*A decision without a published opinion is authority only in the case in which such decision is rendered and should not be cited in any other case in any court for any other purpose, nor should any court consider any such decision for any purpose except in the case in which such decision is rendered. See Rule of Appellate Procedure 30 (e)(3).*

NO. COA01-53

NORTH CAROLINA COURT OF APPEALS

Filed: 5 February 2002

CATHLEEN H. BASS,
Employee-Plaintiff,
Appellee,

v.

North Carolina Industrial Commission
I.C. File No. 227755

JOBBERS OF RALEIGH, INC.,
Employer-Defendant,
Appellant,

and

UNIVERSAL UNDERWRITERS INSURANCE COMPANY,
Carrier-Defendant,
Appellee,

and/or

TRAVELERS INSURANCE COMPANY,
Carrier-Defendant,
Appellant.

Appeal by defendants from Opinion and Award entered 24 August 2000 by the North Carolina Industrial Commission. Heard in the Court of Appeals 5 November 2001.

*Charles R. Hassell, Jr., for plaintiff-appellee.*

*Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Thomas M. Morrow, for defendant-appellants Jobbers of Raleigh, Inc. and Travelers Insurance Company.*

*Cranfill, Sumner & Hartzog, L.L.P., by Buxton S. Copeland, for defendant-appellees Universal Underwriters Insurance Company and Jobbers of Raleigh, Inc.*

EAGLES, Chief Judge.

Jobbers of Raleigh, Inc. and Travelers Insurance Company ("defendants") appeal from an Opinion and Award of the North Carolina Industrial Commission awarding plaintiff workers' compensation benefits for an occupational disease. After careful consideration of the briefs and record, we affirm.

Plaintiff worked forty to seventy hours per week for Jobbers of Raleigh, Inc., an automobile parts supply store, from 1985 to 1992. Plaintiff operated a computer, answered the telephone, typed orders, wrote up packing slips, moved parts, performed inventory, packed orders, and cleaned the warehouse floor and bathrooms. Plaintiff stopped working in 1992 due to pain in her hands and was diagnosed with "CMC degenerative arthritis at the base of her thumb and carpal tunnel syndrome" in 1995.

Plaintiff, Jobbers, and Universal completed a Form 21 on 28 May 1992 which was approved by the Industrial Commission. It provided for a benefit of $403.33 per week to plaintiff. The Industrial Commission approved a Form 24 application to stop benefit payments to plaintiff on 29 June 1993. On 5 August 1994, the Full Commission affirmed the Opinion and Award of a Deputy Commissioner which concluded that the Form 24 was improvidently approved and awarded plaintiff $403.33 for her "continuing total disability."

Dr. Krakauer, plaintiff's treating orthopaedic surgeon, performed surgery on plaintiff in 1996 for "bilateral carpal tunnel syndrome and bilateral first CMC degenerative arthritis." On her arms and wrists, plaintiff received a "[r]ight trapezial excisionand flexor carpi radialis suspension plasty," "[r]ight carpal tunnel release," a "[l]eft trapezium excision, interposition arthroplasty, and carpal tunnel release." After recovery from surgery, Dr. Krakauer placed

plaintiff on certain work restrictions in December 1996. Plaintiff was to avoid repetitive gripping and pinching and was restricted from lifting in excess of 20 pounds.

Between 1992 and 1997, Jobbers experienced a downturn in business and was forced to reduce the number of its employees. Travelers Insurance Company assumed workers' compensation coverage for Jobbers on 3 February 1997 and plaintiff returned to work at Jobbers on or about the same date. Plaintiff resumed the duties she performed prior to her absence. After an appointment with plaintiff on 25 March 1997, Dr. Krakauer placed plaintiff on a six hour work day.

Shortly after her return to work, plaintiff began experiencing numbness and pain in both hands and arms between her wrists and elbows. On 22 August 1997, plaintiff stopped working due to the pain she suffered and her fear concerning the numbness in her arms. Plaintiff saw Dr. Krakauer on 19 September 1997 and 3 October 1997 and complained of pain. He recommended several diagnostic tests. Plaintiff's claim for benefits was denied by Travelers on 1 December 1998 and plaintiff filed a request for a hearing in January 1999. In February 1999, shortly before the first hearing, Dr. Krakauer was authorized to perform the recommended diagnostic tests. After the completion of these tests, Dr. Krakauer diagnosed plaintiff with cubital tunnel syndrome and recommended surgery.

This matter was first heard before Deputy Commissioner Edward Garner, Jr. on 6 May 1999. An Opinion and Award filed 10 September 1999 denied plaintiff workers' compensation benefits. Plaintiff appealed to the Full Commission who heard the matter on 22 March 2000. In its Opinion and Award filed 24 August 2000, the Full Commission awarded plaintiff $403.33 per week in temporary total disability benefits and ordered Travelers to pay the benefit and all medical expenses associated with plaintiff's occupational disease. Jobbers and Travelers appeal.

Defendants raise three issues on appeal. The first is whether the Full Commission committed error in finding that plaintiff's cubital tunnel syndrome was an occupational disease. Alternatively, defendants contend that if the Full Commission properly found that plaintiff suffered a compensable injury, the Full Commission erred in: (1) awarding plaintiff temporary total disability benefits for the period between 22 August 1997 and 23 February 1999; and (2) determining plaintiff's average weekly wage. After careful consideration, we affirm.

This Court reviews an Opinion and Award from the Full Commission to determine "(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). The findings of fact by the Commission are conclusive on appeal if supported by any competent evidence, even if there is evidence to support a contrary finding. *Allen v. Roberts Elec. Contr'rs*, 143 N.C. App. 55, 60, 546 S.E.2d 133, 137 (2001) (citations omitted).

Defendants first contend that the Full Commission erred in finding that plaintiff's cubital tunnel syndrome was a compensable injury under The North Carolina Workers' Compensation Act, G.S. §97-1 *et seq.*

Occupational diseases are delineated in G.S. §97-53. Cubital tunnel syndrome is not specifically listed. However, G.S. §97- 53(13) states that an occupational disease can be:

> (13) Any disease, other than hearing loss covered in another subdivision of this section, which is proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment.

G.S. §97-53(13).

Defendants concede that plaintiff produced expert medical testimony sufficient to show that her job placed her at an increased risk over members of the general public for contracting cubital tunnel syndrome. However, defendants argue that plaintiff did not produce any evidence to show that her cubital tunnel syndrome was the result of "causes and conditions which are characteristic of and peculiar to" her job. We disagree.

In order for an occupational disease to be compensable under G.S. §97-53(13), the plaintiff must prove that:

> (1) [T]he disease is characteristic of and peculiar to persons engaged in a particular trade or occupation in which the plaintiff is engaged; (2) "the disease is not an ordinary disease of life to which the public is equally exposed;" and (3) there is a causal connection between the disease and the plaintiff's employment.

*Pressley v. Southwestern Freight Lines*, 144 N.C. App. 342, 346, 551 S.E.2d 118, 120 (2001) (citation omitted); *Booker v. Medical Center*, 297 N.C. 458, 468, 475, 256 S.E.2d 189, 196, 200 (1979). "To satisfy the first and second elements it is not necessary that the disease originate exclusively from or be unique to the particular trade or occupation in question." *Rutledge v. Tultex Corp.*, 308 N.C. 85, 93, 301 S.E.2d 359, 365 (1983).

> Thus, the first two elements are satisfied if, as a matter of fact, the employment exposed the worker to a greater risk of contracting the disease than the public generally. "The greater risk in such cases provides the nexus between the disease and the employment which makes them an appropriate subject for workmen's compensation."

*Id.* at 93-94, 301 S.E.2d at 365 (quoting *Booker*, 297 N.C. at 475, 256 S.E.2d at 200) (citation omitted).

"[W]here the exact nature and probable genesis of a particular type of injury involves complicated medical questions far removed from the ordinary experience and knowledge of

laymen, only an expert can give competent opinion evidence as to the cause of the injury." *Click v. Freight Carriers*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980).

The Full Commission made the following findings:

> 1. Plaintiff worked as an office manager in defendant-employer's auto parts business. In that capacity she worked forty to seventy (40- 70) hours per week during the period of 1985 to April of 1992. Plaintiff's daily workactivities included the following: receiving telephone orders; keying in orders into a computer; keying price changes and other information into the computer; handwriting telephone orders and other information; filling parts orders, which involved lifting and carrying auto parts of various sizes up to fifty (50) pounds from the shelves in the warehouse to the service desk; conducting inventory in the parts warehouse which involved climbing up on shelves; pulling, lifting and sorting boxed automobile parts; keeping the books and records of the business; and sweeping and cleaning floors, bathrooms and other areas of the warehouse and offices.
>
> . . . .
>
> 5. Upon plaintiff's return to work, the auto parts business at Jobbers' had diminished such that seven former employees who had worked prior to [plaintiff's] medical leave were no longer employed. Following her return to work, plaintiff resumed her normal duties, plus some additional duties made necessary because no other employees were available to assist her.
>
> 6. Plaintiff described her additional workload to Dr. Krakauer on 25 March 1997, complaining that she had to do heavy lifting. In a written medical note, Dr. Krakauer limited plaintiff to six hours of work per day until 1 October 1997.
>
> . . . .
>
> 13. The sum total of plaintiff's work activities for [Jobbers] as described above from 1985 to 1992, and for approximately seven months in 1997, caused or contributed to the development of her cubital tunnel syndrome and also placed her at an increased risk of developing that condition as compared to members of the general public not so employed.

The Full Commission made the following Conclusion of Law:

> 1. Plaintiff's employment with defendant- employer caused or significantly contributed to the development of her cubital tunnel syndrome and exposed her to an increased riskof developing this disease as compared to members of the general public not so employed. G.S. §97-53(13).

Plaintiff testified before the Deputy Commissioner that her duties upon returning to work in 1997 were the same as those before she left in 1992. Her duties included computer work, performing inventory, entering price changes, writing parts orders, packing orders, stocking parts, and cleaning. Moreover, due to the reduction in employees, there were no employees available to help plaintiff with the work.

Dr. Krakauer testified that the duties plaintiff performed "contribute[d] to the problem," placed her "at a greater risk for the development of cubital tunnel syndrome," that her job was "one of them" that puts people at risk for cubital tunnel syndrome, and that plaintiff's work activities in 1997 contributed to the further development of her cubital tunnel syndrome. Dr. Krakauer also testified that "computer use predisposes one to the development of cubital tunnel syndrome" and that the computer use here "would certainly support the relationship between her work and development of [cubital tunnel syndrome]."

The testimony by Dr. Krakauer and plaintiff is competent evidence to support the Full Commission's Finding of Fact 13 in that plaintiff's employment "caused or contributed to the development of her cubital tunnel syndrome and also placed her at an increased risk of developing that condition as compared to members of the general public . . . ."

The Full Commission's findings justify its conclusion that plaintiff suffered an occupational disease. The findings support the conclusion that plaintiff's employment "exposed her to an increased risk of developing this disease as compared to members of the general public not so employed." The findings also support the final element of an occupational disease which

is a causal connection between the disease and plaintiff's employment. This assignment of error is overruled.

Defendants next contend that the Full Commission erred in awarding temporary total disability benefits to plaintiff for the period of 22 August 1997 to 23 February 1999 when defendants contend that plaintiff had no medical evidence of disability and remained out of work without medical authorization. We do not agree.

Defendants argue that plaintiff was not authorized to remain out of work by her treating physician. G.S. §97-32 states that "[i]f an injured employee refuses employment procured for him suitable to his capacity he shall not be entitled to any compensation at any time during the continuance of such refusal, unless in the opinion of the Industrial Commission such refusal was justified." G.S. §97-32. Defendants argue that plaintiff did not offer any evidence to show her refusal to work was justified. Due to G.S. §97-32 and plaintiff's lack of medical authorization to remain out of work, defendants argue that plaintiff should be barred from receiving benefits for the period between August 1997 and February 1999. We do not agree.

The Full Commission found:

> 16. Although Dr. Krakauer suspected cubital tunnel syndrome on 19 September 1997, and on 3 October 1997, he did not have sufficient information at that time to make a definitive diagnosis or to certify that plaintiff was unable to work. In fact, plaintiff's symptoms on and after 22 August 1997 did not change during the year that intervened before defendants authorized her to see Dr. Krakauer again at which time he certified her as being unable to return to work. By 22 August 1997, plaintiff was in fact unable to work and earn wages in her former employment because of pain associated with her cubital tunnel syndrome. Dr. Krakauer was unable to confirm the diagnosis until 23 February 1999. At that time, he noted that plaintiff's cubital tunnel syndrome had been present for several years.

In response to a question regarding the last time plaintiff saw Dr. Krakauer before the diagnostic tests were performed in February 1999, plaintiff answered "[w]hen was the last time [you all] allowed me to see him--October of [1997]."

Dr. Krakauer's clinical notes in the record for 19 September 1997 and 23 February 1999 provide some assistance. The clinical notes for 19 September 1997 state that Dr. Krakauer believes plaintiff is "having some mild cubital tunnel syndrome." The notes for 23 February 1999 state that "[c]linically, I believe [plaintiff] does have cubital tunnel syndrome. This has been present for several years." Dr. Krakauer testified that it "would fit with common sense" that plaintiff's cubital tunnel syndrome existed prior to his diagnosis on 23 February 1999.

The evidence tends to show that plaintiff's cubital tunnel syndrome existed before the diagnosis in 1999 and supports the finding that plaintiff's cubital tunnel syndrome existed before the diagnosis in February 1999.

In addition, one purpose of G.S. §97-32 is "to prevent a partially disabled employee from refusing employment within the employee's capacity in an effort to increase the amount of compensation payable to the employee." *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 444-45, 342 S.E.2d 798, 810 (1986). Plaintiff did not refuse work in order to increase her compensation. Plaintiff returned to work after she received authorization. She worked for five months with increasing pain. Plaintiff only stopped working in August 1997 when the pain became too much for her to continue. This assignment of error is overruled.

Defendants next contend that in the event that the Full Commission properly decided plaintiff was entitled to compensation, the Full Commission erred in calculating plaintiff's average weekly wage.

Defendants argue that the wages used to calculate plaintiff's average weekly wage should be the wages earned by plaintiff during her employment in 1997. Defendants argue that since plaintiff alleged that her cubital tunnel syndrome was the result of her work in 1997, the wages in that period alone should be used. We do not agree.

In Finding 13, the Full Commission found that "[t]he sum total of plaintiff's work activities for [Jobbers] as described above from 1985 to 1992, and for approximately seven months in 1997, caused or contributed to the development of her cubital tunnel syndrome" and in Finding 15 that "[p]laintiff's limited work activities from 5 February 1997 through 22 August 1997 contributed, to some degree, to the development of and aggravation of her cubital tunnel syndrome."

The Full Commission concluded that plaintiff was entitled to receive compensation in the amount of $403.33 per week. This figure is based on plaintiff's average weekly wage and compensation rate determined by the Full Commission in 1994 for her "continuing total disability." The parties stipulated to the "average weekly wage and compensation rate" as previously "determined in the Opinion and Award of former Deputy Commissioner Lawrence B. Shuping, Jr., filed 11 January 1994, and the Opinion and Award by the Full Commission of former Commissioner James J. Booker, 15 August 1994, which affirmed the former Deputy's award." This stipulation was noted in both the Deputy Commissioner's Opinion and Award filed 10 September 1999 and the Full Commission's Opinion and Award filed 24 August 2000.

The Opinion and Award from the Full Commission in 1994 awarded plaintiff $403.33 for her "continuing total disability." The award that is the subject of this appeal awarded plaintiff $403.33 as "temporary total disability compensation." The figures from both awards are the

same since they are compensating plaintiff for her "total disability." This assignment of error is dismissed.

Accordingly, the Opinion and Award of the Full Commission is affirmed.

Affirmed.

Judges MARTIN and BIGGS concur.

Report per Rule 30(e).