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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-525

Filed: 20 October 2020

North Carolina Industrial Commission, I.C. No. 13-758570

DIANE J. KIRBY, Employee, Plaintiff,

v.

MISSION HOSPITAL, INC., Self-Insured Employer, Defendant.

Appeal by plaintiff from opinion and award entered 5 February 2019 by the North Carolina Industrial Commission. Heard in the Court of Appeals 31 March 2020.

Ganly & Ramer, PLLC, by Thomas F. Ramer, for plaintiff-appellant.

Brewer Defense Group, by Joy H. Brewer, for defendant-appellee.

BRYANT, Judge.

Where the findings of fact are supported by competent evidence, which support the conclusions of law, we affirm the opinion and award of the Industrial Commission (“the Commission”) terminating plaintiff’s disability payments after she failed to prove an ongoing disability.

Plaintiff Diane J. Kirby is a registered nurse and sustained compensable injuries to the right side of her body when she fell on 14 October 2013, while working

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for defendant-employer Mission Hospital, Inc., (hereinafter “Mission”). Plaintiff filed a Form 18 indicating that she injured her right foot while “walking from a carpet floor to a marble floor[;] her feet were wet and she slipped and broke her [r]ight foot.”

Plaintiff’s evaluations and treatment began in 2013 immediately following her compensable injury by accident and continued until late-2016. Mission authorized plaintiff to see Dr. Pamela Allen Meliski regarding her injuries. X-rays revealed a fracture to her right foot. Dr. Meliski also treated plaintiff for injuries to her right shoulder, right elbow, and right knee. Plaintiff was subsequently diagnosed with “Chronic Pain Syndrome and/or Reflex Sympathetic Dystrophy/Complex Regional Pain Syndrome.”¹ Mission filed a Form 19 notice of plaintiff’s injuries. Plaintiff was out of work from 15 October to 28 October 2013.

On 28 October 2013, plaintiff was released to sedentary duty work restrictions, including no lifting over ten pounds. Plaintiff also saw Dr. Jay Jansen, who treated plaintiff’s right shoulder, right elbow, and right knee. Dr. Jansen deferred to Dr. Meliski’s sedentary work restrictions. Mission filed a Form 60 accepting liability and awarded temporary total disability benefits. On the Form 60, Mission noted plaintiff’s injuries as a sprain to her “neck, wrist – right, arm – lower right, ankle – right, elbow – right, knee – right, foot – right, hand – right, shoulder – right, arm –

¹ Throughout the opinion, abbreviations such as “CRS,” “RSD,” and “CRPS” are used interchangeably in the findings of fact and conclusions of law to refer to plaintiff’s chronic pain diagnosis.

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upper right, and side – right.” Plaintiff was assigned to work light-duty in Mission’s pharmacy department, and her disability payments were suspended.

In December 2013, plaintiff was in physical therapy for her right knee. Her shoulder, elbow, and knee had remained sore since her injury. Plaintiff had problems with decreased strength and range of motion, normal household chores, sleeping, and other activities of daily living. The physical therapist scheduled her appointments twice a week for four weeks, and plaintiff’s sedentary work restrictions continued with lifting no more than ten pounds.

Plaintiff returned to Dr. Meliski and complained of ongoing pain with hypersensitivity in her right foot. Dr. Meliski recommended an MRI of her right foot. Plaintiff subsequently missed scheduled physical therapy appointments, and follow-up appointments for her right knee, right shoulder, and right elbow. In February 2014, plaintiff underwent an MRI, which revealed that her right foot was healed. Plaintiff failed to attend a follow-up appointment.

On 5 March 2014, plaintiff returned to Dr. Meliski regarding ongoing difficulty with her right foot. Dr. Meliski stated, “[p]laintiff ha[d] difficulty with sheets touching her foot and like[d] to have the foot on the floor. She does not feel any evidence of instability about her foot.” On 23 March 2014, plaintiff was relieved of her light-duty position, and temporary total disability benefits, which had been suspended while she worked, were reinstated. Mission directed plaintiff to undergo further evaluations

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with Dr. Mark Hedrick regarding her right foot. Dr. Hedrick confirmed plaintiff's chronic pain diagnosis and recommended a sympathetic nerve block to alleviate her symptoms.

On 15 August 2014, Mission filed a motion to compel compliance with medical treatment due to plaintiff's failure to attend her physical therapy appointment scheduled that day. The executive secretary of the Commission filed an order compelling plaintiff to "fully cooperate with all recommended medical treatment, including but not limited to attending all scheduled medical appointments and physical therapy sessions."

On 22 August 2014, after the sympathetic nerve block had been administered, plaintiff returned to Dr. Meliski, who noted that plaintiff had not shown signs of relief to her right foot. Plaintiff was recommended to seek evaluation and treatment for "chronic RSD [Reflex Sympathetic Dystrophy]." Dr. Meliski also advised plaintiff to consult with her primary care physician for her symptoms of depression as depression could exacerbate RSD. Sedentary work restrictions remained.

Mission subsequently filed a Form 61 denying additional compensation for plaintiff's psychological treatment, alleging "there [was] insufficient evidence that . . . plaintiff's depression/anxiety [was] causally related to her compensable minimally displaced fracture [in her right foot.]" As a result, Mission denied liability for medical treatment related to that condition. Notwithstanding the denial, Mission authorized

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limited medical treatment for plaintiff's depression/anxiety. Plaintiff sought treatment with Dr. Donald Hinnant, a licensed psychologist certified in pain management, who diagnosed plaintiff with depression and anxiety resulting from her foot injury.

In late 2015 and early 2016, both parties submitted Form 33 hearing requests, alleging disagreements over numerous issues, including plaintiff's disability and entitlement to ongoing temporary total disability benefits. Mission's Form 33 alleged "plaintiff [was] no longer able to establish disability as a result of her compensable injury and that no further medical treatment was necessary to effect a cure, provide relief, or lessen the period of disability." On plaintiff's Form 33, she contended Mission had "refused to authorize necessary medical treatment," "intentionally withheld and misrepresented evidence to medical providers," and engaged in bad faith. Plaintiff filed an amended Form 33 seeking attorney's fees. In response, Mission filed a Form 33R, contending plaintiff's allegation of "intentionally withholding and misrepresenting evidence to medical providers" and her claim of bad faith was without merit, and sought attorneys' fees and costs.

Prior to the hearing, plaintiff had submitted over 70 job applications for employment. She received at least three job interviews, but no offers of employment. Up until 2016, plaintiff had not made efforts to search for employment after her light-duty position ended in March 2014.

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The claims proceeded to a hearing before a deputy commissioner. The hearing was held over three days: on 23 and 24 May and 27 July 2016. Investigative reports and approximately 50 hours of video surveillance of plaintiff were entered into evidence at the hearing. Plaintiff, various staff with Mission, and investigators, who conducted the surveillance, testified during the hearing. After the hearing, ten (10) depositions were taken.

On 1 March 2018, the deputy commissioner filed an opinion and award, concluding that plaintiff failed to meet her burden of proving ongoing disability and awarding Mission a credit for temporary total disability benefits paid to plaintiff since 16 May 2016. The deputy commissioner concluded plaintiff's chronic pain and psychological problems were causally related to the 14 October 2013 incident, and plaintiff was entitled to Mission's authorization of treatment for those conditions. The deputy commissioner also concluded neither party pursued any issue in an unreasonable manner, without reasonable ground, or in bad faith, nor did any party engage in stubborn, unfounded litigiousness or withhold information. As a result, the deputy commissioner did not award attorney's fees or court costs to either party. Plaintiff appealed to the Full Commission.

On review, the Full Commission upheld the opinion and award of the deputy commissioner affirming the denial of plaintiff's claim for additional compensation and

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concluding that plaintiff failed to meet her burden of proving ongoing disability. Plaintiff appeals to this Court.

On appeal, plaintiff argues the Commission erred by I) concluding she failed to meet her burden of proving an ongoing disability and II) concluding Mission was entitled to credit for payment of temporary total disability benefits subsequent to 16 May 2016.

This Court's review of decisions 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." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). All findings of fact shall be conclusive and binding upon review of the Commission if there is any evidence to support the finding. *Hawley v. Wayne Dale Const.*, 146 N.C. App. 423, 427, 552 S.E.2d 269, 272 (2001). "Before making findings of fact, the Industrial Commission must consider all of the evidence. The Industrial Commission may not discount or disregard any evidence, but may choose not to believe the evidence *after* considering it." *Weaver v. Am. Nat. Can Corp.*, 123 N.C. App. 507, 510, 473 S.E.2d 10, 12 (1996). "Accordingly, this Court does not have the right to weigh the evidence and decide the issue on the basis of its weight." *Johnson v. Lowe's Cos., Inc.*, 143 N.C. App. 348, 350, 546 S.E.2d 616, 618 (2001) (citation and quotation marks omitted).

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“However, the Commission’s conclusions of law are reviewable *de novo* by this Court.”

Hawley, 146 N.C. App. at 427, 552 S.E.2d at 272.

I

Plaintiff first argues the Commission erred by concluding that she failed to meet her burden of proving the existence of an ongoing disability. Specifically, plaintiff argues the Commission failed to properly consider testimony from expert witnesses as to her earning capacity or her ability to engage in vocational placement. We disagree.

“In order to qualify for compensation under the Workers’ Compensation Act, a[n] [employee] must prove both the existence and the extent of disability.” *Johnson*, 143 N.C. App. at 350, 546 S.E.2d at 618. “It is well settled that entering into a Form 60 does not create a presumption of ongoing disability.” *Powe v. Centerpoint Human Servs.*, 226 N.C. App. 256, 262, 742 S.E.2d 218, 222 (2013). “Thus, once the continuing status of [p]laintiff’s disability was disputed, it [becomes] [p]laintiff’s burden to prove that she remained disabled.” *Id.*

[T]o support a conclusion of disability, the Commission must find: (1) that plaintiff was incapable after [her] injury of earning the same wages [she] had earned before [her] injury in the same employment, (2) that plaintiff was incapable after [her] injury of earning the same wages [she] had earned before [her] injury in any other employment, and (3) that this individual’s incapacity to earn was caused by plaintiff’s injury.

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Hilliard v. Apex Cabinet Co., 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). An employee must establish all three *Hilliard* elements in order to prove a disability. *Medlin v. Weaver Cooke Const., LLC*, 367 N.C. 414, 421, 760 S.E.2d 732, 737 (2014). “While plaintiff here bears the burden of proof to establish disability, once plaintiff has done so, the burden shifts to defendant to show not only that suitable jobs are available, but also that the plaintiff is capable of getting one, taking into account both physical and vocational limitations.” *Wilkes v. City of Greenville*, 369 N.C. 730, 745, 799 S.E.2d 838, 849 (2017) (citation and quotation marks omitted).

In the instant case, plaintiff disputes the Commission’s reliance on medical testimony, which led to the Commission’s conclusion that plaintiff did not meet her burden of proving an ongoing disability. The Commission made detailed findings regarding plaintiff’s injuries and her ability to work, based on the depositions of her treating physicians who testified as expert witnesses:

4. On October 15, 2013, plaintiff presented to Blue Ridge Bone & Joint Clinic, where she came under the care of Dr. Pamela Allen Meliski. X-rays revealed a fracture of the right fourth metatarsal. Dr. Meliski diagnosed her with a right metatarsal fracture and wrote her out of work through October 28, 2013. On October 28, 2013, Dr. Meliski released plaintiff to sedentary duty work restrictions of no lifting over 10 pounds.

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27. Following Dr. Meliski’s release of plaintiff to return to sedentary work on October 28, 2013, plaintiff began working in a light-duty position provided by [Mission] in

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the pharmacy. Her job duties consisted primarily of answering the telephone and making follow-up telephone calls to patients. During her work in this position, her home department funded her salary and, therefore, [Mission] could not fill her former position. As a result, the light[-]duty pharmacy position did not constitute a viable long-term employment solution. Further, plaintiff did not show any progress in her recovery while working in this position. In March 2014, [Mission] removed plaintiff from the light-duty position and placed her on personal medical leave.

28. [Mission] hoped that removing plaintiff from work would promote the healing process and eventually enable her to return to her pre-injury position. Thereafter, [Mission] made efforts to extend plaintiff's personal medical leave, but plaintiff failed to communicate or provide [Mission] with her updated medical information when requested. Further, as described herein above, plaintiff failed to attend a number of medical appointments during this time, which impaired [Mission]'s ability to address plaintiff's return of work status or an extension of her personal medical leave. [Mission] contends that had plaintiff communicated timely with [Mission], plaintiff's personal medical leave may have been extended. Accordingly, on August 11, 2014, [Mission] terminated plaintiff and thereafter paid temporary total disability benefits and provided medical treatment of plaintiff.

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30. Surveillance video entered into evidence does not show plaintiff exhibiting any significant pain behaviors or activity limitations through 50-plus hours of video footage. Specifically, on April 10, 2014, plaintiff was observed visiting United Services Credit Union, Asheville-Buncombe Tech Community College, and Zoe's Kitchen. She was observed driving, rising from a seated position without assistance, walking to and from all buildings, standing, wearing shoes, and carrying items.

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31. On July 29, 2014, video surveillance showed plaintiff undergoing a pedicure of her right foot, despite the fact that she reported hypersensitivity and right foot pain to medical providers earlier that month. During the pedicure, plaintiff's right foot was exfoliated and held, and she received a massage to her right foot and leg while calmly watching the shop's television. Immediately after the pedicure, plaintiff shopped in Wal-Mart and completed other errands, including visiting Skyland Dry Cleaners, TD Bank, and a UPS Store. She also visited her husband at the mall, then traveled to Kirby Vacuum Cleaner store to pick up a vacuum.

32. On June 28, 2016, the parties took the deposition of Mark Hedrick, who was tendered as an expert in orthopedic surgery. [Mission] presented Dr. Hedrick with a copy of the video surveillance. Dr. Hedrick stated, "I think when you look at all these videos, what you would say is that this does not seem [like] a severe case of chronic regional pain syndrome."

33. On November 11, 2016, the parties took the deposition of Dr. Pamela Meliski, who was tendered as an expert in the field of orthopedic surgery and foot and ankle reconstruction. Dr. Meliski testified about her diagnosis of RSD and her recommendation that plaintiff see a psychologist as a result of the RSD. Dr. Meliski believed that activity would be good for plaintiff's condition and explained "she was unrestricted in . . . activity level." Dr. Meliski further testified that she was surprised by the surveillance depicting plaintiff's tolerance of the pedicure: "for me, that was surprising that she could tolerate someone touching her foot like that, and with her not even watching. She was watching television." She testified hypersensitivity never goes away, and it was surprising to her how plaintiff was allowing her foot to be handled and carrying on in a somewhat nonchalant way. Based upon the activity documented on surveillance, Dr. Meliski did

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not assign any restrictions due to plaintiff's foot condition and believed plaintiff was capable of gainful employment.

34. On October 25, 2016, the parties took the deposition of Dr. McGhee, who was tendered as an expert in neurology. Dr. McGhee testified that he diagnosed plaintiff with RSD in October 2014 based on plaintiff's pain and foot discoloration. After reviewing the surveillance video, he did not observe any evidence of pain or functional limitation in plaintiff's right foot. Dr. McGhee further testified that plaintiff's behavior while undergoing the pedicure was inconsistent with someone who has RSD, and, in particular, contrasted her behavior in the surveillance with his experience touching her foot during examination, stating,

there was a long surveillance video . . . of . . . a therapist massaging the foot and the leg very vigorously, and the same area where when I touched her she was exquisitely sensitive to pain and there was – there appeared to be no pain. In fact, they were both watching TV.

After reviewing the surveillance video, Dr. McGhee questioned whether plaintiff had significant RSD diagnosis given her activities. Specifically, he stated, "I could say that there's probably more than a 50 percent likelihood that there wasn't any significant reflex sympathetic dystrophy."

35. On September 29, 2016 and November 30, 2016, the parties took the deposition of Dr. White, who was tendered as an expert in the field of physical medicine and rehabilitation. Dr. White reviewed the surveillance video and testified,

I was very relieved for this woman seeing her video, because I know what this diagnosis can do to somebody. And by being able to walk in

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that capacity she was able to exhibit essentially normal gait . . . she was highly functional, which is basically the goal you're trying to achieve when you treat these problems.

Dr. White opposed SCS treatment for plaintiff. Regarding plaintiff's ability to work, Dr. White testified that she was capable of sedentary work. Dr. White also testified that a return to work would benefit plaintiff psychologically. He further stated that plaintiff's application for 70 jobs during the course of one week over a two-week period, many of which she was not qualified for, was not the action of someone who wanted to return to the workforce.

36. On November 8, 2016, the parties took the deposition of Dr. Haasis, who was tendered as an expert in anesthesiology and pain medicine. Dr. Haasis testified that plaintiff had a relatively mild case of CRPS. Dr. Haasis also testified that a SCS was a medically viable treatment option for plaintiff, and that psychological treatment would be appropriate to help plaintiff with her chronic pain.

37. On November 7, 2016, the parties took the deposition of Dr. Richard Rauck, who was tendered as an expert in anesthesiology, pain medicine, pain management, and the diagnosis and treatment of CRPS. Dr. Rauck testified that he diagnosed plaintiff with CRPS, Type I with psychological overlay. Dr. Rauck further [stated] that he did not recommend a SCS in plaintiff's case, but he did testify that ketamine therapy gave plaintiff the best chance at CRPS remission. Dr. Rauck recommended psychological counseling to help her deal with the chronic pain occasioned by the 14 October 2013 compensable accident. Dr. Rauck further testified that it would be possible for plaintiff to work in certain light[-]duty positions. Having reviewed the surveillance, he testified that plaintiff was "functioning certainly to some extent, and somewhat reasonably well compared to . . . other full-blown CRPS

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[patients], which led me to believe that she[,] I think[,] could work in a sedentary type role.”

38. On December 12, 2016, the parties took the deposition of Dr. Curling, who was tendered as an expert in pain management. Dr. Curling, who conducted a medical records review, testified that,

[B]ased on the information that I have available now, which does not include examining the patient, it is my impression that she most likely has CRPS Type 1 involving her right lower extremity, based on the information I have. I would – based on that information, it’s probably a relatively mild case, based on the findings that are documented so far.

Dr. Curling testified that a medication trial and psychological treatment would be the proper course of treatment for plaintiff’s condition. He concurred with Dr. Rauck that she should at least be capable of sedentary light[-]duty work, and an FCE may be helpful to further define any specific limitations she might have.

39. On August 1, 2016, the parties took the deposition of Dr. Hinnant, who was tendered as an expert in psychology and pain management. Dr. Hinnant testified that, based upon his evaluation, he diagnosed plaintiff with “depressive disorder NOS, which is not a major depressive disorder,” and noted that psychological care or counseling would be helpful. Dr. Hinnant also testified that a SCS would be appropriate treatment for plaintiff, and that plaintiff was not currently capable of work. Dr. Hinnant further testified, in light of reviewing the surveillance video, that plaintiff may be capable of sedentary work.

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43. Based upon the preponderance of the evidence in view of the entire record, the Full Commission finds plaintiff's reports of pain and alleged functional limitations due to her RSD and CRPS, Type 1 are inconsistent and in contrast with the surveillance evidence of record.

44. Based upon a preponderance of the evidence in view of the entire record, especially the testimony of Drs. Meliski, McGee, Hedrick, Haasis, Rauck, Curling, White, and Hinnant, and the fact that plaintiff was never written out of work completely by any of her providers, the Full Commission finds that plaintiff has been capable of sedentary work.

The Commission then concluded based on these findings that

plaintiff's treating physicians never completely wrote her out from work subsequent to her return to light[-]duty employment with [Mission] in 2013. Plaintiff presented insufficient evidence from which to determine that she conducted a reasonable job search or made reasonable efforts to obtain employment subsequent to May 16, 2016. Plaintiff failed to prove, subsequent to that date, as a result the October 14, 2013 accident, that she was incapable of work in any employment, that she was unable to obtain employment after a reasonable effort, or that it was futile for her to seek employment because of preexisting conditions. [] Further, plaintiff did not present any other sufficient evidence tending to prove that she was disabled. Accordingly, subsequent to May 16, 2016, plaintiff failed to meet her burden of proving the existence and extent of disability that was caused by her admittedly compensable injuries. . . .

After reviewing the record, we agree with the Commission's conclusion as there was competent evidence of plaintiff's ability to perform sedentary work subsequent to 16 May 2019, notwithstanding her injuries. It is true that with any award granted by the Commission for a compensable injury, plaintiff is presumed to have a disability

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if she is unable to return to work. *See Johnson*, 143 N.C. App. at 350, 546 S.E.2d at 618 (“If an award is made by the Industrial Commission, payable during disability, there is a presumption that disability lasts until the employee returns to work[.]” (citation and quotation marks omitted)). However, Mission presented evidence of video surveillance and testimony from seven treating physicians, who viewed the surveillance and testified that plaintiff was capable of performing tasks within her work restrictions. *See id.* (“[A]ny presumptions existing in favor of plaintiff-employee [can be] rebutted by defendant[] through witness testimony, videotaped surveillance of plaintiff, as well as medical evidence and strong evidence of fraud.”).

The surveillance videos showed plaintiff performing personal tasks for extended periods of time without significant pain or discomfort. Specifically, plaintiff was observed driving to/from different locations, rising from a seated position without assistance, walking to and from buildings, standing, and carrying items. Despite reporting pain and hypersensitivity in her right foot to her treating physicians, plaintiff was observed receiving a pedicure and foot massage on the surveillance video. Moreover, on a few occasions, plaintiff was seen bearing weight on her right foot, which included bending over and reaching for items, as she performed her daily activities. Thus, Mission put forth proper evidence that plaintiff was capable of at least working within her restrictions.

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Plaintiff argues that the Commission inadequately analyzed the inconsistent testimony regarding her ability to work and failed to consider Dr. Hinnant's testimony that she was not capable of working until she received treatment for her symptoms. However, we reiterate that it is the Commission, not this Court, who ultimately determines the weight and credibility of testimony. *See Adams v. AVX Corp.*, 349 N.C. 676, 680–81, 509 S.E.2d 411, 413 (1998). The Commission weighed all witness testimony, including the testimony from Dr. Hinnant, and determined that plaintiff was never written out of work subsequent to her return to light-duty employment with Mission in 2013. Regardless of the inconsistencies in the expert testimony, the Commission's findings were consistent with the record and this Court will not disturb those findings "if they are supported by competent evidence *even if there is contrary evidence in the record.*" *Hawley*, 146 N.C. App. at 427, 552 S.E.2d at 272 (emphasis added).

Additionally, there is also evidence in the record to support the Commission's conclusion that plaintiff had not conducted a reasonable job search.

The Commission weighed the testimony of Scott Spencer and John McGregor, both vocational counselors, and made the following findings:

40. On November 28, 2016, the parties took the deposition of Scott Spencer, a certified rehabilitation counselor and certified case manager, who was tendered as an expert in the field of vocational rehabilitation, psychology, and professional counseling. . . . He located 28 suitable positions for plaintiff. Mr. Spencer testified that, based on

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plaintiff's resume and employment history, she was capable of obtaining suitable employment "if she put forth the effort to do so." Mr. Spencer testified that plaintiff's application for positions that resulted in interviews during May 2016 confirmed she was capable of locating suitable employment on her own. Based on Mr. Spencer's expertise and prior work in the vocational field, and assuming plaintiff was capable of at least sedentary work during the previous two years, he believed she could have obtained employment during the time, had she been actively looking and conducting a reasonable job search.

41. On January 31, 2017, the parties took the deposition of John McGregor, who was tendered as an expert in the field of vocational evaluation and disability management. Mr. McGregor developed an individual rehabilitation plan for plaintiff dated May 2, 2016. Mr. McGregor testified that plaintiff had conducted a reasonable job search during the limited time in May 2016. He further testified that as long as plaintiff's doctors were of the opinion that she was not a candidate for vocational services, it was not appropriate for plaintiff to search for employment. He did not review any surveillance video of record in this case.

42. Based upon the preponderance of the evidence in view of the entire record, the Full Commission finds plaintiff's reports of pain and alleged functional limitations due to her RSD and CRPS, Type 1 are inconsistent and in contrast with the surveillance evidence of record.

Here, the record reflects that plaintiff did not conduct a job search until 3 May 2016, two weeks before the claims were heard with the deputy commissioner. Plaintiff submitted 76 job applications, however, for most of the positions, she was either unqualified or unable to work within her work restrictions. Additionally, plaintiff did not file a request for vocational rehabilitation services until five days before the hearing.

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Nevertheless, plaintiff contends that her compliance was reasonable because she was advised by Amber Miller, an employee of the North Carolina Department of Vocational Rehabilitation, to cease vocational efforts until she received treatment. Notably, Miller was never deposed, and her opinion was provided in response to a questionnaire from plaintiff's counsel. A review of Scott's deposition reveals that he characterized the state vocational rehabilitation as a "separate arena" from worker's compensation, explaining that the state guidelines are different from the Commission's guidelines. The Commission properly considered, and appropriately weighed the opinion of Spencer along with the rest of the evidence, and concluded that plaintiff made no reasonable effort to obtain employment before 16 May 2016. As such, plaintiff's contention holds no merit.

We also reject plaintiff's assertion that she was deprived of necessary assistance from Mission to locate suitable employment as there was evidence that she received interviews for several positions without vocational services in the limited time she applied for jobs. Thus, her argument is overruled.

II

Plaintiff argues the Commission erred by awarding a credit to Mission for temporary total disability benefits paid since May 2016 and failing to instruct how the credit should be applied. We disagree.

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The decision of the Industrial Commission on whether to grant or deny credit for any payments made by employer to an injured employee, which were not due and payable, will not be disturbed in the absence of an abuse of discretion. *Moretz v. Richards & Assocs., Inc.*, 74 N.C. App. 72, 75–76, 327 S.E.2d 290, 293 (1985), *modified on other grounds* by 316 N.C. 539, 342 S.E.2d 844 (1986).

Pursuant to North Carolina General Statutes, section 97-42,

[p]ayments made by the employer to the injured employee during the period of [her] disability, or to [her] dependents, which by the terms of this Article were not due and payable when made, may, subject to the approval of the Commission be deducted from the amount to be paid as compensation.

N.C.G.S. § 97-42 (2019). “The language of G.S. 97-42 clearly indicates that a credit (or deduction from the amount of the award to be paid) is not *required* to be granted.” *Moretz*, 74 N.C. App. at 75, 327 S.E.2d at 293. “Rather, the language places the decision of whether to grant a credit within the sound discretion of the Industrial Commission.” *Id.*

These provisions are typically limited to situations where, for example, an employer pays a disabled employee wages intended as compensation (and not as a gratuity) throughout the period of the latter’s absence from work, . . . but a change in the latter’s condition causes the award to be diminished.

Moretz v. Richards & Assocs., Inc., 316 N.C. 539, 541, 342 S.E.2d 844, 846 (1986).

Here, Mission accepted plaintiff’s injuries as compensable shortly after her accident and thereafter began making disability payments. However, the

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Commission found that plaintiff failed to prove she had ongoing disability after 16 May 2016 and concluded “it [was] reasonable to allow [Mission] a credit for total temporary disability payments made subsequent to May 16, 2016.” Having already determined there was competent evidence to support plaintiff was capable of performing sedentary work after 16 May 2019 and that she failed perform reasonable job searches to find employment, we agree plaintiff no longer qualified for further disability compensation. Thus, payments made by Mission following that date were not “due and payable” within the meaning of section 97-42. Therefore, the Commission did not abuse its discretion in awarding Mission a credit for benefits paid, having found that plaintiff was no longer disabled after 16 May 2016.

Accordingly, where the Commission’s findings of fact are supported by competent evidence in the record, and, in turn, support the Commission’s conclusion that plaintiff failed to meet her burden of proving disability caused by her compensable injury subsequent to 16 May 2016, we are compelled to affirm the Commission’s ruling.

AFFIRMED.

Judges DIETZ and ARROWOOD concur.

Report per Rule 30(e).