NO. COA05-1061

NORTH CAROLINA COURT OF APPEALS

Filed: 18 April 2006

VIVIAN S. KNIGHT,
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 431374

ABBOTT LABORATORIES,
Employer,

and

SELF-INSURED (KEMPER RISK MANAGEMENT SERVICES, Servicing Agent),
Defendant.

Appeal by plaintiff from an opinion and award filed 4 April 2005 by the North Carolina Industrial Commission. Heard in the Court of Appeals 9 March 2006.

Law Offices of George W. Lennon, by George W. Lennon, for plaintiff appellant-appellee.

Brooks, Stevens & Pope, P.A., by Michael C. Sigmon and Kimberley A. D'Arudda, for defendant appellants-appellees.

MCCULLOUGH, Judge.

Plaintiff appeals from an opinion and award of the North Carolina Industrial Commission ("the Commission") denying workers' compensation benefits to plaintiff Vivian Knight ("Ms. Knight") based on the finding that plaintiff did not develop an occupational disease which was

due to causes and conditions characteristic of and peculiar to her employment with defendant Abbott Laboratories("Abbott") and which excluded all ordinary diseases of life to which the general public was equally exposed. We affirm in part and remand in part.

FACTS

On 25 March 1994, Ms. Knight was employed by Abbott and was working as a production operator. On this day, Ms. Knight and her supervisor, Mr. Fuller, engaged in a confrontation regarding a request for vacation by Ms. Knight. A similar vacation request had been granted to an employee with less seniority. When Ms. Knight learned of Mr. Fuller's decision, she confronted Mr. Fuller for an explanation. Mr. Fuller became upset, rose from his desk, and began to scream and wave his hands at Ms. Knight. Following the confrontation, Ms. Knight became emotional and upset. Shortly after the confrontation, Mr. Fuller approached Ms. Knight at her work station which resulted in Ms. Knight breaking out in hives. Ms. Knight went from work to her family doctor who prescribed medication, referred her to a psychiatrist, and a psychologist. Subsequently, Ms. Knight required further psychiatric treatment and has been unable to perform her job.

On 28 July 1998, Deputy Commissioner Mary Moore Hoag entered an opinion and award concluding that plaintiff had proven by a preponderance of the evidence that she "suffered a psychological injury by accident when faced with an unexpected and sudden confrontation with her supervisor" and therefore awarded her permanent total disability compensation. On 13 January 2000, the Full Commission entered an opinion and award reversing the Deputy Commissioner's decision and denying Ms. Knight's claim. On appeal to this Court, it was determined that the Commission's findings of fact were inconsistent, contradictory, failed to support its conclusions of law, and was therefore vacated and remanded for redetermination.

Thereafter, the Full Commission entered another opinion and award on 12 July 2002, again concluding that Ms. Knight did not sustain an injury by accident and therefore she was not entitled to workers' compensation benefits. Ms. Knight again appealed to this Court. This Court affirmed the conclusion of the Commission that Ms. Knight had not suffered an injury by accident and the finding of the Commission that the greater weight of the evidence showed that the confrontation did not cause Ms. Knight's psychological problems. However, this Court further found that the Commission failed to address Ms. Knight's claim for occupational disease and therefore remanded the case for consideration of plaintiff's occupational disease claim. On 4 April 2005, the Commission entered the opinion and award at issue in the instant case, finding and concluding that Ms. Knight did not develop an occupational disease due to causes and conditions characteristic of and peculiar to her employment which excluded all ordinary diseases of life to which the general public was not equally exposed and that she was not entitled to workers' compensation benefits.

Ms. Knight and Abbott now appeal.

ANALYSIS

I

We first address Ms. Knight's contention on appeal that the Commission erred in accepting the testimony of Dr. Gualtieri. We overrule this assignment of error.

Once a panel of this Court has rendered a decision on an issue, subsequent panels are bound by that precedent unless it has been overturned by a higher court. *Heatherly v. Industrial Health Council*, 130 N.C. App. 616, 621, 504 S.E.2d 102, 106 (1998); *cf. In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (holding that "[w]here a panel

of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court").

In this instant case, the appeal before this Court is the third appeal that Ms. Knight has brought before us. In a previous appeal, Ms. Knight cited an argument unvarying in substance as error on appeal and an opinion was rendered by a panel of this Court holding that the Commission did not err in finding that the testimony and opinions of Dr. Gualtieri carried greater weight than the testimony of Ms. Knight's experts where he had performed psychological testing and the others had not. The gravamen of Ms. Knight's argument is a desire for this Court to judge the credibility of Dr. Gualtieri's testimony and determine the appropriate weight to be given; however, the law does not permit this. *See Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411,413 (1998), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999) ("'The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony.'"). *Id*. (citation omitted). Therefore, this assignment of error is overruled.

II

Next, we address Ms. Knight's contention that the Commission erred in failing to consider Dr. Lee's medical records. This contention has no merit.

In support of her argument on appeal, Ms. Knight notes in her brief that this error is evidenced by the omission of allusion to Dr. Lee's opinion on causation in the Commission's final award and opinion. However, "'[t]he Commission chooses what findings to make based on its consideration of the evidence[, and this] court is not at liberty to supplement the Commission's findings[.]'" *Pitillo v. N.C. Dep't of Envtl. Health & Natural Res.*, 151 N.C. App. 641, 644, 566 S.E.2d 807, 810 (2002) (citation omitted). Moreover, the Commission made a finding of fact stating Dr. Lee's diagnosis of Ms. Knight and a further finding denoting that the

Commission found by the greater weight of the competent, credible evidence that the events of 25 March 1994 did not cause or aggravate Ms. Knight's psychological problems. Therefore, this assignment of error is overruled.

III

Ms. Knight also contends on appeal that the Commission erred in applying the standards enumerated in Judge Martin's opinion in *Woody v. Thomasville Upholstery, Inc.,* 146 N.C. App. 187, 552 S.E.2d 202 (Martin, Judge, dissenting), *disc. review denied*, 354 N.C. 371, 557 S.E.2d 538 (2001), *rev'd per curiam for the reasons stated in the dissent*, 355 N.C. 483, 562 S.E.2d 422 (2002), instead of *Rutledge v. Tultex Corp*., 308 N.C. 85, 93, 301 S.E.2d 359, 365 (1983). We disagree.

First and foremost it must be noted that the decisions in *Woody* and *Rutledge* are not inconsistent. On the contrary, the dissent of Judge Martin in *Woody,* which was adopted by the North Carolina Supreme Court on further appeal, agrees with the law applied pursuant to *Rutledge*, but did not agree with the majority's application of the law to the facts. Where an employee claims an occupational disease of work-related depression, the standards set forth in *Rutledge* apply; however, a factual analysis must be done on a case-by-case basis in order to determine whether such depression or mental illness falls within the legal definition of such. *Smith-Price v. Charter Pines Behavioral Ctr.,* 160 N.C. App. 161, 584 S.E.2d 881 (2003).

In order to prove that an employee has an occupational disease, the employee has the burden of proving three elements: "(1) the disease must be characteristic of and peculiar to the claimant's particular trade, occupation or employment; (2) the disease must not be an ordinary disease of life to which the public is equally exposed outside of the employment; and (3) there

must be proof of causation" between the disease and the employment. *Id.* at 166, 584 S.E.2d at 885. Our Supreme Court explained in *Rutledge*:

> To satisfy the first and second elements it is not necessary that the disease originate exclusively from or be unique to the particular trade or occupation in question. . . . Only such ordinary diseases of life to which the general public is exposed equally with workers in the particular trade or occupation are excluded.

Rutledge, 308 N.C. at 93, 301 S.E.2d at 365.

However, our Supreme Court further stated in *Woody* that where the findings indicate merely that an employee suffers from depression and fibromyalgia after being placed in the unfortunate position of working for an abusive supervisor, that this is not a condition "'characteristic of and peculiar to'" one's particular employment; but rather an ordinary disease, to which the general public is equally exposed outside the workplace in everyday life. *Woody*, 146 N.C. App. at 202, 552 S.E.2d at 211. It was further noted that these conditions can occur with any employee in any industry or profession, or in fact, in similar abusive relationships outside the workplace. *Id*. Where the facts in the instant case fall squarely within the reasoning of the dissent in *Woody*, adopted by our Supreme Court, it cannot be said that it was error for the Commission to apply that law to this case. Therefore, this assignment of error is overruled.

IV

Lastly, Ms. Knight contends that the Commission erred in failing to address the issues of aggravation or last injurious exposure. We disagree.

Where an employee claims to have suffered from an occupational disease which entitles them to compensation, the employee has the burden of proof. However, "'if the occupational exposure in question is such that it augments the disease process to any degree, however slight, the employer is liable.'" *Keel v. H & V, Inc*., 107 N.C. App. 536, 539, 421 S.E.2d 362, 365

(1992) (citation omitted). In the instant case, Ms. Knight contends that the Commission failed to address the issue of aggravation; however, a review of the Commission's opinion and award clearly shows in finding of fact 26 that the events of 25 March 1994 were found not to have caused or **aggravated** Ms. Knight's psychological problems.

Further, N.C. Gen. Stat. §97-57 (2005) provides that an employer is liable " **[i]n any case where compensation is payable for an occupational disease**" where the employee was last injuriously exposed to the hazards of such disease in their employment. *Id*. (emphasis added). The language of the statute contemplates proof of a compensable occupational disease before the issue of last injurious exposure is ever reached. "To recover under this statute, the plaintiff must show: (1) that he has a compensable occupational disease and (2) that he was 'last injuriously exposed to the hazards of such disease' in defendant-employer's employment." *Vaughn v. Insulating Servs.*, 165 N.C. App. 469, 472-73, 598 S.E.2d 629, 631, *disc. review denied*, 359 N.C. 75, 605 S.E.2d 150 (2004) (citation omitted). Where the Commission found and concluded that Ms. Knight "did not develop an occupational disease which was due to causes and conditions characteristic of and peculiar to her employment with defendant and which excluded all ordinary diseases of life to which the general public was equally exposed" she failed to meet her burden in proving a claim for last injurious exposure. Therefore, the corresponding assignments of error are overruled.

V

Abbott contends on appeal that the Commission erred in failing to address and award attorneys' fees and further moves this Court to assess sanctions. We agree in part.

"'[W]hen [a] matter is "appealed" to the full Commission . . . , it is the duty and responsibility of the full Commission to decide all of the matters in controversy between the

parties.'" *Cialino v. Wal-Mart Stores*, 156 N.C. App. 463, 474, 577 S.E.2d 345, 353 (2003) (citation omitted). It is evident from the record on appeal that Abbott presented its argument to the Full Commission through "Defendant's Brief to the Full Commission on Remand" that Ms. Knight's pursuit of the claim was "extremely unreasonable and frivolous, and merits the imposition of substantial sanctions." North Carolina's General Statutes provide, "[i]f the Industrial Commission shall determine that any hearing has been brought, prosecuted, or defended without reasonable ground, it may assess the whole cost of the proceedings including reasonable fees for defendant's attorney or plaintiff's attorney . . . ." N.C. Gen. Stat. §97-88.1 (2005).

Abbott urges this Court to decide the issue of its entitlement to attorney's fees in this appeal; however, we decline to do so. Instead, we believe the Commission is better suited to determine whether Ms. Knight had a "reasonable basis" to pursue her claim. Therefore, we remand this issue for determination by the Full Commission.

Accordingly, for the aforementioned reasons, we affirm the opinion and award of the Commission, and remand for a determination by the Commission as to whether the further pursuit of claims by Ms. Knight was frivolous and unreasonable entitling Abbott to attorney's fees.

Affirmed in part; remanded to determine attorney's fees.

Judges TYSON and LEVINSON concur.

Report per Rule 30(e).