NO. COA10-1331
NORTH CAROLINA COURT OF APPEALS

Filed: 4 October 2011

JOHN CARL ROSENBERGER,
Employee,
Plaintiff,

v.

CITY OF RALEIGH, Employer,
SELF-INSURED (PMA, Third-Party Administrator),
Defendant.

North Carolina
Industrial Commission
I.C. No. 978106

Appeal by plaintiff from opinion and award entered 7 September 2010 by the North Carolina Industrial Commission. Heard in the Court of Appeals 23 March 2011.

Younce & Vtipil, P.A., by Robert C. Younce, Jr., for plaintiff-appellant.

Teague, Campbell, Dennis & Gorham, by Tamara R. Nance, for defendant-appellee.

GEER, Judge.

Plaintiff John Carl Rosenberger appeals from the Industrial Commission's opinion and award terminating his workers' compensation benefits. Although plaintiff challenges a number of the Commission's findings, competent evidence supports those

findings, which, in turn, support the Commission's conclusions that plaintiff's employer, defendant City of Raleigh ("the City"), rebutted the presumption of continuing disability by showing that suitable jobs have been available for plaintiff, that plaintiff is capable of earning wages, and that plaintiff is not entitled to further benefits under N.C. Gen. Stat. § 97-29 (2009). We, therefore, affirm.

Facts

Plaintiff has a high school education and completed some community college course work prior to starting work for the City in November 1997. On 18 October 1999, plaintiff, who was employed by the City's Public Utilities Department as an Equipment Operator I, sustained injuries to his head, neck, and shoulders when he was hit on the head by the tailgate of a dump truck.

Plaintiff suffered a traumatic C1 fracture and was placed in a halo for three months. On 2 November 1999, plaintiff and the City entered into a Form 21 agreement that provided for payment of temporary total disability benefits beginning 26 October 1999 and continuing for necessary weeks. On 28 March 2000, plaintiff's physician released him to return to work in the medium physical demand category with lifting up to 50 pounds and pushing/pulling up to 200 pounds. Plaintiff returned to

work for the City on 9 April 2000 and continued to work for almost two years.

Plaintiff was, however, taken out of work from 14 January 2002 through 22 January 2002 and from 13 March 2002 until 10 July 2003. The City reinstated temporary total disability benefits, which continued until plaintiff returned to work again on 10 July 2003. Plaintiff continued to work for the City until he underwent neck surgery with Dr. Dennis Bullard on 25 February 2005. The following month, the parties entered into a Form 26 Supplemental Agreement pursuant to which the City again agreed to pay temporary total disability benefits beginning 25 February 2005 and continuing for necessary weeks.

In February 2008, plaintiff filed a Form 33 request that his claim be assigned for hearing because the City had refused to pay for MRIs of the thoracic and lumbar areas. The City contended in response that plaintiff's thoracic and lumbar spine complaints were not causally related to plaintiff's compensable injury. In the pre-trial agreement, in addition to the issue of the compensability of the thoracic and lumbar conditions, plaintiff contended that the hearing should address whether plaintiff should be required to continue with a job search, while the City raised as an issue the question whether plaintiff

had fully cooperated with vocational rehabilitation and whether he should be ordered to cooperate.

On 18 December 2009, the deputy commissioner concluded that plaintiff was not entitled to compensation pursuant to N.C. Gen. Stat. §§ 97-29, 97-30, or 97-31 and that defendant could, therefore, terminate payment of benefits immediately. Plaintiff appealed to the Full Commission. In an opinion and award entered 7 September 2010, the Commission affirmed the deputy commissioner's opinion and award with modifications and made the following additional pertinent findings of fact.

In March 2002, plaintiff was experiencing headaches and ringing in the ears and underwent a neurocognitive evaluation by Dr. Robert Condor. During the evaluation, plaintiff exhibited neurocognitive deficits in several areas, including memory and concentration. Dr. Condor diagnosed anxiety disorder that he felt was impacting plaintiff's memory abilities. Dr. Condor noted in his report that it might be reasonable to reassess aspects of plaintiff's memory abilities in approximately six months, after plaintiff completed a course of biofeedback training. Nonetheless, no reassessment was ever done of plaintiff's neurocognitive function.

On 26 September 2005, seven months after plaintiff's successful surgery, Dr. Bullard released plaintiff to return to

work in the medium physical demand category, with lifting up to 50 pounds. In June 2006, plaintiff came under the care of Dr. Bentley for complaints of back pain and bilateral lower extremity tingling. Although, initially, Dr. Bentley recommended that plaintiff continue vocational rehabilitation within the medium work restrictions set out in the September 2005 FCE, he subsequently restricted plaintiff to no lifting over 10 pounds.

In December 2005, the City asked Lisa Parker, a certified rehabilitation counselor with Carolina Case Management, to provide vocational rehabilitation services to plaintiff. At this point, plaintiff had no restrictions on sitting, standing, or walking, and Dr. Bullard was of the opinion that he was capable of work involving lifting up to 50 pounds. The Commission found that from the outset Ms. Parker was met with resistance from plaintiff with plaintiff refusing to sign the individualized vocational plan Ms. Parker prepared, refusing to perform volunteer work, and failing to meet with an Employment Security Commission ("ESC") counselor to discuss possible job openings. Instead, plaintiff conducted his job search by reviewing the ESC online job postings.

Even though plaintiff had no restrictions on sitting or working an eight-hour day, plaintiff continually told Ms. Parker

he did not think he was capable of working eight hours or sitting in a classroom. He expressed an interest in taking estimating classes at Wake Tech, but after Ms. Parker obtained authorization from the City to pay for the classes, plaintiff refused to go because he did not think he was physically capable of attending class. He refused to sign up for a basic employment preparation class called STARS. When Ms. Parker suggested participating in a vocational evaluation at Community Workforce Solutions and advised plaintiff that among other things, it would help him build up his stamina, plaintiff told her that he thought his self-directed swimming and hot tub activities at Rex Wellness should be considered work hardening.

The Commission found that at various times, plaintiff described Ms. Parker's efforts as "'harassment'" and "'torture.'" When Ms. Parker met with plaintiff and his attorney in plaintiff's counsel's office to discuss non-compliance issues, plaintiff's counsel supported Ms. Parker's suggestions, prompting plaintiff to say that they had "'ganged up'" on him during the meeting. According to Ms. Parker, no matter what direction she tried to take, she received negative feedback from plaintiff.

In addition, the Commission found that from the outset, plaintiff had failed and/or refused to complete the independent

employer contacts that Ms. Parker included in his individualized vocational plan and which are typically required of every employee engaged in a job search. Rather than completing the independent employer contacts, plaintiff conducted his job search by reviewing online listings and newspapers. For more than two years, he turned in weekly logs that were virtually identical in that they usually listed the *News & Observer*, *Southside Shopper*, Craig's List, and the ESC website as having been reviewed with the notation "'nothing available within my restrictions.'" In fact, on at least one occasion, plaintiff turned in a job log to Ms. Parker that was just a carbon copy of one turned in previously, with the date changed. The Commission found that since most job ads do not go into great detail regarding the physical requirements of the job, there would be no way plaintiff could know whether a job was within his restrictions if he did not contact the employer directly.

The Commission found that Dr. Ann Neulicht, who was retained by defense counsel to perform a vocational evaluation, had reviewed all of Ms. Parker's reports and plaintiff's job logs and determined that plaintiff had completed only three independent employer contacts during the more than two-year period that Ms. Parker had been working with him. The Commission noted that Dr. Neulicht had reported that studies

show only 20% of available jobs are advertised, making independent employer contacts important.

In January 2008, plaintiff came under the care of Dr. Michael Gwinn at Carolina Back Institute. Dr. Gwinn recommended that plaintiff participate in a four-week interdisciplinary pain management program. As part of this program, plaintiff was offered psychological treatment with Dr. Dan Chartier. At the outset, Dr. Chartier observed that plaintiff was "'highly focused'" on the fact that he believed his lumbar and thoracic spine was also injured at the time of his 18 October 1999 injury, but had not been adequately addressed to date, and he was virtually obsessed with "'his past and imagined continued medical problems . . . .'" During the course of the program, Dr. Chartier noticed that plaintiff did not appear to be practicing the biofeedback training. At the conclusion of the program, Dr. Chartier stated that there were no further recommendations from a psychological standpoint and that "'it is very clear that [plaintiff] has his own agenda, and no doubt will carry that out to the best of his ability.'" Plaintiff's discharge recommendations were to continue a home exercise program, continue medications, and return to work with no lifting over 15 pounds and no frequent overhead work.

On 7 May 2008, Steve Carpenter completed a vocational evaluation at plaintiff's counsel's request. Mr. Carpenter administered several vocational tests, the results of which revealed that plaintiff was capable of reading, spelling, and math at the high school level; that his thought content was logical and coherent; that he exhibited no significant difficulty with memory, concentration, attention, recall, registration, calculation, abstraction, judgment, or other mental capacity areas related to vocational function; and that he scored above-average in ability to sustain gripping or gross handling tasks in the workplace. The Commission found that "[d]espite these results, and without reviewing a single report from Ms. Parker or talking to a single employer about [plaintiff] specifically, Mr. Carpenter concluded after spending approximately two hours with plaintiff and based in large part upon physical restrictions which were different from those assigned by Dr. Duncan and Dr. Gwinn at the conclusion of the four-week [pain management program], that plaintiff is not employable in any job at any functional level."

The Commission noted that Dr. Neulicht had reviewed all of Ms. Parker's reports, had conducted a labor market survey specific to plaintiff, and had followed up the labor market survey by directly consulting with employers. According to the

Commission, she was "able to identify several job opportunities that she felt were suitable for plaintiff." The Commission also found that over more than two years, Ms. Parker had been able to identify 131 job leads for plaintiff, none of which were proven by plaintiff to be unsuitable.

The Commission chose to give greater weight to the testimony of Ms. Parker and Dr. Neulicht rather than Mr. Carpenter. Based on the testimony of Ms. Parker and Dr. Neulicht, as well as plaintiff's work restrictions, the Commission found "it was not futile because of preexisting conditions such as age or education for plaintiff to look for other employment." Nonetheless, according to the Commission, plaintiff had not cooperated with vocational rehabilitation, had not put forth reasonable effort to obtain employment, and had not diligently sought other employment.

The Commission therefore found, "[b]ased upon the competent, credible evidence of record, . . . that there have been suitable jobs available for plaintiff and that he was capable of getting one, taking into account both his physical restrictions and vocational limitations." The Commission further found that "there existed a reasonable likelihood that plaintiff would have been hired during the course of the 2+ years that vocational rehabilitation services [had] been

offered, if he had put forth reasonable effort to obtain employment and had diligently sought other employment."

Based on these findings of fact, the Commission concluded (1) that the City had rebutted the presumption of continuing disability arising out of the Form 26 agreement, (2) that plaintiff was capable of earning wages, and (3) that he was not entitled to further benefits pursuant to N.C. Gen. Stat. § 97-29. The Commission further determined that plaintiff had reached maximum medical improvement and that the benefits he had received under N.C. Gen. Stat. § 97-29 exceeded those to which he would be entitled under N.C. Gen. Stat. § 97-31 (2009). The Commission therefore concluded that "plaintiff is not entitled to an award of compensation pursuant to N.C. Gen. Stat. §§97-29, 97-30, or 97-31." The Commission also concluded that plaintiff had failed to prove a causal connection between his thoracic spine complaints and his compensable injury and, therefore, he was not entitled to medical compensation for the thoracic spine complaints. Plaintiff timely appealed to this Court.

I

Plaintiff makes a number of challenges to the Commission's conclusion of law that plaintiff has "been capable of earning wages and is not entitled to further benefits pursuant to N.C. Gen. Stat. §97-29," as well as the findings of fact that support

that conclusion. Plaintiff first contends, with respect to the findings of fact, that the Commission erred in failing to find that Ms. Parker had the uncontradicted opinion that, given plaintiff's neurocognitive deficits and anxiety disorder, it is unlikely he will succeed in any retraining and that without substantial retraining plaintiff is not likely to be employable at a full-time job in the competitive job market at the same or similar wages as he had when he suffered his compensable injury.

"[T]he authority to find facts necessary for a worker's compensation award is vested exclusively with the [Commission], and . . . such findings must be upheld on appeal if supported by any competent evidence, even in the face of evidence to the contrary." *Errante v. Cumberland Cnty. Solid Waste Mgmt.*, 106 N.C. App. 114, 118, 415 S.E.2d 583, 585 (1992). It is well established that the Commission is "the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683-84 (1982). For this reason, the Commission "may, of course, properly refuse to believe particular evidence. It may accept or reject all or part of the testimony of . . . any . . . witness, and need not accept even uncontradicted testimony." *Pitman v. Feldspar Corp.*, 87 N.C. App. 208, 216, 360 S.E.2d 696, 700 (1987) (internal citation omitted).

In any event, plaintiff's assertion that Ms. Parker's opinion was uncontradicted is inaccurate. Dr. Neulicht testified that she did not believe that plaintiff would have difficulty maintaining his job "given his psychological situation," but rather that anxiety was something that plaintiff could work on and that anxiety disorder would not prevent a person from holding a job, as many people with anxiety disorder are employed.

In any event, plaintiff's argument assumes that plaintiff had neurocognitive deficits and anxiety disorder -- Ms. Parker's opinion required that the Commission find that plaintiff was, at the time of the hearing, suffering neurocognitive deficits and anxiety disorder. The only evidence of those conditions comes from Dr. Condor's 2002 neurocognitive evaluation report, which suggested a reassessment at a later date. No reassessment occurred following elimination of the physical conditions that led to Dr. Condor's evaluation (headaches and ringing in the ears) or the successful neck surgery.

Further, Dr. Neulicht testified that she had seen no indication that plaintiff still suffered from full blown anxiety disorder. Mr. Carpenter's testing, in turn, showed, as the Commission found, that plaintiff "exhibited no significant difficulty with memory, concentration, attention, recall,

registration, calculation, abstraction, judgment or other mental capacity areas related to vocational function . . . ." Further, psychological treatment during the pain management program did not lead to any recommendations for additional psychological treatment. The Commission was, therefore, not required to accept that, at the time of the hearing, plaintiff was suffering from neurocognitive deficits and anxiety disorder.

Because the Commission did not give weight to the opinion that plaintiff had neurocognitive deficits or anxiety disorder, it was not obligated to find that Ms. Parker believed, if he had neurocognitive deficits or anxiety disorder, that he would not succeed in retraining and, without retraining, could not get a job. *See Bryant v. Weyerhaeuser Co.*, 130 N.C. App. 135, 139, 502 S.E.2d 58, 62 (1998) (explaining that while Full Commission must make findings on critical issues in case, it need not make exhaustive findings as to each statement made by any given witness or make findings rejecting specific evidence that may be contrary to evidence accepted by Commission).

Plaintiff next argues that the Commission erred in concluding that the City rebutted the presumption of continuing disability. A presumption of disability in favor of an employee arises only in limited circumstances, including when the parties have executed a Form 21 or a Form 26, as in this case. *Clark v.*

Wal-Mart, 360 N.C. 41, 44, 619 S.E.2d 491, 493 (2005). An employer may rebut the presumption of disability by presenting evidence that (1) suitable jobs are available for the employee; (2) the employee is capable of getting such a job taking into account the employee's physical and vocational limitations; and (3) the job would enable the employee to earn some wages. *Freeman v. J.L. Rothrock*, 202 N.C. App. 273, 277, 689 S.E.2d 569, 572 (2010).

"A 'suitable' job is one the claimant is capable of performing considering his age, education, physical limitations, vocational skills, and experience. An employee is 'capable of getting' a job if 'there exists a reasonable likelihood . . . that he would be hired if he diligently sought the job.'" *Burwell v. Winn-Dixie Raleigh, Inc.*, 114 N.C. App. 69, 73-74, 441 S.E.2d 145, 149 (1994) (internal citation omitted) (quoting *Trans-State Dredging v. Benefits Review Bd.*, 731 F.2d 199, 201 (4th Cir. 1984)). "Whether the evidence of suitable jobs is sufficient to satisfy the employer's burden is a question of fact for the Commission." *Roset-Eredia v. F.W. Dellinger, Inc.*, 190 N.C. App. 520, 524, 660 S.E.2d 592, 596 (2008).

Plaintiff argues that the City did not provide sufficient evidence that suitable jobs were available to him because the City did not produce evidence of any specific job that was

actually available to him in the local economy. Both Ms. Parker and Dr. Neulicht, however, testified regarding specific jobs that they believed were suitable for plaintiff in light of his age, education, work experience, and physical restrictions. Dr. Neulicht conducted a labor market survey that took into account plaintiff's vocational limitations and physical restrictions and included contacting specific employers. Through her research and her contacts, she identified specific, available positions that she believed plaintiff could perform. This evidence is sufficient to meet defendants' burden in rebutting the presumption. *See Burwell*, 114 N.C. App. at 74, 441 S.E.2d at 149 (holding that evidence of a labor market survey that took into account plaintiff's age, education, physical limitations, and vocational skills and which identified specific jobs that plaintiff was capable of performing was "sufficient to satisfy the defendant-employer's burden of showing that there existed a reasonable likelihood that plaintiff would be hired if he diligently sought employment in the jobs found by the defendant-employer").

Plaintiff, however, points to other portions of Ms. Parker's and Dr. Neulicht's testimony -- during their cross-examinations -- and to Mr. Carpenter's testimony as being contrary to the Commission's findings. This argument cannot be

reconciled with our standard of review. *See Alexander v. Wal-Mart Stores, Inc.*, 166 N.C. App. 563, 573, 603 S.E.2d 552, 558 (2004) (Hudson, J., dissenting) ("[I]t is [not] the role of this Court to comb through the testimony and view it in the light most favorable to the [non-prevailing party], when the Supreme Court has clearly instructed us to do the opposite. Although by doing so, it is possible to find a few excerpts that might be speculative, this Court's role is not to engage in such a weighing of the evidence."), *rev'd per curiam for reasons in dissenting opinion*, 359 N.C. 403, 610 S.E.2d 374 (2005).

Where, as in this case, the employer rebuts the presumption of continuing disability, "'the claimant has the burden of producing evidence that either contests the availability of other jobs or his suitability for those jobs, or establishes that he has unsuccessfully sought the employment opportunities located by his employer.'" *Roset-Eredia*, 190 N.C. App. at 524, 660 S.E.2d at 596 (quoting *Burwell*, 114 N.C. App. at 74, 441 S.E.2d at 149).

Plaintiff contends that he met his burden of showing that it would be futile for him to try to find work. The Commission, however, disagreed, finding that "[b]ased upon the physical work restrictions assigned by plaintiff's treating physicians, and the testimony of Lisa Parker and Ann Neulicht, it is clear that

it was not futile because of preexisting conditions such as age or education for plaintiff to look for other employment." This finding is supported by testimony from Ms. Parker who testified that she did not believe that vocational rehabilitation, including job search and/or retraining, would be futile for plaintiff because of his physical restrictions, his age, his education, or his work experience. It is similarly supported by the testimony of Dr. Neulicht who also testified, in her expert opinion, that she did not believe it had been futile for plaintiff to seek other employment because of preexisting conditions such as age, education, or work experience.

Plaintiff, however, argues that "even if he were able to obtain a job, he would be unlikely to succeed in that employment and thus retains no wage-earning capacity." This contention, however, relies upon plaintiff's assertion that he suffers from neurocognitive deficits that are "insurmountable." As explained above, however, the record contains ample evidence to support the Commission's determination that neurocognitive deficits did not preclude plaintiff from obtaining and continuing to work in a job. To the extent that plaintiff relies upon Mr. Carpenter's opinions, the Commission chose to give greater weight to those of Ms. Parker and Dr. Neulicht.

Because the Commission's determination that plaintiff retained wage-earning capacity is supported by competent evidence, we may not reverse even though plaintiff points to contrary evidence. *See Nobles v. Coastal Power & Elec., Inc.*, ___ N.C. App. ___, ___, 701 S.E.2d 316, 323-24 (2010) (upholding Commission's finding that plaintiff failed to establish inability to earn pre-injury average weekly wage in any employment, where vocational case manager's testimony that plaintiff was not employable at light duty capacity was not credible to Commission); *Springer v. McNutt Serv. Grp., Inc.*, 160 N.C. App. 574, 577-78, 586 S.E.2d 554, 556-57 (2003) (upholding Commission's finding that job search would not be futile where no physician had restricted plaintiff's ability to work, vocational rehabilitation professional identified several jobs plaintiff was capable of performing, and Commission found plaintiff's testimony regarding his physical limitations was not credible).[1]

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[1]Because we have upheld the Commission's determination that plaintiff retained wage-earning capacity, we also reject plaintiff's argument that the Commission erred in failing to find that job placement activities were futile and in failing to order that such activities cease. In addition, although plaintiff's brief is ambiguous, it appears that he is arguing that the Commission erred in not granting plaintiff's motion to remove Ms. Parker from this case. Because plaintiff does not point the Court to anywhere in the record where the motion or a ruling by the Commission on that motion appears, the issue is not properly before the Court.

Finally, plaintiff contends that the Commission should not have terminated plaintiff's temporary total disability compensation without first ordering plaintiff to cooperate with vocational rehabilitation under N.C. Gen. Stat. § 97-25 (2009). Plaintiff argues that the possibility of plaintiff's temporary total disability compensation being discontinued had not been raised in the issues identified for hearing in the parties' pretrial agreement. However, although the deputy commissioner, like the Commission, ordered the termination of benefits because plaintiff has been capable of earning wages, plaintiff did not assert in his Form 44, when appealing to the Commission, that the deputy commissioner erred in addressing that issue.

The North Carolina Workers' Compensation Rules provide that a party wishing to appeal a decision of the Deputy Commissioner to the Full Commission must file a Form 44 "stat[ing] with particularity" the grounds for the appeal, "including the specific errors allegedly committed by the Commissioner or Deputy Commissioner." Workers' Comp. R. of N.C. Indus. Comm'n 701(2). "Failure to state with particularity the grounds for appeal shall result in abandonment of such grounds." ***Id.*** We hold that plaintiff abandoned the N.C. Gen. Stat. § 97-25 issue by not including it in his Form 44.

II

Plaintiff next contends that the Commission erred in finding that he failed to prove a causal connection between his thoracic spine complaints and the 18 October 1999 injury. A claimant in a workers' compensation case bears the burden of proving a causal relationship between an injury and his employment. *Whitfield v. Lab. Corp. of Am.*, 158 N.C. App. 341, 350, 581 S.E.2d 778, 784 (2003). Our Supreme Court has also held that "where the exact nature and probable genesis of a particular type of injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury." *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980).

Plaintiff contends, in this case, that the testimony of Dr. Gwinn and Dr. Bullard established the necessary causal link. Based on our review of the testimony, we disagree.

When Dr. Gwinn was asked whether he had an opinion as to a reasonable degree of medical probability whether herniated disks found in plaintiff's thoracic spine were related to the October 1999 injury, he testified: "I cannot say with any certainty what those are from." Dr. Bullard was also asked whether thoracic symptoms that plaintiff was experiencing in September 2005 "were related to his original cervical injury." He responded by

saying "I don't honestly know." Later, after being asked whether he could express "any opinion whether any of that [including thoracic pain] was causally related to his cervical injury," Dr. Bullard answered, "You know, I really can't." He then added that in 1999 plaintiff "had a broken neck. The cervical issues later, yes, I think they're related to that; the others, I don't know."

We cannot conclude, based on this testimony by Dr. Gwinn and Dr. Bullard, that the Commission erred in determining plaintiff's thoracic spine complaints were not related to the cervical injury. *See Kashino v. Carolina Veterinary Specialists Med. Servs.*, 186 N.C. App. 418, 423, 650 S.E.2d 839, 842 (2007) ("Since there is competent evidence in the record supporting the finding of no causal link, that finding must stand."). To the extent that plaintiff points to excerpts of these doctors' testimony that might permit a finding of causation, that evidence is not sufficient to set aside the Commission's conclusion otherwise. *See Mayfield v. Hannifin*, 174 N.C. App. 386, 399, 621 S.E.2d 243, 252 (2005) ("While defendant points to portions of Dr. Roy's testimony that it believes support its position or suggest speculation, this Court has previously noted that '[c]ontradictions in the testimony go to its weight . . .

.'" (quoting *Harrell v. J.P. Stevens & Co.*, 45 N.C. App. 197, 205, 262 S.E.2d 830, 835 (1980))).

III

Lastly, plaintiff argues that the Commission erred in finding that he retains only a 40% permanent partial impairment to his back as a result of his 18 October 1999 injury. We agree that this finding is not supported by the evidence. Dr. Bullard testified that plaintiff had a 55% permanent partial impairment, and there was no testimony suggesting that plaintiff had only a 40% permanent partial impairment.

Nonetheless, plaintiff has failed to show that he was prejudiced by this finding. Plaintiff has not established that the amount of benefits to which he would be entitled for a 55% rating would exceed the benefits that he has already received under N.C. Gen. Stat. § 97-29. Plaintiff is "not entitled to recover once under § 97-29 and then again under § 97-31." *Kelly v. Duke Univ.*, 190 N.C. App. 733, 742, 661 S.E.2d 745, 750 (2008), *disc. review denied*, 363 N.C. 128, 675 S.E.2d 367 (2009). Consequently, the 40% permanent partial impairment rating did not prejudice plaintiff.

Affirmed.

Judges BRYANT and ELMORE concur.

Report per Rule 30(e).