

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA12-37  
NORTH CAROLINA COURT OF APPEALS

Filed: 7 August 2012

JIMMY ALLEN, Employee,  
Plaintiff,

v.

North Carolina Industrial  
Commission  
I.C. No. 198348

HBD INDUSTRIES, INC., Employer,  
NEW HAMPSHIRE INSURANCE COMPANY,  
Carrier,  
Defendants.

Appeal by defendants from opinion and award entered 2  
September 2011 by the North Carolina Industrial Commission.  
Heard in the Court of Appeals 5 June 2012.

*Wallace and Graham, P.A., by Whitney V. Wallace, for  
plaintiff-appellee.*

*McAngus, Goudelock & Courie, P.L.L.C., by Jason C.  
McConnell and Viral V. Mehta, for defendants-appellants.*

MARTIN, Chief Judge.

Defendants, HBD Industries, Inc. (HBD) and New Hampshire  
Insurance Company, appeal from an opinion and award of the North  
Carolina Industrial Commission (the Commission) affirming an  
opinion and award of a deputy commissioner. The Commission

concluded that the carpal tunnel syndrome and stenosing tenosynovitis suffered by plaintiff, Jimmy Allen, are compensable occupational diseases and awarded plaintiff temporary total disability compensation and payment of resulting medical expenses. We affirm.

Plaintiff, aged sixty-four at the time of the hearing before the deputy commissioner in April 2010, began working for defendant HBD in Salisbury, North Carolina, in October 1977. Plaintiff never graduated from high school and is illiterate. During most of his employment, plaintiff worked as a "roll unwrapper," which required that he reach and pull multiple layers of tape from various sized rolls. On 3 November 2008, plaintiff was transferred to the "200-foot utility position." A little over one month later, on 18 December 2008, while maneuvering a heavy pole, plaintiff sustained a crush injury to his right middle finger. Defendant HBD filed a Form 19 dated 30 December 2008. Plaintiff's employment was terminated on 24 February 2009. On 17 March 2009, plaintiff filed a Form 18, alleging injury to his right middle finger due to a "crush injury."

Later, during the course of his medical treatment, plaintiff underwent a nerve conduction study and was diagnosed

with carpal tunnel syndrome of the right hand/wrist, stenosing tenosynovitis of the right ring and middle fingers, and cubital tunnel syndrome of the right elbow. On 23 June 2009, plaintiff filed an amended Form 18 for "Right Hand/Fingers & CTS" and, on 16 October 2009, an amended Form 18 alleging his repetitive job tasks as a roll unwrapper caused and/or aggravated his right hand and arm injuries/diseases. Defendants denied compensability for these claims.

At a hearing before a deputy commissioner, plaintiff testified, and the deputy commissioner found, that "[p]laintiff had been having pain symptoms and difficulty making a fist with his right hand for several months before his December 16, 2008 crush injury; however, he did not inform his supervisors for fear that he would lose his job." The deputy commissioner filed an opinion and award in which he found that plaintiff suffered from carpal tunnel syndrome of the right hand and wrist and stenosing tenosynovitis of the right ring and middle fingers, and that "[p]laintiff's crush injury and/or repetitive job tasks caused and/or aggravated" these conditions. The deputy commissioner concluded that plaintiff's carpal tunnel syndrome and stenosing tenosynovitis are compensable occupational diseases and awarded temporary total disability from 24 February

2009 until further order of the Commission as well as ongoing medical expenses for treatment of those conditions. Defendants appealed to the Commission. The Commission affirmed, in all respects, the deputy commissioner's opinion and award. Defendants appeal.

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On appeal to this Court, defendants argue the Commission erred in concluding (1) that plaintiff proved he was disabled by the third method articulated in *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 425 S.E.2d 454 (1993), and (2) that plaintiff's carpal tunnel syndrome and stenosing tenosynovitis were caused by his work duties as a roll unwrapper. We reject both arguments and affirm.

Under our Workers' Compensation Act, an employee injured in the course of his employment is disabled 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. Gen. Stat. § 91-2(9) (2011); *Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457. "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." *Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457.

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.

*Id.* (emphasis added) (citations omitted).

The Commission's opinion and award indicates that it found plaintiff had satisfied his burden under the third method. The Commission found that,

since [p]laintiff's termination on February 24, 2009, it has been futile for [p]laintiff to seek employment given his current medical conditions, advanced age, illiteracy, low cognitive abilities, limited education, pre-existing diminished physical abilities, and work history. Plaintiff is not at maximum medical improvement and has been unable to undergo the carpal tunnel release surgery and middle finger release surgery as recommended by his treating physician . . .

Defendants suggest the portion of this finding that considers plaintiff's "current medical conditions" should be supported by "medical evidence." However, this Court has expressly recognized that medical evidence is not required to prove disability by the third method under *Russell*. *Britt v. Gator Wood, Inc.*, 185 N.C. App. 677, 684, 648 S.E.2d 917, 922 (2007); *White v. Weyerhaeuser Co.*, 167 N.C. App. 658, 672, 606 S.E.2d 389, 399 (2005). Defendants also argue that plaintiff cannot prove disability by the third method in *Russell* because, they contend, Dr. Ginn testified that he released plaintiff to return to work full duty in May 2009.<sup>1</sup> However, our review is limited to determining whether the Commission's finding is supported by any competent evidence. See *Matthews v. Petroleum Tank Serv., Inc.*, 108 N.C. App. 259, 264, 423 S.E.2d 532, 535 (1992). The Commission's finding that it would be futile for plaintiff to seek employment is amply supported by the testimony of Stephen Carpenter, a rehabilitation counselor. Mr. Carpenter testified that plaintiff is not employable in any job at any functional level. In forming his opinion, Mr. Carpenter properly considered plaintiff's limited cognitive and physical abilities as well as preexisting factors enumerated in *Russell*

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<sup>1</sup> Dr. Ginn's deposition testimony states that he released plaintiff to work full duty on 28 July 2009.

method three, including plaintiff's advanced age and work history. Mr. Carpenter testified that plaintiff is considered functionally illiterate and, therefore, an office-type occupation would not be appropriate for him; that plaintiff scored too low on tests to qualify for any type of post-secondary training; that based on plaintiff's performance on cognitive and physical ability tests administered by Mr. Carpenter, he doubted plaintiff could locate suitable employment outside the jobs he had previously performed; and, that plaintiff would only qualify for simple, unskilled work. Mr. Carpenter also noted that plaintiff's past relevant jobs were repetitive and labor-intensive and, according to plaintiff's medical records, "because of his injury with marked functional loss," he could not return to those. Although defendants urge this Court to "give greater weight to Dr. Ginn's opinion," we cannot do so, as the Commission is the "sole judge of the credibility of the witnesses and the weight to be given their testimony, and its determination of these issues is conclusive on appeal." *Id.* This issue is overruled.

Next, defendants contend the Commission erred in concluding that plaintiff's carpal tunnel syndrome and stenosing

tenosynovitis are compensable occupational diseases. We disagree.

The Commission concluded that

[p]laintiff's employment with [d]efendant-[e]mployer exposed him to a greater risk of developing carpal tunnel syndrome and stenosing tenosynovitis than members of the general public not equally exposed, and [p]laintiff's employment with [e]mployer-[d]efendant made a significant contribution to the development and/or aggravation of these conditions. Therefore, [p]laintiff's carpal tunnel syndrome and stenosing tenosynovitis are compensable occupational diseases. . . .

Defendants contend the following findings of fact supporting the Commission's conclusion are unsupported by competent evidence:

8. Plaintiff was employed by [d]efendant-[e]mployer for eighteen years as a [r]oll [u]nwrapper where his job consisted of continuously and manually reaching and pulling multiple layers of nylon and cotton tape off of various sized rolls.

9. Plaintiff primarily used his right hand to complete the reaching, pulling, and tape removal, as he was born with cerebral palsy in his left hand. Plaintiff estimates that he has approximately 20% strength in his left hand, and that he used his right hand to complete 80% of his work for [d]efendant-[e]mployer.

10. Plaintiff testified, and the Full Commission finds, that [p]laintiff had to pull as hard as he could to get the tape



rolling, and that he then continued a reaching and pulling motion for six hours of his eight hour workday, for eighteen years.

. . .

Defendants' arguments on this issue consist of pointing to evidence contradicting the above findings. They note that the testimony of their expert vocational rehabilitation specialist, Todd Murphy, who stated that the roll unwrapper position does not require sustained repetitive motion, contradicts Finding of Fact 8 and that Mr. Murphy's analysis of the roll unwrapper position was reviewed by Dr. Steven Sanford, who opined that the tasks described by Mr. Murphy would not place an individual at increased risk for developing carpal tunnel syndrome or tenosynovitis. They also note that plaintiff had never complained of wrist pain or carpal tunnel syndrome for the eighteen years he had been employed as a roll unwrapper. They contend "[t]he greater weight of the medical evidence" "establishes that the position does not involve repetitive motion sufficient to increase [plaintiff's] risk of developing carpal tunnel syndrome (or stenosing tenosynovitis)." Defendants also contend Findings of Fact 9 and 10 are not supported by competent evidence based on the testimony of Mr. Aldridge. With respect to Finding of Fact 10, they point to Mr. Aldridge's testimony that pulling "to get the tape rolling" and

the reaching and pulling motions would have only taken plaintiff about three hours per workday to complete and did not require a significant amount of grasping or pulling strength or as much strength as plaintiff's testimony indicated it had required.

However, "[t]he Commission is vested with the exclusive authority to find facts necessary to determine workers' compensation awards, and such findings must be upheld on appeal if there is any competent evidence to support them." *Matthews*, 108 N.C. App. at 264, 423 S.E.2d at 535. "This is so even if there is evidence which would support contrary findings." *Id.* "The Commission is the sole judge of the credibility of witnesses and the weight to be given their testimony, and its determination of these issues is conclusive on appeal." *Id.*

The Commission's findings are amply supported by other findings and competent evidence, including the Commission's finding referencing plaintiff's testimony that he had to pull as hard as he could to get the tape rolling and then continued a reaching and pulling motion for six hours of his eight-hour workday for eighteen years, and the testimony of plaintiff's former co-worker Mr. Pickeral that for six hours out of plaintiff's eight-hour workday, plaintiff was at his work station, walking back and forth, and manually reaching and

pulling tape off of rolls and that Mr. Pickeral considered plaintiff's job task to be repetitive and to involve continuous use of plaintiff's right hand and arm. The Commission also found that plaintiff did not inform his supervisors of his pain symptoms, which occurred months before his crush injury, for fear he would lose his job. Furthermore, the Commission expressly referenced Mr. Aldridge's testimony that "he did not believe the motion [p]laintiff performed to be repetitive," and then found it would accord less weight to Mr. Aldridge's testimony because Mr. Aldridge had only ever worked in the roll unwrapper position as a "floater," never having consistently performed the tasks for the position daily for multiple, consecutive eight-hour shifts for a consecutive number of years or for the eighteen years plaintiff had done so. Thus, the Commission's findings are supported by competent evidence and, in turn, support its conclusion that plaintiff's carpal tunnel syndrome and stenosing tenosynovitis are compensable occupational diseases.

The Commission's Opinion and Award is affirmed.

Affirmed.

Judges McGEE and ELMORE concur.

Report per Rule 30(e).