NO. COA11-796
NORTH CAROLINA COURT OF APPEALS

Filed: 15 May 2012

CLAYTON RAY HARRELL,
Employee,
Plaintiff,

v.

North Carolina
Industrial Commission
I.C. No. W17633

PALACE ENTERTAINMENT HOLDINGS, INC.,
Employer,
LIBERTY MUTUAL INSURANCE COMPANY,
Carrier,
Defendants.

Appeal by plaintiff from Opinion and Award entered 12 April 2011 by the North Carolina Industrial Commission. Heard in the Court of Appeals 16 November 2011.

Barron & Berry, L.L.P., by Vance Barron, Jr., for plaintiff-appellant.

Cranfill Sumner & Hartzog LLP, by Kirk D. Kuhns and Sara B. Warf, for defendants-appellees.

GEER, Judge.

Plaintiff Clayton Ray Harrell appeals from an Opinion and Award concluding that plaintiff's claim of injury by accident was barred by the statute of limitations and that his

occupational disease claim failed because he did not prove that he was, due to his employment, at increased risk as compared to the general public for developing reactive airways dysfunction syndrome ("RADS"). On appeal, plaintiff does not challenge the Commission's ruling on the accident claim, but argues the Commission's occupational disease ruling was in error. Because the Commission's findings of fact are supported by competent evidence and those findings support the conclusions of law, our standard of review requires that we affirm.

Facts

Plaintiff began his employment as a maintenance plumber with Palace Entertainment Holdings, Inc., also known as Wet & Wild Emerald Point Water Park, in 2005. Plaintiff was primarily responsible for maintaining defendant employer's pools, pipes, chemicals, and pumps.

On 10 July 2006, sodium hypochlorite bleach leaked from a pipe in defendant employer's chemical room due to a fitting/O-ring failure. The bleach was two inches deep on the chemical room floor -- plaintiff estimated that a "couple hundred gallons" of bleach had leaked. It took plaintiff approximately 30 to 35 minutes to repair the leak.

The only ventilation in the chemical room was an opening in the wall where a ventilation fan had been located. Although

plaintiff wore a protective mask while repairing the leak, he indicated that he could still smell the bleach. Plaintiff began to experience difficulty breathing approximately 30 to 40 minutes after completing the repair of the leak. He told his supervisor about the repair, explained that he was having problems breathing, and said he was going home to rest.

The next day, plaintiff continued to have trouble breathing and sought medical care from his family physician, Dr. Richard Letvak of LeBauer Healthcare. A spirometry test was conducted that revealed moderate obstruction of the lungs. Dr. Letvak diagnosed plaintiff with asthma exacerbation, probably due to his chlorine exposure; prescribed prednisone; and instructed plaintiff to use his existing albuterol inhaler as needed.

Plaintiff continued to follow up at LeBauer Healthcare but was ultimately referred for further evaluation to Dr. Murali Ramaswamy, a doctor board certified in general internal medicine, pulmonary medicine, and critical care. Dr. Ramaswamy first evaluated plaintiff on 15 August 2008, two years after the chlorine bleach leak, for respiratory complaints.

Dr. Ramaswamy diagnosed plaintiff with RADS. According to Dr. Ramaswamy, RADS is similar to chronic asthma, but the onset of RADS symptoms can be traced to a single, memorable exposure of a known irritant agent such as chlorine. Dr. Ramaswamy

concluded that plaintiff's RADS developed in July 2006 following his "single, large, memorable workplace chlorine exposure."

As the Commission found, "[p]laintiff missed approximately 70 hours of work due to his injury." On 21 March 2010, plaintiff left his employment with defendant employer to pursue a better job opportunity. As of the date of the deputy commissioner's Opinion and Award, plaintiff was employed with Carolina Specialty Contractors as a plumber. Plaintiff is able to perform the duties associated with his work as a plumber and has not been assigned work restrictions by any medical provider.

On 5 January 2009, defendant employer filed a Form 19, reporting that plaintiff had suffered "unk [sic] injury to lungs" and "has difficulty breathing" as a result of repairing a pipe carrying bleach to the wave pool. Defendants filed a Form 61 denying plaintiff's claim on 8 January 2009 on the grounds that "[n]o benefits will be paid past 7/10/06 as this was a 'temporary aggravation' of pre existing [sic] condition."

On 5 May 2009, plaintiff filed a Form 18, asserting a claim for "[e]xposure to large amount of concentrated chlorine gas that caused RADS." Plaintiff also filed a Form 33 requesting that his claim be assigned for a hearing.

The deputy commissioner filed an Opinion and Award on 9 September 2010 denying plaintiff's claim on the grounds that (1)

any claim for injury by accident was not filed within two years of 10 July 2006 and, therefore, was barred by N.C. Gen. Stat. § 97-24, and (2) plaintiff had failed to prove all the elements of a compensable occupational disease claim. Plaintiff appealed to the Full Commission, and the Commission affirmed the Opinion and Award of the deputy commissioner with minor modifications.

In pertinent part, the Commission found that plaintiff had filed his Form 18 more than 34 months after the accident. The Commission further found that "[a]lthough Plaintiff's expert witness, Dr. Ramaswamy, testified that the Plaintiff contracted RADS due to his onetime exposure of chlorine, the record is void of any evidence that plaintiff's employment exposed him to an increased risk of contracting RADS relative to the general public."

In denying plaintiff's claim, the Commission made the following conclusions of law:

> 1. N.C. Gen. Stat. §97-24 provides that an employee's right to compensation shall forever be barred unless a claim is filed with the Commission within two years after the alleged date of injury or the last payment of medical compensation. *Id.* In the instant case, if plaintiff suffered an injury by accident on July 10, 2006, his filing of a Form 18 on May 5, 2009 was not within the two-year time limitation. The failure to timely file is a jurisdictional bar for the Industrial Commission. *Reinhardt v. Women's Pavilion, Inc.*, 102 N.C. App. 83, 401 S.E.2d 138 (1991).

> 2. For an occupational disease to be compensable under N.C. Gen. Stat. §97-53(13), it must be (1) characteristic of persons engaged in the particular trade or occupation in which the [plaintiff] 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 [plaintiff's] employment." *Rutledge v. Tultex Corp./Kings Yarn*, 308 N.C. 85, 93; 301 S.E.2d 359, 365 (1983) [quoting *Hansel v. Sherman Textiles*, 304 N.C. 44, 52, 283 S.E.2d 101, 105-06 (1981) citing *Booker v. Duke Med. Ctr.*, 297 N.C. 458,468,475; 256 S.E.2d 189,196,200 (1979)].
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> 3. In addition, the claimant must show that the employment significantly contributed to, or was a significant causal factor in, the disease's development. *Hardin v. Motor Panels, Inc.*, 136 N.C. App. 351, 524 S.E.2d 368 (2000) [citing *Rutledge v. Tultex Corp.*, 308 N.C. 85, 301 S.E.2d 359 (1983)]. Further, a plaintiff seeking to prove that he has a compensable occupational disease must show that the employment exposed him to an increased risk of contracting, not merely aggravating, the condition. *Chambers v. Transit Mgmt.*, 360 N.C. 609, 636 S.E.2d 553 (2006).
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> 4. In this case, the greater weight of the credible medical evidence of record, when considered in its entirety, is insufficient to prove that plaintiff's employment exposed him to an increased risk of contracting RADS relative to the general public. N.C. Gen. Stat. §97-53(13); *Booker v. Medical Center, supra*.

Plaintiff timely appealed to this Court.

Discussion

Plaintiff does not contest the Commission's decision on his injury by accident claim. Plaintiff's sole contention on appeal is that the Commission erred in concluding that the evidence was insufficient to show that his employment gave rise to an increased risk of contracting RADS relative to the general public.

We first address, however, defendants' claim that plaintiff's appeal is barred by his failure to challenge the Commission's first conclusion of law regarding plaintiff's failure to file a claim within two years. According to defendants: "Plaintiff's failure to challenge the portion of the Commission's opinion holding that his claim is time-barred by statute means that that determination is binding on this Court. As such, plaintiff's appeal must fail."

Defendants have overlooked the fact that the Commission determined only that plaintiff's injury by accident claim was time-barred under N.C. Gen. Stat. § 97-24 (2011). The Commission did not conclude that plaintiff's occupational disease claim was time-barred. Indeed, N.C. Gen. Stat. § 97-24(a) specifically states that "[t]he provisions of this subsection ***shall not*** limit the time otherwise allowed for the filing of a claim for compensation for occupational disease in

G.S. 97-58 . . . ." (Emphasis added.) We, therefore, turn to the merits of plaintiff's occupational disease claim.

When reviewing an opinion and award of the Industrial Commission, this Court "'is limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law.'" *Clayton v. Mini Data Forms, Inc.*, 199 N.C. App. 410, 415, 681 S.E.2d 544, 548 (2009) (quoting *Wooten v. Newcon Transp., Inc.*, 178 N.C. App. 698, 701, 632 S.E.2d 525, 528 (2006)). "The Commission's findings of fact are conclusive on appeal if supported by competent evidence, notwithstanding evidence that might support a contrary finding." *Hobbs v. Clean Control Corp.*, 154 N.C. App. 433, 435, 571 S.E.2d 860, 862 (2002). "The Commission's conclusions of law are subject to *de novo* review." *Id.*

Because RADS is not specifically listed as an occupational disease in N.C. Gen. Stat. § 97-53 (2011), it falls within the catchall provision of N.C. Gen. Stat. § 97-53(13). Under N.C. Gen. Stat. § 97-53(13), an occupational disease includes "[a]ny 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."

As the Supreme Court has explained, in order to be considered an occupational disease under N.C. Gen. Stat. § 97-53(13), a condition 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, 308 N.C. at 93, 301 S.E.2d at 365 (quoting *Hansel*, 304 N.C. at 52, 283 S.E.2d at 105-06). 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." *Id.* at 93-94, 301 S.E.2d at 365.

Plaintiff contends that he met the increased risk requirement, arguing that his "greater risk of contracting occupational disease from sodium hypochlorite bleach in the workplace, as compared to the risk to the general public, was a function of the high concentration and volume to which he was exposed as a condition 'peculiar' to his employment." Plaintiff argues that his claim is supported by (1) his testimony and a Material Data Safety Sheet showing that he was exposed on the

occasion of the leak to a much higher concentration and volume of bleach than the general public ever uses; and (2) Dr. Ramaswamy's testimony that chlorine is well known to cause RADS.

The Commission, however, based its decision on the fact that plaintiff's expert witness, Dr. Ramaswamy, testified only as to causation (that plaintiff contracted RADS due to his work-related chlorine exposure on 10 July 2006) and that plaintiff failed to present any medical evidence to prove that his employment exposed him to an increased risk of contracting RADS relative to the general public. Plaintiff essentially acknowledges that the record contains no expert testimony regarding the increased risk requirement, but he argues that no such testimony is required.

According to plaintiff, "if there is competent evidence that an employee was exposed to a toxic agent in the workplace at greater quantities and concentration than the public is generally exposed to, the employee meets the requirements of proof of the first element of his ***prima facie*** case, that he demonstrate that he was at a greater risk of contracting his occupational disease than the general public." In support of this argument, he points to four cases in which this Court a***ffirmed*** the Commission's award of benefits for an occupational disease: ***Jones v. Steve Jones Auto Grp.***, 200 N.C. App. 458, 684

S.E.2d 497 (2009) (three-year exposure to mold in workplace); *Matthews v. City of Raleigh*, 160 N.C. App. 597, 586 S.E.2d 829 (2003) (employee's exposure to toxic chemicals when painting two cars a week for 21 years); *Carawan v. Carolina Tel. & Tel. Co.*, 79 N.C. App. 703, 340 S.E.2d 506 (1986) (employee's greater exposure to insecticide than general public in terms of frequency, amount, and close proximity); *Gay v. J. P. Stevens & Co.*, 79 N.C. App. 324, 339 S.E.2d 490 (1986) (exposure to toxic chemicals over course of employment).

Notably, these cases involve longer-term exposure to a toxic element rather than a single incident. And, in three of the four -- *Jones, Matthews,* and *Gay* -- the plaintiff presented expert testimony of increased risk. More importantly, however, in each of these cases, this Court held that the evidence was sufficient to *uphold* the award. Plaintiff has cited no case reversing the Commission for finding inadequate the type of evidence presented by plaintiff.

In contrast, this Court, in *James v. Perdue Farms, Inc.*, 160 N.C. App. 560, 563, 586 S.E.2d 557, 560 (2003), upheld the Commission's conclusion that the plaintiff had presented insufficient evidence to prove that her employment placed her at an increased risk of developing fibromyalgia. This conclusion was based on the Commission's finding that the plaintiff's

neurologist had only testified that the plaintiff's work increased her pain and had not testified that her work exposed her to an increased risk of developing the disease. This Court affirmed the Commission because its "conclusion that plaintiff had not satisfied her burden of showing that her employment exposed her to an increased risk of developing fibromyalgia is supported by the applicable law and by the Commission's findings of fact." *Id.*, 586 S.E.2d at 561.

Here, as in *James*, the Commission concluded that "the greater weight of the credible medical evidence of record, when considered in its entirety" was insufficient to persuade the Commission that plaintiff's employment placed him at an increased risk of contracting RADS. "The Industrial Commission is the sole judge of the credibility of the witness and the weight to be given to his testimony." *Gosney v. Golden Belt Mfg.*, 89 N.C. App. 670, 674, 366 S.E.2d 873, 876 (1988). Only the Commission, therefore, could determine how much weight to give plaintiff's testimony regarding the volume and concentration of the sodium hypochlorite solution he was exposed to and what inferences should be drawn from that testimony. "The Commission may accept or reject the testimony of a witness solely on the basis of whether it believes the witness or not."

Hilliard v. Apex Cabinet Co., 305 N.C. 593, 595, 290 S.E.2d 682, 684 (1982).

Given the circumstances of this case, including the lack of medical or other expert testimony and the fact that plaintiff was relying upon only a single exposure to the bleach as causing his RADS rather than long-term exposure, the Commission was entitled to decide, as it did, that plaintiff's evidence did not establish that plaintiff had suffered an occupational disease. *See Hayes v. Tractor Supply Co.*, 170 N.C. App. 405, 409, 612 S.E.2d 399, 402 (2005) (affirming Commission rejection of occupational disease claim despite expert testimony of increased risk when experts also testified that plaintiff had personal chemical sensitivities predating work-place chemical exposure). Consequently, we affirm.

Affirmed.

Judges ROBERT C. HUNTER and ROBERT N. HUNTER, JR. concur.

Report per Rule 30(e).