

Affirmed
Author: Ballance
Concurring: Riggsbee
Scott

NO. COA00-934

NORTH CAROLINA COURT OF APPEALS

Filed: 17 July 2001

LINDA M. GREENE,
Plaintiff,

v.

N. C. Industrial Commission
I.C. No. 547882

DANA CORPORATION,
Defendant,

HARTFORD INSURANCE COMPANY,
Defendant.

Appeal by defendant from Opinion and Award filed 10 April 2000
by the North Carolina Industrial Commission. Heard in the Court of
Appeals 6 June 2001.

Tim L. Harris & Associates, by Rebecca L. Thomas, for
plaintiff-appellee.

Hedrick, Eatman, Gardner, & Kincheloe, L.L.P., by J.A.
Gardner, III and Dana M. Mango, for defendant-appellants.

WYNN, Judge.

This case arises from proceedings before the Industrial
Commission in which Linda M. Greene alleges she developed thoracic
outlet syndrome and reflex sympathetic dystrophy as a result of her
injury by accident. Defendants Dana Corporation and Hartford
Insurance Company appeal North Carolina Industrial Commission's
decision reversing the deputy commissioner's Opinion and Award. We
find in the record on appeal, competent evidence to support the
Commission's findings of fact which support the Commission's
conclusions of law. Therefore, we uphold the full Commission's
Opinion and Award in favor of Ms. Greene.

Dana Corporation employed Ms. Greene on 9 February 1995, as a machinist. Her job consisted of sliding a basket of thirty pound tubes down a conveyor line, then one by one, lifting the tubes out of the basket and inserting them into a lathe and a grinder, then back into the basket. Ms. Greene would run approximately two to three hundred tubes in a shift.

On 12 April 1995, Ms. Greene felt a sharp pain in her elbow as she rolled parts down the assembly line by pulling on the basket. During the next two days, Ms. Greene's pain radiated from her left wrist and fingers. Within one week, the pain spread to her left shoulder.

Following her injury, Ms. Greene was evaluated and treated by several physicians and medical care providers. On the date of the accident, Dr. S. Andrew Deekens, Jr. treated Ms. Greene and he referred her to Dr. Allen O. Smith, a neurologist. Dr. Smith placed a thirty-pound lifting restriction on Ms. Greene and she continued to perform her regular duties for her employer. His diagnosis was a "spraining, stretching sort of injury."

On 16 May 1995, Dr. Smith took Ms. Greene out of work, and she was allowed to return to light-duty work on 7 June 1995, with a fifteen-pound lifting restriction. Dana Corporation placed her on the magna glow job, where she checked for cracks in pins used in machinery. However, the job irritated her injury because of the repetitive motion involved.

Ms. Greene was next referred to Dr. Ronald J. Neimkin with Carolina Hand Surgery Associates. Dr. Neimkin's impression after

examining Ms. Greene was that she might have thoracic outlet syndrome or a possible brachioplexus pull. He prescribed Relafen and recommended thoracic outlet exercises. He recommended that Ms. Greene not engage in overhead or repetitive work and restricted her lifting to three pounds with her left arm. Shortly thereafter, Dana Corporation placed her on modified duty, working on a bathroom and cleanup crew, where she was required to clean toilets, walls, sinks and floors, empty trash cans, and mop floors.

On 7 July 1995, Wilma Taylor, the Human Resources Manager for Dana Corporation, met with Ms. Greene to discuss her work restrictions. They disagreed on the type of duties Ms. Greene was able to perform as a result of her injuries. Following that meeting, Ms. Greene was terminated.

Subsequent to her termination, Ms. Greene was referred to a neurosurgeon, Dr. A. Gregory Rosenfeld, because of a constant, dull, achy, neck and left upper-arm discomfort, especially in the left elbow region. Based upon his clinical examination of Ms. Greene, Dr. Rosenfeld diagnosed her as having a left ulnar neuropathy at the elbow. On 20 December 1995, Dr. Rosenfeld performed surgery on Ms. Greene and that surgery confirmed there was a compression of the left ulnar nerve at the elbow. According to Dr. Rosenfeld, following surgery, Ms. Greene experienced significant relief of the pain in her hand and wrist, but she was still having some shoulder pain.

In March 1996, Dr. Rosenfeld referred Ms. Greene for an orthopedic consultation with Dr. J. Alfred Moretz, III. Dr. Moretz

ruled out any orthopedic problem giving rise to Ms. Greene's shoulder pain. Dr. Rosenfeld was unable to provide a diagnosis for her continuing shoulder pain, but did not believe she had thoracic outlet syndrome. He also referred Ms. Greene to a chiropractor, Dr. Timothy Fullam. Dr. Fullam's treatment provided significant improvement, but Dana Corporation refused to pay the cost of the treatment.

On 5 July 1996, Dr. Rosenfeld rated Ms. Greene with a ten percent permanent partial disability to her left upper arm and referred her to Dr. Andrea Stutesman, a specialist in physical medicine and rehabilitation who treats musculoskeletal and neuromuscular problems. After examining Ms. Greene one time and reviewing her medical records, Dr. Stutesman attributed Ms. Greene's problems to bad posture and not a compensable injury. Dr. Stutesman did not diagnose Ms. Greene with thoracic outlet syndrome or reflex sympathetic dystrophy. Ultimately, Dr. Stutesman was unable to find any particular pattern to Ms. Greene's pain and determined that the pain was psychological in origin. Ms. Greene's pain increased as a result of the physical rehabilitation through Dr. Stutesman, and Dr. Stutesman dropped Ms. Greene from her program, stating that she was in poor compliance and poorly motivated.

In January 1997, Dr. William D. Lyday, a board certified specialist in thoracic and cardiovascular surgery, diagnosed Ms. Greene as having thoracic outlet syndrome and reflex sympathetic dystrophy, which was a complication of her thoracic outlet

syndrome. He opined that the thoracic outlet syndrome was causally related to the stretching type injury at work that occurred on 12 April 1995.' At the hearing, he testified that thoracic outlet syndrome refers to a condition affecting the nerves that come from the spinal cord and supply the arm, hand, and fingers. Sufferers of thoracic outlet syndrome have pressure exerted on these nerves in what is known as the interscalene triangle in the neck, above the collarbone, which is the space between the anterior scalene muscle and middle scalene muscles. Thoracic outlet syndrome can occur spontaneously or can result from trauma.

Dr. Lyday referred Ms. Greene to a neurologist, Dr. Dennis Hill, for a second opinion. Dr. Hill agreed with Dr. Lyday's diagnosis of thoracic outlet syndrome, and testified that Ms. Greene's thoracic outlet syndrome "could be" associated with her injury. Dr. Hill described Dr. Lyday as one of the most experienced physicians in the nation in diagnosing and treating thoracic outlet syndrome. He also opined that physical therapy makes thoracic outlet syndrome worse. Dr. Ronald Demas, board certified in neurology and psychology, found that Ms. Greene's electrodiagnostic test findings were compatible with bilateral thoracic compression neuropathy.

On 2 May 1997, Dr. Lyday performed left side compression surgery on Ms. Greene. However, Ms. Greene began experiencing pain in the right extremity. Dr. Lyday opined that cross-symptoms are normal in thoracic outlet syndrome cases and recommended an operation on the right side.

On 14 August 1995, Dana Corporation stipulated in an I.C. Form 21 that Ms. Greene sustained a compensable injury on 12 April 1995; and, Dana Corporation agreed to pay Ms. Greene a weekly compensation rate of \$329.44 beginning on 16 May 1995 and continuing as necessary. Ms. Greene was paid temporary disability compensation from 16 May 1995 to 7 June 1995 and from 12 June 1995 to 25 June 1995. She received no compensation benefits between her termination on 7 July 1995 and 20 December 1995. Dana Corporation also filed on 14 May 1996 an I.C. Form 26, Supplemental Agreement as to Payment of Compensation Pursuant to N.C. Gen. Stat. § 97-82, with the Commission, wherein Dana Corporation stipulated that Ms. Greene became totally disabled on 20 December, and agreed to pay temporary total disability compensation at the same rate of \$329.44 beginning on 20 December 1995 and continuing for necessary weeks.

The case was heard before Deputy Commissioner Martha W. Lowrance on 17 January 1997 and 5 February 1997. During a leave of absence of Deputy Commissioner Lowrance, Deputy Commissioner W. Bain Jones, Jr., reviewed the record and filed an Opinion and Award concluding that Ms. Greene did not have thoracic outlet syndrome; was not entitled to medical and indemnity benefits associated with that condition; and her termination was unrelated to her injury by accident or her prosecution of this workers' compensation claim.

Ms. Greene appealed to the full Commission, which reconsidered the evidence but did not hear live testimony. On 10 April 2001, the full Commission unanimously reversed the deputy commissioner and awarded compensation concluding that:

(1) Plaintiff sustained a compensable injury to her upper left extremity arising out of and in the course of her employment with defendant-employer. N.C. Gen. Stat. § 97-2(6).

(2) As a result of the "stretching injury" to her upper left extremity, the plaintiff developed left thoracic syndrome and reflex sympathetic dystrophy which are also compensable.

(3) As a result of her injury by accident and consequences flowing directly from the injury, plaintiff was temporarily totally disabled from 16 May 1995 to 7 June 1995, from 12 June 1995 to 25 June 1995 and from 7 July 1995 through the date of hearing before the Deputy Commissioner and continuing. N.C. Gen. Stat. § 97-29.

(4) Plaintiff is entitled to compensation rate of \$446.76 based on her average weekly wage of \$670.11. N.C. Gen. Stat. § 97-2 (5).

(5) Defendants are obligated to pay all reasonable and necessary medical expenses incurred or to be incurred in the future by plaintiff as a result of her injury by accident, including the medical evaluations and/or treatment she has received from Doctors Larry Anderson; S. Andrew Deekens, Jr.; C.J. Dellinger; Donald C. Demas; M. Timothy Fullam; Dennis L. Hill; William D. Lyday; J. Alfred Moretz III; Ronald J. Neimkin; A Gregory Rosenfeld; Allen O. Smith; and Andrea Stutesman.

(6) The issue of whether plaintiff's upper right extremity problems are causally related to compensable left extremity problems is reserved for subsequent determination. Plaintiff is not entitled to compensation for medical treatment for her right upper extremity problems until this issue is decided.

From the full Commission's Opinion and Award, Dana Corporation and Hartford Insurance Company appeal to this Court.

The issues on appeal are whether the full Commission erred in:

- (I) Concluding Ms. Greene developed thoracic outlet syndrome and reflex sympathetic dystrophy as a result of her injury by accident;
- (II) Finding that Ms. Greene was terminated as a result of her work-related injury; and (III) Finding Ms. Greene is entitled to continued benefits.

"[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." *Hollman v. City of Raleigh, Public Utilities Dept.*, 273 N.C. 240, 252, 159 S.E.2d 874, 882 (1968). Compensation under the Workers' Compensation Act may be awarded for "[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). The employee bears the burden of proving the existence of an occupational disease. See *Gay v. J.P. Stevens & Co. Inc.*, 79 N.C. App. 324, 331, 339 S.E.2d 490, 494 (1986).

"In reviewing the findings found by a deputy commissioner or by an individual member of the Commission when acting as a hearing commissioner, the Commission may review, modify, adopt, or reject the findings of fact found by the hearing commissioner. The Commission is the fact-finding body under the Workmen's Compensation Act." *Watkins v. City of Wilmington*, 290 N.C. 276,

280, 225 S.E.2d 577, 580 (1976).

First, Dana Corporation and Hartford Insurance Company contend that the full Commission committed reversible error in concluding Ms. Greene developed thoracic outlet syndrome and reflex sympathetic dystrophy as a result of her injury by accident. We disagree.

On appeal, we are limited to two inquiries: (1) Whether any competent evidence exists before the Commission to support its findings of fact; and (2) Whether the conclusions of law are supported by the findings. See *Barham v. Food World, Inc.*, 300 N.C. 329, 266 S.E.2d 676, *reh'g denied*, 300 N.C. 562, 270 S.E.2d 105 (1980); *Lowe v. BE & K Construction Co.*, 121 N.C. App. 570, 468 S.E.2d 396 (1996). The Industrial Commission is the fact finding body and findings of fact made by the Commission are conclusive on appeal if supported by competent evidence. See *Hansel v. Sherman Textiles*, 304 N.C. 44, 49, 283 S.E.2d 101, 104 (1981). This is so even if there is evidence which would support a finding to the contrary. *Id.*

In the present case, the Commission made the following relevant findings of fact:

3. On 12 April 1995, plaintiff was moving a basket containing 10 to 20 tubes weighing about thirty (30 lbs.) each. She had to pull and tug the basket to get it around a ninety degree corner turn.

4. During the next forty-eight hours, plaintiff's pain radiated to her left wrist and fingers. Within approximately one week, the pain had spread into her left shoulder. Plaintiff experienced a dull, numbing, tingling pain in her left arm and shoulder,

and noted a loss of strength in her left hand and arm.

5. Plaintiff was treated by Dr. S. Andrew Deekens, Jr. on the date of the accident. Dr. Deekens referred plaintiff to Dr. Allen O. Smith, a neurologist. Dr. Smith diagnosed plaintiff with a "spraining, stretching sort of injury" to her left arm.

6. Plaintiff continued to perform her job until 16 May 1995 when she was written out of work by Dr. Smith due to continuing pain in her left arm. On 6 June 1995 Dr. Smith released plaintiff to return to light duty work. Plaintiff was placed on a job where she was required to use her arms to pick up several thousand items per shift, weighing two to fifteen pounds and check them for cracks. Due to the repetitive motion involved, the job irritated plaintiff's left injured arm. Defendant-employer then placed the plaintiff on bathroom cleaning crew where she was assigned to empty trash cans, stock the bathroom, clean offices and mop. The job required plaintiff to use her arms overhead when cleaning walls and bathroom stalls.

7. On 20 June 1995 plaintiff sought treatment from Dr. Ronald J. Neimkin, Dr. Neimkin's impression after examination was that plaintiff might have "some thoracic outlet or a possible brachioplexus pull injury."

...

23. There is some controversy in the medical community about whether thoracic outlet syndrome exists; however, Dr. Rosenfeld, Dr. Neimkin, Dr. Lyday and Dr. Hill, the majority of the doctors involved in plaintiff's care and treatment, believe that thoracic outlet syndrome is a medical condition which does exist. Also, there is medical literature which indicates that thoracic outlet syndrome can develop from trauma.

...

29. Plaintiff has developed thoracic outlet syndrome which was caused by her "stretching-type" injury to her left upper extremity

arising out of and in the course of her employment. Plaintiff's reflex sympathetic dystrophy developed as a direct and natural consequence of her thoracic outlet syndrome. The injury to plaintiff's left upper extremity was aggravated by repetitive motion and overhead reaching of the light-duty work assigned by defendant after plaintiff returned to work following her injury.

Upon careful examination of the record, we find competent evidence to support the Commission's findings of fact. Likewise, we find that the findings of fact justify its legal conclusions and decision. Based on the testimony of Ms. Greene, Dr. Rosenfeld, Dr. Neimkin, Dr. Lyday and Dr. Hill, there was substantial evidence to show that Ms. Greene sustained an injury by accident arising out of and in the course of her employment with Dana Corporation and that Ms. Greene's left thoracic outlet syndrome and reflex sympathetic dystrophy are related to the 12 April 1995 accident. We also find competent evidence to support the Commission's legal conclusion that more evidence is needed in determining whether Ms. Greene's right upper extremity problems are causally related to her compensable left upper extremity problems.

Next, Dana Corporation and Hartford Insurance Company contend that the full Commission erred in finding that Ms. Greene was terminated as a result of her work-related injury, and not for misconduct or fault on her part.

"Whether the full Commission conducts a hearing or reviews a cold record, N.C.G.S. § 97-85 places the ultimate fact-finding function with the Commission--not the hearing officer. It is the Commission that ultimately determines credibility, whether from a

cold record or from live testimony." *Deese v. Champion Intern. Corp.*, 352 N.C. 109, 115, 530 S.E.2d 549, 552 (2000). "[I]n reversing the deputy commissioner's credibility findings, the full Commission is not required to demonstrate 'that sufficient consideration was paid to the fact that credibility may be best judged by a first-hand observer of the witness when that observation was the only one.'" *Adams v. AVX Corp.*, 349 N.C. 676, 679, 509 S.E.2d 411, 413 (1998) (quoting *Sanders v. Broyhill Furniture Indus.*, 124 N.C. App. 637, 641, 478 S.E.2d 223, 226 (1996)).

Thus, on appeal, this Court "does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965). "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 v. AVX Corp.*, 349 N.C. at 681, 509 S.E.2d at 414.

In the present case, Ms. Greene was terminated when she was on cleanup duty which included cleaning toilets, floors, sinks and walls and she was also required to empty trash cans and stock bathrooms and offices. The record indicates that there was a disagreement between Ms. Greene and Dana Corporation's Human Resources Manager, Ms. Taylor, on what type of duties she could perform as a result of her injuries. Ms. Taylor told Ms. Greene

her weightlifting restriction was thirty-one pounds and Ms. Greene said her restriction was three pounds and she could not wipe overhead walls. The record shows that Dr. Neimkin restricted Ms. Greene from lifting more than three pounds and working with her hands in an overhead position. The record also indicates that Ms. Greene had not received any previous reprimands. The Commission apparently accorded no weight to the employer's testimony that Ms. Greene was fired for insubordination. While the testimony is conflicting, there is competent evidence in the record to support the findings of fact of the full Commission when viewed in the light most favorable to the plaintiff. Thus, this assignment of error is rejected.

In their final argument, Dana Corporation and Hartford Insurance contend that the full Commission erred in finding that Ms. Greene is entitled to continued benefits. We disagree.

Dana Corporation and Hartford Insurance do not dispute the fact that Ms. Greene is entitled to the presumption of disability under the Form 21 agreement. However, they argue that they have rebutted Ms. Greene's continuing presumption of disability under the following criteria: (1) that suitable jobs are available for the employee; (2) that the employee is capable of getting said job, taking into account the employee's physical and vocational limitations; and (3) that the job would enable the employee to earn some wages. See *Franklin v. Broyhill Furniture*, 123 N.C. App. 200, 206, 472 S.E.2d 382, 386, cert. denied, 344 N.C. 629, 477 S.E.2d 39 (1996). They contend that Ms. Greene was provided with suitable

light-duty employment and was terminated for insubordination and she sabotaged vocational rehabilitation efforts that had led to offers of suitable employment.

"If an injured employee refuses employment procured for him suitable to his capacity he shall not be entitled to any compensation at any time during the continuance of such refusal, unless in the opinion of the Industrial Commission such refusal was justified." N.C. Gen. Stat. § 97-32 (1999). The plain language of this statute requires that the proffered employment be suitable to the employee's capacity. If not, it cannot be used to bar compensation for which an employee is otherwise entitled. See *McLean v. Eaton Corp.*, 125 N.C. App. 391, 393, 481 S.E.2d 289, 290 (1997).

In the present case, the Commission found that the job working on a bathroom cleaning crew required plaintiff to use her arms overhead when cleaning walls and bathroom stalls. The Commission also found that at the time of plaintiff's termination, the Human Resource Manager and Ms. Greene disagreed on the type of duties plaintiff was able to perform as a result of her injuries. Ms. Greene was correct as Dr. Neimkin had restricted her from lifting more than three pounds and from working with her hands in overhead positions. We find that the full Commission properly reviewed the evidence in its findings. Thus, we uphold the Commission's conclusion that Ms. Greene is entitled to continued benefits.

Moreover, we determine that the Commission did not abuse its discretion in awarding the plaintiff attorney's fees according to

N.C. Gen. Stat. § 97-88.1 (1999). Because we find that the Industrial Commission's findings of fact and conclusions of law were supported by competent evidence, the Opinion and Award by the Commission, is

Affirmed.

Judges CAMPBELL AND BIGGS concur.

Report per Rule 30(e).