

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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

NO. COA10-1620  
NORTH CAROLINA COURT OF APPEALS

Filed: 20 September 2011

JAMES M. HAWKINS,  
Employee,  
Plaintiff,

v.

A & M AUTO BODY, INC.,  
Employer,

North Carolina  
Industrial Commission  
I.C. No. 097083

and

ANTHONY HERNANDEZ,  
Individually,  
Defendants.

Appeal by defendants from Opinion and Award entered 2 July 2010 by the North Carolina Industrial Commission. Heard in the Court of Appeals 25 May 2011.

*Newton Law Firm, by J. Jefferson Newton, for plaintiff-appellee.*

*Stricklin Law Firm, P.A. by Bobby J. Stricklin, for defendant-appellant.*

STROUD, Judge.

On 2 July 2010, the North Carolina Industrial Commission entered an Opinion and Award ordering defendant-employer A & M

Auto Body Inc. to pay plaintiff "temporary total disability compensation" and plaintiff's attorney's fees.<sup>1</sup> Defendants appeal.

### I. Standard of Review

Our review of the Commission's opinion and award is limited to determining whether competent evidence of record supports the findings of fact and whether the findings of fact, in turn, support the conclusions of law. If there is any competent evidence supporting the Commission's findings of fact, those findings will not be disturbed on appeal despite evidence to the contrary. However, the Commission's conclusions of law are reviewed *de novo*.

*McLeod v. Wal-Mart Stores, Inc.*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 703 S.E.2d 471, 474 (2010) (citation omitted).

### II. Temporary Total Disability

Defendant first contends that "plaintiff is not entitled to compensation for temporary total disability[.]" (Original in all caps.) We agree.

An employee injured in the course of his employment is disabled under the Act if the injury results in an incapacity to earn the wages which the employee was receiving at the time of injury in the same or any

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<sup>1</sup> The Commission also required that defendant-employer pay plaintiff's medical expenses, a fine, and penalties and that defendant Anthony Hernandez pay a penalty and "be referred to the Fraud Unit of the North Carolina Industrial Commission for criminal prosecution[;]" however, defendants do not challenge these portions of the Opinion and Award.

other employment. Accordingly, disability as defined in the Act is the impairment of the injured employee's earning capacity rather than physical disablement.

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

*Russell v. Lowes Prod. Distr.*, 108 N.C. App. 762, 765-66, 425 S.E.2d 454, 457 (1993) (citation and quotation marks omitted).

Here, the Commission relied upon prong 2 of *Russell*, see *id.*, and concluded:

Plaintiff has proven that as a result of his compensable injury, he has been capable of some work since August 13, 2008, but after reasonable efforts on his part, he has been unsuccessful in his effort to obtain employment through the date of hearing before the Deputy Commissioner on September 17, 2009.

The only finding of fact the Commission made regarding *Russell* prong 2 was

[f]ollowing Plaintiff's termination on August 13, 2008, he began receiving unemployment compensation at the rate of \$425.00 per week, from September 7, 2008 through September 5, 2009, for a total amount of \$22,100.00. As a condition of receiving unemployment compensation, Plaintiff conducted at least two employment searches per week. Plaintiff has been unable to secure any employment.

We do not deem this sole finding of fact to be sufficient to support a conclusion of disability nor do we find competent evidence in the record which would support such a conclusion. *See id.* at 765, 425 S.E.2d at 457.

In this case, it appears that the Industrial Commission attempted to fashion a remedy for plaintiff based only upon the reprehensible behavior of defendants and not the law, as plaintiff demonstrated no entitlement to compensation beyond payment of medical expenses. There is no dispute that plaintiff sustained a compensable injury in the course of and arising out of his employment on 11 August 2008, when he was shocked by an electrical fan. Plaintiff was treated by emergency medical personnel, released the same day, and told to stay out of work until Wednesday, 13 August 2008. Plaintiff presented no evidence of any medical treatment after 11 August 2008 and no

medical records or evidence from a physician that he was physically unable to work after 12 August 2008. Furthermore, during the hearing before the Deputy Commissioner, plaintiff stipulated that his injury did not keep him from being employed.

Instead, plaintiff essentially presented his case before the Deputy Commissioner as a wrongful or malicious termination claim. Plaintiff's evidence indicated that defendants terminated his employment upon his return to work on 13 August 2008 because he had made a claim for workers' compensation: Defendant Hernandez told plaintiff "never put nothing on my workmen's comp." The Deputy Commissioner's comments at the end of the hearing reveal that he was considering whether the case was actually a "wrongful termination" claim. The evidence also showed that defendants had failed to maintain workers' compensation insurance as required by law and were uninsured at the time of plaintiff's injury.

Due to the complete absence of any evidence that plaintiff's injury interfered in any way with his ability to work after 12 August 2008, we see no way in which plaintiff can prove his disability. *See id.* Accordingly, the Commission's award of "temporary total disability compensation" was in error.

### III. Attorney's Fees

Defendant also argues that the Commission erred in awarding plaintiff's attorney's fees. Again, we agree. Here, the Commission's award provided that "[a]n attorney's fee in the amount of 25 percent of the compensation awarded is approved for Plaintiff's counsel." As we are reversing the compensation award, we must necessarily reverse the attorney fee award as it was based upon the "compensation awarded[.]"

#### IV. Conclusion

We therefore reverse the disability award and in doing so must necessarily reverse the attorney fee award based on the compensation award. We also note that the Commission ordered defendant Anthony Hernandez to pay a "penalty of 100 percent of the amount of the compensation . . . for failing to comply with § 97-93 of the North Carolina General Statutes." As we are reversing the award of compensation, we remand this issue to the Commission for reconsideration of the penalty issue.<sup>2</sup>

REVERSED; REMANDED in part.

Judges HUNTER, Robert C. and HUNTER, JR., Robert N. concur.

Report per Rule 30(e).

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<sup>2</sup> Defendants' brief states that defendants have already entered into a Settlement Agreement with the State, but this agreement is not part of our record or this appeal.