NO. COA08-786

NORTH CAROLINA COURT OF APPEALS

Filed: 17 February 2009

JAMES J. COLLINS, JR.,
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 545137

CITATION FOUNDRY d/b/a
FOUNDRY SERVICE COMPANY,
Employer,

LIBERTY MUTUAL INSURANCE COMPANY,
Carrier,
Defendants.

Appeal by plaintiff from Opinion and Award entered on or about 8 April 2008 by the North Carolina Industrial Commission. Heard in the Court of Appeals 4 December 2008.

Poisson, Poisson & Bower, PLLC, by Fred D. Poisson, Jr. and E. Stewart Poisson, for plaintiff-appellant.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by M. Duane Jones and Rochelle N. Bellamy, for defendant-appellees.

STROUD, Judge.

Plaintiff appeals the denial of worker's compensation benefits by the Full Commission arguing the Full Commission (1) erred in applying N.C. Gen. Stat. §97-53(13), (2) made findings

of fact unsupported by competent evidence, and (3) made inadequate and inaccurate findings. For the following reasons, we affirm.

I. Background

On or about 8 April 2008, the Full Commission denied plaintiff's claim for worker's compensation benefits based upon the following findings:

> 1. At the time of the hearing before the Deputy Commissioner, plaintiff was sixty-two years old and had a ninth grade education. Plaintiff began working for defendant-employer on December 16, 1996. Citation Foundry is a foundry where metal parts are cast. At the time plaintiff worked there, the production process required movement of raw material and finished products around the plant using forklifts. During his employment, plaintiff worked in several different positions, including as core maker, grinder, drill press operator and finish grinder and on occasion as a forklift operator. In October 2001, plaintiff began working as a full time forklift operator and continued working in that capacity until February 2005, except for a four-month period of time in 2004 when his job was scale operator.
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> 2. The plant layout consisted of two long buildings that faced each other with an outdoor area between the buildings. Plaintiff called this middle outdoor area "the courtway." The buildings on either side of the courtway have large double doors for each of the different departments, and the forklift drivers take the loaded and empty tubs and boxes from one area or department to another through these doors, into the courtway between the buildings and then to other departments. The courtway is made of cracked and broken cement that has potholes. The grounds surrounding the plant are grass and dirt.
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> 3. Plaintiff worked eight to sixteen-hour shifts for defendant-employer. Most of the time, he worked sixteen-hour shifts and, at various times, worked in the core room, in gate breaking, and in grinding and in shipping. Plaintiff's job did not require him to drive the forklift when he was working in the core room, the grinding room or operating the drill press. He performed these jobs for three or four weeks apiece when he first started with defendant-employer; then he worked in the paint room and as a drill press operator.

4. The employment records that defendant-employer produced at hearing corroborated plaintiff's testimony that he took the lift truck operator review on May 20, 1998, about seven years before he was released from work on medical leave.

5. At the hearing before the Deputy Commissioner, plaintiff testified that as a forklift driver, you "just steady go," taking tubs of the metal pellets and dumping them in the wheelabrater, taking the empty tubs back out and putting them aside, picking up another filled tub for the wheelabrater and so on and so forth. This required plaintiff to drive the forklift in the plant and in the courtway. Plaintiff's job also involved driving the forklift on the grounds around the outside of the plant.

. . . .

7. Plaintiff estimated that he drove the forklift outside the plant just as much as he drove it inside. Plaintiff also loaded and unloaded trucks outside using the forklift. The road coming through the courtway and back to the shipping department was unpaved and bumpy with ditches and holes. When plaintiff drove the forklifts, he bounced somewhat, but especially while he was on the courtway as the ground there was not smooth. Plaintiff estimated that he would go up and down the courtway fifty to sixty times a day.

8. Plaintiff testified that when he started driving the forklifts, none of the three forklifts used by the shipping department had a suspension system and they had hard rubber tires, so the only cushioning the driver had was the padding in the seat. At an unknown time, the company bought one or more Baker forklifts, which did have springs. When driving the older models outside, plaintiff would be bounced around and rocked from side to side to some extent as he drove over the uneven surfaces. However, the Full Commission does not accept as credible his testimony that he was being constantly bounced and jarred.

9. In November 2004, plaintiff began to notice that his left foot was dragging. He was also having episodes where it felt as if needles were pricking his arms. On December 14, 2004, he went to Mt. Gilead Medical Services for the symptoms. At that appointment, he denied having any back, hip or leg pain associated with the other symptoms. The physician's assistant who examined him that day referred him to Dr. Tellez for a neurological evaluation.

10. Dr. Tellez examined plaintiff on January 5, 2005. Plaintiff again denied having back or neck pain. There were abnormalities on examination but they were not specific to a particular diagnosis, so Dr. Tellez ordered diagnostic tests. The cervical spine MRI that was subsequently performed revealed spinal stenosis from spondylosis at C4-5, which appeared to be the cause of plaintiff's symptoms, although he also had evidence of chronic ischemic small vessel disease in his brain, but no major stroke was evident.

11. On January 20, 2005, Dr. Tellez reviewed the test findings with plaintiff. He then referred plaintiff to Dr. Hey for a surgical consultation regarding the cervical spondylosis with probable myelopathy. In addition, since nerve testing had proved consistent with carpal tunnel syndrome, he prescribed wrist splints.

12. Plaintiff's condition continued to deteriorate and, as he testified, he would fall when he tried to get onto the forklift because he did not have enough bounce to get up onto it. Plaintiff began having trouble walking and he began to have pain in the bottom of his back, greater on the left side than the right.

13. Plaintiff did not sustain any known injury at work; however, he has claimed that his cervical spondylosis was due to his bouncing on the forklift at work.

14. Dr. Hey evaluated plaintiff and recommended surgery to decompress and fuse the affected area of the cervical spine. Surgery was scheduled on more than one occasion but it had to be cancelled because plaintiff developed pneumonia and later because his blood pressure was not adequately controlled. He had not been able to undergo the operation as of the date of the Deputy Commissioner's hearing but was to have surgery as soon as his hypertension had stabilized.

15. Dr. Tellez advised plaintiff to avoid driving the forklift due to the risk of injury to his spinal cord and possible paralysis. Plaintiff relayed this information to defendant-employer. On February 18, 2005, plaintiff left his employment with defendant-employer as he was unable to continue to work.

16. Dr. Tellez opined that, looking at the general population of males at age fifty, more than sixty or seventy percent will already have degeneration of the spine. He explained that this was why it is so hard to know whether plaintiff's job triggered or accelerated his spinal stenosis.

> 17. Although Dr. Tellez opined that plaintiff was placed at an increased risk of aggravating and potentially developing spinal stenosis due to his job duties as a forklift driver, he was unable to state to a reasonable degree of medical certainty whether driving the forklift caused the stenosis.
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> 18. The Full Commission finds Dr. Telez's [sic] testimony to be inconsistent and, at times, ambiguous, on direct and cross-examination. Furthermore, Dr. Telez's [sic] opinions were based on a hypothetical assuming constant jarring and constant looking backwards, which the Full Commission finds to be an exaggeration of plaintiff's working conditions. Accordingly, the Full Commission finds that although plaintiff may have had pre-existing, non-disabling degenerative changes in his cervical spine when he began the forklift operator position with defendant-employer and his performance of the forklift operator job may have been a contributing factor to the acceleration of his condition; it was not the cause of his degenerative condition.
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> 19. The Full Commission finds the greater weight of the medical evidence of record, including Dr. Tellez's testimony, when considered in its entirety on direct and cross-examination, to be insufficient to establish the necessary causal relationship for plaintiff's condition to be compensable as an occupational disease and specifically to prove plaintiff's employment exposed him to a greater risk of contracting spinal stenosis relative to the general public. Therefore, the Full Commission finds that plaintiff has failed to establish an occupational disease where his employment exposed him to a greater risk of contracting the disease of spinal stenosis than the general public not so employed.

The Full Commission ultimately concluded that plaintiff did not "establish the necessary causal relationship for plaintiff's condition to be compensable as an occupational disease and specifically to prove plaintiff's employment exposed him to a greater risk of contracting spinal stenosis relative to the general public." Plaintiff appeals arguing the Full Commission (1) erred in applying N.C. Gen. Stat. §97-53(13), (2) made findings of fact unsupported by competent evidence, and (3) made inadequate and inaccurate findings. For the following reasons, we affirm.

II. N.C. Gen. Stat. §97-53(13)

Though plaintiff challenges several findings of fact and conclusions of law, plaintiff ultimately contends that the Full Commission misapplied N.C. Gen. Stat. §97-53(13) in concluding that plaintiff did not establish causation of his spinal stenosis as an occupational disease for which he should receive an award of worker's compensation benefits.

Our review of a decision of the Industrial Commission is limited to determining whether there is any competent evidence to support the findings of fact, and whether the findings of fact justify the conclusions of law. The findings of the Commission are conclusive on appeal when such competent evidence exists, even if there is plenary evidence for contrary findings. *Ramsey v. Southern Indus. Constructors Inc.*, 178 N.C. App. 25, 29, 630 S.E.2d 681, 685 (citations and quotation marks omitted), *disc. rev. denied*, 361 N.C. 168, 639 S.E.2d 652 (2006). "However, if the findings are predicated on an erroneous view of the law or a misapplication of the law, they are not conclusive on appeal." *Simon v. Triangle Materials, Inc.*, 106 N.C. App. 39, 41, 415 S.E.2d 105, 106 (citation omitted), *disc. rev. denied*, 332 N.C. 347, 421 S.E.2d 154 (1992). "When the Commission acts under a misapprehension of the law, the award must be set aside and the case remanded for a new determination using the correct legal standard." *Ballenger v. ITT Grinnell Indus. Piping, Inc.*, 320 N.C. 155, 158, 357 S.E.2d 683, 685 (1987) (citations omitted). "This Court reviews the Commission's conclusions of law *de novo*." *Ramsey* at 30, 630 S.E.2d at 685 (citation omitted).

"It is for the Commission to determine the credibility of the witnesses, the weight to be given the evidence, and the inferences to be drawn from it. As long as the Commission's findings are supported by competent evidence of record, they will not be overturned on appeal." *Rackley v. Coastal Painting*, 153 N.C. App. 469, 472, 570 S.E.2d 121, 124 (2002).

The Full Commission is the sole judge of the weight and credibility of the evidence. Furthermore,

> the Commission does not have to explain its findings of fact by attempting to distinguish which evidence or witnesses it finds credible. Requiring the Commission to explain its credibility determinations and allowing the Court of Appeals to review the Commission's explanation of those credibility determinations would be inconsistent with our legal system's tradition of not requiring the fact finder to explain why he or she believes one witness over another or believes one piece of evidence is more credible than another.

Trivette v. Mid-South Mgmt., Inc., 154 N.C. App. 140, 144, 571 S.E.2d 692, 695 (2002) (citations and quotation marks omitted).

Plaintiff sought to recover for his spinal stenosis as an occupational disease under N.C. Gen. Stat. §97-53(13) which provides that

> [t]he following diseases and conditions only shall be deemed to be occupational diseases within the meaning of this Article:
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> . . . .
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> (13) Any disease, other than hearing loss covered in another subdivision of this section, 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) (2005).

> For a disease to be occupational under G.S. 97-53(13) it 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., 308 N.C. 85, 93-94, 301 S.E.2d 359, 365 (1983) (citations, quotation marks, and brackets omitted).

"The plaintiff in a workers' compensation case has the burden of proving the causal connection by expert medical testimony[.]" *Beaver v. City of Salisbury*, 130 N.C. App. 417, 421, 502 S.E.2d 885, 888, disc. review allowed, 349 N.C. 351, 517 S.E.2d 885 (1998).

> In the context of occupational diseases, the proper factual inquiry for determining causation 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.

Baker v. City of Sanford, 120 N.C. App. 783, 788, 463 S.E.2d 559, 563 (1995), *disc. review denied*, 342 N.C. 651, 467 S.E.2d 703 (1996) (citation omitted).

The only expert medical testimony as to plaintiff's spinal stenosis before the Full Commission was from Dr. Henry Tellez ("Dr. Tellez"). The Full Commission found Dr. Tellez's testimony to be "inconsistent and, at times, ambiguous[]" and that "Dr. Telez's [sic] opinions were based on a hypothetical assuming constant jarring and constant looking backwards[.]"

After thoroughly examining Dr. Tellez's testimony, we conclude that there was "competent evidence to support the findings[,]" *Ramsey* at 29, 630 S.E.2d at 685, that Dr. Tellez's testimony was "inconsistent and, at times, ambiguous . . . [and] based on a hypothetical assuming constant jarring and constant looking backwards[.]" Almost the entire direct examination of Dr. Tellez focused on generalizations and hypotheticals; rarely is plaintiff's specific condition even mentioned as it applies to plaintiff. On cross-examination Dr. Tellez was specifically questioned about causation, "When did you first start to think that it was [plaintiff's] job that would cause his cervical spine condition?" Dr. Tellez responded, "I did not, you know, document anything of that sort that it was related to his job."

The Full Commission determined that portions of Dr. Tellez's testimony were not credible, as is within the Commission's right to do. *See Trivette* at 144, 571 S.E.2d at 695; *Rackley* at 472, 570 S.E.2d at 124. Findings of fact numbers 16 and 17 regarding Dr. Tellez's testimony appear to be recitations of Dr. Tellez's testimony and not agreement with it, as is made obvious in finding of fact number 18. Other than Dr. Tellez's testimony, plaintiff presented no other medical experts to show causation, which is necessary for a worker's compensation award. *See Rutledge* at 93, 301 S.E.2d at 365; *Beaver* at 421, 502 S.E.2d at 888. Plaintiff has not carried his burden and this argument is overruled.

As we have already concluded that the Full Commission properly found that there was no causal connection between plaintiff's spinal stenosis and his employment, we need not address plaintiff's other contentions regarding other findings of fact.

III. Conclusion

The Full Commission properly concluded that plaintiff did not prove the requisite element of causation in order to be granted an award for worker's compensation benefits. As such, we affirm the Full Commission's order.

AFFIRMED.

Judges CALABRIA and STEELMAN concur.

Report per Rule 30(e).