IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-1276

Filed: 4 October 2016

North Carolina Industrial Commission, I.C. Nos. 13-760414 & Y91483

THELMA RIGGSBEE, Employee, Plaintiff,

v.

DURHAM CITY TRANSIT COMPANY, Employer, KEY RISK INSURANCE COMPANY, Carrier, Defendants.

Appeal by Plaintiff from Opinion and Award entered 5 August 2015 by the Full Commission of the North Carolina Industrial Commission. Heard in the Court of Appeals 13 April 2016.

*Perry, Perry & Perry, P.A., by Robert T. Perry, for Plaintiff-Appellant.*

*Hendrick Gardner Kincheloe & Garofalo, LLP, by Tonya D. Davis and M. Duane Jones, for Defendant-Appellee.*

INMAN, Judge.

The Industrial Commission, as a fact finding body, is the sole determiner of the weight and credibility of a witness' testimony. This Court will not review the Commission's finding that the testimony of one expert witness was more credible than the testimony of other experts.

Thelma Riggsbee ("Plaintiff"), a bus driver for the Durham City Transit Company, Inc. ("Employer"), whose insurance carrier is Key Risk Insurance

Company, (collectively "Defendants"), appeals from an Opinion and Award entered on 5 August 2015 by the Full Commission of the North Carolina Industrial Commission ("the Commission"). Plaintiff contends that the Commission improperly determined that her right knee meniscus tears and arthritis were not a compensable occupational disease as defined by N.C. Gen. Stat. § 97-53(13) (2015). We disagree and affirm the Commission.

## I. Factual and Procedural History

Plaintiff worked for Employer as a bus driver for 15 years beginning in 1998. She worked approximately eight hours per day, five days per week. Her job required her to remain seated for extended periods of time and to assist securing riders in wheelchairs.

On 27 September 2013, Plaintiff went to see her primary care doctor complaining of knee pain. Plaintiff's doctor referred her to Triangle Orthopaedic Associates Urgent Care. Plaintiff went to another provider where she was diagnosed with a right knee/leg sprain/strain and possible meniscus tears. The same provider restricted Plaintiff from engaging in certain activities including driving.

On 14 November 2013, Plaintiff returned to her primary doctor and for the first time disclosed that she had slipped and fallen at work approximately three months earlier. Plaintiff's doctor again referred her to Triangle Orthopaedic Associates. Plaintiff saw Dr. William P. Silver at that practice and underwent an MRI which

confirmed the diagnosis of right knee meniscal tears. On 9 December 2013, Plaintiff underwent arthroscopic surgery performed by Dr. Silver to repair the meniscal tears.

In March 2014 Plaintiff sought an independent medical evaluation by Dr. Charles Goodno. Dr. Goodno opined that Plaintiff had meniscal tears of the right knee, and that more likely than not, Plaintiff's fall and repetitive motions at work were contributory factors. In April 2014, Plaintiff sought a second independent evaluation by Dr. Paul Wright. Dr. Wright diagnosed Plaintiff with right knee synovitis and arthropathy and opined that she had a pre-existing right knee condition that was aggravated by her duties as a bus driver.

In May 2014, Plaintiff presented to Dr. Brian Szura, an orthopedic surgeon at Cary Orthopaedics & Sports Medicine Specialists. Dr. Szura opined that it was not possible to determine, to any degree of medical certainty, the exact cause of the meniscus tears. Dr. Szura further opined that Plaintiff's duties as a bus driver did not increase her risk of the development of a meniscus tear greater than members of the general population.

In June 2014, Plaintiff underwent another right knee MRI and returned to Dr. Silver for evaluation. Dr. Silver's impression was that Plaintiff had symptoms of pes anserine tendinitis.

Plaintiff reported her injury to the Commission and requested compensation on 5 November 2013. The Commission denied her claim six days later, on 11

November 2013. Plaintiff pursued her claim in a hearing before Deputy Commissioner Victoria M. Homick and argued that her injury was the result of an orthopedic condition caused by her work for Employer. The deputy commissioner issued an Opinion and Award denying Plaintiff's claim. Plaintiff appealed to the Full Commission, which entered an Opinion and Award on 2 September 2015 also denying Plaintiff's claim. Plaintiff now appeals.

## II. Analysis

### A. Standard of Review

> The standard of review in workers' compensation cases has been firmly established by the General Assembly and by numerous decisions of this Court . . . . Under the Workers' Compensation Act, '[t]he Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony.' Therefore, on appeal from an award of the Industrial Commission, review is limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law. This 'court's duty goes no further than to determine whether the record contains any evidence tending to support the finding.'

*Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (citing *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 115-16, 530 S.E.2d 549, 552 (2000), and *Adams v. AVX Corp.*, 349 N.C. 676, 681-82, 509 S.E.2d 411, 414 (1998) (internal citation omitted)). On appeal, unchallenged findings of fact "are 'presumed to be supported by competent evidence' and are, thus 'conclusively established . . . .'" *Chaisson v. Simpson*, 195 N.C. App. 463, 470, 673 S.E.2d 149, 156

(2009) (quoting *Johnson v. Herbie's Place*, 157 N.C. App. 168, 180, 579 S.E.2d 110, 118 (2003)). However, "[t]he Commission's conclusions of law are reviewed *de novo*." *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004) (citation omitted).

**B. Compensable Occupational Disease**

Plaintiff argued before the Commission that her right knee problems were caused by repetitive motion in her work for Employer. A medical condition is compensable as an occupational disease if it falls within the following statutory definition:

> Any disease . . . 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.

N.C. Gen. Stat. § 97-53(13). To meet this definition a plaintiff must show the disease to 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.' " *Rutledge v. Tultex Corp./Kings Yarn*, 308 N.C. 85, 93, 301 S.E.2d 359, 365 (1983) (alteration in original) (quoting *Hansel v. Sherman Textiles*, 304 N.C. 44, 52, 283 S.E.2d 101, 105-06 (1981)) (citing *Booker v. Duke Med.*

*Ctr.*, 297, N.C. 458, 468, 475, 256 S.E.2d 189, 196, 200 (1979)).

The Court in *Rutledge* explained how the first two elements may be satisfied:

> 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. 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. '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.'

*Rutledge*, 308 N.C. at 93-94, 301 S.E.2d at 365 (internal citations omitted).

Plaintiff contends that the first two elements—that (1) her knee condition resulting in meniscus tears is characteristic of others within her occupation and that (2) her condition is not an ordinary disease of life to which the general public is equally exposed—were established by evidence of Plaintiff's work history with Employer and the expert testimonies of Dr. Goodno and Dr. Wright, notwithstanding the contrary testimony by Dr. Szura that Plaintiff's occupation did not predispose her to, or increase her risk of, developing meniscus tears.

The Commission resolved the conflicts between the expert testimonies regarding whether Plaintiff's work for Employer increased her risk of developing her knee condition in its Finding of Fact Number 41:

> Based upon the preponderance of the evidence, the testimony of Dr. Szura is given greater weight than that of Dr. Goodno and Dr. Wright in regard to causation and increased risk.

This finding is not subject to appellate review.

"Under our Workers' Compensation Act, the Commission is the fact finding body . . . [and] the sole judge of credibility of the witnesses and the weight to be given their testimony." *Adams*, 349 N.C. at 680, 509 S.E.2d at 413 (internal quotation marks and internal citation omitted). "[T]his Court does not have the right to weigh the evidence and decide the issue on the basis of its weight. This [C]ourt's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Shaw v. U.S. Airways, Inc.*, 217 N.C. App 539, 542, 720 S.E.2d 688, 690 (2011) (citing *Johnson v. Lowe's Cos.*, 143 N.C. App. 348, 350, 546 S.E.2d 616, 617-18 (2001)). To allow this Court to review credibility determinations by the Commission "would be inconsistent with our legal system's tradition of not requiring the fact finder to explain why he or she believes one witness over another or believes one piece of evidence is more credible than another." *Deese*, 352 N.C. at 116-17, 530 S.E.2d at 553.

Furthermore, Plaintiff has not challenged several other of the Commission's factual findings, which are thus conclusive and establish that Plaintiff did not satisfy the essential elements of her claim. Findings of Fact 33, 34, 35, 36, 37, and 38 are as follows:

33. Dr. Szura testified that the activities Plaintiff described to him did not increase the likelihood that she would have sustained a meniscus tear over that of the general population. Dr. Szura reviewed the photographs of the inside of the bus that showed the position of the bus driver's seat, with someone sitting in it, relative to the accelerator and brake. After reviewing the photographs, Dr. Szura confirmed that his opinion regarding increased risk remained the same. Contrary to the assumptions of Dr. Wright, Dr. Szura recognized that the photographs revealed that the leg had to be extended about 45 degrees at the knee, rather than being positioned in a 90 degree angle.

34. Dr. Szura specifically disagreed with Dr. Wright with respect to the proposition that sitting in a 90 degree angle increases the likelihood of developing knee issues. Dr. Szura testified that even if Plaintiff were required to sit with her legs in a 90 degree angle all day, it should not impact the knees at all, and would not contribute to the development of a meniscal tear. With respect to substantial loading, Dr. Szura explained that when a person is seated, the lower extremities are not being loaded so the difference in the joint forces across the medial and lateral parts of the joints is minimal when there is not substantial force applied to the leg.

35. Dr. Szura also disagreed with Dr. Goodno's testimony that the duties of a bus driver exposed Plaintiff to a greater risk for developing problems with her knee versus the general population. Specifically, Dr. Szura disagreed with the report cited by Dr. Goodno ("A Review of Occupational Knee Disorders") as the authors had not performed any study themselves but compiled literature and drew conclusions based upon the literature selected.

36. Based upon his review of Plaintiff's medical records, the performance of a physical examination of Plaintiff, the photographs of the interior of the bus, and considering the testimony of Dr. Goodno and Dr. Wright, Dr. Szura did not

> believe operating the bus predisposed Plaintiff to developing a meniscus tear or arthritis or increased the risk that Plaintiff would develop meniscal tears or arthritis in her knee as compared to members of the general population not so employed.
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> 37. Dr. Szura opined that if Dr. Wright contends that positioning predisposes a person to a meniscal tear and osteoarthritis in the medial part of the knee, then it should also follow that it would cause a predisposition to a greater extent under the kneecap. In Plaintiff's case, there was absolutely no abnormality of the cartilage in the kneecap at the time of her arthroscopy.
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> 38. Dr. Szura also thought that Plaintiff would have a greater likelihood of developing a meniscal tear as a result of her bowlegged alignment and impact of the arthritis versus driving a bus. Dr. Szura opined Plaintiff's meniscus tear was, in all likelihood, the result of her alignment and many, many years of walking on her legs and carrying out activities of daily living.

Unchallenged findings are binding on appeal, and therefore, the only remaining question before this Court regarding the first two essential elements of Plaintiff's claim is whether these findings support the Commission's conclusions of law.

Conclusion of Law 5 states that "Plaintiff [] failed [to] demonstrate by a preponderance of the evidence that her employment with []Employer placed her at an increased risk of developing a right knee meniscus tear and arthritis as compared to the general population or that her right knee meniscus tear and arthritis is causally related to her employment with []Employer." After considering the issue *de novo*, we hold that the findings provide ample support for the conclusion.

Because we affirm the Commission's findings and conclusion that Plaintiff's condition was not particular to people working in her occupation and that it was an ordinary disease of life for which her employment did not increase her risk of exposure, we need not address Plaintiff's argument regarding the third essential element of her claim.

## III. Conclusion

Accordingly, we conclude that the Commission's findings support the Commission's conclusions of law and we affirm the Opinion and Award.

AFFIRMED.

Judges ELMORE and MCCULLOUGH concur.

Report per Rule 30(e).