An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-669

Filed: 5 January 2016

N.C. Industrial Commission, No. 13-733099

KENNETH BREATH, Employee, Plaintiff,

v.

ORTHOCAROLINA, Employer, THE HARTFORD INSURANCE CO., Carrier, Defendants.

Appeal by plaintiff from opinion and award entered 2 March 2015 by the North Carolina Industrial Commission. Heard in the Court of Appeals 19 November 2015.

The Sumwalt Law Firm, by Vernon Sumwalt, Mark T. Sumwalt and Lauren Walker, for plaintiff-appellant.

Cranfill Sumner & Hartzog LLP, by Jaye E. Bingham-Hinch and Nicholas P. Valaoras, for defendant-appellees.

TYSON, Judge.

Kenneth Breath ("Plaintiff") appeals from the Opinion and Award of the Industrial Commission denying his workers' compensation claim for an occupational disease. We affirm.

I. Background

Plaintiff began working for Defendant in 2004 as a physical therapist, and later as a physical therapy clinical manager. He spends approximately seventy-five

percent of his workdays performing physical therapy and rehabilitation services for Defendant Ortho Carolina's clinical patients. The physical therapy services Plaintiff performs require him to reach, lift, push, and pull. He is required to reach outward and overhead to perform manual treatments, such as physically stretching a patient or to demonstrate the correct techniques for various exercises.

According to his job description, Plaintiff is required to reach outward or over his shoulder on a "constant" basis. This work normally equates to approximately two-thirds of the time he is working. He is required to lift ten pounds or less constantly, eleven to twenty pounds frequently, and up to fifty pounds occasionally. The term "frequently" means between one-third and two-thirds of the workday, and "occasionally" means up to one-third of the work day. Plaintiff's job also requires him to push and pull twelve pounds or less constantly, between thirteen and twenty-five pounds frequently, and between twenty-six and forty pounds occasionally. Plaintiff has performed these job duties since he began work for Defendant in 2004.

On 11 May 2012, Plaintiff felt a "twinge," in his left shoulder while demonstrating an exercise technique. The "twinge" resolved and he continued to perform his normal job duties. Four days later on 15 May 2012, Plaintiff experienced "a very sharp pop and pain" in his left shoulder while performing an aggressive technique on a patient. Plaintiff had previously performed this technique and similar techniques on thousands of patients.

Plaintiff immediately reported his shoulder pain to Defendant's human resources department. Plaintiff was referred to Concentra, where he was examined by a physician's assistant and diagnosed with shoulder strain and possible labrum tear. Plaintiff's activities were restricted by not lifting, pushing, or pulling over twenty pounds and by not reaching above the shoulders.

Defendant filed a Form 19 the following day on 16 May 2012, and reported Plaintiff had experienced shoulder pain on two dates. On 25 May 2012, Defendant's workers' compensation carrier filed a Form 61 denial of Plaintiff's claim. Plaintiff went to Defendant's human resources department to discuss the denial of the claim. He was told that his injury should be covered and he should represent himself on his workers' compensation claim. Defendant and the insurance carrier retained an attorney, but Plaintiff did not.

After denial of his workers' compensation claim, Plaintiff directed his own medical treatment. He came under the care of Dr. Patrick Connor, who is employed by Defendant. On 31 May 2012, one of Dr. Connor's staff physician's assistants evaluated Plaintiff's shoulder and concluded his condition would require surgery. Plaintiff thereafter filed a *pro se* Form 33 request for hearing before the North Carolina Industrial Commission. Plaintiff continued to work and performed only administrative tasks for Defendant.

On 21 November 2012, Plaintiff underwent surgery on his shoulder. Dr. Patrick Connor performed an arthroscopic biceps tenodesis, debridement of the superior labral lesion, and subacrominal decompression on Plaintiff's left shoulder. Dr. Connor explained the surgery "addressed the injury where the biceps tendon was essentially sliding out of its groove and causing irritation and pain in the front of his shoulder." According to Dr. Connor, Plaintiff's injuries "can appear acutely or overtime." Dr. Connor observed bursitis in the shoulder during the surgery. Dr. Connor also removed a bone spur impinging Plaintiff's rotator cuff.

Plaintiff was unable to work from 21 November 2012, the date of his surgery, until 14 January 2013. He performed only administrative duties upon his return to work. Following the surgery, Plaintiff experienced inflammation and tightness in the shoulder. Dr. Connor performed a second shoulder procedure to release the scar tissue on 5 December 2013. Plaintiff returned to work with restrictions seven days later.

Plaintiff's initial claim was heard before the Deputy Commissioner on 19 October 2012, about a month before his first shoulder surgery. Plaintiff appeared at the hearing *pro se*. The Deputy Commissioner determined Plaintiff did not sustain an "injury by accident" under N.C. Gen. Stat. § 97-2(6), because his shoulder condition had resulted from his normal work routine and under normal conditions. Plaintiff did not appeal to the Full Commission.

At that time, Plaintiff had not been advised by a medical professional that his left shoulder condition could have resulted from repetitive motion from his employment. Plaintiff retained counsel following the Deputy Commissioner's denial of his initial claim. On 20 February 2013, Plaintiff's attorney wrote to Dr. Connor and posed five questions directed towards determining whether Plaintiff had suffered an occupational disease.

Based upon those responses, Plaintiff's attorney filed a Form 18 and asserted Plaintiff had suffered an occupational disease. Defendant filed a Form 61 and denied Plaintiff's occupational disease claim. The matter was heard before the Deputy Commissioner on 20 December 2013. The Deputy Commissioner issued an Opinion and Award on 25 July 2014, and concluded Plaintiff had suffered a compensable occupational disease, bursitis, to his left shoulder.

Defendant filed a notice of appeal to the Full Commission and the matter was heard on 11 December 2014. The Commission considered the deposition testimony of Dr. Connor, and determined Plaintiff had failed to prove his left shoulder condition is a compensable occupational disease. Plaintiff appeals.

II. Issues

Plaintiff argues the Commission erred by concluding he failed to prove he suffered an occupational disease, and specifically the Commission: (1) erroneously required Plaintiff to present medical proof that his shoulder condition occurred from

multiple events over a period of time instead of a single event; (2) misapplied the standard of probability for medical causation in evaluating how much additional risk of harm is needed to prove "increased risk;" (3) erroneously required expert testimony to draw the legal conclusion that Plaintiff's bursitis was due to "intermittent pressure in the employment;" and (4) erroneously failed to apply the "law of the case" doctrine to conclude Plaintiff's shoulder condition is an occupational disease.

III. Standard of Review

Our review of the Industrial Commission's Opinion and Award determines whether competent evidence supports the Commission's findings of fact, and whether those findings support the Commission's conclusions of law. *Faison v. Allen Canning Co.*, 163 N.C. App. 755, 757, 594 S.E.2d 446, 448 (2004). This Court reviews the Industrial Commission's conclusions of law *de novo*. *Lewis v. Sonoco Prods. Co.*, 137 N.C. App. 61, 68, 526 S.E.2d 671, 675 (2000). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the [trial court]." *In re Appeal of the Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003) (citation omitted).

The Commission "is the sole judge of the credibility of the witnesses and the weight of the evidence." *Hassell v. Onslow County Bd. of Educ.*, 362 N.C. 299, 305, 661 S.E.2d 709, 715 (2008). The Commission's findings of fact are conclusive and binding on appeal "so long as there is some evidence of substance which directly or

by reasonable inference tends to support the findings, . . . even though there is evidence that would have supported a finding to the contrary." *Shah v. Howard Johnson*, 140 N.C. App. 58, 61-62, 535 S.E.2d 577, 580 (2000) (citation and quotation marks omitted), *disc. review denied*, 353 N.C. 381, 547 S.E.2d 17 (2001). The Commission's findings may be set aside only when there is a "complete lack of competent evidence to support them[.]" *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 914 (2000) (citation omitted).

IV. Occupational Disease

"For a disability to be compensable under the Workers' Compensation Act, it must be either the result of an accident arising out of and in the course of employment or an 'occupational disease.'" *Gibbs v. Leggett and Platt, Inc.*, 112 N.C. App. 103, 107, 434 S.E.2d 653, 656 (1993). "An injury by accident, as that term is ordinarily understood, is distinguished from an occupational disease in that the former rises from a definite event, the time and place of which can be fixed, while the latter develops gradually over a long period of time." *Henry v. A. C. Lawrence Leather Co.*, 234 N.C. 126, 131, 66 S.E.2d 693, 696 (1951). An occupational disease is "a diseased or morbid condition which develops gradually, and is produced by a series of events in employment occurring over a period of time. It is the cumulative effect of the series of events that causes the disease." *Id.* at 131, 66 S.E.2d at 697. N.C. Gen. Stat. § 97-

53 sets forth a list of specific medical conditions that are automatically deemed to be occupational diseases. N.C. Gen. Stat. §97-53 (2013).

A. Bursitis under N.C. Gen. Stat. § 97-53(17)

One of the listed occupational diseases is "[b]ursitis due to intermittent pressure in the employment." N.C. Gen. Stat. § 97-53(17).

1. Burden of Proof

Plaintiff argues the Opinion and Award should be reversed because the Commission improperly placed the burden on Plaintiff to prove his left shoulder bursitis occurred from multiple events over a period of time instead of a single event. We disagree.

Plaintiff argues he was not required to present medical proof that his shoulder condition resulted from multiple events over a period of time instead of a single event because this would be impossible. He asserts the language of N.C. Gen. Stat § 97-53, stating the listed conditions "shall be" deemed occupational diseases, relieved him from having to prove his shoulder condition occurred from more than one event over a period of time.

During surgery, Dr. Connor observed bursitis in Plaintiff's shoulder. He testified, "bursitis is the inflammation and the reaction of some tissue between this bone spur I mentioned and the rotator cuff that was inflamed." He explained that bursitis can either be an acute diagnosis or something that builds up over time. In

Plaintiff's shoulder, "there were no factors, clinical factors, surgical factors, et cetera, that dilate [sic] specifically one versus the other." Dr. Connor testified he observed "a hypertrophic bursa wear pattern" that is a "sign of some chronic wear of the rotator cuff."

Regardless of whether the bursitis develops acutely or from chronic wear and tear, Plaintiff must show the condition resulted from "intermittent pressure *in the employment*." N.C. Gen. Stat. § 97-53(17) (emphasis supplied). The Commission found:

> 21. Dr. Connor was asked, during the course of his deposition, whether bursitis is "normally an acute diagnosis or is it something that builds up over time?" He responded that "it can be both[,]" but that "[t]here were no factors, clinical factors, surgical factors, et cetera, that dilate [sic] specifically one versus the other." While he went on to state that the "wear pattern on the inner surface of the coracoid ligament is a sign of some chronic wear of the rotator cuff on the inner surface of that bone," which was an objective finding characteristic of chronic wear and tear, there is no evidence of record that the bursitis he noted during surgery was "due to intermittent pressure in the employment" as opposed to the discrete event which plaintiff told both PA Heisel and Dr. Connor occurred on May 15, 2012. In this same vein, Dr. Connor was asked whether plaintiff's shoulder condition resulted from an accumulation of those events, i.e., his strenuous job duties, "and then all of a sudden that specific event in May of 2012 . . . was the . . . straw that broke the camel's back . . . ." Dr. Connor responded that "There's no way in the world that I can know that. There's no way to know that." He went on to state, "So how much of that was the tread thinning on the tire before the blowout versus just a blowout on a normal tire, I would be speculating." This testimony goes

> not only to increased risk, but also to the separate issue of whether the bursitis Dr. Connor found during surgery was the result of "intermittent pressure in the employment" or the result of an acute injury that occurred on May 15, 2012.

Plaintiff carried the burden of proof to show all elements of compensability by the greater weight of the evidence. *Hardin v. Motor Panels, Inc.*, 136 N.C. App. 351, 354, 524 S.E.2d 368, 371 (2000). Pursuant to the statute, he was required to show his bursitis was "due to *intermittent* pressure in the employment." *Id.*; N.C. Gen. Stat. § 97-53(17) (emphasis supplied). The use of the word "intermittent" in the statute requires Plaintiff to show the bursitis was due to pressure on the shoulder during the employment that occurred off and on, in intervals. N.C. Gen. Stat. § 97-53(17). The use of the word "intermittent" precludes a compensable bursitis claim as an occupational disease, which occurred from one isolated event. Under the plain language of the statute, the Commission correctly applied the requisite burden of proof.

<u>2. Expert Testimony</u>

Plaintiff argues the Commission erred in requiring expert testimony on the ultimate legal conclusion that his bursitis was due to intermittent pressure in the employment. Plaintiff asserts the phrase "intermittent pressure in the employment" is a legal term of art and experts are not permitted to testify on ultimate issues of law. *See, e.g.*, *State v. White*, 340 N.C. 264, 294, 457 S.E.2d 841, 859, *cert. denied*, 516 U.S. 994, 133 L. Ed. 2d 436 (1995) ("[A]n expert may not testify that a particular legal

conclusion or standard has or has not been met, at least where the standard is a legal term of art which carries a specific meaning not readily apparent to the witness.").

Our Supreme Court has explained, "[i]n cases involving complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury." *Holley v. ACTS, Inc.*, 357 N.C. 228, 232, 581 S.E.2d 750, 753 (2003) (citation and quotation marks omitted). In *Holley*, the Court determined expert medical testimony was necessary to provide a proper foundation for the Commission's findings regarding the cause of deep vein thrombosis. *Id.* at 234, 581 S.E.2d at 754. The cause of Plaintiff's bursitis is a complicated medical question outside the ordinary knowledge of laymen, and was proper for expert testimony. This argument is overruled.

B. Other Diseases Under N.C. Gen. Stat. § 97-53 (13)

Plaintiff argues his bursitis is covered under N.C. Gen. Stat. § 97-53(17) and the rest of his diagnoses fall under N.C. Gen. Stat. § 97-53 (13). "If a disease is not specifically listed in section 97-53, it may still qualify under section 97-53(13)." *Fu v. UNC Chapel Hill*, 188 N.C. App. 610, 613, 655 S.E.2d 907, 910 (2008). N.C. Gen. Stat. § 97-53(13) "defines occupational disease as 'any disease, other than hearing loss . . ., which is proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all

ordinary diseases of life to which the general public is equally exposed outside of the employment.'" *Id.* (quoting N.C. Gen. Stat. § 97- 53(13)).

1. Burden of Proof

Plaintiff argues the Commission erroneously placed the burden of proof on him under N.C. Gen. Stat. § 97-53(13) to show his shoulder condition occurred as a result of multiple events over a period of time. We disagree.

The Supreme Court has explained:

> For a disease to be occupational under G.S. 97-53(13) it must be (1) characteristic of persons engaged in the particular trade or occupation in which the claimant is engaged; (2) not an ordinary disease of life to which the public generally is equally exposed with those engaged in that particular trade or occupation; and (3) there must be "a causal connection between the disease and the [claimant's] employment." *Hansel v. Sherman Textiles*, 304 N.C. 44, 52, 283 S.E. 2d 101, 105-06 (1981); *Booker v. Duke Medical Center*, 297 N.C. 458, 468, 475, 256 S.E. 2d 189, 196, 200 (1979). To satisfy the first and second elements it is not necessary that the disease originate exclusively from or be unique to the particular trade or occupation in question. All ordinary diseases of life are not excluded from the statute's coverage. Only such ordinary diseases of life to which the general public is exposed equally with workers in the particular trade or occupation are excluded. *Booker v. Duke Medical Center*, supra, 297 N.C. at 472-75, 256 S.E. 2d at 198-200. Thus, the first two elements are satisfied if, as a matter of fact, the employment exposed the worker to a greater risk of contracting the disease than the public generally. *Id.* "The greater risk in such cases provides the nexus between the disease and the employment which makes them an appropriate subject for workmen's compensation." *Id.* at 475, 256 S.E. 2d at 200.

Rutledge v. Tultex Corp., 308 N.C. 85, 93-94, 301 S.E.2d 359, 365 (1983).

"An employee seeking workers' compensation benefits can establish the third element of the *Rutledge* test by showing that the job was a *significant* causal factor in, or *significantly* contributed to, the development of the occupational disease." *Jarrett v. McCreary Modern, Inc.*, 167 N.C. App. 234, 239-40, 605 S.E.2d 197, 201 (2004) (citation omitted) (emphasis in original). "Notwithstanding the overriding legislative goal of providing comprehensive coverage for occupational diseases, *the plaintiff has the burden of proof on all three elements of the Rutledge test." Matthews v. City of Raleigh*, 160 N.C. App. 597, 601, 586 S.E.2d 829, 834 (2003) (internal citations and quotation marks omitted) (emphasis supplied).

The Commission found:

> 22. With regard to increased risk, Dr. Connor was asked on the questionnaire whether plaintiff's job duties were risk factors for the development of plaintiff's left shoulder problems, or increased his risk of developing those problems. Dr. Connor responded "yes," but inserted the word "potentially." Dr. Connor made it clear during his deposition that it would be sheer speculation for him to say that plaintiff's job duties placed him at an increased risk of developing his left shoulder problems as compared to members of the general public not so employed. He testified that "[a]ny time you put stress across the shoulder, whether it's at work or at play or just through daily activities, it can be a potential risk factor for a shoulder injury as opposed to just sitting on the couch." Dr. Connor went on to state that "we don't know specific enough to say with any degree of certainty what activities would potentiate one to have an injury. It's probably some

combination of activities and age and predisposing factors and a lot of other variables."

23. On redirect, the following exchange occurred between plaintiff's counsel and Dr. Connor:

Q. You also said that you couldn't say to a reasonable degree of certainty, which is why you used the word "potentially" in there. And I'm not pinning you down to a certain percentage or not. But what's the frame for reasonable degree, what percentage between 0 and 100 percent are we talking about there?

A. . . . I'm not comfortable saying that it was 100 percent that his performance of those physical therapy maneuvers increased the risk of his development of his shoulder problems. I'm also not comfortable saying that it was 0 percent. This probably don't [sic] help much but the practicality of it is that it's somewhere in between. I am sure that I couldn't speculate as to what percentage it would be.

Plaintiff's counsel argues that Dr. Connor testified that plaintiff's risk was somewhere between 0 and 100 percent, and that if the risk was greater than zero, then there was of necessity an "increased" risk. The Full Commission finds that Dr. Connor was indicating that his degree of certainty, not plaintiff's degree of risk, was somewhere between 0 and 100 percent, and thus, there is no competent evidence of record that rises above sheer speculation that plaintiff's employment with defendant-employer more likely than not placed him at an increased risk of developing his left shoulder problems as compared to members of the general public not so employed.

24. Plaintiff's employment with defendant-employer did not place him at an increased risk of developing left shoulder problems as compared to members of the general public not so employed. The left shoulder problems which have disabled plaintiff have not been shown to be

> characteristic of or peculiar to his employment as a physical therapist.

Dr. Connor testified as an expert in the field of orthopedic surgery with a specialization in shoulder and elbow surgery. "When [the] expert opinion testimony is based merely upon speculation and conjecture, it is not sufficiently reliable to qualify as competent evidence on issues of medical causation." *Holley*, 357 N.C. at 232, 581 S.E.2d at 753 (citation and quotation marks omitted).

The Full Commission found Dr. Connor's testimony does not rise to a level above mere speculation of whether Plaintiff's shoulder condition was due to causes characteristic of his employment. *Id.*; N.C. Gen. Stat. § 97-53(13). Competent evidence in the record supports this finding. The Commission applied the correct burden of proof in determining the compensability of Plaintiff's occupational disease claim.

2. Increased Risk

Plaintiff argues the Commission erred by finding his employment did not place him at an "increased risk" of developing his shoulder condition. We disagree.

Dr. Connor refused to speculate concerning the specific percentage that Plaintiff's work increased the risk of shoulder problems. Plaintiff argues Dr. Connor testified the risk was greater than zero, and "a greater-than-zero percent factor means that risk is 'increased by definition.'" In Findings of Fact 22 and 23, the Commission interpreted Dr. Connor's testimony to pertain to his "degree of

certainty," not Plaintiff's degree of increased risk. Even if the testimony would support a different interpretation, the Commission's interpretation is reasonable, supported by the evidence, and is binding on appeal. *Shah*, 140 N.C. App. at 61-62, 535 S.E.2d at 580. Plaintiff failed to show his employment with Defendant placed him at an increased risk of developing left shoulder problems as compared to members of the general public not so employed. *Rutledge*, 308 N.C. at 93-94, 301 S.E.2d at 365.

V. Law of the Case Doctrine

Plaintiff argues his shoulder condition was "due to" his work condition under the law of the case doctrine. We disagree.

Plaintiff appeared before the Deputy Commissioner on his first claim for injury by accident arising out of the 15 May 2012 event. The Deputy Commissioner determined Plaintiff's injury occurred under normal working conditions and in his normal work routine and denied his injury by accident claim. Plaintiff argues it is "logically and factually impossible" to reconcile the Commission's more recent conclusion that Plaintiff's bursitis was not due to intermittent pressure in the employment with the Deputy Commissioner's earlier determination.

"[W]hen a party fails to appeal from a tribunal's decision that is not interlocutory, the decision below becomes the 'law of the case' and cannot be

challenged in subsequent proceedings in the same case." *Boje v. D.W.I.T., LLC*, 195 N.C. App. 118, 122, 670 S.E.2d 910, 912 (2009).

This proceeding is not the "same case" as the previous Opinion and Award. After the denial of his injury by accident claim and failure to appeal to the Full Commission, Plaintiff brought a wholly new claim for occupational disease. The Deputy Commissioner's decision at bar found his occupational disease claim was compensable, which was reversed by the Full Commission on appeal by Defendant. This argument is overruled.

VI. Conclusion

The Commission's findings of fact on the issue of whether Plaintiff proved his occupational disease claim are supported by competent evidence. These findings of fact support the Commission's conclusion of law that Plaintiff failed to carry his burden of proof. The Opinion and Award of the Full Commission is affirmed.

AFFIRMED.

Judges GEER and STROUD concur.

Report per Rule 30(e).