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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-705

Filed: 4 August 2020

North Carolina Industrial Commission, I.C. No. 14-714353

VALEDA KAY DAY, Employee, Plaintiff,

v.

TRAVELERS INSURANCE COMPANY, Employer, and NEW HAMPSHIRE INSURANCE COMPANY, Carrier, Defendants.

Appeal by plaintiff from opinion and award entered 12 April 2019 by the North Carolina Industrial Commission. Heard in the Court of Appeals 7 January 2020.

Wallace and Graham, P.A., by Edward L. Pauley, for plaintiff-appellant.

Teague Campbell Dennis & Gorham, L.L.P., by John A. Tomei and Lindsay A. Underwood, for defendants-appellees.

ZACHARY, Judge.

Plaintiff Valeda Kay Day appeals from an opinion and award of the North Carolina Industrial Commission denying her workers' compensation claim for an alleged occupational disease. After careful review, we affirm the opinion and award of the Commission.

Background

The facts of this case are strongly disputed by the parties. Day's evidence was as follows. On 30 September 1996, Day began her employment as a senior claims representative for Defendant Travelers Insurance Co. ("Travelers") in Reading, Pennsylvania. Day was assigned to handle approximately 175 to 180 cases.

According to Day, the stressful employment conditions at Travelers in Reading caused her to develop anxiety and depression. Day contended that her workload was higher than that of her coworkers, and that she struggled to complete her assignments in a timely and acceptable manner, even though she frequently worked overtime. As a result of her workload, as well as Travelers's monitoring of employee progress and timeliness, Day became increasingly stressed, anxious, and depressed.

After Day's husband was stationed at Charleston Air Force Base, she accepted a claims resolution position in the Travelers office in Charlotte, North Carolina. Numerous aspects of this new position exacerbated her anxiety and stress. Day testified that, among other issues, (1) certain clients made offensive comments about her being a woman and a "Northerner," and Day's supervisor said that Day "would just have to live with it"; (2) departing employees' work would be distributed to the remaining employees, continually increasing the workload; (3) each new manager had "differences in the amount of detail" expected, to which Day had to adapt; (4) Day's supervisor instructed her not to inform corporate representatives of the total number of files that she was handling, because she had more cases than prescribed

by Travelers; and (5) Day's superiors asked that she submit fraudulent claims, undervalue or deny compensable claims, and lie to insureds. Day felt that attempts to discuss these problems with supervisors were met with animus.

Day also testified that she developed a number of medical symptoms in response to the stress. She experienced bouts of rapid heartbeat and "facial tingling and tingling into [her] arms[.]" In 2003, Day began suffering "symptoms in [her] left side," which worsened over the next 10 years, "creat[ing] a weakness" and causing "a shaking of the limbs[.]" Although Day was diagnosed with migraines in her 20s, they increased in frequency; she was having severe headaches daily near the end of her tenure with Travelers. In addition, Day began losing her voice in response to stress.

While Day has not worked for Travelers since 25 March 2013, Day testified that she continued to suffer from anxiety and depression, and the attendant medical conditions.

On 25 February 2014, Day filed a claim with the Industrial Commission asserting that she suffers from ongoing "occupational anxiety disorder, panic disorder, [and] depressive disorder." On 5 March 2014, Travelers denied the compensability of Day's claim. On 23 May 2017, a hearing was held before Special Deputy Commissioner Jesse M. Tillman, III, in Charlotte, North Carolina. The Deputy Commissioner denied Day's claim for workers' compensation benefits in an opinion and award issued on 4 August 2018. Day appealed the opinion and award to

the Full Commission, which denied Day's claim on 12 April 2019. Day timely appealed the Full Commission's opinion and award to this Court.

Discussion

Day argues on appeal that the Commission (1) applied the incorrect legal standard in determining whether she suffered from a compensable occupational disease; (2) improperly evaluated the testimony of her medical experts; (3) disregarded certain testimony and other evidence favorable to Day; (4) denied her due process in discovery rulings; and (5) improperly referenced facts associated with a mediation in its opinion and award.

I. *Standard of Review*

On appeal from an opinion and award of the Industrial Commission, our review is limited to evaluating "whether there is any competent evidence in the record to support the Commission's findings of fact and whether these findings support the Commission's conclusions of law." *Bass v. Morganite, Inc.*, 166 N.C. App. 605, 608, 603 S.E.2d 384, 386 (2004) (citation omitted). "The findings of fact made by the Commission are conclusive upon appeal when supported by competent evidence, even when there is evidence to support a finding to the contrary." *Id.* (citation omitted). Furthermore, "[f]indings of fact that are not challenged on appeal are binding on this Court." *Strezinski v. City of Greensboro*, 187 N.C. App. 703, 706, 654 S.E.2d 263, 265 (2007).

"The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998) (citation omitted). "Contradictions in the testimony go to its weight, and the Commission may properly refuse to believe particular evidence." *Harrell v. Stevens & Co.*, 45 N.C. App. 197, 205, 262 S.E.2d 830, 835 (1980). "The Commission's conclusions of law, however, are reviewed de novo." *Morgan v. Morgan Motor Co. of Albemarle*, 231 N.C. App. 377, 380, 752 S.E.2d 677, 680 (2013) (italics omitted), *aff'd per curiam*, 368 N.C. 69, 772 S.E.2d 238 (2015).

II. Analysis

A. Compensability of Occupational Disease Claims

The Workers' Compensation Act lists the "diseases and conditions . . . deemed to be occupational diseases within the meaning of this Article." N.C. Gen. Stat. § 97-53 (2019). Subsection (13) of the statute provides that, within the meaning of this article, an occupational disease is "[a]ny 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.* § 97-53(13).

An occupational disease is compensable under N.C. Gen. Stat. § 97-53(13) where it is "characteristic of persons engaged in the particular trade or occupation in

which the claimant is engaged; [and] not an ordinary disease of life to which the public generally is equally exposed with those engaged in that particular trade or occupation." *Rutledge v. Tultex Corp.*, 308 N.C. 85, 93, 301 S.E.2d 359, 365 (1983) (citation omitted). In addition, "there must be a causal connection between the disease and the [claimant's] employment." *Id.* (citation and internal quotation marks omitted). "In cases where the employment exposed the worker to a greater risk of contracting the disease than the general public, the first two elements are satisfied." *Chambers v. Transit Mgmt.*, 360 N.C. 609, 612, 636 S.E.2d 553, 555 (2006) (internal citations and quotation marks omitted).

It is well established that "[u]nder appropriate circumstances, work-related depression or other mental illness may be a compensable occupational disease" pursuant to N.C. Gen. Stat. § 97-53. *Pitillo v. N.C. Dep't of Envtl. Health & Natural Res.*, 151 N.C. App. 641, 648, 566 S.E.2d 807, 813 (2002) (citation omitted); *accord Clark v. City of Asheville*, 161 N.C. App. 717, 721, 589 S.E.2d 384, 386 (2003). In such cases, "the claimant must prove that the mental illness or injury was due to stresses or conditions different from those borne by the general public." *Pitillo*, 151 N.C. App. at 648, 566 S.E.2d at 813 (citation omitted).

B. Application of Proper Legal Standard

Day first argues that the Full Commission applied the incorrect legal standard in determining whether she suffered a compensable occupational disease pursuant to N.C. Gen. Stat. § 97-53(13). We disagree.

More specifically, Day contends on appeal that the Commission failed to address whether Day's employment with Travelers "placed her at greater risk" of developing anxiety and depression than that faced by the general public. Day further asserts that although "the Commission found that [her] stressors were common to many if not all employees[,]" this is not the appropriate "legal standard. The legal standard is whether the employment places the employee at a greater risk—not whether the category of risk is the same."

Day misapprehends the *Rutledge* test. As our Supreme Court has consistently explained, "[i]n cases where the employment exposed the worker to a greater risk of contracting the disease than the general public, the first two elements are satisfied." *Chambers*, 360 N.C. at 612, 636 S.E.2d at 555 (citing *Rutledge*, 308 N.C. at 93-94, 301 S.E.2d at 365). "The greater risk in such cases provides the nexus between the disease and the employment which makes them an appropriate subject for workman's compensation." *Id.* (citation omitted).

Moreover, "*Rutledge* and subsequent case law applying its three-prong test make clear that evidence tending to show that the employment simply aggravated or contributed to the employee's condition goes only to the issue of causation, the third

element of the *Rutledge* test." *Id.* at 613, 636 S.E.2d at 556 (citation omitted). But "[r]egardless of how an employee meets the causation prong, the employee must nevertheless satisfy the remaining two prongs of the *Rutledge* test by establishing that the employment placed him at a greater risk for contracting the condition than the general public." *Id.* (citation omitted).

Contrary to Day's assertions on appeal, it is clear that the Commission *did* address the extent to which Day's employment increased her risk of developing anxiety and depression. As Day observes in her brief, the Full Commission found in finding of fact # 91 that "[Day] did sustain employment stressors during her tenure of employment with [Travelers]," and that "these employment stressors did cause or signifcantly [sic] contribute to her anxiety and depression." However, the Commission further found in finding # 92 that these

> are ordinary stressors and diseases of life[,] and they are not characteristic of or peculiar to . . . an insurance claims adjuster work as opposed to occupations in general[,] . . . [and] that [*Day's*] *employment as an insurance claims adjuster did not place her at an increased risk of contracting anxiety and depression as opposed to the general public not so employed*.

(Emphasis added).

Accordingly, Day's first argument lacks merit.

C. Proper Evaluation of Expert Medical Testimony

Day next argues that the Commission "ignored crucial evidence" in determining that her employment as an insurance claims adjuster did not place her at an increased risk of contracting anxiety and depression. In particular, she contends that the Commission failed to properly evaluate the testimony of her medical experts.

Again, the first two prongs of the *Rutledge* test are satisfied by showing that a claimant's employment exposed the claimant to a greater risk of contracting a disease than the general public. *See Chambers*, 360 N.C. at 612, 636 S.E.2d at 555. This Court has required that the existence of an increased risk be established with expert medical evidence. *See Briggs v. Debbie's Staffing, Inc.*, 258 N.C. App. 207, 222, 812 S.E.2d 706, 715, *disc. review denied*, 371 N.C. 474, 818 S.E.2d 277 (2018); *Norris v. Drexel Heritage Furnishings, Inc.*, 139 N.C. App. 620, 623, 534 S.E.2d 259, 262 (2000), *cert. denied*, 353 N.C. 378, 547 S.E.2d 15 (2001).

In the instant case, on the issue of her heightened risk Day presented the testimony of Dr. Adamu Salisu, her psychiatrist; Dr. Sharon Kanelos, her physical medicine and rehabilitation physician; and Dr. Brenda Eshbach, her psychologist. Of the expert medical testimony, the Commission gave the greatest weight to the testimony of Dr. Salisu. The Commission does not have to justify its decision to give greater weight to the opinion testimony of one expert over another; this is the Commission's prerogative. As stated earlier, the "Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Adams*, 349

N.C. at 680, 509 S.E.2d at 413 (citation and internal quotation marks omitted). Nonetheless, the Commission explained that it chose to give more weight to Dr. Salisu's testimony because Dr. Salisu is a psychiatrist specializing in the treatment of depression and anxiety, and has treated Day since 2013.

Here, Dr. Salisu did not express an opinion as to whether Day's employment subjected her to a greater risk of contracting anxiety and depression as compared to the general public. As Day notes, Dr. Salisu testified that "some jobs are inherently more stressful than others," and that "[h]e has treated insurance employees for stress and depression"; this testimony is not, however, sufficient to satisfy the first two prongs of the *Rutledge* test. In addition, at his deposition, Dr. Salisu was questioned by Day's counsel regarding several articles and documents listing levels of occupational stress in various fields. Although Day contends that the Bureau of Labor Statistics report was of particular significance, Dr. Salisu stated he had not read any of the articles and documents, and specifically testified that he had no "prior exposure" to the Bureau of Labor Statistics report.

Accordingly, the Commission properly found, based on the expert medical evidence presented, that Day's employment did not place her at an increased risk of developing anxiety and depression as opposed to the general public not so employed. Day's argument fails.

D. Failure to Consider Competent Evidence

Day also asserts that the Commission erred by failing to consider competent evidence. In particular, Day argues that the Commission improperly (1) failed to acknowledge certain parts of her medical experts' testimony, (2) failed to discuss a statistical report offered by Day, (3) disregarded the contradictory testimony of witnesses for Travelers, and (4) disregarded evidence which contradicted the testimony of witnesses for Travelers.

"[T]he Commission is the sole judge of the credibility of witnesses and may believe all or a part or none of any witness's testimony[.]" *Harrell*, 45 N.C. App. at 206, 262 S.E.2d at 835 (citation and internal quotation marks omitted). Moreover, "[t]he Commission is not required . . . to find facts as to all credible evidence . . . . Instead, the Commission must find those facts which are necessary to support its conclusions of law." *London v. Snak Time Catering, Inc.*, 136 N.C. App. 473, 476, 525 S.E.2d 203, 205 (2000). Nevertheless, the Commission "may not wholly disregard competent evidence." *Harrell,* 45 N.C. App. at 205, 262 S.E.2d at 835. "Contradictions in the testimony go to its weight, and the Commission may properly refuse to believe particular evidence. But, it must first consider the evidence[.]" *Id.* "It is not, however, necessary that the Full Commission make exhaustive findings as to each statement made by any given witness or make findings rejecting specific evidence that may be contrary to the evidence accepted by the Full Commission." *Bryant v. Weyerhaeuser*

Co., 130 N.C. App. 135, 139, 502 S.E.2d 58, 62, *disc. review denied*, 349 N.C. 228, 515 S.E.2d 700 (1998).

In the instant case, it is evident that the Commission considered and weighed the evidence presented by Day. In the Commission's opinion and award, the testimony of Dr. Salisu, Dr. Kanelos, and Dr. Eshbach is described at length. The Commission devoted seven pages and 26 findings of fact to consideration of the testimony of these expert witnesses. The Commission also explained the reason it chose to give more weight to the testimony of Dr. Salisu. And although the Commission did not specifically refer to the Bureau of Labor Statistics report, it referred to the articles and documents offered by Day at Dr. Salisu's deposition, and with which Dr. Salisu testified he was not familiar.

In addition, the Commission extensively discussed the testimony of David Ritger, a Travelers Claims Center Vice President, and Laura Glastetter, a Travelers claims manager. The Commission does not appear to refer to or discuss any of Day's evaluations, which Day contends contradict the testimony of Ritger and Glastetter by providing evidence of the monetary goals set for employees, which relates to the immoral practices at Travelers. However, the Commission directly addressed the issue of monetary goals for employees and their consideration in employee evaluations. Finally, the Commission simply found Day's allegations regarding fraud and other immoral practices at Travelers to lack credibility, noting that "[o]ther

employees who worked with [Day] and shared the same or similar job duties provided credible testimony to the contrary."

In sum, Day objects to the Commission's failure to discuss parts of the evidence which she maintains were supportive of her position. This the Commission is not required to do. The Commission, as finder of fact, may find credible all, a part, or none of a witness's testimony. *See Bass*, 166 N.C. App. at 608, 603 S.E.2d at 386. It need not comment on every piece of evidence, or make a finding of fact as to all credible evidence. *See London*, 136 N.C. App. at 476, 525 S.E.2d at 205. Day's argument is, in essence, a request for this Court to review the weight and credibility of the evidence, which we will not do. *See Hall v. U.S. Xpress, Inc.*, 256 N.C. App. 635, 650, 808 S.E.2d 595, 605 (2017), *disc. review denied*, 371 N.C. 111, 813 S.E.2d 235 (2018).

Thus, the Commission did not err by failing to consider all competent evidence in the record. Day's argument is without merit.

D. Violation of Due Process

Day next argues that her constitutional right to due process was violated by the Commission's failure to rule on her appeal of the deputy commissioner's denial of her "Motion to Permit Post Hearing Discovery."

In the case at bar, Day presented the deputy commissioner with her motion for post-hearing discovery, which the deputy commissioner inadvertently failed to

address until he issued the opinion and award, at which time he denied the motion. Day then appealed the opinion and award of the deputy commissioner to the Full Commission. Day does not contend that she pursued the discovery she sought before the Full Commission.

On appeal, Day fails to support her argument that the Commission violated her right to due process with either cogent argument or citation to relevant legal authority. *See* N.C.R. App. P. 28(b)(6) ("Issues. . . in support of which no reason or argument is stated . . . will be taken as abandoned."). Accordingly, this argument has been abandoned.

E. Improper Reference to Mediation

Finally, Day asserts that the Full Commission incorrectly "utilized facts associated with a mediation not supported by evidence and in violation" of Rule 103(f) of the North Carolina Mediated Settlement Conference Rules.

In finding of fact # 59, the Commission notes, in pertinent part:

> [Day] intermittently testified with an affected weak and raspy manner of speaking, but at other times during the hearing, she spoke in a normal tone and quality of voice. [Day] did not experience complete loss of voice or have a panic attack, despite reporting that this would happen if she was forced to encounter [Travelers], *even at mediation*.

(Emphasis added). Day objects to the reference to mediation in this finding of fact.

Rule 103(f) provides that, save certain exceptions:

> Evidence of statements made and conduct occurring in a mediated settlement conference or other settlement proceeding conducted under this section, whether attributable to a party, the mediator, other neutral, or a neutral observer present at the settlement proceeding, shall not be subject to discovery and shall be inadmissible in any proceeding in the action or other civil actions on the same claim[.]

R.M.S.C. Rule 103(f).

The Rule clearly indicates that evidence of statements made and conduct occurring *in a mediated settlement conference* is inadmissible. Finding of fact # 59, however, does not refer to any statements made or conduct occurring at an actual mediation. Rather, in this finding the Commission refers to the fact that although Day said that she would have a panic attack or lose her voice if compelled to face employees from Travelers, even at a mediation, she testified before employees from Travelers with minimal adverse reaction.

Thus, the Commission did not improperly refer to "statements made and conduct occurring in a mediated settlement conference." Day's final argument lacks merit.

Conclusion

For the reasons stated herein, we affirm the Full Commission's opinion and award.

AFFIRMED.

Judges BRYANT and COLLINS concur.

Report per Rule 30(e).