NO. COA06-1346

NORTH CAROLINA COURT OF APPEALS

Filed: 5 June 2007

MICHAEL L. CLEMMONS,
Plaintiff-Employee,

v.

North Carolina Industrial Commission
I.C. File No. 424068

SECURITAS, INC.,
Defendant-Employer,

and

AMERICAN HOME ASSURANCE COMPANY (ESIS),
Defendant-Carrier.

Appeal by defendants from an Opinion and Award entered 2 June 2006 by the Full Commission. Heard in the Court of Appeals 26 April 2007.

Edelstein & Payne, by M. Travis Payne, for plaintiff-appellee.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Paul Lawrence and Dalton G. Blair, for defendant-appellants.

BRYANT, Judge.

Securitas, Inc. and American Home Assurance Company (ESIS) (defendants) appeal from an Opinion and Award of the North Carolina Industrial Commission entered 2 June 2006, and amended 24 August 2006, awarding Michael L. Clemmons (plaintiff) workers' compensation benefits under N.C. Gen. Stat. §97-29. For the reasons below we affirm the Order and Award of the Full Commission.

Facts and Procedural History

Plaintiff was employed by Securitas, Inc. as a lieutenant guard at the Brunswick Nuclear Plant. Plaintiff worked twelve-hour shifts, working three straight days with three days off. However, during 2002 and 2003, because of a shortage of staff, plaintiff worked extra shifts, often working six twelve-hour shifts in a row. Following the terrorist attacks of 11 September 2001, the equipment security guards at the nuclear power plant had to carry increased significantly, weighing a total of forty pounds. This equipment was worn at almost all times plaintiff was at work.

In 2003, plaintiff began experiencing tingling in his hands which spread to his arms, legs, waist and right side. As a result, in June of 2003, plaintiff saw his primary care physician for these problems. Plaintiff was subsequently referred to Dr. Daniel Tesfaye, a neurologist.

Dr. Tesfaye ran a series of tests that indicated a number of problems in plaintiff's neck, including degenerative arthritis, bone spurs, and actual damage to plaintiff's spinal cord in his neck. Plaintiff was referred to Dr. R. Mark Rodger, a neurosurgeon.

Dr. Rodger's examination of plaintiff and review of plaintiff's test results confirmed spinal cord damage as well as degenerative changes in his neck. Dr. Rodger operated on plaintiff's neck, performing a two-level cervical fusion from C5 through C7 on 1 December 2003. The surgery did improve some of plaintiff's symptoms; however, plaintiff continued to experience problems with his arms, hands, neck, low back and legs such that he was never able to return to his job. Both Dr. Tesfaye and Dr. Rodger indicated that plaintiff was not able to resume his duties as a security guard.

Plaintiff subsequently filed a claim under the North Carolina Worker's Compensation Act, which was denied by his employer. This case was heard on 13 April 2005 by Deputy

Commissioner Morgan Chapman. On 23 September 2005, Deputy Commissioner Chapman filed an Opinion and Award awarding plaintiff workers' compensation benefits for his cervical degenerative disc disease, but denied plaintiff's claim for workers' compensation benefits in relation to his lumbar degenerative disc disease. Plaintiff and defendants appealed from the decision of Deputy Commissioner Chapman to the Full Commission.

The Full Commission heard oral arguments in this matter on 14 March 2006. On 2 June 2006, the Full Commission entered an Opinion and Award denying plaintiff's claim for benefits for his lumbar degenerative disc disease, but awarding benefits for plaintiff's cervical degenerative disc disease and accompanying spinal cord damage. This Opinion and Award was modified by the Full Commission on 24 August 2006 to clarify defendants' right to take a credit for any long-term disability benefits previously paid to plaintiff. Defendants appeal.

Defendants present the issue of whether the Full Commission erred in determining plaintiff's cervical degenerative disc disease is a compensable occupational disease pursuant to N.C. Gen. Stat §97-53(13). Defendants specifically argue plaintiff's degenerative disc disease was not caused by conditions characteristic of and peculiar to his employment and was thus not placed at a greater risk for developing the disease than the general public. We disagree.

Review by this Court of a decision by the North Carolina Industrial Commission is limited to the determination of "whether any competent evidence supports the Commission's findings of fact and whether [those] findings . . . support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). The Commission's findings of fact are conclusive on appeal even where there is contrary evidence, and such findings may only be set aside where there is a "complete lack of competent evidence

to support them." *Johnson v. Herbie's Place*, 157 N.C. App. 168, 171, 579 S.E.2d 110, 113 (2003) (citation and quotations omitted); *see also Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998). Our review "'goes no further than to determine whether the record contains any evidence tending to support the finding.'" *Adams*, 349 N.C. at 681, 509 S.E.2d at 414 (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)). "[E]vidence tending to support plaintiff's claim is to be viewed in the light most favorable to plaintiff, and plaintiff is entitled to the benefit of every reasonable inference to be drawn from the evidence." *Id.* (citation omitted); *see also Hollman v. City of Raleigh*, 273 N.C. 240, 252, 159 S.E.2d 874, 882 (1968) ("[O]ur Workmen's Compensation Act should be liberally construed to effectuate its purpose to provide compensation for injured employees . . ., and its benefits should not be denied by a technical, narrow, and strict construction."). However, the Commission's conclusions of law are reviewed *de novo*. *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004).

N.C. Gen. Stat. §97-53(13) defines an occupational disease as: "Any disease . . . 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) (2005). To prove an occupational disease under N.C. Gen. Stat. §97-53 our Supreme Court has held the disease must be:

> "(1) characteristic of persons engaged in the particular trade or occupation in which the [plaintiff] 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 [plaintiff's] employment."

Chambers v. Transit Mgmt., 360 N.C. 609, 612, 636 S.E.2d 553, 555 (2006) (emphasis added) (quoting *Rutledge v. Tultex Corp.*, 308 N.C. 85, 93, 301 S.E.2d 359, 365 (1983)). The Court further held 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 . . ., 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 613, 636 S.E.2d at 556 (quoting *Futrell v. Resinall Corp.*, 151 N.C. App. 456, 460, 566 S.E.2d 181, 184 (2002), *aff'd per curiam*, 357 N.C. 158, 579 S.E.2d 269 (2003)).

We note that the Full Commission determined plaintiff's lumbar degenerative disc disease is an ordinary disease of life. However, the Full Commission determined plaintiff's cervical degenerative disc disease *is not* an ordinary disease of life to which the general public is equally exposed. Specifically, the Full Commission concluded:

> [P]laintiff's pre-existing asymptomatic degenerative disc disease was aggravated by the duties of his employment. Plaintiff was placed at an increased risk of developing symptomatic degenerative disc disease in his cervical spine and accompanying spinal cord damage by virtue of his working conditions with defendant-employer. Thus, plaintiff's cervical condition was an occupational disease that was due to causes and conditions characteristic of and peculiar to his employment and which was not an ordinary disease of life to which the general public was equally exposed.

This conclusion of law is supported by the Full Commission's findings of fact that:

> 3. After the terrorist attacks on September 11, 2001, security guards at nuclear power plants were required by federal regulations to be more heavily armed and wear more safety gear. Consequently, plaintiff was required to carry a semi-automatic rifle or shotgun, a handgun, many rounds of ammunition for each weapon, a facemask, a radio and other equipment, and he had to wear body armor. The total weight of the gear was approximately

> 40 pounds. The rifle or shotgun hung from a sling around his neck and rounds of bullets from his shoulders in bandoliers or were in the pockets of his bulletproof vest. Plaintiff felt weighted down and restricted in his movement by all of the gear he wore. . . .
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> 13. . . . [T]he greater weight of the medical testimony established that with respect to his cervical spine, plaintiff was placed at an increased risk of developing degenerative disc disease and accompanying spinal cord damage because he had to carry and wear so much heavy gear during the last two years of his employment. Plaintiff's shoulders had to bear much of the weight he was carrying. The unusual load on plaintiff's shoulders caused contraction of the cervical muscles and placed a load on the discs in his neck so that the discs wore at an increased rate.

These findings of fact are in turn supported by the testimony of plaintiff and Dr. Rodger. Plaintiff testified to the increased amount and weight of the gear he had to carry as a result of the changes to federal regulations governing security at nuclear power plants after the terrorist attacks on 11 September 2001. Dr. Rodger stated that it was more likely than not that plaintiff's working conditions increased the risk "for [the] disease that he presents with and the mechanism of that risk[.]"

Dr. Rodger further explained that:

> The load that [plaintiff] wears on his head, the load that he places around his shoulders, the secondary contraction of his cervical muscles that result in the load to his discs clearly increase the wear or work that's been done on his neck. . . . If he already had a degenerative disc disease, he was a neck at risk and did not require a lot of extra stress in order to make him symptomatic. I think that the amount of extra time he placed -_72 hours a week . . . -- with the extra weight going from 15 to 40 pounds of motion and plus the use of body armor, which my personal experience has been that that increases the necessity for range of motion of your neck. I think that the range of motion of the neck, the force is applied, similarly muscle forces are applied, reasonably we expect it to increase the wear and therefore result in the symptoms that he has, those of nerve root compression and spinal cord damage.

While both Dr. Rodger and Dr. Tesfaye stated that degenerative disc disease is an ordinary disease of life, they both also stated that not everyone develops the symptoms experienced by plaintiff. Rather, the nature of plaintiff's job and the increased weight he was required to carry after 11 September 2001 increased plaintiff's risk of developing active symptoms and greatly contributed to his condition. Thus, the Full Commission did not err in concluding plaintiff's cervical degenerative disc disease is a compensable occupational disease pursuant to N.C. Gen. Stat §97-53(13). Defendants' assignments of error are overruled.

Affirmed.

Judges McCULLOUGH and STROUD concur.

Report per Rule 30(e).