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NO. COA02-1031

NORTH CAROLINA COURT OF APPEALS

Filed: 1 April 2003

FAYE SMITH,

Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 956389

GOLD KIST, INC.,

Employer,

and

CARSON-BROOKS, INC.,

Carrier,
Defendants.

Appeal by plaintiff from Opinion and Award entered 3 May 2002 by The North Carolina Industrial Commission. Heard in the Court of Appeals 24 March 2003.

Nancy P. Quinn for plaintiff-appellant.

Cranfill, Sumner & Hartzog, L.L.P., by Scott J. Lasso, for defendant-appellees.

ELMORE, Judge.

Plaintiff Faye Smith, who suffered from asthma since 1993, began working in the defendant-employer's hatchery in 1996. While working at the hatchery, plaintiff was exposed to formaldehyde. Plaintiff's asthma worsened and, in 1998, plaintiff was hospitalized for a severe asthma attack. Plaintiff was not allowed to return to work. Plaintiff subsequently filed a workers

compensation claim against defendant-employer seeking compensation for an occupational disease. After a hearing, the Deputy Commissioner concluded that plaintiff's "exposure to respiratory irritants during her employment with defendant-employer significantly aggravated Plaintiff's pre-existing condition of asthma[.]" and awarded her compensation. Defendant-employer appealed to the Full Commission (Commission).

The Commission reversed the deputy commissioner and entered the following findings of fact:

2. Plaintiff's second shift job duties included recording temperatures of the egg incubators every two hours, rolling the eggs and cleaning the hatchery. Plaintiff also had to enter the hatchery rooms to check on the incubators when alarms sounded indicating high temperatures, which occurred more often during the summer months due to warmer temperatures.

3. Approximately one month after plaintiff began her employment, defendant-employer started using formaldehyde as a disinfectant in the hatchery during the second shift. Once or twice a month, pans containing formaldehyde were placed in the rooms where the incubator machines were housed and the gas was released into the atmosphere through the process of evaporation. The pans of formaldehyde were not used during the first shift.

4. A respiratory mask was provided for employees who worked in the hatcheries, but plaintiff testified that she only wore the mask sporadically. In Spring 1998, plaintiff was transferred out of the hatchery position and started working the first shift cleaning hatches. At this time, plaintiff was no longer exposed to formaldehyde.

5. Plaintiff was diagnosed with asthma as early as 1993. Since 1993, plaintiff used inhalers on a regular basis and suffered from asthma attacks every six months to a year. Plaintiff also reported that she had a 20 year history of smoking approximately one pack of cigarettes per day.

6. On 9 October 1998, plaintiff experienced a severe asthma attack and presented to Chatham Hospital for treatment. She gave a history of six to seven years of asthma and claimed to have quit smoking for one week. On 12 October 1998, plaintiff

presented to Dr. Eric Jon Kozlow, an expert in allergy and immunology, for a consult requested by plaintiff's primary care physician. Plaintiff had severe asthma at that time, and gave a history of severe asthma over many years. Dr. Kozlow noted that plaintiff had very severe obstructive lung disease with hypoxemia despite very aggressive treatment, including the chronic administration of systemic steroids and occasional supplemental oxygen, which puts her in a category of asthmatics that is probably less than one percent of all asthmatics in the country.

7. Dr. Kozlow opined that plaintiff had a number of contributing factors giving rise to her obstructive lung disease, including smoking for an extensive period of time, components of true hyperresponsive bronchospastic lung disease and reflux induced respiratory disease. He noted that plaintiff had "exposure to a fair degree of dust and molds and formaldehyde [sic] when she was working at the food processing plant," but that it would be "almost impossible to prove the extent to which this occupational exposure was responsible for her current condition."

8. Dr. Kozlow's impression of plaintiff's exposure to dust, molds and formaldehyde at work was based solely upon plaintiff's statements to him. Dr. Kozlow stated that he had no information regarding what, if any, actual exposure to formaldehyde plaintiff might have had. There is no evidence presented as to the level of dust, mold or formaldehyde present at plaintiff's work or that these levels exceeded OSHA standards. Further, there is insufficient evidence regarding plaintiff's exposure to these substances while at work. Dr. Kozlow also stated that although plaintiff's asthma worsened around the time that she was working for defendant-employer, "cause-effect can't really be established."

9. Plaintiff has not proven based on the greater weight of the evidence that her asthma and other respiratory problems were caused by or significantly aggravated by her employment.

Based on these findings, the Commission concluded, in part:

2. In the instant case, plaintiff has failed to prove by the greater weight of the evidence that she has contracted a compensable occupational disease. There is insufficient medical and other evidence from which to find and conclude that there is a causal connection between plaintiff's long term asthmatic condition and her employment with defendant-employer. There is insufficient evidence on what, if any, exposure plaintiff may have had with dust, molds or formaldehyde while employed by

defendant-employer, or evidence that such exposures, if any, aggravated her condition. For these reasons, plaintiff is not eligible for compensation under the Act. N.C. Gen. Stat. §97-53.

From the opinion and award, plaintiff appeals.

This Court is limited to two questions when reviewing an opinion and award from the Commission: (1) whether there is any competent evidence in the record to support the Commission's findings of fact; and (2) whether those findings of fact support the Commission's conclusions of law. *Lowe v. BE&K Construction Co.*, 121 N.C. App. 570, 573, 468 S.E.2d 396, 397 (1996). Therefore, if there is competent evidence to support the findings, those findings are conclusive on appeal even though there is evidence to support contrary findings. *Hedrick v. PPG Industries*, 126 N.C. App. 354, 357, 484 S.E.2d 853, 856 (1997), *disc. review denied*, 346 N.C. 546, 488 S.E.2d 801 (1997).

To qualify for compensation for an occupational disease under section 97-53(13) of the General Statutes, the plaintiff must show the disease is: (1) characteristic of persons engaged in the particular trade or occupation in which the claimant was engaged; (2) not an ordinary disease of life to which the public generally was equally exposed with those engaged in that particular trade or occupation; and (3) there had to have been a causal connection between the disease and the claimant's employment. *Hansel v. Sherman Textiles*, 304 N.C. 44, 52, 283 S.E.2d 101, 106 (1981). In *Rutledge v. Tultex Corp.* 308 N.C. 85, 301 S.E.2d 359 (1983), our Supreme Court stated that the causal connection prong is established if the work environment "significantly contributed to, or was a significant causal factor in, the disease's development." *Id.* at 101, 301 S.E.2d at 369-70.

The only evidence in the present case concerning the relationship between plaintiff's exposure to formaldehyde fumes and her lung disease is the testimony of Dr. Kozlow. He

testified that: exposure to a large amount of feathers, chemicals to treat the animals, animal excrement and mold “certainly could have caused [plaintiff’s] problem, but it is going to be very hard to make [a] cause-effect relationship because that happened so long ago. And we don’t really know so much about what [plaintiff’s] status was prior to working in the chicken processing plant or hatchery.” Dr. Kozlow further testified that he was not presented with any objective information regarding formaldehyde levels. Dr. Kozlow testified that he “[did not] think that you can assign her disability solely based upon her exposure to work. I mean, it may be, but you cannot do that with certainty.”

Finally, Dr. Kozlow stated that plaintiff had a variety of different reasons to have obstructive lung disease: smoking for an extensive period of time, reflux induced respiratory disease, true hyperresponsive bronchospastic lung disease, as well as exposure to a fair degree of dust, molds and formaldehyde at the processing plant. However,

[i]t would be difficult to assign a specific contribution of each of these factors that are giving rise to her respiratory condition. Although it is quite possible that her occupational exposure was responsible for the majority of her respiratory disease, it will be almost impossible to prove the extent to which this occupational exposure was responsible for her current condition.

The doctor’s testimony was competent evidence to support the commission’s findings of fact and its conclusion that there was “insufficient medical and other evidence from which to find and conclude that there is a causal connection between plaintiff’s long term asthmatic condition and her employment with defendant-employer.”

Contrary to plaintiff’s contention, the Commission properly considered Dr. Kozlow’s testimony on the medical issue of causation. The Commission “is the sole judge of the credibility of the witnesses and the weight to be given to their testimony, and may reject a witness’ testimony entirely if warranted by disbelief of that witness.” *Lineback v. Wake County Board of*

Commissioners, 126 N.C. App. 678, 680, 486 S.E.2d 252, 254 (1997). However, even though the Commission may choose not to believe some evidence, it cannot “wholly disregard or ignore competent evidence” and must at least consider and evaluate all of the evidence before rejecting it. *Id.* Plaintiff only offered her treating physician’s testimony on the issue of causation. Dr. Kozlow could not identify any clear factors which would identify with the aggravation of plaintiff’s asthma. Based on the findings of fact found by the Commission, it is clear that the Commission reviewed and considered Dr. Kozlow’s testimony.

We also reject plaintiff’s contention that the Commission erred in assessing the evidence offered. Specifically, plaintiff argues the Commission failed to apply the “preponderance of the evidence” standard for determining medical causation.

“The degree of proof required of a party plaintiff under the Act is the ‘greater weight’ of the evidence or ‘preponderance’ of the evidence.” *Phillips v. U.S. Air, Inc.*, 120 N.C. App. 538, 542-43, 463 S.E.2d 259, 261 (1995), *aff’d per curiam*, 343 N.C. 302, 469 S.E.2d 552 (1996). In this case, the Commission applied the recognized standard for determining medical causation and concluded plaintiff failed to prove by the greater weight of the evidence that her employment was causally related to her long term condition or that her job caused her to suffer an aggravation to her condition. Accordingly, we conclude the Commission properly denied plaintiff’s benefits under the Act.

Affirmed.

Judges HUNTER and BRYANT concur.

Report per Rule 30(e).