NO. COA04-1529

NORTH CAROLINA COURT OF APPEALS

Filed: 15 November 2005

PEGGY ROBERTS,
Employee-Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 936103

MILLS MANUFACTURING CORP.,
Employer;

SELF-INSURED,
Key Risk Management Services, Inc.,
Servicing Agent;
Defendant.

Appeal by defendant Mills Manufacturing from opinion and award entered 6 August 2004 by Commissioner Bernadine S. Ballance. Heard in the Court of Appeals 16 June 2005.

David Gantt, for plaintiff-employee.

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

STEELMAN, Judge.

Plaintiff worked for Mills Manufacturing Corp. (Mills) for twenty-five years as an inspector. In her job, plaintiff spent between eighty and ninety percent of her time performing the highly repetitive activity of using snips to clip loose threads off of parachute bags and accessories. Plaintiff has a documented history of hand problems dating back to 1992. She underwent surgery on her thumb in 1992, and had pain and weakness in her left wrist and right

middle finger dating to 1995 for which she sought intermittent treatment until 1997. Plaintiff reported to her supervisor on 12 May 1999 that her hand had been hurting for the previous few days. She was seen by a physician's assistant at Weaverville Family Practice concerning her hand problems on 14 May 1999, and was taken out of work for one week. Plaintiff was referred to Dr. James S. Thompson, an orthopedic surgeon, due to her right ring and middle finger problems. Dr. Thompson examined plaintiff on 1 June 1999, and believed she had developed flexor tenosynovitis of the right ring finger due to her repetitive use of snips at work, and placed her on light-duty restrictions including no use of snips through 10 June 1999. Dr. Thompson subsequently extended her light-duty status with no use of snips from 17 June 1999 through 24 June 1999, the day plaintiff was set to retire from Mills.

Plaintiff has not worked since she left Mills on 24 June 1999, and has not sought employment. She testified that the pain in her hands, as well as non-work related pain in her hips and back, has prevented her from working. Plaintiff continued to see Dr. Thompson, and was subsequently diagnosed with carpal tunnel syndrome in both hands. Surgery was performed on 13 March 2000 to decompress plaintiff's right median nerve, and to release her right middle finger.

Plaintiff saw Dr. Edward Crosby on 14 December 2000. Dr. Crosby's examination revealed tenderness in the carpal tunnel areas and tightness in the small joints of her hands. He opined that her conditions were "definitely" related to her prior work at Mills. He believed plaintiff was at maximum medical improvement, and assigned permanent partial impairment ratings of 7.5% and 5% to plaintiff's right and left hands respectively.

As a result of these hand conditions, plaintiff filed for worker's compensation benefits, and the matter was heard before Deputy Commissioner Edward Garner, Jr. on 1 May 2002. In an

opinion and award filed 27 November 2002, Deputy Commissioner Garner denied plaintiff's claim for worker's compensation benefits. Plaintiff appealed the deputy commissioner's opinion and award, and the matter was reviewed by the Full Commission (Commission) on 28 April 2004. The Commission reversed the deputy commissioner, and awarded plaintiff benefits at the rate of $168.76 per week from 14 May 1999 to 24 May 1999 and from 13 March 2000 to continue until further order of the Commission. The Commission based this award on a determination that plaintiff's "carpal tunnel syndrome, tenosynovitis and related hand conditions are compensable occupational diseases." From the opinion and award of the Commission, defendants appeal.

In defendants' first and third arguments, they contend that the Commission erred in finding and concluding that plaintiff's bilateral carpal tunnel syndrome and right finger condition are compensable occupational diseases. We disagree.

> In reviewing an opinion and award from the Industrial Commission, the appellate courts are bound by the Commission's findings of fact when supported by any competent evidence; but the Commissions's legal conclusions are fully reviewable. An appellate court "does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." If the findings of the Commission are insufficient to determine the rights of the parties, the appellate court may remand to the Industrial Commission for additional findings. "The evidence tending to support plaintiff's claim is to be viewed in the light most favorable to plaintiff, and plaintiff is entitled to the benefit of every reasonable inference to be drawn from the evidence."

Lanning v. Fieldcrest-Cannon, Inc., 352 N.C. 98, 106, 530 S.E.2d 54, 60 (2000) .

In the instant case, plaintiff's conditions are compensable under the Worker's Compensation Act if the Commission finds that she suffers from an occupational disease, which is defined as:

> Any 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. Gen. Stat. §97-53(13) (2004). Our Supreme Court has held that a plaintiff must establish three elements to prove that she suffers from an occupational disease. Plaintiff must prove that the disease is:

> (1) characteristic of persons engaged in the particular trade or occupation in which the claimant 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 [claimant's] employment." To satisfy the first and second elements it is not necessary that the disease originate exclusively from or be unique to the particular trade or occupation in question. All ordinary diseases of life are not excluded from the statute's coverage. Only such ordinary diseases of life to which the general public is exposed equally with workers in the particular trade or occupation are excluded. Thus, 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. "The greater risk in such cases provides the nexus between the disease and the employment which makes them an appropriate subject for workmen's compensation."

Rutledge v. Tultex Corp./Kings Yarn, 308 N.C. 85, 93-94, 301 S.E.2d 359, 365 (1983) .

Defendants first argue that the evidence does not support the Commission's fifteenth finding of fact. That finding of fact states: "Dr. Thompson opined that plaintiff's employment 'accelerated, exacerbated and significantly contributed to' her tenosynovitis, carpal tunnel syndrome, and other hand problems for which he treated plaintiff. He further opined that plaintiff's employment put her at greater risk of contracting tenosynovitis and carpal tunnel syndrome than the general public."

By deposition, plaintiff's expert, Dr. Thompson, testified that plaintiff had tenosynovitis. He explained that tenosynovitis is a general term for inflamation of the tenosynovium, or the lining of the tendon. Tendons slide back and forth through "fine tunnels lined with that tenosynovium; almost like a sausage with a thin, gooey membrane on the outside. And so, that membrane lets it slide back and forth." Dr. Thompson further testified that when that membrane becomes inflamed, it thickens, and the tendons don't slide as well and sometimes catch. "And it's painful. And that can occur anywhere there is a tendon; in your foot, in your ankle, in your wrist." Dr. Thompson further explained: "If it occurs at the wrist, it swells up the compartment. And there is a nerve in that compartment, and it pinches the nerve. That's what carpal tunnel syndrome is." He also explained that when tenosynovitis occurs in the digits of the hand that is called trigger finger (or trigger thumb), and that when it occurs in a certain area on the edge of the radius (one of the lower arm bones), it is called deQuervain's syndrome.

Dr. Thompson treated plaintiff for tenosynovitis (including specifically trigger finger and deQuervain's syndrome) and carpal tunnel syndrome. His treatments included surgery. At times during the course of his treatment, he restricted her from using the snips that she used on a regular basis in her employment. He stated that in his opinion her job "accelerated, exacerbated, [and] significantly contributed to" the conditions for which he treated her. Dr. Thompson was then asked: "Doctor, if her job was as she described it during those office visits to you, do you feel that the specific job she did do put her at a greater risk of getting tenosynovitis and the other _ and deQuervain's than someone _ than the general public who didn't work at Mills Manufacturing?" Dr. Thompson answered in the affirmative. He also responded affirmatively to the question: "Doctor, do you feel that her job as you understand it at Mills Manufacturing

caused, aggravated, accelerated, exacerbated or significantly contributed to the carpal tunnel that she developed?"

The evidence definitively supports the Commission's finding that plaintiff's employment "accelerated, exacerbated and significantly contributed to" her carpal tunnel syndrome and other tenosynovitis related conditions. In light of the testimony that tenosynovitis is a cause of carpal tunnel, and considering all the evidence before the Commission, we further hold that the finding that plaintiff's employment put her at greater risk of developing tenosynovitis and carpal tunnel syndrome than the general public is supported by competent evidence. The elements necessary for a finding that plaintiff suffers from an occupational disease (both tenosynovitis and carpal tunnel syndrome) have been satisfied.

Having found that evidence supports the Commission's findings in this regard, we further hold that the Commission's conclusions of law based on these findings were properly supported. We note that though tenosynovitis is an occupational disease listed under N.C. Gen. Stat. §97-53(21), this does not preclude plaintiff from proving its status as an occupational disease under N.C. Gen. Stat. §97-53(13). *See Flynn v. EPSG Mgmt. Servs.*, __ N.C. App. __, 614 S.E.2d 460 (2005) (Commission found plaintiff's synovitis was an occupational disease under N.C. Gen. Stat. §97-53(20), Court of Appeals affirmed after determining the facts supported plaintiff's injury as an occupational disease under N.C. Gen. Stat. §97-53(13)). It is clear from its opinion and award that the Commission decided this claim under N.C. Gen. Stat. §97-53(13). Having held that the Commission's findings and conclusions were proper under N.C. Gen. Stat. §97-52(13), we do not address defendants' arguments under N.C. Gen. Stat. §97-53(21). These arguments are without merit.

In their second argument, defendants contend that the Commission erred by misapplying and misinterpreting the law in determining that plaintiff is totally disabled because of a work-related injury. We disagree.

> An employee injured in the course of his employment is disabled under the Act if the injury results in an "incapacity . . . to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C.G.S. §97-2(9) (1991). Accordingly, disability as defined in the Act is the impairment of the injured employee's earning capacity rather than physical disablement.

Russell v. Lowes Prod. Distribution, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993). The burden is on the employee to prove disability under N.C. Gen. Stat. §97-2. *Id.* She can meet this burden in one of four ways (only one of which is relevant in the case at bar). *Id.* Defendants and plaintiff in the instant case agree that this issue hinges on whether plaintiff met her burden in providing evidence in support of the third method of proof under *Russell*, "that [s]he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment[.]" *Id*.

Defendants initially argue that the Commission made no finding of fact that any job search by plaintiff would be futile, and therefore its conclusion of law that plaintiff was totally disabled was not supported by the findings of fact.

The Commission found the following: "Considering plaintiff's medical restrictions caused by her compensable occupational disease, her other unrelated medical conditions, her vocational limitations and age, plaintiff was incapable of working in any employment after she reached maximum medical improvement on August 31, 2000 ...." Clearly implicit in this finding is that any job search by plaintiff would be futile.

Defendants next argue that the Commission erred in considering "her other unrelated medical conditions" in determining that she has been totally disabled since 12 March 2000. The "other unrelated medical conditions" mentioned in the record are problems plaintiff was having with her back and hips. There is no evidence that she sought medical attention for these problems before she ceased working for Mills, but she did testify that these conditions were bothering her when she was still working for Mills, and that she simply worked through the pain.

Randy L. Adams, a vocational rehabilitation counselor and evaluator, testified in great detail concerning plaintiff's injuries, her education and vocational skills, her age, and other factors he considered in evaluating her vocational opportunities. He testified that he did factor in all of her medical problems, including her back problem (he did not mention her hip problems), but that he did not think that was "the main limiting factor. In my opinion from the medical records the main limiting factor is her hands." Adams further opined that though plaintiff's hand injuries did not completely bar her from any employment,

> the number of vocational limitations to this lady are significant enough ... to warrant my opinion that really there are no jobs that she could perform as they are normally performed in the national economy. First of all, she is below, functioning below the lowest level of physical demand level. She is below sedentary level because she can't even lift 10 pounds [a lifting restriction imposed because of her hand injuries]. She can't do stressful or repetitive-type work which is what she's done most of her, well, all of the period of past relevant work in the last 15 years but she's worked for the same company doing pretty much the same type of work for the last 25 years, so she can't return to her past work. She can't return to any type of work that's similar to the type of work she's done in the past. She has no training to do any other type of work. She has severe limitations including the fact that she must have frequent rest breaks. She's relegated to unskilled work, she has no transferable skills.

Adams continues in his testimony to provide plenary evidence in support of his opinion that considering plaintiff's hand injuries, along with her age, education, vocational skills and other

relevant factors, there are no regular jobs available to her. Another vocational rehabilitation counselor testified that though her options were limited, he believed plaintiff could find work. The Commission gave greater weight to Adams' testimony.

It is clear from Adams' testimony that very little weight was given to plaintiff's back and hip problems in reaching his opinion. Further, it is proper to consider plaintiff's pre-existing physical limitations, along with other relevant factors, in making a determination of total disability, so long as it is her work-related occupational disease that "tips the scales" and prevents her from earning wages. *See Morrison v. Burlington Industries*, 47 N.C. App. 50, 266 S.E.2d 741 (1980). In light of plaintiff's testimony that she was suffering from these conditions while she was working for Mills, and simply worked through her discomfort, it was not error for Adams to consider these injuries in forming his opinion, and it was not improper for the commission to consider these injuries in making its determination that plaintiff is totally disabled in its opinion and award. *Id.*; *see also Goforth v. K-Mart Corp.*, __ N.C. App. __, __, 605 S.E.2d 709, 712 (2004).

Defendants also argue that plaintiff was not disabled after "mid-July of 2000 [through 14 December 2000] as Dr. Thompson stated that she was capable of full-duty work at that time." It is clear from Dr. Thompson's testimony that he never stated that plaintiff was capable of full-duty work at that time. He was asked for a general estimate for time of recovery following the type of surgery plaintiff had undergone on her hand, and he gave mid-July as an estimate. He made it clear, however, that this was "just a guess" and that he would have had to had examined her and observed how she reacted to her work to make a more definitive determination. Further, "under the Workers' Compensation Act, disability is not defined as an injury or physical infirmity, rather it is a diminished capacity to earn wages." *Renfro v. Richardson Sports, Ltd.*

Partners, __ N.C. App. __, __, 616 S.E.2d 317, 328 (2005). Even assuming *arguendo* Dr. Thompson did release plaintiff to full-duty work for that time period, that alone would not be determinative of her disability status under the Act. *Radica v. Carolina Mills*, 113 N.C. App. 440, 447, 439 S.E.2d 185, 190 (1994). This argument is without merit.

Because defendant has not argued its other assignments of error in its brief, they are deemed abandoned. N.C. R. App. P. Rule 28(b)(6) (2003).

AFFIRMED.

Judges HUDSON and JACKSON concur.

Report per Rule 30(e).