NO. COA12-307
NORTH CAROLINA COURT OF APPEALS

Filed: 6 November 2012

ANTHONY J. WATERS,
Plaintiff,

v. North Carolina
Industrial Commission
I.C. No. W80408

SCHENKER LOGISTICS, INC.,
Employer, and AMERICAN CASUALTY
COMPANY, Carrier,
Defendants.

Appeal by defendants from Opinion and Award entered 29 November 2011 by the North Carolina Industrial Commission. Heard in the Court of Appeals 8 October 2012.

The Deuterman Law Group, by Daniel L. Deuterman and Casey S. Francis, for plaintiff-appellee.

Sharpless & Stavola, P.A., by Eugene E. Lester III, for defendants-appellants.

MARTIN, Chief Judge.

Defendant-employer Schenker Logistics, Inc. and defendant-carrier American Casualty Company appeal from an Opinion and Award of the North Carolina Industrial Commission ("the Commission") awarding plaintiff-employee, Anthony Waters, total

disability benefits for the period of 9 April to 14 April 2010 and 16 April to 12 May 2010 at a rate of $351.85 per week, as well as all related medical expenses incurred or to be incurred related to plaintiff's compensable occupational disease. We affirm.

The evidence presented to the Commission tended to show that plaintiff, a forty-six-year-old male, is employed by defendant as a fork-truck stocker. In connection with his job, plaintiff stocks full and partial pallets and performs "letdowns" and "replenishes." "Letdowns" involve plaintiff removing a partially-stocked pallet from its location and then manually moving boxes of products at waist, chest, or shoulder level from the partially-full pallet onto a full pallet. Plaintiff estimates that he performs approximately 80 to 100 letdowns per twelve-hour shift, and in doing so, manually moves between 100 and 150 boxes weighing between three and fifteen pounds each from partially-full to full pallets.

Plaintiff testified that on 1 April 2010 he was manually transferring boxes as part of a letdown when he experienced pain in his right shoulder. Plaintiff had no symptoms prior to this incident. Plaintiff promptly reported the incident to defendant and filled out an incident report.

Plaintiff continued to work after 1 April 2010; however, his symptoms worsened until plaintiff ultimately filled out another incident report on 8 April 2010, indicating that he had continuing right shoulder pain.

On 9 April 2010, plaintiff visited Greensboro Adult & Adolescent Internal Medicine and was diagnosed with a right scapular shoulder strain, prescribed medication, and ordered to remain on leave from work through 13 April 2010. When plaintiff returned to work on 14 April 2010, his symptoms returned and he was sent home by his supervisor on 15 April 2010.

Plaintiff was referred to Greensboro Orthopaedic Center, where he saw Brad Dixon, PA-C, and obtained an orthopaedic evaluation. Dixon diagnosed plaintiff with a rhomboid strain of the right shoulder and told him to avoid overhead activity. Plaintiff continued to work despite ongoing shoulder pain.

On 9 June 2010, plaintiff returned to Greensboro Orthopaedic Center and was referred for an MRI. Plaintiff saw Dr. Peter Dalldorf at Guilford Orthopaedic and Sports Medicine on 5 November 2010. After Dr. Dalldorf examined plaintiff's MRI results, he diagnosed plaintiff with right shoulder impingement syndrome. At trial, Dr. Dalldorf testified that plaintiff has a Type III hook or acromion and an os acromiale. An acromion is a

bone that protrudes from the shoulder blade to the top of the shoulder ending near the collar bone. Impingement occurs when the rotator cuff tendons rub against the acromion, which creates inflammation and shoulder pain. Normally there is enough space between the acromion and the rotator cuff for the tendons to slide underneath the acromion when the arm is raised, but if the acromion hooks downward farther than usual, it causes impingement. An os acromiale forms when the four growth plates on the acromion fail to fuse together, which can further reduce a person's shoulder function.

Although Dr. Dalldorf acknowledged that these conditions are genetic in nature, he opined that, to a reasonable degree of medical certainty, plaintiff's employment as a stocker contributed to his shoulder impingement and placed him at a higher risk of shoulder impingement than the general population. Dr. Dalldorf reasoned that "overhead use or shoulder level use of your arms, [and] repetitive motions" contribute to the development of shoulder impingement in individuals with an acromion.

Dr. James Applington, an orthopaedic surgeon, reviewed plaintiff's case and medical records; he did not examine plaintiff. Dr. Applington, like Dr. Dalldorf, diagnosed

plaintiff with a right shoulder impingement as well as an acromion or hook and an os acromiale. However, Dr. Applington opined that plaintiff was exposed to no greater risk of developing a shoulder impingement than the general public.

Plaintiff returned to full duty work on 12 May 2010 and continues to work for defendant-employer as a stocker. Plaintiff remains capable of earning the same wages he was earning at the time of his injury.

After a hearing, Deputy Commissioner Bradley W. Houser held that plaintiff had a compensable occupational disease and that plaintiff was entitled to have defendants pay for all related medical expenses incurred or to be incurred. Defendants appealed to the Full Commission, which found, *inter alia*, that:

> 26. Plaintiff's job duties as a stocker for defendant-employer involved repetitive use of his arms for lifting at chest or shoulder level.
>
> 27. Plaintiff's employment with defendant-employer was a significant contributing factor to his development of right shoulder impingement syndrome. Because Plaintiff's employment required that he use his arms repetitively at chest or shoulder level, it placed him at an increased risk of developing right shoulder impingement syndrome as compared to members of the general public not so employed.

The Full Commission ultimately concluded that plaintiff had met his burden of proving that he had an occupational disease. Defendants appeal.

On appeal, defendants challenge the Commission's findings of fact that (I) plaintiff's job duties as a stocker involved repetitive use of his arms for lifting at chest or shoulder level and (II) plaintiff's employment placed him at an increased risk of developing right shoulder impingement syndrome as compared to members of the general public not so employed.

Review of an opinion and award of the Industrial Commission "is limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law. This '[C]ourt's duty goes no further than to determine whether the record contains *any* evidence tending to support the finding.'" *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (emphasis added) (citation omitted) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)), *reh'g denied*, 363 N.C. 260, 676 S.E.2d 472 (2009). "The Commission is the sole judge of the credibility of the witnesses and the weight to be given their

testimony." *Anderson*, 265 N.C. at 433-34, 144 S.E.2d at 274. Thus, this Court "does not have the right to weigh the evidence and decide the issue on the basis of its weight." *Id.* at 434, 144 S.E.2d at 274.

For a condition to be compensable as an occupational disease under N.C.G.S. § 97-53(13),

> 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., 308 N.C. 85, 93, 301 S.E.2d 359, 365 (1983) (citations and internal quotation marks omitted). Here, defendants do not dispute that there is some causal connection between plaintiff's shoulder impingement and his occupation as a stocker. Defendants contend, rather, that plaintiff did not meet his burden to show compensability on occupational disease grounds because there is no competent evidence supporting the first and second elements. "[T]he 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.

I.

Defendants contend there is not competent evidence supporting the Commission's finding that plaintiff's job requires repetitive lifting at chest or shoulder height. However, plaintiff testified that when he performs letdowns, he tries to situate the partially-full pallet on the forklift at about waist height so that he can transfer the cases onto the full pallet, which is sometimes either "up a little bit" from waist level or "below" waist level. Plaintiff also testified that when he transfers cases from one pallet to another during letdowns, his arms are out in front of him and he has to "reach across the pallet." Furthermore, the notes from plaintiff's first office visit at Greensboro Orthopaedic Center indicate that plaintiff told Brad Dixon that he injured his shoulder "at work with lifting some heavy boxes above his head." Thus, the Commission's finding that plaintiff lifts at chest or shoulder height as part of his employment is supported by competent evidence.

Likewise, defendants contend there is not competent evidence to support the Commission's finding that plaintiff's job is repetitive. But, plaintiff testified that before he was injured he performed approximately 80 to 100 letdowns per shift,

during which he would move approximately 100 to 150 cases from one pallet to another. Based on this information, Dr. Dalldorf described plaintiff's job as requiring "repetitive motions" in an office note. Therefore, the Commission's finding that plaintiff's job as a stocker is repetitive in nature is supported by competent evidence in the record.

II.

Defendants next contend there is not competent evidence to support the Commission's finding that plaintiff's employment placed him at an increased risk of developing right shoulder impingement syndrome as compared to members of the general public. We disagree.

When told that plaintiff's job required use of his "arms out in front of his body," "more [at] chest level," and included "reaching and moving across" pallets, Dr. Dalldorf opined that this motion "certainly would contribute to [plaintiff's] problem." He also stated, to a reasonable degree of medical certainty, that "[i]t would put him at an increased risk" versus the public at large. Although defendants point to Dr. Applington's contrary testimony regarding whether plaintiff's job as a stocker exposed him to a greater risk of shoulder impingement than the general public, "findings of fact [made] by

the Commission are conclusive on appeal when supported by competent evidence, even when there is evidence to support a finding to the contrary." *Lathon v. Cumberland Cty.*, 184 N.C. App. 62, 70, 646 S.E.2d 565, 570 (2007) (citation and internal quotation marks omitted). The Commission specifically stated in its findings that it "places greater weight on Dr. Dalldorf's opinion" than that of Dr. Applington and other witnesses. Thus, the Commission's finding of fact that plaintiff's job as a stocker put him at a greater risk of developing shoulder impingement than that faced by the general public not so employed is supported by competent evidence.

Affirmed.

Judges STEELMAN and ERVIN concur.

Report per Rule 30(e).