IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-455

Filed 31 December 2024

North Carolina Industrial Commission, I.C. Nos. 21-021455 & 21-745792

MICHAEL KERSEY, Plaintiff,

v.

PERDUE FARMS INC., Employer, Zurich American Insurance Company, Carrier (GALLAGHER BASSET SERVICES, INC., Third-Party Administrator), Defendants.

Appeal by Defendant-Appellant from order entered 19 February 2024 by the North Carolina Industrial Commission. Heard in the Court of Appeals 21 October 2024.

Hardison & Cochran, PLLC, by Attorney J. Jackson Hardison, for the plaintiff-appellee.

Freedman Law Firm, by Attorney Brian M. Freedman, for the defendant-appellant.

STADING, Judge.

Perdue Farms, Inc. ("Defendants") appeals from an Opinion and Award entered on 19 February 2024 by the Full Commission of the North Carolina Industrial Commission ("Commission"). The Commission ordered that Michael Kersey

("Plaintiff") receive disability benefits from 5 May 2021, the date of injury. Defendant appealed, contesting the award. Upon review, we affirm the Commission's Opinion and Award.

I. Background

In August 2016, Plaintiff was hired by Defendant as an over-the-road driver, working fourteen days at a time for ten to twelve hours per day. In 2019, seeking to return home daily to see his family, he advanced to a short-haul position. Plaintiff's duties included performing all Department of Transportation inspection requirements, which necessitated frequent climbing in and out of the trailer and cabin, and frequent pulling of the landing gear's locking pins. When functioning correctly and adequately lubricated, the landing gear could be operated smoothly with one hand. According to the job description, the position also required the ability to lift boxes up to 100 pounds to load and unload products.

On 20 April 2020, Plaintiff went to an urgent care facility, complaining of right-side neck pain resulting from turning his head awkwardly while working beneath his house. The physician assistant assessed a cervical sprain, administered an injection, prescribed medications, and took Plaintiff out of work for four days to rest and recover. This non-work-related issue was reported to the adjuster during a recorded statement. On 24 April 2020, Plaintiff followed up with the urgent care facility, reporting improved symptoms but noting two episodes of exacerbation while playing with his children. The attending physician adjusted his medications and took him

out of work for an additional week. On 1 May 2020, Plaintiff reported improvement and requested to return to full-duty work, which was approved.

On 27 June 2020, while inspecting an empty trailer at work, Plaintiff fell when exiting the trailer and attempted to stop his fall by holding onto his work vehicle with his right arm. According to Plaintiff, he "had to reach for the right side door and . . . put all [of his] weight on [his] right arm, . . . slid[ ] down, and [ ] hit the ground just before it was . . . pretty much going to snatch [his] arm out of socket." Plaintiff reported the incident to his employer. After informing his employer that he could still drive, Plaintiff's supervisor told him to drive back to Rockingham to seek medical treatment at the Perdue Wellness Center.

Plaintiff returned to the urgent care facility, reporting right-side neck pain. The physician assistant assessed a neck strain and administered an injection. An incident report was completed by Perdue Health Works ("Wellness Center") on 29 June 2020. Subsequent visits included consultations with medical personnel who noted Plaintiff's continued neck pain but informed him he was not under any work restrictions. Plaintiff requested a second opinion from a medical doctor.

On 1 July 2020, Dr. Bohdan Kopynec at the Wellness Center assessed a suspected injury to the right supraspinatus tendon, ordered magnetic resonance imaging ("MRI") of Plaintiff's right shoulder, and assigned light-duty restrictions pending imaging. By 6 July 2020, Plaintiff's right shoulder pain had resolved, leading to cancellation of the MRI and his release back to regular duty work.

Between November 2020 and February 2021, Plaintiff consulted Dr. Jessica Kelley at Harris Family Practice for pain in his left buttock, hip, and lower back, as well as persistent headaches.

On 21 April 2021, during a telemedicine visit with a physician assistant, Plaintiff reported neck and shoulder pain after yard work, like the symptoms from his June 2020 incident. The physician assistant assessed a neck strain and assigned Plaintiff light duty work through 3 May 2021. Plaintiff reported this non-work-related injury during a recorded statement with the adjuster. On 3 May 2021, Plaintiff returned to full-duty work.

Then, two days later, while "manually cranking the landing gear," Plaintiff experienced a "sharp," "electric pain" through his neck and shoulder, accompanied by a "clicking sound" in his throat and "tingling" in his middle finger. He testified that he was applying unusual exertion due to a potential malfunction or inadequate lubrication of the landing gear. Plaintiff reported the injury to his employer and was instructed to seek medical treatment at the Wellness Center. Plaintiff completed an incident report describing the work-related injury on the same day.

At the Wellness Center, a registered nurse saw Plaintiff. The nurse's treatment note did not mention the work injury. The nurse testified before the Commission that the incident report would have been attached to the treatment records. The treatment note indicated that Plaintiff had a good range of motion and no signs of distress. Plaintiff testified that another nurse applied an ice pack and

muscle ointment during the visit but did not conduct a physical examination or any range of motion tests.

The next day, Plaintiff sought to discuss light-duty work but was advised to speak with the Wellness Center nurse supervisor. A day later, Plaintiff was seen by a family nurse practitioner ("FNP") at the Wellness Center. Plaintiff reported worsening sharp pain in the right side of his neck after climbing on a trailer and pulling on an object. The FNP prescribed over-the-counter pain medication and ordered a cervical spine X-ray. The cervical spine X-ray revealed "mild discogenic degenerative findings" at vertebrae "C6-7 and C7-T1." The FNP recounted that she was unaware she was treating Plaintiff for a work-related injury and later amended the treatment note stating Plaintiff was cleared to continue normal job duties. After the X-ray, Plaintiff awaited further instructions.

On 10 May 2021, a registered nurse informed Plaintiff that he could return to work without restrictions. Plaintiff expressed concern due to his ongoing neck condition. On 12 May 2021, Plaintiff contacted his supervisors, seeking assistance in obtaining additional medical treatment. Plaintiff received an email from the nurse supervisor stating the matter was turned over to Gallagher Bassett, the third-party administrator ("TPA").

Over the next two months, Plaintiff tried to communicate with Defendant and the TPA regarding his need for medical treatment but received no response. On 13

July 2021, a Human Resources representative, contacted him. A week later, he spoke with a representative from the TPA, who stated an adjuster would contact him.

Plaintiff notably did not seek medical treatment during this period, believing he needed approval from Defendant or the Commission. On 24 July 2021, Plaintiff provided a recorded statement detailing his prior incidents and the 5 May 2021 work injury. Around four hours later, he was informed by the adjuster that his workers' compensation claim had been denied.

Following the denial, Plaintiff saw Dr. Kelley again on 30 July 2021. Dr. Kelley assessed cervical radiculopathy, neck pain, acute thoracic back pain, and referred Plaintiff to an orthopedist.

On 9 August 2021, Plaintiff saw Dr. Ehsan Alam at OrthoCarolina. Dr. Alam ordered a cervical spine MRI and mentioned an electromyography ("EMG") study. The MRI revealed significant findings at C5-C6 and C6-C7. Dr. Alam administered a spine injection, prescribed pain relievers, and advised Plaintiff not to drive or operate heavy machinery while taking the medication.

On 15 September 2021, Plaintiff requested pain management and psychological services due to ongoing pain and stress related to the work injury, which Dr. Kelley provided. Plaintiff began treatment with another nurse practitioner at a clinic.

After Dr. Alam left OrthoCarolina, Plaintiff's care was transferred to Dr. Ronald VanDerNoord, a board-certified specialist in physical medicine,

rehabilitation, and pain medicine. On 10 November 2021, Dr. VanDerNoord reviewed Plaintiff's treatment and noted that he had exhausted conservative measures. He recommended a two-week course of oral steroids and kept Plaintiff out of work until evaluation by a spine surgeon. He opined that the 5 May 2021 work-related incident caused Plaintiff's current spine condition.

Plaintiff was referred to Dr. Thomas Melin, a board-certified neurosurgeon, who saw him on 19 January 2022. Dr. Melin diagnosed Plaintiff with cervical disc displacement at C5-C6 and C6-C7 and recommended anterior cervical discectomy and fusion. Pending surgery, Dr. Melin kept Plaintiff out of work. In a subsequent questionnaire, Dr. Melin reaffirmed his opinion that the 5 May 2021 work injury caused Plaintiff's condition and need for surgery. Dr. Melin stated that sedentary to light-duty restrictions would have been appropriate from 30 July 2021 onward.

The recommended surgery was initially scheduled for 31 March 2022, but later canceled citing the ongoing litigation. Plaintiff testified about his current condition, expressing fear of moving his head in specific ways, lifting heavy objects, and losing strength in his right arm.

Since the 5 May 2021 injury, Plaintiff has remained out of work. Defendant has not offered any light-duty, modified, or full-duty return-to-work options. Plaintiff understood that he remains employed by Defendant, and has received no notifications or communications stating he is terminated or that work is available.

On 3 August 2021, Plaintiff filed a Form 33, Request for Hearing, to adjudicate Defendant's denial of his claim. Three days later, Defendant filed a Form 61, denying liability for Plaintiff's claim. Four days later, Plaintiff filed a claim alleging that he suffered an injury by accident to his "[r]ight upper extremity[ ] [and] neck" on 5 May 2021.[1] In response, Defendant filed a Form 33R, Response to Request for Hearing, maintaining its denial.

A hearing was held on 11 February 2022 before Deputy Commissioner Kevin V. Howell. On 6 April 2023, the Deputy Commissioner entered an Opinion and Award, finding that Plaintiff suffered a compensable injury to his neck on 5 May 2021 and awarded indemnity benefits from that date and continuing until "Plaintiff returns to suitable employment or further Order of the Commission." Defendant appealed the Deputy Commissioner's Order to the Commission. The Commission issued an Opinion and Award on 19 February 2024, affirming the Deputy Commissioner's award of benefits. Defendant appeals the Commission's Opinion and Award to this Court.

[1] Plaintiff initially filed two claims with the Industrial Commission: one for an injury to his right upper extremity on 27 June 2020, and one for an injury to his right upper extremity and neck on 5 May 2021. The claim related to 27 June 2020 was denied by the Deputy Commissioner in the Opinion and Award dated 6 April 2023. Plaintiff did not appeal that denial. The current appeal involves only the claim for the injury of 5 May 2021.

II. Jurisdiction

This matter is properly before the Court under N.C. Gen. Stat. § 7A-29(a) (2023) (appeal of right "from any final order or decision of the . . . North Carolina Industrial Commission.").

III. Analysis

Defendant presents an overarching issue that the Commission erred by concluding Plaintiff met his burden of proving disability, though within that issue, Defendant raises the following six sub-issues: (1) Finding of Fact No. 12 is not supported by competent evidence; (2) Finding of Fact No. 14 is not supported by competent evidence; (3) Finding of Fact No. 18 is not supported by competent evidence; (4) Finding of Fact No. 20 is not supported by competent evidence; (5) Finding of Fact No. 29 is not supported by competent evidence and is erroneous as a conclusion of law; and (6) Conclusion of Law No. 10 is not supported by competent findings of fact.

"Appellate review of an award from the Industrial Commission is generally limited to two issues: (i) whether the findings of fact are supported by competent evidence, and (ii) whether the conclusions of law are justified by the findings of fact." *Chambers v. Transit Mgmt.*, 360 N.C. 609, 611, 636 S.E.2d 553, 555 (2006). Because the Commission "is the sole judge of the weight and credibility of the evidence," its "findings of fact are conclusive on appeal if supported by competent evidence[.]" *Blackwell v. N.C. Dept. of Pub. Instruction*, 282 N.C. App. 24, 25, 870 S.E.2d 612, 613

(2022) (citation omitted). Thus, "our function is not to weigh the evidence but is to determine whether the record contains any competent evidence tending to support the findings." *Strickland v. Cent. Serv. Motor Co.*, 94 N.C. App. 79, 82, 379 S.E.2d 645, 647 (1989). "Findings not supported by competent evidence are not conclusive and will be set aside on appeal. But findings supported by competent evidence are conclusive, even when there is evidence to support contrary findings." *Johnson v. Covil Corp.*, 212 N.C. App. 407, 408–09, 711 S.E.2d 500, 502 (2011) (cleaned up). Additionally, "[u]nchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal." *Fields v. H&E Equip. Servs., LLC*, 240 N.C. App. 483, 485–86, 771 S.E.2d 791, 793 (2015) (citation omitted).

The Commission's conclusions of law are reviewed *de novo*. *Blackwell*, 282 N.C. App. at 25, 870 S.E.2d at 613. Under *de novo* review, we consider "the matter anew and freely substitute[] [our] own judgment for that of the lower tribunal." *Fields*, 240 N.C. App. at 486, 771 S.E.2d at 793–94 (citation omitted). Similarly, we review conclusions of law *de novo* to determine whether the findings of fact support them. *Whitfield v. Lab. Corp. of Am.*, 158 N.C. App. 341, 348, 581 S.E.2d 778, 783 (2003). Any findings or contentions not raised by Defendant are binding on appeal. *See* N.C.R. App. P. 28(b)(6); *see also Medlin v. Weaver Cooke Constr., LLC*, 367 N.C. 414, 423, 760 S.E.2d 732, 738 (2014) ("[W]here findings of fact are not challenged and do not concern jurisdiction, they are binding on appeal.").

A. Finding of Fact No. 12

Defendant first finds fault in Finding of Fact No. 12, which states, "Plaintiff remained employed by Defendant as of the evidentiary hearing but had not returned to work since only full-duty work was offered." According to Defendant, "[b]ased on Plaintiff's testimony, there is no evidence that Plaintiff remained employed with Defendant as of the date of the hearing on February 11, 2022." Yet Plaintiff provided competent evidence to support the Commission's finding.

Plaintiff not only testified that he believed he remained employed by Defendant because he was "still using" the company's health insurance, but also that he had not received any notifications or communications from Defendant suggesting that he was no longer employed. Plaintiff also made efforts to return to work by requesting light-duty assignments immediately following his injury on 5 May 2021. He sought to discuss light-duty work but was advised to speak with the nurse supervisor. Despite his requests, no light-duty positions were offered to him. Defendant did not offer options—modified or otherwise—after Plaintiff's injury.

Despite Defendant's contention, it presented no evidence contradicting Plaintiff's testimony regarding his employment status. *See Johnson v. Herbie's Place*, 157 N.C. App. 168, 171, 579 S.E.2d 110, 113 (2003) (citation omitted) (holding that the Commission's findings of fact are conclusive on appeal even where there is contrary evidence, and such findings may only be set aside where there is a "complete lack of competent evidence to support them.").

The Commission evaluated the credibility of Plaintiff's testimony and found it persuasive. *See Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) ("The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony."). We hold that Finding of Fact No. 12 is supported by competent evidence.

B. Finding of Fact No. 14

Defendant claims Finding of Fact No. 14 is not supported by competent evidence. In relevant part, that finding states "While Dr. Alam did not provide specific work restrictions, he noted Plaintiff should not drive or operate heavy machinery while taking his narcotics, muscle relaxants, or neuroleptics." Defendant argues that Dr. Alam's records do not explicitly state these instructions and maintains there is no evidence of any work restrictions imposed by Dr. Alam. However, competent evidence supports the Commission's finding.

Dr. Alam's office note from 25 August 2021 shows that he prescribed Plaintiff a "trial of hydrocodone and gabapentin." The same note definitively states: "Patient was told not to drive, operate heavy machinery or make important decisions while taking narcotics, muscle relaxants, or neuroleptics. Patient showed understanding." Plaintiff's testimony that "[t]here was nothing preventing me from doing anything, but I was taking everything very easy due to the injury" does not preclude the trial court from entering Finding of Fact No. 14. *See Deese v. Champion Int'l Corp.*, 352 N.C. 109, 115, 530 S.E.2d 549, 552–53 (2000) (citations omitted) ("[T]he findings of

fact of the Industrial Commission are conclusive on appeal when supported by competent evidence, even though there be evidence that would support findings to the contrary"). Contrary to Defendant's contention, these instructions necessitate work restrictions. We hold that the Commission's Finding of Fact No. 14 is supported by competent evidence.

C. Finding of Fact No. 18

Defendant next challenges Finding of Fact No. 18, which states in relevant part: "Dr. VanDerNoord wrote Plaintiff out of work through the appointment with a spinal surgeon." Defendant contends that this finding is not supported by competent evidence, arguing that Dr. VanDerNoord only restricted Plaintiff from truck driving for a period of two to three weeks and did not find Plaintiff incapable of all work, or totally disabled. Yet, this finding is supported by competent evidence.

In his note dated 10 November 2021, Dr. VanDerNoord stated:

> [Plaintiff] has exhausted conservative management I think it is reasonable to try another 2 week tapering dose of oral steroids and keep him out of work. He would like to consider surgical options and we will make a follow-up appointment with our spine surgeon.

In his deposition, when asked about Plaintiff's ability to work, Dr. VanDerNoord clarified:

> I did not find him incapable of working or not working. I mean, in essence, what I said is he has a fairly significant injury based on objective data and that I didn't think he should be driving a truck with the evidence that I saw until he was assessed by the surgeon.

Dr. VanDerNoord added, "I would have absolutely kept this patient out of work based on my singular assessment on November 10th."

While there was mention of two weeks to taper the oral steroid dose, the context shows that Dr. VanDerNoord planned to keep Plaintiff out of work pending surgical evaluation. Again, "findings of fact by the Commission may be set aside on appeal when there is a complete lack of competent evidence to support them[.]" *Young v. Hickory Bus. Furniture*, 353 N.C. 227, 230, 538 S.E.2d 912, 914 (2000) (citation omitted). Given the statements in the medical note, and the deposition testimony, competent evidence supports the Commission's finding that Dr. VanDerNoord wrote Plaintiff out of work through the appointment with a spinal surgeon. We hold that competent evidence supports Finding of Fact No. 18.

D. Finding of Fact No. 20

Defendant also contests the Finding of Fact No. 20, which states: "Dr. Melin wrote Plaintiff out of work pending surgery." Defendant asserts that this finding is not supported by competent evidence, arguing that Dr. Melin did not find Plaintiff totally disabled and that any out-of-work note was provided after the 19 January 2022 visit, without the doctor's knowledge.

The record includes an "Out of Work Notification," dated 19 January 2022, from Port City Neurosurgery & Spine, electronically signed by Dr. Melin on 7 February 2022, stating that Plaintiff was unable to return to work at this time due

to "[c]urrent diagnosis/disorder and upcoming surgery." Though Defendant points out that Dr. Melin testified he did not place any restrictions on Plaintiff during the 19 January 2022 visit and was not familiar with the work note, the Commission evaluated the evidence and determined that the out-of-work note, bearing Dr. Melin's electronic signature, was sufficient to establish that he took Plaintiff out of work pending surgery. In his deposition, Dr. Melin acknowledged that he was not saying Plaintiff was completely unable to do any work and indicated that Plaintiff could perform sedentary to light-duty work pending surgery.

The existence of the out-of-work note in the record constitutes such competent evidence as to prevent us from disturbing this finding. *Deese*, 352 N.C. at 116, 530 S.E.2d at 553. As the factfinder, the Commission was entitled to weigh the credibility of the documents and testimony and resolve any inconsistencies. We hold that Finding of Fact No. 20 is supported by competent evidence.

E. Finding of Fact No. 29

Defendant next challenges Finding of Fact No. 29, reiterating his argument that the findings contained therein are not supported by competent evidence and thus produce erroneous conclusions of law. Finding of Fact No. 29 states:

> Based upon the preponderance of the evidence in view of the entire record, the [ ] Commission finds that following the 5 May 2021 injury, Plaintiff was unable to earn his pre-injury wages as a result of his cervical spine condition. The [ ] Commission notes that Plaintiff remains employed by Defendant[ ] but has only been offered a return to his full duty pre-injury truck driver position. However, after his 5

> May 2021 injury, he experienced pain and symptoms in his cervical spine that prevented him from returning to his pre-injury position, for which he was subsequently written entirely out of work by Dr. VanDerNoord and Dr. Melin. Further, there is no competent credible medical evidence that Plaintiff has reached maximum medical improvement ("MMI"). Defendants have not offered Plaintiff any suitable employment and Plaintiff has not been assigned any permanent restrictions upon which he could rely to perform a reasonable search for alternate employment given his current position at Defendant-Employer.

Since Finding of Fact No. 29 is a mixed finding of fact and conclusion of law, we must "determine if the findings of fact and conclusions of law are supported by the record." *Ramsey v, N.C. Indus. Comm'n S. Indus. Constructors Inc.,* 178 N.C. App. 25, 30, 630 S.E.2d 681, 685 (2006).

We have already addressed Defendant's first two concerns in the preceding sections. Defendant also contends that the Commission misapplied the evidence in determining Plaintiff was only "offered a return to full duty pre-injury truck driver position" and not offered suitable employment. In support, Defendant argues that Plaintiff requested light duty from Defendant on 6 May 2021 but was instructed that he needed to be evaluated by the Wellness Center. When Plaintiff saw the nurse practitioner on 7 May 2021, she released him to full-duty work. In being cleared without restriction, Defendant maintains that Plaintiff had no restrictions from any medical provider until Dr. Alam or Dr. VanDerNoord imposed restrictions on him—which did not happen until after Plaintiff ceased contact with Defendant on 23 July 2021. Thus, according to Defendant, it never had an opportunity to offer Plaintiff

light duty work. Yet, despite the possibility that the Commission could have reached a different finding, competent evidence nonetheless supports the finding.

For instance, immediately following his injury, Plaintiff could not fulfill his truck driving job duties given his work-related neck condition. When he received the 7 May 2021 call that he was cleared for full-duty, Plaintiff expressed concerns as he later testified that could "hardly turn [his] head left or right and [was] in a lot of pain." Plaintiff added that he was awaiting a second opinion about his clearance yet did not receive any more information until 13 July 2021. Again, the Commission was free to determine the weight and credibility of the evidence presented. *See Adams*, 349 N.C. at 681, 509 S.E.2d at 414 (noting that credibility determinations are within the exclusive province of the factfinder); *see also Deese*, 352 N.C. at 109, 530 S.E.2d at 549.

Defendant also argues that the Commission's finding that Plaintiff had no permanent restrictions by which he could seek alternate employment is "suspect." In a similar fashion to its preceding argument, Defendant asserts that Plaintiff had restrictions by which he could seek alternate employment and the Commission erred in finding that he had not been assigned permanent restrictions. The Commission noted that Plaintiff had not been assigned any permanent restrictions on which he could rely to perform a reasonable search for alternate employment, given his current position with Defendant. The evidence supports this finding that Plaintiff's treating physicians recommended surgery, and his work restrictions were pending surgical

intervention, making it unreasonable to expect him to seek other employment during this period. *See Peoples v. Cone Mills Corp.*, 316 N.C. 426, 443–44, 342 S.E.2d 798, 809 (1986) ("[T]o prove disability, an injured employee must prove he is unable to work and not merely that he unsuccessfully sought work. The converse is not true. In order to prove disability, the employee need not prove he unsuccessfully sought employment if the employee proves he is unable to obtain employment.").

Next, we consider the portions of Finding of Fact No. 29 that are legal conclusions. The Commission determined, "[b]ased upon the preponderance of the evidence in view of the entire record, . . . following the 5 May 2021 injury, Plaintiff was unable to earn his pre-injury wages as a result of his cervical spine condition." The Commission based its conclusion on the factual contentions above, including Plaintiff's continued employment, inability to return to his pre-injury position, and suitable alternative employment. Viewing this evidence in a light most favorable to Plaintiff, and for the above reasons, we hold that the findings of fact contain in Finding of Fact No. 29 are supported by competent evidence, and those findings support the Commission's conclusion of law contained therein. *See Adams*, 349 N.C. at 681, 509 S.E.2d at 414 ("The evidence tending to support plaintiff's claim is to be viewed in the light most favorable to plaintiff, and plaintiff is entitled to the benefit of every reasonable inference to be drawn from the evidence."); *see also Beach v. McLean*, 219 N.C. 521, 525, 14 S.E.2d 515, 518 (1941) ("If [a finding of fact] is a mixed

question of fact and law, it is likewise conclusive, provided there is sufficient evidence to sustain the element of fact involved.").

F. Conclusion of Law No. 10

Last, Defendant challenges the Commission's Conclusion of Law No. 10, arguing that it is not supported by competent evidence and that the Commission misapplied the law. Conclusion of Law No. 10 states:

> Here, following 5 May 2021, Plaintiff remained employed by Defendant[ ], but was unable to return to his pre-injury truck driving position due to pain and issues with his cervical spine—which subsequently resulted in Dr. VanDerNoord and Dr. Melin writing Plaintiff entirely out of work. *See Byrd v. Ecofibers, Inc.*, 728, 731, 645 S.E.2d 80, 82 (2007) (stating "an employee's own testimony as to pain and ability to work is competent evidence as to the employee's ability to work" and can be utilized in determining whether they are disabled). Further, even assuming that Plaintiff was able to perform some work for the period prior to Dr. VanDerNoord writing Plaintiff out of work, Plaintiff remained employed by Defendant[ ], was not at MMI, and was offered no suitable employment—as Defendant[ ] only offered a return to full duty work. Additionally, Plaintiff had not been assigned any permanent restrictions, which when coupled with the fact that Plaintiff remained employed with Defendant[ ], made it premature for Plaintiff to seek employment with a different employer. Therefore, Plaintiff made a reasonable effort during this pre-MMI period to seek employment by remaining available to work within his restrictions for Defendant[ ]. Accordingly, the [ ] Commission concludes Plaintiff is entitled to temporary total disability compensation from 5 May 2021 onward. *See Medlin*, 367 N.C. at 422, 760 S.E.2d at 737; *Wilkes*, 369 N.C. at 745, 799 S.E.2d at 849; *see also Griffin v. Absolute Fire Control, Inc.*, 269 N.C. App. 193, 201, 837 S.E.2d 420, 426 (2020); *review improvidently allowed*, 376 N.C. 727, 845 S.E.2d 578 (2021)

> (adopting the *Snyder* Court's deferential approach to the [ ] Commission's determination of the reasonableness of a pre-MMI job search); *Snyder v. Goodyear Tire & Rubber Co.*, 252 N.C. App. 265, 796 S.E.2d 539 . . . (2017) (unpublished) (upholding the [ ] Commission's findings that Plaintiff made a reasonable effort to seek employment where Plaintiff made himself available to Defendant[ ] for work within his restrictions, was still employed by Defendant[ ], and had not yet reached MMI.

Defendant's factual challenges here mirror those previously addressed. We note that "the Industrial Commission's conclusions of law are reviewable *de novo*." *Lewis v. Craven Reg'l Med. Ctr.*, 122 N.C. App. 143, 145, 468 S.E.2d 269, 272 (1996). Upon review, we find that the Commission's Conclusion of Law No. 10 is supported by competent findings and a proper application of the law. Under the Workers' Compensation Act, an employee is disabled if they cannot earn their pre-injury wages in the same or any other employment due to the injury. N.C. Gen. Stat. § 97-2(9) (2023); *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). To establish disability, an employee may, among other methods, present medical evidence that they cannot work in any employment or show that seeking other employment would be futile. *Russell v. Lowes Prod. Distrib.*, 108 N.C. App. 762, 765–66, 425 S.E.2d 454, 457 (1993). Determinations of disability are conclusions of law that must be based on findings of fact supported by competent evidence. *Grant v. Burlington Indus., Inc.*, 77 N.C. App. 241, 247, 335 S.E.2d 327, 332 (1985).

As discussed above, competent evidence supports the Commission's finding that Plaintiff believed he remained employed by Defendant and no evidence of

termination exists in the record. Competent evidence also supports the Commission's findings that Dr. VanDerNoord and Dr. Melin placed work restrictions on Plaintiff, effectively preventing him from returning to his pre-injury position. Though the physicians noted Plaintiff might be capable of some light-duty or sedentary work, the record does not show that Defendant offered suitable employment. *See Matthews v. Wake Forest Univ.*, 187 N.C. App. 780, 783–84, 653 S.E.2d 557, 560 (2007) ("Because the Commission is the sole arbiter of credibility, defendant's arguments regarding alleged conflicts between defendant's doctors' notes and deposition testimony are also futile.").

The Commission properly considered Plaintiff's testimony regarding his pain and ability to work, which constitutes competent evidence. *See Byrd v. Ecofibers, Inc.*, 182 N.C. App. 728, 731, 645 S.E.2d 80, 82 (2007) ("This Court has previously held that an employee's own testimony as to pain and ability to work is competent evidence as to the employee's ability to work.") (citation omitted). Plaintiff testified that he could not safely operate a truck due to his neck condition and requested light-duty work, which Defendant did not provide. As the sole judge of credibility, the Commission found this testimony credible and supported by competent evidence. *See Deese*, 352 N.C. at 115, 530 S.E.2d at 552 ("The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony.") (citation omitted).

Defendant argues Plaintiff did not make reasonable efforts to seek suitable employment and failed to communicate after 10 May 2021. That said, the Commission found Plaintiff remained available for work within his restrictions, and given his non-MMI status and continued employment, it was premature for him to seek work elsewhere. *See, e.g.*, *Griffin v. Absolute Fire Control, Inc.*, 269 N.C. App. 193, 201, 837 S.E.2d 420, 426 (2020) ("[T]hough there is no general rule for determining the reasonableness of an employee's job search, . . . the Commission is 'free to decide' whether an employee made a reasonable effort to obtain employment[.]") (citations omitted). Contrary to Defendant's assertion, the Commission's findings are entitled to deference, including determining the reasonableness of Plaintiff's pre-MMI job search efforts. *See Perkins v. U.S. Airways*, 177 N.C. App. 205, 214, 628 S.E.2d 402, 408 (2006) (noting the Commission is "free to decide" whether an employee made a reasonable effort to obtain employment).

Defendant ultimately requests that we reweigh the evidence, yet our role is limited to determining whether the findings of fact are supported by competent evidence, and whether the conclusions of law are justified by the findings of fact. *Chambers*, 360 N.C. at 611, 636 S.E.2d at 555. Here, Conclusion of Law No. 10 is supported by findings grounded in competent evidence—those findings discussed at-length above. Thus, Defendant's objection to Conclusion of Law No. 10 is overruled.

IV. Conclusion

The Commission's findings of fact are supported by competent evidence, and its conclusions of law are justified by the findings of fact. We therefore affirm the Commission's Opinion and Award.

AFFIRMED.

Judges GORE and THOMSON concur.

Report per Rule 30(e).