NO. COA11-277
NORTH CAROLINA COURT OF APPEALS

Filed: 1 November 2011

JOHNNIE MACK RUFFIN,
Employee, Plaintiff,

v.

North Carolina
Industrial Commission
I.C. No. 146188

DOMTAR PAPER COMPANY,
Employer, and LIBERTY
MUTUAL INSURANCE COMPANY,
Carrier,
Defendants.

Appeal by defendants from Opinion and Award entered 4 November 2010 by the North Carolina Industrial Commission. Heard in the Court of Appeals 14 September 2011.

Wallace and Graham, P.A., by Mark P. Doby and Edward L. Pauley, for plaintiff-appellee.

Kerner Law, by Robert C. Kerner, Jr., for defendant-appellant.

STEELMAN, Judge.

Where plaintiff established that he was exposed to harmful noise levels exceeding 90 decibels during his employment, the Industrial Commission did not err by awarding him compensation for occupational hearing loss. Credibility determinations are

the sole province of the Industrial Commission, and it is not required to justify or explain such determinations.

I. Factual and Procedural Background

Johnnie Ruffin (plaintiff) had worked at a paper plant located in Plymouth for approximately 36 years in various departments. Weyerhaeuser Paper Company owned the plant until April of 2006 when it was purchased by Domtar Paper Company (defendant). During his employment, plaintiff was exposed to various levels of noise throughout the plant.

Plaintiff began his employment in the timberland department, clearing land with a bulldozer. Plaintiff spent eight hours a day on the bulldozer, which had an eight hundred horsepower diesel motor. No muffler was installed and plaintiff did not wear any hearing protection. Plaintiff worked in this capacity for approximately four years before transferring to the paper mill as an "extra board" performing various jobs around the plant. Plaintiff was assigned to the NC 5 paper machine and worked on the winder, pushing rolls of paper off onto a conveyor belt to be transported to the shipping department. Loud noise was constant around the paper machines: "The paper machine was driven by a line shaft and a turbine. You also had refiner motors, vacuum pumps, steam, metal rolls turning together, turn-

ups at the reel, winding cradles going up and down, hydraulic units screaming, just a lot of noise around a paper machine."

Plaintiff next worked in the maintenance department as an oiler. Plaintiff was responsible for the NC 1, 2, and 3 paper machines. These machines were similar to NC 5, but smaller in size. The noise produced while plaintiff worked on these machines was virtually identical to that described above.

Plaintiff also held the titles of "millwright" and "welder." In these capacities, plaintiff worked in the boiler room, with the wood yard chippers, vacuum pumps, refiners, and paper machines. The boiler room was a "noisy area from top to bottom" because of the steam, pop off valves, and fire inside. The chipper had a five thousand horsepower motor and was located in an insulated building. The chipper took twenty-inch logs and cut them into chips in a matter of seconds. The machine was so loud that you could "yell just as loud as you want to and the man standing beside you [is not] going to hear what you say." The refiners had anywhere from a six hundred to a twelve hundred horsepower motor and cut the paper stock into fine pieces.

Finally, in 1986, plaintiff became a senior mechanic. This job entailed welding, pipe fitting, and millwright work. From 1986 until 1991, plaintiff was assigned to area eight, the

construction part of Weyerhaeuser. "Area eight had a capital project. They might have one in the boiler room this month, the wood yard the next month, on a paper machine the next month." In 1991, plaintiff was assigned to the NC 1 paper machine. From 1999 to the present, plaintiff transferred back to the NC 5 paper machine. Plaintiff was also "loaned out" to different areas as needed, such as the boiler room and the NC 2 paper machine.

In addition to the noise in the plant from the variety of machinery, there were valves throughout the facility that relieved steam pressure built up in the pipes. The release of the steam pressure was so loud that it could be heard several miles away. The valves released steam pressure approximately ten times per month.

On 12 March 2007, plaintiff was referred for an audiological evaluation by defendant. Plaintiff presented to Dr. Lewis Gidley (Dr. Gidley) and was diagnosed with "[h]igh frequency sensorineural hearing loss with a noise induced notch bilaterally." However, when compared to his baseline in 1987, Dr. Gidley found no standard threshold shift in either ear. Plaintiff was re-evaluated by Dr. Gidley on 8 September 2008. Plaintiff was diagnosed with "[m]ild to moderate sensorineural

hearing loss for each ear of symmetrical configuration, poorer in the higher frequencies. There is some suggestion of noise induced audiometric configuration." Dr. Gidley opined that plaintiff suffered a standard threshold shift in his right ear, but noted that plaintiff had some non-occupational noise history from the discharge of firearms while hunting.

On 4 November 2008, plaintiff filed a Form 18 seeking compensation for hearing loss in both ears as of 8 September 2008. Defendant filed a Form 61 denying plaintiff's claim on the basis that plaintiff was not exposed to "harmful noise" sufficient to have caused hearing loss during his employment.

On 4 November 2010, the Commission found that during plaintiff's thirty-six years of employment at the paper plant, plaintiff sustained permanent sensorineural loss of hearing in both ears caused by prolonged exposure to harmful noise in the workplace. Plaintiff had sustained a compensable occupational disease and was awarded compensation at the rate of $816.00 per week for 51.19 weeks. Defendant was also ordered to pay all medical expenses incurred or to be incurred as a result of the compensable occupational disease and "[a] reasonable attorney's fee in the amount of 25% of the compensation due plaintiff . . .

[was] approved for plaintiff's counsel and shall be paid directly to plaintiff's counsel."

Defendant appeals.

II. Standard of Review

> The applicable standard of appellate review in workers' compensation cases is well established. Appellate review of an opinion and award from the Industrial Commission is generally limited to determining: "(1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are justified by the findings of fact." *Clark v. Wal-Mart*, 360 N.C. 41, 43, 619 S.E.2d 491, 492 (2005) (citing *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 186, 345 S.E.2d 374, 379 (1986)).

Hassell v. Onslow Cty. Bd. of Educ., 362 N.C. 299, 305, 661 S.E.2d 709, 714 (2008). The failure to challenge the Commission's findings of fact renders them binding on appeal. *Cornell v. Western & S. Life Ins. Co.*, 162 N.C. App. 106, 110-11, 590 S.E.2d 294, 297 (2004). We review the Commission's conclusions of law *de novo*. *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004).

III. Hearing Protection Capable of Preventing Hearing Loss

In its first argument, defendant contends that the Commission "failed to make adequate and specific findings of fact about whether and when defendant provided hearing

protection capable of preventing hearing loss from plaintiff's noise exposure at work." We disagree.

N.C. Gen. Stat. § 97-53(28) (2009) exclusively controls the compensability of hearing loss caused by harmful noise during employment. "The term 'harmful noise' means sound in employment capable of producing occupational loss of hearing as hereinafter defined. Sound of an intensity of less than 90 decibels, A scale, shall be deemed incapable of producing occupational loss of hearing as defined in this section." N.C. Gen. Stat. § 97-53(28)(a). Our Supreme Court has held that in order to establish a *prima facie* case for compensation under N.C. Gen. Stat. § 97-53(28), the plaintiff must prove: "(1) loss of hearing in both ears which was (2) caused by harmful noise in his work environment. . . . If the employer then proves that the sound which caused plaintiff's hearing loss was of an intensity of less than 90 decibels, A scale, plaintiff cannot recover." *McCuiston v. Addressograph-Multigraph Corp.*, 308 N.C. 665, 667, 303 S.E.2d 795, 797 (1983).

N.C. Gen. Stat. § 97-53(28)(i) provides:

> No claim for compensation for occupational hearing loss shall be filed until after six months have elapsed since exposure to harmful noise with the last employer. The last day of such exposure shall be the date of disability. The regular use of employer-

> provided protective devices capable of preventing loss of hearing from the particular harmful noise where the employee works shall constitute removal from exposure to such particular harmful noise.

Further, a claim of occupational hearing loss is not compensable "if employee fails to regularly utilize employer-provided protection device or devices, capable of preventing loss of hearing from the particular harmful noise where the employee works." N.C. Gen. Stat. § 97-53(28)(k).

The Commission made the following relevant findings of fact:

> 2. According to defendant-employer's noise surveys dating to the early 1970s when plaintiff commenced work, many of the areas in which plaintiff worked had sustained noise levels exceeding 90 decibels, which are considered to be harmful levels. Plaintiff's exposure to loud noise levels varied depending on the job he was performing, the area in which he was performing it, and the type of equipment being operated in the area.
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> 3. While in the timberlands department, plaintiff was exposed to high levels of noise from bulldozers and other logging equipment, which were often in excess of 90 decibels. Plaintiff testified that he spent eight hours each workday on a loud bulldozer with an 800-horsepower diesel motor. No muffler was installed and hearing protection was not used to reduce the noise level. Noise surveys from 1985 indicate that the noise levels produced from the operational bulldozers could be as high as 93 decimals.

4. Plaintiff also worked as a millwright in the maintenance department, a position he held for approximately two years. As a millwright, plaintiff was exposed to noise levels above 90 decibels while working in various areas of the facility including near wood chippers, refiners, paper machines and in the boiler rooms.

5. As a mechanic, plaintiff worked primarily around the plant's paper machines, where noise levels also exceeded 90 decibels in certain areas. A 1981 noise survey near the Number 2 paper machine indicated noise levels ranged from 91 decibels to 98 decibels. Noise levels around the chipper, where plaintiff had worked, ranged from approximately 92 to 111 decibels. The area around the refiners, where plaintiff testified that he also had worked, measured as high as 94 decibels. In the pump house, measurements taken in 1987 indicated noise levels ranged from 94 to 109 decibels. A 1987 internal report submitted into evidence noted that maintenance employees were observed in the building without personal ear protection. Plaintiff testified that overall, as a mechanic, he works in very noisy areas, where it is often impossible to hear someone speaking due to the noise of the machines.

. . . .

7. With respect to the availability of hearing protection devices, when plaintiff started working at the plant, hearing protection was not required but was available at the first aid office. Although there was some inconsistency in the evidence as to exactly when plaintiff began wearing hearing protection on a regular basis, plaintiff testified that in the mid to late

> 1980's, the wearing of hearing protection became mandatory and hearing protection was then available in the specific work areas. Plaintiff's testimony was corroborated by other witnesses who also had worked for defendant-employer.
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> 8. Plaintiff also testified that he was never instructed on the proper use of ear protection. Plaintiff generally wore ear plugs but certain areas required the wearing of double protection of plugs and ear muffs. Plaintiff testified that he had never been reprimanded for not wearing hearing protection. Dr. Mary Katherine Keeter, an audiologist, testified that hearing protection does not necessarily prevent hearing loss due to noise exposure but may reduce the likelihood, assuming the employee understands the correct use of the hearing protection.
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> 9. The Full Commission finds that the actual effectiveness of individual protective hearing devices that plaintiff may have subsequently worn cannot be definitively determined as there are many factors that may affect the degree of protection. Dr. Lewis Gidley, an audiologist, testified that often ear protection is not worn as the manufacturer specifies and is often soiled, which reduces its effectiveness. Dr. Gidley further opined that the degree of protection also depends on the type of noise, whether it is impact or long term, the frequency of the noise, which ear happens to be turned toward the noise, and how reverberant the room is.

Defendant first argues that the Commission made insufficient findings about the noise levels plaintiff was exposed to during his employment. Defendant contends that the

Commission should have addressed the Dosimetry reports, which showed noise levels below 90 decibels, and the overall level of noise plaintiff was exposed to, and "not picked out the highest random measurements from noise surveys that were not the best evidence."

Defendant does not challenge the measurements from the noise surveys reflected in the Commission's findings, but rather argues that it is not the best evidence. However, it is well-established that the weighing of the evidence is the sole province of the Commission. *Hassell*, 362 N.C. at 305, 661 S.E.2d at 714. Findings of fact 2 through 5 clearly show that plaintiff was exposed to noise levels that exceeded the statutory requirement of 90 decibels.

Defendant next argues that the Commission failed to make adequate findings of fact regarding the use of hearing protection while plaintiff was employed by defendant.

Defendant contends that subsection (i) of § 97-53(28) provides that the employee's removal from the harmful noise by use of hearing protection ends further hearing loss, thereby fixing the amount of the loss that can be attributed to the occupational exposure. This is incorrect.

In *Clark v. Burlington Industries, Inc.*, this Court examined the language of subsection (i) and held that the "regular use of protective devices constitutes removal from exposure *only for purposes of triggering the statutory six-month waiting period* established by the first sentence of the section. . . . As we interpret the statute, it simply allows the employee to file a claim while continuing in the employment." 78 N.C. App. 695, 699, 338 S.E.2d 553, 556, *cert. denied*, 316 N.C. 375, 342 S.E.2d 892 (1986). This Court further held that "a rule that provision of hearing protective devices removes employees from exposure to harmful noise as a matter of law is clearly erroneous." *Id.* at 700, 338 S.E.2d at 556. Thus, the use of hearing protection does not equate to the absolute removal of harmful noise exposure as defendant seems to suggest.

Defendant also challenges the Commission's determination that "the actual effectiveness of individual protective hearing devices that plaintiff may have subsequently worn cannot be definitively determined as there are many factors that may affect the degree of protection." Defendant concedes that the finding is "likely accurate," but argues that the Commission may not simply refuse to find a crucial fact because it cannot be definitively determined.

In *Clark*, this Court stated the following as to this issue: "The actual effectiveness of individual hearing protective devices has not been definitively established; there are many problems associated with their use. The federal OSHA has cautioned employers that manufacturers' ratings for their devices 'may be unrealistically high,' and that real life conditions will not necessarily duplicate laboratory test results." *Id.* (citing 46 Fed. Reg. 4078, 4151-53, 42622, 42629 (1981)).

Further, evidence in the record supports such a finding. Dr. Gidley testified that any hearing protection device's Noise Reduction Rating would have to be reduced by half. Dr. Gidley stated that this was because often people do not put the devices into their ears correctly, use the wrong kind of device, or use a device that does not fit properly. Dr. Gidley also noted that the effectiveness of a hearing protection device could be impacted by its cleanliness or frequency of replacement. The degree of hearing protection also depended upon the type of noise, whether it was impact or long term, and the frequency of the noise. Dr. Mary Katherine Keeter (Dr. Keeter), an audiologist, also testified that wearing hearing protection would not necessarily prevent hearing loss due to noise

exposure, but would "hopefully reduce the likelihood" if the employee understood the correct use of the device.

Plaintiff met his burden of establishing hearing loss due to harmful noise, ***i.e.*** exposure to noise levels exceeding 90 decibels, in his work environment. Hearing protection did not become mandatory until the mid to late eighties after which plaintiff wore it on a regular basis. Based upon the evidence presented to the Commission, it could not determine the effectiveness of the hearing protection plaintiff subsequently used during his employment. These findings support the Commission's conclusion that plaintiff suffered compensable occupational hearing loss.

This argument is without merit.

IV. Credibility Determinations

In its second argument, defendant contends that the Commission's findings of fact regarding the credibility of the expert witnesses are not supported by any competent evidence. We disagree.

It is well-established that the Commission is the sole judge of the credibility of the witnesses and the weight to be given to the evidence before it. ***Hassell***, 362 N.C. at 305, 661 S.E.2d at 714. Thus, we do not "have the right to weigh the

evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Id.* (quotations omitted).

Defendant repeatedly contends that it is not contesting the Commission's credibility determinations; however, defendant argues that the Commission's decision to give more weight to the opinions of Dr. Quinn and Dr. Keeter than to the opinion of Dr. Dobie was erroneous.[1] Specifically, "Defendant is asking this [C]ourt to not allow the Commission to justify its credibility determinations on nonsensical bases that have no evidentiary support."

Our Supreme Court has stated the following:

> the Commission does not have to explain its findings of fact by attempting to distinguish which evidence or witnesses it finds credible. Requiring the Commission to explain its credibility determinations and allowing the Court of Appeals to review the Commission's explanation of those credibility determinations would be inconsistent with our legal system's

[1] A number of expert witnesses were deposed on the issue of causation in this case. Dr. Robert Quinn, an ear, nose, and throat specialist, opined that based upon the hearing tests, plaintiff had sustained a pattern of noise-induced hearing loss. Dr. Keeter opined that plaintiff's hearing loss was likely noise-related and that his employment was the cause. Dr. Robert Dobie, an otolaryngologist, opined that plaintiff's hearing loss was due to plaintiff's age and his recreational hunting.

> 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. The Commission's credibility determinations . . . cannot be the basis for reversing the Commission's order absent other error.

Deese v. Champion Int'l Corp., 352 N.C. 109, 116-17, 530 S.E.2d 549, 553 (2000).

This argument is without merit.

AFFIRMED.

Judges HUNTER, Robert C. and MCCULLOUGH concur.

Report per Rule 30(e).