NO. COA07-1371

NORTH CAROLINA COURT OF APPEALS

Filed: 2 December 2008

JOHNNY A. FINK,
Employee,
Plaintiff

v.

North Carolina Industrial Commission
I.C. File No. 344463

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

LIBERTY MUTUAL INSURANCE COMPANY,
Carrier,
Defendants

Appeal by defendants from an Opinion and Award entered 11 July 2007 by the North Carolina Industrial Commission. Heard in the Court of Appeals 3 April 2008.

The Jernigan Law Firm, by Gina E. Cammarano, for the employee- plaintiff-appellee.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by J. A. Gardner, III, and Harmony Whalen Taylor, for employer-carrier- defendants-appellants.

STEELMAN, Judge.

This Court may not re-weigh evidence when the findings of fact of the Industrial Commission are supported by competent evidence in the record. When these findings support the Commission's conclusions of law, its award must be affirmed.

I. Factual and Procedural Background

In October 2002, Johnny A. Fink, plaintiff, retired from thirty years' employment in the curing department of Kelly Springfield ("employer"), a tire manufacturer. During his employment, plaintiff worked at three positions in the curing department, all of which involved solvents or spray lubricants. Plaintiff also smoked tobacco from age 17 to 45, or approximately 28 years, but had not smoked since 14 April 1991. In January 1999, plaintiff was diagnosed with moderate chronic obstructive pulmonary disease, or COPD. Plaintiff continued working until 30 July 2002, when he left work for "moderate emphysema" and subsequently retired.

On 7 July 2003, plaintiff filed a worker's compensation claim seeking an award of compensation for occupational lung disease with the Industrial Commission. Defendants denied the claim.

On 11 July 2007, the Industrial Commission issued an Opinion and Award in which it held that plaintiff had suffered injury as a result of a compensable occupational disease, and awarded plaintiff benefits at the rate of $654 per week beginning 30 July 2002, and continuing until further order of the Commission. Past and future medical expenses were also awarded. Defendants appeal.

II. Standard of Review

"The standard of review on appeal to this Court from an award by the Commission is whether there is any competent evidence in the record to support the Commission's findings and whether those findings support the Commission's conclusions of law." *Oliver v. Lane Co.*, 143 N.C. App. 167, 170, 544 S.E.2d 606, 608 (2001) (citations omitted). The Commission's findings may only be set aside where there is a complete lack of competent evidence. *Young v. Hickory Bus. Furniture*, 353 N.C. 227, 230, 538 S.E.2d 912, 915 (2000).

It is not the role of the Court of Appeals to re-weigh the evidence. *Crump v. Independence Nissan*, 112 N.C. App. 587, 589, 436 S.E.2d 589, 592 (1993).

III. Occupational Disease

Occupational diseases under the laws of North Carolina include the following:

> (13) 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.

N.C. Gen. Stat. §97-53(13)(2007).

Our Supreme Court has set forth three elements that must be satisfied under the statute:

> 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." *Hansel v. Sherman Textiles*, 304 N.C. 44, 52, 283 S.E.2d 101, 105-06 (1981); *Booker v. Duke Medical Center*, 297 N.C. 458, 468, 475, 256 S.E.2d 189, 196, 200 (1979).

Rutledge v. Tultex Corp./Kings Yarn, 308 N.C. 85, 93, 301 S.E.2d 359, 365 (1983). The first two elements may be satisfied by showing that the employee was "at greater risk of contracting the disease than the public generally." *Id.* at 93-94, 301 S.E.2d at 365; *accord Matthews v. City of Raleigh*, 160 N.C. App. 597, 586S.E.2d 829 (2003). In satisfying the third element, the employee need not show that workplace exposure was the sole cause, but only that workplace exposure "significantly contributed to, or was a significant causal factor in, the disease's development." *Rutledge* at 101, 301 S.E.2d at 369-70. "This is so even if other non-work-related factors also make significant contributions, or were significant causal factors." *Id.*, 301 S.E.2d at 370.

Circumstantial evidence is sufficient to show causation. *Keel v. H & V Inc.*, 107 N.C. App. 536, 540, 421 S.E.2d 362, 366 (1992).

IV. Award of Commission is Supported by Evidence in the Record

In their first argument, defendants contend that the Commission's Award is unsupported by competent evidence and is contrary to the law because plaintiff failed to establish the requisite causal relationship between his chronic obstructive pulmonary disease and his employment. We disagree.

The Full Commission considered expert testimony from four medical doctors. Plaintiff presented the testimony of Dr. Ted Kunstling, a physician who personally examined plaintiff and concluded that: (1) plaintiff's employment placed him at an increased risk for developing chronic obstructive pulmonary disorder ("COPD") as compared with the general public; and (2) plaintiff's employment was a significant causal factor to his development of COPD. Each of these opinions was rendered to a reasonable degree of medical certainty. Defendants presented testimony from three physicians who reviewed plaintiff's medical records but did not personally examine plaintiff. In its Opinion and Award, the Commission adopted the opinion of Dr. Kunstling and rejected the opinions of defendants' medical experts.

A. Dr. Kunstling's Testimony

Defendants make a series of attacks upon the testimony of plaintiff's expert, Dr. Kunstling. These are as follows: (1) the Commission ignored flaws in Dr. Kunstling's methodology and found facts not supported by the record; (2) the Commission found that Dr. Kunstling relied upon the Fine and Peters studies in reaching his opinion; (3) the Commission found that Dr. Kunstling's opinion was supported by a radiology report and a review of a 30 March 2005 chest x-ray of plaintiff by Dr. Credle; (4) Dr. Kunstling's opinion was not

competent under *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004), and *State v. Goode*, 341 N.C. 513, 461 S.E.2d 631 (1995); and (5) the Commission failed to give due weight and credibility to the testimony of defendants' experts, which contradicted Dr. Kunstling's testimony.

1. Dr. Kunstling's Methodology and Facts Found by the Commission

The Commission found that:

> 23. After examining plaintiff, Dr. Kunstling testified that plaintiff has COPD caused by and/or exacerbated by cigarette smoking and occupational exposure to fumes and pollutants in the work place. Dr. Kunstling's opinion is based on his physical examination of plaintiff, as well as his review of plaintiff's medical records, PFTs, chest films, work history, smoking history, history of symptoms, and exposure history, plus his review of defendant-employer's industrial hygiene test results and the videotape of the curing department provided by defendants. Dr. Kunstling testified that plaintiff's COPD was caused in part by his employment at defendant- employer. He further stated that plaintiff's employment was a significant contributing factor to his development of COPD.

Defendants complain that Dr. Kunstling had not reviewed all of this material prior to rendering his *initial* opinion in the case. This is irrelevant. It is clear from Dr. Kunstling's deposition that he had reviewed all of those materials and was thoroughly examined and cross-examined by counsel concerning them. He further testified that none of the materials altered his opinions in this case.

Defendants further argue that, upon cross-examination, Dr. Kunstling made certain admissions that weakened his testimony. It is clear from the record that Dr. Kunstling's testimony was not totally without inconsistencies. However, the resolution of those inconsistencies, the credibility of the witness, and the weight to be given to the testimony are to be resolved by the Commission and not by an appellate court. *Young*, 353 N.C. at 230, 538 S.E.2d at 915 ("it is well-established that the Industrial Commission is the sole judge of the

credibility of the witnesses and the evidentiary weight to be given their testimony") (quoting *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998) and *Anderson v. Construction Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965)) (internal quotations omitted).

2. Dr. Kunstling's Reliance Upon the Fine & Peters Studies

The Commission found that:

> 24. Dr. Kunstling cited two studies by Drs. Lawrence Fine and John Peters that followed a population of curing workers in a tire plant and arrived at conclusions regarding the incidences and distribution of pulmonary symptoms and disease. Dr. Kunstling testified that "these two articles describe an increased incidence of chronic obstructive pulmonary disease, and also a worsening loss of lung function for the workers who have had prolonged employment in the rubber tire curing industry compared with controls." He further stated that the mean of the measured levels of curing fumes/TRRF at defendant-employer's Fayetteville plant is approximately .24 milligrams per cubic meter, which Drs. Fine and Peters defined as "light exposure" to curing fumes. According to the Fine and Peters' studies, Dr. Kunstling testified that for both light and heavily exposed workers, COPD rates are definitely increased for those who have worked more than ten years in a curing department. Further, Dr. Kunstling testified that the Fine & Peters studies are considered to be reliable authority on the issue of respiratory morbidity in tire plant curing workers.

Defendants contend that the Fine and Peters studies were inherently unreliable and that even if they were reliable, Dr. Kunstling did not rely upon them in forming his opinions in the case. We first hold that the Commission's finding of fact 24 accurately summarizes Dr. Kunstling's testimony pertaining to the Fine and Peters studies. Defendants contend that the Fine and Peters studies do not contain any evidence that would "assist the trier of fact to understand the evidence or to determine a fact in issue" and was inadmissible under Rule 702(a) of the North Carolina Rules of Evidence.

This argument is more appropriately addressed under Rule 703 of the Rules of Evidence:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

N.C. Gen. Stat. §8C-1, Rule 703 (2007). Dr. Kunstling testified that the two studies by Dr. Lawrence Fine and Dr. John Peters, entitled "Respiratory Morbidity in Rubber Workers[,]" were published in peer-reviewed journals by legitimate investigators, were controlled studies, and were the kind of information that he would use in the development of his opinions. He further testified that the studies supported his original opinion in that they described an increased incidence of COPD for workers who have had prolonged employment in the rubber tire curing industry.

Defendants also contend that Dr. Kunstling did not rely upon the Fine and Peters studies in forming his opinions in this case. At the end of his deposition, Dr. Kunstling testified:

> . . . I really got these articles two days ago, and read them last night. They really did not -- were not a factor in my initial opinions when I made my initial report. I don't think they contraindicate my initial opinions, but they were not utilized when I made my report, and I think the basic opinion as I have responded to the questions I think is basically what is in my report.

Based upon the provisions in Rule 703 and Dr. Kunstling's testimony regarding the Fine and Peters studies, we hold that the Commission did not err in considering Dr. Kunstling's testimony concerning these studies. While the studies were not a factor in Dr. Kunstling's original opinion, he testified upon deposition that they supported his opinion, and his testimony at the end of the deposition merely confirmed that the studies were not the basis of his original opinion.

3. Radiology Report and Dr. Credle's Review of Chest X-ray

There was a conflict in the evidence pertaining to a chest x- ray of plaintiff. Defendant's expert, Dr. Ghio, testified that the x-ray showed hyperinflation of the lungs, which he testified was not associated with COPD resulting from occupational disease. The radiology report did not show any hyperinflation. This report was confirmed by Dr. Credle's review of the x-ray film. The Commission found that Dr. Kunstling's opinion was supported by the report as well as by Dr. Credle. The Commission gave "greater weight to the opinions of Drs. Credle and Kunstling than to Dr. Ghio and finds that plaintiff did not have bullae or hyperinflation of the lungs."

"The Industrial Commission possesses the powers of a court. The issue of whether a witness is qualified to testify as an expert is a question addressed to the court, in its discretion, and its decision will not be disturbed absent a showing of abuse of discretion." *Torain v. Fordham Drug Co.*, 79 N.C. App. 572, 577, 340 S.E.2d 111, 115 (1986) (citations omitted); *accord Howerton v. Arai Helmet, Ltd.*, 358 N.C. at 458, 597 S.E.2d at 686. We find no such abuse here. Defendants complain that there is no evidence in the record of Dr. Credle's expert qualifications to read the chest x-ray. Dr. Credle's report was a one-page document which contains absolutely no information concerning Dr. Credle's qualifications. This document was submitted by plaintiff's counsel to Deputy Commissioner Taylor on 1 June 2006 as evidence, offered without objection from defendants. The submission further indicated that counsel for all parties agreed that Dr. Credle did not need to be deposed. Defendants had an opportunity to object to Dr. Credle's letter and failed to do. We cannot say that the Commission's failure to address an objection not made by defendants is an abuse of discretion. *Id.*

4. Validity of Dr. Kunstling's Opinions Under *Howerton* & *Goode*

In *State v. Goode*, 341 N.C. 513, 461 S.E.2d 631, our Supreme Court "set forth a three-step inquiry for evaluating the admissibility of expert testimony." *Howerton*, 358 N.C. at 458, 597 S.E.2d at 686. Citing *Goode*, the *Howerton* Court summarized the inquiry as follows:

> (1) Is the expert's proffered method of proof sufficiently reliable as an area for expert testimony? [*Goode*] at 527-29, 461 S.E.2d at 639-40. (2) Is the witness testifying at trial qualified as an expert in that area of testimony? *Id.* at 529, 461 S.E.2d at 640. (3) Is the expert's testimony relevant? *Id.* at 529, 461 S.E.2d at 641.

Id. As noted above, we review the Commission's admission of Dr. Kunstling's expert testimony for an abuse of discretion. *Id.*; *Fordham Drug*, 79 N.C. App. at 577, 340 S.E.2d at 115.

Defendants first attack Dr. Kunstling's opinion by asserting that there has "been no showing that he is an expert in pulmonary diseases affecting tire workers or has any specialized training that would address occupational exposures that plaintiff would have had at the Fayetteville plant." We note that at the beginning of Dr. Kunstling's deposition, counsel for defendants stated:

> I'll be happy to stipulate that Dr. Kunstling is an expert in the fields of pulmonary and internal medicine, and is board-certified in both internal and the subspecialty of pulmonary medicine, and can testify in accordance therewith, if that'll ease the record a little bit, or the time.

On appeal, defendants have argued that plaintiff is required to present expert medical testimony as to causation of plaintiff's COPD under *Holley v. ACTS, Inc.*, 357 N.C. 228, 581 S.E.2d 750 (2003). Having stipulated as to the expert qualifications of Dr. Kunstling at his deposition, they now attack his qualifications on appeal. Under defendants' argument on appeal, an expert could not render an opinion unless he or she had specific expertise in all aspects which might have contributed to the patient's condition. In this case, they would have us require that an expert have specialized knowledge or training as to pulmonary diseases affecting tire workers and

specifically at defendant's Fayetteville plant. Such a narrow construction of Rule 702, *Goode*, and *Howerton* would make it virtually impossible for a plaintiff to procure an expert who was not inexorably tied to the operator of the plant.

In *Howerton*, regarding the second prong of the *Goode* test, our Supreme Court quoted the following language from *Goode*:

> "It is not necessary that an expert be experienced with the identical subject matter at issue or be a specialist, licensed, or even engaged in a specific profession. It is enough that the expert witness because of his expertise is in a better position to have an opinion on the subject than is the trier of fact."

Howerton, 358 N.C. at 461, 597 S.E.2d at 688 (2004) (quoting *Goode*, 341 N.C. at 529, 461 S.E.2d at 640) (internal quotations and citations omitted). We agree that Dr. Kunstling was qualified to render an expert opinion as to the medical causation of plaintiff's condition and hold that the Commission did not abuse its discretion in admitting his opinion testimony. *Fordham Drug*, 79 N.C. App. at 577, 340 S.E.2d at 115.

Defendants further argue that the evidence of plaintiff's exposure to chemicals incident to his employment at the tire plant, specifically as to the chemicals to which he was exposed, the level of exposure, and the duration of his exposure was too speculative to be a basis for Dr. Kunstling's causation opinion.

In *Matthews v. City of Raleigh*, 160 N.C. App. 597, 586 S.E.2d 829, this Court held that in *McCuiston v. Addressograph-Multigraph Corp.*, 308 N.C. 665, 303 S.E.2d 795 (1983), the Supreme Court rejected the requirement that an employee quantify the degree of exposure to the harmful agent during employment. Further, in determining the competency of medical testimony, it is well established that circumstantial evidence is sufficient and absolute certainty is not required.

> Circumstantial evidence of the causal connection between the occupation and the disease is sufficient. *Booker* [*v. Duke Medical Center*], 297 N.C. at 476, 256 S.E.2d at 200. Medical opinions given may be based either on "'personal knowledge or observation or on information supplied him by others, including the patient. . . .'" *Id.* at 479, 256 S.E.2d at 202 (citation omitted). Absolute medical certainty is not required.

Keel, 107 N.C. App. at 540, 421 S.E.2d at 366.

We note that Dr. Kunstling's testimony, particularly with respect to the Fine and Peters studies, contains conflicts between the direct and cross-examination portions of his testimony. However, such conflicts are for the Industrial Commission to resolve in its role as the fact-finder in these cases. So long as there is competent evidence in the record to support its findings, they are binding upon the appellate courts. *Young*, 353 N.C. at 230, 538 S.E.2d at 915.

We hold that Dr. Kunstling's testimony meets the requirements for reliability set forth in Rule 702 of the Rules of Evidence, in *Goode*, and in *Howerton*.

5. It is for the Industrial Commission to Determine the Credibility and Weight Given to Expert Testimony

Finally, defendants complain that the Industrial Commission failed to give due weight to the opinions of their experts. Defendants, in effect, are requesting that this Court re-weigh the evidence in this case and determine that their experts were more credible and that the testimony of their witnesses was entitled to more weight than that of Dr. Kunstling. This we decline to do. Determinations of credibility and weight are reserved to the Industrial Commission and not to the appellate courts. *Crump*, 112 N.C. App. at 589, 436 S.E.2d at 592.

These arguments are without merit.

V. Disability

In their second argument, defendants contend that the Industrial Commission erred in concluding that plaintiff was disabled as a result of his lung disease. We disagree.

The Industrial Commission concluded that:

> 5. In the case at bar, plaintiff has shown that although he may be capable of some work, it would be futile for him to seek employment. Plaintiff has shortness of breath at rest, is 60 years old, did not complete high school, and has performed essentially one job for his entire working life, which he is no longer able to perform. Defendants did not produce competent evidence that suitable jobs are available and that plaintiff is capable of obtaining a suitable job, taking into account his physical and vocational limitations. . . .
>
> 6. As a result of his compensable occupational disease, plaintiff is entitled to total disability benefits at a rate of $654.00 per week beginning July 30, 2002 and continuing until further order of the Commission. . . .
>
> 7. Plaintiff is entitled to all medical expenses incurred or to be incurred as a result of his compensable occupational disease, for so long as such examinations, evaluations and treatments may reasonably be required to effect a cure, give relief or tend to lessen plaintiff's period of disability. . . .

Although conclusion of law 5 is more appropriately classified as an ultimate finding of fact, *Woodard v. Mordecai*, 234 N.C. 463, 470, 67 S.E.2d 639, 644 (1951), it is nonetheless supported by findings of fact 1, 4-6, 18-20, and 23. Each of these findings is either unchallenged, or is supported by competent evidence, and is therefore binding upon this Court. Defendants' argument that plaintiff's testimony is incompetent on this issue is unavailing in light of these findings. Conclusion of law 5 is supported by these findings, and in turn supports conclusions of law 6 and 7. As defendants presented no evidence of suitable jobs or that plaintiff was capable of obtaining such a job in light of his limitations, the Commission's conclusions that plaintiff met his burden under *Demery v. Perdue Farms, Inc.*, 143 N.C. App. 259, 545 S.E.2d 485, *aff'd* 354 N.C. 355, 554 S.E.2d 337 (2001), and was entitled to disability and medical treatment compensation properly applies the law to these facts.

This argument is without merit.

AFFIRMED.

Judges McCULLOUGH and ARROWOOD concur.

Report per Rule 30(e).