NO. COA12-1153
NORTH CAROLINA COURT OF APPEALS

Filed: 20 August 2013

GREGORY W. TINCHER,
Employee, Plaintiff

v.

North Carolina
Industrial Commission
I.C. No. 712483

ADECCO (formerly known as OLSTEN STAFFING), Employer, BROADSPIRE, Third-Party Administrator / Carrier,
Defendants.

Appeal by plaintiff from opinion and award entered 26 April 2012 in the North Carolina Industrial Commission. Heard in the Court of Appeals 27 March 2013.

Law Office of Gary A. Dodd, by Gary A. Dodd, for plaintiff-appellant.

Wilson & Ratledge, PLLC, by Kristine L. Prati for defendant-appellees.

BRYANT, Judge.

Where the North Carolina Industrial Commission made findings of fact based on competent evidence in the record

addressing each of the methods for establishing disability as stated in *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 425 S.E.2d 454 (1993), and concluding that plaintiff was not entitled to disability compensation[1], we affirm.

In October of 2006, plaintiff Gregory Tincher was hired by defendant Adecco, a temporary staffing agency, and placed in the position of lathe operator at Borg Warner, a manufacturing plant. The lathe operated by plaintiff required the use of a chemical coolant, Quakercool 3750. Sometime after he started using the coolant, plaintiff developed a rash on his hands. Plaintiff reported the rash to his supervisor and was given a skin cream. Plaintiff continued to work until the plant closed for the holidays on 21 December 2006. Plaintiff's rash worsened over the holidays, and he did not return to work when the plant reopened on 2 January 2007. Thereafter, defendant called plaintiff regarding his availability for work, but plaintiff did not respond. Plaintiff sought medical treatment in February 2007 and in June 2007. Plaintiff never returned to his job as a lathe operator but found employment as a truck driver with K & M Enterprises from April 2007 until February 2008. Also, he

[1] The parties and the Industrial Commission use the term "indemnity benefits" interchangeably with the term "disability compensation." For ease of reading, we use the term "disability compensation."

worked for his sister, Kristie Sluder, stocking vending machines from February 2008 until September 2008.

On 19 February 2007, plaintiff filed a claim against his employer Adecco and its insurer, Broadspire, (collectively defendants) with the North Carolina Industrial Commission. Upon appeal from an opinion and award entered by Deputy Commissioner Victoria M. Homick, the matter was heard before the Full Commission (the Commission) on 13 January 2010. In an Opinion and Award entered 22 February 2010, the Commission concluded that plaintiff sustained a compensable occupational disease, chronic contact dermatitis, and was thus eligible for reimbursement of related medical expenses. However, the Commission also concluded that plaintiff failed to prove he was disabled, and therefore, plaintiff's claim for disability compensation was denied. Both parties appealed to our Court.

In an unpublished opinion filed 7 June 2011, our Court dismissed in part, affirmed in part, reversed and remanded in part the Commission's 22 February 2010 Opinion and Award. *Tincher v. Adecco*, No. COA10-548, 2011 WL 2230488 (N.C. App. 7 June 2011) (unpublished) (referred to as *Tincher I*). Our Court affirmed the Commission's determination that plaintiff suffered a compensable occupational disease and was entitled to payment of related medical expenses. However, our Court determined that the findings and conclusions of the Commission were not

sufficient for appellate review on the question of whether plaintiff was disabled. On remand, the Commission was asked to make additional findings of fact upon which to base its conclusions of law and explain the basis for the denial of disability compensation. "[T]he better practice is for the Commission to address all the *Russell*, [108 N.C. App. 762, 425 S.E.2d 454,] methods and include a determination for each in its opinions and awards." *Id.* at *6.

On remand, the Commission accepted supplemental briefs from the parties and reopened the evidence of record for the taking of additional evidence on the wages plaintiff earned. The matter was remanded to Deputy Commissioner Melanie Wade Goodwin who conducted an evidentiary hearing on 15 December 2011. On 26 April 2012, the Commission filed an Opinion and Award affirming its original award of compensation for medical care and treatment of plaintiff's compensable occupational disease and again denying compensation for plaintiff's disability claim. Plaintiff appeals.

On appeal, plaintiff raises thirty-five individual issues asserting errors by the Commission in its Findings of Fact, Conclusions of Law, and final decision denying plaintiff's claim for disability. However, plaintiff acknowledges that these issues revolve around the single question of whether the

Commission erred in failing to find as fact and conclude as a matter of law that plaintiff was entitled to disability compensation. Plaintiff argues there are two distinct time periods of disability to consider: Plaintiff's unemployment between 2 January 2007 and 8 April 2007; and, the period after he found new employment but earned a lower wage than he had prior to his injury.

Standard of Review

> The standard of review on appeal . . . from an award by the Commission is whether there is any competent evidence in the record to support the Commission's findings and whether those findings support the Commission's conclusions of law. The Commission's findings of fact are conclusive on appeal if supported by any competent evidence. Thus, on appeal, this Court does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the records contain any evidence tending to support the findings.

Evans v. Conwood LLC, 199 N.C. App. 480, 483, 681 S.E.2d 833, 836 (2009) (citations and quotations omitted).

Disability is the "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) (2011). To prove an injury has resulted in a disability, an employee bears the burden of proving that he or she is unable to earn the same level of wages after an injury. ***White v.***

Weyerhaeuser Co., 167 N.C. App. 658, 670-71, 606 S.E.2d 389, 398 (2005).

This Court has established four methods by which an employee can show disability arising from a work-related injury:

> (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. at 671, 606 S.E.2d at 398 (quoting *Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457). If a claimant provides evidence that he or she has met the fourth prong of *Russell*, the burden shifts to the employer to show the claimant could have earned a higher wage. *Britt v. Gator Wood, Inc.*, 185 N.C. App. 677, 684, 648 S.E.2d 917, 922 (2007).

Analysis

In reversing and remanding the Commission's 22 February 2010 Opinion and Award our Court recommended that the Commission address all of the *Russell* methods. In *Tincher I*, we noted that the Commission had established that plaintiff found employment

subsequent to his injury; therefore, it was possible plaintiff might satisfy the fourth prong of *Russell*. But, because no findings were made regarding plaintiff's wages prior to his injury, there was no way to compare his pre- and post-injury earning capacity. *Tincher*, No. COA10-548, 2011 WL2230488, at *5-6. We also noted that because the Commission's findings showed that plaintiff had been able to perform some work after his injury, he may have satisfied the second or third prong of *Russell*. *Id.* at *6. On remand, the Commission was directed to make additional findings of fact, and draw conclusions of law based on those additional findings. *Id.* at *7.

On remand, in its 26 April 2012 opinion and award, the Commission made the following relevant findings of fact and conclusions of law:

> 5. N.C. Gen Stat. § 97-2(5) sets forth five methods for calculating average weekly wage. In order to employ the first two methods listed under that section, the employee must have worked for the employer for 52 weeks prior to the date of injury. As plaintiff in the instant matter worked for defendant-employer for fewer than 52 weeks, methods one and two are not applicable. [R p 109-110].
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> 6. The third method set forth in N.C. Gen. Stat. § 97-2(5) is applicable where the employment prior to the injury extended over a period of fewer than 52 weeks. . . . The application of the third method . . . results in an average weekly wage of $554.81 [for pre-injury wages].

. . .

20. [T]he Full Commission finds that plaintiff's work-related exposure to the industrial coolant either caused or significantly contributed to his chronic contact dermatitis on both hands beginning approximately on November 1, 2006.

. . .

22. From January 2, 2007, . . . until April 9, 2007, plaintiff did not seek to be placed in any other assignments with defendant-employer. . . . [I]f an employee does not call and identify himself as available for work on a weekly basis the employee is placed on an inactive status after sixty days of no contact and will not be placed on an assignment. Plaintiff did not contact defendant-employer . . . and when defendant-employer contacted him to see if he was available for placement on another assignment, plaintiff indicated that he was not.

23. Plaintiff initially testified before Deputy Commissioner Homick that he did not seek employment between December 21, 2006 and April 9, 2007, but subsequently indicated that he remembered that he and his brother "tried and looked for several different jobs in the construction business." When asked to be more specific about the number of jobs he applied for during this time period, plaintiff indicated that it was "about five." Based upon the preponderance of the evidence, in view of the entire record, the Full Commission finds that plaintiff did not make a reasonable effort to obtain employment during the period from December 22, 2006 through

April 8, 2007.

. . .

25. Plaintiff's work hours with K&M Enterprises varied . . . Based upon the best evidence available, and employing the third method of calculating average weekly wage set forth in N.C. Gen. Stat. § 97-2(5), the Full Commission finds that plaintiff's average weekly wage while employed by K&M Enterprises was $328.57.

. . .

29. The evidence shows that plaintiff worked for Ms. Sluder . . . [and based on testimony by Ms. Sluder and plaintiff] the Full Commission finds that plaintiff's average weekly wage while working for Ms. Sluder was $120.00. This is the same figure that would be arrived at by employing the third method of calculating average weekly wage set forth under N.C. Gen. Stat. § 97-2(5).

. . .

32. . . . Plaintiff. . . indicates that he was unable to find further work after his employment with R&M Enterprises ended[.] "Plaintiff is unable to recall and/or produce any further information in regards to employers consulted."

34. Based upon the preponderance of the evidence, in view of the entire record, the Full Commission finds that at no time would it have been futile for plaintiff to seek other employment due to preexisting conditions such as age, inexperience or lack of education. Plaintiff is 40 years old, and there is no evidence to suggest that his age precluded him from being considered for

> employment he could reasonably seek. Plaintiff's educational background, which includes completion of high school as well as some community college coursework, and his extensive work experience, similarly would not prevent him from being considered for employment. Furthermore, there is no evidence showing that plaintiff has a pre-existing health condition that would preclude him from obtaining employment which he could reasonably seek.
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> 35. John Jarema, a certified rehabilitation counselor, performed a labor market survey in January 2009 to look for available positions based on plaintiff's education and experience. Due to plaintiff's contact dermatitis, Mr. Jarema excluded machine operation positions and narrowed his search to jobs that paid at least $8.00 per hour and were located within 50 miles of plaintiff's residence. Mr. Jarema located 17 job openings with 13 different employers, including positions at CarQuest Auto Parts, Rent-a-Center, Courtyard by Marriott and Comair. [Some] paid in excess of $12.00 per hour.
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> . . .
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> 37. The Full Commission finds, based upon the preponderance of the evidence in view of the entire record, that suitable jobs are available to plaintiff which plaintiff is capable of obtaining taking into account his physical, mental and vocational limitations.

After evaluating and making findings as to each of the methods of determining disability, the Commission concluded

plaintiff failed to meet the first three prongs of the *Russell* disability test:

> 7. In the instant case, plaintiff has failed to meet his burden of proving disability under the first prong of the Russell test as the evidence shows that he was at no time written completely out of work. . . . Plaintiff has also failed to meet his burden of proving disability under the second prong of the Russell test in that he has failed to show that he made a reasonable effort to obtain other employment following the last day of his employment with defendant-employer on December 21, 2006. . . . With respect to the third prong of the Russell test, the evidence does not show that it would be futile for because (sic) of preexisting conditions for plaintiff to seek employment. There is no evidence . . . that [his] age . . . [education or health condition] would preclude him from obtaining employment which he could reasonably seek.

After eliminating the first three prongs, the Commission concluded that plaintiff met the initial part of the fourth prong of the *Russell* disability test by showing he found work at lower wages than he earned prior to his injury. However, the Commission also concluded that defendants met their burden of showing that jobs which plaintiff was capable of obtaining were available and that he had offered no further evidence to counter defendant's evidence. The Commission based its conclusion that defendants met their burden on the testimony of the rehabilitation counselor. The counselor's testimony showed that

suitable jobs – jobs plaintiff was capable of performing given his physical, mental and vocational limitations – were available to plaintiff. Because plaintiff did not offer evidence to counter that presented by defendants, the Commission concluded plaintiff failed to prove disability and therefore, was not entitled to disability compensation.

Plaintiff argues he is entitled to disability compensation because medical evidence supports a finding that he was unable to perform his employment working as a machinist after 2 January 2007 and that he found employment as soon as his condition allowed him to do so. Plaintiff argues that he met the first prong of the *Russell* disability test based on a medical excuse from 2 January 2007 to 9 April 2007 that prevented him from returning to work as a machinist.

The Commission was presented with evidence that medical professionals recommended that plaintiff be restricted from contact with the coolant, but there is no evidence in the record showing that plaintiff was unable to perform other types of work. In addition, the record shows plaintiff did not request another work assignment from his employer. This Court cannot reweigh the evidence presented to the Commission. *Evans v. Conwood LLC*, 199 N.C. App. 480, 483, 681 S.E.2d 833, 836 (2009). Further, this evidence does not show plaintiff was unable to work in *any* employment due to injury. Therefore, we find no

error in the Commission's conclusion that plaintiff was not entitled to disability compensation during the period between 2 January 2007 and 9 April 2007.

Plaintiff also argues he is entitled to disability compensation for the period beginning 9 April 2007 when he found employment as a truck driver because he met the fourth prong of the *Russell* disability test showing that he earned lower wages after his injury.[2] The Commission concluded that plaintiff had "met his initial burden to show that he was disabled from April 9, 2007 through February 16, 2008 and from February 17, 2008 through August 31, 2008 by showing he was capable of earning diminished wages . . . ." The Commission based this conclusion on its findings of plaintiff's pre-injury weekly wages of $554.81 and post-injury wages at two jobs of $328.57 and $120.00.

Once the claimant has met the fourth prong of *Russell* by showing he is earning lower wages, the burden shifts to the employer to show a higher wage could be earned. *Britt*, 185 N.C. App. at 684, 648 S.E.2d at 922. The Commission relied on the evidence presented by a rehabilitation counselor that showed a January 2009 labor market survey in which a variety of

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[2] We note plaintiff makes no challenge to the Commission's findings and conclusions as to prongs 2 and 3 of the *Russell* disability test found at 108 N.C. App. at 765, 425 S.E.2d at 457.

advertised job openings at or above $12 per hour were located within a fifty mile radius of plaintiff's residence. Plaintiff offered no evidence to rebut defendant's evidence. Based on the evidence presented and its findings, the Commission concluded that defendants met their burden of showing plaintiff had the opportunity to earn wages similar to his pre-injury wages, and thus, the fourth prong of Russell had not been met.

We hold the Commission's findings of fact are based on competent evidence in the record, and these findings support the Commission's conclusion that plaintiff failed to prove disability as a result of his injury. Accordingly, we affirm the order of the Commission.

Affirmed.

Judges HUNTER, Jr., Robert N., and McCULLOUGH concur.

Report per Rule 30(e).