 342 S.E.2d at 806:

> If the proffered employment does not accurately reflect the person's ability to compete with others for wages, it cannot be considered evidence of earning capacity. Proffered employment would not accurately reflect earning capacity if other employers would not hire the employee with the employee's limitations at a comparable wage level. The same is true if the proffered employment is so modified because of the employee's limitations that it is not

> ordinarily available in the competitive job market. The rationale behind the competitive measure of earning capacity is apparent. If an employee has no ability to earn wages competitively, the employee will be left with no income should the employee's job be terminated.

On the other hand, "[i]f the proffered job is generally available in the market, the wages earned in it may well be strong, if not conclusive, evidence of the employee's earning capacity." *Id.* at 440, 342 S.E.2d at 807.

In this case, the Commission found that plaintiff returned to work in a temporary light duty position provided by defendant-employer from 7 August 2012 through 6 September 2012, but it did not make any findings with respect to whether the proffered employment was available in the competitive job market at a comparable wage level. Such findings are necessary in order to determine plaintiff's earning capacity during this timeframe. Therefore, we conclude that the findings are insufficient to support the conclusion that plaintiff was totally disabled from 7 August 2012 until 6 September 2012. We reverse and remand for further findings of fact. *See Baker v. Sam's Club*, 161 N.C. App. 712, 716, 589 S.E.2d 387, 390-91 (2003) (remanding for further findings of fact where Commission failed to make any findings regarding whether plaintiff's post-injury employment by defendant accurately reflected plaintiff's ability to earn wages in the competitive marketplace).

The parties next challenge whether the Commission properly applied the test established in *Seagraves* to determine that plaintiff was entitled to total disability

compensation after his employment was terminated on 7 September 2012. The *Seagraves* test is used to determine whether an injured employee has the right to continued workers' compensation benefits after being terminated for misconduct. As explained by our Supreme Court:

> [U]nder the *Seagraves'* test, to bar payment of benefits, an employer must demonstrate initially that: (1) the employee was terminated for misconduct; (2) the same misconduct would have resulted in the termination of a nondisabled employee; and (3) the termination was unrelated to the employee's compensable injury.

McRae v. Toastmaster, Inc., 358 N.C. 488, 493, 597 S.E.2d 695, 699 (2004).

"An employer's successful demonstration of such evidence 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). Thus, an employee is "entitled to benefits if he or she can demonstrate that work-related injuries, and not the circumstances of the employee's termination, prevented the employee from either performing alternative duties or finding comparable employment opportunities." *Id.* at 494, 597 S.E.2d at 699.

Plaintiff first argues that *Seagraves* does not apply to this case because the Commission's findings show that the conduct that formed the basis of plaintiff's

termination occurred before the date of his injury and did not constitute "misconduct," but rather "poor work performance." We disagree. The *Seagraves* test applies whenever an employee is terminated "for misconduct *or other fault on the part of the employee*" and simply requires the employer to show that the "misconduct or fault [was] unrelated to the compensable injury[.]" 123 N.C. App. at 233, 234, 472 S.E.2d at 401 (emphasis added). The fact that the events forming the basis for plaintiff's termination occurred prior to his compensable injury supports the Commission's conclusion that his termination was unrelated to the injury. Additionally, plaintiff has cited no authority to support his contention that *Seagraves* only applies when an employee is terminated for certain types of misconduct. Indeed, in *McRae*, the Supreme Court applied *Seagraves* when the claimant was terminated for failure to perform her work duties. 358 N.C. at 489-90, 597 S.E.2d at 697. The basis for termination in this case -- "failure to comply with defendant-employer's requirements . . . and other work-related issues" -- is materially indistinguishable from the basis for termination in *McRae*, to which the *Seagraves* test applied. Accordingly, we hold that *Seagraves* applies to this case.

We now turn to whether the Commission applied *Seagraves* properly. The Commission found that defendants met their initial burden of showing that the first three elements of the *Seagraves* test were met. Specifically, it found that "plaintiff was terminated on 7 September 2012, for failure to comply with defendant-employer's

requirements by failing to prepare an actionable development plan and other work-related issues. The Industrial Commission further found that plaintiff's termination was unrelated to his workers' compensation claim as the events leading to his termination were documented prior to the 10 June 2012 work injury and would have resulted in termination of a non-disabled employee."

Plaintiff argues that there is insufficient evidence to support the Commission's finding that his termination was unrelated to his work-related injury. We disagree. The evidence in the record shows that on 19 December 2011, plaintiff was given a Report of Verbal Counseling for his failure to complete an actionable development plan. The report specified that plaintiff's supervisor determined in July 2011 that plaintiff would be placed on a development plan and, after several meetings in September, October, and November, plaintiff had failed to develop an adequate plan, or to set up a meeting on 7 December 2011 that he was asked to arrange. Plaintiff's supervisor, Tracey Herrmann, completed plaintiff's annual appraisal on 10 February 2012 in which she determined that plaintiff had not met expectations. Specifically, Ms. Hermann noted that plaintiff's "team feels that he is often negative about a company initiative and it is conveyed in his communication -- often leaving his team confused as if they should follow the corporate directive or not[;]" plaintiff is "not flexible or open to other suggested means of getting to an outcome[;]" plaintiff "lead[s]

by fear[;]" and plaintiff's team often "feel[s] that he does not care about the associates, just the bottom line."

On 6 June 2012, Ms. Herrmann completed a Performance Counseling Form indicating that on 4 June 2012, plaintiff failed to promote the brand strategy as he had been directed at the district level Food Lion Brand Strategy meeting. The form concluded that "[t]he incident on June 4th is another example of [plaintiff's] inability to create fellowship. Because of this, effective immediately, [plaintiff] can not [sic] continue in his role of District Manager." This evidence is competent evidence that supports the Commission's finding that plaintiff was terminated for reasons unrelated to his 10 June 2012 injury.

Plaintiff, however, points to evidence that in his nine years of employment at Food Lion, the February 2012 review was the first that he had received anything other than "meets expectations" or "exceeds expectations;" that Ms. Herrmann "offered no specifics as to how the Plaintiff had failed to meet expectations[;]" and that Ms. Herrmann had only been plaintiff's supervisor for less than a year. Plaintiff also calls into question whether Ms. Herrmann had a valid basis for writing the 19 December 2011 Report of Verbal Counseling. Plaintiff points to his own testimony that the development plan was not due until 31 December 2011 and that when he met with Ms. Herrmann on 19 December 2011, he in fact turned in a development

plan, but Ms. Herrmann "barely looked at it and went on with the warning that she had already planned to give."

Plaintiff also asserts that his termination violated defendant-employer's human relations policy because they did not give him two written notices before terminating him. Plaintiff concludes by stating that "[p]laintiff's testimony is uncontroverted as to these employment issues, as Defendants offered no testimony, and therefore the Commission's finding of fact/conclusion of law on this *Seagraves* issue must be overturned because there is no competent evidence to support said finding." (Emphasis omitted.)

Plaintiff's arguments all go to the weight and credibility of the evidence, which are issues solely to be decided by the Commission and are not within the jurisdiction of this Court to determine. *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). It does not matter that defendants did not offer any testimony to counter plaintiff's testimony regarding the employment issues because the record contains documentary exhibits, described above, that provide competent evidence in support of the Commission's conclusion. Furthermore, it is well established that "[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." *Ward v. Beaunit Corp.*, 56 N.C. App. 128, 136, 287 S.E.2d 464, 468 (1982). This is true " 'even if the testimony is uncontradicted.' " *Chaisson v. Simpson*, 195 N.C. App. 463, 470,

673 S.E.2d 149, 156 (2009) (quoting *Hassell v. Onslow Cnty. Bd. of Educ.*, 362 N.C. 299, 307, 661 S.E.2d 709, 715 (2008)).

While the evidence that plaintiff highlights is relevant to determining the reason for plaintiff's termination, it is well settled that this Court " 'does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding.' " *Matthews v. City of Raleigh*, 160 N.C. App. 597, 599-600, 586 S.E.2d 829, 833 (2003) (quoting *Adams v. AVX Corp.,* 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998)). We hold that there is sufficient evidence to support the Commission's finding that the first three elements of the *Seagraves* test were met.

Therefore, plaintiff is only entitled to disability benefits subsequent to his termination on 7 September 2012 if he can " '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.' " *McRae*, 358 N.C. at 494, 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 shifts to plaintiff to re-establish that he suffers from a disability." *Williams v. Pee Dee Electric Membership Corp.*, 130 N.C. App. 298, 303, 502 S.E.2d 645, 648 (1998).

In *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982), our Supreme Court set out the three factual elements that a plaintiff must prove 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."

Recently, in *Medlin v. Weaver Cooke Constr., LLC*, 367 N.C. 414, 422, 760 S.E.2d 732, 737 (2014), the Supreme Court "reaffirm[ed] that a claimant seeking to establish that he is legally disabled must prove all three statutory elements as explained in *Hilliard*." With respect to the third element, causation, the Supreme Court explained:

> Because the focus is on earning capacity, broad economic conditions, as well as the circumstances of particular markets and occupations, are undoubtedly relevant to whether a claimant's inability to find equally lucrative work was because of a work-related injury. Whether in a boom or bust economy, a claimant's inability to find equally lucrative work is a function of both economic conditions and his specific limitations. Both factors necessarily determine whether a specific claimant is able to obtain employment that pays as well as his previous position; the Commission makes this determination based on the evidence in the individual case.

Id. at 422-23, 760 S.E.2d at 737-38.

Defendants argue that the Commission failed to make any finding regarding whether plaintiff met his burden of showing that his failure to find employment after his termination was due to his compensable injury. We agree. The Commission found

only that "[f]rom 29 October 2012 and continuing through the date of the hearing before the Deputy Commissioner, plaintiff conducted a reasonable albeit unsuccessful job search. . . . Plaintiff was released to work without restrictions by his treating physician, Dr. Meighen, on 29 November 2012. Plaintiff presented no evidence to show his inability to find or hold employment *after this date* was due to any work-related disability." (Emphasis added.) This finding does not address whether plaintiff's inability to find work from the date of his termination on 7 September 2012 until his release to work without restrictions on 29 November 2012 was due to his injury. Therefore, the finding is insufficient under *Seagraves* to show that plaintiff was entitled to disability benefits during this timeframe. Accordingly, we reverse and remand to the Full Commission for further findings of fact.

If, on remand, the Commission determines that plaintiff did not meet his burden, he is not entitled to disability compensation for this timeframe. *See McRae*, 358 N.C. at 500, 597 S.E.2d at 703 (after remanding for further findings of fact regarding whether defendant-employer met initial burden under *Seagraves* test, instructing that "[i]f, upon remand, the Commission properly concludes that the evidence presented shows that defendant terminated plaintiff without regard to her injuries, we instruct the Commission to then determine whether plaintiff has shown, by the greater weight of the evidence, *that her work-related injuries prevented her*: (1) from performing her duties as a UPC labeler, or (2) from finding alternative

commensurate employment" and explaining that plaintiff was entitled to benefits only if she makes such a showing (emphasis added)). *See also Williams*, 130 N.C. App. at 303, 502 S.E.2d at 648 (remanding for further findings regarding whether defendant-employer met initial burden under *Seagraves*, and instructing Commission, in the event it found defendants met initial burden, that burden shifts to plaintiff to show "that he cannot, *because of injury*, find and hold a suitable job with another employer that enables him to earn wages at pre-injury levels" (emphasis added)).

Plaintiff next argues that the Commission erred in calculating plaintiff's average weekly wage because it did not include a payment made by defendant-employer to plaintiff in June 2011 for relocation expenses. The record shows that the parties entered a pretrial agreement in which they stipulated that "plaintiff's average weekly wage at the time of injury was $1944.57[.]" Our Supreme Court has held that a "stipulation [that is] approved by the Commission . . . is binding absent a showing that 'there has been error due to fraud, misrepresentation, undue influence or mutual mistake . . . .' " *Little v. Anson Cnty. Sch. Food Serv.*, 295 N.C. 527, 534, 246 S.E.2d 743, 747 (1978) (quoting N.C. Gen. Stat. § 97-17 (1977)).

This Court addressed when a stipulation may be set aside on the grounds of mutual mistake in *Swain v. C & N Evans Trucking Co.*, 126 N.C. App. 332, 484 S.E.2d 845 (1997). In *Swain*, the plaintiff suffered a compensable injury and entered a Form

21 Agreement with his employer and his employer's workers' compensation carrier which provided that the plaintiff's average weekly wage at the time of his injury was $1,469.58. *Id.* at 333, 484 S.E.2d at 846. The agreement was approved by the Commission. *Id.* The Commission later set aside the agreement because when it was entered, "both parties 'were operating under a mutual mistake of fact as to plaintiff's average weekly wage.' " *Id.* at 334, 484 S.E.2d at 847.

On appeal, this Court explained that, pursuant to N.C. Gen. Stat. § 97-17, "the Commission may set aside a Form 21 Agreement if it appears that the agreement was entered into under a mutual mistake of fact." *Swain*, 126 N.C. App. at 335, 484 S.E.2d at 848. However, because "[a] mistake of law ordinarily does not affect the validity of a contract," such a mistake cannot support rescission of the agreement unless "the mistake of law is attended by fraud, misrepresentation, undue influence, or abuse of a confidential relationship." *Id.* (internal quotation marks omitted). The Court then held that the error in calculating the plaintiff's average weekly wages involved an error of law, not an error of fact, because "[t]he determination of the plaintiff's 'average weekly wages' requires application of the definition set forth in the Workers' Compensation Act, N.C.G.S. § 97-2(5) (1991), and the case law construing that statute and thus raises an issue of law, not fact." *Id.* at 335-36, 484 S.E.2d at 848. Therefore, this Court held that "[b]ecause there is no evidence of fraud, misrepresentation, undue influence or abuse of a confidential relationship, any

mistake made by either or both of the parties to the Agreement in the computation of the 'average weekly wages' is not a basis for setting it aside." *Id.* at 336, 484 S.E.2d at 848.

The pretrial agreement in this case was approved by the Commission. Pursuant to *Swain*, any mistake made by the parties in computing plaintiff's average weekly wage constitutes a mutual mistake of law. Therefore, the agreement may only be set aside if plaintiff makes a showing of fraud, misrepresentation, or undue influence. Plaintiff has failed to make any such showing. Accordingly, we affirm the Commission's finding with respect to plaintiff's average weekly wage.

Plaintiff's final argument on appeal is that the Commission erred by designating Dr. Meighen as plaintiff's authorized treating physician. "Generally, an employer has the right to direct the medical treatment for a compensable work injury." *Craven v. VF Corp.*, 167 N.C. App. 612, 616, 606 S.E.2d 160, 163 (2004). This right attaches as soon as the employer accepts the claim as compensable and includes the right to select the treating physician. *Id.* at 617, 606 S.E.2d at 163. If the employee wishes to select a different treating physician, such a change must be approved by the Commission. N.C. Gen. Stat. § 97-25(c) (2013). "In order for the Commission to grant an employee's request to change treatment or health care provider, the employee must show by a preponderance of the evidence that the change is reasonably necessary to effect a cure, provide relief, or lessen the period of

disability." *Id.* This Court reviews for abuse of discretion the Commission's decision whether to grant the employee's request to change treating physician. *Lakey v. U.S. Airways, Inc.*, 155 N.C. App. 169, 174, 573 S.E.2d 703, 707 (2002).

Here, the Commission concluded that "Dr. Meighen shall remain plaintiff's authorized treating physician," but it did not make any findings addressing whether plaintiff met his burden of showing that a change in physicians is "reasonably necessary to effect a cure, provide relief, or lessen the period of disability." N.C. Gen. Stat. § 97-25(c). This Court has explained that even when a decision is reviewed for abuse of discretion, the order must nevertheless contain "sufficient findings of fact and conclusions of law to allow the reviewing court to determine whether a judgment, and the legal conclusions that underlie it, represent a correct application of the law." *Spicer v. Spicer*, 168 N.C. App. 283, 287, 607 S.E.2d 678, 682 (2005). The opinion and award in this case does not contain any findings that explain why it denied plaintiff's request to change physicians or that indicate that it applied the correct legal standard in doing so.

Additionally, we note that the Commission's findings show that although plaintiff continued to report lower back pain at his 29 November 2012 appointment, Dr. Meighen "released plaintiff from his care and noted that no further appointments were to be scheduled by the adjuster or OrthoCarolina without his written and/or verbal approval." In other words, Dr. Meighen had no further treatment to offer

plaintiff. We note that under similar circumstances, this Court has affirmed the Commission's granting of an employee's request to change physicians. *See Lakey*, 155 N.C. App. at 174, 573 S.E.2d at 707 (holding Commission did not abuse its discretion in granting employee's request to change authorized treating physician where employee "was released to work by her approved physician while still suffering from pain"). Because it is unclear why the Commission denied plaintiff's request for a new treating physician, we must remand for further findings of fact.

Conclusion

In conclusion, we hold that pursuant to *Peoples*, the Commission's findings are insufficient to support its conclusion that plaintiff was totally disabled from 7 August 2012 until 6 September 2012 during the time he was employed by defendant-employer in a temporary light duty position. We remand for further findings of fact regarding whether the employment proffered by defendant-employer was available in the competitive job market at a comparable wage level. With respect to whether plaintiff was disabled after his termination on 7 September 2012 until he was released to work without restrictions on 29 November 2012, we hold that there is competent evidence to support the Commission's finding that plaintiff's termination was unrelated to his compensable injury. However, we remand for further findings of fact regarding whether plaintiff met his burden of showing that his inability to find employment from 7 September 2012 until 29 November 2012 was due to his injury.

We also remand for further findings as to whether plaintiff has met his burden of showing that a change in physician is "reasonably necessary to effect a cure, provide relief, or lessen the period of disability." N.C. Gen. Stat. § 97-25(c). Finally, we affirm as to plaintiff's average weekly wage.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Judges ELMORE and DILLON concur.

Report per Rule 30(e).