

*Keeping our clients informed*

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## Jason E. Toups

### Wilmington Office

E-mail: [jtoups@cshlaw.com](mailto:jtoups@cshlaw.com)

Tel: (910) 332-0957

Fax: (910) 344-0276

Culbreth Center, 1209 Culbreth Dr, Ste 200  
Wilmington, North Carolina 28405



## WORKERS' COMPENSATION

### *Clocking in on Return to Work Issues with Injured Employees*

By Jason Toups, Cranfill Sumner & Hartzog LLP

What sort of barriers would prevent an employee out on workers' compensation from returning to work or wanting to return to work after receiving a medical release, and why would an employer or insurance carrier want this employee to return to work anyway? These concerns are common of most employers with employees asserting workers' compensation claims, as well as employment claims. This article addresses these concerns and serves to guide employers and insurance carriers in return to work issues.

The goal of the North Carolina Workers' Compensation Act, N.C.G.S. Chapter 97, is to rehabilitate injured workers and return them to

### Primary Practice Areas

Workers' Compensation

### Education

Louisiana State University, (B.A., 2003)  
Mercer University, Walter F. George School of Law, (J.D., 2006)

### Bar Admissions

North Carolina, 2006

work, preferably earning the same or greater wages the employee was earning prior to his or her injury. However, the reality is that often times returning to work is not the primary goal for the employee, the employee's attorney or even the employer. You may be asking, "why not?" There are several possibilities. It may be that the employee lacks motivation or intent to return to work, or that the relationship between the employer and employee may be soured such that there is no longer a desire to continue their employment relationship. However, perhaps the most common reason is that a claim's value typically increases the longer an employee remains out of work.

In order for an employee receiving workers' compensation benefits to be justified in remaining out of work, the employee must be disabled under the Workers' Compensation Act. "Disability" is defined under the act as the "incapacity because of the injury to earn the wages which the employee was receiving at the time of the injury in the same or any other employment."<sup>1</sup> The landmark Court of Appeals case *Russell v. Lowes Product Distribution* outlines the ways in which an employee may prove disability, with the most common and reliable way being the existence of medical evidence supporting disability.<sup>2</sup> Typically, an injured employee has no obligation to accept an offer of employment until the employee obtains a medical release from his or her physician allowing a return to work. Even so, once the employee is released, he or she will likely be issued work restrictions, whether temporary or permanent, depending on the severity of the injury. It is important to be clear as to the employee's exact work restrictions when attempting a return to work. If the medical records are unclear, this act can be difficult, as neither the employer nor the carrier is allowed to communicate with any of the employee's medical providers.<sup>3</sup> One way of clarifying work restrictions is to hire a nurse case manager. It is important to recognize that the nurse case manager is hired as an impartial facilitator between the parties. However, as a practical matter, the nurse case manager often serves to act as a messenger to the

medical provider on behalf of the employer or carrier. Another less costly, but often less effective method is to send the physician a copy of an Industrial Commission Form 25R or an Industrial Commission Medical Questionnaire in an attempt to clarify the employee's work restrictions.

Once it has been established the employee has been released to return to work with restrictions, the first question the employer must ask is "has the employee been released at maximum medical improvement by his or her physician?" Maximum Medical Improvement, or MMI as is commonly known, serves as a statement by a treating physician that the patient/employee is as close as he or she will get from a medical standpoint to the condition the employee was in prior to the injury. Whether or not the employee has been released at MMI makes a considerable difference regarding the type of employment North Carolina courts have considered "suitable employment" when attempting a return to work. The term "suitable employment" is a loose term used by the Commission that takes into consideration factors such as the physical demands of the employment offered, the location of the employment and the pay rate offered, as well as pre-existing factors such as an employee's age, education level, work experience and unrelated health issues, just to name a few.<sup>4</sup> No one factor shall be considered in determining what employment is "suitable," but rather, the overall factors as a whole.<sup>5</sup> For a more in depth analysis of what employment will be considered "suitable," see the 2004 North Carolina Court of Appeals case *Collins v. Speedway Motor Sports Corp.*<sup>6</sup>

As previously mentioned, the North Carolina Court of Appeals has determined that what is considered "suitable employment" varies depending on whether the employee has reached MMI. In the 2007 unpublished decision of *Russo v. Food Lion*, the Court of Appeals determined there was an exception to what would be considered "suitable employment" in instances where the employee has not yet been released at MMI.<sup>7</sup> In this case, the Court determined a plaintiff's refusal of a temporary alternative duty position was unjustified in light of her doctor's

opinion that the position would be therapeutic. According to *Russo*, if the employee has been released to return to work, but has not yet been released at MMI, “suitable employment” will be loosely defined to include essentially any employment to the benefit of the employer that is within the employee’s physical and mental work restrictions, regardless of the tasks performed or wages earned (however, if the employee returns to work earning fewer wages he or she will be entitled to additional benefits<sup>8</sup>).

In the alternative, if the employee has been released at MMI with permanent work restrictions, the obligations of the employer become much more stringent. After an employee has reached MMI, any employment offered must be substantially the same regarding physical restrictions and wages as the pre-injury employment. The offered employment must also be a job “readily available” in the customary job market and one which has not been altered or modified for the particular employee.<sup>9</sup> For example, assume the employee was a construction worker prior to the injury. If the employee has NOT yet been released at MMI, the employer may offer the employee almost any employment, such as riding in a work truck and serving other employees water, as long as it is within the employee’s work restrictions. However, if that same employee has been released at MMI and a “water boy” position is not a typical position for which the employer would otherwise hire, the offered employment will not be determined “suitable.”

Now that we have determined the employee is capable of returning to work, why is it so important for the employer and carrier to return that employee to work? The reason is because it greatly diminishes the carrier’s, and ultimately the employer’s exposure. An employee out of work receiving weekly workers’ compensation benefits receives those benefits indefinitely until the employee returns to work at “suitable employment” or until otherwise ordered by the Industrial Commission.<sup>10</sup> Examples of when the Industrial Commission may allow a termination of benefits are when the employee fails to comply with vocational

rehabilitation or medical treatment, or when an employee unjustifiably refuses suitable employment. Theoretically, if the employee fails to return to work and the Commission does not allow a termination of benefits, the employee receives benefits indefinitely – not until retirement, but until death. However, if an employee returns to work, the speculation of permanent and total disability (never being able to return to work as a result of a workplace injury) no longer exists, greatly diminishing the value of the employee’s claim.

So if an employee’s return to work is such a useful tool for the employer, why would an employer not want to offer the employee subsequent employment? There may be a more obvious reason such as bad blood or distrust between the parties, although a common superficial fear or concern is that the employee will suffer a second injury, thus, worsening his or her previous injury. In instances such as these, it is important for the employer to exercise caution and best judgment in determining whether it would be wise to offer the employee subsequent employment.

As one can see, returning a workers’ compensation claimant to work may be an easy concept, though there are various factors to consider from a logical standpoint before attempting to do so. Unfortunately, there are rarely easy solutions to these issues. The most important things to remember are to weigh the pros and cons of having the employee return to work, essentially making sure the benefits outweigh the risks, and to make an informed decision before choosing to make a job offer.

For a more detailed explanation of the issues discussed herein and the impact of those decisions on potential employment law issues, we suggest you consult your local Cranfill Sumner and Hartzog workers’ compensation and employment attorneys.

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<sup>1</sup> N.C.G.S. § 97-2(9).

<sup>2</sup> *Russell v. Lowes Product Distribution*, 108 N.C.App. 762, 425 S.E.2d 454 (1993).

<sup>3</sup> *See Salaam v. North Carolina Dept. of Transp.*, 122 N.C.App. 83, 468 S.E.2d 536 (1996).

<sup>4</sup> *See* N.C. Indus. Comm’n Rules for Rehabilitation Professionals III(F)(G), 2004 Ann. R. (N.C.) 1017, 1018-19.

<sup>5</sup> *Id.*

<sup>6</sup> *Collins v. Speedway Motor Sports Corp.*, 165 N.C.App. 113, 598 S.E.2nd 185 (2004).

<sup>7</sup> *Russo v. Food Lion*, 187 N.C.App. 509, 653 S.E.2nd 255 (Table) N.C.App., 2007.

<sup>8</sup> See N.C.G.S. § 97-30, Partial Incapacity.

<sup>9</sup> N.C. Indus. Comm'n Rules for Rehabilitation Professionals III(F)(G), 2004 Ann. R. (N.C.) 1017, 1018-19.

<sup>10</sup> N.C.G.S. §§ 97-18.1, 32, North Carolina Industrial Commission Rule 404.

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## Cranfill Sumner & Hartzog LLP

### **Raleigh Office**

*P.O. Box 27808  
Raleigh, NC 27611  
(919) 828-5100  
(919) 828-2277 (fax)*

### **Wilmington Office**

*Culbreth Center  
1209 Culbreth Dr., Ste. 200  
Wilmington, NC 28405  
(910) 509-9778  
(910) 332-4639 (fax)*

### **Charlotte Office**

*P.O. Box 30787  
Charlotte, NC 28230  
(704) 332-8300  
(704) 332-9994 (fax)*

[www.cshlaw.com](http://www.cshlaw.com)

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