

Affirmed
Author, Scott
Concurring: Ballance
Sellers

NO. COA01-54

NORTH CAROLINA COURT OF APPEALS

Filed: 18 December 2001

CARL E. GWATHNEY,
Employee-Plaintiff,
Appellee

v.

Industrial Commission
Nos. I.C. 446162
I.C. 446581

CHARLES D. GOODWIN, INC.,
Employer-Defendant,
Appellant.
SELF-INSURED,
(Key Risk Management Services,
Servicing Agent.)

Appeal by defendant from opinion and award entered 16 August 2000 by the North Carolina Industrial Commission. Heard in the Court of Appeals 17 December 2001.

Carol M. Schiller for plaintiff-appellee.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Thomas M. Morrow and Erin E. Dancy, for defendant-appellant.

WYNN, Judge.

Defendant appeals from an opinion and award of the Industrial Commission awarding plaintiff workers' compensation benefits for an occupational disease.

Plaintiff was employed by defendant as a long distance driver of tractor trailer trucks from July 1992 through 28 December 1993. In this capacity, he drove trucks from the east coast to the states of California, Arizona, New Mexico and Texas and back. On or about 10 March 1994, he sought medical treatment for symptoms that were

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originally incorrectly diagnosed as caused by Hodgkin's disease. A biopsy performed five days later on a lump on his neck disclosed the presence of coccidio fungi. His illness was subsequently diagnosed as disseminated coccidioidmycosis, an infection caused by coccidio fungi found only in the soil of the southwest and western regions of the United States, including the states of California, Arizona, Nevada, New Mexico and parts of Texas. The fungus does not grow in North Carolina or any state east of the Mississippi River. The fungus may become airborne and inhaled by humans, causing infections.

In the absence of any evidence showing plaintiff was exposed to the fungus prior to or outside of his employment with defendant, the Commission found that plaintiff contracted coccidioidmycosis while driving trucks for the employer through the southwestern United States. The Commission also found that plaintiff's employment with defendant as a long distance truck driver making deliveries to the southwest and western regions of the United States exposed him to an increased risk of contracting coccidioidmycosis as compared to members of the general public not so employed. The Commission concluded that but for his employment, plaintiff would not have developed the disease of coccidioidmycosis. The Commission awarded plaintiff compensation for temporary total and partial disability and payment of all medical expenses incurred as a result of his occupational disease.

Defendant first contends that the Commission erred by considering the affidavit of Dr. Fran Meredith executed after the

record had been ordered closed by the deputy commissioner who conducted the hearing. In considering the affidavit, the full Commission invoked its Rule 801, which permits the Commission to waive its rules "[i]n the interest of justice." No abuse of discretion is shown. In considering the affidavit, the Commission found that the affidavit clarified the witness' deposition testimony, which had been received in a timely fashion as part of the record. Defendant also has not included the subject affidavit in the record on appeal and has not shown any material variance between the deposition testimony and the affidavit. This contention is overruled.

Defendant also contends that plaintiff failed to prove he sustained a compensable occupational disease within the meaning of the Workers Compensation Act. Since coccidioidmycosis is not listed in N.C. Gen. Stat. § 97-53 among the statutory occupational diseases, it is a compensable occupational disease if it "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). Consequently, the plaintiff must prove (1) that the disease is due to causes and conditions characteristic of and peculiar to his employment; (2) the disease is not an ordinary disease of life to which the general public is equally exposed, and (3) the existence of a causal connection between the disease and the plaintiff's employment. *Hansel v. Sherman Textiles*, 304 N.C.

44, 52, 283 S.E.2d 101, 106 (1981). Defendant contends plaintiff failed to prove (1) that his coccidioidmycosis was due to causes and conditions which were characteristic of and peculiar to his employment and (2) that he was placed by his occupation at increased risk of contracting coccidioidmycosis as compared to members of the general public.

This Court recently addressed identical arguments in *Pressley v. Southwestern Freight Lines*, ___ N.C. App. ___, 551 S.E.2d 118 (2001), a case with remarkably similar facts. The Commission's findings showed that Pressley, like plaintiff, contracted coccidioidmycosis while driving a truck through the southwestern United States for his employer. We affirmed the Industrial Commission's finding and conclusion that Pressley's employment placed him at an increased risk of contracting the disease when compared to the general public, which we defined as the general public of North Carolina, and thus the Commission properly concluded that Pressley's coccidioidmycosis constituted a compensable occupational disease. We find the *Pressley* decision is indistinguishable and controlling.

The opinion and award of the Industrial Commission is affirmed.

Affirmed.

Judges THOMAS and BRYANT concur.

Report per Rule 30(e).