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NO. COA05-1279

NORTH CAROLINA COURT OF APPEALS

Filed: 1 August 2006

THOMAS THORNBURG,
Employee,
Plaintiff,

v.

RAINBOW TRANSPORT,
Employer,

and

AM COMP ASSURANCE COMPANY,
Carrier,
Defendants.

North Carolina Industrial Commission
I.C. File No. 295626

Appeal by Plaintiff from Opinion and Award entered 12 April 2005 by the N.C. Industrial Commission. Heard in the Court of Appeals 12 April 2006.

Crumley & Associates, P.C., by J. William Snyder, Jr., for Plaintiff-Appellant.

Orbock Ruark & Dillard, PC, by Barbara E. Ruark and Tina F. Rizzi, for Defendant-Appellees.

STEPHENS, Judge.

Plaintiff appeals from an Opinion and Award of the North Carolina Industrial Commission (Commission), which denied his claim for workers' compensation benefits. In support of his appeal, Plaintiff brings forward nine assignments of error challenging six of the Commission's findings of fact and three of its conclusions of law. For the reasons stated herein,

we affirm.

Plaintiff is a high school graduate who was fifty years old at the time of the hearing on 30 October 2003. He worked as a truck driver for Defendant-Employer (Employer) for almost two years. During his employment, he weighed more than 350 pounds and suffered from poorly controlled hypertension, diabetes, and high cholesterol. His job duties included "hauling trash" to landfills in Kernersville, Charlotte and sometimes Gastonia from a waste management facility in Spencer. He was paid $40.00 per load and usually hauled three or four loads per day.

On the morning of 22 August 2002, Plaintiff delivered two loads of garbage to the Kernersville landfill and returned to Spencer for his third load, arriving at "somewhere around maybe after twelve[]" p.m. He pulled his truck into the parking lot at the Spencer facility and rolled up the tarp to open up the top of the trailer. He then pulled the truck into a "pit" where another employee used a front-end loader to load trash into the trailer. On this occasion, Scott Moore, site operator for Waste Management in Spencer, was loading Plaintiff's truck. Plaintiff testified that the loading process would generally take fifteen to thirty minutes, depending on the amount of garbage to be loaded. While the loading was underway, Plaintiff climbed the stairs to the top deck and sat on a box where the fire hose lines came through. He was sitting in the sun and "it was hot . . . just like any other day[.]" Mr. Moore estimated that the temperature was in the nineties, and National Weather Service records admitted in evidence established that the high temperature in the area that day was ninety-two degrees Fahrenheit.

After about ten to fifteen minutes of loading, Mr. Moore was thirsty and asked Plaintiff to go get them a drink from the on-site vending machine. Plaintiff walked across the parking lot about 100 yards to the drink machine and purchased two drinks, walked back across the parking lot and handed Mr. Moore his drink, and sat down in a chair next to the building to drink his

drink. He "took a drink or two" and then noticed that his left hand "went sort of numb" and he "felt kind of funny . . . like, dizzy." He saw that his drink had fallen out of his hand and spilled. Mr. Moore was behind him, talking to him, but Plaintiff "couldn't talk" back to him.

Mr. Moore testified that when Plaintiff set his drink down, "it fell back on him and was pouring on his shirt[] [a]nd [Plaintiff] just started laughing." Not knowing what was happening and being concerned that Plaintiff had been drinking alcohol, Mr. Moore immediately drove his front-end loader to the area where Employer's mobile mechanic, Darren Corn, was working and asked Mr. Corn to come "check [Plaintiff] out."

Mr. Corn, who had recently been certified as a medical responder, drove his service truck to the place where Plaintiff was sitting and noticed that Plaintiff had a "glazed look in his eyes[,]" his face was "flushed, and he was sweating." Plaintiff was slow to respond to Mr. Corn, so Mr. Corn drove Plaintiff to the office. According to Plaintiff, he continued to feel "weird," could not "get [his] bearings," and had "no balance." Mr. Corn checked Plaintiff's pulse, and it was "a little elevated," "right around a hundred[]" beats per minute. Because he did not have his medical bag, Mr. Corn was not able to check Plaintiff's blood pressure. He gave Plaintiff some wet towels to wipe his face and a cup of water to drink. After five to six minutes, Mr. Corn checked Plaintiff's pulse again, and it "was back down to about eighty . . . eighty-five[]" "which is pretty much normal." Plaintiff knew who he was, who Mr. Corn was, and where they were. Although Plaintiff expressed his desire to deliver his load of garbage to the landfill, Mr. Corn convinced him to let Mr. Corn drive him back to Employer's terminal in Mt. Airy instead. Mr. Corn also asked Plaintiff if he wanted to go to the hospital before they left Spencer, but Plaintiff declined.

During the drive back to Mt. Airy, which took an hour and fifteen minutes to an hour and

a half, Mr. Corn continued to observe Plaintiff and to talk to him. He noticed that Plaintiff was alert, although he "had a little trouble, . . . with his speech." They arrived at the terminal "close to four o'clock[]" and Mr. Corn offered to drive Plaintiff home, but Plaintiff indicated that he was able to drive himself home. Plaintiff testified that he was still having trouble "find[ing][his] words[,]" and he "hung around [the terminal] for a little while[]" talking to "a couple of more people there at the yard[.]" He then drove to his home about ten miles away. When he arrived, he told his wife that "something ain't right, and I ain't feeling too good." His wife took him to the emergency room at Northern Hospital of Surry County in Mt. Airy.

At the hospital, Plaintiff complained of an onset of left arm pain and tingling and difficulty speaking at work earlier that day. He was examined by his family physician, Dr. Nelson Gardner, who admitted him to the Intensive Care Unit (ICU) and ordered various diagnostic evaluations, including a CT scan of Plaintiff's head, which was interpreted as normal, and a doppler echocardiogram which, according to the physician who performed that study, did not "rule out the presence of intracardiac thrombi or other cardiac source of systemic emboli." Plaintiff remained in the hospital until 26 August 2002, at which time Dr. Gardner discharged him with orders for an outpatient MRI and MRA of the cerebral vessels as well as speech therapy for Plaintiff's persistent difficulties in expressing himself. Dr. Gardner's discharge diagnoses included left parietal acute thrombotic cerebrovascular accident (CVA), expressive dysphasia (loss of or difficulty in ability to use or understand language) secondary to CVA, poorly controlled diabetes, hypertension, and high cholesterol. The MRI and MRA of Plaintiff's head performed at North Carolina Baptist Hospital in Winston-Salem on 29 August 2002 confirmed an acute left posterior middle cerebral artery infarct, or stroke, and demonstrated narrowing of the left middle cerebral artery "in the exact distribution" as the infarct.

Plaintiff testified that he has not worked since 22 August 2002 because "I can't function." He complained of continued difficulties with his speech and memory, problems with balance, and depression. Additional evidence necessary to an understanding of the errors assigned will be discussed below.

Employer completed an I.C. Form 19 report to the Industrial Commission on 30 August 2002, and by an I.C. Form 61 dated 3 October 2002, Defendants denied that Plaintiff was owed workers' compensation benefits. On 8 October 2002, Plaintiff filed an I.C. Form 18 notice of claim, and subsequently, an I.C. Form 33 requesting a hearing. Following an evidentiary hearing and the completion of expert medical depositions, Deputy Commissioner Lorrie Dollar denied Plaintiff's claim for workers' compensation benefits in an Opinion and Award filed 24 May 2004. Plaintiff filed a timely notice of appeal to the Full Commission, and on 12 April 2005, Commissioner Bernadine S. Ballance, writing for the Full Commission, affirmed the Opinion and Award of the deputy commissioner with modifications. Plaintiff appeals.

By his first argument, Plaintiff brings forward his assignment of error five challenging the Commission's finding of fact twenty-eight on grounds that the Commission erred in rejecting the testimony of Dr. Gardner. Specifically, Plaintiff argues that the Commission erroneously determined that Dr. Gardner's testimony was not competent because it was based on an inaccurate history provided by Plaintiff's wife. Finding of fact twenty-eight is as follows:

> Dr. Gardner was provided written weather information in response to which he wrote an opinion letter relating plaintiff's stroke to heat. In a 4 June 2003 opinion letter, Dr. Gardner wrote that plaintiff's exposure to the high temperature played a "participating factor in the left middle cerebral artery CVA." However, this opinion was based upon an inaccurate history of plaintiff's physical activity prior to onset of the symptoms. When given a correct history of onset, he gave the opinion that it was possible for a diabetic like plaintiff to be more sensitive to heat and thereby at an increased risk of sustaining a stroke.

Our standard of review of challenged findings of fact in workers' compensation cases is limited to a determination of whether the record contains any evidence to support the disputed findings. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999). Indeed, it is a fundamental tenet of North Carolina workers' compensation law that "'[t]he findings of fact of the Industrial Commission are conclusive on appeal when supported by competent evidence, even though there be evidence that would support findings to the contrary.'" *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 115, 530 S.E.2d 549, 552 (2000)(*quoting Jones v. Myrtle Desk Co.,* 264 N.C. 401-02, 141 S.E.2d 632-33) (1965)). Thus, on appeal, this Court "does 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." *Anderson v. Lincoln Constr. Co.,* 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965). Therefore, we examine the record in this case to determine whether there is competent evidence to support the challenged portions of finding of fact twenty-eight, that is, that Dr. Gardner's opinion was based upon an erroneous history, and that, when provided with an accurate history, Dr. Gardner modified his opinion.

Dr. Gardner testified that the history he obtained regarding the onset of Plaintiff's symptoms "[p]retty much" came from Plaintiff's wife at Plaintiff's bedside in the ICU because Plaintiff "was not talking much at the time." That history was that Plaintiff's symptoms began while he was unloading a truck. He also recorded that Plaintiff "was very hot and sweaty when this happened while unloading the truck." As one of his diagnostic impressions upon initially examining Plaintiff, Dr. Gardner included "[a]cute neurologic injury, *either* heat stroke or cerebrovascular accident." (Emphasis added). In addition, Dr. Gardner received a letter from Plaintiff's attorney, which was not admitted in evidence, but which Dr. Gardner summarized as

follows with respect to the history provided:

> He pulled into a waste management facility, and was unloading the truck. I remember the day as being typically an August[] hot day, and very humid.
>
> And while unloading[] the truck, became very warm, hot; and he said that he had gotten a little hot and asked to get something to drink and to cool off. And after working on the truck for about thirty (30) to forty-five (45) minutes, apparently, became dizzy and had difficulty speaking; and noticed a tingling pain in his left upper extremity.

By letter dated 4 June 2003, Dr. Gardner responded to Plaintiff's attorney and stated in pertinent part that (1) "the temperature and conditions to which [Plaintiff] was exposed, . . . did play a participating factor in the left middle cerebral artery CVA he suffered[,]" (2) it was his medical opinion "that the stress associated with the heat, dehydration, and the impaired cerebral blood flow, in addition to the atherosclerotic narrowing precipitated his stroke[,]" and (3) "the heat played a critical factor in the acute event." Dr. Gardner testified that the impression he formed was "that this man was physically working and unloading a truck" for twenty to thirty minutes and had gotten "very hot and sweaty . . . doing that." Regarding the role that the histories he received from Plaintiff's wife and attorney played in the formation of his opinions, Dr. Gardner testified, "I would not have put 'heat stroke' as a potential part of my diagnosis if I didn't get the impression from the history that it could be a component of the problem." He reiterated that "the thing that clued me in about a possible heat stroke was his history."

It is undisputed, however, that Plaintiff's job duties did not include loading or unloading his truck at the time his problems began and that, on the contrary, his truck was being loaded by an employee of another company. It is further undisputed that after pulling his truck into the pit area, Plaintiff sat down for ten to fifteen minutes and performed no physical activity until he walked approximately 100 yards across the parking lot to purchase two cold drinks and then

walked back to the pit area. Thus, the Commission's finding that Dr. Gardner's opinion about the contribution of heat to Plaintiff's condition "was based upon an inaccurate history of plaintiff's physical activity prior to onset of the symptoms[]" is plainly supported not only by competent evidence, but also by Plaintiff's uncontradicted account of the day's events. We note further that Plaintiff has not challenged the Commission's finding of fact seventeen which contains virtually the same determination, that is, that based on an "inaccurate history of physical activity[]" provided by Plaintiff's wife, "Dr. Gardner erroneously assumed plaintiff was engaged in physical activity unloading a truck for 20-30 minutes[.]"

Moreover, whereas Dr. Gardner expressed his opinion in his 4 June 2003 letter in terms of "reasonable . . . medical probability[,]" upon being given an accurate history of Plaintiff's activities immediately before the onset of his symptoms, Dr. Gardner "qualified" his earlier opinion. Specifically, when asked whether his opinion was still the same as he expressed in his 4 June letter, Dr. Gardner responded: "Is it *possible* on a hot, humid day for a diabetic . . . to be much more sensitive to heat and, as such, [for the heat to] precipitate[] a stroke? Yes." (Emphasis added). This evidence clearly supports the remainder of the Commission's finding of fact twenty-eight.

Plaintiff argues further, however, that the Commission erred as a matter of law because it concluded that Dr. Gardner's testimony was not competent "*per se*" since it was based on an inaccurate history, and therefore, the Commission erroneously rejected Dr. Gardner's testimony. This argument has no merit.

In *Gutierrez v. GDX Auto.*, 169 N.C. App. 173, 176, 609 S.E.2d 445, 448, *disc. review denied*, 359 N.C. 851, 619 S.E.2d 408 (2005) (citations and internal quotation marks omitted), this Court held that the Industrial Commission "must consider and evaluate all the evidence

before it is rejected[,]" and "[i]t is reversible error for the Commission to fail to consider the testimony or records of a treating physician." In this case, the Commission's Opinion and Award contains five findings of fact in addition to findings seventeen and twenty-eight, discussing Dr. Gardner's testimony relating to his treatment of Plaintiff. These detailed findings establish that the Commission clearly considered and fully evaluated the testimony of Dr. Gardner before it concluded that his opinion was "insufficient to establish a causal relationship between plaintiff's employment and his stroke." This conclusion of law is supported by findings of fact seventeen and twenty-eight. Moreover, in finding of fact twenty-five, the Commission determined that it would give greater weight to the opinions of Dr. Peter Donofrio, a board-certified neurologist and professor at Wake Forest University School of Medicine, "over any other contrary opinions." Dr. Donofrio testified unequivocally that there is no causal relationship between the conditions of Plaintiff's employment on 22 August 2002, including the temperature that day, and the stroke he suffered.

Finding of fact twenty-five further establishes that the Commission properly carried out its responsibility to weigh all the evidence before it and then exercised its authority to determine which evidence to accept as the most persuasive. As our appellate courts have repeatedly held in workers' compensation cases, "[t]he Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Adams,* 349 N.C. at 680, 509 S.E.2d at 413 (*quoting Anderson v. Lincoln Constr. Co.*, 265 N.C. at 433-34, 144 S.E.2d at 274). *See also Martin v. Martin Bros. Grading,* 158 N.C. App. 503, 507, 581 S.E.2d 85, 88, *cert. denied,* 357 N.C. 579, 589 S.E.2d 127 (2003)("It was the responsibility of the Commission to weigh all of [the] expert testimony and determine whose opinion was most persuasive."); *Peagler v. Tyson Foods, Inc.,* 138 N.C. App. 593, 598, 532 S.E.2d 207, 210 (2000) ("In evaluating the causation

issue, 'this Court can do no more than examine the record to determine whether any competent evidence exists to support the Commission's findings as to causation. . . .[W]hen conflicting evidence is presented, "the Commission's finding [on] causal connection . . . is conclusive."'") This assignment of error is overruled.

Plaintiff's second argument is that the Commission "erred as a matter of law in its conclusion that the Plaintiff did not suffer an injury by accident arising out of and in the course of his employment on August 22, 2002." In support of this argument, Plaintiff brings forward all nine of his assignments of error, challenging the Commission's findings of fact twenty-four through twenty-nine and its three conclusions of law. Those challenged findings and conclusions are as follows:

> 24. On 24 April 2003, plaintiff returned to Dr. Malone and reported that exposure to intense heat prompted his stroke. However, there is no competent evidence to support plaintiff's conjecture. The evidence presented does not support a finding that plaintiff suffered from heat stroke or injury from extreme heat exposure. In addition, the competent evidence in the record supports a finding that the air conditioner in truck #74 was functioning and cooling properly on 22 August 2002. No weight is given to plaintiff's testimony to the contrary.
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> 25. Board Certified Neurologist and professor at Wake Forest School of Medicine, Dr. Peter Donofrio, reviewed plaintiff's medical records and testing, following which he found plaintiff's hypertension, hyperlipidemia, obesity, diabetes, elevated triglycerides and probably obstructive sleep apnea contributed to his stroke. Greater weight is given to the opinion of Dr. Donofrio over any other contrary opinions.
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> 26. Based on the greater weight of the evidence, plaintiff was not at an increased risk of suffering a stroke due to his employment. Further, there is insufficient evidence that plaintiff's stroke was characteristic of or peculiar to his employment as a truck driver.
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> 27. Dr. Malone, who is board-certified in neurology, clinical neurophysiology and sleep medicine, opined that plaintiff

would never be able to return to work full-time. He noted that on 22 August 2002, plaintiff had several risk factors for stroke including high blood pressure, high cholesterol, diabetes and obesity. He further testified that higher temperatures prompt dehydration, salt wasting, mental fatigue and cognitive changes. However, heat does not directly precipitate a stroke. Prior to April 2003, Dr. Malone had never considered heat to be a factor in plaintiff's stroke.

28. Dr. Gardner was provided written weather information in response to which he wrote an opinion letter relating plaintiff's stroke to heat. In a 4 June 2003 opinion letter, Dr. Gardner wrote that plaintiff's exposure to the high temperature played a "participating factor in the left middle cerebral artery CVA." However, this opinion was based upon an inaccurate history of plaintiff's physical activity prior to onset of the symptoms. When given a correct history of onset, he gave the opinion that it was possible for a diabetic like plaintiff to be more sensitive to heat and thereby at an increased risk of sustaining a stroke.

29. Based on the greater weight of the evidence, plaintiff's employment did not subject him to a greater hazard or risk of heat stroke or a heat-related injury than that to which he would have otherwise been exposed if he did not drive a truck for defendant-employer and extreme heat exposure did not cause plaintiff's stroke on 22 August 2002. Therefore, plaintiff did not suffer an injury by accident arising out of and in the course of his employment on 22 August 2002.

* * * * * * * * * * *

Based upon the foregoing Stipulations and Findings of Fact, the Full Commission makes the following:

CONCLUSIONS OF LAW

1. Plaintiff has failed to prove that he suffered an injury by accident arising out of and in the course of his employment. N.C. Gen. Stat. §97-2(6).

2. Where the exact nature and probable genesis of a particular injury involves complicated medical questions removed from the ordinary experience of the layperson, only a qualified expert witness can give an opinion as to the nature and cause of the injury. *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 265

> S.E.2d 389 (1980). The Commission must first determine whether the proffered expert opinion is competent before the opinion can be weighed as evidence in the case. Expert opinion that rests on speculation and conjecture, or unproven facts, is not sufficiently reliable to qualify as competent evidence concerning the nature and cause of the injury. *Young v. Hickory Business Furniture*, 353 N.C. 227, 538 S.E.2d 912 (2000). [sic] In the instant case, Dr. Gardner's original opinion testimony was based on an inaccurate history of onset given to him by plaintiff's wife that plaintiff's symptoms began after he unloaded a truck. When Dr. Gardner was given an accurate history, he changed his opinion and stated it was possible that plaintiff's exposure to heat increased his risk of sustaining a stroke. Dr. Gardner's opinion is insufficient to establish a causal connection between plaintiff's employment and his stroke.
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> 3. In order to qualify for compensation under the Workers' Compensation Act, a claimant must prove both the existence and extent of disability. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 290 S.E.2d 682 (1982). Plaintiff has failed to prove by competent evidence that he is entitled to temporary total disability benefits as a result of his stroke.

The rule to be applied to determine the compensability of an injury allegedly sustained by exposure to heat or cold was laid down by our Supreme Court in *Fields v. Tompkins-Johnston Plumbing Co.,* 224 N.C. 841, 842-43, 32 S.E.2d 623, 624 (1945):

> [W]here the employment subjects a workman to a *special or particular* hazard from the elements, such as *excessive* heat or cold, likely to produce sunstroke or freezing, death or disability resulting from such cause usually comes within the purview of the compensation acts. . . . *The test is whether the employment subjects the workman to a greater hazard or risk than that to which he otherwise would be exposed.*

(Emphasis added). *Accord, Madison v. Int'l. Paper Co.,* 165 N.C. App. 144, 598 S.E.2d 196 (2004).

As set out above, in this case, the Commission determined in findings of fact twenty-six and twenty-nine that Plaintiff's employment did not expose him to a greater risk of a heat-related injury than that to which he otherwise would be exposed. Although the Commission

denominated this determination a finding of fact, we believe it is a conclusion of law (*see, e.g., Dillingham v. Year gin Constr. Co.,* 320 N.C. 499, 502, 358 S.E.2d 380, 381-82, *reh'g denied,* 320 N.C. 639, 360 S.E.2d 84 (1987)) and, therefore, we review it *de novo. See McRae v. Toastmaster, Inc.,* 358 N.C. 488,496, 597 S.E.2d 695, 701 (2004) (*citing Grantham v. R.G. Barry Corp.,* 127 N.C. App. 529, 534, 491 S.E.2d 678, 681 (1997), *disc. review denied,* 347 N.C. 671, 500 S.E.2d 86 (1998). Our review is guided by our Supreme Court's discussion and application in *Dillingham*, *supra*, of the *Fields's* test for compensability of alleged heat-related injuries.

Mr. Dillingham suffered cardiac arrest at work on a day in June when the outside temperature was at least eighty-five degrees. His job required him to work inside a reactor building to repair control valves, and on the day in question, he was assigned to an area directly beneath the reactor. For radiation protection, Mr. Dillingham was required to wear special clothing consisting of a heavy radiation suit including coveralls, plastic boots, rubber boots, cotton gloves, surgical gloves, work gloves, and a hood. To seal any seams or gaps, duct tape was wrapped tightly around his neck, wrist, and ankle areas. After working on the valve in this clothing for about thirty minutes, Mr. Dillingham became ill and lost consciousness. He was ultimately diagnosed with cardiac arrest.

Mr. Dillingham testified that the outside temperature was ninety degrees, it was hotter in the reactor room "because heat builds up inside," he began to sweat profusely as soon as he put on his protective clothing, the reactor room did not have adequate ventilation, and it was "miserably hot" where he was working. *Dillingham,* 320 N.C. at 501, 358 S.E.2d at 381. His co-worker disputed his testimony about the temperature and ventilation of the reactor room and testified that, whereas it was hot in the room, it was "not abnormally hot for a June day[.]" *Id.*

Mr. Dillingham's treating physician testified that Mr. Dillingham "suffered cardiac arrest precipitated by the heat exhaustive conditions present on the job[]" and that Mr. Dillingham "*would not have suffered cardiac arrest had he not been working under the conditions present at the job site.*" *Id.* (Emphasis added). A second medical expert concurred that Mr. Dillingham's cardiac arrest "resulted from heat stroke due to a hot environment and a confining radiation suit that would not allow effective dissipation of heat." *Id.* It does not appear from the Supreme Court's discussion of the evidence that any contrary medical opinion was offered.

The Commission (affirmed by this Court) denied Mr. Dillingham's claim for workers' compensation benefits upon a determination (denominated a finding of fact, but "deem[ed]" by the Supreme Court to be a conclusion of law, that he "was not at an increased risk of developing heat exhaustion or cardiac arrest as a result of his work. . . ,than the general public not so employed." *Id.* at 502, 360 S.E.2d at 382. The Supreme Court reversed, noting that contrary to this conclusion, "the evidence *unequivocally demonstrates* that plaintiff was exposed to an increased risk of heat-related illness because of his employment." *Id.* at 503, 358 S.E.2d at 382. (Emphasis added). In addition to the heavily confining radiation suit that Mr. Dillingham was required to wear, the Court found it significant that "uncontradicted evidence showed that other employees at the plant had suffered heat-related illnesses leading to emergency room treatment." *Id.* at 504, 358 S.E.2d at 382. Concluding, the Court held as follows:

> It is clear that the type of heavy clothing required by his employment exposed plaintiff to a greater danger of overheating than that to which he otherwise would have been subjected. Members of the public not so employed would not ordinarily wear heavy layers of clothing such as coveralls, boots, gloves, and a hood in an enclosed space with temperatures reaching 85 degrees.

Id. Similarly, in *Madison, supra,* this Court noted that there was evidence that the exposures to heat in that case, which included "periodic exposure to heat in excess of 200 degrees

Fahrenheit[,]" subjected Mr. Madison to a greater risk of a heart attack than if he had not been employed in the job at issue. *Madison,* 165 N.C. App. at 151, 598 S.E.2d at 200. The existence of such evidence supported the Commission's award of death benefits to Mr. Madison's dependents. In reaching its decision affirming the Commission's award, this Court followed the *Fields's* test for determining the compensability of weather-related injuries and rejected the defense argument that to uphold benefits would result in an expansion of the types of cases in which a heat-related contribution to an injury would be compensable. This Court specifically rejected the defense concern that its holding affirming the Commission's award of benefits would abrogate the necessity for an employee alleging a heat-related injury to prove that his employment placed him at a greater risk of sustaining such an injury than members of the general public.

Contrary to the unequivocal and apparently uncontroverted evidence in *Dillingham* that he "would not have suffered cardiac arrest had he not been working under the conditions present at the job site[,]" *Dillingham,* 320 N.C. at 501, 358 S.E.2d at 381, and thus was clearly at an increased risk of a heat-related injury because of his employment, Dr. Donofrio's unequivocal opinion in this case is that Plaintiff "was not at greater risk . . . of having [a] stroke" because of the conditions of his employment on 22 August 2002. Moreover, Dr. Donofrio testified equally as unequivocally that it was "highly unlikely" that heat caused Plaintiff's stroke, that he is unaware of "any relationship between high temperature and stroke[,]" and that, in this case specifically, he found "no relationship" between the heat or outside temperature on 22 August 2002 and the occurrence of Plaintiff's stroke. This evidence fully supports the Commission's determination that Plaintiff's employment on 22 August 2002 did not expose him to an increased risk of suffering a heat-related injury, and because it is the Commission's prerogative to decide

which of the expert witnesses it finds more persuasive, this Court is bound by the Commission's reliance on Dr. Donofrio's opinions even in the face of contrary expert medical evidence.

We also believe it is significant that Mr. Dillingham had no evidence of underlying heart disease, and thus, no other risk factors were identified for his cardiac arrest than the extreme heat conditions under which he was working. By contrast, in the case at bar, the medical experts agree that Plaintiff had multiple risk factors for experiencing a CVA, or stroke. As Dr. Donofrio explained:

> [Plaintiff's] primary risk factors were poorly controlled blood pressure, diabetes that was prominent enough to be . . . advanced . . . . He was morbidly obese. He had persistent elevations in cholesterol and triglycerides, and he probably had obstructive sleep apnea.

Plaintiff's family doctor, Dr. Gardner, identified his risk factors for experiencing a stroke to include a several-year history of hypertension and diabetes, both of which were poorly controlled at best; high cholesterol; and a family history of hypertension, diabetes and heart disease. Indeed, Dr. Gardner testified that the fact that Plaintiff's diabetes and cholesterol levels were not under good control would place him at an "elevated risk" for suffering a stroke. Dr. John Malone, a Mt. Airy neurologist who treated Plaintiff after his stroke, testified that the "biggest" risk factor for the occurrence of a stroke is hypertension, and that, in addition, Plaintiff was at risk for experiencing a stroke because of his diabetes, high cholesterol, obesity, and family history. Further, the fact that Plaintiff's hypertension and diabetes were not under good control made him even "more prone" to suffering a stroke. Importantly, Dr. Malone assessed the significance of the MRI evidence that the narrowing of the left middle cerebral artery was "in the exact distribution" as the acute left posterior middle cerebral artery infarct or stroke that Plaintiff suffered. According to Dr. Malone, the "[i]mplication" of the MRI findings is that "the narrowing is the

cause of the stroke. . . .” He testified further that potential causes of such narrowing of the cerebral artery would be hypertension, diabetes, high cholesterol, and obesity.

The import of the substantial evidence of the many risk factors Plaintiff had for suffering a stroke is plain: it provides even greater support for Dr. Donofrio’s unambiguous opinions that Plaintiff’s stroke was not causally related to his exposure to heat and that his employment conditions, including heat, did not subject him to a greater risk of experiencing a stroke. Because the Commission’s determination on the increased risk test that governs the compensability of alleged heat-related injuries is fully supported by this evidence, it is binding on this Court, and in turn, supports the Commission’s further conclusion that Plaintiff failed to prove he suffered an injury by accident arising out of his employment. We reject Plaintiff’s argument that the Commission misapprehended and misapplied the law which controls the compensability of heat-related injuries. The Opinion and Award of the Commission is

Affirmed.

Judges MCGEE and HUNTER concur.

Report per Rule 30(e).