IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-1166

Filed: 16 August 2016

North Carolina Industrial Commission, No. X29498

MARILYN A. EBRON, Administrator of the Estate of WILLIAM ARTHUR EBRON, Deceased Employee, Plaintiff-Appellant,

v.

AMERICAN RED CROSS, Defendant-Appellee, TRAVELERS INDEMNITY CO., Carrier-Appellee.

Appeal by plaintiff-appellant from opinion and award entered 10 July 2015 by the North Carolina Industrial Commission. Heard in the Court of Appeals 12 April 2016.

Kathleen G. Sumner for plaintiff-appellant.

Teague Campbell Dennis & Gorham, LLP, by Rebecca R. Thornton and Tracey L. Jones, for defendant-appellee.

BRYANT, Judge.

Where the Full Commission denied plaintiff-appellant's motion to take judicial notice of several documents containing disputable facts, the Full Commission did not err in excluding said documents from the record. Where plaintiff-appellant failed to establish the requisite causal connection between plaintiff-decedent's prostate cancer

and his employment with defendant, the Full Commission did not err in its Opinion and Award denying plaintiff-appellant's claim.

William Arthur Ebron, plaintiff-decedent, born 15 December 1940, began working for defendant, the American Red Cross, as a counselor in mid-1967, providing financial assistance with respect to emergency travel for military personnel at Marine Corps Base Camp Lejeune in Jacksonville, North Carolina. He worked five to seven days a week, from eight to twenty-four hours a day, spending some nights working on the base, although he lived off base. While at Camp Lejeune, plaintiff-decedent drank water from the faucet on base (four to five glasses during an eight-hour shift), ate his meals there once or twice a week, and swam in the pool.

Approximately eight months after he began working with the American Red Cross, plaintiff-decedent was sent to Vietnam for about one year, from May or June 1968 through May or June 1969. Plaintiff-decedent returned to Camp Lejeune for six months, working twenty-four-hour shifts once every two or three weeks. He left his employment with the American Red Cross in early 1970.

In 1982, the Marine Corps discovered specific volatile organic compounds ("VOCs") in the drinking water provided by two of the eight water treatment plants at Camp Lejeune. Water from the Tarawa Terrace water treatment plant was primarily contaminated by PCE (perchloroethylene or tetrachloroethylene). Water from the Hadnot Point water treatment plant was contaminated primarily by TCE

(trichloroethylene). Other contamination in the drinking water included PCE, benzene, and TCE degradation products trans-1,2-DCE (t-1,2-dichloroethylene) and vinyl chloride.

After leaving employment with the American Red Cross, plaintiff-decedent was employed as an insurance adjuster for various companies until he opened a dry cleaning business in 1994. He closed the dry cleaning business in 2008 because of the economic downturn.

Plaintiff-decedent began complaining of symptoms in the early 1980s at around age 40–41. He initially sought treatment at Duke University Medical Center, but was told he was too young to have prostate cancer. He then sought treatment from a clinic in Raleigh and, following a biopsy, was diagnosed with prostate cancer in 1986 or 1987. Plaintiff-decedent was referred to Dr. David Paulson at Duke University Medical Center, who recommended prostate surgery, which was performed on 21 July 1987.

On 18 May 1989, after examination, Dr. Paulson noted that plaintiff-decedent had no evidence of disease activity. Over a year later, on 26 November 1990, Dr. Paulson discovered an area of abnormality that required biopsy. On 26 March 1992, plaintiff-decedent underwent a procedure which revealed prostate cancer and was referred for radiation oncology evaluation.

On 8 April 1992, Dr. R. Whittington of the Department of Radiation Oncology at the Hospital of the University of Pennsylvania, performed a radiation oncology evaluation, diagnosed recurrence of cancer of the prostate, and recommended treatment, including hormonal therapy. On 15 June 1992, Dr. Whittington noted that plaintiff-decedent had a rising PSA.[1] In response to a request from plaintiff-decedent for opinions regarding the management of carcinoma of the prostate, in a letter dated 23 September 1996, Dr. Whittington stated "you are a rather young man to develop this disease, since this is usually seen in older men. While carcinomas of the prostate can occur in men at the age of 46, when you developed yours, this is extremely rare."

On 29 April 1999, plaintiff-decedent was evaluated for causation of prostate cancer at the Durham Veterans' Affairs Medical Center ("Durham VAMC"), as plaintiff-decedent attributed it to Agent Orange Exposure in Da Nang from May 1968 to May 1969. The Progress Notes from the Durham VAMC note the following:

> The VA has recognized prostate cancer as presumptively related to Agent Orange exposure. The VA further recognizes that any time spent in Vietnam, however brief, constitutes exposure to Agent Orange. Thus, if a military veteran establishes time spent in Vietnam, even an hour, and later develops any condition recognized by the VA as Agent Orange related, that veteran becomes entitled to VA medical care, and compensation, for that condition.
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> [Plaintiff-decedent] has certainly had the level of exposure

[1] "PSA" stands for Prostate Specific Antigen. Rising PSA levels are associated with prostate cancer.

> that would qualify a military Vietnam veteran for compensation and treatment for prostate cancer . . . . Unfortunately for [plaintiff-decedent], his year in [Vietnam] was as a Federal employee rather than in the military, and thus he is not eligible for VA service connection [sic] for prostate cancer.

From 7 May 2004, and throughout the following years, the Durham VAMC evaluated and treated plaintiff-decedent's prostate cancer and rising PSA. Plaintiff-decedent was out of work for approximately fifty-four to sixty-nine days as a result of medical treatment related to his prostate cancer.

In April 2011, plaintiff-decedent filed a complaint in the North Carolina Industrial Commission against the American Red Cross, alleging prostate cancer as a result of exposure to contaminated water while employed and working at Camp Lejeune. In response to plaintiff-decedent's request that the claim be assigned for hearing, the American Red Cross filed a response, stating that "plaintiff[-decedent's] alleged occupational disease was not caused by exposure while employed by defendants. Additionally, defendants contended that plaintiff[-decedent's] claim was barred by the statute of limitations." On 11 February 2012, plaintiff-decedent's workers' compensation claim was denied by the Commission.

As of 18 May 2000, Dr. Jay Kim of Durham Urology Associates noted that plaintiff-decedent's PSA was abnormal again; however, it was not until 10 June 2003 that Dr. Kim recommended plaintiff-decedent begin hormone therapy. In a 4 April 2012 report, Dr. Kim noted that plaintiff-decedent requested an opinion regarding

exposure to contaminated water as plaintiff-decedent was "involved in a lawsuit with a former employer regarding toxic exposures and the development of cancer." Dr. Kim declined to offer an opinion, stating that he "d[id] not possess any expertise in this area beyond what is already known and established."

Plaintiff-decedent's claim was eventually assigned for hearing and the case was heard before Deputy Commissioner Brad Donovan on 21 August 2013. Ten months later, plaintiff-decedent filed a motion to take judicial notice of over 200 pages of documents, and defendants, American Red Cross and Travelers Indemnity Company, objected and moved to exclude the documents. On 18 September 2014, Deputy Commissioner Donovan issued an Opinion and Award in which he concluded that: (1) plaintiff-decedent's motion was denied and the documents were excluded from the record; (2) the preponderance of the evidence demonstrated that plaintiff-decedent failed to meet his burden of proof to establish a compensable occupational disease; and (3) plaintiff-decedent was not eligible for benefits pursuant to the Workers' Compensation Act.

Plaintiff-decedent timely provided notice of appeal to the Full Commission on 24 September 2014. On 8 October 2014, prior to the hearing before the Full Commission, plaintiff-decedent died as a result of multiple cancers. Marilyn A. Ebron ("plaintiff-appellant"), administrator of plaintiff-decedent's estate, was substituted as plaintiff.

On 10 July 2015, the Full Commission issued its Opinion and Award, denying plaintiff-appellant's motion to take judicial notice, and specifically stating that the documents were to be excluded from the record, except for subsequent appellate review of the matter. The Full Commission held that plaintiff-appellant (1) failed to prove any exposure to volatile halogenated hydrocarbons or benzol; (2) failed to present any expert testimony to prove that plaintiff-decedent's prostate cancer was causally related to the alleged exposure to contaminated water; (3) did not provide evidence showing that plaintiff-decedent's employment placed him at greater risk of contracting prostate cancer than the general public; and (4) did not present any medical evidence demonstrating "a causal connection between the injury and the claimant's employment." Plaintiff-appellant's claim for benefits for the alleged occupational disease was denied. Plaintiff-appellant filed notice of appeal to this Court.

On appeal, plaintiff-appellant contends that the Full Commission committed reversible error when it (I) refused to take judicial notice of the proffered federal documents regarding this case; and (ii) failed to find as fact and conclude as a matter of law that plaintiff-decedent sustained a compensable occupational disease.

I

Plaintiff-appellant first argues that the Full Commission committed reversible error when it refused to take judicial notice of the proffered documents regarding this case pursuant to N.C. Gen. Stat. § 8C-1, Rule 201, and under the case law of this state. Specifically, plaintiff-appellant contends that (1) there is no law which precludes a court from taking judicial notice of facts in dispute in a litigation; (2) judicial notice is not unlike the doctrine of *res ipsa loquitur*; and (3) pursuant to Rule 201, the Full Commission must review each document individually and take judicial notice of certain facts when a party requests it. We disagree.

It is well established that the Industrial Commission is "the fact finding body" and the "sole judge" of witness credibility and the weight to be afforded witness testimony. *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998) (citations omitted). This Court's review is limited to a determination of whether any competent evidence supports the Commission's findings of fact and whether those findings support the Commission's conclusions of law. *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 700 (2004) (citation omitted). If the Commission's findings of fact are supported by competent evidence, they are binding on appeal even if evidence exists that supports a contrary finding. *Adams*, 349 N.C. at 681, 509 S.E.2d at 414 (citation omitted). This Court reviews errors of law under the *de novo* standard. *McRae*, 358 N.C. at 496, 597 S.E.2d at 701 (citation omitted).

Pursuant to N.C. Gen. Stat. § 8C-1, Rule 201, judicial notice may be taken of adjudicative facts. "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." N.C.G.S. § 8C-1, Rule 201(b) (2015). Adjudicative facts are the facts of a particular case and include facts "involving the immediate parties, including 'who did what, where, when, how, and with what motive or intent.' " *Boyce & Isley, PLLC v. Cooper*, 153 N.C. App. 25, 38, 568 S.E.2d 893, 903 (2002) (quoting N.C.G.S. § 8C-1, Rule 201 commentary).

A court may take judicial notice of a fact if it is an indisputable adjudicative fact; however, a court may not take judicial notice of a disputed question of fact. *Hinkle v. Hartsell*, 131 N.C. App. 833, 836, 509 S.E.2d 455, 458 (1998) (citations omitted); *see* N.C.G.S. § 8C-1, Rule 201(b) N.C. Commentary ("With respect to judicial notice of adjudicative facts, the tradition has been one of caution in requiring that the matter be beyond reasonable controversy.").

To warrant judicial notice under the second prong of the test stated in Rule 201, "the source from which the data is drawn must be 'a document of such indisputable accuracy as [would] justif[y] judicial reliance.' " *State v. Canady*, 110 N.C. App. 763, 766, 431 S.E.2d 500, 501 (1993) (alterations in original) (quoting *State v. Dancy*, 297 N.C. 40, 42, 252 S.E.2d 514, 515 (1979)).

Here, plaintiff-decedent requested that the Court take judicial notice and admit eleven documents into evidence. The proffered documents were as follows:

> 1. Agency for Toxic Substances and Disease Registry ("ATSDR"), *Tetrachloroethylene, CAS # 127-18-4*, Agency for Toxic Substances & Disease Registry ToxFAQs (Sept. 1997). [Doc. Exs. 2–3].
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> 2. ATSDR, *Vinyl Chloride, CAS # 75-01-4*, Div. of Toxicology & Envtl. Med. ToxFAQs (July 2006). [Doc. Exs. 4–5].
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> 3. ATSDR, *Benzene, CAS # 71-43-2*, Div. of Toxicology & Envtl. Med. ToxFAQs (Aug. 2007). [Doc. Exs. 6–7]
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> 4. ATSDR, *Camp Lejeune Health Studies: Evaluation of Mortality Among Marines and Navy Personnel Exposed to Contaminated Drinking Water at USMC Base Camp Lejeune: A Retrospective Cohort Study*. [Doc. Exs. 8–9].
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> 5. *Reported Health Effects Linked with Trichloroethylene (TCE), Tetrachloroethylene (PCE), Benzene, and Vinyl Chloride (VC) Exposure*, ADSTR, www.atsdr.cdc.gov/sites/lejeune/tce_pce.html (last visited June 2, 2014, 10:27 AM). [Doc. Exs. 10–17].
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> 6. Daniel Wartenberg, Daniel Reyner & Cheryl Siegel Scott, *Trichloroethylene and Cancer: Epidemiologic Evidence*, 108 Envtl. Health Persp. 161 (May 2000). [Doc. Exs. 18–33].
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> 7. *Chapter A: Summary and Findings*, "Appendix A7. Reconstructed (simulated) monthly mean concentrations in finished water for tetrachloroethylene (PCE), trichloroethylene (TCE), trans-1,2-dichloroethylene (1,2-tDCE), and vinyl chloride (VC) at the Hadnot Point water treatment plant, Hadnot Point-Holcomb Boulevard Study Area, U.S. Marine Corps Base Camp Lejeune, North Carolina, January 1942–June 2008." [Doc. Exs. 34–49].

> 8. ATSDR, "Analyses and Historical Reconstruction of Groundwater Flow, Contaminant Fate and Transport, and Distribution of Drinking Water Within the Service Areas of the Hadnot Point and Holcomb Boulevard Water Treatment Plants and Vicinities, U.S. Marine Corps Base Camp Lejeune, North Carolina," *Chapter A–Supplement 2: Development and Application of a Methodology to Characterize Present-Day and Historical Water-Supply Well Operations* (Mar. 2013). [Doc. Exs. 50–185].
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> 9. *Chapter A: Summary of Findings*, "Appendix A2. Simulated PCE and PCE Degradation By-Products in Finished Water, Tarawa Terrace Water Treatment Plant, January 1951–March 1987." [Doc. Exs. 186–98].
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> 10. Centers for Disease Control and Prevention, *Biomonitoring Summary*, CDC, www.cdc.gov/biomontiroing/HalogenatedSolvents_BiomonitoringSummary.html (last updated Dec. 4, 2013). [Doc. Exs. 199–203].
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> 11. ATSDR, *Trichloroethylene CAS # 79-01-6*, Div. of Toxicology ToxFAQs (July 2003). [Doc. Exs. 204–05].

In general, these documents contain information from fact sheets which do not discuss water contamination at Camp Lejeune specifically or else contain evidence from case studies, many of which are inconclusive. Indeed, while Document Exhibits 8 and 9, titled "Camp Lejeune Health Studies," note that compared to another group studied, "the Camp Lejeune group had higher mortality rates for . . . cancers of the . . . prostate . . .," they also note that, due to the study's limitations, "it does not provide definitive evidence for causality nor can it answer the question whether an individual has been affected by these exposures at Camp Lejeune."

The purpose for which plaintiff-appellant attempted to use these documents was to establish the very issue in dispute—the causation of plaintiff-decedent's prostate cancer. As the excerpt from Document Exhibits 8 and 9 make clear, the documents attached to petitioner-appellant's motion do not contain indisputable adjudicative facts. *See Hinkle*, 131 N.C. App. at 836, 509 S.E.2d at 458.

Plaintiff-appellant's comparison of judicial notice to the doctrine of *res ipsa loquitur* is also misplaced. *Res ipsa loquitur* is a legal principle which allows one to prove facts that form the basis of the claim without expert testimony, and which "permits a jury, on the basis of experience or common knowledge, to infer negligence from the mere occurrence of the accident itself." *Diehl v. Koffer*, 140 N.C. App. 375, 378, 536 S.E.2d 359, 362 (2000) (citation omitted). As such, this doctrine is very narrowly applied in negligence cases. *See Howie v. Walsh*, 168 N.C. App. 694, 698, 609 S.E.2d 249, 251 (2005) (noting the N.C. Supreme Court has characterized the application of *res ipsa loquitur* as "somewhat restrictive" (citation omitted)). Further, "[*r*]*es ipsa loquitur* does not apply where more than one inference can be drawn from the evidence as to the a cause of an injury." *Trull v. Carolina-Virginia Well Co.*, 264 N.C. 687, 693, 142 S.E.2d 622, 626 (1965) (citations omitted). The doctrine is not simply applied where a plaintiff fails to present expert witness testimony regarding the cause of an injury or damages. *See Diehl*, 140 N.C. App. at 378, 536 S.E.2d at 362 ("[I]n order for the doctrine to apply, . . . [the] plaintiff must have been able to show—

without the assistance of expert testimony—that the injury was of a type not typically occurring in [the] absence of some negligence by [the] defendant." (citation omitted)).

Here, despite the fact that no expert testimony was offered at the hearing, the evidence before the Commission was such that the Commission could infer causation of plaintiff-decedent's prostate cancer from something other than water contamination at Camp Lejeune. Therefore, plaintiff-appellant's comparison of judicial notice to the doctrine of *res ipsa loquitur* is unpersuasive.

Lastly, Rule 201 does not require that a court review each document individually and take judicial notice of certain facts just because a party requests it, as plaintiff-appellant contends, unless the facts are not subject to reasonable dispute. N.C.G.S. § 8C-1, Rule 201(b), (d). As it has already been established that the facts contained within the proffered documents were subject to reasonable dispute, plaintiff-appellant's argument is overruled. We hold the Full Commission properly considered and denied plaintiff-appellant's motion to take judicial notice of the proffered documents.

II

Plaintiff-appellant next argues that the Full Commission reversibly erred when it failed to find as fact and conclude as a matter of law that plaintiff-decedent sustained a compensable occupational disease from exposure to contaminated water

at Marine Corps Base Camp Lejeune in Jacksonville, North Carolina when he was only a civilian working on the base. We disagree.

"For [an injury] to be compensable under [the] Workers' Compensation Act, it must be either the result of an accident arising out of and in the course of the employment or an occupational disease." *Hansel v. Sherman Textiles*, 304 N.C. 44, 51, 283 S.E.2d 101, 105 (1981). North Carolina General Statutes § 97-53 enumerates occupational diseases and, where an occupational disease is not enumerated, the statute provides a catch-all category listed under N.C. Gen. Stat. § 97-53(13) (2015).

Plaintiff-appellant contends that plaintiff-decedent was exposed to chemicals enumerated under N.C. Gen. Stat. § 97-53(9) and (12), and as a result, that exposure should be deemed an occupational disease. Specifically, plaintiff-appellant alleges that plaintiff-decedent was poisoned by either (1) volatile halogenated hydrocarbons, *see* N.C.G.S. § 97-53(9), or (2) benzol or nitro and amido derivatives of benzol, *see id.* § 97-53(12). Both subsections consider such poisoning an occupational disease or condition. *See id.* § 97-53(9), (12).

Defendants do not dispute that plaintiff-decedent was diagnosed with prostate cancer. However, no evidence was presented to the Commission, through medical records or otherwise, to establish that he was poisoned by or diagnosed with poisoning by volatile hydrogenated carbons, benzol, or any other chemical listed in N.C. Gen. Stat. § 97-53(9) or (12). Rather, plaintiff-decedent was diagnosed with prostate

cancer, a condition that is not enumerated under N.C. Gen. Stat. § 97-53. *See id.* Even if this Court were to consider the documentary evidence containing information about halogenated solvents and benzol, evidence which we have already deemed properly excluded from consideration before the Full Commission, plaintiff-appellant has presented no direct or substantial evidence that plaintiff-decedent was actually exposed to those chemicals.

Accordingly, the lack of competent evidence in the record supports the Full Commission's findings of fact and those findings support the Commission's conclusion that plaintiff-appellant has not proven a claim under N.C. Gen. Stat. § 97-53(9) or (12). As plaintiff-appellant failed to meet her burden of proof under these subsections of the statute, she must instead proceed pursuant to the "catch-all" provision of the statute. *See id.* § 97-53(13) (2015).

The "catch-all" provision found in N.C. Gen. Stat. § 97-53(13) defines an occupational disease as "[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*." *Id.* § 97-53(13) (emphasis added). The N.C. Supreme Court has consistently held that in order for an occupational disease to be deemed compensable under N.C. Gen. Stat. § 97-53(13), the disease 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."

Chambers v. Transit Mgmt., 360 N.C. 609, 612, 636 S.E.2d 553, 555 (2006) (alterations in original) (quoting *Rutledge v. Tultex Corp./Kings Yarn*, 308 N.C. 85, 93, 301 S.E.2d 359, 365 (1983)). The plaintiff has the burden of proving each element of compensability. *Harvey v. Raleigh Police Dep't*, 96 N.C. App. 28, 35, 384 S.E.2d 549, 553 (1989) (citation omitted).

First, with regard to the first element, plaintiff-appellant has failed to present any evidence that prostate cancer is "characteristic" of those employed with the American Red Cross at Camp Lejeune. Second, plaintiff-appellant has also failed to establish that prostate cancer is not an "ordinary disease of life" and that employment with defendant placed plaintiff-decedent at an increased risk for development of prostate cancer. Plaintiff-appellant offers evidence that plaintiff-decedent was exposed to contaminated water because he drank water from the faucet at Camp Lejeune, ate meals on the base, and used the swimming pool. However, plaintiff-decedent admitted that he was not sure which of the base water systems were contaminated and did not know what areas of the base had the contaminated water or where the contaminated water was pumped. Further, plaintiff-decedent was

unable to provide the exact location of defendant's offices on the base, and admitted he had no evidence that contaminated water was ever pumped to defendant's offices.

Finally, plaintiff-appellant has failed to establish the requisite causal connection between plaintiff-decedent's prostate cancer and his employment with defendant. The plaintiff in a worker's compensation case bears the burden of proving the causal connection by expert medical testimony unless a " 'layman of average intelligence and experience would know what caused the injuries complained of.' " *Banks v. Dunn* , 177 N.C. App. 252, 256, 630 S.E.2d 1, 3 (2006) (quoting *Davis v. City of Mebane*, 132 N.C. App. 500, 504, 512 S.E.2d 450, 453 (1999)). Accordingly, "where the exact nature and probable genesis of a particular type of injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury." *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980) (citations omitted).

Not only was no expert medical testimony regarding the causation of plaintiff-decedent's prostate cancer offered at the hearing, but the medical record evidence is also devoid of any comments by treating medical providers regarding the relationship, if any, between plaintiff-decedent's alleged exposure to contaminated water and his prostate cancer. Indeed, Dr. Kim of Triangle Urology was the only provider to address plaintiff-decedent's alleged toxic exposure to contaminated water,

and that was only to explain that he was not an expert in the area of toxic exposures and development of cancer. Furthermore, plaintiff-decedent testified at the hearing that none of his medical providers had ever told him that his prostate cancer was related to exposure to contaminated water at Camp Lejeune.

In fact, evidence from plaintiff-decedent's evaluation at Durham VAMC tended to show a greater possibility that plaintiff-decedent's prostate cancer may well have been caused by exposure to Agent Orange during the year he spent working for defendant-appellee in Vietnam. Therefore, on this record we must hold that plaintiff-appellant failed to meet her burden to prove a causal connection between plaintiff-decedent's prostate cancer and alleged exposure to contaminated water at Camp Lejeune. Accordingly, the Full Commission's Opinion and Award is

AFFIRMED.

Judges STROUD and DIETZ concur.

Report per Rule 30(e).