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NO. COA99-568

NORTH CAROLINA COURT OF APPEALS

Filed: 1 August 2000

ROY E. REGISTER,
Employee,
Plaintiff

v.

North Carolina
Industrial Commission
I.C. No. 437297

HYDRO CONDUIT CORPORATION,
Employer,

SELF-INSURED (Crawford and Company,
Servicing Agent),
Defendant

Appeal by plaintiff from opinion and award entered 9 December 1998 by the North Carolina Industrial Commission. Heard in the Court of Appeals 22 February 2000.

Richard M. Durham and Herman L. Stephens for plaintiff-appellant.

WOMBLE CARLYLE SANDRIDGE & RICE, a Professional Limited Liability Company, by Clayton M. Custer and Philip J. Mohr, for defendants-appellees.

TIMMONS-GOODSON, Judge.

Plaintiff, Roy E. Register, appeals from an opinion and award whereby the North Carolina Industrial Commission ("the Full Commission" or "the Commission") denied plaintiff's claim for workers' compensation benefits based on its conclusion that plaintiff did not suffer from an occupational disease. For the reasons hereinafter stated, we uphold the decision of the Full Commission.

The facts relevant to this appeal are summarized as follows:

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Plaintiff worked at Gray Concrete for twenty years before the company was purchased by defendant, Hydro Conduit Corporation, in 1985. Plaintiff then began working for defendant as a "working foreman." In that capacity, plaintiff's responsibilities included welding, patching concrete pipe, and operating a forklift, jackhammer, front-end loader, and cement mixer. Plaintiff also occasionally operated a "CVR" pipe-forming machine, which required him to hold a one-inch pipe securely while the machine vibrated. This process exposed plaintiff's hands to very strong vibrations. Plaintiff's hands were additionally subjected to extremely cold temperatures as a result of the wind effect in the buildings where he worked.

In 1986, plaintiff began to experience pain and numbness in his hands, particularly during the winter months. The symptoms intensified and caused plaintiff to leave his position with defendant on 13 December 1992. Plaintiff began receiving short-term disability benefits from defendant effective 17 December 1992.

Plaintiff suffers from a highly unusual form of vascular occlusive disease, which his physicians have labeled Buerger's disease (or atypical Buerger's disease). This disease is characterized by bilateral arterial insufficiency in the extremities and is associated with young to middle-aged males who, like plaintiff, have a history of heavy smoking. The arterial insufficiency plaintiff suffers is primarily in his hands and fingers. The restricted blood flow to his fingers causes ischemic pain. His fingers also develop ulcerations that become infected

and often do not heal. These infections and the pain from the condition often necessitate amputation of the fingers. Secondary to his Buerger's disease, plaintiff suffers from Raynaud's phenomena, which is characterized by color changes of the fingers and toes and pain when exposed to cold temperatures.

In December of 1992, Dr. Stephen Uhlin, a dermatologist, examined plaintiff for complaints of cracking and blistering fingertips and numbness in his hands. Dr. Uhlin suspected scleroderma, a disease of the blood vessels and the collagen in the skin, characterized by decreased blood flow and thickening and hardening of the fingertips. He treated plaintiff for ulcerations on two of the fingers on his left hand. According to Dr. Uhlin, heavy industrial work, such as operating a jackhammer, can cause a sclerodermoid reaction, and jackhammer operators are at an increased risk for scleroderma. However, plaintiff did not return for additional testing, and Dr. Uhlin was unable to identify a cause for plaintiff's skin condition.

On 13 January 1993, plaintiff presented to Dr. L. Andrew Koman, an orthopaedic surgeon at Bowman Gray School of Medicine. Plaintiff was experiencing arterial insufficiency in his hands, with coldness, numbness, and pain. He also had an ulceration on the tip of the little finger of his left hand. Dr. Koman diagnosed plaintiff as having vaso-occlusive disease, which he later called Buerger's disease. Dr. Koman found that the condition primarily affected plaintiff's hands and that it resulted from blood vessels becoming occluded or "clotting off." Dr. Koman continued to treat

plaintiff through March of 1997, during which time he performed two surgeries on plaintiff's left hand and removed portions of his fingers. Plaintiff's condition, however, continued to deteriorate, and he experienced increased pain, numbness, and temperature sensitivity. Dr. Koman, therefore, anticipated that additional surgery would eventually be required.

Plaintiff's claim for workers' compensation benefits came on for hearing before Deputy Commissioner W. Bain Jones, Jr. on 15 July 1996. After reviewing the evidence, the deputy commissioner entered an opinion and award on 11 August 1997 concluding that plaintiff contracted a compensable occupational disease for which he was entitled to temporary total disability benefits. Defendants appealed this decision to the Full Commission on 25 August 1997. Defense counsel received the transcript of the hearing no later than 2 January 1998; however, he did not file defendants' Form 44 Application for Review until 17 February 1998.

Plaintiff moved to dismiss defendants' appeal for failure to file the appeal in a timely manner. Following a hearing on the motion, the Full Commission found that defense counsel negligently failed to comply with Rule 701 of the Workers' Compensation Rules of the Industrial Commission setting forth the time requirements for filing a Form 44 Application and brief. Nevertheless, the Commission declined to penalize defendants for defense counsel's negligence and denied plaintiff's motion to dismiss. The Full Commission subsequently considered the appeal and reversed the deputy commissioner's decision. The Commission concluded that

plaintiff's condition was not an occupational disease and, for that reason, denied plaintiff's disability claim. Plaintiff appeals.

Plaintiff argues, at the outset, that the Full Commission abused its discretion by declining to penalize defendants for defense counsel's negligent failure to timely file a Form 44 Application for Review of the deputy commissioner's decision. It is plaintiff's position that the Commission, upon finding that defense counsel's late filing amounted to inexcusable neglect, was required to impute such negligence to defendants themselves.

Section 97-85 of our General Statutes outlines the procedure for appealing a decision to the Full Commission:

If application is made to the Commission within 15 days from the date when notice of the award shall have been given, the full Commission shall review the award, and, if good ground be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives, and, if proper, amend the award"

N.C. Gen. Stat. 97-85 (1999). In the present case, there is no dispute that defendants gave timely notice of appeal from the deputy commissioner's opinion and award. The decision of the deputy commissioner was entered on 11 August 1997, and notice of appeal was filed by defendants on 25 August 1997, well within the 15-day time period. Plaintiff argues, however, that defense counsel's indefensible violation of Rule 701 of the Workers' Compensation Rules warranted dismissal of defendants' appeal. For this reason, plaintiff contends that the Commission grossly abused its discretion by permitting defendants to submit their Form 44 and

brief after the time for doing so had expired. We cannot agree.

Rule 701 relevantly provides as follows:

(2) After receipt of notice of appeal, the Industrial Commission will supply to the appellant Form 44 upon which he must state the grounds for his appeal. The grounds must be stated in particularity, including the specific errors allegedly committed by the Commissioner or Deputy Commissioner Failure to state with particularity the grounds for appeal shall result in abandonment of such grounds as provided in paragraph (3). The form completed by appellant, along with appellant's brief, must be filed with the Industrial Commission, copies to appellee, within twenty-five (25) days of appellant's receipt of the transcript of the record

(3) Particular grounds for appeal not set forth in the application for review shall be deemed to be abandoned and argument thereon shall not be heard before the Full Commission. . . .

It is well settled, however, that the Commission, in its discretion, may waive its rules, provided that such action does not controvert the provisions of the statute. *Moore v. City of Raleigh*, 135 N.C. App. 332, 520 S.E.2d 133 (1999), *disc. review denied*, 351 N.C. 358, ___ S.E.2d ___ (2000). "The [Commission's] exercise of its discretion in such matters is not reviewable by the courts, absent a showing of manifest abuse of that discretion." *Hyatt v. Waverly Mills*, 56 N.C. App. 14, 25, 286 S.E.2d 837, 843-44 (1982). An abuse of discretion has occurred if the Commission's decision was "manifestly unsupported by reason," *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985), or was "so arbitrary that it could not have been the result of a reasoned decision," *State v. Wilson*, 313 N.C. 516, 538, 330 S.E.2d 450, 465 (1985).

Here, the Commission found that defense counsel received the transcript no later than 2 January 1998 and that he "filed the Form 44 and brief in an untimely manner on February 17 1998." Although the Commission determined that defense counsel's failure to comply with the Workers' Compensation Rules was negligent, it declined to impute such negligence to defendants. Thus, "in the interest of justice and in its discretion," the Commission denied plaintiff's motion to dismiss defendants' appeal. Given that the appeal itself was timely filed in accordance with section 97-85 of the General Statutes, we discern no abuse of discretion in the Commission's decision to waive the requirements of Rule 701 and to accept defendants' late Form 44 and brief. Furthermore, since plaintiff has not shown that he was prejudiced by the Commission's discretionary decision, we overrule plaintiff's argument that the Commission erred in failing to dismiss defendants' appeal.

We hold similarly regarding plaintiff's contention that the Commission erred in finding that good grounds existed to reconsider the evidence in this case. The thrust of plaintiff's argument is that because defense counsel failed to timely file the Form 44 Application for Review, all grounds for appeal set forth in the application should have been deemed abandoned. However, in light of our decision that the Commission acted within its discretion in waiving the requirements of Rule 701, we summarily reject plaintiff's argument that the late filing of defendants' Form 44 "left the Commission with no 'good ground' to reconsider the evidence."

Additionally, plaintiff argues that the Commission erred in concluding that he does not suffer from an occupational disease, as that term is contemplated in section 97-53(13) of the General Statutes. Plaintiff contends that the medical testimony of his treating physicians is contrary to the Commission's findings and ultimate conclusion that plaintiff's employment placed him at no greater risk of contracting Buerger's disease than members of the general public, with or without the same vascular predisposition. Again, we disagree.

Our review of an opinion and award entered by the Full Commission is limited to determining whether (1) the record contains any competent evidence in support of the Commission's findings of fact and, if so, (2) whether those findings, in turn, support the ensuing conclusions of law. *McLean v. Roadway Express*, 307 N.C. 99, 102, 296 S.E.2d 456, 458 (1982). The Commission's factual findings are accorded great deference, *McAninch v. Buncombe County Schools*, 122 N.C. App. 679, 471 S.E.2d 441 (1996), *rev'd on other grounds*, 347 N.C. 126, 489 S.E.2d 375 (1997), and, when supported by competent evidence, are binding on this Court, *Keel v. H & V Inc.*, 107 N.C. App. 536, 421 S.E.2d 362 (1992). This is true, even if the record contains evidence that would support contrary findings. *Lumley v. Dancy Construction Co.*, 79 N.C. App. 114, 122, 339 S.E.2d 9, 14 (1986). Furthermore, "[i]f a finding of fact is a mixed question of fact and law, it is also conclusive if supported by competent evidence." *Murray v. Ahlstrom Indus. Holdings, Inc.*, 131 N.C. App. 294, 296, 506 S.E.2d 724, 726 (1998)

(citations omitted). The Commission's conclusions of law, however, are fully reviewable. *Grantham v. R. G. Barry Corp.*, 127 N.C. App. 529, 491 S.E.2d 678 (1997), *disc. review denied*, 347 N.C. 671, 500 S.E.2d 86 (1998).

Pursuant to section 97-53 of the General Statutes, an occupational disease refers to "[a]ny 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) (1999). Therefore, "[a] disease is an occupational disease compensable under N.C. Gen. Stat. 97-53(13) if claimant's employment exposed him 'to a greater risk of contracting this disease than members of the public generally . . . ' and such exposure 'significantly contributed to, or was a significant causal factor in, the disease's development.'" *Gay v. J.P. Stevens & Co.*, 79 N.C. App. 324, 330, 339 S.E.2d 490, 494 (1986) (quoting *Rutledge v. Tultex Corp.*, 308 N.C. 85, 101, 301 S.E.2d 359, 369-70 (1983)). The question for the Commission is "whether the occupational exposure was such a significant factor in the disease's development that without it the disease would not have developed to such an extent that it caused the physical disability which resulted in claimant's incapacity for work.'" *Id.* (quoting *Rutledge*, 308 N.C. at 102, 301 S.E.2d at 370). To determine the significance of plaintiff's occupational exposure to the development of the disease, the Commission may consider, in addition to expert medical

testimony, "(1) the nature and extent of claimant's occupational exposure, (2) the presence or absence of other non-work-related exposures and components which contributed to the disease's development, and (3) correlations between claimant's work history and the development of the disease." *Id.* at 331, 339 S.E.2d at 494. An employee claiming an occupational disease has the burden of proving compensability. *Id.*

In the case at bar, the Commission's opinion and award contained the following pertinent findings of fact:

12. Plaintiff's preexisting vascular condition and his Buerger's disease predisposed plaintiff to developing occluded blood vessels as a result of trauma. Plaintiff's condition is post-traumatic in nature and developed over a prolonged period of years of exposure to trauma, both micro and macro trauma. Using jackhammers, exposure to cold weather, and hitting one's hands are forms of trauma. While "life is trauma," as Dr. Koman stated, plaintiff's hands were in fact exposed to trauma while employed by defendant.

13. Dr. Koman stated, based on a reasonable medical certainty, that plaintiff's job with defendant significantly contributed to the development of his vaso-occlusive disease. The Commission finds that plaintiff's occupational trauma to his hands over the course of many years was a significant causal factor in the development of his vaso-occlusive disease.

14. Plaintiff probably would have developed vaso-occlusive disease with a lower level of trauma than would be required for the average person. Many jobs involve some level of "trauma" to the hands. Expert testimony is necessary to determine whether the trauma to plaintiff's hands during his employment with defendant put plaintiff at an increased risk of developing his occlusive disease as compared to members of the general public with

this preexisting vascular condition or predisposition but not so employed.

15. No medical expert has offered an opinion that, because of his employment (i.e., the occupational trauma), plaintiff was at an increased risk of developing vaso-occlusive disease, or Buerger's disease, as compared to members of the general public with the same predisposition but not so employed.

16. Dr. Koman testified that workers who use their hands in their occupations as hammers (e.g., airline counter employees) or to protect themselves (e.g., baseball players) are more likely than the general population to have occlusive disease. There is no evidence that plaintiff used his hands to that effect.

17. Dr. Koman testified that plaintiff's job with defendant exposed him to trauma that was different from working at a desk job, but this testimony is insufficient to show that the hazards of the plaintiff's employment with defendant distinguished the employment in character from the general run of occupations.

Based on these and other findings, the Commission made the following conclusions of law:

1. Plaintiff has proven, by the greater weight of the evidence, that his vascular occlusive disease or Buerger's disease was caused or substantially aggravated by conditions of his employment with defendant.

2. Plaintiff has not proven, by the greater weight of the evidence, that his disease developed due to causes and conditions which are characteristic of and peculiar to his employment with defendant, but excluding all ordinary diseases of life to which the general public with a similar vascular predisposition is equally exposed outside of the employment. Specifically, plaintiff has failed to prove that his employment placed him at an increased risk of developing his disease as compared to members of the general public or to members of the general public with the same vascular predisposition. (Citations omitted).

Directing our attention to the following deposition testimony of Dr. O'Rourke, plaintiff contends that there is no factual basis to support the Commission's finding that no medical expert offered an opinion that plaintiff's occupational trauma increased his risk of developing Buerger's disease:

Q. . . . [D]o you have an opinion satisfactory to yourself and to a reasonable degree of medical certainty as to whether the diagnosis that you have given us this morning is occupational in origin -- that is, a disease that is due to causes and conditions which is [sic] characteristic of and peculiar to the plaintiff's occupation, as distinguished from ordinary diseases to which the general public is equally exposed outside of the employment?

A. I think yes - - -

. . . .

[A.] Yes, I can say that there is the possibility that his occupational exposures could certainly have caused all of the problems that he has.

Q. . . . Would it be fair to say -- would your testimony be that it could or might ---

A. --- Yes.

Q. --- Have caused it?

. . . .

Q. . . . [A]gain, Dr. O'Rourke, do you have an opinion satisfactory to yourself and to a reasonable degree of medical certainty as to whether the plaintiff's employment . . . placed him at an increased risk of developing this occupational disease?

. . . .

[A.] I think it's not unreasonable to say that his employment does put him at risk, or his employment did put him at risk.

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[Q.] At an increased risk?

[A.] Yes.

The Commission, however, gave the following consideration to Dr. O'Rourke's testimony:

18. Plaintiff was examined by Kenneth S. O'Rourke, a rheumatologist at Bowman Gray School of Medicine, at Dr. Koman's request. Dr. O'Rourke testified that plaintiff's employment placed him at an increased risk of developing his disease. The context of his testimony clearly shows that Dr. O'Rourke was of the opinion that, because of plaintiff's predisposition, the employment could have been a causative factor in the disease's development. Dr. O'Rourke did not offer an opinion that plaintiff was at an increased risk as compared to the general public not so employed, with the same predisposition or otherwise.

Having reviewed Dr. O'Rourke's deposition in its entirety, we are satisfied that the inferences of the Commission regarding the import of Dr. O'Rourke's testimony were reasonably drawn. Furthermore, the record yields ample evidentiary support for the Commission's remaining findings that plaintiff's employment did not place him at an increased risk of developing Buerger's disease, as compared to the public generally. Because these findings support the Commission's conclusions, the Industrial Commission's opinion and award denying plaintiff's claim for workers' compensation benefits must be affirmed.

Affirmed.

Judges GREENE and WALKER concur.

Report per Rule 30(e).