

Scott - affirm

Bolch

Riggsbee - dissent NO. COA99-303

NORTH CAROLINA COURT OF APPEALS

Filed: 15 February 2000

JAMIE KIRK, Employee,
Plaintiff-Appellee

v.

North Carolina
Industrial Commission
I.C. No. 628621

GREAT AMERICAN INSURANCE
COMPANY,

Employer

SELF-INSURED,
Defendant-Appellant

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CLERK COURT OF APPEALS
OF NORTH CAROLINA

Appeal by defendant from opinion and award entered 17 November 1998 by the North Carolina Industrial Commission (Commission). Heard in the Court of Appeals 7 December 1999.

Law Offices of George W. Lennon, by George W. Lennon and Michael W. Ballance, for plaintiff-appellee.

Teague, Campbell, Dennis & Gorham, L.L.P., by Thomas M. Clare, for defendant-appellant.

WALKER, Judge.

Plaintiff's workers' compensation claim was denied on 13 January 1998 by Deputy Commissioner Morgan. Plaintiff appealed the denial of her claim to the Full Commission. The Commission ordered defendant to pay plaintiff temporary total disability and medical expenses related to treatment for bilateral pronator syndrome, tendinitis, and related medical conditions.

Plaintiff, a 35-year-old high school graduate, last worked for defendant on 22 September 1993. Plaintiff was employed by

defendant in a clerical position that required the repetitive use of her hands, wrists, and arms. She had worked for defendant for five years when she began to experience pain in her left wrist in December 1992. On 31 December 1992, Dr. Tomas Ojeda, a specialist in internal medicine, examined plaintiff, diagnosed her as suffering from unilateral left carpal tunnel syndrome¹ (CTS), and advised her to stay out of work for two weeks. On 3 March 1993, Dr. George Edwards, a specialist in hand and upper extremity orthopedic surgery, also diagnosed plaintiff as suffering from left CTS, advised her to stay out of work for two weeks, and administered an injection to plaintiff.

On 18 March 1993, Dr. Edwards recommended surgery for treatment of the CTS, which was performed 12 April 1993. On 25 August 1993, Dr. Edwards assigned a permanent partial disability rating of six percent to plaintiff's left hand and noted symptoms of CTS in plaintiff's right hand, for which he recommended she wear a splint.

By June 1993, plaintiff had returned full time to her previous job with defendant. In September 1993, plaintiff stopped working when she experienced symptoms of CTS in her right hand.

On 1 December 1993, plaintiff and defendant entered into a Form 21 agreement paying plaintiff temporary total disability for

¹ Carpal Tunnel Syndrome (CTS) is a compression neuropathy (disorder of the nerves) involving the compression and entrapment of the median nerve by the transverse carpal ligament within the wrist. See A.H. Woodward, M.D. and Laura O'Biso Edwards, *Carpal Tunnel Syndrome*, in *Attorneys' Textbook of Medicine* par. 3B.00 (3d ed. 1998).

the period of 7 January 1993 to 25 April 1993. A subsequent Form 26 agreement paid plaintiff permanent partial disability for a twelve- week period based on Dr. Edwards' assigned disability.

On 4 November 1993, Dr. Edwards performed CTS surgery on plaintiff's right hand and on 23 February 1994, he assigned a seven percent permanent partial disability rating to her right hand. He released plaintiff to return to work with several restrictions. On 4 February 1994, plaintiff and defendant entered into another Form 21 agreement paying plaintiff temporary total disability beginning 24 September 1993.

On 16 September 1994, plaintiff and defendant entered into an Agreement of Final Settlement and Release (Agreement), in which plaintiff was compensated in the amount of \$35,000.00. The Agreement was approved by the Commission on 24 October 1995 and provided in part that the settlement was:

in full, final and complete satisfaction of any and all claims under the North Carolina Workers' Compensation Act which employee, her dependents, estate or other representative may have against the employer or the insurer now or in the future by reason of her bilateral carpal tunnel syndrome, or any injury, condition, change of condition, or claim resulting therefrom.

On 15 February 1995, plaintiff returned to see Dr. Edwards due to pain in her right forearm, and he diagnosed her with right pronator syndrome². Dr. Edwards described the condition as "a

² Pronator Syndrome is the entrapment of the median nerve in the forearm, and may be mistaken for CTS. Pain associated with CTS radiates to the proximal forearm from the hand and wrist, whereas pain associated with pronator syndrome predominantly

continuation of the same problem she had previously under workman's [sic] compensation." On 14 March 1995, Dr. Edwards performed right forearm median nerve decompression surgery. On 14 August 1995, Dr. Edwards assigned a permanent partial disability rating of nine percent to plaintiff's right hand, inclusive of the previous seven percent rating originally assigned to her right hand.

On 2 November 1995, plaintiff returned to Dr. Edwards with pain in her left forearm. Dr. Edwards diagnosed left forearm pronator syndrome, but did not recommend surgery. On 9 May 1996, Dr. Edwards diagnosed plaintiff with non-work-related right thoracic outlet syndrome and right shoulder impingement along with left pronator syndrome. Plaintiff related to Dr. Edwards that her symptoms began after she stopped working for defendant.

Dr. Warren Blackburn, a family practitioner, began treating plaintiff in 1995 for a number of problems, including pain in her shoulders and hands. Dr. Blackburn saw plaintiff several times but as of 11 December 1996 had not made a diagnosis with regard to plaintiff's arm and shoulder complaints.

Vocational rehabilitation counselor, David Arthur, has provided vocational services to plaintiff since 1995. Arthur testified that plaintiff would have a difficult time finding full employment in her present condition, based on the speculation that plaintiff was presenting her symptoms accurately to him.

affects the proximal forearm. See A.H. Woodward, M.D. and Laura O'Biso Edwards, *Carpal Tunnel Syndrome*, in *Attorneys' Textbook of Medicine* par. 3B.60 (3d ed. 1998).

Plaintiff filed a new claim for the bilateral pronator syndrome and tendinitis, which was denied by defendant. Pursuant to a hearing on 19 September 1996, the deputy commissioner denied plaintiff's claims after considering the depositions of Drs. Edwards, Ojeda, and Blackburn, as well as vocational rehabilitation counselor Arthur, because plaintiff had failed to establish a causal connection between her current condition and her employment with defendant.

The Commission, with one commissioner dissenting, reversed the deputy commissioner and awarded plaintiff temporary total disability "for the period of 15 February 1995 through the present and continuing until such time as she returns to work or until further order of the Commission."

Defendant assigns as error the Commission's finding that the Agreement entered between the parties did not bar plaintiff's present claims. Specifically, that the following language of the Agreement bars plaintiff from bringing any further claim arising out of her employment with defendant:

[I]t is further understood that the rights and remedies of employee against employer and/or insurer as a result of employee's employment and her bilateral carpal tunnel syndrome are governed and controlled by the North Carolina Workers' Compensation Act and that all such rights are being compromised, adjusted and forever resolved.

This Court's standard of review in a workers' compensation case is well-settled: "When the Court of Appeals reviews a decision of the full Commission, it must determine, first, whether there is competent evidence to support the Commission's findings of fact

and, second, whether the findings of fact support the conclusions of law." *McAninch v. Buncombe County Schools*, 347 N.C. 126, 131, 489 S.E.2d 375, 378 (1997). "The findings of fact of the Industrial Commission are conclusive on appeal when supported by competent evidence, even though there be evidence that would support findings to the contrary." *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998), rehearing denied, 350 N.C. 108, __ S.E.2d __ (1999) (quoting *Jones v. Myrtle Desk Co.*, 264 N.C. 401, 402, 141 S.E.2d 632, 633 (1965)). However, a finding not supported by any sufficient competent evidence or a finding based on incompetent evidence, is not conclusive and such findings must be set aside. *Ballenger v. Burris Industries*, 66 N.C. App. 556, 561, 311 S.E.2d 881, 884 (1984).

The Commission found that the Agreement did not preclude plaintiff from pursuing a claim not related to her CTS. The Commission's findings stated in part:

24.[. . .] However, the proper interpretation of this language is that the agreement settles plaintiff's claim for her carpal tunnel syndrome which developed as the result of her employment, not that it settles her carpal tunnel syndrome claim and all other claims. Therefore, based upon the plain meaning of this language, defendant's interpretation is not reasonable.

(Emphasis in original).

The Commission approved the settlement stating that "[c]ompliance with the terms of the agreement shall discharge defendants from further liability under the Workers' Compensation Act by reason of the injury giving rise to the claim." (Emphasis

added). The Commission found that plaintiff's pronator syndrome and tendinitis were not related to her carpal tunnel syndrome and thus her present claim was not barred by the Agreement. Similarly, the deputy commissioner found that the "evidence [did] not establish that the plaintiff's current claims result from the plaintiff's bilateral carpal tunnel syndrome" and thus the Agreement did not preclude plaintiff's claim. These findings are consistent with Dr. Edwards' testimony that plaintiff's "pronator syndromes appear to be new conditions." The Commission specifically found that plaintiff's bilateral pronator syndrome and tendinitis were not diagnosed until 15 February 1995.

The Commission's findings in regard to the Agreement were based upon competent evidence, binding on appeal, and support the Commission's conclusions of law. Accordingly, we overrule defendant's first assignment of error.

Defendant next argues that the Commission erred in awarding plaintiff compensation pursuant to N.C. Gen. Stat. § 97-53(13) when she presented no competent evidence of a new occupational disease. Specifically, the Commission's findings with regard to her current disability and medically related conditions were not supported by competent evidence.

According to the Workers' Compensation Act, three elements are necessary to prove the existence of a compensable occupational disease under N.C. Gen. Stat. § 97-53(13) (1999): (1) the disease must be characteristic of persons engaged in the particular trade or occupation in which the plaintiff is engaged; (2) the disease

must not be an ordinary disease of life to which the public generally is equally exposed; and (3) there must be a causal connection between the disease and the plaintiff's employment. *Hansel v. Sherman Textiles*, 304 N.C. 44, 52, 283 S.E.2d 101, 105-06 (1981) (citation omitted). A finding that plaintiff's employment "significantly contributed to, or was a significant causal factor in, the disease[']s development," satisfies the third element of an occupational disease. *Rutledge v. Tultex Corp.*, 308 N.C. 85, 101, 301 S.E.2d 359, 369-70 (1983). As previously stated, the findings of fact of the Commission are binding on appeal when supported by competent evidence. *Adams*, 349 N.C. at 681, 509 S.E.2d at 414. Additionally, the "evidence tending to support plaintiff's claim is to be viewed in the light most favorable to the plaintiff, and plaintiff is entitled to the benefit of every reasonable inference to be drawn from the evidence." *Id.* at 681, 509 S.E.2d at 414.

The plaintiff has the burden of proving that her present occupational disease was caused by her employment with defendant. The deposition testimony of Drs. Edwards, Ojeda and Blackburn accounted for all of the medical testimony before the Commission.

With regard to Dr. Edwards' testimony concerning the causation of plaintiff's pronator syndrome and other conditions, the Commission found:

19. Dr. Edwards last saw plaintiff on 9 May 1996. At that time, he diagnosed her with right thoracic outlet syndrome, right shoulder impingement syndrome, which were not work related. Dr. Edwards also reaffirmed his diagnosis of left pronator syndrome, and opined that plaintiff's employment with defendant significantly contributed to the

development of this condition, as well as her left side tendinitis.

Dr. Tomas Ojeda, a specialist in internal medicine, gave his opinion regarding plaintiff's present claims. The Commission's findings regarding Dr. Ojeda stated:

20. Dr. Tomas Ojeda was stipulated to be a physician with expertise in the field of internal medicine and was plaintiff's treating physician from 1992 through 1995. Dr. Ojeda diagnosed plaintiff's symptoms and managed her care during this period of time, including the referral to Dr. Edwards. Dr. Ojeda diagnosed plaintiff as suffering from a number of medical conditions, including residual pain and inability to use her hands and arms, depression, irritable bowel syndrome and morbid obesity. In his opinion, plaintiff's employment with defendant and repetitive job duties were substantial contributing factors in the development of her pronator syndrome in both arms. Dr. Ojeda further opined that plaintiff's internal bleeding, ulcers, gastrointestinal symptoms, depression and anxiety were more likely than not caused or aggravated by her work related injuries, the resulting surgeries, her medication and chronic pain. It is Dr. Ojeda's opinion that plaintiff will require future medical treatment, including psychological and psychiatric care, follow up with neurologists or neurosurgeons for nerve problems, orthopaedic surgeons for hand, wrist and arm problems and chronic pain syndrome and internal medicine specialists for her gastrointestinal problems.

With regard to Dr. Blackburn's testimony, the Commission found:

21. Dr. Warren A. Blackburn, a family practitioner in Louisburg, testified that he has been treating plaintiff since March of 1995 for a number of problems, including chronic shoulder and arm pain. Dr. Blackburn

diagnosed plaintiff with fibromyalgia³, noting that her pain is chronic. In his opinion, her current shoulder and arm problems are more likely than not related to her employment with the defendant. Dr. Blackburn recommended plaintiff receive treatment from a rheumatologist for her fibromyalgia. In his opinion, plaintiff has been unable to return to her prior position with defendant since began [sic] treating her and she would have difficulty maintaining regular attendance in any employment due to the fact that she can only control her pain through the use of narcotic medications.

Also, the Commission found that:

22. David B. Arthur, stipulated to be an expert in the field of vocational rehabilitation, is a vocational rehabilitation counselor with the North Carolina Division of Vocational Rehabilitation. He has provided vocational services to plaintiff since 1995. As a result of testing, Mr. Arthur determined plaintiff's transferable skills place her in the unskilled category. Unskilled workers have the most difficulty finding employment. In his opinion, plaintiff would have a difficult time finding and maintaining full-time employment.

23. Defendant presented no vocational evidence or any employment suitable to plaintiff's capacity and no evidence that, even with medical treatment and improvement in her symptoms, she is likely to be able to return to competitive employment without significant modifications.

Plaintiff points to Dr. Edwards' testimony on which the Commission relied:

³ Fibromyalgia is a form of rheumatism not involving joints that causes musculoskeletal aching and stiffness, fatigue, and disordered sleep. The term literally means muscle fiber pain. See Cramer, David A., M.D.; *Fibromyalgia*, in *Attorneys' Textbook of Medicine*, par. 25.00 (3d ed. 1998).

Q: If there is no evidence of any injurious exposure to repetitive motion and strain, other than Ms. Kirk's seven-year employment with Great American Insurance Company, do you have an opinion satisfactory to yourself and to a reasonable degree of certainty as her treating hand specialist regarding whether more likely than not Ms. Kirk's bilateral pronator syndrome and tendinitis is more likely than not work related?

A: Yes, I have an opinion.

Q: And what is that opinion?

A: It's likely that her work did contribute to her symptoms.

Q: And would that contribution have been significant, given the seven-year history of her work and the repetitive nature of it?

A: Yes.

Dr. Edwards also testified that following plaintiff's diagnosis with pronator syndrome, she was temporarily totally disabled from her employment with defendant.

When asked if plaintiff's employment with defendant was a substantial contributing factor in the development of plaintiff's bilateral pronator syndrome, Dr. Ojeda testified, "In my opinion, definitely her work must have contributed to development [sic] of those two problems." Dr. Ojeda further testified that plaintiff's related medical conditions were all causally related to or aggravated by her injuries at work with defendant and that plaintiff is unable to work and will remain disabled for the foreseeable future.

Further, Dr. Blackburn testified to the following:

Q: And considering all of her medical conditions in conjunction with her chronic pain of the

hand, wrist, arm and shoulder symptoms, do you have an opinion satisfactory to yourself and to a reasonable degree of certainty as her treating family practitioner regarding whether, more likely than not, she has been temporarily totally disabled from her previous employment since you have been seeing her?

A: From her previous employment ---

Q: Yes.

A: --- I believe so, yes.

Additionally, Dr. Blackburn testified that plaintiff was temporarily totally disabled from her usual occupation with defendant.

In summary, there was competent evidence before the Commission to enable it to find that plaintiff had established a causal connection between her employment with defendant and her current occupational disease and that she is temporarily totally disabled. In holding that the Commission's findings are supported by competent evidence, those findings are binding on appeal. Accordingly, defendant's second argument is overruled.

Affirmed.

Judges GREENE and TIMMONS-GOODSON concur.

Report per Rule 30(e).