

NO. COA14-324

NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2014

JERRY SEAMON,
Plaintiff-Appellant,

v.

FROM THE NORTH CAROLINA
INDUSTRIAL COMMISSION
File No. X53438

INGERSOLL RAND, Employer,

and

TRAVELERS, Carrier,
Defendants.

Appeal by plaintiff-appellant and defendants-appellants
from Opinion and Award entered by the North Carolina Industrial
Commission on 17 March 2014. Heard in the Court of Appeals 19
November 2014.

*WALLACE and GRAHAM, PA, by Whitney V. Wallace, for
plaintiff-appellant and for plaintiff-appellee.*

*Hedrick Gardner Kincheloe & Garofalo, LLP, by Neil P.
Andrews, M. Duane Jones, and Amanda A. Johnson, for
defendants-appellants and for defendants-appellees.*

ELMORE, Judge.

Ingersoll Rand ("defendant-employer") and Travelers
(collectively "defendants") appeal from the North Carolina
Industrial Commission's ("the Commission" or "the Full

Commission") Opinion and Award on the grounds that the Commission erred in finding and concluding that plaintiff suffered a compensable work-related injury under the North Carolina Workers' Compensation Act. Jerry Seamon ("plaintiff") appeals from the Commission's Opinion and Award on the grounds that the Commission erred in finding and concluding that he was not completely disabled after 16 November 2011. After careful consideration, we affirm the Full Commission's Opinion and Award.

I. Background

Plaintiff, a sixty-year-old man, began his employment with defendant-employer in 1972. Defendant-employer manufactures compressor units for commercial use. During the course of his employment, plaintiff worked in various capacities for defendant-employer. From 2001 to 27 April 2011, plaintiff worked as a machinist in the CENTAC Balance Room. Plaintiff was responsible for balancing the air compressor units to customer specifications. A machinist must balance the units using hand-held grinders. The units that came into the CENTAC Balance Room ranged from four inches in diameter to twenty-five inches in diameter, but the most common units were eight inches in diameter. Plaintiff was responsible for balancing two to three

of the small to medium sized units per day. Once a unit became balanced, plaintiff had to disassemble the unit using a rubber mallet. The disassembly process had to be done gently to prevent damaging the unit. Plaintiff testified that he often used the palms of his hands rather than a rubber mallet to dislodge the parts from the units due to the close proximity of the compartments.

In late 2010, plaintiff began waking during the night with pain in his hands. His symptoms worsened in February 2011, when he began to experience numbness in his left index and middle finger. By April 2011, plaintiff's nails were turning black and he was in extreme pain. Plaintiff's primary care physician referred him to Dr. Scott Brandon, an orthopedic specialist, for further evaluation. Dr. Brandon was concerned that plaintiff had a vascular insufficiency and he referred plaintiff to Dr. Louis Andrew Koman, a board-certified orthopedist with a certificate subspecialty in hand surgery. Dr. Koman had been treating patients with hand abnormalities for over thirty years, and he had invented operations for the treatment of peripheral hand-related vascular problems. Dr. Koman diagnosed plaintiff as most-likely suffering from a vaso-occlusive disease and an aneurysm in his hand which was throwing clots into his fingers.

Dr. Koman referred plaintiff to Dr. Matthew Edwards, a vascular surgeon, for an arteriography to further evaluate plaintiff's condition. Dr. Edwards diagnosed plaintiff with "ulnar artery aneurysm to the right hand and with distal occlusion and thrombosis to the left hand ulnar artery with aneurysm and distal occlusive disease." Dr. Edwards performed thrombolytic therapy to remove the clots from plaintiff's fingers. On 2, 3, and 5 May 2011, Dr. Koman performed multiple surgical procedures on plaintiff, which included amputations of plaintiff's left index and middle finger.

Plaintiff reached maximum medical improvement on 16 November 2011, at which point Dr. Koman assigned a thirty percent rating to each of defendant's hands and imposed a permanent work restriction of lifting no more than thirty pounds or carrying more than twenty pounds. Dr. Koman advised plaintiff to avoid any physical stress to his hands, including exposure to vibrations or cold. Dr. Koman opined to a reasonable degree of medical certainty that plaintiff's condition was work-related due to plaintiff's use of the palms of his hands to dislodge the rotatory assemblies. He believed plaintiff's use of tools that vibrated exacerbated plaintiff's condition. Dr. Koman testified that it was unnecessary for

plaintiff to hit the assembled parts using his palm with much force to cause the injury because it was the repetitive trauma, not the amount of force used, that caused the disease and the necessary finger amputations. On 20 May 2011, Dr. Koman put into writing his diagnosis that plaintiff's condition was work-related. On 16 June 2011, plaintiff filed a Form 18 alleging that he suffered from a work-related injury/disease involving his upper extremities.

William Tom McClure performed an ergonomic evaluation and assessment of the CENTAC Balance Room machinist position to determine whether the machinist position increased plaintiff's risk of developing an upper-extremity musculoskeletal and/or cumulative trauma disorder. Mr. McClure did not have the opportunity to observe plaintiff perform his job duties, but he did watch another machinist use a rubber mallet to disassemble a unit. Based on his observations, Mr. McClure concluded that a machinist did not use forceful exertion of his hands or fingers and was not at an increased risk of developing upper-extremity musculoskeletal and/or cumulative trauma disorders.

Defendants retained Dr. Frank R. Arko, III, a vascular surgeon, to provide his opinion concerning the cause of plaintiff's condition. Dr. Arko did not personally examine

plaintiff but he did review plaintiff's medical file, Mr. McClure's findings, and a video of a machinist performing his job duties. Dr. Arko opined to a reasonable degree of medical certainty that plaintiff's job did not cause his condition and did not place him at an increased risk of developing the condition from which he suffered as compared to members of the general public not so employed.

Dr. Brandon testified that he would defer to Dr. Koman's opinion concerning the issue of causation in plaintiff's case. Despite deferring to Dr. Koman on the question of causation, Dr. Brandon did opine that plaintiff's use of tools such as a rubber mallet and low vibration grinding tools placed plaintiff at an increased risk for the development of his bilateral peripheral vascular disorder.

Based upon a preponderance of the evidence in view of the entire record, the Full Commission gave greater weight to the opinions and findings of Dr. Koman than to the contrary testimony and opinions of Dr. Arko and Mr. McClure. The Commission found that plaintiff suffered from a bilateral peripheral vascular disorder/condition and that plaintiff's duties as a machinist caused or significantly contributed to the development of this condition. The Commission also found that

plaintiff's job duties placed him at an increased risk of developing a bilateral peripheral vascular disorder as compared to members of the general public not so employed. The Commission determined that from 27 April 2011 to 16 November 2011, plaintiff was physically incapable of earning any wages in any employment as a result of his compensable occupational disease. In addition, it determined that plaintiff failed to prove by a preponderance of the evidence that beginning 16 November 2011, when he was capable of some work, that he made reasonable efforts to find other employment or that such effort would have been futile. Both plaintiff and defendants appeal from portions of the Full Commission's Opinion and Award.

II. Defendants' Appeal

This Court reviews an Opinion and Award of the Industrial Commission to determine whether any competent evidence exists to support the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law. *Cross v. Blue Cross/Blue Shield*, 104 N.C. App. 284, 285-86, 409 S.E.2d 103, 104 (1991). If supported by competent evidence, the Commission's findings are binding on appeal even when there exists evidence to support findings to the contrary. *Allen v. Roberts Elec. Contractors*, 143 N.C. App. 55, 60, 546 S.E.2d 133,

137 (2001). The Commission's conclusions of law are reviewed *de novo*. *Id.* at 63, 546 S.E.2d at 139.

Defendants primarily argue on appeal that the Full Commission's determination that plaintiff suffered from a compensable occupational disease is unsupported by competent evidence. Specifically, defendants challenge findings of fact #5, #11, #12, #17, #19, #20, #22, #24, and #25 as being unsupported by competent evidence. Defendants likewise challenge the Commission's conclusions of law #2, #3, and #5 to the extent that the Commission concluded that plaintiff met his burden of proving the compensability of his medical condition. We conclude that the Commission did not err in finding and concluding that plaintiff suffered a compensable work-related injury.

For an injury or death to be compensable under the North Carolina Workers' Compensation Act "it must be either the result of an accident arising out of and in the course of the employment or an occupational disease." *Keel v. H & V Inc.*, 107 N.C. App. 536, 539, 421 S.E.2d 362, 365 (1992) (quotation and citation omitted). "Where the Commission awards compensation for disablement due to an occupational disease encompassed by G.S. 97-53(13), the opinion and award must contain findings as

to the characteristics, symptoms and manifestations of the disease from which the plaintiff suffers, as well as a conclusion of law as to whether the disease falls within the statutory provision." *Hansel v. Sherman Textiles*, 304 N.C. 44, 54, 283 S.E.2d 101, 106-07 (1981).

A. Challenged Findings of Fact

Initially, we will address defendants' challenges to the following findings of fact as being unsupported by competent evidence:

5. Once the unit was completely balanced, Plaintiff had to disassemble the unit. The disassembly process had to be done gently to avoid damaging the part or nicking off any extra metal, which would affect the balance of the unit. While other machinists used a rubber mallet to remove the parts, Plaintiff sometimes used the palms of his hands as a hammer to "bump" or dislodge the parts.

11. After discussing with Plaintiff his job duties as a machinist, including his exposure to vibration and the use of the palms of his hands to dislodge rotatory assemblies, Dr. Koman advised Plaintiff that his condition was work-related.

12. On May 20, 2011, Dr. Koman followed up in writing with a letter stating that in his medical opinion, Plaintiff's condition was work-related. . . .

17. . . . Dr. Brandon testified that he would defer to Dr. Koman's opinion on causation in Plaintiff's case, but that he would not defer to the causation opinion of

a vascular surgeon over Dr. Koman because "the hand is a little bit different organ system," and vascular surgeons are trained generally and do not have specialized hand training. Although Dr. Brandon was unable to state a causal opinion, he did opine, based upon his personal knowledge of a machinist's job duties, that Plaintiff's job as a machinist for 10 years in the CENTAC Balance Room utilizing tools, such as rubber mallets and low vibration grinding tools to balance parts, placed Plaintiff at an increased risk for the development of his bilateral peripheral vascular disorder.

19. Plaintiff's condition is rare in that he does not have peripheral vascular disease, but he has a peripheral vascular disorder which includes aneurysm, thrombosis and embolism. The potential causes of his condition include abnormalities of collagen, clotting abnormalities or atherosclerosis. Dr. Koman ruled out these potential causes of Plaintiff's condition and opined that Plaintiff's vascular disorder was due to trauma based on his review of the arteriograms and the ergonomic reports, as well as "knowing how he [Plaintiff] actually fixed the impellers. . . ." More specifically, the way in which Plaintiff used the palms of his hands like a hammer to dislodge the assembled parts caused the ulnar vessel to dilate and then become turbulent. The turbulence caused thrombosis which led to the formation of embolisms. The embolisms spread to the fingers, which led to the amputation of the dead portions of the fingers. Dr. Koman did not believe that it was necessary that Plaintiff hit the assembled parts with a lot of force with the palm of the hand. Rather, according to Dr. Koman, the most important factor was how Plaintiff hit the palm of his hand on the part, because the ulnar artery is only a few

millimeters beneath the skin. The repetitive trauma to the palm caused the vessel to dilate resulting in the eventual amputation of the fingers. Dr. Koman's opinion was reinforced by the fact that he found no problems with the big blood vessels in his left arm, elbow or forearm, and the fact that aneurysms occur over time, suggesting lower impact but repeated trauma.

20. Dr. Koman opined to a reasonable degree of medical certainty that Plaintiff's history of using his hands as a hammer to dislodge the parts of the assembled units caused his bilateral ulnar artery thrombosis and placed him at an increased risk of developing the condition as compared to members of the general public not so employed. Dr. Koman agreed with Dr. Arko that Plaintiff's daily exposure to vibration from using grinders at work did not cause Plaintiff's bilateral hand condition.

22. Plaintiff's testimony that he used his hands to dislodge the assembled units after balancing is accepted as credible, even though the evidence would tend to show that other employees primarily used a mallet to dislodge the units.

24. The Full Commission finds that a preponderance of the evidence in view of the entire record establishes that Plaintiff suffers from a bilateral peripheral vascular disorder condition as described by Dr. Koman, and that dislodging the assemblies with his hands as part of his job duties as a machinist in the CENTAC Balance Room with Defendant-Employer caused or significantly contributed to the development of this condition.

25. The Full Commission also finds that dislodging the assemblies with his hands as

part of his job duties in his position as a machinist in the CENTAC Balance Room for the past 10 years placed Plaintiff at an increased risk of developing bilateral peripheral vascular disorder as compared to members of the general public not so employed, and that such a condition is not an ordinary disease of life to which the general public is equally exposed.

Defendants challenge each of these findings only to the extent that the findings support the Full Commission's conclusion that plaintiff's job placed him at an increased risk of developing his vascular condition. We have carefully reviewed the record and conclude that each of these findings is supported by competent evidence. In support of finding #5, that plaintiff sometimes used the palms of his hands as a hammer to "bump" or dislodge the parts, plaintiff testified: "When you dissembled [the unit], sometimes you'd use your hands, palm of your hands, sort of bump it up a little bit to get it loose . . . you have to be real gentle with [the part] as far as getting it off."¹

¹ Defendants take issue with the Commission's use of the word "hammer" in its findings of fact when there was no evidence that plaintiff used his hand as "hammer" to performing his job duties. We hold that the use of the word "hammer" is inconsequential. There is evidence that plaintiff used the palm of his hand to hit the parts. According to Dr. Koman's testimony, it was not the amount of force used but the repetitive trauma to the hand that led to the amputation of

In support of finding #11, regarding the fact that Dr. Koman was of the opinion that plaintiff's medical condition was work-related, Dr. Koman testified that "to a reasonable degree of medical certainty [the injury] is post-traumatic work-related" and "this is a work[-]related injury."

In support of finding #12, the record reflects that Dr. Koman was asked, "I noted on two different occasions that it is written in your medical note that [plaintiff's] condition was work[-]related[?] That's in a 5/20/11 note." Dr. Koman agreed that his written records reflected his opinion that plaintiff's condition was work-related.

In support of finding #17, Dr. Brandon was asked, "[s]o would you be able to say more likely than not that this particular machinist job that [plaintiff] did placed him at an increased risk for the development of these diseases?" Dr. Brandon responded, "I would say it would put him at an increased risk."

Finding #19 is also supported by the record. When asked if he believed plaintiff's aneurisms were more likely than not caused by plaintiff's use of the palms of his hands as a hammer, Dr. Koman responded, "that's correct." He further opined, "[i]t

plaintiff's fingers.

doesn't take a whole lot of force depending on how you hit it. If your muscle [is] relaxed and you - I mean, your ulnar artery is only a few millimeters beneath the skin. It's not that far down there."

As to finding #20, Dr. Koman reiterated that plaintiff's use of his hands in the performance of his job duties placed him at an increased risk of developing his condition. When asked, "it's your opinion that the -- [plaintiff] using his hands as a hammer throughout his -- your discussions with him about his employment, combined with or contributed to by his vibration exposure, would have been sufficient enough trauma to cause [plaintiff's] aneurysms?" Dr. Koman replied, "[t]hat's my opinion, and it's within a reasonable degree of medical certainty." Dr. Koman clarified that the vibration tools would not generally cause thrombosis but the use of the tools could "contribute" to it or "exacerbate" it.

Finding #22, that plaintiff used his hands to dislodge the assembled units, is supported by plaintiff's testimony that he would "work loose" the impellers by giving a "gentle" "bump" using his hands.

Finally, findings #24 and #25, that plaintiff suffered from a bilateral peripheral vascular disorder condition as described

by Dr. Koman and that such a condition was not an ordinary disease of life to which the general public was equally exposed, are best classified as conclusions of law and are supported by the findings of fact discussed above. Upon review, we conclude that the challenged findings of fact are each supported by competent evidence in the record.

B. Rutledge Test

To bring a successful workers' compensation claim, plaintiff must have shown that his condition was:

(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./Kings Yarn, 308 N.C. 85, 93, 301 S.E.2d 359, 365 (1983) (citations and quotations omitted) (alteration in original). "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. . . . Only such ordinary diseases of life to which the general public is exposed equally with workers in the particular trade or occupation are excluded." *Id.* Accordingly, the first two

elements of the *Rutledge* test 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." *Id.* at 93-94, 301 S.E.2d at 365. "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." *Booker v. Duke Med. Ctr.*, 297 N.C. 458, 475, 256 S.E.2d 189, 200 (1979). As for the third prong of *Rutledge*, "[t]his element of the test is satisfied if plaintiff's employment significantly contributed to, or was a significant causal factor in, the disease's development." *James v. Perdue Farms, Inc.*, 160 N.C. App. 560, 562, 586 S.E.2d 557, 560 (2003) (quotation and citation omitted). "This is so even if other non-work-related factors also make significant contributions, or were significant causal factors." *Rutledge*, 308 N.C. at 101, 301 S.E.2d at 370.

With respect to whether plaintiff's employment exposed him to a greater risk of suffering from the disorder than the public generally, Dr. Brandon opined that plaintiff's job as a machinist, utilizing tools such as a rubber mallet and low vibration grinding tools, placed plaintiff at an increased risk for the development of his bilateral peripheral vascular disorder (finding #17). Dr. Koman testified, and the Full

Commission found, that plaintiff's job duties placed him at an increased risk of developing his medical condition as compared to members of the general public not so employed and that his condition is not an ordinary disease of life to which the public is equally exposed (findings #19, #25).

Based on these findings, which are supported by competent evidence, we hold that plaintiff satisfied the first two elements of *Rutledge*. With respect to whether plaintiff's employment significantly contributed to, or was a significant causal factor in the condition's development, Dr. Koman opined to a reasonable degree of medical certainty that plaintiff's history of using his hands while at work to dislodge the parts from the assembled units caused his condition (finding #20). Plaintiff established the requisite causal connection between the disease and his employment, thus satisfying the third element of *Rutledge*. Based on the record before us, we conclude that the Commission's conclusions of law #2, #3, and #5 are supported by the findings of fact. The Commission did not err in concluding that plaintiff sustained a compensable occupational disease within the meaning of N.C. Gen. Stat. § 97-53(13) from 27 April 2011 through 16 November 2011.

III. Plaintiff's Appeal

A. Challenged Findings of Fact

Plaintiff's primary contention on appeal is that the Full Commission erred in concluding that he was no longer disabled after 16 November 2011. Plaintiff first challenges six findings of fact as being unsupported by competent evidence: findings #5, #10, #22, #23, #29, and #34.² Plaintiff also challenges the Commission's conclusions of law #5, #6, #8 on the basis that the Commission erred in concluding that plaintiff was not disabled after 16 November 2011. We hold that the Commission's findings of fact are supported by competent evidence and that its conclusions of law are supported by the findings of fact. The Commission did not err in concluding that plaintiff was not disabled after 16 November 2011.

Initially, we will address plaintiff's challenges to the following findings of fact:

5. While other machinists used a rubber mallet to remove the parts, Plaintiff sometimes used the palms of his hands as a hammer to "bump" or dislodge the parts.

10. . . . Plaintiff has not returned to work or looked for work within the restrictions assigned by Dr. Koman.

² We decline to address plaintiff's challenge to finding #23. Plaintiff concedes that this finding is supported by competent evidence and merely suggests that the Commission include additional evidence presented by Dr. Koman. It is not the duty of this Court to supplement the Commission's findings of fact.

22. Plaintiff's testimony that he used his hands to dislodge the assembled units after balancing is accepted as credible, even though the evidence would tend to show that other employees primarily used a mallet to dislodge the units.

29. Plaintiff has failed to prove by a preponderance of the evidence in view of the entire record, however, that beginning November 16, 2011, when he was capable of some work, that he has made reasonable efforts to find other employment or that it would have been futile because of preexisting conditions such as age, education and work experience for him to look for other employment.

Plaintiff challenges findings #5 and #22 on the same basis. He contends that, while the Commission properly found that plaintiff used the palm of his hands as a hammer to bump or dislodge the parts, he "disagrees there is any competent evidence that other machinists did not similarly use their hands to dislodge the parts, but rather used solely a rubber mallet." Plaintiff has either misread or misinterpreted findings #5 and #22. The Commission did not find that other machinists "solely" used a rubber mallet to dislodge the units, as plaintiff argues. In fact, finding #22 clearly states that other employees "primarily" used a mallet to dislodge the units. As discussed

above, both findings #5 and #22 are supported by competent evidence in the record.

With respect to finding #10, that plaintiff has not looked for employment within the restrictions assigned by Dr. Koman, the record is devoid of evidence that plaintiff sought alternative employment after 16 November 2011. In addition, while plaintiff may have attempted to return to work with defendant-employer *before* 16 November 2011, at which time he was advised that there was no position for him given his medical restrictions, there is no evidence that plaintiff contacted defendant-employer about resuming his employment *after* 16 November 2011. During the hearing, plaintiff merely professed his willingness to return to work for defendant-employer should there be a suitable position. Finding #10 is supported by competent evidence.

Plaintiff argues that finding #29 is a conclusion of law and must be reviewed *de novo* by this Court. Plaintiff further contends that this conclusion of law is not supported by the findings of fact and therefore we must remand this case for additional findings of fact. We disagree with plaintiff and will review finding #29 to ascertain if it is supported by sufficient evidence in the record. Finding #29, that plaintiff

failed to prove that he made reasonable efforts to find employment or that his efforts would have been futile, is supported by the record. Plaintiff presented no evidence that he made reasonable, yet unsuccessful efforts to obtain employment with another employer or return to his employment with defendant-employer after the 16 November 2011 date. In addition, plaintiff did not argue before the Commission that he suffered from a pre-existing condition such as age, limited education, or work history, which would make it futile for him to seek alternative employment opportunities. We conclude that finding #29 is supported by competent evidence. In sum, the findings of fact that plaintiff challenges are each supported by competent evidence in the record.

B. Continuing Disability

In order to meet the burden of proving that he suffered from a continuing disability, plaintiff was required to prove that he was incapable of earning pre-injury wages in either the same or in any other employment and that the incapacity to earn pre-injury wages was caused by the employee's injury. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 596, 290 S.E.2d 682, 684 (1982). *Russell v. Lowes Prod. Distribution* sets forth a four prong test delineating alternative ways that plaintiff could

have satisfied this burden. 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993). Plaintiff must have produced either:

(1) medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment[;] (2) . . . 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) . . . 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) . . . evidence that he has obtained other employment at a wage less than that earned prior to the injury.

Id. On appeal, plaintiff contends that the Commission's findings of fact are insufficient to support a determination as to whether plaintiff met his burden under the *Russell* prongs (2) or (3). Specifically, plaintiff contends that the Commission failed to include any findings of fact, other than #29, which he contends is a conclusion of law, that addressed plaintiff's efforts to return to work. Accordingly, plaintiff argues that the Commission erred by making conclusion #6, which states: "Having failed to prove disability under *Russell* after November 16, 2011, Plaintiff is entitled to permanent partial disability benefits pursuant to N.C. Gen. Stat. § 97-31(12) for a period of 120 weeks."

We disagree and hold that conclusion #6 is supported by the findings of fact. Specifically, finding #29 provides that plaintiff did not make reasonable efforts to obtain employment after 16 November 2011. As such, Plaintiff did not satisfy prong two of *Russell* because he failed to show that he made reasonable efforts to obtain employment. To satisfy prong three, plaintiff was required to show that it would have been futile for him to seek other employment due to certain pre-existing conditions such as age, education level, or inexperience. Plaintiff contends that the Commission neglected to make a finding that addressed whether he satisfied these pre-existing conditions. We disagree.

Finding #1 shows that the Commission considered the fact that plaintiff was sixty-years-old, left-hand dominant, and a high school graduate who had worked for defendant-employer for over thirty-nine years. Thus, the Commission did consider plaintiff's age, education level, and work experience. The Commission also found that plaintiff failed to show that due to a pre-existing condition, his efforts to obtain employment would have been futile (finding #29). As such, there is no evidence in the record that plaintiff satisfied prong three of *Russell*. Given that plaintiff failed to satisfy the *Russell* test, the

Commission did not err in determining that plaintiff was unable to establish that he suffered from a continuing disability after 16 November 2011.

C. Credit for Disability Payments

Lastly, plaintiff argues that the Commission erred in awarding defendant-employer a credit for certain disability benefits paid by it to plaintiff. Specifically, plaintiff argues that the Commission's finding of fact #34 is unsupported by competent evidence and its conclusion of law #8 is unsupported by the findings of fact. We disagree and find no merit in plaintiff's argument.

Under the Workers' Compensation Act, the only statutes that allow the Commission to award credits are N.C. Gen. Stat. § 97-42 and N.C. Gen. Stat. § 97-42.1. *Jenkins v. Piedmont Aviation Servs.*, 147 N.C. App. 419, 425, 557 S.E.2d 104, 108 (2001). "These statutes allow for a credit for amounts voluntarily paid by the employer before the workers' compensation benefits are awarded." *Id.* The "laudable purpose" of this section is "to encourage voluntary payments to workers while their claims to compensation are being disputed and they are receiving no wages[.]" *Evans v. AT & T Technologies*, 103 N.C. App. 45, 48, 404 S.E.2d 183, 185 (1991).

A "credit" is a deduction by the employer of a prior payment made to an injured employee from the compensation benefit that is now due the employee. . . . N.C.G.S. § 97-42 [] provides, in order to encourage voluntary payments by the employer while the worker's claim is being litigated and he is receiving no wages, that any payments made by the employer [(pursuant to an employer-funded salary continuation)] to the injured employee which were not due and payable when made, may in certain cases be deducted from the amount of compensation due the employee.

Gray v. Carolina Freight Carriers, 105 N.C. App. 480, 484, 414 S.E.2d 102, 104 (1992). "This credit applies to payments made by the employer, not to any and all other payments the employee may receive from outside sources." *Jenkins*, 147 N.C. App. at 426, 557 S.E.2d at 108-09. "The decision of whether to grant a credit is within the sound discretion of the Commission" and "will not be disturbed on appeal in the absence of an abuse of discretion." *Shockley v. Cairn Studios, Ltd.*, 149 N.C. App. 961, 966, 563 S.E.2d 207, 211 (2002).

Finding of fact #34 provides:

34. Defendants are entitled to a credit for the employer-funded short-term disability payments Plaintiff received, as well as that portion of the long-term disability benefits Plaintiff has received that were paid pursuant to the fully employer-funded 40 percent plan and which Plaintiff will not have to repay. Defendants are not entitled to a credit for any long-term disability

benefits that were paid pursuant to the additional coverage Plaintiff purchased or that Plaintiff will have to repay to the long-term disability plan.

Conclusion of law #8 provides:

8. Defendants are entitled to a credit for that portion of short-term and long-term disability benefits that Plaintiff has received pursuant to plans that were fully funded by Defendant-Employer and that Plaintiff does not have to repay to the long-term-disability benefit provider. N.C. Gen. Stat. § 97-42.

Plaintiff challenges the Commission's award of a credit for the long-term disability benefits funded by defendant-employer on the basis that (1) the plan is not considered "fully-funded" by the employer under N.C. Gen. Stat. § 97-42 if the employee contributes any monies to the plan, and (2) the employer cannot recover a credit if a third-party insurance carrier pays the benefit directly to the employee. Neither of plaintiff's arguments are supported by case law nor by statute.

Here, the Commission found as fact that plaintiff began receiving long-term disability benefits pursuant to a plan that was fully-funded by defendant-employer after his short-term disability benefits terminated. Specifically, defendant-employer paid the full premium for a long-term disability plan that would allow a disabled employee to collect up to forty

percent of his regular earnings if he became disabled. Should an employee wish to collect an additional twenty percent of his regular earnings, making his total recovery sixty percent of his regular earnings, the employee was also permitted to purchase additional coverage.

In the instant case, plaintiff elected to pay approximately \$10.00 per month to receive the additional coverage. On appeal, plaintiff contends that because he purchased the additional insurance coverage, thus contributing to the plan, the plan was no longer fully employer-funded. Therefore, defendant-employer was no longer entitled to a credit. However, plaintiff is unable to direct this Court to any case law that supports his position. This is likely because neither case law nor N.C. Gen. Stat. § 97-42 requires that an employer forgo its right to receive a credit for benefits paid merely because an employee elects to purchase additional coverage in order to collect a greater portion of his salary than that which the employer-funded plan allows. For the purposes of N.C. Gen. Stat. § 97-42, an insurance plan is considered "employer-funded" when the employer pays the entire premium to fund the requisite amount of coverage the employer elects to provide. The fact that an employee purchases additional coverage beyond that which the

employer offers has no bearing on whether the plan is employer-funded. We overrule plaintiff's first argument concerning this issue.

In addition, plaintiff's contention that defendants are not entitled to a credit because the insurance carrier CIGNA distributed plaintiff's disability funds is likewise unsupported by law. Plaintiff cites *Jenkins, supra*, for the proposition that a credit applies solely to payments made by the employer, not to any and all other payments the employee may receive from outside sources. While true, *Jenkins* is inapplicable to this case since *Jenkins* involved a situation in which the distribution of royalty income was at issue, not the payment of employer-funded disability benefits. Here, CIGNA was not an outside party that independently provided plaintiff with certain disability funds. We overrule plaintiff's second argument with respect to this issue.

It is undisputed that defendant-employer paid the full premium for the disability plan so that plaintiff could receive forty percent of his take-home pay. Upon reviewing the record, we conclude that there is competent evidence in the record to support finding of fact #34. In addition, conclusion of law #8 is supported by the findings of fact. Because the plan was

entirely "employer-funded," it was within the Commission's discretion to award defendant-employer a credit for monies paid. There is no evidence that the Commission abused its discretion by approving such a credit. Plaintiff's arguments are without merit.

IV. Conclusion

Based upon our review of the evidence and the applicable law, we conclude that the Commission's findings of fact are supported by competent evidence and that its conclusions of law are supported by the findings of fact. Plaintiff suffered a compensable occupational disease and was entitled to receive full disability benefits from 27 April 2011 to 16 November 2011. After the November date, plaintiff failed to meet his burden of showing that he was entitled to additional disability benefits. We affirm the Full Commission's Opinion and Award.

Affirmed.

Judges ERVIN and DAVIS concur.