An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA07-1093

NORTH CAROLINA COURT OF APPEALS

Filed: 18 March 2008

DAVID BRADLEY,
Employee,
Plaintiff

v.

North Carolina Industrial Commission
I.C. File No. 471602

CONTINENTAL GENERAL TIRE,
Employer,

GATES MCDONALD,
Carrier,
Defendants.

Appeal by defendants from Opinion and Award of the North Carolina Industrial Commission entered 30 May 2007. Heard in the Court of Appeals 19 February 2008.

Tania L. Leon, P.A., by Kenneth L. Armstrong, for plaintiff-appellee.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Joel K. Turner, for defendants-appellants.

WYNN, Judge.

An employee may prove that he is disabled within the meaning of our Workers' Compensation Act by producing "medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment."**[Note 1]** Here, because the record contains competent evidence that the employee was incapable of working in any employment, we affirm the Opinion and Award of the Full Commission.

Continental General Tire employed David Bradley to work as a diverter _ inspecting tires for defects at a computer station as the tires went by on a conveyor belt, removing defective tires from the belt, and placing them on the floor. Mr. Bradley inspected approximately 4,000 tires during a twelve-hour shift.

On 13 September 2004, Mr. Bradley's conveyor belt became jammed with tires, causing some tires to fall to the floor, an event that occurred six to ten times during a typical twelve-hour shift. According to Mr. Bradley, he stopped the belt, began picking up the tires, and felt a "catch" and pain in his lower back. Nonetheless, he continued to pick up the tires and went back to his station, but after about forty-five minutes, he told a co-worker to notify his supervisor because the "aching pain" in his back had worsened. After informing his supervisor, Carolyn Broadwell, that he had an ache in his back, Mr. Bradley went to the nurse who gave him pain medication and sent him back to work. Thereafter, he finished his shift.

The next day, Mr. Bradley visited his family physician, Dr. Ron Kirkpatrick, for further examination of his back. Dr. Kirkpatrick gave him pain medication and wrote him out of work until 28 September 2004. On 28-29 September 2004, Mr. Bradley returned to work at the plant without restrictions, but because of his continued complaints of pain, on 30 September he was examined by Dr. Robert Blake, an orthopedist. Dr. Blake diagnosed Mr. Bradley with degenerative disc disease with acute sciatica, and recommended physical therapy and restrictive duty at work, including two weeks of eight-hour shifts and "primarily sedentary-type work, alternating sitting and standing."

When Mr. Bradley attempted to return to work, Continental Tire informed him that it could not accommodate the restrictions because the injury was not work-related. Mr. Bradley explained that his injury had in fact occurred at work and he filled out a written report of his 13

September 2004 injury. Continental Tire then filed a report of his injury with the Industrial Commission. On 8 October 2004, Continental Tire denied Mr. Bradley's workers' compensation claim. However, Mr. Bradley applied for and received short-term disability benefits of $385.00 per week, for 52 weeks, from October 2004 through October 2005.

Although Mr. Bradley was receiving physical therapy, he still complained of pain, so in December 2004, Dr. Blake gave him an MRI and referred him to Dr. Herman Gore for pain management. Based on the results of the MRI and unsuccessful treatment by Dr. Gore, Dr. Blake referred Mr. Bradley to Dr. William Hunter for a surgical consultation. Dr. Blake testified that he believed Mr. Bradley was justified in not working from 13 September 2004 through March 2005, and he noted in Mr. Bradley's records that Mr. Bradley was totally disabled from 1 October 2004 through 1 April 2005.

On 5 April 2005, Mr. Bradley underwent surgery for a right-sided L4-5 discectomy. After surgery, Mr. Bradley continued to receive physical therapy, steroid injections, and medication. In July 2005, Dr. Gore told Mr. Bradley that he could go back to work with the restrictions of light duty and no lifting over thirty pounds. Mr. Bradley testified that when he called Continental Tire to see if he could return to work with light duty restrictions, "[t]hey said they didn't have anything in light duty."

Mr. Bradley returned to see Dr. Gore in November 2005 with complaints of pain and numbness. Dr. Gore conducted another MRI on 11 November 2005, and concluded that there were some post-operative changes, but no recurrent disc herniation. In May 2006, Mr. Bradley returned to Dr. Hunter with complaints of back, hip, buttock, and leg pain, and on 5 June 2006, Mr. Bradley underwent another back surgery with Dr. Hunter.

On 16 August 2005, in response to Continental Tire's denial of his workers' compensation benefits, Mr. Bradley filed a Form 33 Request that Claim be Assigned for Hearing. After the hearing, Deputy Commissioner Robert Harris issued an Opinion and Award on 25 August 2006, finding that Mr. Bradley had suffered a compensable back injury and was entitled to temporary total disability of $557.60 per week from 14 September 2004 through the present, with the exception of 28-29 September 2004 when Mr. Bradley returned to work. Continental Tire appealed to the Full Commission, which issued an Opinion and Award on 30 May 2007, essentially affirming Deputy Commissioner Harris and concluding that Mr. Bradley is disabled.

Continental Tire's sole argument on appeal is that the Full Commission erred by concluding that Mr. Bradley is disabled and entitled to ongoing disability benefits. In reviewing the Full Commission's decision, we are constrained by the well-established limitations that "(1) the full Commission is the sole judge of the weight and credibility of the evidence, and (2) appellate courts reviewing Commission decisions are limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000) (citing *Adams v. AVX Corp.*, 349 N.C. 676, 680-81, 509 S.E.2d 411, 413-14 (1998)).

Continental Tire argues that the Full Commission's findings of fact concerning Mr. Bradley's disability were not supported by competent evidence. Our Workers' Compensation Act defines "disability" 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 (2005). The employee has the burden of proving that he is disabled. *Hilliard v. Apex Cabinet*

Co., 305 N.C. 593, 595, 290 S.E.2d 682, 684 (1982). An 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. Lowe's Prod. Distribution, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (internal citations omitted).

The Commission concluded that Mr. Bradley met his burden of proving that he was disabled under the first method in *Russell*, by "producing 'medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment' at least as of February 21, 2006." Continental Tire argues that there is no competent evidence to support the conclusion that Mr. Bradley was incapable of working in any employment. We disagree.

The record shows that Dr. Blake treated Mr. Bradley from 30 September 2004 to April 2005. Although Dr. Blake testified that he felt Mr. Bradley could perform light duty work if it was available and recommended light duty work on 30 September 2004, he wrote Mr. Bradley out of work from 26 October 2004 to 18 November 2004 and again from 17 November 2004 to 7 December 2004. Additionally, Dr. Blake completed numerous short-term disability forms for Mr. Bradley on which he indicated that Mr. Bradley was unable to work. Dr. Blake indicated on one such form that Mr. Bradley was "totally disabled (unable to work)" from 1 October 2004 through 6 April 2005. When asked whether Mr. Bradley was justified in being out of work from

September 2004 to March 2005 when Dr. Blake last saw him, Dr. Blake replied that "based on a reasonable degree of medical certainty . . . Mr. David Bradley was justified in being out of work from the stated period of the record." In April 2005, after ending treatment with Dr. Blake, Mr. Bradley continued to see Dr. Gore and Dr. Hunter. Mr. Bradley's first back surgery occurred on 5 April 2005 and at that time, Dr. Hunter placed him on "total restrictions." Mr. Bradley remained on total restrictions until 11 July 2005, when Dr. Hunter recommended he return to work with restrictions for one month until his next evaluation and continue to see Dr. Gore for steroid injections and physical therapy. Mr. Bradley received a steroid injection from Dr. Hunter on 16 July 2005 and did not see him again until 9 September 2005, when Dr. Hunter noted that Mr. Bradley "brought in his disability work forms with him and I did fill them out for him."

Although the record does not contain evidence of Mr. Bradley's physicians writing him out of work after 11 July 2005, the record does contain substantial evidence of Mr. Bradley's continuing pain. We have stated that "[m]edical evidence that the plaintiff suffers from pain as a result of physical injury, combined with the plaintiff's own testimony that he is in pain has been held to be sufficient to support a conclusion of total disability." *Weatherford v. Am. Nat. Can Co.*, 168 N.C. App. 377, 380-81, 607 S.E.2d 348, 351 (2005) (citation omitted).

When Mr. Bradley visited Dr. Gore on 14 September 2005, Dr. Gore noted that Mr. Bradley "is still having pain in his lower back" on a scale of 5/10 before his steroid injection. In Mr. Bradley's visits to Dr. Gore from January to May 2006, Dr. Gore noted that Mr. Bradley continued to complain of pain in his lower back. On 5 June 2006, Mr. Bradley had a second back operation and Dr. Hunter noted that he "had been doing well until worsening condition with lower back pain, hip pain, buttock pain and right leg pain." Additionally, at the hearing before

Deputy Commissioner Harris on 13 February 2006, Mr. Bradley testified that since his first surgery in April 2005, the pain has not gotten better and "is still there."

The record contains evidence of Mr. Bradley's doctors' recommendations that he be restricted from work, their notes regarding his continuing pain, and testimony from Mr. Bradley of his continuing pain. Therefore, we find that there is competent evidence that Mr. Bradley was disabled and unable to work. Because the record contains competent evidence to support the Full Commission's findings of fact, and in turn, the findings of fact support the conclusions of law, we affirm.

Affirmed.

Judges MCGEE and CALABRIA concur.

Report per Rule 30(e).

NOTE

1. *Russell v. Lowe's Prod. Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993).