

Bolch  
Scott  
Sellers (Dissent)

NO. COA99-636

NORTH CAROLINA COURT OF APPEALS

Filed: 1 August 2000

ANNIE E. CATES, Employee,  
Plaintiff,

v.

NATIONAL SPINNING CO., INC.,  
Employer,

LIBERTY MUTUAL INSURANCE CO.,  
Carrier,  
Defendants.

North Carolina  
Industrial Commission  
I.C. File No. 947775

Appeal by defendant from an opinion and award filed 1 December 1998 by the North Carolina Industrial Commission. Heard in the Court of Appeals 9 May 2000.

Mrs. Annie E. Cates is a 68-year-old former textile worker, who is disabled due to a moderate to severe breathing disorder. Mrs. Cates contends that she is disabled due to an occupational disease which is causally related to her employment at National Spinning Company, and contends that she is entitled to workers' compensation benefits as a result. The defendants, National Spinning Company, Inc., and Liberty Mutual Insurance Company, contend that Mrs. Cates does not suffer from a compensable occupational disease, but instead suffers from intrinsic asthma which is not related to her employment in the textile industry.

The evidence offered by Annie Cates tends to show that she was born in 1931, that she has a ninth-grade education, and her only work experience has been in the textile industry, working for the defendant National Spinning Company (the Company). Except for a

FILED  
00 AUG -1 AM 6:58  
NORTH CAROLINA  
COURT OF APPEALS  
OF NORTH CAROLINA

five-month period in 1976, she was employed by the Company continuously from 1963 until she left her employment in 1989 due to a pulmonary condition. The Company operates a textile plant which processes synthetic yarns. Its physical plant includes a spinning department, a dye shop, and administrative offices. Plaintiff was employed by the Company as a spinner from 1963 until April 1976 and from September 1976 through July 1986. She testified that throughout those periods there was dust and lint on the machines, on the floor, on the workers and in the air. In 1986 plaintiff was employed as a roll picker. Her job consisted of using a hose to pick lint and dust off the machines. Plaintiff continued as a roll picker until her employment ended in 1989.

Plaintiff testified to the presence of various chemicals in the plant. When the machines in the spinning room were overhauled, workers would tear the machines down and wash the parts in some kind of chemical which had a "stinking odor." Workers overhauled machines every day during the last few years she worked in the spinning room. Floors in the spinning room were repaired with glue and painted with shellac. Chemicals which smelled like "rotten eggs" were used in the air conditioning during the last few years she worked there.

Mrs. Cates began having trouble breathing in 1988. Her daughter was concerned that Mrs. Cates might have a heart problem and persuaded her to visit Dr. Donald Tucker, a heart specialist. Dr. Tucker referred her to Dr. Robert Shaw, a board-certified pulmonary specialist. Mrs. Cates complained of shortness of breath

for the prior year and coughing for the prior three months. After reviewing Mrs. Cates' medical history and running tests, Dr. Shaw opined she suffered from chronic obstructive airways disease related to her occupation. In 1990, defendants employer and insurer referred Mrs. Cates to Dr. Allen Hayes, a specialist in the area of occupational pulmonary medicine. After an examination and pulmonary function studies, Dr. Hayes diagnosed plaintiff with moderate to severe obstructive lung disease which was probably intrinsic asthma and unrelated to her employment.

Dr. Woodhall Stopford, a clinical professor and director of the occupational and environmental medicine education program at Duke University, is board certified in occupational medicine. Dr. Stopford examined Mrs. Cates in 1992. Following his study of plaintiff's medical history and results from tests, Dr. Stopford concluded--and later testified--that plaintiff suffered from obstructive lung disease related to her occupation. He further stated that "individuals exposed to synthetic fiber dust would be at increased risk of developing airways disease, and that such exposures would not be seen among the general public."

A deputy commissioner found that plaintiff did not suffer from an occupational disease and denied her claim. Plaintiff appealed to the Full Commission, which reversed the opinion of the deputy commissioner and awarded plaintiff compensation. Defendants appealed.

*The Law Offices of Robin E. Hudson, by Robin E. Hudson, for plaintiff appellee.*

*Lewis & Roberts, P.L.L.C., by Richard Lewis and John H. Ruocchio, for defendant appellant.*

HORTON, Judge.

Defendants bring forward two of their four assignments of error. First, defendants assign error to 20 of the 26 findings of fact made by the Commission on the grounds that the findings "are not supported by competent record evidence and that they mischaracterize record testimony." Second, defendants assign error to the Commission's conclusion that plaintiff suffers from an occupational disease for which she is entitled to compensation. After careful review, we affirm the opinion and award of the Full Commission.

I.

Plaintiff had the burden of showing that the pulmonary disease causing her disability is "(1) characteristic of persons engaged in the particular trade or occupation in which [she was] 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 [is] 'a causal connection between the disease and the . . . employment.'" *Rutledge v. Tultex Corp.*, 308 N.C. 85, 93, 301 S.E.2d 359, 365 (1983) (citation omitted). The Commission found that plaintiff met her burden of proof. Our review of the Commission's decision "is limited to a determination of (1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are supported by the findings." *Barham v. Food World, Inc.*, 300 N.C. 329, 331, 266

S.E.2d 676, 678, *reh'g denied*, 300 N.C. 562, 270 S.E.2d 105 (1980).

A.

Defendants first argue that the Full Commission erred in making crucial findings of fact based on the opinions of Drs. Shaw and Stopford, and contend that the Commission should have placed more weight on the testimony of Dr. Allen Hayes, a respected expert in the area of pulmonary medicine. Defendants argue that Dr. Hayes is a member of the Industrial Commission's Textile Occupational Disease panel, and thus "is relied on by the State of North Carolina." Defendants note that both Drs. Shaw and Stopford acknowledge the expertise of Dr. Hayes in occupational pulmonary medicine, and conclude that "[d]ue to Dr. Hayes' experience, credentials, and reputation, his testimony should be accorded greater weight than either Drs. Shaw or Stopford and plaintiff's claim should be denied."

However, despite Dr. Hayes' experience and expertise in pulmonary medicine, it is well settled that "the Commission is the sole judge of the credibility of the witnesses and the weight given to their testimony, [and] may assign more credibility and weight to certain testimony than other testimony." *Watkins v. City of Asheville*, 99 N.C. App. 302, 303, 392 S.E.2d 754, 756, *disc. review denied*, 327 N.C. 488, 397 S.E.2d 238 (1990). It is not the function of this Court to either determine the credibility of the witnesses or to determine the weight to be given the evidence.

Further, the Commission made careful findings which tend to support its decision to accord less weight in this case to the

opinion of Dr. Hayes. The Commission found that Dr. Shaw is a board-certified pulmonologist who has been practicing in the Greenville area for more than 20 years. Dr. Shaw's experience "has included treating patients with occupational exposures to dust and fume exposure, as well as teaching on the medical school faculty at ECU." The Commission explained that it "accord[ed] significant weight" to Dr. Shaw's opinions because he "had contact with the plaintiff contemporaneous to her exposures." Further, "Dr. Shaw's interpretation of the peak flow tests is given greater weight than that of Dr. Hayes, because he ordered the tests and because he treated the plaintiff over a long period of time."

The Commission also found that Dr. Stopford is a "Harvard-trained physician with board certification in Preventive Medicine, Occupational Medicine and Internal Medicine, as well as a degree in Industrial Hygiene." The Commission gave "great weight" to Dr. Stopford's opinions "because of his education and training in toxic exposures, his comprehensive research and analysis of the case based on his review of the extensive documentation of the plaintiff's hazardous exposures, and in light of the fact that Dr. Hayes had not done such a study." Because this Court does not sit to assess the credibility of witnesses and assign weight to offered evidence, defendants' first argument in support of their assignment of error is overruled.

B.

Defendants also challenge the opinion given by Dr. Shaw on the grounds that his opinions were based on erroneous and "incorrectly

assumed" information. Defendants argue that Dr. Shaw did not have "precise information" upon which to base his opinion, because Dr. Shaw did not know exactly what type of yarn was processed in the Company's spinning room during Mrs. Cates' tenure there. Moreover, they contend that Dr. Shaw's opinions are further weakened by his erroneous reference to the presence of "cotton dust" in the spinning room and his failure to read any study on synthetic dust fibers. We note that although Dr. Shaw found that Mrs. Cates was in an occupation where there was a likelihood of cotton dust, the doctor also opined that his diagnosis and opinion as to causation would not be altered even if the Commission found that Mrs. Cates was exposed to dust from synthetic yarns, rather than cotton dust.

Further, Dr. Shaw was entitled to rely on the history given him by Mrs. Cates in forming his expert opinions. N.C. Gen. Stat. § 8C-1, Rule 703 (1999); *Cherry v. Harrell*, 84 N.C. App. 598, 353 S.E.2d 433, *disc. review denied*, 320 N.C. 167, 358 S.E.2d 49 (1987) (the history given a doctor by his patient was an adequate basis for his opinion as a statement "reasonably relied upon by experts" under Rule 703 of the Evidence Code). Dr. Shaw was vigorously cross-examined by defendants. Therefore, any inconsistencies or discrepancies in his testimony as a result of that examination go to the weight to be accorded his testimony, not to its admissibility. *State v. Covington*, 315 N.C. 352, 338 S.E.2d 310 (1986). The Commission did not err in admitting, and relying upon, the opinions of Dr. Shaw.

C..

Defendants argue that the opinions of Dr. Stopford were improperly relied upon by the Commission because they were based in part on Material Safety Data Sheets (MSDS) forwarded to Dr. Stopford by counsel for Mrs. Cates, which sheets were not admitted into evidence. We disagree.

Following the entry of a pretrial order in this case on 14 May 1990, counsel for Mrs. Cates sought information from the defendants about the yarns processed by the Company and chemicals to which Mrs. Cates may have been exposed during the period from 1963 to 1989. Counsel sought the information through interrogatories to defendants, a motion to compel filed on 24 July 1990, and a *subpoena duces tecum* directed to the Company's division planner. At a hearing held on 23 October 1990, the deputy commissioner found that Mrs. Cates had been "exposed to materials and chemical substances used by the Defendant-Employer in the operation of its business . . . in the spinning room, the roll shop, the dye house and the air circulated by the air conditioning system." The deputy commissioner further found that Mrs. Cates had no knowledge of the "kinds, types, qualities, natures or quantities" of the chemical substances; that she had requested the information from defendants; but that defendants had failed to supply the necessary information to her. The deputy commissioner ordered the Company to comply with the request for information and ordered it to provide Mrs. Cates with

a list of material safety data sheets with



respect to materials and chemical substances used by the [Company] in the spinning room, roll shop and dye house and in maintaining and servicing the air-conditioning and in maintaining and repairing the machinery and flooring in the spinning room and painting in said room in its Washington Plant during the period from 1973 to June 7, 1989, on or before February 1, 1991.

Defendants eventually provided the requested information, and counsel for Mrs. Cates forwarded the MSDS to Dr. Stopford for use in his evaluation of her. It is apparent from Dr. Stopford's deposition testimony and the findings made by the Commission that Dr. Stopford relied on information contained in the MSDS in making a diagnosis and forming an opinion as to Mrs. Cates' condition.

On 5 August 1994, counsel for Mrs. Cates and for the defendants stipulated in writing (the stipulation) that, among other things, the MSDS reports in question were "genuine and, if otherwise admissible, may be received into evidence without further identification or proof[.]" Although counsel for plaintiff contends that she forwarded the stipulation and the large quantity of MSDS reports to the Commission following their receipt, the Commission has no record of their receipt. Consequently, the stipulation and the attached exhibits were excluded from the record on appeal. Plaintiff moved to expand the record on appeal to include the stipulation and its attachments, although acknowledging that the Commission had been unable to locate the documents in its file.

We are aware that a hearing before the Commission may take place in several locations over an extended period of time, and

that medical evidence, including the transcripts of depositions, are frequently forwarded to the Commission following a hearing. While such evidence need not be formally introduced during a hearing, it must be received by the Commission and made a part of its records in a case in order to be included in the record on appeal. We cannot find that Commissioner Riggsbee erred in excluding the stipulation and attachments, and deny the plaintiff's motion to expand the record on appeal.

We hold, however, that the MSDS reports were properly relied upon by the medical experts in this case in making their diagnoses and forming their opinions as to the causal connection between plaintiff's employment and her disabling condition. Rule 703 of the Rules of Evidence provides that:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

N.C. Gen. Stat. § 8C-1, Rule 703 (1999). In *State v. Wade*, 296 N.C. 454, 251 S.E.2d 407 (1979), decided prior to enactment of our Evidence Code, our Supreme Court stated that a "physician, as an expert witness, may give his opinion, including a diagnosis, based either on personal knowledge or observation or on information supplied him by others, including the patient, *if such information is inherently reliable even though it is not independently admissible into evidence.*" *Id.* at 462, 251 S.E.2d at 412 (emphasis

added). One of our leading commentators on the North Carolina Rules of Evidence has concluded that the thrust of *Wade* with its requirement that the information be "inherently reliable" is consistent with the requirement of Rule 703 that the information be "of a type reasonably relied upon by experts in the particular field . . . ." W. Blakey, *Examination of Expert Witnesses in North Carolina*, 61 N.C.L. Rev. 1, 20-32 (1982).

We hold that the information in the MSDS relied upon by the medical experts in this case was "inherently reliable" and could be reasonably relied upon by the medical experts in forming their opinions. It is apparent from the record that the *defendants* supplied the MSDS to plaintiff pursuant to the order of the deputy commissioner. In fact, the defendants introduced certain of the MSDS into evidence as Defendants' Exhibit 5 at the 26 July 1990 hearing of this matter. Further, defendants submitted the same MSDS to its medical expert, Dr. Allen Hayes, for his use in forming an opinion as to causation. Dr. Hayes testified that he reviewed the information in preparation for his deposition. We also note that defendants do not question the authenticity of the MSDS, nor do they question the authenticity of the stipulation entered into by counsel in which it is agreed that the MSDS reports are "genuine."

Finally, we observe that Rule 703 allows an expert to rely on "facts or data" when appropriate which are not admissible in evidence. Here, the MSDS reports were admissible in evidence, as the parties provided in the stipulation that they might "be

received into evidence without further identification or proof" if otherwise admissible. Therefore, even though we cannot determine from this record that the MSDS reports were actually received by the Commission for entry into evidence, we hold that the MSDS reports were properly relied upon in this case by the medical experts as a basis for their expert opinions.

II.

Next, defendants assign error to the Commission's conclusion that "[p]laintiff suffers from an occupational disease resulting from her employment at National Spinning Company, [and] [h]er working conditions placed her at a greater risk of contracting this disease than members of the public generally." Defendants argue that the findings do not support this conclusion, because many of the findings were based on data not admitted into evidence, specifically the MSDS reports discussed above. Because we have already addressed the issue of the MSDS reports, we reject the argument that the findings of fact were based on incompetent evidence. Our review, therefore, is limited to a determination of whether the findings of fact support the conclusion made by the Commission.

The Commission found, among other things, that

3. In her work, Mrs. Cates was exposed to a great deal of dust and lint from the yarn on the spinning machines, including cotton yarns in the early years. She was not able to identify the types of synthetic yarns processed in the plant, but the MSDS sheets produced by the defendant after the hearing before the Deputy Commissioner identify several types of synthetic yarns.

4. Plaintiff also described a number of chemicals that were used in the plant during her employment period. These included solvents, shellacs, -glues, air conditioning additives that had a "Rotten-egg" smell, and others she could not name. The MSDS produced for air-conditioning additives (which were used to treat corrosion in the machinery) show that several are known to be irritating or "severely irritating" to the respiratory tract. Among these are Chemtreat CT-23 and Chemtreat CL-1420.

5. Mrs. Cates had no history of asthma or other significant breathing problems and she first went to a doctor because of shortness of breath in January 1989, when her daughter insisted that she go to the family doctor because of concern that she might have a heart problem. At that time she had been having trouble breathing for some period of time.

. . . . .

7. Dr. Shaw ran some tests and then took plaintiff out of work on account of her pulmonary condition, on 7 June 1989. Plaintiff has not worked since that time and her symptoms of shortness of breath have affected her ability to engage in most activities, including sleeping, walking, doing housework, and any type of exertion.

. . . . .

12. Dr. Shaw has diagnosed plaintiff with chronic obstructive airways disease, which the Full Commission finds was caused by the conditions in her job at the [N]ational Spinning Plant. Among determinative factors considered were: (1) the absence of other possible causative factors, (2) the fact that plaintiff's breathing ability declined on the days that she worked, and (3) on the fact that she was in an occupation where there was a likelihood of cotton dust and possibly other chemicals that are known to induce obstructive airways disease.

. . . . .

16. Dr. Stopford also concluded that Ms. Cates' lung disease was caused by her work at National Spinning. His impression was that her "chronic obstructive-diseases were more likely than not related to her workplace exposures." He said:

She did have exposures to a number of chemicals or dusts that have been associated with an increased risk of acute or persistent lung disease. She did have work-related symptoms associated with exposure to these irritating dusts and fumes. She does have evidence of bronchospastic lung disease.

17. Dr. Stopford identified five reasons for his conclusions. They were (1) the lack of prior symptoms, (2) work-related symptoms, (3) the MSDS showing irritating chemicals, (4) the known relationship between such irritants and airways disease and (5) the known association between synthetic fiber dust and airways disease. Based on those factors, Dr. Stopford testified that the combination of exposures were a significant contributing factor in plaintiff's respiratory condition, and that the exposures placed her at increased risk of developing his [sic] lung condition over members of the general public.

. . . . .

24. The plaintiff, Annie Cates, has chronic obstructive lung disease as a result of her exposures to dusts and chemicals in her employment at the defendant's mill.

The above findings more than adequately support the conclusion that Mrs. Cates "suffers from an occupational disease resulting from her employment at National Spinning Company." Therefore, defendants' final assignment of error is also overruled.

In conclusion, the findings of fact made by the Commission are supported by competent evidence and the conclusion reached by the

Commission is supported by the findings of fact. The Opinion and Award issued by the Full Commission is affirmed.

Affirmed.

Judges GREENE and TIMMONS-GOODSON concur.

Report per Rule 30(e).