NO. COA12-885
NORTH CAROLINA COURT OF APPEALS

Filed: 19 March 2013

MICHAEL BRODIE,
Employee, Plaintiff,

v. North Carolina Industrial Commission
I.C. No. 454421

EXCEL STAFFING SERVICES,
Employer,

AMERICAN ZURICH INSURANCE COMPANY,
Carrier,
Defendants.

Appeal by defendant-carrier from Opinion and Award on remand entered 2 April 2012 by the North Carolina Industrial Commission. Heard in the Court of Appeals 28 January 2013.

*Doran, Shelby, Pethel and Hudson, P.A., by David A. Shelby, for plaintiff-appellee.*

*Womble Carlyle Sandridge & Rice, PLLC, by Philip J. Mohr, for defendant-appellant carrier.*

*Joseph B. Chambliss, Jr., for defendant-appellee employer.*

MARTIN, Chief Judge.

Defendant-carrier American Zurich Insurance Company

("carrier Zurich") appeals from an Opinion and Award on remand by the North Carolina Industrial Commission ("the Commission") awarding plaintiff-employee Michael Brodie temporary total disability benefits, the greater of temporary partial disability or permanent partial disability benefits, medical expenses, vocational rehabilitation, and attorney's fees. We affirm.

The parties stipulate that an employment relationship existed between plaintiff and defendant-employer Excel Staffing Services ("employer Excel") between 23 February 2004 and 15 April 2005. During this time, employer Excel provided construction labor for a remodeling project at the Veterans Administration Hospital ("the VA") in Salisbury, North Carolina, and plaintiff worked on the project as the sole drywall hanger/finisher on behalf of employer Excel. Plaintiff's duties included unloading, carrying, hanging, mudding, taping, sanding, and finishing each piece of sheetrock used on the project.

Each piece of sheetrock was four feet wide, eight feet tall, five-eighths of an inch thick, and weighed fifty to sixty pounds. To move the sheetrock, plaintiff cupped each piece in the fingers of his right hand with all of the weight bearing on his right extremity, and balanced the piece with his left arm and his head, and then carried each piece an average of 100 to 120 feet from the truck to its destination in the building. To

hang the sheetrock, plaintiff exerted approximately twenty to twenty-five pounds of pressure on each piece and secured the pieces with forty-eight screws each in accordance with building code requirements. Plaintiff then applied three coats of mud to each piece of sheetrock, which he retrieved from a mud bucket he carried weighing between forty-five and fifty-five pounds, and sanded each piece with a manual pole sander. Over the course of his work at the VA on behalf of employer Excel, plaintiff personally unloaded, carried, hung, mudded, taped, sanded, and finished over 1400 pieces of sheetrock.

Soon after he began working for employer Excel in late February 2004, plaintiff started to experience a stinging and burning pain in his right arm, which caused him to have difficulty picking up items of any weight. As a result of the pain he experienced in his right arm, plaintiff started using his left arm to perform his duties for employer Excel, which then caused his left arm to start "acting the same way." In March 2004, plaintiff reported his bilateral arm pain to his immediate supervisor and to employer Excel's president and CEO Billie Brown.

At the encouragement of Ms. Brown, plaintiff visited his primary care physician in March 2004, and then did so monthly from May through August 2004. During these months, plaintiff

was treated with prednisone and with injections of Depo-Medrol and lidocaine, and, in September 2004, was treated with injections of lidocaine and Kenalog, even though his pain "seem[ed] to be worse instead of better" and the injections "just hid[] and mask[ed] the problem to where [plaintiff] could just keep using [his arms]." Although plaintiff's primary care physician wrote him out of work between 2 August and 15 August 2004 as a result of his bilateral arm pain, plaintiff's job duties did not change from the time before plaintiff was written out of work until the time the project was completed on 15 April 2005, which caused his bilateral arm pain to continue to "[j]ust [get] worse," because "the more [he] picked up, the worse [his arms] got."

Although plaintiff's pain persisted, plaintiff was offered and accepted two additional employment opportunities while working at the VA. The first opportunity was for Montemayor, Inc., another vendor that provided contract labor services to the VA, which offered plaintiff a "purely supervisory" employment opportunity to work evenings training Montemayor's employees on how to hang sheetrock. The second opportunity was for the VA, which hired plaintiff to perform miscellaneous, light duty, "cosmetic" work——e.g., changing out toilet paper and paper towel holders, hanging wind chimes and small 8 x 10-sized

pictures, etc.——to help the VA prepare for an upcoming inspection. Plaintiff was employed by the VA from 29 April 2005 to 29 June 2005, and by Montemayor on an intermittent, as-needed basis from November 2004 through September 2005. Because the jobs for the VA and Montemayor did not require "physical work," plaintiff testified that these additional jobs did not worsen or aggravate the bilateral arm pain plaintiff suffered as a result of his sheetrock work for employer Excel. However, because plaintiff's severe right and left elbow tendonitis persisted during the months following the completion of his work for employer Excel, in September 2005, orthopedic surgeon Dr. Michael David Lauffenburger performed arthroscopic surgery with extensive debridement on plaintiff's right and left elbows.

In July 2004, during his employment with employer Excel, plaintiff completed an accident report listing the nature of his injury as "lifting sheetrock by myself" and listing the date of his injury as 9 March 2004. On 9 August 2004, carrier Zurich denied plaintiff's claim on the basis that employer Excel, which has its principal place of business in Richmond, Virginia, only had workers' compensation coverage for its Virginia-based employees and did not have coverage for its employees in North Carolina. Plaintiff appealed to the Commission.

The matter was heard by the deputy commissioner, who

awarded compensation to plaintiff after finding and concluding that plaintiff's work for employer Excel placed him at an increased risk for, and was a significant contributing factor to, the development of his compensable occupational disease, and that carrier Zurich was the carrier at risk for employer Excel at the time of plaintiff's injury on 9 March 2004. Carrier Zurich appealed to the Full Commission, which entered an Opinion and Award on 3 December 2008 affirming the deputy commissioner's award of compensation to plaintiff for a compensable occupational disease, but reversing with respect to carrier Zurich's liability. Plaintiff and employer Excel appealed to this Court from the Commission's 3 December 2008 Opinion and Award, and carrier Zurich cross-appealed and moved for a dismissal of plaintiff's appeal. *See Brodie v. Excel Staffing Servs.*, 202 N.C. App. 770, 691 S.E.2d 767 (2010) (unpublished).

In the parties' original appeal, this Court considered whether it was "a mere clerical error on the Commission's part" when it found that carrier Zurich was not "on the risk" for employer Excel in North Carolina until September 2005—five months *after* the time the Commission found that plaintiff worked for employer Excel and was last injuriously exposed to the hazards of his compensable occupational disease while under its employ. Because the Commission's "mere clerical error" may have

caused the Commission to find that carrier Zurich was not on the risk when plaintiff completed his work for employer Excel in April 2005——despite carrier Zurich's stipulation that it was on the risk as the carrier for employer Excel beginning in September 2004——this Court remanded the matter to the Commission "for correction of the start date of [carrier Zurich's] coverage for [employer Excel's] North Carolina employees," and ordered that the Commission "shall review the remaining findings and conclusions in its [O]pinion and [A]ward in light of this correction and make any additional corrections or findings as necessary."

Pursuant to this Court's opinion, the Commission modified its original 3 December 2008 Opinion and Award and entered a subsequent Opinion and Award in this matter on 2 April 2012. Where the 2008 Opinion and Award had originally found that employer Excel "never obtained a policy from [carrier] Zurich providing coverage in North Carolina until September 24, *2005*," (emphasis added), and that plaintiff's "lateral epicondylitis was contracted prior to the date that [carrier] Zurich was on the risk in North Carolina and, thus, Zurich is not liable," after remand, the Commission found that "plaintiff was last injuriously exposed to the hazards of developing bilateral epicondylitis on April 15, 2005, when [carrier Zurich] was the

carrier on the risk." Carrier Zurich now appeals from the Commission's 2 April 2012 Opinion and Award.

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"'[O]ur Workers' Compensation Act should be liberally construed to effectuate its purpose to provide compensation for injured employees or their dependents, and its benefits should not be denied by a technical, narrow, and strict construction.'" *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998) (quoting *Hollman v. City of Raleigh*, 273 N.C. 240, 252, 159 S.E.2d 874, 882 (1968)), *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." *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965). "'The findings of fact by the Industrial Commission are conclusive on appeal if supported by *any* competent evidence,'" *Adams*, 349 N.C. at 681, 509 S.E.2d at 414 (emphasis added) (quoting *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977)), and such findings are conclusive "even though there be evidence that would support findings to the contrary." *Jones v. Myrtle Desk Co.*, 264 N.C. 401, 402, 141 S.E.2d 632, 633 (1965) (per curiam). "The evidence 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." *Adams*, 349 N.C. at 681, 509 S.E.2d at 414 (citing *Doggett v. S. Atl. Warehouse Co.*, 212 N.C. 599, 601, 194 S.E. 111, 113 (1937)).

Carrier Zurich first contends that plaintiff did not present competent evidence to support the Commission's findings and conclusion that plaintiff developed a compensable occupational disease during his employment with employer Excel. We disagree.

For a condition to be compensable as an occupational disease under N.C.G.S. § 97-53(13), such condition 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." *Rutledge v. Tultex Corp./Kings Yarn*, 308 N.C. 85, 93, 301 S.E.2d 359, 365 (1983) (alteration in original) (internal quotation marks omitted). Additionally, "[t]o 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." *Id.* Moreover, "[a]ll ordinary

diseases of life are not excluded from the statute's coverage. Only such ordinary diseases of life to which the general public is exposed equally with workers in the particular trade or occupation are excluded." *Id.* (citing *Booker v. Duke Med. Ctr.*, 297 N.C. 458, 472–75, 256 S.E.2d 189, 198–200 (1979)).

With respect to the first *Rutledge* element, in the present case, "[b]ased on preponderance of the evidence, and in view of the entire record, the Full Commission [found] that plaintiff developed bilateral epicondylitis due to causes and conditions which are characteristic of, and peculiar to, his work with defendant-employer, where he repeatedly hung sheetrock." In support of this finding, the Commission relied on the testimony of Dr. Lauffenburger, who was offered and accepted as an expert in the field of orthopedic surgery and was the only medical expert to testify in this matter. Dr. Lauffenburger testified that lateral epicondylitis is a type of tendonitis that involves a partial tearing of the connection between the tendon and the bone near the elbow, which is more commonly caused by "repeated stress to a tendon over a period of time resulting in a cumulative type trauma to that structure." He also testified that a worker who performs "a large volume of work" requiring "some kind of squeezing, gripping, lifting or rotating of some kind of objects that there is some power that must be applied

through the wrist and hand that must go through their elbow" is susceptible to developing bilateral epicondylitis. He further testified that plaintiff's "work stress" as the drywall installer/finisher for employer Excel, "with that volume of exposure to that occupational injury, based on the volume and frequency that it was performed, . . . would be directly responsible for the development of [plaintiff's] symptoms."

Here, carrier Zurich does not dispute that Dr. Lauffenburger's testimony supports the Commission's finding that plaintiff's condition is "characteristic of persons engaged in the particular trade or occupation in which [he] is engaged." *See Rutledge*, 308 N.C. at 93, 301 S.E.2d at 365. Instead, carrier Zurich urges that, because Dr. Lauffenburger acknowledged that other occupations are also susceptible to developing bilateral epicondylitis, plaintiff's development of this condition cannot be deemed to be "characteristic" of a drywall installer/finisher. However, as we mentioned above, in order to satisfy the first *Rutledge* element, "it is *not necessary* that the disease originate *exclusively from or be unique to* the particular trade or occupation in question." *Id.* (emphasis added). Accordingly, we conclude that plaintiff provided competent evidence to support the Commission's finding that he satisfied the first *Rutledge* element.

With respect to the second *Rutledge* element, in the present case, the Commission found that "Dr. Lauffenburger opined to a reasonable degree of medical certainty that plaintiff's work at Excel Staffing from February 23, 2004 to April 15, 2005 placed him at an increased risk, greater than that of members of the general public, for the development of bilateral epicondylitis in his arms." The record shows that Dr. Lauffenburger testified that plaintiff's job activities for employer Excel significantly contributed to plaintiff's development of bilateral epicondylitis and that such work placed plaintiff at an increased risk to develop this condition over members of the general public. However, carrier Zurich reminds this Court of Dr. Lauffenburger's additional testimony that approximately twenty to twenty-five percent of his patients who have developed this condition have done so by nonoccupational exposure, and suggests that such testimony shows that "everyday living activities are *more likely* to cause the development of bilateral epicondylitis than someone who installs drywall." (Emphasis added.) Because we are not persuaded that this testimony either establishes that the general public is "more likely" to develop this condition than a drywall installer/finisher or renders Dr. Lauffenburger's other testimony on this issue incompetent, and because we decline carrier Zurich's apparent invitation to

reweigh the evidence that was presented to the Commission, we conclude that plaintiff provided competent evidence to support the Commission's finding that "plaintiff's employment with defendant-employer placed him at a greater risk of developing bilateral epicondylitis[] than the risk the ordinary public is exposed to outside of the employment." Because carrier Zurich does not dispute that plaintiff established the third *Rutledge* element by presenting competent evidence that there was a causal connection between plaintiff's bilateral epicondylitis and his work as a drywall installer/finisher for employer Excel, we conclude that plaintiff presented competent evidence to support the Commission's findings and conclusion that plaintiff developed a compensable occupation disease during his employment with employer Excel.

Carrier Zurich next contends plaintiff failed to present competent evidence to support the Commission's finding that plaintiff's disease was augmented after carrier Zurich became the carrier on the risk for employer Excel in North Carolina.[1] We disagree.

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[1] Carrier Zurich also asserts that the Commission erred by even considering this issue because it asserts the issue was never before the deputy commissioner. However, since defense counsel's admissions at the beginning of the first of the two hearings before the deputy commissioner belie carrier Zurich's assertion, we conclude this assertion is meritless and decline to address it further.

N.C.G.S. § 97-57 provides, in relevant part, that in any case "where compensation is payable for an occupational disease, the employer in whose employment the employee was last injuriously exposed to the hazards of such disease, and the insurance carrier, if any, which was on the risk when the employee was so last exposed under such employer, shall be liable." N.C. Gen. Stat. § 97-57 (2011). Thus, in order to establish liability for a claimant's occupational disease under this statute, the claimant "need only show: (1) that she has a compensable occupational disease and (2) that she was last injuriously exposed to the hazards of such disease in defendant's employment." *Rutledge*, 308 N.C. at 89, 301 S.E.2d at 362 (internal quotation marks omitted). "The statutory terms last injuriously exposed mean an exposure which proximately augmented the disease to any extent, however slight." *Id.* (internal quotation marks omitted).

In support of its assertion that plaintiff's job duties did not augment his condition, however slightly, during the time he worked for employer Excel while carrier Zurich was the carrier on the risk, carrier Zurich directs our attention to testimony from plaintiff that his arms "stayed the same" and "never got better, but they didn't get worse." Nonetheless, when reviewing this excerpted testimony in the context in which plaintiff

offered it, it is apparent that plaintiff gave this testimony specifically in response to a question about whether his arms "got worse *during that six month period between when [he] left Excel and [he] went and had [his] surgery*." (Emphasis added.) In other words, in support of its assertion that there was no competent evidence to support the Commission's determination that plaintiff was last injuriously exposed to the hazards of his condition while carrier Zurich was on the risk, carrier Zurich argues testimony from plaintiff that has no bearing on whether plaintiff's condition augmented during the last seven months of his employment with employer Excel, which is when carrier Zurich was on the risk as carrier. Our review of the entirety of plaintiff's testimony shows, however, that when asked about the affect his job duties had on his arms throughout his employment with employer Excel, which included the seven months between late September 2004 and mid-April 2005 that carrier Zurich was on the risk, plaintiff testified that his arms "[j]ust got worse then. You know, the more I picked up, the worse they got." Moreover, carrier Zurich does not dispute, and the evidence in the record supports, the Commission's findings that "Dr. Lauffenburger opined to a reasonable degree of medical certainty that the job activities at Excel were a significant contributing factor to plaintiff's development of

bilateral epicondylitis," and that "plaintiff's continued performance of his job duty of hanging sheetrock, up to and including his last day on April 15, 2005, augmented plaintiff's bilateral epicondylitis." Therefore, in light of the unchallenged findings and the evidence in the record before us, and because the weight of the evidence presented to the Commission is for the Commission's determination rather than ours, *see Anderson*, 265 N.C. at 433-34, 144 S.E.2d at 274, we conclude that the Commission did not err by determining that "plaintiff was last injuriously exposed to the hazards of developing bilateral epicondylitis on April 15, 2005, when defendant-carrier was the carrier on the risk."

Affirmed.

Judges McGEE and CALABRIA concur.

Report per Rule 30(e).