NO. COA02-605

NORTH CAROLINA COURT OF APPEALS

Filed: 18 February 2003

MARGARET BREWER,
Employee,
Plaintiff-Appellant,

v.

North Carolina Industrial Commission
I.C. File No. 927943

SOUTHERN DEVICES, A DIVISION OF LEVITON,
Employer,

SELF-INSURED (GALLAGHER-BASSETT SERVICES, INC.),
Third Party Administrator,
Defendants-Appellees.

Appeal by plaintiff from opinion and award entered 18 March 2002 by the North Carolina Industrial Commission. Heard in the Court of Appeals 9 January 2003.

Franklin Smith for plaintiff-appellant.

McAngus, Goudelock & Courie, P.L.L.C., by Trula R. Mitchell, for defendants-appellees.

McGEE, Judge.

Margaret Brewer (plaintiff) appeals from the opinion and award of the Industrial Commission denying her claim for disability compensation against Southern Devices (employer).

Plaintiff filed a Form 18 on 3 August 1999 claiming workers' compensation due to occupational asthma and breathing problems comprising an occupational disease. Plaintiff also filed a Form 33 request for hearing on 3 August 1999 because of employer's failure to recognize plaintiff's workers' compensation claim and its failure to pay appropriate workers' compensation benefits. Employer filed a Form 33R dated 7 September 1999 denying that plaintiff was injured by accident or suffered from an occupational disease arising out of and in the course of employment.

Plaintiff's claim was heard before a deputy commissioner on 27 March 2000. The deputy commissioner filed an opinion and award on 16 July 2001 and concluded that "the plaintiff sustained an occupational disease arising out of and in the course of her employment with the defendant-employer." The deputy commissioner awarded plaintiff temporary total disability compensation benefits in the amount of $244.58 per week until plaintiff became gainfully employed. The deputy commissioner also awarded plaintiff all of her past, present, and future medical expenses which resulted from her injury. Employer appealed the award to the Industrial Commission and the case was heard on 13 February 2002.

Plaintiff testified before the Industrial Commission that she was exposed to a mist that was sprayed by a machine in her workplace from 1992 through 1999. She stated that she experienced shortness of breath after walking and after exposure to strong odors and fumes, and that she had pain in her lungs and rib cage. Plaintiff also testified that she was treated by Dr. Peter Alford (Dr. Alford), who prescribed inhalers to relieve the pain and breathing problems. Dr. Alford took plaintiff out of work for three weeks and thereafter permitted her to return but instructed her to not inhale fumes. Plaintiff stated that she had been unable to return to work. Dr. Alford stated in his deposition that plaintiff told him she was an ex-smoker and had smoked one

pack of cigarettes a day for twenty-seven years but that she had not smoked in the past fourteen years.

Dr. Alford further stated in his deposition that he examined plaintiff and believed she suffered from occupational asthma. Dr. Alford believed plaintiff's occupational asthma resulted from her exposure to Kutwell 40 and petroleum products used in the machines where she worked. He also stated that he could not form an opinion as to whether plaintiff's condition was a chronic disease or disabling condition because more time was needed to make such an evaluation. Dr. Alford noted that asthma was a common disease that affects the general population and is triggered and exacerbated by different factors, such as stress and environment. He also stated that smoking causes chronic obstructive lung disease and that plaintiff's previous smoking habit was responsible for her below-normal pulmonary function test results.

Jamie Blevins (Blevins) testified that she had worked near plaintiff for approximately six or seven years and operated the same machines as plaintiff. Blevins stated that the Kutwell 40 had never given her problems and that no employee, other than plaintiff, had complained of problems.

In an opinion and award filed 18 March 2002, the Industrial Commission reversed the opinion and award of the deputy commissioner. The Industrial Commission made findings of fact, which included:

> 3. Plaintiff was first treated by Dr. Peter T. Alford, a pulmonologist, on December23, 1998 for shortness of breath and chest pain. Dr. Alford stated that plaintiff's lungs were clear but had decreased air flow. Dr. Alford felt that plaintiff potentially had some occupationally-related lung disease and he put her on inhalers and instructed plaintiff to return in three months. When plaintiff returned on March 23, 1999, Dr. Alford removed plaintiff from work to ascertain if her condition would improve.

> 4. Plaintiff continued to treat with Dr. Alford for her respiratory problems, which improved moderately due to the combination of being out of work for a few months and the use of the inhalers as prescribed. When plaintiff returned to Dr. Alford in January 2000, he recommended that she return to work on a trial basis. As of the hearing before the Deputy Commissioner, plaintiff had not returned to work in any capacity.
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> 5. Plaintiff smoked a pack of cigarettes a day for twenty-seven years until quitting in approximately 1985. Dr. Alford testified that the findings on plaintiff's pulmonary function test were consistent with plaintiff's smoking history.
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> 7. Dr. Alford stated that he believed that plaintiff's occupational asthma was caused by exposure to Kutwell 40 and petroleum products used in the work environment. However, there is no medical evidence of record that plaintiff was placed at an increased risk of developing asthma as a result of her exposure to Kutwell 40 or any other petroleum products.
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> 8. Plaintiff has failed to prove that she developed an occupational disease which was due to causes and conditions characteristic of and peculiar to her employment with defendant-employer and which excluded all ordinary diseases of life to which the general public was equally exposed.

The Industrial Commission concluded as a matter of law that plaintiff had not shown that she was at an increased risk of contracting asthma due to her employment and that plaintiff had no occupational disease resulting from "causes and conditions characteristic of and peculiar to her employment." The Industrial Commission concluded that plaintiff was not entitled to receive workers' compensation benefits and denied plaintiff's claim. Plaintiff appeals.

Our Court has long recognized that

> [o]ur review of the Commission's order is limited to determining (1) whether the Commission's findings of fact are supported by the evidence, and (2) whether the findings of fact justify the Commission's legal conclusions. The findings of fact are conclusive on appeal if supported by competent evidence. This is so even though there is evidence which would support findings to

> the contrary. . . . We may set aside findings of fact only on the ground that they lack evidentiary support. We cannot weigh the evidence but can only determine whether the record contains *any* competent evidence tending to support the findings.

Dean v. Cone Mills Corp., 83 N.C. App. 273, 275-76, 350 S.E.2d 99, 100 (1986) (citations omitted). The Industrial Commission may not completely ignore competent evidence and must evaluate all evidence before it is rejected. *Jarvis v. Food Lion, Inc.*, 134 N.C. App. 363, 366-67, 517 S.E.2d 388, 391 (1999). Weighing the testimony and credibility of witnesses is in the sole discretion of the Industrial Commission. *Id.* at 366, 517 S.E.2d at 390.

Plaintiff's sole argument is that the Industrial Commission erred in finding that plaintiff's exposure to Kutwell 40 petroleum products in her work environment did not place her at a greater risk of developing asthma than the public generally. Plaintiff argues that she suffers from an occupational disease and that her employment put her at a greater risk of contracting the disease than the general public.

> There are three elements which are necessary for the plaintiff to prove in order to show the existence of a compensable occupational disease under N.C. Gen. Stat. § 97-53(13): (1) the disease must be characteristic of persons engaged in a particular trade or occupation in which the plaintiff is engaged; (2) the disease must not be an ordinary disease of life to which the public is equally exposed; and (3) there must be a causal connection between the disease and the plaintiff's employment.

Id. at 367, 517 S.E.2d at 391. "[T]he first two elements are satisfied if, as a matter of fact, the employment exposed [her] to a greater risk of contracting the disease than the public generally." *Rutledge v. Tultex Corp.*, 308 N.C. 85, 93-94, 301 S.E.2d 359, 365 (1983). The plaintiff bears the burden of proving the existence of an occupational disease which entitles her to recover compensation. *Gay v. J.P. Stevens & Co.*, 79 N.C. App. 324, 330-31, 339 S.E.2d 490, 494 (1986). In *Futrell v. Resinall Corp.*, 151 N.C. App. 456, 458, 566 S.E.2d 181, 183 (2002), the

plaintiff argued that the Industrial Commission erred by concluding that his carpal tunnel syndrome was not an occupational disease entitling him to compensation. Neither of the plaintiff's treating physicians offered evidence that the plaintiff's job placed him at a greater risk for developing the disease than the public at large. *Id.* at 459, 566 S.E.2d at 183. The Industrial Commission also found that no other employee who performed the same job as plaintiff had ever developed carpal tunnel syndrome or complained of symptoms. *Id.* The Industrial Commission found that the plaintiff was not at a greater risk for contracting the disease than the general public and denied the plaintiff's claim. *Id.* This Court found the Industrial Commission's finding of fact was supported by competent evidence and upheld the decision. *Id.*

In the case before us, plaintiff offered no medical evidence to show that due to her employment she was placed at a greater risk of developing asthma than the general public. Dr. Alford opined in his deposition that plaintiff's occupational asthma resulted from her exposure to Kutwell 40 and petroleum products used in the machines where she worked. However, he could not determine whether plaintiff's disease was chronic or disabling because more time was needed to make the evaluation. Dr. Alford stated that plaintiff had smoked for twenty-seven years and that her smoking history resulted in her below-normal pulmonary function test results. Dr. Alford also stated that smoking aggravated asthma and caused chronic obstructive lung disease. The evidence before the Industrial Commission also showed that none of plaintiff's co-workers had ever complained of breathing problems relating to Kutwell 40 or to the machinery. This evidence is sufficient to support the findings of fact made by the Industrial Commission.

The Industrial Commission's finding of fact that plaintiff failed to prove she suffered from an occupational disease characteristic of her employment to the exclusion of the general public is supported by competent evidence and therefore conclusive on appeal. This finding of

fact is sufficient to support the Industrial Commission's conclusion of law that plaintiff did not suffer from a compensable occupational disease. This assignment of error is overruled.

We affirm the opinion and award of the Industrial Commission.

Affirmed.

Judges HUNTER and CALABRIA concur.

Report per Rule 30(e).