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Why Aren’t You Working?: Medlin with Proof of Disability Under the North Carolina Workers’ Compensation Act

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ABSTRACT

Individuals hurt on the job face potential uncertainty about their eligibility for benefits under the North Carolina Workers’ Compensation Act. Whereas the state’s courts historically interpreted the law as allowing an injured worker to prove loss of wage-earning capacity following a work injury without any regard to overall economic conditions, the North Carolina Supreme Court recently announced the demise of this absolutist rule in Medlin v. Weaver Cooke Construction, LLC and articulated a new rule allowing overall economic conditions to affect an injured worker’s claim of disability, at least in some circumstances.

The supreme court was wrong to adopt this change, as this Article explains. That said, the North Carolina Court of Appeals and the North Carolina Industrial Commission, the administrative agency charged with administering the workers’ compensation laws, are bound by the supreme court’s decision. The second purpose of this Article, therefore, is to fill a significant gap left by the supreme court’s recent decision by addressing when and how injured workers must concern themselves with the possible effects of overall economic conditions on their post-injury ability to earn wages. These issues went unaddressed by the supreme court in Medlin, and this Article attempts to fill in these details by suggesting a burden-shifting framework to govern adjudication of disputes over whether economic conditions—and not a work injury—are the cause of an individual’s loss of wage-earning capacity. This framework is consistent with the supreme court’s decision in Medlin, but also prevents the workers’

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compensation system from becoming unduly hostile to people hurt on the job and in need of help.

INTRODUCTION

Introduction

Uncertainty looms for injured workers in North Carolina. A recent state supreme court decision upended well-established standards governing a key component of workers’ compensation law, and the tens of thousands of people hurt on the job every year face new questions about their eligibility for wage-replacement benefits. Specifically, proving disability after a workplace injury threatens to become more difficult, at least in some circumstances, after the North Carolina Supreme Court’s decision in Medlin v. Weaver Cooke Construction, LLC.

In Medlin, the court abandoned decades of policy and sound precedent when it concluded that broad economic and market conditions were “undoubtedly relevant” to an injured worker’s claim to wage-replacement benefits after he is hurt on the job. The court explained:

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1. The North Carolina Workers’ Compensation Act is codified as Article 1 of Chapter 97 of the North Carolina General Statutes.


3. In lieu of the sometimes-used phrase “indemnity benefits,” this Article uses the phrase “wage-replacement benefits” to describe those cash payments received by injured workers who prove their eligibility for such payments under the Workers’ Compensation Act.


5. Id. at 738.

6. Id.
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Whether in a boom or bust economy, a claimant’s inability to find equally lucrative work [after a workplace injury] is a function of both economic conditions and his specific limitations. Both factors necessarily determine whether a specific claimant is able to obtain employment that pays as well as his previous position.²

Whereas the state’s courts previously held that overall economic circumstances were never relevant to a claim for wage-replacement benefits, the Medlin court concluded that, at least in some circumstances, an injured worker must be prepared to address the effect of overall economic conditions on his post-injury loss of wage-earning capacity.⁸ In other words, an individual claiming wage-replacement benefits under the North Carolina Workers’ Compensation Act must now be prepared in some circumstances to persuade the North Carolina Industrial Commission⁹ not only that his workplace injury has depressed his ability to earn wages—referred to in the workers’ compensation system as “disability”—but that the overall health of the economy is not the reason he is earning less than he did before he was hurt.¹⁰

The court got this wrong. That said, this Article, while explaining why the court was incorrect as a matter of policy and precedent, recognizes that the decision is binding on all state lower courts and administrative

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². Id. (emphasis added).
⁸. See id. at 737–38.
¹⁰. Medlin, 760 S.E.2d at 737–38.
agencies, which are now charged with the duty of applying the rule announced in *Medlin* to the tens of thousands of claims for workers’ compensation benefits brought annually in North Carolina. So while the first aim of this Article is to critique the decision in *Medlin*, a second, more important purpose is to suggest a reasonable, practical evidentiary framework within which the North Carolina Court of Appeals and the North Carolina Industrial Commission can abide by *Medlin*—a framework not provided by the supreme court in its decision. While the court in *Medlin* explained a claimant may be required in some cases to address the role of overall economic conditions on his loss of wage-earning capacity, the court said nothing about when or how a claimant would be required to do so. The court’s failure to provide a way of applying *Medlin* to future claims threatens needless, significant disruption under the state’s workers’ compensation law, and this Article seeks to understand *Medlin* in a way that avoids such disruption.

Prior to *Medlin*, it was well-established that when a worker was hurt on the job and suffered limitations or restrictions as a result of that workplace injury, any diminishment in his ability to earn wages was attributable to the injury, entitling him to wage-replacement benefits. In short, a claimant who proved he was hurt on the job, suffered work limitations as a result of the injury, and earned less following the injury met his burden of proving he was disabled. That is not always or necessarily the case after *Medlin*. Now, that same worker, at least in some cases, also may have to address whether any diminishment in his wage-earning capacity is the result of broader market conditions, not his workplace injury. Whereas broader market conditions were always irrelevant before *Medlin*, they are now sometimes relevant to an injured worker’s burden of proof before he is entitled to compensation for his lost wage-earning capacity. What the *Medlin* court did not explain, though, is when or how overall economic conditions are to be considered.

11. See Cannon v. Miller, 327 S.E.2d 888, 888 (N.C. 1985) (noting that the courts are obligated to observe supreme court precedent “until otherwise ordered by the Supreme Court”).

12. See *Medlin*, 760 S.E.2d at 737–38.

13. This Article uses “limitations” and “restrictions” interchangeably to refer to any limitations a worker faces in his abilities as a result of an on-the-job injury. Such restrictions can include, for example, limitations on the amount of weight a worker can lift, push, or pull, the amount of time a worker can stand or sit, or prohibitions on certain activities, such as climbing, kneeling, or crawling.

14. See infra Part I-A.

15. See *Medlin*, 760 S.E.2d at 738 (concluding that “a claimant’s inability to find equally lucrative work [after an on-the-job injury] is a function of both economic conditions and his specific limitations”).
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The new rule announced in *Medlin*, if not properly understood, threatens to be a pitfall for injured workers, one that could be interpreted as requiring individuals to always prove a negative regarding something over which they have no control: that the strength or weakness of the economy is not the reason they no longer earn as they did before they got hurt. Properly interpreted, though, the rule announced in *Medlin* poses no such threat, at least not in the vast majority of cases. Reasonable rules governing the evidentiary burden of production in workers’ compensation cases—rules familiar to the law generally\(^\text{16}\) and the North Carolina workers’ compensation system specifically\(^\text{17}\)—can be crafted in a way that abide by *Medlin* while still honoring the overall purpose of the workers’ compensation laws and preventing the workers’ compensation system from becoming intolerably inhospitable to those who are hurt on the job and to whom the system’s benefits are supposed to liberally flow.\(^\text{18}\)

Part I of this Article reviews the relevant principles and rules governing North Carolina’s workers’ compensation system, recounts the facts of *Medlin*, and explains the holding in *Medlin*, all in the service of critiquing the case as incorrectly decided. Part II suggests how the North Carolina Industrial Commission and the North Carolina Court of Appeals, both of which are obligated to honor *Medlin*,\(^\text{19}\) can properly implement *Medlin* in a manner consistent with the purpose and spirit of the state’s workers’ compensation laws, thereby minimizing the needless disruption *Medlin* causes.

At a time when benefits for those hurt on the job face reduction by legislation,\(^\text{20}\) it is especially inappropriate for the judiciary to threaten a

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16. *See, e.g.*, Smith v. Blythe Dev. Co., 665 S.E.2d 154, 155 (N.C. Ct. App. 2008) (stating that in the context of a motion for summary judgment, “[o]nce the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a prima facie case at trial”); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (“The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination... The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee’s rejection.”).

17. *See infra* Part II.

18. *See, e.g.*, Hollman v. City of Raleigh, Pub. Utils. Dep’t, 159 S.E.2d 874, 882 (N.C. 1968) (“We have held in decision after decision that our Workmen’s Compensation Act should be liberally construed to effectuate its purpose to provide compensation for injured employees or their dependents, and its benefits should not be denied by a technical, narrow, and strict construction.”).

19. *See supra* note 11 and accompanying text.

similar reduction by way of interpretation. At first glance, the North Carolina Supreme Court’s decision in Medlin threatens to do just that. Properly understood, though, the decision in Medlin need not have this effect. It is to an explanation of this proper understanding of Medlin that this Article is dedicated.

I. THE LAW OF DISABILITY BEFORE AND AFTER MEDLIN

Most of the basic principles of workers’ compensation law in North Carolina are unaffected by Medlin, but the single change Medlin threatens to introduce, if the case is not properly understood, is potentially dramatic. To appreciate the proper scope of the change adopted by Medlin, a brief review of the relevant provisions of the state’s workers’ compensation law is required.

A. Workers’ Compensation Law Before Medlin

North Carolina established its workers’ compensation system in the early twentieth century “to compel industry to take care of its own wreckage” by requiring “that the wear and tear of human beings in modern industry should be charged to the industry just as the wear and tear of machinery has always been charged.” At their core, workers’ compensation laws are a compromise between workers and employers: injured workers forego common law remedies for injuries suffered on the job.

23. See, e.g., Kellams v. Carolina Metal Prod., Inc., 102 S.E.2d 841, 844 (N.C. 1958) (stating that “[t]he fixing of maximum and minimum awards in industry is a compromise”).
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job in exchange for the "swift and certain remedy"\textsuperscript{24} of medical care and compensation for lost earning capacity,\textsuperscript{25} and employers agree to pay those limited benefits in exchange for being absolved of liability for any damages beyond those provided by the workers' compensation system.\textsuperscript{26}

The concept of disability lies at the heart of the workers' compensation system. The North Carolina Workers' Compensation Act defines disability as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or other employment."\textsuperscript{27} Thus, in the world of workers' compensation, the definition of disability "specifically relates to the incapacity to earn wages, rather than only to physical infirmity."\textsuperscript{28} North Carolina has employed this standard since the advent of the state's workers' compensation system.\textsuperscript{29} When a worker is disabled, the law provides cash payments to make up for lost earnings, with the amount of those payments determined by his pre-injury wages and the degree of disability following injury.\textsuperscript{30}

\begin{thebibliography}{9}
\bibitem{24} Barnhardt v. Yellow Cab Co., 146 S.E.2d 479, 484 (N.C. 1966).
\bibitem{25} See, e.g., Branham v. Denny Roll & Panel Co., 25 S.E.2d 865, 868 (N.C. 1943) ("In short, under our Act wages earned, or the capacity to earn wages, is the test of earning capacity, or, to state it differently, the diminution of the power or capacity to earn is the measure of compensability."). Medical care and payment of wage-replacement benefits still constitute the core of North Carolina's workers' compensation system. \textit{See} N.C. GEN. STAT. § 97-25(a) (2015) ("Medical compensation shall be provided by the employer."); N.C. GEN. STAT. § 97-29(a) (2015) ("When an employee qualifies for total disability, the employer shall pay or cause to be paid . . . to the injured employee a weekly compensation equal to sixty-six and two-thirds percent (66 2/3\%) of his average weekly wages."); N.C. GEN. STAT. § 97-30 (2015) ("[W]here the incapacity for work resulting from the injury is partial, the employer shall pay, or cause to be paid . . . to the injured employee during such disability, a weekly compensation equal to sixty-six and two-thirds percent (66 2/3\%) of the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter.").
\bibitem{26} See, e.g., Barnhardt, 146 S.E.2d at 484 (citing Hendrix v. Linn-Corriher Corp., 345 S.E.2d 374, 378-79 (N.C. 1986) and Fleming v. K-Mart Corp., 324 S.E.2d 214, 216 (N.C. 1985)) (noting that employers benefit from the compromise because workers' compensation laws set "a limited and determinate liability"); \textit{see also} N.C. GEN. STAT. § 97-10.1 (2015) (stating that the Workers' Compensation Act is the exclusive remedy for injured workers who seek recovery for their injuries).
\bibitem{27} N.C. GEN. STAT. § 97-2(9) (2015).
\bibitem{28} Medlin v. Weaver Cooke Constr., LLC, 760 S.E.2d 732, 736 (N.C. 2014).
\bibitem{29} Id. (citing the definition of "disability" used since the adoption of North Carolina's first workers' compensation law in 1929).
\bibitem{30} See N.C. GEN. STAT. § 97-29(a) ("When an employee qualifies for total disability, the employer shall pay or cause to be paid . . . to the injured employee a weekly compensation equal to sixty-six and two-thirds percent (66 2/3\%) of his average weekly wages."); N.C. GEN. STAT. § 97-30 ("[W]here the incapacity for work resulting from the injury is partial, the employer shall pay, or cause to be paid . . . to the injured employee
The North Carolina Supreme Court articulated a three-part test an injured worker must meet to prove disability in *Hilliard v. Apex Cabinet Co.*, a test reaffirmed in *Medlin*. To show disability, an injured worker must prove:

1. that [he] was incapable after his injury of earning the same wages he had earned before his injury in the same employment, 
2. that [he] was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and
3. that [his] incapacity to earn was caused by [his] injury.

This final element—that the injured workers' injury was the cause of his diminished earning capacity—was long ago recognized as "the very sheet anchor of the Workmen's Compensation Act." The burden of proving all three prongs of disability generally lies with the injured worker.

Prior to *Medlin*, overall economic conditions were never relevant to a worker's claim that his injury caused disability. Rather, North Carolina's courts assessed disability by asking whether the injured worker could earn his pre-injury wages "under normally prevailing market conditions" or "in the open market under normal employment conditions." In other words, before *Medlin*, an injured worker and his employer were always required to take the labor market as they found it, and the injured worker's ability to compete within that labor market was assessed against non-injured workers in the same labor market, no matter the strength or weakness of the market. In the context of such a market, the courts would during such disability, a weekly compensation equal to sixty-six and two-thirds percent (66 2/3%) of the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter.

32. *See Medlin*, 760 S.E.2d at 737 ("We reaffirm that a claimant seeking to establish that he is legally disabled must prove all three statutory elements as explained in *[Hilliard]*.").
35. *See Hilliard*, 290 S.E.2d at 683 ("In workers' compensation cases, a claimant ordinarily has the burden of proving both the existence of his disability and its degree." (citing *Hall v. Chevrolet Co.*, 139 S.E.2d 857, 861 (N.C. 1965)). The *Medlin* court reaffirmed this aspect of *Hilliard*, too. *See Medlin*, 760 S.E.2d at 736 ("The burden of proving the existence and extent of a disability is generally carried by the claimant." (citing *Clark v. Wal-Mart*, 619 S.E.2d 491, 493 (N.C. 2005))).
37. *Id.*
38. *Id.*
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ask if the injured worker’s limitations stemming from his injury affected “the employee’s own ability to compete in the labor market.” If those limitations affected the worker’s ability to compete with other, non-injured individuals in the labor market such that the injured worker was unable to find employment or was unable to find work that paid him as much as he earned before getting hurt, then the injured worker met his burden of proving the injury-related limitations were the cause of his disability. Injury-related restrictions resulting in diminished earning capacity equaled disability—without regard to overall economic conditions.

So, for example, in Donnell v. Cone Mills Corp., the court of appeals rejected an employer’s argument that an injured worker with limitations following his injury was not disabled if he lost his job as a result of a plant closing:

Our decision does not ignore that [the injured worker’s] job with the [employer] ended because the plant where he worked was closed. But we do not believe this to be dispositive on the disability issue. The crucial fact is that [the injured worker’s] earning capacity was diminished because he developed the occupational disease of byssinosis during his employment with the [employer].

The Donnell court cited Hilliard’s definition of disability as governing the tribunal’s inquiry and the injured worker’s burden of proof, thereby interpreting Hilliard as disregarding overall economic conditions when determining disability. The court of appeals later approvingly cited Donnell in Preslar v. Cannon Mills Co., in which a deceased textile worker’s executrix attempted to collect benefits due under the Act, over the

39. Id. at 805.
40. Donnell v. Cone Mills Corp., 299 S.E.2d 436 (N.C. Ct. App. 1983). While it is true that the court of appeals, and not the supreme court, developed much of the precedent discussed herein, the court of appeals’ decisions are precedent-setting unless and until the supreme court says otherwise. See, e.g., John V. Orth, “Without Precedential Value”—When the Justices of the Supreme Court of North Carolina are Equally Divided, 93 N.C. L. Rev. 1719, 1735–36 (2015) (describing the development of the court of appeals as a precedent-setting court).
41. Donnell, 299 S.E.2d at 439. The North Carolina Workers’ Compensation Act was amended in 1935 to cover so-called occupational diseases. See N.C. GEN. STAT. § 97-53 (2015) (enumerating occupational diseases); Murphy v. Am. Enka Corp., 195 S.E. 536, 537–38 (N.C. 1938) (explaining that the legislature amended the Workers’ Compensation Act in 1935 to include occupational diseases). Any difference between occupational diseases and other kinds of workplace injuries is not relevant to this Article, as the same definition of disability and the same manner of proving disability applies to both.
42. See Donnell, 299 S.E.2d at 438 (quoting Hilliard’s three-pronged definition of disability).
The employer argued the benefits were not due to the executrix because the worker had not been disabled as a result of his admitted occupational lung disease. In Preslar, the injured worker retired from employment following twenty-five years of work as a weave room foreman; the worker then rejoined the employer less than a year later. The worker was thereafter told by a doctor "that he should not work in a dusty environment" because of decreased pulmonary function, and he quit his new job four days after returning to work for the employer. There was evidence in the record, however, that the worker quit his job not because of limitations related to his occupational lung disease but "because he could not meet production." While the employer argued that the worker was not disabled as a result of his occupational lung disease because he briefly rejoined the employer's workforce before quitting, thereby failing to meet the causation prong of the Hilliard test, the court concluded that it would "not require the claimant to prove that the employer's refusal to rehire the defendant was specifically because of the environmental restriction." Rather, the court said, "We may assume that, at a minimum, an employer would not rehire a dust-sensitive former employee . . . to work in a dusty environment. And this restriction . . . may significantly limit the employability of a long-time textile worker with little education and no other experience or training." The court concluded that restrictions arising from a workplace injury or occupational disease, combined with factors such as lack of training or other work experience, are "competent to establish a causal nexus between the occupational disease and the partial or total inability to earn wages in the same or any other employment." Again, the focus of the disability inquiry was on the

44. See id. at 210.
45. See id. (explaining that the injured worker's widow was attempting to collect "partial disability compensation" from the employer and that the employer contended that the deceased worker's admitted occupational disease did not result in any disability prior to his death).
46. See id. at 211.
47. See id. at 210–11.
48. See id. at 211.
49. See id. at 213 (summarizing the employer's argument as being that "there is no evidence that [the injured worker's] environmental restriction was the reason [he] was not rehired for work in a dust-free area").
50. Id. at 214.
51. Id.
52. Id.

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injury- or disease-related limitations and the resulting loss of wage-earning capacity, with a presumption that such limitations caused disability.\textsuperscript{53}

The court of appeals provided what would become definitive guidance\textsuperscript{54} on proving disability under \textit{Hilliard} in \textit{Russell v. Lowes Product Distribution};\textsuperscript{55} this guidance never required an injured worker to consider or address overall economic conditions. After reiterating that an injured worker shoulders the burden "to show that he is unable to earn the same wages he had earned before the injury, either in the same employment or in other employment,"\textsuperscript{56} the \textit{Russell} court identified four ways by which an injured worker could meet this burden:

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.\textsuperscript{57}

\textsuperscript{53} The textile industry provides an interesting context in which to explore the rule announced in \textit{Medlin}. Between 1977 and 1997, North Carolina lost approximately 82,000 textile jobs. See \textit{North Carolina Textiles, CAROLINA CONTEXT} (UNC Center for the Study of the American South, Program on Public Life, Chapel Hill, N.C.), Jan. 2009, at 2, http://www.textileconnect.com/documents/resources/carolina-context.pdf. The state then lost about 153,000 textile jobs from 1996 to 2006, and another 10,000 in 2007 alone. See \textit{id} at 3. As demonstrated by \textit{Donnell} and \textit{Preslar}, mill workers not infrequently developed occupational diseases as a result of their employment. Since the textile industry has now largely collapsed in North Carolina, are textile workers who suffered workplace injuries or occupational diseases, and who still face limitations as a result, considered disabled today if, but for the demise of the textile industry, they would have been able to return to some form of employment within the textile industry? Application of \textit{Medlin} could suggest those workers are not disabled. But that cannot be right, as the law cannot be that the most vulnerable injured workers—those hurt in a dead or dying industry—are provided less protection under the state’s workers’ compensation system than workers hurt in a robust, dynamic industry that is more likely to be able to accommodate the injured worker’s restrictions because the industry’s health creates plentiful jobs in the industry.

\textsuperscript{54} Definitive, that is, until \textit{Medlin}. See \textit{Medlin v. Weaver Cooke Constr., LLC}, 760 S.E.2d 732, 737 (N.C. 2014) (stating that \textit{Russell} "diverged from" the statutory definition of disability encapsulated by the \textit{Hilliard} test). \textit{But see id.} (stating that the \textit{Russell} factors are a proper, though not exclusive, means of proving the first two prongs of disability under \textit{Hilliard}).


\textsuperscript{56} \textit{id.} at 457 (citing \textit{Hilliard} v. Apex Cabinet Co., 290 S.E.2d 682, 684 (N.C. 1982)).

\textsuperscript{57} \textit{id}. (citations omitted).
Once an injured worker used one of the so-called Russell factors to carry his burden of proving disability, "the burden of production shift[ed] to the employer to show 'that suitable jobs [we]re available' and that the employee [was] capable of obtaining a suitable job 'taking into account both physical and vocational limitations.'"

Prior to Medlin, the second, third, and fourth of the Russell factors—all of which address situations in which an injured worker is not completely precluded from working as a result of injury-related limitations—allowed an injured worker to prove disability, including causation under the third Hilliard prong, by demonstrating that he suffered limitations as a result of his workplace injury and that he was unable to find employment, or could only find employment at a lesser wage, within those limitations. The focus of the inquiry at that time was the injured worker's restrictions, without regard to the health of the labor market or economy. And that was as it should be still: the labor market, whatever its overall condition, is the same for all workers, injured and healthy. The very idea behind compensating workers hurt on the job is that, because of their injury and any resulting limitations, they cannot compete as effectively in the labor market as non-injured job candidates. For both the injured and the non-injured, the job market's strength or weakness is a constant, the only relevant variables being the limitations injured workers experience because of their on-the-job injuries and the effect of those limitations on their attractiveness as job candidates. It is by those variables, therefore, that disability should be—and, prior to Medlin, was—judged, without any regard to any temporary economic "boom or bust."

Indeed, the North Carolina Supreme Court itself approved such an approach when, in Demery v. Perdue Farms, Inc., it summarily affirmed a court of appeals decision that cited Russell as the proper means by which an injured worker could meet his burden under Hilliard for proving disability. 59


59. The first of the Russell factors is probably not relevant to Medlin or this Article's analysis of Medlin because the rule announced in Medlin applies only when an injured worker has not been written out of work entirely but instead has been permitted to return to work under certain limitations or restrictions. The first Russell factor, on the other hand, addresses the manner by which an injured worker who is written entirely out of work can prove disability. In that situation, the Medlin court would presumably agree that medical evidence demonstrating a complete inability to work as a result of an on-the-job injury would be sufficient to meet all three prongs of Hilliard's definition of disability, including causation, without ever requiring any consideration of overall economic conditions.


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The supreme court agreed that an inquiry into the injured worker’s ability to compete in the job market, without any reference to overall economic conditions, was required to prove a worker’s disability was caused by his on-the-job injury. Limitations stemming from his work injury, coupled with either an inability to find work or an inability to find work that paid as much as the worker earned before his injury, provided the necessary causal link between the two.

Time and again following Russell, the court of appeals used that decision’s formulation to assess disability, and never did the court hold that an injured worker was required to address whether economic conditions affected his loss of wage-earning capacity. Rather, the court did the opposite. Just two years after Russell, the court of appeals in Fletcher v. Dana Corp. determined that the claimant had met the second Russell factor to prove disability and that the issue before the court was “whether [the injured worker was] entitled to receive compensation benefits where his inability to earn the same wages was caused in part by unavailability of area jobs consistent with his physical limitations.” To this question, the Fletcher court gave an unequivocal answer: “an employee who suffers a work-related injury is not precluded from workers’ compensation benefits when that employee, while employable within limitations in certain kinds of work, cannot after reasonable efforts obtain employment due to unavailability of jobs.” The court pointed out that this rule was supported by a leading workers’ compensation scholar and had been adopted in other jurisdictions. There can be no mistake about the meaning of Fletcher: overall economic conditions were not relevant to determining disability.

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63. Id.; see Demery, 545 S.E.2d at 490 (applying Russell to determine whether the claimant proved all three parts of disability as defined in Hilliard). But see Medlin, 760 S.E.2d at 737 (stating that Russell strayed from the statutory definition of “disability” and that Russell cannot be used to prove the causation prong of disability articulated in Hilliard).

64. See Demery, 554 S.E.2d 337 (affirming the reasoning of the court of appeals in Demery, 545 S.E.2d 485).


66. Id. at 34.

67. Id. at 37.

68. The court quoted Professor Larson explaining, “The fact that the wage loss comes about through ... unavailability of employment rather than through incapacity to perform the work does not change the result [of disability].” Id. at 35 (quoting 7 Lex K. Larson, Larson’s Workers’ Compensation Law § 84.01[1], at 84-2 (Matthew Bender, Rev. Ed. 2015)).

69. See id. at 35–37 (citing courts in Florida, Michigan, and Maine as reaching the same conclusion).
It is not surprising, then, that in *Britt v. Gator Wood, Inc.*,\(^{70}\) the court of appeals again rejected an employer's argument that an economic downturn and the resulting layoff of employees, not injury-related limitations, was the cause of the worker's loss of wage-earning capacity, thereby precluding a finding that the employee was disabled.\(^{71}\) The court wrote that the employer "focused on the wrong issue," explaining that "while the immediate cause of the loss of [the injured worker's] wages . . . may have been the lay-off, that fact does not preclude a finding of disability . . . if, because of [the worker's] injury, he was incapable of obtaining a job in the competitive labor market."\(^{72}\) Again, the disability inquiry was focused on the worker's limitations, not the economy's health.\(^{73}\)

The court of appeals, prior to *Medlin*, occasionally referenced overall economic conditions in its analysis of disability claims, but never did the court conclude that such conditions could affect a claim of disability. The court in *Segovia v. J.L. Powell & Co.*,\(^{74}\) for example, affirmed a decision of the Industrial Commission that had rejected a claim of disability by an injured worker who was laid off because of "a significant decline in business, which precipitated the layoff of employees"\(^{75}\) and "[the injured worker's] lack of interest in returning to work."\(^{76}\) The Industrial Commission went so far as to find that the injured worker "sabotaged efforts to find alternative employment."\(^{77}\) The worker in *Segovia* had been released to return to work without any limitations,\(^{78}\) and on that basis alone—not to mention his bad faith as manifested in the "sabotage" found by the Industrial Commission\(^{79}\)—he was unable to prove disability, without any need to consider or address overall economic conditions.\(^{80}\)

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71. Id. at 921.
72. Id.
73. See id. (stating that an injured worker proves disability "by offering evidence consistent with one of the methods of proof set forth in Russell" and that, because the injured worker presented evidence of impairment of his earning capacity, he met his burden of proving disability).
75. Id. at 558.
76. Id. at 559.
77. Id.
78. See id. at 558.
79. Id. at 559.
80. See Medlin v. Weaver Cooke Constr., LLC, 748 S.E.2d 343, 350 (N.C. Ct. App. 2013) (Geer, J., dissenting) (noting that because the injured worker in *Segovia* was released without restrictions, suitable jobs were available to the injured worker, and the injured worker was uninterested in returning to work, the injured worker was unable to meet the
Segovia, in other words, did not stand for the proposition that overall economic conditions could defeat an injured worker's claim of disability. The court of appeals affirmed this understanding of Segovia in two other cases: Eudy v. Michelin North America, Inc., in which the court emphasized that the worker in Segovia failed to prove disability because he expressed a "lack of interest in returning to work"; and Graham v. Masonry Reinforcing Corp. of America, which noted that the employee in Segovia had been cleared to return to work without restrictions, thereby precluding a showing of disability. In Segovia, Eudy, and Graham, then, the court of appeals made clear that economic conditions were not part of the disability inquiry.

The law, therefore, was well-established before Medlin: an injured worker who proved that he suffered limitations as a result of a workplace injury and was thereafter unable to earn wages met his burden of proving disability under the North Carolina Workers' Compensation Act. Overall economic conditions and the strength or weakness of the labor market were never relevant to the analysis. Medlin would change this.

B. Workers' Compensation Law After Medlin

Claude Medlin began working in the commercial construction industry after graduating from North Carolina State University in 1974 with a degree in civil engineering. He started working for Weaver Cooke Construction in 2006 and held positions there as a project manager and an estimator. Medlin injured his shoulder at work in May 2008 and continued to work for Weaver Cooke Construction until November 2008 "when he was terminated as part of widespread layoffs both within the company, and within the construction industry as a whole." Medlin's employer thereafter accepted his injury as compensable, providing medical proof of disability under Russell, without regard to overall economic conditions), aff'd, 760 S.E.2d 732 (N.C. 2014).

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82. See id. at 89 (citing Segovia, 608 S.E.2d at 558–59).
84. See id. at 680–81 ("[E]ven assuming arguendo that [the injured worker] was terminated for an economic downturn, this would not preclude a finding that [the injured worker] was disabled and thus eligible to receive indemnity benefits during the term of his disability." (citing Britt v. Gator Wood, Inc., 648 S.E.2d 917, 921 (2007))).
86. Id.
87. Id.
care and paying wage-replacement benefits beginning in February 2009. Also in February 2009, Medlin underwent shoulder surgery and started physical therapy. Medlin’s therapy was halted in April 2009 when he began to complain of increased pain in his shoulder; an MRI done in late 2009 showed Medlin suffered from a superior labral tear to his shoulder. Concluding that the tear was not related to Medlin’s work injury because it was not present when shoulder surgery was performed earlier that year, Medlin’s doctors declared him to be at maximum medical improvement for his work injuries and released him from their care with permanent work restrictions that included not lifting more than ten pounds, not climbing ladders, and not performing repetitive overhead activities.

88. See id.
89. Id.
90. Id. at 733–34.
91. See id. at 734. With one inexplicable exception, every tribunal to consider Medlin’s claim consistently concluded that the permanent work restrictions imposed by his doctors were the result of his workplace injury. See Opinion and Award by Philip A. Baddour III at 5, Medlin v. Weaver Cooke Constr., LLC, 760 S.E.2d 732 (N.C. 2014) (I.C. No. 128568), http://www.ic.nc.gov/livelink/livelink.exe?func=ll&objaction=overview&objid=207401 (stating that the claimant’s authorized physician imposed work restrictions of lifting limitations to under ten pounds and proscribed repetitive overhead activities); Opinion and Award by Danny Lee McDonald at *3, Medlin v. Weaver Cooke Constr., LLC, 760 S.E.2d 732 (N.C. 2014) (I.C. No. 128568), 2012 WL 5266012, at *3 (stating the same); Medlin v. Weaver Cooke Constr., LLC, 748 S.E.2d 343, 345 (N.C. Ct. App. 2013) (stating that claimant’s authorized physician imposed permanent work restrictions that included not lifting more than ten pounds, not climbing ladders, and not performing repetitive overhead activities), aff’d, 760 S.E.2d 732 (N.C. 2014). The exception to this consistent conclusion can be found at the end of the supreme court’s opinion in Medlin. After discussing at length the interplay of disability and overall economic conditions in the workers’ compensation system (a discussion the necessity of which was predicated on Medlin’s restrictions being injury-related), the court wrote that the factual findings made by the Full Commission “establish, among other things, that any limitations because of a superior labral tear were likely not caused by [Medlin’s] work-related injury.” Medlin v. Weaver Cooke Constr., LLC, 760 S.E.2d 732, 738 (N.C. 2014). This observation by the court is inexplicable for two reasons. First, the Full Commission did not find that any limitations Medlin suffered were unrelated to his work injury, so there is no such finding for the court to uphold. Second, if this finding had, in fact, been made by the Full Commission, Medlin’s claim of disability would have failed on well-established grounds that if a claimant suffers no restrictions as a result of his work injury, then he cannot make a showing of disability. See, e.g., Segovia v. J.L. Powell & Co., 608 S.E.2d 557, 559 (N.C. Ct. App. 2004) (noting that the Full Commission properly concluded the claimant was not disabled because he was released by his doctor without any restrictions). That would have rendered unnecessary the discussion of disability and economics undertaken in the opinions issued by the deputy commissioner, Full Commission, court of appeals, and supreme court. It is untenable to maintain that four separate tribunals, including the supreme court itself, undertook such an unnecessary discussion.
Medlin sought employment in the construction industry following his layoff in November 2008, testifying that he made hundreds of job inquiries while trying to find work equivalent to his pre-injury position.\textsuperscript{92} None were successful, and Medlin remained jobless.\textsuperscript{93} In December 2010, while Medlin was out of work and receiving wage-replacement benefits, his employer filed an application with the Industrial Commission to terminate payment of those benefits on the grounds that Medlin “could not show that he was legally disabled because his inability to find another position as an estimator was due to the economic downturn, rather than to any physical limitations.”\textsuperscript{94} A deputy commissioner of the Industrial Commission concluded in May 2011 that Medlin had not proved he was disabled,\textsuperscript{95} and Medlin appealed to the Full Commission.\textsuperscript{96} The Full Commission found that Medlin had, in fact, sought employment following his layoff.\textsuperscript{97} Based on the testimony of a vocational expert who testified at the hearing, the Full Commission also found that the job of estimator, which Medlin had held with his employer and had sought with new employers following his layoff, was within Medlin’s physical limitations.\textsuperscript{98} Finally, the Full Commission noted that the vocational expert testified that Medlin would be able to return to the job of estimator “but for the current economic downturn.”\textsuperscript{99} The Full Commission, in affirming the deputy commissioner, concluded that an injured worker “is unable to meet [his] burden of proving disability where, but for economic factors, the employee is capable of returning to his pre-injury position”\textsuperscript{100} and that Medlin could have returned to work as an estimator “but for the current economic downturn affecting both [Medlin’s former employer] as well as the construction industry as a whole.”\textsuperscript{101} A bad economy trumped injury-related limitations that diminished wage-earning capacity, according to the Full Commission.\textsuperscript{102}

Medlin appealed the Full Commission’s decision to the North Carolina Court of Appeals, which affirmed the Full Commission’s decision.
by a split vote.\textsuperscript{103} The majority at the court of appeals found that Medlin “failed to show \textit{any} causal connection between his injury and subsequent wage loss,”\textsuperscript{104} thereby failing to meet his burden of proving disability under \textit{Hilliard}.\textsuperscript{105} Rather, the majority reasoned, “the uncontested findings of fact establish that [Medlin’s] inability to earn his pre-injury wages is not attributable to his injury but is based solely on the large-scale economic downturn affecting the construction industry as a whole.”\textsuperscript{106} The court interpreted \textit{Segovia}, just as the Full Commission had,\textsuperscript{107} as standing for the proposition that when the Commission finds as fact that overall economic conditions cause an injured worker’s loss of wage-earning capacity, such a finding can properly support the legal conclusion that the worker is not disabled and, therefore, not eligible for wage-replacement benefits.\textsuperscript{108} The majority also distinguished \textit{Eudy} and \textit{Graham} on the ground that in those cases the injured workers could not perform their pre-injury jobs as a result of their restrictions, whereas Medlin was capable of doing so.\textsuperscript{109}

This was all too much for the dissent at the court of appeals. According to the dissent, the majority was simply wrong about the injured worker in \textit{Graham}: he was, just like Medlin, able to return to his pre-injury job.\textsuperscript{110} More generally, “[w]hile the majority opinion attempt[ed] to

\textsuperscript{103} \textit{Medlin}, 748 S.E.2d at 347 (affirming the decision of the North Carolina Industrial Commission).

\textsuperscript{104} \textit{Id.} at 346.

\textsuperscript{105} \textit{See id.} at 345–46.

\textsuperscript{106} \textit{Id.} at 347. Appellate court review of the Full Commission’s decisions “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.” \textit{Id.} at 345 (quoting \textit{Richardson v. Maxim Healthcare/Allegis Grp.}, 669 S.E.2d 582, 584 (N.C. 2008)). Additionally, when “findings of fact are not challenged [on appeal] and do not concern jurisdiction, they are binding on appeal.” \textit{Medlin}, 760 S.E.2d at 738. “The Commission’s conclusions of law are reviewed de novo” by the appellate courts. \textit{Id.}

\textsuperscript{107} \textit{See Medlin}, 748 S.E.2d at 346–47 (citing the Full Commission’s reliance on \textit{Segovia} in concluding that Medlin’s loss of wages “is not attributable to his injury but is based solely on the large-scale economic downturn affecting the construction industry as a whole”).

\textsuperscript{108} \textit{See id.} at 347 (concluding that the Full Commission did not err when it relied on \textit{Segovia} to conclude Medlin failed to prove disability).

\textsuperscript{109} \textit{See id.}

\textsuperscript{110} \textit{See id.} at 351 (Geer, J., dissenting) (noting that “the majority opinion incorrectly states that the laid off employee in \textit{Graham} was not physically capable of performing his former job and, for that reason, sought different work” and reciting the employer’s argument in \textit{Graham} that the injured worker “was fired because of ‘economics’ and poor job
distinguish *Eudy* and *Graham* factually, it never address[e[d] those opinions’ discussion of *Segovia* or the language in the actual *Segovia* opinion limiting its holding.” The dissent argued that the majority’s reading of *Segovia* was too broad because the injured worker there was not simply unable to find work because of a weak jobs market, but failed to prove disability through the *Russell* framework because he expressed a lack of interest in returning to work and “sabotage[d] efforts to find alternative employment.” Additionally, the dissent noted that in *Eudy*, the court had already rejected an interpretation of *Segovia* as standing for the proposition that an injured worker was not disabled if the reason for his loss of wages was an overall economic downturn. The dissent also pointed to *Britt*—which the majority never discussed—and *Graham* as standing for the rule that when an injured worker retains some sort of limitation as a result of his workplace injury, poor economic conditions or a weak jobs market cannot insulate an employer from the obligation to pay wage-replacement benefits if the injured worker cannot find a job. The dissent also noted the court’s decision in *Demery*, which relied on the *Russell* framework to assess whether an employee met his burden of proving disability under *Hilliard*; this case, which did not assess economic factors, was summarily affirmed by the supreme court, making it binding precedent.

The dissent concluded, “It is too simplistic to assume, as the Commission did and the majority opinion does, that in a down economy, an employable employee with restrictions cannot show that his difficulties in performance” (citing *Graham v. Masonry Reinforcing Corp. of Am.*, 656 S.E.2d 676, 678 (N.C. Ct. App. 2008)).

111. *Id.*

112. *Id.* at 349–50 (quoting *Segovia v. J.L. Powell & Co.*, 608 S.E.2d 557, 559 (N.C. Ct. App. 2004)); see also *supra* notes 74–84 and accompanying text.

113. *See Medlin*, 748 S.E.2d at 349–50 (stating that the injured worker in *Segovia* was unable to meet his burden under any of the *Russell* factors and that the case could not be read as standing for the “sweeping proposition” that an employee is unable to prove disability if the cause of his wage loss is overall economic conditions); see also *supra* notes 73–74 and accompanying text.

114. *Medlin*, 748 S.E.2d at 350 (“While the immediate cause of the loss of [the injured worker’s] wages . . . may have been the lay-off, that fact does not preclude a finding of disability . . . . [A]n injured employee’s earning capacity is determined by the employee’s own ability to compete in the labor market. Thus, the fact that [the injured worker] was laid off does not preclude a finding of total disability if, because of [the worker’s] injury, he was incapable of obtaining a job in the competitive labor market.” (quoting *Graham*, 656 S.E.2d at 680–81)).

115. *See id.* at 348 (noting that the majority “overlook[ed]” *Demery*).

116. *See id.* at 349 (stating that “*Demery*, because it was affirmed by the supreme court, is controlling”).
obtaining another job are due to his injury." \(^{117}\) The court, the dissent argued, "should recognize not only (1) that the prospective employers may well choose an applicant without restrictions, but also (2) that an employee is unlikely to be able to prove that he lost out on the job because of his restrictions." \(^{118}\) Therein lay the twin faults of the majority's decision. First, substantively, the opinion ran counter to the longstanding, sound rule that it is an employee's limitations and their effect on wage-earning capacity—not the condition of the jobs market—that is the relevant standard for determining disability. Second, the opinion provided no evidentiary guidance to injured workers who must carry the burden of proving disability.

Both of these faults recurred on appeal to the North Carolina Supreme Court, when the court unanimously affirmed the court of appeals. \(^{119}\) When it decided the case, the supreme court first reaffirmed the three-part test for disability outlined in *Hilliard* and explained that *Hilliard*'s explication of disability "was grounded explicitly in the statutory definition of disability." \(^{120}\) The same could not be said, according to the court, for the *Russell* framework crafted by the court of appeals, which the court said "expanded upon, and perhaps diverged from, that grounding." \(^{121}\) The supreme court explained that the split decision in the court of appeals was a result of that lower court's previous inconsistent application of *Russell*: some decisions held that meeting one of the *Russell* factors satisfied all three prongs of disability identified in *Hilliard*, and other decisions held that the *Russell* framework could properly be used to satisfy only the first two prongs of *Hilliard*'s definition of disability, with additional proof necessary to prove the causal link between injury-related limitations and depressed earning capacity. \(^{122}\) This latter interpretation was the correct

\(^{117}\) *Id.* at 352.

\(^{118}\) *Id.*

\(^{119}\) See *Medlin v. Weaver Cooke Constr., LLC*, 760 S.E.2d 732, 738 (N.C. 2014) (affirming the decision by the court of appeals).

\(^{120}\) *Id.* at 737.

\(^{121}\) *Id.*

\(^{122}\) See *id.* at 736–37. A review of the cases cited by the supreme court suggests this conclusion is incorrect. The court's opinion cited four cases to illustrate that the court of appeals would sometimes allow a claimant to prove all three prongs of *Hilliard*'s definition of disability by meeting one of the four *Russell* factors. See *id.* at 737 (citing *Campos-Brizuela v. Rocha Masonry, L.L.C.*, 716 S.E.2d 427 (N.C. Ct. App. 2011), *Nobles v. Coastal Power & Elec., Inc.*, 701 S.E.2d 316 (N.C. Ct. App. 2010), *Barrett v. All Payment Servs., Inc.*, 686 S.E.2d 920 (N.C. Ct. App. 2009), and *Boylan v. Verizon Wireless*, 685 S.E.2d 155 (N.C. Ct. App. 2009)). The court quoted material from each of these cases suggesting that meeting one of the four *Russell* factors satisfied the three prongs of disability articulated in *Hilliard*. See *id.* On this point, then, the court was correct. The same cannot
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one, according to the Medlin court.\textsuperscript{123} The Russell framework provided a proper, though not exclusive, means of proving only the first two prongs of disability recited in Hilliard: depressed earning capacity in either the same

be said of the court’s conclusion that other panels of the court of appeals had held that meeting one of the Russell factors met only the first two prongs of disability articulated in Hilliard, with additional proof needed to satisfy the causation element in Hilliard’s definition. For this proposition, the court cited three cases. \textit{Id.} at 736–37 (citing Helfrich v. Coca-Cola Bottling Co. Consol., 741 S.E.2d 408 (N.C. Ct. App. 2013), Heatherly v. Hollingsworth, 712 S.E.2d 345 (N.C. Ct. App. 2011), and Graham v. Masonry Reinforcing Corp. of Am., 656 S.E.2d 676, 678 (N.C. Ct. App. 2008)). In each of these cases, the court of appeals said that Russell would satisfy only the first two prongs of Hilliard’s definition of disability. See Helfrich, 741 S.E.2d at 413 (“A[n injured worker] may satisfy the first two prongs of the Hilliard test through [proving one of the Russell prongs].”); Heatherly, 712 S.E.2d at 352–53 (“A[n injured worker] may establish the first two elements through any one of four methods of proof [from Russell].”); Graham, 656 S.E.2d at 679 (“This Court has stated a claimant may prove the first two prongs of Hilliard through [proving one of the Russell prongs].”). A closer look at each of these cases, though, reveals that what the court of appeals said it was doing differed from what the court of appeals, in fact, did. In Helfrich, for example, there was no evidence regarding the cause of disability other than the fact that the injured worker was hurt at work and suffered limitations as a result of that injury, which resulted in a loss of wage-earning capacity. See Helfrich, 741 S.E.2d at 413 (affirming the Commission’s conclusion that the injured worker was disabled without citing any facts other than the Commission’s findings that the worker suffered two on-the-job injuries that resulted in limitations that affected his wage-earning capacity). So, too, in Heatherly. There, in affirming a finding of disability, the court recited the Commission’s findings that the injured worker had suffered a “possible lightning strike” and, as a result, was unable to work. See Heatherly, 712 S.E.2d at 353 (affirming the finding of disability based on the occurrence of a workplace injury and the resulting inability to earn wages). No other cause of disability was discussed. \textit{Id.} The court in Heatherly also arguably contradicted itself by saying, on the one hand, that Russell could be used to prove only the first two prongs of Hilliard, see \textit{id.} at 352–53, but later stating that “a plaintiff’s testimony regarding his or her pain and its effect on plaintiff’s ability to work is sufficient to support a determination of disability under Russell’s first method of proof.” \textit{Id.} at 354. And in Graham, the court again cited nothing but the findings of an on-the-job injury and consequent limitations, resulting in loss of wage-earning capacity, to affirm a conclusion of disability. See Graham, 656 S.E.2d 676, 679–80 (stating that there was “competent evidence” in the form of an inability to secure employment, and thereby earn wages, following a workplace injury that resulted in limitations). Like the Heatherly court, the court in Graham also seemed to contradict itself by stating both that Russell could be used to satisfy only the first two Hilliard prongs, see \textit{id.} at 679, but later noting that the Industrial Commission properly found the injured worker “had proven his disability” by resorting to the third Russell test. \textit{Id.} at 680. It is far from clear, in other words, that the court of appeals actually required injured workers in this line of cases to do anything other than meet one of the Russell factors to satisfy the definition of disability articulated in Hilliard. Rather, it appears that the court of appeals, in the cases cited by the supreme court, understood Russell to be a means of proving Hilliard \textit{in toto}, even if the court of appeals claimed otherwise.

\textsuperscript{123} \textit{Medlin}, 760 S.E.2d at 736–37.
or different employment after a workplace injury. In addition, the court said, "a claimant must also satisfy the third element, as articulated in Hilliard, by proving that his inability to obtain equally well-paying work is because of his work-related injury." As for Demery, in which the supreme court had summarily affirmed a decision of the court of appeals that concluded that using one of the Russell factors proved disability under Hilliard, the Medlin court held that the facts of Demery implicated only the first Russell factor—complete inability to work following a workplace injury—and that discussion of the remaining Russell factors was unnecessary to decide the case, making such discussion dicta. In summary, the Medlin court explained:

Because the focus [of the disability inquiry] is on earning capacity, broad economic conditions, as well as the circumstances of particular markets and occupations, are undoubtedly relevant to whether a claimant’s inability to find equally lucrative work was because of a work-related injury. Whether in a boom or bust economy, a claimant’s inability to find equally lucrative work is a function of both economic conditions and his specific limitations. Both factors necessarily determine whether a specific claimant is able to obtain employment that pays as well as his previous position...

Whereas overall economic conditions were never relevant to disability before Medlin, such was no longer the case. Left unaddressed by the court was when or how such conditions were relevant, the court only offering that “the [Industrial] Commission makes this determination based on the evidence in the individual case,” which is to say the court offered no guidance at all. The court concluded that Medlin had not met his burden of proving “that his inability to find equally lucrative work [was] because of his work-related injury.” The supreme court, therefore, affirmed the lower court’s denial of Medlin’s claim for wage-replacement benefits, thereby adopting a new substantive rule regarding the relevant components of disability. This rule established that the strength or weakness of the overall economy, particular markets, and specific occupations at least sometimes must be addressed before disability can be established; the court announced this without providing any meaningful guidance as to when or how an injured worker might be required to make an evidentiary showing under this new rule.

124. See id. at 737.
125. Id.
126. See id. at 737 n.1.
127. Id. at 737–38.
128. Id. at 738.
129. Id.
130. See id. (affirming the decision of the court of appeals).
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II. THE PROOF REQUIRED FOR DISABILITY AFTER MEDLIN

Broad economic conditions are relevant to determining an injured worker’s disability after Medlin. About this, the supreme court was clear. The court was not clear—indeed, the court said virtually nothing—about when or how an injured worker might be required to account for such conditions when trying to prove disability. The Medlin court stated only that “the [Industrial] Commission makes this determination based on the evidence in the individual case.” This is a serious omission from the court’s opinion, and one this Article seeks to fill.

As the supreme court reiterated in Medlin, “The burden of proving the existence and extent of a disability is generally carried by the claimant.” Under Hilliard, the injured worker bears the burden of persuading the Commission that he is incapable of earning his pre-injury wages in either the same or different employment and that his inability to do so is because of his workplace injury. Prior to Medlin, the court of appeals used the Russell framework to assess all three prongs of Hilliard’s definition of disability. In practical terms, that meant a worker could meet his burden by proving that he was injured at work, suffered limitations as a result of that injury, and lost wages following his injury despite efforts to find work. The overall strength or weakness of the economy was not relevant to the inquiry, and about it the injured worker could always be unconcerned. Now, though, the supreme court has made clear that the Russell framework cannot be used to prove causation under Hilliard and that the question of

131. See id. (concluding that “a claimant’s inability to find equally lucrative work [after an on-the-job injury] is a function of both economic conditions and his specific limitations”).
132. Id.
133. Id. at 736.
134. See id.
135. See id. at 737 (citing cases in which the court of appeals did so); see also Demery v. Perdue Farms, Inc., 554 S.E.2d 337, 337 (N.C. 2001) (summarily affirming a court of appeals decision that used Russell to prove disability under Hilliard); Medlin v. Weaver Cooke Constr., LLC, 748 S.E.2d 343, 348 (N.C. Ct. App. 2013) (Geer, J., dissenting) (“In other words, to prove ‘disability’—which encompasses both incapacity and causation, as Hilliard holds—the employee must meet one of the prongs of Russell.”), aff’d, 760 S.E.2d 732 (N.C. 2014).
136. See Russell v. Lowes Product Distrib., 425 S.E.2d 454, 457 (N.C. Ct. App. 1993) (outlining four methods of proving disability, none of which address overall economic conditions); see also, e.g., Fletcher v. Dana Corp., 459 S.E.2d 31, 37 (N.C. Ct. App. 1995) (concluding “an employee who suffers a work-related injury is not precluded from workers’ compensation benefits when that employee, while employable within limitations in certain kinds of work, cannot after reasonable efforts obtain employment due to unavailability of jobs.”).
causation encompasses not only consideration of how an injured worker’s injury-related limitations affect his wage-earning capacity, but sometimes also involves consideration of larger economic conditions.

The injured worker therefore faces a practical difficulty following Medlin: when must he address overall economic conditions as part of his case for disability? Further, when he is required to do so, how can he prove that his loss of wage-earning capacity is caused by his injury and not the overall condition of the economy? This Article argues that the answer lies in a burden-shifting framework. Under this proposed burden-shifting framework, the injured worker would first be required to produce evidence that he was hurt at work, suffered limitations as a result of his injury, and lost wage-earning capacity following his injury; this is the same showing a worker was required to make before Medlin. Then, under this framework, the burden of production would shift to the employer to produce evidence, if it so desired, that the injured worker’s loss of wage-earning capacity was due not to his work injury, but to the condition of the economy or the injured worker’s occupation. If the employer produces no evidence when this burden of production shifts to it, then the injured worker has met his burden of proving disability under Hilliard, without any need to address the health of the overall economy and any effect it had on the worker’s wage-earning capacity. Only when the employer produces sufficient evidence that overall economic conditions caused the injured worker’s loss of wage-earning capacity would the burden of production shift back to the injured worker. The injured worker would then produce evidence to rebut the employer’s showing that his loss of wage-earning capacity was due not to the work injury, but to economic conditions. If the employee fails to persuasively rebut the employer’s evidence, then the employee will have failed to meet his burden of proving disability under Hilliard.

This burden-shifting framework is consistent with the Medlin court’s holding that the substantive definition of disability must account for both an injured worker’s limitations and the overall health of the economy, but the framework also provides a manageable, practical means by which workers and employers can make their cases before the Industrial Commission.137 Indeed, this framework is consistent with what happened

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137. Id. at 736. This burden-shifting framework should not be considered an affirmative defense to a claim of disability. As the Medlin court reaffirmed, the burden of proving disability lies with the claimant. See id. ("The burden of proving the existence and extent of a disability is generally carried by the claimant."). And, the Medlin court explained, showing that a worker’s loss of wage-earning capacity is due to injury-related limitations is part of the definition of disability. See id. at 737 (stating that a claimant must prove “that his inability to obtain equally well-paying work is because of his work-related injury”). Affirmative defenses, however, impose a burden of persuasion on those parties raising them.
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in Medlin.138 Medlin met his burden of showing he was hurt at work, suffered limitations as a result of his injury, and lost wage-earning capacity while so limited.139 Then, the employer produced testimony from a vocational expert that it was not Medlin’s injury-related limitations, but the condition of the economy and the construction industry, that caused Medlin’s loss of wage-earning capacity.140 In answer to this, Medlin offered no rebuttal.141 Thus, he failed to prove disability under the rule announced in Medlin.142

See, e.g., Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC, 723 S.E.2d 744, 749 (N.C. 2012) (stating that the defendant “bears the burden of proof on its affirmative defense”). Under Medlin, then, it would be inappropriate to consider this Article’s proposed burden-shifting framework as establishing an affirmative defense. Rather, consistent with Medlin, the burden of persuasion remains on the injured worker at all times, with only a burden of production shifting to the employer who wishes to argue that economic factors are the cause of a claimant’s loss of wage-earning capacity. As the North Carolina Supreme Court long ago explained, there is a difference between the burden of persuasion and the burden of production:

[They] are two very different things. The former remains on the party affirming a fact in support of his case, and does not change at any time throughout the trial. The latter may shift from side to side as the case progresses, according to the nature and strength of the proofs offered in support or denial of the main fact to be established.


138. While Medlin is ostensibly about the role economic conditions play in assessing disability, the case is arguably about something much broader: the idea of causation in the workers’ compensation system. The Medlin court’s decision could be interpreted as requiring a worker to show his injury was the sole cause of lost wages to prove disability. Such an interpretation would be erroneous, however, because it is well-established that causation in workers’ compensation claims track the concept of proximate causation that animates tort law, namely that a workplace injury need only be a cause of injury, not the cause of injury, to establish compensability and disability. See, e.g., Roberts v. Burlington Indus., 364 S.E.2d 417, 423 (N.C. 1988) (“Under [the ‘increased risk’] approach, the injury arises out of the employment if a risk to which the employee was exposed because of the nature of the employment was a contributing proximate cause of the injury . . . .” (emphasis added)); Hansel v. Sherman Textiles, 283 S.E.2d 101, 106 (N.C. 1981) (“In workers’ compensation actions the rule of causation is that where the right to recover is based on injury by accident, the employment need not be the sole causative force to render an injury compensable.”); Gilmore v. Hoke Cty. Bd. of Educ., 23 S.E.2d 292, 296 (N.C. 1942) (“And to establish a real relation of cause and effect between an injury to, and subsequent death of employee, the evidence must be such as to take the case out of the realm of conjecture and remote possibility, that is, there must be sufficient competent evidence tending to show a proximate causal relation between the injury and subsequent death.” (emphasis added)). There is no reason to interpret Medlin as abandoning this long-established rule sub silentio.

139. See Medlin, 760 S.E.2d at 734–35.
140. See id. at 735.
141. See id. at 738 (stating that Medlin challenged only a single finding of fact on appeal regarding the job requirements of an estimator). Medlin’s failure to rebut the vocational
The courts already use such a burden-shifting framework in several contexts in North Carolina’s workers’ compensation system, such as when an employer disputes the existence of an injured worker’s disability and a hearing is required to decide the question.\textsuperscript{143} While “the claimant has the initial burden of proving that his/her wage earning capacity has been impaired by injury[,]\textsuperscript{144} the burden of production, after the claimant makes this showing, shifts to the employer to “come forward with evidence to show not only that suitable jobs are available, but also that the [injured worker] is capable of getting one, taking into account both physical and

expert is understandable. Prior to the supreme court’s decision in \textit{Medlin}, there was no case law in North Carolina that allowed an employer to avoid payment of wage-replacement benefits on the ground that overall economic conditions, and not an injured worker’s limitations, were the cause of an injured worker’s loss of wage-earning capacity. Medlin could not reasonably be expected to produce evidence at hearing to meet a legal standard that did not exist at the time of hearing.

\textsuperscript{142} \textit{Id.} The North Carolina Court of Appeals has yet to decide another case with facts like those in \textit{Medlin}, that is, a case in which an injured worker suffers from work restrictions following a workplace injury and the employer alleges that overall economic conditions, and not the worker’s injury-related restrictions, are causing the worker’s loss of wage-earning capacity. The court of appeals, therefore, has not yet had an opportunity to apply \textit{Medlin} in the manner advocated in this Article in circumstances like those present in \textit{Medlin}. The closest the court has come was in the unpublished decision in Ellis v. Key City Furniture, Inc., No. COA15-78, 2015 N.C. App. LEXIS 693 (N.C. Ct. App. Aug. 18, 2015). In Ellis, the claimant was injured at work in 2008 and 2010. \textit{See id.} at *2-*3. Then, in 2012, the injured worker “lost her job as a result of company-wide layoffs.” \textit{Id.} at *4. The injured worker in Ellis, unlike the injured worker in \textit{Medlin}, “offered no evidence that limitations from her injury affected her ability to find work, especially considering that she had been released to work without restriction by three physicians who examined her.” \textit{Id.} at *12. Economic conditions were therefore irrelevant to the court’s analysis, as the injured worker failed to make the threshold showing that her workplace injury somehow diminished her wage-earning capacity. Though the Ellis court cited to \textit{Medlin}’s discussion of the interplay between disability and economics, the same result—a denial of benefits for failure to prove disability—would have been reached in Ellis under the law as it existed before \textit{Medlin}. In any event, the opinion in \textit{Ellis} has no precedential value. \textit{See N.C. R. App. P. 30(e)(3) (stating that an unpublished opinion “does not constitute controlling legal authority”).} Published decisions by the court of appeals citing \textit{Medlin} did so for reasons unrelated to \textit{Medlin}’s discussion of the relationship between disability and economics. \textit{See Fields v. H & E Equip. Servs., LLC, 771 S.E.2d 791, 794 (N.C. Ct. App. 2015) (noting that Medlin reaffirmed that a claimant must prove all three prongs of the disability test first articulated in Hilliard); Ademovic v. Taxi USA, LLC, 767 S.E.2d 571, 577 (N.C. Ct. App. 2014) (citing Medlin’s recitation of the standard of review used to assess the Full Commission’s findings of fact); Tedder v. A & K Enters. 767 S.E.2d 98, 104 (N.C. Ct. App. 2014) (noting Medlin’s affirmation of the three-part test for disability established in Hilliard); Philbeck v. Univ. of Mich., 761 S.E.2d 668, 675 (N.C. Ct. App. 2014) (citing Medlin’s explication of Russell).} \textsuperscript{143} \textit{Kennedy v. Duke Univ. Med. Ctr., 398 S.E.2d 677, 682 (N.C. Ct. App. 1990).} \textsuperscript{144} \textit{Id.}
vocational limitations." Absent such a showing by the employer, the
injured worker will have met his burden of proving disability. If the
employer does make such a showing, "the employee may produc[e]
evidence that either contests the availability of other jobs or [her] suitability
for those jobs, or establishes that [she] has unsuccessfully sought the
employment opportunities located by [her] employer."

A burden-shifting framework is also used when an injured worker and
employer enter into an agreement that the worker is disabled and the
Industrial Commission enters an order approving the agreement, at which
time "a presumption of disability attaches in favor of the employee." Once "the presumption attaches, 'the burden shifts to [the employer] to
show that [the injured worker] is employable.'" If the employer later

145. Id.
146. See id. (stating that the employer "failed to do so" and affirming the award of
disability benefits).
The court of appeals has sometimes described the Russell framework itself as a
burden-shifting mechanism. See Demery v. Perdue Farms, Inc., 545 S.E.2d 485, 490 (N.C.
   Ct. App. 2001) (stating that "[o]nce an employee meets her initial burden of production
   [under Russell], the burden of production shifts to the employer to show 'that suitable jobs
   are available' and that the employee is capable of obtaining a suitable job 'taking into
account both physical and vocational limitations'" (quoting Kennedy, 398 S.E.2d at 682)).
   If the Demery court accurately described Russell, the burden-shifting framework proposed
in this Article could be fairly characterized as, at least in part, Russell-plus: an injured
worker could prove disability via one of the four Russell factors, with an obligation to
produce evidence regarding economic conditions only if the employer does so first. Of
   course, as Medlin made clear, the Russell factors are not the exclusive means of proving the
first two prongs of disability. See Medlin v. Weaver Cooke Constr., LLC, 760 S.E.2d 732,
737 (N.C. 2014) ("[T]hese methods are neither statutory nor exhaustive.").
149. Id. at 749 (quoting Dalton v. Anvil Knitwear, 458 S.E.2d 251, 257 (N.C. Ct. App.
   (stating that when the Industrial Commission has approved an agreement between the
   parties that the injured worker is disabled, "the employee is entitled to a presumption of
   continuing disability" and that "it is incumbent upon the employer to come forward with
evidence that suitable jobs are available to the employee"); Kennedy, 398 S.E.2d at 682
   (stating that "once the claimant meets [his] initial burden [of proving disability], the
   [employer] who claims that the [injured worker] is capable of earning wages must come
forward with evidence to show not only that suitable jobs are available, but also that the
injured worker is capable of getting one, taking into account both physical and vocational
limitations" and "referring to the [employer's] burden of rebutting the [injured worker's]
initial showing of a continuing disability"). Whether these cases' discussions of shifting
burdens relate to burdens of production or burdens of persuasion is irrelevant to the point
made here: use of a burden-shifting framework to implement Medlin would be a task with
whose courts are familiar. That these cases may address burdens of persuasion, and not
alleges the worker is no longer disabled, "[t]he claimant need not present evidence at the hearing [to determine ongoing disability] unless the employer... presents evidence showing both that suitable jobs are available, and that the claimant is capable of getting one, taking into account the claimant's limitations." Just as an employee is under no obligation to present evidence of ongoing disability in this scenario unless the employer presents evidence that suitable jobs are available, this Article's proposed burden-shifting framework would require an injured worker to present evidence that his loss of wage-earning capacity is not due to overall economic conditions only if the employer first presents evidence that this is, in fact, the case. In cases in which the employer does not put into play the issue of overall economic conditions and their effect on disability, such conditions will be irrelevant.

So, too, is a burden-shifting framework used when an employee suffers limitations as a result of his workplace injury, returns to work, and is thereafter terminated for misconduct. Generally, the North Carolina Workers' Compensation Act provides that an injured worker forfeits his right to wage-replacement benefits if he "refuses suitable employment." In Seagraves v. Austin Co. of Greensboro, the court of appeals concluded that termination of an injured employee for misconduct or fault "does not automatically constitute a constructive refusal to accept employment so as to bar the employee from receiving [wage-replacement] benefits..." Instead, "the test is whether the employee's loss of, or diminution in, wages is attributable to the wrongful act resulting in loss of employment... or whether such loss or diminution in earning capacity is due to the employee's work-related disability..." If the former, then benefits are not due; if the latter, they are. A burden-shifting framework is employed...
to decide this question. First, “the employer must . . . show that the employee was terminated for misconduct or fault, unrelated to the compensable injury, for which a nondisabled employee would ordinarily have been terminated.”157 If the employer makes this showing, then the worker’s termination will be deemed a constructive refusal to accept suitable employment, barring the worker from collecting wage-replacement benefits “unless the employee is then able to show that his or her inability to find or hold other employment of any kind, or other employment at a wage comparable to that earned prior to the injury, is due to the work-related disability.”158 Because the employer in Seagraves raised and alleged a fact that would disqualify the injured worker from wage-replacement benefits—in that case, misconduct justifying termination—the court reasonably concluded that the employer bore the burden of production on that issue, just as would be required under this Article’s proposed burden-shifting framework when the employer offers evidence that economic conditions, and not injury-related limitations, are causing a worker’s loss of wage-earning capacity. The supreme court later endorsed the burden-shifting framework established in Seagraves, noting that “the test provides a forum of inquiry that guides a fact finder through the relevant circumstances in order to resolve the ultimate issue”159 of whether the terminated worker’s loss of wage-earning capacity was due to his injury or his misconduct. “As such,” the court wrote, “we conclude that this test is an appropriate means to decide cases of this nature.”160 For the same reasons—namely, workability and practicality—a burden-shifting framework should govern post-Medlin allegations that economic conditions, and not injury-related limitations, are the cause of an injured worker’s loss of wage-earning capacity.

Burden-shifting frameworks, then, are common in North Carolina’s workers’ compensation system, and using one to apply Medlin would respect precedent,161 provide legal rules that are workable,162 and honor the purpose of the state’s workers’ compensation laws.163

157. Id.
158. Id.
160. Id.
161. See supra Part I-A.
162. See McRae, 597 S.E.2d at 700 (describing a burden-shifting framework as “provid[ing] a forum of inquiry that guides a fact finder through the relevant circumstances in order to resolve the ultimate issue”).
CONCLUSION

North Carolina adopted its workers' compensation system to provide ready relief to workers hurt on the job. The law reflected a compromise: workers would receive prompt relief from on-the-job injuries, and employers would get the benefit of limited liability. It was a compromise, in essence, to spread the costs and risks of a modern economy. In the wake of Medlin, another compromise is in order. Under the state's workers' compensation laws, injured workers generally retain the ultimate burden of proving they are disabled as a result of a workplace injury. It is also true that in a variety of circumstances, the burden of production between workers and employers shifts. So it should be after Medlin when an employer alleges that economic conditions, and not injury-related restrictions, cause a worker's loss of wage-earning capacity.

Absent a burden-shifting framework, it would be virtually, and perhaps literally, impossible for an injured worker to prove the negative proposition that economic conditions did not cause his loss of wage-earning capacity. For the courts to assent to any manner of proof that requires this showing would be to transform the workers' compensation system into one unduly hostile to injured workers. A burden-shifting framework, on the other hand, would allow the lower courts to adhere to Medlin, as required, while also remaining loyal to the purpose of the workers' compensation system and applying the law in a practical, workable manner that is even-handed to both employees and employers, requiring neither to shoulder an unreasonable burden.

workers' compensation laws "should be liberally construed to effectuate the legislative intent to give compensation to workmen"); Donnell v. Cone Mills Corp., 299 S.E.2d 436, 439 (N.C. Ct. App. 1983) ("The Workers' Compensation statutes in North Carolina should be liberally construed to effect their purpose of compensating injured claimants and recovery should not be denied by a technical or narrow construction.").