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NO. COA07-192

NORTH CAROLINA COURT OF APPEALS

Filed: 18 March 2008

NELSON EDWIN WILLIAMS,
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File Nos. 240598 & 292360

WAKE COUNTY & APEX
EMS, ET AL.,
Employers,

COMPENSATION CLAIMS,
Carrier,
Defendants.

Before the Full Commission on 2 October 2006. Opinion and Award filed 16 November 2006. Plaintiff appealed. Heard in the Court of Appeals 10 October 2007.

Scudder & Hedrick, by Samuel A. Scudder, for plaintiff appellant.

Cranfill, Sumner & Hartzog, L.L.P., by Meredith L. Taylor and Jonathan C. Anders, for Apex Emergency Medical Service and Key Risk Management Services defendant appellees.

Wilson & Ratledge, PLLC, by James E. R. Ratledge, for County of Wake defendant appellee.

McCULLOUGH, Judge.

FACTS

Nelson Edwin Williams ("plaintiff") began working as an EMT worker/paramedic for Wake County Emergency Medical Services ("Wake EMS") in 1980. Plaintiff's job required that

he inventory his ambulance, clean his ambulance, clean the paramedic station, and respond to calls. While working for Wake EMS, plaintiff worked at several different stations, including the Apex Emergency Medical Service ("Apex EMS") station. According to plaintiff, some of these stations received more calls than others. When the Apex EMS station no longer retained Wake County personnel, plaintiff stayed at the Apex EMS station and began to receive his payments directly from this station. Plaintiff continued to work for Apex EMS, performing his job in much the same manner as he had performed it for Wake EMS until 14 March 2002.

While working as a paramedic, plaintiff was also self-employed as a construction worker. In 1994, plaintiff started a construction business, Williams Construction, for which he performed landscaping work and built decks, utility buildings, and fences. Plaintiff testified that during his busiest years of 1995 and 1996, he probably spent about six hundred and sixty-six hours performing construction work each year. During the time period between 2002 and 2003, plaintiff stopped performing manual labor for his construction company and instead began performing only light duty jobs.

On 1 August 2002, plaintiff received approval for retirement disability from the North Carolina State Retirement System due to degenerative joint disease in his knees. On 5 September 2002, plaintiff filed a claim for compensation with Wake County and Apex Emergency Medical Service ("defendants") which was denied on 17 September 2002. Plaintiff subsequently requested that his claim be assigned for a hearing. Plaintiff's claim was denied in a hearing before Deputy Commissioner Theresa B. Stephenson of the North Carolina Industrial Commission on 16 September 2003. On 2 October 2006, plaintiff's claim was reviewed by the Full Commission. After reviewing the evidence, the Full Commission made, *inter alia*, the following findings of fact:

2. During his tenure as a paramedic with Wake County, plaintiff generally worked a 24-hour shift with the next 24 hours off, and then he worked for a 72-hour period after which he would have four days off, and then said schedule would begin again on the fifth day. At Wake County, plaintiff worked with a partner, and he and his paramedic partner would alternate between being the attending paramedic or the driving paramedic. Plaintiff and his paramedic partner carried certain emergency equipment to each emergency call, but they would divide the responsibility for carrying that equipment. Specifically, the attending paramedic would take the jump kit and the monitor, while the driving paramedic took the oxygen tank which weighed approximately 20 to 25 pounds.

3. In a typical emergency call, the paramedics would make an initial assessment of the patient to determine whether transport to a hospital or to another health care facility would be necessary. If transport was deemed necessary, then the driving paramedic would return to the ambulance for the stretcher, which weighed approximately 75 pounds. The stretcher had wheels and could be rolled on level ground.

....

5. As a paramedic with Wake County, Plaintiff's emergency call volume varied greatly, both from day-to-day and also from station to station. A typical shift with Wake County might involve four or five emergency calls per shift, although on some days he would have more than four or five calls, while on other days he would fewer (sic) than four or five calls. During a typical emergency call, plaintiff might perform some bending or some stooping, but the bending or stooping was not continuous in nature. During times when plaintiff was not responding to emergency calls, he could sit in a chair and rest and could even sleep at the EMS station if he wanted to.

....

12. As of June of 2003, plaintiff has been working as a medical assistant at a physician's office, where his duties involve meeting with patients and taking their blood pressure and other medical information.

....

15. On February 13, 2002, plaintiff was examined by Dr. Hoffmeier for a recent severe headache which left plaintiff feeling confused. Plaintiff was concerned that he may have suffered some type of stroke, and so Dr. Hoffmeier ordered a CT scan of the head. On or around February 20, 2002, Dr. Hoffmeier wrote plaintiff out of work for 30 days in relation to plaintiff's chronic hypertension. Dr. Hoffmeier expressed concern that plaintiff was at risk for stroke and that higher doses of medication lead to unacceptable side effects such as bradychardia (sic) or severe fatigue. On April 30, 2002, Dr. Hoffmeier wrote plaintiff out of work due to degenerative joint disease and acceleration of hypertension.

16. Dr. Hoffmeier has indicated that plaintiff's overweight condition was a substantial factor in his development of arthritis in the knees. Dr. Hoffmeier also believes that plaintiff could have worked in a number of other endeavors, other than paramedic work, and still have developed arthritis in his knees.

17. On March 26, 2003, plaintiff underwent an independent medical evaluation with Dr. George C. Venters. Dr. Venters has diagnosed arthritis of the knees. However, Dr. Venters does not believe that plaintiff's knee problems result from causes or conditions that were peculiar to, or characteristic of his job as a paramedic. Moreover, Dr. Venters believes that plaintiff's work duties with Williams Construction could have added to plaintiff's arthritic symptoms.

18. On May 23, 2002, Dr. Peter Gilmer issued a letter in which he opined that plaintiff's employment as an EMT/paramedic had placed him at a greater risk of developing arthritic problems in the knees as compared to the general public. In that same letter, Dr. Gilmer opined that plaintiff's work duties as EMT/paramedic were a significant contributing factor to plaintiff's arthritic knee problems. However, at the time Dr. Gilmer completed that letter, he did not have sufficient information as to the nature of plaintiff's paramedic duties, including whether plaintiff worked as a part-time paramedic or a full-time paramedic, or how many days he worked per week or how many emergency calls he handled per week. In addition, at the time of that letter, Dr. Gilmer had no information as to the extent of plaintiff's work duties with Williams Construction. In fact, upon being presented with information about plaintiff's work responsibilities with Williams Construction, Dr. Gilmer indicated that plaintiff's construction duties "would play just as much a role as what he did as a paramedic" in terms of developing the arthritic knee condition.

> 19. In addition, Dr. Gilmer is not aware of any epidemiology studies concerning EMT work and joint arthritis; nor is Dr. Gilmer aware of any studies that would indicate that EMT workers are at a greater risk for joint arthritis as opposed to the general public.
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> ....
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> 21. Under these circumstances, the undersigned gives (sic) little probative weight to the opinions of Dr. Gilmer as to issues of causation and increased risk relating to plaintiff's employment as a paramedic with Wake County. The undersigned gives (sic) more probative weight to the opinions of Dr. Hoffmeier and Dr. Venters to the effect that plaintiff suffers from an ordinary disease of life, namely, arthritis, to which plaintiff and the general public are equally exposed.

Based on these findings of fact, the Full Commission concluded as a matter of law that, although plaintiff suffered from osteoarthritis of the knees, this disease was one to which the general public was equally exposed, and plaintiff had not carried his burden in proving his employment caused this condition. Thus, the Industrial Commission issued an Opinion and Award on 16 November 2006 denying plaintiff's claim in its entirety. On 29 November 2006, plaintiff appealed the Opinion and Award of the Industrial Commission.

I.

Plaintiff first argues the Industrial Commission erred by not determining the correct facts necessary to properly determine causation, significant contribution, increased risk, and last injurious exposure. We disagree.

The findings of fact of the Industrial Commission are binding as to all questions of fact. *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977); N.C. Gen. Stat. §97-86 (2007). On appeal, this Court does not have the right to weigh the evidence and determine the issues presented based on this weight. *Anderson v. Construction Co.*, 265 N.C.

431, 434, 144 S.E.2d 272, 274 (1965). "The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Id*. So long as the record contains some competent evidence to support the Commission's findings, the findings of fact of the Industrial Commission are conclusive. *Jones v. Desk Co.*, 264 N.C. 401, 402, 141 S.E.2d 632, 633 (1965).

In the case *sub judice*, plaintiff asserts the Commission did not make the proper findings of fact necessary in order to apply the correct law. Plaintiff's specific contentions will be addressed in turn.

A.

First, plaintiff contends findings of fact 2, 3, and 5 failed to set forth the "true nature" of plaintiff's job duties as a paramedic. According to plaintiff, the Commission tried to "minimize the heavy nature of the job exposure." In support of his argument, plaintiff cites to testimony from various witnesses that support plaintiff's assertion that working as a paramedic can be physically demanding. However, "[i]t is well established ... that the Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Hassell v. Onslow County Bd. of Educ.*, 182 N.C. App. 1, 8, 641 S.E.2d 324, 329 (2007). Therefore, this Court will review the findings of the Industrial Commission only to determine if the record contains *some competent evidence* to support the Commission's findings. *See Jones*, 264 N.C. at 402, 141 S.E.2d at 633. Although the Commission was presented with testimony from several individuals that working as a paramedic often entailed physical exertion, the record also contains competent evidence to support the Commission's findings with regard to (1) how the stretcher was used by the paramedics, (2) the assistance fire department personnel provided to paramedics, and (3) the

activities of a paramedic during the course of a typical shift. Therefore, we hold that the record contains sufficient evidence to support the Commission's findings of fact 2, 3, and 5.

B.

Second, plaintiff contends finding of fact 12 is not supported by competent evidence. Specifically, plaintiff points to the Commission's finding that plaintiff began work as a medical assistant in June 2003. According to plaintiff, the evidence to support this date is speculative. Plaintiff further argues that this date is incorrect and that plaintiff did not actually start working as a medical assistant until the fall of 2003. Upon review, the record reveals that Dr. Hoffmeier provided a patient information sheet noting that plaintiff was working part-time at Orange County Family Medicine as a medical assistant. This information sheet indicated that it had been last updated on 17 July 2003. Dr. Hoffmeier also testified that although he did not remember the date plaintiff informed him of the job as a medical assistant, he had recorded the information in the aforementioned note dated 17 July 2003. Although the information sheet and Dr. Hoffmeier's testimony do not provide an exact date as to when plaintiff began working as a medical assistant, the two pieces of evidence do constitute competent evidence to support the remainder of the Commission's finding of fact 12. In this instance, the exact date during which plaintiff began his work is immaterial because his claim was denied based on plaintiff's failure to demonstrate increased risk and causation. We have previously held that to warrant reversal, an error in an order of the Industrial Commission must be both material and prejudicial. *Vaughn v. Dept. of Human Resources*, 37 N.C. App. 86, 90, 245 S.E.2d 892, 894 (1978), *aff'd*, 296 N.C. 683, 252 S.E.2d 792 (1979). Therefore, we hold that any error in the Industrial Commission's finding that plaintiff began working as a medical assistant in June of 2003 is harmless and does not warrant reversal. Plaintiff's assignment of error is therefore overruled.

C.

Third, plaintiff argues finding of fact 15 is not supported by competent evidence. Plaintiff contends that the portion of the Commission's finding which states, "On or around February 20, 2002 Dr. Hoffmeier wrote plaintiff out of work for 30 days in relation to plaintiff's chronic hypertension[,]" incorrectly implied that plaintiff was out of work due to hypertension. However, a review of the record reveals that Dr. Hoffmeier indicated in a note dictated on 20 February 2002 that he was going to take plaintiff out of work for 30 days due to hypertension and knee pain. Therefore, the record contains competent evidence to support the Commission's findings of fact in this matter.

D.

Finally, plaintiff contends that findings of fact 16, 17, and 18 are nothing more than recitations of physicians' testimony, which in themselves do not constitute findings of fact. Upon review, plaintiff is not wholly correct in asserting that these findings do nothing other than recite physician testimony. However, to the extent that the Commission's findings of fact do incorporate recitations of such testimony, we will review these findings.

We have previously noted that "recitations of the testimony of each witness *do not* constitute *findings of fact* ... because they do not reflect a conscious choice between the conflicting versions of the incident in question which emerged from all the evidence presented." *In re Green*, 67 N.C. App. 501, 505 n.1, 313 S.E.2d 193, 195 n.1 (1984). Nevertheless, our Supreme Court has stated that "[t]he Industrial Commission frequently couches its findings of fact in the form of recitations of testimony without declaring whether it finds the testimony to be a fact." *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 442 n.7, 342 S.E.2d 798, 808 n.7 (1986). As we noted in *Bailey v. Sears Roebuck & Co.*, 131 N.C. App. 649, 654, 508 S.E.2d 831, 835 (1998)

, the practice of our Supreme Court has been to "'interpret the Commission's ... recit[ations of] testimony to mean that [the Commission] does find the recited testimony to be a fact[.]'" *Id.* (quoting *Peoples*, 316 N.C. at 442 n.7, 342 S.E.2d at 808 n.7). We, therefore, accept the Commission's recitations as findings of fact and hold there is sufficient competent evidence in the record to support each finding.

II.

Plaintiff secondly argues the Industrial Commission erred by not applying the correct standards of law in determining significant contribution or increased risk as set forth in *Rutledge v. Tultex Corp.*, 308 N.C. 85, 301 S.E.2d 359 (1983). We disagree.

N.C. Gen. Stat. §97-53(13) (2007) provides that a disease meeting the following criteria shall be deemed an occupational disease:

> Any disease, other than hearing loss covered in another subdivision of this section, 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. The application of this statute was examined in *Rutledge*, in which our Supreme Court held:

> 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."

Rutledge, 308 N.C. at 93, 301 S.E.2d at 365 (citations omitted). "[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." *Id.* at 93-94, 301 S.E.2d at 365. The third element is satisfied if the employment was "such a significant factor in the disease's

development that without [such employment] the disease would not have developed to such an extent that it caused the physical disability which resulted in claimant's incapacity for work." *Id.* at 102, 301 S.E.2d at 370. "The plaintiff bears the burden of proving each element of compensability, including causation, by 'a preponderance of the evidence.'" *Everett v. Well Care & Nursing Servs.*, 180 N.C. App. 314, 318, 636 S.E.2d 824, 827 (2006) (citation omitted).

In the case at bar, plaintiff argues that the Commission incorrectly gave more probative weight to the opinions of Dr. Craig A. Hoffmeier and Dr. George C. Venters as to the issues of causation and increased risk, and less probative weight to the testimony of Dr. Peter W. Gilmer as to these issues. In support of his argument, plaintiff asserts the Industrial Commission's finding of fact 19, with regard to the testimony of Dr. Gilmer, is not supported by competent evidence. Therefore, plaintiff contends that the Commission based its conclusions of law on invalid findings of fact. In his deposition, Dr. Gilmer was presented with a study suggesting that the risk for developing osteoarthritis may be higher in jobs which entail both knee bending and mechanical loading. Dr. Gilmer concurred with this finding, stating that he thought the results of this study would apply to plaintiff's job as an EMT worker. According to plaintiff, this testimony directly contradicts the Commission's finding that Dr. Gilmer was "not aware of any epidemiology studies concerning EMT work and joint arthritis; nor is Dr. Gilmer aware of any studies that would indicate that EMT workers are at a greater risk for joint arthritis as opposed to the general public."

A review of the record reveals that although Dr. Gilmer testified in his deposition that the aforementioned study might be applicable to plaintiff, when asked specifically if he was aware "of any studies or epidemiology studies in relation to EMT workers and joint arthritis[,]" Dr. Gilmer responded that he was not. As this testimony makes clear, although he was presented

with a general study linking jobs that require knee bending and mechanical lifting to the development of arthritis, Dr. Gilmer was not aware of any study dealing specifically with the development of joint arthritis in EMT workers. Therefore, we hold the Commission was presented with competent evidence to support finding of fact 19.

A further review of the record shows that competent evidence was presented to support the Commission's determination with regard to significant contribution and increased risk. In his deposition, Dr. Hoffmeier opined that plaintiff's weight was likely a bigger factor than his occupation in the development of arthritis in his knees. Dr. Hoffmeier also stated that he believed plaintiff would likely have developed arthritis if he had not served as a paramedic, but had instead pursued a different occupation. Similarly, Dr. Venters opined in his deposition that he believed plaintiff's disability was not the result of conditions that were peculiar to and characteristic of his job as a paramedic, and that the general public stood an equal chance of contracting the disease. Dr. Venters further stated that plaintiff's work in construction could have added to his arthritic symptoms. Thus, the deposition testimony of Dr. Hoffmeier and Dr. Venters constitutes competent evidence to support the Commission's findings of fact and conclusions of law with regard to the issues of increased risk and causation. As we have previously noted, the Industrial Commission, and not this Court, is the sole judge of the credibility of the witnesses and the weight to be given the evidence. *See Hassell*, 182 N.C. App. at 8, 641 S.E.2d at 329. We therefore uphold the conclusions of law of the Industrial Commission and hold the Commission did not err by denying plaintiff's claim for benefits in its entirety.

III.

Plaintiff thirdly argues the Industrial Commission erred by failing to apply the proper standard of law when making its determination of last injurious exposure. We disagree.

N.C. Gen. Stat. §97-57 (2007) provides:

> In any case where compensation is payable for an occupational disease, the employer in whose employment the employee was last injuriously exposed to the hazards of such disease, and the insurance carrier, if any, which was on the risk when the employee was so last exposed under such employer, shall be liable.

Id. According to our Supreme Court, the terms "'last injuriously exposed'" refer to "'an exposure which proximately augmented the disease to any extent, however slight.'" *Rutledge*, 308 N.C. at 89, 301 S.E.2d at 362 (citation omitted). "'Disability caused by and resulting from a disease is compensable when, and only when, the disease is an occupational disease, or is aggravated or accelerated by causes and conditions characteristic of and peculiar to claimant's employment.'" *Walston v. Burlington Industries*, 305 N.C. 296, 297, 285 S.E.2d 822, 828 (1982). To show the existence of an occupational disease, an employee must prove the following three elements by a preponderance of the evidence: "'(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) proof of a causal connection between the disease and the employment." *Nix v. Collins & Aikman Co.*, 151 N.C. App. 438, 442-43, 566 S.E.2d 176, 179 (2002) (citation omitted); *Everett*, 180 N.C. App. at 317, 636 S.E.2d at 827.

In the case *sub judice*, plaintiff argues the evidence shows that his employment with Wake EMS and Apex EMS as a paramedic continued to augment the development of osteoarthritis, an occupational disease, in his knees. Plaintiff further contends that because the Industrial Commission found that plaintiff's employment with Williams Construction could also have played a role in his development of arthritis, the Commission erred by failing to make any

findings of fact or conclusions of law with regard to last injurious exposure. However, as the applicable statute and case law make clear, the Commission must make the determination that an occupational disease exists before a finding is required as to last injurious exposure. *See* N.C. Gen. Stat. §97-57; *see also Walston*, 304 N.C. at 679-80, 285 S.E.2d at 828. Here, the Commission found and concluded that plaintiff was not suffering from an occupational disease, but rather "an ordinary disease of life to which the general public is equally exposed outside of the employment [as paramedic]." Further, the Commission concluded that plaintiff had failed to carry his burden of proving causation with the requisite degree of medical certainty. As the record contains competent evidence to support the Industrial Commission's findings of fact and conclusions of law, we hold plaintiff did not meet his burden in proving he suffered from an occupational disease, and thus, also failed to meet his burden in proving last injurious exposure. Plaintiff's corresponding assignments of error are therefore overruled.

IV.

Plaintiff lastly argues the Industrial Commission erred by not applying the correct standard of law in determining medical causation. We disagree.

As we have previously noted, "[a] claimant in a workers' compensation case bears the burden of proving, by a preponderance of the evidence, a causal relationship between the injury and the claimant's employment." *Legette v. Scotland Mem'l Hosp.*, 181 N.C. App. 437, 455, 640 S.E.2d 744, 756 (2007), *disc. review denied*, *appeal dismissed*, ___ N.C. ___, ___ S.E.2d ___ (2008). Although medical certainty is not required to prove causation, "an expert's 'speculation' is insufficient to establish causation." *Holley v. ACTS, Inc.*, 357 N.C. 228, 234, 581 S.E.2d 750, 754 (2003).

In the instant case, plaintiff argues the Commission erred in its determination that other factors played a causative role in the development of plaintiff's osteoarthritis of the knees. Specifically, plaintiff contends defendants did not meet their burden of proving that plaintiff's injuries were the result of a cause independent of plaintiff's work as a paramedic. Plaintiff's assertion appears to be based on a misapprehension of the law. Plaintiff, not defendants, bears the burden of proving causation. *See Everett*, 180 N.C. App. at 318, 636 S.E.2d at 827. Where, as in the case *sub judice*, the plaintiff has failed to meet his burden of proving causation, defendants are under no duty to prove plaintiff's injuries are the result of an activity unrelated to plaintiff's employment with defendants. As the Industrial Commission determined plaintiff did not carry his burden of proving causation with the requisite degree of medical certainty, we hold the Commission did not err in denying plaintiff's claim for compensation.

Affirmed.

Judges CALABRIA and STEPHENS concur.

Report per Rule 30(e).