NO. COA01-68

NORTH CAROLINA COURT OF APPEALS

Filed: 7 October 2003

ERASTUS CAMP,
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 686290

KIMBERLY-CLARK CORPORATION,
Employer,

SELF-INSURED,
Defendant.

Appeal by defendant from Opinion and Award entered 3 August 2000 by the North Carolina Industrial Commission. Originally scheduled to be heard in the Court of Appeals on 15 August 2002. Reassigned to this panel by order dated 16 January 2003 of Chief Judge of the North Carolina Court of Appeals.

Waymon L. Norris, P.A., by Waymon L. Norris, for plaintiff-appellee.

Ogletree, Deakins, Nash, Smoak & Stewart, P.C., by Mary Lou Hill, for defendant-appellant.

GEER, Judge.

Defendant Kimberly-Clark Corporation appeals from the North Carolina Industrial Commission's determination that plaintiff Erastus Camp developed byssinosis, an occupational disease, as a result of inhaling cotton dust during his employment at Kimberly-Clark's Berkley Mills plant. Generally, defendant challenges the sufficiency of the evidence to support the

Commission's decision. Because we find that competent evidence supports the Commission's findings, we affirm.

Mr. Camp began working for defendant at its Berkley Mills plant in 1980. The Berkley Mills plant produces cotton and paper materials for use in paper towels, baby diapers, and feminine hygiene products. Prior to his employment at the Berkley Mills plant, Mr. Camp had never been exposed to cotton or cotton dust. He also had never experienced any pulmonary problems other than a cold or the flu although he had smoked up to two packs of cigarettes a day for 25 years.

During his employment, defendant assigned Mr. Camp to work in a number of different jobs. According to the Commission, in two of the jobs, Mr. Camp worked "in copious aspirable cotton dust and linters." For a short period of time in 1986 and then again from 1987 until 1991, Mr. Camp worked 12-hour shifts in an area called the "bleachery." In the bleachery, employees prepared low grade baled waste cotton for use in the manufacture of feminine napkins. Employees were responsible for opening bales of cotton, bleaching the cotton, and rebaling it for shipment to defendant's other mills. To remove the dust that accumulated heavily on surfaces, the company had "blow downs," after which employees used snow shovels to scoop up the dust and cart it away. During the "blow downs," the dust was thick enough to look like fog.

After only three years of working at defendant's plant, Mr. Camp began to experience pulmonary difficulties for which he sought medical treatment. Because he was afraid that his pulmonary problems might be related to his smoking, he decreased his smoking gradually until he had quit smoking completely in 1984. Subsequently, Mr. Camp's doctor removed him from work on more than one occasion because of his pulmonary problems.

Prior to 1988, defendant did not measure the amount of cotton dust present in its plant. Because dust levels were not measured continuously during the time Mr. Camp worked in different areas, the record does not permit a determination of the precise dust levels in which Mr. Camp worked. In 1988, defendant hired a company called Health and Hygiene Inc. to measure the pulmonary function of defendant's employees. In May 1988, Health and Hygiene reported that Mr. Camp and another employee had tests that were "quite low" and that they needed to be retested.

In 1989, Dr. James Quayle, the medical director for defendant, conducted a pulmonary examination of Mr. Camp. Dr. Quayle titled his report "Problem: Cotton Dust Exposure/Abnormal [Pulmonary Function Test]." Despite this title, Dr. Quayle ultimately concluded that plaintiff's chronic obstructive pulmonary disease ("COPD") was not work-related, but rather was probably due to emphysema from smoking and asthma.

Dr. Quayle recommended that Mr. Camp be referred to a pulmonologist. The company's internist selected Dr. John Morris, a specialist in pulmonary medicine. Dr. Morris discovered that Mr. Camp had a strong allergic reaction to cotton, but still concluded that his working conditions did not significantly contribute to Mr. Camp's condition. Dr. Morris also attributed Mr. Camp's problems to his long history of cigarette smoking. Nevertheless, Dr. Morris repeatedly recommended that Mr. Camp be removed from working areas where he would be exposed to cotton or paper dust.

In 1991, Mr. Camp was allowed to work in the main part of the plant away from cotton dust. In 1992, however, he was reassigned to work in the "tabbi department" where a synthetic material was processed for use in baby diapers. Evidence was presented that the manufacturing

process resulted in clouds of dust or "snow" that ultimately collected on overhead beams and made the floor extremely slippery.

Dr. Phillip Pratt, a retired full professor of pathology and former chair of the pathology department at Duke University Medical School, diagnosed Mr. Camp's condition as byssinosis. Dr. Pratt and his colleagues have developed a method to distinguish between emphysema and byssinosis using radiographs of lungs. Based upon Mr. Camp's chest x-rays, his medical records, and the fact that he had been exposed to cotton dust, Dr. Pratt concluded that Mr. Camp does not suffer from emphysema caused by smoking, but rather that he suffers from byssinosis caused by the inhalation of cotton fibers.

Upon review of the evidence, the Full Commission found, "[t]he risk of contracting byssinosis at defendant's Berkley [Mills] plant was far greater than the risk in the general population of contracting byssinosis" and concluded that "[p]laintiff's byssinosis and COPD resulted from causes and conditions characteristic of and peculiar to the textile industry." The Commission further concluded that "[p]laintiff's employment may not have been the sole cause of his chronic obstructive lung disease but it aggravated and augmented it, despite his smoking."

Standard of review

This Court reviews opinions and awards of the Industrial Commission to determine whether any competent evidence exists to support the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law. *Cross v. Blue Cross/Blue Shield*, 104 N.C. App. 284, 285-86, 409 S.E.2d 103, 104 (1991). If supported by competent evidence, the Commission's findings are binding on appeal even when there exists evidence to support findings to the contrary. *Allen v. Roberts Elec. Contr'rs*, 143 N.C. App. 55, 60, 546

S.E.2d 133, 137 (2001). The Commission's conclusions of law are reviewed *de novo*. *Id.* at 63, 546 S.E.2d at 139.

I

Defendant argues first that the Full Commission erred in finding that plaintiff was at an increased risk for byssinosis as a result of his work at the Berkley Mills plant. Since N.C. Gen. Stat. §97-53 (2001) does not specifically list byssinosis as an occupational disease, it falls instead within the catchall provision of N.C. Gen. Stat. §97-53(13). Under §97-53(13), a condition is considered an "occupational disease" when it "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).

The concept of "increased risk" was adopted by our Supreme Court in *Rutledge v. Tultex Corp.*, 308 N.C. 85, 94, 301 S.E.2d 359, 365 (1983), as a means of proving that a disease meets the requirements of N.C. Gen. Stat. §97-53(13). As the Court explained in *Rutledge*, to be considered an occupational disease under N.C. Gen. Stat. §97-53(13), a condition 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."

308 N.C. at 93, 301 S.E.2d at 365 (quoting *Hansel v. Sherman Textiles*, 304 N.C. 44, 52, 283 S.E.2d 101, 105-06 (1981); *Booker v. Duke Medical Center*, 297 N.C. 458, 468, 475, 256 S.E.2d 189, 196, 200 (1979)). The Court further held that the first two elements "are satisfied if, as a matter of fact, the employment exposed the worker to a greater risk of contracting the disease than the public generally." *Id.* at 93-94, 301 S.E.2d at 365.

Our case law and the evidence in the record establish that byssinosis, by its very nature, is work-related and an occupational disease. In *Rutledge*, the Supreme Court specifically held that byssinosis is "work related," explaining that "[b]yssinosis may be understood as the adverse effect on the lungs resulting from the inhalation of cotton dust, a substance generally present in the work environment of textile mill employees." *Id.* at 94, 301 S.E.2d at 366. Similarly, this Court has described byssinosis as "a work-related lung disease caused by the inhalation of cotton dust" and as a disease "which is peculiarly if not exclusively related to the work environment in textile mills." *Mills v. Fieldcrest Mills*, 68 N.C. App. 151, 154, 314 S.E.2d 833, 835-36 (1984); *Clark v. American & Efird Mills*, 66 N.C. App. 624, 627, 311 S.E.2d 624, 626 (1984), *aff'd per curiam*, 312 N.C. 616, 323 S.E.2d 920 (1985).

The evidence in this case confirmed the almost exclusively work-related nature of byssinosis. As Dr. Pratt explained in his deposition, "[b]yssinosis is the name that was given to the syndrome of impaired pulmonary function associated with work in the cotton industry." Dr. Quayle testified that byssinosis is caused by breathing cotton dust and "is quite rare in this country . . . ."

Defendant's objection to the Commission's finding of increased risk does not actually dispute the work-relatedness of byssinosis, but rather challenges the finding that Mr. Camp's pulmonary condition is byssinosis. Dr. Pratt's testimony provides sufficient support for the Commission's finding. He testified, based on his review of Mr. Camp's chest x-rays, his degree of airflow obstruction, and his exposure to cotton dust, that Mr. Camp was suffering from byssinosis rather than emphysema.

Defendant's argument that the Commission erred in relying solely on the testimony of Dr. Pratt ignores this Court's standard of review. It is well-established that the Commission is the

"'sole judge of the credibility of the witnesses, and of the weight to be given to their testimony[;] . . . it may accept or reject the testimony of a witness . . . in whole or in part . . . .'" *Blankley v. White Swan Uniform Rentals*, 107 N.C. App. 751, 754, 421 S.E.2d 603, 604-05 (1992) (quoting *Anderson v. Northwestern Motor Co.,* 233 N.C. 372, 376, 64 S.E.2d 265, 268 (1951)), *disc. review denied*, 333 N.C. 461, 427 S.E.2d 618 (1993). Defendant does not contend that Dr. Pratt was unqualified to give his opinion. Instead, defendant points to the testimony of other doctors and a written report of a radiologist that, it argues, are inconsistent with Dr. Pratt's diagnosis and review of Mr. Camp's x-rays. This Court, however, "'does not have the right to weigh the evidence and decide the issue on the basis of its weight.'" *Adams v. AVX Corp.,* 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (quoting *Anderson v. Lincoln Constr. Co.,* 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)). Our duty is to determine only whether the record contains "any evidence" tending to support the Commission's finding. *Id.* Our inquiry ends with the determination that Dr. Pratt's testimony supports the finding of byssinosis.

Defendant also indirectly attacks Dr. Pratt's testimony by challenging the Industrial Commission's determination that Mr. Camp was in fact exposed to cotton dust, one of the bases for Dr. Pratt's opinion. While defendant points to its evidence that dust levels, when measured, were below regulatory standards, defendant's own witness confirmed that it would be impossible to determine precisely how much cotton dust Mr. Camp had inhaled while working for defendant. Plaintiff also offered evidence both that measurements were not taken for substantial periods of Mr. Camp's employment and that he was, regardless of any measurements, exposed to significant amounts of cotton dust. Finally, Dr. Pratt testified that there is no medically accepted degree or period of time of exposure to cotton dust that must be present for a diagnosis of

byssinosis to be made. The record thus contains evidence competent to permit the Commission to decide, as it did, that Mr. Camp's exposure to cotton dust was sufficient to lead to byssinosis.

Defendant cites *Knight v. Cannon Mills Co.*, 82 N.C. App. 453, 347 S.E.2d 832, *disc. review denied*, 318 N.C. 507, 349 S.E.2d 861 (1986) as support for its position. In *Knight*, however, the doctors were required to rely upon circumstantial evidence to diagnose the plaintiff's condition. The decision hinges on the doctors' uncertainty as to the cause of plaintiff's lung disease given the plaintiff's smoking and disputed evidence of cotton dust exposure. By contrast, in this case, Dr. Pratt's scientific methodology eliminated the need to rely upon circumstances, excluded smoking as the cause of Mr. Camp's lung disease, and permitted a diagnosis of byssinosis based on the evidence in the record of Mr. Camp's exposure to cotton dust.

Because the Commission is the sole judge of witness credibility and the weight to be given to the evidence, we find no error in the Commission's determination that Mr. Camp was at an increased risk for byssinosis as a result of his work at the Berkley Mills plant.

II

Defendant also argues that the Commission erred in allowing Phil Cohen, a 12-year employee with the union UNITE, to testify as an expert witness on the issue of increased risk. The Commission's Opinion and Award does not, however, specifically refer to Mr. Cohen's testimony and any testimony as to increased risk was, in any event, unnecessary in light of Dr. Pratt's diagnosis of byssinosis.

Mr. Cohen's testimony did not in fact focus on whether Mr. Camp was at an increased risk of contracting byssinosis, but rather on the amount of cotton dust to which Mr. Camp was exposed by his work. Mr. Cohen testified that, outside of cotton mills, there is no measurable

amount of cotton dust and that the general public is not equally exposed to the same level of cotton dust as workers in mills processing cotton. He pointed out that "in one day [Mr. Camp] aspirates more cotton dust than most people do in a lifetime, or did when he was an employee working in the bleachery."

Rule 702 of the Rules of Evidence states: "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. Gen. Stat. §8C-1, Rule 702 (a) (2001). Based on the evidence offered of Mr. Cohen's experience with safety and health hazards in mills (including significant experience regarding cotton dust levels), we believe that the Commission did not abuse its discretion in admitting Mr. Cohen's testimony to assist the Commission in understanding about cotton dust levels. *See In re Faircloth,* 137 N.C. App. 311, 315, 527 S.E.2d 679, 682 (2000) (a trial court's decision that a witness is qualified to testify as an expert will not be overturned absent an abuse of discretion).

Additionally, Mr. Cohen's opinion duplicated the opinion expressed by defendant's own witness, Anthony Gasper, an OSHA specialist, who testified on cross-examination that plaintiff was exposed, as a result of his employment with defendant, to a greater level of cotton dust than a member of the general public. Since defendant has not objected to Mr. Gasper's testimony, it has waived its objection to testimony by Mr. Cohen to the same effect. *State v. Hyman,* 153 N.C. App. 396, 401, 570 S.E.2d 745, 748 (2002) (an objection to the admission of evidence is waived when the same or similar evidence is admitted without objection), *cert. denied*, 357 N.C. 253, __ S.E.2d __ (2003).

We, therefore, overrule defendant's assignment of error as to the admissibility of Mr. Cohen's testimony.

III

Finally, defendant argues that the Full Commission erred in failing to grant defendant credit under N.C. Gen. Stat. §97-42 (2001) for any short-term or long-term disability benefits paid to plaintiff. We cannot determine from the record whether defendant properly raised this issue before the Full Commission and, therefore, remand for further findings. On remand, if the Commission determines that defendant did argue this issue before the Full Commission, then the Commission must make findings of fact and conclusions of law as to whether defendant's payments qualify for a credit under N.C. Gen. Stat. §97-42.

Affirmed in part and remanded in part.

Chief Judge EAGLES and Judge HUNTER concur.

Report per Rule 30(e).