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NO. COA04-994

NORTH CAROLINA COURT OF APPEALS

Filed: 16 August 2005

VIVIAN NANETTE HASTINGS,
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 016472

EASTERN CAROLINA PATHOLOGY
ASSOCIATES,
Employer,

and

CINCINNATI INSURANCE COMPANY,
Carrier,
Defendants.

Appeal by plaintiff from opinion and award entered 8 April 2004 by the North Carolina Industrial Commission. Heard in the Court of Appeals 12 April 2005.

Law Offices of James Scott Farrin, by Matthew D. Harbin, J. Michael Mackay and Laura S. Jenkins, for plaintiff-appellant.

Cranfill, Sumner & Hartzog, L.L.P., by Jonathan C. Anders and Jaye E. Bingham, for defendants-appellees.

ELMORE, Judge.

Vivian Nanette Hastings (plaintiff) was employed as a pathologist assistant at Eastern Carolina Pathology Associates (ECPA) beginning in 1993. Plaintiff's position involved examining specimens removed from patients during surgery. In May of 1999, plaintiff informed

her supervisor, Dr. James Cash, that she would need surgery on her arm. Plaintiff underwent surgery on 25 May 1999 and then returned to work on 13 June 1999. Plaintiff ceased working on 1 December 1999 and at that time began receiving short-term disability benefits. On 2 July 2000 plaintiff began receiving long-term disability benefits. ECPA paid all premiums related to plaintiff's disability insurance.

On 1 March 2000 plaintiff filed a Form 18 Notice of Accident to Employer with the Industrial Commission claiming that she had developed ulnar neuropathy with reflex sympathetic dystrophy as a result of the repetitive use of a scalpel cutting surgical tissues. Following a hearing in October 2001, Deputy Commissioner George T. Glenn II issued an opinion and award on 4 February 2003. Deputy Glenn concluded in pertinent part as follows:

1. Plaintiff developed occupational diseases in the form of cubital tunnel syndrome, which is also known as ulnar neuropathy, and chronic regional pain syndrome, which is also known as reflex sympathetic dystrophy, arising out of and in the course and scope of her employment as a Pathology Assistant with the Defendant-Employer, and due to causes and conditions peculiar to and characteristic of her employment. Plaintiff's job with the Defendant-Employer placed her at an increased risk of [these diseases].

Plaintiff was awarded temporary total disability compensation and medical benefits for cubital tunnel syndrome and reflex sympathetic dystrophy.

ECPA and Cincinnati Insurance Company, the workers' compensation insurance carrier, filed a notice of appeal to the Full Commission. The Full Commission filed an opinion and award on 8 April 2004 reversing the opinion and award of Deputy Commissioner Glenn. The Commission concluded that plaintiff does not suffer from an occupational disease because her ulnar neuropathy is not causally related to her job duties. Commissioner Laura K. Mavretic filed a dissenting opinion stating that the greater weight of the medical evidence in the record

establishes that plaintiff developed occupational diseases due to the conditions of her employment with ECPA. Plaintiff appeals.

First, plaintiff argues that the Commission erred in finding that the medical opinion of a non-treating physician was entitled to greater weight on the issue of causation than the opinions of her treating physicians. Plaintiff asserts that these “findings” are actually “conclusions of law” on causation and must be reviewed *de novo*. See *Matthews v. Charlotte-Mecklenburg Hosp. Auth.*, 132 N.C. App. 11, 15, 510 S.E.2d 388, 392 (“if a finding of fact is essentially a conclusion of law, it will be treated as such on appellate review”), *disc. review denied*, 350 N.C. 834, 538 S.E.2d 197 (1999). While plaintiff is correct about this general rule of law, the *de novo* standard of review of a Commission’s conclusions of law does not apply to determinations of credibility by the Commission. See *Deese v. Champion Int’l Corp.*, 352 N.C. 109, 115, 530 S.E.2d 549, 552 (2000) (“on appeal, [an appellate court] does not have the right to weigh the evidence and decide the issues on the basis of its weight”) (internal quotation omitted); see also *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998) (it is the role of the Commission to determine the credibility of the witnesses and the weight of their testimony).

Here, the Commission made the following findings, in relevant part, with respect to each of plaintiff’s two treating physicians:

17. Dr. Stanton-Hicks testified that plaintiff’s condition was related to her employment because plaintiff was required to perform repetitive fine movements of the hands while holding her arms and hands in the same position for 15 to 20 minutes. Dr. Stanton-Hicks testified that plaintiff’s holding of the scalpel for the entire time that she worked while going from one specimen to another was the cause of plaintiff’s ulnar neuropathy. Dr. Stanton-Hicks’ testimony is not supported by the evidence, as the evidence indicates that plaintiff in fact usually was not holding the scalpel while performing varied tasks. Dr. Stanton-Hicks is unfamiliar with plaintiff’s job duties and any opinions that he has rendered regarding causation are nothing more than mere speculation. Dr.

Stanton-Hicks did not provide any literature to support his opinion. The [Commission] gives little weight to Dr. Stanton-Hicks' testimony.

19. Dr. Hendrickson testified that plaintiff's ulnar neuropathy was related to her job duties based on the fact that plaintiff performed what Dr. Hendrickson considered to be an extraordinary number of pathology cases in a short period of time. Dr. Hendrickson was however unable to explain what it was about the number of cases that plaintiff performed that was extraordinary. Dr. Hendrickson was unable to explain how plaintiff's condition resulted from a physiological standpoint, and what job duties plaintiff performed caused ulnar nerve compression. Dr. Hendrickson was non-responsive and [did not] respond to hypotheticals presented by defense counsel. Dr. Hendrickson did not provide any literature to support his opinion. Dr. Hendrickson compared plaintiff's job duties to the job duties performed by a Maryland eastern shore chicken processor. The [Commission] gives Dr. Hendrickson's opinion little weight.

The Commission made a similar finding as to the testimony of Dr. Michael Kushner, stating that Dr. Kushner was unable to provide any literature to support his opinion that plaintiff was at an increased risk of developing ulnar neuropathy. As a result, the Commission determined that his testimony would be given little weight. Plaintiff asserts that Dr. Kushner was one of her treating physicians and thus his opinion should be entitled to considerable weight; however, Dr. Kushner testified that he saw plaintiff in May and in December 1999 for an evaluation only and that he does not consider himself a treating physician for the condition of ulnar neuropathy.

The Commission considered the testimony of a non-treating physician, Dr. Edwards, as follows:

15. Dr. George Edwards, Jr. Of the Raleigh Hand Center testified after reviewing an accurate physical demands analysis and videotape of plaintiff's job duties. Dr. Edwards testified that ulnar neuropathy was not peculiar to plaintiff's profession as a pathologist assistant, that plaintiff was not at an increased risk of developing ulnar neuropathy as compared to a member of the general public not working as a pathologist assistant, and that plaintiff's job duties as a pathologist assistant

did not significantly contribute to plaintiff's development of ulnar neuropathy. Dr. Edwards explained in clear concise terms the physiology of ulnar neuropathy and the compression of the ulnar nerve, and how ulnar neuropathy can develop physiologically. Dr. Edwards provided literature in conjunction with his deposition that supports his opinion regarding ulnar neuropathy and acute flexion at the elbows. Dr. Edwards is the only physician to support his opinion with literature. The [Commission] gives Dr. Edwards' opinion considerable weight in this matter.

We reject plaintiff's characterization of the findings stated above as "conclusions of law." The Commission was not applying any legal standard to the evidence, but rather was evaluating the credibility of each physician's testimony under the circumstances. Accordingly, we now determine whether competent evidence exists to support these challenged findings.

When there is any evidence in the record to support a finding of fact, that finding is binding upon the appellate court even if contradictory evidence exists. *See Adams*, 349 N.C. at 681, 509 S.E.2d at 414. "[F]indings of fact by the Commission may be set aside on appeal [only] when there is a complete lack of evidence to support them[.]" *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 914 (2000). After reviewing the record, we determine that competent evidence exists to support the Commission's findings numbers 15, 17, and 19. Dr. Edwards testified that many people who develop cubital tunnel syndrome are genetically predisposed to it because their anatomy is tight in the cubital tunnel groove of the arm, where the ulnar nerve is located. Dr. Edwards stated that flexing the elbow at more than 90 degrees for an extended period of time increases the pressure on the ulnar nerve and may result in compression of the nerve; the period of time depends upon the tightness in a person's cubital tunnel. However, he stated that the exact cause of ulnar neuropathy is often unknown. Consistent with Dr. Edwards' testimony, Dr. Kushner testified that ulnar neuropathy is often of unknown etiology.

Dr. Edwards expressed his opinion that ulnar neuropathy was not peculiar to plaintiff's job as a pathologist assistant because plaintiff did not keep her elbow flexed at or beyond 90 degrees for extended periods of time. Rather, he testified that plaintiff would have experienced immediate discomfort at work if she flexed her elbow for an extended period of time in her job duties. Dr. Edwards submitted medical literature on cubital tunnel syndrome to support his opinion that repetitive motions alone, without prolonged flexion of the elbow, cannot cause the condition. Neither Dr. Stanton-Hicks nor Dr. Hendrickson produced any medical literature in support of their opinions that plaintiff's condition resulted from sustained, repetitive hand movements alone. The Commission determined that Dr. Edwards was more credible because his explanation of the physiology of cubital tunnel syndrome was more concise and straightforward and was supported by literature. Thus, the Commission properly exercised its role as fact finder in determining that the two treating physicians, Dr. Stanton-Hicks and Dr. Hendrickson, were less credible than Dr. Edwards. Where there is competent evidence to support the Commission's findings, this Court may not substitute its judgment and independently weigh the credibility of the witnesses. *See Deese*, 352 N.C. at 115, 530 S.E.2d at 552. As evidence in the record supports the Commission's findings, we are bound by them.

By her next assignment of error, plaintiff argues that the Commission did not base its findings with respect to plaintiff's alleged injury by her child upon competent evidence. Findings of fact number 8 and 9 state:

8. During the spring of 1999, and prior to her surgery, plaintiff stated while interacting with individuals in the histology lab that she had injured her right arm when one of her children struck or landed on her elbow. Plaintiff stated that she was going to need surgery to repair her injury or condition.

9. In January of 1999, plaintiff first experienced symptoms of ulnar neuropathy after lifting her son out of a

highchair, placing her son on the floor, placing her son in the car, and driving the car to daycare prior to going to work.

Dr. Darlene Thorn, one of plaintiff's supervisors in the histology lab, testified that plaintiff told her that one of her children injured her right arm by striking it or falling on it. However, plaintiff testified that no such incident with her child occurred and that she did not have such a discussion with Dr. Thorn. As the findings of the Commission are binding upon this Court where there is any evidence in the record to support them, we must affirm finding of fact number 8. *See Young*, 353 N.C. at 230, 538 S.E.2d at 914.

We also find competent evidence in the record to support finding of fact number 9. Plaintiff testified that she first experienced pain in her right arm in January of 1999. Plaintiff stated that she lifted her son out of a highchair with both arms and placed him on the floor for a "timeout" prior to driving him to daycare that morning. Plaintiff explained that she noticed the pain in her right arm after these events and while driving to work later that morning:

I was driving to work, and I felt my elbow hurt, and it was a pretty severe pain, and I felt of it, because I thought maybe I broke it, and I didn't feel a broken bone. So I thought maybe I fractured it. I couldn't remember anything where I'd knocked anything over or bumped into anything. I did remember putting my son in timeout, but I couldn't -- nothing happened with that. So I just kind of thought maybe something happened. Maybe I fractured it and didn't even know it. So I thought I'll give it some time to heal because, you know, I couldn't put it in a splint. I had to work. So I didn't do anything. I thought it would go away.

Plaintiff argues that "[t]here was no testimony that such pain was related to plaintiff's caring for her children as the Commission's finding of fact indicates." Plaintiff contends that, even assuming *arguendo* that a child did strike plaintiff's arm, the evidence does not support a finding that the force of such an injury would be sufficient to cause ulnar neuropathy. The Commission does not find that plaintiff's ulnar neuropathy was the result of a specific traumatic event to

plaintiff's elbow involving her children; rather, the Commission finds that plaintiff first experienced symptoms of her right arm condition while performing activities unrelated to her job duties. The Commission was not required to enter a finding of how plaintiff's condition developed physiologically where the evidence tended to show that her condition had no established cause. Plaintiff testified that she first experienced pain while driving and could not connect it with any specific event. Moreover, Dr. Edwards testified that ulnar neuropathy is often of unknown cause and that the performance of plaintiff's job duties did not involve acute and prolonged flexion of the elbow associated with ulnar neuropathy. Thus, the Commission had evidence to support a finding that plaintiff's initial symptoms were related to her activities outside of the workplace.

Plaintiff also challenges the Commission's finding of fact number 10, which states that plaintiff's symptoms were no worse at work than at home. Dr. Cash testified that plaintiff told him that she wanted to continue working following the surgery because she was having symptoms both at home and at work. Plaintiff testified that the condition of her right arm continued to deteriorate following the surgery in May of 1999 and that during the last few weeks prior to leaving her job, any activity involving the arm caused pain. The Commission's finding is supported by plaintiff's own testimony and the testimony of her supervisor. We overrule this assignment of error.

As we have reviewed plaintiff's challenges to the Commission's findings and determined that they are without merit, we now consider whether the Commission's conclusions of law are supported by its findings. Plaintiff assigns error to conclusions of law 2, 3, 4, and 5.

2. Plaintiff's job duties did not expose plaintiff to a greater risk of contracting ulnar neuropathy than the public generally.

3. Plaintiff's job duties did not significantly contribute to the development of plaintiff's ulnar neuropathy.

4. Ulnar neuropathy is not a condition peculiar to the occupation of pathologist assistant.

5. Plaintiff does not suffer from an occupational disease, as plaintiff's ulnar neuropathy is not causally related to plaintiff's job duties as a pathologist assistant.

As discussed *supra*, the Commission entered finding number 15 based upon the testimony of Dr. Edwards. That finding states that plaintiff was not at increased risk of developing ulnar neuropathy relative to the general public; that plaintiff's job duties as pathologist assistant did not significantly contribute to the development of ulnar neuropathy; and that ulnar neuropathy is not a condition peculiar to plaintiff's occupation. The Commission also found, in finding of fact number 10, that plaintiff's symptoms were no worse while working than they were when plaintiff was not working. These findings support the conclusion that plaintiff's ulnar neuropathy is not causally related to her job duties as a pathologist assistant.

We have reviewed plaintiff's remaining assignments of error and conclude that they are without merit. Having determined that competent evidence supports the Commission's findings and that the findings in turn support the conclusions of law, we affirm the Commission's 8 April 2004 opinion and award.

Affirmed.

Judges WYNN and TYSON concur.

Report per Rule 30(e).