An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA14-461
NORTH CAROLINA COURT OF APPEALS

Filed: 18 November 2014

DAVID BELCH,
Employee, Plaintiff,

v.

From the North Carolina Industrial Commission File No. X80963

JOHNNY KORTHEUER DBA JK'S CONSTRUCTION & REPAIR, Employer, and KEY RISK MANAGEMENT SERVICES, INC., Carrier, Defendants.

Appeal by plaintiff from Opinion and Award entered 27 November 2013 by the North Carolina Industrial Commission. Heard in the Court of Appeals 24 September 2014.

The Olive Law Firm, by Juan A. Sanchez, for plaintiff-appellant.

HEDRICK GARDNER KINCHELOE & GAROFALO, LLP, by Erica B. Lewis and M. Duane Jones, for defendant-appellee Key Risk Management Services, Inc.

ELMORE, Judge.

This appeal arises from an opinion and award of the Full Commission (the Commission) entered 27 December 2013. The Commission, in confirming the opinion and award of the Deputy

Commissioner, found that David Belch (plaintiff) did not sustain a compensable injury by accident arising out of and in the course and scope of his employment. The Commission determined that plaintiff was intoxicated at the time of the accident and that his intoxication was the proximate cause of the incident. Plaintiff appeals from the Commission's opinion and award. After careful consideration, we affirm.

I. Background

The unchallenged findings of fact show the following: Plaintiff resided in Carolina Beach with Johnny Kortheuer, owner of JK's Construction and Repair Services, and plaintiff's former employer. On the morning of 2 January 2012, Mr. Kortheuer drove plaintiff and David Purvis, a co-worker, to a job-site in Carolina Beach to repair and replace rotting pickets and railings on the balcony of a home. Plaintiff has a history of alcohol abuse, and he does not hold a valid driver's license due to multiple DWI convictions. At lunch, Mr. Kortheuer drove Mr. Purvis and plaintiff to his and plaintiff's residence for a ninety-minute break. Plaintiff testified that he ate a small sandwich and drank two beers. Plaintiff admitted that he regularly drank beer at lunch. Mr. Kortheuer testified that he was aware plaintiff occasionally drank beer during lunch. Mr.

Kortheuer returned Mr. Purvis and plaintiff to the job-site at 1:00 p.m.

At approximately 4:00 p.m., plaintiff fell fifteen to twenty feet from a second-story balcony onto concrete. He sustained injuries to his left shoulder, left hip, ribs, and thumbs. Plaintiff attributed his fall to the fact that the railing he had been leaning against gave way. Mr. Purvis did not observe plaintiff fall from the balcony, but he did see plaintiff lying on the ground immediately thereafter. Mr. Purvis promptly alerted Mr. Kortheuer of plaintiff's fall.

After falling, plaintiff alleged that he asked Mr. Purvis to call 911 and fetch him a beer from a cooler located in a nearby vehicle. Plaintiff claimed that while he was lying on the ground awaiting EMS, he consumed a twenty-four-ounce can of Natural Ice beer, some of which spilled onto his shirt. Mr. Kortheuer alleged that Mr. Purvis assisted plaintiff in consuming the beer by lifting plaintiff's head from the concrete.

Michael Storms, a licensed emergency medical technician and paramedic, arrived at the scene of the accident at approximately 4:39 p.m. Mr. Storms testified that he detected an odor of alcohol on plaintiff. Mr. Storms asked plaintiff if he had been

drinking, and plaintiff responded that he had had a beer at lunch. Plaintiff did not mention drinking after the fall, and Mr. Storms stated that none of the bystanders mentioned plaintiff's purported consumption of the beer following the fall. Plaintiff told Mr. Storms that he fell when the railing gave way. Mr. Storms testified that he did not observe any debris from a broken railing, an empty beer can, or evidence of alcohol spilled anywhere on plaintiff.

Plaintiff was transported to New Hanover Regional Medical Center where he was examined and treated. Plaintiff's blood was drawn and a sample was tested for alcohol. Lab reports showed that plaintiff had a blood alcohol concentration (BAC) of .077 (.08) at the time the sample was drawn. Elizabeth Moore, the Administrative Network Director of Laboratories for New Hanover Regional Medical Center, testified that she was familiar with the policies and procedures in place to ensure appropriate identification and labeling of blood test samples. Ms. Moore reported that blood samples are taken from the emergency department, identified and assigned a patient number and barcode, and then sent to the laboratory for testing. In the laboratory, the samples are assigned identifying numbers. Ms. Moore testified that laboratory errors typically occur at a rate

of .01 percent—only two misidentified samples had been reported in the past 3 to 4 years. Ms. Moore also testified to the accuracy and calibration of the testing devices that evaluated plaintiff's blood sample. These devices are calibrated every thirty days by an outside entity. The particular device that tested plaintiff's blood had been calibrated by the outside entity on 16 December 2011 and was in good working order. In addition, each device is calibrated twice daily in the hospital lab to ensure its accuracy.

Dr. John Mennear was retained by defendant Key Risk Management Services, Inc., the insurance carrier for JK's Construction and Repair, and tendered as an expert in the areas of toxicology and pharmacology. Dr. Mennear was asked to assume that plaintiff had been truthful about his post-injury consumption of the twenty-four-ounce beer. Using the Widmark Calculation, Dr. Mennear calculated that plaintiff's BAC would have been approximately .044 at the time of the injury. Based on his calculation, Dr. Mennear opined to a reasonable degree of medical certainty that plaintiff was not truthful about his pre-injury consumption of alcohol. Dr. Mennear determined that plaintiff would have had to have consumed more than four beers

between lunch and the time of the accident to have a BAC consistent with his calculations.

Alternatively, assuming plaintiff was not truthful about his post-injury consumption of alcohol, Dr. Mennear calculated that plaintiff's BAC at the time of his accident would have been .097. Dr. Mennear opined that a BAC at this level would have impaired plaintiff and that this impairment would have been a proximate cause of plaintiff's fall.

The Commission found the expert testimony of Ms. Moore, Mr. Storms, and Dr. Mennear to be competent and reliable. It found that plaintiff consumed all the alcohol prior to his fall. The Commission also gave little weight to Mr. Purvis and Mr. Kortheruer, finding clear inconsistencies in their testimony and an interest in plaintiff's favor. The Commission concluded that plaintiff was intoxicated at the time of his injury and that his state of intoxication proximately caused his fall and subsequent injuries:

> 7. In this case, the Defendant carrier has shown sufficient evidence and the undersigned has found and concluded that the Plaintiff was intoxicated at the time of his fall and that such intoxication was a proximate cause of his fall and resulting injuries. Even though Plaintiff sustained an otherwise compensable injury by accident on January 2, 2012, Defendant carrier has

> established the affirmative defense of intoxication and Plaintiff may not recover any compensation for his fall and injuries sustained on January 2, 2012. N.C. Gen. Stat. § 97-12.

II. **Analysis**

Plaintiff argues that the chain of custody pertaining to his blood alcohol test was insufficient to permit its admission into evidence. We disagree.

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 court'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) (citation and quotation omitted). "The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965).

Pursuant to N.C. Gen. Stat. § 97-12 (2013), "[n]o compensation shall be payable if the injury or death to the employee was proximately caused by . . . [h]is intoxication,

provided the intoxicant was not supplied by the employer or his agent in a supervisory capacity to the employee[.]" The statute further provides:

> "Intoxication" and "under the influence" shall mean that the employee shall have consumed a sufficient quantity of intoxicating beverage or controlled substance to cause the employee to lose the normal control of his or her bodily or mental faculties, or both, to such an extent that there was an appreciable impairment of either or both of these faculties at the time of the injury.
>
> A result consistent with "intoxication" or being "under the influence" from a blood or other medical test **conducted in a manner generally acceptable to the scientific community and consistent with applicable State and federal law**, if any, shall create a rebuttable presumption of impairment from the use of alcohol or a controlled substance.

N.C. Gen. Stat. § 97-12 (emphasis added).

Plaintiff contends that the Commission's findings were not based on competent evidence because JK's Construction & Repair and Key Risk (collectively defendants) failed to establish the proper chain of custody before admitting his blood alcohol test results into evidence. Plaintiff avers "there is no way to verify that the blood sample that was tested by the laboratory was the same blood that was drawn from [plaintiff] in the

emergency room." Thus, plaintiff argues that the test results and all testimony interpreting the results were incompetent.

We are not persuaded. "It is well settled in this jurisdiction that the effect of alcohol in the blood stream as shown by proper chemical tests is competent evidence on the question of intoxication." *Robinson v. Life & Casualty Ins. Co.*, 255 N.C. 669, 672, 122 S.E.2d 801, 803 (1961) (citations omitted). The admissibility of a blood alcohol test "depends upon a showing of compliance with conditions as to relevancy in point of time, tracing and identification of specimen, accuracy of analysis, and qualification of the witness as an expert in the field. In other words, a foundation must be laid before this type of evidence is admissible." *Id.* "The expert witness who offers the results of these types of scientific tests must be in a position to [explain] the way the test is conducted, attesting its scientific reliability, and vouching for its correct administration *in the particular case*." *Johnson v. Charles Keck Logging*, 121 N.C. App. 598, 601, 468 S.E.2d 420, 422 (1996) (citation and quotation omitted) (alteration in original).

Here, plaintiff relies on *Johnson* in arguing that his blood alcohol test is inadmissible. 121 N.C. App. 598, 468 S.E.2d

420. In *Johnson*, the plaintiff, a tree "limber/topper" was injured at work when a tree fell on him. *Id.* at 598, 468 S.E.2d at 421. The only evidence as to the plaintiff's intoxication at the time of the accident was a positive blood alcohol test administered at Community Hospital. *Id.* at 598-99, 468 S.E.2d at 421 The plaintiff did not admit to drinking on the day of the accident and none of the plaintiff's co-workers suspected that he was intoxicated. *Id.* at 600, 468 S.E.2d at 422. A subsequent blood alcohol test was performed at Duke University Hospital and listed the plaintiff's alcohol level as "negative." *Id.* Accordingly, this Court reasoned that the accuracy of the blood alcohol test administered at Community Hospital was "critical." *Id.*

This Court found that the Community Hospital blood alcohol test contained numerous discrepancies that affected the reliability of the test, including a contention that the chain of custody from the time the plaintiff's blood was drawn until it was tested was never clearly established. *Id.* at 601, 468 S.E.2d at 422. The expert technologist who analyzed the plaintiff's blood admitted he had not drawn blood in years, that he "didn't know what happened to this particular blood[,]" and "there was no testimony as to the identity of the phlebotomist

who drew [the] plaintiff's blood nor the specific manner in which [the] plaintiff's blood was drawn." *Id.* at 601, 468 S.E.2d at 422-23. We noted additional inconsistencies with the "critical test results" that warranted a more thorough development of the chain of custody, including (1) evidence that the blood test was incorrectly dated as having been drawn on the Sunday afternoon *before* the accident occurred; (2) concerns about the calibration of the testing equipment; and (3) testimony admitting that an inadequate number of controls may have been run on the particular specimen which could negatively impact the plaintiff's test results. *Id.* at 601-02, 468 S.E.2d at 423. Thus, we concluded there was inadequate evidence to establish that the blood alcohol analysis was scientifically reliable or that it was correctly administered in "compliance with conditions as to relevancy in point of time, tracing and identification of specimen, [and] accuracy of analysis[.]" *Id.* (quotation and citation omitted).

Johnson is easily distinguishable from the case before us. Clearly, *Johnson* is an unusual case in which healthcare personnel botched the administration of the plaintiff's blood alcohol test on multiple levels. There is no evidence of such incompetence or discrepancy in the case at hand. For example,

there is no evidence that (1) plaintiff's blood sample was incorrectly dated, (2) no evidence that the machine was not accurately calibrated, and (3) no evidence that there were an inadequate number of controls in place that may have affected the reliability of the test results. To the contrary, Ms. Moore testified, and the Commission found, that there were no irregularities or errors with respect to (1) the drawing of plaintiff's blood sample, (2) the identification of plaintiff's blood sample by the laboratory, (3) the accuracy of the testing performed by the laboratory, or (4) the reliability of the test results. We conclude that plaintiff's reliance on *Johnson* is misplaced.

We find *State v. Detter*, 298 N.C. 604, 260 S.E.2d 567 (1979) to be persuasive. In *Detter*, the defendant challenged the sufficiency of a blood sample's a chain of custody on the grounds that it was not shown which laboratory employee picked up the deceased's blood specimen at the post office and because several people had supervision over the bench where the specimens were first placed. *Id*. at 634, 260 S.E.2d at 587. This Court held that the chain of custody was sufficiently established because "the possibility that the specimens were interchanged with those from another body [was] too remote to

have required ruling this evidence inadmissible." *Id*. at 634, 260 S.E.2d at 588 (citation omitted). Here, like *Detter*, the possibility that plaintiff's blood sample was confused with someone else's is too improbable to require the exclusion of this evidence. *See also State v. Grier*, 307 N.C. 628, 633, 300 S.E.2d 351, 354 (1983). Any weakness in the chain of custody relates only to the weight of the evidence and not to its admissibility. *Id*.

B. Compliance with N.C. Gen. Stat. § 20-139.1

Plaintiff next argues that his blood alcohol test results are inadmissible because defendants failed to comply with the requirements set forth in N.C. Gen. Stat. § 20-139.1. We disagree.

N.C. Gen. Stat. § 20-139.1(c3), entitled "Procedure for Establishing Chain of Custody Without Calling Unnecessary Witnesses," provides:

> (1) For the purpose of establishing the chain of physical custody or control of blood or urine tested or analyzed to determine whether it contains alcohol, a controlled substance or its metabolite, or any impairing substance, a statement signed by each successive person in the chain of custody that the person delivered it to the other person indicated on or about the date stated is prima facie evidence that the person had custody and made the delivery as stated, without the necessity of a personal

> appearance in court by the person signing the statement.
>
> (2) The statement shall contain a sufficient description of the material or its container so as to distinguish it as the particular item in question and shall state that the material was delivered in essentially the same condition as received. The statement may be placed on the same document as the report provided for in subsection (c1) of this section.
>
> (3) The provisions of this subsection may be **utilized in any administrative hearing**, but can only be utilized in cases tried in the district and superior court divisions, or in an adjudicatory hearing in juvenile court[.]

N.C. Gen. Stat. § 20-139.1(c3) (emphasis added).

Plaintiff argues that N.C. Gen. Stat. § 20-139.1 is applicable to a workers' compensation case because N.C. Gen. Stat. § 97-12 (cited in issue 1) provides that a blood alcohol test must be conducted in a "manner generally acceptable to the scientific community **and consistent with applicable State and federal law**" and because N.C. Gen. Stat. § 20-139.1(c3)(3) specifies that it is applicable in administrative hearings. Further, plaintiff contends that defendants' failure to comply with N.C. Gen. Stat. § 20-139.1(c3)(1) or (3) renders his test results inadmissible.

We agree with plaintiff that N.C. Gen. Stat. § 20-139.1 is applicable to a workers' compensation case, although it is technically a criminal statute. However, we do not agree that plaintiff's test results are inadmissible based on defendants' noncompliance with subsection (c3). Subsection (c3) outlines a method for establishing a chain of custody without calling an unnecessary witness; however, it does not preclude a party from calling a witness to establish a chain of custody. In essence, (c3) is a fast-track method for establishing a chain of custody provided appropriate officials sign any requisite documentation. Plaintiff's argument ignores section (a) of N.C. Gen. Stat. § 20-139.1, which specifically provides: "This section *does not limit* the introduction of other competent evidence as to a person's alcohol concentration or results of other tests showing the presence of an impairing substance, including other chemical tests." N.C. Gen. Stat. § 20-139.1(a) (emphasis added). Here, Ms. Moore's testimony constituted the "other competent evidence" necessary to lay the proper foundation for plaintiff's blood test to be admissible.

In sum, we hold that competent evidence was presented by defendants to justify the Commission's conclusion that plaintiff's claim was not compensable under the Workers'

Compensation Act. Therefore, we affirm the decision of the Commission.

Affirmed.

Judges BRYANT and ERVIN concur.

Report per Rule 30(e).