NO. COA07-1218

NORTH CAROLINA COURT OF APPEALS

Filed: 17 June 2008

DONALD E. POWERS, JR.,
Employee,
Plaintiff

v.

North Carolina Industrial Commission
I.C. File No. 268384

GOODYEAR TIRE & RUBBER CO., d/b/a
KELLY SPRINGFIELD TIRE CO.,
Employer,

LIBERTY MUTUAL INSURANCE COMPANY,
Carrier,
Defendants

Appeal by plaintiff from an opinion and award entered 21 June 2007 by the North Carolina Industrial Commission. Heard in the Court of Appeals 19 March 2008.

Kathleen G. Sumner for plaintiff-appellant.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by J. A. Gardner, III and Heather T. Raber, for defendant-appellees.

HUNTER, Judge.

Donald E. Powers, Jr. ("plaintiff") appeals an opinion and award by the Industrial Commission denying his claim for workers' compensation benefits. After careful review, we affirm.

I.

Plaintiff was employed by Goodyear Tire & Rubber Co. ("defendant") beginning in 1983 as a machine checker, a position that required him to perform a variety of tasks associated with stage 1 tire machines. On 31 December 2001, when plaintiff attended an appointment with Dr. Erik Kenyon, an osteopath, Dr. Kenyon noted skin lesions -- areas of skin that were scaly or raised and ulcerated -- that could be cancerous. He treated the lesion with a type of chemotherapy for the skin called Efudex. In January and February 2002, Dr. Kenyon excised the same area on plaintiff's left posterior neck three times, each time excising a larger portion of the same area. A pathology report stated that the excised lesion was "sun-damaged skin with basal cell carcinoma[.]" Between June 2002 and May 2005, plaintiff visited Dr. Kenyon's office ten times to have lesions excised or treated with Efudex and twice for follow-ups on such treatment. The sites from which lesions were removed included plaintiff's neck, face (including his eyelid and eyebrow), hands, and wrists. Dr. Kenyon testified that plaintiff's occupational exposure to chemicals contributed to the basal cell carcinoma, but agreed that 99.9% of all such carcinomas are attributed to sun damage.

The deputy commissioner awarded benefits to plaintiff, but the Industrial Commission reversed on appeal and held that no benefits were owed. Plaintiff appeals from that order.

II.

A.

Our review of the Industrial Commission's decisions is "strictly limited to the two-fold inquiry of (1) whether there is competent evidence to support the Commission's findings of fact; and (2) whether these findings of fact justify the Commission's conclusions of law." *Foster v. Carolina Marble and Tile Co*., 132N.C. App. 505, 507, 513 S.E.2d 75, 77 (1999). Upon such review, "[t]he Commission's findings will not be disturbed on appeal if they are supported by

competent evidence even if there is contrary evidence in the record. However, the Commission's conclusions of law are reviewable *de novo* by this Court." *Hawley v. Wayne Dale Constr.*, 146 N.C. App. 423, 427, 552 S.E.2d 269, 272 (2001) (citations omitted).

B.

Plaintiff first argues that the Industrial Commission applied the wrong burden of proof to the evidence. This argument is without merit.

Plaintiff's claim falls under N.C. Gen. Stat. §97-53(14) (2007), which lists within the list of enumerated occupational diseases "[e]pitheliomatous cancer or ulceration of the skin or of the corneal surface of the eye due to tar, pitch, bitumen, mineral oil, or paraffin, or any compound, product, or residue of any of these substances." At the end of the enumerated occupational diseases, the statute states:

> Occupational diseases caused by chemicals shall be deemed to be due to exposure of an employee to the chemicals herein mentioned only when as a part of the employment such employee is exposed to such chemicals in such form and quantity, and used with such frequency as to cause the occupational disease mentioned in connection with such chemicals.

Id.

The Industrial Commission's opinion and award contains five conclusions of law. The first states that "plaintiff has the burden of proving every element of compensability" -- that is, providing convincing evidence of those elements. The second gives the text of N.C. Gen. Stat. §97-53(14) and final paragraph of the statute set out above. Conclusion of law 3 states that a plaintiff must prove "a causal connection between the disease and the plaintiff's occupation[,]" which "must of necessity be based on circumstantial evidence." The conclusion of law then states:

> Plaintiff alleged he was exposed to mineral oil and paraffin or a compound, product[,] or residue of these substances. However, plaintiff has failed to prove exposure to these substances, or a compound, product, or residue of one of these substances. Plaintiff has also failed to prove that his basal cell carcinoma was caused by any exposure [to] mineral oil, paraffin, or any compound, product, or residue of these substances. Plaintiff did not sustain an occupational disease under N.C. Gen. Stat. §97-53(14).

Plaintiff argues that all of the Industrial Commission's conclusions of law show that the wrong burden of proof was applied, but does not elaborate on that statement in any intelligible way. Generally, his argument seems to stem from conclusions of law 4 and 5, which follow the conclusion of law quoted above:

> 4. Assuming *arguendo* that plaintiff alleged that he suffered from an occupational disease under N.C. Gen. Stat. §97-53(13), plaintiff must prove that the disease is characteristic of individuals engaged in the particular trade or occupation in which the plaintiff was engaged, that the disease is not an ordinary disease of life to which the public is equally exposed, and that there exists a causal relationship between the disease and plaintiff's employment. . . .
>
> 5. Plaintiff has not proven by the greater weight of the evidence that his employment with defendant-employer caused him to contract basal cell carcinoma or that his employment with defendant-employer placed him at greater risk than the general public of contracting basal cell carcinoma. N.C. Gen. Stat. §97-53(13) . . . .

Plaintiff argues at length that the Industrial Commission applied the standard from §97-53(13), and because his claim is based on §97-53(14), the Industrial Commission erred. This argument is without merit.

As shown above, the Industrial Commission first considered plaintiff's situation under §97-53(14). The Industrial Commission then stated that, even were they to consider it under §97-53(13), plaintiff had not proven his case. Clearly, the Industrial Commission was simply covering all bases in order to fend off superfluous arguments on appeal.

Plaintiff then argues that the case of *McCuiston v. Addressograph-Multigraph Corp*., 308 N.C. 665, 303 S.E.2d 795 (1983), states that a plaintiff suffering from any of the enumerated occupational diseases need only prove that he was exposed to harmful substances listed in N.C. Gen. Stat. §97-53(14) and that he suffered injury of the type described in that section, and then the burden of proof is shifted to the employer to prove that the form, quantity, and frequency of use of the chemicals did *not* cause the injuries. This argument is without merit.

McCuiston analyzed the portion of the statute having to do with hearing loss, which is uniquely worded. N.C. Gen. Stat. §97- 53(28) states that "[l]oss of hearing caused by harmful noise in the employment" constitutes an occupational disease, and then states: "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 (emphasis added). It is this second sentence that serves to shift the burden to the employer. This is made clear by the Court's analysis in *McCuiston*:

> The question dispositive of this appeal is whether the following part of N.C.G.S. 97-53(28)(a) is an element of plaintiff's prima facie case, or whether it is an affirmative defense for the employer: "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."

McCuiston, 308 N.C. at 667, 303 S.E.2d at 797. Because the portion of the statute on which *McCuiston* relies is unique in its burden- shifting provision, the case is inapt to the one at hand, and plaintiff has misconstrued its holding.

C.

Plaintiff's second argument is captioned "N.C. Gen. Stat. §97-52 and §97-53(14) do not require that other workers employed with defendant**[Note 1]** must suffer with the same

complaints or disease in order for an injured worker's claim to prevail as an enumerated occupational disease." However, of the five and a half pages of argument that follow, only *four sentences* pertain to this argument. The remainder is an entirely unrelated argument attempting to make N.C. Gen. Stat. §97-53(14) into a negligence *per se* statute. Because this portion of the argument is not properly linked to an assignment of error, we disregard it.

Plaintiff's entire argument on this point is that he is not required to demonstrate that other employees suffer from the same disease as he does. He does not elaborate on why this is important, how this affects the Industrial Commission opinion and award, or how it supports his appeal. As such, it is without merit.

D.

Plaintiff argues, as before, that he need prove only that he was exposed to the chemicals at issue and that he has basal cell carcinoma to prevail. He argues that the Industrial Commission erred because he believes it required him to prove that he was exposed to a specific quantity and form of the chemicals at a certain frequency. However, plaintiff does not point to any portion of the Industrial Commission order that would make such a requirement. The only relevant portion of the order is findings of fact 44 and 45, which state:

> 44. The greater weight of the evidence does not show that plaintiff was exposed to mineral oil or paraffin or any compounds, products, or residue of these substances as defined and set forth under N.C. Gen. Stat. §97-53(14) while working for defendant- employer in such form and quantity and used with such frequency as to cause his basal cell carcinoma. While [chemical] is a compound containing paraffinic distillate solvent extract and is an ingredient in the rubber, there has been no competent, credible evidence showing that by touching the solid rubber compound containing [chemical] that paraffin or a paraffin residue can be released from the rubber, deposited on the skin, and result in the development of basal cell carcinoma.

> 45. Plaintiff has failed to show that his epitheliomatous cancer was caused by exposure to mineral oil, paraffin, or any compound, product, or residue of these substances.

Put in context, the phrase plaintiff quotes clearly means that plaintiff has not shown causation, not that plaintiff is required to provide such scientific evidence before a claim may be made. He attempts once again to shift the burden to defendant to prove that their chemicals did not cause this injury, an argument that is, again, without merit.

E.

Plaintiff argues that the Industrial Commission's findings of fact were not supported by competent evidence, and in certain cases the Commission disregarded competent testimony by defendants. These arguments are without merit.

Plaintiff disputes thirteen findings of fact. He argues about the wording of the following findings of fact:

> 1 * As to finding of fact 4: Incorrect because it says "Plaintiff also admits to having been sunburned in his lifetime" instead of "sunburned *once or twice* in his lifetime." (Emphasis added.)
>
> 2 * As to finding of fact 11: Incorrect because it states that a certain chemical evaporates from the skin, but does not state that it leaves a residue, and does not include references to other kinds of oil.
>
> 3 * As to finding of fact 12: Incorrect because it states that plaintiff did not want to get a chemical on his hands and tried to avoid doing so, instead of stating that plaintiff washed his hands to remove the chemical after coming in contact with it.
>
> 4 * As to finding of fact 23: Incorrect because it states that the pathology report on the skin removed from one lesion was "sun-damaged skin with basal cell carcinoma[,]" because the report does not distinguish between sun-damaged skin and chemically damaged skin.

In none of these cases does he state how the "incorrect" wording would support his arguments or conclusions.

Plaintiff's argument as to finding of fact 29, which states that Dr. Kenyon's only information as to plaintiff's contact with chemicals comes from plaintiff's own reporting, is essentially that the tone of the finding is improper; plaintiff states that it implies Dr. Kenyon's opinion was unfounded, which is neither stated nor implied. As to finding of fact 30, plaintiff argues that the Industrial Commission applied the wrong burden of proof, which is incorrect, as discussed above. He makes the same argument as to findings of fact 32, 42, 43, 44, 45, and 46, and also argues that these findings of fact misstate the evidence, but does not elaborate in any way. Plaintiff's argument as to finding of fact 14 unintelligible. Finally, he argues that conclusions of law 3, 4, and 5, set out above, apply the incorrect burden of proof, which, as discussed above, is in itself an incorrect assertion.

III.

Because the Industrial Commission's opinion and award are based on competent evidence, we affirm.

Affirmed.

Judges ELMORE and STROUD concur.

Report per Rule 30(e).

NOTE

1. We note that Powers is the plaintiff in this suit, but his attorney refers to him alternately as the plaintiff and the defendant in his brief.