NO. COA05-536

NORTH CAROLINA COURT OF APPEALS

Filed: 18 April 2006

SANDRA TAYLOR,
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 283223

HENDERSON COUNTY PUBLIC LIBRARY,
Employer,
SEDGWICK CMS,
Carrier,
Defendants.

Appeal by defendants from opinion and award filed 8 February 2005 by the North Carolina Industrial Commission. Heard in the Court of Appeals 30 November 2005.

*Waymon L. Morris, P.A., by Waymon L. Morris, for plaintiff-appellee.*

*Cranfill, Sumner & Hartzog, L.L.P., by Nicole Dolph Viele, for defendants-appellants.*

GEER, Judge.

Defendants Henderson County Public Library and Sedgwick CMS appeal from the Industrial Commission's decision awarding plaintiff Sandra Taylor temporary total disability based on an occupational disease, epicondylitis, in her upper extremities. Defendants argue: (1) the record does not contain competent medical evidence to support the Commission's determination that Taylor's epicondylitis constituted a compensable occupational disease, and

(2) Taylor failed to meet her burden of proving total disability. We disagree with defendants on both issues and, therefore, affirm the Full Commission.

## Facts

Taylor began working for the Henderson County Public Library ("the Library") in January 1999 as a full-time library assistant. About 25% of her time at work was devoted to reshelving books, with an additional 15% spent on tasks such as sorting mail and replacing newspapers and magazines. She spent the remaining 60% of her time working at the circulation desk, checking borrowed materials into and out of the library.

In December 1999, Taylor developed radiating pain in her right shoulder, arm, and hand. Dr. Hobart Rogers, an orthopaedic surgeon, diagnosed her as suffering carpal tunnel syndrome and recommended conservative treatment, including medication and a night splint. Taylor also began using a right wrist brace at work and tried to use her left hand for more of her duties. Subsequently, however, nerve conduction tests ruled out carpal tunnel syndrome as the cause of the pain.

Despite the conservative treatment, Taylor's pain in her right upper extremities continued to worsen, and she also began to suffer similar symptoms in her left arm. In November 2001, Taylor consulted Dr. Angelo Cammarata, an orthopaedic surgeon specializing in the upper extremities. He diagnosed epicondylitis, also known as "tennis elbow," which is an inflammation of the tendons of the forearm. Although he believed the original cause of the epicondylitis was "hard to determine," he testified that Taylor's employment was exacerbating her symptoms.

Starting in December 2001, Dr. Cammarata placed Taylor on light duty and prohibited her from working at the circulation desk or in the stacks. With the reduced activity, Taylor's

condition improved to a degree. At the end of January 2002, Dr. Cammarata approved Taylor's returning to her regular work as an assistant librarian with some restrictions.

In February 2002, because Taylor was still experiencing pain and felt she was unable to perform her job fully, Taylor sought treatment from Dr. Lorraine K. Doyle. Dr. Doyle diagnosed lateral and medial epicondylitis, prescribed splints and therapy, and recommended that Taylor not perform repetitive work as a librarian. The Library then offered Taylor disability retirement because there was no job meeting Taylor's restrictions.

After leaving her job at the Library, Taylor began working towards a degree in accounting at the University of North Carolina at Asheville, but found that the school activities increased her pain. On 7 November 2002, Dr. Doyle recommended that Taylor cease working towards the accounting degree because of her exacerbated symptoms. Dr. Doyle ultimately concluded that Taylor reached maximum medical improvement as of 25 September 2003, but that she could not return to any job that required the kind of repetitive motion that would aggravate her chronic pain symptoms.

Defendants denied Taylor's claim for workers' compensation, and a hearing was held before Chief Deputy Commissioner Stephen T. Gheen. Although the Chief Deputy noted that Dr. Cammarata and Dr. Doyle had "differences in professional judgment" regarding the degree of work Taylor could perform, he found that "Dr. Doyle's opinion that Taylor's condition has become chronic and prevents her from performing as an assistant librarian is more compelling." Accordingly, he awarded Taylor temporary total disability and designated Dr. Doyle to be Taylor's treating physician. On appeal, a majority of the Full Commission agreed with the Chief Deputy and likewise awarded temporary total disability and approved the designation of Dr. Doyle as Taylor's treating physician. Commissioner Dianne C. Sellers dissented, indicating that

she thought Dr. Doyle's opinions should be disregarded. Defendants timely appealed to this Court.

Discussion

This Court reviews opinions and awards of the Industrial Commission to determine whether any competent evidence exists to support the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law. *Cross v. Blue Cross/Blue Shield*, 104 N.C. App. 284, 285-86, 409 S.E.2d 103, 104 (1991). 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. Contractors*, 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.

I

Defendants primarily argue on appeal that the Full Commission's determination that Taylor had suffered a compensable occupational disease is unsupported by competent evidence. Since N.C. Gen. Stat. §97-53 (2005) does not specifically list epicondylitis as an occupational disease, Taylor was required to prove that her condition was:

> (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 v. Tultex Corp.*, 308 N.C. 85, 93, 301 S.E.2d 359, 365 (1983) (internal quotation marks omitted).

The 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. As for the third prong of *Rutledge*, "[t]his element of the test is satisfied if plaintiff's employment 'significantly contributed to, or was a significant causal factor in, the disease's development.'" *James v. Perdue Farms, Inc.*, 160 N.C. App. 560, 562, 586 S.E.2d 557, 560 (2003) (quoting *Hardin v. Motor Panels, Inc.*, 136 N.C. App. 351, 354, 524 S.E.2d 368, 371, *disc. review denied*, 351 N.C. 473, 543 S.E.2d 488 (2000)), *disc. review denied*, 358 N.C. 234, 594 S.E.2d 191 (2004). "This is so even if other non-work-related factors also make significant contributions, or were significant causal factors." *Rutledge*, 308 N.C. at 101, 301 S.E.2d at 370.

Defendants do not address the 20-year-old test set forth in *Rutledge* - and consistently applied by our appellate courts - but rather urge this Court to adopt a new test requiring "a very distinct nexus" or "a tight nexus" between a claimant's job duties and the development of a condition, which, defendants contend, should be demonstrated by evidence that a condition is "peculiar . . . if not exclusively related" to the particular job. Even if we were inclined to do so, we may not apply a test at variance with the one adopted by the Supreme Court in *Rutledge*. We note, however, that to date the *Rutledge* test has proven to be a workable method for determining the existence of an occupational disease.

In this case, the Commission concluded that Taylor's epicondylitis was an occupational disease based on (1) "Dr. Doyle['s] testi[mony] that Plaintiff was at an increased risk of developing epicondylitis as compared to the general public not so employed," (2) Dr. Doyle's opinion that Taylor's employment contributed to plaintiff's epicondylitis, and (3) both Dr. Doyle's and Dr. Cammarata's "opinion that Plaintiff's employment at Defendant-Employer, at the least, significantly aggravated her epicondylitis if it did not cause the condition." Defendants challenge the competency of the testimony of Dr. Doyle and Dr. Cammarata on these issues.

With respect to Dr. Doyle's testimony, defendants first argue that the doctor's opinion regarding the repetitive nature of Taylor's job was speculative, citing one excerpt of her deposition. Our review of Dr. Doyle's deposition, however, reveals that the doctor's opinion was the result of a reasoned analysis based on her medical experience, her review of a videotape of Taylor's work, and her discussion with Taylor regarding her duties. It was, therefore, competent evidence on the question of the repetitive nature of Taylor's job. Further, as Judge Hudson stated in a dissenting opinion adopted by the Supreme Court in *Alexander v. Wal-Mart Stores, Inc.*, 359 N.C. 403, 610 S.E.2d 374 (2005) (per curiam), it is not "the role of this Court to comb through the testimony and view it in the light most favorable to the defendant, when the Supreme Court has clearly instructed us to do the opposite. Although by doing so, it is possible to find a few excerpts that might be speculative, this Court's role is not to engage in such a weighing of the evidence." *Alexander v. Wal-Mart Stores, Inc.*, 166 N.C. App. 563, 573, 603 S.E.2d 552, 558 (2004) (Hudson, J., dissenting).

Defendants also argue that Dr. Doyle's opinions regarding the repetitive nature of the job and causation were incompetent because Dr. Doyle formed her initial opinion based on what Taylor told her during her office visits rather than waiting to view a videotape of Taylor's work or conducting other investigation of Taylor's job duties. Dr. Doyle, however, in her deposition, specifically relied upon the videotape in rendering her opinions. Moreover, our Supreme Court has previously rejected defendants' argument:

"A physician, as an expert witness, may give his opinion, including a diagnosis, based either on personal knowledge or observation or on information supplied him by others, including the patient, if such information is inherently reliable even though it is not independently admissible into evidence. . . ." Statements made by a patient to his physician for the purposes of treatment

and medical information obtained from a fellow-physician who has treated the same patient are "inherently reliable" [for evidentiary purposes].

*Booker v. Duke Med. Ctr.*, 297 N.C. 458, 479, 256 S.E.2d 189, 202 (1979) (quoting *State v. Wade*, 296 N.C. 454, 462, 251 S.E.2d 407, 412 (1979)). *See also Rogers v. Lowe's Home Improvement*, 169 N.C. App. 759, 767, 612 S.E.2d 143, 148 (2005) (holding that doctor "was entitled to credit his patient's account of his own pain symptoms in formulating his expert opinion").

Defendants make no further specific challenge regarding Dr. Doyle's opinion, adopted by the Commission, that Taylor's work subjected her to a greater risk of contracting epicondylitis than members of the general public. *See Hobbs v. Clean Control Corp.*, 154 N.C. App. 433, 436, 571 S.E.2d 860, 862 (2002) ("Evidence that the plaintiff's employment exposed her to a greater risk than that of the general public is the *sine qua non* of a workers' compensation claim for an occupational disease . . . ."). Defendants do generally state that "Dr. Doyle made a diagnosis without performing and/or reviewing objective testing," but they do not suggest that the diagnosis - also reached by Dr. Cammarata - was incorrect. Defendants also object that "Dr. Doyle's only treatment consists of a brief course of physical therapy and issuance of pain medication and out of work/out of school notes" without explaining how their argument relates to the competency of Dr. Doyle's testimony or pointing to any evidence that this treatment was inappropriate.

With respect to Dr. Cammarata's testimony regarding the causal relationship between Taylor's work and her condition, defendants argue that it was not competent under *James*, because he simply testified that Taylor's job duties exacerbated her *symptoms* and not her epicondylitis. Defendants misread *James*, which did not address the causation prong of *Rutledge*.

In *James*, this Court held only that a doctor's testimony that the plaintiff's demanding work gave rise to an increased risk of hand pain and problems was not sufficient to prove that the work exposed her to an increased risk of developing fibromyaligia. 160 N.C. App. at 563, 586 S.E.2d at 560. This Court held: "The distinction between plaintiff's pain and her underlying condition is a significant one. Plaintiff must demonstrate that her employment exposed her to an increased risk of developing the *disease*." *Id.*

Here, the Commission did not rely upon Dr. Cammarata's testimony regarding exacerbation in concluding that the "increased risk" requirement of *Rutledge* was met. Dr. Doyle's testimony supplied evidence to support that determination. Instead, the Commission pointed to Dr. Cammarata as support for the third prong of *Rutledge*, requiring a causal connection between Taylor's employment and her epicondylitis. We hold that Dr. Doyle's testimony and Dr. Cammarata's testimony are sufficient to meet the requirement of causation. *See Cialino v. Wal-Mart Stores*, 156 N.C.App. 463, 475-76, 577 S.E.2d 345, 354 (2003) ("[T]he uncontroverted evidence from three medical professionals related the symptoms and disease afflicting [plaintiff] to her employment with Wal-Mart. Thus, the Commission had competent evidence from which to find an occupational disease.").

Defendants also urge that *Futrell v. Resinall Corp.*, 151 N.C. App. 456, 566 S.E.2d 181 (2002), *aff'd per curiam*, 357 N.C. 158, 579 S.E.2d 269 (2003), requires reversal of the Commission. In *Futrell*, however, the Commission had concluded that the plaintiff failed to prove the existence of an occupational disease. In affirming, this Court explained:

> [A]lthough there may have been some evidence tending to show plaintiff's employment could have aggravated the condition, there is no authority from this State which allows us to ignore the well-established requirement that a plaintiff seeking to prove an occupational disease show that the employment placed him at a greater risk for *contracting* the condition, even where the condition

> may have been aggravated but not originally caused by the plaintiff's employment. . . .
>
> > . . . *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. Regardless of how an employee meets the causation prong (i.e., whether it be evidence that the employment caused the disease or only contributed to or aggravated the disease), 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.* at 460, 566 S.E.2d at 184.

Contrary to defendants' argument, *Futrell* supports affirmance of the Commission. The record contains evidence in the form of Dr. Doyle's opinion to meet the requirement that Taylor prove that her employment placed her at a greater risk for contracting epicondylitis than the general public - thus complying with the first two prongs of *Rutledge*. In addition, both Dr. Doyle's and Dr. Cammarata's testimony supplied the necessary evidence to meet the third element of *Rutledge*, relating to causation, by providing evidence that the employment contributed to or aggravated the epicondylitis. Defendants have, therefore, offered no persuasive basis for reversing the Commission's conclusion that Taylor contracted a compensable occupational disease.

II

Defendants also contend that Taylor failed to meet her burden of proving disability. In order to support a conclusion of compensable disability, the Commission must find:

> (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment,

> and (3) that this individual's incapacity to earn was caused by plaintiff's injury.

*Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982).

As defendants acknowledge, an employee may meet his or her burden of proving disability in one of four ways:

> (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

*Russell v. Lowes Prod. Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (internal citations omitted).

The Commission's finding of fact number 24, to which defendants have not assigned error, states:

> Plaintiff has attempted to find employment consistent with her restricted capabilities. As of the date of hearing Plaintiff has been unsuccessful in finding employment, having applied for in excess of thirty positions she thought might be within her capabilities. Defendant-Employer has not provided vocational rehabilitation. A Vocational Evaluation Report prepared by the North Carolina Department of Health and Human Services, Division of Vocational Rehabilitation Services, dated February 26, 2003, concluded it would be difficult for Plaintiff to find jobs which do not require repetitious motion or lifting.

It is well-established that findings of fact not challenged on appeal are binding on this Court. *Johnson v. Herbie's Place*, 157 N.C. App. 168, 180, 579 S.E.2d 110, 118, *disc. review denied*, 357 N.C. 460, 585 S.E.2d 760 (2003).

The Commission's finding of fact indicates that Taylor met her burden under both the second and third prongs of *Russell*. That finding is sufficient to support the Commission's conclusion that Taylor is entitled to temporary total disability benefits. *See White v. Weyerhaeuser Co.*, 167 N.C. App. 658, 673, 606 S.E.2d 389, 399-400 (2005) (affirming award of total disability for closed period based on the Commission's finding that the plaintiff, during that period, made unsuccessful efforts to find suitable work); *Bridwell v. Golden Corral Steak House*, 149 N.C. App. 338, 344-45, 561 S.E.2d 298, 302 (holding that an award of total disability should be affirmed based on findings that the plaintiff had unsuccessfully sought suitable employment), *disc. review denied*, 355 N.C. 747, 565 S.E.2d 193 (2002). We, therefore, uphold the Commission's award of temporary total disability benefits.

III

In defendants' final argument, they contend that the Commission erred in designating Dr. Doyle to be Taylor's treating physician. The Commission's decision to approve a doctor as an employee's treating physician is reviewed for an abuse of discretion. *Lakey v. U.S. Airways, Inc.*, 155 N.C. App. 169, 174, 573 S.E.2d 703, 707 (2002), *disc. review denied*, 357 N.C. 251, 582 S.E.2d 271 (2003).

Here, the Commission found based on competent evidence that Taylor continued to experience pain and limited movement after she had been released for full-time work by Dr. Cammarata. Our Court has held that in these circumstances, no abuse of discretion occurs when the Commission changes a plaintiff's approved physician. *See, e.g.*, *Terry v. PPG Indus., Inc.*, 156 N.C. App. 512, 520, 577 S.E.2d 326, 332-33 (holding that the Commission did not abuse its discretion in approving treatment by a particular physician when none of the other authorized physicians had successfully provided relief for her condition), *disc. review denied*, 357 N.C. 256,

583 S.E.2d 290 (2003); *Lakey*, 155 N.C. App. at 174, 573 S.E.2d at 707 ("[P]laintiff was released to work by her approved physician while still suffering from pain. Therefore, we do not find that the Commission abused its discretion in allowing approval of plaintiff's physician."). Thus, no basis exists to overturn the Commission's decision to approve Dr. Doyle as Taylor's authorized treating physician.

Affirmed.

Judges HUNTER and McCULLOUGH concur.

Report per Rule 30(e).