NO. COA13-100
NORTH CAROLINA COURT OF APPEALS

Filed: 15 October 2013

RANDY G. HARVELL,
Employee, Plaintiff,

v.

North Carolina
Industrial Commission
I.C. NO. W78766

WIX FILTRATION, LLC,
Employer,
and TRAVELERS INDEMNITY COMPANY,
Carrier Defendants.

Appeal by defendants from Opinion and Award entered 7 September 2012 by the Industrial Commission. Heard in the Court of Appeals 14 August 2013.

*The Roberts Law Firm, P.A., by Scott W. Roberts, for plaintiff-appellee.*

*Hedrick Gardner Kincheloe & Garofalo, LLP, by Paul C. Lawrence and M. Duane Jones, for defendant-appellants.*

McCULLOUGH, Judge.

Defendant-employer Wix Filtration, LLC ("Wix"), and its carrier, Travelers Indemnity Company (collectively "defendants") appeal from an opinion and award of the North Carolina Industrial Commission ("the Commission"), awarding plaintiff,

Randy G. Harvell, workers' compensation benefits and temporary total disability compensation. We affirm.

## I. Background

Plaintiff began working for Wix in 1999. Plaintiff's first position with Wix, lasting three years, was in the Master Distribution Center driving a lift in the Six Digit Department. For approximately the next two years, plaintiff worked in Wix's Gastonia facility in the Returns Department. In this position, plaintiff's job duties included unboxing and unpacking returned products and repackaging products. The returned products were brought to the work area on pallets, and plaintiff would open boxes of returned products that weighed a maximum of six (6) pounds each. Following the position in the Returns Department, plaintiff worked in the Production Facility for one month. Plaintiff then returned to the Master Distribution Center, Six Digit Department as a "Picker" for approximately three to three and one-half years until 28 June 2010.

As a Picker, plaintiff worked eight (8) hours a day, five (5) days a week. Plaintiff's job duties as a Picker required lifting a wooden pallet onto a wagon or cart. Plaintiff then placed a cardboard packing box on top of the wooden pallet and pushed the cart throughout aisles that stored such items as air

filters, oil filters, hydraulic fuel filters, and transmission filters. Plaintiff would reach for and lift the individual items down from bins on the racks along the aisles and place it into the cardboard packing box. The racks along the aisles were on two levels, one level ran from five (5) inches off the floor to waist level and the other level began at chest level. The items are located in bins that sit on the two racks from about five (5) inches off the floor to overhead levels.

After the cardboard boxes are filled, plaintiff would push the cart to the finish station and the cardboard boxes were sealed with tape and lifted by plaintiff. Each full cardboard box weighed approximately thirty-five (35) pounds. In a given shift, plaintiff would lift three to four wooden pallets which plaintiff estimated to weigh from thirty to fifty (30 – 50) pounds. The wooden pallets were usually stacked waist high or higher.

Plaintiff testified that on 25 March 2010, he was moving a packed box from a wagon to another pallet when he felt a sharp pain in his right shoulder that increased throughout his shift. Plaintiff reported this incident to his supervisor and completed an Incident Statement. However, the Incident Detail Report indicated that plaintiff had stated that "[his] arm started

hurting a couple of weeks ago" and that the incident occurred on 11 March 2010.

On 24 March 2010, plaintiff presented to his primary care physician for right shoulder pain with a week-long history of right shoulder pain that spread to his right upper arm. Plaintiff testified that prior to March 2010, he had never experienced any pain or problems with his right shoulder.

On 25 March 2010, plaintiff was directed to CaroMont Occupational Medicine by Wix where plaintiff was examined by a nurse practitioner and diagnosed with right shoulder strain. Plaintiff was restricted to lifting no more than five (5) pounds and no overhead work. Thereafter, plaintiff saw the nurse practitioner and Dr. Charlton Owensby through 16 April 2010. Plaintiff remained on the same restrictions.

On 15 April 2010, defendants completed a Form 18, "Employer's Report of Employee's Injury or Occupational Disease to the Industrial Commission." The Form 18 listed the date of injury as 11 March 2010 and stated that the injury of the right shoulder occurred when plaintiff was "lifting/pulling boxes down." On 15 April 2010, defendants filed a Form 61, "Denial of Workers' Compensation Claim."

On 19 August 2010, plaintiff filed a Form 18, "Notice of Accident to Employer and Claim of Employee, Representative, or Dependent." On 29 August 2010, plaintiff completed a Form 33, "Request that Claim be Assigned for Hearing." On 28 September 2010, defendants filed a Form 33R, "Response to Request that Claim be Assigned for Hearing."

A hearing was held before Deputy Commissioner Mary C. Vilas on 22 March 2011. On 8 February 2012, Deputy Commissioner Vilas entered an opinion and award concluding that

> [p]laintiff has established by a preponderance of the evidence in view of the entire record that as a result of his employment with [Wix], he contracted his right shoulder condition involving rotator cuff tear, AC joint arthrosis, subacromial and subdeltoid bursitis, SICK scapula syndrome, and adhesive capsulitis, an occupational disease. N.C. Gen. Stat. § 97-53(13).

Citing *Rutledge v. Tultex Corp./King's Yarn*, 308 N.C. 85, 301 S.E.2d 359 (1983), Deputy Commissioner Vilas held that plaintiff met the burden of "proving that his employment duties placed him at greater risk for contracting his right shoulder condition, and that Plaintiff's employment duties, more likely than not, caused the development of his right shoulder condition." Further, Deputy Commissioner Vilas concluded that

> [a]s a result of Plaintiff's occupational

> disease of rotator cuff tear, AC joint arthrosis, subacromial and subdeltoid bursitis, SICK scapula syndrome, and adhesive capsulitis, Plaintiff has been totally disabled and unable to earn wages in any employment from June 28, 2010 and continuing. Plaintiff is entitled to temporary total disability compensation at the rate of $495.63 per week from June 28, 2010 and continuing until further Order of the [Commission]. N.C. Gen. Stat. § 97-29; *Russell v. Lowes Prod. Distribution*, 108 N.C. App. 762, 425 S.E.2d 454 (1993).

Defendants appealed the 8 February 2012 opinion and award entered by Deputy Commissioner Vilas to the Full Commission.

The Full Commission reviewed the matter on 13 July 2012 and entered an opinion and award on 7 September 2012, affirming the 8 February 2012 opinion and award of Deputy Commissioner Vilas. From the Full Commission's 7 September 2012 opinion and award, defendants appeal.

## II. Standard of Review

The Commission determines "the credibility of the witnesses, the weight to be given the evidence, and the inferences to be drawn from it." *Johnson v. Herbie's Place*, 157 N.C. App. 168, 171, 579 S.E.2d 110, 113 (2003). Review of an opinion and award of the Industrial Commission

> is limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law.

> This [C]ourt's duty goes no further than to determine whether the record contains any evidence tending to support the finding.

*Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (internal quotation marks and citations omitted). "However, the Industrial Commission's conclusions of law are reviewable *de novo*." *Johnson*, 157 N.C. App. at 171, 579 S.E.2d at 113 (citation omitted).

## III. Discussion

Defendants present the following issues on appeal: whether the Industrial Commission erred (A) by awarding plaintiff workers' compensation benefits (i) where there was no competent evidence to support findings of fact 17, 18, 20, 24, and 25 and; (ii) where plaintiff failed to establish that he sustained a compensable occupational disease pursuant to the *Rutledge* test; and (B) by awarding plaintiff temporary total disability compensation when he failed to meet his burden of proving disability pursuant to the *Russell* test.

### A. *Rutledge* Test

First, defendants assert there was a lack of competent evidence to support findings of fact 17, 18, 20, 24, and 25. Defendants also contend the Commission erred in awarding plaintiff workers' compensation benefits when plaintiff failed

to prove that he sustained a compensable occupational disease pursuant to the three-part test outlined in *Rutledge v. Tultex Corp./Kings Yarn*, 308 N.C. 85, 301 S.E.2d 359 (1983).

i. Challenged Findings of Fact

Defendants argue that there was no competent evidence in the record to support the Commission's findings of fact 17, 18, 20, 24, and 25. We disagree.

Finding of fact number 17 provides that:

> 17. Dr. Niemeyer was deposed subsequent to the hearing and opined to a reasonable degree of medical certainty that Plaintiff's employment duties and activities in the job of Six Digit Picker, based on the job description provided to Dr. Niemeyer in a hypothetical question by Plaintiff's counsel, caused Plaintiff to develop the right shoulder condition for which Dr. Niemeyer diagnosed and treated Plaintiff. Dr. Niemeyer further opined to a reasonable degree of medical certainty that the Six Digit Picker job exposed Plaintiff to a higher risk of contracting the rotator cuff tear and shoulder condition than the general public not so employed.

A review of the record reveals that plaintiff was referred to Dr. Charles J. Niemeyer of Carolina Orthopaedic & Sports Center on 23 April 2010. Plaintiff was initially diagnosed with subacromial bursitis. On 15 June 2010, an MRI was taken of plaintiff's right shoulder which revealed a full thickness tear of the rotator cuff, labral degeneration, AC joint arthrosis

with Type II acromion, and subacromial and subdeltoid bursitis. Dr. Niemeyer performed surgery to the right shoulder on 28 June 2010. Following surgery, plaintiff continued to have problems with range of motion, weakness, and pain and his shoulder failed to improve. An MRI was performed on 30 December 2010, revealing deltoid thinning; and Dr. Niemeyer referred plaintiff to Dr. Erik C. Johnson, also of Carolina Orthopaedic & Sports Medicine Center, for a second opinion.

At Dr. Niemeyer's deposition, plaintiff's counsel presented Dr. Niemeyer with facts describing the job requirements of plaintiff's Picker position at WIX. Based on those facts, Dr. Niemeyer was asked whether he had "an opinion to a reasonable degree of medical certainty whether or not the job as described could and might have caused any of [plaintiff's] conditions which [he] ultimately diagnosed." Dr. Niemeyer replied that based on the description of plaintiff's activities at WIX, there was "a direct relationship to the condition of [plaintiff's] shoulder" and "to a reasonable degree of medical certainty," the job as described exposed plaintiff to a higher risk of contracting his injuries than the general public not so employed.

Based on the foregoing evidence, we hold there was competent evidence to support finding of fact number 17 and overrule defendants' argument.

Challenged findings of fact numbers 18 and 20 provide the following:

> 18. Dr. Johnson opined to a reasonable degree of medical certainty that Plaintiff's job as a Six Digit Picker caused the injury to Plaintiff's right shoulder including the rotator cuff tear. Dr. Johnson also opined that Plaintiff's job exposed him to a higher risk of contracting a rotator cuff injury than the general public not so employed. Dr. Johnson testified that Plaintiff's "job requires him to perform multiple repetitions, and according to his job description he performs that 600 to 650 times in an eight-hour time frame, which is very stressful for the shoulder joint. And the weight from ounces to pounds, you multiply that 600 to 650 times, puts a tremendous amount of physical stress on the shoulder joint." Dr. Johnson further noted that Plaintiff is right-hand dominant and presumably does most of his work, including the lifting, with his right shoulder.
>
> . . . .
>
> 20. Upon learning during cross examination that Mr. McClure "actually saw the job description in action," Dr. Johnson later stated "now that he's witnessed it, I certainly agree with [Mr. McClure's] findings"; however, Dr. Johnson also states "certainly the opinion from [Mr.] McClure sheds light that doing his normal job may not cause the injury but according to [plaintiff], you know, the way he describes

> his job certainly would place him at risk for some type of shoulder injury." Based upon a preponderance of the evidence of record, the Full Commission gives greater weight to Plaintiff's description of the way that his job was performed than to that of Mr. McClure as he never actually observed Plaintiff performing his job duties. As such, the Full Commission gives greater weight to Dr. Johnson's statement that Plaintiff's job places him at risk for some type of shoulder injury.

Dr. Johnson, a Board Certified orthopaedic surgeon, saw plaintiff on 14 February 2011. Dr. Johnson diagnosed plaintiff as having SICK scapula syndrome and adhesive capsulitis following the right shoulder rotator cuff repair. At his deposition, Dr. Johnson testified that based on plaintiff's counsel's description of plaintiff's job requirements, "[c]ertainly within medical reasonability his job is the cause of the injury to the right shoulder[.]" Dr. Johnson further testified that "[c]ertainly his job description puts him at a high risk for rotator cuff injury, and in my opinion the job is the cause of the rotator cuff tear" in response to whether he had an opinion to a reasonable degree of medical certainty whether plaintiff's job exposed plaintiff of a higher risk of contracting a rotator cuff tear than the general public not so employed.

When asked how a Picker job could lead to a rotator cuff tear, Dr. Johnson answered that multiple repetitions as much as 600 to 650 times in an eight-hour shift would be very stressful for the shoulder joint. Because plaintiff is right-hand dominant, Dr. Johnson testified that he "presumably does most of the work or lifting with the right shoulder and obviously leads to an injury."

In regard to finding of fact 20, Dr. Johnson was informed during cross-examination that defendant's medical expert, Mr. McClure, witnessed other Pickers performing plaintiff's job description. Dr. Johnson did testify that "now that [Mr. McClure] witnessed [the Picker position performed by someone other than plaintiff,] I certainly agree with his findings" but also later testified that plaintiff's description of his job requirements "certainly would place him at risk for some type of shoulder injury." Defendants' challenge to the Commission giving greater weight to plaintiff's description of the requirements of his job over Mr. McClure's observations in the latter part of finding of fact is, in essence, asking our Court to reweigh the evidence before the Commission. We decline to do so.

Finally, defendants challenged findings of fact number 24 and 25 which state the following:

> 24. The Full Commission gives greater weight to the expert medical opinions of Dr. Niemeyer and Dr. Johnson than to those of Dr. Owensby and Dr. Paul regarding medical causation and the increased risk of Plaintiff developing his right shoulder rotator cuff tear as a result of his work duties with Defendant-Employer and whether his employment exposed Plaintiff to a greater risk of contracting a shoulder injury than the public generally. Dr. Niemeyer and Dr. Johnson are the surgeons who examined and treated Plaintiff's rotator cuff tear injury and the complications from the rotator cuff tear injury.
>
> 25. Based on a preponderance of the evidence of record, the Full Commission finds that Plaintiff's job duties as a Six Digit Picker placed him at an increased risk, when compared to the general public, for contracting his right shoulder condition and rotator cuff tear and that Plaintiff's job duties more likely than not were a significant causal factor in the development of his rotator cuff tear and right shoulder condition.

We reiterate that our review is limited to whether there is any competent evidence to support the Commission's findings of fact, even where there was evidence presented to the contrary. *Richardson*, 362 N.C. at 660, 669 S.E.2d at 584. "[I]t is well established that the [Industrial] Commission is the *sole* judge of the credibility of the witnesses and the [evidentiary] weight

to be given their testimony[.]" *Young v. Hickory Bus. Furniture*, 353 N.C. 227, 230, 538 S.E.2d 912, 914 (2000) (internal quotation marks and citations omitted) (emphasis added). Accordingly, we reject defendants' argument that findings of fact 24 and 25 were made in error as they were fully supported by competent evidence as previously discussed and it is not our duty to judge the credibility of the witnesses and the evidentiary weight to be given to their testimony.

ii. *Rutledge* Test

The North Carolina Workers' Compensation Act provides that an "occupational disease" is

> [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) (2011). A disease may be compensable if the plaintiff shows that:

> (1) [the disease is] characteristic of persons engaged in the particular trade or occupation in which the claimant is engaged; (2) [the disease is] 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.

*Matthews v. City of Raleigh*, 160 N.C. App. 597, 600, 586 S.E.2d 829, 834 (2003) (quoting *Rutledge*, 308 N.C. at 93, 301 S.E.2d at 365) (hereinafter "the *Rutledge* test").

Defendants specifically argue that the opinions of Dr. Charles J. Niemeyer and Dr. Erik C. Johnson as to causation were based on mere speculation and conjecture, and therefore, the plaintiff failed to satisfy the *Rutledge* test. We disagree.

Although the employment-related injury "need not be the sole causative force to render an injury compensable, the plaintiff must prove that the accident was a causal factor by a preponderance of the evidence[.]" *Holley v. ACTS, Inc.*, 357 N.C. 228, 231-32, 581 S.E.2d 750, 752 (2003) (internal quotation marks and citations omitted). "[I]n cases involving complicated medical questions, those questions must be addressed by an expert and only an expert can give competent opinion testimony as to the issue of causation." *Adams v. Metals USA*, 168 N.C. App. 469, 475, 608 S.E.2d 357, 361-62 (2005). "However, when such expert opinion testimony is based merely upon speculation and conjecture, . . . it is not sufficiently reliable to qualify as competent evidence on issues of medical causation." *Holley*, 357 N.C. at 232, 581 S.E.2d at 753 (internal quotation marks and citation omitted).

> Stating an accident "could or might" have caused an injury, or "possibly" caused it is not generally enough alone to prove medical causation; however, supplementing that opinion with statements that something "more than likely" caused an injury or that the witness is satisfied to a "reasonable degree of medical certainty" has been considered sufficient.

*Carr v. Dep't. of HHS (Caswell Ctr.)*, __ N.C. App. __, __, 720 S.E.2d 869, 873 (2012) (citation omitted).

In the case before us, the Full Commission stated in conclusion of law number 2 that:

> Based upon a preponderance of the evidence of record, Plaintiff has established that as a result of his employment with Defendant-Employer, he contracted his right shoulder condition involving rotator cuff tear, AC joint arthrosis, subacromial and subdeltoid bursitis, SICK scapula syndrome, and adhesive capsulitis, an occupational disease. N.C. Gen. Stat. § 97-53(13). The opinion testimony of [plaintiff's medical experts] Drs. Niemeyer and Johnson, to which the Full Commission has given greater weight over the contrary opinions of [defendants' medical experts] Dr. Owensby, Dr. Paul, and Mr. McClure, is sufficient to meet Plaintiff's burden of proving that his employment duties placed him at greater risk for contracting his right shoulder condition, and that Plaintiff's employment duties, more likely than not, caused the development of his right shoulder condition. *Rutledge*, 308 N.C. 85, 301 S.E.2d 359 (1983); N.C. Gen. Stat. § 97-53(13).

As noted above in section (A)(i) of our discussion, both Dr. Niemeyer and Dr. Johnson each testified to a reasonable degree of medical certainty that plaintiff's job caused the injury to his shoulder. Because our Court has held that stating that an injury is satisfied to a "reasonable degree of medical certainty" was sufficient to prove medical causation, and after a thorough review of Dr. Niemeyer and Dr. Johnson's deposition testimony, we are not persuaded by defendants' argument that their testimony was merely conjecture and speculative as to causation. *See Carr*, __ N.C. App. at __, 720 S.E.2d at 873.

B. *Russell* Test

Next, defendants challenge the Commission's determination that plaintiff met his burden of proving disability under the test set out in *Russell v. Lowes Prod. Distribution*, 108 N.C. App. 762, 425 S.E.2d 454 (1993).

Pursuant to the North Carolina Workers' Compensation Act, the term "disability" means "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 (2011).

> To support a conclusion of disability, the plaintiff must prove and the Commission must find that: (1) plaintiff was incapable after [his] injury of earning the same wages

> earned prior to injury in the same employment, (2) plaintiff was incapable after [his] injury of earning the same wages [he] earned prior to injury in any other employment, and (3) plaintiff's incapacity to earn wages was caused by [his] compensable injury.

*Effingham v. The Kroger Co.*, 149 N.C. App. 105, 111, 561 S.E.2d 287, 292 (2002).

Our Court in *Russell* stated that the employee may meet his 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*, 108 N.C. App. at 765, 425 S.E.2d at 457 (internal citations omitted).

> To meet the requirements of the first method of proof in *Russell*, plaintiff must present medical evidence that [he] is incapable of *work in any employment*. If the findings of fact show plaintiff is capable of performing some work, and there is evidence plaintiff may have satisfied the second or third prong

> of *Russell*, the Commission must make findings addressing those methods of proof.

*Carr*, __ N.C. App. at __, 720 S.E.2d at 874 (citations omitted).

With respect to plaintiff's burden of establishing disability, the Commission found the following, in pertinent part:

> 1. Plaintiff, born on October 27, 1946, was 64 years old at the time of the hearing of [sic] before the Deputy Commissioner. Plaintiff graduated from High School and enlisted in the Air Force. After serving for four years, Plaintiff received an honorable discharge. Plaintiff worked for AMP, Inc. in the warehouse moving stock and loading and unloading trucks for twenty-six years until approximately 1998 or 1999 when the company closed. Plaintiff worked in temporary jobs until he began working for Defendant-Employer in 1999.
>
> . . . .
>
> 10. On June 15, 2010 an MRI was taken of Plaintiff's right shoulder and revealed a full thickness tear of the rotator cuff, labral degeneration, AC joint arthrosis with Type II acromion, and subacromial and subdeltoid bursitis. Dr. Niemeyer performed surgery to the right shoulder on June 28, 2010, which included an excision of distal right clavicle, inferior acromioplasty and suture repair of the rotator cuff tear.
>
> . . . .
>
> 12. . . . Dr. Johnson restricted Plaintiff from his regular work duties as a Six Digit Picker as he gave Plaintiff restrictions of no lifting more than 5

> pounds and no overhead work. Dr. Johnson has not indicated that Plaintiff is at maximum medical improvement.
>
> . . . .
>
> 27. Based upon a preponderance of the evidence of record, the Full Commission finds that Plaintiff has not reached maximum medical improvement. Plaintiff is entitled to all medical treatment incurred or to be incurred as a result of his compensable right shoulder condition as may reasonably be required to effect a cure, provide relief, or tend to lessen the period of disability.
>
> . . . .
>
> 29. Plaintiff has been out of work since June 28, 2010, and has received short-term and long-term disability benefits which were both employer funded.

The Commission then concluded, citing to *Russell*, that plaintiff was entitled to temporary total disability compensation at the rate of $495.63 per week from 28 June 2010 and continuing until further order of the Commission.

A thorough review of the record reveals the following: Dr. Niemeyer testified that on 28 June 2010, plaintiff underwent an operation on his right shoulder. On 19 August 2010, Dr. Niemeyer gave plaintiff light work restrictions. Because plaintiff stated that there was no light work available, Dr. Niemeyer "put him out of work until his next return visit, which

was the 16th of September." On 16 September 2010, Dr. Niemeyer noted that plaintiff's shoulder was not improving and continued to write plaintiff out of work until 14 October 2010. Dr. Niemeyer testified that on 28 October 2010, plaintiff's condition was not improving and that he continued to write plaintiff out of work until the last day he saw him, 26 January 2011.

Dr. Johnson testified that when he saw plaintiff on 22 March 2011, plaintiff had not returned to work and had not improved at all in regard to function of the shoulder and pain. As of 3 May 2011, Dr. Johnson testified that plaintiff had "improved but [was] not normal" and that he had not returned to work. However, Dr. Johnson also testified that "if they had a job that required no lifting more than 5 pounds and overhead work I would let him perform such duties." Later, Dr. Johnson testified that he anticipated plaintiff having continued problems with pain and loss of mobility and as a result of these, plaintiff would have permanent work restrictions.

In order to fulfill the first prong in *Russell*, plaintiff was required to present medical evidence that he was physically or mentally unable to work in *any employment* as a result of his work-related injury. *See Ramsey v. Southern Indus. Constructors*

*Inc.*, 178 N.C. App. 25, 42, 630 S.E.2d 681, 692 (2006) (holding that medical evidence that plaintiff could no longer lift objects over his head, that he suffered a 25% permanent loss of the use of his arm because of the injury, and that since he had other congenital problems with his left arm, the partial loss of the use of his right arm might make him more disabled, was insufficient to meet plaintiff's burden of proving that he could not obtain work in any type of employment because of his work-related injury). However, the foregoing medical evidence shows that both of plaintiff's medical experts testified to giving plaintiff light work restrictions. Therefore, the Commission's conclusion regarding disability cannot be based on the first *Russell* prong.

In order for the Commission's conclusion to be based on the second or third *Russell* prong, "it would have to make findings regarding plaintiff's disability; i.e., whether plaintiff has made a reasonable effort to obtain employment, but been unsuccessful, or that it would be futile for plaintiff to seek work because of preexisting conditions." *Carr*, __ N.C. App. at __, 720 S.E.2d at 875. Because the Commission did not make findings regarding whether plaintiff made a reasonable effort to

obtain employment as required under the second *Russell* prong, we turn to the third *Russell* prong.

In *Thompson v. Carolina Cabinet Co.*, __ N.C. App. __, 734 S.E.2d 125 (2012), our Court held that, although the Commission's opinion and award awarding disability pursuant to the third *Russell* prong was not as detailed as we prefer, "it [was] minimally adequate regarding the basis for the determination that a job search would be futile." *Id.* at __, 734 S.E.2d at 128. Our Court pointed to the Commission's findings of fact regarding the plaintiff's age, that the plaintiff only had a high school education, and that the plaintiff had a prior work history that included only heavy jobs. *Id.* "In addition, the Commission found that [the] plaintiff's doctor had imposed work restrictions of 15 pounds lifting, no more than nine hours on the job, and avoidance of repetitious bending, lifting, and twisting." *Id.* Our Court held that the plaintiff had met his burden of proving disability under prong three of *Russell*.

Likewise, we hold that the better practice would have been to include more specific findings explaining the basis of the Commission's disability compensation determination. However, in the instant case, the Commission made findings regarding

plaintiff's age (64 years old at the time of the hearing before the Deputy Commissioner), that plaintiff only had a high school education, and that plaintiff's prior work history was limited to such activities as moving stock, unloading and loading trucks, etc. The Commission also found that Dr. Johnson restricted plaintiff from his regular work duties and put plaintiff on a work restriction of lifting no more than 5 pounds and no overhead work. Based on the foregoing, we affirm the Commission's conclusion that plaintiff is disabled under the third prong in *Russell*.[1]

The Commission's 7 September 2012 opinion and award is affirmed.

Affirmed.

Judges HUNTER, Robert C. and GEER.

Report per Rule 30(e).

[1] We note that the Commission's conclusion cannot be based on the fourth *Russell* prong because plaintiff had not, at the time of the hearing, obtained other employment.