NO. COA07-1449

NORTH CAROLINA COURT OF APPEALS

Filed: 5 August 2008

WILLIAM D. McHENRY,
Employee,
Plaintiff

v.

North Carolina Industrial Commission
I.C. File No. 221276

INTERNATIONAL PAPER COMPANY,
Employer
THE SCHAFTER COMPANIES,
Carrier,
Defendants

Appeal by plaintiff from an opinion and award entered 31 August 2007 by the North Carolina Industrial Commission. Heard in the Court of Appeals 30 April 2008.

Brumbaugh, Mu & King, P.A., by Leah L. King, for plaintiff-appellant.

Brooks, Stevens & Pope, P.A., by Matthew P. Blake, Ginny P. Lanier, and James A. Barnes, IV, for defendant-appellees.

HUNTER, Judge.

William D. McHenry ("plaintiff") appeals from an opinion and award entered by the Full Industrial Commission ("Commission") in which it found that plaintiff "did not contract a compensable occupational disease" while employed by International Paper Company("defendant").**[Note 1]** After careful review, we affirm the ruling of the Commission.

Prior to his employment with defendant, plaintiff served in the United States Marine Corps during the Vietnam War, earning the Navy Cross. During his service, plaintiff was shot in

his left arm. Plaintiff's Veterans Affairs records establish that he was subsequently diagnosed with post-traumatic-stress disorder ("PTSD") and was assessed as fifty-percent disabled as of 14 December 1999.

Plaintiff began working with Federal Paper in 1979. In 1996, defendant purchased the plant from Federal Paper. After taking over management, defendant changed some operations, including bringing in new supervisors and implementing new safety practices. Plaintiff was angry and frustrated by the new policies.

The changes brought about stress to plaintiff, culminating in some work-place incidents which resulted in plaintiff quitting, re-starting employment, being suspended from work for a day, and ultimately being referred to a counselor. Defendant saw a number of doctors to treat his stress and ultimately filed a claim for worker's compensation.

Our review of an opinion and award of the Commission is limited to a determination of: "(1) whether the Commission's findings of fact are supported by any competent evidence in the record; and (2) whether the Commission's findings justify its conclusions of law." *Goff v. Foster Forbes Glass Div.*, 140 N.C.App. 130, 132-33, 535 S.E.2d 602, 604 (2000). If supported by competent evidence, the Commission's findings are binding on appeal even when there exists evidence to support findings to the contrary. *Allen v. Roberts Elec. Contr'rs*, 143 N.C. App. 55, 60, 546 S.E.2d 133, 137 (2001). The Commission's conclusions of law are reviewed *de novo*. *Id.* at 63, 546 S.E.2d at 139.

In order to find that a claim for mental stress, in this case PTSD, is a compensable occupational disease, the plaintiff must prove three elements: "(1) the disease must be characteristic of a trade or occupation, (2) the disease is not an ordinary disease of life to which the public is equally exposed outside of the employment, and (3) there must be proof of

causation, *i.e.*, proof of a causal connection between the disease and the employment." *Hansel v. Sherman Textiles*, 304 N.C. 44, 52, 283 S.E.2d 101, 105-06 (1981).

"[T]he 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." *Rutledge v. Tultex Corp.*, 308 N.C. 85, 93-94, 301 S.E.2d 359, 365 (1983) (emphasis added). As to causation, "'evidence tending to show that the employment . . . aggravated or contributed to the employee's condition goes . . . to . . . the third element of the *Rutledge* test.'" *Chambers v. Transit Mgmt.*, 360 N.C. 609, 613, 636 S.E.2d 553, 556 (2006).

The Commission concluded as a matter of law that plaintiff had "failed to prove that PTSD was [1] characteristic of or peculiar to his employment or that [2] he was at an increased risk of developing this condition due to his work" but did conclude that "[3] plaintiff proved by the greater weight of the evidence that his employment caused or was a significant contributing factor in his development of PTSD[.]" In other words, the Commission concluded that plaintiff had only established the third element of the *Rutledge* test, causation, and had not established either of the first two elements.

Plaintiff argues on appeal that this was error. Thus, we must determine whether the Commission's conclusions of law are justified by its findings of fact and whether those findings of fact are in turn supported by competent evidence. If so, the decision of the Commission must be affirmed.

The Commission made a finding of fact that "plaintiff's job with defendant-employer did not place him at an increased risk for developing PTSD, depression or bipolar disorder." This finding of fact justifies the Commission's conclusion of law as to the first two elements of the

Rutledge test. We must next determine whether that finding of fact is supported by competent evidence. If so, those findings are binding upon this Court.

The burden of producing evidence before the Commission to establish a claim is on plaintiff. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 684 (1982). Plaintiff's counsel only asked Dr. James Pawlowski whether the conditions associated with plaintiff's employment could *exacerbate* any pre-existing PTSD. Similarly, plaintiff's counsel asked Dr. Henry Branham whether plaintiff's job activities *exacerbated* his previous PTSD. Moreover, Dr. Gerald Aronoff testified that plaintiff did not suffer from PTSD. Instead, Dr. Aronoff was of the opinion that plaintiff's work with defendant could *exacerbate* his depression and anger. In summation, the doctors that received the greatest weight by the Commission never testified that PTSD was characteristic of or peculiar to plaintiff's employment, concluding only that at most plaintiff's PTSD was *exacerbated* by his employment with defendant.

The only evidence presented by plaintiff that PTSD was characteristic of or peculiar to his employment came from Dr. Frank Snyder. Dr. Snyder testified that plaintiff's employment "absolutely" increased the risk of contracting PTSD as opposed to people in the general population. Plaintiff argues that the Commission should have given Dr. Snyder's testimony greater weight. However, the weight afforded the evidence and the credibility of the witnesses are to be determined by the Commission. *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998). We thus conclude that the Commission's finding of fact as to this issue is supported by competent evidence and therefore binding on this Court.

Plaintiff argues that because the Commission found as a fact that his work environment *worsened* his PTSD, he is entitled to compensation. However, there were no findings of fact, or evidence presented that the Commission found credible, that the nature of his work for defendant

exposed individuals in that occupation to a greater risk of *contracting* the disease than the public generally. Instead, there were only factual findings that his conditions worsened as a result of the employment, and persons without the pre-existing condition would be less likely than plaintiff to *suffer* from those symptoms. As our Supreme Court has explained, "'evidence tending to show that the employment simply aggravated or contributed to the employee's condition goes only to . . . the third element of the *Rutledge* test.'" *Chambers*, 360 N.C. at 613, 636 S.E.2d at 556. Here, plaintiff has only established causation under the test. Plaintiff's arguments to the contrary are therefore rejected. In light of this holding, we need not address plaintiff's remaining argument that the Commission erred in determining, on an alternate ground, that he was estopped from asserting the claim against defendant because he was already receiving disability from the United States Navy.

Affirmed.

Judges STEELMAN and STEPHENS concur.

Report per Rule 30(e).

NOTE

1. The Schafter Companies, defendant's insurance carrier, is also a named defendant in this action. For clarity, we refer only to International Paper Company as "defendant."