NO. COA08-835

NORTH CAROLINA COURT OF APPEALS

Filed: 17 February 2009

GERALD T. LANE,
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 963599

AMERICAN NATIONAL CAN COMPANY,
Employer,
SELF-INSURED

GALLAGHER BASSETT SERVICES, INC.,
Servicing Agent,
Defendants.

Appeal by plaintiff from an Opinion and Award entered 8 May 2008 by the North Carolina Industrial Commission. Heard in the Court of Appeals 11 December 2008.

Elliot Pishko Morgan, PA, by J. Griffin Morgan, for plaintiff appellee.

Teague, Campbell, Dennis & Gorham, LLP, by George H. Pender and Courtney C. Britt, for defendants-appellants.

STEELMAN, Judge.

Where there was competent evidence to support the Commission's finding of fact, the Commission did not err in concluding that plaintiff did not suffer a compensable occupational disease due to his employment.

I. Factual and Procedural Background

The facts of this case are presented in *Lane v. Am. Nat'l Can Co.*, 181 N.C. App. 527, 640 S.E.2d 732 (2007), *disc. review denied*, 362 N.C. 236, 659 S.E.2d 735 (2008).

The Commission filed its initial opinion and award in this case on 6 October 2005 denying plaintiff's claim for workers' compensation benefits. Plaintiff appealed to this Court. We entered an opinion on 6 February 2007 remanding the case back to the Commission for further findings of fact regarding whether plaintiff's workplace stressors and employment placed him at a greater risk for contracting his psychological condition than the general public. *Lane* at 531, 640 S.E.2d at 735.

Upon remand, the Commission amended its opinion and award and finding of fact number 28:

> 28. Based upon the totality of the evidence and testimony elicited from the doctors, the Full Commission gives greater weight to the opinion of Dr. Artigues and finds that plaintiff's job did not place plaintiff at an increased risk for contracting his psychological condition than the general public. There is no competent evidence in the record to establish that plaintiff's working conditions at ANC exposed him to unique or peculiar job stressors to which the general public is not exposed. The greater weight of the evidence is that the job stressors plaintiff experienced at ANC can occur in any profession or industry. The working conditions which brought on plaintiffs increased level of stress are not characteristic of and peculiar to his line management supervisor position with ANC because these working conditions can occur in any industry, trade or profession.

The Commission concluded that plaintiff failed to prove that he sustained an occupational disease as the result of his employment with defendant American National Can ("ANC") and denied plaintiff's occupational disease claim. Plaintiff appeals.

II. Finding of Fact Number 28

In plaintiff's first argument, he contends that finding of fact number 28 is not supported by competent evidence. We disagree.

"The standard of review on appeal to this Court from an award by the Commission is whether there is any competent evidence in the record to support the Commission's findings and whether those findings support the Commission's conclusions of law." *Oliver v. Lane Co.*, 143 N.C. App. 167, 170, 544 S.E.2d 606, 609 (2001) (citations omitted).

In order for a disease to be compensable as an occupational disease under the North Carolina Worker's Compensation Act, it must be:

> (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."

Rutledge v. Tultex Corp./Kings Yarn, 308 N.C. 85, 93, 301 S.E.2d 359, 365 (1983) (quotation and citation omitted). "[T]he first two elements are satisfied if . . . the employment exposed the worker to a greater risk of contracting the disease than the public generally." *Id.* at 93-94, 301 S.E.2d at 365 (citation omitted).

This Court has recognized work-related depression as an occupational disease and compensable under the Act. *Smith-Price v. Charter Pines Behavioral Ctr.*, 160 N.C. App. 161, 170, 584 S.E.2d 881, 888 (2003). "However, the claimant must prove that the mental illness or injury was due to stresses or conditions different from those borne by the general public." *Pitillo v. N.C. Dep't of Envtl. Health & Natural Res.*, 151 N.C. App. 641, 648, 566 S.E.2d 807, 813 (2002).

Plaintiff contends that there is no competent evidence to support the Commission's finding that plaintiff's employment did not place him at an increased risk for contracting his psychological condition than the general public.

A review of the record reveals that Dr. Artigues, a board certified general and forensic psychiatrist who performed an independent evaluation of plaintiff, testified on at least two occasions that plaintiff's employment with ANC did not place him at an increased risk of developing a psychiatric condition when compared to the general public. Dr. Artigues specifically stated that the job stressors complained of by plaintiff "could happen in any workplace" and that "anybody in [plaintiff's] situation would be experiencing a lot of stress."

Plaintiff contends that Dr. Artigues' testimony demonstrates that she erroneously believed that plaintiff's disease had to originate exclusively from or be unique to plaintiff's employment with ANC and that, due to this erroneous understanding of the test for increased risk, her testimony was not competent evidence on this issue.

Dr. Artigues' opinion was framed in terms virtually identical to the test set forth in *Rutledge* and applied in cases dealing with issues of workplace depression and mental illness. These cases have consistently refused to hold a mental illness to be compensable where the evidence demonstrated only that plaintiff was exposed to stressors common to many professions and workplaces. *See Rutledge*; *see also Woody v. Thomasville Upholstery, Inc.*, 146 N.C. App. 187, 202, 552 S.E.2d 202, 211 (2001) (Martin, J., dissenting), *rev'd*, 355 N.C. 483, 562 S.E.2d 422 (2002) ("[W]orking for an abusive supervisor . . . can occur with any employee in any industry or profession, or indeed, in similar abusive relationships outside the workplace. Therefore, I do not believe plaintiff's conditions can be construed as "characteristic of and peculiar to" her particular employment; they are ordinary diseases, to which the general public is equally exposed outside the workplace in everyday life."); *Lewis v. Duke Univ.*, 163 N.C. App. 408, 417, 594 S.E.2d 100, 106 (2004) ("None of [plaintiff's] stressors is characteristic to or peculiar to the nursing profession; rather, they are general stressors common to many

workplaces. Thus, Plaintiff failed to prove that her employment placed her at a greater risk of developing depression than the public generally."). Accordingly, Dr. Artigues' testimony that the stressors experienced by plaintiff in his employment with ANC were common to many workplaces is competent on the issue of increased risk. *See Lewis* at 416-17, 594 S.E.2d at 106.

Although plaintiff demonstrated multiple problems with his job, he failed to demonstrate that those workplace stressors were greater than those experienced by the public generally. The Commission's finding is supported by competent evidence.

This argument is without merit.

III. Expert Witnesses

In plaintiff's second argument, he contends that the Commission erred in finding that there was no competent evidence to establish that plaintiff's working conditions exposed him to unique or peculiar job stressors to which the general public is not exposed. We disagree.

Plaintiff cites the testimony of his expert witnesses, as well as "numerous medical and scientific studies in the record," and argues that this evidence establishes that the stresses of his job placed him at an increased risk of suffering from depression. However, it is well-established that "[t]he Commission is the sole judge of the credibility of the witnesses and the weight accorded to their testimony." *Effingham v. Kroger Co.*, 149 N.C. App. 105, 109-10, 561 S.E.2d 287, 291 (2002).

The Commission gave greater weight to the opinion of Dr. Artigues, who testified that plaintiff's job did not place him at an increased risk of contracting a psychological condition. Thus, although the record may contain evidence tending to support a contrary finding, the Commission did not err in finding that plaintiff's evidence was not competent.

This argument is without merit.

Plaintiff fails to argue his remaining assignments of error in his brief and they are deemed abandoned. N.C. R. App. P. 28(b)(6) (2008).

AFFIRMED.

Judges CALABRIA and STROUD concur.

Report per Rule 30(e).