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NO. COA09-1125

NORTH CAROLINA COURT OF APPEALS

Filed: 20 July 2010

JEROME A. SMITH,
Plaintiff-employee,

v.

North Carolina
Industrial Commission
No. 763801

VALLEY PROTEINS,
Defendant-employer,

and

ESIS RISK MANAGEMENT,
Defendant-carrier

Appeal by plaintiff from Opinion and Award entered 23 June 2009 by the Industrial Commission. Heard in the Court of Appeals 10 February 2010.

Crumley Roberts, LLP, by Michael T. Brown, Jr. and Jacalyn D. Ackerman, for plaintiff-appellant.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Adam E. Whitten and M. Duane Jones, for defendant-appellee.

STEELMAN, Judge.

The Industrial Commission's findings of fact that plaintiff failed to prove that his work tasks as a truck driver placed him at a greater risk than the general public of developing a rotator cuff tear, and that his job duties caused his rotator cuff tear were supported by competent evidence. The Commission did not err in

concluding that plaintiff did not suffer a compensable occupational disease under N.C. Gen. Stat. § 97-53(13).

I. Factual and Procedural Background

Jerome A. Smith (plaintiff) was employed by Valley Proteins (defendant) as a truck driver. Plaintiff was responsible for going to restaurants, schools, and other businesses to pick up grease. These businesses stored the grease either in dumpsters or cylindrical barrels. After arriving at one of his scheduled stops, plaintiff would park his truck as close to the grease containers as possible. Plaintiff would then remove the lids from whichever type of container was present.

When servicing a dumpster, plaintiff would remove a hose from his truck, attach it to the suction pump on the truck, and use that hose to suction the grease from the dumpster. When servicing a barrel, plaintiff would first manually unhook the tailgate from the truck, and would then lower it using hydraulic controls. Plaintiff then covered the open end of the barrel with a plastic bag, tilted the barrel onto its edge, and rolled it onto the lowered tailgate of the truck. After positioning both the barrel and himself on the tailgate, plaintiff would use the hydraulic controls to lift the tailgate. If the grease needed to be heated to empty the barrel, plaintiff would manually manipulate the barrel into the "hot house," where hot water was used to raise the temperature of the barrel and grease to a point where it could be poured out of the barrel. Once completed, or if heating wasn't required, plaintiff

would push the barrel into the dumping station, and would use the hydraulic controls to dump the barrel into the truck. After returning the barrels and the tailgate to their proper positions, plaintiff would proceed to his next stop.

Plaintiff testified that around mid-November 2006 he experienced a sharp pain in his left shoulder while moving one of the grease barrels. He lowered the container back to the ground, "stepped off of it for a few minutes," and the pain subsided. He reported the pain to his supervisor upon finishing his shift.

Plaintiff sought treatment for "progressive pain with reduced mobility of the left shoulder over the past year" on 25 January 2007 from his primary care physician, Dr. Margaret E. Simpson. Plaintiff underwent an MRI of his left shoulder on 1 February 2007, which revealed a "small full thickness tear of the distal supraspinatus tendon," as well as "supraspinatus tendinopathy and mild infraspinatus tendinopathy."

Plaintiff was then examined by Dr. Stanley Harrison (Dr. Harrison) on 15 February 2007. Dr. Harrison's report indicated that plaintiff had shoulder pain for the "last six months," and had received a cortisone injection in his right shoulder a year previously due to arthritis. Dr. Harrison reviewed plaintiff's MRI and diagnosed plaintiff with a "small full-thickness tear of the distal supraspinatus but no retraction . . . some supraspinatus tendinopathy and distal infraspinatus tendinopathy." Dr. Harrison prescribed six weeks of physical therapy and pain-killers, and recommended surgery if the condition persisted. Plaintiff returned

to Dr. Harrison on 29 March 2007 complaining of constant pain in the left shoulder. Dr. Harrison recommended surgery.

Plaintiff sought a second opinion from Battleground Urgent Care on 30 March 2007. At this evaluation, plaintiff stated that his pain began while lifting grease barrels in November 2006. On the intake form, however, plaintiff stated that he had suffered the same pain for six months prior to the visit. Plaintiff was referred back to Dr. Harrison for surgery.

On 15 May 2007, plaintiff applied for short-term disability through his employer. On 28 June 2007, Dr. Harrison completed the physician's statement portion of the application and indicated that the condition causing the disability was not related to his employment. On 27 June 2007, plaintiff underwent surgery on his left shoulder. Plaintiff worked up until the day of his surgery. Dr. Harrison released plaintiff to return to work on 7 April 2008 with permanent restrictions that plaintiff could perform "heavy duty" work with regards to climbing, standing, walking, lifting floor to waist, and lifting waist to shoulders, but was restricted to "medium duty" work with regards to overhead lifting and carrying. Dr. Harrison also assigned a ten percent permanent partial disability rating to plaintiff's left arm.

On 18 April 2008, plaintiff returned to work, but was assigned to drive a "night shuttle" from Greensboro to Wadesboro, North Carolina, which did not require plaintiff to handle any barrels. Plaintiff continues to work for defendant in this capacity.

On 13 April 2007, prior to plaintiff's surgery, defendants filed a Form 19 with the Industrial Commission reporting plaintiff's injury and a Form 61 denying that the injury was compensable. Plaintiff filed a Form 18 reporting the injury and a Form 33 requesting a hearing on 28 August 2007.

The Full Commission entered an Opinion and Award on 23 June 2009 denying plaintiff's claim and holding that plaintiff had not proven by the greater weight of the evidence that the repetitive heavy tasks required by his employment as a truck driver placed him at greater risk than the general public of developing a rotator cuff tear or that his rotator cuff tear arose as a result of an accident occurring in the course and scope of his employment.

Plaintiff appeals.

II. Standard of Review

Appellate review of an Opinion and Award from the Industrial Commission "is generally limited to determining: (1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are justified by the findings of fact." *Hassell v. Onslow Cty. Bd. of Educ.*, 362 N.C. 299, 305, 661 S.E.2d 709, 714 (2008) (quotation omitted). The Commission's findings of fact are conclusive on appeal if they are supported by competent evidence, even if there is evidence to support a contrary finding. *Id.* The Commission is the sole judge of the credibility of the witnesses and the weight to be given to the evidence before it. *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999). Thus,

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." *Id.* at 681, 509 S.E.2d at 414 (quotation omitted).

Further, "failure to assign error to the Commission's findings of fact renders them binding on appellate review." *Estate of Gainey v. Southern Flooring & Acoustical Co.*, 184 N.C. App. 497, 501, 646 S.E.2d 604, 607 (2007) (citation omitted). We review the Commission's conclusions of law *de novo*. *Frost v. Salter Path Fire & Rescue*, 361 N.C. 181, 183-184, 639 S.E.2d 429, 432 (2007).

III. Increased Risk

In his first argument, plaintiff contends that the Full Commission's finding that plaintiff's work tasks did not place him at an increased risk of developing a rotator cuff tear compared to the general public was not supported by competent evidence. We disagree.

In workers' compensation cases, the plaintiff has the burden of establishing the compensability of his or her claim. *Holley v. ACTS, Inc.*, 357 N.C. 228, 231, 581 S.E.2d 750, 752 (2003). For an occupational disease to be compensable under N.C. Gen. Stat. § 97-53(13):

it must be (1) characteristic of persons engaged in the particular trade or occupation in which the [plaintiff] 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
[plaintiff's] employment.'

Chambers v. Transit Mgmt., 360 N.C. 609, 612, 636 S.E.2d 553, 555 (2006) (quoting *Rutledge v. Tultex Corp./Kings Yarn*, 308 N.C. 85, 93, 301 S.E.2d 359, 365 (1983)).

When considering whether a claimant suffers from an occupational disease, the term "employment" refers to the claimant's particular job. *Woody v. Thomasville Upholstery Inc.*, 146 N.C. App. 187, 201, 552 S.E.2d 202, 211 (2001), *per curiam rev'd on other grounds by Woody v. Thomasville Upholstery, Inc.*, 355 N.C. 483, 483, 562 S.E.2d 422, 422 (2002). In order to prove that his employment exposed him to a greater risk of the injury than the general public, plaintiff must establish (1) that his employment exposed him to some circumstance to a greater extent than the exposure experienced by the general public, and (2) that the circumstance to which plaintiff had a greater exposure is a cause of the injury from which plaintiff suffers. *Matthews v. City of Raleigh*, 160 N.C. App. 597, 608-09, 586 S.E.2d 829, 838 (2003).

When the issue of medical causation of the injury is beyond the knowledge and experience of laymen, "only an expert can give competent opinion evidence as to the cause of the injury." *Hassell*, 362 N.C. at 306, 661 S.E.2d at 714-715 (citing *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980)). An expert's opinion must be based on more than mere speculation and conjecture, otherwise it is not sufficiently reliable to qualify as competent opinion evidence to show medical causation. *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538

S.E.2d 912, 915 (2000). An expert's opinion testimony may be based on information or observations reasonably relied upon by experts in a particular field in forming opinions or inferences upon the subject. N.C. Gen. Stat. §8C, Rule 703 (2009); see, e.g., *Cherry v. Harrell*, 84 N.C. App. 598, 601-02, 353 S.E.2d 433, 436, cert. denied, 320 N.C. 167, 358 S.E.2d 49 (1987).

The Commission made the following finding of fact regarding whether plaintiff's job duties placed him at higher level of risk of suffering a rotator cuff tear than the general public:

14. Mr. William T. McClure, Jr., a certified ergonomic expert, observed an employee of defendant-employer performing plaintiff's job duties. Mr. McClure produced an Ergonomic Work Task Analysis and recorded a video of the job. Mr. McClure testified that all of plaintiff's work with respect to the barrels is done below shoulder level. It was his opinion, and the Full Commission finds as fact, that "the work tasks do not place the truck driver at an increased risk compared to the acceptable risk for development of musculoskeletal and/or cumulative trauma disorders to the upper extremity."

Plaintiff contends that this finding is not supported by competent evidence because McClure did not interview plaintiff personally, and did not observe plaintiff perform his job duties. Plaintiff argues that McClure's testimony does not tend to make whether plaintiff's job duties put him at greater risk than the general public of developing a rotator cuff injury more or less probable, was therefore not relevant, and was consequently inadmissible. Additionally, plaintiff contends that the Commission ignored evidence that would call McClure's credibility into

question, and ignored the testimony of Dr. Harrison and Dr. Michael Lauffenburger (Dr. Lauffenburger). We disagree.

McClure was tendered as an expert in the field of ergonomics without objection, and was found by the Commission to be an expert. McClure's expertise included making determinations as to whether there is an increased risk of developing conditions of the upper extremity based on the normal population performing a particular job. He testified concerning the meaning of "repetitive" work, defined by various peer-reviewed journals as to movements of the upper extremity body parts per hour, and explained that each individual body part has a threshold number of movements per hour that is considered acceptable. On 29 May 2008, McClure observed Mike Copeland, another truck driver employed with defendant, who performed the same job duties as plaintiff over an eight-hour period. McClure recorded his observations of the physical demands of the tasks performed. He testified that 80-90% of plaintiff's job tasks occurred below shoulder level. Plaintiff testified that he would have to slide barrels weighing several hundred pounds in order to dump them, but McClure testified that while rolling the grease barrels plaintiff's hands would be placed below shoulder level, and that this particular task encompassed less than 1% of the workday. McClure concluded that "the work tasks do not place the truck driver at an increased risk compared to the acceptable risk for development of musculoskeletal and/or cumulative trauma disorders to the upper extremity."

McClure was found to be an expert by the Commission, and he was qualified to offer his opinion as to whether the job placed plaintiff at an increased risk of sustaining a rotator cuff injury as compared to the general public. McClure observed the very same job that plaintiff performed. Since the evaluation of an occupational disease hinges on the characteristics of the particular job, and not upon the manner in which a claimant performs that job, plaintiff's contention that McClure's observations are irrelevant because he did not observe plaintiff personally performing the job is not supported by the law of this state. See *Woody*, 146 N.C. App. at 201, 552 S.E.2d at 211; see also *Bass v. Morganite, Inc.*, 166 N.C. App. 605, 610, 603 S.E.2d 384, 387 (2004) (upholding the Commission's conclusion that the plaintiff failed to prove she suffered an occupational disease where the expert had observed video of another employee demonstrating plaintiff's particular job duties in a similar fashion). McClure's testimony provided competent evidence to support the Commission's finding that plaintiff's work tasks did not place him at an increased risk of sustaining a rotator cuff tear.

Plaintiff contends that the Commission ignored competent evidence from Dr. Harrison and Dr. Lauffenburger because it did not specifically reference their testimony in finding of fact 14. Plaintiff correctly contends that, "[b]efore making findings of fact, the Industrial Commission must consider *all* of the evidence. The Industrial Commission may not discount or disregard any

evidence, but may choose not to believe the evidence *after* considering it." *Weaver v. American National Can Corp.*, 123 N.C. App. 507, 510, 473 S.E.2d 10, 12 (1996). However, the Commission "is the sole judge of the credibility of the witnesses and the weight to be given to their testimony, and may reject a witness' testimony entirely if warranted by disbelief of that witness." *Lineback v. Wake County Bd. of Comm'rs*, 126 N.C. App. 678, 680, 486 S.E.2d 252, 254 (1997) (citing *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 425 S.E.2d 454 (1993)).

In this case the Commission discussed the testimonies of Dr. Harrison and Dr. Lauffenburger in findings of fact 12 and 13, demonstrating that the Commission considered both of their testimonies. The Commission was not required to specifically state why it did not find the testimony of Dr. Harrison or Dr. Lauffenburger credible with respect to each issue presented to the Commission. *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116-17, 530 S.E.2d 549, 553 (2000). Instead, the Commission must merely "find those facts which are necessary to support its conclusions of law." *Peagler v. Tyson Foods, Inc.*, 138 N.C. App. 593, 602, 532 S.E.2d 207, 213 (2000) (quoting *London v. Snak Time Catering, Inc.*, 136 N.C. App. 473, 476, 525 S.E.2d 203, 205 (2000)). The Commission's failure to specifically cite the testimony of Dr. Lauffenburger or Dr. Harrison in finding of fact 14 does not indicate that their testimonies were not considered.

This argument is without merit.

IV. Causation

In his second argument, plaintiff contends that the Commission's conclusion that plaintiff failed to prove his rotator cuff tear was caused by his job duties was not supported by competent evidence, and that the Commission impermissibly ignored competent evidence to the contrary. We disagree.

Plaintiff has the burden of establishing the compensability of his claim. *Holley*, 357 N.C. at 231, 581 S.E.2d at 752. Accordingly, plaintiff has the burden of proving that his job duties caused his injury. *Chambers*, 360 N.C. at 612, 636 S.E.2d at 555. The Commission is the sole judge of the credibility of the witnesses and the weight to be given to the evidence before it. *Adams*, 349 N.C. at 680, 509 S.E.2d at 413.

The Commission specifically addressed its reasons for finding that the testimonies of Dr. Harrison and Dr. Lauffenburger failed to show that plaintiff's injury was causally related to his job duties in findings of fact 12 and 13. Plaintiff's contention that the Commission ignored either of their testimonies as it relates to causation is unfounded for the reasons discussed above.

Our scope of review is limited to determining whether there was competent evidence to support the Commission's findings of fact. *Hassell*, 362 N.C. at 305, 661 S.E.2d at 714. In finding of fact 12, the Commission stated that due to inconsistencies in Dr. Harrison's opinion on causation, and his mistaken belief that plaintiff engaged in overhead activity, his testimony failed to show that plaintiff's rotator cuff injury was causally related to his job duties.

On 28 June 2007, Dr. Harrison noted on plaintiff's disability claim form that plaintiff's condition was not related to his employment. On 8 August 2007, Dr. Harrison wrote a letter suggesting that plaintiff's shoulder injury "appear[ed] to be an over-use-type injury with attritional tearing of the supraspinatus tendon. The patient's employment involves frequent and repetitive overhead activity." Upon hearing a description of the job, Dr. Harrison conceded in his deposition testimony that none of plaintiff's job activity involved overhead work. In March 2008, in response to a questionnaire sent by defendant's counsel, Dr. Harrison stated that he could not tell whether plaintiff's job duties caused his injury. In his June 2008 deposition, Dr. Harrison acknowledged that it was possible that the tearing he saw inside plaintiff's shoulder could have resulted from a singular event in November 2006, and that by the time he performed plaintiff's surgery in June 2007, a prior acute tear could have manifested itself as an attritional tear. However, Dr. Harrison also indicated multiple times that he believed the job duties caused plaintiff's injuries. These inconsistencies, when coupled with the evidence presented by McClure about the lack of overhead work, present competent evidence to support the Commission's finding that Dr. Harrison's testimony failed to show that plaintiff's injury was caused by his job duties. Plaintiff's insistence that other portions of Dr. Harrison's testimony adequately explain away the inconsistencies is beyond the scope of

this Court's review, as it asks this Court to reweigh the evidence. *Hassell*, 362 N.C. at 305, 661 S.E.2d at 714.

In finding of fact 13, the Commission found that although Dr. Lauffenburger rendered an opinion that plaintiff's injury was work related, he was of the opinion that it was a one-time injury. The Commission noted that Dr. Lauffenburger also testified that he could not say with medical certainty whether plaintiff's job duties caused his shoulder problems if plaintiff was doing below-shoulder-level work for five to ten minutes out of every thirty to sixty minutes. As a result, the Commission found that his testimony failed to show plaintiff's rotator cuff injury was causally related to his job duties.

Dr. Lauffenburger's report from his initial examination of plaintiff indicated that plaintiff reported injuring his shoulder in November of 2006. It further stated that plaintiff reported that he had no symptoms of any kind in the left shoulder prior to that time. Dr. Lauffenburger further testified that Dr. Harrison's observations about the nature of the tear in plaintiff's shoulder could have been the result of an acute injury that occurred in November of 2006. Dr. Lauffenburger never observed the plaintiff's job being performed. McClure testified that plaintiff's job duties required him to reach above his shoulders very infrequently, and that between 80-90% of plaintiff's work occurred below shoulder level. While Dr. Lauffenburger's testimony at times also offers support for plaintiff's position, it is well-established that conflicts in the evidence are for the Commission to resolve in its

role as the fact finder in workers' compensation cases. *Cauble v. The Macke Co.*, 78 N.C. App. 793, 795, 338 S.E.2d 320, 321 (1986). There was competent evidence to support the Commission's finding of fact 13.

Plaintiff also assigns error to finding of fact 5, contending that the Commission incorrectly found that plaintiff testified that he made 50-60 stops per week, when plaintiff's testimony was that he typically made 50-60 stops per day. However, the Commission did note the correct number of stops per day in finding of fact 2. Plaintiff also contends that finding of fact 5 is erroneous because it finds that plaintiff estimated that an hour of time would pass between stops during which he had to service barrels. Plaintiff did testify that there were times when an hour would pass between stops that required servicing barrels. To the extent that finding of fact 5 may be erroneous, it is clear that the Commission did not rely on the erroneous portions in making further findings. Furthermore, as there is competent evidence to support the other dispositive findings of fact discussed *supra*, any error in finding of fact 5 is harmless.

V. Conclusions of Law

Finally, plaintiff contends that the Commission erred in its conclusions of law (nos. 3, 4, and 5) that plaintiff did not prove by the greater weight of the evidence that: 1) his job duties placed him at greater risk than the general public of developing a rotator cuff tear, 2) that those tasks caused him to develop a rotator cuff tear, and 3) that he sustained an injury by accident.

We review the Commission's conclusions of law *de novo*, but review is limited to whether the findings of fact support the Commission's conclusions of law. *Ramsey v. Southern Indus. Constructors Inc.*, 178 N.C. App. 25, 30, 630 S.E.2d 681, 685, *cert. denied*, 361 N.C. 168, 639 S.E.2d 652 (2006).

All three of these conclusions are supported by the findings discussed in the preceding sections of this opinion. Conclusion of law 3 is specifically supported by finding of fact 14, which states that "the work tasks do not place the truck driver at an increased risk compared to the acceptable risk for development of musculoskeletal and/or cumulative trauma disorders to the upper extremity." Conclusion of law 4 is specifically supported by findings of fact 12 and 13, which state the reasons the Commission did not find the testimonies of Dr. Harrison and Dr. Lauffenburger conclusive on the issue of medical causation. Conclusion of law 5 is likewise supported by findings of fact 12 and 13, as an "injury by accident" must "aris[e] out of and in the course of the employment." N.C. Gen. Stat. §97-2(6) (2009). The Commission found in findings of fact 12 and 13 that plaintiff failed to prove that his rotator cuff injury was causally related to his job duties.

We hold that the Commission's conclusions of law and Award are supported by its findings. *Clark v. Wal-Mart*, 360 N.C. 41, 43, 619 S.E.2d 491, 492 (2005).

This argument is without merit.

VI. Disability and Compensation

We need not address plaintiff's additional arguments regarding whether the Commission erred in not finding that plaintiff was disabled as a result of his torn rotator cuff and was therefore entitled to indemnity, medical benefits, attorneys fees, and litigation costs that may have been awarded if the Commission had found plaintiff's injury compensable. It is well established that the plaintiff first has to prove a compensable occupational disease and then that the disease caused a disability before an award of compensation can be granted. *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 185, 345 S.E.2d 374, 378 (1986). These arguments are without merit.

AFFIRMED.

Judges MCGEE and BEASLEY concur.

Report per Rule 30(e).