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NO. COA01-1068

NORTH CAROLINA COURT OF APPEALS

Filed: 2 July 2002

MARY HUNTER, Administratrix
of the Estate of PERCY HUNTER,
Deceased Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 847355

N.C. DEPARTMENT OF TRANSPORTATION,
Employer,

SELF-INSURED,
Defendant.

Appeal by defendant from opinion and award of the North Carolina Industrial Commission filed 22 December 2000. Heard in the Court of Appeals 4 June 2002.

Scudder & Hedrick, by Samuel A. Scudder, for plaintiff appellee.

Attorney General Roy Cooper, by Special Deputy Attorney General Jonathan P. Babb, for defendant appellant.

GREENE, Judge.

The North Carolina Department of Transportation (Defendant) appeals an opinion and award of the Full Commission of the North Carolina Industrial Commission (the Commission) filed 22 December 2000 awarding Mary Hunter (Plaintiff), Administratrix of the Estate of Percy Hunter (Hunter), workers' compensation benefits owed to Hunter. Those benefits included: death

benefits, all of Hunter's unpaid medical expenses, reimbursement for past treatment related to Hunter's occupational disease, and partial funeral expenses.

The record reveals that from 1968 until 1985, Hunter worked for Defendant in Hertford, Manteo, and at Mann's Harbor doing various service and mechanical work on vehicles and equipment. When Hunter worked in Hertford, he was "blowing out" dust and grime from the hub housing of large wheels on motor graders using an air hose. During the time Hunter was not blowing out various particles, his co-workers were blowing out particles and he was exposed to dust and grease particles, as well as carbon monoxide fumes. When Hunter worked in Manteo, he continued working on various equipment and blowing black dust particles which would get into his mouth and nose and would remain there for two-to-three days. Sometime between 1980 and 1981, instead of "blowing out" equipment, Hunter began using Varsol and paint thinner to wash fluids and grease from various parts. While in Manteo, Hunter worked around men who ran large lathes and used torches to spray chemicals on the shafts of ferries. Hunter was also exposed to particles, including asbestos and other airborne particles, generated from sandblasting various equipment.

After leaving his employment with Defendant in 1985, Hunter began experiencing breathing problems in 1988 and was treated by Dr. Robert Shaw (Dr. Shaw) who requested an open lung biopsy. Dr. Shaw analyzed the tissue from the biopsy and made a diagnosis of interstitial fibrosis which, at the time, he thought was asbestosis. Dr. Victor L. Roggli (Dr. Roggli) examined the tissue samples and determined the "asbestos content of [Hunter's] lung tissue [was] unremarkable" and diagnosed Hunter with idiopathic pulmonary fibrosis. In 1989, Hunter filed a workers' compensation claim citing asbestosis. Hunter's medical records and tissue samples were subsequently reviewed by Dr. D. Allen Hayes (Dr. Hayes) who noted

abnormal chest x-rays dating back to 1980 showing early evidence of interstitial lung disease. After reviewing Hunter's tissue samples, Dr. Hayes determined asbestosis was not present. Subsequently, Hunter voluntarily withdrew his workers' compensation claim for asbestosis.

In 1992, Hunter's treating physicians sent him to Duke University Medical Center to be evaluated for a lung transplantation. Subsequently, in October 1994, Hunter underwent a left lung transplant. After Hunter's lung was explanted, it showed fibrotic disease as well as exogenous lipid pneumonia. In a letter dated 10 January 1995, Hunter told Dr. Victor F. Tapson (Dr. Tapson) that he used fuel oil to clean parts and also sprayed fuel oil and 10W motor oil on all snow equipment. Subsequently, in a letter dated 4 April 1995, Dr. Tapson stated Hunter had "sprayed fuel oil/10W motor oil on equipment from 1968 until several years ago. . . . It is possible that this activity may have contributed to his lung disease." In May 1995, Hunter filed a claim alleging his lung disease was caused by his exposure to asbestos and other substances, including oil mist during his employment with Defendant. Hunter died on 1 September 1995 as a result of his lung disease.

In his deposition, Dr. Tapson testified that based on the history reported by Hunter, the exogenous lipid pneumonia was caused by Hunter's occupation. Defendant objected to the history tendered by Plaintiff in Hunter's 10 January 1995 letter to Dr. Tapson on the basis of hearsay. Dr. Tapson went on to testify that to a reasonable degree of medical probability, Hunter's exposure to dust and fuel oil contributed to his overall lung condition. Dr. Tapson opined that the lipid pneumonia caused Hunter's fibrotic lung disease.

Dr. Gary N. Greenberg (Dr. Greenberg) testified that before a diagnosis of environmentally triggered lipid pneumonia could be achieved, he would require evidence of exposure other than the oil mist referenced in Dr. Tapson's letter. Dr. Greenberg had heard of

and read cases where mechanics had developed lipoid pneumonia. Dr. Greenberg stated that if Hunter were “exposed to aerosols of petroleum products then that would certainly have increased his risk of developing lip[o]id pneumonia.”

Plaintiff’s claim for compensation was denied by the deputy commissioner on 19 April 1999. On appeal to the Commission, the Commission reversed the deputy commissioner and overruled any objections made in the deposition testimonies of Dr. Greenberg, Dr. Tapson, and Dr. Roggli. The Commission found that:

4. . . . In Mann’s Harbor, . . . [t]here was . . . a lot of dust from sandblasting and from removal of asbestos from the boats.

5. During his work for [Defendant, Hunter] was exposed almost daily to airborne dust and greasy mist from blowing out brake drums and other parts with a compressed air hose and from the constant washing and spraying, by him and others in the facility, of oil and oily mixtures on the vehicles and equipment.

6. The dusts and mists contained asbestos, motor oil[,] and other petroleum products like [V]arsol or paint thinner that were used on a daily basis to clean and lubricate the pieces of equipment and parts.

. . . .

8. [Hunter] testified and the Commission finds as fact that he used a compressed air hose to blow off machinery and “black dust” would get in his nose and mouth and traces would remain [there] for two[-]to[-]three days. After [Defendant] stopped using compressed air to clean oily dust and grease from machinery in the early 1980’s, [Hunter] continued to clean large machinery and equipment by spraying it with [V]arsol chemicals.

. . . .

23. Dr. Tapson wrote a letter in April[] 1995 in which he stated that [Hunter] had sprayed fuel oil/10W motor oil on equipment from 1968 until several years ago and stating that he

thought it possible that the spraying contributed to [Hunter's] lung disease.

....

25. In his deposition [taken on] July 23, 1998, Dr. Tapson gave his opinion that [Hunter] had "exogenous lipoid pneumonia . . . caused by something inhaled." Based on the history that [Hunter] gave him, as corroborated in the letter [Hunter] wrote January 9, 1995, as well as the analysis of the removed lung, Dr. Tapson's opinion was that [Hunter's] exposure to oil mists at work was the only factor in his history to have caused the lipoid pneumonia. . . .

....

28. The . . . Commission gives greater weight to the opinions of Dr. Tapson because he was in a better position than Dr. Roggli to express opinions on causation, because he was a clinician treating [Hunter] and because the entire lung was available as a sample for his review. As such, Dr. Tapson based his opinion upon a history of exposure obtained from the patient and from looking at the whole lung. . . .

....

30. . . . [Dr. Greenberg] acknowledged that . . . if he assumed a history of oil mist exposure, that would very much support the diagnosis of exogenous lipoid pneumonia. Dr. Greenberg further stated that there is a well-known connection in the medical literature between lipoid pneumonia and interstitial fibrosis and that there were connections in studies of various types of mechanics. Dr. Greenberg also opined that if [Hunter were] exposed to aerosols of petroleum products at work, that would certainly have increased his risk of developing lip[o]id pneumonia.

31. . . . [T]he parties . . . deposed Dr. Hayes . . . Dr. Hayes was of the opinion that . . . the occupational exposure was[,] more likely than not, the source of [Hunter's] lipoid pneumonia and the interstitial fibrosis. Dr. Hayes was also of the opinion and the . . . Commission finds as fact that [Hunter's] exposure to oil mists at work was the source of his inhaled exogenous lip[o]id [pneumonia] and contributed to the development of his pulmonary fibrosis and that the treatment for his fibrosis, including the transplant and immunosuppression medication, most likely caused

the cancer that [Hunter] developed in his native right lung and which resulted in his death.

. . . .

34. [Hunter's] occupational exposures to oil mists and oily dust while in [Defendant's] employ caused his lung condition to degrade to the point of being unable to earn wages as of Christmas 1987.

. . . .

36. Based on the greater weight of the evidence, the . . . Commission finds that [Hunter's] exposure to oil sprays and mists, as well as dusts, including airborne, pressure-blown oil dust, in his employment with [Defendant] was a significant contributing factor in the development of his exogenous lipoid pneumonia and interstitial fibrosis and that his treatment for these conditions caused his lung cancer and subsequent death.

37. Based on the greater weight of the evidence, including the opinion[s] of Dr. Greenberg and Dr. Hayes, . . . the . . . Commission finds that [Hunter's] job as a mechanic with [Defendant] where he used compressed air to blow oil dust, oily dirt[,] and other oily substances from large pieces of machinery and where he was constantly exposed to airborne, sprayed oil mist used in cleaning large equipment in enclosed spaces placed him at an increased risk over the general public for contracting exogenous lipoid pneumonia and interstitial fibrosis over members of the general public not so employed. The general public, not so employed, would not be exposed to airborne, pressure-blown oil dusts, oil sprays[,] and other airborne oil substances almost daily and in such an amount for such a long duration of time as [Hunter]. Since exogenous lipoid pneumonia is a rare or uncommon disease that is difficult to diagnose without studying a removed lung, the absence of a significant number of documented cases in the literature of exogenous lip[o]id pneumonia and interstitial fibrosis contracted by mechanics does not preclude a finding of causation and increased risk in this case.

The Commission then concluded Hunter contracted an occupational disease, namely exogenous lipoid pneumonia and interstitial fibrosis, as a result of his exposures to and inhalation of mists and oil dusts in his employment with Defendant.

The issues are whether: (I) Defendant has preserved its objection to Hunter's 10 January 1995 letter for appellate review;(II) there is any substantive evidence of causation in the record; and (III) Hunter suffered from a compensable occupational disease.

I

"In order to preserve a question for appellate review, a party must have presented to the trial court a timely . . . objection . . . stating the specific grounds for the ruling the party desired." N.C.R. App. P. 10(b)(1). On appeal, a party is estopped from asserting a position contrary to that advanced before the trial court or the Commission. *In re Petition of Utils., Inc.*, 147 N.C. App. 182, 194, 555 S.E.2d 333, 341-42 (2001); *see Burchette v. Lynch*, 139 N.C. App. 756, 765, 535 S.E.2d 77, 83 (2000); *see also State v. Francis*, 341 N.C. 156, 160, 459 S.E.2d 269, 271 (1995) (because objections at trial "in no way supported" the defendant's assignment of error on appeal, the defendant did not preserve error for appellate review); *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934) ("the law does not permit parties to swap horses between courts in order to get a better mount [on appeal]"). This is so because when a party changes the basis of its objection between courts, the lower tribunal is without an opportunity to consider a party's contention in the terms now presented on appeal to this Court. *State v. Hoffman*, 349 N.C. 167, 177, 505 S.E.2d 80, 86 (1998), *cert. denied*, 526 U.S. 1053, 143 L. Ed. 2d 522 (1999).

In this case, Defendant's objection to admitting Hunter's letter during Dr. Tapson's deposition was based on hearsay, and it did not object to the admissibility of the letter based on Rule 703 or unfair prejudice. Further, in its brief to this Court, Defendant does not present any argument pertaining to Hunter's letter being inadmissible hearsay. Defendant, however, does argue the Commission erred by admitting Hunter's 10 January 1995 letter into evidence based on

N.C. Gen. Stat. §8C-1, Rule 703 and unfair prejudice. Defendant fails to cite any part of the record where it objected to the admissibility of Hunter's letter on the grounds of Rule 703 or unfair prejudice, and this Court has found no such indication in the record. Accordingly, Defendant has not properly preserved its objection to Hunter's letter for appellate review.

II

Defendant next argues the Commission's findings of fact relating to Hunter's exposure to fuel or oil mists were not supported by evidence. We disagree.

This Court's review of the Commission's findings of fact is "limited to reviewing whether any competent evidence supports [those] findings of fact." *Deese v. Champion, Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). This Court "does not have the right to weigh the evidence and decide the issue on the basis of its weight. [Our] duty goes no further than to determine whether the record contains any evidence tending to support the finding[s]." *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965).

In this case, Hunter testified he used compressed air to blow out dust and grime from the hub housing of large wheels, he was constantly exposed to dust and grease particles, and he used a chemical called Varsol to remove fluid and grease from vehicle parts. In addition, Hunter's letter and Dr. Tapson's deposition testimony reveal Hunter had used fuel oil and 10W motor oil on equipment and had been exposed to oil mist.**[Note 1]** Accordingly, the Commission's findings of fact relating to Hunter's exposure to oily substances is supported by competent evidence in the record.

III

Defendant finally argues that even if there were competent evidence to support that Hunter was exposed to oil mists and fuel, Plaintiff has not met her burden of showing Hunter suffered from a compensable occupational disease. We disagree.

“Whether a given illness or disease fits within the definition of an occupational disease under N.C. Gen. Stat. §97-53(13) is a mixed question of law and fact.” *Norris v. Drexel Heritage Furnishings, Inc.*, 139 N.C. App. 620, 621, 534 S.E.2d 259, 261 (2000), *cert. denied*, 353 N.C. 378, 547 S.E.2d 15 (2001). Within the meaning of the Workers’ Compensation Act, an occupational disease is “[a]ny disease . . . 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.G.S. §97-53(13) (2001). In other words, in order for a disease to be compensable under N.C. Gen. Stat. §97-53(13), the employee must have been exposed “to a greater risk of contracting [the] disease than members of the public generally,” and such exposure must have “significantly contributed to, or was a significant causal factor in, the disease’s development.” *Rutledge v. Tultex Corp.*, 308 N.C. 85, 101, 301 S.E.2d 359, 369-70 (1983); *see Booker v. Duke Med. Ctr.*, 297 N.C. 458, 472, 256 S.E.2d 189, 198 (1979) (under section 97-53(13), “[a] disease is ‘characteristic’ of a profession when there is a recognizable link between the nature of the job and an increased risk of contracting the disease in question”).

Increased Risk

In order for there to be an increased risk, the conditions of the employment “‘must result in a hazard which distinguishes it in character from the general run of occupations.’” *Booker*, 297 N.C. at 473, 256 S.E.2d at 199 (citation omitted). Section 97-53(13) precludes only those

diseases “to which the general public is *equally exposed* outside of the employment.” *Id.* at 475, 256 S.E.2d at 200 (quoting N.C.G.S. §97-53(13)).

In this case, the Commission found that Hunter’s employment with Defendant “placed him at an increased risk over the general public for contracting exogenous lipid pneumonia and interstitial fibrosis over members of the general public not so employed.” This finding is supported by competent evidence in that Dr. Greenberg stated that if Hunter were “exposed to aerosols of petroleum products then that would certainly have increased his risk of developing lip[o]id pneumonia.” Accordingly, the Commission’s findings as well as the evidence establish Hunter’s employment with Defendant placed him at an increased risk of developing lipid pneumonia.

Significant Factor

An employee’s exposure is significant if without the exposure, “the disease would not have developed to such an extent that it caused the physical disability which resulted in [the] claimant’s incapacity for work.” *Rutledge*, 308 N.C. at 102, 301 S.E.2d at 370.

In this case, the Commission found as fact that Hunter’s “exposure to oil sprays and mists, as well as dusts, . . . in his employment with [Defendant] was a significant contributing factor in the development of his exogenous lipid pneumonia and interstitial fibrosis.” Dr. Tapson testified Hunter’s lung condition was caused by Hunter’s occupation and his exposure to fuel oil while working for Defendant. In addition, according to the Commission, Dr. Hayes stated that Hunter’s “exposure to oil mists at work was the source of his inhaled exogenous lip[o]id [pneumonia]” that led to the condition which most likely caused the cancer that Hunter developed and ultimately died of. Accordingly, Hunter’s exposure to fuel and oil mists was a significant contributing factor in his development of lipid pneumonia.

The Commission's findings, as well as the evidence, establish that Hunter's employment with Defendant placed him at an increased risk of developing lipoid pneumonia and his workplace exposure was a significant factor in Hunter's development of the disease. Therefore, Hunter's condition is a compensable occupational disease under N.C. Gen. Stat. §97-53(13).

Affirmed.

Judges McGEE and BIGGS concur.

Report per Rule 30(e).

NOTE

1. It appears, from the Commission's findings, Dr. Hayes also offered testimony on Hunter's exposure to oil mists while working for Defendant. The transcript of Dr. Hayes' deposition has not been submitted to this Court; thus, we are unable to determine whether this finding of fact is supported by evidence. We note that it is the appellant's burden "to show, by presenting a full and complete record, that the record is lacking in evidence to support the Commission's findings of fact." *Dolbow v. Holland Indus., Inc.*, 64 N.C. App. 695, 696, 308 S.E.2d 335, 336 (1983), *disc. review denied*, 310 N.C. 308, 312 S.E.2d 651 (1984). We will not presume error when none appears in the record to this Court. *Pharr v. Worley*, 125 N.C. App. 136, 139, 479 S.E.2d 32, 34 (1997).