An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA01-515

NORTH CAROLINA COURT OF APPEALS

Filed: 19 March 2002

BETTY RICHARDS PARSONS,

Plaintiff,

v.

N. C. Industrial Commission
I.C. No. 725281

K-MART CORPORATION,

Employer,
Self-Insured,
Defendant,

and

IHDS CORPORATION,

Third-Party Administrator.

Appeal by defendant from Opinion and Award of the North Carolina Industrial Commission entered 28 December 2000. Heard in the Court of Appeals 20 February 2002.

Randy D. Duncan, for the plaintiff-appellee

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Shelley W. Coleman, for the defendant-appellant

WYNN, Judge.

Employer K-Mart Corporation appeals from an Industrial Commission workers' compensation award to employee Betty Parsons, a stock clerk, of ongoing disability benefits and medical expenses. Parsons, struck by a falling pallet of automotive parts, suffered

work-related back and leg injuries on 19 December 1996.

Dr. Alan Forshey initially treated Parsons on 21 April 1997, and subsequently referred her to Dr. Herbert Schulten, an orthopaedist with Carolina Orthopaedic Specialists in Hickory. Bone scans and MRIs revealed no fractures, and Parsons underwent conservative treatment through physical therapy which failed to help. Dr. Schulten performed surgery on 28 October 1997 to relieve what he diagnosed as tarsal tunnel syndrome caused by the injury.

Parsons later developed what Dr. Schulten diagnosed as reflex sympathetic dystrophy (RSD); she also suffered chronic pain syndrome and psychological problems stemming from her 1996 injury. Dr. Schulten treated her with muscle relaxers, and recommended that she undergo a "sympathetic block" to more accurately diagnose the RSD; however, K-Mart would not approve the proposed "sympathetic block." On 30 December 1997, Parsons was directed to Dr. Thomas Ray, who indicated that "[a] cognitive-behavioral model utilizing a pain management approach should be utilized[.]"

Parsons next saw Dr. Anthony Wheeler, a neurologist in Charlotte, in June 1998. Dr. Daniel Gooding, also in Charlotte, performed a differential spinal block (previously recommended by Dr. Schulten) on Parsons. From 5 October through 2 November 1998, Parsons attended Mid-Atlantic Pain Clinic in Charlotte, where she received physical therapy and biofeedback. However, Parsons was taking more pain medication at the end of the clinic than she was at the beginning.

Dr. Wheeler prohibited Parsons from returning to her original

position with K-Mart as a stock clerk, rating her on 2 November 1998 with a fifteen percent permanent partial impairment to her left leg and a five percent permanent partial impairment to her back.

From 5 November through 11 November 1998, Parsons attempted to return to work at K-Mart as a communications center associate, but suffered a recurrence of pain. Parsons attempted to contact Dr. Wheeler, and after she failed to hear back from Dr. Wheeler she contacted Dr. Schulten, who resumed treating her. Dr. Schulten prescribed conservative treatment for Parsons including physical therapy. On 9 December 1998, Parsons filed a Form 33 Request for Hearing with the Commission, requesting approval for her treatment by Dr. Schulten.

Dr. Wheeler saw Parsons on 2 December 1998 and prescribed medication to alleviate Parsons' pain and help her sleep. Dr. Leslie Phillips, a psychologist, also saw Parsons on 2 December 1998, and recommended psychological treatment to alleviate the emotional and psychological factors caused by the injury and resulting pain. However, Dr. Wheeler overruled these recommendations.

The Commission found that, although Dr. Wheeler and Dr. Schulten opined that Parsons was capable of returning to work in a sedentary-type position, no showing was made that a job exists that Parsons could perform, or that she could obtain any such employment. Furthermore, the Commission found that Parsons was in need of further treatment at a pain clinic other than Dr.

Wheeler's, and needed additional psychological treatment to alleviate the emotional and psychological factors stemming from her injury and resulting chronic pain.

The Commission found that the communications center associate position offered to and attempted by Parsons was "make-work," as it was specially created and modified for Parsons and was not otherwise available in the economy. Therefore, the Commission concluded that Parsons was not obligated to accept the position. Accordingly, the Commission awarded continuing compensation until Parson returns to work or until a suitable job is offered to her; approved Parsons' request for treatment by Dr. Schulten; and concluded that her injuries require continuing medical treatment, including treatment at a pain clinic other than Dr. Wheeler's. Furthermore, the Commission ordered K-Mart to reimburse Parsons for any compensable medical payments, and to pay for all subsequent injury-related compensable medical expenses. From this opinion and award, K-Mart appeals.

In reviewing an opinion and award of the Commission, this Court is limited to addressing two questions: (1) Whether any competent evidence supports the Commission's findings of fact; and (2) Whether the Commission's findings of fact support its conclusions of law. *See Jenkins v. Easco Aluminum Corp.*, 142 N.C. App. 71, 541 S.E.2d 510 (2001). The Commission's findings are binding on appeal if supported by any competent evidence, even where the evidence may also support a contrary finding. *See Bailey v. Sears Roebuck & Co.*, 131 N.C. App. 649, 652-53, 508 S.E.2d 831,

834 (1998). It is the Commission's responsibility to judge the witnesses' credibility and determine the weight to be given their testimony. *Id.* at 653, 508 S.E.2d at 834.

As stipulated in the Commission's opinion and award, the parties entered into a Form 21 agreement on 23 September 1997, entitling Parsons to compensation at the rate of $192.00 per week. Parsons was thereby "cloaked in the presumption of disability, and the burden was on the employer to rebut that presumption." *Saums v. Raleigh Community Hospital*, 346 N.C. 760, 764, 487 S.E.2d 746, 750 (1997). A disability under the Workers' Compensation Act refers to a diminished earning capacity. *See Peoples v. Cone Mills Corp.*, 316 N.C. 426, 342 S.E.2d 798 (1986); *see also* N.C. Gen. Stat. § 97-2(9) (1999). An employer may therefore rebut the presumption of disability by introducing evidence showing not only that a suitable job is available to the employee, but also that the employee is capable of getting it, considering the employee's vocational and physical limitations. *See Jenkins*, 142 N.C. App. at 73, 541 S.E.2d at 512.

A suitable job is one the employee is capable of performing, given her age, education, physical limitations, experience and vocational skills. *See Webb v. Power Circuit, Inc.*, 141 N.C. App. 507, 513, 540 S.E.2d 790, 794 (2000), *cert. denied*, 353 N.C. 398, 548 S.E.2d 159 (2001). The fact that an employee is capable of performing a position tendered by the employer does not necessarily, as a matter of law, indicate the employee's ability to earn wages. *See Saums*, 346 N.C. at 764, 487 S.E.2d at 750. For

instance, an employer may not rebut the presumption of disability by offering the injured employee a position with the employer that is not ordinarily available in the competitive job market under normally prevailing market conditions, as such a position would not accurately reflect the injured employee's ability to earn wages. *See Jenkins*, 142 N.C. App. at 73, 541 S.E.2d at 512.

> 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.

Peoples, 316 N.C. at 438, 342 S.E.2d at 806.

In the instant case, K-Mart argues that the Commission erred in finding and concluding that K-Mart failed to rebut the presumption of disability. We disagree.

N.C. Gen. Stat. § 97-32 (1999) provides that an injured employee is not entitled to compensation if the employee refuses suitable employment, unless such refusal was justified in the Commission's opinion. An injured employee's refusal of unsuitable employment may not be used to bar compensation to which the employee would otherwise be entitled. *See Peoples*.

In the instant case, the record shows that competent evidence existed before the Commission supporting its finding that the communications center associate position was not available in the

competitive job market. Chris McCarrick, a manager at the K-Mart where Parsons worked, testified before the deputy commissioner that an attempt was made to modify the communications center associate position to make it fit Parsons' restrictions. The typed job description for the position included handwritten modifications at the bottom of the form. McCarrick testified that the handwritten modifications would not be included if K-Mart was simply hiring someone "off the street"; instead, such a person would be shown only the typed form. McCarrick indicated that "[t]he position was offered to fit Ms. Parsons' restrictions at the time." This testimony constituted competent evidence to support the Commission's finding that the proffered position was not available in the competitive marketplace, and K-Mart failed to rebut the presumption of Parsons' continuing disability. As the proffered position did not constitute "suitable employment," Parsons was justified in refusing it. K-Mart's arguments to the contrary are overruled.

K-Mart next argues that the Commission erred in finding that Parsons' treatment by Dr. Schulten starting on 13 November 1998 was compensable. K-Mart contends that compensation for Dr. Schulten's services beginning on 13 November 1998 was not justified, as the treatment rendered by Dr. Schulten was not necessary to give relief or effect a cure, and Dr. Schulten was not authorized to treat Parsons. We disagree.

N.C. Gen. Stat. § 97-25 (1999) provides that "an injured employee may select a physician of his own choosing to attend,

prescribe and assume the care and charge of his case, subject to the approval of the Industrial Commission." This proviso applies even in the absence of an emergency. *See Schofield v. Tea Co.*, 299 N.C. 582, 264 S.E.2d 56 (1980). However, an injured employee must obtain the Commission's approval within a reasonable time after selecting a physician of her own choosing to assume her treatment. *See id.* The approval of an injured employee's chosen physician under this section is within the Commission's discretion, and may only be reversed for abuse of discretion. *See Forrest v. Pitt County Bd. of Education*, 100 N.C. App. 119, 394 S.E.2d 659, *disc. review denied*, 327 N.C. 634, 399 S.E.2d 121 (1990), *cert. denied*, 328 N.C. 330, 400 S.E.2d 448, *and aff'd*, 328 N.C. 327, 401 S.E.2d 366 (1991).

G.S. § 97-25 does not limit an employer's obligation to reimburse future medical expenses to those cases where such expenses will lessen the period of disability. *See Simon v. Triangle Materials, Inc.*, 106 N.C. App. 39, 415 S.E.2d 105, *disc. review denied*, 332 N.C. 347, 421 S.E.2d 154 (1992). Rather, employers are also required to pay future medical expenses for treatments "as long as they are reasonably required to (1) effect a cure or (2) give relief." *Little v. Penn Ventilator Co.*, 317 N.C. 206, 210, 345 S.E.2d 204, 207 (1986). "[R]elief from pain constitutes 'relief' as that term is used in N.C. Gen. Stat. § 97-25." *Simon*, 106 N.C. App. at 43, 415 S.E.2d at 107; *see Lewis v. Craven Regional Medical Center*, 122 N.C. App. 143, 468 S.E.2d 269 (1996).

In the instant case, Parsons saw Dr. Schulten on 13 November 1998 despite Dr. Wheeler having been assigned as her treating physician. Parsons sought the Commission's approval of the change in her 9 December 1998 request for hearing. The Commission approved the change in physicians in its 28 December 2000 opinion and award upon concluding that Parsons' request for approval was reasonable and timely made. K-Mart has failed to show that such approval constituted an abuse of discretion. Furthermore, competent evidence existed before the Commission supporting its finding that Dr. Schulten's treatment was designed to "give relief" by relieving Parsons' pain. Dr. Schulten testified in his deposition that he "felt there was an excellent chance" that the prescribed pain clinic would alleviate Parsons' pain. K-Mart's arguments to the contrary are overruled.

We have reviewed the record in its entirety and conclude that the Commission's conclusions of law were supported by its findings of fact, which in turn were supported by competent evidence in the record. Accordingly, the Commission's 28 December 2000 opinion and award is,

Affirmed.

Judges TIMMONS-GOODSON and TYSON concur.

Report per Rule 30(e).