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NO. COA13-14
NORTH CAROLINA COURT OF APPEALS

Filed: 3 September 2013

THOMAS CULBRETH, Employee,
Plaintiff

v.

North Carolina Industrial
Commission
No. 999981

IRONMEN OF FAYETTEVILLE, INC.,
Employer, STONEWOOD INSURANCE COMPANY,
Carrier,
Defendants

Appeal by defendants from Opinion and Award entered 2
October 2012 by the North Carolina Industrial Commission. Heard
in the Court of Appeals 22 May 2013.

*Adams, Burge & Boughman, by Vickie L. Burge, for Plaintiff-
Appellee.*

*Lewis & Roberts, P.L.L.C, by John H. Ruocchio and Mallory
E. Lidaka, for Defendants-Appellants.*

ERVIN, Judge.

Defendants Ironmen of Fayetteville, Inc., and Stonewood
Insurance Company appeal from an order entered by the Commission
awarding Plaintiff, among other things, temporary partial
disability as the result of a work-related injury to his right
knee. On appeal, Defendants contend that the Commission erred
by measuring Plaintiff's earning capacity utilizing his gross

income rather than his net income, that the Commission erred by failing to determine that Plaintiff was not disabled by virtue of the fact that he had transferable work skills, and that any loss of earning capacity which Plaintiff may have sustained did not stem from his work-related injury. After careful consideration of Defendants' challenges to the Commission's order in light of the record and the applicable law, we conclude that the Commission's order should be affirmed.

I. Factual Background

A. Substantive Facts

In 1993, Plaintiff, who is now sixty-one years old, owned a catering business and two restaurants named Papa Jack's and Bunces. As a restaurateur, Plaintiff functioned as a "jack of all trades" who cooked, cleaned, visited with customers and performed "mostly all of the manual labor." By 2004, Plaintiff had left the restaurant business.

In 2004, Plaintiff began working for Ironmen as a sales representative while concurrently owning and operating a catering business known as Papa Jack's. Ironmen was involved in the fabrication of wrought iron for use in new construction projects. In the course of his work as an Ironmen sales representative, Plaintiff was responsible for visiting new construction sites and taking measurements of buildings under construction to facilitate the sale of wrought iron products.

On 18 July 2008, Plaintiff sustained an injury to his right knee while stepping off an unfinished porch onto uneven ground. At the time of his injury, Plaintiff was earning an average weekly wage of \$941.99. As a result of this injury, Plaintiff was required to undergo a total right knee replacement on 22 January 2009. Plaintiff was medically restricted from performing any work from 6 August 2008 until 22 April 2009, when his treating physician, Dr. Stephen Kouba, released him to return to work subject to permanent restrictions under which Plaintiff was precluded from lifting more than twenty pounds and from engaging in more than a specified amount of kneeling, squatting, crawling, ladder climbing, and running. In addition, Dr. Kouba recommended that Plaintiff lose 100 pounds in order to aide his recovery. By the time that Dr. Kouba released Plaintiff to return to work, he was no longer employed by Ironmen, having been terminated on 22 September 2008.

As of 19 April 2009, Plaintiff had sought and obtained work selling wrought iron products for Larry Davis. At the time that he was determined to have reached the point of maximum medical improvement and had been assigned a forty percent permanent partial disability rating to his right leg on 18 November 2009, Plaintiff was still working for Mr. Davis. While working for Mr. Davis, Plaintiff was responsible for contacting potential

customers, visiting the homes of potential customers to take measurements, and providing installation cost estimates. However, Plaintiff's knee injury precluded him from accepting certain assignments while working for Mr. Davis. As a result, Plaintiff made substantially less money while working for Mr. Davis than he did while working for Ironmen.

In November of 2009, Plaintiff opened a restaurant under the name "Papa Jack's" and operated it as a sole proprietorship in conjunction with a catering business under the same name. In addition to himself, Plaintiff had a number of full-time employees, most of whom were family members, who were paid \$424.00 on a biweekly basis to cook and serve food. At the restaurant, Plaintiff's responsibilities included "setting menu prices, purchasing food, performing paperwork, paying vendor bills" and sitting and talking with customers for public relations purposes. Plaintiff's restaurant-related work was performed in addition to, rather than in lieu of, his work for Mr. Davis and his catering-related work.

In reporting his income for tax-related purposes, Plaintiff combined the income he earned in connection with all three of these activities for the 2009 and 2010 tax years and reduced the amount of his income to account for applicable deductions to

determine the amount of net income to be reported on Form 1040.¹ Although Plaintiff reported \$7,291 and \$25,200 in gross income associated with the operation of the restaurant for 2009 and 2010, respectively, he suffered a net restaurant-related loss of \$1,317 in 2009 and \$2,437 in 2010. In addition, Plaintiff netted \$1,305 in 2009 and \$1,173 in 2010 in connection with his work for Mr. Davis. Finally, Plaintiff had catering-related earnings of \$4,557 in 2009 and \$2,742 in 2010. Plaintiff did not take a salary or receive any other personal payments from either his restaurant or catering business in 2009 or 2010.

B. Procedural History

On 11 August 2008, Defendants filed a Form 19 reporting that Plaintiff had been injured on 18 July 2008. On 22 August 2008, Defendants filed a Form 63 notifying Plaintiff that Defendants were making a payment of medical benefits without prejudice to their rights to deny the compensability of Plaintiff's claim. On 16 September 2008, Defendants filed a Form 61 denying that they were liable to Plaintiff for workers' compensation benefits on the grounds that Plaintiff had not sustained a compensable injury by accident in the course and scope of his employment; that the injury which Plaintiff claimed

¹Plaintiff employed a certified public accountant to ensure that the required tax reports and returns were properly prepared.

to have sustained did not arise from a specific traumatic incident, stem from a risk associated with his employment, or involve an interruption of his normal work routine; and that Plaintiff was not disabled as a result of his alleged injury.

On 9 October 2008, Plaintiff filed a Form 18 notifying Defendants that he had sustained a work-related injury on 18 July 2008 and requesting an award of workers' compensation benefits. On 16 January 2009, Plaintiff filed a Form 33 requesting that his claim be set for hearing on the grounds that Defendants "have denied liability." On 26 January 2009, Defendants filed a Form 33R alleging that Plaintiff's claim for workers' compensation benefits should be denied on the grounds that Plaintiff did not suffer a compensable injury by accident in the course and scope of his employment, that Plaintiff suffered from a pre-existing condition, and that Plaintiff's disability did not result from any injury by accident that he might have sustained.

On 21 July 2009, Plaintiff's claim was heard before Deputy Commissioner Phillip A. Holmes. On 2 November 2009, Deputy Commissioner Holmes entered an order determining that Plaintiff had sustained a compensable injury by accident stemming from the exacerbation of a preexisting arthritic condition in his right knee, that he was entitled to medical benefits and temporary

total disability benefits in the amount of \$627.99 per week from 22 September 2008 through 19 April 2009, and that the issue of whether Plaintiff was entitled to permanent partial disability or any sort of scheduled payment should be reserved for resolution when Plaintiff reached maximum medical improvement. On 16 November 2009, Defendants noted an appeal from Deputy Commissioner Holmes' order to the Commission.

On 24 May 2010, the Commission entered an order by Commissioner Bernadine S. Ballance and joined by Commissioners Laura Kranfield Mavretic and Christopher Scott which affirmed Deputy Commissioner Holmes' order with some modifications. In its order, the Commission determined that Plaintiff had sustained a compensable injury by accident to his right knee which significantly aggravated his pre-existing arthritic condition, resulting in the need for total knee replacement; that Plaintiff was entitled to medical benefits and to temporary total disability payments in the amount of \$627.99 per week covering the period from 22 September 2008 through 19 April 2009; and that Plaintiff's "entitlement to further disability compensation after April 22, 2009 [was] reserved for later determination after Plaintiff has reached maximum medical improvement," with either party entitled to "file a Form 33 request for hearing to determine this issue if the parties

cannot agree." Although Defendants noted an appeal to this Court from the trial court's order, they ultimately elected to accept Plaintiff's claim and withdrew their appeal.

On 24 January 2011, Plaintiff filed a Form 33 alleging that Defendants had denied Plaintiff's request for temporary partial disability payments and requesting that the issue of Plaintiff's entitlement to permanent partial disability be set for hearing. On 28 January 2011, Defendants filed a Form 33R in which they alleged that they had made all the payments required by the Commission's prior order and alleging that Plaintiff had failed to provide sufficient information to permit a determination of whether Plaintiff had sustained "any loss of earning capacity." On 31 May 2011, Plaintiff's request for an award of permanent partial disability benefits was heard before Deputy Commissioner Kim Ledford. On 24 February 2012, Deputy Commissioner Ledford entered an order determining that, while Plaintiff had failed to establish that his "wage-earning capacity ha[d] been diminished due to his compensable injury," such that he would be entitled to partial permanent disability payments, he was entitled to a lump sum compensation payment in the amount of 80 weeks compensation at a weekly rate of \$627.99 stemming from a 40% impairment of his right leg. Plaintiff noted an appeal from Deputy Commissioner Ledford's order to the Commission.

On 2 October 2012, the Commission entered an order by Commissioner Bernadine S. Ballance, joined by Commissioners Danny Lee McDonald and Tammy Nance, which reversed Deputy Commissioner Ledford's order in part. In its order, the Commission concluded that, although Plaintiff was self-employed and involved in the day-to-day operation of his business, Defendants had failed to establish that "the skills Plaintiff currently utilizes at his restaurant . . . would be sufficient to meet the qualifications of jobs that actually exist[ed] in the competitive market place" or that "Plaintiff would have a reasonable opportunity to be hired for such a job, if it does exist, considering his age, his limited education, his past training and vocational history," "his permanent [work] restrictions," and "his ongoing injury-related right leg pain and swelling." In addition, the Commission concluded "that[,] considering the cumulative work that Plaintiff does in the restaurant and wrought iron sales businesses," Plaintiff "has the capacity to earn diminished wages in self-employment ventures"; that "Plaintiff's actual net earnings are indicative of his wage earning capacity"; that "the wages Plaintiff earned in his concurrent employment as a caterer [should] be disregarded in computing his partial disability" given that "North Carolina does not allow aggregation of wages from

concurrent employment to determine the compensation rate"; and that Plaintiff was "entitled to temporary partial disability compensation at varying rates based upon 66 2/3 percent of the difference between [his] pre-injury average weekly wage and the net average weekly wage which [he] was able to earn after April 19, 2009, excluding earnings from the catering business, for up to 300 weeks from the date of injury." Finally, the Commission concluded that, since Plaintiff's work-related right knee injury by accident significantly aggravated his pre-existing arthritic condition and resulted in the need for a total knee replacement and that Plaintiff was at substantial risk of needing future medical treatment, the Commission concluded that Plaintiff was entitled to future medical benefits as well. Defendants noted an appeal to this Court from the Commission's order.

II. Legal Analysis

A. Standard of Review

Appellate review of an order entered by the Commission is "limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law," with the Commission having sole responsibility for evaluating the weight and credibility to be given to the record evidence. *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). "[F]indings of fact which are left unchallenged by the

parties on appeal are 'presumed to be supported by competent evidence' and are, thus 'conclusively established on appeal.'" *Chaisson v. Simpson*, 195 N.C. App. 463, 470, 673 S.E.2d 149, 156 (2009) (quoting *Johnson v. Herbie's Place*, 157 N.C. App. 168, 180, 579 S.E.2d 110, 118, *disc. review denied*, 357 N.C. 460, 585 S.E.2d 760 (2003)). However, the "Commission's conclusions of law are reviewed *de novo*." *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004) (citation omitted).

B. Basic Legal Principles Governing
Disability Determinations

According to N.C. Gen. Stat. § 97-30, "where the incapacity for work resulting from the injury is partial, the employer shall pay, or cause to be paid, as hereinafter provided, to the injured employee during such disability, a weekly compensation equal to sixty-six and two-thirds percent (66 2/3%) of the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter." "[D]isability is defined . . . [as] the impairment of the injured employee's earning capacity rather than physical disablement." *Russell v. Lowes Prod. Distrib.*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (citing *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 434, 342 S.E.2d 798, 804 (1986)). A determination that a particular plaintiff is disabled requires proof:

(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) (citing *Watkins v. Motor Lines*, 279 N.C. 132, 137, 181 S.E. 2d 588, 592 (1971)).

The 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. The employee may meet this burden in one of four ways: (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work, but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

Russell, 108 N.C. App. at 765-66, 425 S.E.2d at 456 (citing *Hilliard*, 305 N.C. at 595, 290 S.E.2d at 684; *Peoples*, 316 N.C. at 444, 342 S.E.2d at 809; 1C A. Larson, *The Law of Workmen's Compensation*, § 57.61(d) (1992); *Tyndall v. Walter Kidde Co.*,

102 N.C. App. 726, 730, 403 S.E.2d 548, 550, *disc. review denied*, 329 N.C. 505, 407 S.E.2d 553 (1991)) (citations omitted). "The determination that an employee is disabled is a conclusion of law that must be based upon findings of fact supported by competent evidence." *Teraska v. AT&T*, 174 N.C. App. 735, 739, 622 S.E.2d 145, 148 (2005) (citing *Hilliard*, 305 N.C. at 594-95, 290 S.E.2d at 683), *aff'd in part and disc. review improvidently granted in part*, 360 N.C. 584, 634 S.E.2d 888 (2006).

Although, as we have already noted, "[t]he employee seeking compensation under the [Workers' Compensation] Act bears 'the burden of proving the existence of [his] disability and its extent,'" *Clark v. Wal-Mart*, 360 N.C. 41, 43, 619 S.E.2d 491, 493 (2005) (quoting *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 185, 345 S.E.2d 374, 378 (1986)), an employee is, however, entitled to a presumption of disability when either a Form 21 or Form 26 has been executed between the parties or "when there has been a prior disability award from the Industrial Commission." *Clark*, 360 N.C. at 44, 619 S.E.2d at 493 (citing *Johnson v. S. Tire Sales & Serv.*, 358 N.C. 701, 706, 599 S.E.2d 508, 512 (2004)). In view of the fact that the Commission had previously awarded workers' compensation benefits to Plaintiff, Defendants bore the burden of proving that Plaintiff was not disabled,

i.e., that he was not incapable of earning the same wages in his previous or other employment as a result of his work-related injury. *Hilliard*, 305 N.C. at 595, 290 S.E.2d at 683.

C. Defendants' Specific Challenges
to the Commission's Order

1. Use of Net Income Rather than Gross Income

In their initial challenge to the Commission's decision, Defendants argue that the Commission erred by utilizing Plaintiff's net income, as compared to his gross income, in determining the extent to which Plaintiff's earning capacity had been diminished in the course of making its disability determination and that, had the Commission focused on the proper measure of Plaintiff's earning capacity, it would have found that he was not partially disabled. According to Defendants, the Commission's reliance on Plaintiff's net, rather than gross, income conflicts with the well-established legal principle that disability determinations must be based upon a plaintiff's earning capacity rather than the plaintiff's actual earnings and with this Court's decision in *Sims v. Charmes/Arby's Roast Beef*, 142 N.C. App. 154, 160-61, 542 S.E.2d 277, 282, *disc. review denied*, 353 N.C. 729, 550 S.E.2d 782 (2001), in which we upheld a Commission determination that the plaintiff had failed to sustain his burden of proving total disability because the evidence contained in the record, including evidence of

"increased gross profits," "failed to prove he was unable to earn income as a result of his on-the-job injury." We do not find either component of Defendants' argument persuasive.

In its order, the Commission specifically found that:

21. Plaintiff has provided 2009 and 2010 tax returns and supporting documentation which show Plaintiff's income and expenses from the restaurant, catering and wrought iron business ventures. His documentation includes a Schedule C for the restaurant/catering and wrought iron sales businesses for each year. The Schedule C for each of Plaintiff's business ventures shows various deductions that he takes from the gross sales or receipts of those businesses. Plaintiff uses the Schedule C of each business to determine his net income for tax purposes, and this net income is listed on his Form 1040 for each year.

. . . .

23. Plaintiff takes no depreciation on his tax returns. His expenses represent the actual costs of doing business.

24. Based upon Plaintiff's 2009 tax returns, Papa Jack's restaurant, which operated approximately two months, had \$7,291.00 in sales and receipts and a gross income of \$6,347.00. However, the business had \$7,664.00 in expenses, including car and truck expenses, insurance, other business property, repairs and maintenance, taxes and licenses, utilities, and wages paid, which resulted in a net loss in 2009 of \$1,317.00. In 2010, Papa Jack's gross sales and receipts were \$60,231.00 and its gross income was \$25,200.00. The 2010 tax returns show Plaintiff reported expenses of \$27,673.00, for a net loss in 2010 of \$2,473.00 from the restaurant business.

[Plaintiff's accountant] was of the opinion that a business like Papa Jack's usually operates at a loss for the first three to five years.

25. During 2009, Plaintiff had gross sales of \$11,732.00 as a wrought iron salesman and a gross income of \$2,732.00, for which he reported net earnings of \$1,350.00. In 2010, Plaintiff's gross sales in the wrought iron business were \$8,711.00, he earned a gross income of \$1,711.00 and he reported earnings of \$1,173.00.

27. Plaintiff testified that he has not personally received any earnings and has not taken a salary from his restaurant and catering businesses for the years 2009 and 2010. Plaintiff's testimony is consistent with that of [his accountant], who saw nothing in the documentation used to prepare Plaintiff's tax returns, suggesting to him that Plaintiff had personally received income from the restaurant and catering business in 2009 or 2010. [Plaintiff's accountant] testified that Plaintiff did receive a small amount of income from wrought iron sales in 2009 and 2010 but this net income was offset by the net loss from his restaurant.

28. Plaintiff testified that from time to time his wife has provided cash from her salary to support the ongoing operation of the restaurant. This was confirmed by [Plaintiff's accountant]. The information Plaintiff has provided to [his accountant] for 2009 and 2010 appears to be consistent with what [Plaintiff's accountant] would expect for a new restaurant in the first and second year of operation.

29. The Full Commission finds Plaintiff's testimony that he did not receive any wages or earnings from his restaurant business to be credible. The

Full Commission also finds that Plaintiff's business records, including the documentation he prepared and provided to [his accountant], and the 2009 and 2010 tax returns prepared by [Plaintiff's accountant], are credible.

30. Although Plaintiff's business records and income tax returns show that Plaintiff's business increased in 2010, based upon a preponderance of evidence, the Full Commission finds that Plaintiff has earned no wages or income from his restaurant business.

31. Plaintiff's earning[s] from his catering business [are] sporadic and did not increase following his compensable injury. He estimated that he averages two caterings a month, if he is "lucky," and that he spends an average of five hours per month catering. Plaintiff testified his job duties as a caterer include pricing catering orders, purchasing food, preparing and delivering the food and occasionally assisting in the service of the food. There is no evidence showing that Plaintiff spent more time working in his catering business or that his income was enlarged following his compensable injury. Plaintiff's income from his catering business that he operated concurrently while employed with Defendant-Employer was not considered in calculating Plaintiff's average weekly wage in this case.

32. The Full Commission finds the income reported on Plaintiff's tax returns is more credible than the amount of \$200.00 per week that Plaintiff "estimated" he earned at the first hearing in this case. Plaintiff's estimate included income from his catering business.

. . . .

37. The Full Commission further finds that Plaintiff's net earnings as reported on his income tax returns are the best evidence of his post injury wage earning capacity; however, losses from the restaurant business may not be used to offset wrought iron business earnings.

Based upon these and other findings, the Commission concluded, in addition to the determinations set forth above, that:

4. Plaintiff has proven that as a result of his injury, he is partially disabl[ed] under the fourth (4th) prong of *Russell*. On April 19, 2009, Plaintiff returned to work with a different employer at a wage less than what he was earning previously in his full time position with Defendant-Employer. Plaintiff has shown that he was temporarily partially disabled in that he obtained employment at wages less than his pre-injury wages. *Russell*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993). Plaintiff's actual net earnings are indicative of his wage earning capacity. Defendants have failed to show that Plaintiff could have obtained employment at the same or higher wages. *Britt v. Gator Wood, Inc.*, 185 N.C. App. 677, 648 S.E.2d 917 (2007).

As a result of the fact that Defendants have not established that the Commission's findings lack adequate record support and our inability to understand any legitimate reason for concluding that the Commission was not, in its role as fact-finder, precluded from determining that Plaintiff's net income was a better measure of his earning capacity than the gross income figures upon which Defendants rely given that one derives a

person's net income by subtracting certain expenses necessary for the proper operation of the business from the gross income amount, we conclude that Defendants have not established the existence of any error of law in these findings and conclusions.

Although Defendants advance a number of arguments in support of their effort to persuade us of the merits of their position with respect to this issue, we conclude that each of these arguments is tantamount to an assertion that the Commission should have reached a different decision than the decision embodied in its order with respect to certain disputed factual issues. For example, although Defendants argue at length that the Commission's decision to utilize the net income figures instead of the gross income figures to measure Plaintiff's earning capacity is inconsistent with the legal requirement that a disability determination be based upon a plaintiff's earning capacity rather than his or her actual earnings, they never clearly explain why the use of the net income figures represents anything more than a permissible factual determination by the Commission that the net income figures provide a better representation of Plaintiff's earning capacity than the gross income figures. At a minimum, we see no reason why the Commission could not conclude, given the facts contained in the present record, that a measure of income which

excludes necessary business expenses better reflects Plaintiff's earning capacity than a measure which ignores the existence of such expenses. *Baldwin v. Piedmont Woodyards, Inc.*, 58 N.C. App. 602, 604, 293 S.E.2d 814, 816 (1982) (stating that "we agree with the Full Commission that[,] by the method it used in determining income from Piedmont, expenses incurred in producing revenue should be deducted"); *York v. Unionville Volunteer Fire Dept.*, 58 N.C. App. 591, 593, 293 S.E.2d 812, 814 (1982) (stating that, although "[i]t is difficult to determine what the plaintiff would have earned had he not been injured," "this is the job of the Industrial Commission").

In addition, we note that nothing in our opinion in *Sims* indicates any disapproval of the use of net income, rather than gross income, for the purpose of determining a plaintiff's earning capacity or any indication that the Commission is obligated to use gross, rather than net, income when determining disability-related issues. Instead, our opinion in *Sims* simply upheld the Commission's decision to utilize evidence tending to show increased gross profits from the operation of certain businesses in which Plaintiff was involved in determining that the plaintiff's wage earning capacity had not been impaired. Thus, nothing in *Sims* in any way undercuts the Commission decision in this case that the net, rather than the gross,

income that Plaintiff earned in connection with his restaurant and wrought iron sales businesses provided the best measure of Plaintiff's post-injury earning capacity. As a result, given that none of Defendants' challenges to the Commission's decision to base its disability determination on net, rather than gross, income information have merit, this component of Defendants' challenge to the Commission's order necessarily fails as well.²

²Although Defendants include a discussion of Plaintiff's gross earnings from his catering-related activities in their brief, the Commission concluded that Plaintiff's catering business, which he had continued to operate while working for Ironmen, should not be considered in making the required disability determination given that "North Carolina does not allow aggregation of wages from concurrent employment to determine the compensation rate" and since "[t]here is no evidence showing that Plaintiff's concurrent employment as a caterer was enlarged as a substitute for loss of earnings in the employment of injury." The Commission's decision is consistent with the legal principles enunciated in recent decisions of this Court. See *Tunnell v. Resource MFG/Prologistix*, ___ N.C. App. ___, ___, 731 S.E.2d 844, 848 (2012) (holding that, "since our statutes and case law do not allow aggregation of wages from concurrent employment in calculating a plaintiff's average weekly wages pursuant to N.C. Gen. Stat. § 97-2(5), by extension, an employer cannot deduct wages earned from concurrent employment in calculating the employer's obligation to pay partial disability compensation pursuant to N.C. Gen. Stat. § 97-30," although "this holding may not apply in situations where the post-injury employment is found to have been enlarged or used as a substitute for the loss of earnings in the injury producing employment"), *disc. review denied*, ___ N.C. ___, 735 S.E.2d 191 (2012). As a result of the fact that the record contains sufficient evidence to support this determination and the fact that Defendants' argument to the contrary is tantamount to an assertion that the Commission should have resolved a disputed factual issue differently than it did, we find no basis for disturbing the Commission's decision to refrain from considering Plaintiff's catering-

2. Transferability of Plaintiff's
Restaurant Operation Skills

Secondly, Defendants contend that the Commission erred by determining that they had failed to demonstrate that Plaintiff had transferable skills in restaurant operations and that the existence of these skills precluded a finding that Plaintiff was partially disabled. In essence, Defendants argue that the Commission's findings demonstrate that Plaintiff had the ability to operate a restaurant and that the existence of these skills established that there had been no diminution in his earning capacity. Defendants' argument lacks merit.

The ability of an injured employee to earn wages as the result of self-employment is, of course, relevant to the making of a disability determination. As the Supreme Court has stated:

the test for determining whether the self-employed injured employee has wage-earning capacity is that the employee (i) be actively involved in the day to day operation of the business and (ii) utilize skills which would enable the employee to be employable in the competitive market place notwithstanding the employee's physical limitations, age, education and experience.

Lanning v. Fieldcrest-Cannon, Inc., 352 N.C. 98, 107, 530 S.E.2d 54, 61 (2000). In a finding of fact which has not been challenged on appeal and is, therefore, conclusive for purposes

related earnings in making the required disability determination.

of appellate review, *Chaisson*, 195 N.C. App. at 470, 673 S.E.2d at 156, the Commission found that Plaintiff was actively involved in the day-to-day operations of his restaurant business. As a result, the Commission found the existence of the first prong of the *Lanning* test. On the other hand, the Commission did not find the existence of the second prong of the *Lanning* test, concluding instead that "the evidence is insufficient to establish that the skills Plaintiff currently utilizes at his restaurant business" "would be sufficient to meet the qualifications of jobs that actually exist in the competitive market place." Defendants contend that the Commission erred by failing to conclude that they had satisfied the second prong of the *Lanning* test as well as the first.

In its order, the Commission made the following findings of fact relating to the issues it was required to address in light of *Lanning*:

33. The type of work Plaintiff performed in his pre-injury restaurant businesses is significantly different than the work he currently performs in his restaurant. Plaintiff testified that prior to his July 18, 2008 injury, he was a "jack of all trades" in his previous restaurant businesses. He cooked, cleaned, visited with customers and performed mostly all of the manual labor. Following his July 18, 2008 injury by accident, Plaintiff's testimony indicates that the services he performed post-injury were mostly sedentary and performed at his discretion and most of

the manual and physical labor, such as cooking and serving customers, was performed by family members.

34. The Full Commission further finds that, although Plaintiff has owned and operated two restaurants from 1993 to 2004, and a second restaurant from 2009 to present, the evidence is insufficient to show that the skills Plaintiff currently utilizes at his restaurant business . . . would be sufficient to meet the qualifications of jobs that actually exist in the competitive market place. The evidence is also insufficient to show that Plaintiff would have a reasonable opportunity to be hired for such a job, if it does exist, considering his age, his limited education, his past training and vocational history consisting mainly of self-employment in the restaurant business, his permanent restrictions of no lifting greater than twenty pounds, limited kneeling, squatting, crawling, climbing ladders and running, his ongoing injury-related right leg pain and swelling which limit his ability to stand for long periods of time and other unrelated health problems. There is no testimony from any vocational expert as to the value of the work Plaintiff provides for his restaurant business or whether the skills he uses in his restaurant are transferable to existing jobs in the local competitive market.

. . . .

36. Based upon the preponderance of the evidence in view of the entire record, the Full Commission finds that as a result of his compensable injury, Plaintiff has diminished wage earning capacity and is partially disabled. Although Plaintiff has shown no earnings from the restaurant business and the evidence is insufficient to show the value of the services he is able to

provide, the Full Commission finds that the approximately forty hours of work per week that Plaintiff provides for the restaurant and wrought iron businesses cumulatively demonstrate that Plaintiff has some wage earning capacity in self-employment ventures, although diminished. The Full Commission further finds that Plaintiff's decision to seek self-employment constituted a reasonable effort to find suitable employment under the circumstances of this case, that Plaintiff's wage earning capacity varies from year to year, and that Plaintiff's actual net earnings are indicative of his post-injury wage earning capacity.

Based upon these findings, the Commission concluded as a matter of law that:

3. The test for determining whether the self-employed injured employee has wage-earning capacity is that the employee be actively involved in the day to day operation of the business and utilize skills which would enable the employee to be employable in the competitive market place notwithstanding the employee's physical limitations, age, education and experience. *Hunter v. Apac/Barrus Const. Co.*, 188 N.C. App. 723, 728-29, 656 S.E.2d 652, 655 (2008). While the evidence has established that Plaintiff was actively involved in the day to day operation of his own business, the evidence is insufficient to establish that the skills Plaintiff currently utilizes at his restaurant business, specifically setting menu prices, purchasing food, paying vendors, preparing paperwork and sitting and talking to customers, would be sufficient to meet the qualifications of jobs that actually exist in the competitive market place. The evidence is also insufficient to show that Plaintiff would have a reasonable opportunity to be hired for such a job, if

it does exist, considering his age, his limited education, his past training and vocational history consisting mainly of self-employment in the restaurant business, his permanent restrictions of no lifting greater than twenty pounds, limited kneeling, squatting, crawling, climbing ladders and running, his ongoing injury-related right leg pain and swelling which limit his ability to stand for long periods of time and other unrelated health problems. Following his July 18, 2008 injury by accident, the services Plaintiff performed in his restaurant were mostly sedentary and could be performed at his discretion. Therefore, Plaintiff's earnings in the restaurant business which operated at a loss are not indicative of his wage earning capacity in the competitive job market. The Full Commission also concludes that the work Plaintiff performed as a wrought iron salesman post injury was limited, in part, due to Plaintiff's limitations from his compensable injury. The Full Commission further concludes, however, that considering the cumulative work that Plaintiff does in the restaurant and wrought iron sales businesses, the evidence does establish that he has the capacity to earn diminished wages in self-employment ventures and that Plaintiff is partially disabled. *Id.*

As a result of the fact that the relevant Commission findings are supported by sufficient evidence and support the Commission's conclusions, we are unable to see any error of law in the Commission's determination that Plaintiff was partially disabled as a result of his work-related injury.

In seeking to persuade us to reach a different result, Defendants argue that they did, in fact, adduce sufficient

evidence to establish that, despite the presumption of disability arising from the Commission's prior disability decision, Plaintiff's skills "would enable [him] to be employable in the competitive market place." *Lanning*, 352 N.C. at 107, 530 S.E.2d at 61. For example, Defendants claim that the record "establishes the extensive managerial and operational skills Plaintiff possesses" and that the validity of their description of Plaintiff's managerial skills is demonstrated by the increase in the restaurant's gross sales between 2009 and 2010. In addition, Defendants describe Plaintiff's skills in operating a restaurant in considerable detail, apparently taking the position that the transferability of these skills is self-evident. As a result, Defendants conclude that "all of these management skills are transferrable into other management positions in the competitive labor market."

The fundamental problem with Defendants' argument is that the Commission specifically found that "the evidence is insufficient to show that the skills Plaintiff currently utilizes at his restaurant business . . . would be sufficient to meet the qualifications of jobs that actually exist in the competitive market place" and that there was "no testimony from any vocational expert as to the value of the work Plaintiff provides for his restaurant business or whether the skills he

uses in his restaurant are transferable to existing jobs in the local competitive market place." These determinations reflect factual findings which are binding upon this Court for purposes of appellate review so long as they have adequate record support. See *Lanning*, 352 N.C. at 108, 530 S.E.2d at 61 (stating that "[w]hether [a] plaintiff's management skills are marketable and whether [a] plaintiff is actively involved in the business' personal management are questions of fact" and that "the Court of Appeals usurped the fact-finding role of the Commission" when it found its own independent facts) and *Deese*, 352 N.C. at 116, 530 S.E.2d at 553 (holding that our review of the factual findings of the Commission is limited to whether the "competent evidence supports the Commission's findings of fact"). In view of the fact that the record does not, in fact, contain any evidence describing the marketability of Plaintiff's skills in operating a restaurant or that a person with Plaintiff's skills and subject to Plaintiff's physical limitations could realistically expect to find work operating a restaurant, the fact that the record might contain evidence which would have supported a different result provides no justification for overturning the Commission's decision. As a result, we conclude that the Commission did not err by failing to conclude that Defendants had satisfied both prongs of the

Lanning test based upon the alleged transferability of Plaintiff's skills in operating a restaurant.³

3. Relation of Loss of Earning
Capacity to Compensable Injury

Finally, Defendants assert that the record does not establish the existence of a causal relationship between Plaintiff's injury and his loss of earning capacity. Aside from the fact that Defendants, rather than Plaintiff, bore the burden of proof with respect to this issue, a careful review of the record demonstrates that the Commission did, in fact, make the determinations which Defendants claim to have been omitted. For example, as the Commission stated in Finding of Fact No. 13, "[a]s a result of his physical limitations, Plaintiff has been unable to accept certain" wrought iron sales jobs. In addition, the Commission stated in Finding of Fact No. 33⁴ that "[t]he type of work Plaintiff performed in his pre-injury restaurant businesses is significantly different than the work he currently performs in his restaurant" and that, "[f]ollowing his July 18, 2008 injury by accident, Plaintiff's testimony indicates that the services he performed post-injury were mostly sedentary and

³As we understand the arguments advanced in Defendants' brief, they have not contended that Plaintiff has developed skills in his catering and wrought iron sales work that, due to their transferability, preclude a finding that Plaintiff was disabled.

⁴Similar language appears in Conclusion of Law No. 3.

performed at his discretion and most of the manual and physical labor, such as cooking and serving customers, was performed by family members." Our review of the record indicates that these findings have adequate evidentiary support. Plaintiff testified that the physical restrictions to which he was subject limited his ability to perform the sort of sales duties that he had performed for Ironmen during the time that he worked for Mr. Davis. Similarly, Plaintiff testified that, while he had been a "[j]ack of all trades and a master of none" when operating his earlier restaurants, with his work having included cooking, paying the bills, waiting on tables, dish washing, and sitting and talking to customers when he was not cooking or waiting on tables, his work at his current restaurant included setting the prices, purchasing the food, paying the bills, and "visit[ing] customers and sit[ting] down and shoot[ing] the breeze with them." Although the record evidence concerning the impact of the 18 July 2008 injury on Plaintiff's ability to perform restaurant-related work is less explicit than is the case with respect to the testimony addressing the impact of that injury on Plaintiff's ability to engage in the wrought iron sales business, we believe that the record still supports the Commission's findings with respect to this issue. Simply put, the fact that Plaintiff did not mention doing the more physical

sorts of work that he performed in his pre-2004 restaurant in describing what he did in his current restaurant coupled with his emphasis upon the performance of more sedentary tasks in his description of the work that he performs at his current restaurant and the nature of the work restrictions imposed upon Plaintiff by Dr. Kouba supports the Commission's determination that Plaintiff's job-related injury did, in fact, adversely affect his ability to earn wages while operating a restaurant. Although the record does contain evidence from which the Commission might have reached a different conclusion, that fact does not, as we have already noted, justify a decision to overturn the Commission's decision on appeal. As a result, we conclude that Defendants are not entitled to relief from the Commission's order based upon this final argument.

III. Conclusion

Thus, for the reasons set forth above, we conclude that none of Defendants' challenges to the Commission's order have merit. As a result, the Commission's order should be, and hereby is, affirmed.

AFFIRMED.

Judges ROBERT C. HUNTER and STROUD concur.

Report per Rule 30(e).