

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA10-211

NORTH CAROLINA COURT OF APPEALS

Filed: 4 January 2011

STEPHANIE P. HYMAN,
Employee-Plaintiff,

v.

From the North Carolina
Industrial Commission
I.C. File Number 806721

DIVISION OF MARINE FISHERIES,
Employer-Defendant,

and

CORVEL, INC.,
Third Party Administrator.

Appeal by plaintiff from opinion and award entered 9 November 2009 by the North Carolina Industrial Commission. Heard in the Court of Appeals 14 October 2010.

Brumbaugh, Mu & King, P.A., by Nicole D. Hart, for plaintiff.

Attorney General Roy Cooper, by Assistant Attorney General Karissa J. Davan, for the State.

ELMORE, Judge.

Stephanie P. Hyman (plaintiff) appeals from an opinion and award by the North Carolina Industrial Commission denying plaintiff's claim for worker's compensation benefits. After careful review, we affirm.

Plaintiff began her employment with the North Carolina Division of Marine Fisheries (defendant employer)¹ in May 2000. Plaintiff's work entailed entering data from trip tickets for commercial fishing trips into her computer. She began experiencing problems with her right shoulder, elbow, and wrist in 2005, and in January 2005 she saw Dr. Harold M. Vandersea for treatment. She was diagnosed with bursitis of the right shoulder and epicondylitis of the right elbow, but sought no additional treatment.

Two years later, in March 2007, plaintiff began experiencing problems with her left shoulder, arm, and hand, as well as her neck, and sought treatment from an urgent care facility. There, she was diagnosed with left shoulder strain and was referred to physical therapy - specifically, to Dr. Thomas E. Bates at Carteret Surgical Associates. Plaintiff first saw Dr. Bates on 4 June 2007, at which point he diagnosed her with "left shoulder pain consistent with rotator cuff tendinitis versus bursitis versus rotator cuff tear." She received an injection and was instructed to perform exercises intended to strengthen her rotator cuff. On 30 June 2007, plaintiff saw Dr. Bates again and was found to have improved.

On 8 October 2007, plaintiff returned to Dr. Vandensea complaining of severe pain in her right shoulder, elbow, and wrist and the right side of her neck. Dr. Vandersea recommended that plaintiff undergo an MRI of her right shoulder, and Dr. Bates

¹We note that, while the Industrial Commission's opinion and award specifies the third party to this case as "CORVEL, INC., Third Party Administrator," the third stipulation recited in the opinion and award names the third party administrator as "Key Risk Management Services, Inc."

ordered the test; it revealed a partial thickness rotator cuff tear. On 22 October 2007, Dr. Bates diagnosed plaintiff with probable right carpal tunnel syndrome, but EMG nerve conduction studies did not show evidence of it. Dr. Bates issued the restriction of no repetitive activities at work.

On 17 December 2007, Dr. Bates diagnosed plaintiff with impingement syndrome of the right shoulder and rotator cuff tendinitis of the left shoulder. Plaintiff was again instructed not to perform repetitive overhead activities or do heavy lifting. On 27 December 2007, an ergonomics study found that plaintiff's job "placed her at a low risk of developing shoulder tend[i]nitis and related pain and discomfort."

Plaintiff ended her employment with defendant on 2 January 2008 and began receiving unemployment compensation on that date. On 3 January 2008, plaintiff underwent a physical abilities test at Carteret Surgical Associates; that test "found that she could perform sedentary and light duty work and could return to work as a data entry operator." Plaintiff eventually obtained a new position with another company as a career coach.

Plaintiff filed the appropriate forms requesting worker's compensation benefits from defendant, and defendant filed the appropriate forms denying the request. Plaintiff requested a hearing. Deputy Commissioner John B. Deluca conducted a hearing and entered an opinion and award denying compensation on 23 April 2009. Plaintiff appealed to the Full Commission, which affirmed the opinion and award of the Deputy Commissioner with minor

changes. Plaintiff now appeals that opinion and award to this Court.

Plaintiff argues that the Full Commission erred in finding that (1) plaintiff failed to prove that her employment placed her at an increased risk of developing the medical conditions of which she complains and (2) plaintiff's employment with defendant caused or contributed significantly to these conditions. Plaintiff does not specify, but from her argument it appears that she takes issue with three findings of fact and two conclusions of law.

First, finding of fact 10, which states:

10. Dr. Vandersea testified that it was "unlikely" that Plaintiff was at an increased risk of developing bursitis or rotator cuff tear due to her work duties unless she was reaching or working at shoulder height or above. He further testified that her job duties could place her at an increased risk, but admitted that he did not really "have any information about her job."

Next, finding of fact 13, which states:

13. Dr. Bates testified that Plaintiff's symptoms were not what would be typical of a data entry operator. He also testified that he could not say that Plaintiff's job duties caused her to have an increased risk of developing such problems, though he could state that repetitive activities can cause tendinitis and bursitis of the shoulder.

Finally, finding of fact 19, which states: "19. The competent evidence of record fails to establish that Plaintiff's employment with Defendant-Employer placed her at an increased risk of developing her upper extremity conditions or that this employment caused or contributed significantly to said conditions."

The relevant conclusions of law state:

1. Plaintiff failed to establish by the greater weight of the evidence that she suffered an injury by accident in the course and scope of her employment with Defendant-Employer N.C. Gen. Stat. § 97-2(6).

2. Plaintiff failed to establish by the greater weight of the evidence that she suffered an occupational disease as a result of her employment with Defendant-Employer. N.C. Gen. Stat. § 97-53(13).

Plaintiff argues that the Full Commission ignored portions of the doctors' testimony regarding causation, and thus the findings of fact above were in error, resulting in the conclusions of law based on those findings to be in error as well. We disagree.

In reviewing the Full Commission's opinion and award, our review is limited to

(1) whether the Commission's findings of fact are supported by competent evidence; and (2) whether the conclusions of law are supported by the findings of fact. Findings of fact are supported by competent evidence, and therefore conclusive on appeal, [i]f the record contains any evidence tending to support the finding.

Lewis v. N.C. Dep't of Corr., 167 N.C. App. 560, 564, 606 S.E.2d 199, 202 (2004) (quotations and citations omitted; alteration in original). As our Supreme Court recently put it,

[f]or an occupational disease to be compensable under N.C.G.S. § 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) (quotations and citations omitted; alterations in original).

In support of her argument that the above findings of fact were erroneous, plaintiff points to two pieces of testimony from the doctors' depositions. Dr. Bates's deposition² included the following exchange:

Q. . . . [D]o you have an opinion to a reasonable degree of medical certainty as to whether [plaintiff's] job duties placed [plaintiff] at an increased risk of developing tendinitis in her right and left shoulders?

A. They could. Typically, this is more [transcript obscured] with overhead type activities, though.

Q. So when you say that it could, do you have an opinion to a reasonable degree of medical certainty as to whether it's more likely than not that her job duties placed her at an increased risk for developing these problems?

A. I cannot say that they caused her to have an increased risk than anybody else, but I can say that repetitive type activities can cause some tendinitis and bursitis of the shoulder.

Dr. Vandersea's deposition included this exchange:

Q. . . . [D]o you have an opinion to a reasonable degree of medical certainty as to whether [plaintiff's] job duties . . . placed her at an increased risk of developing either subacromial bursitis or a rotator cuff tear compared to members of the general public not so employed?

A. That's difficult to answer not knowing specifically what she had to do. If she was sitting at a desk at a computer entering information, it would be unlikely to cause a

²We note that the transcript of Dr. Bates's deposition provided to this Court is in all capital letters. We decline to reproduce it that way here.

rotator cuff problem or a subacromial bursitis. If she was reaching and placing things, getting records or data off of a higher shelf and bringing them down that could possibly cause the bursitis or rotator cuff irritation.

Q. But it would require at least shoulder height or reaching --

A. Usually shoulder height or above. Things done below shoulder height generally don't irritate a shoulder bursitis or a rotator cuff problem.

Dr. Vandersea also stated that plaintiff's job duties "could aggravate or cause [plaintiff's] epicondylitis."

In essence, then, the Full Commission's findings of fact are restatements of the deposition testimony on which plaintiff herself relies. We hold that these findings of fact are supported by competent evidence.

Plaintiff's brief details the law regarding the required nexus between the disease complained of and the duties of employment, but does not explain to this Court how that law supports her argument that the conclusions of law are in error. Regardless, we hold that the findings of fact above support the Commission's conclusions of law. As such, plaintiff's arguments are overruled.

Affirmed.

Judges JACKSON and THIGPEN concur.

Judge JACKSON concurred in this opinion prior to 31 December 2010.

Report per Rule 30(e).