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NO. COA03-798

NORTH CAROLINA COURT OF APPEALS

Filed: 6 July 2004

MYRTLE KOHNEN,  
Employee,  
Plaintiff,

v.

North Carolina Industrial Commission  
I.C. File No. 985679

EATON CORPORATION,  
Employer,

SELF-INSURED, (GAB ROBINS  
NORTH AMERICA, Servicing Agent)  
Defendants.

Appeal by plaintiff and defendants from an opinion and award filed 27 March 2003 by the North Carolina Industrial Commission. Heard in the Court of Appeals 3 March 2004.

*Huggins, Pounds, & Davis, L.L.P., by Dallas M. Pounds, for plaintiff appellant-appellee.*

*Lewis & Roberts, P.L.L.C., by Garth H. White, for defendant appellant-appellee.*

McCULLOUGH, Judge.

Plaintiff Myrtle Kohnen began working for defendant Eaton Corporation on 14 October 1985. Plaintiff had never smoked cigarettes and prior to October 1998 had no pulmonary problems. Defendant Eaton Corporation is a golf grip manufacturer in Laurinburg, North Carolina. Defendant's plant includes a paint department which is responsible for painting logos on golf grips. The painting department also includes the roll paint operation, paint mixer operation, auto spray operation, and cleaning operation.

Plaintiff worked in the roll paint department from 14 October 1985 until 1989. From 1989 to 1995, plaintiff worked in the auto spray department. Finally, plaintiff worked in the hand paint department from 1995 until 7 December 1997.

During her employment, plaintiff came in contact with a number of chemical solvents. Industrial survey reports indicated that these chemicals were within acceptable limits prescribed by OSHA. However, air samples revealed that employees who the following jobs were exposed to the chemicals on a constant basis: roll paint, paint mixer, auto spray, and cleaning. More importantly, Material Safety Data Sheets (MSDS) indicate that most of these chemicals can result in nasal and respiratory irritation, shortness of breath, tightness of chest, and other respiratory problems when employees are exposed to excessive inhalation of the chemicals.

In October of 1998, plaintiff was working in the roll paint department when a urethane gun became blocked, causing a thick fog of urethane to permeate the entire painting department. Plaintiff experienced burning in her throat, tightening of her chest, coughing, and wheezing. At the time plaintiff was exposed, plaintiff's supervisor, Linda McGee, and other coworkers were present.

In May of 1989, plaintiff accepted a position on the first shift in the auto spray department. Over time, plaintiff began to suffer from constant shortness of breath, throat irritation, and wheezing. Plaintiff consulted with her family physician, Dr. John W. Neil. During the hearing before the Deputy Commissioner, plaintiff contended that Dr. Neil's office misplaced her medical records. However, based on the stipulated medical records of Dr. Neil, plaintiff's first complaint occurred on 9 August 1994. Plaintiff testified that Dr. Neil told her in the early 1990s that her coughing and respiratory problems were related to her employment with defendant.

On 4 May 1995 and 1 May 1996, plaintiff filed a workers' compensation claim after contracting right and left carpal tunnel syndrome. These claims were heard on 3 November 1997, but prior to the filing of an opinion and award, the parties reached a settlement agreement. As a result of plaintiff's bilateral carpal tunnel syndrome, defendant changed plaintiff's job. Plaintiff's new duties included hand painting logos on golf grips. This position was considered to be light duty.

Plaintiff was laid off on 9 December 1997. Plaintiff was offered a job in defendant's clutch department, but she declined because of her bilateral carpal tunnel syndrome. After the layoff, plaintiff received unemployment compensation in the amount of \$290.00 per week for 26 weeks for a total of \$7,540.00. As a condition for continued receipt of these funds, plaintiff was required to conduct two job searches per week. Plaintiff applied for positions with several potential employers, but was unable to secure employment.

On 17 April 1998, plaintiff went to see Dr. Jeffrey Moore after complaining about shortness of breath. Dr. Moore's tentative diagnosis was asthma.

Plaintiff received assistance from the North Carolina Department of Vocational Rehabilitation in an effort to get her GED. However, plaintiff's efforts ceased in June of 1999 because she only passed one test at Richmond Community College.

In September of 1999, plaintiff began working at Wal-Mart as a stocker, but she resigned in November. She claimed that she was forced to resign because of exposure to environmental irritants while performing her job duties. Based on plaintiff's testimony, Wal-Mart appears to have been the last injurious exposure to the hazards of occupational asthma. Wal-Mart was not named as a defendant, and there is no expert medical evidence that this employment augmented plaintiff's occupational disease to any extent.

On 8 March 2001, plaintiff was examined by Dr. Ted Kuntsling of Raleigh Pulmonary and Allergy Consultants. Dr. Kuntsling opined that plaintiff contracted occupational asthma after being exposed to various chemicals at defendant's plant, that plaintiff's job duties placed her at an increased risk of developing occupational disease when compared to members of the general public, and plaintiff's job duties were a significant causal factor in the development of her occupational asthma.

When Dr. Kuntsling last saw plaintiff, plaintiff's asthma and nasal congestion were controlled, and her lung function test was normal. The doctor determined that plaintiff was capable of working provided that she refrain from environmental exposure to cleaning materials, cosmetics, or hot and humid conditions. Dr. Kuntsling assigned no permanent functional impairment to her lungs.

At the time of the hearing before the Deputy Commissioner, plaintiff was not working and was receiving social security disability benefits based upon her inability to work due to carpal tunnel syndrome, arthritis, and pulmonary complications. Since leaving her job at Wal-Mart, plaintiff has not looked for work.

Plaintiff filed an Industrial Commission Form 18 on or about 19 November 1999. Form 18 states that plaintiff's disability from occupational asthma began on 9 December 1997. However, plaintiff's testimony shows that any disability after that time was due to bilateral carpal tunnel syndrome and was not causally related to the occupational asthma. Plaintiff was able to work as a hand painter until the layoff on 9 December 1997, and her refusal to accept a position in the clutch department was solely based on her carpal tunnel syndrome. Finally, plaintiff's doctors stated that plaintiff is not disabled because of occupational asthma, but she must avoid exposure to fumes.

This matter was heard before Deputy Commissioner George R. Hall, III on 22 October 2001, and an award was entered on 10 June 2002. Plaintiff received temporary partial disability compensation and medical compensation. Defendant appealed to the Full Commission. On 27 March 2003, the Full Commission modified in part and affirmed in part the opinion and award of the Deputy Commissioner. The Full Commission concluded that although plaintiff suffers from an occupational disease, she was not disabled within the meaning of the North Carolina Workers' Compensation Act. In its opinion and award entered 27 March 2003, the Full Commission required defendant to pay medical expenses and costs, but plaintiff's claim for disability compensation was denied.

Both sides appeal. On appeal, defendant argues that the Full Commission erred in determining that plaintiff developed a compensable occupational disease. In contrast, plaintiff argues that the Full Commission erred in concluding that plaintiff was not disabled within the meaning of the North Carolina Workers' Compensation Act. We reject these assignments of error and affirm the opinion and award of the Full Commission.

The standard of review in this case is limited to "whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). The Full Commission is the "sole judge of the weight and credibility of the evidence[.]" *Id.* at 116, 530 S.E.2d at 553. An appellate court reviewing a workers' compensation claim "does not have the right to weigh the evidence and decide the issue on the basis of its weight." *Anderson v. Construction Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965). "The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Id.* at 434, 144 S.E.2d at 274. If there is any evidence at

all, taken in the light most favorable to the plaintiff to support it, the finding of fact stands, even if there is evidence going the other way. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999). With these principles in mind, we consider the case before us.

### I. Plaintiff's Assignment of Error

Plaintiff argues that the trial court erred in determining that plaintiff was not disabled within the meaning of the North Carolina Workers' Compensation Act. We disagree.

Plaintiff first contends that finding of fact 24 is not supported by competent evidence.

That finding states:

24. Plaintiff's Industrial Commission Form 18 was filed on or about November 19, 1999 alleging a claim for workers' compensation benefits based upon her occupational exposure while employed by defendant. The Form 18 states that plaintiff's disability as a result of the occupational asthma began December 9, 1997. However, plaintiff's own testimony at the hearing shows that her disability, if any, after December 9, 1997 was due to bilateral carpal tunnel syndrome and was not causally related to the occupational asthma. Plaintiff was able to perform the duties of a hand painter for defendant until the layoff on December 9, 1997. Her refusal to accept the job in the clutch department offered by defendant was based solely on her bilateral carpal tunnel syndrome. Drs. Moore and Kuntsling stated that plaintiff is not disabled from employment due to the occupational asthma but must continue on a permanent basis to avoid exposure to fumes from chemicals and other substances.

We conclude that there is competent evidence to support this finding. First, the record contains a copy of plaintiff's Form 18. Our review reveals that finding of fact 24 accurately reflects the information found in plaintiff's Form 18. This includes the date on which the form was filed (19 November 1999), the nature of the alleged injury (occupational asthma), and the date of the alleged injury (9 December 1997).

There is also sufficient evidence to sustain the remainder of the finding. Plaintiff's own testimony proves that her disability, if any, was due to bilateral carpal tunnel syndrome, not an occupational disease. Plaintiff admitted that nothing in the hand paint caused her difficulty breathing. She further acknowledged that her refusal to accept a job in another department was related to problems with her hands, not breathing difficulties. Finally, plaintiff's physicians never testified that plaintiff was incapable of work. Instead, both indicated that plaintiff could work as long as she avoided exposure to environmental irritants. Therefore, we conclude that there is competent evidence in the record to support finding of fact 24.

Plaintiff also takes issue with the Full Commission's conclusions of law which determined that plaintiff sustained no disability. A disability is defined as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C. Gen. Stat. §97-2(9) (2003). An employee may meet this burden by producing:

(1) . . . medical evidence that [she] is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) . . . evidence that [she] is capable of some work, but that [she] has, after a reasonable effort on [her] part, been unsuccessful in [her] effort to obtain employment; (3) . . . evidence that [she] 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; or (4) . . . evidence that [she] has obtained other employment at a wage less than that earned prior to the injury.

*Demery v. Perdue Farms, Inc.*, 143 N.C. App. 259, 265, 545 S.E.2d 485, 489-90, *aff'd per curiam*, 354 N.C. 355, 554 S.E.2d 337 (2001).

We conclude that plaintiff has not established any of the prerequisites set out in *Demery*. The first factor, medical evidence that plaintiff was incapable of work, was not satisfied because neither of plaintiff's doctors testified that plaintiff was incapable of work. The second factor,

whether plaintiff has been unable to work despite reasonable efforts, was also not met. Plaintiff only attempted to work one other job after December of 1997, and she failed to show why she was unable to continue working in that position. Furthermore, plaintiff's failure to seek *any* subsequent employment was simply not reasonable.

Plaintiff did not establish factor three, whether it would be futile to seek other employment due to plaintiff's age, education, and experience. Simply put, plaintiff did not present any vocational evidence that showed plaintiff was incapable of securing employment. Finally, factor four, evidence that plaintiff has obtained work earning less than at the time of the injury, is not relevant since plaintiff in this case failed to return to any employment. In sum, we conclude that the Full Commission correctly determined that plaintiff is not disabled within the meaning of the North Carolina Workers' Compensation Act. Therefore, plaintiff's assignment of error is dismissed.

## II. Defendant's Assignment of Error

Defendant argues that the trial court erred in determining that plaintiff developed a compensable occupational disease. We disagree.

To prove the existence of a compensable occupational disease under N.C. Gen. Stat. §97-53(13) (2003), a plaintiff must establish three elements: (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. *Jarvis v. Food Lion, Inc.*, 134 N.C. App. 363, 367, 517 S.E.2d 388, 391, *disc. review denied*, 351 N.C. 356, 541 S.E.2d 139 (1999).



In its brief, defendant did not assign error to any of the Full Commission's findings of fact.[**Note 1**] Rather, defendant's brief focuses on conclusion of law 1 which determined that plaintiff had a compensable occupational disease.

We believe that the findings of fact support this conclusion. Plaintiff was exposed to a number of chemicals while working for defendant. Air samples indicated that employees performing the duties of roll paint, paint mixer, auto spray, and cleaning were exposed to these chemicals on a constant basis. Additionally, Material Safety Data Sheets (MSDS) reveal that excessive inhalation of the chemicals can lead to a number of respiratory problems. In October of 1998, plaintiff was working in the roll paint department; she was exposed to urethane when the equipment she was using malfunctioned. Finally, Dr. Kuntsling opined that plaintiff contracted occupational asthma based on her exposure to chemicals and that plaintiff's job duties placed her at an increased risk when compared with members of the general public.

This evidence is sufficient to establish all three elements of the claim. First, plaintiff's disease was characteristic of people who work in her trade or profession. While working for defendant, plaintiff was exposed to a number of chemicals. Moreover, scientific data indicates that inhalation of those chemicals can lead to respiratory problems. Therefore, "there is a recognizable link between the nature of the job and an increased risk of contracting the disease in question." *Booker v. Medical Center*, 297 N.C. 458, 472, 256 S.E.2d 189, 198 (1979). Second, the disease is not an ordinary disease of life to which the public is equally exposed. Dr. Kuntsling's deposition substantiates the view that plaintiff's job duties placed her at a greater risk when compared with members of the general public. Finally, there was a causal connection between the disease and plaintiff's employment. Plaintiff inhaled harmful chemicals, and this led to her respiratory problems. We hold that the Full Commission correctly determined that plaintiff

developed a compensable occupational disease. Therefore, defendant's assignment of error is rejected.

After careful consideration of the record and the arguments presented by the parties, we conclude that the Full Commission acted properly in all respects. Accordingly, the opinion and award of the Full Commission is

Affirmed.

Judges BRYANT and ELMORE concur.

Report per Rule 30(e).

**NOTE**

1. Even if defendant had made this argument, it would not be persuasive. Our review of the record indicates that the Full Commission's findings of fact were supported by competent evidence.