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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-430

Filed 2 January 2024

N.C. Industrial Commission, I.C. No. 18-017149

STANLEY SPENCER, Employee, Plaintiff,

v.

GOODYEAR TIRE & RUBBER CO., Employer; LIBERTY INSURANCE CORP.,
Carrier, Defendants.

Appeal by defendants from opinion and award on remand entered 9 January 2023 by the North Carolina Industrial Commission. Heard in the Court of Appeals 31 October 2023.

Lennon, Camak & Bertics, PLLC, by Michael W. Bertics and S. Neal Camak, for plaintiff-appellee.

Hedrick Gardner Kincheloe & Garofalo, LLP, by M. Duane Jones and Matthew J. Ledwith, for defendants-appellants.

GORE, Judge.

Goodyear Tire and Rubber Co. and Liberty Insurance Corp. (collectively, “defendants”) appeal from an Opinion and Award on Remand entered by the Full Commission on 9 January 2023. Appeal lies to this Court as a matter of right pursuant to N.C.G.S. §§ 7A-29(a) and 97-86. Upon review, we affirm on grounds that

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the Full Commission's findings of fact are supported by competent evidence in the record; the supported findings of fact in turn support the Full Commission's conclusion of law that plaintiff suffers from a compensable occupational disease.

The Full Commission originally reviewed this matter and entered an Opinion and Award on 25 February 2021 denying that plaintiff Stanley Spencer sustained a compensable injury by accident but concluding that plaintiff had established an occupational disease and awarding compensation. Defendants filed a Notice of Appeal to this Court on 29 March 2021. Plaintiff filed a Notice of Appeal to this Court on 8 April 2021.

On 17 May 2022, we issued an opinion affirming in part, vacating in part, and remanding the matter to the Industrial Commission. *Spencer v. Goodyear Tire & Rubber Co.*, 283 N.C. App. 471, 2022 N.C. App. LEXIS 372 (2022) (unpublished). We affirmed that plaintiff had not experienced a compensable injury by accident, but vacated and remanded the issue of whether plaintiff had sustained a compensable occupational disease. Specifically, we stated that the Full Commission failed to apply the proper standard for an occupational disease and remanded for further findings regarding whether plaintiff established his "occupational exposure was such a *significant factor* in [his] disease's development that without it the disease would not have developed to such an extent that it caused the physical disability which resulted in plaintiff's incapacity for work." *Id.*, 2022 N.C. App. LEXIS 372, at *20 (emphasis added).

On remand, the Full Commission made alterations to Finding of Fact 21, which now states:

21. Based upon the preponderance of the evidence in view of the entire record, the Full Commission finds that [p]laintiff's left shoulder condition, which prevented him from returning to regular duty work on [21 April 2018], was the result of an occupational disease. Specifically, the Full Commission finds that [p]laintiff's employment was a significant factor in the development of bone spurs in his left shoulder, which when coupled with [p]laintiff's ongoing work for [d]efendant-[e]mployer led to damage to the ligaments surrounding [p]laintiff's left biceps tendon, destabilizing the tendon and playing a significant factor in its eventual tearing on [21 April 2018]. In reaching this finding, the Full Commission assigns greater weight to the testimony of Dr. Speer. Additionally, both Dr. Speer and Dr. Barnes opined that [p]laintiff's job exposed him to greater stress in his shoulders than the general population, resulting in a greater degree of wear and tear. As such, the Full Commission finds that [p]laintiff's employment was a significant factor in his development of left shoulder bone spurs and in the damage to his biceps tendon, eventually culminating in his biceps tendon tear.

The Full Commission further entered conclusions of law 3, 4, and 5, which reflect its comprehensive analysis on occupational disease requirements:

3. To establish an occupational disease under [N.C.G.S.] § 97-53(13), a claimant must show (1) that the disease is characteristic of persons engaged in the particular trade or occupation in which the claimant is engaged, (2) that the disease is not an ordinary disease of life to which the general public is equally exposed, and (3) that there is a causal connection between the disease's development and the claimant's unemployment. [N.C.G.S.] § 97-53(13) (2021); *Rutledge v. Tultex Corp.*, 308 N.C. 85, 93, 301 S.E.2d 359, 365 (1983). 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. The third element is satisfied if the claimant shows that the disease “would not have developed to such an extent that it caused the physical disability which resulted in claimant’s incapacity for work.” *Baker v. City of Sanford*, 120 N.C. App. 783, 788, 463 S.E.2d 559, 563 (1995), *disc. rev. denied*, 342 N.C. 651, 467 S.E.2d 703 (1996) (quoting *Rutledge*, 308 N.C. at 102, 301 S.E.2d at 370). Additionally, to establish that workplace exposures placed plaintiff at increased risk over the general public of developing the disease complained of, plaintiff is required to present competent medical evidence. *Matthews v. City of Raleigh*, 160 N.C. App. 597, 609, 586 S.E.2d 829, 839 (2003).

4. In the present case, [p]laintiff produced competent medical testimony — specifically, the opinions of Dr. Speer and Dr. Barnes — that his position at Goodyear exposed him to additional stress on his shoulder that placed [p]laintiff at greater risk of developing the shoulder injuries that he sustained than the general public — including biceps tendon injuries per Dr. Barnes and both arthritis and biceps tendon issues per Dr. Speer. Based on such medical opinions and assigning more weight to Dr. Speer, the Full Commission concludes that [p]laintiff’s employment with [d]efendant-[e]mployer was a significant factor in the development of [p]laintiff’s left shoulder bone spurs and the destabilization of [p]laintiff’s left biceps tendon, resulting in the eventual tear, to the extent that without such employment [p]laintiff would not have experienced an incapacity to perform his regular duty work. Therefore, [p]laintiff’s left shoulder condition is the result of compensable occupational diseases, namely bone spurs and damage to the biceps tendon and supraspinatus tendon, including the eventual biceps tendon tear. [N.C.G.S.] § 97-53(13) (2021).

5. The Full Commission finds no support in the cases cited by [d]efendants for the premise that an injured worker must exhibit symptoms prior to later seeking a determination of an occupational disease. *See Flynn v.*

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EPSC Mgmt. Servs., 171 N.C. App. 353, 357–58, 614 S.E.2d 460, 463 (holding that plaintiff through a medical expert provided competent evidence that “[p]laintiff developed a rotator cuff tear and further medical complications due to causes and conditions characteristic of and peculiar to his employment”; and (2) “[t]his rotator cuff tear and further medical complications is not an ordinary disease of life to which the general public not so employed is equally exposed, and is, therefore, an occupational disease.”); *Garren v. P.H. Glatfelter Co.*, 131 N.C. App. 93, 96–97, 504 S.E.2d 810, 813 (1998) (affirming the Industrial Commission awarding benefits for an occupational disease, rotator cuff damage, based on the medical testimony that plaintiff’s medical expert that “the excessive stress” on plaintiff’s upper extremities could aggravate her rotator cuff problems and therefore plaintiff had greater increased exposure to rotator cuff injury than members of the general public); *Gibbs v. Leggett and Platt, Inc.*, 112 N.C. App. 103, 108, 434 S.E.2d 653, 657 (1993) (affirming the Industrial Commission’s conclusion that plaintiff’s “spontaneous” tear of the rotator cuff because plaintiff’s medical expert testified that “plaintiff’s injury was consistent with the type of work plaintiff performed and that plaintiff’s work placed him at greater risk than the general public for injuries to the shoulder or arms”). The Full Commission found no reference in the Court of Appeals’ analysis sections of these cases to whether an injured worker was symptomatic prior for the occupational disease before acute onset. Similarly, the Full Commission concludes that [p]laintiff need not demonstrate that an occupational disease has a gradual onset to establish compensability. *Booker v. Duke Med. Ctr.*, 297 N.C. 458, 471, 256 S.E.2d 189, 198 (1979) (rejecting the requirement of gradualness entirely in the context of infectious disease).

Defendants argue the Full Commission erred in concluding that plaintiff suffers from a compensable occupational disease. We disagree.

Appellate review of an award from the Commission is generally limited to two issues: (1) whether the findings

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of fact are supported by competent evidence, and (2) whether the conclusions of law are justified by the findings of fact. In weighing the evidence, the Commission is the sole judge of the credibility of the witnesses and the weight to be given to their testimony, and the Commission may reject entirely any testimony which it disbelieves. The findings of the Commission are conclusive on appeal when such competent evidence exists, even if there is plenary evidence for contrary findings. This Court does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding. Additionally, failure to assign error to the Commission's findings of fact renders them binding on appellate review. This Court reviews the Commission's conclusions of law de novo.

Raper v. Mansfield Sys., 189 N.C. App. 277, 281 (2008) (cleaned up).

We first note that defendants have not effectively challenged any of the Full Commission's findings of fact. While defendants "*challenge* findings of fact 16, 17, 18, 19, and 21," and "any findings contained in conclusion of law No. 4," defendants have not argued those findings are unsupported by competent evidence in the record. Defendants contend they "are merely asking this Court to look at the testimony of Dr. Speer and conclude that this testimony does not support a conclusion of law that plaintiff sustained a compensable occupational disease." Defendants' arguments, they assert, "are based on the absence of *any* evidence to support a factual determination," not a question of the weight and credibility of the evidence. However, defendants essentially — and impermissibly — ask this Court to "comb through the testimony and view it in the light most favorable to the defendant[s] . . .", and to

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ascertain whether that testimony could support an alternative factual determination. *Alexander v. Wal-Mart Stores, Inc.*, 166 N.C. App. 563, 573 (2004) (Hudson, J., dissenting), *dissent adopted per curiam in* 359 N.C. 403 (2005). In this case, the Full Commission found as fact, based on Dr. Speer's testimony, that plaintiff's bone spurs created a vulnerability for the biceps tendon tear which ultimately occurred, and that plaintiff's employment was a significant factor in causing plaintiff's injury. Dr. Barnes testified that plaintiff's employment placed plaintiff at increased risk for developing tears of the biceps and rotator cuff. Considering the Full Commission's findings of fact are effectively not challenged, those findings are "presumed to be supported by competent evidence and . . . [are] binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97 (1991) (citation omitted).

Thus, the sole issue before this Court is whether the Full Commission's findings of fact support its conclusion of law that plaintiff suffers from a compensable occupational disease. While we review conclusions of law de novo, defendants also fail to contest any enumerated conclusion of law in the Full Commission's Opinion and Award on Remand — in whole or in part — as unsupported by findings of fact. Generally, failure to do so constitutes waiver and acceptance of the Full Commission's conclusions. See *Fran's Pecans, Inc. v. Greene*, 134 N.C. App. 110, 112 (1999) (citations omitted) (noting that a plaintiff must challenge "each conclusion it believes is not supported by the evidence[,] [and] [f]ailure to do so constitutes an acceptance of the conclusion and a waiver of the right to challenge said conclusion as unsupported

by the facts.”). Regardless, the requirements of N.C.G.S. § 97-53(13) have been analyzed by our Supreme Court at length, in cases like *Rutledge* and *Booker*, as the Full Commission discussed and applied in conclusions of law 3, 4, and 5. Here, defendants do not specifically contest the Full Commission’s conclusions of law 3, 4, or 5 — either in whole or in part — in their brief filed with this Court.

Rather, the Full Commission found, as fact, that plaintiff’s employment was a significant factor in the development of bone spurs in his left shoulder, which led to ligament damage, which destabilized the biceps tendon, and which played a significant role in the eventual tearing. These facts, as found by the Full Commission, show causation as a single chain of events, not two separate disease processes as argued by defendants. We will not reevaluate the testimony of Dr. Speer or Dr. Barnes in a light most favorable to defendants, or similarly consider whether the evidence presented could support an alternative ultimate factual determination. In accordance with our limited standard of review, the Full Commission’s unchallenged findings of fact in turn support the effectively uncontested conclusions of law that plaintiff has shown each element of a compensable occupational disease under § 97-53(13). *See Rutledge*, 308 N.C. at 93.

For the foregoing reasons, we affirm the Full Commission’s Opinion and Award on Remand.

AFFIRMED.

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Chief Judge STROUD and Judge HAMPSON concur.

Report per Rule 30(e).