NO. COA11-1589
NORTH CAROLINA COURT OF APPEALS

Filed: 3 July 2012

KIMBERLY SUE PHELPS,
Administratrix of the Estate of
GAIL S. BLACKBURN, Deceased
Employee-Plaintiff,

v.

From the North Carolina
Industrial Commission
IC No. 563760

STABILUS,
Employer-Defendant,
and FIREMAN'S FUND INSURANCE,
ROYAL & SUNALLIANCE INSURANCE (now
ARROWPOINT) and TRAVELERS
INSURANCE COMPANY,
Carrier-Defendants.

Appeal by defendant from the Opinion and Award entered 14 April 2010 by the North Carolina Industrial Commission. Heard in the Court of Appeals 9 May 2012.

Wallace and Graham, P.A. by Edward L. Pauley for plaintiff-appellee.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P. by M. Duane Jones and J.A. Gardner, III for defendant-appellants Stabilus and Travelers Insurance Company.

McAngus, Goudelock & Courie, P.L.L.C. by Cameron S. Wesley and David M. Galbavy for defendant-appellee Fireman's Fund Insurance Company.

Rudisill White & Kaplan, P.L.L.C. by Stephen Kushner for defendant-appellee Arrowpoint Capital Insurance Company.

STEELMAN, Judge.

The Commission did not err in concluding that plaintiff's lung cancer was a compensable occupational disease. Travelers was the carrier at risk when plaintiff was last injuriously exposed to hexavalent chromium.

I. Factual and Procedural History

Gail Blackburn (plaintiff) began working for Stabilus in 1984. Plaintiff's primary job was to operate a paint booth. In the normal course of her employment, plaintiff was exposed to hexavalent chromium. Plaintiff experienced chest pain, shortness of breath, fatigue, coughing, and wheezing and was diagnosed with lung cancer in early 2005.

On 5 October 2005, plaintiff filed a Form 18, alleging that exposure to chemicals during her employment caused her lung cancer. Stabilus filed a Form 61 on 18 October 2005, denying plaintiff's claim for injury by occupational disease. Plaintiff died from lung cancer on 7 March 2009. Kimberly Sue Phelps, plaintiff's administratrix, was substituted as the party plaintiff on 17 April 2009. The Full Commission filed an Opinion and Award on 14 April 2010, holding that plaintiff developed the

occupational disease of lung cancer from exposure to hexavalent chromium; that plaintiff's last injurious exposure occurred during the coverage of Travelers Insurance Company (Travelers); that Travelers was the responsible carrier and liable for compensation owed to plaintiff; that, prior to her death, plaintiff was totally disabled as a result of her occupational disease and was entitled to temporary total disability from the last date of employment until her death; and that plaintiff's estate is entitled to reimbursement for all medical treatment resulting from her occupational disease. The Opinion and Award did not address "any separate claim filed seeking death benefits."

Defendants Stabilus and Travelers (hereinafter referred to collectively as appellants) appealed the Opinion and Award on 14 May 2010. The Court of Appeals dismissed this appeal on 2 August 2011 because the Opinion and Award failed to determine the amount of plaintiff's compensation, reserving final disposition pending receipt of further evidence. ***Phelps v. Stabilus***, ___ N.C. App. ___, 714 S.E.2d 530 (2011) (unpublished). On 26 October 2011, the Commission entered an order approving the parties' stipulation as to the rate of compensation. On 3

November 2011, appellants again gave notice of appeal. The remaining defendants did not appeal.

II. Compensable Occupational Disease

In their first argument, appellants contend that the Commission erred in concluding that plaintiff's lung cancer was a compensable occupational disease. We disagree.

A. Standard of Review

"Appellate review of an order and award of the Industrial Commission is limited to a determination of whether the findings of the Commission are supported by the evidence and whether the findings in turn support the legal conclusions of the Commission." *Radica v. Carolina Mills*, 113 N.C. App. 440, 445-46, 439 S.E.2d 185, 189 (1994). "The Industrial Commission's findings of fact are conclusive on appeal when supported by competent evidence . . . even [if] there is evidence to support a contrary finding[,] and may be set aside on appeal [only] when there is a complete lack of competent evidence to support them[.]" *Johnson v. Herbie's Place*, 157 N.C. App. 168, 171, 579 S.E.2d 110, 113 (2003) (internal quotation marks and citation omitted) (alterations in original).

> It is not the role of the Court of Appeals or of this Court to substitute its judgment for that of the finder of fact. When the aggrieved party appeals to an appellate

> court from a decision of the Full Commission on the theory that the underlying findings of fact of the Full Commission are not supported by competent evidence, the appellate courts do not retry the facts. It is the duty of the appellate court to determine whether, in any reasonable view of the evidence before the Commission, it is sufficient to support the critical findings necessary for a compensation award.

Hansel v. Sherman Textiles, 304 N.C. 44, 50, 283 S.E.2d 101, 105 (1981) (internal citation omitted).

B. Analysis

An occupational disease is any 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) (2011).

Three elements are required to prove the existence of a compensable occupational disease:

> (1) the disease must be characteristic of a trade or occupation, (2) the disease is not an ordinary disease of life to which the public is equally exposed outside of the employment, and (3) there must be proof of causation, *i.e.*, proof of a causal connection between the disease and the employment.

Hansel, 304 N.C. at 52, 283 S.E.2d at 105-06. The plaintiff

bears the burden of proving these elements. ***Matthews v. City of Raleigh***, 160 N.C. App. 597, 601, 586 S.E.2d 829, 834 (2003).

i. Amount of Exposure

Appellants argue that plaintiff offered no competent evidence of the amount of exposure to hexavalent chromium or the threshold level necessary to cause cancer.

"However, plaintiff is not required to prove that he was exposed to a specific quantity of paint fumes or chemicals. Indeed, [o]ur Supreme Court rejected the requirement that an employee quantify the degree of exposure to the harmful agent during his employment." ***Matthews***, 160 N.C. App. at 606, 586 S.E.2d at 837 (internal quotation marks omitted) (alteration in original).

This argument is without merit.

ii. Causation

Appellants argue that plaintiff's expert witnesses offered no competent evidence of causation.

"The third element of the test is satisfied if the employment significantly contributed to, or was a significant causal factor in, the disease's development." ***Matthews***, 160 N.C. App. at 601, 586 S.E.2d at 834 (internal quotation marks omitted). "Significant [exposure] is to be contrasted with

[exposure that is] negligible, unimportant, . . . miniscule, or of little moment." *Id.* (alterations in original). "To establish the necessary causal relationship for compensation under the Act, the evidence must be such as to take the case out of the realm of conjecture and remote possibility." *Chambers v. Transit Mgmt.*, 360 N.C. 609, 616, 636 S.E.2d 553, 557 (2006) (internal quotation marks omitted).

In the instant case, the Commission found that "[b]ased on the greater weight of the competent and credible evidence," plaintiff "was exposed to hexavalent chromium in her employment with Defendant-Employer such that she was placed at an increased risk of contracting lung cancer over that of the general public not similarly employed." The Commission also found that "[n]otwithstanding Plaintiff's cigarette smoking history, the exposure to hexavalent chromium in her workplace was a significant contributing factor to her development of lung cancer."

The testimony of plaintiff's experts, Dr. Arthur Frank, Dr. David Schwartz, and Dr. Max Costa, supports the Commission's findings. Dr. Frank testified that plaintiff's "employment caused her to have an increased risk of developing lung cancer than someone in the general population." He also testified that

"to a reasonable degree of medical certainty that [plaintiff's] lung cancer was caused by smoking and hexavalent chromium exposure."

Dr. Schwartz testified that "to a reasonable degree of medical certainty," plaintiff's "exposure to hexavalent chromium at Defendant-Employer would have increased her risk of developing lung cancer over someone not so exposed." He also testified that "to a reasonable degree of medical certainty, [plaintiff's] lung cancer was caused by exposure to cigarette smoke and hexavalent chromium." Dr. Costa testified that "the exposure to hexavalent chromium at work would have placed [plaintiff] at an increased risk of developing lung cancer and, to a reasonable degree of scientific certainty, was a substantial factor in causing her lung cancer."

This testimony went beyond mere conjecture or remote possibility. Dr. Frank, Dr. Schwartz, and Dr. Costa each testified as to their opinions, which were based on a reasonable degree of medical certainty. The Commission's findings of fact were supported by competent evidence. The findings in turn supported the Commission's conclusion of law that plaintiff's lung cancer was causally related to her chemical exposure.

iii. Admissibility of Expert Testimony

Appellants argue that the Commission failed to apply the proper standards for the admission of the opinion testimony of plaintiff's expert witnesses. We disagree.

"It appears that our courts have never decided whether the standard for admissibility of expert testimony set forth in [*State v.*] *Goode*[, 341 N.C. 513, 461 S.E.2d 631 (1995)] and *Howerton* [*v. Arai Helmet, Ltd.*, 358 N.C. 440, 597 S.E.2d 674 (2004)] applies in the workers' compensation context." *Lane v. American Nat'l Can Co.*, 181 N.C. App. 527, 532, 640 S.E.2d 732, 735 (2007). Even assuming *arguendo* that the *Goode* and *Howerton* standard applies, appellants failed to preserve this issue.

"In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C.R. App. P. 10(a)(1) (2011). "It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion." *Id.*

In the instant case, appellants never obtained a ruling on the admissibility of the expert testimony. Assuming *arguendo*

that appellants preserved the issue for appellate review, we analyze the admissibility of plaintiff's expert testimony.

a. Standard of Review

"Trial courts are afforded wide latitude of discretion when making a determination about the admissibility of expert testimony." *Lane*, 181 N.C. App. at 532, 640 S.E.2d at 735 (internal quotation marks omitted). "[I]t follows that a ruling on the qualifications of an expert or the admissibility of an expert's opinion will not be reversed on appeal absent a showing of abuse of discretion." *Lane*, 181 N.C. App. at 532, 640 S.E.2d at 735-36 (citing *Howerton*, 358 N.C. at 458, 597 S.E.2d at 686). "A trial court abuses its discretion only when its ruling is manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *Lane*, 181 N.C. App. at 532, 640 S.E.2d at 736 (internal quotation marks omitted).

b. Analysis

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.

N.C.R. Evid. 702(a) (2009).[1] "The Supreme Court of North Carolina in *State v. Goode*, 341 N.C. 513, 461 S.E.2d 631 (1995), set out a three-part analysis for determining whether to permit expert testimony." *Lane*, 181 N.C. App. at 532, 640 S.E.2d at 736. The "first step evaluates whether the expert's method of proof is sufficiently reliable as an area for expert testimony. The second step determines whether the witness testifying at trial is qualified as an expert in that area of testimony. Finally, the court must ask whether the expert's testimony is relevant." (citations omitted). *Lane*, 181 N.C. App. at 532-33, 640 S.E.2d at 736.

Appellants argue that plaintiff's experts' opinions were "founded on assumptions that so overstated and misrepresented [plaintiff's] exposure that the factual foundation therefore would be deemed irrelevant."

A challenge to the methodology of the expert's opinion "goes to the weight of [the] testimony and not the admissibility, and this Court will not address such issues." *Lane*, 181 N.C. App. at 533, 640 S.E.2d at 736. "Our Supreme Court clearly stated in *Howerton* that North Carolina does not

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[1] The General Assembly since amended N.C.R. Evid. 702. 2011 N.C. Sess. Laws ch. 283, § 1.3. The amendment does not apply to the instant case.

apply the gatekeeping function articulated by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469 (1993)." *Lane*, 181 N.C. App. at 533, 640 S.E.2d at 736. Rather, the Court "leaves the duty of weighing the credibility of the expert testimony to the trier of fact." *Id.*

II. Carrier On the Risk

Appellants next argue that the Commission erred in concluding that plaintiff was last injuriously exposed while Travelers was the carrier on the risk. We disagree.

A. Standard of Review

> It is not the role of the Court of Appeals or of this Court to substitute its judgment for that of the finder of fact. When the aggrieved party appeals to an appellate court from a decision of the Full Commission on the theory that the underlying findings of fact of the Full Commission are not supported by competent evidence, the appellate courts do not retry the facts. It is the duty of the appellate court to determine whether, in any reasonable view of the evidence before the Commission, it is sufficient to support the critical findings necessary for a compensation award.

Hansel, 304 N.C. at 50, 283 S.E.2d at 105 (internal citation omitted).

B. Analysis

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).

The carrier on the risk when the employee was last injuriously exposed "must bear the liability, even though the disease has been present and has progressed over a long period of time." *Stewart v. Duncan*, 239 N.C. 640, 645, 80 S.E.2d 764, 768 (1954). The exposure can be a last injurious exposure under N.C. Gen. Stat. § 97-57 "even if the exposure in question is so slight quantitatively that it could not in itself have produced the disease." *Caulder v. Waverly Mills*, 314 N.C. 70, 72, 331 S.E.2d 646, 647 (1985).

Appellants argue that no medical evidence supports a finding that plaintiff's exposure to hexavalent chromium "causally augmented the disease to any extent whatsoever after 1 October 2003."

The parties stipulated that Stabilus was insured by Fireman's Fund Insurance from 1983 through 1 May 2002, by Royal and SunAlliance Insurance (now Arrowpoint Capital Insurance Company) from 1 May 2002 through 1 October 2003, and by Travelers from 1 October 2003 "to present." The Commission found

that plaintiff "was exposed to hexavalent chromium until [Stabilus] ceased using it in 2004." The Commission also found that "the carrier on the risk upon [plaintiff's] last day of exposure to the hazards of hexavalent chromium-related lung cancer was Defendant-Carrier Travelers."

Testimony at the hearing established that, until July 2004, hexavalent chromium was in the paint to which plaintiff was exposed. Dr. Costa testified that plaintiff's exposure to chromium during the last four years of her employment "may have been a factor" in causing her cancer.

The Commission did not err in concluding that plaintiff was last injuriously exposed while Travelers was the carrier on the risk.

AFFIRMED.

Judges CALABRIA and BEASLEY concur.

Report per Rule 30(e).