IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-276

Filed: 7 November 2017

From The North Carolina Industrial Commission IC Nos. 352789, X51838, Y22531

JACQUELYN BROWN, Employee, Plaintiff,

v.

N.C. DEPARTMENT OF PUBLIC INSTRUCTION (MACON COUNTY SCHOOLS), Employer, SELF-INSURED (CORVEL CORPORATION, Third-Party Administrator), Defendant.

Appeal by Plaintiff from an Opinion and Award entered 8 December 2016 by the Full North Carolina Industrial Commission. Heard in the Court of Appeals 7 September 2017.

The Harper Law Firm, PLLC, by Richard B. Harper, for Plaintiff-Appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General Donna B. Wojcik, for Defendant-Appellee.

HUNTER, JR., Robert N., Judge.

Jacquelyn Brown ("Plaintiff") appeals from an Opinion and Award entered 8 December 2016 by the Full North Carolina Industrial Commission (the "Commission"). For the reasons explained in this opinion, we affirm.

I. Factual and Procedural Background

During the course of her employment as a teacher with Macon County Schools ("Defendant"), Plaintiff suffered three compensable injuries. On 30 May 2003, Plaintiff suffered her first admittedly compensable injury when she slipped and fell on wet floor in the school hallway. This resulted in injury to her left knee, right elbow, and right shoulder; and her shoulder injury necessitated surgery. Plaintiff received compensation for this injury, and returned to work in February of 2004. Over seven years later, on 17 June 2011, Plaintiff sustained a second admittedly compensable injury after hurting her right shoulder when she was cleaning a cabinet in her classroom and the cabinet door fell off its hinges. This injury necessitated a second shoulder surgery.

Following her second surgery, Plaintiff returned to work for a trial period on 2 August 2012. On 6 September 2012, she slipped on standing water near a water fountain and fell, reinjuring her right shoulder a third time. Four days later, Defendant-Employer filed a Form 19 (Employer's Report of Employee's Injury or Occupational Disease to the Industrial Commission) indicating Plaintiff "was walking her class to the gym at the end of [the] day and fell on a wet floor." Defendant noted Plaintiff suffered hip strain as a result of the fall. On 24 September 2012, Plaintiff filed a Form 18 (Notice of Accident to Employer and Claim of Employee,

Representative, or Dependent), stating she injured her right arm, shoulder and hip when she fell.

On 20 November 2012, Defendant filed a Form 63 (Notice of Payment of Compensation Without Prejudice . . . or Payment of Medical Benefits Only Without Prejudice) stating payment of medical compensation was without prejudice to Defendant to later deny the compensability of Plaintiff's claim. Then on 14 February 2013, Defendant filed a Form 60 (Employer's Admission of Employee's Right to Compensation) admitting Plaintiff's right to compensation and notably indicating the compensable injury occurred on 17 June 2011—the date of Plaintiff's second injury.

Deputy Commissioner Kim Ledford heard Plaintiff's case on 20 November 2014. The parties stipulated Plaintiff was employed by North Carolina Department of Public Instruction as a second grade teacher at the time she sustained each of her three injuries and until she retired on 1 May 2014. The parties also stipulated Plaintiff is not entitled to any additional benefits with respect to the 30 May 2003 injury. The parties disagreed "as to the ongoing compensation that Plaintiff-Employee is entitled to, as a result of her admitted [2011] accident" as well as the 2012 accident.

Deputy Commissioner Ledford issued an Opinion and Award on 23 November 2015. The Opinion and Award found and concluded Plaintiff's third accident "was the event that interrupted her recovery from the second accident . . . . Therefore, any

ongoing medical or indemnity compensation payable in this case relates to the third and final accident." Deputy Commissioner Ledford ordered the following: "Defendant shall continue to pay Plaintiff compensation for total disability at the rate of $564.77 per week from January 17, 2013 and continuing until further order of the Commission." Plaintiff gave notice of appeal to the Full Commission on 2 December 2015.

The Commission filed its Opinion and Award on 8 December 2016 and found the following facts.

Plaintiff, a sixty-five year old female at the time of the hearing, suffered her first compensable injury on 30 May 2003 when she slipped on a wet floor in a school hallway and fell, injuring her right shoulder, right elbow, and left knee. Plaintiff underwent surgery for her shoulder injury on 2 February 2004 and was released without any permanent restrictions on 8 September 2004.

On 17 June 2011, Plaintiff sustained a second compensable injury to her right shoulder. This occurred when she was cleaning a cabinet in her classroom, and the cabinet door fell off its hinges; "Plaintiff reached her arm upwards to stop the cabinet door from falling on her" injuring her shoulder in the process. Following this injury, Defendant submitted a Form 63 "agreeing to pay 'Section 2: Medical Benefits Only' without prejudice to Defendant's right to later deny the compensability of the June 17, 2011 claim." Plaintiff participated in physical therapy treatment from 3 August

2011 until 9 January 2012. Because she continued to experience pain and her right shoulder remained limited Plaintiff visited orthopedic surgeon, Dr. Cammarata, in January of 2012. Dr. Camamrata assessed her injury as "possible recurrent rotator cuff tear." He ordered an MRI of her shoulder which revealed "she had a tear of the rotator cuff in the supraspinatus." On 26 April 2012, Dr. Cammarata performed Plaintiff's second surgery on her right shoulder.

Plaintiff returned to work in the Fall of 2012. At the time Plaintiff resumed work, "she had not yet been assessed at maximum medical improvement from the June 17, 2011 injury and the April 26, 2012 surgery." Dr. Cammarata restricted her to "modified duty, or to be out of work if no appropriate light duty was available." On 2 August 2012, Defendant filed a Form 28T (Notice of Termination of Compensation by Reason of Trial Return to Work), indicating Plaintiff began her trial return to work, and temporary total disability compensation would terminate on 7 August 2012.

On 6 September 2012, while still in the trial return to work period, Plaintiff sustained a third injury to her right shoulder. This injury occurred when she fell due to standing water near a water fountain. According to Dr. Cammarata, this fall re-injured her right shoulder. Plaintiff underwent another MRI which indicated Plaintiff had a "recurrent tear at the supraspinatus insertion site." Thus, Dr. Cammarata "decided to continue conservative care for an additional three to four

weeks, but indicated that if she did not improve, 'she may require repeat operative intervention.'"

During an appointment on 31 October 2012, Dr. Cammarata determined Plaintiff "had failed conservative care for the recurrent rotator cuff tear." On 17 January 2013, he performed Plaintiff's third surgical repair of her right shoulder. On 14 February 2013, Defendant filed a Form 60 admitting Plaintiff's right to compensation, notably stating the compensation was "for an injury by accident on 06/17/2011"—the date of Plaintiff's second injury.

Following the third surgery, Plaintiff participated in physical therapy on her right shoulder and also underwent an outpatient procedure to treat an unrelated degenerative eye condition. On 14 August 2013, she completed a Functional Capacity Evaluation which indicated she was "incapable of sustaining the sedentary level of work for an 8-hour day/40-hour week" and she was unable to perform fifty-eight percent of the tasks associated with her job as a second grade teacher. On 19 August 2013, "Dr. Cammarata assessed Plaintiff at maximum medical improvement with a ten percent . . . permanent partial impairment to her right shoulder and discharged her from his care."

On 1 May 2014, Plaintiff visited Dr. Barron, an orthopedic surgeon, at her own expense. Plaintiff complained of ongoing pain in her right shoulder, as well as pain in her left shoulder. Dr. Barron ordered MRIs of both shoulders and upon reviewing

them, he assessed Plaintiff with rotator cuff syndrome bilaterally, as well as overuse to her left shoulder. He also "recommended reverse shoulder anthroplasty surgery for Plaintiff's right shoulder."

Dr. Cammarata, Plaintiff's primary treating physician, reviewed the results of the MRI which Dr. Barron ordered. "He explained that the MRI showed no evidence of recurrent tear in Plaintiff's right shoulder, and mild fraying or inflammation along the rotator cuff, with mild degenerative changes." Additionally, Dr. Cammarata disagreed with Dr. Barron's assessment, and does not recommend further surgery for Plaintiff. He further believes Plaintiff's rotator cuff has healed. "He testified that Plaintiff has permanent restrictions of no consistent lifting more than ten . . . pounds, and no pushing or pulling more than twenty-five . . . pounds. . . . These restrictions place her in the sedentary job category."

Dr. Marcus Peter Cook conducted a second opinion examination of Plaintiff's right shoulder. Dr. Cook examined Plaintiff's 2003 MRI and compared it to her 2012 and 2014 MRIs. He stated the 2012 MRI showed a new tear or re-tear of the rotator cuff. "In Dr. Cook's opinion, the . . . 2014 MRI results showed nothing of concern, 'not given all of the surgeries she's had.' He did not recommend further surgery." Dr. Cook and Dr. Cammarata agree Plaintiff's third fall in 2012 "changed the course of Plaintiff's healing." The two doctors also agree no further surgery is needed and Plaintiff is not totally disabled. Dr. Cammarata believed Plaintiff could return to

work as a school teacher; however, Dr. Cook did not believe Plaintiff could continue teaching second grade. Vocational Rehabilitation Expert John McGregor conducted a vocational assessment of Plaintiff and testified a teaching position is not within Plaintiff's capabilities.

The Commission found on or about 1 October 2013, Defendant filed a Form 24 (Application to Terminate or Suspend Payment of Compensation) "seeking to terminate Plaintiff's benefits alleging, 'Dr. Cammarata released [Plaintiff] with permanent restrictions to return to work on 8/19/2013. The Employer is able to accommodate work restrictions. However, [Plaintiff] is out of work due to medical issues that are not related to the workers' compensation claim.'" Plaintiff filed a response alleging the form was "legally deficient and inaccurate, and further assert[ed] that her disability was ongoing. Plaintiff denied that she had been offered suitable employment." Special Deputy Commissioner Kelly denied the Form 24 Motion to Terminate Benefits, and Defendant did not appeal that decision.

The Commission found insufficient evidence "to support a finding that Defendant-Employer offered Plaintiff suitable employment within her restrictions at the time the Form 24 was filed or subsequent thereto." In a letter dated 4 March 2014, the Macon County Schools Superintendent informed Plaintiff of "the intention of Macon County to separate her from employment" as he believed there were no positions available which were suitable for her. The Commission found based upon

a preponderance of the evidence "no suitable jobs were offered to Plaintiff. She was unable to perform work as a second grade teacher given the restrictions she was under, and Defendant-Employer made no offer of appropriate accommodations."

The Commission found given Plaintiff's current restrictions she is not capable of earning the same or similar wages and thus, she is entitled to compensation for temporary total disability. Because the Commission determined her ongoing disability is related to her 2012 injury, the Commission concluded the statutory provisions of N.C. Gen. Stat. § 97-29 which became effective on 24 June 2011 govern her claim. The Commission awarded Plaintiff temporary total disability compensation at the compensation rate of $564.77 per week from 17 January 2013, and continuing until further order of the Commission, for up to 500 weeks.

Plaintiff filed notice of appeal of the Commission's Opinion and Award to this Court on 3 January 2017.

II. Jurisdiction

This Court has jurisdiction over appeals from the Industrial Commission pursuant to N.C. Gen. Stat. § 7A-29(a) and N.C. Gen. Stat. § 97-86 (2015).

III. Standard of Review

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

'[C]ourt'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) (citation omitted) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)).

"The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Anderson*, 265 N.C. at 433-34, 144 S.E.2d at 274. "This Court does not weigh the evidence; if there is any competent evidence which supports the Commission's findings, we are bound by their findings even though there may be evidence to the contrary." *Peagler v. Tyson Foods, Inc.*, 138 N.C. App. 593, 597, 532 S.E.2d 207, 210 (2000) (citing *Hansel v. Sherman Textiles*, 304 N.C. 44, 283 S.E.2d 101 (1981)).

IV. Analysis

On appeal, Plaintiff argues her right to disability compensation is governed by the language of N.C. Gen. Stat. § 97-29 as it existed on the date of her second injury, 17 June 2011. In support of her argument Plaintiff contends Defendant conclusively admitted her current disability is the result of her 2011 injury. Plaintiff also contends the Commission's conclusion her disability relates only to her third injury is inconsistent with the Commission's findings of fact and conclusions of law.

"[T]he law of this jurisdiction is that the applicable version of the statute is the one in effect when the disability occurs." *Smith v. Am. and Efird Mills*, 51 N.C. App.

480, 491, 277 S.E.2d 83, 90 (1981) *modified and aff'd*, 305 N.C. 507, 290 S.E.2d 634 (1982). In *Smith* this Court stated "[T]his simple rule can become difficult to apply unless one bears in mind the rationale for the rule . . . [t]he date of disability is the date upon which the employee's claim accrues and the date upon which the employer becomes liable." *Id.*

Prior to 24 June 2011, N.C. Gen. Stat. § 97-29 allowed the award of total disability benefits "during the lifetime of the employee." However, effective 24 June 2011 the statute was amended to limit the award of disability benefits to five hundred weeks, in most cases. Consequently, Plaintiff argues the Commission committed error by finding and concluding her right to total disability benefits is governed by the statute as it existed on 24 June 2011, and thus her award is limited to five hundred weeks. Therefore, the essential question on appeal is when Plaintiff's compensable disability occurred.

Plaintiff first argues the compensable disability occurred at the time of her second injury because Defendant conclusively admitted such on a Form 60. The Form 60, dated 14 February 2013 states "[y]our employer admits your right to compensation for an injury by accident on 06/17/2011" and "[t]he disability resulting from the injury began on 01/17/2013." Plaintiff argues these statements conclusively establish Plaintiff's "continuous total disability since 17 June 2013 is due proximately to the second accident of 17 June 2011 and her benefits should be governed by the

law in place at that time." Plaintiff essentially contests the Commission's Finding of Fact Number Ninety-three in which the Commission found the following:

> 93. Plaintiff's contention that her current claim for disability is controlled by the statutory provisions of N.C. Gen. Stat. § 97-29 that were in effect prior to the June 24, 2011 amendments is unpersuasive. With regard to Plaintiff's contention based upon the February 14, 2013 Form 60 agreement that her disability compensation should be paid pursuant to her June 17, 2011 injury, the Full Commission finds that the Form 60 agreement filed by Defendant on February 14, 2013 admitted liability and compensability for Plaintiff's injury by accident on June 17, 2011. The body part admitted was right shoulder rotator cuff tear. In the section on the Form 60 stating, "THE FOLLOWING ITEMS 1 THROUGH 4 ARE PROVIDED FOR INFORMATIONAL PURPOSES ONLY AND DO NOT CONSTITUTE AN AGREEMENT," Defendant indicated that disability from the injury began on January 17, 2013. This statement does not constitute an admission or agreement by Defendant to compensate Plaintiff for her September 6, 2012 injury as part of the prior June 17, 2011 claim.

The Commission's finding is consistent with our law. This Court has held "an employer's payment of compensation pursuant to a Form 60 filed with the Commission is an enforceable award." *Perez v. Am. Airlines/AMR Corp.*, 174 N.C. App. 128, 131, 620 S.E.2d 288, 290 (2005). However, we have also emphasized "[b]y executing a Form 60 and paying compensation pursuant thereto, a defendant admits *only the compensability* of the employee's injury"; it does not constitute a final award. *Watts v. Hemlock Homes of the Highlands, Inc.*, 141 N.C. App. 725, 729, 544 S.E.2d 1, 3 (2001) (emphasis added). In *Watts* we held "where disputes arise regarding issues

other than compensability, . . . such issues are within the exclusive jurisdiction of the North Carolina Industrial Commission." *Id.*

Here, Defendant does not dispute compensability of the third injury. Rather, this dispute concerns when the compensable disability arose for the purpose of determining the governing law. Thus, the information on the Form 60 is not conclusive as to these issues.

Plaintiff next argues the Commission's conclusion her continuing disability relates solely to her third injury is inconsistent with certain findings of fact and conclusions of law. Related to this contention, the Commission found the following:

> 29. Plaintiff returned to work for Macon County Schools in the Fall of 2012. At this time, she had not yet been assessed at maximum medical improvement from the June 17, 2011 injury and the April 26, 2012 surgery. She was still restricted by Dr. Cammarata to modified duty, or to be out of work if no appropriate light duty was available. On or about August 2, 2012, Defendant filed a form 28T *Notice of Termination of Compensation By Reason of Trial Return to Work* indicating that Plaintiff began her trial return to work on August 2, 2012 and that temporary total disability compensation would be terminated on August 7, 2012.
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> 30. On September 6, 2012, Plaintiff fell at work, due to standing water near a faulty water fountain. As a result of her fall, Plaintiff's right shoulder was re-injured a third time. . . . According to the testimony of Dr. Cammarata, at the time of this third injury, Plaintiff was healing, but this fall caused re-injury to her right shoulder. . . .
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> 37. . . . As of February 14, 2013, Plaintiff's disability related to both her June 17, 2011 and September 6, 2012 injuries, as Plaintiff had only returned to work on a trial basis from her June 17, 2011 compensable injury when she sustained the September 6, 2012 injury. However, the preponderance of the evidence shows that Plaintiff's June 17, 2011 shoulder injury was healing and was expected to fully heal.
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> . . . .
> 74. Although there was not a right shoulder MRI just before Plaintiff's fall and third injury on September 6, 2012, Dr. Cook testified that the right shoulder most likely was healing as expected. He agreed with Dr. Cammarata's opinion that the fall of September 6, 2012 changed the course of Plaintiff's healing. . . .
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> 84. Based upon a preponderance of the evidence in view of the entire record, the Full Commission finds that on September 6, 2012, Plaintiff sustained an injury by accident arising out of and in the course of her employment due to a fall at work. Plaintiff's fall aggravated her pre-existing right shoulder condition and caused the need for further medical treatment and resulted in disability.
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> 87. Based upon a preponderance of the evidence in view of the entire record, the Full Commission finds that Plaintiff does not have failed rotator cuff syndrome. Although she still has pain, weakness and decreased range of motion in her right shoulder, Plaintiff's right rotator cuff is intact, with a small surface tear, but no recurrent tear or full thickness tear. Her ongoing pain is most likely due to her multiple surgeries. . . .

Related to Plaintiff's contention, the Commission found the following

conclusions of law.

> 3. . . . Based upon the preponderance of the evidence in view of the entire record, the Full Commission concludes that Plaintiff's third accident, the fall of September 6, 2012, was the event that interrupted her recovery from the second accident and precipitated the rotator cuff re-tear in the right shoulder and the need for a third surgery. . . .
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> 10. Based upon the preponderance of the evidence in view of the entire record, including expert medical and vocational opinions, the Full Commission concludes that due to the injuries Plaintiff sustained in the most recent accident of September 6, 2012, Plaintiff has been unable to return to her work as a second grade school teacher. Plaintiff has further established that, although she is well-educated, considering her age, experience and other pre-existing conditions, as well as her injury-related restrictions and physical limitations, at present Plaintiff is not capable of earning the same or similar wages in other employment and therefore she would be entitled to compensation for temporary total disability. . . .
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> 12. The Full Commission concludes based upon the preponderance of the evidence, that Plaintiff's September 6, 2012 fall was a separate incident unrelated to her prior compensable injury and, although she injured the same body part that was involved in her June 17, 2011 injury, Plaintiff's current disability is related to the September 6, 2012 injury. Based upon the testimony of Dr. Cook, which has been given greater weight, the Full Commission further concludes that any ongoing disability compensation payable in this case relates to the third and final accident; however, Plaintiff's need for ongoing treatment for pain relates to all three of her injuries, as Dr. Cook has opined, and the Full Commission concludes, that Plaintiff[']s

> ongoing chronic pain necessitating future medical treatment is related to all three of her surgeries related to her injuries by accident. . . .
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> 14. The Full Commission concludes that Plaintiff's ongoing disability is related to her September 6, 2012 injury by accident and is controlled by the statutory provisions of N.C. Gen. Stat. § 97-29 that became effective on June 24, 2011. Defendant did not appeal from the Opinion and Award of the Deputy Commissioner awarding compensation for up to 500 weeks.
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> 15. Plaintiff is entitled to temporary total disability compensation from January 17, 2013, and continuing until further order of the Commission, for up to 500 weeks. . . .

Plaintiff contends many of the Commission's findings of fact tend to suggest her current disability is a continuation or aggravation of her second injury, rather than a new and distinct injury. We agree, some of the Commission's findings do suggest such a conclusion, yet other findings suggest Plaintiff's final injury was separate and distinct. Our review is limited to considering whether any evidence in the record tends to support the Commission's findings, and whether those findings support the Commission's conclusions. Our review is deferential to the final decisions of the Industrial Commission so long as that decision is supported by competence evidence, even when the evidence is in conflict.

Here, there is evidence in the record tending to show Plaintiff's disability is related only to her third fall. Plaintiff's primary physician, Dr. Cammarata, testified

prior to her third fall in September 2012, "she was progressing as anticipated" and there was nothing to suggest her recovery from surgery would be unsuccessful. Dr. Cook testified "the most recent fall has resulted in her current pain . . . and need for future treatment." Dr. Cook went on to say "[o]nce a rotator cuff has healed, . . . it should be just as strong. It should not be more likely . . . to be reinjured." Randy Phillips, a physical therapist who worked with Plaintiff on several occasions, testified prior to Plaintiff's fall in September 2012, she had progressed well. He stated in August, she had good range of motion, and her strength was good. Thus, there is evidence to support the Commission's finding Plaintiff's current disability is the result of her third fall which was a separate, unrelated incident.

Plaintiff also contends her third fall is an aggravation of a preexisting compensable injury which occurred during a trial return to work period, and thus the applicable law is the law which was in place at the time of her second injury. Plaintiff's argument is misplaced. She relies on this Court's holding in *Starr v. Charlotte Paper Company*, which stated "[w]hen the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to claimant's own intentional conduct." 8 N.C. App. 604, 611, 175 S.E.2d 342, 347 (1970). In *Starr* we went on to say "[t]he basic rule is that a subsequent injury, whether an aggravation of the original injury

or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury." *Starr* 8 N.C. App. at 612, 175 S.E.2d at 347. Yet, *Starr* only stands for the proposition subsequent injuries are deemed *compensable* and again, compensability is not disputed in this case. *Starr* does not stand for the proposition that the date of the subsequent injury relates back to the date of the primary injury.

Finally, Plaintiff contends her third injury constitutes a "failed return to work" under N.G. Gen. Stat. § 97-32.1. This statute provides:

> Notwithstanding the provisions of G.S. 97-32, an employee may attempt a trial return to work for a period not to exceed nine month[s]. . . . If the trial return to work is unsuccessful, the employee's right to continuing compensation under G.S. 97-29 shall be unimpaired unless terminated or suspended thereafter pursuant to the provisions of this Article.

N.C. Gen. Stat. § 97-32.1 (2015). If "during the trial return to work period, the employee must stop working *due to the injury for which compensation had been paid*, the employee should complete and file with the Industrial Commission, a Form 28U." *Burchette v. E. Coast* Millwork *Distribs.*, 149 N.C. App. 802, 809, 562 S.E.2d 459, 463 (2002) (emphasis added). Our cases concerning failed attempts to return to work have involved employees who are unable to continue working due to physical limitations resulting from their prior injury. We are not aware of, nor does Plaintiff

rely on, any cases in which an employee had a failed return to work due to a new, independent injury such as a slip and fall.

In *Burchette* we affirmed the Commission's finding the employee's trial return to work was unsuccessful when employee made

> at least eight different good faith, trial return to work efforts at very light duty jobs . . . . In each instance the job was not suitable to [employee's] capacities and his effort was unsuccessful due to increased lower back pain and increased right leg pain and weakness from the prolonged sitting or standing required by the job. . . . The various employment opportunities offered to [employee] by defendant-employer . . . were not suitable to [employee's] capacities . . . .

Burchette 149 N.C. App. at 807, 562 S.E.2d. at 462. Similarly in the unpublished case *Baxter v. Danny Nicholson, Inc.*, the employee's return to work was unsuccessful when his physical condition precluded him from performing required tasks and caused increased pain. No. COA07-865-2, 2010 N.C. WL 3633031, at *3 (unpublished) (N.C. Ct. App. Sep. 21, 2010). The facts of this case are clearly distinguishable from *Burchette* and *Baxter*. Here, when Plaintiff returned to work on 2 August 2012 following her second surgery, she had not yet been assessed at maximum medical improvement, and was restricted to "modified duty." Yet, there is no indication Plaintiff was incapable of performing her duties as a second grade teacher. Her third injury was the result of slipping and falling on a puddle of standing water. There is nothing in the record to suggest this injury occurred due to Plaintiff's

physical limitations resulting from her second surgery. Therefore, Plaintiff's return to work was unsuccessful as a result of a new, independent injury, *not* because of her physical limitations or an inability to perform her duties. Thus, her injury and subsequent absence from work did not constitute a failed return to work within the meaning of N.C. Gen. Stat. § 97-32.1.

There is competent evidence to support the Commission's findings and the findings support the Commission's conclusion Plaintiff's current disability is the result of her third and final injury. Therefore, the appropriate version of N.C. Gen. Stat. §97-29 is the one in place at the time of her third injury on 6 September 2012.

V. Conclusion

For the foregoing reasons we affirm the decision of the Industrial Commission.

AFFIRMED.

Judges DILLON and ARROWOOD concur.

Report per Rule 30(e).