NO. COA05-75

NORTH CAROLINA COURT OF APPEALS

Filed: 3 January 2006

David R. Blake,
Plaintiff-Appellant

v.

North Carolina Industrial Commission
I.C. File No. 826228

Parkdale Mills,
Defendant-Appellee

and

Self-Insured, Cameron D.
Harris & Company,
Carrier

Appeal by plaintiff-appellant from an opinion and award entered 1 September 2004 by the North Carolina Industrial Commission. Heard in the Court of Appeals 20 September 2005.

Wallace & Graham, P.A., by Edward L. Pauley for plaintiff-appellants.

Mullen Holland & Cooper, P.A., by H. Randolph Sumner and Jesse V. Bone, Jr. for defendant-appellee.

CALABRIA, Judge.

David R. Blake ("appellant") appeals an opinion and award issued by the North Carolina Industrial Commission ("Commission") denying appellant's claim for workers' compensation benefits. We affirm.

Appellant, 54 years of age, was employed at the same cotton fiber manufacturing plant in Landis, North Carolina from 1 July 1967 through 21 July 1998. Parkdale Mills ("appellee")

purchased the facility on approximately 4 March 1986. Appellant worked in both the spinning and carding room. His job duties included removing spools of yarn from spindles and then placing the now empty spools on each spindle to be filled again by the spinning machines. In the card room, appellant situated cans of raw cotton behind each drawing machine to initiate the manufacturing process with the fiber. Appellant testified the spinning room was very dusty even to the extent cotton dust collected on the floors, walls, machines and employees' clothes.

Appellant had pre-existing hypertension, diabetes mellitus, and depression as well as a family history of heart disease and chronic obstructive pulmonary disease. Also, appellant smoked cigarettes for eighteen years, but stopped in 1974.

In 1995 when appellant experienced shortness of breath and morning coughing, appellee referred him to Dr. Stephen Proctor ("Dr. Proctor") for an evaluation. Prior to this referral and throughout appellant's employment with appellee, appellant completed respiratory questionnaires as part of pulmonary function testing at appellee's facility. No breathing problems at work were noted. On 27 February 1995, Dr. Proctor diagnosed appellant with asthma, noting appellant's shortness of breath was episodic and was not associated with work. When appellant's condition persisted, he returned to see Dr. Proctor. At the Deputy Commissioner hearing Dr. Proctor explained appellant's symptoms were either a progression of his condition or possibly nothing more than a state of mind.

After treating appellant for another three years, Dr. Proctor changed appellant's diagnosis to byssinosis and further concluded that appellant could not return to work in <u>any</u> employment. On 2 June 1998, appellant completed I.C. Form 18 which notified appellee he contracted byssinosis on 23 February 1998. Appellant left his employment in August 1998 and has not returned to any employment since.

On 12 September 1998, appellee referred appellant to Dr. Douglas Kelling**[Note 1]** ("Dr. Kelling") for an evaluation regarding a possible occupationally related lung disease. After an exhaustive examination of appellant including medical and family history as well as physical exam, Dr. Kelling found no evidence of byssinosis and diagnosed appellant with hyperactive airway disease. In Dr. Kelling's opinion, appellant's respiratory ailment started after 15 years of cotton dust exposure and that the normal exposure period is a maximum of ten years for symptoms associated with cotton dust to appear. Other than the counter-intuitive nature of this inconsistent time period, Dr. Kelling agreed appellant had a breathing impairment consistent with byssinosis.

Appellant, through the advice of his counsel, was then referred to Dr. David Schwartz ("Dr. Schwartz") for a medical evaluation, where Dr. Schwartz diagnosed appellant with byssinosis based upon a variety of factors including: exposure to cotton dust; profound airflow obstruction at a young age; and his responsiveness to bronchodilators.

The Commission subsequently referred appellant to Dr. Robert R. Rostand ("Dr. Rostand") for an advisory panel evaluation. Dr. Rostand concluded appellant had reactive airways disease consistent with a diagnosis of adult onset asthma unrelated to an occupational exposure to cotton dust.

The Commission, in its opinion and award, gave greater weight to the consistent diagnoses of Dr. Proctor and Dr. Schwartz since Dr. Proctor treated appellant on a regular basis for three years. The Commission found that despite the appellant proving by a greater weight of the competent medical evidence that exposure to cotton dust during his employment with appellee contributed to or was a significant causal factor in the development of the occupational lung disease, byssinosis, there was no medical expert testimony appellant's employment placed

him at an increased risk of developing the ailment as compared to the general public not so employed. Thus, the Commission concluded that, absent such testimony, since the appellant did not develop an occupational disease due to causes and conditions peculiar to his employment with appellee, he was not entitled to compensation under the provisions of the North Carolina Worker's Compensation Act. Appellant appeals.

As a preliminary matter, though appellant furnishes ten assignments of error in both his brief and the record on appeal, he fails to argue or provide any authority for six of these alleged errors. Specifically, assignments of error one, five, six, and ten are listed as contentions in the record, but are not argued in appellant's brief. Assignments of error two and nine, though appropriately listed as error under appellant's first and second argument respectively, contain no discernible argument, reason or authority for support. Thus, according to N.C.R. App. P. 28(b)(6) (2005), they are abandoned.

"The standard of appellate review of an opinion and award of the Industrial Commission in a workers' compensation case is whether there is *any competent evidence* in the record to support the Commission's findings of fact and whether these findings support the Commission's conclusions of law." *Lineback v. Wake County Bd. of Comm'rs*, 126 N.C. App. 678, 680, 486 S.E.2d 252, 254 (1997) (emphasis added). The Commission's findings of fact "are conclusive on appeal when supported by competent evidence ... even [if] there is evidence to support a contrary finding[,]" *Morrison v. Burlington Indus.*, 304 N.C. 1, 6, 282 S.E.2d 458, 463 (1981) (citations omitted), and "may be set aside on appeal [only] when there is a complete lack of competent evidence to support them[.]" *Young v. Hickory Bus. Furniture*, 353 N.C. 227, 230, 538 S.E.2d 912, 914 (2000). Appellant argues in assignment of error three that it was improper for the Commission to require appellant to prove he was at an increased risk for development of

byssinosis compared to the general public. Appellant contends since byssinosis is an occupational disease, he need not prove he was at an increased risk for contracting it. Specifically, appellant avers that the requirement of heightened risk is only applicable to non-occupational ailments, or 'ordinary diseases of life,' of which byssinosis is not.

"By the express language of [N.C. Gen. Stat. §]97-53, only the diseases and conditions enumerated therein shall be deemed to be *occupational diseases* within the meaning of the [Worker's Compensation] Act." *Hansel v. Sherman Textiles*, 304 N.C. 44, 51, 283 S.E.2d 101, 105 (1981) (emphasis added). Byssinosis is not expressly enumerated in N.C. Gen. Stat. §97-53, however, the statute does provide that compensation may nevertheless be granted for "[a]ny disease...proven to be due to causes and conditions... 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) (2003).

To prove that byssinosis is occupational and thus compensable under the language of N.C. Gen. Stat. §97-53(13), appellant must illustrate:

> (1) the disease must be characteristic of a trade or occupation, (2) the disease is not an ordinary disease of life to which the public is equally exposed outside of the employment, and (3) there must be proof of causation, i.e., proof of a causal connection between the disease and the employment.

Hansel, 304 N.C. at 52, 283 S.E.2d at 106.

Moreover, "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." *Rutledge v. Tultex Corp.*, 308 N.C. 85, 93-4, 301 S.E.2d 359, 365 (1983) (emphasis added). Notably, it is "[t]he greater risk...[which] provides the nexus between the disease and the employment which makes them an appropriate subject for workmen's compensation." *Id.* Therefore, as our Supreme

Court has found that an increased risk need be shown when the ailment is not defined by statute as occupational, we overrule this assignment of error.

Appellant argues in assignment of error number seven that if proof of a greater risk was necessary, the Commission erred in concluding he failed to prove he was at an increased risk for developing byssinosis. Appellant contends the following evidence was introduced illustrating he was at an increased risk of contracting byssinosis: exposure to cotton dust during 31 years of employment in the textile industry. Appellant further avers such evidence was firmly established through the testimony of appellant, appellant's co-workers, and appellant's medical experts.

It is well established that "[w]here findings of fact are challenged on appeal, each contested finding of fact must be separately assigned as error, and the *failure to do* so results in a waiver of the right to challenge the sufficiency of the evidence to support the finding." *Okwara v. Dillard Dep't Stores, Inc.*, 136 N.C. App. 587, 591, 525 S.E.2d 481, 484 (2000) (citations omitted). Thus, "[w]here an appellant fails to assign error to the trial court's findings of fact, the findings are presumed to be correct." *Id.* (citation and internal quotation marks omitted). Consequently,"[o]ur review...is limited to the question of whether the trial court's findings of fact, which are presumed to be supported by competent evidence, support its conclusion of law and judgment." *Id.*, 136 N.C. App. at 591-92. As the rules governing "an appeal from an opinion and award of the Industrial Commission [are] taken under the same terms and conditions as govern appeals from the Superior Court to the Court of Appeals," *Johnson v. Herbie's Place*, 157 N.C. App. 168, 179, 579 S.E.2d 110, 118 (2000), *disc. rev. denied*, 357 N.C. 460 (2003) (internal quotation marks omitted), the effect of the rules which govern findings of fact and conclusions of law are the same upon the Commission.

Finding of fact number nineteen, in pertinent part, states "none of the medical experts was asked or testified that plaintiff's employment placed him at an increased risk of developing byssinosis... ." Conclusion of law number two, in pertinent part, states "there is insufficient medical evidence of record to support a finding that plaintiff's employment with defendant placed him at an increased risk of contracting byssinosis as compared to the public not so exposed." Despite appellant assigning error to both finding of fact number nineteen and conclusion of law number two, he failed to present any argument on behalf of these two assignments of error in his brief, and consequently, it is abandoned. Thus, as the effect of failing to assign error is the same as assigning error with no concomitant supporting argument, our review is limited to whether this finding of fact supports the corresponding conclusion of law.

Finding of fact number nineteen, which is presumed to be correct, adequately supports conclusion of law number two, because without the necessary medical evidence and testimony presented, there is no recorded medical proof of appellant being at an increased risk of getting byssinosis when compared to the public at large. Assignment of error number seven is overruled.

Appellant argues in assignment of error number four that the Commission erred in finding he failed to prove his byssinosis was due to causes and conditions characteristic of and peculiar to a particular occupation. Appellant contends through the same aforementioned testimony of self, co-workers, and medical experts that he proved byssinosis was due to causes and conditions characteristic of and peculiar to his 31 years of work in the textile industry.

Finding of fact number twenty, which appellant failed to object to, states "[t]he Full Commission finds...that plaintiff did not develop an occupational disease...due to causes and conditions characteristic of and peculiar to his employment." Conclusion of law number two, upon which appellant failed to present any argument, states "[p]laintiff failed to prove his

byssinosis was due to causes and conditions...characteristic of and peculiar to a particular...occupation." Due to appellant's failure to either assign error or present an argument in support of the alleged error, our review is limited to whether the finding of fact supports the corresponding conclusion of law. Finding of fact number twenty adequately supports conclusion of law number two because appellant failed to illustrate to the satisfaction of the Commission the required link between byssinosis, his employment in the textile industry, and the likelihood he would get the disease as opposed to the general public. Thus, we overrule this assignment of error.

Lastly, appellant argues the trial court erred by requiring him to elicit expert medical testimony regarding an increased risk for the development of byssinosis. Appellant contends medical testimony is not the only means to constitute an increased risk and further, through the evidence and testimony he provided, this increased risk was established.

"[W]here the exact nature and probable genesis of a particular type of injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury." *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980). Moreover, "[w]here a layman can...do no more than indulge in mere speculation (as to the cause of a physical condition), there is no proper foundation for a finding by the trier without expert medical testimony." *Gillikin v. Burbage*, 263 N.C. 317, 325, 139 S.E.2d 753, 760 (1965) (citations and internal quotation marks omitted). Thus, "findings regarding the nature of a disease -- its characteristics, symptoms, and manifestations -- must ordinarily be based upon expert medical testimony." *Norris v. Drexel Heritage Furnishings, Inc.*, 139 N.C. App. 620, 623, 534 S.E.2d 259, 262 (2000).

Nowhere in the depositions of either Dr. Proctor or Dr. Schwartz is there any indication that in their individual medical opinions appellant was at an increased risk of contracting byssinsosis because of his employment with appellee. Further, though two of appellant's co-workers, Lance Carter and Barbara Blackwelder, testified per deposition as to how dusty appellee's business facility was, there was no commentary whatsoever regarding the appellant's medical condition or the likelihood that working at appellee's facility placed appellant at a greater risk than the public at large to contract byssinosis. There was no medical testimony from the appellant, his co-workers or his medical experts providing him proof that his employment with appellee placed him at a greater risk of developing byssinosis when compared to the public not so employed. Absent such necessary medical testimony and evidence and in the opinion of the Commission, appellant failed to prove he was at a greater risk of developing byssinosis. This assignment of error is overruled.

We hold the Commission properly found and concluded, upon the evidence presented, that appellant does not have a compensable occupational disease. Thus, we affirm the Commission's opinion and award.

Affirmed.

Judges WYNN and STEELMAN concur.

Report per Rule 30(e).

NOTE

1. Dr. Kelling is a member of the Commission's Advisory Medical Committee.