NO. COA05-1408

NORTH CAROLINA COURT OF APPEALS

Filed: 5 July 2006

JOHN DODRILL,
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 331691

JERRY RHYNE'S COLLISION REPAIR,
Employer,

SOUTHERN GUARANTY and UNIVERSAL UNDERWRITERS INSURANCE COMPANY,
Carriers,
Defendants.

Appeal by defendants from opinion and award entered 12 July 2005 by the North Carolina Industrial Commission. Heard in the Court of Appeals 17 May 2006.

The Sumwalt Law Firm, by Vernon Sumwalt and Mark T. Sumwalt, for plaintiff-appellee.

Cranfill, Sumner & Hartzog, L.L.P., by Meredith T. Black, for defendant-appellee Universal Underwriters Insurance Company.

Morris York Williams Surles & Barringer, LLP, by Michelle S. Langdon and Keith B. Nichols, for defendants-appellants Jerry Rhyne's Collision Repair and Southern Guaranty.

McGEE, Judge.

Universal Underwriters Insurance Company (Universal) provided workers' compensation coverage for Jerry Rhyne's Collision Repair (employer) from 1 September 1999 through 1

September 2002. Southern Guaranty provided workers' compensation coverage for employer from 1 September 2002 through May 2004. Southern Guaranty and employer (collectively appellants) appeal from an opinion and award of the North Carolina Industrial Commission (the Commission) filed 12 July 2005.

John Dodrill (plaintiff) began working as an automobile body repairman in 1983. He began working for employer in 1995. Under employer's production-based system, plaintiff's wages depended on the number of repairs plaintiff completed. Plaintiff normally worked more than twelve hours per day, seven days per week.

Plaintiff used both his arms extensively and repetitively while repairing vehicles. Plaintiff worked from a lying or seated position underneath an automobile, and he routinely reached above his shoulders to perform repairs. Plaintiff also handled powerful air chisels, grinders, and other tools that required complete reliance on his arms and shoulders to operate.

Plaintiff began experiencing pain in his arms in 2001 while working with employer. Plaintiff saw Dr. Russell Garland (Dr. Garland), an orthopedic surgeon, on 16 January 2002. Dr. Garland diagnosed impingement syndrome, or bursitis, in plaintiff's right shoulder. He noted plaintiff had been symptomatic of this condition for "a long period of time." When plaintiff saw Dr. Garland again on 1 February 2002, Dr. Garland recommended that plaintiff undergo surgery to repair plaintiff's right shoulder and recommended that plaintiff discontinue his work with employer. However, plaintiff declined surgery and continued to work because he could not afford to be out of work.

Plaintiff returned to Dr. Garland on 19 July 2002 and complained that his right shoulder pain had worsened and that he now felt pain in his left elbow. Dr. Garland diagnosed plaintiff

with lateral epicondylitis in the left elbow, commonly known as "tennis elbow." Dr. Garland noted that plaintiff's job duties could "absolutely" cause lateral epicondylitis.

Dr. Garland saw plaintiff on 10 October 2002 and noted that plaintiff continued to complain of pain in his right shoulder and left elbow. Dr. Garland again recommended surgery on plaintiff's right shoulder, but again plaintiff did not have the surgery because he could not afford to be out of work. Dr. Garland continued plaintiff on his medications. When plaintiff saw Dr. Garland on 5 March 2003, plaintiff complained of pain in his left shoulder for the first time. Dr. Garland then diagnosed medial epicondylitis in plaintiff's left elbow. Explaining the distinction between medial epicondylitis and the previously-diagnosed lateral epicondylitis in plaintiff's left elbow, Dr. Garland testified that plaintiff "was doing such strenuous work that [plaintiff] . . . had inflamed the flexor tendons as well." Thus, Dr. Garland stated that plaintiff's left elbow had worsened since he diagnosed tennis elbow in July 2002.

Plaintiff's condition deteriorated to the point that he had developed medial epicondylitis in both elbows and impingement syndrome, or bursitis, in both shoulders by 3 April 2003. Dr. Garland performed surgery on plaintiff's right shoulder and right elbow on 6 May 2003. Despite plaintiff's wishes that Dr. Garland perform surgery on plaintiff's left shoulder and elbow the same day, Dr. Garland did not do so because of the limitation surgeries on both arms would have caused plaintiff. Plaintiff was out of work from 6 May 2003 until 1 July 2003. Plaintiff filed a Form 18 on 21 May 2003 seeking workers' compensation.

After a hearing, a deputy commissioner entered an opinion and award on 19 May 2004, concluding that plaintiff suffered a compensable occupational disease while working for employer. The deputy commissioner also found that plaintiff "was last injuriously exposed to the hazards of his employment with [] employer after 1 September 2002." Plaintiff was awarded

total disability compensation at the rate of $674.00 per week from 6 May 2003 through 1 July 2003, as well as all reasonably necessary medical compensation related to plaintiff's compensable bilateral upper extremity conditions. The deputy commissioner concluded that Southern Guaranty was the carrier on the risk for plaintiff's claim, since plaintiff was last injuriously exposed to the hazards of his employment with employer after 1 September 2002.

Appellants appealed to the full Commission. The Commission affirmed the deputy commissioner's opinion and award, finding that plaintiff "was last injuriously exposed to the hazards of his employment with [] employer after 1 September 2002." The Commission concluded, under N.C. Gen. Stat. §97-57, that Southern Guaranty was the carrier of risk for the entire claim. Appellants appeal.

Appellants do not contest that plaintiff suffered a compensable occupational disease. The only issue before our Court is which insurance carrier was on the risk during the time plaintiff was last injuriously exposed to the occupational disease. Appellants argue the Commission erred in determining that Southern Guaranty was the carrier on the risk for plaintiff's claim. Appellants contend that Universal, which provided coverage for employer from 1 September 1999 through 1 September 2002, was the carrier on the risk during the entirety of plaintiff's occupational disease. Therefore, appellants argue, Universal is liable for compensating plaintiff. Appellants assign error to one finding of fact and one conclusion of law from the Commission's opinion and award.

Appellate review of an opinion and award by the Commission is limited to two inquiries: (1) whether the Commission's findings of fact are supported by any competent evidence in the record; and (2) whether the conclusions of law are justified by the findings of fact. *Counts v. Black & Decker Corp*., 121 N.C. App. 387, 389, 465 S.E.2d 343, 345 (internal citation omitted),

disc. review denied, 343 N.C. 305, 471 S.E.2d 68 (1996). If supported by competent evidence, the Commission's findings are conclusive even if the evidence might also support a contrary finding. *Jones v. Candler Mobile Village*, 118 N.C. App. 719, 721, 457 S.E.2d 315, 317 (1995). The Commission's conclusions of law are reviewable *de novo*. *Whitfield v. Laboratory Corp. Of Am.*, 158 N.C. App. 341, 348, 581 S.E.2d 778, 783 (2003); N.C. Gen. Stat. §97-82 (2005).

I.

Appellants first argue there is no competent evidence to support the Commission's finding of fact number nineteen. Finding of fact number nineteen provides: "Plaintiff's conditions developed over time as he performed the same job duties for [] employer. Therefore, plaintiff was last injuriously exposed to the hazards of his employment while working for [] employer after September 1, 2002, when Southern Guaranty was on the risk." Although the Commission designated it as a finding of fact, the second sentence in finding of fact number nineteen "is in reality a conclusion of law in that it applies principles of law, rather than a determination of facts from the appellant's evidence[.]" *State ex rel. Utilities Comm. v. Mackie*, 79 N.C. App. 19, 30, 338 S.E.2d 888, 896 (1986). Therefore, we discuss the Commission's statement of plaintiff's "last injurious exposure" as a conclusion of law in section II of this opinion.

Appellants concede that plaintiff's job duties remained the same throughout his tenure with employer from 1995 through 2004. Our review of the record shows competent evidence that plaintiff's medical condition developed over time as he performed his work for employer. This evidence supports the Commission's finding that plaintiff's medical condition continued to develop after 1 September 2002.

Most notably, Dr. Garland's medical testimony shows that plaintiff's condition worsened after 1 September 2002, when Southern Guaranty was on the risk. Dr. Garland testified that he diagnosed plaintiff with medial epicondylitis in plaintiff's left elbow on 5 March 2003. Dr. Garland responded affirmatively when asked if plaintiff's left elbow had worsened since July 2002, when Dr. Garland diagnosed lateral epicondylitis, or "tennis elbow," in plaintiff's left elbow. Dr. Garland noted plaintiff "was doing such strenuous work that [plaintiff] . . . had inflamed the flexor tendons as well." According to Dr. Garland, this was also the first time plaintiff had complained of pain in his left shoulder.

Furthermore, Dr. Garland testified that on 3 April 2003, plaintiff complained for the first time of pain in his right elbow. At that time, Dr. Garland diagnosed medial epicondylitis in plaintiff's right elbow. Dr. Garland performed surgery on plaintiff's right arm on 6 May 2003. Dr. Garland opined that plaintiff's work activities caused his conditions, despite evidence of plaintiff's prior jobs and the presence of a previous rotator cuff injury.

Appellants point to plaintiff's statement that plaintiff suffered from conditions in both arms prior to his initial visit with Dr. Garland in January 2002. Thus, appellants argue, there is no competent evidence to show that plaintiff's medical condition changed after 1 September 2002. Although plaintiff's statement may support a finding contrary to the Commission's finding of fact number nineteen, Dr. Garland's testimony regarding the deterioration in plaintiff's condition is competent evidence to support the Commission's finding. Under *Jones*, we need only find competent evidence to support the Commission's finding, despite evidence that might support a contrary finding. *Jones*, 118 N.C. App. at 721, 457 S.E.2d at 317. Accordingly, we affirm the finding that plaintiff's condition developed over time as he performed the same job duties for employer.

II.

We next address the Commission's conclusion of law that "Southern Guaranty is the carrier on the risk for [plaintiff's] claim, since plaintiff was last injuriously exposed to the hazards of his employment with [] employer after September 1, 2002." Appellants argue this conclusion is incorrect as a matter of law and is not supported by the Commission's findings. In reviewing the "last injurious exposure" rule from N.C. Gen. Stat. §97-57, we uphold the Commission's conclusion as a matter of law, and find it supported by the Commission's findings of fact.

N.C. Gen. Stat. §97-57 (2005) provides:

> [i]n 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.

This is true "even though the disease has been present and has progressed over a long period of time." *Stewart v. Duncan*, 239 N.C. 640, 645, 80 S.E.2d 764, 768 (1954). As to the risk assumed by insurance carriers, "the law makes no provision for a partnership in responsibility[.] . . . It takes the breakdown practically where it occurs -- with the last injurious exposure." *Haynes v. Feldspar Producing Co.*, 222 N.C. 163, 170, 22 S.E.2d 275, 279 (1942); *see also Hartsell v. Thermoid Co.*, 249 N.C. 527, 531-32, 107 S.E.2d 115, 118 (1959) (holding a second carrier fully liable even though it was on the risk for only the last five days of the thirty-day period applicable to asbestosis claims).

Our Supreme Court has interpreted the term "last injuriously exposed" to mean "an exposure which proximately augmented the disease to any extent, however slight." *Rutledge v. Tultex Corp.*, 308 N.C. 85, 89, 301 S.E.2d 359, 362 (1983) (internal quotation omitted) (holding

that the plaintiff was last injuriously exposed to the hazards of her occupational disease at the defendant's mill, even though the plaintiff had worked at other mills and there was evidence that the plaintiff's habitual smoking could have contributed heavily to her chronic obstructive lung disease). A "hazard" of a disease to which an employee is "last injuriously exposed" is defined as "[a] condition peculiar to the workplace which accelerates the progress of an occupational disease to such an extent that the disease finally causes the worker's incapacity to work[.]" *Caulder v. Waverly Mills*, 314 N.C. 70, 75, 331 S.E.2d 646, 649 (1985).

Applying those definitions to the present case, the Commission concluded plaintiff's last injurious exposure occurred after 1 September 2002, when Southern Guaranty began covering plaintiff's employer. Appellants assign error to this conclusion as a matter of law and argue that plaintiff was last injuriously exposed to the hazards of his disease prior to 1 September 2002. Appellants contend that plaintiff's upper extremity conditions arose entirely before Southern Guaranty began providing coverage and had reached a "point of saturation" well before 1 September 2002.

In *Jones v. Beaunit Corp*., 72 N.C. App. 351, 354, 324 S.E.2d624, 626 (1985), our Court rejected a "point of saturation" argument similar to appellants' argument. Our Court noted that, while the prior insurance carrier in *Jones* would have been liable if the plaintiff had reached the point of saturation during its coverage period, an analysis of the evidence indicated otherwise. *Id*. In *Jones*, the plaintiff worked for his employer until he could work no longer due to his breathing problem, and he was exposed to the hazards of his disease, the dangerous dust and fumes from his workplace, after defendant carrier began providing coverage for the employer. *Id*. Similarly, in the present case, a review of the evidence shows that plaintiff's condition did not reach the "point of saturation" during Universal's coverage, but rather continued to worsen after Southern

Guaranty came on the risk in September 2002. Like the plaintiff in *Jones*, plaintiff "worked at the same company under the same deleterious conditions for the duration of his employment." *Jones*, 72 N.C. App. at 354, 324 S.E.2d at 626.

As discussed in Section I of this opinion, appellants do not contest that plaintiff's job duties remained the same from 1999 to 2004. Furthermore, appellants do not contest the Commission's finding that plaintiff's job duties caused or significantly contributed to plaintiff's occupational disease. Following the logic from *Jones* and *Haynes*, since plaintiff continued to work under the hazards of his occupational disease after 1 September 2002, he remained capable of further injury. *Jones*, 72 N.C. App. at 354, 324 S.E.2d at 626; *see also Haynes*, 222 N.C. at 170, 22 S.E.2d at 279 (affirming an award to the plaintiff after exposure to silica particles augmented his already-contracted silicosis, stating: "But although his breath was short and his heart beat faster . . . we must assume, because he still lived and breathed, he was capable of further injury.").

In the opinion of Dr. Garland, plaintiff's job duties caused or significantly contributed to plaintiff's condition in both arms. When asked if plaintiff was at an increased risk for developing the condition, Dr. Garland stated: "Everything I can think of and know of that causes these injuries, he engaged in at work." As mentioned in Section I, Dr. Garland testified that plaintiff's condition continued to worsen after 1 September 2002. Dr. Garland noted on 5 March 2003 that plaintiff complained of pain in his left shoulder for the first time, and plaintiff's left elbow deteriorated to the point he was diagnosed with medial epicondylitis. Dr. Garland diagnosed plaintiff with medial epicondylitis in the right elbow for the first time on 3 April 2003. Dr. Garland performed surgery on plaintiff's right elbow and right shoulder on 6 May 2003, effectively causing plaintiff to be totally incapacitated until 1 July 2003.

This evidence supports the Commission's conclusion that plaintiff suffered an exposure to a hazard after September 2002, the uncontested date that Southern Guaranty began coverage. The Commission was therefore correct in concluding that Southern Guaranty was on the risk when plaintiff was last injuriously exposed and in ordering employer and Southern Guaranty to pay for plaintiff's temporary total disability and reasonably necessary medical compensation. Moreover, we find this conclusion of law is supported by the Commission's finding of fact number nineteen, discussed above, as well as findings of fact numbers seventeen and eighteen.

Affirmed.

Judges ELMORE and STEELMAN concur.

Report per Rule 30(e).