NO. COA10-895
NORTH CAROLINA COURT OF APPEALS

Filed: 5 April 2011

JACQUELINE REID,
Employee,
Plaintiff,

v. North Carolina Industrial Commission
I.C. No. 823914

HOSPIRA, INC.,
Employer,
Defendant.

Appeal by plaintiff from opinion and award entered 19 January 2010 by the North Carolina Industrial Commission. Heard in the Court of Appeals 13 January 2011.

Mario M. White for plaintiff-appellant.

Young Moore and Henderson P.A., by Jeffrey T. Linder and Angela Farag Craddock, for defendants-appellants.

HUNTER, Robert C., Judge.

Jacqueline Reid ("plaintiff") appeals from the Industrial Commission's opinion and award in which the Commission determined that plaintiff's shoulder injury was an "acute injury" rather than "a gradual disease process," and, therefore, was not a compensable

injury entitling her to workers' compensation benefits. After careful review, we affirm.

Background

At the time of her injury, plaintiff was employed as a production operator by Hospira, Inc. ("defendant"), a pharmaceutical manufacturer. Plaintiff worked in the "finishing department" where six stations were set up for packaging defendant's product in preparation for shipping. Plaintiff worked at station one, loading carts with boxes that contained liquid-filled bottles. Typically, these boxes weighed between 25 to 40 pounds. When plaintiff first began working in the finishing department, she had a male partner at station one who would assist in lifting the boxes. After six months, he was terminated.

Plaintiff testified that on the day of her injury, 8 October 2007, the boxes she was lifting weighed 40 pounds and that she lifted approximately 240 boxes during a three-hour shift because her partner was unable to lift the boxes. At one point during her shift, plaintiff felt a "pop" in her right shoulder as she was lifting a box of bottles onto a cart. Plaintiff continued her shift without interruption. Plaintiff testified that the pop in her shoulder was the first time she experienced any pain in her shoulder.

Plaintiff was first treated on 12 October 2007 at Clayton Medical Associates. She was told that she likely had a shoulder strain and could return to light duty work. Defendant placed

plaintiff on the "packaging line" where she loaded boxes with liquid-filled bottles weighing around 10 pounds each. Plaintiff testified that she reported to her supervisor that she "was in a lot of pain[.]" On 26 October 2007, plaintiff was treated at Raleigh Orthopedic where physicians informed her that she was suffering from a shoulder strain and that she could return to light duty work. Although defendant claims that light duty work was available, plaintiff did not return to work after 29 October 2007. Plaintiff was scheduled to begin physical therapy in November, but on 5 November 2007, her claim for workers' compensation was denied by defendant and she did not attend her physical therapy appointments. On 16 November 2007, defendant sent plaintiff a letter stating that plaintiff was deemed to have voluntarily resigned from her employment since she had failed to appear for work.

Plaintiff then sought treatment from Dr. David Rockwell on 4 December 2007. Dr. Rockwell ordered x-rays and diagnosed plaintiff with bursitis tendinitis. Dr. Rockwell instructed plaintiff not to work at that time. Dr. Rockwell subsequently ordered an MRI, and, on 7 January 2008, he diagnosed plaintiff with a small rotator cuff tear about 4 millimeters in length. Dr. Rockwell instructed plaintiff to perform exercises at home. After plaintiff did not obtain pain relief from conservative treatment, Dr. Rockwell performed surgery to repair plaintiff's rotator cuff on 8 December

2008. After several follow-up visits, plaintiff's last visit with Dr. Rockwell was on 19 March 2008. At that time, Dr. Rockwell instructed plaintiff that she could return to work but that she should not perform "repetitive work above chest height" and that she should not "lift significant amounts of weight . . . above waist height."

On 22 January 2008, plaintiff filed a Form 33 requesting a hearing before the Industrial Commission. A hearing was held on 12 March 2009. The deputy commissioner issued an opinion and award on 13 July 2009 denying plaintiff's claim for workers' compensation benefits. Plaintiff appealed to the Full Commission, which filed an opinion and award on 19 January 2010 affirming the deputy commissioner's opinion and award.

Standard of Review

The standard of appellate review of an opinion and award of the Industrial Commission in a workers' compensation case is 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." *Clark v. Wal-Mart*, 360 N.C. 41, 43, 619 S.E.2d 491, 492 (2005). As the "Commission is the sole judge of the credibility of the witnesses and the weight of the evidence[,]" *Hassell v. Onslow County Bd. of Educ.*, 362 N.C. 299, 305, 661 S.E.2d 709, 714 (2008), its findings are conclusive and binding on appeal "so long as there is some 'evidence of substance which directly or

by reasonable inference tends to support the findings, . . . even though there is evidence that would have supported a finding to the contrary[,]'" *Shah v. Howard Johnson*, 140 N.C. App. 58, 61-62, 535 S.E.2d 577, 580 (2000) (quoting *Porterfield v. RPC Corp.*, 47 N.C. App. 140, 144, 266 S.E.2d 760, 762 (1980)), *disc. review denied*, 353 N.C. 381, 547 S.E.2d 17 (2001). The Commission's findings may be set aside on appeal only "when there is a complete lack of competent evidence to support them[.]" *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 914 (2000). The Commission's conclusions of law are reviewed *de novo* on appeal. *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004).

Analysis

I.

"For a disability to be compensable under the Workers' Compensation Act, it must be either the result of an accident arising out of and in the course of employment or an occupational disease." *Gibbs v. Leggett and Platt, Inc.*, 112 N.C. App. 103, 107, 434 S.E.2d 653, 656 (1993) (internal quotation marks omitted). It is undisputed that plaintiff's shoulder injury occurred during the course and scope of her employment. It is also undisputed that the injury was not the result of an accident as defined by the North Carolina Workers' Compensation Act. Plaintiff's argument on appeal

is that the Commission erred in determining that plaintiff's injury was not the result of an occupational disease.

"[A]n occupational disease is a diseased or morbid condition which develops gradually, and is produced by a series of events in employment occurring over a period of time. It is the cumulative effect of the series of events that causes the disease." *Henry v. A. C. Lawrence Leather Co.*, 234 N.C. 126, 131, 66 S.E.2d 693, 697 (1951). N.C. Gen. Stat. § 97-53 (2009) recognizes those diseases that qualify as occupational diseases for which an employer may be liable:

> Any disease, other than hearing loss covered in another subdivision of this section, which 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). In applying the statute, our Supreme Court has held that,

> [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) (citations and quotation marks omitted; alterations in original).

The determination of whether an illness or condition qualifies as an occupational disease under N.C. Gen. Stat. § 97-53(13) is a mixed question of fact and law. *Moore v. J.P. Stevens & Co.*, 47 N.C. App.744, 750, 269 S.E.2d 159, 163, *disc. review denied*, 301 N.C. 401, 274 S.E.2d 226 (1980). As the statute and the *Chambers* test indicate, as a threshold matter, plaintiff must have a disease condition. Plaintiff must then establish that this disease is, by definition, an occupational disease that satisfies the *Chambers* three-prong test.

It is undisputed that plaintiff did not have any prior shoulder pain and that she felt a "pop" in her shoulder accompanied by a sudden onset of pain on 8 October 2007. Plaintiff argues that the record establishes that she had an underlying occupational disease, bursitis tendinitis, that led to her rotator cuff tear. As to this issue, plaintiff argues that the following findings of fact are not supported by competent evidence:

> 10. Plaintiff testified that she experienced a sudden, rather th[a]n gradual, onset of pain. Prior to October 8, 2007, plaintiff had never experienced any problems with her shoulder. The etiology of plaintiff's shoulder problems was not a gradual disease process, but rather

> was an acute injury that occurred on October 8, 2007.
>
> . . . .
>
> 15. Dr. Lymann Scott-William Smith testified by deposition that plaintiff experienced an "acute onset of pain" on October 8, 2007 and that there were no indications that plaintiff experienced a non-acute condition. . . .
>
> . . . .
>
> 24. There is insufficient evidence of record from which to determine by its greater weight that plaintiff's employment with defendant caused her to suffer a compensable occupational disease.

The evidence shows that Dr. Rockwell and Dr. Smith reached different conclusions regarding plaintiff's injury. Dr. Rockwell testified:

> [My] opinion is that repetitive lifting can result in, and in [plaintiff's] case likely did result in, a bursitis tendinitis. Because of the anatomy of her shoulder blade, ***she did develop the bursitis tendinitis***, and over time that can result and did result in a partial tear of the rotator cuff that necessitated her treatment.
>
> . . . .
>
> I feel that her work as described would more likely make her at risk for the tendinitis bursitis than the general public, given her otherwise anatomic structures of her shoulder.

(Emphasis added.) Dr. Smith testified:

> [T]ypically, and by no means always, a rotator cuff outright tear is a result of a single

> incident, and lifting something heavy with your arm outstretched would be one of those conditions. . . . [T]he work [plaintiff] does with her arm extended and repetitively lifting objects certainly can predispose you to a chronic problem that may in fact set you up for an acute tear.

Dr. Smith agreed with plaintiff's attorney on re-cross examination that a job requiring repetitive lifting of the kind plaintiff performed could place a person at greater risk of a rotator cuff tear, partial tear, or rotator cuff "problem" than the general public. Dr. Smith further testified that it was his opinion that plaintiff suffered from an "acute onset of pain," and there was no evidence that plaintiff suffered from a non-acute condition.

In sum, Dr. Rockwell testified that bursitis tendinitis can result in a rotator cuff tear and that plaintiff did, in fact, suffer from bursitis tendinitis as a result of her employment, which led to the rotator cuff tear. Dr. Smith testified in general terms that plaintiff's type of employment, which involves repetitive lifting, ***can*** cause a "chronic problem," but that rotator cuff tears are typically the result of a "single incident." Dr. Smith did not mention bursitis tendinitis. Specifically, with regard to plaintiff, Dr. Smith testified that plaintiff had an acute onset of pain on 8 October 2007 and there was no indication that plaintiff suffered from a non-acute condition.

The Commission found as fact:

> 18. Having considered the testimony of Dr. Smith and Dr. Rockwell, taken with their expertise, relative treatment histories with plaintiff, and knowledge of the physical requirements of defendant-employer's jobs, the Full Commission gives greater weight to the testimony and expert opinion of Dr. Smith.

It is well established that, although the evidence is conflicting, "this Court may set aside a finding of fact only if it lacks evidentiary support," *Rose v. City of Rocky Mount*, 180 N.C. App. 392, 400, 637 S.E.2d 251, 256 (2006) (internal citation and quotation marks omitted), *disc. review denied*, 361 N.C. 356, 644 S.E.2d 232 (2007), and, our "duty goes no further than to determine whether the record contains any evidence tending to support the [challenged] finding[s of fact]." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 115, 530 S.E.2d 549, 552 (2000) (internal citation and quotation marks omitted). Moreover, "the ultimate fact-finding function [rests] with the Commission — not the hearing officer. It is the Commission that ultimately determines credibility, whether from a cold record or from live testimony." *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 413 (1998).

We recognize that this Court has held that an acute rotator cuff tear constituted an occupational disease; however, in these cases, there was evidence that the tear was a result of an underlying gradual disease process. *See, e.g., Flynn v. EPSG Mgmt. Serv.*, 171 N.C. App.

353, 357, 614 S.E.2d 460, 463 (2005) (holding that plaintiff's rotator cuff tear was an occupational disease where the evidence showed that plaintiff was experiencing tightness and stiffness in his shoulder and a physician testified that the last act of lifting his arm above his head was "the final straw that broke the camel's back"); *Garren v. P.H. Glatfelter Co.*, 131 N.C. App. 93, 95, 504 S.E.2d 810, 812 (1998) (holding that plaintiff's rotator cuff tear was an occupational disease where the evidence showed that plaintiff began experiencing pain in her shoulder three years prior to seeing a doctor); *Gibbs*, 112 N.C. App. at 105, 434 S.E.2d at 654 (upholding the Commission's determination that plaintiff suffered from an occupational disease where the Commission found that the plaintiff had a "slow, but steady tear" of his rotator cuff that was preceded by months of pain).

To be clear, it is not our holding that a spontaneous rotator cuff tear can never be classified as an occupational disease. The caselaw is clear on that matter. Nevertheless, plaintiff must show that she did, in fact, have an underlying disease condition that led to the tear. Despite Dr. Rockwell's testimony that plaintiff's injury was, in fact, due to a gradual disease process, we hold that Dr. Smith's testimony provided evidentiary support for the Commission's findings of fact related to the cause of plaintiff's injury. As the Commission was entitled to do, it gave greater weight to Dr. Smith's testimony.

Likewise, plaintiff argues that the following conclusions of law are erroneous:

> 7. In this case, plaintiff has not proven by the greater weight of the evidence that her employment with defendant placed her at greater risk than the general public of contracting bursitis tend[i]nitis or any other occupational disease.
>
> 8. In this case, plaintiff has not proven by the greater weight of the evidence that her employment with defendant caused her to contract bursitis tend[i]nitis or any other occupational disease.
>
> . . . .
>
> 10. In this case[,] plaintiff failed to meet her burden of proving the existence and extent of disability that resulted from a work-related injury.
>
> 11. Given the foregoing, plaintiff's claim is not compensable under the provisions of the North Carolina Workers' Compensation Act.

We hold that the Commission erred in conclusion of law seven when it determined that the evidence did not establish that plaintiff was at a "greater risk than the general public of contracting bursitis tend[i]nitis or any other occupational disease." Both Dr. Rockwell and Dr. Smith testified that repetitive lifting can cause a chronic problem and that anyone performing plaintiff's specific job is at a greater risk than the general public of developing a chronic problem, which can lead to a rotator cuff tear. Although Dr. Smith did not specify exactly what he meant by a "chronic problem," Dr. Rockwell

labeled this chronic problem as bursitis tendinitis. Therefore, all the evidence presented at the hearing established that plaintiff was at a greater risk of developing a "chronic problem" that could lead to a rotator cuff tear. *See Garren*, 131 N.C. App. at 97, 504 S.E.2d at 813 (stating that, "[b]oth doctors also testified that due to her occupation, plaintiff had a greater increased exposure to rotator cuff injury than members of the general public"). Nevertheless, the Commission concluded, and the findings based on Dr. Smith's testimony support, that plaintiff did not prove that she had a chronic problem such as bursitis tendinitis; rather, she suffered an acute injury on 8 October 2007. We hold that conclusions of law eight, 10, and 11 are supported by the findings of fact in this case.

Plaintiff briefly argues that the Commission failed to find as fact that plaintiff suffered from two of the specifically enumerated occupational diseases in N.C. Gen. Stat. § 97-53. Plaintiff claims that the evidence supports a finding that plaintiff suffered from "bursitis" pursuant to N.C. Gen. Stat. § 97-53(17) and "tenosynovitis" pursuant to N.C. Gen. Stat. § 97-53(21). This argument is without merit. N.C. Gen. Stat. § 97-53(17) lists "[b]ursitis due to intermittent pressure in the employment." N.C. Gen. Stat. § 97-53(21) lists "[t]enosynovitis, caused by trauma in employment." There is no evidence in the record suggesting that plaintiff suffered bursitis due to intermittent pressure, or tenosynovitis caused by

trauma. Moreover, as stated *supra*, Dr. Smith's testimony supports the Commission's finding that plaintiff did not suffer from a gradual disease process.

II.

Next, plaintiff argues that the Commission erred in making findings of fact and conclusions of law regarding plaintiff's termination from Hospira. Plaintiff argues that the following findings of fact were not supported by competent evidence in the record:

> 11. Plaintiff was seen at Clayton Medical Associates on October 12, 2007, reporting that she experienced a pop in her right shoulder while lifting cartons of bottles on October 8, 2007, and that she suffered subsequent pain. She was released to return to work with restrictions. These restrictions were to last one week. Plaintiff was also released to return to work at light-duty after a October 19, 2007 appointment at Clayton Medical Associates and again on October 26, 2007 by Dr. Lyman Smith at Raleigh Orthopaedics. Defendant accommodated plaintiff's restrictions and plaintiff returned to work on October 12, 2007 at light duty in the "packaging room."
>
> 12. Although multiple medical professionals identified light-duty work as appropriate for plaintiff, plaintiff stopped working on October 29, 2007. By letter to plaintiff dated November 16, 2007, defendant documents that, given plaintiff's work stoppage notwithstanding her medical release to return to light duty, plaintiff would be deemed to have abandoned her job and to have voluntarily resigned from defendant.

> . . . .
>
> 15. Dr. Smith, who had observed video of plaintiff's job tasks with defendant, also testified that the tasks at stations three and four were within the restrictions he assigned plaintiff on October 26, 2007.
>
> . . . .
>
> 17. Vocational Counselor Anthony Enoch testified by deposition that there was suitable employment for plaintiff within her restrictions in the Goldsboro area.

Plaintiff further contests conclusion of law nine, which states: "Plaintiff was terminated for reasons, unrelated to her workplace incident, for which any other employee would have been terminated."

Plaintiff argues that when she returned to light duty on 12 October 2007, she was still in pain and unable to work. She also argues that Mr. Enoch was not familiar with her work duties at Hospira or her situation in general, and, therefore, should not have been allowed to testify. Plaintiff does not make a specific argument that any one of these findings of fact was not based on competent evidence. The evidence supports the findings that plaintiff was placed on light-duty restrictions, defendant offered her light-duty employment, she ceased going to work on 29 October 2007, and she was subsequently terminated for failure to report to work. Dr. Smith testified that the tasks at stations three and four were consistent with her work restrictions. Plaintiff was not told to cease working

by Dr. Rockwell until after she was terminated. Finally, Mr. Enoch testified that there were light-duty positions available in the Goldsboro area.

Additionally, plaintiff does not dispute that any other employee would have been fired for the same conduct. She makes an unsupported claim that she was terminated for reasons related to her injury and that she was entitled to FMLA benefits, which do not require an individual to accept light duty work. We hold that plaintiff's arguments are without merit and that the Commission's findings of fact related to plaintiff's termination were supported by the evidence of record and that these findings in turn support conclusion of law nine.

Conclusion

Based on the foregoing, we hold that there was conflicting evidence as to whether plaintiff's rotator cuff tear was the result of an underlying disease process; however, there was evidentiary support for the Commission's determination that plaintiff suffered from an acute injury rather than an occupational disease. We further hold that the evidence supports the Commission's findings of fact concerning plaintiff's termination and that those findings support the conclusion of law in that regard.

Affirmed.

Judges GEER AND STEPHENS concur.

Report per Rule 30(e).