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Mauretic
Scott

NO. COA98-1616

NORTH CAROLINA COURT OF APPEALS

Filed: 7 March 2000

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IN THE OFFICE OF
CLERK COURT OF APPEALS
OF NORTH CAROLINA

JEWELL FELMET,
Employee-Plaintiff

v.

North Carolina
Industrial Commission
I.C. File No. 490145

REYNOLDS METALS CO., INC.,
Employer-Defendant

and

CIGNA PROPERTY AND CASUALTY
COMPANIES, INC.,
Carrier-Defendant

Appeal by plaintiff from judgment entered 28 August 1998 and
filed 9 September 1998 by the North Carolina Industrial Commission.
Heard in the Court of Appeals 3 January 2000.

Seth M. Bernanke for plaintiff-appellant.

*Teague, Campbell, Dennis & Gorham, L.L.P., by Dayle A. Fammia
and Tamara R. Nance, for defendants-appellees.*

WALKER, Judge.

Plaintiff filed a workers' compensation claim under N.C. Gen.
Stat. § 97-53(13) alleging that she developed an occupational
disease after being exposed to chemicals used by defendant-
employer. After a hearing, the deputy commissioner denied
plaintiff's claim. The Full Commission (Commission) affirmed the
deputy commissioner's decision.

The Commission's findings include the following:

1. At the time of hearing before the Deputy Commissioner, plaintiff was a forty-eight-year old female with a date of birth of August 25, 1948.

2. Plaintiff began working for defendant-employer in 1979. She worked as a bake oven tender, washer tender and palletizer operator, spending over two-thirds of her time during the last ten years of her employment with defendant-employer as a palletizer. In the position of palletizer, plaintiff did not work at a station in the plant which used any chemicals.

3. Defendant employer is an aluminum can manufacturing plant. A variety of chemicals, many of which may cause respiratory irritation with exposure, are used at various stages of the manufacturing process. The plant where plaintiff worked vents to the outside each process that uses chemicals, and in addition the plant has exhaust fans in the ceiling. The air quality surveys taken during the course of plaintiff's employment with defendant-employer tend to show that the manufacturing process used at the plant generated levels of chemical mist and vapors which were, for the most part, either non-detectable, or so far below the OSHA permissible exposure limits as to not be significant.

...

5. During plaintiff's course of employment with defendant-employer, she was never overexposed to any of the above said chemicals, but it is her contention that she was exposed to continuous low levels of the chemicals used in the plant. There were not any studies performed that showed that plaintiff in whatever station she worked was exposed to any particular level of the chemicals, although there was a study performed in 1994 that indicated that airborne contaminants were diffused throughout the plant air.

6. As early as 1981, plaintiff began complaining of sinus congestion and wheezing, which she attributed to problems with seasonal

allergies. In 1987, she began to experience repeated and prolonged bouts of viral bronchitis and upper respiratory infections, both of which were always associated with a dry, as opposed to productive, cough. At no point prior to seeing Dr. Landis in October 1995 did plaintiff mention to any doctor who treated her bronchitis that she attributed her breathing problems to exposure to chemicals at work. In 1992, Dr. Zeller placed her on Axid, a medication which is commonly used to treat esophageal reflux. In 1993, plaintiff began to experience left-sided thoracic back pain, which was worse when she was lying down at night on her left side. Plaintiff is allergic to aspirin.

7. Plaintiff was told by Dr. Hinson in 1984 that she had bronchitis and possible asthma. Plaintiff's condition i[n] this matter is reactive airways disease or asthma as diagnosed by both Drs. Kelling and Landis.

8. Plaintiff last worked for defendant employer on April 11, 1994. ...Prior to plaintiff leaving her employment with defendant-employer she had not indicated to defendant-employer that she thought that she had contracted asthma or any other respiratory problems as a result of her employment.

9. Plaintiff's condition worsened after she stopped working for defendant-employer.

10. Shortly after leaving defendant-employer, plaintiff opened a retail store in which she works five and a half days per week, and she has no difficulty in this position.

11. Plaintiff has been treated by a number of doctors for her respiratory problems over the years. She was informed in 1984, that she had bronchitis and she has received treatment for the same and other respiratory problems since that time.

12. Drs. Landis and Kelling agreed that plaintiff had reactive airway disease or asthma. They agreed that her job with defendant-employer placed her at an increase[d] risk of developing this condition, but neither were able to say with any degree

of certainty that her asthma was related to her job. When they were asked by plaintiff's counsel and given the facts as he saw them, both indicated that plaintiff's job with defendant-employer was the cause of the asthma. However, plaintiff's version of the facts are not the facts found in this case in that plaintiff did not tell either Dr. Landis or Dr. Kelling that she had been experiencing difficulties with her respiratory system back as far as 1981, along with some other facts. When both doctors were informed of the additional facts, they both changed their opinions to indicate that plaintiff's condition of asthma was not caused by her employment with defendant-employer or they indicated that they could not say what was the cause of plaintiff's asthma.

Based on these findings, the Commission concluded that plaintiff failed to prove that her asthma was "either caused by her exposure to chemicals used by defendant-employer in the plant [where] she worked or the chemicals w[ere] a significant contributing factor to the development of her asthma" and thus denied her claim.

In order to state a claim for benefits under N.C. Gen. Stat. § 97-53(13), plaintiff has the burden of proving that her employment with defendant-employer was a significant contributing factor to the development of the occupational disease. *Rutledge v. Tultex Corp.*, 308 N.C. 85, 301 S.E.2d 359 (1983). When considering an appeal from the Commission, this Court is limited to two questions: (1) whether competent evidence exists to support the Commission's findings, and (2) whether the Commission's findings justify its conclusions and decision. *Simmons v. N.C. Dept. of Transportation*, 128 N.C. App. 402, 496 S.E.2d 790 (1998). Findings of fact by the Commission, if supported by competent evidence, are

conclusive on appeal even though there is evidence which would support a contrary finding. *Id.* On appeal, this Court "does not have the right to weigh the evidence and decide the issue on the basis of its weight." *Anderson v. Lincoln Construction Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965). "The Court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Id.* The Commission determines credibility, whether from a cold record or from live testimony and is the ultimate fact-finder on appeal. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 413 (1998).

Plaintiff contends the Commission erred in basing its decision to deny her claim on incompetent evidence by relying on the answers of Dr. Edward Landis and Dr. Douglas Kelling which were in response to improper hypothetical questions. Specifically, defense counsel asked the doctors in hypothetical questions whether they had an opinion to a "reasonable degree of medical certainty" rather than to a "reasonable probability." Therefore, plaintiff asserts that the answers of Dr. Landis and Dr. Kelling are not competent to support the Commission's findings.

After review, we find that the language used by defense counsel in the hypothetical questions comports with language which has been approved by this Court and our Supreme Court. *See Agee v. Thomasville Furniture Products*, 119 N.C. App. 77, 83, 457 S.E.2d 886, 890 (1995), *affirmed*, 342 N.C. 641, 466 S.E.2d 277 (1996), *Wilder v. Barbour Boat Works*, 84 N.C. App. 188, 194, 352 S.E.2d 690, 693 (1987), and *Knight v. Cannon Mills Co.*, 82 N.C. App. 453,

462, 347 S.E.2d 832, 838, *disc. review denied*, 318 N.C. 507, 349 S.E.2d 861 (1986).

Plaintiff next contends that the Commission failed to make definite findings for purposes of appellate review, since it refers in finding 12 to "some other facts." See *Vieregge v. N.C. State Univ.*, 105 N.C. App. 633, 414 S.E.2d 771 (1992), *disc. review denied*, 345 N.C. 354, 483 S.E.2d 192 (1997) (holding that the Commission's conclusions must be supported by its findings).

As previously noted, the Commission did not accept plaintiff's version of the facts since she did not tell either Dr. Landis or Dr. Kelling that she had been experiencing difficulties with her respiratory system as far back as 1981. The Commission then concluded that the testimony of the doctors did not support plaintiff's claim. Although finding 12 makes reference to "some other facts," it is apparent that the Commission relied on the evidence from these doctors in rendering its decision. Therefore, we conclude that the Commission's findings were sufficiently definite to support its conclusion.

Affirmed.

Chief Judge EAGLES and Judge WYNN concur.

Report per Rule 30(e).