An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA05-203

NORTH CAROLINA COURT OF APPEALS

Filed: 6 December 2005

BARBARA A. REAVIS,
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 176890

CARLYLE & COMPANY,
JEWELERS, INC., Employer,
WAUSAU INSURANCE COMPANY,
Carrier,
Defendants.

Appeal by defendants from opinion and award entered 28 October 2004 by the North Carolina Industrial Commission. Heard in the Court of Appeals 13 October 2005.

Douglas S. Harris for plaintiff-appellee.

Hedrick Eatman Gardner & Kincheloe, L.L.P., by C. J. Childers for defendants-appellants.

LEVINSON, Judge.

This case arises from an award and opinion of the North Carolina Industrial Commission awarding plaintiff temporary total disability compensation beginning 27 August 2001. We affirm.

The evidence presented to the Full Industrial Commission may be summarized as follows:

In August 2001 plaintiff was employed by Carlyle & Co. Jewelers, Inc. as a sales associate. Before working for Carlyle & Co., plaintiff had worked as a retail associate for Belk's department stores, as a manager for a textile manufacturer, as a textile machine operator, and as a waitress. Plaintiff is a high school graduate. She has no professional certifications.

On 26 August 2001, armed gunmen entered the jewelry store where plaintiff was working, ordered everyone to the ground, shot the security guard, and smashed and looted the jewelry cases. According to plaintiff, the gunmen had not been caught. Plaintiff, although physically unharmed during the shootout, experienced severe emotional distress and did not return to work.

On 29 August 2001 plaintiff sought psychological treatment with Dr. Margaret Simpson, Ph.D. Dr. Simpson initially diagnosed plaintiff with acute stress reaction, and later with post-traumatic stress disorder. Dr. Simpson testified that plaintiff's acute stress reaction and post-traumatic stress disorder were the direct result of witnessing the armed robbery at work. In Dr. Simpson's opinion, plaintiff would not be able to work again in the retail industry due to her post-traumatic stress disorder and would be limited by her level of education in finding other employment. At the time of the initial hearing before the Deputy Commissioner, Dr. Simpson had been treating plaintiff for approximately one year.

Deposition testimony of Dr. Verne Schmickley, Ph.D. was also introduced into evidence. Plaintiff had been referred to Dr. Schmickley for an independent psychological evaluation by defendants' attorney. Dr. Shmickley performed various standardized assessments on plaintiff to determine the validity and extent of her psychological disorder. Dr. Schmickley concluded that, at the time he saw her, plaintiff was not suffering from post-traumatic stress disorder. In Dr.

Schmickley's opinion, plaintiff could return to retail employment with "some preparation or transition."

Plaintiff testified she had been out of work since 26 August 2001. She had neither attempted to return to work with Carlyle & Company, nor had she attempted to find other employment. Plaintiff testified she was unable to return to work in the retail industry due to her post-traumatic stress disorder, and that she would require retraining to find employment in a different field. Following the robbery at work, plaintiff testified she had been able to obtain a license as an underwater "dive master."

The Full Commission found, *inter alia*, the following:

> 1. At the time of the incident in question, Plaintiff had been a sales associate with Defendant-employer for three years. She also had a work history of retail sales, textile employment and working as a waitress. She graduated from high school but had not attended college.
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> 2. On August 26, 2001 Plaintiff, a co-worker and security guard were at work for Defendant-employer when two men walked into the store. One approached the Rolex watches case and the other yelled, "Let's do it!" One of the assailants shot the security guard in the leg. Other customers were also in the store, including a man with a four-year old girl. One of the assailants waved a gun and ordered the customers and workers, including Plaintiff, to get down on the floor. Plaintiff was afraid for her life and for the life of the security guard, who was being threatened by one of the assailants. During her time on the floor, Plaintiff heard gunfire. The armed assailants stole watches and diamonds. After the robbery and shooting, the store was left in disarray, with glass and blood around the store and smashed jewelry cases.
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> 3. After the robbery, Plaintiff went home and cried. She was scheduled to work the next day but could not bring herself to go back to the mall where the jewelry store was located. Plaintiff did not seek immediate medical attention. Plaintiff received no physical injuries as a result of this incident. During the course of her testimony at the hearing concerning the events of August 26, 2001, Plaintiff became very upset and was crying.

4. On August 29, 2001, Plaintiff presented to Dr. Margaret Simpson for psychological treatment. Dr. Simpson saw a need for immediate treatment for Plaintiff, as Plaintiff was having an acute distress reaction to the events of August 26, 2001. After thirty days of treatment, Plaintiff's condition evolved into post-traumatic stress disorder, resulting from the armed robbery on August 26, 2001.

5. Dr. Simpson continued to treat Plaintiff up until the time of the hearing. Dr. Simpson opined that the armed robbery and shooting incident Plaintiff experienced at work on August 26, 2001 caused the conditions for which she treated Plaintiff, and that as a result of those events, Plaintiff was unable to return to work with Defendant-employer or in any retail setting. There was no evidence of Plaintiff malingering with respect to her symptoms.

6. After several months of treatment with Dr. Simpson, Plaintiff undertook certification as a dive master and explored courses in underwater photography. Dr. Simpson thought this was a good idea to help with Plaintiff's recovery and to enhance her sense of productivity as an individual. Plaintiff's psychological prognosis is good with the continued pursuit of the photography/videography vocation.

7. At the time of the hearing, Plaintiff had not returned to work in any capacity.

8. On August 28, 2002, Plaintiff underwent an independent psychological evaluation with Dr. Verne Schmickley, Ph.D. Dr. Schmickley administered several psychological tests to Plaintiff, including the Bek Depression Inventory. The score from this Inventory was not suggestive of any significant level of depression, but did indicate that Plaintiff was not exaggerating any psychiatric problems. The post-traumatic stress diagnostic scale and the Traumatic Event Sequelae Inventory suggested that Plaintiff's symptoms were at a relatively low level and were more consistent with an adjustment disorder rather than post-traumatic stress disorder. The MMPI-II was also administered to Plaintiff, and the results were primarily within a normal range and were unremarkable.

9. Based on the testing and review of Plaintiff's medical records, Dr. Scmickley diagnosed Plaintiff with somatoform features, which are psycho-physiological problems or physical features without physical problems. He considered Plaintiff to have dependent personality features but not post-

traumatic stress disorder. Based on the test results, Dr. Schmickley indicated that malingering should be strongly suspected.

> 10. At the time of his examination of Plaintiff, Dr. Schmickley did not believe that post-traumatic stress disorder was present, nor did he consider Plaintiff having suffered any psychological damage as a result of the incident of August 26, 2001. Dr. Schmickley also considered Plaintiff to be at maximum psychological improvement and that she was not disabled from gainful employment, even in a retail setting. Dr. Schmickley opined that structured exposure therapy and a psychiatric medication referral should have been utilized in Plaintiff's treatment, but he did not disagree with Dr. Simpson's assessment of acute distress disorder followed by post-traumatic disorder. Finally, in his view, the events of August 26, 2001 led to Plaintiff's conditions as assessed by Dr. Simpson.
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> 11. Plaintiff's average weekly wage is $676.05, yielding a compensation rate of $450.72.
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> 12. On August 26, 2001, Plaintiff sustained a compensable injury by accident arising out of and in the course of her employment with Defendant-employer, resulting in acute distress disorder and post-traumatic stress disorder. Dr. Simpson's opinions are given greater weight than the contrary opinions of Dr. Schmickley.
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> 13. As a result of the injury by accident of August 26, 2001, Plaintiff has been unable to earn any wages in any employment from the date of the injury by accident on August 26, 2001 to the date of hearing before the deputy commissioner and continuing.
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> 14. As a result of the injury by accident of August 26, 2001, Plaintiff is in need of further psychological treatment and vocational assistance in order to return to gainful employment.

The Full Commission concluded:

> 1. On August 26, 2001, Plaintiff sustained a compensable injury by accident arising out of and in the course of her employment with Defendant-employer, resulting in acute distress disorder and post-traumatic stress disorder. N.C.G.S. §97-2(6).

> 2. As a result of the injury by accident of August 26, 2001, Plaintiff incurred expenses for psychological treatment of her conditions and is in need of further psychological treatment and vocational assistance in order to return to gainful employment. N.C.G.S. §§97-2(19); 97-25.
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> 3. Plaintiff's average weekly wage is $676.05, yielding a compensation rate of $450.72.
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> 4. As a result of the injury by accident of August 26, 2001, Plaintiff has been unable to earn any wages in any employment from the date of her injury on August 26, 2001 to the present and continuing. Plaintiff is entitled to temporary total disability compensation at the rate of $450.72 per week from August 27, 2001 to the date of hearing before the deputy commissioner and continuing until further order of the Industrial Commission. N.C. Gen. Stat. §§97-2(9); 97-29.

The Full Commission awarded plaintiff "temporary total disability compensation at the rate of $450.72 per week from August27, 2001 to the date of the hearing before the deputy commissioner and continuing until further order of the Industrial Commission." Defendants were further ordered to pay plaintiff's medical expenses for her psychological treatment, and to provide plaintiff with "vocational retraining, if necessary, and vocational assistance[.]".

One Commissioner, Pamela T. Young, concurred in part and dissented in part from the opinion and award of the Full Commission. Commissioner Young concurred with the Full Commission's finding that plaintiff sustained an injury by accident, but dissented "from their ultimate decision that plaintiff should receive a continuing award of indemnity benefits[.]" In her dissent, Commissioner Young concluded that plaintiff failed to prove that she continued to be disabled.

From the opinion and award of the Full Commission, defendants now appeal. Defendants contend the Commission erred by finding that plaintiff (1) sustained a compensable injury by accident during the course and scope of her employment, and (2) was disabled past July 1, 2002.

We turn first to defendants' contention that the Commission erred by finding that plaintiff sustained a compensable injury by accident during the course and scope of her employment. Under N.C. R. App. P. 28(b)(6), "[a]ssignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned." In defendant's two-page argument concerning this first issue, defendants do not cite this Court to one case or statute in support of their argument.

Defendants' first assignment of error is dismissed.

We next turn to defendants' contention that the Commission erred by finding that plaintiff was disabled past July 1, 2002.

Our review in a workers compensation case "is limited to a determination of (1) whether the Commission's findings of fact are supported by any competent evidence in the record; and (2) whether the Commission's findings justify its conclusions of law." *Goff v. Foster Forbes Glass Div*., 140 N.C. App. 130, 132-33, 535 S.E.2d 602, 604 (2000) (citation omitted). "The facts found by the Commission are conclusive upon appeal to this Court when they are supported by [any] competent evidence, even when there is evidence to support contrary findings." *Hodgin v. Hodgin*, 159 N.C. App. 635, 639, 583 S.E.2d 362, 365 (2003) (internal quotation marks and citations omitted).

"In workers' compensation cases, a claimant ordinarily has the burden of proving both the existence of [her] disability and its degree." *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982) (citation omitted). "The degree of proof required . . . is the 'greater weight' of the evidence or 'preponderance' of the evidence." *Phillips v. U.S. Air, Inc.*, 120 N.C. App. 538, 541-42, 463 S.E.2d 259, 261 (1995) (citation omitted). Emotional injuries, as well as physical injuries, from accidents arising out of and in the course of employment, are covered

under the Workers' Compensation Act. *See Jordan v. Central Piedmont Community College*, 124 N.C. App. 112, 119, 476 S.E.2d 410, 414 (1996) ("[A]s long as the resulting disability meets statutory requirements, mental, as well as physical impairments, are compensable under the Act.").

> 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 other employment.' N.C.G.S. §97-2(9) (1991). Accordingly, disability as defined in the Act is the impairment of the injured employee's earning capacity rather than physical disablement.
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> 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 Product Distribution, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (citations omitted).

Plaintiff testified before the Commission as follows:

> [PLAINTIFF'S COUNSEL] Do you feel that you could, during this period since the robbery, have worked in other retail stores other than Carlyle, even if you couldn't go back to Carlyle?
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> [PLAINTIFF]: No.

. . . .

> [PLAINTIFF'S COUNSEL]: Have you been able to work at all since this incident?
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> [PLAINTIFF]: No.
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> [PLAINTIFF'S COUNSEL]: Subject to corroboration by the doctor, what is your understanding as to whether or not your doctor recommends you to go back to work?
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> [PLAINTIFF]: She recommends me to go back to work. She doesn't--- I don't feel comfortable. My job was retail. That's what I know.
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> . . . .
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> [PLAINTIFF]: And I cannot go back into [retail]. So I would need help in education or something to have other skills to do something more than what I'm doing now or was doing.

The deposition testimony of Dr. Simpson, likewise, provided evidence of plaintiff's disability under the third means of establishing disability under *Russell*. In Dr. Simpson's opinion, plaintiff would not be able to return to work with Carlyle & Company, or in any other retail establishment, due to her post-traumatic stress syndrome. Dr. Simpson testified, "I really don't see her able to work in retail in a sales position now or in the future." While Dr. Simpson acknowledged she had encouraged plaintiff to seek employment after several months of treatment, she noted that, with plaintiff's lack of education, "[plaintiff] would be very limited in what she could do." Furthermore, there was additional evidence suggesting that plaintiff's post traumatic stress syndrome was significant. For example, according to Dr. Simpson, plaintiff experienced anxiety and depression as a result of the robbery and had "constricted her lifestyle all the way through this year, and it remains constricted today." Plaintiff herself testified that, directly following the armed robbery, she had run out of a department store upon seeing a young black male enter the store. At the time of the hearing, plaintiff testified she was still not able to enter retail stores.

The testimonies of plaintiff and Dr. Simpson constitute competent evidence, under *Russell*, "that [plaintiff] 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[.]" *Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457. Although Dr. Simpson indicated that, in her opinion, plaintiff had been ready to seek employment "about halfway through this year", plaintiff did not articulate any date when she was ready, or would be ready, to return to work. And, as noted before, plaintiff's therapist testified that, in her opinion, plaintiff could not return to work in the retail industry. Finally, we note that defendants offered minimal assistance to plaintiff to help her return to work. There is nothing in the record to show that defendants offered plaintiff any vocational rehabilitation or a different job.

In making their argument that there is no competent evidence in the record to support the Commission's determination of continuing disability past July 2002, defendants point this Court to excerpts from the testimony of expert witnesses and other evidence in the record. Defendants, for example, refer to plaintiff's own statement that, following the robbery at work , she became licensed as an underwater "dive master," giving her the authority to train new divers and lead underwater tours. Defendants argue that plaintiff's underwater dive certification is evidence of plaintiff's physical and mental capacity to work. Defendants also cite plaintiff's high school diploma, as well as her previous employment in the textile industry, as evidence that plaintiff was not prevented by pre-existing conditions, such as lack of experience and education, from finding work in a field unrelated to retail. In citing the evidence favorable to their argument, defendants ignore other portions of the record which suggest, on the contrary, that findings of fact 12 and 13 are supported by competent evidence in the record and that these findings, in turn, help support conclusion of law 4 that "[p]laintiff has been unable to earn any wages in any

employment from the date of her injury . . . to the present and continuing." It is, of course, the Commission's function to assess the credibility of witnesses and to assign weight to the evidence. *See Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000) ("[T]he full Commission is the sole judge of the weight and credibility of the evidence[.]"). And, as here, the Commission's findings of fact are binding on appeal when they are supported by competent evidence in the record. *See Hodgin*, 159 N.C. App. at 639, 583 S.E.2d at 365. This assignment of error is overruled.

Affirmed.

Judges McCULLOUGH and ELMORE concur.

Report per Rule 30(e).