Bolch – affirmed
Mauretic
Riggsbee

NO. COA99-122

NORTH CAROLINA COURT OF APPEALS

Filed: 7 March 2000

ALICIA DIANE CAVANAUGH,
Employee

v.

North Carolina Industrial
Commission
I.C 600965

LEXINGTON FURNITURE,
Employer

and

CARSON BROOKS, INC.,
Carrier

Appeal by employer and its carrier on the risk from Opinion and Award of the North Carolina Industrial Commission filed 16 October 1998. Heard in the Court of Appeals 16 November 1999.

Cox, Gage and Sasser, by Robert H. Gage, for employee-appellee.

Morris, York, Williams, Surles & Barringer, L.L.P., by C. Michelle Sain, for employer and carrier-appellants.

TIMMONS-GOODSON, Judge.

Lexington Furniture ("employer") is a furniture manufacturer which uses an assembly line to cut, sort and inspect wood stock prior to assembling the stock into furniture. Alicia Diane Cavanaugh ("employee") began working for employer on 26 January 1995. Before working for employer, employee had not experienced hand, wrist or elbow pain. Employee first worked on the "kick line" where her duties consisted of picking up pieces of wood stock of varying weights and lengths from a conveyor belt and placing

them into a "buggy." Employee worked on the "kick line" until 2 February 1995.

Employee was moved to a lumber inspector or "mark line" position where she worked from February 1995 through June 1995. On the "mark line," employee was required to pull boards off the conveyor, flip the boards on their edge, mark defects in the wood with a crayon and slide the boards through the marking station. At times, the speed of the conveyor was such that employee had to pick up two or three boards at a time.

Employee began to experience pain in her arms after having worked in the "mark line" position for approximately one week. She informed her supervisor of the pain and was sent to the personnel manager who gave her a hand brace. Employee visited first aid from March through May of 1995 where she was given wrist wraps and Ibuprofen. On 7 December 1995, employee prepared a written statement of injury stating that she had begun to experience pain in her hands on or about 9 February 1995.

Employee's supervisor noted that employee continued to complain of pain in the wrists, arms or elbow as well as numbness and slight swelling in the elbows. Employee was moved to the "molder off-bearer" position in June of 1995, where she handled lighter wood as compared with the "mark line" position. In the "molder off-bearer" position, employee was required to stack pieces of wood stock on a "buggy" after the stock came out of a "molder" machine. Employee worked in the "molder off-bearer" position until approximately 7 December 1995.

On 7 December 1995, employee was evaluated by the plant doctor, Benny W. Goodman, for symptoms in her arms and hands. Dr. Goodman diagnosed right epicondylitis and restricted her from lifting and repetitive motion of the right elbow. Dr. Goodman referred employee to Dr. Mark McGinnis. On 21 December 1995, employer denied employee compensation for her injury.

Employee was moved to a stock inspection position at the "putty table" where she worked until 10 January 1996. The "putty table" is a light duty position where employer places injured employees. On the "putty table," employee was required to inspect stock for splits and seasoned checks and to apply wood filler to defective areas.

Dr. McGinnis treated employee in January and February of 1996. He diagnosed employee with bilateral carpal tunnel syndrome and released her to go back to light duty work. Employee last worked with employer as a final inspector where she handled still smaller pieces of wood.

Employee took medical leave of absence beginning 22 February 1996. Dr. Scott McCloskey treated employee beginning in February 1996 and performed right and left carpal tunnel release surgery in February and June 1996. Employee received a letter from employer terminating her employment and benefits as of 20 August 1996. Employee had received short term disability benefits of $150.00 per week for 13 weeks.

On 9 September 1996, employee obtained a position at Waffle House. Her duties included taking orders, washing dishes,

cashiering and some food preparation. Dr. McCloskey testified that the Waffle House job could have aggravated the ulnar nerve entrapment and carpal tunnel syndrome which employee retained from her position with employer.

On 26 November 1997, Deputy Commissioner W. Bain Jones filed an Opinion and Award awarding employee compensation. Employer appealed to the Full Commission ("the Commission"). Employee filed two Motions to Amend the Opinion and Award of the Deputy Commissioner. On 16 December 1997, Deputy Commissioner Jones granted employee's Motion to Amend the Opinion and Award regarding the duration of temporary partial disability benefits but denied employee's second Motion to Amend the Opinion and Award regarding attorney's fees. Employee gave Notice of Cross Appeal to the Commission. Employer also gave Notice of Appeal to the Commission from the 16 December 1997 Order by Deputy Commissioner Jones to be incorporated into employer's pending appeal to the Commission. On 16 October 1998, the Commission entered an Opinion and Award modifying and affirming the Opinion and Award of Deputy Commissioner Jones. Employer and its carrier appeal.

By its first assignment of error, employer argues that the Commission erred in finding and concluding that employee sustained a compensable occupational disease for which employer and its carrier on the risk are liable. We cannot agree.

Appellate review of an Opinion and Award of the Commission is limited to a determination of whether the findings of fact are

supported by competent evidence and the conclusions of law are supported by the findings. *Barham v. Food World*, 300 N.C. 329, 266 S.E.2d 676 (1980). If there is any competent evidence to support the findings of the Commission, the findings are conclusive on appeal, even though there is evidence to support contrary findings. *Adams* v. AVX Corp., 349 N.C. 676, 509 S.E.2d 411 (1998). Conclusions of law, however, are reviewable *de novo*. *Grant v. Burlington Industries, Inc.*, 77 N.C. App. 241, 335 S.E.2d 327 (1985). The Commission is the "sole judge of the credibility of the witnesses, and of the weight to be given their testimony[;] . . . it may accept or reject the testimony of a witness, either in whole or in part[.]" *Anderson* v. Motor Co., 233 N.C. 372, 376, 64 S.E.2d 265, 268 (1951).

The policy underlying the Worker's Compensation Act is to "provide a swift and certain remedy to an injured worker and to ensure a limited and determinate liability for employers." *Matthews v. Charlotte Mecklenburg Hosp. Auth.*, 132 N.C. App. 11, 16-17, 510 S.E.2d 388, 393, *disc. review denied*, 350 N.C. 834, __ S.E.2d __ (1999). Therefore, the Act should be construed liberally and "benefits are not to be denied upon technical, narrow, or strict interpretation of its provisions." *Id.* at 16, 510 S.E.2d at 392.

In order to show that a disease is a compensable occupational disease under North Carolina General Statutes § 97-53(13), employee must show that: (1) her condition is due to causes and conditions characteristic of and peculiar to her employment, (2) her

particular employment placed her at a greater risk than the general public of contracting the disease, and (3) there is a causal connection between her condition and her employment. *Hansel v. Sherman Textiles*, 304 N.C. 44, 283 S.E.2d 101 (1981). The claimant has the burden to show the exposure "significantly contributed to, or was a significant causal factor in, the disease's development." *Rutledge v. Tultex Corp.*, 308 N.C. 85, 101, 301 S.E.2d 359, 369-70 (1983).

The Commission may consider the following circumstances in determining whether there is a causal connection between a disease and the employee's occupation: "(1) the extent of exposure to the disease or disease-causing agents during employment, (2) the extent of exposure outside employment, and (3) absence of the disease prior to the work-related exposure . . . ." *Booker v. Medical Center*, 297 N.C. 458, 476, 256 S.E.2d 189, 200 (1979).

In the present case, employer argues that the Commission erred in giving any weight to Dr. McCloskey's diagnosis and opinions regarding employee's alleged bilateral tardy ulnar nerve palsy and in concluding that the same was a compensable occupational disease sustained during the course of her employment with employer.

According to employer, the Commission should have disregarded Dr. McCloskey's diagnosis of bilateral tardy nerve palsy because an electrical test of the right ulnar nerve performed in January of 1996 did not indicate an ulnar nerve problem. However, Dr. McGinnis testified that the electrical test is not 100% reliable in making a diagnosis. Furthermore, Dr. McCloskey testified that the

electrical test could not rule out an ulnar nerve entrapment, and therefore, clinical examination was preferable. Finally, a second electrical test performed in March 1997 revealed bilateral ulnar nerve neuropathies at the elbow segments. The initial diagnosis of Dr. McGinnis supported Dr. McCloskey's diagnosis of tardy ulnar nerve palsy. Dr. McGinnis first diagnosed employee with "bilateral carpal tunnel syndrome" and "right radial tunnel syndrome and cubital tunnel syndrome." Cubital tunnel syndrome is another term for tardy ulnar palsy.

We note that Dr. McCloskey is a board certified neurosurgeon who has treated over one thousand patients with ulnar nerve entrapments at the elbow. He treated employee for a year and a half and twice performed surgery on her.

The Commission properly weighed the evidence and resolved inconsistencies and conflicts within it. *See Smith v. Carolina Footwear, Inc.*, 50 N.C. App. 460, 274 S.E.2d 386 (1981). As the sole judge of the credibility of the witnesses, the Commission could conclude that the diagnosis by Dr. McCloskey of tardy ulnar nerve palsy was competent evidence that employee suffered from that disease.

Employer further argues that the Commission erred in finding and concluding that employee's duties with employer significantly contributed to her alleged occupational disease, and placed her at an increased risk of contracting her disease as compared to members of the general public not so employed. We cannot agree.

Dr. McCloskey testified that there was a causal relationship

between employee's disease and her duties with employer. However, employer contends that the Commission should have disregarded Dr. McCloskeys' opinion because the doctor did not base his opinion on the videotape of employee's duties. Instead, Dr. McCloskey based his opinion on a written description of employee's duties which was later reviewed and largely approved by employee's supervisor.

Employee's supervisor noticed that the videotape was not entirely representative of employee's duties. In the video, the wood depicted was oak, which moves slowly on the conveyor as compared with soft woods. In contrast, the wood which employee normally handled was poplar, a soft wood which moves more quickly on the conveyor. While the video did not depict workers picking up more than one board at a time, employee's supervisor testified that sometimes the line was moving so fast that employee had to pick up several boards at a time.

Employer does not cite any law in support of its position that Dr. McCloskey's testimony should be considered incompetent because it was not based on the video, nor does employer support its assertion that the video is the "most accurate depiction" of employee's duties. We conclude that Dr. McCloskey's opinion provided competent evidence to support the Commission's finding that:

> [Employee's] carpal tunnel syndrome and tardy ulnar palsy are a direct result of the repetitive motion activity [employee] was required to perform on her job with [employer]. Further, [employee's] jobs with [employer] placed her at a greater risk of developing carpal tunnel syndrome and/or tardy ulnar palsy than that of the general public.

Finally, employer argues that the Commission erred in failing to make the proper findings regarding whether employee was last injuriously exposed to the hazards of her alleged occupational disease subsequent to her employment with employer.

Employer failed to assign error to the findings or lack of findings of the Commission regarding the last injurious exposure. While employer assigned error to Finding of Fact Number 15 on the grounds that it is not supported by competent evidence, Finding of Fact Number 15 does not address the last injurious exposure.

In its brief, employer cites that portion of Finding of Fact Number 15 which states:

> There is no evidence in the record that [employee's] current job as a waitress involves any repetitive motion activities of the type which would have caused either carpal tunnel syndrome or tardy ulnar palsy, or would have placed [employee] at a greater risk than that faced by the general public.

Finding of Fact Number 15 addresses whether employee's waitressing position could have caused the diseases, but it does not address whether employee's waitressing job was the last injurious exposure. We conclude that the issue of whether the waitressing job was the last injurious exposure is not properly before this Court. N.C.R. App. P. 10.

We hold that there was competent evidence to support the findings that employee suffers from carpal tunnel syndrome and tardy ulnar palsy and that employee's duties with employer significantly contributed to the development of the diseases and placed her at an increased risk of contracting them as compared to

members of the general public. We conclude that the findings support the Commission's conclusion of law that "[a]s a result of [employee's] sustaining an occupational disease, defendants are responsible for payment of [employee's] past and future medical expenses related to the occupational diseases."

By its second assignment of error, employer argues that the Commission abused its discretion in failing to allow defendants a credit for the short term disability benefits paid to employee pursuant to a plan fully funded by employer. We cannot agree.

It is within the discretion of the Commission whether to allow a deduction for payments made by an employer to the injured employee during her period of disability where those payments were not required under the Worker's Compensation Act at the time they were made. N.C. Gen. Stat. § 97-42 (1991).

In the present case, employer received $150.00 per week for thirteen weeks pursuant to a fully funded employer plan. However, employer stipulated as to the issues it contended to the Commission and employer failed to contend the issue of credit for short term disability payments. Both the Deputy Commissioner and the Commission found that employer should not have denied employee's claim. As a result of employer's denial of the claim, employee suffered lengthy periods out of work without money for medicine. We conclude that the Commission did not abuse its discretion in failing to allow defendants a credit for the short term disability benefits paid to employee pursuant to a plan fully funded by employer.

For the foregoing reasons, we affirm the Opinion and Award of the Commission finding that employee sustained a compensable occupational disease for which employer and its carrier on the risk are liable and denying defendants a credit for short term benefits paid to employee.

Affirmed.

Judges GREENE and WALKER concur.

Report per Rule 30(e).