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NO. COA09-1581

NORTH CAROLINA COURT OF APPEALS

Filed: 19 October 2010

DANNY SPRUILL,
Employee, Plaintiff,

v.

N.C. Industrial Commission
I.C. No. 559533

NORTH CAROLINA DEPARTMENT
OF AGRICULTURE, Employer,
Self-Insured (KEY RISK
MANAGEMENT SERVICES, INC.,
Third Party Administrator),
Defendant.

Appeal by Defendant from Opinion and Award of the North Carolina Industrial Commission entered 9 September 2009. Heard in the Court of Appeals 12 May 2010.

Lennon and Camak, PLLC, by Michael W. Bertics, for Plaintiff-Appellee.

Attorney General Roy Cooper, by Assistant Attorney General Karissa J. Davan, for Defendant-Appellant.

STEPHENS, Judge.

I. Procedural History

Plaintiff Danny Spruill became employed by Defendant North Carolina Department of Agriculture on 31 August 1998. Defendant filed an Industrial Commission Form 19, Employer's Report of Employee's Injury or Occupational Disease, on 1 September 2005 stating, "Employee has not reported an injury. Employee had [a] medical app[ointment] on Tuesday, 7/12/05. He was admitted into

Washington Co. Hospital[.] He was diagnosed with [Lyme] disease, Meningitis, & possibly Tick Fever." The date of injury was not noted on the form. Defendant filed an Industrial Commission Form 61, Denial of Workers' Compensation Claim, on 26 September 2005, denying any claim by Plaintiff for benefits. Plaintiff filed a Form 18, Notice of Accident to Employer and Claim of Employee, on 3 October 2005, claiming he was suffering from Lyme disease, meningitis, and tick-borne disease. Plaintiff filed a Form 33, Request that Claim be Assigned for Hearing, on 30 May 2007, claiming entitlement to disability benefits and medical expenses.

The matter was heard before Deputy Commissioner Philip A. Baddour, III in Raleigh, North Carolina on 18 February 2008. In an Opinion and Award filed 30 December 2008, the Deputy Commissioner concluded that Plaintiff had failed to establish that he suffered from an occupational disease and, thus, was not entitled to compensation under the North Carolina Workers' Compensation Act.

The Full Commission heard Plaintiff's appeal on 9 June 2009. In an Opinion and Award filed 9 September 2009, the Full Commission reversed the Deputy Commissioner and concluded that Plaintiff had established that he suffered from an occupational disease. Thus, Defendant was ordered to "pay to [P]laintiff total disability compensation in the amount of \$341.09 per week beginning July 12, 2005, through October 22, 2005 and from June 29, 2006 and continuing until further Order of the Commission." Defendant was also ordered to "pay for all medical expenses incurred or to be incurred for treatment provided to [P]laintiff by Dr. Jeon, Dr.

Carlson, Dr. Mayo, and [P]laintiff's other physicians, for his compensable [L]yme disease, [L]yme meningitis, depression, PTSD, and other related conditions."

From the Opinion and Award of the Full Commission, Defendant appeals.

II. Evidence

Plaintiff has a GED and was 61 years old at the time of the hearing before the Deputy Commissioner. Plaintiff was employed by Defendant as an Agricultural Research Assistant at the Tidewater Research Station ("Tidewater"). Plaintiff worked outdoors and his job required him to work in the vicinity of ditches and maintain the fence lines. Parts of the facility are fenced in to keep deer out of the research crops.

Plaintiff testified that he had been bitten by ticks at Tidewater in the past and that he had been bitten by other insects as well. Plaintiff testified that during warm weather and when new ground was being fenced, tick bites were a "daily thing[.]" Plaintiff also testified that if you did not go into the area of new ground, "you didn't find ticks." Plaintiff stated that the worst area for ticks was the edge of the woods where they put the fence.

Beginning in 2003, Plaintiff was mainly responsible for taking care of cattle. Plaintiff testified that he would feed cattle in the mornings in July of 2005. In the afternoons he worked out in the cow pastures digging up an irrigation system and repairing it. He had problems with fire ant bites.

One Monday evening in July 2005, Plaintiff discovered he was purple from the waist down. He went to see Dr. Myung Kil Jeon, his family physician, on Tuesday, 12 July 2005. Based on Plaintiff's symptoms, which included a rash, swollen and aching joints, a fever, and chills, as well as Plaintiff's work history, Dr. Jeon diagnosed Plaintiff with Lyme disease. Dr. Jeon ordered two tests to detect Lyme disease, but both were negative for the disease. On 14 July 2005, Plaintiff was admitted to Plymouth Hospital. Another blood test performed on 19 July 2005 also came back negative for Lyme disease but confirmed bacterial meningitis. Plaintiff was discharged from the hospital with a final diagnosis of meningitis and Lyme disease. On 30 November 2005, another blood test for Lyme disease was negative.

Plaintiff began to suffer from concentration and attention problems, memory loss, mental fog, temper tantrums, irregular heartbeat, worsening of his post traumatic stress disorder ("PTSD"), depression, and fatigue. These conditions severely limit Plaintiff's ability to engage in routine tasks.

In October 2005, Plaintiff attempted to return to work. However, he was removed from work by Dr. Kathy Mayo, his treating psychiatrist, in June 2006 due to his aggravated PTSD, depression, and ongoing memory, concentration, and attention problems. Plaintiff has not worked since that date.

Dr. Weber, a Professor of Medicine, Pediatrics, and Epidemiology, and an expert in the field of epidemiology at the University of North Carolina at Chapel Hill, reviewed Plaintiff's

medical records. Based on the appearance of Plaintiff's rash, which Dr. Weber opined did not resemble the characteristic rash associated with Lyme disease, and the absence of "a set of laboratory examinations that met the CDC/Infectious Disease Society criteria for diagnosing Lyme disease[,]” Dr. Weber testified that he would not have diagnosed Plaintiff with Lyme disease.

III. Discussion

A. Standard of Review

The standard of appellate review of an opinion and award of the Industrial Commission "is limited to a determination of (1) whether the Commission's findings of fact are supported by any competent evidence in the record; and (2) whether the Commission's findings justify its legal conclusions." *Aaron v. New Fortis Homes, Inc.*, 127 N.C. App. 711, 714, 493 S.E.2d 305, 306 (1997) (citation and quotation marks omitted). "The findings of fact by the Industrial Commission are conclusive on appeal, if there is any competent evidence to support them, and even if there is evidence that would support contrary findings." *Grantham v. R. G. Barry Corp.*, 127 N.C. App. 529, 534, 491 S.E.2d 678, 681 (1997), *disc. review denied*, 347 N.C. 671, 500 S.E.2d 86 (1998) (citation and quotation marks omitted). This Court's duty goes no further than to determine whether the record contains any evidence tending to support the findings of the Commission, and this Court does not have the authority to weigh the evidence and decide the issue on the basis of its weight. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998). This Court reviews the Commission's

conclusions of law *de novo*. *Lewis v. Craven Reg'l Med. Ctr.*, 122 N.C. App. 143, 149, 468 S.E.2d 269, 274 (1996).

B. Occupational Disease

By Defendant's arguments, Defendant contends that the Full Commission incorrectly found and concluded that Plaintiff contracted an occupational disease. We disagree.

N.C. Gen. Stat. § 97-53, which lists various compensable occupational diseases, does not include Lyme disease among these. However, a disease not specifically listed in the statute may nonetheless be compensable pursuant to N.C. Gen. Stat. § 97-53(13), which 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.

N.C. Gen. Stat. § 97-53(13) (2009). Our Supreme Court has interpreted this language as requiring three elements in order to prove that a disease is an occupational disease: (1) the disease must be characteristic of and peculiar to the claimant's particular trade, occupation, or employment; (2) the disease must not be an ordinary disease of life to which the public is equally exposed outside of the employment; and (3) there must be proof of a causal connection between the disease and the employment. *Rutledge v. Tultex Corp./Kings Yarn*, 308 N.C. 85, 93, 301 S.E.2d 359, 365 (1983); *accord Hardin v. Motor Panels, Inc.*, 136 N.C. App. 351, 354, 524 S.E.2d 368, 371, *disc. review denied*, 351 N.C. 473, 543

S.E.2d 488 (2000). The first two elements of the *Rutledge* test are satisfied where the employee can show that "the employment exposed the worker to a greater risk of contracting the disease than the public generally." *Rutledge*, 308 N.C. at 94, 301 S.E.2d at 365. The third element is satisfied if the employment "'significantly contributed to, or was a significant causal factor in, the disease's development.'" *Hardin*, 136 N.C. App. at 354, 524 S.E.2d at 371 (quoting *Rutledge*, 308 N.C. at 94, 301 S.E.2d at 365).

1. *Increased Risk*

Defendant first contends that the competent evidence does not support the Commission's findings and conclusions that Plaintiff was at an increased risk of contracting Lyme disease as compared to the general public. We disagree.

In order to prove that his employment exposed him to a greater risk of the injury than the general public, Plaintiff must establish (1) that his employment exposed him to some circumstance to a greater extent than the exposure experienced by the general public, and (2) that the circumstance to which Plaintiff had a greater exposure is a cause of the injury from which Plaintiff suffers. *Matthews v. City of Raleigh*, 160 N.C. App. 597, 608-09, 586 S.E.2d 829, 838 (2003).

The Commission made the following findings of fact concerning whether Plaintiff's employment placed him at an increased risk for contracting Lyme disease:

2. Plaintiff has worked for [D]efendant-employer since 1998 at Tidewater Research Center as an agricultural assistant. This job is performed almost entirely outside, around

farm animals and crops. Among other duties, [P]laintiff was responsible for maintaining ditch banks and fence lines to keep deer away from the crops.

3. Plaintiff and other workers had significant tick exposure in their employment. Plaintiff was routinely exposed to ticks and would find them on his clothes and attached to his body on a daily basis during warm weather. The problems were the worst in the summer months, and around the fence lines frequented by deer. Maintaining the fence lines was an important part of his job as deer were attracted to many of the crops grown at the Tidewater Research Center. The work of maintaining the fences was performed in the summer months including June and July. Plaintiff was doing a great deal of work with the fences in the month just prior to the onset of his symptoms.

4. Dwight Davenport, one of [P]laintiff's coworkers at Tidewater Research Center, confirmed that the duration of exposure to ticks was greater at work than one would generally experience outside of work. He had many of the same job duties and worked in the same environment as [P]laintiff. Mr. Davenport testified that there are ticks at the Tidewater Research Center and that they are "everywhere." Mr. Davenport's testimony is found to be credible. Based on the totality of the credible evidence, [P]laintiff was at an increased risk of tick bites as a result of his employment with [D]efendant compared to members of the general public not so employed.

. . . .

9. In this case, the experts agree, and the Full Commission finds as fact, that for all practical purposes, the only way one contracts [L]yme disease is through a tick bite. Lyme disease is associated with ticks from deer. . . .

. . . .

12. Plaintiff's treating doctor, Dr. Jeon, opined and the Full Commission finds as fact that [Plaintiff] more likely than not

developed [L]yme disease as a result of tick exposure in his job. . . . Dr. Jeon was the only physician to testify in this case who actually witnessed [P]laintiff's rash

13. Defendant retained Dr. David Weber, an infectious disease physician, to review the records in this case and offer opinions. . . . Dr. Weber admitted that the treating physician is in the best position to make a diagnosis of [L]yme disease. Based on the greater weight of the evidence, the opinions of Dr. Jeon are given greater weight than the opinions of Dr. Weber.

. . . .

15. Based on the greater weight of the evidence, the Full Commission find[s] as fact that [P]laintiff was at a greater risk of developing [L]yme disease as a result of his employment compared to members of the general public not so employed.

Defendant first argues that the portion of finding of fact 3 which states that Plaintiff was routinely exposed to ticks on a daily basis was not supported by competent evidence. We disagree.

Plaintiff testified that his work was performed almost entirely outside. As a result, Plaintiff frequently came into contact with biting bugs and insects, including ticks. Plaintiff further testified that ticks were worst near the ditch banks and fence lines where he spent a good deal of his work day between June and July 2005, and that tick bites were a daily event during the warm weather when he was putting up fences. This evidence sufficiently supports the challenged portion of finding of fact 3 that Plaintiff was routinely exposed to ticks on a daily basis.

Defendant next argues that finding of fact 4 is not supported by competent evidence. We agree.

Mr. Davenport was asked, "So in your outdoor's [sic] work, you were exposed to a greater frequency of encountering insects and bugs than at your home? Would that be a fair statement?" Mr. Davenport responded, "I - not necessarily." Additionally, Mr. Davenport was asked, "Are there ticks in eastern North Carolina?" Mr. Davenport responded, "Ticks all over down there." Mr. Davenport was then asked, "Are there more ticks at the Tidewater Research Center than outside the Tidewater Research Center?" Mr. Davenport responded, "I couldn't say that there are. I mean - I mean - I couldn't say that - sit here today and say there are more ticks on Tidewater than there is at my home or somebody else's home. We're in tick infested country down there. There's ticks everywhere." Mr. Davenport also testified that he did not know if there were more deer in the vicinity of the Tidewater Research facility than at Plaintiff's home. This evidence does not support the Commission's finding of fact 4 and, accordingly, finding of fact 4 may not be considered in determining whether the Commission's findings of fact support its conclusions of law.

Defendant next argues that Dr. Weber's testimony that "[w]e are all at risk" for contracting Lyme disease does not support the Commission's finding of fact 14 that Plaintiff was at a greater risk of exposure to contracting Lyme disease because of his work. Defendant's argument is misplaced. Dr. Jeon testified that more likely than not, Plaintiff's employment exposed him to a greater risk of developing Lyme disease than members of the general public not so employed, and the Commission specifically found that "the

opinions of Dr. Jeon are given greater weight than the opinions of Dr. Weber." The credibility of the evidence and the resolution of conflicts in the evidence is the sole prerogative of the Commission. *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965). Defendant does not specifically argue that Dr. Jeon was not competent to express an opinion on the increased risk issue, and our review of Dr. Jeon's testimony discloses no basis to conclude that he was not a competent witness. Thus, although we may be more persuaded by the expertise and opinion of Dr. Weber, this Court does not have the authority to weigh the evidence and decide the issue on the basis of its weight. *Adams*, 349 N.C. at 681, 509 S.E.2d at 414.

Accordingly, while finding of fact 4 is not supported by competent evidence, the remaining challenged findings are supported by competent evidence. We conclude that these findings sufficiently support the Commission's conclusion of law that "[P]laintiff has established by the greater weight of the evidence that his employment exposed him to a greater risk of tick bites and contracting Lyme [d]isease than the general public. Therefore, [P]laintiff has met the first two prongs of establishing that he suffered from a compensable occupational disease." Defendant's argument is overruled.

2. Causation

Defendant next argues that the competent medical evidence does not support the Full Commission's finding that Plaintiff contracted Lyme disease through his employment. We disagree.

It is well settled that, in order to establish a compensable occupational disease, the employee must show "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 v. Sherman Textiles*, 304 N.C. 44, 52, 283 S.E.2d 101, 106 (1981)). In cases involving "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). "However, when such expert opinion testimony is based merely upon speculation and conjecture, . . . it is not sufficiently reliable to qualify as competent evidence on issues of medical causation." *Young v. Hickory Bus. Furniture*, 353 N.C. 227, 230, 538 S.E.2d 912, 915 (2000). "To establish the necessary causal relationship for compensation under the Act, 'the evidence must be such as to take the case out of the realm of conjecture and remote possibility.'" *Chambers v. Transit Mgmt.*, 360 N.C. 609, 616, 636 S.E.2d 553, 557 (2006) (quoting *Gilmore v. Hoke Cty. Bd. of Educ.*, 222 N.C. 358, 365, 23 S.E.2d 292, 296 (1942)).

The Commission made the following findings of fact regarding causation:

5. In July of 2005, [P]laintiff experienced the onset of flu-like symptoms, headache, muscle and joint aches, chills, and a rash on his body which Dr. Jeon called an "erythematous macular type of rash." He presented to Dr. Myung Kil Jeon, his long-time treating physician for treatment on July 12, 2005, within a few days of the onset of his

symptoms. Based on the clinical presentation, Dr. Jeon diagnosed probable [L]yme disease, and prescribed a course of antibiotics.

6. On July 14, 2005, [P]laintiff was hospitalized because his condition had worsened and he had developed meningitis. While hospitalized, he was treated with three different intravenous antibiotics for several weeks. Plaintiff's rash, headache, chills, and other flu-like symptoms improved, and he was released from the hospital. His final diagnosis was [L]yme disease and meningitis. However, [P]laintiff began to suffer from several other problems including concentration problems, memory loss, mental fog, temper problems, irregular heartbeat, worsening of his PTSD, and depression. Dr. Jeon referred [P]laintiff to several specialists to treat these problems, including Dr. Kathy Mayo, a psychiatrist. . . .

. . . .

9. In this case, the experts agree, and the Full Commission finds as fact, that for all practical purposes, the only way one contracts [L]yme disease is through a tick bite. Lyme disease is associated with ticks from deer. The symptoms of [L]yme disease include fever, flu-like symptoms, muscle aches, arthralgia, cardiac problems, and meningitis. There is no dispute that the most recognizable symptom of [L]yme disease is a characteristic rash.

10. The Center for Disease Control (CDC) notes that [L]yme disease is generally diagnosed clinically based on symptoms, physical findings, and history of exposure to ticks. Laboratory testing is not required by the CDC for a valid [L]yme disease diagnosis. Also, the CDC recognizes that not all patients with [L]yme disease will recall a specific tick bite. The Full Commission gives greater weight to the Center for Disease Control Guidelines for diagnosis of [L]yme disease over the Infectious Disease Society of America [g]uidelines (IDSA).

11. Plaintiff underwent four laboratory tests for [L]yme disease which were negative. The CDC recognizes that tests performed early in

the course of the disease may result in false negatives. The scientific literature submitted into evidence recognizes that testing administered after antibiotic treatment for the disease may also come back falsely negative. In Dr. Jeon's opinion, the test results do not mean that [P]laintiff does not have [L]yme disease. Dr. Jeon's opinions on the testing are supported by the scientific literature submitted in evidence, as well as by the CDC article on point.

12. Plaintiff's treating doctor, Dr. Jeon, opined and the Full Commission finds as fact that [Plaintiff] more likely than not developed [L]yme disease as a result of tick exposure in his job. . . . Dr. Jeon was the only physician to testify in this case who actually witnessed [P]laintiff's rash

13. Defendant retained Dr. David Weber, an infectious disease physician, to review the records in this case and offer opinions. . . . Dr. Weber admitted that the treating physician is in the best position to make a diagnosis of [L]yme disease. Based on the greater weight of the evidence, the opinions of Dr. Jeon are given greater weight than the opinions of Dr. Weber.

14. Based upon the greater weight of the evidence, the Full Commission finds as fact that [P]laintiff more likely than not developed [L]yme disease as a result of exposure to ticks at work. While [P]laintiff[] could, in theory, have developed [L]yme disease as a result of a tick bite sustained outside of work, his exposure to ticks at work was significantly greater than his exposure away from work.

At deposition, Dr. Jeon testified that based on Plaintiff's rash, chills, joint pain, and high fever, along with Plaintiff's job duties which required him to work outside in close proximity to cattle and deer, Dr. Jeon concluded that more likely than not, Plaintiff had contracted Lyme disease. Dr. Jeon testified that he originally treated Plaintiff with Vibramycin, an antibiotic used

specifically to treat Lyme disease, and that Plaintiff "responded to that treatment." In Dr. Jeon's opinion, Plaintiff's positive response to this treatment indicated that he in fact suffered from Lyme disease. Dr. Jeon further testified that Lyme disease can cause meningitis, arthritis, heart problems, and mental problems, and that most likely, Plaintiff's meningitis resulted from his Lyme disease.

Dr. Jeon acknowledged that four blood tests conducted on Plaintiff returned negative results for the presence of the microorganism that is associated with causing Lyme disease. Dr. Jeon explained, however, that a substantial number of patients with Lyme disease do not have a positive blood test and that a negative blood test does not rule out the possibility that a patient has Lyme disease. Dr. Jeon explained that Plaintiff's negative blood tests could have resulted from his treatment with antibiotics and that, in this case, the clinical diagnosis was the most important part of the process. Dr. Jeon further acknowledged that when blood testing is negative for Lyme disease, the clinical diagnosis is especially important.

Dr. Jeon was asked, "Do you have an opinion satisfactory to yourself and to a reasonable degree of certainty as a medical expert, and as [Plaintiff's] treating physician, regarding whether more likely than not his [L]yme disease was caused by his employment?" Dr. Jeon responded, "Most likely, yes."

According to the CDC guidelines, "[L]yme disease is diagnosed based on symptoms, objective physical findings (such as erythema

migrans, facial palsy, or arthritis), and a history of possible exposure to infected ticks." The guidelines explain that not all patients with Lyme disease will develop the characteristic rash, and many may not recall a tick bite. While the guidelines indicate that "[v]alidated laboratory tests can be very helpful" in diagnosing the presence of Lyme disease, such tests are generally not recommended when a patient has erythema migrans, the skin rash associated with Lyme disease. Furthermore, although laboratory tests may be reliable for diagnosing later stages of Lyme disease, the guidelines indicate that laboratory tests "may be falsely negative in patients with early disease[.]"

Dr. Weber testified that Plaintiff's flu-like symptoms including joint pain, muscle aches, and chills, were "consistent with Lyme disease." Dr. Weber stressed the importance of the erythema migrans rash in diagnosing Lyme disease and admitted that "the treating physician is generally in the best position to diagnose Lyme disease initially[.]" Dr. Weber stated that Dr. Jeon "would certainly be the one who would be in the best position to make the diagnosis[.]"

Defendant argues that Dr. Weber's opinion that Plaintiff did not suffer from Lyme disease should be given greater weight than Dr. Jeon's contrary opinion. However, the Full Commission specifically found that "the opinions of Dr. Jeon are given greater weight than the opinions of Dr. Weber." As "[t]he 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, and this Court may not weigh the evidence and decide the issue on the basis of its weight, *Adams*, 349 N.C. at 681, 509 S.E.2d at 414, Defendant's argument to this Court on the causation issue is also misplaced.

We conclude that the Commission's findings of fact regarding causation are fully supported by the competent record evidence. Furthermore, because Dr. Jeon's testimony that Plaintiff had contracted Lyme disease as a result of his occupation was "such as to take the case out of the realm of conjecture and remote possibility," *Chambers*, 360 N.C. at 616, 636 S.E.2d at 557 (citation and quotation marks omitted), we conclude that the findings of fact were sufficient to support the Commission's conclusion that Plaintiff "developed [L]yme disease as a result of his occupational exposure to ticks." Accordingly, the Full Commission correctly concluded that Plaintiff contracted an occupational disease. Defendant's argument is overruled.

The Opinion and Award of the Full Commission is
AFFIRMED.

Judges HUNTER and GEER concur.

Report per Rule 30(e).