An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA06-1282

NORTH CAROLINA COURT OF APPEALS

Filed: 3 July 2007

ANDREW LEWIS WEST,
Employee,
Plaintiff-Appellee,

v.

North Carolina Industrial Commission
I.C. Nos. 364195 & 367025

CONSOLIDATED DIESEL COMPANY,
Employer,

ACE USA/ESIS, Servicing Agent,
Carrier,
Defendants-Appellants.

Appeal by Defendants from opinion and award entered 25 May 2006 by the North Carolina Industrial Commission. Heard in the Court of Appeals 23 May 2007.

Yolanda L. Nowlin for Plaintiff-Appellee.

McAngus, Goudelock & Courie, P.L.L.C., by Jessica C. Smythe and Carolyn T. Marcus, for Defendants-Appellants.

McGEE, Judge.

Consolidated Diesel Company (CDC) and Ace USA/ESIS (collectively Defendants) appeal from an opinion and award of the North Carolina Industrial Commission (the Commission) filed on 25 May 2006, reversing a Deputy Commissioner's decision denying benefits to Andrew Lewis West (Plaintiff). We affirm the Commission's opinion and award.

Plaintiff filed two workers' compensation claims against CDC. He alleged disability resulting from a specific traumatic incident on or about 23 December 2002, as well as disability resulting from an occupational disease, specifically carpal tunnel syndrome. In support of his claims, Plaintiff testified that he had worked for CDC since 11 July 1989. At the time of the alleged traumatic incident on 23 December 2002, Plaintiff was employed as a line technician. He was responsible for operating machines and loading engine heads. Each engine head weighed approximately 200 pounds. Plaintiff testified that while loading an engine head, he bent down to hook a hoist to the engine head. When he looked up to ensure that the chain was secured, he felt a "funny move" or "crick" in his neck. Plaintiff stated that he tried to ignore the pain, but the pain persisted and he was unable to straighten his neck after the incident.

Plaintiff testified that he contacted his family physician, Dr. Matthew Chamberlain (Dr. Chamberlain), who subsequently referred Plaintiff to a neurologist, Dr. Lucas Martinez (Dr. Martinez). Dr. Martinez told Plaintiff that he needed immediate cervical disc fusion surgery because Plaintiff's cervical discs were so badly damaged that they would not "keep [Plaintiff's] head straightened back up." Dr. Martinez performed surgery on Plaintiff's neck and Plaintiff stated that as a result of the surgery he was out of work until approximately 29 June 2003. After the surgery, Plaintiff said he experienced dizziness and that he had continually taken medication to treat the dizziness.

Plaintiff testified that he had pre-existing lower back pain prior to the 23 December 2002 incident. He stated that the pain he experienced from this incident did not stop, that his neck was "caught in a crook[,]" and that he could not straighten his head or neck. He stated he had never before felt pain like the pain he experienced after the 23 December 2002 incident.

Dr. Martinez testified that he treated Plaintiff's neck pain on 6 January 2003. Dr. Martinez further testified that after performing a lumbar and cervical MRI, as well as a myelogram, he recommended that Plaintiff undergo cervical disc fusion surgery. Dr. Martinez performed the surgery on 29 January 2003. Dr. Martinez stated that Plaintiff's cervical disc herniation could have been caused by Plaintiff's work duties, but stated that it was "impossible" for him to say whether it was more likely than not the cause. However, Dr. Martinez explained that

> the only way to determine whether something like that can cause a [cervical disc herniation] is just historical. [If a patient] tells me that he was doing something and he noticed something sharp that would indicate that the disc ruptured at that time, then I will have an indication that that was more likely than not the cause. In the absence of that, there is no way that I can tell you whether it was more likely than not.

Dr. Martinez stated that "the timing of the accident" was an important factor. He indicated that if the herniated disc symptoms started at approximately the same time as an accident or a specific incident described by a patient, then he would conclude that the incident significantly contributed to the herniated disc. However, if the symptoms arose several months or years prior to the incident, then he would conclude the incident did not significantly contribute to the herniated disc. In a 26 April 2004 letter to Plaintiff's attorney, Dr. Chamberlain stated that he was "uncertain as to whether [Plaintiff's] cervical dis[c] herniation was caused in any way by his employment," but felt it "certainly would have been aggravated by [Plaintiff's] employment." As a result of the disc surgery, Plaintiff was out of work until approximately 29 June 2003.

Plaintiff also alleged that he developed carpal tunnel syndrome as a result of his employment. According to his testimony, Plaintiff felt a pain and a snap in the palm of his right hand while pushing an engine head into place on a conveyor on or about 30 July 2003. Plaintiff

pushed another engine head into place and felt the same severe pain. He continued to feel intense pain, and after a day Plaintiff's hand was very swollen. Plaintiff reported the injury to the medical nurse and went to see Dr. Chamberlain. Dr. Chamberlain referred him to Dr. William Deans (Dr. Deans). Dr. Deans checked both of Plaintiff's hands, and recommended carpal tunnel surgery for both. On cross-examination, Plaintiff admitted that he had been diagnosed with mild carpal tunnel syndrome in 1991.

Plaintiff testified that Dr. Frederick Park (Dr. Park) performed carpal tunnel release surgery on Plaintiff's right and left hands in March and May 2003, respectively. Plaintiff testified that his ability to sleep improved after the surgery, but that he still experienced pain in his hands and remained unable to grip anything. He stated that he continued to experience numbness and severe pain in his hands, even after the surgeries.

Plaintiff also described his daily job responsibilities. Plaintiff stated that until 1999, he worked as a blockline technician and then was transferred to the C-encore line, but that his job tasks, for the most part, remained the same while in both positions. Plaintiff testified that he used his hands for almost everything he did, including loading and off-loading parts, changing tools in machines, carrying tools, cleaning machines, and gauging parts. Plaintiff testified that when gauging parts, he "had to twist [his hands] all the time." He estimated that he gauged between five to six parts each day, and that it took between eight to twelve minutes to gauge each part.

Dr. Chamberlain stated that Plaintiff's carpal tunnel syndrome was "related to the repetitive movement that [Plaintiff] underwent at work." Dr. Chamberlain testified that he based his opinion on Plaintiff's description of his particular job duties and responsibilities. Dr. Chamberlain stated that, compared to a member of the general public not equally exposed to Plaintiff's work conditions, he felt Plaintiff's employment placed him at an increased risk for

developing carpal tunnel syndrome. He testified that "the job described, with fine manipulation and repetitive activity, certainly could contribute to or cause carpal tunnel syndrome." Dr. Chamberlain testified that he intended to keep Plaintiff out of work indefinitely after Plaintiff reported continued and severe pain and weakness in his hands after the carpal tunnel surgery. In a medical note dated 13 April 2004, Dr. Chamberlain stated that Plaintiff "need[ed] to be out of work indefinitely until he recovers from [carpal tunnel syndrome]." Dr. Chamberlain stated he was keeping Plaintiff out of work due to Plaintiff's hand pain and weakness. Dr. Chamberlain stated during his testimony that he felt Plaintiff was unable to return to work.

Dr. Deans testified that he began treating Plaintiff on 7 November 2003, and that Plaintiff complained of numbness and tingling in his hands, and aching in his arms. Plaintiff also reported that his hands would "go to sleep" at night and interfere with Plaintiff's ability to sleep. Dr. Deans concluded that Plaintiff's previous neck problems were not the cause of the numbness, and diagnosed Plaintiff with carpal tunnel syndrome. Dr. Deans treated Plaintiff with oral steroids and wrist splints, with no improvement. Dr. Deans stated that if Plaintiff was involved with repetitive work with his hands, the repetitive work would aggravate Plaintiff's carpal tunnel syndrome. Further, Dr. Deans stated that if Plaintiff was repeatedly and forcefully "grasping and twisting[,]" then Plaintiff would be at an increased risk for carpal tunnel syndrome. However, Dr. Deans stated that he did not have enough information to state with a reasonable degree of medical certainty that Plaintiff's employment caused Plaintiff's carpal tunnel syndrome.

Dr. Park testified that Dr. Chamberlain referred Plaintiff to him for carpal tunnel release surgery on both of Plaintiff's hands. Dr. Park stated that after surgery, Plaintiff complained of "a lot of pain and problems recovering from surgery[.]" Plaintiff told Dr. Park that he was in so much pain that he "would prefer to have his hands amputated[.]" As a result, Dr. Park sent

Plaintiff to a pain clinic and started Plaintiff on physical therapy. The physical therapy reports indicated that Plaintiff reported experiencing severe pain, an inability to grip, and a decrease of strength in his wrists and hands. When asked about Plaintiff's ability to return to work, Dr. Park stated that Plaintiff's activities would only be restricted based upon Plaintiff's experience of pain.

Plaintiff also offered into evidence CDC's job description of a blockline technician. The job description indicated that a blockline technician's work involved continuous and repetitive actions of the upper extremities, including carrying and lifting of one to twenty-four pounds, simple grasping, fine manipulation, and firm grasping. "Continuous" denoted that the worker spent between 67 percent and 100 percent of each workday on such tasks.

In an opinion and award filed on 22 March 2005, a Deputy Commissioner concluded that Plaintiff sustained an injury by accident on 23 December 2002, but that the accident produced only transient symptoms. The Deputy Commissioner also concluded that Plaintiff had not proven he developed a compensable occupational disease. Accordingly, Plaintiff's claims for benefits were denied. Plaintiff appealed to the Commission. In an opinion and award filed 25 May 2006, the Commission reversed the Deputy Commissioner's opinion and award. The Commission concluded that (1) Plaintiff suffered a cervical spine injury as a result of a specific traumatic incident on 23 December 2002, which exacerbated a previously nondisabling condition and made it disabling; (2) Plaintiff was entitled to benefits for the cervical spine condition; (3) Plaintiff's carpal tunnel syndrome was a compensable occupational disease pursuant to N.C. Gen. Stat. §97-53(13); and (4) Plaintiff was entitled to benefits for his carpal tunnel syndrome. Defendants appeal. Additionally, Plaintiff requests that he be awarded attorney's fees pursuant to N.C. Gen. Stat. §97-88.

I. Standard of Review

When reviewing an opinion and award of the Commission, we are limited to two issues: "(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). If the record contains competent evidence to support the Commission's findings, they are conclusive on appeal even though there may be evidence to support contrary findings. *Hedrick v. PPG Industries*, 126 N.C. App. 354, 357, 484 S.E.2d 853, 856, *disc. review denied*, 346 N.C. 546, 488 S.E.2d 801 (1997). "'The Commission is the sole judge of the credibility of the witnesses and the weight to be given to their testimony.'" *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 413 (1998), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965)). The Commission need not explain its findings of fact by distinguishing which evidence or witnesses it finds credible. *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116-17, 530 S.E.2d 549, 553 (2000). Further, evidence must be taken in the light most favorable to the plaintiff and the plaintiff is "entitled to the benefit of every reasonable inference to be drawn from the evidence." *Adams*, 349 N.C. at 681, 509 S.E.2d at 414.

II. Cervical Disc Herniation

Defendants argue that the Commission erred by concluding that the 23 December 2002 incident was a proximate cause of Plaintiff's cervical disc herniation. Brief 24. We disagree.

When an injury involves complex medical questions, "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). Expert testimony based merely on speculation and conjecture "is not

sufficiently reliable to qualify as competent evidence on issues of medical causation." *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 915 (2000). "[I]f an expert's opinion as to causation is wholly premised on the notion of *post hoc ergo propter hoc* (after it, therefore because of it), then the expert has not provided competent record evidence of causation." *Singletary v. N.C. Baptist Hosp.*, 174 N.C. App. 147, 154, 619 S.E.2d 888, 893 (2005). It is the duty of the Commission, and not the reviewing Court, to determine what weight should be given to expert testimony. *Adams v. Metals USA*, 168 N.C. App. 469, 483, 608 S.E.2d 357, 365, *aff'd per curiam*, 360 N.C. 54, 619 S.E.2d 495 (2005).

The testimony of Dr. Martinez, along with Plaintiff's testimony, constituted competent evidence on the question of causation. Dr. Martinez testified that

> the only way to determine whether something like that can cause a [cervical disc herniation] is just historical. [If a patient] tells me that he was doing something and he noticed something sharp that would indicate that the disc ruptured at that time, then I will have an indication that that was more likely than not the cause. In the absence of that, there is no way that I can tell you whether it was more likely than not.

Dr. Martinez clarified that his opinion as to whether a specific traumatic incident significantly contributed to a herniated disc depended on the "timing of the accident." However, he stated he would conclude the incident significantly contributed if the symptoms arose at the same time as the incident, as they did in the present case. Although Plaintiff's medical records reveal a prior cervical disc protrusion at the C6 nerve root, Plaintiff's pain during that time was not so severe that he needed to be treated with surgery. The testimony of Dr. Martinez, the abrupt change in Plaintiff's allegations of neck pain, and Dr. Chamberlain's opinion that Plaintiff's employment would have "certainly" aggravated his cervical disc herniation constituted competent evidence to support the Commission's findings that Plaintiff's cervical disc herniation was caused by the 23

December 2002 incident. Therefore, we overrule the assignments of error grouped under this argument.

III. Carpal Tunnel Syndrome

Defendants next argue that the Commission erred (1) by finding that Plaintiff's employment with CDC caused Plaintiff's carpal tunnel syndrome, and (2) by concluding that Plaintiff's employment placed him at an increased risk for developing carpal tunnel syndrome as compared to the general public. We disagree.

The Workers' Compensation Act lists numerous compensable occupational diseases, including "[a]ny disease . . . 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." N.C. Gen. Stat. §97-53(13) (2005). For a disease to be occupational under this statute,

> it must be (1) characteristic of persons engaged in the particular trade or occupation in which the claimant is engaged; (2) not an ordinary disease of life to which the public generally is equally exposed with those engaged in that particular trade or occupation; and (3) there must be "a causal connection between the disease and the [claimant's] employment."

Rutledge v. Tultex Corp., 308 N.C. 85, 93, 301 S.E.2d 359, 365 (1983) (quoting *Hansel v. Sherman Textiles*, 304 N.C. 44, 52, 283 S.E.2d 101, 105-06 (1981)) (alteration in original). To satisfy the first two elements of the *Rutledge* test, a plaintiff must prove that his employment exposed him to a greater risk of contracting the disease than the general public. *Id.* at 93-94, 301 S.E.2d at 365. "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." *Id.* at 93, 301 S.E.2d at 365. This Court has stated that both causation and increased risk are essential

elements of an occupational disease claim, and if either element is lacking, the claim necessarily fails. *Futrell v. Resinall Corp.*, 151 N.C. App. 456, 459-60, 566 S.E.2d 181, 184 (2002), *aff'd per curiam*, 357 N.C. 158, 579 S.E.2d 269 (2003). "[E]vidence tending to show that the employment simply aggravated or contributed to the employee's condition goes only to the issue of causation, the third element of the *Rutledge* test." *Id.* at 460, 566 S.E.2d at 184.

In his deposition testimony, Dr. Chamberlain stated that he believed Plaintiff's job tasks placed Plaintiff at an increased risk of developing carpal tunnel syndrome compared with the general public. Dr. Deans also testified that if Plaintiff was forcefully and repeatedly grasping and twisting parts, then Plaintiff was at an increased risk for carpal tunnel syndrome. Additionally, CDC's job description revealed that the duties of a blockline technician involved continuous and repetitive simple grasping, fine manipulation, and firm grasping of the upper extremities. The job description defined "continuous," as an action in which a technician spends between 67 percent and 100 percent of his daily workday performing. We conclude that the Commission's finding that Plaintiff was at a greater risk than members of the general public not similarly employed was supported by competent evidence. Further, we find the Commission's findings justify its conclusions. We overrule the assignments of error grouped under this argument.

IV. Plaintiff's Disability

In their final argument, Defendants claim that Plaintiff failed to prove that he was disabled as a result of either the cervical disc herniation or carpal tunnel syndrome. In support of this position, Defendants refer us to the deposition of Dr. Park, who stated that Plaintiff should be able to return to full duty work and would only need to be out of work for two to three weeks after surgery. Defendants also note that Dr. Park reported that there were not objective findings

to support Plaintiff's subjective complaints of pain. Finally, Defendants argue that none of Plaintiff's medical providers testified that Plaintiff had a decreased ability to work or earn wages as a result of either the carpal tunnel syndrome or the cervical disc herniation.

Disability is defined by the Workers' Compensation Act as "incapacity because of injury 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. §97-2(9) (2005). Under this provision, to receive disability compensation the job injury must have impaired the employee's earning capacity. *Brown v. S & N Communications, Inc.*, 124 N.C. App. 320, 329, 477 S.E.2d 197, 202 (1996).

The Commission made the following finding as to Plaintiff's disability:

> From December 23, 2002, until his recovery from back surgery, [P]laintiff was unable to earn any wages by reason of his compensable specific traumatic incident. During the period of his recovery from back surgery, [P]laintiff's compensable carpal tunnel syndrome began to be a factor in [P]laintiff's inability to earn wages. After [P]laintiff's recovery from back surgery the carpal tunnel syndrome and its sequelae became the causes of [P]laintiff's inability to earn wages.

Dr. Chamberlain testified that he intended to keep Plaintiff out of work indefinitely after Plaintiff reported continued pain and weakness in his hands after the carpal tunnel surgery. This competent evidence supported the Commission's finding. Further, Dr. Chamberlain's medical note dated 13 April 2004, which stated that Plaintiff needed to be out of work indefinitely, also supported the Commission's finding. Therefore, we overrule the assignments of error grouped under this argument.

V. Attorney's Fees

Lastly, Plaintiff requests that this Court award him attorney's fees pursuant to N.C. Gen. Stat. §97-88. N.C. Gen. Stat. §97-88 (2005) provides that the Commission or a reviewing court may award costs to an injured employee if the insurer has appealed and, on appeal, the

Commission or reviewing court orders the insurer to make, or continue to make, payments to the employee. *Flores v. Stacy Penny Masonry Co.*, 134 N.C. App. 452, 459, 518 S.E.2d 200, 205 (1999). This Court, upon finding that the requirements of N.C.G.S. §97-88 had been satisfied, granted the plaintiff's request for expenses incurred on appeal, including attorney's fees, and remanded the matter to the Commission for a determination of the amount due. *Id.* We find that the requirements of N.C.G.S. §97-88 were met in the present case. We remand this matter to the Commission to determine the amount due Plaintiff for reasonable attorney's fees he incurred as a result of the appeal to this Court.

Affirmed and remanded.

Judges LEVINSON and JACKSON concur.

Report per Rule 30(e).